VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST VCAT REFERENCE NO BP1039/2015

CATCHWORDS

LANDLORD AND TENANT – Section 78(2) of the *Victorian Civil and Administrative Tribunal Act 1998* – whether application should be dismissed for failing to comply with orders – sufficiency of evidence.

APPLICANT	John Lucas
FIRST RESPONDENT	Vincenzo Lizio
SECOND RESPONDENT	Feliciana Lizio
WHERE HELD	Melbourne
BEFORE	Senior Member E. Riegler
HEARING TYPE	Hearing
DATE OF HEARING	10 May 2017
DATE OF ORDER	15 May 2017
CITATION	Lucas v Lizio (No 2) (Building and Property) [2017] VCAT 689

ORDERS

1. Pursuant to s 78(2) of the *Victorian Civil and Administrative Tribunal Act 1998* the Applicant's application is dismissed and the proceeding is determined in favour of the Respondents as to liability, with the quantum of the Respondents' counterclaim, costs and interest to be determined.
2. The injunction granted under Order 2 of the Tribunal's orders dated 17 August 2015 is dissolved.
3. The Applicant must give vacant possession of the demised premises located at 520 Mickelham Road, Greenvale.
4. The costs of and associated with the hearing on this day are reserved, with liberty to apply.
5. This proceeding is listed for an administrative mention on 2 June 2017, by which date if the Respondents have not advised the Principal Registrar in writing that they wish to proceed with any outstanding matters relating to their counterclaim or the costs of and associated

with this hearing, orders will be made without further notice that their counterclaim is struck out, with a right given to the Respondents to apply for reinstatement.

SENIOR MEMBER E. RIEGLER

APPEARANCES:

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

REASONS

INTRODUCTION

1. Following a hearing on 22 March 2017, I pronounced orders and published *Reasons* dated 30 March 2017, which provided, in part:

> 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:
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> (a) paying to the Respondents' solicitors any outstanding rent;
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> (b) paying to the Respondents' solicitors all outstanding water and electricity charges with respect to the demised premises during the period of the Applicants occupancy within seven days of demand; and
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> (c) paying $4,050 to the Respondents' solicitors by 14 April 2017.

2. I further ordered that in the event that the Applicant failed to comply with the above order then, pursuant to s 78(2)(b) of the *Victorian Civil and Administrative Tribunal Act 1998* (**'the Act'**), orders would be made that the proceeding be summarily determined in favour of the Respondents as against the Applicant on the question of liability with the quantum of their counterclaim to be assessed.

3. At the time that the above order was made, I anticipated the possibility that there may be some disputation over whether payments have or have not been made. Consequently, I listed the proceeding for further hearing on 10 May 2017 to allow the parties to address the Tribunal as to whether there had been compliance with the above order. In addition, orders were made for the exchange of affidavit material, also directed at that question.

4. The foreshadowed s 78 orders made on 30 March 2017 (**'the s 78 Orders'**) were similar to the *self-executing* orders previously made on 14 February 2017 (which were subsequently set aside). On 14 February 2017, the hearing was unable to proceed because the Applicant did not attend. Upon the Respondents' application, self-executing orders were made on that day ('**the Earlier Orders'**).

5. On 17 February 2017, an application was filed by the Applicant under s 120 of the Act for an order setting aside the Earlier Orders. Although that application was successful in setting aside the Earlier Orders, the substance of those orders was subsequently reproduced in the s 78 Orders. Those s 78 Orders were pressed by the Respondents on the

basis that, if the Tribunal set aside the Earlier Orders, then similar orders should be made, albeit with an extension of time to comply. Indeed, the Applicant, during the course of the review hearing on 22 March 2017, did not oppose *self-executing* orders being renewed, should his application under s 120 of the Act succeed.

6. As anticipated when the s 78 Orders were made, the parties are at odds as to whether there has been compliance with Order 2 dated 30 March 2017, set out above. Consequently, the hearing on 10 May 2017 provided the forum by which each party was afforded an opportunity to adduce evidence going to that issue. What follows is my determination of whether Order 2 dated 30 March 2017 has been complied with.

BACKGROUND

7. The *genesis* of this proceeding concerns an application by the Applicant seeking an injunction to restrain the Respondents, who are registered owners of the subject property, from re-entering the property, which was and is being used by the Applicant to conduct a rose farm business. One of the critical issues in dispute between the parties was whether any lease agreement existed between them and if so, what were the terms of such a lease agreement.

8. On 17 August 2015, the Applicant's injunction application was heard and orders made which restrained the Respondents from re-entering the property pending further hearing of the proceeding. The orders made on that day also included the following orders:

> …
>
> 3. The Applicant must pay the following sums to the Respondents' solicitors, Caleandro, Guastalegname & Co:
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> (a) $2,000 by 4.00 pm on 19 August 2015;
>
> (b) $2,000 by the first day of September 2015 and by the first day of each month thereafter until the hearing and determination of this proceeding.
>
> 4. Such sums are to be disbursed by those solicitors to the Respondents and the nature of those payments, whether rental, mesne profits or otherwise, shall be determined by the Tribunal at the hearing.
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> 5. The Applicant must also pay to the Respondents' solicitors all water and electricity charges with respect to the said premises for the period of his occupancy within seven days of demand.
>
> …

11. **This proceeding is set down for hearing at 10.00 am on 5 November 2015 at 55 King Street, Melbourne, with two days allocated**.

9. Mr O'Connor, of counsel, who appeared on behalf of the Respondents, submitted that it was implicit in the orders made by the Tribunal on 17 August 2015 that compliance with Orders 3 and 5 above was a precondition upon the granting of the injunction. The Applicant has not suggested otherwise.

10. As indicated above, the interlocutory injunction was extended to the hearing of the proceeding, which was listed to commence on 5 November 2015. However, prior to the hearing on 5 November 2015, an application was made by the Applicant for an adjournment of that hearing. On 5 November 2015, orders were made adjourning the hearing date to 14 April 2016.

11. On 14 April 2016, the Applicant applied for another adjournment, which was granted and the matter was re-fixed for hearing on 25 August 2016. Having regard to the belated adjournment application and the grounds upon which it was based, the Tribunal ordered that the Applicant pay the Respondents' costs thrown away by reason of the adjournment, which were fixed in the sum of $3,100. The orders made on that day further noted:

> The adjournment is granted because the Applicant presently has no documents and has failed to arrange representation and so is unable to proceed.

12. On 2 June 2016, the Respondents filed an application, wherein they sought an order that the Applicant's application be dismissed pursuant to s 78 of the Act and that the injunction previously granted be dissolved. The grounds upon which that application were made alleged that the Applicant had failed to make monthly payments of $2,000 in accordance with the Tribunal's orders dated 17 August 2015. That application was ultimately dismissed. It appears from the orders made by the Tribunal that the application failed because the default was remedied, albeit one day before the hearing of the s 78 application. The Applicant was, again, ordered to pay the Respondents' costs, which were fixed in the sum of $750.

13. Due to the business of the Tribunal, the hearing listed to commence on 25 August 2016 was vacated and relisted to commence on the following day; namely 26 August 2016. Shortly prior to the commencement of that hearing, the Applicant, again, applied for an adjournment of the hearing.

14. The orders made on that day noted the following:

OTHER MATTERS

> Prior to the commencement of the hearing, the Applicant applied for an adjournment based on two grounds; namely, that insufficient time had been allocated by the Tribunal to hear the proceeding and that he was not ready to proceed. The Applicant advised the Tribunal that his legal representation was withdrawn in the week leading up to the hearing which resulted in him being unable to properly prepare for the hearing.
>
> The Tribunal notes that the Applicant has on two prior occasions sought and obtained an adjournment of the hearing date. Consequently, the Applicant was advised by the Tribunal that no further adjournment application would be granted when the matter returned on 28 September 2016, unless there were significant and extenuating circumstances. The Tribunal further indicated that an inability to proceed because legal representation had been withdrawn would not constitute *significant and extenuating circumstances* if a third application for an adjournment was made on that ground.

15. Notwithstanding the matters set out under the heading *OTHER MATTERS* and in particular, the fact that the Applicant had previously been advised by the Tribunal that the hearing on 26 August 2016 would not be adjourned simply on the ground that the Applicant's legal representation had been withdrawn, the Tribunal did, nevertheless, grant a further indulgence to the Applicant by adjourning the hearing to 28 September 2016. The orders made on 26 August 2016 included the following order:

> 7. Pursuant to s 109(3) of the *Victorian Civil and Administrative Tribunal Act 1998* and finding that it is fair to do so, the Applicant must pay the Respondents' costs thrown away by reason of the adjournment, fixed in the amount of $4,050.

16. On 28 September 2016, the hearing was unable to proceed because an Italian interpreter had not been arranged to assist the Respondents. That was not the fault of either party. The matter was adjourned to 16 November 2016.

17. On 16 November 2016, the hearing commenced but was unable to be concluded within the time allocated and was further adjourned to continue on 14 February 2017.

18. On 14 February 2017, the Applicant did not appear at the hearing. The orders made on that day noted the following:

> **OTHER MATTERS**
>
> A. On 13 February 2017, the Applicant notified the Tribunal and the Respondents that he was unable to attend the hearing on 14 February 2017 due to an ongoing illness. In

that correspondence, the Applicant advised that he became seriously ill on 13 December 2016, following which, he attended a number of medical appointments leading up to and including hospitalisation on 17 January 2017. The Applicant further advised that he was discharged from hospital on 20 January 2017. However, and notwithstanding the Applicant's contention that he has been ill since 13 December 2016, the Applicant failed to notify the Respondents or the Tribunal of any illness or intention to adjourn the hearing listed for 14 February 2017 until 13 February 2017.

B. The Respondents have further advised that the Applicant has failed to comply with previous orders made by the Tribunal, which include:

(a) the failure to pay rent at $2,000 per month for the month of September, November, and December 2016 and January and February 2017 (total of $10,000) in accordance with Order 3 dated 17 August 2015;

(b) the failure to pay water charges in the amount of $1,342.42, in accordance with Order 5 dated 17 August 2015; and

(c) the failure to pay the Respondents' costs of $4,050, in accordance with Order 7 dated 26 August 2016.

19. An application was made by the Respondents on that day that the Applicant's application be summarily dismissed and that the injunction previously granted dissolved. That application was refused. Consequently, an alternative application was made for a self-executing order, which was made – in the form of the Earlier Orders.

20. As set out above, the Earlier Orders were ultimately set aside under s 120 of the Act and effectively replaced with the s 78 Orders. A number of affidavits have now been filed by both parties going to the question of whether the Applicant has complied with Order 2 dated 30 March 2017. What follows is my determination of that question.

Has the Applicant paid outstanding rent?

21. As indicated above, the orders made on 17 August 2015 required the Applicant to pay $2,000 on 19 August 2015 and then a further $2,000 on the first day of each month which followed. Although subsequent orders have referred to that monthly payment as *rent*, it is clear from the orders made on 17 August 2015 that this description is not to be construed as suggesting that a leasehold agreement exists between the parties. Nevertheless, both parties have proceeded to use the expression

rent and having regard to the fact that the Applicant was not legally represented, it was appropriate to continue to use that word to describe the monthly payments to be made by the Applicant. For the sake of consistency, I will continue to use that expression to describe the monthly payments, notwithstanding that no determination has been made as to whether any leasehold agreement exists between the parties.

22. The Respondents rely upon an affidavit of Frank Caleandro, the solicitor acting on their behalf, as evidence that the Applicant has not complied with the Tribunal's previous orders regarding the payment of rent. Mr Caleandro deposes to the following:

> 4. As at 5 PM on the 20/04/2007 the Applicant has not made any payment whatsoever to my office pursuant to paragraph two above, nor has any payment been received in relation to the month of April, nor has the amount of $4,050.00, other cost order made in February 2017.
>
> …
>
> 6. That according to my calculations the Applicant has paid my office the total of $33,000.00 by way of "rent" since August 2015, whereas the total amount that should have been paid as at the 01/04/2017 is of $42,000.00, with a balance outstanding of $9,000.00. This includes a payment of $2,000.00 deposited into our account in August 2016 but with no reference. I have requested the Applicant to provide details of payment in that period to establish if the said amount should be credited to his account, but no reply was ever received.

23. During his oral evidence, Mr Caleandro said that his affidavit contained one typographical error; namely, that in paragraph 6 the words "this includes a payment of $2,000" should have read "this does not include a payment of $2,000". Accordingly, with that amendment, Mr Caleandro's evidence is that if the $2,000 was counted towards a payment by the Applicant, then $7,000 remains outstanding in rent up until the date of his affidavit. In addition, a further $2,000 was due and payable on 1 May 2017, making the total amount of arrears $9,000. Mr Caleandro also produced a printout from his solicitors trust account ledger, showing all payments received and disbursed from the account. That ledger accords with his evidence.

24. The Applicant filed and served a number of affidavits or statutory declarations on or shortly prior to the hearing on 10 May 2017. He deposes to the following:

> 2015
>
> July – Real Estate Agent Bond $2000.00 Two Months rent $4000.00

$2000 rent mistakenly paid for on top of this on the 28/07/2015

August – Real Estate Agent $2000 cash

September, October, November and December – $2000 per month via MDN

2016

January and February – $2000 per month via MDN

March and April – $2000 per month paid by Gavin via EFT to Frank's trust account

May, June, July, August and September $2000 per month by Schembri Lawyers

October, November and December $2000 per month via EFT from JDO

2017

January – I was in hospital and contacted Pi Di Natale to release the $4000 held in trust to cover the next 2 months rent.

March – 2 payment made 1 x $2000 by Bill KK Pty Ltd and $1000 from JDO

April – $1000 via EFT by JDO

Total rent $43,000.00 plus $2000.00 Bond

25. The Applicant was unable to produce any documentation verifying any of the payments made by him or on his behalf. No bank records or cheque butts were produced. The Applicant's evidence is clearly at odds with the information contained in the Respondents' solicitor's trust account ledger, which records payments as follows:

Month	**Amount due**	**Ledger recorded payments**	**Date of payments**	**Description of payments**
19/8/15	2,000	2,000	19/08/15	MDM
1/9/15	2,000	2,000	2/9/15	MDM
1/10/15	2,000	2,000	3/10/15	MDM
1/11/15	2,000	2,000	5/11/15	MDM
1/12/15	2,000	-		
1/1/16	2,000	-		
1/2/16	2,000	4,000	3/2/16	M & D
1/3/16	2,000	2,000	3/3/16	Greenvale
1/4/16	2,000	2,000	21/4/16	Gavin
1/5/16	2,000	2,000	9/5/16	Greenvale
1/6 /16	2,000	4,000	1/6/16	CBA
1/7/16	2,000	2,000	29/6/16	CBA
1/8/16	2,000	2,000	1/08/16	CBA

1/9/16	2,000	2,000	31/8/16	Deposit
1/10/16	2,000	2,000	28/9/16	Greenvale
1/11/16	2,000	2,000	28/11/16	JDO
1/12/16	2,000	1,000	28/2/17	JDO
1/1/17	2,000	2,000	1/3/17	Bil KK
1/2/17	2,000	-		
1/3/17	2,000	-		
1/4/17	2,000	-		
TOTAL	**42,000**	**35,000**		

26. In the Applicant's affidavit, the reference to *MDM* is a reference to the Applicant's former solicitors. According to the Applicant, arrangements were put in place where payments were made by that firm of solicitors directly to the Respondents' solicitors. Similarly, payments referred to as *Schembri Lawyers* are also said to have been payments made by the Applicant's subsequent solicitors directly to the Respondents' solicitors. The reference to *Gavin* is a reference to the Gavin Sheehan, the former occupier of the property. According to the Applicant, Mr Sheehan was also responsible for making payments on his behalf.

27. As can be seen in the above table, the payments set out in the affidavit of the Applicant do not accord with the payments recorded in the trust account ledger. As indicated above, some payments were made by third parties on behalf of the Applicant. In that sense, the Applicant was reliant upon those third parties making those payments. This is problematic because there is no evidence from any other person, apart from the Respondents' solicitors, confirming that those payments have been made. On the other hand, the trust account ledger is a business record and, in my view, accurately records receipts paid to the Respondents' solicitors. It is not reliant upon the goodwill or trust of third parties to make those payments but is simply a record of what has been received. Moreover, Mr Caleandro verified that the only payments received by his office were those payments recorded on the trust ledger and he emphatically denied during cross-examination that any other payments other than those recorded on the trust ledger were received.

28. Mr Caleandro presented as a reliable and credible witness and I accept his evidence as to what monies have been received in respect of rent. As I have indicated, the Applicant's evidence is problematic because he relies upon third parties to have made payments but provides no evidence from those third parties as to whether those payments are actually made or not. Moreover, no documentary evidence was produced by the Applicant to support his evidence. Therefore, I find, on the balance of probabilities, that the monies received in respect of rent over the period 19 August 2015 until 1 March 2017 are those

monies which are recorded in the trust account ledger. Moreover, I accept Mr Caleandro's evidence that, as of the date of the hearing on 10 May 2017, no further money has been paid towards rent.

29. That means that only $35,000 has been paid towards rent, if the miscellaneous deposit of $2,000 made on 31 August 2016 was also counted. The Applicant gave evidence that $2,000 was held by way of a security deposit and that this amount should also be counted as it can be drawn upon in circumstances where rent was in arrears. However, that course of action does not accord with the orders made by the Tribunal on 19 August 2015. Moreover, according to Mr Massese, the leasing agent who also gave sworn evidence during the course of the hearing, the $2,000 security deposit, which was paid into the leasing agent's trust account on 13 May 2015, has subsequently been appropriated in respect of arrears for the month of July 2015. In other words, it no longer exists. Nevertheless, even if that amount were counted, it would still mean that the Applicant is in arrears of $7,000.

30. Having regard to the above, I find that this aspect of the 30 March orders has not been complied with.

Payment of costs order

31. As indicated above, Mr Caleandro gave evidence that the $4,050 ordered against the Applicant has never been paid. Although not set out in any of the affidavits filed on behalf of the Applicant, the Applicant gave oral evidence to the effect that he handed a cheque, which he said was in an envelope, to Mr Guastalegname, being the partner of Mr Caleandro, on 5 May 2017.

32. In particular, he said that he visited the offices of the Respondents' solicitors twice on that day for the purpose of dropping off his affidavits and making payment of the costs order. The Applicant said that he visited the Respondents' solicitors' offices in the morning to drop off unsworn versions of the affidavits, which he has now filed with the Tribunal, and then later in the afternoon to drop off sworn versions of those affidavits. He said that it was on that second occasion that an envelope was also given to Mr Guastalegname, containing a cheque in the amount of $4,050.

33. Mr Caleandro gave evidence that he made enquiries and spoke with Mr Guastalegname and was confident that no cheque or monies were delivered to his office on 5 May 2017 or any subsequent time. Mr Guastalegname also gave evidence, via telephone, during the course of the hearing. He confirmed that he saw the Applicant on one occasion, being the afternoon of 5 May 2017. However, that was for the purpose of the Applicant picking up copies of Mr Caleandro's affidavit and other documents because the Respondents' solicitors were unable to

serve those documents on the Applicant by email. Mr Guastalegname said that the Applicant took an envelope from Mr Guastalegname and left. He said there was no envelope or any other documents given to him on that occasion. He said that on the morning of 10 May 2017, a bundle of documents had been slipped under the front door of the Respondents' solicitors' office, which were the affidavits with details of jurat. He said there was no cheque, or envelope containing a cheque, amongst that bundle of documents.

34. In my view, the Applicant's evidence in relation to this aspect of the dispute is questionable. In particular, his evidence was that he had dropped off unsworn versions of his affidavits on the morning of 5 May 2017 and then later that day, copies of those documents with details of jurat. However, the affidavits which were filed prior to the hearing of this proceeding on 10 May 2017 show that they were sworn on Tuesday 9 May 2017. Therefore, it cannot be the case that those sworn versions were served on the Friday before.

35. In any event, even if the Applicant had confused the dates when he served the sworn affidavits, which can sometimes occur, given the stress associated with litigation, I nevertheless prefer the evidence of Mr Guastalegname over that of the Applicant in relation to this issue. Mr Guastalegname has no interest in the outcome of this proceeding, other than his firm representing the Respondents. It seems inconceivable that both Mr Guastalegname and Mr Caleandreo would both be mistaken in relation to receiving a payment, especially in circumstances where all other payments received have been accurately recorded in the trust account ledger, including previous payments towards costs orders made against the Applicant.

36. Moreover, there is no documentary evidence supporting the Applicant's version of events. No cheque butt was produced to verify that a cheque was drawn. Indeed, when he was questioned as to why that was not the case, he answered that the cheque was not drawn by him but by one of his debtors. He said that he had instructed that debtor to make out the cheque to the Respondents' solicitors. That debtor was not called to give evidence nor was there any request made by the Applicant for the Tribunal to contact that person by telephone, even though that process of adducing evidence had already been adopted in respect of the evidence of Mr Guastalegname and been offered to the Applicant in respect of another potential witness.[1]

37. Accordingly, when balancing all the evidence, I find, on the balance of probabilities, that the amount of $4,050 has not been paid.

Water charges

[1] See paragraph 39 below.

38. Mr Caleandro gave evidence that the last invoice from *Yarra Valley Water*, in the amount of $6,229.81, has not been paid by the Applicant. The Applicant concedes that to be the case. However, he contends that there is an error in the account because the amount of water usage is disproportionately higher than any other month during the period that he has occupied the Property. This appears to be the case, as the amount of water used in the month of March grossly exceeds any other month. The Applicant contends that the likely cause of this disproportionate increase in water usage is due to a broken pipe. He said that he had formed that view after he had engaged a plumber to investigate why the water consumption was so high. He recounted that after the plumber turned off all taps, the water meter was still *ticking away*. He said that, according to the plumber, this was indicative of there being a broken pipe.

39. The plumber engaged by the Applicant was not called to give evidence. Nevertheless, I asked the Applicant whether the Tribunal should contact the plumber by telephone so that he could give his evidence remotely. The Applicant indicated that he did not have the plumber's telephone number. I asked whether I should stand the matter down to allow the Applicant time to ascertain the plumber's telephone number. The Applicant responded that he did not wish to do that because he had paid the plumber in cash and did not want to get the plumber into trouble with his employer.

40. However, after the hearing on 11 May 2017, the Applicant filed a statutory declaration from Anthony Phan, who declared that he visited the property on the instructions of the Applicant to investigate why the water usage was disproportionately high. In that statutory declaration, Mr Phan declared:

> … in my opinion there is no major leak above ground so it will have to be in the ground.

41. As indicated, Mr Phan was not called to give evidence nor was any opportunity afforded to the Respondents to file any material in reply or cross-examine him. This is critical because there may have been other plausible explanations as to why water usage was disproportionately high. For example, excessive watering or inadvertently leaving a tap on. Without the benefit of material in reply or cross-examination, these other explanations could not be explored with Mr Phan. Consequently, I place little weight on that statutory declaration.

42. In any event, Mr O'Connor submitted that, even if there was a broken water pipe, that did not exonerate the Applicant from having to pay the *Yarra Valley Water* account, although it may provide some basis for the Applicant to seek reimbursement from that water authority.

43. In my view, the obligation to pay the *Yarra Valley Water* account rested with the Applicant, notwithstanding that the amount charged by the water authority may ultimately prove to be incorrect. Further, I note that the invoice dated 4 April 2017 included an amount from a previous invoice of $1,342.42, which had also not been paid.

44. In those circumstances, I find that the Applicant has failed to comply with this aspect of the 30 March orders.

CONCLUSION

45. Having regard to my findings set out above, I determine that the Applicant has failed to comply with Order 2 of the orders dated 30 March 2017. In forming that view, I am mindful of the fact that Order 2 contains an anomaly. In particular, on one hand, the order requires that the Applicant pay outstanding rent, water charges and costs by 20 April 2017, while on the other hand, the order also states that the $4,050 costs order was to be paid by 14 April 2017. In that respect, I read the order down in favour of the Applicant such that compliance with all three components was to have been completed by 20 April 2017 and not 14 April 2017. However, that does not change the outcome of this proceeding, given my findings set out above.

46. On any version, whether it be 20 April, 14 April or 10 May 2017, not all of the rent, water charges or the costs order have been paid. Accordingly, I will order that the foreshadowed self-executing order, as described in Order 5 dated 30 March 2017, and which contemplates that the Applicant's application be dismissed and the Respondents' counterclaim be determined in favour of the Respondents (on the question of liability), be executed.

47. There will be liberty given to the Respondents to apply for the hearing of their counterclaim (on the question of quantum) and any other consequential orders, should they choose to proceed.

SENIOR MEMBER E. RIEGLER