**VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL**

**CIVIL DIVISION**

**DOMESTIC BUILDING LIST**

VCAT REFERENCE NO. D144/2004 AND D145/2004

## CATCHWORDS

S.149 VCAT Act, Application for a stay, Applicable test, Failure to provide affidavit in response, Inference that can be drawn

## D144/2004

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| **APPLICANT** | Ceri Wyn Lawley |
| **FIRST RESPONDENT** | Terrace Designs Pty Ltd (ACN 004 984 025) |
| **SECOND RESPONDENT** | Geoffrey Joseph Graham |
| **THIRD RESPONDENT** | Arthur John Gunston t/as AJ Gunston |
| **FOURTH RESPONDENT** | Vero Insurance Limited (ACN 005 297 807) |
| **FIFTH RESPONDENT** | Matine Deana Casagrande (as executrix of the Estate of Alvisio Casagrande, deceased) |
| **SIXTH RESPONDENT** | Civil and Soil Pty Ltd (ACN 076 191 056) |
| **SEVENTH RESPONDENT** | Robert Brotchie and Associates Pty Ltd (ACN 007 122 018) (released from proceeding 29/4/2005) |
| **WHERE HELD** | Melbourne |
| **BEFORE** | Senior Member R. Young |
| **HEARING TYPE** | Directions Hearing |
| **DATE OF HEARING** | 01 May 2007 |
| **DATE OF ORDER** | 30 May 2007 |
| **CITATION** | Lawley v Terrace Designs (Domestic Building) [2007] VCAT 963 |

## D145/2004

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| **APPLICANT** | Suzanna Baines |
| **FIRST RESPONDENT** | Terrace Designs Pty Ltd (ACN 004 984 025) |
| **SECOND RESPONDENT** | Geoffrey Joseph Graham |

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| **THIRD RESPONDENT** | Arthur John Gunston t/as AJ Gunston |
| **FOURTH RESPONDENT** | Vero Insurance Limited (ACN 005 297 807) |
| **FIFTH RESPONDENT** | Civil and Soil Pty Ltd (ACN 076 191 056) |
| **SIXTH RESPONDENT** | Alvisio Casagrande |
| **SEVENTH RESPONDENT** | Robert Brotchie and Associates Pty Ltd (ACN 007 122 018) (released from proceeding 29/4/2005) |
| **WHERE HELD** | Melbourne |
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| **DATE OF ORDER** | 30 May 2007 |
| **CITATION** | |

## ORDER

1 The application of the Third Respondent for a stay of the orders pertaining to it in the orders of 6 March 2007 is dismissed.

**2 A directions hearing is set down for 9.30 a.m./p.m. on 21 June 2007 at 55 King Street Melbourne before Senior Member Young to consider any submissions of the parties arising from this determination.**

**SENIOR MEMBER R. YOUNG**

**APPEARANCES:**

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| For the Applicant | Mr K. Oliver of Counsel |
| For the First Respondent | No appearance |
| For the Second Respondent | No appearance |
| For the Third Respondent | Mr E. Riegler of Counsel |
| For the Fourth Respondent | Mr P. Rodriguez, Solicitor |
| For the Fifth Respondent | No appearance |

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| For the Sixth Respondent | Ms R. Bennett, Solicitor |
| For the Seventh Respondent | No appearance |

## REASONS

1 This is an application by the Third Respondent seeking a stay on the orders I made on 6 March 2007 in proceedings D144/2004 and D145/2004 in relation to himself. The Applicant in each proceeding opposes the application on the basis that it would deny them the fruits of their victory.

2 The stay is being applied for under s149 of the *Victorian Civil and Administrative Tribunal Act* 1998 ("the Act"), the provisions of which are:-

> *"1. The Tribunal, on application of a party or on its own initiative, may stay the operation of any order it makes pending the determination of any appeal that may be instituted under this Part.*
>
> *2. The Tribunal may attach any conditions it considers appropriate to a stay of an order under sub-section (1)".*

3 The Third Respondent("the Respondent") submits that the Tribunal's power under the section is similar to Rule 64.25 of the Civil Procedure Rules of the Supreme Court which is in the following terms:

> *"Except so far as the Court of Appeal or a Judge otherwise orders –*
>
> *(a) an appeal shall not operate as a stay of execution or of proceedings under the decision appealed from;*
>
> *(b) no intermediate act or step shall be invalidated".*

4 The Respondent asked the Tribunal to note that the rule is expressed in positive terms in relation to complying with any orders made; whereas, s149 of the Act was negative as to whether the orders made should be complied with. The Respondent submitted this meant that the Tribunal's discretion was not constrained in relation to the grant of a stay as it would be if the wording of s149 was the same as Rule 64.25, in this regard the Tribunal's discretion is less fettered than the Courts. This, the Respondent submits, means that the normal tests that attach to an application for a stay under Rule 64.25 submit that the Applicant must establish "special or exceptional circumstances" before the court will exercise its discretion. The Respondent submits the same tests do not apply to an application under s149 of the Act. The Respondent contends that the appropriate test under s149 of the Act is the balance of convenience. This means weighing the effect of denying the Applicant the fruits of its judgement against the Appellant Respondent's right not to have a successful appeal rendered nugatory.

5 In support of the application the Respondent filed an affidavit of Mark John Attard of 5 April 2007, which in relation to the Applicants alleged that Ms Lawley in proceeding D144/2004 owned the property at 57 Evansdale Road, Hawthorn, which property was encumbered by a mortgage for an initial sum of $422,600.00 ;and, Ms Baines in proceeding D145/2004 was the registered proprietor of 59 Evansdale Road, Hawthorn which was

unencumbered. Mr Attard attested that he had written to the solicitors for both Applicants on 22 March 2007 expressing concern about their ability to repay any judgement award and interest in the event that the appeal was successful. He proposed that the judgement award payable by the Third Respondent be paid into a joint interest bearing trust account pending the outcome of the appeal. By way of letters in response the solicitors for each Applicant rejected the proposal nor did they provide any assurances that the applicants were in a position to repay the judgement award if the appeal was successful. Ms. Lawley relied on the affidavit of her solicitor, Peter Megens, of 11 April2007 in which he attests that the mortgage over the Lawley property had been discharged and thev property was unencumbered.

6 In relation to Ms Baines, proceeding D145/2004, the Respondent submitted that she had not filed an affidavit in opposition to the application and that the Tribunal should note from Transcript Page 235 that the Applicant gave her occupation as "shop assistant". Counsel for Ms Baines formally objected to this evidence and this was noted by the Tribunal. The Third Respondent submitted that the failure to provide an affidavit to the Tribunal meant that there was nothing that Ms. Baines could say that would assist the Tribunal in deciding against granting a stay. The Respondent it was more convenient to order a stay at this juncture because if the appeal was successful the Respondent would not have to retrieve its money from the Applicant. Finally, in terms of fact the costs of the proceeding could fall to a large extent on the Third Respondent's shoulders as he was unsure whether the builder would have sufficient funds to pay its share of the costs which had been made jointly and severally liable.

7 In relation to Ms Lawley, the Respondent submitted that she was currently out of the jurisdiction undertaking post graduate study in the United States of America. It would be more convenient if the Respondent did not have to seek reimbursement of monies paid in compliance with the Tribunal's orders if the appeal was successful; and, likewise the proportion of Ms Lawley's costs that may fall onto the Respondent could be onerous.

8 Finally, the Respondent submitted that he considered the grounds of appeal to be reasonably strong. I note that there are some seven grounds of appeal and whilst it is difficult for me to judge specifically ;and, I have no wish to do so; I don't disagree, based on the normal rules of forensic probability, that the Third Respondent has reasonable prospects of success on one or more of his grounds.

9 The Fourth Respondent submitted that if a stay was granted then the exercise of assessing the Applicant's costs of this proceeding should be halted until the appeal is finalised for the reason that if it is successful that a significant amount of the assessment of costs in relation to the Third Respondent would be rendered nugatory and wasted.

10 The Applicants oppose the grant of a stay on a number of grounds; -

(a) the Applicant submits that in the Tribunal the tests that should apply to s149 are still the traditional tests that have been developed in the previous decisions as in relation to Rule 64.25 and the decided cases establish that the Respondent must show "special or exceptional circumstances" to establish that a stay is warranted: see *Cellante v G Kallis Industries Pty. Ltd.* [1991] 2 VR 653 at 657;

(b) in any event a stay was not warranted as there had been no factual evidence produced to show that the Respondent was under any real risk of having its appeal rendered nugatory; therefore, no special or exceptional circumstances have been established;

(c) a stay may frustrate any costs orders made against the First and Fourth Respondents due to the operation of Order 9 of the orders of 6 March 2007 which requires that the Applicants each submit a single bill for assessment; on the other hand the Applicants submitted that no costs would be wasted if a stay was refused as the costs were awarded between the Respondents on the basis of joint and severally liability;

(d) The Third Respondent's offer to pay the sum ordered against it into a trust account is relevant but not decisive: *Challenge Charter Pty Ltd v Curtain Bros (Qld) Pty Ltd* (2004) 9 DR 382 at 10:

11 Ms Baines' Counsel submits that no adverse inference under the *Jones v Dunkel* (1959) 101 CLR 298 principle can be drawn from the failure of Ms. Baines to provide an affidavit in response: *Interactive Network Services Pty Ltd and Anor. v NPV Wordspace W A Securities Pty Ltd* [2006] VSCA 225 at paragraph [35] per Maxwell P]

12 As a start to my analysis as to whether a stay should be granted I will first deal with the Third Respondent's submission that "special or exceptional circumstances' are not required under s149 of the Act and under the Act the test should be the balance of convenience. Although Rule 64.25 and s149 are worded somewhat differently I do not consider that the import of the words is any different. There are few cases in the Tribunal that deal with a stay under s149 whereas there is a long line of authority that has considered the effect of Rule 64.25 and its predecessors. This line of authority has firmly established that it is a principle in the exercise of a discretion to grant a stay that "special or exceptional circumstances" must be established by the Applicant for a stay. Secondly, the orders of the Tribunal, as in the courts, should have effect and a successful litigant is entitled to the fruits of its victory. In considering the discretion of whether or not to grant a stay, I do not consider that it is an even handed balancing act, such as the balance of convenience. In assessing whether or not to grant a stay; the successful litigant has a weighting in favour of refusing a stay unless the Applicant for a stay can demonstrate a special or exceptional circumstance that establish

that there is a significant risk that if its appeal is successful that success will be rendered nugatory by the appellants inability to recover the resources originally ordered by the adjudicator at first instance to be transferred from the appellant to the respondent to the appeal. Therefore, I consider that the authorities in relation to the requirements for a stay of "special or exceptional circumstances": *Cellante* (supra), *Interactive Network Services Pty Ltd* (supra) are equally applicable to applications for a stay under s.149 of the Act.

13 I have considered all of the factual evidence put before me and I do not consider that the Respondent has raised any factual evidence that raises any doubt of the Applicants being able to repay any sums paid to them by the Respondent in the event that the Respondent's appeal is successful. That is not to say that he is guaranteed to have his money returned, it is that the risk appears no higher than for any other normal solvent member of the community and ;therefore, prima facie, does not reach the standard required by "special" or "exceptional" circumstances that could justify the Tribunal exercising its discretion to grant a stay. No actual circumstances at all have been raised by the Respondent that would justify the grant of a stay even on a balance of convenience argument. Therefore, the stay application factually must fail.

14 In relation to the Third Respondent's claim that I should take some credence of the fact that Ms Baines did not submit an affidavit in opposition to his application for a stay, I consider this to be incorrect. I agree with Maxwell P's reference in *Interactive Network Services Pty Ltd* (supra) to *Schellenberg v Tunnel Holdings Pty Ltd* (2000) 200 CLR 121 where the High Court found that the principle in *Jones v Dunkel* is only engaged where something is raised by the other party which requires an answer. As I have found above the Respondent raised no factual allegations that raised any doubt as to Ms Baines' ability to repay any amount in the event of a successful appeal and therefore there was nothing requiring Ms Baines to answer. Therefore, on balance I do not consider that her failure to lodge an affidavit in opposition of the application has any bearing on my assessment.

15 I consider that the relatively small amounts of money that the Respondent was ordered to pay the Applicant, especially when compared to the unencumbered value of the two subject properties, raises no real risk on the applicants circumstances as they are presently known, that the Applicants would not be sufficiently solvent to repay such sums in the event that the appeal is successful. I also consider it is important that the Applicants be provided with the sums necessary to rectify the unsatisfactory building work in their dwellings.

16 In relation to the Fourth Respondent's claim that the costs assessment of the Applicants' costs of these proceedings should cease until the appeals have been finalised. I accept the Applicants' submission that as the costs have been ordered to be paid jointly and severally then there is little risk that time spent in assessing the Applicants' costs prior to the finalisation of any

appeal will be wasted. Therefore, I dismiss the application of the Third Respondent for a stay under s149 of the Act and I make no further orders in relation to any other matters in this proceeding.

17 I will order that this matter be brought back for a directions hearing of one hour in the future to consider any parties' submissions arising out of my determination.

**SENIOR MEMBER R. YOUNG**