VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST VCAT REFERENCE: BP54/2015

CATCHWORDS

Reconstitution of a division of the Victorian Civil and Administrative Tribunal – Suggested unsuitability of a senior member for the specialist task required by the proceeding – Reasonable apprehension of bias – *Victorian Civil and Administrative Tribunal Act 1998* (Vic) ss 97, 98, 108 – Application dismissed.

APPLICANT:	Mackie Pty Ltd
RESPONDENT:	Republic of Turkey
JOINED PARTY:	Tectura Pty Ltd
WHERE HELD:	Melbourne
BEFORE:	Justice Greg Garde AO RFD
HEARING TYPE:	Hearing
DATE OF HEARING:	24 April 2017
DATE OF ORDER:	8 May 2017
CITATION	Mackie Pty Ltd v Republic of Turkey & Anor (Building and Property List) [2017] VCAT 620

ORDERS

1 The application by the joined party for reconstitution of the Tribunal under s 108(1)(a) of the *Victorian Civil and Administrative Tribunal Act 1998* (Vic) is dismissed.

2 **The hearing of the proceeding resumes at 55 King Street, Melbourne on Monday 15 May 2017 at 10:00am before the senior member hearing the proceeding.**

3 Costs are reserved.

Justice Greg Garde AO RFD
President

APPEARANCES:

For Applicant	J A F Twigg QC instructed by KCL Law.
For Respondent	R Andrew and N J Phillpott of Counsel instructed by AUM Lawyers.
For Joined Party	K L Walker QC and J M Forrest of Counsel instructed by Norton Rose Fulbright Australia.

REASONS

Introduction

1 The joined party, Tectura Pty Ltd ('Tectura'), makes application for the reconstitution of the Tribunal hearing the proceeding under s 108(1)(a) of the *Victorian Civil and Administrative Tribunal Act 1998* (Vic) ('the Act').

2 In December 2009, the Republic of Turkey ('the Republic') entered into a domestic building contract with Mackie Pty Ltd ('Mackie') for the construction of a new consular residence at 671 Toorak Road, Toorak.

3 The new residence comprises a basement area and three floors above ground level. It has six bedrooms, two car parks, a large reception room on the ground floor, dining rooms including one with a capacity to seat 25 persons, and kitchens to serve the dining rooms and the reception room.

4 Construction works were completed in 2012. A dispute then arose between Mackie and the Republic. In 2015, Mackie commenced a proceeding in the Tribunal ('the proceeding') claiming damages from the Republic for:

(a) variations of $354,133.72;

(b) agreed variations of $6,312.12;

(c) delay costs of $232,331; and

(d) reimbursement of liquidated damages of $264,000.

5 The Republic denied liability and filed a counterclaim against Mackie. The Republic joined Tectura as a third party to the proceeding and claimed contribution from it. Tectura is the architectural firm which designed the new residence and administered the building contract as superintendent. Mackie has not made a claim against Tectura and Tectura denies liability on the claim for contribution.

6 The proceeding is a quintessential domestic building dispute with variations, defects, delays and liquidated damages all in issue.

The hearing

7 Following an unsuccessful compulsory conference, the estimated duration of the final hearing was 20 days. A senior member was appointed to hear and determine the proceeding.

8 The hearing commenced on 5 September 2016 and has now run for 25 days. Mackie presented its case, calling evidence from Ralph Mackie, a director of Mackie; Peter Beattie, a quantity surveyor and builder employed by Mackie; George Cross, the project manager; and Andrew Watson, a programming expert. There was extensive cross-examination of Mackie's witnesses by the Republic and Tectura.

9 On day 14 of the hearing, the Republic opened and closed its case. It did not call any evidence.

10 Tectura opened its case with a lengthy opening address. On day 19, Serdar Baycan, an architect employed by Tectura, commenced giving evidence. He was cross-examined for six days.

11 Tectura has not yet closed its case and intends to call at least another 2–3 witnesses.

12 On 19 October 2016, the senior member ordered the parties to attend a second compulsory conference and gave directions for the filing of written submissions and submissions in reply. The compulsory conference did not achieve settlement of the proceeding.

13 No application for recusal has been made to the senior member.

14 The hearing is scheduled to resume on 15 May 2017 with a further 10 days reserved for the completion of the hearing.

Evidence

15 Tectura relies on three affidavits of Mark John Attard, its solicitor, in support of the application and on written and oral submissions.[1] The Republic relies on an affidavit sworn by the Consul General for the Republic on 12 April 2017, and on oral submissions. Senior counsel for Mackie cited a number of transcript references and relies on written and oral submissions.

Relevant statutory provisions

16 Sections 97, 98 and 108 of the Act state:

> **97 Tribunal must act fairly**
>
> The Tribunal must act fairly and according to the substantial merits of the case in all proceedings.
>
> **98 General procedure**

[1] The affidavits of Mark John Attard sworn 29 March, 12 April and 19 April 2017 are respectively described as the First, Second and Third Attard Affidavits.

(1) The Tribunal—

(a) is bound by the rules of natural justice;

(b) is not bound by the rules of evidence or any practices or procedures applicable to courts of record, except to the extent that it adopts those rules, practices or procedures;

(c) may inform itself on any matter as it sees fit;

(d) must conduct each proceeding with as little formality and technicality, and determine each proceeding with as much speed, as the requirements of this Act and the enabling enactment and a proper consideration of the matters before it permit.

…

(3) Subject to this Act, the regulations and the rules, the Tribunal may regulate its own procedure.

…

108 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;

…

(2) If an application is made under subsection (1)(a) …

(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.

Tectura's principal submissions

17 Tectura made two principal submissions in support of its reconstitution application:

(a) the senior member is ill-suited for the specialist task required by the proceeding; and

(b) there is a reasonable apprehension of bias as a result of the manner in which the senior member has conducted the hearing.

18 The two submissions are of a different character. If established, the first is a significant reason why the Tribunal should be reconstituted under s 108 of the Act. The second, if established, would show a breach of procedural

fairness and an error of law in the conduct of the hearing. It would be a reason for recusal of the Tribunal or ground on which the Supreme Court of Victoria might allow an appeal under s 148 of the Act.

19 The Republic supported Tectura's submissions. Mackie opposed the application for reconstitution of the Tribunal.

Suitability for the specialist task

The senior member's background and experience

20 In *State of Victoria v Bradto Pty Ltd*,[2] Morris P said that a substantial purpose of the power contained in s 108 of the Act is to deal with circumstances in which the Tribunal constituted to hear and determine a proceeding is ill-suited to the specialist task that actually arises in the case.[3] His Honour provided an example of a Tribunal constituted solely by a legal member hearing a planning case, where it subsequently transpired that there were technical issues concerning traffic engineering or heritage that would be better determined by a member having that special skill.[4]

21 The examples given by Morris P in *Bradto*[5] are very different from the present case. Here the senior member is very experienced in civil law, having first been appointed to the predecessor of the Victorian Civil and Administrative Tribunal ('the Tribunal'), and then to the Tribunal following its establishment in 1998. He has many years of tribunal service, predominantly in the Civil and Administrative Divisions of the Tribunal.

22 The senior member has heard many cases in the Building and Property List and the other lists which preceded it, including the Domestic Building List. He has heard and determined many proceedings in the Civil Claims List and the Review and Regulation List of the Tribunal, including taxation matters. According to senior counsel for Mackie, he has heard and determined close to 1,000 cases.

The evidence relied on by Tectura

23 In support of its submissions, Tectura relies on a number of passages from the transcript of the hearing. These passages are set out at length in Mr Attard's affidavits. I will summarise the passages set out by Mr Attard in his affidavits in chronological order:

Day 1

24 During the opening address by senior counsel for Mackie, the senior member asked whether the claim for liquidated damages and delay were really the same. Senior counsel explained why they were different.

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2 [2005] VCAT 2512 ('*Bradto*').
3 Ibid [13].
4 Ibid.
5 Ibid.

Day 2

25 There was a discussion between the senior member and senior counsel for Mackie about cl 35 of the building contract and the obligation of the builder to notify the superintendent of any delay within 28 days. The senior member could not immediately locate the obligation of the builder to notify the superintendent within 28 days. On a separate issue later that day, the senior member inquired about Mackie's claim to recover liquidated damages and delay damages. Senior counsel explained it was claiming its entitlement to receive back the liquidated damages.

Day 7

26 The senior member queried the purpose of cross-examination by counsel for Tectura. He said that he did not understand where counsel's cross-examination of Mr Mackie was going and would find it helpful if the purpose of cross-examination was indicated. He said that submissions would be in three or four weeks, and he might have forgotten the cross-examination if he did not know why it was being conducted.

27 Later on the same day, the senior member referred to his 'ignorance of the building industry'[6] in seeking to understand why, after the architect and engineer had completed the plans and the project had been tendered, the shop drawings were again sent to the tenderer and the engineer. Counsel for the Republic explained the reason for this.

Day 8

28 The senior member asked counsel about the meaning of 'bar chairs' and 'bar table' in the building industry, as used in the construction of panels or strip footings. Counsel for Tectura responded. The senior member asked senior counsel for Mackie about the meaning of the abbreviations 'PC' (practical completion) and 'CP' (construction program). Senior counsel for Mackie responded. The senior member requested assistance from counsel in preparing a nomenclature, which senior counsel for Mackie agreed to provide.

Day 9

29 The senior member enquired of Mr Watson, who was giving expert evidence at the time, about the meaning of the word 'float' in a building construction program. Mr Watson responded. The senior member enquired after the meaning of the term 'RFI' (request for information) in the building industry. Senior counsel for Mackie responded.

Day 10

30 The senior member asked Mr Watson about the difference in role between a civil engineer and a structural engineer. Mr Watson, who is a civil engineer by title, responded. The senior member asked Mr Watson about the

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6 Transcript of Proceedings, *Mackie Pty Ltd v Republic of Turkey* (Victorian Civil and Administrative Tribunal, 15 September 2016), 538.13 ('Transcript').

meaning of the expression ‘leg of cogged stratus starter bars’. Mr Watson responded.

Day 11

31 In the course of argument over Mackie’s claim for the extension of time, the senior member amended Mackie’s written opening address (in response to a request), commenting that although he had no idea why it was important he was happy to change the document. He added that lots of documents had been covered and at some point he would have to know what the parties said about the issues. He commented that this was not a happy situation for him or the parties. He had not had an opportunity to read the documents or assess their relevance having regard to the speed that it was going.

32 In a later discussion with counsel for Tectura, the senior member said that he understood the basic disputes in the case, but needed to understand the nuances of it. He said the submissions would need to make this very clear to him.

33 Later on the same day, counsel for Tectura raised concerns about the cross-examination proceeding in circumstances where the senior member could not understand the nuances of the case particularly arising in cross-examination. The senior member said that there would need to be a reference to the transcript in submissions and he would have to go back to this and hopefully work it out. He said he was having difficulty in following what was going on at times. He would need a great deal of assistance. He later commented that ‘the nuances aren’t going to fall in the next two or three minutes’.[7]

Day 13

34 Two days later, after counsel for the Republic said that there were too many documents to be able to provide useful written submissions within one day, the senior member responded that the whole thing was ‘a nightmare’.[8]

Day 14

35 In a discussion with counsel for the Republic, the senior member misdescribed the architect as the supervisor. He then said that he had intended to refer to the architect. In discussion with counsel for the Republic, the senior member clarified that it was the superintendent, or joined party, he was intending to refer to, and not Mackie’s supervisor.

Day 22

36 The senior member asked again about the meaning of a starter bar, which was discussed on day 10.

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[7] Transcript 815.17.

[8] Ibid 1032.1.

Day 23

37 In ruling that questions asked in cross-examination should be clear and relevant, the senior member stated that he did not have specialised knowledge in architecture, building or engineering, and had little experience in construction law which was unfortunate. He said that nonetheless, he was listed to do this case and would do it to the best of his ability.

Tectura's submissions

38 Tectura submitted that:

(a) These exchanges showed that the senior member had insufficient knowledge of the legal and technical building issues arising in the proceeding and that the Tribunal should be reconstituted.

(b) While no single transcript extract would substantiate its submission that the senior member was unsuited to conduct the proceeding, the transcript extracts taken collectively were sufficient to show unsuitability.

Mackie's submissions

39 Senior counsel for Mackie submitted:

(a) The senior member was appointed under s 13 or s 16A of the Act. A senior member has to be an Australian lawyer who has, in the opinion of the Minister, extensive knowledge or experience in a class of matters in respect of which functions may be exercised by the Tribunal.

(b) There is no separate or additional qualification that is required by a member under sch 1 of the Act for domestic building proceedings.

(c) If no single transcript extract was sufficient to demonstrate that the senior member was ill-suited to hear and determine the proceeding, then the cumulative effect of the transcript extracts could not be different. It was not a matter of preparing a selected list of transcript extracts over many days of hearing.

(d) There were more than 24 folders of documents in the Tribunal book relied on by the parties, and the senior member had the benefit of a lengthy hearing.

(e) The senior member's approach to better understand the evidence and the case of each party was orthodox and demonstrative of his diligence.

(f) It was appropriate that the senior member ask questions about details of which he was uncertain, and ask counsel to provide assistance. Equally, it is counsel's responsibility to provide assistance and respond with a detailed written submission.

(g) There is no legal principle that calls for recusal on the basis that a party apprehends that the member may not comprehend the case.

Conclusions to unsuitability

40 I reject Tectura's submissions that the Tribunal should be reconstituted on the basis of an absence of specialised knowledge by the senior member:

(a) The questions asked by the senior member, and the discussions that he has had with counsel do not demonstrate that he is unsuitable to determine the proceeding or lacks requisite knowledge. Tectura itself acknowledges that no single transcript extract demonstrates that the senior member is unsuitable to conduct the hearing and determine the proceeding.

(b) It is unpersuasive on a reconstitution application to seek to draw general conclusions as to the competency of a member from a small number of selected remarks made by the member over many days of hearing.

(c) The transcript extracts relied on by Tectura are taken from about 2,000 pages of transcript. On one day, the senior member said that he had fallen behind with the reading of documents because of the speed with which they had been produced. This is not surprising as there are 24 folders of documents, and numerous documents produced during the hearing for the first time.

(d) Where a member would be assisted by further information or does not understand a technical term or matter, it is the duty of the member to raise the issue and obtain that assistance. It is unreasonable to expect that a member will be entirely familiar with every term used in the building industry and its associated trades, or have past knowledge sufficient to master all of the procedures, practices and terminology of that industry.

(e) While it is true that the senior member said that he does not have specialised knowledge in architecture, building or engineering, and has little experience in construction law, at no time has he said that he is unable to properly hear and determine the case given the assistance of experienced counsel and expert witnesses.

(f) It is not the role of s 108 of the Act to achieve a de facto review of what has happened in a proceeding or to compromise the independence of the Tribunal in a proceeding.[9]

(g) Counsel for Tectura and the Republic have had every opportunity to make written and oral submissions and to call any witnesses that they wish. All issues and any perceived deficiencies can be fully addressed.

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[9] *Metrospan Developments Pty Ltd v Whitehorse City Council* [2000] VCAT 44, [13], quoted in *Bradto* [2005] VCAT 2512, [16].

(h) Tectura is yet to close its case. It has the forensic advantage of a lengthy adjournment giving it more time to comprehensively prepare and put the balance of its case. It has the opportunity of calling further expert or lay witnesses.

(i) The senior member has set aside two days for the hearing of final submissions. This is another opportunity for Tectura to present its case and deal with any outstanding issues.

(j) The Tribunal is assisted by a comprehensive tribunal book and substantial written submissions prepared by counsel.

Reasons not to reconstitute

41 The power to reconstitute the Tribunal under s 108(2)(a) of the Act is a discretionary power.

42 There are cogent reasons why the Tribunal should not be reconstituted for unsuitability at this time.

43 Reconstitution of the Tribunal after a hearing that has continued for 25 days would cause very serious difficulties for the parties and their witnesses. Mackie's witnesses and Mr Baycan have given evidence. They have been cross-examined and re-examined at great length. Clearly, the Tribunal's assessment of the witnesses and the weight to be given to their evidence is of considerable importance.

44 If the Tribunal is reconstituted at such a late stage, much of the benefit of the hearing is likely to be forgone. The present Tribunal's impressions of the witnesses, their competency and the weight to be given to each witness would be largely lost. It would be oppressive to the parties and to their witnesses for them to be recalled to give evidence again. The reconstituted Tribunal would have to receive fresh evidence, master the tribunal book, and read many pages of transcript. A reconstituted Tribunal would be at great disadvantage in understanding what had occurred in evidence and in submissions.

45 In *Chiropractic Board of Australia v Hooper*,[10] I observed:

> … [A]n important factor is the advanced stage of the hearing. Both parties have a considerable stake and investment in the proceeding. It would be very undesirable to bring in a new member of the Tribunal at such a late stage of the hearing. The new member would be unfamiliar with the proceeding, would not have heard the witnesses or seen them cross-examined. The new member would be significantly disadvantaged in the determination of the proceedings. I should not permit such a situation to arise unless absolutely necessary in the interests of justice.[11]

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[10] [2013] VCAT 417.

[11] Ibid [37].

46 Another major concern relates to costs. Reconstitution of the Tribunal would incur substantial additional costs for all parties. The proceeding has already been a very expensive one. Section 98(1)(d) of the Act requires the Tribunal to conduct each proceeding with as little formality and technicality, and as much speed, as the requirements of the Act, the enabling enactment and a proper consideration of the matters before the Tribunal may permit. It is most undesirable for the parties to incur considerable additional costs over and above the 10 further days of hearing as presently expected.

47 A final significant consideration is the late stage at which this application is brought. While an explanation for the late application is advanced by Mr Attard, the fact remains that the application for reconstitution is brought significantly later than the hearing days from which the majority of the transcript references that are relied on by Tectura are drawn. In the meantime, the hearing has progressed and is scheduled to resume shortly.

Apprehension of bias

Relevant evidence

48 Tectura contends that the cumulative effect of a number of passages in the transcript is sufficient to show that there might be a reasonable apprehension of bias, and that the senior member had moved into counsel's shoes and into the perils of self-persuasion.[12] Tectura and the Republic seek to compare passages in the transcript where Mr Baycan fails to answer questions and is cautioned to like situations involving Mr Mackie. I will first summarise the passages of Mr Baycan's evidence relevant to Tectura's submission, grouped in terms of the concerns raised by Tectura:

Directions to answer the question

49 During the cross-examination of Mr Baycan by counsel for the Republic and senior counsel for Mackie, there were instances where Mr Baycan either did not answer the question asked or was not directly responsive to the question. In answer to one question about record keeping, Mr Baycan said 'that is just absurd, it is just laughable, absurd, to make that suggestion'.[13] On another occasion, Mr Baycan said to Mackie's senior counsel that his proposition was absurd and that senior counsel was making absurd suggestions. The senior member then said that Tectura had competent counsel and that it was not for Mr Baycan to be telling Mackie's senior counsel how he should frame his questions. It was better if Mr Baycan just answered the question.

50 A short time later, Mr Baycan said to Mackie's senior counsel that his question did not make any sense. After referring to the fact that Mr Baycan was very well educated and qualified and that Tectura had very competent

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[12] Citing *Galea v Galea* (1990) 19 NSWLR 263, 279–80; *Ikosidekas v Karkanis* [2015] VSCA 121, [65].

[13] Transcript 1489.6–7.

counsel, the senior member said it was not for Mr Baycan to make gratuitous comments about the question. If he did not understand the question, he should say this.

51 On day 20, during an objection in cross-examination, the senior member observed that part of the problem had arisen because Mr Baycan was not answering the questions, and that he had to correct him on two occasions the previous day. The senior member said that he had kept quiet during the morning because senior counsel had to intervene to get him to answer questions, and it was quite extraordinary that Mr Baycan could not answer the question. The senior member commented that Mr Baycan was obviously a well-educated man. He then warned Mr Baycan that he might make certain inferences if he did not answer the question.

52 Later on the same day after Mr Baycan objected to a question by Mackie's senior counsel as uncalled for, the senior member said he did not know how many times he had to tell him, and he would not waste time telling him again, as he would see it in the decision, but it was not for Mr Baycan to take objection.

53 Two days later in cross-examination, an exchange occurred between Tectura's counsel and Mackie's senior counsel as to whether Mr Baycan was answering the question or should be permitted to complete his answer. The senior member referred to the fact that the witness had been warned several times, and that senior counsel and the Tribunal were entitled to the answers to questions put. The senior member then said that the witness might think that he was running the Tribunal, but he was not. It was not for the witness to determine what question he wanted to answer or whether he should give an explanation. It was for the cross-examining counsel to ask a question, the witness to listen very carefully to the question and answer it but not to give explanations. In response to submissions by Tectura's counsel, the senior member said that he had told this witness over and over again to answer questions and he had totally ignored all the instructions he had been given. The senior member said that if the witness was not answering questions, cross-examining counsel was entitled to stop the witness. He said that it was open to counsel calling the witness to re-examine on the subject.

Cross-examination by the senior member regarding 'missing information'

54 Mr Attard deposes that on day 22, the senior member cross-examined Mr Baycan about the words 'missing information' in the superintendent's instructions. The senior member instructed the witness to carefully read a particular paragraph and explained how he read it. He questioned Mr Baycan's interpretation but said that Mr Baycan may read it differently.

Criticism regarding note taking

55 On day 21, the senior member had a discussion with Mr Baycan as to Tectura's normal office practice regarding note taking. Mr Baycan said that

there is so much information in a busy practice that not everything was noted. In large projects it was not always possible to make notes and some members of the team may have discarded the notes they did make. The senior member referred to a dispute between the parties in the Supreme Court in February 2012 and said he was surprised that it was not Mr Baycan's normal office practice to take notes, particularly given the Supreme Court dispute.

56 The senior member raised the issue again three days later, referring to the practices of solicitors and accountants and the need to keep proof of what of what they did.

Suggestion of 'lazy drafting' in preparing the contract

57 On day 14, the senior member discussed with counsel for the Republic the practice of adopting standard contractual documents and then preparing other documents with amendments to the standard contractual documents. The senior member commented that he thought it was 'a lazy person's way'[14]of drawing contractual documents. He commented that the problem is that the documents were prepared by architects and superintendents and not lawyers. The senior member discussed the same subject with Tectura's counsel who responded that the practice was commonly adopted throughout Victoria and Australia for the construction of public buildings, and by government departments.

Pressure to make an admission

58 Tectura raises concern about the pressure it says was applied during a discussion between the senior member and Mr Baycan to try to get Mr Baycan to make an admission. The senior member asked Mr Baycan whether it was reasonable to demand that outstanding defects be addressed in four working days. Mr Baycan initially referred to the fact that the defects had been outstanding for 10 months but ultimately agreed, in answer to the senior member, that a four day period was not reasonable.

Relevance of concern about dishonesty in failing to grant an extension

59 Tectura says neither Mackie nor the Republic alleged that Tectura had acted dishonestly. However, in discussions with counsel on days 14, 19 and 20, the senior member referred to the issues of fairness and honesty on the part of Tectura as superintendent. He said that they were things that he had to understand in order to make findings on that eventually. Mackie alleges that the superintendent acting in accordance with its contractual duties ought to have extended the date for practical completion.

Concern about senior member's statement as to tile price negotiation

60 Mr Attard deposes that the senior member had an apparent tendency to look unfavourably upon Tectura with respect to the claim relating to a tile variation. On day 17, there was a discussion about the fact that Mackie did

[14] Transcript 1061.6–15

not, or could not, obtain the tiles from the nominated supplier at the price said to have been agreed with that supplier. In discussion with Tectura's counsel about why this was so, the senior member referred to a suggestion by counsel for the Republic that the nominated supplier would not work for Mackie, or may have felt that they had been 'screwed by Mr Baycan to get the price down',[15] and decided that they were not going to do the job. The senior member said that he just didn't know. The same topic was mentioned on day 22 when the senior member raised with Mr Baycan whether any guaranteed price for the supply of the tiles was given by the nominated supplier and also referred to 'the machinations between [Mr Baycan] and [the tile supplier]'.[16]

Determination of objections

61 The final concern relates to the senior member's determination of objections by counsel during Mr Baycan's evidence. According to Mr Attard, Mackie's senior counsel objected 27 times of which 15 were allowed. The Republic's counsel objected on 10 occasions of which four were allowed. Tectura's counsel objected 23 times with only six successful objections.

62 Mr Attard also deposes that Mackie's senior counsel objected on 22 occasions during Mr Mackie's evidence and was upheld on 13 occasions. Counsel for Tectura objected to the questioning of Mr Baycan on 16 occasions with only four successful objections.

Contrast with approach towards Mr Mackie

63 According to Mr Attard, Mr Baycan was asked by the senior member to answer the question on 12 occasions. Initially it was by way of simple direction, but later his directions were expressed with criticism, and at times, he admonished Mr Baycan. Mr Attard said the senior member's approach in respect of Mr Mackie's cross-examination was different. Mr Attard deposed that the senior member directed Mr Mackie to answer the question on seven occasions. On these occasions, the senior member's approach was to be direct and require Mr Mackie to answer the question without admonishment or threats.

64 On one occasion, Mr Mackie was directed by the senior member not to talk back to counsel without any further admonishment. The senior member directed Mr Mackie to answer the question on a number of occasions, referring also to the competence of his senior counsel and his opportunity to clarify anything raised in cross-examination. On another occasion, the senior member said that Mr Mackie could answer the question how he wanted to answer it.

65 On day 5, the senior member expressed concern about Mr Mackie's age and travel requirements, and on day 7 concluded the proceedings early because

[15] Transcript 1248.12–13.
[16] Ibid 1725.27–28.

of concerns about Mr Mackie's larynx. Mr Attard deposes that no similar concern was expressed by the senior member about Mr Baycan's health during his lengthy cross-examination.

Mackie's response to Tectura's submissions

66 Senior counsel for Mackie submits:

(a) It is normal practice to ask a witness to answer a question if the witness does not do so. All witnesses including Mr Mackie and Mr Baycan were directed to answer the question and not to talk back to counsel. Such a direction gives a witness another opportunity to consider the manner of giving evidence and response.

(b) A warning is given out of fairness to a witness. It cannot be inferred, on a reasonable basis, that the senior member's approach was unfair.

(c) On numerous occasions, Mr Baycan did not answer questions or gave long winded or unresponsive answers. The senior member's manner was not unfair. Both Mr Mackie and Mr Baycan were directed to answer questions where that was necessary and not to talk back to counsel. A review of the transcript did not support the assertions made by Tectura. On one occasion, Mr Baycan chose to argue with the senior member when directed to answer the question.

(d) None of the transcript extracts demonstrate unfairness, threats or criticism of the evidence or the witness, as opposed to the manner of answering questions.

(e) It cannot be inferred from the exchanges between any witness and the senior member that the senior member was treating the evidence of the witness other than on its merits.

(f) It is well established that an adjudicator may properly adopt reasonable efforts to confine proceedings within reasonable limits and ensure that time is not wasted. The fictitious bystander is aware of the strong professional pressures on adjudicators (reinforced by the facilities of appeal and review) to uphold traditions of integrity and impartiality.[17]

(g) The senior member was not aggressive. A fair minded observer would be sufficiently mature to know that the exchanges that occurred are not likely to affect the mind of the senior member when he decides the case.

(h) The objective lay observer would be mature enough to know that whatever view the senior member may hold on day 17 or any other day is unlikely to affect his final determination after hearing Tectura's evidence and the closing addresses of the parties.

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17 Citing *Waddington v Dandenong Magistrates' Court* [2014] VSCA 12, [23]; *Johnson v Johnson* (2000) 201 CLR 488, 492–3 [53].

(i) The parties are yet to make closing addresses and two days have been set aside for this to occur at the conclusion of the evidence. There is ample opportunity to correct any wrong impressions.

(j) The exchanges regarding note taking by architects and the practice of solicitors are not such as to show any predisposition to a point of view. Like judges, members are entitled to test the evidence and give counsel the opportunity to appreciate the manner in which they are thinking.

(k) Counsel for Tectura explained the rationale for the practice the senior member had referred to as 'lazy drafting'. Senior counsel for Mackie later said to the Tribunal that no criticism was made of the superintendent because of his approach to drafting the contract in this manner.

(l) The question of whether four days is sufficient to complete defects is a mixed question of fact and law. Final submissions are yet to be made. The ability to complete the listed defects in four days was the only consideration at the time the questions were asked. The admission made by Mr Baycan was impossible not to make.

(m) Mr Mackie is 74 years old and has a health problem that impacted significantly on the tone and volume of his voice after four days of cross-examination. There is no prejudice resulting from the senior member's proper concern about Mr Mackie's health. Mr Baycan did not experience obvious health problems.

(n) The clause of the contract relied on by Mackie requires the superintendent, Tectura, to act honestly and fairly. Whether the decisions were objectively unfair is an issue in the case. The passages relied on are not logically connected to a predetermination of the issue in the mind of the lay observer. If the senior member considers the issue to be relevant, and it is properly irrelevant, Tectura will have grounds for an appeal to the Supreme Court.

(o) There is nothing in the exchange concerning the tile variation claim that would lead a lay observer to conclude that the senior member had predetermined the issue, or determined the issue other than on the merits.

(p) Nothing is gained from the statistics as to the success of objections.

Case law regarding reasonable apprehension of bias

67 The Tribunal must afford procedural fairness and is bound by the rules of natural justice.[18]

68 In *Ebner v Official Trustee in Bankruptcy,*[19] the High Court held that 'a judge is disqualified if a fair minded lay observer might reasonably apprehend that the judge might not bring an impartial mind to the resolution

[18] Act ss 97, 98(1).

[19] (2000) 205 CLR 337 ('*Ebner*').

of the question that the judge is asked to decide'.[20] The test proceeds by reference to the material objective facts, and is one of real possibility not probability.[21]

69 In *Ebner*,[22] the High Court set out a two-step test to determine whether an allegation of apprehended bias is established.[23] The first step requires the identification of what it is said might lead a judge (or a member) to decide a case other than on its legal and factual merits. The second step requires an articulation of the logical connection between the matter and the feared deviation of the course of deciding the case on the merits.[24]

70 *Ebner*[25] was followed and applied by the High Court in the later cases of *Michael Wilson & Partner v Nicholls*[26] and *Isbester v Knox City Council*.[27]

71 In *AJH Lawyers Pty Ltd v Careri*,[28] the Court of Appeal drew on a wide selection of authorities to set out eight principles to assist in determining whether a proper basis for an apprehension of bias is established. As adapted to apply to the Tribunal, they are:

(1) when dealing with an appeal, grounds relating to actual or apprehended bias should be dealt with first, regardless of whether the decision was correct on its merits;

(2) members should not accept recusal simply because a party has asked for it;

(3) when called upon to assess the existence of a reasonable apprehension of bias relating to another decision maker, the test is one which requires no conclusions to be drawn about what factors actually influenced that decision maker's conclusions, or as to what their 'actual thought processes' were;

(4) apprehension refers to an apprehension of the member not deciding a case impartially, as opposed to an apprehension that a case will be decided adversely to one party;

(5) satisfaction of the test for apprehended bias requires two distinct steps – the first is the identification of what might lead a member to decide a case other than on its legal and factual merits, and the second is an articulation of the logical connection between the matter and the feared deviation;

(6) the perception of a lay observer will not be as informed as the perception of a lawyer, particularly a litigation lawyer, but they are

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20 Ibid 344 [6], citing *R v Sussex Justices; Ex parte McCarthy* [1924] 1 KB 256, 259.
21 Ibid 345 [7]; see also *Johnson v Johnson* (2000) 201 CLR 488, 492–3 [12].
22 (2000) 205 CLR 337.
23 Ibid 345 [8].
24 Ibid.
25 (2000) 205 CLR 337.
26 (2011) 244 CLR 427, 437–8, [31]–[34].
27 (2015) 255 CLR 135, 146 [21]–[22].
28 (2011) 34 VR 236.

taken to have some understanding of modern decision making practice;

(7) a line is drawn between robust indications of a member's tentative views on a point of importance in a proceeding, and an impermissible indication of prejudgment; and

(8) members do not have to devote unlimited time to listening to unmeritorious arguments, but should be cautious of the impression that can be given by rejecting a submission out of hand.[29]

72 As I said in *Jinshan Investment Group Pty Ltd v Melbourne CC*,[30] while the discretion given to a presidential member of the Tribunal under s 108(2) is of a general character and is not limited by specific criteria, the High Court's decision in *Ebner*[31] and the other authorities to which I have referred are of considerable assistance in determining how the discretion should be exercised.[32] Where a reasonable apprehension of bias is alleged against a member, any application for reconstitution of the Tribunal requires identification of what it is said might lead the Tribunal to decide the case other than on its legal and factual merits and an articulation of the logical connection between that matter and the feared deviation from the proper course.[33]

Conclusion as to apprehension of bias

73 The critical issue is whether Tectura and the Republic have shown that a fair minded lay observer might reasonably apprehend that the senior member might not bring an impartial mind to the resolution of the proceeding. It is significant that the word 'might' appears twice in the test. The first step is to identify what is said that might lead the senior member to decide the proceeding other than on its legal and factual merits.

74 In my view, Tectura and the Republic have failed to identify what it is that might lead the senior member to decide the proceeding other than on its merits. No reasonable basis has been advanced as to why there is a real possibility of bias in circumstances where the senior member is a long-standing and very experienced member of the Tribunal and its predecessors.[34]

75 As the trial judge said, and the Court of Appeal agreed, in *Waddington v Dandenong Magistrates' Court*,[35] as a general rule, rudeness, abruptness and an unwillingness to listen would not, without more, give rise to an apprehension that the judicial officer might not bring an impartial mind to the resolution of a question that he or she is required to decide. A

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[29] Ibid 241–3 [18]–[25].
[30] [2015] VCAT 635.
[31] (2000) 205 CLR 337.
[32] *Jinshan Investment Group Pty Ltd v Melbourne CC* [2015] VCAT 635, [24].
[33] Ibid.
[34] Above [21], [22].
[35] [2014] VSCA 12.

connection needs to be made between the rudeness or abruptness and a predisposition or prejudice against a case for reasons unconnected with the merits.[36]

76 In *Bradto*,[37] Morris P observed that judges must make rulings and decisions, and when they do someone will be displeased.[38] If one were to take an oversensitive approach to the consequence of rulings, it would make the administration of justice impossible.[39] It must be accepted that when a judge makes a ruling during the course of a case, that does not mean that the judge is incapable of fairly and impartially making future rulings, or a final decision in the case.[40]

77 As Morris P said, judges are entitled to express themselves forcefully.[41] The fact that a ruling or judgment is expressed forcefully, even colourfully, is not a basis for concluding that the judge is not impartial or should be apprehended to be biased.[42]

78 In *Legal Services Commissioner v Johnson*,[43] I held that these observations applied to legally qualified senior members of the Tribunal just as much as judges.[44]

79 Tribunal members hear evidence from lay and expert witnesses on most days that they sit. They are entitled and expected to ask questions of witnesses where they have concerns or require assistance, but not so far as to assume the mantle of counsel.[45] They are entitled to take up issues with counsel and the parties, and express robust views and opinions without prejudgment. They must direct and control hearings, and ensure that counsel and witnesses are addressing the issues and not irrelevancies. When witnesses are not responsively answering questions which are not the subject of objection, members are entitled to direct witnesses to answer in a responsive manner, and caution witnesses who are unresponsive or do not give direct answers to questions. It is plain that a member's method of dealing with witnesses who do not answer questions is within the member's discretion and may properly vary from witness to witness depending on the expertise, experience, agility with language, age and state of health of the witness, among other factors. There is not sufficient evidence in this proceeding that suggests that the senior member did not apply the same standards to all witnesses or act appropriately to progress the hearing and determination of the proceeding.

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36 Ibid [22].
37 [2005] VCAT 2512.
38 Ibid [20].
39 Ibid [21].
40 Ibid.
41 Ibid [23].
42 Ibid.
43 [2012] VCAT 1482.
44 Ibid [18].
45 Act sch 3 gives members of the Tribunal extensive powers in relation to expert witnesses.

80 Although Tectura fails at the first step, it is appropriate also to consider the second step. This requires an articulation of the logical connection between the matter and the feared deviation from the course of deciding the case on the merits. Tectura and the Republic have not shown any logical connection between what has occurred in the proceeding and the suggested variation from the course of deciding the case on the merits. As a result, Tectura and the Republic also fail at the second step required by the *Ebner*[46] decision.

81 I accept the submissions made on behalf of Mackie that:

(a) the senior member directed witnesses from both Mackie and Tectura to answer questions and not talk back to counsel;

(b) by directing witnesses to answer questions, the senior member gave them a second opportunity to respond to questions where they had not previously done so;

(c) the senior member warned witnesses from both sides when they continued to be unresponsive;

(d) the senior member did not say or do anything that suggested that he would not be deciding the proceeding on its factual and legal merits;

(e) the senior member sought to direct the proceeding so as to ensure that time was not wasted;

(f) although direct and forceful at times, the senior member was not aggressive or impolite;

(g) note taking by architects and professionals is a relevant matter given the issues in the proceeding, and the senior member was entitled to question Mr Baycan on this issue;

(h) Tectura is still presenting its case and has every opportunity to disabuse the senior member of any tentative view he may have formed or opinion that he may have expressed;

(i) the parties have the opportunity of final addresses to deal with contested issues;

(j) the lazy drafting issue has been explained and clarified by counsel, and appears to have little, if any, continuing significance;

(k) the four day notice to repair defects is a live and contested issue to be dealt with in the senior member's final determination;

(l) the weight to be given to the evidence of individual witnesses is a matter for the Tribunal in its final determination; and

(m) the statistical scorecard as to successful and unsuccessful objections is of no value, as each objection must be determined on its merits having

[46] (2000) 205 CLR 337.

regard to the question asked, the nature of the objection and the response of the witness.[47]

82 As a result, Tectura and the Republic fail at both of the steps set out in *Ebner*.[48] I hold that if a fair minded lay observer were asked whether he or she might reasonably apprehend that the senior member might not bring an impartial mind to the resolution of the issues and questions which arise in the proceeding, the answer would be 'no'.

83 In making this finding, I do not take into account any discretionary considerations such as are discussed above.[49] It is unnecessary to consider whether it is appropriate to do so.

Conclusion

84 For the reasons that I have given, the grounds for reconstitution of the Tribunal advanced by Tectura and the Republic fail. The application for reconstitution must be dismissed. The hearing will resume on Monday 15 May 2017 at 10:00am before the senior member.

Justice Greg Garde AO RFD
President

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47 As to statistical evidence regarding bias, see *ALA15 v Minister for Immigration and Border Protection* [2016] FCAFC 30, [37]–[44].
48 (2000) 205 CLR 337.
49 Above [41]–[47].