

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

DOMESTIC BUILDING LIST

VCAT REFERENCE NO. D878/2008

CATCHWORDS

Domestic Building, s78 of the *Victorian Civil and Administrative Tribunal Act 1998*, self-executing order, misleading evidence

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|-------------------------|--|
| FIRST APPLICANT | Danny Tauber |
| SECOND APPLICANT | Ronit Tauber |
| RESPONDENT | Noel Lloyd Connick and Katherine Lynn Connick t/as NL & KL Connick |
| WHERE HELD | Melbourne |
| BEFORE | Senior Member M. Lothian |
| HEARING TYPE | Hearing |
| DATE OF HEARING | 28 May 2009 and 22 July 2007 (Amended 20 October 2009) |
| DATE OF ORDER | 14 October 2009 |
| CITATION | Tauber v Connick tas NL & KL Connick (Domestic Building) [2009] VCAT 2144 |

ORDER

- 1 The proceeding is determined in favour of the Applicants, the counterclaim is struck out and the Applicants' claim is referred to a hearing to determine the quantum to which the Applicants are entitled.
- 2 By 28 October 2009 the Applicants must file and serve any documents upon which they will rely at the hearing concerning quantum.
- 3 By 12 November 2009 the Respondent must file and serve any documents upon which they will rely in reply.
- 4 **The proceeding is set down for a hearing on quantum on 26 November 2009 at 10:00 am at 55 King Street Melbourne with an estimated hearing time of one day.**
- 5 Costs are reserved.

SENIOR MEMBER M. LOTHIAN

APPEARANCES:

For Applicants

Mr D. Pumpa of counsel on 28 May 2009 and
Mr D. Noble, solicitor, on 22 July 2009

For Respondent

Mr T. Whitehead, solicitor on 28 May 2009
and Mr J. Twigg of counsel on 22 July 2009

REASONS

- 1 On 28 May 2009 I heard this application under section 78 of the *Victorian Civil and Administrative Tribunal Act 1998* (“VCAT Act”) and reserved my decision. I also ordered that the compulsory conference, due to be conducted the next day, proceed. I did so on the submission of Mr Whitehead, solicitor for the Respondents, who submitted that the compulsory conference could proceed and that the result of striking out his clients’ defence and counterclaim would be to award over \$300,000.00 to the Applicants and deprive the Respondents of a potentially substantial counterclaim. All matters before the Tribunal deserve serious consideration; even more so when the application sought leads to determination without consideration of the merits of the primary dispute and the result is potentially ruinous to a party.
- 2 The applicant owners, Mr and Mrs Tauber, applied for determination in their favour of their claim and the respondents’ counterclaim under section 78 of the VCAT Act. The Respondents are Mr and Mrs Connick, who trade as NL & KL Connick. In the alternative, the Applicants have sought reinstatement of a self-executing order made by Senior Member Cremean of 16 April 2009.
- 3 The Applicants’ application of 18 May sought the following orders:
 1. An order that the Respondents’ Points of Defence and Counterclaim be struck out pursuant to section 78(2)(a) of the *Victorian Civil and Administrative Tribunal Act 1998*;
 2. An order that the proceeding be determined in favour of the Applicants pursuant to section 78(2)(b) of the *Victorian Civil and Administrative Tribunal Act 1998*;
 3. An order that the Respondents pay the Applicants’ costs of the proceeding pursuant to section 109 of the *Victorian Civil and Administrative Tribunal Act 1998*.
- 4 The proceeding did not settle at the compulsory conference of 29 May and on that day the member who conducted the compulsory conference, ordered:

Unless the parties advise that they have settled this matter it shall be listed for directions before Ms Lothian Senior Member on 15 July 2009 ...
- 5 On 11 June I referred the proceeding to an administrative mention on 30 June 2009. Unfortunately the proceeding did not settle then either. It is therefore necessary that I deliver my reserved decision.
- 6 On each occasion the Applicants have been legally represented. On 16 April and 6 May by Mr Noble, solicitor, on 28 May 2009 by Mr Pumpa of counsel, instructed by Mr Noble and on 22 July 2009 by Mr Noble. The First Respondent appeared for both respondents on 16 April, and they were represented by Mr Whitehead, solicitor, on 6 May and 28 May 2009. On 22

July the Respondents were represented by Mr Twigg of counsel. The directions hearings of 6 May and 22 July 2009 were also before me. The events of 6 May 2009 are described in detail below. The directions hearing of 22 July 2009 was to consider a further affidavit of Mrs Tauber that had been filed by the Applicants. It is also mentioned below.

S78

7 S 78 of the VCAT Act provides:

78 Conduct of proceeding causing disadvantage

s. 78 (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
- (d) causing an adjournment; or
- (e) attempting to deceive another party or the Tribunal; or
- (f) vexatiously conducting the proceeding; or
- (g) failing to attend mediation or the hearing of the proceeding.

(2) If this section applies, the Tribunal may—

- (a) order that the proceeding be dismissed or struck out, if the party causing the disadvantage is the applicant; or
- (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; or
 - (ii) order that the party causing the disadvantage be struck out of the proceeding;
- (c) make an order for costs under section 109.

(3) The Tribunal's powers under this section are exercisable by the presiding member.

HISTORY OF DIRECTIONS

8 The relevant history of directions in this proceeding is that at the first directions hearing, on 19 February 2009, the Respondents were ordered to file and serve points of defence and any counterclaim by 20 March 2009. On 23 March 2009 Mr Connick wrote to the Tribunal seeking an extension

of time to 3 April 2009, which the Applicants opposed. On 16 April 2009 the time for filing and serving the defence and any counterclaim was extended to 4:00 pm on 17 April 2009 – the next day.

9 Order 2 of 16 April 2009 was:

In the event that the respondent fails to file and serve points of defence by 4:00 pm on 17 April 2009 this proceeding shall stand determined in favour of the applicants save as to costs and interest.

10 On 17 April 2009 at 10:21 am the Tribunal received a fax from Mr Connick which said, relevantly:

I write on behalf of my building company, seeking a copy of the “Points of Claim” document from Noble Lawyers ...

We are reluctant to contact the above lawyers to seek this document because the matter has become “vexatious”.

We require the document immediately – we have until 4:00 pm today to file our response and counterclaim ...

The Tribunal faxed the Points of Claim to the Respondents just over an hour later, at 11:46 am on 17 April 2009.

11 On 20 April 2009, under cover of a letter dated 16 April 2009, the Respondents filed a new proceeding including “Points of Claim” in the Civil Claims List which were actually points of defence, dated 14 April 2009. It is unclear why they did not follow the directions of 16 April 2009 and file a counterclaim in this Domestic Building List file.

12 On 29 April 2009 the following orders were made in chambers:

Having regard to the Tribunal’s orders dated 16 April 2009 which extended the date for filing and service of Points of Defence and Counterclaim to 4:00 pm on 17 April 2009, and the application subsequently lodged by the Respondent in the Civil Claims List under cover of a letter dated 16 April 2009 which was recorded as having been received by the Tribunal on 20 April 2009, the Tribunal orders:

1. The proceeding is referred to a directions hearing on 6 May 2009 at 9:30 am at 55 King Street, Melbourne to consider whether the Respondent should be given an extension of time in which to file the Counterclaim.

6 May 2009

13 At the directions hearing of 6 May 2009 I extended the time for compliance with the orders of 16 April 2009 to 20 April 2009, thereby retrospectively approving the Respondents’ late filing of the Points of Defence and Counterclaim. I also made the following relevant directions:

2. By 20 May 2009 the Respondents must file and serve answers to the Applicants’ request for further and better particulars of 22 April 2009.

3. By 20 May 2009 the Respondents must file and serve the expert report which the First Respondent has said, under oath, has been prepared but is not yet available to them because the expert's fee has not yet been paid.

...

5. The First [Respondent]¹ has undertaken to:
 - (a) Produce to the Tribunal the file note which he said, under oath, that he made when discussing filing his defence and counterclaim with a female staff member of the Domestic Building List;
 - (b) Produce to the Tribunal telephone records to support his evidence that he spoke to the Tribunal on 17 April 2009; and
 - (c) To pay \$550.00 to Noble Lawyers if the cheque which he said was posted on 30 April 2009 is not received by Noble Lawyers

And must fulfil the undertaking by 20 May 2009.

6. By 13 May the Respondents must file and serve copies of documents referred to in their defence and counterclaim.
 7. Should the Respondents fail to strictly comply with any order of the Tribunal, the Tribunal will entertain an application from the Applicants pursuant to s78 of the *Victorian Civil and Administrative Tribunal Act 1998*.
- 14 I made the order to extend time, and the subsequent orders, because the First Respondent gave sworn evidence that would explain the Respondents' non-compliance, the accuracy of which was challenged by the Applicants. Some of the First Respondent's explanations seemed unlikely, but he said he had supporting documentary evidence that could be produced later.
- 15 Mr Whitehead explained that he had only recently commenced to act for the Respondents and that he was instructed that the First Respondent had posted the points of defence and counterclaim on 14 April 2009, but that they had not been received at the Tribunal until 20 April. Mr Noble said that both documents had been received in his office on time by facsimile but had not been received by the Tribunal on time and no posted version was received. He submitted that as the Respondents had failed to comply with the orders of 16 April, the proceeding stood determined in favour of the Applicants.
- 16 The First Respondent agreed, under cross-examination, that he had told Senior Member Cremean on 16 April that the expert report, which was to be filed by 4 May, was "ready". When Mr Noble asked why it had not been filed, he replied that the expert would not release the report because he had

¹ The orders of 6 May incorrectly stated that the First Applicant had made various undertakings. This was not so and was corrected by an order in chambers of 13 May 2009.

not been paid, and he added that the expert report would be available to file within seven days.

- 17 When Mr Noble asked the First Respondent why he had not filed the defence and counterclaim on time, he said he spoke to a representative of the Domestic Building List at about 3:00pm on 17 April, to ask if he could e-mail or fax the documents and that she replied that he could not, but that he could post them, as long as they were posted by 6:00 pm that evening. The First Respondent said the documents were dated 14 April 2009 because he started to compile them then, although he later admitted that he sought a copy of the application on the Tribunal on the morning of 17 April. He added "We misplaced it at that particular time we had it the day before and we subsequently found it one hour later, which I'm particularly deeply sorry about that."
- 18 I asked the First Respondent why he said that he could not fax material to the Tribunal when he had sent a fax that morning. He first denied sending it, then said it was a different matter and added that because the document was 25 or 30 pages he should post it rather than faxing it. Under further cross-examination from Mr Noble, who had put to the First Respondent that he could not prove the conversation, he volunteered that he could prove it because he had a file note and telephone records. When Mr Noble asked him if the note was in the substantial file he had with him, he responded that it was in the other part of the file, which he had not brought with him.

The s78 application – directions of 28 May 2008

- 19 The Applicants made the s78 application, referred to above, by fax on 18 May 2009. By fax of 20 May 2009 the Respondents' lawyers sent documents stated to be referred to in the Points of Defence and documents in apparent compliance with the orders of 6 May 2009.
- 20 The Applicants supported their application with an affidavit of 26 May 2009 by Mr Darren Noble, and of Mrs Tauber of 27 May 2009. The Respondents supported their opposition to the application with an affidavit of their solicitor, Mr Timothy Whitehead, of 27 May 2009.
- 21 The Applicants base their application upon alleged lies by Mr Connick, a failure to strictly comply with the orders of 6 May 2009 by not providing all documents ordered, attempts to cover up evidence by undertaking work before their expert inspected and failure to provide the Further and Better Particulars ordered on 6 May 2009.

Documents stated to be annexed to the Points of Defence and Counterclaim

- 22 At paragraph 17 Mr Noble said:

The letter [from the Respondents' solicitors of 12 May 2009] failed to enclose the following documents, all of which are referenced by the Respondents in their Points of Defence and or Counterclaim:

In respect of the Points of Defence:

- a) the progress claim referred to at paragraph 8.4;
- b) the original tender from DDB Design at paragraph 15;
- c) the letters relating to the missing sump pump at paragraph 15;
- d) the letters relating to the allowance for works to existing foundations at paragraph 15; and
- e) the builder's basement quotation for the basement staircase at paragraph 15.

In respect of the Counterclaim and the document entitled "Response to Notice of Termination":

- f) the letters showing lack of consultation, inability and willingness to make crucial decisions;
- g) the plans and specifications; and
- h) the letters and notices from the architect and engineers;
- i) Contract Works Policy.

23 At paragraph 18 of his affidavit, Mr Noble referred to paragraph 15 of the Respondents' Points of Defence dated 14 April 2009 and quoted:

"The Construction company who were unsuccessful in the original tender (see attached document) will show that the Builder's ... tender price of \$902,000.00 was not insufficient or underquoted ..."

24 Mr Noble went on to say that his clients had advised him that the reference to the construction company was to DDB Design, which was ultimately retained by the Applicants to complete the works. He added in paragraph 20 that :

...at the directions hearing on 6 May 2009, Mr Connick of the Respondents gave sworn evidence that he did not include the attachments referred to in the Points of Claim as he had insufficient time to compile them prior to serving the Respondents' Points of Defence. He later gave evidence that he had taken legal advice to the effect that he was not required to provide copies of the documents referred to in the Points of Defence and Counterclaim ...

25 Mr Noble's recollection is confirmed by the transcript, which was obtained by the Applicants. Pages 13 and 14 of the transcript record the following exchange:

Mr Noble: Now your Points of Defence ... and Counterclaim talk about documents being attached?

Mr Connick: Yes.

Mr Noble: And those documents aren't attached are they?

Mr Connick: We understood they were attached but we will forward them again to you.

Mr Noble: ... you understood they were attached but do you accept that they were not attached?

Mr Connick: Some – well it depends which ones you ---

...

Mr Noble: So [the Defence and Counterclaim] refers to numerous documents said to be attached, correct?

Mr Connick: They weren't attached.

Mr Noble: They weren't attached, no. Any reason for that?

Mr Connick: Only that we hadn't collated them all at that particular time, by four pm on the 17th.

...

Mr Noble: You recall I wrote to you and your wife and requested that you provide copies of those documents?

Mr Connick: Yes, that's correct.

Mr Noble: And you responded by saying you'd do so by 1 May?

Mr Connick: Yes.

Mr Noble: You haven't done so have you?

Mr Connick: No.

Mr Noble: And you've got no good reason for not having complied with that request by 1 May?

Mr Connick: Only that we've sought legal advice about it and have been asked to not file it yet.

26 At paragraph 21 of his affidavit, Mr Noble said that his clients had given him a copy of a letter from Mr Connick to DDB Design dated 21 April 2009; at least a day after the Respondents served their points of defence. The letter, exhibited to Mr Noble's affidavit, asked whether DDB Design had tendered and what the tender price was.

27 At paragraphs 22 and 23 of his affidavit, Mr Whitehead said:

There is one document referred to in the Points of Defence which the Applicants are unable to produce, being a document referred to at item 15 of the Points of Defence which was intended to show that the Builder's tender price of \$902,000.00 was insufficient or underquoted.

By letter dated 12 May 2009 ... I advised the solicitors for the applicant[s] that the said document did not exist. The Respondents had requested information from DDB Design, being a company who had apparently tendered for the building work which is the subject of this dispute, but did not receive a response. Accordingly, the document did not come into existence and it cannot be provided to the Applicants.

28 Mr Whitehead said in submissions regarding the alleged quotation that Mr Connick simply made a slip. He intended to attach a document that he was seeking. Mr Whitehead went on to make the extraordinary claim that the Applicants bear some responsibility because they "have been actively engaged in preventing the document from coming into existence."

29 I do not accept the “slip” explanation and it is unsupported by evidence from Mr Whitehead’s clients. On the contrary, Mr Connick on behalf of the Respondents has repeatedly suggested to the Applicants and to the Tribunal that the document exists. He either deliberately lied or has been extraordinarily careless with the truth concerning assertions made in the Points of Defence and Counterclaim.

Other documents not supplied

30 Mr Whitehead agreed, in the course of submissions, that there were other documents, such as the plans, specifications, letters and notices that were ordered to be provided but had not been. He said that they were in his possession at the Tribunal on 28 May 2009, they could be inspected and copied on the spot and the Applicants had not suffered prejudice. He gave no explanation for the Respondents’ failure to supply them.

31 On 22 July 2009 Mr Noble, solicitor, for the Applicants said that the documents had still not been provided. On that day Mr Twigg of counsel for the Respondents said that the issue of possible non-existence of some of the documents is not relevant to the question of whether the Applicants should succeed in their application under s78.

Alleged telephone conversation with VCAT about filing the Points of Defence and Counterclaim

32 As mentioned above, on 6 May 2009 Mr Connick gave sworn evidence upon which I relied to extend time for filing the Respondents’ Points of Defence and Counterclaim. His evidence was that he had been told by a person whom he telephoned at the VCAT registry that he could not send these documents by fax and that although the documents were due that day, he could post them and they would be acceptable if there were a post-mark before 6:00 pm. He also said that by the time the documents were ready, it was too late in the afternoon to drive them to VCAT. He said that he had contemporaneous notes of the conversation with the VCAT staff member – whose name he did not recall – and also that his telephone records would support his assertions.

Time of the alleged telephone call

33 At page 11 of the transcript of 6 May 2009, it is recorded that Mr Connick said, in answer to a question from Mr Noble, that the telephone call was made at about 3pm. He said this once and responded to two further questions concerning the time being around 3pm. The time was critical, because Mr Noble had just reminded him that the self executing order of 16 April 2009 would become effective if the Points of Defence and Counterclaim were not filed by 4:00pm on the 17th, and had asked whether it would take 20 or 30 minutes to drive from the Respondents’ home in Ashburton to the Tribunal. Mr Connick’s response was “not on a Friday afternoon”.

Telephone bill and notes

34 The telephone bill showed that there was one call from that number to the Tribunal on 17 April 2009 with a duration of approximately 10 minutes. It was at 9:53am. The document that purports to be notes of the same day includes:

- Checked with VCAT for alternatives to Faxing – too many pages!
(10.00 am)
- Instructed that posting by 6.00pm OK!

Conclusion regarding the telephone call

35 I am left with the inescapable conclusion that Mr Connick gave false evidence on 6 May 2009 in an attempt to have time for filing the Points of Defence and Counterclaim extended. It also appears likely that the document purporting to be notes of 17 April 2009 is a recent invention.

Alleged attempted cover-up of work

36 Mrs Tauber said in her affidavit that on 21 July 2008 she believes that Mr Noble of her solicitors caused a Notice of Termination of Contract to be delivered to the Respondents. She said her husband told her that on 24 July 2008 the Respondents' employees and/or contractors entered the Applicants' property without their knowledge or consent and carried out rectification work "specifically covering and patching up hollow areas of the walls of the basement which had not been core filled with concrete."

37 On the next day Mr Tauber wrote a letter, the last paragraph of which was:

Your unauthorised entry upon the building site and attempt to rectify and cover up the obvious defects in the basement wall on 24 July 2008 was unlawful. I offered you the opportunity to inspect the status of the works for your own records in good faith, and you have instead tried to cover up your defective workmanship, presumably in order to improve your position. Your actions are likely to cause the costs of rectification to be increased, and I will be seeking the appropriate compensation.

38 Mrs Tauber went on to say that the Respondents' tradespersons would not leave and the police had to be called to resolve the matter. An e-mail from Constable Wallace of Caulfield Police confirmed that he attended the site and resolved the situation when Mr Tauber reported that the Respondents' tradesmen refused to leave.

39 Mrs Tauber said that Mr John Gibcus, expert for the Respondents, attended the site to inspect the next day – 25 July 2008. The report from Mr Gibcus confirms that date.

40 At the directions hearing of 28 May 2009 Mr Tauber gave sworn evidence to confirm the parts of Mrs Tauber's affidavit in which he was directly involved.

- 41 Mr Whitehead submitted that the Respondents' tradespeople were simply doing work that needed to be undertaken. This is a possible explanation but is unsupported by evidence from the Respondents or those undertaking the work, and does not explain why they should do so after the Applicants had sent a notice revoking the Builder's licence to attend site. Neither does it explain their reluctance to leave site until the police were called.
- 42 I accept the accuracy of Mr and Mrs Tauber's evidence which raises the likelihood that Mr Connick has attempted to mislead his own expert, which in turn is, in the words of Mr Pumpa on 28 May 2009, an attempt to deceive another party or the Tribunal.

Further and Better Particulars

- 43 Mr Noble said in his affidavit that on 20 May 2009 his office received revised Points of Counterclaim and not answers to the Applicant's Request for Further and Better Particulars of 22 April 2009. In circumstances where the request concerned a document upon which the Respondents no longer intended to rely, the failure to comply with this order was not of sufficient gravity to justify an order under s78 of the VCAT Act.

Mrs Tauber's affidavit of 3 June 2009

- 44 On 3 June 2009 the Applicants filed a further affidavit by Mrs Tauber. They were neither invited to do so nor given leave to do so. The issue of whether I should take the affidavit into account was to be considered at the directions hearing of 22 July 2009, but on that day it was withdrawn and returned to them. I did not read the affidavit.

THE APPLICATION OF SECTION 78

- 45 Section 78(1) gives examples of the conduct of a party that empowers the Tribunal to make an order in favour of another party where the conduct unnecessarily disadvantages the other party. Under s78(1)(a) I am satisfied that the Respondents repeatedly failed to comply with directions of the Tribunal. Under s78(1)(e) I am satisfied that the Respondents attempted to deceive both the Applicants and the Tribunal.
- 46 Both parties referred me to the decision of Ashley J in *Bell Corp Victoria Pty Ltd v Stephenson* (2003) 20 VAR 280 where at paragraph 51 his Honour said:

In my opinion, bearing in mind the submissions of counsel directed to the provision here under scrutiny, the subject matter, scope and purpose of the Act show that if the Tribunal forms a belief concerning the matters required by s. 78(1)(a) of the Act the following matters must be considered in the exercise of the discretion under sub-s. (2):

* The subject matter of the belief formed by the Tribunal for the purposes of sub-s. (1).

* The nature of the power conferred by sub-s. (2) in the context of the armoury of power conferred upon the Tribunal by ss. 75-77. By this I

mean, particularly, that s. 78(2) operates in circumstances which at least do not require that the proceeding be frivolous, vexatious, misconceived, lacking in substance or otherwise an abuse of process; and which at least do not require that the circumstances demonstrate want of prosecution. Put another way, the sub-section contemplates the making of an order with very serious consequences in circumstances that very probably would not fit the templates set up by ss. 75 and 76. Whilst it can rightly be said that the creation of such a remedy in the situation contemplated by s. 78(1) shows that an intention that orders be made in some cases where the situation exists, it should also be firmly concluded, in statutory context, that the remedy should be of last resort and not first resort.

* The requirement imposed upon the Tribunal by s. 97. That section should be considered to import the concept that, ordinarily, the interests of case management should not be employed so as to shut a party out of litigating its case. The ultimate aim of the Tribunal, as much as of a court, must be the attainment of justice in respect of issues joined.

* The requirement imposed by s. 98(1)(a), to the extent that a party should ordinarily be given an opportunity to be heard upon the merits. That opportunity is not absolute. It may be lost without breach of the rules of natural justice. But the consequence that the making of an order under s. 78(2) will deprive a party of an opportunity to be heard upon the merits is surely relevant to exercise of the discretion whether to so order.

* The power to make costs orders conferred by ss. 109(2)(3) and 78(2)(c). The last-mentioned, it appears, might be exercised even though no order is made under s. 78(2)(a) or (b).

- 47 I note in particular that his Honour was considering an application under s78(1)(a) alone - there was no suggestion that s78(1)(e) was also under consideration.

Last resort

- 48 The Respondents have used the application under s78 as a last resort. The first resort was to a self executing order, which was subverted by Mr Connick's deceptive conduct.

"Disadvantage"

- 49 The disadvantage suffered by the Applicants is that they have had to respond to deceptive statements and possibly deceptive documents. They have had to overcome the actions of an opponent who seemingly attempts to cover up, or at least change the condition of the work to be inspected by an expert. They have also been put to the trouble and expense of responding to an opponent who has repeatedly failed to follow directions.

“Unnecessary disadvantage”

- 50 Mr Whitehead submitted that s78 only applies when a party is not only disadvantaged, but unnecessarily disadvantaged. The disadvantage has arisen largely through Mr Connick’s untruthfulness or reckless disregard for accuracy. The disadvantage is not only unnecessary, it is entirely gratuitous.
- 51 Even without the untruthful evidence which led to the extension of time for filing the Points of Defence and Counterclaim, the preconditions for s78 are met. The claim is determined in favour of the Applicants, the counterclaim is struck out and the claim is referred to a hearing to determine the quantum of the claim.

SENIOR MEMBER M. LOTHIAN