VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

VCAT REFERENCE NO. D916/2006

DOMESTIC BUILDING LIST

CATCHWORDS

Victorian Civil and Administrative Tribunal Act 1998 – application for stay of proceedings – *Charter of Human Rights and Responsibilities Act* 2006 – *McMahon v Gould* guidelines – not persuaded that it is in the interests of justice to grant a stay – application dismissed.

APPLICANT:	Seachange Management Pty Ltd (ACN 091 443 211)
FIRST, SECOND AND THIRD RESPONDENTS:	Bevnol Constructions & Developments Pty Ltd (ACN 079 170 577), Bruce Jamieson, Louis Allain
SECOND RESPONDENT TO COUNTERCLAIM:	Giuseppe De Simone
WHERE HELD:	Melbourne
BEFORE:	Vice President Judge I J K Ross
HEARING TYPE:	Stay Application
DATES OF HEARING:	24 July and 26 September 2008 (further written submissions filed on 20 November 2008)
DATE OF ORDER:	25 November 2008
CITATION:	Seachange Management Pty Ltd v Bevnol Constructions & Developments Pty Ltd & Ors (Domestic Building) [2008] VCAT 2629

ORDER

1 The application for a partial stay of Bevnol's counterclaim is dismissed.

2 Costs reserved.

Judge I J K Ross
Vice President

APPEARANCES:

For Seachange Management Pty Ltd:	Mr P.S. Lustig, Solicitor
For Bevnol; Jamieson and Allain:	Mr B. Reid of counsel
For Mr De Simone:	Mr C. Young of counsel and Mr De Simone, in person.

REASONS FOR DECISION

Background

1 The substantive proceeding to which this application relates concerns a dispute about the development of a retirement village at 177 Bonnyvale Road, Ocean Grove ('the site'). Seachange Management Pty Ltd ('Seachange') is the registered proprietor of the site and is in the property development business. Bevnol Constructions and Development Pty Ltd (Bevnol) is a builder. It is common ground that on or about 15 May 2006 Seachange and Bevnol entered into an agreement whereby Bevnol agreed to construct 11 units on the site for the sum of $1,809,827.80.

2 In its Amended Points of Claim[1] Seachange alleges, among other things, that the agreed works were not completed within the period specified in the contract and that the work undertaken by Bevnol was deficient in various respects. Seachange claims damages, interest and costs.

3 On 29 May 2007 Bevnol filed a counterclaim against, relevantly, Seachange and Mr Giuseppe De Simone (the second respondent to the counterclaim). The third and fourth respondents to the counterclaim are Paul Marc Custodians Pty Ltd (formerly Paul Marc Management Pty Ltd) and Martin Jurblum (a director of the third respondent). In its counterclaim Bevnol alleges, among other things:

- Seachange refused to pay in full the deposit required by the contract.
- On 18 December 2006 Bevnol served a notice of suspension on Seachange. Seachange failed to rectify the breach identified in the notice within the 7 days specified in the contract and on that basis Bevnol was entitled to suspend the contract.
- Between 8 December 2006 and 24 April 2007 Seachange breached express terms of the contract and by letter dated 24 April 2007 Bevnol accepted Seachange's repudiation and was thereby discharged from future performance of the contract.
- Bevnol claims loss and damages by reason of Seachange's wrongful termination of the contract.

4 Bevnol also alleges that the first (Seachange) and third respondents (Paul Marc Management Pty Ltd) engaged in conduct that was misleading or deceptive or likely to mislead or deceive in contravention of s 9 of the *Fair Trading Act* 1999 (the FTA). The misrepresentation is said to arise from a representation made by the first and third respondents that all necessary finance required by the contract had been obtained. It is alleged that the financial approval had not in fact been obtained and that the first and third respondents had no reasonable basis for belief in the accuracy of the representation made to Bevnol.

[1] Dated 31 May 2007

5 The claims made by Bevnol against Mr De Simone are made in the alternative and are set out at paragraphs 41 and 42 of the Counterclaim. It is alleged that Mr De Simone contravened s 9 of the *Fair Trading Act* pursuant to s.159 of that act by reason of:

> "(a) being involved in the contravention; and/or
>
> (b) contravened section 9 of the FTA; and/or
>
> (c) aided, abetted counselled or procured the contraventions; and/or
>
> (d) induced the contraventions."

6 Bevnol claims damages (pursuant to ss. 158 and/or 159 of the FTA), interest and costs against Mr De Simone.

7 This decision deals with the second of two interlocutory applications by Mr De Simone, namely that there be a partial stay of Bevnol's counterclaim (the stay application) as it relates to him.

The Stay Application

8 In *Dowie v Northey & Anor* (*Dowie*)[2] Deputy President McKenzie concluded that VCAT had power to issue a stay of proceedings and that such a power emanated from a combination of various provisions in the *Victoria Civil and Administrative Tribunal Act* 1998 (the *VCAT Act*). The provisions relied on were s 80(1) (power to give directions and do 'whatever is necessary for the … fair hearing and determination of a proceeding'); s 97 (duty of the Tribunal to act fairly) and s 98(3) (which empowers the Tribunal to regulate its own procedure subject to the Act, the regulations and the rules).

9 For the purpose of this decision I have assumed, without deciding the issue, that the Tribunal has the power to grant the relief sought.

10 The Tribunal is being asked to stay part of the proceedings in the Seachange-Bevnol dispute, namely that part of the Bevnol counterclaim which relates to Mr De Simone.

11 Insofar as Mr De Simone is concerned the substance of Bevnol's claim against him is that contrary to s 159 of the *Fair Trading Act* he aided, abetted or procured conduct which was misleading and deceptive, and/or unconscionable.

12 It is common ground that on or about 24 July 2006 Mr Marc Jurblum of Paul Marc Custodians Pty Ltd authorised a letter which asserted that the stage 1 and 2 finance for the Seachange Retirement Village had been approved ('the construction finance letter').

[2] [2000] VCAT 823 (30 April 2000)

13 In an affidavit by Mr De Simone dated 24 January 2007 and filed by Seachange, Mr De Simone says:

> "33 … I sent a copy of the letter I received from Martin Jurblum to the respondent to show that additional funds had been obtained and to reassure it that the funding in place was more than adequate to cover the civil and domestic building works for the whole of the first and second stages of the development."

14 In an earlier affidavit of 27 August 2007 Mr De Simone sets out his evidence in relation to the circumstances in which he forwarded the construction finance letter to Bevnol:

> "15. I requested the Custodians letter of 24 July 2006 be prepared for Bank West and National Australia Bank, the two lenders bidding for the business of providing additional loan funds to Seachange. The letter was to show that the development project had access to additional funds (by way of partner syndicated loans) to meet the equity requirements of the project in terms of loan to valuation ratios and also to show that the first stage of the project was fully funded if need be.
>
> 16. I did not ask Jurblum's permission to send the 24 July 2006 letter to Bevnol nor did I make him aware of the letter being sent to Bevnol. The letter was sent to Bevnol at its request in the following circumstances.
>
> 17. On 27 July 2006, I received a call from Bosancic to advise me that Bevnol had been unable to get domestic builder's warranty insurance. Bosancic advised me that Bevnol claimed its insurer required evidence of finance prior to issuing the policy. I told him this wasn't a requirement of any insurer I knew as the insurance was to protect Seachange not the builder. He said that they needed something or they could not start.
>
> 18. I told him I had a letter in my possession that spoke of the loan funds being advanced by the partners. He said that would do for the loan letter.
>
> 19. I asked him for Bevnol's fax number and then faxed the letter to Bevnol as requested. I was at the offices of Paul Marc & Co, Seachange's accountants, so I faxed it from there. Custodians is an entirely separate legal entity to Paul Marc & Co and has never acted as Seachange's accountants, nor is it qualified to do so.
>
> 20. At no time prior to 8 December 2006, did I speak to anyone at Bevnol about the letter."

15 The construction finance letter was provided to Bevnol prior to Bevnol providing building services to Seachange.

16 In its counterclaim Bevnol says that it forwarded a copy of the construction finance letter to its insurer, Vero, as evidence that the funding was in place

and Vero issued a Domestic Warranty Insurance Policy on 2 August 2006 and a Building Permit was obtained on the same day.

17 Bevnol alleges that it was misled by the construction finance letter into believing that the required finance had been obtained.

18 Mr De Simone is the subject of a police investigation involving allegations of obtaining a financial advantage by deception. It is apparent that the police investigation and Bevnol's claim against Mr De Simone arise from the same factual substratum. In the proceedings before me the parties have agreed upon certain facts relating to the police investigation into Mr De Simone's conduct. The Agreed Facts are as follows:

> "1. Mr De Simone is the subject of a police investigation involving allegations of obtaining a financial advantage by deception. The investigation was instigated following a complaint made by a director of Bevnol in about March 2007.
>
> 2. The complaint concerned the circumstances in which financial assistance was sought or obtained in relation to the Seachange development and in particular the 'Construction Finance Letter' dated 24 July 2006.
>
> 3. The police investigation has not been completed. When it is further advanced the last thing the investigating officer will do is to seek to complete a formal interview with Mr De Simone. If at that time Mr De Simone refuses to answer any question it is likely that he will be charged.
>
> 4. In respect of the investigation Mr De Simone has been advised not to answer any questions or provide any material to the police. Mr De Simone intends to follow that advice.
>
> 5. The probability that charges will be laid against Mr De Simone is high.
>
> 6. While criminal proceedings have not yet commenced it is more than likely they will be, but the time frame for the laying of charges and for the conduct of the prosecution is unknown."

19 As discussed with the parties on 24 July 2008 I also propose to draw the inference that the police investigation of Mr De Simone concerns the matters set out in paragraph 2 of the Agreed Facts.[3] No party resisted the drawing of such an inference.

20 Bevnol has given the police copies of affidavits sworn in this proceeding.[4]

Stay: Relevant Principles

21 In *Dowie* the Deputy President decided that the principles to be applied in determining whether to grant a stay were the principles applied by courts in

[3] See Transcript of 24 July 2008 at pp 14-15

[4] Item 3 in letter dated 5 June 2008 from Brendan Archer to Giuseppe De Simone (and referred to in paragraph 29 De Simone affidavit 1 July 2008 and exhibited thereto)

the same circumstances. The same approach has been applied subsequently in the context of domestic building cases.[5]

22 In *McMahon v Gould*,[6] Wootten J listed a number of what he called guidelines for determining whether to grant a stay application where criminal proceedings are on foot or threatened, with the overriding consideration being what 'the interests of justice' require in the circumstances. The relevant guidelines are as follows:[7]

(a) Prima facie a plaintiff is entitled to have his action tried in the ordinary course of the procedure and business of the court (*Rochfort v John Fairfax & Sons Ltd* [1972] 1 NSWLR 16 at 19);

(b) It is a grave matter to interfere with this entitlement by a stay of proceedings, which requires justification on proper grounds (ibid);

(c) The burden is on the defendant in a civil action to show that it is just and convenient that the plaintiff's ordinary rights should be interfered with (*Jefferson v Bhetcha* [1979] 1 WLR 898 at 905);

(d) Neither an accused (ibid) nor the Crown (*Rochfort v John Fairfax & Sons Ltd* at 21) are entitled as of right to have a civil proceeding stayed because of a pending or possible criminal proceeding;

(e) The court's task is one of "the balancing of justice between the parties" (*Jefferson Ltd v Bhetcha* at 904), taking account of all relevant factors (ibid at 905);

(f) Each case must be judged on its own merits, and it would be wrong and undesirable to attempt to define in the abstract what are the relevant factors (ibid at 905);

(g) One factor to take into account where there are pending or possible criminal proceedings is what is sometimes referred to as the accused's "right of silence", and the reasons why that right, under the law as it stands, is a right of a defendant in a criminal proceeding (ibid at 904). I return to this subject below;

(h) However, the so-called "right of silence" does not extend to give such a defendant as a matter of right the same protection in contemporaneous civil proceedings. The plaintiff in a civil action is not debarred from pursuing action in accordance with the normal rules merely because to do so would, or might, result in the defendant, if he wished to defend the action, having to disclose, in resisting an application for summary judgment, in the pleading of his defence, or by way of discovery or otherwise, what his defence is likely to be in the criminal proceeding (ibid at 904–5);

[5] See *LU Simon Buildngs v Lubica Systems Aust Pty Ltd* per Judge Duggan [2001] VCAT 2217 (30 November 2001) and *Browne v Greenleaf Nominees Pty Ltd* per Deputy President Aird [2006] VCAT 1646 (11 August 2006)
[6] (1982) 7 ACLR 202
[7] Ibid

(i) The court should consider whether there is a real and not merely notional danger of injustice in the criminal proceedings (ibid at 905);

(j) In this regard factors which may be relevant include:

(i) the possibility of publicity that might reach and influence jurors in the civil [sic][8] proceedings (ibid at 905);

(ii) the proximity of the criminal hearing (ibid at 905);

(iii) the possibility of miscarriage of justice e.g. by disclosure of a defence enabling the fabrication of evidence by prosecution witnesses, or interference with defence witnesses (ibid at 905);

(iv) the burden on the defendant of preparing for both sets of proceedings concurrently (*Beecee Group v Barton* (1980) 5 ACLR 33);

(v) whether the defendant has already disclosed his defence to the allegations (*Caesar v Somner* [1980] 2 NSWLR 929 at 932; *Re Saltergate Insurance Co Ltd* (1980) 4 ACLR 733 at 736);

(vi) the conduct of the defendant, including his own prior invocation of civil process when it suited him (cf *Re Saltergate Insurance Co Ltd* at 735–6);

(k) The effect on the plaintiff must also be considered and weighed against the effect on the defendant. In this connection I suggest below that it may be relevant to consider the nature of the defendant's obligation to the plaintiff;

(l) In an appropriate case the proceedings may be allowed to proceed to a certain stage, e.g., setting down for trial, and then stayed. (*Beecee Group v Barton*).[9]

23 The principles set out above are well established and have been applied in numerous other cases.[10]

24 Mr De Simone contends that the guidelines set out in *McMahon v Gould* should be reconsidered, for two reasons:

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[8] The reference should be to criminal proceedings.

[9] Ibid 206

[10] See for example, *Philippine Airlines v Goldair (Aust) Pty Ltd* [1990] VR 385 at 387 and 389-90 per Young CJ; *Halabi v Westpac Banking* Corporation (1989) 17 NSWLR 26, 58 per McHugh JA; *Yuill v Spedley Securities Ltd* (1992) 8 ACSR 272, 275 per Priestley JA; *Australian Securities Commission v Kavanagh* (1993)12 ACSR 69 at 72, 75-76 per Hayne J; *Griffin v Sogelease Australia Ltd* [2002] NSWCA 421 at [5]–[14] per Sheller Ipp JA and Davies AJA; *Guglielmin v Trescowthick* (No 3) (2005) 220 ALR 535 per Mansfield J at [9]–[12]; *Niven v SS* [2006] NSWCA 338 at [25]–[35] per Tobias JA (Giles JA agreeing); *Gallaher v Collins* [2006] VSC 139 at [27] per Hargrave J; *Trade World Enterprise Pty Ltd v DCT* (2006) 64 ATR 316 at [12] per Chernov JA (Nettle and Redlich JJA agreeing); *Commonwealth Bank of Australia v May* [2007] NSWSC 490 per Einstein J at [5]-[7]; *Osric Investments Pty Ltd v Probst* [2007] QSC 293 per Daubney J at [11]-[12]. See also *Elliot v Australian Prudential Regulation Authority* [2004] FCA 586 per French J.

- several authorities have expressed 'some misgivings' in relation to the guidelines on the basis that they do not specifically take into account the primacy of the administration of criminal justice in our legal system (Kirby P. in *Yuill v Spedley Securities Ltd* (Yuill) (1992) 8 ACSR 272; and Beazley JA in *Niven v SS* [2006] NSWCA 338, among other authorities, were referred to in this regard); and
- the *Charter of Human Rights and Responsibilities Act 2006* (the Charter) modifies the balancing exercise inherent in the *McMahon v Gould* guidelines.

25 As to the first matter, there have been indications that the principles may require review by an appellate court. In *Yuill v Spedley Securities Ltd*[11] Kirby P referred to *McMahon v Gould*[12] as 'the existing law'. His Honour indicated, however, that one day it may be appropriate for the guidelines in *McMahon v Gould* to be reconsidered. His Honour said that the guidelines do not take specifically into account the primacy of the administration of criminal justice in our legal system. Further, in *Niven v SS*[13] Beazley JA of the New South Wales Court of Appeal said there was force in Kirby P's opinion although the case before her was not the case to reconsider *McMahon v Gould.*[14]

26 More recently Robson J in *Re AWB Limited*[15] expressed some reservations about the need for a reconsideration of *McMahon v Gould*. His Honour said (at [58]):

> "For the purposes of this case I assume I am bound to follow the McMahon v Gould line of authorities. Nevertheless, I wish to add my voice to those at first instance suggesting that an appellate court may wish to reconsider McMahon v Gould. In particular, an appellate court may consider that the right of silence should not only be recognised but protected by the courts by preventing a defendant from being effectively compelled to waive his right of silence and thereby help those who seek to prove an offence by requiring him to defend civil actions relating to the same or similar conduct the subject of existing or potential criminal proceedings before those civil proceedings are completed. Compelling the defendant to defend civil proceedings, particularly those which impose a penalty, may assist the Crown in its prosecution by putting the Crown onto a train of inquiry or enable it to adjust its case to meet the anticipated defence in advance. It might be thought that such a circumstance denies the defendant his or her basic common law right to have the Crown establish its case against him or her without any assistance from the defendant."

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11 *Yuill v Spedley Securities Ltd* (1992) 8 ACSR 272
12 (1982) 7 ACLR 202
13 [2006] NSWCA 338
14 (1982) 7 ACLR 202
15 [2008] VSC 473

27 The parties filed written submissions as to the relevance of *Re AWB Limited* to the matter before me. I need not deal with those submissions in detail because it is sufficient to note that while his Honour expressed reservations about the *McMahon v Gould* line of authorities he assumed that he was bound to follow them.

28 I am in the same position. In *Trade World Enterprises Pty Ltd v DCT*[16] the Court of Appeal held that the relevant principles applicable to the exercise of discretion on an application for a stay were set out by Young CJ in *Philippine Airlines v Goldair (Aust) Pty Ltd*[17] where his Honour cited with approval the guidelines in *McMahon v Gould*. Unless persuaded that the Charter alters the position I am obliged to apply the principles in *McMahon v Gould.*

29 I now turn to consider the Charter issues and deal first with Mr De Simone's application to refer two questions of law to the Supreme Court.

Referral to the Supreme Court

30 Section 33(1) of the Charter provides:

> "(1) If, in a proceeding before a court or tribunal, a question of law arises that relates to the application of this Charter or a question arises with respect to the interpretation of a statutory provision in accordance with this Charter, that question may be referred to the Supreme Court if –
>
> (a) a party has made an application for referral; and
>
> (b) the court or tribunal considers that the question is appropriate for determination by the Supreme Court."

31 Where a question is referred to the Supreme Court the Tribunal is not permitted to determine an issue to which the referred question is relevant until the question is determined (s 34(2)).

32 Mr De Simone seeks the referral of two questions of law.

33 The first is said to be a question of law that relates to the application of the Charter to courts and tribunals and the second relates to the interpretation of statutory provisions in accordance with the Charter:

> "1. Does s 24 of the *Charter* (right to a fair hearing) affect the exercise of the discretion of the Victorian Civil and Administrative Tribunal in considering whether to order a stay of a civil proceeding where the applicant is also the subject of probable criminal charges?
>
> 2. Under ss 80, 97 and 98(3) of the *Victorian Civil & Administrative Tribunal Act* 1998 and s 41 of the *Supreme Court Act* 1986, construed in accordance with s 32 of the Charter (the interpretative obligation), what is the appropriate test to be

[16] (2006) 64 ATR 316 at [12]
[17] [1990] VR 385

> applied in considering whether to grant a stay of a civil proceeding in circumstances where the applicant is also the subject of probable criminal charges?"

34 I am not persuaded that it is appropriate to refer either of these questions to the Supreme Court pursuant to s 38(1). The issues raised by the questions were fully ventilated in the proceedings as was the application of the relevant principles to the facts of this matter. In my view the most expeditious course is to determine the application. Any party aggrieved by the decision may exercise their appeal rights and the issues sought to be determined by the referral application may be determined in that context. I now turn to consider the impact of the Charter on these proceedings.

35 The Charter may impact on VCAT's work in three ways:

- if VCAT is a 'public authority' s 38(1) provides that it would be unlawful for it to act incompatibly with human rights (subject to the exceptions in ss 338(2) and (4));
- all statutory provisions must be interpreted in a way that is compatible with human rights (s 32(1)); and
- the Charter applies to courts and tribunals to the extent that they have functions under Part 2 and Division 3 of Part 3 of the Charter (s 6(2)(b)).

A public authority

36 Section 38(1) provides that it is unlawful for a 'public authority':

- to act in a way that is incompatible with a human right; or
- in making a decision, to fail to give proper consideration to a relevant human right.

37 This general provision imposes a substantive obligation on 'public authorities' to act compatibly with human rights and a procedural obligation to properly consider relevant human rights in making decisions. It is subject to a number of exceptions which are not presently relevant. In relation to the substantive obligation s 3(1) defines an 'act' to include a failure to act and a proposal to act.

38 Whether VCAT is a 'public authority' is answered by s 4 of the Charter. The definition of a 'public authority' is divided into two categories:

- core public authorities (e.g. public officials within the meaning of the *Public Administration Act 2004*; Victoria Police); and
- functional public authorities (ie. entities established by statutory provision that have functions of a public nature: s 4(1)(b)[18].

39 Core public authorities are bound by the Charter generally. Functional public authorities are only bound by the Charter when they are 'exercising functions of a public nature'.

[18] See pp 3-4 of the Explanatory Memorandum to the Charter Bill.

40 VCAT clearly satisfies the first element of the definition of a functional public authority as it is established by the *VCAT Act*. As to the second element of the definition s 4(2) sets out a non-exhaustive list of factors which may be taken into account in determining whether 'a function is of a public nature'. Relevantly for present purposes these factors include:

- that the function is conferred on the entity by or under a statutory provision (s 4(2)(a));
- that the function is connected to or generally identified with functions of government (s 4(2)(b));
- that the function is of a regulatory nature (s 4(2)(c)); and
- that the entity is publicly funded to perform the function (s 4(2)(d)).

41 It is apparent that some functions performed by VCAT are consistent with the indicia of a function which is 'of a public nature'.

42 As a creature of statute VCAT has no inherent jurisdiction[19]. It has such jurisdiction as is conferred on it by Victorian legislation, referred to as 'enabling enactments' in s 43 of the *VCAT Act*, which is consistent with the definitional indicia in s 4(2)(a) of the Charter. Under some enactments it is given a review jurisdiction and under others it has original jurisdiction[20].

43 VCAT is publicly funded and a number of VCAT's adjudicative and other functions may be regarded as being regulatory in nature or being inherently governmental in nature. For example:

- applications for review pursuant to the *Liquor Control Act* 1998;
- applications for an Assessment Notice under the *Working with Children Act* 2005*;* and
- review applications under the *Health Professions Registration Act* 2005.

44 On this basis it may be said that in the performance of some of its functions VCAT is a 'public authority' for the purposes of the Charter.

45 But that is not the end of the matter. Section 4(1)(j) provides that 'a court or tribunal' is not a public authority 'except when it is acting in an administrative capacity'.

46 While the term 'tribunal' is not defined in the Charter it is clear that VCAT is a tribunal and should be so regarded for the purposes of the Charter.

47 The question that arises in the context of the present matter is whether, in determining the application for a stay, the Tribunal is acting in an

[19] *Herald and Weekly Times Pty Ltd v VCAT and ors* [2006] VSCA 7 (9 February 2006) at [27] per Maxwell P.
[20] See generally *Casey v Galimberti and ors* [2006] VSCA 232 (1 November 2006) at [5]-[6] per Maxwell P.

administrative capacity or in a judicial capacity. If the former VCAT is a public authority to which s 38 applies. If the latter s 38 does not apply.

48 The expression 'acting in an administrative capacity' is not defined in the Charter. The Explanatory Memorandum suggests that the expression was intended to exclude courts and tribunals 'when acting in a judicial or quasi judicial capacity'[21]. The note to s 4(1)(j) gives the following examples of a court or tribunal acting in an administrative capacity: issuing warrants; committal proceedings; listing cases or adopting practices and procedures.

49 In *Sabet v Medical Practitioners Board of Victoria*[22] her Honour Hollingworth J read 'administrative capacity' in s 4(1)(j) as equating to 'administrative power' at common law. On this basis her Honour was satisfied that in exercising its powers to suspend Dr Sabet the Board was acting in an administrative capacity.

50 Applying the same approach here, can it be said that in determining Mr De Simone's stay application the Tribunal is acting in an administrative capacity?

51 In considering this question it is important to bear in mind the context in which the application relates. The substantive proceedings relate to an inter parties dispute about the existence of legal rights and obligations and the application of those rights and obligations to facts as determined by the Tribunal. The determination of such a dispute involves the exercise of judicial power[23]. An application to stay part of such a proceeding similarly involves the exercise of judicial power[24]. In determining such an application the Tribunal is not 'acting in an administrative capacity' within the meaning of s 4(1)(j).

52 Mr De Simone submitted that the application before me relates to the administration of justice and as such the Tribunal should have regard to the matters which would bind it if it were acting in an administrative capacity[25]. This submission is misconceived. The relevant test is whether the Tribunal is 'acting in an administrative capacity' not whether the matter relates to the administration of justice. Indeed on one view of it everything done by the Tribunal may be regarded as relating to the administration of justice and so adopting Mr De Simone's contention would defeat the legislative intent of s 4(1)(j).

53 As the Tribunal is acting in a judicial capacity it is not a 'public authority' and s 38 has no application.

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[21] Explanatory Memorandum to the Charter Bill, at p 4.
[22] [2008] VSC 346
[23] See *R v Trade Practices Tribunal;* Ex parte Tasmanian Breweries Pty Ltd (1970) 123 CLR 361 at 374-375 per Kitto J; *Albarran v Members of the Companies Auditors and Liquidators Disciplinary Board* (2007) 234 ALR 618 at [16] per Gleeson CJ, Gummow, Hayne, Callinan, Heydon and Crennan JJ).
[24] In *R v Williams* (2007) 16 VR 168 at [50] King J held that a judge was not acting in an administrative capacity when determining an application to adjourn a trial.
[25] See paragraph 25 of Mr De Simone's consolidated submissions of 23 September 2008.

The interpretative mandate

54 Section 32(1) of the Charter provides;

> "So far as it is possible to do so consistently with their purpose, all statutory provisions must be interpreted in a way that is compatible with human rights."

55 This provision requires that a 'human rights consistent' interpretation be adopted wherever it is possible to do so, regardless of whether there is any ambiguity and regardless of how the provision may have been interpreted previously[26]. Seen in this way s 32(1) goes beyond the common law position that where a statute is ambiguous a construction should be favoured which accords with Australia's human rights obligations[27].

56 The Explanatory Memorandum says that the reference to statutory purpose in s 32(1) is to ensure that in giving effect to human rights, courts and tribunals do not 'strain the interpretation of legislation so as to displace Parliament's intended purpose or interpret legislation in a manner which avoids achieving the object of the legislation.'

57 The gravamen of Mr De Simone's submission is that the guidelines in *McMahon v Gould* require reformulation in light of the provisions in the Charter regarding the right to a fair hearing (s 24) and to the rights relating to criminal proceedings (s 25).

58 Section 24(1) provides:

> "A person charged with a criminal offence or a party to a civil proceeding has the right to have the charge or proceeding decided by a competent, independent and impartial court or tribunal after a fair and public hearing."

59 Mr De Simone's primary submission is that the right to a fair hearing which he asserts from the Charter is the fair hearing of the likely criminal proceeding[28]; though in oral argument concern was expressed about the impact of failing to grant the stay on his right to a fair hearing in the civil proceeding.

60 It is not suggested that VCAT is not a competent, independent or impartial tribunal.

61 The unfairness which is said to arise if the stay is not granted is based on the rights set out in s 25 of the Charter.

62 Section 25 provides:

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[26] See *R v Offen* [2001] 2 ALL ER 154 where the Court of Appeal held that an earlier decision in relation to the interpretation of s 2 the *Criminal (Sentences) Act* 1977 required reconsideration. See Evans S and Evans C, 'Legal Redress under the Victorian Charter of Human Rights and Responsibilities' (2006) 17 *Public Law Review* 264 at 267 – 268.

[27] *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 at 287 per Mason CJ and Deane J.

[28] Mr De Simone's submissions of 23 September 2008 at para 41.

"(1) A person charged with a criminal offence has the right to be presumed innocent until proved guilty according to law.

(2) A person charged with a criminal offence is entitled without discrimination to the following minimum guarantees –

(a) to be informed promptly and in detail of the nature and reason for the charge in a language or, if necessary, a type of communication that he or she speaks or understands; and

(b) to have adequate time and facilities to prepare his or her defence and to communicate with a lawyer or advisor chosen by him or her; and

(c) to be tried without unreasonable delay; and

(d) to be tried in person, and to defend himself or herself personally or through legal assistance chosen by him or her or, if eligible, through legal aid provided by Victoria Legal Aid under the **Legal Aid Act 1978**; and

(e) to be told, if he or she does not have legal assistance, about the right, if eligible, to legal aid under the **Legal Aid Act 1978**; and

(f) to have legal aid provided if the interests of justice require it, without any costs payable by him or her if he or she meets the eligibility criteria set out in the **Legal Aid Act 1978**; and

(g) to examine, or have examined, witnesses against him or her, unless otherwise provided for by law; and

(h) to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses for the prosecution; and

(i) to have the free assistance of an interpreter if he or she cannot understand or speak English; and

(j) to have the free assistance of assistants and specialised communication tools and technology if he or she has communication or speech difficulties that require such assistance; and

(k) not to be compelled to testify against himself or herself or to confess guilt.

(3) A child charged with a criminal offence has the right to procedure that takes account of his or her age and the desirability of promoting the child's rehabilitation.

(4) Any person convicted of a criminal offence has the right to have the conviction and any sentence imposed in respect of it reviewed by a higher court in accordance with law."

63 The entitlement to a fair hearing in a criminal proceeding extends to a person 'charged with a criminal offence'. Similarly the rights specified in s 25 only extend to persons 'charged with a criminal offence'[29].

64 Mr De Simone has not been charged with a criminal offence. While the probability that charges will be laid against Mr De Simone is high the time frame for the laying of charges and for the conduct of the criminal proceedings is not known.

65 Mr De Simone contends that while the rights in s 25 are expressed to apply to persons charged they must be construed 'to apply prospectively to persons who are under investigation'.

66 I am not persuaded that there is any warrant for rewriting s 25 in the manner contended by Mr De Simone.

67 The circumstances in which words will be implied into legislation are rare and this case does not meet any of the accepted circumstances[30]. As his Honour Spigelman CJ said in *R v Young*[31]:

> "… the proposition that a court can introduce words into an Act of Parliament offends a fundamental principle of our constitutional law. It is not part of the function of any judge to amend the legislation."

68 In relation to the fairness of the civil proceeding I am not persuaded that s 24(1) of the Charter adds anything, given that the *VCAT Act* already requires that the Tribunal act fairly and that it is bound by the rules of natural justice[32]. Implicit in the notion of a fair hearing is that fairness extends to all parties. Such a concept is inherent in the balancing exercise reflected in the *McMahon v Gould* guidelines.

Functions under Part 2 and Division 3 of Part 3

69 Section 6(2)(b) provides that the Charter applies to courts and tribunals to the extent that they have functions under Part 2 and Division 3 of Part 3.

70 In the context of this case s 6(2)(b) does not add anything further to that which has been discussed in the context of the interpretation mandate. The rights said to be enlivened are the right to a fair hearing and the rights in s 25.

71 For the reasons given I am not persuaded that the application of the Charter in the circumstances of this case warrants any change in the *McMahon v Gould* guidelines. I now turn to consider the application of those guidelines to this case.

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[29] Or in the case of s 25(4) a person convicted of a criminal offence.
[30] See McHugh JA in *Birmingham v Corrective Services Commissioner of NSW* (1988) 15 NSWLR 292.
[31] (1999) 46 NSWLR 681
[32] See s 97 and s 98(1)(a); see *Abdullahi v Department of Human Services* [2003] VCAT 1514 at [18]; *Collection House Limited v Taylor* [2004] VSC 49 at [27].

The Application of McMahon v Gould *to this case*

72 Mr De Simone submits that even if the Charter does not effect a modification of the *McMahon v Gould* guidelines, the interests of justice favour the grant of a stay. The essence of Mr De Simone's contention is that defending Bevnol's counterclaim may require him to forego or waive his right to silence with the adverse consequences that may follow in the subsequent criminal proceedings. The *McMahon v Gould*[33] line of authorities provides little support for the grant of a stay on this basis.

73 The courts have consistently rejected as a relevant consideration the loss by a party of any tactical advantage that flows from his 'right of silence.' In *Australian Securities Commission v Kavanagh*,[34] Hayne J dealt with an application to stay civil on the ground that the trial of the civil proceedings would mean that in practical terms the defendants forfeit the right not to reveal their defence in subsequent criminal proceedings. Hayne J cited with approval Wootten J in *McMahon v Gould* [35] and said:

> "For the reasons I have given earlier, the statement that the respondents would, in practical terms, forfeit their right not to reveal their defences, is a statement that is unsustainably broad. The respondents have already stated the grounds of their defence in the civil proceedings; if committed for trial it may be expected that they will have to file other material revealing their defence to the criminal charges. What underlies the proposition is that the respondents do not wish to have to choose whether to expose themselves to examination and cross-examination in the civil proceedings before the criminal trial begins. As Wootten J said in *McMahon v Gould*,[36] there are:
>
> > … advantages which the 'right of silence' gives to an accused, but they cannot reasonably be regarded as part of the reason why the right exists. In exercising its discretion to stay civil proceedings the court *need not be concerned to preserve these advantages. It should be concerned to avoid the causing of unjust prejudice by the continuance of the civil proceedings, not to preserve the tactical status quo in the criminal proceedings whether it be just or unjust.*[37] (Emphasis added)."

74 Hayne J concluded that he did not consider the applicants for a stay had demonstrated something more than a mere concern to preserve whatever tactical advantage they may have in any criminal trial by not having earlier given evidence in answer to the allegations made against them and that was not sufficient to warrant staying the civil proceedings.[38]

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33 Ibid
34 (1993) 12 ACSR 69
35 (1982) 7 ACLR 202
36 Ibid at 208
37 *Australian Securities Commission v Kavanagh* (1993) 12 ACSR 69 at 76
38 Ibid

75 Similarly in *Philippine Airlines v Goldair (Aust) Pty Ltd*,[39] Young CJ refused an application for a stay of civil proceedings until completion of criminal proceedings where the alleged offences arose out of the same conduct impugned in the civil proceedings. His Honour accepted the principles set out in *McMahon v Gould* 'as a useful guide to the exercise of the court's discretion in cases of this kind'[40] and cited *Jefferson Ltd v Bhetcha*[41] where Megaw LJ held the 'right of silence' is a right of a defendant in criminal proceedings and does not extend to give the defendant as a matter of right the same protection in contemporaneous civil proceedings. Megaw LJ said:

> "There is, I say again, in my judgment, no principle of law that a plaintiff in a civil action is to be debarred from pursuing that action in accordance with the normal rules for the conduct of civil actions merely because so to do would, or might, result in the defendant, if he wished to defend the action, having to disclose, by an affidavit under order 14, or in the pleading of his defence, or by way of discovery or otherwise, what his defence is or may be, in whole or in part, with the result that he might be giving an indication of what his defence was likely to be in the contemporaneous criminal proceeding. The protection which is at present given to one facing a criminal charge – the so-called 'right of silence' – does not extend to give the defendant as a matter of right the same protection in contemporaneous civil proceedings."[42]

76 Young CJ found the observations of Megaw LJ 'highly persuasive.' After referring to *R v BBC; ex parte Lavelle*[43] and *Caesar v Sommer*[44] and Wootten J's discussion of the 'right of silence' in *McMahon v Gould*,[45] Young CJ concluded that the 'right of silence' is a right which relates to criminal proceedings and held it would need a very strong case indeed before the court should intervene solely on that ground to stay civil proceedings pending determination of criminal proceedings.[46]

77 Mr De Simone also submits that there is a real risk that absent the grant of a stay the police will obtain material that they will not otherwise have, which will assist in the prosecution. I am not persuaded that this point adds anything to Mr De Simone's primary contention and it is also relevant to note that on 26 September 2008 I issued an order in the following terms:

> "Pursuant to s 101(3)(b) of the *Victorian Civil & Administrative Tribunal Act* 1998 the Tribunal orders that:

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39 [1990] VR 385
40 Ibid 389
41 [1979] 1 WLR 898
42 Cited in *Philippine Airlines v Goldair (Aust) Pty Ltd* [1990] VR 385 at 389
43 [1983] 1 WLR 23 at 39 per Woolf J
44 [1980] 2 NSWLR 929
45 (1982) 7 ACLR 202
46 [1990] VR 385 at 390

1.1 no party to these proceedings (or their legal advisors) is to disclose the contents of Mr De Simone's affidavit of 1 July 2008 to any person; and

1.2 a party may disclose the contents of Mr De Simone's affidavit of 1 July 2008 to their legal advisors."

78 Mr De Simone may make application for similar orders in the future so as to limit the use to which any additional material filed may be put.

79 In addition to the impact on his right to silence Mr de Simone submits that *McMahon v Gould* guidelines (j)(i)-(vi) are relevant.

80 Guideline (j)(i) deals with the possibility of publicity that might reach and influence jurors in the criminal proceedings. As to this matter Mr De Simone says:

> "… there has been media reporting for the past twelve months of the civil proceedings in News Limited publications including the Geelong Advertiser. Matters such as the reconstitution application and the requests for adjournment caused by the ASIC investigation and the police raid have been reported. It is likely that the case will receive further media scrutiny. Allegations of criminal investigation are more likely to lead to media interest."[47]

81 I am not persuaded that there is any real possibility that such publicity might reach and influence jurors. The evidence as to the extent to which these proceedings have already attracted publicity is limited but in any event Mr De Simone can apply for a suppression order when the Tribunal comes to consider the Bevnol counterclaim. Further, the timing of any criminal proceedings is uncertain as Mr De Simone is yet to be charged.

82 Guideline (j)(ii) refers to the proximity of the criminal hearing. In my view this is not a factor which favours the grant of a stay in this case. In his written submission of 23 September 2008 Mr De Simone suggested that charges may be 'imminent'. Yet there is no suggestion in his subsequent written submission of 20 November 2008 that he has been charged. The facts are that the time frame for the laying of charges and the conduct of any subsequent criminal proceedings are unknown.

83 Guideline (j)(iii) refers to the possibility of a miscarriage of justice. Mr De Simone submits that the disclosure of material in the defence of the civil proceedings will give crown witnesses (who are also parties to the civil litigation) advance warning of the line of questioning and allow them time to prepare their answers. It is not suggested that evidence may be fabricated as a consequence but rather that the forensic benefit of cross examination in the criminal trial will be reduced. I am not persuaded that concerns as to the loss of a forensic advantage fall within the intended scope of guideline (j)(iii).

[47] Mr De Simone's submissions of 23 September 2008 at [66]

84 Guideline (j)(iv) refers to the burden on the applicant for the stay of preparing for both sets of proceedings concurrently. Contrary to Mr de Simone's submissions I am not persuaded that this consideration is enlivened in this case. Mr de Simone has not been charged and the timing of any likely criminal proceedings is unknown.

85 Guideline (j)(v) deals with whether the defendant has already disclosed his defence to the allegations. A full defence has not yet been disclosed in the civil proceedings and as Mr De Simone is yet to be charged no criminal proceedings have commenced. However some material has been disclosed which is likely to form part of Mr De Simone's defence in the civil proceedings and this is a consideration which weights against granting a stay.

86 Guideline (j)(vi) refers to the conduct of the defendant, including his own prior invocation of civil process when it suited him. In my view this element of the guidelines does not favour the grant of a stay in this case. Mr De Simone is not personally a party to the proceedings against Bevnol, but it is relevant to note that he issued instructions to Seachange to institute the substantive proceedings against Bevnol and now seeks a partial stay of Bevnol's counterclaim.

87 Having regard to the matters referred to and the submissions of the parties I am not persuaded that it is in the interests of justice to grant the stay sought.

88 The application for a partial stay of Bevnol's counterclaim is dismissed.

89 In the event that the circumstances change Mr De Simone may make a further application.

Judge I J K Ross
Vice President