

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

DOMESTIC BUILDING LIST

VCAT REFERENCE NO. D201/2006

CATCHWORDS

Domestic Building List – major building contract – owner in liquidation - “*sham*” contract entered into between registered building practitioner and owners with forged signatures – insolvent builder not entitled to carry out major domestic building contract work or obtain builder’s warranty insurance – registered building practitioner “*lending*” his licence to obtain builder’s warranty insurance on basis not he but insolvent and unregistered builder carrying out work - registered building practitioner not in fact engaged in the work – whether registered building practitioner liable on contract on basis insolvent unregistered builder entered into same as agent for him – whether registered building practitioner estopped from denying his liability – respondent not liable on contract or on basis of estoppel – respondent liable for misleading and deceptive conduct

APPLICANTS	Neill Hill, Arlieal-Isa Hill
RESPONDENT	George Bastecky
WHERE HELD	Melbourne
BEFORE	M.F. Macnamara, Deputy President
HEARING TYPE	Hearing
DATE OF HEARING	18 December 2006
DATE OF ORDER	22 December 2006
CITATION	Hill v Bastecky (Domestic Building) [2006] VCAT 2663

ORDERS

- 1 Questions posed for determination at preliminary hearing by Order 5 made 1 November 2006 are answered as follows :
 - (a) No
 - (b) Yes - pursuant to ss 11 and 159 of the *Fair trading Act* 1999.

2 Costs reserved.

M.F. Macnamara
Deputy President

APPEARANCES:

For Applicant

M S Stuckey of counsel with Mr C Moyle,
instructed by Moyle Legal

For Respondent

Mr D Pumpa of counsel instructed by Guymer
Naidoo

REASONS

BACKGROUND

- 1 This proceeding concerns a nasty “*scam*” operated in the home building industry.
- 2 Mr and Mrs Hill became interested in the services offered by a company known as World Property Investments Pty Ltd. According to Mr Hill :

WPI offered a package of services which suited our needs. We were both in our middle years, had little in the way of assets and were renting premises in Lancefield. WPI promoted its ability to get people into the real estate market. It had access to land in various subdivisions around Melbourne and offered to facilitate most, if not all, related activities that would lead to home ownership including finance, conveyancing, architectural, engineering, building, rental and further investment opportunities. The services offered by WPI were therefore very appealing. Through WPI we were able to purchase land and build now what is now our home at Sorbonne Street at Sunbury.
- 3 This proceeding concerns a property at Lot 11 James Patrick Way, Lancefield, which the Hills acquired from WPI as an investment.
- 4 On 27 February 2003, the Hills signed a contract with WPI in the form of the Master Builders Association of Victoria “*New Home Contract Where The Contract Price Is More Than \$5,000*”. The total contract price was \$225,000. The contract provided for progressive payments at a number of stages including the “*lock-up*” stage with a 5% deposit payable, 20% payable on the completion of the concrete slab, 20% payable at the frame stage, 30% payable at the lock up stage, 15% payable at the final fixing stage and 10% paid upon completion. The contract provided for a construction period of some 200 days. WPI prepared the plans and also a set of project specifications which were initialled on behalf of both the builder and the owners Mr and Mrs Hill. An employee of WPI, Mr Nathan Zablocki, signed on behalf of WPI. It seems that Mr Zablocki signed the contract some time after the Hills attended at the WPI premises for the purpose of signing as owners under the contract.
- 5 At or about that time, Mr Neill Hill said that he met a Mr George Bastecky who is the respondent in this proceeding at the WPI offices “*when he was introduced to me as ‘your builder’*”. Mr Bastecky denies that this occurred. Mr Bastecky agrees that he was introduced to Mrs Hill but in her capacity as an employee of WPI. She worked for WPI between June 2003 and September 2004 “*to perform various office duties*”. At various times their duties included taking signed building contracts from customer files and forwarding those contracts to the relevant customers who had signed as

owners. In that capacity, she came to take a copy of the contract that she and her husband had signed with WPI. Mrs Hill said that on another occasion, she was introduced to Mr Bastecky when she was invited to “*meet your builder*”. Again, Mr Bastecky denies this.

- 6 Building of the Lancefield property commenced in September 2003. The Hills obtained loan finance from National Australia Bank Limited under two facilities which provided for loans to finance their residence in Sunbury and the investment property at Lancefield.
- 7 The bank wrote to the Hills by letter dated 29 May 2003 advising that it had approved a loan facility of \$232,200. Various progress payments were made by way of draw down of this bank facility. According to Mrs Hill :

Construction commenced on this property in or around September 2003 and reached the lock up stage later in the year. Shortly after all works ceased. No work has been performed on the house since early 2004 and the house has never been completed.
- 8 In her viva voce evidence she said that she understood that some work had been carried out in July or August 2004 as a result of representations which she and her husband had made to WPI. The house remains incomplete at or around the lock up stage.
- 9 When the Hills remonstrated with WPI at the lack of progress on their house, they were given a series of explanations. One was that Lancefield was relatively remote and it was difficult to obtain trades people who would work in that location. Another explanation according to Mrs Hill was that the company was short of “*cash flow*” and that priority was being given to those houses which were in a more advanced state of completion with a view to obtaining final payments from the owners.
- 10 Mrs Hill says that her situation was complicated by the fact that until June 2003, she was employed by WPI and did not wish to lose that employment. WPI has since, I was told, been placed successively in administration and then in insolvent liquidation. It is clear that WPI will not complete the Lancefield house.
- 11 To understand how the present issues arise, it is necessary to say something as to the statutory controls on domestic building in the State. The *Building Act* 1993 Part 9 Division 3 (s 135 and following) entitles the responsible Minister by order published in *The Gazette* to require certain species of builder’s warranty insurance. Section 136(1) provides that a building practitioner must not carry out building work unless covered by the required insurance. Section 176(2A) prohibits a builder from carrying out domestic building work under a major domestic building contract unless the builder is registered as a building practitioner. The contract which WPI signed with the Hills is a major domestic building contract. Section 136(2) of the *Building Act* prohibited a builder from carrying out work under such a contract unless covered by the required insurance. Section 24A(2) of the *Building Act* provides as follows :

24A. Further limitations on issue of building permit

.....

(2) The relevant building surveyor may consider an application for a building permit for domestic building work that is to be carried out under a major domestic building contract but must not issue the permit unless he or she is satisfied that—

(a) the work is to be carried out by a builder who is registered under Part 11 in the appropriate class of domestic builder and is covered by the required insurance; and

(b) each architect to be engaged in the building work is an insured architect.

12 It will be seen the effect then is that no building permit could issue for the building work at Lancefield unless it was being carried out by a builder registered as a building practitioner under the Act who was covered by the appropriate insurance. Section 176(4) of the *Building Act* provides that corporate builders may only carry out domestic building work under a major domestic building contract if at least one of the directors of the corporation is registered as a practitioner. In WPI's case, none of its directors was so registered.

13 WPI therefore had committed itself by contract to carry out work which it was statutorily prohibited from doing. More pertinently the building surveyor would not issue a relevant building contract and insurance cover would not be extended by an insurer for work carried out by an unregistered builder. If matters stayed as they were, the contract for WPI to build at Lancefield would have gone nowhere.

14 In 2002/2003, Mr Bastecky, the respondent, was registered as a domestic building practitioner and was carrying on business as such. He saw an advertisement in his local newspaper place by WPI. He said he was finding work scarce and was looking for new opportunities :

WPI explained to me that they offered house and land packages and helped many customers to achieve their dream of home ownership, especially those customers who otherwise may have difficulty in achieving that dream. WPI explained to me that because of the volume of work it had, it was recruiting registered building practitioners who were able to obtain statutory domestic warranty insurance for construction of residential dwellings.

15 Mr Bastecky said that the arrangement that he entered into with WPI entailed him being paid a "*finder's*" fee of \$2,500 per customer. This is a paradoxical characterisation because it was WPI which was the "*finder*" of the relevant customer. Mr Bastecky said that the arrangement entailed him signing up the first four pages of a major domestic building contract with a price of \$110,000 for a single storey dwelling and \$125,000 for a double

storey dwelling. Under the arrangements that Mr Bastecky had with his insurer, he could enter into new contracts so long as the face value of uncompleted contracts did not exceed \$500,000. It will be seen that under the arrangements which he had with WPI, he could have approximately four such contracts “*on the go*” at any particular moment. In fact Mr Bastecky did no building under his arrangements with WPI. He admits that he entered into an arrangement along the lines described with regard to the Hills’ residence at Sunbury. He said it was a matter for WPI to produce the plans and specifications though in fact none were produced to him. He said that he paid approximately a half dozen visits to the Sunbury building site early in the morning and late in the evening. He agreed, however, that the utility of these visits was difficult to understand given that without plans and specifications, it was impossible for him to ascertain whether the building was being carried out in accordance with the relevant plans and specifications. Further, he agreed that his observations of the Sunbury property demonstrated to him that what was being built was far larger and more elaborate than could have been provided for at a cost of \$110,000. It was a matter for WPI to receive payments under the contract and for WPI to pay the relevant trades. He appears to have given no thought to any apparent liability which this arrangement might have subjected him to. In fact, it seems that WPI’s customers were not told of the arrangements with Mr Bastecky. So, for instance, the new homes contract or at least the first four pages thereof which Mr Bastecky signed up for the Sunbury property at a total price of \$110,000 was signed by Mr Bastecky and dated 14 August 2003. This contract was prepared by WPI. It contained apparent signatures by the Hills but it seems that those signatures were photocopied. The Hills denied signing that contract. Mr Bastecky signed another one of these four page instruments dated 14 August 2003 for the Lancefield property, once again showing a price of \$110,000. Again, the Hills denied signing that contract and it appears that this document was prepared by WPI for signature by Mr Bastecky and included photocopy signatures by the Hills.

- 16 On 14 August 2003, Mr Bastecky said he applied for statutory warranty insurance for the Lancefield property “*and a certificate of insurance for that domestic building contract was issued in my name on 14 August 2003, being Certificate No Reward-002-054243*”. He returned the certificate together with the contract signed by him on the same day. According to Mr Bastecky in contrast to the situation relative to the Sunbury property, he was not requested by WPI to visit the site from time to time. He said :

Because I did not receive any remuneration for the contract dated 14 August 2003 and no further information about it, I assumed that the contract had not proceeded and that works under the contract had not been carried out.

- 17 He said he was unaware that any work had been done on the Lancefield property and “*I was not involved in that project in any manner*”. He

received a letter of demand from solicitors acting for the Hills dated 10 May 2005. He said that until receiving that letter, he was unaware of the “*existence of the building contract dated 27 February 2003*” [ie the contract between the Hills and WPI with respect to the Lancefield property]. He continued :

I was not aware that any project building specifications had been prepared or that any building permit had issued for a building contract for construction at Lot 11 James Patrick Way, Lancefield, let alone a building contract dated 27 February 2003 for a sum of \$220,000.00.

18 He said with regard to other properties, apart from Lancefield :

At all times, in accordance with the arrangements that WPI had with me, WPI would send to me a copy of the building contract that was signed by the owners.

19 The building permit was issued by Checkpoint Building Surveyors dated 29 September 2003. Mr Bastecky said he had no involvement in obtaining that permit and had no knowledge of it. Mr Bastecky said it was clear that the Hills had never relied upon the contract that he signed for a sum of \$110,000. On their own account, they were unaware of that contract and had never sought to enforce it.

THE PRESENT PROCEEDING

20 On 28 March, 2006, the Hills’ then solicitors commenced the present proceeding against Mr Bastecky seeking orders that he complete the building on the Lancefield property and pay damages for late completion. They filed Points of Claim in June 2006 alleging that WPI made the major domestic building contract dated 27 February 2003 with the Hills as agent for Mr Bastecky and, as such, WPI had Mr Bastecky’s actual authority to enter into the contract. They sought damages for breach of the contract.

21 An alternative claim was that Mr Bastecky “*represented to the world in general and [the Hills] in particular*” that he was the builder under the February contract and that he had effected insurance “*in respect of the works*”. The Points of Claim allege that the Hills had “*relied upon the representations to their detriment in proceeding with the building works*”. Accordingly, it was said that Mr Bastecky was “*estopped from denying that he was the builder lawfully engaged under a major domestic building contract to carry out the works for*” the Hills as owners. Finally, the Points of Claim alleged that Mr Bastecky had made misrepresentations whilst acting in trade and commerce and hence was guilty of misleading and deceptive conduct contrary to s 11 of the *Fair Trading Act* and therefore liable to the Hills in damages pursuant to s 159 of that Act.

22 In his amended Points of Defence filed 4 December 2006, Mr Bastecky said that the building contract dated 14 August 2003 had been abandoned by the Hills. He “*took no steps to perform the contract, nor did they require him to perform any obligations under that Building Contract*”. He denied that

WPI made the contract of February 2003 as agent for him and that the Hills knew at all materials times that they were contracting with WPI *“and that WPI did not act as [Mr Bastecky’s] agent”*. He alleged that he honestly believed that the only building contract that he signed was the one dated 14 August 2003 for the sum of \$110,000. He said he did not sign or bind himself under the February 2003 contract.

- 23 Mr Bastecky denied the allegations said to ground the estoppel alleged against him. The only representation that he admitted was *“that he had obtained building insurance in relation to the building contract dated 14 August 2003 for the sum of \$110,000”*. Further, he said that the Hills *“did not rely on any representation made by him either as alleged or at all”*. He said they were not induced to act upon any representation to their detriment by him. He said that he acted in the honest belief that the only building contract binding him was dated 14 August 2003 and that the applicants [the Hills] had abandoned that contract. He denied engaging in misleading and deceptive conduct and at any rate said the Hills were not misled or deceived in any way. Any loss they suffered was, he said, *“not caused by nor did it result from nor was it related in any manner whatsoever to the alleged misleading or deceptive conduct”*.
- 24 Senior Member Lothian made orders on 1 November 2006 by Order 5 setting the following questions for determination at a preliminary hearing :
- (a) whether the Respondent [Mr Bastecky] was the builder for the purpose of the erection of the house at Lot 11, James Patrick Way, Lancefield, if not
 - (b) whether the Respondent is any other way liable to the Applicants with respect to the erection of the house at Lot 11, James Patrick Way, Lancefield in accordance with the Points of Claim.

APPLICANTS’ CONTENTIONS

- 25 Mr Stuckey of counsel appeared on behalf of the Hills with his instructing solicitor Mr Moyle. He supported each of the grounds alleged in the applicants’ Points of Claim. He contended that when WPI made the building contract in September 2003 for the Lancefield property, it did so as agent for an undisclosed principal, viz Mr Bastecky. Its authority to do so he said derived from the arrangements which it had entered into with Mr Bastecky. That this was the intention of the parties was testified he said by the fact that Mr Bastecky made or purported to make a contract binding himself directly to carry out building work on the Lancefield property for the Hills.
- 26 Mr Stuckey conceded that the Hills had not relied upon the conduct or representations of Mr Bastecky whose existence as a contracting party was not known to them until after the arrangements with WPI had broken down. Nevertheless he said others such as the indemnity insurer and the building surveyor, who were charged with the duty of protecting the interests of the

Hills had relied upon Mr Bastecky's conduct and representations. He said in the circumstances it was artificial to draw a distinction between representations and conduct which induced such persons to act or abstain from acting and conduct and representations which induced the Hills themselves to act or abstain from acting. He cited no authority for this proposition.

- 27 As to the claim based on misleading and deceptive conduct, he submitted that there was nothing in s 11 of the *Fair Trading Act* 1999 which would require that the Hills be misled and deceived, it was sufficient he said to make out the cause of action if it appeared that some persons were misled and deceived by the conduct of Mr Bastecky and that process inflicted loss and damage on the Hills.

CONCLUSIONS

- 28 The learned editors of *Bowstead and Reynolds on Agency* (17th edition 201) state at article 78(1) [8-070] :

An undisclosed principal may sue or be sued on any contract made on his behalf, or in respect of money paid or received on his behalf, by his agent acting within the scope of his actual authority. Where a contract is involved, the agent on entering into it must have intended to act on the principal's behalf.

- 29 Mr Bastecky's evidence was in firm denial of his having authorised WPI to contract on his behalf. The only evidence to suggest that he did was the rather vague suggestion that Mr Bastecky had been identified to Mrs Hill and perhaps Mr Hill as "*your builder*". Mr Bastecky admitted that the arrangements described above amounted to his "*lending his licence*". In fact the part performance which has been had of the contract of 27 February 2003 was carried out solely by WPI and Mr Bastecky had no involvement in it at all. In those circumstances, I cannot think that WPI had Mr Bastecky's authority to contract on his behalf whether actual or ostensible or that in making the contract of February 2003 WPI was intending to contract on his behalf.
- 30 Nor am I able to attach any significance to the "*August contract*" as indicating that WPI acted with the authority of Mr Bastecky to bind him as agent under the February contract. The terms of the August document were radically different from the February contract. In his viva voce evidence, Mr Bastecky quibbled at describing the August document as a "*contract*". Given that the signatures of the Hills on this document have in effect been forged, there might be much to be said for that view. His contention however was that it was not "*a contract*" because only the four pages required by the warranty insurer were included. As the quotations from his written witness statement appearing above indicate, he seemed willing to describe the August document as a "*contract*". Nevertheless, I think it is best described as a "*sham*". From time to time, it is alleged that arrangements are "*shams*" where it appears that they were entered into for

no purpose other than to avoid the operation of a particular statute, typically, a revenue statute levying some form of impost.

31 Nevertheless, the courts have invariably found that even where this is the motivation for parties entering into a set of obligations the contract which results is not a sham as long as it creates real legal obligations. In England a doctrine of “*fiscal nullity*” has developed but it has not found favour in Australia.

32 In *Snook v London and West Riding Investments Limited* [1967] 2 QB 786, 802 Diplock LJ (as he then was) considered what the concept of “*sham*” might mean in law. He said :

I apprehend that if it has any meaning in law, it means acts done or documents executed by the parties to the ‘*sham*’ which are intended by them to give to third parties or to the court the appearance of creating between the parties legal rights and obligations different from the actual legal rights and obligations (if any) which the parties intend to create.

33 His Lordship’s formulation has been adopted and applied many times since. This I think exactly describes the August document. It was intended to give to the indemnity insurer the appearance that a registered builder was carrying out the major domestic building work on the Lancefield property. Neither Mr Bastecky nor WPI ever intended that Mr Bastecky would carry out any of this work. He was just in it for a “*spotter’s fee*” for “*lending*” his registration as a building practitioner to enable insurance and a building permit to be obtained. This “*sham*” therefore cannot lend any colour to the contention that WPI was acting as agent for Mr Bastecky when it entered into the February 2003 contract for the Lancefield property building work.

34 It follows that I reject the contention that Mr Bastecky is liable on the February 2003 contract.

35 Nor can the doctrine of estoppel avail the Hills. According to Dixon J as he then was, in all cases where an estoppel is relied upon –

One condition appears always to be indispensable. That the other must have so acted or abstained from acting upon the footing of the state of affairs assumed that he would suffer a detriment if the opposite party were afterwards allowed to set up rights against him inconsistent with the assumption. In stating this essential condition, particularly when the estoppel flows from representation, it is often said simply that the person asserting the estoppel must have been induced to act to his detriment. ...

This means that the real detriment or harm from which the law seeks to give protection is that which would flow from the change of position if the assumption were deserted that led to it.

Grundt v The Great Boulder Proprietary Gold Mines Limited (1937) 59 CLR 641, 674 - see also *Thompson v Palmer* (1933) 49 CLR 507, 547.

- 36 In the present case, as the Hills conceded, they had no knowledge of Mr Bastecky's involvement, in no way did they rely upon him, they relied upon WPI. The indispensable condition of estoppel is therefore wanting and so the claim based upon it fails.
- 37 As I noted no authority was cited in support of the proposition it was sufficient that, for instance, the indemnity insurer relied upon the acts or representations of Mr Bastecky. In no way was the indemnity insurer acting for or on behalf of the Hills. Hence, it seems to me that what was represented to the insurer and what the insurer did is insufficient to make good the gap in the Hills' case on estoppel. The claim based on estoppel must fail.

MISLEADING AND DECEPTIVE CONDUCT

- 38 Section 11 of the *Fair Trading Act* 1999 provides as follows :

11. Misleading conduct in relation to services

A person must not, in trade or commerce, engage in conduct that is liable to mislead the public as to the nature, the characteristics, the suitability for their purpose or the quantity of any services.

600 penalty units, in the case of a natural person.

1200 penalty units, in the case of a body corporate.

- 39 This provision is modelled upon the pivotal Consumer Protection provision in the *Trade Practices Act* 1974, viz s 52. It is well established that whilst the section may be breached and a plaintiff or applicant may have a right to recover damages caused by misleading and deceptive conduct where the plaintiff or applicant is the person misled and deceived and induced to act in a particular way, nevertheless the section has a wider operation. It has frequently been used as a quasi "*passing off*" remedy so that a trader who proves that a competitor has falsely created the impression in consumers that the rival's product is the same product as the plaintiff's or in some way associated with it is entitled to recover damages.
- 40 In such a case, it is clear that the plaintiff or applicant is at all times fully cognizant of the truth and is not the person misled and deceived; rather it is members of the public who are misled and deceived with the result that the plaintiff or applicant loses sales or has his image tarnished. See, for example, the decision of Lockhart J in *The Federal Court of Australia and Levi Strauss & Co v Wingate Marketing Pty Ltd* (1993) 43 FCR 344. There his Honour found that the plaintiff's trademark "*Levi's*" was infringed by the sale of second-hand jeans bearing the mark "*Revise*". His Honour also found that insofar as the public was misled rather than merely confused, the cause of action under s 52 of the *Trade Practices Act* had been made out (1993) 43 FRCR 344, 372.

- 41 In the present case, it is clear that the indemnity insurer was misled by Mr Bastecky's submission of the four pages constituting the August 2003 document into believing that there was a genuine contract for the carrying out of major domestic building work between the Hills and Mr Bastecky.
- 42 Section 159 of the *Fair Trading Act* gives a person suffering loss and damage, inter alia, by reason of a breach of s 11 of the Act a right to recover damages in the Tribunal. This section is for present purposes the *Fair Trading Act* equivalent of s 82 of the *Trade Practices Act* which forms the basis for claims such as those appearing in the *Levi Strauss* case. All that is necessary to be proven is that there is a causal link between the contravention and the damage sustained. Here, the necessary causal connection exists. It was only because Mr Bastecky obtained the apparent indemnity insurance cover by the use of the "sham" August document that WPI was able to obtain the building permit to commence work at Lancefield. Without that they could not have done work with a colour of legality. Obviously WPI was concerned to have that colour of legality. Without Mr Bastecky's assistance by way of misleading and deceptive conduct, the arrangement between the Hills and WPI would simply have fallen through.
- 43 More difficult issues arise, however, in establishing what quantum of damage, if any, beyond the purely nominal can be proven. A person found to have engaged in misleading and deceptive conduct is not liable as if he promised in a contract that what he represented was true. Matters seem to have moved substantially since over 20 years ago in *Gould v Vaggelas* (1985) 157 CLR 215 the High Court said that the measure of damage under s 82 of the *Trade Practices Act* was the "tort" measure. A number of more recent authorities including for instance *Murphy v Overton Investments Pty Ltd* (2004) 216 CLR 388 have established causation as the key connecting factor rather than a simple application by analogy of the rules for the computation of damages in tort. In *Marks v GIO Australia Holdings Limited* (1998) 196 CLR 494, the plaintiff failed to recover substantial damages despite proving that GIO had misled and deceived him as to the features of its loan facility. The damages which the plaintiff sought would only be recoverable if it could be proven that had he not been misled and deceived by GIO he could have obtained the same benefits under an alternative loan provider in the market which evidence was not forthcoming. In the present case, it may be inferred that it would be possible for the Hills to prove by evidence that there were solvent and reputable builders who could have undertaken the work at Lancefield for them who would not have become insolvent part way through. On the other hand, there may have been credit issues or price issues which might have made a contract offered by one of these solvent providers less favourable than the one offered by WPI. Such issues would be relevant to the quantum of damage.

- 44 Of course Mr Bastecky did not cause WPI's insolvency. Nevertheless, the Hills deal with WPI would not have proceeded but for the misleading and deceptive conduct of Mr Bastecky. He could be regarded as responsible for the Hills dealing with a company which became insolvent before performing its obligation in the same way as the negligent valuer was responsible for the consequences of the collapse of the property market in *Kenny and Good Pty Ltd v MGICA* (1999) 199 CLR 413 because but for the negligent valuation the loan transaction which *MGICA* insured would not have been entered into.
- 45 Given that I heard no submissions on these points of quantum of damage, I should say no more. These are matters which may require subsequent determination.

COSTS

- 46 I have heard no submissions on the question of costs and so I will reserve them.