

**VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL
CIVIL DIVISION**

DOMESTIC BUILDING LIST

VCAT Reference: D401/2004

CATCHWORDS

Domestic building – joinder – test to be satisfied.

APPLICANT: Radan Constructions Pty Ltd (ACN 007 070 135)

FIRST RESPONDENT: Palladium Developments Pty Ltd (ACN 094 701 774)

SECOND AND THIRD RESPONDENTS: Ante Desa and Sime Desa (trading as S T Property Consultants)

FOURTH, FIFTH, SIXTH AND SEVENTH RESPONDENTS Mayfair Land Pty Ltd, Urban Dwellings Pty Ltd, Belgravia Estates Pty Ltd, Palladium Developments Pty Ltd (the “ASD Property Group)

EIGHTH RESPONDENT: City of Greater Geelong

TENTH RESPONDENT: John Gurry and Associates Pty Ltd

ELEVENTH RESPONDENT: Stephen Dodd and Partners Pty Ltd

TWELFTH RESPONDENT R2 Building Surveyors Pty Ltd

THIRTEENTH RESPONDENT: P & T Plumbing Pty Ltd

JOINED PARTY: Australian International Insurance Ltd.

JOINED PARTY TO COUNTERCLAIM: Tomo Perkovic

WHERE HELD: Melbourne

BEFORE: Senior Member D. Cremean

HEARING TYPE: Hearing

DATE OF HEARING: 18 November 2005

DATE OF ORDER: 25 November 2005

MEDIUM NEUTRAL CITATION: [2005] VCAT 2451

ORDERS

1. Pursuant to s60 of the *Victorian Civil and Administrative Tribunal Act 1998* I join the following parties:-
 - (a) On the claim: Ante Desa and Sime Desa (trading as S T Property Consultants) as Second and Third Respondents; Mayfair Land Pty Ltd, Urban Dwellings Pty Ltd, Belgravia Estates Pty Ltd and Palladium Developments Pty Ltd as Fourth, Fifth, Sixth and Seventh Respondents; City of Greater Geelong as Eighth Respondent; John Murray and Associates Pty Ltd as Tenth Respondent, Stephen Dodd and Partners Pty Ltd as Eleventh Respondent; R2 Building Surveyors as Twelfth Respondent; and P & T Plumbing Pty Ltd as Thirteenth Respondent.
 - (b) On the counterclaim: Tomo Perkovic of 8 Karina Court, Keilor, 3036.
2. By 2 December 2005 the Applicant must provide the Principal Registrar with written details of the addresses for service of each of the parties referred to in paragraph 1 (a) hereof.
3. By 9 December 2005 the Applicant (after complying with paragraph 2 hereof) must:
 - (a) serve a copy of these directions and orders on each of the parties named in paragraph 1 (a) hereof:
 - (b) file and serve Points of Claim on each of the parties named in paragraph 1 (a) hereof.
4. By 16 December 2005 the Applicant must file a statement of service with respect to the service with respect to the service referred to in paragraphs 3 (a) and 3 (b) hereof.
5. By 9 December 2005 the First Respondent must:
 - (a) serve on Tomo Perkovic a copy of these directions and orders.
 - (b) file and serve Amended Points of Counterclaim on the said Tomo Perkovic.
6. By 16 December 2005 the First Respondent must file a statement of service with respect to the service referred to in paragraphs 5 (a) and 5 (b) hereof.
7. I direct the Principal Registrar to list this matter for further directions before me on a date in January or February 2006 to be notified to all the parties. Allow ½ day. All notices to all parties are to be duly served.

8. Reserve costs.

SENIOR MEMBER D. CREMEAN

APPEARANCES:

For the Applicant:	Mr Ian P Smith, Solicitor
For the First Respondent, Fourth, Fifth, Sixth and Seventh Respondents	Mr P Duggan of Counsel
For the Second and Third Respondents:	In person
For the Eighth Respondent	Ms M Mancuso, Solicitor
For the Tenth Respondent	Mr S Soysa, Solicitor
For the Eleventh Respondent	No appearance
For the Twelfth Respondent	No appearance
For the Thirteenth Respondent	No appearance
For the Joined Party:	Mr R Wilkinson, Solicitor
For the Joined Party to Counterclaim:	Mr Ian P Smith, Solicitor

REASONS

s. 60

1. Application is made by the Applicant to join parties under s60 of the *Victorian Civil and Administrative Tribunal Act 1998*. That provision reads as follows:
 - (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.
2. The Applicant is, in fact, seeking to join the following: Ante Desa and Sime Desa (trading as S T Property Consultants) as Second and Third Respondents; Mayfair Land Pty Ltd, Urban Dwellings Pty Ltd, Belgravia Estates Pty Ltd and Palladium Developments Pty Ltd (the “ASD Property Group”) as Fourth, Fifth, Sixth and Seventh Respondents; City of Greater Geelong as Eighth Respondent; Harvey Painting Pty Ltd as Ninth Respondent; John Gurry and Associates Pty Ltd as Tenth Respondent; Stephen Dodd and Partners Pty Ltd as Eleventh Respondent; R2 Building Surveyors Pty Ltd as Twelfth Respondent; and P & T Plumbing Pty Ltd as Thirteenth Respondent.
3. In support, the Applicant relies on the lengthy affidavit of Tomo Perkovic (sole director of the Applicant) sworn 17 June 2005. The Applicant has provided draft Points of Claim – equally lengthy – setting out alleged causes of action against

the proposed new parties.

4. I have also entertained, at the same time as the Applicant's application, an application made informally by the current Respondent to join Tomo Perkovic as a joined party to the Counterclaim it brings against the Applicant. The current Respondent relies on the affidavit of Tomo Perkovic sworn on behalf of the Applicant. I have been provided with draft Points of Counterclaim identifying Tomo Perkovic as joined party and relying on the provisions of the *Fair Trading Act 1999*.
5. The Applicant's application for joinder is consented to in respect of all parties by the so-called Interested party (Australian International Insurance Ltd). The current Respondent (which was represented by Counsel) opposed joinder. The proposed Second and Third Respondents (appearing for themselves) also opposed their joinder. The proposed Fourth, Fifth, Sixth and Seventh Respondents (all represented by Counsel for the current Respondent) opposed their joinder. The proposed Eighth Respondent neither consented to nor opposed its joinder. This was also the case with the proposed Tenth Respondent. I was informed that the proposed Ninth Respondent is in liquidation but the liquidators neither consented to nor opposed joinder. The proposed Eleventh and Twelfth Respondents did not appear and were not represented. The proposed Thirteenth Respondent did not appear and was not represented but objected to joinder in a solicitor's letter.
6. Joinder of parties under s60 was recently considered by Cummins J in *Zervos v*

Perpetual Nominees Ltd [2005] VSC 380. It appears from his Honour's ruling (at [11]) that it suffices under s60 that a claim is "open and arguable". As he said: "Whether it is sustained in the end is a matter for trial". He indicated that the bar, while higher than that apposite to a mere pleading matter, is set lower than on an application for summary judgement.

7. Bearing these remarks in mind, and having regard to the terms of s60 which are very wide, I am satisfied that I should grant the Applicant's application in respect of all proposed new parties except for the proposed Ninth Respondent. I rely upon the affidavit of Tomo Perkovic and also upon the proposed Points of Claim.

8. It seems to me that as regards all such proposed new Respondents, except the Ninth, the case is readily "open and arguable" to the requisite degree. It is not the duty of the Tribunal, on this occasion, to find that the Applicant will necessarily succeed against all or any of the same. I note, too, the arguments of Counsel for the current Respondent and the proposed Fourth, Fifth, Sixth and Seventh Respondents, in opposing the joinder, are not without force. I disagree though that under s60 I can take into account, in the exercise of my discretion, the prejudice to the current Respondent, in terms of delay, should I allow joinder. To a degree the joinder is occasioned by the nature of the sizeable Counterclaim which has been brought by the current Respondent itself. Therefore, it ought not to be heard to complain. It is true that joinder will considerably increase the dimensions of the litigation but that is unavoidable it seems to me in the circumstances. Nor do I consider that under s60 I can take into account, to rule

against joinder, the prospect that there may be a security for costs application brought against the Applicant. That seems to me to be an irrelevant consideration.

9. There was nothing said to me by the proposed Second and Third Respondents which persuaded me they should not be joined under s60 having regard to the test which must be satisfied. I make no findings about whether they have breached the *Bankruptcy Act* 1966.
10. Except for the proposed Ninth Respondent, the other proposed Respondents said nothing about the matter. As regards the proposed Thirteenth Respondent I have noted the terms of the solicitor's letter dated 16 November 2005 but still consider that it should be joined.
11. I shall order that all such proposed additional Respondents be joined under s60. I note the current Respondent hitherto is proposed to be joined as Seventh Respondent in a different capacity. I do not order joinder of the proposed Ninth Respondent. That party I am informed is in liquidation and no leave to proceed has been obtained. Such leave, in my view, is necessary under s471B of the *Corporations Act* 2001. See remarks of Nettle J in *Moorabool Shire Council v J & B Taitapanui* [2002] VSC 418 at [15] "Authority makes plain that the reference to 'court' in s471B is not to be construed in a strict sense, but, in a fashion that is broad enough to cover a proceeding in a Tribunal such as the Victorian Civil and Administrative Tribunal".

12. Turning to the application by the current Respondent hitherto to join Tomo Perkovic I am satisfied it is proper to join him having regard to s60 and to the provisions of the *Fair Trading Act* 1999. I rely also upon the affidavit he himself has sworn which indicates, as I have noted, he is the sole director of the Applicant and had, himself, direct involvement in factual matters in dispute. Further, I note that Counsel for the Applicant conceded the arguable case requirement was met in his case.
13. It follows I shall order also that Tomo Perkovic be joined as a joined party on the Counterclaim.
14. I direct the Applicant to serve Points of Claim against all joined Respondents (excluding the proposed Ninth) and to do so by 1 December 2005. The current Respondent shall henceforth be known as the First Respondent.
15. I direct the Respondent on the Counterclaim to serve Points of Claim on the joined party.
16. I refer this proceeding to a directions hearing after 8 December 2005 on a date to be notified.

SENIOR MEMBER D. CREMEAN