

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

DOMESTIC BUILDINGLIST

VCAT REFERENCE NO. D272/2007

CATCHWORDS

Domestic Building, self-executing order, application to extend time or set aside, whether trigger order fulfilled, importance of trigger order, obligation to provide an affidavit regarding assets, whether an order for costs can cure prejudice to another party caused by failure to comply, history of non-compliance, party who controls proceeding by non-compliance, discretion to extend and competing interests, freezing order - variation of

APPLICANT	Anton Bianco
RESPONDENT	Rad Dinovic
THIRD RESPONDENT TO COUNTERCLAIM	Sharanton Pty Ltd (ACN 074 264 378)
WHERE HELD	Melbourne
BEFORE	Senior Member M. Lothian
HEARING TYPE	Hearing
DATE OF HEARING	19 May 2009
DATE OF ORDER	3 July 2009
CITATION	Bianco v Dinovic & Anor (Domestic Building) [2009] VCAT 1126

ORDERS

- 1 The proceeding, being the claim and counterclaim, stands determined in favour of the Respondent.
- 2 **The proceeding is listed for further hearing before me on 15 July 2009 at 10.00 am at 55 King Street Melbourne with an estimated hearing time of half a day to make orders regarding the variation of the freezing order, quantification of the Respondent's damages, including interest and costs.**
- 3 The Principal Registrar is directed to send these orders and reasons to the parties by facsimile now, marked "urgent".

SENIOR MEMBER M. LOTHIAN

APPEARANCES:

For Applicant	Mr Dickenson of Counsel
For Respondent	Mr Graham, Solicitor
For the Third Respondent to Counterclaim	Mr Dickenson of Counsel

REASONS

- 1 An important aspect of procedural fairness is the right to be heard. Another is the right to a hearing that is not unreasonably delayed by a reluctant opponent. This directions hearing concerned such allegations and their impact on a self executing order. It also concerned a freezing order.
- 2 Mr Dinovic owns the property the subject of the proceedings. In accordance with the decision of Deputy President Aird of 19 September 2008 the Third Respondent to Counterclaim (“Sharanton”) was the builder. The hands that directed Sharanton and built on its behalf were those of the Applicant, Mr Bianco.
- 3 On 30 March 2009 Graham Legal on behalf of Mr Dinovic sought orders, the significant one being:
 - That the third Respondent to Counterclaim (Sharanton Pty Ltd) having failed to comply with paragraph 7 of the Tribunal’s orders made on 29 January 2009 this proceeding stand determined in favour of the Respondent.

This application was referred to the directions hearing I conducted on 19 May 2009.
- 4 On 22 April 2009 Johnston Construction Lawyers filed notice that they had commenced to act for Mr Bianco and Sharanton. On 14 May 2009 they made application for orders (among others):
 - discharging or varying the freezing order first made on 8 January and extended on 29 January 2009,
 - setting aside the self-executing order of 19 March 2009 or extending the time for compliance from 27 March 2009 to 30 March 2009,
 - substituting Sharanton for Mr Bianco as applicant, and
 - adjourning the hearing which was previously listed for 1 June 2009 to after the sale of Sharanton’s property at Waterview Lane.
- 5 On 19 June 2008 I conducted a compulsory conference which did not lead to settlement. I explained at the commencement that I could continue the compulsory conference on 19 May 2009, adjourn the directions hearing for another member to hear, or hear it myself if both parties agreed. After a break to obtain instructions, Mr Dickenson of Counsel for Mr Bianco and Sharanton and Mr Graham, solicitor, for Mr Dinovic, advised that in accordance with section 86 of the *Victorian Civil and Administrative Tribunal 1998* (“VCAT Act”) that none of their clients objected to me hearing the issues before the Tribunal on that day. I have no recollection of the negotiations that took place at the compulsory conference.
- 6 A brief recent history of this proceeding is that on 9 December 2008 Senior Member Cremean conducted a compliance hearing extending the time during which Mr Bianco could file and serve witness statements and

confirmed that the final hearing was to proceed on 15 December 2008. On 15 December the hearing commenced in the absence of Mr Bianco, or any representation for him or Sharanton. Senior Member Cremean reserved his decision and directions were made on 21 January 2009 arising out of the aborted hearing.

- 7 On 22 December 2008 Mr Dinovic sought a freezing order to prevent the sale or disposal of certain assets of Sharanton. The application was heard by Deputy President Macnamara on 8 January 2009, and was granted. It was extended on 29 January 2009. There was no appearance by or on behalf of Mr Bianco and Sharanton on either day.
- 8 At the directions hearing of 19 May 2009 it was submitted for Mr Dinovic that Senior Member Cremean made a legal error when he stated in his reasons of 21 January 2009 that although Mr Bianco had knowledge of the hearing, there was no proof that Sharanton did as well. Whether it was or was not a legal error, as I said on 19 May 2009 and as appeared to be acknowledged in Mr Dinovic's chronology of events presented at the directions hearing, the only avenue for redress would be appeal – not agitation of the matter before me. I have not taken it into account.

THE SELF EXECUTING ORDER

- 9 On 19 March 2009 there was a directions hearing before Senior Member Cremean where various orders were made including, relevantly to the self executing order:
 2. By 24 April 2009 the applicant (third respondent to Counterclaim) must file and serve Witness Statements.
 3. By 24 April 2009 the applicant (third respondent to Counterclaim) must file and serve a copy of his/its expert report.
 - ...
 5. By 27 March 2009 the third respondent to Counterclaim must comply with paragraph 7 of the orders made on 29 January 2009.
 6. If the applicant (third respondent to Counterclaim) fails to comply with paragraph 2, 3 or 5 of these directions and orders the proceeding shall stand determined in favour of the first respondent.
- 10 Paragraph 7 of the orders of 29 January 2009 provided:

You [Sharanton] must by 3 February 2009 swear and serve on the Respondent an affidavit setting out, to the best of your knowledge, all your assets in Australia, giving their value, location and details (including any mortgages, charges or other encumbrances to which they are subject) and the extent of your interest in the assets.

This paragraph was very similar to paragraph 7 of the orders of 8 January 2009 which did not require Sharanton to make an affidavit.
- 11 At the directions hearing of 19 May 2009 Mr Graham said from the bar table (not under oath) that his firm sent a facsimile to the Tribunal regarding

Sharanton's failure to comply with order 5 of 19 March 2009 and sent a fax copy to Mr Bianco and Sharanton at 9.19am. He said that at 11.45am Mr Bianco attended Graham Legal's office and provided an unsworn document headed "Sharanton Assets and Liabilities". Mr Graham said he told Mr Bianco that the document was inadequate and that at 2.15 pm Mr Bianco returned with two documents. They were a statutory declaration stating that the affidavit was late because Mr Bianco's "accountant wasn't helping put it together and couldn't see my solicitor in time" and an affidavit sworn before a VCAT officer to which was exhibited the same document that had been provided at 11.45am.

With the exception of the date, was order 5 complied with on 30 March 2009?

12 On 30 March 2009 Mr Bianco swore in his affidavit:

These figures submitted are true and correct to my knowledge. The reason for late is Accountant wasn't helping put it together and couldn't see my solicitor in time. Attached is Sharanton Pty Ltd assets +liabilities. [sic]

13 The document annexed to the affidavit stated:

Sharanton Assets & Liabilities Date 30/03/09

Assets

71 Waterview Lane Cairnlea	\$450,000
42 Lakewood Blvd Cairnlea	\$180,000
Total Assets	\$630,000

Liabilities

Bentons	\$2,000
ANZ Card	\$6,000
Comm Loan	\$330,000
Comm Loan 2	\$149,000
Comm Card	\$7,000
Lakewood GST	\$17,000
Brookglen Bld GST	\$20,000
Stone mason	\$1,000
Tony Bianco	\$83,000
Heather Young	\$120,000
Real Estate Agent	\$1,000
Total Liabilities	\$736,000
Total	-\$106,000

- 14 The affidavit and its attachment are at best a poor attempt to comply with the relevant order. It does not list mortgages, charges or other encumbrances and it is hard to imagine that if “Comm” – presumably the Commonwealth Bank – has loaned somewhere in the region of \$479,000.00, it would do so without security. Exhibit AB 20 to Mr Bianco’s affidavit of 15 May 2009 indicates that the Commonwealth Bank does hold a mortgage over the property at 71 Waterview Lane Cairnlea, but this is not listed in the attachment.
- 15 Apart from the “liabilities” which Sharanton was not ordered to provide, it gave no further information than that which was before the Tribunal on 29 January 2009. I find that it is a document designed to give the impression of compliance with the order without actually complying.
- 16 I find that order 5 of 19 March 2009 has never been complied with.

Should it be set aside or should time for compliance be extended?

- 17 Assuming I am accurate in my finding that Mr Bianco’s affidavit of 30 March 2009 does not comply with order 5 of 19 March 2009, neither he nor Sharanton derive any advantage from extending the time for compliance. However, I will consider whether, if I am wrong, the time should be extended or whether, regardless of non-compliance, the self executing should be set aside.
- 18 Considerations in favour of extending time are that there would be no hearing as to the merits and Mr Bianco or Sharanton would lose their right to continue the claim for \$54,480.20. It has not been put to me that this is a case where, on the face of Mr Bianco’s and Sharanton’s pleadings, they have no case and are bound to fail, although Senior Member Cremean said in his reasons of 21 January 2009 that he could not detect “very clearly, what that case may be.”
- 19 On the counterclaim, Sharanton would have determined against it a nett claim of \$148,472.48 plus an unspecified amount for general damages in accordance with the Second Further Amended Points of Defence and Amended Points of Counterclaim of 15 December 2007. Although Mr Bianco’s affidavit of 30 March 2009 indicates that Sharanton has a negative nett worth, determination of the proceeding as sought by Mr Dinovic is likely to deliver the mortal blow to Sharanton.
- 20 Mr Dickenson submitted:

The order in respect of which the applicant and the company were late in complying was relevant only to the freezing order and not to the conduct of the substantive dispute.

In orders 6 of 19 March 2009 Senior Member Cremean chose to include failure to comply with the obligations concerning the freezing order as a trigger for the self executing order and I find the obligation was an important one.

- 21 I do not consider it relevant that Mr Bianco and Sharanton were not legally represented on 19 March 2009 – they were previously legally represented and are again now. Mr Bianco cannot have been ignorant of the peril facing him and his company if he failed to comply with an order.
- 22 Mr Dickenson also submitted that the time for compliance with the self executing order should be extended to 30 March 2009 as it was the next business day after the day for compliance in accordance with *Ng v Rockman* [1999] VSC 470. In that matter at paragraphs 12 and 13 Beach J said:
12. ... in refusing to extend the self executing order by 24 hours as requested by the plaintiffs, the tribunal was clearly guilty of a denial of natural justice so far as the plaintiffs were concerned. The plaintiffs had complied with the spirit of the tribunal's order ... in that further and better particulars had been supplied to both the tribunal and the defendant's solicitors on the day stipulated by the tribunal.
 13. To take the point that by virtue of the provisions of s141 of the [VCAT] Act they were deemed to be one day late, was in my view to take a most technical and unrealistic view of the matter, No prejudice whatsoever has been caused to the defendants by the plaintiffs' failure to comply ... On the other hand, significant prejudice would be caused to the plaintiffs if they are unable to pursue their counterclaim against the defendants.
- 23 One of the grounds of appeal in that matter was:
- 1 (a) whether granting the relief sought by the appellants would have caused any prejudice or detriment to the respondent which could not be remedied by an appropriate order for costs or damages.

Mr Dickenson made the same point, in reliance upon *JG King Pty Ltd v Evans* [2005] VCAT 2367 at paragraph 22.

- 24 Considerations against either extending time or setting aside the self executing order include:
- the inability to have prejudice cured by an order for costs,
 - a history that supports the view that Mr Bianco and Sharanton are trying to avoid having the dispute heard expeditiously, and
 - that Mr Bianco and Sharanton had control over what occurred but Mr Dinovic did not.

The capacity of costs to cure any prejudice

- 25 In the application before me I am not satisfied that any order for costs would give Mr Dinovic anything more than a pyrrhic victory. Sharanton's own statement of assets and liabilities shows that it has a negative asset balance of \$106,000.00 and as Mr Bianco said at paragraph 37 of his affidavit of 15 May 2009: "I have no money and my company has no money." Further, Mr Bianco was ordered to pay Mr Dinovic's costs on 5

November 2008 (\$1,250.00), and Sharanton was ordered to pay them on 9 December 2008 (\$440.00). At the directions hearing of 19 May 2009 Mr Graham said that neither sum had been paid and this was not disputed by or on behalf of Mr Bianco or Sharanton.

- 26 Further, Mr Dinovic wrote to Senior Member Cremean on 19 May 2009, because he expected that he would have been conducting the directions hearing that day. Mr Dickenson first objected to the letter then withdrew his objection. I reproduce the letter because it demonstrates that there might be some defaults that costs cannot cure:

Dear Sir

This is in my own words regarding the continue legal battle I have with Sharanton Pty/Ltd.

Please note that this continuing legal battle has so far affected me and my family both mentally and financially, putting an enormous strain on my wife and four daughters.

At the start the house was suppose to be built in 12 months.

The builder was running behind 17 months before sought legal advice.

I refinanced my home at the start of the proceeding so I could finish the house and take possession.

I then had to refinance again to pay my solicitors to keep going with the proceedings.

I have attended every court date I was required, missing out on work, and as I am the only provider in the household, I fell behind on a lot of my finances due to taking time off and refinancing twice so far.

The builder has shown no commitment on any responsibilities with this court action, hardly ever turning up himself.

If he made an effort, this court would not be dragging up for over two years I believe because of his incompetence and negligence.

The builder had more than enough opportunities to show his side of the case, but did not attend himself or send any representation on his behalf.

Since the court case started 17-05-2007 to this day, I have borrowed over \$200,000, to be able to move into the house (complete the building).

And over \$70 000 for my continued legal costs.

Im so far over \$270000 in loss over this court proceedings and I feel like nothing is achieved and I'm back at the start, as Anton has yet again been given another opportunity.

I have invested a lot of money and time into all this with seeing any results whatsoever.

This should have been over on 15-12-2008, but it is still going due to Anton getting more opportunities and I don't understand why after all this time. [sic]

Mr Bianco's and Sharanton's history of non-compliance

- 27 As Mr Graham said, the appearance before the Tribunal of 19 May 2009 was the eighteenth occasion on which his client, or a lawyer for his client, had appeared at the Tribunal. On eight of those occasions there was no appearance for either Mr Bianco or Sharanton, often without any explanation. In his affidavit of 15 May 2009 Mr Bianco said that he was not present at the directions hearing of 9 December 2008 (which was actually a compliance hearing listed to consider Mr Bianco's failure to file witness statements) "because I cannot afford to take a day off work." He also admitted in his affidavit that he was aware of the hearings concerning the freezing order on 8 January 2009 and 29 January 2009, and the directions hearing of 10 March 2009. He did not attend any. He did attend the directions hearing of 19 March 2009 and was aware that the orders included a self-executing order, should he fail to comply. He said:

After the hearing on 19 March I began collecting the information required for compliance with paragraph 7 of the order of 29 January 2009. I had the information ready on Friday 27 March 2009 but I was hoping to see a solicitor before filing the material at VCAT. I was waiting to hear from the solicitor that I had called several days earlier and basically just forgot to put in the material by the end of the day on 27 March 2009. I know this is unsatisfactory but I have a very poor memory due to some [unspecified] health issues I had several years ago, and have difficulty remembering obligations even when they are important like this particular one.

- 28 I also note that Mr Bianco's and Sharanton's failure to attend the directions hearing of 10 March 2009 led to order 2:

Should the applicant and/or third respondent to counterclaim fail to attend the directions hearing [of 19 March 2009] the proceeding may be determined pursuant to s76 and /or s.78 of the *Victorian Civil and Administrative Tribunal Act 1998*. I direct the principal registrar to send a copy of s76 and s.78 to the applicant and third respondent by counterclaim with a copy of these orders by express post today.

- 29 There is a point at which the additional straw breaks the camel's back. Although an individual act of non-compliance might seem minor in isolation, it should also be considered as part of a pattern of behaviour. Compliance with the obligation to provide information regarding Sharanton's assets was considered sufficiently important by Senior Member Cremean that he chose to include it as one of the triggers for the self-executing order. I also note that, had I extended time, Mr Dickenson was seeking leave to file a reply and defence to counterclaim, so there would be an opportunity for further non-compliance by Mr Bianco and Sharanton.

Mr Bianco's and Sharanton's control

30 There is potential injustice to whichever party I find against, but Mr Bianco had the power to prevent it. If Mr Bianco had attended the hearing on 15 December 2008 – which had been listed for a five day hearing on the merits of the claim and counter-claim – he would have had the opportunity to put his case. He also had the power to properly respond to order 7 of 29 January 2009. Mr Dinovic did not have such power in the face of Mr Bianco's and Sharanton's non-compliance.

Discretion

31 In accordance with *World Link Assets Pty Ltd v James Kay* [1999] VCAT 5 the Tribunal's discretion as to whether to extend time is unfettered. In this proceeding I find that even if an extension of time would be effective to cure the default, and with respect to the application to set aside the self executing order, the greater injustice will be done to Mr Dinovic if I exercise my discretion in favour of Mr Bianco and Sharanton rather than to Mr Bianco and Sharanton if I do not. I therefore decline to do so.

32 The self executing order is effective and the proceeding stands determined against Mr Bianco and Sharanton. I note that in accordance with the Second Further Amended Points of Defence and Amended Points of Counterclaim dated 15 December 2008, Mr Dinovic only seeks relief against Sharanton.

THE FREEZING ORDER

33 Paragraphs 1 and 2 of the freezing order provide:

1. Subject to the next paragraph, this order has effect until further order by the Tribunal.
2. Anyone served with or notified of this order, including [Sharanton] may apply to the Tribunal at any time to vary or discharge this order of so much of it as affects the person served or notified.

34 Mr Dickenson said that if the freezing order were not varied to allow Sharanton to sell one of the properties, it would be deprived of funds to enable them to obtain expert evidence and put their cases before the Tribunal. As the proceeding has now been determined against them, the need for these funds is less urgent.

35 Mr Dickenson also submitted that there has been a demand by the Commonwealth Bank against Sharanton and referred me to exhibit AB20 to the affidavit of Mr Bianco of 15 May 2009. This is a matter of concern, and terms varying the freezing order will therefore be considered to enable Sharanton to sell 71 Waterview Lane, Cairnlea to enable the debt to the Commonwealth Bank to be paid, and any balance to be paid into a joint account in the name of Sharanton's and Mr Dinovic's solicitors.

OTHER ORDERS

- 36 The proceeding is listed for further hearing before Senior Member Lothian on 15 July 2009 to make orders regarding the variation of the freezing order, quantification of Mr Dinovic's claim, including interest and costs.

SENIOR MEMBER M. LOTHIAN