

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST

VCAT REFERENCE NO. BP792/2014

CATCHWORDS

Application for reconstitution of the Tribunal pursuant to s 108 of the *Victorian Civil and Administrative Tribunal Act 1998*; Whether an application for reconstitution can be made while the proceeding is stayed pursuant to s 149 of the *Victorian Civil and Administrative Tribunal Act 1998*; Application held to be misconceived and inconsistent with the purpose of s 108, and an abuse of process.

APPLICANT	Mr Michael Guastalegname
RESPONDENT	Chevros Pty Ltd (ACN: 076 603 583)
WHERE HELD	Melbourne
BEFORE	Judge Jenkins, Acting President
HEARING TYPE	Directions Hearing
DATE OF HEARING	15 June 2015
DATE OF ORDER	15 June 2015
DATE OF REASONS:	17 June 2015
CITATION	Guastalegname v Chevros Pty Ltd (2) (Building and Property) [2015] VCAT 944

ORDERS

1. The Respondent's Application for reconstitution of the Tribunal pursuant to s108 of the *Victorian Civil and Administrative Tribunal Act 1998* is dismissed.
2. Costs reserved.

Judge Jenkins
Acting President

APPEARANCES:

For Applicant	In person
For Respondents	Mr P Best of Counsel

TABLE OF CONTENTS

REASONS	3
NATURE OF APPLICATION.....	3
BACKGROUND	3
FINDINGS.....	5
Does the Tribunal have jurisdiction to hear a further s 108 application? ..	5
Is the Respondent’s application an abuse of process?.....	7
The Tribunal’s authority to constitute the Tribunal as it sees fit	7
CONCLUSION	8

REASONS

NATURE OF APPLICATION

- 1 This is an application for reconstitution of the Tribunal pursuant to s 108 of the *Victorian Civil and Administrative Tribunal Act 1998* ('VCAT Act'), by Chevros Pty Ltd ('the Respondent').

BACKGROUND

- 2 I have set out the relevant chronology and facts briefly, only where it is necessary to give context to the Tribunal's decision to dismiss the Respondent's application.
- 3 I have read and considered the submissions by the Applicant and the Respondent in relation to this application, but I have not recited the submissions fully in these reasons.
- 4 The Applicant is the lessee and the Respondent is the lessor of a retail premises being 408A and 409B Blackshaws Road, Altona North.
- 5 The Respondent sought to recover possession of the Premises. The Applicant then commenced these proceedings in VCAT on 17 December 2014 by filing an Application for an injunction and an affidavit in support.
- 6 On 19 and 22 December 2014, the Respondent gave undertakings to the effect that the Applicant would remain in possession of the premises until hearing and determination of this proceeding, or further written agreement between the parties.
- 7 Directions Hearings were held and orders were made for filing and serving various documents leading up to the Hearing, which took place on 1, 2 and 7 April 2015.
- 8 On 7 April 2015, the Applicant made an application for the Tribunal to be reconstituted pursuant to s 108 of the VCAT Act, alleging apprehended bias by Member Kincaid. The hearing was adjourned to 4 June 2015, subject to the outcome of the reconstitution hearing before a Presidential Member.
- 9 Deputy President Lulham heard the Applicant's reconstitution application on 7 May 2015, and dismissed it with written reasons. The orders reserved the Respondent's costs of the proceeding thrown away and costs of the reconstitution hearing to be heard by Member Kincaid, initially on 25 May 2015. The costs hearing was later rescheduled for hearing on 27 May 2015.
- 10 On 25 May 2015, the Applicant filed and served an Originating Motion in the Supreme Court of Victoria, seeking leave to appeal the decision of Deputy President Lulham.
- 11 On 27 May 2015, at the costs hearing before Member Kincaid, the Applicant applied for a stay pursuant to s 149 of the VCAT Act. After submissions on the question of the stay, but before the Tribunal pronounced

orders, the Respondent offered to consent to the reconstitution of the Tribunal, which the Applicant did not oppose.

- 12 By Orders dated 27 May 2015, the proceeding was stayed until hearing and determination of the application by the Applicant for leave to appeal, and if granted, the appeal.
- 13 The 27 May 2015 Orders noted:

although the Respondent has indicated it would consent to an order reconstituting the Tribunal for the hearing on 4 June 2015, the Tribunal is unable to make such an order where it has refused the application for reconstitution.
- 14 On 28 May 2015, the Tribunal received an urgent letter from the Respondent, now seeking to prosecute its own application that the proceeding be reconstituted pursuant to s 108 of the VCAT Act. If successful, the Respondent sought to retain the 4 June 2015 hearing date.
- 15 On 28 May 2015, the Applicant wrote to the Tribunal advising that he opposed the Respondent's s 108 application. He submitted, amongst other reasons, that it was his opinion that the Tribunal has no jurisdiction, given that the matter is now before the Supreme Court.
- 16 On 1 June 2015, the Respondent wrote to the Tribunal re-stating its request for reconstitution, noting that the application is a fresh application on different grounds, as opposed to a re-hearing or appeal of the Applicant's previous s 108 application.
- 17 On 1 June 2015, Deputy President Aird considered the correspondence and advised the Respondent by email that the application was misconceived, and that the matter was stayed pending determination of the appeal before the Supreme Court.
- 18 Approximately half an hour later, the Respondent emailed the Tribunal noting again that the s 108 application was on fresh grounds, and submitting that the Respondent should be afforded the right to be heard as a matter of natural justice.
- 19 An hour later, the Applicant emailed the Tribunal reaffirming his opposition to the Respondent's s 108 application.
- 20 Deputy President Aird then listed the proceeding for a Directions Hearing before me on 15 June 2015. The Deputy President also ordered the Applicant and Respondent to file and serve submissions as to the Tribunal's jurisdiction to hear the new s 108 Application.
- 21 Both the Respondent and the Applicant filed and served submissions which gave a detailed history of the litigation.
- 22 The Respondent set out its grounds for making the application as follows:

- (a) It could take six months to one year until a judgment is reached at the Supreme Court;
 - (b) The Applicant is not bona fide prosecuting the appeal;
 - (c) The Reconstitution would save both parties time and money;
 - (d) The reconstitution is consistent with s 98(1)(d) of the VCAT Act which directs the Tribunal to act with little formality and technicality, and expeditiously;
 - (e) The reconstitution is consistent with s 97 of the VCAT Act which requires that the Tribunal act fairly and in accordance with the substantial merits...;
 - (f) The Applicant would not be prejudiced by the reconstitution as he may, if he wishes, continue to prosecute his appeal;
 - (g) The reconstitution would deliver the Applicant the outcome he seeks from the Supreme Court without further delay or expense;
 - (h) The only possible reason that the Applicant is opposing an order for reconstitution is to further delay the VCAT hearing;
 - (i) If the reconstitution is not granted, then the Respondent will be unfairly prejudiced in that:
 - (i) The trial has twice been adjourned;
 - (ii) It faces considerable delay while a pointless appeal is determined;
 - (iii) The Applicant is not paying rent under the lease.
 - (j) The Tribunal is not *functus officio* as s 108 does not state that only one party may apply for reconstitution; and
 - (k) The Respondent's application is a fresh application, by a different party, on different grounds.
- 23 The Respondent opposed the initial application by the Applicant for reconstitution. It still denies there is any basis for reconstitution on the grounds of apprehended bias or denial of natural justice by Member Kincaid.

FINDINGS

Does the Tribunal have jurisdiction to hear a further s 108 application?

- 24 In the circumstances of the current case, the short answer is No.
- 25 The Respondent has raised a number of grievances, in relation to delay and further expense. It appears to make a pragmatic offer to consent to the reconstitution by way of a 'fresh' application for reconstitution. Its

application may bear a superficial attraction, in the interests of expediting the trial. However, there is no statutory basis, for the reasons which follow.

- 26 First, the Applicant has exercised his right to appeal the decision of Deputy President Lulham. This Tribunal makes no criticism of the Applicant in electing to take this course and makes no comment as to the likely merits of such appeal. The Tribunal was advised that the appeal is first listed on 26 June 2015. The Applicant is entitled to prosecute such appeal in the normal way. Any further action by the Tribunal in the interim is thereby precluded. The Applicant sought and was granted a stay pending such appeal pursuant to s 149 of the VCAT Act.
- 27 If the Supreme Court either refuses the Applicant leave to appeal, or grants leave but dismisses the appeal, the decision of Deputy President Lulham stands and the matter can be relisted before Member Kincaid, before whom it is currently partly heard.
- 28 If the Supreme Court allows the appeal, then the matter will be remitted to the Tribunal for hearing before a member other than Member Kincaid or Deputy President Lulham. In either case, there will have been a proper determination by the Supreme Court which gives effect to the statutory obligations of the Tribunal.
- 29 Secondly, while there is no question that either party may make an application or further application pursuant to s 108 of the VCAT Act, during the hearing of a proceeding, such entitlement does not extend to the current circumstances in which the Respondent purports to make a new application. As indicated above, the Respondent opposed the Applicant's application for reconstitution both before Member Kincaid and before Deputy President Lulham. The Respondent confirmed its opposition to the grounds raised by the Applicant before me. The grounds upon which the Respondent relies for its current application does not in any way relate to the conduct of the hearing by Member Kincaid, any alleged conflict of interest or the Member's unavailability to continue to hear the matter. Rather, the Respondent effectively seeks to thwart or circumvent the appeal lodged by the Applicant in a bid to have the proceeding relisted for hearing as soon as possible.
- 30 Thirdly, the Respondent submitted that the Applicant will not be prejudiced by the reconstitution of the Tribunal because he may, if he wishes, continue to prosecute his appeal. Such submission is misconceived. Section 149 of the VCAT Act is designed specifically to avoid multiplicity of proceedings. The Applicant is entitled to have his grounds of appeal properly determined. Equally, the Tribunal is entitled to manage proceedings and list matters before Members in a manner which is not influenced by or determined at the election of one or more parties.

Is the Respondent's application an abuse of process?

- 31 In my view, the application is an abuse of process, as the application is made for an ulterior motive.
- 32 Section 108 of the VCAT Act states:

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.
- 33 The power conferred by s 108 is discretionary and broad. Proper grounds can extend to matters relating directly to a Member, such as an allegation of apprehended bias, denial of natural justice or a conflict of interest; or it may relate to extraneous circumstances, such as the unavailability of a Member due to other Tribunal commitments, leave, illness, death or retirement.
- 34 Alternatively, the Tribunal may give notice pursuant to s 108(1)(b) that it will reconstitute itself on its own motion. This might occur, for instance, where it becomes apparent that a party or witness is known to the Member; or if the Tribunal requires another member with specialist expertise to participate on a Tribunal Panel.
- 35 In contrast, none of the grounds advanced by the Respondent in the present application relate in any way to the hearing conducted by the Member or the Member's unavailability. The only purpose of the Respondent's 'fresh' s 108 Application is to thwart the Applicant's appeal to the Supreme Court, essentially to expedite the time in which the matter can again be listed for further hearing before VCAT.
- 36 The Respondent's invitation to the Tribunal to accede to its application pursuant to s 97 and s 98(1)(d) of the VCAT Act is also misconceived. The Respondent effectively sought an adverse determination by the Tribunal of the merits of the Applicant's claim generally and his appeal in particular. It is clearly inappropriate for the Tribunal to make any such determination or presumption.

The Tribunal's authority to constitute the Tribunal as it sees fit

- 37 Pursuant to s 64(3) of the VCAT Act, the President of the Tribunal determines how each proceeding is to be constituted.

38 While s 108 is a broad and discretionary power, it does not permit the Tribunal to exercise its discretion to reconstitute itself merely to accommodate the desires of the parties, unless there is otherwise a sound basis. It follows therefore that even if the Applicant agreed to withdraw its appeal conditional upon the Respondent consenting to a reconstitution, the Tribunal would not accede to such request without a proper basis, consistent with the intent of s 108.

CONCLUSION

39 The Respondent's application for reconstitution is dismissed for the reasons given.

40 Consistent with the pending stay, the Tribunal will not currently order the parties to submit to a compulsory conference. However, the parties were offered the facility of a compulsory conference, with a view to facilitating an early resolution of their dispute. It is noted that the Applicant agreed to participate in a compulsory conference but the Respondent declined to do so.

Judge Jenkins
Acting President