VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

DOMESTIC BUILDING LIST VCAT REFERENCE NO. D180/2009

CATCHWORDS

Domestic Building, joinder, s60 of the Victorian Civil and Administrative Tribunal Act 1998, open and arguable case.

APPLICANT	Dalstruct Pty Ltd (ACN 076 446 967)
FIRST RESPONDENT	James Mckay
SECOND RESPONDENT	Jillian Mckay
WHERE HELD	Melbourne
BEFORE	Senior Member M. Lothian
HEARING TYPE	Directions Hearing
DATE OF HEARING	17 November 2009
DATE OF ORDER	17 November 2009
DATE OF REASONS	22 January 2010
CITATION	Dalstruct Pty Ltd v Mckay (Domestic Building) [2010] VCAT 39

REASONS

1 The Applicant Builder applied to join to the proceeding Mr Trevor Main and Trevor Main & Associates Pty Ltd ("TMA") under s60 of the *Victorian Civil and Administrative Tribunal Act 1998* ("VCAT Act"). The application came before me on 17 November 2009 and I ordered:

> The Applicant's application to join Trevor Eric Main and Trevor Main and Associates Pty Ltd as respondents to this proceeding is dismissed [on] the basis that I am not satisfied that the proposed [further] amended Points of Claim of 12 October 2009 demonstrate an open and arguable case[1] against them.

2 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

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[1] See *Zervos v Perpetual Nominees Ltd* [2005] VSC 380 per Cummings J at paragraph 11

(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 made an order under sub-section (1) on its own initiative or on the application of any person.

Section 60 gives the Tribunal a wide discretionary power to join a party.

3 The Builder was represented at the hearing of the application by Mr Ritchie of Counsel. Mr Roberts of Counsel represented the Owners and Mr Main and TMA were represented as proposed joined parties by Mr Twigg of Counsel.

4 On 20 November 2009 the Builder 's solicitors wrote to the Tribunal saying, among other things:

> Senior Member Lothian denied our client's application but noted the possibility of our client re-making it at a later date.
>
> To assist our client in considering its position with respect to a future application and pursuant to s117 of the VCAT Act, we are instructed to request written reasons for Senior Member Lothian's decision.

I provide these reasons in response to that request.

BACKGROUND

5 The contract between the Builder and Owners was for the Builder to construct two units on The Esplanade, Brighton, for $3,960,000.00, varied to an even greater sum ("the Agreement").

6 The Builder's claim against the First and Second Respondent Owners is for sums the Builder claims is owing under or associated with the Agreement, including a declaration that the Builder is entitled to $300,000 invested by the Builder in two separate terms deposits, $183,116.64 held by the Owners as retention monies, a declaration that "payment certificate 13" for $225,834.67 was validly issued and in the alternative to a claim for damages or quantum meruit, $248,418.13 as a claim in debt. It is not clear precisely how much the Builder claims – it is enough to say that it is substantial.

7 The Owners claim that the Builder wrongfully repudiated the Agreement, built defectively and/or made misleading representations. Inclusive of GST they counterclaim over $2.7m.

8 A major point of difference between the parties is when and in what form payment certificate 13 was issued. The Builder says it was issued by Mr Main or TMA on 31 July 2008. The Owners say that no progress certificate was issued in respect of progress claim 13 until 21 August 2008 and that it was issued by Michael Dore. In schedule 2 item 14 of the Points of Claim attached to the application of 17 March 2009, Mr Dore is described as "appointed by Kingprop to assist in project management."

9 The importance of progress certificate 13 is that the Builder claims that the Owners breached the contract by failing to pay by 10 August 2008, whereas the Owners say that the Builder repudiated the contract by basing default, suspension and termination notices on the alleged progress certificate of 31 July 2008, that would have required payment by 10 August 2008.

10 Neither Mr Main nor TMA contracted with either the Builder or the Owners. As described by Mr Ritchie, the Agreement was a standard-form with provision for a superintendent who was to certify for payment on the Builder's claims. He said that the Superintendent was Kingprop Pty Ltd, a project management company. The procedure called for by the Agreement was that the Superintendent would certify the claim and deliver copies to the Builder and Owners. The Builder would then give the Owners a tax invoice for the certified amount and the Owners would pay within 10 days.

11 According to Mr Ritchie, the Builder claims that the role of certification was delegated to either Mr Main or TMA. The Owners had a finance facility with the National Australia Bank ("NAB") for the job, and Mr Ritchie says that either Mr Main or TMA were engaged by the NAB to assess and certify for it, without which NAB would not pay. The Builder does not allege that Kingprop, NAB, Mr Main or TMA were involved in the delegation.

12 There are a number of iterations of the Builder's pleadings, but the one I refer to is the Proposed Further Amended Points of Claim of 12 October 2009 ("PFAPoC").

THE RELEVANCE OF MR MAIN'S/TMA'S FUNCTION TO THE AGREEMENT

13 The Builder pleads at paragraph 4(c) that there was an implied term that some or all of the functions of the superintendent could, by agreement, be performed by or delegated to a person other than the superintendent. At paragraph 7 it pleads that in or about September 2007 "the Superintendent's authority to assess and certify progress claims was delegated to Mr Trevor Main, alternatively [TMA]". The particulars to this pleading recite the NAB's appointment of Mr Main to certify for it, the certification of progress claims 2 to 13 and payment by the Owners of the amounts certified relating to progress certificates 2 to 12. I note that the Builder claims $81,548.06 (including GST) of the amount payable by the Owners under certificates 2 to 12 has not been paid, but it was not clear to me how this amount is calculated.

14 Alternatively to paragraph 7, at paragraph 8 of the PFAPoC the Builder pleaded that the Agreement was varied in or about September 2006 so that the Superintendent's obligation to assess and certify progress claims was to be performed by or alternatively delegated to Mr Main or TMA. The particulars to paragraph 8 refer to an express variation but do not identify it.

15 As a further alternative to paragraphs 7 and 8, at paragraph 9 the Builder pleads:

(a) at all relevant times the [Builder] and the [Owners] acted upon the common and fundamental assumption that the assessment and certification of progress claims submitted by the [Builder] was to be undertaken by [Mr Main or alternatively TMA].

16 Then the Builder pleads a further variation. At paragraph 9A of the PFAPoC it pleads that the Owners and Builder varied the Agreement again to dispense with the need for Mr Main or TMA to issue a progress certificate to the Builder and Owners as a trigger for payment, to further dispense with the need for the Builder to present a tax invoice and the progress certificate to the Owners and instead agreed to oblige the Owners to pay the Builder any progress claim certified for payment by Mr Main or TMA within ten day of delivery of the certificate, or notice of certification, to the Owners, Kingprop or the NAB.

17 Paragraph 9B of the PFAPoC is similar to 9A, but like paragraph 9, pleads a common fundamental assumption by the Builder and Owners. It is noted that the Builder pleads two written deeds of variation to the Agreement, but neither of them include these alleged variations to methods of payment.

18 At paragraph 20 the Builder pleads that Mr Main, or alternatively TMA, certified progress claims 2 to 12. At paragraph 23 it pleads that it submitted progress claim 13 to Mr Main on or about 16 July 2008. At paragraph 24 it pleads that Mr Main or TMA issued progress certificate 13 for $225,834.67 (excluding GST) to the Builder and Owners, or alternatively to Kingprop, or alternatively to NAB on or about 31 July 2008 and dated 18 July 2008. The particulars state that a copy of the certificate is in the possession of the Builder's solicitors. A copy of the alleged certificate was submitted during the hearing. It is the "Interim Assessment of Costs" addressed to the NAB.

19 Paragraph 25A is alternative to paragraph 24 and pleads that Mr Main or TMA gave notice to the Owners and/or NAB that $225,834.67 had been certified. It does not particularise this pleading, except to say that further particulars will be provided after discovery and before trial. The Builder pleads that either under the paragraph 24 certificate or the paragraph 25A notification, the Owners were obliged to pay.

20 To recap, the Builder pleads that the Builder and Owners have agreed to vary the trigger for payment so that it is not necessary for the Superintendent, Kingprop, to issue a payment certificate, but that a certificate by NAB's quantity surveyor, Mr Main or TMA, would be sufficient. It then pleads that even the certificate is unnecessary if Mr Main or TMA notifies the Owners, Kingprop or the NAB of that certification, and that it is also unnecessary for the Builder to issue a tax invoice to the Owners. As I said during the hearing "it does not necessarily follow that a certification for the purpose of the bank also became certification under the contract".

21 As I also said during the hearing, the Interim Assessment of Costs by Mr Main's firm with the disclaimer:

> The Valuation of Work in Progress includes materials on or off site is a certification of the monetary value of completed work only and excludes either an expressed and/or implied warranty that the standards and quality of materials and workmanship are in accordance with the Contract document.

does not sound much like a certificate.

22 I also noted that the first sentence of the covering letter to the NAB is:

> We enclose our Interim Assessment of Costs No 13 amounting to $225, 834.67 (Excluding GST) for Building Works which we recommend for your approval. [Emphasis added]

I now remark that the emphasised words seem to require the NAB to exercise a discretion – the Interim Assessment of Costs by Mr Main or TMA did not appear to automatically trigger payment by the bank – although in practice this might have been what happened. The Builder's pleadings do not indicate the interaction between the Owners and the NAB which led to it receiving each payment.

23 The facts pleaded seem unlikely, but "unlikely" is not the same as "misconceived or doomed to fail" which was a test considered by the Tribunal in *Age Old Builders Pty Ltd v Swintons Pty Ltd* [2006] VCAT 871 at paragraph 55.

THE CLAIMS AGAINST MR MAIN AND TMA

24 The pleaded claims against Mr Main and TMA are found at paragraphs 39 to 43 of the PFAPoC. Paragraph 39 is that Mr Main or TMA are alleged to have represented to the Builder that progress certificate 13 was certified on or before 29 July 2008, that notice of certification had been given to the Owners, the NAB and Kingprop and that a certificate for the progress payment was issued to NAB on 29 July 2008. The particulars to this paragraph are that there was a conversation between Mr Main and Mr Phillip D'Aloia on behalf of the Builder to that effect and that on 31 July Mr Main gave Mr D'Aloia a copy of the certificate and covering letter to the NAB. The covering letter to the NAB and the letter to the Owners were also provided to me during the directions hearing.

25 Paragraph 40 is that the Builder relied on the accuracy of the alleged representations and issued a notice of default to the Owners on 11 August 2008 for failure to pay, followed by a suspension and termination notice on 26 August 2008. Paragraph 41 is that the Owners plead in their Defence and Counterclaim that Mr Main did not issue a certificate to the NAB on 29 July 2009 (as the Builder alleges he represented) and no progress certificate was issued until 21 August 2008, when it was issued by Kingprop.

26 Paragraph 24 of the Owners' Points of Defence and Counterclaim (OPDC) states that Mr Main's recommendation to the NAB (as the Owners describe it) was not sent to the Builder or the Owners until 21 August 2008, that the Superintendent issued progress certificate 13 on the same day and that no

tax invoice was issued by the Builder in accordance with the Agreement, although I note that there is a tax invoice issued by the Builder to the Owners dated 14 July 2008, for a greater sum.

27 Paragraph 42 of the PFAPoC recites that the Owners claim the notices of default and termination were (therefore) invalid and a repudiation of the agreement. Paragraph 42 makes reference to paragraph 27(d) of the OPDC and it is one of four reasons the Owners give for the alleged invalidity of the notice of default.

28 Paragraph 43 is that if the Tribunal accepts the Owners' claims with respect to paragraphs 41 and 42, it follows that the alleged representations regarding certificate 13 were untrue, the making of the representations was misleading and deceptive in breach of s9 of the *Fair Trading Act 1999* and the Builder will have suffered loss. Mr Ritchie said during the hearing:

> … if Mr Main falsely tells [the Builder] that he has certified, when in fact he hasn't, reliance on that representation in my submission is not so unreasonable as to make it clear that this claim can have no merit.

29 The Builder does not plead that either Mr Main or TMA had agreed to undertake any role under the Agreement between the Builder and Owners. Neither does it plead that Mr Main was even aware of the role that the Builder claims the parties to the Agreement had decided to impose on a certificate given for another purpose. In particular there is no indication that the proposed joined parties had any idea that the Builder might choose to base an alleged breach by the Owners upon a trigger that was not provided for by the Agreement, but was based on Mr Main's or TMA's actions. As Mr Ritchie said in his submissions:

> No one is suggesting nor is it pleaded that Mr Main was formally retained to have that [role]. What is said is that as between the [Owners] and [Builder] – the trigger for payment was certification by Mr Main or his company.

30 I note that the Builder has not pleaded that it was reasonable to rely on Mr Main's alleged representation. I also note with concern the comment made by Mr Roberts, albeit from the bar table:

> We [the Owners] told them during the default period that, in fact, there was never any such certificate from Mr Main.

MR MAIN'S AND TMA'S OPPOSITION TO JOINDER

31 Mr Twigg made extensive written and oral submissions and I refer to a few:

- There is no evidence supporting the application for joinder. The deponents [of the supporting affidavits] do not seek to prove the accuracy and truth of their instructions contained in the draft pleadings.
- The alleged capacity to amend payment terms by implication or convention would undo a carefully constructed regime designed to

take into account the provisions of the *Building and Construction Industry Security of Payment Act.*

- The Agreement is a substantial document which the Builder alleges has been amended twice by deeds of variation, in neither of which the alleged terms appear.
- The Builder fails to distinguish between Mr Main and TMA.

Lack of supporting evidence

32 The facts the Builder pleads are hard to follow and seem unlikely although not impossible. I note in particular that there is no affidavit from Mr D'Aloia to confirm the conversation with Mr Main alleged in paragraph 39 of the PFAPoC and in particular to recount, as far as possible, the alleged conversation. Assuming such a conversation took place, the words could conceivably confirm that the Builder has a good case against Mr Main or TMA, or might demonstrate that no claim is possible.

33 Mr Twigg referred in this respect to the decision of DP Aird in *Perry v Binios* [2006] VCAT 1604 to which I had regard. I note in particular paragraph 19:

> I am not satisfied that the proposed Points of Claim demonstrate that there is an 'open and arguable' case against the proposed party, and the application for joinder will be dismissed. However, I will grant the Applicants leave to made a further application for joinder but caution that it should be accompanied by accurate supporting material and properly particularised Points of Claim. [Emphasis added]

Unlikeliness of an express or implied amendment of the Agreement in the terms pleaded

34 I note Mr Twigg's submissions that it is unlikely that the Builder and Owners would have agreed to amend the Agreement as pleaded or that such terms would be implied. However, as indicated above, unlikeliness is not a factor that governs whether Mr Main or TMA should be joined, except that it militates against there being an obvious cause of action against either.

35 More importantly, without further particulars Mr Main and TMA cannot know what case they have to answer and I cannot be satisfied that there is an open and arguable case. As Mr Twigg said at the conclusion of his written submissions:

> The pleas are ambiguous, lacking particulars and feature insolvable inconsistency.

The failure to distinguish between Mr Main and TMA

36 I accept Mr Twigg's submission concerning the failure of the Builder to distinguish in its pleadings between Mr Main and TMA. If the Builder cannot say which of them acted as pleaded and why it has come to that conclusion, it is difficult if not impossible for them to defend themselves.

THE OWNERS' OPPOSITION TO JOINDER

37 Mr Roberts made oral submissions on behalf of the Owners which were in part:

> I wholeheartedly endorse what Mr Twigg said so far, and he's only touched the tip of the iceberg. … [The Builder's claim] is utterly hopeless[2] against my client. … there are fundamental problems with the way [the Builder] sought to operate the contractual regime under the contract, including the fact that there [are] all manner of technical difficulties with the notice of default.
>
> …
>
> And so, before we … join somebody like Trevor Main, they need to not come along with a points of claim which … are completely misconceived. There are disconnects all over the joint, and it's … obviously something where we pointed out the fact … and they have said "Well, if you're right about that, well, we'd better blame Mr Main."

38 Mr Roberts has a point. An example of the disconnection he referred to is that the Builder has failed to plead a logical connection between the allegedly misleading statement of Mr Main and its own action in serving the notices of default, suspension and termination.

CONCLUSION

39 As Mr Twigg said, the amount the Owners claim against the Builder for alleged repudiation is great, and this is the amount the Builder seeks to recover from Mr Main or TMA. I dismissed the application for joinder on the grounds that the Builder had failed to demonstrate an open and arguable case against them. I suggested that they might like to "have another go" because it might be possible, with further particularisation and a supporting affidavit, to demonstrate that there is an open and arguable case against either Mr Main or TMA, or against both of them.

SENIOR MEMBER M. LOTHIAN

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[2] I note that on 17 September 2009 the Owners applied to dismiss the Builder's claim and have the Counterclaim determined in their favour. The proceeding was before Senior Member Walker for a compliance hearing the next day. He made orders giving the Builder leave to file and serve amended points of claim, and requiring the Builder to pay the Owners' costs thrown away by reason of that amendment.