

# VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

## CIVIL DIVISION

### DOMESTIC BUILDING LIST

VCAT REFERENCE NO. D112/2008

### CATCHWORDS

Application for an adjournment – no consent – conduct of respondents – adjournment refused – self executing orders

<b>APPLICANT</b>	Romantic Homes Pty Ltd (ACN 096 120 875)
<b>FIRST RESPONDENT</b>	Salah Marcus
<b>SECOND RESPONDENT</b>	Shilan Patros
<b>WHERE HELD</b>	Melbourne
<b>BEFORE</b>	Deputy President C. Aird
<b>HEARING TYPE</b>	Compliance Hearing
<b>DATE OF HEARING</b>	12 December 2008
<b>DATE OF ORDER</b>	12 December 2008
<b>CITATION</b>	Romantic Homes Pty Ltd v Marcus & Anor (Domestic Building) [2008] VCAT 2539

### ORDER

1. The date by which the respondents must file and serve Points of Defence is extended to 19 December 2008.
2. The date by which the respondents must file and serve any Points of Counterclaim (with the fee payable) is extended to 19 December 2008. If they do not intend filing a counterclaim they must advise the applicant and the tribunal by 19 December 2008.
3. If the respondents fail to comply with orders 1 and 2 by 19 December 2008 the proceeding shall stand determined in favour of the applicant, and judgement entered for the amount of its claim: \$58,755.45 with liberty to apply for interest and costs.

4. If the respondents comply with orders 1 and 2 the parties may apply for an extension of the timetable set out in the orders of 31 October 2008, which orders may be made in chambers, or the proceeding referred to a further directions hearing in the discretion of the presiding member.
5. Having regard to the provisions of s109 of the *Victorian Civil and Administrative Tribunal Act* 1998 and being satisfied it is fair to do so I order the respondents to pay the applicant's costs of this day, and of the non-compliance hearing held on 7 October 2008 fixed in the sum of \$286.00 for each, a total of \$572.00.
6. By 16 December 2008 the applicant must serve a copy of the affidavit of Anthony Sammassimo sworn on 11 December 2008 on the respondents by posting it to them by ordinary pre-paid post to their address for service on the record.
7. **I direct the principal registrar to send a copy of this order together with a copy of the affidavit of Anthony Sammassimo sworn on 11 December 2008 to the respondents by express post today.**

**DEPUTY PRESIDENT C. AIRD**

**APPEARANCES:**

For Applicant	Mr S. Lowry of Counsel
For Respondents	No appearance

## REASONS

- 1 These reasons are provided for the benefit of the respondents who did not appear, and were not represented at the compliance hearing scheduled for 9.30 a.m. on 12 December 2008. I am satisfied the respondents had notice of the compliance hearing because they attended at the tribunal on 11 December 2008 seeking an adjournment. A copy of the medical certificates produced by the respondents in support of their application for an adjournment were forwarded to the solicitors for the applicant by the tribunal. The applicant did not consent to the adjournment.
- 2 I declined to grant the adjournment in circumstances where the respondents were well enough to attend at the tribunal to deliver the medical certificates and discuss their application for an adjournment with a member of the tribunal's registry staff. The respondents were advised by a member of the tribunal's registry staff leaving a message on their home telephone on 11 December 2008 at approximately 4.45 p.m. that the compliance hearing would proceed. A Chaldean interpreter had been arranged by the tribunal to assist the respondents at the compliance hearing. When the respondents did not attend, attempts were made to telephone them on their home phone and on the mobile phone number noted on their letter of 21 October 2008. Neither was answered but I asked the interpreter to leave a message on the mobile phone voicemail confirming that the compliance hearing was proceeding in their absence.
- 3 Mr Lowry of counsel once again appeared on behalf of the applicant. He urged me to make final orders under s78 of the *Victorian Civil and Administrative Tribunal Act 1998* submitting that the respondents had been conducting the proceeding in a 'way that unnecessarily disadvantages another party to the proceeding'.<sup>1</sup> I declined to make the orders as I could not be satisfied that the respondents were aware that the adjournment had not been granted. However, having regard to the history of the proceeding, and the persistent failure of the respondents to comply with the orders of the tribunal I made self-executing orders whereby if the respondents fail to comply by the due date the proceeding will be determined in favour of the applicant and judgement entered for the amount of its claim: \$58,755.45 with liberty to apply for interest and costs.
- 4 The following is a brief chronology so that the context in which these orders are made is understood:

19 February 2008	Application filed by applicant seeking payment of the sum of \$58,755.45 plus interest plus costs
27 March 2008	Mediation scheduled for 28 March 2008 adjourned by consent due to non-availability of applicant.

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<sup>1</sup> S78(1)

	Mediation re-scheduled for 9 May 2008
7 May 2008	The mediation was adjourned by consent pending receipt by the respondents of a report from the Building Commission – an inspection having been carried out on 1 May 2008. The mediation rescheduled for 24 June 2008 was unsuccessful.
24 July 2008	<p>First directions hearing at which time directions were made for the conduct of the proceeding including directions that the respondents file and serve points of defence and their counterclaim by 19 September 2008. The proceeding was referred to a compulsory conference on 20 October 2008.</p> <p>The respondents attended with the first respondent's brother who provided some interpreting assistance and confirmed they required the assistance of a Chaldean interpreter.</p>
7 October 2008	<p>A compliance hearing was held to consider respondents failure to file and serve points of defence or any counterclaim by 19 September 2008. A Chaldean interpreter was arranged by the tribunal to assist them and the following orders were made in relation to their defence and counterclaim:</p> <ol style="list-style-type: none"> <li>1. By 21 October 2008 the respondents must send to the Tribunal and to the applicants solicitor the following documents: <ol style="list-style-type: none"> <li>a. A document setting out their defence to the claim made by the applicant builder which must include the reasons they say they do not owe the applicant builder any money;</li> <li>b. If they wish to make a counterclaim they should do so on an application form which must be accompanied by copies of all reports (including the Building Commission report), invoices and quotations and any other documents on which they reply in support of their claim. They may apply to the Principal Registrar for a waiver of the application fee, who will decide if they are eligible.</li> </ol> </li> </ol>
21 October 2008	The respondents wrote to the tribunal seeking an adjournment of the compulsory conference whilst they tried to obtain obtaining legal advice. A copy

	was sent by the tribunal to the applicant's solicitors who advised the applicant did not consent to an adjournment.
22 October 2008	Orders were made in chambers confirming the compulsory conference date of 30 October 2008, and further extending the date by which their defence was to be filed and served to 28 October 2008. This order was not complied with.
30 October 2008	The compulsory conference proceeded but was unsuccessful. Orders were made further extending the date by which the respondents were to file and serve their defence and any counterclaim to 20 November 2008. These orders have not been complied with. Although they were legally represented at the compulsory conference, they are not presently legally represented.
11 December 2008	<p>Medical certificates for each of the respondents were received by facsimile at 7.13 p.m. on 10 December 2008. The certificate for Mr Marcus stated that he was too ill to attend the tribunal, the one for Ms Patros indicated she was unwell but not that she was unable to attend the tribunal. On 11 December 2008, the respondents attended the tribunal in person seeking an adjournment and were advised by counter staff that the application for adjournment would be referred to the case management area.</p> <p>A copy of the medical certificates was forwarded by the tribunal to the solicitors for the applicant who advised the applicant did not consent to the adjournment. The affidavit by its solicitor was filed in support of an application for the proceeding to be determined under s78 of the VCAT Act.</p>

- 5 I also made orders for costs of the compliance hearing held on 7 October 2008 and today being satisfied that in all the circumstances it was fair to do so having regard to s109(3)(a) of the VCAT Act.

**DEPUTY PRESIDENT C. AIRD**