VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST VCAT REFERENCE NO. D413/2011

CATCHWORDS

Application for leave to file and serve Fifth Proposed Second Further Amended Points of Claim – relevant principles – leave refused – order for substituted Points of Claim

APPLICANT	Marianne Ruth Robinson
FIRST RESPONDENT	George Rydell Constructions Pty Ltd (ACN 005 338 616)
SECOND RESPONDENT	Cocks Carmichael Pty Ltd (ACN 006 279 894)
THIRD RESPONDENT	Graeme Lesley Ainley
WHERE HELD	Melbourne
BEFORE	Deputy President C Aird
HEARING TYPE	Directions hearing
DATE OF HEARING	13 May 2015
DATE OF ORDER	11 June 2015
CITATION	Robinson v George Rydell Constructions Pty Ltd (Building and Property) [2015] VCAT 823

ORDER

1. Leave is refused to the applicant to file and serve the Fifth Proposed Second Further Amended Points of Claim.
2. By 29 July 2015 the applicant must file and serve Substituted Points of Claim which must include fully itemised particulars of the loss and damage claimed, and the relief or remedy sought. Any reference to variations may be to a consolidated Variation Schedule.
3. By 29 July 2015 the applicant must file and serve her further expert reports as to quantum.
3. This proceeding is listed for a further directions hearing before Deputy President Aird on 13 August 2015 commencing at 2.15pm at 55 King Street, Melbourne – allow half a day.
4. Liberty to apply.
5. Costs reserved.

DEPUTY PRESIDENT C AIRD

APPEARANCES:

For Applicant	Mr J Forrest of Counsel
For First Respondent	Mr D Cain, solicitor
For Second Respondent	Mr D Klempfner of Counsel
For Third Respondent	Ms A Elmes, solicitor

REASONS

1 This proceeding has had a tortuous history. This is partly due to the complex technical issues which led to the appointment of an engineer expert under s94 of the *Victorian Civil and Administrative Tribunal Act* 1998 ('the VCAT Act'), exacerbated by the applicant owner's seeming difficulties in finalising her Points of Claim. These Reasons concern the owner's application for leave to file and serve Fifth Proposed Second Further Amended Points of Claim dated 15 October 2014 ('the 5th PSFAPC'). Since the second respondent architect was joined as a party to the proceeding, on 3 April 2012, the owner has filed four proposed amended Points of Claim, such that this leave application relates to the 5th PSFAPC.[1]

2 The application for leave to file and serve the 5th PSFAPC is opposed by the first respondent builder and the architect. Mr Klempfner of counsel, who appeared on behalf of the architect, provided helpful written submissions. Mr Cain, solicitor, who appeared on behalf of the builder, adopted the architect's submissions and made oral submissions in relation to some specific issues of concern to the builder. Mr Forrest of counsel, who appeared on behalf of the owner, did not provide written submissions but made expansive oral submissions. Ms Elmes, solicitor, who appeared on behalf of the third respondent engineer, did not make any submissions.

3 As indicated to the parties during the directions hearing, I find the 5th PSFAPC confusing and difficult to follow. I share many of the concerns expressed on behalf of the architect and the builder and, for the reasons which follow, I consider it appropriate to refuse the owner leave to file and serve the 5th PSFAPC and agree with the submissions made on behalf of the respondents that it is expedient to order the owner to, in effect, start again, and prepare substituted Points of Claim.

4 In the interests of progressing this proceeding to final hearing, and hopefully avoiding the need for further interlocutory applications in relation

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[1] The numbering and references to the various iterations of the Points of Claim and proposed Points of Claim has become confused. The 5th PSFAPC include a notation on the first page identifying the various amendments as follows:

1. In this document amendments underlined in green are amendments made by the Amended Points of Claim dated 31 August 2011.
2. In this document amendments underlined and in red are amendments made by the Applicant's Further Amended Points of Claim dated 14 February 2012.
3. In this document amendments highlighted in yellow are the amendments made by the Applicant's Further Amended Points of Claim dated 27 April 2012.
4. In this document, the dark black underlining and black strikethrough is an amendment made by the Third Further Amended Points of Claim dated 6 August 2012.
5. In this document, the amendments in purple are amendments made by the Fourth Proposed Amended Points of claim from the Third Amended Points of Claim dated 6 August 2012.
6. In this document, the amendments in blue are amendments made by the Fifth Proposed Second Further Amended Points of claim from the Fourth Proposed Amended Points of claim dated 31 March 2014.

to the owner's Points of Claim, it is, in my view, appropriate to consider some of the matters raised by the architect and the builder. In particular, whether the claims set out in the 5th PSFAPC are arguable, as there would be no utility in the owner simply redrafting and filing substituted Points of Claim including claims which are not arguable. I do not propose to consider all of the concerns raised by the architect and the builder, as I am hopeful that these will be taken into account during drafting of the substituted Points of Claim.

BACKGROUND

5 In October 1999, the owner entered into an agreement with the architect by which the architect agreed to provide 'full architectural services' for the design and construction of the owner's new home in Beaumaris. In 2002 the engineer was engaged by the architect to prepare the engineering design and drawings for the construction of the owner's new home. In July 2002 the owner entered into a domestic building contract with the builder for the construction of her new home. The contract price was $1,475,073. The architect was identified in the building contract as the administering architect.

6 In September 2005 the owner commenced proceedings in this tribunal in proceeding number D660/2005 in respect of alleged defective and incomplete works ('the 2005 proceeding'). The 2005 proceeding was settled on 23 February 2006 when Terms of Settlement were executed by the owner and the builder ('the TOS').

7 Pursuant to the TOS the builder was to carry out certain agreed rectification works and the owner agreed to pay the builder the sum of $207,000 by way of three instalments, with the final payment to be made when the rectification works were completed and approved by Peter Carmichael (of the second respondent in this proceeding). The project was to be completed by 16 April 2006. The works were not completed by 16 April 2006, and in January 2011 Mr Carmichael inspected the works and identified that of the 191 items requiring rectification, 101 items were outstanding.

8 The owner commenced these proceedings in May 2011. On 3 April 2012, the architect was joined as the second respondent, upon application by the builder, for the purposes of the proportionate liability provisions of Part IVAA of the *Wrongs Act 1958.* The owner was granted leave to amend her claim to, in effect, 'piggyback' on the builder's Part IVAA defence.

9 On 26 July 2012 the engineer was joined as the third respondent, upon application by the owner. Orders were made for the owner to file and serve further amended Points of Claim in substantially the form exhibited to the affidavit relied on in support of the joinder application. Third Further Amended Points of Claim dated 6 August 2012 were subsequently filed and served.

10 Following a compulsory conference in December 2012 the parties agreed to the appointment of an engineer expert under s94 of the *Victorian Civil and Administrative Tribunal Act 1998* ('the VCAT Act') to advise in relation to the engineering design. The questions to be answered by the expert were agreed in May 2013, and orders appointing the s94 expert were made on 2 May 2013.

11 The owner subsequently sought leave to file and serve various further proposed amended Points of Claim, in which she seeks to make a number of direct claims against the architect including claims for breach of retainer, and misleading and deceptive conduct.

12 At a directions hearing, on 13 December 2013, orders were made requiring the owner to file and serve *amended proposed fourth Amended Points of claim with all amendments made since the initial Points of Claim clearly identified.* A further directions hearing was scheduled for 2 April 2014 to consider any objections to the amended proposed fourth amended Points of Claim.

13 On 27 March 2104 the architect's solicitors wrote to the Tribunal enclosing an Application for Directions Hearing or Orders seeking orders that the owner's claims be struck out under ss76 and/or 75 of the VCAT Act. They advised they were making this application because they had not received proposed fourth amended Points of Claim from the owner, despite repeated requests. They requested that the application be heard at the directions hearing which was listed for 2 April 2014.

14 The directions hearing listed for 2 April 2014 was subsequently adjourned by consent to 14 May 2014 and then to 16 June 2014 to allow the s94 expert to complete his report. Due to my unavailability this directions hearing was further adjourned to 21 July 2014 when various orders were made, including an order for the owner to file and serve 5th PSFAPC. A directions hearing was listed for 20 October 2014 to consider the owner's application for leave to file the 5th PSFAPC. A compulsory conference was set for 15 December 2014. The 5th PSFAPC were filed under cover of a letter dated 15 October 2014.

15 At the directions hearing on 20 October 2014 the parties agreed that the owner's application for leave to file the 5th PSFAPC should be considered after the compulsory conference. The compulsory conference held on 15 December 2014 was adjourned part heard to 18 March 2015. When settlement was not achieved the proceeding was listed for a directions hearing before me on 15 April 2015, which was subsequently adjourned by consent to 13 May 2015.

16 Although the tribunal is not a court of pleadings, and pleading summonses are unusual in the tribunal, leave has yet to be granted to the owner to file and serve the Fourth or Fifth Further Amended Points of Claim. This directions hearing was to consider her application for leave to file and serve her 5th PSFAPC.

THE PRINCIPLES

17 Mr Klempfner referred me to the comments by Kaye J in *Makrenos v Papaioannou*[2] where he set out the principles to be applied by the tribunal when considering an application for leave to amend Points of Claim, or Points of Defence:

> **Amendment – legal principles**
>
> 10. The tribunal is not a court of pleading. Nonetheless, in determining the appropriate approach of the tribunal to proposed amendments of points of claim or points of defence, it is useful to bear in mind the principles which apply to applications for amendment to pleadings in courts of higher jurisdiction. In such cases, the guiding principle is that a court should permit amendments in order to enable the real questions in controversy between the parties to be determined upon a full hearing of the case at trial. A proposed amendment to a pleading will only be disallowed if it would be futile, in the sense that it would have been struck out if it had appeared in the original pleading.[3] The power to strike out summarily an action, or a substantive cause of action, is exercised sparingly in courts of higher jurisdiction. It is only invoked where it is clear that the action, or the cause of action, is so untenable that it cannot possibly succeed.[4]
>
> 11. Since, as I have observed, the tribunal is not a court of pleading, those principles need to be qualified when considering applications before the tribunal to amend the manner in which a party proposes to put its claim or defence. Clearly, the rules of pleadings, which bind higher courts, do not apply to the tribunal. Section 98(1)(b) of the Act requires the tribunal to proceed "with as little formality and technicality" as the requirements of the Act permit. On the other hand, as Ashley J (as his Honour then was) pointed out in *Barbon v West Homes Australia Pty Ltd*[5], the fact that the tribunal is not a court of pleading does not warrant the conclusion that "Rafferty's Rules" should prevail. Clearly they should not. Section 97 of the Act requires the tribunal to act fairly and according to the substantial merits of the case in all proceedings. Section 98(1)(a) requires the tribunal to be bound by the rules of natural justice. Section 102(1) requires the tribunal to allow a party a reasonable opportunity to call or give evidence, to examine, cross-examine or re-examine witnesses, and to make submissions to the tribunal. Thus, other than in a simple case, it is appropriate that the tribunal should require a party, making a claim, to properly

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[2] [2008] VSC 83

[3] *Commonwealth of Australia v Verwayen* (1990) 170 CLR 394, 456, 464 (Dawson J); *Howarth v Adey* [1996] 2 VR 535, 542 to 3 (Winneke P); *Horton v Jones (No 2)* (1939) 39 SR (NSW) 305, 310 (Jordan CJ).

[4] *General Steel Industries Inc v Commissioner for Railways (NSW)* (1964) 112 CLR 125, 128 to 30 (Barwick CJ); *Dey v Victorian Railways Commissioners* (1949) 78 CLR 62, 91 (Dixon J).

[5] [2001] VSC 405, [16, 17].

spell out the ambit of that claim, so as to give appropriate notice of it to the respondent to the claim. Similarly, it is appropriate that the tribunal should require a respondent to a claim to set out, in sufficient detail, the points upon which the respondent proposes to defend the proceeding.

12. The question, then, for the senior member was whether the proposed amendments were so obviously bad in law that it would be futile to permit them to be included in the appellants' claim. That question was to be addressed by the member, bearing in mind that the appellants were not required to frame the proposed amendments in accordance with rules of pleadings, nor with the precision or specificity required of pleadings. The decision by the senior member to disallow the proposed pleading was, strictly speaking, an exercise by that member of the discretion of the tribunal, under s 127(1) of the Act, to amend documents. Thus, in order to succeed, the appellant must establish that the senior member erred in his exercise of that discretion, in refusing to allow the proposed amendments to the points of claim in respect of the first and second respondents.[6] In essence, the appellants must satisfy me that the senior member erred in holding that the cause of action, relied on by the appellants in the proposed amendments, had no demonstrable prospect of success. [underlining added]

18 Further, it is well established that a party (or a proposed party) has a right to know the case it has to answer. In *Barbon v West Homes Australia Pty Ltd*[7] Ashley J said at [6]:

> I would not want it thought for a moment, because the Tribunal is not a court of pleading, and because the Act encourages a degree of informality in proceedings, that Rafferty's Rules should prevail. They should not. Any party, perhaps particularly a party facing a long, drawn-out hearing in the Tribunal - and I note in this case an estimate that the Tribunal hearing would extend for some nine weeks - is well entitled to know what case it must meet before the hearing commences. That is not to say that the case must be outlined with exquisite particularity. It is not to say that a defendant is entitled to evidence rather than particularisation. None the less a defendant is entitled to expect that a claim will be laid out with a degree of specificity such that, if it is obvious that the claimant seeks to pursue a claim which is untenable, that can be the subject of an application before trial; such that, moreover, if adequate particularisation is not provided, the matter will be clear to the Tribunal on application by an aggrieved party. [underlining added]

19 In *West Homes (Australia) Pty Ltd v CrebarPty Ltd*[8] Deputy President Cremean (as he was then) said at [11]:

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[6] *Australian Coal and Shale Employees' Federation v The Commonwealth* (1953) 94 CLR 621, 627 (Kitto J); *House v The King* (1936) 55 CLR 494, 504, 505 (Dixon, Evatt and McTiernan JJ).

[7] [2001] VSC 405

> The Tribunal, plainly, may be a *"court"* for various purposes but it is not a court of pleadings. It is basic that the Tribunal should require that this duty [that a party make its case known to the other side] be observed. Otherwise, natural justice will be denied. Often, though, it is quite possible for a party to make its case known sufficiently without having to resort to fine legalese. Indeed, fine legalese can often obscure. Moreover, the Tribunal is not bound to proceed with all technicality and undue formality. A so-called *"pleading"* summons invites excessive semantical debate. Ideally, Points of Claim, or of Defence, should normally be able to be understood by the average person. [underlining added]

THE OWNER'S CLAIMS

20 The substance of the owner's case is not complicated. She claims that there are defects in both the architectural and engineering design and the construction of her home requiring significant rectification works, which will require her to move out of her home whilst the works are carried out. However, liability for the defective work and the cost of rectification is in dispute. The owner also has separate claims against the architect from whom she is seeking a refund of the amounts she has paid for variations.

21 The owner also claims against each of the builder and the architect that she was induced to enter into the TOS by misrepresentations she alleges were made by each of them. Curiously, the allegations against each of them are identical.

22 Mr McFarlane, engineer was appointed as an expert under s94 of the VCAT Act to prepare a report and a scope of rectification works.

23 On 17 October 2014 the owner filed 'Applicant's Particulars of Loss and Damage' in which she claimed:

A.	Cost of rectification	$2,721,618.00
B.	Alternative accommodation	$ 120,000.00
C.	Storage charges one year estimated at	$ 10,000.00
D.	Removalist expenses estimated at	$ 10,000.00
E.	Architect's fees to administer rectification works at 11%	$ 299,378.00
F.	Sums paid for variations (as against second respondent)	
	Schedule 1	$ 63,433.40
	Schedule 2	$ 308,877.16
	Schedule 3	$ 58,299.53
	TOTAL	**$3,591,606.69**

[8] [2001] VCAT 46

24 Although the cost of this scope of works recommended by the s94 expert has been estimated by the owner's expert at $2,721,618, Mr Forrest indicated that the owner was waiting on a further, more detailed costings report from her expert. It is unclear whether this will impact on the amount claimed for the rectification works.

CLAIMS AGAINST THE ARCHITECT

The architectural agreement

25 In paragraph 18 and 19 of the 5th PSFAPC the owner pleads:

> 18 In or about October 1999 the Second Respondent and the Applicant entered into an agreement whereby the Second Respondent agreed to provide to the Applicant "full architectural services" ("the architectural services") in respect of the design and construction of a domestic dwelling on the Applicant's land ("architectural agreement").
>
> …
>
> 19. There were implied terms of the architectural agreement that the full architectural services the Second Respondent agreed to provide in accordance with the architectural services included inter alia:-
>
> (a) Preparing the architectural design of the works;
>
> (b) Documenting the architectural design;
>
> (c) Ensuring that the architectural design of the works was compatible with any other designs of the works and the materials used in the construction of the works;
>
> (d) Administering the building agreement between the Applicant and her ultimate contractor.

Allegations concerning the architect's role

26 After pleading a number of alleged breaches of the architectural agreement, including in relation to variations which are discussed below, the owner pleads a number of allegations in paragraphs 22.1 to 22.4.1 in relation to the appointment of the architect under the building contract which are confusing and difficult to follow. It is helpful to set out some extracts from those paragraphs.

> 22.1 Further or alternatively, in or about July 2002, pursuant to the architectural agreement the Second Respondent was appointed as the Architect under the [building] contract [dated 31 July 2002] to carry out the express functions and duties referred to in the contract as:
>
> (a) the agent of the Applicant or
>
> (b) as the independent assessor, valuer and certifier
>
> PARTICULARS

(i) The Second Respondent's roles as agent of the Applicant or the independent assessor, valuer and certifier are referred to in clause A5.1 of the [building] contract. Pursuant to clause A5.1 of the contract:

"The architect is appointed to administer this contract on behalf of the owner. The architect is the owner's agent for giving instructions to the contractor. However, in acting as assessor, valuer or certifier, the architect acts independently"

(ii) The Second Respondent was nominated as the Architect in the contract.

(iii) The architectural agreement referred to the provision of contract administration services by the Second Respondent to the Applicant.

(iv) Further, the Second Respondent performed the functions and duties of the Architect nominated in the contract from 2002 onwards until the contract was terminated in May 2005.

22.2 [sets out the role of the architect under the building contract]

22.3 As a result of the matters referred to in paragraphs 18, 22.1 and 22.2, there were implied terms of the architectural agreement that the Second Respondent would:

(a) perform the functions and duties of the Architect referred to in the contract exercising the care and skill of a reasonable, qualified and registered architect;

(b) when required, perform its role as the agent of the Applicant of the contract in the best interests of the Applicant; [sic]

(c) when required, perform its role as the agent of the Applicant within the authority referred to in clause A5.1 of the contract given to it by the Applicant;

(d) obtain the Applicant's consent or approval prior to giving written instructions to the Second [First] Respondent to vary the works pursuant to clause H1 of the contract;

(e) disclose information to the Applicant about any change or variation to the design and/or scope of the works under the contract and any additional cost of any such variation that would have to borne by the Applicant as a result; [sic]

(f) obtain the Applicant's consent or approval prior to issuing a written instruction to proceed with a variation to the First Respondent in accordance with clause A9 or H4 of the contract;

(g) not approve or certify any claim to adjust the contract submitted by the First Respondent in circumstances where the First Respondent had not complied with Section H of the

contract or in circumstances where clauses H3.1 or H4.1 applied.

PARTICULARS

The terms are implied:

(i) from the special and proximate relationship between the Applicant as owner and the Second Respondent as her architect;

(ii) from the nature of the fiduciary relationship existing between the Applicant and the Second Respondent being one of principal and agent in the course of the Second Respondent giving instructions to the First Respondent pursuant to clause A5.1;

(iii) from regulation 6 of the Architects Regulations 1993 which obliged the Second Respondent to employ its skills in the interests of the Applicant;

(iv) from regulation 7 of the Architects Regulations 1993 which obliged the Second Respondent to act in the interests of the Applicant and not favour its own interests over that of the Applicant; and

(v) to give the architectural agreement the business efficacy the parties intended it to have.

27 The difficulty with the allegations set out in these paragraphs is that in circumstances where the architect was not a party to the building contract, it is not clear how it is said that the architect can be bound by the terms of a building contract to which it is not a party. Further, the allegations that these obligations are implied terms of the architectural agreement entered into three years before the building contract, are not clear.

28 I accept the submission on behalf of the architect, as set out in its written submissions, that:

> 52. Further the purported particulars are circular to the extent that it is alleged that the terms are implied "from the nature of the fiduciary relationship existing between the Applicant and the Second Respondent".
>
> …
>
> 53. It is therefore circular to allege the implication of terms by reference to a [fiduciary] relationship which itself is defined by the very agreement whose terms are said to be implied from the relationship

Alleged fiduciary duties

29 The owner alleges in paragraph 22.4 of the 5th PSFAPC that the architect owed her fiduciary duties and/or duties of care:

Further, as a result of the matters referred to in paragraph 18, 22.1 and 22.2 the Second Respondent owed the Applicant fiduciary duties and/or duties of care:

(a) to perform the function and duties of the Architect referred to in the contract exercising the care and skill of a reasonable, qualified and registered architect;

(b) when required, to perform its role as the agent of the Applicant in the best interests of the Applicant;

(c) when required, to perform its role as the agent of the Applicant within the authority referred to in clause A5.1 of the contract given to it by the Applicants;

(d) to obtain the Applicant's consent or approval prior to giving written instructions to the Second Respondent to vary the works pursuant to clause H1 of the contract;

(e) to disclose information to the Applicant about any change or variation to the design and/or the scope of the works under the contract and any additional cost of any such variation that would have to be borne by the Applicant as a result;

(f) obtain the Applicant's consent or approval prior to issuing a written instruction to proceed with a variation to the First Respondent in accordance with clause A9 or H4 of the contract;

(g) not to approve or certify any claim to adjust the contract submitted by the First Respondent in circumstances where the First Respondent had not complied with Section H of the contract or in circumstances where clauses H3.1 or H4.1 applied.

PARTICULARS

The duties arise:

(i) at common law given the special and proximate relationship between the Applicant as owner and the Second Respondent as her architect;

(ii) from the fiduciary relationship existing between the Applicant and the Second Respondent being one of principal and agent in the course of the Second Respondent giving instructions to the First Respondent pursuant to clause A5.1 [of the building contract];

(iii) from regulation 6 of the Architects Regulations 2004 which obliged the Second Respondent to employ its skills in the interests of the Applicant.

(iv) from regulation 7 of the Architects Regulations 2004 which obliged the Second Respondent to act in the interests of the Applicant and not in favour of its own interests over that of the Applicant.

30 Mr Klempfner submitted that apart from the duty set out in (a) the duties alleged in paragraph 22.4 are not duties which are known to law, and that there is no obvious link between the particulars and the material facts.

31 In support of his submission that the alleged fiduciary duties were not clearly identified and articulated, Mr Klempfner referred me to *Hoh and ors v Frosthollow Pty Ltd and ors*[9] where Derham AsJ considered the nature of fiduciary duties and said:

> 61. …in relation to the question of whether the law recognises fiduciary duties as extending beyond the two undoubted duties, the 'no conflict duty' and the 'no profit duty', does not depend on the resolution of disputed questions of fact in this case but, like the position facing Hollingworth J in *P&V Industries Pty Ltd v Porto,*[10] is a matter of law not dependant on first resolving any underlying factual dispute.
>
> 62. The 'no conflict rule' is, in essence, that a fiduciary is under an obligation, without informed consent, not to promote their personal interest by making or pursuing a gain in circumstances where there is a conflict, or real or substantial possibility of a conflict, between their personal interests and those to whom the duty is owed: *Pilmer v The Duke Group Ltd (in liq)* at [78];[11] *Streeter v Western Areas Exploration Pty Ltd [No 2]* (***Streeter***)*,*[12]
>
> 63. The 'no profit rule' is often formulated by reference to an account of profits. In *Warman International Ltd v Dwyer*[13] the High Court said that 'a fiduciary must account for a profit or benefit if it was obtained...by reason of his fiduciary position or by reason of his taking advantage of opportunity or knowledge derived from his fiduciary position'.[14]
>
> …
>
> 69 This is not a case where it can be said that the boundaries of the fiduciary duties available to the plaintiffs are still developing. So far as concerns the available fiduciary duties, the High Court has spoken and the boundaries are, for present purposes, not capable of movement at this level. The evidence will not change that conclusion.
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> …
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> 71. It seems to me, however, that in large measure the two proscriptive duties can be made to work across the range of

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9 [2014] VSC 77

10 [2006] VSC 131 ; (2006) 14 VR 1.

11 [2001] HCA 31; (2001) 207 CLR 165 at [78]; EC Dawson Investments Pty Ltd -v- Crystal Finance Pty Ltd [No 3] [2013] WASC 183 at [411].

12 [2011] WASCA 17at [66], [372]; op cit *EC Dawson Investments Pty Ltd -v- Crystal Finance Pty Ltd [No 3]* [2013] WASC 183 at [411].

13 [1995] HCA 18; (1995) 182 CLR 544, 557.

14 See ***Streeter*** at [73], [386]; op cit *EC Dawson Investments Pty Ltd -v- Crystal Finance Pty Ltd [No 3]* [2013] WASC 183 at [414].

> alleged breaches of duty. So, for example, the 'no conflict duty' gives rise to breaches where the fiduciary has acted in his own interests or promoted his personal interest by making or pursuing a gain in circumstances where there is a conflict, or real or substantial possibility of a conflict, between his personal interests and the interests of plaintiffs to whom the duty is owed.

32 However, the duties of an architect set out in regulation 7 of the *Architects Regulations 2004* are consistent with his Honour's enunciation of the duties in *Hoh.* Regulation 7 provides:

> **Duties**
> An architect must—
> (a) act in the interest of his or her client or prospective client; and
> (b) not favour his or her own interest over that of his or her client or prospective client.

33 In my view the allegations in paragraph 22.4 are difficult to follow because they fail to differentiate between what are said to be the fiduciary duties and the duties of care owed by the architect to the owner, and how they arise. Further, I agree that there is no obvious link between the allegations set out in this paragraph and the particulars. When drafting the substituted Points of Claim I encourage counsel for the owners to differentiate between the duties, succinctly indicate how it is said they arise, and provide appropriate particulars.

References to Schedules

34 There are three Schedules attached to the 5th PSFAPC, all of which concern the owner's claims against the architect in relation to variations. A further Schedule 'A' was handed up at this directions hearing, and I understand it is proposed to amend the owner's claims to include this Schedule A wherever the other three Schedules are referred to.

35 The first reference to these Schedules is in the Particulars to paragraph 22C:

> 22C. Further, or alternatively, in breach of the implied term referred to in paragraph 20 herein and the duty of care referred to in paragraph 22 herein, the Second Respondent performed the architectural services negligently and defectively.
>
> PARTICULARS
>
> …
>
> The variations referred to in Schedules 1, 2 and 3 attached hereto were the result of the Second Respondent completing, rectifying and adjusting the architectural design documentation during the course of the works.
>
> …

36 Then again, in the Particulars to paragraph 22D:

> 22D As a result of the breaches referred to in paragraphs 22C hereof, the Applicant has suffered loss and damage.

PARTICULARS

…

The Applicant claims payment from the [Second] Respondent of the costs and expenses the Applicant incurred to the First Respondent to perform the variations referred to in Schedules 1, 2 and 3 [and A] hereof.

Schedule 1

37 Schedule 1 does not have a heading. It is in table form with the following column headings: *Variation No, Date, Amount, Description, Details.* In the details column for each of the variations listed in this Schedule 1, the owner states that each of these variations was not approved or agreed to by the owner.

38 Although Schedules 1, 2 and 3 are collectively referred to a number of times throughout the 5th PSFAPC, Schedule I is specifically referred to in the Particulars to paragraph 22.5 which pleads:

> 22.5 Further, in breach of the implied terms of the architectural agreement and the duties referred to above in paragraphs 22.3(a) – (d) and 22.4 (a) – (d) respectively the Second Respondent failed to obtain the Applicant's consent prior to giving instructions to the Second Respondent to vary the works pursuant to clause H1 of the contract.
>
> PARTICULARS
>
> The Second Respondent did not obtain the Applicant's consent prior to giving the instructions to vary the works in respect of the variations listed in Schedule 1 hereto.

39 First, it seems that the second reference to the Second Respondent architect in paragraph 22.5 is a mistake, and that it should refer to the First Respondent builder. There are many such mistakes throughout the 5th PSFAPC which will, no doubt, be addressed when the substituted Points of Claim are drafted.

40 Schedule 1 is also referred to in the Particulars to paragraph 22.5.1 in which the owner pleads she has suffered loss and damage *as a result of the breaches referred to in paragraphs 22.5 hereof* (sic):

> …
>
> The Applicant seeks reimbursement of the sums paid in respect of the items referred to in Schedule 1 attached hereto.

41 Surprisingly, although the amount of each variation is set out in Schedule 1, these amounts have not been totalled. It should not be necessary for the respondents to do their own calculations.

Schedules 2 and 3

42 Schedules 2 and 3 are only referred to in the 5th PSFAPC in conjunction with Schedule 1. Schedules 2 and 3 do not have a heading. They are also in table form with the same column headings as Schedule 1. From the information set out in the Details column it appears that it is alleged that many of these variations were not approved or agreed to by the owner before the works were carried out. However, this does not apply to all of them, and various other explanations are included in the Details column as to why the owner is contesting the variations set out in these two Schedules. Once again, although amounts have been included for each variation, they have not been totalled.

Schedule A

43 At the directions hearing on 13 May 2015 a further Schedule was handed up. This is headed 'Schedule A Variations caused by design deficiencies'. It is 29 pages and is table form with the same headings as the other Schedules except for the last column which is headed *Design deficiencies*.

44 It is not clear whether there is any duplication between the variations contained in each of the Schedules. Accordingly, at the directions hearing I indicated I would make orders for the filing and service of a consolidated Variation Schedule.

Schedule 1A

45 Schedule 1A which is also attached to the 5th PSFAPC is not in table form. It is referred to in the Particulars to paragraph 5 of the 5th PSFAPC:

> …
>
> Further, pursuant to the 'Build Assess' report dated 19 October 2005 the following works have either not been completed by the First Respondent or rectified by the First Respondent and remain outstanding – The Applicant refers to Schedule 1A attached hereto.

46 It is not clear whether Schedule 1A was prepared by Build Assess or formed part of its report. It seems to be little more than a summary of alleged defective and incomplete work with no detail as to what rectification or completion works are required.

Cross referencing

47 The 5th PSFAPC are 42 pages and contain 45 paragraphs (and many sub-paragraphs and sub-sub paragraphs) with numerous cross references to other paragraphs which make them difficult to follow.

48 For instance, and this is just one example, the Particulars to:

i paragraph 29 on page 39 are:

> The Applicant refers to paragraph 8 hereof.

ii paragraph 31 on page 40 are:

The Applicant refers to and repeats the particulars subjoined to paragraph 8 herein.

iii paragraph 34 on page 41 are:

The Applicant refers to and repeats the particulars subjoined to paragraph 8 herein.

iv paragraph 44 on page 42 are:

The Applicant refers to and repeats paragraph 8 hereof.

v paragraph 45 on page 42 are:

The Applicant refers to paragraph 8 hereof.

49 Paragraph 8 which commences on page 5 pleads:

> By reason of the matters referred to in paragraphs 1 to 7 inclusive hereof [the allegations against the builder] the Applicant has suffered loss and damage.

The Particulars subjoined to paragraph 8 set out the various heads of damage claimed by the owner, although the amount claimed under each head of damage is yet to be quantified.

50 As each of the paragraphs referred to sets out the owner's claim for loss and damage against the engineer, presumably the intention is to cross reference the Particulars in each instance to the Particulars subjoined to paragraph 8. However, this is not clear. The respondents should not be required to speculate as to what is intended by the 5th PSFAPC.

Limitation periods

The 10 year period for the bringing of a building action

51 There are a number of, what might be referred to, as 'pre-emptive allegations' where the owner pleads that her claim is brought within 10 years of the occupancy permit and is therefore within time under s135 of the *Building Act 1993*. Although the first attempt to amend the Second Further Amended Points of Claim was made before the Court of Appeal confirmed that the limitation period for the bringing of a building action is 10 years from the date of the occupancy permit,[15] these pleadings are unnecessary. In any event, any allegations that a claim is brought outside the relevant limitations period is properly a defence, which can be responded to by an applicant in a Reply.

Claims against the architect under the *Fair Trading Act 1998*

52 The owner pleads that in 2006 she was induced to enter into the TOS by certain misrepresentations which she says were made by the builder and on behalf of the architect.[16] Generally, any contention that a claim is made outside the relevant limitations period is properly a defence. However, the

[15] *Brirek Industries Pty Ltd v McKenzie Group Consulting (Vic) Pty Ltd* [2014] VSCA 165
[16] 5th PSFAPC - paragraphs 22.26 to 22.37

limitations period for the bringing of a claim for misleading and deceptive conduct is 6 years from the date on which the representation is made and relied upon. The owner alleges in paragraph 22.26 of the 5th PSFAPC the representation was made in or about February 2006 (although in the Particulars to this paragraph the period is stated to be from in or about October 2005 up to 23 February 2006). However, as the architect was not joined as a party to this proceeding until 3 April 2012, more than 6 years after the date on which it is alleged the representations were made and relied upon, this claim is doomed to fail. If it were to be included in the substituted Points of Claim it is difficult to conceive how, as presently pleaded, this claim would not be struck out if a s75 application were to be made by the architect.

53 In paragraphs 22.26 to 22.37 under the heading 'Settlement Representations' the owner makes a number of further or alternative allegations: that the representations constitute misleading and deceptive conduct in contravention of s9 of the *Fair Trading Act 1999* ('the FTA')[17]; further or alternatively, that the settlement representations were representations of future matters for the purposes of s4 of the FTA[18], and further or alternatively, that the architect owed the owner a duty of care which it was negligent in breaching in making the settlement representations.[19] However, the damages claimed in paragraph 22.37 are pursuant to s159 of the FTA which allows a person to recover damages for a contravention of the FTA – it does not contemplate an award of damages for a claim arising in negligence.

54 The Particulars to paragraph 22.37 are a further example of the confusion caused by cross referencing. These Particulars are simply:

> The Applicant refers to paragraph 22.34 hereof.[20]

Paragraph 22.34 pleads:

> In the premises [that the settlement representations constitute misleading and deceptive conduct in contravention of s9 of the FTA] the Applicant has suffered loss and damage and is entitled to damages from the Second Respondent.
>
> PARTICULARS
>
> The Applicant refers to and repeats paragraph 8 hereof.

55 The difficulties with the cross referencing to paragraph 8 have been discussed earlier in these Reasons.

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[17] 5th PSFAPC – paragraph 22.33
[18] 5th PSFAPC – paragraph 22.36
[19] 5th PSFAPC – paragraphs 22.28, 22.31
[20] Misnumbering of paragraphs was identified and corrected during the directions hearing. It is accepted that the reference to paragraph 22.44 in these Particulars is a reference to paragraph 22.34 as there is no paragraph 22.44.

CONCLUSION

56 A number of other issues and concerns were raised by Mr Klempfner for the architect and by Mr Cain for the builder. However, I do not consider it necessary to address each of them. The matters set out and discussed above are a clear indication of the general difficulties with the 5th PSFAPC. In drafting the substitute Points of Claim I encourage counsel for the owners to carefully consider the claims to be made, to make the claims concisely and logically with relevant Particulars. Cross referencing should be used sparingly, and checked for accuracy. All references to the consolidated variation schedule should be clear.

57 The comments by Derham AsJ in *Hoh* AT [85] could have been made about the 5th PSFAPC and I respectfully adopt them:

> The ASOC is overly long, difficult to follow, encumbered with unnecessary allegations and allegations of fact that should be no more than particulars.

58 Accordingly, I will refuse the owner leave to file the 5th PSFAPC and order her to file and serve substituted Points of Claim. In the interests of progressing this matter in a timely manner, I will not require the owner to seek leave to file the substituted Points of Claim. However, as there will be liberty to apply, it will of course be open to the respondents or any one of them to bring an application under s75.

59 At the directions hearing on 13 May 2015 counsel for the owner indicated that the owner was hopeful of receiving a further expert report in relation to quantum within approximately 8 weeks, subject to the availability of her expert. For convenience, and to allow counsel time to draft the substituted Points of Claim and for the owner to obtain her further expert report, I will order that the substituted Points of Claim and the owner's further expert report as to quantum be filed and served on the same day: 29 July 2015.

60 I will reserve the question of costs with liberty to apply.

DEPUTY PRESIDENT C AIRD