VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

DOMESTIC BUILDING LIST VCAT REFERENCE NO. D114/2003

CATCHWORDS

Setting aside order made in absence of party – relevant considerations

APPLICANT	Antony John Pratley t/as Pratley Constructions
RESPONDENTS	Brian Racine, Lynette Racine
WHERE HELD	Melbourne
BEFORE	Senior Member R. Walker
HEARING TYPE	Section 120 – Application to set aside order
DATE OF HEARING	27 March 2006
DATE OF ORDER	18 April 2006

[2006] VCAT 638

ORDER

1 Pursuant to s. 120 of the Victorian Civil and Administrative Tribunal Act 1995, the order by Registrar Jacobs made on 23 January 2006 is set aside.

2 Order the Applicant to pay the costs of the Respondents thrown away by reason of this order including the costs of this application, such costs to be assessed if not agreed by the registrar at the re-hearing in accordance with Scale "D" of the County Court Scale.

3 The Registrar may give such directions as he sees fit as to the date and conduct of the assessment.

4 Direct the Respondent to comply with the Tribunal's order of 12 October 2005 at least 14 days before the date fixed for the assessment.

SENIOR MEMBER R. WALKER

APPEARANCES:

For the Applicant	Ms M O'Sullivan of Counsel
For the Respondents	Mr B Reid of Counsel

REASONS FOR DECISION

The application

1 This is an application by the Applicant pursuant to s120 of the ***Victorian Civil and Administrative Tribunal Act 1998*** ("the Act") to set aside an order of the Registrar, Mr Jacobs, fixing the costs of the Respondents of the proceeding following an assessment of costs. The application to set aside the order came before me for hearing on 27 March 2006. I heard submissions from Miss M O'Sullivan of Counsel for the Applicant and from Mr B Reid of Counsel for the Respondents. Both Counsel made lengthy and helpful submissions and provided me with copies of a number of authorities. I reserve my decision.

2 The principal proceeding was determined in favour of the Respondents by Senior Member Young on 18 March 2005 and an order for the costs of the application was made in their favour. By that order, one part of the Respondents' costs was to be assessed by the principal registrar on Scale "D" of the County Court Scale and the rest were to be assessed on an indemnity basis.

The order for costs

3 A taxable Bill of Costs was prepared and served on the Applicant on 15 August 2005 and the registrar fixed 12 October 2005 as the date for the taxation. On that day, the Applicant attended in person but he had not filed any objections to the Bill of Costs and the matter was adjourned to 3 November 2005 with costs against the Applicant.

4 The disbursements sought in the taxable bill were very large indeed and the greater part of these was for experts' reports. It was perhaps for this reason that, on 12 October 2005, the Tribunal ordered the Respondents to file and serve on or before 31 October 2005 copies of all accounts of Resi-Check, Mr Cheong and W & M Plumbing Service together with supporting documentation, including details of such matters as the names of the personnel who worked on the matter, their qualifications and hourly charge out rates. The Respondent was further to produce at the assessment of costs relevant time sheets and working sheets of Resi-Check, Mr Cheong and W & M Plumbing Service, if available, and any

other documentation on which the Respondent intended to rely on at the assessment.

5 It is not disputed that the Respondents failed to comply with the first part of this order although it appears that they had certain documents available for presentation to the Applicant at the taxation.

6 A notice of objection to the bill of costs was filed and served by the Applicant on 31 October 2005.

7 The hearing was further adjourned to 30 November 2005 to allow the issue of reserved costs to be dealt with by Senior Member Young and, after further delays it was ultimately fixed for hearing on 23 January 2006.

8 When the assessment finally came on for hearing on 23 January 2006, the Applicant did not appear and after hearing from the representatives of the Respondents the Registrar assessed and allowed the costs at $174,651.26. The assessment was expressed in the form of an order signed by the Registrar and dated 1 February 2006.

The application for review

9 On 12 February 2006 the Tribunal received by facsimile an application to set aside the order together with a supporting affidavit of the Applicant. Directions were subsequently given by the Tribunal for the filing of material. Pursuant to those directions an affidavit was filed on behalf of the Respondents and a further affidavit was filed on behalf of the Applicant.

The evidence

10 In his original affidavit the Applicant says that:

(a) he instructed Hausler and Associates, solicitors to draw a list of objections and to that he "believed" that they had agreed to appear on his behalf of the taxation.

(b) on 20 December 2005 he received a notice of the taxation to be held on 23 January 2006 and on the same day he received it he telephoned *"what I thought was Hausler and Associates"* and spoke to *"a lady there"*. He said that he informed her of the new hearing date for the taxation and confirmed that they would be appearing for him.

(c) he received notification from the Tribunal in February that the Bill of Costs had been taxed. Upon receiving this notification he telephoned Hausler and Associates and a Miss Wirth of that firm said that she was unaware that a date for the taxation had been set down.

11 In his later affidavit of 23 March he says that he engaged Hausler and Associates to represent him in October 2005 and that on 20 January 2006 his wife telephoned the office of that firm and spoke to someone in respect to the taxation hearing scheduled for 23 January. He says that she asked whether everything was *"okay for the hearing"* and the person to whom she spoke said that the hearing was noted in the diary and that everything was fine. This evidence is hearsay but I can receive hearsay.

12 In opposition to the application the Respondents' solicitor, Mr Smith, swore an affidavit acknowledging a failure to comply with the registrar's direction of 12 October. He suggested that it was due to a delay in obtaining information from Resi-Check, which was not received until 17 November 2005, and in the meantime the Applicant filed and served Notice of Objection to the Bill of Costs. The rest of the affidavit deals with what took place at the taxation.

Submissions

13 In support of the application to set aside judgement Ms O'Sullivan submitted first, that the order encapsulating the assessment by the registrar was an "order" within the meaning of s120. I agree. The assessment was carried out on notice to the parties, the registrar had regard to written material provided by both parties and the taxation hearing was convened in order to consider that material and hear oral submissions from both parties. Following this process, the registrar made a determination which was expressed in the form of an order.

14 The assessment of costs by the registrar is dealt with s111 of the Act which states as follows:

> *"(1) If the Tribunal makes an order for costs, the Tribunal may fix the amount of costs itself or order that costs be assessed or settled by the principal registrar.*
>
> *(2) An assessment of costs by the principal registrar is to be taken to be an assessment of costs by the Tribunal."*

15 Section 120 of the Act provides as follows:

"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 sub-section (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 the applicant had a reasonable excuse for not attending or being represented at the hearing; and

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

16 In the case of ***Alesci v Salisbury*** [2002] VSC 475, Bongiorno J said (at para 6):

> *"Section 120 is a section which is to be construed liberally. It would be difficult, I think, to put forward a case where a blameless not attending defendant would not be entitled to a review of the order made in his or her absence. As I have said, Ms Burdon-Smith, in her findings of fact, exonerated the plaintiff. To then proceed to say that the entrusting of his legal representative with the conduct of the matter did not constitute a reasonable excuse, in my opinion was not sustainable. Saying that a conclusion is not sustainable is equivalent to saying that it was a finding or a conclusion which was not open to her to make. That such constitutes an error of law is beyond argument"*

15. In ***Wahr v the Australian Broadcasting Authority*** [2000] VCAT 1080, Mckenzie DP said:

> *"Section 120 is a provision which operates for the benefit of a party who has not been represented at, and has not appeared, at a hearing. In my view, and taking into account the scheme and objectives of the VCAT Act it should be construed liberally. In my view it will apply not only to hearings in person but to matters "heard", on the papers. That is, by agreement between the parties, under s.100, sub-s2 of the VCAT Act".*

16. Reference was also made to **Taxis *R Us Pty Ltd v Concord Gem Pty Ltd* [**2003] VCAT 1165 at para 9, ***Gosbell v Radovanic*** [2005] VCAT 1594.

17. In opposing the application Mr Reid submitted that s.120 only applies to orders made at a hearing. He said that the assessment of costs is not a hearing for the purposes of s.120. It is an assessment pursuant to s.111.

18. Mr Reid pointed to the definition of a *"proceeding"* in the definition section of the Act and also referred to the comment of Pizer in ***"Annotated VCAT Act"*** second edition at para 4300 where the learned author expressed the opinion that a compulsory conference was probably not a hearing.

19 Whatever may be the position in regard to a compulsory conference, where the parties are brought together in an effort to resolve the dispute, it seems to me that an assessment where the parties provide written material and oral submissions which are considered by the Tribunal resulting in a order that one pay another a particular sum must be a hearing. Indeed, Deputy President Mackenzie's comments in ***Wahr*** referred to above would suggest that the determination of the rights of parties on the papers would amount to a hearing. I respectfully agree.

19. Mr Reid pointed to sub-section (3) and the following sub-sections in s.111 which contemplate a situation where a party does not attend the assessment and the registrar adjourns it for that reason. In such circumstances, the registrar is empowered by the section to award costs against the non-attending party in the circumstances set out. He submitted that, as s.111 specifically addresses the non-attendance at a cost assessment, the assessment of costs cannot be a hearing. I do not think that follows. He also submitted that the registrar had a discretion whether or not to adjourn the assessment if a party did not appear and that to allow a re-hearing would be to interfere with the exercise of that discretion. I do not believe that follows at all. In any case, the same argument would apply to any other hearing where a party did not appear. The Tribunal member would always have a discretion as to whether or not to proceed and if he did so, s120 contemplates that the non attending party will have an opportunity to apply for a re-hearing in an appropriate case.

20. Ms O'Sullivan submitted that the Applicant had demonstrated that he had a reasonable excuse for not attending the assessment, namely, that he had engaged a solicitor to represent him and the solicitor had not attended. Mr Reid said that I should reject this suggestion on the ground that the solicitor in question has not been called to verify the alleged retainer, no documents such as would be required to be provided by a solicitor retained to appear on behalf of the client had been produced to corroborate the existence of a retainer. He submitted that I should infer that the evidence these documents might have afforded and the evidence that could have been given by the solicitors, Hausler & Associates, would not have assisted the Applicant. In regard to the documents that have not been produced there is no evidence that these exist. As to the failure to call the solicitor, the Applicant said in his affidavit that, upon learning of the order he telephoned the office of Hausler & Associates afterwards and the woman having charge of the matter indicated that she was not aware that the matter had been listed. It does not appear that she would have been able to given any satisfactory evidence. Certainly, that evidence would not have assisted the Applicant.

21. Mr Reid also pointed out that the evidence as to the conversation alleged to have occurred between the Applicant's wife and an unidentified person from Hausler & Associates was hearsay. In fact, he said it was hearsay upon hearsay but I think it is only hearsay because the information was provided to him by a party to the conversation. He said no explanation for failure to call the Applicant's wife had been given. That may be so, but the material was all prepared by the Applicant who is a lay person.

22. Mr Reid pointed out that in a number of cases to which reference was made in argument where the "reasonable excuse" was a failure by a solicitor who had been instructed to appear, an affidavit was provided by the solicitor to prove the fact. It would obviously be better to have such an affidavit but the real question is not the form of the proof, but what the evidence that I have received demonstrates. The Applicant has sworn that he engaged the solicitors to represent him and that evidence is not so inherently improbable that I should reject it. There is no contrary evidence so I must find that that is the case.

23. In ***Avonwood Homes v Milodanovic*** [2005] VCAT 1297, I said as to the requirement for there being "a reasonable excuse"

> *"I accept that, in determining what is a reasonable excuse, the Tribunal should adopt a liberal approach; where for example the failure to attend is due to oversight or accident or the reliance upon one's solicitors, but these situations are very different to a situation where the failure to attend arises from the Respondents hiding themselves from the Applicant and the Tribunal"*.

23. Although the Applicant's evidence could have been much better, since there is no contrary evidence I find that the reason for the non attendance by the Applicant at the assessment was that he had engaged a solicitor to attend on his behalf and that due to some error the solicitor did not attend.

24. Ms O'Sullivan pointed out that the documents required to have been served by the Respondents were not served and that the very high disbursements which form the bulk of the bill have not been able to be tested by the Applicant. She said that very little was taxed off and it is reasonable to suppose that, if the matter is reheard, the bill will be reduced by a greater sum. I cannot speculate on what the result of a rehearing will be, but the essence of granting a party the right to be heard is that that party will be entitled to put and argue his case and have an opportunity to have the matters he wants to put taken into account. It seems to me that there is a purpose to be served by setting aside this order namely, the Applicant will have an opportunity to put his case. In doing so, he will have an opportunity to test the evidence as to the very high disbursements claimed.

24. In setting aside the order, it should be done on terms that the Applicant pay the costs of the Respondents thrown away by reason of this order including the costs of this application. To avoid yet another assessment of costs I shall direct that those costs be assessed if not agreed by the registrar at the re- hearing. I shall also direct the Respondent to comply with the order of 12 October 2005.

SENIOR MEMBER R. WALKER