VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

VCAT REFERENCE NO. D254/2011

DOMESTIC BUILDING LIST

CATCHWORDS

Order in the absence of the respondents – application to set aside – *Victorian Civil and Administrative Tribunal Act* 1998 s.120 – application to extend time - s.126 – relevant considerations – one of the two respondents unaware of proceedings or hearing - solicitor relying upon other party for instructions – other party not authorized to represent or instruct solicitors on behalf of first party - claim for misleading and deceptive conduct – tortious measure of damages - other party purporting to represent unaware party without authority – order affecting joint rights and property – order against them jointly and not severable - order set aside as against both Respondents

FIRST APPLICANT	Mr Mark William Roberts
SECOND APPLICANT	Ms Rowena Teresa Lam
FIRST RESPONDENT	Mr Peter Chung
SECOND RESPONDENT	Ms Alice Chung
WHERE HELD	Melbourne
BEFORE	Senior Member R. Walker
HEARING TYPE	Hearing
DATE OF HEARING	17 January 2014
DATE OF ORDER	17 February 2014
CITATION	Roberts v Chung (Domestic Building) [2014] VCAT 142

ORDER

1 The order made by the Tribunal in this proceeding on 7 May 2012 is set aside.

2 Costs are reserved pending further submissions.

SENIOR MEMBER R. WALKER

APPEARANCES:

For the Applicants	Mr A. Bristow of Counsel
For the First Respondent	Mr B. Wright of Counsel
For the Second Respondent	Mr D. Cole of Counsel

REASONS

This application

1 At the hearing of this proceeding on 7 May 2012 an order was made that the Respondents pay to the Applicants damages of $93,675.00. Certain other orders were also made. Neither of the Respondents appeared at the hearing and so the orders were made in their absence.

2 The Applicants are the owners of a dwelling unit in East St Kilda ("the Unit"). It is one of seven units that were constructed by the First Respondent ("the Builder") who was at all material times carrying on business on his own account as a builder. The Second Respondent ("Miss Chung") is his sister.

3 Following the service upon each of them of a bankruptcy notice, each respondent brought a separate application to set aside the order, pursuant to s.120 of the *Victorian Civil and Administrative Tribunal Act* 1998 ("the Act"). That section provides (where relevant) as follows:

> **"120. Re-opening an order on substantive grounds**
>
> (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."

4 The time limit specified by the rules for the making of such an application is fourteen days after the person seeking to set the order aside becomes aware of it (*Rule 4.19*). However in an appropriate case the Tribunal can extend the time pursuant to s.126 of the Act. That section provides (where relevant):

> **"Extension or abridgment of time and waiver of compliance**
>
> (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 addition to her application pursuant to s.120, Miss Chung also sought "revocation" of the order pursuant to s.97 or 98 of the Act, upon the ground that it was irregular or obtained by fraud in that it was, she claimed, obtained in bad faith, being based upon misleading or incorrect material. I declined to deal with that application for reasons given orally at the time.

The hearing

6 The applications to set aside the order came before me for hearing on 27 November 2013. Mr A. Bristow of Counsel appeared for the Applicants, Mr B. Wright of Counsel appeared for the Builder and Mr D. Cole of Counsel appeared for Miss Chung.

7 The time allotted was insufficient and the applications were adjourned part heard before me to 17 January 2014.

8 Evidence was given by affidavit. The affidavits were as follows:

(a) by the Builder, affidavits sworn 13 September and 20 November 2013;

(b) by Miss Chung, affidavits sworn 23 August 2013, 4 October 2013 and 8 October 2013;

(c) by the Applicants' solicitor, Mr James Karavias, sworn 30 September 2013;

(d) by a Miss Warzawski, a clerk employed by Mr Karavias who swore that the contents of Mr Karavias' affidavit were true. She did not identify which parts of his affidavit she was confirming and so presumably she intended to confirm the correctness of all of it.

9 Miss Chung was cross-examined on her affidavit. From her answers and her demeanour in the witness box I formed the view that she was a truthful witness.

10 The material relied upon by Miss Chung was in her own affidavits and also the affidavits of the Builder. They set out a great deal of background material relating to:

(a) the construction of the Unit and the other six units;

(b) the suspect nature of some documents relied upon by the Applicants as the basis of their claim; and

(c) the dealings between the Builder and the Applicants.

11 Mr Bristow objected to much of her affidavit material, largely upon the basis that it was hearsay or speculation on her part but also upon grounds of relevance.

12 A similar criticism could perhaps be levelled at Mr Karavias' affidavit which includes many assertions as to matters that appear to have occurred before he became involved. However he was not sought to be cross-examined.

13 The general thrust of Miss Chung's evidence was that she had no involvement at all in the transaction between the Applicants and the Builder, save that she was one of the registered proprietors of the land upon which the Unit had been built. She said that she knew nothing about the sale of the Unit to the Applicants until 2005 when she was asked by the Builder to sign a Transfer of Land and a mortgage document. Many of the matters to which she has deposed in her affidavit are facts which she and her solicitors have discovered from other sources. Some of it is verified by the Builder's affidavits.

14 I am not bound by the rules of evidence and can receive hearsay, giving it such weight, if any, as seems appropriate in the circumstances. Insofar as something is irrelevant it will not assist me. Insofar as it is speculation, it is not for a deponent to speculate. It is for me to make findings of fact on the balance of probabilities. I said to Mr Bristow that, in assessing what Miss Chung has deposed to, I will keep his objections in mind in deciding as to any particular matter whether I should give it any or what weight. My conclusions will be apparent from the findings made.

The Applicants' claim

15 By their original Points of Claim the Applicants claimed that:

(a) They purchased the Unit from the Respondents by a Contract of Sale dated 9 November 2003;

(b) In order to induce them to purchase the Unit the Builder represented to them that the Unit was built in compliance with all planning permits, laws and regulations, with good workmanship and materials, that it was built to a state where it could be rented from the date of settlement and that there was "a contract of insurance for the building works in force".

(c) They entered into the Contract of Sale in reliance upon the representations;

(d) The representations were false in the respects set out in an expert's report accompanying the Points of Claim; and

(e) They had suffered damage which they claimed.

16 It was an unusual claim for a domestic building case in that there was no reliance upon any statutory warranty in either the *Domestic Building Contracts Act* 1995 or the *Building Act* 1993. It was simply a claim for damages arising from "misrepresentation". Moreover, there was no allegation in the Points of Claim that any of the representations were made by or on behalf of Miss Chung.

17 On 9 June 2011, amended Points of Claim were filed. The purpose of this document appears to have been to assert that there was no contract of insurance.

18 On 17 April 2012, less than three weeks before the hearing, further amended Points of Claim were filed. This alleged that the representations were made by both Respondents but provided no particulars as to how the representations were alleged to have been made. More significantly, it pleaded that the representations alleged were not about how the Unit was built but how it would be built. That is, the representations were now alleged to have been made before the Unit was built.

19 It also pleaded the existence of a mortgage the Applicants granted to the Respondents to secure $123,000, which was the balance of the purchase price they still owed to the Respondents, and the existence of a caveat the Respondents had lodged against the title of the Unit. The Applicants asserted that they had repaid $65,000 of the money secured by the mortgage and sought to set off the rest of what they owed against their claim for damages for defective work. They sought an order for the removal of the caveat.

20 This was the claim that went for hearing on 7 May 2012 and gave rise to the order made on that day that the Respondents now seek to set aside.

The conduct of the proceedings

21 The Builder was initially represented in the proceeding by TressCox, solicitors. Those solicitors also purported to represent Miss Chung. They were instructed to do so by the Builder. She was unaware of the existence of the proceedings and gave no such instructions.

22 Following the withdrawal of TressCox as solicitors for the Respondents the Builder purported to represent Miss Chung as well as himself in correspondence and also at directions hearings held on 4 November 2011 and 16 November 2011. Again, this was without her knowledge or authority.

23 A further directions hearing was held on 14 February 2012 at which there was no appearance on behalf of either Respondent.

24 According to the Builder's first affidavit, TressCox ceased to act because he had no money to pay them. He said that he then tried to handle the matter himself but by early 2012 "felt overwhelmed" and stopped taking any action to defend it. He said that he did not attend the hearing and did not tell Miss Chung of the hearing.

25 Miss Chung said that she was unaware of the existence of these proceedings and had never instructed or authorized TressCox or the Builder to represent her in regard to them.

26 She said that she knew very little about the construction of the units until about August 2004 when the Builder told her that they were completed. She said that the Builder never told her that he had applied for permits naming her and himself as "owner-builders" and she did not consent to him doing so.

27 She said that the Unit was rented by the Builder from November 2004 to 30 June 2005. In his written objection Mr Bristow queried how she could know that but she was not challenged in cross-examination on it and the Builder gave similar evidence in his later affidavit.

28 It appears from the Tribunal file that, up to the time of judgment, the address to which the Tribunal sent documents to the Respondents, including the various orders, was 15 Davis Street Doncaster, which is the address of the Builder. A number of letters were received by the Tribunal from the Builder but no communication was ever received from Miss Chung.

Background

29 When the seven units were built, the land upon which they were constructed was owned by the Builder and Miss Chung. According to her affidavit, when the land was purchased in 2003, she became a co-purchaser of the land at the Builder's request so as to enable him to obtain finance, since she had a "steady income" and he did not. It does not appear that she contributed any money towards the purchase of the land and there is no suggestion that she was involved in the construction.

30 Thereafter, the Builder constructed the units and they were completed by 27 August 2004.

31 According to a title search exhibited to Miss Chung's affidavit of 4 April 2013, the Plan of Subdivision by which separate titles were created with respect to the seven units was registered on 23 April 2005.

Sale of the Unit

32 Mr Karavias swore that the Applicants contracted to purchase the Unit by a contract of sale dated 9 November 2003. He does not say when that contract was signed. The only evidence that I have as to when the Unit was sold to the Applicants is that of the Builder, which is detailed below. He said that it was in late July or early August 2005.

33 Three forms of a contract of sale have been produced. The first of these was, according to Mr Karavias's affidavit, the contract entered into by the Applicants with the Builder. It is exhibit "JK1" to his affidavit. This contract ("Version One") appears to be signed by the Builder as Vendor and both Owners as purchasers. In the particulars of sale the names of the Builder as sole Vendor and the Applicants as purchasers are all typed, as are the other particulars on the page, except for the day of sale, where the date has been altered in pen to 9 November 2003, the number "3" having been originally typed as some other number. Payment of the residue of purchase money is said to be due on 15 August 2005. The title particulars provided are:

> "Certificate of Title Volume 3654 Folio 671 and Lot 1 Plan of Subdivision 514465N and being Certificate of Title Volume 10870 Folio 844".

34 Version One was not signed by Miss Chung and she was not named in it as a Vendor.

35 The title particulars in Version One are curious in that two Certificates of Title are referred to. According to the Title search which is exhibit "AC6" to Miss Chung's affidavit sworn 4 October 2013, the first Volume and Folio numbers mentioned are those of the original parent title. The second are those of the title that issued for the Unit when the Plan of Subdivision was registered on 23 April 2005. That being so, this page could not have been typed before 23 April 2005 because before that date neither the new title particulars nor the Plan of Subdivision number would have been known.

36 The second form of contract of sale is Exhibit "AC8" to Miss Chung's affidavit sworn 4 October 2013 ("Version Two"). She swore that she obtained this copy from the person or persons named in the document as being the "Conveyancers" for the Applicants. Except in one respect, the signing and particulars of sale pages of this document are identical to those in Version One, although one is not a photocopy of the other. The difference on the particulars of sale page is that the words "and Alice Chung" have been added in pen after the name of the Builder. Notwithstanding the apparent intention to include her as a vendor, Miss Chung did not sign this version of the contract of sale either.

37 Special Condition 9 of Version Two of the Contract of Sale reads as follows:

> "The Vendor warrants as at the date of the Contract the value of the land and the improvements thereon amount to $200,000 and the value of the works to be completed after the date of the Contract amount to approximately $273,000.00. The said value of the land is exclusive of infrastructure costs as may be required for stamp duty purposes."

38 If the "date of the Contract" is intended to mean the date upon which it was prepared and signed, this warranty is patently false, since the Unit had been completed more than a year earlier and that was known to all contracting

parties. By its terms the warranty appears to have been included "for stamp duty purposes".

39 When I raised that question during the hearing Mr Bristow suggested that there was an earlier contract to "buy off the plan" that this contract replaced. That is not how the case was pleaded in any of the Points of Claim filed, including the last, which articulated the claim that was before the Tribunal when the order was obtained. Moreover, if this contract did in fact replace an earlier binding contract between the same parties, then in order to be actionable, the representations alleged would have to have been made before the earlier contract.

40 In the same affidavit, Miss Chung swore that she obtained yet another version of the contract of sale ("Version Three") from Messrs TressCox, who were the Solicitors retained by the Builder. The page in Version Three bearing the signatures of the parties appears to be a photocopy of the same signing page as Version Two but the particulars of sale page have the names of the Builder and Miss Chung typed in as Vendors. The payment of residue is the same as the other versions and the day of sale is the same except that the year "2003" is now typed. The page has the appearance of being a typed version of the equivalent page in Version Two.

41 All three versions provide that an amount of $123,000 of the purchase price is to remain owing by the Applicants to the Builder and Miss Chung, and is to be secured by a mortgage.

42 The only explanation for these forms of contract is from the Builder. In his first affidavit of 13 September 2013 he says that he sold the Unit "by a contract of sale entered into in 2003 and which settled in 2005". In his second affidavit sworn 20 November 2013 he said that, in making that statement he was relying upon the date written in the form of Contract.

43 He said that, in fact, the Contract was entered into in late July or early August 2005. He said that he first became aware of the Applicants in mid to late July 2005 when he was telephoned by an agent in Sydney, a Mr Comer, who was trying to sell the units. Mr Comer is the uncle of the First Applicant. The Builder said that he negotiated the sale of the Unit with Mr Comer. He said that the Contract of Sale was prepared in late July or early August and was signed by him approximately two weeks before the settlement date, which he said was 15 August. He said that he never met the Applicants before entering into the Contract and he denied ever having made any representations to them.

Miss Chung's version of the sale

44 Miss Chung's signature does not appear on any of the three versions of the contract of sale and she swore that she never signed such a document. She denied having seen any of the three versions of the Contract of Sale until after 23 August 2013.

45 According to Miss Chung's affidavit the Builder contacted her in about June, July or August 2005 to tell her that the Unit had been sold and at his request she signed an Instrument of Transfer and a mortgage to secure the balance of the purchase money.

46 Following settlement of the sale a caveat was lodged at the Titles Office in order to protect the rights of the Builder and Miss Chung under the unregistered mortgage for the balance of the purchase money.

The claim for defects

47 On 13 August 2008 the Applicants' solicitors, James Karavias & Co, sent a letter to the Respondents alleging defective workmanship and suggesting that the claim for defective workmanship be satisfied by the Respondents "revoking" their mortgage. This letter was sent to the Respondents at an address at 13 Kialoa Court Taylors Lakes, being the address specified for them in the contract, mortgage and caveat. It was not Miss Chung's address. Two months later, on 13 October 2008, Mr Karavias faxed a copy of the letter at the Builder's request to his solicitors, TressCox.

48 In the meantime, a notice under s89(A) of the *Transfer of Land Act* 1958 had been lodged on behalf of the Applicants at the Titles Office in order to remove the caveat

49 In response to the lodging of that notice, on 16 October 2008, TressCox Lawyers wrote to Mr Karavias, stating that they acted for the caveators, who were the Builder and Miss Chung. They required the Applicants to withdraw the application under s89(A) and threatened legal action if that did not occur.

50 The notice was thereafter removed. In his letter dated 22 October 2008, informing TressCox of the Applicants' intention to withdraw the notice to remove the caveat Mr Karavias informed TressCox that he had instructions to issue proceedings against the Respondents and asked them to obtain instructions as to whether they would accept service on the Respondents' behalf. In response to this letter, on 5 November 2008, TressCox stated:

> "We refer to previous correspondence and confirm that we have our client's instructions to accept service of any process".

51 The present proceeding was issued by the Tribunal two and a half years later, on 30 March 2011. The reason for this delay is not explained.

Service of the present application

52 It is the practice of the Tribunal to serve proceedings on behalf of Applicants upon the named Respondents at the addresses the Applicant has provided for them in the application.

53 In the present case the following are specified in the Application as the addresses:

"C/ TressCox Lawyers, Level 9, 469 La Trobe Street, Melbourne, 3000

Ph: 9602 9725

Fax: 9642 0382

10 Atkinson Close, Windsor 3181"

54 The first address is that of the lawyers named. The second address is the personal address of Miss Chung.

55 According to the Tribunal file a copy of the application was posted to:

"TressCox Lawyers

Level 9, 469 La Trobe Street

Melbourne Vic 3000;

and

TressCox

10 Atkinson Close

Windsor Vic 3181.

56 Miss Chung swore that she never received a copy of the application and that she was overseas at the time that it was posted to her address. It was not suggested that TressCox Lawyers has any connection with the premises at Atkinson Close where she lives.

57 According to Mr Karavias' evidence he wrote to Miss Chung on 20 April 2011 at 10 Atkinson Close Windsor 3181 to confirm that she had received the application. He said that he received no reply and the letter was not returned to his office. Miss Chung says that she never received such a letter and that she was overseas at the time that it would have arrived.

58 Thereafter, through the various interlocutory stages the defence of the proceedings was conducted by Messrs TressCox, purporting to act on behalf of both Respondents. They did this upon instructions they received from the Builder.

59 Late in October 2011 TressCox filed and served a Notice of Solicitor Ceasing to Act. The last known address for the Respondents specified by TressCox in this Notice is 15 Davis Street Doncaster Vic 3108. That is the address of the Builder. This notice was not served upon Miss Chung.

60 Between the service of the notice and the hearing, correspondence from both the Tribunal and Mr Karavias was addressed to the Respondents at 15 Davis Street Doncaster Vic 3108. Nothing was sent to Miss Chung's address.

After the hearing

61 The proceeding came on for hearing on 7 May 2012 and an order was made that the Respondents pay the Applicants $93,675.00, that they discharge the

mortgage over the Unit and they withdraw the caveat lodged on their behalf against the title.

62 It does not appear from the Tribunal file or from the affidavit material what then occurred following judgment until 7 December 2012 when Mr Karavias sent a letter to Miss Chung at her address in East St Kilda. That letter encloses a copy of an earlier letter addressed to the Builder and Miss Chung at the Builder's address at 15 Davis Street Doncaster in May. The two letters between them informed Miss Chung of the outcome of the hearing of the matter and the quantum of the costs that the Owners were claiming.

63 Miss Chung said that when she received the letter she did not understand what it was about. She said that she contacted the Builder who told her that:

(a) the proceeding related to an old building development where the purchaser owed him an outstanding amount of about $120,000 and had not paid him;

(b) the purchaser claimed that the property required repairs and was claiming a very large amount as compensation for those repairs;

(c) the amount claimed was about the same as the purchaser owed him and so there was nothing for Miss Chung to be concerned about;

(d) the letter had been addressed to her by mistake and that her name should not be on the documents;

64 She said that she asked the Builder to have her name removed and he assured her that would be done.

65 Thereafter, Mr Karavias sent further letters to Miss Chung as follows:

(a) on 1 February 2013, enclosing a summons for taxation and a bill of costs;

(b) on 20 February 2013, advising of an order made by the Costs Court; and

(c) on 7 March 2013, enclosing an order for payment of costs that had been assessed at $33,520.34.

66 She said that she spoke again to the Builder after receiving each of these letters and asked him what action he was taking on her behalf. She said that he reassured her that his solicitors were taking action to remove her name from the proceeding, that he had matters in hand and that she need not be concerned. He told her that these legal matters take time.

Delay

67 According to Miss Chung's evidence she relied upon the Builder's assurances and did nothing about the matter until she was served with a bankruptcy notice on 9 August 2013. She then consulted solicitors and this application was issued on her behalf on 23 August 2013.

68 When asked why she took no independent action before then she said that she is Chinese and the Builder is her older brother. She said that it would have been culturally difficult for her not to accept what he told her.

69 In cross-examination she was shown a copy of an affidavit she swore in the bankruptcy proceedings. In paragraph 5 of that affidavit she said that she had never seen a copy of the VCAT order before it was shown to her after she received the bankruptcy notice. She acknowledged that in fact she had seen it when it was sent to her in December 2012, although she said that, at the time, she thought that it related to County Court proceedings. There is a reference to the County Court in the order relating to costs.

70 I believe she is a truthful witness and I accept her evidence.

Extension of time

71 Since Miss Chung became aware of the order when she received Mr Karavias' letter of 7 December 2012, an application under s.120 was required to be made within 14 days of that date. It was not, and so she must seek an extension of time under s.126 of the Act.

72 The relevant matters to be considered in an application for an extension of time are well established. In *Javni Homes v Victorian Managed Insurance Authority* [2006] VCAT 1915 and *Owner's Corporation SP414292B v Victorian Managed Insurance Authority & Anor* [2009] VCAT 1920, the Tribunal adopted the principles set out by Wilcox J in *Hunter Valley Developments Pty Ltd and Others v Minister for Home Affairs and Environment* (1984) 3FCR 344 at pp.348 to 349.

73 That was a case involving an appeal from an administrative decision and an application for an extension of time in which to bring that appeal. The legislation (s.11 of the *Administrative Decisions Judicial Review Act* 1977 CW) provided no criteria by which an application to extend time should be assessed. After discussing the authorities his Honour set out the matters that he considered relevant, which may be summarised as follows:

(a) Whether there is an "acceptable" explanation for the delay and whether it is fair and equitable in the circumstances to extend time;

(b) Whether the Applicant for extension has rested on his or her rights or has continued to make the decision-maker aware that he or she contests the finality of the decision as distinct from allowing the decision-maker to believe that the matter was finally concluded;

(c) Whether the Respondent has been prejudiced by the delay; although the mere absence of prejudice is not enough in itself to justify an extension;

(d) Whether, if the Applicant for extension is successful, the delay may result in the unsettling of other people or of established practices;

(e) The merits of the substantial application; and

(f) Considerations of fairness as between the Applicant and other persons otherwise in a like position.

74 In that case, his Honour was dealing with an application to extend time in which to appeal from an administrative decision. After extracting the foregoing principles he added that it was important to bear in mind the following point made by Sheppard J in *Wedesweiller v. Cole* (1983) 47 ALR 528 relating to the diversity of decisions of which review may be sought under the Act:

> "…there may be some cases which may be decided upon considerations which affect only the immediate parties. It will be appropriate to consider whether the delay which has taken place has been satisfactorily explained, the prejudice which may be caused to an Applicant by the refusal of an application, the prejudice which may be suffered by the government or a particular department if the application is granted and, generally, what the justice of the case requires. In other cases, wider considerations will be involved."

75 These principles, which are commonly referred to as "the Hunter Valley principles", are not a check list. They are relevant matters to be considered and one factor may be more significant in a particular case than it would be in another. Some of the considerations mentioned by his Honour are more appropriate to an appeal against an administrative decision. Any discretion must be exercised judicially and the Tribunal should not be constrained by rigid rules.

76 Mr Cole referred me to the Tribunal's decision in *Performance Builders v Keele* [2006] VCAT 2 where the learned Senior Member, after referring to the Hunter Valley principles, said (at para 14):

> "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."

77 Mr Cole submitted that, in considering whether to extend time, the overriding purpose is to enable justice to be done. He referred me to several authorities including the following passage from the Tribunal's decision in *Dingley Village Neighbourhood Centre Inc v Kingston City Council* (1997) AATR 227 at p.285:

> "... the overriding purpose of the power granted to extend time is to enable justice to be done. Time limits are expected to be observed. They facilitate the

timely conduct of the business of the court or tribunal. A party obtaining benefit from the failure of another to observe a time limit is able to retain that benefit unless the discretion to extend is exercised in favour of the defaulter. The grant of an extension is not automatic. It is generally relevant to consider the history of the case, but none of these things establish any hard and fast rule, and each case must be judged on its own merits with various considerations being given appropriate weight in the circumstances of the case. Finally however, it is a matter of doing justice, or enabling justice to be done."

78 Mr Bristow's submissions focussed on the merits of the substantive application which he submitted was not bona fide. There is no allegation of prejudice in the Applicants' material if the time for the application under s.120 should be extended.

Should time be extended?

79 The delay to be explained is that between fourteen days from December 2012, when Miss Chung first became aware of the decision and 23 August 2013, when the application to set aside the order was issued on her behalf.

80 Although she said that she thought it was a County Court proceeding she was nonetheless alerted to the fact that an order had been made against her. Her explanation was that she spoke to the Builder who assured her and continued to assure her that the matter did not concern her and that he was having her name removed from the proceeding. He also told her that the claim made by the Applicants was equivalent to what they owed him from the sale of the Unit. She said that she accepted what he said and I accept her evidence in that regard. Although one might criticize her for accepting these assurances and continuing to accept them when further letters were received, there were cultural reasons why she would accept what her older brother told her.

81 The term "satisfactory" does not mean that the reason for the delay must be exculpatory. Although another person might have behaved differently and taken action earlier, the delay is understandable in all the circumstances. I am satisfied that a satisfactory explanation has been given and that she has not simply slept on her rights.

82 There does not appear to have been any prejudice arising from the delay between December 2012 and August 2013. Certainly the principal claim, which arises from representations alleged to have been made in 2003, is now very old but that is mainly due to the Applicants not issuing this proceeding until March 2011.

83 As to the substantive defence that Miss Chung intends to present there is certainly an issue to be tried. Indeed, on the facts deposed to in the material, the Applicants' claim in this proceeding has substantial difficulties. She was unaware of either the proceeding itself or the trial. The prospects of a successful application under s.120 are therefore good.

84 In those circumstances I will extend time.

The application under s.120 - relevant considerations

85 Turning now to the substantive application, s.120 provides that, if I am satisfied that Miss Chung had a reasonable excuse for not attending or being represented at the hearing I may, if I think fit, order that the order be revoked or varied.

86 As to what is a reasonable excuse I adopt what I said in the case of *Avonwood Homes v Milodanovic* [2005] VCAT 1297 at paragraphs 27 and 28:

> "27. I accept that, in determining what is a reasonable excuse, the Tribunal should adopt a liberal approach; where for example the failure to attend is due to oversight or accident or the reliance upon one's solicitors. But these situations are very different to a situation where the failure to attend arises from the Respondents hiding themselves from the Applicant and the Tribunal. A liberal approach to the section has been taken (see for example *Melhen v Transport Accident Commission* [2005] VCAT 25, *DFS Corporation Pty Ltd v Basyle Enterprise* [2004] VCAT 931) but in the absence of an explanation that can be considered to be reasonable leave cannot be granted (see *Russell v Transport Accident Commission* [2004] VCAT 2507).
>
> 28. The explanation does not have to be 'particularly satisfactory' but the party seeking the setting aside of the order must not have ignored the proceeding (see *Whittlesea CC v S M & L M Lewis* [2000] VCAT 967 para 11)".

87 Mr Bristow said that Miss Chung chose first to instruct lawyers and then her brother to represent her. I do not find that to have been the case. I accept that she was unaware of the existence of the proceeding or of the hearing. That is a reasonable excuse for her not being present.

88 Both Mr Cole and Mr Bristow referred to the principles generally applied in setting aside default judgments in the Supreme Court of Victoria. Mr Cole referred me to the case of *Kostokanellis v. Allen* [1974] VR 596. Mr Bristow provided me with an excerpt from paragraph 21.7.15 of Civil Procedure Victoria in which the relevant considerations set out in that case and in similar cases were discussed. They may be usefully summarized as follows:

(a) Whether the person seeking to set aside the order has a defence on the merits;

(b) Whether the reason for the default is explained;

(c) Whether the application to set aside the judgment has been made promptly in the circumstances. Delay in itself is not said to be important but delay prejudicing the other party or allowing the rights of third parties to intervene would be; and

(d) Whether, if the order were to be set aside it the other party would be prejudiced in any respect that could not be cured by an award of costs.

89 In regard to the first of these, it is not a requirement that the applicant show a prima facie case but it must be apparent that there is some purpose in setting aside the order and that there is a case to be tried (*Kostokanellis p.604)*. Where the merits of the Applicant's case are demonstrated the Tribunal will not prima facie allow an order to remain where there has been no adjudication on the merits (*Kostokanellis p.603).*

90 The second consideration is a requirement found in the section itself. I remain of the same view as I expressed in *Avonwood* that the reason for non-attendance does not need to have been satisfactory in the sense of being exculpatory but the applicant should not have ignored the proceeding.

91 The time aspect has already been considered in the context of the s.126 application and I am satisfied that the delay in bringing the present application is not a reason for refusing it.

92 Apart from costs, no prejudice to the Applicants arising from the setting aside of the order is apparent on the material apart from the necessity of having to conduct the hearing again. In those circumstances, the prejudice to the Applicants which will arise from setting aside the order can be addressed by an award of costs which ought to be made in their favour but in the unusual circumstances of this case I should hear submissions as to who should pay those costs, since that issue was not argued before me.

Conclusion as to Miss Chung's application

93 I am satisfied that the order should be set aside and I will so order. I will indicate that I intend to make an order that the Applicants' costs of the hearing be paid but I have yet to decide against whom that order should be made since it does not appear on the material presently before me that either TressCox or the Builder were authorized to represent to either the Applicants' solicitors or to the Tribunal that they represented Miss Chung.

94 Mr Cole submitted that the costs to be awarded should be the costs of obtaining the judgment, including some preparation time for the hearing. He said that the other costs were not thrown away as the work was still of utility in preparing for the re-hearing. Those are matters that can be considered in the course of considering who should pay the costs.

The Builder's application

95 Mr Wright's principal submission was that if Miss Chung succeeded in her application under s.120 then I should set the whole order aside against both Respondents. Before dealing with that submission I should look at the merits of the Builder's own application.

96 It is clear that the Builder was aware of and actively participated in the proceeding throughout. It is not clear precisely when he became aware of the order that was made against him and Miss Chung but according to the Tribunal's records, a copy of the order was posted to him on 14 May 2012 and according to Mr Karavias' affidavit, a letter advising him of the order was sent to him on 23 May 2012.

97 The Builder does not explain why he did not seek a re-hearing within time, apart from saying that, following the departure of TressCox, he felt overwhelmed and tried to avoid the proceeding.

98 His affidavit material focuses upon the merits of the proceeding and he raises a number of matters to cast further doubt upon the veracity of the Applicants' claim. On the strength of the material as to the merits of the substantive proceeding I would be inclined to allow a re-hearing if I were to allow him an extension of time.

99 However before further considering the Builder's application I should look at the implications of my decision to set aside the order on Miss Chung's application, given the nature of that order. I now turn to that.

Can the order remain against the Builder?

100 Mr Wright's primary position was that, if the order is set aside on Miss Chung's application it cannot remain against the Builder alone. He said that if the order stood against the Builder there would be the possibility of two different decisions as to the same matters when the claim against Miss Chung was finally determined.

101 Mr Wright referred me to the material on the merits and what he considered to be the unlikelihood of the factual basis of the Applicants' claim. On that material, if unanswered, it would seem that the chance of Miss Chung succeeding is a very real one.

102 The order sought to be set aside is in the following terms:

> "1. The respondents must pay to the applicants $93,675.00.
>
> 2. The respondents must do all things necessary to effect the discharge of the mortgage dated 16 August 2005 in respect of the property identified as Volume 10870 Folio 844 wherein the respondents are identified as the mortgagees and the applicants are identified as the mortgagors.
>
> 3. The respondents must pay the applicants' costs of this proceeding, the sum of which, if not agreed, to be assessed by the Victorian Costs Court on party/party basis in accordance with the County Court Scale." (sic.)

103 If the order is set aside only against Miss Chung, if that is possible and practicable, there will be a judgment against the Builder but no judgment against Miss Chung unless and until the Applicants succeed against her. Quite obviously, the Applicants might fail against Miss Chung but they would still have their order against the Builder.

104 That is not in itself a reason for setting aside the order against the Builder. Parties jointly liable for a debt or damage can be subject to separate judgments as a result of a default judgment entered against one of them and a judgment against one does not prevent the proceeding being continued against the other (*Wrongs Act* 1958 s.24AA). A judgment arising from any such proceeding that is continued might produce a different result from the default judgement but the law seems to contemplate that possibility.

105 The real problem with leaving the order alive against the Builder lies in the nature of both the claim the Applicants brought and the order arising from it.

106 Because of the paucity of detail given in the further amended Points of Claim that I have summarised above, the way the claim was put as a matter of law is not clear. No precise date is given for the alleged representations but since it is alleged that the Applicants entered into the contract of sale on 9 November 2003 in reliance upon them, they must have been made before that date.

107 No fraud is pleaded, it is not suggested that the representations were part of a collateral contract and there is no pleading of negligent misstatement.

108 The only claim that I can see that was open to the Applicants on the document that articulated their case on the day of trial would have been for damages for misleading and deceptive conduct in contravention of the *Fair Trading Act* 1999. If so the argument must have been that the Builder made the representations in trade and commerce and in contravention of s.9 of that Act. The cause of action would then have been for damages against the respondents as parties "involved in the contravention" within the meaning of s.159. Of course, it would have been necessary for them to prove that Miss Chung was a party involved in the contravention.

109 Damages for such a claim are according to the tortious measure, that is, the measure of the Applicants' damages would have been the difference between what they paid and the value of the Unit at the time they purchased it. It was not the cost of remedying the defects although that cost might have been relevant in assessing the value of the Unit at the time of purchase (see *Beamish v Archicentre Ltd* [2004] VCAT 2023).

110 Where there is an allegation of a breach of s.9 by two people there would be no difficulty in having an order against one respondent and not another. The difficulty with paragraph 1 of the order that was made is the manner in which the damages were sought and, I am told, awarded.

111 In the final paragraph of their further amended Points of Claim the Applicants plead that, as a consequence of payments that they made to a named company associated with Mr Comer, the First Applicant's uncle, and as a consequence of the cost of rectification of defects and loss of rent, they did not owe any money to the Respondents and that the Respondents therefore had no caveatable interest in the Unit.

112 In their prayer for relief the Applicants quantified their damages by deducting the balance of the purchase money that they admitted owing to the Respondents from the cost of repairs and loss of rent they alleged they suffered. After making this set-off they claimed $82,260.19 plus interest.

113 The Tribunal awarded them $93,675.00 which might have included the claim for interest but the manner in which that figure was calculated does not appear from the material before me.

114 By paragraph 2 of the order, the Tribunal ordered the Respondents to discharge their mortgage over the Unit. That order can only have been made on the basis that the Tribunal allowed the set-off and found that no moneys were owed and secured by the mortgage.

115 While the order stands the debt for the balance of the purchase money owed jointly to the Builder and Miss Chung is extinguished.

116 Further, paragraph 2 of this order will not be enforceable unless and until there is an order in identical terms against Miss Chung. That is because she is one of the mortgagees and one of the caveators and would need to join in doing what the order requires to be done. In the meantime, the Builder could not comply with the order. It is a non-monetary order and a person who does not comply with such an order is guilty of an offence (s.133 *Victorian Civil and Administrative Tribunal Act* 1998). If the same order is not made against Miss Chung the Builder will, presumably, continue to commit an offence indefinitely.

117 The application by Miss Chung is to set aside the order. There is only one order and it is against them both jointly. The section enables me to set aside or vary it. I would have power to vary it by removing Miss Chung as a respondent but that would be not be appropriate. I have made no final findings of fact and the Applicants maintain their claim against her. It was not suggested how else I could vary it.

Conclusion

118 Whatever view I might take of the merits of the Builder's application for an extension of time and a rehearing I have to set aside the order and since the order is against both of them jointly it is necessarily set aside against both.

119 Consequently the order made in this proceeding on 7 May 2012 is set aside. I will reserve the question of costs until I hear submissions as to who should pay them but I have indicated that the Applicants are entitled to their costs thrown away by reason of the setting aside of the order.

SENIOR MEMBER R. WALKER