VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST VCAT REFERENCE NO. R33/2014

CATCHWORDS

Applications pursuant to s 123 and/or s 62 of the *Victorian Civil and Administrative Tribunal Act 1998* (VCAT Act) to restrain law firm from continuing to represent the other party and an application pursuant to s 108(1)(a) of the VCAT Act for reconstitution of the Tribunal on the grounds of prior adverse comments about a witness' credibility and alleged prejudgment of issues to be determined at final hearing; Applications dismissed; Vexatious conduct; Costs awarded pursuant to s 92(2)(a) of the *Retail Leases Act 2003*.

APPLICANT	Trombone Investments Pty Ltd (ACN 142 192 845)
RESPONDENT	TBT (Victoria) Pty Ltd (ACN 006 325 873)
RESPONDENT TO COUNTERCLAIM	Andy B Pty Ltd (ACN 132 838 487)
WHERE HELD	Melbourne
BEFORE	Judge Jenkins, Acting President
HEARING TYPE	Hearing
DATE OF HEARING	9 December 2015
DATE OF ORDER	9 December 2015
DATE OF WRITTEN REASONS	6 January 2016
CITATION	Trombone Investments Pty Ltd v TBT (Victoria) Pty Ltd (Building and Property) [2016] VCAT 12

ORDERS

1 By consent, by 5pm on Wednesday 16 December 2015, Ms Hannah Fong must produce all documents in response to the summonses dated 22 January 2015 and answer the matters raised in the Affidavit of Mr Kazatsky dated 7 December 2015, by way of an affidavit in reply.

2 The Applicant's application to restrain Kalus Kenny Intelex (KKI) and/or Jonathan Kenny from acting for the Respondent is dismissed.

3 Pursuant to s 92(2)(a) of the *Retail Leases Act 2003*, I order that the Applicant pay the Respondent's costs of attending today's Directions Hearing and costs incurred incidental to responding to the application to restrain KKI and/or Mr Kenny from acting for the Respondent, since 13 October 2015, in accordance with the County Court Scale and on a standard basis. In making this Order, the Tribunal notes that the Applicant was advised by letter dated 13 October 2015 from KKI that the witness statements of Mr Kenny would be withdrawn and that Mr Kenny 'would not be a witness in the case'. Accordingly, the Tribunal has found that there was no basis to continue prosecuting the application and it ought to have been withdrawn. The Tribunal further finds that the failure to withdraw the application was vexatious conduct that caused the Respondent to be unnecessarily disadvantaged.

4 The Applicant's application for reconstitution of the Tribunal pursuant to s 108(1)(a) of the *Victorian Civil and Administrative Tribunal Act 1998* is dismissed.

5 This proceeding is listed for a directions hearing at 9:30 am on Monday 21 December 2015 at 55 King Street, Melbourne.

Note:

It is noted that the directions hearing on 21 December 2015 may be vacated if the parties can agree upon a timetable leading up to the listing for final hearing, including an estimation of the likely duration of the hearing and any dates on which the parties are not available.

Judge Jenkins
Acting President

APPEARANCES:

For Applicant	Mr Wilson QC and Mr Searle of Counsel
For Respondent	Mr Best of Counsel
For Respondent to Counterclaim	No Appearance

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REASONS

NATURE OF APPLICATION

1 This Directions Hearing was held to determine a number of interlocutory applications by the Applicant, Trombone Investments Pty Ltd ('Trombone'). The interlocutory matters considered by the Tribunal were:

(a) An application pursuant to s 134(2) of the *Victorian Civil and Administrative Tribunal Act 1998* (the 'VCAT Act') to apprehend the proper officer of TBT and Hannah Fong, whom the Applicant alleges have failed to produce documents in accordance with a summons;

(b) An application pursuant to s 123 of the VCAT Act for an injunction to restrain the law firm Kalus Kenny Intelex from continuing to act for TBT (Victoria) Pty Ltd ('TBT');[1] and

(c) An application pursuant to s 108(1)(a) of the VCAT Act for reconstitution of the Tribunal, on the grounds that there is a reasonable apprehension that Senior Member Riegler may not bring an impartial or unprejudiced mind to the resolution of the matters to be dealt with in the hearing.

2 The application to apprehend Ms Fong was added to the matters for consideration by Application dated 7 December 2015. The Respondent, quite reasonably indicated that it had not had sufficient time to consider or respond to the application. The matter was discussed at the Directions Hearing but ultimately the parties reached a consent position, which is reflected by Order 1.

3 The two remaining applications were dismissed. Costs were ordered against the Applicant for pursuing its application to restrain Kalus Kenny Intelex from continuing to act for the Respondent. I gave oral reasons at the Directions Hearing for each determination including the decision to award costs.

4 The Applicant requested written reasons for Orders 2, 3 and 4 by email dated 17 December 2015. I agreed to provide such reasons, which are as follows.

BACKGROUND

5 This proceeding has been the subject of previous Orders and Reasons,[2] however the substantive issues in dispute remain unresolved. There have

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1 The Tribunal's powers to make such an order is more accurately contained in s 62 of the VCAT Act, see *R & D Rae Developments Pty Ltd v Amberley Corporation Australia Pty Ltd* (Domestic Building) [2007] VCAT 1970.

2 *Trombone Investments Pty Ltd v T.B.T (Victoria) Pty Ltd* (Building and Property) [2015] VCAT 289.

also been determinations in a related proceeding in which TBT was the Applicant and Trombone was the Respondent.[3]

6 The substantive issues in the current proceeding were helpfully summarised by Senior Member Riegler[4] and were again summarised by Her Honour Associate Justice Daly as follows:[5]

> 2. Trombone is (or, on another view, was) a tenant in a building in Meyers Place in the city owned by TBT ('premises') pursuant to the terms of a lease dated 18 April 2008 ('lease'). Disputes have arisen between Trombone and TBT, and between TBT and the predecessor tenant of the premises, Sobel Investments Pty Ltd (the former director of which is also a director of Trombone, Mr Jerome Borazio) from time to time.
>
> The most recent dispute relates to the issue by TBT of a notice under s 146 of the *Property Law Act 1958* (Vic) ('s 146 Notice') on 3 February 2014. The s 146 Notice alleges that Trombone had breached the terms of the lease by reason of Trombone having 'given up possession or shared occupancy of the premises with Andy B without TBT's consent'.
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> 3. On 19 February 2014, TBT re-entered the premises by the service of a Notice of Re-entry of the same date. However, Trombone remains in possession of the premises, and Andy B continues to operate a business from the premises.
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> …
>
> 5. The lease was originally entered into by Sobel Investments Pty Ltd ('Sobel') and TBT. The term of the lease was for five years, with options to renew for two further five year periods. On or about 4 September 2012, apparently as part of a settlement of an earlier VCAT proceeding between Sobel and TBT, TBT transferred the lease to Trombone 'with all Options'.
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> 6. It was in this context that Trombone issued the VCAT proceeding, seeking, among other things, the following relief:
>
> (a) declaration that the s 146 Notice and the Notice of Re-Entry are ineffective, void, and/or invalid;
>
> (b) alternatively, relief against forfeiture; and

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3 *TBT (Victoria) Pty Ltd v Trombone Investments Pty Ltd* (Retail Tenancies) [2013] VCAT 2021 (29 November 2013), *TBT (Victoria) Pty Ltd v Trombone Investments Pty Ltd* (Retail Tenancies) [2014] VCAT 25 (15 January 2014) and *TBT (Victoria) Pty Ltd v Trombone Pty Ltd* (Costs) (Building and Property) [2015] VCAT 136 (5 February 2015).

4 *Trombone Investments Pty Ltd v T.B.T (Victoria) Pty Ltd* (Building and Property) [2015] VCAT 289 at [1]-[3].

5 See *Trombone Investments Pty Ltd v TBT (Victoria) Pty Ltd anor* [2015] VSC 517 at [2]-[7].

(c) orders that TBT consent to the transfer of the lease from Trombone to Andy B and take such steps necessary to effect the transfer of the lease.

7. …In short, Trombone asserts that since TBT has been under the control of Mrs Hannah Fong (who is the recipient of one of the witness summonses), TBT has embarked upon a campaign of trying to eject the entities controlled by Mr Borazio from the premises, either by seizing upon technical breaches of the lease, and even going so far as to manufacture circumstances so as to create the conditions for a breach…

APPLICATION TO RESTRAIN KALUS KENNY INTELEX FROM CONTINUING TO ACT FOR TBT

7 The Applicant submitted that the law firm, Kalus Kenny Intelex (KKI), ought to be restrained by the Tribunal from continuing to act as the solicitors for the Respondent.

8 The Applicant relied upon Rule 27.2 of the *Australian Solicitor's Conduct Rules* which states that:

> In a case in which it is known, or becomes apparent, that a solicitor will be required to give evidence material to the determination of contested issues before the court the solicitor, an associate of the solicitor or a law practice of which the solicitor is a member may act or continue to act for the client unless doing so would prejudice the administration of justice.

9 The Applicant filed the Application because Mr Jonathan Kenny, a solicitor at KKI, had filed witness statements in this proceeding, which it said made him a material witness. The Applicant submitted that the witness statements were extensive and well beyond statements of mere formality. The Applicant submitted that if Mr Kenny or his firm continued to act, that would prejudice the administration of justice.

10 The parties agreed that by letter dated 13 October 2015 to the Applicant's solicitor Mr Warren, Mr Kenny had stated unambiguously that he would withdraw his witness statements and he would not be giving evidence. Such withdrawal was made expressly without prejudice to the Respondent's contention that there is no basis for their firm to cease acting if Mr Kenny had remained as a witness. The withdrawal was further confirmed by letter dated 27 October 2015.

11 The Applicant's application to restrain Mr Kenny or his firm KKI from continuing to act, and any reliance that could be placed upon Rule 27.2, had been forestalled by the Respondent's letter of 13 October 2015 and further confirmed by letter dated 27 October 2015. In the circumstances, there was no issue for the Tribunal to hear and determine.

12 The more pertinent question for the Tribunal was why, after Mr Kenny had agreed to withdraw as a witness, had the Applicant persisted in its

application? Furthermore, as a consequence of not withdrawing the application, was it appropriate to award costs against the Applicant?

13 The Applicant explained that Ms Fong had provided one lengthy witness statement, and that Mr Kenny had provided two others. In the course of the proceeding, the Applicant had been advised that Ms Fong would no longer be giving evidence. Now that Mr Kenny had also withdrawn as a witness, the Respondent had no witnesses to answer the claims made against it.

14 The Applicant's concern for the Respondent's seemingly untenable position is not a basis for the Applicant maintaining its application to restrain KKI from acting. It is not for the Applicant to advise the Respondent about how to run its case. The Applicant could have made enquiries with the Respondent by simply asking who the Respondent's witnesses would be, if any. As Counsel for the Respondent explained, the Respondent would be making arrangements to introduce evidence through other witnesses. That is a matter for the Respondent.

15 The Applicant also submitted that the Tribunal should consider whether it was reasonable for Mr Kenny's client to be put in a position whereby a centrally vital witness is forced to withdraw his statement. The Applicant invited the Tribunal to conclude that the fact of Mr Kenny withdrawing his statement showed that he should not have been acting as a solicitor once it became apparent that he became involved in the day-to-day events, and that he should have handed the matter to another firm.

16 I also find this explanation unsatisfactory. First, it ignores the fact that Mr Kenny expressly withdrew as a witness without prejudice to KKI's contention that there was no basis for KKI ceasing to act for the Respondent. As Counsel for the Respondent stated, Mr Kenny's witness statements were withdrawn, not because of concern in relation to substantial issues, but simply to avoid incurring additional costs fighting the issue, in a no-costs jurisdiction. Secondly, it is not a relevant matter for the Tribunal or the Applicant to enquire into or be concerned about matters between Mr Kenny and his client.

17 After hearing from the parties, I found that there was no basis for continuing with the application from 13 October 2015, once the Applicant had been notified by letter that Mr Kenny was withdrawing his statement and would not be giving evidence.

18 As noted in Order 3 above, I found that the failure to withdraw the application was vexatious conduct that caused the Respondent to be unnecessarily disadvantaged, namely having to appear before the Tribunal at the Directions Hearing on 9 December 2015, and having to incur incidental costs associated with the Applicant's application after 13 October 2015. Had the Applicant acted reasonably and withdrawn the application in a timely manner, rather than persisting with an application with no basis, the Respondent would not have incurred those costs.

19 It was suggested by the Applicant that the Respondent had to appear at this Directions Hearing in any event, as two other issues needed to be resolved, namely, the recusal of Senior Member Riegler and whether Ms Fong and/or TBT had complied with the summons to produce documents. I rejected that submission.

20 In regard to the recusal application, the Respondent neither consented nor opposed the recusal. The Respondent had advised the Applicant and the Tribunal that it would not be opposing the recusal application and that it would not be appearing at the reconstitution hearing. As anticipated, the Respondent's Counsel and instructing Solicitor asked to be excused, and were excused, when the Applicant began making submissions on this recusal issue. Clearly, no attendance was required by the Respondent for this matter.

21 In regard to the application to apprehend Ms Fong pursuant to s134(2), this was only added as a third matter for consideration at the Directions Hearing out of convenience, in light of the other two matter already being scheduled for a Directions Hearing on 9 December 2015.

22 The Tribunal received the s 134(2) application at approximately 4:15 pm on 7 December 2015. The Respondent received the application about 45 minutes later at approximately 5 pm. By email dated 8 December 2015, from the Respondent to the Applicant (copying the Tribunal), the Respondent advised that they were not in a position to argue the application at the Directions Hearing the next day, and that they would be seeking an adjournment to a date convenient to the Tribunal.

23 The application was accompanied by a seven page affidavit from the Applicant's solicitor Mr Kazatsky and 209 pages of exhibits. An application to apprehend a person for refusal to comply with a summons is a serious application. It is unsurprising that the Respondent was unable to adequately prepare in the time available.

24 Were it not for the other two matters already listed for directions, the matter would not have been listed for a Directions Hearing so quickly. The matter was only discussed out of convenience, because both parties were present at the Tribunal. In normal circumstances, the Respondent would certainly have been given additional time to prepare and respond.

25 I therefore found that the Respondent's attendance for the purpose of responding to the s 134(2) application was not a proper basis for submitting that the Respondent needed to attend the Tribunal in any event, and that the costs for appearing at the Directions Hearing should not be apportioned. Accordingly, I awarded costs for the Respondent having to attend the Directions Hearing.

APPLICATION FOR RECONSTITUTION OF THE TRIBUNAL

26 Trombone put forward two reasons for why SM Riegler ought to be recused. The Applicant says that SM Riegler has:

(a) Made a number of adverse comments in previous decisions; and

(b) Has made interlocutory orders 'which ought not to have been made', including rulings about the relevance of documents sought by Summons by the Applicant (I refer to this below as the 'prejudgment' issue).

These two grounds are considered in further detail below.

27 I note that the hearing and determination of the substantive issues in this application has not yet been assigned to any particular member. As such, this application for reconstitution has been pre-emptively filed, anticipating the likelihood that this matter will be re-listed before SM Riegler, in light of his past dealings with the file. This may or may not be the case and it will be a matter for Listings to determine who ultimately hears the matter.

28 The Applicant also sought to prevent Senior Member Levine from presiding at the final hearing. However, SM Levine does not generally preside in final hearings. It is also the practice at the Tribunal for Members to disqualify themselves if they have conducted a compulsory conference or mediation in the same matter. In this case, SM Levine has conducted a compulsory conference in related proceedings. Accordingly, it is not necessary to consider the merits of the application for reconstitution with respect to SM Levine.

Are the adverse comments a basis for reconstitution of the Tribunal?

29 The Applicant submits that SM Riegler's previous adverse comments about the conduct of its director and principal witness, Mr Jerome Borazio (Snr) and/or about the conduct of the companies of which he was the controlling mind, lead to a reasonable apprehension of bias.

30 The adverse comments referred to were:

> I find that the position taken by the Respondent prior to 12 November 2012 was unjustified in that there was no basis to impose such conditions, having regard to the Tribunal's orders dated 4 October 2012. In that regard, I find that the Respondent was conducting the proceeding in a vexatious way that unnecessarily disadvantaged the Applicant.[6]

31 Having made the above finding, SM Riegler then ordered that the Respondent (Sobel Investments Pty Ltd) of which Mr Jerome Borazio was the Director, pay the Applicant's (T.B.T (Victoria) Pty Ltd) costs up to and including 12 November 2012 on a party and party basis.

32 I note that the above comments were not published. They are comments made in the context of a directions hearing concerning an application by TBT that it be given access to the demised premises in order to give effect

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6 These comments were made in the Orders dated 27 November 2012.

to previous orders of the Tribunal requiring Sobel Investments to grant access to the premises.

33 The second adverse comments cited were as follows:[7]

> 32. Irrespective of the fact that the directions hearing partly comprised the Tenant's application for an order to disqualify Mr Croucher as special referee, the directions hearing was unavoidable because of the actions of the Tenant and or the Second Respondent. In my view, the failure to adhere to the orders requiring notification of the nominated *inspection stages* is reprehensible and constitutes vexatious conduct on the part of the Tenant and or Second Respondent. It is conduct which I consider is *productive of serious and unjustified trouble or harassment, or conduct which is seriously and unfairly burdensome, prejudicial or damaging*.
>
> 33. Accordingly, I find that, in the circumstances, it would be fair to order that the Landlord's costs of and associated with the directions hearing on 6 June 2014 be paid by the Tenant and the Second Respondent. In that regard, I accept the submissions made on behalf the Landlord that the circumstances justify a special costs order being made. Accordingly, I will order that the Landlord's costs of and associated with the directions hearing on 6 June 2014 be paid by the Tenant and Second Respondent on a solicitor and client basis in accordance with the *County Court Scale of Costs*.

34 The Applicant submitted that ordering the Tenant and the Second Respondent to pay the costs of the entire directions hearing, notwithstanding that only a part of the directions hearing was occupied with the failure to adhere to the nominated inspection stages, and a significant proportion of the directions hearing was occupied with other legitimate matters, is a ground for the reasonable apprehension of bias.

35 If the Applicant alleges that the Senior Member made an error of law, then the remedy for such error is on appeal. His Honour Justice Kellam, then President of the Tribunal, in *Metrospan Developments Pty Ltd v Whitehorse City Council*,[8] made it clear that the reconstitution provisions were not to be used for the purpose of defacto reviews or defacto appeals:[9]

> …whatever might be the breadth or limit of discretion under s108 it is clear also that the power to reconstitute the membership of any Tribunal hearing during the hearing must be in accordance with a proper exercise of discretion. The section clearly cannot be used to

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7 T.B.T (Victoria) Pty Ltd v Trombone Pty Ltd (Costs) (Building and Property) [2015] VCAT 136 (5 February 2015).

8 [2000] VCAT 44.

9 *Metrospan Developments Pty Ltd v Whitehorse City Council* [2000] VCAT 44, at para 13. See also the decision of *Gabrielidis v Hobsons Bay CC* [2004] VCAT 508 at paras 11-16; [2004] VCAT 614 at para 11-15.

> achieve a defacto review or a defacto appeal of what has happened heretofore in the hearing. …

36 The Applicant's submission that either of the above comments made by SM Riegler could form an appropriate basis for reconstitution is misconceived for the following additional three reasons.

37 First, s 92(2)(a) of the *Retail Leases Act 2003*, expressly requires a finding that a party acted vexatiously before the Tribunal can make an award for costs. It is therefore necessary and appropriate for the Senior Member to describe the conduct he perceived to be vexatious in his reasons. The language used is robust, but it falls well short of language that could be considered inherently inappropriate.[10]

38 Secondly, the first comment relied upon dates back to 27 November 2012. The adverse comment was not relied upon earlier as a ground for recusal, and SM Riegler has continued to hear other matters in which Mr Borazio was involved, without objection being raised by the Applicant.

39 In my view, it is inappropriate to now rely on a statement dating back some three years, as a ground for recusal, having not raised it earlier in other proceedings. While this may not always be determinative, it weighs heavily against the Tribunal exercising its discretion to reconstitute the Tribunal.

40 Thirdly, the comments made are a matter of public record. Where Mr Borazio's character and credibility is in issue in subsequent hearings, the parties are not prevented from bringing any previous adverse determinations regarding Mr Borazio's credit to the attention of the Member or Judge determining the case, whoever it may be. This may occur whether SM Riegler is hearing the application or where another Member or Judge is allocated.

41 The comments of His Honour Mason J of the High Court in *Re JRL; Ex parte CJL*[11] are frequently cited and relied upon,[12] and in my view the comments are applicable in this context. His Honour made the important distinction between a reasonable apprehension of bias and a reasonable apprehension that a judicial officer will decide a case adversely to one party:[13]

> …It needs to be said loudly and clearly that the ground of disqualification is a reasonable apprehension that the judicial officer will not decide the case impartially or without prejudice, rather than that he will decide the case adversely to one party. There may be many situations in which previous decisions of a judicial officer on issues of fact and law may generate an expectation that he is likely to decide issues in a particular case adversely to one of the parties. But this does not mean either that he will approach the issues in that case

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10 See *Antoun v R* [2006] HCA 2 at [27].
11 *Re JRL; Ex parte CJL* (1986) 161 CLR 342
12 At 352.
13 *Re JRL; Ex parte CJL* (1986) 161 CLR 342 per Mason J at 352.

> otherwise than with an impartial and unprejudiced mind in the sense in which that expression is used in the authorities or that his previous decisions provide an acceptable basis for inferring that there is a reasonable apprehension that he will approach the issues in this way. In cases of this kind, disqualification is only made out by showing that there is a reasonable apprehension of bias by reason of prejudgment and this must be "firmly established". Although it is important that justice must be seen to be done, it is equally important that judicial officers discharge their duty to sit and do not, by acceding too readily to suggestions of appearance of bias, encourage parties to believe that by seeking the disqualification of a judge, they will have their case tried by someone thought to be more likely to decide the case in their favour.[14]

42 In my view, the above submission is misconceived in that it has not raised any proper basis for concern about SM Riegler's impartiality. Accordingly, I reject the Applicant's submission that SM Riegler ought to be prevented from hearing this application based on any previous adverse comments about Mr Borazio's character.

Prejudgment – are there sufficient grounds for reconstitution?

43 The Applicant noted that SM Riegler has made two adverse rulings about the relevance of documents sought by way of discovery.[15] The first of those rulings is contained in the Transcript dated 10 June 2014.[16] The second ruling is set out in SM Riegler's reasons dated 11 February 2015.[17] The second ruling encompasses the matters in the 10 June 2014 ruling, and it is not necessary to consider the rulings separately.

44 The witness summonses which were the subject of the application before SM Riegler were directed at TBT, its director Ms Hannah Fong, and Mr Bill Romanovski, a building surveyor who had been engaged by the predecessor tenant, Sobel, sometime in 2008. In his Reasons of 11 February 2015, SM Riegler described the nature of the interlocutory application before him as follows:

> The current application concerns three summonses issued by the Principal Registrar at the request of the Tenant, which are contested by the Landlord and the Intervenor, who is the recipient of one of those summonses. The summonses are contested principally on the ground that the category of documents sought to be produced is too wide and irrelevant to the legitimate issues to be determined in this proceeding…

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14 Citations omitted.

15 As submitted in the letter dated 13 February 2015, from Mr Leonard Warren of Russell Kennedy to the Principal Registrar, in support of the Application for reconstitution, page 2.

16 Exhibit DIK 14 to the Affidavit of David Kazatsky dated 8 December 2015, T206. The matters raised in the Transcript are considered in the 11 February 2015 decision, it is not necessary to consider the Transcript ruling separately.

17 *Trombone Investments Pty Ltd v T.B.T (Victoria) Pty Ltd* (Building and Property) [2015] VCAT 289.

45 It was SM Riegler's preference to consider the relevance of matters contained in witness statements at the commencement of the substantive hearing. However, the Respondent's interlocutory application to quash the summonses made it necessary to determine the relevance issue prior to the trial.[18] SM Riegler then proceeded to consider whether the documents sought to be produced were relevant, and stated:[19]

> As I indicated during the hearing on 5 February 2015, the question whether the documents are relevant raises a threshold question; namely whether at law, the s 146 notice served on 3 February 2014 can be impugned and rendered void by reason only of a finding that the Landlord had acted unconscionably, in a general sense, in its dealings with the Tenant up to that point. Put at its highest, Mr Searle submitted that the Landlord had embarked on a campaign to oust the Tenant and that this campaign was motivated by reasons other than any breach of the lease.

46 SM Riegler noted that it is possible for conduct prior to the issuing of the s 146 notice to be relevant in some circumstances. However, in this case, the allegedly unconscionable acts or omissions of the Landlord did not touch upon the allegations of breach contained in the s 146 notice. Therefore, SM Riegler determined that the categories of documents sought were not relevant to any legitimate issues in the proceeding. He determined the interlocutory application in favour of TBT and quashed the three summonses. He stated:[20]

> I do not accept, as a general proposition, that conduct which predates the issuing of a s 146 notice cannot be relevant to the validity of the notice. There may be examples where a party's conduct gives rise to an estoppel or where the actions of a landlord have caused or materially contributed to a tenant's breach. Such conduct may be relevant to the validity of a s 146 notice relied upon and cannot be ignored.
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> In the present case, the acts or omissions alleged against the Landlord do not directly touch upon the allegations of breach contained in the s 146 notice. Those allegations of breach are set out in the s 146 notice as follows:
>
> > NOW TAKE NOTICE that Trombone has committed the following breaches of the Lease and engaged in the following repudiatory conduct.
> >
> > > In breach of Clause 4.7 of the Lease Trombone has given up possession or has shared occupancy of the Premises with Andy B Pty Ltd without TBT's consent.

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18 See SM Riegler's Reasons at [20] and the oral ruling on 10 June 2014, as contained in the Transcript T206-208.

19 At [11] .

20 At [13]-[14].

47 The decision of SM Riegler then became the subject of an appeal by Trombone,[21] leave was granted and the appeal was upheld.[22] Daly AsJ stated:

> In determining the application to set aside the witness summonses, the Senior Member in effect determined that the matters, or at least some of the matters pleaded as particulars of unconscionable conduct, are not relevant to the issues to be determined in the VCAT proceeding. The logical consequence of the Senior Member's finding is that the trial of the proceeding would be limited to, at its widest, the conduct of TBT after the transfer of the lease from Sobel to Trombone, and, most likely, based upon the Senior Member's reasons, the conduct of TBT which was directly connected to the breach alleged in the s 146 Notice, being the alleged giving up of possession by Trombone to Andy B, or the sharing of the premises with Andy B without TBT's consent.[23]
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> …
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> I would also allow the appeal, on the basis that the Senior Member's findings regarding the relevance of the documents sought by the subpoena to any issue which might legitimately arise in the proceeding arose out of an unduly restrictive approach to what facts and matters might be ventilated in support of Trombone's claim for relief in the VCAT proceeding. It is correct to say, and Trombone seems to accept, that when determining whether to grant relief against forfeiture, the focus of a court or tribunal is largely directed at the conduct of the tenant. However, it must be remembered that the remedy of relief against forfeiture has its origins in equity, and one must be careful to stifle developments in the law in that regard. Certainly the language of s 146(2) of the *Property Law Act 1958*, which provides that the Court may grant or refuse relief 'as the Court, having regard to the proceedings and conduct of the parties under the foregoing provisions of this section, and to all the other circumstances thinks fit' seems to be sufficiently wide to encompass an examination of the conduct of each of the parties.[24]
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> …
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> While I accept that it is more probable than not that Trombone's claim for relief against forfeiture, to the extent that it seeks to rely upon TBT's conduct unconnected with the breach specified in the s 146 Notice, might be unlikely to succeed on that basis alone, in my view, the position regarding the relief sought by Trombone with respect to its claims for unconscionable conduct within the meaning of the

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21 *Trombone Investments Pty Ltd v TBT (Victoria) Pty Ltd and anor* [2015] VSC 517 at [17].
22 Ibid.
23 At [29].
24 At [30].

> *Retail Leases Act 2003* or under the *Australian Consumer Law* is far from clear cut.[25]

48 The above passages give context to how the Tribunal and then the Supreme Court considered the question of relevance. Clearly, SM Riegler took a more restrictive view about what could be relevant than the Supreme Court.

49 The Applicant referred to the general test for disqualification,[26] namely 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 of the question the judge is required to decide.

50 In the context of this case, the Applicant says that the requirements for disqualification is met because SM Riegler has prejudged matters in controversy. As such, SM Riegler presiding at the substantive trial would 'clearly offend' the test quoted in *Cab Charge*,[27] namely:

> In this context, disqualifying bias results in a state of mind that is not open to persuasion. That is, in this species of apprehended bias, "[t]he state of mind described as bias in the form of prejudgment is one so committed to a conclusion already formed as to be incapable of alteration, whatever evidence or arguments may be presented": see *Minister for Immigration and Multicultural Affairs v Jia Legeng* (2001) 205 CLR 507 ('*Jia Legeng'*) at 531-2 [71]-[72] per Gleeson CJ and Gummow J. That is, in such a case as the present, it must be firmly established that a reasonable observer might conclude that the decision-maker might not bring to his or her task an impartial mind by reason of prejudgment, in the sense that the decision-maker might be so committed to a conclusion as to be incapable of persuasion to a different view: see *Re JRL; Ex parte CJL* (1986) 161 CLR 342 ('*Re JRL*') at 352 per Mason J.[28]

51 I note that *Cab Charge* was not determined in favour of the party seeking recusal. In the joint reasons for decision the Court recognised that previous findings of fact, which overlap with live issues to be determined, is not automatically a basis for recusal. The Court stated:[29]

> It may be accepted, as the ACCC concedes, that there is some overlap between the factual findings made by the Tribunal … and some of the issues of fact which are in dispute in the present proceeding. It does not necessarily follow that the primary judge is, for this reason, disabled from conducting the forthcoming trial. He will only be disqualified if it is "firmly established" that a reasonable observer might apprehend that he might be "so committed to a conclusion

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25 At [31].

26 *Ebner v Official Trustee in Bankrupty* (2000) 205 CLR 337 at 344, per Gleeson CJ, McHugh, Gummow and Hayne JJ.

27 *Cab Charge Australia Ltd v Australian Competition and Consumer Commission* [2010 FCAFC 111] at [25].

28 The underlined emphasis is added.

29 *Cab Charge* per Kenny, Tracey and Middleton JJ at [44].

already formed as to be incapable of alteration, whatever evidence or arguments may be presented" at trial.

52 The Applicant submitted that SM Riegler had brought down a decision in relation to discovery issues, which had far reaching implications in relation to matters raised as substantive issues by the tenant in its pleadings, and matters which go directly to matters that the Member hearing the trial will have to determine. Furthermore, when presented with any documents, the subject of the summonses, SM Riegler will simply confirm his previous decision about relevance and reject them. Or at least, that a fair minded lay observer might reasonably consider SM Riegler likely to adopt such a course. For the following reasons, I disagree with both propositions.

53 The question for the Tribunal now is whether or not a fair minded lay observer might reasonably consider SM Riegler to be so committed to the conclusion that the documents are not relevant to any legitimate issue, that he would be incapable of altering his view about the relevance of those summonsed documents, whatever the contents of those documents turn out to be, and whatever the evidence and arguments presented with respect to those documents turn out to be?

54 It is important to note that divergence between the decision of the Supreme Court and SM Riegler are relatively minimal. Whereas SM Riegler found the relevance of the summonsed documents were 'too remote to affect the validity of the s 146 notice',[30] the Supreme Court held that finding to be 'unduly restrictive'.[31] However, Her Honour acknowledged that:

> …it is more probable than not that Trombone's claim for relief against forfeiture, to the extent that it seeks to rely upon TBT's conduct unconnected with the breach specified in the s 146 Notice, might be unlikely to succeed on that basis alone...[32]

55 Her Honour also stated:[33]

> …It may well be that a number of the allegations made by Trombone in the particulars to paragraph 15B of the Further Amended Points of Claim, if made out at trial, will not clear the relatively high hurdle raised by the authorities regarding what conduct amounts to sufficient wrongdoing to amount to unconscionable conduct. But I accept the submission made on behalf of Trombone that the hurdle might well be cleared if Trombone is able to prove its allegations that the director and controlling mind of TBT conspired with a building surveyor to concoct a document which had the effect of causing Sobel to be found to be carrying out works in breach of a building permit, then seeking to rely upon that breach in a s 146 notice, notwithstanding that notice was subsequently withdrawn. Whether that conduct could give rise to the relief sought by Trombone in the VCAT proceeding is, in my

30 At [17].
31 At [30].
32 At [31].
33 At [35].

> view, a matter for argument at trial, and Trombone is entitled to use what legitimate means are available to it to gather evidence to prove these allegations at trial.

56 The Supreme Court made it clear that it was not making any prejudgment about the final relevance and admissibility of any documents obtained through the summonses. Her Honour stated: [34]

> I should emphasise that in granting the application for leave and allowing the appeal I am not prejudging the question of whether the documents sought by the witness summonses are admissible at trial, or that any witness summons which seeks documents relevant to one of the particulars under paragraph 15B of the Further Amended Statement of Claim ought not be set aside.

57 In summary, Daly AsJ expressly left open the possibility that the Tribunal may confirm that the documents produced are not relevant, too remote or that the high threshold required to prove unconscionable conduct has not been met.

58 Alternatively, the Tribunal may find that the documents are relevant and do establish unconscionable conduct. That is a final determination to made, once the documents are produced to the Applicant and sought to be used as evidence.

59 In the context of an interlocutory application, the Supreme Court has determined that SM Riegler took an unduly restrictive approach which fettered the Applicant's ability to fully argue its allegations of unconscionable conduct. In doing so, the Supreme Court has reinstated the summonses which SM Riegler had quashed and broadened the potential scope of enquiry about TBT's conduct leading up to the relevant s 146 Notice.

60 This is not simply a matter of SM Riegler acting in sufferance because of the obligations imposed by the Supreme Court.[35] In this case, any decision to be made about the relevance and admissibility of documents is not a repeat of the earlier assessment made in relation to the impugned summonses. Assessment at trial will be made by the Tribunal having the benefit of the summonsed documents before it. An assessment will need to be made about the actual documents produced.

61 The Applicant's contention that SM Riegler would be so committed to the conclusion that the documents are too remote, and that he could not be persuaded about relevance no matter what the documents reveal, is, with respect, too simplistic. Judicial Officers and Tribunal Members have the necessary skills to follow the directions of a superior court, and to make an impartial assessment about relevance and admissibility on that basis.

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34 At [44].

35 *See Antoun v R* [2006] HCA 2 at [34].

62 In making a fresh assessment, no doubt SM Riegler, if ultimately assigned to hear this matter, would have regard to the guidance of the Supreme Court in relation to the potentially broad ambit of a claim based upon unconscionable conduct.

63 In my view, a lay observer would not reasonably conclude that SM Riegler would now be incapable of assessing any documents produced to determine whether they are in fact relevant to any issues at trial. It follows therefore that the Applicant's application to for reconstitution of the Tribunal is dismissed.

64 I am fortified in my view not to reconstitute the Tribunal in light of the absence of any order from the Supreme Court for reconstitution of the Tribunal. While the Court was silent on the issue, it is frequently the practice for the Supreme Court to remit matters back to the Tribunal with a direction that the Tribunal be reconstituted, in circumstances where it is considered appropriate to do so.

Judge Jenkins
Acting President