

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

DOMESTIC BUILDING LIST

VCAT REFERENCE NO. D833/2007

CATCHWORDS

Application for joinder – relevant consideration – definition of ‘builder’ under s3 of *Domestic Building Contracts Act 1995* – only natural person can be a registered building practitioner, s169 of *Building Act 1993* – s29(c) of *Domestic Building Contracts Act 1995*.

APPLICANTS

Body Corporate Strata Plan No: PS 446708Q, Hangani Pty Ltd, Jane E Pfeifer, John Worledge, Shirley Worledge, Peter Rufus, Diane Rufus, Pamela Westaway, Kim Sith, Phally Lach, David Feuerherdt, Joy Feuerherdt, Jason L Robertson, Christopher Abeyewardene, Elaine Abeyewardene, Peter Edge, Vanessa Edge, Mark Richards, Dianne Richards, Frederickus Duimel, Michelle Duimel, Reni Strong, Corinne Strong, Steven H Amiet, Shane Westerman, Donna Westerman, Ian Costin, Susanne Costin, Michael Smith, Anne-Marie Smith, Samantha Ann Grouios, Marin Durkovic, Gregory Harvey, Barbara Harvey, Mohummed Y Shair, Kenneth J Griffiths, Paul Murphy, Elizabeth Murphy, Monica F Antony, Mark Holden, Marilyn Holden, Natalia Chernishova-Simoes, Robert W Hawkes, Dragan Perkovic, Phillip Rivelli, Ryan J Padula, Stefanie Weedon, Mark Weedon, Lou P Szwajlyk, Paul McCabe, Gail McCabe, Frank Van Den Essen, Josaphina Van Den Essen, Yagnesh Mehta, Purvi Mehta, Asuncion Mackenzie, Sean O'Connell, Leanne Roach, Stuart W Bourke, Roselle Ellarinas, David Briant, Janice Briant, Paul Meilak, Maria Meilak, Mustafa Mustafa, Bruce Saunders, Gail Saunders, Stephen Pelly, Leonie Pelly, Michael P Church, Madhur Mishra, Victor Lucas, Lianne Lucas, Metodija Stojcevski, Beti Stojcevski, Rio Suryana, Bruce May, Sharon May, Micheal Stroud, Susan Stroud, Niel Kavanagh, Phen Kavanagh, Robert Woodburn, Dianne Woodburn, Ivan Istuk, Maria Istuk, Andrew Catley, Jeanette Catley, John D Flemming, David Bass, Julie Bennett, Prabhuram Jayabalan, Lupce Acevski, Zivko Acevski, Letka Acevski

RESPONDENT

Arundel Homes Pty Ltd (ACN 074 299 424)

WHERE HELD

Melbourne

BEFORE

Deputy President C Aird

HEARING TYPE

Directions hearing

DATE OF HEARING

30 April 2009

DATE OF ORDER

18 May 2009

CITATION

Body Corporate Strata Plan No PS 446708Q & Ors v Arundel Homes Pty Ltd (Domestic Building) [2009] VCAT 891

ORDER

- 1 The applicants' application for joinder of Mark Galli as the second respondent is dismissed.
- 2 I direct the principal registrar to amend the record to correctly identify the applicants in this proceeding. Currently the applicants on the record do not accord with the schedule of applicants attached to the application, and other than the Body Corporate, appear to be a duplicate of the applicants in D834/2007.
- 3 Costs reserved with liberty to apply.

DEPUTY PRESIDENT C. AIRD

APPEARANCES:

For the Applicants

Mr V. Ruta of Counsel

For the Respondent

Mr A. Ritchie of Counsel

REASONS

- 1 The applicants, the respective owners corporations and the individual unit owners, commenced proceedings in December 2007 relating to alleged defective works at the Watergarden Villas development in Sydenham. There are two relevant plans of subdivision which are identified respectively as Watergarden Villas, and Watergarden Villas South. Each includes 58 residential units, gardens, driveways, guest carparking and gazebos. In addition, Watergarden Villas also includes a swimming pool, tennis court, and barbeque area which the owners of the lots in Watergarden Villas South are entitled to use under a licence agreement.
- 2 The applicants allege that there are defective works, primarily to the common property, for which the respondent builder, Arundel Homes Pty Ltd is responsible. It is alleged that the works were carried out between July 2001 and November 2002. The alleged defects are set out in Schedule 3 to the amended Points of Claim and relate to: the swimming pool area, gazebo structures, tennis court area, pathways leading to gym area, letterboxes, driveways, roofs and downpipes and miscellaneous external fitments including light poles, meter boxes, irrigation system, and the telephone pit. The applicants claim damages of approximately \$1.7m as the cost of rectification works in both proceedings.
- 3 The proceedings were referred to mediation on 22 September 2008 which was adjourned part-heard to 20 October 2009 to enable further investigations. Following two further adjournments the respondent sought a further adjournment of the mediation scheduled for 13 February 2009. At a directions hearing on 12 February 2009, to consider the application for an adjournment, the applicant foreshadowed an application for joinder. The mediation was cancelled and the directions hearing adjourned to consider any application for joinder.
- 4 On 18 March 2009 the applicants lodged an application for directions/orders seeking a number of orders including leave to join Mark Galli as a party to this proceeding. The application is supported by an affidavit by their solicitor, Christopher Grant Speck, in which he deposes to having been advised by the respondent's solicitors that it did not carry out the works set out in 'Section C of the Second Amended Points of Claim'¹ and that these works were carried out by the proposed second respondent. In their letter of 31 October 2008 the respondent's solicitors relevantly advise:

We confirm that:

1. Alto Plant Pty Ltd was the civil works contractor for the development at ...; and
2. There is no formal written contract between Alto Plant Pty Ltd and the developer.

¹ Affidavit Christopher Grant Speck sworn 18 March 2009, para 6 a.

3. We note that the civil works performed by Alto Plant Pty Ltd at the properties were standard civil works, including the preparation of the site for building and construction of roads, kerbs, pathways, retaining walls and underground services.

The application for joinder

- 5 The applicants seek to join Mr Galli as the Second Respondent, as he was the registered building practitioner, although it appears that the works were carried out by Alto Plant Pty Ltd of which Mr Galli is the sole director. They have not applied to join Alto. I understand Mr Galli is also the sole director of the developer: L Galli Group Pty Ltd., and the respondent builder – Arundel Homes Pty Ltd.
- 6 The applicants were represented by Mr Ruta of Counsel, the respondent by Mr Snow, solicitor, and Mr Galli was represented by Mr Howden of Counsel to oppose the application for joinder.
- 7 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). The proposed Points of Claim do not satisfy this test.

The proposed Points of Claim

- 8 In their proposed Points of Claim as against Mr Galli (in both proceedings) the applicants make the following allegations:
 11. The Second Respondent [Mr Galli] –
 - (a) is and was at material times a building practitioner registered number DB-U16152;
 - (b) the sole director of Alto Plant Pty Ltd;
 - (c) caused Alto Plant Pty Ltd to carry out domestic building work at Water Garden Villas at ...; and/or
 - (d) managed or supervised and directed the carrying out of domestic building works at Water Garden Villas ('the Premises') by Alto Plant Pty Ltd for L Galli Group Pty Ltd.

PARTICULARS (omitted)

 12. By reason of section 8 of the Domestic Building Contracts Act 1995 each of the Applicants are entitled to the benefit of the implied warranties concerning the domestic building work carried out at the Premises. (sic)
 - ...
 15. In breach of the said warranties, the Second Respondent failed to:
 - (a) carry out the work in a proper and workmanlike manner;

- (b) supply materials which were good and suitable for the purpose for which they were used;
- (c) carry out the work in compliance with all laws and legal requirements including the Building Act 1993 and the regulations made under that Act;
- (d) carry out the work with reasonable care and skill;
- (e) use material in carrying out the work that would be reasonably fit for the purpose for which it was carried out or would be of such nature and quality that might reasonably be expected to achieve that result.

PARTICULARS

The Applicants refer to-

- (a) the Defects Report set out in Schedule 3 annexed hereto in respect of [both plans of subdivision] prepared by Nazario Vocale Architects to the extent that defects referred to in the said reports relate to each item of building work the responsibility of the Second Respondent; and
- (b) the Jubb Constructions Pty Ltd Report of February 2009 – Section B.

10. In consequence of the breach of the implied warranties the Applicants have suffered loss and damage (sic, this paragraph appears to be misnumbered).

9 Although it is impossible to ascertain from the draft Points of Claim exactly what works it is contended are the responsibility of the proposed second respondent, by reference to the particulars to paragraph 10, it seems these are civil works comprising: sewer pit, concrete kerbing, road speed hump and concrete stencilled driveways. The total of the claim against the proposed second respondent is \$97,346.20. In the related proceeding the claim against the proposed second respondent is \$79,121.42. I was not addressed about whether these can properly be regarded as domestic building works, although this is alluded to, in passing, in the written submissions filed on behalf of Mr Galli. Accordingly, I make no findings about this, although the applicants may wish to consider *Winslow Constructors Pty Ltd v Mr Holden Estates Pty Ltd* [2004] VSCA 159.

10 In support of their application for joinder the applicants rely on the definition of ‘builder’ in s3 of the *Domestic Building Contracts Act 1995*:

builder means a person who, or a partnership which—

- (a) carries out domestic building work; or
- (b) manages or arranges the carrying out of domestic building work; or
- (c) intends to carry out, or to manage or arrange the carrying out of, domestic building work;

- 11 Counsel for the applicants submitted that in the absence of a formal building contract with Alto, that Mr Galli should properly be regarded as the builder, and Alto as his sub-contractor. Although there may not be a written contract this does not mean I can simply assume that Alto was engaged by Mr Galli in his personal capacity, or that he was the builder. There is no evidence before me as to how Alto came to do the works, or at whose request. The suggestion in the letter from the builder's solicitors referred to in paragraph 4 above, is that Alto was engaged by the developer – L Galli Group Pty Ltd.
- 12 Whilst it is true that the definition of 'builder' is very wide, I agree with counsel for Mr Galli, that this necessarily means the builder who is the party to the building contract – in this case, the 'civil works contract'. It does not mean the registered building practitioner, or the managers or supervisors of a building company who it might be said 'manage or arrange the carrying out of building work'. The warranties in s8 of the *DBCA Act* which are implied into every domestic building contract, are warranties given by the 'builder' who enters into the contract. They are not warranties given by every officer or employee of the 'builder' who is involved with the works.
- 13 It is irrelevant that Alto is not a registered builder. Section 169 of the *Building Act 1993* provides that only natural persons can be registered as building practitioners. Section 29(c) of the *DBCA Act* is relevant. It provides:
- A Builder must not enter into a major domestic building contract unless-
- (c) in the case of a builder which is a corporation, at least one of the directors is registered as a builder under that Act [the *Building Act 1993*]
- 14 Further, as Lothian SM said in *Rosenthal Munckton & Shields Pty Ltd v McGregor* [2005] VCAT 1702 at [12-13]:
12. ... section 8 is perfectly clear and where "builder" appears, it clearly means "the builder under the relevant contract". The relevant parts of section 8, using paragraph (a) as an example are:
- The following warranties ... are part of every domestic building contract –
- (a) the builder warrants ...
13. In answer to the question: which builder? The only possible answer is "The builder under the building contract." If Parliament had intended that [the sole director], or anyone in his position should give such a warranty in addition to the builder under the building contract, section 8 would need to be differently expressed to take that into account.

- 15 The observations by Young SM in *Lawley v Terrace Designs Pty Ltd* [2006] VCAT 1363 are apt. After considering and analysing the various authorities he concluded:

Thus, I consider there must be something more than simply organising or even carrying out the work badly. There must be some act or behaviour of the director that is more than merely carrying out of his company duties, even if it results in a breach of contract or a failure by the company to fulfil its obligations. An intention to induce a company to breach its contract by a director does not incur liability; therefore, I do not see how a careless act by a director by itself can attract personal liability, unless the carelessness was so flagrant as to be outside normal bad building practice[188]. (emphasis added).

Similarly, it is difficult to conceive how the registered building practitioner, in this case Mr Galli, could be bound by or be found to have breached the s8 warranties.

- 16 As I am not satisfied the draft Points of Claim reveal an '*open and arguable*' case against Mr Galli, I will dismiss the application and reserve the question of costs.

DEPUTY PRESIDENT C. AIRD