

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

DOMESTIC BUILDING LIST

VCAT REFERENCE NO. D1069/2010

CATCHWORDS

s82(2) *Bankruptcy Act (Cth)* 1966 - claim for misleading or deceptive conduct under s159 of the *Fair Trading Act (Vic)* 1999 which induced a contract with a party other than a bankrupt is not provable debt and is justiciable in the Tribunal – a claim in negligence arising out of a contract or a general claim in contract arising under section 107 of the *Fair Trading Act* 1999 are capable of being subject to a proof of debt and provable in the bankrupt estate and are not justiciable in the Tribunal

APPLICANT	Clare Wilson
FIRST RESPONDENT	Guido Francis Carpi
SECOND RESPONDENT	Joseph Peter Borg t/as J.P.B. Building Consultants (ABN 84 540 010 360)
WHERE HELD	Melbourne
BEFORE	Senior Member M. Levine
HEARING TYPE	Directions Hearing
DATE OF HEARING	29 March 2011
DATE OF ORDER	13 April 2011
CITATION	Wilson v Carpi and Anor (Domestic Building) [2011] VCAT 573

ORDERS

1. The claim under s159 of the *Fair Trading Act* 1999 relating to the inducement to enter a contract with a third party is not capable of being subject to a proof of debt in the bankrupt estate of the Second Respondent and is not provable in the bankrupt estate of the Second Respondent and is justiciable in the Tribunal.
2. The claim in negligence arising out of contract with the Second Respondent is capable of being subject to a proof of debt and is provable in his bankrupt estate and not justiciable in the Tribunal.

3. The general claim in contract with the Second Respondent under section 107 of the *Fair Trading Act* 1999 is capable of being subject to a proof of debt and is provable in his bankrupt estate and not justiciable in the Tribunal.
4. **There shall be a directions hearing on 25 May 2011 commencing at 9:30 a.m. at 55 King Street Melbourne before any Member to determine the further conduct of this application.**
5. Direct Principal Registrar to serve a copy of these orders and reasons on all parties and the trustee in bankruptcy of the Second Respondent.

SENIOR MEMBER M. LEVINE

APPEARANCES:

For the Applicant	Mr E. Stents, Solicitor
For the First Respondent	No appearance
For the Second Respondent:	No appearance

REASONS

BACKGROUND

- 1 The Applicant's claim arises out a Contract of Sale of Real Estate for a domestic dwelling between the Applicant and the First Respondent dated 14 April 2008.
- 2 The Second Respondent prepared a pre-purchase building inspection report for the Applicant on or about 16 April 2008.
- 3 The Second Respondent was declared bankrupt on 10 February 2009.
- 4 The Applicant asserts that she became aware of her rights to claim damages in connection with the report when cracks appeared in her ceiling on or about 5 May 2010.
- 5 The Applicant issued proceedings in the Domestic Building List on 23 December 2010.
- 6 On 10 February 2011 the Tribunal ordered:

The respondent having advised the tribunal he has been declared bankrupt, the tribunal orders:

 1. The proceeding is referred to an administrative mention on 10 March 2011 by which time the respondent must send to the tribunal and to the applicant's solicitors contact details for his trustee in bankruptcy, and the applicant must advise the tribunal and the respondent of its recommendations for the further conduct of the proceeding.

Note:

You should respond to the administrative mention in writing (by fax or letter) by the above date advising the current status of this matter. You are not required to attend the tribunal on this date.
- 7 In response:
 - a) the Second Respondent provided the required details in a letter dated 1 March 2011
 - b) the Solicitors for the Applicant claimed that there is no impediment to the claim proceeding against the Second Respondent in a letter dated 9 March 2011
- 8 On 15 March 2011 the Tribunal ordered

The proceeding is referred to a directions hearing on 29 March 2011 commencing at 2:15 p.m. at 55 King Street Melbourne to consider the matters raised in the Applicant's correspondence dated 9 March 2011 – allow 1 hour.
- 9 The Applicant appeared before me on 29 March 2011 and there was no appearance by or on behalf of either Respondent.

THE CLAIM AGAINST THE FIRST RESPONDENT

- 10 In her “Statement of Claim” the Applicant states her claim in relation to the First Respondent arises by contravention of s 32 of the *Sale of Land Act* 1962 and warranties as to the carrying out of domestic building works.
- 11 The Applicant alleges the First Respondent carried out domestic building work on the property and (inter alia) that workmanship “was undertaken by an amateur and possibly without a building permit as there appear to be too many structural issues” paragraph 8(a)(viii).

THE CLAIM AGAINST THE SECOND RESPONDENT

- 12 The Applicant alleges that the Second Respondent is a registered building practitioner and (at paragraph 20 of the claim) failed to
- a) inspect the roof of the property
 - b) disclose in the Building Report that
 - (i) alterations had been performed on the Property;
 - (ii) some internal walls in the kitchen, meals and family rooms had been removed;
 - (iii) the roof over the kitchen, meals and family rooms was not adequately supported;
 - (iv) the roof hanging beams had been cut to install a skylight void and no supports were provided; and
 - (v) the workmanship of the alterations on the Property was undertaken by an amateur and possibly without a permit, and that there were many structural issues with the workmanship.
- 13 By reason of the allegations the Applicant states that “the Second Respondent breached his duty of care to the Applicant in that he negligently failed to exercise special care or skill in preparing” his report.
- 14 Further or in the alternative the Applicant states in paragraph 23 that by providing the report the Second Respondent represented to the Applicant that:
- a) he inspected all reasonably accessible parts of the Property;
 - b) there are no visible defects to the Property; and
 - c) the Property was fit for purchase by the Applicant.
- 15 The Applicant states the Representations were made in trade or commerce within the meaning of section 3 of the *Fair Trading Act 1999* and
- 25. In reliance on the Representations and induced thereby, the Applicant purchased the Property.
 - 26. The Representations were false and misleading.

Particulars

The Second Respondent did not inspect all reasonably accessible parts of the Property because he did not inspect the roof.

There were visible defects to the Property.

The Property was not fit for purchase by the Applicant.

The Applicant otherwise refers to and repeats the particulars to paragraph 8(a) above.

27. In the circumstances, the Second Respondent engaged in conduct that was misleading and deceptive or likely to mislead and deceive, in contravention of section 9(1) of the *Fair Trading Act 1999*.

LEGAL CONTENTIONS OF APPLICANT

- 16 The claim made in negligence commences to run from the date when the damage came into existence - *Pirelli v Oscar Faber & Partners* [1983] 2 AC1.
- 17 The claim made under the *Fair Trading Act 1999* (based upon similar legislation under the *Trade Practices Act 1974* (Cth) as relevant to this claim) occurs when the loss becomes actual and not when the plaintiff enters into the contract that exposes a contingent liability - *Wardley Australia Ltd v Western Australia* (1992) 175 CLR 154.
- 18 Under both claims the Applicant alleges the relevant date to be on or about 5 May 2010 a date later than the date the Second Respondent became a bankrupt (10 February 2010).
- 19 The Applicant alleges that the two cases (being the only cases cited) provide all that is necessary to establish that both causes of action are not provable debts and fall outside the bankrupt estate of the Second Respondent.
- 20 In the *Wardley* case Mason C.J., Dawson, Gaudron and McHugh JJ said (page 527)
- “When a plaintiff is induced by a misrepresentation to enter into an agreement which is, or proves to be, to his or her disadvantage, the plaintiff sustains a detriment in a general sense on entry into the agreement. That is because the agreement subjects the plaintiff to obligations and liabilities which exceed the value or worth of the rights and benefits which it confers upon the plaintiff. But, as will appear shortly, detriment in this general sense has not universally been equated with the legal concept of "loss or damage". And that is just as well. In many instances the disadvantageous character or effect of the agreement cannot be ascertained until some future date when its impact upon events as they unfold becomes known or apparent and, by then, the relevant limitation period may have expired. To compel a plaintiff to institute proceedings before the existence of his or her loss is ascertained or ascertainable would be unjust. Moreover, it would increase the possibility that the courts would be forced to estimate

damages on the basis of likelihood or probability instead of assessing damages by reference to established events. In such a situation, there would be an ever-present risk of undercompensation or overcompensation, the risk of the former being the greater”

21 And at page 533

The conclusion which we have reached is reinforced by the general considerations to which we referred earlier. It is unjust and unreasonable to expect the plaintiff to commence proceedings before the contingency is fulfilled. If an action is commenced before that date, it will fail if the events so transpire that it becomes clear that no loss is, or will be, incurred. Moreover, the plaintiff will run the risk that damages will be estimated on a contingency basis, in which event the compensation awarded may not fully compensate the plaintiff for the loss ultimately suffered. These practical consequences which would follow from an adoption of the view for which the appellants contend outweigh the strength of the argument that the principle applicable to the cases in which the plaintiff acquires property (or a chose in action) should be extended to cases where an agreement subjects the plaintiff to a contingent loss. In such cases, it is fair and sensible to say that the plaintiff does not incur loss until the contingency is fulfilled.

22 *Wardley* related to an indemnity which “generates an executory and contingent liability upon the part of the respondent, the respondent suffered no loss until that contingency was fulfilled and time did not begin to run until that event” (page 534).

DISCUSSION OF LEGAL CONTENTIONS OF APPLICANT

23 In my view the cases cited by the Applicant do not assist in determining the matters before me.

24 Firstly, bankruptcy was not an issue in the *Wardley* case.

25 Secondly, the claim in this application arises in contract, and/or for a breach of duty and/or for loss for contravention of an Act - not an indemnity.

26 Notwithstanding the differences, as in *Wardley's* case it would be impossible for the Applicant to be aware of any actual liability owed to her by the Second Respondent until there was a manifestation of some loss that occasioned her to question the validity of the report. She is surely not obliged to “second guess” the report even if she became aware of the bankruptcy of the Second Respondent prior the manifestation of any damage giving rise to a claim.

27 Further, as in *Wardley's* case prima facie it would be “unjust and unreasonable to expect the plaintiff to commence proceedings before the contingency is fulfilled”.

28 However the Second Respondent is bankrupt and s82 *Bankruptcy Act 1966 (Cth)*- (as relevant in this case) provides

- (1) Subject to this Division, all debts and liabilities, present or future, certain or contingent, to which a bankrupt was subject at the date of the bankruptcy, or to which he or she may become subject before his or her discharge by reason of an obligation incurred before the date of the bankruptcy, are provable in his or her bankruptcy.
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- (2) Demands in the nature of unliquidated damages arising otherwise than by reason of a contract, promise or breach of trust are not provable in bankruptcy.
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- (4) The trustee shall make an estimate of the value of a debt or liability provable in the bankruptcy which, by reason of its being subject to a contingency, or for any other reason, does not bear a certain value.
- (5) A person aggrieved by an estimate so made may appeal to the Court not later than 28 days after the day on which the person is notified of the estimate.
- (6) If the Court finds that the value of the debt or liability cannot be fairly estimated, the debt or liability shall be deemed not to be provable in the bankruptcy.
- (7) If the Court finds that the value of the debt or liability can be fairly estimated, the Court shall assess the value in such manner as it thinks proper.
- (8) In this section, liability includes:
- (a) compensation for work or labour done;
 - (b) an obligation or possible obligation to pay money or money's worth on the breach of an express or implied covenant, contract, agreement or undertaking, whether or not the breach occurs, is likely to occur or is capable of occurring, before the discharge of the bankrupt; and
 - (c) an express or implied engagement, agreement or undertaking, to pay, or capable of resulting in the payment of, money or money's worth, whether the payment is:
 - (i) in respect of amount--fixed or unliquidated;
 - (ii) in respect of time--present or future, or certain or dependent on a contingency; or
 - (iii) in respect of the manner of valuation--capable of being ascertained by fixed rules or only as matter of opinion.

- 29 Thus the indemnity in *Wardley* as expressed by their Honours as being an “executory and contingent liability” would be capable of being subject to a proof of debt and provable in the bankrupt estate.
- 30 The question is whether the duty owed or statutory liability in this case should be classed as a contingent liability and be provable in the bankrupt estate (and exclude the jurisdiction of this Tribunal) or remain outside the estate.
- 31 In *Coventry v Charter Pacific Corporation Limited* [2005] HCA 67, Gummow, Kirby, Hayne and Callinan JJ said
70. What is revealed by the analysis of decided cases recorded in the preceding pages of these reasons is that s 82(2) (*Bankruptcy Act 1966 (Cth)*) and its legislative predecessors stopped short of providing that “the bankrupt is to be a freed man - freed not only from debts, but from contracts, liabilities, engagements, and contingencies of every kind” (emphasis added)[71]. Some claims stand outside the reach of the statute. Although consideration of the application of the set-off provision required the inclusion, within the class of debts provable in bankruptcy, of those claims for unliquidated damages for fraudulent misrepresentation which had induced the making of a contract between the bankrupt and the claimant, the words of the section were not and are not to be stretched to encompass every other kind of claim which a person may have against the bankrupt.
71. The claim in the present matter was a statutory claim. The relevant question is whether that claim is a demand arising “otherwise than by reason of a contract [or] promise”. What the fraudulent misrepresentation cases of *Jack v Kipping* and *Re Giles* show is that claims of the kind made in this case (for unliquidated damages for misleading or deceptive conduct which induced the party misled to make a contract with a party *other than the bankrupt*) are claims arising otherwise than by reason of a contract. They are claims of a kind which s 82(2) provides are not provable. By contrast, however, claims for unliquidated damages for misleading or deceptive conduct inducing the making of a contract with the bankrupt are claims arising by reason of a contract. They are provable. To the extent to which *Aliferis* held to the contrary, it should be overruled.

CONCLUSION - THE CLAIMS UNDER THE FAIR TRADING ACT 1999

- 32 As pleaded by the Applicant there is a claim for loss under s159 of the *Fair Trading Act 1999* (that became apparent after the bankruptcy) for a contravention of that Act in that the Second Respondent engaged in misleading or deceptive conduct which induced her, as misled, to make a contract with a party other than the bankrupt.

- 33 As discussed in the *Coventry* case that is a claim “arising otherwise than by reason of a contract.... of a kind which s82 *Bankruptcy Act 1966 (Cth)* provides are not provable” [71] in the estate of the bankrupt.
- 34 Accordingly that part of the claim made under s159 of the *Fair Trading Act 1999* remains outside the bankrupt estate of the Second Respondent and is justiciable before the Tribunal.
- 35 In the “Statement of Claim” there may be a discernable general claim in contract for which the Tribunal would normally have jurisdiction under s107 of the *Fair Trading Act 1999* and following.
- 36 If there is such a claim it is capable of being provable in the bankrupt estate and therefore not justiciable before the Tribunal.

CONCLUSION - THE CLAIM IN NEGLIGENCE

- 37 There is conflicting authority relating to claims for unliquidated damages arising in contract and tort – as in this case a professional (who should be insured but apparently was not) being sued for negligence arising out of a retainer (contract) for a pre purchase report (see *Australian Bankruptcy Law and Practice* 1-4083).
- 38 On the one hand the claim only arises as a result of the retainer and on the other the claim arises by virtue of a duty which only becomes actionable when there is discovery of a breach.
- 39 As the authors of *Australian Bankruptcy Law and Practice* point out the High Court in the *Coventry* case at [66] states that “the framing of a case as a claim in tort does not conclude the question whether the demand arises by reason of a contract or promise”. In effect it is not a pleading point that characterises the claim but rather a statutory test. [69]
- 40 On that basis it seems to me that the claim for negligence in this case is a contingent liability arising out of a contract caught by s82 and subject to being capable of a proof of debt, provable in the Second Respondent’s bankrupt estate.
- 41 That is so even though in the words of their Honours in *Coventry* it compels “a plaintiff to institute proceedings before the existence of his or her loss is ascertained or ascertainable” and I should add in this case in circumstances where the Applicant was not aware of any loss until after the date of bankruptcy.
- 42 Having regard to the bankruptcy of the Second Respondent, the claim in negligence as currently pleaded is not justiciable before the Tribunal.

SENIOR MEMBER M. LEVINE