VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

VCAT REFERENCE NO. D626/2005

DOMESTIC BUILDING LIST

CATCHWORDS

Domestic building – application to set aside orders – exercise of discretion – relevant factors.

APPLICANT	Joseph Giardina
FIRST RESPONDENT	Wilcon Constructions Pty Ltd (ACN 086 301 966)
SECOND RESPONDENT	Wilcon Constructions (Vic) Pty Ltd (ACN 104 660 451)
THIRD RESPONDENT	Brett Anthony Mazouris
WHERE HELD	Melbourne
BEFORE	Senior Member D. Cremean
HEARING TYPE	Hearing
DATE OF HEARING	20 April 2007
DATE OF ORDER	2 May 2007
CITATION	Giardina v Wilcon Constructions (Domestic Building) [2007] VCAT 659

ORDER

1 I extend time to enable the application under s126 to be brought, if need be.

2 I set aside the orders made on 3 August 2006 under s120.

3 I reserve costs.

4 I direct that this matter be returned before me on 8 June 2007 at 10.00 a.m. at 55 King Street Melbourne. Allow one-half day.

SENIOR MEMBER D. CREMEAN

APPEARANCES:

For the Applicant	Mr S. Matters of Counsel
For the First and Second Respondents	No appearance
For the Third Respondent	Mr J. Gray of Counsel

REASONS

1 This matter took, all up, nearly 4 days to hear. One day alone should have sufficed. I shall be giving consideration to this issue on a question of costs, should costs be sought.

2 The matter arises under s120 of the *Victorian Civil and Administrative Tribunal Act* 1998 which reads as follows:

> (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 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.

3 As an issue has arisen also with respect to time, I am asked to extend time, if necessary, under s126 of the Act which provides

> (1) The Tribunal, on application by any person or on its own initiative, may extend any time limit fixed by or under an enabling enactment for the commencement of a proceeding.
>
> (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.
>
> (3) The Tribunal may extend time or waive compliance under this section even if the time or period for compliance had expired before an application for extension or waiver was made.
>
> (4) The Tribunal may not extend or abridge time or waive compliance if to do so would cause any prejudice or detriment to

a party or potential party that cannot be remedied by an appropriate order for costs or damages.

(5) In this section—

relevant enactment means an enactment specified in the rules to be a relevant enactment for the purposes of this section.

4 In dealing with this matter I am bound to observe ss 97 and 98 of the Act. Of relevance, as well, are ss 83, 84, 85, 86 and 87 of the Act – which relate to compulsory conferences.

5 The matter arises out of orders made by Senior Member Walker on 3 August 2006. Those orders are as follows:

> The First Respondent being de-registered and the Second Respondent being in liquidation and the Third Respondent not having attended this compulsory conference, with the agreement of the Applicant, he being the only party present, pursuant to s87 of the *Victorian Civil and Administrative Tribunal Act* 1998, it is ordered as follows:
>
> 1. Order the Third Respondent pay to the Applicant the sum of $159,941.30 together with interest pursuant to s53 of the *Domestic Building Contracts Act* 1995, of $16,340.30, making together the sum of $176,281.60.
> 2. The counterclaim by the Third Respondent is dismissed.
> 3. The counterclaim by the Second Respondent is struck out.
> 4. Order the Third Respondent to pay the Applicant's costs of this proceeding fixed at $19,360.70.

6 The matter was referred to compulsory conference on 3 August 2006 by Senior Member Lothian by orders made on 31 July 2006. Her orders made on that date read as follows:

> 1. The hearing of today is adjourned to a compulsory conference which is listed for 3 August 2006 at 10.00 am at 55 King Street, Melbourne.
> 2. Direct the Principal Registrar to notify the Respondents by facsimile and the Third Respondent by e-mail as well at brett.mazouris@bigpond.com that the compulsory conference will proceed on that day, and that this notification supersedes the facsimile message of 26 July 2006.
> 3. The Respondents are reminded that, under section 87 of the *Victorian Civil and Administrative Tribunal Act 1998*, if a party does not attend a properly convened compulsory conference, the Member presiding may determine the proceeding adversely to the absent party.
> 4. The parties are excused from preparing position papers for the compulsory conference.

7 There were also earlier orders made by her on 29 June 2006 which in paragraph 3 state:

> 3. This proceeding is listed for compulsory conference before Member Walsh or Acting Deputy President Levine on 3 August 2006 commencing at 10.00 a.m. at 55 King Street Melbourne. Costs may be ordered if the compulsory conference is adjourned or delayed because of a failure to comply with directions including those relating to the compulsory conference.

8 The orders on 29 June 2006 were made in consequence of orders made by Deputy President Aird on 5 June 2006 which provide:

> 1. The Compulsory Conference set down for 7 June 2006 is vacated.
>
> 2. By 9 June 2006 the Third Respondent must file and serve fully itemised particulars of the quantum meruit he has prepared on behalf of himself and the Second Respondent.
>
> 3. Adjourned to a further directions hearing at 9.30 am on 29 June 2006 at 55 King Street, Melbourne.
>
> 4. The orders of 9 March 2006 are suspended pending further order of the Tribunal.
>
> 5. Costs reserved.

9 Earlier, by orders made on 9 March 2006 Senior Member Lothian ordered in paragraphs 1, 2, 10 and 21 as follows:

> 1. The application pursuant to s.78 of the Act is dismissed.
>
> 2. The application pursuant to s.79 of the Act is adjourned *sine die* and the Applicant, if seeking to bring the application on, must file and serve an Outline of Argument and seek a date for the matter to be heard.
>
> 10. This proceeding, and any counterclaim, is referred to compulsory conference to be conducted on 7 June 2006 commencing at 10.00 am at 55 King Street Melbourne. Costs may be ordered if the compulsory conference is adjourned or delayed because of a failure to comply with directions including those relating to the compulsory conference.
>
> 21. This proceeding, and any counterclaim, is set down for hearing on 31 July 2006 commencing at 10.00 am at 55 King Street, Melbourne with an estimated hearing time of 10 days. Costs may be ordered if the hearing is adjourned or delayed because of a failure to comply with directions.

10 There have, therefore, been a number of occasions on which this matter has been before the Tribunal. It is, however, the occasion of 3 August 2006 which is particularly in issue. On that occasion, as may be seen, the Third Respondent's counterclaim was dismissed; he was ordered to pay $176,281.60 (on the claim for $159,941.30 with interest of $16,340.30) with costs of the proceeding of $19,360.70.

11 There is nothing in the orders made on 3 August 2006 which specifies how the interest component of $16,340.30 is calculated or how the costs of $19,360.70 are calculated. It seems to me, with respect, that this is not very informative for the absent party being asked to pay such large sums. And this was a point in substance made to me. Arguably, he has been denied fairness in not having been notified of the detail making up the orders. It might be asked, how should he be expected to comply with orders nowhere detailed in their component figures? I am sure the orders are properly made up and correctly calculated but with respect to the Senior Member I think an absent party – particularly – is entitled to more detail than that supplied. These are not, as I have indicated, small amounts. Nevertheless, I offer no criticism, as such, of the Senior Member's orders except as I have indicated. And much must depend, of course, on what was said to him on the occasion which I know little or nothing about.

12 It is argued, in any event, that the orders made on 3 August 2006 should be set aside under s120 on the ground of "reasonable excuse". If necessary, as I have pointed out, application is made to extend time under s126. One of the grounds advanced on "reasonable excuse" is the lack of detail in the (not inconsiderable) orders the Third Respondent is being ordered to pay. Of necessity, therefore, I have been required to make some comment about them in that regard as an issue directly raised for my consideration. But, as I have indicated, my comments are prefaced with all due respect to the Senior Member.

13 The governing principles underlying the operation of s120 have been laid down in numerous cases. In *Alesci v Salisbury* [2002] VSC 475 at [6] Borgiorno J said: "It would be difficult, I think, to put forward a case where a blameless non-attending defendant would not be entitled to a review of [an] order made in his or her absence". I was referred to this decision in particular. See also, however, *Performance Builders (Vic) Pty Ltd v Keele* [2006] VCAT 2 at [2].

14 Many arguments were advanced about the alleged irregularity of the orders made on 3 August. I shall not deal with them all as it seems to me I am sufficiently able to deal with this application on one single ground. However I do point to s87(b)(i) of the Act. In saying the Tribunal may determine a proceeding "adversely to [an] absent party and make any appropriate orders", I do think the provision is requiring, in the first place, a determination which is adverse and, in the second place, appropriate orders being made. I do not regard it as allowing – consistently with ss97 and 98 of the Act – an adverse determination and orders for interest and costs all being made at the same time. I consider that once a proceeding is determined adversely the absent party must then be given a further opportunity to be heard on quantum, interest and costs and that appropriate orders may be made for the hearing of those matters on some subsequent occasion. Otherwise it seems to me a party's absence may lead to untold and possibly catastrophic results unintended by Parliament – such as

happened in this case. The Third Respondent was absent and could never have reasonably expected, if he knew of the proceeding, that, if he did not attend, he might be ordered to pay upwards of $200,000.00. He might have known the size of the claim but not the amounts claimed for interest and costs. As it happens, moreover, in determining a proceeding "adversely" the grounds to do so must exist – which may be constituted not only by mere absence. I think the Tribunal must inform itself (as it may under s98(1)(c)) of materials appearing on file. In this matter there was on file the Hargreaves report filed in 2005 which could have indicated, misgivings about making the order on the claim. If there is something on file of relevance in this way, I do not think it fair (under s97) for a party to be penalized by their absence by it not being duly considered. I think whatever is on file needs to be considered along with the party's absence. It seems to me that this is implied by the word "determine" in s87(b)(i). Something is not "determined" if the only consideration taken into account is a party's absence. That does not seem very fair if there are materials on file which would indicate the position is not straightforward. A party's absence really only turns a matter into one which is, in effect, undefended. But undefended matters still must be proven. In any event, though, I do not know whether the learned Senior Member did consider the Hargreaves report and he may well have done so.

15 I determined on 14 February in this matter that orders made at a compulsory conference occur at a "hearing" for the purposes of s120. That is because to "determine" something under s87(b)(ii) requires a hearing. And if it requires a hearing then, before orders may be made, the Tribunal must be satisfied on the evidence that orders should be made. Obviously that evidence may readily justify the orders being made because of the absence of the other party. But a degree of satisfaction must be reached I consider, beyond merely a party's absence. I see this as dictated by s97 if by no other provision.

16 In this matter, I have considered the affidavits filed and served by the parties and the evidence they gave in cross-examination and the evidence of Mr Murray and Mr Mansfield (the liquidator). I would agree there are grounds to call into question the haphazard nature of the Third Respondent's business affairs and his apparent lack of co-operation with authorities.

17 However, I consider telling concessions were made by the Applicant, as they should have been. The evidence indicates, for whatever reason, that the Third Respondent did not know of the Compulsory Conference. Notice was sent apparently to the wrong address. At the time he was shifting between addresses and was having business and personal difficulties.

18 In such circumstances I think it would be unjust and unfair to say he was not or is not a "blameless" non-attending respondent. Despite the purport of some of Mr Mansfield's statements, I think the Third Respondent was telling me the truth. In such circumstances it would be grossly unjust in my

view if he was left to pay an amount of nearly $200,000.00 essentially unexplained as to about $35,000.00 in important respects as to interest and costs. And there is also the issue of the Hargreaves report which may or may not have been considered.

19 I am satisfied I should act under s120 to set aside the orders made on 3 August 2006. So as to further the interests of justice, if need be, I extend time under s126 to enable application to be made to enable me to do so. I cannot see any distinct prejudice to the Applicant out of doing so.

20 I caution the Third Respondent to be more attentive to his affairs as far as the Tribunal is concerned with the notices it sends.

21 I reserve liberty to apply for costs to both parties bearing in mind my earlier observations. The difficulty for me will be, on a question of costs that both parties are innocent of actual wrongdoing. I refer to s109 (1) of the Act. But I refer also to my observations also.

22 I direct that this matter be returned before me.

SENIOR MEMBER D. CREMEAN