

# VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

## CIVIL DIVISION

### BUILDING AND PROPERTYLIST

VCAT REFERENCE NO. BP1679/2018

### CATCHWORDS

Domestic building, joinder, section 60 of the *Victorian Civil and Administrative Tribunal Act 1998*, open and arguable, sections 2, 8 and 9 of the *Domestic Building Contracts Act 1995*, sections 2, 18 and 236 of the *Australian Consumer Law*, contested substitution of one party for another in the absence of an application under s75 of the VCAT Act.

<b>APPLICANT</b>	Frances Therese McQueen
<b>FIRST RESPONDENT</b>	Destiny Rise Pty Ltd (ACN 097 664 376)
<b>SECOND RESPONDENT</b>	JTX Construction and Development Group Pty Ltd (ACN: 142 621 056)
<b>THIRD RESPONDENT</b>	Mr Anthony Elcheikh
<b>WHERE HELD</b>	Melbourne
<b>BEFORE</b>	Senior Member M. Lothian
<b>HEARING TYPE</b>	Hearing
<b>DATE OF HEARING</b>	28 August 2019
<b>DATE OF ORDER</b>	17 October 2019
<b>CITATION</b>	McQueen v Destiny Rise Pty Ltd (Building and Property) [2019] VCAT 1613

### ORDERS

- 1 Under s60 of the *Victorian Civil and Administrative Tribunal Act 1998* and upon application by the applicant I join as a party to this proceeding Mr Anthony Elcheikh c/- Oldham Construction Lawyers, Level 1, 552 Lonsdale Street, Melbourne, Victoria 3000 ('the third respondent).
- 2 By 11 November 2019 the applicant must file and serve Amended Points of Claim in general accord with the Proposed Amended Points of Claim and having regard to the reasons attached to these orders.
- 3 **The compulsory conference scheduled for 17 December 2019 before Senior Member Farrelly is confirmed.**
- 4 Liberty to apply.

5 Costs reserved.

**SENIOR MEMBER M. LOTHIAN**

**APPEARANCES:**

For Applicant

Mr L. Guymer, solicitor

For Respondents

Mr N.J. Philpott of counsel

## REASONS

- 1 These reasons and orders concern the applicant's application to join two additional parties to the proceeding commenced by her in November 2018. By application of 30 July 2019 she sought to join JTX Construction and Development Group Pty Ltd ("JTX") and the director of both the respondent, Destiny Rise Pty Ltd ("Destiny") and JTX, Mr A Elcheikh.
- 2 I heard the application on 28 August 2019. On that day the applicant was represented by Mr L Guymmer, solicitor, and Destiny was represented by Mr N.J. Philpott of Counsel, who also appeared on behalf of the proposed joined parties.
- 3 Destiny and the proposed joined parties did not object to joining JTX, but submitted that it should be substituted for Destiny. I ordered that it be joined as second respondent pending my decision about whether Destiny should be substituted out of the proceeding and whether Mr Elcheikh should be joined.

### S 60 OF THE VCAT ACT

- 4 The Tribunal's power to join a party to a proceeding is governed by s 60 of the *Victorian Civil and Administrative Tribunal Act 1998* ("VCAT Act"). Section 60(1) relevantly provides:

#### **60 Joinder of parties**

- (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.

### **Broad discretion**

- 5 It has often been said that the Tribunal has a broad discretion to join parties to proceedings. However, in the words of Senior Member Walker in *Lawley v Terrace Designs Pty Ltd* [2004] VCAT 1825 at [26] with respect to joining respondents:

... building disputes are notoriously lengthy and costly to dispose of and the more parties to such a dispute, the greater that expense and the greater the time taken to determine it.

- 6 As Cummings J said in *Zervos v Peretual Nominees Ltd* (2005) 23 VAR 145, an applicant for joinder must show that:

...the claim [against the proposed joined party] is open and arguable. Whether it is sustained in the end is a matter for trial. [Underlining added].

## HISTORY

- 7 The applicant is the Owner of a townhouse in Eaglemont which she bought off the plan from Castlemont Investments Pty Ltd (“Developer”), which is now deregistered. She alleges a number of defects in the home and as subsequent owner seeks to claim against the builder under sections 8 and 9 of the *Domestic Building Contracts Act 1995* (“DBC Act”).
- 8 As pleaded in the Proposed Amended Points of Claim (“PAPoC”) filed with the application for joinder, the Owner also seeks to recover against Destiny and/or JTX for misleading representation. She seeks to join Mr Elcheikh as being “involved” in making the representation.
- 9 As provided in s98(1)(b) of the VCAT Act, the Tribunal may inform itself as it sees fit. An ASIC search of the Developer reveals that on the date the Owner signed the contract to purchase the home – 29 February 2016 – the sole director of the Developer was Mr Tony Elcheikh and the principal place of business for the developer was the same address as that given for Destiny. This leads to the high likelihood that the director of the Developer was the same person as the Mr Elcheikh whom the applicant seeks to join.
- 10 Issues raised relevant to the identity of the respondent or respondents include the identity of the builder, and the availability of domestic building warranty insurance to the Owner, should the builder fail to satisfy judgement.
- 11 I accept as a matter of common knowledge that the availability of warranty insurance for a particular home is of value to the owner.

## IDENTITY OF THE BUILDER

- 12 In the Points of Claim which accompanied the application dated 30 October 2018, the Owner pleaded at paragraph 4 that Destiny built three townhouses for the Developer, one of which is the Owner’s home. The particulars to that paragraph state:

Particulars of the building contract will be provided after discovery by the Respondent.
- 13 Mr Guymer made an affidavit affirmed 30 July 2019 in support of joining JTX and Mr Elcheikh.
- 14 At paragraph 2 of his affidavit, Mr Guymer stated that at the time of sale, as part of the sale documents, the Owner was provided with a certificate of warranty insurance naming Destiny as the builder. In addition the documents provided in the section 32 statement (pursuant to section 32 of the *Property Law Act 1958*) also included the occupancy permit of 1 February 2016 which named JTX as the builder.

- 15 Mr Guymer stated at paragraph 3 of his affidavit that the Owner had made an application to DBDRV. He said that at first the application was made against JTX, but as a result of the conciliation it was agreed with Mr Luke Chamberlain of JTX that the correct entity as per the warranty insurance certificate was Destiny. The DBDRV certificate concerning JTX is dated 12 July 2018 and the certificate concerning Destiny is dated 31 October 2018.
- 16 At paragraph 4 of his affidavit, Mr Guymer stated that he attended two directions hearings at the Tribunal, on 15 January 2019 and 2 April 2019. At both directions hearings Destiny was represented by Mr Chamberlain, and Mr Elcheikh also attended the second. He stated that at neither directions hearing was the possibility raised that Destiny was not the builder of the home.
- 17 Mr Guymer said at paragraph 5 of his affidavit that the first time it was raised that Destiny was not the builder was in the Points of Defence of 31 May 2019, prepared after Destiny appointed Oldham Construction Lawyers (“Oldhams”) as his solicitors.
- 18 Mr Guymer said that on 5 June 2019 he wrote to Oldhams requesting a copy of the building contract and also requesting that endeavours be made by Destiny to have VMIA (the warranty insurer) alter the identity of the builder so that the Owner would have valid warranty insurance. He continued at paragraph 7:
- In the alternative, we indicated our client would reserve the right to amend her claim to seek damages for loss of warranty insurance and to join the parties responsible.
- 19 At paragraph 8 Mr Guymer said he received a letter from Oldhams attaching a copy of a building contract on 11 June 2019 which names JTX as the builder and advising that enquiries were being made regarding the warranty insurance certificate.
- 20 Mr Guymer commenced paragraph 12 of his affidavit saying:
- Accordingly, it appears that JTX ... is the correct builder providing the statutory warranties to our client...
- 21 Paragraph 4 and the following paragraphs of the Proposed Amended Points of Claim (‘PAPoC’) states that JTX was the builder and therefore gave the warranties in accordance with section 8 of the DBC Act, extended by s9 to be in favour of the Owner.
- 22 I remark that one of the warranties to which the Owner is entitled under section 8 of the DBC Act is 8(c) which provides:
- (c) the builder warrants that the work will be carried out in accordance with, and will comply with, all laws and legal requirements including, without limiting the generality of this warranty the Building Act 1993 and the regulations made under that Act;

As pleaded by the Owner in paragraph 11 of the PAPoC, an obligation of builders under s135 of the *Building Act 1993* is to obtain insurance for works which they are obliged to insure.

- 23 I am satisfied that it is open and arguable that JTX was the builder, or at least a builder, of the home. It is properly a respondent to the Owner's claim.
- 24 It is noted that the definition of "builder" in section 3 of the DBC Act includes "manages or arranges the carrying out of domestic building work". Under section 31(1)(l) of the DBC Act, a builder must not enter a domestic building contract unless the contract "sets out details of the required insurance...". It is therefore conceivable that a builder who arranges domestic building insurance for a particular project is a "builder" for the purpose of that project.
- 25 I remark that both the application for insurance to QBE through VMIA of 11 November 2014 and the certificate of insurance dated 1 December 2014 have prominent notes regarding the identity of the builder and the insured entity. The statement on the certificate of insurance is:
- If the builder's name and/or its ABN/ACN does not match with the information on the domestic building contract, please contact QBE IMMEDIATELY. If these details are incorrect, the domestic building work will not be covered.
- 26 This warning seems to be addressed to the owner at the time the insurance was issued. That owner was the Developer, and Mr Elcheikh, as the sole director of the developer, should have ensured that the Developer checked for consistency between the name of the builder in the building contract and the builder taking out the insurance.
- 27 Somewhat surprisingly, the invoice for warranty insurance from the broker, Adroit, for QBE warranty cover dated 2 December 2014 named the insured builder as JTX, whereas the cover summary of the same day named Destiny. Both documents are exhibited to Mr Guymer's affidavit at LJG-7.

#### **MR ELCHEIKH AND DESTINY**

- 28 The PAPoC does not plead that either Mr Elcheikh or Destiny is a "builder" of the home. The pleading against both, and also a pleading against JTX, is under the Competition and Consumer Act 2010 – Schedule 2 – Australian Consumer Law ("ACL"). The PAPoC refers to s18 and s236.
- 29 Section 18(1) provides:

##### **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.

- 30 Section 236(1) of the ACL provides:

##### **236 Actions for damages**

- (1) If:
- (a) a person (the *claimant*) suffers loss or damage because of the conduct of another person; and
  - (b) the conduct contravened a provision of Chapter 2 or 3;

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

31 The definition of “involved” in s2 of the ACL is:

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

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

32 To succeed under s18 the Owner must prove misleading or deceptive conduct, or conduct likely to mislead or deceive, upon which she relied. To recover under s236 she must prove that because of the conduct upon which she relied, she suffered loss.

33 For the joinder application, all that is necessary is to demonstrate that the PAPoC pleads these elements and that they are supported by affidavit.

### **Misleading or deceptive conduct**

34 At paragraph 9 of his affidavit Mr Guymer said he received a letter from Oldhams dated 19 June 2019 advising that the VMIA had told Destiny that the warranty insurance certificate could not be changed. At paragraph 10 he said that he wrote to Oldhams on 19 June 2019 saying that he had instructions to seek to join JTX and also Mr Elcheikh “on the basis that he was involved in the application which lead to an incorrect warranty insurance policy certificate.”

35 Mr Guymer said Oldhams sent him a copy of the application for warranty insurance which was signed by Mr Elcheikh on behalf of Destiny and dated 11 November 2014.

### What conduct?

36 Paragraph 10 of the PAPoC states:

In order to induce the [Owner] to enter into the contract of sale, [Destiny] and/or [JTX] by its director, [Mr Elcheikh] represented to the [Owner] that [Destiny] was the builder of her home and was providing the statutory home owner's warranty insurance issued by the VMIA in compliance with Section 135 of the Building Act 1993 for the benefit of the [Owner].[Underlining added]

#### PARTICULARS

The representation was partly written and partly implied. In so far as it was written, it is contained within the warranty insurance certificate number 440031541 BW – 32 dated 1 December 2014 which incorrectly named [Destiny] as the builder. In so far as it was implied, it was implied by the conduct of [Destiny] and/or [JTX] in providing to the vendor for inclusion in the vendor's statement the warranty insurance certificate for consideration of the [Owner].

The representation:

- (a) was made in trade and commerce within the meaning of Section 18 of the Australian Consumer [sic];
- (b) was made with respect to a future matter.

37 Paragraph 11 of the PAPoC pleads that JTX maintains that it was the builder under the building contract with the Developer but in breach of s135 of the *Building Act 1993* did not obtain insurance in its own name. Rather, insurance was issued in the name of Destiny.

38 Paragraph 12 states that JTX and/or Destiny engaged in misleading or deceptive conduct, or conduct likely to mislead the Owner, contrary to Section 18 of the Australian Consumer Law.

39 Mr Guymer said at paragraph 12 of his affidavit:

Accordingly ... our client has been misled into believing that [Destiny]... was the builder, and that Mr Elcheikh was involved in obtaining of the incorrect warranty insurance certificate by making the application for the same in the name of Destiny.... As a result, if the certificate cannot be altered, our client does not have a warranty insurance certificate which will respond to the building contract and the statutory warranties. Accordingly we are instructed to amend our client's claim to include damages for loss of warranty insurance and to make application to join JTX... and Mr Elcheikh as respondents to the proceeding.

#### **Case against Mr Elcheikh**

40 I accept that providing a domestic building warranty insurance certificate for a building that is not being built (or about to be built) by the named builder could mislead an owner or potential owner. The question remains whether the Owner was misled.

41 Mr Phillpott objected that Paragraph 10(b) is defective because the certificate of insurance was not a representation as to a future matter.



Although this might be upheld in any future decision, I am satisfied that a representation about the availability of insurance, should the preconditions for claim be fulfilled in future, is arguably a representation as to a future matter.

- 42 I agree with Mr Phillpott that the PAPoC does not clearly articulate how each of Destiny, JTX and Mr Elcheikh was involved in the allegedly misleading and deceptive conduct.
- 43 Nevertheless, the factual matrix binding each of Destiny, JTX and Mr Elcheikh personally to a potential loss by the Owner for lack of warranty insurance is such that, regardless of any potential imperfections in the PAPoC, I am satisfied that there is an open and arguable case<sup>1</sup> against each of them under the ACL.
- 44 I agree with the comments of Deputy President Aird in *Owners Corporation 1 PS538430Y v H Building Pty Ltd (ACN 091 236 912) (under external administration)* (Building and Property) [2019] VCAT 680 at paragraph 20 where she said that the Tribunal is not a court of pleadings and the tendency by many proposed parties in seeking to oppose joinder applications by focussing on nuances in pleadings is discouraged.
- 45 Paragraph 9 of the PAPoC pleads:
- [Mr Elcheikh] is and was at all times, the sole Director and Secretary and Sole Shareholder of each of [Destiny] and [JTX], carrying on business from premises at... and capable of being sued in his own name.
- 46 This is not in contention.
- 47 Paragraph 14 states that Mr Elcheikh was involved in making the representation within the meaning of Section 236 of the Australian Consumer Law. The particulars are:
- [Mr Elcheikh] signed the Application which was forwarded to VMIA for the warranty insurance certificate representing that [Destiny] was the builder of the home, whereas in fact [JTX] was the builder. [Mr Elcheikh] therefore personally arranged the warranty insurance for the construction of the [Owner's] home, naming [Destiny] instead of [JTX] as the builder.
- 48 If Destiny's pleading is accurate, and it did not build the Owner's home, someone got the warranty insurance wrong. And the documents received by the Owner's solicitors from Destiny's, indicate that the error was Mr Elcheikh's. The question is whether the error was by Mr Elcheikh personally, or whether his was the mind that made the error on behalf of one of his companies, possibly including the Developer.
- 49 Where there is doubt about whether the step was taken by the builder who contracted to build, or the builder who arranged the insurance, it is not

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<sup>1</sup> This is in addition to the rights the Owner is entitled to against the party found to be the builder.

inconceivable that the common director of those two entities could be acting independently of both. As he also appears to have been the director of the Developer, there is added support for the view that Mr Elcheikh may have been on a frolic of his own, or may have been acting as the director of the vendor Developer when preparing the s32 statement which included the certificate of insurance.

### **Reliance by the Oner**

- 50 Paragraph 13 of the PAPoC pleads that the Owner relied on the truth of the representation (that Destiny was the builder and that it was providing warranty insurance) in entering into the contract of sale.
- 51 There is no positive statement from the Owner or Mr Guymer on her behalf that she turned her mind to the identity of the builder, that she was misled, or the action she would have taken had she become aware of the allegedly misleading conduct. Nevertheless, a purchaser's interest in having available warranty insurance is so basic that I accept that it is arguable that a purchaser in her position could be misled.
- 52 I am satisfied that there is sufficient information to support the conclusion that it is open and arguable that the Owner was misled and relied on conduct by Destiny and/or JTX.

### **Loss to the Owner**

- 53 Paragraph 15 of the PAPoC is:

By reason of the fact that [JTX] did not, at any material time, obtain insurance in its name in compliance with Section 135 of the Building Act 1993, the [Owner] has suffered loss and damage and the [Owner] claims damages as against [Destiny] and or [JTX] and/or [Mr Elcheikh) pursuant to the Australian Consumer Law.

#### **PARTICULARS**

The [Owner] has lost the benefit of being able to call upon the insurance in the value of \$300,000 in the event that [Destiny] and/or [JTX] is unable to meet any Order made in this Proceeding.

- 54 I am satisfied that this paragraph pleads an open and arguable head of loss.

### **PROPOSED SUBSTITUTION OF JTX FOR DESTINY?**

- 55 I have already ordered that JTX should be added as the second respondent. I refuse the application that JTX should be substituted for Destiny. I have found that there is an open and arguable case that Destiny misled the Owner.
- 56 Further, Destiny is a party to this proceeding and the effect of substituting JTX for it would be equivalent to an order under s75 of the VCAT Act, dismissing or striking out the proceeding against it. Other than a submission made during the hearing, no application has been made by Destiny under s75.

- 57 Given that either Destiny or Mr Elcheikh apparently erroneously took out the builder's warranty insurance that should have been taken out by JTX, I am not satisfied that it is reasonable to effectively strike out the proceeding against it at present. Having regard to the application for a job specific policy to VMIA completed by Mr Elcheikh, apparently on behalf of Destiny and dated 11 November 2014 stating that it was the "building entity" for which cover was sought, its role in the construction of the Owner's home remains unclear.
- 58 As discussed in paragraph 24 above, the true identity of the builder has not necessarily been finally determined, and could include Destiny.

**NOTE**

- 59 Two days after I heard this application I conducted a compulsory conference in an unrelated proceeding where Mr Phillipott acted for one of the parties. At the commencement of the compulsory conference I recorded that I was part-heard in this proceeding and that I would have private sessions with Mr Phillipott and his client. I said that no mention of this proceeding would be made in conversations with Mr Phillipott during the day and none was.

**SENIOR MEMBER M. LOTHIAN**