VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST VCAT REFERENCE NO BP1039/2015

CATCHWORDS

DOMESTIC BUILDING DISPUTE – Section 120 of the *Victorian Civil and Administrative Tribunal Act 1998* – whether self-executing order should be allowed to stand when made in the absence of the affected party. Whether the moving party had a reasonable excuse for not attending the hearing – sufficiency of evidence.

APPLICANT	John Lucas
FIRST RESPONDENT	Vincenzo Lizio
SECOND RESPONDENT	Feliciana Lizio
WHERE HELD	Melbourne
BEFORE	Senior Member E. Riegler
HEARING TYPE	Review Hearing
DATE OF HEARING	22 March 2017
DATE OF ORDER	30 March 2017
CITATION	Lucas v Lizio (Building and Property) [2017] VCAT 447

ORDERS

1. Pursuant to s 120 of the *Victorian Civil and Administrative Tribunal Act 1998*, the Applicant's application for review is granted and the Tribunal's orders dated 14 February 2017 are hereby revoked.
2. **By 20 April 2017**, the Applicant must comply with Orders 3 and 5 dated 17 August 2015 and Order 7 dated 26 August 2016 (if he has not already done so) by:
   (a) paying to the Respondents' solicitors any outstanding rent;
   (b) paying to the Respondents' solicitors all outstanding water and electricity charges with respect to the demised premises during the period of the Applicant's occupancy within seven days of demand; and
   (c) paying $4,050 to the Respondents' solicitors by 14 April 2017.

3. **Subject to Order 4 of these orders, in the event that the Applicant fails to comply with Order 2 of these orders, then pursuant to s 78(2)(b) of the *Victorian Civil and Administrative Tribunal Act 1998*, orders will be made that the proceeding is summarily determined in favour of the Respondents as against the Applicant on the question of liability with quantum to be assessed**.

4. **The hearing currently listed for 10 May 2017 (or such other date as ordered by the Tribunal) will hear and determine whether there has been compliance with Order 2 of these orders.**

5. For the avoidance of doubt, if at the conclusion of the hearing on 10 May 2017, the Tribunal determines that the Applicant has not complied with Order 2 of these orders, then the following orders will be made pursuant to Order 3 of these orders:

   (a) the Applicant's application is dismissed;

   (b) the injunction granted under Order 2 of the Tribunal's orders dated 17 August 2015 is dissolved; and

   (c) the Applicant must give vacant possession of the demised premises located at 520 Mickelham Road, Greenvale.

6. **By 28 April 2017**, the parties must file with the Tribunal and send to each other any affidavit material that they intend to rely upon at the hearing on 10 May 2017.

7. **By 5 May 2017**, the parties must file with the Tribunal and send to each other any affidavit material in reply.

8. Any application for an adjournment of the hearing listed for 10 May 2017 due to the ill-health of the Applicant must be accompanied by a medical certificate, which must specify the nature of the illness and confirm that the Applicant is unable to appear at that hearing.

9. Liberty to apply.

SENIOR MEMBER E. RIEGLER

APPEARANCES:

For the Applicant	In person
For the Respondent	Mr M O'Connor of Counsel

REASONS

INTRODUCTION

1. On 14 February 2017, orders were made by the Tribunal, which provided:

> 1. By 28 February 2017, the Applicant must comply with Orders 3 and 5 dated 17 August 2015 and Order 7 dated 26 August 2016, by paying:
>
> (a) any outstanding rent for the months of September, November and December 2016 and January and February 2017;
>
> (b) any outstanding water rates and usage; and
>
> (c) $4,050 in respect of costs previously ordered.

2. Orders 2 and 3 made on 14 February 2017 further provided that if the Applicant did not comply with Orders 3 and 5 dated 17 August 2015 and Order 7 dated 26 August 2016, then the proceeding was to be summarily determined in favour of the Respondent as against the Applicant on the question of liability with quantum to be assessed.

3. The Applicant did not appear at the hearing on 14 February 2017, nor was he represented on that day. The Applicant now seeks an order under s 120 of the *Victorian Civil and Administrative Tribunal Act 1998* (**'the Act'**) that the Tribunal's orders made on that day be set aside. The Respondents oppose that application.

SECTION 120 OF THE ACT

4. Section 120 of the Act provides, in part:

> 120 Re-opening an order on substantive grounds
>
> (1) A person in respect of whom an order is made may apply to the Tribunal for a review of the order if the person did not appear and was not represented at the hearing at which the order was made.
>
> (2) An application under subsection (1) is to be made in accordance with, and within the time limits specified by, the rules.
>
> (3) The rules may limit the number of times a person may apply under this section in respect of the same matter without obtaining the leave of the Tribunal.
>
> (4) The Tribunal may —
>
> (a) hear and determine the application if it is satisfied that —

(i) the applicant had a reasonable excuse for not attending or being represented at the hearing; and

(ii) it is appropriate to hear and determine the application having regard to the matters specified in subsection (4A); and

(b) if it thinks fit, order that the order be revoked or varied.

(4A) For the purposes of subsection (4)(a)(ii), the matters are —

(a) whether the applicant has a reasonable case to argue in relation to the subject-matter of the order; and

(b) any prejudice that may be caused to another party if the application is heard and determined.

5. On 17 February 2017, the Applicant filed an *Application to Reopen an Order* form, in which he stated that the reason he did not attend the hearing on 14 February 2017 was:

> 1. I was unwell and was unable to attend the hearing on 14 February 2017.
>
> 2. All my personal property including all documents relating to my matter and my personal ID located at my home at … was seized by the sheriff in execution of a warrant on the premises. I am in the process of taking legal action to request for my documents back and for the judgment and warrant to be set aside.

6. Mr O'Connor of counsel, who appeared on behalf of the Respondents, submitted that there were two grounds upon which the Applicant's application under s 120 of the Act should be dismissed:

(a) first, he submitted that the Applicant did not have a reasonable excuse for not attending or being represented at the hearing on 14 February 2017; and

(b) second, he submitted that the Applicant did not have a reasonable case to argue in relation to the subject-matter of the orders made on 14 February 2017.

BACKGROUND

7. The proceeding was initiated by the Applicant in August 2015, at which time he sought and was granted an injunction restraining the Respondents from re-entering the demised property, which comprises a

rose farm. Subsequently, the Respondents issued a counterclaim, in which they sought an order for possession, amongst other things.

8. Regrettably, the proceeding has been plagued with numerous adjournments, most of which resulted from the Applicant not being in a position to proceed on the listed day. Eventually, the hearing commenced on 28 September 2016 with two days allocated. However, the proceeding could not be concluded within that timeframe and was adjourned to 16 November 2016 for a further three days. The proceeding was, again, unable to be concluded within the timeframe allocated and was further adjourned to 14 February 2017, with two remaining days allocated.

9. On 13 February 2017, the Tribunal received an email from the Applicant at 2:14 PM in which he sought an adjournment of the hearing listed to commence on the following day for a period of three months. In that correspondence, the Applicant set out his reasons as follows:

> 1. I am unfit to prepare adequately for this hearing nor to appear on 12 February 2017 [sic] as I am recuperating from my severe illness during the period 13 December 2016 to late January 2017.
>
> On 13 September 2016, I collapsed on William Street, Melbourne while walking. I was brought to St Vincent's Hospital by ambulance and admitted for about 10 days. After doing several tests, including ex-ray of my lungs, the doctors told me that I was having a relapse of pneumonia. After being discharged, I was told to go home to recuperate.
>
> On about 30 December 2016, as my condition was worsening, I was taken to Sunshine Hospital because I was still coughing up blood. I was admitted for about nine days and was discharged on or about 7 January 2017. I was prescribed very strong antibiotic medication for 24 days and it caused me to be very drowsy and unable to do any work activities.
>
> Between about 7 and 17 January 2017, I went to Greenvale Medical Centre to see a doctor, who prescribed me some more medication.
>
> On or about 17 January 2017, I was taken to Sunshine Hospital again as my condition was not improving. The doctors took some more tests and discharged me on or about 20 January 2017. I was told to stay at home to recuperate.
>
> The ongoing medication that I need to take had serious side-effects on my ability to concentrate and prepare for this case. I feel weak if I stand for long periods of time and feel drowsy and dizzy.
>
> 2. In addition, on 25 January 2017, all my personal property including all documents relating to this matter and my

> personal ID, which were located at my home at … were seized by the sheriff in execution of the warrant on the premises.
>
> Despite numerous requests to the Victoria Police and the representatives of the applicant of the warrant for the return of my personal property, my personal property has not been returned to me.
>
> I am in the process of taking legal action to requesting for these documents back and applying for the judgment and warrant to be set aside. I anticipate this process will take about 60 to 90 days.
>
> …

10. In response to that email correspondence, the Tribunal wrote to the parties by email correspondence dated 13 February 2017, sent at 3:12 PM, stating:

> Dear Sir/Madam,
>
> I refer to the Applicant's correspondence dated 13 February 2017, requesting an adjournment of the hearing listed to recommence on 14 February 2017. A copy of this correspondence has been referred to the presiding member. I am instructed to advise as follows.
>
> In the absence of any medical certificate or documents corroborating the matters set out in the Applicant's correspondence dated 13 February 2017, the Tribunal is not willing to vacate the hearing date currently listed for 14 February 2017, especially where the consent of the respondent has not been obtained. Moreover, the Tribunal notes, with some concern, that the application for an adjournment is made one day prior to the recommencement of the hearing, in circumstances where the matters relied upon occurred in December 2016 in January 2017.
>
> Consequently, the Tribunal refuses to order that the hearing listed for 14 February 2017 be vacated without first giving the Respondent an opportunity to be heard. Accordingly, the Applicant's application for an adjournment will be heard prior to the commencement of the hearing. If the application is unsuccessful the hearing will proceed as listed.
>
> If you have any questions, please contact VCAT on the number below.
>
> …

11. On 14 February 2017 at 9:35 AM, the Applicant forwarded another email to the Tribunal, which attached an undated medical certificate from *Greenvale Medical Centre*. That email correspondence stated:

> Dear Sir
>
> Please see attached.

> My doctor will be sending more documents through when he receives them.
>
> Regards
>
> John Lucas

12. The medical certificate from *Greenvale Medical Centre* stated:

> This is to certify that Mr John Lucas consulted me on 13/2/2017.
>
> From the history and/or examination I consider that Mr John Lucas is unfit to work during the following dates.
>
> 13/02/17 until 17/02/2017 inclusive.
>
> …

13. As indicated above, the Applicant did not appear at the hearing on 14 February 2017. Moreover, no further correspondence or medical certificates were provided to the Tribunal, despite the Applicant's statement that this would occur.

14. At the hearing on 14 February 2017, Mr O'Connor submitted that the Respondents were being significantly prejudiced by delay and adjournments in the hearing of the Applicant's claim and the Respondents' counterclaim. In particular, he said that the Respondents, being the owners of the farm property leased by the Applicant, had not been paid rent or outgoings for some period of time. He said this had culminated in a lawyer's letter of demand being forwarded to the Respondents on behalf of the water authority. In addition, Mr O'Connor stated that the responsible authority had threatened enforcement action against the Respondents on the ground that the activities conducted by the Applicant upon the leased premises were contrary to the *Planning and Environment Act 1987*. In particular, correspondence dated 31 January 2016 from Hume City Council stated:

> I refer to Council's recent inspections and correspondence with the occupier, John Lucas of 'Greenvale Rose Farm Pty Ltd', regarding a large stockpile of soil resulting from the Rose Farm operations, that is possibly contaminated at the above address.
>
> Upon inspection it was revealed that there still remains a stockpile of soil on site despite Council's advice and directions that under the Green Wedge Zone (GWZ) of the Hume Planning Scheme (HPS) any stockpiling of more than 100 m^3 soil requires a planning permit and that it should be removed. It was also revealed that the tyre stockpile has not yet been reorganised and distributed as agreed.
>
> Under section 126 of the Planning and Environment Act 1987, both the owner and the occupier are liable for enforcement action. Due to continued non-compliance with the HPS you are now required to remove the stockpile of soil and any possible contaminants and begin

> the reorganisation of the tyre stockpiles by no later than 3 March 2017.
>
> Failure to comply with Council's directions may result in a Planning Infringement Notice being issued to both the owner and the occupier to the amount of $777 and $1,555 respectively.
>
> …

15. Consequently, Mr O'Connor submitted that the hearing should not be further delayed and should proceed in the absence of the Applicant. I refused that application.

16. In the alternative, Mr O'Connor submitted that, at the very least, self-executing orders should be made against the Applicant in respect of his (alleged) failure to comply with previous orders made by the Tribunal.

17. In that respect, Mr O'Connor drew my attention to the Tribunal's orders dated 17 August 2015, which required, as a condition of granting an injunction to restrain the Respondents from re-entering the leased property, that the Applicant continue to pay rent in the amount of $2,000 per month on the first day of each month. In addition, Mr O'Connor also pointed to orders made by the Tribunal on 26 August 2016, where the Applicant was ordered to pay to the Respondents $4,050, as a result of the hearing listed to commence on that day being adjourned on the ground that the Applicant was not ready to proceed. Mr O'Connor stated that this amount had also not been paid.

18. As indicated above, the Respondents' application for self-executing orders was ultimately accepted and orders were made to that effect.

REASONABLE EXCUSE

19. In *Celona v Lillas & Loel Lawyers Pty Ltd*,[1] the Tribunal observed that the benchmark for satisfying the Tribunal that a party had a reasonable excuse for not attending the hearing is not overly burdensome:

> … the word 'reasonable' imports an explanation or excuse which is in accordance with reason. It does not have to be an especially compelling explanation and so there have been occasions when parties have been successful in applications under Section 120 on what might be thought are fairly feeble grounds such as 'I just forgot, sorry'; not compelling but it accords with reason and human experience that individuals can simply forget things and a person in that unhappy situation ought not be deprived of the opportunity of having his or her dispute heard and determined on the merits.[2]

20. On appeal, Robson AJA reinforced this statement:

[1] [2012] VCAT 403.
[2] Ibid at [12].

> The authorities have held that s 120 should be construed liberally. Regard should also be had as to the common law principle that a litigant has a prima facie right to present his or her case.[3]

21. In *Tomasevic v Victoria*,[4] Justice Morris P observed that determining what constitutes a reasonable excuse for not attending a hearing may ultimately be a question of fact:

> It seems clear enough that a "blameless non-attending defendant" would usually be able to satisfy the first element. The Tribunal has an obligation to act fairly and, in the normal course, this would require a party to be notified of the hearing and be given an opportunity to be heard. However what may constitute a "reasonable excuse" (or, for that matter, what would make an applicant "blameless") ought to be left to the judgment of the tribunal in a particular case. It is likely to be a question of fact, to be determined by the member concerned. To lay down legal principles that might govern this exercise seems to me to be fraught with difficulty.[5]

22. The Applicant did furnish a medical certificate in support of his contention that he was too ill to attend. Regrettably, the medical certificate provides little or no information to corroborate the Applicant's account of what occurred. It simply says that the Applicant was *unfit to work* between 13 and 17 February 2017.

23. Despite the Applicant's statement that the Tribunal would be provided with further medical certificates or documentation, no other documents have been produced in support the Applicant's contention that he was too ill to attend the hearing. In particular, no documents have been produced which corroborate that the Applicant had been hospitalised during December 2016 and January 2017 or that the Applicant had been heavily medicated with antibiotics during January 2017.

24. Moreover, there are no documents which corroborate that the Applicant's documents have been seized by the sheriff pursuant to a warrant for possession.

25. The Applicant contends that he was unaware of the need to produce any documentation in support of his application under s 120 of the Act. I do not accept that statement. In particular, that contention runs counter to the Applicant's own email correspondence, where he advised the Tribunal that further medical documentation would be provided.

26. Further, the Tribunal's correspondence dated 13 February 2017 clearly put the Applicant on notice of the need to provide a medical certificate or documents verifying that he was too ill to attend the hearing on the

[3] *Lillas & Loel Lawyers Pty Ltd v Celona* [2014] VSCA 19 at [18] (in dissent, but not on this point).
[4] [2005] VCAT 1525.
[5] Ibid at [12].

following day. Similarly, the *Application to Reopen an Order* form filed by the Applicant, states:

> You need to bring any documents that support your reasons for not attending or being represented at the hearing.

27. The only medical certificate relied on by the Applicant is that referred to above. It states that the Applicant was unable to attend work due to illness between 13 and 17 February 2017. That certificate makes no reference to the Tribunal hearing; nor does it give any indication as to the Applicant's ailment. In my view, the probative value of that certificate is diminished by the fact that it makes no reference to the Tribunal hearing or give any details of the Applicant's ailment.

28. I appreciate that self-represented litigants may not always have the knowledge or experience to present their case with the finesse and thoroughness of a legal practitioner or somebody experienced in litigation. However, in this particular case, I find it difficult to accept that the Applicant was ignorant of the need to produce some further documentation, apart from the medical certificate from *Greenvale Medical Centre*, covering the relevant period in order to support his contentions.

29. Nevertheless, I am mindful that the benchmark for establishing that a party had a reasonable excuse for not attending the hearing is low. Therefore, having regard to Applicant's email correspondence dated 13 February 2017, the subsequent medical certificate from *Greenvale Medical Centre* and his submissions made in support of his s 120 application, I am satisfied that the Applicant had a reasonable excuse for not attending the hearing on 14 February 2017.

APPROPRIATE TO HEAR AND DETERMINE THE APPLICATION

30. As indicated above, satisfying the Tribunal that a party had a reasonable excuse for not attending a hearing is only one element of what a party must establish under s 120 of the Act. Even if that first element has been established, the Tribunal must also be satisfied that it is appropriate to hear and determine the application having regard to the matters specified in s 120(4A) of the Act. There are two elements to s 120(4A):

> For the purposes of subsection (4)(a)(ii), the matters are—
>
> (a) whether the applicant has a reasonable case to argue in relation to the subject-matter of the order; and
>
> (b) any prejudice that may be caused to another party if the application is heard and determined.

Reasonable case to argue

31. The orders made on 14 February 2017 were self-executing. Those orders, without further order, did not determine any substantive issue in the

proceeding. That would only occur if the self-executing orders were ultimately executed. This would follow in circumstances where the Tribunal found that its orders dated 17 August 2015 and 26 August 2016 had not been complied with by 28 February 2017. However, if there was compliance with those orders, then the self-executing orders fall away.

32. The Applicant contends that he has complied with the Tribunal's orders dated 17 August 2015, insofar as those orders impose an obligation on him to make a payment. He further contends that he understood that he did not have to pay the costs order dated 26 August 2016 until after the proceeding had been finally determined. Consequently, he submitted that in those circumstances, the self-executing orders should never have been made without giving him an opportunity to be heard or without first disavowing him of his misunderstanding as to the payment of costs.

33. By contrast, Mr O'Connor submitted that if the Applicant believed that he had complied with the Tribunal's orders dated 17 August 2015 and 26 August 2016, then it was of no consequence that the self-executing orders should continue to stand. In other words, if the Applicant was ultimately proved correct, the self-executing orders would never execute and his rights would not be affected by their existence. Therefore, Mr O'Connor argued that the Applicant did not have a reasonable case to argue in relation to the subject-matter of the self-executing orders.

34. On one view, Mr O'Connor's submission has merit, in that, it could be said the Applicant's argument is self-defeating, in the sense that his submissions, if proved correct, would render the self-executing orders meaningless.

35. However, I am of the view that this submission is too simplistic. It fails to take into account that there are aspects of the self-executing order which the Applicant erroneously believed did not require compliance until after the proceeding had been determined. In particular, the Applicant contends that he believed that he did not have to pay the costs order until after the proceeding had been finally determined. Therefore, if the self-executing orders were allowed to stand, the Applicant will lose the opportunity of being disavowed of that belief, given that the date for compliance has now passed. In my view, that is a factor which supports the Applicant's contention that he has a reasonable case to argue, at least insofar as contending that the self-executing orders would not have been made in their present form, if he had he appeared on 14 February 2014.

36. Consequently, I find that it is appropriate to set aside the self-executing orders made on 14 February 2017.

WHAT ORDERS SHOULD NOW BE MADE?

37. Mr O'Connor submitted that if the Applicant's application under s 120 of the Act was successful, it would be appropriate for the Tribunal to essentially repeat those self-executing orders, save for extending the date for compliance.

38. The Applicant did not oppose that course of action, provided he was given an opportunity to be heard as to whether he had complied with the Tribunal's orders dated 17 August 2015 and was given a reasonable period in which to make payment of the costs order dated 26 August 2016.

39. In my view, the course proposed by Mr O'Connor is reasonable in the circumstances. In that regard, I have not only had regard to the submissions made by the Applicant but have also considered those submissions in light of an affidavit sworn by the Respondents' solicitor, Mr Frank Caleandro, on 20 March 2017, in which he exhibits an email addressed to the Applicant dated 10 February 2017. That email states, in part:

> We refer to the above matter which is scheduled to continue on the 14th next and note that notwithstanding our numerous correspondence to you, you are still in breach of the Tribunal's orders of the 17/08/2015 which, as explained to you and your legal representatives at the time by Senior Member Walker, and as mentioned in paragraph two of the said Orders, are crucial to the restraining Order made at the time.
>
> Your blatant continual refusal to comply with the Orders is an insult not only to the Respondents, but also to the Tribunal.
>
> In contradiction to the Orders you have refused and still refused to:-
>
> 1. Comply with paragraph three of the said orders in that you have failed to make payments in the sum of $2,000.00 on the first of each month. No such payments have been received for the months of September, November and December 2016. Nor has there been any payments for January and February 2017.
>
> 2. Comply with the provisions of Paragraph five of the said Orders in that you have failed to pay water rates and electricity bills. Copy letter from water authority attached.
>
> 3. Comply with general provisions of paragraph two in that you failed, and continue to refuse to pay costs in the sum of $4,100.00 ordered by the Tribunal to be paid by you. Further you have failed to comply with the requirements of the Council. (See letter attached).
>
> You have further failed to provide sound and photographic evidence of your identity notwithstanding having being so requested on several occasions.

> Please be on notice that unless the above mentioned deficiencies are complied in full by 400.p.m the 13/2/2017, an application will be made to the senior member on the morning of the 14/02/2017 for your application to be dismissed with costs, and for an order to be made in favour of the Respondents as per cross application…

40. That correspondence clearly contemplates an application for summary judgment being made in the event that previous orders of the Tribunal are not complied with. Consequently, I find that it is appropriate to make self-executing orders, substantially in the form of the orders made on 14 February 2017, save that further time will be given to the Applicant to comply with those orders. In that regard, the Applicant submitted that he should be given six weeks in which to satisfy the costs order. In my view, that period is too long, having regard to the fact that the costs order was made nearly 7 months prior. In my opinion, a period of 21 days is appropriate in the circumstances.

41. Having said that, I accept that the issue of compliance may be contested at the expiration of that 21 day period. Therefore, I am of the view that self-executing orders should not execute until the parties have had an opportunity to address the Tribunal over that controversy, should it exist. As it presently stands, the proceeding is listed for further hearing on 10 May 2017. In my view, that date should be preserved to hear any submissions that the parties wish to make as to whether or not there has been compliance.

COSTS

42. It is not entirely clear whether the Applicant also seeks to set aside Order 8 of the Tribunal's orders dated 14 February 2017, which required him to pay the Respondents' costs of and associated with the hearing on that day being adjourned. Those costs were fixed on the amount of $4,000, the majority of which comprised fees of Counsel, thrown away.

43. In that regard, I note that the Applicant submitted that the appropriateness of ordering costs against him should be viewed in light of him being too unwell to appear at the hearing on 14 February 2017. Accordingly, and for the sake of completeness, I will assume that the Applicant contends that no order should have been made in respect of costs, given that he had a reasonable excuse for not appearing at the hearing on 14 February 2017.

44. That being the case, I will set aside Order 8 dated 14 February 2017 and now reconsider the Respondents' application that their costs of and associated with the aborted hearing on 14 February 2017 be paid by the Applicant, having regard to each party's submissions going to that issue.

45. Mr O'Connor submitted that the issue was not whether the Applicant had a reasonable excuse for not attending the hearing but rather, concerned

the timing of the Applicant's application to adjourn the hearing. Mr O'Connor argued that the lateness of the application to adjourn caused the Respondents to incur costs which were ultimately thrown away. Therefore, he argued that it was fair that the Applicant compensate the Respondents for those costs.

46. In my view, the Applicant's conduct in belatedly applying for an adjournment, at a point in time when the Respondents had already incurred or would inevitably incur substantial costs, makes it fair to order that their costs be paid by the Respondent. As noted above, the afternoon prior to commencement of the hearing was the first occasion where the Applicant informed the Respondents and the Tribunal of his application for an adjournment. This is extraordinary, given that the Applicant first became ill on 13 December 2016. Even allowing for sporadic hospital visits, the Applicant concedes that he was discharged from hospital on 20 January 2017. No explanation was proffered as to why it took him until 13 February 2017 to notify the Tribunal and the Respondents of his illness and of his application to adjourn the hearing on 14 February 2017.

47. Moreover, in his correspondence dated 13 February 2017, the Applicant stated that on 25 January 2017 all his personal property including all documentation relating to the proceeding were seized by the sheriff in execution of a warrant on the premises. This was a further ground relied upon by the Applicant in his application for an adjournment of the 14 February 2017 hearing. However, nothing was mentioned until 13 February 2017, even though it would have been abundantly clear to the Applicant, as at 25 January 2017, that he was not in a position to proceed with the hearing on 14 February 2017, given that all his documentation had been seized.

48. In my view, the Applicant's conduct in waiting until the last moment before requesting an adjournment amounts to *conducting the proceeding in a vexatious way that unnecessarily disadvantages the other party to the proceeding.*[6] It is conduct which justifies an award of costs in favour of the disadvantaged party and this is the case irrespective of whether the *Retail Leases Act 2003* applies or not.

49. Therefore, I find that it is fair that the Respondents' costs of and associated with the aborted hearing on 14 February 2017, thrown away by reason of the hearing being adjourned, be paid by the Applicant, such costs to be fixed in the sum of $4,000. As indicated above that amount largely comprises fees of Counsel, with approximately $750 representing solicitor's fees.

[6] Section 92(2)(a) of the *Retail Leases Act 2003*.

SENIOR MEMBER E. RIEGLER