

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

DOMESTIC BUILDING LIST

VCAT REFERENCE NO. D527/2004

CATCHWORDS

Domestic building – Particulars – Delay in providing same - Costs.

APPLICANT	Wow Design/Construct (VIC) Pty Ltd (ACN 104 208 317)
FIRST RESPONDENT	Darryl Wilson
SECOND RESPONDENT	Kerryn Weickhardt
THIRD RESPONDENT	Nottus Pty Ltd (ACN 005 907 424)
FOURTH RESPONDENT	John A Sutton
WHERE HELD	Melbourne
BEFORE	Senior Member D. Cremean
HEARING TYPE	Directions Hearing
DATE OF HEARING	8 June 2006
DATE OF ORDER	9 June 2006

Wow Design Construct v Wilson (Domestic Building) [2006] VCAT 1100

ORDER

- 1. I vacate the hearing date of 13 June 2006 and subsequent dates.**
- I order the Applicant to provide all known particulars of the delays alleged in paragraphs 7 and 9 of its Amended Points of Claim (including dates; duration; and reasons therefor).
- The Applicant must comply with paragraph 2 of these orders by 4.00 p.m. on 15 June 2006 and if failing to do so paragraphs 7 and 9 of its Amended Points of Claim shall stand thereafter as struck out.
- The First Respondent must provide the Second, Third and Fourth Respondents with the particulars referred to in paragraph 2 (if provided with the same by the Applicant) by no later than 4.00 p.m. on 22 June 2006.

5. **I refer this proceeding to a compulsory conference to take place on a date after 30 June 2006 to be notified to the parties. All must attend and may be represented. Short position papers must be prepared.**
6. By 22 June 2006 the Applicant must file and serve a supplementary list of documents relating relevant to the proceedings.
7. Under s109 of the *Victorian Civil and Administrative Tribunal Act 1998* I order the First Respondent to pay the costs of the Second, Third and Fourth Respondents of and incidental to the Applications and occasioned by my orders this day.
8. Also under s109 of the Act I order the Applicant to pay the costs of the First Respondent of and incidental to the Applications and occasioned by my orders this day.
9. Further under s109 of the Act I order the Applicant to pay the costs of the First Respondent paid by him to the Second, Third and Fourth Respondents under paragraph 7 hereof.
10. In default of agreement by 30 June 2006 I refer the assessment of all such costs to the Principal Registrar under s111 of the Act who shall assess the same according to Supreme Court scale. I allow the sum for costs of the First Respondent to include Senior Counsel. I allow costs for the attendances of instructing solicitors.
11. In default of such agreement, I direct the Second, Third and Fourth Respondents to file and serve bills of costs in taxable form by 14 July 2006 and the First Respondent to do so by 28 July 2006. The First Respondent or the Applicant, if objecting, must do so in writing by document filed and served by 18 August 2006. Thereafter the Principal Registrar must carry out his assessment and may make such arrangements with the parties as are necessary or proper.

SENIOR MEMBER D. CREMEAN

APPEARANCES:

For the Applicant	Mr J. Bolton of Counsel
For the First Respondent	Mr R. Manly, SC and Mr M. Whitten of Counsel
For the Second Respondent	Mr M. Robbins of Counsel
For the Third Respondent	Mr J.R. Dixon of Counsel
For the Fourth Respondent	Mr J.R. Dixon of Counsel

REASONS

1. This case is due to proceed next Tuesday 13 June 2006.
2. Applications are made by the Respondents (all four) for a strike out – despite the proximity of the hearing date – under s75 or s78 of the *Victorian Civil and Administrative Tribunal Act 1998* as the case may be.
3. Those applications arise out of orders made by me on 3 May 2006 allowing Requests for Particulars to be served.
4. Such requests were served.
5. Particulars in response to such requests have been given.
6. The problem giving rise to the need for the requests appears to derive from allegations of delay in the Amended Points of Claim (November 2005). In particular paragraphs 7 and 9 of same.
7. I make the following points:
 - (a) The Applicant denies now that any claim for damages is made for delay. The Applicant in fact expressly disclaims any such claim for damages. Nonetheless I apprehend that delay is a material fact – historically or otherwise – for, were it not, it would not be alleged. I was not convinced by the submissions of the Applicant in that regard. It seems to me the Applicant cannot allege delay in a carefully prepared document (Amended Points of Claim) and then, disclaiming damages, say that it is not a material fact. I consider delay in one way or another is a material fact. I think it is so, in reality, based on what Mr Manly SC said.

- (b) The Respondents consequently were entitled to seek particulars of delay. Some of the Requests are in suitable form. Others, however, are in Interrogatory form. The difference between a Request for Further and Better Particulars and an Interrogatory is obvious. It should be very clear to all concerned that any Request should not be served in Interrogatory form. A request is served to “clarify” a case and not to do more in an argument: see *Visionmax Pty Ltd v Budget Specs (Franchising) Pty Ltd* [2006] FCA 222 at [7] – [8] Collier J. Seldom in any event will a Request seeking “the usual particulars” or “the usual details” be allowed, I should add.
- (c) The Applicant nonetheless should not have provided particulars in response in Requests in the way it chose to do so. It is not sufficient, in providing particulars, simply to refer to other documents. Moreover there was a chance, then, to make it clear that damages for delay were not being sought.
- (d) The Particulars provided by the Applicant, apparently, lead nowhere on the question of delay. I am told, though, that details of delay may still, now, be able to be given by the Applicant.
- (e) The Second, Third and Fourth Respondents are parties in the proceeding solely at the instigation of the First Respondent. But the First Respondent has taken this action believing, not unreasonably in my view, that either a claim for damages for delay or delay itself will figure in the alternative *quantum meruit* case.

8. I do not take up the invitation to strike out the paragraphs of the Amended Points of Claim. I rely upon *Bell Corp Victoria Pty Ltd v Stephenson* [2003] VSC 255. I reject the notion that I made anything like a self-

executing order in the orders I made on 3 May 2006. If a party should think I am mistaken in this they should take this up elsewhere.

9. Having regard to s97 of the Act, in light of what Mr Bolton has said, I consider I should give the Applicant a further opportunity to formulate proper details with respect to delay.
10. Until it is seen what those details are, I am satisfied the case cannot proceed to trial as scheduled on 13 June 2006.
11. I shall make orders and directions accordingly.
12. As to costs, which are sought, I am satisfied, under s109 of the Act that it is fair to order as follows (having regard to s109(3)):
 - (a) The Second, Third and Fourth Respondents are entitled to an order for costs as against the First Respondent. The First Respondent's proceeding against those parties is an independent proceeding.
 - (b) The First Respondent is entitled to an order for costs as against the Applicant.
 - (c) The First Respondent is entitled to be indemnified by the Applicant in respect of the orders made in paragraph (a).
13. I make these following further points on costs:
 - (a) Having heard the parties I am satisfied the principal proceeding (Applicant against First Respondent) cannot proceed on the scheduled trial date for failure of the Applicant to provide particulars of delay

sought. It would have been helpful if the Applicant had indicated expressly, and much earlier, that it would not be seeking damages for delay.

- (b) I am satisfied though that the subsidiary proceeding (First Respondent against the other Respondents) cannot proceed for that reason (in (a)) also. This, however, is not the fault of the First Respondent.
- (c) I am satisfied that for the reason in (b) it would be unfair and unjust in all the circumstances if the First Respondent was not indemnified by the Applicant against costs to be paid to the Second, Third and Fourth Respondents.
- (d) The Second Respondent is not disentitled to an order for costs (despite its Request for Particulars being a day late) in light of the position adopted in the letter of 18 May 2006 from the Applicant's solicitors.
- (e) The matter is complex and difficult justifying the attendance of Senior Counsel (Mr Manly) for the First Respondent.
- (f) Considering the complexity and difficulty of the matter, and having regard to the amounts involved, I am of the view that costs should be ordered on Supreme Court scale. I am not bound to apply that scale but, having heard the parties, I am satisfied I should do so.

14. I shall make further orders and directions accordingly.

SENIOR MEMBER D. CREMEAN