VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

VCAT REFERENCE NO. D766/2006

DOMESTIC BUILDING LIST

CATCHWORDS

Domestic building – Joinder – practice Note Clause 13 – Requirement to observe same.

FIRST APPLICANT	Abigroup Contractors Pty Ltd
SECOND APPLICANT	Body Corporate No. PS 502581D (Riviera Apartments) (By Counterclaim)
RESPONDENT	River Street Developments Pty Ltd
WHERE HELD	Melbourne
BEFORE	Senior Member D. Cremean
HEARING TYPE	Directions Hearing
DATE OF HEARING	13 March 2007
DATE OF ORDER	23 March 2007
CITATION	Abigroup Contractors v River Street Developments (Domestic Building) [2007] VCAT 467

ORDER

1 Leave to join Second Applicant (Body Corporate No. PS 502581D) to Counterclaim.

2 Refer to a directions hearing before me on 15 May 2007 at 9.30 a.m. at 55 King Street Melbourne.

3 Reserve costs.

SENIOR MEMBER D. CREMEAN

APPEARANCES:

For the First Applicant:	Mr J. Twigg of Counsel
For the Second Applicant:	Mr R. Andrew of Counsel

For the Respondent:	Mr R. Andrew of Counsel

REASONS

1 This matter arises out of a directions hearing. I am asked to give leave, *nunc pro tunc*, to allow the Body Corporate No PS 502581D ("Body Corporate") to be joined as a co-applicant on the Counterclaim.

2 The initiating proceeding is between Abigroup Contractors Pty Ltd ("Abigroup") as Applicant and River Street Developments Pty Ltd ("River Street Developments") as Respondent. The application was filed on 27 October 2006. Amongst other things Abigroup is claiming a sum of $4,767,599.20.

3 The Counterclaim was filed on 22 December 2006. Amongst other things an amount of $979,750.00 is claimed. The Respondent is named as Abigroup. But the Applicants are named as not only River Street Developments but also the Body Corporate.

4 No order has been made giving leave for the Body Corporate to be joined as a party. Such order must be given under s60 of the *Victorian Civil and Administrative Tribunal Act* 1998 for joinder to be effective.

5 It is argued I may allow joinder despite an order not previously having been sought or made. Reference is made in that regard to the decision in *Anderson v Economo* [2000] VCAT 434.

6 Joinder on the basis of orders being made *nunc pro tunc* is, however, opposed, despite the decision in that case. Reliance is placed on clause 13 of PNDB1 – General Procedures which reads as follows

> Any application for joinder of further parties, whether as respondent or joined party, should be made in a timely manner, on the Application for Orders/Directions form.
>
> Such application for joinder should be accompanied by affidavit material in support together with draft Points of Claim.
>
> A copy of such application together with the supporting material must be served by the applicant for joinder on all parties to the proceeding, and the proposed party (who must also be advised of the date and time of the directions hearing at which the application will be heard) by 12 noon at least four (4) business days prior to the directions hearing.
>
> Should any party to the proceeding, or the proposed party, oppose such application for joinder they must, where practicable, file and serve affidavit material in reply by 12 noon at least two (2) business days prior to the directions hearing.
>
> Where the proceeding relates to an appeal by an insurer or a builder of a decision of a warranty insurer, it is desirable that the owner or the builder as the case may be, is a party to the proceeding. Where they are not named as a party in the original application, orders for their joinder may be sought. Where the owner or the builder consents to joinder, orders in chambers will generally be made, otherwise the

application for joinder should be made in accordance with the above procedure.

7 It is argued also that not only procedurally, but substantively, I should not proceed to agree to the joinder. As I understand it, it was submitted to me that the interests of the supposed co-Applicants by Counterclaim might not be co-extensive and may be different.

8 It was also argued that the Particulars given in the Counterclaim of defects were insufficient or at times incomprehensible.

9 I do not need, on this occasion, to deal with the adequacy of Particulars – although I agree some do appear deficient. See, for example, defect 111: "Consequential damage due to rectification of other defects". This is not any further particularized, as it should be.

10 Nor do I consider I must decide whether the claims of the supposed Co-Applicants by Counterclaim are co-extensive or not, or derived differently.

11 For present purposes I consider I can base my decision on the failure to comply with clause 13 of the Practice Note. The Practice Note has statutory force under s158 of the Act. It has simply been ignored. I do not believe I should disregard such failure or act as if it is not material. The requirements of the Practice Note are well known. Particularly in a case of this size and complexity it is important that proper procedures be followed. Those procedures are designed to enable parties to know where they stand and to fulfil the requirements of natural justice. There may occur cases, from time to time, where, after argument, it is considered unnecessary to follow the Practice Note joinder procedures. But I am satisfied this is not one of them. The Tribunal's decision in *Anderson v Economo*, above, turns on its own facts and does not establish a general principle.

12 I do not propose therefore to make orders which join the Body Corporate *nunc pro tunc.* That must mean the Counterclaim stands with only one Applicant. A new document will be necessary.

13 Alternatively if joinder of the Body Corporate is to be sought in compliance with clause 13 – as I assume it will be – then the current document may satisfy if joinder is ordered. But the other points raised by Abigroup should be borne in mind in that regard.

14 I propose to disallow the application for leave. The Applicant on the Counterclaim is at liberty to make application, in the appropriate way, to join a co-applicant.

15 The second application being made by the River Street Developments is that I should adjourn the Compulsory Conference fixed for 23 April 2007. It is submitted I should re-fix it for a date between 15 and 30 May 2007 so that Mr Delany SC will be able to appear.

16 This too is opposed. It is pointed out to me that adjournments are not arranged so as to suit Counsel. I am referred to remarks of Burt C J in

Brabazon v Jones, WA Supreme Court, FC, 10 November 1983, unreported.

17 I agree with the proposition that adjournments are not arranged so as to suit Counsel. But I do not think the parties will be in a position to go to Compulsory Conference on 23 April in any event in light of my ruling on joinder.

18 I intend, therefore, to cancel the Compulsory Conference altogether. I am not indicating by that, however, that it may not be suitable to refer this whole matter to a Compulsory Conference at some point – preferably by consent.

19 I shall direct that this matter be returned to a directions hearing before me on 15 May 2007. That should give River Street Developments sufficient time in which, if it is minded or advised to do so, to make its joinder application.

20 I reserve costs. I have not yet heard the parties on that question. They may want to make submissions on costs at the next directions hearing.

SENIOR MEMBER D. CREMEAN