VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

DOMESTIC BUILDING LIST **VCAT REFERENCE NO. D819/2002**

CATCHWORDS

Domestic Building – review – "reasonable excuse" - costs

[2005] VCAT 1594

APPLICANT	Lorna Blake Gosbell
1ST RESPONDENT	George Radovanovic
2ND RESPONDENT	Peter Radovanovic
3RD RESPONDENT	Zoran Radovanovic
WHERE HELD	Melbourne
BEFORE	Senior Member D Cremean
HEARING TYPE	Hearing
DATE OF HEARING	28 July 2005
DATE OF ORDER	8 August 2005

ORDERS

1. The orders made on 27 February 2004 are revoked in consequence of which this proceeding is not struck out but is reinstated.

2. I reserve costs – as to both the Applicant and the Respondents in respect of the hearing on 28 July 2005 and as to the Respondents in respect of the hearing on 27 February 2004.

3. I direct the Principal Registrar to relist this matter for further directions and orders before me on 23 September 2005 at 10.00am at 55 King Street Melbourne – and to serve all notices accordingly. Allow one half day.

4. I direct the Principal Registrar to serve a copy of these directions and orders (and reasons) on Wightons Lawyers and on Mr Murray George Pegg, Solicitor, having regard to the requirements of s.109 (5) of the *Victorian Civil and Administrative Tribunal Act* 1998.

5. Orders may be made in default (including orders as to costs) in the event that a party or Wightons Lawyers or Mr Murray George Pegg fails to attend or be represented at the directions hearing referred to in para 3 hereof.

SENIOR MEMBER D CREMEAN

APPEARANCES:

For Applicant	Mr G Hardy of Counsel
For Respondents	Mr A J Laird of Counsel

REASONS

1. In this matter application is made under s.120 of the *Victorian Civil and Administrative Tribunal Act* 1998 for review of an order made on 27 February 2004 whereby it was ordered as follows:

> *1. Pursuant to s.76 and s.78 of the Victorian Civil and Administrative Tribunal Act 1998 and upon being satisfied that the Applicant has failed to prosecute this proceeding with due diligence and has conducted this proceeding so as to cause unnecessary disadvantage to the Respondents, the proceeding is struck out*
>
> .
>
> *2. Order the Applicant to pay the Respondents' costs of this proceeding to be assessed in accordance with Scale "D" of the County Court Scale.*

2. The provisions of s.120 are 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 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 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. In support of the application I have been provided with numerous Affidavits including those of Margaret May Leech, solicitor, sworn 9 December 2004, 22 February 2005, 22 March 2005 (resworn), 22 March 2005 and 3 June 2005; Murray George Pegg, solicitor, sworn 16 February 2005 and 4 March 2005; Lynette Hockley sworn 2 June 2005; and Gregory William Francis Gosbell sworn 2 June 2005. I also have Affidavits of Phillip James Considine, solicitor, including those sworn on 4 June 2003, 25 February 2004 and 18 March 2005. As well there is an Affidavit of the Applicant herself which was sworn on 31 May 2005.

4. I am informed that the Applicant is an elderly lady over 80 years of age suffering Parkinson's disease. She also suffered a stroke in July 2004. Her husband Albert Joseph Edwick (known as Ike) Gosbell, died on 6 March 2002. Lynette Hockley and Gregory William Francis Gosbell, both deponents who are referred to above, are her children. There appears to be a further child – Rae.

5. Many of the facts in the matter are not in dispute. These proceedings were commenced by Application dated 11 December 2002. The Application was filed by Wightons Lawyers of 89 Myers Street Geelong and the reference was "MGP" Mr Murray George Pegg. Orders for dismissal for want of prosecution were sought by the Respondents on the ground of the

Applicants "failure to either attend or to arrange representation at two of three Directions hearings which [had] been listed in this matter…". See para 2 of the Phillip James Considine Affidavit of 25 February 2004. It was said that this failure was "clearly indicative of the [the Applicant's] disinterest in the prosecution of the claim". Such orders were granted by the Tribunal on 27 February 2004 as set out above.

6. It turns out, however, that the Applicant had no intention whatsoever to abandon her proceedings. She had entrusted her affairs to Wightons Lawyers – in particular, to Mr Pegg, who, according to his earlier Affidavit, received instructions to act on her behalf on 14 October 2002. I am not informed why it was that proceedings were not issued for nearly a further two months. I am not aware of any reason, I should add, why I should not mention his name or identify the firm. During 2003, he deposes, he suffered a condition described to him as "burnout". He says he was continually suffering from stress. See para 3 of his Affidavit. He says he "was finding it very difficult to cope with things on a day to day basis". See para 5. It appears, so much was this so, that Mr Pegg failed to attend the Tribunal at a directions hearing on 19 February 2004 or at the hearing of the application for the matter to be struck out on 27 February 2004.

7. It is deposed that the Applicant had no knowledge of these matters and I accept that this was so. The Applicant continued to pay invoices from Wightons Lawyers for services rendered in October 2003. See para 8 of Affidavit of Margaret Mary Leech of 9 December 2004. But Mr Pegg admits in his Affidavit of 4 March 2005 that "I failed to inform Mrs Gosbell that her application filed in [the] proceeding had been struck out". See para 2 of same.

8. It is also deposed, and not doubted, that Lynette Hockley and Gregory Gosbell became aware that the proceedings had been struck out in about

mid or late November 2004. They did not tell their mother because of her frailty and because she had been ill. However she was told that this had happened at a meeting with Ms Leech of Marshalls & Dent, solicitors, on 1 December 2004.

9. Thereafter application was made to this Tribunal for a review of the orders that had been made. That application was heard by me on 28 July 2005. It was not in dispute that the application was itself made within time. In any event, any delay by the Applicant was not inordinate and is readily explainable. It is not any delay which should count against the Applicant.

10. It had been in dispute, however, whether the Applicant had any standing to make the application. Opposition on that ground, though, fell away after a Deed of Confirmation was produced on the day of the hearing.

11. By s.120 (4) (a) of the Act, if I am satisfied (as I am) that the requirements of s.120 (1) have been met, I may hear and determine an application if I am satisfied that the applicant had "a reasonable excuse" for not attending or being represented at the hearing. The proper approach to s.120 is set out by Bongiorno J in *Alesci v Salisbury* [2002] VSC 475 a [6] who 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 [an] order made in his or her absence". Neither party cited this case to me as I recall. Bearing in mind the approach I should adopt, I am satisfied in this case, overwhelmingly, that the Applicant did have the "reasonable excuse" required.

12. It was argued before me that a striking out of a proceeding (as has happened in this case) is different to a dismissal of a case. I think this is clearly correct in law. In this case, had it been marked as dismissed, however, there still would have been no adjudication on the merits. At no stage have the merits of the Applicant's case been ventilated.

13. It was also argued before me that in order to exercise my discretion under s.120 I should indeed have regard to the merits of the Applicant's case. I would point out that there is nothing in s.120 of the Act that expresses this as a requirement. But that may be a matter that should be taken into account in the exercise of the discretion. In any event, on the materials before me, I am quite satisfied that there exists in the Applicant's case at least a triable issue or arguable position. I do not consider I need to be satisfied to any greater extent than that. This is not the place to conduct a hearing before the hearing.

14. Nor do I consider that remarks of Mandie J in *Scott v Bridge Street Clinic* [1998] VSC 160 at [4] can apply in this matter. I am not persuaded there is an element of "futility" involved in reinstating the Applicant's proceedings. I do not see that the discretion in s.120 is conditional upon the absence of a limitations defence. Nowhere in s.120 has Parliament legislated to that effect. A party may satisfy s.120: whether they succeed at the hearing on the merits – whether because of a limitations defence or otherwise – is a separate and different matter. Mandie J, in any event, was not considering the operation of s.120.

15. Opposition, however, was expressed to the Applicant having a "reasonable excuse" under s.120 on the ground that what lead to the striking out was a failure by her former lawyers to attend to her affairs in the matter. Because she would have a cause of action (so it was alleged) against them it was urged upon me, as I see it, that I should exercise my discretion against her. I cannot see that this is a proper reading of s.120 – it would mean that a person who has a reasonable excuse for not attending or being represented would, nonetheless, miss out on having a matter re-heard because they could always sue their lawyers. It would be a most wasteful exercise for me to hold that, despite the terms of s.120, the Applicant should now embark on

legal proceedings against her former lawyers. And this, despite her age and condition. There are cases, in any event, which indicate, quite plainly, that the existence of a parallel cause of action against former lawyers should not be determinative. I was referred to a number of these authorities and they include *Collins Depot v Bretherton* [1938] VLR40 at 44 where it is said:

> *"In general, where default is due to the carelessness of a party's solicitor, the party is not penalised to the extent of being shut out from litigating his claim or defence".*

This was referred to with approval by Jordan CJ in *Vacuum Oil Co Pty Ltd v Stockdale* (1942) 42 SR (NSW) 239 at 240. Harris J delivering the judgement of the Full Court in *Kostakanellis v Allen* [1974] VR 596 at 607, said "we ourselves think that it is correct". Accordingly, the fact that the Applicant may have a cause of action (if so) against her former lawyers is not, to my mind, decisive in the exercise of discretion under s.120.

16. A party – particularly a vulnerable person – is entitled to rely on their legal practitioner to act in their best interests and to apply proper standards. In this particular case it seems that the Applicant was let down (so it was argued) by her former lawyers. Based on that view I consider she does have a "reasonable excuse" for not attending or being represented at the hearing where her claim was struck out. I do not consider it would be fair or proper to visit her with the sins – if such they be – of her former lawyers.

17. It was argued, however, that I should decline to exercise a discretion against her on account of prejudice to the Respondents. Prejudice is a consideration referred to in a number of cases. In this case the Respondents argued that I had to balance competing prejudices – the prejudice to the Applicant if I did not allow her case to be reinstated and the prejudice to the Respondents if I should do so – and that I should find that the prejudice to the Respondents outweighs, as it were, that of the Applicant should I not reinstate. I cannot agree with is analysis. It is true that, following the orders made on 27

February 2004, the Respondents considered this matter was over. But if I reinstate I am not satisfied that they will suffer any actual prejudice – I am not satisfied that they would have any viable causes of action in the proceedings against any other persons. If, however, this might be the case I do not consider it goes beyond the "mere general possibility" referred to by Smith J in *Shepperdson v Lewis* [1966] VR 418 at 429 of "a sufficiently real and substantial danger of prejudice". In any event, in my view, if there is a real prejudice to the Respondents in my reinstating the proceedings – and I am not saying there is – I do not consider, in the exercise of my discretion under s.120, that it preponderates over that of the Applicant in not being able to argue a triable issue if I do not reinstate. If I do not reinstate, she may suffer a grave injustice. I consider that a vital consideration. It must not be overlooked that s.120 does not contain any provision the equivalent of s.126 (4) of the Act.

18. I note, in passing, that the Applicant has paid all costs orders standing against her, in sums certain, in this proceeding.

19. I consider, it proper, for the reasons I have given, to order that the orders made on 27 February 2004 be revoked.

20. Having done so, the proceeding does not stand as struck out but remains on foot. If I need to reinstate it, I do so.

21. The Respondents urged me, as innocent parties, to order costs in their favour should I reinstate. To accede to this submission would mean I would be ordering the Applicant to pay costs even though this whole episode is not, to any extent, so it would appear, of her making. And she would have to pay her own legal costs too. Then again, the Respondents appear to have done no wrong in seeking the orders made on 27 February 2004.
22. I intend, therefore, to reserve the question of costs.

23. Further however, I intend to direct the Principal Registrar to serve a copy of my orders and these reasons on Wightons Lawyers and on Mr Pegg with a view to them being given a reasonable opportunity to be heard (as required by s.109 (5) of the Act) on the question whether they or Mr Pegg should be ordered to pay not only the costs of the Respondents but also the costs of the Applicant under s.109 (4). I extend this to include the costs of the Respondents in respect of the 27 February 2004 hearing. I wish to make it quite clear that I do not have a concluded view that either Wightons Lawyers or Mr Pegg should be ordered to pay costs.

24. I make orders and directions accordingly.

SENIOR MEMBER D CREMEAN