**VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL**
**CIVIL DIVISION**
**BUILDING AND PROPERTY LIST** VCAT REFERENCE NO D586/2012

## CATCHWORDS

DOMESTIC BUILDING DISPUTE – s 60 of the *Victorian Civil and Administrative Tribunal Act 1998*; application to join municipal council to domestic building dispute. Jurisdiction of Tribunal - whether Tribunal has accrued jurisdiction.

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| **FIRST APPLICANT** | Mr Tharwat Bestawros |
| **SECOND APPLICANT** | Mrs Jacqueline Bestawros |
| **FIRST RESPONDENT** | Mr Domiano Sorace |
| **SECOND RESPONDENT** | Mrs Felicia Sorace |
| **INTERVENOR** | Melton City Council |
| **WHERE HELD** | Melbourne |
| **BEFORE** | Senior Member E. Riegler |
| **HEARING TYPE** | Interlocutory Hearing |
| **DATE OF HEARING** | 4 March 2015 |
| **DATE OF ORDER** | 13 March 2015 |
| **CITATION** | Bestawros v Sorace (Building and Property) [2015] VCAT 288 |

## ORDER

1. Under s 60 of the *Victorian Civil and Administrative Tribunal Act 1998* and upon application by the Applicant, Melton City Council, c/o DLA Piper Australia, Lawyers, Level 21, 140 William Street, Melbourne, Vic, 3000 is joined as a party to this proceeding to be named as the Third Respondent.
2. **By 27 March 2015** the Applicants must file and serve Amended Points of Claim, which shall set out the material allegations as against the Third Respondent.
3. **By 27 March 2015,** the Applicant must serve on the Third Respondent:
   (a) copies of documents which have been filed and/or served in the proceeding;
   (b) copies of all orders made by the Tribunal in the proceeding; and

(c) must advise the Third Respondent the addresses for service and contact details for each of the parties to the proceeding.

4. **By 24 April 2015,** the Third Respondent must file and serve Points of Defence specifying the material facts relied upon.

5. **This proceeding is listed for a further directions hearing before SM E Riegler (if available) at 11 AM on 23 April 2015 at 55 King Street, Melbourne, at which time further orders will be made as to the future conduct of the proceeding, including consideration as to whether the proceeding should be listed for final hearing**.

**SENIOR MEMBER E. RIEGLER**

**APPEARANCES:**

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| For the Applicants | Mr D Pumpa of counsel |
| For the Respondents | No appearance |
| For the Intervenor | Mr R Bennett, solicitor |

# REASONS

## INTRODUCTION

1. The Applicants are owners of a residential property located in Caroline Springs (**'the Owners**'). They purchased the property from the Respondents, who, as owner-builders, originally constructed a residential dwelling on the property (**'the Property'**). The Owners claim that the concrete slab and footings of the dwelling suffers from abnormal subsidence, which has resulted in significant cracks manifesting within the dwelling.

2. As part of their defence, the Respondents contend that the movement of the concrete slab and footings is caused by a chain of trees which have been planted adjacent to the Property and which have disproportionately dried the soil on that side of the dwelling compared with the opposite side. The Respondents contend that they did not plant the trees nor did they have any involvement in that exercise. The trees are located on land which is said to be owned or managed by Melton City Council.

3. As a consequence of the defence raised by the Respondents, the Applicants have sought to join Melton City Council as an additional respondent in this proceeding. In support of that application, they rely upon an affidavit sworn by Anthony Zita and a number of expert reports prepared by Russell Brown, the consulting engineer engaged by the Respondents. Draft *Amended Points of Claim* have been exhibited to the affidavit of Anthony Zita. Those draft *Amended Points of Claim* set out the allegations against the Melton City Council as follows (omitting the particulars):

    14. The Third Respondent is and was at all material times the municipal council for the municipal district containing the Property.

    15. The Third Respondent is the occupier of the land adjoining the western boundary of the Property (**'the Council Land'**).

    16. The Third Respondent has the care and control of the Council Land.

    17. From on or about October 2004 a number of trees (**'the Council Trees'**) have been growing and continue to grow on the Council Land and have done and continue to do so under the care and control of the Third Respondent.

    18. Roots from the Council Trees have penetrated the land of the Property with those roots abstracting water and moisture from under the foundations of the dwelling on the Property.

    19. The Applicants have alleged that damage to the dwelling has occurred as a consequence of breaches of the warranties by the First and Second Respondents with respect to construction of the dwelling.

    20. The First and Second Respondents deny any breach of warranty and allege that damage to the dwelling is as a consequence of the Council Trees drying out the foundations to the dwelling.

Liability of the Third Respondent

21. In the event the Tribunal was to determine that damage to the dwelling is not as a consequence of any breach of warranty by the First and Second Respondents then that damage is as a consequence of the nuisance and trespass of the Council Trees.

22. The Third Respondent knew or ought reasonably to have known that the location of and growth of trees of the type of the Council Trees would or would most likely create a danger to the dwelling at the Property.

23. As a consequence of the nuisance and trespass of the tree roots of the Council Trees the Council is liable for damage suffered by the Applicants.

4. The Respondents did not appear at the hearing of this joinder application. However, Mr Bennett, solicitor, appeared on behalf of Melton City Council, which was given leave to intervene. Mr Bennett submitted that the joinder of Melton City Council should be refused, principally on the ground that the claim alleged against Melton City Council was not justiciable in the Tribunal.

## SECTION 60 OF THE VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL ACT 1998

5. Section 60 of the *Victorian Civil and Administrative Tribunal Act 1998* (**'the VCAT Act'**) states:

> (1) The Tribunal may order that a person be joined as a party to a proceeding if the Tribunal considers that –
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> (a) the person ought to be bound by, or have the benefit of, an order of the Tribunal in the proceeding; or
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> (b) the persons interests are affected by the proceeding; or
>
> (c) for any other reason it is desirable that the person be joined as a party.

6. In *Independent Cement & Lime Pty Ltd v Victorian Civil and Administrative Tribunal & Ors*,[1] Byrne J commented that a party can be joined if one of the preconditions to s 60(1) of the VCAT Act were met, however, there is then a discretion as to whether this power is to be exercised by the Tribunal. The power must be exercised reasonably in the circumstances. The reasonableness of the exercise of the discretion will depend on the particular circumstances of the case.

7. In *Age Old Builders Pty Ltd v Swintons Pty Ltd*, Judge Bowman VP stated:

> As I have stated in previous decisions, the discretion contained in section 60 of the Act is a broad one. As I stated in *Maryvell Investments Pty Ltd v Sigma Constructions Pty Ltd* [2006] VCAT 74 … The discretion should

[1] [2000] VSC 355.

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…[2]

## IS THE CLAIM JUSTICIABLE IN THE TRIBUNAL?

8. The Tribunal's jurisdiction is derived through enabling legislation, such as the *Domestic Building Contracts Act 1995*, which is the Act under which the Owners claim against the Respondents in this proceeding. Section 60 of the VCAT Act, of itself, does not provide a source of power to enable one party to claim against another party. In *Roads Corporation v Maclaw*, Balmford J confirmed this:

> And like the Tribunal, I am satisfied that section 60 does not, itself, confer jurisdiction where no jurisdiction exists. The Tribunal is the creature of statute, and its jurisdiction, extensive though it is, is precisely defined in the various enabling enactments (see sections 41 and 42 of the VCAT Act). The issue is whether the Tribunal has jurisdiction to deal with the claim against VicRoads. If that is not the case, the joinder of VicRoads would be futile.[3]

9. The draft *Amended Points of Claim* do not distil what source of power is relied upon by the Owners in their claim against Melton City Council. Mr Pumpa of counsel, who appeared on behalf of the Owners, submitted that the source of power was ancillary to the jurisdiction vested in the Tribunal under the *Domestic Building Contracts Act 1995*. In essence, he argued that the facts and circumstances surrounding the claim against Melton City Council were so interwoven with the claim against the Respondents that it fell within the purview of that *domestic building dispute* (within the meaning of that term as defined under the *Domestic Building Contracts Act 1995*). Mr Pumpa submitted that, given the substantial number of common issues arising in the proceeding, it would be desirable to have all those issues determined in the one hearing, rather than run the risk of the claim against Melton City Council being heard in court at another time as there would be additional cost and the possibility of inconsistent findings.

10. Mr Bennett submitted that the Tribunal does not have ancillary or accrued jurisdiction. His view is reinforced by comments made by Cavanough J in *Tucci v Victorian Civil and Administrative Tribunal & Anor*, where his Honour stated that he was prepared to assume*, without deciding, that VCAT has no "accrued" jurisdiction of the kind referred to in Fencott v Muller and McCauley v Hamilton Island Enterprises*.[4] In essence Mr Bennett argued that the mere fact that there are common issues arising between the two claims does not vest jurisdiction in the Tribunal to make an order that Melton City Council pay damages to the Owners, even if it was *responsible* for the Owners' loss.

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[2] [2006] VCAT 871 at [55]. See also *Lawley v Terrace Designs Pty Ltd* [2004] VCAT 1825 and *Zervos* v *Perpetual Nominees Ltd* (2005) 23 VAR 145

[3] [2001] VSC 435 at [19]. See also *Director of Housing v Sudi* [2011] VSCA 266.

[4] [2010] VSC 425 at [48].

11. It is trite that the Tribunal does not possess inherent jurisdiction.[5] This situation does not change even if it results in an inability to determine all common issues in the one hearing.[6] In *Wizardry Kennels v Semtach Breeding Services*,[7] Judge Bowman VP illustrated this point as follows:

> [T]his Tribunal is a creature of statute and, while it has broad powers, its jurisdiction is limited to that conferred by the VCAT Act and by the enabling enactments … its essential jurisdiction must be established, and, however tempting it might be to determine what might appear to be a simple factual matter in a prompt, economical and hopefully fair way, that cannot be done if the jurisdiction to do so does not exist.

12. However, if the relevant enabling legislation empowers the Tribunal with ancillary or broad jurisdiction, the relief that might be ordered may have wider reach. Ultimately, that question requires an examination of the enabling statute in order to ascertain how broad the Tribunal's jurisdiction is.

13. In *Greenhill Homes Pty Ltd v Domestic Building Tribunal*[8], Byrne J considered the jurisdiction of the former Domestic Building Tribunal to resolve domestic building disputes. His Honour confirmed that the extent of jurisdiction was to be found in the text of the enabling statute, which he considered had to be construed liberally. He stated:

> 16. In this case, the text in question is found in a statute and in one which sets up a tribunal with broad powers to resolve domestic building disputes: s.1. It is a statute and which empowers the parties or one of them to require that the dispute be taken from the courts to this specialist tribunal. In such a case, the courts should not approach its construction in a grudging way; they should be no less liberal in their identification of the matters which might be referred to this Tribunal.
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> 17. A further consideration is that the evident purpose of this part of the Act is to establish a forum to resolve domestic building disputes. Counsel for the Proprietor said that the Tribunal was intended to be a "one stop shop" for this purpose …
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> To my mind, the court should strive to construe the Act wherever possible to give effect to this objective. It would be regrettable indeed if, in a given case, disputants were obliged to submit part of their claim to be Tribunal, part to the court and, perhaps subject to s.14 of the Act, the third part to arbitration.

14. An example of *ancillary* or *extended* jurisdiction is illustrated in *Roads Corporation v Maclaw*.[9] In that case, claims were made that in or about 1979, Roads Corporation (trading as VicRoads) widened the roadway of

[5] *Director of Housing v Sudi* [2011] VSCA 266.
[6] *Attorney-General for Victoria v Kay* [2009] VSC 337 at [28].
[7] [2006] VCAT 2369 at [11].
[8] [1998] VSC 34.
[9] [2001] VSC 435.

Hoddle Street, in front of a building owned by Maclaw, and planted *Plane* trees on the footpath in close proximity to that building. It was alleged that by reason of planting the trees, VicRoads owed a duty of care to Maclaw to maintain the trees and their root systems and if the trees caused a nuisance, to remove them and make good the damage.

15. Like the present case, a question arose whether the Tribunal had jurisdiction to hear and determine the claim against VicRoads, which was grounded in negligence and in nuisance. Balmford J, while confirming that the Tribunal did not possess inherent jurisdiction, found that it was arguable that the enabling legislation, being the *Water Act 1979*, conferred jurisdiction to allow relief to be granted against VicRoads. In particular, the case concerned the flow of water from an adjoining property into the property owned by Maclaw. It was alleged that the flow of water attracted the tree roots from the *Plane* trees, which then damaged the building. There was no allegation that VicRoads was responsible for the flow of water. However, the damage caused by the encroaching tree roots fell within the purview of the *Water Act* dispute, over which the Tribunal had jurisdiction.

16. Similarly, in *Anderson v Economo*,[10] a non-builder vendor of a domestic dwelling was joined as a party to a proceeding which concerned a domestic building dispute as between owner and builder. In that case, Deputy President Macnamara (as he then was) stated:

> 35. I[n] this situation therefore, should an order of joinder be made? On the face of it, the only basis upon which the Tribunal can join Ms Cassimatis pursuant to Section 60 of the **Victorian Civil and Administrative Tribunal Act** would be on the basis that "*for any other reason it is desirable that the person be joined as a party*". There are, as Mr McAndrew correctly submitted, a substantial number of common issues arising in the proceedings in the Tribunal concerning the Economos and the claim made against Ms Cassimatis. It is, in my view, highly desirable and economical to have all those issues determined once and for all in a single hearing. If the claim against Ms Cassimatis were heard in court at another time there would be additional cost and the possibility of inconsistent findings. In my view these considerations demonstrate that joinder of Ms Cassimatis is "*desirable*". The Section states that the Tribunal "*may*" order that a person be joined. The use of the word "*may*" imports a discretion. See Section 45 of the **Interpretation of Legislation Act 1983**. For the reasons already given I am satisfied that this is a discretion which should be exercised favourably to the applicants.
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> 36. Mr Twigg submitted that joinder of Ms Cassimatis and an adjudication upon the claim against her would be an abuse of the Tribunal's powers because Section 53 only empowered it to exercise the various powers set out in sub-section (2) "*to resolve a domestic building dispute*". In my view however, the making of orders such as this is calculated to resolve domestic building disputes. The Tribunal's powers of resolution under Section 53 are twofold. First, the matter may be referred to a mediator

[10] [2000] VCAT 434.

(presumably with the intent of obtaining a mediated settlement to the dispute) or secondly, the matter may be heard and determined and various classes of relief granted. A building dispute is the more effectively resolved by hearing a determination, if all related matters are heard and determined together. There are a number of reasons that this. First, in situations where it seems appropriate that a sum of money by way of compensation or otherwise is payable to a particular party, the more parties amongst whom the duty of raising that matter can be spread, the more likely it is that that money will be forthcoming as part of a compromise mediated process. Moreover, one party may be more willing to compromise a particular point in the central domestic building dispute if it is satisfied that it has received some sort of compromise, release or limitation of liability or at least concluded its liability in a related matter. In that way, in my opinion, it can be demonstrated that the making of orders by way of joinder and if necessary, adjudication upon collateral but related matters can be of assistance in the resolution of the core domestic building dispute.

17. In the present case, it is not in dispute that the Tribunal has jurisdiction to hear and determine the domestic building dispute as between the Owners and the owner-builders. Section 53 of the *Domestic Building Contracts Act 1995* then provides that:

> (1) The Tribunal may make any order it considers fair to resolve a domestic building dispute
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> (2) Without limiting this power, the Tribunal may do one or more of the following –
>
> (a) refer a dispute to a mediator appointed by the Tribunal;
>
> (b) order the payment of a sum of money –
>
> (i) found to be owing by one party to another party;
>
> …

18. In my view, it is arguable that once vested with jurisdiction to hear a domestic building dispute, the Tribunal may grant relief against another party joined to that proceeding pursuant to s 60 of the VCAT Act, even if that party does not fall within the categories of persons identified under s 54 of the *Domestic Building Contracts Act 1995*. Where a third party's conduct is alleged to fall within the purview of a domestic building dispute, it is open and arguable that the Tribunal has jurisdiction, under s 53 of the *Domestic Building Contracts Act 1995*, to order relief against that party, if that course would further the resolution of the domestic building dispute. Obviously, there would need to be a strong nexus between the claim made against that joined party and the domestic building dispute.

## Should there be joinder?

19. The expert opinion of Mr Brown, the consulting engineer engaged by the Respondents, unequivocally suggests that the building distress is caused by the drying effect of the trees planted adjacent to the Owners' Property.[11]

20. That being the case, I am satisfied that the allegations raised against Melton City Council demonstrate a strong nexus to the issues, the subject of the domestic building dispute comprising this proceeding. Accordingly, I consider that it is arguable that the relief sought against Melton City Council is justiciable in the Tribunal.

21. Moreover, I consider that in the present case, a curial determination of the claim as between the Owners and the Respondents could directly or indirectly affect the interests of Melton City Council. In particular, if it were found that the 'offending' trees were the cause of building distress, then it is conceivable that some remedial action would need to be undertaken, such as removal of the trees or installation of tree-root barriers. In either case, the interests of Melton City Council might be affected.

22. Therefore, I consider that it is not only desirable that Melton City Council be joined as a party to the proceeding but also that its interests are likely to be affected by the outcome of the proceeding.

23. Accordingly, I will order that Melton City Council be joined as a party to the proceeding, to be named as the Third Respondent.

**SENIOR MEMBER E. RIEGLER**

[11] Expert report of Russell Brown dated 5 September 2012 filed in the proceeding.