

**VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL**

**CIVIL DIVISION**

**DOMESTIC BUILDING LIST**

VCAT REFERENCE NO: D420/2009

**CATCHWORDS**

*Fair Trading Act 1999* – jurisdiction - ss107, 108 and 109 – meaning of ‘consumer and trader dispute’ – whether ‘guarantee’ in trade and commerce

<b>APPLICANT</b>	Monty Manufacturing Pty Ltd (ACN 050 464 356)
<b>FIRST RESPONDENT</b>	Joel David Platt
<b>SECOND RESPONDENT</b>	Abraham Platt
<b>THIRD RESPONDENT</b>	David Sanderson
<b>FOURTH RESPONDENT</b>	Vito Sgro
<b>WHERE HELD</b>	Melbourne
<b>BEFORE</b>	Deputy President C. Aird
<b>HEARING TYPE</b>	Directions hearing
<b>DATE OF HEARING</b>	7 September 2009
<b>DATE OF ORDER</b>	2 October 2009
<b>CITATION</b>	Monty Manufacturing Pty Ltd v Platt & Ors (Domestic Building) [2009] VCAT 1980

**ORDER**

1. The application by the first second and third respondents under s75 of the *Victorian Civil and Administrative Tribunal Act 1998* is dismissed.
2. **Further to the tribunal’s orders dated 2 July and 30 July 2009 this proceeding is referred to a compulsory conference with D43/2009, on 16 November 2009 at 10:00 a.m. at 55 King Street Melbourne to be conducted by Senior Member Young.**
3. Liberty to apply.
4. Costs reserved. I direct the principal registrar to list any application for costs for hearing before Deputy President Aird with an estimated hearing time of one hour.

**DEPUTY PRESIDENT C. AIRD**

**APPEARANCES:**

For Applicant

Mr J Forrest of Counsel

For Respondents

Mr R Andrew of Counsel

## REASONS

- 1 In or about July 2007 the applicant owner ('Monty') entered into an ABIC SW-1 2002 simple works contract with Architectural Building & Project Management Pty Ltd, as builder, for the construction of seven apartments. It was a condition of the building contract that each of the respondents, in this proceeding, execute a Deed of Guarantee guaranteeing the performance of the builder under the building contract. The Deed of Guarantee is signed by each of the respondents but is undated.
- 2 Disputes have arisen between Monty and the builder, and separate proceedings were issued by the builder in February of this year (D43/2009 – 'the related proceeding'). In the related proceeding, Monty has filed a counterclaim alleging that the builder has failed to carry out its obligations under the contract, as a result of which it claims it has suffered significant loss and damage. The amount claimed by Monty is approximately \$1.6m. The builder denies Monty's claims.
- 3 Subsequently, Monty issued these proceedings seeking to enforce the Deed of Guarantee. The first to third respondents are legally represented. The fourth respondent has not taken part in these proceedings, to date. The first to third respondents, who I will collectively refer to as the guarantors in these Reasons, deny Monty is entitled to invoke its rights under the Guarantee. However, that is not a matter with which I am presently concerned.
- 4 The guarantors contend the tribunal does not have jurisdiction and seeks orders that the proceeding be dismissed under s75 of the *Victorian Civil and Administrative Tribunal Act 1998*. Section 75 relevantly provides:
  - (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.
  - ...
  - (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.
- 5 The guarantors were represented by Mr Andrew of counsel, and Monty was represented by Mr Forrest of counsel, both of whom have provided me with written submissions.
- 6 The tribunal's jurisdiction can only be enlivened by virtue of an enabling enactment. Monty contends the tribunal has jurisdiction under both the *Domestic Building Contracts Act 1995* ('the *DBC Act*') and the *Fair Trading Act 1999* ('the *FTA*') - that the dispute is a domestic building

dispute under s54 of the *DBC Act* and a consumer and trader dispute under s107 of the *FTA*.

### Is this a domestic building dispute?

7 A domestic building dispute is defined in s54 of the *DBC Act*:

- (1) A "domestic building dispute" is a dispute or claim arising—
  - (a) between a building owner and—
    - (i) a builder; or
    - (ii) a building practitioner (as defined in the **Building Act 1993**); or
    - (iii) a sub-contractor; or
    - (iv) an architect—  
in relation to a domestic building contract or the carrying out of domestic building work; or
  - (b) between a builder and—
    - (i) another builder; or
    - (ii) a building practitioner (as defined in the **Building Act 1993**); or
    - (iii) a sub-contractor; or
    - (iv) an insurer—  
in relation to a domestic building contract or the carrying out of domestic building work; or
  - (c) between a building owner or a builder and—
    - (i) an architect; or
    - (ii) a building practitioner registered under the **Building Act 1993** as an engineer or draftsman—  
in relation to any design work carried out by the architect or building practitioner in respect of domestic building work.
- (2) For the purposes of sub-section (1), a dispute or claim includes any dispute or claim in negligence, nuisance or trespass but does not include a dispute or claim related to a personal injury.
- (3) A reference to a building owner in this section includes a reference to any person who is the owner for the time being of the building or land in respect of which a domestic building contract was made or domestic building work was carried out.

8 Clearly the claim and counterclaim in the related proceeding are a domestic building dispute under s54(1) – the claims concern a dispute between an owner and a builder. Monty submits that its claim in this proceeding is similarly a domestic building dispute because, in agreeing to be jointly and severally liable with the builder for the performance of the builder under the

building contract, the guarantors are in effect ‘the builders’. I reject this. In guaranteeing the performance of the builder it cannot be said the guarantors fall within the definition of ‘builder’ in s3 of the DBC Act:

**"builder"** means a person who, or a partnership which—

- (a) carries out domestic building work; or
- (b) manages or arranges the carrying out of domestic building work; or
- (c) intends to carry out, or to manage or arrange the carrying out of, domestic building work;

9 The guarantors were, at the relevant time, directors of the builder<sup>1</sup>. As has been considered by this tribunal on a number of occasions, where the builder is a corporate entity the director/s are not a builder within the definition in s3 of the DBC Act.<sup>2</sup>

#### Is this a ‘consumer and trader’ dispute?

10 A ‘consumer and trader’ dispute is defined in s107 of the *FTA* as:

- (1) In this Part a consumer and trader dispute is a dispute or claim arising between a purchaser or possible purchaser of goods or services and a supplier or possible supplier of goods or services in relation to a supply or possible supply of goods or services.
- (2) For the purposes of subsection (1), a dispute or claim includes any dispute or claim in negligence, nuisance or trespass that relates to the supply or possible supply of goods or services but (except as provided in subsection (3)) does not include a dispute or claim related to a personal injury.
- (3) For the purposes of subsection (1), a dispute or claim includes a claim related to personal injury if—
  - (a) the claim is for an amount not exceeding \$10 000; and
  - (b) the claim relates to a supply or possible supply of goods or services; and
  - (c) the supply or possible supply of goods or services is the subject of a related consumer and trader dispute.

11 Although the Victorian Court of Appeal has held, on at least two occasions<sup>3</sup>, that under ss107 and 108 of the *FTA* the tribunal has jurisdiction to hear and determine commercial disputes, the guarantors contend the proper interpretation of ‘consumer’ in s107 is a ‘member of the public in

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<sup>1</sup> It was suggested by counsel for the guarantors that the second respondent, who is the first respondent’s father, may have resigned as a director at the relevant time but this does not impact on the current application.

<sup>2</sup> *Body Corporate Strata Plan No PS 446708Q & Ors v Arundel Homes Pty Ltd* [[2009] VCAT 891, *Rosenthal Munckton & Shields Pty Ltd v McGregor* [2005] VCAT 1702

<sup>3</sup> *Zeus and Ra Pty Ltd v Nicolaou* [2003] VSCA 11, *Sigma Constructions (Vic) Pty Ltd v Marvell Investments Pty Ltd* [2004] VSCA 242

the capacity of a consumer of goods or services ordinarily acquired for personal, domestic or household use<sup>4</sup>.

- 12 Whilst it is true that the words of any statutory provision must be first read in the context provided by the statute as a whole<sup>5</sup> ‘consumer’, when read in the context of the *FTA*, does not support this contention. Section 107 refers to a dispute between a ‘purchaser...of goods or services’ not to a ‘consumer ...of goods or services’.
- 13 *Zeus and Ra Pty Ltd v Nicolaou*<sup>6</sup> concerned a lease of premises to be used as a car wash, car detailing, café and automotive repairs business. Charles and Eames JJA in their joint judgement, with which Winneke P concurred, in confirming the tribunal had a general landlord and tenant jurisdiction under ss107 and 108, summarised the purpose and extent of the *FTA* at [74]:

The purposes of the *Fair Trading Act* 1999 are set out in s.1. They include the promotion and encouragement of fair trading practices and a competitive and fair market, the regulation of trade practices, provision for the safety of goods or services supplied in trade or commerce, and to provide for codes of practice. The *Fair Trading Act* was clearly intended to give VCAT a general jurisdiction for the resolution of fair trading disputes. The definition of "fair trading dispute" insofar as relevant, includes (omitting reference to "possible supply") a "dispute or claim arising between a purchaser ... of ... services and a supplier ... of ... services in relation to a supply ... of ... services."

and at [79]

The solicitor for Zeus & Ra submitted to Judge Bowman that VCAT had jurisdiction to hear and determine the claims sought to be made by Zeus & Ra by virtue of ss.107 and 108 of the *Fair Trading Act*. In our opinion both the terms of Zeus & Ra's original application to VCAT together with the contents of the Nicolaou affidavit (summarised in [60]<sup>7</sup> above) which was before Judge Bowman provide all the foundation necessary to establish that the application was validly made to VCAT under the *Fair Trading Act*.

- 14 Although counsel for respondents relies on the heading for Part 8 – ‘Consumer Protection’ and the main purposes of the *FTA* as set out in s1 of the *FTA* this is, in my view, to misconstrue the purposes of the as set out in s1, and give too narrow an interpretation to ‘consumer’. The purposes of the *FTA* as set out in s1 are:

The main purposes of this Act are—

- (a) to promote and encourage fair trading practices and a competitive and fair market;

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<sup>4</sup> First to third respondents outline of submissions, 2 September 2009 [27]

<sup>5</sup> *K+S Lake City Freighters Pty Ltd v Gordon & Gotch Ltd* (1985) 157 CLR 309 at 312, per Gibbs CJ

<sup>6</sup> *supra*

<sup>7</sup> This is not relevant for the purposes of this application

- (aa) to protect consumers;
- (b) to regulate trade practices;
  - (ba) to provide for statutory conditions and warranties in consumer contracts;
  - (bb) to provide for unfair terms in consumer contracts to be void;
- (c) to provide for the safety of goods or services supplied in trade or commerce and for the information which must be provided with goods or services supplied in trade or commerce;
- (d) to regulate off-business-premises sales and lay-by sales;
- (e) to provide for codes of practice;
- (f) to provide for the powers and functions of the Director of Consumer Affairs Victoria including powers to conciliate disputes under this Act and powers to carry out investigations into alleged breaches of this Act;
- (g) to repeal the Consumer Affairs Act 1972, the Ministry of Consumer Affairs Act 1973, the Fair Trading Act 1985 and the Market Court Act 1978.

15 'Consumer' is not defined in the *FTA* and I agree with counsel for the guarantors when he says in his written submission that '*In its broadest sense, a consumer is anyone who consumes*'. If Parliament intended consumer to have the limited meaning suggested by the guarantors, one might well have expected that term to have been defined. Further the definition of 'purchaser' in s3 is very wide:

purchaser in relation to a supply of goods or services means the person to whom the goods or services have been or are to be supplied

16 As raised with counsel during the hearing, it is of some assistance to consider the relevant definitions in the *Small Claims Act 1973* ('the *SCA*'). Jurisdiction under the *SCA* was previously exercised by the Small Claims Tribunal. A number of provisions of the *SCA* were amended effective from 1 July 1998 – the date on which the Small Claims Tribunal and its function and jurisdiction were absorbed by VCAT. 'Consumer' was defined at that time as:

... a person, not being a corporation other than a residential corporation, who buys or hires goods otherwise than for re-sale or letting on hire or than in the course of or for the purposes of a trade or business carried on by him, or than as a member of a business partnership, or for whom services are supplied for fee or reward or who, as the insured party, enters into a contract of insurance otherwise than in the course of or for the purposes of a trade or business carried on by him, or than as a member of a business partnership

17 Subsequently, effective from 1 February 1999, the jurisdiction of the tribunal was extended so that disputes where a party was a corporation are

no longer excluded. In s3 'consumer' was replaced by 'customer' which was defined as:

... a person—

- (a) who buys or hires goods; or
- (b) to whom services are provided for fee or reward; or
- (c) who enters a contract of insurance as the insured party

- 18 Effective 10 September 2003 the *SCA* was repealed and its provisions incorporated into the *FTA*. Whereas, the tribunal's jurisdiction under the *SCA* was limited to claims of \$10,000 or less, the tribunal's jurisdiction under the *FTA* is unlimited. Section 107A, which defines a 'small claim', and which is in substantially the same terms as the definition of 'small claim' in the *SCA*, was inserted:

In this Part "small claim" means a consumer and trader dispute in relation to—

- (a) a claim for payment of money in an amount not exceeding \$10,000 or other prescribed amount; or
- (b) a claim for performance of work of a value not exceeding \$10,000 or other prescribed amount—

that in either case arises out of a contract for the supply of goods or the provision of services other than a contract of life insurance.

- 19 I am satisfied that, by reference to section 35 of the *Interpretation of Legislation Act 1984*, I may have regard to the relevant parliamentary debates. Counsel for the guarantors referred me to the comments made by the Hon Rob Hulls, when debating the *Fair Trading Bill 1999*, in which he confirmed the opposition's support for legislation to protect Victorian consumers. I also have regard to, and consider pertinent, his comments in the second reading speech for the *Fair Trading (Amendment) Bill (7 May 2003)* delivered as attorney-general, where Mr Hulls said:

This bill:

- a. states explicitly that one of the purposes of the act is to protect consumers;

and

The bill also amends the act to:

...

- (n) repeal the Small Claims Act 1973 and transfer the special procedures for small claims to the act;
- (o) expand the tribunal's powers to resolve fair trading disputes (which are to be renamed 'consumer and trader disputes' to better indicate the broad nature of the jurisdiction) by enabling it to:
  - (i) declare that a debt is not owing;
  - (ii) order a party to do or refrain from doing something;
  - (iii) deal with small personal injuries claims attendant on a consumer and trader dispute; and
  - (iv) enable the tribunal to transfer a consumer and trader dispute to a court;

- (p) expand the extraterritorial reach of the act to the maximum extent, particularly so as to catch activities of interstate Internet traders operating into Victoria;
- (q) remove unnecessary restrictions on access to the ancillary remedies under the act, and clarify who is a 'person involved in a contravention' of the act, and how the state of mind and the agency of a corporation is established for the purposes of civil proceedings; (emphasis added)

20 So, not only does this provide a clear indication that it was Parliament's intention that consumer protection was but one of the purposes of the *FTA*, but that in renaming 'fair trading dispute' as 'consumer and trader disputes' 'to better indicate the broad nature of the jurisdiction' it demonstrated an intention not to restrict the jurisdiction as suggested by counsel for the guarantors.

21 The meaning of 'consumer and trader disputes' in s107 was considered by Judge Bowman in *Jogeo Pty Ltd v Schierholter* [2006] VCAT 1295:

- 26. Firstly, I am of the opinion that the dispute between Jogeo and Schierholter is a consumer and trader dispute within the meaning of s.107 of the *FTA*, and that this Tribunal therefore has jurisdiction pursuant to s.108. The fact that both Jogeo and Schierholter are, in a sense, commercial entities does not mean that their dispute is a trader-trader dispute. Whilst its description as such may be somewhat curious, the definition of a "trader-trader dispute" as contained in s.109(4) of the *FTA* scarcely differs from that of a "consumer and trader dispute" found in s.107(1), save that, in the former case, the value of the dispute in question must not exceed \$10,000.00. The fact that both parties to a dispute might, in the general commercial sense, be described as "traders", is not to the point. A "trader-trader dispute", for the purposes of the *FTA*, is one as defined in s.109(4), and the definition is confined to the operation of s.109.
- 27. In order to establish whether a dispute is a consumer and trader dispute, the wording of s.107(1) and the definitions contained in s.3 should be examined. This is, in essence, the approach which I adopted in *Bovalino v Crea* (delivered 8<sup>th</sup> July 2005), and I believe that it is the correct approach to adopt in the present case. I appreciate that, in *Bovalino*, the meaning of the words "in trade or commerce" received considerable attention whilst here the fact that the dispute concerns a matter arising in trade or commerce is not disputed.

and

- 30 In my opinion, the arguments of Mr Lim based upon a purposive interpretation of the Act are not sufficient to overcome its clear wording. If a dispute falls within the definition contained in s.107(1), it is a dispute which falls within the operation of the *FTA* and, accordingly, this Tribunal may hear and determine it.

22 The comments by SM Levine in *Athedium (Vic) Pty Ltd v Matchpoint Pty Ltd & Ors* [2009] VCAT 1124 are also apt:

27. When considered more fully it is apparent that the FTA is remedial legislation that includes a quite separate and distinct form of dispute resolution that does not rely on any contravention of the Act to enliven jurisdiction.
28. Using the definitions and s107 of the FTA, the jurisdiction of the Tribunal is really one of a dispute between “purchaser and supplier” and those words mean that any purchaser or supplier (or possible purchaser or supplier) whether in a domestic or commercial sense may bring an application to the Tribunal to resolve a dispute for the supply or possible supply of goods or services for an unlimited value.

23 Section 109(1) of the *FTA* relevantly provides:

- (1) In addition to its powers under section 108, the Tribunal, in determining a consumer dispute or a trader-trader dispute, may make any order it considers fair including declaring void any unjust term of a contract or otherwise varying a contract to avoid injustice. (emphasis added)

‘Consumer dispute’ and ‘trader-trader’ dispute are defined in s109(4):

In this section—

**consumer dispute** means a dispute relating to the supply or possible supply of goods or services of a kind ordinarily used for personal household or domestic purposes but does not include a dispute relating to the supply or possible supply of goods if the supply or the possible supply of the goods is for the purpose of re-supply, in trade or commerce, or for the purpose of using the goods up or transforming the goods in trade or commerce;

**trader-trader dispute** means a dispute between a purchaser or possible purchaser and a supplier or possible supplier in relation to the supply or possible supply of goods or services in trade or commerce which involves—

- (a) a claim for payment of money in an amount not exceeding \$10,000; or
- (b) a claim for performance of work of a value not exceeding \$10,000.

24 The jurisdiction in s109 is additional to the jurisdiction in ss107 and 108, and specifically relates to the tribunal’s jurisdiction when considering a ‘consumer’ dispute or a ‘trader-trader’ dispute. If it was intended that ss107 and 108 be limited by reference to s109 then it would be have been made clear. Section 109 stands on its own, and is an additional not ancillary provision. Further s108, which sets out the tribunal’s powers to resolve a consumer-trader dispute, would not be interposed between ss107 and 109.

25 Any attempt to rely on the restricted definition of “consumer contract” in s3 of the *FTA* is similarly misguided. Not only is the jurisdiction under s107 not limited to contractual disputes, s107(2) specifically contemplates and

includes claims in “negligence, nuisance or trespass”. The definition of ‘consumer contract’ is only relevant in considering the tribunal’s jurisdiction under s109.

- 26 I therefore find this is a consumer-trader dispute within the meaning of s107 and accordingly is within the tribunal’s jurisdiction.

#### Have the respondents supplied goods or services?

- 27 The guarantors also contend that in signing the Deed of Guarantee they have not provided goods or services to Monty. This was recently considered by SM Levine in *Athedium (Vic) Pty Ltd v Matchpoint Pty Ltd & Ors* [2009] VCAT 1124 where he considered whether a guarantee is a ‘service’. He said:

A guarantee confers a right and a benefit on the person to whom the guarantee is given. It is a right and benefit to recover in the event of the default of the primary obligator under a contract and falls within the definition of services under the FTA. [42]

- 28 In any event, in *Cash Resources Australia Pty Ltd v Bentley* [2002] VSC 271, Gillard J held that the execution of a mortgage and guarantee in favour of *Cash Resources*, a lender of money, was a service within the meaning of s107 of the *FTA*. For the reasons discussed above, it is in my view, irrelevant that his Honour was concerned with the earlier version of s107 where the words ‘fair trading dispute’ were used, which have since been replaced by the words ‘consumer and trader’ dispute. The definition of ‘services’ has not been amended and with the clearly expressed intention of Parliament to broaden the jurisdiction under s107 rather than limit it, I find the provision of a guarantee is a ‘service’.

#### The claim for misleading and deceptive conduct

- 29 Monty claims damages under s159 of the *FTA Act* alleging the guarantors have contravened ss 4 and 9 of the *FTA* which prohibit misleading and deceptive conduct.
- 30 There can be no doubt that ss 4 and 9 extend to and include conduct by all persons and entities and do not apply only to the limited extent suggested by the guarantors. The word ‘consumer’ is not used in ss 4 and 9.
- 31 Section 4 provides:
- (1) For the purposes of Part 2, if a person makes a representation about a future matter, including the doing of, or the refusing to do any act, and the person does not have reasonable grounds for making the representation, the representation is deemed to be misleading.
  - (2) Subject to subsection (2A), in any proceeding under this Act concerning a representation made by a person about a future matter, the person making the representation bears the burden of proving that the person had reasonable grounds for making the representation.

- (2A) In any proceeding for an offence under this Act concerning a representation made by a natural person about a future matter, the person making the representation is taken not to have had reasonable grounds for making the representation unless the person adduces evidence to the contrary.
- (3) Subsection (1) is deemed not to limit by implication a reference in Part 2 to a misleading representation, a representation that is misleading in a material particular or conduct that is misleading or is likely or liable to mislead.

Section 9 provides:

- (1) A person must not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.
- (2) Nothing in the succeeding provisions of this Part is to be taken as limiting by implication the generality of subsection (1).

32 For there to be a contravention of these sections, the conduct complained of must have been in 'trade or commerce'. The guarantors contend that even if Monty is a consumer, and the provision of the guarantee is a service, they were not engaged in trade or commerce. This is, in my view, an unsustainable proposition. Monty agreed to enter into the building contract on condition that the guarantors guarantee, and be jointly and severally liable with the builder for, the performance of its obligations under the building contract. This has also recently been considered by the tribunal. In *Athedium* (supra) SM Levine found:

... that the Second Respondent as the director of the Tenant provided his guarantee in trade or commerce and that guarantee is a service as defined and is subject to the jurisdiction of VCAT under the FTA.

[44]

33 In giving the guarantees, for the purpose of a contract which was clearly entered into by the builder in trade or commerce, I am satisfied the guarantors were themselves engaged in trade and commerce.

34 Accordingly, I will dismiss the application and reserve the question of costs. It has previously been ordered that this proceeding be referred to compulsory conference with the related proceeding. I will confirm those orders.

**DEPUTY PRESIDENT C. AIRD**