VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

VCAT REFERENCE NO. D292/2005

DOMESTIC BUILDING LIST

CATCHWORDS

Domestic building – Leave to amend – principles applicable.

APPLICANTS	Steven Makrenos, Stam Makrenos
FIRST AND SECOND RESPONDENTS	Konstantinos Papaioannou, Evridiki Papaioannou
THIRD RESPONDENT	Barnabas Papaioannou
JOINED PARTY	Combined Building Consultants Pty Ltd (ACN 067 407 943)
WHERE HELD	Melbourne
BEFORE	Senior Member D. Cremean
HEARING TYPE	Hearing
DATE OF HEARING	23 May 2007
DATE OF ORDER	31 May 2007
CITATION	Makrenos v Papaioannou (Domestic Building) [2007] VCAT 959

ORDER

1 I adjourn the hearing of the application for joinder to 10.00 a.m. on 30 May 2007 before Senior Member Cremean at 55 King Street Melbourne.

2 By 3.00 p.m. on 28 May 2007 the proposed Joined Party must file and serve any affidavit(s) in response to that of the Applicants sworn in support of the application.

3 By 4.00 p.m. on 29 May 2007 the Applicants must file and serve any affidavit(s) in reply to that or those of the proposed Joined party.

4 By 4.00 p.m. on 25 May 2007 the Applicants must file and serve any Notice to Admit on the First and Second Respondents in respect of the documents referred to in exhibit "DJN 9" of the affidavit of Darren John Noble sworn 2 May 2007.

5 By 4.00 p.m. on 1 June 2007 the First and Second Respondents must file and serve a document responding to such Notice to Admit (if served)

admitting or denying or not admitting (as the case may be) the facts or matters set out therein including the authenticity of any document(s) referred to therein.

6 Under s98(1)(b) of the *Victorian Civil and Administrative Tribunal Act* 1998 I adopt the practices or procedures of the Supreme Court of Victoria in relation to Notices to Admit and as to the cost consequences applicable to the same.

7 Leave to amend the Amended Points of Claim (in the form submitted) is granted as regards the Fourth Respondent. I reserve on the question of any costs thrown away.

8 Leave to amend the Amended Points of Claim (in the form submitted) is granted as regards the Third Respondent. I reserve on the question of any costs thrown away.

9 I dismiss the application for leave to amend the Amended Points of Claim as regards the First and Second Respondents. I reserve costs.

10. The compulsory conference scheduled for 4 June 2007 remains fixed subject to any orders to the contrary made at the hearing on 30 May 2007.

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.P. Dickenson of Counsel
For the Joined Party	Ms A. Grice, Solicitor

REASONS

1 The Applicants make application:

a for leave to further amend their already amended Points of Claim.

b for the joinder of a party.

2 Counsel acting for the proposed joined party sought an adjournment of the application on the ground of short notice, considering the terms of the Practice Note. I was satisfied, for reasons I gave at the time, that such adjournment should be granted. I indicated I was relying on ss97 and 98 of the *Victorian Civil and Administrative Tribunal Act* 1998 together with authorities such *as Sullivan v Department of Transport* (1978) 1 ALD 383 AT 403 and *Queensland v J L Holdings Pty Ltd* (1997) 141 ALR 353 at 357. To proceed, in disregard of the Practice Note, as if it does not exist, and despite objection to doing so, would be, I think, a denial of natural justice.

3 Accordingly, I adjourned off the joinder application and made directions.

4 There remains the application for leave to amend. All parties, except the Joined Party, opposed the application. The Joined Party, who was represented by Ms Grice, offered no opposition and I, therefore, allowed the application as regards that party. At Ms Grice's request, however, I reserved the question of any costs thrown away.

5 The opposition of the Third Respondent was based, principally, on the ground of delay.

6 The opposition of the First and Second Respondents went further and was based on the submission that the proposed amendments would be futile or untenable. In short, that, if allowed, they would disclose a cause of action doomed to only fail.

7 Having heard the parties on these issues, I reserved my decision, to enable me to further consider this quite complex matter.

8 In the end, however, I am clear that I should allow the application as regards the Third Respondent, but not allow it as regards the First and Second Respondents. My reasons for doing so, follow.

9 As regards the Third Respondent the amendments sought are largely those to be found in proposed paragraphs 2 and 8.1 to 8.6.

10 As regards the First and Second Respondents the amendments sought are largely those to be found in proposed paragraphs 3 and 8.7 to 8.15.

11 Proposed paragraphs 2, 3, 8.1 to 8.6 and 8.7 to 8.15 are as follows:

2. <u>The Third Respondent:</u>

a. <u>is and was at all material times carrying on business under the name Arista Construction; and</u>

b. has never has been registered as a building practitioner under the Building Act 1993,

3. The first named Respondent (the First Respondent) is and was at all material times registered with the Building Commission as a Registered Building Practitioner in the class and category of domestic builder unlimited, holding registration number DBU- 10370.

Particulars

The First Respondent has been continuously registered with the Building Practitioners Board as a building practitioner in the class and category of domestic builder – unlimited since 28 June 1996 as certified by the Registrar of the Building Practitioners Board by certificate issued on 27July 2006 under section 239 of the *Building Act*.

The owners also refer to paragraph 2 of the affidavit sworn in this proceeding by the First Respondent on 17 July 2006,

Copies of the aforementioned documents are in the possession of the solicitors for the applicants and may be inspected by appointment.

8.1 Further and in the alternative, at all material times, the Third Respondent represented to the owners that he was registered as a building practitioner in the class and category of domestic builder unlimited ("the representation").

Particulars

The representation is partly in writing and partly to be implied from conduct. Insofar as the representation is in writing it is contained in the Particulars of Contract at page 4 of the contract in the second box where the Third Respondent has written in information about the identity of the builder under the contract,

Insofar as the representation is to be implied by conduct, it is to be implied by the Third Respondent providing a written quote to the owners, entering into the contract and carrying out the works under the contract in circumstances where only a building practitioner registered in the class of domestic builder was permitted to enter into a major domestic building contract.

Copies of the contract and the quote are in the possession of the solicitors for the Applicants and may be inspected by appointment.

8.2 The representation was a representation made in trade and commerce within the meaning of section 9 of the Fair Trading Act 1999,

8.3 The Representation was false, misleading and deceptive,

Particulars

The Third Respondent has never been registered as a building practitioner, whether in the class or category of domestic builder or otherwise.

8.4 By making the representation of the Third Respondent engaged in misleading and deceptive conduct in breach of section 9 of the Fair Trading Act 1999.

8.5 Acting upon and induced thereby and in reliance upon the representation, the owners entered into the contract.

8.6 By reason of the matters alleged in paragraphs 8.1 through 8.5 hereof the owners have suffered loss and damage.

Particulars

The owners refer to and repeat the particulars subjoined to paragraph 8 hereof.

8.7 Further, on or about 6 April 2002, the First, Second and Third Respondents represented to the statutory warranty insurer, Vero, that for the purposes of the domestic builders warranty insurance required under the building Act there was a business known as "K. E. B. Papaioannou" and that:

a. it traded as a partnership; and

b. the partners were Kon, Evridiki and Varnava Papaioannou.

("the representations").

Particulars

The representations are in writing and are contained in an application to Vero comprising Rapid Access Application and Form 1 Standard National General Indemnity.

The Rapid Access Application form is signed by the First Respondent who declared that the details on the application form were true and represented a fair and accurate representation of the affairs of the application for statutory domestic builder's warranty insurance.

The Form 1 Standard National General Indemnity is signed by each of the First, Second and Third Respondents.

Copies of the aforementioned documents are in the possession of the solicitors for the Applicants and may be inspected by appointment.

8.8 By reason of each of the representations alleged in paragraph 8.7 above, Vero issued a certificate of insurance in the name of KE & B Papaioannou for the works at the owners' land ("the certificate of insurance").

Particulars

The certificate of insurance is in writing and is dated 26 November 2003, a copy of which is in the possession of the solicitors for the owners and may be inspected by appointment.

8.9 But for the issue of the certificate of insurance in the names of the First, Second and Third Respondents the Third Respondent would not have been able to obtain the Building Permit that was issued by the Fourth Respondent on 18 December 2003 and to illegally conduct business as a domestic builder notwithstanding that he was not registered as a building practitioner and was not entitled to or eligible to obtain domestic builders warranty insurance.

Particulars

The Building Permit is in writing and dated 18 December 2003, a copy of which is in the possession of the solicitors for the owners and may be inspected by appointment.

8.10 But for the issue of the Building permit, the Third Respondent could not have carried out the works.

8.11 Each of the representations alleged in paragraph 8.7 above were made in trade or commerce within the meaning of section 9 of the Fair Trading Act 1999.

8.12 Each of the representations alleged in paragraph 8.7 above were false, misleading and deceptive within the meaning of section 9 of the Fair Trading Act 1999 in that the First, Second and Third Respondents have never been in partnership together and have never traded as KE & B Papaioannou.

Particulars

The affidavit sworn by the First Respondent in this proceeding on 17 July 2006;

The affidavit sworn by the Third Respondent in this proceeding on 17 July 2006;

The witness statement by the First Respondent dated 19 April 2007;

The witness statement by the Second Respondent dated 19 April 2007;

The witness statement by the Third Respondent dated 20 April 2007.

8.13 By making the representations alleged in paragraph 8.7 the First Second and Third Respondents engaged in false, misleading and deceptive conduct within the meaning of section 9 of the Fair Trading Act.

8.14 By reason of the breaches of section 9 of the Fair Trading Act 1999 alleged in paragraph 8.13 the owners have suffered loss and damage.

Particulars

By reason of the false, misleading and deceptive conduct of the First, Second and Third Respondents, the Third Respondent has been able to procure domestic builder's warranty insurance and obtain building permits on behalf of various building owners

including the owners and illegally conduct business as a domestic builder as a result of which he was thereby able to enter into the contract and carry out the defective building works as alleged herein and as a result of which the owners have suffered the loss and damage set out in the particulars sub-joined to paragraph 8 hereof.

8.15 But for the false, misleading and deceptive conduct as alleged, the owners would have entered into the contract with a registered building practitioner.

12 The principles I should follow in deciding whether to allow the proposed amendments or not are laid down in many authorities. In *Hall v National & General Insurance Co Ltd* [1966] VR 355 at 367 Gowans J said this: "I should allow all such amendments to be made as are necessary for the purpose of determining the real questions in controversy". He also said: "A claim sought to be raised by amendment may appear to have not much chance of success, but unless that is demonstrably so, the amendment should not be refused". In *Howarth v Adley* [1996] 2 VR 535 at 542 Winneke P said that the "fundamental principle which … should guide a trial judge upon an application by a party to amend his pleadings so as to plead a new or alternative claim or defence is that such an application should ordinarily be allowed provided that any injustice arising to the other party from so doing can be compensated by the imposition of terms". I mentioned these authorities recently in *Construction Engineering (Aust) Pty Ltd v Victorian Managed Insurance Authority* (unreported)

13 As regards the Third Respondent, I agree there has been delay in these proceedings, for one reason or another. The proceedings were begun over 2 years ago and, if they do not settle in the meantime, are a long way off finalisation. Is the delay in this case, however, enough to say that, in justice, the Applicants should not be able to bring the amended proceedings against the Third Respondent? In my opinion, not. The delay is not, in my view, disabling. The proposed paragraphs, on their face, assert a complete cause of action under the *Fair Trading Act* 1999 and are not obviously irrational or lacking foundation. To deprive the Applicants of any opportunity to advance this cause of action would be to do them, in my view, an injustice, in light of the matters that were put to me. I propose, therefore, to allow the amendments sought.

14 Having done so, I note the remarks, above, of Winneke P. I reserve costs, for the moment. But I should think it would be proper to allow any costs thrown away by reason of the amendments. I say this, however, without heaving heard Counsel on the matter. Having done so, my views may alter.

15 It seems to me, in summary, that, as regards the Third Respondent, I should allow the amendments sought to enable the real questions in controversy to be determined, and that I should do so, as a matter of justice. It is not for me to determine, at this point, whether the *Fair Trading Act* claim has any

or any strong prospects of success. It is enough that it is demonstrably so that it does not have any chance of success at all.

16 On the other hand, I am satisfied, having heard Counsel, that it is "demonstrably so" that the proposed amendments as regards the First and Second Respondents do not have any change of success. I am aware that the test, at this stage, is often expressed in terms of the bare arguability of the claim, but in my view, for reasons I will give, the proposed amendments lack that basic arguability. I agree with Counsel's characterization of them as "untenable".

17 It is on the issue or causation, I think, as was submitted to me, that the proposed paragraphs founder. Each of proposed paragraphs 8.9, 8.10 and 8.15 are expressed in terms of "but for" as a matter of causation. The "but for" test of causation can only ever serve as a guide of sorts on the issue and can never be regarded as the sole or exclusive criterion for determining whether something was caused by something else: see *March v E + M Strathmare Pty Ltd* (1991) 171 CLR 506 at 515-7; 522-3. Yet, if I take proposed paragraph 8.15 as an example this confuses necessary conditions ("but for" the conduct alleged) with contingent conditions ("would have entered into a different contract") and seeks to elevate this confusion into the pleading of a material fact. In reality, it is not a fact which is sought to be pleaded but merely a speculative circumstance. The same might also be said of proposed paragraph 8.9 and possibly also of proposed paragraph 8.10. The difference between those two, however, is that whereas the former is expressed speculatively ("would not have") the latter is expressed as a necessary truth ("could not have"). But proposed paragraph 8.10 hardly qualifies for necessary truth status. These are impermissible leaps in logic which go to the heart of the proposed amendments.

18 But, as was submitted to me, the failings go even further than that. The proposed paragraphs, nowhere, allege that the Applicants were misled or deceived by the First and Second Respondents into believing that the First Respondent was the registered builder and would be carrying out the works. If, as alleged, they did make a representation to the insurer, there is no allegation of any substance connecting up that representation with liability on their part for the Third Respondent's workmanship subsequently in a contract entered into with the Applicants. Moreover if, as alleged, the Third Respondent could not have carried out the works but for the issue of a building permit, how is it that the issue of the latter caused the works to occur and, as alleged, caused them to be carried out shoddily? If, as alleged, the Third Respondent was not able to carry out works legally, and yet did carry out works, how is that this illegality occurred by reason of the issue of the permit?

19 In any event, I note the date of the contract in this case is 18 May 2003. As was pointed out to me, the certificate of insurance is dated 26 November 2003. How could it be possible for a misrepresentation, inducing the latter,

to have induced the former? When the certificate of insurance was issued, the contract had already been entered into.

20 The failings in the proposed amendments are so fundamental and far-reaching that they should not, in my view, be allowed. The response of the Applicants to the objections taken by the First and Second Respondents was unpersuasive. The case demonstrates the unhelpful nature of the "but for" test of causation. I cannot agree that a viable issue arises out of the proposed amendments. They are, in my view, irrational in the logic involved.

21 It follows that I should not allow those amendments. They fall within the qualification allowed for by Gowans J – it is "demonstrably so" that they have no chance of success. I do not consider them even slightly arguable at the base level at which I must operate on this question.

22 I reserve costs.

23 I make the other directions and orders I set out.

SENIOR MEMBER D. CREMEAN