

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST

VCAT REFERENCE NO. BP1382/2017

CATCHWORDS

Domestic building, joinder application, proposed joined party the director of the respondent-builder and also the director of another company. Respondent not entitled to undertake domestic building work as no director DBU-registered. Other company was entitled to undertake domestic building work, as two directors DBU-registered. Proposed joined party alleged to have advised first applicant and director of second applicant that work could be completed in a short time with the respondent, and to have failed to notify the applicants that he was not DBU-registered, and that the respondent was not entitled to undertake domestic building work. Sufficiency of pleadings. Failure to particularise. Sufficiency of material in supporting affidavit.

FIRST APPLICANT	Xian Tong
SECOND APPLICANT	Kano Investments Pty Ltd (ABN 60 560 782 772) t/as Kano Investment Trust
RESPONDENT	Tongji Sutra Pty Ltd (ACN: 607 020 593)
WHERE HELD	Melbourne
BEFORE	Senior Member M. Lothian
HEARING TYPE	Directions Hearing
DATE OF HEARING	28 June 2018
DATE OF ORDER	14 August 2018
CITATION	Tong v Kano Investments Pty Ltd (Building and Property) [2018] VCAT 1269

ORDERS

- 1 The applicants' application to join to join Mr Ronghua Liu to this proceeding is refused.
- 2 Liberty to the applicants to make further application for joinder until 7 September 2018, to be accompanied by affidavit material in support and draft Further Proposed Amended Points of Claim.
- 3 **The proceeding is listed for a further directions hearing before Senior Member Lothian on 17 September 2018 at 10:00am at 55 King Street Melbourne with an estimated hearing time of two hours to hear any further application for joinder and to make directions for the further conduct of the proceeding.**

- 4 Costs reserved with liberty to apply. Any application for costs of the joinder application and the directions hearing on 28 June 2018 will be heard at the directions hearing on 17 September 2018.

SENIOR MEMBER M. LOTHIAN

APPEARANCES:

For Applicants

Ms J Zhou of counsel

For Respondent

Mr N.J. Phillpott of counsel

REASONS

- 1 On 28 June 2018 I heard the applicants' application to join Mr Ronghua Liu, also known as Jason Liu, as a respondent to this proceeding.
- 2 I reserved these reasons because on 23 April 2018 the proceeding came before me concerning the respondent's alleged failure to comply with its obligation to file and serve Points of Defence. On that occasion, Mr Phillipott of counsel, appearing for the respondent, drew to my attention to the fact that the Amended Points of Claim dated 26 February 2018 purported to add Mr Liu as second respondent without first seeking leave to have him joined under s 60 of the *Victorian Civil and Administrative Tribunal Act 1998* ("VCAT Act"). The requirement to do so is contained in practice note PNBP1.
- 3 In accordance with my orders of 23 April 2018, the applicants filed an affidavit of Mr Chia Jeng Hon dated 10 May 2018 and also filed proposed Amended Points of Claim ("PAPoC") dated 10 May 2018. Neither the respondent nor Mr Liu, as the proposed joined party, filed any material in response. However, I was assisted by the submissions put by Mr Phillipott who appeared on 28 June 2018 on behalf of both the respondent and Mr Liu. Ms J. Zhou of counsel appeared for the applicants and I note she was not the author of the PAPoC. I was also assisted by her submissions.

S 60 OF THE VCAT ACT

- 4 The Tribunal's power to join a party to a proceeding is governed by s 60. 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].

BACKGROUND

7 The first step in this proceeding was that the applicants sought an injunction to prevent the respondent from entering two sites in Ashburton, or doing any work there. The sites are in Pitt Street and Munro Avenue.

8 I granted the injunction sought on 24 November 2017, made orders for pleadings, a compulsory conference, and also gave the parties liberty to apply for further directions. At that stage the applicants were legally represented but the respondent was represented by its director, Mr Liu.

9 In the Points of Claim of 12 October 2017, the applicants stated that the first applicant, Ms Tong, owns the Pitt Street property and is a director of the second respondent, which owns the Munro Street property. The Points of Claim contained a number of other pleadings, but as they are not altogether consistent with the PAPoC, I have regard to the latter.

10 In summary, the PAPoC pleads, concerning the respondent:

- [At paragraph 21] On or about 14 September 2016 the applicants and the respondent entered two contracts.
- [At paragraph 24] The total deposit for both contracts was \$71,000¹.
- [At paragraphs 25 and 26] Both projects would be complete within six months of signing the contracts and paying the deposit.
- [At paragraph 28] The applicant was paid \$41,411.53 by 16 September 2016 of which \$30,461.51 was in the form of wine, and paid a further \$75,088.47 by 8 March 2017.
- [At paragraph 29] The respondent was obliged to proceed with one of the contracts from 16 September 2016 and both from 8 March 2017.
- [At paragraph 31] On or about 19 March 2017 the respondent demolished the dwellings at both properties.
- [At paragraph 32] The respondent never obtained building permits.
- [At paragraph 33] The respondent did not complete the dwellings within six months of signing and receiving the deposits.

¹ The particulars to paragraph 24 state:
The term is contained in clause 4 of the respective contract, and equalled \$35,000 for each property (total \$71,000). It is noted that either the deposit amounts are incorrect or the total is incorrect.

MATERIAL CONCERNING MR LIU

Pleadings concerning Mr Liu

11 In summary, the PAPoC pleads, concerning Mr Liu:

- [At paragraphs 4 and 5] Mr Liu was a director of RT Smart Homes Pty Ltd and also the sole shareholder and director of the respondent, Tongji Sutra Pty Ltd. It is also stated that he is a citizen of the People's Republic of China living in Australia on a temporary visa.
- [At paragraph 6] Mr Kaharaman and Mr Ulus were, at all material times, directors of RT Smart Homes and registered builders which would enable RT Smart Homes to enter domestic building contracts.
- [At paragraph 8] Ms Tong was introduced to Mr Liu on about 3 July 2016 as the operator of RT Smart Homes and as a builder who could construct new dwellings at her property.
- [At paragraphs 9 - 11] between July and September 2016 Ms Tong, Mr Liu and directors and employees of RT Smart Homes negotiated to construct dwellings at the two properties using prefabricated modules from China. During the negotiations RT Smart Homes produced several concept drawings and on or about 20 August 2016 it provided Ms Tong with contract signed by a Mr Yang on behalf of RT Smart Homes. Both contracts were in accordance with the Housing Industry Association standard form "Plain English Contract for Domestic New Homes".
- [At paragraph 12] Each contract was for \$605,000 to be constructed within 180 days allowing 15 days for inclement weather and 20 days for weekends and other days off.
- [At paragraph 13] On or about 2 September 2016, Mr Liu "indicated" that if Ms Tong contracted with the respondent, "he" would complete construction within 18 weeks of signing. I note that this is 126 days.
- [At paragraph 14] Mr Liu also told Ms Tong that a building permit could be obtained within one week of the contract being signed.

12 Paragraphs 15 to 20 of the PAPoC described Ms Tong as Tong, Mr Liu as Jason and the respondent as Tongji Sutra. They are as follows:

15. The statements were misleading and deceptive in that Jason/Tongji Sutra –
 - (a) did not believe in the accuracy of the timeframe; or in the alternative
 - (b) put forward the timeframes and estimates with reckless indifference as to their accuracy.

Particulars

An 18-week timeframe is unrealistic and improbable for the proposed works, and in circumstances where insufficient details were provided to obtain a building permit.

16. Further and in addition, in the course of those negotiations, Jason failed to disclose that:
 - (a) he was not a registered builder; and
 - (b) in the premise, Tongji Sutra was not entitled to enter into a major domestic building contract.
17. In the circumstances:
 - (a) a reasonable person in the position of Jason would explain the significance of his non-registration; and would not remain silent; and
 - (b) explained that Tongji Sutra could not enter into a major domestic building contracts [sic], other than in contravention of section 29 of the *Domestic Building Contracts Act 1995*.
18. Further, in the course of those negotiations, Jason through his statements indicated that Tongji Sutra was ready, willing and able to perform any contract it signed.
19. The statements were misleading and deceptive in that Jason/Tongji Sutra made the statements about Tongji Sutra's ability to perform any contract with reckless indifference to their accuracy.
20. In the premise:
 - (a) Jason procured the entry by Tong into the contract with Tongji Sutra through misleading and deceptive conduct; and
 - (b) Tong signed with Tongji Sutra instead of RT Smart Homes.

Relief sought against Mr Liu

- 13 The prayer for relief seeks a declaration against both the respondent and Mr Liu that they have contravened the DBC Act by entering two major domestic building contracts. It also seeks an order that Mr Liu (named "Lau") [p]ay damages pursuant to section 236 of the Australian Consumer Law (Victoria).
- 14 It is noted that the relief sought is \$116,500 against the respondent or alternatively against Mr Liu. The PAPoC does not seek to distinguish the basis upon which relief is sought although against the respondent it is for breach or repudiation of the contracts.

- 15 There are no pleadings in the PAPoC setting out the basis upon which it is alleged Mr Liu is liable under the Australian Consumer Law.

Affidavit material

- 16 Mr Hon’s affidavit states that he is a solicitor with the firm acting on behalf of the applicants and he makes the affidavit of his own knowledge other than where indicated otherwise.

- 17 In paragraph 6(f), Mr Hon said:

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

- 18 In paragraph 7 Mr Hon said that he was arranging to have the WeChat conversations translated by a certified translator.

- 19 In paragraph 8 Mr Hon said that Mr Liu, who he referred to as Jason, had provided a document outlining the alleged ownership structure of the respondent, RT Smart Homes and another entity, RT Module Pty Ltd, but on further investigation the structure was not accurate. This was not pleaded and the relevance of the structure of the companies is not obvious.

- 20 At paragraph 12 Mr Hon said that the effect of Mr Liu’s words was that rather than contract with RT Smart Homes the applicants contracted with the respondent. The relevant words seem to be those quoted from paragraph 6(f) above.

- 21 I accept Mr Phillipott’s submission that this falls short of demonstrating Ms Tong’s reliance, on behalf of the respondents, on the statement referred to in paragraph 6(f) of Mr Hon’s affidavit. I also note that the pleadings in the PAPoC also fail to particularise any reliance.

- 22 In addition to confirming the matters raised in the pleadings against Mr Liu, Mr Hon said at paragraph 13 that the translated contracts between each of the applicants and the respondent provided that they were contingent upon the respondent contracting with another domestic builder. At paragraph 14, Mr Hon went on to give evidence that the respondent made no effort to contract with a DBU-registered builder and therefore the contracts were unlawful within the meaning of the *Domestic Building Contracts Act 1995* (“DBC Act”).

- 23 I remark that the Chinese Contracts were not translations of any standard-form domestic building contract.

- 24 At paragraphs 17 and 18 Mr Hon stated:

17. But-for the representations made by [Mr Liu] the applicants would not have paid the respondent, at all, and instead have contracted with RT Smart Homes, and in the present circumstances would have had recourse against:

- (a) the registered builders serving as directors of RT Smart Homes; and
- (b) RT Smart Homes' warranty insurance.

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

25 It is noted that neither of these paragraphs are pleaded in the PAPoC as they appear in the affidavit. It is surprising that either the pleading or the affidavit would suggest that the applicants might have recourse against registered builders who are directors of a building company.

26 Exhibits to the affidavit include certified translated copies of the Chinese contracts for both houses. Paragraph 2.2 of each contract provides:

[The respondent] shall engage or work with qualified builder(s) with specific credentials in the project in compliance with Australian building laws and regulations. [The respondent] shall be liable for any loss or penalties as a result of its inappropriate behaviour associated with the project;

Respondent's/Mr Liu's submissions about the pleadings

27 Mr Phillpott submitted with respect to paragraph 15 of the PAPoC that the applicants could not possibly know Mr Liu's belief. While it is unlikely that the applicant would have this knowledge, I note that paragraph 15 is drafted in the alternative, pleading either actual knowledge of Mr Liu's belief or a conclusion of reckless indifference as to accuracy.

28 With respect to paragraph 16, Mr Phillpott remarked that the applicant effectively pleads misrepresentation through silence.

29 Mr Phillpott pointed out that there are no particulars to paragraphs 17 to 20.

Australian Consumer Law - S 236

30 Section 236(1) of the Competition and Consumer Act 2010 – Schedule 2 – Australian Consumer Law 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.

31 Ms Zhou submitted that the alleged representations as to time to complete concerned future matters. Presumably she was indicating the relevance of the accessorial liability of a person such as a director, that could arise under s236, or even concerning representations about future matters under s 4, but neither have been spelled out sufficiently to enable Mr Liu to understand the case against him.

DISCUSSION

The basis of joinder is not the same as a pleading summons

32 There are a number of matters that may not be proven and for which criticism is justified. However, my decision in this matter is whether there is sufficient pleading to join Mr Liu. I have no intention of deciding a pleading summons by proxy.

33 With respect to Mr Phillpott's submissions regarding paragraph 15 of the PAPoC, it is unlikely that the applicant would have evidence of Mr Liu's belief. However, I note paragraph 15 also pleads reckless indifference.

34 With respect to paragraph 16 of the PAPoC, it will be difficult for the applicant to demonstrate that there has been a misrepresentation through silence unless it was reasonable for the applicant to assume that Mr Liu was a registered builder and/or that there was a representation that Tongji Sutra was entitled to enter the Chinese language contracts when it was not. There is neither a pleading nor WeChat information on affidavit on this point.

35 I note that at the date the contracts were allegedly executed by the applicants and respondent, 14 September 2016, section 31(1) of the DBC Act provided² in part:

31 General contents etc. of a contract

(1) A builder must not enter into a major domestic building contract unless the contract—

...

(f) states the registration number (as it appears on the registration certificate under the **Building Act 1993**) of—

...

(iii) in the case of a builder which is a corporation, the directors who are registered as builders under that Act;

36 With respect to paragraphs 17 to 20 of the PAPoC, I am not persuaded that paragraphs 17 or 20 necessarily need particulars, but paragraphs 18 and 19 refer to statements of which no particulars are provided.

² This section was subsequently amended.

Sufficient pleading

- 37 VCAT is not a court of pleadings, but it is necessary for parties to understand the case against them.
- 38 As Ashley J said in *Barbon v West Homes Australia Pty Ltd* [2001] VSC 405:

I would not want it thought for a moment, because the Tribunal is not a court of pleadings, and because the Act encourages a degree of informality in proceedings, that Rafferty's Rules should prevail. They should not. Any party, particularly a party facing a long, drawn-out hearing in the Tribunal... 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. Nonetheless 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.

Against the director of a company?

- 39 In order to have an open and arguable case against Mr Liu, as distinct from the respondent, the applicants must show how Mr Liu could be liable.
- 40 In *Perry v Binios* [2006] VCAT 1604 Deputy President Aird said at paragraph 6:

...it does not follow that where correspondence and/or documents from a company are signed by a director of that company that they were written in the director's personal capacity.

- 41 And at paragraph 12 of *Seachange Management Pty Ltd v Bevnol Constructions & Development Pty Ltd* [2008] VCAT 1186, Senior Member Young said:

It is a principle of corporate law that individual directors are not normally liable personally for the failings of the company of which they are director. The level of involvement of a director in a particular transaction complained of is critical in determining whether their conduct renders them liable as to joint tortfeasors...

He then mentioned the four lines of authority discussed in *Pioneer Electronics Australia Pty Ltd v Lee* (2001) 108 FCR 216 at 233 and concluded:

The least stringent of these tests being that a director will be liable if he has assumed responsibility for the company's act: *Trevor Ivory Ltd v Anderson* [1992] 2 NZLR 517. I adopt the least stringent test on the basis that this line of authority is open and arguable; and, therefore, it is on this basis that I should assess whether the joinder of the First Respondent's directors is appropriate.

Other than as a director

42 Mr Liu's role has an important difference from those of many other directors. At the time when the applicants entered the contracts, he was a director of both the respondent and of RT Smart Homes. His role could therefore be seen not strictly as director of either company, but as the person who advised Ms Tong (on behalf of the applicants) with whom she should contract. However, there are no pleadings about this.

Respondent and Mr Liu's submissions

43 Mr Phillpott objected to the application to join Mr Liu on the basis that no arguable case was demonstrated in either the PAPoC, or Mr Hon's affidavit.

44 Ms Zhou submitted that Mr Liu had been involved in misleading and deceptive conduct concerning the ability of the respondent to undertake building work, and the time that would be taken to complete it. She referred to the inclusion of the reference to section 236 of the Australian Consumer Law in the prayer for relief.

45 Mr Phillpott criticised the applicants for failing to provide evidence of the WeChat conversations, and it is surprising that it was not available, as it was referred to in Mr Hon's affidavit of 10 May 2018, but still not available on 28 June 2018. I emphasise that the applicants are not expected to prove their case when they seek to join a party; but must demonstrate that there is factual support for their case being open and arguable.

Australian Consumer Law

46 Having regard to s 236, quoted above, the applicants have not pleaded how Mr Liu's conduct contravened a provision of Chapter 2 or 3, which is a necessary precondition to recovery.

47 I note Mr Phillpott's concession that he did not submit that it was impossible to bring an ACL claim against Mr Liu, but that it had been insufficiently pleaded. Relief cannot simply be sought in the Prayer for Relief in the absence of supporting pleadings.

Allegation that Ms Tong was misled

48 Having regard to clause 2.2 of the Chinese contracts referred to above, it seems unlikely that Ms Tong, on behalf of herself and the second applicant, was entirely unaware of the potential difficulties for the respondent regarding registration requirements. It would be helpful for any future pleadings against Mr Liu to address that issue.

CONCLUSION

49 I am not satisfied that the PAPoC sets out an open and arguable case against Mr Liu, or that the supporting affidavit demonstrates such a case, whether pleaded or not.

50 I will refuse the applicants' application to join Mr Liu to the proceeding at this time but give leave to make a further application.

SENIOR MEMBER M. LOTHIAN