

**VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL  
CIVIL & HUMAN RIGHTS DIVISION**

**DOMESTIC BUILDING LIST**

**VCAT REFERENCE NO. D764/2001**

**CATCHWORDS**

Domestic building – costs – leave to withdraw – leave to amend

[2005] VCAT 963

<b>APPLICANT</b>	Body Corporate No. 1/PS40911511E St James Apartments
<b>FIRST RESPONDENT</b>	Renaissance Assets Pty Ltd (ACN 074 521 010)
<b>SECOND RESPONDENT</b>	Multiplex Limited (formerly Multiplex Constructions Pty Ltd (ACN 008 687 063))
<b>WHERE HELD</b>	Melbourne
<b>BEFORE</b>	Senior Member D Cremean
<b>HEARING TYPE</b>	Hearing
<b>DATE OF HEARING</b>	11 May 2005
<b>DATE OF ORDER</b>	27 May 2005

**ORDER**

1. Applications of Applicant dismissed.
2. Reserve liberty to apply.
3. Direct this matter be re-listed for further directions and orders to be given in the proceeding, before me on a convenient date. Allow 2 hours.

**SENIOR MEMBER D CREMEAN**

**APPEARANCES:**

For Applicant	Ms C Kirton of Counsel
For 1 <sup>st</sup> Respondent	Mr M Roberts of Counsel
For 2 <sup>nd</sup> Respondent	No Appearance

## REASONS

1. The Applicant applies for the following orders:
  - (a) an order that the First Respondent pay the Applicant's costs thrown away by reason of the decisions of the Tribunal given on –
    - (i) 5 September 2003;
    - (ii) 17 December 2003;
    - (iii) 28 January 2004.
  - (b) an order discontinuing the proceedings against the Second Respondent; and
  - (c) an order giving leave to file and serve Further Amended Points of Claim.
2. In support the Applicant filed Submissions and Further Submissions. It relies upon the affidavits of Kyle Siebel sworn 17 February 2005 and 6 April 2005.
3. I have read those Submissions and the Affidavits and I also heard from Counsel at the hearing on 11 May 2005. I also heard from Counsel for the First Respondent. On file there is an Affidavit of Kin Weng sworn 3 March 2005 and an earlier one of Annette Eastman sworn 3 March 2005.
4. The Second Respondent has indicated by letter dated 10 May 2005 that it supports the Applicant in its application for an order for discontinuance but that it neither consents to nor opposes the other orders which are sought.
5. The First Respondent, however, opposes each of the orders which is sought.

### Costs

6. It is convenient to deal with the question of costs first.
7. On 5 September 2003 I struck out the proceeding (so far as it alleged that the Applicant was the owner of the common property) and (by para 2) I ordered that costs be reserved. Then, on 17 December 2003, I refused the application and (by para 3) I again ordered that costs be reserved. Finally, on 28 January 2004, I

dismissed an application for a stay and struck out the proceedings in their entirety and (by para 3) I ordered the Applicant to pay the Respondents compensation. I stayed such order (see para 4). However, on that date, I made no orders as to costs. I did not reserve costs.

8. Subsequently, there have been proceedings in the Supreme Court on appeal. On 9 November 2004 (authenticated on 19 November) his Honour Justice Mandie made the following orders:

- “1. *The appeal is allowed. The decision and rulings of the Victorian Civil and Administrative Tribunal (VCAT) constituted by Deputy President Cremean and made on 5 September 2003, 17 December 2003 and 28 January 2004 are set aside.*
2. *The proceeding in VCAT which was the subject of the appeal is remitted to VCAT to be heard and decided in accordance with law and the Tribunal may be constituted by the said Deputy President or any other Member of VCAT as may be appropriate.*
3. *The First named Respondent pay the appellant’s (Applicant’s) costs of this proceeding and appeal (including any reserved costs).*
4. ...”

9. The Applicant submits that I now have power to order costs in its favour having regard to the submissions it advances. The First Respondent, however, denies that I have power to do so. As I have indicated the Second Respondent neither consents nor opposes.

10. Quite apart from the question whether I have power to order costs, I must point out (for I was addressed on these matters in the event I should find I did have power) that, in my view, the position of the Second Respondent, in the first place, in submitting the matter should be struck out (as regards the common property) was not unmeritorious. As it happens, his Honour has authoritatively taken a different view. But the argument put to me at the time did not lack substance. I should also indicate that, at the hearing, in particular on 5 September 2003, it was not the First Respondent which was the main proponent of the issue. Should I have power to order costs, I would be inclined to take

these matters into account at least as far as the hearing on that date is concerned. But the hearings on the subsequent dates (17 December 2003 and 28 January 2004) really fall also into the same category as regards the merit of the point being taken. Costs do not follow the event in the Tribunal (see s109(1) of the *Victorian Civil and Administrative Tribunal Act 1998*) and I do not consider that the submissions made to me on either of those subsequent dates were lacking respectability. That is indicated by my decisions that I gave.

11. In any event, I am not satisfied that I do have powers to make the orders which are now sought, should they be orders which, in the exercise of my discretion, should be made at all. His Honour on 9 November 2004 not only allowed the appeal but he set aside the “decisions” and the “rulings” I had made on the dates in question. It would seem to me that that includes the orders I made reserving costs (5 September 2003 and 17 December 2003) and the orders I made ordering compensation (28 January 2004). If they are set aside then it seems to me that costs are no longer reserved and compensation is no longer payable. I do not think his Honour meant by “reserved costs” in para 3 of his orders, the costs reserved by me, I should add.
  
12. The further difficulty is this. His Honour did not otherwise himself deal with the questions of the costs in the matters before me on the dates in question. But in respect of the hearings which took place on the dates in question the appeal has been allowed and my decisions and rulings set aside. I cannot see, how, at this point, I can simply revisit those occasions, as if I still had authority to do so, and as if the appeal had not been allowed, and make the costs orders sought, should they be warranted. I consider I am *functus officio* in respect of those occasions. I do not consider either that my jurisdiction has somehow been enlivened by the remitter. I agree his Honour, in that regard, remitted the proceeding “the subject of the appeal” to be heard and decided in accordance with law, but that indicates to me that his Honour, unless I am wrong, intended the matter to be started afresh, whether before me or another member.

13. His Honour's remitter does not seem to me to give me authority to entertain applications in respect of the matter before it went on appeal, where the appeal was allowed. It has been remitted to the Tribunal to be re-heard by me or by someone else. But no directions or orders have been made by his Honour with respect to costs in the Tribunal. Indeed, this may indicate that his Honour *did not* intend the costs of the hearings in question to be dealt with. I am unable to say whether the appellant may have overlooked mentioning this matter to him. I do not consider his Honour would have overlooked something on which he was addressed.
14. The appeal having been allowed and my decisions and rulings having been set aside, I agree with the First Respondent that I do not have, any longer, power to order costs in respect of the occasions in question. Costs are no longer reserved and the compensation order no longer applies. In my view, it is, as if, the entirety of my decisions given on the dates in question has been expunged. It is as if no part of them remains standing for any purpose whatever.
15. I consider I cannot order costs in favour of the Applicant even if, in the exercise of my discretion, I was minded to do so. The issue of costs was not remitted for reconsideration, either.
16. I accede, therefore, to the submissions of the First Respondent in this regard.
17. It is unnecessary for me to go further than this. I consider I lack the power to order costs by reason of the terms of his Honour's orders. And, I say so, with due respect, of course.

## **Discontinuance**

18. The Applicant, as I have noted, also applies for an order for discontinuance of the proceedings against the Second Respondent. The Second Respondent supports the Applicant in this.
19. Discontinuance (or withdrawal as it is known) may be ordered under s74 of the 1998 Act. Before an application may be withdrawn, however, leave must first be given. See s74(1).
20. The granting of such leave is opposed by the First Respondent on the basis that if leave is granted the First Respondent will remain as the only respondent in the proceedings. Should it then wish to be able to join the (current) Second Respondent as a party to the proceedings (alleging responsibility or seeking contribution or indemnity) it may be unable to do so by reason of the effluxion of time.
21. Normally, an applicant which wishes to withdraw a proceeding is routinely given leave to do so. However, the Tribunal is not bound to act under s74(1) to grant leave.
22. I am not satisfied in this case (despite the accommodation between the Applicant and the Second Respondent) that I should act to grant the leave sought. The matters raised by the First Respondent are, in my view, of serious concern. Were I to grant the leave sought I am not satisfied that I will not be doing a grave injustice to a (possibly) innocent party. While the Second Respondent remains in the proceedings as a party, the possibility exists for the First Respondent to file for contribution or indemnity against the Second Respondent. If, however, the Second Respondent is removed from the proceedings, as would happen by the granting of leave to withdraw, that possibility may no longer exist and the First Respondent may be unable to bring the Second Respondent into the proceedings again.

23. I consider I would not be acting in the interests of justice, as far as the First Respondent is concerned, if leave was given.
24. I am mindful of the Tribunal's obligation in that regard and I, accordingly, decline to give leave to the Applicant to withdraw. I should mention that a factor I have taken into account in my consideration is the (draft) Further Amended Points of Claim sought to be filed and served by the Applicant. I have more to say about those, however, as follows.

### **Further Amended Points of Claim**

25. The Applicant seeks an order giving leave to file and serve Further Amended Points of Claim.
26. This is opposed by the First Respondent. The Second Respondent neither consents nor opposes.
27. I was taken, at length, through the draft Further Amended Points of Claim at the hearing on 11 May 2005.
28. I am not satisfied, on my reading of the same, that they properly disclose a reasonable cause of action or are maintainable in law against the First Respondent. Many fresh allegations are made but many of them, I must indicate, appear to lead nowhere, in light of the need to show a cause of action which is viable in law. I refer, in particular, to paras 7, 11, 12 and 15 of the same. Considering what is alleged to be the First Respondent's position, these paragraphs, or some of them, seem to be misplaced. To descend into further detail on deficiencies, however, could involve me in an advisory role, which I decline to undertake.
29. I have given due consideration to the submissions on behalf of the Applicant (and to the materials on affidavit) but I am not satisfied that I should grant the leave

sought, if leave is required. Amongst other things, the draft Further Amended Points of Claim do not in my view, give the First Respondent proper notice of the case it must meet. As well, I consider there is a serious threshold issue in s3(4) of the *Domestic Building Contracts Act 1995* (passed with effect from 1 May 1996).

30. This, however, is not to say that, with appropriate amendment, the draft Further Amended Points of Claim may not be re-presented, in a form which overcomes many of the objections which have properly, in my view, been taken by the First Respondent.

### **Conclusion**

31. I am not satisfied I should grant any of the orders sought by the Applicant.
32. I dismiss the application.
33. I direct that this matter be re-listed before me for further directions and orders on a convenient date. Allow 2 hours.
34. I reserve liberty to apply.

**SENIOR MEMBER D CREMEAN**