VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST VCAT Reference No. R291/2011

CATCHWORDS

Building and Property List – retail tenancy – application to set aside order by consent – jurisdiction – implied and inherent power of Tribunal – *functus officio* – whether applicant appeared through Counsel whose suspension was stayed at relevant time – was applicant represented – conflict of interest in relation to respondent's Counsel – no power to set aside order – no jurisdiction in Tribunal – *Victorian Civil and Administrative Tribunal Act 1998* (Vic) sections 119 and 120.

APPLICANT	Big Apple Group Pty Ltd
RESPONDENT	Melbourne City Council
WHERE HELD	Melbourne
BEFORE	Senior Member Robert Davis
HEARING TYPE	Hearing
DATES OF HEARING	19 June 2018 & 22 August 2018
DATE OF ORDER	3 September 2018
CITATION	Big Apple Group Pty Ltd v Melbourne City Council (Building and Property) [2018] VCAT 1323

ORDER

1 The answer to the preliminary question: "*Does the Tribunal have jurisdiction in this proceeding to determine whether the consent orders made on 23 January 2013 should be set aside?* – No.

2 The applicant's application dated 16 January 2018 is dismissed for want of jurisdiction.

3 Costs reserved.

Robert Davis
Senior Member

APPEARANCES

For Applicant:	Mr B. Mako'ochieng, Director, in person
For Respondent:	Ms L. Papaelia of Counsel

REASONS FOR DECISION

1 The Applicant has made an application to set aside orders made by consent in this Tribunal, by Senior Member Walker on 23 January 2013, wherein it was ordered:

> 1. "The applicant's claim is dismissed.
> 2. The respondent's counterclaim is dismissed.
> 3. No order as to costs, including reserved costs."

2 The hearing before me, is in relation to a claim by the respondent, that this Tribunal does not have jurisdiction to determine whether the consent orders made on 23 January 2013 should be set aside

The Relevant Facts

3 The applicant, Big Apple Group Pty Ltd, commenced proceedings in 2011. The applicant was a tenant and the respondent, being Melbourne City Council, was the landlord. The respondent filed a defence and counterclaim in the proceeding.

4 The hearing of this proceeding, before Senior Member Walker, was stood down so the parties could have a chance to mediate their differences.

5 The applicant was represented by one Matthew Stirling, who represented himself to be a member of Counsel. The applicant, at the outset of the hearing before me maintained, that Mr Stirling's right to practise had been suspended for misconduct at the relevant time. However, on the second day of hearing the applicant conceded that the order suspending Mr Stirling's practising certificate had been stayed at the relevant time. The respondent was also represented. It is also noted, that Mr Mako'ochieng, the applicant's director, was present at the mediation and the hearing.

6 As a result of the mediation, the parties entered into a Deed of Settlement (the **deed**) and consented to the orders which were made on 23 January 2013, which I have outlined above. The deed inter-alia provided that in exchange to the applicant agreeing to settle its claim against the respondent, the respondent would grant authority to the applicant to relocate to alternative licensed premises in the area, with the late-night on premises liquor licence attached to the premises, which the applicant was required to have in order to operate its late-night licensed premises.

7 At the time of the execution of the deed, there was a moratorium on granting planning permits for licensed premises with trading hours after 1.00 am. The moratorium extended to granting variation or relocation of late-night liquor licenses.

8 Further, by the deed of the terms of settlement, the respondent was entitled to remain in possession of the premises for approximately 1.5 years.

9 Subsequently, in June of 2014, after the 1.5-year period had passed, the respondent re-entered the premises.

10 In a proceeding different to the present, on 9 July 2014 the applicant made an application to the Tribunal for an urgent injunction, claiming that the terms of settlement should be set aside. The applicant claimed that the terms of settlement should be set aside because it would not have entered into them if it had known that there was a moratorium on issuing liquor licences after 1:00am. The Tribunal found that the applicant did not have a prima facie case and the injunction was denied.

11 In January 2018, 3.5 years after vacating the premises, the applicant issued the current application in the original proceedings, seeking to set aside the consent orders of 23 January 2013.

12 The applicant submitted that the Tribunal has power to re-open the proceeding and set the order of 23 January 2013 aside because of the following:

(a) First, to ensure that the Tribunal's procedures do not effect injustice.

(b) Secondly, those which are authorized by statute, in particular, section 119 and section 120 of the *Victorian Civil and Administrative Tribunal Act 1998* (Vic). That is, section 119 allows the re-opening of proceedings for clerical error and mistake and section 120 allows the review of a proceeding where a party has not appeared. It is said by the applicant that it did not appear in this proceeding because Mr Stirling was not able to practise as a barrister at that time because he had been suspended (however, the applicant conceded on the second day of hearing that the suspension was stayed at the relevant time).

(c) Thirdly, that the judgement was obtained by fraud, misleading and deceptive conduct or by agreement which was void or voidable. That is, there was alleged fraud on behalf of the respondent because it represented to the applicant that it could transfer its liquor licence to other premises. It is further alleged that there was third party fraud because Mr Stirling was not permitted to practise. However, it is clear that the VCAT order suspending Mr Stirling from practice was stayed at the time the consent orders were made in this proceeding and therefore Mr Stirling was entitled to practise. It is further alleged, that there was also third-party fraud because Mr Robert Hay of Counsel, who represented the respondent at the hearing, had discussions about the proceeding at an earlier time. Apparently, Mr Hay was asked if he would appear in the proceeding and he requested material from the applicant; which material was never supplied.

13 The respondent submitted that this proceeding should be struck out because:

(a) The Tribunal is *functus oficio* having made final orders on 23 January 2013.

(b) *The statutory exceptions of section 119 and 120 of the Victorian Civil and Administrative Tribunal Act 1998* (Vic) do not apply in this situation because there was no clerical mistake or error or/and the applicant was in fact represented and appeared at the hearing, by Mr Stirling, and that the applicant's director was also present at the hearing.

(c) Thirdly, the respondent says that the Tribunal has no inherent jurisdiction that is possessed by superior courts to set aside its own consent orders on the ground of fraud, or any other ground, that invalidates the underlying agreement. It also denies that there is a distinction that is relevant to this proceeding of implied or inherent powers as was submitted by the applicant.

(d) Finally, it was submitted that even if there was a jurisdictional error in the consent orders, they were still valid until set aside by a court.

Functus officio

14 The Tribunal becomes *functus officio* once it has made an order finally determining a proceeding or once the order has been authenticated.

Implied and Inherent Power

15 Mr Mako'ochieng, for the applicant, acknowledged that the Tribunal did not have an inherent power to set aside orders; but, said that there was an implied power which allowed the orders to be set aside. He based the distinction between inherent and implied powers on a decision of the New South Wales Court of Appeal in *Logwon Pty Ltd v Warringah Shire Council* (1993) 33 NSWLR 13. In particular, Mr Mako'ochieng relied on the decision of Kirby P, the relevant part of which decision was different and contrary to the decision of the plurality of the court.

16 In coming to the conclusion that there was a distinction between implied and inherent power, the president decision came from the obiter dicta of the High Court and he acknowledged as much. At page 16 he stated: *"I acknowledge that in some of the dicta of the High Court of Australia, the distinction I would uphold has not been consistently followed."*

17 The President of the New South Wales Court of Appeal then traced the inherent powers arising directly or indirectly from the charter of the court. That is, the New South Wales Land and Environment Court. At page 17, the president stated:

> To the express powers conferred by such statutes are added a wide penumbrum of powers implied both in the language of the relevant statutes and derived from the nature and purposes of the court as a court. Beyond that, however I would not go.

18 Bearing in mind, that the decision of Kirby P was contrary to the plurality of the court, I am of the view, that for the purposes of this proceeding in VCAT, the implied power is the opposite side of the coin to inherent power.

19 There is no question that superior courts, such as the Supreme Court, have power to set aside their own consent orders on the ground of fraud or upon any ground that invalidates the underlying agreement. However, the position is somewhat different in a Tribunal such as VCAT which is entirely a creature of statute. That the Tribunal has exclusive power under the *Retail Leases Act 2003* and the *Australian Consumer Law and Fair Trading Act 2012* does not give the Tribunal power to set aside its own orders.

20 In *Logwon's* case, an application had been made to the Land Environment Court to set aside consent orders on the ground of mistake. The Land Environment Court dismissed the application and an appeal was instituted to the Court of Appeal in New South Wales. The Court of Appeal held that the Land Environment Court was a superior court (of limited jurisdiction, and therefore that it had inherent jurisdiction to discharge or revoke consent orders). At page 30 the plurality of the court held:

> A superior court's inherent jurisdiction to uphold, protect and fulfil its function by ensuring that justice is administered according to law and in an effective manner … enables it in the absence of statutory limitation to discharge or revoke a consent order made by it giving effect to a compromise of proceedings before the court and entered into by a party under a mistake.

21 In *McVey v St Vincents Hospital* (2005 VSCA 233), the Court of Appeal was dealing with a situation of whether consent orders signed by a guardian to settle County Court proceedings could be set aside. In the course of their Honours' judgment at [43] it was stated,

> Say, for limited purposes, it may be doubted that a judge of the county court, an inferior statutory court, would have power to set aside a perfected judgment of the court. The only remedy would be by way of appeal to the court of appeal, and that is the course which the applicant has attempted to pursue. An appellant court has power '*to strike off the fetters*', which might restrain an inferior court from setting aside the judgement entered pursuant to a consent agreement.

22 This position was confirmed by Steele SM in *Fishlock v State of Victoria* final order has been authenticated (2016) VCAT 1214. In that proceeding the applicant sought to set aside consent orders on the basis that her husband, who signed the consent orders on her behalf, did not have authority to do so. Like the present case, the applicant brought the application to set aside the consent orders in proceedings in which the consent orders were made. The Senior Member held that VCAT did not have power to declare the orders invalid. She stated at [8] - [10]:

> The applicant contends that the Tribunal's orders of 21 May 2015 are invalid because Mr Fishlock did not have her power of attorney to sign the proposed consent orders on her behalf. In my view, I have no

power to declare the orders of 21 May 2015 to be invalid. The Tribunal made a final order on 21 May 2015, subject to the provisions in that order for seeking reinstatement. By making a final order on 21 May 2015, the Tribunal fulfilled its function in this proceeding. Except for the possibility of reinstatement set out in order 9 of that day (or perhaps if all parties consented to an order), VCAT has no power to make further substantive orders in this proceeding.

In the Courts, a consent judgement giving effect to a settlement agreement; "may only be set aside on grounds which would justify setting aside the contractual agreement upon which the settlement for compliance was based…".

The parties' submissions did not address this issue, but I consider VCAT does not have power to set aside a final order for invalidity in the proceeding in which that order was made. I am not aware that VCAT has ever considered it has inherent jurisdiction to set aside its own orders, in separate proceedings either.

23 Thus, taking these matters into account, I consider that the Tribunal has no inherent or implied power to set aside properly-perfected consent orders as were made in this case as it is *functus officio*.

24 In *Willner v City of Melbourne* [2016] VCAT 154, the President, Garde J, at [9] – [10] stated as follows:

> [9] This proceeding is a review proceeding initiated under the FOI Act, seeking access to CCTV footage. On 20 October 2015, the Tribunal made a final order disposing of the proceeding by affirming the decision under review.
>
> [10] I am satisfied that the Tribunal is *functus officio*, having made and perfected an order disposing of the proceeding. It is well established that the Tribunal is *functus officio* when it has made a final determination in a proceeding and a final order has been authenticated. As a result, the Tribunal does not have jurisdiction or power to make the declaratory orders now sought by the applicant.

25 In similar vein, Deputy President Macnamara (as he then was) in *Hill v Baylite Homes* [2000] VCAT 1860 at [12] explained that *functus officio* meant that:

> [12] This is an application of a doctrine which is summed up by a Latin phrase *"functus officio"*. What it means is that once the Tribunal has decided a matter once and concluded the proceeding, it cannot go back and do it a second time, or modify one that is already done…

26 Mr Mako'ochieng relied on the decision of Deputy President Gibson in *Canaan Holdings Pty Ltd v Whitehorse City Council* [2015] VCAT 1608 and, in particular, paragraphs [15] and [16]. I did not find that decision

helpful, as that case was referring to a Planning Scheme which the Whitehorse City Council had adopted. And the question before the Tribunal was whether the Council could revoke an Amendment to the Planning Scheme. The matter before the Deputy President had nothing to do with the powers of the Tribunal to set aside a perfected order of the Tribunal.

27 Thus in the present case, the order made on 23 January 2013 was made and authenticated by the consent of the parties dismissing the claim and counterclaim. This is a final determination of the proceedings (see *Tanska v Transport Accident Commission* [2000] VSC 56 at [16]). Thus, subject to any exceptions that may apply, upon the making of the consent orders, the Tribunal became *functus officio*.

Fraud, misleading and/or deceptive conduct

28 The applicant alleged that the Tribunal has jurisdiction to re-open the proceedings after the consent order because it was induced into agreeing to the consent order because of fraud and/or misleading and deceptive conduct on the part of the respondent. The applicant said that the respondent knew that there was a moratorium on all-night liquor licenses and the promise by the respondent to transfer the liquor licence was made fraudulently because any transfer of licence would result in the applicant not being able to trade from other premises after 1.00 am in the morning. The Council were well aware of these restrictions and as a consequence, the Deed of Settlement, which accompanied the consent orders, was procured by fraud and/or misleading and deceptive conduct. He also referred to the fact that Tribunal had exclusive jurisdiction in retail tenancy matters and in matters concerning the *Australian Consumer Law and Fair Trading Act 2012* law.

29 Mr Mako'ochieng referred to the High Court decision in *Clone Pty Ltd v Players Pty Ltd (In Liquidation) (Receivers & Managers Appointed)* [2018] HCA 12 at [2] the Court stated:

> Firstly, the general power of a court to set aside its perfected judgment requires actual fraud, although there are other discrete grounds to set aside a perfected judgment… Secondly, it is not a precondition to the exercise of the power that the party seeking to set aside the judgment exercised reasonable diligence to attempt to discover the fraud during the earlier proceedings.

30 Mr Mako'ochieng then stated that for the purposes of the *Retail Leases Act* and *Australian Consumer Law and Fair Trading Act 2012,* VCAT was a court and as such there was jurisdiction to set aside an order on the grounds of fraud.

31 The difficulty with Mr Mako'ochieng's submission was that while VCAT acts judicially and in particular in relation to the statute law that he referred to, it is still not a court. And not a court within the meaning of what the High Court was referring to in *Clone*'s case.

32 The only power that the Tribunal has to set aside its own orders is that provided by the *Victorian Civil and Administrative Tribunal Act 1998* (**VCAT Act**) or any enabling enactment. Apart from sections 119 and 120 of the VCAT Act, which I will deal with below, the Tribunal does not have power to set aside its orders. Mr Mako'ochieng referred to *Brimbank Lifestyle Properties v Ready Retail Holdings Pty Ltd* [2016] VCAT 2148 as authority for the proposition that VCAT could set aside its own orders. However, the *Brimbank* case had nothing to do with setting aside orders, it was in relation to enforcement of terms of settlement. The landlord in that case sought repudiation of the terms of settlement. The issue before the Tribunal, was whether the terms of settlement had been repudiated.

33 Thus, this Tribunal does not have power to set aside these orders on the grounds of fraud, or deceptive and misleading conduct as alleged by the applicant.

34 Ms Papaelia of Counsel, for the respondent, made it clear that the matter before me was very different from a matter to do with an application pursuant to section 75 of the VCAT Act. For a section 75 application, the applicant to the proceedings only needs to show that on its evidence, it could succeed in the proceeding. Put differently, the respondent must show that the applicant's case is about to fail. This proceeding before me, is a question of jurisdiction and the Tribunal is not given power save and except for sections 119 and 120 of the VCAT Act to set aside or alter its orders.

35 I believe it is necessary for me to emphasize, before leaving this point, that because the Tribunal does have original and exclusive jurisdiction in retail tenancy matters and exclusive jurisdiction in some matters concerning Australian Consumer Law, that does not give the Tribunal power to set aside consent orders which have been properly made and authenticated.

Issue of Conflict of Interest relating to the Respondent's Counsel

36 Mr Mako'ochieng submitted, that as he had spoken to Mr Hay previously about his problem with the respondent, that Mr Hay had a conflict of interest and therefore that was equivalent to fraud. I note, that at no stage during the proceedings or the consent orders in January of 2013, did the applicant through its Counsel raise the question of Mr Hay's conflict of interest. Mr Mako'ochieng informed me that he had forgotten at that time that he had spoken to Mr Hay because he had spoken to 5 – 8 members of Counsel about the matter. Therefore he did not instruct Mr Stirling on that issue. In this particular instance, there is no suggestion that Mr Hay used any information that was given to him in a confidential manner to help the respondent or against the applicant. If a question of a conflict of interest was to be raised, it should have been raised at the hearing in January 2013. It was not. Even though Mr Mako'ochieng, who was the director of the applicant, was present at the time, knew that he had spoken to Mr Hay (I accept he may not have remembered the same). In my view, it makes no

difference as to whether he remembered it or not. Mr Hay was never given a retainer in this proceeding.

Statutory Provisions sections 119 and 120 of the VCAT Act

37 Mr Mako'ochieng submitted that section 119 of the VCAT Act applied in this situation, because there was a mistake in the orders in the sense that the orders were brought about by fraud in the way that I have outlined above.

38 In my view, it cannot be said that such matters constitute a clerical error or mistake, or an error arising from an accidental slip, or omission, or a material miscalculation. The Tribunal at all times objectively intended to make the orders that it made on the 23 of January 2013, and it made such orders with the consent of the parties. That is what the Tribunal intended to do and in fact did, therefore the section 119 exception does not apply.

39 In relation to the exception provided in section 120 of the VCAT Act, in order to open the "gateway" to that section it is necessary that the party did not appear or was not represented at the hearing. Mr Mako'ochieng submitted, that as the Tribunal decision was induced or affected by fraud, it was equivalent to non-appearance by Mr Stirling as Mr Stirling did not disclose he had been found guilty of misconduct. That is, he said Mr Stirling did not have authorisation to appear because his registration was suspended even though the suspension was stayed as to the finding of misconduct and, as such, the applicant did not appear when the consent orders were made. He further states that the fact that he was present at the time makes no difference because he was not "appearing" in the legal sense of the word even though he was present.

40 The applicant relied on *SZFDE v Minister for Immigration and Citizenship* [2007] HCA 35. In that case the ground upon which the appellant sought relief in the Federal Magistrates' Court was that the decision of the Tribunal was induced or affected by the fraud of Mr Fahmi Hussain. In that case, a couple failed to appear at an Immigration Tribunal hearing on the advice of Mr Fahmi Hussain who was said to have represented himself to the appellants as a solicitor and/or a migration agent. This was said to be jurisdictional error because the Tribunal, while making its decision blamelessly, had acted pursuant to a process compromised "by third party fraud". That is, the fraud was perpetrated upon the Tribunal as well as the appellants. Thus, the High Court held that the jurisdiction of the Tribunal remained unexercised and mandamus and certiorari were appropriately ordered. The High Court at [7] stated:

> For the reasons that follow there was in this case fraud in the necessary sense which was perpetrated "on" the Tribunal, as well as upon the appellants. The result was that, in law, the jurisdiction of the Tribunal remained unexercised…

41 This present case is somewhat different to the SZFDME case. In the present case, not only was Mr Mako'ochieng present at the Tribunal, but Mr Stirling appeared as counsel for the applicant.

42 Section 62 of the VCAT Act sets out those that may appear for parties. A disbarred legal practitioner, is precluded from appearing for the parties by reason of Regulation 4.5 of the *VCAT Rules*, however that rule does not apply because Mr Stirling's suspension was stayed.

43 In any event, Mr Mako'ochieng was at the Tribunal and knew precisely what was going on at the time.

44 The word "appear" in section 120 in my view has a broad definition to being present at the hearing. The idea of section 120 is to give those that were not present at the hearing a chance for a review. However, those that were present at the hearing should have no such chance. The words, "the order if a person did not appear and was not represented at the hearing at which the order was made" clearly, in my view, is to be interpreted that the relevant people were present at the time of the hearing and were able to state a case in support of their position. In Pizer's Annotated VCAT Act (6th Ed.) at [120.40] it is stated:

> It follows that a person cannot make an application under section 120 if they attended the "hearing" at which the order was made (either personally or through a representative)": *Koromilas v Housing Guarantee Fund Ltd* [2004] VCAT 2184 at [14]. There are numerous cases in which an application under section 120 has failed because the applicant attended the relevant hearing. For one example, see *Zolis v Vero Insurance Ltd* (2004) 21 VAR 497.

45 Thus, in my view, neither of the statutory exceptions in section 119 or section 120 of the VCAT Act have any application in this proceeding.

Jurisdictional error

46 The applicant maintains, that the orders are invalid due to a jurisdictional error. It says that the jurisdictional error arose because of the fraud in relation to the situation with Mr Stirling who had not disclosed the finding of misconduct, the fact that Mr Hay had privileged knowledge in relation to the applicant and the fact that the applicant was deceived about its ability to move its liquor licence.

47 I have already dealt with the ability of this Tribunal to set aside its own orders and I do not need to repeat what I have said there. Once an order has been perfected, the order can only be set aside by the court pursuant to the appeal process referred to in section 148 of the VCAT Act (save for the statutory exceptions to which I have referred).

48 In *Minister for Immigration and Multicultural Affairs v Bhardwaj* [2002] 209 CLR 597, the Minister revoked a student visa. When the matter came before the Tribunal, Mr Bhardwaj sent a fax to the Tribunal seeking that the

hearing be adjourned. The Tribunal pursuant to the relevant Act was bound to give an oral hearing. Unfortunately, it did not receive the fax and thus proceeded to the hearing. The decision was overturned by judicial review and the High Court held that Mr Bhardwaj had not received a fair hearing.

49 However, the situation in the present case is different. In the *Bhardwaj* case, the decision was an administrative review while in this particular instance, it is in the civil arm of this Tribunal. Further, in that case, the court had the power to review the first decision upon the Minister seeking review and the second decision because it was collaterally challenged in that review. This was different from the present case, where it is sought that the Tribunal deal with a review of a civil case.

50 It is clear from the decision of the High Court in the *Bhardwaj* case that the Tribunal in that case was exercising its administrative jurisdiction which was not incidental but indeed central to the High Court's conclusion. Gaudron and Gummow JJ (with whom McHugh J agreed) held:

> [50] …only if the general law so requires or the [*Migration*] *Act* impliedly so directs, are [administrative] decisions involving jurisdictional error to be treated as effective unless and until set aside…
>
> [51] There is, in our view, no reason in principle why the general law should treat administrative decisions involving jurisdictional error as binding or having legal effect unless and until set aside. A decision that involves jurisdictional error is a decision that lacks legal foundation and is properly regarded, in law, as no decision…
>
> [54] There being no provision of the [*Migration*] *Act* which, in terms, purports to give any legal effect to decisions of the Tribunal which involve jurisdictional error, as did the September decision [first decision], it is necessary to consider whether, nevertheless, the [*Migration*] *Act* which might impliedly have that effect…
>
> [60] It is impossible to impute such an intention to the Parliament.

51 The above passage makes it clear, not only that the principle enunciated by the High Court only applies to administrative decisions, but also the ability of administrative decision-maker to remake and reconsider a decision depends upon whether the applicable legislation, expressly or impliedly, requires the decision involving jurisdictional error to be given legal effect. In *Bhardwaj*, the High Court found that the *Migration Act* did not expressly or impliedly require that decisions involving jurisdictional error were to be given legal effect.

52 The applicant also relied on *Mercier Rouse Street Pty Ltd v Burness* [2015] VSCA 8. In that particular case, Mr O'Bryan applied to VCAT for specific performance. VCAT did not order specific performance but ordered the

value of the property to which Mr O'Bryan was seeking specific performance in the sum of $1.2 million.

53 The company to which Mr O'Bryan was seeking redress went into liquidation, and the liquidator sought directions, as to whether Mr O'Bryan had any proprietary interest in the property or merely a judgement debt. Proceedings were commenced in the Federal Court. Mr O'Bryan made a counterclaim in the Federal Court seeking that the property to which he sought to be transferred be transferred. The company opposed Mr O'Bryan's order and said the proceeding had already been determined by VCAT.

54 Mr O'Bryan argued the VCAT decision was invalid because it failed to give procedural fairness. He said that his application to VCAT sought specific performance and not repayment of a debt.

55 The Court of Appeal upheld Mr O'Bryan's argument that there was a lack of procedural fairness. However, this was done on the basis of a collateral review which is different from the current situation. At [193] it was stated by the Court:

> Even if VCAT had jurisdiction to hear and determine the O'Bryans' application, the manner in which it purported to exercise that jurisdiction meant that it failed to do so. It failed to accord the O'Bryans procedural fairness.

56 Then at [197] – [210] the Court stated:

> In the present case, the departure from the rules of procedural fairness was egregious. It can hardly be doubted that, had Mrs O'Bryan applied to the Court to set aside the decision made in VCAT or appeal under section 148 of the VCAT Act, she would have been successful. Any contention that Mrs O'Bryan was estopped from seeking proprietary remedy in the present proceedings should be rejected.
>
> The decision of VCAT involved a jurisdictional error and as such, may be regarded as no decision at all. Nevertheless, in the absence of any application to set aside the decision, it appears that the order of VCAT remains capable of enforcement and, prima facie, affords the O'Bryans a right to a remedy in respect of their claim.
>
> I am satisfied that the notice of contention filed by the O'Bryans in this proceeding constitutes **a collateral challenge to the validity of VCAT decision** of the kind described by Hayne J in *Minister for Immigration and Multicultural Affairs v Bhardwaj* – indeed, it expressly asserts that the order was made without jurisdiction and invalid and had no legal effect. In the circumstances it is appropriate that this Court make a declaration confirming that the VCAT order is a nullity and is incapable of enforcement.
>
> Having determined that the VCAT decision is a nullity, any contention that it is an abuse of process by the O'Bryans to seek

> proprietary remedy in this proceeding cannot be sustained. **The O'Bryans are not seeking to litigate anew a case which has already been disposed of by an earlier proceeding. [***emphasis supplied*]

57 It is clear from this case that even where the Tribunal's decision is affected by a jurisdictional error, the decision of VCAT remains until it is set aside. The mechanism for setting aside an error by VCAT is pursuant to section 148 of the VCAT Act. It is also clear, that the Court of Appeal was able to make the decision it did because of a collateral attack on the decision. There is no such attack in this situation.

58 The case of the *Director of Housing v Sudi* [2011] VSCA 266 involved the VCAT Act, *Residential Tenancies Act* (the **RTA***)* and the *Charter of Human Rights* (the **Charter**). At [36], the Court of Appeal discussed the ability of VCAT to conduct inquiries. It there stated:

> But *Bhardwaj* is not an authority for the broad proposition that administrative tribunals can, in general, conduct inquiries into the validity of purported decisions of any administrative body if the decision happens to be material to the dispute before the tribunal. Rather, the extent of an administrative tribunal's ability, if any, to conduct such inquiries remains a question of construction of the relevant statutory provisions. The question is whether the provisions evince an intention that the tribunal should attach "some relevant legal consequence" to a purported decision of the kind in question, even if the decision is vitiated by jurisdictional error.
>
> Accordingly, to determine whether VCAT can carry out collateral review, it is necessary to interpret the relevant provisions of the RTA, the VCAT Act and the Charter.

59 The facts of the present case differ from both *Bhardwaj* and *Sudi*, in that in the present case, the applicant has requested the Tribunal in its civil jurisdiction to reconsider a decision of the Tribunal exercising its civil jurisdiction. Both *Bhardwaj* and *Sud*i, related to reconsideration of an administrative decision. Therefore, neither case is applicable in this situation.

60 I also agree with Ms Papaelia's submission, at paragraph 21 of her reply submission, where she states:

> Even if the decisions (*Bhardwa*j and *Sudi*) were applicable, it is evidence that the VCAT Act does not expressly or impliedly permit the Tribunal to conduct a collateral review of a decision of the Tribunal made in the exercise of its civil jurisdiction. The reasons, set out below, adopt, and adapt to the present case, the reasons given, and the language used, by Warren CJ in *Sudi* at [34] to [36]:
>
> (a) VCAT is a forum for the speedy and inexpensive resolution of specific kinds of dispute – a power to undertake collateral review would be wholly inconsistent with that purpose.

(b) In order to ascertain whether the consent order should be set aside, the Tribunal would in effect need to conduct a trial within a trial. It would need to leave the subject of retail leasing and enter the field of fraud, misrepresentation and jurisdictional error. A detour into these areas of law would be anomalous given that the Tribunal does not possess general civil jurisdiction but only has original jurisdiction in respect of specific kinds of disputes and claims. This would destroy the advantages of litigating before the Tribunal.

Conclusion

61 In this particular proceeding, I have already referred to the provisions of sections 119 and 120 of the VCAT Act and in interpreting those provisions in light of the situation before me, in my view VCAT does not have the right to review this decision.

62 As a result, I have determined that the application of the applicant dated 16 January 2018 should be dismissed. It necessarily follows that I answer the preliminary question: "*Does the Tribunal have jurisdiction in this proceeding to determine whether the consent orders made on 23 January 2013 should be set aside?* – No.

Robert Davis
Senior Member