SUPREME COURT OF QUEENSLAND

CITATION:	*JM Kelly (Project Builders) Pty Ltd v Toga Development No 31 Pty Ltd & Anor* [2008] QSC 311
PARTIES:	**JM KELLY (PROJECT BUILDERS) PTY LTD** (plaintiff) **v** **TOGA DEVELOPMENT NO 31 PTY LTD** (first defendant) and **SUTERS ARCHITECTS PTY LTD** (second defendant)
FILE NO:	3651 of 2006
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court of Queensland
DELIVERED ON:	1 December 2008
DELIVERED AT:	Brisbane
HEARING DATE:	29 February 2008, 20 March 2008, 4 June 2008
JUDGE:	Daubney J
ORDER:	**1. So much of the FASOC as relates to the purported claim in equity by JMK against Suters is untenable and should be struck out** **2. The parts of the FASOC which seek to plead a case for breach of s 52 of the TPA in reliance on the 'Suters' Pre-Contract Conduct' are untenable and should be struck out** **3. The claim under s 75B of the TPA that Suters is liable as an accessory for the conduct of Toga prior to the contract is bad in form and should be struck out** **4. I will hear the parties as to the necessary orders and directions** **5. The plaintiff pay the second defendant's costs of and incidental to the application**
CATCHWORDS:	PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – PROCEDURE UNDER RULES OF COURT – PLEADING – STATEMENT OF CLAIM – the second defendant applied under r 171 of the UCPR for the further amended statement of claim of the plaintiff to be struck out – numerous bases are nominated by the second

defendant to justify the strike out – whether the claim for compensation in equity against the second defendant should be struck out – whether the claims under the TPA against the second defendant should be struck out – whether the claim against the second defendant for damages for non-payment of progress payments should be struck out because the plaintiff also has a contractual claim against the first defendant or because the damages are too remote

EQUITY – GENERAL PRINCIPLES – FIDUCIARY OBLIGATIONS – the second defendant was the superintendent under a building project, of which the plaintiff was the builder – whether the second defendant owes fiduciary duties to the plaintiff because of that relationship

Trade Practices Act 1974 (Cth), s 52, s 75B, s 82
Uniform Civil Procedure Rules 1999 (Qld), r 171

Breen v Williams (1996) 186 CLR 71, cited
Brewarrina Shire Council v Beckhaus Civil Pty Ltd (2003) 56 NSWLR 576, discussed
Burns v Man Automotive (Aust) Pty Ltd (1986) 161 CLR 653
Hospital Products Ltd v United States Surgical Corporation (1984) 156 CLR 41, discussed
John Holland Construction & Engineering Pty Ltd v Majorca Projects Pty Ltd (1997) 13 BCL 235, cited
Johnson Tiles Pty Ltd v SO Australia Pty Ltd (2000) 104 FCR 564, discussed
Perini Corp v Commonwealth [1969] 2 NSWR 530, discussed
Pilmer v Duke Group Ltd (in liq) (2001) 207 CLR 165
Pilkington v Wood [1953] Ch 770, cited
Quinlivin v ACCC (2004) 160 FCR 1, applied
Twidale v Bradley [1990] 2 Qd R 464, discussed
Walker v Medlicott & Son [1999] 1 WLR 727, cited

COUNSEL: G J Digby QC with G P Harris for the plaintiff
R Schulte for the first defendant
D J S Jackson QC for the second defendant

SOLICITORS: Hopgood Ganim for the plaintiff
Colin Biggers & Paisley for the first defendant
Plastrias Lawyers for the second defendant

[1] The plaintiff ('JMK'), the builder of a development known as 'Swell' at Burleigh Heads ('the project'), seeks relief in this proceeding against the first defendant ('Toga'), the developer of the project, and the second defendant ('Suters'), the architect and superintendent of the project.

[2] Subject to one matter which I will mention shortly, the claims sought to be advanced by JMK against Suters are pleaded in a further amended statement of claim dated 11 December 2007 ('FASOC').

[3] The prayer for relief in the FASOC relevantly seeks the following relief against Suters:

> 'A. Declarations that, by the terms of the Contract:
>
> (a) JMK is entitled to have had payment certificates issued by Suters in the amount claimed by each of the Progress Payment Claims submitted by JMK and as detailed in Annexure "E" – Progress Claims – to the statement of claim;
>
> (b) Toga is indebted to JMK in the amount of the difference between each of the Progress Payment Claims referred to in subparagraph (a) above, and the amount of the Payment Certificate for that claim as detailed in the Annexure "E" – Progress Claims to the statement of claim, together with interest in accordance with clause 42.9 of the Contract;
>
> (c) JMK is entitled to have had each of JMK's Variations Claims valued by Suters for the amount of the value therein claimed and paid by Toga;
>
> (d) JMK achieved practical completion of:
>
> (i) Separable Portion A on 2 September 2005;
>
> (ii) Separable Portion B on 19 May 2006;
>
> (iii) Separable Portion C on 11 October 2006;
>
> (e) JMK is entitled to the extensions of time under the Contract and for the delay and disruption costs claimed by the EOT Claims and paid by Toga.
>
> ...
>
> E. Further, and jointly and severally with Toga, orders against Suters for:
>
> (a) damages, alternatively, compensation in equity, in the amount represented by the difference between each of the Payment Certificates identified in Annexure "J" and the amount claimed in the Progress Claim relevant to that Certificate of Payment as detailed in Annexure "E" together with interest in accordance with clause 42.9;
>
> (b) Further damages as detailed in Annexure "M" – Additional Suters damage – hereto;
>
> (c) Damages, alternatively, compensation in equity;
>
> (d) Alternatively, damages pursuant to s 82 of the TPA [Trade Practices Act].'

[4] Suters has applied, pursuant to *UCPR* rule 171 for the FASOC against it to be struck out. (The application, as filed, referred to a previous iteration of the statement of claim. Argument proceeded, however, on the basis of the FASOC, and to the extent that the application needs to be amended to refer to the FASOC, leave to amend the application should be granted.) It has articulated numerous bases on which it contends that the various claims pleaded against it in the FASOC are so fundamentally defective or misconceived as to require it to be struck out.

[5] In order to make sense of Suters' complaints, it is necessary to set out a précis of the FASOC, at least so far as it concerns Suters. In setting out this summary, I note that the FASOC contained express allegations of dishonesty on the part of Suters. Since the hearing of argument on Suters' application, however, the legal advisers for JMK have advised that JMK will not be pursuing the allegations of dishonesty contained in the FASOC, and have stated their intention to further amend the pleading so as to delete references to dishonesty, recklessness and knowing wrongfulness where those allegations are made against Suters in the current pleading. Whilst some considerable time was devoted in argument to addressing those allegations of dishonesty, in light of JMK's advice that it does not persist with those allegations, it is unnecessary for me to deal with Suters' complaints about those allegations for the purposes of determining the present application.

[6] The allegations remaining in the FASOC against Suters can be summarised as follows.

[7] At all material times, Suters was a trading corporation in the business of the provision of architectural services and the administration of construction contracts as a superintendent (para 2A).

[8] On 5 November 2003, Toga invited prospective tenderers to tender for the construction of the 'Swell' project ('the Project') 'in accordance with documents, including a Project Specification that had been prepared by' Suters (para 3).

[9] On about 9 December 2003, JMK delivered its tender to undertake the Project for $64,971,415 (exclusive of GST) (para 5). On 15 December 2003, JMK was advised by Toga that its tender was not accepted because JMK's tender price was significantly in excess of Toga's budget for the project (para 8).

[10] Between 15 December 2003 and 14 May 2004, Toga and JMK entered into negotiations in respect of the Project 'on the basis that Toga would value manage the Project to reduce the JMK Tender Price to a cost that was acceptable to it'. This, it is said, was done 'with Suters' knowledge, direct involvement and assistance', and was done by Toga implementing changes in the design and scope of the works, eliminating excesses and making other cost savings, reviewing the JMK Buildsoft Database, and by Toga and JMK obtaining further or revised tenders and quotes from subcontractors and suppliers (para 9). This is described in the pleading as the 'Toga Value Management Process'.

[11] As part of the Toga Value Management Process, Toga, inter alia, retained Suters to assist Toga and its other consultants to implement the Toga Value Management Process (para 10.1).

[12] On 11 February 2004, during post-tender meeting No 1, Toga advised JMK and Suters, inter alia, that 'it was agreed that Suters would consider whether the balcony roofs would be deleted from the Project and whether the podium slab could be more effectively redesigned' (para 11.4).

[13] On 25 February 2004, during post-tender meeting No 2, Toga tabled its budget for the Project dated 24 February 2004 for discussion and advised JMK and Suters, inter alia, that:

- Toga would be working through the Toga Value Management Process with the objective of entering into an agreement with JMK to undertake the agreed trades packages for the Project by April 2004 (para 12.1);

- It was agreed that the extent of tiling in the bathrooms and en suites was to be limited by Suters (para 12.8);

- It was agreed that the joinery details were to be simplified by Suters (para 12.9);

- It was agreed that Suters would investigate acoustic treatment for the kitchen floors, balcony membranes and the glazing schedule to determine whether they could be more efficiently redesigned or cost savings achieved by changes in scope (para 12.12);

- Suters was to investigate the local authority fees for connection of services to see whether any cost savings could be made (para 12.13).

[14] On 10 March 2004, in the course of post-tender meeting No 3, Toga advised JMK and Suters, inter alia, that it was agreed that Suters was to prepare and forward to another consultant (Humes) structural drawings that reflected the fact that the scope of works now included 45,000 m² of suspended slabs (para 13.5).

[15] On 12 March 2004, Toga provided to Humes, and subsequently to JMK, for costing revised area drawings for the Project that had bee prepared by Suters (para 14).

[16] On 24 March 2004, during post-tender meeting No 5, Toga advised JMK and Suters, inter alia, that Suters would provide preliminary marked-up drawings defining wall construction for pricing (para 15.4) and that Suters would eliminate set-downs for wet areas from the plans (para 15.5).

[17] On 24 March 2004, Suters provided to JMK 'for its information only' copies of certain drawings prepared by a structural engineer (BJNM) (para 16).

[18] It is pleaded in para 20 that 'in the course of the Toga Value Management Process, on about 14 April 2004, 19 April 2004, 29 April 2004, 12 May 2004, 18 May 2004 and 24 May 2004 Toga, JMK and Suters met with potential subcontractors to review and negotiate their quotations and subcontract scope of works'. From the particulars, however, it is alleged that Suters was represented at meetings on only two of those days, namely the meeting on 19 April 2004 with Humes and Complete Concrete Consulting and the meeting on 24 May 2004 with Humes.

[19] On 20 April 2004, Suters provided JMK with the 'coloured marked-up architectural drawings' for the costing of pre-cast concrete, block walls, party walls and stud walls by JMK (para 21).

[20] On 21 April 2004:

(a) Toga sent JMK a 'letter of intent' which referred to the negotiations 'in which it has been agreed that a lump sum contract price of up to a maximum amount of $50,018,219 (exclusive GST) is achievable', attached a 'draft Trade Cost Allocation which identifies three types of trade costs', referred to Toga's intention to enter into a building contract with JMK, noted that the final contract details were to be resolved over the coming weeks, and asked JMK to signify its concurrence with the letter of intent by signing and returning it (para 22);

(b) JMK signed and returned the letter of intent (para 23).

[21] On 5 May 2004, 'Suters, for an on behalf of Toga, provided to JMK for information copies of proposed drawings for the purposes of the proposed agreement between Toga and JMK for the Project' (para 26).

[22] On 7 May 2004, Suters 'for and on behalf of Toga' provided a Contract Document Register to JMK for the purpose of the proposed agreement (para 27). The Contract Document Register referred to the contract set of drawings (copies of which were provided by Suters to JMK) as 'issued for approval as contract documents' (para 27.1) and also specified which drawings had been issued for JMK for 'information' and which had been issued for costing, and also identified which of the Original Tender Documents had been deleted from the scope of works (para 27).

[23] On 14 May 2004, representatives of Toga met to agree on the trade packages that were to be the subject of the agreement with JMK (para 28).

[24] The FASOC then pleads:

> '29. In the premises referred to in paragraph 9 to 28 hereof, on about 14 May 2004, JMK and Toga agreed that:
>
> 29.1 JMK would undertake the trade packages for the project agreed between JMK and Toga as a result of the Toga Value Management Process (the "Trade Cost Allocation Works") for the price determined by that process for each of

those trade packages plus a 6 per cent margin (the "Contract") being an agreed total price of $50,018,219 (the "Contract Price").

[Particulars are then given of the Contract being partly written, partly oral and partly implied]

29.2 The agreed scope of the Trade Cost Allocation Works were to be recorded in a document that was to be produced by Toga (the "Trade Cost Allocations") as clarified by the "Scope Clarifications" for each of those trades (collectively, the "Scope Clarifications").

[Particulars are given of this allegation]'

[25] On 17 May 2004, Toga 'provided to JMK and to Suters copies of the Trade Cost Allocation and Scope Clarification documents, amended to reflect the agreements reached at the meeting on 14 May 2004' and a variation involving the slab on ground and landscaping trade costs which had been agreed to on 17 May 2004 (para 32).

[26] Toga contends, in para 34, that by the Toga Value Management Process, it, with Suters' knowledge, reduced the scope of works for the Project from that contained in the Tender Specification to the Trade Cost Allocation Works (i.e. the works the subject of the Contract made on 14 May 2004). Particulars of those reductions are given. Specifically, and only in relation to what is described as 'additional reductions in the costs of a multitude of miscellaneous items and smaller trades ... as detailed in Annexure "D"' (and noting that Annexure D to the FASOC itself runs for 48 pages), it is baldly asserted in all bar one of the particulars that 'Roger Johnson and Mike McGrath of Suters had knowledge of the reductions in scope'.

[27] The FASOC then pleads:

'36A. Notwithstanding the matters referred to in paragraphs 9 to 36, Suters did not further amend the terms of the Original Tender Documents that had been prepared by Suters, including the Specification, so as to reflect the scope of works the subject of the Trade Cost Allocation Works.

36B. By reason of the conduct of Suters referred to in paragraphs 2A to 4, 9, 10, 1.3, 11 to 16, 20, 21, 24A to 27, 32, 34 to 36A and in the circumstances of the matters set out in paragraphs 1 to 36A, it is to be inferred that Suters also knew that:

(a) as a result of the Toga Value Management Process, the scope of works the subject of the Project agreed to by JMK and Toga was different from that detailed in the Original Tender Documents;

(b) the terms of many of the Original Tender Documents that had been prepared by Suters, including many of the terms of the Specification (the **"Suters Original Tender Documents"**) had not been amended to record the change in scope of works

that had occurred as a result of the Toga Value Management Process and that was the subject of the Trade Cost Allocation Works;

(c) Toga would or was likely to have documents that had been prepared by Suters for the Project incorporated into the terms of any contract with JMK for the Project; and

(d) to avoid or minimise the risk that any of the Suters Original Tender Documents would give rise to any discrepancy with any other document that formed part of any contract between JMK and Toga for the Project, the Suters Original Tender Documents ought to have been amended to ensure that they recorded the scope of works that had been agreed to as a result of the toga Value Management Process and that was the subject of the Trade Cost Allocation Works.

36C. Sometime prior to 21 May 2004, Suters told Toga that the Suters Original Tender Documents ought to be amended to ensure that they recorded the changes in scope agreed to as a result of the Toga Value Management Process and that was the subject of the Trade Cost Allocation works.

PARTICULARS

The fact of the conversation occurring is to be inferred from statement by Stephenson of Suters to Lewkowicz and Williams of JMK in late 2005, the substance of which is to the effect alleged, and by the fact that amendments were made to the preliminaries section of the tender specification. JMK is unable to provide further particulars of the conversation until after disclosure has been completed.

36D. Suters did not amend the Suters Original Tender Documents to ensure that they recorded the scope of works that had been agreed to as a result of the Toga Value Management Process and that was the subject of the Trade Cost Allocation Works.

36E. Suters did not inform JMK that:

(a) the terms of many of the Suters original Tender Documents, including many of the terms of the Specification, had not been amended to record the change in scope of works that had been agreed to as a result of the Toga Value Management Process and that was the subject of the Trade Cost Allocation Works;

(b) to avoid or minimise the risk that any of the Suters Original Tender Documents would give rise to any discrepancy with any other document that formed part of any contract between JMK and Toga for the Project, the Suters Original Tender Documents ought to be amended to ensure that they recorded the scope of works that had been agreed to as a result of the Toga Value Management Process and that was the subject of the Trade Cost Allocation Works;

(c) Suters had told Toga that the Suters Original Tender Documents ought to be amended to ensure that they recorded the scope of works that had been agreed to as a result of the toga Value Management Process and that was the subject of the Trade Cost Allocation Works; and

(d) the Suters Original Tender Documents could be relied on by Toga or the superintendent under any contract for the Project, to hold JMK to a scope of works for the Project that was different from that which was agreed to as a result of the toga Value Management Process and that was the subject of the Trade Cost Allocation Works.'

[28] The conduct of Suters pleaded in the FASOC up to and including paragraph 36E is described as 'Suters Pre-Contract Conduct', and it is alleged that induced by and in reliance on, inter alia, the Suters Pre-Contract Conduct, JMK agreed to the contract (para 38).

[29] It is then relevantly pleaded in para 39 that the Suters Pre-Contract Conduct 'was misleading or deceptive or was likely to mislead or deceive, and therefore, [was] in contravention of s 52 of the TPA if, as asserted by Toga and Suters the scope of works required by Toga and Suters to be undertaken by JMK for the contract price was not limited to the Trade Cost Allocation Works' but was, in effect, the works certified under the numerous progress payment certificates issued by Suters in respect of the Project.

[30] JMK alleges that if, relevantly, the Suters Pre-Contract Conduct was in contravention of s 52 of the TPA, then by reason of that conduct JMK has suffered loss and damage (para 41). That paragraph claims an entitlement to, relevantly, damages from Suters, which is alleged to be:

'(a) the difference between the cost to JMK of having performed the works constituted by the project (as at 10 December 2007 $87,741,942.82) less the amount paid by Toga (as at 10 December 2007 $55,487,789.18);

(b) loss of the use of the product of the sum detailed in subparagraph (a);

(c) the damages set out in Annexure M hereto'.

[31] Annexure M to the FASOC sets out a number of alleged heads of damage said to have been caused by Suters' conduct, namely:

- Costs incurred by JMK in connection with a complaint made by it to the Board of Architects of Queensland;

- Costs incurred by JMK in preparing an 'as built' program of the completed works to support its variation claims and extension of time claims;

- Losses resulting from the reduced working capital enjoyed by JMK as a consequence of Suters alleged under-certification of the progress claims, being, in effect, lost opportunity claims;

- Costs incurred by JMK in applying for an injunction to restrain Toga from calling on a negative payment certificate which had been issued by Suters;

- Losses incurred by reason of the loss of use by JMK of money it was otherwise entitled to receive from Toga;

- Loss of the 'productive use' of the principals of JMK;

- Compensation for JMK having paid more to certain subcontractors than it would have been required if Suters had certified subcontractors' work properly;

- Losses said to have been incurred by JMK as a consequence of a forced sale of assets in order to meet its banker's requirements.

[32] It is then alleged in the FASOC that, if only Toga is found to have engaged in conduct in contravention of s 52 of the TPA, then by reason of Suters' Pre-Contract Conduct, Suters is subject to accessorial liability pursuant to s 75B of the TPA as a person who aided or abetted, or was knowingly concerned in or party to, Toga's contraventions.

[33] The FASOC then goes on to plead the execution and terms of a formal written agreement which was entered into between Toga and JMK, asserting relevantly, in effect, that JMK signed and provided the formal contract to Toga induced by and in reliance on the Suters' Pre-Contract Conduct. Cognate allegations are made in para 53 in connection with the formal Instrument of Contract, and the Suters' Pre-Contract Conduct is, in para 55, again alleged to have been misleading or deceptive or likely to mislead or deceive 'if as Toga and Suters now assert the tender form and formal Instrument of Agreement are to the effect that the scope of works required to be undertaken by JMK for the contract price is not limited to the Trade Cost Allocation Works' but are the works certified for by Suters in the course of construction (para 55). The same claim for damages is made in para 57, and para 57A is a further articulation of the claim for accessorial liability against Suters.

[34] The FASOC then pleads at some considerable length the terms and conditions it contends were contained in its contract with Toga, including the general or standard conditions.

[35] Paragraph 62A of the FASOC then alleges:

> '62A On about 17 August 2005, pursuant to clause 8.1 of the Standard Conditions consistent with the terms of the Trade Cost Allocations and Scope Clarifications, Suters gave the following direction to both JMK and Toga;

> *"The Australian Standard Form of Formal Instrument of Agreement, signed by both parties on the 11th June 2004, lists the documents forming part of the contract. Point 1 identifies the contract drawing numbers as those listed in section 1 of the specification. This list is in contrast and conflict with the Document Issue Register, issued by Suters Architects as a contract document under separate cover dated 28.06.04. We note that this Document Register was signed by both parties (11 June 2004) as acknowledgement of the drawings that formed the contract set.*
>
> *On the basis that the intent of the contract scope of works and that construction has proceeded for the past 14 months in accordance with the scope of work most accurately reflected in drawings listed as issued on the 7th May 2004,* [i.e. the Contract Document Register] *and confirmed by both parties signing this register as acknowledgment of the same, it is our interpretation that the drawings listed n the signed Contract Document Issue Register as issued on the 7th May 2004, and only those drawings are the drawings that constitute the contract set of drawings.*
>
> *Therefore, pursuant to clause 8.1 of the General Conditions of Contract, it is our direction that those drawings listed on the signed Contract Document Issue Register, under the 7th of May 2004 heading, form the contract set of drawings to be followed by the Contractor in carrying out the work."*
>
> (The "**17 August 2005 Direction"**)'

[36] The FASOC then alleges execution of the works by JMK required under each of Separable Portions A, B and C of the contract, but contends that Suters wrongfully refused, failed or neglected to issue Certificates of Practical Completion for Separable Portion A until 6 September 2006, for Separable Portion B until 14 September 2006 and for Separable Portion C until 23 November 2006 (paras 62B – 62G). The FASOC then pleads the progress payment claims made by JMK, the claims for variation to the Trade Cost Allocation Works, and the claims it made for delays in performance of the Trade Cost Allocation Works, pleading then in para 64 that 'Suters issued payment certificates in respect of each of the progress payment claims (collectively, the 'Payment Certificates')'. It is said that, with the exception of Payment Certificate 57 which remains unpaid, the amount certified in each Payment Certificate as being paid by Toga 'by reason of and in reliance on' Suters' determinations under the contract, as reflected in the terms of each Payment Certificate, and Suters' failures to make determinations in respect of JMK's variation claims and extension of time claims.

[37] Paragraph 65 is then a claim of breach by Toga (through Suters) of various conditions of the Contract constituted by failures to correctly certify the amounts claimed in the Progress Payment Claims, making wrongful adjustments, and not setting out various calculations and reasons for differences in the Payment Certificates, as well as failing to correctly value the variation claims and failing to grant the extension of time claims. These breaches by Toga and the damages claimed against Toga are further articulated in paras 66 – 67C of the FASOC.

[38] The FASOC then turns, from para 68, to the allegations against Suters. It is contended that Suters had agreed with Toga that it would discharge the functions of superintendent under the terms of the contract 'for the benefit of Toga and JMK' and in doing so, Suters would:

(a) act fairly;

(b) act within the time prescribed under the contract or where no time is prescribed, within a reasonable time, and

(c) arrive at a reasonable measure or value of the work, quantities or time. (para 68)

[39] JMK asserts that, by reason of the matters previously pleaded in the FASOC, by at least 21 May 2004, or alternatively 17 August 2005 'Suters knew or ought reasonably to have known that the scope of works required by the terms of the contract to be performed by JMK was that detailed in the Trade Cost Allocation as clarified by the Scope Clarifications'.

[40] It is then pleaded:

> '70. In discharging its functions as Superintendent under the contract, at all material times, Suters knew and intended or ought reasonably to have known that Toga would act in accordance with and in reliance on:
>
> (a) Suters' determinations purportedly made [under the Contract];
>
> (b) The absence of any other such determinations,
>
> in making payment to JMK or in demanding payment from JMK from time to time.
>
> 71. Suters knew or ought reasonably to have known that JMK was vulnerable to the consequences of Suters not exercising its functions as superintendent under the contract:
>
> ...
>
> (b) fairly;
>
> (c) reasonably;
>
> when determining the measure of the value of work, quantities or time under [the Contract] in that Toga would rely on:
>
> (a) any such determination; and/or
>
> (b) the absence of such a determination,
>
> in making payment to JMK from time to time or in demanding payment from JMK from time to time.
>
> [Particulars of JMK's alleged vulnerability are then set out]

> 72. By reason of the matters set out in paragraphs 68 to 71 hereof, at all material times, Suters owed a duty to JMK, both in tort and in equity, to discharge its functions as Superintendent under the Contract:
>
> ...
>
> (b) fairly;
>
> (c) reasonably; and
>
> (d) with reasonable care and skill,
>
> when arriving at a measure of work, quantities or time under the Contract.'

[41] Paragraph 73 of the FASOC then recites the various complaints JMK has about Suters' conduct, for example, in under-certifying the value of completed works, and refusing to assess variation and extension of time claims, contending that these were 'in breach of [Suters'] duties in both equity and tort, in that it acted as Superintendent ... unfairly, further in the alternative, unreasonably in determining the net value of the work under the Contract for payment by Toga'.

[42] It is then alleged that JMK is entitled to damages or compensation in equity in the sum of the difference between the amount that ought to have been certified by Suters in JMK's favour and the amount actually certified by Suters in the Payment Certificates. The further damages claimed in Annexure M (which I have described above) are also claimed (para 75).

[43] The FASOC then pleads a further case of misleading and deceptive conduct, contrary to s 52 of the TPA, against Suters. This claim, set out in some considerable length in paragraphs 76 – 79 of the FASOC is, in essence, that by issuing the Payment Certificates, Suters:

(a) Expressly represented to Toga that the amount certified in each Payment Certificate was 'based on the assessed value [by Suters] of the work completed since the date of the preceding certificate';

(b) Impliedly represented to Toga that this was an assessment by Suters in accordance with the terms of the Contract;

(c) Impliedly represented to Toga that each assessment by Suters was made fairly, reasonably, and with reasonable care and skill;

(d) Impliedly represented to Toga that Suters' assessment of the total value of work completed as at the date of the preceding Payment Certificate continued to be fair and reasonable.

It is said that each of these representations was untrue because the amount of the current value of the work completed was not based on a proper assessment, particularly by reference to the Trade Cost Allocation Works, the variation claims

and the extension of time claims, and that consequently the implied representations also did not represent fair or reasonable opinions. These allegations are set out in paragraphs 76 and 77 of the FASOC, and para 78 pleads:

> 'By reason of the matters set out in paragraphs 76 and 77, by issuing each of the misleading Payment Certificates to Toga, Suters engaged in conduct that was misleading or deceptive or which was likely to mislead or deceive in contravention of s 52 of the TPA'.

[44] It is then pleaded that, by reason of the issuing of the 'misleading payment certificates', JMK has suffered the loss and damage to which I have already referred.

Suters' complaints

[45] Suters' complaints about the FASOC fall into the following categories:

(1) That there was no reasonable cause of action disclosed in the FASCOC for a claim for compensation against Suters in equity;

(2) That the claim in tort founded in dishonesty or deceit was not available as a matter of law. In view of advice received from JMK after the hearing that it would not be pursuing the allegations of dishonesty made in the FASOC, and notwithstanding the very considerable time devoted to this issue in oral argument and the significant quantity of ink spilt over it in the parties' written submissions, this complaint is now effectively rendered redundant in respect of the present application (although it may have some relevance when I need to decide the costs of the application);

(3) That the claim in negligence was not available as a matter of law. In the course of argument, however, counsel for Suters conceded that, having regard to current authorities (particularly the observations of Byrne SJA in *Northbuild Construction Pty Ltd v Napier Blakely Pty Ltd* [2006] QSC 133), this point would not be pressed on the application to strike out the FASOC;

(4) That paragraph 75 of the FASOC is embarrassing for a failure to correlate the allegations of loss in that paragraph to the particular breaches of duty which are said to have caused that loss;

(5) That there is no reasonable basis for most of the loss claimed against Suters because those losses are recoverable by JMK from Toga under the terms of the Contract, and unless and until JMK is unable to recover those losses from Toga it has no entitlement to recover them from Suters;

(6) That the losses claimed in Annexure 'M' to the FASOC are too remote, or not caused in law by the alleged breaches;

(7) That JMK has impermissibly pleaded a reservation to itself of a right to make further claims;

(8) That the claims of misleading and deceptive conduct, in contravention of the TPA, are embarrassing;

(9) That the prayer for relief, particularly insofar as it seeks declaratory relief, seeks incorrect relief against Suters.

The claim for compensation in equity

[46] Cognisant as I am of the appropriate caution which the courts exercise when determining strike-out applications[1], I nevertheless consider, for the reasons that follow, that this issue can, and ought, be resolved now.

[47] JMK's advancement of a claim to compensation in equity is founded on an assertion that Suters, as superintendent under the Contract, owed duties as a fiduciary to JMK, that it breached those duties of fairness and reasonableness in the respects pleaded in the FASOC, and that JMK is therefore entitled to compensation for the loss it has suffered by reason of those breaches. JMK submitted:

> 'A superintendent who accepts an appointment to administer the terms of a contract honestly, fairly and reasonably so as to determine the present entitlements of the parties to it, demonstrates all of the "critical" features of a relationship that equity would describe as "fiduciary".'

[48] It was further submitted that 'the courts have been willing to embrace the description of a person who occupies the position of superintendent in a construction contract as being that of a fiduciary to the parties to that contract'.

[49] I interpolate that paragraph 59.8 of the FASOC pleads the terms of clause 23 of the conditions of the Contract between JMK and Toga. That clause relevantly provided:

> 'The Principal [Toga] shall ensure that at all times there is a superintendent and that in the exercise of the functions of the superintendent under the Contract, the superintendent –
>
> (a) acts honestly and fairly;
>
> (b) acts within the time prescribed under the Contract or where no time is prescribed within a reasonable time; and
>
> (c) arrives at a reasonable measure or value of work, quantities or time.'

[50] The authority cited by JMK in support of the existence of the fiduciary duties pleaded in the FASOC is the following statement in the dissenting judgment of Young CJ in Eq in *Brewarrina Shire Council v Beckhaus Civil Pty Ltd* (2003) 56 NSWLR 576 at [77]:

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[1] It is sufficient in this regard to refer to the well-known cautionary observations of Barwick CJ in *General Steel Industries Inc v Commissioner for Railways* (1964) 112 CLR 125 at 129-130.

> 'There is no doubt that the superintendent has duties to the contractor under clause 23 of the and that, even though the superintendent may have close connections with the proprietor, he owes what could be termed fiduciary duties to the contractor; see, e.g., *Perini Corp v Commonwealth* [1969] 2 NSWR 530.'

[51] For my part, however, I would not be prepared to accept this statement as an expression of settled principle such as to underpin the claims in equity made by JMK in this proceeding. It was, as I have noted, a statement made in a dissenting judgment in a case which concerned the obligations of a superintendent to issue a payment certificate in response to a progress claim. Ipp JA, with whom Mason P agreed, made no reference to any such fiduciary obligations on a superintendent in the course of his judgment.

[52] Moreover, the case referred to by Young CJ in Eq provides scant support for the proposition that a fiduciary relationship exists between the superintendent and a contractor. *Perini Corp v Commonwealth of Australia* concerned a contract under which the plaintiff builder had contracted with the Commonwealth to build the Redfern Mail Exchange. The building contract contained a term that a Commonwealth official called the 'Director of Works' could extend the time for completion of the works to such period as the Director of Works thought adequate upon sufficient cause being shown to him (clause 35). The builder had made numerous applications to the Director of Works for extensions of time, but those requests were refused or, in some cases, only partially granted. As McFarlan J noted, at 535, the fundamental basis upon which the plaintiff builder sought to litigate its case against the defendant was that the defendant was in breach of certain terms implied in the agreement. It was also argued that the defendant Commonwealth was liable to the plaintiff builder for damage suffered by the plaintiff in consequence of errors by the Director of Works, it being contended, inter alia, that the Director of Works performed the function of a certifier under clause 35, and there was an implied term in the contract between the plaintiff and the defendant that the defendant either was obliged to ensure that the Director of Works as certifier performed his duties properly, or alternatively was required to refrain from undertaking any action or course of conduct which would oblige or influence the Director of Works to act otherwise than in accordance with his duties as certifier.

[53] In the course of concluding that the position of the Director of Works was that of a certifier under clause 35, McFarlane J said at 536:

> 'The decisions of the courts extending back over many years show that in many agreements there are included provisions of the same general character as is clause 35. These characteristics appear most noticeable and perhaps most frequently in agreements which have been made for the construction of public works or where one party is a local governing body. The characteristic of them is that there is a person appointed on behalf of the Government or semi-Government body to supervise the execution of the contract on behalf of his employer. He is generally a senior engineer or a Director of Works or a principal architect or some other officer who, because of his technical qualifications and experience, is competent to undertake that work. He is, as I have said, an employee of the body on whose behalf he undertakes this work, but, in addition, the same cases

> show that he is commonly charged with a duty either of resolving disputes between the contractor and the body which employs him or in certifying as to the quality of the work done or the whole or part of the cost of doing that work. **In my opinion the cases make plain that throughout the period of performance of all these duties, the senior officer remains an employee of the Government or semi-Government body, but that in addition and while he continues as such an employee he becomes vested with duties which oblige him to act fairly and justly and with skill to both parties to the contract. The essence of such a relationship in my opinion is that the parties by the contract have agreed that this officer shall hold these dual functions and they have agreed to accept his opinion or certificate on the matters which he is required to decide. It has also been said, and in my opinion correctly said, that the agreement of the parties is that they have referred the decision of these matters to a person who by reason of his employment and who by reason of his other duties in supervising the execution of the contract is a person who has both bias and partiality.** It is now in my opinion too late to hold that an appointment of this kind is not one for which the parties to a contract cannot provide. I have reached the conclusion that although the Director of Works as an officer of the Commonwealth may well have been the servant of the Commonwealth, the general nature of the duties imposed upon him by clause 35 was such that at the same time he fulfilled this biased and partial role of a certifier when he was required to consider an application by the plaintiff for an extension of the completion date.' (Emphasis added)

[54] Further, when considering the case of the implied terms contended for by the plaintiff in that case, McFarlan J, at 545, said that 'the plaintiff and the defendant, being the parties bound by this agreement, are bound to do all co-operative acts necessary to bring about the contractual result' and that 'in the case of the defendant this is an obligation to require the Director [of Works] to act in accordance with his mandate if the defendant is aware that he is proposing to act beyond it'.

[55] Importantly, *Perini* did not, and did not attempt to, identify a relationship between the Director of Works and the builder in that case which could in any way be described as a fiduciary relationship. The case was concerned with the claimed right of the builder to recover against the Commonwealth under the express and implied terms of the contractual arrangements between them. The particular point in that case was to identify the duties which the contract between the builder and the Commonwealth required the Director of Works to perform, and the manner in which the Director of Works was to perform those duties, notwithstanding his position as an employee of the Commonwealth. That, in my opinion, is a far cry from the present case in which, as has been noted above, clause 23 of the Conditions of Contract specifically obliged Toga to ensure that the superintendent acted honestly and fairly and arrived at a reasonable measure or value of the work performed under the Contract in circumstances where the superintendent was engaged by, but not an employee of, Toga.

[56] To say that fiduciary duties are owed by one party to another presupposes the existence of a fiduciary relationship between those parties. No authority was cited to me in which it has been held that parties in the position of JMK, as a builder under a Contract of this nature, and Suters, as superintendent appointed under this

Contract, stand in a fiduciary relationship. The reluctance of courts of highest authority to definitively prescribe the circumstances in which a fiduciary relationship will be found to exist is well known. It is sufficient in that regard to refer to the following statement by Gibbs CJ in *Hospital Products Ltd v United States Surgical Corporation*:[2]

> 'The authorities contain much guidance as to the duties of one who is in a fiduciary relationship with another, but provide no comprehensive statement of the criteria by reference to which the existence of a fiduciary relationship may be established. The archetype of a fiduciary is of course the trustee, but it is recognised by the decisions of the courts that there are other classes of persons who normally stand in a fiduciary relationship to one another – e.g. partners, principal and agent, director and company, master and servant, solicitor and client, tenant for life and remainderman. There is no reason to suppose that these categories are closed. However, the difficulty is to suggest a test by which it may be determined whether a relationship, not within one of the accepted categories, is a fiduciary one.'

[57] Gibbs CJ continued, at 69:

> 'I doubt if it is fruitful to attempt to make a general statement of the circumstances in which a fiduciary relationship will be found to exist. Fiduciary relations are of different types, carrying different obligations ... and a test which might seem appropriate to determine whether a fiduciary relationship existed for one purpose might be quite inappropriate for another purpose.'

[58] In the same case, Mason J (as he then was) noted, at 102, that the categories of fiduciary relationships 'are infinitely varied and the duties of the fiduciary vary with the circumstances which generate the relationship'.

[59] Mason J[3], said that as the courts have declined to define the concept of the fiduciary relationship 'preferring instead to develop the law in a case by case approach', it is necessary to distil the 'essence or the characteristics of the relationship from the illustrations which the judicial decisions provide'. His Honour continued:[4]

> 'The accepted fiduciary relationships are sometimes referred to as relationships of trust and confidence or confidential relationships ..., viz, trustee and beneficiary, agent and principal, solicitor and client, employee and employer, director and company, and partners. The critical feature of these relationships is that the fiduciary undertakes or agrees to act for or on behalf of or in the interests of another person in the exercise of a power or discretion which will affect the interests of that other person in a legal or practical sense. The relationship between the parties is therefore one which gives the fiduciary a special opportunity to exercise the power or discretion to the detriment of that other person who is accordingly vulnerable to abuse by the fiduciary of his position. The expressions "for", "on behalf of", and "in the interests of" signify that the fiduciary acts in a "representative" character in the exercise of his responsibility, to adopt an expression used by the Court of Appeal.

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2 (1984) 156 CLR 41

3 at 96.

4 at 96-7.

> It is partly because the fiduciary's exercise of the power or discretion can adversely affect the interests of the person to whom the duty is owed and because the latter is at the mercy of the former that the fiduciary comes under a duty to exercise his power or discretion in the interests of the person to whom it is owed ... Thus a mere subcontractor is not a fiduciary. Although his work may be described loosely as work which is to be carried out in the interests of the head contractor, the subcontractor cannot in any meaningful sense be said to exercise a power or discretion which places the head contractor in a position of vulnerability.
>
> That contractual and fiduciary relationships may co-exist between the same parties has never been doubted. Indeed, the existence of a basic contractual relationship has in many situations provided a foundation for the erection of a fiduciary relationship. In these situations it is the contractual foundation which is all important because it is the contract that regulates the basic rights and liabilities of the parties. The fiduciary relationship, if it is to exist at all, must accommodate itself to the terms of the contract so that it is consistent with, and conforms to, them. The fiduciary relationship cannot be imposed upon the contract in such a way as to alter the operation which the contract was intended to have according to its true construction.'

[60] Consistent with his Honour's observation that the critical feature of the accepted fiduciary relationships is the undertaking or agreement by the fiduciary to act, inter alia, in the interests of another person in the exercise of a power or discretion which will affect the interests of that other person in a legal or practical sense, it has been reaffirmed in the High Court that, in Australia, fiduciary obligations arise because a person has come under an obligation to act in another's interests.[5]

[61] The relationship of a superintendent to the builder under a contract such as that presently under consideration, however, is not one by which the superintendent is obliged to act in the interests of the builder. Rather, the obligation of the superintendent, as ordinated by clause 23, is to act honestly, fairly and reasonably. Obligations of this nature were described by Byrne J in the Supreme Court of Victoria in *John Holland Construction & Engineering Pty Ltd v Majorca Projects Pty Ltd*[6] as being met by 'a certifier making decisions which are professional, careful and even-handed, not in the interests of any one party'. That a superintendent, in the position of Suters, is bound to act <u>not</u> in the interests of a party speaks strongly against the superintendent being the fiduciary of the builder.

[62] In the absence of any authority binding me to conclude that a fiduciary relationship could be said to have existed between JMK and Suters in the present case, for the reasons I have just identified I am of the view that the current state of the law in this State would not admit even of the possibility of such an alleged fiduciary relationship existing. In those circumstances, the remedies claimed by JMK 'in equity' are unsustainable, and the parts of the FASOC which seek to plead for such relief ought to be struck out.

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5 *Breen v Williams* (1996) 186 CLR 71 per Gaudron and McHugh JJ at 113; *Pilmer v Duke Group Ltd (in liq)* (2001) 207 CLR 165, per McHugh, Gummow, Hayne and Callinan JJ at 197-198.

6 (1997) 13 BCL 235 at 247.

The Trade Practices Claims

[63] JMK seeks to mount two broad categories of claims under the TPA. In its submissions, it described the claims as two classes of conduct by Suters which caused loss and damage to JMK, namely:

(a) Suters' involvement in the negotiations that led to the contract between Toga and JMK, by which damages are sought against Suters for misleading and deceptive conduct in contravention of s 52 of the TPA, or alternatively based on accessorial liability within the meaning of s 75B of the TPA for Suters' involvement in Toga's misleading and deceptive conduct;

(b) Suters' conduct as superintendent in issuing misleading payment certificates (as summarised at [43] – [44] above).

[64] It will be seen from the summary of the pleadings on the first category of TPA claims that the central allegation is to the effect that, if it be held that the scope of works required to be performed by JMK was not limited to the Trade Cost Allocation Works, then the Suters' Pre-Contract Conduct was misleading and deceptive. That immediately begs the question 'what was it about the Suter's Pre-Contract Conduct which was misleading or deceptive or likely to mislead or deceive?' That question, however, is left hanging by the FASOC. This lies at the heart of Suters' complaints about this aspect of the pleading.

[65] Accepting that this part of JMK's claim proceeds on an assumption that it will be found that the scope of works required to be performed by JMK under its Contract with Toga was not limited to the Trade Cost Allocation Works, Suters submits that the difference (whatever it might be) between the Trade Cost Allocation Works and the adjustments to the progress claims 'is a comparison that is alleged in some way to make the Suters' Pre-Contract Conduct misleading or deceptive' and that 'beyond that, the reader is left to guess which among the identified paragraphs of conduct are complained about'. In its submissions, Suters analysed the paragraphs in the FASOC which are said to constitute the Suters' Pre-Contract Conduct to demonstrate the absence of any coherent plea that any, or all, of that conduct was misleading or deceptive, and otherwise to highlight particular deficiencies in the pleading. It is sufficient for present purposes to recount the following complaints and submissions by Suters:

- paras 9 and 10 of the FASOC alleged some five months of negotiations between JKM and Toga with some (unparticularised) involvement by Suters to reduce the JMK tender price to a level acceptable to Toga, but there is no allegation that the negotiations were misleading or deceptive as such or that Suters' conduct in them (whatever that was) was misleading or deceptive;

- paras 11 to 16, 20, 21 and 25 to 27 of the FASOC allege some specific involvement of Suters in the process, but there is no allegation that any of its conduct was misleading or deceptive;

- paras 29 to 31 of the FASOC contain the allegations of the agreement between JMK and Toga about the price of the works to be performed, but it is not alleged that Suters was any part of this conduct;

- para 34, which alleges conduct by Toga which reduced the scope of works for the project, baldly pleads knowledge of this by Suters,[7] but makes no allegation of conduct by Suters;

- para 36A alleges that Suters did not amend the terms of the original tender documents, but there is no allegation that Suters owed any obligation to any party to make the amendment alleged. It is submitted that, in the absence of such an obligation, the allegation must be one of a refusal by Suters to amend the terms of the original tender documents and, in reliance on s 4(2) of the TPA, an omission is only a refusing to do an act if it constitutes refraining (otherwise than inadvertently) from doing that act. None of this is alleged against Suters;

- Similarly, para 36E alleges that Suters did not inform JMK of the matters specified in that paragraph, but there is no allegation that Suters owed any obligation to JMK to give it that advice, and there is no plea that the omission was not inadvertent.

[66] In short, the complaint is that it is impossible to Suters to detect from the pleading precisely what is alleged against it as the conduct which will be said at trial to have contravened s 52 of the TPA, and accordingly the pleadings are embarrassing.

[67] For its part, JMK submitted that the structure of the pleading is that JMK entered into the agreement with Toga in the erroneous belief that, by doing so, JMK was only under an obligation to undertake the scope of work constituted by the Trade Cost Allocation Works. It was submitted that the Suters' Pre-Contract Conduct was a cause of that belief and therefore the Suters' Pre-Contract Conduct was in contravention of s 52 of the TPA and was a cause of the damage suffered by JMK. The central tenet of JMK's submissions in this regard is that, whilst it is not alleged that individual elements of the Suters' Pre-Contract Conduct was in itself misleading or deceptive, the conduct, when looked at as a whole, can be adjudged to have been misleading or deceptive if it is found to have been a cause of JMK holding the erroneous assumption. In that regard, it was submitted that the application of s 52 is not predicated upon or limited to cases involving express or implied misrepresentations, but rather 'the touchstone of liability is whether the conduct relied on can, in all the circumstances relied on, be characterised as being misleading or deceptive'. JMK further submitted, in support of that proposition, that an example of when conduct contravenes s 52 is when it is a cause of the plaintiff's erroneous assumption or belief and the plaintiff, in fact, acts on that belief. In those circumstances, so it was submitted, the defendant's conduct will be misleading or deceptive if, given the context of its surrounding circumstances, it

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[7] Suters also complains that this knowledge is insufficiently pleaded, in contravention of *UCPR* Rule 150(1)(k).

was reasonably capable of inducing the error complained of by the plaintiff. It was further submitted that the case sought to be mounted in this regard against Suters is not a 'representation' case, and accordingly the character of the conduct which is said to be misleading 'is not a matter of pleadings, but a matter for the evaluative judgment of the court based on the evidence of the matters pleaded.' It was further submitted that once the facts of the conduct in the erroneous assumption have been established 'it will then be for the court to determine if the plaintiff's erroneous assumption was so "extreme or fanciful" that it could not be said to have been caused by the defendant's conduct judged in the context of the surrounding circumstances relied on'. JMK confirmed in its submission that 'no single act or omission of Suters is relied on as being misleading or deceptive or likely to mislead or deceive in its own right', but that 'all of the conduct of Suters referred to is relied on in the collective in the context of the surrounding circumstances identified as being a cause of JMK's erroneous belief'.

[68] JMK's submissions in this regard do not, however, stand up to close scrutiny. As was said by French J (as his Honour then was), with whom Beaumont and Finkelstein JJ agreed, in *Johnson Tiles Pty Ltd v Esso Australia Pty Ltd*,[8] the touchstone of liability under s 52 of the TPA is the conduct by act or omission of the particular defendant 'and its characterisation as misleading or deceptive'. His Honour said:

> 'The analysis of the statement of claim must begin by identifying the conduct and the facts relied upon to give it that character. The principles governing characterisation are well established. Conduct is misleading or deceptive if it induces or is capable of inducing error... The so-called "doctrine" of "erroneous assumption" referred to by the High Court in *Campomar Sociedad Limitada v Nike International Ltd* (2000) 169 ALR 677 at 704 is merely another way of expressing that general proposition albeit it seems to have arisen in the context of cases involving similar product names. The statement in the joint judgment of Deane and Fitzgerald JJ in *Taco Co of Australia Inc v Taco Bell Pty Ltd* (1982) 2 TPR 48 at 70 ... that "no conduct can mislead or deceive unless the representee labours under some erroneous assumption", cited in *Campomar*, is another way of saying that the representee must be led into error.'

[69] His Honour then referred to the species of conduct which is misleading or deceptive because it involves an express representation which is false, and also discussed the accepted general proposition that it is not necessary in order to show misleading or deceptive conduct for the purposes of s 52 that the contravener intended to mislead or deceive. French J then referred to what he described as a useful general statement about what is necessary for an applicant in a non-disclosure case to establish in *Fraser v NRMA Holdings Ltd*[9], by the Full Federal Court[10]:

> 'Where the contravention of s 52 alleged involves a failure to make a full and fair disclosure of information, the applicant carries the onus of establishing how or in what manner that which was said involved error or how that which was left unsaid had the potential to mislead or deceive. Errors and omissions to have that potential must be relevant to the topic about which it is said that the respondent's conduct is likely to mislead or

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8 (2000) 104 FCR 564.

9 (1995) 55 FCR 452.

10 at 467.

> deceive. The need for an applicant to establish materiality is of particular importance ... Where the proposal is complex, and involves difficult questions of commercial judgment and matters of degree and conjecture as to the future about which there is room for a range of honestly and reasonably held opinions.'

[70] French J then referred to the particular allegations in the case he was considering, noting that the conduct alleged against the defendant in that case included, relevantly, omissions said to be constituted by 'failing to contradict the pleaded assumptions and failing to disclose the susceptibility of the gas supplies to interruption'. Specifically in relation to the pleaded case of misleading or deceptive conduct by non-disclosure, his Honour said[11]:

> 'The omission to do a thing as a species of conduct is defined in s 4(2) of the *Trade Practices Act*. And as Black CJ observed in *Demagogue Pty Ltd v Ramensky* (1992) 39 FCR 31 at 32:
>
> > "... The significance of silence always falls to be considered in the context in which it occurs. That context may or may not include facts giving rise to a reasonable expectation, in the circumstances of the case, that if particular matters exist they will be disclosed."
>
> Gummow J in similar vein (Cooper J agreeing) said (at 40):
>
> > "... In any case where a failure to speak is relied upon the question must be whether in the particular circumstances the silence constitutes or is part of misleading or deceptive conduct."
>
> I respectfully differ from one aspect of the observations by the Chief Justice in *Demagogue* when his Honour spoke (at 32) of silence as requiring "to be assessed as a circumstance like any other". As appears from the balance of his Honour's judgment, silence, in the context of s 52, is conduct to be assessed by reference to context or circumstances. If a corporation fails to disclose a fact which, absent disclosure in the circumstances of the case, would reasonably be expected not to exist, then that non-disclosure may convey the misleading impression that the fact does not exist.'

[71] I do not, however, construe anything said in that case by his Honour, or indeed in any of the other authorities to which I was referred, as authorising the approach which appears to be that adopted by JMK in the present case, which is simply to say that one should look at all of Suters' conduct and, if it be found that JMK was labouring under an erroneous assumption, then the court should 'evaluate' Suters' pre-contract conduct as having been misleading or deceptive. Such an approach turns a blind eye to the onus which rests on JMK to establish how or in what manner that which was done by Suters, or that which was not done by Suters, had the potential to mislead or deceive. It is not enough simply to say that, because Suters had some involvement in what was obviously a complex chain of circumstances and negotiations and that because JMK ended up having an erroneous assumption as to the basis on which it was contracting with Toga, Suters' Pre-Contract Conduct as a whole was misleading or deceptive.

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11 at 592.

[72] I am therefore of the view that the entire pleading of this aspect of the Trade Practices claim is untenable, and in any event is embarrassing, as it in no way informs Suters of the case which it is expected to answer at trial, and should be struck out.

[73] The complaints by Suters in respect of the accessorial liability pleading in connection with the first category of TPA claims can be dealt with much more briefly. Paragraph 41A of the FASOC simply pleads:

> 'If, notwithstanding the foregoing, only Toga is found to have engaged in conduct in contravention of s 52 of the TPA, then further, by reason of the Suters' pre-contract conduct, Suters is also liable under s 82 of the TPA for Toga's contravention as Suters was a person who:
>
> (a) aided or abetted; or
>
> (b) was knowingly concerned in or a party to,
>
> that contravention by Toga within the meaning of s 75B of the TPA.'

[74] In *Quinlivan v ACCC*[12], the Full Federal Court provided authoritative guidance on the matters required to be pleaded in respect of an accessorial liability claim under s 75B. The court said:

> '8. The leading case on s 75B is *Yorke v Lucas* (1985) 158 CLR 661. The High Court held that the section imports the requirements of the criminal law. The person sought to be made liable must be shown to have had knowledge of the essential matters which go to make up the contravention. This contrasts with the rule as to primary liability under s 52 where liability may attach even though a corporation acts honestly and reasonably: *Hornsby Building Information Centre Pty Ltd v Sydney Building Information Centre Ltd* (1978) 140 CLR 216 at 228, *Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd* (1982) 149 CLR 191 at 197.
>
> 9. In *Yorke* 158 CLR 661 itself the alleged accessory, an employee of a corporate respondent, was held not to be liable because although he was aware of the representations made – indeed they were made by him – he had not knowledge of their falsity. Therefore he could not be said to have intentionally participated in the contravention: *Yorke* 158 CLR at 668. "Knowledge" means actual and not constructive knowledge: *Compaq Computer Australia Pty Ltd v Merry* (1998) 157 ALR 1 at 5. What is said in *Yorke* 158 CLR 661 about s 75B is applicable to s 80(1)(c), (d), (e) and (f).
>
> 10. From the interaction of these provisions three conclusions emerge. First, s 51A does not detract form the *Yorke* principle that actual knowledge of the essential elements of the contravention is required is s 75B or s 80 is to apply. Where the contravening conduct involves misrepresentations, whether as to a future matter or not, this principle requires actual knowledge by the accessorial respondent of the falsity of the representation. This is an essential matter which must be alleged and provide: *Su v Direct Flights International Pty Ltd* [1999] FCA 78 at [38]: *Fernandez v Glev Pty Ltd* [2000] FCA 1859 at [18].

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12 (2004) 160 FCR 1.

…

15. Accordingly, where s 75B or s 80 accessorial liability is in issue in relation to a representation with respect to a future matter, the existence or otherwise of reasonable grounds will be relevant. If reasonable grounds exist, there will have been no contravention and thus no question of accessorial liability will arise. However, as against the accessorial respondent, the onus will be on the applicant to show the respondent had actual knowledge that:

    - the representation was made and
    - it was misleading or
    - the corporation had no reasonable grounds for making it

(See *Australian Competition and Consumer Commission v Michigan Group Pty Ltd* [2002] FCA 1439 at [303].)'

[75] The pleading in para 41A of the FASOC goes nowhere near satisfying these requirements, and ought therefore be struck out as embarrassing.

[76] I should observe, for completeness, that the reasons I have just given apply with equal force to the further TPA claims made by JMK in reliance on the Suters' pre-contract conduct (at para 57 of the FASOC) and the further accessorial liability claim made at para 57A of the FASOC. Those pleadings should also be struck out.

The damages claims

[77] In respect of the breaches of duty contended for by JMK, paragraph 75 of the FASOC pleads:

'75. Further and/or in the alternative, by reason of paragraphs 73 and 74 hereof, JMK has:

75.1 suffered loss and damage and/or is entitled to compensation in equity as at the date of each of the Payment Certificates specified in Annexure J, in the sum of the difference between the amount that ought to have certified by Suters in JMK's favour (as detailed in Annexure "E") and paid by Toga and the amount actually certified by Suters in the Payment Certificates specified in Annexure "J", together with interest in accordance with clause 42.9 of the Contract; and

75.2 suffered further loss and damages and/or is also entitled to compensation in equity because, at those relevant times referred to in paragraph 75.1 hereof, JMK was only paid the amounts wrongfully certified by Suters which caused JMK the losses as set out in Annexure "M" – Suter's Additional Damages – hereto.'

[78] In view of my rejection of JMK's claimed entitlement for relief in equity, the reference to 'compensation in equity' can be disregarded.

[79] Paragraph 79 pleads claims for damages in cognate terms in respect of the post-contract TPA claims.

[80] These claims for damages can be contrasted with the damages claimed against Toga, which are pleaded in paragraph 67 as follows:

> '67. Further and/or in the alternative, by reason of the breaches set out in paragraph 66 hereof:
>
> 67.1 Toga is indebted to JMK pursuant to the Contract, or alternatively for damages, in the amount being the difference between each of the relevant Progress Payment Claims and the amount of the Payment Certificate for that claim, together with interest in accordance with clause 42.9 of the Contract;
>
> 67.2 alternatively, JMK has suffered and continues to suffer loss and damage, namely, the amount represented by the difference between each of the relevant Progress Payment Claims and the amount of the Payment Certificate for that claim, together with interest in accordance with clause 42.9 of the Contract.'

[81] Suters' first complaint, both in respect of the claims for breach of duty and the TPA claim is that, so far as the damages sought in paragraph 75.1 are concerned, the fact that JMK has a contractual entitlement to recover those same amounts from Toga means that the losses claimed for breach of duty against Suters do not arise until the claim against Toga is exhausted or demonstrated to be unmaintainable. Suters points to the contractual mechanism under the Contract which entitles JMK to dispute a payment certificate and, if successful, recover amounts determined to be owing under the disputed certificates. Further, Suters points to clause 23 of the Contract, which contains a contractual obligation on the part of Toga to ensure that Suters observed the duties of honesty, fairness and reasonableness with respect to the certification process, saying that a failure by Suters to observe those obligations sounds primarily as a remedy in damages for breach of contract against JMK. In short, it is contended that unless JMK's right of recovery against Toga is prejudiced in some way by the alleged actions of Suters (which JMK does not allege), JMK will have suffered no loss by the alleged breach of tortious duty or the alleged misleading conduct for post-contract administration by Suters.

[82] For its part, JMK highlights the differences between the claims made against Toga, on the one hand, and the claims made against Suters on the other, pointing out that the claim it makes against Suters is for compensation for the damage it suffered when it was not paid for work that had been completed at the time when Suters wrongly under-certified in respect of the various payment certificates. JMK submitted that the fact that the contract between Toga and JMK provides another, separate mechanism as between those parties for the resolution of disputes between them as to the superintendent's determination of the value of the works from time to time, and to have adjustments made to monies already paid by Toga to JMK, is no answer to the fact that JMK has separate causes of action against Suters for the losses suffered at the times of the under-certifications.

[83] The only authority cited to me by Suters in support of its complaint in this regard is not, it seems to me, on point. That case was *Walker v Medlicott & Son*,[13] which concerned a claim of professional negligence against a firm of solicitors. The plaintiff was the disappointed nephew of a deceased testatrix. Before she had executed her will, which was drafted by the defendant solicitor, the testatrix had told the plaintiff that he would inherit her house. When she died, it was discovered that her will did not contain a specific devise of the house, but merely gave him a share of the residuary estate, which included the house. He sued the solicitors in negligence for failing to carry out the testatrix's instructions. It was held in that case that the plaintiff had failed to discharge the onus of proving that the testatrix had instructed the defendants to make a gift of the house to the plaintiff in her will. It was further argued in that case that, if the plaintiff's version had been supported by credible evidence, he would have had a good claim for rectification of the will, and that he ought to have exhausted that remedy before proceeding against the solicitors for professional negligence. The submission in response to that was that it was reasonable in the circumstances for the plaintiff not to have brought proceedings for rectification, relying in that regard on *Pilkington v Wood*[14] for the proposition that the plaintiff was not obliged to undertake 'complex litigation'. Sir Christopher Slade sitting in the Court of Appeal noted[15], that the court had been told that 'not infrequently, in cases where the solicitor draftsman of a will admits a negligent error, proceedings for rectification will be brought with the protection of an indemnity offered by the solicitor in respect of the costs of the proceedings'. It was pointed out, however, that the solicitor in that case not only had not offered an indemnity, but had contested the case, and accordingly an action for rectification would have been as hotly disputed as the case of professional negligence against the solicitor.

[84] Sir Christopher Slade continued at 739:

> 'This may be so, but, so far as I can see, the evidence on both sides would have been precisely the same. If the plaintiff had a valid claim in negligence, then a fortiori he would have had a good claim for rectification of the will. (I say "a fortiori" because, as I have already indicated, proof of the factors necessary to ground a claim for rectification would not ipso facto establish negligence on the part of Mr Medlicott.)
>
> Throughout this judgment, I have assumed in favour of the plaintiff, without deciding, that a beneficiary who, due to the negligent failure of the solicitor draftsman of a will to carry out the testator's instructions, takes no benefit under the will in its form as executed has a good cause of action against the solicitor who drafted the will, even though he also has a good claim for rectification. Even on that assumption, however, I do not think that the law should encourage the bringing of actions against solicitor draftsmen in such circumstances.
>
> First, successful actions for negligence in such circumstances will or may result in beneficiaries other than the successful plaintiff, for example, the five other residuary beneficiaries in the present case, retaining adventitious benefits greater than those which they would have enjoyed if the will had been rectified so as to accord with the testator's intentions, for example, in

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13 [1999] 1 WLR 727

14 [1953] Ch 770

15 at 739.

> the present case, a share of residue depleted by the removal of the house. Justice would seem to demand that such other beneficiaries should share in the financial burden of putting things right. Secondly, in my judgment, notwithstanding the decision in *Pilkington v Wood*, this is a situation in which, as a general rule, the courts can reasonably expect the plaintiff to mitigate his damage by bringing proceedings for rectification of the will, if available, and to exhaust that remedy before considering bringing proceedings for negligence against the solicitor, for example, in relation to costs incurred in the rectification proceedings.'

[85] Far from supporting the proposition now contended for by Suters, that case seems to me, with respect, to be a particular application, in the particular circumstances of the case then before the Court of Appeal, of the principle that a party who claims to have suffered loss is under an obligation to take all reasonable steps to mitigate that loss. But each case will depend on its own facts. For example, in *Twidale v Bradley*,[16] the plaintiffs sued the solicitor who had acted for both the plaintiffs and the second defendants in the purchase by the plaintiffs from the second defendants of a certain business. The claim against the solicitors was for professional negligence. The claim by the plaintiff purchasers was against the second defendant vendors under the contracts by which they had agreed to sell the business, and a contemporaneous agreement between those parties for the sale by the plaintiffs to the second defendants of a particular residential property. The case against the second defendants included a claim that, in breach of their contractual arrangements with the plaintiffs, they had failed to take all steps necessary to procure the landlord's consent, and thereby had failed to make the title contracted for. On the facts of that case, it appeared that the landlord had, in fact, allowed the plaintiffs into possession, and had accepted rental payments, but had refused to sign the necessary form of consent to evidence the assignment of the second defendants' interest under the unregistered lease with the second defendants. The landlord gave evidence that he would not agree to a lease, or consent to an assignment, until certain repairs had been made to the premises and it had been cleaned. This apparent dilapidation of the premises was a breach by the second defendants of their lease with the landlord. In response to a submission that the plaintiffs ought have pursued the landlord to obtain consent to an assignment or a new lease, Cooper J said at 480:

> 'The plaintiffs' prospects in any action without expending an unknown amount of money to clean and reinstate the premises were by no means certain. In order to mitigate their loss the plaintiffs were not obliged to do anything other than in the ordinary course of business (*Sacher Investments Pty Ltd v Forma Stereo Consultants Pty Ltd* [1976] 1 NSWLR 5,9). They were not required to sacrifice or risk any of their property or rights to mitigate their loss (*Sacher* at 9) nor take the risk of starting an uncertain legal action against the landlords (*Pilkington v Wood* [1953] Ch 770).'

[86] Those applications of the principles relating to mitigation of damages, in the particular circumstances of those particular cases, do not, in my view, lend support for the proposition which Suters would now seek to advance. This case, it seems to me, is one in which JMK would claim to have separate causes of actions against separate parties, albeit that the measure of damages in respect of each of the respective causes of action is the same in terms of calculation, but not necessarily

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16 [1990] 2 Qd R 464

derived by reason of the same principles of recovery. There is, so far as I am aware, nothing in principle to prevent JMK from proceeding against either, or both, of Suters and Toga on the respective different causes of action. The relevant limiting principle, at the end of the day, will be that, if it establishes its claims against both Toga and Suters, JMK will not be permitted to have the benefit of double recovery. That, however, is not a concern raised for consideration at present.

[87] Accordingly, I am not persuaded to the requisite standard that this claim for damages against Suters is so untenable as to be struck out.

[88] Suters' further complaint about the damages claimed is a contention that the items of damage referred to in Annexure "M" as consequential losses are too remote. The nature of the damages claimed in Annexure "M" are summarised above at para [31]. On a preliminary review of those claimed heads of damage, one can well understand the concerns which Suters raises in this regard. For example, claims for lost management time are not usually seen as compensable in cases such as this.

[89] The difficulty for Suters, however, is that, notwithstanding concerns that I might harbour about JMK's ultimate prospects of establishing the recoverability of each of these heads of damage, it is simply inapt for me to make that sort of determination on a summary basis on a striking out application. Questions of remoteness are questions of fact.[17] To the extent that the claims made for damages against Suters rely on the principles relating to recovery for tort, it is uncontroversial that the questions of fact will involve investigations of reasonable foreseeability in the circumstances of the case.

[90] There may be cases in which heads of damage are claimed which are so manifestly remote as to call for summary striking out. The present case, however, is not such a circumstance.

Suters' other complaints

[91] For completeness, I will mention the other complaints made by Suters, although it was quite properly conceded in argument by Suters' counsel that neither of these matters were determinative of the present application.

[92] To the extent that it is contended that JMK, in a number of places in the FASOC, 'purports to reserve to itself the right to make future claims', I accept the characterisation of this by JMK's counsel as an articulation of an intention to provide further particulars once disclosure has been completed. I would only observe that it might be better, as a point of drafting technique, to say so directly, rather than give rise to the concern ventilated by Suters.

[93] In terms of Suters' concerns about the prayer for relief, it is said that Suters is not a proper party to declaratory relief in para A of the prayer for relief which JMK seeks

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17 *Burns v Man Automotive (Aust) Pty Ltd* (1986) 161 CLR 653, per Brennan J at 675.

in general terms (apparently against both Toga and Suters) as to JMK's entitlement to have had payment certificates issued, the indebtedness of Toga, the reaching of practical completion on particular dates, and JMK's claimed entitlement to extensions of time, and delay and disruption costs. Notwithstanding JMK's assertion that 'there is no reason why Suters could not be a party to a declaration', that misses the point, with respect, that the subject matter of each declaration goes directly to the contractual relationship between JMK and Toga. In those circumstances, it seems to me that the declarations ought properly be expressly sought as against Toga.

Conclusion

[94] It follows from what I have said that:

(a) So much of the FASOC as relates to the purported claim in equity by JMK against Suters is untenable and should be struck out;

(b) The parts of the FASOC which seek to plead a case for breach of s 52 of the TPA in reliance on the 'Suters' Pre-Contract Conduct' are untenable and should be struck out;

(c) The claim under s 75B of the TPA that Suters is liable as an accessory for the conduct of Toga prior to the contract is bad in form and should be struck out.

[95] Otherwise, having regard to my determinations above, the fact of Suters' proper concession in relation to the potential availability of a cause of action in negligence against it, and JMK's post-hearing abandonment of the allegations of dishonesty, it is clear that the statement of claim against Suters will need to be re-pleaded.

[96] I will hear the parties as to the necessary orders and directions in that regard, including as to whether JMK would seek, for example, leave to re-plead the claim for assessorial liability against Suters.

[97] It will also be necessary for Toga to file an amended claim which is concordant with the relief it would pursue in the next version of the statement of claim. There was some debate before me about the efficacy of a previous amended claim which had been filed by Toga but, in light of these reasons for judgment, it is clear that the situation should be regularised by the filing of a fresh amended claim.

[98] On the question of costs, I have already observed that a significant part of both the written and oral submissions were devoted to that part of the JMK claim against Suters which was effectively abandoned after the hearing, i.e. the claims founded in dishonesty. Much of the hearing was also devoted to the issues on which Suters has prevailed, namely striking out the claims in equity and the pre-contract Trade Practices claims.

[99] In all the circumstances, I consider that Suters has enjoyed sufficient overall success on its application to warrant an order for costs in its favour.