

# VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

## CIVIL DIVISION

### BUILDING AND PROPERTY LIST

VCAT REFERENCE NO. D32/2014

### CATCHWORDS

Application for review of a Tribunal order - *Victorian Civil and Administrative Tribunal Act 1998* s120 - application to extend time – s126 – relevant considerations – first and second respondents unaware of proceeding, directions hearing or the self-executing orders – self-executing orders made against the respondents pursuant to s78 for first and second respondents failing to file Points of Defence – relevant considerations - s98.

<b>FIRST APPLICANT</b>	Trevor Kealy
<b>SECOND APPLICANT</b>	Maree Cook
<b>FIRST RESPONDENT</b>	Anthony Vincent Milanovic
<b>SECOND RESPONDENT</b>	Milanovic Urban Developments Pty Ltd
<b>THIRD RESPONDENT</b>	Equity - One Mortgage Fund Limited (Struck out by order of 28 November 2014)
<b>WHERE HELD</b>	Melbourne
<b>BEFORE</b>	Member F A Marks
<b>HEARING TYPE</b>	Review Hearing
<b>DATE OF HEARING</b>	20 August 2015
<b>DATE OF ORDER</b>	16 October 2015
<b>CITATION</b>	Kealy v Milanovic (Building and Property) [2015] VCAT 1644

### ORDERS

- 1 The time for the filing of the first respondent's application for review under s120 of the *Victorian Civil and Administrative Tribunal Act 1998* is extended to 19 June 2015.
- 2 The first respondent's application for review under s120 of the *Victorian Civil and Administrative Tribunal Act 1998* is granted.
- 3 Order 2, order 3 and order 4 of the Tribunal's orders dated 4 July 2014 and the orders of the Tribunal dated 22 July 2014 and 15 August 2014 are revoked.

- 3     **The proceeding is referred to a directions hearing on 4 November 2015 at 9:30 a.m. at 55 King Street Melbourne, at which time further orders will be made as to the future conduct of the proceeding, including listing.**
  
- 4     **The Principal Registrar is directed to amend the address for service of the First and Second Respondents on the register to [amilanoviv060603@hotmail.com](mailto:amilanoviv060603@hotmail.com)**
  
- 5     Costs reserved.

**MEMBER F. A. MARKS**

**APPEARANCES:**

For the Applicants	Mr Starvaggi of Counsel
For the First Respondent	Mr AV Milanovic in person

# REASONS

## The s120 application

- 1 On 15 August 2014 the Tribunal made orders pursuant to s 78 of the *Victorian Civil and Administrative Tribunal Act 1998* (**the Act**), that the proceeding as between the applicants and the first respondent, Mr Milanovic and the second respondent (**Milanovic Urban Developments**), be determined in favour of the applicants. The Tribunal made the orders because of the failure of Mr Milanovic and Milanovic Urban Developments to file Points of Defence.
- 2 The Tribunal also made orders that Mr Milanovic and Milanovic Urban Developments pay the applicants \$207,481.57.
- 3 Mr Milanovic is a builder and director of Milanovic Urban Developments. On 19 June 2015, following service of a bankruptcy notice on him, Mr Milanovic made an application to set aside the order under s 120 of the Act.
- 4 Section 120 of the Act relevantly provides:

### **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.
- (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.

- 5 The time specified by the *Victorian Civil and Administrative Tribunal Rules* ('**the Rules**') for making a s 120 application is 14 days after the person applying to set aside the order becomes aware of it (Rule 4.19). In an appropriate case, the Tribunal may extend the time under s 126 of the Act.
- 6 As Mr Milanovic did not file his s 120 application within 14 days of becoming aware of the order, he now seeks an extension of time in which to file his application.
- 7 Section 126 of the Act relevantly provides:

**Section 126: Extension or abridgment of time and waiver of compliance**

- (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;
- (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.

**The issues**

- 8 The issues for determination are:
- (a) Should the Tribunal extend the 14 day time limit for the filing of Mr Milanovic's review application?
  - (b) If yes to (a), should the Tribunal set aside orders 2, 3 and 4 made on 4 July and the orders dated 22 July and 15 August 2014?

**The hearing**

- 9 Mr Milanovic's s 120 application came before me for hearing on 20 August 2015. Mr Milanovic appeared in person. Mr Starvaggi of counsel appeared for the applicants.
- 10 Mr Milanovic gave oral evidence at the hearing. The applicants gave evidence by affidavit. The applicants' solicitor Ms Marta Kowalczyk gave evidence by affidavit sworn on 24 July 2015. Ms Kowalczyk did not appear

at the hearing. Mr Milanovic was cross examined and relied on his statutory declaration made 19 June 2015 and text messages sent to him in May 2015.

### **The applicants' claim**

- 11 The applicants filed Amended Points of Claim dated 29 April 2015. They claim that they entered into a building contract with Mr Milanovic, as builder, on 11 January 2011 in which he agreed to demolish a house and build a double storey home in its place. They claim that on 22 January 2011 they entered into a contract of sale of land with Milanovic Urban Developments to purchase Lot 1 on a proposed plan of subdivision, in Carrum, on which they intended to build their home (**'the Land'**).
- 12 The applicants claim that Mr Milanovic breached the building contract by, amongst other things, failing to start the works on time, obtain an occupancy certificate and complete the building works. They claim that Mr Milanovic has repudiated the building contract and failed to reimburse them for amounts paid and for the cost of fittings that they purchased for their home.
- 13 The applicants claim that the contract for the purchase of the Land from Milanovic Urban Developments was incorporated into and formed part of the building contract. Regrettably, their Amended Points of Claim does not adequately explain how or what they claim against Milanovic Urban Developments.
- 14 The applicants allege that in 2012, Milanovic Urban Developments defaulted on its loan payments to Equity One Mortgage Funds Limited (**'Equity One'**). They allege that Equity One took possession of the Land following Milanovic Urban Developments' failure to make repayments to it under the loan, appointed a receiver, assumed the responsibilities of the builder under the building contract, sold the Land and failed to reimburse them for their contributions towards the construction of the building works undertaken by Mr Milanovic.
- 15 The applicants claim damages of \$195,530.13 and interest from Mr Milanovic and Equity One.

### **The conduct of the proceedings**

- 16 The applicants filed Amended Points of Claim on 2 May 2014. At a directions hearing on 4 July 2014 the Tribunal made orders extending the date for the filing and service of Points of Defence, by Mr Milanovic and Milanovic Urban Developments, to 18 July 2014.
- 17 At that directions hearing the Tribunal made further orders that if the respondents failed to file and serve their Points of Defence by the due date, orders would be made under s 78 of Act that the proceeding be determined in favour of the applicants with damages to be assessed. Neither Mr Milanovic nor Milanovic Urban Developments appeared at the directions

hearing so the orders were made in their absence. It appears from my review of the Tribunal's file that the Tribunal did not serve the orders on Milanovic Urban Developments. Rather, the orders were posted to Mr Milanovic at his Carrum address.

- 18 On 22 July 2014, the Tribunal made orders in chambers extending the date for filing and service of the Points of Defence to 12 August 2014. Once again, the orders were posted to Mr Milanovic at his Carrum address and not served on Milanovic Urban Developments. Despite the extension of time granted, neither Mr Milanovic nor Milanovic Urban Developments filed Points of Defence.
- 19 On 15 August 2014 the Tribunal made orders in chambers, determining the proceeding, as between the applicants and Mr Milanovic and the Milanovic Urban Developments, in favour of the applicants. It ordered that Mr Milanovic and the Milanovic Urban Developments pay the applicants \$207,481.57. Once again, the orders were posted to Mr Milanovic at his Carrum address and not served on Milanovic Urban Developments.

### **The evidence**

- 20 Mr Milanovic made a statutory declaration on 19 June 2015. He declared that he first became aware of the Tribunal's order against him when he received a SMS text message on his mobile phone from the Federal Magistrates Court on 26 May 2015.
- 21 At the hearing before me, Mr Milanovic said that he did not appear at any hearing or comply with any orders because he did not know about the proceeding and did not have notice of the hearings or the orders.
- 22 He said that on 26 May 2015, when interstate, he received a text message notifying him of a court order and bankruptcy notice which had been issued against him. However, after reading the affidavit of Ms Kowalczyk, he corrected his earlier evidence and agreed that on 22 May 2015 he had received a SMS text on his mobile phone from Ms Kowalczyk. Mr Milanovic said he then returned to Melbourne. He said that on about 27 or 28 May 2015 he went to the Federal Magistrates Court to look at the documents referred to in the text message and saw that the Tribunal had made orders against him.
- 23 Mr Milanovic said that he was not in a good state between 27 May and 6 June 2015 because of mental health issues. He produced a text message sent to his mobile phone from the "CAT" team on 13 June 2015, in which they said he should contact the mental health triage because of concerns raised by his psychologist Marita Murphy. I understood the CAT team to be a group that assist people who have mental health issues, in emergency situations.
- 24 Mr Milanovic said that since April 2014 he had been involved in another proceeding in the Tribunal for about 12 months and the other party had

been able to contact him. He reiterated the fact that he did not know about this proceeding until May 2015.

- 25 He said he had lived at the Carrum address until September 2012 when the Land on which he was building the applicants' home was repossessed and he was forced to move. He said the applicants knew that he had not lived at the Carrum address since that time because they knew that the "bank" had taken possession of the Land. I took Mr Milanovic's reference to the bank to be to Equity One.
- 26 Ms Kowalczyk swore that Mr Milanovic would have been aware of the application made against him and the other respondents. However, Ms Kowalczyk did not provide any evidence that Mr Milanovic and Milanovic Urban Developments had been served with the originating application, Points of Claim or the Amended Points of Claim.

## **Findings**

- 27 Having heard Mr Milanovic's evidence, having reviewed the sworn evidence of Ms Kowalczyk, and having checked the Tribunal's file, I am not satisfied that Mr Milanovic or Milanovic Urban Developments were served with the originating application, Points of Claim or Amended Points of Claim, or with the orders made on 4 July and 22 July 2014.
- 28 I find that Mr Milanovic did not attend the directions hearing on 4 July 2014 because he did not have notice of that hearing. I also find that he did not have notice of the Tribunal's self-executing orders made on 4 July and 22 July 2014, which were executed by the Tribunal by orders made on 15 August 2014.
- 29 I find that Milanovic Urban Developments did not appear at the directions hearing on 4 July 2014 because it did not have notice of that hearing. I also find that it was not served with the Tribunal's self-executing orders dated 4 July and 22 July 2014 which were executed by the Tribunal by orders made on 15 August 2014.

## **When did Mr Milanovic become aware of the Tribunal's orders?**

- 30 Ms Kowalczyk swore that on or about 23 October 2014 she left a voice mail message on Mr Milanovic's mobile phone, identified herself and asked him to return her call which she said was about the VCAT matter.
- 31 She swore that on 24 October 2014 Mr Milanovic returned her call. She told him that the Tribunal had made orders against him and his company and that they had been trying to contact him for a few weeks. She advised him that they had called his mobile number as listed in their file and had also sent him correspondence to his Post Office Box address. Ms Kowalczyk swore that Mr Milanovic told her that he had not received any phone calls and had not been checking his Chelsea Post Office Box for a while as he was interstate. She asked him to provide an updated mailing

address and he said that he did not have one and that he was not renting and not living anywhere.

- 32 Ms Kowalczyk swore that she told Mr Milanovic that they were in the process of having VCAT orders registered with the appropriate court with a view to issuing a bankruptcy notice against him. She asked him whether he had any intention of coming back to Victoria and he said he did not. He told her that he did not feel obligated to give her his updated contact details and that he did not want to be helpful. Mr Milanovic said that they would be doing him a favour issuing bankruptcy proceedings.
- 33 In response to the sworn evidence of Ms Kowalczyk, Mr Milanovic said he recalled having a vague conversation with Ms Kowalczyk in October 2014 but denied being told that orders had been made against him. He said Ms Kowalczyk had told him the Tribunal was going to make orders. However, he agreed that the mobile phone number used by Ms Kowalczyk to contact him was his mobile number which he had used for some years. He denied that he had received other calls. He said that the applicants gave the Tribunal the wrong address and he had not used the Chelsea Post Office box since about November or December 2013.
- 34 Mr Starvaggi submitted that I should not accept Mr Milanovic's evidence because it was inconsistent, not only with his statutory declaration but with Ms Kowalczyk's sworn evidence. He said the inconsistencies included, amongst other things, the date when Mr Milanovic said he had become aware of the orders made by the Federal Circuit Court, the date when he had gone interstate, the dates when he had been working and his recollection of his discussions with Ms Kowalczyk in October 2014.
- 35 I accept that Mr Milanovic's evidence was somewhat inconsistent however he was self represented and only had an opportunity to look at Ms Kowalczyk's affidavit at the hearing. I accept that he gave inconsistent evidence when questioned by Mr Starvaggi and me. Nevertheless I am satisfied that Mr Milanovic did not deliberately set out to mislead the Tribunal. Ms Kowalczyk did not appear at the hearing and so could not be questioned on her affidavit.
- 36 Having reviewed Ms Kowalczyk's affidavit, I am not satisfied that she made Mr Milanovic aware of the orders in her telephone discussions with him on 24 October 2014. This is because her sworn evidence does not identify Milanovic Urban Developments as a respondent. Nor does it specify the proceeding in which Mr Milanovic was involved, the date the order was made or the amount that Mr Milanovic and Milanovic Urban Developments were ordered to pay the applicants.

### **Should the Tribunal extend the time for filing the s 120 application?**

- 37 Ms Kowalczyk swore that on 22 May 2015 she notified Mr Milanovic by SMS message on his mobile phone, that a bankruptcy notice had been issued against him and an order for its service made. She swore that the



SMS message stated that documents on file MLG414/2015 could be inspected at the Court: level 7, 305 William Street Melbourne.

- 38 Having accepted that Mr Milanovic visited the Court on or about 27 or 28 May 2015 to view the Court file, he had until 12 June 2015 to make his s 120 application. As he filed his application on 19 June 2015, he must seek an extension of time under s 126 of the Act.
- 39 Mr Starvaggi submitted that the Tribunal should not extend the time for filing the s 120 application because the applicants would be prejudiced and such prejudice could not be remedied by an appropriate order for costs or damages. He submitted that the applicants gave Mr Milanovic notice of the Tribunal's order on 24 October 2014. He also submitted that interest was accruing on the claim, that a hearing in relation to the bankruptcy proceedings was listed for 1 September 2015 and that an insurance claim had been lodged for the amount of the order. He estimated the applicants' legal costs to be \$17,000.
- 40 Mr Starvaggi did not make any submission about the applicants being prejudiced between the date when they sent Mr Milanovic the text message of the bankruptcy notice on 22 May 2015, or the date when he inspected the Court file on or about 28 May 2015 and the date on which he filed his s 120 application, 19 June 2015.
- 41 The matters to be considered in an application for an extension of time under s 126 of the Act are well established. They are:
- (a) Whether there is an "acceptable" explanation for the delay and whether it is fair and equitable in the circumstances to extend time;
  - (b) Whether the applicant for an extension has rested on his rights or has continued to make the decision-maker aware that he contests the finality of the decision as distinct from allowing the decision maker to believe that the matter was finally concluded;
  - (c) Whether the respondent to the application has been prejudiced by the delay; although the mere absence of prejudice is not enough in itself to justify an extension;
  - (d) Whether, if the applicant for an extension is successful, the delay may result in the unsettling of other people or of established practices;
  - (e) The merits of the substantial application; and
  - (f) Considerations of fairness as between the applicant and any other persons otherwise in a like position.
- 42 These considerations are referred to as the "Hunter Valley principles". They are not a check list. They are relevant matters to be considered and one factor may be more significant than another factor. Time may be extended even in the absence of an acceptable explanation. Each case must be judged on its own merits with various considerations being given appropriate weight in the circumstances of the case. Finally, it is a matter of doing

justice or enabling justice to be done (see *Roberts v Chung* [2014] VCAT 142 referring to *Hunter Valley Developments Pty Ltd and Ors v Minister for Home Affairs and Environment* (1984) 3 FCR 44 and 349 to 349 and other relevant cases).

- 43 Mr Milanovic gave evidence of his actions from the time that he received the text message on 26 May 2015 up to when he filed his s 120 application on 19 June 2015. Although his evidence was inconsistent, I am satisfied that Mr Milanovic has given a satisfactory explanation for his delay in making his application. Also, I am satisfied that there does not appear to be any prejudice suffered by the applicants arising from the seven day delay, between 12 June and 19 June 2015, when Mr Milanovic filed his application.
- 44 Mr Milanovic submitted that he had a good defence to the applicants' Points of Claim. He gave evidence that he completed the building works as required by the building contract and obtained an occupancy certificate. He said in about February or March 2012 the building inspector inspected the property and provided a minor list of items that needed to be addressed which the applicants did not accept.
- 45 His evidence was that following completion of the building an issue arose over the subdivision of the Land. He said that his wife had cancer at this time which required him to take her every second day to get medical assistance. He said that the applicants were aware of this fact and agreed to move into their home and let him put the subdivision on hold. He said they agreed to pay the amount owing on their home upon occupying it and to pay the amount owed under the contract for the sale of the Land on completion of the subdivision. He said that after the final inspection, the applicants refused to honour their agreement.

## Conclusion

- 46 I am satisfied on the evidence of Mr Milanovic that he has demonstrated that he has an arguable defence to the applicants' claim and that he should be given an opportunity to have his defence heard and the proceeding determined.
- 47 The applicants claim against Milanovic Urban Developments, as owner of the Land, is far from clear. In particular, there may be a question as to whether the Tribunal has jurisdiction to hear the applicants' claim against Milanovic Urban Developments.
- 48 The Tribunal has made orders under s 78 of the Act against Mr Milanovic and Milanovic Urban Developments. Section 98 of the Act provides that the Tribunal is bound by the rules of natural justice. Before an order is made under s 78 of the Act reasonable notice must be given that such an order may be made and of the grounds for the foreshadowed order (*Martin v Fasham Johnson Pty Ltd* [2008] VSC 289 at [34] and *Towie v Victoria* (2008) VSC 177 at [43] per Kyrrou J).

- 49 Having heard the evidence and reviewed the Tribunal's file, I am not satisfied that Mr Milanovic and Milanovic Urban Developments were served with either the originating application, Points of Claim or Amended Points of Claim.
- 50 I find that Mr Milanovic and Milanovic Urban Developments were not aware of the directions hearing on 4 July 2014, nor were they aware or given notice of the self-executing orders that the Tribunal made, pursuant to s 78 of the Act, that the proceeding be determined in favour of the applicants if they failed to file Points of Defence by the date fixed by the Tribunal. I also find that they were not aware of any subsequent orders made by the Tribunal pursuant to s 78 of the Act.
- 51 For the reasons set out above I find that Mr Milanovic and Milanovic Urban Developments have reasonable grounds for not attending the hearing on 4 July 2014 and that the circumstances are appropriate for me to extend the time for the filing of the s 120 application to 19 June 2015.
- 52 Accordingly, I will allow Mr Milanovic's application and revoke the self-executing orders 2, 3 and 4 dated 4 July 2014 and 22 July 2014. It follows that Tribunal's orders dated 15 August 2014 are also revoked. Since the orders are against both Mr Milanovic and Milanovic Urban Developments I will revoke the orders against both of them.
- 53 I will reserve costs with liberty to apply.

## **MEMBER F A MARKS**