VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

DOMESTIC BUILDING LIST VCAT REFERENCE NO. D512/2008

CATCHWORDS

Application for joinder – relevant considerations - whether draft Points of Claim disclose an '*open and arguable*' case – need to distinguish between conduct as directors of the builder, and in their personal capacity.

FIRST APPLICANT	Qingping/Clara Luo
SECOND APPLICANT	Jinhua Liu
FIRST RESPONDENT	Reynson Concepts Pty Ltd (ACN 114 816 956)
SECOND RESPONDENT	John Ferguson (Struck out from proceeding 24/2/09)
THIRD RESPONDENT	John Armstrong (Struck out from proceeding 24/2/09)
WHERE HELD	Melbourne
BEFORE	Deputy President C. Aird
HEARING TYPE	Directions Hearing
DATE OF HEARING	7 May 2009
DATE OF ORDER	13 May 2009
CITATION	Luo & Anor v Reynson Concepts Pty Ltd (Domestic Building) [2009] VCAT 890

ORDER

1. The applicant's application for joinder is dismissed.
2. **This proceeding is referred to a directions hearing before Deputy President Aird on 28 May 2009 at 9.30 a.m. at 55 King Street, Melbourne.**
3. Costs reserved with liberty to apply.

DEPUTY PRESIDENT C. AIRD

APPEARANCES:

For Applicants	Mr D. Pumpa of Counsel
For Respondent	Mr A. Ritchie of Counsel
For proposed parties	Mr A. Ritchie of Counsel

REASONS

1 On 25 May 2007 the applicants entered into a contract with Reynson Concepts Pty Ltd for the construction of a new home. The builder is clearly identified on the cover page, and on page 31, of the contract as Reynson Concepts P/L. Its ABN and ACN are provided, as is the number of the registered building practitioner. The contract is signed and initialled by the first named applicant Qingping/Clara Luo. The contract price was $492,433.00 of which the owners have paid $73,864.95. The works did not progress past the slab stage, seemingly because the applicants allege that the builder did not pour the slab and lay the pipes in accordance with the plans. The contract was terminated and the applicants engaged an alternative builder to complete the works. Their claim is for the additional costs of construction, some other items, interest and costs.

2 The applicants claim that they always understood the builder to be Rencon Constructions, which they understood was a business carried on by John Ferguson and John Armstrong, the two proposed parties, in partnership. They commenced proceedings against Reynson, John Ferguson and John Armstrong in July 2008. On 24 February 2009 the tribunal struck out the proceedings as against John Ferguson and John Armstrong. The tribunal found the claims against them, for breach of contract and claims for damages arising out of alleged negligence, were bound to fail. In its reasons for decision, the tribunal anticipated that an application to join them might be made. Following an unsuccessful compulsory conference, conducted by a differently constituted tribunal, the parties were given leave to apply for joinder.

3 An application to join John Ferguson and John Armstrong was received on 22 April 2009. A supporting affidavit, by the applicants' solicitor, was filed on 23 April 2009. It is accompanied by two versions of the draft Points of Claim as against the proposed parties. The first identifies and tracks the changes from the original, and the second is a 'clean' copy with the amendments underlined in the usual way.

4 The application for joinder is opposed. The respondent and the proposed parties were once again represented by Mr Ritchie of Counsel. The applicants were represented by Mr Pumpa of Counsel, although he did not draft the proposed Points of Claim. These were apparently drafted by the applicants' solicitors. As against the proposed parties, the applicants seek to claim damages for misleading and deceptive conduct, including a claim under s9 of the *Fair Trading Act* 1999, breach of contract, and in negligence. Unfortunately, the draft Points of Claim do not disclose a cause of action against the proposed parties and for the reasons set out below, this application must fail.

When should joinder be ordered?

5 I accept that the Tribunal's powers under s60 of the *Victorian Civil and Administrative Tribunal Act* 1998 are very wide. Section 60 provides:

> (1) The Tribunal may order that a person be joined as a party to a proceeding if the Tribunal considers that—
>
> (a) the person ought to be bound by, or have the benefit of, an order of the Tribunal in the proceeding; or
>
> (b) the person's interests are affected by the proceeding; or
>
> (c) for any other reason it is desirable that the person be joined as a party.
>
> (2) The Tribunal may make an order under sub-section (1) on its own initiative or on the application of any person.

6 However, in considering any application for joinder where proposed Points of Claim have been filed, the Tribunal must be satisfied that they reveal an *'open and arguable'* case (*Zervos v Perpetual Nominees Limited* [2005] VSC 380 per Cummins J at paragraph 11). The proposed Points of Claim do not satisfy this test.

The misleading and deceptive conduct claim

7 The proposed Points of Claim relevantly provide:

> 6. In or about May or June 2007, Mr Ferguson made representations to the First Applicant to induce her into entering into an agreement with him or with him and Mr Armstrong to build a two storied house on the land.
>
> PARTICULARS
>
> The first Applicant had several conversations with Mr Ferguson. In the course of those conversations, Mr Ferguson told her that
>
> (a) he was in partnership with Mr Armstrong in Rencon Homes;
>
> (b) Mr Armstrong was a registered builder; [statement of fact]
>
> (c) they would work on the building diligently;
>
> (d) they were expert in building;
>
> (e) he had been a builder for 16 years and Mr Armstrong for 20 years; [statement of fact]
>
> (f) they could build the house within 6 months of being able to commence; and
>
> (g) where a registered builder number was required the number would be used. [statement of fact]
>
> 7. By making the representations pleaded in paragraph 6 Mr Ferguson engaged in conduct that was deceptive or misleading

well knowing the representation to be false or alternatively not caring whether they were true or false and with the intent that the Applicants would rely on the representations and thereby be induced to enter into the building agreement and the Applicants relied upon the representations and were thereby induced to enter into the building agreement and Mr Armstrong acquiesced in the conduct.

PARTICULARS

Mr Ferguson knew or ought to have known that he would have the building agreement executed by the Builder, that the Builder had been incorporated a year before, that he and Mr Armstrong would not work on the building work diligently, that if they were expert in building they would not perform their work to the level of an expert, that they would not build the dwelling within 6 months of commencement.

8. Further and alternatively the conduct referred to in paragraph 7 was engaged in trade or commerce.

9. The conduct referred to in paragraph 7 was misleading or deceptive or was likely to mislead or deceive contrary to s9 of the *Fair Trading Act* 1999 and in fact misled or deceived the Applicants.

10. As a result of the matters pleaded in paragraphs 6 to 9 hereof the Applicants have suffered loss and damage.

8 As raised with counsel during the directions hearing, many of the allegations of misleading and deceptive conduct as set out in paragraph 6 are actually statements of fact. Further, there can be no dispute that the contract was entered into with Reynson Concepts Pty Ltd. The particulars to paragraph 7 do not support the allegations set out in paragraph 7. Whilst it may be that the work was not completed within 6 months of commencement there are no particulars as to how this supports an allegation of misleading and deceptive conduct. Similarly there are no particulars as to the relevance of the incorporation of the builder, or how it is said that the representation that the work would be carried out diligently was misleading and deceptive. It is not enough to make bald allegations, they must be supported by relevant particulars, although it is not necessary to set out the evidence.

9 The draft Points of Claim continue:

11. In reliance upon these representations described in paragraph 6, the first Applicant

    (a) agreed that Rencon Homes would build a 2 storied house for the Applicants for $492,433.00 on the land;

    (b) paid a deposit of $24,621.65 on 25 May 2007 being payment of an invoice from Mr Ferguson headed “Rencon Homes” for which she paid by electronic transfer from her account with HSBC on 25 May 2007 to an account which

she was told was an account for the business of Messrs Ferguson & Armstrong account …

(c) signed an agreement produced by Mr Ferguson on 25 May 2007 ("the building agreement").

12. At the time that the first Applicant signed the building agreement she believed that she was contracting with Rencon Homes, a partnership between Mr Ferguson and Mr Armstrong.

13. In the premises an agreement exists between the Applicants as owners, Messrs Ferguson and Armstrong as partners in Rencom Homes (sic) and the Builder the terms of which are those set forth in the building agreement.

14. The building agreement was executed by the Builder.

15. As a consequence of the matters pleaded in paragraphs 6 to 10 Mr Ferguson, Mr Armstrong and the Builder are bound by the terms of the building Agreement.

10 It seems that in preparing these draft Points of Claim the applicants' legal advisors have had little regard to the tribunal's earlier Reasons[1] where Lothian SM said:

7. The Applicants' Points of Claim of 18 July 2008 plead at paragraph 7 that Reynson entered a building agreement with the Applicants. Paragraph 8 alleges there were terms of the building agreement obliging Reynson or Mr Ferguson or Mr Armstrong to complete the building work, but this pleading was not particularised and no support was given by the Applicants for the assertion that anyone other than Reynson might have obligations under the contract. Equally importantly, there is no pleading that Reynson had the power to bind Mr Ferguson or Mr Armstrong to the building contract, and no allegation of agency.

8. In support of the contention that there was a contract which bound Mr Ferguson and/or Mr Armstrong, Mr Ryan, solicitor for the Applicants submitted that certain payments were made to Rencon Homes, that Rencon Homes is the business name of Mr Ferguson alone and that a document describes Rencon Homes as "Trading as Reynson Constructions Pty Ltd". He also submitted that Mr Ferguson told the First Applicant (Ms Luo) that he and Mr Armstrong were in partnership, that Mr Armstrong was a registered builder and that they would work on the Applicants' home.

9. Even if all these allegations were established, they still fall short of establishing that there is a contract to which Mr Ferguson or Mr Armstrong were parties, because the only contract or agreement pleaded is the written agreement of 25 May 2007. Further, none of them are pleaded.

[1] *Luo & Anor v Reynson Concepts Pty Ltd* [2009] VCAT 139

11 Although the matters referred to by Lothian SM in paragraph 8 above have now been pleaded, there is still nothing to support the allegation in paragraph 13 of the draft Points of Claim that there is an agreement between the applicants and the proposed parties (the pleadings are silent as to the terms and conditions of any such agreement), or the allegation in paragraph 15 that the proposed parties are bound by the terms of the building agreement.

12 As I observed in *Perry v Binios* [2006] VCAT 1604:

> However, in considering the applications for joinder, I must have regard to the proposed Points of Claim. Unfortunately they appear to be little more than a recitation of various allegations … and do not distinguish between the conduct of Mr Giovanis in his capacity as a director of GPI and in his personal capacity. [14]

13 The same is true here. Various allegations are made against the proposed parties. Some of the allegations of misleading and deceptive conduct as set out in paragraph 6 of the draft Points of Claim are statements of fact. There is simply no attempt to distinguish between the conduct of the proposed parties in their personal capacity and as directors of the first respondent. Rather, a number of bald allegations are made, with an un-supported conclusion that the proposed parties must therefore be parties to 'an agreement', the terms of which have not been pleaded, and be bound to the terms of the building agreement.

The breach of contract claim

14 The pleadings make various allegations against Mr Ferguson as if it was he, and not the respondent who was the only party to the building agreement. Once again they do not distinguish between his conduct as a director of the respondent, or in his personal capacity. In paragraph 19 the applicants allege that the pipes in the slab were not placed where required by the plans (although the particulars also refer to the failure to pour the slab in accordance with the plans); in paragraph 25 that by Mr Ferguson [not the respondent] showing himself [not the respondent] unwilling to complete the works, the respondents repudiated the building agreement and in paragraph 27 that neither the builder [Reynson] nor either of the proposed parties have resumed work since the applicants served a notice of intention to terminate the building agreement.

15 The comments by Ashley J in *Barbon v West Homes Australia Pty Ltd* [2001] VSC 405 are apt. He made it quite clear that whilst pleading summonses should be discouraged a party has a right to know the case it has to answer:

> I would not want it thought for a moment, because the Tribunal is not a court of pleading, and because the Act encourages a degree of informality in proceedings, that Rafferty's Rules should prevail. They should not. Any party, perhaps particularly a party facing a long, drawn-out hearing in the Tribunal - and I note in this case an estimate

that the Tribunal hearing would extend for some nine weeks - is well entitled to know what case it must meet before the hearing commences. That is not to say that the case must be outlined with exquisite particularity. It is not to say that a defendant is entitled to evidence rather than particularisation. None the less a defendant is entitled to expect that a claim will be laid out with a degree of specificity such that, if it is obvious that the claimant seeks to pursue a claim which is untenable, that can be the subject of an application before trial; such that, moreover, if adequate particularisation is not provided, the matter will be clear to the Tribunal on application by an aggrieved party.[6]

The negligence claim

16 The negligence claim is set out in paragraphs 29 to 32 of the draft Points of Claim:

> 29. Alternatively Mr Ferguson and Mr Armstrong owed the Applicants a duty of care to carry out the work with the competence and skill and care of experienced builders.
>
> 30. Mr Ferguson held himself and Mr Armstrong out as being competent, skillful (sic) and experienced builders who could complete the works within 6 months of commencing.
>
> 31. Mr Ferguson and Mr Armstrong knew or ought to have known that the Applicants relied on their competence, skill and care.
>
> 32. Mr Armstrong and Mr Ferguson are in breach of their duty of care.
>
> PARTICULARS
>
> (a) the Applicants refer to and repeat the contents of paragraphs 19, 25 and 27 hereof and the particulars subjoined to those paragraphs;
>
> (b) failing to complete the building works or ensuring that the works were completed;
>
> (c) failing to complete sufficient of the works to ensure that sufficient of the works were completed so that the Applicants would not suffer loss;
>
> (d) failing to commence work in a timely manner and to complete the works within the time they represented that it would be finished or failing to ensure that works were so completed;
>
> (e) seeking to vary the terms of payment without explanation or reasonable cause;
>
> (f) failing or refusing to attend to the works or to ensure that works were attended to when they knew or ought to have known that such failure would result in loss to the Applicants.

17 Once again, there is no attempt to establish how it can be said that the individuals owe a duty of care to the applicants, separate from and distinct to any duty owed to them by the builder. In the tribunal's earlier Reasons Lothian SM made it quite clear that such a distinction was required:

> There is little doubt that Mr Ferguson and Mr Armstrong provide the hands and minds that did the work for Reynson, and it is possible that either or both could have a duty to the Applicants separate from that of Reynson, but this has not been pleaded. As Senior Member Walker said in *Korfiatis v Tremaine Developments Pty Ltd* [2008] VCAT 403 at [46]:
>
> > What [the director] is said to have done would suggest nothing more than his acting as an employee and director of [the company]. It is not suggested that he had any independent arrangement or agreement with any of the Applicants or undertook any personal responsibility directly to them. His actions did not extend beyond the contractual obligations that [the company] assumed by entering into the building contract. This is not sufficient to show an assumption by [the director] of any duty of care to the Applicants or to any of them. [13]

18 The applicants' legal advisors might be assisted by the comments of Senior Member Young in *Lawley v Terrace Designs Pty Ltd* [2006] VCAT 1363 where he carefully considered and analysed the various authorities and concluded:

> Thus, I consider there must be something more than simply organising or even carrying out the work badly. There must be some act or behaviour of the director that is more than merely carrying out of his company duties, even if it results in a breach of contract or a failure by the company to fulfil its obligations. An intention to induce a company to breach its contract by a director does not incur liability; therefore, I do not see how a careless act by a director by itself can attract personal liability, unless the carelessness was so flagrant as to be outside normal bad building practice[188]. (emphasis added).

Conclusion

19 I am not satisfied that the draft Points of Claim disclose an *'open and arguable'* case against the proposed parties. The draft pleadings are little more than a recitation of various allegations against them. They do not demonstrate an independent duty or breach by them in their personal capacity. I will therefore dismiss the application. If the applicants seek to make a further application to join Mr Ferguson and/or Mr Armstrong care must be taken to clearly identify and articulate an *'open and arguable'* case against each of them, distinguishing between their conduct as directors of the respondent and in their personal capacity.

20 I am not satisfied there would be any utility in joining them to the proceeding under s60 of the *VCAT Act* simply so they are bound by the decision of the tribunal, as suggested by counsel for the applicants. I am

not aware of any claim against the applicants that Mr Ferguson and/or Mr Armstrong might have in their personal capacity that would make joinder for that limited purpose desirable.

21 I will reserve the question of costs with liberty to apply. It is unfortunate that not only have the respondent and the proposed joined parties been put to the cost of responding to this application, but that the applicants have unnecessarily incurred costs because of the seeming lack of regard by their legal advisors to the relevant authorities and the tribunal's earlier reasons.

DEPUTY PRESIDENT C. AIRD