

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

DOMESTIC BUILDING LIST

VCAT REFERENCE NO. D355/2008

CATCHWORDS

Domestic building – CAV conciliation – whether conciliator’s notes liable to production – public interest immunity.

APPLICANT	Mardel Constructions Pty Ltd (ACN 090 939 601)
FIRST RESPONDENT	Jogendra Sinha
SECOND RESPONDENT	Poonam Sinha
WHERE HELD	Melbourne
BEFORE	Senior Member D. Cremean
HEARING TYPE	Hearing
DATE OF HEARING	21 November 2008
DATE OF ORDER	24 November 2008
CITATION	Mardel Constructions Pty Ltd v Sinha (Domestic Building) [2008] VCAT 2397

ORDER

- 1 Leave given to hear from Mr Devlin on behalf of Consumer Affairs Victoria.
- 2 Application as regards the conciliator’s notes (paragraph 1(a)) is dismissed.
3. Application otherwise (as regards paragraph 1(b)) is adjourned over pending agreement between the parties.
4. Costs between Applicant and Respondents are reserved.

SENIOR MEMBER D. CREMEAN

APPEARANCES:

For the Applicant

Mr T. Mulcahy, Solicitor

For the Respondents

Ms Z. Maud of Counsel

For the Third Party

Mr S. Devlin, Solicitor

Consumer Affairs Victoria

REASONS

- 1 Application is made for orders under s81 of the *Victorian Civil and Administrative Tribunal Act* 1998 for Consumer Affairs Victoria (CAV) to produce to the Applicant certain documents. They include written (printed) notes of Mr Bruno Panozzo taken by him in a conciliation on or about 14 March 2008 (and dated perhaps 19 March 2008) between the Applicant and the Respondents.
- 2 Production of other documents sought is not opposed subject to privacy considerations.
- 3 Production of the notes is opposed by the Respondents who direct my attention to s37 of the *Domestic Building Contracts Act* 1995.
- 4 Their production is also opposed by CAV – whom I have given leave to appear.
- 5 CAV opposes production principally on the ground of public interest immunity.
- 6 Conciliation (or mediation) is provided for under s104 of the *Fair Trading Act* 1999 which says:
 - (1) The Director may refer to a consumer affairs employee for conciliation or mediation any dispute (which is reasonably likely to be settled)—
 - (a) between a purchaser (who is a natural person) or a possible purchaser (who is a natural person) and a supplier about a supply or possible supply of goods or services in trade or commerce;
 - (b) between a purchaser (who is not a natural person) or a possible purchaser (who is not a natural person) and a supplier about a supply or possible supply of goods or services in trade or commerce, which the Director believes involves a matter of significant public interest.
 - (2) If the whole or any part of a dispute under subsection (1) falls within the jurisdiction of any prescribed person or body, the Director must refer the dispute, or that part of the dispute, to the person within whose jurisdiction it falls.
 - (3) Subsection (1) applies whether or not a person has made a complaint.
 - (4) In this section—

consumer affairs employee means any person employed under Part 3 of the **Public Administration Act 2004** in the administration of this Act.
- 7 I consider production of the notes would harm public interest within the meaning of the ruling in *Conway v Rimmer* [1968] AC 910. I have examined the notes in considering my decision as their Lordships in that case indicate I should.

- 8 In my view production of the notes could inhibit the things people may be prepared to say at a conciliation. It could inhibit attempts at dispute resolution, therefore, and this is the reverse of the purpose specified in s104.
- 9 Further I consider it arguable, in any event, that the parties entered into the conciliation on a without prejudice basis. However, I am not in a position to make any findings about that, without having heard witnesses.
- 10 Reference was made to observations of Lindley L J in *Walker v Willsher* (1889) 23 QBD 335 at 337 that a “without prejudice” letter may be admissible if the later constitutes a complete agreement. I cannot say that of these notes one may or the other. In any event my ruling is not based on a without prejudice ground. Further these words were spoken at a time long before the institution of alternation dispute resolution mechanism.
- 11 I am satisfied public interest immunity applies in this case and that it informs the discretion in s81.
- 12 I decline to order production in consequence.
- 13 I dismiss the application as regards paragraph 1(a) of the same.
- 14 I stand over the applications regards paragraphs 1(b) and 2.

SENIOR MEMBER D. CREMEAN