

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

DOMESTIC BUILDING LIST

VCAT REFERENCE NO. D30/2014

CATCHWORDS

Application for joinder –s60 of the *Victorian Civil and Administrative Tribunal Act 1998* – whether Amended Points of Claim reveal an *open and arguable* case – application for joinder refused.

APPLICANT	5 Rivoli Court Mount Waverley Pty Ltd (ACN 150 866 023)
FIRST RESPONDENT	USI Homes Pty Ltd (ACN 136 425 066)
SECOND RESPONDENT	Habib Bulut
WHERE HELD	Melbourne
BEFORE	Deputy President C Aird
HEARING TYPE	Directions Hearing
DATE OF HEARING	1 May 2014
DATE OF ORDER	15 May 2014
CITATION	Rivoli Court Mount Waverley Pty Ltd v USI Homes Pty Ltd (Domestic Building) [2014] VCAT 553

ORDER

1. The applicant’s application for joinder dated 14 April 2014 is refused.
2. Costs reserved – any application for costs will be considered at the directions hearing listed before Deputy President Aird at 9.30am on 20 May 2014 at 55 King Street Melbourne.
3. **I direct the principal registrar to send a copy of these orders to the solicitors for the proposed third respondent, MDM Lawyers, Suite 2/23 Louis Street, Airport West 3042.**

DEPUTY PRESIDENT C AIRD

APPEARANCES:

For Applicant	Mr M Settle of Counsel
For First and Second Respondents	Mr D Epstein of Counsel
For proposed Third Respondent	Mr M Biviano of Counsel

REASONS

- 1 This is the second application for joinder by the applicant owner of Ekrem Bulut who the applicant alleges is also known as Ekram Bulut. The first application was refused at a directions hearing on 28 March 2014 when oral reasons were given. The application was refused because the draft Points of Claim did not disclose an arguable case against Mr Bulut.
- 2 On 28 March 2014 directions were made for the further conduct of the proceeding including:
 2. Liberty to the applicant to file and serve any further application for joinder until 14 April 2014. Any application for joinder must be accompanied by affidavit material in support together with draft Points of Claim as against the proposed party which may be included in the foreshadowed draft Amended Points of Claim.¹ The applicant for joinder must serve a copy of the application and supporting material on the proposed party and advise it of the date and time when the application will be heard.
- 3 On 14 April 2014, the applicant filed a further application for joinder accompanied by supporting material in accordance with the above order. In its application the applicant seeks the following orders:

That the Applicant have leave pursuant to section 60 of the *Victorian Civil and Administrative Tribunal Act* 1998 to join Ekrem Bulut (also known as Ekram Bulut) as a Respondent to the proceeding.

That the hearing of the proceeding be expedited.

On the following grounds:

It is sought to join Ekrem Bulut (also known as Ekram Bulut) as a Respondent as the Applicant relied on representations made by him, which representations the Applicant relied upon to its detriment.

Further, Ekreme Bulut guaranteed the application of monies paid by the Applicant towards the works the subject of the proceeding, which were not applied to the works.

An expedited hearing of the proceeding is sought as the conduct of the Respondents has left the Applicant's director in dire financial circumstances.

The reasons are expounded upon in the affidavits filed in support of the Application. (sic)
- 4 At the directions hearing, Mr Settle of Counsel appeared on behalf of the applicant, Mr Epstein of Counsel appeared on behalf of the respondents, and Mr Biviano of Counsel appeared on behalf of the proposed third respondent. Mr Biviano advised that the application was opposed by the proposed third respondent.

¹ The applicant had foreshadowed at the directions hearing that it would be seeking leave to file Amended Points of Claim

Jurisdiction

- 5 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.
- 6 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 be exercised lightly, particularly where supporting material and draft Points of Claim have been filed.
- 7 As I said in *Perry v Binios*² 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 application for joinder

- 8 The application for joinder is supported by affidavits of Rachael Fantauzzo, the director of the applicant, and Andrew Lennox who states that he was a director of Abode Design & Construct Pty Ltd (in liquidation) and that Ms Fantauzzo's is his sister-in-law.
- 9 In summary, Ms Fantauzzo relevantly deposes in her affidavit that:
- (a) On or about 21 February 2012 she [by which I understand her to mean the applicant] entered into a contract for the construction of two units in Keilor;
 - (b) The second respondent is named as the builder on the contract;
 - (c) The proceedings have also been issued against the first respondent because:
 - (i) Its ACN appears in the Appendix to the Contract under the heading 'Builder';
 - (ii) The invoices for the 'Lockup Demands' were issued by the first respondent;

² [2006] VCAT 1604

- (iii) the certificate of insurance is in the name of the first respondent;
- (iv) the building permit is in the name of the first respondent,
- (d) The units, which the applicant was building as an investment to sell, were to have been completed by 30 November 2012;
- (e) She has geared herself heavily through the applicant to fund the purchase of the property and the construction of the units, and is in default under her mortgage;
- (f) On 7 February 2013 she wrote to the respondents stating that no work had been done on site for a long time and seeking a response as she had not been able to contact the respondents;
- (g) After the Lockup Demands [progress claim for lock up stage] - were made on 11 February 2014 (sic) [2013] her brother-in-law, Andrew Lennox (*who was a former director of the Applicant*) has told me and I believe, that he told the Second Defendant [respondent] that he was not entitled to serve the demands as the works had not reached that stage.
- (h) After the Lockup Demands were made she received up to 20 telephone calls a day from the second respondent which she did not answer because previous telephone conversations had been difficult and unpleasant;
- (i) Her mother and sister have told her that the second respondent also attempted to telephone them on multiple occasions;
- (j) Mr Lennox has told her that:

[he] met with the Second Respondent and Ekrem Bulut after the demands were made. Both the Second Respondent and Ekrem Bulut told and made representations to my brother-in-law that if the Lockup Demands were paid they would ensure that the works would proceed quickly, that defects would be fixed immediately and that Ekram Bulut would assist with the works until completion of the builder. Mr Lennox prepared a document in which both the Second Defendant and Ekrem Bulut further represented that if the Lockup Demands were paid, that money would be applied to the works. This document is dated 26 February 2013. I believe that that document guaranteed the application of the payment of the Lockup Demands to the construction of the units. I would not have authorised the payment of the Lockup Demands if the Second Defendant and Ekrem Bulut did not make the representations referred to above and if they had not guaranteed the performance of the works and the application of the monies to the works.

....

10 In summary, in his affidavit, Mr Lennox relevantly deposes that:

- (a) He was a director of Abode Design & Construct Pty Ltd (in liquidation) ('Abode') which was a company that assisted builders in

obtaining access to labour, architects and other building professionals.

- (b) In December 2012, Mr Frank Zurolo, the bricklayer on the job who is a friend of his wife and Ms Fantauzzo, told him that the second respondent *had told him that he planned to get the lockup stage payment from the Applicant and run away;*
- (c) He had a number of telephone conversations with the second respondent after the invoices for the lockup stages were sent during which the second respondent told him that he had a new construction/site manager named 'Ekrem' and that *everything will be fine;*
- (d) He told the second respondent he wanted to meet Ekrem and that the second respondent texted him Ekrem's telephone number.
- (e) He rang Ekrem who he states said that he was the second respondent's brother which he states the second respondent denied in a separate telephone conversation;
- (f) On 26 February 2013 he and his wife met with the second respondent and Ekrem Bulut at Abode's then office;
- (g) Prior to the meeting on 26 September 2013 (sic) [26 February?] he prepared a document headed '2 Lincoln Dr Keilor East' ('Guarantee')
- (h) At the meeting, the second respondent again denied what Mr Zucolo had told Mr Lennox in December, having first denied the substance of that conversation in January 2013 and:

The Second Respondent stated that he had lots of money and this type of situation would simply not happen, as he didn't need to do such a thing. I replied by asking whether they would provide an assurance to the Applicant that: they would not disappear and the works would be performed. Both the Second Respondent and Ekrem Bulut gave me that assurance. In the presence of both my wife and I, the Second Respondent and Ekrem Bulut signed the Guarantee.

- (i) He provided a copy of the signed Guarantee to Ms Fantauzzo, and the applicant then paid the lockup stage invoices on or about 7 March 2013.

The Amended Points of Claim

- 11 Amended Points of Claim dated 11 April 2014 (including claims against the proposed third respondent) have been filed. I will discuss each of the objections raised by the proposed third respondent to the allegations insofar as they relate to the applicant's proposed claim against him.

Paragraph 2B

- 12 In paragraph 2B it is alleged that the third respondent is a former director of the first respondent, the brother of the second respondent and that he is also known as Ekram Bulut.
- 13 Mr Biviano submitted that particulars should be provided for each of these allegations. Whilst it is surprising that a company search for the first respondent was not exhibited to either of the supporting affidavits, I am satisfied that these allegations are clear.

Representations - Paragraph 13 - 21

- 14 It is alleged in these paragraphs:
 - 13 The Second Respondent and the Third Respondent told the Applicant that the money demanded for the lockup stages would be applied to the construction of the Units. (**Representations**)
 14. The Representations were made in trade and commerce.
 15. In reliance on [the] Representations, the Applicant paid the First and Second Respondent [the lockup stage payments].
 - 16 The First and Second Respondent have abandoned the works the subject of the Contract and not progress the work up to the frame stage. (sic)
 17. Pursuant to section 40(5) of the [*Domestic Building Contracts*] Act,³ the Applicant seeks an order that the First Respondent or the First Respondent and the Second Respondent or the Second Respondent refund to the Applicant all of the Lockup Stage Payments.
 18. Alternatively, the Applicant seeks from the First Respondent or the First Respondent and the Second Respondent or the Second Respondent the Lockup Stages Payments as money had and received.
 19. Further and in the premises, the Second Respondent and the Third Respondent engaged in conduct that was misleading and deceptive contrary to section 18 of the *Australian Consumer Law*.
 20. By reason of the conduct of the Second Respondent and the Third Respondent the Applicant has suffered loss and damage, being the Lockup Stage Payments.
 21. In the premises, pursuant to section 236 of the *Australian Consumer Law*, the Second Respondent and the Third Respondent are jointly and severally liable to the Applicant for the Lockup Stage Payments.
- 15 Mr Biviano submitted that in the absence of particulars the proposed third respondent could not understand the case he had to answer.

³ This is defined in paragraph 5

- 16 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*⁴ Ashley J said at [6] 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.

- 17 It may be that the applicant has a claim against the proposed third respondent but neither it nor an '*open and arguable case*' are revealed in the Amended Points of Claim. It is not enough to make bald assertions without setting out the material facts relied upon and/or particulars. I reject Mr Settle's submission that these are not required in circumstances where the application for joinder is supported by affidavits setting out the evidence to be relied upon by the applicant. Untested evidence is not a substitute, particularly in circumstances where there is an apparent inconsistency between the allegations in the draft Points of Claim and the matters set out in the supporting affidavits.
- 18 There a number of matters which are not clear from either the allegations in the Amended Points of Claim nor the affidavit material. Some of these include, and this is not an exhaustive list:
- (i) when the Representations were made;
 - (ii) who the Representations were made to;
 - (iii) how it is alleged that the Representations were made to the applicant: a company, noting that the only 'evidence' is set out in Mr Lennox's affidavit where he deposes that he had various discussions with the second and proposed third respondent. The capacity in which he had those discussions is unclear, particularly as he deposes in his affidavit that he was a director of Abode *which was a company that assisted builders in obtaining access to labour, architects and other building professionals*.

⁴ [2001] VSC 405

- (ii) how the applicant became aware of the Representations;
 - (iii) how it is alleged that any representations by the proposed third respondent are relevant;
 - (iv) the allegation that the applicant paid the lockup stage payment in reliance on the Representations;
 - (v) the allegation that the first and second respondents have abandoned the works and that the works have not been completed to lock up;
 - (vi) the allegation that the second and third respondents have engaged in misleading and deceptive conduct including what conduct is alleged to have been misleading and deceptive, when the conduct occurred, and why it is alleged to have been misleading and deceptive.
 - (vii) the allegation that by reason of the second and third respondents' conduct the applicant has suffered loss and damage, namely making the lockup stage payment.
 - (viii) how and why it is alleged that the second and third respondents are *jointly and severally* liable to the applicant pursuant to s236 of the *Australian Consumer Law* ('the ACL').
 - (ix) how the tribunal's jurisdiction is enlivened under the ACL.
- 19 Accordingly, I find that paragraphs 13-21 of the Amended Points of Claim do not reveal an *open and arguable* case in relation to the so-called misrepresentation claim.

Guarantee – paragraphs 22-25

20 It is alleged in paragraphs 22-25 that:

- 22. Alternatively, on 26 February 2013, the Second Respondent and Third Respondent jointly and severally guaranteed that the Lockup Stage Payments would be applied to the works under the Contract (**guarantee**)

Particulars

Annexed hereto is a copy of the Guarantee

- 22A The consideration stated in the Guarantee was the payment of the Lockup Stage Payments.
- 22B Alternatively, the Applicant relies on section 129 of the *Instruments Act 1959* and the payment of the Lockup Stage Payments.
- 23. The First Respondent or the First Respondent and the Second Respondent or the Second Respondent have not proceeded with the works the subject of the Contract to the frame stage.
- 24. The Lockup Stage Payments were not applied to the works under the Contract.

25. In the premises and pursuant to the Guarantees (sic) the Second Respondent and Third Respondent are liable to the Applicant for the Lockup Stage Payments.

21 The 'Guarantee' is exhibited to both affidavits. It is dated '26/02/2013' and relevantly it provides:

2 Lincoln Dr, Keilor East

Conditions for Continuation of Works

1. A personal guarantee that the money paid from stage payments are to be reinvested into the project (ie no termination of contract or "disappearance").

...[details of works]

7. As you will be supplying your own inclusions (not from Abode approved suppliers), anything that is not an exact match from the specs needs approval from the owner in substitution.

8. Confirm all payments to be deducted from the stage invoice:

a. Commission to Abode

b. Rebates to the Owner

9. You accept that the bank will (likely) pay on or around 14 days. This is outside the control of Abode. No communicate to be made direct to the bank by Builder. All correspondence to the bank will be from Abode via email and the builder will be 'cc'd'.

Upon agreeance of the above items, the stage invoice will be submitted to the bank immediately...[details of defects to be rectified].(sic)

Signed in agreeance of all terms noted above and acceptance of my personal guarantee. (sic)

Habib Bulut [signed]

Ekram Bulut [signed]

22 I make no finding whether this document constitutes a guarantee. The 'Guarantee' is not addressed to the applicant and it is unclear from its terms whether any 'guarantee' is being given in favour of the applicant or Abode. Accordingly, it is important that the material facts be set out and, in this instances that appropriate and sufficient particulars to the allegations be provided. Without them, the proposed third respondent (and the second respondent) cannot know the case they have to answer.

23 Further, it is not clear from the draft Amended Points of Claim the capacity in which it is alleged the personal guarantees are given, and precisely what it is alleged is being guaranteed. These are critical elements that constitute the legal grounds on which the claim is based. I reject Mr Settle's submission that the identification of the address on the 'Guarantee' makes it clear what is being guaranteed by the two 'guarantors'. Accordingly, I find

that an *open and arguable* case is not revealed by paragraphs 22-25 of the Amended Points of Claim.

DISCUSSION

- 24 I reject Mr Settle's submission that the proposed third respondent is being 'nitpicky'. It is unfortunate, that following the refusal of the first application for joinder when I made a number of observations about the lack of clarity of a number of the allegations that these observations were not addressed when the Amended Points of Claim were prepared with minor amendments only. The affidavit material does not assist. The supporting affidavits are lacking in detail and substance with the deponents relying to a large extent on 'hearsay evidence'. Although the Tribunal is not bound by the rules of evidence, it is not enough to simply proffer untested, unsupported evidence in an attempted substitute for properly pleaded allegations that ground a cause of action.
- 25 As an *open and arguable* case is not revealed by the Amended Points of Claim, the application for joinder must be refused.
- 26 Although these Reasons have focussed on the submissions made in relation to the joinder application, Mr Epstein indicated that he joined with Mr Biviano's submissions as to the need for the applicant to properly plead all allegations including the allegations made against the first and second respondents.
- 27 I will reserve costs with any application for costs to be heard at the next directions hearing when directions will be made for the further conduct of the proceeding.

DEPUTY PRESIDENT C AIRD