

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

DOMESTIC BUILDINGLIST

VCAT REFERENCE NO. D596/2008

CATCHWORDS

Domestic building, directions, adjournment on psychological grounds

APPLICANT	Ro-N-Co Construction Pty Ltd (ACN: 114 360 280)
FIRST RESPONDENT	Alvin Frederick Clausen
SECOND RESPONDENT	Diane Elizabeth Clausen
WHERE HELD	Melbourne
BEFORE	Senior Member M. Lothian
HEARING TYPE	Directions Hearing
DATE OF HEARING	3 April 2009
DATE OF ORDER	3 April 2009
DATE OF REASONS	15 April 2009
CITATION	Ro-N-Co Construction Pty Ltd v Clausen (Domestic Building) [2009] VCAT 690

REASONS

- 1 A complex and difficult dispute has gained a further layer of difficulty and pain from the bushfires of 7 February 2009.
- 2 This is a claim where the applicant company, the Builder, seeks over \$158,000.00 from the respondent Owners, Mr and Mrs Clausen. The Owners' counterclaim is not yet fully quantified, but is likely to be at least \$80,000.00. The further layer of difficulty and pain is that both parties lost houses in the bushfires on what is now known as "black Saturday". The Owners had previously been burnt out, had rebuilt, then lost their home and its contents on that dreadful day.
- 3 Technically, the Builder might not have lost anything. The sole director of the Builder is Mr Rowan Steele and it is he and his wife Alice who lost a partly built new home in Marysville. Either the Builder or the Steeles also lost a substantial shed on the property, which according to Mr Steele's affidavit of 2 April 2009, contained personal items, furnishings, tools of trade and building materials.

- 4 These reasons relate to directions of 3 April 2009 and in particular to my decision to convene the compulsory conference in this proceeding on 9 June 2009, and if that is not successful, the hearing on 3 August 2009. I undertook to publish reasons because of order 8, which provides:

Should any party seek a further adjournment on medical or psychological grounds, the party seeking the order must provide a copy of the reasons for these orders (which [I reserve]) to the professional upon whose affidavit the party relies. Anyone making an affidavit on such matters must be prepared to attend the Tribunal for cross examination at the request of the other party.

After I undertook to provide reasons, Mr Carr of counsel for the Owners also confirmed that he wished me to do so.

- 5 I have no views about the eventual outcome of this proceeding. My decision regarding the timetable for the proceeding is based solely on the need to be fair to both parties. In that respect I have regard to s98 of the *Victorian Civil and Administrative Tribunal Act 1998* which provides, among other things, that the Tribunal is bound by the rules of natural justice and must conduct each proceeding with as much speed as proper consideration of the relevant matter permits.

- 6 The Owners sought an adjournment of the whole proceeding for not less than six months. This request was first made on 24 February 2009 by the Owners' solicitors, David Naidoo & Associates, to the Builders' solicitors. The request was in part a reply to the Builder's solicitors' letter of 18 February 2009 which stated in among other things:

Your clients as owners of the land have derived a very considerable benefit in relation to the building work undertaken by our client and having regard to the respective claims made by the parties it is asserted that our client will on any analysis be entitled to a substantial monetary order upon hearing. In our view the applicant is vested with an equitable interest in the property subject to your clients discharging their obligations with regard to the payment of the balance of the contract price.

The letter went on to request copies of documents relating to the existence of household insurance, claims against such insurance and the settlement of claims or proposed payments by any insurer.

- 7 The Builder issued proceedings on 20 August 2008 and there were directions hearings on 28 October 2008 and 17 November 2008. On 3 March 2009 this proceeding first came before me for a directions hearing. Mr Naidoo appeared for his clients on that day and told me of their acute distress in the wake of the fires, which I have no reason to doubt. Mr and Mrs Steele were present on that day and their acute distress was evident. Mr Naidoo asked on that occasion that the proceeding be stayed for six months and said that his clients were undergoing psychological treatment. He said he was concerned that they were not in a fit state to deal with a complex dispute.

- 8 On 3 March 2009 Mr Telford, solicitor, of Telford Story & Associates, appeared for the Builder. He said from the bar table that Mr and Mrs Steele are under financial stress. He said that neither they nor the Builder were insured and that the tools of trade were lost.
- 9 On 3 March 2009 in the face of Mr Naidoo's objections to adjournment of less than six months, I adjourned the compulsory conference scheduled for 6 March 2009 to 31 March 2009 before myself and set the hearing down for 9 June 2009. There had already been two dates for the compulsory conference - 26 November 2008 when the Owners were not available because they were travelling overseas, and 28 January 2009 when Mr Clausen had to give evidence as a witness in a criminal trial. The 31 March 2009 compulsory conference was also adjourned due to my own unavailability, although the Owners' solicitor had sought an adjournment by that date.
- 10 Order 10 of 3 March 2009 was:
Liberty to apply for further directions until 4.00 pm on 4 June 2009. It is noted that either or both parties may need to make application on medical grounds arising out of trauma suffered in the recent bushfires.
- 11 The Owners' application for further adjournment was made on 24 March 2009. The orders sought were:
1. That the Compulsory Conference fixed for 30th March 2009 be vacated and that it be adjourned to a date not earlier than 18th August 2009.
 2. That dates for compliance with paragraphs 5, 6, 8 and 10 of the orders made 3rd March 2009 be extended for a period of 6 months from 18th March 2009.
 3. That the hearing date of 9th June 2009 be vacated and that this matter not be fixed for hearing no earlier than 6 months after 18th March 2009.

Their application was supported by affidavits sworn by Mr Naidoo and by Ms Jan Seeley, registered psychologist.

- 12 Mr Naidoo's affidavit of 25 March 2009 said, among other things:

The Respondents lost the entire contents of their home in the bushfires and apart from their motor vehicles, have been unable to salvage anything so that literally every asset or possession they had, has been destroyed including but not limited to, for example, personal papers etc.

He went on to say that they have household insurance with CGU and have received a number of small, emergency payments but CGU's assessment was expected to take "another three weeks".

- 13 I am concerned that no mention was made of a property owned by them at 459 Wedderburn-Serpentine Road, Wedderburn Junction, mentioned in Mr Telford's affidavit of 2 April 2009. Mr Carr said from the bar table that it is

mortgaged to their bank, but no further details were available. No-one was able to tell me whether there is a house on that property.

- 14 Ms Seeley's affidavit exhibited a report of the post-traumatic reactions suffered by both the Owners. She had seen them for the first time on 2 March 2009; the day before the penultimate directions hearing, but after their solicitors had suggested a six month adjournment would be appropriate. She said in part:

It is the opinion of the writer that Mr and Mrs Clausen are both currently unable to cope with the pressure of litigation and attending the Compulsory Conference. In counselling, they have been discouraged from making any major decisions until they recover from the post-traumatic symptoms they are experiencing. The difficulties they report ... would significantly disadvantage them in dealing with litigation at this time. Further, the pressure this would place on them would likely exacerbate their symptoms and serve to impede their longer-term recovery.

- 15 I accept Ms Seeley's evidence that on the four occasions she has seen Mr Clausen and the three occasions she has seen Mrs Clausen between 2 and 18 March 2009, they were not in a position to make decisions of the gravity called for in a successful compulsory conference.

- 16 Ms Seeley went on to say:

It is difficult to give a reliable prognosis at this stage. Statistically, 85-90% of people recover from post-traumatic reactions three months after they experience a life threatening trauma, 10-15% go on to develop Post-Traumatic Stress Disorder. ... In the case of the Clausens, the loss of their home and personal possessions, the earlier house-fire and their current homelessness are further mitigating [sic] factors in their recovery.

As arranged before the fire, Mr and Mrs Clausen are leaving to visit their daughter in France in four weeks. It is hoped that this will assist their recovery, and that they will be able to make some decisions about future plans when they return. It is the opinion of the writer that a six month period would allow time for Mr and Mrs Clausen to recover sufficiently to be able to address pending legal matters. This time frame would also avoid further traumatisation of them at this critical time.

- 17 I am less convinced by this evidence which is, quite properly, given in apparent ignorance of any financial or other danger to the Builder and Mr and Mrs Steele. Taking into account possible detriment to the Builder, I had regard to the facts upon which I could rely - that the vast majority of people recover from post-traumatic stress within three months of the trauma, which would be around 7 May 2009. I also note that the Owners are sufficiently mentally robust to undergo the rigours of travel to France.

- 18 Mr Hellyer of counsel, who appeared for the Owners at the directions hearing of 3 April 2009, said there is no evidence that the Builder will

suffer “significant disadvantage” if resolution of this dispute is adjourned for six months. In the current financial climate it is hard to imagine any builder which would not be seriously inconvenienced if such a sum were owing to it and payment were delayed for at least a further six months. There is at least a chance that the Builder will succeed in part or in whole. It is therefore important that any adjournment take into account the potential harm to both parties.

- 19 I have listed the compulsory conference for 9 June 2009, which according to Mr Carr is 11 days after the Owners’ return to Australia. I have done so in reliance upon Ms Seeley’s statistics and in the hope that their trip will assist their recovery, as Ms Seeley says it is likely to. I have listed the hearing at a time that allows the parties to commence preparations for a hearing after the compulsory conference. Finally, I made order 8, which is referred to in paragraph 4 above, because it is possible that a further adjournment might be necessary. On the next occasion, it is important that any medical or psychological professional who gives evidence is aware that benefit to their patient can be at the expense of detriment to the other party. The opinion should consider not just the possibility of any risk of harm to the party examined, but rather consider whether there is an unreasonable risk of harm.

SENIOR MEMBER M. LOTHIAN