

**VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL**

**CIVIL DIVISION**

**DOMESTIC BUILDING LIST**

VCAT REFERENCE NO. D916/2006

**CATCHWORDS**

*Victorian Civil and Administrative Tribunal Act 1998 – ss 101(4) and 146(4)(b) - application for suppression orders*

**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

**BEFORE:** His Honour Judge I J K Ross

**HEARING TYPE:** Hearing

**DATE OF HEARING:** 12 January 2009

**DATE OF ORDER:** 15 January 2009

**CITATION:** Seachange Management Pty Ltd v Bevnol Constructions & Developments Pty Ltd & Ors (Domestic Building) [2009] VCAT 38

**ORDER**

1. The order made by Justice Bell dated 11 December 2008 is set aside.
2. This order commences operation on 15 January 2009.

**His Honour Judge I J K Ross**  
**Vice President**

**APPEARANCES:**

For Seachange Management Pty Ltd: Mr P S Lustig, solicitor

For Bevnol Constructions & Developments Pty Ltd: Mr B Archer, solicitor

For 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 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.
- 2 In May 2005 Seachange and Bevnol entered into an agreement whereby Bevnol was to construct 11 units on the site for an agreed sum. Seachange alleges that the agreed works were not completed within the time specified in the contract and that the work undertaken by Bevnol was deficient in various respects.
- 3 Bevnol has filed a counterclaim against, relevantly, Seachange and Mr Guiseppe De Simone. Bevnol claims loss and damages by reason of Seachange's wrongful termination of the contract.
- 4 The substance of Bevnol's claim against Mr De Simone 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.
- 5 Mr De Simone is the subject of a police investigation involving allegations of obtaining a financial advantage by deception. The police investigation and Bevnol's claim against Mr De Simone arise from the same factual substratum.
- 6 Mr De Simone applied for a stay of Bevnol's counterclaim insofar as it related to him. In support of the stay Mr De Simone submitted that defending Bevnol's counterclaim may require him to forego or waive his right to silence such that his interests may be adversely affected in the subsequent criminal proceedings.
- 7 In a decision dated 25 November 2008 I dismissed Mr De Simone's application for a partial stay of Bevnol's counterclaim.
- 8 After the decision was handed down Mr De Simone sought a suppression order in relation to both the decision and the transcript of the stay proceedings. As I was on leave at the time Mr De Simone's application was referred to the President. On 11 December 2008 Justice Bell issued the following orders:

"The tribunal orders that:

1. Pursuant to ss 101(4) and 146(4)(b) of the Victorian Civil and Administrative Tribunal Act 1998, until 19 January 2009 or further order, the disclosure or publication of:
  - (a) the decision of Vice president Judge Ross dated 25 November 2008

- (b) the transcript of the hearing conducted on 24 July and 26 September 2008

is prohibited to all persons other than the parties to these proceedings and their legal representatives, the tribunal constituted to hear these proceedings, and the staff of the tribunal, however, may be used for the purposes of prosecution of, and in opposition to, any appeal from the decision of Vice President Judge Ross dated 25 November 2008.

2. The request of the second respondent to counterclaim is otherwise referred to Vice President Judge Ross immediately upon his return from leave.”

9 Upon my return from leave I listed Mr De Simone’s application for hearing.

10 This decision deals with the application for orders pursuant to s 101(3) of the *Victorian Civil and Administrative Tribunal Act 1998* (the VCAT Act) to prevent the disclosure or publication of my decision of 25 November 2008.

11 During the course of the hearing on 12 January 2009 it emerged that the transcript of the stay proceedings had either not yet been released or had not been transcribed. Mr De Simone made it clear that he was only seeking the suppression of selected parts of the transcript. The following course was adopted in relation to Mr De Simone’s application to suppress part of the transcript:

- (i) When the transcript becomes available the suppression application will be listed for mention.
- (ii) The transcript will be released to the parties for the limited purpose of preparing their submissions in relation to the suppression proceedings.
- (iii) Mr De Simone will be required to prepare a document setting out the extracts of the transcript he seeks to have suppressed and the basis for that application.

12 As the transcript of the stay proceedings has either not been prepared or has not been released there is nothing to suppress at present. Accordingly there is no purpose in maintaining his Honour’s order of 11 December 2008 insofar as it relates to the transcript of the hearings conducted on 24 July and 26 September 2008.

13 In relation to my decision of 25 November 2008 Mr De Simone seeks an indefinite continuation of the orders made by the President on 11 December 2008. Bevnol opposes the making of any suppression order.

### **The Relevant Provisions**

14 Section 101 deals with suppression orders. The Tribunal may make a suppression order in relation to:

- any evidence given before it;

- the contents of any documents produced to it; and
  - any information that might enable a person who has appeared before it to be identified (s 101(3)).
- 15 Section 101(4) provides that such orders may be made if the Tribunal ‘considers it necessary to do so’ –
- “(a) to avoid –
- (i) endangering the national security or international security of Australia; or
  - (ii) prejudicing the administration of justice; or
  - (iii) endangering the physical safety of any person; or
  - (iv) offending public decency or morality; or
  - (v) the publication of confidential information or information the subject of a certificate under section 53 or 54; or
- (b) for any other reason in the interests of justice.”
- 16 The power conferred by s 101 may be exercised to restrict the openness of Tribunal proceedings and accordingly it may be characterised as a provision that is ‘designed to derogate from the open administration of justice’. The question of how such a provision should be construed was considered by Kirby P in *Raybos Australia Pty Ltd v Jones* where his Honour said:
- “Many cases report the scrutiny by courts of statutory provisions designed to derogate from the open administration of justice. Running through these decisions is a common theme. It is that, by our tradition, the open administration of justice is the rule. Statutory derogation from openness is the exception. In defence of the rule, such statutes will usually be strictly and narrowly construed. Unless the derogation is specifically provided for, courts are loathe to expand the field of secret justice.”<sup>1</sup>
- 17 I respectfully agree with his Honour’s observations and propose to construe s 101 ‘strictly and narrowly’.

### **Submissions**

- 18 Mr De Simone seeks an order suppressing the publication of my decision of 25 November 2008 until any related criminal proceedings have been resolved. In the alternative he seeks to have the decision anonymised such that he is not able to be identified.
- 19 It is contended that such orders are necessary to avoid prejudicing the administration of justice (s 101(4)(a)(ii)) and are in the interests of justice (s 101(4)(b)). In this context Mr De Simone referred to paragraph 18 of the decision sought to be suppressed:

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<sup>1</sup> (1985) 2 NSW LR 47 at 55; *The Herald and Weekly Times Ltd v The Magistrates Court of Victoria* [1999] per Beach J at [J-45[45]] 2 VR 672

“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.”

20 In support of the orders sought Mr De Simone contended that the publication of point 4 of the Agreed Facts document would prejudice the administration of justice and was not in the interests of justice. Mr De Simone submitted that in the normal course he would not be required to disclose to the police the course of action he intended to adopt or the advice he had received. The publication of my decision would have the effect of disclosing such information.

21 In opposing the orders sought Mr Archer, on behalf of Bevnol, submitted that:

- there was no application properly before the Tribunal as Mr De Simone had not complied with the relevant rules;
- the Tribunal was functus officio and had no jurisdiction to make the orders sought; and

- s 101 did not empower the Tribunal to make a order suppressing the publication of a decision.
- 22 Given the decision I have come to on the merits of Mr De Simone's application it is unnecessary for me to deal with Mr Archer's jurisdictional arguments. In relation to the alleged non compliance with the rules I propose to waive such requirements in order to ensure that the substance of the application can be heard and determined.

### **Ruling**

- 23 The applicant only relies on the adverse consequences said to flow from the publication of point 4 of the Agreed Facts. No other aspect of the decision is relied on in support of the orders sought.
- 24 Mr De Simone concedes that at the time the Agreed Facts were settled it was in his interests to disclose that he had been advised not to answer any questions or to provide any material to the police. Such disclosure was made in the context of a hearing that was open to the public and there was no attempt by Mr De Simone at that time to place any restrictions on the disclosure or publication of the Agreed Facts.
- 25 In the circumstances I am not persuaded that the orders sought are necessary to avoid prejudicing the administration of justice. Nor am I persuaded that such orders are necessary in the interests of justice.
- 26 The order made by Justice Bell on 11 December 2008 is expressed to operate until 19 January 2009 or further order. I propose to make a further order setting aside his Honour's order.

**His Honour I J K Ross**  
**Vice President**