

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

DOMESTIC BUILDING LIST

VCAT REFERENCE NO. D916/2006

CATCHWORDS

Application for extension of time to file further and better particulars – whether self-executing order appropriate – stay of application if further and better particulars not filed by extended date – inspection of documents produced in response to witness summonses – whether compulsory conference should proceed as ordered.

APPLICANT	Seachange Management Pty Ltd (ACN 091 443 211)
FIRST RESPONDENT	Bevnol Constructions & Developments Pty Ltd (ACN 079 170 577)
SECOND RESPONDENT:	Bruce Jamieson
THIRD RESPONDENT:	Louis Allain
SECOND RESPONDENT TO COUNTERCLAIM	Giuseppe De Simone
THIRD RESPONDENT TO COUNTERCLAIM	Paul Marc Custodians Pty Ltd (ACN 110 485 982) formerly known as Paul Marc Management Pty Ltd
FOURTH RESPONDENT TO COUNTERCLAIM	Martin Jurblum
WHERE HELD	Melbourne
BEFORE	Deputy President C. Aird
HEARING TYPE	Directions Hearing
DATE OF HEARING	18 May 2009
DATE OF ORDER	18 May 2009
CITATION	Seachange Management Pty Ltd v Bevnol Constructions & Developments Pty Ltd & Ors (Domestic Building) [2009] VCAT 892

ORDER

- 1 The compulsory conference scheduled for 25 May 2009 commencing at 10.00 a.m. at 55 King Street Melbourne before Senior Member Levine is confirmed. Having regard to the Orders and Reasons of Judge Ross dated 13 May 2009 the referral of the proceeding to the compulsory conference does not include the counterclaim as against Mr De Simone, the second respondent to counterclaim. The conduct of the compulsory**

conference is at the discretion of the presiding member, and nothing in this order fetters the matters which may be discussed.

- 2 By 4.00 pm on 20 May 2009 the parties must file and serve position papers marked 'Confidential and 'without prejudice' - for the purposes of the compulsory conference only'. Upon receipt I direct the principal registrar to place the position papers in a sealed envelope with the above notation. The tribunal notes the applicant has previously filed a position paper. If it does not intend filing a supplementary position paper it must advise the principal registrar and the parties accordingly.**
- 3 The applicant may make arrangements with the principal registrar to inspect the documents produced by Build Assist Pty Ltd and Jason Dudley in response to the Summonses to Appear and Produce Documents dated 16 March 2009.
- 4 The date by which the applicant must file and serve further and better particulars of its claim insofar as it relates to incomplete and defective works, as ordered in Order 2 of the orders dated 12 December 2008 is extended to 31 July 2009.
- 5 The date by which the applicant must file and serve any further expert report is extended to 31 July 2009.
- 6 Should the applicant fail to comply with order 2 and 3 of these orders by 31 July 2009 its application shall be stayed until such time as the orders are complied with. If the applicant's application is stayed the respondent may make application for directions to be made for the hearing of its counterclaim.
- 7 Any application for joinder of further parties to this proceeding should be made in accordance with PNDB1 (2007) by 31 August 2009 or such later date as may be ordered by the tribunal.
- 8 By 3 July 2009 the parties, other than the second respondent to counterclaim (having regard to the Orders and Reasons of Judge Ross dated 13 May 2009) must make discovery in accordance with the Rules of Civil Procedure.
- 9 Any witness summonses may only be issued under s104 of the *Victorian Civil and Administrative Tribunal Act 1998* with leave of the tribunal. Any party requesting the issue of a witness summons must file and serve application for orders/directions accompanied by affidavit material in support. Any party wishing to be heard in relation to any such request must file and serve any answering material by 12 noon 2 business days prior to the directions hearing at which the application will be heard.
- 10 By 4.00 p.m. on 20 May 2009 the first respondent must serve on the applicant and the third and fourth respondents to counterclaim a copy of all summonses to appear which have been issued by the Principal Registrar at its request.

- 11 The applicant, and the third and fourth respondents to counterclaim may make arrangements with the Principal Registrar to inspect the documents produced to the tribunal by Jack Chrapot in response to the Summons to Appear dated 29 April 2009 – any such inspection is to be carried out by 3 June 2009. They must identify any documents over which they claim privilege or otherwise object by marking such documents with post-it notes – if no objection is taken they must advise the Principal Registrar accordingly by 9 June 2009. The inspection by or on behalf of the applicant may be carried out by its sole director, Mr De Simone.
- 12 If objection is taken by the applicant, its solicitor, Peter Simon Lustig having this day undertaken to take all reasonable care of the documents produced to the tribunal by Jack Chrapot pursuant to the summons dated 29 April 2009, comprising one volume (the documents) and further not to lose, damage, destroy or alter their order, the Tribunal orders and directs:
 - (i) Mr Lustig may make arrangements with the principal registrar to collect the three volumes of documents produced by Mr Brereton on 16 March 2009 or such other date as may be arranged on or after 4 June 2009 and to return them by 12 June 2009.
 - (ii) During the period after the documents are collected by Mr Lustig and until they are returned to the Tribunal Mr Lustig must keep them in his care, custody or control, other than making appropriate arrangements for them to be copied.
 - (iii) Mr Lustig shall sequentially number each page in the three volumes and may thereafter make a copy of the documents. Mr Lustig shall make arrangements to provide Mr De Simone with a copy.
- 13 If objection is taken, by 3 July 2009 a party objecting must file and serve an affidavit deposing to their grounds of objection which must include a list of all documents or parts thereof identifying the date of the document, a general description of the document and the page number/s which they object to the first respondent inspecting.
- 14 By 3 August 2009 the first respondent must file and serve any affidavit material in reply.
- 15 By 17 August 2009 the parties must advise the principal registrar of an anticipated duration for the hearing of the objections which should be accompanied by details of any dates within the following two months on which they or their legal advisors are unavailable. **Thereafter I direct the Principal Registrar to list the objections for hearing before Deputy President Aird (if available).**
- 16 Liberty to apply.
- 17 Costs reserved.

DEPUTY PRESIDENT C. AIRD

APPEARANCES:

For the Applicant:	Mr P. S. Lustig, Solicitor
For the First Respondent:	Mr B. Reid of Counsel
For the Second Respondent:	Mr B. Reid of Counsel
For the Third Respondent:	Mr B. Reid of Counsel
For the Second Respondent to Counterclaim:	Mr G. De Simone in person
For the Third Respondent to Counterclaim:	Mr M. Biviano of Counsel
For the Fourth Respondent to Counterclaim:	Mr M. Biviano of Counsel

REASONS

- 1 This proceeding was commenced in December 2006. It has had a long and tortuous history and it is therefore unnecessary to restate the history of the dispute. There have been numerous interlocutory applications. The tribunal file comprises some nine volumes plus a number of folders containing transcript, the documents produced in response to the witness summonses, affidavits, exhibits and various other ancillary documents including tribunal books, and authorities.
- 2 On 16 December 2008 a summons to Michael Brereton to appear and produce documents was issued at the request of the first respondent, Bevnol. Mr Brereton produced three volumes of documents in response to this summons. The applicant, Seachange, having foreshadowed a possible objection to Bevnol having access to the documents, applied for and was granted leave to inspect those documents by order dated 22 December 2008. Seachange having confirmed it objected to Bevnol having access to a significant proportion of those documents, I made various orders on 2 March 2009 to allow the proper identification and notice of the objections, and referred the matter to a further directions hearing on 18 May 2009 essentially to make directions for the hearing of Seachange's objections.
- 3 In the intervening period a number of other issues arose including difficulties with Seachange complying with orders for the filing of further and better particulars of its claim insofar as defective and incomplete works are concerned, and the filing of any further expert reports on which it sought to rely; the issuing of further witness summonses at Bevnol's request, and the referral of certain questions of law to the Supreme Court pursuant to s 33 of the *Charter of Human Rights and Responsibilities Act*.

The application for an extension of time

- 4 Seachange has sought a further extension of time in which to file and serve further and better particulars of its claim insofar as it relates to defective and incomplete works. On 12 December 2009 I ordered that these be filed and served by 11 March 2009. An extension of time was granted at a directions hearing on 1 April 2009 – to 30 April 2009. A further application for an extension of time, made on 30 April 2009, was referred to the directions hearing on 18 May 2009.
- 5 I accept that the expert engaged by Seachange has had difficulty completing his report due to ill-health. However, I share the concern expressed by Mr Reid of Counsel, on behalf of Bevnol, that despite Seachange being ordered to file and serve further and better particulars of its defective and incomplete works claims, that its expert has deposed in his affidavit to preparing estimates of the cost of rectification works, and specifically states at paragraph 7 that the estimate will not include completion costs.
- 6 Although Mr De Simone, the sole director of Seachange (and the second respondent to counterclaim), said from the bar table that the expert had been

instructed to prepare estimates of the cost of rectification and completion works, I do not have any affidavit material before me, nor do I have a copy of the letter of instruction to the expert.

- 7 Accordingly, noting that Seachange was first ordered to provide further and better particulars on 12 July 2007 and has failed to do so, but being mindful of the tribunal's obligations under s97 of the *Victorian Civil and Administrative Tribunal Act 1998* to 'act fairly and according to the substantial merits of the case' I extend time until 31 July 2009 to enable Seachange to satisfy itself either that its expert would be able to comply, or to otherwise make alternative arrangements. I decline to make a self-executing order as requested by Bevnol, but consider it appropriate that if Seachange does not comply with this generous timetable, its application should be stayed until it does. If it fails to comply, Bevnol may apply for directions for an early hearing of its counterclaim.

Witness Summonses

- 8 On 24 January 2007 I ordered that the then parties, Seachange and Bevnol, file and serve their Lists of Documents by 24 April 2007. Since that time, a number of parties have been joined, and there have been numerous interlocutory applications. There have been no further orders for discovery. At the request of Seachange a witness summons was issued by the principal registrar requiring Vero Insurance Limited, the warranty insurer, to produce its file to the tribunal.
- 9 A number of witness summons have been issued at Bevnol's request, including the summons to Mr Brereton referred to above. On 16 March 2009 witness summonses were issued requiring Build Assist Pty Ltd and Jason Dudley to produce certain documents to the tribunal. At the directions hearing on 20 April 2009, Bevnol applied for leave to inspect those documents. At its request, I granted Seachange leave to first inspect the documents and raise any objections to them being made available to Bevnol.
- 10 Mr De Simone inspected the documents on 9 April 2009, in his capacity as the sole director of Seachange. On the same day he sent an email to the principal registrar advising that Seachange objected to Bevnol having access to the documents on four grounds:
- i Abuse of process
 - ii Improper purpose
 - iii Irrelevance and confidentiality
 - iv Breach of confidence.
- 11 After hearing from counsel for Bevnol, and from Mr Lustig, solicitor, on behalf of Seachange, I order that Bevnol may make arrangements with the Principal Registrar to inspect the documents produced by Build Assist and Jason Dudley.

- 12 Whether Bevnol already has copies of the documents is, in my view, irrelevant. If they do, I am not persuaded that seeking to inspect the documents produced to the tribunal in response to a witness summons is an abuse of process.
- 13 Both Mr Lustig and Mr De Simone sought to persuade me that the documents were irrelevant. They made various submissions as to their interpretation of the contents and effect of the documents and why they considered them to be irrelevant. However, in considering Seachange's objections I am not required to interpret or otherwise satisfy myself as to the accuracy of the documents. As I indicated during the directions hearing, I consider relevance should be widely interpreted. Unless a document is patently irrelevant, its relevance will not be determined until the hearing of the substantive issues.
- 14 The documents are clearly relevant. Build Assist has produced a copy of the Existing Condition Report dated 26 April 2007 – this is clearly relevant as to Seachange's claims which include claims relating to alleged defective and incomplete works. The documents produced by Jason Dudley comprise an HIA standard form Victorian Cost Plus contract, and details of warranty insurance. Again, these appear relevant to the issues in dispute. After I had pronounced my orders Mr De Simone requested that I not allow Bevnol to inspect the documents relating to warranty insurance. This objection was not raised prior to me pronouncing my orders, and I am not persuaded there is any reason why they should not be inspected by Bevnol. In any event, the production of details of warranty insurance is uncontroversial being required by virtue of s135 of the *Building Act* 1993, with details of the relevant insurance to be included in every major domestic building contract under s31(1)(l) of the *Domestic Building Contracts Act* 1995.
- 15 Further, I do not consider it appropriate or necessary for the tribunal to embark on a forensic exercise to determine how Bevnol became aware of the Build Assist or Jason Dudley documents, or how they may or may not have come into their possession. Any issues that Seachange may have with Mr Chrapot are not matters with which I am currently concerned in this proceeding. In any event, no forensic investigation is required to ascertain how Bevnol became aware of Jason Dudley's involvement with the project. Attached to the Amended Points of Claim dated 31 May 2007, is an expert report prepared by David Gairns of BSS Design Group. In paragraph 6 on page 3 of the report Mr Gairns records that Jason Dudley (Dudley & Co, Builders) was in attendance at the first inspection (on 13 April 2007). I understand that Build Assist inspected on behalf of the warranty insurer.
- 16 Orders for the hearing of Seachange's objections to Bevnol having access to certain of the documents produced by Mr Brereton, and any objections it may have to the documents produced by Mr Chrapot, were also made.
- 17 I also consider appropriate that leave be obtained before any further witness summons are issued under s104 of the *VCAT Act* and that all parties be

served with a copy of the application for leave together with the supporting affidavit material.

Joinder

- 18 Seachange has been foreshadowing the possible joinder of additional parties for considerable period of time. As applications for joinder should be made in a timely manner, I will order that any application for joinder be made by 31 August 2009.

The compulsory conference

- 19 Bevnol applied for an adjournment of the compulsory conference scheduled for next Monday, 25 May 2009 should be adjourned pending Seachange providing further and better particulars of its defective and incomplete works claims. After hearing from each of the parties, and noting the difficulties of referring the counterclaim as against Mr De Simone to a compulsory conference, until the questions of law referred to the Supreme Court have been determined, I decided the compulsory conference should proceed. I am mindful of the history of this proceeding. It was commenced in December 2006. I anticipate that the parties have incurred significant legal costs to date and that ultimately any outcome might be a hollow victory for the 'successful' party. Under s109 of the *Victorian Civil and Administrative Tribunal Act* 1998 there can be no expectation that there will be an order for costs. The starting position under s109 is that each party will bear their own costs unless the tribunal is minded to exercise its discretion under s109(2) having regard to the matters set out in s109(3). A review of decisions on Austlii will demonstrate that the tribunal gives careful consideration in each and every instance as to whether it is fair to exercise its discretion under s109(2).
- 20 As I mentioned during this directions hearing, the tribunal's primary concern is the people behind the litigation: the parties, and I consider it appropriate they be given an opportunity to fully ventilate the issues between them in the context of a compulsory conference. If nothing else, maybe they can agree the issues to be determined, and the necessary steps to facilitate the expeditious progress of this proceeding to a final hearing and determination notwithstanding the issues confronting Mr De Simone personally.
- 21 As I noted during the directions hearing, there is a significant level of distrust between the parties. They have been less than co-operative in their conduct of the proceeding, generally relying on the tribunal to resolve even minor differences between them.
- 22 I will reserve the question of costs.

DEPUTY PRESIDENT C. AIRD