VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL
CIVIL DIVISION
DOMESTIC BUILDING LIST **VCAT Reference: D425/2005**

CATCHWORDS

Joinder of party - s.60 Victorian Civil and Administrative Tribunal Act 1998 – party to be joined seeking to be heard – s. 73(3) – application to intervene in proceedings – status of intervenor – right to apply for an order for costs where joinder application unsuccessful

APPLICANT: Peris Kyrou

FIRST RESPONDENT: Contractors Bonding Limited

WHERE HELD: Melbourne

BEFORE: Senior Member Rohan Walker

HEARING TYPE: Chambers

DATE OF HEARING: 9 March 2006

DATE OF ORDER: 27 March 2006

MEDIUM NEUTRAL CITATION: [2006] VCAT 597

ORDERS

1 Order that John Lentini ("the Intervenor") have leave, nunc pro tunc, to intervene in this proceeding for the purpose only of being heard in regard to the application to join him as a party pursuant to s.60 of the Act.

2 Leave is granted on the condition that the Intervenor shall cease to be a party forthwith upon the determination of the joinder application unless he has been joined as a party pursuant to s. 60.

3 Order the Respondent to pay the Intervenor's costs of the joinder application, such costs to be assessed if not agreed by the Registrar in accordance with Scale "D" of the County Court Scale.

SENIOR MEMBER R. WALKER

APPEARANCES:

For the Applicant: Mr R. Andrew of Counsel

For the Respondent: Mr Quinn, Solicitor

For the Intervenor: Mr Horan, Solicitor

REASONS FOR DECISION

The joinder application

1. On 7 March 2006 an Application by the Respondent to join one John Lentini as a party to this proceeding came before me for hearing.

2. The solicitor for Mr Lentini, Mr Horan, announced an appearance on his behalf and sought leave to intervene in the proceeding pursuant to s73 of the ***Victorian Civil and Administrative Tribunal Act 1998*** for the purpose of opposing the application for joinder. I told Mr Horan that I would rule on his application for leave to intervene after I had had an opportunity to consider it carefully and, if I determined that leave should be granted, I would grant it nunc pro tunc. In the meantime I would hear his submissions.

3. After hearing submissions from the parties and from Mr Horan on the joinder application and after considering the material filed I dismissed the application for joinder.

Intervention

4. It has been the practise of the Tribunal in this list to hear submissions in joinder applications from the party whose joinder is sought without, so far as I am aware, considering the basis upon which this occurs. The matter is of some consequence because s.109 of the Act, which empowers the Tribunal to make orders for costs, does not enable the Tribunal to make an award of costs in favour of someone who is not a party. Accordingly, if the proposed party is successful in avoiding joinder he is then unable to make an application under s109 to obtain an order for his costs of opposing the application. It is sought to avoid this consequence by making application for leave to intervene for the purpose of the joinder application and then applying, as a party, for costs.

5. The application for leave to intervene is made pursuant to s.73 of the Act. Subsections (1) & (2) deal with applications by the Attorney General, the Director or the Small Business Commissioner to intervene. Subsection (3) permits any person at all to apply for leave to intervene. It reads as follows:

"(3) The Tribunal may give leave at any time for a person to intervene in a proceeding subject to any conditions that the Tribunal thinks fit."

When should leave to intervene be granted?

6. The section provides no guide as to when leave should be granted although the words "subject to any conditions the Tribunal thinks fit" seem very wide indeed. In Chapter 1 of ***Williams Civil Procedure*** at paragraph 1.9.06.17 intervenor is discussed as follows:

> *"Under certain circumstances the Court may permit a person who is not a party and is not entitled to become a party to nonetheless participate in the proceedings. One way is to allow the person to intervene. Another way is to hear the person as Amicus Curiae. Allowing a person to intervene or be heard as Amicus Curiae is a matter for the Court to decide in the exercise of discretion.*
>
> *The person whose legal interest will be affected by a judgement may be given leave to intervene for it is likely that submissions that the person would make to the Court and that would assist the Court in reaching a correct determination will not be made by the existing parties."*

7. The case cited in support of this passage is ***Levy v. Victoria*** (1997) 189 CLR 579. In that case, Brennan CJ was concerned with the grant of leave to intervene in High Court proceedings. His Honour said (at p.601)

> *"None of the constitutional statutory provisions which confer jurisdiction on this court contains an express grant of jurisdiction to allow non-party intervention save s78(a) of the Judiciary Act 1903 (Cth). If there be jurisdiction apart from s78(a) to allow non-party intervention, that must be an incident of the jurisdiction to hear and determine the matters prescribed by the several constitutional statutory provisions which confer this Court's jurisdiction. It is of the nature of that jurisdiction that it should be exercised in accordance with the rules of natural justice. Accordingly, its exercise should not affect the legal interest of persons who have not had an opportunity to be heard. Therefore, a non-party whose interest will be affected directly by a decision of the proceeding – that is, one who would be bound by the decision albeit not a party – must be entitled to intervene to protect the interest liable to be affected."*

8. On page 603 his Honour continued:

> *"Nevertheless, an indirect affection of legal rights enlivens no absolute right to intervene. The assumption is that the Court will determine the law correctly, so that the indirect affection of an applicant's legal interest is simply the inevitable consequence of the exercise by this Court of its jurisdiction as a final court in the Australian hierarchy. On that assumption, no undue prejudice is suffered by a person whose interest will be affected by the decision. The exercise of this Court's jurisdiction to determine controversies between parties is not, and could not be, conditional on allowing intervention by all those whose interest is susceptible to affection by the Court's judgement. Such a condition would virtually paralyse the exercise of that jurisdiction. The principles of natural justice which control the exercise of curial power must take account of the nature of the jurisdiction to be exercised.*
>
> *However, where a person having the necessary legal interest to apply for leave to intervene can show that the parties to the particular proceeding may not present fully the submissions on a particular issue, being submissions which the court should have to assist it to reach a correct determination, the court may exercise its jurisdiction by granting leave to intervene. The grant may be limited, if appropriate, to particular issues and subject to such conditions, as to costs or otherwise, as will do justice between all parties. In that situation, intervention may prevent an error that would affect the interests of the intervenor. Of course, if the intervenor's submission is merely repetitive of the submissions of one or other of the parties, efficiency would require that intervention be denied."*

9. Although the source of the power to allow intervention in that case was different from our express statutory power, there is no logical reason why the same considerations should not apply to applications to intervene before this Tribunal. There is no inconsistency between his Honour's comments and the wording of s.73. The task of deciding whether or not to grant leave is the same and raises the same questions.

10. In the present case the interest that Mr Lentini wishes to protect is to avoid being made a party to a substantial building dispute in this Tribunal. Joinder of parties to such a dispute is something that should receive careful consideration. 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. Hence this Tribunal has adopted the practice of requiring parties wishing to apply for the joinder of additional parties to serve each potential party whose joinder is sought with the application in order to allow that party to be heard on the question whether joinder should be allowed.

11. It seems to me that this is the very sort of situation where leave to intervene ought to be permitted. There is no express provision in either the Act or the rules allowing the proposed party to be heard apart from this section. The potential party's rights are affected in that, if the order is made, that person is made a party to the proceeding and burdened with the consequent cost and inconvenience of defending himself from whatever claim might be made against him. It may well be that existing parties have an interest in bringing that person into the litigation and do not raise matters which ought to be drawn to the Tribunal's attention which might militate against the joinder. It is therefore in the Tribunal's interest to have the advantage of submissions from the proposed party before determining whether the joinder is appropriate. Without this additional material a wrong decision might be made.

12. For these reasons, I think leave to intervene should generally be granted to a person whose joinder to a proceeding is sought for the purpose of resisting the joinder application. If the intervenor should be successful in resisting the application for joinder it would not be in the interests of justice that that person should continue to be a party. Indeed the very failure of the joinder application would have demonstrated that such person ought not to be a party. Therefore, the condition of the leave to intervene should be that the person granted the leave may intervene only for the purpose of that application.

13. Leave will therefore be granted nunc pro tunc to Mr Lentini to intervene in the proceeding for the purpose of the joinder application.

The application for costs

14. Mr Horan applies for the costs of the successful intervention. Under s110 of the Act the

Tribunal may order that a person given leave to intervene in a proceeding pay an amount specified by the Tribunal to a party as compensation for all or part of the costs reasonably incurred by the party as a result of the intervention. There is no corresponding provision that the intervenor be paid costs by one of the other parties.

15 The general power to award costs is conferred by s109. That section provides (where relevant):

> ***"109. Power to award costs***
> *(1) Subject to this Division, each party is to bear their own costs in the proceeding.*
> *(2) At any time, the Tribunal may order that a party pay all or a specified part of the costs of another party in a proceeding."*

Subsection (3) goes on to set out relevant matters to be considered in determining whether orders for costs might be made but it is clear from subsection (2) that the costs must be those of *"…another party in the proceeding."*

The status of an intervenor

16 As to the consequence of granting leave to intervene, ***Williams Civil Procedure*** (paragraph 1.9.06.17) states (at p.2663):

> *"An intervenor becomes a party to the proceeding with all the benefits, including the right to adduce evidence, to join in argument, and to appeal and to the burdens of a party."*

In support of that statement the learned author cites the case of ***Corporate Affairs Commission V Bradley*** [1974] 1NSW Law Reports 391,where Hutley JA said (p396):

> *"A person accepted as an intervenor becomes a party to the proceedings with all the privileges of the parties. Thus he can appeal, tender evidence and participate fully in all aspects of the arguments. His position is quite different from that of an Amicus Curiae. Intervenors have been allowed to appeal."*

17 At first sight, this sits somewhat uneasily with s.59 of the Act which states as follows:

> ***"59. Who are the parties to a proceeding?***
> *(1) The parties to a proceeding are-*
> *(a) in a proceeding in the Tribunal's original jurisdiction-*

(i) the person who applies to the Tribunal, or who requests or requires a matter to be referred to the Tribunal; and

(ii) in the case of an inquiry by the Tribunal, the person who is the subject of the inquiry; and

(iii) any person joined as a party to the proceeding by the Tribunal; and

(iv) any other person specified by or under this Act or the enabling enactment as a party;"

18 Since we are dealing here with the Tribunal's original jurisdiction the rest of the section is not relevant. Mr Lentini has not been joined as a party to the proceeding under s.60 but if, as appears to be the case, the consequence of granting him leave to intervene is to make him a party, the grant of the leave amounts to a joinder, albeit temporary and only for a limited purpose. I therefore think he comes within s.59(1)(iii). There is no basis for giving him leave to intervene to any other extent than to resist the joinder application but to this extent I think he is a party.

19 For completeness I should refer to s.73(2B) which states:

"Where the Small Business Commissioner intervenes in proceedings referred to in subsection (2A), he or she becomes a party to the proceedings and has all the rights (including rights of appeal) of such a party."

The express provision that the Commissioner becomes a party with all that that entails might at first sight be thought to indicate that there is some other consequence when someone else is given leave to intervene. I do not think that is a correct interpretation. If parliament had intended to provide some different consequence for the granting of leave to intervene than that which applies at common law it would have done so specifically. I think the words in subsection (2B) are mere surplusage.

20 Since Mr Lentini was a party during the application for the joinder, there is power for the Tribunal to make an award of costs in his favour pursuant to s.109. Should such an award be made?

21 In dismissing the application for joinder I gave oral reasons which I will not attempt to summarise. It is sufficient to say that the application for joinder was misconceived. This

proceeding is an application for a review of the decision of the Respondent to deny liability with respect to a policy of domestic building insurance. The Respondent sought to join the architect to the proceeding in the expectation that by doing so it could take advantage of the limitation of liability provisions to be found in Part IVAA of the ***Wrongs Act 1958***. Such joinder was not appropriate because, amongst a number of other difficulties, the application for a review was not an apportionable claim within the meaning of that part. The application for joinder, being misconceived was hopeless from the outset and would have achieved no purpose. It was reasonable for Mr Lentini to treat it seriously and engage solicitors to avoid being drawn into a costly building dispute. In view of the hopeless nature of the application I think it is appropriate to award costs.

Conclusion

22 The orders will be as follows:

1. Order that John Lentini ("the Intervenor") have leave, nunc pro tunc, to intervene in this proceeding for the purpose only of being heard in regard to the application to join him as a party pursuant to s.60 of the Act.
2. Leave is granted on the condition that the Intervenor shall cease to be a party forthwith upon the determination of the joinder application unless he has been joined as a party pursuant to s. 60.
3. Order the Respondent to pay the Intervenor's costs of the joinder application, such costs to be assessed if not agreed by the Registrar in accordance with Scale "D" of the County Court Scale.

Rohan Walker
Senior Member