

**VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL**

**ADMINISTRATIVE DIVISION**

**BUILDING AND PROPERTY LIST**

VCAT REFERENCE NO. BP288/2015

**CATCHWORDS**

Section 108 *Victorian Civil and Administrative Tribunal Act 1998*; application by Respondent for recusal of presiding Member on basis of a reasonable apprehension of bias; Member conducted compulsory conference in unrelated proceeding in week prior to hearing; Respondent defending claims in a building action in both proceedings; disclosure by Member at commencement of hearing; misunderstanding of Counsel; late application; appropriate circumstance for Tribunal to exercise discretion to order reconstitution of Tribunal.

<b>APPLICANT</b>	G Rocca Pty Ltd (ACN 004 577 477)
<b>RESPONDENT</b>	Timetrex Pty Ltd (ACN 006 586 223)
<b>WHERE HELD</b>	Melbourne
<b>BEFORE</b>	Judge Jenkins, Vice President
<b>HEARING TYPE</b>	Hearing
<b>DATE OF HEARING</b>	19 October 2016
<b>DATE OF ORDER</b>	19 October 2016
<b>DATE OF WRITTEN REASONS</b>	2 November 2016
<b>CITATION</b>	G Rocca Pty Ltd v Timetrex Pty Ltd (Building and Property) [2016] VCAT 1858

**NOTE**

On 19 October 2016, the following Orders were made in this proceeding:

1. The Tribunal shall be reconstituted for the further hearing of this proceeding.
2. The reconstituted Tribunal shall have regard to the evidence previously given and heard in the hearing which commenced on 10 October 2016 and such evidence shall be treated as evidence for the purpose of the further hearing of this proceeding.
3. The Respondent (Applicant in this hearing) shall pay the Applicant's costs thrown away by reason of day 3 of the initial hearing which commenced on 10 October 2016, such costs to be fixed at \$6,120.
4. The proceeding is listed for a Directions Hearing on 24 November 2016.
5. The proceeding is listed for further hearing on 20 February 2017, before a Member other than Senior Member Farrelly, with an estimate of 5 days.
6. No order as to costs on the application of the Respondent, which application is otherwise dismissed.

At the conclusion of the Hearing, Counsel for the Applicant (Respondent to the application) requested written reasons. These are those Reasons.

Judge Jenkins  
**Vice President**

**APPEARANCES:**

For Applicant

Mr D Cole of Counsel

For Respondent

Ms L Keily of Counsel

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# REASONS

## NATURE OF APPLICATION

- 1 This is an interlocutory application by the Respondent for the Tribunal to be reconstituted pursuant to s 108 of the *Victorian Civil and Administrative Tribunal Act 1998* (the **VCAT Act**)
- 2 Section 108 of the VCAT Act provides as follows:

### Reconstitution of Tribunal

- (1) At any time before the conclusion of the hearing of a proceeding—
  - (a) a party may apply to the Tribunal for the reconstitution of the Tribunal for the purposes of the proceeding; or
  - (b) the President or a member of the Tribunal as presently constituted may give notice to the parties that the President or member seeks the reconstitution of the Tribunal for the purposes of the proceeding.
- (2) If an application is made under subsection (1)(a) or notice is given under subsection (1)(b)—
  - (a) a presidential member, after allowing the parties to make submissions, may decide that the Tribunal should be reconstituted; and
  - (b) if so, the President must reconstitute the Tribunal.
- (3) If the Tribunal is reconstituted for the purposes of a proceeding, the reconstituted Tribunal may have regard to any record of the proceeding in the Tribunal as previously constituted, including a record of any evidence taken in the proceeding.

## BACKGROUND

- 3 The hearing of this matter commenced on Monday, 10 October 2016, (the **Hearing**) before Senior Member Farrelly (**SM Farrelly**). Shortly after preliminary comments of the Applicant's Counsel, SM Farrelly made the following statement:

I should mention, just in passing, that I did do a compulsory conference last Wednesday or Thursday and your client was involved in that but I am just raising it so that you know. Sometimes a party might perceive bias ... [indistinct].
- 4 The statement was directed at the Respondent's Counsel. Neither Counsel responded verbally but did not otherwise ask any questions or raise any objection.
- 5 On Wednesday, 12 October 2016, being the third day of the Hearing, Counsel for the Respondent made an application for SM Farrelly to recuse himself on the grounds of apprehended bias.
- 6 SM Farrelly stood down the matter and after due consideration the application was refused.

## APPLICATION FOR RECONSTITUTION

7 The Respondent now brings this application, pursuant to s 108 of the VCAT Act, to have the Tribunal reconstituted on the basis of apprehended bias having regard to the fact that SM Farrelly conducted a compulsory conference, in an unrelated matter, the week before the commencement of the Hearing, in which the Respondent was a party and Mr Mario Mazza, Director appeared on behalf of the Respondent without legal representation. It is also alleged that the other party in that unrelated matter is an associate of Mr Pat Rocca, the director of the Applicant in this proceeding.

### Respondent Counsel's Submissions

8 Counsel emphasized that there was no criticism of anything which SM Farrelly had done or said and certainly no allegation of actual bias. Counsel explained the sequence of events as follows:

- (a) The Respondent and Mr Mazza, as its sole Director, was a respondent in an unrelated proceeding in which the respondent did not have legal representation;
- (b) Neither the Respondent's Counsel nor instructing solicitor were aware of the unrelated proceeding or Mr Mazza's involvement in it;
- (c) On the morning of 10 October 2016, before the commencement of the hearing, Mr Mazza approached the bench clerk assisting SM Farrelly, outside of the hearing room and asked to speak to SM Farrelly. Mr Mazza was told to the effect that the Member could not speak to one party alone;
- (d) Mr Mazza did not advise his Counsel or instructing solicitor:
  - i. That he had approached the bench clerk or why;
  - ii. That he was involved in an unrelated proceeding and had been involved in a compulsory conference the previous week in which SM Farrelly presided; or
  - iii. That he was concerned about SM Farrelly's involvement in the compulsory conference.
- (e) There was also a compulsory conference the previous week in the current proceeding. Counsel mistakenly assumed that SM Farrelly's declaration related to this compulsory conference, to which no objection was taken; and
- (f) Mr Mazza did not raise his concerns with Counsel or his approach to the bench clerk until the luncheon adjournment on day 2 of the Hearing.

9 Counsel admitted and now deeply regrets that:

- (a) Upon reflection, SM Farrelly could only have been referring to another matter;
- (b) She gave no indication of any concern with SM Farrelly's disclosure; and
- (c) She should have made enquiries at the time of such disclosure.

10 In summary, Counsel submitted that SM Farrelly ought recuse himself for the following reasons:

- (a) The Respondent was not legally represented in the unrelated proceeding and Mr Mazza was unrepresented at the compulsory conference;

- (b) The unrelated proceeding was also a building matter in which the matters in dispute were similar to the matters in the current proceeding;
- (c) The compulsory conference occurred less than one week before the commencement of the Hearing in the current proceeding;
- (d) SM Farrelly was extensively involved in discussions with Mr Mazza, as sole director of the Respondent, in the compulsory conference;
- (e) SM Farrelly was instrumental in obtaining a settlement of the unrelated proceeding at the compulsory conference;
- (f) The Applicant in both proceedings are associates;
- (g) The Respondent is the defendant builder in both proceedings;
- (h) Mr Mazza attempted to speak to the presiding member prior to the commencement of the Hearing, by approaching the bench clerk. Upon being told, to the effect, that he was not entitled to speak to the Member directly, Mr Mazza mistakenly assumed that the matter had been dealt with and he could do nothing further about it;
- (i) The Respondent's Counsel and instructing solicitor were unaware that the Member had conducted a compulsory conference in an unrelated matter which also involved the Respondent; and were also unaware that the Respondent was engaged in such other matter;
- (j) The Respondent's Counsel was first advised by the Respondent, in the absence of her instructing solicitor, immediately before the resumption of hearing in the afternoon of day two;
- (k) The Respondent's Counsel sought instructions regarding the disclosures made to her at the conclusion of day two of the Hearing;
- (l) Upon making an application for the Member to recuse himself at the commencement of day three of the Hearing, the Respondent's Counsel:
  - i. confirmed to SM Farrelly that prior to the commencement of the Hearing the Member sought confirmation that they did not have an issue with his participation in the compulsory conference the previous week; and
  - ii. indicated that while she heard what SM Farrelly had said, she did not appreciate what it meant at the time and all of the possible implications.
- (m) The disclosure by SM Farrelly was inadequate for the purpose of alerting the Respondent's Counsel that he was referring to a compulsory conference in another matter. In any event, Counsel did not appreciate the substance of the disclosure and assumed that, because there had been a compulsory conference in the current proceeding the previous week, the Member was making a disclosure pursuant to s 86 of the VCAT Act.

11 The Respondent's Counsel referred to the principles summarised by then President Ross J relevant to the application of s108 of the VCAT Act in *Medical Board of*

*Australia v Dr Piesse (Occupational and Business Regulation)*.<sup>1</sup> These principles are well understood and accepted and I do not propose to repeat them here.

- 12 At this point, it is worth noting that the current application is somewhat unusual in that there is no suggestion that SM Farrelly made any prior comment, ruling or decision that could provide an acceptable basis for inferring that there is a reasonable apprehension of bias or that he would approach the issues in this proceeding in a particular way. Furthermore, the Respondent's Counsel submitted that the Respondent does not use this current application to achieve a de facto review or appeal of any ruling made during the Hearing.<sup>2</sup> Indeed no objection was made to any such ruling at the time.
- 13 The Respondent's Counsel submitted that the Respondent has a reasonable apprehension that it might not receive a fair hearing by reason that it is not in any position to know what if any view, either favourable or unfavourable, has been formed by the Member as a result of his involvement in the compulsory conference. Furthermore, the Respondent's legal advisers are in no position to give advice to the Respondent as to whether there is in fact the possibility for grounds for an apprehended bias by reason that the discussions and disclosures made within a compulsory conference are entirely confidential. The Respondent is concerned that the issues in dispute in the current and in the unrelated proceeding are very similar in nature, namely: the quality of the Respondent's building practice; alleged building defects; and the responsibility for delay. The Respondent's legal advisers are not privy to any admissions or concessions which may have been made by Mr Mazza, who was not legally represented, on behalf of the Respondent, in the context of the compulsory conference. There may have been other disclosures made, for instance relating to the Respondent's financial position.
- 14 In summary, the Respondent's Counsel submitted that a fair-minded observer might reasonably apprehend that SM Farrelly might not bring an impartial mind to the resolution of this proceeding having been exposed to information disclosed confidentially in another compulsory conference, prior to the Hearing, relating to the skill, capacity and quality of the Respondent builder.
- 15 Finally, the Respondent's Counsel submitted that the Applicant will not be unduly prejudiced by a reconstituted Tribunal by reason that:
- (a) only two days of a Hearing, listed to last seven days, had been completed;
  - (b) the Hearing was going to be adjourned part heard in any event by reason of the unavailability of an Applicant's expert; and
  - (c) any costs thrown away can be remedied by an appropriate award of costs.

### **Applicant Counsel's Submissions**

- 16 The Applicant's Counsel opposed the application. The factual background, as outlined above, is largely uncontested.
- 17 The Applicant's Counsel submitted that the Respondent, through Mr Mazza, first raised an objection to SM Farrelly, with the Respondent's Counsel, on the afternoon of

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<sup>1</sup> [2011] VCAT 64 [5], [6], [8], [10]-[14].

<sup>2</sup> *Metrospan Developments Pty Ltd v Whitehorse City Council* [2000] VCAT 44.

day two of the Hearing which immediately followed a ruling by SM Farrelly to strike out a number of paragraphs of Mr Mazza's witness statement. Mr Mazza's cross examination commenced during the afternoon of day two of the Hearing and the application for reconstitution of the Tribunal did not take place until the commencement of day three.

- 18 The Applicant's Counsel referred the Tribunal to the principles of apprehended or perceived bias enunciated by the High Court in *Livesey v New South Wales Bar Association*.<sup>3</sup> Importantly, an applicant must demonstrate those matters alleged to give rise to the decision maker not having a mind open to persuasion and then articulate the logical connection between that matter and the possibility of the matter not being decided on its merits.<sup>4</sup> Once an applicant becomes aware of comments or decisions made by the judicial officer, which are likely to convey to a reasonable and intelligent lay observer an impression of bias, then an application ought to be made promptly. By delaying such application, an applicant may waive their right subsequently to object.<sup>5</sup>
- 19 The Applicant's Counsel submitted that the Respondent:
  - (a) had failed to identify any basis upon which an informed reasonable lay observer might conclude that there might be a reasonable apprehension of bias; and
  - (b) the Respondent has waived its right to object by reason of its delay in making such application, particularly where appropriate disclosure had been made by SM Farrelly at the commencement of the Hearing.
- 20 The Applicant's Counsel further submitted that SM Farrelly's participation in the compulsory conference is analogous to the situation where a Tribunal Member may have previously heard cases involving the same party or parties.<sup>6</sup> In this case, SM Farrelly made no findings, rulings or determinations in relation to the unrelated proceeding. Accordingly there is no basis upon which a reasonable apprehension of bias could arise.

## FINDINGS

- 21 As indicated during the course of the hearing, the law and principles applicable to this kind of application are well-settled. However, for the reasons summarised below, I have decided that this is an appropriate case in which the Tribunal ought to exercise its discretion to reconstitute the Tribunal.
- 22 Neither Mr Mazza nor his Counsel have acted in a timely or entirely reasonable manner:
  - (a) it is extra ordinary that Mr Mazza apparently chose not to advise his legal representatives of his concerns about SM Farrelly's involvement in the compulsory conference, prior to the commencement of the Hearing or at least some time early during the first day of the Hearing;

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<sup>3</sup> [1983] HCA 17; (1983) 151 CLR 288 [7]-[8].

<sup>4</sup> *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 at 345 [7].

<sup>5</sup> *Vakautu v Kelly* [1989] HCA 44; (1989) 167 CLR 568 [5].

<sup>6</sup> *Victoria v Bradko Pty Ltd* [2005] VCAT 2447 [25] per Morris J.

- (b) it is also extra ordinary that Mr Mazza did not either seek advice from his legal representatives or advise them in advance of his approach to the bench clerk, and then failed to advise them of the outcome of such approach;
  - (c) it is inexplicable why Mr Mazza waited to raise his concerns with Counsel until the luncheon adjournment on day two;
  - (d) it is unacceptable that the Respondent's Counsel did not alert the Tribunal as to these concerns upon resumption of the Hearing following the luncheon adjournment on day two; and
  - (e) it is inexplicable why the Respondent's Counsel indicated consent to the continued participation of SM Farrelly in the proceeding, by raising no objection or question, upon SM Farrelly's disclosure at the commencement of the Hearing.
- 23 Notwithstanding the above concerns and criticism, I accept that the Respondent's Counsel and instructing solicitor had not been instructed on behalf of the Respondent, as to relevant matters, in a timely manner and consequently made the errors of judgement to which Counsel admitted.
- 24 I also accept that SM Farrelly's participation in the compulsory conference is significant by reason of:
- (a) its proximity to the commencement of the Hearing;
  - (b) the fact that in both unrelated proceedings, the Respondent was defending a claim in relation to its building work, which may potentially have raised similar issues;
  - (c) the Respondent and Mr Mazza were unrepresented in the unrelated proceeding and at the compulsory conference; and
  - (d) all matters discussed, disclosed or conceded at the compulsory conference, by either party, are confidential.
- 25 I accept that it is simply not possible for the Respondent or indeed the Applicant to know whether any disclosures or discussions made at the compulsory conference might give rise to a basis for a reasonable apprehension of bias by the Member in favour of either party, as perceived by a reasonable and informed lay observer. The relevant facts are simply unknown. Accordingly, the usual analysis required for the purpose of this application, cannot be made.
- 26 It is regrettable that the application was not made in a timely manner. However, as indicated, the circumstances are somewhat unusual and were further confused by the fact that this proceeding was also the subject of a compulsory conference in the same week, a circumstance which further misdirected the Respondent's Counsel.
- 27 In my view, this is a proper case in which the Tribunal ought to exercise its discretion on a broader basis, not limited to a finding that there were grounds in the prior comments, rulings or decisions of the Senior Member for an apprehension of bias. I make no such finding in relation to SM Farrelly. However, a party is entitled, as of right, to object to a Member presiding in a proceeding where that Member has recently conducted a compulsory conference. In my view that right extends to, as in this case, where the Member has very recently conducted a compulsory conference in an unrelated proceeding, involving one of the parties, where similar issues in dispute may have been involved.

- 28 The Respondent's Counsel indicated and I accept that this application was not motivated to achieve a de facto review or appeal of the indicative ruling made by SM Farrelly, striking out certain paragraphs of Mr Mazza's witness statement. During the course of the hearing of this application, the Respondent's Counsel indicated that further information has become available, which the Respondent's legal representatives have not had an opportunity to properly consider, which may cause an application to be made for the relevance of the impugned paragraphs of Mr Mazza's statement to be reconsidered. This will be a matter for a reconstituted Tribunal. However, I note that the Respondent's Counsel made no objection to the indicative ruling at the time it was made on day two of the Hearing and there ought to be no further agitation of the same submissions. Any future reconsideration of the contents of the witness statement ought to be predicated upon new evidence.
- 29 Although an application pursuant to s 86 of the VCAT Act is limited to the circumstance of a compulsory conference conducted in the same proceeding, in my view there are circumstances where the Tribunal may exercise its discretion pursuant to s 108 to reconstitute the Tribunal in limited and appropriate cases where a Member may have presided in a compulsory conference in another proceeding involving the same party.

## **CONCLUSION**

- 30 For the reasons given and in the interests of fairness and the future conduct of the proceeding in accordance with the rules of natural justice, the Tribunal ought to be reconstituted.
- 31 Upon hearing the parties on the question of costs, the order as to costs was made in the terms which appear in the order on the date of the hearing of this application.

**Judge Jenkins**  
**Vice President**