VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING & PROPERTY LIST VCAT REFERENCE NO. BP1634/2015

CATCHWORDS

Remittal of matter following appeal – scope of remitted matter – whether new evidence can be adduced on remitted matter – whether member hearing remitted matter can be prevented from having read the original decision

APPLICANTS	Mr Kamalesh Kapadia, Ms Rajvee Kapadia
RESPONDENT	Mr Adrian Porto t/as AP Concreting and Landscaping (ABN: 84 539 905 373)
WHERE HELD	Melbourne
BEFORE	Senior Member S. Kirton
HEARING TYPE	Hearing
DATE OF HEARING	19 June 2018
DATE OF ORDER	5 December 2018
CITATION	Kapadia v Porto (Building and Property) [2018] VCAT 1869

ORDERS

1. By 22 December 2018 the applicants may, if so minded, and if they wish to do so, must file and serve amended Points of Claim limited to:
   (i) their claim that there are defects in the building work carried out by the respondent,
   (ii) that these defects constitute a breach of the warranties implied by section 8 of the *Domestic Building Contracts Act* 1995, and
   (iii) the loss and damage they allege they have suffered, fully itemised particulars of which must be included in the amended Points of Claim.
2. By 15 March 2019 the respondent must *file and serve* amended Points of Defence to any Amended Points of Claim specifying the material facts relied upon. Any set-off claimed must be fully set out.

3. Where experts are retained:

   (a) they must prepare their reports in accordance with PNVCAT 2: Expert Evidence; and

   (b) copies of their reports must be filed and served:

      (i) by the applicants, by 22 December 2018,

      (ii) by the respondent, by 8 March 2019;

   (c) All expert reports must be *filed* in hard copy (not by facsimile or email). Where the original report includes coloured photographs, coloured photographs must be included in the copy which is filed and served.

   (d) **Where a party does not intend to rely on expert evidence, they must advise the other parties and the principal registrar in writing by no later than the date on which any report was to be filed and served.**

4. This proceeding is listed for a further directions hearing before Senior Member Kirton on **18 March 2019** at **9.30am** at 55 King Street Melbourne at which time directions will be made for its further conduct.

5. Liberty to apply.

6. Costs reserved.

SENIOR MEMBER S. KIRTON

APPEARANCES:

For the Applicant	Mr K. Kapadia in person and Mr R. Kapadia, personal representative
For the First Respondent:	Mr A. Porto in person

REASONS

Background

1. This proceeding has a long history since being commenced in 2015. It began as a claim by the homeowner applicants ("the Kapadias") against the respondent landscaper ("Mr Porto"), for allegedly defective and incomplete landscaping works carried out at their home in Endeavour Hills.

2. The claim was heard by the Tribunal in September 2016 ("the First Tribunal Hearing") and the member hearing the matter handed down their decision on 26 October 2016 ("the original decision"). In summary, the Tribunal dismissed the Kapadias' claim and ordered them to pay $2632.10 on the counterclaim.

3. The Kapadias were dissatisfied with the original decision and appealed to the Supreme Court of Victoria. By a decision made on 27 October 2017, Associate Justice Ierodiaconou gave leave to the Kapadias to appeal the original decision and allowed the appeal, in part.

4. Her Honour made orders remitting the matter back to the Tribunal, as follows:

> Pursuant to s 148(7)(c) of the VCAT Act, orders will be made remitting this proceeding to the Tribunal differently constituted. As to whether the Tribunal allows any fresh evidence to be admitted by the parties, that is a matter more appropriately determined by it.[1]

5. The proceeding then came before me for a directions hearing on 19 June 2018. The purpose of the directions hearing was to consider the Kapadias' application to be allowed to present new expert evidence at the remitted hearing. Mr Porto opposed this course.

6. Each of the parties provided detailed written submissions and submissions in reply in support of their contentions as to whether new expert evidence should be admitted. As well, each of the parties provided oral submissions to me at the directions hearing on 19 June 2018.

7. Following the directions hearing, the Kapadias sent to the Tribunal a further written submission, headed "Letter to Senior Member Kirton", in which they sought to raise a new issue, namely whether or not the Tribunal member hearing the remitted proceeding would have access to the original decision. That issue was not originally part of the application made on 19 June 2018, but the issue had arisen during that directions hearing.

8. The circumstances in which it arose were that I was discussing with the parties how the remitted hearing would run. I said that my preliminary view was that the Tribunal's findings in the original decision in respect of

[1] *Kapadia and Anor. v Adrian Porto t/as AP Concreting and Landscaping* [2017] VSC 615 at [57]

the issues which had not been overturned on appeal would stand, and the scope of the remitted hearing would be to reconsider the one issue which was successfully appealed.

9. Based on that view, it became apparent to the Kapadias that this would mean that the reconstituted Tribunal would necessarily have to be familiar with the original decision. They expressed some concern during the directions hearing and expounded on these concerns in their written submission sent following the directions hearing.

10. On 10 July 2018 I made an order in which I agreed to take into consideration the matters raised in the Kapadias' further submission, in the interests of fairness and pursuant to the Tribunal's obligations under sections 97 and 98 of the *Victorian Civil and Administrative Tribunal Act* 1998 ("the VCAT Act"). I also ordered that Mr Porto could make any submission in response. Mr Porto did so, in a submission dated 2 August 2018. The Kapadias provided a reply submission on 6 August 2018. Although there was no order made allowing for reply submissions, I have nonetheless considered this document, as there was nothing in it which would have caused any prejudice to Mr Porto.

The Legislation

11. The VCAT Act gives the Tribunal wide discretion as to how it decides to conduct hearings before it. In particular:

> s.97 The Tribunal must act fairly and according to the substantial merits of the case in all proceedings.
>
> s.98 (1)(a) The Tribunal is bound by the rules of natural justice.
>
> s.98 (1)(d) The Tribunal 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 (4) Sub-section 98(1)(a) does not apply to the extent that this Act or an enabling enactment authorises, whether expressly or by implication, a departure from the rules of natural justice.
>
> s.98 (3) Subject to this Act, the regulations and the rules, the Tribunal may regulate its own procedure.
>
> s.102 (2) Despite sub-section (1), the Tribunal may refuse to allow a party to call evidence on the matter if the Tribunal considers that there is already sufficient evidence of that matter before the Tribunal.
>
> s.108 (6) If the Tribunal is reconstituted for the purposes of a proceeding, the reconstituted Tribunal may have regard to any record of the proceeding in the Tribunal as

previously constituted, including a record of any evidence taken in the proceeding.

What was the result of the appeal?

12. The Supreme Court described the grounds of appeal raised by the Kapadias as six distinct questions, as follows[2]:

    1) Was the Tribunal bound to put the legal characterisation of repudiation to the parties before making a finding of repudiation?

    2) Was it open to the Tribunal to find the following on the facts before it:

        a) the Kapadias repudiated a contract; and

        b) Mr Porto accepted the repudiation?

    3) Did the Tribunal fail to make a finding on material facts, namely whether or not the building work carried out by Mr Porto was defective within the meaning of the *Domestic Building Contracts Act* 1995 ("DB Contracts Act"), and whether or not Mr Porto breached the contract with the Kapadias?

    4) Alternatively, if there were findings in respect of 3(a) and (b)[3] above:

        a) were they open to the Tribunal; or

        b) were they so unreasonable that no reasonable tribunal would have made them; or

        c) was the pathway of reasoning to those findings disclosed?

    5) Was the finding the Kapadias were not entitled to damages:

        a) open on the evidence; or

        b) so unreasonable that no reasonable tribunal would have made the finding?

    6) Did the Tribunal err in a calculation of quantum of Mr Porto's counterclaim?

13. The Court's findings in respect of these grounds of appeal were as follows:

    a. It rejected the grounds of appeal described in questions 1 and 2.[4]

    b. It allowed ground 3.[5]

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[2] Ibid at [4]

[3] Despite this reference to subparagraphs 3(a) and (b), the published decision does not divide paragraph 3 into subparagraphs. However, as there are two questions posed within paragraph 3, I have assumed that the first question is what is meant by subparagraph (a), and the second question by subparagraph (b).

[4] At [25], [32]

c. It did not need to decide ground 4, as this was put in the alternative to ground 3.[6]

d. It did not allow ground 5, but noted that the question of the quantum of any defects would need to be reconsidered as part of the remittal on ground 3, as to whether there was any defective work.[7]

e. The parties agreed that there had been an error in the calculation of the quantum of the counterclaim (ground number 6), and the Court noted that this issue would be part of the remittal to the Tribunal, without making any findings about the degree of the error.[8]

14. Ground 3, which was allowed, concerned whether the Tribunal had failed to make a finding as to whether the building work carried out by Mr Porto was defective within the meaning of the DB Contracts Act, and whether or not Mr Porto breached the contract with the Kapadias. Her Honour found:

> Perhaps it may be inferred … that the Tribunal held there were defects but they were not serious. This is unclear. It was however incumbent upon the Tribunal to make a finding as to whether or not there were defects. It was a material question of fact before it. The failure to make such a finding is a vitiating error of law.… [T]here was no express finding as to whether or not Mr Porto breached the contract by undertaking defective work. I do not think that the finding can simply be inferred from the Tribunal's acceptance of Mr Porto's evidence.
>
> I find the Tribunal erred in law by failing to make a finding on the Kapadias' allegations that Mr Porto's work was defective and if so, whether he had breached his contract with the Kapadias.[9]

15. Her Honour also found that it was appropriate that the Tribunal had categorised the appropriate cause of action as being defective building work which constitutes a breach of section 8 warranties implied into the contract by the DB Contracts Act:

> In short, the points of claim are confused as to legal issues. However, they do contain a list of alleged defects in Mr Porto's work.
>
> Section 3 of the DB Contracts Act defines 'defective' in relation to domestic building work to include '(a) a breach of any warranty listed in section 8; (b) a failure to maintain a standard of quality of building work specified in the contract'. It was open to the Tribunal to deal with the issue of the defective work as a breach of contract. The purpose of the DB Contracts Act is to regulate contracts.[10]

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[5] At [47]
[6] At [48]
[7] At [54]
[8] At [56]
[9] At [46]-[47]
[10] At [41] – [42]

16. I note also the Applicants Submissions for Further Evidence dated 1 May 2018 at paragraphs 24 and 27 where they agree that the cause of action brought is for a breach of contract due to defective work and refer to the warranties.

What is the effect of the Supreme Court decision?

17. Apart from that one ground of appeal, and the consequential adjustment to the quantum that may be necessary as a result of the answers to grounds 5 and 6 (at paragraph 13.d) and 13.e) above), the remainder of the Tribunal's decision was not overturned. Accordingly, the original findings, in respect of the following matters, stand:

    a. The parties entered into a contract in 2015 for Mr Porto to carry out landscape building works, which involved removing existing steps and constructing new concrete steps from the front portico down to the street and building two sleeper retaining walls to form terracing in the garden.[11]

    b. The basis of the contract was a written quotation dated 14 September 2015 in the sum of $20,544.50 including GST.[12]

    c. The parties subsequently agreed to a substantial number of written variations, additions to and subtractions from the contract works. The full contract price after those variations was $17,369, which included the following variations:

        i. Steps and associated works $6380, including GST

        ii. Upper sleeper wall $4301 including GST

        iii. Lower sleeper wall $6688 including GST.[13]

    d. The project quickly became highly fluid, with multiple changes to the project works.[14]

    e. By late November 2015 Mr Porto had built the steps and the upper retaining wall. He was well on the way to finishing the bottom wall, when a dispute developed. Mr Porto stopped work and has not returned.[15]

    f. The contract between the parties was terminated when Mr Porto left the site on 26 November 2015.[16]

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[11] Original decision at [2]
[12] At [3]
[13] At [4]
[14] At [5]
[15] At [6]
[16] At [30]

g. Mr Porto placed the upright posts for the bottom retaining wall in the locations instructed by Mr Kapadia senior. Mr Kapadia senior then required a variation of the contract terms to move the upright posts, which Mr Porto refused to do unless he was paid an extra $2915 and allowed 3 days to do so. Mr Kapadia senior's demand that Mr Porto accept a variation of the contract terms for no extra payment amounted to a refusal to be bound by the contract and constituted a repudiation of the contract. Mr Porto accepted the repudiation by his conduct in refusing to return to the site to carry on with the contract works unless the Kapadias agreed to pay for the variation required by them. [17]

h. The Kapadias' claim for the cost of completing the contract works failed because they had repudiated the contract.[18]

i. Mr Frank Porto was not a party to the contract and is not properly a respondent.[19]

18. In other words, the only matters to be decided on the remitted hearing are:

a. whether there are defects in the work; and

b. whether these defects constitute a breach of the warranties implied into the contract by section 8 of the DB Contracts Act.

19. Although the Kapadias have described the remitted hearing as a "De Novo Appeal hearing", they have also recognised that the scope of the remittal is only "in respect of the breaches of contract and defects in work… The Member is effectively conducting a new hearing on the issue of whether there are defects in the work and whether there were any breaches of contract". [20]

Should new expert evidence and pleadings be allowed?

20. The Supreme Court has expressly left the question of whether to allow further evidence for the Tribunal to decide. The Kapadias have made an application to present new expert evidence, which Mr Porto opposes. In particular, the Kapadias' application is to "file further evidence in the form of a supplementary Expert Report and further photographic evidence as well as clarified and reformatted pleadings"[21].

21. The new evidence is a report by Paul Dee of Houspect prepared in February 2018, which, according to the Kapadias, "provides further detail and expert opinion on the deterioration in the works" and notes further defects. It also

[17] At [28], [29], [33], [34]
[18] At [35]
[19] At [36]
[20] Applicants' Submissions for Further Evidence dated 1 May 2018 ("Kapadias' Submissions") paragraphs 12, 44-45
[21] Kapadias' Submissions paragraph 1

"elaborates on" earlier reports and "provides further explanation and advice regarding defects". The further pleadings are to "clearly identif[y] what the breaches of contract are and what the defects are, simplifying the matter for the presiding Member"[22].

22. The Kapadias allege that further defects have emerged since the previous reports and/or hearing and it would cause "prejudice and undue hardship" if these new defects were not considered by the Tribunal. "Allowing this further evidence to be admitted will allow the Tribunal to provide a final determination in respect of all issues between the parties, giving finality to this dispute"[23].

23. Further, they say, Mr Dee's report includes "expert costings which includes the further costs to rectify the newly discovered defects and the updated reasonable costs to rectify the work… It would be unfair to award damages on the basis of rectification quotes from 2016, which are now outdated"[24].

24. Mr Porto opposes the application on grounds that it will put the parties to great expense. "Should the matter be decided on the current evidence, the hearing may be concluded in half a day. If new evidence is allowed, this may extend to even longer than the first hearing which lasted over 12 months".[25]

25. Further, the works are now three years old and "other tradespeople and their machinery have corrupted the site and altered the works done by Mr Porto making it difficult to accurately determine the accountability of any new evidence... The new expert [Mr Dee] would have no knowledge of the works that were conducted by Mr Porto and the condition of the site three years ago".[26]

26. The Tribunal has a discretion as to how to conduct the rehearing, and it should exercise its discretion in a way that ensures that the parties are afforded procedural fairness. As was held by Senior Member Riegler (as he then was) in *Rustam v Ismail*[27] (although discussing an amended pleading, the same principles apply to the calling of further evidence):

> the exercise of the Tribunal's discretion to allow a party to amend its pleading in a remitted proceeding is no different to the exercise of the Tribunal's discretion to allow an amendment to a pleading in a proceeding heard at first instance. The factors which will influence that discretion include (but are not limited to) when the amendment is sought, the nature of the amendment and what prejudice may be suffered by the other party.

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[22] Kapadias' Submissions paragraph 18-22, 46
[23] Kapadias' Submissions paragraphs 24-28
[24] Kapadias' Submissions paragraphs 34-38
[25] Respondent's Submissions dated 29 May 2018 ("Porto's Submissions") paragraph 2
[26] Porto's Submissions paragraphs 4-5
[27] [2010] VCAT 973 at [23]

27. I am satisfied that it is appropriate to make an order allowing the expert report of Mr Dee and the foreshadowed amended pleadings to be relied on in this proceeding. If the Kapadias were not allowed to amend their pleading in this proceeding, they could simply commence a separate proceeding and request that it be heard at the same time as this proceeding. Having regard to the Tribunal's obligations under sections 97 and 98 of the VCAT Act, it would be difficult to refuse to hear the matters at the same time, as similar evidence as to the contractual arrangements and other matters will be necessary in both proceeding. Further, it is desirable to avoid a multiplicity of proceedings, which, in my view would be prejudicial to the parties. The application was made at an early stage of the remitted proceeding, well before the matter was listed for hearing. Further, as the Supreme Court has noted, the quantum of the claim will have to be revisited in any event, following the reassessment of defects (if any) and the agreed error in the findings on the counterclaim.

28. The concerns raised by Mr Porto that Mr Dee will not be familiar with the state of the work three years ago, and that the works have been altered in the previous three years, are matters that can be tested and about which submissions can be made in the final hearing. Any concerns that this order may cause Mr Porto can be remedied by allowing him to file and serve any expert reports in response. It may also be relevant in considering whether any orders for costs should be made under section 109 of the VCAT Act at the end of the proceeding. As for the increase in quantum since 2016, it is a matter for the Member hearing this proceeding to determine whether Mr Porto (if liable at all) is also liable for the increase.

29. Accordingly I will make an order allowing the Kapadias to file and serve amended points of claim and any further expert material on which they intend to rely.

Should the reconstituted Tribunal have access to the original decision?

30. There is no issue that the proceeding will be heard by a differently constituted Tribunal, as ordered by the Supreme Court. The authorities relied on by the Kapadias in their submissions all refer to whether the Tribunal should be differently constituted. There is also no dispute that that a "perception that a decision maker might start off with an unfavourable predisposition towards the proposal is contrary to the interests of justice", and that "[p]erception of a fair hearing must ultimately be the most important consideration"[28].

31. However, the Kapadias' application is that:

    a. the next presiding member should not have "read the strong views of [the original member]",

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[28] *Barro Group Pty Ltd v Brimbank CC* (No 2) [2012] VSC 199 per Emerton J at [9]

b. the next presiding member should “merely read “the pleadings of the parties prior to entering the hearing room”,

c. the next presiding member should not be “fully aware of the contents of the [original] decision”, and

d. “[the original member]’s judgement [is] not referred to or read by the next presiding Member, and not raised by the Respondent”.[29]

32. There is a practical difficulty with this application, and that is that because the original decision and the appeal have been published, all Tribunal members will be familiar with it. It is not possible now to make an order that a member “un-read” or ‘un-remember” something which they have previously done.

33. As set out above, the only issue to be decided relates to defects in the work. The evidence on these questions will largely be given by the technical experts. It is possible that there will not need to be any evidence heard from the lay witnesses at all. However, it is a matter for the member conducting the proceeding to determine what evidence will be relevant in determining the question of whether there are any defects, if so, whether these constitute a breach of the implied warranties, and if so, what is the appropriate cost to rectify the defects.

Orders

34. I will make the following orders:

1. By 22 December 2018 the applicants may, if so minded, and if they wish to do so, must file and serve amended Points of Claim limited to:

   (i) their claim that there are defects in the building work carried out by the respondent,

   (ii) that these defects constitute a breach of the warranties implied by section 8 of the *Domestic Building Contracts Act* 1995, and

   (iii) the loss and damage they allege they have suffered, fully itemised particulars of which must be included in the amended Points of Claim.

2. By 15 March 2019 the respondent must *file and serve* amended Points of Defence to any Amended Points of Claim specifying the material facts relied upon. Any set-off claimed must be fully set out.

[29] Applicants’ Letter to Senior Member Kirton Page 4

3. Where experts are retained:

   (a) they must prepare their reports in accordance with PNVCAT 2: Expert Evidence; and

   (b) copies of their reports must be filed and served:

      (i) by the applicants, by 22 December 2018,

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   (c) All expert reports must be *filed* in hard copy (not by facsimile or email). Where the original report includes coloured photographs, coloured photographs must be included in the copy which is filed and served.

   (d) Where a party does not intend to rely on expert evidence, they must advise the other parties and the principal registrar in writing by no later than the date on which any report was to be filed and served.

4. This proceeding is listed for a further directions hearing before Senior Member Kirton on **18 March 2019** at **9.30am** at 55 King Street Melbourne at which time directions will be made for its further conduct.

5. Liberty to apply.

6. Costs reserved.

SENIOR MEMBER S. KIRTON