

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

DOMESTIC BUILDING LIST

VCAT REFERENCE NO. D232/2005

CATCHWORDS

Application for joinder – whether draft Points of Claim disclose arguable case – jurisdiction of Tribunal to consider claims made against proposed parties

[2005] VCAT 2366

APPLICANT	Hoang Tran Investments Pty Ltd (ACN 007 229 656)
RESPONDENT	2M'S Constructions Pty Ltd (ACN 109 705 348)
WHERE HELD	Melbourne
BEFORE	Deputy President, C. Aird
HEARING TYPE	Directions Hearing
DATE OF HEARING	20 October 2005
DATE OF ORDER	9 November 2005

ORDER

1. The application for joinder by the Respondent is dismissed.
2. The Respondent has leave to make further application for joinder until 28 November 2005 or as otherwise ordered by the Tribunal.
3. The compulsory conference date of 30 November 2005 is confirmed.
4. Costs reserved. Liberty to apply.

DEPUTY PRESIDENT C AIRD

APPEARANCES:

For the Applicant	Mr M Telford, Solicitor
For the Respondent	Mr J Forrest of Counsel
For the proposed Second Respondent	Mr Toumazou in person
For the proposed Third Respondent	Mr Franzese, Solicitor

REASONS

1. By application dated 18 April 2005 the Applicant, an owner builder, seeks recovery of the sum of \$20,000.00 which was paid by way of deposit to the Respondent for concreting works to be carried out under a contract entered into on or about 21 July 2004. The deposit was paid on or about 12 August 2004. The Applicant alleges the Respondent repudiated the contract, and further, that such repudiation was acknowledged and the contract terminated by the Respondent on or about 8 September 2004 by letter signed by Mr Michael Toumazou, a director of the Respondent. Alternatively, the Applicant alleges that it accepted the Respondent's repudiation of the contract by letter dated 16 March 2005 from its Solicitors to the Respondent.
2. The Respondent alleges that the letter of 8 September 2004 was not an acknowledgement or acceptance of repudiation by the Respondent, and further that it was *'signed without the knowledge or authority of the Respondent and the Applicant is otherwise not entitled to rely upon it in all the circumstances'*. By counterclaim dated 9 September 2005 the Respondent alleges the Applicant repudiated the contract by letter dated 8 September 2004, and further that it entered into a contract with Bullion Holdings Pty Ltd ('Bullion') dated 26 September 2004 for the same or similar works to those which were the subject of its contract with the Respondent. It alleges that it has accepted the Applicant's repudiation of the contract and is therefore entitled to retain the deposit of \$20,000.00 and, in addition, claims loss of profit on the contract works of \$236,720.00.
3. Essentially the Respondent alleges that the repudiation/termination of the contract by the Applicant was to: damage the business of the Respondent; the result of a conspiracy between the Applicant and Mr Toumazou; a wrongful interference with the business relations of the Respondent, and/or

to induce a breach of the contract by the Respondent, and in the full knowledge of its consequences (paragraphs 8-13 of the Points of Counterclaim dated 9 September 2005). It is also alleged that the Applicant's conduct was unconscionable in breach of s8 and/or s8A of the *Fair Trading Act 1999*.

4. Not surprisingly each of the allegations is denied by the Applicant in its Points of Defence to Counterclaim dated 30 September 2005. It asserts that it entered into the contract with Bullion after the Respondent's repudiation of the contract and in order to mitigate its loss.
5. On 7 October 2005, the Respondent made application pursuant to s60 of the *Victorian Civil and Administrative Tribunal Act 1998* to join Mamas Toumazou and Bullion as parties to the proceeding. This application was accompanied by an affidavit in support sworn by Milic Milenkovic, a director of the Respondent and draft Points of Claim as against each of the proposed parties. The application for joinder was set down for hearing on 21 October 2005 at which time the Applicant was represented by Mr Telford, Solicitor, and the Respondent by Mr Forrest of Counsel. Bullion was represented by Mr Franzese, solicitor and Mr Toumazou appeared in person. Mr Forrest confirmed that the Respondent was seeking joinder of the proposed parties as Respondents.
6. At the commencement of the hearing Mr Forrest indicated that in the few days prior the Respondent had discovered that Mr Toumazou is an undeclared bankrupt. Apparently he was declared bankrupt on 12 March 2002. The Respondent company was incorporated on 24 June 2004 at which time Mr Toumazou was named as a director as was Mr Milenkovic. Whilst there would seem to be an issue as to whether Mr Toumazou, as an undischarged bankrupt, was entitled to be a director of the Respondent

company but that is not a matter for this Tribunal arising as it does under the *Corporations Act 2001*.

7. Although Mr Franzese indicated that Bullion neither consents nor opposes to being joined as a party to this proceeding, and Mr Telford advised that the Applicant consents to the joinder of both proposed parties, this is not, of itself, sufficient for me to order joinder. I must have regard to the draft Points of Claim as against both of the proposed parties to satisfy myself firstly that the Tribunal has jurisdiction in relation to the claims, and secondly that they disclose an arguable case.
8. In relation to the proposed Points of Claim as against Mr Toumazou Mr Forrest foreshadowed they would be amended to include claims under the *Fair Trading Act 1999 (Vic)*. Those draft amendments were not provided to the Tribunal at the hearing.
9. The first question to be answered is whether the Tribunal has jurisdiction to consider the claims made by the Respondent against Mr Toumazou. I note that the Respondent seeks to have Mr Toumazou joined as a Respondent to this proceeding. I have carefully considered the draft Points of Claim – paragraphs 7-12 are of particular relevance:

7. In or about September 2004, Toumazou executed a written document which purported to terminate the Contract by agreement with Tran.

PARTICULARS

The document was dated 8 September 2004 (**the 8 September document**). A copy of the 8 September document may be inspected at the offices of the Solicitors for the First Respondent by prior appointment.

8. Further or alternatively, after the execution of the 8 September document Toumazou arranged a quotation for the same works the subject of the Contract to be provided by Bullion to Tran.

PARTICULARS

In concert with his de facto wife, Elisa Steel, director of Bullion, Toumazou provided Tran with Bullion's quotation dated 16 September 2004 for the same works the subject of the Contract (**Bullion's quotation**).

9. Further or alternatively, after the execution of the 8 September document Toumazou arranged for Tran to reach agreement with Bullion to perform the same works the subject of the Contract.

PARTICULARS

The agreement was in writing and comprised Bullion's quotation. Toumazou signed Bullion's quotation.

10. Further or alternatively, after the execution of the 8 September document Bullion performed the same works the subject of the Contract for Tran.

PARTICULARS

In concert with his de facto wife, Elisa Steel, Toumazou managed, arranged or performed the same works the subject of the Contract for and on behalf of Bullion.

11. The conduct by Toumazou alleged in paragraphs 7-10 hereof was:
 - (a) undertaken without the consent of 2Ms;
 - (b) not undertaken in the interests of 2Ms;
 - (c) not undertaken for the benefit of 2Ms;
 - (d) undertaken to enable Toumazou to gain a personal advantage.
12. Further or alternatively, by the conduct alleged in paragraphs 7-11 hereof, Toumazou:
 - (a) breached the fiduciary duties;
 - (b) caused damage to the business of 2Ms;
 - (c) conspired to injure 2Ms and/or 2Ms' business;
 - (d) interfered with the business relations of 2Ms;
 - (e) induced a breach of the Contract by Tran.

In its prayer for relief the Respondent seeks:

AND THE FIRST RESPONDENT CLAIMS AGAINST THE SECOND RESPONDENT

- A. A declaration that Toumazou's conduct alleged in paragraphs 7-10 hereof, was:
 - (a) undertaken without the consent of 2Ms;
 - (b) not undertaken in the interests of 2Ms;
 - (c) not undertaken for the benefit of 2Ms;

- (d) undertaken to enable Toumazou to gain a personal advantage.
- B. A declaration that Toumazou's conduct alleged in paragraphs 7-11 hereof;
 - (a) breached the fiduciary duties;
 - (b) caused damage to the business of 2Ms;
 - (c) conspired to injure 2Ms and/or 2Ms' business;
 - (d) interfered with the business relations of 2Ms;
 - (e) induced a breach of the Contract by Tran.
- C. Damages.
- D. Alternatively, indemnity or contribution from Toumazou.
- E. Interest pursuant to Statute.
- F. Costs.
- G. Such further and other orders or declarations as the Tribunal deems fit.

AND THE FIRST RESPONDENT CLAIMS AGAINST THE THIRD RESPONDENT

- A. A declaration that Bullion's conduct alleged in paragraphs 8-10 hereof:
 - (a) caused damage to the business of 2Ms;
 - (b) conspired to injure 2Ms and/or 2Ms' business;
 - (c) interfered with the business relations of 2Ms;
 - (d) induced a breach of the Contract by Tran.
- B. Damages.
- C. Interest pursuant to Statute.
- D. Costs.
- E. Such further and other orders or declarations as the Tribunal deems fit.

10. I am not satisfied that the draft Points of Claim disclose any cause of action against Bullion. Although in the Prayer for Relief there is reference to the conduct of Bullion alleged in paragraphs 8-10 a careful consideration reveals that the primary allegations in those paragraphs relate to the conduct of Mr Toumazou with passing reference only to the entering into a contract between the Applicant and Bullion. Clearly no breach of the contract between the Applicant and Bullion (if any) would be relevant to this

dispute. It is not pleaded that any duty was owed by Bullion to the Applicant or the First Respondent or that such duty was breached.

11. In considering any application for joinder, where draft Points of Claim as against the proposed party are provided, the Tribunal must be satisfied that there is an arguable case disclosed in the proposed Points of Claim. In *Wimmera-Mallee Rural Water Authority v FCH Consulting Pty Ltd* (No 2) [2000] VSC 193 Byrne J applied what he described as “*the conventional pleading test*” and in refusing the application for joinder as a Defendant said that “*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.*” In this case, it cannot even be said that a pleading as against Bullion has been proffered. I cannot be satisfied on the material before me in relation to the application to join Bullion that the Respondent has an arguable case against it.

12. In relation to the application to join Toumazou whilst an arguable case may be disclosed in the draft Points of Claim I am not satisfied the Tribunal has jurisdiction to consider those claims. The Tribunal is a creature of statute as confirmed recently by Balmford J in *Australian International Insurance Limited v Graham & Ors* [2005] VSC 183 where at paragraph 27 she said:

The Tribunal does not have the inherent powers of the Supreme Court of a State. The Tribunal is the creature of statute and has only those powers expressly conferred upon it by the VCAT Act or an enabling enactment. The comment by Byrne J in *Greenhill Homes Pty Ltd v Domestic Building Tribunal*, adopted by Hollingworth J in *Vero Insurance v Witherow* that the Tribunal is intended to be a “one stop shop” is not authority for the proposition that the Tribunal has an inherent power...

13. The Respondent’s claims against Toumazou cannot be categorised as a domestic building dispute as defined in s54 of the *Domestic Building Contracts Act* 1995. They are not a dispute between an owner and a builder, or a builder and another builder, or a builder and a sub-contractor in

relation to a domestic building contract, or the carrying out of building work. Rather, they are claims between a company and one of its directors. Mr Forrest indicated following discovery of Mr Toumazou's bankruptcy the Respondent would be amending its draft Points of Claim insofar as they relate to him. As I understand it, it is proposed to make claims against Mr Toumazou pursuant to the provisions of the *Fair Trading Act 1999 (Vic)*. I will grant the Respondent leave to make further application for joinder accompanied by further draft Points of Claim. However, whether the Tribunal will have jurisdiction in relation to any claim will, of course, depend on the nature of the claims made and the sections of that Act under which they are made. I am not prepared to order joinder based on no more than speculation as to what might be in the amended draft Points of Claim.

14. Mr Forrest submitted that whether or not the Tribunal would otherwise have jurisdiction to consider the Respondent's claims against Mr Toumazou he should be joined as a party so that they could conveniently be heard and determined at the same time as the principal proceeding. He referred me to *Greenhill Homes Pty Ltd v Domestic Building Tribunal & Ors* [1998] VSC 34 where Byrne J at paragraph 13 said:

...What is required in order to attract jurisdiction is that the subject matter of the claim has the appropriate nexus with the building contract or with the building work.

and at paragraph 14

...The representations were connected both to the building contract and to the building works because, as it is alleged, these events occurred only because the Proprietors were induced by the representations to enter into this building contract. It may be that there is also a point of contract with the building works because the damages claimed are assessed by reference to the costs of completion and rectification of those works, matters which are to be determined also in the claim for breach of the building contract.

and at paragraph 25

...It is not uncommon for claims arising out of a written contract including a building contract that a party alleges a collateral agreement. In such a case the facts concerning this collateral agreement are often intertwined with the principal contract as are those concerning breach and loss and damage. For reasons already explained, it is reasonable to suppose that Parliament did not wish to force the parties to litigate a claim based on a collateral contract in a forum which is different from that chosen by it for the dispute under the principal contract.

15. However, the situation in *Greenhill* was quite different. In *Greenhill* the Applicants alleged the Respondent builder and its directors had engaged in misleading and deceptive conduct which were, in effect, collateral warranties. In this case, the Respondent seeks to join as a party to this proceeding its own 'director' in relation to disputes about the authority and conduct of the 'director'. These claims do not arise under the *Victorian Civil and Administrative Tribunal Act 1998* or any enabling enactment and, as noted above, the tribunal is a creature of statute and does not have inherent jurisdiction (although I accept it may have some implied ancillary powers)

16. The application for joinder is made under s60 of the *Victorian Civil and Administrative Tribunal Act 1998* which 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 sub-section (1) on its own initiative or on the application of any person.

17. Whilst I accept the powers conferred by s60 are very wide, I am not persuaded, on the material before me, that I should otherwise exercise my discretion and join Mr Toumazou or Bullion. Further, although it is desirable to avoid multiplicity of proceedings wherever possible this does not mean that every conceivable claim between ‘parties’ should be heard and determined at the same time. There needs to be sufficient nexus between the conduct of the ‘parties’ and the various claims before it is desirable for the tribunal to exercise its discretion under s60 of the Act, having regard always to the requirement of s97 that the *‘Tribunal must act fairly and according to the substantial merits of the case in all proceedings.’*

18. The application for joinder will therefore be dismissed with leave to the Respondent to make further application for joinder of Mr Toumazou. Any such application should address the capacity in which Mr Toumazou is to be joined if the application is successful. Costs will be reserved with liberty to apply.

DEPUTY PRESIDENT C. AIRD