VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

VCAT REFERENCE NO. D916/2006

DOMESTIC BUILDING LIST

CATCHWORDS

Victorian Civil and Administrative Tribunal Act 1998 – application for reconstitution of Tribunal – s.108.

APPLICANT:	Seachange Management Pty Ltd (ACN 091 443 211)
FIRST, FIFTH AND SIXTH RESPONDENTS:	Bevnol Constructions & Developments Pty Ltd (ACN 079 170 577), Bruce Jamieson, Louis Allain
SECOND RESPONDENT TO COUNTERCLAIM:	Giuseppe De Simone
WHERE HELD:	Melbourne
BEFORE:	Acting President Judge I J K Ross
HEARING TYPE:	Section 108 Application
DATE OF HEARING:	10 July 2008
DATE OF ORDER:	18 July 2008
CITATION:	Seachange Management Pty Ltd v Bevnol Constructions & Developments Pty Ltd & Ors (Domestic Building) [2008] VCAT 1479

ORDER

1. Pursuant to sub-sections 108(4) and (5) of the Victorian Civil and Administrative Tribunal Act 1998 I exercise my discretion to reconstitute the Tribunal constituted to hear and determine matter D916/2006.
2. The Tribunal now constituted to hear and determine matter D916/2006 will be Vice President Ross.

His Honour Judge I J K Ross
Acting President

APPEARANCES:

For Seachange Management Pty Ltd: Mr P.S. Lustig, Solicitor

For Bevnol; Jamieson and Allain:	Mr B. Reid, barrister
For Mr De Simone:	Mr De Simone, in person

REASONS FOR DECISION

Background

1 The substantive proceeding to which this application pertains concerns a dispute about the development of a retirement village at 177 Bonnyvale Road, Ocean Grove ('the site'). Seachange Management Pty Ltd ('Seachange') is the registered proprietor of the site and is in the property development business. Bevnol Constructions and Development Pty Ltd (Bevnol) is a builder. It is common ground that on or about 15 May 2006 Seachange and Bevnol entered into an agreement whereby Bevnol agreed to construct 11 units on the site for the sum of $1,809,827.80.

2 In its Amended Points of Claim[1] Seachange alleges, among other things, that the agreed works were not completed within the period specified in the contract and that the work undertaken by Bevnol was deficient in various respects. Seachange claims damages, interest and costs.

3 On 29 May 2007 Bevnol filed a counterclaim against, relevantly, Seachange and Mr Giuseppe De Simone (the second respondent to the counterclaim). The third and fourth respondents to the counterclaim are Paul Marc Custodians Pty Ltd (formerly Paul Marc Management Pty Ltd) and Martin Jurblum (a director of the third respondent). In its counterclaim Bevnol alleges, among other things:

- Seachange refused to pay in full the deposit required by the contract.
- On 18 December 2006 Bevnol served a notice of suspension on Seachange. Seachange failed to rectify the breach identified in the notice within the 7 days specified in the contract and on that basis Bevnol was entitled to suspend the contract.
- Between 8 December 2006 and 24 April 2007 Seachange breached express terms of the contract and by letter dated 24 April 2007 Bevnol accepted Seachange's repudiation and was thereby discharged from future performance of the contract.
- Bevnol claims loss and damages by reason of Seachange's wrongful termination of the contract.

4 Bevnol also alleges that the first (Seachange) and third respondents (Paul Marc Management Pty Ltd) engaged in conduct that was misleading or deceptive or likely to mislead or deceive in contravention of s.9 of the Fair Trading Act 1999 (the FTA). The misrepresentation is said to arise from a representation made by the first and third respondents that all necessary finance required by the contract had been obtained. It is alleged that the financial approval had not in fact been obtained and that the first and third respondents had no reasonable basis for belief in the accuracy of the representation made to Bevnol.

[1] Dated 31 May 2007

5 The claims made by Bevnol against Mr De Simone are made in the alternative and are set out at paragraphs 41 and 42 of the Counterclaim. It is alleged that Mr De Simone contravened s.9 of the Fair Trading Act pursuant to s.159 of that act by reason of:

> "(a) being involved in the contravention; and/or
>
> (b) contravened section 9 of the FTA; and/or
>
> (c) aided, abetted counselled or procured the contraventions; and/or
>
> (d) induced the contraventions."

6 Bevnol claims damages (pursuant to ss. 158 and/or 159 of the FTA), interest and costs against Mr De Simone.

7 This decision deals with the first of two interlocutory applications by Mr De Simone, namely that the Tribunal dealing with the substantive application by reconstituted pursuant to s.108(4) of the Victorian Civil and Administrative Tribunal Act 1998 (the VCAT Act) (the reconstitution application).

8 The second interlocutory application - that there be a partial or complete stay of Bevnol's counterclaim (the stay application) - is the subject of a separate proceeding.

The Reconstitution Application

9 Section 108 of the VCAT Act provides for the reconstitution of the Tribunal during the hearing of a proceeding. The substantive proceeding to which this application relates has been the subject of a number of interlocutory proceedings before a Senior Member.

10 On 13 May 2008 the Senior Member dismissed an application by Mr De Simone that he disqualify himself on the basis of perceived or actual bias. The Senior Member's reasons for decision were published on 19 June 2008. The background to the bias application is central to the application for reconstitution and I deal with it in more detail later.

11 Section 108(1) provides that at any time during the hearing of a proceeding a party may apply to the Tribunal requesting that it be reconstituted for the purposes of the proceeding. In this matter Mr De Simone's application to the Senior Member that he disqualify himself was, in effect, an application that the Tribunal be reconstituted. That application was rejected.

12 Section 108(4) provides that if the Tribunal rejects an application under subsection 108(1) for reconstitution a party may make a request to the President that the Tribunal be reconstituted. Mr De Simone has made such a request.

13 If a request is made to the President under subsection 108(4) the President may allow or reject the request for reconstitution, with or without allowing the parties to make written or oral submissions (s.108(5)).

14 I am determining Mr De Simone's application in the capacity of Acting President. In that capacity I have 'all the powers and must perform all the duties of the President' (s.26)(5)(a) of the VCAT Act).

15 I propose to make some brief observations about the nature of the discretion in s.108(5) before turning to the merits of Mr De Simone's application.

16 These issues have been discussed in a number of previous cases[2] and three things may be said about the nature of the power vested in the President under s.108(5):

1. It is a discretionary power.
2. The discretion is a broad discretion – the VCAT Act does not specify particular criteria to be taken into account nor does it impose limitations on the exercise of the discretion.
3. The power is designed for a wide range of circumstances.[3]

17 In relation to the last point Kellam J, in *Metrospan Developments Pty Ltd v Whitehorse City Council*[4] (Metrospan) said that the power might be used when a member of the Tribunal becomes ill or retires or their term expires. In *State of Victoria v Bradto Pty Ltd* (Bradto)[5] Morris J was of the view that a substantial purpose of the power is to deal with the circumstances in which the Tribunal constituted to hear and determine a proceeding is ill suited to the specialist task that actually arises in the case. His Honour gave an example in the planning field where a tribunal might be appointed consisting of a legal member and it may subsequently transpire that there are technical issues concerning traffic engineering or heritage that would be better determined by a member having that special skill.

18 The discretion should also be construed in its statutory context and may be exercised where necessary to ensure that the future conduct of the proceeding complies with the rules of natural justice. As Kellam J observed in *Metrospan*:

> "… the section gives a broad discretion to the President of the Tribunal to order reconstitution of the Tribunal for any proper means or any proper reason. In my opinion the section should be read in light of s 98 of the Act which sets out the general procedure by which the Tribunal is to be conducted. In my opinion it would be appropriate for me to order reconstitution if that was necessary to ensure that the proceeding would be heard in circumstances which complied with the rules of natural justice.

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[2] *See Metrospan Developments Pty Ltd v Whitehorse City Council* [2000] VCAT 44 per Kellam J; *Delaney v Pasunica Pty Ltd* (2001) 18 VAR 287 per Judge Strong; *Gabrielidis v Hobsons Bay City* [2004] VCAT 614 per Morris J; *Tomasevic v State of Victoria [*2005] VCAT 423 per Morris J; and *State of Victoria v Bradto Pty Ltd (Palace Entertainment Complex)* [2005] VCAT 2512 (29 November 2005) per Morris J.

[3] See *State of Victoria v Bradto Pty Ltd*, ibid at para [13]

[4] op cit

[5] op cit

> Indeed my opinion is that in appropriate circumstances it would be a proper exercise of discretion to reconstitute a Tribunal where there is merely a risk that there may be a compromise of the rules of natural justice. Likewise I consider a proper exercise of the discretion … could arise in circumstances where reconstitution was likely to achieve the objective required under s.98(d) of the Act."[6]

19 His Honour went on to observe that whatever the breadth of the discretion the power to reconstitute the Tribunal must be in accordance with a proper exercise of discretion. In this context his Honour said:

> "The section clearly cannot be used to achieve a de facto review or a de facto appeal of what has happened heretofore in the hearing. Neither is section 108 to be used to signify the disapproval of the President as to the manner of the conduct of the hearing by the member or members concerned. Indeed it cannot be used in any way to compromise the independence of the tribunal in question."[7]

20 In that context Justice Kellam observed that the power would be exercised rarely.

21 The exercise of the discretion to reconstitute in the context of an allegation of bias was also considered by Morris J in *Bradto*. That matter arose after Judge Bowman had rejected an application that the Tribunal be reconstituted on the basis of perceived bias. The unsuccessful applicant then sought the reconstitution of the Tribunal by the President.

22 In *Bradto* Morris J gave consideration to the approach to exercising the discretion in circumstances where the essential basis of the application is a matter that could be found on appeal to the Supreme Court. In this context his Honour said:

> "I think the appropriate principle that should guide me in the exercise of the discretion in section 108(5) of the Act in a natural justice context is that I should not exercise the discretion to reconstitute the tribunal unless there is an obvious and clear cut case that the future conduct of the proceeding would involve a breach of the principles of natural justice. I do not think that the relevant principle should be the same that would apply if I was sitting in the Supreme Court, or as a member of the Court of Appeal of the Supreme Court, in determining whether or not there had been a breach of natural justice. To adopt the latter as the principle would be, in effect, to substitute myself for, in this case, the Court of Appeal, which is neither appropriate nor within the legislative intent in relation to section 108(5)."[8]

23 The above statement conflicts to some extent with the observation of Kellam J in *Metrospan*. In *Metrospan* his Honour said that in appropriate circumstances it would be a proper exercise of discretion to reconstitute a

[6] op cit at paras [11] and [12]
[7] [2000] VCAT 44 at [13]
[8] [2005] VCAT 2512 at [18]

Tribunal where 'there is merely a risk that there may be a compromise of the rules of natural justice'.

24 The term "natural justice" in the context of administrative decision making has been essentially equated to an obligation to act fairly or to accord procedural fairness:[9] The requirements of natural justice or procedural fairness are not prescribed in a fixed body of rules. What is required in one case may be quite different from what is required in another[10].

25 As I have indicated the discretion is cast in broad terms and should be construed in its statutory context[11]. Section 108 appears in Division 7 of Part 4 of the VCAT Act. In the same Division sections 97, 98 and 99 speak, relevantly, of the Tribunal's obligations regarding the conduct of hearings. In particular the Tribunal:

- must act fairly and according to the substantial merits of the case in all proceedings (s 97);
- is bound by the rules of natural justice (s 98(1)(a));
- must conduct each proceeding with as little formality and technicality, and determine each proceeding with as much speed, as the requirements of this Act and the enabling enactment and a proper consideration of the matters before it permit (s 98(1)(a)); and
- must allow a party a reasonable opportunity to adduce evidence; question witnesses and to make submissions to the Tribunal (s 102(1)).

26 These obligations may be seen as incidents of a general duty on the Tribunal to ensure a fair hearing. The provision of a fair hearing is at the very heart of the Tribunal's obligations to the parties who appear before it. One element of that obligation which is particularly relevant in the circumstances of this case is the duty to provide assistance to litigants in person. I deal with the incidents of that duty later.

27 To what extent does the obligation to provide a fair hearing inform the exercise of the discretion under s 108?

28 In the matter before me the essence of Mr De Simone's submission in support of his application for reconstitution is based upon a concern that the future conduct of the proceeding before the Senior Member would involve a breach of natural justice. This submission is based on the proposition that the manner in which the Senior Member has conducted the proceedings to date gives rise to a reasonable apprehension of bias. The matters relied upon are matters that could be ventilated on appeal to the Supreme Court (see s 148 VCAT Act).

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[9] *Kioa v Minister for Immigration & Ethnic Affairs* [1985] 62 ALR 321 at 347 per Mason J
[10] *Russell v Duke of Norfolk* [1940] 1 All ER 109 at 118 per Tucker LJ and *Mobil Oil Australia Pty Ltd v Commissioner of Taxation (Cth)* (1963) 113 CLR 475 at 504 per Kitto J.
[11] *K & S Lake City Freighters Pty Ltd v Gordon & Gotch Ltd* (1985) 60 ALR 509 at 517 per Mason J; *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 381

29 In his affidavit filed in support of his application Mr De Simone confirmed that he will be appealing Senior Member Young's decision of 13 May 2008 for which written reasons were given on 19 June 2008. On 17 July 2008 the notice of appeal was lodged with the Supreme Court.

30 In *Bradto* Morris J said that the discretion to reconstitute the Tribunal in a natural justice context should not be exercised unless it was 'an obvious and clear cut case that the future conduct of the proceeding would involve a breach of the principles of natural justice'. The test formulated by his Honour clearly imposes a higher threshold on applications for reconstitution which are predicated on an apprehension that the Tribunal as constituted will not provide a fair hearing. I have already referred to the apparent conflict between his Honour's view and that expressed by Kellam J in *Metrospan*. I am not persuaded, with respect, that the restrictive approach to the exercise of the discretion postulated by Morris J is required by the terms the section itself or the statutory context in which it appears.

31 The test formulated by Morris J reflected his Honour's concern to ensure that the reconstitution of the Tribunal under s 108 not undermine the appeal process under s 148. But it seems to me that the two processes are conceptually quite different. An appeal may quash or vary decisions already made, as well as affecting the future conduct of a proceeding. Unlike an appeal, a decision to reconstitute the Tribunal only has prospective effect – it has no legal effect on decisions taken by the Tribunal as previously constituted. Seen in this way the powers exercised in each context are quite different.

32 The manner in which a proceeding has been conducted will no doubt inform the exercise of the reconstitution discretion, but under s 108(5) the President is not concerned with providing legal redress for past wrongs.

33 In my view if a party has a reasonable apprehension that they will not receive a fair hearing before the Tribunal as presently constituted then that will provide a proper basis for the exercise of the discretion to reconstitute the Tribunal.

34 The concept of a fair hearing is fundamental to the justice system[12]. The principle is applied not only to the judicial system but also to many other kinds of decision making and decision makers, including tribunal members[13].

35 In this context it is relevant to note that Mr De Simone is a litigant in person. Tribunal members are required to provide litigants in person with such assistance as is necessary to ensure that the proceedings are fair. This is an incident of the requirement to provide a fair hearing. I deal with this in more detail later.

[12] In *Ebner v The Official Trustee in Bankruptcy* (2000) 176 ALR 644 at 646 the joint judgment of Gleeson CJ, McHugh, Gummow and Hayne JJ described it in terms of an adversarial trial conducted by an independent and impartial tribunal.
[13] Ibid

36 The impartiality of the Tribunal is central to a fair hearing. It is in this context that the apprehension of bias principle becomes relevant. Bias, whether actual or apprehended, connotes the absence of impartiality.

37 Applied to Tribunal members the governing principle is that a member is disqualified if a fair minded observer might reasonably apprehend that the member might not bring an impartial mind to the resolution of the question that the member is required to decide. The principle gives effect to the requirement that justice should both be done and be seen to be done[14].

38 Three things should be noted about the application of the apprehended bias principle.

39 First, the contemporary test – that the member might not bring an impartial mind to the resolution of a question – requires no prediction about how the member will in fact approach the matter. As observed by the joint judgment in *Ebner v The Official Trustee in Bankruptcy*:

> "The question is one of possibility (real not remote), not probability."

40 The contemporary formulation of the principle was adopted by the High Court in *Livesey v New South Wales Bar Association* (*Livesey)*[15]. Prior to this time the test had been expressed in terms of the existence of 'a high probability … of a bias inconsistent with the fair performance of his duties'[16].

41 The second point to observe is that the principle is formulated in terms of what a fair minded observer might reasonably apprehend. Different formulae have been adopted. Phrases that have been used include the 'lay observer'[17], 'fair minded observer'[18], 'fair minded lay observer'[19], 'fair minded people'[20], 'reasonable or fair minded observer'[21], 'reasonable and intelligent man'[22], the 'parties or the public'[23], and 'a reasonable person'[24]. But whatever expression is used it is postulated to make it clear that the test is objective. Further, as Kirby J observed in *Johnson v Johnson*:

> "… all that is involved in these formulae is a reminder to the adjudicator that, in deciding whether there is an apprehension of bias, it is necessary to consider the impression which the same facts might

[14] *Ebner*, joint judgment p 647; *Re Finance Sector Union of Australia Ex parte Illaton Pty Ltd* (1992) 107 ALR 581
[15] (1983) 151 CLR 288 at 293-294
[16] See *R v Australian Stevedoring Industry Board; Ex parte Melbourne Stevedoring Co. Pty Ltd* (1953) 88 CLR 100 at 116
[17] *Vakauta v Kelly* (1989) 167 CLR 568 at 573, 574
[18] *Livesey* (1983) 151 CLR 288 at 300; *Laws v Australian Broadcasting Tribunal* (1990) 170 CLR 70 at 87
[19] *Laws v Australian Broadcasting Tribunal* (1990) 170 CLR 70 at 92
[20] *R v Watson; Ex parte Armstrong* (Watson) (1976) 136 CLR 248 at 263
[21] *Vakauta v Kelly* (1989) 167 CLR 568 at 585
[22] Watson (1976) 136 CLR 248 at 267
[23] *Re Media Entertainment Arts Alliance and Theatre Managers' Association; Ex parte Hoyts Corporation Pty Ltd* (1994) 199 ALR 206 at 210
[24] *Vakauta v Kelly* (1989) 167 CLR 568 at 576

> reasonably have upon the parties and the public. It is their confidence that must be won and maintained."[25]

42 As to the attributes of the fictitious fair minded observer his Honour observed:

> "Such a person is not a lawyer. Yet neither is he or she a person wholly uninformed and uninstructed about the law in general or the issue to be decided … Acting reasonably, the fictitious bystander would not reach a hasty conclusion based on the appearance evoked by an isolated episode of temper or remarks to the parties or their representatives, which was taken out of context. Finally, a reasonable member of the public is neither complacent nor unduly sensitive or suspicious."[26]

43 The third observation is that the reasonableness of any suggested apprehension of bias is to be considered in context. In *Livesey* the High Court said '… each case must be determined by reference to its particular circumstances'[27]. In this regard it is relevant to note that Tribunal members, responding to the need for more active case management, routinely intervene in the conduct of cases to a degree not contemplated in times past. These contemporary features of the Tribunal's work impact on the way in which apprehended bias is approached in practice[28].

44 As the joint judgment in *Johnson v Johnson* observed:

> "… the reasonableness of any suggested apprehension of bias is to be considered in the context of ordinary judicial practice. The rules and conventions governing such practice are not frozen in time. They develop to take account of the exigencies of modern litigation. Judges … who, in exchanges with counsel, express tentative views which reflect a certain tendency of mind, are not on that account alone to be taken to indicate prejudgment. Judges are not expected to wait until the end of a case before they start thinking about the issues, or to sit mute while evidence is advanced and arguments are presented. On the contrary, they will often form tentative opinions on matters in issue, and counsel are usually assisted by hearing those opinions, and being given an opportunity to deal with them."[29]

45 In the same case Kirby J said:

> "The bystander must also now be taken to have at least in a very general way, some knowledge of the fact that an adjudicator may properly adopt reasonable efforts to confine proceedings within reasonable limits and to ensure that time is not wasted."[30]

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[25] Insert ref [52]
[26] Ibid at [53]
[27] (1983) 151 CLR 288 at 299 - 300
[28] See *Magazzu v Business Licensing Authority* (2000) 17 VAR 264; *Delaney v Pasunica Pty Ltd* (2001) 18 VAR 287
[29] [13]
[30] Ibid

46 However intervention can be excessive and should not be such as to deprive a party of the opportunity to put their case coherently and in the manner in which they wish to put it[31].

47 It is also important to observe that members ought not accede too readily to apprehended bias applications. As the High Court observed in *Re JRL Ex parte CJL*:

> "… Although it is important that justice must be seen to be done, it is equally important that judicial officers discharge their duties as set out and do not, by acceding too readily to suggestions of appearance of bias, encourage parties to believe that they 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."[32]

48 The basis for disqualification is not merely that the member's past decisions, on questions of fact or law, might lead to a reasonable expectation that she or he will decide the case adversely to one of the parties[33].

49 I now turn to the merits of the application before me.

50 The essence of Mr De Simone's application is based on what is said to be a reasonable apprehension that he will not receive a fair hearing. It is submitted that he has a reasonable apprehension that the Senior Member will not deal impartially with matters affecting Mr De Simone's interests. The apprehended bias argument is put in the context of Mr De Simone's concern that the Senior Member will not provide him, as a litigant in person, with the assistance necessary to ensure that he receives a fair hearing.

51 I propose to deal with the Tribunal's obligations to litigants in person before turning to the apprehended bias point.

The Tribunal's obligations to litigants in person

52 As part of their overriding obligation to ensure a fair trial, judges have a positive duty to give proper assistance to litigants in person, both in criminal[34] and civil[35] trials and also in interlocutory proceedings[36]. The

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[31] Re Keeley; Ex parte Ansett Transport Industries (Operations) Pty Ltd, High Court special leave application before Dawson J 25 June 1990, (1990) 94 ALR 1 at 10

[32] [1986] 161 CLR 342 at 352

[33] *Re Finance Sector Union of Australia Ex parte Illaton Pty Ltd* (1992) 107 ALR 581 at 583

[34] *MacPherson v R* (1981) 147 CLR 512, 524, 534, 546-547; *Dietrich v R* (1992) CLR 292, 327; *R v White* (2003) 7 VR 442, 453-458; *Pezos v Police* [2005] SASC 500; (2005) 94 SASR 154, 159-160; *R v Kerbatieh* [2005] VSCA 194; (2005) 155 A Crim R 367, 379-380; *R v Rostom* [2007] SASC 210, [35]-[43]; *Tomasevic v Travaglini* [2007] VSC 337

[35] *Abram v Bank of New Zealand* (1996) ATPR ¶41-507, 42,341, 42,347; *Rajski v Scitec Corporation Pty Ltd* (New South Wales Court of Appeal, 16 June 1986, unreported (the relevant passages from the judgment are set out in *Re Morton; Ex parte Mitchell Products Pty Ltd* [1996] 828 FCA 1; (1996) 21 ACSR 497, 513-514); *Andrew Garrett Wines Resorts Pty Ltd v National Australia Bank Ltd* [2006] SASC 381, [54]; *Uszok v Henley Properties (NSW) Pty Ltd*[2007] NSWCA 31, [148]-[157] per Beazley JA, Basten JA concurring and Bryson JA dissenting; *Barghouthi v Transfield Pty Ltd* [2002] FCA 666;

same duty applies to tribunals[37], but the application of the duty must take into account the particular institutional framework. These general principles have been reinforced by the enactment of the Charter of Human Rights and Responsibilities Act 2006[38].

53 The scope of the duty is discussed in *Abram v Bank of New Zealand*[39], in which the Full Court of the Federal Court observed:

> "What a judge must do to assist a litigant in person depends on the litigant, the nature of the case, and the litigant's intelligence and understanding of the case[40]."

54 Their Honours referred to the finding of the trial judge that Mr Abram was a quick and intelligent man and decided that he needed no more assistance than what the judge provided.

55 The degree of assistance which must be afforded depends on the context. As Bell J observed in *Tomasevic v Travaglini and anor*:

> "The matters regarding which the judge must assist a self-represented litigant are not limited, for the judge must give such assistance as is necessary to ensure a fair trial. The proper scope of the assistance depends on the particular litigant and the nature of the case. The touchstones are fairness and balance. The assistance may extend to issues concerning substantive legal rights as well as to issues concerning the procedure that will be followed …
>
> The judge cannot become the advocate of the self-represented litigant, for the role of the judge is fundamentally different to that of an advocate. Further, the judge must maintain the reality and appearance of judicial neutrality at all times and to all parties, represented and self-represented. The assistance must be proportionate in the circumstances – it must ensure a fair trial, not afford an advantage to the self-represented litigant."[41]

(2002) 122 FCR 19, 23; *Nagy v Ryan* [2003] SASC 37 [39]-[46]; *Panagopoulos v Southern Healthcare Network* (Supreme Court of Victoria, Smith J, 15 September 1997, unreported, BCV 9704538, 2); *Santamaria v Secretary to Department of Human Services* [1998] VSC 107, [28]; *Zegarac v Tomasevic* [2003] VSC 150, [3]; *Minogue v Human Rights and Equal Opportunity Commission* [1999] FCA 85; (1999) 84 FCR 438, 445-447; *Tobin v Dodd*[2004] WASCA 288, [13]-[16]; *Murphy v Stevens* [2003] SASC 238, [204]-[209] (Full Court).

[36] *Panagiotopoulos v Rajendram* [2005] NSWCA 58, [33]; *Tobin v Dodd* [2004] WASCA 288, [13]-[14]; *Re Morton; Ex parte Mitchell Products Pty Ltd* [1996] 828 FCA 1; (1996) 21 ACSR 497, 513-514; *Wentworth v Rogers (No 5)* (1986) 6 NSWLR 534, 536; *Panagiotopoulos v Rajendram* [2005] NSWCA 58, [35]-[36]; *Awan v Minister for Immigration and Multicultural and Indigenous Affairs* [2002] FCA 594; (2002) 120 FCA 1, 17; *Tobin v Dodd* [2004] WASCA 288, [15]-[16].

[37] See eg *Davidson v Aboriginal and Islander Child Care Agency* (1998) 105 IR 1, 8-10 (Full Bench of the Australian Industrial Relations Commission).

[38] For a discussion as to the impact of the Charter on these issues see *Tomasevic v Travaglini* (2007) VSC 337 (13 September 2007) per Bell J.

[39] (1996) ATPR ¶41-507; 43,341.

[40] (1996) ATPR ¶41-507, 43,341, 43,347. Also see *Rajski v Scitec Corporation* unreported NSW Court of Appeal 16 June 1986.

[41] [2007] VSC 337 (13 September 2007)

56 The duty to assist may extend to issues of law as well as procedure[42]. In a case involving a litigant in person the Tribunal should endeavour to ascertain the true legal character of the claims made. As the High Court said in *Neil v Nott*[43]:

> "A frequent consequence of self-representation is that the court must assume the burden of endeavouring to ascertain the rights of parties which are obfuscated by their own advocacy."

57 A member has a responsibility to ensure that the proceedings are fair. This means that in some circumstances a member has an obligation to intervene, both for the benefit of a litigant in person and more generally.

58 The assistance provided by a member may, depending on the circumstances, include:

- identifying the issues which are central to the determination of the particular proceedings.
- drawing a party's attention to the relevant legislative provisions and key decision(s) on the issue being determined.
- asking a party questions designed to illicit information in relation to the issues which are central to the determination of the particular proceedings;
- assisting a party to conform to the *Brown v Dunn* principle and other procedural rules designed to avoid unfairness; and
- drawing a party's attention to the relative weight to be given to Bar table statements as opposed to sworn evidence.

59 A member may also intervene, to an appropriate extent, by asking questions of witnesses. Such a role is appropriate in the following circumstances:

- to clear up a point that has been overlooked or left obscure;
- to obtain additional evidence to better equip the member to choose between the witnesses' versions of critical matters;
- to excluded irrelevancies and discourage repetition;
- to ask admissible questions which a party is unable, for the moment to formulate; and
- to facilitate expedition in the progress of the proceedings[44]:

60 The role of a member in asking questions of a witness may be greater where a party is a litigant in person or ineptly represented.

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[42] *R v White* [2003] VSCA 174 (2003) 7 VR 422
[43] (1994) 121 ALR 148 at 150
[44] See generally *Government Insurance Office (NSW) v Glasscock* (1991) 13 MVR 521 at 534 per Handley JA; and *Spiteri v Monocure Pty Ltd* (1995) 62 IR 359.

61 But excessive intervention during the elucidation of evidence is undesirable and may lead to the appearance of bias or prejudice. And it may leave one or both parties with the feeling that the proceedings have not been fair[45].

62 However the assistance to be provided to a litigant in person is limited. It is plainly necessary to balance the interests of litigants who represent themselves with the need to afford procedural fairness to other parties[46].

63 As I have said context is important in assessing the level of assistance to be provided to a litigant in person. There are three contextual matters which are important in this case.

64 The first is that Mr De Simone is an intelligent and articulate litigant. He has studied law but has not been a legal practitioner. His submissions before me demonstrated an understanding of the relevant statutory provisions and the decided cases. But he lacks a competent advocate's attribute of objectivity and the facility to present a focussed and cogent argument. This is not a criticism of Mr De Simone. These are common disadvantages encountered by litigants in person.

65 A report prepared by the Australian Institute of Judicial Administration to assist courts and tribunals in managing litigants in person makes the following observation about the disadvantage that comes from a lack of objectivity:

> "The problem of self representation is not just a lack of legal skills – it is also a problem of a lack of objectivity and emotional distance from their case. Litigants in person are not in a good position to assess the merits of their claim …"[47]

66 The Tribunal has an obligation to assist a litigant in person to overcome these disadvantages, to the extent necessary to ensure a fair hearing.

67 The second matter concerns the relationship between Mr De Simone and one of the other parties in the proceedings, Seachange. Mr De Simone is a director of Seachange – indeed he is the Managing Director and sole executive[48]. In that capacity Mr De Simone instructs Mr Lustig, the solicitor acting for Seachange. During the course of the proceedings before me it was apparent that on occasion Mr Lustig provided some assistance to Mr De Simone in the conduct of his case. I also note that on one occasion the Senior Member observed that Mr Lustig appeared to be taking over Mr

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[45] See: *Tousek v Bernat* (1959) 61 SR (NSW) 203 at 209 per Owen J in which it was held that the trial judge, by excessive interventions, had identified himself with the case before him and given the impression that he was the advocate for one party: *Galea v Galea* (1990) NSWLR 263 and *Government Insurance Office (NSW) v Glasscock* (1991) 13 MVR 521.

[46] See *Abram v Bank of New Zealand* (1996) ATPR 42,340, affirmed on appeal (1998) ATPR 41-507.

[47] Australian Institute of Judicial Administration Incorporated, *Litigants in Person Management Plans*: *Issues for Courts and Tribunals* (2001) at 4

[48] Transcript 6 July 2007 p30 at lines 2 and 8-9

De Simone's case and putting a submission on his behalf[49], though this suggestion was refuted by Mr De Simone[50].

68 But these considerations do not absolve the Tribunal from providing such assistance to Mr De Simone as is necessary to ensure a fair hearing.

69 Mr De Simone is a named party to the proceedings and his alleged conduct is the subject of a counterclaim by Bevnol. As a party his interests are separate and distinct from the interests of Seachange.

70 The final matter to which I wish to refer is the institutional context. Informality and expedition are common features of proceedings in the Tribunal. In an endeavour to ensure that costs are kept to a minimum and that the relevant issues are identified and determined in a timely way Tribunal proceedings often take on an inquisitorial character rather than the adversarial process of a traditional court setting.

71 Against that background I now turn to consider Mr De Simone's apprehended bias point. In doing so I have not found it necessary to deal with each and every point advanced in support of Mr De Simone's application.

72 In support of his apprehended bias point Mr De Simone relied on extracts from the transcript relating to the proceedings on five separate days: 6 July 2007[51]; 28 August 2007[52]; 19 December 2007[53]; 4 March 2008[54]; and 13 May 2008[55].

73 I have read the totality of the transcript on each of these days in order to appreciate the context in which the extracts relied upon appear. At Mr De Simone's request the digital recording of each of the extracts was played during the course of the proceeding before me, to enable submissions to be made about the tone used by the Senior Member.

74 These steps were appropriate because in dealing with the suggestion of apprehended bias it is reasonable to assume that the hypothetical lay observer would base the opinion on a fair assessment of the member's conduct in the context of the whole proceeding. A judgment of the loss of impartiality and neutrality ought not be made from a short and emotional exchange taken out of context and weighed in isolation.[56]

75 I need only deal in detail with the proceedings on three of the days referred to by Mr De Simone, namely 28 August 2007, 4 March and 13 May 2008. Before turning to those extracts I propose to briefly deal with the proceedings on 6 July and 19 December 2007.

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[49] Transcript 6 July 2007 p21 at lines 19-23
[50] Ibid at p21 lines 24-25 and 28-29
[51] Tn p15 line 1 to p16 line 18; p32 lines 2-16, p37 lines 1-23; p45 lines 5-11, p47 line 8 to p48 line 3
[52] Tn p32 lines 14-25, p51 line 26 to p52 line 4, p118 line 3 to p119 line 25, p124 line 4 to p125 line 5
[53] Tn p1 lines 9-12, p31 line 22 to p32 line 17
[54] Tn p1 lines 1 to 11, p10 line 9 to p14 line 29, p14 line 30 to p16 line 22
[55] Tn p128 line 22 to p131 line 14, p117 line 21 to p118 line 17, p109 line 1 to p110 line 6
[56] See *Galea v Galea* (1990) 19 NSWLR 263 at 279

The proceeding on 6 July 2007

76 The proceeding on 6 July was a directions hearing primarily concerning joinder applications, one by Seachange to join the directors of Bevnol and the other by Bevnol to join Mr De Simone and others. Mr De Simone applied for an adjournment on the basis of illness. He tendered a medical certificate and gave oral evidence in support of his application. The Senior Member declined Mr De Simone's adjournment application for reasons he subsequently published on 23 July 2007[57]. Mr De Simone contends that it was unjust not to provide an adjournment to a person who is ill.

77 I am not persuaded that the failure to accede to Mr De Simone's request for an adjournment provides any support for the reconstitution application. While Mr De Simone's application was not granted, all of the joinder applications (including the application to join Mr De Simone) were adjourned to a later date. The matters actually determined on 6 July 2007 were limited and largely procedural in nature.

The proceeding on 19 December 2007

78 On 19 December 2007 the Senior Member was dealing with Seachange's application to join the directors of Bevnol and a number of other interlocutory matters concerning further and better particulars and an outstanding costs application. While taking appearances the Senior Member expressed surprise that Mr De Simone was in attendance,:

> "Mr De Simone how come you're there? It's all right, thank you, we don't need to stand up, thank you very much. You're there. OK."[58]

79 By this stage Mr De Simone had been joined as a party to the proceedings and was entitled to be present.

80 The Senior Member's comment is somewhat surprising given his previous exchange with Mr De Simone on 28 August 2007 when Mr De Simone indicated that he would be attending the subsequent hearing (see paragraph 92 infra). But I am not persuaded that the comment, viewed in isolation, gives rise to a reasonable apprehension of bias on the Senior Member's part. I deal with the cumulative effect of such comments later.

81 Mr De Simone also relies on a later exchange in the context of a discussion about discovery:

> " SENIOR MEMBER: When was discovery meant to take place? Anybody know?
> MR REID: I couldn't say off the top of my head.
> MR REIGLER: The first orders that were made 24 January 2007 by Deputy President Aird.
> SENIOR MEMBER: Yes
> MR REIGLER: Say that list of documents by 24 April 2007.
> SENIOR MEMBER: Right

[57] Exhibit D5 8
[58] Transcript p1 lines 9 to 12

> MR DE SIMONE: Senior Member, if it may assist, I wrote to Mr Archer in ---
> SENIOR MEMBER: No no, I don't want to hear from you on it Mr De Simone, I just want to know if it has been done or not done.
> MR DE SIMONE: No party has done it sir, and ---
> MR REIGLER: I think one of the problems is the pleadings were still – hadn't been closed and we were ---
> MR REID: Senior President, I think that my recollection may have been incorrect, I will be guided by my friends here as to – if they haven't received anything so I think you can – I think as Mr Lustig quite happily advised me, all that – the sort of ancillary orders, I think were put on – essentially I may have been put on hold after 30 April.
> SENIOR MEMBER: OK. All right. Yes, did you want to say something?
> MR REIGLER: You were asking me a question about ---
> SENIOR MEMBER: Well you don't know whether it was being discovered, so you said there was no discovery …"[59]

82 Mr De Simone submits that he had the information that the Senior Member was seeking but his proffer of assistance was rejected. It is argued that this exchange reflected a developing theme that the Senior Member was not good with litigants in person and was not extending the same courtesy to Mr De Simone that he would extend to a legal representative.

83 There is no substance to this point and in my view Mr De Simone is being somewhat oversensitive. This was a routine exchange between the Tribunal and parties in an effort to ascertain whether something had been done. Mr De Simone wasn't singled out – the Senior Member also cut Mr Reigler off – and his rights were not adversely affected.

84 I now turn to the proceedings on 28 August 2007, 4 March and 13 May 2008, which I propose to deal with in some detail.

The proceeding on 28 August 2007

85 The purpose of the proceeding was to deal with the joinder applications which had been adjourned on 6 July 2007. The Senior Member first dealt with an application on behalf of Seachange to adjourn its joinder application[60]. The Senior Member declined to grant the adjournment[61]. He then heard Bevnol's application to join Mr De Simone, Paul Marc Custodians Pty Ltd and Mr Martin Jurblum[62]. Mr De Simone did not oppose the application that he be joined as a party to the counterclaim but made submissions opposing the joinder of Paul Marc Custodians Pty Ltd and Mr Martin Jurblum. After hearing the parties the Senior Member granted Bevnol's application[63]. By that time it was late in the day and the parties proposed that Seachange's joinder application be adjourned to avoid

[59] Transcript p31 line 22 to p32 line 17
[60] Transcript 28 August 2007 pp2-22
[61] Ibid at pp24-25
[62] Ibid at pp29-114
[63] Ibid at pp114-116

it being heard on a piecemeal basis. The Senior Member acceded to this request[64].

86 Mr De Simone directed my attention to three parts of the transcript which he submitted were relevant to this reconstitution application.

87 The first extract is from p32 of the Transcript:

> "MR REID: Now that letter is the Paul Marc Management Pty Ltd letter of 24 July.
> SENIOR MEMBER: Just hold on a minute. Sorry, Mr De Simone, you said something? I didn't catch it.
> MR DE SIMONE: What are we actually on right now?
> SENIOR MEMBER: Sorry, what are we doing right now? What we're doing right now is I am hearing the respondent's application to join yourself, Paul Marc Custodians and whoever he is, Martin Jurblum, as respondents to or joint parties to this proceeding.
> MR DE SIMONE: Page 16, OK, great. Sorry, OK. Thank you, thank you, Member."[65]

88 Mr De Simone says that he had asked the Senior Member to identify the page of the document which was being referred to. He submits that the Senior Member's response was condescending in that he assumed that Mr De Simone was unaware of the purpose of the proceeding. There is no substance to this point. It was not clear what Mr De Simone was asking and it is likely that the Senior Member simply misunderstood his request for clarity.

89 The second extract relied appears on pages 51 and 52:

> "SENIOR MEMBER: Yes, well, there's an application to join Mr De Simone too and he was first in the list.
> MR BIVIANO: OK, well, I'm happy for
> SENIOR MEMBER: No, look, it's probably better and easier if you go first. Probably Mr De Simone will be greatly assisted by your professional - and I think Mr Reigler might - you can't represent him can you? He might not. It might mean we get through a little faster. Is that all right with you, Mr De Simone?
> MR DE SIMONE: I'm very happy to wait, Senior Member."[66]

90 Mr De Simone submits that by suggesting that Mr Biviano (counsel for Paul Marc Custodians Pty Ltd and Mr Martin Jurblum), go first, the Senior Member was insinuating that it was inappropriate for Mr De Simone to represent himself. I am not persuaded that a fair reading of the exchange in question could reasonably lead to such a conclusion and note that Mr De Simone acceded to the suggestion at the time.

91 The third extract relied upon appears towards the end of the proceedings on the day:

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[64] Ibid at pp116-117
[65] Transcript p32 lines 14-25
[66] Transcript p52 line 26

"SENIOR MEMBER: Mr De Simone will not be appearing. You don't need to appear do you?
MR DE SIMONE: No, because - - -
SENIOR MEMBER: He's a separate party but he'll be represented. At the next hearing you'll be represented by whoever legal representative for Seachange?
MR DE SIMONE: It is Seachange's application to join the two directors of Bevnol.
SENIOR MEMBER: I understand but you won't be appearing though will you?
MR DE SIMONE: I don't have representation, sir, and I'm not required to and I don't have it.
SENIOR MEMBER: No, no. Well, the thing is I've just made you a party.
MR DE SIMONE: Yes.
SENIOR MEMBER: So the thing is you can arrange for representation or you can appear for yourself.
MR DE SIMONE: Exactly right.
SENIOR MEMBER: I would not appear for yourself because you'll just up your costs, all right?
MR DE SIMONE: Sir, this is a Tribunal where legal representation is not normally granted and - - -
SENIOR MEMBER: So you want me to throw all these gentlemen out?
MR DE SIMONE: I would prefer that, yes.
SENIOR MEMBER: You would? I don't think so. I fear not.
MR DE SIMONE: You know, and I have a right to be present my self and for you to say, as you have, that it will increase my costs by me being present that is a threat which I take most - - -
SENIOR MEMBER: A threat, no, no.
MR DE SIMONE: It is, sir. It is a threat.
SENIOR MEMBER: No, no.
MR DE SIMONE: It is a threat, sir, that's what it is with respect.
SENIOR MEMBER: No, no, all I'm saying is you take so long to say something, Mr De Simone, that it will be cheaper for you to get a barrister for yourself.
MR DE SIMONE: Sir, I don't agree with that. I actually spent less time talking today than any of the other parties, and with respect, sir, your view that I take a long time to answer, it shows a bias and a prejudice and I think you should disqualify yourself now. And I make that application formally. You disqualify yourself from any further proceeding on this matter because of bias; apprehended bias - - -
SENIOR MEMBER: If you could then explain to me - - -
MR DE SIMONE: Sir - - -
SENIOR MEMBER: Could we just get the case set down for the next hearing, Mr De Simone, and then I'll address your application, all right?
MR DE SIMONE: Fine.
SENIOR MEMBER: Is that OK?

MR DE SIMONE: Yes."[67]

92 The parties then discussed the next available day for dealing with a number of interlocutory matters. This led to a further exchange about whether or not Mr De Simone would be represented,:

> MR BIVIANO: Sir, I'm presuming that at the next return date there will be a full set of directions given in relation to …
> SENIOR MEMBER: On interlocutory matters?
> MR BIVIANO: Yes
> SENIOR MEMBER: Yes
> MR DE SIMONE: So I do have to be present there, sir.
> SENIOR MEMBER: M'mm
> MR DE SIMONE: I have to be present because you're setting a timetable which affects me, so you can't not have me present at a hearing …
> SENIOR MEMBER; But you could be represented by …
> MR DE SIMONE: I choose not to be and I'm not required to, sir, and please don't put me to it again. I've already said that you're biased and I'm really – you know, I really think it's time for you to hear the application before you go any further. Once application is made that you should disqualify yourself on the basis of bias, you are required to consider that application and to hear it before you go or before you proceed further."[68]

93 The Senior Member then heard Mr De Simone's application and dismissed it,:

> "SENIOR MEMBER: … I don't consider that there can be a reasonable apprehension of bias, that you said that my statement would mean that you – you've got I would be getting costs orders against me often, right. Now, I'm sorry, it wasn't what I meant. My statement as to that at the end of a long day was a very weak attempt at a joke, for which I apologise. What I meant was that just in taking so long, all right, when you say things much shorter, we'd get a lot more done in a day. OK, and that therefore that was the weak joke that you may actually save money by hiring a barrister.
>
> If that gave you offence I apologise, but I don't consider that it should give rise to a reasonable apprehension of bias, because it was not connected at all to a threat that you would have costs awarded against you. The costs awards, any costs awards that will be made against you in the future would only be on the basis of s109, so I considered it fair to do so. So we'll stop here today. I don't see how – well, you may wish to take that further, so that I think we should stop here today to give you that opportunity to consider your position. OK. Do you understand?"

[67] Transcript at p118 line 3 to p119 line 25
[68] Transcript p120 at lines 12-31

MR DE SIMONE: I do. I will take that on advisement. I do accept your apology. I did not see the joke in it, but I accept as genuine your position that it was a weak attempt at a joke.
SENIOR MEMBER: I apologise.
MR DE SIMONE: It has been a long day and I do acknowledge that sometimes things are misconstrued. I will carefully consider your statements and see if my misinterpretation of your implication was something - which I now acknowledge to be the case, is something which causes me to feel that you can conduct the case fairly from now on. And if that's the case then obviously I would have absolutely no problem with you continuing. Obviously it's not something I can decide immediately. I need to - - -
SENIOR MEMBER: Look, sorry, yet again we may be misunderstanding each other. What I'm giving you the opportunity to do when I say reconsider, you'll consider your position, is whether you want to appeal - go to the Supreme Court, right. I want to give you that opportunity because you made a serious proposal to me. I have not accepted it and I'm just giving you the right to get up the road if you want to. So that that would mean given where we are we're probably going have to at least adjourn for I don't know. How long does the appeal period go for when an order's made?
MR REID: Thirty days - - -
MR DE SIMONE: Twenty eight days - - -
SENIOR MEMBER: Twenty eight days.
MR DE SIMONE: From when reasons are given.
SENIOR MEMBER: I mean if you lodge an appeal up there I won't hear any further matters. It will go to somebody else, but I do want keep it moving. I think the parties benefit. This thing must be getting (indistinct) off."[69]

94 Two things may be said about the proceeding on 28 August 2007.

95 The first is that, viewed objectively and in context, there was no real substance in Mr De Simone's bias application. The Senior Member's remarks were unfortunate but did not give rise to a reasonable apprehension that he might not bring an impartial mind to the resolution of the issues before him. In complex matters it will often be appropriate to inform a litigant in person that they should give consideration to obtaining legal advice and representation. The cumulative effect of such remarks is a matter I deal with later.

96 The second, and more significant matter, arises from the following exchange:

"MR DE SIMONE: Sir, this is a Tribunal where legal representation is not normally granted and …

SENIOR MEMBER: So you want me to throw all these gentlemen out?

MR DE SIMONE: I would prefer that, yes.

[69] Transcript p123 at line 9 to p125 at line 6

SENIOR MEMBER: You would? I don't think so. I fear not."[70]

97 This exchange should be seen in the context of s 62 of the VCAT Act. A party who is a natural person has the right to appear personally (s 62(1)(a)) but as a general proposition the parties are not entitled to be represented on an application before the Tribunal.

98 In this context I note that in *Aussie Invest Corporation Pty Ltd v Hobsons Bay CC* Morris J said that 'It can be inferred from s 62 that the parliament intended VCAT to operate without legal representation being the norm'.[71]

99 Section 62 proceeds on the assumption that, unless all the parties to the proceeding agree, a party must obtain the leave of the Tribunal to be represented by a professional advocate. Even after leave to be so represented has been granted it may subsequently be withdrawn.[72]

100 It is apparent from the transcript that what Mr De Simone was seeking, as a litigant in person, was a reconsideration of the leave previously granted by the Tribunal permitting the other parties to be legally represented. Mr De Simone had just been joined as party to the proceeding and such an application was clearly open to him and was capable of being granted. The prospects of such an application being successful may not have been strong however he was entitled to make it.

101 But the matter raised by Mr De Simone was simply dismissed out of hand. He was given no assistance in developing his application to have the Senior Member withdraw the leave to appear of the representatives of the other parties, and was given no opportunity to develop his submission. Depriving Mr De Simone of such an opportunity was a denial of procedural fairness.

The proceedings on 4 March and 13 May 2008

102 Seachange's application to join the directors of Bevnol was part heard on 19 December 2007 and adjourned until 4 March 2008. At the start of the hearing on 4 March 2008 Mr De Simone asked to be excused on the ground that the issue of the joinder of the directors of Bevnol was not relevant to any of his personal interests in the proceedings[73]. The Senior Member excused Mr De Simone[74] who then took himself to the body of the hearing room where he sat down to observe the proceedings.

103 Later, Mr Reid, counsel for Bevnol, in the course of making a submission opposing the joinder application made reference to an affidavit of Mr De Simone dated 24 January 2007. At this point Mr De Simone rose from the body of the hearing room to object to counsel's assertions with respect to his affidavit. Mr De Simone sought leave to return to the bar table to make a submission as to the approach being taken by counsel towards his

[70] Transcript p118 lines 23-28
[71] (2004) 22 VAR 212 at [7]
[72] *Dowie v Northey & anor* [2000] VCAT 823 (30 April 2000)
[73] Transcript 4 March 2008 p1 lines 1-4
[74] Ibid p1 lines 9-11

affidavit. An exchange then took place between Mr De Simone and the Senior Member during which Mr De Simone asserted that he should be able to address the Tribunal to the effect that the submissions of counsel for Bevnol in relation to the evidence in his affidavit, were improper. The Senior Member stopped him and informed him that if he wished to continue with his submission he must address the facts which are said to substantiate his allegation. The exchange is set out below.

> "MR DE SIMONE: Sir, with respect - - -
> SENIOR MEMBER: No, hold on, you were excused.
> MR DE SIMONE: Sir, I am just saying that - - -
> SENIOR MEMBER: No, I am sorry. There is a degree of informality in this but it is not a free-for-all.
> MR DE SIMONE: I understand. If you refuse to allow me to address you on the facts that - look, I am really getting - - -
> SENIOR MEMBER: You were excused.
> MR DE SIMONE: I understand sir.
> SENIOR MEMBER: I let you sit there and listen. Now do you wish to come back?
> MR DE SIMONE: Sir, I would like to come back and make a submission in relation to Mr Reid's approach here.
> SENIOR MEMBER: No, sorry, I am not interested in you addressing Mr Reid's approach.
> MR DE SIMONE: You're not?
> SENIOR MEMBER: No, I am not.
> MR DE SIMONE: You are allowing him to continue his approach?
> SENIOR MEMBER: Yes, I am allowing him to continue.
> MR DE SIMONE: I think that, sir you are, with respect, wrong to do so. Mr Reid is - and we have made this point - - -
> SENIOR MEMBER: No, where are we going?
> MR DE SIMONE: Sir, I wish to say this - - -
> SENIOR MEMBER: No, no, where are you going?
> MR DE SIMONE: Where I am going is this is Mr Reid - I am asking to be allowed to address you in relation to listening to Mr Reid's rabbiting on about a document which he knows was prepared for a particular purpose and not for this purpose, it was an affidavit prepared on 24 January for Deputy President Aird and used by Deputy President Aird in relation to an application made by the respondents which was wholly unsuccessful before Deputy President Aird and the affidavit of 24 January was in response to that application - - -
> SENIOR MEMBER: With all this how was he - just hear me - sorry, stop. No, you are - again, you are just addressing me in what I consider to be a generalised - - -
> MR DE SIMONE: Sir - - -
> SENIOR MEMBER: Stop and listen. In generalised assertions that I have no idea where they are going. I have no idea what the point you are trying to make is, so all I am asking you now is to stop and tell me what is the relevance of what you are addressing me on as to the affidavit of 24 January?

MR DE SIMONE: I object to Mr Reid producing evidence which does not - - -
SENIOR MEMBER: He is not producing evidence, he is quoting your evidence.
MR DE SIMONE: He is sir, no he is producing evidence. What he is saying is - - -
SENIOR MEMBER: Stop.
MR DE SIMONE: Sorry.
SENIOR MEMBER: You will be polite to me and you will understand that I am in charge of this hearing, and you will understand that I make the determinations and I wish to inform you that I want to make them impartially and fairly. That means that I need you to give me your information in some form of coherent manner that has some clarity to it so I can understand it. So you don't normally do this. I am not putting up with it any more and I am going to stop and I am going to direct you to the point that I need to know so that I can judge what you say, the way I consider impartially and fairly, right, and you will do as I say or I will just say I don't want to listen to you because you don't help me in assessing this case fairly or impartially. So when we go back to the relevance of this, you said Mr Reid has produced evidence. All right, stop. What evidence has Mr Reid produced?
MR DE SIMONE: Mr Reid is asserting - - -
SENIOR MEMBER: No, stop. Just answer the question. You say he produced evidence, that means he produced a fact. He produced a document - he produced something. What is it that he has produced?
MR DE SIMONE: What he is doing, sir - - -
SENIOR MEMBER: No, no, answer me what he has produced.
MR DE SIMONE: He has produced an inaccurate and incorrect factual matrix of what actually the affidavit of 24 January was produced for.
SENIOR MEMBER: Stop. What the affidavit of 24 January was produced for is irrelevant.
MR DE SIMONE: No it's not sir.
SENIOR MEMBER: Yes it is. It is sworn evidence by you and all it does is he is saying "These facts in this affidavit say X" isn't he?
MR DE SIMONE: What he says - - -
SENIOR MEMBER: No, sorry just tell me if I am wrong in this. Isn't he just saying, using the affidavit of 24 January and the facts say these are the facts that are attested to?
MR DE SIMONE: No sir, that's not correct. The affidavit of - and I will put it to you in terms where a lay person could understand it.
SENIOR MEMBER: No, no, I am not interested in - - -
MR DE SIMONE: I am sir, and it is just - - -
SENIOR MEMBER: Just give me facts. Just give me facts.
MR DE SIMONE: It is my submission sir, and with respect, OK, I am allowed to make my submission informally and your obligation is to assist me in so doing.
SENIOR MEMBER: No, sorry, just stop and just give me fact.
MR DE SIMONE: OK this is a fact sir, right. I say certain things happened at a particular date, right.

SENIOR MEMBER: In the affidavit?
MR DE SIMONE: In one affidavit. That does not preclude other things having happened on a different date, right, so if I say you ate breakfast this morning, does that preclude you having eaten breakfast yesterday sir, with respect?
SENIOR MEMBER: No.
MR DE SIMONE: Right. OK. What Mr Reid is attempting to do before you, with the greatest of respect, is say that because I say they said certain things on this date, they did not say those things on a different date and an affidavit was prepared - - -
SENIOR MEMBER: This is useless. Stop. Gee whiz I am getting sick of you. Stop and listen to me. What you have just said is just hot air it - - -
MR DE SIMONE: It is not hot air.
SENIOR MEMBER: Stop and listen. God you[75] want some help - I am trying to help you to the best of my ability. What you are giving me is nothing but hot air. If you wish to go to the affidavit and you go, "You can see I said this on this date and I did this on this date - a la breakfast this day and that day" I don't mind. But I want fact.
MR DE SIMONE: Sir the fact is this …"[76]

104 At that stage counsel for Seachange informed the Tribunal that a document setting out the list of the facts in Mr De Simone's affidavit had been prepared. A short adjournment was granted to locate this document. When the Tribunal resumed Mr De Simone had left the hearing room and the transcript sets out what then occurred:

"SENIOR MEMBER: Now where is Mr De Simone?
MR REIGLER: Sir, he has indicated to me that he won't be making any submissions in relation to the matters which are before you today.
SENIOR MEMBER: You see, that is a real problem.
MR REIGLER: He has taken the opportunity which you gave him earlier that he would be excused and he has acceded to - - -
SENIOR MEMBER: Yes but then he has come back and he has said that he has to be able to make a submission, then he just leaves without telling me. What am I meant to do? Am I meant to stand it down until he comes back?
MR REIGLER: Maybe it is best if - - -
SENIOR MEMBER: That is right. Who is representing who?
MR REIGLER: I am not representing him sir, I am just - - -
SENIOR MEMBER: Good, so because then this all gets very - I mean because it can come back and bite us all with the allegations he has made and then left hanging in the air, right, we are in trouble. Mr Lustig, have you got an answer?
MR LUSTIG: Sir, I act for Seachange not for Mr De Simone. That having been said I was able to communicate with him by mobile phone during the short break.

[75] The word 'God' does not appear on the transcript but is clearly audible on the digital recording.
[76] Transcript 4 March 2008 p10 line 9 to p14 line 29

SENIOR MEMBER: Well get him back.
MR LUSTIG: I don't know if I can but I am happy to try. However - - -
SENIOR MEMBER: The thing is, I need to know that he doesn't want to make the submission. He has been there - - -
MR LUSTIG: I am sorry, but Mr Reigler has just said that he doesn't want to make a submission.
SENIOR MEMBER: No, sorry. You don't represent him. Mr Reigler doesn't represent him. I've got no-one here to - - -
MR LUSTIG: So do you want - - -
SENIOR MEMBER: Are you giving me an undertaking that - - -
MR LUSTIG: No I am not giving you any undertaking sir, I am asking whether - - -
SENIOR MEMBER: I am leaving the bench. I want Mr De Simone back.
MR LUSTIG: Do you want Mr De Simone back in order to tell you that he is not going to make another submission, is that correct?
SENIOR MEMBER: Exactly. Because you don't represent him and Mr Reigler doesn't represent him.
MR LUSTIG: And you won't take Mr Reigler's word for it even though he spoke with him?
MR REIGLER: Sir, we will contact him by phone and we will try and get him back as soon as possible.
SENIOR MEMBER: Please explain to him that if he is in mid-flow, right, and I give him an opportunity to produce some documents, he doesn't walk out on me, OK? So ring him - get him back, and you can tell him if he doesn't hurry it's likely if anybody makes an application that costs will be ordered against him directly. Thank you. We will adjourn until Mr De Simone has returned. Thank you gentlemen."[77]

105 The proceeding recommenced after a short adjournment and when it became apparent that Mr De Simone was not in attendance it was then adjourned to 13 May 2008.

106 At the commencement of the hearing on 13 May 2008 the Senior Member informed the parties that he intended to deal first with Mr De Simone's explanation for leaving the hearing without notice on 4 March 2008.

107 Mr De Simone's explanation was, in summary terms, as follows:

- He had been excused – this was a reference to his application at the commencement of the hearing that he be excused, which the Senior Member had granted (Mr De Simone acknowledges that he later stood from the body of the hearing room to object to the approach taken by counsel for Bevnol to his affidavit and that he had submitted that he should be heard in respect of that matter).

[77] Transcript 4 March 2008 p14 line 30 to p16 line 22

- When the Tribunal stopped Mr De Simone's submissions and required him to address the Tribunal as to the factual matters upon which he wished to rely, Mr De Simone formed the view that the Tribunal was not listening to him impartially or fairly and on that basis he did not feel it was appropriate to continue. Further, Mr De Simone said that it was his belief that counsel for Seachange had taken over his submission.
- There was no obligation upon him to continue to make a submission in relation to the use by counsel for Bevnol of his affidavit of 24 January 2008. If he did not wish to pursue his submission and left the hearing then the Tribunal should have continued without him.

108 During the course of his submissions Mr De Simone informed the Senior Member that if he was going to hear any application for costs arising from the determination in relation to his explanation for leaving the hearing on 4 March 2008 then he would be making an application that the Senior Member disqualify himself from further dealing with the matter on the basis of bias.[78]

109 Given the foreshadowed application the Senior Member then permitted Mr De Simone to make an application that he disqualify himself on the ground of bias.

110 After hearing the parties the Senior Member rejected the bias application. The Senior Member also rejected the explanation proffered by Mr De Simone for the reasons set out at paragraphs 22 – 24 of his decision of 19 June 2008.

111 In his subsequent reasons for decision the Senior Member deals with Mr De Simone's bias application in these terms:

> "25 The Second Respondent submits I should disqualify myself from hearing any further interlocutory matters in this proceeding on the grounds of perceived and actual bias because of my comments to him during the hearing of 4 March 2008. He submits that my refusal to allow him to address what he perceives as factual inaccuracies in the submission of Counsel for the Applicant in relation to his affidavit of 24 January 2007 constitutes shows an indication of bias which is reinforced by the language I used to him on page 13 of the transcript of the hearing of 4 March 2008.
>
> 26 I do not accept that I refused to let him address me on such factual inaccuracies. I stopped his submission on a number of occasions in an attempt to get the Second Respondent to identify what were the factual inaccuracies rather than making generalised statements. The adjournment was to allow him to find the extracts in the transcript of the hearing of 19 December 2007 identifying such factual inaccuracies.

[78] Transcript reference - quote

27 I do not consider that my approach to requiring the Second Respondent to refer to specific facts when seeking to submit that the Counsel for the Applicant was using his affidavit of 24 January 2007 for an improper purpose showed a partiality or bias. As the Second Respondent represents himself I was giving him some leeway as a non-legally trained party to put matters before me. If he had been legally trained it would be most unusual to have allowed him to interject from the body of the hearing after he had been excused from a matter on the ground that it did not concern him.

28 As I was not addressed as to any specific inaccuracies he alleged had been made by the Counsel for the First Respondent in addressing his affidavit of 24 January 2007 I could not understand the reason for his submission or its relevance to the Applicant's joinder application.

29 I attempted to stop the Second Respondent a number of times to inquire about relevance and to direct him to address facts in his submission. I accept that the language I finally used was peremptory and direct. I consider it was necessary to get the Second Respondent to stop, listen and follow the Tribunal's directives as to relevance and facts. The Second Respondent is not legally trained and does not show the normal politeness with which legal practitioners address an adjudicator. This makes it difficult to keep the Second Respondent making cogent and relevant submissions.

30 It was necessary to have the relevance and specific factual allegations of the Second Respondent's submissions made out so that the joinder application was progressed. I do not consider that to a reasonable lay observer aware of the nature of the application and the Second Respondent's lack of personal legal interest in the joinder issue would consider that I had exhibited either actual or apprehended bias in my direction to the Second Respondent during the hearing of 4 March 2008. My direct language was an indication of my exasperation with my attempts to get the Second Respondent to address specific facts and make specific allegations, such as would show how his submission was relevant to the joinder matter in issue. I dismiss his application.

31 Finally, I note that in his email to the Solicitor of the First Respondent of 5 March 2008 the Second Respondent informed the First Respondent that he would only be making this application on the basis that the First Respondent would be making an application for its costs from him if I did not accept his explanation for absenting himself from the hearing of 4 March 2008. I consider this shows that the Second Respondent's lack of faith in my impartiality towards him was not his sole reason for making this application. It was also used as a threat in an attempt to get the First Respondent to agree to not make an application for its costs from him in relation to the

> hearing of 4 March 2008. As such I consider the Second Respondent's application that I disqualify myself can be seen as making an application for an improper purpose."[79]

112 Four things may be said about the exchange between the Senior Member and Mr De Simone on 4 March 2008 and the Senior Member's decision of 19 June 2008.

113 First, it is apparent from an examination of the transcript and listening to the tape that the extent of the Senior Member's interventions were such that Mr De Simone was given no real opportunity to put his case. Depriving Mr De Simone of such an opportunity was a denial of procedural fairness. In an exchange lasting some six minutes the Senior Member interrupted Mr De Simone on some 11 occasions. The denial of procedural fairness is also apparent from the fact that at the outset of Mr De Simone's submission the Senior Member makes it clear that he was 'not interested' in Mr De Simone addressing Mr Reid's approach and that he was allowing Mr Reid to continue.

114 Second, in his decision of 19 June 2008 the Senior Member accepts that the language he used was 'peremptory and direct'. He says that he felt it necessary to adopt this course in order to get Mr De Simone to 'stop listen and follow the Tribunal's directives as to relevance and facts'.

115 In my view the language and tone used by the Senior Member was not merely peremptory and direct, it was unacceptable. It is completely inappropriate for a member to use the language of personal abuse towards a party appearing before the Tribunal. That is what the Senior Member did when he said:

> "This is useless. Stop. Gee whiz I am getting sick of you. Stop and listen to me. What you have just said is just hot air …"

116 Further, it is clear from the tape that the Senior Member had raised his voice and his anger and frustration is evident and clearly directed at Mr De Simone. It was not merely a forceful or robust exchange.

117 In his decision of 19 June 2008 the Senior Member says that the language used was necessary because:

> "[Mr De Simone] is not legally trained and does not show the normal politeness with which legal practitioners address an adjudicator. This makes it difficult to keep [Mr De Simone] making cogent and relevant submissions."

118 It might be said of Mr De Simone that he has difficulty in formulating his submissions with precision and a tendency to lapse into the irrelevant, and on occasions has been discourteous towards the Tribunal. Having reviewed the transcript I think such observations are apt. But that does not excuse the Senior Member's conduct. As Kirby P observed in *Escobar v Spindaleri*:

[79] *Seachange Management Pty Ltd v Bevnol Constructions & Development Pty Ltd and ors* [2008] VCAT 1186 (19 June 2008) at [25] – [31]

> "… This appeal illustrates the importance of courteous and vigilant behaviour in court on the part of counsel and temperate and painstaking conduct by judicial officers … Under the pressure of busy court lists and concern for the rights of other litigants awaiting hearing, impatience can occasionally lead to error. Judicial officers and advocates exercise important responsibilities. The interest of justice to the litigants is at stake. But so too is the interest of the appearance of justice and the observance of the proper forms and procedures which have been developed over centuries to facilitate its attainment. It does not become counsel to lose his or her temper in court. Still less does it become a judicial officer to depart from proper procedures, no matter how provocative may be the ill judged conduct of those before the court."[80]

119 The third point is directed at the Senior Member's statement regarding his future intentions with respect to Mr De Simone, namely:

> "I need you to give me your information in some form of coherent manner that has some clarity to it. So you don't normally do this. I am not putting up with it any more and I am going to stop and I am going to direct you to the point that I need to know so that I can judge what you say … you will do as I say or I will just say I don't want to listen to you because you don't help me in assessing this case …"

120 The final point goes to the suggestion in the Senior Member's decision of 19 June 2008 that Mr De Simone's application that the Senior Member disqualify himself was made for an improper purpose. The Senior Member's conclusion in this regard is based on an email from Mr De Simone to Bevnol's solicitors dated 5 March 2008. The Senior Member says that in this email Mr De Simone informs Bevnol's solicitors that he would only be making the disqualification application if Bevnol pursued a costs order against him in the event that the Senior Member did not accept his explanation for absenting himself from the hearing on 4 March 2008.

121 The relevant parts of the email of 5 March 2008 are as follows:

> "In relation to more substantive matters, I do not wish to retract my submission which I understand had in any event been dealt with and rejected by the Senior Member. I have evinced no desire to be heard further so I do not know why I am being asked to attend. Having been asked, it is incumbent on me to attend at least for the purpose of asking yet again to be excused.
>
> Finally, I note you wish to seek costs from me, I do not know on what basis such costs will be sought nor their quantum. Perhaps you might care to elucidate so I can consider the merits of such a claim.
>
> If such costs are to be sought before Senior Member Young, I will be seeking that he disqualify himself for reasons already stated."

[80] (1980) 7 NSWLR 51 at 52

122 The reference to 'reasons already stated' is a reference to an email sent by Mr De Simone to Bevnol's solicitors earlier on 5 March 2008[81] in which Mr De Simone says:

> "I really do not understand why the Senior Member chose to adjourn the hearing due to my absence as I had been excused from attendance.
>
> I no longer have any confidence in the Senior Member's impartiality in hearing my submissions so I do not see any benefit in participating any further before this member. His disdain and dislike of me is apparent from the fact that he allowed your Counsel to address him on irrelevancies (such as costs before any application is decided) without demur from him for hours yet he cut me off mid-sentence without the courtesy of hearing what I wanted to say even for a short period of a minute and did not allow me to develop my thought carefully. This is not the first time he has done so. Out of courtesy to his position and respect for the Tribunal, I was prepared to give him the benefit of the doubt once when he apologised for a bad joke on a previous occasion. I am considering my options in terms of him hearing any matter which affects me directly.
>
> As your client's proposed joinder does not affect me personally as I am neither the applicant for that joinder nor the respondent to it, I do not feel it is necessary at this stage to stop that application continuing before the member. However, if the member continues to entertain negative submissions in relation to or makes any adverse findings on any of my affidavit material, I am inclined to raise an immediate objection that the member disqualify himself on the basis of actual bias.

123 It is also relevant to note that on 12 May 2008 Mr De Simone sent a facsimile message to the Senior Member and copied to the parties, confirming an email sent the previous day. In this document Mr De Simone says:

> "From the transcript, it seems you have already made up your mind about or at the very least formed a strong preference for awarding costs against me for the hearing time that was abandoned due to the misunderstanding that occurred.
>
> It therefore seems appropriate for me to once again ask that you disqualify yourself on the grounds of bias with dealing with any matters that affect my interests and that of the applicant company of which I am sole director. I believe any reasonable person having witnessed the altercation that occurred between us would feel a reasonable apprehension that you might not be impartial towards me.
>
> For reasons of keeping costs contained, I do not object to you making a determination in relation to the joinder of the Bevnol directors. Having done so, I would ask that you then take no further part in these proceedings or any related matters.

[81] Transcript of 13 May 2008 p81 lines 2-6

> In an attempt to contain costs for represented parties, I would respectfully request that the hearing date on 13 May be vacated and that in lieu you hand down written reasons for decision and circulate those to the parties.
>
> A further directions hearing could be then set by the Registrar in consultation with the parties before another member to consider any costs applications arising from that joinder application and any other preliminary matters or other directions required."[82]

124 The reference in the first paragraph of the 12 May 2008 facsimile message to the transcript is a reference to the Senior Member's statement at the end of the proceedings on 4 March 2008,:

> "So ring him – get him back, and you tell him if he doesn't hurry it's likely if anybody makes an application that costs will be ordered against him directly."[83]

125 Having regard to all this it is clear that Mr De Simone had formed the view that the Senior Member would not impartially deal with any matter involving him. Mr De Simone raised no objection to the Senior Member determining Seachange's joinder application as that matter did not personally impact upon him, but it is clear that apart from that matter Mr De Simone's position was that the Senior Member 'take no further part in these proceedings or any related matters'[84].

126 No 'improper purpose' is evident in any of this. Contrary to the suggestion in paragraph 31 of the Senior Member's decision the material clearly shows three things:

> 1. After determining the Seachange joinder application Mr De Simone did not want the Senior Member to take any further part in the proceedings or any related matters.
>
> 2. Having regard to the Senior Member's comments on 4 March 2008 about a costs application against Mr De Simone, Mr De Simone formed the view that the Senior Member would not deal with such an application impartially. On this basis Mr De Simone made it clear that if such an application were made he would be asking the Senior Member to disqualify himself and that the application be referred to another member for determination.
>
> 3. A fair reading of all the material makes it clear that Mr De Simone was not using the disqualification application as a threat in an attempt to dissuade Bevnol from making a costs application. This is made clear in the facsimile of 12 May in which Mr De Simone asks the Senior Member to take no further part in the proceeding and that: "A further directions hearing

[82] Exhibit D5 9
[83] Transcript p16 lines 18-20
[84] See the facsimile message of 12 May 2008

could be then set by the Registrar in consultation with the parties before another member to consider any costs applications arising from that joinder application and any other preliminary matters or other directions required".

127 More importantly the proposition that Mr De Simone's application that the Senior Member disqualify himself was made for an improper purpose was never ventilated in the proceeding. The proposition was not agitated by any of the parties and nor was it put to Mr De Simone so that he might have an opportunity to respond to it. To then find against Mr De Simone on this issue amounts to a denial of procedural fairness.

Conclusion

128 As I have indicated, if a party has a reasonable apprehension that they will not receive a fair hearing before the Tribunal then that will provide a proper basis for the exercise of the discretion to reconstitute the Tribunal.

129 The review of the transcript of the proceedings set out above supports the following findings:

1. Mr De Simone has been denied procedural fairness on three separate occasions:

- On 28 August 2007 in relation to the reconsideration of leave previously granted to the Tribunal permitting the other parties to be legally represented (infra at paras 96-101).
- On 4 March 2008 the extent of the Senior Member's interventions were such that Mr De Simone was given no real opportunity to put his case (infra at para 113).
- On 13 May 2008 in relation to the proposition that Mr De Simone's disqualification application was made for an improper purpose (infra at para 127).

2. Early in his conduct of this matter, on 6 July 2007, the Senior Member did provide Mr De Simone with some assistance. In particular the Senior Member explained the operation of s.60 of the VCAT Act[85].

   But even at this early stage the Senior Member exhibited a tendency to interrupt Mr De Simone as he was attempting to make submissions.[86]

   This pattern continued in subsequent hearings[87] and on 4 March 2008 the interruptions were such that Mr De Simone was given no real opportunity to put his case.

[85] Transcript 6 July 2007 p22 at lines 19-31 and p23 at lines 1-9
[86] Transcript of 6 July 2007 p32 lines 2-16; p70 lines 1-31 and p74 lines 14-31
[87] For example on 28 August 2007 Transcript p15 lines 6-25 and p16 lines 16-22

In the absence of reconstitution it is likely that this pattern will continue. The Senior Member makes his future intentions clear during the proceedings on 4 March 2008 when he says:

> "I need you to give me your information in some form of coherent manner that has some clarity to it. So you don't normally do this. I am not putting up with it any more and I am going to stop and I am going to direct you to the point that I need to know so that I can judge what you say … you will do as I say or I will just say I don't want to listen to you because you don't help me in assessing this case …"

I readily accept that in order to accord procedural fairness to all parties a balance must be struck between the need for expedition in order to contain costs on the one hand, and providing a party with an opportunity to run their case as they wish, on the other. The Tribunal will often intervene in an effort to focus the submissions on the matters in issue.

But care needs to be exercised when seeking to constrain a litigant in person. Professional advocates generally take a more robust approach to such matters and understand the need for expedition and efficiency. A litigant in person usually lacks that sense of objectivity and frequent interruptions of the type that occurred in these proceedings can give rise to a real sense of injustice, a sense that they have not had an opportunity to have their say.

3. I am satisfied that a fair minded observer might reasonably apprehend that the Senior Member might not bring an impartial mind to the resolution of matters affecting Mr De Simone's interests. This conclusion is based on my assessment of all of the material with particular regard to:

   - the unacceptable language and tone used by the Senior Member towards Mr De Simone on 4 March 2008;
   - the Senior Member's repeated failure to accord Mr De Simone procedural fairness; and
   - the cumulative effect of the numerous comments made by the Senior Member about whether Mr De Simone needed to attend hearings and his lack of representation (eg. see infra at paras 80 and 95).

130 In addition to the above findings I have also had regard to the views of the other parties and the impact that an order reconstituting the Tribunal may have on the proceedings.

131 In relation to the views of the parties I note that Mr De Simone's application is supported by Seachange and that Bevnol neither consents to nor opposes the application.

132 This matter is at an interlocutory stage and has been dealt with by two other members as well as the Senior Member. I am satisfied that the reconstitution of the Tribunal at this early stage will not adversely affect the parties.

133 For the reasons set out above I have decided to exercise my discretion, pursuant to sub-sections 108(4) and (5) of the VCAT Act to reconstitute the Tribunal constituted to hear and determine this matter. The Tribunal now constituted to hear and determine matter D916/2006 will be Vice President Ross.

His Honour Judge I J K Ross
Acting President