

# VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

## CIVIL DIVISION

### DOMESTIC BUILDING LIST

VCAT REFERENCE NO. D782/2007

### CATCHWORDS

Domestic Building, joinder, section 60 of the *Victorian Civil and Administrative Tribunal Act 1998*, Part IVAA of the *Wrongs Act 1958*, open and arguable case, timeliness of application for joinder.

<b>APPLICANT</b>	McInness Developments Pty Ltd
<b>RESPONDENT</b>	June Detering
<b>WHERE HELD</b>	Melbourne
<b>BEFORE</b>	Senior Member M. Lothian
<b>HEARING TYPE</b>	Hearing
<b>DATE OF HEARING</b>	5 May 2009
<b>DATE OF ORDER</b>	14 July 2009
<b>CITATION</b>	McInness Developments Pty Ltd v Detering (Domestic Building) [2009] VCAT 1185

### ORDER

1. Under section 60 of the Act upon the application of the Applicant I join as parties to this proceeding Mr Terry Detering of 141 The Basin-Olinda Road, The Basin, Victoria 3145 (the first joined party) and Mr Trevor McMaster trading as Warmcrete of 112 Redbank Road, Seymour Victoria 3660 (the second joined party).
2. I dismiss the application of the applicant to join Pleysier Perkins Pty Ltd as a party to this proceeding.
3. By 29 July 2009 the Respondent must file and serve amended Points of Defence and Counterclaim that reflect her intention to take no action against the Applicant for the valley gutter.
4. By 5 August 2009 the applicant must file and serve Points of Claim as against the first and second joined parties in substantially the form exhibited to the affidavit of Timothy Graham of 15 April 2009, amended to take into account findings in the reasons that follow.
5. Costs reserved with liberty to apply.
6. **The proceeding is referred to further directions before Senior Member Lothian on 12 August 2009 at 9:30 a.m. with an estimated hearing time**

**of one hour at 55 King Street Melbourne when directions for the further conduct of the proceeding will be made and any application for costs will be heard.**

7. The Principal Registrar is directed to send a copy of this order to solicitors for the proposed third joined party, Moray & Agnew, attention Ms Edmonds.

**SENIOR MEMBER M. LOTHIAN**

**APPEARANCES:**

For Applicant	Mr M Whitten of Counsel
For Respondents	Mr M Champion, Solicitor
For the first proposed joined party	No appearance
For the second proposed joined party	Mr McMaster in person
For the third proposed joined party	Ms Edmonds, Solicitor of Moray & Agnew

## REASONS

- 1 The Applicant (“Builder”) seeks to join three further respondents to this proceeding. In brief, the background to this application is that the Builder issued proceedings against the Respondent home-owner for allegedly unpaid contract sums in excess of \$100,000.00. The Respondent, Mrs Detering, counterclaimed for allegedly defective work and delay. The alleged defects alone have been costed by Mrs Detering’s expert, Mr Cross, at approximately \$280,000.00. The contract between the parties was dated 12 September 2004.
- 2 The alleged defects include malfunctioning electric slab heating, an inadequate valley gutter and a defective sliding door. In his affidavit of 21 April 2009, Mr Champion, solicitor, for Mrs Detering, said at paragraph 7:

I am instructed by the respondent and the proposed first joined party that:

  - (a) works have recently been undertaken to the valley gutter by the applicant’s plumber, Robert Anthony Goodwin under direction of the Plumbing Commission;
  - (b) at this stage they have no reason to believe the rectification will not be satisfactory; and
  - (c) accordingly withdraw their [sic] claim in relation to the valley gutter, being the defects noted at paragraph 10.1 of the report of Bayside Building Surveyors Pty Ltd.
- 3 Mr Whitten of Counsel for the Builder said that Mrs Detering is yet to amend her counterclaim to withdraw allegations regarding the valley gutter, but there also remains the possibility that Mr Goodwin will seek to recover against the Builder for the extra work necessary - arguably for poor design. I have not taken this possibility into account.
- 4 The proposed joined parties are Mr Terry Detering, Mr Trevor McMaster trading as Warmcrete and Pleysier Perkins Pty Ltd (“Pleysier”), the architects for the project. Mr McMaster appeared for himself and Ms Edmonds, solicitor, appeared on behalf of Pleysier. Mr Detering neither appeared nor was represented at the hearing of 5 May 2009. Mrs Detering opposed the application for joinder of all parties and Mr McMaster and Pleysier each opposed their own joinder.
- 5 In each case the Builder seeks to apportion any “loss” pursuant to the provisions of Part IVAA of the *Wrongs Act 1958* or that it should be “reduced” under section 63 or section 26 of that Act. Further or in the alternative the Builder seeks indemnity or contribution from Mr Detering and/or Mr McMaster. I note that it is responsibility rather than liability which is apportioned under the Act.

## CONSIDERATIONS FOR JOINDER

6 Section 60(1) 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.

7 When an application for joinder is made, an important consideration is whether there is an open and arguable case on the face of the pleadings. (*Zervos v Perpetual Nominees Ltd* (2005) 23 VAR 145, *Radan Constructions Pty Ltd v Palladium Developments Pty Ltd* [2005] VCAT 2451) The case does not have to be one that is certain to succeed, but neither should it be one which is clearly “misconceived or hopeless”. (*Age Old Builders v Swintons Pty Ltd* [2006] VCAT 871 at 55.

8 Deputy President Aird’s comments at paragraph 36 of *Salta Constructions Pty Ltd v Solid Investments Australia Pty Ltd & Anor* [2009] VCAT 464 at [36] are useful where an application is made to join a party for the purpose of seeking apportionment of responsibility under Part IVAA of the *Wrongs Act*:

In seeking to take advantage of apportionment provisions under Part IVAA it is simply necessary for [a respondent or respondent to counterclaim] to set out the basis upon which it alleges a person is a concurrent wrongdoer, set out how it is that person has failed to take reasonable care, and how it has caused or contributed to the [applicant’s or applicant by counterclaim’s] loss and damage.

9 Another consideration is whether there has been a delay in making the application for joinder.

## ALLEGED DEFECTS

10 The proposed points of claim against the first to third joined parties annexed to the affidavit of Timothy Graham of 14 April 2009 (“PPC”) state that the counterclaim alleges works were not carried out with reasonable skill and care and recite and interpret the allegations by Mr Cross (Mrs Detering’s expert). The Builder denies liability for them as it alleges that all concern the design of the home which was supplied by Mrs Detering and that she warranted that it was good and suitable for the purpose for which it was to be used.

### **Floor heating**

- 11 The PPC says that Mrs Detering alleges the Builder should have realised there was a discrepancy between the engineer's required placing of reinforcing (25mm below the surface of the concrete) and the placing of the electric coils which were to be tied to the reinforcing (between 25mm and 80mm below the concrete surface). The allegation is that some of the cables floated to the surface and that the Builder should have either requested that the owner obtain an appropriate design, or prepared or obtained a design itself.

### **Valley gutter**

- 12 According to the PPC Mr Cross alleges that the design of the valley gutter, as constructed, is insufficient for the amount of water flowing into it. The PPC goes on to allege that Mr Detering has contacted the Plumbing Commission and that on or about 4 March 2009 the Plumbing Commission issued a rectification notice that works are to be undertaken by Robert Goodwin, who was the plumber engaged by the Builder to perform these works.
- 13 I rely on Mr Champion's affidavit of 21 April 2009 that the claim regarding the valley gutter is withdrawn. There is no indication that the plumber has yet claimed against the Builder for the cost of rectifying the roof and might never do so. Once Mrs Detering's counterclaim is amended to remove pleadings regarding the valley gutter, there will not be a sustainable claim on the face of the PPC concerning it.

### **Sliding door**

- 14 The allegation is that there are a couple of nails or screws which project into the cavity into which a door slides which scratch the door. The Builder does not allege that the sliding door mechanism scratches the door, but alleges that it is unsuitable for the position in which it is placed and increases the cost of rectification of any sliding door defect as it is not possible to adjust the door on the internal recessed track which is covered by plaster. There is no indication of the cost of rectification of this door.
- 15 I am not satisfied that the PPC sets out an arguable causal nexus between the alleged damage to the door and the sliding door mechanism. I therefore find that there is no sustainable claim on the face of the PPC regarding the sliding door.

### **CLAIMS AGAINST PROPOSED JOINED PARTIES**

- 16 It is only necessary for the Builder to demonstrate one arguable head of claim in the PPC against each proposed joined party.

### **Mr Detering**

- 17 Mr Detering is the husband of Mrs Detering and the Builder alleges that he has had substantial involvement in the project. Mr Champion submitted that

there is no suggestion that Mr Detering did anything other than communicate Mrs Detering's requirements to the Builder, and referred me to *Chaudrey v Prabhakar and Ors* [1988] All ER 718 where Stocker LJ said:

In many cases in which actionable negligence is claimed in respect of the voluntary giving of advice, the first question that arises is whether any duty of care is owed in respect of such advice where the relationship of the parties is such that no voluntary assumption of legal responsibility was intended or can properly be imputed and where the giving of the advice was motivated solely out of friendship. Thus, in my view, in the absence of other factors giving rise to such a duty, the giving of advice sought in the context of family, domestic, or social relationships will not in itself give rise to any duty in respect of such advice.

- 18 The other two members of the Court of Appeal made similar comments. However they found that the friend was liable for his negligent advice, and Stuart-Smith LJ said:

The degree of care and skill owed by a gratuitous agent is stated to be—  
‘such skill and care as persons ordinarily exercise in their own affairs or, where the agent has expressly or impliedly held himself out to his principal as possessing skill adequate to the performance of a particular undertaking, such skill and care as would normally be shown by one possessing that skill.’<sup>1</sup>

- 19 Relevantly to the floor heating only, the PPC alleges that at all relevant times Mr Detering was “the builder” who managed or arranged among other things:

- changes to the heating system from hydronic to electric coil before the Builder tendered. It states that he amended and initialled the contract plans and specifications with his design changes and sought the advice of neither the engineer nor the architect as to these changes.
- instructing, briefing and selecting Warmcrete to be a nominated sub-contractor to the Builder.
- the engineer's redesign of the ground floor slab to a suspended slab.

- 20 It alleges further that Mr Detering:

- knew or ought to have known that the Builder had no specialised knowledge regarding electric floor heating.
- knew and intended that the Builder would engage the sub-contractor nominated by him.
- knew the Builder would construct the slab in accordance with the engineer's design.

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<sup>1</sup> Page 721 of the report - reference to *Bowstead on Agency* (15<sup>th</sup> Ed, 1985) p 152 art 44(3)

And that he owed Mrs Detering a duty to act with reasonable care to ensure that she would not suffer financial loss by reason of his failure to carry out his works with reasonable skill and care. It is alleged that he breached the duty and Mrs Detering has suffered loss and damage.

- 21 I find that it is open and arguable that Mr Detering owes Mrs Detering a duty which he has breached. I further find it is arguable that Mr Detering has failed to act with “such skill and care as persons ordinarily exercise in their own affairs” and therefore he is not relieved of any possibility of liability by virtue of his relationship with Mrs Detering.

#### **Mr McMaster**

- 22 The allegations against Mr McMaster are that at all relevant times he was carrying on business as an electric concrete floor heating specialist under the name of Warmcrete and was a nominated subcontractor to the Builder.
- 23 In circumstances where the claim against the Builder is failure to properly design, supply and install the heating system and the Builder alleges Mr McMaster was responsible for this, there is an open and arguable claim by the Builder against Mr McMaster. The Builder’s claim against Mr McMaster is that Mr McMaster owes it a duty, which is certainly open and arguable.

#### **Pleysier Perkins Pty Ltd**

- 24 The PPC alleges that at all relevant times Pleysier was a company carrying on business as registered architects and was engaged by both Mr and Mrs Detering to design Mrs Detering’s home.
- 25 The claims against Pleysier concern the valley gutter and the sliding door. As I have found there is no sustainable claim concerning either (conditional upon further amendment of Mrs Detering’s counterclaim), it follows that there is no sustainable claim against Pleysier and I decline to join them.

#### **TIMELINESS OF APPLICATION FOR JOINDER**

- 26 An application to join additional parties to a proceeding should be made reasonably expeditiously. One would hope that such an application would be made within, say, a month of a party obtaining their own expert report that identifies alleged failures that might be attributable to others, so that the proceeding is not unduly delayed. There will be circumstances that could render this too long or not long enough.
- 27 By orders of 7 February 2008 Mrs Detering was obliged to file and serve any counterclaim by 14 March 2008. Following a dispute about further and better particulars of points of claim, the date for the counterclaim was extended to 29 May 2008, and it was filed on 23 May 2008. The alleged incomplete and defective work refers to Mr George Cross’s report of January 2008. That report described alleged defects in the heated concrete floor, the valley gutter and the sliding door.

- 28 On 19 June 2008 the Builder filed its Reply and Defence to Counterclaim. As to the allegations of defective work, the Builder simply denied the pleading and based the denial on a report by Faulkner Lees Constructions Pty Ltd of 22 March 2007, and stated that it intended to file and serve an additional report in due course.
- 29 At the time when the counterclaim was filed there was to be a mediation on 5 June 2008, which was adjourned by consent to 1 August, then again by consent to 28 August 2008. The mediation was held and adjourned to further mediation on 24 September 2008. It did not settle and at directions on 13 November 2008, orders were made for discovery and witness statements and the proceeding was listed for a ten day hearing on 28 April 2009.
- 30 The proceeding has not been prosecuted with as much diligence as it could. On 2 December 2008 a warning fax was sent to Mrs Detering's solicitors because she had not filed her affidavit of documents. It was due on 28 November 2008 and was finally received at the Tribunal on 5 December 2008. A compliance hearing was set for 9 April 2009 because neither party had filed its witness statements by 27 February 2009.
- 31 Before the directions hearing, on 27 March 2009, the Builder filed and served the application to join the three additional respondents. At paragraph 25 of his affidavit of 27 March 2009, Mr Graham said that as a consequence of the opinions expressed by Mr Lees in his expert report of 25 January 2009 and of the matters raised in the Plumbing Industry Commission notice of 4 March 2009, the Builder now seeks to join the three parties to the proceeding.
- 32 Mr Graham said in his affidavit of 15 April 2009 that Mr Ron McInnes of the Builder considered joining additional parties after receipt of reports from HRS Electronics Pty Ltd and Mr Lees, both in August 2008, but elected to proceed with the mediation.
- 33 Mr Champion said in his affidavit of 21 April 2009 that there has been a dispute between the parties since early 2007 and that there was an unsigned report of Mr Lees dated 22 March 2007.
- 34 The proposed joined parties had not been served and the hearing of the joinder application was set for 22 April. Again, on that date the proposed joined parties were not served, the application was adjourned to 5 May 2009 and the hearing date for the substantive proceeding was vacated.
- 35 The application to join should have been made by about the time of the directions hearing of 13 November 2008. However although the application has not been made expeditiously and the addition of Mr McMaster and Mr Detering is likely to add to the time necessary to ready the proceeding for hearing, the delay does not have the appearance of an attempt by the Builder to delay for the sake of delay. I have regard to the principles enunciated in *Queensland v JL Holdings Pty Ltd* (1997) ALJR 294 at 296:

...it ought always be borne in mind, even in changing times, that the ultimate aim of a court is the attainment of justice and no principle of case management can be allowed to supplant that aim.

- 36 Mrs Detering has, undoubtedly, been disadvantaged by the current and future delay, but I also find the delay is not so great that it, alone, is sufficient to deny the Builder the right to join additional parties.

**SENIOR MEMBER M. LOTHIAN**