

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST

VCAT REFERENCE NO. BP1591/2017

CATCHWORDS

Domestic building – application for joinder – relevant considerations

APPLICANTS

Owners Corporation PS646781P,
Subramanyam & Anirudh Vemulpad, Gurmet
Singh, David and Loretta Parker, Fenny Yong
& Indra Tahumihardja, Kiing Tung Lau & Sie
Lim Ting, Joseph Hoi-Tong Fung & Yim Yi
Fung, Madumsudan Chhiboo & Rupa Narsi,
Joseph Coen, Jeetesh M Chhiboo & Rupa
Narsi, Tan Hee Choon & Rupa Narsi, David
Miller, Heather Marasco, Amanda Stanley,
Judith Coates, Vivien Chen, Diana M Doidge,
Janine Lisa Reymers, Ganeshbabu Narsi, Adam
Kowalewski

FIRST RESPONDENT

Verve Constructions Pty Ltd (ACN 132 046
827)

SECOND RESPONDENT

Crowntex Pty Ltd (ABN 63 136 598 966)

THIRD RESPONDENT

Danlaid Contracting Pty Ltd (ABN 76 079 777
914)

FOURTH RESPONDENT

Sonata Tiling Pty Ltd (ACN 162 097 896)

FIFTH RESPONDENT

Alan Lorenzini

SIXTH RESPONDENT

A.A. & A.S. Lorenzini Pty Ltd

SEVENTH RESPONDENT

Hayball Pty Ltd (ABN 84 006 394 261)

WHERE HELD

Melbourne

BEFORE

Deputy President C Aird

HEARING TYPE

In Chambers

DATE OF ORDER

29 October 2018

CITATION

Owners Corporation PS646781P v Verve
Constructions Pty Ltd (Building and Property)
[2018] VCAT 1700

ORDERS

1. Under s60 of the *Victorian Civil and Administrative Tribunal Act 1998* and upon application by the first respondent I join as parties to this proceeding:
 - i. Crowntex Pty Ltd (ABN 63 136 598 966) c/- Colin Biggers & Paisley Lawyers, Level 23, 181 William Street Melbourne, 3000 (tel: 8624 2000, email: cameron.mason@cbp.com.au) ('the second respondent');
 - ii. Danlaid Contracting Pty Ltd (ABN 76 079 777 914) c/- Barry Nilsson Lawyers, Level 16, 600 Bourke Street, Melbourne 3000 (tel: 9909 6300, email: Ashlea.Hawkins@bnlaw.com.au) ('the third respondent');
 - iii. Sonata Tiling Pty Ltd (ACN 162 097 896) c/- Piper Alderman, GPO Box 2105 Melbourne 3001 (tel: 8665 5543, email: amoylan@piperalderman.com.au) ('the fourth respondent');
 - iv. Alan Lorenzini ('the fifth respondent') and A.A. & A.S. Lorenzini Pty Ltd ('the sixth respondent') c/- Clyde & Co, Level 28, 140 William Street, Melbourne 3000 (tel: 8600 7214, email: Steven.Donley@clydeco.com);
 - v. Hayball Pty Ltd (ABN 84 006 394 261) c/- Lander & Rogers, Level 12, 600 Bourke Street, Melbourne 3000 (tel: 9269 9645, email: jchew@landers.com.au) ('the seventh respondent').
2. By 8 November 2018 the first respondent must file and serve Points of Claim as against the second, third and fourth respondents and amended Points of Defence in substantially the form filed on 25 September 2018.
3. **This proceeding is listed for a further directions hearing before Deputy President Aird on 5 December 2018 at 10am at 55 King Street Melbourne – allow 1 hour.**
4. Liberty to apply.
5. Costs reserved.

DEPUTY PRESIDENT C AIRD

REASONS

1 On 15 August 2018 I heard an application for joinder by the respondent builder. At that directions hearing all proposed respondents, other than the proposed fifth and sixth respondents attended. I disallowed the joinder application and gave the builder leave to file and serve further draft amended Points of Claim against each of the proposed respondents and further draft amended Points of Defence.

1 Under the heading 'OTHER MATTERS' I recorded the attitude of the proposed respondents as follows:

The proposed respondents indicated their attitude to the joinder application as follows:

- the proposed second respondent does not oppose the application for joinder as a concurrent wrongdoer, and has no issues with the matters set out in the draft further amended Points of Defence, but takes issue with the proposed Points of Claim seeking contribution and indemnity;
- the proposed third respondent neither consents nor objects to its joinder as a respondent, although has some concerns about the 'evidence';
- the proposed fourth respondent had some minor concerns with the draft pleadings;
- the proposed seventh respondent raised significant concerns about the lack of particulars, and indicated it was therefore impossible to understand the case it has to answer. The respondent acknowledged this and suggested it would be appropriate to file and serve further draft pleadings once the further 'fire expert' report was filed and served by the applicants.

I made the following relevant orders:

1. By 7 September 2018 the applicants must file and serve any further expert report in relation to the fire safety issues.
2. The respondent's application for joinder of the proposed second to seventh respondents as concurrent wrongdoers, and to serve Points of Claim against various of them seeking contribution is adjourned to be determined by Deputy President Aird in chambers in accordance with the following orders.
3. By 25 September 2018 the respondent must file and serve further amended draft Points of Claim against the proposed respondents, and further draft amended Points of Defence.

4. By 12 October 2018 the proposed parties must advise the principal registrar in writing, copied to the parties and the other proposed parties, whether they seek to be heard as to the proposed amendments and whether they consent to, oppose or neither consent nor oppose to their joinder as parties to the proceeding.
 5. **Upon receipt of the draft further amended Points of Defence, and draft further amended Points of Claim against the proposed parties, and the responses from the proposed parties, I direct the principal registrar to refer the file to Deputy President Aird for the making of any necessary orders in chambers.**
- 2 The first respondent has filed two pleadings dated 25 September 2018: ‘First Respondent’s Points of Claim against the Second Third and Fourth Respondents’ (‘APOC’) and ‘First Respondent’s Amended Points of Defence’ (‘APOD’) – neither of which identifies them as a ‘draft amended’ pleading in accordance with my orders of 15 August 2018.
- 3 The proposed respondents have responded as follows:
- i the proposed second respondent’s solicitor, indicated by letter dated 12 October 2018 that its client, Crowntex Pty Ltd (‘Crowntex’), did not seek to be heard further in relation to the application for joinder, but confirms it opposes the application for reasons set out in that letter;
 - i the proposed third respondent’s solicitor advised by email dated 12 October 2018 that its client, Danlaid Contracting Pty Ltd (‘Danlaid’), neither consents nor objects to its joinder as a party to the proceeding;
 - ii the proposed fourth respondent’s solicitors, advise by letter dated 12 October 2018 that its client, Sonata Pty Ltd (‘Sonata’), does not wish to be heard further in relation to the application for joinder, but confirms it opposes the application for the reasons set out in that letter
 - iii the proposed fifth and sixth respondents’ solicitors by email dated 30 August 2018 that its clients, Alan Lorenzini and A.A. & A. S. Lorenzini Pty Ltd do not take any position in relation to the application to join them to the proceeding, whilst reserving their rights to seek ‘appropriate’ orders if they are joined.
 - iv the proposed seventh respondent’s solicitors by email dated 12 October 2018 indicates that its client, Hayball Pty Ltd (‘Hayball’), maintains its opposition to joinder but provides no reasons for its opposition
- 4 The builder’s solicitor by letter dated 17 October 2018 sets out its response to the objections raised on behalf of Crowntex and Sonata.
- 5 It is surprising that Crowntex and Sonata have effectively filed submissions setting out the basis for their objection without having sought leave from the Tribunal to do so. By the orders made at the directions hearing on 15

August 2018, and as discussed with the parties at that time, it was clearly contemplated that orders would be made in chambers if no objections were raised to joinder. By filing submissions, Crowntex and Sonata have, in effect, sought to be ‘heard’ in relation to the application.

- 6 However, as the builder has responded to each of the objections, in the interests of the efficient management of this proceeding, I will decide the joinder application having regard to the material which has been provided by the parties.

JURISDICTION

- 7 The Tribunal’s power to order joinder of parties is found in s60 of the *Victorian Civil and Administrative Tribunal Act 1998* (‘the VCAT Act’).

- (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.

- 8 It is clear that the Tribunal’s powers to order joinder under s60 of the VCAT Act are very wide. The power is discretionary and considering the possible implications for the parties (including costs) it is not a discretion that should ever be exercised lightly, particularly where supporting material and proposed pleadings have been filed.

- 9 As I said in *Perry v Binios*¹ at [17]:

In considering any application for joinder where proposed Points of Claim have been filed, the Tribunal must be satisfied that they reveal an ‘open and arguable’ case (*Zervos v Perpetual Nominees Limited* [2005] VSC 380 per Cummins J at paragraph 11).

The builder’s position

- 10 The builder’s solicitors have responded to the matters raised on behalf of the Crowntex and Sonata. In particular, they note that both seek to raise factual matters which are properly matters for a defence, and which they note were addressed by the Tribunal at the directions hearing on 15 August 2018.
- 11 It also submits that the claims against each of the proposed respondents as set out in the APOC are separate claims which could otherwise be brought by way of separation applications, if joinder is refused in this proceeding. I

¹ [2006] VCAT 1604

agree. The primary reason for considering whether the APOC disclose an open and arguable case before ordering joinder is to forestall any application under s75 of the VCAT Act. In effect, to have the argument before, rather than after, joinder or the commencement of separate proceedings.

- 12 Generally, no issue is raised with the adequacy of the proposed pleadings, and therefore except where discussed, it is not necessary to discuss them in detail.
- 13 For the Reasons which follow having considered the APOD, I am satisfied that it is open and arguable that the proposed parties are concurrent wrongdoers, and that the claims for contribution and indemnity set out in the APOC are also open and arguable. I will therefore join the proposed parties as respondents to this proceeding.

The proposed second respondent – Crowntex Pty Ltd

- 14 Crowntex, the rendering subcontractor, opposes the application that it be joined as a party to the proceeding. Having regard to the ‘Other Matters’ recorded before the Orders made on 15 August 2018 which record that it does not oppose joinder as a concurrent wrongdoer, it is surprising it now seeks to resile from that position without explanation.
- 15 Crowntex’s primary objections to joinder are predicated on what, it contends, are misunderstandings about the scope of its works under the sub-contract, and the expert evidence relied upon by the builder in support of the joinder application. However, these matters should properly be set out in its defence.
- 16 The only issue in relation to the adequacy of the proposed pleadings concerns the allegations in paragraph 15 of the APOC and paragraph 31 of the APOD where the builder alleges that if it has breached its obligations [to the owners] then Crowntex has breached the Rendering Subcontract [in relation to the rendering works]. Crowntex submits this is a non sequitur for reasons which are not explained. I note that the allegation is more specific than suggested by Crowntex’s submission. Rather than a simple allegation of breach, the allegation is:

...if as alleged by the Applicants, the First Respondent has breached either the “building contract”, the section 8 warranties and/or the Alleged Duty (which is expressly denied), then the Second Respondent has, in the performance and supervision of the Rendering Works, breached the Rendering Subcontract.

In my view, any suggestion that this allegation is a non sequitur is also properly a defence.

- 17 Having considered the APOC and the APOD I am satisfied the claim for contribution and indemnity is arguable, and it is arguable that Crowntex is a concurrent wrongdoer.

The proposed third respondent – Danlaid Contracting Pty Ltd

- 18 Danlaid was engaged by the builder to install waterproofing to all planter boxes and lift shafts.
- 19 By email dated 12 October 2018 Danlaid’s solicitors confirmed that it neither consents nor objects to its joinder as a party to these proceedings.
- 20 Having considered the APOC and the APOD I am satisfied the claim for contribution and indemnity is arguable, and it is arguable that Danlaid is a concurrent wrongdoer.

The proposed fourth respondent – Sonata Tiling Pty Ltd

- 21 Sonata is a tiling and waterproofing subcontractor which the builder alleges was responsible for the carrying out of tiling and waterproofing works to the balconies and courtyards.
- 22 In their letter dated 12 October 2018 Sonata’s solicitors state that the application for joinder is opposed *on the basis that the claims made by the first respondent in the points of defence and points of claim are fundamentally misconceived and factually incorrect and that some of the claims made in respect of our client, do not even relate to works that our client was responsible for or actually undertook.*
- 23 A copy of drawings which they assert *clearly identify the relevant areas referred to below and further, the works that our client says were undertaken by others.* Sonata also disputes the contract sum referred to in the proposed pleadings.
- 24 However, the scope of Sonata’s works and the contract price are matters which are properly a defence. They are not matters which should be determined summarily without a thorough consideration of all of the evidence.
- 25 Sonata also raises an issue in relation to the final retention withheld by the builder in relation to this and other projects which the builder has failed to release to it, which it says the builder has failed to account for when quantifying its claim. Again this is a matter which should properly be raised by way of defence and/or set-off.
- 26 I am satisfied that the builder’s claims for contribution and indemnity from Sonata are arguable, and that having considered the APOD it is arguable that Sonata is a concurrent wrongdoer.

The proposed fifth and sixth respondents – Alan Lorenzini and A.A. & A.S. Lorenzini Pty Ltd t/as Lorenzini Group

- 27 The builder alleges that Alan Lorenzini was appointed as the Relevant Building Surveyor (‘RBS’) for the project and A.A. & A.S. Lorenzini Pty Ltd t/as Lorenzini Group was appointed as the building surveyor.
- 28 Having regard to the APOD I am satisfied it is arguable that they are concurrent wrongdoers.

The proposed seventh respondent – Hayball Pty Ltd

- 29 Hayball is the architect, which the builder alleges was engaged by the Developer. The builder does not make a claim for contribution and indemnity against Hayball. Its application is for joinder of Hayball as a concurrent wrongdoer.
- 30 Hayball’s solicitors emailed the Tribunal on 12 October 2018 advising that Hayball maintains its opposition to joinder. However, no reasons for its opposition are provided. In the circumstances, and having considered the APOD I am satisfied it is arguable that Hayball is a concurrent wrongdoer and I will join it as a respondent to this proceeding.

DEPUTY PRESIDENT C AIRD