

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

DOMESTIC BUILDING LIST

VCAT REFERENCE NO. D673/2006

CATCHWORDS

Section 78 VCAT Act application. Whether 'reasonable excuse' under Sub-section (1)(a). Whether costs order warranted under Sub-section (2)(c). Section 78 application dealt with on same day fixture as vacated compulsory conference. Whether costs order re vacated compulsory conference should automatically give rise to a costs order in the Section 78 application. Meaning of 'proceeding' in Section 109 considered – distinguished in the circumstances.

APPLICANTS	Dianne Whiteside, Neil Whiteside, Kevin Steele
RESPONDENT	Wesley Raymond Taylor
WHERE HELD	Melbourne
BEFORE	Member M. Walsh
HEARING TYPE	Hearing
DATE OF HEARING	15 February 2007
DATE OF ORDER	15 February 2007
CITATION	Whiteside v Taylor (Domestic Building) [2007] VCAT 523

ORDER

1. Having regard to the provisions of Section 78(1)(a) and (c) of the *Victorian Civil and Administrative Tribunal Act 1998* and having the required belief, I determine, as provided for in Section 78(2), the proceeding in favour of the Applicant.
2. I order that the amount for which judgement is entered pursuant to order 1 be reserved for further hearing on the question of quantum on a date and at a time to be fixed by the principal registrar with an estimated hearing time of 3 days.
3. The date by which any experts retained by the parties must prepare, file and serve their reports as provided for in order 5 of 26 October 2006 is extended to 15 March 2007.
4. Liberty to apply.

5. Application for costs by the Applicant against the Respondent refused.
6. Oral reasons given at hearing. Written reasons to follow.

MEMBER M. WALSH

APPEARANCES:

For the Applicants

Mr D. Pumpa of Counsel

For the Respondent

Mr W. Taylor in person

REASONS

- 1 In this proceeding; I delivered an oral decision with reasons at the conclusion of the hearing and subsequently committed the orders made to writing the same day. I now commit those reasons to writing.
- 2 On 31 January 2007 Senior Member Lothian made the following orders at a Directions Hearing:
 - “1. In accordance with the Application for orders by the Applicants, the Respondent’s Points of Defence and Particulars of Counterclaim dated 23 November 2006 and the Respondent’s Amended Counterclaim dated 14 December 2006 but received at the Tribunal on 13 December 2006 are struck out pursuant to s.71(1) of the *Victorian Civil and Administrative Tribunal Act* 1998 on the basis that the drafting of these documents is obscure to the point of vexatious conduct.
 2. By 4.00 pm on 8 February 2007 the Respondent must file at the Tribunal and serve upon the Applicants care of their lawyers, Points of Defence which clearly answer each paragraph of the Applicants’ Points of Claim of 21 September 2006.
 3. By 4.00 pm on 8 February 2007 the Respondent may file at the Tribunal and serve upon the Applicants care of their lawyers a Counterclaim. If the Respondent Counterclaims the document must clearly set out each point of the Counterclaim and may not be filed unless accompanied by the appropriate fee.
 4. Order 3 of 26 October 2006 which required the Applicants to file and serve Points of Defence to Counterclaim is suspended pending the outcome of the Compulsory Conference.
 5. **The Compulsory Conference date of 15 February 2007 is maintained and is to be conducted by Member Michael Walsh.**
 6. Should the Respondent fail to file and serve Points of Defence or file Points of Defence which do not clearly answer each paragraph of the Applicants’ Points of Claim, the Applicants may renew their Application under s.78 of the *Victorian Civil and Administrative Tribunal Act* 1998 at the Compulsory Conference to have the proceeding determined in their favour.
 7. The Respondent must pay the Applicants’ costs of and associated with today’s directions hearing to be agreed, but failing agreement to be assessed by the Principal Registrar pursuant to s.111 of the *Victorian Civil and Administrative Tribunal Act* 1998 on a party-party basis on the Supreme Court scale.”
- 3 I presided at the listed compulsory conference on the morning of 15 February 2007.

- 4 The file record indicted, and this was confirmed by the parties, that the Respondent had not filed Points of Defence or Counterclaim pursuant to either Order 2 or 3 of those orders.
- 5 I then canvassed with the parties the issue whether I should proceed with the conduct of a compulsory conference and whether they would wish me to. In the circumstances, the conference would be conducted solely on the basis of the Applicants' claim as filed, there being no Counterclaim on record in circumstances where he considered his counterclaim to be substantial.
- 6 As the Respondent was unrepresented, I stood down the matter for a short while to enable him to consider his position and to seek advice which he did. I specifically asked the Respondent whether he advised those from whom he sought advice of the substance of order 6 above. He told me he had.
- 7 On resumption, the Respondent advised me that he did not wish to proceed to participate in the compulsory conference on the above basis and that he sought an adjournment.
- 8 As the reasons for seeking the adjournment arose from circumstances of the Respondent's own making and as I formed the view from all the circumstances in the history of the proceeding including the nature and type of issues and matters included in his correspondence and documentation, his failure (including inability) to seek legal advice and assistance, his failure (including inability) to support his substantive position with the evidence of a building expert, I refused the request for adjournment and vacated the conference as such. In all the circumstances I considered there was little hope that a compulsory conference (including an adjournment of this conference) could achieve its purpose.
- 9 That being the case, the Applicants' counsel then renewed his application (I understand was previously made at the Directions Hearing) to have the matter determined in their favour under s78 of the *Victorian Civil and Administrative Tribunal Act 1998*. I proceeded to entertain that application.
- 10 The application by the Applicant owners was filed in the Tribunal on 22 September 2006.
- 11 A 'routine' Directions Hearing was held on 26 October 2006 at which the 'usual' orders were made by Deputy President Aird including orders for the filing and serving of Points of Defence, any Counterclaim, expert reports and the like.
- 12 On 24 November 2006 the Respondent did file Points of Defence and a very brief Particulars of Counterclaim dated 23 November 2006. A slightly more expanded counterclaim by way of a completed 'Application' form dated 14 December 2006 and a one and one half page 'Building Advice' were faxed together to the Tribunal on 6 December 2006. He has not filed

and I understand does not have a proper and full report of a building expert in the form of VCAT Practice Note No. 2.

- 13 On 27 November 2006, the Applicants' solicitors wrote to the Respondent acquainting him with their perception that the documentation filed was inadequate and that there were options open to them (including the present option) if he did not remedy the situation. Nothing further was received from the Respondent.
- 14 On 13 December 2006, a much more extensive letter containing a significant amount of information seemingly intended to assist rather than threaten was sent to the Respondent. It again advised him of the options available to the Applicants and urged him to seek legal advice. Again, nothing further was received from the Respondent.
- 15 By Notice dated 11 January 2007 to the parties, the further Directions Hearing was held before Senior Member Lothian on 31 January 2007 at which the orders set out in paragraph 2 were made. Mr Taylor was not present at that hearing. Apparently he mistook the time of the fixture and attended after the orders had been made. He has not sought to review those orders.
- 16 Clearly, Senior Member Lothian was of the view as she found and expressed it that 'the drafting of these documents (Points of Defence and Particulars of Counterclaim) is obscure to the point of vexatious conduct'. That is a properly formed view of the Senior Member and it is not for me or anybody else to revisit it except by way of appropriate appeal and that has not been done. No further documentation has been filed to remedy that situation.
- 17 I was invited by the Applicants to form the belief pursuant to Section 78(1) of the VCAT Act that the Respondent was 'conducting the proceeding in a way that unnecessarily disadvantages another party by conduct such as failing to comply with an order or direction of the Tribunal without reasonable excuse ... or ... asking for an adjournment as a result of' the above.
- 18 It is clear and I so find that the Respondent did fail to comply with an order or direction of the Tribunal – specifically order 2 of the orders of 31 January 2007.
- 19 I further find that such conduct has unnecessarily disadvantaged the Applicants as they remain in ignorance as to the Respondent's precise attitude and response to each of the Points of Claim of the Applicants thereby hindering the proper preparation of their own case and possibly wasting resources pursuing evidence and information in support of their claim which may be unnecessary. Costs in these and other respects may be unnecessarily incurred.

- 20 It is also a fact that the Respondent did ask for an adjournment as a result of his failure and consequently as a result of his inability to proceed with the compulsory conference.
- 21 The Respondent's response to the application being made by the Applicants was that there was 'reasonable excuse' within the meaning of Sub-Section (1)(a) of Section 78 for his failure.
- 22 The Respondent referred in particular to an allegation made by the Respondent on the basis of information he said has been conveyed to him by a Mr Branco Mladichek, a Building Consultant he had engaged that Mr Mladichek would not complete or provide to the Respondent a proper completed report because Diane Whiteside, one of the Applicants had raised doubts with him about the Respondent's ability to pay him. Counsel for the Applicants did acknowledge that there had been some communication about that issue between the two but denied that it was without any intent of depriving the Respondent of an ability to properly defend the claim being made against him.
- 23 Whatever may have been the situation concerning the above, I do not accept that the absence if an expert report from a building consultant necessarily deprives a party (the Respondent in this case) of an ability to file and serve a succinct response to each of the particulars alleged against it except perhaps in some very discrete aspects.
- 24 The Respondent's further contention was that he did not properly understand the words used both by the Applicants' solicitors and the Tribunal in the orders of 31 January 2007 to describe the deficiencies in his documentation. In the light of the very detailed letters to him from the Applicants' solicitors and having regard to the words used, I do not accept this as providing a sufficient consideration either by itself or cumulatively with the above as constituting a reasonable excuse for the Respondent's failure. I note that the Respondent advised me that he did attempt to seek advice from Tribunal officers about that matter. I accept that he did do this.
- 25 The substance of the Applicants' evidence on this matter was comprised of the sworn affidavits of his instructing solicitor of 5 January 2007 to which letters from him to the Respondent, in particular those of 27 November 2006 and 13 December 2006, are exhibited.
- 26 Having regard to the above, I formed the belief required of Sub-section (1) of Section 78 in respect of paragraphs (a) and (c) and exercised the discretion conferred by Sub-section (2)(b)(i). I have made appropriate orders accordingly.
- 27 Having determined the substance of the proceeding in that way, Counsel for the Applicants then proposed that I should further exercise my discretion and make an order for costs under section 109, pursuant to Sub-section (2)(c) of Section 78.

- 28 Section 109 provides that the Tribunal may make a costs order if it is satisfied that it is fair to do so having regard to the criteria outlined in the section. The criteria in Section 109 are substantially the same as those in Section 78 with one deletion. The criteria upon which Counsel for the Applicants based his application were the same two criteria as those used for the consideration of the substantive application under Section 78 and which are considered above.
- 29 Counsel in essence submitted that because I had found the way I had in that respect that I should be significantly persuaded to make the costs order as requested. I did not agree with that submission.
- 30 At the hearing to which these Reasons relate, I was dealing with an application pursuant to Section 78 of the *Victorian Civil and Administrative Tribunal Act 1998*.
- 31 Although Section 109 refers to ‘costs in the proceeding’, I considered that in the circumstances it would not be ‘fair’ within the meaning of Sub-section (2) of Section 109 to consider the Section 78 application as ‘the proceeding’. Provision was made in the previous orders for it to be dealt with in the context of the listed Compulsory Conference for the convenience and costs mitigation of both the parties and the Tribunal. It might otherwise have been dealt with as a discrete proceeding initiated as an ‘application under Section 78 of the VCAT Act’. I consider it fair to treat it as if it were a discrete proceeding than as a mere part and appendage of the substantive proceeding.
- 32 In the context of the Section 78 proceeding as such, the Respondent had not been shown to have infringed any of the paragraphs (i) to (vi) of Sub-section (3) of Section 109. Nor has he been shown to have conducted the proceeding in any other way or behaved in any other way which would warrant me considering it fair to make a costs order against him. I therefore refused the Applicants’ costs application.

MEMBER M. WALSH

1 March 2007.