

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST

VCAT REFERENCE NO. D1032/2013

CATCHWORDS

Domestic building, application under s78 of the *Victorian Civil and Administrative Tribunal Act 1998*, application for adjournment on the grounds of ill health, order for further doctor's certificate stating that the doctor has read the orders and giving an expected date for recovery, no indication of a likely date for recovery.

FIRST APPLICANT	Mr Suhail Mir Mohamed
SECOND APPLICANT	Ms Amela Mahmic
RESPONDENT	Ms Aurora Pollara
WHERE HELD	Melbourne
BEFORE	Senior Member M. Lothian
HEARING TYPE	Hearing
DATE OF HEARING	15 July 2014
DATE OF ORDERS	15 July 2014
DATE ORDERS AND REASONS PUBLISHED	22 July 2014
CITATION	Mohamed v Pollara (Building and Property) [2014] VCAT 1085

ORDERS

- 1 Under s78 of the *Victorian Civil and Administrative Tribunal Act 1998* ("VCAT Act") the application is determined in favour of the Applicants, with quantum reserved.
- 2 By 4 August 2014 the Applicants must file and serve an affidavit from Mr Sam Mahouz, confirming that the 11 second video shown at the hearing of 15 July 2014 was the video taken by him of the lintel or top plate of the southern door jamb in the Applicants' home.
- 3 On the earlier of receipt of the affidavit or 6 August 2014 I direct the Principal Registrar to refer the file to me to determine quantum.
- 4 **I direct the Principal Registrar to note that the Respondent's address for service is Unit 6/4 Prince Street, North Essendon Victoria 3041.**

- 5 I direct that these orders and reasons not be published on the internet by the Tribunal until 22 August 2014 unless a party makes application under the *Open Courts Act* 2014 before that time. If an application is made under the *Open Courts Act* 2014, these orders and reasons are not to be published until that application has been heard and determined.
- 6 **I direct the Principal Registrar to send a copy of these orders to the parties by facsimile marked “urgent”, email or express post and to Messrs Hegeditch & DeCrescenzo, Lawyers, C5, Level 1, 2 Main Street, Point Cook, Victoria 3030.**
- 7 Costs are reserved with liberty to apply after the decision regarding quantum has been published.

SENIOR MEMBER M. LOTHIAN

APPEARANCES:

For Applicants	Mr M Dean of Counsel
For Respondent	No appearance

REASONS

- 1 Far too often, litigation and ill health go hand in hand. The Respondent, Mrs Pollara, has sought an adjournment of the final day of hearing for an indeterminate time on the basis of her health. Her son Mr J Pollara, has supported her in this litigation and wrote to say that his health has also suffered.
- 2 The Applicant-Owners are Mr Mohamed and Ms Mahmic. The hearing scheduled for 15 July 2014 was to enable the parties to complete their evidence and make submissions. On 17 June 2014 the Applicants made application under s78 of the *Victorian Civil and Administrative Tribunal Act 1998* (“VCAT Act”). As ordered on 27 June 2014, the first issue was the Applicants’ application under s78.
- 3 Mrs Pollara neither appeared, nor was represented, at the hearing on 15 July 2014.

HISTORY

The claim

- 4 The home the subject of these proceedings is in Strathmore. Mrs Pollara and her family lived there, and during her ownership, the home was renovated. An owner-builder permit was granted to Mrs Pollara on 18 June 2008. The Applicants entered a contract to buy the home from Mrs Pollara on 4 August 2009.
- 5 After the contract was completed the Applicants complained of a number of defects in the works undertaken by Mrs Pollara and commenced these proceedings.

The proceedings

- 6 There was a mediation between the parties in November 2013, but settlement was not achieved.
- 7 On 19 December 2013 there was a directions hearing where there were orders for Points of Defence to be filed and served by Mrs Pollara, together with a counterclaim, should she wish to file one. The Points of Defence and Counterclaim were to be filed by 23 December 2013. The orders also provided for a defence to counterclaim, exchange of relevant documents and any further expert reports to be filed by 15 February 2014. The matter was set down for hearing on 6 March 2014, with an estimated duration of two days.
- 8 The Tribunal received Mrs Pollara’s expert report, by Mr Rob Simpson of Building Check Pty Ltd, dated 17 December 2013. It is noteworthy that Mr Simpson’s evidence is that there are two defective areas, which he valued at \$5,615.61 to rectify.

- 9 On 22 December 2013 Mr J Pollara wrote to the Tribunal seeking further time for “points of claim documentation” due to a family matter overseas. On 5 January 2014 Mr Pollara emailed “Respondents Points of Defence [Points of Defence to Counterclaim]”, dated 22 December 2013. 5 January 2014 was a Sunday, and the email was noted on the Tribunal’s electronic filing system and physically filed on 7 January 2014.
- 10 According to a copy letter to Mrs Pollara sent to the Tribunal by the Applicants dated 6 January 2014, they sought an adjournment of the hearing set down for 6 March 2014 to enable their expert to respond to Mr Simpson’s report.
- 11 On 6 January 2014 Mr Pollara sent a page long response to that request, best summarised as “no”.
- 12 On 7 January 2014 the Tribunal wrote by email to Mr J Pollara asking if the document was a defence only, or a counterclaim as well, as the email to the Applicants’ solicitors of 5 January 2014 referred to “attached objections and points of counterclaim issued to VCAT”.
- 13 On 13 January 2014 the Applicants’ solicitors wrote to the Tribunal seeking adjournment of the hearing for at least a month, to enable their expert to respond.
- 14 On 14 January 2014 the Tribunal wrote to the parties setting the matter down for a compliance hearing for 11 February 2014 as follows:
- It appears from the Tribunal’s file that the following directions have not been complied with:
- | | | |
|------------|---|------------------------|
| Respondent | failing to file Points of Defence/
Counter claim | by 23 December
2013 |
|------------|---|------------------------|
- 15 On 16 January 2014 Mr Pollara sent another email to the Tribunal, pointing out, not surprisingly, that there appeared to be an administrative error.
- 16 On 17 January 2014 the Tribunal sent an email to Mr J Pollara, confirming receipt of the Points of Defence and adding:
- Please be advised that the compliance hearing will proceed as listed on 11 February 2014 at 9:30am to address the correspondence dated 13 January 2014 from the Applicant [sic] (copy attached).
- 17 On 30 January 2014 the Applicants filed their supplementary expert report.
- 18 The directions hearing was held on 11 February 2014 and the relevant orders were as follows:

ORDERS

...

- 2. The hearing scheduled to commence on 6 March 2014 is adjourned to 19 March 2014 commencing at 10:00am at 55 King Street, Melbourne with a revised hearing time of 3 days.**

3. By 17 February 2014 the Respondent must send to the Tribunal and to the Applicant fully itemized particulars of her counterclaim including the amounts claimed. The Respondent must pay the application fee payable for the counterclaim.

NOTE:

The Tribunal notes the Respondent says she has paid the application fee for the counterclaim but that enquiries of the Tribunal reveal that such payment has not been processed. If a duplicate payment is processed the extra fee will be refunded.

4. The date by which the Applicant must file and serve Points of Defence to counterclaim is extended to 3 March 2014.
 5. The date by which the parties must exchange copies of all documents that they intend to rely upon at the hearing of this proceeding is extended to 11 March 2014.
 6. The parties must arrange for their expert to attend the hearing at the same time for the purpose of giving their evidence concurrently.
- 19 Both Mrs Pollara and Mr J Pollara attended the directions hearing, as did Mr Hughes of Counsel for the Applicants.
 - 20 On 13 February 2014 the Applicants' solicitors wrote to the Tribunal to say that Mr Hughes was briefed to appear in another matter also commencing on 19 March 2014, and requesting that the hearing of this matter be adjourned to after 26 March 2014, but this application for adjournment was withdrawn on 21 February 2014.
 - 21 On 17 February 2014 Mr Hughes of the Applicants' solicitors emailed Mr Pollara and copied the Tribunal. He said that the counterclaim was not particularised, but was simply a list of costs Mrs Pollara was seeking. He added:

A counterclaim is required to set out the grounds for such claim and must have a legal basis.

Please seek further instructions from the Tribunal on filing a counterclaim. What has been provided has no basis for a counterclaim in which the Applicants can respond to. [sic]

- 22 On 21 February 2014 the Applicants' solicitors wrote to the Tribunal seeking confirmation that no defence to counterclaim was necessary. In consequence, the matter was again listed for directions on 11 March 2014. The orders were:

ORDERS

1. The date by which the parties must exchange copies of all documents on which they rely is extended to 4:00pm on 13 March 2014.
2. The parties must bring hard copies of all documents on which they rely to the hearing and provide them to the presiding member at the commencement of the hearing.

3. The applicant is not required to file Points of Defence to the respondent's counterclaim. The Tribunal notes the application fee for the counterclaim is still to be paid and unless it is paid or a fee waiver granted before the commencement of the hearing the hearing will only concern the application filed by the applicant.
4. The hearing date of 19 March 2014 is confirmed.
5. The orders of 11 February 2014 is otherwise confirmed.
6. Costs reserved.

NOTE

The Tribunal notes the respondent has arranged for her expert to attend the second day of the hearing – 20 March 2014 at 10:00am.

- 23 The proceeding came before me for hearing on 19 March 2014. After the end of the first day of hearing, Mr Pollara informed me by email that Mr Simpson would not be available for the hearing on 20 March 2014 due to a family bereavment. The hearing proceeded on 20 March 2014, but was adjourned to a directions hearing by telephone on 10 April 2014 to obtain a date to complete the hearing. Order 3 was:

By 4:00 p.m. on 8 April 2014 the Respondents must file at the Tribunal and serve on the Applicants' Solicitors hard copies of the receipts which they say establish the cost of the materials, and building work undertaken in constructing the extension.

- 24 The purpose of filing and serving these documents was to provide further evidence for Mrs Pollara that the value of work and materials included in the extension did not exceed \$12,000. This was to support her contention that it was not necessary for her to obtain insurance under s137B of the *Building Act* 1993, having regard to clause 18 of Ministerial Order s98 of 23 May 2003.
- 25 On 3 April 2014, solicitors for the Applicants advised that Mr Dean of counsel would be unavailable for the directions hearing fixed for 10 April 2014. Mr Dean appeared for the Applicants at the hearing on 19 and 20 March 2014.
- 26 On 6 April 2014, Mr Pollara sent an email as follows:

Dearest VCAT

I regret to inform that due to recent life and health events my Mother [Mrs Pollara] will not be able to respond to or assist with any request from VCAT. Following the Previous hearing I Jean-Carlo had suffered a near fatal seizure which has restricted my ability to function it is only now that I have returned to work on restricted duties, my poor mother on the other hand is currently being treated for mental and physical exhaustion and she remains under constant care from my only sister and myself. Considering these circumstances and Mr Simpsons tragic loss of his mother before the hearing it is probably best to delay until at least My mother fully recovers and or at least I can attend. [sic]

- 27 On 8 April 2014 the Tribunal sent an email to Mr Pollara to say that he could attend the directions hearing on 10 April 2014 by telephone and seeking a contact number. The Tribunal sent a further notice on 9 April 2014 notifying the parties that due to my unavailability the directions hearing would be by telephone on 11 April 2014, at 9:30am. It is not clear, from the copy of the email on the file, whether the email was sent to the correct address for Mr Pollara.
- 28 Mrs Pollara was not present or represented at the directions hearing. On 11 April 2014 I made the following orders:
1. **The hearing is scheduled for a further day before Senior Member Lothian at 10:00 a.m. on 15 July 2014 at 55 King Street Melbourne.**
 2. Should this date be impossible for the Respondent or her expert witness, Mr Rob Simpson, she must write to the Tribunal and the Applicants' solicitors to notify them of the reason she or the expert cannot attend, without delay.
 3. The Applicants' costs of and associated with this directions hearing are reserved.
 4. The Tribunal notes the Respondent's email, written by Mr J.C. Pollara, of 6 April 2014, regarding his own and his mother's ill-health. The Respondent must provide medical certificates to the Tribunal and to the Applicants' solicitors concerning the instances of ill-health.
 5. The date by which the Respondent must comply with order 3 of 20 March 2014 is extended to 16 June 2014.
 6. Should the Respondent fail to comply with order 5, the Tribunal will entertain an application by the Applications under s78 of the *Victorian Civil and Administrative Tribunal Act 1998*.

A copy of this order was posted to Mrs Pollara's address for service on 30 April 2014.

- 29 Mrs Pollara did not respond to the above orders and nothing further was heard from her until a facsimile was received from her on 19 June 2014, attaching a medical certificate (which I refer to below) and stating:

Dear Member Lothian,

As you may be aware I Aurora Pollara have been quite ill and would like to inform you that we ask kindly that we continue with this case once I receive the all clear from my Doctors.

- 30 In the course of writing these reasons it has come to my attention that Mrs Pollara included a note:

Please update my address to Unit 6/4 Prince Street, North Essendon Vic 3041.

This appears not to have been done, and postal mail for Mrs Pollara appears to have continued to be sent to her earlier address for service.

- 31 On 27 June 2014 I made the following orders in chambers with background remarks, to explain to Mrs Pollara as a self-represented party, the difficulties of balancing the rights of parties where one wishes the matter to be finalised without delay, and the other complains of ill-health.

Background

1. On 20 March 2014 I ordered that the Respondent was to file at the Tribunal and serve on the Applicants' solicitors hard copies of the receipts which the Respondent and her son say establish the cost of the materials and building work undertaken.
2. On 11 April 2014 I conducted a directions hearing by telephone and set the matter down for a hearing on 15 July 2014 with an estimated duration of 1 day. By order 5 I extended the date for filing the receipts to 16 June 2014. I recited that the Respondent and her son had reported ill-health by a letter of 6 April 2014 and ordered that the Respondent must provide medical certificates concerning the instances of ill-health. No medical certificates for those reported instances of ill-health have been provided.
3. Order 6 was:

"Should the Respondent fail to comply with order 5, the Tribunal will entertain an application by the Applicants under s78 of the *Victorian Civil and Administrative Tribunal Act 1998*."
4. The Respondent did not comply and by application dated 17 June 2014, the Applicants made application under s78.
5. On 20 June 2014 the Respondent sent a medical certificate from Dr Caitlin Tran dated 16 June 2014, the substantive part of which is:

"Ms Aurora Pollara, age 64 yrs, is suffering from Anxiety/Depression. She is undertaking treatment and is not currently well to attend court."

The certificate gives no indication of when, if ever, the Respondent might be able to attend the hearing.
6. The Tribunal must take into account the rights of both the Applicants and the Respondent and do equal justice between them.

ORDERS

1. If the Respondent wishes to have the hearing of 15 July 2014 adjourned she must send the Tribunal and the Applicants' solicitors a further medical certificate by no later than 8 July 2014 which states:
 - (a) That the medical practitioner making the certificate has read these orders, and
 - (b) When it is contemplated that the Respondent will be sufficiently well to attend the hearing.

2. The medical certificate must be sent to the Tribunal by facsimile marked "urgent".
3. **On receipt of any such certificate, the Principal Registrar must refer the file to Senior Member Lothian, Deputy President Aird or Member Farrelly.**
4. **Unless the Tribunal orders otherwise, the proceeding remains scheduled for hearing at 10:00a.m on. 15 July 2014 at 55 King Street Melbourne before Senior Member Lothian. The hearing will commence with the Applicants' application under s78.**
5. **I direct the Principal Registrar to send copies of these orders to the parties by facsimile marked "Urgent", email or express post.**

32 A copy of these orders was sent by express post to Mrs Pollara's old address in Napier Street. Nevertheless, the orders seem to have been received by Mrs Pollara, because on 7 July 2014 the Tribunal received a letter from Hegeditch & DeCrescenzo, lawyers, on behalf of Mrs Pollara. Hegeditch & DeCrescenzo referred to orders "of 30 June" and included a further medical certificate from Dr Tran that did not comply with the orders of 27 June 2014, but was almost identical to the earlier certificate. Tellingly, the last two paragraphs of their letter are:

We are therefore instructed to advise that Mrs Pollara's health is unlikely to improve whilst this matter remains on foot, which is supported by Dr Tran's authorised medical certificate.

We await the Tribunal's Order with respect to the future conduct of this matter. [Underlining added].

33 The Tribunal sent Hegeditch & DeCrescenzo a letter by urgent facsimile on 10 July 2014 enclosing a copy of the orders of 27 June 2014, noting that Dr Tran's medical certificate did not comply with the orders and confirming that the proceeding remained listed for hearing on 15 July 2014. The letter also said:

Please advise urgently whether you act for the Respondent, or whether you have just been engaged to respond only to the "order dated 30 June 2014."

A copy of the letter was also sent to Mrs Pollara by express post, but at the Napier Street address.

34 On 14 July 2014 Hegeditch & DeCrescenzo responded by urgent facsimile and stated that their role was limited to responding to the orders of [27] June 2014. They gave the Prince Street address as the address for service of Mrs Pollara.

35 Also received on 14 July 2014 by email was a further copy of the Respondent's counterclaim and fee waiver application, and a number of other documents of the same date including one headed "Application to

dismiss cause for a strike out”, and a further copy of the report of Mr Simpson of 17 December 2013.

- 36 At about the same time the Tribunal received a copy of an email from Mr Hughes of the Applicants’ solicitors to Mr Pollara stating:

We refer to the attached application received today.

The VCAT Orders dated 11 February 2014 required you to provide us with fully itemised particulars of any counterclaim. You have simply listed costs on which the Respondent is seeking to claim and you have failed to provide any particulars of such claims. A counterclaim is required to set out the grounds for such claim and must have a legal basis.

Please seek further instructions from the Tribunal on filing a counterclaim. What has been provided has no basis for a counterclaim in which the Applicants can respond to. [sic]

- 37 Another letter to the Tribunal of 14 July 2014 was from the Victorian Equal Opportunity & Human Rights Commission (HRC) concerning a complaint of alleged discrimination by Mrs Pollara against the Tribunal, and against me personally, on the basis of age, disability and race in the area of goods and services, and also victimisation. I understand that the HRC has discontinued this complaint.

- 38 A further facsimile was received at 4:53 on 14 July 2014, addressed to the Tribunal President from “Aurora Pollara’s carer” which stated:

The Tribunal member is advised to immediately withdraw from this Case and to strike out this application on the basis of a current Equal Opportunity commission investigation. The Tribunal is cautioned that should you continue with this case an appeal will be lodged against the ruling made by this particular member. We have legal grounds and merit to conduct an appeal. You are advised we will be subpoenaed the member to attend the court to defend her biased actions towards our clients and the equal opportunity commission. VCAT is in breach of the disability act 2006. As mentioned and recorded during the previous hearings VCAT is aware of our conditions however has chosen to ignore our heartfelt pleas, and the Tribunal has shown bias behaviour, unethical conduct, intimidation and prejudice, and conducting a Directions without disclosing that this hearing was taking place on the following day. Without the correct notification you have discriminated against us and therefore this response is warranted and a Adjournment is necessary. Failure to comply will result in the events as describe. [sic]

- 39 At 8:50 am on 15 July 2014 Mrs Pollara sent an application by facsimile to the Anti-Discrimination List and General List naming the Tribunal as the Respondent and me as the “contact person”. The reasons for the application are:

I sincerely am ill and make the tribunal well aware of my condition in advanced and the tribunal has chosen to discriminate against me by

making an order that I attend. However should I attend it must be in strict accordance with the disability act 2000 and according to my certified and registered General Practitioner. [sic]

- 40 Had Mrs Pollara, or Mr J Pollara, or anyone else such as Mr Hegeditch been present at the hearing on 15 July 2014, the opportunity would have been afforded to her to renew her application for adjournment and/or to apply to have the proceeding reconstituted before another member. As this did not occur, I proceeded with the hearing.

S78 OF THE VCAT ACT

- 41 The relevant parts of s78 of the VCAT Act are:

78 Conduct of proceeding causing disadvantage

- (1) This section applies if the Tribunal believes that a party to a proceeding is conducting the proceeding in a way that unnecessarily disadvantages another party to the proceeding by conduct such as—
- (a) failing to comply with an order or direction of the Tribunal without reasonable excuse; or
 - (b) failing to comply with this Act, the regulations, the rules or an enabling enactment; or
 - (c) asking for an adjournment as a result of (a) or (b); or
 - ...
 - (g) failing to attend mediation or the hearing of the proceeding.
- (2) If this section applies, the Tribunal may—
- ...
 - (b) if the party causing the disadvantage is not the applicant—
 - (i) determine the proceeding in favour of the applicant and make any appropriate orders; ...
 - ...
 - (c) make an order for costs under section 109.

- 42 Having regard to the history of the proceedings, Mrs Pollara failed to:
- i file the documents concerning the value of the materials and labour included in the renovation, in breach of order 3 of 20 March 2014 as extended by order 5 of 11 April 2014; and
 - ii provide medical certificates for the instances of her own and Mr Pollara's ill-health reported in Mr Pollara's letter of 6 April 2014, in breach of order 4 of 11 April 2014; and
 - iii provide a medical certificate in accordance with order 1 of 27 June 2014; and

iv attend or be represented at the hearing of 15 July 2014.

- 43 I am satisfied that Mrs Pollara has conducted the proceeding in a way that unnecessarily disadvantages the Applicants by failing to comply with orders of the Tribunal and failing to attend the hearing, or otherwise be represented at the hearing.

OUTCOME

The Applicants' Claim

- 44 The Applicants' claim is determined in their favour, subject to determination of quantum. I reserve my decision concerning quantum, because I have had the benefit of evidence by both parties, the expert reports of Mr Ryan for the Applicants and Mr Simpson for Mrs Pollara, oral evidence from Mr Ryan and a view of the home the subject of this proceeding.
- 45 I note that the Applicants' claim is for "inconvenience and loss of quiet enjoyment" plus:
- \$51,773.76 in accordance with the report of Mr Ryan,
 - \$300 for the AAMI excess for the household insurance claim of 2010,
 - \$2,046 for Findlay-Evans Waterproofing,
 - \$2,547.40 for temporary repairs to Vic Constructions Pty Ltd, and
 - \$866 being the cost claimed for rectification of drainage to the south side of the dwelling, leading from the portico.

The Respondent's Counterclaim

- 46 Mrs Pollara's "counterclaim" was first filed on 17 February 2014, then again on 14 July 2014. On 5 March 2014 the Registrar ordered that the application fee was not waived, but no application fee was paid, contrary to order 3 of 11 February 2014.
- 47 When the counterclaim was filed the second time it was also accompanied by a fee waiver application. In accordance with order 3 of 11 March 2014 I do not make orders concerning the counterclaim. Nevertheless, I note that most of the items claimed are in the nature of legal costs. Mrs Pollara has made a substantial claim for mental and emotional anguish. It is not unusual for parties in litigation of this nature, often for both parties, to report such distress. I remark that in order to recover anything, in any circumstances, it is necessary for a claimant to establish why the other party is liable to them, in fact and in law.

ORDERS AND REASONS NOT TO BE PUBLISHED ON THE INTERNET BY THE TRIBUNAL

- 48 The letter from Hegeditch & DeCrescenzo of 7 July 2014 included:

Firstly, Mrs Pollara **DOES NOT** consent to any details of this case being published online and we would appreciate if your records were marked accordingly.

- 49 Application has not been made under the *Open Courts Act* 2013. To give the parties an opportunity to make such an application, these orders are not to be published on the internet by the Tribunal until 22 August 2014 unless a party makes application under the *Open Courts Act* 2014 before that time. If an application is made under the *Open Courts Act* 2014, these orders and reasons are not to be published until that application has been heard and determined.

COSTS

- 50 Costs are reserved with liberty to apply after the decision on quantum has been published.

SENIOR MEMBER M. LOTHIAN