VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

OWNERS CORPORATIONS LIST VCAT REFERENCE NO. OC2779/2014

CATCHWORDS

Application by respondent for review of Tribunal's orders; multiple applications by respondent; continual failure by respondent to appear or be represented at hearings; assessment of costs

APPLICANT	Owners Corporation RP002044
RESPONDENT	Jo-Anne Laura Finch
WHERE HELD	Melbourne
BEFORE	BW Thomas, Member
HEARING TYPE	Hearing
DATE OF HEARING	18 May 2018
DATE OF ORDER AND WRITTEN REASONS	31 July 2018
CITATION	Owners Corporation RP002044 v Finch (Owners Corporation) [2018] VCAT 1215

ORDER

1. The respondent's application for review of the Tribunal's Order of 30 May 2018 is dismissed. The Order dated 30 May 2017 is confirmed.

2. Jo-Anne Laura Finch is to pay the costs of Owners Corporation RP0022044 fixed at $4,500.00.

BW Thomas
Member

APPEARANCES:

For applicant for review	No appearance
For respondent for review	Ms D Wilson, solicitor

REASONS

BACKGROUND

1 On 18 May 2018, I heard Ms Finch's application for a review of the Tribunal's Order of 30 May 2017. Ms Finch did not appear and was not represented at the hearing. Her application was dismissed.

2 By an email to the Tribunal dated 30 May 2018, the date Ms Finch received the Tribunal's Order of 18 May 2018, she requested written reasons for that Order. These are those reasons.

CHRONOLOGY

3 I set out below the chronology of this proceeding –

- 6 February 2015 — There being no appearance by or on behalf of Ms Finch at the hearing of the Owners Corporation's claim for unpaid levies, Ms Finch was ordered to pay the applicant the sum of $2,249.12;
- 27 March 2015 — The order of 6 February 2015 was registered in the Magistrates Court;
- 22 February 2017 — Proceeding OC245/2017 was filed with the Tribunal by Ms Finch. This proceeding appeared to be an application to review the order of 6 February 2015;
- 12 April 2017 — It was ordered that proceeding OC245/2017 was taken as an application under s 120 for review of the order dated 6 February 2015 (the **First Application for Review**);
- 30 May 2017 — The First Application for Review was dismissed by reason of the non-appearance by or behalf of Ms Finch. She was ordered to pay the applicant's costs fixed at $400.00;
- 3 November 2017 — A further Application for Review was filed by Ms Finch seeking a review of the order of 30 May 2017;
- 12 January 2018 — It was ordered that the application filed on 3 November 2017 was to be taken as an application under s124 of the *Victorian Civil and Administrative Act 1998* for leave to bring a second review of the Order of 30 May 2017 (the **Second Application for Review**) The application was listed for hearing on 14 February 2018;

- 14 February 2018 — Ms Finch appeared in person and her application for leave to make a second application for review was adjourned to 21 March 2018;
- 15 February 2018 — Ms Finch's "amended" application for review of the order of 30 May 2017 was received by the Tribunal;
- 21 March 2018 — It was ordered that the Second Application for Review be amended to an application for review of the Order of 30 May 2017. By consent, the application was granted and the Order dated 30 May 2017 was suspended pending a rehearing on a date to be fixed not before 15 May 2018. The application was then listed for hearing at 9.30 am on 18 May 2018;
- 15 May 2018 — Ms Finch's application for an injunction to restrain Ms Diane Wilson from representing the applicant was dismissed, and she was ordered to pay the applicant's costs fixed at $600.00. The hearing of her application for review and rehearing listed for 18 May 2018 was confirmed;
- 18 May 2018 — Ms Finch's application for a review and rehearing of the Order dated 30 May 2017 was dismissed by reason of her failure to attend or be represented. She was ordered to pay the applicant's costs fixed at $4,500.00;

  At 12:24 pm, Ms Finch's email attaching an Application for an Adjournment dated 17 May 2018 was received by the Tribunal;
- 29 May 2018 — Ms Finch's further Application to Review the Order of 18 May 2018 was received by the Tribunal.

The *Victorian Civil and Administrative Act 1998* (the Act)

4 Section 117(2) provides that if the Tribunal gives oral reasons for an order, within fourteen days, a party may request the Tribunal to give written reasons.

5 Rule 14.24 (2) of the Victorian Civil and Administrative Act Rules 2005 provides that a second or subsequent application for review of an order may only be made with the leave of the Tribunal.

6 Section 120(4) provides that the Tribunal may hear and determine an application for review of an order if it is satisfied that –

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

b) the matters specified in subsection (4A) exist.

7 The matters specified in subsection (4A) 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.

FINDINGS

8 The Tribunal's order of 18 May 2018 was forwarded to Ms Finch by email on 30 May 2018. Fourteen days later, Ms Finch requested written reasons for the order by email on 30 May 2018. I therefore find that she is entitled under s117(2) to written reasons.

9 The Chronology above shows that Ms Finch has filed two, and arguably three, applications for review of the Order of 30 May 2017. The First Application for Review was dismissed on 30 May 2017, by reason of her failure to attend or be represented at the hearing. Her Second Application for Review was listed for hearing on 18 May 2018. Ms Finch again failed to attend or be represented at that hearing and, without leave being sought under Rule 14.24 (2), her application was dismissed.

10 Ms Finch's Second and Third Applications for Review appear to be identical as they both seek to set aside the Order of 30 May 2017. As regards her inability to attend the hearing on 30 May 2017 for medical reasons, both applications rely on a certificate of Dr Daniel Lewis, rheumatologist, dated 26 May 2017 and stating –

> This is to certify that I examined Ms Jo-Anne Finch on 26 May, 2017. In my opinion, she will be unfit for her normal work and to attend any appointments including court attendances from 26 May, 2017 until 2 June, 2017.

11 Had Ms Finch been represented at the hearing on 18 May 2018 and sought an adjournment, I would have found this medical certificate unacceptable as it does not identify the illness or condition from which Ms Finch suffers, how that condition would render her unfit to attend a VCAT hearing and was dated almost 12 months earlier.

12 Furthermore, one of the grounds in Ms Finch's Application for an Adjournment dated 17 May 2018, received at 12:24 pm on 18 May 2018 after her Application for Review had been dismissed, was headed "Medical Evidence (Health Related Issues). Attached to that Application for an Adjournment was a redacted letter from Austin Health to Ms Finch dated 27 April 2018. The letter refers to a referral received from her Referring Doctor and states –

….. Your referral has been assessed and we have placed you on the (redacted) Clinic waiting list. The current waiting time for appointments in this clinic is approximately 1 to 3 months.

We will contact you when an appointment becomes available to arrange a suitable time and provide you with other information you will need for your visit.

13 This letter makes no reference to the nature of Ms Finch's medical condition or that she would be unable to attend the hearing on 18 May 2018. Accordingly, had this report been before me on 18 May 2018, I would have dismissed her application on this ground also.

14 Ms Finch's Second and Third Applications for Review appear to be identical as they both seek to set aside the Order of 30 May 2017 and, with reference to her having a reasonable case to argue, state –

1. The member did not acknowledge, nor consider, my serious and debilitating severe sciatic back nerve medical issue.
2. The member did not acknowledge, nor consider, the medical excusal of a Specialist Doctor provided to VCAT verifying I was unable to attend pursuant to the Doctors instructions and the above-mentioned medical issue.
3. The member did not consider I had contacted the respondent via email in the morning of 25 May 2017 (copying in the VCAT), seeking an adjournment of the hearing and advising the legal representative that had previously acted could not act by way of conflict (as raised below), however she had refused to cooperate and did not respond to me herself, not until four (4) days later as below.
4. The member did not consider that the respondent had advised me via email dated 29 May 2017 (four (4) days later), and via a lawyer, and being a different lawyer, who was unknown to me and did not act for the respondent in any previous hearings or this hearing, advising she (being the respondent) had no knowledge of the hearing and thus inferring she would not be attending the hearing, and at no time confirmed that she was.
5. The member did not consider that the respondent should have attended the hearing herself, if she were to attend, and did not need a lawyer (as is commonly known Body Corporate's can attend to their own matters as other laypeople ordinarily do at the Tribunal.
6. The member did not consider the respondent that had hired a lawyer at the last minute, who did not advise me until the actual day of the hearing and not long before it, she would be attending to represent the respondent, and therefore not giving me due notice of such attendance, and the attendance of a lawyer, thus ambushing me and diminishing my rights.

7. The member did not permit my right to be heard upon a restraint application of the lawyer which I had previously raised, due to, however not limited to; a severe conflict of interest, prior to a decision being made in the matter, which must be heard and determined, before any other matters can be heard and determined, pursuant to law.

8. The member allowed the legal representative to act notwithstanding the above, including that I had notified the VCAT she was conflicted and pursuant to case law, she could not be permitted to act.

9. The member ordered legal costs for the respondent's lawyer, which may have been a misleading of the member by the lawyer, however VCAT cannot order such costs.

15 I consider that these matters simply go to the manner in which the hearing on 30 May 2017 was conducted. Had Ms Finch appeared or been represented at the hearing on 18 May 2018, I would have dismissed her application on the ground that I considered that she did not have a reasonable case to argue in regard to the subject matter of the order of 30 May 2017.

COSTS

16 Ms Wilson sought an order that Ms Finch pay the costs of the Owners Corporation in the proceeding. The application for costs falls to be determined in accordance with s109 of the Act. S109(1) and (2) provide that the starting point is that each party is to bear their own costs, but that the Tribunal may order a party to pay all or a specified part of the costs of another party.

17 S109(3) lists the factors to which the Tribunal must have regard in considering whether it would be fair to make an order for costs in favour of a party against another party. I consider that ss3(b) and (c) are relevant in considering the Owners Corporation's application for costs.

18 Ss3(b) provides that a relevant factor is –

> …whether a party has been responsible for prolonging unreasonably the time taken to complete the proceeding.

19 The Chronology set out above shows that between 22 February 2017 and 29 May 2018 Ms Finch has filed three Applications for Review. She appeared only once – on 14 February 2018 when her second Application for Review was adjourned to 21 March 2018. Due to adjournments sought by Ms Finch, the Application was not ultimately heard until 18 May 2018. Her various applications for an adjournment were not made until just before a hearing, and on grounds that did not address the requirements of s120 and Rule 4.24. I therefore consider that she has unreasonably prolonged the time taken to complete the proceeding.

20 Ss3(c) is also a relevant factor and provides that –

> the relevant strength of the claims made by each of the parties, including whether a party has made a claim that has no tenable basis in fact or law.

21 For the reasons set out in paragraphs 11-15 of my Findings above, I consider that Ms Finch's claim had no tenable basis in fact or law.

22 I am therefore persuaded that in the circumstances of this proceeding it would be fair to make and order for costs in favour of the Owners Corporation.

23 As to the quantum of costs, Ms Wilson sought the sum of $4,500.00 plus travelling time. I disallowed the claim for travelling time. She provided a break-up of the sum of $4,500.00 which, as an experienced litigation lawyer, I accepted as reasonable and in accordance with the County Court Scale on a standard basis.

BW Thomas
Member