VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

DOMESTIC BUIDING LIST VCAT REFERENCE NO. D405/2009

CATCHWORDS

Application for rectification of release in settlement agreement – joinder – s60 of the *Victorian Civil and Administrative Tribunal Act* 1998 – wide discretion – avoiding multiplicity of proceedings

APPLICANT	Madeleine Ioannidis
RESPONDENT	Glenvill Pty Ltd (ACN 007 034 451)
WHERE HELD	Melbourne
BEFORE	Deputy President C Aird
HEARING TYPE	Directions hearing
DATE OF HEARING	17 November 2009
DATE OF ORDER	23 December 2009
CITATION	Ioannidis v Glenvill Pty Ltd (Domestic Building) [2009] VCAT 2650

ORDER

1. Under s60 of the *Victorian Civil and Administrative Tribunal Act* 1998 and upon application by the respondent I join as a party to this proceeding Bayside Building Surveyors Pty Ltd (ACN 065 908 045) c/- DLA Phillips Fox Lawyers, DX 147 Melbourne 3001 (ref: JZG05:NES01:0480907, attention Ms N Stojanovich).
2. **The proceeding is referred to a directions hearing before Deputy President Aird on 4 February 2010 at 9:30 am for one hour at 55 King Street Melbourne at which time any application for costs will be heard and directions made for its further conduct.**
3. Liberty to apply.
4. Costs reserved with liberty to apply.

DEPUTY PRESIDENT C. AIRD

APPEARANCES:

For Applicant	Mr E Riegler of Counsel
For Respondent	Mr G D Bloch of Counsel
For proposed Joined Party	Mr B Carr of Counsel

REASONS

1 In March 2003 Ms Ioannidis entered into a building contract with Glenvill for the design and construction of her new home. The contract price was $379,601. In 2004 Glenvill engaged Bayside Building Surveyors Pty Ltd ('BBS') to report and recommend rectification works after cracks appeared in the plasterboard. All contact was with George Cross of BBS. Glenvill says it carried out the works as recommended by BBS in its first report and that Mr Cross inspected and approved the recommended bracing works before the installation of the plasterboard. Further, that he also inspected and approved the strengthening and bracing works carried out to the roof trusses.

2 Ms Ioannidis commenced proceedings in June 2009 claiming that significant rectification works are required. She relies on a report prepared by BBS in December 2008. The estimated cost of the works is $357,098. Glenvill has applied to join BBS as a joined party to these proceedings on the grounds that if the damage now complained of is caused by the engineering design, as alleged, that BBS is responsible for the failure or inadequacy of the rectification works carried out at its direction in 2004. The application for joinder is opposed by BBS which contends it has been released from any liability in relation to this project by virtue of a settlement agreement entered into on 11 December 2006 when its claim for payment of fees was settled in the Civil Claims List of this tribunal ('the CCL settlement agreement').

3 This is the second application for joinder of BBS made by Glenvill. I dismissed its first application on 8 October 2009 because I was not satisfied the draft Points of Claim as against BBS disclosed an open and arguable case. However, I granted Glenvill leave to make a further application for joinder with any such application to be made in accordance with paragraph 9 of PNDB1 (2007). The proceeding was referred to a further directions hearing on 17 November 2009 for the hearing of any joinder application. The date by which Glenvill was to file and serve its Points of Defence was also extended.

4 I granted BBS leave to intervene nunc pro tunc, at the directions hearing on 8 October 2009 when Mr Carr of counsel appeared on its behalf and relying on an affidavit sworn by BBS's lawyer, Natasha Eloise Stojanovich, submitted that even if the draft Points of Claim against BBS disclosed an open and arguable case, joinder should not be ordered because BBS had been released from all liability in relation to its retainer on Mrs Ioannidis' project by the CCL settlement agreement. Mr Bloch of counsel who appeared on behalf of Glenvill foreshadowed an application for rectification of the terms of settlement.

5 On 17 November 2009 I heard Glenvill's second application for joinder of BBS. Once again I granted BBS leave to intervene. Mr Carr again appeared on behalf of BBS and said the application was opposed on two bases. First, that the application for rectification is untenable in law, and

secondly that there are no particulars of the alleged duty of care. Mr Riegler of counsel appeared on behalf of Ms Ioannidis and said the application was opposed; first because the damage claimed against the joined party was different from the damage claimed by Ms Ioannidis against Glenvill, and secondly, that in exercising the tribunal's discretion under s60 I should have regard to the disadvantage and prejudice which would be suffered by her if she had to obtain alternative expert advice.

6 Section 60 of the *Victorian Civil and Administrative Tribunal Act* 1998 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.

7 In considering an application for joinder I am not required to determine the issues, rather I am simply required to have regard to the various matters set out in s60 of the VCAT Act. The broad scope of the tribunal's powers under s60 were considered in *Zervos v Perpetual Nominees Limited* [2005] VSC 380 where Cummins J said at [11]:

> Whether it [the allegation] is sustained in the end is a matter for trial. The application for joinder is not an application for summary judgment and whilst I agree with Mr Herskope that the test is higher than that apposite to a mere pleading matter because it involves joinder of a party, on the other hand Mr Frenkel is entirely right that the bar is set lower than on an application for summary judgment.

The application for rectification of the settlement agreement

8 The relevant provisions of the terms of settlement provide:

> Whereas:
>
> The parties have been in dispute in relation to various invoices raised by BBS to be paid by Glenvill
>
> A) BBS has made application to VCAT for the resolution of the dispute at VCAT (VCAT reference number: C5963/2006)
>
> B) The parties now wish to settle their dispute on the following terms:
>
> 1. Glenvill shall pay BBS the sum of $5,444 within 7 days of the execution of this Agreement
>
> 2. BBS shall immediately notify VCAT of the settlement and request that the matter listed be struck off. (Glenvill shall received copies of all correspondence sent by BBS to VCAT)

3. The parties release and hold released from each other all claims, demands, suits, proceedings, actions of the like arising out of and/or including the subject matter of this agreement

…

9 In its draft Points of Claim after setting out the background and terms of the CCL terms of settlement, Glenvill contends:

> 23. …the parties in settling the civil claim proceeding and subsequently signing the Terms of Agreement did not intend to release or document a release of the Joined Party from liability to the Respondent in the event the services provided by the Joined Party to the Respondent under the agreement were in breach thereof or in breach of the said duty or were in contravention of the said sections of the *Fair Trading Act 1999*
>
> 24. The Respondent contends that the Terms of Agreement on their proper construction do not disentitle the Respondent whether in this proceeding or otherwise from recovering damages against the Joined Party or from claiming an entitlement to be indemnified by the Joined Party in respect of any award or order which the Applicant obtains against the Respondent in this proceeding including the costs of the proceeding.
>
> 25. The Terms of Agreement, to the extent to which they provide that the Respondent has released the Joined Party in respect of any of the Respondent's claims against the Joined Party (which is denied), do not embody the settlement agreement being the true agreement between the parties.
>
> 26. In the premises the Respondent is entitled to an order that the Terms of Agreement be rectified so as to excise any such provision therefrom.

10 Glenvill relies on an affidavit, sworn on 6 November 2009, by Stephen Bloch, its strategic and development manager, in support of its application for amendment of the release [if that is required]. In that affidavit he deposes to his understanding that the only issue in dispute between Glenvill and BBS in the CCL proceedings concerned the payment of BBS's fees. The amount claimed in the CCL proceeding was $5,444 plus GST – and as can be seen from the settlement agreement, the full invoiced amount was paid to BBS. Relevantly, he states in paragraphs 7 and 8:

> 7. In none of the correspondence which passed between BBS and Glenvill at that time nor in the conversation I had with George Cross as I have described above, was any mention ever made of the sufficiency or adequacy of the works carried out by BBS for Glenvill and we never discussed a release from liability in the event of any such insufficiency, inadequacy or negligence on the part of BBS.
>
> 8. The document I sent to Cross was prepared from a precedent document I had in my office. I did not excise C3 [clause 3] as it did not occur to me to involve a release of anything wider than

> the dispute we had just settled, namely a claim for money on BBS's part and a denial of liability on Glenvill's part on the ground it was not the proper party chargeable. I intended the document to preclude any further claim of money by BBS for works allegedly performed on Glenvill's behalf. However, I did not intend, nor do I believe Cross intended, when signing the document to give the release a wider application.

11 It is by no means clear, on the material before me, that first, the release in clause 3 extends to anything other than BBS's claim for payment of its outstanding invoices, or secondly, if it is to be so construed, whether it is appropriate that rectification be ordered. The only evidence about the parties' intentions at the time the settlement agreement was entered into is contained in Mr Bloch's affidavit. I do not have any evidence before me as to Mr Cross's intention or understanding. These questions cannot be determined until evidence is heard from Mr Cross, and all submissions as to the proper interpretation of clause 3 are made and considered. Accordingly, I am satisfied the proposed Points of Claim insofar as they relate to an application for rectification are open and arguable.

The draft Points of Claim

12 The draft Points of Claim against BBS include claims in contract, tort and under statute. Despite the best endeavours of counsel for BBS to persuade me to the contrary, I am satisfied that the draft Points of Claim reveal an open and arguable case against BBS. The primary complaint appears to be that the claim made against BBS is a contingent claim. Glenvill denies it has any liability to Ms Ioannidis but if it is found that Glenvill is responsible for her loss and damage then, it alleges, such loss and damage was caused by BBS's breach. BBS complains that the draft Points of Claim do not provide any particulars of the breach. I do not agree. Particulars of each of the allegations are provided albeit contingent upon a finding that Ms Ioannidis succeeds in her claim against Glenvill. BBS may, of course, seek further and better particulars of each of the allegations.

13 BBS relies on the affidavit of Peter Stangherlin dated 16 September 2009 which was filed in support of Glenvill's first joinder application. In paragraph 11 of his submissions dated 17 November 2009 counsel for BBS says:

> This affidavit not only sets out no evidence that BBS has breached its duty to the Respondent, but suggests the very opposite in that if only "minor cracking" is evident, BBS's recommended remedial measures appear to have been largely successful.

In my view, it is irrelevant, in considering this joinder application, whether Glenvill accepts it has any liability to Ms Ioannidis.

14 As Senior Member Cremean observed in *Johnston v Victorian Managed Insurance Authority* [2008] VCAT 402 at [15-17]:

> 15. …. I do not think Parliament intended that the Tribunal should be functioning as a court of pleadings. From time to time, of course,

and contained within the Sixth Respondent's submissions, it is expressly disclaimed that the Tribunal is a court of pleadings. And that remains the reality: the Tribunal is not a court in the normal sense of that word and is not, most definitely, a court of pleadings.

16. There is also this point. The primary function of the tribunal, apart from alternative dispute resolution, is to conduct hearings. A hearing is a trial of the action. <u>There should not be a trial before a trial</u>. (emphasis added)

Do the claims relate to the same damage?

15 Counsel for Ms Ioannidis and for BBS submit that BBS should not be joined because the respective claims: Ms Ioaniddis against Glenvill, and Glenvill against BBS, do not relate to the same damage. In essence, it was submitted that the claim by Ms Ioaniddis is that this house was always 'doomed to fail' because of certain deficiencies in its design, as identified by Mr Cross, and that Glenvill's claim against BBS is for an alleged breach of contract, duty of care, and statutory duty in relation to the rectification works.

16 Ms Ioannidis' claim as set out in her Points of Claim relies on the BBS report of December 2008 which is specifically referred to in the particulars to paragraph 8. The first sentence of that report, under the heading 'SUMMARY OF MAJOR FINDINGS' demonstrates the breadth of the allegations made against Glenvill:

> There are systematic failures in the design, construction, supervision and the workmanship of the building. The system failures occurred in each major structural component of the building except for the concrete strip footings. (sic)

The alleged design and construction failures, administrative requirements and workmanship and supervision issues are then summarised.

17 Whether the claim by Glenvill against BBS is in respect of the same damage as the claim against it by Ms Ioannidis is problematic. However, this cannot be finally determined until the evidence is heard and considered. Even if the proper construction of any claim Glenvill might have against BBS is for recovery of the costs thrown away of the allegedly unsuccessful rectification works, it is highly likely that the tribunal would order that any application by Glenvill for recovery of those costs be heard and determined at the same time as this proceeding.

18 In any event whether the claim against BBS is for the same damage is but one of the factors to be taken into account in deciding whether to join BBS under s60.

Possible prejudice to the applicant if joinder ordered

19 The tribunal has an unfettered discretion under s60 of the VCAT Act whether to order joinder, even where the draft Points of Claim reveal an open and arguable case. Counsel for Mrs Ioannidis submitted that in

considering whether to exercise the tribunal's discretion I should have regard to the serious prejudice that she would suffer if she was required to obtain alternative expert advice following BBS's joinder. However, in my view, any prejudice that might be suffered by Mrs Ioannidis is but one of the factors to be considered. For reasons which are unclear to me, she sought expert assistance from BBS. Notwithstanding that BBS had previously provided expert advice to Glenvill which carried out rectification works as directed and approved by its Mr Cross, BBS accepted the retainer from Mrs Ioannidis.

Conclusion

20 Section 60 provides that joinder is appropriate for a number of reasons, all of which apply here. Of course it is desirable and necessary that BBS have the benefit of and be bound by the decision of the tribunal.

21 Further, it is important to avoid multiplicity of proceedings wherever possible, and in a case such as this to avoid any possibility of inconsistent findings; issue estoppel or res judicata. As Cummins J said in *Zervos* at [15]

> Further, I consider that to refuse the joinder would have most undesirable consequences of duplication and expense, the very reason for the provision in the first place.

22 Similarly, BBS's interests are clearly affected and, in my view, it is somewhat surprising that it is resisting an opportunity to take whatever steps it considers appropriate to protect its interests to minimise the risk of an adverse finding as to the cause of the damage. One might expect in such circumstances that it would welcome an opportunity to be heard so as to minimise any potential liability.

23 For these reasons it is irrelevant, in my view, whether the claims by Glenvill relate to the same damage as the claim by Mrs Ioannidis against Glenvill. Not only would it be inappropriate to determine whether the respective claims relate to the same or different damage without hearing the evidence, it is desirable, even if the claims relate to different damage, for the reasons set out above for BBS to be a party to this proceeding.

24 I will therefore order that BBS be joined as a party to this proceeding and reserve the question of costs with liberty to apply.

DEPUTY PRESIDENT C. AIRD