

**VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL
CIVIL DIVISION**

DOMESTIC BUILDING LIST

VCAT REFERENCE NO. D618/2004

CATCHWORDS

Application for joinder – ss143 and 145 of the *Fair Trading Act 1999*

APPLICANT	Building Project Control Pty Ltd (ABN 64 103 013 752)
RESPONDENT	Amalgamated Group Pty Ltd (ACN 006 320 387)
WHERE HELD	Melbourne
BEFORE	Deputy President C Aird
HEARING TYPE	Directions Hearing
DATE OF HEARING	17 June 2005
DATE OF ORDER	7 July 2005
[2005] VCAT 1298	

ORDER

1. Under section 60 of the Act upon the application of the Applicant I join as a party to these proceedings Neal Slattery of 35 Garden Road Donvale (the Second Respondent).
2. By 14 August 2005 the Applicant has leave to file and serve Amended Points of Claim.
3. **The proceeding is referred to a further directions hearing at 9.30 am on 18 August 2005 at 55 King Street, Melbourne before Deputy President Aird – allow 1 hour.**
4. Costs reserved

DEPUTY PRESIDENT C AIRD

APPEARANCES:

For Applicant

Ms Neskovicin of Counsel

For Respondent and
Proposed 2nd Respondent:

Mr Carew of Counsel

REASONS

1. Application has been made by the Applicant to join Neal Slattery, director of the Respondent, as a party to this proceeding. This application is opposed by Mr Slattery. The Applicant was represented at the hearing by Ms Neskovicin of Counsel, and the Respondent and Mr Slattery were represented by Mr Carew of Counsel.

Background

2. The Applicant engaged the Respondent to supply and install Ardesia 'look alike' slate roofing tiles in July 2003. The tiles were laid in December 2003. The Applicant alleges that shortly after installation the tiles started to curl and lift, discolour and appear to have shrunk. Further they do not have the appearance of slate. The Respondent attempted rectification works in March 2004 which were apparently unsuccessful. This proceeding was commenced on 10 September 2004. Settlement was reached at mediation on 5 November 2004 and consent orders made whereby the proceeding was struck out with a right to apply for reinstatement.
3. The Applicant applied to have the proceeding reinstated and at a directions hearing on 23 February 2005 the following orders were made:
 1. The parties having agreed upon further work to be done within the next 8 weeks, this directions hearing is adjourned to 9.30 am on 27 April 2005 at 55 King Street Melbourne before any member.
 2. The parties are to notify the Tribunal if the matter resolves in the meantime.
4. The matter came before me for directions on 27 April 2005, when being satisfied further works had not been carried out, the proceeding was reinstated, and set down for hearing on 24 May 2005. On 10 May 2005 the Applicant made application for joinder of Mr Slattery as a party to the proceeding which was accompanied by an Affidavit in support, and draft Amended Outline of Claim.

The Applicant's claim is for breach of contract, and misleading and deceptive conduct. This application was listed before me on 16 May 2005 when it was adjourned to 17 June 2005 and Mr Slattery encouraged to obtain legal advice. Mr Slattery indicated on 16 May 2005 that the claim had been accepted by the manufacturer of the tiles and their insurers and that he was expecting a delivery of the new roofing material in the next few days. Mr Scott-Sutton of the Applicant expressed frustration at, what he described as repeated broken promises to replace the roofing material. I note that the Respondent has never denied liability for the defective roofing material, although its position in relation to the claim for consequential and associated damaged is unclear.

The joinder application

5. In seeking to join Mr Slattery, director of the Respondent, the Applicant alleges Mr Slattery represented to the Applicant in discussions with Mr Scott-Sutton, and in the quotation dated 2 July 2003, that the tiles were a 'look alike' slate roof tile, would look like and perform exactly the same as slate, that a 30 year written warrantee from the manufacturer and a 10 year installation guarantee from the Respondent would be provided and that the tiles would be laid in accordance with the manufacturer's recommendations and specifications. The Applicant also relies on the following typed notation on the quotation dated 2 July 2003 which is on the Respondent's letterhead and signed by Mr Slattery:

All workmanship remains guaranteed for 10 years from completion and on the following handwritten notation:

- 30 year guarantee on roofing slate

6. The Applicant asserts these discussions and the quotation constitute representations as defined in s4 of the *Fair Trading Act* 1999 ('FTA') which provides:
- (1) For the purposes of Part 2, if a person makes a representation about a future matter, including the doing of, or refusing to do any act, and the person does not have reasonable grounds for making the representation, the representation is deemed to be misleading.

- (2) In any proceeding under this Act concerning a representation made by a person about a future matter, the person making the representation bears the burden of proving that he or she had reasonable grounds for making the representation.
7. In its Particulars of Claim dated 16 May 2005 the Applicant also alleges that the representations were misleading and/or deceptive or likely to mislead or deceive in breach of s9 of the FTA. And further that the Respondent has failed to provide the 30 year written warranty from the manufacturer and the 10 year installation guarantee in breach of s12(k) of the FTA.
8. The application for joinder is opposed by Mr Slattery principally, it seems, because of the matters set out in paragraph 13 of Mr Scott-Sutton's affidavit affirmed on 10 May 2005 whereby he states:
- If the Applicant is successful in its claims against the Respondent, it might be without a remedy if Mr Slattery hides behind his company to avoid complying with any order of the Tribunal as to damages or costs or begins operating his business under a different company.
9. The Applicant's motives are not relevant in determining whether or not Mr Slattery should be joined as a Respondent. The primary consideration in determining any application for joinder as a Respondent is whether the draft Points of Claim against the proposed party contain an arguable cause of action.
10. Mr Carew of Counsel, who appeared on behalf of both the Respondent and Mr Slattery, submitted that the application for joinder was misconceived insofar as it relied on the alleged representation that the materials would be guaranteed by the manufacturer and the installation by the First Respondent. He submitted that these were contractual terms and that the only cause of action in relation to the guarantees was for breach of contract. In relation to their pre-contractual status they were no more than promises – not representations. I decline to make a summary determination on this point as requested by Mr Carew. The purpose of this hearing was to consider and determine an application for joinder. This

matter was raised without notice to the Applicant and it is premature to determine it in the absence of the Applicant having an opportunity to fully argue its position and make submissions on the various sections of the FTA on which it relies. In any event, even if I were to summarily determine this question it would not directly impact on the application for joinder currently before me – the alleged representations in relation to the warranty and guarantee are just two of the representations the Applicant alleges induced it to enter into the contract with the Respondent for the supply and installation of the roofing material.

11. Any concerns the Respondent has with the plausibility of paragraphs 4 and 5 of the Amended Outline of Claim (as submitted by Mr Carew) are properly matters to be included in any defence. Whether Mr Slattery told Mr Scott-Sutton that the tiles would look ‘exactly the same as slate’ once they were installed, which is denied in paragraph 4 of his Affidavit sworn 16 June 2005, is in the nature of a defence, not grounds for dismissing an application for joinder.

Sections 143 and 145 of the Fair Trading Act 1999

12. This application is made pursuant to ss143 and 145 of the FTA and whilst the power to order joinder is found in s60 of the *Victorian Civil and Administrative Tribunal Act 1998* (which is very wide in its compass) I must consider the provisions of ss143 and 145 of the FTA which provide:

143. Offences by bodies corporate

- (1) If a body corporate contravenes any provision of this Act, each officer of the body corporate is deemed to have contravened the same provision if the officer knowingly authorised or permitted the contravention.
- (2) A person may be proceeded against and convicted under a provision in accordance with sub-section (1) whether or not the body corporate has been proceeded against under that provision.
- (3) Nothing in this section affects any liability imposed on a body corporate for an offence committed by the body corporate against this Act.

...

145. Interpretation

A reference in this Division to a person involved in a contravention of this Act means a reference to a person who—

- (a) has aided, abetted, counselled or procured the contravention;
- (b) has induced, whether by threats or promises or otherwise, the contravention;
- (c) has been in any way, directly or indirectly, knowingly concerned in or party to, the contravention;
- (d) has conspired with others to effect the contravention.

13. Mr Carew conceded that s143(1) of the FTA is a deeming provision, but nevertheless submitted that joinder would be inappropriate. First, because the promise to provide the guarantees was not a representation, and any action in relation to the failure to honour any guarantee was for breach of contract - this is considered above. He also submitted that for s143 to apply it was not sufficient that the company be engaged in trade and commerce, it was also necessary for the officer of the Company, in this case its director, Mr Slattery, to be engaged in trade and commerce. I reject this. The wording of s143 is quite clear: ‘If a body corporate contravenes any provision of this Act, each officer of the body corporate is deemed to have contravened the same provision if the officer knowingly authorised or permitted the contravention.’ There is no requirement that the officer of the body corporate be independently engaged in trade and commerce.

Conclusion

14. I am satisfied on the material before me that there is an arguable case as against Mr Slattery under s143 of the FTA, and possibly under s145(c) as a “person who has been in any way, directly or indirectly, knowingly concerned in or party to, the contravention” and that he should be joined as the Second Respondent.

15. Although the Amended Outline of Claim which accompanied the Application for Joinder dated 10 May 2005 makes allegations against the Second Respondent

personally, not related to the deeming provisions of s143 of the FTA, no submissions were made by Ms Neskovicin that these were grounds on which the Applicant was relying in support of its application for joinder and therefore further amendment will be required to the Points of Claim to confine the claim against Mr Slattery to one arising under ss143 and 145 of the FTA.

DEPUTY PRESIDENT C AIRD