

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

DOMESTIC BUILDING LIST

VCAT REFERENCE NO. D950/2009

CATCHWORDS

Domestic building, joinder, open and arguable case. s4 of the *Fair Trading Act 1998*, statement about a future matter

APPLICANT	C & J Designer Homes Pty Ltd (ACN 005 236 144)
RESPONDENT	Colbren Sealing & Tiling Australia Pty Ltd (ACN 130 921 881)
WHERE HELD	Melbourne
BEFORE	Senior Member M. Lothian
HEARING TYPE	Order in Chambers on the papers
DATE OF ORDER	28 September 2010
CITATION	C & J Designer Homes Pty Ltd v Colbren Sealing & Tiling Australia Pty Ltd (Domestic Building) [2010] VCAT 1598

ORDER

I dismiss the Applicant's application of 7 September 2010 to join Mr Moro to the proceeding.

SENIOR MEMBER M. LOTHIAN

REASONS

- 1 The Applicant has made a third application to join Mr Moro to the proceeding who, as I have said in the two previous applications for joinder, is an employee of the Respondent. The Applicant has requested that I make an order in chambers.

- 2 The Applicant pleads that Mr Moro made a representation about a future matter and that the representation was made without reasonable grounds. As discussed previously, the representation alleged is that tiling work to be done by the Respondent would be to the same or a better standard than tiling work at a property in Ivanhoe, carried out by the Applicant.
- 3 Paragraph 11 of the Further Amended Points of Claim of the Applicant of 7 September 2010 is:

The representation was a representation as to a future matter made without reasonable grounds.

Particulars

Insofar as the Applicant alleges that the representation was made without reasonable grounds, the Applicant refers to and relies on section 4(2) of the *Fair Trading Act 1999*.

- 4 In the second joinder decision, dated 7 September 2010, I quoted the following parts of s4 of the *Fair Trading Act 1999* (“FTA”):
- (1) ... if a person makes a representation about a future matter ... 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 the person had reasonable grounds for making the representation.
- 5 Having regard to both sub-sections 4(1) and 4(2) of the FTA, I consider that for s4(2) to apply in this case, the Applicant must do more than allege there has been a representation as to future matters; it must say why, under s4(1), the representation was unreasonable. The onus of proof then moves to Mr Moro’s position to prove that the representation, if made, was reasonable. The Applicant has merely alleged that there was a representation as to future matters and alleged, without any factual basis, that it was unreasonable.
- 6 As I said in the last two decisions, it is a very serious matter to join a person such as Mr Moro to a proceeding of this nature. I repeat my words in paragraph 29 of the decision of 7 September 2010:
- ... representations about the future are likely to be made in many commercial transactions and it is potentially oppressive to employees if they could be personally liable for every statement they make as to future matters in the course of their employment.
- 7 I therefore dismiss the Applicant’s third application to join Mr Moro to this proceeding.

SENIOR MEMBER M. LOTHIAN