VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

VCAT REFERENCE NO. D394/2007

DOMESTIC BUILDING LIST

CATCHWORDS

Remittal of matter – Scope of remitted matter – Whether new evidence can be adduced on remitted matter.

APPLICANT	Sayed Rustom t/as Snab Home Builders
RESPONDENT	Mohammed Ismail
WHERE HELD	Melbourne
BEFORE	Senior Member E. Riegler
HEARING TYPE	Directions Hearing
DATE OF HEARING	25 May 2010
DATE OF ORDER	3 June 2010
CITATION	Rustom trading as Snab Home Builders v Ismail (Domestic Building) [2010] VCAT 973

ORDER

1 In the absence of consent of the parties, the hearing of this matter is not to be confined to determining the proceeding based on the transcript of the hearing conducted on 30 June, 1-3, 7-10, 14-15, 18-22 July 2008.

2 **This proceeding is listed for a directions hearing before Senior Member Riegler at 9.30 a.m. on 18 June 2010 at 55 King Street Melbourne 3000.**

3 Costs reserved.

SENIOR MEMBER E. RIEGLER

APPEARANCES:

For the Applicant	Ms S. Kirton of counsel
For the Respondents	Mr J. Shaw of counsel

REASONS

1 This directions hearing is the first return date of a proceeding that has been remitted back to the Tribunal by order of the Supreme Court of Victoria, following a successful appeal of an earlier decision made by the Tribunal (**'the First Tribunal Hearing'**) . The appeal judgement remitting the matter back to the Tribunal was expressed as follows:

> 34. After discussion, it became common ground that, if the decision were to be set aside and the matter remitted to the Tribunal, the Tribunal should be left free to decide whether or not to admit further evidence.
> 35. For the reasons I have given, I consider that the Tribunal's decision should be set aside and the matter remitted to the Tribunal, differently constituted, for rehearing and re-determination.[1]

2 It is clear from the content of the appeal judgement that the Tribunal, differently constituted, is to rehear the matters previously before the Tribunal *de novo*. The question arises, however, as to the mode of that rehearing. In other words, should the Tribunal hear and determine the proceeding based solely on the transcript of the First Tribunal Hearing, partly on the Transcript and partly by way of oral evidence; or wholly afresh.

3 The form of the orders made by the Supreme Court provides little guidance as to how the Tribunal should conduct the remitted proceeding. It has left it to the Tribunal to decide whether to admit further evidence or not.

4 Ms Kirton of counsel, who appeared on behalf of Mr Rustom, the unsuccessful applicant in the First Tribunal Hearing, contends that Mr Rustom would be denied natural justice if the remitted proceeding was conducted solely 'on the papers'.

5 Mr Shaw of counsel, who appeared on behalf of Mr Ismail, being the successful party in the First Tribunal Hearing, contends that the remitted proceeding should be conducted solely by reference to the transcript, witness statements and other documents filed in the First Tribunal Hearing.

Legislation

6 The *Victorian Civil and Administrative Tribunal Act* 1998 (**'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.

[1] *Rustom (t/a Snab Home Improvements) v Ismail* [2009] VSC 625

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.100 (2)	If the parties to a proceeding agree, the Tribunal may conduct all or part of a proceeding on the basis of documents, without any physical appearance by the parties or their representatives or witnesses.
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.

Should the remitted hearing be conducted 'on the papers?'

7 Mr Shaw contended that to allow Mr Rustom to call fresh evidence in the remitted proceeding would, in effect, give him a *second bite at the cherry*. He submitted that Mr Ismail would suffer a substantial injustice because Mr Rustom, who was unsuccessful in the First Tribunal Hearing, would be given the opportunity to remodel his case and cure any defects in the evidence given at first instance. Mr Shaw suggested that the demeanour of the witnesses called by Rustom and his own demeanour may be seen differently in the remitted proceeding because those witnesses will be aware of what cross-examination they will be subjected to. Mr Shaw contended that there was nothing fair about allowing a witness to give their evidence twice. He submitted that an unrestricted remitted proceeding would give an unfair advantage to Mr Rustom.

8 Ms Kirton submitted that the nature of the proceeding at first instance and the basis upon which the appeal was granted warranted that the remitted proceeding required all evidence to be reheard. In particular, Ms Kirton said that First Tribunal Hearing was set aside because it was found to be affected by an apprehension of bias. She contended that as a consequence, all of the evidence heard in that First Tribunal Hearing was tainted by that apprehension of bias, which could only be cured by that evidence being

heard again through a differently constituted Tribunal. Finally, she contended that it was inappropriate to attempt to evaluate and determine the evidence by reading the transcript of the First Tribunal Hearing because there were factual issues in contest which required the Tribunal to consider the demeanour of each witness so as to determine which witness was more credible than the other.

9 The Tribunal, which subsumed the former Domestic Building Tribunal, was, like its predecessor, established to provide a specialist forum able to determine domestic building disputes in a fair, efficient and cost effective manner.[2] The First Tribunal Hearing occupied 15 hearing days, with lay and expert witnesses called to give evidence. The prospect of conducting another 15 day hearing, with the obvious costs associated therewith is a factor to be weighed against any prejudice suffered by either party if the remitted proceeding was conducted solely on the papers.

10 I was taken to numerous authorities relevant to the question whether the remitted proceeding should be conducted solely on the papers or wholly afresh.

11 In *John W Blackman v Commissioner of Taxation* [1993] FCA 345, the Full Court of the Federal Court of Australia made the following comments:

> 13…The Tribunal stands in the place of the original decision maker, to make the "correct or preferable decision" on the material before the Tribunal... the Tribunal has the responsibility of ascertaining the facts necessary for the making of the decision. By s.33(1)(c) of the Administrative Appeals Tribunal Act 1976, the Tribunal is not bound by the rules of evidence but may inform itself on any matter in such manner as it thinks appropriate.
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> 13. The obligation of the Tribunal to find facts is not diminished where there has been a successful appeal to the Federal Court of Australia under s.44 of the Administrative Appeals Tribunal Act 1975. If the Court allows the appeal, sets aside the decision of the Tribunal, and remits the case to be heard and decided again, the Tribunal retains its responsibility to find the facts. If, as is usually the case, the remitted matter is heard and decided by a Tribunal differently constituted from the Tribunal whose decision was the subject of the successful appeal, the differently constituted Tribunal will have to find facts. In the exercise of its powers, and subject to the submissions of the parties, the Tribunal may decide to act on the findings of fact made by the earlier Tribunal, or some of them. It may decide, as the learned senior member did in the present case, to rely upon evidence which was before the earlier Tribunal. It may decide that the proper course is to receive all or some evidence afresh.

12 Consistent with the relevant provisions of the VCAT Act and the dicta in *John W Blackman*, I find that it is open for the Tribunal to conduct the

[2] Second reading speech 9 April 2009

remitted proceeding purely by way of reference to the earlier transcript. However, it appears to me that a common theme flows through the other authorities referred to me, namely, that where factual matters are in contest and the credibility of witnesses is at issue, there are difficulties in conducting the remitted proceeding solely on the basis of the transcript of the earlier proceeding. This is because it is difficult to assess the credibility of a witness without observing their demeanour during cross-examination.

13 Although it is open for the Tribunal to rely solely on the transcript and other material of the First Tribunal Hearing, it seems to me that this course should not be adopted in circumstances where it deprives a party of procedural fairness. I hold this view mindful of s.98 and s.108 of the *Victorian Civil and Administrative Tribunal Act* because those provisions do not relieve the Tribunal of exercising its discretion judicially. In my view, a proceeding that has been remitted back to the Tribunal for re-hearing is to be conducted with the same procedural fairness as if the hearing was being heard for the first time. Whether the Tribunal can rely upon transcript of an earlier proceeding must be weighed against the ability of the Tribunal to continue to afford natural justice to all parties.

14 The Federal Court in *Ashmore v Commissioner for Superannuation* [2000] FCA 1816 grappled with this same issue in the context of analogous legislation, which regulated the operation of the Commonwealth Administrative Appeals Tribunal. In *Ashmore*, Moore J stated:

> 52. Reference should be made to the content of any legal obligation of a court or tribunal to observe a witness giving oral evidence before disbelieving that witness' evidence. Counsel for both parties referred to numerous authorities that deal with the obligation of an appellate court to defer to findings of credibility made by the court or tribunal appealed from, where the latter has seen and heard the witnesses.
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> 54 In *D'Antuono v Minister of Health* (1997) 80 FCR 226, the Full Federal Court addressed this issue in the context of an application to a single judge of the Court for review of a decision of a judicial registrar under s 377 of the then *Industrial Relations Act 1988* (Cth). Such an application was by way of hearing *de novo*. Carr j observed (at FCR 240):
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> > "*In my opinion, an attempt to conduct a review, being a review which requires choosing between conflicting evidence to resolve a dispute about primary facts, on the basis of the transcript of the proceedings below runs a great risk of being vitiated by legal error from the outset.*
>
> 55 His Honour agreed with an observation of Madwick J in Cosco Holdings Pty Ltd v Thu Thi Van Do (unreported, Industrial Relations Court of Australia, 30 June 1997) that there may be cases where it is possible for the judge to resolve a dispute about

primary facts on the papers. However, His Honour was "inclined to think that they will be exceptional cases"…

> 58 However these proceedings concern administrative and not judicial proceedings. The question of whether procedural fairness might require a hearing at which evidence would be given orally (if the credibility of a party to the administrative process is or may be important) before an administrative decision is made is not susceptible of a single answer of universal application. The question has arisen in a variety of contexts and the answer almost invariably lies in the terms of the applicable statute and the circumstances of the particular case...
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> 59 It cannot be doubted that a person who must ascertain what the facts are can often derive an advantage from seeing a person give an account of the facts where credibility is an issue. As Gleeson CJ said in Re Refugee Review Tribunal; Ex Parte Aala [2000] HCA 57 (at par 4):
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> > *"Decisions as to credibility are often based upon matters of impression, and an unfavourable view taken upon an otherwise minor issue may be decisive."*
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> 61 Often a view can be formed about a person's account of the facts by the evidence being tested in cross-examination. So much was recognised by the Full Court in *Omran v Australian Postal Commission* (1992) 15 AAR 232 at 234:
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> > *"We do not wish to minimise the importance of cross-examination. It is undoubtedly true that in many cases cross-examination has a vital role to play in evaluating the reliability of evidence. This is particularly the case with non-expert evidence, especially when matters of credibility are involved."*
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> 65 In these proceedings there was a hearing at which the applicant's demeanour was observed when she gave both evidence in chief and was cross-examined. However two members of the Tribunal who found the facts and formed a negative view about the applicant did not see her give evidence. This, in my opinion, does raise a question about the fairness of the procedure which was adopted.

15 The present case is an inter-party dispute. It is not an administrative proceeding. When one considers the various authorities cited by Moore J in *Ashmore,* it would appear that there is a greater reluctance on the part of the courts in inter-party or *judicial proceedings* to conduct re-hearings on the papers.

16 In the present case, counsel for both parties agreed that issues of credibility were at the forefront of the First Tribunal Hearing. Indeed, reference is made to that fact in the appeal judgement.[3] Mr Shaw, however, submitted

[3] See *Rustom v Ismail* [2009] VSC 625 at [9], [11] and [31]

that whether or not a newly constituted Tribunal can assess the demeanour of witnesses in a remitted proceeding should not be paid significant weight. He contended that there was High Court authority supporting the proposition that the demeanour of witnesses was no longer seen as being of great significance, although that authority was not cited. I agree that in some cases, the demeanour of witnesses may not play a fundamental role in the assessment of their credibility. For example, there may be corroborating documentary evidence or it may be difficult to judge the credibility of a witness by their demeanour because of cultural or linguistic differences. Mr Shaw submitted that the evidence given by the applicant in the First Tribunal Hearing was through the assistance of an interpreter and in those circumstances, it would be difficult to judge the credibility of Mr Rustom by his demeanour.

17 In my view, it would be difficult to ensure that procedural fairness is afforded in circumstances where the remitted proceeding has to determine contested matters of fact, which may turn on the credibility of witnesses without being able to assess the demeanour of those witnesses. Accordingly and with great reluctance, I feel that I am left with little option but to order that the remitted proceeding be conducted afresh without limiting the evidence to be adduced by either party to the transcript of the First Tribunal Hearing. I feel that in the circumstances of this case, depriving a party of the opportunity to give their evidence again would amount to a denial of justice. In making that finding, I have concluded that the perceived 'advantage' that might be afforded to Mr Rustom does not outweigh the prejudice that he might suffer if he were not allowed to re-call his witnesses to give their evidence again in the absence of any perceived apprehension of bias.

18 Having made that finding there is no suggestion, however, that any part of the proceeding prior to the first day of hearing was affected by an apprehension of bias. Consequently, there is no reason to disqualify witness statements, pleadings, expert reports and other materials filed in the proceeding prior to the first day of hearing. Those documents remain part of the remitted proceeding.

19 Moreover, the evidence given in the first Tribunal proceeding is not extinguished.[4] Accordingly, it is open for the parties to consider limiting the amount of oral evidence to be given in the remitted proceeding by relying on evidence already given in the First Tribunal Hearing. That is, however, a matter for the parties to consider as I do not believe it is appropriate for the Tribunal to impose or restrict what evidence each party seeks to adduce afresh in the remitted hearing.

[4] S.108 (6) of the VCAT Act.

Should the parties be permitted to amend their points of claim?

20 A further issue arose during the course of the directions hearing which related to whether Mr Rustom should be given leave to amend his *Amended Points of Claim*. Ms Kirton submitted that Mr Rustom had amended his points of claim during the course of the First Tribunal Hearing but the amendments were affected by the apprehension of bias which attached to that whole proceeding. She indicated that it was not the intention of Mr Rustom to conduct a different case to the case that was prosecuted at the First Tribunal Hearing but rather, that the proposed amendments were minor.

21 The appeal judgement stated that the decision of the Tribunal was to be set aside and the *matter* remitted to the Tribunal for rehearing and re-determination. It is not clear whether the reference to the word *matter* in the appeal judgement is be given any special consideration or meaning, given that s.148 (7) (c) of the VCAT Act makes reference to the *proceeding* rather than the *matter* being heard and decided again. In that regard, I note that the Commonwealth Administrative Appeals Tribunal in *Lees Repatriation Commission* [2004] AATA 583 gave the word *matter* special consideration. That case involved the Full Court of the Federal Court allowing an appeal against a decision made by the AAT at first instance, and ordering that *the decision of the Tribunal should be set aside, the matter remitted to the Tribunal differently constituted.* The AAT had to decide whether the reference to the word *matter* in the orders of the Full Court of the Federal Court meant that the re-hearing was confined to matters, the subject of the error of law or alternatively, the proceeding at large.

22 Consequently, a question arises whether it was intended to confine the rehearing to only those *matters* that were agitated in the First Tribunal Hearing or whether the appeal judgement is to be construed more widely to mean the proceeding at large. The answer to that question may affect the Tribunal's jurisdiction to hear other disputes that were not agitated in the First Tribunal Hearing because those other disputes do not comprise the *matter* remitted back to the Tribunal.[5]

23 On the other hand, if the *proceeding* at large has been remitted for rehearing, then it may be the case that there is no restriction on what issues may be agitated in the rehearing. If that is the case, 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.

[5] See *Repatriation Commission v Nation* (1995) 57 FCR 25 at pages 31 – 34.

24 In the present case, however, I was not informed of what amendments were proposed or given a draft of the proposed amended pleading. Consequently, I am unable to say whether the proposed amendment goes beyond the matters comprising the First Tribunal Hearing. It is therefore unnecessary for me at this point to decide whether the rehearing is to be restricted to only those matters that were raised at first instance.

25 In the present case, no hearing date has been fixed for the remitted hearing. Accordingly, argument as to the proposed amendment can be advanced at the next directions hearing, where further interlocutory orders will be made to progress the remitted proceeding towards final hearing. I will therefore order that the remitted hearing be listed for further directions.

SENIOR MEMBER E. RIEGLER