VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

DOMESTIC BUILDING LIST

VCAT REFERENCE NO. D286/2007

CATCHWORDS

Application for review — costs – sections 109 and 120 *Victorian Civil and Administrative Tribunal Act* 1998

APPLICANT	Matan Properties Pty Ltd t/as Matan Constructions
FIRST RESPONDENT	William Waterson
SECOND RESPONDENT	Roisin Waterson
WHERE HELD	Melbourne
BEFORE	Deputy President Aird
HEARING TYPE	Review Hearing
DATE OF HEARING	29 November 2007
DATE OF ORDER	17 December 2007
CITATION	Matan Properties Pty Ltd v Waterson (Domestic Building) [2007] VCAT 2436

ORDER

1 The application for review is granted and the orders of 3 October 2007 are set aside.

2 The "Without Prejudice' document filed on 31 August 2007 and described as Points of Defence and Points of Counterclaim shall stand as the respondents' Points of Defence.

3 By 14 January 2008 the applicant may file and serve on the respondents a Request for Particulars (to be specified in detail). A notice requesting "the usual particulars" or "the usual details" of some matter or thing shall not be served.

4 By 31 January 2008 the respondents must provide answers to the Request for the Particulars.

5 By 31 January 2008 the respondents may file and serve a counterclaim in the form of Points of Counterclaim (with the fee payable) which shall include fully itemized particulars of the counterclaim, loss and damage

claimed, and the relief or remedy sought, and which must be accompanied by any expert reports, quotations and invoices on which they seek to rely.

6 By 14 February 2008 the applicant must file and serve Points of Defence to Counterclaim specifying the material facts relied upon, and which must be accompanied by any expert reports, quotations and invoices on which they seek to rely. Any set-off claimed must be fully set out.

7 The date by which the respondents must file and serve their List of Documents is extended to 31 January 2008.

8 This proceeding (and any counterclaim) is set down for hearing on 3 March 2008 commencing at 10.00 a.m. at 55 King Street, Melbourne with an estimated hearing time of 2 days, unless the parties advise the Principal Registrar at least 14 days prior to the scheduled hearing date that they consider 2 days to be insufficient. Costs may be ordered if the hearing is adjourned or delayed because of a failure to comply with directions.

9 The parties may be represented by professional advocates at the hearing.

10 Liberty to the parties to apply by consent in writing signed by or on behalf of all parties for the proceeding to be referred to a compulsory conference.

11 Liberty to apply for further directions until 4.00 p.m. on 25 February 2008.

12 Costs of and incidental to the compulsory conference held on 3 October 2007 and the review hearing are costs in the proceeding.

Warning

The parties are warned that the Registry will monitor compliance with these directions and may list a further directions hearing if there is any failure to comply. Any party in default may be ordered to pay costs including the costs of such hearing and any costs thrown away.

DEPUTY PRESIDENT C. AIRD

APPEARANCES:

For the Applicant	Mr L Magowan of Counsel
For the Respondents	Ms Robinson (Mrs Waterson) and Mr Waterson, in person

REASONS

1 In May 2007 the applicant builder lodged an application seeking payment of the sum of $32,655.10 for *'extension works carried out by builder at owner's request at …which the respondents refused to pay for'*. In accordance with the Tribunal's usual practice, the proceeding was listed for mediation on 18 June 2007 which was unsuccessful. At a directions hearing, on 12 July 2007, directions were made for the filing and service of Points of Claim, Points of Defence, Counterclaim, Points of Defence to Counterclaim and discovery; and the proceeding referred to a compulsory conference on 19 September 2007. The directions hearing was attended by the first named respondent owner, Mr Waterson, who completed the appearance sheet as appearing on behalf of both respondents. A copy of the orders were handed to the parties at the directions hearing. The Compulsory Conference proceeded on the adjourned date of 3 October 2007, in the absence of the respondents, and they now seek a review of that order under s120 of the *Victorian Civil and Administrative Tribunal Act* 1998. The background to this application is relevant.

Background

2 Points of Claim were filed on 30 July 2007 setting out the applicant's claim in detail. The applicant claims it has carried out works to the value of $94,027.60 of which the sum of $62,372.50 has been paid. On 7 August 2007 the applicant's solicitors wrote to the tribunal, seeking an adjournment of the compulsory conference advising the applicant's principals would be in Queensland on the scheduled date, and that they had not had a response from the respondents to their letter of 27 July 2007 seeking their consent to an adjournment.

3 On 8 August 2007 the applicant's solicitors again wrote to the tribunal advising they had been in contact with Mrs Waterson who, they said, had advised that a letter of consent to the adjournment had been faxed to their office that day, and that as it had not been received she would fax it again. It was not received, and attempts to contact Mrs Waterson had been unsuccessful.

4 On 9 August 2007 a member of the tribunal registry staff made a file note of a conversation she had when she rang Mrs Waterson. It records that Mrs Waterson advised her fax machine was broken but that she would try to fax the consent to the adjournment, and confirmed orally that the respondents consented to the adjournment. By order in chambers dated 9 August 2007 the compulsory conference was adjourned to 3 October 2007. Copies of this order were sent to the parties on 10 August 2007.

5 On 23 August 2007, the tribunal wrote to the respondents advising they were in default of the orders of 12 July 2007 which required Points of Defence and any Counterclaim to be filed and served by 17 August 2007. On 31 August 2007 the respondents filed a letter headed 'WITHOUT

PREJUDICE' addressed to the applicant's solicitors with a covering letter advising *'Please find attached copy of Points of Defence and Points of Counterclaim'* . The first paragraph of this letter makes it clear that this letter sets out the respondents' Points of Defence and Points of Counterclaim. In this letter the respondents allege that the applicant abandoned the site on 25 January 2007 at which time the works should have been, but were not, at the completion of frame stage, that the frame is non-compliant and that they are entitled to liquidated damages at the rate of $250 per week. In their final paragraph they state:

> Upon completion of the contracted work the respondent shall pay outstanding monies as per the existing contract to the complainant with the following understanding:
>
> As a consequence of the complainant' abandonment of the worksite on 27th January 2007, it was necessary for the respondents to carry out certain contracted works on the site in order to maintain the integrity of the construction and to make the construction sage. Accordingly, an independent costing shall be carried out on those works undertaken by the owner which formed part of the initial contracted works and such costs shall be deducted from outstanding monies due. (sic)

No details of the works carried out by the respondents were provided, nor have they been provided since. A costing of the works they say they carried out has never been provided.

6 On 3 September 2007 the tribunal advised the respondents about the fees payable on a counterclaim, and further that they could apply for a waiver of the fee if payment would cause them financial hardship. The fee has not been paid, and an application for a waiver of the fee has not been received.

7 On 17 September 2007 the tribunal wrote to the parties advising them they were in default of the orders of 12 July 2007 in that they had failed to file their List of Documents which were required to be filed and served by 13 September 2007.

8 On 26 September 2007 after referral of the file to a Senior Member the tribunal wrote to the parties advising:

> I wish to confirm that the Compulsory Conference will proceed on 3 October 2007, despite the lack of discovery, unless there is a prior application for directions.
>
> Should you have any further queries in relation to the above, please do not hesitate to contact the Tribunal.

9 On 1 October 2007, the tribunal received an undated letter from the respondents wherein they advised:

> This letter is to notify VCAT that due to prior work obligations we will be interstate as of Friday 28th September until mid February-early March, for this reason any matters in relation to the above file no. will need to be heard after these dates.

10 On 1 October 2007 Senior Member Lothian made the following orders in chambers:

> The Tribunal notes that although notification of the date of the compulsory conference was sent to the parties on 10 August 2007, notification was not received from the Respondents that they would be interstate from 28 September 2007 until February or March 2008 until today and no forwarding address has been provided. In the circumstances it is ordered that:
>
> 1. The Compulsory Conference fixed for 3 October 2007 will proceed.
> 2. The parties are reminded of section 87 of the *Victorian Civil and Administrative Tribunal Act* 1998 which provides in part:
>
>> If a party does not attend a properly convened compulsory conference-
>>
>> (a) the conference may proceed at the appointed time in the party's absence; and
>>
>> (b) if a member of the Tribunal is presiding and all the parties present agree, the Tribunal, constituted by that member may-
>>
>> (i) determine the proceeding adversely to the absent party and make any appropriate orders;
>
> 3. The Principal Registrar is directed to have a member of the VCAT registry ring the Respondents on the telephone number provided by them, (mobile number), and read this order to them, to send a copy of this order to their Victorian address by express post and to send a copy by facsimile to solicitors for the Applicant marked "urgent".

11 The orders were sent to the respondents by express post and a member of the registry staff attempted to telephone the respondents, as directed, and made the following file note at 3.43 p.m.

> Phoned R's as per Orders dated 1/10/07 para 3 mobile turn off no messagebank (sic)

A member of the registry staff also made the following file note:

> Message sent to (mobile phone no) at 2.47 on 2 October 2007 by …Phone response indicated "sent".
>
> As no consent from the Applicant, VCAT compulsory conference proceeds tomorrow. Ring…on (registry phone number).

12 The compulsory conference proceeded on 3 October 2007. The respondents did not attend nor were they represented. The applicant was represented by Mr Magowan of Counsel who has represented it throughout this proceeding. Pursuant to s87 of the *Victorian Civil and Administrative Tribunal Act* 1998 the proceeding was determined in favour of the applicant and the respondents ordered to pay the applicant the sum of $33,299.43 –

the outstanding balance of $31,655.10 plus interest of $1,644.33. The following order was also made:

> There is no order as to costs, however the Applicant has leave to apply for costs of and associated with today's compulsory conference and hearing should the Respondents seek to re-open the proceeding.

The order was posted to the parties on 9 October 2007.

13 On 15 October 2007 the tribunal received the following undated letter from the Ms Robinson (formerly Mrs Waterson):

> My partner (ex) William Waterson was retrenched from his job in April of this year 2007. Due to our financial committments of refinancing house for supposed renovations (which is in dispute) we have been seeking work wherever we can. In September we thought a job opportunity had arise in Port Hedlands, WA which due to our financial desperation decided to take. On this decision we contact VCAT via phone at first on 25th September 2007 and we were then informed to place information in letter stating details. On this conversation I thought that would be the only requirement. The only contacts numbers I could provide VCAT at that stage was my mobile no. On the 26th September I posted letter to VCAT on the believe that was all that was needed. Over that weekend due to all the financial pressure and emotional strain of the past year with these matters (with builder) myself and my partner decided to separate, obviously due to the emotional upheaval on my children (as they are only 4 and 6 yrs old) my attention and focus was on them and explaining situation to them. It was never my intention at any time not to defend or appear in these matters or cause any inconvenience to relevant parties. I had not realised the hearing was going ahead (I had not been notified) until on the 11th October I received a letter from VCAT informing me due to non appearance orders had been made, I telephoned VCAT straight away, to enquire which had led me to this letter appeal for hearing to be re-opened/reviewed. I have no legal representation as I am trying to represent myself and finding it very hard to understand whats legal or allowed, when I posted original letter, I thought I had done the right thing and then my attention was focussed on my personal issues on the understanding I would be informed of a new hearing date to defend myself. (sic)

14 On 17 October 2007 the following orders were made in chambers:

1. The Principal Registrar is directed to treat the Second Respondent's letter received 15 October 2007 as an application for review under s120 of the *Victorian Civil and Administrative Tribunal Act* 1998.
2. By 4.00 p.m. on 31 October 2007 the Respondents must file at the Tribunal and serve upon the Applicant, care of its solicitors, Aughtersons, PO Box 267 Maroondah Highway, Ringwood 3134, a Statutory Declaration in general accordance with the form enclosed with this order.

3. Should the Respondents fail to comply with order 2, their application for review shall stand struck out and the order of 3 October 2007 shall stand as the final determination of this proceeding.

4. The attention of the parties is drawn to order 3 of 3 October 2007.

…

15 On 26 October 2007 the tribunal received an undated facsimile from Ms Robinson advising she had not received the 'Statutory Declaration" form referred to in the orders, that she had telephoned registry who were sending her a copy by mail and that she was seeking an extension of time in which to return it. The date by which it was to be filed and served was extended by further order in chambers until 7 November 2007.

16 A Statutory Declaration made by Roison Robinson (Waterson) on 6 December 2007 was received by the tribunal by facsimile on 7 November 2007. The respondents' application for review was set down for hearing on 29 November 2007 at which time the respondents appeared in person and the applicant was again represented by Mr Magowan of Counsel. Two affidavits of their solicitor sworn 3 October and 26 November 2007 were also filed (a copy of the October affidavit having been filed by facsimile prior to the compulsory conference).

Preliminary issues

17 At the commencement of the hearing, Mr Magowan raised the issue of jurisdiction. He submitted that there was no power under s120 to review an order made at a compulsory conference because a compulsory conference is not a hearing. Section 120 relevantly provides:

(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 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.

18 Mr Magowan referred me to the reservations expressed by the learned author, Jason Pizer in his *Annotated VCAT Act, 3rd Edition* as to whether a compulsory conference is a 'hearing' for the purposes of s120. Whilst s83 contemplates that there may be one or more compulsory conferences before a matter is *'heard'* it is important to consider the precise wording of s83:

> If a party does not attend a properly convened compulsory conference-
>
> (a) the conference may proceed at the appointed time in the party's absence; and
>
> (b) if a member of the Tribunal is presiding and all the parties present agree, the Tribunal, constituted by that member may-
>
> (i) determine the proceeding adversely to the absent party and make any appropriate orders; or
>
> (ii) direct that the absent party be struck from the proceeding.

19 In circumstances, such as this, where the presiding member hears sworn evidence from the party who attends the compulsory conference, and makes final orders having considered that evidence, I am satisfied there has been a 'hearing'. I also note that in her orders of 3 October 2007, Senior Member Lothian granted the applicant leave to *apply for costs of and associated with today's compulsory conference and hearing'* (emphasis added).

20 Further, having regard to the provisions of ss97 and 98 of the *VCAT Act*, it cannot have been intended by Parliament that a party, who had a reasonable excuse for failing to attend a compulsory conference, would not have the same rights to a review and re-opening of the case, as a person who had a reasonable excuse for failing to attend a hearing. Whilst it may be that having regard to s98(4), ss97 and 98 do not operate to override s87, as held by Balmford J in *Vero Insurance v Body Corporate Strata Plan No 417161B* (2005) 22 VAR 406, I am not persuaded this means that in considering an application for review under s120 the tribunal cannot and should not have regard to those sections. Rather, in my view, her Honour's comments simply confirm that there is no impediment to the tribunal making final orders under s87 in the absence of one of the parties which might otherwise be considered to offend the rules of natural justice (s98(1)(a)).

The application for review

Did the respondents have a reasonable excuse for not attending the compulsory conference?

21 In considering any application for review the tribunal must be satisfied that the applicant for review had a reasonable excuse for not attending or being represented. Whilst Ms Robinson confirmed under oath that she and Mr Waterson were not in Western Australia on 28 September 2007, as she

indicated they would be in her letter received by the Tribunal on 1 October 2007, and that they never went to Western Australia, I am not persuaded this is sufficient for me to dismiss the application under s120. Ms Robinson has made it quite clear, in her correspondence to the tribunal, in her statutory declaration, and in her evidence at the hearing, that she thought when she wrote seeking an adjournment that was all that was required. As soon as she received a copy of the orders made at the compulsory conference she wrote to the tribunal explaining her understanding of the situation. The order was sent to the respondents under cover of a letter dated 9 November, Ms Robinson states that she received it on 11 November which was a Thursday and her undated letter was received on 15 November – the following Monday.

22 The application for review and re-opening is opposed by the applicants and I was referred to two affidavits of their solicitor sworn on 3 October 2007 (the day of the Compulsory Conference) and 26 November 2007 which sets out the basis upon which the application is opposed. In paragraph 8 he deposes as to the significant personal and financial hardship he understands this proceeding has caused Mr and Mrs Downs, the principals of the applicant. In both affidavits he deposes as to his concern that the '… *Respondents have needlessly caused delay and expense in the resolution of this dispute to the detriment of my client, and if permitted, will continue to cause delay and expense to my client…'*. This concern was reinforced by Mr Magowan at the review hearing who suggested that the respondents had hidden from the tribunal because they were unable to cope with the situation. There is simply no evidence to support this assertion. Ms Robinson gave uncontested sworn evidence that she had been in contact with the tribunal before writing the letter requesting an adjournment and understood that was all she was required to do. Mr Magowan declined to cross-examine the respondents when given an opportunity to do so. I must therefore accept their uncontested sworn evidence as to the circumstances surrounding their application for an adjournment, and their subsequent application for review and re-opening under s120.

23 Mr Magowan also noted that the respondents have previously indicated they would be seeking legal advice, but so far have not done so. Further in her most recent correspondence, Ms Robinson says they are unable to afford legal representation, but at the review hearing she said they would now be doing so. I do not construe this as an attempt to deceive the tribunal as suggested by Mr Magowan.

24 Whether or not a party is impecunious is not a matter properly to be taken into account in determining an application under s120. Impecuniosity does not deny a party of his or her right to be heard. Once satisfied that a party had a reasonable excuse for not attending a compulsory conference, ss97 and 98 become relevant. To deny the respondents an opportunity to be heard, and for the applicant's claim (and any counterclaim the respondents

may wish to formally lodge) not to be determined on its merits would not be fair.

25 It was submitted by Mr Magowan that the respondents have consistently failed to comply with orders of the tribunal, and in particular that they failed to file Points of Defence and a List of Documents. He subsequently conceded that the respondents had described the 'Without Prejudice' correspondence dated 31 August 2007 as 'Points of Defence and Counterclaim'. This document was prepared without the assistance of lawyers and despite the incorrect use of the term 'Without Prejudice' I am satisfied it was the respondents' attempt to comply with the orders for the filing and service of Points of Defence.

26 Further, the orders of 12 July 2007 required the parties to file and serve Lists of Documents by 13 September 2007. Although the respondents have not complied with this order, the applicants were in default until 1 October 2007 when they filed their List of Documents, by facsimile, seemingly in response to the tribunal's correspondence of 26 September 2007 advising the parties *'the Compulsory Conference will proceed on 3 October 2007, despite the lack of discovery, unless there is a prior application for directions.'* I also note the compulsory conference which was listed for 19 September 2007, at the directions hearing on 12 July 2007, was adjourned at the request of the applicants, and with the consent of the respondents, to 3 October 2007.

27 I am satisfied, on balance, that the respondents had a reasonable excuse for failing to attend the compulsory conference and that consistent with the tribunal's obligations under ss97 and 98 of the *VCAT Act* they must have an opportunity to be heard so that the claim and any counterclaim can be decided fairly, and according to their substantial merits.

Costs

28 The applicant seeks its costs of the compulsory conference of and incidental to this application for review. The orders made at the compulsory conference include:

> 3. There is no order as to costs, however the Applicant has leave to apply for costs of and associated with today's compulsory conference and hearing should the Respondents seek to re-open the proceeding.

29 Mr Magowan said that his clients have incurred significant financial hardship as a result of the non-payment of the outstanding balance by the respondents, and the legal costs which they have incurred to date. However, this is not a matter which I can properly take into account in deciding whether to exercise the tribunal's discretion under s109.

30 In considering any application for costs of a proceeding I must have regard to s109 of the *Victorian Civil and Administrative Tribunal Act* 1998 starts with the premise that each party will bear their own costs in any proceeding

unless the tribunal is minded to exercise its discretion under s109(2) having regard to the matters set out in s109(3) which provides:

> (3) The Tribunal may make an order under sub-section (2) only if satisfied that it is fair to do so, having regard to—
>
> (a) whether a party has conducted the proceeding in a way that unnecessarily disadvantaged another party to the proceeding by conduct such as—
>
> (i) failing to comply with an order or direction of the Tribunal without reasonable excuse;
>
> (ii) failing to comply with this Act, the regulations, the rules or an enabling enactment;
>
> (iii) asking for an adjournment as a result of (i) or (ii);
>
> (iv) causing an adjournment;
>
> (v) attempting to deceive another party or the Tribunal;
>
> (vi) vexatiously conducting the proceeding;
>
> (b) whether a party has been responsible for prolonging unreasonably the time taken to complete the proceeding;
>
> (c) the relative strengths of the claims made by each of the parties, including whether a party has made a claim that has no tenable basis in fact or law;
>
> (d) the nature and complexity of the proceeding;
>
> (e) any other matter the Tribunal considers relevant.

31 The approach to be taken by the tribunal in considering whether to exercise its discretion under s109(2) was recently considered by Gillard J in *Vero Insurance Ltd v The Gombac Group Pty Ltd* [2007] VSC 117 where he said at [20]:

> the Tribunal should approach the question [of costs] on a step by step basis, as follows –
>
> (i) The prima facie rule is that each party should bear their own costs of the proceeding.
>
> (ii) The Tribunal may make an order awarding costs, being all or a specified part of costs, only if it is satisfied that it is fair to do so. That is a finding essential to making an order. (emphasis added)
>
> (iii) In determining whether it is fair to do so, that is, to award costs, the Tribunal must have regard to the matters stated in 109(3). The Tribunal must have regard to the specified matters in determining the question, and by reason of paragraph (e) the Tribunal may also take into account any other [matter] it considers relevant to the question.

32 As discussed above I am not persuaded on the evidence before me that the respondents can be regarded as having attempted to deceive the tribunal and

therefore reject any suggestion that their conduct in not attending the compulsory conference and their subsequent application under s120 can be regarded as vexatious as contemplated by s109(3)(a)(vi).

33 Similarly I cannot be satisfied that they have still not filed a defence as suggested by Mr Magowan and that this has, in some way, disadvantaged the applicant. As I noted above the document which the respondents described as their 'Points of Defence' was filed albeit not in the formal manner in which a lawyer may expect. However, parties cannot and will not be penalised because they seek to represent themselves and are unaware of the 'usual form'. A defence in a narrative form is entirely appropriate where a party is not legally represented.

34 On balance, after considering the submissions made on behalf of the applicant, I am not persuaded that this is an appropriate case for the exercise of the tribunal's discretion. However, I do consider it appropriate, and will order, that the costs of the compulsory conference and of the review hearing be costs in the proceeding.

Further conduct of the proceeding

35 To ensure that this proceeding progresses in an efficient and timely manner, and to minimise the inconvenience and cost to the parties of a further directions hearing, I propose to make directions for the further conduct of the proceeding. I caution both parties that any failure to comply with the orders may lead to a determination under ss76 or 78 of the *VCAT Act* provided proper notice of an intention to make an application under ss76 and/or 78 is given to the other party. At this stage I propose setting the matter down for a two day hearing. If and/or when the respondents retain legal advisors, the parties may seek an amendment to the timetable by filing Minutes of Proposed Consent Orders for consideration in chambers. Otherwise, any further applications must be made at a directions hearing, although I will grant the parties liberty to apply by consent in writing for the matter to be referred to a Compulsory Conference.

DEPUTY PRESIDENT C AIRD