

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

DOMESTIC BUILDING LIST

VCAT Reference: D736/2008

CATCHWORDS

Self-executing order to dismiss the proceeding in the event of non-compliance by the applicant, re-opening orders made in a directions hearing under s120 of the *Victorian Civil and Administrative Tribunal Act 1998* on substantive grounds when a party does not attend and is not represented, non-attendance caused by failure of a party's lawyer.

APPLICANT: Leslie Joseph Spiteri

FIRST RESPONDENT: Stonehenge Homes & Associates Pty Ltd (ACN 006 798 563)

SECOND RESPONDENT: Stonehenge Estates Pty Ltd (ACN 097 982 244) (deregistered)

THIRD RESPONDENT Lumley General Insurance Limited (ACN 000 036 279)

WHERE HELD: Melbourne

BEFORE: Senior Member M. Lothian

HEARING TYPE: Directions Hearing

DATE OF HEARING: 10 September 2009

DATE OF ORDER: 10 September 2009

DATE OF REASONS: 15 October 2009

CITATION: Spiteri v Stonehenge Homes & Associates Pty Ltd & Ors (Domestic Building) [2009] VCAT 2309

REASONS

- 1 This proceeding is the master-file for proceedings D736/2008, D744/2008, D746/2008, D748/2008 and D751/2008. In all but one of those files there is a single applicant. References to "Applicant" or "Applicants" is to the applicants in each of the proceedings. The respondents are the same in each proceeding.
- 2 On 10 September 2009 I made orders, the most contentious of which is order 1:

I find that the self-executing order, being order 1 of 20 July 2009, has not become effective as the Points of Claim filed 23 July 2009, while incomplete, are sufficient to comply with that order, or in the alternative, the order is reopened under Section 120 of the *Victorian Civil and Administrative Tribunal Act 1998* and to the extent necessary time for making the application is extended and the order is revoked.

- 3 I also gave oral reasons. The First Respondent sought reasons and with the exception of “background”, what follows is an edited transcription of the reasons given orally.

BACKGROUND

- 4 On 26 March 2009 I made order 3:

By 29 April 2009 the applicant must file and serve Points of Claim will shall include fully itemized particulars of the claim, loss and damage claimed, and the relief or remedy sought.

This is a standard order made in almost all Domestic Building List proceedings that go to a directions hearing.

- 5 On 20 July 2009 Senior Member Walker made orders which included the following:

Unless by midday on 10 August 2009 the applicant files and serves Points of Claim in accordance with the Tribunal’s Order of 26 March 2009 this proceeding will stand dismissed and the Applicant will pay the costs of the first and third respondents to be assessed if not agreed in accordance with scale D of the County Court scale.

- 6 Three days later, on 23 July 2009, the Applicants filed and served Points of Claim in the master file and any necessary adjustments in the other files. They were sufficient to enable the Respondents to identify the claims against them, but did not fully itemise certain aspects of the claim and in particular did not quantify the relief or remedy sought.

- 7 On 18 August 2009, 26 days after the Applicants filed their Points of Claim, solicitors for the First Respondent wrote to the Principal Registrar and stated in part:

We ... refer to the self-executing orders made by Senior Member Walker dated 20 July 2009 ...

The applicants have failed to comply with order 1 of the 20 July, 2009 orders because the applicants have not filed and served fully itemized particulars of the loss and damage claimed ...

Accordingly, the applicants’ claims are dismissed and the first respondent is entitled to its costs of the proceeding. [emphasis added]

- 8 On 9 September 2009 the Applicants filed the affidavit of the solicitor who has the conduct of their case, Mr Lachlan Nguyen to which is exhibited

Points of Claim which appear to cure the defects of the iteration of 21 July 2009.

- 9 Mr Lithgow of counsel for the First Respondent submitted that the Applicants had not complied with the orders of 20 July 2009, therefore from the vital date 10 August 2009 after midday, the proceeding was dismissed. He said the proceeding was at an end at that moment (save as to any application for costs) and in the evocative words of the learned author Pizer at page 228 of the Third Edition of the Annotated VCAT Act, “dismissal is death” .
- 10 Mr LaPirow of counsel appeared for the Applicants. He submitted that the Points of Claim of 23 July 2007 were sufficient to comply with the orders of 20 July 2009 He also applied for the orders of 20 July 2009 to be re-opened under s120 of the *Victorian Civil and Administrative Tribunal Act* on substantive grounds on the basis that no-one was present to represent the Applicants on 20 July 2009. The reason for the Applicant’s absence, as explained in Mr Nguyen’s affidavit, was that he overlooked the compliance hearing of 20 July 2009 as he had failed to make the appropriate diary entry.

EDITED ORAL REASONS

Whether there was non-compliance leading to dismissal

- 11 If this had been a matter where non-compliance would result in the proceeding being struck out rather than dismissed I would not have hesitated to extend time for compliance. Mr Lithgow’s submissions concerning the proceeding standing dismissed do cause me some concern. However the Points of Claim that were filed on 21 July 2009 were within time and although they do not state the amount claimed, nor say precisely what needs to be done to rectify matters complained of by the Applicants, it is open to question whether they were adequate to fulfil the terms of order 1 of 20 July 2009.
- 12 I am not satisfied that the Points of Claim of 21 July are so flawed that they constitute a breach of the orders of 26 March although I note that the Applicant is now seeking to file the Points of Claim (and they appear to have been filed on 9 September 2009) which do particularise the losses of each of the Applicants. I also note that in his affidavit of 8 September 2009 the Applicants’ solicitor, Mr Nguyen, admits that there has not been strict compliance with the orders of 26 March 2009.
- 13 My conclusion is that the proceeding is not dead. The Points of Claim left a lot to be desired but they are not so hopeless that the self executing order became effective.

Application under s120

- 14 If I am wrong on the question of whether the self-executing order was effective I note that the Applicants made an application under s120,

somewhat euphemistically [in Mr Nguyen's affidavit], which was made directly today by Mr Lapiro [at the directions hearing on 10 September 2009]. In order to open up an order on substantive grounds I have to be satisfied that the parties seeking to open the order had a reasonable excuse for not attending or being represented at the hearing and perhaps failing to diarise properly is a weak excuse. It is not like having a car accident on the way into the Tribunal or somebody being very ill.

- 15 However I note the approach that has been taken by the Tribunal in the past and in particular a decision reported by the learned author Pizer on page 506 in the matter of *Avonwood Homes Pty Ltd (in liquidation) v Miladnovic* (2005) 23 VAR 189. In that matter it was determined that a reasonable excuse can include matters such as reliance on solicitors who, for want of a better description, drop the ball.
- 16 When somebody doesn't appear and they want an order reopened the appropriate course of action is to do so without delay. It certainly should have been done within 14 days of becoming aware of the order [as required by VCAT rule 4.18] and I hear what Mr Lithgow says, that his instructing solicitor immediately sent a copy of the order to Mr Nguyen after the directions hearing.
- 17 My view is that the Respondents have a lot to complain of today and I will certainly hear the Respondents on the question of costs. However as I am satisfied that the Respondents can be adequately compensated by an order for costs, [under s126 of the VCAT Act] I am extending the time for an application under s120 until today and in accordance with s120 of the VCAT Act I reopen the order of 20 July 2009. I revoke order 1, which is the self executing order.

SENIOR MEMBER M LOTHIAN