

**VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL
CIVIL DIVISION
DOMESTIC BUILDING LIST**

VCAT Reference: D618/2001

CATCHWORDS

Adequacy of Particulars

APPLICANT: Age Old Builders Pty Ltd (ACN 068 142 638)
RESPONDENT: Swintons Pty Ltd
JOINED PARTIES: Edgard Pirrotta & Associates Pty Ltd (ACN 005 529 715)
WHERE HELD: Melbourne
BEFORE: Deputy President C Aird
HEARING TYPE: Costs Hearing
DATE OF HEARING: 28 March 2006
DATE OF ORDER: 3 April 2006

[2006] VCAT 462

ORDER

1. By 18 April 2006 the Applicant must file and serve further and better particulars of paragraph 16 of its Further Amended Points of Claim dated 15 February 2006, which shall specify the person or persons alleged to have been the cause of such delays, together with all material facts giving rise to the delays.
2. Costs reserved – to be determined in conjunction with the questions of costs which were otherwise the subject of the hearing on 28 March 2006.

DEPUTY PRESIDENT C AIRD

APPEARANCES:

For the Applicant: Mr J Shaw of Counsel
For the Respondent: Mr K. Oliver of Counsel
For the Joined Parties: No appearance

REASONS

1. Order 1 of the directions made on 8 February 2006 provides:

By 15 February 2006 the Applicant may file and serve Further Amended Points of Claim to incorporate the Further and Better Particulars and to delete references to potential liability of the Joined Party, which document shall include fully itemized particulars of the claim, loss and damage claimed, and the relief or remedy sought.

2. On 15 February 2006 the Applicant filed and served Further Amended Points of Claim. I am only concerned here with paragraph 16:

During the course of the works there were delays in the progress of the works by causes beyond the control of the applicant being acts (other than instructions by the architect as to variations), defaults or omissions on the part of the respondent, ~~the architect~~, any separate contractor, employee or agent of the respondent (“the delays”)

PARTICULARS OF DELAYS

Particulars of the delays are set out in the applicant’s Notice of Dispute dated 28 July 2000 and the applicant’s submission to John Coghlan dated 28 September 2000. The total duration of the delays was 75 days.

The documents are in the possession of the applicant’s solicitors and can be inspected upon the giving of reasonable notice.

The particulars ~~sought~~ of the delays are contained in part in the applicant’s extensions of time notices. They are numbered and dated as follows:

<u>Extension of time no.</u>	<u>Date</u>
32	13 April 2000
33	13 April 2000

Extension of time no 32 – joinery works

The joinery was a provisional sum/prime cost item listed on page 50 of the contract and was not detailed at tender stage or in the contract drawings. In order to obtain quotations it was necessary for the architect to provide full working drawings. ~~The architect was slow in producing the necessary drawings which delayed pricing of the works. There were subsequent changes to these drawings which resulted in the joinery having to be repriced.~~ The nominated sub-contractor would not commence production until the final price had been agreed upon.

~~As a result the~~The manufacture of joinery was delayed. This delayed installation and completion on site. The works were thus delayed by 35 days.

~~The delay was caused by the architect in that the drawings were provided late and were subsequently amended.~~

~~The architect was the agent of the proprietor pursuant to clause 5.01 of the contract.~~

The causes of the delay were beyond the control of the applicant because the applicant was not responsible for producing the drawings, the joinery could not be tendered until the drawings were received and ~~subsequent~~ changes to the drawings were not at the request of the applicant.

Extension of time no 33 – landscaping works.

(Similar amendments to those made in relation to Extension of time no 32 have been made and it is not necessary to repeat them)

3. Mr Oliver of counsel, submitted on behalf of the Respondent, that with the deletion of all reference to any liability on the part of the architect for the delays, the Respondent does not know the case it has to answer, and in particular, who it is the Applicant alleges is responsible for the delays.

4. In considering this application I have reviewed the file and in particular, the various iterations of the Applicant's Points of Claim. In the Points of Claim filed on 16 January 2002 there are no allegations as to delay. These first appear in the Amended Points of Claim dated 29 April 2002 which were filed pursuant to an order made on 22 April 2002. Paragraph 16 was essentially in the same terms as the current version, except that references to the 'architect' had not been deleted, and the only particulars were as set out in the first and second paragraphs of the current Particulars. A Request for Further and Better Particulars dated 30 April 2002 was filed and served by the Respondent. Further and Better Particulars of the Amended Points of Claim dated 7 May 2002 were subsequently filed by the Applicant, and in relation to paragraph 16 the particulars are substantially in the form set out above (except for the deletion of references to the 'architect'). These particulars were provided under

cover of an objection that they were known to the Respondent having been set out in the Applicant's Notice of Dispute dated 18 July 2000.

5. As the parties are well aware, the tribunal's determination of the preliminary questions dated 6 December 2002 was the subject of an appeal to the Supreme Court, following which there was a further appeal to the Court of Appeal and the preliminary questions remitted to the tribunal for determination. The preliminary questions were determined by me on 3 November 2005. The Respondent then made application to join the architect as a party to the proceedings, primarily because of the allegations made in paragraph 16 of the Amended Points of Claim as to the architect's responsibility for the delays. I granted this application for joinder being satisfied it was appropriate to do so having regard to s60 of the *Victorian Civil and Administrative Tribunal Act* 1998.

6. Mr Shaw of Counsel, who appeared on behalf of the Applicant, submitted that it was sufficient to plead the material facts – in this case, that the joinery and landscaping works had been delayed but that it was not necessary for it to indicate who was the cause of those delays. He submitted that the tribunal should be guided by the provisions of Rule 13.02 of the Supreme Court Rules. In *Arrow International Australia Pty Ltd v Indevelco* [2005] VCAT 2710 Bowman J made the following observations at paragraph 19 with which I respectfully concur:

The matter is before the Victorian Civil and Administrative Tribunal. Section 98 of the Act requires this Tribunal to conduct each proceeding with as little formality and technicality, and to determine each proceeding with as much speed as the requirements of the Act and the enabling enactment and a proper consideration of the matters before it permit. This Tribunal is not bound by the rules of evidence or any practices or procedures applicable to courts of record except to the extent that it adopts such rules, practices and procedures. ... Certainly, as I have earlier stated, in appropriate cases documents akin to pleadings will be ordered and more formal case management structures put in place. That has occurred in the present case. ... ***It is important that each party understands the case which it is to meet.*** ... (emphasis added)

7. In *Barbon v West Homes Australia Pty Ltd* [2001] VSC 405 Ashley J held that whilst pleading summonses should be discouraged a party has a right to know the case it has to answer (at paragraph 16):

I would not want it thought for a moment, because the Tribunal is not a court of pleading, and because the Act encourages a degree of informality in proceedings, that Rafferty's Rules should prevail. They should not. Any party, perhaps particularly a party facing a long, drawn-out hearing in the Tribunal - and I note in this case an estimate that the Tribunal hearing would extend for some nine weeks - is well entitled to know what case it must meet before the hearing commences. That is not to say that the case must be outlined with exquisite particularity. It is not to say that a defendant is entitled to evidence rather than particularisation. None the less a defendant is entitled to expect that a claim will be laid out with a degree of specificity such that, if it is obvious that the claimant seeks to pursue a claim which is untenable, that can be the subject of an application before trial; such that, moreover, if adequate particularisation is not provided, the matter will be clear to the Tribunal on application by an aggrieved party.

8. Paragraph 16 does not, in its present form, enable the Respondent to understand the case it is to meet. The Respondent is entitled to know who it is that the Applicant alleges is responsible for the delay. It is not sufficient for the Applicant to simply refer to the Notice of Dispute dated 28 July 2000, and the Applicant's submissions to John Coghlan dated 28 September 2000. I have reviewed the documents contained in the Appeal Book which the parties agreed should stand as the tribunal book when the preliminary questions were before me. I am unable to locate a copy of a Notice of Dispute dated 28 July 2000 in the Appeal Book nor am I able to locate a copy of any detailed submission by the Applicant to Mr Coghlan dated 28 September 2000. The Index indicates the submission is at pages 278-280 as an exhibit to the affidavit of John Frances Hoey sworn on 26 February 2003. However, I note that pages 278-280 are comprised of the exhibit sheet (p278), letter from the Applicant to Mr Coghlan (p279) advising that the items in dispute are set out in the attached Schedule (p280). Neither the letter nor the Schedule contain any supporting details which would provide the Respondent with the necessary particulars to enable it to understand the claim against it, as set out in paragraph 16. The person or persons who the Applicant alleges caused the delays are clearly material facts.

Further, in circumstances, where the Applicant has previously provided Further and Better Particulars of its claim (on 7 May 2002), it seems somewhat churlish to seek to avoid providing proper particulars now.

9. I will therefore order that by 18 April 2006, the Applicant must provide further and better particulars of paragraph 16 of its Further Amended Points of Claim, which shall specify the person or persons alleged to have been the cause of such delays, together with all material facts giving rise to the delays. I will reserve the question of costs of this application to be determined in conjunction with the questions of costs which were otherwise the subject of the hearing on 28 March 2006.

DEPUTY PRESIDENT C AIRD