

**VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL**

**CIVIL DIVISION**

**DOMESTIC BUILDING LIST**

**VCAT Reference: D213/2004**

**CATCHWORDS**

*Costs wasted by party resulting from deficient discovery of another party – recovery from the defaulting party – informal list of documents generally ordered – when more formal discovery should be ordered*

**APPLICANT:** Snowdon Developments Pty Ltd (ACN 078 452 187)

**FIRST RESPONDENT /  
APPLICANT BY  
CROSSCLAIM:** Actpen Pty Ltd (ACN 082 112 981)

**SECOND RESPONDENT /  
RESPONDENT BY CROSS  
CLAIM:** Peter John Hogan

**JOINED PARTY TO  
CROSS CLAIM:** Shane Thomas Constructions and Design Pty Ltd (ACN 081 811 127)

**WHERE HELD:** Melbourne

**BEFORE:** Senior Member R. Walker

**HEARING TYPE:** Directions Hearing

**DATE OF HEARING:** 10 February 2006

**DATE OF ORDER:** 14 February 2006

[2006] VCAT 291

**ORDERS**

1. Order John Douglas Group Pty Ltd to produce all documents in its possession relevant to this proceeding to the solicitors for the Respondent by Cross Claim, Peter John Hogan, subject to the Respondent by Cross Claim paying its costs of and incidental to the production of the said documents on a solicitor/client basis.
2. Liberty to John Douglas Group Pty Ltd to apply in regard to paragraph 1 of this Order.
3. Order the Applicant by Cross Claim Actpen Pty Ltd to file and serve upon the other

parties an affidavit of documents in accordance with the form prescribed by the Supreme Court (General Civil Procedure) Rules 1996 with appropriate amendments for a proceeding before this Tribunal.

4. Order the Applicant by Cross Claim Actpen Pty Ltd to pay two thirds of the costs incurred by the Respondent by Cross Claim of and incidental to the application for the joinder of John Douglas Group Pty Ltd, such costs, if not agreed, to be assessed by the registrar, in accordance with Scale D of the County Court Rules.

**SENIOR MEMBER R. WALKER**

**APPEARANCES:**

For the Applicant:	Mr D. Pumpa of Counsel
For the First Respondent/Applicant by Crossclaim:	Mr R Appuduari of Counsel
For the Second Respondent/ Respondent by Cross Claim:	Mr R Andrew of Counsel
For the Joined Party to Cross Claim:	Mr Sorensen of Counsel

## **REASONS FOR DECISION**

### **This application**

1. This matter came before me for directions at the instance of the Respondent by Cross Claim, Mr Hogan (“Hogan”), seeking:
  - (a) third party discovery from one John Douglas Group Pty Ltd (“Douglas”);
  - (b) an order that the Applicant by Cross Claim, Actpen Pty Ltd (“Actpen”), prepare a formal affidavit of documents; and
  - (c) an order that Actpen pay his costs with respect to an unsuccessful application to join Douglas as a party to this proceeding.
  
2. Following submissions from the parties and the production of a letter of consent from the solicitors acting for Douglas I indicated that I would grant the order for third party discovery and order Actpen to prepare a formal affidavit of documents but would reserve my decision in regard to the application for the costs of the joinder application.

### **Background**

3. On 14 June 2005, the tribunal ordered each of the parties to file at the registry and forward to each other a list of all documents in their possession or control and make such documents available for inspection. This informal method of discovery is normal in this list and is generally considered adequate. The order does not require the list to be in any particular form nor need it be verified on affidavit as is required in rules of court.
  
3. On 16 August 2005 the tribunal received a List of Documents on behalf of Actpen comprising 44 documents described on 2 ½ pages. Of the documents discovered only one document, a letter dated 11 June 2003, related to correspondence between Actpen and Douglas.
  
4. On 10 October 2005 Hogan’s solicitors applied pursuant to s60 of the Act to join two further parties namely:
  - (a) Douglas, which was the consultant that obtained the town planning permit and prepared the drawings and amended drawings that were endorsed and formed part of that permit;

- (b) Shane Thomas Construction Design Pty Ltd (“Thomas”) which prepared the working drawings for the construction.
5. The essence of the Cross claim is that the development was constructed too close to the street. The original plans provided for a set back of 4.5 metres but as a condition of granting the town planning permit, the Council required that the set back be increased to 5.4 metres. Douglas altered the numbered dimensions on the plans but did not redraw the plans to show how it would look with these amended dimensions. If one simply looked at the plans without reading the altered dimensions, it would appear as though the development was unchanged and the original plan still applied.
  6. Accompanying the application to join the two additional parties was a draft of proposed Points of Claim against Douglas and Thomas. The breaches against Douglas were alleged in this document to be, in essence, a failing to warn or give advice or make any alterations to the drawings beyond merely changing the dimension of the set back. As I pointed out in my reasons for the decision refusing the joinder of Douglas, the document was in error in suggesting that no other dimension had been changed. Nevertheless it was correct in that the drawing itself had not been altered.
  7. Douglas was represented at the hearing of the application for joinder by Mr Whitten of Counsel who relied upon an affidavit sworn by its director, Mr Douglas, in which he exhibited a number of documents setting out the advice that Douglas had given to Actpen concerning the changes the Council required. For the reasons set out in my decision of 7 December 2005 I refused the joinder.
  8. Mr Andrew on behalf of Hogan now seeks an order for the costs thrown away for this application on the ground that, if the documents exhibited to Mr Douglas’s affidavit had been discovered by Actpen, as they ought to have been, the application to join Douglas would not have been made.
  9. In resisting the application for costs Mr Appuduari urged me to read the Reasons for Decision on the joinder application and suggested that there were other reasons why the joinder application failed. Since I had no time to properly consider the matter before the

commencement of my 10.00 a.m. hearing I indicated that I would read the decision and then determine Mr Andrews' application after I had done so.

10. Mr Appuduari also pointed out that the costs of the joinder application were not wasted by Hogan in any event since Thomas was joined on that occasion.
11. Having re-read the Reasons for Decision on the joinder application I accept Mr Andrews' submission that it is unlikely the joinder application would have been made in regard to Douglas had these documents been discovered. In determining the joinder application I considered that, in the light of the correspondence passing from Douglas to Actpen the chances of any blame for the mistake being attached to Douglas were so negligible that it ought not to be joined. As an experienced member of Counsel in this area I accept that it is most unlikely Mr Andrew would have advised his client to seek the joinder.
12. I am satisfied that there is some substance in Mr Appuduari's submission that the day was not entirely wasted in that Thomas was also joined but the joinder of Thomas was not opposed and took only a few minutes. The real argument concerned the joinder of Douglas. I think an appropriate apportionment of costs in regard to the unsuccessful application to join Douglas is two thirds of the costs incurred on the application. I do not accept Mr Andrews' submission that the costs should be on the Supreme Court Scale. They should be on County Court Scale D as is the general practice in this list. Costs are occasionally awarded on the Supreme Court Scale where the nature of the case and the amount sought justify such an order. That is not the case here.
13. As to the order concerning an affidavit of documents to be prepared by Actpen, although the informal method of discovery commonly used in this tribunal is generally thought sufficient on this occasion it has not worked. I think it is appropriate that the officers of Actpen turn their mind more seriously to the question of discovery and I think having to verify the list on affidavit in the usual court form is the appropriate way to do that.

**SENIOR MEMBER R WALKER**