SUPREME COURT OF VICTORIA

COURT OF APPEAL

S APCI 2019 0048

TANAH MERAH VIC PTY LTD (ACN 098 935 490) Applicant

v

OWNERS CORPORATION NO 1 OF PS613436T and ORS [No 2] Respondents

S APCI 2019 0051

GARDNER GROUP PTY LTD (ACN 056 178 262) Applicant

v

OWNERS CORPORATION NO 1 OF PS613436T and ORS Respondents

S APCI 2019 0053

ELENBERG FRASER PTY LTD (ACN 081 961 855) Applicant

v

OWNERS CORPORATION NO 1 OF PS613436T and ORS Respondents

JUDGES:	BEACH, OSBORN JJA and STYNES AJA
WHERE HELD:	MELBOURNE
DATE OF HEARING:	5 May 2021
DATE OF JUDGMENT:	12 May2021
MEDIUM NEUTRAL CITATION:	[2021] VSCA 122
JUDGMENT APPEALED FROM:	[2019] VCAT 286 (Judge Woodward)

BUILDING AND CONSTRUCTION – Finding relevant to apportionment between concurrent wrongdoers set aside – Whether matter should be remitted to VCAT for apportionment to be redetermined – *Osland v Secretary, Department of Justice [No 2]* (2010) 241 CLR 320 applied – Matter not remitted – *Civil Procedure Act 2010*, ss 7 and 8.

BUILDING AND CONSTRUCTION – Apportionment between concurrent wrongdoers – Allocation of responsibility between building surveyor, architect, fire engineer and smoker who started fire – Extent of respective departures from expected standards of care – Causal potency of each wrongdoer's acts and omissions – Liability reapportioned: fire engineer 42%, building surveyor 30%, architect 25% and smoker 3%.

APPEARANCES:	Counsel	Solicitors
For Tanah Merah Vic Pty Ltd in all proceedings	Mr T J Margetts QC with Mr J B Waters	Clyde & Co Australia
For the Owners in all proceedings	Mr W Thomas	Wotton & Kearney
For Gardner Group Pty Ltd in all proceedings	Mr C M Caleo QC with Ms V Blidman	DLA Piper Australia
For LU Simon Builders Pty Ltd in all proceedings	Mr P B Murdoch QC with Mr R Andrew	Colin Biggers & Paisley
For Mr A Galanos in proceeding S APCI 2019 0153	Mr C M Caleo QC with Ms V Blidman	DLA Piper Australia
For Elenberg Fraser Pty Ltd in all proceedings	Mr J A F Twigg QC with Mr C F E Dawlings	Clyde & Co Australia

BEACH JA
OSBORN JA
STYNES AJA:

1 On 26 March 2021, the Court published reasons in the applications for leave to appeal brought by Thomas Nicolas, Gardner Group and Elenberg Fraser against orders that had been made in the Victorian Civil and Administrative Tribunal ('VCAT') in relation to a fire that occurred on 24 November 2014 in the Lacrosse apartment tower.[1] In those reasons, we rejected all of the grounds of appeal advanced by Thomas Nicolas and Elenberg Fraser, and all but one of the grounds of appeal advanced by Gardner Group (ground 3). In relation to ground 3, we accepted Gardner Group's submission that the judge's finding, of a causal link[2] in respect of the second of two bases upon which the judge found that Gardner Group had breached the Gardner Group Agreement, had to be overturned.

2 As a result of our conclusion, the apportionment between Gardner Group, Thomas Nicolas, Elenberg Fraser and Mr Gubitta must be set aside and a fresh apportionment between those parties must be undertaken.

3 Gardner Group contended that this Court should perform the new apportionment, rather than remitting the proceeding to the Tribunal. It submitted that a remittal of the issue to the Tribunal would cause the parties to incur significant additional costs, and delay the resolution of these proceedings. Ultimately, the parties most affected by any reapportionment (Thomas Nicolas and Elenberg Fraser) agreed that it was appropriate for the apportionment to be done by this Court. No party was heard to speak against this proposal.

The appropriateness of this Court performing the reapportionment

4 In *Osland v Secretary, Department of Justice [No 2]*,[3] French CJ, Gummow and Bell JJ

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1 *Tanah Merah Vic Pty Ltd v Owners' Corporation No 1 of PS613436T* [2021] VSCA 72 ('Appeal Reasons'). We shall use the same abbreviations in these reasons as in the Appeal Reasons.

2 At Reasons [564].

3 (2010) 241 CLR 320 ('*Osland*').

said:

> The Court of Appeal, in the exercise of its jurisdiction under s 148 of the VCAT Act, may make substitutive orders where only one conclusion is open on the correct application of the law to the facts found by the Tribunal. Such a case arises when no other conclusion could reasonably be entertained. In that event, the Court can make the order that the Tribunal should have made. The language of s 148(7) is also wide enough to allow the Court of Appeal to make substitutive orders in other circumstances. But its powers must, as with the equivalent powers of the Federal Court in relation to the AAT, be exercised having regard to the limited nature of the appeal. Absent such restraint, a question of law would open the door to an appeal by way of rehearing. Where there is a factual matter that has to be determined as a consequence of the appeal, it may be that it is able conveniently to be determined by the Court of Appeal upon uncontested evidence or primary facts already found by the Tribunal. When the outstanding issue involves the formation of an opinion which is, as in this case, based upon considerations of public interest, then it should in the ordinary case be remitted to the body established for the purpose of making that essentially factual, evaluative and ministerial judgment.[4]

5 As has been said many times before, a finding on a question of apportionment involves the weighing of different considerations, and is one as to which there may well be differences of opinion by different minds.[5] Plainly, no apportionment that might be arrived at by this Court, or on remittal to the Tribunal, could be described as being the 'only … conclusion … open on the correct application of the law to the facts'[6] that have been found.

6 In *Osland*, however, their Honours accepted that 'where there is a factual matter that has to be determined as a consequence of the appeal, it may be that it is able conveniently to be determined by the Court of Appeal upon uncontested evidence or primary facts already found by the Tribunal'.[7]

7 Sections 7 and 8 of the *Civil Procedure Act 2010* require this Court, in the exercise of its powers, to give effect to the 'just, efficient, timely and cost-effective resolution'

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4 Ibid 332–3 [20].

5 See, eg, *Podrebersek v Australian Iron and Steel Pty Ltd* (1985) 59 ALJR 492, 493–4 ('*Podrebersek*').

6 *Osland* (2010) 241 CLR 320, 332 [20].

7 Ibid 333 [20]. See also *Leeda Projects Pty Ltd v Zeng* (2020) 61 VR 384, 386–7 [3] (Tate JA), 387 [4] (Kaye JA) and 432–4 [193]–[201] (McLeish JA).

of these proceedings. The facts upon which the new apportionment must be conducted have all been found. They are the facts found by the Tribunal, minus the judge's finding on causation at Reasons [565] to which we have already referred. Gardner Group correctly submitted that a remitter of the apportionment issue would likely cause all parties to incur significant further costs and to delay the finalisation of these proceedings. Plainly, taking such a course would be contrary to ss 7 and 8 of the *Civil Procedure Act*. Accordingly, we propose to accede to the submission that we should not remit the proceeding to the Tribunal.

8 For completeness, we should also note that, unlike the proceeding in *Osland* which concerned an administrative case in VCAT's review jurisdiction,[8] this proceeding is a civil case in VCAT's original jurisdiction.[9]

The relevant facts

9 The relevant facts may now be summarised as follows:

(1) Gardner Group breached the Gardner Group Agreement by failing to exercise due care and skill in issuing the Stage 7 Building Permit and, in so doing, approving the ACP Specification, which specification did not comply with the BCA. This breach was a cause of LU Simon's loss and damage (being the damages payable by LU Simon to the Owners).

(2) Elenberg Fraser breached the Elenberg Fraser Agreement by failing to exercise due care and skill in:

- failing to remedy defects in its design (namely, the ACP Specification and design drawings providing for the extensive use of ACPs on the eastern and western facades of the building, including the balconies) that caused the design to be non-compliant with the BCA and not fit for purpose; and
- failing as head design consultant to ensure that the ACP sample

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8 See div 3 of pt 3 of the *Victorian Civil and Administrative Tribunal Act 1998* ('the VCAT Act').

9 See div 2 of pt 3 of the VCAT Act.

provided by LU Simon was compliant with Elenberg Fraser's design intent as purportedly articulated by the T2 Specification and the BCA,

which failures were also a cause of LU Simon's loss and damage.

(3) Thomas Nicolas breached the Thomas Nicholas Agreement by failing to exercise due care and skill in:

- failing to conduct a full engineering assessment of the building in accordance with the requisite assessment level dictated within the International Fire Engineering Guidelines and failing to include the results of that assessment in the Fifth FER; and
- failing to recognise that the ACPs proposed for use in the building did not comply with the BCA and failing to warn at least LU Simon (and probably also Gardner Group, Elenberg Fraser and PDS) of that fact, whether by disclosing those matters in the Fifth FER or otherwise,

which failures were again also a cause of LU Simon's loss and damage.

(4) Mr Gubitta failed to exercise reasonable care in the disposal of his smouldering cigarette, and to ensure that it was fully extinguished before leaving it in the plastic container on a table on the balcony of the apartment he was staying in.

Parties' submissions on apportionment

Gardner Group's submissions

10 Gardner Group submitted that on a proper assessment of the factual findings of the Tribunal, its relative culpability should be reduced by one third of that determined by the Tribunal — that is, from 33 per cent to 22 per cent. It was submitted that this reduction acknowledges that the finding in relation to the negligent issuing of the Stage 7 Building Permit was responsible for two thirds of the original assessment of liability against it, and is accordingly consistent with the Tribunal's assessment that the Fifth FER negligence finding was 'one of considerably less force than the issue of the Stage 7 Building Permit'.

11 Gardner Group contended that if its liability was reduced by one third (or by some other percentage as determined by this Court) the relevant reduction could be reallocated in one of two ways:

- the entire percentage could be attributed to Thomas Nicolas; or
- the reallocation could be apportioned between Thomas Nicolas and Elenberg Fraser in the same proportions between them as found by the Tribunal.

Elenberg Fraser's submissions

12 Elenberg Fraser submitted that an apportionment performed by this Court should be performed 'afresh, having due regard to the reasons of the Tribunal'. It submitted that performing the exercise afresh would not necessarily result in Gardner Group's share of the apportionment being reduced. It also submitted that if there were to be a new apportionment then any alteration to the proportions should be made chiefly between Gardner Group and Thomas Nicolas — the finding on causation which has been set aside by this Court having involved only the conduct of those parties.

13 Elenberg Fraser contended that it was open to this Court to find that no adjustment to the proportions allocated by the Tribunal should be made. If an adjustment were to be made, Elenberg Fraser submitted that it should be 'extremely minor — less than a few percentage points'. By way of example, it submitted that this Court could decrease Gardner Group's share from 33 per cent to 31 per cent; decrease Elenberg Fraser's share from 25 per cent to 24 per cent; and increase Thomas Nicolas' share from 39 per cent to 42 per cent.

Thomas Nicolas' submissions

14 Thomas Nicolas submitted that there should be no reduction in Gardner Group's liability as determined by the Tribunal. It contended that, on a 'complete reading' of the Tribunal's Reasons, Gardner Group's success on ground 3 of its appeal and the

'removal of that aspect of culpability' would not have changed the Tribunal's conclusion as to the relevant apportionment between each of the consultants and Mr Gubitta, 'in any manner whatsoever'.

15 In support of its submissions, Thomas Nicolas asserted that in that part of the Reasons dealing with the amounts to be apportioned between the consultants and Mr Gubitta, no reference was made to Gardner Group's failure to identify deficiencies in the Fifth FER. Thomas Nicolas submitted that the amount apportioned to Gardner Group by the Tribunal was justified by the Tribunal, in its Reasons, by reference only to Gardner Group's breach of the Gardner Group Agreement as identified at Reasons [564].[10]

16 Thomas Nicolas contended that the Tribunal had carefully considered the 'complex factual matrix and responsibility of the parties' in its Reasons and 'none of those reasons have been shown to be wrong'. Therefore, it was submitted, the proportions as determined by the Tribunal should not be changed, and there is 'no basis to support a *de minimis* reduction and consequential changing in the Tribunal's findings'.

LU Simon and the Owners

17 Neither LU Simon nor the Owners sought to be heard in relation to the reapportionment between Gardner Group, Elenberg Fraser, Thomas Nicolas and Mr Gubitta.

Consideration

18 In any apportionment between concurrent wrongdoers, the matters that need to be considered are: first, the degree of departure by each wrongdoer from the standard of care reasonably expected of that wrongdoer; and secondly, the causal potency of each wrongdoer's negligent acts or omissions. The judgment required

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10 See paragraph [9(1)] above.

involved a synthesis having regard to the whole of the conduct of each wrongdoer.[11]

19 In dealing with the apportionment issue now before this Court, there is no challenge by any party in respect of the 3 per cent attributed by the Tribunal to Mr Gubitta. The apportionment issue in this Court now falls to be considered by us on the basis of the facts found by the Tribunal, but absent the causal finding against Gardner Group in relation to its failure to identify deficiencies in the Fifth FER.

20 In arriving at its conclusion on apportionment, the Tribunal made the following findings and conclusions:

- There was a hierarchy of responsibility between the consultants. In that hierarchy, Thomas Nicolas sat at the top 'by a clear margin'.[12] Thomas Nicolas was the only building professional with knowledge that the ACPs were non-compliant and a fire risk. It was uniquely placed to 'raise the red flag' on the use of the ACPs. Its failures had considerable causal potency and placed it 'highest in the relative importance of the acts of the parties which caused the damage'.[13] Its engagement by LU Simon 'sp[oke] to its level of culpability'.[14] It was engaged because of its specialist expertise in fire safety. Moreover, it was invested with 'frontline responsibility' for identifying and avoiding risks relating to fire spread.[15]
- Gardner Group assumed a 'special responsibility to ensure that the design and materials complied with the BCA'.[16] It was

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11 *Yates v Mobile Marine Repairs Pty Ltd* [2007] NSWSC 1463, [93]-[94]; *Podrebersek* (1985) 59 ALJR 492, 494; *Smith v McIntyre* [1958] Tas SR 36, 46; *Dual Homes Pty Ltd v Moores Legal Pty Ltd* (2016) 50 VR 129, 217 [391]; *Thiess Pty Ltd and John Holland Pty Ltd v Parsons Brinckerhoff Australia Pty Ltd* [2016] NSWSC 173, [511], [514]; *Perpetual Trustee Company Ltd v Ishak* [2012] NSWSC 697, [194].

12 Reasons [595].

13 Ibid.

14 Ibid [596].

15 Ibid.

16 Ibid [593].

engaged specifically for the purpose of guarding against non-compliance. Its decision to approve the extensive use of ACPs with a 100 per cent polyethylene core, 'based primarily on a history of similar approvals and without even making the most straightforward enquiry of Thomas Nicolas, point[ed] to significant culpability'.[17] The fact that this decision led to the issuing of the Stage 7 Building Permit, and thus the construction of the tower incorporating the ACPs in reliance on that permit, gave Gardner Group's role 'particular causal potency'.[18]

- Elenberg Fraser's position in the hierarchy was materially below that of the 'specialist' building surveyor (Gardner Group) and the fire engineer (Thomas Nicolas). While there were flaws inherent in Elenberg Fraser's design which gave rise to a failure to comply with the BCA, 'it would be expected in the ordinary course of things that either Gardner Group or Thomas Nicolas (or both) exercising reasonable care, would identify and take steps to correct those flaws'.[19]

21 On the facts found by the Tribunal, and which are no longer in dispute, there is no basis for interfering with the Tribunal's findings and conclusions to which we have just referred. Having set aside the causal finding in relation to Gardner Group's negligence in failing to identify deficiencies in the Fifth FER, and having considered all of the remaining facts for ourselves by reference to the consultants' respective departures from the standards of care expected of them and the causal potency of each of their acts and omissions, we conclude that the appropriate apportionment for each consultant is:

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17 Ibid.

18 Ibid.

19 Ibid [594].

- Thomas Nicolas: 42 per cent
- Gardner Group: 30 per cent
- Elenberg Fraser: 25 per cent

22 In arriving at this apportionment, we have rejected Gardner Group's submission that the apportionment attributed to Mr Gubitta of 3 per cent requires a reduction in Gardner Group's apportionment by more than 3 per cent. First, while no party sought to overturn the finding against Mr Gubitta, having regard to the limited area of damage for which he was found responsible,[20] it might be thought that the apportionment in respect of Mr Gubitta was higher than it ought otherwise have been.

23 Secondly, in any event, there is no ready comparison between the amount apportioned to Mr Gubitta on the one hand and the amount apportioned to Gardner Group on the other hand, given the very different amounts of damage attributed to each of them by the Tribunal.[21]

24 Thirdly, as was submitted by Elenberg Fraser, the apportionment required to be performed by this Court is one which is to be performed afresh, having due regard to the Tribunal's findings and conclusions. It would be contrary to principle to engage in some mathematical rectification, without properly considering relevant degrees of departure from the particular standards of care expected of each consultant, and the respective causal potencies of each consultant's negligent acts and omissions.

25 While it might appear that we have simply assigned the reduction in Gardner Group's share of the apportionment to Thomas Nicolas without increasing Elenberg Fraser's share, the figures we have arrived at reflect the views we have formed about each party's relative responsibility. As the Tribunal correctly found, Thomas Nicolas sits at the top of the hierarchy by a clear margin from Gardner Group and Elenberg

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20 Ibid [597].

21 Ibid.

Fraser, but Gardner Group bears a not insignificantly greater responsibility than Elenberg Fraser. The figures which we have arrived at reflect our views in relation to these matters.

Conclusion

26 The orders made by the Tribunal will be varied to the extent necessary to accord with our conclusion that the damages payable by LU Simon to the Owners should be apportioned:

- Gardner Group: 30 per cent
- Elenberg Fraser: 25 per cent
- Thomas Nicolas: 42 per cent
- Mr Gubitta: 3 per cent

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