

**TRYHAZ V FIELDER [2005] NSWSC 906**

Supreme Court of New South Wales – 9 September 2005

**FACTS**

Multiplex Constructions Pty Ltd (“Multiplex”) was engaged to design and construct the marine and infrastructure works undertaken as part of the redevelopment of wharves 9 and 10, 7-11 Sussex Street, Sydney, known as the King Street Wharf works. Multiplex subcontracted the marine section to Tryhaz Pty Limited (“Tryhaz”). Tryhaz engaged Fielder Engineers Pty Ltd (“Fielder”) to provide engineering and project management services in connection with the marine works, including for the construction of the wash barrier element of the works. The wash wall was intended to prevent any disturbance of the berths from the wave wash generated by port activities, and in particular, by tug vessels. However, the wash barrier deteriorated after completion needed reconstruction.

Fielder commenced proceedings to recover unpaid fees. Tryhaz brought a cross-claim against Fielder arising out of the collapse of the wash barrier claiming damages for breach of contract, alleging deficiencies in design and project management. Multiplex also sought damages from Tryhaz and Fielder arising out of the defects in the wash barrier.

A Referee was appointed by the Supreme Court, delivering a verdict for Fielder for the unpaid fees in the sum of \$216,863 and that Multiplex was entitled to recover the cost of reconstructing the wash wall in the amount of \$1,507,380 plus GST, 60% against Fielder and 40% against Tryhaz.

Fielder and Tryhaz challenged the Referee’s finding that Multiplex was entitled to GST on the rectification costs. Tryhaz submitted that the Referee’s Report was predicated on Multiplex having to acquire at some future stage, goods and services required to make good the wash wall. On that basis, if Multiplex acquired the goods and services to build the new wash wall it would be charged GST by the suppliers but would not be able to obtain a credit for the amount charged. Therefore, the damages should be GST neutral. The issue of GST was not raised before the Referee.

**ISSUE**

Whether the Referee’s report should be amended or remitted for further consideration.

**FINDING**

The Court held that as Fielder did not raise the issue of GST before the Referee it was not appropriate to remit the issue back to the Referee for further consideration. Further, the Court found that the GST component should not be rejected.

**QUOTE**

Associate Justice Macready commented at paragraphs 32 and 33:

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[22] “... There is a strong reluctance referred to in the authorities to allow the parties to bring forward fresh evidence at the time of the adoption of the report which could have been brought forward before the Referee. The attitude on such occasions is well illustrated...”

[37] “... Fielder did not raise the GST point before the Referee and in the circumstances I do not think it appropriate to remit to the Referee a further consideration of this point. It should have been dealt with in the hearing before the Referee when all the facts were available to the Referee and the parties. Accordingly, I do not propose to reject or remit for further consideration that part of the report which made allowance for GST.”

## **IMPACT**

This case confirms the proposition that the Court will not ordinarily interfere with the Referee’s Report and will not ordinarily allow fresh evidence or submissions which could have been made before the Referee.

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