

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST

VCAT REFERENCE NO. BP614/2017

CATCHWORDS

Domestic building contract dispute; joinder of respondent; whether a pre-requisite of joinder to obtain a certificate from Domestic Building Dispute Resolution Victoria under section 56 of *Domestic Building Contracts Act 1995*; effect of section 45(5) of *Domestic Building Contracts Act 1995*; whether motive of applicant for joinder relevant; relevance of lateness of application; *Perry v Binios trading as Australian Building Inspirations of Australia* followed; *Zervos v Perpetual Nominees* applied.

APPLICANTS

Dexel Engineering Pty Ltd ACN 063 091 574
and Peter Piotrowski as trustee for the
Piotrowski Family t/as Customised Concreting
(ABN 22 063 091 574)

FIRST RESPONDENT

Crios Australia Pty Ltd ACN 082 073 176

SECOND RESPONDENT

606 Esplanade Pty Ltd ACN 605 404 519

WHERE HELD

Melbourne

BEFORE

R Buchanan, Member

HEARING TYPE

Directions Hearing

DATE OF HEARING

29 March 2018

DATE OF ORDER

29 March 2018

DATE OF REASONS

26 April 2018

CITATION

Dexel Engineering Pty Ltd v Crios Australia
Pty Ltd (Building and Property) [2018] VCAT
651

ORDER

- 1 Under s60 of the *Victorian Civil and Administrative Tribunal Act 1998* and upon application by the applicant, I join as the second applicant to this proceeding, Peter Piotrowski as trustee for the Piotrowski Family trust, t/as Customised Concrete ABN 22 063 091 574, c/o Hassall's Litigation Services, solicitors of 308 Highett Road, Highett Vic 3190.
- 2 I direct that the title of the proceeding be amended to record the applicants as Dexel Engineering Pty Ltd ACN 063 091 574 and Peter Piotrowski as

trustee for the Piotrowski Family Trust t/as Customised Concreting ABN 22 063 091 574.

- 3 Under s60 of the *Victorian Civil and Administrative Tribunal Act 1998* and upon application by the applicant, I join as a respondent to this proceeding, 606 Esplanade Pty Ltd ACN 605 404 519 c/- Marsh & Maher Richmond Bennison, solicitors, of Level 2, 100 Wellington Parade, East Melbourne Vic 3000.
- 4 The hearing listed for 16 April 2018 is vacated.
- 5 The proceeding is listed for a directions hearing at 2.15 pm on 1 May 2018.
- 6 Liberty to apply.
- 7 Costs reserved.

R Buchanan
Member

APPEARANCES:

For the Applicant	Mr J Nixon of Counsel.
For the First Respondent	Mr D. Oldham, solicitor.
For the Second Respondent	Mr N. Philpott of Counsel.

REASONS

[The following are reasons for an order which I made on 29 March 2018.]

- 1 In the present proceeding the applicant, a sub-contractor, makes a claim against a builder, the respondent, in relation to an alleged failure by the builder to pay money for domestic building work performed under a contract (the “contract”). For its part, the respondent has made a counterclaim against the applicant.
- 2 The proceeding was set down for hearing on 16 April 2018, which date I subsequently vacated pending further order, including the handing down of these Reasons.
- 3 The applicant has applied for leave to join 606 Esplanade Pty Ltd, the owner of the land on which the domestic building works were carried out (the “owner”), as a respondent to the proceeding.
- 4 By its proposed Further Amended Points of Claim, the applicant asserts that the owner was a party to the contract by virtue of being a partner of the respondent or, alternatively, that there was a partnership by estoppel.

Section 56 of the Act

- 5 The owner argued that the present joinder application was premature. That was so, it said, because s 56 of *Domestic Building Contracts Act 1995* (the “Act”) required the applicant to first obtain a certificate of conciliation from Domestic Building Dispute Resolution Victoria (“DBDRV”).
- 6 Section 56 of the Act prohibits “A party to a domestic building work dispute” from commencing an application to this Tribunal in relation to the dispute unless the chief dispute resolution officer of DBDRV has issued a certificate of conciliation under s45F or s46E of the Act.
- 7 No such certificate has been issued in relation to the applicant’s claim against the owner.
- 8 Section 56 provides:

Certificate of conciliation required to bring proceedings in VCAT to resolve domestic building work dispute

- (1) A party to a domestic building work dispute must not make an application to VCAT in relation to the dispute unless the chief dispute resolution officer has issued a certificate of conciliation to the party certifying that the dispute –
 - (a) was not suitable for conciliation; or
 - (b) was not resolved by conciliation.
- 9 While it may be that no DBDRV certificate has been obtained, relevantly, s 45 of the Act provides as follows:

(1) A party to a domestic building work dispute (the **referring party**) may refer the dispute to the chief dispute resolution officer.

...

(5) A party may not refer a domestic building work dispute under this section if proceedings in relation to the matter in dispute have commenced in VCAT or in a court. [emphasis added]

10 The applicant's claim plainly constitutes a "domestic building work dispute" as defined by s44 of the Act. The claim concerns a dispute between a building owner and a subcontractor in relation to an alleged failure to pay money for domestic building work.

S 44

What is a domestic building work dispute?

(1) In this Part, a domestic building work dispute is a domestic building dispute arising between the building owner and –

- (a) a builder; or
- (b) a building practitioner (as defined in the *Building Act 1993*); or
- (c) a sub-contractor; or
- (d) an architect –

in relation to a domestic building work matter.

(2) In this Part, "domestic building work matter" means any matter relating to a domestic building contract or the carrying out of domestic building work, including any of the following –

- (a) an alleged breach of warranty set out in section 8;
- (b) an alleged failure to maintain the standard or quality of building work specified in the domestic building contract;
- (c) an alleged failure to complete the domestic building work required by a domestic building contract;
- (d) an alleged failure to complete the domestic building work required by a domestic building contract within the times specified in the contract;
- (e) an alleged failure to pay money for domestic building work performed under the contract.

11 I am not persuaded that a joinder application can properly be described as commencing a proceeding, as referred to in s 56. Further, s 45(5) of the Act applies to the claim which the applicant seeks to bring against the owner. In any event, proceedings have clearly been commenced in VCAT in relation to the matters in dispute and accordingly, having regard to s 45(5) of the Act, I am satisfied that a certificate of conciliation is not required before an application can be made to join the owner to this proceeding.

12 Joinder applications are not unusual in domestic building disputes, including those made by applicants who seek to join another respondent

after obtaining expert reports, or those by respondents seeking to take advantage of the proportionate liability defences available under Part IVAA of the *Wrongs Act 1958*. Generally, when a respondent joins a concurrent wrongdoer, an applicant will ‘piggyback’ on the defence, to make a claim against the joined respondent in the event that the Tribunal apportions responsibility between respondents. In addition, it is not unusual for more than one joinder application to be made in the course of a domestic building dispute.

- 13 In light of the comments by Minister Wynne, in the second reading speech for the *Building Legislation Amendment (Consumer Protection) Bill 2015*, Parliament could not have intended that a proceeding in this Tribunal could be subject to the delay which would occur, if a properly-based joinder application (or a claim by an applicant against an alleged concurrent wrongdoer) could only be made after the claim against the proposed joined party/respondent had worked its way through the necessary steps required by the DBDRV process. Minister Wynne said:

It [the bill] also establishes a new system to respond as early, quickly and inexpensively as possible so that where a dispute does arise it will be resolved in a manner that is fair and balanced for both consumers and building practitioners.

- 14 Finally, support for this conclusion is to be found in the wording of s 45C(3)(e) of the Act, which provides:

The chief dispute resolution office may assess a referred dispute as not suitable for conciliation if –

...

(e) all issues arising out of the dispute have been or are the subject of proceedings before VCAT or a court.

- 15 The claim against the owner is the same as the claim against the builder: it is a claim for payment of monies for work carried out by the applicant sub-contractor, albeit there may be differences in the way in which the claim is put. It therefore may be said that all issues arising out of the dispute between the applicant and the owner are the subject of proceedings before VCAT.

The joinder application

Motive

- 16 The respondent and the owner opposed the joinder application on three grounds. The first ground was the reason which, the respondent perceived, was motivating the applicant in making the application, namely the applicant’s fear of being unable to recover from respondent. The applicant may have such motivating concerns, but they are not relevant to the issue before the Tribunal. They do not invalidate the application. Nor do they support it. When considering a similar issue in *Perry v Binios trading as*

Building Inspirations of Australia (Domestic Building) [2006] VCAT 1922 at paragraph 19, Deputy President Aird said:

... whilst they may have concerns as to the ability of Griffin to satisfy any judgement they may obtain this is not of itself a factor which should be taken into account in considering any application for joinder.

Timing

- 17 The second ground for opposing the joinder application was that the application was brought too close to the scheduled hearing date, which was 18 days after the date of the application.
- 18 The parties were in agreement that, if the joinder application were successful, the hearing could not proceed on the appointed date.
- 19 Clearly there would be some inconvenience to the respondent if the hearing were adjourned; the respondent has made a substantial counterclaim. I am, however, satisfied that any mischief caused by adjourning the hearing would be far less than that which would be caused by refusing the joinder application and the possibility which would flow from that refusal, namely that the applicant's claim against the owner would be the subject of another proceeding, involving the same facts and issues. As well as that being wasteful, that would create the risk that those facts and issues could be the subject of inconsistent findings.
- 20 Section 60 of the *Victorian Civil and Administrative Tribunal Act 1998* allows the Tribunal to join a party whose interests are affected, and/or who ought to be bound by or have the benefit of the decision. It is clear that the interests of the owner are affected by this proceeding.

The applicant's claim

- 21 The third ground on which the respondent and the owner opposed the joinder application was that the applicant had failed to disclose an arguable claim against the owner.
- 22 The applicant claimed that the respondent and the owner had been in partnership, a partnership which had been disclosed to the applicant prior to the applicant's contracting with the respondent. Alternatively, the applicant argued that there was a partnership by estoppel.¹
- 23 The respondent and the owner argued that the existence of a partnership was not clear on the material relied upon by the applicant. I do not agree. The affidavit of Peter Piotrowski sworn 23 March 2018 contained evidence of conversations between himself and Christian Secara and George Cota, the principles of the respondent and the owner, respectively. Mr Piotrowski's affidavit states clearly that those conversations pre-dated the

¹ "It has long been established that a person who is not a partner becomes liable as if he were one to people towards whom he so conducts himself as to lead them to act upon the supposition that he is a partner in point of fact." Lindley on the Law of Partnership, 14th edition.

formation of the contract between the applicant and the respondent and that the conversations contained statements that Messrs Secara and Cota were partners, in the building project which is the subject of this proceeding. Mr Piotrowski's evidence was supported by an affidavit by Nicholas Sheridan sworn 29 March 2018.

- 24 In my view, the evidence relied on by the applicant was sufficient to show a case against the owner which was "open and arguable". That is the test described by Cummins J in *Zervos v Perpetual Nominees Limited* [2005] VSC 380: "... This is a case where the claim on behalf of the defendant to join is open and arguable. Whether it is sustained in the end is a matter for trial."
- 25 I am fortified in my view by the absence of material from the owner showing that the owner and the applicant dealt with each other on an arms-length basis. The absence of any such material is surprising, leading me to infer that no such material exists.
- 26 The applicant and the owner argued that it was relevant that the contract between the applicant and the respondent was in the name of the respondent only and did not mention the owner. In a similar vein, the respondent and the owner referred to the fact that the building permit did not refer to the owner as an owner/builder.
- 27 I do not accept that these facts necessarily show that the respondent and the owner were not in partnership. There are possible explanations for them which would be consistent with the existence of the partnership which is alleged by the applicant. This is a matter to be determined following the final hearing.

Joinder of Peter Piotrowski as applicant

- 28 In addition to the application to join the owner as a respondent, the applicant applied to join as an applicant Peter Piotrowski, (as trustee for the Piotrowski Family Trust), trading as Customised Concrete.
- 29 The affidavit of Mr Piotrowski sworn 23 March 2018 exhibited an ASIC search showing that the applicant and Mr Piotrowski (as trustee for the Piotrowski Family Trust) were partners trading under the business name of Customised Concreting.
- 30 The application was unopposed. Surprisingly, no submission was made that Mr Piotrowski's claim should be referred to DBDRV before he could be joined as an applicant to this proceeding. Similar considerations apply irrespective of whether a person is to be joined to a proceeding as an applicant, respondent or joined party and I am satisfied that in each instance, s 45(5) applies.

Orders

- 31 I will order that the owner is joined to the proceeding as a respondent and that Mr Piotrowski as trustee for the Piotrowski Family Trust trading as Customised Contrary is joined to the proceeding as an applicant.

R Buchanan
Member