VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

DOMESTIC BUILDING LIST VCAT REFERENCE NO. D524/2010

CATCHWORDS

Application to strike out parts of the points of claim under s75 of the *Victorian Civil and Administrative Tribunal Act* 1998, two successive contracts for building work on the same site, first contract cancelled, *Fair Trading Act* 1999, ss 8, 8A, 12(n), 13(n), misleading and deceptive conduct, unconscionable conduct, false representation, "unwarranted benefit", unjust enrichment, s38, variation.

APPLICANT	George Kalikas
RESPONDENT	AV Jennings Properties Limited (ACN:004 601 503)
WHERE HELD	Melbourne
BEFORE	Senior Member M. Lothian
HEARING TYPE	Directions Hearing
DATE OF HEARING	8 March 2011
DATE OF ORDER	12 April 2011
CITATION	Kalikas v AV Jennings Properties Limited (ACN:004 601 503) (Domestic Building) [2011] VCAT 639

ORDERS

1 Paragraphs 6-9, 13, 25-30 and 40-44 of the Points of Claim dated 8 December 2010 and filed by the Applicant are struck out.

2 The Applicant has leave to file and serve Amended Points of Claim by 2 May 2011.

3 The date by which the Respondent must file and serve Points of Defence is extended to 23 May 2011.

4 The proceeding remains listed for compulsory conference before Senior Member Levine, commencing at 10:00am on 15 June 2011, at 55 King Street, Melbourne.

5 Costs of and associated with the application to strike out are reserved with liberty to apply.

SENIOR MEMBER M. LOTHIAN

APPEARANCES:

For Applicant	Mr J. Gray, Solicitor
For Respondent	Mr C. Edquist, Solicitor

REASONS

1 The Respondent-builder applied to strike out a number of paragraphs in the Applicant-owner's Points of Claim of 8 December 2010 on the basis that they disclose no cause of action. The paragraphs are 6, 7, 8, 9, 13, 17, 19, 20, 25, 26, 27, 28, 29, 30, 40, 41, 42, 43 and 44.

2 As described by Mr Edquist, solicitor, who appeared for the Respondent, the Applicant's claim falls into two parts: allegations of incomplete or defective work which are not subject to the strike-out application, and allegations arising out of an alleged variation or "variation representation" which are subject to the strike-out application.

HISTORY

3 The parties agree that they entered into two contracts. The first, dated 14 October 2007 was for a house called the "Springwood 21 Traditional". As the name implies, the house is about 21 squares in size and the contract price was $162,999.84.

4 The Applicant pleads that he asked the Respondent to stop work under the first contract on 22 August 2008 because he wanted his house to be bigger. and that there followed a series of requests and negotiations between the parties.

5 The parties agree that the second contract was signed, dated 6 November 2008, which the Applicant claims is for an area of approximately 22 squares for $213,752.19. I note from paragraph 34 that the house is not a standard Springwood design, but is "based on the Springwood 28" with deductions. There are fewer rooms than in the Springwood 28, but the room sizes are larger than for the Springwood 21.

6 The cause of the Applicant's grievance can, perhaps, be seen in paragraphs 39 and 8(a) of the Points of Claim. The eventual cost to the Applicant, all of which he has paid, was $74,544 in respect of the first contract and $213,752.19 in respect to the second; a total of $288,296.19. If the Applicant had chosen the "Springwood 30" of approximately 31 squares in 2007, rather than choosing the Springwood 21 then changing his mind, the cost would have been $184,500. Paragraph 43 describes the sum of $74,544 as "the unwarranted benefit" to the Respondent.

7 The Respondent's solicitors wrote a detailed letter to the Applicant's solicitor dated 15 December 2010 ("Respondent's letter"), concerning the matters which form the basis of the Respondent's strike-out application. The parties agree that the Respondent and its solicitors have not received a reply.

SECTION 75

8 Section 75 of the VCAT Act is as follows:

> **75 Summary dismissal of unjustified proceedings**

(1) At any time, the Tribunal may make an order summarily dismissing or striking out all, or any part, of a proceeding that, in its opinion—

(a) is frivolous, vexatious, misconceived or lacking in substance; or

(b) is otherwise an abuse of process.

(2) If the Tribunal makes an order under subsection (1), it may order the applicant to pay any other party an amount to compensate that party for any costs, expenses, loss, inconvenience and embarrassment resulting from the proceeding.

(3) The Tribunal's power to make an order under subsection (1) or (2) is exercisable by—

(a) the Tribunal as constituted for the proceeding; or

(b) a presidential member; or

(c) a member who is a legal practitioner.

(4) An order under subsection (1) or (2) may be made on the application of a party or on the Tribunal's own initiative.

(5) For the purposes of this Act, the question whether or not an application is frivolous, vexatious, misconceived or lacking in substance or is otherwise an abuse of process is a question of law.

9 In *Norman v Australian Red Cross Society* (1998) 14VAR 243 the Tribunal applied the principles of *State Electricity Commission v Rabel* [1998] 1VR 102 to applications under s75, and included in the reasons:

> The Tribunal should exercise caution before summarily terminating a proceeding. It should only do so if the proceeding is obviously hopeless, obviously unsustainable in fact or in law, can on no reasonable view justify relief, or be bound to fail. This will include, but is not limited to, a case where a complaint can be said to disclose no reasonable cause of action, or where the respondent can show a defence sufficient to warrant the summary termination of the proceeding.

10 The Respondent does not seek to terminate the proceeding, but only to strike out various paragraphs. Nevertheless, the same considerations apply.

THE PARAGRAPHS

Paragraphs 6 to 9, 13

11 Paragraphs 6 to 9 describe how the Applicant claims he became familiar with the Springwood range of homes, his perception of them and the information or lack of information he obtained from the Respondent's sales consultants.

12 Paragraph 13 alleges that the Applicant saw a Springwood 24 some months after he had signed the first contract and paid the deposit. He alleges that its

rooms were comparable in size with those of the Springwood 21 and that he "formed the view that the house was smaller than he wanted".

13 These paragraphs support the allegations in paragraphs 25 to 30 and 40 to 44 and, as I conclude below that these paragraphs must be struck out, paragraphs 6 to 9 and 13 are irrelevant as the Applicant's case is currently pleaded, and must also be struck out.

Paragraphs 17, 19 and 20

14 These paragraphs allege that the date for completion of the first contract was 17 May 2008, there were agreed damages of $250 per week and that by 22 August 2008 the Applicant was entitled to 14 weeks of agreed damages, being $3,500. Neither party tendered the contract cancellation document referred to on page 8 of the Respondent's 15 December 2010 letter, so I do not know whether it wiped the delay slate clean between the parties. I do not find this part of the Applicant's points of claim bound to fail, and do not order that these paragraphs be struck out.

Paragraphs 25 to 30

15 I reproduce paragraphs 25 to 30 and paragraph 24 to give them context:

> 24. The Applicant was told by the Respondent ... [that] ... it would cost $74,000 to vary the works to build what he wanted, plus $9,000 for on site alterations, due to the fact the trusses for the house had already been made and couldn't be altered and so the contract would have to be terminated, the Respondent's costs paid, and a new contract signed (hereinafter the "variation representation").
>
> 25. The Applicant believed the variation representation and considered he had no other choice but to accept the terms of the variation representation and did accept the representation.
>
> 26. The variation representation induced the Applicant to agree to vary the works on the house for an added cost of $74,544 + $7,445 and enter into a second house contract to such effect.
>
> 27. The variation representation was untrue.
>
> 28. Alternatively the trusses for the first contract house could have been used on another Springwood 21 without direct loss to the Respondent.
>
> 29. Further the trusses for the Applicant's house would only have cost the Respondent about $9,000 in January 2008.
>
> 30. The variation representation was conduct by the Respondent that was:
>
> a. unconscionable conduct, contrary to section 8A of the Fair Trading Act;
>
> b. misleading and deceptive conduct, contrary to section 9(1) Fair Trading Act;

c. a false representation, contrary to section 13(n) Fair Trading Act.

[sic]

Misleading and deceptive conduct

16 It is unclear what the Applicant means by the "[untrue] variation representation". If he means that it was untrue that the first contract could not be varied in the way sought by him and that this led to unnecessary termination of the first contract, he should say so. However, in paragraphs 40 to 44 he seems to plead that the first contract was varied. This lack of clarity makes paragraph 30 unclear. The allegation of misleading and deceptive conduct is unsupported by pleadings that indicate precisely what the Applicant considers to be misleading and deceptive.

Unconscionable conduct

17 I note that the allegation of unconscionable conduct under paragraph 30 is not particularised. Mr Edquist remarked on the lack of particulars in the Respondent's 15 December 2010 letter and repeated it in submissions before me. There are a number of matters to which a court or tribunal must have regard under section 8A(3) of the *Fair Trading Act* 1998 ("FT Act"). The Applicant's reference to section 8A appears to be erroneous as it governs allegedly unconscionable conduct in business transactions. However, even if the reference were to s8(2), there is no indication of the basis upon which the Applicant claims to be the victim of unconscionable conduct under s8(2)(a) to (e) or other similar matters.

False representation

18 I note that the reference to s13(n) of the FT Act is erroneous, this was brought to the attention of the Applicant in the Respondent's 15 December 2010 letter. Although Mr Gray, solicitor for the Applicant, said at the hearing that it was a typographical error and the section he intended to refer to is 12(n), he did not say that he had made any attempt to correct the error in correspondence with the Respondent's solicitors.

19 Section 12(n) provides:

> **12. False representations in relation to goods and services**
>
> A person must not, in trade or commerce, in connection with the supply or possible supply of goods or services or in connection with the promotion or advertising by any means of the supply or use of goods or services-
>
> …
>
> (n) make a representation that is false, misleading or deceptive in any material particular.

20 Even if this allegation were free of the typographical error, as discussed above, the paragraphs culminating in paragraph 30 do not indicate precisely what the Applicant considers to be false, misleading or deceptive.

Conclusion regarding paragraphs 25 to 30

21 Paragraphs 25 to 30 must be struck out.

Paragraphs 40 to 44

22 Paragraphs 40 to 44 are:

> 40. A quantity surveyor ... has assessed the true commercial value of the change costs in altering the design from the first house to the second house and making associated site alterations at $7,455 (hereinafter "change cost").
>
> 41. The change cost is verified by the Respondent's own documents in its document titled New Home Contract dated 26 November 2008 at:
>
> - 12. Provide additional costs to alter the existing site conditions to match the proposed $7,170.00
> - 13. Provide additional cost for Engineer's inspection $275.00
>
> 42. The Respondent was only entitled to charge the Applicant for the cost of the second house at $213,752.19 which includes the change cost of $7,445.
>
> 43. Consequently, the Respondent has obtained an unwarranted benefit from the Applicant in the amount of $288,296.19 - $213,752.19 = $74,544 (hereinafter "unwarranted benefit").
>
> 44. The Applicant is entitled to receive compensation from the Respondent in the amount of the unwarranted benefit together with interest thereon as:
>
> a. the variation proposed by the Applicant to change from the first house to the second house was governed by section 38 [of the Domestic Building Contracts] Act and since the Respondent did not comply with section 38(3)(a)(i) Act or section 38(3)(a)(ii) Act or section 38(3)(a)(ii) Act and so section 38(6) Act prohibits the Respondent from recovering any money in respect of the variation;
>
> b. the first contract allowed for variations at clause 23.4, substantially giving contractual effect to section 38(3) Act, and in substantial breach of contract the Respondent refused to acknowledge, rely on or act on clause 23.4 of the first contract;
>
> c. the Applicant could have ended the contract in reliance on the Respondent's substantial breach regarding clause 23.4 and be obliged to pay the Respondent only for the

value of the works performed to that date less damages accrued as a result of the Respondent's breaches;

d. otherwise the Respondent would obtain an unjust enrichment;

e. there is a dispute relevantly defined under the Act as to the unwarranted amount and it would be fair in all the circumstances;

f. the variation representation amounted to unconscionable conduct, misleading and deceptive conduct and a false representation for the purposes of the Fair Trading Act 1995 in that it was untrue, took advantage of the Applicant's poor grasp of his rights under the contract and under the Act and thereby induced the Applicant to enter the variation and the second contract;

g. the variation representation was unconscionable for the purposes of the Fair Trading Act 1995 in that it was untrue, it was made while the Respondent knew it to be untrue and without regard to the Applicant's rights whatsoever;

[sic]

Variation

23 The Respondent's 15 December 2010 letter agreed that under s38 of the *Domestic Building Contracts Act* 1995 ("DBC Act") a building owner seeking a variation must give the builder a notice outlining the variation and that under s38(3), for variations that will add more than 2% to the contract price, the builder must give the building owner either:

(a) a notice that states the effect the variation will have on the work as a whole and if the variation will result in any delays and state the cost of the variation; or

(b) a notice that states the builder refuses, or is unable, to carry out the variation and states the reasons for the refusal or inability.

24 The Respondent's 15 December 2010 letter also asserts that an e-mail from Mr Dornbusch of the Respondent to the Applicant, in the context of oral statements, amounted to a notice under s38(3)(b). However, this is a matter for defence rather than a ground to strike out.

25 Mr Gray submitted that s38 applies to the physical change to a building, regardless of the contract that governs it. He drew on the distinction between a "variation" – changes to the physical product or to the way it is built – and amendments to a contract, that I made in *Caldwell v Cheung* [2008] VCAT 853. That proceeding did not concern more than one contract. Section 38 commences:

> A building owner who wishes to vary the plans or specifications set out in **a** domestic building contract ... [Emphasis added]

26 The Applicant has pleaded more than one contract, but then asserts that the second contract varies the first within the meaning of s38 of the DBC Act. I find that pleading bound to fail.

Alleged "unwarranted benefit" or unjust enrichment

27 I remark that I am unfamiliar with the possibility that an applicant might recover because a respondent has gained an "unwarranted benefit", although it has some semantic similarity to unjust enrichment, which is pleaded at paragraph 44(d). As stated at (g) on page 4 of the Respondent's 15 December 2010 letter:

> Precisely which of the … arguments [concerning alleged substantial breach] give rise to the unjust enrichment is not stated.

28 I find pleadings concerning unwarranted benefit and unjust enrichment bound to fail as pleaded.

Unconscionable, false, misleading or deceptive conduct

29 These paragraphs shed no further light on what the Applicant claims is unconscionable, false, misleading or deceptive conduct and are also bound to fail.

Conclusion regarding paragraphs 40 to 44

30 For the reasons given above, paragraphs 40 to 44 must also be struck out.

PARTICULARS

31 The Points of Claim are, on the whole, difficult to follow. This difficulty is exacerbated by the absence of particulars from all paragraphs except 48.

CONSEQUENTIAL ORDERS

32 As sought by the Respondent in its application for directions/orders of 13 January 2011, the Applicant has leave to file and serve amended Points of Claim by 2 May 2011 and the date by which the Respondent must file and serve Points of Defence is extended to 23 May 2011. In accordance with order 2 of 12 October 2010 any amended points of claim must fully particularize the claim, loss and damage claimed and the relief or remedy sought. The Points of Defence must accord with order 3 of 12 October 2010.

33 As foreshadowed in order 10 of 8 March 2011, costs of and associated with the application to strike out are reserved with liberty to apply.

SENIOR MEMBER M. LOTHIAN