

**VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL**

**CIVIL DIVISION**

**DOMESTIC BUILDING LIST**

**VCAT REFERENCE NO. D916/2006**

**CATCHWORDS**

*Charter of Human Rights and Responsibilities Act 2006 – s 33 application for referral to the Supreme Court – application granted.*

**APPLICANT**

Giuseppe De Simone

**FIRST, SECOND AND THIRD RESPONDENTS:**

Bevnol Constructions & Developments Pty Ltd (ACN 079 170 577), Bruce Jamieson and Louis Allain

**FIRST RESPONDENT TO COUNTERCLAIM**

Seachange Management Pty Ltd (ACN 091 443 211)

**WHERE HELD**

Melbourne

**BEFORE**

Vice President Judge I J K Ross

**HEARING TYPE**

Hearing

**DATE OF HEARING**

6 May 2009

**DATE OF ORDER**

13 May 2009

**CITATION**

De Simone v Bevnol Constructions & Developments Pty Ltd & Ors (Domestic Building) [2009] VCAT 888

**ORDER**

The following question is referred to the Supreme Court for determination pursuant to s 33 of the *Charter of Human Rights and Responsibilities Act 2006* –

“Given that the Tribunal has an implied statutory power to stay a civil proceeding, whether the *McMahon v Gould* guidelines applicable to that power should be revised in light of the *Charter of Human Rights and Responsibilities Act 2006*, and in particular ss 24 and 25 of that act and, if so, how.”

**Judge I J K Ross**  
**Vice President**

**APPEARANCES:**

For Applicant:

In person

For Bevnol Constructions &  
Developments Pty Ltd and the  
Second and Third  
Respondents:

Mr B. Reid of Counsel

For Seachange Management  
Pty Ltd:

Mr P.S. Lustig, solicitor

## REASONS

### Background

- 1 On 16 April 2009 the applicant, Mr Giuseppe de Simone, applied to the Tribunal for referral of certain questions of law to the Supreme Court of Victoria, pursuant to s 33 of the *Charter of Human Rights and Responsibilities Act 2006* (the Charter Act). The referral application is related to an application by Mr De Simone for a partial stay of a counterclaim. I propose to briefly deal with the substantive proceedings to which these matters relate before turning to Mr De Simone's stay and referral applications.
- 2 The substantive proceeding concerns a dispute about the development of a retirement village at Ocean Grove in Victoria ('the site'). Seachange Management Pty Ltd ('Seachange') is the registered proprietor of the site and is in the property development business. It commenced proceedings against Bevnol Constructions and Development Pty Ltd (Bevnol), a builder.
- 3 It is common ground that in May 2006 Seachange and Bevnol entered into an agreement for the construction of 11 units on the site for the sum of \$1,809,827.80. Seachange alleges that the agreed works were not completed within the period specified in the contract and that the work undertaken by Bevnol was deficient. Seachange claims damages, interest and costs.
- 4 Bevnol filed a counterclaim against Seachange and Mr De Simone, its sole director, and against the third and fourth respondents.<sup>1</sup> Bevnol claimed loss and damages by reason of Seachange's wrongful termination of the contract.
- 5 The counterclaim also alleged that Seachange and the third respondent had engaged in misleading and deceptive conduct contrary to s 9 of the *Fair Trading Act 1999* (the Fair Trading Act). Alternatively Bevnol alleged that Mr De Simone, as a director of Seachange, was involved in such conduct. Insofar as Mr De Simone is concerned the substance of Bevnol's claim against him is that contrary to s 159 of the Fair Trading Act he aided, abetted or procured conduct which was misleading and deceptive, and/or unconscionable.
- 6 Mr De Simone has also been the subject of a police investigation involving allegations of obtaining a financial advantage by deception. The police investigation and Bevnol's claim against Mr De Simone arise from the same factual substratum. Mr De Simone has recently been charged with a number of offences.

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<sup>1</sup> Paul Marc Custodians Pty Ltd (ACN 110 485 982) formerly known as Paul Marc Management Pty Ltd was the third respondent; Martin Jurblum, a director of Paul Marc Custodians Pty Ltd, was the fourth respondent.

7 In the proceedings before me the parties agreed upon certain facts relating to these matters, as follows:

- “1. Mr De Simone has been the subject of a police investigation involving allegations of obtaining a financial advantage by deception. The investigation was instigated following a complaint made by a director of Bevnol in about March 2007.
2. The complaint concerned the circumstances in which financial assistance was sought or obtained in relation to the Seachange development and in particular the ‘Construction Finance Letter’ dated 24 July 2006.
3. Mr De Simone was charged with eight offences including obtaining financial advantage by deception.

8 Mr De Simone has sought a stay of the Bevnol counterclaim insofar as it relates to him (ie. paragraphs 9-12, 27-30 and 36-44 of the counterclaim).

9 In support of the stay Mr De Simone submitted that defending Bevnol’s counterclaim may require him to forego or waive his right to silence such that his interests may be adversely affected in the subsequent criminal proceedings. He also contends that he would be denied a fair hearing in the substantive civil proceedings because he would be constrained as to the evidence he could lead in his defence lest he be disadvantaged in the criminal proceeding.

10 Mr De Simone has previously made an application to stay that part of Bevnol’s counterclaim which relates to him and to refer certain questions to the Supreme Court pursuant to s 33 of the Charter Act.

11 In a decision dated 25 November<sup>2</sup> 2008 I dismissed Mr De Simone’s application for a stay and referral. My reasons included consideration of the relevant principles and, in particular, I applied what Wootten J in *McMahon v Gould*<sup>3</sup> called guidelines for determining whether to grant a stay application where criminal proceedings are on foot or threatened. The *McMahon v Gould* guidelines have previously been applied by the Tribunal in determining whether to grant a stay<sup>4</sup>.

12 I refused the referral application as the issues raised by the questions sought to be referred had been fully ventilated in the proceedings and the most expeditious course was to determine the application. Importantly, at the relevant time, Mr De Simone had not been charged with any offence.

13 On 23 December 2008 Mr De Simone lodged an application in the Supreme Court of Victoria for leave to appeal against my decision of 25 November 2008.

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<sup>2</sup> *Seachange Management Pty Ltd v Bevnol Constructions & Developments Pty Ltd & Ors* (Domestic Building) [2008] VCAT 2629

<sup>3</sup> (1982) 7 ACLR 2002

<sup>4</sup> *Dowie v Northey and Anor* [2000] VCAT 823 (30 April 2000); *LU Simon Buildings v Lubica Systems Aust Pty Ltd* per Judge Duggan [2001] VCAT 2217 (20 November 2001) and *Browne v Greenleaf Nominess Pty Ltd* per Deputy President Aird [2006] VCAT 1646 (11 August 2006).

14 Mr De Simone's application for leave to appeal was heard on 20 March 2009. In a decision handed down on 3 April 2009 the Court refused leave to appeal. In the intervening period, on 23 March 2009, eight criminal charges were laid against Mr De Simone.

15 The Court of Appeal summarised the key issues raised as follows:

'In the VCAT proceedings the applicant submitted that *McMahon* required modification in light of ss 24 and 25 of the Charter. He claimed that a stay was required because the VCAT proceedings would prejudice his right under s 24 to have the charge determined by a competent, independent and impartial court after a fair and public hearing, and his right to a fair criminal trial under s 25, including the right to silence recognised by s 25(2)(j)'<sup>5</sup>

16 The Court also noted that the applicant had submitted that the *McMahon* principles should be reconsidered because there had been judicial criticism about whether they give sufficient weight to the protection of defendants in criminal proceedings, referring to *Re AWB Limited*.<sup>6</sup> In that decision Robson J had supported a reconsideration but considered that he was bound, as I did in my earlier decision, to follow the *McMahon v Gould* principles.<sup>7</sup>

17 Justices Neave and Williams then said:

'We doubt whether s 24 of the Charter requires modification of the *McMahon* principles, which emphasise the protection of the accused's right to silence in criminal proceedings and attempt to balance it against the rights of the parties in civil proceedings. *Nevertheless we consider that the applicant has a real argument that the McMahon principles should be modified in light of ss 24 and 25 of the Charter.*' [my emphasis]<sup>8</sup>

18 However, their Honours did not deem it necessary to determine this issue, for a number of reasons. Among them was the applicant's circumstances, which they referred to in this way:

'the matter has been somewhat overtaken by events. The applicant has now been charged as anticipated. It is open to him to make a fresh stay application in these altered circumstances, bearing in mind that the judge reached his conclusion in part on the basis that s 25 of the Charter did not apply to persons who were only under investigation. His Honour did not exercise his discretion in the circumstances which now prevail and there would be no utility in

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<sup>5</sup> *Giuseppe De Simone v Bevnol Constructions and Developments Pty Ltd*, VSCA No 3933 of 2008 at para [34]

<sup>6</sup> *Ibid* para [44]. *Re AWB Limited* (2008) 252 ALR 566

<sup>7</sup> (2008) 252 ALR 566 at 591

<sup>8</sup> *Ibid* para [54]

the Court considering the challenge the applicant presently seeks to ventilate on appeal.’<sup>9</sup>

- 19 Their Honours also said that the Court’s refusal of leave would not cause substantial injustice to the applicant because of the suppression orders in place at the Tribunal and that further such orders may be applied for as necessary.<sup>10</sup>
- 20 The Court also noted that Mr De Simone may apply again for a stay in light of the fact that he has now been charged with criminal offences. That application has now been made, as has a further referral application. This decision only deals with the referral application.

### **Referral to the Supreme Court**

21 Section 33(1) of the Charter provides:

- “(1) If, in a proceeding before a court or tribunal, a question of law arises that relates to the application of this Charter or a question arises with respect to the interpretation of a statutory provision in accordance with this Charter, that question may be referred to the Supreme Court if –
- (a) a party has made an application for referral; and
  - (b) the court or tribunal considers that the question is appropriate for determination by the Supreme Court.”

22 Where a question is referred to the Supreme Court the Tribunal is not permitted to determine an issue to which the referred question is relevant until the question is determined (s 34(2)).

23 Mr De Simone seeks the referral of four questions of law:

- “1. Is there an operative difference in application of the requirement of VCAT to afford a “fair hearing” in proceeding D916/2006 under section 97 of the VCAT Act with the obligation of VCAT to ensure a “fair hearing” under section 24 of the Charter of both the criminal and civil proceedings?
2. Does the requirement of VCAT to afford a speedy hearing under section 98(1)(d) of the VCAT Act affect the balance to be struck in considering a stay of proceedings that would otherwise be afforded under sections 24 and 25 of the Charter?
3. Does the decision in *Reid v Howard* (1995) 184 CLR 1 elucidate the rights recognised under the Charter in section 24 to a fair hearing and in section 25 to the guarantees provided to persons charged and if so what modification if any is warranted because of section 105 of the VCAT Act?

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<sup>9</sup> Ibid para [57]

<sup>10</sup> Ibid para [69]

4. Given (i) the rights set out in the Charter in sections 24 and 25 as interpreted in accordance with section 32 and the mandates of sections 6(2)(b), 38 and 39 and (ii) the decision of the High Court in *Reid v Howard* as modified if necessary by the specific terms of section 105 of the VCAT Act, is the decision in *McMahon v Gould* still operative in Victoria? If it is still operative what modifications if any need to be made to the guidelines expressed therein? If it is not operative, what guidelines if any ought be applied by courts and tribunals when considering applications for a stay of civil proceedings when (a) criminal charges have been laid or (b) there is a formal investigation that may lead to charges (including further charges)?”

- 24 During the course of oral argument it was generally agreed that the questions posed may not be appropriately phrased and as such may not specify a relevant question of law relating to the application of the Charter or a question which arises with respect to the interpretation of a statutory provision in accordance with the Charter.
- 25 Mr Reid, Counsel for Bevnol, submitted that if the referral was to be granted then the questions to be referred should be as follows:
- (i) In what way, if any, are the principles in *McMahon v Gould* to be modified given the rights expressly recognised in the Charter, particularly in ss 24 and 25?
  - (ii) How should ss 80(1), 97, 98(3) and 105 of the *Victorian Civil and Administrative Tribunal Act 1998* be interpreted in light of ss 6(1)(b) and 32 of the Charter Act?
- 26 Mr De Simone accepted Mr Reid’s proposed formulation of the referral questions but submitted that ultimately the appropriate formulation was a matter for the Tribunal. In Mr De Simone’s submission the question(s) should be formulated in a way that resolved the legal issues relating to the application of the Charter to his stay application.
- 27 Mr De Simone advanced three points in support of the referral:
- The intention of the referral power in s 33 is that questions of law which were important and have general applicability ought to be authoritatively determined by the Supreme Court.
  - The questions proposed are live issues in the proceeding.
  - The referral process would be more expeditious than the Tribunal dealing with the question, with a consequent right of appeal.
- 28 In reply, Mr Reid’s written submissions were largely directed at the four particular questions Mr De Simone originally sought to refer. In the course of oral argument Mr Reid submitted that if the Tribunal was satisfied that there was now a real argument as to whether ss 24 and 25 of the Charter

Act required that the *McMahon v Gould* guidelines be revised, then I should refer an appropriately formulated question to the Court.

- 29 I am satisfied that a question of law has arisen that relates to the application of the Charter. The particular question is whether the *McMahon v Gould* principles should be revised in light of the Charter, and in particular ss 24 and 25 of the Charter Act.
- 30 Section 24 of the Charter provides that a person charged with a criminal offence or a party to a civil proceeding has a right to have the charge or proceeding decided by a competent, independent and impartial court or tribunal after a fair and public hearing.
- 31 Section 25(1) provides that a person charged with a criminal offence has the right to be presumed innocent until proven guilty according to law. Section 25(2) sets out a number of minimum guarantees which apply to a person charged with a criminal offence, including the right ‘not to be compelled to testify against himself or to confess guilt’ (s 25(2)(k) of the Charter).
- 32 Mr De Simone has now been charged with a number of criminal offences which arise from the same factual substratum as Bevnol’s counter claim against him. The fact that Mr De Simone has been charged with a criminal offence enlivens ss 24 and 25.
- 33 Further, in deciding to refuse leave to appeal in relation to my earlier decision the Court of Appeal considered that Mr De Simone had ‘a real argument that the *McMahon* principles should be modified in light of ss 24 and 25 of the Charter’ (see paragraph 17 above).
- 34 I am satisfied that it is appropriate to refer such a question to the Supreme Court for determination. The relevant issue has not been the subject of prior determination by the Tribunal or by a court and raises an important issue of general application. I have also had regard to the Court of Appeal’s observation that there is a ‘real argument’ as to whether the *McMahon v Gould* guidelines should be modified in light of ss 24 and 25 of the Charter Act. The position taken by the parties is also relevant and I have taken that into account. I now turn to the formulation of the question to be referred.
- 35 I have considered the formulations advanced by Mr Reid (and accepted by Mr De Simone) and have decided to refer the following question to the Supreme Court for determination pursuant to s 33 of the Charter Act:
- “Given that the Tribunal has an implied statutory power to stay a civil proceeding, whether the *McMahon v Gould* guidelines applicable to that power should be revised in light of the *Charter of Human Rights and Responsibilities Act 2006*, and in particular ss 24 and 25 of that act and, if so, how.”
- 36 The question is a revision of Mr Reid’s first formulation (see paragraph 23(i) above). I have amended the proposed question in order to properly place the issue in context.

- 37 I am not persuaded that it is appropriate to refer the second of Mr Reid's proposed questions. As formulated the question asks how certain provisions of the VCAT Act are to be interpreted in light of the Charter Act. Such a question is too general in nature and lacks sufficient context. As such it is not an appropriate question for referral pursuant to s 33 of the Charter Act.
- 38 Further, in my view, such questions can, and should, generally be determined by the Tribunal in the context of particular cases. I make the same observation in relation to the questions which Mr De Simone initially sought to have referred (see paragraph 23 above).
- 39 I note that in *Kracke v Mental Health Review Board and Ors*<sup>11</sup> the President of the Tribunal, Justice Bell, decided that four stages of analysis were required when interpreting legislation against the Charter – engagement; justification, reinterpretation and (for the Supreme Court alone) declaring inconsistency. These steps are briefly summarised below.
1. *Engagement*: Does the legislation in question limit human rights, having regard to its interpretation and scope?
  2. *Justification and proportionality*: In the limitation justified under the general limitations provision in s 7(2) of the Charter Act?
  3. *Reinterpretation*: If not, is it possible to interpret the legislation compatibly with human rights under the special interpretative provision in s 32(1) of the Charter Act?
  4. *Declaration of inconsistency*: If not, should the Supreme Court exercise its power to make a declaration of inconsistent interpretation under s 36(2)? (A question for the Supreme Court alone).
- 40 Absent a persuasive argument to the contrary I would propose to adopt his Honour's analysis when interpreting the VCAT Act against the Charter.

**Judge I J K Ross**  
**Vice President**

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<sup>11</sup> (General) [2009] VCAT 646