

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

DOMESTIC BUILDING LIST

VCAT REFERENCE NO. D721/2005

CATCHWORDS

Victorian Civil and Administrative Tribunal Act 1998 – s.60 – joinder of parties – proposed party seeking no order but wishing to participate in proceedings – relevant considerations for joinder – joinder refused

FIRST APPLICANT	Roscon Developments Pty Ltd (ACN 098 916 002)
SECOND APPLICANT	Roscon Constructions Pty Ltd (ACN 007 268 804)
RESPONDENT	Buckerfield Pty Ltd
WHERE HELD	Melbourne
BEFORE	Senior Member R. Walker
HEARING TYPE	Application for Joinder of Party – s.60
DATE OF HEARING	9 November 2006
DATE OF ORDER	14 November 2006
CITATION	Roscon Developments v Buckerfield (Domestic Building) [2006] VCAT 2296

ORDER

1. The application is dismissed.
2. Costs reserved.

SENIOR MEMBER R. WALKER

APPEARANCES:

For the Applicants	Mr C. Juebner of Counsel
For the Respondent	Mr J. Gleeson of Counsel
For the HMT Capital Investments Pty Ltd	Mr E. Reigler of Counsel

REASONS

Background

- 1 By their Points of Claim in this proceeding the Applicants (“the Applicants”) seek to recover damages from the Respondent Architect (“the Architect”) for professional negligence in relation to a development carried out by them in Prahran. The First Applicant (“Roscon”) was the developer on behalf of a syndicate of investors. The Second Applicant (“Roscon Developments”) was the builder.
- 2 One of the parties to the joint venture and one of the investors was HMT Capital Investments Pty Ltd (“HMT”).
- 3 During the course of construction a mistake was made involving the dimensions of the buildings and an adjoining footpath. This caused substantial delay and additional work and the resulting loss is said to have been in excess of \$3,000,000.00 (“the Loss”). It is the responsibility for the Loss that is the subject of these proceedings between the Applicants and the Architect..
- 4 HMT now applies to be joined as a party to these proceedings. It acknowledges that it has no present cause of action that it wants to pursue as a consequence of that joinder but it nonetheless wants to participate in the conduct of the proceeding.
- 5 I am not prepared to join it as a party for the reasons that follow.

The agreement

- 6 After the Loss was suffered and following a dispute between HMT and Roscon, a written agreement was entered into between them and one Paul Cummaudo (“Cummaudo”), a director of Roscon, the substantial provisions of which were as follow:
 - a Roscon would contract to sell to HMT one of the residential units in the development for an agreed price which was agreed to have been paid;
 - b Roscon would pay certain interest to HMT;
 - c HMT would transfer to Cummaudo all of its interest in the joint venture;
 - d If Roscon decided to sue the Architect for the Loss it would do so at its own risk and indemnify HMT against all risks associated with any such proceedings and pay to HMT an agreed proportion of the net proceeds of the litigation;
 - e If Roscon failed to commence the proceedings against the Architect by a particular date then HMT would be entitled to take such proceedings in its own name and at its own expense and the proceeds of any such proceedings would be shared in agreed proportions.

- 7 Following this agreement Roscon commenced these proceedings to sue the Architect for the Loss but it has failed to transfer the Unit to HMT and has failed to pay the last three instalments of interest due.

Reasons for joinder

- 8 HMT wants to be joined as a party to this proceeding, not for the purpose of seeking any relief against any existing party but rather, to ensure that the proceeding to recover the Loss is prosecuted with due diligence and that any award made in favour of Roscon is maximised and not diverted by some settlement agreement to someone else and in order to prevent Roscon from conducting the proceeding in such a way as to divert any of the proceeds that might otherwise flow to it to the Roscon Constructions instead.
- 9 Applications for joinder of parties are governed by s.60 of the *Victorian Civil and Administrative Tribunal Act 1998*, which is in the following terms:

- (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.

HMT's submissions

- 10 In support of his application, Counsel for HMT, Mr Riegler, submitted that it was not necessary for a party seeking to be joined if seeking any claim or relief in the proceeding. That is correct. There is no such requirement in the section.
- 11 The case really falls within s60(1)(b) that is, it is said that HMT's interests are affected by the outcome of the proceeding. In a practical sense, since it is entitled to an agreed proportion of the net proceeds of any award in favour of Roscon, that is certainly so. Mr Riegler referred to the Tribunal's decision in *Director of Consumer Affairs Victoria v Australian Finance Directs Limited* [2004] VCAT 645 where the Tribunal said of section 60 (at paragraph 22 of the Decision):

“It is clear from decisions of VCAT under this section that the power given to the Tribunal is very broad. It is expressly more broad than the joinder powers of the Supreme Court. In the context of s60(1)(b) I accept that the word “interests” has a very broad interpretation covering pecuniary, proprietary, reputation and other personal interests – indeed any interest in a proceeding which a person has beyond that of an ordinary member of the public”.

- 12 It is not sufficient however that the proposed party has such an interest. The Tribunal has a discretion as to whether a joinder ought to be made. Accepting for the moment, without so deciding, that HMT has an interest sufficient to invoke the power in s60(1)(b), should the joinder be made as a matter of discretion? It was on this basis that the joinder was resisted by Mr Juebner, Counsel for the Applicants, and Mr Gleeson, Counsel for the Architect.
- 13 Mr Riegler argued that the following matters indicate that the discretion to allow the joinder should be exercised. First, he said that it was in HMT's interest that the claim be prosecuted against the Architect and not diminished by an award in favour of the Roscon Constructions. He said that HMT should be entitled to protect its interest by making submissions to the effect that the party entitled to recover is Roscon rather than Roscon Constructions. However when one looks at the Amended Points of Claim filed on 21 April 2006 it is said in them that the duties owed by the Architect were owed to Roscon. A further duty is pleaded to Roscon Constructions but the loss and damage said to have been suffered in the pleading by Roscon Constructions was an increase in the cost of labour and materials of a little over \$1,000,000.00 and that is only claimed "...to the extent that the Tribunal finds that the additional construction cost was not loss and damaged suffered by Roscon Developments". It is clear from this document that the primary claim is by Roscon and not by Roscon Constructions. As presently pleaded this is not a claim where, if the case proceeded to judgment, Roscon could simply divert damages that it would otherwise receive to Roscon Constructions.
- 14 Mr Riegler said that HMT ought to be entitled to protect its interest in circumstances where the proceeding is settled so as to avoid an unbalanced settlement. It would certainly be open to Roscon, Roscon Constructions and the Architect to agree upon a settlement where a large sum was paid to Roscon Constructions and nothing at all to Roscon but this could happen even if HMT were a party. The cause of action that would be compromised in such a settlement is one that vests in Roscon, not HMT. HMT would not need to be a party to any Terms of Settlement because it would not be seeking any relief against the Architect. Indeed, it might not know of any settlement discussions, even if it were a party. All it could do would be to take proceedings against Roscon for breach of the earlier agreement.
- 15 Mr Riegler said that were it a party, it could not complain at any later stage that the proceeding was not properly litigated. Whether and to what extent its presence at the bar table would require Roscon to litigate the claim properly is unclear but this does not seem to me to be a proper reason for joining an additional party.
- 16 Finally, Mr Riegler said that there was no other way that HMT could protect its interests other than by becoming a party to the proceeding. It seems to me that the appropriate way to protect its interest is to threaten

legal proceedings for any threatened breach of the agreement and take them if the agreement were breached.

Architect's submissions

- 17 Mr Gleeson submitted, and I accept, that the consequences of joining a party are serious. By s102 of the Act, any party has power to fully participate in the proceedings and must be given the opportunity to examine and cross examine witnesses. He said that the joinder of an additional unnecessary party would simply add to the cost by exposing witnesses to additional cross examination without any corresponding benefit. Mr Gleeson submitted that it was apparent from the affidavit material that there was a bitter dispute between Roscon and HMT that his client did not want to be involved in. He said that the areas of disputation between them could cause a great deal of additional expense and delay pursuing matters that were quite extraneous to the claim Roscon has brought against the architect. I agree with these submissions.

Applicants' submissions

- 18 Mr Juebner pointed out that, if Roscon should elect to take proceedings against the Architect itself, there was no power under the agreement for HMT to interfere in the conduct of the proceedings. He also pointed out that, under the terms of the agreement, Roscon was to indemnify HMT from any costs associated with the proceedings. He said that I could not remake the agreement with the consequence that, if HMT were joined, Roscon would have to pay its costs. Mr Riegler said that I could make the joinder subject to the condition that his client pay its own costs. It is unnecessary to decide whether it would be appropriate to impose such a condition because there are too many reasons in my view why the joinder should not be allowed.

Conclusion

- 19 Despite Mr Riegler's able submissions, I am not persuaded that it is appropriate to join HMT as a party to this proceeding. It was a term of the agreement that, if Roscon wished to take these proceedings, it would have the right to do so. There was no provision that HMT would have the right to interfere. It is seeking to be made a party solely for the purpose of ensuring that it receives its appropriate share of the proceeds. I cannot see how joining them as a party is even going to achieve that object but in any case it does not appear to me that is an appropriate reason for a joinder. The application will therefore be refused. Costs are reserved.

Rohan Walker
Senior Member