IN THE HIGH COURT OF AUSTRALIA
MELBOURNE OFFICE OF THE RESISTRY

No. M52 of 2013

BETWEEN:

WINGFOOT AUSTRALIA PARTNERS PTY LTD and GOODYEAR TYRES PTY LTD

Appellants

- and -

EYUP KOCAK

First Respondent

- and -

DR PETER LOWTHIAN (as Convenor of Medical Panels pursuant to the provisions of the *Accident Compensation Act* 1985)

Second Respondent

-and-

MEDICAL PANEL (Constituted by Dr Stephen Jensen, Mr Kevin Siu and Mr John Bourke)

Third Respondent

HIGH COURT OF AUSTRALIA
FILED
- 5 JUL 2013
THE REGISTRY MELBOURNE

FIRST RESPONDENT'S SUBMISSIONS

Part I- Certification of suitability for publication on the Internet:

1. The First Respondent certifies that these submissions are in a form suitable for publication on the Internet.

Part II- Issues that the First Respondent contends that the appeal presents:

2. The issues presented by the appeal are those stated by the Appellants, and also the issue of whether an issue estoppel arises from the order of the Magistrates' Court as to the matters stated in the Medical Panel's Opinion.

Part III- s 75B *Judiciary Act* 1903:

3. The First Respondent considers that no notice should be given under s 78B of the *Judiciary Act* 1903 (Cth).

Date of document: 5 July 2013
Filed on behalf of: The First Respondent
Prepared by:
Slater & Gordon Lawyers
485 La Trobe Street
MELBOURNE VIC 3000

Solicitor's Code: 339
Tel: 9602 6888
DX: 229 Melbourne
Ref: PAT3:MAM7:M332476

Part IV- Material Facts

4. In addition to those referred to by the Appellants, the material facts include the contents of the documents and information referred to by the Medical Panel in paragraph 3 of its reasons, and the terms of the Order of the Magistrates' Court at Melbourne made on 29 September 2010 ~~(attached)~~.

Part V- Applicable Legislation:

5. The Appellants' Statement of applicable legislation is accepted.

Part VI- Statement of Argument

Maurice Blackburn Cashman v Brown

6. The Appellants' argument at paragraphs 17-32 under the heading of "The obligation to give reasons" is really addressed to the issue concerning the effect of the decision of this Court in *Maurice Blackburn Cashman v Brown* (2011) 242 CLR 647. The issue arose because the Court of Appeal had raised with the parties a question as to whether there was any utility in pursuing the appeal to set aside the Opinion of the Medical Panel in the light of the reasons in *Maurice Blackburn Cashman v Brown.*

7. Also considered in relation to the question of the utility of the appeal was the matter of whether the order of the Magistrate's Court gave rise to an issue estoppel in the County Court proceeding as to the matters set out in the Certificate of the Medical Panel. The (present) First Respondent contended that it did not do so, and the (present) Appellants contended that it did, but had agreed that if the Opinion was set aside, then the order of the Magistrate's Court would also be set aside.

8. The First Respondent agrees with the submissions of the Appellants that *Pope v Walker* is not affected by *Maurice Blackburn Cashman v Brown.* The First Respondent's submission in that regard are that:

   (a) in *Maurice Blackburn Cashman v Brown* the Court read down s 68 (4) of the *Accident Compensation Act* 1985 so that the words "[f]or the purposes of determining any question or matter" were not given a literal meaning, and it was held that that the meaning of the words that best accorded with its context, was "for the purposes of determining any question or matter *arising under or for the purposes of the Act*", because "Those are the purposes for which the opinion of a Medical Panel on a medical question is to be adopted and applied and accepted as final and conclusive." See at [35]. The expression "*arising under or for the purposes of the*

Act" should be understood as referring to the *relevant* purposes of the Act, which in the present case are its compensation provisions, or particularly, in the present case, the purpose of determining the question or matter for which the medical question was referred, namely for the purpose of determining a matter in the claim for compensation.

(b) section 68(4) was enacted by s 21 of Act No. 107 of 1997, which by s 45 inserted a new s 134A, which abolished an employee's right to recover common law damages for injuries after 12 November 1997, and left in place only the compensation regime for such injuries. The better view of s 68(4) is that it was intended to apply only to the compensation proceedings which the Act then provided for, despite the apparent width of its verbiage, which as the Court has held, has to be read down.

(c) sub-sections (1)(a)(iii) and (1)(b)(ii) of s 135A (the relevant provision, as the event causing the injury is claimed to have occurred on 16 October 1996) provide that a worker shall not recover damages in respect of an [employment related] injury except (relevantly) "as permitted by and in accordance with this section". Sub-sections (4)(b) and (6) of s 135A provide that a court can give leave to bring proceedings for damages, as part of the processes prescribed by the section, but not unless the court is satisfied that the injury is a serious injury. Thus, it is the court which must be satisfied of all elements of that description, and it would not be so satisfied if it was required to adopt the opinion of a Medical Panel obtained for other purposes. An application under s 135A(4)(b) will commonly be made after by a claim for compensation in which there will have been reference to a Medical Panel, and the powers of the court under that section are not made subject to the result of a prior reference by another tribunal.

(d) common law rights to sue for damages were restored from 20 October 1999 by the *Accident Compensation (Common Law and Benefits) Act* 2000. In the second reading speech on the Bill for the Act of the Minister for Workcover in the Legislative Assembly of the Victorian Parliament (Hansard, 13 April 2000, at p 1007) the minister said

"The common-law pre-litigation process will only commence once the degree of impairment has been assessed and will be modified to dovetail with the new process.

An essential aspect of these changes is that a worker will not be able to commence an application under the narrative serious injury test until the worker's level of impairment has been assessed.

Medical panels are currently responsible for providing opinions on a range of medical questions in relation to statutory benefits. It is proposed to extend the role of medical panels to provide opinions on medical questions associated with the narrative serious injury test.

As is currently the case, the decisions of medical panels will be final and binding. The value of the medical panels is that independent experts determine medical questions and the degree of whole-person impairment in a non-adversarial environment. As is currently the case the only appeal permitted will be on the basis that the medical panel has failed to afford procedural fairness or has breached other principles of administrative law."

It appears from the third paragraph above that it was not then considered that a Medical Panel's opinion (which would often be obtained for compensation purposes before an application for leave to commence a common law proceeding was or could be made) had any effect in the application for leave.

(e) Special and somewhat different provision has been made by which a Court hearing an application for leave to issue a proceeding under s 134AB(16)(b) (applying to injuries occurring after 20 October 1999) may be required to obtain the opinion of a Medical Panel on a medical question for the purposes of such an application, see s 45(1A)-(1H) and the amended definition of "medical question" in s 5. This makes it unlikely that it was intended that the Opinion of a Medical Panel obtained for other purposes would have been applicable to an application for leave to issue proceedings.

Issue estoppel

9. No issue estoppel arose from the order of the Magistrates' Court as to any matter stated in the Medical Panel's opinion. An issue estoppel prevents the assertion of a matter of fact or law contrary to that in which the precise matter has been necessarily and directly decided by a competent tribunal in resolving rights or obligations between the same parties, see *Kuligowski v Metrobus* (2004) 220 CLR 363 at 373-4 [22] and 379 [40], and requires a determination of a court on an issue, either on evidence or by admission, see *Thoday v Thoday* [1964] P 181 at 98. The Magistrates' Court made no determination of any matter of fact or law stated in the Medical Panel's Opinion. The Magistrates' Court did no more than order, or note, "That the Court adopt and apply the opinion of the

Medical Panel dated 15 August 2010". The determination of the matters contained in the Opinion was done by the Medical Panel, not by the Magistrates' Court, which was bound by the determination, see *Masters v McCubbery* [1996] 1 VR 635 at 642-3, 654 and 659. The Order of the Magistrates' Court expressed no more than its compliance with s 68(4).

The First Respondent's argument on the reasons issue

10. The Medical Panel was required to give a written statement of its reasons for its opinion, by s 68(2) and (4). The Opinion of a Medical Panel is a "decision", and "The requirement to provide reasons of this sort makes medical panels indistinguishable from many other tribunals created by statute who are required to provide reasons for their decisions", see *Masters v McCubbery* [1996] 1 VR 635 at 651 (20) per Winneke P. The reasons of the Medical Panel are part of its record, by the operation of s 10 of the *Administrative Law Act* 1978.

11. The content of the obligation of a Medical Panel to give reasons for its decision is determined by the requirements of the Act. In that regard

    (a) when the Act requires that the Medical Panel give its reasons for its decision, it requires that the Panel give all of its reasons. There is no room for a requirement of partial disclosure,

    (b) In the case of *In re Poyser and Mills' Arbitration* [1964] 2 Q.B. 467 at 478,[1] Megaw J held that when "Parliament provided that reasons be given.....that must be read as meaning that proper, adequate reasons must be given. The reasons that are set out must be reasons which are not only intelligible, but deal with the substantial points which have been raised", and that the reasons in that case gave "insufficient and incomplete information as to the grounds of the decision", with the result that the reasons did not "fairly comply with that which Parliament intended". The failure of the record to contain what the statute required was held to be an error of law on the face of the record. The requirement of adequacy is probably an implication from the provisions of a

[1]The provision was s. 12 of the *Tribunals and Inquiries Act* 1958 (set out in the report) which imposed a duty on a tribunal to which the Act applied or any Minister who makes a decision after the holding of a statutory inquiry to give reasons for their decision, if requested on or before the giving or notification of the decision.
The statute was one of *general* application.

statute, or a legislative intention derived from the meaning of "reasons", and the purpose of requiring that they be provided.

12. Megaw J's judgment in *In re Poyser and Mills' Arbitration* has been referred to or applied in a variety of different contexts, by courts including appellate courts. Relevant cases include *Westminster City Council v Great Portland Estates PLC* [1985] 1 AC 661 at 673, *South Bucks District Council v Porter (No 2)* [2004] 1 WLR 1953 at 1961-2, *Oil Basins Ltd v BHP Billiton Ltd* (2007) 18 VR 346 at [62]-[63], *Dornan v Riordan* (1990) 24 FCR 564 at 573, *Sabag v Health Care Complaints Commission* [2001] NSWCA 411at [43]-[45], *Re Robert John Gillett; Ex Parte Rusich* [2001] WASCA 111 at [36]-[41], *Re Bannan; Ex Parte Suleski* [2001] WASCA 289 at [12]-[14], *Re Alexeef; Ex Parte Paul* [2002] WASC 291 at [31]-[53], *Re Croser; Ex Parte Rutherford* [2001] WASCA 422 at [66]-[73], *Northbuild Construction Pty Ltd v Discovery Beach Project Pty Ltd* [2010] QSC 94 at [37].

13. That inadequacy of reasons required by law to be given by a tribunal and which are part of its record is an error of law on the face of the record, has also been held in *Westport Insurance Corporation v Gordian Runoff Limited* (2011) 244 CLR 239 at 262-266 [24]- [32], 269-272 [49]-[59], *Campbelltown City Council v Vegan* (2006) 67 NSWLR 372 at 398-399 [129]-[130], *Treacy v Newlands* [2008] VSC 395 and the cases referred to at footnote [7]) and *Paul & Paul Pty Ltd v Business Licensing Authority* [2010] VSC 460 at [67]-[79]. This is not an exhaustive list. See also Wade and Forsyth, *Administrative Law*, 10th. Ed. (2010) at 191-2 and 792-3, *De Smith's Judicial Review*, 6th ed. (2007) at 7-097 to 7-115.

14. In *Westport Insurance*, the relevant statute made an arbitrator's reasons for an award part of the award. It was held that the reasons were inadequate, and for that reason they gave rise to an error of law on the face of the award. Applying *Westport Insurance* to the present case, the relevant statute made the Medical Panel's reasons part of its record, and by the same principles, if the reasons are inadequate, there is an error of law on the face of the record. The common point is that inadequacy of reasons (or non-compliance with a statutory requirement as to the content of reasons) is an error of law, on the face of the record or the award.

15. In order to comply with the requirement of adequacy, reasons should be adequate to satisfy the purposes for which reasons are required: *Soulemezis v Dudley (Holdings) Pty Ltd* (1987) 10 NSWLR 247 at 280 G.

16. The purposes for which reasons are required to be given by a Medical Panel are the same as the purposes in the case of other decision makers. These purposes are described

in *Soulemezis v Dudley (Holdings) Pty Ltd* (ante) at 280 D-G and in *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Palme* (2003) 216 CLR 212 at [105] (Kirby J) applied in *East Melbourne Group Inc v Minister for Planning* (2008) 23 VR 605 at [225]-[228], and also in Wade and Forsyth, *Administrative Law*, 10th. Ed. (2010) at 792-3 Reasons serve the interests of the parties, and of the public. It is important that the value of the purposes of the giving of reasons not be eroded by a lessening of the content required of them.

17. It has been held in cases involving the reasons of a Medical Panel that they should disclose a discernable path of reasoning, show what evidence the Panel did and did not accept, and show the basis on which it reached a conclusion different from that of opinions expressed in the medical reports provided by the parties: see for example *Clarke v National Mutual Life Insurance Ltd* [2007] VSC 341 at [46]-[61], *Moyston Court Fisheries Ltd v Malios* [2007] VSC 518 at [57]-[83], *Davidson v Fish* [2008] VSC 32 at [12] and *Treacy v Newlands* [2008] VSC 395 at [25]-[29]. What was said in those cases in that respect has not been disagreed with, and accords with the above submissions as to the content of reasons and with the purpose for which reasons are required to be given. Those cases were decided in respect of the Medical Panel's obligation to give reasons under s 8 of the *Administrative Law Act*, but the principles as to the content of reasons given under that statute are the same as in the present case[2].

18. Reasons which comply with these considerations will commonly need to include the matters to which the Court of Appeal referred. There can be no justification for the conclusion for which the Appellants appears to contend, which is that a Medical Panel need not give all of its actual reasons for its Opinion, or that it need not give reasons which are adequate.

19. As the Medical Panel's reasons are part of its record, the consequence of inadequacy in the reasons is that there is an error of law on the face of the record.

20. A remedy in the nature of certiorari is available to quash the decision of a decision maker (including a Medical Panel) if there is an error of law on the face of the decision maker's record. The remedy for an error of law on the face of the record is certiorari to quash the decision, see *Re McBain; ex parte Catholic Bishops Conference* (2002) 209 CLR 372

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[2] These cases also gave relief in the nature of certiorari and quashed the Opinions which had been given in those cases. In *Sherlock v Lloyd* (2010) VR 435 it was held that the remedy in the nature of certiorari was not available in applications under the *Administrative Law Act* on the basis of inadequacy of reasons. The correctness of *Sherlock v Lloyd* does not need to be argued in the present case.

at 412-418 [86] -[99]. See also Wade and Forsyth, *Administrative Law*, 10th. Ed. (2010) at pages 191-2 and 792-3 and *De Smith's Judicial Review*, 6th ed. (2007) at 7-097 to 7-115.

21. After the quashing of a decision, the matter should be further dealt with by a differently constituted body, see *Body Corporate Strata Plan No 4166 v Stirling Properties Ltd (No 2)* [1984] VR 903 at 912, *In re Poyser and Mills' Arbitration* (ante), R. *v. Westminster C.C. ex p. Ermakov* [1996] 2 All ER 302, *De Smith's Judicial Review*, 6th ed. (2007) at 7-114.
22. The reasons provisions of s 68 were enacted in the context of the above jurisprudence.

Response to Appellants' Argument

23. The Appellants' argument does not deal with any of the authorities referred to above, or, largely, with the reasoning of the Court of Appeal.
24. It is submitted that the Appellants' submissions at paragraphs 17-20 are wrong. The passage from the reasons of the Court of Appeal referred to here by the Appellants (paragraph 47) when read with paragraphs 44-46, means that because of the significant effect of opinions of Medical Panels, the standard of reasons to be expected of them is greater than it had been supposed to be in some previous decisions. The passage does not mean that the reasons were required to be of a judicial standard, or support that proposition, or that the Court of Appeal considered that the reasons in *Maurice Blackburn Cashman v Brown* did so. Further, paragraphs 48-50 make the contrary position clear.
25. The Court of Appeal's reference to "reasons jurisprudence" (see paragraph 33) was perfectly appropriate, and was no more than a reference to the cases in which a description of the general nature of the content of proper reasons was given, referable to the purposes which reasons serve. These purposes are of a general nature and are relevant to all types of case in which reasons are required to be given. They are not limited to any particular category of case, and the examples referred to by the Court of Appeal (and there are others) merely illustrate that the relevant principles have been applied in various types of case. Reasons do not (at least generally) serve a purpose in the application of the decision under review, and in the present case they do not serve any purpose in the application of the Act. Reasons serve other public and private purposes, which have often been described. There is no basis for considering that reasons given under s 68 of the Act do not also serve these purposes.
26. The submissions of the Appellants do not appear to address this point, or indeed to provide any principled basis on which it should be considered that a Medical Panel has

complied with its statutory obligation to give its reasons, if it does not give all of its reasons, or if the reasons which it does give are not adequate, or do not adequately serve the purpose for which reasons are to be given.

27. The features referred to in paragraphs 35 to 43 do not support any particular relevant conclusion, and some of them are submitted to be wrong, or incomplete. Particular reference is made to the following:

    (a) the definition of "medical question" (see s 5) covers many matters, and is not limited to a diagnosis of a medical condition, as if a medical practitioner was being consulted by a patient,

    (b) an answer to a medical question given at about the time of a claim for compensation may be different from the answer to the same question given years later (after the injury has stabilised) on an application for leave to issue proceedings,

    (c) the matters referred to in paragraph 36 are common to many tribunals which are required to give reasons, and have not been regarded as inhibiting the content of the reasons,

    (d) the statement in *Sherlock v Lloyd* referred to in paragraph 37 is, with respect, wrong. Section 68(4) requires that "the opinion of a Medical Panel .....is to be adopted and applied by any court, body or person and must be accepted as final and conclusive by any court, body or person...". It is quite inconsistent with this provision to regard an opinion of a Medical Panel as being an "opinion for the assistance of the court and the parties on medical questions." The opinion of a Medical Panel does not "assist" a court, but binds the court on a particular matter which is an issue in the relevant proceeding. The view expressed in *Sherlock v Lloyd* is also quite inconsistent with the views expressed by the Court of Appeal in *Masters v McCubbery* (1996) 1 VR 635 at 647, 649-50, 651-2, and 654. It was because an opinion of a Medical Panel conclusively decides an issue which affected the interests of parties that the Court in *Masters v McCubbery* considered that a Medical Panel was a body which was bound by the rules of natural justice, and in consequence was a tribunal to which the provisions of the *Administrative Law Act* 1978 applied, and had to give reasons for its opinion.

28. Judicial review is not as confined as proposed in paragraph 40. The passage referred to from the reasons of Brennan J in *Attorney-General (NSW) v Quin* does not support the

wide proposition for which the Appellants contends. The passage concerned the divide between merits review and legality review, and only stands for the proposition that in judicial review the primary consideration is the legality of what has been done by a decision maker, see also *Quin* at 35-38.

29. A Medical Panel may be required to exercise a "legal" function. In *Masters v McCubbery* Ormiston JA stated, at page 653, that "…..the task of determining impairment and the like given to medical panels cannot strictly be described as a mere enquiry of fact as it would ordinarily involve, to a greater or lesser extent, questions of law such as the proper interpretation of the Guides …….and their legal application under the *Accident Compensation Act.*"

30. As to paragraph 42, the Appellants' arguments in the present case as to why a Medical Panel should not give the reasons which the Court of Appeal considered that it should give bear a close resemblance to those rejected in *Masters v McCubbery* as reasons for a Medical Panel not being obliged to give reasons at all. Reference is also made to the rejection of the "intolerable burden" argument, in the following passage from *Regina (Wooder) v. Feggetter* [2003] 1 QB 219 at [27],

" There is an interesting discussion of the "intolerable burden" grounds for resisting the giving of reasons in the essay by Sir Patrick Neill QC entitled "The Duty to Give Reasons: the Openness of Decision-making": see *The Golden Metwand and the Crooked Cord*, edited by Christopher Forsyth and Ivan Hare (1998), pp 163-164. Sir Patrick describes how a review in Australia showed how ten years after a fairly wide statutory duty to give reasons had been introduced in that jurisdiction a higher quality of decision-making had resulted. The authors of the review observed that the "cost" of providing statements of reasons had to be balanced against the social justice benefit which flowed from the fact that aggrieved individuals knew how their cases had been decided."

31. The requirements which the Court of Appeal considered appropriate do not impose an unnecessary or onerous burden on Medical Panels or on the relevant M-4edical Panel.

32. As to paragraph 44,

    (a) one reason for the giving of reasons is so that a decision may be reviewed in an appropriate case. If the giving of reasons does expose a reviewable error, then the decision should be quashed. It cannot be sensibly suggested that a reason for not giving complete or adequate reasons is that doing so will expose an error, or an arguable error.

(b) The finality of the Medical Panel's decision is a matter in favour of reasons being complete and adequate, not the contrary.

33. At paragraphs 44 and 47 the Appellants attribute to the Court of Appeal a conclusion to which it did not come, expressly or otherwise. The Court's conclusion as to the content of reasons does accord with what was briefly referred to in *Masters v McCubbery*, which concerned with the matter of whether a Medical Panel was obliged to give reasons for its Opinion, not with the content of the reasons, and indeed in that case no reasons had been given. There have been a number of cases in Victoria since *Masters v McCubbery*, relating to the content of adequate reasons of a Medical Panel. These include *Clarke v National Mutual Life Insurance Ltd* [2007] VSC 341 at [46]-[61], *Moyston Court Fisheries Ltd v Malios* [2007] VSC 518 at [57]-[83], *Davidson v Fish* [2008] VSC 32 at [12] and *Treacy v Newlands* [2008] VSC 395 at [25]-[29]. What was said in those cases in that respect has not been disagreed with, accords with the First Respondent's submissions and with the purpose for which reasons are required to be given.

34. The Appellants do not appear to argue that the conclusions of the Court of Appeal as to what the reasons of the Medical Panel did not contain were wrong, and it is submitted that they are correct. Rather, the Appellants' argument is that a Medical Panel does not have to provide reasons which set out why it came to the conclusions stated in its answers to the questions put to it, partly by raising a false issue (the "judicial standard" issue) and partly by arguing for a limitation on the reasons to be given so that they only have to contain a recitation of the evidence which was taken into account and what the ultimate conclusion is. But there can be no basis on which a statute, which simply requires that reasons for an opinion be given, is interpreted as requiring that limited reasons be given.

35. The present case is one in which the First Respondent's medical evidence supported the view that the trauma of the incident of October 1996 caused both a soft tissue injury and a progressive degeneration of his cervical spine, or an aggravation of a pre-existing degenerative condition. There must have been a medically valid reason for these views, and the Medical Panel did not say that there was not. The Medical Panel observed, as matter of generality, that a degeneration of the spine may occur without trauma, but it did not relate this observation to the particular case of the First Respondent. A positive opinion cannot be expressed as to the answers to the questions contained in the Opinion without there being a valid medical reason for the view that, in the First

Respondent's case, the degeneration of his cervical spine was simply the result of natural progression of a pre-existing condition, and was not the result of the trauma to the neck[3]. It is inferred that the Medical Panel had a valid medical reason for its view, but the reasons given do not say what it was.

36. Indeed, there were substantial matters raised by the First Respondent in the material before the Medical Panel which *taken in combination* were substantially in his favour. The reasons of the Medical Panel did not deal with these matters, or show the basis on which it reached a conclusion different from that of opinions expressed in the medical reports provided by the First Respondent. The matters relevant here are that:

(a) the records of medical imaging of the First Respondent's cervical spine showed minimal degeneration in late 1996 (after the neck incident in October 1996) but a progressive degeneration over the years thereafter, and showing as at 23 March 2009 multi-level disc degeneration with reversal of the normal cervical lordosis, bilateral bony foraminal stenosis and mild central canal stenosis without cord compression at C3-4, and C4-5 and a left foraminal disc protrusion at C5-6 compromising the exiting C6 nerve.

(b) there was no evidence of any subsequent event which may have caused the First Respondent's eventual symptoms,

(c) in an affidavit sworn on 18 June 2009 the First Respondent stated (inter alia) that following the October 1996 incident he continued for more than 10 years to suffer from symptoms from his neck down through his left shoulder and into his left arm at variable levels, also referred to in the Appellants' clinical notes, during the period that they were kept,

(d) medical reports by medical practitioners who had treated and/or examined the First Respondent expressed the view that there was a causal connection between the incident of October 1996 (or the appellant's work in general at about that time) and the condition of his neck, left shoulder and left arm, or were given on the basis of such there being such a connection. The Medical Panel does not say that these views were not available medical conclusions, and it must be taken that they were.

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[3] The Medical Panel was required to come to a positive conclusion on the answer to the questions referred to it. If the Medical Panel's reasons are to be interpreted as meaning that it was not satisfied of the causal connection, without positively concluding to the contrary, then it should have said that it was unable to answer the questions.

(e) the Medical Panel's findings and observations preceding its conclusion (after "therefore concluded") did not express reasons for considering that in the First Respondent's case the October 1996 incident did not have the effect referred to, or for the Panel having rejected the opinions of his medical practitioners. It must be inferred that the Medical Panel as an expert panel did have reasons, but that they are unstated.

Consequences

37. The conclusion expressed by the Appellants at paragraph 50 does not come from the authorities cited in the footnotes to that paragraph, none of which are authority for the proposition advanced, and the argument in its favour appears to commence at paragraph 54.

38. This leaves the matters contained in the intermediate paragraphs as observations without an objective.

39. As to the passage from the reasons of Brennan J in *Repatriation Commission v O'Brien* referred to in paragraph 51, if the words "adequately" and "fully" were omitted, so that the passage referred to a failure to give any reasons, it would accord with other authority, but as expressed it is submitted that it is incorrect, and is contrary to a long line of settled authority. The passage has not been followed or applied by any appellate court (see for example *Dornan v Riordan* (1990) 24 FCR 564 at 573), no authority is given for it, the proceeding below was not an application for certiorari, the subject of the passage was not referred to in the judgment of the majority, was obiter, and was not apparently the subject of argument.

40. As is observed in paragraph 53, *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Palme* (2003) 216 CLR 212 is a case concerning jurisdictional error[4], and in which the authority relied on by the prosecutor concerned non-compliance with an essential pre-requisite to the exercise of a power, see at 224-226 [[38]-[47]. *Palme* did not concern the matter of whether inadequacy of reasons given after a decision was an error of law on the face of the record, and this matter was not discussed. Also, the better view is that *Palme* is a case in which no reasons had been given, see Gleeson CJ, Gummow and Heydon JJ at 223-224 [38] and [40] and McHugh J at 227-228 [54] and [57], and Kirby J at 235 [84] and 241 [102].

41. As to Paragraph 54

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[4] *Nezovic v Minister for Immigration & Multicultural & Indigenous Affairs (No 2)* (2003) 133 FCR 190 at [33].

(a) This paragraph raises a false issue. The question is whether inadequacy of reasons for a decision, which is part of the record of a tribunal, and where reasons are required to be given by law, is an error of law on the face of the record, and if it is, whether the decision should be quashed by a remedy in the nature of certiorari. The question is not one of the invalidity of the decision.

(b) *Project Blue Sky v Australian Broadcasting Authority* (1998) 194 CLR 355 has no application in this context. That case replaced the concept of whether provisions of a statute were "mandatory" and "directory" with a requirement to consider the intention of the statute as to the validity of acts done in breach of a condition regulating the exercise of a statutory power to do those acts, such as a failure to comply with an essential preliminary to, or the commission of an act in breach of, a procedural condition for the exercise of a statutory power or authority, see at [91]-[92]. The decision is described in the latter terms in *Minister for Immigration and Multicultural and Indigenous Affairs; ex parte Palme* (2003) 216 CLR 212 at [42].

(c) In *Project Blue Sky*, the Court did not consider the matter of inadequate reasons, or whether and when inadequate reasons were an error of law on the face of the record, or the remedies available in such a case, or any of the numerous authorities on the topic, and did not overrule (by default as it were) the long standing body of law referred to. In any event, even if *Project Blue Sky* applies, the traditional and appropriate remedy for inadequacy of reasons required by law to be given is a quashing of the decision.

(d) The Appellants' application of *Project Blue Sky* has been accepted by the Court of Appeal in *Colquhoun & Ors v Capitol Radiology Pty Ltd* [2013] VSCA 58 at [53]. That decision is the subject of an application to the Court for special leave to appeal, on this and other issues.

(e) the *Accident Compensation Act* says nothing about the relief available for the giving of inadequate reasons, and thus it leaves this matter to the general law. Presumably the Parliament enacted a requirement that reasons be given, without more, with the intention that the remedies available under the general law be applicable.

(f) it is not the case that if reasons are "separate from the opinion" that inadequacy of reasons is not an error of law on the face of the record of the Medical Panel, if that is what is meant by the last sentence of paragraph 54. Reasons for a

decision are usually, or at least often, given after the decision, without affecting the availability of certiorari for error of law on the face of the record. The temporal separation of the opinion and the reasons is irrelevant.

42. As to paragraph 55, there was a requirement to give reasons under the *Convenor's Directions as to the Arrangement of Business and as to the Procedures of Medical Panels Accident Compensation Act*, made under s 65. In *Colquhoun & Ors v Capitol Radiology Pty Ltd* [2013] VSCA 58 the Court of Appeal has recently held that the Convenor's Directions as to reasons (in that case, the Directions made for the purposes of part VBA of the *Wrongs Act* 1958) are ultra vires. The decision is the subject of an application to the Court for special leave to appeal, on this and other issues.

43. *Sherlock v Lloyd* did not decide what is stated at paragraph 56. What it decided was that the effect of the particular provisions of the *Administrative Law Act* was that the only remedy available for inadequacy of reasons *requested under that Act* was an order for the provision of better reasons. It would, if necessary, be argued that this conclusion was incorrect.

44. The unstated conclusion of paragraphs 56-60 appears to be that Parliament intended that what had been decided by *Sherlock v Lloyd* as to the remedies available under the particular provisions of the *Administrative Law Act* applies to reasons given without request under the differently worded provisions of the *Accident Compensation Act*, without Parliament actually so providing. This is not a valid conclusion.

45. The authorities referred to in the footnotes to paragraph 61 do not support the propositions advanced in it. It may be that inadequacy of reasons has to be more than minor to warrant relief in the nature of certiorari being given, although if reasons are inadequate in the sense held in the relevant authorities, it may be thought that there cannot be a "minor " inadequacy. But the passages from the authorities cited by the Appellants do not relate to that point, but to the point that where the claim is that a decision should be set aside because of an error *in the course of making the decision*, the error has to have had an effect on the decision. This is trite law, and applies to appeals from judicial decisions, as well as to challenges to administrative decision making by way of judicial review. The principle has no application in the present context, not least because the decision making process itself is not challenged.

46. Paragraphs 60 and 61 also raise the same false issue as is referred to above.

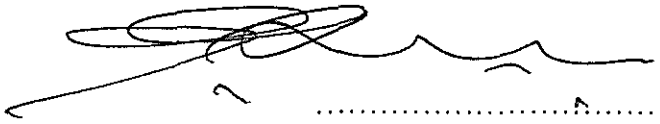
Part VII

47. Not applicable.

Part VII- Estimate of time required for presentation of oral argument

48. It is estimated that oral argument for the First Respondent will take 2 hours.

Dated: 5 July 2013



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A G UREN

03 9225 7277

aguren@vicbar.com.au

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ADB INGRAM

03 9225 8610

IN THE HIGH COURT OF AUSTRALIA
MELBOURNE OFFICE OF THE RESISTRY

No. M107/2012

BETWEEN:

WINGFOOT AUSTRALIA PARTNERS PTY LTD and GOODYEAR TYRES PTY LTD

Applicants

- and -

EYUP KOCAK

First Respondent

- and -

DR PETER LOWTHIAN (as Convenor of Medical Panels pursuant to the provisions of the *Accident Compensation Act* 1985)

Second Respondent

MEDICAL PANEL (Constituted by Dr Stephen Jensen, Mr Kevin Siu and Mr John Bourke)

Third Respondent

HIGH COURT OF AUSTRALIA
FILED
- 5 JUL 2013
THE REGISTRY MELBOURNE

FIRST RESPONDENT'S LIST OF AUTHORITIES AND MATERIALS

Counsel for the First Respondent intend at the hearing of this matter to read from the following:

Authorities:

Body Corporate Strata Plan No 4166 v Stirling Properties Ltd (No 2) [1984] VR 903 at 912

Campbelltown City Council v Vegan (2006) 67 NSWLR 372 at 398-399 [129]-[130]

Kuligowski v Metrobus (2004) 220 CLR 363 at 373-4 [22] and 379 [40].

Masters v McCubbery [1996] 1 VR 635 at 642-3, 654, 647, 649-50, 651-2, and 654.

Date of document: 5 July 2013
Filed on behalf of: The First Respondent
Prepared by:
Slater & Gordon Lawyers
485 La Trobe Street
MELBOURNE VIC 3000

Solicitor's Code: 339
Tel: 9602 6888
DX: 229 Melbourne
Ref: PAT3:MAM7:M332476

Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Palme (2003) 216 CLR 212 at 224-226 [38]-[48].

Moyston Court Fisheries Ltd v Malios [2007] VSC 518 at [57]-[83],

Poyser and Mills' Arbitration [1964] 2 Q.B. 467 at 478.

Re McBain; ex parte Catholic Bishops Conference (2002) 209 CLR 372 at 412-418 [86] -[99]

Westport Insurance Corporation v Gordian Runoff Limited (2011) 244 CLR 239 at 262-266 [24]-[32], 269-272 [49]-[59]

Texts:

De Smith's Judicial Review, 6th ed. (2007) at 7-097 to 7-115.

Legislation:

The legislation to be referred to by the First Respondent is that referred to by the Appellants in their submissions.

Slater + Gordon

Slater and Gordon

PATRICIA TOOP 69

Dated: 5 July 2013