

# VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

## CIVIL DIVISION

### BUILDING AND PROPERTY LIST

VCAT REFERENCE NO. BP1382/2017

### CATCHWORDS

Domestic building, joinder, s 60 of the *Victorian Civil and Administrative Tribunal Act 1998*, open and arguable case, whether supporting affidavit sufficiently support the points of claim.

<b>FIRST APPLICANT</b>	Xian Tong
<b>SECOND APPLICANT</b>	Kano Investments Pty Ltd (ABN 60 560 782 772) t/as Kano Investment Trust
<b>RESPONDENT</b>	Tongji Sutra Pty Ltd (ACN: 607 020 593)
<b>WHERE HELD</b>	Melbourne
<b>BEFORE</b>	Senior Member M. Lothian
<b>HEARING TYPE</b>	Hearing
<b>DATE OF HEARING</b>	3 December 2018
<b>DATE OF ORDER</b>	25 January 2019
<b>CITATION</b>	Tong v Tongji Sutra Pty Ltd (Building and Property) [2019] VCAT 130

### ORDERS

- 1 The applicants have leave until 7 February 2019 to make any further application to join Mr Ronghua Liu to this proceeding as second respondent.
- 2 The date by which the applicants must file and serve Amended Points of Claim is extended to 7 February 2019.
- 3 **I direct the Principal Registrar to send copies of these orders and Reasons to the parties by email marked “urgent”.**
- 4 Liberty to apply.

**SENIOR MEMBER M. LOTHIAN**

**APPEARANCES**

For the Applicants:

Ms J. Zhou of counsel

For the Respondent:

Mr N.J. Phillpott of counsel

## REASONS

- 1 As promised at the hearing of 3 December 2018, these are the reasons for refusal to join Mr Roghua Liu to this proceeding as second respondent. I have also made further orders.
- 2 Ms J. Zhou of counsel appeared for the applicants and Mr N.J. Phillpott of counsel appeared for both the respondent, Tongji Sutra Pty Ltd (“Tongji Sutra”) and Mr Liu; the proposed joined party.
- 3 Tongji Sutra and Mr Liu continued to resist the application that Mr Liu be joined to this proceeding.

### History

- 4 As can be seen from the orders and reasons of 14 August 2018, this was the second formal attempt to join Mr Liu. An earlier informal attempt was made on 26 February 2018 when the applicants named Mr Liu as second respondent without seeking the Tribunal’s leave to join him to the proceeding.
- 5 To recap, Ms Tong is the first applicant and the director of the second applicant. The applicants plead that Ms Tong was introduced to Mr Liu who at all relevant times was a director of Tongji Sutra and also of RT Smart Homes Pty Ltd (RT Smart Homes), which is not a party to the proceeding.
- 6 Contracts were offered to both applicants by RT Smart Homes, but not signed for the applicants.
- 7 Each applicant signed a contract with Tongji Sutra instead of with RT Smart Homes. The question of whether these contracts are building contract has not been raised. It is noted that they are not in English and therefore do not fulfil s 31(m) of the *Domestic Building Contracts Act 1995* (DBC Act).

### The Proposed Points of Claim of 22 November 2018

- 8 The Proposed Amended Points of Claim of 22 November 2018 (November PAPoC) repeat some pleadings but are also substantially different to the Proposed Amended Points of Claim of 10 May 2018 (May PAPoC).
- 9 Both versions plead that there were two other directors of RT Smart Homes who were at all relevant times, registered builders. They draw the conclusion that RT Smart Homes was entitled to enter major domestic building contracts under s 29(c) of the DBC Act but that Tongji Sutra was not.
- 10 Both versions plead that the contract offered to the applicants by RT Smart Homes were signed by an employee of RT Smart Homes, on or about 20 August 2016 and the contracts were in the form of Housing Industry Association standard form domestic building contracts.

### Alleged misrepresentation

11 The parts of the November PAPoC relevant to the claim against Mr Liu are as follows:

#### Misrepresentation by Tongji Sutra

14. On or about 26 August 2016, Liu represented to Tong that:
- (a) For the purposes of his immigration to Australia, it would be better for him<sup>1</sup> if the applicants signed with his other company, Tongji Sutra, instead of with RT Smart Homes;
  - (b) He was a 50% shareholder of a company, RT Module Pty Ltd, which was in turn the majority shareholder of RT Smart Homes;
  - (c) He was the director of RT Smart Homes;
  - (d) He was the director and 100% shareholder of Tongji Sutra;
  - (e) Save for the matters in paragraphs 15 – 17, there would be no material difference between signing the building contract with RT Smart Homes or with Tongji Sutra, as he had control of both companies.

...

15. On or about 2 September 2016, Liu stated in a conversation to Tong that if Tong contracted with Tongji Sutra instead of RT Smart Homes, he would complete construction of both dwellings within 18 weeks.

...

16. On or around 5 September 2016, Liu further represented to Tong that if she contracted with Tongji Sutra instead of RT Smart Homes, she would only need to pay a deposit of 5% of the contract price, rather than deposit of 30% of the contract price if she contracted with RT Smart Homes.

12 Paragraphs 17 and 18 refer to the alleged request by Ms Tong of Mr Liu for a reference regarding his construction experience.

13 Paragraph 19 states that Mr Liu was not a shareholder of RT Module and RT Module was not a shareholder of RT Smart Homes. There is no reference as to how RT Module is of any relevance to the proceeding.

14 Paragraph 19(c) states that there was a material difference between the contract with RT Smart Homes and Tongji Sutra in that Tongji Sutra was not entitled to enter domestic building contracts.

15 Paragraph 20 states that it was misleading or deceptive for Tongji Sutra to represent that it could complete works in 18 weeks when it did not have

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<sup>1</sup> This seems to be a reference to Mr Liu.

reasonable grounds for making such representations and there were insufficient details to even obtain a building permit.

16 The pleadings continued:

23. Further and in addition, in the course of those negotiations in September 2016, Tongji Sutra failed to disclose that:
  - (a) Liu was not a registered building practitioner;
  - (b) accordingly, Tongji Sutra was not entitled to enter into a major domestic building contract; and
  - (c) there was a reasonable expectation that Tongji Sutra would explain the significance of the non-registration of Liu with respect to its ability to enter into a major domestic building contract, and not remain silent.
24. By reason of paragraphs 19 – 23, Tongji Sutra contravened section 18 of the Australian Consumer Law (Victoria) (“ACL”).
25. Liu, as the director and 100% owner of Tongji Sutra, and having personal knowledge of the matters in paragraphs 14 – 18, was involved in Tongji Sutra’s contravention, within the meaning of section 236 of the ACL.
26. In reliance on the statements made in paragraphs 14 – 16 and 18, on or about 14 September 2016, the applicants chose to enter into two separate “major domestic building contracts” with Tongji Sutra...
- ...
40. By reason of the matters in paragraphs 14 – 18 and 26, the applicants have suffered loss and damage.

**PARTICULARS OF LOSS AND DAMAGE**

The applicants have been deprived of the sum of \$116,500 advanced to Tongji Sutra for no consideration in exchange.

The second applicant has been unable to obtain any income from [one of the properties] due to its demolition.

The first applicants have incurred avoidable rental expenses as a result of the demolition of the [other property]

...

41. Pursuant to section 236 of the ACL, the applicants seek recovery of ... loss and damage ... against the respondent and [ Mr Liu].

**The Supporting Affidavits of Mr Hon**

- 17 As recorded in the reasons of 14 August 2018, Mr Hon is a solicitor with the firm acting on behalf of the applicants. His affidavit of 21 November

2018 (“November affidavit”) does nothing more than identify various documents exhibited to it.

18 Although Mr Phillpott submitted that the applicants had not adopted Mr Hon’s earlier affidavit of 10 May 2018 (“May affidavit”), I have regard to it as well because I am not satisfied that this degree of formality is consistent with s98(1)(d) of the *Victorian Civil and Administrative Tribunal Act 1998* which provides:

(1) The Tribunal –

...

(d) must conduct each proceeding with as little formality and technicality, and determine each proceeding with as much speed, as a requirements of this Act and the enabling enactment and a proper consideration of the matters before it permit.

Paragraphs 14(e) and 19(c) of the November PAPoC – alleged misrepresentations by Tongji Sutra

19 Neither affidavit supports the allegation in paragraph 14(e) of the November PAPoC, although at paragraph 12 of the May affidavit Mr Hon said:

The effect of [Mr Liu’s] words was that, rather than contract with RT Smart Homes, the applicants contracted with Tongji Sutra.

And at paragraph 18 he said:

I am informed and verily believed that [Mr Liu] convinced the applicants, through his statements, to sign with Tongji Sutra instead of RT Smart Homes, when the former entity had no capacity whatsoever to undertake the domestic building work which was then under discussion.

20 Mr Hon’s evidence is vague and draws conclusions, rather than providing specific evidence of what Ms Tong says occurred.

21 If the pleadings in the sub paragraphs are proven, under s 31(1) of the DBC Act, Tongji Sutra should not have entered any domestic building contracts with the applicants.

Paragraphs 15 and 20 of the November PAPoC – alleged undertaking to complete in 18 weeks

22 At paragraph 6(f) of the May affidavit, Mr Hon said:

on 2 September 2016, through WeChat and phone conversation, [Mr Liu] expressed to the applicant words to the effect that they should not sign with RT Smart Homes, and that if the applicants instead signed with Tongji Sutra, construction would be completed in 18 weeks;

23 Paragraph 7 of the May affidavit stated that Mr Hon was arranging to have the WeChat conversations translated by a certified translator. Given that the

affidavit was dated 10 May 2018 and the first joinder hearing was not until 28 June 2018 it is surprising that the translated WeChat conversations were not available at that hearing. This was a matter that I raised at paragraph 45 of the reasons of 14 August 2018.

- 24 Further, there was ample opportunity to have the relevant conversations translated before the hearing the subject of these reasons. However, the only WeChat documents referred to in the November affidavit are exhibits CJH – 2 – 11 and CJH – 2 – 13. Neither is a conversation with Mr Liu, and neither is relevant to the matters in paragraph 6(f).
- 25 Nothing in the affidavit supports the allegation that the promise of an 18 week completion period had any effect on Ms Tong choosing to contract with Tongji Sutra rather than RT Smart Homes. Further, I accept Mr Phillpott’s submission that there are no particulars to establish that the 18 week period was unrealistic.
- 26 I also note that each of the translated contracts with Tongji Sutra states:

The time limit for this housing construction contract project (see Appendix 6 Schedule) is 6 months as from the next day after approval of this project.

This contractual term seems to contradict Mr Liu’s alleged undertaking to have the work completed within 18 weeks.

#### Paragraphs 16 and 21 of the November PAPoC – deposit of 5% instead of 30%

- 27 There is no reference to the amount of deposit to be paid in either affidavit, and in particular no reference to the effect that the alleged change in deposit had on Ms Tong’s decisions on behalf of herself or the second applicant.
- 28 I note with some surprise that both the building contracts allegedly provided by RT Smart Homes to the applicants included 30% deposits. However, the Schedule 3 – Method 1 which appears on page 11 of both contracts also refers to clause 9. Clause 9 describes the limit of deposits permitted under s 11 of the DBC Act. These limits are as set out in paragraph 21 of the November PAPoC.
- 29 Mr Phillpott submitted that a representation that Tongji Sutra would require a smaller deposit than RT Smart Homes is of no practical difference when the statutory requirement differs from the alleged term in the RT Smart Homes’ contracts. I note Ms Zhou’s submission that regardless of RT Smart Homes’ entitlement, the 5% deposit was represented by Mr Liu as a benefit of the Tongji Sutra contracts and that this alleged representation is not in either affidavit.

#### Paragraphs 17 and 18 of the November PAPoC – alleged request that Mr Liu provide a reference

- 30 Neither affidavit refers to enquiries made by the applicants concerning Mr Liu’s building experience. Exhibit CJH – 2 – 12 is a reference from Dr He-

ling Shi of the Monash Business School dated 15 September 2016, which is the same date as the contracts with Tongji Sutra.

31 Excluding the formal parts, the reference is:

I have known Mr Ronghua Liu, a director of Tongji Sutra Pty Ltd for one year. We have been working together on several projects. Based on these experience, Mr Liu has demonstrated his enthusiasm and diligence in undertaking projects and honestly in dealing with business partners. [sic]

I can be contacted if you have further concerns.

32 There is no indication that the “projects” had anything to do with building and there is no evidence that Ms Tong or anyone on her behalf contacted Dr He-ling Shi to check the reference.

Paragraphs 23 of the November PAPoC – alleged misrepresentation by silence concerning Mr Liu’s lack of building registration

33 Ms Zhou submitted that nothing in the ACL prevents silence from amounting to misrepresentation. However, she did not draw my attention to any authorities to demonstrate that silence in this context can be misrepresentation.

Paragraphs 24, 25 and 41 of the November PAPoC – alleged contraventions of the ACL by Tongji Sutra and Mr Liu

34 Section 18 of the ACL is 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.
- (2) Nothing in Part 3-1 (which is about unfair practices) limits by implication subsection.

35 Section 236 is:

**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.

- (2) An action under subsection (1) may be commenced at any time within 6 years after the day on which the cause of action that relates to the conduct accrued.

- 36 Section 18 is in Chapter 2 of the ACL.
- 37 It is noted that the applicants plead that only Tongji Sutra has contravened s 18 of the ACL, and that by reason of being a director and the 100% owner of Tongji Sutra, as well as having direct knowledge of the alleged contraventions, Mr Liu is liable.
- 38 In order for Mr Liu to be liable, there must therefore be an open and arguable case against Tongji Sutra.

Paragraphs 26, 40 and 41 of the November PAPoC – alleged choice of Tongji Sutra instead of RT Smart Homes and loss allegedly suffered

- 39 Although reliance has been pleaded, this is not the subject of either of the affidavits. The closest approaches are paragraphs 12 and 18 of the May affidavit, which I discussed at paragraphs 19 and 20 above.
- 40 I accept Mr Phillipott's submission that the applicants did not particularise the alleged reliance. The respondents need to understand the case against them.

Need for the affidavit to support the claims

- 41 As I said at paragraph 45 of the reasons of 14 August 2018:
- I emphasise that the applicants are not expected to prove their case when they seek to join a party; but must demonstrate that there is factual support for their case being open and arguable.
- 42 At paragraph 48 of the reasons of 14 August 2018 I said:
- Having regard to clause 2.2 of the Chinese contracts referred to above, it seems unlikely that Ms Tong, on behalf of herself and the second applicant, was entirely unaware of the potential difficulties for the respondent regarding [domestic building] registration requirements. It would be helpful for any future pleadings against Mr Liu to address that issue.
- 43 This issue was not addressed in either the November PAPoC or the November affidavit. As Deputy President Aird said in *Evans v Fynannan Pty Ltd (Building and Property)* [2018] VCAT 1335 at paragraph 24:
- The comments by Byrne J in *Wimmera-Mallee Rural Water Authority v FCH Consulting Pty Ltd*<sup>2</sup> are apt. After confirming that in considering an application for joinder what he described as 'the conventional pleading test' should be applied, he said:
- ...Since the application is not a true pleading application, but an application to join a party, the Applicant must adduce material, including, if need be, hearsay in accordance with rule 43.03 (2) sufficient to satisfy the Court to these matters as well as to the matters which may be relevant to the exercise of the discretion of the Court.

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<sup>2</sup> [2000] VSC 102

### **No open and arguable case**

44 I was not satisfied that the November PAPoC, as supported by both the May and November affidavits were sufficient to demonstrate that the applicants have an open and arguable case against Mr Liu personally. For this reason, I declined to join him to the proceeding.

### **Permit further application**

45 As I stated at the directions hearing, I was attracted to the applicants' argument that they could have been misled in accordance with paragraph 14(e) of the November PAPoC.

46 I give the applicants leave to make a further application to join Mr Liu and remark that it is often simpler for a party seeking to join another if the supporting affidavit is made by the party or a director of the party, rather than by their lawyers.

**SENIOR MEMBER M. LOTHIAN**