

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

DOMESTIC BUILDING LIST

VCAT REFERENCE NO. D918/2005

CATCHWORDS

Application for Joinder – relevant considerations – whether proposed Points of Claim demonstrate an ‘open and arguable’ case

APPLICANT	Angela Perry
FIRST RESPONDENT	Bill Binios t/as Building Inspirations of Australia
SECOND RESPONDENT	Griffin Property Investments Pty Ltd (ACN 108 655 081)
WHERE HELD	Melbourne
BEFORE	Deputy President C. Aird
HEARING TYPE	Directions Hearing
DATE OF HEARING	20 July 2006
DATE OF ORDER	28 July 2006
CITATION	Perry v Binios (Domestic Building) [2006] VCAT 1604

ORDER

1. The Applicant’s application for joinder is dismissed.
2. Liberty to the Applicant to make further application for joinder until 11 August 2006. Any such application to be accompanied by Affidavit material in support and draft Points of Claim as against the proposed party copies of which shall be served on the proposed party together with details of the date and time at which such application shall be heard.
3. The proceeding is referred to a further directions hearing together with proceeding no D920/2005 before Deputy President Aird on 24 August 2006 at 2.15 p.m. at which time any further application for joinder will be heard.
4. Costs reserved – liberty to apply.

DEPUTY PRESIDENT C. AIRD

APPEARANCES:

For the Applicant	Mr M. Campbell of Counsel
For the First Respondent	No appearance
For the Second Respondent	Mr T Zervas, Solicitor
For the Proposed Third Respondent	Mr J. Bolton of Counsel

REASONS

- 1 The Applicants in proceedings D918/2005 and D920/05 ('Ms Perry' and 'Ms Thompson' respectively) seek to join George Giovanis, a director of the Second Respondent ('GPI'). The facts and circumstances in relation to each of the Applicant's claims are similar, as is the supporting material and the proposed Points of Claim as against Mr Giovanis. It is therefore appropriate that these Reasons apply to both proceedings. Extensive affidavit material was filed in support of both applications. I note with some concern that much of each affidavit is simply a re-stating of the evidence contained in the respective affidavits of the Applicants sworn on 13 June 2006 in support of their applications for an asset preservation order against the First Respondent ('Mr Binios'). Many of the exhibits have been duplicated, no doubt at significant cost to the Applicants, a matter about which I confirm my concerns as expressed at the hearing of these applications.
- 2 The Applicants were represented by Mr Campbell of Counsel who I accept did not draft the proposed Points of Claim as against Mr Giovanis and who, in all the circumstances, presented a carefully prepared and considered submission in support of their applications. Mr Giovanis was represented by Mr Bolton of Counsel and GPI by Mr Zervas, solicitor. Mr Binios did not attend, nor was he represented.

BACKGROUND

- 3 The background is set out in the Applicants' respective affidavits. Ms Perry states that she first met Mr Binios in 1990 and that in 2002 he contacted her in relation to a property development opportunity whereby, she alleges, she was to purchase a block of land, he would build a house on it, and they would share any profits upon sale of the house and land. Ms Perry signed a building contract on 11 July 2002 which identifies 'Building Inspirations of Australia' as the builder, and quotes what she describes as Binios' Master Builders Registration No. 36259 (MBAV No 36259). Although on the cover page of that contract Building Inspirations of Australia is identified as the builder, the builder named in Item 2 of the Appendix to the Building Contract is Rickard Constructions (Ricon), something which is not referred to in her affidavit or the Points of Claim.
- 4 Ms Perry states that she believed Mr Binios was a registered builder at the time she signed the building contract. Work commenced on site in late 2002 and Mr Binios rendered various progress claims. Progress Claims totalling \$175,824.00 for the base, frame and lock up stages were paid on Ms Perry's behalf by the Commonwealth Bank through which she had arranged finance. In April 2004, the Bank refused to make the fixing stage payment of \$47,520.00. Ms Perry states in her affidavit that the Bank advised her it had foreclosed on the construction loan and that she should take this up with the builder. The Bank also advised her that the final two

payments under the construction loan would not be advanced. Although there is no evidence from the Bank she states that she was told by a Bank representative that its valuer had reported that the house was not in accordance with the plans which had been submitted to the Bank in support of the application for finance.

- 5 The background to Ms Thompson's claim is similar except that she was introduced to Mr Binios by Ms Perry in 2002 when Ms Perry told about her agreement with Mr Binios and that he was prepared to enter into a similar arrangement with her. On 20 March 2003 Ms Thompson entered into a Building Contract with Building Inspirations of Australia, MBAV No 36259 for the construction of a house on land she had purchased at Caroline Springs. She also states that she believed Mr Binios was a registered builder. She applied for a construction loan from the Bank of Melbourne. Although no payments were made to Mr Binios or Building Inspirations Australia on her behalf, progress payments totalling \$141,000.00 were made by the Bank of Melbourne to GPI.
- 6 Both Applicants depose to a meeting with Mr Binios in June 2004 and the substance of their evidence in relation to the discussions at that meeting is identical. They say Mr Binios told them he would be unable to continue with the project because the Commonwealth Bank had frozen his assets, that the business operations of Building Inspirations Australia had been taken over by GPI, and that he had discussed the situation with Mr Giovanis who had agreed to take over the project and complete the building works and assume responsibility for the works under the building contract.
- 7 There is some dispute between the Applicants and Mr Giovanis as to the capacity in which GPI became involved, and what has transpired since June 2004. Unfortunately, many of the statements made by Ms Perry and Ms Thompson in their supporting affidavits are not consistent with the information contained in the documents exhibited to those affidavits. For instance, there is constant reference to correspondence received from Mr Giovanis notwithstanding it is on GPI letterhead and both Applicants allege that the relevant notices terminating the contract were sent to Mr Giovanis they are clearly addressed to GPI. It does not follow that where correspondence and/or documents from a company are signed by a director of that company that they were written in the director's personal capacity.
- 8 Mr Giovanis has filed an Affidavit in Opposition sworn 18 July 2006 in which he denies that he has ever carried out, managed or arranged the carrying out of any domestic building work. He alleges that an exhibit to each of the Applicants' affidavits although purportedly from GPI was not on GPI's usual letterhead, and that he believes they were prepared by Mr Binios as the contain the contact details of Building Inspirations Australia.
- 9 Further, he refers to various other documents which he contends confirm that the Applicants always considered Mr Binios to be the builder, not GPI nor him.

THE APPLICATION FOR JOINDER

- 10 At the commencement of the hearing I indicated to Mr Campbell that having considered the proposed Points of Claim it would be necessary for him to demonstrate they distinguished between conduct carried on by Mr Giovanis in his capacity as a director of GPI and conduct carried on by him in his personal capacity.
- 11 Mr Campbell sought to persuade me that Mr Giovanis should be joined as a party to the proceeding as he had procured and directed GPI to engage in a wrongful act – the entering into of an allegedly illegal contract in contravention of the provisions of the *Domestic Building Contracts Act* 1995 ('the *DBC Act*') and the carrying out of building work when not a registered building practitioner. He referred me to *Johnson Matthey (Aust) Ltd v Dascorp Pty Ltd* (2003) 9 VR 171 and *Root Quality Pty Ltd v Root Control Technologies Pty Ltd* [2000] FCA 980 as authorities for the proposition that a director can be held personally liable for a company's wrongdoing.
- 12 Further he submitted that Mr Giovanis in 'managing and arranging the carrying out of domestic building work' was a 'builder' as defined in the *DBC Act*; and that the monies which had been paid to GPI had not been applied in accordance with the specific trust given to GPI by the Applicants, conduct for which Mr Giovanis should be held responsible.

When should joinder be ordered?

- 13 I accept that the Tribunal's powers under s60 of the *Victorian Civil and Administrative Tribunal Act* 1998 are very wide. Section 60 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.
 - (2) The Tribunal may make an order under sub-section (1) on its own initiative or on the application of any person.
- 14 However, in considering the applications for joinder, I must have regard to the proposed Points of Claim. Unfortunately they appear to be little more than a recitation of various allegations as set out in the supporting affidavits, and do not distinguish between the conduct of Mr Giovanis in his capacity as a director of GPI and in his personal capacity. It is helpful to set out the following extracts from the proposed Points of Claim in the 'Perry proceeding':
 4. By a Major Domestic Building Contract ('the Building Contract') made, by the Applicant ('Perry') and Binios, alternatively Jamie

Richard as agent for Binios, on 11 July 2002, Binios agreed to construct a two storey dwelling on land situated at Dunstall Gardens in Caroline Springs.

...

- a. Further, in about June 2004, Perry and Giovanis agreed, that Giovanis through his company, Griffin, would assume the role of builder under the Building Contract and that Giovanis would complete the works under the Building Contract.
- b. Subsequently, Giovanis through Griffin, performed building works purportedly in accordance with the Building Contract.
- c. As a result of the matters pleaded in paragraphs 19 to 21, Griffin was a builder for the purposes of section 3 of the *Domestic Building Contracts Act 1995*.
- d. Further, Giovanis managed and/or arranged the carrying out of the domestic building work from mid June 2004.
- e. As a result of the matters pleaded in the previous paragraph Giovanis was a builder for the purposes of section 3 of the *Domestic Building Contracts Act 1995*.

...

28. Further, Giovanis and Griffin carried out and managed the carrying out of domestic building work under the Building Contract without being covered by the required insurance, namely the insurance required by order under s135 of the Building Act.
29. As a result of the matters pleaded in the previous paragraph Giovanis and Griffin contravened section 136 of the Domestic Building Contract Act.
30. By reason of the matters aforesaid, the Building Contract was an illegal building contract.
31. Perry entered into the Building Contract on 11 July 2002 and in mid June 2004 agreed to Giovanis through Griffin assuming the role of builder under the Building Contract and completing the works under the building contract in the mistaken belief that each of the contract and arrangement with Giovanis was lawful.
32. As a result of the matters aforesaid Perry claims \$175,824.

...

35. The works contained a number of defects and as a result, Binios, Giovanis and Griffin breached the building contract.

15 Mr Campbell submitted that the proposed Points of Claim assert the material facts as required, that the case against Mr Giovanis is clearly articulated, and that Mr Giovanis' knowledge that he and GPI were not registered builders, and his direction of the company, give rise to a parallel liability to Mr Giovanis.

- 16 However, as noted above, the proposed Points of Claim are simply a restating of the matters set out in the supporting affidavits. Many of the allegations and bases of the joinder applications as submitted by Mr Campbell are not found in the proposed Points of Claim. The allegations of a 'parallel liability' are nowhere to be found. Similarly there are no allegations as to Mr Giovanis' liability for the company's wrongdoing. Further, although a number of allegations are made, there is a distinct lack of Particulars. I accept that the grounds which, it was submitted on behalf of the Applicants, support their applications for joinder were not in any way apparent prior to the hearing of those applications, and came as a complete surprise both to counsel for the proposed Third Respondent and to me.
- 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 proposed Points of Claim do not satisfy this test.
- 18 Further, it is well established that a party (or a proposed party) has a right to know the case it has to answer. In *Barbon v West Homes Australia Pty Ltd* [2001] VSC 405 Ashley J held that whilst pleading summonses should be discouraged a party has a right to know the case it has to answer:
- I would not want it thought for a moment, because the Tribunal is not a court of pleading, and because the Act encourages a degree of informality in proceedings, that Rafferty's Rules should prevail. They should not. Any party, perhaps particularly a party facing a long, drawn-out hearing in the Tribunal - and I note in this case an estimate that the Tribunal hearing would extend for some nine weeks - is well entitled to know what case it must meet before the hearing commences. That is not to say that the case must be outlined with exquisite particularity. It is not to say that a defendant is entitled to evidence rather than particularisation. None the less a defendant is entitled to expect that a claim will be laid out with a degree of specificity such that, if it is obvious that the claimant seeks to pursue a claim which is untenable, that can be the subject of an application before trial; such that, moreover, if adequate particularisation is not provided, the matter will be clear to the Tribunal on application by an aggrieved party.[6]
- 19 I am not satisfied that the proposed Points of Claim demonstrate that there is an 'open and arguable' case against the proposed party, and the application for joinder will be dismissed. However, I will grant the Applicants leave to make a further application for joinder but caution that it should be accompanied by accurate supporting material and properly particularised proposed Points of Claim.

DEPUTY PRESIDENT C. AIRD