

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST

VCAT REFERENCE NO. BP249/2014

CATCHWORDS

DOMESTIC BUILDING – application for joinder – *Victorian Civil and Administrative Tribunal Act 1998* – s60 – whether Amended Points of Claim disclose an ‘open and arguable’ case – application refused

APPLICANTS	Simon John Laughlin and Maureen Laughlin
FIRST RESPONDENT	Certainteed Windows Pty Ltd (ACN 006 383 955) (stayed in liquidation)
WHERE HELD	Melbourne
BEFORE	Deputy President C Aird
HEARING TYPE	Directions hearing
DATE OF HEARING	23 August 2016
DATE OF ORDER	14 September 2016
CITATION	Laughlin v Certainteed Windows Pty Ltd (Building and Property) [2016] VCAT 1553

ORDERS

1. The applicants’ further application for joinder of Ian Rudd and Ross Wilson as the second and third respondents to the proceeding is dismissed.
2. Costs reserved with liberty to apply. Any application for costs is to be listed for a one hour hearing before Deputy President Aird.

DEPUTY PRESIDENT C AIRD

APPEARANCES:

For applicants	Mr P Little of Counsel
For the proposed second and third respondents	Mr B Powell, solicitor

REASONS

- 1 The applicant owners entered into a contract with the first respondent ('Certainteed') in July 2009 whereby Certainteed was to advise, supply and install 37 windows and 4 sets of doors. The applicants commenced these proceedings on 18 August 2014 claiming damages of \$160,271.67 for alleged breach of contract, and for misleading and deceptive conduct, by Certainteed. Shortly prior to the hearing, which was scheduled to commence on 8 December 2015, Certainteed went into liquidation.
- 2 On 2 March 2016 the applicants filed an Application for Directions Hearing or Orders ('the first application') seeking orders for the joinder of three individuals as respondents to this proceeding: Ian Rudd and Ross Wilson who were directors of Certainteed, and William Taylor who was a sales representative with Certainteed. The first application was accompanied by a supporting affidavit by Marta Karolina Kowalczyk, the applicants' solicitor, and Amended Points of Claim dated 28 January 2016. These Amended Points of Claim were an amendment to the Points of Claim dated 19 August 2014 concerning the applicants' claims against Certainteed.
- 3 I heard and refused the first application on 28 April 2016 with liberty to the applicants to renew the application.
- 4 The applicants renewed their application for joinder on 15 June 2016, by filing Amended Points of Claim naming Ian Rudd as the second respondent, and Ross Wilson as the third respondent ('the proposed respondents'). As they have been unable to locate Mr Taylor, they do not seek to join him as a respondent at this stage. When renewing the application ('the second application'), the applicants did not file draft Points of Claim as against the [proposed] parties as contemplated by the orders made on 28 April 2016. Rather, they once again amended the Points of Claim dated 14 August 2014.
- 5 As the applicants did not amend the Amended Points of Claim dated 28 January 2016, it has been difficult to cross reference the further amendments made in support of the second application.
- 6 Mr Little of Counsel appeared on behalf of the applicants and Mr Powell, solicitor, appeared on behalf of the proposed respondents at the hearing of both applications.
- 7 Mr Little indicated at the commencement of this directions hearing that the applicants relied on the material filed in support of the first application, as well as their submissions dated 4 July 2016. Mr Powell advised that the proposed respondents relied on the material filed in response to the first application as well as the further submissions dated 3 August 2016. Surprisingly, although Mr Powell has referred to a number of authorities in his 3 August 2016 submissions, Mr Little did not seek to specifically

address those authorities, or refer me to any others to support the application.

SECTION 60

8 Section 60 of the *Victorian Civil and Administrative Tribunal Act 1998* 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.

9 In considering an application for joinder I am not required to determine the issues, rather I am simply required to have regard to the various matters set out in s60 of the VCAT Act. The broad scope of the tribunal's powers under s60 were considered in *Zervos v Perpetual Nominees Limited* [2005] VSC 380 where Cummins J said at [11]:

Whether it [the allegation] is sustained in the end is a matter for trial. The application for joinder is not an application for summary judgment and whilst I agree with Mr Herskope that the test is higher than that apposite to a mere pleading matter because it involves joinder of a party, on the other hand Mr Frenkel is entirely right that the bar is set lower than on an application for summary judgment.

THE ALLEGATIONS

10 The Amended Points of Claim dated June 2016 ('the APOC') are difficult to follow as they continue to include allegations against Certainteed, despite the proceeding being stayed against it because it is in liquidation, with various deletions and cross referencing between paragraphs. Further, the particulars to new allegations against the proposed respondents are cross referenced to particulars to allegations against Certainteed. It is unfortunate that the owners have not complied with, nor taken heed of, the orders I made on 28 April; 2016, when refusing the first application for joinder: that:

2...Any application must be accompanied by draft Points of Claim as against the other parties must include particulars of the "representation" allegations, and any further submissions.

...

4. For the avoidance of doubt the application for joinder was refused today primarily because of the lack of particulars. Various issues in relation to the Australian Consumer Law and Fair Trading Act

were raised on behalf of the proposed respondents and Counsel for the applicants has indicated he will respond to those in his further submissions.

- 11 Surprisingly, there is no mention in the APOC that Certainteed is in liquidation. The allegations against it for breach of contract remain, primarily, it seems, so that various allegations against the proposed respondents can be cross referenced to ‘particulars’ to those allegations. I have not included the underlining identifying the amendments made.
- 12 Mr Powell identifies three causes of action sought to be brought by the owners against the proposed second and third respondents:
 - (i) allegations they engaged in misleading and deceptive conduct;
 - (ii) allegations that the dispute with them is a Consumer and Trader Dispute for the purposes of s107 of the FTA or ss182 of the ACL&FTA (these allegations were abandoned by the applicants at the directions hearing)
 - (iii) allegations that the proposed second and third respondents were persons involved in a contravention of s18 of the ACL by Certainteed, in that they aided, abetted, counselled or procured the contravention by Certainteed or were directly or indirectly, knowingly concerned in, or party to the contravention by Certainteed.

The misleading and deceptive conduct claim

- 13 Mr Powell submitted that the relevant allegations are not supported by the particulars relied upon. It is helpful to set out the new pleadings containing the allegations of misleading and deceptive conduct as against the proposed respondents:
 - 11A Further, the second respondent made various representations including that the Certainteed Windows will:
 - (a) Be properly sealed,
 - (b) Not allow cold draughts in or allow out heat loss through the frames. There will be no draughts,
 - (c) Insulate the house and provide uniform temperatures throughout,
 - (d) Fit tightly and there will be a complete barrier against unwanted sound and air,
 - (e) Meet superior thermal and acoustic standards required by the applicants,
 - (f) Not allow noise from South Road, Brighton in the State of Victoria to penetrate,
 - (g) Conform to the required building plans and notations

- (h) Be of the same design as the one shown to the Applicant in the Certainteed Showroom subject to one modification to one upper window as agreed.

(“the Second Respondent’s Representations”)

Particulars

The Second Respondent’s Representations are from two face to face meetings between the first applicant and the second respondent together with the third respondent at the first respondent’s showroom in the first half of 2009, the subject of content of conversations was that:

- (a) The applicants will use insulated concrete foam to construct the house on the Property and how the Second Respondent was familiar with insulated factors of using insulated concrete foam for thermally and acoustic reasons.
- (b) The applicant’s concerns about the level of noise on South Road,
- (c) The exposure of the cold wind from the bay in winter given the closeness to the bay,
- (d) The Certainteed Windows are properly sealed,
- (e) The Certainteed Windows are weather sealed,
- (f) The Certainteed Windows will keep put unwanted noise and air filtration.

11B Further, the third respondent made various representations including that the Certainteed Windows will:

- (a) Be thermally and acoustically sealed
- (b) Not allow cold draughts in or allow out heat loss through the frames. There will be no draughts.
- (c) Insulate the house and provide uniform temperatures throughout.
- (d) Fit tightly and there will be a complete barrier against unwanted sound and air,
- (e) Not allow noise from South Road, Brighton in the State of Victoria to penetrate,
- (f) Conform to the required building plans and notations,
- (g) Be of the same design as to the one shown to the Applicant in the Certainteed showroom subject to one modification,
- (h) Comply with Australian Standards and building codes

(“the Third Respondent’s Representations”)

Particulars

The Third Respondent's Representations are from two face to face meetings between the first applicant and the third respondent at the first respondent's showroom between late 2008 or early 2009 the subject of content of conversations was that:

- (a) The Certainteed Windows will be thermally and acoustically sealed;
- (b) The third respondent was very familiar with the noise of the heavy traffic from South Road and the cold in winter off the bay;
- (c) How the Certainteed Windows will be a sealed barrier against air infiltration and noise,
- (d) How the Certainteed Windows were weather tight and would stop the noise from South Road,
- (e) How the Certainteed Windows would be an "envelope" of insulation;
- (f) How the CertainTeed Windows would be sealed;
- (g) The details of the manufacturing of the Certainteed Windows and how they will meet all the Australian standards;
- (h) The construction of the house in insulated concrete foam ("ICF") and how the third representation (sic) was familiar with ICF;
- (i) The applicant's window plan together with the characteristic and finishes of the windows required;
- (j) The heating and cooling system including the possibility of log fire hearing, evaporating and refrigerated cooling systems;
- (k) The third respondent explained the characteristics of the Certainteed Windows via illustrating a similar window.

- 14 Unfortunately, the particulars to these two paragraphs simply set out matters that were apparently discussed during two alleged meetings in early 2009. It is not clear whether there were two, three or four meetings – in other words, whether the conversations between Mr Laughlin and each of the proposed second and third respondents took place at the same or different meetings. In the particulars to paragraph 11A reference is made to meetings with both of the proposed respondents. However, in the particulars to paragraph 11B the only reference is to meetings with the proposed third respondent. It is difficult to discern what the actual representations were. Further, the particulars appear to simply repeat the allegations without any specificity.

15 At paragraph 12 the owners allege:

The respondents made the Representations in order to induce the applicants to enter into the Contract and they were made:

- (a) In the course of trade or commerce; and
- (b) Insofar as the Representations were made with respect to any future matter (including the doing of, or refusing to do, any act) in circumstances where it did not have reasonable grounds for making the Representations.

Particulars

The applicant refers to, and relies on section 4 of the FTA, or in the alternative, section 4 of Australian Consumer Law (Vic) pursuant to section 8 of ACL&FT Act.

16 This allegation is the same as the allegation initially made against Certainteed, except that the allegation is now made against the proposed respondents. I accept that any representations made by the proposed respondents are in respect of the future matters. Mr Powell raised concerns about the adequacy of the Particulars with which I agree. He referred me to my comments in *Ioannides & Anor v Everest View Pty Ltd & Ors*¹ where I said:

41. ...There are no Particulars. I was once again referred to Orminston J's comments in *Futuretronics Interntational Pty Ltd v Gadzhis*²:

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:

- 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)

¹ [2010] VCAT 2008

² [2992] 2 VR 217 at 239

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

- 17 The same is true here. There are no particulars to support the allegation that any representations made by the proposed respondents were misleading at the time they were made. Further, references to legislation are not particulars of an allegation and are not sufficient to enable the proposed respondents to understand the case they have to answer.
- 18 The APOC continue:
13. Acting on the faith of the Representations and in reliance thereon and in consideration there and being induced thereby the applicants entered into the Contract.
14. The Representations were untrue, false and/or misleading and as the Certainteed Windows were defective, the Representations were untrue, false and/or misleading or deceptive.

Particulars

The applicants refer to and repeat the particulars to subparagraph 7(a) and 7(b) and paragraphs 8 and 9 herein.

- 19 Paragraph 7 sets out the owners claims against Certainteed for breach of contract:

7. The first respondent breached the terms of the Contract as:
- (a) The CertainTeed Windows do not comply with section 2.3.1.5 of the AS 2047.

Particulars

The applicants refer to VIPAC Residential Window Air Leaking Testing Report....

- (b) The CertainTeed Windows are defective as they were not properly sealed. They are not draft free and they are not dust tight. They allow noise, cold air and hot air from the outside to penetrate into the house.

Particulars

The applicants refer to and repeat the particulars to subparagraph 7(a).

The frames compromised the energy rating, the thermal integrity and acoustic integrity of the house. In particular, the frames contain holes, apertures, channels and poor quality seals which allow water, air and/or noise to penetrative into the applicants' house; and

Each frame has four weep holes that allow air to travel freely between the outside and inside of the applicants' house. There are gaps between bottom window and top window that allows air to pass freely. The gaps between the window and the frames are too big for the seal to be effective.

(Collectively '**the Defects**')

- 20 In my view allegations of breach of contract against Certainteed cannot be relied upon to support allegations of misleading and deceptive conduct against the proposed respondents, particularly where the proceeding is stayed against it. Further, particulars of defective works are not, in my view, sufficient or adequate particulars to support allegations that the alleged representations were misleading and deceptive at the time they were made.
- 21 In paragraphs 8 and 9 of the APOC the applicants set out details of communications with Certainteed in January 2011 and July 2014. Clearly, these paragraphs cannot be relied upon to support allegations of misleading and deceptive conduct in respect of representations made by the proposed respondent, which are alleged to have induced the applicants to have

entered into the contract with Certainteed. The communications referred to in paragraphs 8 and 9 occurred after the contract was entered into, and the windows installed. It is irrelevant to a claim for misleading and deceptive conduct that defects in the works are subsequently acknowledged. It is not suggested that the proposed respondents acknowledged that it was always known to them that the first respondent would not be able to fulfil the terms of the contract.

The ‘Aided and Abetted’ claim

22 The applicants then make the following allegations against the proposed respondents:

- 20 Further or in the alternative, the respondents were persons involved (as defined in section 2 of the ACL) in a contravention of section 18 of the ACL, by the respondents as they:
- (a) Aided, abetted, counselled or procured the contravention by the first respondent; and/or
 - (b) Was directly or indirectly, knowingly concerned in, or party to the contravention by the first respondent, as defined in section 2 of the ACL.

Particulars

The respondents made the Representations. The applicants dealt with no other person prior to entering into the Contract. The respondents were responsible for co-ordinating the Works and were on site when the Works were performed and issued instructions in relation to the Works.

23 Before considering these allegations, I note in passing that the applicants state in the Particulars that they dealt with no other person, other than the proposed respondents, prior to entering into the Contract. This is despite stating in the Particulars to paragraph 11 of the Points of Claim dated 19 August 2104, in which they allege Certainteed made various representations about the windows and doors that:

On or about September 2008, Mr Bill Taylor of the respondent made the Representations to Mr Simon Laughlin at the respondent’s [Certainteed’s] office.

Further, paragraph 20 of the Amended Points of Claim dated 29 January 2016, filed in support of the first application for joinder of three respondents – the proposed respondents and Mr Bill Taylor, who at that stage they were seeking to join as the fourth respondent – is in identical terms to the paragraph 20 of the APOC filed in support of this application to join two respondents only.

24 I agree with Mr Powell’s observations that this paragraph is lacking in that it fails to identify the alleged ‘contravention’, or how the alleged contravention relates to anything said by either of the proposed respondents.

- 25 In order for this pleading to give rise to an arguable case, the applicants need to first identify and set out the alleged contravention of s18 of the ACL by Certainteed. It is not enough to simply plead that the proposed respondents aided and abetted Certainteed in a contravention of the ACL. Further, the Particulars are vague and lacking in any specificity. It is not enough to state that the proposed respondents made the representation.
- 26 As I said in *Perry v Binios trading as Building Inspirations of Australia*³ at [11]
- ...It is not enough to make bald assertions unsupported by Particulars or supported by Particulars that are so inadequate they do not progress matters any further.
- 27 Although the Tribunal is not a court of pleadings, it is important a party knows the case it has to answer. The comments by Ashley J in *Barbon v West Homes Australia Pty Ltd*⁴ are apt. He made it quite clear that whilst pleading summonses should be discouraged a party has a right to know the case it has to answer:

I would not want it thought for a moment, because the Tribunal is not a court of pleading, and because the Act encourages a degree of informality in proceedings, that Rafferty's Rules should prevail. They should not. Any party, perhaps particularly a party facing a long, drawn-out hearing in the Tribunal - and I note in this case an estimate that the Tribunal hearing would extend for some nine weeks - is well entitled to know what case it must meet before the hearing commences. That is not to say that the case must be outlined with exquisite particularity. It is not to say that a defendant is entitled to evidence rather than particularisation. None the less a defendant is entitled to expect that a claim will be laid out with a degree of specificity such that, if it is obvious that the claimant seeks to pursue a claim which is untenable, that can be the subject of an application before trial; such that, moreover, if adequate particularisation is not provided, the matter will be clear to the Tribunal on application by an aggrieved party.[6]

OTHER MATTERS

- 28 Issues raised on behalf of the proposed respondents as to the relevant legislation (the FTA or the ACT/ACL&FTA) and whether any claims against the proposed respondents are statute barred are properly defences to any claim, and it is not necessary to consider them here.

³ [2006] VCAT 1922

⁴ [2001] VSC 405

CONCLUSION

- 29 Accordingly, as I am not satisfied that the APOC disclose an ‘open and arguable’ case against the proposed respondents, this application will be dismissed, with costs reserved.

DEPUTY PRESIDENT C AIRD