IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMON LAW DIVISION

Not Restricted

No. SCI 2011 3265

PATRICK ARTHUR DEWAN — Appellant

v

MEDICAL BOARD OF AUSTRALIA — Respondent

JUDGE:	BEACH J
WHERE HELD:	Melbourne
DATE OF HEARING:	17 November 2011
DATE OF JUDGMENT:	21 November 2011
CASE MAY BE CITED AS:	Dewan v Medical Board
MEDIUM NEUTRAL CITATION:	[2011] VSC 588

APPEAL FROM VICTORIAN CIVIL & ADMINISTRATIVE TRIBUNAL ON A QUESTION OF LAW – Natural justice – Procedural fairness – Obligation to give a fair hearing – VCAT orders set aside – Matter ordered to be re-heard in its entirety - *Victorian Civil and Administrative Tribunal Act* 1998, s 148.

APPEARANCES:	Counsel	Solicitors
For the Appellant	Mr D.G. Brookes SC with Mr J.P. Gorton	Perry Maddocks Trollope
For the Respondent	Mr J. Ruskin QC with Ms S.L. Hinchey	Minter Ellison

HIS HONOUR:

Introduction

1 Patrick Arthur Dewan, the appellant, is a medical practitioner and specialist paediatric surgeon. On 18, 21 and 26 November 2008, 5 December 2008, 4, 5 and 6 May 2009, 11 September 2009, 23 November 2009 and 10 December 2009, a panel ("the panel") appointed by the Medical Practitioners Board of Victoria ("the Board") conducted a formal hearing into the appellant's professional conduct pursuant to a notice of formal hearing that had been served on the appellant. The notice contained allegations of unprofessional conduct relating to the adequacy of investigations made and treatment and advice given by the appellant in respect of a patient, EF, between 17 December 2003 and 2 January 2004. Amongst other allegations was an allegation that the appellant "proceeded to operate on EF in circumstances where it was not medically warranted and/or where EF's barium enema of 19 December 2003 showed no evidence of Hirschsprung's disease and his post evacuation film showed marked decompression of the sigmoid and rectum". The operation consisted of a resection of the rectum and the sigmoid colon.

2 On 10 December 2009, the panel found the allegations in the notice of hearing were made out and that the appellant had engaged in unprofessional conduct of a serious nature and professional misconduct as defined in s 3(1) of the *Medical Practice Act* 1994. Further, the panel determined that:

(a) Pursuant to s 45A(2)(c) of the Act the appellant would be reprimanded for his unprofessional conduct of a serious nature.

(b) Pursuant to s 45(2)(a) of the Act, the appellant would be required to undergo counselling or retraining regarding appropriate communication between doctor and patient or the parent/guardian of a patient, with particular reference to informed consent, obtaining a second opinion, seeking non-surgical solutions, discussion of possible alternate diagnoses and situations

where the outcome of the procedure is not as good as expected.

(c) The counselling or retraining was to be by a senior paediatric surgeon, approved by the Chief Executive Officer of the Board or his nominee. The counselling or retraining was to consist of four sessions at three-monthly intervals, to be completed within twelve months of 1 March 2010. The cost of the sessions was to be borne by the appellant. The senior paediatric surgeon and the appellant were each to report to the Board by 1 September 2010 and by 1 March 2011 detailing the content and lessons learnt. The reports were to be to the satisfaction of the Board.

(d) Pursuant to s 45A(2)(e) of the Act, the following condition was to be imposed on the appellant's registration: he would be required to undergo an audit of his surgical practice by a senior paediatric surgeon approved by the Chief Executive Officer of the Board or his nominee. The audit was to include indications for surgery, surgical outcomes and long term follow-up of surgical cases where indicated. The audit was to be over a period of two years commencing 1 March 2010 with reports at six monthly intervals to the Board. The cost of the audit is to be borne by the appellant.

3 Pursuant to s 60 of the *Medical Practice Act*, the appellant applied to the Victorian Civil and Administrative Tribunal ("VCAT") for the review of the Board's decision. The matter was heard at VCAT (constituted by Senior Member R. Davis and Members B. Collopy and A. Shanahan) on 2-4, 6, 9, 16-19, 23 and 24 May 2011. On 10 June 2011, VCAT made the following orders:

> "1. The decision of the respondent is set aside.
>
> 2. Pursuant to s 45A(2)(g) of the *Medical Practice Act* 1994 (the Act), the registration of Patrick Dewan as a medical practitioner is suspended for a period of 12 months from 28 days after the date of this order.
>
> 3. Pursuant to s 45A(2)(c) of the Act, Patrick Dewan is reprimanded for his unprofessional conduct of a serious nature and professional misconduct.
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> 4. Pursuant to s 45(2)(a) of the Act, before recommencing practice, Patrick Dewan is to undergo counselling and retraining regarding

appropriate communication between doctor and patient or parent/guardian of a patient with particular reference to informed consent, obtaining a second opinion, seeking non-surgical solutions, discussion of possible alternate diagnoses and situations where the outcome of the procedure is not as good as expected.

5. The counselling or retraining is to be by a senior paediatric surgeon, approved by the Chief Executive Officer of the Medical Board of Australia or his/her nominee. The counselling or retraining is to consist of four sessions at three-monthly intervals, to be completed within twelve months of the date of this decision. The cost of the sessions is to be borne by Patrick Dewan. The senior paediatric surgeon and Patrick Dewan are each to report to the Board by 1 January 2012 and by 31 May 2012 detailing the content and lessons learnt. The reports are to be to the satisfaction of the Board. The senior paediatric surgeon must confirm in writing to the Board that he or she has a copy of this decision and reasons.

6. Upon resumption of practice, pursuant to s 45A(2)(e) of the Act, the following condition is imposed on Patrick Dewan's registration:

> All patients admitted to hospital under Patrick Dewan for bowel resection should have a documented second opinion by another paediatric surgeon supporting the decision for surgery. This practice should be periodically audited (at the expense of the applicant) by the Surgical/Medical committee within the hospital, responsible for addressing the standards of clinical care. The term of this condition is for a period of two years from the date that Patrick Dewan commences to practice after the suspension.

7. Liberty to apply in respect of the form of these orders.

8. Costs reserved."

4 The Medical Board of Australia, the respondent, is the successor of the Board. Following the making of the VCAT orders, the appellant sought leave to appeal, on a question of law, pursuant to s 148 of the *Victorian Civil and Administrative Tribunal Act* 1998. The grounds on which leave to appeal was sought were:

"1. The Tribunal failed to accord the Appellant procedural fairness by making determinations pursuant to the *Medical Practice Act* 1994 without first giving the Appellant the opportunity to lead evidence or to make submissions as to what would be appropriate determinations.

2. The Tribunal misdirected itself, and applied the wrong template, commensurate with the terms of the Agreed Facts, in its approach to allegations 2(a) and (b) – being the allegations that the Appellant had engaged in unprofessional conduct (including professional misconduct) by proceeding to operate and not first performing investigations for Hirschsprung's disease (including a biopsy), in that:

a) it failed to limit its consideration to whether or not there had been sufficient medical management prior to making the decision to operate and whether the Appellant had failed in the exercise of professional judgment in that regard; and

b) it failed to properly consider the Agreed Facts and/or relevant evidence to the effect:

i. EF had a megarectum;

ii. a megarectum is amenable to resection even if not caused by Hirschsprung's disease;

iii. EF had had substantial bowel problems for years and presented with significant ongoing problems; and

iv. his parents were at their wit's (sic) end.

c) it failed to give proper consideration to the Appellant's belief that a rectal resection was appropriate irrespective of whether the child had Hirschsprung's disease;

d) it failed to have regard to the Appellant's evidence, and case, that the operation was warranted whether or not EF had Hirschsprung's disease, and thus that a pre-operative biopsy was unnecessary and imposed an unnecessary health risk if the operation were to be performed regardless of whether or not there was Hirschsprung's disease.

3. Further and/or alternatively, it was not open to the Tribunal, acting reasonably, to conclude that the Appellant operated in the positive belief that his patient had Hirschsprung's disease (rather than because of a megarectum whether caused by Hirschsprung's disease or otherwise) in light of:

a) the Appellant's findings on rectal examination at the first consultation;

b) the evidence of the patient's father that the Appellant told him that EF's rectum had been stretched for such a period of time that it was now out of shape and had lost its elasticity; and

c) the Appellant's contemporaneous letter dated 13 January 2044 to EF's general practitioner, Dr Wong, which identified the purpose of the operation as being for either Hirschsprung's disease or congenital megarectum without innervations (sic) abnormality.

4. In concluding that because the Appellant was operating at least in part for Hirschsprung's disease the operation should not have been performed without first obtaining a pre-operative biopsy, the Tribunal failed to have regard to the relevant evidence that:

a) such a biopsy was unnecessary and imposed an unnecessary health risk if the operation were to be performed regardless of

whether or not there was Hirschsprung's disease; and

b) the Appellant considered the operation was warranted whether or not EF had Hirschsprung's disease.

5. It was not open to the Tribunal, acting reasonably, to conclude that there was no reasonable ground for the Appellant to hold the belief that he informed EF's parents that he was not operating simply for Hirschsprung's disease.

6. The Tribunal's conclusion that a suspension of the Appellant's registration as a medical practitioner was required or was appropriate was not reasonably open, especially in light of the finding that the Appellant 'is a competent technical surgeon and there is a public interest in surgeons of that ilk being allowed to continue to practice'.

7. The Tribunal's conclusion that the appellant was not of good character or was not a fit and proper person to engage in practice as a health professional;

a) was not reasonably open;

b) gives rise to a perception that the Tribunal was biased against the Appellant;

c) was not evidenced by a discernable path of reasoning.

8. The Tribunal erred by speculating, and having regard to its speculated conclusion, that the Appellant's patient had suffered psychological damage by reason of his surgery, in circumstances where it was an agreed fact that he had not suffered any long term neurological damage by reason of the surgery, and there was no evidence that the fact of surgery (as compared to his underlying condition) had caused any psychological damage.

9. The Tribunal erred by speculating that a trial of pre-operative medical management would likely have been successful.

10. The finding that there was a need to increase the period of suspension because the earlier suspension was disproportionate to the seriousness of the circumstances 'as to shock the public conscience' was:

a) not open;

b) wrong at law;

c) created a perception that the Tribunal was biased in its deliberation.

11. In finding allegations 1(c), (d) and 3 proved the Tribunal erred by basing the findings on 'the firm view that EF's parents, even though with some inconsistencies, were reasonably accurate historians who told the truth' and not properly considering why they should disbelieve the Appellant."

5 On 19 August 2011, Randall AsJ gave the appellant leave to appeal in respect of ground 1 and adjourned the application for leave to appeal in respect of grounds 2 to 11 to be heard and determined with the appeal on ground 1.

The hearing before VCAT

6 The hearing before VCAT occupied 11 days. It (together with the transcript of earlier hearings in October 2010 and February 2011) generated 1,764 pages of transcript, and 73 exhibits were tendered.

7 As the transcript of the hearing before VCAT shows, the case was conducted at VCAT along conventional lines dealing with the question of whether any of the charges in the notice of hearing were made out. That is, the parties conducted the case on the basis that VCAT would first determine whether the appellant was guilty of any unprofessional conduct or professional misconduct within the meaning of the *Medical Practice Act*, before having a hearing (if one was necessary) on the question of penalty or what orders should ultimately be made. This was, of course, entirely appropriate.

8 However, and notwithstanding the expectation of the parties, VCAT delivered judgment on 10 June 2011 covering both the question of whether there had been any unprofessional misconduct or professional misconduct and the question of the appropriate penalty and/or orders. VCAT gave judgment in respect of the issue of penalty and orders and made the orders to which I have referred without giving the appellant a hearing and without receiving his submissions in relation to these matters. This constituted an obvious denial of procedural fairness. Indeed, Senior Counsel for the respondent fairly conceded this point before me.

The disposition of this appeal

9 At the hearing of this appeal, it was common ground that the orders made by VCAT had to be set aside and the matter remitted to be determined by a differently constituted tribunal. Notwithstanding that position, both sides flirted with the possibility of the matter being heard and determined by this Court pursuant to

s 148(7)(b) of the *VCAT Act*. However, as the transcript and exhibits to which I have referred, and proposed grounds 2 to 11 and the submissions of the parties demonstrate, such a course is not appropriate. This Court is not in the same position as VCAT to resolve the complex competing questions of fact that are in issue between the parties (even if the matter was limited to a determination based upon VCAT's liability findings as suggested by the respondent).

10 The appellant submits that if this Court is not to determine the whole of the proceeding, the orders of VCAT should be set aside and the whole of the matter remitted for re-hearing and re-determination by a differently constituted tribunal. To the contrary, the respondent submits that such a course would be wasteful and that whilst the matter should be remitted to a differently constituted tribunal, that tribunal should be asked to make orders on the basis of the liability findings made by the tribunal as originally constituted.

11 In my view, the course proposed by the respondent has a number of difficulties associated with it. The respondent submitted that orders could be made both from the conclusions made in respect of the allegations in the notice of formal hearing and from VCAT's reasons up to the point where the tribunal commenced to consider the penalty and orders to be made.

12 The VCAT judgment occupies 79 pages and 266 paragraphs. Its reasons for penalty and orders appear to commence at paragraph 250 on p 75 under the heading, "THE APPLICANT'S ATTITUDE". I say that its reasons for penalty and orders appear to commence at this point because the findings of unprofessional conduct and professional misconduct are made in paragraphs 243 and 249 respectively, and what follows paragraph 249 does not appear to be necessarily relevant to liability. That said, the issue is not free from doubt because, in paragraph 250, the tribunal said:

> "We were somewhat surprised throughout the hearing that the applicant never at any stage admitted that his conduct was wrongful or that it caused any damage whatsoever either physical or psychological. He was neither sorry nor remorseful."

13 This passage suggests that at some point or points of time during the hearing, the

tribunal formed the view that the appellant should have admitted that his conduct was wrongful and that he had matters in respect of which he ought to have been sorry and/or remorseful. Having regard to the fact that the appellant's case before VCAT was that he was not guilty of any unprofessional conduct or professional misconduct, and that these were the very issues the tribunal was required to hear and determine, it would in fact have been surprising if the appellant did admit that his conduct was wrongful. This statement in VCAT's reasons, at least, calls into question the tribunal's understanding of the nature of that part of the proceeding it was hearing.

14 Notwithstanding the complexity and length of the VCAT judgment, it would, in my view, be a difficult exercise to determine the appropriate orders to be made simply from reference to it or the findings contained in it. Undoubtedly, the tribunal as originally constituted knew at the time it delivered reasons on the liability issue precisely what conduct it thought was deserving of, or required, some particular order. The difficulty for a different tribunal would involve trying to construe the various reasons and findings, with or without reference to the full evidence and hearing which led (or might have led) such findings.

15 In *Pettitt v South Australian Tattersall's Club*,[1] the plaintiff's continued membership of a club was considered at two meetings of the Club's committee. At the first meeting, reasons for refusing his tender of a subscription were explained to the plaintiff and he made a detailed statement responding to the allegations against him. After the plaintiff left the meeting, the committee members resolved that the refusal should be maintained. At the second meeting, the committee included an additional member, M, to whom "some explanation of the position" was given by the chairman beforehand. The plaintiff was told at this meeting that its purpose was only "for consideration of judgment", not to inquire further into the facts. In the course of addressing the meeting, the plaintiff objected to the procedure being followed. But the committee, with M participating, confirmed the earlier decision.

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1 [1930] SASR 258.

16 The plaintiff in *Pettitt* successfully challenged his dismissal from the Club. One of the grounds for the Court's decision was that M had sat and voted at the second meeting without having heard the plaintiff at all on the questions of fact. Piper J said:[2]

> "In my opinion, the committee which ultimately decides what is to be done must have heard the whole case. Not only the conclusions of fact, but the course to be taken upon them, may be affected in any committeeman's mind by the evidence as he hears it and by incidence of the inquiry into the facts."[3]

17 Section 45A of the *Medical Practice Act* which deals with the findings and determinations that may be made at a formal hearing makes it clear that if a panel appointed by the Board finds unprofessional conduct (whether of a serious nature or not), the same panel then determines the penalty or orders. This reflects the relevance of the actual evidence that led to the conclusion of unprofessional conduct, to the issue of what should occur as a result of that conclusion having been reached. As was said in *Pettitt*, the course to be taken may be affected by the evidence as it is heard. Further, it may be affected by the detail as it unfolds from the witnesses during the formal hearing.

18 The right of review provided by s 60 of the *Medical Practice Act* is a right to have matters re-heard, re-argued and re-determined as fully as that provided in a formal hearing. There is no more warrant for concluding that the process of fact-finding on liability and then making orders can be split on review by VCAT than there is in respect of a formal hearing conducted under the *Medical Practice Act*. That is, the procedure mandated by the *Medical Practice Act* (insofar as a procedure is mandated) for the conduct of formal hearings should also form the basis upon which a review application is heard at VCAT. In any event, in this case, as I have said above, dissecting out those parts of VCAT's reasons relating to liability from those parts relating to the orders made is not necessarily a straightforward task.

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2 Ibid, 265.

3 See further, *Lloyd v Veterinary Surgeons Investigating Committee (Inquiry 3: "Remus" – Allegations 1(a) to (e)) (GD)* [2003] NSWADTAP 45, [80]-[100].

19 In *Parker v DPP*,[4] the Court had before it an application for *certiorari* in respect of an order made by a District Court judge on appeal confirming a conviction by the local court and imposing a custodial sentence in lieu of the non-custodial sentence appealed from. Kirby P[5] held that in failing to warn the appellant that the trial judge was contemplating imposing a custodial sentence in lieu of the non-custodial sentence appealed from, the trial judge denied the appellant procedural fairness.[6] Having concluded that there was a denial of procedural fairness, the question then became whether the Court should proceed simply to quash the sentence imposed by the District Court judge (leaving the finding of guilt pronounced by his Honour to stand) or whether the Court should quash the order in its entirety. In the result, the Court proceeded to quash the order in its entirety. Kirby P said:[7]

> "For some time there has been a controversy concerning the proper order to be made where the Court grants relief in the nature of certiorari addressed to the District Court after an adjudication of an appeal pursuant to s 122 of the Act: see, eg, *Attorney-General for New South Wales v Dawes* [1976] 1 NSWLR 242 at 246 applying *R v Willesden Justice; Ex parte Utley* [1948] 1 KB 397 at 399; see also *Re Beale* [1956] NZLR 24 at 25; *R v Smith; Ex parte James* [1966] SASR 47; *McNeven v Cavit* (1988) 91 FLR 475. It is unnecessary to explore this controversy further. In a recent decision this Court has made it plain that the relief provided by the Court goes to the one judicial act by which the adjudication of the District Court in a s 122 appeal is formalised. This is the 'order' by which the appeal to the District Court is determined. Section 125 of the *Justices Act* provides (relevantly):
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> > '(1) The Court hearing any appeal under this Division shall determine the matter of every such appeal, and may adjourn the hearing thereof, and may *by its order*, confirm, quash, set aside, vary, increase, or reduce, the conviction, order, sentence, or adjudication appealed against, or make such other order in the matter, and as to costs to be paid by either party … as to the Court seems just …'
>
> It is thus in the 'order' of the District Court that the finding of guilt and sentence come together. The 'order' is part of the record of the District Court which comes up for the relief sought in this Court. It is one and singular. It does not differentiate between the finding of guilt (the conviction) and the imposition of penalty (the sentence). It is not possible, at least under the legislation operating in this State, for this Court to differentiate between

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4 (1992) 28 NSWLR 282.

5 With whom Handley and Sheller JJA agreed.

6 A similar complaint could have been made here, had VCAT afforded the appellant any hearing on the issue of penalty: see generally *Brand v Parson* [1994] 1 VR 252; *Jones v DPP* (1994) 76 ACrimR 422; *Fagioli v Ure* (1996) 84 ACrimR 504 and *New South Wales Thoroughbred Racing Board v Waterhouse* (2003) 56 NSWLR 691.

7 Ibid, 297-298.

> different decisions on the way to the final 'order'. Thus, it is not possible for this Court to uphold the particular rulings on evidence, procedural directions, the determination of guilt and the sentence, differentially: see *Kopuz v District Court of New South Wales* (1992) 28 NSWLR 232; *Anderson v Judges of the District Court of New South Wales* (1992) 27 NSWLR 701.
>
> Conformably with these recent decisions of the Court, the order of McDevitt DCJ must be quashed in its entirety. Necessarily, this involves the quashing of the determination of guilt as well as his Honour's sentence. In the eye of the law there has been no valid adjudication of the claimant's appeal. That appeal remains to be adjudicated according to law. The purported adjudication by the District Court, in the form of the order by McDevitt DCJ, had no effect in law. Thus, the conviction and sentence of the magistrate still stands. They remain subject to an appeal to the District Court, not yet validly adjudicated upon."

20 Recognising the obvious differences between disciplinary proceedings and criminal proceedings and the differences between the statute in *Parker* and the statute in the present case, there is nevertheless, force in the reasoning in *Parker* so far as the present case is concerned. It is an order of the tribunal, not the reasons for some determination made as part of the process of arriving at that order, which s 148 of the *VCAT Act* permits a party (with leave on a question of law) to appeal from.

21 There are, of course, circumstances on the other hand when it may be appropriate for a differently constituted tribunal to hear the penalty phase of disciplinary or like proceedings.[8] Examples can be found in cases such as *Hall v New South Wales Trotting Club Limited*,[9] *Malone v Marr*,[10] and *Lovett v Chiropractors and Osteopaths Registration Board*.[11] However, and putting *Parker v DPP* and like authorities to one side, the issue is the appropriateness of such a course having regard to the facts and circumstances of the individual case. I have concluded that the complexity of the present case and the capacity for the minds of the tribunal to be altered by seeing and hearing the witnesses involved in this complex case requires, as a matter of fairness, the re-hearing and re-determination of the whole of the appellant's application for review of the Board's decision.[12]

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8 But see, with respect to courts, *Wentworth v Rogers (No 3)* (1986) 6 NSWLR 642, 649 (Kirby P).
9 [1977] 1 NSWLR 378.
10 [1981] 2 NSWLR 894.
11 Unreported Supreme Court of Victoria, Cummins J, 7 December 1993.
12 Cf *Pettitt v South Australian Tattersall's Club* [1930] SASR 258, 265 (Piper J).

22 For the above reasons, the orders of VCAT made on 10 June 2011 must be set aside and the matter remitted to a differently constituted tribunal for re-hearing and re-determination.[13]

23 The appellant argued that a further ground for not acceding to the respondent's submission that the matter be remitted for orders to be made on the liability findings contained in the reasons of 10 June 2011 was that the liability findings were "cross-infected" by the denial of procedural fairness brought about by the making of orders without a relevant hearing. I took this to be a submission by the appellant that a fair-minded lay observer informed as to the relevant facts might reasonably apprehend that the tribunal, in making its orders and giving its reasons, might not have brought an impartial mind to the appellant's application.[14] Of specific note was said to be the tribunal's imposition of a 12 month suspension from practice in circumstances where no such penalty had been imposed by the Board and no warning of the possibility of any such outcome had been given by the tribunal. These submissions are not entirely without force. However, in view of the conclusions I have already reached, it is not necessary to say anything further about this issue.

24 Similarly, in light of my conclusion that the matter must be re-heard in its entirety by a differently constituted tribunal, it is not necessary to say anything about proposed grounds 2 to 11. Those grounds appear to deal with matters of fact, or at least are in part based upon matters of fact. Further, it is to be remembered that a question of law is not involved in a decision simply because a tribunal makes one or more findings of fact that are not supported by evidence, nor is it sufficient that the reasoning whereby a conclusion of fact is reached is demonstrably unsound.[15] At least in part (if not substantially) it might be thought that proposed grounds 2 to 11 labour to convert what are essentially questions of fact into questions of law. As

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13 Cf s 148(8) of the *VCAT Act*.

14 Cf *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337, 344-5 (Gleeson CJ, McHugh, Gummow and Hayne JJ).

15 See *Transport Accident Commission v O'Reilly* [1992] 2 VR 436, 460 [58] (per Callaway JA).

Phillips J said in *Nikolic v Schultz*:[16]

> "Such attempts have not gone unnoticed by the courts which have tended to deprecate the practice of 'attempting to magnify or inflate questions of fact into questions of law and of trying to obtain decisions from the courts on matters which the legislature would appear to have thought suitable for decision by' some other body …"

25 In any event, having regard to the conclusions I have reached in respect of ground 1, I do not propose to grant leave in respect of the appellant's remaining grounds (grounds 2 to 11).

Conclusion

26 The orders of VCAT made 10 June 2011 will be set aside and the appellant's application for review remitted to VCAT for re-hearing and re-determination by a differently constituted tribunal. I will hear the parties on the precise form of order and any question of costs.

16 Unreported Supreme Court of Victoria delivered 22 October 1991.