VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

DOMESTIC BUILDING LIST **VCAT Reference: D19/2005**

CATCHWORDS

Domestic building – Extension of time – Application for orders to be set aside – costs.

APPLICANT: Performance Builders (Vic) Pty Ltd

FIRST RESPONDENT: Peter Keele, P K Developments

WHERE HELD: Melbourne

BEFORE: Senior Member D. Cremean

HEARING TYPE: Hearing

DATE OF HEARING: 1 February 2006

DATE OF ORDER: 7 February 2006

[2006] VCAT 2

ORDERS

1. I extend time under s126 of the *Victorian Civil and Administrative Tribunal Act* 1998 to enable application to be made under s120 of such Act.

2. Under s120 of such Act, I revoke the orders made on 8 September 2005 and those made on 2 August 2005 and I amend the application of the Respondents accordingly.

3. By 20 February 2006 the Respondents must file and serve Points of Defence and Counterclaim.

4. By 6 March 2005 the Applicant must file and serve Points of Defence to Counterclaim.

5. I reserve costs.

6. I direct that this matter be listed for directions before me as soon as convenient after 13 March 2006.

7. I direct the principal registrar to serve Notices of Directions hearing accordingly.

8. Notices I direct also must be served on Messrs Clarkson & Socio solicitors of Suite 5, Medical and Professional Centre, 1 Melton Highway, Taylors Lakes, Victoria 3038 who I direct shall attend such directions hearing. Should they fail to attend or be represented orders under s109 (4) may be made in default.

SENIOR MEMBER D. CREMEAN

APPEARANCES:

For the Applicant:	Mr D Noble, Solicitor
For the Respondents:	Mr P Teele, director & Ms T Keele

REASONS

1. The Second Respondent (P K Developments Pty Ltd) appeared by the First Respondent. Both Respondents were represented by Ms Keele. Ms Keele is the wife of Mr Peter Keele who is the First Respondent.

2. Previously the Respondents were represented by lawyers but not on this occasion on 1 February 2006.

3. The Applicant was represented by Mr Noble, solicitor. Previously the Applicant was represented also by Mr Herskope of Counsel who was unavailable on this occasion.

4. The Respondents (although the application dated 30 January 2006 is made in the first person) make application for a number of orders including under s126 of the *Victorian Civil and Administrative Tribunal Act* 1998 for an extension of time to make an application under s120 of such Act for orders made on 8 September 2005 to be set aside.

5. The Respondents also seek, in consequence, leave to file and serve a defence and counterclaim and for any other orders the Tribunal deems appropriate.

6. The application of the Respondents was opposed by the Applicant.

7. At the hearing of this matter, the Respondents via Ms Keele took me through the affidavits on which they relied. They include affidavits of the First Respondent, Peter Keele, sworn 18 October 2005, 3 November 2005 and 31 January 2006. They also include affidavits of Ms Keele, herself, sworn 3 November 2005 and 27 January 2006.

8. At the hearing also, Mr Noble took me through the affidavits on which the Applicant relied in opposition. They include affidavits sworn by him on 19 October 2005, 27 October 2005 and 3 November 2005. In addition Mr Noble relied on an affidavit sworn by Malcolm Davies on 17 October 2005 and an affidavit sworn by Kate Sanger on 31 January 2006.

9. Further, at the hearing, I heard sworn evidence, on several matters, given by both Mr Keele and Ms Keele who were cross-examined.

10. The specific orders I am asked to set aside were those made by Deputy President Aird on 8 September 2005. By those orders the learned Deputy President, inter alia, "determined [the proceeding] in favour of the Applicant save as to the quantum and costs". The order, she noted, was made under s78 of the Act she being satisfied there was "no appearance by or on behalf of the Respondents at the time scheduled … and … taking into account the note which appears on the orders of 2 August 2005" which she was satisfied had been sent to the Respondents. She also ordered the Respondents to pay the Applicant's costs of $275.00. Mr Noble appeared for the Applicant.

11. The reference in the Deputy President's orders to orders made on 2 August 2005 is a reference to orders made by Senior Member Davis on that occasion. The learned Senior Member adjourned the directions hearing that day to 8 September 2005 (the date of the orders in fact made by Deputy President Aird) "by reason of the Respondents' failure to attend". He also ordered the Respondents to pay the costs of the Applicant of $330.00. Again, Mr Noble appeared for the Applicant. A note appears at the bottom of the Senior Member's orders as follows – "If the Respondents fail to appear at the Directions

Hearing on 8 September 2005 the Applicant may apply pursuant to s78 (2) (b) (i) of the Act to have the proceeding determined in favour of the Applicant in a summary manner and the proceeding may be so determined".

12. As it turns out, that is exactly what happened on 8 September 2005 when the Respondents again failed to appear – this time before the Deputy President.

13. In the first instance the Respondents make application under s126 of the Act to extend time so as to enable them to make application under s120. Application to set aside the orders made on 8 September was not made until 19 October. This is outside the period allowed for applications to be made under s120: see the *Victorian Civil and Administrative Tribunal Rules* r 4.18.

14. I agree that the principles to be applied in an application under s126 are well known. The authority usually cited is *Hunter Valley Developments Pty Ltd v Minister for Home Affairs and Environment* (1984) 3 FCR 344. Usually an "acceptable" explanation for delay involved must be provided. It must be recalled, however, that s126 of the Act gives a discretion which is unfettered. It cannot be the rule that unless such an explanation is forthcoming time cannot be extended for that would be to fetter the discretion. Time may be extended under s126, in some cases, even in the absence of an "acceptable explanation". For example, in *Radan Constructions Pty Ltd v Australian International Insurance Ltd* [2005] VCAT 2712 Senior Member Lothian extended time under s126 even though she described the delay in that case as "unacceptably long [and] without adequate explanation". It is apparent that she was concerned to ensure that the Tribunal did not act to stifle a case which, in justice, should have been heard. Therefore,

she extended time.

15. I consider I am in very much the same situation in this case. The delay in this case is not inordinate. There is no prejudice, I can see, if I do extend time. The explanation for the delay is that the Respondents only became aware of the orders of 8 September on 7 October when they were informed by their then lawyers. If I accept that this is so – that they were informed on 7 October – a delay of some 12 days before making application does not seem an unduly long period.

16. It seems to me that, in such circumstances, it would be quite unjust if I did not extend time to enable the application under s120 to be made. Reliance on one's legal representation seems a reasonable thing to do. I say this, without taking into account the grounds of the application under s120. But when or if I do take those grounds into account as well, the situation, in my view, becomes all the clearer. I rely upon s97 of the Act in this regard, in addition.

17. I propose, therefore, that I should extend time under s126 of the Act to enable the application under s120 to be made.

18. Under s120 (4) (a) I may hear and determine an application for review of an order if I am satisfied that the party applying for the same "had a reasonable excuse for not attending or being represented" at a hearing at which the order was made. By s120 (4) (b) if I think fit, I may, in consequence "order that the order be revoked or varied".

19. The Respondents in this case did not attend the hearing at the Tribunal on either 2

August 2005 or 8 September 2005. Nor were they represented at either. Their excuse though is that they say they had instructed solicitors to act for them in the matter and they say they thought that that was what they were doing. The firm involved was Clarkson & Socio and the solicitor they say they were dealing with was Mr Rex Franich.

20. It turns out, however, the Respondents allege, that their solicitors let them down. There is detailed evidence of this in the affidavits filed on behalf of the Respondents. Both Mr Keele and Ms Keele said that until this day they had never seen the orders of 2 August 2005 made by Senior Member Davis. Where Mr Franich has gone, or why he has gone from the firm, remains a mystery. Mr and Mrs Keele have reported the whole matter to the Law Institute which is investigating their complaint.

21. The approach I should adopt to s120 is, I consider, that set out by Bongiorno J in *Alesci v Salisby* [2002] VSC 475 at [6] who said: It could be difficult … to put forward a case where a blameless non attending defendant would not be entitled to a review of [an] order made in his or her absence". See also my decision in *Gosbell v Radovanov* [2005] VCAT 1594.

22. I am satisfied, to the requisite degree, that I should consider the Respondents to be in the position of "blameless non attending defendant [s]". I consider they have a reasonable excuse under s120 (4) (a) for having failed to attend the Tribunal on either 2 August or, in particular, on 8 September. I expect, therefore, I should amend their application so as to enable it to include an application to set aside the orders made on 2 August 2005 also.

23. That is not to say that I am entirely satisfied about all the evidence that was given by Mr

and Ms Keele. I was troubled especially by the evidence I was given by them, about the land Transfer declaration noted as being declared on 14 June 2005 before Mr Franich. But even if I was satisfied that they were lying on oath on this point – and I am not saying I am satisfied they were – that would not carry, of necessity, the inference that they lack a "reasonable excuse" under s120 (4) (a). The two are not directly related at all. For what it counts, I am inclined to think that Mr and Ms Keele are confused or mistaken in what they recounted to me.

24. Further, reliance was placed by the Applicant on correspondence emanating from the Tribunal. In particular reliance was placed on letters of 3 August 2005 said to enclose the orders made on 2 August. The correspondence in question, including those letters, is addressed to the home address of Mr and Ms Keele. However, I could not see I could take this issue to the point of saying I could be satisfied that they *must have* known of the orders made on 2 August including the warning given. In some cases the letters are addressed to "P R Developments" and not "P K Developments". In other words they name a different entity – although the address is correct. I am unable to say whether letters sent to Mr Keele personally at that address were sent in the one envelope with the name "P R Developments" appearing on the face of the envelope. I am unable to say, even, that I can be satisfied that the letters were sent in fact. I refer to the evidence of both Mr and Mrs Keele. Significantly, from my point of view, as I pointed out, critical letters on file, unless those coming before the ones in question, or after them, lack a Registry date stamp as having been sent out on a particular date. There is, furthermore, this point: even if I can be satisfied the letters were sent, there is nothing to say, except what the letters themselves assert, that the orders were, in fact, enclosed. They may have been or they may not have been. In any event, formal letters from the Tribunal, it

was indicated in the evidence, especially of Mr Keele, would have been sent on or delivered to the solicitors. People routinely rely on their solicitors in these matters.

25. I should add that I am unable to see the inconsistency suggested by Mr Noble between the letter from Mr Keele to the Tribunal and his affidavit of 18 October 2005.

26. In all the circumstances, informing myself as I may, and relying upon s97 of the Act, I am satisfied that the Respondents have demonstrated a "reasonable excuse" under s120 (4) (a) for their failure to attend the Tribunal on 8 September. It is proper that I should revoke the orders made on that occasion. I extend this, by amending the application, to the orders made on 2 August 2005 (which are essential to the operation of the orders made on 8 September).

27. I should direct that the Respondents have leave to file and serve a defence and counterclaim. The continued existence of the Second Respondent needs to be verified. If it has been deregistered, it cannot sue.

28. I continue the undertaking given by Mr Keele until further order. I shall need to hear argument from the Applicant as to why that undertaking should be continued. It is not usual for a party, such as the Applicant in this case, to be conferred secured creditor status in advance of judgement. Also, of course, the orders made on 8 September 2005 are revoked by me and they include the determinations adverse to the Respondents. So it is now as if the matter is proceeding in the normal way. An undertaking of the sort given is not usual.

29. I direct this matter be listed for a directions hearing on a date to be notified.

30. I am concerned at the costs which have been incurred in this matter. There have been 4 separate convenings of the Tribunal – 2 August 2005; 8 September 2005; 4 November 2005; and now 1 February 2006. The Applicant has appeared at each of these, the Respondents only at the last two. In light of the allegations being made by the Respondents I consider I should direct Clarkson & Socio to attend the Tribunal at the next directions hearing heaving regard to the terms of s109 (4) of the Act. I cannot regard the Applicant at fault or, in light of what was said to me, I cannot regard the Respondents at fault either. All it seems to me are innocent parties on the basis of what I have been told.

31. For the moment, I reserve costs.

SENIOR MEMBER D. CREMEAN