CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

VCAT REFERENCE NO. D105/2010

DOMESTIC BUILDING LIST

CATCHWORDS

Section 75 application – whether arguable that director of building company owed a duty of care.

FIRST APPLICANT	Frank Germano
SECOND APPLICANT	Carmela Germano
RESPONDENT	Brenner Homes Pty Ltd (CAN 007 008 460)
SECOND RESPONDENT	Norbert Aschenbrenner
WHERE HELD	Melbourne
BEFORE	Senior Member E. Riegler
HEARING TYPE	Interlocutory Hearing
DATE OF HEARING	16 December 2010
DATE OF ORDER	20 December 2010
CITATION	Germano v Brenner Homes and Anor (Domestic Building) [2010] VCAT 2081

ORDER

1. Paragraphs 3, 6, 16, 17 and 18 (insofar as it refers to the second respondent) are struck out.
2. By 10 January 2011, the Applicants may file and serve amended Points of Claim.
3. By 21 January the Respondents must file and serve amended Points of Defence to any amended Points of Claim filed by the applicants.
4. Costs reserved.

SENIOR MEMBER E. RIEGLER

APPEARANCES:

For the Applicant	Mr Edmund of counsel
For the Respondents	Mr P Baker of counsel

REASONS

1. This matter concerns an interlocutory application made by the second respondent seeking an order that the claims made against him be struck out pursuant to section 75 of the *Victorian Civil and Administrative Tribunal Act* 1998 (**'the Act'**). Those claims are based upon an alleged duty of care owed by him in his capacity as a director of the first respondent building company.

2. The relevant parts of the applicant's Points of Claim dated 11 February 2010, wherein allegations are made against the second respondent are as follows:

> 3. The 2nd respondent is and was that all times material:
>
> (a) A registered building practitioner; and
> (b) The sole director of, and 50% shareholder in, the 1st respondent.
>
> 6. The building works were undertaken and/or supervised on behalf of the 1st respondent by the 2nd respondent.
>
> 16. Further, the 2nd respondent owed a duty of care to both DA [the original homeowner] and to subsequent owners of the property to undertake the building works:
>
> (a) In a proper and workmanlike manner;
> (b) In accordance with, and would comply with, all laws and legal requirements including, without limiting the generality of the warranty, the *Building Act* 1993 and the regulations made under that Act; and
> (c) With reasonable care and skill;
>
> ("the 2nd respondent's duty of care").
>
> 17. Further and alternatively the 2nd respondent has breached the 2nd respondent's duty of care to both DA and to subsequent owners of the property and was negligent in his performance and/or supervision of the building works.
>
> 18. By reason of the 1st respondent's breaches of warranty and/or breaches of the 1st respondent's duty of care and/or by reason of the 2nd respondent's breaches of the 2nd respondent's duty of care the applicants have suffered loss and damage.

Section 75

3. Section 75 of the Act empowers the Tribunal to strike out a claim found in a pleading: *Yim v State of Victoria*.[1] The test to be applied in determining an application under s 75 is one that should be exercised

[1] [2000] VCAT 821

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*.[2]

4. 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*.[3] Therefore, s 75 is not to be used as a mechanism to have a 'pleadings' summons only: *Barbon v West Homes Australia Pty Ltd*.[4] 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:

> 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.

5. The general principles applicable to applications made under s 75 of the Act were succinctly set out in *Norman v Australian Red Cross Society*.[5] 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.

[2] (1983) 154 CLR 87 at [99].
[3] [2001] VCAT 406 at paragraph 11.
[4] [2001] VSC 405.
[5] (1998) 14 VAR 243.

6. Further, in *Forrester v AIMS Corporation*,[6] 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.

7. 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*.[7] 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*.[8]

Second respondent's submissions

8. Mr Baker of counsel appeared on behalf of the second respondent. He submitted that the claim against the second respondent was *obviously hopeless, obviously unsustainable in fact or in law and is bound to fail*. He argued that there were two basis upon which it was open for the Tribunal to find that the claim against the second respondent was unarguable.

9. First, he contended that in assessing whether or not the duty of care is owed to a subsequent owner of a residential property, it is necessary to first establish whether or not a duty of care is owed to the original owner. Therefore, he argues that the first question to address is whether the second respondent owed a duty of care to the original owner. Mr Baker submitted that if no duty of care was owed to the original owner then it follows that no duty of care could be owed to the subsequent owners, namely the applicants.

10. Mr Baker argued that the claim against the second respondent must fail because no duty of care was owed by either the first respondent or second respondent to the applicants, as subsequent owners of the property. In essence, Mr Baker submitted that the principle of law enunciated in *Bryan v Maloney* is not to be followed, at least in Victoria. In support of the proposition, he relied on the judgement of Brooking JA in *Zumpano v Montagnese*,[9] where His Honour stated:

> I have already drawn attention to the *Domestic Building Contracts and Tribunal Act* 1995. For a good many years now there has been in force in this State a statutory insurance scheme for the protection of house owners against faulty building work in relation to dwelling houses. (So far as I am aware, nothing similar exists in Tasmania, where *Bryan v Maloney* has its

[6] (2004) 22 VAR 97.
[7] [2001] VCAT 39.
[8] [2003] VCAT 377 at [9].
[9] [1997] 2 VR 525at 536..

> origin.) The current Victorian legislation is contained in the *House Contracts Guarantee Act* 1987. The provisions of this Act are themselves much affected by the *Domestic Building Contracts and Tribunal Act* 1995, but for present purposes I shall ignore the amendments made by the Act of 1995. It is arguable – although the argument has less force than the corresponding argument in relation to the Act of 1995 – that the regime of the compulsory provision of guarantees established by the *House Contracts Guarantee Act* 1987 and the legislation formerly in force, if not consistent with the duty of care held to exist in *Bryan v Maloney*, nonetheless bears on whether that duty should be imposed in Victoria the argument being that, so far as policy considerations are concerned, the protection already afforded by the legislation at the expense of builders should tip the balance in deciding whether in all the circumstances a duty of care should in addition be imposed.

11. At page 539 of the judgement, His Honour states further:

> For an Australian judge, the question must be determined by careful consideration of the majority judgements in *Bryan v Maloney*, and, as I have said, such consideration shows in my opinion that the builder who erects a house otherwise than under a contract does not come under the duty of care recognised in *Bryan v Maloney*.

12. Accordingly, Mr Baker submits that no duty of care arises in favour of the applicants by reason of them being subsequent purchasers, given the regulatory scheme currently existing in Victoria.

13. Second, Mr Baker submitted that the Points of Claim goes no further than to allege:

    (a) *what a director of a small residential building company does when that company constructs a home; and*

    (b) *that the second respondent, acting in his capacity as a director of the first respondent, performed his duties " badly or incorrectly"*.

14. Mr Baker submitted that there was no legal basis upon which to allege that a director of building company owed a common law duty of care to a subsequent homeowner in respect of building work carried by the building company, simply by virtue that he or she was the controlling mind of the company. In support of that proposition, he referred me to two decisions of this Tribunal: *Korfiatis v Tremaine Developments Pty Ltd* [10] and *Lawley v Terrace Designs Pty Ltd*.[11] In particular, in *Lawley* the Tribunal stated:

> 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

[10] [2008] VCAT 403.
[11] [2006] VCAT 1363 at [188].

> 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.

15. Mr Baker submitted that the pleading against the second respondent did not allege any facts that he, as a director, did something more than carry out his duties badly or incorrectly. He submitted that the pleading did not make any positive allegations to the effect that the second respondent's actions were so flagrantly careless as to be outside normal bad building practice. He argued that in the absence of any such allegation, the claim against the second respondent was untenable.

Applicant's submissions

16. Mr Edmund of counsel, who appeared on behalf of the applicants, opposed the application.

17. As to the first argument raised by Mr Baker, he argued that the law regarding whether a builder owes a duty of care to a subsequent purchaser is unclear. He submitted that the obiter comments made by Brooking JA do not alter the current state of common law. In other words, it is still arguable that a builder may owe a duty of care to subsequent purchasers of a residential property constructed by that builder.

18. As to the second basis upon which Mr Baker rested his case, Mr Edmund argued that directors of building companies can be held personally liable in certain circumstances. He referred me to a number of authorities in support of his submission that where the carelessness of a director of the building company is so flagrant as to be outside normal building practice, a duty of care can arise.

19. Mr Edmund submitted that the current pleading raised an issue of fact that went to the question as to whether the second respondent's conduct was so flagrantly careless as to be outside normal building practice. He pointed to the particulars subjoined the paragraph 14 of the applicant's Points of Claim to demonstrate this point. In essence, he argued that the design documents used to construct the dwelling expressly required that the first respondent construct "regularly spaced full height articulations joints in the masonry walls" and specifically warned against planting trees too close to the dwelling. Mr Edmond submitted that the second respondent had failed to ensure that the first respondent adhered to these design elements. He said it was a question of fact to be determined at trial whether that conduct constituted the degree of carelessness so flagrant as to be outside normal building practice, sufficient to found a duty of care.

Is there an open and arguable claim?

20. Dealing firstly with the argument raised by Mr Baker that *Bryan v Maloney* no longer supports the proposition that a builder owes a duty of care to a subsequent owner of a residential dwelling constructed by that builder. It seems to me that despite the obiter comments made by Brooking JA in *Zumpano*, *Bryan v Maloney* still represents binding authority in Victoria or at least arguably so. I agree with Mr Edmund that the decision has not been overruled, despite the fact that it has attracted criticism.

21. In any event, I regard it inappropriate to make a finding as to the application of *Bryan v Maloney* in an interlocutory proceeding. The law as it relates to any duty of care owed to subsequent owners of residential properties is, in my view, not settled. It cannot be said that *Bryan v Maloney* is not still applicable in Victoria, despite the comments made by Brooking JA in Zumpano. Indeed, His Honour's comments simply raise the argument whether *Bryan v Maloney* is to be followed, rather than pronounce any principle of law.

22. I therefore consider it open and arguable that in certain circumstances a duty of care may exist between a builder and a subsequent owner. Accordingly, I reject that aspect of Mr Baker's argument.

23. That then leaves me to decide the second limb of Mr Baker's argument – whether the pleading discloses an open and arguable claim, based on an allegation that the second respondent owed a personal duty of care, as distinct from the building company itself.

24. As outlined above, Mr Edmund argues that in order to prove the pleaded allegation that the second respondent owed a duty of care to the applicants, the applicants must show that the conduct of the second respondent was so flagrantly careless to be outside normal building practice. He submits that the particulars subjoined to paragraph 14 of the Points of Claim detail the facts necessary to prove that conduct.

25. I disagree. That statement does not accurately reflect what Senior Member Young said in *Lawley v Terrace Designs Pty Ltd*. In particular, Senior Member Young stated at paragraph 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 like a director by itself can attract personal liability, unless the carelessness was so flagrant as to be outside normal **bad** building practice...[emphasis added].

26. It seems that the submission made by Mr Edmund does not take into consideration that the careless act needs to so flagrant as to be outside

normal bad building practice, rather than merely being outside normal building practice. In my view, simply being careless and doing work outside normal building practice is far less than what Senior Member Young considered to be conduct that might give rise to a separate duty of care owed by a director of the building company.

27. I have considered the authorities referred to me by both Mr Baker and Mr Edmund. In my view, those authorities distil the following principles, insofar as the personal liability of a director of a building company is concerned:

    (a) A director of a building company may be personally liable if that director procured or directed the tortious act in circumstances where the director knew or was indifferent as to whether the acts were or were likely to cause loss and damage to the proprietor: *Johnston Matthey (Aust) Ltd* v *Dascorp*.[12]

    (b) A director of a building company may be personally liable along with the company when he has procured or directed the building company to commit the tort. However, before a director can be held personally liable there must be an element of deliberateness or recklessness and knowledge or means of knowledge that the act or conduct is likely to be tortious: *Root Quality Pty Ltd v Root Control Technologies Pty Ltd*.[13]

    (c) There must be some act or behaviour of the director that is more than merely carrying out his company duties, even if it results in a breach of contract or a failure by the company to fulfil its obligations: *Lawley v Terrace Designs Pty Ltd.*

28. The question arises whether the current pleading raises an allegation that the conduct of the second respondent falls within the conduct described above. In my view, the pleading does not go that far.

29. The pleading is not couched in terms of the second respondent having acted in a manner consistent with him:

    (a) Knowingly or being recklessly indifferent as to whether the building works undertaken by the first respondent would be likely to cause loss and damage to the owners.

    (b) Deliberately or recklessly procuring conduct on the part of the first respondent likely to be tortuous.

    (c) Behaving in a manner that was inconsistent with him carrying out his company duties.

    (d) Acting with such carelessness which is so flagrant that it is outside normal **bad** building practice.

[12] (2003-2004) 9 VR 171.
[13] [2000] FCA 980.

30. I agree with the submissions made by Mr Baker that the allegations raised in the pleading do no more than simply allege that the second respondent performed his duties badly or incorrectly. In addition, I note that paragraph 6 of the Points of Claim does not allege that the second respondent has acted outside of the authority given to him by the first respondent. In particular, that paragraph expressly states that the second respondent either undertook or supervised the works on behalf of the first respondent. There is no allegation that the acts of the second respondent where his own.

31. Similarly, there is no allegation that the second respondent has acted in flagrant disregard of the duties given to him as a company director. In my view, it is not simply a matter for trial to establish that the second respondent had acted with such flagrant carelessness to be outside normal building practice. Something more needs to be alleged to substantiate that a duty of care arises in present case. The comments made by Bryne J in *Wimmera-Mallee Rural Water Authority v FCH Consulting Pty Ltd (N0 2)*,[14] although relating to a joinder application, are apt insofar as they highlight the difficulty when a novel claim is raised:

> As I mentioned in my earlier judgement, a party seeking to add a defendant must satisfy the court that the joinder is proper. This may not be a heavy burden since Rule 9.06 (b) (ii) requires no more than that there may exist a question. Where such a question is based on a breach of a duty of care, the existence of that duty will often be self-evident. Where, as here, this is not the case and where the application is opposed, the onus lies on the applicant to discharge this burden of bringing material in support where this is necessary. I have anxiously considered the affidavits. I have been ready, as a judge in charge of a specialist list, to draw inferences from these affidavits and to approach the suggested cause of action in a practical way. I regret that I am left with the conclusion that the burden on the applicant has not been discharged.

32. In the present case, no affidavit material is before me to assist in elucidating the matters raised by Mr Edmund. The pleading, in its present form, merely alleges that the second respondent owed a duty of care to the applicants. Nothing is stated to give any indication how that duty arises. I reiterate what I said in *Destine Constructions Pty ltd v McLennon* and what the Tribunal has held in *Lawley v Terrace Designs Pty Ltd*, *Korfiatis v Tremaine Developments Pty Ltd* and most recently in *Ioannidis v Everest View Pty Ltd & Ors*:[15]

> It is not sufficient simply to extend allegations made against the developer so they are made in the alternative against Mr Yarrow. The draft Points of Claim do not identify how it is said that Mr Yarrow has acted in a personal capacity, separate and distinct from his role as principal and sole director of the developer company.

[14] [2000] VSC193 at paragraph 11
[15] 17 December 2010 per Deputy President Aird at paragraph 49 - 50.

> As the sole director of the developer Mr Yarrow is its guiding mind. Where people enter into contracts with companies they clearly expect to have conversations with representatives of that company. A company can only operate through its officers and employees. This is the usual manner in which a company conducts business, and is not of itself sufficient to lift the corporate veil so that the director becomes personally liable for all the acts and omissions of the company.

33. In the circumstances, I find that the claims pleaded against the second respondent have no tenable basis in fact or law. I therefore order that paragraphs 3, 6, 16, 17 and 18 (as it refers to the second respondent) are struck out pursuant to section 75 of the Act. I will, however, give the applicants leave to re-plead in light of my comments above.

34. In making that order, I am mindful of the submission made by Mr Baker that in accordance with the principles enunciated in *AON Risk Services Australia Limited v Australian National University*,[16] I should not allow any amendment to the Points of Claim given that the date for hearing is approaching. It seems to me, however, that this argument loses force when weighed up against the fact that this application was brought 10 months after the Points of Claim were first filed and served. No explanation was proffered as to why this application was made so late. In my view, it would be unfair to now deny the applicants an opportunity to re-plead simply because there is little time left before the listed hearing date, especially in circumstances where there pleading has been belatedly challenged.

SENIOR MEMBER E. RIEGLER

[16] [2009] HCA 27