IN THE HIGH COURT OF AUSTRALIA
MELBOURNE OFFICE OF THE REGISTRY

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 Sui and Mr John Bourke)
Third Respondent

APPELLANTS' REPLY

Part I – Certification for publication on the Internet:

1. The appellants certify that this reply is in a form suitable for publication on the Internet.

Part II – Reply to the written submissions of the first respondent:

The content of the obligation to give reasons

2. As is implicit from the authorities cited by the first respondent at [17] and [33], prior to the decision under appeal, there was no Victorian appellate authority requiring a Medical Panel to give reasons of the kind required by the Court of Appeal in this case.

Filed on behalf of: the appellants

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3. The first respondent accepts at [15] that the extent of the duty to give reasons is informed by the function to be served by the giving of reasons, citing McHugh JA in *Soulemezis v Dudley (Holdings) Pty Ltd*[1].

4. In *Masters v McCubbery*[2] the Court of Appeal expressed the functions to be served by the provision of reasons by a Medical Panel in response to a request made pursuant to s 8 of the *Administrative Law Act 1978* (Vic) as follows: to enable it to be seen that the Medical Panel arrived at its decision in accordance with its statutory functions[3]; and to show that the question referred to the Medical Panel had been properly considered according to law and that the opinion furnished was based on an appropriate application of medical knowledge and experience[4]. The functions identified in *Masters v McCubbery* apply equally to reasons given pursuant to s 68 of the *Accident Compensation Act 1985* (Vic) (**Act**).

Re Poyser and Mills' Arbitration

5. The first respondent relies on the decision of Megaw J in *Re Poyser and Mills' Arbitration*[5], and cases citing it, in support of submissions advanced, first, as to the content of the obligation to give reasons (see [11] and [12]) and, secondly, as to the consequences of a failure to give adequate reasons (see [13] and [21]).

6. *Re Poyser* arose out of a statutory arbitration, and the statement of Megaw J at page 478 concerning the content of the statutory obligation to give reasons in that case should be seen in that light. The sufficiency or otherwise of reasons will depend on the particular circumstances[6] and facts of the case[7], and the relevant statutory framework.

7. To the extent that *Re Poyser* is relied on as authority for the submission that inadequate reasons is a ground for quashing an administrative decision, while there has been some judicial acceptance of *Re Poyser* on that question[8], this has not been universal[9]. The appellants submit that the correct position is that –

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1 (1987) 10 NSWLR 247 at 280G.

2 [1996] 1 VR 635.

3 *Masters v McCubbery* [1996] 1 VR 635 at 650 per Winneke P.

4 *Masters v McCubbery* [1996] 1 VR 635 at 661 per Callaway JA.

5 [1964] 2 QB 467 at 478 (***Re Poyser***).

6 *Westport Insurance Corporation v Gordian Runoff Ltd* (2011) 244 CLR 239 at 270 [53] per French CJ, Gummow, Crennan and Bell JJ.

7 *Mountview Court Properties Ltd. v. Devlin* (1970) 21 P & CR 689 at 692 per Lord Parker CJ, cited in *Body Corporate Strata Plan No 4166 v Stirling Properties Ltd (No 2)* [1984] VR 903 at 911 per Ormiston J.

8 For example, *Dornan v Riordan* (1990) 24 FCR 564 at 573.

9 See *Mountview Court Properties Ltd v Devlin and Ors* (1970) 21 P & CR 689 at 692 and 695 per Lord Parker CJ (Cooke J agreeing), and at 695-6 per Bridge J (statutory appeal "in point of law"); *Comcare v Lees* (1997) 151 ALR 647 at 657 per Finkelstein J (appeal

(a) in the case of a statutory appeal from, or statutory review of, an administrative decision or arbitral award, a decision may be set aside on the ground of inadequate reasons where the relevant legislation authorises such an order; and

(b) in the case of certiorari, it is necessary that any inadequacy in the reasons affect the legality of the decision itself so that there is a material error of law before certiorari will lie to quash the decision on the ground of error of law on the face of the record (see [61] of the appellants' written submissions)[10].

8. In the present case, the appellants submit that the obligation to give reasons is not a condition of the valid exercise of statutory function in forming the opinion, and therefore any failure to give adequate reasons does not, without more, indicate error in the opinion itself. Accordingly, the appropriate remedy for inadequate reasons (had it been sought) was mandamus, not certiorari.

The Medical Panel's reasons

9. The first respondent in effect submits, at [35], that the Medical Panel did not give reasons for its view that that the degeneration of his cervical spine was the result of a natural progression of a pre-existing condition, and not the result of the 1996 work injury.

10. The first respondent stated in his submissions to the Medical Panel that his "employment with the [appellants], and in particular an incident occurring on 16 October 1996, [was] a significant contributing factor to the injuries referred to" **(AB-374)**. There was, however, no compelling evidence in support of this causation submission. Illustratively, the one page report of Mr D'Urso dated 18 May 2009 **(AB-300)**, which was noted by the Medical Panel in its reasons **(AB-452.30)**, records no more than the expression of an opinion that the October 1996 work injury, "*may have* resulted in intervertebral disc prolapse or an aggravation of underlying cervical spondylosis"[11]. Mr D'Urso also said that it was "plausible that [the May 2000 work injury] could have aggravated underlying (sic) cervical condition".

11. In the circumstances, the material placed before the Medical Panel on the issue of causation was not such as to require more elaborate reasons than those given by the Medical Panel.

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under s 44(1) of the *Administrative Appeals Tribunal Act 1975* (Cth)); *Body Corporate Strata Plan No 4166 v Stirling Properties Ltd (No 2)* [1984] VR 903 at 912.14 per Ormiston J (statutory appeal on a question of law).

[10] *Westport Insurance Corporation v Gordian Runoff Ltd* (2011) 244 CLR 239 and *Paul & Paul Pty Ltd v Business Licensing Authority* [2010] VSC 460, which are referred to by the first respondent at [13], concerned statutory appeals.

[11] Emphasis added.

Issue estoppel

12. On the application of established principles, an issue estoppel may arise out of the Magistrates' Court order **(AB-377)**, notwithstanding that the Magistrates' Court was required by s 68(4) of the Act to adopt the medical panel opinion. This feature of the adjudication procedure in the Magistrates' Court proceeding does not deprive the relevant issue of the character of an issue finally determined on the merits. The phrase, "on the merits", in the judicial formulations of the principles of issue estoppel relates to the final disposition of the merits of the cause of action[12]. It is not directed to the quality of the process of adjudication.

10 13. The Court of Appeal's conclusion on this question at [32] **(AB-498)** was correct.

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[12] *Carl Zeiss Stiftung v Rayner & Keeler Ltd (No 2)* [1966] AC 853 at 918F (Lord Reid), 935D (Lord Guest) and 969E (Lord Wilberforce); *Administration of the Territory of Papua and New Guinea v Daera Guba* (1973) 130 CLR 353 at 453 (Gibbs J); and *Kuligowski v Metrobus* (2004) 220 CLR 363 at 375 [25].