VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

VCAT REFERENCE NO. D292/2005

DOMESTIC BUILDING LIST

CATCHWORDS

Domestic building – joinder – disallowed.

APPLICANTS	Steven Makrenos, Stam Makrenos
FIRST AND SECOND RESPONDENTS	Konstantinos Papaioannou, Evridiki Papaioannou
THIRD RESPONDENT	Barnabas Papaioannou
JOINED PARTY 1	Combined Building Consultants Pty Ltd (ACN 067 407 943)
WHERE HELD	Melbourne
BEFORE	Senior Member D. Cremean
HEARING TYPE	Hearing
DATE OF HEARING	30 May 2007
DATE OF ORDER	8 June 2007
CITATION	Makrenos v Papaioannou (Domestic Building) [2007] VCAT 1074

ORDER

1 Application for joinder dismissed.

2 The compulsory conference scheduled for 4 June 2007 is cancelled.

3 I extend time to reply to Notice to Admit to 24 June 2007.

4 Reserve costs.

5 I direct the Principal Registrar to list this matter before me on 28 June 2007 at 10.00 a.m. at 55 King Street Melbourne. Allow ½ day.

SENIOR MEMBER D. CREMEAN

APPEARANCES:

For the Applicants	Mr A. Herskope of Counsel
For the First and Second Respondents	Mr K. Oliver of Counsel
For the Third Respondent	Mr A. Dickenson of Counsel
Joined Party 1	No appearance

REASONS

1 Application is made by the Applicants to join Efthemia Papaioannou, wife of the Third Respondent, as a party to these proceedings.

2 Joinder is governed by s60 of the *Victorian Civil and Administrative Tribunal Act* 1998 which reads as follows:

> (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 person's interests are affected by the proceeding; or
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> (c) for any other reason it is desirable that the person be joined as a party.
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> (2) The Tribunal may make an order under sub-section (1) on its own initiative or on the application of any person.

3 There are now numerous decisions on the width of the power granted by s60. A recent decision is that of Deputy President Aird in *Perry v Binios* [2006] VCAT 1604. In that decision she refers to the statement of Cummins J in *Zervos v Perpetual Nominees* Ltd [2005] VSC 380 at [11] - that before a joinder can be ordered the Tribunal must be satisfied that the case against the proposed joined party is "open and arguable".

4 In this particular case I am satisfied the case against Efthemia Papaioannou is "open". But I am not satisfied, for reasons I will give, that it is at all "arguable". The proceedings proposed to be brought against her, on the materials placed before me, are, in my view, doomed to fail.

5 The case against the proposed joined party is founded principally on what is revealed in a search of the Australian Business Register. This is a relatively recent discovery. The search discloses that Barnabas Papaioannou (the Third Respondent) and Efthemia Papaioannou are together registered as holders of business number – 66 656 353 808. The entity type is described as: "Family partnership".

6 The significance of this is said to be that the Third Respondent and his wife are obviously business partners. Moreover, that they are business partners in a way which is relevant to the present proceedings because that business number is mentioned in a number of documents including tax invoices.

7 Thus it is important, it is said, if the Tribunal is to do complete justice, in this case, for it to have before it as a party the proposed party. It is necessary or proper to join her.

8 I do not wish to unduly compress the Applicants' application but they are, as set out above, its essentials.

9 Joinder of the proposed party was opposed on several grounds. One was that the proposed party has sworn, in her affidavit, that no business

partnership exists between her and the Third Respondent. Also that she has had no involvement at all in the contractual matters in issue in this case. That is, except inferentially by virtue of the business number – as I understand the submission. But, if contrary to this, there was a business partnership between the two, that was not determinative of the question whether the proposed party might be liable as a result as a partner. In that regard reference was made to s9 of the *Partnership Act* 1958 which reads as follows:

> Every partner is an agent of the firm and his other partners for the purpose of the business of the partnership, and the acts of every partner who does any act for carrying on in the usual way business of the kind carried on by the firm of which he is a member bind the firm and his partners, unless the partner so acting has in fact no authority to act for the firm in the particular matter and the person with whom he is dealing either knows that he has no authority or does not know or believe him to be a partner.

I was also referred to the decision of the High Court in *Construction Engineering (Aust) Pty Ltd v Hexyl Pty Ltd* (1985) 155 CLR 541.

10 The submissions in opposition were more detailed than this but, again, I believe I have set out their essentials.

11 I consider it is "open" to be said that the proposed party should be joined because there is some basis for putting that view forward and it is not obviously irrational to do so. The basis exists in the use of the business number (ABN). It turns out that that ABN records as partners both the Third Respondent and his wife. It is true, too, that no Business Activity Statements were given in evidence before me as the Applicants point out – I agree they could shed some light on the issue.

12 However, I consider an ABN of limited value in recording business arrangements in detail. It is a facility for the imposition and collection of revenue. It is not much more than that, in my view. Its evidentiary utility is, I consider, minimal. Perhaps the application for the ABN could reveal more.

13 In any event, the ABN in this case records an entity type as "Family Partnership". I am not sure what type of "entity" that is. What, exactly, is a "Family" partnership as opposed to any other kind of partnership? And is it using the word "Partnership" in its strict legal sense, of a business being carried on in common with a view of profit, or in some other sense? The latter only would be suggested by the word "Family".

14 If, however, I regard a "Family Partnership" as being capable of embracing a business of some kind, why should I regard the business in this case between the Third Respondent and his wife as one directed to the works the subject of the proceedings? The business, it seems, could be one of any number of kinds. I am not informed, otherwise, what it might be. The mere

issue of tax invoices in some instances in this case is hardly conclusive and is only merely suggestive.

15 Even if there was a business partnership of relevance, factually, to the subject-matter of the proceedings, that is not to say that the proposed party is inevitably liable for any and all of the activities of the Third Respondent. That is not the meaning and purport of s9 of the *Partnership Act* 1958, as is pointed out to me. Liability, under that provision, of one partner for the acts of another, has a number of key elements and I simply have too little information to go on, from the Applicants' side of things, to say the proposed party would necessarily be liable from the acts of her husband in this case based on that provision.

16 From the proposed party's side of things there is, moreover, the sworn account given in her affidavit sworn on 28 May 2007. No affidavit from the Applicants directly contradicts her in the contents of her affidavit. Her affidavit very plainly denies a partnership in this case. I quote paragraphs 1, 2, 3 and 5 as follows:

> 1. I am the wife of the Third Respondent ("Barney") and the Applicants seek to join me as a party to this proceeding. I make this affidavit in opposition to that application and I do so from my own knowledge save where stated to the contrary.
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> 2. I am aware from reading documents that Barney has shown me that in about mid 2005 the Applicants issued this proceeding against Barney and his parents alleging that Barney and his parents were in partnership in relation to the building of the Applicants' house. The Applicants now wish to allege that I was in partnership with Barney in relating to the building of the Applicants' house. That is not true.
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> 3. I am informed by Barney and believe that he entered into the contract with the Applicants in May 2003. I did not sign the contract and did not even see the contract prior to this proceeding being issued. I have now seen the contract and the various documents referred to in it. Neither the contract nor any of the documents referred to in the contract refer to me as a party to the contrary. My name does not appear on any of the documents. Now produced and shown to me and marked with the letters "EP1" is a true copy of the contract.
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> …
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> 5. The Australian Business Number recorded on some of the progress payment claims by Barney was obtained by our accountant, Hamilton Morello. Barney and I used that ABN in relation the construction of 2 units by us on the land at 300 Porter Street, Templestowe. We sub-divided that land and built 2 units on it, one of which we sold and the other we kept for our family home.

Nothing in evidence contradicts these propositions although the Applicants via their Counsel sought to argue their way around them. To my mind,

however, they did so to no effect. I refer also to the decision of Fox J in *Aikman v Brown* (1973) 1 ACTR 121 at 124-5.

17 The case, I agree, in light of the proposed party's sworn assertions is very close in factual setting to the analysis undertaken by the High Court in the *Construction Engineering* case, above. Bearing in mind also the terms of s9 of the *Partnership Act* it is useful to quote the following long passage from the judgment of the Court (at p.547):

> It has not been suggested that Construction entered into the building contract under any belief that Tambel was acting as agent for the firm of which Hexyl and Tambel were members. To the contrary, it is conceded that Construction did not, at the time the building contract was made, even know of the existence of the partnership or, for that matter, of Hexyl. At the cost of some repetition, the circumstances may be summarized in four propositions: (i) Tambel did not have authority to contract for Hexyl as an undisclosed principal; (ii) Tambel did not represent to Construction that it was making the contract for Hexyl as an undisclosed principal (iii) the actual building contract is, in its terms, a contract between Construction and Tambel alone and contains provisions which would be inappropriate if Tambel had been acting as agent for Hexyl, as an undisclosed principal, and itself, and (iv) Construction, for its part, did not believe that Tambel was contracting for Hexyl or anyone else as an undisclosed principal. For Construction, particular reliance was placed on the provisions of s.5 of the Act [which is the same as s9, above] ….
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> It can be seen that s.5 comprises two distinct limbs. The first deals with actual authority. It provides not that every partner is deemed to be an agent of the firm and his other partners for the purposes of the partnership business but that every partner is an agent of the firm and his other partners for that purpose. The actual authority to which it refers is, however, but prima facie in that it may be negated or qualified by contrary agreement of the partners (see above and Act, s.19). In substance, that first limb states the common law. Construction can obtain no solace from it in the present case since, as has been seen, any prima facie authority of Tambel to contract as agent for the partnership was effectively negated by the provisions of the Partnership Deed.
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> The second limb of s.5 deals with ostensible authority. Even though actual authority be lacking, the act of every partner who does any act for carrying on in the usual way business of the kind carried on by the firm of which he is a member binds the firm and his partners unless the other party "either knows that he has no authority, or does not know or believe him to be a partner". Again, this limb effectively states the common law. Again, Construction can gain no solace from it since it is conceded that Construction neither knew nor believed Tambel to be a partner. There is a further reason why the provisions of s.5 of the Act do not, in the circumstances, have the effect that Hexyl is liable to Construction as an undisclosed principal under the building contract. The provisions of that section are, as has been seen,

> concerned with the actual or ostensible authority of a partner to bind his firm. They do not produce the consequence that a partner who has authority to enter into a contract as agent for his firm cannot enter into a contract as trustee for himself and his partners. Even if the effect of s.5 had been that Tambel had actual or ostensible authority to enter into the building contract on behalf of Hexyl as an undisclosed
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> principal and itself, the fact would remain that it did not, on the material before the Court, contract in that capacity.

18 It seems to me, as was submitted to be so, that the remarks of the Court in that case are directly relevant to the facts in this case. Those remarks, if I apply them to this case, as I was invited to do, lead inevitably to the result that the proposed party on the materials before me, could not be made liable.

19 I, therefore, consider, for the reasons I have given, that joinder of the proposed party has no prospect of success. It is not "arguable". It is only "open". But to be joined the case against a proposed party must be both "open" and "arguable". This is not.

20 I do not allow the joinder considering the foregoing.

21 The proposed party may have difficulty in applying for costs, if costs are to be sought, because she is not a party. And s109 of the 1998 Act only relates to parties. Nonetheless I reserve liberty to apply for costs if any other arguments come to mind of the proposed party's legal advisers.

22 I make the directions and orders set out.

SENIOR MEMBER D. CREMEAN