**VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL**

**CIVIL DIVISION**

VCAT REFERENCE NO. D618/2001

**DOMESTIC BUILDING LIST**

## CATCHWORDS

*Victorian Civil and Administrative Tribunal Act* 1998 – S.60 – *Domestic Building Contracts Act* 1995 – proposed joinder of expert who has delivered determination allegedly negligently or in breach of terms of contract of engagement – *Fair Trading Act* 1999.

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| **APPLICANT:** | Age Old Builders Pty Ltd |
| **RESPONDENT:** | Swintons Pty Ltd |
| **JOINED PARTY:** | Edgard Pirrotta & Associates Pty Ltd |
| **PROPOSED SECOND JOINED PARTY:** | John Coghlan |
| **WHERE HELD:** | Melbourne |
| **BEFORE:** | His Honour Judge Bowman |
| **DATE OF HEARING:** | 4 April 2006 |
| **DATE OF REASONS:** | 19 May 2006 |

[2006] VCAT 871

## ORDERS

1. Pursuant to s.60 of the *Victorian Civil and Administrative Tribunal Act* 1998, and upon the application of the Respondent, John Coghlan is joined as the Second Joined Party to the proceedings.
2. Question of costs reserved.
3. Liberty to apply.

**Judge Bowman**
**Vice President**

**APPEARANCES:**

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| For Applicant: | Mr Shaw of Counsel, instructed by Mason Sier Turnbull |
| Respondent: | Mr Oliver of Counsel, instructed by Hoeys Lawyers |
| Joined Party: | Mr Attard, Solicitor, of Monahan & Rowell |
| Proposed Joined Party: | Mr Schwarz, Solicitor, of LMS Lawyers |

## REASONS FOR DECISION

### GENERAL BACKGROUND

1 This matter comes before me by way of an application by the Respondent, Swintons Pty Ltd ("Swintons") against which a claim is being made by the Applicant, Age Old Builders Pty Ltd ("Age Old"). Edgard Pirrotta & Associates Pty Ltd ("Pirrotta") has already been added to the action as a joined party. Pursuant to s.60 of the *Victorian Civil and Administrative Tribunal* Act 1998 ("the *VCAT Act*"), Swintons now seek to add, as a second joined party, John Coghlan ("Coghlan").

2 On this occasion, Mr Shaw of counsel appeared on behalf of Age Old. Mr Oliver of counsel appeared on behalf of Swintons. Mr Attard appeared as solicitor for Pirrotta. Mr Schwarz appeared as solicitor for Coghlan.

3 The attitude of the parties to the proposed joinder of Coghlan is as follows. Swintons seeks the joinder. Coghlan opposes it. Age Old opposes it. Pirrotta had no view in relation to it. I should add that, whilst Pirrotta has no position in relation to the proposed joinder, Mr Attard attended as a matter of courtesy and to be of assistance if required, which was much appreciated.

### FACTUAL BACKGROUND

4 The following factual background is set out solely for the purposes of this joinder application. It does not represent any factual findings relating to the merits of the proceeding, but is included so as to place this ruling in context, and hopefully make it more easily understood.

5 The dispute in this matter concerns a major domestic building contract ("the building contract") as defined in the *Domestic Building Contracts Act* 1995 ("the *DBCA*"). It concerns the construction of four townhouses in Acland Street, South Yarra. Age Old is the builder. Swintons can be described as the owner. Pirrotta is the Architect. Coghlan is an expert who was engaged contractually by Age Old and Swintons ("the engagement contract") to determine certain matters in dispute between them under the building contract. The engagement contract is substantially in writing. This occurred in approximately September, 2000. Coghlan was to determine such matters as whether Age Old was entitled to any further extensions of time under the contract; whether Age Old was entitled to extension of time, or delay, costs; and whether Swintons was entitled to liquidated damages. On or about 15th April 2002, Coghlan delivered his expert determination ("the determination"), which, without going into the particulars, allowed Age Old extensions of time; allowed Age Old extension of time costs; and allowed Swintons some liquidated damages. The extension of time costs allowed to Age Old exceeded by a very considerable margin the amount of liquidated damages allowed to Swintons.

6 Again without going into the allegations made against Coghlan by Swintons in their proposed "Points of Claim Against Second Joined Party", it is alleged that Coghlan, in delivering the determination, failed to have regard to a special

condition in the building contract; that he failed to have regard to s.32(1)(a) of the *DBCA*; that he allowed extensions of time when such claims had already been allowed by the architect; and that he allowed extension of time costs without applying, or properly applying, certain clauses contained in the building contract.

7 This represents the briefest of précis of a matter with a long and tortuous history. I shall now move on to summaries of the cases as advanced on behalf of the parties. As the application for joinder is made by Swintons, I shall deal firstly with the case advanced by them.

## THE CASE FOR SWINTONS

8 The submissions made by Mr Oliver on behalf of Swintons could be summarised as follows.

9 Swintons' application is supported by affidavits of John Francis Hoey, the solicitor for Swintons, sworn 15th March 2006 and 26th March 2006. The affidavit of 15th March 2006, and the exhibits thereto, is the primary affidavit upon which Swintons rely.

10 The effect of the building contract is that the builder is not entitled to delay costs and is only entitled to damages for delay if the delays were caused by an act, default or omission on the part of Swintons, or the architect, or a separate contractor, employee or agent of Swintons. By the time Coghlan gave the determination, proceedings had already been issued out of this Tribunal by Age Old. Swintons claimed it was entitled to liquidated damages, a claim which was denied by Age Old on the basis that the matter had been sent off for determination by Coghlan. Shortly after that, Coghlan handed down the determination. In the determination, Coghlan allowed an extension of time, allowed delay costs of almost $151,000.00, and allowed the Swintons liquidated damages of just over $25,000.00. The satisfaction of the architect in relation to delay is an essential part of the clauses of the contract concerning extension of time costs.

11 In the determination, Coghlan found that, in respect of some of Age Old's claims that had not been responded to by Pirrotta, the conditions of the building contract had been complied with by Age Old so that Age Old was entitled to an extension of time of 43 days. In essence, Coghlan applied a deeming provision in the building contract. If Pirrotta did not respond in time to Age Old's claim for an extension of time, the extension was deemed to have been granted. By so doing, Coghlan ignored special condition 9.2 of the building contract which is to the effect that, despite anything else in the contract, Age Old was required to satisfy Pirrotta that it had been actually delayed. Further, delay costs in respect of some 62 days were allowed by Coghlan. This included 30 days for which Pirrotta had already granted Age Old an extension of time.

12 Age Old now seeks to enforce the determination before this Tribunal. Swintons resist that on the basis that Coghlan did not apply the terms of the building contract when making the determination. Swintons' primary position is that Coghlan failed to assess the extension of time claims in accordance with special

condition 9.2 which in turn inserts clause 9.06A. Age Old was not entitled to an extension of time unless it was actually delayed. Coghlan wrongly awarded delay costs to Age Old in circumstances where the building contract did not provide for them.

13 Age Old is asserting that, even if Swintons' position is correct, the alleged errors do not impugn the determination so that the Tribunal, which has previously ruled that it has the power to order compliance with the determination need not apply it. There is a dispute, and the law is developing in this area, as to whether and to what extent an expert determination can be attacked by or before a court. It is submitted by Coghlan and Age Old that a determination cannot be so impugned. If it were found that the determination could not be so attacked and that Coghlan had been negligent in not having regard to the special condition, Swintons would then wish to commence proceedings against him for damages suffered as a result of that negligence or of breach of contract. In other words, if the determination cannot legally be impugned and is applied by the Tribunal to Swintons' disadvantage, Swintons would then claim that it is entitled to recover amounts so lost from Coghlan, such losses being due to his negligence or to breach of the engagement contract.

14 Reference is made to the Proposed Points of Claim against Coghlan and to items of correspondence, including a copy of the "Rules For The Expert Determination of Commercial Disputes" ("the Rules"), which were forwarded by Coghlan to Age Old and Swintons. The Rules require, inter alia, that the expert (Coghlan) must make the determination according to law, and must conduct the process in accordance with the requirements of procedural fairness. It is not in dispute that the Rules governed the process. Coghlan went ahead and handed down the determination accordingly. The Rules make it clear that Coghlan was to make the determination on the basis of information received from the parties and based upon his own expertise. Apart from anything contained in or to be implied from the engagement contract, Coghlan owed a duty of care to Swintons to conduct the determination process with reasonable care and skill. In breach of the engagement contract and of his duty of care, Coghlan failed to have regard to the relevant provisions of the building contract. Coghlan also failed to make the determination according to law.

15 In its Further Amended Points of Claim, Age Old is seeking a declaration that the determination is final and binding and that Swintons pay to Age Old the amount determined by Coghlan as being so payable. If the Tribunal orders this, Swintons will have suffered loss and damage as a result of the breaches of the engagement contract and of the duty of care owed by Coghlan to it.

16 On the basis of the above and of what is set out in the "pleadings", Swintons clearly has an arguable case against Coghlan so as to warrant his joinder.

17 Pursuant to s.60 of the *VCAT Act*, it is appropriate that Coghlan be joined, as he ought to be bound by, or have the benefit of, any order which the Tribunal might make on the question of the enforceability of the determination. In addition, joinder would remove the risk of possible inconsistent findings. It is also

desirable to avoid a multiplicity of proceedings. The Tribunal's power to order joinder is very wide. There has been no delay by Swintons in bringing the joinder application. The matter has been to the Court of Appeal and only returned to this Tribunal in the second half of 2005. The final form of the Points of Claim upon which Age Old will seek to rely is still not clear. No hearing date has been set.

18 In relation to any possible immunity from suit or indemnity which might apply to an expert such as Coghlan, in the present case Coghlan enjoys no such immunity and there has been no agreement to such effect. In summary, he should be joined as a party.

## THE CASE ON BEHALF OF COGHLAN

19 The submissions advanced by Mr Schwarz on behalf of Coghlan could be summarised as follows.

20 In relation to any indemnity, Coghlan will be arguing that such an indemnity does extend to him. In the full copy of the Rules, provision is made for an indemnity in relation to an expert determination. However, it would seem in the present case that the copy of the Rules forwarded to Age Old and Swintons by Coghlan accidentally did not include the last page upon which such indemnity is contained.

21 The application to join Coghlan is opposed on a number of grounds. Firstly, whether or not Coghlan did his job properly is a totally different issue from the issues arising from the building contract or from building activity. Section 54 of the *DBCA* defines a "domestic building dispute" as a dispute or claim between certain parties "in relation to a domestic building contract or the carrying out of domestic building works". The claim which Swintons wishes to pursue against Coghlan does not relate to these matters, but is concerned with an expert determination made pursuant to a completely separate contract. Because the issues which Swintons seek to agitate arise out of that separate contract – the engagement contract – their proposed claim would not be justiciable in this Tribunal. Coghlan was not involved in the buildings works or activities, and was simply appointed by the parties as a form of alternative dispute resolution.

22 Coghlan does not fall into the classes or categories of persons described in s.54 of the *DBCA*. Whilst s.54 is not exhaustive in relation to the classes of person that can be joined, it is indicative of the type of person that is generally involved in such disputes. Section 54 is temporal in nature, relating to building works and activities. It was not envisaged that it should extend to a claim made later relating to the conduct of the parties thereafter. The proper forum for any claim of this nature against Coghlan is not this Tribunal, but is a court. Whilst it has been held (by Deputy President Aird on 3 November 2005) that the Tribunal has power to order compliance with the determination, it is another matter to hear proceedings relating to the performance of the expert. In the earlier proceedings before Deputy President Aird, it was Swintons that submitted that the Tribunal does not have jurisdiction to consider a dispute arising under the expert determination agreement as that is not a domestic building contract.

Furthermore, it has pleaded this in its Second Further Amended Points of Defence and Counterclaim, dated 8th March 2006.

23 Further, during these submissions, two basic questions have been raised. Can the determination be attacked? Can Coghlan be sued? In relation to the first question, reliance is placed upon the submissions previously advanced by Age Old on 8th September 2005, and the authorities referred to therein. These support the proposition that the determination cannot be vitiated. There is a distinction between a situation where an expert is exercising some discretion as opposed to performing a mechanical task. In the former situation, there can be no challenge. In the latter, it is easier to attack the determination. Coghlan was not simply to perform a mechanical function. He was to exercise a discretion. For that reason, an attack on the determination will not be sustainable. This further demonstrates that any alleged negligence on the part of Coghlan is a completely separate matter, distinct from the building contract. Whilst it is conceded solely for the purposes of this exercise that a claim could be brought elsewhere against Coghlan, it is a "very tall order".

24 Thus, the primary submission made on behalf of Coghlan is that the issue of challenging an expert determination is not justiciable in this Tribunal.

25 Turning to the exercise of any discretion in relation to joinder, the criteria of s.60(1) of the *VCAT Act* have not been satisfied. This is not a situation similar to that of the proposed joinder of, for example, an architect or a sub-contractor who has a financial interest in the building works. Coghlan has no financial interest in the dispute between the parties. He does not need to be bound by an order of the Tribunal or have the benefit of same. His interests are not affected by the proceedings. He has made a final and binding determination. It is undesirable to include a completely separate claim against Coghlan in a dispute between parties concerning a domestic building contract and domestic building works. In this unusual situation, the criteria have not been satisfied.

26 The next submission is that there is a lack of proper or adequate material to support the joinder application. It is a serious matter to join a party to a proceeding and the Tribunal must be satisfied that it is appropriate so to do. This was discussed by Senior Member Walker in *Snowden Developments Pty Ltd v Hogan* [2005] VCAT 2910. To join a party to a substantial building dispute may well cause that party to incur significant costs and will also prolong the proceeding. The claim against Coghlan is so weak as to be untenable. There has to be material, in the form of evidence and not just pleadings, which can satisfy the Tribunal that there is an arguable case against Coghlan.

27 The affidavit of Mr Hoey does not disclose any negligence on the part of Coghlan. There is no evidence that Coghlan failed to take into account the relevant clauses in the building contract. In fact, the clauses are referred to in the determination. Even if one of the clauses is not specifically referred to, it is embraced in the determination. In short, there is no proper or adequate evidence to support the making of the joinder application.

28 Related to this submission is the submission that there is no viable cause of action. The proposed claim is misconceived or doomed to failure viz a viz the parties. The determination cannot be attacked and is binding upon the parties. In its Second Further Amended Points of Defence, Swintons alleges that Coghlan was appointed as an arbitrator. If this be accepted, s.51 of the *Commercial Arbitration Act* 1984 provides an arbitrator with complete immunity.

29 Next, there is no, or no sufficient, commonality of fact or law to warrant joining Coghlan. For example, Age Old claims the cost of some mechanical works. The binding nature of the determination made by Coghlan involves completely different issues of fact and law than those arising from allegations of negligence. In addition, it would be unfair to involve Coghlan in a lengthy proceeding which may run for many weeks. A safer course would be to determine the principal dispute between the parties and then, if a party wished to take proceedings against Coghlan based upon professional negligence, this could be done in the courts.

30 In relation to the delay in making this joinder application, Swintons refers to the length of time that the matter was effectively "on hold" whilst arguments were advanced and a decision awaited in the Supreme Court. That approach overlooks the two occasions on which Swintons had the clear opportunity to join Coghlan should it have so desired. The first of these was in April, 2002 when the determination was received. If there was unhappiness concerning this, an application should then have been made to join him to the proceeding. Four years have now elapsed, during which time no complaint was made about Coghlan's performance of his duties. That is basically a "recent invention". The other occasion when such an application could and should have been made was in November 2005 when the application by Swintons to join Pirrotta was made. There is no adequate explanation in the material as to why no application was made for joinder on these occasions. Given these delays, the discretion of the Tribunal pursuant to s.60 should be exercised against joinder.

31 Finally, if a claim against Coghlan is justiciable in the Tribunal, the Tribunal's discretion should be exercised against joinder because an application of this kind, joining an expert as a party to a dispute concerning which he has made an expert determination, is not to be encouraged. Such a claim is a totally separate matter. Coghlan should not be joined to the present proceeding.

## THE CASE FOR AGE OLD

32 The submission advanced by Mr Shaw on behalf of Age Old could be summarised as follows.

33 Firstly, it is clear from the terms of the engagement contract that the determination by Coghlan was to be final and binding – see the correspondence previously referred to. Secondly, it is agreed in the present case that the final page of the Rules, which page contains the immunity provisions, is missing. For understandable reasons, that immunity would normally prevail, but, in the present case, for some unexplained reason, the page which contains the immunity provisions was not sent to the parties. What cannot be disputed is that the parties

agreed that the determination would be final and binding. This is in the Rules and in the correspondence. Therefore, the determination cannot be challenged.

34 The claim against Coghlan, based as it is in contract and particularly in negligence, goes to the specifics as to how Coghlan would have arrived at his decision. What Swintons is, in reality, trying to do is to impugn Coghlan's decision. This is illustrated by paragraph 9 of the Proposed Points of Claim, which is really alleging what Coghlan should have done in relation to the building contract.

35 As contained in the previous submissions made on behalf of Age Old on 8th September 2005, the Tribunal should not or cannot intervene in relation to the determination if the determination has been made honestly and within the power conferred on the expert by the engagement contract. There is no suggestion that Coghlan has not acted honestly. Nor is there any suggestion that he acted outside the power conferred upon him by the engagement contract. What is being alleged by Swintons is that Coghlan simply "got it wrong". However, a mistake does not vitiate the engagement contract unless the determination is made other than in accordance with that contract. The type of mistake referred to in the authorities which support this proposition is if, for example, the expert went to the wrong address. That would then vitiate the determination. The matters set out in the Proposed Points of Claim against Coghlan, and particularly in paragraph 9 thereof, whilst purportedly being based upon breach of contract or breach of duty of care, are really an attempt to challenge or investigate Coghlan's thought processes. This type of allegation could be used to try and overturn or avoid any expert determination. Public policy is strongly against such an approach. The authorities establish that it is the obligation of the courts to enforce the agreement between the parties, including those terms which provide that the determination will be final and binding. The parties agree to accept the outcome providing it is made honestly and within power. The whole point of an expert determination, made honestly and within the powers conferred by the agreement engaging the expert, is that it is final and binding, and the proposed action by Swintons against Coghlan is simply a means of trying to get around this.

36 The affidavit of Mr Hoey is no more than submissions and does not contain evidence. It takes the matter no further. There is no appropriate evidence upon which to base a joinder application.

37 In relation to the issue of delay, the present joinder application could have been brought as early as July, 2002. At that time Further Amended Points of Defence were filed and served by Swintons. Paragraph 23.1 and following of that document address the expert determination agreement. Allegations are made against Coghlan, including an assertion that he failed to take into account relevant special conditions. Those allegations accord closely with the Proposed Points of Claim now being advanced against Coghlan some four years later. In July 2002, Swintons also filed a Statement of Facts and Contentions. Paragraphs 98 and following of that document again assert that Coghlan failed to take into account the relevant provisions of the building contract, and misapplied the

provisions of the building contract. It is then being basically alleged that Coghlan "got it wrong". Thus, there were allegations in the Statement of Facts and Contentions that were also embodied in the "pleadings". Whatever may have subsequently occurred in relation to appeals and the like, this was the clear opportunity to apply for joinder of Coghlan. At that time, there was no suggestion of any appeal. Coghlan had already handed down the determination. That was when an application for joinder should have been made.

38 At the every latest, such application should have been made on 6th December, 2005. That was when Pirrotta was joined. Admittedly, the delay involved since then is much shorter, and this submission puts the case at its absolute highest. However, the bottom line is that it had been clear in the mind of Swintons' legal advisors for some time that there may be a case against Coghlan, and in July, 2002 they had effectively pleaded it without making any joinder application. It puts Coghlan in a very unfair position in relation to recalling what had occurred and the like.

39 In relation to the impact of any joinder of Coghlan upon Age Old, it would cause further delay. The hearing of matter will go longer. Efforts by Swintons to dismantle the determination would lengthen the ultimate trial to a considerable extent.

40 It is conceded that, if the determination is found at trial to be final and binding, something in the order of 90 percent of the substance of Age Old's claim will no longer require supporting evidence. The duration of the ultimate hearing would be considerably reduced, as would the extent of the matters in dispute. If the determination is upheld, the case becomes relatively simple. If the determination is not upheld, then there will be the need for some detailed examination of extensions of time and of the building contract.

41 Age Old believe that they are entitled to some money. Coghlan expressed the same view in the determination. The delay which would result from the joinder of Coghlan means that Age Old is out of its money for a longer period. If it was Swintons' intention to join Coghlan, this should have been done some four years ago.

## OBSERVATIONS ON BEHALF OF PIRROTTA

42 As indicated above, Pirrotta adopts no particular attitude in relation to the proposed joinder. However, Mr Attard, on his behalf, did have some observations which he wished to make. They may be summarised as follows.

43 The absence from the Rules as forwarded to the parties of the provisions relating to immunity or release does have the potential to expose Coghlan to liability in this proceeding. The Tribunal may wish to deal with this as a preliminary question, as it is a discrete issue. Secondly, the claim against Coghlan is a contingent one, but nevertheless the Tribunal has previously indicated, in relation to Pirrotta, that its involvement at all stages of the proceeding would be helpful. Thirdly, in relation to delay and the length of the proceedings, Swintons might

consider issuing a separate application against Coghlan out of this Tribunal rather than having him joined to the existing proceeding.

## THE REPLY ON BEHALF OF SWINTONS

44 The reply of Mr Oliver to the submissions made against his application could be summarised as follows.

45 Nowhere in s.60 of the *VCAT Act* does it say that there must be a justiciable claim existing between the party seeking the joinder and the party sought to be joined. It is not necessary for Swintons to establish that a domestic building dispute exists between Swintons and Coghlan. In any event, a possible claim by Swintons against Coghlan would be justiciable pursuant to the *Fair Trading Act* 1999 ("the *FTA*"). It is not necessary that the jurisdiction of the Tribunal be determined solely in the context of the *DBCA*. Whilst the relief sought by Swintons against Coghlan might be pursuant to a different Act, nevertheless Coghlan should be joined because of the close connection between the action of Age Old against Swintons and that of Swintons against Coghlan. If he were not so joined, then Swintons would face the risk of there being inconsistent findings of fact and law in the two possible actions.

46 Further, the proposed claim against Coghlan is justiciable upon the following grounds. Firstly, it is a domestic building dispute. It is a dispute between a building owner, namely Swintons, and a building practitioner, namely Coghlan. A "building practitioner" is defined in s.3 of the *Building Act* 1993 as being, inter alia, an engineer engaged in the building industry. Coghlan's letterhead reveals that he is an engineer. It is therefore at least arguable that the dispute between Swintons and Coghlan is a domestic building dispute, and therefore the Tribunal has jurisdiction pursuant to the *DBCA*.

47 Secondly, on the basis of the decision in *Greenhill Homes Pty Ltd v Domestic Building Tribunal & Ors* [1998] VSC 34, even if Coghlan is not a building practitioner, nevertheless the claim can be determined. In that case, an action against directors of a company was justiciable because there was a sufficient nexus between the claim and the contract. The legislation should be interpreted liberally in order to ensure that all domestic building disputes and associated disputes are before the Tribunal. In the present situation there is a sufficient nexus between the proposed claim against Coghlan and the principal claim to give to the Tribunal jurisdiction to hear the proposed claim. It is desirable that the related disputes be heard in the one place at the one time.

48 Thirdly, even if the above be incorrect, the proposed claim against Coghlan is justiciable under the *FTA*, it being a consumer and trader dispute as defined in s.107 of that Act. The contract with Coghlan falls under the provisions of the Act. It is alleged that the services provided pursuant to the contract were not so provided with due care and skill.

49 In relation to any possible defence of immunity, the absence of any immunity is clearly arguable.

50 Swintons' proposed claim against Coghlan is really nothing more than a standard third party claim. If, in the principal action, Age Old is right and Swintons is wrong, Swintons then has a claim against Coghlan.

51 In relation to any allegations of delay in joining Coghlan, within a very short time of Coghlan delivering the determination, the point which took the matter on appeal to the Supreme Court arose. It cannot be suggested that Swintons should have joined Coghlan during the years in which the appeal process was underway. At that stage it was not even clear whether the engagement contract was valid in law. There is no evidence of any prejudice suffered by reason of any delay. There is certainly no prejudice that could possibly outweigh the desirability of having all parties present before the Tribunal.

52 Suggestions that the case could be a comparatively short one which would be lengthened by the joinder of Coghlan are without foundation. As demonstrated in the Further Amended Points of Claim which Age Old has lodged, it is not simply relying upon the existence of the determination. It has not jettisoned its reliance upon the merits of the matter generally.

53 In relation to the adequacy of material, a party does not have to prove its case on a joinder application. There is no need, for example, for a party to present affidavit material proving its case as if the matter were an application for summary judgment. Sufficient materials are before the Tribunal to establish that an arguable case has been presented. Swintons' allegation is evident from the face of the documents, including special condition 9.2 of the building contract, which it alleges was overlooked or ignored by Coghlan and which removes the entitlement to any extension of time unless the builder has established to the satisfaction of the architect that there had been actual delay. Swintons' arguable case can clearly be discerned on the face of the documents.

54 The issues between Age Old and Swinton are inextricably linked with the issues involving Coghlan. It is not a case where there is a substantial amount of material not related to the case against the proposed joined party.

## RULING

55 As I have stated in previous decisions, the discretion contained in s.60 of the Act is a broad one. As I stated in *Maryvell Investments Pty Ltd v Sigma Constructions Pty Ltd* [2006] VCAT 74, (and there referring to the earlier decision of Deputy President Macnamara in *Sensyn Australia Pty Ltd v United Colours on Collins Pty Ltd* (2000) V Conv R 58-544), the discretion should not be exercised in favour of joinder if the same would enable a person to bring a claim that was clearly misconceived or doomed to failure. In *Maryvell*, I refused the proposed joinder on the basis that the proposed joined party would have available, and had foreshadowed reliance upon, a complete defence pursuant to s.126 of the *Instruments Act* 1958.

56 In the present case, Mr Oliver, in seeking the joinder of Coghlan, has argued that no justiciable cause of action need be demonstrated as against a proposed joined party. I am not totally persuaded by this argument. I raised with Mr Oliver the

hypothetical example of whether, if it was alleged in the present case that damage such as cracks and other faults had in fact been caused by low flying aircraft, Qantas could be joined as a party, given that arguments would arise as to whether such an action would be possible under state legislation. Whilst Mr Oliver's response was that such a joinder could take place, even if such a hypothetical action against Qantas could only be brought under federal legislation, I am not totally persuaded that such a submission is correct. Whilst it is obviously desirable to avoid the risk of conflicting decisions and to avoid multiplicity of litigation, it seems to me that joinder, in circumstances where there is no justiciable cause of action against the proposed joined party or where such joinder would enable the bringing of a claim which is clearly misconceived or doomed to failure, is a joinder which should not be countenanced. The desirability of avoiding conflicting decisions does not seem to me to outweigh the undesirability of joining parties in circumstances where there is no, or no realistic, justiciable issue to be tried.

57 In summary, I am against Mr Oliver's submission that there need not be a justiciable claim existing between the party seeking the joinder and the party sought to be joined.

58 Before considering the requirements of s.60 of the Act, what must next be determined is whether Swintons has an arguable case against Coghlan, and whether it is justiciable before this Tribunal. If there is no arguable case, the joinder application does not seem to me to be able to proceed any further.

59 In my opinion, and in part subject to what could be described as a "pleading" qualification to which I shall return, Swintons does have an arguable case against Coghlan. There is no dispute but that Swintons, along with Age Old, entered into the engagement contract with Coghlan. There is no suggestion but that it was for valuable consideration. Of course, as stated at the outset, these findings are for the purposes of the present application and are not determinative of matters of fact or law which may be argued in relation to the merits of the matter.

60 It is certainly arguable that, by not including in the Rules as forwarded by Coghlan, any reference to immunity or release, no defence of immunity is open to him. It is also arguable that, in arriving at the determination which he did, he failed to have regard to special condition 9.2 and the requirement concerning satisfaction regarding actual delay. It is then arguable that, by failing to have regard to the special condition, he breached the terms of the engagement contract, or that he was negligent in arriving at the determination in the manner in which he did. It is arguable that he owed a duty of care to Swintons in this regard. In this regard, I agree with the submissions of Mr Oliver. On a joinder application, it does not seem to me to be necessary that the party seeking the joinder prove its case against the party which it seeks to join. Submissions made upon the basis of documents which are already in evidence may be sufficient. In addition to general principles, the broad discretion contained in s.60 of the Act is to be remembered. The documents placed before me, including those previously placed on the Tribunal's file and being what could be described as the essential documents such as the determination and the building contract, seem to me to be

sufficient to establish an arguable case before one turns to the affidavit of Mr Hoey and any other supporting material.

61 Furthermore, it seems to me that one of the arguments advanced on behalf of Coghlan and Age Old, namely that the determination cannot be vitiated, is not entirely to the point. Whilst Swintons is contesting this proposition, in essence it seeks to join Coghlan on the basis that it has an arguable case against him should it fail against Age Old. It is, as described by Mr Oliver, a typical third party action. If the determination cannot be attacked in the context of the claim by Age Old against Swintons, Swintons then wishes to proceed against Coghlan on the basis that the result with which it is saddled is one at which Coghlan has arrived, via the determination, either negligently or in breach of contract. Thus, the submission that the determination cannot be vitiated is, at least as far as an arguable case by Swintons against Coghlan is concerned, not to the point.

62 In summary, I do not accept the submission advanced by Mr Schwarz that the case against Coghlan is so weak as to be untenable. Nor do I accept submissions that there is an absence of material sufficient to form the basis of an arguable case. In my opinion, the material before the Tribunal is sufficient to found an arguable case.

63 The next question to be determined is whether, given the existence of an arguable case, it is justiciable before this Tribunal. In my opinion, a claim of the nature proposed by Swintons against Coghlan is justiciable before this Tribunal. Firstly, it seems to me to be justiciable pursuant to the provisions of the *FTA*. I earlier mentioned a qualification. That qualification is that the Proposed Points of Claim do not specifically refer to the *FTA*. Mr Oliver informed me that, lest there be any doubt, Swintons would amend the Proposed Points of Claim by adding specific reliance upon various provisions of the *FTA*. I appreciate that he was not conceding that the absence of such a specific reference in some way prevented Swintons from so relying, but he nevertheless foreshadowed such an amendment, so as to make it quite clear as to the way in which Swintons put its case against Coghlan. As I understand it, the proposed amendment will include, inter alia, reference to the conduct of Coghlan which forms the basis of a claim pursuant to the *FTA* and the provisions of the *FTA* upon which reliance is placed.

64 A dispute between an expert such as Coghlan and a party such as Swintons, which is seeking the determination of the expert, seems to me to be a consumer and trader dispute for the purposes of s.107 of the *FTA*. Given the amount involved, it is not a small claim within the meaning of that Act. Section 107(1) defines a "consumer and trader dispute" as a dispute or claim arising between the purchaser of goods or services and a supplier of goods or services in relation to the supply of goods or services. These terms are defined in s.3 of the *FTA*. A "purchaser" means the person to whom the goods or services have been supplied. The "supplier" means the person who has supplied the goods or services. To "supply" in relation to services means to provide, grant or confer. "Services" are defined as including, inter alia, rights, benefits, privilege or facilities that are provided, granted or conferred under a contract for or in relation to the performance of work, including work of a professional nature.

65 It seems to me at least arguable that, pursuant to the engagement contract, which was a contract in relation to the performance of work, Coghlan was to provide services to Swintons within the meaning of the *FTA*. If it be such a dispute, pursuant to s.108 of the *FTA*, this Tribunal may hear and determine the dispute and may, for example, order the payment of a sum of money found to be owing or by way of damages.

66 Accordingly, it seems to me that the proposed claim by Swintons against Coghlan would be justiciable before this Tribunal. Whilst the Proposed Points of Claim may well be sufficient to infer reliance upon the provisions of the *FTA*, it would have been preferable if such reliance had been clearly spelt out. I accept Mr Oliver's statement that some amendment in this regard will be forthcoming if leave is granted for the proposed joinder of Coghlan.

67 It was also argued by Mr Oliver that the proposed claim is justiciable because it is a domestic building dispute within the meaning of the *DBCA* on the basis that Coghlan is a building practitioner as defined in s.3 of the *Building Act* 1993. Alternatively, even if he is not, it is argued that a claim against him would be justiciable on the basis of the approach adopted in *Greenhill Homes*.

68 This submission, and particularly insofar as it is based upon the decision in *Greenhill Homes*, seems to me to have some merit. I appreciate that *Greenhill Homes* is set in a slightly different statutory context, and that, when contemplating whether a proposed action against directors would be justiciable before the Domestic Building Tribunal, Byrne J was considering s.56 of the *Domestic Building Contracts and Tribunal Act* 1995, a provision which has since been repealed. However, the approach taken by His Honour is quite clear. At paragraph 34, he stated:-

> "… my general attitude to this legislation is that it should be construed liberally where this is necessary or convenient to ensure that all domestic building disputes and associated disputes are before the Tribunal."

69 Section 54(1)(a) of the *DBCA* defines a domestic building dispute as including a dispute or claim arising between a building owner and a building practitioner as defined in the *Building Act*. The definition of "building practitioner" to be found there includes "an engineer engaged in the building industry". Coghlan includes in his qualifications, as demonstrated on his letterhead, engineering degrees and describes himself as a "chartered building professional". Whilst a dispute of the kind that has arisen may not have been envisaged as the type of building dispute originally designed to be covered by the *DBCA*, it seems to me to be strongly arguable that the wording of s.54(1)(a), when read in conjunction with the definition in s.3 of the *Building Act*, leads to the conclusion that a proposed claim such as this is justiciable in this Tribunal as a domestic building dispute. That is particularly so when the approach adopted by Byrne J in *Greenhill Homes* is also borne in mind. It is also to be remembered that the relevant definition of a domestic building dispute contained in s.54 of the *DBCA* concludes with the words "in relation to a domestic building contract or the carrying out of domestic building work". If the parties fall within the categories described earlier in the sub-section, its breadth of application is thus considerable.

70 Thus, it seems to me that there are strong arguments in favour of the proposition that the proposed claim is justiciable before this Tribunal on at least two bases. Certainly, if the other requirements of s.60 of the *VCAT Act* are satisfied, those arguments are of sufficient strength to support a joinder application.

71 Having determined that the proposed joinder is not misconceived or doomed to failure either because of an untenable fact situation or because of what could be described as a lack of jurisdiction, I now turn to a consideration of the factors to be considered pursuant to s.60 of the *VCAT Act* and the overall merits of the application pursuant to it.

72 The discretion pursuant to s.60 is a broad one. There are various factors to be considered. In the present case, it seems to me that a consideration of those factors results in the conclusion that my discretion should be exercised in favour of joining Coghlan. I think it desirable that Coghlan be so joined. I agree that, particularly as the claim by Age Old against Swintons now stands, it has substantial issues in common with the proposed claim against Coghlan. Duplication of litigation is to be avoided if at all possible. The risk of conflicting outcomes is also to be considered. The proposed claim against Coghlan is in the nature of a third party claim and it is desirable that it be dealt with at the same time as the original action.

73 For similar reasons, it seems to me that Coghlan ought to be bound by, or have the benefit of, the Tribunal's order. Given the matters that, as "pleadings" presently stand, will be ventilated at the principal hearing, it is in everyone's interest, including those of Coghlan, that there not be a subsequent and separate action by Swintons against him. I disagree with the submission of Mr Schwarz that the interests of Coghlan are not affected by the proceeding. I disagree with his submission that there is no sufficient commonality of fact or law to warrant joining Coghlan, or that he ought not be bound by, or have the benefit of, any order made in the proceeding. As the material before the Tribunal now stands, there are significant issues in common between the principal action and the proposed action. Even if the principal action proceeds solely on the basis that Coghlan's determination is binding and cannot be attacked, the terms and conditions of the building contract, which remains a constant, and the interpretation of them will be the subject of argument and investigation. The contract lies at the heart of both Age Old's action against Swintons and Swintons' proposed action against Coghlan. It seems to me highly desirable that all of this be determined in the one hearing and with Coghlan as a joined party.

74 I am also of the view that joinder in this situation is consistent with the approach of Byrne J in *Greenhill Homes*, and with the policy behind and objects of the *DBCA*. I would also refer to the decision of Deputy President McKenzie in *Gregor v State of Victoria* [2000] VCAT 414, and the factors that she there listed, she having also considered Order 9.06 of the Supreme Court Rules. It seems to me that a consideration of those factors, and particularly where what is being considered is whether the relevant claims arise from a common transaction or series of transactions and whether the joinder would enable all the issues in

dispute to be determined effectively, leads to the conclusion that Coghlan should be joined.

75 Whilst there is some force in the submissions advanced on behalf of Age Old and Coghlan concerning the passage of time which has elapsed between the commencement of the principal application and this application for joinder, on balance I am of the view that delay in this particular case is not a factor which, in the exercise of my discretion, should operate so as to prevent joinder. It is understandable that no such application was made whilst, what I understand to be a jurisdictional argument, was pursued in the Court of Appeal. I also agree with the submission of Mr Oliver that no prejudice caused by any delay has been demonstrated. Certainly there is no prejudice that cannot be overcome by affording to Coghlan sufficient time to prepare his case or, should circumstances warrant it, an order for costs.

76 In summary, for the above reasons, I am of the opinion that a consideration of all the relevant factors leads to the conclusion that Coghlan should be joined as a party to these proceedings.

77 I shall reserve the question of any argument as to costs, and shall also reserve liberty to apply.

**Judge Bowman**
**Vice President**