

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST

VCAT REFERENCE NO.BP638/2017

CATCHWORDS

Joinder, s 60 of the *Victorian Civil and Administrative Tribunal Act 1998*, application to join directors of applicant as respondents by counterclaim, primary and accessorial liability alleged, sufficient pleading, alleged unconscionable conduct, silence as a representation, relief for misrepresentation sought – declaration – claim not crystallised, whether party seeking joinder could be estopped against proposed joined parties in future if basis of claim crystallises.

APPLICANT	Stellar Projects (Vic) Pty Ltd ACN: 600 804 073
RESPONDENT	A.A. Platinum Developments Pty Ltd ACN: 142 984 101
WHERE HELD	Melbourne
BEFORE	Senior Member M. Lothian
HEARING TYPE	Hearing
DATE OF HEARING	2 November 2017
DATE OF ORDER	21 December 2017
CITATION	Stellar Projects (Vic) Pty Ltd v A.A. Platinum Developments Pty Ltd (Building and Property) [2017] VCAT 2152

ORDERS

- 1 The respondent's application filed on 15 September 2017, to join Mr Thomas and Mr Saadia to this proceeding as respondents by counterclaim, is dismissed.
- 2 Costs are reserved with liberty to apply.
- 3 **I direct the Principal Registrar to send copies of these orders and reasons to the parties by email.**

SENIOR MEMBER M. LOTHIAN

APPEARANCES:

For Applicant

Mr K.A. Loxley of Counsel

For Respondents

Mr A. Blair of Counsel

REASONS

- 1 This interlocutory decision concerns the application of the respondent-Developer (AAPD) to join the directors of the applicant-Builder (Stellar) as parties to this proceeding.
- 2 Stellar's claim against AAPD is, among other things, that it has failed to pay and has repudiated the contract. AAPD's claim against Stellar (before the application to join the directors) was that, among other things, Stellar:
 - failed to comply with its obligations under the *Domestic Building Contracts Act 1995* ("DBC Act") with respect to documenting the contract,;
 - failed to arrange necessary builders warranty insurance;
 - was paid for items for which it was not entitled to claim;
 - failed to complete the works in time or at all; undertook defective work; and
 - improperly lodged a caveat over the land on which the works were built.
- 3 The application to join the directors, Mr Thomas and Mr Saadia, was filed on 15 September 2017 and came before Senior Member Farrelly on 28 September 2017.
- 4 SM Farrelly's orders of that day commence with the note:

The Tribunal finds that the proposed pleading by the respondent as against the proposed first and second joined parties is, in its current form, inadequate as it fails to adequately detail the cause of action as against the proposed further parties.
- 5 SM Farrelly ordered AAPD to file and serve amended proposed points of counterclaim by 6 October 2017 and adjourned the application for joinder to 2 November 2017.
- 6 AAPD filed a document entitled "Proposed Points of Counterclaim and Third Party Action" on 6 October 2017. On 31 October it filed a document entitled "Further Proposed Points of Counterclaim and Third Party Action". I refer to the latter as the FPPC, but note that AAPD relies, in the alternative, on the document filed on 6 October 2017 ("PPC"), to which I also have regard.
- 7 In brief, AAPD claims that Mr Thomas and Mr Saadia have primary¹ or accessorial² liability due to conduct that was unconscionable, or misleading or deceptive.

¹ Where an action is the act of a person who might also be a director, but is not by reason of their directorship.

² Where a person is liable dependent upon their directorship.

Pleadings against the directors

8 At paragraph 2 of the FPPC, AAPD pleads that Mr Thomas is and was a registered Domestic Builder and also a director of Stellar. It pleads that Mr Saadia is a director of Stellar.

9 Paragraph 4 states:

In their respective capacities as directors of Stellar, Thomas and Saadia at all material times controlled the actions of Stellar jointly and severally were the embodiment of, and in constant and effectual control of Stellar.

10 At paragraph 6 the Developer pleads:

Thomas, Saadia and Stellar knew or ought reasonably to have known, that:

- a. [AAPD's] purpose in conducting the project the subject of the Agreement was to develop the land by procuring the construction of residential apartments and arranging for the sale of those residential apartments; and
- b. AAPD was financing the project ...

11 The pleading goes on to set out various obligations on the part of Stellar and alleges that AAPD overpaid it, and there were various other breaches by Stellar.

12 At paragraph 25, AAPD alleges:

On 15 February 2017, without a proper basis and in substantial breach of the Agreement Thomas and, or Saadia, through Stella caused a caveat to be lodged over the Property without a caveatable interest.

13 There is a similar pleading under the heading "Unconscionable conduct: caveat", where AAPD pleads section 18 of the Domestic Building Contracts Act 1995 ("DBC Act") which provides:

A domestic building contract does not give a builder and estate or interest in any land for the purposes of section 89 of the Transfer of Land Act 1958.

14 It then continues:

Despite the matters pleaded ... above ... on 15 February 2017 Thomas and, or, Saadia, through Stellar caused its solicitor to lodge a caveat ...

15 At paragraph 44, AAPD pleads that lodgement of the caveat would cause it to fall into default with its commercial lender and that was either reasonably foreseeable or known to Stellar, Mr Thomas and Mr Saadia at the time of the caveat lodgement.

16 At paragraphs 46 and 47 AAPD describes the significant financial pressure exerted by its own bank to either remove the caveat, repay all money advanced by its bank, Westpac, or face the bank exercising rights as a

mortgagor in respect of the property. AAPD described this as a “special disadvantage” and claims that Stellar, Mr Thomas and Mr Saadia created the special disadvantage in trade and commerce which caused AAPD to make a substantial payment into the trust account of Stellar’s then solicitor pending the outcome of these proceedings.

- 17 At paragraph 49, AAPD pleads that Mr Thomas and Mr Saadia knew or ought reasonably to have known that they were creating the special disadvantage and through Stellar, took unfair advantage by requiring the payment into trust. I note, as submitted for Stellar, that there is no allegation that Stellar, Thomas or Sadia knew of the default notice, all had actual knowledge of the terms of Westpac’s loan to Stellar.
- 18 At paragraph 50 AAPD pleads that Mr Thomas and Mr Saadia’s conduct was unconscionable and that they each individually or together:
 - a. Aided, abetted, counselled or procured it;
 - b. Were directly or indirectly, knowingly concerned, or a party to;
or
 - c. Conspired to cause

Stellar to take unfair advantage of the special disadvantage by requiring payment of the settlement sum by AAPD to its detriment before withdrawing the caveat from the Property.
- 19 AAPD pleads at paragraph 51:

By reason section 8 of the Australian Consumer Law and Fair Trading Act (VIC) 2012 and in contravention of section 20 of the Australian Consumer Law (being Schedule 2 of the Competition and Consumer Act 2010 ...) (“ACL”) Stellar and, Thomas and, or Saadia engaged in unconscionable conduct by reason of the matters pleaded in paragraphs 38 to 50 above and further or in the alternative, Thomas and Saadia were involved in contravention of section 20 of the ACL by Stellar.
- 20 AAPD pleads that Stellar is obliged to have “Required Insurance”, but failed to arrange it. At paragraph 59 AAPD pleads:

Each of Thomas and Saadia failed to give notice to AAPD that Stellar had not procured and maintained the Required Insurance despite the obligation to so procure and maintain (the Insurance Representation).
- 21 AAPD pleads that the representation is by the omission of each of Thomas and Saadia.
- 22 At paragraph 62 AAPD pleads that Stellar commenced work when both Mr Thomas and Mr Saadia knew or should have known that Stellar was obliged to procure and maintain the required insurance and therefore the alleged insurance representation was misleading or false.
- 23 At paragraph 63 AAPD pleads:

By reason of the matters pleaded [above] Thomas and Saadia each, individually or together

- a. aided, abetted, counselled or procured or were directly or indirectly, knowingly concerned in, or a party to Stellar making the Insurance Representation in contravention of section 18 of the ACL.

24 There are two almost identical paragraphs in the prayer for relief, the first naming Mr Thomas and the second Mr Saadia which seek:

A declaration that in contravention of section 18 of the ACL, [Mr Thomas/Mr Saadia] engaged in misleading or deceptive conduct, or conduct likely to mislead or deceive by his failure to notify the Respondent that the Applicant was obliged to procure and maintain the Required Insurance but had failed to do so; ...

25 The prayer for relief also seeks damages under section 236 of the ACL, which damages can be claimed from directors and office bearers of companies as well as from companies themselves.

Basis of joinder

26 I accept AAPD's submission at paragraph 9 of its "Outline of submissions on its joinder application" that it only needs to disclose an open and arguable case against each of the proposed joined parties. The case against them does not have to be one that is certain to succeed but neither should be clearly misconceived or hopeless. I agree that:

It is only necessary to show one arguable head of claim against each party that is proposed to be joined.

27 I also accept Stellar's submission, in accordance with the findings of Judge Bowman VP in *Age Old Builders Pty Ltd v Swintons Pty Ltd* [2006] VCAT 871 at 55:

... the discretion contained in section 60 of the Act is a broad one ... The discretion should not be exercised in favour of joinder if the same would enable a person to bring a claim that was entirely misconceived or doomed to failure. [Underlined in Stellar's submissions]

Sufficient pleading

28 The application for joinder is not supported by an affidavit as to the facts of the matters pleaded, other than an affidavit as to the identity of the proposed joined parties as directors of Stellar. Neither are there any particulars as to allegations of actual rather than imputed knowledge of either of the proposed joined parties, in the FPPC or in the PPC.

29 As I said in *Watson v Richwall Pty Ltd*³:

To show that there is an open and arguable case against a proposed joined party it is necessary to plead facts and law that support a successful case without proving the

³ *Watson v Richwall Pty Ltd* (Building and Property) [2014] VCAT 1127 at [31].

facts to demonstrate a prima facie case. Nevertheless, it is not sufficient merely to assert the facts without demonstrating how those facts are supported.

Possible causes of action

Unconscionable conduct

30 The unconscionable conduct complained of is lodging a caveat when the proposed joined parties knew, or should have known, that this would cause a “special disability” because of the requirements of AAPD’s bank to have a caveat removed.

31 I accept Stellar’s submission at paragraph 10:

The threshold set for unconscionable conduct is a high one and requires a moral obliquity on the part of the defendant. Without pleading and particularising knowledge by Thomas and Saadia of the default notice from Westpac there can have been no “unfair” taking advantage of a superior bargaining position sufficient to establish liability in unconscionable conduct.

32 I am not satisfied that AAPD has pleaded and particularised a case against either Mr Thomas or Mr Saadia which is sufficient to support a prima facie case of unconscionable conduct.

Misleading or deceptive conduct

33 Although under the heading of misleading and deceptive conduct, Stellar has described the “representation” as the failure of Stellar, and its directors, to inform AAPD that it did not have the required warranty insurance.

34 As Stellar submitted at paragraph 16 of its written submissions:

Neither causation nor loss or damage are pleaded in respect of this cause of action as AAPD seeks declaratory relief only at this time, because any loss or damage has not yet crystallised.

35 The relevant sections of the ACL to support a claim for misleading or deceptive conduct are as follows:

18 Misleading or deceptive conduct

(1) A person must not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.

...

236 Actions for damages

(1) If :

(a) a person (the *claimant*) suffers loss or damage because of the conduct of another person; and

(b) the conduct contravened a provision of Chapter 2 or 3;

the claimant may recover the amount of the loss or damage by action against that other person, or against any person involved in the contravention. [Underlining added]

36 And “involved” is defined as:

Involved: a person is involved, in a contravention of a provision of this Schedule or in conduct that constitutes such a contravention, if the person:

- (a) has aided, abetted, counselled or procured the contravention; or
- (b) has induced, whether by threats or promises or otherwise, the contravention; or
- (c) has been in any way, directly or indirectly, knowingly concerned in, or party to, the contravention; or
- (d) has conspired with others to effect the contravention.

“Involved”

37 In AAPD’s submission is an extract from *Arktos Pty Ltd v Idyllic Nominees Pty Ltd*⁴:

... a director of a corporation who acts on its behalf in the course of trade or commerce also acts himself or herself in trade or commerce

...

However, I note that, to the extent it is necessary to do so, AAPD does not attribute liability or responsibility for any particular act to either Mr Thomas or Mr Saadia. Where there is only one director it might be arguable that he or she is the only possible person who could have carried out an act, or engaged in the relevant conduct. Where there is more than one, this does not necessarily follow.

Silence

38 I accept the submission of Stellar that:

What the pleading may be trying to do is allege that Thomas and Saadia’s silence was misleading because a reasonable expectation of disclosure had been established. But that reasonable expectation has not been pleaded, ...

39 I note the words of the learned author Miller⁵:

As a general proposition, s 18 does not require a party to commercial negotiations to volunteer information which will assist the decision-making of the other party. It does not impose on a party an obligation to volunteer information in order to avoid the consequences of the careless disregard, for its own interest, of another party of equal bargaining power and competence [citations omitted]. However, if the circumstances of a particular case would give rise to a reasonable expectation that, if a fact existed, it would be disclosed, then the

⁴ [2004] FCAFC 119 at paragraph 13

⁵ 2017 Miller’s Australian Competition and Consumer Law Annotated, [ACL.18.380]

failure to disclose that fact may give rise to an inference that the fact does not exist: *Rafferty V Madgwicks* (2012) 203 FCR 1.

Claim not crystallised and only a declaration is sought

40 AAPD said at paragraphs 21 and 22 of its written submissions:

Presently, to the extent that Stellar, Saadia and, or Thomas engage in conduct in contravention of section 18 of the ACL, loss and damage has not yet crystallised and is therefore contingent only.

Nonetheless, there remains the real risk of future loss and damage being suffered by AAPD by reason of this contravention. Upon the sale of the various apartments given that the purchase price of the properties will likely be diminished in value on account of the additional risk that any subsequent purchaser entitle assumes in consequence of the failure to procure and maintain the required builders warranty insurance. [Sic]

41 I accept the submission of Stellar that declaratory relief is inappropriate in this instance and AAPD's claims against Mr Thomas and Mr Saadia are premature. In this respect I note the passage quoted from the High Court in *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564 at 581 – 582:

Declarations will not be granted if the question “is purely hypothetical” if relief is “claimed in relation to circumstances that have not yet occurred and might never happen” or if “the Court’s declaration will produce no foreseeable consequences for the parties”.

Risk of estoppel

42 At paragraph 24 of its written submissions, AAPD said:

In the circumstances, if Thomas and Saadia have acted in breach of section 18 of the ACL but are not joined to the present proceeding due to the contingent nature of the loss and damage resulting from that conduct, AAPD will be at real risk of being barred or estopped from bringing any subsequent action against them.

43 I prefer the submission of Stellar at paragraph 17 of its written submissions:

... if AAPD suffers loss and damage as a result of misleading or deceptive conduct at a date subsequent to these proceedings, the cause of action will only at that time have accrued, and therefore no estoppel or plea in bar argument would be available to Stellar or Thomas or Saadia.

Conclusion

44 I am not satisfied that AAPD has demonstrated any arguable cause of action against either Mr Thomas or Mr Saadia.

45 AAPD's application filed on 15 September 2017, to join Mr Thomas and Mr Saadia to this proceeding as respondents by counterclaim, is dismissed

- 46 Costs are reserved with liberty to apply, noting that Senior Member Lothian will not be available on 30 January 2018 when the proceeding has been set down for the next directions hearing.

SENIOR MEMBER M. LOTHIAN