

**VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL
CIVIL DIVISION
DOMESTIC BUILDING LIST**

VCAT REFERENCE NO D927/2008,
D928/2008
D930/2008

CATCHWORDS

Application for joinder of director of first respondent developer – relevant considerations – whether draft Points of Claim reveal open and arguable case – sections 4, 9 and 159 of the *Fair Trading Act 1999*

D927/2008

APPLICANTS	Ari Ioannides, Gioconda Russo
FIRST RESPONDENT	Everest View Pty Ltd (ACN 059 464 336)
SECOND RESPONDENT	Trades 'n' Services Management Group Pty Ltd (ACN 098 874 107)
FIRST JOINED PARTY	Tony Paladino t/as Rainbow Tiling
SECOND JOINED PARTY	Marek Droszczak and Jozef Droszczak t/as as Picture Perfect Painting Service
THIRD JOINED PARTY	Filipini Plastering & Construction Pty Ltd ACN 115 498 943
FOURTH JOINED PARTY	The Trustee for the Al Sayed Family Trust t/as Sayetex Rendering Services
FIFTH JOINED PARTY	Michael John Musgrave and Dana Jane Musgrave t/as Stormseal Roofing
SIXTH JOINED PARTY	ER Bull Electrical Pty Ltd (ACN 123 985 080)

D928/2008

APPLICANTS	Francis Yuk Pang Ma, Katherine Chen
FIRST RESPONDENT	Everest View Pty Ltd (ACN 059 464 336)
SECOND RESPONDENT	Trades 'n' Services Management Group Pty Ltd (ACN 098 874 107)
FIRST JOINED PARTY	Tony Paladino t/as Rainbow Tiling
SECOND JOINED PARTY	Marek Droszczak and Jozef Droszczak t/as as Picture Perfect Painting Service
THIRD JOINED PARTY	Filipini Plastering & Construction Pty Ltd ACN 115 498 943

FOURTH JOINED PARTY The Trustee for the Al Sayed Family Trust t/as Sayetex Rendering Services

FIFTH JOINED PARTY Michael John Musgrave and Dana Jane Musgrave t/as Stormseal Roofing

SIXTH JOINED PARTY ER Bull Electrical Pty Ltd (ACN 123 985 080)

D930/2008

APPLICANTS George Csefalvay, Maria Angela Csefalvay

FIRST RESPONDENT Everest View Pty Ltd (ACN 059 464 336)

SECOND RESPONDENT Trades 'n' Services Management Group Pty Ltd (ACN 098 874 107)

FIRST JOINED PARTY Tony Paladino t/as Rainbow Tiling

SECOND JOINED PARTY Marek Droszczak and Jozef Droszczak t/as as Picture Perfect Painting Service

THIRD JOINED PARTY Filipini Plastering & Construction Pty Ltd
ACN 115 498 943

FOURTH JOINED PARTY The Trustee for the Al Sayed Family Trust t/as Sayetex Rendering Services

FIFTH JOINED PARTY Michael John Musgrave and Dana Jane Musgrave t/as Stormseal Roofing

SIXTH JOINED PARTY ER Bull Electrical Pty Ltd (ACN 123 985 080)

WHERE HELD Melbourne

BEFORE Deputy President C Aird

HEARING TYPE Directions hearing

DATE OF HEARING 14 July 2010

DATE OF ORDER 26 August 2010

CITATION Ioannides & Anor v Everest View Pty Ltd & Ors (Domestic Building) [2010] VCAT 1431

ORDERS

- 1 The application by the applicants to join Jeffrey Neil Yarrow as the third respondent to each of these proceedings is refused.
- 2 Liberty to the applicants to make further application for joinder until 17 September 2010 which must be made in accordance with paragraph 9 of PNDB1 (2007).
- 3 By 17 September 2010 the applicants may file and serve amended Points of Claim which shall include fully itemized particulars of the claim, loss and damage claimed, and the relief or remedy sought, and which must have regard to the Reasons for these orders.
- 4 If a further application for joinder is filed, I direct the principal registrar to list it for hearing with priority before any Member.
- 5 Costs reserved with liberty to apply. Any application for costs will be heard at the next directions hearing.

Following Senior Member Young's retirement the tribunal further orders:

- 1 **The compulsory conference listed for 6 October 2010 is adjourned to 12 November 2010 at 10:00 a.m. at 55 King Street Melbourne.**
2. The orders of 14 July 2010 in relation to the conduct of the compulsory conference apply.

DEPUTY PRESIDENT C AIRD

APPEARANCES:

For Applicant	Mr B Reid of Counsel
For Respondent and proposed Third Respondent	Mr D Aghion of Counsel

Note: Appearances for parties concerned with this application only are recorded

REASONS

- 1 In late 2007 the applicant owners, in each of the proceedings, each entered into a contract for the purchase of a unit 'off the plan'. The units were part of a three unit development in Bulleen. The first respondent, Everest View Pty Ltd was the developer which had entered into a contract for the construction of the units with the second respondent, Trades "N" Management Group Pty Ltd, the builder.
- 2 Settlement was effected for each unit in early 2008. At the time of settlement certain defective and incomplete works had been identified by each of the owners.
- 3 These proceedings were commenced by application to the Civil Claims List in November 2008 with the developer as the respondent. At that time the owners were not legally represented. The proceeding was transferred to the Domestic Building List on 1 December 2008. On 19 February 2009 the builder was joined as the second respondent upon application by the developer.
- 4 Notice of Solicitor commencing to act on behalf of the owners in each of the proceedings was filed on 4 March 2009. Points of Claim were filed on 13 March 2009 in accordance with the orders made on 13 February 2009.
- 5 The owners have applied to join Jeffrey Yarrow, the sole director of the developer, as the third respondent to each of the proceedings. The builder also applied to join a number of sub-contractors as joined parties. All applications were heard at the same directions hearing. Orders were made joining the sub-contractors as joined parties, but I reserved my decision on the owners' application to join Mr Yarrow.
- 6 At the directions hearing the owners were represented by Mr Reid of Counsel and Mr Yarrow was represented by Mr Aghion of Counsel, who confirmed that the application for joinder was opposed.
- 7 Although there are some minor differences between the affidavits filed on behalf of each of the owners, these differences are immaterial and for the purposes of this application I propose to refer to Ari Ioannides' affidavit sworn 2 June 2010.

Background

- 8 Mr Ioannides deposes that their unit was advertised for \$620,000 but when he and his wife expressed interest in purchasing it, they were told by Mr Yarrow that the price was actually \$640,000. They subsequently entered into a Contract of Sale to purchase their unit for \$640,000. This is a discrete issue relevant only to D927/2008 in which Mr Ioannides and Ms Russo are the applicants.
- 9 He then deposes that at the pre-settlement inspection on 4 January 2008 he and his wife identified a number of incomplete and defective works

including ‘damaged appliances, the airconditioning hanging off the wall with wires hanging out and it was not working’ and ‘the fuses to the electricity supply kept tripping and we were unable to test any other appliances’. Further, that Mr Yarrow acknowledged there were a number of items to be ‘finished and fixed’ and that these would be done within the 90 day [maintenance] period. He deposes that he and his wife agreed to proceed to settlement relying on this representation, and that they advised their solicitor they would settle under protest.

- 10 He then states that more defects became apparent after they moved in, and that he emailed various lists setting out the defects in his unit, and those in his neighbours units, to Mr Yarrow during January and February 2008. On 17 February 2008 he received an email from Mr Yarrow advising that the builder would arrange for tradespeople to fix the defects the following week. On 27 February 2008 he received an email from the builder identifying those works it was prepared to rectify and those it considered to be contractual issues which, it said, should be sorted out with the developer. The builder indicated that its contract with the builder was different from the details included in the Contract of Sale between the developer and the owners.

The application for joinder

- 11 The tribunal’s power of joinder is found in s60 of the Victorian Civil and Administrative Tribunal Act 1998 (‘the VCAT Act’) which 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.
- 12 In considering any application for joinder where draft Points of Claim have been filed, the tribunal must be satisfied that they reveal an ‘open and arguable’ case.¹ The draft Amended Points of Claim do not satisfy this test.
- 13 Draft amended Points of Claim were handed up at the commencement of the directions hearing in support of the applications to join Mr Yarrow as the third respondent to each of the proceedings. Unfortunately, these draft Amended Points of Claim have not been marked up to show the proposed amendments. Although leave has not been formally sought or granted to file amended Points of Claim a careful comparison of the Points of Claim as originally filed, and the draft amended Points of Claim reveals that the

¹ *Zervos v Perpetual Nominees Limited* [2005] VSC 380 per Cummins J at [11].

proposed amendments are not simply confined to the claims against Mr Yarrow. Paragraphs 10 through 16 are new.

- 14 In their Points of Claim, the owners allege the developer breached its contractual obligation by failing to:
 - i ensure that the construction of the Dwelling was carried out in accordance with the General Specifications;
 - ii ensure that the construction of the Dwelling was carried out in accordance with all legal requirements'
 - iii procure the Builder to carry out remedial work to ensure that the construction of the Dwelling complied with the General Specifications to the Contract and all legal requirements.
- 15 There are also allegations that the developer engaged in misleading and deceptive conduct in breach of s9 of the *Fair Trading Act* 1998 ('the FTA').
- 16 In the draft amended Points of Claim allegations are also made that the developer and Mr Yarrow engaged in conduct which was unconscionable (ss7 and 8 of the FTA) and that the representation was a representation as to future matters (s4 of the FTA). The owners also seek to rely on s159 of the FTA.
- 17 Whilst in his written and oral submissions Mr Reid set out a number of bases on which Mr Yarrow should be joined most of these matters, including Mr Yarrow's relationship with the developer, are not pleaded.
- 18 In considering this application for joinder I am concerned with the draft amended Points of Claim as they have been filed in support of this application for joinder, not with foreshadowed claims which have not been properly articulated in a draft pleading, and where it is not clear how they might be pleaded if Mr Yarrow was joined as a party to these proceedings. There might be times when it is appropriate to join a party under s60 of the VCAT Act in the absence of a draft pleading, but given the nature of the allegations made here, I am not persuaded this is one of those times.
- 19 The allegations in paragraphs 10 to 13 of the draft amended Points of Claim concern the alleged representations made by the developer. The draft amended Points of Claim appear to have been drafted with a lack of attention to detail. For instances, there are references to 'defendant' instead of 'respondent', repeating of numbers, and inconsistencies.

Representations by the Developer

10. Further, the Developer made representations to the Owners that:
 - 10.1 the construction of the Dwelling would be carried out in accordance with the General Specifications attached to the Contract;
 - 10.2 the construction of the Dwelling would comply with all legal requirements;

- 10.3 it would complete all incomplete building works and ensure defective building works were rectified urgently and within a 90 day period following the pre-purchase inspection of the Property;
- 10.4 all items that were defective, incomplete or a departure from the Specifications would be fixed once Jeffrey Yarrow of the Developer had been notified of them, including but not limited to the items in the pre-purchase inspection of the Property;
- 10.5 it was arranging, and would arrange, for the Builder to carry out rectification works to the Dwelling; and
- 10.6 the sale price of the property was \$620,000

(the Representations)

11. The Representations were made in trade and commerce.
 12. Relying upon and induced by its communication, the Owners settled on the purchase of the dwelling and awaited the rectification of defective works and departures from the specifications by the Developer and or the Builder.
 13. The Representations were false and misleading or likely to mislead and deceive in contravention of section 9 & 12 of the FTA.
- 20 The first two allegations in 10.1 and 10.2 simply repeat the allegations made in support of the claim for damages arising from an alleged breach of contract. It is well established that a breach of a contractual promise is not of itself misleading and deceptive conduct². There must, at the very least, be an intention not to perform the contractual promise. Any allegations about a lack of intention to perform a contractual promise would, of course, need to be supported by Particulars.
- 21 Although the pleadings at paragraphs 10-16 refer to alleged representations by the developer only, the Particulars, which I do not propose to include in full in these Reasons, generally refer to conduct by Mr Yarrow, or the developer and Mr Yarrow. The following Particulars to some of the allegations in paragraph 10 concerning representations by the developer (which are not numbered) are illustrative:

The Representation at 10.3 is oral and in writing. Insofar as the Representation was oral, the Third Respondent made it to the Applicants in response to the identification of the defects and incomplete works by the Applicants at the pre-purchase inspection on 4 January 2008 and at other times before and after settlement.

The Representation at 10.3 is further constituted by oral representations [made] by the Third Respondent when he told the Owners that he would attend to the items identified urgently and

² *Futuretronics International Pty Ltd v Gadzhis* [1992] 2 VR 217

assured that Applicants that the problems identified would be rectified within a 90 day period.

And in the Particulars to paragraph 13 concerning representations by the first respondent Developer:

(c) The Owners procured and provided to the First and Third Respondents a pre-purchase inspection listing defective works and departures from the Specification prior to Settlement;

...

(e) Following the provision by the Owners of the pre-purchase inspection and or the First and or the Second and or Third Defendants own knowledge, the Third Defendant advised the owners that all defective works and departure from specification items already notified, and to be notified, to him and the First Defendant would be rectified within 90 days or prior to settlement; (sic)

(d)³ All items that were defective, incomplete or a departure from the Specifications were not rectified once Jeff Yarrow [the proposed third respondent] and or the Third Respondent had been notified of them.

22 However, Particulars are not pleadings. They are particulars of the allegations pleaded against a respondent, and there is no claim pleaded against Mr Yarrow in paragraphs 10-13.

23 I now turn to consider paragraph 14:

14. Further or alternatively, in the premises the First Respondent and or alternatively the Third Respondent engaged in conduct which was unconscionable within the meaning given to that term in sections 7 and 8 of the FTA.

This is a bald allegation unsupported by Particulars. In the absence of Particulars it is impossible to identify an 'open and arguable' claim.

24 Paragraph 15 is difficult to understand:

15. Further or alternatively, the First Respondent and/or the Third Respondent contravened section 9 of the FTA as referred to in paragraph 13 herein pursuant to section 159 of the FTA by reason of:

- (a) being involved in the contravention; and/or
- (b) contravening section 9 of the FTA; and/or
- (c) aiding abetting, counselling or procuring the contraventions; and/or
- (d) inducing the contraventions.

25 Section 159(1) of the FTA provides:

³ Where it appears for the second time in the Particulars to paragraph 13

- (1) A person who suffers loss, injury or damage because of a contravention of a provision of this Act may recover the amount of the loss or damage or damages in respect of the injury by proceeding against any person who contravened the provision or was involved in the contravention. (emphasis added)

It is not a deeming provision whereby, as alleged by the owners, the contravention in s9 is pursuant to s159. Rather, s159 effectively identifies the persons against whom a claim may be made where there has been a contravention of the FTA – in this case where (if proved) the contravention is the engaging in misleading and deceptive conduct under s9. This paragraph does not set out an ‘open and arguable’ claim against either the developer or Mr Yarrow.

26 In paragraph 16 the owners plead:

16. The representation was a representation as to future matters within the meaning of section 4 of the FTA.

Section 4(1) provides:

For the purposes of Part 2, if a person makes a representation about a future matter, including the doing of, or the refusing to do any act, and the person does not have reasonable grounds for making the representation, the representation is deemed to be misleading. (emphasis added)

- 27 Not only are there no Particulars, ‘the Representations’ as set out in paragraph 10 are the representations by the developer. Although paragraph 16 refers to ‘the Representation’ – I suspect this is a typographical error. If not, it is unclear which specific representation this paragraph refers to. A representation as to future matters does not of itself give rise to a claim under the FTA.
- 28 Lastly, I note that in the Prayer for Relief in the draft amended Points of Claim damages are claimed as against each of the first and third respondents ‘pursuant to section 158 and/or 159’ of the FTA. Section 158 contemplates orders which may be made by a court against a person accused and found guilty of contravening provisions of the FTA. If the applicants wish to maintain their claim for damages under s158 they will of course first have to persuade the tribunal that it has jurisdiction to make findings and orders under that section.
- 29 Mr Aghion submitted, correctly in my view, that it is not only necessary to establish reliance on the alleged representations but that the reliance on the representation must have caused the loss and damage⁴. Reliance and causation have not been clearly articulated in the draft amended Points of Claim.
- 30 In all proceedings there are various allegations about representations made about rectification and completion made prior to the owners settling.

⁴ *Futuretronics* at page 242

Although it is alleged they proceeded to settlement in reliance on these representations, there are no pleadings as to the loss and damage suffered by the owners as a result of these representations. In other words, that the alleged representation caused the loss and damage claimed. This is particularly important in the context of these proceedings where clause 30 of the Contracts of Sale provides:

Notwithstanding the other provisions herein it is a fundamental term of this Contract if at the date of payment of balance any dispute arises as to any matter relating to the building works or the completion, the Purchaser shall not be entitled to delay or postpone payment of the balance or to request or demand the holding back or retention of any part of the balance of security for the satisfactory completion of the work.

So, although the owners allege they were induced into settlement by the representations, they seemingly had a contractual obligation to do settle, even where the works were incomplete or defective. The proper interpretation of this clause is of course subject to argument and I make no findings here as to its enforceability.

- 31 Allegations are also made about representations made after settlement. However, there are no pleadings about what it was the owners were induced to do in reliance on those representations, or the loss and damage caused as a result of those representations.
- 32 In the Ioannides' proceeding, where there is a discrete issue about the alleged representation as to the price of the unit (in paragraph 10.6) there are no pleadings as to what the owners say they were induced to do in reliance on this representation which forms the basis for their claim for a refund of \$20,000.
- 33 Accordingly, I refuse the application by the owners to join Mr Yarrow as a third respondent to each of the proceedings, although I will grant them leave to make a further application to join him.
- 34 Further, as leave has not been sought nor obtained to file amended Points of Claim, I refuse leave to the applicants to file Amended Points of Claim in the form which was filed in support of their application for joinder of Mr Yarrow. However, I will grant the applicants leave to file amended Points of Claim in each proceeding which must clearly set out their claims with fully itemised and clear particulars against the developer. When drafting the amended Points of Claim regard should be had to the submissions made in opposition to the application for joinder, and the observations made in these Reasons.
- 35 I will reserve the question of costs with liberty to apply.

DEPUTY PRESIDENT C AIRD