

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

DOMESTIC BUILDING LIST

VCAT REFERENCE NO. D950/2009

CATCHWORDS

Domestic building, joinder, employee of party sought to be joined, alleged misleading representation, *Fair Trading Act 1999* sections 4, 9, 143(1), 144(4) and 159, “officer” of a corporation, whether conduct personal or “ministerial” or “as an organ of” an employer.

APPLICANT	C &J Designer Homes Pty Ltd
RESPONDENT	Colbren Sealing
WHERE HELD	Melbourne
BEFORE	Senior Member M. Lothian
HEARING TYPE	Directions Hearing
DATE OF HEARING	11 May 2010
DATE OF ORDER	20 May 2010
CITATION	C &J Designer Homes Pty Ltd v Colbren Sealing (Domestic Building) [2010] VCAT 969

ORDERS

- 1 I dismiss the Applicant’s application to join Michael Moro to this proceeding as Second Respondent.

Directions by consent

- 2 By 10 June 2010 the respondent must file and serve Points of Defence specifying the material facts relied upon. Any set-off claimed must be fully set out.
- 3 By 24 June 2010 the parties must each:
 - (a) file and serve a list of all documents in their possession or control, or in the possession or control of an agent, relevant to the proceedings; andmake such documents available for inspection and photocopying upon 24 hours written notice.
- 4 Where experts are retained:
 - (a) they must prepare their reports in accordance with Practice Note VCAT 2: Expert Evidence; and
 - (b) copies of their reports must be filed and served:

- (i) by the applicant, by 24 June 2010;
 - (ii) by the respondent, by 19 August 2010.
- (c) Where a party does not intend to rely on expert evidence, they must advise the other parties and the principal registrar in writing by the date on which any report was to be filed and served.

5 This proceeding is referred to compulsory conference on 9 September 2010 commencing at 10:00 a.m. at 55 King Street Melbourne. Costs may be ordered if the compulsory conference is adjourned or delayed because of a failure to comply with directions including those relating to the compulsory conference.

6 The parties may each be represented by professional advocates at the conference.

7 All parties must attend a compulsory conference personally or be represented by a duly authorised person with personal knowledge of the issues in dispute, and who has, for all practical purposes, unlimited authority to settle. Costs may be ordered if a party's representative does not have unlimited authority to settle, or where a party refuses to negotiate in good faith at the compulsory conference.

8 The parties must each prepare a document not exceeding 4 A4 pages setting out a summary of their positions and must exchange copies by 4.00 p.m. on the business day prior to the compulsory conference, and provide the Tribunal with a copy at the commencement of the conference.

9 If the compulsory conference takes place but the parties do not settle, directions will be given and the matter fixed for hearing.

10 If the parties settle before the conference, they must notify the Registry immediately in writing.

Further orders by the Tribunal:

11 There is liberty to apply until 4:00 p.m. on 7 September 2010.

12 The Respondent's costs of and associated with the application for joinder are reserved and may be taken into account if an order is made for costs of the proceeding in favour of the Respondent. The costs of and associated with the remainder of the directions hearing are reserved.

13 I direct the Principal Registrar to send copies of these orders and reasons to both parties by facsimile without delay.

SENIOR MEMBER M. LOTHIAN

APPEARANCES:

For Applicant

Mr D. Noble, solicitor

For Respondent and proposed
joined party

Mr C.W. Gilligan of Counsel

REASONS

- 1 The proceeding failed to settle at mediation on 18 February 2010, in consequence of which it was referred to a directions hearing. At the directions hearing the Applicant-builder's application to join Michael Moro to the proceeding was the subject of submissions in support by Mr Noble, solicitor for the Applicant and opposed by Mr Gilligan of Counsel for both the Respondent-tiling sub-contractor and as intervener for Mr Moro. The case between the Applicant and Respondent is that the Applicant alleges the tiling work sub-contracted by it to the Respondent was not properly done, which necessitated demolition and reconstruction by the Applicant for its owner-client.
- 2 The parties agree that in accordance with *Zervos v Perpetual Nominees Ltd*¹ Mr Moro should be joined under s60 of the *Victorian Civil and Administrative Tribunal Act 1998* ("VCAT Act") if the case pleaded against him is "open and arguable". In other words, if the Applicant could prove the factual matters pleaded against Mr Moro, it would succeed in its claim against him.

PLEADING AGAINST MR MORO

- 3 The pleadings in the Proposed Amended Points of Claim dated 7 April 2010 do not identify Mr Moro's relationship with the Respondent or Applicant, and are as follows:
 7. ...on or about 25 August 2009, the Second Respondent ("Moro") attended at premises at ... Ivanhoe with the Applicant's supervisor, Mr Tony Kinna, to view tiling works carried out thereat by the Applicant.
 8. During the course of the viewing of the tiling works at [Ivanhoe], Moro represented to Mr Kinna of the Applicant that the standard of tiling work that the Respondent would carry out for the Applicant at ... East Brighton would be to the same or better standard than the tiling works carried out at [Ivanhoe] ("the representation").
 9. The representation was made by Moro in trade and commerce.
 10. The representation was false, misleading and deceptive or likely to mislead or deceive.
 11. The representation was a representation as to a future matter made without reasonable grounds.
 12. In reliance on the representation, the Applicant entered into the sub-contract with the Respondent.
 13. By reason of the making of the Representation by Moro the Applicant has suffered loss and damage.

¹ [2005]VSC380

SUPPORTING AFFIDAVIT FOR THE APPLICANT

4 Mr Kinna made an affidavit for the Applicant stating, among other things, that he spoke to a director of the Respondent. Mr Kinna stated the director told him that the Respondent's supervisor, Mr Moro, could meet with him to discuss the possibility of undertaking the work. Both parties agree that Mr Moro was an employee of the Respondent at the time of the alleged representation. Mr Kinna's affidavit includes evidence that Mr Moro said, of the tiling work seen at Ivanhoe: "my tilers will do work to the same standard as that here or even better."

OPPOSITION TO THE JOINDER OF MR MORO

5 The Respondent and Mr Moro oppose the joinder of Mr Moro on the basis that he was an employee of the Respondent, not a director. In his affidavit of 11 May 2010 Mr Moro agreed that he met Mr Kinna at Ivanhoe and told him that he was a supervisor for the Respondent. He said he saw some lipping in the tiling at Ivanhoe and commented that the Respondent would do a better job. He appears to agree that he made the alleged representation.

6 He said in his affidavit:

18. At no time have I indicated in any manner that I acted in a separate capacity to the respondent in any dealings with the applicant.

19. I submit the proposed joinder of myself to this action is misconceived.

7 Mr Gilligan referred me to the words of Senior Member Walker in *Kyrou v Contractors Bonding Ltd*²:

Joinder of parties to [substantial building disputes] is something that should receive careful consideration. [They] are notoriously lengthy and costly to dispose of and the more parties to such a dispute, the greater the expense and the greater the time taken to determine ...

I agree with Senior Member Walker and I am particularly concerned not to put Mr Moro, a person who is not a director of a contracting party, to the financial and emotional expense of being a party to the proceeding, unless there is an arguable cause of action against him.

FAIR TRADING ACT

8 The Applicant has not expressly mentioned the *Fair Trading Act 1999* ("FTA"), but its pleadings against Mr Moro are consistent with sections of the FTA. It has also not pleaded any facts that distinguish between actions Mr Moro might have taken on behalf of the Respondent, and those for which he might have adopted personal responsibility. The question is therefore whether he can be personally liable under the FTA.

9 Section 4 of the FTA provides:

² [2006]VCAT597 at [10]

- (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.
- 10 The pleadings against Mr Moro are a formulaic allegation that he did not have reasonable grounds for making the representation, but do not give any particulars to support the assertion and there is no support in Mr Kinna's affidavit for pleading that Mr Moro did not have reasonable grounds for making the representation. Although s4(2) places the burden of proving that the representation was reasonable on the person making it, representations about the future are likely to be made in many commercial transactions and it is potentially oppressive to employees if they can be personally liable for making any representation as to a future matter.
- 11 Section 143(1) provides:

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. [Emphasis added]
- 12 "Officer" is defined in the FTA to have the same meaning as in s9 of the Corporations Act 2001. The only part of the definition of "officer" that could be relevant is part (b):

a person:

 - (i) who makes, or participates in making, decisions that affect the whole, or a substantial part, of the business of the corporation;
or
 - (ii) who has the capacity to affect significantly the corporation's financial standing; or
 - (iii) in accordance with whose instruction or wishes the directors of the corporation are accustomed to act ...
- 13 I am not satisfied that Mr Moro's role as an employee of the Respondent corresponds to part (b) of the definition, therefore I am not satisfied that he was an "officer" of the Respondent for the purposes of the FTA.
- 14 Mr Noble also referred me to sections 9, 143, 144(4) and 159 of the FTA.
- 15 Section 9 provides:
 - (1) A person must not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.
 - (2) Nothing in the succeeding provisions of this Part is to be taken as limiting by implication the generality of subsection (1).

- 16 In considering whether Mr Moro could have any personal liability under s9, I have regard to *Australian Securities & Investments Commission v Narain*³. In that case the Full Court of the Federal Court considered whether both Mr Narain, the chief executive officer of the relevant company, and Mr Hanlon, the company secretary, had engaged in misleading and deceptive conduct. Mr Narain participated in drafting an announcement for the ASX, which he approved. He authorised Mr Hanlon to send it to the ASX. Mr Narain was found to be personally liable (as principal) for the conduct. Mr Hanlon's actions were found to be “ministerial, as an organ of the company or as an agent of Mr Narain, and ... he was accordingly not liable.”⁴
- 17 There is nothing in the pleadings which, if proven, would take Mr Moro's actions beyond those which are ministerial, or done as an organ of the company.
- 18 Section 144(4) provides:
- For the purposes of any proceedings under this Act, any conduct engaged in on behalf of a person other than body corporate (*the principal*) is deemed to have been engaged in also by the principal if the conduct was engaged in by—
- (a) an employee of the principal within the scope of the employee's actual or apparent authority; [Emphasis added]
- 19 Mr Noble said that the word “also” means that the conduct complained of must be engaged in by the person, who could be an employee, as well as the corporation. I am not satisfied that s144 has the effect of imposing liability on individuals other than the “principal”. Its purpose appears to be to establish the “state of mind” of a corporation or other principal by reference to the state of mind of those individuals who are its hands and brains.
- 20 Section 159(1) provides:
- 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]
- 21 While I accept that Mr Moro could fall within the class envisaged by “any person”, in order to be liable for loss or damage it is necessary to first establish contravention of “a provision of this Act”. As I have found that the Applicant has failed to plead the facts upon which a contravention could be founded, it follows that Mr Moro could not be required to pay (on the present pleadings) under s159.

³ [2008]FCAFE 120

⁴ As summarised in *Taylor & Anor v Gosling & Ors* [2010] VSC 75 at [152]

CONCLUSION

22 I am not satisfied that the Applicant has pleaded an arguable case against Mr Moro. I therefore dismiss the application to join him as a party to this proceeding.

DIRECTIONS

23 The parties agreed on two sets of directions, dependent upon whether or not I would join Mr Moro to the proceeding. I now make those directions.

COSTS

24 The Respondent sought orders that the application for joinder be refused and for costs. S109(1) of the VCAT Act provides that each party will bear its own costs. S109(2) provides that there are exceptions and s109(3) lists the circumstances in which costs will be allowed. The one provision that might be relevant is s109(3)(c) which provides that costs may be ordered when it is fair to do so having regard to:

- (c) the relative strengths of the claims made by each of the parties, including whether a party has made a claim that has no tenable basis in fact or law;

25 Although I have refused to join Mr Moro as a party to this proceeding, the application was not so weak as to attract the operation of s109(3)(c), particularly as argument occupied some time during a directions hearing that was called for other purposes. Nevertheless, the Respondent should not run the risk of bearing the Applicant's cost of preparing for and contesting the question of Mr Moro's joinder. That would not be fair. I therefore order that the Respondent's costs of and associated with the joinder application are reserved and may be taken into account if it is found that the Respondent is entitled to costs of the proceeding. The costs of the remainder of the directions hearing are reserved.

SENIOR MEMBER M. LOTHIAN