VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

DOMESTIC BUILDING LIST VCAT REFERENCE NO. D791/2007

CATCHWORDS

Domestic Building, s120 of the *Victorian Civil and Administrative Tribunal Act*, application by respondent to re-open an order on substantive grounds, failure of respondent to attend previous hearing, alleged reasons for failure to attend, credibility of the respondent.

FIRST APPLICANT	Silvia Beatriz Mackay
SECOND APPLICANT	Craig James Mackay
RESPONDENT	Christopher Knight
WHERE HELD	Melbourne
BEFORE	Senior Member M. Lothian
HEARING TYPE	Hearing
DATE OF HEARING	6 May 2008
DATE OF ORDER	6 May 2008
DATE OF THESE REASONS	17 June 2008
MEDIUM NEUTRAL CITATION	Mackay v Knight (Domestic Building) [2008] VCAT 1612

APPEARANCES:

For Applicants	Mr A. Kirby of Counsel
For Respondent	Mr Hanson of Counsel

REASONS

On 6 May 2008 I heard and dismissed an application by the respondent under s120 of the *Victorian Civil and Administrative Tribunal Act* 1998 to re-open an order of the Tribunal on substantive grounds. I gave oral reasons on that day and written reasons have now been sought by solicitors for the respondent. A transcript of the hearing, including my reasons, was obtained by the respondent. The following are the transcribed reasons of 6 May 2008 with the exception that alterations or additions to those reasons appear in square brackets:

1 On 14 March 2008, the Tribunal ordered that the Respondent pay the Applicants $242,229.00 [and] costs on an indemnity basis. On 28 March 2008 the Respondent wrote to the Tribunal about the orders and on 3 April 2008 he swore a statutory declaration which was the basis of his application under section 120 of the *Victorian Civil and Administrative Tribunal Act* 1998 to re-open the proceeding on substantive grounds. Section 120 provides, in part:

> *(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.*

And

> *(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 not being represented at the hearing; and*
>
> *(b) If it thinks [fit, order] that the order be revoked or varied.*

2 [I am satisfied that the Respondent was neither present nor represented on 14 March 2008].

3 The first limb, without going into the question of whether it is reasonable for Senior Walker to make the decision that he did, is to decide whether I should hear and determine the application, and as Mr Kirby, for the Applicants has said, [] I have to decide whether the [Respondent] had a reasonable excuse for not attending or not being represented at the hearing.

4 The Respondent's statutory declaration is on the Tribunal's standard form. The Respondent completed the statement that "I first became aware of the decision of the Tribunal on" – and the date filled in was 14 March 2008, in the following way, and his words were:

> *Mail was forwarded to Dandenong South, 27 Ruhr street, where I work and staff has misplaced it.*

5 Now, he said that on oath. Under the point "the reason I was not in attendance or represented at the original hearing", he wrote:

> *As per attached letter.*

6 And as he admitted under cross-examination, the letter he was referring to was the letter of 28 March 2008. So, it therefore follows that that letter of 28 March 2008 is also part of his oath. He has sworn that that letter is true. The letter contains a number of assertions

7 [The letter, excluding the formal parts, states:

> We would like to advice [sic] that I have just become aware of the dispute between Silvia Beatriz & Craig James Mackay and myself.

> Unfortunately I was only made aware of this 2 weeks ago by documentation being forwarded to my new address at 27 Rhur Street Dandenong South. We would like to inform the Tribunal that I have been in America re Florida Lakeland through the months of January & February 2008 doing courses on Geothermal at ECR Technologies. Prior to this, we have been in constructions of 8 new homes in Lot 10-13, 34-37 Jerling Street, Tasmania Ulverstone. Whilst the majority of my time has been spent on these projects, we did not become aware of the dispute because of commitment to complete the above building works on time. We have been renting a home in Ulverstone since June last year at 50 Clara Street, Ulverstone where we have been residing. Therefore we have not had the chance to represent our side of the dispute and would like to request to have this re-hearing to settle this matter.
>
> It would appear that information has been withheld severely from these clients. We dispute that allegations are not true. The majority of building works in dispute is not of our fault. We would also like to state that at the time we were building this project, the clients were under extreme financial pressure being once we started the project, we had to make progress payment claims directly back to the client to what we thought at the time were payments for his electricians and plumbers only to find out these payments went on to their caravan and not into the building project. Also these clients booked up on my account $36,600.00 in materials for his shed at the rear of their property for their family to live in whilst the property was still under construction. This money was never allowed for in the original building loan. At that time, the job started to run sour due to the client were drawing too much money from their loan provider NAB leaving insufficient fund to complete the rest of the building works.
>
> We would like to make it known that we are gladly and open to rectify any defective works as seen or in dispute straight a way.]

8 [The letter states the Respondent] was travelling, or had travelled, to America, and the expression that he used there is:

> *…. through the month of January and February 2008.*

"Through the month of January and February 2008" has been shown to mean seven days during that period. He also said:

> *Prior to this, we have been in construction in Tasmania, Ulverstone. While the majority of my time has been spent on these projects, we did not become aware earlier of the dispute because of my commitment to complete the above works on time, we have been renting a home in Ulverstone since June last year at 50 Clara Street, Ulverstone, were we have been residing.*

9 Now, I read that, and I assume[d] that meant he had been living there the whole time. That proved not to be the case. He was unable to produce any document which established that he had travelled to Tasmania, although apparently, other members of his firm have travelled to Tasmania.

10 He also makes reference to the [first applicant] having booked up to [the respondent's account] $36,600.00 in materials for his shed at the rear of their property for their family to live. This money was never allowed for in the original building loan. Now, that may well be so, but it is not the whole truth. It is partial truth which [led] to me being misled. I assumed, when I read that, that it meant that the [applicants] had used $36,600.00 of the builder's money, and had not paid it back. They have paid it back.

11 It is said that the mail was probably forwarded [from his home in Corinella] to his office in Ruhr Street. When asked what happened in Ruhr Street, he said that he has a secretary who is 100per cent efficient. [She opens the mail] but when she finds a private document she does not look at it. She leaves it in a pile on the desk for the respondent to look at. I am not sure how you would classify a document that indicates that a person is being sued in VCAT as a private document. But let us leave that aside for a moment.

12 His explanation for the fact that this particular lady had not brought this document to his attention was that she was in Hong Kong for two weeks. The first time that this was raised to anybody, apparently including his lawyers, was today in the hearing. When asked what he did with the big pile of documents on his desk he said that he did not touch it. So assuming all the documents arrived at Corinella, assuming that all of those documents were then put in letters and sent to Ruhr Street, and that his 100 per cent efficient secretary then decided that those documents were private, they would be left on the desk and no further action take. In Mr Kirby's words:

> *It seems to be gross neglect of his own business.*

13 [The respondent] told me, under cross-examination, that there is a man of the same name who also lives in Corinella, [apparently suggesting that his mail might have been misdelivered.] That proved not to be the case based on the white pages extract that he provided. There is another Mr Knight who lives in Corinella, but his initial is not C and there is no indication that his name is Christopher.

14 I agree with Mr Hanson [of Counsel for the Respondent] that section 120 should be [construed] broadly. I have rarely declined to reopen when there has been an application under section 120. Unfortunately, today is the day when I do so decline. I found Mr Knight's evidence absolutely unbelievable, and I do not accept the truth of his statutory declaration. I do not accept that he has given a basis upon which he has a reasonable excuse for not being present at the hearing which took place on 14 March.

15 I have regard to the affidavit of Ms Carageorgous [solicitor for the Applicants]. I have no reason to doubt her statements on oath about the numbers of documents that were sent to Mr Knight. In addition to those documents, letters were sent by the Tribunal to him on 19 December 2007, 25 February 2008, 7 February 2008, and 12 March 2008, and all of those documents were by express post. Now it seems extraordinary to me that

[on the respondent's version of events] none of those documents arrived, whereas the order apparently arrived the day [after it was posted]. That is the basis upon which I find that the Respondent has failed to provide a reasonable excuse for not attending or being represented at the hearing. The application to reopen is dismissed.

COSTS

16 I consider that it is reasonable to make an order for costs. I am in two minds about whether the conduct of Mr Knight is contumelious and high handed in a way which indicates that there should be an order for indemnity costs against him of [and] associated with this application. I am going to err on the side of caution and say that, because I believe that he has been less than candid with the Tribunal and the other party, and that his application for rehearing was weak at best that I will make an order for costs, but those costs will be party-party costs. So order number 2 will be the Respondent must pay the Applicants' costs of, and associated with, this application to be agreed but, failing agreement, to be fixed by the Principal Registrar pursuant to section 111 of the *Victorian Civil and Administrative Tribunal Act* 1998 on a party-party basis on County Court Scale D.

SENIOR MEMBER M. LOTHIAN