**VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL**

**CIVIL DIVISION**

VCAT REFERENCE NO. BP792/2014

**BUILDING AND PROPERTY LIST**

## CATCHWORDS

*Application for reconstitution of the Tribunal - section 108 of the Victorian Civil and Administrative Tribunal Act 1998 – application to adjourn the application for reconstitution refused – applicant's grounds for the application vague, subjective and lacking in merit*

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| **APPLICANT** | Mr Michael Guastalegname |
| **RESPONDENT** | Chevros Pty Ltd (ACN 076 603 583) |
| **WHERE HELD** | Melbourne |
| **BEFORE** | Deputy President I. Lulham |
| **HEARING TYPE** | Applicant's application for reconstitution of the Tribunal, under section 108 of the Victorian Civil and Administrative Tribunal Act 1998 |
| **DATE OF HEARING** | 7 May 2015 |
| **DATE OF ORDER** | 7 May 2015 |
| **CITATION** | Guastalegname v Chevros Pty Ltd (Building and Property) [2015] VCAT 647 |

## ORDERS

1 The Applicant's application for reconstitution of the Tribunal pursuant to section 108 of the *Victorian Civil and Administrative Tribunal Act* 1998 is dismissed.

2 The time for compliance by the Applicant with paragraph 1 of the Order made by consent on 7 April 2015 is extended to 18 May 2015.

3 Costs of and incidental to the application for reconstitution of the Tribunal brought by the Applicant are reserved, for consideration and determination by Member Kincaid.

4 The Respondent's application for costs of the proceeding thrown away and the costs of the application for reconstitution of the Tribunal brought by the Applicant shall be heard by Member Kincaid and **I direct the Principal Registrar to list that application for costs for hearing by Member Kincaid at 10.00 a.m. on 25 May 2015 with an estimated duration of half a day.**

**DEPUTY PRESIDENT I. LULHAM**

## APPEARANCES:

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| For the Applicant | Mr M. Guastalegname in person |
| For the Respondent | Mr P.R. Best of Counsel |

## REASONS

1 At the conclusion of today's hearing, in which directions were given after the conclusion of the Applicant's application for reconstitution, the Applicant sought written reasons for paragraph 1 of my Order. I did not take this to include reasons for the directions (paragraphs 2 – 4 of my Order).

2 I set out below the reasons I gave orally at the hearing. The hearing was recorded. The text below has been corrected for errors of syntax and the like which may be evident in that recording.

3 Today's hearing was of the Applicant's application to reconstitute the Tribunal, under s 108 of the *Victorian Civil and Administrative Tribunal Act* 1998.

4 I reject the Applicant's argument that it was a directions hearing about that application. The nature of the hearing today was made clear by the third paragraph of the Notice of the hearing, which is set out in bold type.

5 It follows that much of what the Applicant said in today's hearing was in support of an application to adjourn the hearing of the application for reconstitution.

6 The grounds relied on by the Applicant for the adjournment were that the Applicant needed a transcript of the hearings conducted by Member Kincaid on 1, 2 and 7 April 2015. However:

(a) Paragraph 8 of the Order made 7 April 2015 shows that the application for reconstitution had been made on that day. It is not a situation of the Applicant needing the transcript in order to make the application for reconstitution. By making the application on 7 April 2015, the Applicant knew the grounds upon which he did so;

(b) The Applicant has had the recording of the hearings on 1, 2 and 7 April 2015 since 29 April 2015. The Applicant has had ample time to isolate on the recording any discussions or exchanges that he wished to rely on;

(c) The Applicant says the transcript exists. The Applicant said to me that the "transcript office" has read extracts of the transcript to him. The Applicant then changed his submission, to say instead that the "transcript office" had confirmed that the transcript contained certain passages. I express my concern that the Applicant sought to mislead the Tribunal by his first version of his alleged discussion with the "transcript office".

(d) The Applicant had not notified the Respondent of his proposed application for an adjournment, or even of the alleged lesser position of the Applicant understanding that today was a directions hearing. In this regard, the Applicant breached paragraph 12 of PNVCAT1,

the rationale for which is set out in paragraph 13. By doing this, the Applicant failed to put the Respondent on notice of his intentions, and the Applicant put the Respondent in the position of incurring costs in preparing for today's hearing, when those costs could have been wasted.

7 I reject the proposition that the absence of a transcript warrants the adjournment.

8 Accordingly, the application for an adjournment of the application for reconstitution is refused.

9 The application for an adjournment having been refused, the application proceeded. The Applicant relied on the same submissions. Those submissions of the Applicant show that he had a very detailed knowledge of the points he wanted to make, despite his assertion that he had needed a transcript.

10 The Applicant's submissions in support of his application for reconstitution have no merit:

(a) The Applicant says that Member Kincaid's decision to grant leave to the Respondent to amend a pleading amounted to "a lack of procedural fairness". This submission reflects the Applicant's misunderstanding of the nature of a pleading and of a party's right to seek leave to amend, and is not a reflection on Member Kincaid;

(b) Whilst the Applicant alleged that Member Kincaid said things which would cause a person to have a reasonable apprehension of bias, when the Applicant disclosed the facts they fell well short of doing so. The Applicant asserted that:

(i) Member Kincaid "seemed to take on the Respondent's arguments";

(ii) Member Kincaid did not make a ruling on the legal consequences of the matters put in the Respondent's Amended Defence and Counterclaim.

However, the point at hand was the amendment of that pleading, not a determination of the case, and both sides agreed before me that no evidence was even given in the hearing before Member Kincaid;

(iii) The Applicant made a point to me about him being self represented, and then said the point was irrelevant;

(iv) Member Kincaid ruled that the Applicant could not cross-examine the Respondent's solicitor.

However, no evidence was given in the hearing before Member Kincaid. When evidence is given in the Tribunal, the applicant's evidence is presented first. Cross-

examination takes place after a witness has given evidence in chief, and it is unclear whether the Respondent's solicitor will give evidence. I was advised that all the Respondent's solicitor has done which is of relevance to this submission of the Applicant, is to have sworn an affidavit exhibiting correspondence. It follows that no question of the cross-examination of the Respondent's solicitor would have arisen for a "ruling" by Member Kincaid as suggested by the Applicant;

(v) The Applicant alleges that he made an oral application for summary judgment, which Member Kincaid dismissed. The Respondent denies that such an application was made.

On the basis of what I have heard today, no such application could sensibly have been made and I cannot accept that Member Kincaid "ruled" on such an application. If he did, it might be a matter from which the Applicant could appeal, but it would not be a matter warranting reconstitution of the Tribunal;

(vi) Member Kincaid "pre judged" the issue about "pre lease representations".

The Applicant put it to me as a fact that there had been such representations and that they had been misleading, but he then conceded that in its Defence the Respondent denied the allegation. It follows that Member Kincaid cannot have "ruled" on the issue. It was illogical of the Applicant to suggest otherwise;

(vii) The Applicant made the remarkable allegation that the alleged omission of Respondent's Counsel to take notes during the hearing was evidence of bias on the part of Member Kincaid. I consider this submission nonsensical;

(viii) Member Kincaid "attacked" the Applicant for not paying rent.

When I asked the Applicant for particulars of this, he downgraded his description to one of "sarcasm". In making this submission, the Applicant stated that he was 3 months in arrears of rent. I considered this submission of "sarcasm" to be highly subjective;

(ix) Member Kincaid was silent sometimes during the hearing.

Whilst I considered the Applicant's alleged observation to be, at best, highly subjective, it is more to the point that the submission itself is ludicrous. It does the Applicant no credit to make such a time-wasting submission;

(x) Member Kincaid "seemed to be receptive" to the Respondent.

This submission is subjective.

11 None of these points could cause a fair minded observer, as distinct from a person with a highly subjective perception, to reasonably apprehend that Member Kincaid might not bring an impartial and unprejudiced mind to the case.

12 Therefore, the application for reconstitution must be dismissed.

**DEPUTY PRESIDENT I. LULHAM**