

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

DOMESTIC BUILDING LIST

VCAT REFERENCE NO. D918/2005
D920/2005

CATCHWORDS

Application for joinder – relevant considerations – whether draft Points of Claim disclose ‘*open and arguable*’ case

D918/2005

APPLICANT Angela Perry

AND

D920/2005

APPLICANT Narelle Thompson

RESPONDENTS IN BOTH PROCEEDINGS

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 13 September 2006

DATE OF ORDER 18 September 2006

CITATION Perry v Binios trading as Building Inspirations of Australia (Domestic Building) [2006] VCAT 1922

ORDER

1. The application for joinder is dismissed.
2. These proceedings are referred to a further directions hearing before Deputy President Aird on 5 October 2006 at 10.00 a.m. - allow half a day.
3. Costs reserved - liberty to apply.

DEPUTY PRESIDENT C. AIRD

APPEARANCES:

For the Applicant Mr B Powell of Counsel

For the First Respondent No appearance

For the Second Respondent Mr T Zervas, Solicitor

For the Proposed Joined Party: Mr J Bolton of Counsel

REASONS

- 1 This is the second application by the Applicants in proceedings D918/2005 and D920/05 ('Ms Perry' and 'Ms Thompson' respectively) for joinder of George Giovanis, a director of the Second Respondent ('Griffin'). The first application was dismissed on 28 July 2006. The background was set out in the Reasons for that decision and it is not necessary to repeat it here.
- 2 Although a further application for joinder has not been filed, such application is implied by the filing of the further draft Points of Claim, when considered in conjunction with the letter from the Applicants' solicitors dated 11 August 2006, wherein they advise their clients intend to make further application for joinder. On this occasion, Mr Powell of Counsel appeared on behalf of the Applicants, Mr Zervas, solicitor appeared on behalf of the Second Respondent and Mr Bolton of Counsel appeared on behalf of Mr Giovanis.
- 3 On 28 July 2006 I granted the Applicants leave to make further application for joinder and made the following order:
 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.
- 4 In those Reasons I expressed some concerns about the affidavit material which had been filed in support of the applications and refer to my comments at paragraph 19:

...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.
- 5 Inexplicably, although further draft Points of Claim have been filed and served, no further affidavit material has been filed although new allegations have been raised for the first time in the amended draft Points of Claim.
- 6 In considering this application it is helpful to set out various extracts from the draft Points of Claim in D920/2005, as it is those to which I was referred by Mr Bolton during the hearing. Similar allegations are made in D918/2005 albeit in differently numbered paragraphs and with some minor alterations reflective of the slightly differing factual matrix.
 14. In about June 2004 Binios (the First Respondent) informed the owner that:

...

 - (c) He had spoken to Giovanis who operated Griffin and Giovanis had agreed to take over all of Binios' jobs

including the completion of the works under the construction agreement.

- (d) Giovanis would assume responsibility for the works under the construction agreement.

15. In about June 2004 the owner and Giovanis entered into an oral agreement (“the Giovanis agreement”) pursuant to which it was agreed that Giovanis through his company Griffin, would assume the role of builder under the construction agreement and that Griffin would complete the works under the construction agreement.

Particulars

The Giovanis agreement was constituted by a number of conversations held between the owner, Binios, Angela Perry ...and Giovanis in or about June 2004. The content of the conversations was to the effect alleged.

16. The Giovanis agreement was a major domestic building contract as defined in s3 of the DBC Act.
17. There were terms of the Giovanis agreement that:
 - (a) Progress Payments from the Bank of Melbourne would be paid to Griffin instead of Binios.
 - (b) Binios and Griffin would share Binios’ share of any profit on the sale of the land on a 50:50 basis. (i.e. The owner would continue to receive 50% share of any profit, but Binios’ previous entitlement to 50% of the profit would be split equally between Binios and Griffin).
 - (c) The work to be performed under the Giovanis agreement would be performed as a priority by Griffin, and in any event would be completed within a reasonable time.
18. Subsequently, Giovanis through Griffin, performed building works purportedly in accordance with the construction agreement and rendered to, and was paid for by, the Bank of Melbourne, the following progress claims:

...
19. The total paid to Griffin by the Bank of Melbourne amounted to \$149,600.
20. In contravention of s29 of the Act, at the time that Griffin entered into the Giovanis agreement, neither Giovanis or Griffin was registered as a builder under the Building Act.
21. In contravention of s136 of the Building Act, Griffin carried out and managed the carrying out of domestic building work under the Giovanis agreement without being covered by the required insurance, namely the insurance required by Ministerial Order made under section 135 of the Building Act.

22. As a result of the matters referred to in the preceding two paragraphs the Giovanis agreement was an illegal contract because:
- (a) Griffin was not permitted by law to enter into the Giovanis agreement.
 - (b) Griffin was not permitted by law to carry out or manage or arrange the carrying out of any of the work required to be carried out or managed or arranged under the construction agreement.

...

28. Further, wrongly and in breach of the “Giovanis agreement”, Griffin failed to apply all of the moneys received into the construction fund for work that was to be carried out under the construction agreement

Particulars

The sum of \$40,561 remains unaccounted for.

29. Further, wrongly and in breach of the Giovanis agreement, Griffin converted funds from the construction fund to the use of Giovanis, for use by Giovanis on his own personal projects, namely the construction of dwellings on land owned personally by Giovanis in the Caroline Springs area.

Particulars

Particulars will be provided after proper and more complete discovery by Griffin of its bank statements for the period from June 2004 to date. Griffin has only selectively discovered its bank statements, covering the periods ... The owner will seek further discovery.

...

Claims against Giovanis

Joint tortfeasor with Griffin

32. At all material times Giovanis carried out and arranged and managed the carrying out of the works required under the Giovanis agreement on behalf of Griffin.

Parties (sic – read Particulars)

Giovanis agreed that the works would be carried out by Griffin. Giovanis arranged for progress payments for the works to be made to Griffin. Giovanis arranged sub-trades for Griffin. Giovanis attended progress meetings with the owner to discuss the progress of the work.

33. As a result of the matters referred to in the preceding paragraph, and by reason of Giovanis being a director of Griffin, Giovanis was under a duty of care to the owner to

ensure that Griffin complied with its obligations under the Giovanis agreement.

34. Wrongly, and in breach of his duty of care, Giovanis failed to ensure that Griffin complied with its obligations under the Giovanis agreement.

Particulars

The owner refers to and repeats paragraph 27 to 29 and the particulars subjoined to those paragraphs.

35. Further, Giovanis as director of Griffin, directed and procured Griffin to enter into the Giovanis agreement, which was unlawful, by reason of the contravention of s29 of the DBC Act, referred to above.
36. Further, Giovanis as director of Griffin, directed and procured Griffin to convert the owner's funds to the personal use of Giovanis.
37. As a result of the matters referred to above, Giovanis is a joint tortfeasor with Griffin and jointly liable with Griffin for any loss flowing to the owner as a result of Griffin's breaches of the Giovanis' agreement.

Unjust enrichment

38. As a result of the wrongful conversion of the owner's funds out of the construction fund from Griffin to Giovanis referred to above, Giavanis (sic) has been unjustly enriched at the owner's expense and is obliged to make restitution to the owner for such sum of money as has been paid to him for his personal use out of the construction fund.

Discussion

- 7 It is clear that the Tribunal's powers to order joinder under s60 of the *Victorian Civil and Administrative Tribunal Act 1998* are very wide. The power is discretionary and considering the possible implications for the parties (including costs) it is not a discretion that should be exercised lightly, particularly where supporting material and draft Points of Claim have been filed. As I said at paragraph 17 of my earlier Reasons:

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).

- 8 Mr Bolton has prepared a detailed analysis of the relevant paragraphs of the current draft Points of Claim which identify a number of shortcomings only some of which I propose to consider in these Reasons. The current draft Points of Claim seem to me to be little more than a 'fleshing out' of those filed in support of the joinder application I dismissed on the last occasion, with the obvious exception of the addition of the claim relating to the

conversion of funds by Griffin for Mr Giovanis' personal use. Mr Powell indicated during the hearing that 'diversion of funds' was a more accurate description of the allegation.

- 9 The current draft Points of Claim make various allegations about the conduct of Griffin. The description 'Giovanis agreement' is a misnomer. The allegations as to the formation of that agreement commence at paragraph 15 and relate to an agreement entered into by Griffin. It is the norm, rather than the exception, for a director of a company to conduct negotiations on behalf of the company, and the conducting of those discussions does not, of itself, make the director personally liable for the performance of the contract by the company. Whilst that may seem desirable, to do so would be contradictory to the personal protection afforded to those who conduct business through a corporate entity, the desirability of which is a matter for the legislature not this Tribunal.
- 10 Once again it is difficult to distinguish between the conduct of Giovanis in his personal capacity and as a director of Griffin. The 'new allegations' in relation to the conversion or diversion of funds is primarily an allegation that Griffin converted/diverted those funds for Giovanis' personal use. The allegation that Giovanis directed and procured Griffin to convert/divert those funds for Giovanis' personal use is a bald assertion not supported by any Particulars. As noted during the hearing this is the first time this allegation has been made. It does not appear in any of the affidavit material filed by the Applicants in either proceeding. Whilst I accept that these allegations have been included in the current draft Points of Claim on instructions, there was no explanation as to why further affidavit material deposing to the facts and circumstances giving rise to such allegations had not been filed. As Byrne J said in *Wimmera-Mallee Rural Water Authority v FCH Consulting Pty Ltd* [2000] VSC 102 after confirming that in considering an application for joinder what he described as '*the conventional pleading test*' should be applied:

...Since the application is not a true pleading application, but an application to join a party, the Applicant must adduce material, including, if need be, hearsay in accordance with rule 43.03 (2) sufficient to satisfy the Court to these matters as well as to the matters which may be relevant to the exercise of the discretion of the Court.

- 11 It may be that the Applicants have a claim against Giovanis, but neither it nor an '*open and arguable case*' is disclosed in the current draft Points of Claim. It is not enough to make bald assertions unsupported by Particulars or supported by Particulars that are so inadequate they do not progress matters any further. For instance, the Particulars to paragraph 28 simply state

The sum of \$40,561 remains unaccounted for.

That may be the case but quite how these can be regarded as particulars of a failure to apply the funds towards the 'construction agreement' is not clear.

12 I reiterate the comments I made paragraph 18 of my earlier Reasons:

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]

13 Further, the current draft Points of Claim ignore the reality that there are two directors of Griffin and whilst it may well be that Giovanis is not a registered builder there is no evidence as to whether or not the other director may be registered. I note that s29(c) of the *Domestic Building Contracts Act 1995* provides:

A builder must not enter into a major domestic building contract unless—

...

(c) in the case of a builder which is a corporation, at least one of the directors is registered as a builder under that Act; or

...

14 Mr Powell submitted that the law insofar as it relates to a director's liability for corporate torts is far from settled. This was recently considered by Senior Member Young in *Lawley v Terrace Designs Pty Ltd* [2006] VCAT 1363 where he carefully considered and analysed the various authorities and concluded:

Thus, I consider there must be something more than simply organising or even carrying out the work badly. There must be some act or behaviour of the director that is more than merely carrying out of his company duties, even if it results in a breach of contract or a failure by the company to fulfil its obligations. An intention to induce a company to breach its contract by a director does not incur liability;

therefore, I do not see how a careless act by a director by itself can attract personal liability, unless the carelessness was so flagrant as to be outside normal bad building practice[188].

15 The allegations in paragraph 33 that:

... by reason of Giovanis being a director of Griffin, Giovanis was under a duty of care to the owner to ensure that Griffin complied with its obligations under the Giovanis agreement

are remarkably similar to those made in *Lawley*. However, these are observations only and not a 'finding on the merits'.

16 I am not persuaded that the current draft Points of Claim disclose an '*open and arguable*' case. It may well be that the Applicants could have simply issued separate proceedings against Giovanis and then sought to have the proceedings heard and determined at the same time. However, had they done so and filed Points of Claim in the form of the current draft Points of Claim it is highly likely, as indicated by Mr Bolton, that Giovanis would have sought to have those Points of Claim struck out under s75 of the *VCAT Act*.

17 Mr Powell submitted that having regard to the following comments made by Kirby J in *Woolcock Street Investments Pty Ltd v CDG Pty Ltd* [2004] HCA 16 (in a dissenting judgement) any strike out application would be unsuccessful:

If there is any reasonable prospect that the appellant might be able to make good a cause of action, it is not proper for a court, in effect, to terminate the appellant's action before trial. **Where the law is uncertain**, and especially where it is in a state of development, it is inappropriate to put a plaintiff out of court if there is a real issue to be tried. The proper approach in such cases is one of restraint. Only in a clear case will answers be given, and orders made, that have the effect of denying a party its ordinary civil right to a trial. This is especially so where, as in many actions for negligence, the factual details may help to throw light on the existence of a legal cause of action - specifically a duty of care owed by the defendant to the plaintiff. [138] (emphasis as added by Mr Powell)

18 However, this is not a strike out application. This is an application for joinder of a party where draft Points of Claim have been filed. This application has not been unsuccessful because the law as to the personal liability of directors is uncertain, but because I am not satisfied that the draft Points of Claim disclose an '*open and arguable*' case.

19 I appreciate that the Applicants may well be frustrated that their two applications to join Giovanis have been unsuccessful. There is no doubt they found themselves in a difficult position after Mr Binios indicated he was unable to complete the projects. However, whilst they may have concerns as to the ability of Griffin to satisfy any judgement they may obtain this is not of itself a factor which should be taken into account in

considering any application for joinder (*Maryvell Investments Pty Ltd v Sigma Constructions Pty Ltd* [2006] VCAT 743).

- 20 The application will therefore be dismissed and the proceedings referred to a further directions hearing.

DEPUTY PRESIDENT C. AIRD