VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST VCAT REFERENCE NO BP843/2015

CATCHWORDS

DOMESTIC BUILDING DISPUTE – Section 120 of the *Victorian Civil and Administrative Tribunal Act 1998* – whether an order striking out a review hearing constitutes a curial determination of that application, requiring leave if another application is made – whether the moving party had a reasonable excuse for not attending the hearing – sufficiency of evidence – credibility of unsworn statements.

APPLICANT	G & L Taig Pty Ltd (ACN 006 558 274)
RESPONDENT	Paolino Tomaiuolo
WHERE HELD	Melbourne
BEFORE	Senior Member E. Riegler
HEARING TYPE	Directions Hearing
DATE OF HEARING	3 March 2016
DATE OF ORDER	7 March 2016
CITATION	G & L Taig Pty Ltd v Tomaiuolo (Building and Property) [2017] VCAT 347

ORDERS

1. The Respondents application under s 120 of the *Victorian Civil and Administrative Tribunal Act 1998* to reopen the Tribunal's orders dated 13 September 2016 is dismissed.

2. Costs reserved, with liberty to apply, provided such liberty is exercised within 21 days of the date of this order.

APPEARANCES:

For the Applicant	Mr P Kistler of counsel
For the Respondent	In person by telephone

REASONS

INTRODUCTION

1. On 13 September 2016, following the hearing of the Applicant's claim and the Respondent's counterclaim, the Tribunal ordered:

   (a) The Respondent pay the Applicant $31,589.46 plus interest in the amount of $3,659.75.

   (b) The Respondent pay the Applicant the application fee of $525.60, pursuant to s 115B of the *Victorian Civil and Administrative Tribunal Act 1998*.

   (c) The Respondent's counterclaim is dismissed.

   (d) The Respondent pay the Applicant's costs.

2. The Respondent did not attend the hearing on 13 September 2016, nor was he represented on that day. The Respondent now seeks an order under s 120 of the *Victorian Civil and Administrative Tribunal Act 1998* (**'the Act'**) that the orders made on 13 September 2016 be set aside and the matter re-opened. The Applicant opposes that application.

SECTION 120 OF THE ACT

3. Section 120 of the Act provides, in part:

> 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 subsection (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—
>
> (i) the applicant had a reasonable excuse for not attending or being represented at the hearing; and
>
> (ii) it is appropriate to hear and determine the application having

regard to the matters specified in subsection (4A); and

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

(4A) For the purposes of subsection (4)(a)(ii), the matters 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.

4. Further, the *Victorian Civil And Administrative Tribunal Rules 2008* provide that an application under s 120 of the Act must be made within 14 days after the applicant for review becomes aware of the order and further provides that no more than one application may be made under s 120 of the Act *in respect of the same matter* without leave of the Tribunal.

5. Mr Kistler of counsel, who appeared on behalf of the Applicant, submitted that there were two grounds upon which the Respondent's application should be dismissed:

(a) First, the application was the second attempt to secure an order for a re-hearing and it was not appropriate for leave to be given to make more than one application *in respect of the same matter*.

(b) The Respondent did not have a reasonable excuse for not attending or being represented at the hearing on 19 September 2016.

BACKGROUND

6. It is uncontested that the Respondent was aware of the hearing listed for 13 September 2016. Indeed, on 5 September 2016, an email was received from the Respondent's email address stating, in part:

> dear sirs,
>
> this is to advise youre office that paolino tomaiuolo suffered what appeared to be a minor stroke late last week and has not been able to arrange to talk to his solicitors for this matter to which he wasnt advised of a date until only five weeks ago or so. Therefore we request it be put off until paolino is well enough to which we cannot give an exact time. [sic]

7. No medical certificate or other documentary evidence was attached to that correspondence. Consequently, the Tribunal responded by return email dated 6 September 2016, stating, in part:

> VCAT has received an email from this email address advising that the respondent is unwell, and seeking an adjournment of the hearing listed to commence on 13 September 2016. As the respondent is legally represented, any correspondence with the VCAT should be through his solicitors who have been copied in on this email, as have the applicant's solicitors.
>
> Any application for an adjournment of the hearing should be made by the respondent's solicitors on an Application for an Adjournment form which is available on the VCAT website, and must be accompanied by a medical certificate setting out details of the respondent's current medical condition including when he will be well enough to attend a hearing. Attempts should be made to obtain the applicant's consent to any adjournment.
>
> As the hearing is listed to commence on 13 September 2016 any application for an adjournment should be made urgently.
>
> [Underlining added]

8. The Applicant's solicitors responded to the Tribunal's email correspondence by letter dated 7 September 2016, stating, in part:

> …
>
> We are instructed to object to the Respondent's application in the strongest of terms. The Respondent consistently abuses due process and clearly has no intention of assisting this 15 month old matter to reach its proper conclusion.
>
> …
>
> Our client has organised eight witnesses and briefed Counsel to appear before the Tribunal at Horsham on 13 September 2016 at 10:00 am as ordered…

9. Further correspondence was received from the Respondent's sibling on 9 September 2016, which stated:

> dear sirs,
>
> this is my 4th attempt on my brother's behalf to send you his initial certificate as he suffered stroke symptoms last week and as a result he is in no mental or physical condition to be instructing or thinking about anything apart from getting himself better.
>
> paolino is re-seeing his doctor next week as he is going through extensive medical tests until next week to determine how long he will be out for and the extent of his scare.

> we apologise but he cannot provide you with another final certificate until he sees his doctor next thursday. It is completely unjust and unfair that not only does he and us feel pressured to make immediate decisions to be there but simply he is completely unwell and his solicitors like us need to put this off until his health improves one way or another.
>
> we are unfairly targeted here by VCAT as it seems like its all 1 way decisions and that nasty builder seems to be targeting my brother just for his ego.
>
> I hope you can accept our response. I will get you an updated letter of illness next Thursday [15 September 2016]. [sic]

10. The *initial certificate* referred to in that correspondence was a letter from Dr Bruno Rositano of *Allcare Medical Centre*, which stated:

> This is to certify that
>
> **Mr Paolino Tomaiuolo**
>
> is unable to attend work due to illness, between the following dates:
>
> **5/09/2016** to **7/09/2016** inclusive
>
> The specific reason for the time off work is confidential medical information and can only be revealed to an employer with the express permission of the patient.

11. On 9 September 2016, the Tribunal was informed that the Respondent's solicitors were no longer acting for him.

12. Consequently, by return email correspondence dated 12 September 2016, the Tribunal stated, in part:

> In view of the history of the matter as summarised by the applicant's solicitors letter dated 7 September 2016 and there being no medical certificate to support the respondent's sister's [sic] contention that her brother is indisposed, the respondent's request for an adjournment is refused.
>
> An application may be reheard before the presiding Member sitting at Horsham.

13. A further letter dated 12 September 2016 from the Tribunal was forwarded to the Respondent by email. It stated, in part:

> The Tribunal has received correspondence from your former solicitors that they no longer act for you. If you have engaged another firm of solicitors to represent you, can you please ask them to write to the Tribunal advising that they are now acting on your behalf.
>
> The Tribunal anticipates that your former solicitors have sent you copies of the orders which have been made by the Tribunal. If you require copies please let us know.

> The next listing for your proceeding, which you are required to attend is a Hearing at 10:00 am on 13 September at Horsham Magistrates' Court, Roberts Avenue, Horsham.
>
> Please see the attached copy of the most recent Order dated 18 May 2016 for your records. To obtain copies of any other documentation on the file, you will be required to lodge a File access request and subpoenaed documents form with the Tribunal. This form can be found on the Tribunal's website.

14. There was no response to that correspondence. Consequently, the matter proceeded to hearing on 13 September 2016 at Horsham Magistrates' Court. There was no appearance by or on behalf of the Respondent. Consequently, the Tribunal made the following findings:

> The Tribunal finds that:
>
> > The application for an adjournment made by the respondent was made at a time when it was not practicable to adjourn the hearing and notify the parties.
> >
> > The consent of the applicant has not been obtained and there are otherwise insufficient grounds for granting an adjournment.
> >
> > Any duly appointed agent or employee of the party seeking the adjournment may represent that party at the hearing.
> >
> > The medical report dated 5 September 2016 from Dr Rositano stated the respondent is unable to attend work from 5 September to 7 September 2016 inclusive. It does not provide any details of the diagnosis or whether the respondent is able to give evidence at the hearing on 13 September 2016.
> >
> > The emails from the respondent's brother Dominic Tomaiuolo dated 9 and 12 September 2016 do not provide any further reason for the respondent not being able to attend the hearing. Without any medical report or diagnosis the Tribunal cannot accept that the respondent has suffered a stroke and therefore unable to attend the hearing.
> >
> > The respondent has not attended and has sought three adjournments in the past being 17 September 2015, 4 November 2015 and 1 December 2015. He did not attend the mediation listed on 19 January 2016 but was represented by his lawyer Mr Hoban.
> >
> > The respondent has engaged three lawyers for this hearing and each lawyer has notified the Tribunal over various dates that they no longer act for the respondent.
>
> The Tribunal orders that:
>
> > The application for an adjournment is refused.

15. As indicated above, orders were made at the conclusion of the hearing on 13 September 2016 in favour of the Applicant. It appears from the Tribunal's file that a copy of those orders was posted and emailed to the Respondent on or about 13 September 2016.

16. On 12 October 2016, the Respondent filed an *Application to Reopen an Order*. In that application, he stated that he first received a copy of the Tribunal's order dated 13 September 2016 on 12 October 2016. He also requested that he be permitted to appear at the review hearing by telephone, on the ground that he resided in South Australia.

17. In response to that application, orders were made in Chambers on 7 November 2016 which stated, in part:

> 1. In accordance with the respondent's application dated 12 October 2016 but apparently received 18 October 2016, **the proceeding is referred to a hearing under s 120 of the *Victorian Civil and Administrative Tribunal Act 1998*. It is scheduled for hearing before Senior Member Farrelly or Senior Member Lothian on 1 December 2016 at 2:15 p.m. at 55 King Street, Melbourne.**
>
> …
>
> 3. As the respondent has applied to attend by telephone, both parties have permission to do so, on condition that by no later than 4:00 pm on 17 November 2016 they inform the Tribunal in writing of a telephone number on which they can be reached.
>
> …
>
> 5. Because there are occasions where injustice arises to a party from a medical certificate being granted to another party, should the respondent again seek to rely on a medical certificate he must:
>
> (a) Give his doctor permission to reveal details of his illness, in general rather than specific terms, to the Tribunal and to the applicant.
>
> (b) obtain a medical certificate that states:
>
> (i) The doctor has read this order 5 of 7 November 2016; and
>
> (ii) whether the illness is acute or chronic and particularly, when the respondent can be expected to be sufficiently well to conduct the litigation.
>
> (c) Any such certificate must be sent to the Tribunal and the applicant as soon as it is received by the respondent.

…

8. **I direct the Principal Registrar to send copies of these orders to both parties by email**.

18. By email correspondence dated 28 November 2016, the Respondent advised the Tribunal of his telephone contact details, for the purpose of appearing at the review hearing on 1 December 2016 (**'the 0467 Number'**).

19. On 1 December 2016, the review hearing was heard but there was no telephone appearance by the Respondent, despite attempts by the Tribunal to contact the Respondent on the 0467 Number. Consequently, the application for review was struck out and orders made that the Respondent pay the Applicant's costs. A copy of that order was forwarded by email to the Respondent and by post, although it appears that the postal address was incorrect.

20. On 13 December 2016, the Respondent forwarded an email to the Tribunal stating that he had not been contacted by telephone prior to the 1 December 2016 review hearing commencing. Further correspondence dated 15 and 18 December 2016 reiterated the Respondent's sentiments, although in a somewhat belligerent manner.

21. The Tribunal responded in writing by letter dated 21 December 2016 stating:

> The matter was listed for hearing on 1 December 2016 at 2:15 pm and you were to attend the hearing by telephone as ordered by the Tribunal on 7 November 2016. On 28 November 2016 you provided the Tribunal a telephone number that you were to be contacted on …[the 0467 Number].
>
> The Tribunal conducted the hearing on 1 December 2016 and a number of attempts were made to contact you on the phone number provided. On each occasion you failed to answer the call. Subsequently the matter proceeded and your application for review was struck out.

22. On or about 24 December 2016, the Respondent filed an Application for *Leave to Apply for a Review*. That application was listed for hearing on 3 March 2017.

APPLICATION FOR LEAVE TO APPLY FOR REVIEW

23. As indicated above, the Applicant contends that the review hearing on 3 March 2017 constitutes a second attempt by the Respondent to seek a review of the Tribunal's orders dated 13 September 2016. Mr Kistler submitted that the Respondent was aware of the review hearing on 1

December 2016 but did not make himself available to be contacted by telephone and in those circumstances, should not be given leave to make a second application for review.

24. In my view, it is not clear whether leave is required. In particular, the review hearing on 1 December 2016 did not determine the application for review on the merits but merely struck out the application on the ground of non-appearance. That situation is to be distinguished from one where there is a second review hearing following a second occasion of non-appearance at the re-heard hearing of the substantial application. In my view, it is the latter scenario which usually attracts the operation of s 120(3) of the Act.

25. In the present case, striking out the review application on 1 December 2016 merely had the effect of removing the review application from the list. However, that action carries with it the right to apply for reinstatement. The mere fact that the Tribunal relisted the review application for hearing on 3 March 2017 infers that the Tribunal has reinstated that review hearing. Therefore, the review hearing listed for 3 March 2017 effectively is the same review hearing that had previously been listed for 1 December 2016.

26. In any event, even if my categorisation of the 1 December 2016 review hearing is incorrect, I consider it appropriate to grant leave to apply for a second review hearing, given the nature of the order made by the Tribunal on 1 December 2016. As indicated above, that order did not constitute a curial determination of the review application.

SHOULD THE PROCEEDING BE RE-HEARD?

27. Section 120(4) of the Act embodies a two-stage process, which requires the Tribunal to be satisfied that:

    (a) the party seeking a rehearing had a reasonable excuse for not attending or being represented at the hearing; and

    (b) it is appropriate to hear and determine the application having regard to the matters specified in s 120 (4A) of the Act.

28. In the present case, the Applicant contends that the Respondent did not have a reasonable excuse for not attending or being represented at the hearing on 13 September 2016. By contrast, the Applicant argues that he was too ill to attend the hearing on 13 September 2016.

29. In *Celona v Lillas & Loel Lawyers Pty Ltd*,[1] the Tribunal observed that the benchmark for satisfying the Tribunal that a party had a reasonable excuse for not attending the hearing is not overly burdensome:

[1] [2012] VCAT 403.

> … the word 'reasonable' imports and explanation or excuse which is in accordance with reason. It does not have to be an especially compelling explanation and so there have been occasions when parties have been successful in applications under Section 120 on what might be thought are fairly feeble grounds such as 'I just forgot, sorry'; not compelling but it accords with reason and human experience that individuals can simply forget things and a person in that unhappy situation ought not be deprived of the opportunity of having his or her dispute heard and determined on the merits.[2]

30. On appeal, Robson AJA reinforced this statement:

> The authorities have held that s 120 should be construed liberally. Regard should also be had as to the common law principle that a litigant has a prima facie right to present his or her case.[3]

31. *Tomasevic v Victoria*,[4] Justice Morris P observed that determining what constitutes a reasonable excuse for not attending a hearing may ultimately be a question of fact:

> It seems clear enough that a "blameless non-attending defendant" would usually be able to satisfy the first element. The Tribunal has an obligation to act fairly and, in the normal course, this would require a party to be notified of the hearing and be given an opportunity to be heard. However what may constitute a "reasonable excuse" (or, for that matter, what would make an applicant "blameless") ought to be left to the judgment of the tribunal in a particular case. It is likely to be a question of fact, to be determined by the member concerned. To lay down legal principles that might govern this exercise seems to me to be fraught with difficulty.[5]

32. In my opinion, the threshold question in this case is confined to a single question of fact; namely, was the Respondent too ill to attend the hearing on 13 September 2016? If I accept the Respondent's contention that he was too ill, then I would have little hesitation in finding that the Respondent had a reasonable excuse for not attending the hearing on that day. However, the onus of proof lies with the Respondent and ultimately, I must be satisfied, on the balance of probabilities, that he was too ill on 13 September 2016 to reasonably be expected to attend the hearing on that day.

33. Regrettably, no relevant medical certificate or other documentary evidence has ever been produced to corroborate the unsworn statements made by the Respondent. Moreover, no affidavit material has ever been filed by the Respondent to support his contention that he was too ill to attend the hearing on 13 September 2016. This is surprising, given that

[2] Ibid at [12].
[3] *Lillas & Loel Lawyers Pty Ltd v Celona* [2014] VSCA 19 at [18] (in dissent, but not on this point).
[4] [2005] VCAT 1525.
[5] Ibid at [12].

the Respondent indicated, during the hearing on 3 March 2017, that he has, once again, retained legal representation.

34. The only medical certificate filed with the Tribunal is that referred to above. It states that the Respondent was unable to attend work due to illness between 5 and 7 September 2016. That certificate does not give any indication as to why the Respondent was unable to attend the hearing on 13 September 2016. In my view, that certificate has no probative value as it does not cover the hearing period, nor does it specify that the Respondent is unable to attend the hearing or specify what illness is suffered by the Respondent.

35. When asked during the course of the hearing on 3 March 2017 why the he has not produced any medical certificates to corroborate his contention, the Respondent replied that he was not aware that he was required to do so. This statement is completely at odds with what the Respondent was requested to do by correspondence from the Tribunal dated 6 September 2016 and ultimately, by Order 5 of the Tribunal's orders dated 7 November 2016.

36. When taken to the orders dated 7 November 2016, the Respondent said that he had never received a copy of those orders. I do not accept that statement. The Tribunal file indicates that a copy of those orders was emailed to the Respondent's email address, being the same email address that the Respondent used to communicate with the Tribunal. Further, those orders constitute the only notice of the hearing listed for 1 December 2016. It is clear from correspondence received from the Respondent that he was aware of that 1 December 2016 hearing date. That begs the question: how else did the Respondent know of the hearing on 1 December 2016 if he was not privy to the orders made on 7 November 2016?

37. Moreover, those orders specifically gave leave to the Respondent to appear by telephone on 1 December 2016, subject to him providing telephone contact details. On 28 November 2016, the Respondent filed a *Telephone Attendance Request*, in which he stated that the date of the hearing was 1 December 2016.

38. Consequently, I do not accept the Respondent's statement that he did not receive a copy of the 7 November 2016 orders. Further, I do not accept the Respondent's contention that he was not aware of the need to file a medical certificate or some other form of documentation verifying that he was too ill to attend the hearing on 13 September 2016.

39. Moreover, there are other matters which further question the Respondent's credibility. In particular, the *Telephone Attendance Request* filed by the Respondent stated that the Respondent was to be contacted on the 0467 Number. The correspondence from the Tribunal

dated 21 December 2016 (referred to above) made reference to the Tribunal's attempts to contact the Respondent on that number at the commencement of the hearing on 1 December 2016. In response to that correspondence, the Respondent forwarded an email to the Tribunal dated 22 December 2016 stating:

> excuse me but that is not my phone number…

40. That statement is incorrect. The 0467 Number is the number written on the *Telephone Attendance Request* and on some of the Respondent's email correspondence to the Tribunal. Further, the 0467 Number was the number that was successfully used to contact the Respondent at the hearing on 3 March 2017. To suggest that it was not the correct phone number, in order to justify the Respondent's non-appearance at the hearing on 1 December 2016 is clearly erroneous.

41. Further, on 2 February 2017 the Respondent forwarded email correspondence to the Tribunal stating his mobile phone number was 0459 999 … It appears that this was done to support his contention that the Tribunal had failed to contact him when the matter was heard on 1 December 2016. That email correspondence states, in part:

> … on last occasion, it was alleged i was supposed to have received a call from youre member on my mobile number 045999… but i never rewceived any calls. unless some other number was contacted which wasnt mine then how on earth am I supposed to get damn fairness… [sic]

42. In my view, the above extract of the Respondent's email correspondence suggests that the Tribunal telephoned the wrong mobile phone number. If that is the intention of that email, it is disingenuous, having regard to the Respondent's previous correspondence, where he advised the Tribunal that his contact details were the 0467 Number.

43. I appreciate that self-represented litigants may not always have the knowledge or experience to present their case with the finesse and thoroughness of a legal practitioner or somebody experienced in litigation. However, in this particular case, the Respondent was ordered, and clearly had notice of the need to produce a medical certificate, covering the relevant period in order to corroborate his unsworn statements. The Respondent has not availed himself of that, despite the inordinate amount of time since the 13 September 2016 orders were made, and has chosen to prosecute this review application based on oral statements and email correspondence only. Apart from saying that he was unaware of the need to produce any medical certificates, no excuse was proffered as to why medical certificates covering 13 September 2016 were not produced in support of his application. In my view, this casts

serious doubt over whether the Respondent was, in fact, too ill to appear on 13 September 2016.

44. In weighing all the above factors, I do not accept that the Respondent was too ill to attend the hearing on 13 September 2006.

45. I make this finding cognisant of the fact that the Tribunal is mandated to conduct proceedings with as little formality and technicality. However, that does not mean that the burden of proving issues of fact is to be given short shrift. Evidence of an issue of fact, especially where that issue is material to the outcome of the proceeding, needs to be proved with credible evidence. A statement or contention going to that issue, of itself, may not be sufficient to prove that issue.

46. Consequently, I am not satisfied that the Respondent had a reasonable excuse for failing to attend the hearing on 13 September 2016.

47. That being the case, it is unnecessary for me to consider the second limb of s 120(4) of the Act. The Respondent's application will be dismissed.

48. At the conclusion of the hearing on 3 March 2017, Mr Kistler indicated that the Applicant would be seeking its costs of that hearing if it was successful in opposing the Respondent's application for review. However, that foreshadowed costs application was made after I had indicated that I would reserve my decision. At that point, telephone contact with the Respondent had already ceased. Accordingly, the Respondent has not had the opportunity to hear any arguments in support of the foreshadowed costs application, nor has he had the opportunity to address me on that question. Therefore, I will reserve the question of costs and give the parties' liberty to apply, should they wish to pursue that course.

SENIOR MEMBER E. RIEGLER