VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

DOMESTIC BUILDING LIST VCAT REFERENCE NO. D813/2009

CATCHWORDS

Self-executing order – failure by the first respondent to comply – order confirmed – counterclaim stands dismissed.

APPLICANT	Di Manno Enterprises Pty Ltd (ACN 006 611 794)
FIRST RESPONDENT	Victor Perton
SECOND RESPONDENT	Nicholas Murray trading as Nicholas Murray Architects
WHERE HELD	Melbourne
BEFORE	Deputy President C Aird
HEARING TYPE	Hearing
DATE OF HEARING	1 July 2011
DATE OF ORDER	1 July 2011
DATE OF REASONS	5 July 2011
CITATION	Di Manno Enterprises Pty Ltd (ACN 006 611 794) and Anor v Nicholas Murray trading as Nicholas Murray Architects (Domestic Building) [2011] VCAT 1236

ORDER

1 The first respondent's application dated and received by the tribunal on 16 June 2011 for an order that the report from Permewan Consulting Pty Ltd filed on 16 May 2011 complies with the orders of the tribunal's orders dated 7 April 2011, is refused and the first respondent's counterclaim stands dismissed.

2 The first respondent must pay the applicant's costs of and incidental to the first order sought in the respondent's application dated 16 June 2011 fixed in the sum of $3000 and there is to be no set off.

3 The second respondent's costs are reserved.

The tribunal further orders by consent:

4 The date by which the second respondent must file and serve witness statements is extended to 6 July 2011.

5 The date by which the parties must file and serve any witness statements in reply is extended to 20 July 2011.

6 By 11 July 2011 the first respondent must file and serve a supplementary list of documents.

7 **The compulsory conference listed for 26 July 2011 is confirmed**.

8 **The hearing listed for 1 August 2011 is confirmed**.

DEPUTY PRESIDENT C AIRD

APPEARANCES:

For Applicant	Mr R Andrew of Counsel
For First Respondent	Mr P Rompotis of Counsel
For Second Respondent	Ms Kerhoulas, Solicitor

REASONS

1 These reasons are provided pursuant to a request on behalf of the first respondent at the conclusion of the directions hearing on 1 July 2011, after brief oral reasons had been given for the refusal of the first respondent's application dated 16 June 2011 for an order that the report from Permewan Consulting Pty Ltd filed on 16 May 2011 complies with the tribunal's orders dated 7 April 2011.

Background

2 On 31 January 2008 the applicant builder and first respondent owner entered into a cost plus contract for the renovation and extension of a house in South Melbourne.

3 On 5 November 2009 the builder commenced these proceedings seeking payment of the sum of $171,389.80 for payment of outstanding progress claims and interest.

4 On 20 January 2010 the tribunal made Consent Orders in Chambers pursuant to which the owner was to file and serve Points of Defence by 18 February 2010.

5 The owner failed to comply and the matter was listed for a compliance hearing on 16 March when the tribunal extended the date by which the owner was to file and serve Points of Defence to 16 April. The tribunal also ordered that the owner had leave to make any application for joinder until 16 April and referred the matter to a compulsory conference on 9 June.

6 Once again the owner failed to comply and the matter was listed for a directions hearing on 7 May. On 5 May the owner filed Points of Defence and Counterclaim claiming damages of $400,000 for alleged cost overruns (including variations) and $139,775 for rectification costs. The directions hearing listed for 7 May was cancelled following receipt of consent orders dated 6 May, pursuant to which the date by which the owner was to make any application for joinder was extended to 19 May. The compulsory conference listed for 9 June was adjourned to 29 July.

7 There was a further directions hearing on 15 June when the tribunal further extended the date by which the owner was to make any application for joinder to 29 June. The compulsory conference listed for 29 July was also cancelled. This was the third adjournment of the compulsory conference.

8 When the owner failed to make an application for joinder by 29 June the matter was listed for a further directions hearing on 15 July at which there was no appearance by or on behalf of the owner. The tribunal ordered the parties to file witness statements and listed the matter for hearing to commence on 8 November with an estimated hearing time of five days. The tribunal also ordered:

3. The respondent having failed to make any application for joinder by the dates previously ordered and extended, must seek leave of the tribunal before filing any such application.

9 The owner was ordered to pay the builder's costs fixed in the sum of $450. When the owner failed to file and serve witness statements by the due date of 16 September the matter was listed for a further compliance hearing on 18 October, when the owner was granted leave to file an application for joinder by 1 November. The hearing scheduled for 8 November was vacated and a further directions hearing listed for that date. The owner was ordered to pay the builder's costs thrown away of the compliance hearing of 18 October fixed in the sum of $2500 to be paid by 1 November.

10 The application for joinder of the architect was filed on 4 November and the directions hearing listed for 8 November was adjourned to 23 November by consent.

11 On 23 November the architect was joined as the second respondent. The owner was ordered to file and serve his experts reports by 25 February 2011 and the matter referred to a compulsory conference on 28 April. A further hearing date of 1 August was set with an estimated hearing time of 12 days.

12 The owner failed to file and serve his expert reports by 25 February and the matter was listed for a compliance hearing when the compulsory conference was once again cancelled and the tribunal made the following orders which are relevant to this application:

1. The date by which the First Respondent shall file and serve his Expert Reports is extended to 16 May 2011. The Tribunal notes that Mr Rompotis has indicated that reports will be sought from Mr Buchanan, quantity surveyor, Mr Lees, building expert and an expert architect.
2. Should the First Respondent fail to file and serve reports from both a quantity surveyor and a building expert by 16 May 2011, in accordance with Section 78 of the Victorian Civil and Administrative Tribunal Act, the counterclaim against the Applicant shall stand dismissed.
3. Should the First Respondent fail to file and serve a report from an expert architect by 16 May 2011, in accordance with Section 78 of the Victorian Civil and Administrative Tribunal Act, the cross-claim against the Second Respondent shall stand dismissed.

13 On 16 May the owner filed an expert report from Permewan Consulting Pty Ltd (John Permewan is an architect). On 23 May the owner filed an amended defence and counterclaim. On 10 June, after receiving a notice of non-compliance for failure to serve Points of Defence to Counterclaim the builder's lawyers wrote to the tribunal advising:

> The First Respondent failed to file reports by either a quantity surveyor or a building expert by 16 May 2011(or at all).

> Accordingly, the First Respondent's counterclaim stands dismissed as per the self executing order at paragraph 2 of the April orders. For this reason, the Applicant is not required to file a defence to counterclaim.

14 On 16 June the owner filed an Application for Directions/Orders. The first order sought was:

> That the filing [by] the First Respondent of the Expert Witness Report of John Permewan of PCA Consulting Pty Ltd, and quotations from Lynford Pty Ltd and Lang Constructions Pty Ltd for the cost of rectification of defects satisfies Order No 1 of the Tribunal's Orders issued 7 April 2011.

15 The owner also sought an order that the builder pay its costs of the application with respect to order 1. The application was supported by an affidavit by the owner's solicitor, Brendan James Archer dated 16 June. In his affidavit Mr Archer deposes, by reference to correspondence passing between him and the builder's solicitors, that Mr Permewan's report complied with order 1 of the April orders. Relevantly, in his letter of 27 May Mr Archer states:

> We are aware of the order issued by the Tribunal. However if you carefully read the report filed by our client on 16 May 2011, you will note that the content of that report addresses issues relating to the administration of the contract, and the cost of rectification of defects. We are sure that Mr Permewan would be intrigued by your suggestion that he is not a "Building Expert".
>
> Your assertion that a Quantity Surveyor's report is required is rejected. While Counsel indicated the possibility that a Quantity Surveyor would be instructed by our client, a subsequent detailed examination of the material produced on discovery resulted in a conclusion on the part of both the writer and counsel that a Quantity Surveyor's report is not required as all information necessary for our client to defend your client's claim and to prosecute its claim against your client is contained in the discovered material.
>
> With respect to the Orders issued by the Tribunal, it is not for the Tribunal nor your firm to instruct our client's counsel or solicitors as to the evidence which it is required to produce to establish its case. We should be most interested to learn from you what evidence could be provided by either a different Building Expert or a Quantity Surveyor which would assist your client or the Tribunal to understand our client's case in defence of your client's claim, or in prosecution of our client client's counterclaim against your client, and its claim against the architect, as the writer is at a total loss to identify that evidence.

Discussion

16 A detailed consideration of Mr Permewan's report reveals little information about defects. At paragraphs 113 to 123 he briefly comments about the defects. Mr Permewan states he was provided with two lists of defects. One

from the architect dated 7 August 2009 and another dated 8 March 2011 that he refers to as the 'Perton list'. He continues that he prepared a further list following his inspections and based on comments made by Mrs Perton. However, the defects list as set out in appendix 'A' is not very enlightening. Although there are a number of headings including:

- plumbing,
- leaks,
- sanitary fittings,
- inadequate ventilation provided to garage for pool heating,
- gas connection to house,
- electrical issues,
- lighting-generally,
- garage/loft,
- C bus/alarm/intercom,
- air-conditioning/heating,
- timber/joinery/plaster,
- painting,
- glazing,
- bench tops,
- masonry/rendering,
- miscellaneous,

there is little or no detail about each of the alleged defects. Under the heading 'Evidence of defect' in many instances there is a notation 'yes', in others 'no' and in others there is no notation – the space is simply left blank. A number of the alleged defects are recorded as 'made good' in the 'Comment column'.

17 Despite noting that he had been provided with two quotations to rectify the defects listed on the 8 March 2011 list (one from Lang Construction Pty Ltd for $115,000 plus GST and another from Lynford Pty Ltd for 127,000 plus GST) copies of those quotations are not referred to as attachments to the report and have not been formally filed. I note copies of parts of these quotations are attached to correspondence from the owner's lawyers to the builder's lawyers date 28 March which was handed up at the directions hearing on 7 April. At paragraph 18 of his report Mr Permewan states:

> Because the rectification scope of works are based on an outcome, and not a list of specific tasks, we believe the Lang Construction approach is the more reasonable because it allows the cost of significant items to reflect the actual work required rather than be included within an

> overall figure. There is a possibility that provisional amounts can either reduce or be increased depending on what is found on site. Items such as CBus defects could relate to the physical installation, adequacy of equipment for the programming of the system so that the required scope of rectification cannot be reasonably established without further investigation
>
> The additional defects listed during the recent inspection will further add to the cost of rectification.
>
> On the basis of commercial certainty we believe that quotation is preferable to an estimate prepared by the writer because it represents the cost in the marketplace.

18 Although Mr Permewan states in his report that he identified additional defects when he inspected the property, I note that in Schedule 'A' there is reference to an 8 March 2011 list and the NMA ('the architect's') list of 7 August 2009. The additional defects identified by Mr Permewan have not been separately identified.

19 Further, it is impossible to identify from the defects list set out in schedule 'A' precisely which of the items are included in the quotations referred to by Mr Permewan, particularly as a number of those items have apparently been made good. As noted above copies of the quotations are attached to correspondence handed up to the tribunal at the directions hearing on 7 April. They are in very general terms and are not complete. The Lynford quotation comprises two pages – on the first page there is a general list of defects. The list of defects on the second page is more specific but lacks details. It seems that only the second page of the Lang quotation has been included – it refers to the Perton List of Defects dated 8 March and a site inspection conducted on 11 March.

9 In my view the 7 April orders are quite clear. They did not simply require the owner to file and serve all expert reports on which he relied by 16 May. Rather, order 2 stipulated that a report from both a quantity surveyor and a building consultant be filed and served.

10 Mr Rompotis confirmed that he appeared on behalf of the owner at the 7 April directions hearing when the directions were typed and handed to the parties. If the typed orders did not accurately reflect his understanding of the orders being made by the tribunal, an amendment could have been sought during the directions hearing. Alternatively, if on reflection after the directions hearing, the owner's legal representative believed the typed orders were unclear or ambiguous a correction could have been sought under s119 of the *Victorian Civil and Administrative Tribunal Act* 1998 ('the VCAT Act') – the 'slip rule'. Rather, the owner's lawyers apparently decided that reports from a quantity surveyor and a building consultant were not required. Had the Permewan report filed on 16 May contained a detailed analysis of the alleged defects including details of the nature and extent, the cause and effect, the method of rectification and an estimate of

the cost of rectifying each defect, the 7 April orders might well have been satisfied.

11 The owner could have applied to the tribunal for orders to be varied. Instead, the Permewan Consulting Report was filed and when the builder's lawyers advised the owner's lawyers and the tribunal that the counterclaim had been dismissed in accordance with order 2 of the April orders, the owner filed an application seeking an order that this report complied with order 1 although the specificity of the reports to be filed and served is set out in order 2. Leave was not sought to vary the orders until after a lengthy discussion between me and Mr Rompotis during the course of the directions hearing, following which I stood the matter down for a short time so that he could obtain instructions from Mr Archer. Mr Rompotis then submitted that the 7 April orders should be varied under section 131 of the VCAT Act so that the owner was simply required to file an expert report and not specifically reports from both a quantity surveyor and a building expert.

12 I accept that the tribunal is required to determine matters according to their substantial merits under s97 of the VCAT Act. However, once again, having regard to the history of this proceeding and in particular the owner's persistent and consistent failure to comply with the tribunal's orders, I am not persuaded the 7 April orders should be varied.

20 It was further submitted on behalf of the owner that it would be unfair not to allow him to proceed with the counterclaim because there are claims other than the defects claim which he wishes to pursue. It seems to me that those claims relate to the cost over-run on the project, and disputes about variations. As raised with counsel during the directions hearing, a quantity surveyor's report would have been directly relevant in relation to these claims. In any event, although the counterclaim stands dismissed, the owner remains at liberty to defend the applicant's claim, as set out in his Points of Defence.

21 Mr Rompotis then suggested that alternatively I could order the owner to file a report from a quantity surveyor. I have taken this as an application for leave to file such a report. I am not persuaded it would be fair to make this order for the reasons set out above. It would be difficult to be confident that any orders for the filing of further expert reports would be complied with having regard to the owner's persistent and consistent failure to comply with orders of the tribunal. And, even if he were to comply, this would inevitably delay the hearing. I am not persuaded in all the circumstances, and in particular having regard to the tribunal's obligations under ss97 and 98 of the VCAT Act, that this would be fair to the other parties, particularly the builder.

Conclusion

22 Accordingly, this application is refused. The 7 April orders are quite clear – if reports from <u>both</u> a quantity surveyor and a building consultant are not

filed by 16 May the counterclaim stands dismissed. If one reads order 2 in the context of order 1, order 1 does no more than identify the potential experts who might be retained. Order 2 does not require that the reports be obtained from the particular experts identified in order 1 but it is otherwise quite specific. As discussed during the course of the directions hearing, it cannot be said that Mr Permewan's report satisfies the requirements of VCAT PN2 or PNDB1(2007) nor the general understanding in this List as to what constitutes a building consultant's expert report in relation to defects. He does no more than recite or record items he says he has been told are defective or which he may have noticed. No identification of the nature and extent of the defects or how they might be rectified are provided nor are any costings other than a statement that the quotations seem to be reasonable and that the works might well cost more.

23 As the 7 April orders have not been complied with, the counterclaim stands dismissed. Surprisingly, although in April the tribunal was so concerned about the owner's consistent and persistent failure to comply with orders that it made self executing orders, it seems that Mr Permewan was not engaged to provide an expert report until 17 April – 10 calendar days later. This is not a situation where the owner had been unable to comply with the tribunal's orders for the filing of his expert reports because his experts, who had been engaged in good time, had not completed their reports. As at 7 April he had not engaged experts to provide reports which pursuant to the tribunal's orders of 23 November 2010 were due to be filed by 25 February 2011, some two months after the date of that order, and approximately 6 weeks prior to the 7 April directions hearing.

Costs

24 The builder seeks its costs of this application on an indemnity basis, to be payable within 7 days and with no right of set-off. Mr Andrew submitted that the owner's consistent and persistent failure to comply with the tribunal's orders had caused unnecessary inconvenience and costs for the builder. The amount sought is $4,405 being Counsel's fees of $3,300 for one day (including preparation) and solicitor's costs of $2,100 including revision of Mr Archer's affidavit, and preparation of an affidavit in reply as well as attending the tribunal to instruct at this directions hearing.

25 Having regard to s109(3)(a) (i) (failing to comply with an order of the tribunal), s109(3)(a)(vi) (conducting the proceeding vexatiously), s109(3)(d) (the nature and complexity of the proceeding) and s109(3)(e) (any other matter the tribunal considers relevant) and the history of this proceeding and the context in which the 7 April order were made, I am satisfied it is appropriate to exercise the tribunal's discretion under s109(2) and order the owner to pay the builder's costs. However, I am not persuaded that $4,405 is reasonable. In all the circumstances, I consider $3,000 to be appropriate, allowing half a day for counsel, and the balance for his instructors. I am satisfied it is appropriate to order these costs be

paid in 7 days with no set-off.

26 The second respondent has resolved its outstanding issues with the first respondent, and makes no application for costs other than that its costs be reserved which I am satisfied the appropriate order.

DEPUTY PRESIDENT C AIRD