VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

VCAT REFERENCE NO. D789/2009

DOMESTIC BUILDING LIST

CATCHWORDS

Section 75 application – whether arguable that director of building company owed a duty of care – whether promise to perform contractual provisions constitutes an arguable cause of action under the *Fair Trading Act*. Whether arguable that registered building practitioner owes a statutory duty of care.

APPLICANT	Destin Constructions Pty Ltd
RESPONDENT	Julie McLennon
RESPONDENT BY COUNTERCLAIM	David Schwarzer
WHERE HELD	Melbourne
BEFORE	Senior Member E. Riegler
HEARING TYPE	Hearing
DATE OF HEARING	2 September 2010
DATE OF ORDER	22 September 2010
CITATION	Destin Constructions Pty Ltd v McLennon (Domestic Building) [2010] VCAT 1582

ORDERS

1. Pursuant to s 75 of the *Victorian Civil and Administrative Tribunal Act* 1998, paragraphs 52 to 58 (inclusive) and 61 to 75 (inclusive) of the Respondent's Counterclaim dated 19 February 2010 are struck out with liberty to re-plead.
2. BY 20 October 2010, the Respondent may file and serve an amended Counterclaim.
3. BY 20 November 2010, the Applicant may file and serve Points of Defence to the Respondent's Amended Counterclaim.
4. Costs reserved, with party either having liberty to apply.

SENIOR MEMBER E. RIEGLER

APPEARANCES:

For the Applicant	Mr B Reid of counsel
For the Respondent	Mr R Andrew of counsel
For the Second Respondent to Counterclaim	Mr B Reid of counsel

REASONS

1. This proceeding relates to an application by the respondent by counterclaim, David Schwarzer, seeking orders that the Respondent's Defence and Counterclaim dated 19 February 2010, as it relates to him, be struck out pursuant to s 75 of the *Victorian Civil and Administrative Tribunal Act* 1998 (**'the Act'**). In addition, Mr Schwarzer seeks further orders that the cost of and incidental to the claims made against him and the costs of and incidental to this application be paid by the respondent, Julie McLennon.

2. It would appear that the application made before me on 2 September 2010 is framed differently to the *Application for Orders* filed with the Tribunal on 27 July 2010. In particular, the application made on 2 September 2010 seeks an order that:

> 1.1 The Respondent's defence and Counterclaim, as against the Respondent by Counterclaim be struck out.
>
> 1.3 make such further orders or other orders as the Tribunal deems fit. [1]

3. The *Application for Orders* was drafted narrower than that. It stated:

> 1. An order pursuant to section 75 (1) of the Victorian Civil and Administrative Tribunal Act 1998 ("the Act"), summarily dismissing the Applicant's [by counterclaim] claims against the Second Respondent by Counterclaim contained in paragraph 52-60 & 67(b) of the Applicant's [by counterclaim] Counterclaim dated 19 February 2010.

4. Nevertheless, there was no objection to hearing the application on the basis that all of the claims made against Mr Schwarzer are sought to be struck out.

5. Mr Schwarzer is the sole director of Destin Constructions Pty Ltd, the applicant in these proceedings. Destin Constructions Pty Ltd issued an application against Julie McLennon, wherein it claims $261,935.80. Julie McLennon, subsequently filed a counterclaim against Destin Constructions Pty Ltd and separately against Mr Schwarzer. The claim made against Mr Schwarzer is couched on three basis:

   (a) breach of a common law duty owed to Ms McLennon;

   (b) breach of a statutory duty owed to Ms McLennon; and

   (c) breach of ss 4, 9, 145 and 159 of the *Fair Trading Act* 1999.

6. Mr Schwarzer contends that the claims brought against him are frivolous, vexatious, misconceived or lacking in substance or an abuse of process and should be struck out.

[1] See paragraph 1 of the Respondent's by Counterclaim written submissions filed with the Tribunal.

Section 75

7. Section 75 of the Act empowers the Tribunal to strike out a claim found in a pleading: *Yim v State of Victoria* [2000] VCAT 821. The test to be applied in determining an application under s 75 is one that should be exercised with great care and should never be exercised unless it is clear that there is no question to be tried: *Fancourt v Mercantile Credits Ltd* (1983) 154 CLR 87 at [99].

8. Section 75 does not allow the Tribunal to strike out a pleading that merely displays poor drafting: *West Homes (Australia) Pty Ltd v Crebar Pty Ltd & Ors* [2001] VCAT 46. Therefore, s 75 is not to be used as a mechanism to have a 'pleadings' summons only: *Barbon v West Homes Australia Pty Ltd* [2001] VSC 405. It must be exercised when there are no merits to the claim, rather than when the pleadings have not been sufficiently detailed. In *West Homes* the Tribunal stated:

> [11] It is basic that the Tribunal should require that this duty be observed. Otherwise, natural justice will be denied. Often, though, it is quite possible for a party to make its case known sufficiently without having to resort to fine legalese. Indeed, fine legalese can often obscure. Moreover, the Tribunal is not bound to proceed with all technicality and undue formality. A so-called *"pleading"* summons invites excessive semantical debate. Ideally, Points of Claim, or of Defence, should normally be able to be understood by the average person.

9. The general principles applicable to applications made under s 75 of the Act were succinctly set out in *Norman v Australian Red Cross Society* (1998) 14 VAR 243. Those principles are summarised as follows:

   (a) The application is for the summary termination of the proceeding; it is not the full hearing of the proceeding.

   (b) The Tribunal's procedure on the application is in its discretion. The application may be determined on the pleadings or by way of submissions, or by allowing the parties to put forward affidavit material or oral evidence.

   (c) If a party indicates to the Tribunal that the whole of their case is contained in the material put before the Tribunal, the Tribunal is entitled to determine the matter by asking whether, on all the material placed before it, there is a question of real substance to go to a full hearing.

   (d) The Tribunal should exercise caution before summarily terminating a proceeding.

   (e) For a dismissal or strike out to succeed, the proceeding must be obviously hopeless, obviously unsustainable in fact or in law, can on no reasonable view justify relief, or be bound to fail.

   (f) A complaint cannot be struck out as lacking in substance merely because it does not in itself contain the evidence supporting the claims made.

10. Further, in *Forrester v AIMS Corporation* (2004) 22 VAR 97 Kay J stated that:

> It was not for the Tribunal, at least at an interlocutory stage of the proceedings, to conduct a pre-trial assessment of the complainant's evidence to determine whether the complainant can prove his case. Such an approach is incorrect and inappropriate unless the complainant clearly concedes that the material he or she has placed before the Tribunal contains the whole of the complainant's case.

11. Indeed, the correct approach to adopt on an application under s 75 is to assume that the applicant will be able to prove each fact alleged in the claim in question: *Boek v Australian Casualty and Life* [2001] VCAT 39. In other words, a proceeding should not be dismissed or struck out under s 75 if the ultimate fate of the proceeding depends upon contested questions of fact that would be established or eliminated by cross-examination: *Evans v Douglas* [2003] VCAT 377 at [9].

12. Mr Andrew, of counsel, who appeared on behalf of Ms McLennon contends that the orders sought by Mr Schwarzer are to strike out the whole of the proceeding made against him. He submitted that if I was to find that one of the three claims made against Mr Schwarzer was open and arguable, the application must fail. He argued that the application, as put, did not contemplate striking out only those claims that I found to be not open and arguable, with the remaining claims being left in tact.

13. I disagree with that submission. Both the *Application for Orders* document and the written submissions prepared by Mr Reid, counsel for Mr Schwarzer, also state that the Tribunal: *make such further or other orders as the Tribunal deems fit.* In my view, it is not only open for the Tribunal but also desirable in order to avoid further appearance before the Tribunal that I have some discretion to strike out only a part of the Counterclaim against Mr Schwarzer, should I consider that other parts of the Counterclaim do not justify relief under s 75 of the Act.

14. Mr Andrew further submitted that the material before the Tribunal was not the totality of the material that would be put before the Tribunal at trial. With that in mind, I have examined each of the grounds upon which the claim against Mr Schwarzer is made.

Breach of duty of care (paragraphs 52 to 58)

15. Mr Reid submitted that there was no legal basis upon which to assume that a director of a builder separately owed a common law duty of care to a homeowner in respect of building work carried out by the building company. In support of that proposition, he referred me to two decisions of this Tribunal: *Korfiatis v Tremaine Developments Pty Ltd (Domestic Building)* [2008] VCAT 403 and *Lawley v Terrace Designs Pty Ltd (Domestic Building)* [2006] VCAT 1363. In particular, in *Lawley* the Tribunal stated:

[188] Thus, I consider there must be something more than simply organising or even carrying out the work badly. There must be some act or behaviour of the director that is more than merely carrying out of his company duties, even if it results in a breach of contract or a failure by the company to fulfil its obligations. An intention to induce a company to breach its contract by a director does not incur liability; therefore, I do not see how a careless act by a director by itself can attract personal liability, unless the carelessness was so flagrant as to be outside normal bad building practice.

[189] The evidence of the director's relationship with the builder was cited by the owners as comprising:-

(i) was the registered builder [Andrew Gerard Roberts WS para 7];

(ii) performed some of the building work himself [Baines WS para 3]

(iii) personally supervised the construction of the houses including the construction of the footings [Lawley WS para 10; para 50; Baines para 3];

(iv) planted the offending trees [Deborah Louise Roberts WS 12 (Ex. A12); Andrew Gerard Roberts WS 13-14 (Ex.A13); Anthony John Snell WS 6-7 (Ex. A14)];

(v) was intimately involved in the design of the houses [Gunston witness statement; Deborah Louise Roberts WS para 6]; and

(vi) personally undertook rectification work on the light courts [Lawley WS paras 43-46; Baines WS paras 18-19];

However, I consider these facts do no more than cite what a director of a small residential building company does when building a home for future sale. He was carrying out his normal duties, albeit, he did them carelessly. There is no evidence that the director of the builder carried out his duties knowing or intending that the damage to the building that has occurred, would occur. I consider to find the director of the builder liable on this evidence would make all participating directors of residential building company personally liable for its defaults.

[190] Likewise to find the director of the builder liable on the basis that he was the registered building practitioner and directed and procured the acts of the company is not of itself sufficient to find the director of the builder personally liable as a tortfeasor. To do so would in effect mean that for one-person corporations the principle of limited liability was of no effect. In the acknowledged tension between the operation of corporate law and tort law this would be going too far. Therefore, a director to be liable must do something more than carry out his

duties badly or incorrectly and there is no evidence the director of the builder has done so. Therefore, I do not consider the director of the builder personally liable as a tradesperson for the company's breaches of contrast with the owner at the time of construction.

16. Mr Reid contends that the pleading against Mr Schwarzer does not allege any facts which suggest that he, as a director, did something more than carry out his duties badly or incorrectly. Looking at the relevant paragraphs of the pleading, it is alleged:

> 52. At all material times Mr Schwarzer was:
>
> (a) registered as a domestic building practitioner (DBU-1631);
>
> (b) the sole director of the builder and as such was the natural person who controlled and directed its operations;
>
> (c) the only director of the builder who held registration as a domestic building practitioner;
>
> (d) the person that the builder relied upon to enable it to lawfully undertake the building works so as to comply with the requirements set out in sections 176(2A) and 176(4) of the *Building Act* 1993.
>
> 53. Mr Schwarzer knew or ought reasonably to have known, that if the builder:
>
> (a) failed to carry out the building works in a proper and workmanlike manner or with reasonable care and skill or in accordance with the plans and specifications set out in the agreement; or
>
> (b) failed to carry out the works in accordance with or comply with all laws and legal requirements;
>
> the owner would suffer loss and damage of the very kind that she has suffered.
>
> 54. Further, throughout the course of the works, Mr Schwarzer was personally involved in and directed every aspect of the builder's works, and was privy to all of the information and the directions that were given to the builder by the owner, the structural engineer, and the building surveyor, in order to allow it to construct the works in accordance with its duty.
>
> 55. As a result of the matters alleged above Mr Schwarzer was under a duty to ensure that the builder …..

15. The allegations, as pleaded, do not allege anything more than what a director of a small residential building company does when building a home. It is not alleged that Mr Schwarzer carried out his duties *badly or incorrectly*. Moreover, there is no allegation suggesting any special

relationship or reliance placed on Mr Schwarzer in his personal capacity, as opposed to his capacity as director of the building company.

16. Mr Andrew referred me to the decision of Mandie J (as his Honour then was) in *TNT Australia Pty Ltd v CMW Design & Construction Pty Limited & ors (No. 1)* [2003] VSC 338. In that case Mandie J considered a joinder application where the joinder was based on an alleged breach of duty of care. His Honour found that the claims were very weak but nevertheless, decided to order the joinder because "it is only at trial that the many factors which the cases show may be relevant to the existence of a duty of care can be properly analysed in the full factual context". At paragraph 18 of that decision, His Honour said:

> In my opinion, it is barely arguable on the facts disclosed by the affidavits that TNT relevantly relied upon BH&P's design or its design responsibilities, or that BH&P assumed responsibility in the relevant sense for that design.

17. In my view, *TNT Australia* can be distinguished from the facts in the present case. In particular, *TNT Australia* was not a case where individual directors of the company were sought to be joined to the proceeding. The question in that case was whether an entity that had a specific role in the building works should be joined to enable the defendants to take advantage of Part IVAA of the *Wrongs Act* 1958. This case is very different. It is not a situation where Mr Schwarzer is said to have acted in its own personal capacity. Indeed, it is acknowledged in the pleading that Mr Schwarzer was, at all material times, *the sole director of the builder and as such was the natural person who controlled and directed its operations.*

18. There are other salient features in *TNT Australia* which are not present here. In particular, there is no evidence or even a bare allegation that Ms McLennon placed any reliance on the conduct of Mr Schwarzer separate to any reliance that she may have placed on the conduct of the building company.

19. Mr Andrew referred me to a number of authorities, which were discussed in the judgment of Mandie J. Mr Andrew impressed upon me that the sheer number of authorities referred to in *TNT Australia Ltd* indicated the uncertainty of the question relating to whether a duty of care is owed by a director of building company, distinct to the company itself. However, none of these authorities concern a claim that a director of a building company owes a personal duty of care to a homeowner, as distict from the building company itself. Consequently, I fail to see how those authorities are relevant to the matters before me.

20. There is no affidavit material filed by or on behalf of Ms McLennon to suggest that Mr Schwarzer had acted other than in his capacity as a director of the building company. In addition, there is nothing pleaded in the Counterclaim which alleges that Mr Schwarzer was acting outside of

his capacity as a director or, to use the words in *Lawley*, doing something more than carrying out his duties *badly or incorrectly*.

21. In those circumstances, I find that the pleaded claim, couched in terms of a breach of common law duty of care, has no tenable basis in fact or law. I do not consider that the allegations made against Mr Schwarzer in paragraphs 52 to 58 of the Counterclaim disclose an open and arguable case because nothing is alleged to indicate that Mr Schwarzer was carrying out his duties more than simply *badly or incorrectly*, if that were proved.

***Fair Trading Act* claim (paragraphs 61 to 75)**

22. There are two main aspects to the *Fair Trading Act* claim. The first relates to representations said to have been made by Mr Schwarzer prior to the parties entering into the building contract. The second relates to representations made by Mr Schwarzer during the course of the building project. The pre-contractual representations are set out in paragraph 63 of the Counterclaim as follows:

    (a) The builder would perform its obligations under the agreement according to its terms;

    (b) The building works would be constructed in accordance with the drawings;

    (c) The building works would be constructed in accordance with the specifications; and

    (d) The building works would be constructed competently and professionally.

23. It is alleged that Ms McLennon entered into the building contract in reliance upon those representations and that each of those representations was false, misleading and deceptive, within the meaning of s 9 of the *Fair Trading Act* 1999 and pursuant to s 143 of that Act.

24. The second group of representations are set out under paragraph 67 of the Counterclaim. Again, these representations concern the future conduct of the building company in relation to the rectification of defective or non-complying work. It is alleged that Ms McLellan relied upon these representations and therefore *did not require further inspections of the building works, seek an injunction or suspend building works under the contract to protect herself from any loss or damage.*

25. In my view, all representations alleged by Ms McLellan constitute representations as to future matters. What is alleged is that Mr Schwarzer represented that the building company would do what it was required to do under the contract. In other words, discharge its contractual obligations. It is alleged that the representations are false and misleading because the building works are said to be defective or continue to be defective.

26. It seems to me that the difficulty with the Counterclaim is that nothing is alleged to suggest that the representations were misleading or deceptive at the time when they were made, save for an obscure reference in paragraph 75 that the applicant did not have reasonable grounds for making each representation, although there are no facts alleged upon which that allegation is grounded, nor are any particulars of that allegation given.

27. Mr Reid referred me to the decision of Ormiston J in *Futuretronics International Pty Ltd v Gadzhis* [1992] 2 VR 217, where his Honour stated at page 235 referring to *Wright v TNT Management*:

> Where the only conduct of the respondent was the entry into a contract in which, as a matter of law, a term or warranty was implied I am unable to accept that because the warranty was later breached any question of misleading conduct arises.

28. Then further at page 238:

> If a promissory statement is to be the subject of complaint, it is also necessary to ask how did it amount to misleading or deceptive conduct. It is wrong to view every contractual obligation as an unqualified promise to perform the stipulated act… The promise can only be said to be misleading or deceptive if it was in some way inaccurate; otherwise every unfulfilled mutual contractual promise will constitute misleading or deceptive conduct, a consequence which I cannot believe those who drafted the Act intended. If intention be relevant, the promise may be misleading if the promisor had no intention to fulfil it at the time it was made and accepted. If intention be irrelevant, then the promise may be misleading if the promisor had no ability to perform it at that time.

29. Further at page 239:

> It would seem on the authorities that, at the least, a contractual promise would amount to an implied representation that the promisor then had an intention to carry out that promise. If it can be shown that he had no such intention he would be guilty of misleading or deceptive conduct. Likewise it would seem that such a representation connotes a present ability to fulfil that promise which, if shown to be untrue at the time of making, would likewise characterise the implied representation as misleading or deceptive.

30. In my view, the difficulty with the Counterclaim is that nothing has been alleged to suggest that the representations were misleading or deceptive at the relevant time they were made. The obscure statement in paragraph 75 of the Counterclaim that *the builder, in making each representation did not have reasonable grounds for making each representation under section 4 of the FTA* is not supported by any particulars, nor was any evidence given during the course of this application hearing to cast any

light on how it could be said that the applicant did not have reasonable grounds for making each representation. In my view, such an obscure allegation requires, at the very least, some particularisation to enable Mr Schwarzer to understand the case that he needs to meet. This is not a situation where I can simply assume that the respondent will, at trial, be able to prove the allegation because no facts are pleaded or raised in particulars, which could then cast light on the allegation or give it some factual substance. What is pleaded is, in essence, a legal conclusion. The relevant facts upon which that legal conclusion is based have not been pleaded.

31. Mr Andrew referred me to *Makrenos & Anor v Papaioannou & Ors* [2008] VSC 83. He submitted that the facts in that case were similar to the matters presently before me. In my view, the facts in *Makrenos* are very different. In that case, proceedings were issued against three respondents, the first-named respondent being the registered building practitioner. There it was alleged that all three respondents carried on business as partners under an unregistered trading name of Arista Construction. After obtaining leave to amend their Points of Defence, the first and second respondents withdrew their admissions that they were parties to the building contract. The applicant then applied for leave to file further Amended Points of Claim against the three respondents. Leave was refused by the Tribunal.

32. On appeal, it was held that the Tribunal had erred in exercising its discretion to refuse the amendment because the claim as against the first and second respondents was arguable. It was arguable because it was alleged that the representation made by the first and second respondents, that they were partners in the building business, led to the relevant building surveyor issuing a building permit because one of those persons was a registered building practitioner, which was a pre-requisite for the issuing of a building permit. In that case, it was alleged that the loss and damage suffered by the applicant would have been avoided had a building permit not been issued.

33. What differentiates *Makrenos* is that in *Makrenos,* the representations were representations of fact, whereas in this case, the representations are representations as to future conduct. In other words, the allegation made against the first and second respondents was that they had represented that were parties to the building contract when applying for the building permit, when in fact they were not, or so they subsequently contended. They were not representations as to future matters.

34. In this case, Ms McLellan alleges that the applicant made representations as to future matters. She pleads that there was promise to comply with the contractual provisions – in the future. There is nothing to suggest that at the time when the representations were made, there was no intention to carry out that promise or that there were no reasonable grounds upon which to make that promise. As I have already noted, there are no

particulars subjoined to paragraph 75 of the Points of Claim, which give any indication as to the basis upon which such an allegation is made. In my view, absent of any supporting particulars or allegations of fact, such an obscure allegation fails to identify any basis upon which such a claim is made. I find that this claim, as pleaded, is not open and arguable.

Breach of statutory duty of care (paragraphs 59 and 60)

35. The applicant alleges that Regulation 1502 of the *Building Regulations* 1996 gives rise to a private right of action against the individual building practitioner.

36. Mr Reid argued that it was not specifically pleaded that a breach of Regulation 1502 gave rise to a private right of action. Nevertheless, it seems clear to me that paragraphs 59 and 60 of the Counterclaim, although not specifically mentioning the words "private right of action", clearly indicate that the effect of Regulation 1502 was to give rise to a statutory duty of care. Mr Reid further submits that no damages are claimed in respect of any breach of the statutory duty. I disagree. paragraph 76, which seems to relate to all three causes of action, states:

> As a result of the matters alleged against Mr Schwarzer above, the owner has suffered loss and damage.

37. Mr Reid further submits that Regulation 1502 should not be construed as giving rise to a private right of action because its purpose is directed towards maintaining professional standards. He argued that s 8 of the *Domestic Building Contracts Act* 1995 provided rights of action in favour of consumers and that it could not have been the intent of Parliament to double up these rights in subordinate legislation to the *Building Act* 1993.

38. In my view, the position is not all that clear. Mr Andrew referred me to *Gunston v Lawley & Ors* [2008] VSC 97 where Byrne J stated at [20]:

> As a matter of legal analysis, this regulation might impose a statutory obligation whose breach confers upon a person a right of action for damages; it might give rise to an implied term in a contract between the practitioner and the client; or it might provide a standard which informs the common law duty of care owed by the practitioner to the client and, perhaps, to third parties. In this case the owners' claims rested upon the last of these analyses. Grounds 14 and 15 and, probably ground 12, appear to be based upon the premise that the owners' claims were for a breach of statutory duty imposed by regulation 15.2. This is not the way the owner's cases were put against the architectural draftsman. Perhaps the architectural draftsman should be grateful that they did not. If such a case were made out, it may be that it would not have entitled him to dilute his liability by the application of a proportionate liability regime established by Part IVAA of the *Wrongs Act*.

39. It seems to me that the law on this particular issue is not settled. In addition, there may well be further facts and submissions given at the hearing dealing with this particular issue that require further consideration and argument. In those circumstances, I do not consider that the applicant's claim based on a breach of a statutory duty of care is so untenable to say that it is not open and arguable. I refuse to strike out that aspect of the applicant's claim.

Orders

40. Accordingly, the orders that I will make are that paragraphs 53 to 58 (inclusive), being the common law duty of care claim and paragraphs 61 to 75 (inclusive), being the *Fair Trading Act* claim, be struck out but that the claim in relation to the statutory duty of care remains. For that reason, I refuse Mr Schwarzer's application to summarily strike out all claims against him. Mr Schwarzer will therefore remain a party to the proceeding.

41. I will, however, give Ms McLellan leave to re-plead or provide further particulars in light of my comments above. Any amended Counterclaim is to be filed and served by 20 October 2010. Any amended Points of Defence to Amended Counterclaim is to be filed and served by 20 November 2010. All other orders made on 15 July 2010 are otherwise confirmed.

42. I will reserve the question of costs of this application for later argument, should either party wished to agitate the same. To that end, either party is at liberty to make application for payment of their costs of this application. Having said that, however, I remind the parties that under s 109 of the Act, there is no presumption that costs will follow the event.

SENIOR MEMBER E. RIEGLER