

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

DOMESTIC BUILDING LIST

VCAT REFERENCE NO. D916/2006

CATCHWORDS

Application for adjournment, Evidence, Natural Justice, Interlocutory Programme.

APPLICANT	Seachange Management Pty Ltd (ACN 091 443 211)
FIRST RESPONDENT	Bevnol Constructions & Developments Pty Ltd (ACN 079 170 577)
SECOND RESPONDENT	Guiseppe De Simone
THIRD RESPONDENT	Paul Marc Custodians Pty Ltd (ACN 110 485 982) formerly known as Paul Marc Management Pty Ltd
FOURTH RESPONDENT	Martin Jurblum
WHERE HELD	Melbourne
BEFORE	Senior Member R. Young
HEARING TYPE	Directions Hearing
DATE OF HEARING	6 July 2007
DATE OF ORDER	23 July 2007
CITATION	Seachange v Bevnol Constructions (Domestic Building) [2007] VCAT 1307

REASONS

- 1 The Applicant sought the reasons for my dismissal of Mr De Simone's application for an adjournment. Mr De Simone is not a party to the proceeding, he is a person that the Respondent, Bevnol Constructions and Development Pty Ltd, is seeking to join to the action. His relationship to the parties in this proceeding is that he is a director of the Applicant, Seachange Management Pty Ltd. As Mr De Simone is not a party to the proceeding I doubt that he has standing to seek an adjournment.
- 2 Further, the requirement that parties sought to be joined to an existing proceeding are notified and have an opportunity to be heard before the Tribunal in relation to their joinder has become the practice of the Domestic Building List, see the latest Practice Note of 2007. However, traditionally in the courts, see Civil Procedure Victoria, Williams, 3rd Edition, a person does not have a right to appear before a tribunal that is considering whether they should be joined as a party to a proceeding. Notwithstanding that, I have heard and considered Mr De Simone's application on its merits.
- 3 This one day hearing was fixed to hear a number of interlocutory applications by the two parties including joinder applications. Firstly, these involved joinder applications by the Respondent that the Tribunal join as Second, Third and Fourth Respondents to the Counterclaim dated 29 May 2007 Guiseppe De Simone, Paul Marc Custodians Pty Ltd and Martin Jurblum respectively. The Respondent also sought answers to its Request for Further and Better Particulars of the Applicant's Amended Points of Claim dated 31 May 2007. The Respondent also sought a copy of the documents referred to in the Applicant's Amended Points of Claim. The Respondent's final application was for costs of the appearances on 10 April 2007 and 30 April 2007, the question of which had been put over by Senior Member Walker to this hearing. The final issue of the Respondent was that two of the parties that the Respondent sought to join being, Paul Marc Custodians Pty Ltd and Martin Jurblum, had filed an affidavit late the previous day and the Respondent had not had time to consider or respond to such affidavit.
- 4 The Applicant's issues were that it sought the joinder of Louis Allain and Bruce William Jamieson as Second and Third Respondents respectively to the proceeding.
- 5 Mr De Simone sought the adjournment of all of the issues set out in the paragraphs above on the basis that he was ill and had not had sufficient time to prepare, file and serve affidavits in opposition to his joinder as well as the other issues raised by the Respondent. He produced a doctor's certificate that stated that Mr De Simone had been unfit for work from 26 June 2007 to 9 July 2007 for the reason of bronchitis.
- 6 During the hearing of Mr De Simone's application for an adjournment the Respondent indicated that as a result of the late served affidavit on behalf of

the proposed joined parties it would need time to consider this affidavit and from the facts set out in this affidavit the Respondent would need further financial details from the proposed persons to be joined to consider if the joinder applications should still proceed. After a short adjournment of Mr De Simone's application for adjournment so he could obtain further information all of the parties attending the hearing informed the Tribunal that they had agreed that the joinder applications of both the Applicant and Respondent should be adjourned to another day with a rescheduling of the interlocutory timetable for the provision of material both as to joinder and as to the opposition to joinder. Therefore, the dismissal of Mr De Simone's application for adjournment is only in relation to these issues other than the applications for joinder.

- 7 Mr De Simone submitted again that in relation to the issues of the provision of Further and Better Particulars, the production of documents and reports identified in the Applicant's Amended Points of Claim and in relation to any hearing of submissions for costs of this and previous directions hearings, his illness had meant that he needed more time to prepare and submit further material that would be relevant to the consideration of any or all of the remaining issues. To enable me to properly assess whether his illness was restraining him from putting together relevant evidence that would be cogent to any assessment I was required to make in relation to the issues remaining in this directions hearing I needed Mr. De Simone to identify some specific piece of relevant factual evidence that would establish that he could justify his request for further time in which to prepare and submit such additional evidence. I pressed him numerous times to identify for me any facts that would be relevant to the considerations of the issues remaining. His answers were general and framed in terms of the provision of natural justice, the need for the Tribunal to avoid injustice, etc.; despite my requests, Mr De Simone did not identify one specific evidentiary fact that would positively reinforce his submission that he should be provided with more time to produce further affidavits.
- 8 In relation to whether the Applicant should be required to answer the Request for Further and Better Particulars of its Amended Points of Claim or whether it should produce the documents identified in its Points of Claim, I could not see any relevant evidence that Mr De Simone could produce that would tend to sway my finding one way or the other. In relation to the requested documents, prima facie, as the documents were identified and in fact formed part of the Amended Points of Claim going to establish the particular allegations of defective work and the loss occasioned by such allegations, the reports identified in the Amended Points of Claim needed to be provided to the Respondent to enable it to properly understand the Applicant's allegations against it. In relation to the answers of the Request for Further and Better Particulars these merely come down to whether they are correct and proper requests, again evidence of the

behaviour of the parties has little or no bearing on whether any such requests should be answered.

- 9 Further, Mr De Simone in seeking to have an adjournment so that he could provide instructions as to what privileged documents he considered the Respondent was seeking. However, the Respondent was not proceeding with this application at this hearing and had not identified any documents it was seeking the production of other than general discovery. Therefore, Mr De Simone's need to provide further affidavits on this issue at this time was premature and speculative.
- 10 This proceeding only commenced at approximately the start of this year and there have been numerous directions hearings and it is important in an effort to minimise the costs to the parties and the expenditure of the Tribunal resources that the interlocutory programme for this proceeding be kept moving with all due dispatch. Therefore, I refuse the adjournment application of Mr De Simone generally and I will allow the postponement of the joinder applications by consent and I will hear and decide the remaining interlocutory issues between the parties.

SENIOR MEMBER R. YOUNG