

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

DOMESTIC BUILDING LIST

VCAT REFERENCE NO. D705/2004

CATCHWORDS

Directions – costs – ordered against a party having been made a party on the Tribunal’s own initiative.

APPLICANTS	Roger William Johnston, Elizabeth Ann Johnston
FIRST 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	Compulsory Conference
DATE OF HEARING	24 August 2006
DATE OF ORDER	28 August 2006
CITATION	Johnston v Victorian Managed Insurance Authority (Domestic Building) [2006] VCAT 1811

ORDER

- 1 As to the Second and Sixth Respondents, in light of what has been conveyed to me, and acting under ss97 and 98 of the *Victorian Civil and Administrative Tribunal Act 1998*, I require each such party to file and serve an affidavit (duly sworn or affirmed):

- a Specifying the documents such party has in its possession or control or in the possession or control of any agent relating to these proceedings or to the construction of the Applicants' premises;
 - b specifying whether such party has ever had (but no longer has) any other documents in its possession or control or in the possession or control of any agent relating to these proceedings or to the construction of the Applicants' premises and specifying, if so:
 - i the present whereabouts of such documents;
 - ii if such whereabouts are not known, what became or has become of such documents and if the same are or have been destroyed the circumstances leading to their destruction.
- 2 The Second and Sixth Respondents must comply with paragraph 12 of these orders by no later than 7 September 2006.
 - 3 In the event that there is any non-compliance, orders in default (including judgment in default) may be made, including orders as to costs.
 - 4 Until 21 September 2006 the Applicants or any other party (not including the Second and Sixth Respondents) may make application in writing to the Tribunal for an oral examination of the Second and/or Sixth Respondents in the matter of discovery arising upon their affidavits if paragraph 1 of these orders has been complied with. If paragraph 1 has been complied with, however, and until such date, the Second Respondent may apply to orally examine the Sixth Respondent and/or the Sixth Respondent may apply to orally examine the Second Respondent.
 - 5 If any application is made under paragraph 4, a copy of the same must be served on every other party.
 - 6 If such application is made the Principal Registrar shall arrange for the same to be conducted by me on a date to be notified.
 - 7 **I adjourn the Compulsory Conference in this matter to a date to be fixed in a directions hearing.**
 - 8 If no application is made as under paragraph 4, the Applicants must file and serve Points of Claim by 21 September 2006.
 - 9 **I adjourn this directions hearing to a date to be fixed in October or November 2006.**
 - 10 At such directions hearing directions may be made with respect to:
 - a the filing and service of any documents or amended documents;
 - b the fixing of a date for a compulsory conference;
 - c such other matters as may be convenient including filing of experts' reports and any application under s75 of the Act.
 - 11 I reserve costs in respect of this day.

12 I order the Sixth Respondent to pay costs of each other party in respect of 18 August 2006 which I fix for each party in the sum of \$275.00.

SENIOR MEMBER D. CREMEAN

APPEARANCES:

For the Applicants	Mr J. Conquest, Solicitor
For the First Respondent	Mr J. Collier, Solicitor
For the Second Respondent	Mr J. Catalano, Representative
For the Third Respondent	Mr J. Cutler, Solicitor
For the Fourth Respondent	Ms K. Ranaldo, Solicitor
For the Fifth Respondent	Mr A. Hall, Solicitor
For the Sixth Respondent	Mr A. Barclay, Solicitor

REASONS

- 1 I am satisfied the orders above may, and should, be made.
- 2 As to costs I am unable to identify any wrongdoing by the Sixth Respondent occurring on this day.
- 3 However, I am satisfied I should order the Sixth Respondent to pay the costs of each other party on 18 August 2006 in the sum of \$275.00 as to each.
- 4 I am satisfied I have power to make the order in paragraph 12:
 - a s109 of the *Victorian Civil and Administrative Tribunal Act 1998* enables me to order a “party” to pay costs. The Sixth Respondent is a “party”. The provision does not, in my view, have only an operation whereby a party can be ordered to pay costs in respect of matters occurring only after they became a party.

I am satisfied under s109(2), having regard to s109(3), that the conduct of the Sixth Respondent (in failing to comply with orders I made on 20 July 2006) lead to the directions hearing on 18 August which I adjourned off at the request of the Sixth Respondent, then having been made a party on the Tribunal’s own initiative with effect on and from that day.
 - b if s109 does not allow the order to be made, I am satisfied that I may order a third party in the special circumstances of this case, in failing to comply with discovery orders, to pay the costs of parties incurred by reason of such default. I am satisfied, considering s98(1)(b) of the Act, that a court of record would follow a practice or procedure to that effect and I adopt the same.
 - c I consider, in any event, the order in paragraph 12 is fair under s97 of the Act having regard to the conduct of the Sixth Respondent.
- 5 Accordingly, I have so ordered.

SENIOR MEMBER D. CREMEAN