VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

DOMESTIC BUILDING LIST

VCAT REFERENCE NO. D341/2004

CATCHWORDS

Application for rehearing – s. 120 under Victorian Civil and Administrative Tribunal Act 1998 to vary or revoke order – requirement for reasonable excuse – liberal approach required – Respondents returning mail – unlikely that none of the mail was received – absence of reasonable excuse not balanced by merits of defence

[2005] VCAT 1297

APPLICANT	Avonwood Homes Pty Ltd (In Liquidation) (ACN 056 308 420)
FIRST RESPONDENT	Jozel Milodanovic
SECOND RESPONDENT	Katharin Milodanovic
WHERE HELD	Melbourne
BEFORE	Senior Member R Walker
HEARING TYPE	Application under s.120 for Rehearing
DATE OF HEARING	6 July 2005
DATE OF ORDER	8 July 2005

ORDER

1. The application pursuant to s. 120 of the Victorian Civil and Administrative Tribunal Act 1998 to vary or revoke the Tribunal's order of 15 September 2004 is dismissed.

2. Costs reserved.

SENIOR MEMBER ROHAN WALKER

APPEARANCES:

For Applicant	Mr C. Harrison of Counsel
For Respondents	On 24 March 2005: In person On 6 July 2005: Mr M. Champion of Counsel

REASONS FOR DECISION

The application

1. This is an application pursuant to s.120 of the ***Victorian Civil and Administrative Tribunal Act 1998*** to set aside an order of the tribunal made at an undefended hearing on 15 September 2004 that the Respondents pay to the Applicant the sum of $68,015.95. The Respondents were not present at the hearing and say they only discovered it had been made when a Sheriff's officer visited their home on 17 November 2004. The application is opposed by the Applicant.

2. The Application came before me for hearing on 24 March 2005. Mr Harrison of Counsel represented the Applicant and the Respondents attended in person. During the course of his cross-examination, the First Respondent applied for an adjournment to enable him to seek legal representation. The adjournment was granted with costs ordered to be paid by the First Respondent. After several further adjournments the matter finally came back before me on 6 July 2005. Mr Harrison again represented the Applicant and the Respondents were represented by Mr Champion of Counsel.

Background

3. The Applicant is a former builder of dwelling houses but it is now in liquidation. The Respondents and the Applicant entered into a building contract on 30 September 1999 to build a dwelling house on the Respondents' land at 4 Ashbrook Close Rowville. The Applicant went into provisional liquidation on 5 May 2000 but construction appears to have been continued by the company in provisional liquidation. The Applicant claims that the frame stage was reached although the Respondents claim that the frame was never passed by the building inspector. The property was then accidentally damaged and the Respondents received $74,500 from an insurance claim. They then sought quotations from other builders to repair the damage and complete the house. These were in excess of the amount they had received from the insurer and so they sold the partially completed house in its damaged condition to a third party for a price of $175,000. When one adds the value of the land to the amount the Respondents paid to the Applicant and compares that with the total of the insurance payout and the proceeds of sale, it would seem that the Respondents made a substantial profit, although this is the subject of dispute.

4. The Applicant claims that a total of $68,015.95 was owed to it with respect to the construction of the house which the Respondents have never paid. Demands were sent to them at their address at 12 Gibson Street, Hallam but no payment was made. These proceedings were issued by the Applicant on 28 May 2004.

5. Until at least September 2004 both Respondents lived at 12 Gibson Street, Hallam. It is a corner block, the other street being Thomas Court. On 23 May 2002, at the Respondents' request, the council changed the address of the property to 8 Thomas Court Hallam, being the street upon which their house actually fronted. After September 2004 the Second Respondent lived "on and off" in the house but the First Respondent lived there continuously.

6. On 29 June 2004 the Tribunal ordered substituted service of the Application on the Respondents by Registered post to them at 12 Gibson Street Hallam and also by newspaper advertisement. It would seem that the requirements of the order for substituted service were complied with because the Tribunal so found on 22 July 2004. In that same order, the proceeding was fixed for hearing on 15 September 2004.

7. Copies of the Tribunal's order of 22 July 2004 were sent by the Registry to the Respondents at both 12 Gibson Street Hallam and also 8 Thomas Court Hallam. Each was returned with the endorsement "Unclaimed".

8. On 20 August 2004 the Tribunal wrote again to both Respondents to both 12 Gibson Street Hallam and also 8 Thomas Court Hallam. These were sent by express post and all four were returned with a cross drawn over the address and the initials "R.T.S." in what appears to be a black texta pen.

9. On 15 September 2004, the proceeding came on for hearing. There was no appearance by the Respondents and an order was made by Senior Member Davis that the Respondents to pay to the Applicant $68,015.95 plus costs. It is this order that the Respondents now seek to have set aside.

10. Copies of the Order of 15 September were posted to each of the Respondents on that day to both addresses. They were returned to the Registry with a blue cross drawn over the address and the return address of the Tribunal circled in blue.

11. On 21 September 2004, an amending order was posted to both Respondents to the same two addresses. The amendment was to correct the word "Respondent" in the original order to "Respondents". The two envelopes addressed to 12 Gibson Street Hallam were returned with the endorsement in what appears to be black ball point pen: "UNDELIVERED DUE TO ADDRESS DOES NOT EXSIST." The address was crossed out, apparently with the same pen. The two envelopes addressed to 8 Thomas Court Hallam were also returned with a different endorsement in what appears to be blue texta pen: "DO NOT SEND HERE NOT KNOWN AT THIS PLACE!". The address is also crossed out and a blue texta line has been drawn around two sides of the return address of the Tribunal.

The rehearing application

12. In December 2004 the Tribunal received an application by Katharine Miladanovic requesting a rehearing. The precise date of this is impossible to read on the facsimile that she sent but the index to the Tribunal's file says it was received on 20 December 2004. She gives her address in this document as "8 Thomas Court Hallam". The grounds of the application are said to be:

    "*Because we didn't know anything about it"* (sic.).

    She states in her application that she first became aware of the decision of the tribunal on 17 November 2004 but does not say how she became aware of it.

13. Following receipt of the fax from the Second Respondent a directions hearing was fixed for 8 February 2005. Notice of this directions hearing was sent by ordinary post to each of the Respondents at 8 Thomas Court Hallam. Since they appeared at the directions hearing it would seem that they received these letters. In cross-examination they did not dispute that they had received them.

14. On 8 February 2005 the Tribunal gave directions for the filing and service of material in support of, and in opposition to, the application for a rehearing. A copy of those

directions was posted out to each of the Respondents at each of the two addresses and not one of the four copies was returned.

The material

15. On 10 March 2005, a statutory Declaration dated 8 March 2005 was received from each of the Respondents. In his declaration the First Respondent refers to having lived at 8 Thomas Court, Hallam, that he did not receive any notice of hearing and that the first he became aware of the proceedings was on the 17 November 2004. He says that prior to that date he had not seen documents relating to this matter. He said that he saw a solicitor on 19 November 2004 and also contacted Monash Legal Service and another firm of solicitors. The declaration by the Second Respondent is in very similar terms.

16. An affidavit sworn by the First Respondent on 6 May 2005 was filed. In it he sets out details of the merits of the matter but does not deal with the reasons why he was not present at the hearing. An affidavit by the Second Respondent simply confirms the correctness of her husband's affidavit and her earlier declaration.

17. A lengthy affidavit with exhibits was filed by the Liquidator but he was not available for cross-examination and I have not considered it. An affidavit was sworn on behalf of the Applicant by the articled clerk having conduct of the matter, Mr Yiu. In it he sets out a chronology of the matter including the correspondence that he sent to the Respondents. These were put to the Respondents in cross-examination.

18. The envelopes sent to the Respondents by the Applicant's solicitors and returned were as follows:

    (a) A letter to both Respondents addressed to 12 Gibson Street, Hallam. This bears the date stamp "9 June 2004". The address has been crossed out and next to the crossing out someone has written in capitals "NOT AT THIS ADDRESS RETURN TO SENDER". On the reverse of the envelope are the further words "*ATTN: DO NOT SEND ANY MORE! NOT AT THIS ADDRESS".

    (b) On 1 July 2004 a letter was addressed to the Second Respondent at 12 Gibson Street, Hallam by registered mail. The post office endorsement on the envelope indicates that delivery of the article was "Refused". On the same day a registered

letter was addressed to the First Respondent at 12 Gibson Street, Hallam and the envelope bears the same post office endorsement that delivery of the article was "Refused".

(c) On 16 July 2004 an envelope was sent by registered post to the Second Respondent addressed to 8 Thomas Court, Hallam. Both the envelope and the delivery confirmation advice receipt have been tendered. The receipt shows the signature of an "Addressee or Agent" which is indecipherable and shows that the item was collected from the post office on 19 July 2004. The envelope was then marked "Return to Sender" and the address was crossed out.

(d) Also on 16 July 2004 a registered letter was addressed to the First Respondent. The envelope indicates three dates which appear to have been when cards were left notifying the addressee of the presence of the article at the post office, the "final" being 3 August 2004. The endorsement shows the letter to have been returned "Unclaimed" on 10 August 2004.

(e) Two further letters were sent to the Respondents at 8 Thomas Court, Hallam. The name and address is crossed out in what appears to be texta pen and there is endorsed on each envelope "NOT AT THIS ADDRESS DO NOT SEND ANYMORE" and the letters "R.T.S".

19. These envelopes sent by the Applicant's solicitors and also the returned envelopes sent by the Registry were put to both Respondents but neither could offer any explanation as to why no delivery of any of these articles could have been affected. Both denied any knowledge of them. Both denied that they had received any of the articles or returned them. They both denied that the endorsements on the envelopes were in the handwriting of either of them and were unable to say whose handwriting it was on any of the envelopes. Apart from the change of address, no explanation was offered as to why the envelopes would not be received at an address at which they were both living at the time apart from a suggestion by the First Respondent that there might have been confusion with another street in Hallam called "Thanos Court." I do not accept this as an explanation. The confusion could only relate to the letters addressed to Thomas Court, not to Gibson Street and the letters sent to Thomas Court appeared to have been treated

in the same way and endorsed in the same way with similar handwriting as those addressed to Gibson Street.

20. During cross-examination I carefully studied the demeanour of both Respondents in the witness box and I did not form a favourable impression of their reliability. I consider that the accounts they have given simply cannot be reconciled with the undeniable fact that extensive correspondence has been sent to them by the Applicant's solicitors and the Tribunal to an address which they admitted occupying and were then sent back. The only inference open on the evidence is that they are the ones who returned the various letters. I do not believe that they know nothing about it. I also regard as significant the fact that, after the application for re-hearing was filed by the Respondents, no correspondence sent to them by the Tribunal has been returned unclaimed.

21. Accordingly, I conclude that the Respondents have deliberately returned the mail in order to create an impression that they were not at that address, perhaps in the hope that by doing so the action against them would not proceed. They have hidden from both the Applicant and the Tribunal in an unsuccessful attempt to avoid having to deal with this proceeding.

Re-opening of proceedings

22. The application is brought pursuant to s.120 of the ***Victorian Civil and Administrative Tribunal Act 1998***. That section 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.

(5) Nothing in Division 3 of Part 3 applies to a review under this section.

23. By Rule 4.18 of the Tribunal Rules, an application under s.120 must be brought within fourteen after the Applicant becomes aware of the order. The Applicants claim to have become aware of the order on 17 November 2004 when they were visited by a Sheriff's officer. The application was not made until 20 December 2004 and so it was nine days outside the permitted time. Accordingly, the Respondents also seek to have the time extended pursuant to ***s.126*** of the Act. That section provides as follows:

126. Extension or abridgment of time and waiver of compliance

……

(2) If the rules permit, the Tribunal, on application by a party or on its own initiative, may—

(a) extend or abridge any time limit fixed by or under this Act, the regulations, the rules or a relevant enactment for the doing of any act in a proceeding; or

(b) waive compliance with any procedural requirement, other than a time limit that the Tribunal does not have power to extend or abridge."

24. There was some attempt to explain the delay and no issue was taken on behalf of the Applicant in regard to the application being outside the fourteen day time period. All arguments concentrated on whether, in any event, the order should be revoked or varied under s.120(4)(b). I will therefore proceed to deal with the substantive application.

Submissions

25. Mr Harrison pointed to the inherent unlikelihood of the claim by the Respondents that they had not returned the various letters sent to them. He submitted that no reasonable excuse had been given by them for their failure to attend the hearing and without that, he said, I could not grant the application. He referred me to a number of authorities.

26. In his very thorough submission, Mr Champion referred me to the comments of Bongiorno J in the case of ***Alesci v Salbury*** [2002] VSC 475. In that case his Honour said of section 120:

> *"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 non-attending defendant would not be entitled to review of an order made in his or her absence."*

27. 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. A liberal approach to the section has been taken (see for example ***Melhen v Transport Accident Commission*** [2005] VCAT 25, ***DFS Corporation Pty Ltd v Basyle Enterprise*** [2004] VCAT 931) but in the absence of an explanation that can be considered to be reasonable leave cannot be granted (see ***Russell v Transport Accident Commission*** [2004] VCAT 2507).

28. The explanation does not have to be 'particularly satisfactory' but the party seeking the setting aside of the order must not have ignored the proceeding (see ***Whittlesea CC v S M & L M Lewis*** [2000] VCAT 967 para 11).

29. In ***Curcio v HGS and SPV Homes Pty Ltd*** [2003] VCAT 1041 the Tribunal was faced with a similar situation to this case, where a party did not attend because, it was claimed, it had not received notice of the hearing or copies of orders made. The Tribunal's records indicated that the letter in question had been sent and no particular difficulties with the post were suggested. The learned Deputy President said (at para. 15):

> *"Certain it is that there are instances where things go astray…accordingly, even although I think a Judge in a Court in Victoria would be entitled to take judicial notice of the fact that the mails in Australia are generally reliable and therefore sitting on a Tribunal I can do likewise with the more ample power that I have to inform myself as I see fit, the mails are not infallible and things can and do go wrong.*

If matters went no further than this I believe the proper course for me would be simply to accept Mrs Kiriakidis' affidavit and despite the misgivings that I have as to the substance of the case that SPV might be able to make, grant this application.

However matters do go further. In SPV's case, not only did one notice not arrive, a second notice, namely the one covering the orders of the Tribunal. It is frankly difficult to credit and leaves one with the beginnings of some scepticism. There is also the fact that the notice from Housing Guarantee Fund Limited was despatched by registered mail.

……

Putting all these things together, lightning does strike sometimes …… It is highly unlikely that it would strike twice, so close together in March and April; and when I put that together with the material relative to the earlier proceedings between the same parties I am forced to the conclusion that it is more probable then not that these communications, both of them, did in fact reach SPV. If SPV and its officers do not acquaint itself and themselves with the contents of those documents, it was not because they did not arrive. Hence I do not accept that there is a reasonable excuse for non-attendance and this application fails."

30. The situation in the present case is stronger. There are many more letters said not to have been received and the circumstances are highly suspicious. No matter how lenient a view I take of the word "reasonable excuse" I cannot see that a party that behaves in this way and, as a result of such behaviour, becomes unaware of the hearing date has a reasonable excuse for not attending on the day fixed for the hearing.

31. The order for substituted service was complied with and so service was effective. There was therefore nothing irregular about the order that is now sought to be set aside.

The merits

32. Mr Champion submitted that the section should not be construed as though sub-sections 4(a) and 4(b) both had to be complied with. He said that the existence or otherwise of a reasonable excuse was just one matter to be taken into account in determining whether or not to set aside the order and in this regard he referred to the well known case of

Kostakanellis v Allen [19974] VR 596. Not only was this approach not what the section says it is not the way the section has been interpreted by the Tribunal. Indeed a very similar submission was rejected by Deputy President Aird in ***DFS Corporation Pty Ltd and Basyle Enterprises Pty Ltd***. I likewise reject it.

33. Mr Champion addressed me at length on the merits of the matter which most of the Respondents' affidavit material seemed to be addressed to. Having heard what Mr Champion has to say I think that there might well have been a case to be tried but I do not believe that I get to that stage. I accept Mr Harrison's submission that the section provides that before proceeding to deal with the matter I must be satisfied that the Respondents had a reasonable excuse for not attending or being represented at the hearing.

34. Mr Champion suggested that the section is poorly drafted in that if read literally it suggests that the hearing cannot be commenced until the Tribunal is satisfied that there is a reasonable excuse and the Tribunal cannot enquire into whether there is such an excuse until the hearing is commenced. I do not see that as a difficulty. I think the hearing proceeds in two stages. In the first instance the Tribunal must satisfy itself that there is a reasonable excuse, giving those words "reasonable excuse" a very liberal interpretation. Once satisfied that there is such an excuse the Tribunal should then proceed to consider the other matters including whether there is an issue to be tried. I do not accept Mr Champion's submission that the reasonableness or otherwise of the excuse is just one of the matters to be taken into account and that the strength of the application in other areas might make up for some weakness in this area. Unlike the situation in the Courts (see ***Kostakanellis v Allen*** [1974] VR 596) this section provides that the existence of a reasonable excuse is a requirement before the application can be further dealt with on the merits. There is no such excuse shown here.

Conclusion

35. The application will therefore be dismissed. I have heard no argument on costs so costs will be reserved for further argument.

SENIOR MEMBER R WALKER