

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

**VCAT Reference: D14/2005**

[2005] VCAT 1299

**APPLICANT:** Damian Fraser  
**FIRST RESPONDENT:** Housing Guarentee Fund,  
**SECOND RESPONDENT:** Gail Ziman,  
**THIRD RESPONDENT:** Paul Daly,  
**FOURTH RESPONDENT:** Ly Sugianto,  
**FIFTH RESPONDENT:** Christopher O'Mahony,  
**SIXTH RESPONDENT:** Andrew Phillips,  
**SEVENTH RESPONDENT:** Stella Minahan,  
**EIGHTH RESPONDENT:** Allan Griffin,  
**NINTH RESPONDENT:** Ross Door,  
**TENTH RESPONDENT:** Diane Griffin  
**WHERE HELD:** Melbourne  
**BEFORE:** Senior Member R. Walker  
**HEARING TYPE:** Small Claim Hearing  
**DATE OF HEARING:** 18 March 2005  
**DATE OF ORDER:** 18 March 2005

**ORDERS**

1. The Applicant's application for an adjournment is refused.
2. The proceeding is dismissed.

3. Order the Applicant to pay the costs of the Second Respondent fixed at \$40.00, the costs of the Third Respondent fixed at \$110.00 and the costs of the Eighth Respondent fixed at \$15.00.

**SENIOR MEMBER R. WALKER**

**APPEARANCES:**

For the Applicant:	No Appearance
For the First Respondent:	Mr B. Powell of Counsel
For the Second Respondent:	Ms G. Ziman, in person
For the Third Respondent:	Mr P. Daly, in person
For the Fourth Respondent:	No Appearance
For the Fifth Respondent:	No Appearance
For the Sixth Respondent:	No Appearance
For the Seventh Respondent:	No Appearance
For the Eighth Respondent:	Dr A. Griffin, in person
For the Ninth Respondent:	No Appearance
For the Tenth Respondent:	Ms D. Griffin, in person

## REASONS FOR DECISION

1. This matter came before me for a Small Claim Hearing on 18 March 2005. It concerns domestic building work carried out at 1172-1174 Dandenong Road, Carnegie by Damgar Development Concepts Pty Ltd (“the Builder”).
2. The appeal is by the Applicant, Mr Fraser, against a decision of the First Respondent to accept the claim of the other Respondents in regard to the driveway and defective gates at the subject premises. The decision required the Builder to reimburse an amount \$1,490.45 to the owners, and carry out some work to the paving at the driveway.
3. A copy of the decision was sent on 21 December 2004 and the present appeal was commenced on 14 January 2005. The appeal ought to have been brought by the Builder. Although Mr Fraser describes himself as the builder in the application, it is apparent that he was not the builder although perhaps he is its director.
4. The proceeding was fixed for hearing on 18 March and notice of that Hearing was posted to the parties on 27 January 2005.
5. On 23 February 2005 the Tribunal received a letter from Mr Fraser noting the date of the Hearing and stating in the second paragraph:

*“Due to a death in my family, I would ask that the matter be adjourned until mid April 2005. Please notify me in writing of your decision as soon as possible.”*
6. The Registry responded on the same day by letter, a copy of which is on the file. The relevant part of the letter states:

*“The Registry has noted your request for an adjournment of the Small Claim Hearing scheduled for 18 March 2005 due to a death in your family. The Registry, however, requires written consent from the Respondent Parties for the matter to be adjourned to a later date. If consent cannot be obtained the matter will be referred to the Deputy President for consideration.”*

7. Nothing further was heard from the Applicant until 4.43pm on of the day preceding the date fixed for the hearing when the Registry received by fax a letter dated 15 March 2005 in the following terms:

*“As previously stated, Damian Fraser is not able to attend tomorrow’s hearing as he is overseas due to a death in his family – as stated in his letter of 22 February 2005.*

*Should this Hearing proceed, we will be seeking a Directions Hearing at a later date.”*

8. The letter is signed by one Kristen Saunderson and it is apparent from its text that at the time it was written Mr Fraser had already departed overseas. It is also apparent from evidence given before me that he made no attempt to obtain the consent of the Respondents to an adjournment of the appeal, nor did he contact them before the Hearing to say that such an application would be made. The Respondents were informed of the application by the Registry.

9. At 8.45am on the morning of the hearing a further letter was received from Miss Saunderson in the following terms:

*“In the absence of Mr Damian Fraser from today’s Hearing, I wish to reiterate to you our objection to this Hearing proceeding.*

*Firstly, your letter to Mr Fraser does not CLEARLY state whose responsibility it is to contact all parties – it simply says that written consent of all parties is required. It does state anywhere in this letter that it was Mr Fraser’s duty to obtain consent.*

*Secondly, Mr Fraser – not a Company, has lodged this appeal. This means that there is no other representative available to attend the Hearing in his place.*

*Due to the circumstances of Mr Fraser’s request for an adjournment and your subsequent refusal, he would now like to formally request a Directions Hearing.*

*Please forward any necessary paperwork to me for this to happen.” (sic.)*

10. When the matter came before me this morning there was no appearance by or on behalf of the Applicant. Mr Powell of Counsel represented the Fund and the Second, Third, Eighth and Tenth Respondents attended in person.

11. I read out to the parties present the letter from the Applicant requesting an adjournment and invited submissions as to whether an adjournment ought to be granted. Mr Powell said that he did not oppose an adjournment and the same position was taken by three of the other four Respondents present. However, one Respondent opposed the granting of an adjournment. I then heard evidence from the Second and Third Respondents as to the nature of the dispute and received evidence as to medical conditions suffered by a number of them. After hearing this evidence I determined to refuse the application for an adjournment and there being no evidence in support of the appeal it was dismissed and orders for costs were made to the three Respondents who made application for them. I now provide reasons for this decision.
12. The claim is a very small one. The Applicant quantifies the amount in dispute as being \$5,000. It involves a large number of parties, some of whom are in poor health and some are advanced in years.
13. The Application has been brought in the name of Mr Fraser, who is not the Builder. It is apparent that this is not simply a mistake because Ms Saunderson makes a point of the fact that it is not an application by the Builder. It is not apparent that the Applicant's interests are affected by the First Respondent's decision or what standing he has to bring this proceeding.
14. In the form of application, the grounds are stated as follows:

*“As the claims do not form part of the Home Owners’ Warranty.”*
15. No facts are set out, nor is any explanation given as to why the claims, which clearly relate to the gateway and driveway of the development and the security gate would not fall within the Domestic Building Insurance. In any event, if it were simply a legal argument as to the scope of the insurance, that argument could have been advanced by anyone and would not have required the personal attendance of Mr Fraser.

16. Notwithstanding the warning given by the Registry, the Applicant made no attempt to contact any of the Respondents to obtain their consent. He has simply written requesting it and then departed overseas assuming that it will be granted. There was no reasonable basis for him to have adopted this assumption. The letter from the Registry was quite clear. His conduct is high-handed and presumptuous.
17. The grounds for the application for an adjournment are simply “due to a death in my family”. Since this statement appears in a letter dated 22 February 2005, it is apparent that the death occurred on or prior to that date. It is unclear why this would prevent the hearing of this proceeding almost a month later, particularly where the grounds for the appeal appear to be quite technical, rather than reliant upon evidence.
18. There is no indication at all as to what the Applicant’s case is, but from the evidence given by the Respondents from whom I heard there seems to be an abundance of evidence available to be called to demonstrate that the gates to the driveway and also the pedestrian security gate are defective and have required constant attention from the Body Corporate and considerable expense to it. Indeed, the bills for this work are attached to the Applicant’s own application.
19. I find that to delay this hearing would cause prejudice to the Second to Tenth Respondents. It appears that the gate is at times impassable and visitors cannot obtain admission as a result of the malfunctioning intercom system. In particular, the Second Respondent, who is on medication, has to put up with the banging of the gate at night when she is attempting to sleep. The Third Respondent has a new born baby. The Seventh, Eighth and Tenth Respondents are in poor health and may face a medical emergency when accessibility to the premises would be vital. It seems to me that there is an element of urgency in having these matters attended to in all the circumstances and the cavalier attitude of the Applicant should not be rewarded by granting an adjournment in order to allow him to prosecute what would seem to be a highly dubious appeal.

**Senior Member R Walker**