VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

VCAT REFERENCE NO. D775/2006

DOMESTIC BUILDING LIST

CATCHWORDS

Domestic building – amendment – strike out - relevant principles.

APPLICANTS	Sam Salerno, Pino Salerno, Lida Salerno
FIRST RESPONDENT	Stonehenge Homes & Associates Pty Ltd
SECOND RESPONDENT	Australian International Insurance Limited
FIRST JOINED PARTY	Momentum Commercial Pty Ltd (ACN 065 766 841)
SECOND JOINED PARTY	The Australian Steel Company (Operations) Pty Ltd (ACN: 069 426 955) t/as Smorgon A.R.C.
THIRD JOINED PARTY	M3 Consulting Engineering Pty Ltd (ACN 092 686 881)
FOURTH JOINED PARTY	Steel Foundations Limited (ACN 064 933 599)
FIFTH JOINED PARTY	Robert Cilia
SIXTH JOINED PARTY	Theo Alexopoulos
WHERE HELD	Melbourne
BEFORE	Senior Member D. Cremean
HEARING TYPE	Hearing
DATE OF HEARING	27 November 2007
DATE OF ORDER	7 December 2007
CITATION	Salerno v Stonehenge Homes & Associates Pty Ltd (Domestic Building) [2007] VCAT 2343

ORDER

1 Save as below, I allow the First Joined Party's application to amend its Points of Claim.

2 By 17 December 2007 the First Joined Party must file and serve such Amended or Further Amended Points of Claim. I allow minor typographical errors to be rectified in the version to be filed and served.

3 By 17 December 2007 the Joined Parties (not including the First) must file and serve Points of Defence or Amended Points of Defence as the case may be. I reserve costs thrown away (if any).

4 I dismiss the application of the Fifth Joined Party to dismiss or strike out.

5 The cost of the application in paragraph 1 and in paragraph 3 shall, by consent, be costs in the cause.

6 Notwithstanding paragraphs 1 and 2, I reserve to the Third, Fourth and Sixth Joined Parties the right to make submissions on the Amended or any Further Amended Points of Claim.

7 I refer this proceeding to a compulsory conference on 28 February 2008 before Senior Member Young commencing at 10.00 a.m. at 55 King Street Melbourne. The parties must attend and may be legally represented. Short position papers must be prepared.

8 I otherwise reserve costs.

SENIOR MEMBER D. CREMEAN

APPEARANCES:

For the Applicant	Ms M. Calder, Solicitor
For the First Respondents	No appearance
For the Second Respondent	No appearance
For the First Joined Party	Mr P. Golombek of Counsel
For the Second Joined Party	No appearance
For the Third Joined Party	Ms R. Mendis, Solicitor
For the Fourth Joined Party	Ms R. Mendis, Solicitor
For the Fifth Joined Party	Mr J. Twigg of Counsel
For the Sixth Joined Party	Mr D. Thomas, Solicitor

REASONS

1 I have made certain orders in this matter, *inter alia*, referring it to a Compulsory Conference.

2 Consequently I was able to excuse the Applicant, Third and Fourth Joined Parties and Sixth Joined Party from further attendance this day.

3 I am left with an application by the First Joined Party to amend its Points of Claim against the Joined Parties. Reliance is placed on s127 of the *Victorian Civil and Administrative Tribunal Act* 1998 which reads as follows:

> (1) At any time, the Tribunal may order that any document in a proceeding be amended.
>
> (2) An order under subsection (1) may be made on the application of a party or on the Tribunal's own initiative.

4 I am also left with an application by the Fifth Joined Party to dismiss or strike out paragraphs 25A to 25C of such Points of Claim. Reliance is placed on s75 of the Act which reads as follows:

> (1) At any time, the Tribunal may make an order summarily dismissing or striking out all, or any part, of a proceeding that, in its opinion—
>
> (a) is frivolous, vexatious, misconceived or lacking in substance; or
>
> (b) is otherwise an abuse of process.
>
> (2) If the Tribunal makes an order under sub-section (1), it may order the applicant to pay any other party an amount to compensate that party for any costs, expenses, loss, inconvenience and embarrassment resulting from the proceeding.
>
> (3) The Tribunal's power to make an order under sub-section (1) or (2) is exercisable by—
>
> (a) the Tribunal as constituted for the proceeding; or
>
> (b) a presidential member; or
>
> (c) a senior member who is a legal practitioner.
>
> (4) An order under sub-section (1) or (2) may be made on the application of a party or on the Tribunal's own initiative.
>
> (5) For the purposes of this Act, the question whether or not an application is frivolous, vexatious, misconceived or lacking in substance or is otherwise an abuse of process is a question of law.

5 Those paragraphs are complex and I set them out hereunder.

> 25A Further and alternatively the Fifth Joined Party alternatively Consulting Engineers Pty Ltd ("DOME") owed to the Applicants and the First Joined Party a duty to act with reasonable care and professional skill as an engineer and as a

design engineer in certifying the design of the Slabmaster System to be installed at the Premises.

PARTICULARS

The duty to the Applicants arose from the factual circumstances, namely, that the Fifth Joined Party was a registered building practitioner under the Building Act 1993 in the category of engineer and in the class of civil engineer who pursuant to the Building Regulations 1994 including regulation 15.2(a) had a personal duty to perform his design compliance certification work as a building practitioner in a competent manner and to professional standards including a duty to ensure that the design compliance certificate issued by him complied with the Building Regulations 1994 including regulation 15.7 and the Building Code of Australia and Australian Standards; that the Fifth Joined Party knew that he was certifying the design compliance of the Slabmaster System which was to be installed for the Applicants at their premises as part of a dwelling house to be constructed for and to be occupied by the Applicants; it was obviously foreseeable by the Fifth Joined Party that lack of care by him in certifying design compliance of the Slabmaster System at the premises, was very likely to cause economic loss to the Applicants of the kind claimed by them; the Applicants who had no experience in building dwelling houses or the design of footings and slab systems for dwelling houses were in a vulnerable position as against the Fifth Joined Party who was an expert in certifying design compliance for dwelling houses including the Applicants dwelling house constructed at the premises; the Fifth Joined Party undertook the responsibility of certifying the adequacy of the design compliance of the Slabmaster System at the Applicants premises; the Fifth Joined Party had complete control over the discharge of his function as design compliance certifier and the Applicants were in no position to influence its certification; the Applicants were dependant on the Fifth Joined Party to certify the design compliance of the Slabmaster System to be installed at their premises with skill and due care. The Fifth Joined Party knew or ought to have known that the design of the Slabmaster System it was certifying as being compliant was likely to be inadequate in the soil conditions existing at the premises and likely to cause economic loss to the Applicants.

The duty to the First Joined Party arose out of the relationship of the First Joined Party and the Fifth Joined Party; the fact that the Fifth Joined party was a registered building practitioner under the Building Act 1993 in the category of engineer and in the class of civil engineer who pursuant to the Building Regulations 1994 including regulation 15.2(a) had a personal duty to perform his design compliance certification work as a building practitioner in a competent manner and to professional

standards including a duty to ensure that the design compliance certificate issued by him complied with the Building Regulations 1994 including regulation 15.7 and the Building Code of Australia and Australian Standards; the actual certification that the design documents prepared by M3 Consulting Engineers Pty Ltd (the Third Joined Party) including drawing 2425 sheet 4/4 complied with the Building Code of Australia and all relevant Australian Standards, such Certificate of Compliance-Design being dated 7 June 2001 and signed by the Fifth Joined Party, the assumption of responsibility by the Fifth Joined Party to act as design compliance certifier in respect of the structural design for the premises; and the reliance by the First Joined Party upon the Fifth Joined Party to perform such design compliance certification with reasonable care and professional skill, and the fact that the Joined Party had no control over the certification of the design compliance by the Fifth Joined Party who alone had such control.

25B Negligently and in breach of the said duties the Fifth Joined Party alternatively DOME failed to exercise reasonable care and skill as an engineer and design compliance certifier in relation to the design and certification of the Slabmaster System at the Premises.

PARTICULARS

(a) certifying that the Slabmaster System designed for the Premises by the Third Joined Party was properly designed when in fact the design was defective;

(b) in assessing and considering the adequacy of the Slabmaster System design for the Premises by the Third Joined Party, he failed to consider adequately or at all the Third Joined Party's specific computations for the design of the suspended concrete slab and the screw piles to be constructed at the Premises;

(c) In assessing and considering the adequacy of the Slabmaster system design for the Premises he failed to consider adequately or at all the general computations prepared by Ove Arup for the design of the suspended concrete slab and the screw piles to be constructed at the Premises;

(d) Certifying that the Slabmaster System designed for the Premises by the Third Joined Party was an adequate design to support the building to be constructed on the Slabmaster System foundation at the Premises;

(e) Providing a certificate of design compliance in respect of the Slabmaster System at the Premises without considering any geotechnical report as to the site soil classification at the Premises and in particular not considering the

geotechnical report of D.M. Lawrence Soil Testing Pty Ltd prepared by Mr D.M. Lawrence dated 7 April 2000 providing the soil classification and conditions at the Premises and stating that:

(i) the proposed footing system at the premises should be designed to be supported on deep piers founded on the natural clay soil and/or natural rock at a depth of at least 2500 mm;

(ii) it is essential that the design engineer consider the extreme reactivity of the natural clay soil at the premises when undertaking the design of the proposed slab on which the building is to be constructed at the Premises;

(f) certifying that the Slabmaster System designed for the Premises by the Third Joined Party was properly and adequately designed and complied with the Building Code of Australia and Australian Standards when the Third Joined Party's design plan for the premises (drawing 2425 sheet 4/4) did not indicate a minimum founding depth to which the screw piles were to be installed at the Premises;

(g) certifying that the Slabmaster System designed for the Premises by the Third Joined Party and contained in drawing 2425 sheet 4/4 complied with the Building Code of Australia and all relevant Australian Standards when it did not so comply.

PARTICULARS

(a) the drawing 2425 sheet 4/4 did not include on it any information in respect of the site classification as required by AS2870-1996 clause 1.10 Information on Drawings;

(b) the drawing 2425 sheet 4/4 did not include on it any information in relation to special construction conditions, including that it did not contain any reference to the content of the soil report D.M. Lawrence Soil testing Pty Ltd prepared by Mr D.M. Lawrence dated 7 April 2000 and including in particular that:

(i) In paragraph 3.0(a) that "The proposed footing system should be design to be supported on deep piers or piles founded on the natural clay soil and/or on natural rock at a depth of at least 2500mm."; and

(ii) In paragraph 3.0(b) that "All load bearing beams of the proposed slabg must be founded through any filling and onto the underlying natural clay soil.".

As required by AS2870-1996 clause 1.10 Information on Drawings;

(c) the drawing 2425 sheet 4/4 did not include on it any information in relation to special construction conditions as required by AS2970 clauses G3.3 and G3.4 (requiring the minimum timber pile depth to be not less than 4/3 Hs for articulated masonry veneer construction for class M&H sites, being 2.5 meters to 3.0 meters as shown in figure G.1), and AS2870-1996 clause 1.10 as it did not obtain a special construction condition to:

(i) take account of seasonal ground movement n the soil upper layer; and

(ii) require the piles to be drive to a depth below the seasonal ground movement.

(d) the certificate of design compliance dated 7 June 2001 was not in the standard form as required by the Building Regulations 1994 as it did not include under the heading 'Design Documents' references to specifications, Computations, Test Reports and Other Documents and the said sub-heading references had been deleted;

(e) the certificate of design compliance dated 7 June 2001 did not contain the information required by the Building Regulations 1994 as it should have included a reference to a soil report in relation to the Premises namely, the soil report of D.M. Lawrence Soil Testing Pty Ltd prepared by Mr D.M. Lawrence dated 7 'April 2000;

25C By reason of the matters aforesaid, the Applicants, the First Respondent an din turn the First Joined Party alternatively DOME have suffered loss and damage and the Fifth Joined Party caused or contributed to such loss and damage.

PARTICULARS

The loss and damage claimed by the Applicant in its points of claim and the amount of the indemnity and costs claimed by the First Respondent against the Firs Joined Party in its points of claim.

6 It is immediately apparent that Dome Consulting Engineers Pty Ltd ("Dome") is referred to in those paragraphs but it is not a party to the proceedings. Dome, however, I understand went into liquidation and was wound up on 7 June 2003. It is not sought to make Dome a party. It is of relevance only so far as the *Wrongs Act* 1958 apportionment procedure is concerned.

7 The amendment application and the strike out application are obviously related. I should not allow amendment if I am satisfied that the proceeding, as amended, should be dismissed or struck out.

8 The amendments proposed are regular on their face. They are not obviously irrational or absurd. In justice they should be allowed under s127 subject to costs (if any) having been thrown away.

9 That is, however, unless, having been allowed, I should proceed to dismiss or strike out under s75. As regards s76 what I said in *Abigroup Contractors Pty Ltd v River Street Developments* [2007] VCAT 1965 at [8] is relevant:

> It is not easy to establish a case under To quote from the judgment of Kirby J in *Lindon v Commonwealth of Australia* (No 2) [1996] HCA 14; (1996) 136 ALR 251 at 256: to secure summary relief, such as by a striking out, "the party seeking it must show that it is clear, on the face of the opponent's documents, that the opponent lacks a reasonable cause of action or is advancing a claim that is clearly frivolous or vexatious.

10 It is argued in this case on a number of bases that I should proceed to dismiss or strike out. Jurisdictional aspects of the application include s6 of the *Domestic Building Contracts Act* 1995; and s23 of the *Wrongs Act* 1958. Other aspects include whether a person in the Fifth Joined Party's position can himself be personally liable or whether only his company is liable; and whether a duty of care is owed in any event and, if so, to whom. I do not wish to unduly compress the detailed submissions made to me but it seems to me these are the elements which are important in the application the Fifth Joined Party seeks to advance.

11 Having duly considered the matter I am not satisfied I should proceed to dismiss or strike out paragraphs 25A to 25C if I am minded to allow them to be amended in the way formulated.

12 To my mind they are not obviously untenable or manifesty unsustainable. As regards s6(e) of the 1995 Act I should indicate it is not in my view beyond argument that it overrides s54(1)(c) of that Act. As regards s23 of the *Wrongs Act* I am not persuaded it is beyond argument that the Tribunal cannot be a court for the purposes of that provision.

13 Nor am I persuaded that the Fifth Joined Party cannot be personally liable. Or, that he did not owe a duty of care as alleged.

14 It seems to me that all the points argued by the Fifth Joined Party raise triable issues of fact or points of law which should be argued after a full hearing. These are not matters I should be determining at this early point. They are not matters which are clearly wrong.

15 It follows I reject the Fifth Joined Party's application under s75.

16 It follows also, being satisfied in justice that the amendments should be allowed, that I allow the amendments.

17 The parties in question agreed that I should order that costs be costs in the cause regardless of the outcome. I so order.

SENIOR MEMBER D. CREMEAN