VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

VCAT REFERENCE NO. D395/2004

DOMESTIC BUILDING LIST

CATCHWORDS

Domestic building – strike out – incomprehensible Points of Claim - costs.

APPLICANT	Dr Jennifer Marie Martin
RESPONDENT	Fasham Johnson Pty Ltd
WHERE HELD	Melbourne
BEFORE	Senior Member D. Cremean
HEARING TYPE	Directions Hearing
DATE OF HEARING	18 April 2006
DATE OF ORDER	21 April 2006

[2006] VCAT 680

ORDER

1. The Amended Points of Claim are struck out, with liberty to replead.

2. By 19 May 2006 the Applicant must file and serve Points of Claim. Such Points of Claim must set out the material facts relied on and given proper particularization.

3. I order the Applicant to pay the costs of the Respondent of and incidental to the hearing this day. In default of agreement by 19 May 2006, I direct that the assessment of such costs shall be referred to the principal registrar under s111 of the *Victorian Civil and Administrative Tribunal Act* 1998 who shall assess the same according to Supreme Court Scale unless otherwise directed or agreed between the parties.

4. I direct that this proceeding be returned before me at a directions hearing on a date after 19 May 2006 to be fixed and notified to the parties. Allow 2 hours.

SENIOR MEMBER D. CREMEAN

APPEARANCES:

For the Applicant	Mr J. Gray of Counsel
For the Respondent	Mr A.J. Laird of Counsel

REASONS

1. Application is made under, in particular, s78 of the *Victorian Civil and Administrative Tribunal Act* 1998, to strike out this proceeding on the ground that it is being conducted in a way that is unnecessarily disadvantaging the Respondent.

2. The application is based on the Applicant's Amended Points of Claim – the latest incarnation of which is dated 2 February 2006.

3. I am asked to rule in favour of the Respondent's application upon a mere perusal of those Amended Points of Claim. That is, it is submitted that the document is so hopelessly constituted as Points of Claim that it is immediately obvious that the Respondent should not be called upon to respond to it by way of defence.

4. As regards that last issue, I am asked also by the Applicant to order the Respondent to file and serve a defence. However, as I made clear at the hearing, it seems to me I should not make any such order until I have ruled upon the sufficiency or otherwise of the Amended Points of Claim.

5. I consider the principles I should apply in this matter are set out by Ashley J in *Barbon v West Homes Australia Pty Ltd* [2002] VSC 405 at [16] which

are quoted by Aird DP in *Age Old Builders Pty Ltd v Swintons Pty Ltd* [2006] VCAT 462 at [7]. His Honour indicated that although the 1998 Act encourages a degree of informality in proceedings in the Tribunal "Rafferty's Rules" should not prevail. He said: "Any party … is well entitled to know what case it must meet before [a] hearing commences". He said this did not mean that a case must be outlined "with exquisite particularity". He said also, though, that: "None the less a [respondent] is entitled to expect that a claim will be laid out with a degree of specificity such that, if it is obvious that the claimant seeks to pursue a claim which is untenable, that can be the subject of an application before trial; such that, moreover, if adequate particularisation is not provided, the matter will be clear to the Tribunal on application by an aggrieved party".

6. In this matter I have duly heard the arguments of the parties in light of the matters raised in a letter dated 9 March 2006 sent by the Respondent's solicitors to the solicitors for the Applicant. Paragraphs 1 to 6 which appear in that letter are as follows:

> 1. unparticularised terms and descriptions are used throughout the document. This is vague and embarrassing and does not allow our client to understand what is actually being alleged against it. By way of example only:
>
> (a) para 1 "At all relevant times";
> (b) para 2 "entered into negotiations";
> (c) para 4 "At all material times";
> (d) para 5.4 "A set of drawings and plans";
> (e) paras 5.5 and 6.1 "Variation Orders";
> (f) para 5.6 and 5.7 "Discussions between" and "various times";
> (g) paras 5.8 and 6.5 "Correspondence between…";

(h) paras 5.9 and 6.6 "Sketches, notes, previous building contracts, drawings and plans and general specifications";
(i) paras 5.10 and 6.7 "Advertising and promotional material produced by or for the Builder";
(j) para 6.1 "Variation Orders";
(k) para 6.2 "Correspondence, sketches, drawings and plans exchanged between the Builder and the Owner";
(l) paras 6.3 and 6.4 "Conversations between"; and
(m) the term "in the premises", is used throughout the document.

2. the document "rolls up" numerous often unparticularised allegations into sub-paras of a single para. In addition to the matters already referred to many of the paras between para 9 and para 29 suffer from this voice.

3. excluding sub-sub-paras, para 7 alleges 38 terms. The alleged terms are said to form part of both the alleged building agreement and the alleged variation agreements, however no details are provided of how the alleged terms are said to have arisen. For example there is no indication of whether an alleged term is said to be in writing, oral or implied or how this is said to have occurred. As you know contractual terms do not arise in a vacuum and our client is entitled to know and understand the case that it is being asked to meet.

4. a number of the terms alleged in para 7 are vague and embarrassing. Without limitation we refer to the terms alleged at sub-paras 7.3, 7.4, 7.5, 7.10, 7.25, 7.31, 7.37 and 7.38.

5. para 8 of the document alleges a number of breaches of what is said to be the "Agreement" referred to in the previous para. This is not a defined term and no details are provided in relation to which of the alleged terms in para 7 our client is alleged to have breached and why. Further:

   (a) the particulars of para 8 appear to be paras 9 to 29 of the document together with the plethora of sub paras contained therein. As you know the law is that a party does not plead to particulars and (even if this was not the case) it is clearly oppressive for our client to be expected to attempt to respond individually in a pleading to the multifarious and frequently defective allegations made in those paras; and

   (b) a number of the alleged breaches are either vague and embarrassing, inadequately particularised or a combination of both. By way of example only we refer to paras 9.1, 9.4, 9.5, 9.6, 10.3.2 to 10.3.5, 11.3, 11.4, 12.5, 12.6, 12.7, 12.14, 12.16.6, 13.1, 13.2, 13.4, 14.8, 14.13, 14.14, 14.15, 16.1,

16.3, 18.2, 19.1, 19.3, 19.4, 19.5, 19.6, 19.7, 19.8, 19.8, 29.4, 29.5 and 29.6.

6. para 30 of the document alleges a duty of care. No details are provided about what the duty of care is said to be or how it is said to have arisen, save that there is a vague reference to the "relationship" between the Builder and the Owner. Para 31 asserts that the alleged duty of care was breached, however the alleged breach is sought to be particularised by simply referring back to the alleged contractual breaches discussed in the previous para. Further an allegation of damage is simply rolled up into the same para (i.e. para 31) and is sought to be particularised by reference to your client's alleged contractual entitlement to damages despite the fact that the contractual and tortious measure of damages is very difficult. Your client's purported pleading of her alleged cause of action in negligence is plainly defective and inadequate to inform our client of the case that it has to meet or to define the issues for trial."

7. Counsel for the Respondent addressed the various matters set out in the letter in question and then Counsel for the Applicant replied. In the course of his reply, I consider he, frankly, conceded there were matters in the Amended Points of Claim which required further attention. I made it clear, however, I was not troubled by questions arising from the use of phrases such as "At all relevant times" or "At all material times" or "In the premises". These are time honoured and in frequent use.

8. Having heard the parties, however, I am satisfied that the Amended Points of Claim in this case do not satisfy the elemental criterion of letting a party know the case they must meet. Particularly is this so with the 38 terms alleged in para 7. The sources or origins or constituents of these terms is nowhere made clear. Also though, the allegations of negligence in paras 30 and 31 are completely unparticularized. I note in passing a claim for stress and anxiety which I would think is not within the jurisdiction of the

Tribunal in domestic building. I note general damages are claimed which seems to take this beyond County Court level even.

9. I cannot dissociate those parts of the Amended Points of Claim which are salvageable from those which are not. Partly this is due to an unfortunate and overly complex drafting style. Overall, I consider the document is, mostly, incomprehensible. In many areas it is simply unintelligible.

10. I am quite satisfied that the Amended Points of Claim do not satisfy the criteria laid down by Ashley J and quoted by Aird D P.

11. It follows, I consider, I must strike the same out under s78, and I do so, accordingly.

12. If I was to strike out, it was submitted by the Respondent, I should order costs. This was opposed by the Applicant who submitted that costs should be reserved.

13. I do not consider costs should be reserved. I am satisfied s78(1) applies and I am satisfied also (under s78(2)(c)) that s109(3) applies as well. It is, I consider, fair I should order the Applicant to pay the costs of and incidental to the hearing of the strike out motion. I make directions for that purpose.

14. It follows, too, that I should not proceed to order that the Applicant must file and serve Points of Defence.

15. I intend, however, to grant the Applicant liberty to re-plead her case. I pass by the procedural oddity of the solicitor for the Applicant (who is mentioned in the Amended Points of Claim) being the spouse of the Applicant. Although I am granting such leave (as I am directing) there must come a time when a party reaches a stage, where, after numerous attempts, it must be said there is obviously no case in law to be pleaded.

16. I make directions and order accordingly.

SENIOR MEMBER D. CREMEAN