VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

DOMESTIC BUILDING LIST VCAT REFERENCE NO. D266/2005

CATCHWORDS

Section 75 application - strike out or dismissal of unjustified proceedings – domestic building work – contract with building company to carry out work – work carried out negligently – claim against director of building company in negligence – duty of care must be shown – *Bryan v Maloney* - whether director owes duty of care to customer of building company or subsequent owner – whether director liable for torts committed by company – relevant principles – *Johnson Matthey v Dascorp* - assumption of personal responsibility by director must be shown – what is assumption of responsibility – director not a joint tortfeasor with company – misleading and deceptive conduct – representations alleged not made by director – Fair Trading Act 1999 – s.143(1) – binding authority that it applies only to proceedings for an offence and not to a claim in damages – would not apply anyway – s.145 – not alleged that director knowingly involved in the alleged contraventions – proceedings dismissed

APPLICANT	George Korfiatis
FIRST RESPONDENT	Tremaine Developments Pty Ltd (ACN 005 373 268)
SECOND RESPONDENT	Andreas Ktori
THIRD RESPONDENT	Des Holmes Architects Pty Ltd (ACN 006 050 979)
FOURTH RESPONDENT	Wayne Spencer & Partners Pty Ltd (ACN 066 316 461)
FIFTH RESPONDENT	Anton Burggraf (Stayed until final determination 12/2/07)
SIXTH RESPONDENT	Nicki Babatsikos (Stayed until final determination 12/2/07)
SEVENTH RESPONDENT	Precision Building Consultants (Stayed until final determination 12/2/07)
WHERE HELD	Melbourne
BEFORE	Senior Member R. Walker
HEARING TYPE	Application to dismiss proceedings under s.75
DATE OF HEARING	7 December 2007
DATE OF ORDER	29 February 2008
CITATION	Korfiatis v Tremaine Developments Pty Ltd (Domestic Building) [2008] VCAT 403

ORDER

1. The proceeding against the Second Respondent is dismissed.
2. Costs reserved.

SENIOR MEMBER R. WALKER

APPEARANCES:

For the Applicant	Mr J. Forrest of Counsel
For the First Respondent	No appearance
For the Second Respondent	J. Nixon of Counsel
For other Respondents	No appearance

REASONS

The application

1 This is an application brought with respect to three related proceedings that raise substantially identical issues. In each proceeding, the Second Respondent ("Ktori") seeks to strike out or dismiss the claim against him pursuant to s75 of the *Victorian Civil and Administrative Tribunal Act* 1998. That section (where relevant) says as follows:

> "(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."

2 The manner in which this section should be applied has been discussed in numerous cases which adopted an interpretation by Deputy President Mackenzie *in Norman v Australian Red Cross Society* (1998) 14 VAR 243 of a very similar provision in the *Equal Opportunity Act 1995*. In that case, the learned Deputy President said:

> "The Tribunal should exercise caution before summarily terminating a proceeding. It should only do so if the proceeding is so obviously hopeless, obviously unsustainable

in fact or in law or on no reasonable view can justify relief, or is found 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 a respondent can show a good defence sufficient to warrant summary determination of a proceeding".

The facts

3 In each of the three cases the Applicants contracted with a building company, Tremaine Developments Pty Ltd ("Tremaine") for Tremaine to construct a town house in Port Melbourne. The three town houses were adjoining and constructed together on land owned by Gerasimos and Stamata Korfiatis, the applicants in proceeding D269/2005. It is alleged that the work was done defectively and it is common ground that the construction was never completed. Damages are sought by the Applicants against Tremaine but since it is now in liquidation that claim cannot proceed. The claims against the other Respondents apart from Ktori have been settled. Ktori is a registered building practitioner and is and was at material times a director of Tremaine.

The "pleadings"

4 By its Amended Points of Claim the Applicants set out the following causes of action against Ktori:

35. "Further or alternatively, Ktori, in his capacity as the director of Tremaine:

35.1 Directed Tremaine to carry out the works the subject of the contract on the property; alternatively

35.2 Procured and directed Tremaine to carry out the works the subject of the contract on the property:

PARTICULARS

(a) The building permit issued by the Sixth and Seventh Respondents identified the registered builder as Ktori;

(b) The contract was executed by the builder's son, Hector Ktori, who had actual or ostensible authority to execute the contract on behalf of Tremaine which authority had been provided to him by Ktori;

(c) Tremaine performed the works the subject of the contract between September 2003 and November 2004. Between September 2003 and approximately August 2004 Ktori was the registered building practitioner and without him, the performance of the works the subject of the contract would have been in breach of s176(2)(a) of the *Building Act* 1993 ("the Act') pursuant to s176(4) of the Act;

(d) Ktori's son, Hector Ktori, had actual or ostensible authority to execute the contract on behalf of Tremaine which authority had been provided to him by Ktori;

(e) Ktori physically performed some of the works undertaken by Tremaine on the property.

PARTICULARS

(i) Ktori regularly attended the property himself from time to time;

(ii) Ktori physically jack hammered the bluestone foundations on a neighbouring property due to the footing protruding into the property in preparation for the pouring of the concrete slab;

(iii) Ktori assisted the concreter, Andrew Verocchi, with the lifting, placement and positioning of the concrete panels for the basement in or about February 2004;

(iv) Ktori applied a protection board to the outside of the basement panels;

(v) Ktori applied tape to the joins of the basement panels prior to the back filling of the basement;

(vi) Ktori assisted the plumber with the construction of agricultural drains for the construction of the basement;

(vii) Ktori undertook the backfilling of the basement;

(viii) Ktori demolished brick walls under the direction of the architect and reconstructed them;

(f) Ktori attended the property from time to time.

(g) Ktori regularly attended the property from time to time to oversee and supervise the works on the property.

PARTICULARS

Ktori supervised and oversaw the performance of Tremaine's subcontractors when he attended the property from time to time whilst the subcontractors' works were being performed. The subcontractors' works he supervised and oversaw included:

(i) The concretor, Andrew Verocchi, with respect to the excavation of the basement

(ii) The concretor, Andrew Verocchi with respect to the casting, lifting and erection of panels;

(iii) The drilling of dowells into the concrete slab;

(iv) The application of the "Emer-proof" coating to the exterior of the panels prior to the backfilling of the basement panels with the plumber who had been contracted by Tremaine;

(v) The block laying and brickwork undertaken by Tremaine's subcontractors;

(vi) The plumbing works undertaken by the plumber retained by Tremaine;

(vii) The carpenter employed by Tremaine to construct the frame.

(h) Ktori regularly attended meetings and discussed the works with the architect and the owner from time to time.

(i) Ktori appointed his son Hector to supervise and perform building works for and on behalf of Tremaine notwithstanding that Hector Ktori was not a registered building practitioner.

(j) Ktori discussed and arranged for the attempted rectification of defects that had been identified by the architect in its lists of defects from time to time during the performance of the works.

35.3 Procured and directed Tremaine to carry out the works subject to the contract on the property in contravention of s176(2)(A) and s176(4) of the Act.

PARTICULARS

Ktori's registration as a domestic builder was suspended between approximately August 2004 and November 2004. However Tremaine continued to carry out the works. Between August 2004 and November 2004 Ktori was purporting to perform rectification works and organised the performance of rectification works as directed by the architect from time to time.

36. Tremaine carried out the works on the property negligently and defectively.

PARTICULARS

The owner refers to the schedule of breaches of contract and duty of care by Tremaine attached hereto.

37. As a result of the negligent and defective works performed by Tremaine the owner has suffered loss and damage.

PARTICULARS

The owners refer to paragraph 21 and 38. Further, Ktori directed and procured the performance of the works by Tremaine which were performed negligently and defectively.

38. Further, Ktori directed and procured the performance of the works by Tremaine which were performed negligently and defectively.

PARTICULARS

The owner refers to the schedule of breaches of the contract and duty of care by Tremaine attached hereto. Otherwise the owner refers to and repeats paragraph 35 herein.

39. In the circumstances, Ktori:

(a) is liable as a joint or several primary tortfeasor for the loss and damage suffered by the owner;

(b) Alternatively is liable as a joint or several primary tortfeasor for the losses suffered by the owner;

(c) Alternatively (b) is liable as a joint or several primary tortfeasor for accessorial or civil secondary liability for the loss and damages suffered by the owner.

PARTICULARS

The owner refers to paragraph 21.

40. Further or alternatively Ktori knowingly authorised and permitted Tremaine to make the representations.

PARTICULARS

Ktori gave his son Hector Ktori actual and/or implied authority to negotiate with the owner in respect of entering into the contract and to make the representations. Hector Ktori introduced his father to George and Jim Korfiatis at another building site where Tremaine was carrying out building works.

41. In the circumstances pursuant to s143 of the *Fair Trading Act* 1999 Ktori is deemed to have contravened sections 9 and 4 of the *Fair Trading Act* 1999.

42. As a result the owner has suffered loss and damage and is entitled to damages pursuant to s159 of the *Fair Trading Act* 1999.

PARTICULARS

(a) Had the representations not been made the owner would not have entered into the contract with Tremaine and entered into a contract with an alternative tenderer. Tremaine's tender was the lowest tender that the owner had received. The second lowest tender was provided by Combuild in the sum of $991,866.00 plus GST or on about 15 October 2001 in respect of the works. The Applicant would have entered into an agreement with Combuild for the contract sum of $991,866 plus G.S.T. As a result of the works being performed by Combuild the defective and negligent works performed by Tremaine are referred to in paragraph 15 would not have occurred and the owner would not have had to undertake any of the rectification of negligent and defective works referred to in paragraph 21. Therefore the loss and damage suffered by the owner is compensation for the cost of rectifying the negligent and defective works referred to in paragraph 21 less the additional amount that the Applicant would have to pay Combuild to carry out the works.

(b) Alternatively had the representations not been made the owner would not have entered into the contract with Tremaine and not undertaken any works at all on the property. Therefore the loss and damage suffered by the owner as compensation for *[particulars of the cost and rectification are then set out]*."

The causes of action

5 This is not a court of pleading. Natural justice requires a party to be fully apprised of the case that he has to meet and so documents akin to pleadings are used for that purpose and are even occasionally referred to as pleadings. However they are not pleadings in the court sense and this is not a pleading summons. It is a serious matter to strike out or dismiss a party's case without a full hearing and for the purpose of this sort of application I should give the documents which articulate that case a beneficial interpretation (*Norman*).

6 There are two causes of action brought against Ktori. The first is in negligence and the second is for misleading and deceptive conduct in breach of the *Fair Trading Act 1999*. Ktori can only succeed in his application under s.75 insofar as I am satisfied that the claims made against him are manifestly hopeless and have no chance of success. To that extent he is entitled to an order which will obviously spare him the burden of having to defend a case which should not have been brought against him. Otherwise the Applicant is entitled to have his case heard at a full hearing.

Negligence

7 In regard to the claim in negligence, it is asserted that Ktori directed Tremaine to do the work. The contract was signed on behalf of Tremaine by his son but Ktori was the registered builder and a director of Tremaine. For Tremaine to have been able to lawfully enter into the building contract it was necessary for one of its directors to be a registered builder (*Building Act 1993 s.169(1) and s.176(2A) & (4)*). However, the party contracting to do the work was Tremaine, not Ktori.

8 Mr Dixon points out, correctly, that the present claim does not suggest that Ktori owed the Applicants a duty of care himself but for the purpose of this application I will consider that possibility. I should not dismiss a proceeding that might survive if articulated differently. It is suggested that Ktori was responsible for Tremaine's negligence. It is trite that, for a claim in negligence to succeed there must be a duty of care owed to the Plaintiff by the alleged tortfeasor and also a breach of that duty. The acts or omissions said to constitute a breach of a duty of care do not in themselves amount to a tort. There must also be a duty of care that has been breached.

9 In this case, the Applicants seek to prove that Ktori did the acts or omissions that are said to have amounted to a breach of duty but Ktori denies that he owed the Applicants any duty of care. Whether Ktori himself owed a duty of care to the Applicants and whether Tremaine owed a duty of care to them are quite separate questions.

Did Ktori himself owe the Owners a duty of care?

10 In *Bryan v Moloney* (1995) 128 ALR 163 the defendant was a builder who built a house on inadequate foundations. The original owner for whom the house was built sold it to someone else who in turn sold it to the plaintiff. As a result of the defective foundations the house required extensive repairs, the cost of which the plaintiff sought from the defendant. The High Court held that the defendant

owed a duty to subsequent owners of the house to use reasonable care in its construction. In the majority judgment, Mason CJ, Deane and Gaudron JJ said (at p. 165):

> "The cases in this Court establish that a duty of care arises under the common law of negligence of this country only where there exists a relationship of proximity between the parties with respect to both the relevant class of act or omission and the relevant kind of damage. In more settled areas of the law of negligence concerned with ordinary physical injury to the person or property of a plaintiff caused by some act of the defendant, reasonable foreseeability of such injury will commonly suffice to establish that the facts fall into a category which has already been recognized as involving a relationship of proximity between the parties with respect to such an act and such damage and as "attracting a duty of care, the scope of which is settled". In contrast, the field of liability for mere economic loss is a comparatively new and developing area of the law of negligence. In that area, the question whether the requisite relationship of proximity exists in a particular category of case is more likely to be unresolved by previous binding authority with the consequence that the "notion of proximity ... is of vital importance". As Stephen J indicated in Caltex Oil (Australia) Pty. Ltd. v. The Dredge "Willemstad", it is the "articulation", in the different categories of case, "of circumstances which denote sufficient proximity" with respect to mere economic loss, including "policy considerations", which will gradually provide "a body of precedent productive of the necessary certainty". Inevitably, the policy considerations which are legitimately taken into account in determining whether sufficient proximity exists in a novel category will be influenced by the courts' assessment of community standards and demands." [footnotes omitted]

11 As to proximity in the case before them they said (at p.172):

> "Upon analysis, the relationship between builder and subsequent owner with respect to the particular kind of economic loss is, like that between the builder and first owner, marked by the kind of assumption of responsibility and known reliance which is commonly present in the categories of case in which a relationship of proximity exists with respect to pure economic loss. In ordinary circumstances, the builder of a house undertakes the responsibility of erecting a structure on the basis that its footings are adequate to support it for a period during which it is likely that there will be one or more subsequent owners. Such a subsequent owner will ordinarily have no greater, and will often have less, opportunity to inspect and test the footings of the house than the first owner. Such a subsequent owner is likely to be unskilled in building matters and inexperienced in the niceties of real property investment. Any builder should be aware that such a subsequent owner will be likely, if inadequacy of the footings has not become manifest, to assume that the house has been competently built and that the footings are in fact adequate."

12 There was an undertaking of responsibility in this case, Tremaine undertook responsibility to construct the town houses in accordance with the documents. That obligation was assumed by contract in exchange for the Applicants' agreements to pay the contract price. The extent of the obligation assumed was delineated by the contract documents and the terms implied by s.8 of the

*Domestic Building Contracts Act 199*5. The obligation in each case was to the relevant Applicant or Applicants.

13 However Ktori has undertaken no such responsibility. His responsibility for what he did and did not do was to Tremaine. Tremaine had undertaken responsibility for all of the work but it is not alleged that Ktori did anything more than parts of the work and any "undertaking" by him to do those parts was given to Tremaine. Other tradesmen were employed to do most of the work and they also undertook that on behalf of Tremaine. As to supervision, it is not alleged that Ktori was the only person supervising the work on behalf of Tremaine. His son Hector was also involved and, according to the documents filed, to a greater extent than Ktori was. There was therefore no undertaking of responsibility by Ktori to the Applicants.

14 There was certainly reliance by the Applicants but that was a reliance upon Tremaine to do what it had agreed to do, not on each and every tradesman who worked on the site. This is obvious from the very nature of a project where different types of work are done by different people, most of them skilled in their own areas and some of them specially licensed to do work of that nature. Each of them is liable in contract to the builder to do an agreed scope of work. What one tradesman does not do, another might be engaged to do. Where one starts and another finishes is determined by the builder who has undertaken overall responsibility to the owner for the whole of the work.

15 In addition, it was agreed between the Applicants and Tremaine that the work would be done by Tremaine. The Applicants knew they were dealing with a limited liability company and there was no agreement by Ktori that he would guarantee that Tremaine would perform its obligations.

16 A duty of care may be specifically assumed between a director and the company's customer, as in *Furline Shipping Corporation v Adamson* [1975] QB 180 where the director assumed a duty of care as a baillee. In the New South Wales case of *Surprises Tsaprazies v Goldcrest Properties Pty Ltd* (2000) 18 ACLC 285, it was held that a director of a lessor is not personally liable for a breach of a duty of care owed by the lessor to the lessee that the landlord not breach its lease. Hodgson CJ said (at para 15 of the Judgment):

> **"**It is pertinent to note that there would generally be a problem with a director contracting with a third party that he or she would cause the company to perform the obligations of the company under a contract with that third party. Certainly, if a director received consideration in return for such a promise, this would be a secret commission, unless the consideration was received with the informed consent of the company, and in situations of insolvency, possibly the informed consent of creditors. Even if there were such informed consent, it seems to me that a direct promise to act as a director in a particular way, where the director's obligation is to act bona fide in the interests of the company in all situations, may itself be a breach of fiduciary duty. It would be a breach of fiduciary duty to perform that promise if that performance was not itself in accordance with the fiduciary duty of the director.

> In my opinion, if all that is alleged is that the director knows of a contract by the company, knows of circumstances such that the other party would be severely damaged by breach of that contract, and has the power to ensure that the company does not breach its contract, then this is plainly insufficient to give rise to a duty to exercise reasonable care to ensure that the company fulfils its contract. However, could it perhaps be otherwise if the director by some positive act substantially contributes to the circumstances which make the other party so vulnerable?
>
> It is possible that a director of a company who takes some positive action, knowing that it will bring about a situation where a person who has a contract with the company will suffer substantially greater loss if the company breaks its contract, could come under a duty to exercise reasonable care to ensure that the company fulfils its contract. The important elements here, I believe, would be the positive action, substantially increasing the vulnerability of the other party, taken in actual knowledge of this effect."

17 It is not suggested here that there was any positive action by Ktori substantially increasing the loss to the Applicants if Tremaine were to break the contract. It is only suggested that he did those parts of the work detailed in the Amended Points of Claim.

18 For these reasons I find that there was no duty of care owed by Ktori to the Applicants or to any of them. Indeed, the Applicants did not allege that there was.

The duty of care of Tremaine.

19 On the other hand Tremaine did assume responsibility for the whole of the work and the Applicants did rely upon it to carry out the work without negligence. It seems clear from the comments in *Bryan v Maloney* that it did have a duty of care in tort. This would be co-extensive with its contractual duty because it was the contact that defined the extent of its undertaking and there was no other undertaking given by Tremaine apart from the contract. For the purpose of this application I should assume that the Owners will be able to prove a breach by Tremaine of that duty of care. Is Ktori responsible together with Tremaine for the negligence of Tremaine thus established?

Responsibility of directors

20 A company acts as its directors dictate but that does not necessarily mean that a tort committed by a company has also been committed by its directors. It is trite law that a company has a legal personality distinct from its members *(Salomon v Salomon & Co Ltd* [1897] AC 92). If a company breaches a contract, the proceedings for breach of contract must generally be taken against the company, not the director who caused it to be in breach. In *Said v Butt* [1920] 3 KB 497 Mc Cardie J said (at p. 506):

> "I hold that if a servant acting bona fide within the scope of his authority procures or causes the breach of a contract between his employer and a third person, he does not thereby become liable to an action of tort at the suit of the person whose contract has thereby become broken."

21 However his Honour added shortly afterwards:

> "Nothing that I have said today is, I hope, inconsistent with the rule that a director or servant who actually takes part in or who actually authorises such torts as assault, trespass to property, nuisance, or the like may be liable in damages as a joint participant in one of such recognised heads of tortious wrong."

22 Quite obviously, if I assault someone it is no answer to the ensuing legal action for me to say that, at the time of the assault, I was acting as a director of a company. The company as my principal or employer might also be liable to the victim of the assault but that will not relieve me of my separate liability as the perpetrator of the tortious act. What I did, in itself, constituted a tort. But in the present case there was no independent tort committed by Ktori. It was Tremaine that committed the tort (assuming for present purposes that this is proven) because it was only Tremaine that owed the duty of care that was breached. In what circumstances is a director, whose company commits a tort, personally liable for the company's tort? The law in this area is unsettled.

The authorities

23 The principal authority in Victoria is *Johnson Matthey (Aust) Pty Ltd v Dascorp Pty Ltd & Ors* (2003-2004) 9 VR 171. In that case a claim was successfully made against a company that had purchased the Plaintiff's gold from a thief. Proceedings were also taken against the two directors of the company. It was found that the two directors had not themselves purchased the gold and so were not primarily liable in conversion but were nonetheless liable in regard to some of the transactions where they had either taken possession of the gold or directed that to occur. The case was one in conversion but its value for present purposes lies in the very lengthy judgement of Redlich J, who exhaustively examined the authorities concerning liability in tort of directors of companies. In paragraph 198 (p.227) he said:

> "Both in Australia and in England a director is in no different position to an agent, who whilst binding their principal may also be liable for their tortious acts. The defendant's submission that Mr and Mrs Secchi cannot be held liable for their conduct as directors because their acts are those of those of the corporation, expressed in such absolute terms, must be rejected. This does not mean that directors become personally liable merely because they are directors. Unless they procure or direct the tortious conduct the law does not impose upon them liability for the acts of other agents or employees, whether they are directors of large corporations or what is described as "one man" companies."

24 His Honour considered that a breach of the duty was not a necessary element of a director's secondary liability for the wrongful conduct of the corporation (see p. 226) but it is important to note that his Honour was there talking of a breach of the duty that a director owes to the company (see the reference to *King v Milpurra* (p.225). He was also dealing with a tort, conversion, which is not based upon a breach of duty).

25 In the course of his judgment his Honour referred to a number of cases which contain some useful comments as to the relevant principles.

26 In *Pioneer Electronics Australia Pty Ltd v Lee* (2001) 108 FCR 216, Sundberg J said (at p. 233):

> "The law on the personal liability of a director for corporate torts is in an uncertain state. There seem to be at least four views having judicial support.
>
> 1. A director will be liable along with the company when he has procured or directed it to commit the tort: *Performing Right Society Ltd v Cyril Theatrical Syndicate Ltd* [1924] 1 KB 1 at 14; *Kalamazoo (Aust) Pty Ltd v Compact Business Systems Pty Ltd* (1985) 84 FLR 101 at 127; *Martin Engineering Co v Nicaro Holdings Pty Ltd* (1991) 100 ALR 358; *Microsoft Corp v Auschina Polaris Pty Ltd* (1996) 142 ALR 111; *Lott v JWB & Friends Pty Ltd* [2000] SASC 3; *Henley Arch Pty Ltd v Clarendon Homes (Aust) Pty Ltd* (1998) 41 IPR 443 at 464.
>
> 2. A director will be liable only if he has made the wrongful act his own as distinct from it being an act of the company: *Mentmore Manufacturing Co Ltd v National Merchandising Manufacturing Co Inc* (1978) 89 DLR (3d) 195; *White Horse Distillers Ltd v Gregson Associates Ltd* [1984] RPC 61 at 91; *King v Milpurrurru* (1996) 136 ALR 327 at 346-351.
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> 3. A director will be liable if he has assumed responsibility for the company's acts: *Trevor Ivory Ltd v Anderson* [1992] 2 NZLR 517.
>
> 4. A director is not liable for procuring the company to infringe the rights of others: *Said v Butt* [1920] 3 KB 497; *O'Brien v Dawson [1942] HCA 8;* (1942) 66 CLR 18 at 32, 34; *Rutherford v Poole* [1953] VLR 130; *Root Quality Pty Ltd v Root Control Technologies Pty Ltd* [2000] FCA 980."

27 In the present case it is said that Ktori directed and procured Tremaine to carry out the work but it is not, and could not sensibly be, suggested specifically that he directed or procured that it be carried out negligently. The implication seems to be that, because Ktori directed and procured Tremaine to carry out the work (para 35) and because Tremaine carried it out negligently (para 36), he is somehow liable. The alternate claim (para 38) is that Ktori directed and procured the performance of the works by Tremaine and that those works were carried out negligently, which seems to be the same allegation expressed in other words. The document then proceeds to say (in para 39) that "In the circumstances…" Ktori is liable, as if that conclusion necessarily follows from what has gone before.

28 Since it is not claimed that Ktori directed and procured Tremaine to carry out the work negligently, the case is that he is responsible for its negligence in that he was the registered builder, he did some of the work himself (albeit not a great deal) and exercised some control over other work. For the purposes of this case the relevant line of authority is in paragraph 3 of the passage cited, which is concerned with the tort of negligence.

29 In *Trevor Ivory v Anderson* [1992] 2 NZLR 517, the Appellant was a director of a "one man company" that was retained by an orchardist to provide horticultural advice. The company by its director advised the orchardist to use a particular

herbicide which destroyed the orchardist's crop. The orchardist sued the company but also sued the director in negligence alleging that he failed to exercise reasonable care, skill and diligence in advising on the use of the spray. In rejecting the claim, the President of the Court, Sir Robin Cooke, said (at p.523):

> "…it behoves the courts to avoid imposing on the owner of a one man company a personal duty of care which would erode the limited liability and separate identity principles associated with the names of Salomon and Lee. Viewing the issue as one of assumption of a duty of care … I cannot think it reasonable to say that Mr Ivory assumed a duty of care to the plaintiffs as if he were carrying on business on his own account and not through a company".

30 In the same case, Hardie Boys J said (at p.527):

> ""An agent is in general personally liable for his own tortious acts: Bowstead on Agency (15th ed, 1985) at p 490. But one cannot from that conclude that whenever a company's liability in tort arises through the act or omission of a director, he, because he must be either an agent or an employee, will be primarily liable, and the company liable only vicariously. In the area of negligence, what must always first be determined is the existence of a duty of care. As is always so in such an inquiry, it is a matter of fact and degree, and a balancing of policy considerations. In the policy area, I find no difficulty in the imposition of personal liability on a director in appropriate circumstances. To make a director liable for his personal negligence does not in my opinion run counter to the purposes and effect of incorporation.
> ……Essentially, I think the test is, or at least includes, whether there has been an assumption of responsibility, actual or imputed. That is an appropriate test for the personal liability of both a director and an employee. It was the basis upon which the director was held liable in *Fairline Shipping Corporation v Adamson* [1975] QB 180, (see p 189), where the assumption of responsibility was virtually express. It may lie behind the finding of liability in *Centrepac Partnership v Foreign Currency Consultants Ltd* (1989) 4 NZCLC 64,940. Assumption of responsibility may well arise or be imputed where the director or employee exercises particular control or control over a particular operation or activity, as in *Adler v Dickson* [1955] 1 QB 158 (although there the issue did not arise, as it was a pre-trial decision on a different point of law). *Yuille v B & B Fisheries (Leigh) Ltd* [1958] 2 Lloyd's Rep 596 is another illustration. This is perhaps more likely to arise within a large company where there are clear allocations of responsibility, than in a small one. It arose however in the case of a small company in *Morton v Douglas Homes Ltd* [1984] 2 NZLR 548, 593ff; but not in a case to which I made some reference in my judgment in *Morton*, namely *Callaghan v Robert Ronayne Ltd* (Auckland, A 1112/76, 17 September 1979), a judgment of Speight J. It may be that in the present case there would have been a sufficient assumption of responsibility had Mr Ivory undertaken to do the spraying himself, but it is not necessary to consider that possibility."

31 In *Root Quality Pty Ltd v Root Control Techonology Pty Ltd* (2000) 177 ALR 231 Finkelstien J referred (inter alia) to these passages and said (at p265):

"*Trevor Ivory* concerned a claim in negligence against the director of a one-man company. The general rule is that a director who actually participates in a tort, such as assault, trespass to property, nuisance, negligence and the like, will be liable in damages. The point which troubled the court in *Trevor Ivory* may be confined to the case of a one-man company, that is to say a case where, unless some limitation were placed on the liability of a director, there would almost always be concurrent liability in both the corporation and the director. Such a situation may be undesirable. Whether this is so, however, is a very difficult question. Be that as it may, Trevor Ivory should not be regarded as authority for the proposition that it will only be in the case of "an assumption of liability" that a director or officer will be found liable for a personal tort: *Banfield v Johnson* (1994) 7 NZCLC 260,496. For present purposes, I would observe that the issues raised by *Trevor Ivory* will arise in acute form whenever there is an attempt to impose secondary liability on a director."

32 In *Johnson Matthey* Redlich J said concerning the *Trevor Ivory* case (at p.216) :

"With great respect to those who suggest otherwise, the judgements of each of the members of the Court of Appeal in *Trevor Ivory* appear confined to analysis of the elements required to establish liability by a director for economic loss dependent upon a personal duty of care by the director to the injured party. The assumption of responsibility, actual or imputed, as described by Hardie Boys J arises for consideration in the area of negligence where the existence of a duty of care must be determined. Hardie Boys J unequivocally stated (at p.530) the test be applied for other civil wrongs is different:

> "Where a director is said to have authorised, directed or procured the commission by his company, or indeed by an employee, the enquiry is rather different and the cases in that area such as *C Evans and Sons Limited v Spritebrand Limited* in the English Court of Appeal and *Kalamazoo (Aust) Pty Ltd v Compact Business Systems Pty Ltd* in the Supreme Court of Queensland are not really in point, save as a reminder of the need for care in fixing directors with negligence".

The decision in *Natural Life Health Foods* confirmed the application to directors of the "assumption of responsibility" test for third party economic loss claims in negligence which had previously been considered by the House of Lords in *Henderson v Merrett Syndicates Limited* [1994] 3 All ER 506."

33 His Honour then referred to the Court of Appeal decision of *Standard Chartered Bank v Pakistan National Shipping Corporation* (No 2) [2000] 1 All ER 1 in which it was held that for the Plaintiff to succeed against a director who had procured the fraudulently tender bills of lading containing false dates, it must be established that the director had conveyed "directly or indirectly to the Plaintiff that he assumed a personal responsibility towards the Plaintiff". His Honour said that that view had been criticised, and he referred with apparent approval to the Court of Appeal decision of *Essex Holdings Limited v Sincronette Limited* [2000] EWCL 60, where Potter LJ said (at paragraph 25):

"Whereas liability from negligence is a liability imposed in respect of inadvertent damage caused to one's neighbour and/or upon the postulate that the

> Defendant has assumed personal responsibility towards an injured claimant, liability in deceit is imposed on the basis of harm deliberately (or recklessly) caused by representor to a "targeted" representee".

34 After referring to these cases Redlich J said (at p.218)

> "If a director's assumption of responsibility is to be relevant in cases that do not involve dealings between the director and the injured third party, it is likely to arise where a director exercises particular control over an operation or activity. The assumption of responsibility might more readily be imputed where a director is so involved. Thus Hardie Boys J in *Trevor Ivory* thought that if a director had undertaken the spraying of the herbicide himself he would have assumed responsibility. This test of "control" had been previously suggested by Hardie Boys J *Morton v Douglas Homes Limited* [1984] 2 NZ LR 548 at 594. There his Honour expressed the view that the degree of control of a director provides a means of determining whether a director's personal carelessness may be likely to cause damage to a third party so that the director becomes subject to a duty of care. His Honour saw no difference in this respect between a director, a general manager or a more humble employee;
>
> > "Each is under a duty of care, both to those with whom he deals on the company's behalf and to those with whom the company deals insofar as that dealing is subject to his control"
>
> Such a formulation of liability depending as it does upon the direct level of involvement in control may result in the liability being co-extensive with the direct and procure tests".

35 In the case of *Morton v Douglas Homes Limited* that his Honour refers to, directors of a building company were found liable in negligence for defective foundations. The buildings in question were built on land filled with sawdust that, to the director's knowledge, required a particular foundation. The director negligently failed to ensure that the company implemented the engineer's instructions including an important one given to him personally. It was found that in the circumstances of that case the director had assumed a personal duty of care to the subsequent owners, that is, he was directly liable for his own tort.

36 In a negligence context, it is difficult to see how a director can assume responsibility for the company's acts vis á vis a customer of the company without at the same time assuming a direct duty to the company's customer to take reasonable care. Although it does not appear to be expressly stated in these terms in the cases, a director does not appear to be guilty of negligence unless he himself owed a duty of care to the person who suffered the loss.

37 In the House of Lords case of *Williams v Natural Life Foods* [1998] 2 All ER 577, the plaintiffs were induced to take a franchise of a health food business from the defendant company by certain negligent advice that it gave. They obtained judgment against the company for the resulting losses and also against the director of the company who had given the advice but the judgment against the

director was set aside on appeal. In a judgment with which the other members of the House agreed, Lord Steyn said (at p. 582):

> "In such a case where the personal liability of the director is in question, the internal arrangements between a director and his company cannot be the foundation of a director's personal liability in tort. The inquiry must be whether the director or anybody on his behalf, conveyed directly or indirectly to the prospective franchisees that the director assumed personal responsibility towards the prospective franchisees."

38 As to what did not amount to an assumption of risk in that case, his Lordship said (on p. 584):

> "Mr Mistlin owned and controlled the company. The company held itself out as having the expertise to provide reliable advice to franchisees. The brochure made clear that this expertise derived from Mr Mistlin's experience in the operation of the Salisbury shop. In my view these circumstances were insufficient to make Mr Mistlin personally liable to the plaintiffs."

39 As to the argument that the director was a joint tortfeasor with the company, his Lordship said (at p. 585):

> "A moments reflection will show that, if the argument were to be accepted in the present case, it would expose directors, officers and employees of companies carrying on business as providers of services to a plethora of new tort claims. The fallacy in the argument is clear. In the present case liability of the company is dependant on a special relationship with the plaintiffs giving rise to an assumption of responsibility. Mr Mistlin was a stranger to that particular relationship. He cannot therefore be liable as a joint tortfeasor with the company. If he is to be held liable to the plaintiffs, it could only be on the basis of a special relationship between himself and the plaintiffs. There was none."

Tribunal decisions

40 For completeness I must deal with some decisions on the point in this Tribunal to which I have been referred by counsel.

41 In *Perry v Binios &ors* [2006] VCAT 1604 the Applicant sought to join a director of a company that had allegedly entered into a contract with her to complete the construction of a house. Joinder was refused because the claim that the director, as distinct from his company, was liable, was not properly articulated.

42 In *Brien v Brighton Pool Shop Pty Ltd & anor* [2006] VCAT 1810 the Applicant sought damages from the director of a pool company with respect to a defectively constructed pool. The pool was constructed pursuant to an agreement entered into between the Applicant and the pool company. The director was not a party to that agreement. The claim against the director as dismissed. The Tribunal said:

> "I consider I would be disregarding numerous authorities if I were to proceed to hold the Second Respondent himself personally liable to pay such sum. The decision of Redlich J in *Johnson Matthey (Aust) Pty Ltd v Dascorp Pty Ltd* [2003] VSC 291, as I indicated to the parties, is not one which I consider I am bound to apply or should

> apply in the circumstances of this case. I agree with the substance of paragraph 4 of the Second Respondent's Defence. There are grounds for saying that the liabilities of directors needs to be reconsidered by Parliament but this is neither the time nor the place to engage in discussion of that issue. I do wish, however, to make it clear that, in the absence of statutory intervention, the time may arise, in some future case, where it is appropriate to hold directors of a company personally liable for the defaults of the company – especially if the company is put out of business to defeat rightful claimants. Or, if an individual is a director of several or numerous companies in a group deliberately structured to confuse and mislead the public."

43 In *Rosenthal, Munckton & Sields Pty Ltd v McGregor & anor* [2004] VCAT 2429, application was made by the owners to join the sole director of the builder as a party to the proceeding on the ground that he was the person with whom they dealt on behalf of the building company, he was the Registered Building Practitioner for the company for the job and, it was argued, he owed them a duty of care to do the work properly. The Tribunal considered *Johnson Matthey* and *Pioneer* and other authorities and concluded that the law was unsettled. Joinder was allowed on the basis that whether or not the director was personally liable was a matter for trial.

44 In *Cantar v Harper & ors* [2007] VCAT 650 money was owed to a subcontractor by a building company. An order was also made against the directors of the building company because it was found that they had assumed personal liability for the debt. That was a claim in contract and is of no assistance here.

45 In *Lawley v Terrace Designs Pty Ltd* [2006] VCAT 1363 a director of a building company was sued in negligence for the builder's defective workmanship. The claim was dismissed. Senior Member Young said (at para177)

> "Thus, I consider there must be something more than simply organising or even carrying out the work badly. There must be some act or behaviour of the director that is more than merely carrying out of his company duties, even if it results in a breach of contract or a failure by the company to fulfil its obligations. An intention to induce a company to breach its contract by a director does not incur liability; therefore, I do not see how a careless act by a director by itself can attract personal liability, unless the carelessness was so flagrant as to be outside normal bad building practice."

Conclusion to be drawn

46 In the case as articulated, reliance is placed upon the degree of personal involvement and control Ktori had over aspects of the work. Even if all that is established on the evidence, in the light of the authorities referred to, I do not think that this is amounts to an assumption of responsibility in the required sense. What Ktori is said to have done would suggest nothing more than his acting as an employee and director of Tremaine. 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 Tremaine assumed by entering into the building

contract. This is not sufficient to show an assumption by Ktori of any duty of care to the Applicants or to any of them.

47 Mr Forrest submitted that I should apply the "direct or procure test" to found liability in Ktori. He relied upon *Foxtel management Pty Ltd v The Mod Shop Pty Ltd* [2007] FCA 463, a case of copyright infringement, and *Coastal Recycled Cooking Oils Pty Ltd v Innovative Business Action and Strategies Pty Ltd* [2007] NSWC 831, a case of conversion. The "direct or procure test" is not of any assistance in this case because it is a claim in negligence, a very different kind of tort, and the authorities referred to have used a different approach in such cases.

48 The direct and procure test used in *Johnson Matthey* might have application in a building context in some fact situations; where, for example, the director intentionally sabotaged the work or procured or caused a breach of the contract otherwise than while acting bona fide within the scope of his authority. However it is not of assistance where all that is alleged is that the company was negligent *(Said v Butt; Williams v Natural Life Foods).*

49 In addition, as Redlich J pointed out in *Johnson Matthey* (p.227):

> "There is an obvious jurisprudential distinction to be drawn between those who by choice enter into contractual arrangements with a corporate entity and should thus be taken to have accepted limited liability and those who have had no dealings with a company and whose only interest is not to be harmed by the conduct of anyone. The utilisation of limited liability as a shield against those who choose to deal with a company can be more readily accepted than in the case of strangers who are harmed by corporate activity and who naturally turn for liability to those who caused the harm. Those who are victims of a tortious act such as trespass, conversion or negligence will probably have played no role in the selection of the tortfeasor who inflicts the harm."

Should this claim be dismissed?

50 It occurred to me that, because the matter is of some difficulty, perhaps I should do what was done in *Rosenthal* and say that because the law is unsettled the claim should proceed to trial. However I have a duty to decide Ktori's application and I should not shy away from that because it is difficult. The law in this area is certainly in a state of development but it has not gone as far as Mr Forrest suggests.

51 Otherwise, applicants in the majority of building cases issued in this Tribunal would join the directors of the building company as a matter of course because in most cases of defective work it is said that the work was done carelessly. This "plethora of new tort claims" would be at enormous additional cost and inconvenience to parties. In my experience it has never been considered that directors of a building company are personally liable to its customers for defective work. The owner who contracts with a building company contracts, to his knowledge, with an entity having limited liability, not with its directors.

Misleading and Deceptive conduct

52 To consider these claims it is necessary to carefully examine the representations that are said to have been made. They are to be found in paragraph 22 of the Amended Points of Claim and are as follows:

> "Further or alternatively, prior to entering into the contract, Tremaine made representations to the owners as follows:
>
> (a) Tremaine was competent and capable of constructing the works.
>
> (a) In reference to the construction of the works, everything would be satisfactorily performed;
>
> (a) The standard of workmanship would be equivalent to the photographs of other projects undertaken by Tremaine and shown to the owners;
>
> (a) The matters referred to in paragraph 9 (a) – (n) hereof".

53 Paragraphs 9(a)-(n) set out certain written terms and conditions of the contract and also terms implied into it by the *Domestic Building Contracts Act* 1995. Section 176(2)(A) of the *Building Act* is also referred to. It seems unlikely that any of these would have been the subject of any specific representation made by Tremaine. Nevertheless, that is the way it is pleaded.

54 The particulars to paragraph 22 are as follows:

> "The representations are partly oral and partly inferred from the conduct of Tremaine. Insofar as they were oral they were contained in conversations between the owners and Dimitrious Korfiatis and Hector Ktori for and on behalf of Tremaine in or about September 2003 to the effect alleged. Insofar as they were inferred from the conduct of Tremaine, they were inferred from Tremaine showing other projects performed by Tremaine to the owner and a number of photographs of the other projects".

55 The overriding difficulty with the claim for misleading and deceptive conduct is that Ktori did not make the representations himself, nor are they said to have been made on his behalf. It is not suggested in the claim as presently articulated that Ktori himself had any part in it beyond the fact that he was a director of Tremaine, both at the time that his son allegedly made these representations and also at the time the Applicants were shown the projects and photographs referred to. Causing Tremaine to authorise his son to deal with the Applicants is not equivalent to Ktori engaging in the son's subsequent conduct himself.

56 In paragraph 40 of the Amended Particulars it is suggested that Ktori knowingly authorised and permitted Tremaine to make the representations. The particulars provided were as follows:

> "Ktori gave his son, Hector Ktori, actual and/or implied authority to negotiate with the owners in respect of entering into the contract and to make the representations. Hector Ktori introduced his father to George and Jim Korfiatis at another building site which Tremaine was carrying out building works".

57 It was not Ktori that gave Hector Ktori his authority, it was Tremaine. Certainly, as the director of Tremaine, Ktori caused the company to authorise his son to act on its behalf but there is no suggestion that he authorised or directed his son to make any representation that was misleading or deceptive. When made, the representations were made by the son and he made them on behalf of Tremaine, not on behalf of Ktori.

58 Mr Forrest argues that Ktori is deemed to have contravened sections 9 and 4 of the *Fair Trading Act* 1999 by reason of s143 of the Act. Section 9(1) provides as follows:

> "A person must not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive".

59 Section 4 provides that, if a person makes representation about a future matter without reasonable grounds for doing so, the representation is deemed to be misleading. By s4(2) the person making the representation bears the onus of proving that he had reasonable grounds.

60 Section 143(1) provides:

> "If a Body Corporate contravenes any provision of this Act, each officer of the Body Corporate is deemed to have contravened the same provision if the officer knowingly authorised or permitted the contravention".

61 As I understand the argument, when Ktori's son represented that Tremaine was competent and capable of constructing the work, that it would be all satisfactorily performed and that the standard of workmanship would be equivalent to photographs of other projects undertaken by Tremaine, he did not have reasonable grounds for making those representations. By reason of s.4, he and Tremaine would bear the onus of proving that he did have such grounds.

62 However for Ktori himself to be liable it must be shown that he knowingly authorised or permitted the contravention. It would not be sufficient to show that, as a director of Tremaine, he caused it to authorise his son to negotiate with the owners and make representations on its behalf. That would give no force to the word "knowingly". It must appear that he knew about the contravention and authorised or permitted it. In other words, he must have known that his son was to make the representations without having sufficient ground for doing so and have authorised him to make them. It is not suggested this is the case. Indeed, it is difficult to see how any person could be found liable under s143(1) unless he were the person who made the representation or was present when they were made and allowed them to be made or knew in advance that they were made and authorised them to be.

63 In any event, as was pointed out by Bell J in *Astvilla Pty Ltd v Director of Consumer Affairs* VSC [2006] 289, the section only applies to an offence under the Act, not to a claim in damages. The claim under s143 is therefore misconceived.

64 It was suggested that s145 of the *Fair Trading Act* 1999 might found some liability in Ktori. That section provides as follows:

”Reference in this division for a person involved in a contravention of this Act means a reference to a person who,

(a) has aided, abetted, counselled or procured the contravention;

(b) has induced, whether by threats or promises or otherwise, contravention;

(c) has been in any way, directly or indirectly, knowingly concerned in or party to the contravention;

(d) has conspired with others to effect the contravention.

65 By s159 of the Act,

> “A person who suffers loss, injury or damage because of the contravention or of a provision of this act may recover the amount of the loss or damage or damages in respect of the injury by proceeding against any person who contravened the provision or is involved in the contravention”.

66 It is not suggested that Ktori knew about the content of the conversations that his son intended to have with the Applicants and it is simply not possible to show that he was at all involved in the contravention.

67 In the case of *Yorke v Lucas* (1985) 158 CLR 661 the High Court considered the meaning of s75(B) of the *Trades Practices Act* 1974 (Cth) which is in identical terms to s145 of the *Fair Trading Act* 1999. In the majority judgement (Mason ACJ, Wilson, Deane and Dawson JJ) considered, as to subsection (a), that it would only apply to a person who intentionally aided, abetted, counselled or procured the contravention. Because the defendant in that case lacked any knowledge of the falsity of the representations made he could not form the required intent. As to subsection (c), their Honours said (at p.670):

> “In our view, the proper construction of paragraph (c) requires the party to a contravention to be an intentional participant, the necessary intent being based upon knowledge of the essential elements of the contravention”.

68 For these reasons, the claim for damages for misleading and deceptive conduct is also not maintainable.

Orders to be made

69 The Applicant’s claim in each case will be dismissed. Costs will be reserved for further argument.

SENIOR MEMBER R. WALKER