VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

VCAT REFERENCE NO. D401/2004

DOMESTIC BUILDING LIST

CATCHWORDS

Domestic building – Default judgment – Application to set aside – Extension of time.

APPLICANT	Radan Constructions Pty Ltd (ACN 007 070 135)
RESPONDENT	Palladium Developments Pty Ltd (ACN 094 701 774)
JOINED PARTY 1	Australian International Insurance Ltd.
JOINED PARTY 2	Tomo Perkovic
WHERE HELD	Melbourne
BEFORE	Senior Member D. Cremean
HEARING TYPE	Hearing
DATE OF HEARING	5 February 2007
DATE OF ORDER	15 February 2007
CITATION	Radan Constructions Pty Ltd v Palladium Developments Pty Ltd (Domestic Building) [2007] VCAT 211

ORDER

1 Applications of Second Joined Party dismissed.

2 Reserve liberty to the Respondent and the Joined Party to apply for costs.

3 Direct the Principal Registrar to list this proceeding for a directions hearing before me on 2 March 2007 at 10.00 a.m. at 55 King Street Melbourne – allow 2 hours.

SENIOR MEMBER D. CREMEAN

APPEARANCES:

For the Applicant	No appearance
For the Respondent	Mr S. Kirton of Counsel
For Joined Party 1	Mr T. Sedal, Solicitor
For Joined Party 2	Mr A. McNab of Counsel

REASONS

1 On 29 September 2006 I made orders inter alia that the First Respondent's Counterclaim be determined in favour of the First Respondent. I reserved the amount for which such judgment should be entered and I reserved interest and costs.

2 Such orders followed application for the same being made upon the non-appearance of the Applicant and the Second Joined Party.

3 The Second Joined Party was joined to the proceedings by orders I made on 25 November 2005 under s60 of the *Victorian Civil and Administrative Tribunal Act* 1998.

4 The Second Joined Party now applies under s120 of that Act for the orders I made on 29 September 2006 to be set aside. That section provides as follows:

> (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.

5 To be able to make application under s120 the Second Joined Party must first make application under s126 of the Act for an extension of time.

> (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; or
>
> (b) waive compliance with any procedural requirement, other than a time limit that the Tribunal does not have power to extend or abridge.

(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.

(5) In this section—
"relevant enactment" means an enactment specified in the rules to be a relevant enactment for the purposes of this section.

6 The application of the Second Joined Party is opposed by the First Respondent. The Joined Party (the insurer) neither opposes nor consents. The opposition of the First Respondent must be seen in light of the fact, as I believe it to be, that the Applicant has gone out of business.

7 At the hearing on 5 February 2007 the Second Joined Party was represented by Counsel who submitted I should act under s126 to extend time to enable the application under s120 to be made and that, having done so, I should allow that application on the ground that the Second Joined Party had a reasonable excuse for not being present or having attended or been represented at the hearing on 29 September when I made the default orders. He relied upon materials on file including two affidavits sworn by the Second Joined Party on 26 October 2006 and 24 November 2006. I asked Counsel if the Second Joined Party needed an interpreter and I was assured that one was not needed.

8 The Second Joined Party gave sworn evidence verifying his affidavits and was then cross-examined by Counsel for the First Respondent. He was not cross-examined by Counsel for the insurer.

9 At the conclusion of the hearing I reserved my decision which I said would be provided in due course together with my Reasons for Decision.

10 I have decided I should not allow the Second Joined Party's applications for one reason or another.

11 The application under s126 to extend time and under s120 to set aside the orders made is based on the affidavits I have mentioned which are filed with the Tribunal. There is also, of course, the submissions of Counsel and the sworn evidence of the Second Joined Party himself.

12 I indicated to Counsel at the hearing my misgivings about relying on the affidavit materials. I maintain that as my position. I am not satisfied that the affidavits in question may be safely relied upon. I heard and saw the Second Joined Party giving evidence. I am not satisfied the affidavits depose to matters based on his knowledge and belief. In many or most respects I am satisfied they depose to matters which his solicitor, upon instructions, regards as the Second Joined Party's knowledge and belief. The difference, however, is a critical one. The Second Joined Party should have sworn his affidavits after they were translated for him. This has not

occurred. Had they been translated for him, he might not have agreed with some or all of their contents. I cannot accept as his knowledge and belief what his solicitor regards as his knowledge and belief. This is serious irregularity and it is enough for me to say that I cannot safely rely upon the documents. I am surprised Counsel assured me that his client did not need an interpreter.

13 If I assume, however, that I can rely upon the affidavits, I am not satisfied I should extend time under s126. In my view there is no strong evidence of a reasonable explanation for the delay involved in making application under s120. The Second Joined Party did not, it seems to me, act promptly to apply under s120 when he could have done so. There is simply a void in the materials – if I can rely on them – as regards explanation for the delay. Or if there is some explanation for the delay, that explanation is not a reasonable one. It is not in point to blame Mr Smith (the previous solicitor) for having failed to properly take steps on behalf of his clients – the Applicant and the Second Joined Party. That is a separate matter and it may be that that matter gave rise to the default orders being made. But that does not provide any reasonable explanation for delay to apply within the required time limits under s120.

14 If, however, I assume that I should be ordering an extension of time I am not satisfied that the Second Joined Party has a reasonable excuse within the meaning of s120. It is clear that s120 should be interpreted beneficently and that seldom will an innocent non-attending party be unable to claim the advantage of its provisions. But I do not regard the Second Joined Party as innocent in the sense meant. All he did, as far as I can make out, and so far as material, is to instruct Mr Smith to do whatever he could for him. He says, I think, that he was not advised of matters by Mr Smith after about March 2006. Then he went to his present solicitors on 17 October 2006. But this does not seem to me to be the actions of someone who is being attentive to his rights. I have no idea why he did not chase up Mr Smith more than this – although perhaps it was due to a fees dispute. In that regard I would note that Mr Smith seems to have charged a lot of money for little in return – or so it appears. I accept though, based on cross-examination, that the Second Joined party was aware he could be personally liable. I rely upon the various documents tendered in evidence. He should have been far more alert to proceedings than he, evidently, was. I pass by the confusion in his evidence about whether Mr Smith ever acted for him personally as opposed to his company. If I assume, as I may not be able to do, that Mr Smith did act for him personally, he still should have chased matters up much more than he did in my view. If Mr Smith did not act for him personally then he should have been very alert to the proceedings because he knew, I am satisfied, that he could be held personally liable.

15 In the end, he failed to attend the hearing on 29 September 2006 and the orders in default were made. Either he should have attended – if he was acting for himself – or Mr Smith should have attended on his behalf. Either

way I am not satisfied he has a reasonable excuse for not having attended. My Reasons on that date record that "once again" he had chosen not to appear or be represented despite knowing of the proceedings.

16 Nor am I satisfied that the Second Joined Party establishes a reasonable excuse by pointing to inadequacies in the nature of the claims being made against him in the pleadings. I would agree, superficially, that there do appear to be areas lacking in the proper pleading of those claims under the *Fair Trading Act* 1999 using as the analogy the *Trade Practices Act* 1974. It should be remembered though that the Tribunal is not a court of pleadings. Perhaps, if the matter had been argued, the case could not have proceeded to judgment against the Second Joined Party. But that is one of the purposes of ensuring attendance at the Tribunal either in person or by representative: to put one's case in reply. Advantage was not taken of that opportunity with the consequence now that judgment must stand in a matter where it is contended it could not have been entered following argument. Nothing in s97 or s98 of the Act allows me to revisit the orders made on 29 September 2006 bearing this consequence in mind.

17 In all the circumstances I must reject the Second Joined Party's application. Either it is lacking any probative basis in the affidavits, and founders as a result, or, if not, it is not a case where time should be extended under s126 or, if it is a case where time should be extended, the requirements of s120 are not met. I note that it has been clear all along that the Second Joined Party is not precluded from arguing the question of quantum. As I say, I specifically reserved that issue. That seems to be one of his principal concerns.

18 I am satisfied though that the orders I made on 29 September 2006 must stand. It may be that the Second Joined Party has a cause of action against Mr Smith arising out of the same having been made. I simply do not know about that and I comment no further on it.

19 I reserve costs but give liberty to apply for the same at the next directions hearing.

SENIOR MEMBER D. CREMEAN