

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

DOMESTIC BUILDING LIST

VCAT REFERENCE NO. D916/2006

CATCHWORDS

Application for joinder, party absenting himself without notice; application for the Senior Member to disqualify himself.

APPLICANT	Seachange Management Pty Ltd (ACN 091 443 211)
RESPONDENT	Bevnol Constructions & Developments Pty Ltd (ACN 079 170 577)
SECOND RESPONDENT	Giuseppe De Simone
THIRD RESPONDENT	Paul Marc Custodians Pty Ltd (ACN 110 485 982) formerly known as Paul Marc Management Pty Ltd
FOURTH RESPONDENT	Martin Jurblum
FIFTH RESPONDENT	Bruce Jamieson
SIXTH RESPONDENT	Louis Allain
WHERE HELD	Melbourne
BEFORE	Senior Member R. Young
HEARING TYPE	Reasons
DATE OF HEARING	13 May 2008
DATE OF REASONS	19 June 2008
CITATION	Seachange Management Pty Ltd v Bevnol Constructions & Developments Pty Ltd & Ors (Domestic Building) [2008] VCAT 1186

REASONS

A INTRODUCTION

1 These written reasons were requested by the Second Respondent in relation to the following orders I made on 13 May 2008:

“9. The Second Respondent’s application that I disqualify myself from presiding at any future interlocutory hearings of this matter for perceived and actual bias is dismissed.”

10. *The Tribunal does not accept the Second Respondent's explanation for absencing himself from the hearing of 4 March 2008 following an adjournment, without giving notice to the Tribunal.*
11. *Upon the application of the Applicant under s60 of the Victorian Civil and Administrative Tribunal Act 1998, I join with effect from this day as Fifth Respondent, Mr Bruce Jamieson, C/- Macpherson and Kelley, Solicitors, DX 174, Melbourne; and, as Sixth Respondent, Mr Louis Allain, C/- Macpherson and Kelly, Solicitors, DX 174, Melbourne".*

- 2 The hearing of 4 March 2008 arose as a result of the Tribunal calling the parties together to ascertain if there were any further submissions that the parties wished to make in relation to the Applicant's application under s60 of the VCAT Act to join the directors of the First Respondent as parties to this proceeding, which was heard on 19 December 2007. At the commencement of the hearing of 4 March 2008 the Second Respondent requested to be excused on the ground that the issue of the joinder of the directors of the First Respondent was not relevant to any of his personal interests in the proceeding. The Second Respondent is, as I understand it, the sole director of the Applicant. The Applicant was represented by experienced Counsel and an instructing solicitor. The Second Respondent has been adamant throughout the time he has been a party to this proceeding that he represents himself personally and not by the legal representatives of the Applicant. I excused the Second Respondent who then took himself to the body of the hearing room and he sat down to observe.
- 3 During an address by Counsel for the First Respondent opposing the joinder of the directors of the First Respondent as parties to this proceeding; specifically, when he was addressing the Tribunal in relation to the affidavit of the Second Respondent of 24 January 2007, the Second Respondent rose from the body of the hearing to object to the veracity of what Counsel was submitting in relation to that affidavit. The Second Respondent submitted that he should be able to return and make a submission in relation to Counsel for the First Respondent's approach to his affidavit. I refused him leave as he had not submitted how his complaint was relevant to the issue at hand; i.e. joinder, and, secondly, he did not inform me of the ruling he was asking me to make. The Second Respondent insisted that he should be able to continue to address me on the basis that the First Respondent Counsel's address in relation to the evidence in his affidavit was improper.
- 4 After listening to the Second Respondent for some minutes I stopped his submission informing him that if he wished to continue with his submission he must address facts that would indicate whether his complaint about Counsel for the First Respondent's use of his affidavit was improper. At this stage Counsel for the Applicant broke in to inform the Tribunal that the Applicant had prepared and provided to the Tribunal at the hearing of 19 December 2007, a list of the facts set out in the Second Respondent's

affidavit of 24 January 2007. I allowed a small adjournment while this list of facts was found. Upon my return I found that the Second Respondent had left the hearing without notice to the Tribunal. At the time of the adjournment I was forcefully attempting to get the Second Respondent to put facts to me and not generalised assertions that had no substantiation. The Second Respondent was equally forcefully attempting to continue with his generalised submission. After the adjournment I fully expected him to continue this submission armed with the Applicant's facts as to his affidavit. Counsel and the instructing solicitor for the Applicant submitted that I just proceed with the hearing in relation to the joinder; however, they acknowledged that they had no instructions from the Second Respondent; or to represent him personally; therefore, they could not inform me that the Second Respondent had concluded his submission. I had no explanation from the Second Respondent as to why he had left the Tribunal without notice or whether he had completed his submission. In the light of this I had no option but to adjourn the hearing at that stage to reconvene at another time so I could hear from the Second Respondent as to his reasons for leaving the Tribunal and whether he had abandoned his submission. This explains the reason for the hearing of 13 May 2008, the subject hearing.

- 5 At the commencement of the hearing of 13 May 2008 I informed the parties that the order of business for the day would be to firstly address the Second Respondent's explanation for leaving the hearing without notice on 4 March 2008, following that I would listen to any further submissions that would be made arising from my decision as to whether or not I accept his explanation. Finally, that we would proceed to my decision in relation to the Applicant's application to join the directors of the First Respondent and any other interlocutory matters that were outstanding.
- 6 During the Second Respondent's explanation for leaving the hearing on 4 March 2008 he informed me that if I was going to hear any further applications in relation to costs arising from my determination in relation to his explanation; then, he was going to make an application that I disqualify myself for bias. He informed me that he had sent correspondence to this effect to the Tribunal on 12 May 2008, the day before this hearing. This letter was provided to the Tribunal by the Registry during the Second Respondent's rebuttal to Counsel for the First Respondent's submission that the Second Respondent's explanation for absenting himself from the Tribunal on 13 May 2008 was not satisfactory.
- 7 It was during this Second Respondent's rebuttal that the Second Respondent submitted that if I would entertain making a costs order against him in relation to his explanation then he was making an immediate application that I disqualify myself; as per his letter to the Registry of 12 May 2008. Further, on 5 March 2008 the Second Respondent had emailed the Solicitor for the First Respondent and informed him if the First Respondent sought costs for the hearing of 4 March 2008 then he would be

seeking that I disqualify myself from any further hearing of this proceeding on the grounds of bias. Given the notice of his intention in his letter of 12 May 2008; I allowed the Second Respondent to immediately make his submission that I disqualify myself on the grounds of bias and this was followed by a response from the First Respondent.

- 8 At the completion of the Second Respondent's submission as to his explanation for leaving and his application that I disqualify myself and the other parties' responses, all parties, including the Second Respondent, submitted that prior to any determination in relation to those matters I should make a finding as to the application by the Applicant to join the directors of the First Respondent as Respondents within the proceeding. My initial inclination was to adjourn and consider both the Second Respondent's explanation for absenting himself from the hearing of 4 March 2008 and as to his application that I dismiss myself for bias, providing a written determination. However, upon retiring and considering the matter I reached the conclusion that it was best to give an oral determination in relation to the Second Respondent's explanations and application to disqualify, together with the joinder application. These determinations give rise to Orders 9, 10 and 11 of the Orders of 13 May respectively. The factor which was the strongest determinant in giving an oral decision was the need to keep this proceeding moving. There have been procedural skirmishes involving relatively minor matters without real progress towards a resolution or final determination in this proceeding for almost a year. It is important to get the proceeding moving so that there can be some expectation that the proceeding will be finalised within the foreseeable future. I will deal firstly with my determination in relation to the Applicant's joinder application, followed by my determination in relation to the Second Respondent absenting himself from the hearing of 4 March 2008; and, finally in relation to his application that I disqualify myself for bias.

B APPLICATION TO JOIN DIRECTORS OF THE FIRST RESPONDENT

- 9 This is an application by the Applicant to join the directors of the First Respondent, Mr Bruce Jamieson and Mr Louis Allain as the Fifth and Sixth Respondents, respectively, to this proceeding. The application for joinder is opposed by the First Respondent and the directors sought to be joined.
- 10 The Applicant submits that the application for joinder should be allowed on the following grounds:-
- (a) the parties sought to be joined could have been named as Respondents in the original application document giving rise to this proceeding; thereby, to join them as respondents at this stage it should be borne in mind that the test should have more of the flavour of an application to strike out or dismiss proceedings, as embarrassing or having no basis in fact or law, rather than as to the joinder of joined parties;

- (b) the Tribunal's normal caution as to joining parties should not be as high in the case where the parties sought to be joined have a nexus or relationship with an existing respondent;
- (c) the application should only be refused if it is clear that there is no real issue to be tried or the action proposed is obviously hopelessly unsustainable or bound to fail;
- (d) the claim against the directors of the Respondent is in the alternative; and, it flows from the First Respondent's denial that the scope of works under the contract between the Applicant and the Respondent required certain works and contain terms to be included in the contract specification;
- (e) alternatively, the allegation can be put in terms that the directors of the First Respondent made representations to the Applicant as to the scope of works under the contract and the times by which such works would be completed;
- (f) on this basis, the Applicant will be alleging that the directors of the First Respondent are liable to it as a result of misleading and deceptive conduct;
- (g) it is apparent from the affidavits of the directors of the First Respondent and those of the director of the Applicant that there are issues of fact that need to be heard and determined;
- (h) the misrepresentations made by the directors of the First Respondent were as to future matters; in this case, matters regarding the extent of works to be carried out under the contract and when certain items of the work were to be completed;
- (i) the directors of the First Respondent say that the specification contained all terms and conditions that had been discussed and agreed between the parties when the Applicant maintains the specification does not; and
- (j) the joinder is necessary to avoid a multiplicity of proceedings or duplication of litigation.

11 The First Respondent submitted that the Tribunal should not use its discretion to order the joinder of its directors as respondents to this proceeding on the grounds that:-

- (a) the discretion under s60 is broad: *Independent Cement and Lime Pty Ltd v Victorian Civil and Administrative Tribunal, Ashley Wagg & Simmonds Homes Melbourne Pty Ltd* [2000] VSC 355 per Byrne J at [12];
- (b) the test to be applied in assessing whether, in its discretion, the Tribunal considers that joinder is appropriate is influenced by the following considerations:-

- (i) the application should not be granted if it is clearly misconceived or doomed to failure: *Age Old Builders Pty Ltd v Swintons Pty Ltd* [2006] VCAT 871 per Bowman J. At paragraph [17];
- (ii) the proposed action is clearly hopeless; *Wimmera-Mallee Rural Water Authority v FCFCH Consulting Pty Ltd* [2000] VSC 102 per Byrne J at paragraph [8];
- (iii) the test as for joinder is higher than that apposite to a mere pleading matter; on the other hand; the bar is set lower than that by which an application for summary judgement is assessed: *Zervos v Perpetual Nominees Limited* [2005] VSC 380 per Cummins J at paragraph [11];
- (iv) the application for joinder has no prospects of success as it is impermissible to plead that where an implied term or warranty of a contract is breached that a similar allegation of fact can be put forward as misleading conduct; *Futuretronics International Pty Ltd v Gadzhis* [1992] VR 217 at 235
- (v) further, as observed the judgement of Ormiston J in *Futuretronics* at 238:

“In my opinion mere acceptance of the promise by a promisee cannot ordinarily be characterised as being led into error. In the usual case, the consequence would be that the promisee has enforceable rights. It is hard to believe that normally any promise with ordinary contractual rights would then describe himself as having been misled or deceived”.

- 12 It is a principle of corporate law that individual directors are not normally liable personally for the failings of the company of which they are director. The level of involvement of a director in a particular transaction complained of is critical in determining whether their conduct renders them liable as to joint tortfeasors: *Johnson Matthey (Aust) Ltd v Dascorp* [2003] VSC 291 per Redlich J at paragraph [107]. Sundberg J. in *Pioneer Electronics Australia Pty Ltd v Lee* (2001) 108 FCR 216 at 233 found that there were four lines of authority as to what degree of participation and type of behaviours could result in a director being held personally liable for the failings of the subject corporation. The least stringent of these tests being that a director will be liable if he has assumed responsibility for the company’s acts: *Trevor Ivory Limited v Anderson* [1992] 2 NZ LR 517. I adopt the least stringent test on the basis that this line of authority is open and arguable; and, therefore, it is on this basis that I should assess whether the joinder of the First Respondent’s directors is appropriate.
- 13 I accept the observations of Ormiston J in *Futuretronics* that if a promisee makes a promise that is incorporated into a contract it is very difficult to see how it can also be maintained that it is a misrepresentation. However, it

does appear that there may be some small window of factual assertion in relation to precontractual promises where this may be appropriate.

- 14 Representations as to future matters are different to representations as to existing facts or matters. The Applicant alleges that the directors of the First Respondent made specific representations to the Applicant as to what would be contained in the contract and the specification; and, as to what form those terms would take in the final written contract document and; the Applicant maintains, they were; therefore, representations as to future matters.
- 15 Representations as to future matters are dealt with under s4 of the *Fair Trading Act 1999* as follows:
- (1) *For the purposes of Part 2, if a person makes a representation about a future matter, including the doing of, or the refusing to do any act, and the person does not have reasonable grounds for making the representation, the representation is deemed to be misleading.*
 - (2) *In any proceeding under this Act concerning a representation made by a person about a future matter, the person making the representation bears the burden of proving that he or she had reasonable grounds for making the representation.*
 - (3) *Sub-section (1) is deemed not to limit by implication a reference in Part 2 to a misleading representation, a representation that is misleading in a material particular or conduct that is misleading or is likely or liable to mislead”.*

- 16 It was not seriously disputed by the Respondent that if representations as alleged were made they were as to future matters and I agree with this position. This being the case then under sub-section 4(2) of the *Fair Trading Act* the directors of the Respondent bear the burden of proving that they had reasonable grounds for making such representations. Accepting for the purposes of joinder only that the representations as alleged were made, then for me to be satisfied that a case is hopeless or doomed to failure I would need as a matter of fact to be convinced that on the balance of probabilities the directors could establish they had reasonable grounds for making the representations alleged. The directors’ affidavits are insufficiently detailed to establish this fact or situation to me. Therefore, I consider that it is arguable that the directors of the Respondent could be liable for misrepresentation as to future matters and I should exercise my discretion to join them as parties to this proceeding. I will so order.

C THE SECOND DEFENDANT’S EXPLANATION FOR LEAVING THE HEARING OF 4 MARCH 2008

- 17 In relation to his absenting himself from the adjourned hearing on 4 March 2008, the Second Respondent submitted that he had been excused. This was a reference to his initial application at the start of the hearing to be excused, which I had granted. However, the Second Respondent

acknowledged that after he stood from the body of the court to object to Counsel for the First Respondent's approach to the material in his affidavit of 24 January 2007 he submitted that he should be allowed to return to the hearing and be heard. I refused that application as he had not informed me how his submission was relevant to the joinder issue; nor, what was the order he was seeking. He objected to my ruling on the basis that Counsel for the First Respondent was using the affidavit for a purpose for which it was not prepared i.e. an improper purpose; and, he insisted on continuing with his submission.

- 18 I objected to the Second Respondent's submission which contained only generalised assertions without any reference to the specific evidence in his affidavit; nor, was there any specific allegations as to how Counsel for the First Respondent's use of his affidavit material was improper. Further, the Second Respondent did not identify what ruling he wished me to make, and, although I requested this, it was never clearly identified. Further, the Applicant was represented by experienced Counsel and if such a submission was appropriate it was the Applicant Counsel's task to make it. It was not the Second Respondent's task to do this when the issue had no relevance to him.
- 19 I stopped his submission and said that he must address me in relation to actual evidence and fact in relation to his affidavit. At this stage Counsel for the Applicant broke in to inform me that the Applicant had gone through this process in its address to the Tribunal at a previous hearing on 19 December 2007. Counsel suggested a short adjournment to produce the extracts of the transcript of that hearing that identified the specific facts in the Second Respondent's affidavit. Upon returning from this short adjournment I found that the Second Respondent had absented himself from the Tribunal without notice.
- 20 When I requested the Second Respondent as to why he should break into the joinder application from the body of the Tribunal, when it was not an issue that concerned him, he submitted that the assertions that Counsel for the First Respondent was making in relation to his affidavit of 24 January 2007 was not supported by the evidence in the affidavit. Further to his explanation that he considered he had been excused, he said that when I stopped his address and required me to address him with factual matters he did not feel it was appropriate to continue because I was not listening to him impartially or fairly. He submitted further that it was his belief that Counsel for the Applicant had taken over his submission. He submitted that there was no obligation upon him to continue to make a submission in relation to Counsel for the Applicant's use of his affidavit of 24 January 2007. He submitted that if he didn't wish to continue this submission and had left the hearing then the Tribunal should have continued without him.
- 21 Counsel for the First Respondent submitted that there was no issue with the Second Respondent remaining in the hearing upon being excused. The First Respondent submitted that there was an inconsistency in the Second

Respondent's explanation to the Tribunal in that the Second Respondent had submitted that he had abandoned his submission when he left the Tribunal. The First Respondent produced an email to the Solicitor for the First Respondent from the Second Respondent of 5 March 2008, the day after the relevant hearing. In the email the Second Defendant stated that:

"In relation to more substantive matters, I do not wish to retract my submission which I understood had in any event been dealt with and rejected by the Member. I have therefore no desire to be heard further so I do not know why I am being asked to attend".

The email concludes with the following sentence:-

"If such costs (the costs of the First Respondent in relation to the hearing of 4 March 2008) are to be sought from Senior Member Young, I would be seeking that he disqualify him for reasons already stated".

- 22 I do not consider that the Second Respondent's explanation that he was excused from the hearing is accurate. He was initially excused from the hearing but then from the body of the Tribunal he stood and made submissions in relation to a matter in which he acknowledged he had no relevant interest. When this was pointed out he continued to forcefully state that he should be heard because of the Counsel for the Applicant was using the evidence given in his affidavit of 24 January 2007 for an improper purpose. He insisted in his pursuit of this line, notwithstanding that I requested of him and required him to be specific factually as to how Counsel was using the evidence in his affidavit improperly. Both my recollection and a reading of the transcript of the hearing of 4 March 2008 at page 14 shows that the interjection by Counsel for the Applicant to inform the Tribunal that the facts in the affidavit had been addressed specifically in the hearing of 19 December 2007 was merely to provide information to the Tribunal, Counsel was not taking over the Second Respondent's submission. The adjournment was solely for the purpose of obtaining those extracts in the transcript of the hearing of 19 December 2007 as to those facts. It was my understanding that the Second Respondent was going to continue with his submissions once he had the facts at hand in relation to his affidavit. I do not accept that counsel for the Applicant had taken over his submission. Such a proposition was not assented to by Counsel for the Applicant.
- 23 If the Second Respondent did not feel it was appropriate to continue with his submission because he considered I was not listening impartially or fairly he should have informed me that he was not proceeding with his submission. In relation to his submission that he was under no obligation to continue with his submission; I agree with this, provided he expressly informs me he is abandoning his submission.
- 24 As to his submission that the Tribunal should have continued after he had left without explanation, I disagree. This is the crucial issue in relation to his behaviour towards the Tribunal on 4 March 2008. Notwithstanding that

he is the sole director of the Applicant which is represented by experienced Counsel the Second Respondent has been emphatic that he represents himself and no one else has any instructions to represent him. Both representatives of the Applicant informed me that the Second Respondent had left but neither accepted that they had instructions from him to represent him. Therefore, they could not provide me with instructions from the Second Respondent that he had completed or abandoned his submission. Given that I had no explanation from the Second Respondent for his absence and he had left no instructions with anyone as to why he had left the hearing; and, how insistent he had been that he be heard in relation to his submission; I consider I had to adjourn the hearing to ascertain whether he had completed his submission. I do not accept that the Second Respondent was entitled to leave the hearing of 4 March 2008 without notice to the Tribunal.

D SECOND RESPONDENT'S APPLICATION THAT THE TRIBUNAL DISQUALIFY ITSELF

- 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.
- 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.

SENIOR MEMBER R. YOUNG