

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

DOMESTIC BUILDING LIST

VCAT REFERENCE NO. D916/2006

CATCHWORDS

Discovery according to the rules of civil procedure – whether affidavit by sole director complies

APPLICANT	Seachange Management Pty Ltd (ACN 091 443 211)
FIRST RESPONDENT	Bevnol Constructions & Developments Pty Ltd (ACN 079 170 577)
SECOND RESPONDENT	Bruce Jamieson
THIRD RESPONDENT	Louis Allain
SECOND RESPONDENT TO COUNTERCLAIM	Giuseppe De Simone
THIRD RESPONDENT TO COUNTERCLAIM	Paul Marc Custodians Pty Ltd (ACN 110 485 982) formerly known as Paul Marc Management Pty Ltd
FOURTH RESPONDENT TO COUNTERCLAIM	Martin Jurblum
WHERE HELD	Melbourne
BEFORE	Deputy President C. Aird
HEARING TYPE	Directions hearing
DATE OF HEARING	15 July 2009
DATE OF REASONS	21 July 2009
CITATION	Seachange Management Pty Ltd v Bevnol Constructions & Developments Pty Ltd & Ors (Domestic Building) [2009] VCAT 1197

REASONS

- 1 At the directions hearing on 15 May 2009 Mr De Simone, in his capacity as sole director of the applicant, Seachange Management Pty Ltd, sought reasons for order 6 of the orders made on that day:

The date by which the applicant must make discovery in accordance with the rules of civil procedure is extended to 24 July 2009.

Although under s117 of the *Victorian Civil and Administrative Tribunal Act* 1998 ('the Act'), the tribunal is only required to give reasons for final

orders (the requirement to give reasons for interim orders is expressly excluded), I provide these written reasons in the hope they will assist the expeditious progression of this proceeding.

- 2 It is helpful to set out the background to the making of the order.
- 3 This proceeding has had a long and, some might say, tortuous history. Mr De Simone, the second respondent to counterclaim, has recently been charged with a number of criminal offences. On 13 May 2009, Vice President Judge Ross referred the following question to the Supreme Court for determination pursuant to s33 of the *Charter of Human Rights and Responsibilities Act 2006* –

“Given that the Tribunal has an implied statutory power to stay a civil proceeding, whether the *McMahon v Gould* guidelines applicable to that power should be revised in light of the *Charter of Human Rights and Responsibilities Act 2006*, and in particular ss24 and 25 of that act and, if so, how.”

The counterclaim as against Mr De Simone is stayed by virtue of s34(2) of the *Charter* pending determination of the question by the Supreme Court. Mr De Simone is also the sole director of the applicant, Seachange, but it is only the counterclaim as against Mr De Simone personally which is stayed by virtue of the referral to the Supreme Court.

- 4 On 18 May 2009 I ordered the parties to make discovery according to the rules of civil procedure, by 3 July 2009. On 2 July 2009 the tribunal received a facsimile from Seachange’s solicitor, Peter Lustig, wherein he advised he had been instructed by Mr De Simone that because of the orders and reasons of 13 May 2009, and the referral to the Supreme Court, he should not be required to swear an affidavit of documents in his capacity as a director of Seachange ‘*on the basis that it would of necessity require him to traverse issues presently the subject of the stay applicable to him. He believes such an outcome would render nugatory his rights at law.*’ However, Mr De Simone was prepared to provide a list of documents ‘*which excluded references to any documents the subject of the paragraphs of the counterclaim sought to be stayed*’. The proceeding was referred to a directions hearing on 15 July 2009 to consider the matters raised in this correspondence.
- 5 At the commencement of the directions hearing, Mr De Simone said he had prepared an affidavit, but that before swearing it he wanted to make it clear that he was relying on s105(2) of the Act. He was also seeking various orders under s101 of the Act preventing inspection, disclosure or publication of the material in his affidavit including the exhibits. Further, that the hearing of the application by Seachange for privilege or other objection to inspection of documents produced to the tribunal under a summons to appear and/or produce documents should be closed to the public.

- 6 During the course of these proceedings Mr De Simone has been at pains to ensure that he is treated, in his personal capacity as the second respondent to counterclaim, as a separate and distinct party, which he clearly is. Despite the attitude of some of the other parties, and their legal representatives, the tribunal has ordered that he be served with all documents in his personal capacity, in addition to service on Seachange. Seachange is represented by Peter Lustig, solicitor and on occasion, has been represented by counsel. However, there have been times where it has been unclear in which capacity Mr De Simone has been addressing the tribunal. Where a legal representative has appeared at a directions hearing on behalf of Seachange and I have been the presiding member, I have carefully explained to Mr De Simone that I should hear from him in relation to matters affecting him in his personal capacity as the second respondent to counterclaim, and from Seachange's legal representatives in relation to any matters directly affecting it.
- 7 Notwithstanding this attempt to distinguish between the capacities in which Mr De Simone appears before this tribunal, it was clearly appropriate that he, both in his personal capacity and in his capacity as the sole director of Seachange, claimed the protection under s105(2) of the Act at the commencement of the directions hearing, and prior to swearing and filing his affidavit which is the subject of the orders made on 15 July. It is unclear whether the application under s101 was made in his personal capacity or in his capacity as the sole director of Seachange but being mindful of the tribunal's obligations under ss97 and 98 I considered it appropriate to hear from him. Mr Lustig confirmed that he supported the application on behalf of Seachange.
- 8 Section 105 of the Act provides:
- (1) A person is not excused from answering a question or producing a document in a proceeding on the ground that the answer or document might tend to incriminate the person.
 - (2) If the person claims, before answering a question or producing a document, that the answer or document might tend to incriminate them, the answer or document is not admissible in evidence in any criminal proceedings, other than in proceedings in respect of the falsity of the answer.
- 9 The relevant provisions of s101 provide:
- (1) Unless another provision of this Act provides otherwise, all hearings of the Tribunal must be held in public.
 - (2) The Tribunal, on its own initiative or on the application of a party, may direct that a hearing or any part of it be held in private.
 - (3) In the circumstances set out in sub-section (4) the Tribunal may order-
 - (a) that any evidence before it;

(b) that the contents of any documents produced to it;

...

must not be published except in the manner and to the persons (if any) specified by the Tribunal.

(4) The Tribunal may make an order under sub-section (3) if the Tribunal considers it necessary to do so -

(a) to avoid-

...

(ii) prejudicing the administration of justice

...

(b) for any other reason in the interests of justice.

10 Having regard to the history of this proceeding, and to the provisions of ss97 and 98 of the Act (that the tribunal act fairly, according to the substantial merits of the case, expeditiously and with as little informality and technicality permitting a proper consideration of the matters before it) I made the following orders:

1. The tribunal notes that prior to filing his affidavit sworn on 15 May 2009, Mr De Simone in his capacity as a director of the applicant, Seachange Management Pty Ltd, and in his personal capacity relies on s105(2) of the *Victorian Civil and Administrative Tribunal Act 1998* ('the *VCAT Act*') in relation to the applicant's application for privilege in relation to, and its objections to inspection of the documents produced to the tribunal by Jack Chrapot in response to the summons to appear dated 29 April 2009 ('the Chrapot documents').
2. That under s101(2) of the *VCAT Act* all hearings in relation to the applicant's application referred to in order 1 hereof be held in private.
3. That under s101(3)(a) and (b) of the *VCAT Act* no party to the proceedings or their legal advisors, representatives and/or experts shall disclose the affidavit of Giuseppe De Simone sworn on 15 May 2009, or any other documents filed in support of the application, or the transcript of the hearing of the application, including any directions hearing, nor are they to be published or otherwise made available for inspection. Such material may only be disclosed to experts engaged by the parties if such expert acknowledges and agrees they are bound by these orders not to disclose the content of such material to any other person. **I direct the principal registrar to place such affidavit and its exhibits in a separate folder titled 'Application by the applicant in relation to the Chrapot documents' and with the notation 'Not available for inspection in accordance with the orders dated 15 July 2009'.**
4. **I direct the principal registrar to file all material which is filed in relation to the application referred to in order 1**

hereof in the separate folder referred to in order 3 hereof. The parties must identify any such material by attaching a cover sheet with the notation 're Application by the applicant in relation to the Chrapot Documents, the subject of the orders dated 15 July 2009'.

5. These orders take effect and operate immediately from this day 15 July 2009 and extend to and include this directions hearing and the transcript of this directions hearing.
- 11 I also extended the date by which Seachange was required to make discovery in accordance with the rules of civil procedure to 24 July 2009. I made this order despite Mr De Simone's objection and contention that all relevant matters were contained in his affidavit sworn 15 July 2009 which is subject to the orders referred to in paragraph 7 above.
- 12 As I understand it, Mr De Simone's primary objection to Seachange making discovery according to the rules of civil procedure is that the affidavit sworn on 15 July 2009 contains a list of documents which should suffice. However, without disclosing the detailed content of the affidavit I make the observation that it is not simply an affidavit in which Mr De Simone deposes to certain facts and circumstances. Rather it is a document which in part sets out the reliance on s105(2), the applications under s101, submissions, and a list of documents with submissions and reservations of rights in relation to those documents. It is not in the form required by the rules of civil procedure i.e. it is not an affidavit of documents sworn by Mr De Simone as the sole director of Seachange, and thus Seachange has not complied with order 6 of the orders made on 18 May 2009. To comply with the order that discovery be made in accordance with the rules of civil procedure it is necessary that a properly prepared affidavit of documents be prepared (r29.04 *Supreme Court (General Civil Procedure) Rules 2005*), and sworn by Mr De Simone in his capacity as the sole director of Seachange.
- 13 It must be remembered that Seachange commenced this proceeding. It seeks a substantial award of damages yet has been seemingly unwilling to progress the proceeding with any expedition. As noted above, under s98(1)(d) of the Act requires the tribunal to:

...conduct each proceeding with as little formality and technicality and determine each proceeding with as much speed as the requirement of this Act and the enabling enactment and a proper consideration of the matters before it permit.

However, it is difficult for the tribunal to satisfy this obligation without the co-operation of the parties.

DEPUTY PRESIDENT C. AIRD