VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

DOMESTIC BUILDING LIST **VCAT REFERENCE NO. D619/2000**

CATCHWORDS

Domestic building – Equitable estoppel – Elements of cause of action – company ceasing to exist.

APPLICANTS	Strato Filonis & Angelina Filonis
RESPONDENT	Orbit Homes Pty Ltd
WHERE HELD	Melbourne
BEFORE	Senior Member D Cremean
HEARING TYPE	Hearing of separate question
DATE OF HEARING	11 November 2004, 18 February 2005, 8 April 2005 and 27 July 2005
DATE OF ORDER	1 September 2005

[2005] VCAT 1770

ORDER

1. I determine that the proceedings are maintainable in law against the Second Respondent. This is so, saving all just and proper defences.

2. By 23 September 2005 the Applicants must file and serve Fifth Further Amended Points of Claim.

3. By 7 October 2005 the Second Respondent must file and serve Amended Points of Defence.

4. Reserve liberty to the Applicants or to either party to make any application(s) for costs.

5. I direct the Principal Registrar to list this matter before me on Wednesday 26 October 2005 at 2.15pm. Allow half a day.

SENIOR MEMBER D CREMEAN

APPEARANCES:

For Applicant	Ms J Johnston, Solicitor
For Second Respondent:	Mr J Bolton of Counsel

REASONS

1. Introduction

1. The Applicants commenced these proceedings by Application dated as received on 15 September 2000.

2. At a directions hearing on 15 June 2004 I set aside for separate hearing "the question whether the proceedings are maintainable in law against the Second Respondent". I also made directions for the filing and service of affidavits both by the Applicants and by the Second Respondent.

3. Such hearing took place, subsequently, on 11 November 2004, 18 February and 8 April 2005. On the last date I adjourned the matter, for final submissions, to 17 June 2005, which subsequently became 27 July 2005.

4. For the purposes of such hearing I had before me Affidavits from the parties. Each of the deponents was cross-examined. I was well placed to observe the demeanour of each witness when being cross-examined.

5. I have also been provided with lengthy written submissions from the parties – those from the Applicants dated 27 May 2005 and those from the Second Respondent dated 27 July 2005.

6. In coming to a conclusion in this matter, but on the separate question only, I have taken into account and considered all the material provided to me by the parties, including their Affidavits, referred to above, and their submissions. I have also taken into account and considered the evidence elicited in cross-examination and noted the manner in which it was given. As well, I have considered the various authorities to which I was referred, several of which I have found most helpful as will appear.

2. Points of Claim

7. The Applicants' case against the Second Respondent is contained in various paragraphs to be found in their Fourth Further Amended Points of Claim. Their initial Points of Claim are dated 14 September 2000. The Second Respondent is quite specifically named at all times as "Orbit Homes Pty Ltd". It is nowhere named as "Orbit Properties Pty Ltd" or as "Orbit Homes Australia Pty Ltd".

8. The relevant paragraphs in such Further Amended Points of Claim are as follows:

> 2. The Second Respondent is and was at all material times incorporated pursuant to the laws of the State of Victoria and is registered pursuant to the Corporations Law.
>
> 3. Orbit is and was at all material times the Builder pursuant to a Building Contract made with the Applicants as owners and dated the 20th day of April 1989 ("the contract") to build a brick veneer dwelling at Lot 1893 Shankland Boulevard, Coolaroo ("the premises").
>
> 6. It was an express or alternatively, an implied term of the said contract and/or Orbit warranted:
>
> (a) that it would exercise all reasonable care, skill, diligence and competence as a builder and the work would be carried out in a proper and workmanlike manner and in accordance with the plans and project specifications referred to in the contract dated the 20th day of April 1989 ("the plans project specifications").
>
> (b) That it would carry out the works in accordance with and would comply with all laws and legal requirements of the Victorian Building Regulations ("V.B.R.'s") and any other Statute or Regulation administered by the Local Municipal Council or other Authority with Statutory responsibility for the compliance of the work performed.
>
> 7. Orbit breached the said contract in the terms, conditions and warranties thereof and was negligent in the performance of its works.
>
> **Particulars**
>
> (a) Failing to comply with the recommendations of the soil report of Universal Soil Laboratories Pty Ltd particularly in light of the very high soil profile re-activity present at the premises:
>
> (i) by failing to grade the ground away from all footings at a minimum slope of 1.20 and by failing to construct soil drains to prevent soil moisture from accumulating near footings;

(ii) by omitting to include in the building either full height construction joints and/or full height openings in all brick or masonry at a maximum spacing of approximately 5 metres.

(b) Failing to ensure that the building works were in accordance with the plans and project specifications in that the dwelling house was constructed without expansion/articulation joints as shown in the approved plans;

(c) Failing to repair cracked internal or external walls in a proper and workmanlike manner or at all;

(d) Failing to ensure that the building was constructed in a proper and workmanlike manner so that the front wall was not misaligned;

(e) Failing to ensure that the building was constructed to comply with the V.B.R.'s and any other Statute or Regulation administered by the Local Municipal Council or other Authority with Statutory responsibility; and

(f) Failing to exercise any or any responsibility, care, skill, diligence or competence.

8. By reason of the aforesaid matters, the Applicants have sustained and continue to suffer loss and damage.

Particulars

The cost of repair and rectification of structural cracking both to the exterior and interior. The cost of all necessary repairs and rectification to the foundations. The cost of all necessary internal repairs. It is anticipated that the rebuilding of the dwelling will be required to rectify the defects, and further particulars of which will be provided upon receipt of expert witness reports to be served further to the Directions made 31 October 2000.

8A. The Applicants further allege that there has been significant movement of the foundations of the premises and accordingly rely on Section 11 of the *House Contracts Guarantee Act* 1987.

Particulars

9. The Applicants rely on the report of John Merlo dated 2nd April 2001. On or about 1995, the Second Respondent assumed Orbit's obligations under the contract to the Applicants and to the First Respondent.

10. Pursuant to the Guarantee, on or about 19 April 1996 a Notice of Complaint was lodged by the Applicants with the First Respondent.

Particulars

A copy of the Notice of Complaint may be inspected at the offices of the solicitors for the Applicants by appointment.

11. On or about 2 September 1996 the First Respondent made a determination regarding the Notice of Complaint made by the Applicants herein.

Particulars

A copy of the determination made 2 September 1996 by the First Respondent may be inspected at the offices of the solicitors for the Applicants by appointment.

12. Pursuant to the determination, the Second Respondent was required to rectify the defects which were found to exist within 28 days of the date of the determination.

13. Pursuant to the determination, the Applicants have repeatedly requested that the Second Respondent, alternatively, the First Respondent rectify the defects.

14. In spite of such requests, the First and Second Respondents have failed and or neglected to rectify satisfactorily or at all, the defects at the premises and the Second Respondent has failed to decide the quantum of the claim within a reasonable time of the claim being made pursuant to Section 62 of the *Domestic Building Contracts* Act 1995.

15. By reason of the aforesaid matters, the Applicants have sustained, and are continuing to sustain loss and damage.

Particulars

The Applicants refer to and repeat the particulars under paragraph 8 hereof.

15A. Further or alternatively, in the years of 1995 to 1998 a director of the Second Respondent, Craig Millson, represented to the Applicants that the Second Respondent had assumed the obligations and liabilities under the contract and/or that it would rectify the defects in the premises.

Particulars

The following instances comprised the said representations:

a. A letter dated 29 May 1995 signed by Craig Millson on the letterhead of the Second Respondent referring to *inter alia:*

   i. a ***'recent inspection at the above dwelling, regarding your concerns with shrinkage cracks.'***

   ii. an undertaking that '***we shall reinspect and take the necessary remedial action.'***

iii. A paragraph stating: '***However, please be assured your concerns have been noted on your file…'***

b. Craig Millson stating to Mrs Filonis over the telephone a short time after receiving the said letter dated 29 May 1995 words to the effect that the Applicants should ***Let the house weather for about 12 months*** prior to undertaking any remedial works.

c. Craig Millson attending the premises on several occasions in or about September to December of 1995 to:

i. supervise the rectification of the agreed scope of works

ii. inspect the rectification of the agreed scope of works undertaken by the tradespersons supervised by Craig Millson.

d. In or about October of 1995 Mrs Filonis telephoned Craig Millson and said words to the effect that ***its already been five years since the troubles began and you still have not fixed them,*** to which Craig Millson replied words to the effect ***That's fine, that's not in dispute, just let the house weather for another six months.***

e. Between 1996 to 1998, Craig Millson attended the premises on numerous occasions, particularly when a representative of the Housing Guarantee Fund was present. In or about September or October of 1998, minor rectification works were supervised by a person whom was introduced to the Applicants by Craig Millson.

15B. By reason of the matters particularised in paragraph 15A hereof, the Second Respondent is estopped from denying:

a. that it had assumed the liabilities and obligations of Orbit under the contract and/or to rectify the defective building works in the premises.

b. Any limitation period such as that contained in Section 134 of the *Building Act* 1993 applies.

15C. Further, by reason of the matters particularised in Paragraph 15A hereof the Applicants at all relevant times assumed or expected:

a. That the Second Respondent had assumed the liabilities and obligations of Orbit under the contract and/or to rectify the defective building works in the premises.

b. That any limitation of actions period such as that prescribed in section 134 of the ***Building Act* 1993** would not apply.

("the assumption or expectation")

15D. Craig Millson encouraged alternatively induced the Applicants to adopt the assumption or expectation acting in the capacity of director of the Second Respondent.

The Applicants refer to and repeat the Particulars subjoined to paragraph 15A hereof

15E. The Applicants acted in reliance on the assumption or expectation.

15F. Craig Millson knew that the Applicants would act in reliance of the assumption or expectation alternatively intended that they would so act.

15G. Craig Millson's said action will occasion detriment to the Applicants if the assumption or expectation is not fulfilled.

Particulars

The Second Respondent has failed to accept the liability or obligations to rectify the defects in the premises, which defects are becoming worse and potentially dangerous, full particulars of which will be provided prior to the trial of the matter.

The Applicants face a potential limitation of actions proceeding which, if successful, would deny them a remedy that would, but for the said action, otherwise have been available to them.

15H. Craig Millson has failed to act to avoid the said detriment whether by fulfilling the assumption or expectation or otherwise.

15I. By reason of the matters contained in paragraphs 15A to 15I inclusive hereof the Applicants have suffered and continue to suffer loss and damage.

23. By reason of the foregoing matters the Applicants have suffered loss and damage.

9. I am told that the Applicants' claim against the First Respondent has been settled for the statutory maximum (of $40,000.00) and that their claim against the Third Respondent has also been settled on terms. A point was sought to be made by the Second Respondent that the Applicants have not used the moneys obtained in settlement on repairs or rectification. I did not consider much of substance came from this point, however, if it was correct.

10. The Applicant's case, therefore, remains on foot only against the Second Respondent.

3. Points of Defence

11. The Points of Defence of the Second Respondent are dated 21 August 2001.

12. By those Points of Defence the Second Respondent admits that it was registered under the *Corporations Law* (now *Corporations Act* 2001) on or about 6 June 1991. See paragraph 2. It also admits that by an agreement dated 20 April 1989 between Orbit Properties Pty Ltd (which it calls "Orbit") and Mr and Mrs Filonis, Orbit agreed to construct a dwelling for the Applicants at their Coolaroo address. See paragraph 3. It admits further that it was a term of such agreement that "Orbit" would exercise reasonable care skill and diligence in carrying out the works and that "Orbit" would carry out the works in a workmanlike manner and in accordance with the plans and specifications referred to in the agreement. See paragraph 6.

13. The Second Respondent then goes on to deny the allegation that Orbit breached the agreement (see paragraph 7). It also denies that the Applicants have suffered any loss or damage but says that if any damage was caused to the property of the Applicants then it was caused by pavement construction by the Applicants and/or by cracks in such pavement (see paragraph 8). It denies that it was required by the First Respondent's determination to rectify defects (see paragraph 12). It denies any allegations made against it that it has failed to rectify defects (see paragraph 14). It then denies the Applicants have suffered any loss and damage or continue to do so (see paragraph 15).

14. Save to mention two further matters, that exhausts the utility of the Second Respondent's Points of Defence because they were done at a time prior to the filing and service or the Applicant's Fourth Further Amended Points of Claim. Really, the Points of Defence relate to the Applicant's initial Points of Claim. Many of the allegations made in the Fourth Further Amended Points of Claim are

thus not addressed by the Points of Defence. In particular I refer to paragraphs 15A to 15I of the same.

15. First, I wish to mention that the Second Respondent's Points of Defence specifically plead that the Applicants' claim is statute barred by virtue of s5 of the *Limitation of Actions Act* 1958 or alternatively by s134 of the *Building Act* 1993. See paragraph 21.

16. The second matter I wish to mention is this. Apart from denials, the Second Respondent's Points of Defence do not specifically allude to the fact that the named Second Respondent is "Orbit Homes Pty Ltd". This is left unmentioned. Nor do the Points of Defence specifically go on to say anywhere that the Second Respondent was not itself under any obligation to the Applicants to do anything.

17. The Second Respondent's Points of Defence, therefore, are silent on the live issue I have had to decide.

4. Rival contentions

18. The real dispute between the parties – what I have to decide – is, apart from anything else, whether the Applicants properly have a cause of action against "Orbit Homes Pty Ltd" which is, of course, the Second Respondent. The Applicants' contract – and this is admitted – was with "Orbit Properties Pty Ltd". It was not with "Orbit Homes Pty Ltd". Yet "Orbit Properties Pty Ltd" ceased to exist after 28 August 1995 when it became deregistered. The point being taken, therefore, by the Second Respondent is that the Applicants have no case against the Second Respondent. Their true cause of action was against "Orbit Properties Pty Ltd", but that company ceased to exist over 10 years ago. Therefore, it is argued, I should hold that the present proceedings are not maintainable in law against the Second Respondent.

(a) The Applicants

19. The Applicants have, however, continued to maintain a position whereby they argue that the proceedings are properly brought against the Second Respondent even though, as they themselves admit, their contract to build was one made initially with "Orbit Properties Pty Ltd". They cite various considerations in support of their position. These focus on the activities of Mr Craig Millson who is referred to in their Fourth Further Amended Points of Claim set out above. Mr Millson was a director of "Orbit Properties Pty Ltd" and is a director of "Orbit Homes Pty Ltd".

20. That circumstance is a foundational element in the case of the Applicants against the Second Respondent. They submit that in all the circumstances "it is incontrovertible that there was the creation of encouragement by Orbit Homes in the Applicants of the assumption that a contract would come into existence, or a promise performed or a transaction carried out between it and the Applicants, and reliance on that by the applicants in circumstances where departure from the assumption by Orbit Homes would be unconscionable". They submit (emphasis included) "that this is a compelling case, par excellence, which ought properly attract the equitable relief found in the doctrine of estoppel". They say the material facts forming the basis of their claim are to be "found in their Fourth Amended Points of Claim… and their respective Affidavits of Evidence filed specifically in relation to the preliminary hearing [sic] on the issue of estoppel". They argue that to deny them such relief "would condone the unconscionable conduct of Orbit Hones and permit a significant detriment to [them] to remain". Such a situation, they say, if "left unremedied, would send a clear signal to big developers and unscrupulous builders that lay home owners, with little or no commercial experience, can be bullied and hoodwinked into falsely believing that their builder will comply with the Building Contract and Statutory Warranties". As I recall, the Second Respondent, via Counsel, took objection to this last assertion and it is very emotively expressed I agree.

(b) The Second Respondent

21. On the other hand, the Second Respondent has continued to maintain a position whereby it denies that any legal obligations, arising from an estoppel, have arisen between the parties. It is submitted that none of the allegations made in paragraph 15A of the Applicants' Fourth Further Amended Points of Claim "amounts to an estoppel and, if proved, creates no [sic] obligations on the Second Respondent". Picking up on the points mentioned by Brennan J in *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387 each of those points is addressed by the Second Respondent in its submissions to me. It is submitted that the Applicants "thought that they were at all times dealing with Orbit Properties and that there was no relationship between them and Orbit Homes". It is submitted that if they did have an assumption or expectation that a legal relationship existed between them and the Second Respondent they "have suffered no detriment as a result of their assumption or expectation".

22. It is denied, in any event, that the Second Respondent has acted so as to induce the Applicants "to adopt any relevant assumption or expectation". It is denied also that the Applicants have "acted or abstained from acting in reliance on any assumption or expectation created by the Second Respondent". The allegations in the Fourth Further Amended Points of Claim are that Craig Millson made the representations: it is said "there is no allegation that he was, at any relevant time, acting for or on behalf of the Second Respondent" and "[w]ithout such connection the representations cannot be attributed to the Second Respondent". It is said that "[i]n fact the only allegations are against Craig Millson personally and he is not a party to the proceedings".

23. But even if the Second Respondent has "somehow accepted liability", it is claimed the Applicants have suffered no loss and that even if the Second Respondent had assumed responsibility for rectification works, that assumption of responsibility "was clearly withdrawn by Craig Millson when he pointed out

that Mrs Filonis was too late and 'you are out of guarantee and you can go and f… yourself' or whatever phrase may have been used". In any event the Applicants' "action or inaction did not occasion any detriment even if the assumption or expectation was not fulfilled". It is said that "[a]t its highest, the Second Respondent merely offered to carry out, and in fact carried out, rectification of some of the defects at the home". This was because, "[a]s sworn by Craig Millson, Orbit Homes was the vehicle used to carry out that rectification to enable the directors of Orbit Properties and other guarantors to avoid liability for their personal guarantees to HGF". It is pointed out that "[a]t that time Orbit Properties was deregistered and the works had to be carried out by a registered builder". The engagement of one Craig McTaggart to carry out the works was not done on behalf of Orbit Homes Pty Ltd but was done by "Orbit Homes Australia Pty Ltd". Thus, any representations made by him cannot be referred to the Second Respondent. "Orbit Homes Australia Pty Ltd" appears to be yet another entity.

5. Discussion

24. The above is only a summary of the rival contentions of the parties. The submissions of each are both very detailed and very complex. In many areas, however, I must indicate that they are quite wide of the mark, if not polemical. This applies particularly to the Applicants. My concern is the narrow legal question of whether the proceedings are maintainable in law against the Second Respondent. This must be seen in light of the fact that the Second Respondent is maintaining that it cannot be under any liability to the Applicants who only had dealings with "Orbit Properties Pty Ltd". Should I decide that the Second Respondent cannot maintain that this is so, it must then be a matter of deciding whether the proceedings are maintainable, given then that the Second Respondent is correctly sued. But that is a question for another occasion. If I decide on this occasion that the Second Respondent is being correctly sued, I am not deciding that it has no defences which may be available to it. I am not deciding the case

fully and finally against the Second Respondent, should I decide it has been correctly sued. I would then need to hear argument on the question whether any defences can or do arise. On the other hand, should I decide that the Applicants cannot maintain a case against the Second Respondent, then that is an end of the matter. That is why I agreed, at Counsel's insistence, to the course of hearing and determining this issue as a separate question. It is a question that has the potential to end the proceedings depending on what I decide.

25. I consider I am entitled, on the evidence and submissions, to make the following observations:

(a) the Applicants definitely entered into a building contract in the beginning with "Orbit Properties Pty Ltd". That building contract was for the construction of their premises at Coolaroo.

(b) "Orbit Properties Pty Ltd" has never been a party in these proceedings and went out of existence after August 1995.

(c) the Applicants have had structural and other problems with their premises of an ongoing nature continuing past the time when "Orbit Properties Pty Ltd" went out of existence.

(d) Mr Craig Millson, the person whom the Applicants principally dealt with over the period, was a director of the now defunct "Orbit Properties Pty Ltd" and is a director of the Second Respondent "Orbit Homes Pty Ltd" which came into existence on 6 June 1991, that is to say, over 4 years before "Orbit Properties Pty Ltd" went out of existence.

(e) there appears to be or to have been a group of companies in the "Orbit" group another of which, as I have said, is or was "Orbit Homes Australia Pty Ltd".

(f) Mr Millson was in relatively regular contact with the Applicants over the condition of their premises for a relatively long period of time.

(g) although Mr Millson denies several of the conversations Mrs Filonis says she had with him, the Second Respondent did, nonetheless, make arrangements to rectify

works at the Applicants' premises and such arrangements were made at Mr Millson's direction.

(h) rectification works were carried out by or on behalf of the Second Respondent at the Applicants' premises.

(i) it is said that such works were carried out by the Second Respondent as the vehicle to protect the guarantors of the obligations of Orbit Properties Pty Ltd. This is given as the motivation for the carrying out of the works.

(j) the Applicants did not know they were no longer dealing with someone, in the person of Mr Millson, representing "Orbit Properties Pty Ltd".

(k) Mr Millson, although in relatively regular contact with the Applicants, never told them that "Orbit Properties Pty Ltd", a company of which he had been a director, had gone out of existence.

(l) a letter from the Second Respondent dated 29 May 1995 – that is, before "Orbit Properties Pty Ltd" went out of existence – gives the assurance to the Applicants that their "concerns have been noted on…file" and should the shrinkage problem at their premises become more severe "we shall re-inspect and take the necessary remedial action". That letter is on a letterhead from "Orbit Homes Pty Ltd" and carries Mr Millson's name and signature.

(m) the limitations defence taken in the Second Respondent's Points of Defence is not inconsistent with a legal relationship existing between the Applicants and the Second Respondent, but it is to the effect that any rights of action against the Second Respondent are statute barred.

26. I consider I am also entitled, on the evidence, to make these following further observations:

(a) the Applicants impressed me as witnesses who were giving truthful evidence. It is true that Mrs Filonis appeared to be confused about the exact formulation of words used by Mr Millson in a parting conversation with her. She gave perhaps as many as four different versions of it. Each account, however, was consistent, at least in the sense of some form of unseemly, or vulgar, words being used to her. Also, I

can understand some reluctance on her part to repeat the words. Why he should have spoken to her in some such manner, I am unable to say.

Much was sought to be made of her confusion on this point as affecting her credibility generally. I cannot agree, however. In my view she was a truthful witness as was Mr Filonis.

Overall, I was impressed by the detailed recollection of events given in evidence by both Mr and Mrs Filonis. See (c) below.

(b) it was "respectfully submitted that Craig Millson was not an impressive witness". It was said of him that his evidence "on important issues was shifting, evasive and inconsistent". It was said that it was "difficult to fathom the poor quality of his evidence generally". I cannot agree with this either, however. I do not consider that Mr Millson lied to me in evidence and I consider a general attack on his credibility is quite unwarranted.

On the other hand, I do consider that Mr Millson was confused in places in the evidence he gave. This was particularly so when he was trying to recall whether there were defects in the Applicants' premises in the mid-1990's and it was also so when he was trying to differentiate between companies in the "Orbit" group. These, however, have implications for how I should view his evidence generally in the recollection of events. See (c) below.

(c) it follows from (a) and (b) that I consider I am warranted in preferring the evidence of Mr and Mrs Filonis to that of Mr Millson where there is conflict on material points. This follows also from the respective positions of the parties in this dispute. Mr Millson over the years, no doubt, has been a very busy man dealing with many, many clients and their concerns. Perhaps he has had to deal with many disgruntled clients. But Mr and Mrs Filonis, no doubt busy too, have, however, been able to concentrate their concerns on one house – their own – and, basically, on one person, namely, Mr Millson.

6. Relevant principles

27. The relevant legal principle to be applied – if it applies at all – is, I consider, that to be found set out in Brennan J's judgement in *Waltons Stores (Interstate) Ltd v Maher*, referred to above. The Second Respondent cannot claim to be taken by surprise by this (as it appeared to do) because the submissions of the Second Respondent directly address the issue. In a sense, it is irrelevant to argue it is not pleaded. In any event, I consider the Applicants' pleadings, if only implicitly, do sustain an allegation that this doctrine applies even if infelicitously expressed.

28. At p 428-9 of his judgement Brennan J said as follows:

> In my opinion, to establish an equitable estoppel, it is necessary for a plaintiff to prove that (1) the plaintiff assumed that a particular legal relationship then existed between the plaintiff and the defendant or expected that a particular legal relationship would exist between them and, in the latter case, that the defendant would not be free to withdraw from the expected legal relationship; (2) the defendant has induced the plaintiff to adopt that assumption or expectation; (3) the plaintiff acts or abstains from acting in reliance on the assumption or expectation; (4) the defendant knew or intended him to do so; (5) the plaintiff's action or inaction will occasion detriment if the assumption or expectation is not fulfilled; and (6) the defendant has failed to act to avoid that detriment whether by fulfilling the assumption or expectation or otherwise. For the purposes of the second element, a defendant who has not actively induced the plaintiff to adopt an assumption or expectation will nevertheless be held to have done so if the assumption or expectation can be fulfilled only by a transfer of the defendant's property, a diminution of his rights or an increase in his obligations and he, knowing that the plaintiff's reliance on the assumption or expectation may cause detriment to the plaintiff if it is not fulfilled, fails to deny to the plaintiff the correctness of the assumption or expectation on which the plaintiff is conducting his affairs.

29. It is correctly pointed out to me that these observations of his Honour were quoted by Warren J (as she then was) in *Edensor Nominees Pty Ltd v Anaconda Nickel Pty Ltd* [2001] VSC 562 at [164].

30. It is also correctly observed, in my view, that conduct falling within Brennan J's formulation may be variously described as "promissory estoppel" or "estoppel by conduct" or "estoppel by representation" or howsoever otherwise. Underlying

the doctrine, and informing its principles, is a unifying theme of unconscionability: but unconscionability is not itself "a discrete ingredient which is additional…". See *Anaconda Nickel Ltd v Edensor Nominees Pty Ltd* [2004] VSCA 167 at [40] per Buchanan JA.

31. Other cases relevant to the area include *Commonwealth v Verwayen* (1990) 170 CLR 394 (at 410-11) and *Giumelli v Giumelli* (1999) 196 CLR 101 (at 112).

32. It seems clear to me, as was submitted, that Brennan J's formulation may found either a cause of action or a defence. It was not submitted to me, in any event, that it could be used only as a shield and never as a sword, as was the doctrine in earlier learning.

7. Findings

33. I make the findings hereunder on the materials and the evidence (elicited in cross-examination or otherwise) in light of the doctrine advanced by Brennan J in *Waltons Stores (Interstate) Ltd v Maher*, above.

(a) Legal relationship.

34. I am satisfied the Applicants have proved that they assumed a particular legal relationship existed between them and the Second Respondent; or, that they expected that a particular legal relationship would exist between them and that the Second Respondent would not be free to withdraw from that expected legal relationship. The relationship is that of builder and client - whereby, in effect, the Second Respondent was taking over from "Orbit Properties Pty Ltd". It seems to me that this finding is dependent essentially upon the evidence of the Applicants. The evidence of the Second Respondent is not directly germane, except as establishing any grounds or not for the assumption or expectation. Should there be any conflict in the evidence on the point, between that of the Applicants and that given by or

on behalf of the Second Respondent by Mr Millson, I prefer the evidence of the Applicants for the reasons I have given. As to the assumption by Mrs Filonis that it was the Second Respondent with whom she and Mr Filonis had a particular legal relationship, I refer to paragraphs 26 and 27 of her October 2004 Affidavit. In the former she says: "we were lead to assume from about 1995 onwards by Orbit Homes that Orbit Homes and Orbit Properties were in fact one and the same building company and that the change in name was of no consequence to us and was merely an administrative change in name".

35. I cannot see how the Second Respondent can contend, from this, that Mr and Mrs Filonis "thought they were at all times dealing with Orbit Properties". There is simply no warrant for that contention from that paragraph of her Affidavit. In paragraph 27 Mrs Filonis refers to the fact that neither she nor her husband was advised that Orbit Properties Pty Ltd was to be or had been deregistered. This, in my view, lends support to her assumption. I have already observed that this is something I consider they should have been told.

36. I refer also to the October 2004 Affidavit of Mr Filonis. Although he clarifies (paragraph 1) that it was his wife who had "most of the dealings with Orbit Homes since about 1995" he does say (paragraph 7) that, up to the time when he and his wife received the Second Respondent's Points of Defence, "it was [his] honest belief that Orbit Homes had assumed the responsibilities under the contract and was committed to repairing the defects in [their] house".

37. In my view, cross-examination of Mrs Filonis did not weaken her stated, and deposed to, position. Nor did it, in my view, weaken Mr Filonis' stated, and deposed to, position. It is true that, in evidence, he referred to "Craig

Millson the builder", but it ought not to be forgotten that a company is a legal fiction and that it acts via human agency. Moreover, it has never been either the Applicants' case or (as I understand it, except perhaps latterly) the Second Respondent's case that Craig Millson was ever *"the"* builder. The Second Respondent's Points of Defence appear to make no mention of this.

38. I do not prefer the evidence of Mr Millson where, if at all, it is in conflict with the stated, and deposed to, positions of Mr and Mrs Filonis on their assumption of a particular legal relationship of builder and client existing between them and the Second Respondent. It is contested by the Second Respondent that this has not been pleaded by the Applicants. I disagree as I have pointed out, and I refer to paragraphs 15A, 15B and 15C of the Fourth Further Amended Points of Claim. In any event, the Tribunal is not a court of pleadings. But I would agree that the Fourth Further Amended Points of Claim could have been better drafted. They do not properly, in my view, set out the material facts in what is, undoubtedly, a complex action.

39. It seems to me, however, as an extension of the Applicants' evidence, that, having that as their assumption in about 1995, they also had an expectation thereabouts that that particular relationship would exist thereafter and that the Second Respondent would not be free to withdraw from it. I do not see that Brennan J meant to say that a party could have an assumption of a relationship but not also an expectation of one for the future. Care must be taken, in my view, to avoid reading the words of judgments as if they were words of statutes.

40. I consider the Applicants had rational grounds for their assumption, or expectation, out of the inducement given by the Second Respondent to have

or to adopt that assumption, or expectation. See paragraph (b) below. I do not consider their grounds to be fanciful or unreal.

(b) Inducement.

41. I am satisfied that the Second Respondent acted so as to induce the Applicants to have or to adopt the assumption, or expectation, referred to in paragraph (a). It seems to me that this finding is dependent essentially upon the activities of the Second Respondent. The activities of the Second Respondent in question centre mainly on the activities of its director Mr Millson. I consider activities, to be of relevance, may be constituted either by acts or omissions.

42. If I am required to find it, I consider it was not unreasonable for the Applicants to have the belief then formed by them by reason of these activities of the Second Respondent which I make findings of:

(i) knowing, via Mr Millson, that the Applicants had signed a contract with "Orbit Properties Pty Ltd" but failing to inform them, despite the common directorships of Mr Millson, that "Orbit Properties Pty Ltd" had gone out of business or was about to do so.

(ii) knowing, via Mr Millson, that "Orbit Properties Pty Ltd" had gone out of business, and that Mr Millson had been a director of that defunct company, authorising (actually or apparently) Mr Millson to have ongoing dealings with the Applicants in relation to their house.

(iii) assuring the Applicants by letter (dated 29 May 1995), at a time when "Orbit Properties Pty Ltd" was still in existence, and able to make arrangements with another company or other companies in the "Orbit" group, that their concerns over conditions at their premises had been noted on file and undertaking, should the shrinkage problem become

more severe, to reinspect the premises and to take "the necessary remedial action".

(iv) actually taking remedial action at the Applicants' premises by the carrying out of works or by arranging for the same to be carried out.

43. As to each of these I make the following further observations:

(i) as to paragraph (i) – because Mr Millson was a director of "Orbit Properties Pty Ltd" he must have known, unless delinquent in his duties, that that company was to go out of business and he must have known also when it went out of business. He gave evidence on these matters. He also would have known of the contracts it had entered into while it was in existence, one of which was that with the Applicants. But he had knowledge of these matters while he was also a director of the Second Respondent. He should have reasonably foreseen that people might get confused over which company or companies they were dealing with when they were dealing with him. He, himself, was confused in evidence on this question as I have mentioned. This aspect of his evidence was not an impressive exercise on his part. This may often happen to people who are directors of companies in a group of companies – all with similar sounding names: sometimes a director gets confused over which company he or she is acting on behalf of and when it is alleged he or she was acting on behalf of one particular company in the group he or she will often disagree and say it was another. Proper discharge of his duties, in my view, should have seen Mr Millson informing people, in the position of the Applicants, that "Orbit Properties Pty Ltd" was to go out of business or had gone out of business and that new arrangements, this time with Orbit Homes Pty Ltd, the Second Respondent, were underway or had been made. Perhaps this could have been done even only informally. Yet nothing

was said to the Applicants. This would not have mattered if the Second Respondent had had no further dealings with them. But this is not the case. The Second Respondent had ongoing dealings with them via Mr Millson and actually became involved in works carried out at their premises. But, I accept there was silence on the point from the Second Respondent. In other words, it is clear to me that Mr Millson said nothing when he could have said something.

(ii) as to paragraph (ii) – I am satisfied that the Second Respondent via Mr Milson must have known that "Orbit Properties Pty Ltd" ceased to exist in 1995. Yet despite knowing this, I am satisfied that the Second Respondent – another member of the "Orbit" group – authorised Mr Millson to have ongoing dealings with the Applicants (principally Mrs Filonis) regarding their house. I am satisfied those dealings were as frequent as that given in evidence by Mrs Filonis and that often the advice of Mr Millson was in effect to "wait and see". I prefer the evidence of Mrs Filonis on this point. But these ongoing dealings, of the kind deposed to, could not but encourage a belief that the Second Respondent had assumed a responsibility to the Applicants considering, as was the fact, and as was the fact known to the Second Respondent, that after 1995 "Orbit Properties Pty Ltd" was no longer in existence.

(iii) as to paragraph (iii) – the letter of 29 May 1995, on the Second Respondent's letterhead and signed by Mr Millson, is, in my view, a most telling indicator of the Second Respondent's role in relation to the Applicants. I am unable to read it except as expressing, without or almost without qualification, that the Second Respondent is now the party whom the Applicants must look to to resolve their problems with their house. Why else would the Second Respondent bother to advise that their concerns had been noted on file? Why else would the Second Respondent undertake to reinspect and take necessary remedial

action should the shrinkage problem become more severe? Further, this letter was sent at a time while "Orbit Properties Pty Ltd" was still in existence. How, I might ask, can the Second Respondent maintain no legal relationship with the Applicants, as builder, with them, as client, in view of the terms of the letter of 29 May, which it chose to send, when, if "Orbit Properties Pty Ltd" still had involvement with them, it could have sent the letter instead? Corroborative of the view that the Second Respondent was taking upon itself a responsibility to the Applicants, in a sense, is the Second Respondent's letter to the First Respondent dated 2 July 1998 (being exhibit "AF 11" to the Affidavit of Mrs Filonis) whereby it says "we…confirm we wish to be in attendance when Building Surveying Services perform their further inspection". This letter is signed by Mr Millson and is inconsistent with maintenance of a notion that no "particular legal relationship" existed at that stage between the Applicants and the Second Respondent. Significantly, at that time, of course, "Orbit Properties Pty Ltd" was long gone. Mr Millson must have known that by requesting involvement in an inspection process, he could not be acting on behalf of "Orbit Properties Pty Ltd". The letter is consistent, in my view, with an assumption of responsibility by the Second Respondent which was made known also to another party in the proceeding.

(iv) as to paragraph (iv) – The position of the Applicants would be less maintainable – and that of the Second Respondent, in denial, more maintainable – if the Second Respondent had not followed up its written (and other) assurances by actually having works carried out at the Applicants' premises. But this is not what happened. The Second Respondent actually did carry out or did arrange the carrying out of remedial works at the house. I regard this as a most damaging circumstance. And it paid for those works to be done, as I recall. The

Second Respondent cannot be portrayed, in my view, as a mere volunteer - conferring a benefit as a goodwill gesture. I am satisfied that it was no mere volunteer. I cannot interpret its activity except as referable to an assumption of responsibility by the Second Respondent – why else do so, I might ask? - which, in turn, is, in my view, referable to, or consistent with, a "particular legal relationship" by then existing between the Applicants and the Second Respondent. The works were carried out in November 1998 – long after "Orbit Properties Pty Ltd" has ceased to exist – pursuant to "Official Order" forms of the Second Respondent signed on behalf of the Second Respondent by, it would appear, one Craig McTaggart. The forms are not issued by "Orbit Homes Australia Pty Ltd" even though that person may have been, at that time, employed by that entity in the "Orbit" group. A business card, bearing the name "Orbit Homes" was given by him to Mr Filonis. A vehicle with "Orbit Homes:" on it was, I recall, mentioned in evidence by him.

I consider the actual carrying out of remedial works, coming after the written assurance given by letter on 29 May 1995, as evidence pointing directly to a relationship existing between the Applicants and the Second Respondent.

I might ask, if the Second Respondent believed no relationship existed between it and the Applicants, why did it actually take remedial action at their house, even if it was done by someone else, on its behalf, employed by another entity in the group? There is no reason why it should take such action if it was of the view that such a relationship did not exist. I found Mr Millson's explanation, that it did so to protect the guarantors of the obligations of "Orbit Properties Pty Ltd", as quite unconvincing or implausible and unworthy in all the circumstances.

As between the Applicants and the Second Respondent, I consider it inconsequential that it was "Orbit Properties Pty Ltd" which was required by the First Respondent to carry out works.

I cannot agree with the analysis offered on behalf of the Second Respondent that none of its correspondence contains any inducement to the Applicants "to adopt any stance in the matter". I refer, in particular, to the letter of 29 May 1995. I refer also to the conduct by and on behalf of the Second Respondent subsequently.

(c) Reliance.

44. I am satisfied that the Applicants have acted or abstained from acting on the assumption or expectation referred to in paragraph (a). This was denied by the Second Respondent, inter alia, on the ground that there is no evidence that the Applicants have acted any differently than they would have acted "had they known that Orbit Homes was not Orbit Properties". This, however, is flawed in that it conflates detriment with reliance. I am satisfied to the requisite degree, however, that there was reliance on the part of the Applicants. If I view this from their perspective, they "[a]t all times, and actively encouraged by Craig Millson, with whom [they] had an uninterrupted business relationship, … were led to believe that Orbit Homes would take care of [their] file and make the necessary rectification works, as promised by it". See paragraph 29 of Mrs Filonis' Affidavit in which she also says "we were reassured as to this state of affairs pursuant to Orbit Homes letter to us dated 29 May 1995…". She adds – although this also only goes to detriment – "Had we known otherwise, I am certain that we would immediately have sought legal advice in 1995 to ascertain our legal position". In paragraph 30(b) she says "we believed that its [i.e. the Second Respondent's] conduct in undertaking rectification works was unconditional and unfettered". I cannot see that the evidence of Mrs Filonis on this point was effectively or at all undermined by cross-examination. If, however, I

view the situation not from the perspective of the Applicants, but objectively, I cannot see how it could be said that they were not relying on the assumption or expectation created by the Second Respondent. For the fact is, as I find it, there was no one else in the "Orbit" group – except perhaps Mr Millson personally – on whom they could be relying. "Orbit Properties Pty Ltd" went out of business after August 1995 and "Orbit Homes Australia Pty Ltd" did not figure at this point.

45. Although the submissions of the Second Respondent would indicate otherwise, I do not think that Mr Millson was forthcoming in his evidence enough to say that he considered the Applicants were relying on him personally and not in his capacity as director of the Second Respondent. It is unfounded in law or otherwise to say, in any event, that representations made by him, when he is a director of the Second Respondent, *cannot* be attributed to the Second Respondent. I consider this was pleaded by the Applicants, if only implicitly, in paragraph 15A of their Fourth Further Amended Points of Claim.

46. Of course, it is being alleged by the Applicants that it was he who was making the representations – as I have said earlier a company is a species of legal fiction that, of necessity, must act via human agency. This may have been, however, the effect of some of the Second Respondent's submissions to me.

47. Had he said this, though, he would not be supported by the terms of the correspondence in the case – the letter of 29 May 1995 is clearly expressed as "*we*" (and is inconsistent with personal undertakings by Mr Millson) as is the letter of 2 July 1998 addressed to the First Respondent. The Points of Defence of the Second Respondent, moreover, are silent on the point as I have noted.

(d) Knowledge or intention.

48. I am satisfied that the Second Respondent knew or intended the Applicants to rely on the assumption or expectation referred to in paragraph (a). It seems plain to me that the Second Respondent must have known this was so or intended it to be so. Many of the considerations in paragraph (c) ("reliance") apply with equal force here. From August 1995 onwards the Applicants, it must have been known by the Second Respondent, via Mr Millson, could not have been relying on anything done by "Orbit Properties Pty Ltd" because that company no longer existed. And I have rejected an analysis that the Applicants were relying on Mr Millson in his personal capacity. I am satisfied they were relying on him in his capacity as representing "Orbit Homes" – the Second Respondent.

49. The submissions of the Second Respondent, again, appear to conflate knowledge of reliance or intention with detriment. It is true, however, that paragraph 15G of the Applicants Fourth Further Amended Points of Claim appears to contradict a position whereby they maintain that the Second Respondent assumed liabilities. But this is to be contrasted with paragraph 15A. In any event the Second Respondent's knowledge or intention is something, it seems to me, separate and apart from the points covered by either paragraph 15A or paragraph 15G.

50. I cannot agree that the true analysis of the whole of the evidence in the case is, in this respect, that the Applicants were relying upon what they were told by the First Respondent. They may have relied upon what they were told by the First Respondent – why would they not rely on what they were told by the *statutory* insurer? – but this does not mean they *did not* rely on what they were told by the Second Respondent. But this, as I have pointed out, is a separate question to the one of what the Second Respondent knew or intended. I refer to the letter of 29 May 1995 and to the various site visits of

Mr Millson and to what he said on those occasions given in evidence by Mrs Filonis (whose evidence I accept in preference). It seems to be reasonable to say, on the evidence, that the Second Respondent did know the Applicants would be relying on the assumption or expectation in question or did intend them to do so. No other analysis of the evidence in the case, as a whole, is, in my view, reasonably open.

51. It is not, in my view, critical to the knowledge or intention of the Second Respondent, should the Applicants have believed they were dealing, or were dealing throughout, with "Orbit Properties Pty Ltd".

(e) Detriment.

52. I am satisfied that the Applicants have suffered detriment in a relevant sense. I have already referred to this above, but it seems to me, as deposed to by Mrs Filonis, that the Applicants did suffer a real, and not a notional, detriment by relying on the assumption or expectation created by the Second Respondent in that the opportunity apparently passed to bring legal proceedings against "Orbit Properties Pty Ltd". By the time they realised that they were not in fact dealing with that company, it had long since disappeared. As I have noted, it was deregistered over 10 years ago. Mr Millson, the director of the Second Respondent, knew of this. To bring a claim against "Orbit Properties Pty Ltd" the Applicants would now need to apply for its re-registration. That would be an expensive procedure and one not guaranteed of success. Then, should they achieve its re-registration, presumably they would be met with a limitations defence. That defence could well succeed on my understanding of the authorities.

53. It seems to me, however, that the Applicants lost their chance to sue "Orbit Properties Pty Ltd" because of the assumption or expectation created by the Second Respondent. Mr Millson, although a director of "Orbit Properties Pty

Ltd", and a director of "Orbit Homes Pty Ltd", was not considerate enough to inform the Applicants that the former was going out of business or had gone out of business. I refer again to paragraph 29 of Mrs Filonis' Affidavit: had she and Mr Filonis known otherwise, she deposes, as I have noted, and I accept, they "would immediately have sought legal advice in 1995 to ascertain our legal position".

54. I consider, however, that the Applicants lost their chance to sue "Orbit Properties Pty Ltd" after it became deregistered because of the assumption or expectation created by the Second Respondent. Mr Millson, although dealing with them, did not tell them that "Orbit Properties Pty Ltd" was to go out of business even though he was a director of that company, as I have noted. Instead, however, and shortly before its demise, he encouraged them to believe, by the letter of 29 May 1995, that their concerns would be kept on file. This was done at a time while "Orbit Properties Pty Ltd" was still in existence. In reality, however, I consider, he meant, and was reasonably taken to mean, kept on the file of *the Second Respondent*. Encouraged by that assurance, and by the assurance that remedial works might later be carried out, the Applicants took no steps whatever to sue "Orbit Properties Pty Ltd". The assumption or expectation created by that letter, I am satisfied on the evidence, lead to the unhappy result that the Applicants could not have any redress against "Orbit Properties Pty Ltd" which went out of existence, unannounced by Mr Millson, in the meantime. Effectively, the assumption or expectation of a particular legal relationship between them and the Second Respondent, deprived the Applicants of any remedy against "Orbit Properties Pty Ltd" which was their original builder.

55. These and other considerations may bear upon the question of any defences which may now be open or not open to the Second Respondent as the case may be.

56. I consider it unrealistic to say, as was said on behalf of the Second Respondent in submissions, that it was open to the Applicants "to apply to have Orbit Properties reinstated for the purposes of their claim, obtain judgment and seek to trace any assets that Orbit Properties may have disposed of". It is said that the Applicants, "apparently with legal advice at their disposal" chose not to follow this course. But "Orbit Properties Pty Ltd", as I have noted, was de-registered over 10 years ago and I note also the unsatisfactory nature of some of the evidence of Mr Millson about its assets. In any event, the submission assumes a number of points in favour of the Applicants, including a successful reinstatement application, none of which might occur or eventuate.

57. Other detriment referred to by the Applicants includes "waiting and seeing" and letting their property settle following out Mr Millson's advice from time to time. This they did – but without any knowledge that the other party to their building contract had gone out of existence. I accept that this would also qualify as detriment – any deterioration in their premises following advice by Mr Millson to the stated effect.

58. Yet other detriment referred to by the Applicants includes a lost opportunity to sell their house. I am not in agreement with them on this. It seems to me it is always open to a vendor to sell his or her house if minded to do so and then look to recover any loss. Of course, if they had sold their house after August 1995, they would have had little or no hope of any recovery in respect of loss suffered out of the activities of "Orbit Properties Pty Ltd".

59. I can acknowledge that this whole episode has been most stressful for the Applicants but I cannot see that that qualifies as "detriment" in law for present purposes.

(f) Failing to avoid.

60. I am satisfied also that the Second Respondent has failed to act to avoid the detriment to the Applicants. The Second Respondent, I consider, did nothing to prevent the Applicants from believing that "Orbit Properties Pty Ltd" was still in existence. The Second Respondent's Points of Defence still do not mention this. Indeed, on the contrary: I am satisfied that the Second Respondent actively encouraged the Applicants to believe their concerns about their house were being treated seriously. The fact that they could no longer be treated seriously, or at all, by "Orbit Properties Pty Ltd" was never made known. This not having been made to them by a person who was a director of both companies involved – Mr Millson – and who was in a position to know what was going on, prevented them from taking any steps to sue one of those companies because of the assumption or expectation which existed on their part. And yet, they continued to allow their home to settle, as advised.

61. It follows from my findings in paragraph 34-60 hereof that I am satisfied, within the principle advanced by Brennan J, that an equitable estoppel arises in this case whereby the Second Respondent is denied the opportunity of maintaining that the proceedings are not maintainable on the ground that the proceedings should properly, if at all, have been brought against the now defunct "Orbit Properties Pty Ltd". But the estoppel may go further than that, depending on argument, and into the question whether any defences, which might have been open to "Orbit Properties Pty Ltd", can now be taken by the Second Respondent. Conceivably, this could extend to any limitations defences which could have been taken by "Orbit Properties Pty Ltd" had it continued to exist. Subject to argument, it is difficult to see how the Second Respondent could be the successor in law to those defences.

62. Should I be required to find as a separate requirement that it would be unconscionable for the Second Respondent to be allowed now to resile from the assumption or expectation it created, I so find, and for the reasons given in the above. I consider it would be thoroughly unfair and inequitable if the Second Respondent could now walk away from the impression it created and the belief it induced. But as Buchanan JA has indicated, "unconscionability" may not itself be a superadded requirement.

8. Conclusion

63. I answer the separate question as follows: the proceedings are maintainable in law against the Second Respondent. The Second Respondent does not show the proceedings are not maintainable by saying Mr Millson may have been at fault but not the Second Respondent itself. Responsibility, in my view, cannot be divided up in that way in this case. It is tempting in some cases to stigmatize a defence of this nature by a corporate party as shabby.

64. The Fourth Further Amended Points of Claim will, no doubt, require further amendment in light of my Reasons. I should add, independently, that I should think proceedings could be maintainable against the Second Respondent, and possibly against Mr Millson personally, based on the *Fair Trading Act* 1999. Neither party, however, addressed me on this point and I say nothing further about it.

65. I am not to be taken as saying that the Second Respondent may have no statutory or other defences to the proceeding even if brought under the 1999 Act. But, as I have indicated, the estoppel arising in the case may have far-reaching effect depending on argument and submissions.

66. I reserve liberty to apply for costs.

67. Answer accordingly.

68. I make directions and orders accordingly. I would be hopeful, having provided these Reasons, that the parties could give consideration to having their dispute mediated.

SENIOR MEMBER D. CREMEAN