

Lesley and John Huggins v Fasham Johnson Pty Ltd

CATCHWORDS Domestic Building List; Registered domestic builder entering into agreement to supply kits and arranging for owners to enter into construction contract with regional builder to erect the kit items as a house designed by the registered builder; Whether registered builder 'a builder' or 'the builder' and responsible as such for the construction of the house; Effect of assurances given by builder's officers

ORDER 1 Proceeding dismissed.
2 Costs reserved.

REASONS : M.F. Macnamara, Deputy President : VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL. CIVIL AND HUMAN RIGHTS DIVISION . DOMESTIC BUILDING LIST. Melbourne. 23rd November 2004

BACKGROUND

- 1 Fasham Johnson Pty Ltd was incorporated in 1972 and is in the business of designing and constructing what it describes as 'unique homes' in a price range of \$300,000 to \$1,500,000. In its 32 years of operation it has won over 30 industry awards for excellence and has an enviable reputation in the housing industry. Every fortnight a full page display advertisement for the company appears in the opening pages of the 'Good Weekend' colour magazine which is a supplement to Saturday's Age newspaper. It includes a commentary on some topical issue relative to planning or the home building industry. The articles are typically written by Mr Trevor Fasham the managing director or his wife.
- 2 In 2002 Mr and Mrs Huggins were seeking a builder for what they believed would be their last and retirement home. They had previously constructed what had for them been a 'dream home' with the substantial assistance of a friend who was a bricklayer. They wanted this planned new home to be of similar standard. They had bought land near Drouin in southern Gippsland for a premium price based upon the views and were keen that their new house would properly complement this special location.
- 3 The Huggins' family company Waler Pty Ltd carries on business as an independent machinery agent and Mr and Mrs Huggins were and are occupied in running that company. So far as the proposed new house was concerned Mrs Huggins' special interest was the house's design features, whilst Mr Huggins' interests were focussed on the technical quality of the building. Because of the demands of their company's business they could not undertake the responsibilities of owner builders again. They wanted a first rate builder to deal with all matters from the beginning of the project to the end.
- 4 The Huggins went to a number of display homes around metropolitan Melbourne and considered a number of builders for their project. In many cases the builders excluded themselves on the footing that they did not undertake work in Drouin. Eventually, they attended a display home constructed and exhibited by Fasham Johnson in Glen Waverley. Fasham Johnson did not rule out Drouin as a building location. The precise discussion on this subject is disputed between the parties. They are agreed however that Mr and Mrs Huggins explained their position and their particular concerns to a Fasham Johnson sales representative, Ms Barbara Callil. Following a number of further visits by the Huggins to the display home, Ms Callil drove to Drouin and inspected the Huggins' land. Subsequently the Huggins had further discussions with Ms Callil and Mr Brian Stacey who is a Senior Designer of Fasham Johnson. Eventually this led to Fasham Johnson issuing a quotation dated 30 July 2002. The total price was \$348,271 which included two subtotals, namely \$174,427 described as 'regional builder quotation' and \$173,844 described as 'Fasham regional package quotation', both figures inclusive of Goods and Services Tax. The quotation included three columns headed 'Lock-up package', 'Finishing package' and 'Regional builder'. Mrs Huggins says that she asked Mr Stacey why the quotation included three columns, 'and he said words to the effect that this is a break down to show what the regional builder will get'. Previously Mr Stacey had introduced the Huggins to a Mr Terry Lawrence of Lawren Pty Ltd whom Mr Stacey described as the 'Fasham regional builder'. About the same time the Huggins were provided with a document styled '15 day fixed price outline specification'.
- 5 Discussions continued. According to Mrs Huggins the planned home was generally described as 'a Fasham home'. She said that this phrase was used by staff at Fasham Johnson 'as a matter of pride'.
- 6 On 10 October 2002 the Huggins signed a document styled 'Fasham Johnson pre-contract agreement (regional supply)'. This agreement describes the Huggins as the owners and Fasham Johnson as 'the builder'. It provided for the quotation dated the 30th of July 2002 to be accepted and for the payment of \$2,200 inclusive of GST to meet the cost of a site survey, soil test and 'essential planning and design information to advance the project to the "foundation meeting"'. The agreement referred to a foundation meeting to be held 'for the purpose of proceeding with working drawings, engineering, specifications and contract preparation as soon as possible after the foundation meeting.' At that stage a payment of six percent of the quotation value of the 'Fasham regional package' was payable, credit being given for the \$2,200. Fasham Johnson would prepare a set of contract documents. The Huggins or their agents would obtain a building permit approval and once that approval was forthcoming a further 10% of the contract price would be payable. The Huggins attended the foundation meeting and made payments of \$10,430 by instalments of \$2,200 on 10 October and \$8,230 on 21 October 2002. Fasham Johnson obtained the soil report on 29 October 2002.
- 7 Ms Callil wrote a letter dated 19 December 2002 to the Huggins enclosing two packages of contract documents. The first consisting of:

- (a) Purchase agreement;
- (b) Supply specification; and
- (c) Working drawings were described as 'to be signed in favour of the Company'. The second, included:
 - (a) Housing Industry of Victoria contract;
 - (b) Project specifications;
 - (c) Working drawings.

These were said to be intended to be 'signed in favour of the builder'. There was a revised quotation for \$371,156. In her affidavit in the proceeding, Mrs Huggins said that she received this letter 'on or about 19 December'. When she was cross-examined at some length about the letter and its contents during the hearing, she expressed doubt about the document's receipt. Given that the document exhibited appeared to be an original and not a file copy and that there had been no discovery in the proceeding, she must have received the letter at some point. Despite the doubts she expressed she did not indicate a distinct memory of having received the letter at any other time than shortly after 19 December. The letter included a statement 'your builder will also be in contact with you in the near future to arrange for the signing of the building contract documents'.

- 8 In October Mr Terry Lawrence of Lawren Pty Ltd and the Huggins called by arrangement at Lot 15 Seaview Parade, Lakes Entrance, to inspect a residence owned by a Mr and Mrs Jackson. This residence had been designed by Mr Stacey of Fasham Johnson and constructed by Lawren Pty Ltd. There was some dispute in the evidence as to precisely who called whom to arrange the meeting, though nothing seems to turn upon those issues of detail.
- 9 A number of documents were signed early in 2003. There was some dispute and uncertainty as to whether there were meetings for the signing of documents at the offices of Fasham Johnson in Armadale, a suburb of Melbourne, on one or both of 31 January 2003 and 31 March 2003. Again, little seems to turn upon the detail of the narrative. It is common ground that the parties executed a document styled 'purchase agreement' dated 31 January 2003 naming the Huggins as purchaser and Fasham Johnson as the vendor. The agreement provided for the purchase by the Huggins of two groups of unassembled components described as 'the lock-up kit' and 'the finishing kit' to be used to construct a dwelling. The agreement was expressed to be conditional upon the purchasers obtaining a building permit. It provided for a total price of \$155,026 with the balance to be payable as provided in the agreement of \$139,526. Paragraphs 7, 8 and 9 provided as follows:
- 7. *The purchaser or his agent will in all cases be responsible for the final preparation, finishing, shaping, cutting and painting of all parts supplied with the Package.*
 - 8. *The Purchaser or his agent shall be responsible for all maintenance, preparations and work necessary in connection with the site upon which the Package is to be erected and the preparation thereof for erection of the package.*
 - 9. *The vendor shall conform to the provisions of any Acts of Parliament, regulations and by-laws affecting the package. The purchaser or his agent shall be responsible for complying with the requirements of any Acts of Parliament, regulations and by-laws affecting the site, and the preparation of the site for the erection of the package and the erection of the package. (emphasis added)*
- 10 The building contract forwarded under cover of the letter of 19 December was in blank, that is the particulars of the parties and the other variables had not been included.
- 11 On 2 March 2003 Mr Lawrence called at the Huggins' residence in Warragul having rung to say that he was bringing some documents to be signed. The Huggins signed a document styled 'Victorian new homes contract July 2000' as published by the Housing Industry Association which was described as a 'plain English contract for domestic new homes'. The details were completed in the contract by manuscript which showed the Huggins as the owners and builder as Lawren Pty Ltd. It provided for the construction of a single storey rendered brick dwelling as set out in the specifications and plans. The specifications were said to be of 46 pages supplied by Fasham Johnson Pty Ltd. The site was Lot No. 2 Buln Buln Road, Drouin East. The contract was signed by the Huggins on their own behalf and by Mr T. Lawrence 'by or on behalf of the builder'. The contract was undated and did not provide for a commencement or a finishing date. The parties also signed the contract particulars which were in the same form as those prepared by Fasham Johnson and forwarded under cover of the letter of 19 December. Mr Lawrence signed as builder but at page 6 of the particulars 'the builder' was described in typescript as 'Fasham Johnson Pty Ltd, 1173 High Street, Armadale Vic 3143'.
- 12 The specifications have been the subject of a number of variations. All of them prepared in the offices of Fasham Johnson, initially by a Ms Marnie Atcliffe, a graduate architect who was employed by Fasham Johnson as a contract manager and latterly by its senior designer, Mr Brian Stacey. All are on Fasham Johnson stationery. Those which relate to materials are expressed to be from Fasham Johnson Pty Ltd, but those expressed to relate to construction matters, even although printed on Fasham Johnson stationery are headed and stated as being from 'Lawren Pty Ltd'. An application for building permit for the project including certain additional works for a shed was signed on 2 March 2002 by Mr Lawrence as 'owner or agent'. The applicant for the permit was shown as Lawren Pty Ltd with the Huggins as owners. Coast to Coast Building Service Pty Ltd through its private building surveyor Roger W. Kidd issued a permit dated 24 April 2003 stipulating that building work was to commence by 24 April 2004 and be completed by 24 April 2005. Once again the permit showed the builder as Lawren Pty

Ltd and Mr and Mrs Huggins as the owners. A certificate of insurance for major building work issued by 'Home Owners Warranty' was obtained, expressed to be issued by Royal and Sun Alliance Insurance Australia, issued 14 April 2000 and showing that it was in respect of 'kit home' with the work being carried out by Lawren Pty Ltd. Around the same time the Huggins signed 'supply specification lock-up kit prepared by Fasham Johnson Pty Ltd, 1173 High Street, Armadale Vic 3143'. The final page of the document included the following: 'Fasham Johnson Pty Ltd warrant that sufficient materials of the respective kinds described herein shall be supplied, and provided always that construction is carried out in accordance with the construction manual, any shortage of materials shall be made good by Fasham Johnson Pty Ltd'. The document itself was undated but a rubber stamp appears at the top right hand corner of the first page, stating 'this is the referred to in our kit agreement dated 31/3/03 signed on behalf of supplier ... witness ...'. I have seen no 'kit agreement' dated 31/3/03. One infers that the 'kit agreement' is a reference to the purchase agreement which was signed according to its date on 31 January 2003. It is the presence of the date '31/3/03' on the other stamp that raises the question whether there was a signing meeting on 31 March.

- 13 Excavation began on 26 May 2004. Regrettably things got off to a bad start. The Huggins were of the view that the cost of excavation was for the account either of Fasham Johnson or Lawren Pty Ltd. Mr Lawrence however, the licensed builder and principal of Lawren Pty Ltd was firmly of the opposite view. The Huggins relied upon the terms of the specification which they and Mr Lawrence had signed which clearly required the builder to do the excavation work. Mr Lawrence however relied upon the quotation which it is common ground, required the owners to arrange the excavation at their own cost.
- 14 Things continued to go badly. The Huggins say that even as at today's date their house remains incomplete and there are serious defects. There have been a number of disputes as to proper supply items and the like. The major structural item remaining in dispute relates to the rendering of the walls and the underlying brickwork. The Huggins complain that the brickwork is 'bowed' and that attempts to cover this defect with rendering have been unsuccessful. There have been numerous meetings both on site and at the conference room of Fasham Johnson in Armadale. Fasham Johnson's Managing Director, Mr Trevor Fasham, has involved himself on a number of occasions in seeking to resolve matters and the former Fasham Johnson Construction Manager, Mr Mat Surace (alas now deceased) has attended the site. One of Fasham Johnson's Supervisors, Mr Doug Beaman has also attended the site to attempt to resolve construction issues. In a letter dated 17 October 2003 to Mrs Huggins, Mr Fasham dealt with some 14 construction defects or alleged defects raised by Mrs Huggins in a facsimile to him dated 5 October 2003. He concluded:

I further confirm our commitment in the office that the house is to be finished to the quality of our display homes.

Turning to the dispute over excavation, he said:

The matter of the excavation is to be resolved as quickly as possible. It is clear from the quotations that you received in the first instance that the excavation was by the owner and no charge has been included in the contract price for this excavation. I have questioned both Barbara Callil and Brian Stacey on this point and they are both adamant that you instructed us not to include any costs for excavation as you knew the contractors in the area. Further, you introduced the contractor to Terry Lawrence.

Unfortunately, we made a mistake in the preparation of the specification which says that the excavation is by the builder. This is clearly a mistake as you have not been charged for the excavation.

If the matter is not resolved and it results in legal action at VCAT, the evidence given by our staff as witnesses will be in accordance with the above. ... I urge you to resolve the matter as quickly as possible as it is extremely important for future relationships as you have indicated that it has put Terry off side ...

- 15 At about this time the Huggins consulted Mr John Coghlan of Coghlan Lorich Associates Pty Ltd, trading as Buildspect. He inspected the house on 21 October 2002 and was provided with the contract documents. In a report dated 29 October 2003 at paragraph 3, Mr Coghlan characterised the contractual situation as follows:
- Mr and Mrs Huggins have signed a Purchase Agreement with Fasham Johnson Pty Ltd (Fasham) under which Fasham would provide materials for the construction of the home at the above address - that home having been designed by Fasham to suit the requirements of the Owners. Mr and Mrs Huggins have signed a separate Building Agreement with Lawren Pty Ltd to build the home using the drawings provided and the materials delivered by Fasham. The works have progressed to a stage approaching lock-up.*
- 16 Mr Coghlan's report identified a large number of items which he said required attention. Speaking of Mr Coghlan's inspection on 21 October, Mrs Huggins said in her affidavit in this proceeding:
- During his inspection, or in subsequent discussions, John Coghlan pointed out to us that there is no completion date in the contract, and that the builder under the HIA contract was Lawren, not Fasham Johnson. We were surprised to hear this, and very concerned, as by this time we had formed the view that Lawren was having great difficulty progressing the works to the standard required and we were also concerned that the works were taking so long to complete.*
- 17 There was a meeting on 29 October at Fasham Johnson at which Mr Coghlan's preliminary report was tabled. It seems that the issues as to contractual obligation were not canvassed at the meeting. Mrs Huggins sent a facsimile to Mr Trevor Fasham commenting on the upshot of the meeting and complaining about problems of delay and workmanship. She said that the delay in completion was 'costing us in the vicinity of \$1200 per month'. There was a further meeting at Fasham Johnson in Armadale on 14 November 2003. There were further meetings and it was

at this point that Messrs Surace and Beaman became involved. The Huggins were still not provided with a completion date for the house. Mr and Mrs Huggins sent a fax to Mr Fasham dated 19 November 2003. It may be however that the date was mistaken and that the facsimile was actually transmitted on 19 December. The facsimile stated, inter alia:

We have met with Nat on site and also met with Doug the Supervisor who is to look after the house on site.

We are very pleased with Nat and his attitude to the difficulties that we have been having in regard to the standard of work etc. Sills have been replaced and look great. A number of other items have also been brought up to standard with the majority of items listed now rectified. Unfortunately, rectification of the slab was undertaken after the sills had been laid and it would appear that this work might have loosened some of the sill work. Nat is aware of this and will attend to any re-work that is required. We have today authorised the payment for completion of brickwork in the sum of \$54,000 to Lawren Pty Ltd.

18 In her affidavit Mrs Huggins said:

After repeated telephone calls from Nat Surace, Supervisor for Fasham Johnson, and on his assurance that he would make sure all things still outstanding would be attended to, we agreed 'as a sign of good faith' to arrange for the payment of the next stage in December 2003.

19 The Huggins say that they were subject to extreme stress and anxiety. On 13 April 2004 Mr Huggins attended Fasham Johnson and demanded to see Trevor Fasham. This resulted in August 2004 in an application by Mr Fasham for an intervention order at the Magistrate's Court at Dandenong. According to Mrs Huggins:

In August 2004 my husband agreed without admissions to make undertakings not to enter the Fasham Johnson showroom again.

20 In support of the intervention order application, Mr Fasham swore an affidavit. In the affidavit he said that his company built houses in the Melbourne metropolitan area, the Mornington Peninsula and the Bellarine Peninsula and that when it received enquiries from customers seeking erection of houses outside that area it was:

The company's policy to design the house to the requirements of the customer and to advise the customer of reputable builders in their area that had previously been associated with the Company ... once the company has engaged a local builder the company supplies all the necessary materials in kit form to build the house. This is pursuant to a contract entered into between the Builder and the customer. ... In the circumstances set out in this affidavit there is no contract to carry out building works between the customer and the Company.

21 In a facsimile dated 6 September 2004 the Huggins said, referring to an earlier fax of 27 August:

As we indicated in our last fax, our solicitor has informed us that it is a serious offence for a builder to carry out domestic building work without having taken out the required builder's warranty insurance to which both you and your company would be liable with eviction and penalty.

They said failing a satisfactory response by 5.00 pm, 7 September, they would refer the matter to the Building Commission. Mr Barry of Fasham Johnson replied in a letter dated 10 September 2004:

Lawren has fulfilled its obligations by providing me with an insurance policy, which you have confirmed in your fax to us of 27 August 2004.

No other insurances are required to be provided.

22 In a letter dated 14 September 2004 Pillely and Associates, the law firm acting for Fasham Johnson said that Mr Fasham's involvement was merely as a matter of goodwill. On behalf of Fasham Johnson it denied any liability.

THE PRESENT PROCEEDING

23 On 29 September 2004 lawyers acting for the applicant filed two applications which commenced the present proceedings. The prayer for relief was as follows:

The applicants seek the following orders:

1. A declaration that the first respondent is the builder of the applicants' home.
2. Costs.
3. Such further or other relief as the Tribunal deems appropriate.

24 The grounds for the application are said to be set out in the affidavit of Mrs Huggins.

25 On the same day the solicitors filed a document styled '*application for directions/orders seeking the following orders on behalf of the applicant*'

1. A declaration that the respondent is within the meaning of the *domestic Building Contracts Act 1995*, a builder of the applicants' home and is responsible to ensure that the home is built to the same standard or quality as the respondent's display home at Marriott's Boulevard, Glen Waverley and within a reasonable time.

2. Costs.

3. Such further or other orders as the Tribunal deems appropriate.

26 This document designated the matter as urgent and in the box designed estimated direction/hearing time required stated '*four hours*'.

- 27 The matter was listed for directions before a senior member who ordered that it be determined upon affidavit and without pleadings on 28 October before a presidential member. On 28 October due to difficulties with the availability of counsel, the applicants were not ready to proceed. Two days had been set aside for the hearing before Deputy President Aird. She adjourned the matter to 8 November and three days were set aside for the hearing. As it was, the hearing proceeded till half-way through the afternoon of the fourth day.
- 28 The respondent complained of its difficulty in knowing what case it had to meet in the absence of pleadings. I myself remained unclear until the closing address of Mr Andrew, Counsel for the applicants as to precisely how their case was put. I assumed that the direction that the matter be heard by a presidential member indicated that the applicants were seeking a declaration pursuant to Section 124 of the *Victorian Civil and Administrative Tribunal Act 1998*. I also assumed that the final relief sought was as set out in the initiating application. When I raised this matter with Mr Andrew at the outset of his closing address, he did not disagree with my interpretation. About half-way through, apparently at the prompting of his instructing solicitor however, he referred to the relief sought in the directions application. It need hardly be stated that this form of document which so far as I am aware, has no official status under the rules, but is merely a form approved by the Registry, is appropriate for the seeking of directions and perhaps interlocutory orders. It is not the appropriate repository of the prayer for final relief. As it was however, I did not understand Mr Whitten, Counsel for Fasham Johnson to object to my entertaining an application for the declarations set out in the directions application.

THE APPLICANTS' CASE

- 29 Mr Andrew on behalf of the Huggins put his clients' case on three bases:
- (a) Contract;
 - (b) Equitable estoppel; and
 - (c) Misleading and deceptive conduct.
- 30 Turning first to the arguments based on contract, Mr Andrew submitted the question was not whether Fasham Johnson was 'the builder' under the HIA contract which named Lawren Pty Ltd as the builder and was signed on behalf of the builder by Mr Lawrence, the question rather is 'whether there is any contract between the applicants and Fasham Johnson under which Fasham Johnson was liable for the completion of the home'. He said that there was such an agreement which could be inferred from the conduct of the parties either as a contract or warranty collateral to the purchase agreement (the agreement dated 31 January 2003 dealing with the lock-up and finishing kits) or as a variation to that agreement. He set out some 13 items of conduct which he said led to this conclusion as follows:
1. Fasham Johnson held itself out as a 'Design and Build' building company.
 2. Fasham Johnson described itself as the builder on the Pre-Contract Agreement.
 3. Fasham Johnson designed the house.
 4. Fasham Johnson arranged for the building permit to be obtained.
 5. Fasham Johnson arranged for various components of the home to be supplied under the Purchase Agreement (exhibit LH-10) which included structural roof trusses and wall frames, windows, doors, and the installation of the kitchen.
 6. The contract specification prepared by Fasham Johnson listed itself as the builder of the home. This was referred to in the Outline Specification (exhibit LH-4) which stated 'In due course this specification will be replaced by a Contract Specification ...'.
 7. Fasham Johnson arranged for the soil report to be obtained.
 8. When there were complaints about the quality of the works, the owners made their complaints in writing to Fasham Johnson, and referred to Fasham Johnson as the builder.
 9. At no time prior to August 2004, did Fasham Johnson ever contradict any of the applicants' letters on this issue.
 10. Fasham Johnson representatives attended site meetings concerning the Applicants' allegations of defective works. This included, amongst others, the managing director Trevor Fasham, the head designer Brian Stacey, the construction manager Nat Serace and Doug Beaman.
 11. Fasham Johnson processed variations under cover of its own facsimiles and on its letterhead - references to Lawren appeared on some of the variations, but these were headed regional Builder and were also on Fasham Johnson letterhead with the Fasham Johnson logo.
 12. Trevor Fasham, in response to a letter of complaint from the Applicants to Fasham Johnson, wrote on Fasham Johnson letterhead, *inter alia*: 'I further confirm our commitment in the office that the house is to be finished to the quality of our display homes.
 13. Fasham Johnson convened meetings in its head office to discuss the Applicants' concerns about the standard or quality of the home. Mr Coghlan attended some of these meetings. No-one from Fasham Johnson denied that it was the builder. Mr Coghlan deposes (at para 6) that Mr Fasham seemed very co-operative about rectifying the defects which Mr Coghlan had raised in his report. Fasham Johnson did not seek to challenge Mr Coghlan's evidence.

- 31 According to Mr Andrew this conduct was consistent only with their being a contract as alleged. He said: *It has long been held that when parties do not sign a contract, the actual conduct of the parties can establish the existence of a contract, even in the days when the formalities of written contracts were given highest importance.*
- 32 He referred to the decision of the House of Lords in **Brogden v Metropolitan Railway Co** (1877) 2 App Cas 666, 672 per Lord Cairns LC.
- 33 Mr Andrew said that the test to determine whether such a contract existed was objective and not based upon the parties' subjective intentions. He said that the consideration for its collateral agreement was Huggins entry into the purchase agreement and *The opportunity for Fasham Johnson to claim another Fasham home and possibly winning an overall award. In this sense, the contract between the applicants and Fasham Johnson was a collateral contract, ie. in consideration of the applicants entering into the Fasham and regional builder contract, Fasham warranted that the house would be completed according to the plans and specifications and to the same quality as its display home.*
- 34 This was, he said, consistent with the statement made by Mr Fasham in his facsimile transmission of 17 October 2003 quoted above. He noted that it was also consistent with the statement which Ms Callil attributed to Brian Stacey, namely that issues of design and materials should be directed to Fasham Johnson, issues as to construction should be directed to Mr Lawrence but that they could be referred to Fasham Johnson if Mr Lawrence or his company were not giving satisfaction.
- 35 Mr Andrew relied upon a passage from the judgment of Gibbs CJ in **Hospital Products Limited v United States Surgical Corporation** (1984) 156 CLR 41, 61.
- 36 Mr Andrew also relied upon the doctrines of promissory estoppel. He referred to some four examples of conduct by Fasham Johnson as follows:
1. *the fact that, in response to a request from John Huggins for reassurance if things went wrong with the building side of things, it was represented in effect that if the builder did not fix the problem, come to us, its our name on the project (Brian Stacey, according to Barbara Callil)*
 2. *the fact that after the dispute escalated the Applicants wrote to Fasham Johnson in terms which made it plain that they were expecting Fasham Johnson as their builder to ensure that the works were completed to the required standard, and that Fasham Johnson remained silent on this point and did not contradict what it now says was an incorrect belief*
 3. *further, the fact that in response to the first letter of complaint Fasham Johnson "confirmed our commitment in the office that the house is to be finished to the quality of our display home"*
 4. *thereafter and up to August 2004, Fasham Johnson conducted itself as if it were responsible for the completion of the house by: attending site meetings, convening meetings at its offices, appointing its construction manager to oversee the project, by employing a supervisor on site, whilst at no time in that period (October 2003 to August 2003) advising the Applicants that it was not responsible. Nor were these "services" offered as part of another agreement with the Applicants.*
- 37 Mr Andrew submitted that the evidence disclosed that the Huggins relied on the Fasham Johnson 'representations/promises'. He said this was evident from the correspondence until August 2004. He also referred to the statement by Mrs Huggins in her affidavit that she paid Lawren Pty Ltd \$54,000 by way of progress payments 'after Nat Surace had made repeated calls' and given her certain assurances. He said that the Huggins had paid a lock-up payment to Lawren Pty Ltd in the sum of \$32,400 but had suffered detriment in that their house was still incomplete and defective and the two progress payments described 'could have been withheld until the original builder conformed to the contractual requirements'. Mr Andrew said it was 'unconscionable' for Fasham Johnson to 'now depart from its earlier representations or promises, and accordingly it is estopped from doing so.'
- 38 Finally, Mr Andrew relied upon what he said was misleading and deceptive conduct by Fasham. He said that Fasham Johnson misled or deceived the Huggins into believing that they were either:
- (1) Entering into a contract with Fasham Johnson for the construction of the home (as opposed to the Purchase Agreement); or
 - (2) Entering into a contract with a Fasham Regional Builder but that Fasham Johnson would ensure the completion of the home to the required standard.
- 39 He referred to Section 9 of the *Fair Trading Act 1999*.
- 40 Mr Andrew referred to the following specific alleged misleading and deceptive conduct:
1. *Fasham Johnson in the Pre-Contract Agreement defined itself as "the builder". Whilst this agreement did not contain any terms which indicated that it would construct the house, or be responsible for the construction of the house, the mere description of "builder" by a company which is openly engaged in business as a builder, is sufficient to cause any reasonable person to believe that Fasham Johnson would be "the builder" of the home. It is also noteworthy that this document represents that: "The Builder will prepare a complete set of contract documents including the Contract, plans and specifications ..." Subsequently "the Builder" did prepare a complete set of contract documents, including the contract specifications.*
 2. *These contract specifications prepared by Fasham Johnson are also misleading and deceptive, or likely to be so. They contain, on page 6, the "Particulars of Contract" and include the Applicants name and their site address, and*

the builder is listed as "Fasham Johnston Pty Ltd". It is beyond doubt that anyone reading the contract specification would be led to believe that Fasham Johnson was the builder of the home as described in the specification. Even after the contract was signed the working specification, which the parties worked off, contained this same representation.

3. *In none of the Fasham Johnson documentation provided to the Applicants was Lawren Pty Ltd (or even Terry Lawrence) ever referred to. All such references were to "the regional builder" or "your builder".*
 4. *Fasham Johnson erected a Fasham Johnson builder's sign on the Applicants' land during construction.*
 5. *Fasham Johnson arranged for the soil report to be obtained.*
 6. *Fasham Johnson processed all variations on its letterhead.*
 7. *When complaints were made to Fasham Johnson about the quality of the work, and those complaints were to the effect that the owners believed that Fasham Johnson was the builder of the home and responsible for its completion to the required standard, Fasham Johnson did not take any steps (specifically it did not contradict) to clarify the position as it believed it to be. On the contrary, it engaged in further conduct which was misleading or deceptive, or likely to be so, in confirming its commitment to have the house finished to the quality of its display home; and by sending its construction manager (Nat Surace) and a site supervisor (Doug Beaman) to take control of the works.*
 8. *Fasham Johnson representatives attended site meetings and convened meetings in its office.*
- 41 According to Mr Andrew the Huggins relied on the misleading and deceptive conduct in that they rejected alternative builders on the basis that Fasham Johnson was prepared to build in Drouin and they would not have paid \$10,000 a square for a 'kit home'. Mr Andrew continued, that whilst explanations or justifications might be made individually for a number of the matters he relied upon, in fact these matters did mislead the Huggins. Finally Mr Andrew said that a brochure produced by Mr Fasham during cross-examination which he said explained the 'regional builder' system

Actually fails to do just that. On the contrary, it is just as misleading or deceptive as the other conduct referred to above. In particular, the reference to its 'network' of regional builders reinforces the picture created by Fasham Johnson that its 'regional builders' are part of the Fasham Johnson company.

CONCLUSIONS

- 42 I will deal with these three arguments in reverse order. Ms Barbara Callil was the Huggins first point of contact with Fasham Johnson. Since these events she has retired and at the date of the hearing was within days of departing overseas. According to her affidavit, when she met the Huggins at their initial meeting she
- Told them that Fasham did not build outside of area bounded by the Bellarine Peninsula, Melbourne metropolitan area and the Mornington Peninsula. I informed the Huggins that if they wished to go ahead with a Fasham home, Fasham had builders in regional Victoria that it was confident could be to Fasham's standards.*
- 43 Under cross-examination by Mr Andrew, Ms Callil conceded that she did not have a distinct recollection of the conversation just described, rather she said it was her invariable practice as a sales consultant for Fasham to give such advice to customers seeking the construction of a home in a country location outside Fasham's building area. Mrs Huggins said that she was unaware that she and her husband were signing up with a separate builder, namely Lawren Pty Ltd until she received advice from Mr Coghlan as to the contractual situation in October 2003, that is about 18 months after the initial interview.
- 44 Mr Huggins frankly conceded at the outset of his viva voce evidence that he suffers from a medical condition which has impaired his memory.
- 45 Mr Andrew conceded that Ms Callil presented as a candid and straight forward witness. He said however that I should not act upon her evidence because it was not based on any direct recollection of a particular conversation with the Huggins.
- 46 I see no reason why I should not accept the evidence of Ms Callil on this point. She did present in precisely the manner described by Mr Andrew. Mrs Huggins on the other hand was deeply committed to the success of her own case and described an abstention from reading a large number of the documents to which she was taken by Mr Whitten, Fasham Johnson's Counsel which was frankly difficult to credit. Mr Huggins because of his memory impairment can add little on these disputed matters.
- 47 Mr Andrew submitted that even if Ms Callil had referred to the fact that a regional builder would be constructing the Huggins house, she would likely have referred not to Lawren Pty Ltd or even to Mr Lawrence but most likely to 'Terry'. Ms Callil agreed that Mr Lawrence was well known in the Fasham organisation and customarily referred to simply as 'Terry', therefore the Huggins might reasonably have taken a description that 'Terry' would build their house as merely a reference to a particular Fasham Johnson executive, manager or supervisor who would be in charge of their project. Whilst this view has some plausibility, it is ultimately unconvincing. The Huggins had already assessed the Fasham Johnson standards of workmanship in their inspection of the display in Glen Waverley. They lived in Warragul at the time. Had they needed to view some other Fasham Johnson house to assess quality of workmanship there would have been closer examples than in Lakes Entrance. The trip to Warragul is intelligible only as an assessment of the workmanship of Mr Lawrence and his company in constructing a Fasham designed home.

- 48 Further, the various documents that I have described contain the occasional anomaly which taken in itself might be calculated to mislead. For instance, the pre-contract agreement describing Fasham as the builder or the specifications at page 6 describing it as such. In total however, when one considers these things in light of the explanation which I find Ms Callil did give at the initial interview, the terms of the balance of the documents and the letter of 19 October, I believe the Huggins were not misled. This is also consistent with the fact that immediately after consulting Mr Coghlan and having the benefit of his preliminary report, if the contractual arrangements did come as a complete surprise to the Huggins it is extraordinary that they did not put complaint as to these matters in the forefront of their criticisms at the meeting held at Fasham Johnson where Mr Coghlan's report formed the basis of discussion. There was some evidence about a Fasham Johnson sign at the Drouin site. There was also evidence of a Lawren sign at the site. Neither Mr nor Mrs Huggins described having been induced or misled by this sign. Mr Fasham said that signs were erected to guide persons directing kit materials. To refer to Fasham Johnson's having obtained a soil report in isolation seems significant. There were other things however that Lawren Pty Ltd did, such as obtaining the building permits and being named as builder on the warranty insurance certificate.
- 49 Post contractual conduct including an apparent acceptance of responsibility for construction problems raises more difficult issues. Fasham Johnson said that this amounted to no more than the use of its good offices to stand behind a house which would be regarded as a 'Fasham house'. Whatever other significance it might have, it is difficult to see that it can be supportive of the applicants' main case on misleading and deceptive conduct. Their main case was based, as the references to Mr Andrew's submissions demonstrate, upon the view that the damage which they suffered flowed from entering into the complex of contractual obligations already described. Those obligations were undertaken long before Mr Surace or Mr Beaman became involved and certainly prior to the various meetings held at Fasham Johnson's offices. Reference was also made to assurances given by the late Mr Nat Surace inducing the payment of a \$54,000 progress payments. The contemporary correspondence quoted above does not support this view of things.
- 50 According to the Fasham witnesses, the description of Fasham Johnson in the specifications as 'the builder' was simply a mistake. In any event the specifications were signed by Mr Lawrence.
- 51 Even if contrary to what I have said already I did make findings in favour of the Huggins of misleading and deceptive conduct as contended for by Mr Andrew it is not evident to me that such a finding would justify making the declaration sought in the main application or in the summons.
- 52 As previously noted the direction that this matter be heard before a presidential member assumes that the power invoked to support the proposed declarations is Section 124 of the *Victorian Civil and Administrative Tribunal Act* 1998. That provision is perfectly general in its terms giving a Tribunal constituted by a presidential member power to make a declaration in a proceeding. Inferentially, declarations under that section should be made, subject to the specific jurisdictional stipulations that the matter be in a proceeding where the Tribunal otherwise has jurisdiction to deal with, in accordance with ordinary equitable principles. If a consumer is misled into believing that the fact is 'black' when it is really 'white', neither the common law nor equity would regard that as a basis for declaring contrary to the fact that the situation is black. Section 158 of the *Fair Trading Act* 1999 gives the Tribunal a range of orders which it may make 'in any proceedings for an offence against or a contravention of this Act'. These proceedings are not proceedings for an offence or a contravention but by virtue of sub-section (3) the same powers are available to the Tribunal in proceedings under Sections 149, 150 or 159 of the *Fair Trading Act*. Sections 149 and 150 concern proceedings for injunctions. Section 159 deals with action for damages. This proceeding fits into none of those categories. Section 108 of the *Fair Trading Act* authorises the Tribunal to make a range of orders for the settlement of a consumer and trader dispute. Without descending into detail, this dispute would appear to be a consumer and trader dispute within the meaning of Section 107 of the *Fair Trading Act*; but none of the paragraphs of Section 108(2) setting out the specific powers of the Tribunal would appear to authorise the Tribunal to make either of the declarations sought. Mr Andrew relied upon Section 109 of the Act which in the case of a consumer dispute (defined in Section 109(4) and it would seem extending to this dispute) authorises the Tribunal to 'make any order it considers fair including declaring void any unjust term of a contract or otherwise varying a contract to avoid an injustice'. The precise scope of that power may be open to debate. What is sought here goes beyond declaring void an unjust term of a contract or merely varying a contract. It would require the declaration of the existence of a contract which does not as a matter of general law exist or substituting or adding as a party to a contract someone who is namely Fasham Johnson who is not a party to the contract in the first place. Of course, if as a matter of contract law, Mr Andrew is able to make good his contentions, there would be no occasion to resort to the *Fair Trading Act* at all. If the contractual relations asserted to exist between the Huggins and Fasham Johnson do not exist as a matter of contract law, the *Fair Trading Act* cannot bring them into existence.
- 53 I next turn to the applicants' case in so far as it is based on promissory estoppel.
- 54 A convenient formulation of the requirements for a successful claim along these lines is to be found in the judgment of Brennan J (as he then was) in *Walton Stores (Interstate) Limited v Maher* (1988) 164 CLR 387, 528-9.
- In my opinion, to establish an equitable estoppel, it is necessary for a plaintiff to prove that (1) the plaintiff assumed that a particular legal relationship then existed between the plaintiff and the defendant or expected that a particular legal relationship would exist between them and, in the latter case, that the defendant would not be free to withdraw from the expected legal relationship; (2) the defendant has induced the plaintiff to adopt that assumption or*

expectation; (3) the plaintiff acts or abstains from acting in reliance on the assumption or expectation; (4) the defendant knew or intended him to do so; (5) the plaintiff's action or inaction will occasion detriment if the assumption or expectation is not fulfilled; and (6) the defendant has failed to act to avoid that detriment whether by fulfilling the assumption or expectations or otherwise.

55 This passage was specifically adopted and applied by Warren J (as she then was) in *Edensor Nominees Pty Ltd v Anaconda Nickel Limited* [2001] VSC 502.

56 It will be seen that the essence of a claim based on promissory estoppel is that the plaintiff or applicant has relied to his, her or its detriment upon a represented state of affairs. This means there must be a causal link between the applicant or plaintiff's reliance and what has been represented. Only two acts of reliance seem to have been pointed to. First, the Huggins' action in entering into the complex of legal agreements described above and secondly the making of payments under the terms of the HIA contract. Many of the vents referred to and relied upon Mr Andrew took place after the Huggins signed up the various agreements. Those later events must be irrelevant to any reliance evidenced by the Huggins signing the agreements. Mrs Huggins' facsimile transmission to Fasham Johnson whether it be properly regarded as sent on the 19th of November 2003 or the 19th of December 2003 gives no indication that she made the \$54,000 progress payment relying upon any particular promise by Mr Surace. In any event, whatever the correct date be, Mrs Huggins was clearly aware when she wrote this fax of the regime established by the various written agreements because she had had the advantage of discussions with Mr Coghlan and his preliminary report prior to these events. I was not referred to any particular piece of evidence with regard to the lock-up payment of \$32,400. In the circumstances therefore, I believe I can put to one side all alleged representations taking place after the Huggins entered into the various agreements viz. after 2 March 2003. I have already found as a matter of fact that Ms Callil on the balance of probabilities did correctly describe the effect of these various written agreements. The only inducing conduct therefore that could be relevant was Mr Stacey's explanation to the Mr Huggins that structural or building problems should be taken up with Mr Lawrence or his company, Lawren Pty Ltd but that if the Huggins were getting no satisfaction they could take their complaint to Fasham Johnson. This admitted statement was, if you will, reiterated in a facsimile transmission from Mr Fasham where he said that Fasham Johnson remained committed *'that the house is to be finished to the quality of our display homes'* (facsimile 27 October 2003).

57 For reasons which I explain in the section of my reasons dealing with the applicants' arguments based on contract, I do not believe that either Mr Stacey's initial assurance or Mr Fasham's reiteration amounted to any sought of representation or promise that Fasham Johnson assumed the liabilities of *'builder'* with regard to the erection of the Huggins' house.

58 Finally, I turn to Mr Andrew's submissions based on contract.

59 It will be recalled that he contended either that Fasham Johnson assumed the liabilities of builder by way of a collateral contract or warranty to the supply agreement or by way of variation to the supply agreement.

60 The alleged collateral contract or warrant said to be collateral to the supply agreement cannot in my view be accepted as binding. It is established by the highest authority in Australia (whatever the situation may be in England as to which see *City & Westminster Properties Ltd v Mudd* [1959] Ch 129) that a collateral contract cannot validly be set up which is inconsistent in its terms with the principal contract, the entry into which is said to be the consideration or part of the consideration for a collateral contract. *Hoyt's Pty Ltd v Spencer* (1919) 27 CLR 133; *Maybury v Atlantic Union Oil Company Limited* (1953) 89 CLR 507. To say that Fasham Johnson undertook the obligations of the builder of the Huggins house is inconsistent with the alleged principal agreement viz. the purchase agreement, specifically Clauses 7, 8, and 9 quoted above. Nor is there any evidence of anything which would operate as a variation to the supply agreement.

61 Fasham Johnson's case with regard to the assurances given by Mr Stacey and reiterated by Mr Fasham was that it was no more than a statement of commercial intention and that there was no undertaking of any legal obligation to the Huggins. It is unnecessary for me in the present proceeding to express a view as to the correctness of that contention. The declaration I am asked to make is that by virtue of the alleged variation Fasham John became either *'a builder'* or *'the builder'* of the Huggins house. Put at its highest, the assurance given by Mr Stacey imposed some sort of suretyship obligation upon Fasham Johnson, assuming of course that some consideration could be found to support the premise as a contract apart from entry into the supply agreement.

62 Where a surety guarantees the payment of money, the surety's secondary obligation is functionally identical to the primary obligation viz. to pay the sum of money guaranteed. Where however, the subject of the suretyship is a performance of a non-monetary obligation, the situation is more complex. The nature of a guarantor's obligation was considered by Mason CJ (with whom Deane, Dawson and Toohey JJ agreed) in *Sunbird Plaza Pty Ltd v Maloney* (1988) 166 CLR 245. His Honour considered the view expressed by Lord Diplock in the House of Lords and *Moschi v Lep Air Services Limited* [1973] AC 331, 348. The guarantors obligation was *'to see to it that the debtor performed his own obligations to the creditor'*. Mason CJ said:

It may be that as a matter of history the view that the guarantor has an obligation "to see to it" that the debtor performs his obligation explains why the guarantor is not entitled to notice of the debtor's default and why the creditor's cause of action arises on that default. But the view certainly does not accord with the nature of the guarantor's obligation as it is understood today. Rarely do guarantors have control of, or the capacity to influence,

the principal debtor such that they would willingly assume an obligation to ensure that he performs his primary obligation. (1988) 166 CLR 245, 255-6

- 63 His Honour preferred the view expressed in *Moschi's* case by Lord Reid where according to His Honour :
'His Lordship rejected the notion that there is a common rule applicable to all guarantees and acknowledged that the parties are at liberty to make such agreement as they chose. There are, however, two common classes of guarantee of the payment of instalments by the principal debtor. The first is an undertaking by the guarantor that if the debtor fails to pay an instalment he will pay. This is a conditional agreement. The guarantor's obligation to pay arises on the debtor's failure to pay. The second is an obligation by the guarantor that the debtor will carry out his contract. Then a failure by the debtor to perform his contract puts the guarantor in breach of his. (1988) 166 CLR 245, 256
- 64 It would be possible in the present case I suppose to regard Mr Stacey as having promised that Fasham Johnson would 'see to it' that Lawren Pty Ltd performed its obligations as builder. This would not entail the view that Fasham Johnson was going to perform the obligations of builder itself, merely that it would 'procure that Lawren Pty Ltd performed its obligations'. The evidence was that Lawren Pty Ltd does a considerable amount of work on Fasham Johnson kit homes on reference from Fasham Johnson. This would give, one would imagine, Fasham Johnson a considerable influence, if not complete control over Lawren Pty Ltd. In fact, the evidence seems to show that this is the line which Fasham Johnson took. It convened meetings and sent its personnel on site to try and get Lawren to perform its obligations. None of this of course amounts to Fasham Johnson directly itself undertaking the liabilities of the builder.
- 65 Again, Mr Stacey's assurance might be regarded as a promise that Lawren Pty Ltd would perform its obligations as builder. If that company did not, Fasham Johnson would be regarded as in breach of its obligations and liable for damages. Again, however this would not have Fasham Johnson undertaking a primary as distinct from some kind of secondary suretyship obligation, as builder. I do not believe that someone who gives a guarantee of a builder's obligations is himself to be regarded as a builder.
- 66 In undertaking these analyses I do not wish it to be thought that I am finding that Mr Stacey's assurance amounted to some form of guarantee or suretyship obligation. I mention it merely to indicate that this is the highest that the assurance can go and as such it falls short of constituting Fasham Johnson, the builder or a builder of the Huggins house.
- 67 It follows that Mr Andrew's submissions based on contract must likewise be rejected.
- 68 I should also note submissions which he made to the effect that even in its bare, unamended and unsupplemented form, the supply agreement rendered Fasham Johnson a builder within the meaning of the *Domestic Building Contracts Act*. Mr Andrew said that someone who contracts to supply fungible items to a domestic building site such as bricks or sand does not thereby become a 'builder' within the meaning of the *Domestic Building Contracts Act*; however where specially designed or fabricated items are involved such as roof trusses or to take a hypothetical example, pre-stressed concrete sheets, the supplier is a builder within the meaning of the *Domestic Building Contracts Act*. It is unnecessary for me to express a view as to the correctness of these contentions. Neither of the declarations sought amounts to a request that a finding along these lines should be made, rather the declarations sought seek a finding that Fasham Johnson as the builder or a builder of the Huggins house is responsible for its construction, that is the work apparently allocated to Lawren Pty Ltd under the HIA contract. Since it is unnecessary for me to express a view as to whether the supply agreement in its unamended form would make Fasham Johnson a builder under the *Domestic Building Contracts Act* it is inappropriate for me to express a view on this subject.
- 69 It follows that neither of the declarations sought should be made and this proceeding should be dismissed.

COSTS

- 70 I have heard no submissions as to costs and so I will reserve them.

POSTSCRIPT

- 71 Since dictating the above I have had the advantage of reading a decision of the High Court of Australia *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* [2004] HCA 52 published 11 November 2004. The judgment was delivered to me under cover of a letter from the respondent's solicitors. The Court in a joint judgment emphasised that in the absence of misrepresentation on *non est factum* a party is bound by contractual documents which he or she signs whether he or she reads them or not. My reasons are consistent with that principle.