

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

DOMESTIC BUILDING LIST

VCAT REFERENCE NO. D475/2008

CATCHWORDS

Domestic building – Anshun estoppel – costs.

FIRST APPLICANT	Andrew Peter Schultz t/as Panther Designer Homes
SECOND APPLICANT	Darren Lindsay Nelson t/as Panther Designer Homes
RESPONDENT	Aurel Turcan t/as Aura Construction & Maintenance
WHERE HELD	Melbourne
BEFORE	Senior Member D. Cremean
HEARING TYPE	Small Claim Hearing
DATE OF HEARING	25 September 2008.
DATE OF ORDER	25 September 2008.
CITATION	Schultz trading as Panther Designer Homes v Turcan trading as Aura Construction & Maintenance (Domestic Building) [2008] VCAT 2033

ORDER

- 1 Application dismissed.
- 2 Order Applicants to pay the Respondent's costs of this day fixed in the sum of \$750.00. Stay of 3 months.

SENIOR MEMBER D. CREMEAN

APPEARANCES:

For the Applicants	In person
For the Respondent	Mr T. Hurley of Counsel

REASONS

- 1 In this matter the Applicants claim the sum of \$10,695.81 as costs of rectification.
- 2 The claim is opposed by the Respondent who relies on *Port of Melbourne Authority v Anshun Pty Ltd* (1981) 147 CLR 589 as authority for an estoppel said to have arisen.
- 3 Reference was made to the following passage, in particular from the judgment of the High Court in that case:

The critical issue, then, is whether the case falls within the extended principle expressed by Sir James Wigram V.C. in *Henderson v. Henderson* (1843) 3 Hare, at p 115 (67 ER, at p 319) . The Vice-Chancellor expressed the principle in these terms:
"where a given matter becomes the subject of litigation in, and of adjudication by, a Court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of *res judicata* applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time." (at p598)
- 4 The estoppel in this case is said to arise out of proceeding D182/2008.
- 5 That proceeding involved the same parties as this one and concerned the same issues. The Respondents there were the Applicants here.
- 6 I am satisfied the Respondents in those proceedings knew a debt was claimed to be due yet no Counterclaim was brought.
- 7 No reason for failing to bring a counterclaim has been advanced (as a "special" circumstance referred to by the Vice Chancellor) except that the Respondents in the earlier case did not turn their mind to it. I do not regard that as a special circumstance.
- 8 In fact as I read the Reasons for Decision in the other matter (dated 29 May 2008) it is apparent from paragraph 34 thereof that the learned Member did allow a set off of part of the Respondents' claim sufficient to extinguish any amount due to the Applicant. That is to say, he was mindful of the Respondents' position and was prepared to allow them to claim a set-off.
- 9 There is no reason given to me why I should not follow and apply the ruling in *Anshun*. Indeed, I consider I am obliged to do so.
- 10 Applying that ruling, the application in this proceeding must be dismissed.

- 11 Costs are now sought by the Respondent. A letter of 23 June 2008 from the Respondent in this case denies any money is due to the Applicants as a result of the prior ruling and the failure to bring a Counterclaim. A further letter of 25 July draws the Applicants' attention to the prior ruling and says costs will be sought if the Applicants continue to press their case in these proceedings.
- 12 I am satisfied, by reason of the foregoing, that it is fair to depart from the initial position established by s109(1) of the *Victorian Civil and Administrative Tribunal Act* 1998. I act under s109(2) having regard to s109(3). The sum claimed is in the amount of \$1,500.00. That sum is, in itself, not unreasonable given the complexity of the matter. However, I have regard to s97 of the Act. The Applicant, I note, has lost a cause of action of some considerable value. In all the circumstances (costs being in my discretion) I allow a sum of \$750.00. I accept that the Applicants knew that this application would be made (see letter dated 25 July 2008) but went on regardless. This has caused the Respondent unnecessary expenditure in legal costs. The Respondent, however, has been fortunate in being able to take advantage of the ruling in *Anshun*.
- 13 I order accordingly.

SENIOR MEMBER D. CREMEAN