

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

DOMESTIC BUILDING LIST

VCAT Reference: D511/2005

CATCHWORDS

Domestic Building, joinder, sufficient articulation of claim
[2006] VCAT 102

APPLICANT: Camille Lovering

FIRST RESPONDENT: Suncorp Metway Insurance Ltd (ACN 075 695 966)

JOINED PARTY: Langan Constructions (ACN 007 347 924)

WHERE HELD: Melbourne

BEFORE: Senior Member M. Lothian

HEARING TYPE: Directions Hearing

DATE OF HEARING: 2 February 2006

DATE OF ORDER: 9 February 2006

ORDERS

1. The application under s60 of the *Victorian Civil and Administrative Tribunal Act 1998* to join Kennedy Nolan Architects as Second Joined Party is dismissed.
2. Costs of this application are reserved. There is leave to apply for costs after 24 February 2006.
3. It is specifically noted that Kennedy Nolan Architects, through their Counsel, agreed to attend and participate in the mediation which is currently listed for 24 February 2006.

SENIOR MEMBER M. LOTHIAN

APPEARANCES:

For the Applicant: Mr Simon Gerber, Solicitor

For the Respondent: Mr Andrew Archer of Counsel

For the Joined Party: Ms A Llewelyn, Solicitor

For the Proposed Joined Party: Mr D Cole, Solicitor

REASONS

1. At the directions hearing the determination regarding joinder was reserved for decision.
2. This interlocutory proceeding is an application by the Joined Party, Langan Constructions Pty Ltd (“Langan”) to join Kennedy Nolan Architects (“Kennedy Nolan”) as Second Joined Party to this proceeding.
3. The original application was an appeal by the owner, Ms Lovering, against the Respondent, Suncorp Metway Insurance Ltd (“the Insurer”) which is the warranty insurer of the Applicant’s (“Ms Lovering’s”) home. The home was built under contract between Langan and the then owner. Ms Lovering is a subsequent purchaser.
4. Ms Lovering claimed against the Insurer for approximately 25 defects, some of which were admitted by the Insurer. Her claim is for indemnity regarding the admitted defects and a review of the Insurer’s decision regarding the remainder.
5. On 28 October 2005 Langan was joined as a Joined Party to this proceeding on the application of the Respondent, which was not opposed by Ms Lovering.
6. Ms Llewelyn for Langan submitted in the current joinder application that two matters complained of against her client, which she identified as lack of capping of concrete parapet walls and defective terrazzo tiles, are, if defective, the responsibility of Kennedy Nolan rather than Langan.
7. The proposed Points of Claim by Langan against Kennedy Nolan plead, at paragraphs 19 and 20:

- “19. Further, by reason of the matters set out in paragraph 18.3 above, if the Joined Party is liable to the Respondent, which the Joined Party specifically denies, the Second Joined Party is liable to the Joined Party for any amounts the Respondent seeks to recover from the Joined Party.
20. Further, by reason of the matters set out in paragraph 18.3 above, the Joined Party is entitled to indemnity or contribution from the Second Joined Party in respect of any amounts the Respondent seeks to recover from the Joined Party”.

And at paragraph 18:

“In respect of the rejected items [by the Insurer] the Joined Party denies liability on the basis that it completed the works.

....

18.3 In accordance with the instructions and drawings of the Second Joined Party”.

8. The Insurer’s claim against Langan is that if the Insurer is liable to Ms Lovering, it is entitled to recover from Langan under the warranty policy.
9. With regard to Ms Llewelyn’s submission for Langan, there is a specific reference in paragraph 7 (g) of the Points of Claim to the terrazzo floor: “In the study, bedroom and passage on the ground floor” which it is alleged “has not been adequately ground or sealed”. Nothing in the proposed Points of Claim or in the supporting affidavit indicate what Kennedy Nolan are alleged to have done or not done which could give rise to liability. The enigmatic statement in the Insurer’s decision, “Tiles laid to architects direction”, does not assist.
10. The relevance of Kennedy Nolan’s alleged instructions not to cap the concrete parapet is not clear. It is referred to in item 17 of the Respondent’s decision, but the Applicant’s Points of Claim do not mirror the Insurer’s decision, and this item is not specifically included. It is possible that items in paragraphs 7 (h) or 7 (q) refer to this alleged fault, but they are not equivocal.
11. The proposed Points of Claim by Langan against Kennedy Nolan also contain the surprising pleading, at paragraphs 12, 13 and 14, that the original owner, who is

not a party to this proceeding, neglected to pay Langan; that a dispute arose between Kennedy Nolan and Langan regarding the previous owner's refusal to pay and that this alleged failure amounts to a repudiation of the original building contract. Paragraph 14 includes the statement "the Joined Party hereby accepts the owner's repudiation of the contract" – it is hard to see how this statement can have any effect.

12. Mr Archer for the Respondent neither opposed nor consented to the joinder. Mr Gerber for Ms Lovering indicated that his client would also consider making application to join Kennedy Nolan, particularly if the application by Langan were to be unsuccessful.
13. Mr Cole of Counsel appeared for Kennedy Nolan and opposed the application for joinder. He argued that the proposed Points of Claim could be characterised as a notice of contribution under s23B of the *Wrongs Act* 1958. He said the proposed Points of Claim as drafted allege neither negligence nor breach of contract on the part of Kennedy Nolan, and that nothing listed in paragraph 7 of Ms Lovering's Points of Claim is the responsibility of Kennedy Nolan as architects.
14. It is possible that Kennedy Nolan are responsible for some of the items complained of in the original Points of Claim, just as it is always possible in any building dispute involving an architect that the architect has done something, or failed to do something, which results in loss. In this case the draft Points of Claim do not sufficiently articulate any claim against Kennedy Nolan to demonstrate whether Langan's claim against them is "open and arguable" in accordance with *Zervos v Perpetual Nominees Limited* [2005] VSC 380, at paragraph 11.

15. The application under s60 to join Kennedy Nolan as Second Joined Party is therefore unsuccessful.

SENIOR MEMBER M. LOTHIAN