VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

DOMESTIC BUILDING LIST VCAT REFERENCE NO. D420/2003

CATCHWORDS

Domestic Building List; application to reopen earlier orders; earlier orders alleged to have been made without jurisdiction; where orders made in absence of party seeking reopening whether any excuse or explanation for non-attendance need be given

APPLICANT	Elias Moutidis
FIRST RESPONDENT	Allianz Australia Insurance Ltd
SECOND RESPONDENTS	Mr & Mrs Woodman
JOINED PARTY	Mrs Sofia Moutidis
WHERE HELD	Melbourne
BEFORE	M.F. Macnamara, Deputy President
HEARING TYPE	Directions Hearing
DATE OF HEARING	28 May 2008
DATE OF ORDER	28 May 2008
CITATION	Moutidis v Allianz Australia Insurance Ltd (Domestic Building) [2008] VCAT 2031

ORDER

1 Application under Section 75 of the *Victorian Civil and Administrative Tribunal Act* 1998 is dismissed.

2 No order as to costs.

3 **These applications under Section 120 and Section 126 of the *Victorian Civil and Administrative Tribunal Act*** are adjourned to directions hearing 9.30 am, 7 November 2008.

M.F. Macnamara
Deputy President

APPEARANCES:

For Applicant	No appearance
For Respondents	Mr M.H. Whitten of Counsel
For Joined Party	Mr Bernard Carr of Counsel

REASONS

1 This proceeding has had a fairly complex history, so complex in fact that the file relating to the earlier part of the proceeding kept by the Tribunal was lost in archives and I only have a continuation file of the later part of it.

2 For present purposes I will give a broad and somewhat impressionistic account of the background. Mr Elias Moutidis, the applicant in the proceeding was a registered builder who had obtained building insurance from Allianz Australia Insurance Ltd, the respondent. The insurance was not for first party risks for Mr Moutidis but rather in accordance with a Ministerial order made under the *Building Act* 1993 to provide indemnity cover to Mr Moutidis' building clients or customers. Two of those customers, Mr & Mrs Woodman made a claim on the policy which had been issued to them and Allianz determined to accept the claim and outlay moneys. The effect of Allianz' determination to accept would be to render Mr Moutidis liable under the arrangements that Allianz had with him to indemnify Allianz. In addition Mrs Moutidis who is not the builder, had executed a deed of indemnity, the effect of which in broad terms was to give her a co-extensive liability to indemnify Allianz as Mr Moutidis had undertaken.

3 Mr Moutidis sought a review of Allianz' determination to accept the Woodmans' claim and so proceeding D420/2003 came into existence. As that proceeding wended a fairly weary way through the Tribunal's processes, Allianz made a cross-claim against Mr Moutidis for indemnity and sought and obtained an order joining Mrs Moutidis as an indemnifying party.

4 A series of orders were made against Mrs Moutidis in default of her attendance at the Tribunal. First, there was an order determining that she was liable under the indemnity and there were thereafter orders rendering her liable for particular sums of money and for various items of costs.

5 On 24 March 2008 the matter was before me upon an application made by Mrs Moutidis under Section 120 of the *Victorian Civil and Administrative Tribunal Act* 1998 to re-open the order which required her to pay a particular sum of money. Section 120 whose terms I need not rehearse in detail broadly gives a party against whom an order was made in that party's absence a right to have the order re-opened upon demonstration that the absent party had a reasonable excuse for his/her absence. That reasonable excuse or lack of it appeared to be at the centre of the dispute between the parties.

6 Mr Whitten who appears and appeared on 25 March for Allianz, the party with the benefit of the orders against Mrs Moutidis, says that the way the matter was brought before me was misconceived, the order which was under attack was a mere quantification of liability and Mr Whitten contended correctly I think, that what Mrs Moutidis wished to do was to

attack the adjudication that she was liable at all under the indemnity. As a result the application which was made not only under Section 120 of the Act but also under Section 126 of the *Victorian Civil and Administrative Tribunal* because as an application under Section 120 it was made way out of time was adjourned and set down for further hearing next week on 3 June. On the application of Mr Whitten, I made an order pursuant to Section 109(6) of the *Victorian Civil and Administrative Tribunal Act* that the application could not continue until Mrs Moutidis paid costs in the sum of $1,500 which I determined should be paid having regard to the misfire of the application on 25 March.

7 By letter dated 20 May 2008 marked *'urgent'* a new and different law firm acting for Mrs Moutidis raised a different issue. The letter stated, inter alia:

> We take the view for the reasons that the joinder was made without proper consideration or determination of the liability of the joined party to the first respondent and the subsequent orders against our client were made without proper consideration or application of the reasons set forth in the Supreme Court decision of *Vero Insurance Limited v Withero* [2004] VSC 272.

8 As a result of that letter the proceeding was listed for an urgent directions hearing before me this afternoon.

9 Today Mrs Moutidis is represented by Mr Bernard Carr of Counsel. He submits that in the circumstances it is unnecessary for his client to establish the reasonable excuse requirement under Section 120 or it would seem, give any explanation for the lengthy delay in bringing the present applications which seem to have been stimulated by the attempt to bankrupt her upon the Tribunal's orders. Rather says Mr Carr, since the entire process of impleading Mrs Moutidis and adjudicating liability against her, had been made without jurisdiction, this was all that needed to be established and the orders should be set aside on that basis. Hence, today Section 120 has been given the go-by and attention has focussed upon a decision of Hollingsworth J in *Vero Insurance v Withero* which was referred to in the letter from Mrs Moutidis' new solicitors.

10 The effect of Hollingsworth's judgment in *Withero's* case appears to be that the Tribunal does not have jurisdiction to adjudicate upon the liability of a third party indemnifier, even although the indemnity is given with respect to an insurance policy, the substantive liability under which is reviewable by the Tribunal under Section 60 of the *Domestic Building Contracts Act* 1995.

11 Mr Whitten submits that it is impossible simply for Mrs Moutidis to go straight to the jurisdictional issues which are now raised based on *Withero's* case without any regard for the issues of time and reasonable excuse raised by Sections 120 and 126 of the *Victorian Civil and Administrative Tribunal Act*. He contends that aside from those provisions the Tribunal is *functus*

officio and so whatever the correctness of the argument based on *Withero's* case the Tribunal is simply unable to entertain the argument.

12 Mr Carr contends that in the circumstances the Tribunal is not *functus officio*. He relies upon a passage from reasons of Morris J then President of the Tribunal in *Jeffery and Corrections Victoria v Herald and Weekly Times Limited* [2004] VCAT 1211. At paragraph [38] of *Jeffery's* case the learned Judge said:

> When an order is made affirming a decision or setting aside a decision or ordering damages or dismissing an application the substantive issues in that case would usually be regarded as having been finally determined. Even then there would still be some issues that might not be finally determined for example if the decision contained an accidental slip it would be possible for that slip to be corrected using Section 119 of the Act. If a person had not appeared at the hearing it may be open for an application to be made to the Tribunal that the order be revoked under Section 120 of the Act. It has also been long established that the Tribunal retains the power to consider an application for costs notwithstanding that the substantive issue when the case is finally determined perhaps that is now articulated in Section 109(2) that provides 'at any time the Tribunal may order that a party pay all or the specified costs of another party in a proceeding'.

13 Mr Carr contended therefore that once there was an application under Section 120 on foot, this opened the jurisdictional door for the Tribunal to consider not only the matters specifically referred to in Section 120 but also the more fundamental issues which he now seeks to agitate on behalf of his client.

14 Mr Whitten said that to countenance such a view of things would undermine the finality of Tribunal decisions and make a mockery of the entire concept of *functus officio*. What then is the appropriate view of things? I should say something first about *Jeffery's* case. In *Jeffery's* case a matter had been determined in the Tribunal's Anti-Discrimination List or perhaps more appropriately settled on confidential terms. The Herald and Weekly Times Limited breached those confidential terms and the Learned President was invited to deal with the company for contempt. He joined the Herald and Weekly Times Limited as a party to the proceeding and made an order punishing it for contempt. The paragraph which I quoted and which is relied upon by Mr Carr was mentioned in His Honour's reasons for the purposes of rebutting a contention put by the Herald that the Tribunal was *functus officio* and therefore lacked the ability now to add an additional party and punish it for contempt.

15 The present case differs I think from *Jeffery's* case in that to give effect to the confidential terms of settlement the Tribunal struck out the proceeding, a process which on well established authority does not render the Tribunal *functus officio*. At paragraph [41] His Honour referred to a decision of the learned Chief Justice, then a Puisne Judge of the Supreme Court of

Victoria, *Tanska v Transport Accident Commission* [2000] VSC 56. In that case Her Honour was establishing no new law, merely giving utterance to well established principle. *Jeffery's* case is therefore I think clearly distinguishable from the matter that I have before me. Moreover, I note in passing that His Honour's judgment was reversed by the Court of Appeal though it is fair to say in a manner that I do not believe really casts an doubt or impunges the passage which Mr Carr relies upon for the purposes of his submission.

16 The concept of establishing a body to hear and determine matters whether that body is a court, a tribunal, an arbitrator or an expert has inherent in it the requirement that the adjudication in broad terms be final and conclusive between the parties. The process of adjudication would be a mere mockery or an empty ritual if it did not have that quality and so in the 1870's in the law or arbitration it was held by the Court of Appeal in Chancery in *Morde v Palmer* that once an arbitrator had signed his award he lacked the ability to correct even the most transparent and obvious error. Commercial arbitration legislation has long since remedied that defect, however it goes to show just how strong and intractable the doctrine of *functus officio* can be. The effect of what His Honour Morris J said in *Jeffery's* case which I respectfully agree, is that the doctrine of *functus officio* operates with respect to Tribunal determinations subject to the specifically limited number of exceptions. His Honour referred to those that I can think of now, namely the slip rule Section 119; the power to re-open a case or determination where a party was absent with reasonable excuse Section 120 and the power to award costs even after the determination of the principal issues. Whether we regard the power to award costs after the event as depending upon the words in Section 109(2) (the Tribunal's costs power) or regard it as something which flows from a view that whilst the Tribunal may be *functus officio* on the substantive portions of the case, the issue of costs is a distinct issue upon which the Tribunal is not *functus officio* need not now detain us. The general rule is that once the Tribunal has made a determination it cannot be re-opened except on appeal. Here of course even although the letter on behalf of Mrs Moutidis asked for a listing before a presidential member, I am in a position to exercise no appeal power. I stand in no superior or appellate relationship to others who have made orders in this proceeding any more than when the Chief Justice of the Supreme Court or for that matter the President of the Court of Appeal, sits as a Trial Judge in the Supreme Court, the President or the Chief has any appellate function within the Court. So no appellate jurisdiction is here invoked. I reject the submission that once an allegation is made a reasonable excuse for non-attendance at a hearing or that there has been a clerical error in a judgment or order that it remains open for any other compelling argument which might have been urged before the making of a determination and its authentication to be brought in. I accept the submission made by Mr Whitten that this would make a mockery of the doctrine of *functus officio*. It would make a small and limited series of exceptions, a set of flood gates

that could allow anything through. The result then seems to be that Mr Whitten is right, though the result is an unsatisfying one for more reasons than merely to say that the arguments as to jurisdiction relied upon seem to be very compelling and stand unanswered by Allianz. The reason why one feels particularly uneasy at reaching this conclusion is the knowledge that orders of this Tribunal, at least orders which like the present one have not been registered in the Supreme Court under Section 122 of the *Victorian Civil and Administrative Tribunal Act* are not immune from collateral attack. An order of a superior court of record is valid until set aside on appeal. An order of the Tribunal or an inferior court is subject to collateral attack and I would suppose for instance that if the Federal Magistrates Court had these arguments pressed upon it in bankruptcy proceedings based on the Tribunal order it may very well be convinced both to entertain and accept them. So there is an element of mere formalism in saying here in the Tribunal these orders have been made, they are set in concrete, they cannot be re-visited, when outside the Tribunal they are open to a collateral attack; however, in the end I think that that is the result and so I accept Mr Whitten's submissions on the point and I dismiss the application that is brought today. Mr Carr characterised it as an application under Section 75 of the *Victorian Civil and Administrative Tribunal Act* 1998.

MFM:RB