

**VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL**

**CIVIL DIVISION**

**DOMESTIC BUILDING LIST**

VCAT REFERENCE NO. D512/2008

**CATCHWORDS**

Domestic Building, s75 of the *Victorian Civil and Administrative Tribunal Act 1998* - application to strike out claim against two directors of the respondent company which contracted with the applicants, pleadings regarding breach of contract and negligence, proceeding bound to fail

<b>FIRST APPLICANT</b>	Qingping/Clara Luo
<b>SECOND APPLICANT</b>	Jinhua Liu
<b>FIRST RESPONDENT</b>	Reynson Concepts Pty Ltd (ACN 114 816 956)
<b>SECOND RESPONDENT</b>	John Ferguson
<b>THIRD RESPONDENT</b>	John Armstrong
<b>WHERE HELD</b>	Melbourne
<b>BEFORE</b>	Senior Member M. Lothian
<b>HEARING TYPE</b>	Directions Hearing
<b>DATE OF HEARING</b>	23 January 2009
<b>DATE OF ORDER</b>	24 February 2009
<b>CITATION</b>	Luo & Anor v Reynson Concepts Pty Ltd (Domestic Building) [2009] VCAT 139

**ORDERS**

- 1 The proceedings against the Second and Third Respondents are struck out.
- 2 Costs are reserved and there is liberty to apply.

**SENIOR MEMBER M. LOTHIAN**

**APPEARANCES:**

For First Applicant	Mr V. Ryan, Solicitor
For Second Applicant	Mr V. Ryan, Solicitor
For First Respondent	Mr A. Ritchie of Counsel
For Second Respondent	Mr A. Ritchie of Counsel
For Third Respondent	Mr A. Ritchie of Counsel

## REASONS

- 1 On 23 January 2009 I made certain directions in this matter and reserved my decision concerning the Respondents' application that the Applicants' claim against the Second and Third Respondents ("Mr Ferguson" and "Mr Armstrong" respectively) be dismissed pursuant to section 75 of the *Victorian Civil and Administrative Tribunal Act 1998*.
- 2 Section 75(1) provides:

At any time, the Tribunal may make and 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.
- 3 The First Respondent ("Reynson") is a proprietary limited company of which Mr Ferguson and Mr Armstrong are the directors. They are also substantially involved in the work undertaken in the First Respondent's name. It is common ground that the building contract dated 25 May 2007 was in the names of the Applicants as owners and the First Respondent as builder.
- 4 The points of claim are for a substantial sum and plead both breach of contract and breach of duty of care against all three Respondents. Mr Ritchie of Counsel for the Respondents submitted that the proceeding against Mr Ferguson and Mr Armstrong should be dismissed because it is frivolous, vexatious, misconceived and obviously hopeless.
- 5 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.
- 6 As Mr Ritchie of Counsel for the Respondents submitted, the claims against Mr Ferguson and Mr Armstrong fall into two categories; claims for breach of contract and claims for damages arising out of alleged negligence.

## ALLEGED BREACH OF CONTRACT

- 7 The Applicants' Points of Claim of 18 July 2008 plead at paragraph 7 that Reynson entered a building agreement with the Applicants. Paragraph 8 alleges there were terms of the building agreement obliging Reynson or Mr Ferguson or Mr Armstrong to complete the building work, but this pleading

was not particularised and no support was given by the Applicants for the assertion that anyone other than Reynson might have obligations under the contract. Equally importantly, there is no pleading that Reynson had the power to bind Mr Ferguson or Mr Armstrong to the building contract, and no allegation of agency.

- 8 In support of the contention that there was a contract which bound Mr Ferguson and/or Mr Armstrong, Mr Ryan, solicitor for the Applicants submitted that certain payments were made to Rencon Homes, that Rencon Homes is the business name of Mr Ferguson alone and that a document describes Rencon Homes as “Trading as Reynson Constructions Pty Ltd”. He also submitted that Mr Ferguson told the First Applicant (Ms Luo) that he and Mr Armstrong were in partnership, that Mr Armstrong was a registered builder and that they would work on the Applicants’ home.
- 9 Even if all these allegations were established, they still fall short of establishing that there is a contract to which Mr Ferguson or Mr Armstrong were parties, because the only contract or agreement pleaded is the written agreement of 25 May 2007. Further, none of them are pleaded.
- 10 The allegations of breach of contract by Mr Ferguson or Mr Armstrong is bound to fail.

#### **ALLEGED DUTY OF CARE**

- 11 At paragraph 13 of the Points of Claim the Applicants plead:

Alternatively the Builder and/or Mr Ferguson and/or Mr Armstrong owed the Applicants a duty of care to carry out the work with the competence and skill and care of experienced builders.
- 12 As the Tribunal said in *Hawkins v Holland* [203] VCAT 1838, in turn relying on the decisions of Byrne J in *Wimmera-Mallee Rural Water Authority v FCH Consulting Pty Ltd* [2000]VSC 102 and (*No 2*) [2000] VSC 193:

It is clear that for this application [for joinder] to succeed there must be an arguable case - and that it is not sufficient to merely state that a duty of care was owed by the proposed Third Respondent to the Applicant ... but to provide some particulars as to how such duty of care arises and how it has been breached.
- 13 There is little doubt that Mr Ferguson and Mr Armstrong provide the hands and minds that did the work for Reynson, and it is possible that either or both could have a duty to the Applicants separate from that of Reynson, but this has not been pleaded. As Senior Member Walker said in *Korfiatis v Tremaine Developments Pty Ltd* [2008] VCAT 403 at [46]:

What [the director] is said to have done would suggest nothing more than his acting as an employee and director of [the company]. It is not suggested that he had any independent arrangement or agreement with any of the Applicants or undertook any personal responsibility directly to them. His actions did not extend beyond the contractual obligations

that [the company] assumed by entering into the building contract. This is not sufficient to show an assumption by [the director] of any duty of care to the Applicants or to any of them.

- 14 In accordance with Korfiatis and for the reasons I gave in *Rosenthal Munckton & Shields Pty Ltd v McGregor* [2005] VCAT 1702 I am satisfied that the Applicants have not pleaded a duty of care and a breach of that duty sufficient to enable them to recover against either Mr Ferguson or Mr Armstrong.

## **CONCLUSION**

- 15 The Applicants have not pleaded a case against either Mr Ferguson or Mr Armstrong that would enable them to succeed, assuming all they have pleaded is proven.
- 16 As the problem might be one of pleading rather than ultimate entitlement, I strike out the applications against Mr Ferguson and Mr Armstrong rather than dismiss them. There has been no indication that the Applicants wish or intend to amend their points of claim, so the step is taken to strike out the proceedings against Mr Ferguson and Mr Armstrong, rather than to order the Applicants to amend.
- 17 Should the Applicants seek to re-join either or both to this proceeding, they must do so in accordance with the provisions of VCAT Practice Note PNDB1(2007) with respect to joinder, which requires, among other things, that the applicant for joinder file and serve on other parties and the proposed joined parties an affidavit in support which exhibits draft points of claim.

**SENIOR MEMBER M. LOTHIAN**