

**VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL**

**CIVIL DIVISION**

**BUILDING AND PROPERTY LIST**

VCAT REFERENCE NO. BP 1561/2015

**CATCHWORDS**

Application by applicant for a release from 'Harman Undertaking' in respect of documents 'discovered' in and for the purpose of the proceeding by the eighth and ninth respondents. Harman undertaking principles discussed. Finding that there is no 'special circumstance' warranting a release from the Harman undertaking.

<b>APPLICANT</b>	Mr Boris Zaitsev
<b>SIXTH RESPONDENT</b>	Nicholson Wright Pty Ltd (ACN: 072 393 741)
<b>SEVENTH RESPONDENT</b>	Jim Tsaganas
<b>EIGHTH RESPONDENT</b>	R. I. Brown Pty Ltd (ACN: 006 712 223)
<b>NINTH RESPONDENT</b>	Mr Russell Ian Brown
<b>TENTH RESPONDENT</b>	Mr Alan Temling
<b>ELEVENTH RESPONDENT</b>	A.A. & A.S. Lorenzini Pty Ltd (ACN 050 277 168)
<b>TWELFTH RESPONDENT</b>	Mr Anthony Alan Lorenzini
<b>THIRTEENTH RESPONDENT</b>	Buckingham Holdings Pty Ltd (ACN 004 502 363)
<b>JOINED PARTY:</b>	Svetlana Zaitsev
<b>INTERVENER:</b>	Victorian Building Authority
<b>WHERE HELD</b>	Melbourne
<b>BEFORE</b>	Senior Member M. Farrelly
<b>HEARING TYPE</b>	Hearing
<b>DATE OF HEARING</b>	30 August 2019
<b>DATE OF ORDER</b>	26 September 2019
<b>CITATION</b>	Zaitsev v Nicholson Wright Pty Ltd (Building and Property) [2019] VCAT 1508

## ORDERS

1. The applicant's application for a release in respect of the implied 'Harman' undertaking to not make collateral use of documentation is dismissed.
2. Costs reserved with liberty to apply.
3. **I direct the Principal Registrar to refer any application for costs to Senior Member Farrelly for orders as to the future conduct of such application.**

## SENIOR MEMBER M. FARRELLY

### APPEARANCES:

For the Applicant and Joined Party: Mr J. Baly of Counsel

For the Eighth and Ninth Respondents: Mr C. Madder of Counsel

For the Intervener, the Victorian Building Authority: Mr C. Lum of Counsel

## REASONS

- 1 The application before me involves the applicant, the joined party, the eighth and ninth respondents, and the Victorian Building Association which was granted leave to intervene and be heard in the application. In the reasons that follow:
  - the applicant, Mr Boris Zaitsev, and the joined party, Mrs Svetlana Zaitsev, will together be referred to as **‘the owners’**;
  - the ninth respondent, Mr Russell Ian Brown (**‘Mr Brown’**), and the eighth respondent, R.I. Brown Pty Ltd of which Mr Brown is a director, will together referred to as **‘the respondents’**; and
  - the Victorian Building Authority will be referred to as **‘the VBA’**
- 2 In this long-running proceeding, which commenced in around November 2015, Mr Boris Zaitsev brings a substantial claim for damages against a number of parties, including the respondents, in respect of building works at the owners’ property in Caulfield North Victoria. Mrs Svetlana Zaitsev is a joined party in the proceeding as her interests will be affected by the outcome of the proceeding. In the proceeding Mr Zaitsev alleges, amongst other things, liability of the respondents arising from their provision of engineering advice and certifications in around 2014.
- 3 The proceeding is listed for final hearing commencing on 17 October 2019.
- 4 Sometime after the proceeding commenced, the owners made a complaint to the VBA as to Mr Brown’s professional conduct in providing engineering services in respect of the subject building works. The VBA investigated the complaint and served a ‘show cause notice’ on Mr Brown. The ‘Show cause process’ in respect of a VBA investigation into a practitioner’s conduct is set out in Subdivision 5 (sections 182 – 182E) under Division 3 of Part 11 of the Building Act 1993 (**‘the Act’**). In response to the show cause notice, Mr Brown, with the aid of his lawyers, provided a detailed response including the provision of an expert report of Ms Jenny Norris, a structural engineer.
- 5 Although the investigation was carried out in response to the complaint from the owners, after lodging their complaint the owners had no input in the investigation.
- 6 By decision dated 11 April 2017, addressed to Mr Brown care of his lawyers, the VBA determined to not take disciplinary action against Mr Brown. The decision, about 5 pages in length, summarises the VBA’s investigation and findings. A copy of this decision was not provided to the owners, however there is no dispute that the owners were, at some point in time (the actual date is unclear), informed by the VBA of its decision to not take disciplinary action against Mr Brown.

- 7 In any event, in February 2018 the owners wrote to the VBA seeking access to documents, including the documents relating to the VBA’s investigation, under the *Freedom of Information Act 1982* (Vic) (‘**FOI Act**’). By letter dated 7 March 2018<sup>1</sup>, the VBA advised the owners that it had decided to refuse access to all documents falling within the scope of the request.
- 8 The owners, dissatisfied with the VBA’s decision in respect of Mr Brown, presented further material to the VBA in 2018 as to alleged defective engineering design certified by Mr Brown, and requested that the VBA conduct a further investigation. The VBA has, on around 10 July 2018, 19 December 2018 and in May 2019, confirmed to the owners that it declines to carry out any further investigation as requested by them.
- 9 In the course of the proceeding in the Tribunal, orders were made requiring the parties to ‘discover’ relevant documents<sup>2</sup>. Pursuant to their ‘discovery’ obligation, the respondents served a list of documents dated 11 December 2017 and a further supplementary list of documents dated 8 April 2019. Those lists of documents include documentation from the VBA investigation:
- (a) from the list of documents dated 11 December 2017:
    - the “show cause notice” of the VBA addressed to Mr Brown dated 16 November 2016;
    - a letter from the VBA to Mr Brown’s lawyers dated 15 December 2016;
- and
- (b) from the supplementary list of documents dated 8 April 2019:
    - statutory declaration of Mr Brown dated 7 April 2017 with annexures;
    - letter (containing detailed submissions) from Mr Brown’s lawyers to the VBA dated 7 April 2017;
    - the VBA decision dated 11 April 2017
- 10 The respondents have also filed and served the above-mentioned expert report of Ms Jenny Norris.
- 11 The above documents provide detailed information as to the nature of the VBA investigation into the conduct of Mr Brown, Mr Brown’s detailed response including the expert report of Ms Norris, and the reasons for the VBA’s decision to not take disciplinary action. They are documents, amongst others, in respect of which the VBA, in response to the owners’ freedom of information request in 2018, refused access.

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<sup>1</sup> a copy of the letter is exhibited as exhibit BP2-1 to the affidavit of Boris Pogoriller sworn 17 July 2019

<sup>2</sup> orders made 9 December 2016 required, amongst other things, the parties to serve a list of relevant documents in their possession or control and to make such documents available for inspection and copying to the other parties.

- 12 Remaining dissatisfied with the VBA's decisions, that is the decision of 11 April 2017 and the subsequent decisions to decline any further investigation, the owners now wish to seek advice from their lawyers as to further action they might take in respect of the VBA's decisions, and subject to that advice, take further action. In so doing, the owners wish to consider and use the discovered documents, including the expert report of Ms Norris.
- 13 In litigation, parties to a proceeding are generally bound by an implied undertaking, often referred to as a 'Harman undertaking', to not make collateral or ulterior use of documents produced in the course of, and for the purpose of, the proceeding. Mindful of that undertaking, the applicant Mr Zaitsev brings an application seeking, to the extent it is necessary, a release of the owners (and the respondents) from their 'Harman undertaking' in respect of the discovered documents.<sup>3</sup> That application was filed on 17 June 2019 and, at a directions hearing on 8 July 2019, I made orders for the filing and service of affidavit material and submissions, and listed the application for hearing on 30 August 2019. I also ordered that, of the parties in the substantive proceeding, only the owners and the (eighth and ninth) respondents should attend the hearing of the application on 30 August 2019.
- 14 Prior to the application hearing date, the Tribunal received notification from the VBA that it sought to intervene and to make submissions. At the commencement of the hearing before me on 30 August 2019, there being no objection from the owners or the respondents, I granted leave for the VBA to intervene and to make submissions. At the hearing:
- the owners were represented by Mr Baly of Counsel;
  - the respondents were represented by Mr Madder of Counsel; and
  - the VBA was represented by Mr Lum of Counsel.
- 15 The owners seek orders<sup>4</sup> that, in respect of the discovered documents, the owners and the respondents be released from their implied undertaking (if applicable) to not make collateral use of such documents, to the extent that those parties may use such documents for any or all of the following purposes:
- a) obtaining advice in relation to making or defending any application for internal review, merits review or judicial review of the VBA's decisions:
    - i. dated 11 April 2017 not to take disciplinary action against Mr Brown; and
    - ii. dated 10 July 2018, 19 December 2018 and/or May 2019 not to consider taking disciplinary action against Mr Brown

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<sup>3</sup> The application brought by Mr Zaitsev, dated 14 June 2019 and filed 17 June, seeks orders that himself and the joined party and the 8th and 9th respondents be released from the implied Harman undertaking in respect of the documents.

<sup>4</sup> as noted above, the application is brought by Mr Zaitsev, however the subsequently filed written submissions in support of the application are made on behalf of both Mr Zaitsev and Mrs Zaitsev.

(collectively, ‘the decisions’)

- b) making or defending any application for internal review, merits review or judicial review of the decisions;
  - c) obtaining advice in relation to making any fresh complaint or referral to the VBA and/or making such a complaint or referral;
  - d) obtaining advice in relation to making or defending any complaint about the decisions to the Ombudsman, the Minister administering the *Building Act 1993* (Vic) and/or another member of State or Federal Parliament; and/or
  - e) making or defending any complaint about the decisions to the Ombudsman, the Minister administering the *Building Act 1993* (Vic) and/or another member of State or Federal Parliament; and/or
- 16 The respondents and the VBA say the ‘Harman undertaking’ applies to the discovered investigation documents, and the orders sought should not be granted.

#### **HARMAN UNDERTAKING**

- 17 The ‘Harman undertaking’ principle takes its name from *Harman v The Secretary of State for the Home Department* (1983) 1 AC 280. The principal is expressed by Hayne, Heydon and Crennan JJ in *Hearne v Street*<sup>5</sup>, as follows:
- Where one party to litigation is compelled, either by reason of a rule of court, or by reason of a specific order of the court, or otherwise, to disclose documents or information, the party obtaining the disclosure cannot, without the leave of the court, use it for any purpose other than that for which it was given unless it is received into evidence. The types of material disclosed to which this principle applies include documents inspected after discovery, answers to interrogatories, documents produced on subpoena, documents produced for the purpose of taxation of costs, documents produced pursuant to a direction from an arbitrator, documents seized pursuant to an *Anton Piller* order, witness statements served pursuant to a judicial direction and affidavits.
- 18 The principal provides protection against the use of material, produced for the purpose of a proceeding, for some other collateral or ulterior purpose outside the proceeding.
- 19 But the protection is not absolute. As noted in the above statement of the principal, the protection does not extend to documentation received into evidence. Nor does the protection extend to documentation which has otherwise already entered the public domain.<sup>6</sup>
- 20 A court (or in this case, the Tribunal) may grant leave for use of the documentation for a purpose collateral or ulterior to the proceeding. Such

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<sup>5</sup> (2008) 235 CLR 125, at [96]

<sup>6</sup> Forrest J, Deputy Commissioner of taxation v Karas [2012] VSC 143 at [32]

leave will not be granted lightly. There must be ‘*special circumstances.*’ As stated by Vickery J in *Ambridge Investments Pty Ltd v Baker & Ors* [No 3]:<sup>7</sup>

The fundamental principle is that the court ought not to exercise its discretion to release or modify the implied undertaking unless there are “special circumstances” present which justify taking this course.

...

The rule has the purpose of protecting both private and public interests. The two are interrelated.

Protection of a private right to keep one’s documents to oneself, yielding only so far as is necessary to the interests of justice for the purposes of a proceeding in which the documents are compelled to be produced, is clearly championed by the rule. The rationale is to ensure that the privacy of the person from whom otherwise private or confidential information is coercively obtained is invaded no more than is necessary for the purposes of the administration of justice.

Of no less import is the public interest in maintaining privacy and confidence in relation to documents produced to a court under compulsion... Protection of the confidentiality of a person’s private documents encourages the full and proper disclosure of documents that the administration of justice requires. As such, it is an important element in maintaining public confidence in the conduct of legal proceedings in court and by this means securing constructive participation in its processes.

21 After considering a number of authorities, Vickery J went on to say:<sup>8</sup>

In my opinion, it is not possible nor desirable to confine the notion of “special circumstances” to an exhaustive list of factors. As Wilcox J said in *Springfield Nominees Pty Ltd v Bridgelands Securities Ltd*<sup>9</sup> “For ‘special circumstances’ to exist it is enough that there is a special feature of the case which affords a reason for modifying or releasing the undertaking and is not usually present.”

However, in approaching a determination as to whether “special circumstances” are present in a particular case, consistently with the applicable case law as it has developed to this point, I would vary a little the formulation of Wilcox J in *Springfield* to arrive at the following test: “special circumstances” may arise where there are special features (or a special feature) of the case which afford good reason for modifying or releasing the undertaking, being circumstances which are of sufficient gravity to override the private and public interest in protection of the confidentiality of a person’s private documents which are required by law to be produced to a court.

Factors beyond the strictly public interest may be present to satisfy the “special circumstances” criterion. Such factors may be circumstances of a private nature, for example where the party who produced the document in one

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<sup>7</sup> [2010] VSC 545 at paras 25 - 30

<sup>8</sup> Vickery J, *Ambridge* at paras 32 - 35

<sup>9</sup> (1992) 38 FCR 217 at 225

proceeding waived any objection to it being used in another proceeding or expressly or impliedly consented to this course. Or there may be matters in relation to the character of a document, for example where the document in question was already in the public domain and where any semblance of it retaining a private character has been significantly compromised.

However, an important consideration in weighing the various factors which may enliven the discretion are also matters of a public interest character. They will include the likely contribution of the document in question to achieving justice in the second proceeding and the public interest in ensuring that all relevant material is before a court to enable it to properly discharge its function.

22 And later, Vickery J says:<sup>10</sup>

In order to determine whether “special circumstances” exist and if so whether the discretion should be exercised in favour of permitting a modification of the obligation granting a release in respect of it, it is necessary, as a first step, to specify the documents in respect of which the modification or release is sought. It is then necessary to identify the purpose of the modification or release.

The character of the document and its potential importance in the second proceeding will often be critical to the determination as to whether “special circumstances” exist.

...

Further, the purpose of the modification or release needs to be considered, not only in considering the factors which may give rise to “special circumstances”, but also in weighing the factors which may bear upon the exercise of the discretion.

### **DOES THE HARMAN UNDERTAKING APPLY?**

23 It is not disputed that the documents in question were ‘discovered’ in the proceeding pursuant to order of the Tribunal, that they have not yet been received into evidence, and that they are not otherwise in the public domain.

24 The owners submit that it is open to find that the Harman undertaking is not enlivened because their intended use of the documents may be considered, not as collateral or ulterior to this proceeding, but rather as *intimately bound up* with this proceeding such that this proceeding and the other foreshadowed potential courses of action constitute two aspects of a single *wider dispute*. In support of this submission, the owners refer to the decision of Forrest J in *Deputy Commissioner of taxation v Karas & Others*<sup>11</sup>, where his Honour considered that a proceeding in which the Commissioner of Taxation obtained a freezing order on a person’s assets was intimately bound up with a separate proceeding in which the

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<sup>10</sup> Vickery J, *Ambridge* at paras 39 - 43

<sup>11</sup> [2012] VSC 143, at paragraph 43



Commissioner of Taxation sought to enforce a judgement debt against the same person.

- 25 I do not accept the submission.
- 26 The two proceedings in *Karas*, which formed part of the same wider dispute, involved the same two parties. There is no similar nexus between the proceeding in this Tribunal and any of the other potential proceedings the owners have foreshadowed (**‘the potential proceedings’**). The potential proceedings would involve the VBA, which is not a party to this proceeding.
- 27 I do not accept that any of the potential proceedings would be intimately bound up with this proceeding. I understand that, in the owners’ minds, this proceeding and the potential proceedings involve, what they consider to be, the alleged culpability of Mr Brown in respect of engineering services provided to them. But that belief does not make this proceeding and any of the potential proceedings ‘intimately bound up’. In this proceeding, Mr Zaitsev seeks compensatory damages he alleges he has suffered by reason of, amongst other things, the negligence or fault of the respondents. In the potential proceedings, the owners would seek a review of a decision or decisions of an administrative body performing its statutory functions. They are distinct and separate issues.
- 28 It is significant that none of the potential proceedings have been commenced. The owners have raised the potential proceedings they might take, subject to legal advice. All that can be said, at this time, is that the owners might take some further action, and such further action might involve a review proceeding in respect of one or more of the VBA’s decisions, and/or it might involve a complaint to the Ombudsman or a member of Parliament. In the absence of any other proceeding, I reject the suggestion that this proceeding and whatever other action the owners might or might not take are intimately bound up in the same wider dispute.
- 29 I am satisfied that the intended purposes, outside of this proceeding, for which the owners seek to utilise the documents in question are purposes collateral or ulterior to this proceeding. The documents in question were discovered and revealed to the owners pursuant to orders of the Tribunal in this proceeding. The documents are not yet received into evidence and are not in the public domain. As such, I am satisfied that the Harman undertaking applies to the documents.

#### **PREMATURE APPLICATION?**

- 30 As noted earlier, the substantive hearing in this proceeding is listed to commence on 17 October this year. As such, the documents in question may well be received into evidence in the near future, and, as a consequence, thereafter no longer protected by the implied Harman undertaking. Having regard to this, the respondents submit that the application for release from the Harman undertaking is premature, and any

such application should be brought after the evidence of the respondents in the substantive proceeding hearing is closed.

- 31 The owners say that their application is not premature as they have an obligation to act in a timely manner in respect of the potential proceedings. They say that the full extent of the discovered investigation documents was revealed to them only after the respondents served their supplementary list of documents in April this year. They say that time is important in respect of the potential review proceeding avenues that may be open to them. For example, they may require an extension of time to bring a review proceeding in respect of the VBA decisions. Having regard to this, they say they must be seen to be acting in a timely manner in seeking a release from their Harman undertaking in respect of the documents. They say they are doing this by bringing and pursuing this application ahead of the substantive hearing.
- 32 It may be that in the near future the documents in question are received into evidence and therefore no longer subject to the protection of the Harman undertaking. However, there are other possibilities. The documents, or some of them, may not be received into evidence in the substantive hearing. For any number of reasons, the substantive hearing may be adjourned, either before or after it commences. The parties might settle. Given these possibilities, and accepting that it is important that the owners act in a timely manner in respect of potential review proceedings, I am satisfied that the application before me should not be refused on the ground that it has been brought prematurely.

### **SPECIAL CIRCUMSTANCES**

- 33 The remaining question is whether I am satisfied that “special circumstances” exist such that it is appropriate to grant a release from the Harman undertaking in respect of the documents in question.

### **The documents and confidentiality**

- 34 There is no issue as to the identification of the relevant documents. They are clearly identified by the owners.
- 35 The VBA, in performance of its statutory functions, has, following receipt of a complaint about a building practitioner, investigated the professional conduct of the practitioner. The VBA subsequently provided the practitioner with its findings and proposed grounds for taking disciplinary action, and the practitioner was given the opportunity to respond and show cause why the proposed disciplinary action should not be taken. Following consideration of the comprehensive response from the practitioner, including the expert report of Ms Norris, the VBA determined not to take disciplinary action. The documents that tell the tale of the process are the documents the subject of the application before me.

- 36 The respondents say that the documents attract the ‘confidentiality’ provision set out (at the relevant time) in section 234A of the Act. The current version of the Act includes a similar confidentiality provision under section 229J. The section provides:

**Confidentiality**

- (1) An authorised person must not, except to the extent necessary—
- (a) to carry out functions or to exercise powers under this Act or the regulations; or
  - (b) in connection with the administration or enforcement of this Act or the regulations; or
  - (c) to give any information the authorised person is authorised, permitted or required to give under this Act or any other Act or the regulations under this Act—

give to any other person, whether directly or indirectly, any information gained in the exercise of the powers as an authorised person.

Penalty: 20 penalty units.

- (2) Subsection (1) does not prevent the giving of information—
- (a) for the purpose of any legal proceedings arising out of this Act or the regulations, or of any report of those proceedings; or
  - (b) with the consent of the Minister.

- 37 The section is included within *Division 2 (Powers of Entry)* under *Part 13 (General Enforcement Provisions)* in the Act as it was at the relevant time. That division, Division 2 under Part 13, commences with section 228 which defines ‘*authorised person*’ as follows:

**Authorised persons**

- (1) In this Division—

*authorised person* means—

- (a) a municipal building surveyor; or
- (b) a private building surveyor appointed under Part 6; or
- (c) the Authority; or

\* \* \* \* \*

- (d) a Minister, public authority or person who is authorised or required by this Act or the regulations to carry out any work or inspection or any other function; or
- (da) a plumbing inspector appointed under Part 12A; or
- (db) a compliance auditor appointed under Part 12A; or
- (e) a person authorised under subsection (2).

- (2) A person or body referred to in paragraphs (a) to (d) of the definition of "authorised person" may authorise in writing any person to exercise a power under this Division on its behalf.

- 38 Whilst the VBA is an *authorised person* as defined in section 228 above, by reason of the words "*In this Division*" at the commencement of section 228, the definition is, in my view, limited to the operation of Division 2 under Part 13 in the Act.
- 39 As noted earlier, the VBA's 'Show cause process' investigation was carried out under a different Part of the Act - *Subdivision 5 (Show cause process)* under *Division 3 (Disciplinary proceedings and action)* of *Part 11 (Registration of building practitioners)*.
- 40 As such, I am not satisfied that the documents obtained as part of the VBA investigation into the conduct of Mr Brown attract the mandatory confidentiality provisions in section 234A.
- 41 But that does not mean that the documents do not attract confidentiality.
- 42 As noted earlier, in February 2018 the owners sought access to documents under the FOI Act, and by letter of 7 March 2018, the VBA refused access. Amongst other things, the VBA's letter of 7 March 2018 sets out a clear public interest in keeping investigation documents confidential:

[the documents] contain information that was communicated in confidence to the VBA and disclosure of such information is against the public interest because it would be likely to impair the VBA's ability to obtain similar information in the future

...

Statements and submissions from building practitioners in response to complaints, investigations and subsequent disciplinary proceedings (including internal review of disciplinary proceedings) are clearly confidential.

- The VBA has a long-standing practice of treating such information as confidential, and practitioners choose to engage with the VBA in the knowledge of this practice and in the expectation that any information provided will be treated confidentially
- ...
- The Building Act does not give complainants any opportunity to inspect or comment on responses from the practitioners that are the subject of the complaint, and does not even provide that complainants must be notified of reasons for decisions that ultimately made. Rather, it provides only that they informed of the outcome – this further supports the view that complaint and investigation processes are confidential processes.<sup>12</sup>

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<sup>12</sup> Page 2 of the VBA letter of 7 March 2018

43 The VBA letter of 7 March 2018 also raises personal privacy as a further reason to refuse access to the documents:

Based on the terms of your request for documents, each document contains and relates to the personal affairs information of the building practitioners involved.

In my view, disclosure of information relating to the personal affairs of these building practitioners would be unreasonable, based on the following factors including:

- i. the nature of the information in question;
- ii. the extent to which the information is available to the public;
- iii. the possible cause for anxiety disclosure may cause;
- iv. whether disclosure would impair this agency's ability to obtain similar information in the future;
- v. the circumstances in which the VBA came to possess the information; and
- vi. the consequences of release, that is, there being no restrictions or limits to the dissemination of the information<sup>13</sup>

44 The owners did not bring a proceeding seeking a review of the VBA's decision of 7 March 2018 to refuse access to documents. I asked counsel for the owners why I might not consider their application before me as a 'backdoor' or alternative means of gaining access and use of the documents in question.

45 The owners submit it is important to distinguish the effect of a *freedom of information* release of information from the more limited effect of the orders sought in the application before me. As set out at point *vi* in the above excerpt from the VBA's 7 March 2018 letter, one of the VBA's considerations was the fact that a *freedom of information* release would carry no restrictions or limitations as to the dissemination of the information in the documents. In contrast, the use and dissemination of the information in the documents, upon a release from the Harman undertaking, would be limited to the specific purposes outlined by the owners, or such other limitations as I might impose.

46 In my view, there may be little to distinguish the two avenues of release if the effect of either avenue is to put the information within the public domain.

47 However, whatever the owners' reasons for not pursuing a review of the VBA's decision to refuse the release of documentation, I am satisfied that there is nothing improper in bringing the application before me in respect of the Harman undertaking.

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<sup>13</sup> Page 3 of the letter under the heading 'section 33(1) FOI Act - Documents affecting personal privacy'

### **The purposes for which the release is sought**

- 48 The purposes for which the owners seek a release from the Harman undertaking in respect of the documents in question are set out in the proposed orders, produced above in these reasons. The documents are clearly relevant for these purposes.
- 49 The respondents say that the owners have no legal entitlement to take some of the potential proceedings, and that this is an important matter when considering whether a release from the Harman undertaking should be granted.
- 50 As to a potential review proceeding of the VBA's decision/s, whether an internal review (within the VBA) or a review proceeding in this Tribunal, the respondents say that the owners, together or individually, do not meet the definition of '*affected person*' which is a prerequisite to bringing such review proceeding.<sup>14</sup>
- 51 It is arguable as to whether the owners would meet such statutory criteria. However, in my view this is not a matter that I must determine in reaching a decision on the application before me. The owners seek a release from the Harman undertaking so that they may utilise the documents in question in pursuing a range of potential courses of action, including application to review the VBA's decision/s. In my view, the fact that it might be determined that the owners have no standing to bring a review application (and I make no finding on that) is not sufficient reason to refuse a release from the Harman undertaking.
- 52 The same can be said in respect of any potential judicial review of the VBA's decision/s. The respondents say that judicial review is not available to interfere with the VBA's discretionary decisions. Again, that is an arguable proposition, but in my view not reason enough to refuse the sought release from the Harman undertaking.
- 53 Ultimately, the question before me is whether there is special circumstance of sufficient gravity to override the private and public interest in protecting the confidentiality of the documents in question pursuant to the Harman undertaking. In my view, there is not.
- 54 There is currently no *other* proceeding on foot wherein there is risk that justice might be de-railed if the documents in question cannot be produced. There is currently no other proceeding at all.
- 55 The owners submit that the special circumstance lies in the fact that the potential proceedings, whether a review proceeding and/or a complaint to the Ombudsman or a member of Parliament, could not be pursued without

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<sup>14</sup> sections 184 – 186 of the *Building Act* 1993 make provisions for review proceedings and the requirement to be an '*affected person*' to have standing to bring such proceedings.

addressing the merits of the impugned decision/s in their entirety, including by reference to the material contained in the documents.<sup>15</sup>

- 56 While I accept that the documents would be relevant in the potential proceedings, I am not satisfied that the possible stultification of any of the potential proceedings, in the event the documents are not released, constitutes a special circumstance of sufficient gravity.
- 57 The owners do not shy away from the fact that it is their own dissatisfaction with the VBA's decision/s in respect of their complaints about Mr Brown that is driving their desire to pursue the potential proceedings. In my view, the owners' dissatisfaction does not, on its own, translate to a special feature or circumstance that outweighs the general public interest, together with the private interest of Mr Brown, in upholding the protection of the documents pursuant to the Harman undertaking.
- 58 The owners submit that the potential proceedings advance the broader public interest "*in ensuring that the VBA exercises its functions according to law and/or that it makes the correct or preferable decision on the material before it.*"<sup>16</sup>
- 59 I make no finding as to the correctness or otherwise of the VBA's decisions. That is not the issue before me.
- 60 Clearly, it is always arguable that there is a public interest in scrutinising the decisions provided by an administrative body in the course of carrying out its statutory functions. But in my view, in this case the public interest that might be served by any of the potential proceedings foreshadowed by the owners is outweighed by the public interest that is served in preserving the protection provided by the Harman undertaking. Or to put it another way, I am satisfied that the public interest is better served by preserving the protection provided by the Harman undertaking.
- 61 The owners have failed to persuade me that there are any "special circumstances" to warrant the sought release from the Harman undertaking.

## **CONCLUSION**

- 62 For the above reasons, I will dismiss the application. I will reserve costs with liberty to apply.

## **SENIOR MEMBER M. FARRELLY**

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<sup>15</sup> the owners' written submissions at paragraph 17.2

<sup>16</sup> Owners' submissions paragraph 17.3