VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST VCAT REFERENCE NO D32/2014

CATCHWORDS

DOMESTIC BUILDING DISPUTE – Section 120 of the *Victorian Civil and Administrative Tribunal Act 1998* – whether the applicant for review had a reasonable excuse for not attending the hearing – sufficiency of evidence.

FIRST APPLICANT	Mr Trevor Kealy
SECOND APPLICANT	Ms Maree Cook
FIRST RESPONDENT	Anthony Vincent Milanovic
SECOND RESPONDENT	Milanovic Urban Development Pty Ltd (ACN 116 880 123) (deregistered)
THIRD RESPONDENT	Equity-One Mortgage Fund Limited (Struck out by order dated 28 November 2014)
WHERE HELD	Melbourne
BEFORE	Senior Member E. Riegler
HEARING TYPE	Review Hearing
DATE OF HEARING	15 June 2017
DATE OF ORDER	16 June 2017
CITATION	Kealy v Milanovic (No 2) (Building and Property) [2017] VCAT 874

ORDERS

1. The First Respondent's application for review under s 120 of the *Victorian Civil and Administrative Tribunal Act 1998* is dismissed.
2. Liberty to apply for any consequential orders arising out of these orders, provided such liberty is exercised by 30 June 2017.

SENIOR MEMBER E. RIEGLER

APPEARANCES:

For the Applicants	Ms M Kowalczyk, solicitor
For the First Respondent	In person
For the Second Respondent	No appearance (deregistered)
For the Third Respondent	No appearance (struck out)

REASONS

INTRODUCTION

1. On 5 May 2016, orders were made by the Tribunal, which provided:

> 2. Order the First and Second Respondents to pay to the Applicant $207,481.57 plus the costs of the application including reserved costs and the costs of today, such costs if not agreed to be assessed by the Victorian Costs Court on a standard basis in accordance with the County Court Scale. Counsel's fees for today, 15 April 2016, 9 December 2015 and 4 November 2015 are fixed altogether at $4,950. Remaining Counsel's fees are to be assessed and allowed by the Costs Court.

2. The First and Second Respondents did not appear at the hearing on 5 May 2016, nor were they represented on that day. The First Respondent now seeks an order under s 120 of the *Victorian Civil and Administrative Tribunal Act 1998* (**'the Act'**) that the Tribunal's orders made on that day be set aside. The Applicants oppose that application.

SECTION 120 OF THE ACT

3. Section 120 of the Act provides, in part:

> 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 subsection (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 —
>
> (i) the applicant had a reasonable excuse for not attending or being represented at the hearing; and
>
> (ii) it is appropriate to hear and determine the application having regard to the matters specified in subsection (4A); and

(b) if it thinks fit, order that the order be revoked or varied.

(4A) For the purposes of subsection (4)(a)(ii), the matters are —

(a) whether the applicant has a reasonable case to argue in relation to the subject-matter of the order; and

(b) any prejudice that may be caused to another party if the application is heard and determined.

4. On 13 April 2017, the First Respondent filed an *Application to Reopen an Order* form, in which the stated that the reason he did not attend the hearing on 5 May 2016 was:

> Due to serious medical issues attached.

5. There is no affidavit or statutory declaration filed in support of the application. Nevertheless, the First Respondent appeared in person and and gave unsworn evidence from the Bar table as to his *medical issues*.

6. Ms Kowalczyc, the solicitor acting on behalf the Applicants, appeared on their behalf. She filed written submissions in support of the Applicants' opposition to the First Respondent's application for review and supplemented those written submissions with oral submissions.

BACKGROUND

7. The background to this proceeding was helpfully set out in the Applicants' written submissions as follows:

> **BACKGROUND**
>
> 3. The Applicants' claim against the Respondents was initially filed with the Victorian Civil and Administrative Tribunal (**the Tribunal**) on or about 8 January 2014.
>
> 4. The matter was decided by Senior Member M Farrelly on 15 August 2014 and orders were made by the Tribunal against the Respondents. The Respondents were ordered to pay the Applicants the total sum of $207,481.57 (comprised of damages of $195,530.13 and interest of $11,951.44) (**the 15 August 2014 Orders**).
>
> 5. The 15 August 2014 Orders were registered with the County Court on 23 February 2015.
>
> 6. The Applicants filed a Bankruptcy Notice application on 24 February 2015 (**the First Bankruptcy Notice**) and a subsequent creditor's petition was filed at the Federal Court of Australia (**First Creditors Petition**).

7. On or about 19 June 2015, the First Respondent filed an application under section 120 of the *Victorian Civil and Administrative Tribunal Act 1998* (**the VCAT Act**) (**First VCAT Application**). On 20 August 2015, Member FA Marks heard the First VCAT Application and on 16 October 2015 gave orders that the First VCAT Application was granted and a directions hearing was to be held on 4 November 2015.

8. At the directions hearing on 4 November 2015 the parties made submissions and Senior Member R Walker made orders (**the 4 November Orders**) that the Respondent's file and serve Points of Defence by 18 November 2015. The 4 November 2015 orders further stated that if the Points of Defence were not filed, pursuant to section 78 of the VCAT Act, the proceeding would be determined in favour of the Applicants and that damages were to be assessed.

9. The First Creditors Petition was withdrawn on 5 November 2015 on the basis that there was no valid act of bankruptcy (there were issues about service on the Respondent).

10. On or about 26 November 2015 the Tribunal was notified that the Respondent had failed to comply with the 4 November 2015 orders and that the Applicants were respectfully requesting that the Tribunal make orders in favour of the Applicants pursuant to the 4 November 2015 Orders.

11. On or about 9 December 2015, the parties appeared before Senior Member M Farrelly who ordered that the Applicant's file and serve Amended Points of Claim by 21 January 2016, that the Respondent's file and serve Points of Defence by 11 February 2016 and again if orders were not complied with by the Respondents, pursuant to section 78 of the VCAT Act, the matter would be found in favour of the Applicants with damages to be assessed. The orders also detailed the First Respondent's address and contact details given that there were issues with service of documents earlier on (**the 9 December 2015 Orders**).

12. The Applicant's Amended Points of Claim were filed at the Tribunal on 22 January 2016 and served on the First Respondent as per the 9 December 2015 Orders.

13. On or about 17 February 2016, the Senior Member M Farrelly made orders that as the Second Respondent [and First Respondent] had once again failed to comply with the orders of the Tribunal, the matter be determined in favour of the Applicants and that damages were to be assessed.

14. On or about 5 May 2016, submissions were made on behalf of the Applicants in relation to damages. The Second Respondent [and the First Respondent] did not appear. Senior Member R Walker assessed damages at $207,481.57 in relation to the claim costs with Counsel's costs of the damages hearing fixed at $4,950.00 with the remaining counsel fees to be assessed and allowed by the Costs Court (**the 5 May 2016 Orders**).

15. On or about 23 June 2016, the 5 May 2016 Orders were registered with the County Court. The Certificate of Judgment was filed at the County Court on 28 July 2017.

16. On or about 13 October 2016, a Bankruptcy Notice (**Second Bankruptcy Notice**) was served on the Second Respondent at the address given to the Tribunal by the Respondent.

17. On or about 8 February 2017 a Creditor's Petition (**Second Creditors Petition**) was filed and on or about 15 March 2017 the Second Creditors Petition together with all supporting documents were served on the Second Respondent by email and post.

18. Addressing the concerns of the Federal Court, the Second Respondent was personally served with the Bankruptcy Notice on 16 May 2017.

19. The Second Creditors Petition is currently adjourned until 29 June 2017.

REASONABLE EXCUSE

8. In *Celona v Lillas & Loel Lawyers Pty Ltd*,[1] the Tribunal observed that the benchmark for satisfying the Tribunal that a party had a reasonable excuse for not attending the hearing is not overly burdensome:

> … the word 'reasonable' imports an explanation or excuse which is in accordance with reason. It does not have to be an especially compelling explanation and so there have been occasions when parties have been successful in applications under Section 120 on what might be thought are fairly feeble grounds such as 'I just forgot, sorry'; not compelling but it accords with reason and human experience that individuals can simply forget things and a person in that unhappy situation ought not be deprived of the opportunity of having his or her dispute heard and determined on the merits.[2]

9. On appeal, Robson AJA reinforced this statement:

[1] [2012] VCAT 403.
[2] Ibid at [12].

> The authorities have held that s 120 should be construed liberally. Regard should also be had as to the common law principle that a litigant has a prima facie right to present his or her case.[3]

10. In *Tomasevic v Victoria*,[4] Justice Morris P observed that determining what constitutes a reasonable excuse for not attending a hearing may ultimately be a question of fact:

> It seems clear enough that a "blameless non-attending defendant" would usually be able to satisfy the first element. The Tribunal has an obligation to act fairly and, in the normal course, this would require a party to be notified of the hearing and be given an opportunity to be heard. However what may constitute a "reasonable excuse" (or, for that matter, what would make an applicant "blameless") ought to be left to the judgment of the tribunal in a particular case. It is likely to be a question of fact, to be determined by the member concerned. To lay down legal principles that might govern this exercise seems to me to be fraught with difficulty.[5]

11. Consequently, I accept that the authorities indicate that there is a low threshold to overcome in order to satisfy the Tribunal that a party had a reasonable excuse for not attending a hearing. With that in mind, I now consider the First Respondent's evidence and submissions.

12. The First Respondent contends that he suffered or had suffered from drug addiction which resulted in him having psychotic episodes and being generally unfit to deal with day-to-day matters from May 2015 until August 2016, with this condition getting significantly worse in around January 2016.

13. In support of that contention, the First Respondent produced a *Centrelink Medical Certificate*, engrossed by Dr Zev Bar which stated:

> **Capacity to Work or Study**
>
> In my opinion the patient is/has been unfit for work/study from 06/07/2016 to 06/08/2016

14. The document further states that the primary condition of the First Respondent is *depression and suicidal* and that this condition is *temporary*. It states that his symptoms are that he is *depressed*.

15. Regrettably, the *Centre Link Medical Certificate* does not cover the period when the hearing was conducted on 5 May 2016. It refers to a period two months after that hearing had been heard and determined.

16. Nevertheless, the First Respondent said that his depression and associated symptoms prevented him from appearing at the hearing on 5

[3] *Lillas & Loel Lawyers Pty Ltd v Celona* [2014] VSCA 19 at [18] (in dissent, but not on this point).
[4] [2005] VCAT 1525.
[5] Ibid at [12].

May 2016. In support of that contention, he produced a number of receipts from his treating psychologist over the period January 2016 until July 2016. There is no detail on those receipts as to the First Respondent's capacity to attend a Tribunal hearing or any information about his medical condition. The invoice merely identifies the date of the consultation, the amount charged and confirmation that the account has been paid.

17. The First Respondent also referred to an email from Ms Hopcraft, an acquaintance of the First Respondent, which set out a number of issues experienced by the First Respondent consistent with how he described his medical condition. Regrettably, Miss Hopcraft was not called to give evidence at the review hearing.

18. It is regrettable that there is no medical certificate covering the relevant period to support the First Respondent's contention that he was too ill to attend the hearing on 5 May 2016. Moreover, there is no correspondence on the Tribunal's file, indicating that the First Respondent was ill or unable to appear at the hearing on 5 May 2016. Further, there is no correspondence on the Tribunal's after 5 May 2016, advising that the First Respondent was unable to appear on 5 May 2016 because of medical issues. The only documentation received after 5 May 2016 was the *Application to Reopen an Order* filed on 13 April 2017. In that application, the First Respondent states that he first became aware of the order on 8 April 2017.

19. The Tribunal's file indicates that a copy of the 5 May 2016 orders was sent to the First Respondent's address set out in the Tribunal's orders dated 9 December 2015. According to the Applicants, that is the address given by the First Respondent to the Tribunal when he appeared at the directions hearing on 9 December 2015.

20. However, the First Respondent said that this address was no longer his place of residence and that due to a dispute with the occupier of that address, he was no longer able to visit that address to collect mail. Moreover, the First Respondent gave a different email address to the email address used to send the orders dated 5 May 2016.

21. Nevertheless, the Second Respondent conceded that he was aware of the hearing on 5 May 2016, albeit only *vaguely aware*, whatever that means.

22. Ultimately, the question is whether his medical condition reasonably prevented him from appearing at the hearing on 5 May 2016 or at the very least, advising the Tribunal that he was unable to appear on that day. As indicated above, there is no direct medical evidence which supports that contention.

23. Further, apart from the *Centrelink Medical Certificate*, there is no other medical certificate filed during the course of this proceeding, to indicate

that the First Respondent suffered from a medical condition or was unable to attend any of the hearings listed during the course of this protracted proceeding. I note, however, that the First Respondent said that there was medical evidence on another Tribunal file relating to an unrelated matter. However, in my view, that does not assist me in determining whether the First Respondent was prevented from being able to attend the hearing on 5 May 2016, due to medical issues.

24. Further, the First Respondent did attend the directions hearing on 9 December 2015, at which time self-executing orders were made by the Tribunal, which provided that the proceeding would be determined in favour of the Applicants on the question of liability, in the event that the Respondents did not file a defence to the Applicant's claim. Ultimately, those self-executing orders were executed, as no defence was ever filed and the matter was then listed for hearing on the question of quantum. Moreover, the First Respondent also appeared in person at the first review hearing conducted on 20 August 2015, and successfully argued his application on that day.

25. In my view, the fact that the First Respondent appeared at the directions hearing and the second review hearing, during the period where he says he was too ill to deal with day-to-day matters, weighs against the credibility of his evidence given today.

26. Consequently, I am not satisfied that, in the absence of any medical certificates or medical documentation verifying that the First Respondent was unable to attend the hearing on 5 May 2016, the First Respondent has a reasonable excuse for not attending the hearing on that day. In making that finding, I accept that the First Respondent may have been ill during the relevant period but the question is whether that illness reasonably prevented him from either communicating with the Tribunal or attending the hearing on 5 May 2016. As I have indicated, without corroborating direct medical evidence, I am not persuaded that this was a case.

27. For that reason, the application is refused dismissed.

SENIOR MEMBER E. RIEGLER