VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

VCAT REFERENCE NO. D401/2004

DOMESTIC BUILDING LIST

CATCHWORDS

Domestic building – judgment on Counterclaim – position of insurer – quantum reserved.

APPLICANT	Radan Constructions Pty Ltd (ACN 007 070 135)
FIRST RESPONDENT	Palladium Developments Pty Ltd (ACN 094 701 774)
FIRST JOINED PARTY	Australian International Insurance Ltd.
SECOND JOINED PARTY	Tomo Perkovic
WHERE HELD	Melbourne
BEFORE	Senior Member D. Cremean
HEARING TYPE	Directions Hearing
DATE OF HEARING	29 September 2006
DATE OF ORDER	29 September 2006
CITATION	Radan Constructions v Palladium Developments (Domestic Building) [2006] VCAT 1974

ORDER

1. I am satisfied, under ss78(1) and (2)(b)(i) of the *Victorian Civil and Administrative Tribunal Act* 1998, that I may proceed to determine the First Respondent's Counterclaim in favour of the First Respondent.
2. Having regard again to the provisions of s78(2)(b)(i), I consider, it appropriate, having regard to ss97, 98 and 102 of the Act, that I should order that the amount for which judgment is entered under paragraph 1 of these orders be reserved for further hearing on the question of quantum.
3. I order the Applicant and the Second Joined Party to pay interest and the costs of the claim under s78(2)(c) of the Act but I reserve the amount of such costs pending the outcome of the hearing referred to in paragraph 2.
4. **I direct that this matter be listed for further directions before me on 16 November 2006 at 9.30 a.m. for the purpose of making such directions**

or orders as may be appropriate with regard to its future conduct including a reference of the issue of quantum to mediation or to compulsory conference (as between the First Respondent and the First Joined Party).

5. I reserve the costs of and incidental to the hearing on 28 September 2006 for further argument at such directions hearing

SENIOR MEMBER D. CREMEAN

APPEARANCES:

For the Applicant	No appearance
For the First Respondent	Mr P. Duggan of Counsel
For the First Joined Party	Mr A. Archer of Counsel
For the Second Joined Party	No appearance

REASONS

1 I provided written orders in this matter on 29 September 2006. These, now, are my Reasons for Decision.

2 The application of the Applicant in this matter was dismissed by Senior Member Walker on 25 September 2006 following the Applicant's failure to attend or be represented at a Compulsory Conference and to comply with directions. I consider his decision to do so was fully justified.

3 On 3 August 2006 this matter was set aside for hearing. The Deputy President had intimated that application should be made under s78 of the *Victorian Civil and Administrative Tribunal Act* 1998. That, in fact, is what has occurred. The Applicant's application, having been dismissed, the First Respondent, by application dated 16 August 2006, applies for orders that the Counterclaim be determined in its favour. It applies also for interest and costs against both the Applicant and the Second Joined Party.

4 The application of the First Respondent is opposed by the insurer who is the First Joined Party.

5 The First Respondent and the First Joined Party filed detailed submissions in this matter and were each represented by Counsel at the hearing at which they addressed the various matters in issue.

6 Section 98 of the 1998 Act provides as follows:

> (1) This section applies if the Tribunal believes that a party to a proceeding is conducting the proceeding in a way that unnecessarily disadvantages another party to the proceeding by conduct such as—
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> (a) failing to comply with an order or direction of the Tribunal without reasonable excuse; or
>
> (b) failing to comply with this Act, the regulations, the rules or an enabling enactment; or
>
> (c) asking for an adjournment as a result of (a) or (b); or
>
> (d) causing an adjournment; or
>
> (e) attempting to deceive another party or the Tribunal; or
>
> (f) vexatiously conducting the proceeding; or
>
> (g) failing to attend mediation or the hearing of the proceeding.
>
> (2) If this section applies, the Tribunal may—
>
> (a) order that the proceeding be dismissed or struck out, if the party causing the disadvantage is the applicant; or
>
> (b) if the party causing the disadvantage is not the applicant—
>
> (i) determine the proceeding in favour of the applicant and make any appropriate orders; or

(ii) order that the party causing the disadvantage be struck out of the proceeding;

(c) make an order for costs under section 109.

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

7 I must indicate that I entirely agree with the intimation of the learned Deputy President. I consider there are proper grounds for me to have the "belief" referred to in s78(1). In particular I rely upon s78(1)(a) or s78(1)(b). The Applicant has quite evidently failed to participate in these proceedings for some reason, and for some time, and has failed to comply with orders or directions. No offer has been made of a reasonable excuse for doing so. The Applicant appears simply to have absented itself and ignored the Tribunal proceedings. I, therefore, have the belief which is required.

8 In the circumstances, it seems to me that the proper vehicle for the First Respondent is to make application under s78, which it has done. I cannot see that either s75 or s76 is more properly applicable at all.

9 The First Respondent moves under s78(2((b)(i) for a determination in its favour on the Counterclaim. This is opposed by the First Joined Party – although I must make it clear that, at one point, I thought this was a point which it was conceding. Be that as it may, opposition was expressed, as I would understand it, on the ground that, to allow the First Respondent to "enter judgment", as it were, on the Counterclaim would be to affect the First Joined Party's vital interests in a number of ways contrary to the Act.

10 I cannot agree with the First Joined Party's analysis. Orders are sought under s78(2)(b)(i) against the Applicant, not the First Joined Party. Indeed, in some respects, there is even a serious question whether the First Joined Party has any standing at all to oppose the making of those orders – given that they are not orders which are sought against it. If, however, I assume it does have standing to express opposition then it seems to me that the substance of its opposition derives from insurance law, in particular the principle of subrogation. That is, that it is the insurer and, ultimately, its rights may be affected if it is called upon to indemnify. I cannot see, however, that this should stand as a sufficient ground to disentitle the First Respondent to seek orders it may properly seek under a legislative measure. The provision in s78(2)(b)(i) exists plainly in circumstances of this nature. I consider that if I refrain from exercising the discretion to "determine" the Counterclaim on the ground advanced by the First Joined Party then I am allowing extraneous considerations (which may never eventuate) to enter into the inquiry.

11 The discretion under s78(2)(b)(i) having arisen for exercise I consider it would be improper <u>not</u> to proceed as submitted by the First Respondent. Further, considering the terms of s97 of the Act, I would think it would be

"unfair", and possibly productive of injustice, if I were not to accede to the submission of the First Respondent and enter judgment in its favour. If this happens to have deleterious consequences for the First Joined Party at some point into the future then that will happen to have arisen because the First Joined Party is an insurer obliged to abide by the law of subrogation or other applicable principle arising from its obligation to indemnify as an insurer.

12 The First Joined Party referred me to the decision in *Bell Corp Victoria Pty Ltd v Stephenson* [2003] VSC 255 and argued that, before proceeding under s78(2)(b)(i), I should provide for self-executing orders directed to the Applicant. That case and this one are quite different. I doubt that the First Joined Party can, as it were, call for self-executing orders to be directed to the Applicant. But, if I assume it can, then it seems to me, given the history of marked non-activity by the Applicant, that it would be an exercise in futility to impose self executing orders. I learn, in any event, that steps may be under way to liquidate the Applicant which seems to make this point even plainer. Moreover, the Applicant has not even seen fit to pursue its own proceeding (which I note has been dismissed), so why, I might ask, should I expect that it will comply with self-executing orders made by me?

13 In my view, the proper course is to determine the Counterclaim in favour of the First Respondent and to, in effect, enter judgment accordingly. I do so, acting principally under s78(2)(b)(i).

14 That provision says I may make any "appropriate" orders having done so. There is considerable merit in the submissions of the First Joined Party that it will have been deprived of natural justice if it is not heard on the question of quantum. I make the assumption that it has standing to be able to argue this. Upon the basis of that assumption I do not consider it would be fair (having regard to ss97 and 98 of the Act) to determine the quantum issue at this point without having given the First Joined Party the opportunity of input into the question. If, however, I am wrong in saying this – and I do not consider I am – I would not in any event be prepared to determine the Counterclaim and enter judgment for any particular amount on the present state of the materials. I consider I am entitled to inform myself on any matter as I see fit (s98(1)(c)) and I regard it as proper to inform myself on the First Joined Party's position on quantum.

15 I consider then that under the power to make "appropriate" orders I can adjourn off the determination of the exact amount for quantum. That, it seems to me, is in accord with s97. The situation is different to that in *Koromilas v HGF Ltd* [2005] VCAT 135 – a matter which I determined and which I mentioned to the parties in this case – where the insurer sought to be heard <u>after</u> judgment was entered. Here the insurer sought to be heard in opposition to judgment being entered in the first place and at the relevant time. Had the case fallen within the facts presented in *Koromilas*, I would

have had no hesitation in reaching the same conclusion I did on that occasion.

16 Because I am not in a position to determine the exact amount for quantum I am unable to make orders for costs against the Applicant and Second Joined Party except to say that I do order them to pay the costs of the First Respondent but I reserve for further determination the details of the orders I should make. In ordering them to pay costs I act under s78(2)(c) of the Act which draws in s109. I am satisfied that, out of the inactivity of the Applicant and the Second Joined Party, the conditions for an order for costs under s109 are met. But I reserve what exactly it is I should be ordering.

17 I also reserve the costs of this day as between the First Respondent and the First Joined Party. I need to hear further argument from the parties having regard to the orders I have made.

18 It is appropriate that I refer this matter to a directions hearing. At the same, I will give consideration to referring the question of quantum to mediation or to a compulsory conference.

19 Finally, I should note, I am quite satisfied that the Applicant and Second Joined Party knew of the hearing being conducted on 28 September 2006 but have chosen, once again, not to appear or to be represented.

20 I so order.

SENIOR MEMBER D. CREMEAN