VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

VCAT REFERENCE NO. D705/2004

DOMESTIC BUILDING LIST

CATCHWORDS

Domestic building – strike out application – joinder application – amendment - particular discovery.

FIRST APPLICANT	Roger William Johnston
SECOND APPLICANT	Elizabeth Ann Johnston
RESPONDENT	Victorian Managed Insurance Authority
SECOND RESPONDENT	Paul Pavlovski
THIRD RESPONDENT	Banyule City Council
FOURTH RESPONDENT	Mornington Peninsula Shire Council
FIFTH RESPONDENT	Craig Matheson
SIXTH RESPONDENT	Elmant Pty Ltd (ACN 077 561 276)
WHERE HELD	Melbourne
BEFORE	Senior Member D. Cremean
HEARING TYPE	Directions Hearing
DATE OF HEARING	16 November 2007
DATE OF ORDER	27 February 2008
CITATION	Johnston v Victorian Managed Insurance Authority & Ors (Domestic Building) [2008] VCAT 402

ORDER

1 Application under s75 of the *Victorian Civil and Administrative Tribunal Act* 1998 by the Sixth Respondent dismissed.

2 Application under s60 of the *Victorian Civil and Administrative Tribunal Act* 1998 by Applicants allowed and I join as a party George Kotefski (of Suite 3, 200 Toorak Road, South Yarra in the State of Victoria) and Tyrone Diskin (of 71/4 Sydney Street Prahran East in the State of Victoria) as each a Respondent (as Seventh and Eighth Respondents respectively).

3 I allow the Points of Claim to be amended in consequence and for yet Further Amended Points of Claim (in the form submitted) to be filed and served accordingly.

4 Application for particular discovery by Applicants is allowed under s80 of the *Victorian Civil and Administrative Tribunal Act* 1998. By 31 March 2008, the Sixth Respondent must give particular discovery of the matters set out in paragraph 24 (items 1 to 6) of the affidavit of John Conquest sworn 15 November 2007. That is, by filing and serving a list or supplementary list by such date specifying which (if any) of such documents are now in the possession or custody of the Sixth Respondent and making such documents (if any) available for inspection and photocopying upon 24 hours' written notice.

5 By 13 March 2008 the Applicants must serve a copy of these orders on the Seventh and Eighth Respondents.

6. By 26 March 2008 the Applicants must file a statement of service.

7 I direct the Principal Registrar to list this matter as a directions hearing before me on a date after 21 April 2008. The Sixth, Seventh and Eighth Respondents must attend same or be represented thereat. Orders in default may be made if a party fails to attend or be represented including orders as to costs.

8 I reserve liberty to apply.

SENIOR MEMBER D. CREMEAN

APPEARANCES:

For the Applicants	Mr A. Monichino of Counsel
For the First Respondent	No appearance
For the Second Respondent	Mr P. Pavloski in person
For the Third Respondent	No appearance
For the Fourth Respondent	Mr H. Wajszel, Solicitor
For the Fifth Respondent	Mr J. Cross, Solicitor
For the Sixth Respondent	Mr J. Twigg of Counsel

REASONS

1 This matter has had a most unfortunate history.

2 As far back as 16 November 2007 I reserved my decision on the joinder and amendment applications.

3 I specified dates by which submissions were to be filed.

4 The Applicants' submissions were filed on time – 30 November 2007.

5 Those of the Sixth Respondent were not filed until 19 December 2007 – nearly a week after they were due. Yet there was sufficient time in which to prepare them. And they were filed at a time of most inconvenience – immediately before the Christmas break. Moreover, they are exceedingly complex.

6 Despite this, I have decided I should proceed regardless. That is to say, I duly consider them and take them into account.

7 As at 16 November 2007 there was before me an application by the Applicants for joinder (of the directors of the Sixth Respondent Kotefski and Diskin). There was also an application by the Sixth respondent itself to dismiss the proceeding or order a strike out of relevant parts of the Second Further Amended Points of Claim. As well, further procedural directions were sought. But these included directions providing for very detailed particular discovery. Alternatively, third party discovery was sought. A new hearing date was requested.

8 In support of the Applicants' various applications were affidavits of Anthony Malkoun (sworn 4 October 2007) and John Conquest, solicitor (sworn 23 October 2007 and 15 November 2007). There are other affidavits on file as well. I have re-read the file as a whole for the purposes of these Reasons.

9 It was pointed out to me that since the last hearing on 12 October 2007 the Applicants had settled their proceedings as regards the First, Third, Fourth and Fifth Respondents. But no orders were to be sought in that connexion until proceedings were determined against any remaining Respondent (and any that might be added).

10 The submissions of the Sixth Respondent, directed to the question of dismissal or strike out, are dated 4 October 2007. Those opposing joinder of the directors are dated 18 December 2007.

11 I draw to the attention of the parties sections 60 and 75 of the *Victorian Civil and Administrative Tribunal* Act 1998 on both of which reliance was placed. The Applicants rely on s60 which reads as follows:

> (1) The Tribunal may order that a person be joined as a party to a proceeding if the Tribunal considers that—
>
> (a) the person ought to be bound by, or have the benefit of, an order of the Tribunal in the proceeding; or

(b) the person's interests are affected by the proceeding; or

(c) for any other reason it is desirable that the person be joined as a party.

(2) The Tribunal may make an order under sub-section (1) on its own initiative or on the application of any person.

12 The Sixth Respondent relies on s75 which reads as follows:

(1) At any time, the Tribunal may make an order summarily dismissing or striking out all, or any part, of a proceeding that, in its opinion—

(a) is frivolous, vexatious, misconceived or lacking in substance; or

(b) is otherwise an abuse of process.

(2) If the Tribunal makes an order under sub-section (1), it may order the applicant to pay any other party an amount to compensate that party for any costs, expenses, loss, inconvenience and embarrassment resulting from the proceeding.

(3) The Tribunal's power to make an order under sub-section (1) or (2) is exercisable by—

(a) the Tribunal as constituted for the proceeding; or

(b) a presidential member; or

(c) a senior member who is a legal practitioner.

(4) An order under sub-section (1) or (2) may be made on the application of a party or on the Tribunal's own initiative.

(5) For the purposes of this Act, the question whether or not an application is frivolous, vexatious, misconceived or lacking in substance or is otherwise an abuse of process is a question of law.

13 As regards particular discovery the Tribunal is able to make appropriate directions and orders under s80 of the Act which states:

(1) The Tribunal may give directions at any time in a proceeding and do whatever is necessary for the expeditious or fair hearing and determination of a proceeding.

(2) The Tribunal's power to give directions is exercisable by any member.

(3) The Tribunal may give directions under this section requiring a party to produce a document or provide information in a proceeding for review of a decision despite anything to the contrary in section 106(1) or any rule of law relating to privilege or the public interest in relation to the production of documents.

14 If third party discovery is sought the Tribunal may act under s81 of the Act which specifies:

(1) On the application of a party to a proceeding, the Tribunal may order that a person—

(a) who is not a party to the proceeding; and

(b) who has, or is likely to have, in the person's possession a document that is relevant to the proceeding—

produce the document to the Tribunal or the party within the time specified in the order.

(2) The Tribunal's power to make an order under subsection (1) is exercisable by any member.

15 I also wish to refer directly to s97 of the Act which says the Tribunal "must act fairly and according to the substantial merits of the case in all proceedings". As well I note the terms in which s80, quoted above, is expressed: it refers to the Tribunal doing "whatever is necessary for the expeditious or fair hearing and determination of a proceeding". It cannot have been Parliament's intention, I think, to have the long drawn out skirmishes which have taken place in this proceeding from time to time over the last 3 or 4 years and since its inception. Anyone disadvantaged by being wrongly proceeded against should have their remedy in a likely or possible award of costs under s109 of the Act. But I do not think Parliament intended that the Tribunal should be functioning as a court of pleadings. From time to time, of course, and contained within the Sixth Respondent's submissions, it is expressly disclaimed that the Tribunal is a court of pleadings. And that remains the reality: the Tribunal is not a court in the normal sense of that word and is not, most definitely, a court of pleadings.

16 There is also this point. The primary function of the tribunal, part from alternative dispute resolution, is to conduct hearings. A hearing is a trial of the action. There should not be a trial before a trial.

17 It is convenient to deal with the Sixth Respondent's application under s75. The hurdle to be overcome under s75 is very high. The case for strike out or dismissal must be plain and obvious; clear untenability must be quire apparent: see *General Steel Industries Inc v Commissioner for Railways* (NSW) (1964) 112 CLR 125 at 129-30. As Barwick C J said in that case a "plaintiff ought not to be denied access to the customary tribunal which deals with actions of the kind he [she] brings undless his [her] lack of a cause of action … is clearly demonstrated": at p129. For, as Kirby J said in *Lindon v Commonwealth of Australia (No 2)* (1996) 136 ALR 251 at 256 it is "a serious matter to deprive a person of access to the courts of law for it is there that the rule of law is upheld …"

18 The Sixth Respondent's submissions directed to this question before me are lengthy, learned and elaborate. The submission is, for the reasons given therein, that there is no cause of action against the Sixth Respondent – and maintaining that there is one, is an abuse of process, and a "luxury" warranting an order for indemnity costs.

19 Having, however, read the submissions of the Applicants I am not satisfied that the Sixth Respondent meets the very high hurdle set by s75. In a way, the more the Sixth Respondent must argue that it has overcome that hurdle the more it must act self defeatingly. For by doing so it is only showing that the position is one which must be argued and perhaps argued at great length.

20 The submissions of the Sixth Respondent cannot be rejected out of hand as lacking respectability. That is not what I am saying. They put forward a respectably arguable position. But they do not satisfy me – despite their thorough detail – that I should act under s75 to say that it is plainly obvious no case should be allowed to proceed against that party at this point.

21 I am, in consequence, not satisfied that the issue of the Sixth Respondent's liability (if any) should not proceed to hearing in the customary way. The issue in my view is triable even though, as I indicate, I can see arguments which may be raised at trial which, if accepted, may mean the Sixth Respondent is not liable in law after all. But, in my view, I should not prematurely terminate the proceedings against it. I find no warrant under s75, as it is understood in the authorities, for me to act to do so.

22 I am satisfied also, considering s97, that I should allow the Points of Claim to be amended, yet again, in the ways indicated in the draft submitted. I act under s127 to do so. I reserve any costs thrown away. I rely upon *Queensland v J L Holdings Pty Ltd* (1997) 141 ALR 353. I consider I would be acting unfairly or unjustly if I did not allow the amendments sought particularly in light of joinder. See below.

23 Next, I turn to the Applicants' case for joinder. This is opposed. Under s60, however, as Cummins J observed *in Zervos v Perpetual Nominees Ltd* [2005] VSC 380 it is sufficient under s60 if the claim to join is "open and arguable". I am quite satisfied bearing this in mind as the test, that, on the materials presented to me, and on the submissions of the Applicants made to me, the claim against each of the named individuals is "open and arguable". I am not satisfied on the submissions of the Sixth Respondent (or of any proposed joined party) that the claim against each is not at least "open and arguable". It is true it may be somewhat novel for directors to be sued personally but I cannot say that the law is to the effect that that must not or cannot ever be so. As an aside, I would note some shift in recent authorities in the direction of holding directors liable independently of statutory assistance. But in any event in this case s159 of the *Fair Trading Act* 1999 is called in aid in particular.

24 I appreciate there is force in the submissions by the opposing party but I think they relate to matters which are best determined in an authoritative way following a hearing and the reception of evidence.

25 I am satisfied, therefore, that I should order joinder. Accordingly, I order the joinder which is sought. In my view, on the materials, it is only by taking that course that the justice of the Applicants' claim against the joined

parties will be exposed, following a hearing, either as existent or as non-existent. If non-existent, I do not need to repeat a reference to s109 of the Act and the likelihood or possibility of an order for costs if the conditions set out in that section are met.

26 Lastly I refer to the question of discovery. Third party discovery under s81 is rarely ordered, and for good reason. But particular discovery is a different matter. I am particularly having regard to the matters set out in Mr Conquest's affidavit sworn 15 November 2007. I appreciate the submissions made by both parties but I think the position is such that I should order that the particular discovery sought should be given. The documents sought, on the face of them, should be in existence and I consider are relevant and should be made available for inspection or perusal. I rely upon s97 in particular and have regard to the substantial merits of the case as I see them at this interlocutory stage. Often – and I am not commenting on this case – it is simply easier to hand over copies of documents sought (unless containing plain confidentiality) and, in that way, avoid arid discovery disputation. In any event, I am satisfied these particular documents should be discovered. That is, those set out in paragraph 24 of the Affidavit (points 1 to 6).

27 I have indicated the nature of the rulings. I reject the s75 application. I allow the application for joinder (as foreshadowed in the draft Third Further Amended Points of Claim) under s60. I allow amendment (mostly in consequence of joinder in any event but not limited strictly to that). I allow the application for particular discovery. I act under s80 to do so. I do not, therefore, need to act under s81 at this point.

28 Fundamentally, I am concerned to see that justice is done in the case to all parties, including the Applicants. In that way I see my various rulings as warranted.

29 I reserve costs, at this point. But I reserve liberty for application to be made for the same.

30 I direct that this matter to be returned to a directions hearing before me on a date to be notified where further directions will be made. I would be hopeful that, one day, this whole matter might be finalized.

SENIOR MEMBER D. CREMEAN