

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST

VCAT REFERENCE NO. D26/2014

CATCHWORDS

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

FIRST APPLICANT	Mr Bradley O'Donnell
SECOND APPLICANT	Mrs Kerryn O'Donnell
RESPONDENT	Absolute Builders Pty Ltd (ACN 142 179 548)
WHERE HELD	Melbourne
BEFORE	Senior Member M Lothian
HEARING TYPE	Directions Hearing
DATE OF HEARING	13 June 2014
DATE OF ORDER AND REASONS	2 July 2014
CITATION	O'Donnell v Absolute Builders Pty Ltd (Building and Property) [2014] VCAT 952

ORDER

- 1 The proposed joined party, David Williams, is given leave to intervene under s73(3) of the *Victorian Civil and Administrative Tribunal Act 1998*.
- 2 The Respondent's application to join Mr Williams is dismissed, but it may make a further application by 30 July 2014 supported by properly particularised draft pleadings.
- 3 **The proceeding is set down for directions before Senior Member Lothian at 9:30am on 7 August 2014 at 55 King Street Melbourne with an estimated duration of 1 hour to hear any further application to join Mr Williams and to make further directions for the conduct of the proceeding.**
- 4 Costs are reserved, with liberty to apply. Any such application will be considered at the directions hearing.

- 5 I direct the Principal Registrar to send a copy of these orders and reasons to the proposed joined party, care of Noble Lawyers, Level 3, 179 Queen Street, Melbourne 3000 attention Mr Phillipott.

M Lothian
Senior Member

APPEARANCES:

For Applicants

Mr R A Fink of Counsel

For Respondents

Mr J Wilkinson of Counsel

REASONS

- 1 The applicant for joinder is the Respondent-Builder. The Applicant-Owners commenced proceedings against the Builder for a number of alleged breaches of contract, including for allegedly defective brickwork. The expert report upon which the Owners base their claim is by Robert Paul, dated 15 March 2013. At pages 11 and 12 of that report Mr Paul pointed out three alleged defects in the brickwork. For two of the three his recommended remedy is “Remove bricks and reconstruct brick veneer walls to BCA 3.3.1.”
- 2 The proposed joined party is Mr David Williams, trading as Lay By Day. Both parties, and Mr Williams himself, acknowledge that Mr Williams was the bricklayer who laid the bricks at the Owners’ property in Mt Evelyn.

Jurisdiction

- 3 Section 60 of the *Victorian Civil and Administrative Tribunal Act 1998* (‘the VCAT Act’) empowers the Tribunal to order joinder.
 - (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.
 - (2) The Tribunal may make an order under sub-section (1) on its own initiative or on the application of any person.
- 4 As Deputy President Aird said in *Perry v Binios*¹ [2006] VCAT 1604 at [17]:

In considering any application for joinder where proposed Points of Claim have been filed, the Tribunal must be satisfied that they reveal an ‘*open and arguable*’ case (*Zervos v Perpetual Nominees Limited* [2005] VSC 380 per Cummins J at paragraph 11).

History of the application to join Mr Williams

- 5 On 31 March 2014 orders by consent were made in chambers. Order 6 was:

Any application for joinder of any further party to the proceeding must be made by 23 May 2014 or such further date as the Tribunal may order, and must be made in accordance with the relevant provisions of Practice Note PNDB1, and must be served on the party proposed to be joined.
- 6 Practice Note PNDB1 provides at paragraph 26:

¹ [2006] VCAT 1604

Any application for joinder of a party, whether as respondent or joined party, should be made using the Application for Orders or Directions form. The application for joinder must be accompanied by affidavit material in support and draft Points of Claim as against the proposed party (except where the party is to be joined as a concurrent wrongdoer for the purposes of Part IVAA of the *Wrongs Act 1958*).

- 7 On 23 May 2014 the Builder applied to join Mr Williams as Second Respondent. Under the heading “Reasons for making application” the Builder’s lawyers wrote:
 - 2) Lay By Day was and is the sub-contractor engaged by the Respondent (“Builder”) to perform bricklaying works at the premises which are the subject of this proceeding.
 - 3) The Builder alleges that any defects in the bricklaying work are the liability of Lay By Day.
 - 4) The Applicant’s claim is an apportionable claim pursuant to section 24AE of the *Wrongs Act 1958* (Vic) (“Act”) and Lay By Day is a concurrent wrongdoer as defined by Section 24AI of the Act.
- 8 The application to join Mr Williams was supported by a brief affidavit by Ms Hunter of the Builder’s solicitors and accompanied by a document entitled “Points of Defence & Counterclaim”.
- 9 Ms Hunter’s affidavit pleads that the Builder engaged Mr Williams to lay bricks at the premises, that he did so, that Mr Williams invoiced two sums: of \$5,445 and \$5,364; both of which were paid by the Builder and that the Owners allege the bricklaying works performed by Mr Williams are defective. Somewhat surprisingly, as the Builder contracted with the Owners, and Mr Williams is alleged to have contracted with the Builder, she also included in her affidavit:
 6. [The Builder] is not responsible for the Works completed by Lay By Day.
- 10 The “Points of Defence & Counterclaim” is confusing and, to some degree, contradictory. At paragraph 37 the Builder denies the Owners’ allegation that the Works are defective, yet at paragraph 56 of the counterclaim the Builder pleads against Mr Williams (named as the Second Respondent) that the “Bricklayer Works” are defective in certain respects. The counterclaim pleads the “Bricklayer Retainer” between the Builder and Mr Williams. It also pleads duties of care owed by Mr Williams to the Owners and further or alternatively, to the Builder. The counterclaim further pleads that Mr Williams is a concurrent wrongdoer under the *Wrongs Act*, that the Owners’ claim is apportionable and that Mr Williams is liable to the Owners for the degree to which he has caused the loss they have suffered.
- 11 The prayer for relief against Mr Williams includes:

- G. An order that [Mr Williams] pay compensation to [the Owners] for loss or damage by reason of his breach of duty to the Builder.
 - H. Further or alternatively, damages equal to that proportion of loss and damage the Tribunal determines [Mr Williams] to be responsible for as a concurrent wrongdoer, as that term is defined in Part IVAA of the Wrongs Act.
- 12 The joinder application came before me first on 27 May 2014. No representative of the Builder was present at the commencement of the directions hearing, but the Tribunal was able to arrange for the Builder's solicitors to attend by telephone. Mr Williams was neither present nor represented that day and I ordered that the Builder serve copies of the orders of that day on him without delay. I also noted that the Owners neither consented to, nor objected to, the joinder of Mr Williams. I ordered that the application for joinder return to me for further hearing at 9:00am on 13 June 2014.

Mr Williams' submissions

- 13 On 13 June 2014 Mr Williams was present. So too was his solicitor, Mr Phillpott of Noble Lawyers. I gave Mr Williams leave to intervene and reserved the costs of the parties and of Mr Williams. Mr Williams opposes being joined to this proceeding and relies on his affidavit of 12 June 2014, which can be characterised as an outline of a defence.

Potential defence

- 14 At paragraph 5 of the affidavit Mr Williams stated that Mr Andrew Brooke of the Builder telephoned him and invited him to visit the site with a view to undertaking the labour only of bricklaying. He said:

During the telephone conversation, Mr Brooke told me that all materials, including the bricks (which were selected by the Applicants (**the Owners**)) and mortar, would be supplied by and paid for [by] the Builder and that I was only providing labour.

- 15 Mr Williams expressed his concern at the Owners' choice of bricks. He said, at paragraph 8:

I said to Mr Brooke that I had used these bricks before and that I had experienced significant issues with them because the bricks vary in size, shape and colour. I told him that the last time I used these bricks on a project, Boral, the supplier of the bricks, required me to replace sections of the walls.

- 16 Mr Williams said he told Mr Brooke that the bricks would cause irregularity in the perpend "not lining up or being regular" and where bricks were laid to achieve a straight line along the top of each course of bricks "the bottom line will be jagged due to the varying size and shape of the bricks".

17 Mr Williams reported that Mr Brooke said he would speak to the Owners about this issue and that later the same day he spoke to Mr Brooke by telephone. He continued:

Mr Brooke told me that:

- (a) he had spoken to the Owners about the issues I raised with him in respect of the bricks to be used;
- (b) he was happy with me to carry on with the job using the bricks already purchased and delivered to the property; and
- (c) he would like me to commence work the following week.

18 Mr Williams said that he commenced the work in December 2011 and issued two invoices. The first was in December 201[1] which was paid before Christmas by the Builder. The second was issued in January 2012. After receipt of that invoice, Mr Williams said he met on site with the Builder and Owners and they walked the perimeter of the house. He said at paragraph 20:

The Owners selected approximately 15 bricks from various locations around the house which they sought to have me replace. Mr Brooke did not identify any issues with my work.

19 Mr Williams said he replaced the identified bricks and was paid in full. He added that:

22. Until the receipt of this application by the Builder on Friday, 6 February 2014, I have not received any notification from either the Owners or the Builder that the work I performed was defective or that the Owners were unhappy with my work.
23. On or about 11 June 2014, I telephoned Mr Brooke. I asked him if he recalled my conversation with him in respect of the bricks and the issues that may arise if they were to be used. Mr Brooke told me that he did recall the conversation and he also confirmed that he told the Owners of the issues, and they told him that it was ok to proceed. I asked Mr Brooke if he could confirm this to me in an email, which he told me he would do. At the time of swearing this, my affidavit, I am yet to receive any such email from Mr Brooke.

20 If everything Mr Williams says in his affidavit is proven he has a good defence to the Builder's action against him. However, a good defence is not a sufficient reason to refuse to join a proposed party. The facts of a case are proven at the hearing, not at the point where a party is seeking to join another. Until those facts are proven, a properly pleaded case can still be "open and arguable"

"Open and arguable"?

21 Mr Phillpot pointed out that the Builder has not filed draft points of claim against Mr Williams, and that is accurate. There are circumstances where that might be appropriate, such as where one party seeks to join another

with whom it has no contractual nexus, purely for the purpose of apportionment. In this proceeding, where the Builder pleads Mr Williams was its sub-contractor, it is somewhat surprising.

- 22 Mr Phillpott made submissions about the Builder's claims concerning Mr Williams being the sub-contract claim, the duty of care claim and the *Wrongs Act* or proportionate liability claim.

The sub-contract claim

- 23 Mr Phillpott acknowledged the pleading of the sub-contract but said it was insufficiently particularised. While the particulars sought by Mr Phillpott are desirable, the pleading would not be insufficient if it had gone on to either plead contribution, or demonstrate how the contract empowers the Builder to seek an order against Mr Williams on behalf of the Owners.

The duty of care claim

- 24 This claim is formulaic rather than fully particularised, and as Deputy President Aird said in *5 Rivoli Court Mount Waverly Pty Ltd v USI Homes Pty Ltd and Bulut* [2014] VCAT 553 paragraph 17:

It is not enough to make bald assertions without setting out the material facts relied upon and/or particulars.

- 25 Mr Phillpott submitted that the facts set out in Mr Williams' affidavit demonstrate that Mr Williams "was aware of his Duty of Care that he owed to the Builder and Owners" (in itself a singular admission) and fulfilled the duty. As stated above, this is a matter of evidence for the hearing, not a matter that must be proven or disproved at this point.
- 26 My criticism of the pleading of the duty of care is that it must be fully particularised so that Mr Williams will understand the case he has to answer. Nevertheless, a duty of care, breach of the duty and loss have been pleaded against Mr Williams, and in the course of the submissions Mr Phillpott seems to have admitted that such a duty is owed to both the Builder and the Owners.
- 27 The unusual aspect of the duty of care claim is that the Builder does not seek to recover from Mr Williams.
- 28 I find that there would be an "open and arguable case" concerning the duty of care, but for the absence of a claim by the Builder against Mr Williams or a properly pleaded defence as described below.

The proportionate liability claim

- 29 Part IVAA of the *Wrongs Act* provides a defence rather than the basis of a claim, as it has been expressed in the Builder's "Counterclaim against the Bricklayer sub-contractor". The Builder has pleaded a duty of care owed by Mr Williams to the Owners, breach of that duty and loss. Such a pleading commonly supports a defence under Part IVAA of the *Wrongs Act*.

30 Mr Phillpott properly submits that the Builder has pleaded proportionate liability as part of its “counterclaim” against Mr Williams, rather than as a defence against the Owners. Such pleading is unusual and I am not satisfied that it demonstrates an open and arguable case.

To join or not to join?

31 This proceeding is by no means identical to *5 Rivoli Court*. The Owners are claiming for a number of alleged defects including brickwork. The parties and Mr Williams agree that he was the bricklayer. Nevertheless, I am not satisfied that the Builder has pleaded an open and arguable case.

32 The Builder’s application to join Mr Williams is dismissed, but it may make a further application by 30 July 2014 supported by properly particularised draft pleadings.

33 The proceeding is set down for directions before Senior Member Lothian at 9:30am on 7 August 2014 at 55 King Street Melbourne with an estimated duration of 1 hour to hear any further application to join Mr Williams. Any application for costs will be heard at the same time, and further directions will be made for the conduct of the proceeding.

M Lothian
Senior Member