

**VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL**

**CIVIL DIVISION**

**DOMESTIC BUILDING LIST**

VCAT REFERENCE NO. D855/2005

**CATCHWORDS**

Domestic building, joinder.

<b>APPLICANTS</b>	Martin Browne, Greenleaf Nominees Pty Ltd
<b>FIRST RESPONDENT</b>	Victorian Managed Insurance Authority
<b>SECOND TO THIRTEENTH RESPONDENTS:</b>	Brett Andrew King, Rebeckah King, Christopher Teston Lane, Dee Christine Lane, Wendy Elizabeth Brown, Body Corporate 442930L att: Peter Michell, Madeleine Louise HO, Geoffrey Phillip Luff, John Edward Wilkinson, Denise Nancy Branson, Michelle Nookdin Hoodbhoy, Margaret Mary Hill
<b>FOURTEENTH RESPONDENT:</b>	Robert Cilia
<b>FIFTEENTH RESPONDENT:</b>	Omiros Pty Ltd (ACN 007 125 466)
<b>SIXTEENTH RESPONDENT:</b>	Theo Theodorou
<b>SEVENTEENTH RESPONDENT:</b>	Metro Roofing Supplies Pty Ltd
<b>EIGHTEENTH RESPONDENT:</b>	Pacific Estates Pty Ltd (ACN 006 901 542)
<b>WHERE HELD</b>	Melbourne
<b>BEFORE</b>	Senior Member M. Lothian
<b>HEARING TYPE</b>	Hearing
<b>DATE OF HEARING</b>	27 March 2007
<b>DATE OF ORDER</b>	31 May 2007
<b>CITATION</b>	Greenleaf v Victorian Managed Insurance Authority (Domestic Building) [2007] VCAT 961

## ORDERS

- 1 The Application to make a further claim against Mr Robert Cilia is dismissed.
- 2 The Applicants are given leave to withdraw their claim against the Seventh Respondent, Denise Nancy Branson, and it is now withdrawn.
- 3 The Application to re-join Mr Omiros Emmanoulides as a party to this proceeding is dismissed. In consequence, Omiros Pty Ltd will remain the Fifteenth Respondent.
- 4 Dome Consulting Pty Ltd (ACN 097 488 090) of 217 Johnston Street, Collingwood 3066 is joined to the proceeding as the Nineteenth Respondent.
- 5 By 21 June 2007 the Applicants must file and serve Further Amended Points of Claim to reflect these orders and the reasons annexed to these orders.
- 6 This proceeding and proceeding D574/2006 are listed for directions on 28 June 2007 at 2.15 pm before Deputy President Aird with an estimated hearing time of two hours for the purpose of making further orders for the conduct of these proceedings.**
- 7 Costs are reserved and there is liberty to apply.

- Notes:
1. At the Directions Hearing on 27 March 2007 the Applicants were ordered to provide particulars of paragraphs 20, 23E, 27, 31, 37, 47 and 58 of their Points of Claim by 24 April 2007. A document entitled "Further and Better Particulars" was filed by Mr Browne on behalf of himself and the Second Applicant on 8 May 2007.
  2. The Seventeenth Respondent has foreshadowed that it might be necessary to amend its defence.
  3. Mr Brown for the Owners foreshadowed that because if the sale of Unit 6, 10 Lalbert Crescent, Prahran, application might be made to substitute as Thirteenth Respondent Mr Graham Cook for Mr Geoffrey Luff.

**SENIOR MEMBER M. LOTHIAN**

**APPEARANCES:**

For the Applicants	Mr D. Pumpa of Counsel
For the First Respondent	Mr M. Czapnik, Solicitor
For the Second to Thirteenth Respondents:	Mr A. Brown, Solicitor
For the Fourteenth Respondent:	Mr E. Riegler of Counsel
For the Fifteenth Respondent:	Mr C. Harrison of Counsel
For the Sixteenth Respondent:	Mr M. Djuric, Solicitor
For the Seventeenth Respondent:	Mr Holzer, Solicitor
For the Eighteenth Respondent:	Mr D. Calabro, Director

## REASONS

- 1 On 19 March 2007 the First and Second Applicants applied for the following orders:
  1. Revoke Order 1 made 8 September 2006 (on application by Counsel for the Applicants but without the Applicants' instruction) granting leave to withdraw the Applicants' claim against the Fourteenth Respondent but otherwise the Fourteenth Respondent to remain a party to the proceedings, and reinstate a claim by the Applicants against the Fourteenth Respondent, Robert Cilia;
  2. Amend Order 4 made 8 September 2006 (on application by Counsel for the Applicants but without the Applicants' instruction) substituting Omiros Pty Ltd for Omiros Emmanoulides as the Fifteenth Respondent to:
    - a. reinstate Omiros Emmanoulides as the Fifteenth Respondent;
    - b. join Omiros Pty Ltd as the Nineteenth Respondent rather than the Fifteenth Respondent.
  3. Join Dome Consulting Pty Ltd ACN 097 488 090 to the proceeding as the Twentieth Respondent as it was the company that issued a Form 14 of 2 October 2001 pursuant to the *Building Act* 1993 recording its inspections of building works relevant to the proceeding;
  4. Leave to amend points of claim generally in accord with the proposed amended points of claim exhibited to the affidavit of Martin Browne to include First Applicant, claims against reinstated and joined parties and against Dome Engineering Design Pty Ltd.
- 2 It is assumed the Applicants were in error in referring to Dome Engineering Design Pty Ltd ("Dome Engineering") in the fourth paragraph of the application. Dome Consulting Pty Ltd ("Dome Consulting") is named as the proposed Twentieth Respondent and no claim is made against Dome Engineering and I note the statement of Mr Pumpa of Counsel for the Applicants that it has been deregistered.
- 3 The main issue in this proceeding is the allegation that the underground car park of the subject property at 10 Lalbert Crescent, Prahran, leaks to an unacceptable degree.
- 4 Mr Browne signed the Application for Orders for himself and as director and secretary of the Second Applicant, and Mr Pumpa appeared for them at the Directions Hearing. In addition to the specific orders, the proposed Further Amended Points of Claim included substitution of the Victorian Managed Insurance Authority for the Housing Guarantee Fund Ltd. This amendment appears to have been made some time ago. It also includes the deletion of Ms Denise Branson as the Seventh Respondent, as she is no longer the owner of unit 3 of the property the subject of this proceeding.

Section 60 of the *Victorian Civil and Administrative Tribunal Act 1998* governs joinder to proceedings before the Tribunal and provides:

- (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 subsection (1) on its own initiative or on the application of any person.

5 Mr Pumpa referred me to the decision of *Iliopoulos v Housing Guarantee Fund* [2006] VCAT 290 where Senior Member Cremean said:

The width of s60 of the Victorian Civil and Administrative Tribunal Act 1998 is well established. In applying the provision it is sufficient if a case sought to be raised against a proposed joined party is “open and arguable”. See observations of Cummins J. in *Zervos v Perpetual Nominees Ltd* [2005] VSC 380.

Certainty of success is not necessary. As Senior Member Cremean quoted in his book *Annotated VCAT Act, 2<sup>nd</sup> Edition*: “Whether it is sustained in the end is a matter for trial.”

6 Mr Pumpa submitted that there is an “open and arguable” case against each proposed joined (or re-joined) party. He reminded me that Mr Cilia remains a party, but there is no current claim against him by the Applicants. He drew my attention to exhibit MGRB 6 to the affidavit of Mr Browne of 16 March 2007. The relevant document is a Form 13 Certificate of Compliance of 12 April 1999 on the letterhead of Dome Engineering, which names Mr Cilia as the “Relevant Building Practitioner” and carries his signature. The Form 13 includes the statement:

Compliance

I did prepare the design and I certify that the part of the design described as:

PROPOSED UNIT DEVELOPMENT

Complies with the following provisions of the regulations\*\*

\*\*Includes BCA and relevant standards [there follows a list of standards]

7 Mr Pumpa pointed out that the proposed joined party, Dome Consulting, was not registered until 13 July 2001, as shown in MGRB 4. That exhibit also included an undated Form 14 on Dome Consulting letterhead and was signed by Mr David Shepherd, Engineer. The last date of inspection of building work shown on the Form 14 was “01-02-01” and the document carries two fax dates, both of which are 2 October 2001.

- 8 With respect to Mr Emmanoulides, Mr Pumpa referred me to MGRB 3 which is a “Building Permit Amendment dated “2/4/2000” issued to “Omios One” and providing particulars of the building practitioners. Mr Emmanoulides is named as the architect.
- 9 The proposed Further Amended Points of Claim are exhibit MGRB 8 to Mr Browne’s affidavit. The pleadings against Mr Cilia commence at paragraph 26A. They allege, among other things, that Mr Cilia was retained by the developers to provide engineering services, that he owed various people, including the Owners, a duty of care, and that if the “Applicants are adjudged liable” they will suffer a loss. They further allege that Mr Cilia provided services negligently with the consequence that “any water penetration to the basement car park has been caused or contributed to by the design of the basement car park” and that the Applicants seek indemnity or contribution, or an order pursuant to section 24AI of the *Wrongs Act* 1958 regarding Mr Cilia.
- 10 The pleadings against Dome Consulting commence at paragraph 26L. They also plead a retainer between the developers and Dome Consulting for engineering services. Paragraph 18B, which describes Dome Consulting, has been careful to say that Dome Consulting was providing engineering services at “a material time” rather than “all material times.” However, the particulars to paragraph 26L state that Dome Consulting “agreed to undertake all engineering and certification work necessary by an engineer for the Development ...”. The remainder of the pleadings against Dome Consulting are similar to those against Mr Cilia.
- 11 The pleadings define Mr Emmanoulides as “the Architect” and say that there was a retainer between him and the developers. The particulars state “full particulars of the architect’s retainer shall be provided shortly”. In contrast, it is pleaded “further or in the alternative” that Omios Pty Ltd (“Omios”) was retained to provide architectural services in respect of the development and the particulars refer to a letter of 25 August 1997.
- 12 It is also noted that this particular pleading, including the promise to provide full particulars “shortly” has been the same since 13 February 2006 when the Applicants’ then solicitors filed the first amended points of claim. Like the claims against Mr Cilia and Dome Consulting, the pleadings against Mr Emmanoulides and Omios allege that each owed various people, including the Owners, a duty of care, and that the Applicants will suffer a loss if they “are adjudged liable”.
- 13 The pleadings against both Mr Emmanoulides and Omios say that any water ingress is caused by an alleged failure of the architect to include a waterproof membrane in the design of the podium above the car park and inadequate design of the pump to remove the water that enters. As with the engineers, the Applicants seek indemnity or contribution, or an order pursuant to section 24AI of the *Wrongs Act* 1958 against Mr Emmanoulides and/or Omios.

- 14 Mr Czapnik, solicitor, appeared for the First Respondent, VMIA, and neither consented to nor opposed the proposed orders. Mr Djuric, solicitor, for the Sixteenth Respondent and Mr Calabro, director of the Eighteenth Respondent, did the same.
- 15 Mr A. Brown, solicitor, appeared for the Second to Thirteenth Respondents (“Owners”). He confirmed that Ms Denise Branson has sold her property and agreed that it is appropriate for the Applicants to withdraw their proceedings against her. He submitted that the proceeding remains no more than an appeal against the decision of VMIA, that the appeal is not apportionable under the Wrongs Act and that the proposed joined parties and Respondents Fourteen to Eighteen inclusive are irrelevant to the proceeding.
- 16 Mr Brown remarked that Mr DJ Cuthbertson was also a consultant mentioned in pleadings in this proceeding. He said that he trusted there would be no further application by the Applicants to join him as a party.

#### **Mr Robert Cilia**

- 17 Mr Riegler of Counsel appeared on behalf of Mr Cilia to oppose reinstatement of the Applicants’ claim against him. Mr Riegler did not appear for Dome Consulting – there was no appearance for it. He submitted an affidavit by Mr Cilia of 27 March 2007 which stated that he did not undertake the engineering design work or prepare the civil and structural drawings which were prepared by Dome Engineering. This statement does not sit easily with his statement in the Form 13 of 12 April 1999 which was exhibited as MGRB 6 that he did prepare the design.
- 18 It is emphasised that Dome Engineering is not the same company as the Dome Consulting, which the Applicants seek to join. Mr Cilia acknowledged in his affidavit that his name appeared on the building permit as the relevant building practitioner.
- 19 Mr Riegler referred me to three cases. In referring to *Wimmera-Mallee Rural Water Authority v FCH Consulting Pty Ltd (No. 2)* [2000] VSC 193 he pointed out that Byrne J emphasised the need of the party seeking to join another (in that case FCH Consulting) to demonstrate a claim against the proposed joined party by the plaintiff. His Honour said at paragraph 11:

Where, as here ... the application [to join a party] is opposed, the onus lies on the applicant to discharge this burden [demonstrating the existence of a duty of care] offering material in support where this is necessary.
- 20 His Honour also said at paragraph 9:

...it is an application in which it is for the applicant, FCH, to demonstrate, to the appropriate degree, the Authority’s claim against [the proposed joined party]. It is not sufficient for the applicant merely to proffer a pleading containing allegations which, if found to be justified, would make out the cause of action.

21 Mr Riegler said there was no allegation in an affidavit of a contractual relationship between Mr Cilia and any other party, and neither was there an allegation in an affidavit which supported the existence of a duty of care owed by Mr Cilia.

22 Mr Riegler said that the application to join Mr Cilia was an attempt to lift the corporate veil. He referred to *Lawley v Terrace Designs Pty Ltd* [2006] VCAT 1363, where Senior Member Young said with respect to both the liability of directors and the liability of registered building practitioners at paragraphs 189 and 190:

... I consider these facts do no more than cite what a director of a small residential building company does when building a home for future sale. He was carrying out his normal duties, albeit, he did them carelessly. There is no evidence that the director of the builder carried out his duties knowing or intending that the damage to the building that has occurred, would occur. I consider to find the director of the builder liable on this evidence would make all participating directors of residential building company personally liable for its defaults.

Likewise to find the director of the builder liable on the basis that he was the registered building practitioner and directed and procured the acts of the company is not of itself sufficient to find the director of the builder personally liable as a tortfeasor. To do so would in effect mean that for one-person corporations the principle of limited liability was of no effect. In the acknowledged tension between the operation of corporate law and tort law this would be going too far. Therefore, a director to be liable must do something more than carry out his duties badly or incorrectly

23 The third case Mr Riegler referred me to was *L U Simon Builders Pty Ltd v Lubeca Systems Australia Pty Ltd and GIO Australia Limited* [2002] VCAT 10 where Deputy President Cremean, as he then was, said at paragraph 8:

The case sought to be pleaded against Specific Engineering [the proposed joined party] is based in negligence. Apparently LU Simon and Specific Engineering were never in a contractual relationship. The situation, however, is not one where the existence of a duty of care owed by Specific Engineering to L U Simon is self evident. The onus therefore lies on Lubeca to satisfy me, on proper materials, that ordering the addition of Specific Engineering as a respondent is proper.

24 The proposed pleadings against Mr Cilia are tenuous. The retainer is pleaded, but not properly particularised at paragraph 26A and it is asserted that Mr Cilia was to provide engineering services, while no mention is made of Dome Engineering. At paragraph 26D there is mention of his statement in the Form 13 in the particulars, but the paragraph states:

Cilia provided the services the subject of the engineer's retainer and duty of care.

25 I am not satisfied that the affidavit material supports the contention that Mr Cilia, as distinct from Dome Engineering, was retained by the developers. Further, the proposed points of claim fail to plead, and the affidavit fails to support, a duty of a director of a company acting in that capacity. I note that in *Lawley*, Senior Member Young also said that for the director of a company to be liable:

... 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 his company duties, even if it results in a breach of contract or a failure by the company to fulfil its obligations.

26 I find that the Applicants have failed to establish that the case against Mr Cilia is open and arguable. I therefore dismiss their application to make a further claim against him in this proceeding.

### **Mr Omiros Emmanoulides**

27 Mr Harrison of Counsel appeared for both Omiros and Mr Emmanoulides. Mr Harrison submitted that not only did the Applicants state 15 months ago that they would provide “full particulars of the architect’s retainer shortly”, it is also six months since discovery, and there is no evidence or assertion in an affidavit of such retainer. I note that since the Directions Hearing on 27 March 2007 the Applicants have filed Further and Better Particulars. To paragraph 27 they say:

The Architects retainer is contained in a letter dated 25 August 1997 from Omiros Architecture to Peter Agushi of Pacific Estates Pty Ltd.

This was not before me on 27 March 2007 and there is no evidence that Mr Emmanoulides was personally engaged.

28 I am not satisfied that the inclusion of Mr Emmanoulides’ name on a list of registered building practitioners in a building permit issued to his firm is sufficient to establish that he owes a personal duty of care to the developers or the Owners.

29 I find there is no claim against Mr Emmanoulides personally which is open and arguable, and I decline to re-join him as a party to the proceeding. It therefore follows that Omiros Pty Ltd will remain the Fifteenth Respondent to this proceeding.

30 I note Mr Harrison concurs with Mr Browne for the Owners and says that the claim by the Applicants against any party other than VMIA and the Owner is premature. He emphasised that this is not a proceeding where (unlike many similar proceedings before the Tribunal) the Owners have cross-claimed against the developers, designers and builders. The hearing will determine whether they are correct, but it appears to be a re-agitation of the s75 application before Senior Member Cremean decided 7 April 2006 and the stay application decided by Deputy President Aird on 11 August 2006. I decline to consider it any further.

### **Dome Consulting**

31 As stated above, there was no appearance on behalf of Dome Consulting although Mr Cilia was present and he is the sole director. It is pleaded that Dome Consulting assumed the responsibilities of Dome Engineering when it ceased to operate and there is affidavit material to support this allegation. I therefore find that the case against Dome Consulting is open and arguable. I join it as a party to the proceeding.

**SENIOR MEMBER M. LOTHIAN**