

**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

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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 4 November 2010

DATE OF ORDER 17 December 2010

CITATION Ioannides & Anor v Everest View Pty Ltd & Ors (Domestic Building) [2010] VCAT 2008

ORDERS

- 1 The application by the applicants to join Jeffrey Neil Yarrow as the third respondent to each of these proceedings is refused.
2. By 25 January 2011 the applicants must file and serve amended Points of Claim in substantially the form of the amended Points of Claim dated 17 September 2010 but omitting all references to the third respondent including paragraphs 4, 16-22 and 23-33.
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 2 hours after the conclusion of the Compulsory Conference which has been adjourned part-heard to 17 March 2011.

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 This is the second application by the applicant owners in each of the proceedings to join Jeffrey Yarrow, director of the first respondent developer, as the third respondent. The first application was refused on 26 August 2010 when the applicants were given liberty to make a further application to join Mr Yarrow. This was filed on 17 September and heard on 4 November. The background to these proceedings was set out at length in my earlier Reasons and I do not propose to repeat it here.
- 2 Particularly relevant to this application are the pre-settlement inspections each of the owners had with Mr Yarrow of the developer, when they say they identified a number of incomplete and defective works. The owners allege they proceeded to settle relying on Mr Yarrow's representation that all rectification works would be completed within the 90 day maintenance period. I note from the chronology provided by counsel for Mr Yarrow, that each of the owners settled within a few days of the pre-settlement inspection.
- 3 Although there are three proceedings, the draft Points of Claim filed in support of the application to join Mr Yarrow is essentially in the same form in each. For the sake of consistency with my earlier Reasons I will refer to those filed in D927/2008.
- 4 Mr Reid of Counsel once again appeared for the owners, and Mr Aghion of Counsel appeared for Mr Yarrow.

The application for joinder

- 5 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.
- 6 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 the draft Amended Points of Claim (as against the proposed third respondent only) do not satisfy this test.

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

- 7 In the written submissions filed in support of the application, to which Counsel for the owners spoke at the directions hearing, it is stated that the basis of the application are the allegations set out at paragraphs 4, 16-22 and 23-33 of the proposed Amended Points of Claim. Although I will consider the claims made in each of those paragraphs, I make no finding or comment about whether they disclose an open and arguable case against the developer.

Paragraph 4

- 8 It is alleged that Mr Yarrow is and was at all material times the sole director of the developer, the servant and authorised agent of the developer; and that he was not a registered building practitioner.

Paragraphs 16 and 17

- 9 The allegations follow the heading '**Concurrent liability of the First Respondent's director**'. Whilst they lack clarity, the allegations essentially seem to be that Mr Yarrow is concurrently liable with the developer for the alleged breach of the duty of care, it is alleged the developer owed to the owners, when it failed to ensure the works were carried out in accordance with the Contract, the contract documents and all legal requirements. It is not pleaded that Mr Yarrow owed a separate duty of care to the owners.
- 10 Mr Yarrow's knowledge and participation in the alleged breach of duty is pleaded at paragraph 16, the particulars to which are, in summary:
- (a) Mr Yarrow is the sole director and principal of the developer with knowledge of the matters pleaded against the developer;
 - (b) Mr Yarrow advised the owners the non-conforming works would be rectified;
 - (c) Mr Yarrow should have known or been aware that the works were defective and did not conform with the contract.
- 11 In paragraph 17 it is pleaded that because of his knowledge, direction, performance and or participation in the negligent acts of the developer Mr Yarrow is jointly and severally liable with the developer for the loss and damage suffered by the owners as a result of those negligent acts. The particulars supporting this allegation refer to the particulars subjoined to paragraph 15 [the allegation that the owners have suffered loss and damage arising from the negligence of the developer]. In summary:
- (a) In relying on the contract terms being fulfilled, the owners lost any ability to negotiate a price reduction or any amendment to the terms of the contract;
 - (b) The owners have incurred legal and professional fees following settlement of the property as a result of the developer's negligence

and or failure to ensure the works were carried out in accordance with the contract, the contract documents and all legal requirements;

(c) The owners need to carry out rectification works.

12 Counsel for the owners referred me to a number of authorities which he submitted confirm that the pleadings in paragraphs 16 and 17 are ‘open and arguable’. I do not agree, and in my view those authorities do not assist the owners’ arguments. It is not necessary to consider all of the authorities to which I was referred as the proposition advanced is common to them all.

13 In *Henley Arch Pty Ltd v Clarendon Homes (Aust) Pty Ltd*² where Merkel J said:

A person (including a director) may also be primarily liable as a joint or concurrent tortfeasor in relation to the infringement [of copyright] by involvement in the tortious acts which constitute the infringement. [emphasis added]

14 Henley Arch succeeded in its claim that Clarendon Homes had infringed its copyright, in circumstances where the relevant director was directly involved in the approval of the infringing design. In other words, where there was a wilful act of the director. It was not the conduct of a sole director as in this case.

15 Counsel for the owners submitted that the *Henley Arch* test had been amended by the tribunal in *Korfiatis v Tremaine Developments Pty Ltd*³ such that the director was to *procure and direct negligently*.⁴ Even accepting that to be an accurate reflection of the tribunal’s decision in *Korfiatis*, it is not pleaded in paragraphs 16-17 that Mr Yarrow negligently procured and directed the developer to breach its duty to the owners. In *Korfiatis* Senior Member Walker summarises the allegations as against the director at [27]:

In the present case it is said that Ktori directed and procured Tremaine to carry out the work but it is not, and could not sensibly be, suggested specifically that he directed or procured that it be carried out negligently. The implication seems to be that, because Ktori directed and procured Tremaine to carry out the work (para 35) and because Tremaine carried it out negligently (para 36), he is somehow liable. The alternate claim (para 38) is that Ktori directed and procured the performance of the works by Tremaine and that those works were carried out negligently, which seems to be the same allegation expressed in other words. [emphasis added]

16 Senior Member Walker then discusses the various authorities and relevantly at [36] comments:

² (1998) 41 IPR 443 at 464

³ [2008] VCAT 403

⁴ Applicant’s submissions dated 4 November 2010 at [5.2]

... Although it does not appear to be expressly stated in these terms in the cases, a director does not appear to be guilty of negligence unless he himself owed a duty of care to the person who suffered the loss.

- 17 As noted above, it has not been pleaded that Mr Yarrow owed a separate duty of care to the owners.

Paragraphs 18 - 21

- 18 In paragraph 18 it is pleaded in the alternative that as a director of the developer Mr Yarrow *committed, authorised, procured, directed or knowingly acquiesced in the actions giving rise to the negligence of the first respondent*. The particulars again refer to the particulars subjoined to paragraph 15.

- 19 In paragraph 19 it is alleged that:

The liability of the Third Respondent arises as he, as the sole director of the First Respondent has:

- 19.1 Procured, actively participated in, and or directed the First Respondent to commit acts of negligence; and or

Particulars

The owners refer to and repeat the particulars subjoined to paragraph 25 [that notwithstanding assurances by the first and third respondent that the defective and non conforming works would be rectified, they remain]

- 19.2 Made wrongful acts his own as distinct from such actions being the proper actions of the First Respondent company; and or

Particulars

The Owners refer to and repeat the particulars subjoined to paragraph 23 [the representations] and further say that in the email and verbal exchanges the Third Respondent was acting in his own capacity.

- 19.3 Assumed responsibility for the company's actions.

- 20 At paragraph 20 it is pleaded that Mr Yarrow:

... had knowledge of and or was recklessly indifferent to whether its actions were unlawful and or would otherwise cause harm to the Owners.

- 21 And at paragraph 21:

By reason of the matters in paragraph 18-20 the Third Respondent is liable for the negligent acts of the First Respondent and for the loss and damage suffered by the Owners by reason of such negligence.

- 22 The difficulty with these pleadings is that they do not identify any actions or conduct by Mr Yarrow that are distinct from those he has carried out in his role as the sole director of the developer company. It is not enough to simply say he has assumed responsibility for the company's actions – it

must be made clear how those actions were carried out by him in his personal capacity.

- 23 Senior Member Young's discussion in *Lawley v Terrace Designs Pty Ltd* [2006] VCAT 1363 is pertinent. Although in that case the owners also sought to claim against the director of the building company, the discussion in, my view, is equally applicable when considering the personal liability of a sole director of any company. Senior Member Young said:

178. The owners submit on the authority of the decision of Redlich J in *Johnston Matthey (Aust) Ltd v Dascorp* (2003) that the director of the builder is liable as a tortfeasor on the following basis:

- (d) Where the primary tortfeasor is a corporation, questions as to the liability of its directors for the tort attract principles which impose personal liability on directors which are dependant on the degree of their involvement [106].*
- (e) The level of involvement of each defendant in each particular transaction is critical in determining whether their conduct renders them liable as joint tortfeasors for the conversion by their company [107].*
- (f) For a tort such as conversion that does not require a particular intention, a director is liable for the tortious acts of the corporation **which he or she directed or procured** [emphasis added in original] regardless of the director's state of mind. The level of involvement and the degree of control which a director exercises will determine whether it can be said that the acts have directed or procured by the director [201].*

Note: The numbers in square brackets are the relevant paragraph numbers in Redlich J's decision.'

179. The owners submit further, that in the alternative the director of the builder, as the registered building practitioner responsible for the work undertaken by the builder, and in light of the director of the builder's close involvement in, and control over, all aspects of the building work undertaken by the builder, the director of the builder directed or procured the tortious conduct of the builder in undertaking defective work, and is liable accordingly.

- 24 Senior Member Young then considered various authorities (including those to which I was referred by counsel for the owners) before concluding:

188. Thus, I consider there must be something more than simply organising or even carrying out the work badly. There must be some act or behaviour of the director that is more than merely carrying out of his company duties, even if it results in a breach of contract or a failure by the company to fulfil its obligations. An intention to induce a company to breach its contract by a

director does not incur liability; therefore, I do not see how a careless act by a director by itself can attract personal liability, unless the carelessness was so flagrant as to be outside normal bad building practice. [emphasis added]

and at [190]

190. Likewise to find the director of the builder liable on the basis that he was the registered building practitioner and directed and procured the acts of the company is not of itself sufficient to find the director of the builder personally liable as a tortfeasor. To do so would in effect mean that for one-person corporations the principle of limited liability was of no effect. In the acknowledged tension between the operation of corporate law and tort law this would be going too far. Therefore, a director to be liable must do something more than carry out his duties badly or incorrectly and there is no evidence the director of the builder has done so...[emphasis added]

Paragraph 22

- 25 Curiously, at paragraph 22 a claim is made under Part IVAA of the *Wrongs Act* 1959. Simply pleading a claim under Part IVAA is not enough – it does not of itself constitute a viable cause of action. This is the type of claim ordinarily made by a respondent who, in seeking to limit its responsibility for an applicant’s loss and damage, contends that the applicant’s claim is an apportionable claim.

Paragraphs 23-28

- 26 These pleadings follow the heading ‘**FAIR TRADING ACT**’ (this is a reference to the *Fair Trading Act* 1999 (‘the FTA’))
- 27 Paragraph 23 essentially repeats sub-paragraphs 10.3, 10.4 and 10.5 of the draft Points of Claim which I considered in my earlier decision, save that it is now alleged that the representations were made by the developer, through its sole director, Jeffrey Yarrow, or alternatively the third respondent. The allegation in paragraph 10 of the earlier draft was that the representations were made by the developer. However, in each of the sub-paragraphs the allegations refer to performance by the developer of certain obligations. There is no mention of performance of those obligations by Mr Yarrow in his personal capacity, or even in his capacity as an officer of the developer:
23. Further and alternatively, the Developer through its sole director, Jeffrey Yarrow, or alternatively, the Third Respondent, stated and represented to the Owners that:
- 23.1 It would complete the incomplete building works and ensure defective building works and otherwise non-conforming works were rectified urgently and within a 90 day period following the pre-purchase inspection of the Property;

23.2 all items that were defective, incomplete or otherwise 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; and

23.3 it was arranging, and would arrange, for the Builder to carry out rectification works, including rectification of non conforming works, to the Dwelling.

(collectively ‘**the Representations**’)

28 The Particulars subjoined to paragraph 23 (which are not numbered) are somewhat inconsistent with the allegations. Although some reference is made of emails to and from Mr Yarrow there are no allegations or particulars as to how in corresponding with the Owners Mr Yarrow was doing so in his personal capacity as distinct from his role as an officer of the developer company.

29 The final particular subjoined to paragraph 23 lacks clarity and does not support any of the allegations made in paragraph 23:

Each of the representations 23.1-23.3 (inclusive) are also to be implied from the following facts and circumstances:

- i The Contract between the Applicants and the First Respondent, entered into and executed by Jeffrey Yarrow, as director of the First Respondent [emphasis added – I note in passing that a company cannot execute a contract otherwise than by a director or authorised representative.]
- ii The nature of the Work contemplated by the Contract [it is unclear how this is a particular of a representation apparently made, by reference to the other Particulars to paragraph 23, at the pre-settlement inspection or in correspondence following settlement];
- iii The obligations imposed upon builders performing domestic building works; [it is unclear how this is a relates to any of the representations set out in paragraph 23];
- iv No demurring or departure from the oral and written advice to the Owners that the defective and otherwise non-conforming work would be rectified.

30 In paragraph 24 it is alleged that the representations were made in trade and commerce, and in paragraph 25 that they were *false and misleading or likely to mislead and deceive in contravention of section 9 & 12 of the FTA*. Again, it is alleged that these representations were misleading and deceptive because the developer or alternatively the third respondent failed to have the works completed and rectified within a 90 day period following a pre-purchase inspection of the property.

31 In paragraph 26 it is alleged that, relying on the representations, the owners:

- (a) awaited rectification of the defective and non-compliant works by the developer or alternatively by Mr Yarrow;
- (b) awaited the developer or alternatively Mr Yarrow to procure the builder to rectify the defective and non-compliant works;
- (c) did not seek or negotiate a variation to the contract, or revised purchase price;
- (d) did not arrange to have the works carried out themselves.

32 Paragraph 27 appears to repeat paragraph 25.

33 Paragraph 28 sets out the loss and damage it is alleged the owners have suffered as a result of their reliance on the representations: the cost of rectification of defective and non-compliant works.

34 The authorities to which I was referred are examples of where a director has been held to have accessorial liability for the misrepresentation of a company but do not assist the owners' arguments. This can be illustrated by reference to two of those authorities:

35 In *Chippendale Printing Co Pty Ltd v Spunaline Pty Ltd*⁵ the Federal Court held that a director could be held personally liable for the misrepresentations of a company where:

Each of these possibilities involves his knowledge that the positive representations made about the software were misleading, and indeed false. It would be as much a false statement for him, in ignorance of the capacities of the software, to represent positively that it had certain particular capacities, as to make the same representation having ascertained its actual capacities to be different. For in either case, the representation would falsely convey that the person making it was aware of facts which justified it. [emphasis added]

36 Similarly, in *Sutton v AJ Thompson Pty Ltd*⁶, a decision of the Full Federal Court, an accountant was held liable as an accessory for the misrepresentations *because he must have known* the representations were untrue.

37 Here it is not alleged that Mr Yarrow knew the representations were false at the time they were made. These comments are made only in the context of the allegations which rely on s9 of the FTA.

Paragraphs 29-31

38 In paragraph 29 it is pleaded:

Further or alternatively to paragraph 27 herein, the Third Respondent and/or alternatively the First Respondent contravened section 9 of the FTA as referred to in paragraphs 25, 26 and 30 herein, pursuant to section 159 of the FTA, by reason of:

⁵ (1985) ATPR ¶40-631

⁶ (1987) 73 ALR 233

- 29.1 Being involved in the contravention of the FTA; and/or
- 29.2 Contravening section 9 and or section 12 of the FTA; and/or
- 29.3 Aiding abetting counselling or procuring the contraventions of the First Respondent; and/or
- 29.4 Inducing the contraventions of the First Respondent of section 9 of the FTA.

39 This paragraph remains difficult to understand. With the exception of the juxtaposition of Third and First Respondent in the first sentence, and the addition of the words *of the First Respondent* in 29.3 and *of the First Respondent of s9 of the FTA* in 29.4, the pleading is identical to paragraph 15 of the earlier Points of Claim. The Particulars subjoined to this paragraph do not assist. They are confusing and as I noted in my earlier Reasons, particulars are not pleadings.

40 Paragraph 30 is identical to paragraph 16 in the earlier Points of Claim – that the representations were representations as to future matters.

41 Paragraph 31 pleads:

The First and or alternatively the Third Respondent made the Representations without having reasonable grounds for believing that it would be able to act and or would in future act in accordance with those Representations.

There are no Particulars. I was once again referred to Orminston J's comments in *Futuretronics Interntational Pty Ltd v Gadzhis*⁷:

It would seem on the authorities that, at the least, a contractual promise would amount to an implied representation that the promisor then had an intention to carry out that promise. If it can be shown he had no such intention he would be guilty of misleading or deceptive conduct. Likewise it would seem that such a representation connotes a present ability to fulfil that promise which, if shown to be untrue at the time of the making, would likewise characterize the implied representation as misleading or deceptive.

42 Again I refer to my earlier Reasons at paragraphs 26 and 27 where I said:

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. ... there no Particulars, ... A representation as to future matters does not of itself give rise to a claim under the FTA.

⁷ [2992] 2 VR 217 at 239

- 43 Not only is it unclear which specific representations are alleged to be representations as to future matters, there are no allegations that the representations were misleading and deceptive at the time they were made. It is not a matter of considering a person's conduct with the benefit of hindsight. A representation as to future matters will only be misleading and deceptive if the person making it did not have a reasonable grounds for making the representation when it was made. As Senior Member Riegler recently said in *Destin Constructions Pty Ltd v McLennon* [2010] VCAT 1582 at [30]:

In my view, the difficulty with the Counterclaim is that nothing has been alleged to suggest that the representations were misleading or deceptive at the relevant time they were made. The obscure statement in paragraph 75 of the Counterclaim that *the builder, in making each representation did not have reasonable grounds for making each representation under section 4 of the FTA* is not supported by any particulars, nor was any evidence given during the course of this application hearing to cast any light on how it could be said that the applicant did not have reasonable grounds for making each representation. In my view, such an obscure allegation requires, at the very least, some particularisation to enable Mr Schwarzer to understand the case that he needs to meet. This is not a situation where I can simply assume that the respondent will, at trial, be able to prove the allegation because no facts are pleaded or raised in particulars, which could then cast light on the allegation or give it some factual substance. What is pleaded is, in essence, a legal conclusion. The relevant facts upon which that legal conclusion is based have not been pleaded. [emphasis added]

Paragraph 32

- 44 At paragraph 32 it is pleaded:

As a consequence of the operation of section 159 of the FTA and the matter pleaded in paragraph 25, 26, 27 and 29 the First Respondent and or alternatively the Third Respondent and or both of them have contravened section 9, and/or section 12 of the FTA.

- 45 As I said at paragraph 25 of my earlier Reasons:

Section 159(1) of the FTA provides:

- (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 pursuant to s159 [or in these draft Points of Claim 'as a consequence of']. 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.

- 46 Although references are made to s145 of the FTA in the written submissions filed on behalf of the owners, there are no pleadings in the proposed Points of Claim against Mr Yarrow referring to or setting out any claim against him under s145. Accordingly, I have not considered these submissions.

The 90 day representation

- 47 It was conceded by counsel for Mr Yarrow that the representation that the rectification works would be carried out within 90 days of the date of the pre-purchase inspection is a representation made by Mr Yarrow in his personal capacity. However, again I repeat my comments at paragraph 30 of my earlier Reasons:

In all [the] proceedings there are various allegations about representations made about rectification and completion made prior to the owners settling. 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 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.

- 48 I note that it is pleaded in paragraph 6.7 that the obligations set out in clause 30 of the Contract of Sale are a fundamental term.

Conclusion

- 49 It is unfortunate that little attention appears to have been paid to my earlier Reasons for refusing the owners' first application to join Mr Yarrow. It is not sufficient simply to extend allegations made against the developer so they are made in the alternative against Mr Yarrow. The draft Points of Claim do not identify how it is said that Mr Yarrow has acted in a personal

capacity, separate and distinct from his role as principal and sole director of the developer company.

- 50 As the sole director of the developer Mr Yarrow is its guiding mind. Where people enter into contracts with companies they clearly expect to have conversations with representatives of that company. A company can only operate through its officers and employees. This is the usual manner in which a company conducts business, and is not of itself sufficient to lift the corporate veil so that the director becomes personally liable for all the acts and omissions of the company.
- 51 As I am not persuaded the amended draft Points of Claim reveal an open and arguable case against the proposed third respondent, the application for joinder is refused.

DEPUTY PRESIDENT C AIRD