

**VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL  
CIVIL DIVISION**

**DOMESTIC BUILDING LIST**

**VCAT Reference: D70/2003**

**CATCHWORDS**

S75 VCAT Act, strike out application, company director's personal liability for negligence, warranty under ss8 and 9 of *Domestic Building Contracts Act 1995*

[2005] VCAT 1702

**APPLICANT:** Rosenthal Munckton & Shields Pty Ltd (ACN 006 401 485)

**FIRST RESPONDENT:** Warren & Lela McGregor

**SECOND RESPONDENT:** Lumcorp Contractors Pty Ltd (ACN 077 662 296)

**THIRD RESPONDENT:** Scott Lumsden

**WHERE HELD:** Melbourne

**BEFORE:** Senior Member M. Lothian

**HEARING TYPE:** Hearing

**DATE OF HEARING:** 15 August 2005

**DATE OF ORDER:** 18 August 2005

**ORDER**

1. The First Respondent's Points of Counterclaim against the Third Respondent with respect to alleged warranties, and which appear in paragraphs 3 and 6 are dismissed.
2. The First Respondent's Points of Counterclaim against the Third Respondent are otherwise struck out.
3. Costs are reserved with liberty to apply.

**SENIOR MEMBER M. LOTHIAN**

**APPEARANCES:**

For the Applicant: No appearance  
For the First Respondent: Mr C Harrison of Counsel  
For the Second Respondent: No appearance  
For the Third Respondent: Mr N Frenkel of Counsel

## REASONS

1. An application has been made by the Third Respondent by Counterclaim (“Mr Lumsden”) pursuant to s75 of the *Victorian Civil and Administrative Tribunal Act 1998*, that the proceeding against him should be dismissed, and that he should be awarded costs on an indemnity basis.
2. The history of this application is that Mr Lumsden is the sole director of the Second Respondent by Counterclaim, Lumcorp Contractors Pty Ltd (“the Builder”) and was joined to this proceeding pursuant to my order of 6 December 2004. At that time both the Builder and Mr Lumsden were represented by Rigby Cooke Lawyers. That decision was not appealed. On 4 August 2005 a letter was sent to the Tribunal advising that Mr Lumsden and the Builder were to be represented by Messrs Cinque Morrow and foreshadowing an application under s75.
3. It is noted that it has not been argued on behalf of Mr and Mrs McGregor (“the Owners”) that Mr Lumsden has delayed unduly in bringing his application at this late stage in the proceedings. It is also conceded by Mr Harrison on their behalf that because the basis for the application under s75 is not identical with the basis for resisting joinder under s60, Mr Lumsden is not prevented from bringing this application. In particular I am persuaded by Mr Frenkel’s submission that the witness statements filed on 5 August 2005 on behalf of Mr and Mrs McGregor do not support the earlier assertion that there are special circumstances which justify the director of a company being personally liable.
4. Evidence was given by Mr Lumsden by affidavit that if he remains a party to these proceedings he will be adversely affected financially and would possibly be bankrupted. His evidence is also that he will be unable to afford legal representation. Mr Frenkel indicated that whether the application under s75 is

successful or not, Mr Lumsden will do his best to represent the Builder, and himself if necessary. It therefore does not follow that it is the hearing which will cause the adverse financial impact.

5. The likely outcome, as discussed during the hearing, is that if the Owners succeed against the Builder, the Builder is likely to become insolvent and the warranty insurer is likely to have to pay any award, up to the limit of indemnity, which is \$100,000. This falls a long way short of the \$471,099.10 which the Owners are claiming against the Respondents to Counterclaim, being Rosenthal Munckton and Shields, the Builder and Mr Lumsden.

### **Basis for dismissal under s75**

6. S75 provides:

#### **Summary dismissal of unjustified proceedings**

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;

7. In the words of Deputy President McKenzie in *Norman v Australian Red Cross Society* 1988 14 VAR 243:

(e) 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 law, or on no reasonable view can justify relief, or is bound to fail. This will include, but is not limited to a case where a complainant can be said to disclose no reasonable cause of action, or where a respondent can show a good defence sufficient to warrant the summary termination of the proceeding.

8. Mr Frenkel said he understood that he had to demonstrate that the application by the Owners against Mr Lumsden is bound to fail. Mr Harrison said Mr Frenkel's client had to demonstrate not just that the Owners' claim was unlikely to succeed, but that it must be hopeless.

9. Mr Frenkel took me, in particular to paragraphs 3, 4 and 5 of the Points of Claim against Third Respondent to Counterclaim of 23 December 2004 (“PoC”), and it is useful to set them out here:

3. Lumsden warranted to the Respondents in relation to the work carried out in relation the property under the Contract (“the work”) that:
  - a. the work would be carried out in a proper and workmanlike manner and in accordance with the plans and specifications set out in the Contract;
  - b. all materials to be supplied by Lumsden for use in the work would be good and suitable for the purpose for which they were to be used;
  - c. the work would be carried out in accordance with and comply with, all laws and legal requirements including, without limiting the generality of this warranty, the Building Act 1993 (Vic) and the regulations made under the Act;
  - d. the work would be carried out with reasonable care and skill;
  - e. to the extent that the work consisted of the renovation, alteration, extension, improvement and repair of a home, the home would be suitable for occupation at the time the work was completed, (“theWarranties”)

**Particulars**

The Warranties arise by operation of law by virtue of sections 8 and 9 of the Domestic Building Contracts Act 1995.

4. Further, at all material times:
  - a. Lumsden knew that the Respondents would be entering into a contract with the Builder for the performance of the project;
  - b. Lumsden held himself out as the person who would be responsible for and oversee the work undertaken by the Builder in performance of the Contract;
  - c. Lumsden signed the Contract for and on behalf of the Builder;
  - d. The Respondents relied on Lumsden inter alia to:
    - (i) Properly and adequately manage and arrange the carrying out of the work under the Contract on behalf of the Builder;
    - (i) Exercise or use skill care and diligence in managing and arranging the carrying out of the work by the Builder under the Contract;
    - (ii) Exercise or use skill care and diligence in ensuring that the Builder executed the Contract in accordance with its terms;
    - (iii) Exercise or use skill care and diligence in connection with the administration of the Contract;
  - e. Lumsden knew or ought to have known the matters alleged in sub-paragraph (d) above;
  - f. Lumsden assumed responsibility to do the things set out in sub-paragraph (d); and
  - g. Lumsden knew or ought to have known that in the event that he failed to do those things or any of them, it was likely that the Respondents would suffer loss and damage.

**Particulars**

As to sub-paragraph (a), knowledge is actual or to be inferred from the fact that:

- (i) Lumsden signed the Contract for and on behalf of the Builder, and
- (ii) Lumsden was the point of contact for the builder and the Respondents dealt with Lumsden on behalf of the builder prior to the execution of the Contract.

As to sub-paragraphs (b), Lumsden was the point of contact for the Builder and all of the Respondents’ dealings in relation to the Contract were with Lumsden.

In relation to sub-paragraph (d), reliance is to be inferred from the Respondents' dealings with Lumsden and the execution of the Contract by the Respondents.  
As to sub-paragraph (f), Lumsden did or attempted to do the things set out in sub-paragraph (d) above.

5. In the premises, Lumsden owed the Respondents a duty of care:
  - a. To exercise all due skill, care and diligence in managing and carrying out the work;
  - b. To construct the work in a good and workmanlike manner;
  - c. To make such inspections as may be necessary and/or supervise the works so as to be reasonably satisfied that the work was being executed by the Builder;
    - (i) in general accordance with the plans and specifications for the work; and
    - (ii) in a good and workmanlike manner;
  - d. To exercise all due skill, care and diligence in connection with the administration of the Contract.

### **Warranty claim**

10. In the reasons of 6 December 2004 regarding the application to join Mr Lumsden, I said of the warranty claim that if this had been the only ground raised by the Owners, I would have found they did not have an arguable case against Mr Lumsden.
11. In paragraph 3 of the PoC the particulars are that the "...Warranties arise by operation of law by virtue of sections 8 and 9 of the Domestic Building Contracts Act 1995." Mr Harrison raised the possibility that his clients might contend at the hearing that the Act imposes a statutory duty upon Mr Lumsden personally. The basis of that assertion is that Mr Lumsden falls within the definition of "builder" and that if Parliament had intended only the builder named in the building contract to be the warrantor, in the operative provisions of section 8, wherever "builder" appears, it would include an expression such as "under the relevant building contract".
12. Further to paragraphs 6 and 7 of the Reasons of 6 December 2004, section 8 is perfectly clear and where "builder" appears, it clearly means "the builder under the relevant contract". The relevant parts of section 8, using paragraph (a) as an example are:

The following warranties ... are part of every domestic building contract –  
(a) the builder warrants ...

13. In answer to the question: which builder? The only possible answer is “The builder under the building contract.” If Parliament had intended that Mr Lumsden, or anyone in his position should give such a warranty in addition to the builder under the building contract, section 8 would need to be differently expressed to take that into account.
14. I find that the Owners do not have an arguable case against Mr Lumsden for alleged breach of warranties under sections 8 and 9 of the *Domestic Building Contracts Act 1995*, and it is not able to be cured by re-pleading.

### **Negligence claim**

15. Mr Frenkel has described the Owners’ claim against Mr Lumsden as “an afterthought” and “speculative”. Whether or not it was an afterthought eight months ago is of little relevance at this point in the proceedings. The “speculative” nature of the claim is of more concern.
16. As indicated in the reasons of 6 December 2004, the law is far from settled concerning the potential liability of a company director to a party who contracts with the company. Mr Frenkel submitted that where a company simply enters a building contract, a director and employee of the company who personally dealt with the other party does not thereby owe a duty of care to the other party; rather, “there is a good argument to say that, by the contract, the parties intended to cover the field”. Mr Frenkel suggested that, if the Owners’ negligence claim were upheld, the floodgates would be opened. He said that there is nothing in the PoC that makes this a special case; not even an allegation that Mr Lumsden orally guaranteed the work. Mr Frenkel asserts that the claims against Mr Lumsden “identically mirror” those against the Builder, which has led Mr Frenkel to

conclude that the only claims are those against the Builder, and that whenever Mr Lumsden acted, he acted as the Builder.

- **Are the claims against Mr Lumsden and the Builder the same?**

17. The assertion that the claim against Mr Lumsden identically mirrors the claim against the Builder is not borne out by a comparison of the PoC with the Respondents' Amended Points of Defence and Cross Claim of 9 November 2004. For example, paragraph 4(b) of the PoC pleads that Mr Lumsden held himself out as the person who would be responsible for and oversee the work, and 4(d) pleads that the Owners relied on him to properly undertake certain functions on behalf of the builder, and in sub-paragraph (iii), to "exercise or use skill care and diligence in connection with the administration of the contract".
18. Although there is substantial similarity between the claims against Mr Lumsden and the Builder, they are not the same.

- **Co-existence of negligence and contractual claim**

16. I was referred in particular to *Astley v Austrust* (1999) 197 CLR1 at 22-23. The case concerned a claim by a trustee company against a firm of solicitors for breach of contract and for negligence. The passage of the majority judgment read to me at paragraph 47 is not, I believe, authority for the proposition that where a contract exists it "covers the field" of responsibility between the parties. The paragraph commences; "History and legal principle combine to indicate that the conclusion of the House of Lords in *Henderson* is the correct view". The conclusion referred to appears immediately before:

The result may be untidy; but given that the tortious duty is imposed by the general law, and the contractual duty is attributable to the will of the parties, I do not find it objectionable that the claimant may be entitled to take advantage of the remedy which is most advantageous to him, subject only to ascertaining whether the tortious duty is so inconsistent with the applicable contract that, in accordance with ordinary principle, the



parties must be taken to have agreed that the tortious remedy is to be limited or excluded.

17. There can be a concurrent claim in tort and contract in this case.

- **The absence of a personal guarantee from Mr Lumsden**

18. It was submitted by Mr Frenkel that Mr McGregor is an experienced business man. His witness statement indicates that he has an honours degree in economics and a business degree and that his career includes work as a management consultant with KPMG in Australia and South East Asia.

19. Mr Frenkel argued that Mr McGregor had the power and knowledge to seek a guarantee from the director of the proprietary limited building company.

20. The evidence of Mr McGregor's training and experience makes it unlikely, but not impossible, that the Owners could establish the reliance on Mr Lumsden personally, necessary to base a successful claim for negligence against him.

- **Claim against a director of a contracting party**

21. Mr Frenkel submitted that a claim against a director of a contracting party is novel, and his submission has merit.

22. I refer to paragraph 20 of the reasons of 6 December 2004, and in particular to the passage from the New Zealand case, *Trevor Ivory Ltd v Anderson* [1992] 2 NZLR 517, where Cooke P said:

... I commit myself to the opinion that, when he formed his company, Mr Ivory made it plain to all the world that limited liability was intended. ... such a limitation is a common fact of business and, in relation to economic loss and duties of care, the consequence should in my view be accepted in the absence of special circumstances.

23. The "special circumstances" must have been present at the time the relationship was entered, or the alleged reliance occurred. Those special circumstances hinted

at the time of the application under s60 have not become apparent. In particular I note that there is nothing in the witness statements of Mr or Mrs McGregor which supports such special circumstances.

24. I refer again to the words of Deputy President McKenzie in *Norman v Australian Red Cross Society* where she said:

- (c) If the complainant indicates to the Tribunal that the whole of his or her case is contained in the material placed before the Tribunal, the Tribunal is entitled to determine whether the complaint lacks substance by asking whether, on all the material placed before it, there is a question of real substance to go to a full hearing. However if a Complainant indicates to the Tribunal that there is other evidence he or she can call to support the claim and the Tribunal, on application, does not permit that evidence to be called, then the Tribunal cannot determine the application of the basis that the Complainant's material contains the whole of his or her case."

25. Although the Owners have not expressly indicated that the PoC and their witness statements contain the whole of their case against Mr Lumsden, witness statements are prepared in accordance with Directions of the Tribunal, including those of 21 December 2004. Direction 13 ordered in part that:

A party will not be allowed to present any evidence at the hearing which is not contained in a Witness Statement without justifying the need to do so to the Tribunal.

It is therefore reasonable to assume that the PoC and Witness Statements do contain the whole of the Owners' case against Mr Lumsden.

26. I find that, as pleaded and supported by the witness statements, the claim against Mr Lumsden in tort is bound to fail.

### **Impact of trial on Mr Lumsden**

24. I am not persuaded that the financial impact of the trial on Mr Lumsden is a matter I should take into account and Mr Frenkel did not refer me to any authority to convince me otherwise. This matter has not been taken into account in reaching the decision.

### **Order under s75**

25. It was submitted by Mr Frenkel that a proceeding should be dismissed rather than struck out if it is not curable by amendment. While his submission is accepted with respect to the claim for warranties, I find that, although novel, it is possible that an amended claim for breach of duty of care could succeed. It is therefore ordered that the Owners' Points of Claim against the Third Respondent to Counterclaim is dismissed regarding warranties, and is otherwise struck out.

### **Costs**

26. No argument has yet been put to me regarding costs. They are reserved and there is liberty to apply.

**SENIOR MEMBER M. LOTHIAN**