

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST

VCAT REFERENCE NO. BP1195/2015

CATCHWORDS

Domestic building – application for joinder of additional applicants and substitution of applicants – application refused as statute barred – *Building Act 1993* – s134

APPLICANTS

Owners Corporation PS 517 029T, Michael Wood, Pieter Walker and Tania Walker, Mita Basir, Duy Phan and Sally Scuto-Phan, Emma Woodward, Jamie Cockerill and Gillian Cockerill, Railene Young, Rajini Dorairaj and Shanthini Dorairaj, Sefija Demirova, Subhash Arora, Steven Lawries and Cheryl Lawries, Jacquie Snare and Derrell Snare, Juliana Keyte and Neil Keyte, Tony Lewis and Jillian Lewis, Gillian Joseph and Paul Joseph, Elisa Carayannis, Cameron McDonald, Michelle Walker and Matthew Walker, Donna Martin, Leigh Burke, Sam Harris and Christina Hayes, Tong Lau and Karen Murata-Lau, Alexander Geilings and Laura Begley, Chris Chan and Liang Tang, Rodney Williams, Steve Hurd

RESPONDENT

Hickory Group Pty Ltd (ACN:091 236 912)

WHERE HELD

Melbourne

BEFORE

Deputy President C Aird

HEARING TYPE

Directions hearing

DATE OF HEARING

19 April 2016

DATE OF ORDER

11 May 2016

CITATION

Owners Corporation PS 517 029T v Hickory Group Pty Ltd (Building and Property) [2016] VCAT 731

ORDERS

1. The first applicant's application for joinder and substitution of applicants to the proceeding is refused.

2. Costs reserved with liberty to apply. I direct the principal registrar to list any application for costs for hearing before Deputy President Aird for 1 hour.

DEPUTY PRESIDENT C AIRD

APPEARANCES:

For Applicants

Mr J Cotton, solicitor

For Respondent

Mr L Connolly of Counsel

REASONS

- 1 In around 2004 to 2005 the respondent builder constructed a six storey apartment building containing 65 private units, and a basement car park in Hawthorn. These works were carried out pursuant to a major domestic building contract. An occupancy permit was issued on 15 September 2005.
- 2 This proceeding, which was commenced on 10 September 2015, includes claims by the relevant owners corporation and a number of individual lot owners for the rectification of alleged defective works in the common property and individual units. The alleged defects affecting individual units are primarily concerned with balcony falls/waterproofing issues that allow water ingress onto private lots.
- 3 On 13 April 2016, the first applicant ('the OC') filed an Application for Directions Hearing or Orders seeking orders joining three additional applicants to the proceeding, and substituting two new owners for current applicants. The proposed applicants' details are set out in Schedule 'A' to the application. The application is accompanied by a supporting affidavit by the applicants' solicitor, Justin Michael Cotton dated 13 April 2016.
- 4 The applications were heard at a directions hearing on 19 April 2016 when the OC and the proposed applicants were represented by Mr Cotton and the builder was represented by Mr Connolly of counsel. Mr Connolly handed up written submissions at the commencement of the directions hearing, and I heard oral submissions on behalf of both parties.

The claims by the three proposed new applicants

- 5 Mr Cotton deposes in his affidavit that the defects, identified in the units of the three proposed applicants, are the same as those identified in those units included in the application filed on 10 September 2015, namely: the same balcony and water ingress issues as identified for the other units. Further, that Unit 314 *has an added problem [according to the expert] of only having a limited soffit above it, meaning that more stormwater is collected by the balcony floor than with other Units in the building.*
- 6 Mr Cotton further deposes that defects were discovered in two of the units in or about October 2015, after the proceeding was commenced. Inspections were carried out by building consultants engaged to provide expert reports on 26 October 2015, who provided a supplementary report dated 16 November 2015. Defects were discovered in the third unit in or about February or March 2016. These were inspected in early March 2016 by the same expert who provided a supplementary expert report dated 10 March 2016.
- 7 Mr Cotton deposes at [7] of his affidavit:

...The Owners of Units 408 and 310 did not notify the Owners Corporation or Committee prior to September 2015 that they wished to join the VCAT proceeding, despite the intention to issue proceedings for building defects being notified to Lot Owners many months previously (with reminders sent). However, the Owners or occupiers of these Units were not previously aware of water entry problems until the rain event of 21 October 2015, which was more than 1 month after the VCAT application was filed.

And at [10] and [19]

...it is apparent that the Owners described at paragraph 9 [and paragraph 16] above are parties whose interests may be affected by this proceeding and ought to be joined as parties to the proceeding as Applicants.

And at [16]

The Owners of 314 did not notify the Owners Corporation Manager or Committee prior to September 2015 that they wished to join the VCAT proceeding, despite the intention to issue proceedings for building defects being notified to Lot Owners many months previously (with reminders sent). However, the Owners or occupants of this Unit were not previously aware of water entry problems until rainfall and water problems in around late February 2016, which was several months after the VCAT application was filed.

Claims by the proposed substituted applicants

- 8 Mr Cotton deposes in his affidavit that title in Units 306 and 403 has been transferred since the proceedings were commenced on 10 September 2015, and that the new owners seek to be substituted as applicants in this proceeding. Claims in relation to both units were included in the original Points of Claim.
- 9 The sale of Unit 306 was settled on 17 October 2015, and the sale of Unit 403 was settled on 20 January 2016.
- 10 The new owners rely on s9 of the *Domestic Building Contracts Act 1995* ('the DBCA') which provides that the owner for the time being, of the building or land on which domestic building work was carried out, can bring proceedings for a breach of the s8 warranties as if it was a party to the contract.

The builder's position

- 11 The applications are opposed by the builder on the grounds that any claims by the proposed applicants are statute barred by operation of s134 of the *Building Act 1993*. Section 134 limits the time for the bringing of building actions to 10 years from the date of the occupancy permit, or where an occupancy permit is not issued, from the date of issue of the certificate of final inspection.

The proposed applicants' position

- 12 Mr Cotton conceded that the 10 year limitation has expired, but submitted that this should not be an impediment to the joinder of the proposed applicants. In the case of the three new proposed applicants, he submitted that the nature of defects complained of by them were the same as the defects identified by the current applicants, and it was simply a matter of adding their claims to the existing claims. In the case of the proposed substituted applicants, he submitted that save for substituting the applicants, there was no change to the claims, and therefore these claims are not affected by the limitation period.
- 13 Mr Cotton, relies on my decision in *Owners Corporation PS447493 v Burbank Australia Pty Ltd*.¹ However, the situation in *Burbank* was quite different to this proceeding.
- 14 In *Burbank* the owners corporation issued proceedings within the 10 year limitation period in relation to a number of identified defects, but there was no differentiation between those that related to common property and those that related to individual lots. After the expiration of the 10 year limitation period the individual lot owners were joined as parties and Points of Claim filed in relation to common property and individual lot defects but did not differentiate between them. In refusing an application to strike out the individual lot owners' claims I observed:
- The claims by both the Owners Corporation and the individual lot owners are closely intertwined arising from the alleged defective works in both common property and private property and consequential damages to both common and private property caused by those defective works. This is not a case where the individual lot owners claims are independent to and distinct from the claims by the Owners Corporation.²
- 15 Unlike *Burbank*, the claims in this proceeding are specific to alleged defects in each individual lot.

Discussion

- 16 Generally, a contention that a claim is statute barred will be included in a defence, and determined at a later time, often when determining the substantive claims
- 17 In circumstances where the date for the commencement of the 10 year limitation period in building actions is clearly defined, and it is a serious matter to join a party to any proceeding,³ to be satisfied it is desirable to join the proposed applicants as parties I must first be satisfied they have an arguable claim.

¹ Domestic Building [2013] VCAT 1911.

² At [40].

³ *Snowden Developments Pty Ltd v Actpen*

Proposed new applicants

18 The difficulty for the proposed new applicants is that the 10 year limitation period has expired. It is irrelevant that the alleged defects in their units are substantially the same as those forming the basis for the claims in this proceeding, or that the ‘general nature’ of the defects were identified within the 10 year period. It is clear from Mr Cotton’s affidavit that all lot owners were given notice of the intended proceedings, and given an opportunity to be included. Further, that reminders were sent. A failure by the proposed applicants to take all necessary steps to protect their interests within the 10 year limitations period cannot be remedied by the Tribunal. It was their responsibility. Whether or not they were aware of the defects within the 10 year period is irrelevant. In any event, the proposed applicants could, presumably, have arranged for their lots to be inspected when they were advised of the issues. In *Brirek Industries Pty Ltd v McKenzie Group Consulting (Vic) Pty Ltd*⁴ the Court of Appeal stated that one of the main purposes of s134 was:

...to limit the periods within which building actions and plumbing actions may be brought.⁵

114. Section 134 does not contain any express limitation that confines its application to cases in contract or in tort. It does not contain any reference to some distinction between limitation periods for actions in negligence as opposed to those in contract. It does not contain any reference to patent or latent faults. It does not contain any suggestion that its operation is limited to physical loss and damage. What it does is to limit the period within which ‘building actions’ may be brought generally.

Proposed substituted applicants

19 The two proposed substituted applicants purchased their units after the expiration of the 10 year limitation period. As noted above, they seek to rely on s9 of the DBCA. Specifically, Mr Cotton states in his affidavit:

21. As a consequence of the settled purchases of these Units occurring some time after the Points of Claim were filed at VCAT, the then registered owners of these 2 Units (306 and 403) are no longer the registered owners and do not have an ongoing interest in the proceedings. However, the new owners do have an interest in having any defects in these Units rectified or [being] adequately compensated. Pursuant to section 9 of the DBCA, the domestic building warranties pertaining to these residential dwellings (under section 8 of that Act) are to “run with the land” and inure for the benefit of the owners for the time being of the building or land in respect of which the building work was carried out. Therefore the owners for time

⁴ [2014] VSCA 165

⁵ Section 1(h).

being (that is the current new owners) also have the benefit of the warranties and can take action or continue a VCAT action in regard to any breach of those warranties.

22. It is noted that both of these Units (306 and 403) were included as part of the Points of Claim filed with the Application to the Tribunal on 10 September 2015. Therefore a legal claim was initiated in regard to these 2 units within the 10 year warranty period post the approval of the Occupancy Permit for the building.
- 20 Ordinarily, under s9 of the DBCA a subsequent owner will have the benefit of the s8 warranties which are implied into every domestic building contract. These rights are personal to the *owner for the time being*. The rights of a subsequent owner to bring a claim for a breach of the statutory warranties (a contract claim) or in negligence, are limited by s134 of the *Building Act*.
- 21 It is irrelevant that the previous owners of the two Lots commenced proceedings within the 10 year period. Of itself, that does not give the current owners standing to continue the action commenced by the previous owners, or to bring their own claims.

CONCLUSION

- 22 In circumstances where the proposed applicants' claims, and those of the proposed substituted applicants are clearly statute barred, and they do not otherwise have standing to bring them, the application that they be joined as applicants must be dismissed.
- 23 If the previous owners of Units 306 and 403 no longer seek to pursue any claims in this proceeding, they should seek leave under s74 of the VCAT Act to withdraw them.

DEPUTY PRESIDENT C AIRD