VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

VCAT REFERENCE NO. D253/2005 & D836/2005

DOMESTIC BUILDING LIST

CATCHWORDS

Victorian Civil and Administrative Tribunal Act 1998 – S.77 – associated Supreme Court proceedings on foot – duplication of proceedings – risk of conflicting decisions – doubts concerning power of Tribunal to afford relief sought in Supreme Court.

APPLICANT:	Raline Industries Pty Ltd
FIRST RESPONDENT:	MJPE Investments Pty Ltd
SECOND RESPONDENT:	Phillip Watt
WHERE HELD:	Melbourne
BEFORE:	His Honour Judge Bowman
DATE OF HEARING:	3 August 2006
DATE OF REASONS:	11 August 2006

Raline Industries PL v MJPE Investments PL (Domestic Building) [2006] VCAT 1607

ORDERS

(1) Respondent's application pursuant to s.77 of the *Victorian Civil and Administrative Tribunal Act* upheld.

(2) Proceeding struck out and, pursuant to s.77(3) of the Act, referred to the Supreme Court of Victoria at Melbourne (Building Cases List).

(3) Question of any ancillary orders, including costs, reserved.

(4) Liberty to apply.

Judge Bowman
Vice President

APPEARANCES:

For the Applicant:	Mr John Bolton of counsel, instructed by Lewenberg & Lewenberg.
For the Respondents:	Mr James Nixon of counsel, instructed by Mills Oakley Lawyers.

REASONS FOR DECISION

GENERAL BACKGROUND

1 This matter comes before me by way of an application pursuant to s.77 of the *Victorian Civil and Administrative Tribunal Act* 1998 ("the Act"). It is brought by the respondents MJPE Investments Pty Ltd and Phillip Watt, who have a common interest in the proceeding, and whom I shall describe collectively as "MJPE". The application is resisted by Raline Industries Pty Ltd ("Raline"). MJPE is seeking that, pursuant to s.77, the proceeding issued out of this Tribunal be struck out and referred to the Supreme Court of Victoria on the basis that it would be more appropriately dealt with by the Supreme Court.

2 Mr John Bolton of counsel appeared on behalf of Raline. Mr James Nixon of counsel appeared on behalf of MJPE. No evidence was called. Each counsel spoke to particularly well prepared and detailed written submissions, and referred to various documents. The manner in which each counsel was able to summarise what is a very complex factual situation and come directly to the salient points was very helpful and was much appreciated. It is readily apparent that both counsel and their instructing solicitors had done a large amount of work preparing for this application, and were, to use a colloquialism, right on top of it.

FACTUAL BACKGROUND

3 As stated, the factual background to the proceeding is quite complicated, but some brief analysis of it is necessary for the purposes of the present application. That is particularly so, given that the principal argument of MJPE is that there is already a proceedings on foot in the Supreme Court which involves some similar, if not identical, facts and which is closely intertwined with the proceeding which is on foot before this Tribunal.

4 Of course, the factual background which I shall now set out is not intended in any way to be determinative of the merits of matters the subject of the principal litigation. Insofar as there are any references to matters of fact, they are made for the purposes of setting this application in context and, hopefully, making it more easily understood. This qualification in relation to the factual background does not apply to such things as the dates upon which various steps in the litigation were taken, but these are not controversial in any event.

5 The litigation involving Raline and MJPE concerns a development involving both domestic and commercial units on land in Hawthorn ("the project"). For the purposes of this very brief summary, MJPE could be described as a developer in relation to the project. Raline could be described as the builder. A joint developer of the project, although not a party to the proceeding before VCAT, was an entity called Finhaven Holdings Pty Ltd ("Finhaven"). Finhaven is a party to the Supreme Court proceeding. After earlier agreements which were revoked, on 18th January 2002, MJPE and Finhaven executed a document which can be referred to as "the Master Agreement". This is quite an involved

document with a number of schedules. Reference will be made to some key provisions.

6 Pursuant to clause 1 of the Master Agreement, Finhaven, as owner of the Hawthorn land, sold part of that land to MJPE. Pursuant to clause 2, MJPE agreed that it would enter into a building contract with a registered builder in respect of the construction of six residential units and five commercial units on the land. Put simply, these were to be Finhaven's units, and, whilst it is not spelt out in that particular clause, an identical number of units, both commercial and residential, were to be constructed on the land for MJPE. Subsequently, by means of three building contracts, which I shall refer to collectively as "the building contract", MJPE engaged Raline as the builder of the units.

7 Quite complex repurchasing and financing arrangements are set out in the Master Agreement. Whilst the precise details of these need not concern us for the moment, suffice to say that transfers of land, mortgages and caveats are involved. Reference is made to these in the Supreme Court proceeding. There are also default provisions. For example, pursuant to clause 3.3 in Schedule E of the Master Agreement, Finhaven agreed to pay to MJPE a total of $826,800.00 in respect of the construction of the commercial units. If, however, the builder (which was ultimately Raline) defaulted in relation to its obligations under the building contract and this affected the construction of the commercial units so as to render it liable under that contract to pay to MJPE liquidated damages, MJPE agreed to pay to Finhaven an amount equal to such liquidated damages or, if appropriate, on a pro rata basis.

8 Pursuant to clause 2.4 of the Master Agreement, MJPE agreed that it would ensure that the builder complied with its obligations and responsibilities under the building contract, and no variations, alterations or amendments were to be made to the building contract without the express consent in writing of Finhaven. Pursuant to the building contract, there was, as one would expect, a date for practical completion.

9 It is alleged by Finhaven that, inter alia, there was substantial delay, that the construction of its units was not completed by the date of practical completion, and that completion had still not occurred some eighteen months later. On approximately 7th February 2005, Finhaven stated that the Master Agreement was at an end and took possession of the project. As I understand it, no further work was done by Raline thereafter. Various allegations have been made by the parties, substantial amounts claimed, and other forms of relief sought. Proceedings have been issued out of this Tribunal and out of the Supreme Court. The allegations, the relief sought, and the proceedings generally shall be discussed subsequently.

10 In summary, against this background of dispute, in this Tribunal Raline is claiming from MJPE damages in relation to the performance of unpaid variations, the dissipation of retention monies and the like. In the Supreme Court proceeding, MJPE is claiming as against Finhaven damages in amounts due by way of quantum meruit and unjust enrichment, together with other relief. In

those proceeding, Finhaven is counterclaiming against MJPE, claiming damages based upon loss of profit due to delay, the cost of rectification works and the like. MJPE has issued a Third Party Notice against Raline, effectively seeking to be indemnified in relation to Finhaven's counterclaim. That is a very brief overview of the situation. I will now turn to a summary of the history of the litigation of the dispute.

LITIGATION HISTORY

(a) The History of the VCAT Proceeding

11 Raline initially issued an application against MJPE out of this Tribunal on 22nd April 2005. Essentially Raline seeks $365,768.00 for work performed pursuant to the building contract and variations thereto, compensation for architectural and consultancy services performed, and compensation for delay. The application so issued placed reliance upon the *Domestic Building Contracts Act* 1995.

12 On 30th May 2005, Points of Claim were filed and served, these spelling out in greater detail the basis of the claim. The proceeding was still being brought pursuant to the *Domestic Building Contracts Act*.

13 On 21st October 2005, Raline issued out of this Tribunal what was in fact a new application including Amended Points of Claim. The existing Points of Claim were deleted. Raline was, in essence, starting again. Apart from a considerable number of other alterations, the claim was now brought pursuant to the provisions of the *Domestic Building Contracts Act* and the *Fair Trading Act* 1999. This was presumably to counter a defence raised by MJPE that a dispute concerning the commercial units which formed part of the project was not a domestic building dispute and hence the Tribunal had no jurisdiction. That application remains on foot, and there has been no further amendment to the Amended Points of Claim. The relief sought includes damages, with reference to reasonable sums for performance of unpaid variations, amounts to which there was an entitlement by reason of the frustration of the contract, and damages arising from the dissipation of retention monies. A declaration is sought that MJPE held the retention monies on constructive trust for Raline. "Equitable compensation" is also sought. In seeking such relief, Raline pleads reliance upon claims for amounts owing for work done, misleading or deceptive conduct, waiver and estoppel, unjust enrichment, repudiation and other grounds. In claiming that retention monies have been wrongfully dissipated, Raline raises issues concerning practical completion of the project. MJPE filed and served Points of Defence on 19th December 2005. As far as I can ascertain, and at least as far as this Tribunal is concerned, the matter of an application pursuant to s.77 of the Act seems first to have been raised at a directions hearing before Senior Member Lothian on 20th December 2005. A timetable was then put in place for the filing and serving of any affidavit material relating to such application, and the s.77 application referred for hearing by a judicial member.

14 Any orders made thereafter and any procedural steps adopted seem to relate to the s.77 application rather than to the principal application. I accept the

statement from the Bar table that, if MJPE is unsuccessful in its s.77 application, a counterclaim will be lodged here. Otherwise, the progress of the matter has effectively been halted pending the outcome of the present application.

(b) The Supreme Court Proceeding

15 MJPE issued its proceeding out of the Supreme Court on 10th December 2004. Such proceeding was placed in the Building Cases List. Whilst I do not have before me the Supreme Court file, it is apparent that, on 5th October 2005 and pursuant to orders of Habersberger J made 9th September 2005, MJPE filed and served an Amended Statement of Claim. That Amended Statement of Claim is lengthy and detailed. It seeks various heads of relief. In addition to a claim for damages for a very substantial amount based upon quantum meruit or unjust enrichment, MJPE seeks various orders in relation to the land upon which the project is located. Such orders include the provision by MJPE of a discharge of mortgage; an injunction requiring Finhaven to execute partial discharges of mortgage; declarations concerning the entitlement of MJPE to maintain the charge upon the land on which Finhaven's commercial units were being constructed and to maintain caveats in support of such charge; and, in the event of default by Finhaven in relation to payment of monies owing to MJPE, a declaration that MJPE is at liberty to apply to the Court to enforce the charge. It also seeks orders that the land the subject of the project be sold and that monies owing to MJPE be paid from the proceeds of such sale. As stated, the document is a lengthy one, and the above is very much a summary of it.

16 Finhaven has apparently made a number of attempts at filing and serving a counterclaim. The most recent, and Fourth Further Amended Counterclaim, is dated 9th June 2006. The document also includes a Further Amended Defence. This is a particularly lengthy document of some 79 pages, not including attached Schedules. I shall certainly not attempt to set it out here, and shall give only the briefest of summaries. The relief sought by Finhaven includes a declaration that it is not required to discharge a second mortgage until the obligations of MJPE, pursuant to the Master Agreement, have been discharged, or damages paid; an order that all necessary accounts be taken in relation to the project; a declaration that the Master Agreement has been repudiated by MJPE; an order for the removal of each of the caveats lodged by MJPE over the Finhaven units; damages for breach of contract and pursuant to the *Trade Practices Act* 1974; and compensation pursuant to the *Transfer of Land Act* 1958. Damages are also sought against Phillip Watt.

17 On 26th July 2006, MJPE filed and served a Third Party Notice by which it made Raline a third party to Finhaven's counterclaim. The Third Party Notice refers to the counterclaim made against MJPE by Finhaven; it refers to the building contract and to the date for practical completion; it alleges a breach by Raline of the term of the contract relating to a timely practical completion; it refers to an allegation by Finhaven concerning rectification in relation to the failure to provide certain items, and a breach of the building contract resulting therefrom; and it seeks damages in terms of the damages that may be ordered in favour of Finhaven together with costs and interest that may be ordered in favour of

Finhaven. In other words, as one might expect, MJPE is basically seeking from Raline indemnity in relation to Finhaven's counterclaim.

18 Having summarised what is being sought in the proceedings, I shall now turn to a brief summary of the cases as advanced on behalf of the parties in both oral and written submissions. I shall deal with these in the order of presentation.

THE CASE ON BEHALF OF MJPE

19 The submissions advanced by Mr Nixon on behalf of MJPE could be summarised as follows.

20 This application falls squarely within the previous decision (of mine) in *Gore Street Pty Ltd v Enviroprotect Pty Ltd* [2003] VCAT 955. As in that case, there is a related proceeding on foot in the Supreme Court. There is a factual overlap. The two actions are so intertwined that there is a risk of inconsistent findings. There should not be duplication of proceedings. There should be a single hearing, or consecutive hearings, dealing with all issues. As in *Gore Street*, the current proceeding should be struck out and referred to the Supreme Court. Furthermore, the Supreme Court proceeding was commenced several months prior to the original VCAT proceeding, and well before the issuing of the current VCAT application in October, 2005. In addition, some of the relief sought in the Supreme Court proceeding is relief which cannot be afforded by this Tribunal because there is no jurisdiction so to do.

21 Expanding upon these points, it is quite apparent that the two proceedings involve the same questions. The same Master Agreement and the same building contracts are in issue. The same parties are involved. Each claim involves a consideration of the same factual matrix. Both cases will involve an assessment of the appropriateness of all variations made under the building contract. Both will involve the extensions of time and a consequent assessment of liquidated damages, if any. Both will require an assessment of the extent of defects and consequent rectification costs. Both will require consideration of the circumstances relating to the exclusion of MJPE and Raline from the project site in early 2005, and the question of which party, if any, repudiated its contractual obligations. Accordingly, there is a real risk of conflicting decisions if the two proceedings are allowed to continue in different forums. That Raline has now been joined to the Supreme Court proceeding adds emphasis to this.

22 Given that the two proceedings should be heard in the one forum, the Supreme Court is the more appropriate forum. The Supreme Court proceeding is far more advanced than the proceeding at VCAT. In addition, the matter is complex and can be judge managed at the Supreme Court.

23 The Supreme Court is also a more appropriate forum for the hearing of the combined proceedings because some of the heads of relief sought cannot be ordered by this Tribunal, or at least a considerable doubt exists as to whether they could be. Reference is made to the orders sought in relation to mortgages, caveats, and the charge. It is desirable that the proceedings be dealt with in the

one forum, and that should be the forum which possesses the jurisdiction to make orders in respect of all heads of relief sought.

24 In relation to other discretionary matters, MJPE has not been guilty of delay. It has pressed for and obtained interlocutory orders in the Supreme Court proceeding, and ultimately the Fourth Further Amended Counterclaim of Finhaven was received in June of this year. Furthermore, delay in the VCAT proceeding has been occasioned by Raline. Effectively there was a delay of seven months caused by the fact that the original application and Points of Claim were totally replaced by a new application.

25 In relation to the principles to be applied in dealing with an application pursuant to s.77, the power to strike out and transfer is discretionary, and the discretion must be exercised judiciously. In that regard, reference is made to the decision (of mine) in *Bovalino v Crea* [2005] VCAT 1692. In the circumstances, with the Supreme Court proceeding having advanced further than the proceeding at VCAT, and given the nature of the two proceedings, little inconvenience will be caused to Raline if the VCAT proceeding is transferred to the Supreme Court. There should be no greater delay. These factors do not operate so as to favour Raline's position.

26 In addition, Raline has hinted at a possible application to the Supreme Court pursuant to s.57 of the *Domestic Building Contracts Act*. If that were successful, and the proceedings were severed, the result would be disastrous. Such an unfortunate result can be avoided by the referring of the VCAT proceeding to the Supreme Court. This again avoids duplication of litigation and the risks attached thereto.

27 In summary, pursuant to s.77 of the Act, the VCAT proceeding should be struck out and referred to the Supreme Court.

THE CASE ON BEHALF OF RALINE

28 The submissions of Mr Bolton on behalf of Raline could be summarised as follows.

29 Both the VCAT proceeding and the Supreme Court proceeding have all the appearance and content of a building case. In fact, the whole dispute is a building case of the type with which VCAT is very familiar. If the whole dispute is to be dealt with anywhere, it should be dealt with at VCAT. The issuing of a Third Party Notice against Raline in the Supreme Court proceeding is belated. MJPE has still not filed a counterclaim in relation to the VCAT proceeding.

30 VCAT is the jurisdiction chiefly responsible for the determination of matters where the statutory provisions relied upon are contained in the *Domestic Building Contracts Act* and the *Fair Trading Act*. In the present case, the two proceedings contain distinct issues of fact and law and have arisen out of different circumstances. Further, MJPE's conduct has delayed the VCAT proceeding, and that delay includes the lateness in relation to the present application pursuant to s.77. The pleadings in the Supreme Court proceeding are still not closed, and continuing dispute and amendment is occurring in that regard.

31 Given the interlocutory steps that have been taken in the Supreme Court proceeding, it is unlikely to be listed in that Court before mid to late 2007, and it will be a lengthy trial. In fact, referral of this proceeding will probably cause further delay until well into 2008. The costs would be prohibitive. Furthermore, Finhaven supports Raline's position in this regard.

32 Pursuant to the Act, the Tribunal is obliged to have regard to the substantial merits of the case and is not bound by the rules of evidence and the like. MJPE's application has no merit, and should be dismissed. Given the objects of the Act, the Tribunal should not refer the matter to the Supreme Court, when such referral would result in significant delay, extra cost and a more formal procedure.

33 The late joinder of Raline to the Supreme Court proceeding has denied it the opportunity to bring an application pursuant to s.57 of the *Domestic Building Contracts Act* at an earlier time. Raline could have been so joined as early as 2004. It is unfair that Raline should be so deprived of that opportunity. The entire dispute could have been referred to this Tribunal, and should have been, but Raline was deprived of the opportunity to make the relevant application at the appropriate time. The Finhaven dispute could also have been dealt with at VCAT. Indeed, MJPE could still make an application to the Supreme Court pursuant to s.57 of the *Domestic Building Contracts Act.* The relevant matters could still be determined by VCAT. There could have been a prompt and economical disposal of the matter before this Tribunal. Section 97 of the Act requires the Tribunal to act fairly. It would be unfair if, Raline having elected to issue its proceeding out of this Tribunal and having been deprived of the opportunity to apply to the Supreme Court pursuant to s.57 of the *Domestic Buildings Contract Act*, the matter were now referred to the Supreme Court.

34 MJPE has caused delay. That delay has worked to the detriment of Raline. Considerations of fairness, convenience, timeliness and expense lead to the conclusion that Raline's application issued out of this Tribunal should not be struck out and referred to the Supreme Court.

RULING

35 As I have indicated in a considerable number of previous decisions, I am reluctant to accede to applications brought pursuant to s.77 where what is alleged is that this Tribunal lacks sufficient expertise, adequate powers in relation to the discovery of documents, sufficiently structured "pleadings", or appropriate case management procedures to enable it to deal with complex or sizeable cases. Whilst each application must be dealt with on its merits, to date I have not been easily persuaded that such matters outweigh the other factors to be considered, particularly in relation to claims brought pursuant to statutory provisions where the first port of call would appear to be this Tribunal. The arguments of Mr Nixon in this regard were somewhat tentative, and I reject them. I continue to have confidence in the expertise of members of this Tribunal to deal with large or complex matters brought pursuant to Acts of Parliament which confer jurisdiction upon VCAT. However, as stated, each application must be dealt

with on its merits. Arguments as to complexity and the like in relation to the present application do not impress me.

36 I do not wish to be continually reciting decisions of my own as if they were some sort of jurisprudential masterpieces, but basically I have dealt with all s.77 applications argued before this Tribunal in the last few years. Hence the reference to them by counsel. Whilst in the past I have generally not been impressed with arguments advanced in relation to complexity, quantum or pleadings, I have been concerned about situations where there exists the risk of duplication of proceedings and conflicting decisions. In this regard, Mr Nixon referred to my decision in *Gore Street*, and to my observations in *Pong Property Development Pty Ltd v Paradise Constructions Pty Ltd* [2005] 2513 and in *Crampsey v McLean and Rosengrave* (delivered 15 December 2003), although *Pong* related more to the issue of VCAT's jurisdictional powers. In other decisions such as *Geopec Pty Ltd v Ausbuild Constructions Pty Ltd & Anor* (delivered 20 December 2005), *Jogeo Pty Ltd v Schierholter* (delivered 4 July 2006), and very recently *Maryvell Investments Pty Ltd v Sigma Constructions Pty Ltd* (delivered 7 August 2006), I have alluded to duplication of proceedings and the risk of conflicting decisions when referring to important factors not present in those cases. In appropriate circumstances, where the proceedings are intertwined, where duplication should be avoided, and where I am satisfied that there is a risk of conflicting decisions, I have been prepared to accede to applications pursuant to s.77. That remains my opinion. As was stated by Warren J in *Rogan & Ors v Rushton (QLD) Pty Ltd* [2002] VSC 375, matters of cost and convenience should be taken into account. Duplication of litigation and conflicting decisions add to the expense and can create considerable inconvenience and uncertainty. The risk of this happening should be avoided.

37 In the present case I am persuaded that the proceedings are closely intertwined. I agree with Mr Nixon that they arise out of the same Master Agreement, the same building contract, the same factual matrix. The same parties are involved. Even though Finhaven is not a party to the VCAT proceeding, it is closely linked with it in the sense that elements essential to the dispute involving it are the subject of the dispute on foot here.

38 In my opinion, the issues to be determined overlap to a very considerable extent. It is therefore desirable that the proceedings be dealt with in the one hearing or in consecutive hearings before the same decision-making body. The question then is whether the proceeding would be more appropriately dealt with by a Court (the Supreme Court) rather than by this Tribunal. In my opinion, it would be. I have previously expressed the view that, apart from the risk of duplication of litigation or conflicting decisions, where doubt exists as to whether this Tribunal can afford the appropriate relief for jurisdictional reasons, the proceeding should be referred to a body which unquestionably possesses such jurisdiction. In this regard, and without wishing to refer endlessly to my own judgments, I refer to the decisions in *Linton and Vink v Commonwealth Bank of Australia* (delivered 20 April 2004) and *Pong Property*. Particularly where there are proceedings, or proposed proceedings, which may be on foot elsewhere, fairness seems to me to require

that, if there exists doubts as to the power of this Tribunal to grant aspects of the relief sought, the matter should be struck out and referred to the other proposed jurisdiction where no such doubts exist. Apart from the fact that there is currently no application on foot to transfer the Supreme Court proceeding to this Tribunal, and that I could certainly not make such an order, some doubt must exist as to whether this Tribunal possesses the jurisdiction which would enable it to make some of the orders sought in the Supreme Court. The orders sought in relation to mortgages and caveats fall into this category. Apart from the other orders sought, the relief sought by Finhaven in the form of an order for the removal of caveats, which would presumably be directed to an official not a party to the proceeding, might be viewed as being of particular concern and raising considerable jurisdictional doubts. If the proceedings are to be dealt with essentially as one hearing, or as consecutive hearings, it is highly desirable that all issues be determined and the appropriate orders made. If a considerable doubt exists as to the power of this Tribunal to make some of those orders, it is preferable that the proceeding before it be struck out and referred to the Court dealing with the related proceedings and where no jurisdictional doubts exist.

39 This is apart from the fact that I can only deal with the application that is before me. I cannot compel a party to make an application to the Supreme Court pursuant to s.57 of the *Domestic Building Contracts Act*. It is not for me to say that the Supreme Court proceeding should be transferred here. The fact remains that, despite Mr Bolton's arguments in relation to fairness and deprivation of opportunity, no application has been made to the Supreme Court and the dispute continues to be dealt with by Habersberger J in the Building Cases List. The application which I must consider relates to striking out and transferring of the VCAT proceeding to the Supreme Court, and it does not and could not embrace the reverse situation. The close intertwining of the proceedings, the duplication of same, and the risk of conflicting decisions, when combined with the doubts that may exist concerning VCAT's jurisdictional capacity in relation to all of the orders sought (as compared with the clear jurisdictional capacity of the Supreme Court in that regard) all militate towards the transferring of the VCAT proceeding to the Supreme Court.

40 Other factors to be considered also lead to this conclusion. The material placed before me persuades me that the Supreme Court proceeding is well advanced. It commenced before the VCAT proceeding. Delay in obtaining a hearing before the Supreme Court may frequently be greater than before this Tribunal, but, in the present case, it may not be significantly greater. For instance, I accept that MJPE has delayed the filing of any counterclaim in the VCAT proceeding pending the outcome of the present application. Given the nature of the matter, doubtless further delay would then be encountered. Furthermore, the Supreme Court proceeding, now involving the same parties, would still be on foot, so that the end of litigation may be no nearer. In addition, I accept that Raline effectively started again with its application before this Tribunal some seven months after its original application. For much the same reasons as those related to delay, I am not persuaded that the cost differential would be so great as to

outweigh the other factors which I have taken into account in the exercise of my discretion.

41 In *Ewins v BHP Billiton Limited* [2005] VSC 4, Gillard J referred to the concept of a natural forum based upon connecting factors. In my opinion, in the circumstances of the present dispute, that natural forum is the Supreme Court. The facts of this particular case seem to me to lead inevitably to the conclusion that the VCAT proceeding should be struck out and referred to the Supreme Court.

42 Accordingly, the application of MJPE succeeds. The proceeding is struck out and referred to the Supreme Court of Victoria, where it can be dealt with more appropriately.

43 I shall hear the parties in relation to any ancillary orders that are required.

Judge Bowman
Vice President