VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

VCAT REFERENCE NO. D30/2014

BUILDING AND PROPERTY LIST

CATCHWORDS

Assessment of damages – Australian Consumer Law sections 18(1) and 236(1) – damages in the nature of interest – Domestic Building Contracts Act 1995 s53(2)(b)(ii), Australian Consumer Law and Fair Trading Act 2012 s184(2)(b)(ii) – costs – Victorian Civil and Administrative Tribunal Act 1998 section 109.

APPLICANT	5 Rivoli Court Mount Waverley Pty Ltd ACN 150 866 023
FIRST RESPONDENT	USI Homes Pty Ltd (ACN 136 425 066)
SECOND RESPONDENT	Mr Habib Bulut
WHERE HELD	Melbourne
BEFORE	Deputy President I. Lulham
HEARING TYPE	Hearing
DATE OF HEARING	6 October 2014
DATE OF ORDER	6 October 2014
CITATION	5 Rivoli Court Mount Waverley Pty Ltd v USI Homes Pty Ltd (Building and Property) [2014] VCAT 1269

ORDERS

1. The name of the Applicant is amended to "5 Rivoli Court Mount Waverley Pty Ltd ACN 150 866 023".
2. The proceeding is struck out as against the First Respondent, with a right of reinstatement which may be exercised if the First Respondent ceases to be deregistered.
3. The Second Respondent shall pay the Applicant $133, 270.27, plus interest of $22,670.55, plus the Applicant's costs of the proceeding, including all reserved costs, to be assessed by the Costs Court on a party / party basis under the County Court Scale, and including the costs of the Applicant's building consultant attending the hearing today.

DEPUTY PRESIDENT I. LULHAM

APPEARANCES:

For the Applicant	Ms R. Fantauzzo, director
For the First Respondent	(deregistered) no appearance
For the Second Respondent	No appearance

REASONS

1 The First Respondent corporation is deregistered. Legal proceedings cannot be brought or continued with against a deregistered corporation. Accordingly the proceeding against it is struck out with a right of reinstatement, which may be exercised if the First Respondent ceases to be deregistered.

2 The Applicant's claim continues against the Second Respondent. The claims are articulated in paragraphs 16 – 30 of the Amended Points of Claim. In substance the Applicant claims $149,747.50 against the Second Respondent as damages caused by his misleading and deceptive conduct.

3 Sections 18(1) and 236(1) of the *Australian Consumer Law* ("ACL") are as follows:

> **18 Misleading or deceptive conduct**
>
> (1) A person must not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.
>
> **236 Actions for damages**
>
> (1) If:
>
> (a) a person (the claimant) suffers loss or damage because of the conduct of another person; and
>
> (b) the conduct contravened [amongst other provisions, section 18(1)];
>
> the claimant may recover the amount of the loss or damage by action against that other person or against any person involved in the contravention.

4 Having heard the evidence of Ms Rachel Fantauzzo, director of the Applicant, and Mr Andrew Lennox, I am satisfied that the Applicant has proven the following:

(a) That in the course of trade or commerce, being the building business of the First Respondent, on 26 February 2013 the Second Respondent and Ekram Bulut represented to Andrew Lennox who was then agent for the Applicant, that if the Applicant paid the "Lockup Stage Payments" –
  (i) the First Respondent would use all of that money in the building works;
  (ii) the First Respondent would not terminate the contract;
  (iii) the First Respondent would not disappear; and
  (iv) the Second Respondent personally guaranteed the matters set out in (i) – (iii).

(b) The representation was made orally, by both the Second Respondent and Ekram Bulut, in a meeting between them and Andrew Lennox.

(c) The representation was confirmed by both the Second Respondent and Ekram Bulut, by their signing of a document headed '2 Lincoln Dr, Keilor East" dated 26 February 2013.

(d) That in reliance on the representation and induced thereby, the Applicant paid the First Respondent $133, 270.27 on 7 March 2013. The payment was made by money drawn down on the Applicant's bank loan and it was foreseeable by the Respondents that the Applicant would incur interest on the moneys so drawn down.

(e) Contrary to the representation, the First Respondent did not use the money in the building works, terminated the contract by failing neglecting or refusing to carry out any more work after receiving the payment, and in effect disappeared. In these circumstances, the making of the representation was misleading and deceptive.

(f) The Applicant suffered loss and damage of $133, 270.27 because of the misleading and deceptive conduct of the Second Respondent.

5 I am satisfied that the Second Respondent is liable to pay the Applicant's loss and damage of $133, 270.27.

6 Section 53(2)(b)(ii) *Domestic Building Contracts* Act 1995 and section 184(2)(b)(ii) of the *Australian Consumer Law and Fair Trading Act* 2012 empower the Tribunal to award damages in the nature of interest. I am satisfied that the Applicant is entitled to damages in the nature of interest on the sum of $133, 270.27 from the date it was paid, 7 March 2013, because the Applicant received no benefit from the payment which it was induced to make by the Second Respondent's misleading and deceptive conduct.

7 Using the interest rates applicable from time to time, the amount payable is $22,670.55, calculated as follows.

Start Date	End Date	Days	Rate	Amount Per Day	Total
07/Mar/2013	06/Oct/2013	214	10.5%	$38.3380	$8204.34
07/Oct/2013	02/Feb/2014	119	10%	$36.5124	$4344.98
03/Feb/2014	10/Aug/2014	189	11.5%	$41.9893	$7935.97
11/Aug/2014	06/Oct/2014	57	10.5%	$38.3380	$2185.27
Total		579			$22670.55

8 The Applicant claimed its costs of the proceeding. The relevant parts of section 109 of the *Victorian Civil and Administrative Tribunal Act* 1998 are as follows:

109 Power to award costs

(1) Subject to this Division, each party is to bear their own costs in the proceeding.

(2) At any time, the Tribunal may order that a party pay all or a specified part of the costs of another party in a proceeding.

(3) The Tribunal may make an order under subsection (2) only if satisfied that it is fair to do so, having regard to—

(a) whether a party has conducted the proceeding in a way that unnecessarily disadvantaged another party to the proceeding by conduct such as—

(i) failing to comply with an order or direction of the Tribunal without reasonable excuse;

(ii) failing to comply with this Act, the regulations, the rules or an enabling enactment;

(iii) asking for an adjournment as a result of (i) or (ii);

(iv) causing an adjournment;

(v) attempting to deceive another party or the Tribunal;

(vi) vexatiously conducting the proceeding;

(b) whether a party has been responsible for prolonging unreasonably the time taken to complete the proceeding;

(c) the relative strengths of the claims made by each of the parties, including whether a party has made a claim that has no tenable basis in fact or law;

(d) the nature and complexity of the proceeding;

(e) any other matter the Tribunal considers relevant.

9 I am satisfied that it is fair to award costs against the Second Respondent, for these reasons:

(a) The Second Respondent has been a party to the proceeding since it was issued on 10 January 2014.

(b) The Second Respondent is a director of the First Respondent and, until it became deregistered, controlled it.

(c) On 7 April 2014 a Counterclaim was filed by the First and Second Respondents, for $114,547.90 plus three other heads of damage. The pleading was quite vague as to the identity of the

"Builder", and it was signed for both Respondents. I can only interpret it to mean that both Respondents alleged they were the "Builder" entitled to the damages. The Counterclaim was struck out by Order of 22 July 2014. There is no doubt that between 7 April 2014 and 22 July 2014 the proceeding was prolonged by the existence of the Counterclaim, and that this prolongation was unreasonable given that the Counterclaim was struck out.

(d) Paragraph 1 of the Order made 23 September 2014 sets out a litany of breaches of orders and directions by both Respondents. No reasonable excuse has been given for these instances of non-compliance and the failure of the Second Respondent to even appear at the hearing today only serves to show that no reasonable excuse could be given.

(e) Notice of the hearing today was given in the Order made 22 July 2014. The parties were informed by that Order that the estimated duration of the hearing was 7 days. The Second Respondent would have well known the amount of preparation which would the Applicant would put into the hearing. When on 23 September 2014 the multiple breaches of Orders by the Respondent resulted in the hearing been confined to an assessment of damages, the Respondents would have expected the Applicant to incur the expense of having its building consultant attend to give evidence, as indeed occurred. The Second Respondent did not advise the Applicant that the First Respondent had become deregistered, and nor did he give the Applicant any notice of his intention not to appear. These acts and omissions of the Second Respondent unnecessarily disadvantaged the Applicant and caused it to incur expense which could otherwise have been avoided.

(f) Finally, whilst one cannot equate the criterion of "relative strengths of the claims" in section 109(3)(c) with the principle of "costs following the event", in this case the striking out of the Respondents' Counterclaim due to the Respondents' breaches of Orders and directions, the failure of the Second Respondent to appear at the hearing today, and the awarding to the Applicant of the substantial sum of $133, 270.27 all bring this matter within section 109(3)(c).

10 For these reasons, I will order the Second Respondent to pay the Applicant's costs of the proceeding, including all reserved costs and the disbursement entailed in the attendance of the Applicant's building consultant at the hearing today.

DEPUTY PRESIDENT I. LULHAM