

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST

VCAT REFERENCE NO. BP288/2015

CATCHWORDS

Applicant seeks joinder under section 60 *Victorian Civil and Administrative Tribunal Act 1998* for joinder of director of first respondent.

Whether the applicant has an open and arguable claim that the conduct relied on was by the director in his personal capacity-joinder on this basis refused.

Whether the applicant has an open and arguable claim that the director is liable to the applicant under the accessory liability provisions of the *Trade Practices Act 1974* and/or the *Fair Trading Act 1999 (Vic)* (in respect of alleged conduct of the first respondent prior to 1 November 2011) and the *Australian Consumer Law (Vic)* (in respect of alleged conduct after 1 November 2011)-joinder on this basis ordered.

APPLICANT	G Rocca Pty Ltd (ACN 004 577 477)
FIRST RESPONDENT	Timetrex Pty Ltd (ACN 006 586 223)
SECOND RESPONDENT AND SECOND JOINED PARTY	BJP Holdings Pty Ltd (ACN 074 343 285)
THIRD RESPONDENT AND THIRD JOINED PARTY	CGB Consulting Engineers Pty Ltd (ACN 059 161 205)
FOURTH RESPONDENT	Joseph Mazza trading as JM Designs
FIFTH RESPONDENT	Mario Mazza
FIRST JOINED PARTY	Barry James Park
WHERE HELD	Melbourne
BEFORE	A Kincaid, Member
HEARING TYPE	Joinder Application
DATE OF HEARING	17 January 2017
DATE OF ORDER AND REASONS	21 February 2017
CITATION	G Rocca Pty Ltd v Timetrex Pty Ltd (Building and Property) [2017] VCAT 261

ORDER

1. Pursuant to section 60 of the *Victorian Civil and Administrative Tribunal Act 1998*, Mr Mario Mazza of Unit 1/7 Lindaway Place, Tullamarine Victoria 3043 is joined as fifth respondent to the proceeding.

2. The applicant is granted leave to file and serve Further Amended Points of Claim having regard to the attached Reasons.
3. **The principal registrar is directed to fix this proceeding for further directions in the event of a failed compulsory conference, presently fixed for 22 February 2017.**
4. The solicitors for the First Joined Party must also notify the Tribunal by email within 48 hours of any failed compulsory conference whether they wish to make any application to strike out the claim against the First Joined Party.

A Kincaid
Member

APPEARANCES:

For Applicant

Mr D Cole, Counsel.

For the proposed fifth
respondent.

Ms J Johnston, Solicitor.

REASONS

INTRODUCTION

- 1 By a building contract dated 16 June 2010 between the applicant and the first respondent (the “**building contract**”), the first respondent agreed to undertake the construction of 3 units on land owned by the applicant at Woyna Avenue, Rosebud West, Victoria.
- 2 The applicant alleges by proposed Further Amended Points of Claim dated 22 December 2016 (the “**PPOC**”) that it terminated the building contract by letter dated 7 June 2013, consequent upon the first respondent’s alleged repudiation of its obligation to complete the works.¹
- 3 The first respondent alleges that the applicant did not purport to accept the first respondent’s alleged repudiation until 24 June 2015² and, that in doing so, the applicant repudiated the building contract which was accepted by the first respondent.³

PART HEARING TO DATE

- 4 The hearing of the proceeding started on 10 October 2016. The first respondent was then the sole respondent. The hearing was adjourned on 12 October 2016, the third day of the hearing, for the purpose of the Tribunal considering an application by the first respondent for the recusal of the presiding Member. The Tribunal has since been reconstituted, pursuant to the terms of the Tribunal’s orders dated 19 October 2016.

RELIEF SOUGHT BY APPLICANT

Damages for defective and incomplete works

- 5 By the PPOC the applicant claims \$144,288.59 damages for allegedly defective and incomplete works, against which it provides a credit for monies under the building contract unpaid at the date of termination.

Damages for delay

- 6 Prior to the PPOC, the applicant also claimed from the first respondent (then the sole respondent) “loss of rental” damages in respect of two of the units “from 1 January 2011” for alleged late completion of the works.
- 7 By the PPOC, the applicant now seeks “loss of rental” damages in respect of 3 of the units “from 1 January 2011-3 December 2016” and continuing, for alleged late completion of the works. It claims \$340,770 to 3 December 2016.
- 8 The applicant alleges that the obligation upon the first respondent to complete arose as an oral term of the building contract, agreed “in or

¹ Paragraph 15, PPOC.

² By paragraph 15 of the Applicant’s Amended Points of Claim dated 24 June 2015.

³ See paragraph 13(e) of the Defence and Counterclaim dated 14 September 2015.

around June 2010” between the director of the applicant Mr Rocca, and the director of the first respondent, Mr Mario Mazza (“**Mr Mazza**”), the proposed fifth respondent. The applicant alleges that the term was that the front unit of the 3 units would be completed by Christmas 2010, with the other 2 units completed “by the [end of the] first quarter of 2011”.⁴

- 9 The applicant also alleges in the PPOC, supposedly in the alternative, that it entered into the building contract in reliance upon a representation by Mr Mazza on about 10 June 2010, that the 3 units would be completed “within ten months”, and that there was “no need for a completion date in the contract” (the “**first representation**”).⁵ The applicant says that the first representation, and two subsequent representations allegedly made by Mr Mazza concerning the completion date were false and misleading⁶ and but for these representations it would have entered into a contract with another builder (in the case of the first representation), or terminated the first respondent earlier (in the case of the two subsequent representations).
- 10 I interpose here that one of the issues at the hearing will be the extent to which (if at all) there were oral terms or representations made outside the terms of the building contract. Subject to evidence, no details were inserted by the parties in the “time for completion” section of the building contract,⁷ and the “agreed damages for late completion” section of the building contract appears to have been scored out by the parties.⁸

RELIEF SOUGHT BY FIRST RESPONDENT

Unpaid variations

- 11 By Defence and Counterclaim dated 14 September 2015, the first respondent claims from the applicant \$31,724 as variations, as follows:

Variation	Description	Cost
Extra concrete	After works commenced, the relevant authority required new levels on the basis that the property was in a flood zone. This resulted in an increase in the cost of obtaining concrete	\$12,232.00
Pits (materials)	Council requires installation of further pits not shown on construction drawings	\$5,905.00

⁴ Paragraph 4(f) of the PPOC. It is difficult to see how the breach of this alleged term gives rise to an entitlement to claim for alleged delay from 1 January 2011 in respect of all 3 units.

⁵ See paragraph [45] of the PPOC. I note that the alleged content of the oral term of the building contract on the one hand, and the alleged content of the first representation on the other hand, are at odds with each other.

⁶ Given that the building contract was entered into in June 2010, the misleading and deceptive conduct complained of is that proscribed by section 9 of the *Fair Trading Act 1999* (Vic) in the case of representations said to have been made by the proposed fifth respondent, and section 52 of the TPA in respect of representations said to have been made by the first respondent.

⁷ Item 1 of Schedule 1 to the building contract (page 6 of the building contract).

⁸ Item 9 of Schedule 1 to the building contract (page 8 of the building contract).

Pits (labour)	Labour paid to Catania Labour Contractors	\$8,637.00
Additional tiling	40m ² to bathroom of unit 1	\$4,950.00
		\$31,724.00

Loss of profit

- 12 The first respondent also claims loss of profit of \$29,000 arising from the applicant's alleged wrongful termination of the building contract, being the further amount due to the first respondent under the building contract as varied, less the first respondent's anticipated costs of completion.

Reimbursement of monies advanced by the first respondent

- 13 The first respondent also seeks reimbursement of \$9,700 being payments allegedly paid by the first respondent to third parties at the applicant's request.

FURTHER PARTIES SUBSEQUENTLY JOINED

- 14 As I have stated, at the time of the adjournment of the hearing, the first respondent was the sole respondent. At that time, the first respondent had alleged by way of defence that, to the extent that it failed to complete the works by 1 January 2011 or by some other date (liability for which it denied in any event), that alleged failure was caused by:
- (a) errors in the construction drawings⁹ prepared by the architectural draftsman, the fourth respondent;
 - (b) errors in the engineering drawings¹⁰ prepared by the consulting engineer, the third respondent; and/or
 - (c) a failure by the relevant building surveyor, the second respondent and/or the first joined party, to ensure that all drawings and plans complied with the planning permit.¹¹
- 15 Since then, the parties have sought to join additional parties to the proceeding.

Joinder of architectural draftsman

- 16 On the application of the applicant at a directions hearing on 16 December 2016, I joined the fourth respondent, the architectural draftsman to the proceeding. The applicant concedes that he engaged the fourth respondent.¹²

⁹ See particulars to paragraph 22 of the PPOC.

¹⁰ See particulars to paragraph 37 of the PPOC.

¹¹ See particulars to paragraph 43 of the PPOC.

¹² See paragraph 19 of the PPOC.

Joinder of relevant building surveyor

- 17 The parties are in dispute over who engaged the relevant building surveyor (“**BJP**” and/or “**Mr Park**”).
- 18 At a directions hearing on 24 November 2016, on the application of the first respondent, I ordered the joinder of BJP and Mr Park as joined parties.
- 19 At the directions hearing on 16 December 2016, the applicant applied to join BJP only as the second respondent, and I made that order.
- 20 Whether Mr Park remains a party is subject to any application on his behalf to have the claim against him struck out.¹³

Joinder of consulting engineer

- 21 The parties are also in dispute over who engaged the consulting engineer (“**CGB**”).
- 22 At the directions hearing on 24 November 2016, on the application of the first respondent, I ordered the joinder of CGB as a joined party.
- 23 At a directions hearing on 16 December 2016, the applicant applied to join CGB as the third respondent, and I made that order.
- 24 I also interpolate that it seems tolerably clear, subject to evidence, that the third respondent was engaged by the fourth respondent.¹⁴

FURTHER JOINDER APPLICATION

- 25 The applicant now seeks leave to join Mr Mazza, the sole director of the first respondent, as fifth respondent.
- 26 It seeks to do so on two bases. The first is that Mr Mazza is personally liable for conduct, prior to 1 November 2011, that contravened sections 7 and 9 and of the *Fair Trading Act 1999 (Vic)* (the “**FTA**”) (now repealed).
- 27 Section 7 of the FTA provided:

Unconscionable conduct within the meaning of the unwritten law

- (1) A person must not, in trade or commerce, engage in conduct which is unconscionable, within the meaning of the unwritten law, from time to time.

- 28 Section 9 of the FTA provided:

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.

¹³ Any such application is to await the outcome of a compulsory conference, presently set down for 22 February 2017.

¹⁴ See “Chronological Sequence of Events” and accompanying copy documents filed by the third respondent on 15 December 2016, such material perhaps not having reached the hands of the first respondent when it made its joinder application on 24 November 2016.

- 29 In respect of alleged conduct of Mr Mazza in his personal capacity after 1 November 2011, the applicant relies on similar provisions in the *Australian Consumer Law (Vic)* (the “ACL”).
- 30 Section 52(1) of the *Trade Practices Act 1974 (Cth)* (the “TPA”) provided:
A corporation shall not, in trade or commerce, engage in conduct that is misleading or deceptive.
- 31 Section 82 of the TPA provided:
(1) A person who suffers loss or damage by conduct of another person that was done in contravention of a provision of Part IVA or V may recover the amount of the loss or damage by action against that other person or against any person involved in the contravention.
- 32 The second basis for seeking leave to join Mr Mazza is that to the extent, prior to 1 November 2011, that the first respondent contravened section 52 of the TPA, Mr Mazza was a person “involved in the contravention” within the meaning of section 82(1) of the TPA, and is therefore a party from whom the applicant may recover damages pursuant to section 82 of the TPA.¹⁵ The applicant also relies on the accessorial liability provisions of the FTA and, in respect of conduct after 1 November 2011, section 18 of the ACL.

JOINDER-RELEVANT PRINCIPLES

- 33 I accept that the Tribunal’s powers under section 60 of the *Victorian Civil and Administrative Tribunal Act 1998* are wide.
- 34 Section 60 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.
- 35 In considering any application for joinder, where proposed Points of Claim have been filed, the Tribunal must be satisfied that they reveal an “open and arguable” case.¹⁶
- 36 Further, I respectfully adopt the observations of Senior Member Lothian in *Watson v Richwall Pty Ltd*¹⁷, as follows:

¹⁵ See paragraphs [68]-[69] PPOC.

¹⁶ See; *Zervos v Perpetual Nominees Limited* [2005] VSC 380; applied in *Perry v Binios* [2006] VCAT 1604; *Watson v Richwall* [2014] VCAT 1127 at [28].

¹⁷ See footnote 16. At [31].

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

37 Similarly, in her decision of in *Luo v Reynson Concepts Pty Ltd*¹⁸ Deputy President Aird stated:

There can be no dispute that the contract was entered into with Reynson Concepts Pty Ltd...Whilst it may be that the work was not completed within 6 months of commencement, there are no particulars as to how this supports an allegation of misleading and deceptive conduct. Similarly there are no particulars as to the relevance of the incorporation of the builder, or how it was said that the work would be carried out diligently was misleading and deceptive. It is not enough to make bald allegations, they must be supported by relevant particulars, although it is not necessary to set out the evidence.

38 The applicant relies on *Johnson Matthey (Aust) Ltd v Dascorp Pty Ltd*¹⁹ and *Root Quality Pty Ltd v Root Control Technologies Pty Ltd*²⁰ as authorities for the general proposition, which I accept, that a director may, in certain circumstances, be held personally liable as a joint tortfeasor in respect of the wrongs of the company of which he is a director.

39 Where, as in this case, an applicant is seeking to join a director on the basis that he or she is personally liable in respect of conduct contravening relevant legislation, in addition to whatever may be found to be the liability of the company of which he is a director, the proposed pleading must distinguish between the conduct of the director in his capacity as a director, and his conduct alleged to have been in a personal capacity.²¹

RELEVANT PARAGRAPHS FROM THE PPOC

40 It is helpful to set out the following extracts from the PPOC:

3. By an agreement made on or about 16 June 2010 the First Respondent agreed to construct 3 units (the **Units**) for the Applicant on the Property (the **Works**) for the sum of \$640,000 (including GST) (the **Contract**).

PARTICULARS

[details are recited of the written building contract between the applicant and the first respondent]

...Insofar as it was oral, it was comprised by discussions between Mr P Rocca for and on behalf of the Applicant and Mr M Mazza for and on behalf of the First Respondent in or around June 2010...

Mario Mazza

¹⁸ [2009] VCAT 890 at [8].

¹⁹ [2003] VSC 291

²⁰ [2000] FCA 980

²¹ See *Perry v Binios* supra at fn 16, at [14] and [16]; *Luo & Anor v Reynson Concepts Pty Ltd* supra fn 18, at [].

Misleading and Deceptive Conduct

45. On or about 10 June 2010, [Mr Mazza] licenced builder and Sole Director of the First Respondent represented to Mr Pat Rocca on behalf of the Applicant that:
 - (a) The First Respondent would complete construction of the units within ten months:
 - (b) There was no need for a completion date in the contract (the **First Representation**)
46. In or about January 2011 [Mr] Mazza, represented to Mr Pat Rocca on behalf of the Applicant that:
 - (a) the First Respondent would complete construction of the units by Christmas 2011 (the **Second Representation**)
47. On or about 7 February 2013 [Mr] Mazza represented to Mr Pat Rocca on behalf of the Applicant that:
 - (a) The First Respondent would complete construction of the units within six weeks (the **Third Representation**).
48. The First Representation was made orally to Rocca and Mrs Pattie Rocca, by [Mr] Mazza at the home of Mr and Mrs Rocca.
49. The Second Representation was made orally to Rocca, by Mazza at the office of Rocca.
50. The Third Representation was made to Rocca, by [Mr] Mazza in writing, comprising an emailed letter dated 7 February 2013²², a copy of which is in the possession of the solicitor for the Applicant and may be inspected by appointment.
51. The First, Second and Third Representations were made by [Mr] Mazza in trade or commerce.
- 52-64 [The PPOC recites that the representations were in respect of “future matters” within the meaning of the applicable law, that they were false and misleading and that the applicant relied on them].
65. The Applicant has suffered loss and damage because of the conduct of [Mr] Mazza in making the [First, Second and Third Representations], and the Applicant is entitled to recover that loss pursuant to [the applicable law].

CLAIM AGAINST MR MAZZA IN HIS PERSONAL CAPACITY

- 41 The above paragraphs of the PPOC contain all the allegations in support of the applicant’s claims that Mr Mazza is liable in his personal capacity in respect of the claimed contravening conduct.
- 42 Subsequent paragraphs of the PPOC allege that Mr Mazza thereby engaged in conduct that was in contravention of section 7 (unconscionable conduct)

²² I note that the email relied on here is a document with the letterhead “Timetrex Builders”, also describing Mr Mazza as a director of the first respondent, and which is signed by “Mario Mazza of Timetrex Builders”.

and section 9 (misleading and deceptive conduct) of the FTA and (I take it, from 1 November 2011) conduct that was in contravention of section 18 (misleading and deceptive conduct) and section 20 (unconscionable conduct) of the ACL. The applicant claims his loss and damage against Mr Mazza pursuant to section 159 of the FTA and section 236 of the ACL²³.

43 It is a principle of company law that individual directors are not normally liable personally for the failings of the company of which they are a director.²⁴ Something more is required, and “there have been many formulations in various jurisdictions as to what more is required before a director will be liable for a company’s wrongful conduct... whichever formulation is adopted, the nature and participation in the breach must be identified”.²⁵

44 The applicant submits that a director of a company will be liable [under the statutory provisions to which I have referred] “if he has assumed responsibility for the company’s acts”.²⁶ This expression comes from an oft-quoted passage in *Pioneer Electronics Australia Pty Ltd v Lee*²⁷ (2001) 108 FCR 216, in which Sundberg J said:

The law on the personal liability of a director for corporate torts is in an uncertain state. There seem to be at least four views having judicial support.

1. A director will be liable along with the company when he has procured or directed it to commit the tort: *Performing Right Society Ltd v Cyril Theatrical Syndicate Ltd* [1924] 1 KB 1 at 14; *Kalamazoo (Aust) Pty Ltd v Compact Business Systems Pty Ltd* (1985) 84 FLR 101 at 127; *Martin Engineering Co v Nicaro Holdings Pty Ltd* (1991) 100 ALR 358; *Microsoft Corp v Auschina Polaris Pty Ltd* (1996) 142 ALR 111; *Lott v JWB & Friends Pty Ltd* [2000] SASC 3; *Henley Arch Pty Ltd v Clarendon Homes (Aust) Pty Ltd* (1998) 41 IPR 443 at 464.
2. A director will be liable only if he has made the wrongful act his own as distinct from it being an act of the company: *Mentmore Manufacturing Co Ltd v National Merchandising Manufacturing Co Inc* (1978) 89 DLR (3d) 195; *White Horse Distillers Ltd v Gregson Associates Ltd* [1984] RPC 61 at 91; *King v Milpurrurru* (1996) 136 ALR 327 at 346-351.
3. **A director will be liable if he has assumed responsibility for the company's acts:** *Trevor Ivory Ltd v Anderson* [1992] 2 NZLR 517.
4. A director is not liable for procuring the company to infringe the rights of others: *Said v Butt* [1920] 3 KB 497; *O'Brien v Dawson* [1942] HCA 8; (1942) 66 CLR 18 at 32, 34; *Rutherford v Poole* [1953] VLR 130; *Root Quality Pty Ltd v Root Control Technologies Pty Ltd* [2000] FCA 980 (**emphasis added**).²⁸

²³ See paragraphs [65] and [67] PPOC. Damages are also claimed under the TPA, but it would seem to be inapplicable.

²⁴ *Salomon v Saloman* [1897] AC 92.

²⁵ See *Young Investments Group Pty Ltd v Mann* [2012] FCAFC 107 at [58].

²⁶ See paragraph 30 of the applicant’s submissions dated 16 December 2016.

²⁷ (2001) 108 FCR 216

²⁸ *Ibid.* at page 233.

45 In *Trevor Ivory v Anderson*²⁹, the appellant was a director of a “one man company” that was retained by an orchardist to provide horticultural advice. The company by its director advised the orchardist to use a particular herbicide which destroyed the orchardist’s crop. The orchardist sued the company, but also sued the director in negligence alleging that he failed to exercise reasonable care, skill and diligence in advising on the use of the spray. In rejecting the claim, the President of the Court, Sir Robin Cooke, said:

...it behoves the courts to avoid imposing on the owner of a one man company a personal duty of care which would erode the limited liability and separate identity principles associated with the names of Salomon and Lee. Viewing the issue as one of assumption of a duty of care ... I cannot think it reasonable to say that Mr Ivory assumed a duty of care to the plaintiffs as if he were carrying on business on his own account and not through a company.³⁰

46 In the same case, Hardie Boys J said:

An agent is in general personally liable for his own tortious acts: *Bowstead on Agency* (15th ed, 1985) at p 490. But one cannot from that conclude that whenever a company's liability in tort arises through the act or omission of a director, he, because he must be either an agent or an employee, will be primarily liable, and the company liable only vicariously. In the area of negligence, what must always first be determined is the existence of a duty of care. As is always so in such an inquiry, it is a matter of fact and degree, and a balancing of policy considerations. In the policy area, I find no difficulty in the imposition of personal liability on a director in appropriate circumstances. To make a director liable for his personal negligence does not in my opinion run counter to the purposes and effect of incorporation...

Essentially, I think the test is, or at least includes, whether there has been an assumption of responsibility, actual or imputed. That is an appropriate test for the personal liability of both a director and an employee. It was the basis upon which the director was held liable in *Fairline Shipping Corporation v Adamson* [1975] QB 180, (see p 189), where the assumption of responsibility was virtually express. It may lie behind the finding of liability in *Centrepac Partnership v Foreign Currency Consultants Ltd* (1989) 4 NZCLC 64,940. Assumption of responsibility may well arise or be imputed where the director or employee exercises particular control or control over a particular operation or activity, as in *Adler v Dickson* [1955] 1 QB 158 (although there the issue did not arise, as it was a pre-trial decision on a different point of law). *Yuille v B & B Fisheries (Leigh) Ltd* [1958] 2 Lloyd's Rep 596 is another illustration. This is perhaps more likely to arise within a large company where there are clear allocations of responsibility, than in a small one. It arose however in the case of a small company in *Morton v Douglas Homes Ltd* [1984] 2 NZLR 548, 593ff; but not in a case to which I made some reference in my judgment in *Morton*, namely *Callaghan v Robert Ronayne Ltd* (Auckland, A 1112/76, 17 September 1979), a judgment of Speight J. It may be that in the present case there would have been a sufficient assumption of

²⁹ [1992] 2 NZLR 517. Summary taken from *Korfatis v Tremaine Developments Pty Ltd* [2008] VCAT 403 per SM Walker at [29]-[30].

³⁰ Ibid at page 523.

responsibility had Mr Ivory undertaken to do the spraying himself, but it is not necessary to consider that possibility (**emphasis added**).³¹

47 The applicant also relies on the statements of principle in the principal authority in Victoria, *Johnson Mathey (Aust) Pty Ltd v Dascorp Pty Ltd & Ors*.³²

48 In that case a claim was successfully made against a company that had purchased the Plaintiff's gold from a thief. Proceedings were also taken against the two directors of the company. It was found that the two directors had not themselves purchased the gold, and so were not primarily liable in conversion but were nonetheless liable in regard to some of the transactions where they had either taken possession of the gold or directed that to occur. The case was one in conversion, but its value for present purposes lies in the very lengthy judgment of Redlich J, who exhaustively examined the authorities concerning liability in tort of directors of companies. In paragraphs 198 and 201, relied on by the applicant, his Honour said:

Both in Australia and in England a director is in no different position to an agent, who whilst binding their principal may also be liable for their tortious acts. The defendant's submission that Mr and Mrs Secchi cannot be held liable for their conduct as directors because their acts are those of those of the corporation, expressed in such absolute terms, must be rejected. This does not mean that directors become personally liable merely because they are directors. **Unless they procure or direct the tortious conduct the law does not impose upon them liability for the acts of other agents or employees, whether they are directors of large corporations or what is described as "one man" companies [emphasis added by applicant].**

...Notwithstanding those decisions which invite a different conclusion the 'direct and procure' test has not been shown to be unsound and it remains the standard for determination of a director's liability. **The level of involvement and degree of control which a director exercises will determine whether it can be said that the acts have been directed or procured by the director [again, emphasis added by applicant].**

49 I note that both decisions relied on by the applicant concerned allegedly tortious acts.

50 A number of other decisions concerning whether a director is co-extensively liable with the company of which he is a director for tortious acts, were cited on behalf of the applicant in argument.³³

³¹ Ibid. at page 527.

³² (2003-2004) 9 VR 171. The summary that follows is also taken from *Korfiatis v Tremaine Developments Pty Ltd* [2008] VCAT 403 per SM Walker at [23].

³³ I was referred by the applicant's counsel to *Pioneer Electronics Australia Pty Ltd v Lee* 92001) 108 FCR 216; *Johnson Matthey (Aust) Pty Ltd v Dascorp Pty Ltd & Ors* (2003-2004) 9 VR 171; *Korfiatis v Tremaine Developments Pty Ltd and Ors* [2008] VCAT 403; *Kierce v Morris Architects*

- 51 The applicant submits that these decisions can be relied on, by analogy, in making an application to join a director on the ground that he is personally liable for conduct in contravention of the FTA and the ACL because the conduct proscribed by these statutes is tortious in character. On the other hand, Mr Mazza submits that it is not open to the applicant, on such an application, to rely on the common law relating to joinder of directors where there are allegedly individual and corporate *tortfeasors*.
- 52 I agree with the submissions on behalf of Mr Mazza. Liability in respect of misleading and deceptive conduct, and unconscionable conduct, arises only under the relevant pieces of legislation. The only question of fact where, as in this case, the contract was with a company, is whether there are any particulars provided by the applicant sufficient to make an open and arguable case that the company's sole director is personally liable, whether solely or together with the company, for the contravening conduct alleged.
- 53 It becomes clear, from a review of the allegations in the PPOC recited above, that they do not distinguish between the conduct of Mr Mazza in his capacity as a director of the first respondent, and in his personal capacity.³⁴
- 54 The applicant's written submissions contain the only available material as to why it is said Mr Mazza is personally liable for the claimed contravening conduct, unsupported by any affidavit of the applicant. The argument is as follows:

The [level of] involvement [and degree of control, in the *Johnson Matthey* sense] of Mr Mazza is absolute. He is the person who made the representations, he had full knowledge of the things necessary to get construction started, he should have known how long it would take to get the house demolished and a building permit issued and he should have known how long it would take to build the units. And he should have known what information, plans and specifications the builder had to have before entering into a Major Domestic Building Contract and the obligations with regard to including a set construction period in the contract.³⁵

55 And this:

However, it was Mr Mazza, with a close relationship of mutual trust between him and Mr Rocca, who filled out the contract, omitting crucial parts, including the construction period or completion date. It was Mr Mazza personally who had the knowledge that a building surveyor needed to be appointed and a building permit had to be obtained. Mr Mazza also knew the existing house had to be demolished. Mr Rocca's evidence was that Mr Mazza agreed to arrange the demolition, engage the building survey and apply for the building permit. Whilst Mr Mazza denies this, again this is a question to be determined at the hearing.

Pty Ltd and Ors [2010] VCAT 1740; *Young Investments Group Pty Ltd v Mann* [2012] FCAFC 107 and *JR Consulting & Drafting Pty Limited v Cummings* [2016] FCAFC 20.

³⁴ See *Perry v Binios* [2006] VCAT 1604 and *Luo & Anor v Reynson* [2009] VCAT 890 at [13].

³⁵ Applicant's submissions dated 16 December 2016 at [42].

Notably also, Mr Mazza knew, when he attended on the Roccas to have the contract executed and a deposit paid, he was intending to travel overseas shortly after. It was not the company that flew off to Italy-it was Mr Mazza personally, although it would be reasonable to assume that the funds for the trip may well have come from the deposit paid by [Mr Rocca].

The applicant **maintains that by virtue of the close relationship** between Mr Mazza and Mr Rocca, Mr Mazza ought to be found liable personally for the misleading and deceptive conduct comprising promises made by him with full knowledge that the Roccas wanted to be able to occupy the first unit for the Christmas holidays. Mr Mazza **repeated the personal assurance to Mr Rocca** that he would see that the construction was completed within certain timeframes, but on each such occasion due largely to his own personal conduct the construction is never completed by the respondent.³⁶

- 56 These submissions, were they properly incorporated as particulars in the PPOC, would in my view, not be sufficient to make Mr Mazza personally liable for the contravening conduct. In my view, they amount to nothing more than a proposition that the applicant trusted Mr Mazza, but there is nothing that supports the proposition that Mr Mazza made a series of “personal assurances” to Mr Rocca on behalf of the applicant.
- 57 I find that the applicant has failed, by the matters contained in the PPOC, to demonstrate an open and arguable case that Mr Mazza is personally liable for the claimed conduct in contravention of the various statutes. Insofar as paragraphs 45-67 and the prayer for relief seek to do so, the proposed amendments are disallowed.

CLAIM AGAINST MR MAZZA UNDER THE ACCESSORIAL LIABILITY PROVISIONS OF THE TPA AND THE ACL.

- 58 The applicant claims in the PPOC that the first respondent, by its agent Mr Mazza, engaged in conduct that was in breach of sections 52 (misleading and deceptive conduct) of the TPA and, (I take it, from 1 November 2011) section 18 of the ACL.³⁷
- 59 Given that the first respondent is alleged to have been in contravention of the relevant provisions of the TPA and the ACL, Mr Mazza is alleged to be personally liable for the offending conduct under the accessorial liability provisions of the FTA (now repealed), the TPA and the ACL.³⁸
- 60 Under these statutory provisions, a claimant (in this case, the applicant) “may recover the amount of loss or damage by action against [in this case,

³⁶ Applicant’s reply Submissions dated 17 January 2017.

³⁷ See paragraph [68(a)] of PPOC. No allegation is made that the first respondent is liable under the provisions of 51AA TPA (unconscionable conduct) or section 20 ACL (unconscionable conduct) on account of the conduct of Mr Mazza.

³⁸ See paragraph [68(b)] PPOC.

the claim against the first respondent] or “against any person involved in the contravention”³⁹ [in this case, the claim against Mr Mazza].

61 The basis upon which the PPOC claims Mr Mazza is said to be liable as a person involved in the contravention is stated to be as follows:

...(b) Mazza:

- (i) aided and abetted the first respondent’s contravention;
- (ii) has been directly or indirectly knowingly concerned in and party to the first respondent’s contravention⁴⁰

62 Section 2 of the ACL (and the other legislation upon which the applicant relies⁴¹) provides:

involved [means]: a person is involved , in a contravention of a provision of this Schedule or in conduct that constitutes 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;
- (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 (**emphasis added**).

63 It can be seen that the applicant’s allegations in paragraph 68(b) PPOC, as the claimed basis for the accessorial liability of Mr Mazza, are taken from this definition.

64 The applicant submits, correctly in my view, that the three alleged representations in paragraphs 45-47 of the PPOC are as to “future matters” within the meaning of the relevant pieces of legislation. I have now found that the applicant is unable to allege other than that they were made Mr Mazza on behalf of the first respondent.

65 In respect of representations as to future matters, the various pieces of legislation relied on by the applicant are to the effect that such representations, including the doing of any act (in this case, the alleged commitments by the first respondent to complete by certain dates), are deemed to be misleading unless, in this case, the first respondent (through its director, Mr Mazza) proves that the first respondent had reasonable grounds for the making of each of the representations.⁴²

66 Accepting for the purposes of joinder only that the representations as to future matters were made (and whether they were in fact made is plainly a matter for hearing), it remains for me to be satisfied, on the pleadings, that it is open and arguable that:

³⁹ See section 236 ACL.

⁴⁰ See paragraph 68(b) PPOC.

⁴¹ See also section 75B TPA and section 145 FTA.

⁴² See section 4 FTA section 4 ACL.

- (a) the first respondent did not have reasonable grounds for the making of one or more of the three representations in regard to the future matters (and therefore one or more of the relevant representations is taken to have been misleading); and
- (b) that the relevant test for the accessorial liability of Mr Mazza for the alleged misleading and deceptive conduct on the part of the first respondent, is satisfied.

67 In regard to whether or not the first respondent had reasonable grounds for the alleged representations concerning future matters, I observe that there is much material in the PPOC intended to support the conclusion contended for by the applicant to the effect that the first respondent did not have reasonable grounds for making the alleged representations. This material appears in the particulars to paragraphs 53 and 54 of the PPOC. Strictly, this is “reply” material, the onus first being upon the first respondent to adduce evidence of having had reasonable grounds⁴³. I consider that in regard to alleged misrepresentations as to future matters, until such time as the first respondent adduces evidence that it had reasonable grounds for the making of the alleged representations, it is open and arguable that the first respondent did not have reasonable grounds.

68 In regard to the claimed accessorial liability of Mr Mazza, it has been held that for the purposes of the definition of “involved” in the legislation to which I have referred, it must be shown that the person intentionally participated in the contravention, and knew the facts constituting the contravention.⁴⁴ *Yorke v Lucas*⁴⁵ was a case that involved misrepresentations by a corporate business agent about turnover and profit of a business which induced its sale. The agent escaped liability as an accessory, because the agent was not aware that the figures were incorrect, and he did no more than pass on the vendor’s instructions.

69 There is also debate whether the statutory provisions place any onus upon natural persons (such as Mr Mazza) who are alleged to have been knowingly concerned in contravening conduct to demonstrate the presence of reasonable grounds.⁴⁶

70 The allegations made by the applicant in the particulars to paragraphs 53 and 54 of the PPOC are to the effect that Mr Mazza was aware that there were various events that had to occur in connection with the proposed building works, such that he “knew” or “well knew” that there was no reasonable basis for making the alleged representations as to completion dates, such as to give rise to accessorial liability of Mr Mazza. The

⁴³ See section 4 ACL; section 4 FTA; section 51A TPA.

⁴⁴ See *Yorke v Lucas* (1985) 158 CLR 661 at 667-668; *Quinlivan v ACCC* (2004) ATPR 42-010. See also *Accessorial Liability for Misleading and Deceptive Conduct* by Michael Pearce QC (2006) 80 ALJ 104.

⁴⁵ Ibid.

⁴⁶ See *Accessorial Liability under the Trade Practices Act* by Conor Bannon (2009) 83 ALJ 407 at 420-422.

authorities make it clear that in order for the applicant to establish the liability of Mr Mazza as a person “involved” in the contravention by another will require a high standard of proof as to his knowledge or, as some authorities suggest, his constructive knowledge. I consider that these allegations are presently open and arguable, and that they should be allowed to stand.

- 71 Particulars of Mr Mazza’s claimed knowledge will need to be provided as particulars to what is now paragraph 68 of the PPOC.
- 72 I make the orders attached.

A T Kincaid
Member