

IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMERCIAL AND EQUITY DIVISION
TECHNOLOGY ENGINEERING AND CONSTRUCTION LIST

S ECI 2015 000325

SSC PLENTY ROAD PTY LTD (ACN 124 197 128)

Plaintiff

v

CONSTRUCTION ENGINEERING (AUST) PTY LTD
(ACN 392 781 199) & Anor

Defendants

JUDGE: VICKERY J
WHERE HELD: MELBOURNE
DATE OF HEARING: 17 NOVEMBER 2015
DATE OF JUDGMENT: 2 DECEMBER 2015
CASE MAY BE CITED AS: SSC PLENTY ROAD v CONSTRUCTION ENGINEERING
(AUST) (No 2)
MEDIUM NEUTRAL CITATION: [2015] VSC 680

ADMINISTRATIVE LAW - Certiorari granted - Part of determination of an adjudication under the *Building and Construction Security of Payment Act 2002* (Vic) quashed - Whether invalid parts of determination should be remitted for redetermination - Whether remitted to same or different adjudicator - Considerations as to whether remittal should be to a different adjudicator.

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<u>APPEARANCES:</u>	<u>Counsel</u>	<u>Solicitors</u>
For the Plaintiff	Mr J A F Twigg QC with Dr K Weston-Scheuber	Baker & McKenzie
For the First Defendant	Mr T J Margetts QC	Piper Alderman

HIS HONOUR:

- 1 On 13 November 2015, I delivered my judgment on the main proceeding, *SSC Plenty Road v Construction Engineering (Aust)* (the “principal judgment”).¹ This case involved an application by the Plaintiff, SSC Plenty Road Pty Ltd, for judicial review of an adjudication determination made by the Second Defendant (the “Adjudicator”) on 21 August 2015 (the “Adjudication Determination”) under the *Building and Construction Industry Security of Payment Act 2002* (Vic) (the “Act”).
- 2 Relevantly, I found that the Adjudicator fell into jurisdictional error by failing to carry out the function assigned to him under the Act in valuing or purporting to value 33 of the 37 variation claims (the “Disallowed Variation Claims”)² and 3 of the 5 deduction claims (the “Disallowed Deduction Claims”)³ listed in the payment claim made by the First Defendant, Construction Engineering (Aust) Pty Ltd (the “Defendant”) dated 1 July 2015 (the “Payment Claim”). Explanation of his error is set out in [134]–[135] and [140]–[143] of the principal judgment. In sum, the Adjudicator did not demonstrate in his Adjudication Determination any process of assessment of the value of the Disallowed Variation Claims and the Disallowed Deduction Claims other than adopting the amounts claimed by the claimant.
- 3 It followed that the Plaintiff succeeded in its claim for relief by way of certiorari in respect of both the Disallowed Variation Claims and Disallowed Deduction Claims.
- 4 It was, however, noted that having regard to the strict time constraints imposed by the Act within which adjudicators are required to deliver a determination, the size of the material before the Adjudicator and the complexity of the factual and legal issues upon which he had to decide, the preparation of the reasons for the Adjudication Determination was a substantial task.⁴ Moreover, the Adjudicator’s generally methodical approach to assessing the value of the items was, to my mind, an

¹ [2015] VSC 631.

² See Annexure “A”.

³ See Annexure “B”.

⁴ *SSC Plenty Road v Construction Engineering (Aust)* [2015] VSC 631, [85], [121]–[125].

appropriate way to proceed.⁵ Despite demonstrable error in carrying out part of the valuation exercise, the Adjudication Determination was otherwise acceptable.

5 On 17 November 2015, Counsel for Plaintiff and Defendant presented oral submissions on the form the orders should take in light of the findings made in the reasons for judgment. Argument chiefly addressed the issue of whether the Adjudication Determination, or any part thereof, should be remitted –

(i) at all; or

(ii) back to the Adjudicator; or

(iii) to a different adjudicator from either the same, or another, Authorised Nominating Authority (ANA)

– for redetermination in accordance with law.

6 The issue of who should pay the costs of the main proceeding was also briefly addressed. However, I have decided to reserve any orders as to costs at this stage.

Preliminary considerations

7 Where an order in the nature of certiorari is granted, the usual form of relief is to quash the decision (or part thereof) under review and remit it back to the tribunal for reconsideration according to law.⁶ In the present case, it is appropriate that the 33 Disallowed Variation Claims and the 3 Disallowed Deduction Claims be remitted back to an adjudicator for redetermination in accordance with the principal judgment and any other directions specified herein.

Remitting to the same or different adjudicator

8 The Plaintiff submitted that in the event that the Adjudication Determination or any part thereof were to be remitted, I should direct that it be redetermined by an adjudicator other than the primary decision-maker, being the Adjudicator/Second Defendant. This was because the nature of the errors identified in the process of

⁵ Ibid [126]–[128].

⁶ *Maxstra Constructions Pty Ltd v Joseph Gilbert & Ors* [2013] VSC 243, [72].

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reasoning relating to the valuations of the Disallowed Variation Claims and Disallowed Deduction Claims was said to give rise to a perception that the Adjudicator might not bring an impartial mind to any remitted issues.

- 9 The Defendant opposed the assignment of any remittal to anyone other than the Adjudicator.
- 10 Neither party addressed me on whether it would be impracticable, as a matter of fact, for the Adjudicator to redetermine any remitted issues.

Relevant legal principles

- 11 Two cases are frequently cited by this Court in consideration of whether it is appropriate to order that a decision set aside for error is to be remitted for reconsideration by a different decision-maker or reconstituted decision-making body.
- 12 The first, *Body Corporate Strata Plan No. 4166 v Stirling Properties Ltd (No 2)*,⁷ involved two appeals on questions of law by way of order to review against determinations made by a statutory planning appeals board to refuse two applications for permits to use certain lands for the erection of residential units. The appeals were heard concurrently before Ormiston J (as his Honour then was).
- 13 Five grounds of complaint were raised by the applicants, the first two of which are relevant for present purposes.⁸ First, it was contended that the inadequacy of the board's written reasons for its determination left it open for the Court to infer that certain questions the board was bound to consider had not been considered at all or, on an alternative view, that there had been a failure to provide reasons as was required pursuant to statute.⁹ Second, and linked in part with the first ground, it was alleged that, in reaching its conclusions, the board had failed take into account certain relevant considerations.

⁷ [1984] VR 903.

⁸ Ibid 910.

⁹ *Planning Appeals Board Act 1980 (Vic)* s 61.

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14 After outlining the major issues which arose from the hearings conducted before the board and then detailing the content of the board's subsequent written determination, his Honour said:¹⁰

In the present case it is apparent that each of the issues has not been dealt with in detail, and many have been touched upon only on a generous interpretation of what the Board said. On the other hand it would appear difficult to suggest that the Board has not given any reasons.

15 His Honour continued:¹¹

[W]here reasons are partly defective, in the sense that not all issues have been dealt with, then an order compelling delivery of further or better reasons would have an air of unreality about it. Such an order would merely give a tribunal an opportunity to patch up what has been shown to be defective in circumstances where it is more than likely that the tribunal overlooked the issue altogether.

In the present case the form of the determination points clearly enough to the Board providing some reasons for its decision, whatever may otherwise be the deficiencies of that reasoning. To ask the Board to give further reasons now is not only impractical, in that I am told the Chairman of the Division has retired, but it is also undesirable that it should appear that the Board might have an opportunity to reconstruct its reasoning to meet the defects pointed out in detail at the hearing of these appeals.

16 Ultimately, his Honour concluded that the board's reasoning 'was not so inadequate as to justify a finding that it failed to furnish a statement of the reasons for its determination' as was legislatively prescribed.¹²

17 His Honour was, however, 'entirely satisfied that the Board ha[d] not adverted to relevant considerations' and 'may well have taken into account a number of irrelevant considerations'.¹³ The remaining three grounds were dismissed. It followed that the appeals were allowed and orders made that, inter alia, the board's determination be set aside and the appeal remitted to a reconstituted board.

¹⁰ Ibid 911-912.

¹¹ Ibid 912.

¹² Ibid 913.

¹³ Ibid 916.

- 18 In the second, *Northern NSW FM Pty Ltd v Australian Broadcasting Tribunal*,¹⁴ Davies and Foster JJ of the Full Court of the Federal Court advanced the following observation on the constitution of tribunals:¹⁵

If a decision has been set aside for error and remitted for rehearing, it will generally seem fairer to the parties that the matter be heard and decided again by a differently constituted tribunal. This is because the member constituting the Tribunal in the original inquiry or hearing will already have expressed a view upon facts which will have to be determined in the rehearing. The aggrieved party may think that a rehearing before the Tribunal as originally constituted could be worthless, for the member's views have been stated. Thus, if a decision of the Administrative Appeals Tribunal has been set aside and the matter remitted for rehearing, the President of that Tribunal ordinarily allocates to the rehearing a different member of the Tribunal. There are, of course, cases where it is convenient for the Tribunal as previously constituted to deal with the matter. And occasionally the Court itself expresses such a view, so as to make it clear that it would not be improper for the Tribunal as previously constituted to consider the matter again. See for example *Versatile Carpets Pty Ltd v Collector of Customs* (unreported Federal Court of Australia, Sweeney, Woodward and Davies JJ, 21 February 1985) in which the Court remarked, "... subject to questions to availability of members, it would be helpful if the matter were heard by the Tribunal as it has so far been constituted".

- 19 Their Honours added:¹⁶

[The trial judge] concluded that as "the Tribunal's consideration of the matter was extensive, far-reaching and lengthy" and as "strong views on the applicant's compliance with the requisite criteria" had been expressed, it would better achieve the object of having the matter be heard and decided again that the Tribunal should be differently constituted. Such a finding imports no criticism whatsoever of the member who originally constituted the Tribunal, but simply recognises that when decisions in judicial and administrative proceedings are set aside *in toto* and the matter remitted to be heard and decided again, justice is in general better seen to be done if the Court or the Tribunal is reconstituted for the purposes of the rehearing.

- 20 The principles expressed in the preceding authorities ought to be read in light of their consideration by Pagone J in *Davidson v Fish*.¹⁷ It is instructive to isolate the following comment:¹⁸

¹⁴ *Northern NSW FM Pty Ltd v Australian Broadcasting Tribunal* (1990) 26 FCR 39.

¹⁵ *Ibid* 42-43.

¹⁶ *Ibid* 43.

¹⁷ [2008] VSC 32; (2008) 28 VAR 179, 188-191 [14]-[21].

¹⁸ *Ibid* 189 [17] (citations omitted). See also *Ceccattini v ICM 2000 Pty Ltd* [2000] NSWCA 357, [55] (Heydon JA, with whom Mason P and Giles JA agreed).

The relief that is appropriate in any particular case must “depend on all the circumstances of the case” and I do not think it desirable for any fixed rule to be developed in substitution for a careful evaluation of all the facts of each case.

- 21 As may be seen then, the question of whether or not it is appropriate for a different decision-maker, or a differently constituted decision-making body, from the original to determine the issues on remitter is necessarily a context-dependent inquiry.
- 22 During argument I was directed to a decision of this Court in *Vegco Pty Ltd v Gibbons*.¹⁹ That proceeding involved an application for judicial review under O 56 of the *Supreme Court (General Civil Procedure Rules) 2005 (Vic)* in relation to an opinion of a medical panel which answered two medical questions and provided an assessment on the degree of a compensation claimant’s impairment arising from a work injury. The application was upheld and the opinion quashed on the grounds that the panel both committed jurisdictional error in taking into account an irrelevant consideration and breached the rules of natural justice. Addressing a submission that the medical questions ought to be remitted to a differently constituted panel, Kyrou J (as his Honour then was) observed:²⁰

Successful applicants in judicial review and appeal proceedings to the trial division of this Court frequently seek remittal to a differently constituted primary decision-maker when the primary decision is set aside and the matter is remitted. If orders are made by this Court as a matter of course requiring decisions to be remade by a differently constituted primary decision-maker, this may have serious resourcing implications for primary decision-makers and add to the costs and delays of the decision-making process.

- 23 His Honour went on:

For the Court to be persuaded to order remittal to a differently constituted primary decision-maker, good reason for doing so, based on established principles, must be shown by the party seeking such an order. The guiding principle is that remittal will be to a differently constituted primary decision-maker where there is some feature of the conduct or reasons for decision of the primary decision-maker which would render it unfair to the successful party or give the appearance of unfairness to that party (whether arising from strongly expressed views on key issues, adverse findings on the credit of witnesses, apprehended bias or otherwise) if the matter were remitted to the

¹⁹ [2008] VSC 363; (2008) 30 VAR 1.

²⁰ Ibid 10–11 [33] (citations omitted).

same decision-maker or where it would be impracticable for the same primary decision-maker to redetermine the matter.

24 I adopt, with respect, this formulation of the principle.

Application

25 Turning to the situation at hand, I note that the error upon which certiorari issued was a failure by the Adjudicator to value the items the subject of the Disputed Variation Claims and Disputed Deduction Claims in a manner demonstrating that the conclusions arrived at were based on an evaluation of the material before him.

26 The Adjudication Determination, which was an interim decision “done on the papers” and without an oral hearing, makes no adverse findings or observations in respect of the conduct of either party or the manner in which they presented their respective cases. Nor is any part of its content phrased in language which might suggest the formation by the Adjudicator of a preconceived view towards the reliability of any of the materials or a general preference for the submissions of one party over the other. No concerns were raised about the Adjudicator’s management of the matter during the course of making his determination.

27 The fact that the values attributed to the Disputed Variation Claims and Disputed Deduction Claims would have, on one view, been unfavourable to the Plaintiff had they not been set aside falls short of giving rise to a perception of unfairness were the Adjudicator to undertake any redetermination. The species of error evident in his process of assessment does not speak to how he might approach the task on a remittal.

28 I am not persuaded that any feature of the Adjudication Determination or the Adjudicator’s conduct favour making the direction that the Plaintiff contends for. There is no reasonable foundation for any apprehension that the Adjudicator on a remitted determination would undertake the valuation task otherwise than in good faith and in accordance with the remarks on the function of an adjudicator under the Act set out in the principal judgment. It would not be a question of ‘patching up’ the deficiencies in the original reasoning but of commencing afresh an evaluation of the

items of work the subject of the remittal, albeit with some degree of familiarity with the matter.

29 It is also appropriate to have regard to the relevant statutory regime. In *Hickory Developments Pty Ltd v Schiavello (Vic) Pty Ltd* this Court said the following about the intent of the Act:²¹

The Act also manifests another central aspiration, that of freedom from excessive legal formality. The provisions demonstrate a pragmatic concern to provide a dispute resolution process which is not bedevilled with unnecessary technicality.

30 In *Grocon Constructors v Planit Cocciardi Joint Venture (No 2)* was added:²²

[T]he main purpose of the Act is to ensure that any person who carries out construction work, or provides related goods or services, is able to promptly recover progress payments. To advance that purpose, the Act sets up a unique form of adjudication of disputes over the amount due for a claimed progress payment. Parliament intended that a progress payment, on account, should be made promptly and that any disputes over the amount finally due should be decided in separate proceedings, either by a court or an agreed dispute resolution procedure.

31 Both passages emphasise the Act's concern for expeditious adjudication. I am minded to ensure this paramount objective is not too readily displaced. Minimisation of delay in the decision-making process promotes a central aim of the Act.

32 The Adjudicator is already acquainted with the substantial body of documentation which will inform the evaluation exercises. This should serve to enable him to deliver the redetermination of the relevant parts remitted in a more timely manner than would be the case if a different adjudicator was appointed.²³ Declining to direct that a new adjudicator reconsider the remitted matters also eliminates the inconvenience of sourcing another able and available decision-maker. This will be of advantage to both parties and go some way to reducing delay.

²¹ [2009] VSC 156; (2009) 26 VR 112, 121 [46].

²² [2009] VSC 426; (2009) 26 VR 172, 202 [110].

²³ Similar considerations might not bear as strongly in other circumstances: *Port Phillip City Council v Maureen Hickey & Ors* [2001] VSC 129, [38].

Conclusion

33 I am not satisfied that it is appropriate to direct that a different adjudicator be appointed for the purposes of the remittal.

34 I will hear the parties on whether I should make the orders set out below.

THE COURT ORDERS THAT

1. The adjudication determination made by the Second Defendant (the "Adjudicator") on 21 August 2015 under the *Building and Construction Security of Payment Act 2002* (Vic) (the "First Adjudication Determination") is quashed insofar as it relates to:

- (a) the 33 Disallowed Variation Claims referred to in Annexure A hereto;
- (b) the 3 Disallowed Deduction Claims referred to in Annexure B hereto; and
- (c) the calculation of the total Adjudicated Amount insofar as it incorporates the 33 Disallowed Variation Claims and the 3 Disallowed Deduction Claims.

2. Those parts of the First Adjudication Amount referred to in Order 1 be remitted to the Adjudicator to be determined according to law, as summarised in paragraph [101] of the reasons delivered in this proceeding on 13 November 2015 (the "Second Adjudication Determination").

DECLARATION

1. The Second Adjudication Determination when delivered shall stand as the Adjudication Determination in place of the First Adjudication Determination for all purposes under the Act.

DIRECTIONS

1. The Adjudicator is to determine, prepare and deliver the Second Adjudication Determination which makes determinations with respect to:

- (a) the 33 Disallowed Variation Claims;

- (b) the 3 Disallowed Deduction Claims;
 - (c) the total Adjudicated Amount by reference to:
 - i. the valid determinations in the First Adjudication Determination; and
 - ii. the determinations made in the Second Adjudication Determination.
 - (d) the date on which the total Adjudicated Amount, so found, became payable;
 - (e) the interest rate payable on the total Adjudicated Amount, so found; and
 - (f) the percentage of the Adjudicator's fees which is to be paid by each party.
2. The Adjudicator is to determine, prepare and deliver the Second Adjudication Determination upon the material which was before him in making the First Adjudication Determination.
 3. The Adjudicator is to deliver the Second Adjudication Determination as soon as practicable, but in any event, no later than Friday 18 December 2015.
 4. Liberty to Apply is granted to the Adjudicator to seek:
 - (g) any extension of time for the delivery of the Second Adjudication Determination; and
 - (h) any further directions as to the conduct of the adjudication.

COSTS OF PROCEEDING

1. The costs of the proceeding are reserved until the delivery of the Second Adjudication Determination.

Annexure "A"

Disallowed Variation Claims (33)

VA No.	Item
02/008	'Enviroprotect hygienist services'
02/009	'Kmart V1 brief'
02/038	'MSBs 1 & 2 metering alterations'
02/067	'Floor boxes to CML & ATMs in the mall'
02/068	'Telstra fibre optic protection slab'
02/071	'Electrical management changes at Coles'
02/080	'Build-up of access road adjacent to Coles due to contaminated soil'
02/083	'Kmart auto preparation of pad site for future use'
02/086	'Coles internal fitout design/ documentation'
03/001	'Design document alterations as per TMA SI T001 (Part 2)'
03/005	'T.03 services alterations'
03/016	'T.19 services alterations'
03/022	'T.26 services alterations'
03/024	'Kiosk 1 Donut King'
03/025	'Kiosk 2'
03/026	'Kiosk 3-5'
03/027	'Kiosk floor boxes'
02/031	'Detention tanks'
03/034	'T.10 Brumby's CAT1 works'
03/035	'FFH services alterations'
03/036	'T.10 Brumby's hydraulic services alterations'
03/043	'T.10 Brumby's saw cutting and slab reinstatement'
03/045	'FFH additional inground point'
03/046	'T.24 butcher additional inground hydraulics points'
03/052	'T.17 sawcutting and slab reinstatement'
03/053	'T.18 sawcutting and slab reinstatement'
03/054	'T.21 sawcutting and slab reinstatement'
03/055	'Kiosk 2 sawcutting and slab reinstatement'
03/056	'T.25 sawcutting and slab reinstatement'
03/058	'T.27 sawcutting and slab reinstatement'
03/059	'T.29 sawcutting and slab reinstatement'
03/061	'T.31 sawcutting and slab reinstatement'
03/084	'T.24 mechanical and fire services work'

Annexure "B"

Disallowed Deduction Claims (3)

TM No.	Description
-	Alleged defective work - pebble finish
037	'Telstra connection costs'
038	'Value management items painting precast CFC'