

# VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

## CIVIL DIVISION

### DOMESTIC BUILDING LIST

VCAT REFERENCE NO. D916/2006

### CATCHWORDS

Sections 131 and 149 of the *Victorian Civil and Administrative Tribunal Act 1998* – power of tribunal to maintain stay or order further stay of proceedings pending application to the High Court for special leave to appeal dismissal by Court of Appeal of application for leave to appeal – requirement to act fairly under s97 of *Victorian Civil and Administrative Tribunal Act 1998* – stay discharged

<b>APPLICANT/FIRST RESPONDENT TO COUNTERCLAIM</b>	Seachange Management Pty Ltd (ACN 091 443 211)
<b>FIRST RESPONDENT/ APPLICANT BY COUNTERCLAIM</b>	Bevnol Constructions & Developments Pty Ltd (ACN 079 170 577)
<b>SECOND RESPONDENT</b>	Bruce Jamieson
<b>THIRD RESPONDENT</b>	Louis Allain
<b>SECOND RESPONDENT TO COUNTERCLAIM</b>	Giuseppe De Simone
<b>THIRD RESPONDENT TO COUNTERCLAIM</b>	Paul Marc Custodians Pty Ltd
<b>FOURTH RESPONDENT TO COUNTERCLAIM</b>	Martin Jurblum
<b>WHERE HELD</b>	Melbourne
<b>BEFORE</b>	Deputy President C. Aird
<b>HEARING TYPE</b>	Directions Hearing
<b>DATE OF HEARING</b>	16 March 2011
<b>DATE OF ORDER</b>	21 March 2011
<b>CITATION</b>	Seachange Management Pty Ltd (ACN 091 443 211) v Bevnol Constructions & Developments Pty Ltd (ACN 079 170 577) (Domestic Building) [2011] VCAT 420

### ORDER

1. The stay of the tribunal's decision dated 18 March 2010 as ordered on 3 May 2010 is discharged as and from 4:00 pm on 23 March 2011. Thereafter the legal representatives for the first respondent may make arrangements with the principal registrar to inspect the subpoenaed documents in accordance with the

orders dated 18 March 2011 and the undertaking given by them by letter dated 23 March 2010.

2. Costs reserved. Any application for costs must be accompanied by submissions. Any submissions in reply must be filed and served no later than 14 days from the date on which the application for costs is filed and served. Thereafter, any costs application will be determined on the papers.

## **DEPUTY PRESIDENT C. AIRD**

### **APPEARANCES:**

For the Applicant	Mr P Lustig, Solicitor
For the First Respondent/Applicant by Counterclaim	Mr B Archer, Solicitor
For the Second Respondent to Counterclaim	Mr G De Simone, in person
No appearance by or on behalf of the other parties	

## REASONS

- 1 This proceeding has had a long and tortuous history and the background is well known. On 8 March 2011 Justice Ross P ordered the proceeding be struck out pursuant to s77(1) of the *Victorian Civil and Administrative Tribunal Act 1998* ('the VCAT Act') and referred to the Supreme Court pursuant to s77(3). Further, that the orders under s77 were to take effect from 25 March 2011, partly as I understand it, to allow for the hearing of Bevnol's application for a removal of the stay of the tribunal's orders dated 18 March 2010.
- 2 On 18 March 2010 her Honour Judge Harbison VP made the following orders which are relevant to this application:
  3. I declare the documents produced to the Tribunal by Jack Chrapot in response to the summons to witness dated 29 April 2009 and Michael Brereton in response to the summons to witness dated 16 December 2008 should be made available for inspection by the legal representatives of the respondents with the following exceptions –[as listed]
  4. Prior to inspection of the documents referred to in these orders, the legal representatives of the respondents must file a written undertaking with the Tribunal not to disclose the contents of these documents to any person, including directors and agents of the respondent, until further order of the Tribunal.
- 3 On 3 May 2010, following notice by Mr De Simone that he had lodged an application for leave to appeal the decision of 18 March 2010 ('Mr De Simone's leave application') with the Court of Appeal, her Honour made the following orders:
  1. That pursuant to section 149 of the VCAT Act, my order of 18 March 2010 is stayed until further order of any Member of this Tribunal.
  2. That the question of the listing of any argument as to the appropriateness of the continuation of the stay be listed for directions before me on a date to be fixed.
- 4 On 3 March 2011 the Court of Appeal dismissed Mr De Simone's leave application. On the same day Bevnol's solicitors wrote to the tribunal requesting the tribunal to make an order in chambers removing the stay and to make the documents identified in the 18 March 2010 decision available for inspection on 7 March 2011. This request was made by facsimile which was received by the tribunal at 12.54 p.m.
- 5 On 3 March 2011, at 3.13 pm, Mr De Simone emailed the tribunal with a copy to the solicitors for the other parties, advising that he intended to make application to the High Court for Special Leave to Appeal the decision of the Court of Appeal refusing his leave application. He requested that he be *allowed to submit an affidavit and make a submission in opposition to the lifting of the stay.*

- 6 On 4 March 2011 the solicitors for Bevnol again wrote to the tribunal confirming they had been instructed to *reject any further stay and confirm our request of 3 March 2011 to inspect the documents ...and ..Please confirm that the documents will be made available to us for inspection on Monday 7 March 2011 at 10:00 am.*
- 7 Apparently this matter was raised briefly with the President at the directions hearing on 8 March 201. As that directions hearing had been listed to consider the further conduct of the proceeding, and whether orders should be made under s77 of the VCAT Act, given the limited time available I understand his Honour indicated to the parties he would refer Bevnol's request to another member for hearing.
- 8 On 10 March 2011 I made the following orders in chambers:  
The first respondent having written to the tribunal seeking an order that the Stay of the tribunal's decision dated 18 March 2010 as ordered by the tribunal on 3 May 2010 be removed, and Mr De Simone, having advised he opposes such an order, the tribunal orders:
1. This proceeding is referred to a directions hearing before Deputy President Aird on 16 March 2011 at 9.30 a.m. at 55 King Street Melbourne at which time the first respondent's application that the Stay be removed will be heard.
  2. By 4:00 pm on 15 March 2011 the parties must file and serve their submissions and any other material on which they rely.
- 9 On 15 March 2011 Mr De Simone emailed the principal registrar advising he would be relying on the material he had previously filed on 3, 10 and 11 March 2011. No material was filed on behalf of Bevnol.
- 10 Mr De Simone emailed the parties and the tribunal on 10 March and again on 15 March 2011 suggesting an appropriate order would be:  
The stay granted by Harbison J Vice-President on 3 May 2010 of the orders of 18 March 2010 be discharged on 2 April 2011 and Mr Archer be permitted to inspect the documents in accordance with the undertaking provided by him to the Tribunal unless prior to that date Mr De Simone provides the Tribunal and the parties evidence of lodgment of an application for special leave to appeal to the High Court in which case the stay shall remain in place until determination of that application and if it is granted until determination of the appeal arising.
- 11 Bevnol did not consent to this order and the directions hearing proceeded. Bevnol was represented by Mr Archer, solicitor. Mr De Simone appeared on his own behalf and Mr Lustig, solicitor, appeared on behalf of Seachange. The solicitors for the third and fourth respondents to counterclaim advised the tribunal they would not be attending the directions hearing, but would comply with any orders made by the tribunal whilst reserving their rights to make separate applications in the future.

- 12 Mr Archer's primary submission is that following the dismissal by the Court of Appeal of Mr De Simone's leave application, there is no jurisdiction for the tribunal to continue the stay.
- 13 Mr De Simone's submitted that as he proposes to apply to the High Court for special leave to appeal the Court of Appeal's dismissal of his leave application, the appeal instituted under s148 of the VCAT Act has not been determined. Further, it will not have been determined until his appeal to the High Court has been determined, if his special leave application is successful, or the special leave application is dismissed. Alternatively, he submits that the tribunal can extend the stay under s131 of the VCAT Act.

### **Does s131 apply?**

- 14 It is convenient to first consider Mr De Simone's alternative submission that the tribunal can extend the stay under s131 of the VCAT Act which provides:

An order or direction as to the procedure to be followed in a proceeding may be varied or revoked at any time by any member empowered by or under this Act or the rules to make such an order or give such a direction.

- 15 In my view, s131 does not apply. An order under s149 is not a procedural order or direction. Section 149 explicitly deals with the tribunal's power to grant a stay of its orders pending the determination of an appeal instituted under s148, and is the operative provision.

### **The tribunal's powers under s149**

- 16 Section 149 of the VCAT Act provides:

- (1) The Tribunal, on the application of a party or on its own initiative, may stay the operation of any order it makes pending the determination of any appeal that may be instituted under this Part.
- (2) The Tribunal may attach any conditions it considers appropriate to a stay of an order under subsection (1).

- 17 Section 148 of the VCAT Act relevantly provides:

- (1) A party to a proceeding may appeal, on a question of law, from an order of the Tribunal in the proceeding—
  - (a) to the Court of Appeal, if the Tribunal was constituted for the purpose of making the order by the President or a Vice President, whether with or without others; or
  - (b) to the Trial Division of the Supreme Court in any other case—  
if the Court of Appeal or the Trial Division, as the case requires, gives leave to appeal.
- (2) An application for leave to appeal must be made—
  - (a) no later than 28 days after the day of the order of the Tribunal; and

- (b) in accordance with the rules of the Supreme Court.
- (3) If leave is granted, the appeal must be instituted—
  - (a) no later than 14 days after the day on which leave is granted; and
  - (b) in accordance with the rules of the Supreme Court.

...

- 18 I note that Judge Harbison’s orders of 3 May 2010 provide the orders of 18 March 2010 are stayed until *further order by any member of the tribunal*. In the context of the history of this proceeding, where the parties have been in constant dispute at every step during the interlocutory process, this was an appropriate order. Bevnol’s request that the stay be lifted has been strenuously defended by Mr De Simone and Seachange.
- 19 As Mr De Simone’s leave application has been dismissed, the appeal instituted by Mr De Simone under part 5 of the VCAT Act (accepting for these purposes that instituting an appeal includes making an application for leave to appeal) has been determined. Accordingly, the 18 March 2010 orders of the tribunal stand. In my view, the tribunal does not have jurisdiction to maintain the stay or order a further stay. Any application to the High Court for special leave to appeal the dismissal of the leave application by the Court of Appeal is not an appeal instituted under Part 5 of the VCAT Act.
- 20 Mr De Simone advised me towards the end of his submissions that the Court of Appeal has listed Bevnols’ application for indemnity costs, following the dismissal of his leave application, for hearing next Wednesday 23 March 2011. In the circumstances, and having regard to s97 of the VCAT Act which proves that the tribunal must act fairly, I will order that the stay as ordered on 3 May 2010 be discharged as and from 4:00 pm on 23 March 2011. Thereafter the legal representatives for the first respondent may make arrangements with the principal registrar to inspect the subpoenaed documents in accordance with the orders dated 18 March 2010 and the undertaking given by them by letter dated 23 March 2010. This will give Mr De Simone an opportunity to make an application for a further stay to whichever Court he considers appropriate.
- 21 In determining that the stay should be discharged as and from 23 March 2011 I have considered Mr Archer’s submissions that it is a matter of urgency that he have an opportunity to inspect the documents. He referred to a County Court proceeding in which he says Bank West is seeking possession of the subject property being the only asset owned by Seachange. Mr De Simone indicated that Bank West is claiming payment of monies and that possession is but one of the remedies sought in the Prayer for Relief. I have not seen any court documents but am not persuaded there is any compelling reason to lift the stay before 23 March 2011.

- 22 I will reserve costs but draw the parties' attention to the provisions of s109 of the VCAT Act. Any application for costs must be accompanied by submissions. Any submissions in reply must be filed and served no later than 14 days from the date on which the application for costs is filed and served. Thereafter, any costs application will be determined on the papers.

**DEPUTY PRESIDENT C. AIRD**