

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

DOMESTIC BUILDING LIST

D213 / 2004

Catchwords

Application for joinder of party – relevant matters to be considered – must show joinder desirable – action against proposed joined party to be open and arguable

APPLICANT: Snowden Developments Pty Ltd

FIRST RESPONDENT / APPLICANT BY Actpen Pty Ltd

CROSS-CLAIM:

SECOND RESPONDENT / RESPONDENT Peter John Hogan

BY CROSS-CLAIM:

JOINED PARTY TO CROSS CLAIM Shane Thomas Construction and Design Pty Ltd

WHERE HELD: Melbourne

BEFORE: Mr Rohan Walker, Senior Member

HEARING TYPE: Directions Hearing

DATE OF HEARING: 30 November 2005

DATE OF ORDER: 7 December 2005

[2005] VCAT 2910

ORDERS

1. Under section 60 of the Act and on the application of the Respondent by Cross claim I join as a party to these proceedings Shane Thomas Construction and Design Pty Ltd (ACN 081 811 127) of 19 Platypus Avenue Sorrento, Queensland 4217 (“the Joined Party to Cross claim”). The Respondent by Cross claim must forthwith serve a copy of this order upon the Joined Party to Cross claim.
2. The application to join John Douglas Group Pty Ltd (ACN 074 840 403) to the Cross claim is refused.

3. Direct the Registrar to list the proceeding for directions as to its future conduct as soon as practicable.
4. Costs reserved.

SENIOR MEMBER R. WALKER

APPEARANCES:

For the Applicant:	Mr R Smith, Solicitor
For the First Respondent:	Mr R Appuduari of Counsel
For the Second Respondent by Cross Claim:	Mr R Andrew of Counsel
For the Proposed Joined Party John Douglas Group Pty Ltd	Mr M H Whitten of Counsel
For Shane Thomas Construction and Design Pty Ltd	Mr R Sorenson, Solicitor

REASONS FOR DECISION

The proceeding

1. This proceeding concerns the construction by the Applicant, Snowdon Developments Pty Ltd (“Snowdon”) of six residential units on land owned by Actpen Pty Ltd (“Actpen”) pursuant to a Building Permit issued by the Second Respondent, Mr Hogan (“Mr Hogan”). After construction commenced work was halted because the building work was sited closer to the street than the relevant town planning permit allowed. The partially constructed buildings had to be altered with consequent delay and expense which, Actpen claims, amounts to over \$1,000,000.00.
2. In this proceeding Snowdon seeks to recover monies said to be due to it for the work it has carried and Actpen seeks to recover, by way of cross claim, the losses it has suffered from the incorrect siting of the initial construction. It seeks these from Snowdon as the Builder and from Mr Hogan as the building surveyor who issued the building permit without, it is said, satisfying himself that it was consistent with the planning permit that had been issued for the development.
3. On 11 October 2005, on the application of Hogan, I ordered that Actpen provide security for Mr Hogan’s costs. In the course of dealing with that application the solicitors for Mr Hogan intimated that application would be made to join two more parties, namely, the person who obtained the town planning permit and the draftsman who prepared the working drawings. That application came before me today. Mr R Smith, Solicitor appeared on behalf of the Applicant, Mr R Appudurai of Counsel appeared on behalf of Actpen and Mr R Andrew of Counsel appeared on behalf of Hogan.
4. The parties proposed to be joined were John Douglas Group Pty Ltd (“Douglas”) and Shane Thomas Construction Design Pty Ltd (“Thomas”). Douglas is a company that provides the services of Mr John Douglas, an architectural draftsman. It was retained by Actpen to advise, prepare documents and obtain a planning permit. In its initial letter it also quoted a price to prepare the building permit documents which I presume means the working drawings but ultimately, the involvement of Douglas ceased when the planning

permit was obtained and Thomas prepared the working drawings instead. At this hearing, Mr M H Whitten of Counsel appeared on behalf of Douglas and opposed the application to join his client. Mr R Sorenson, Solicitor, appeared on behalf of Thomas and did not oppose the joinder of his client.

The factual background

5. On 25 June 2002, the Moreland City Council (“the Council”) determined to issue a planning permit, subject to certain conditions. The relevant condition for present purposes is that, whereas the setback from the street was shown on the drawings submitted to Council as 4.5 metres, it was to be increased to 5.4 metres. There is an easement at the rear of the property and in order to accommodate this increased setback it was necessary to reduce the dimensions of the front units.
6. The permit required plans to be submitted in accordance with the conditions subject to which the permit was granted. When endorsed by the Council, these plans would then form part of the planning permit. In preparing these plans Douglas altered the written dimensions of the plans without redrawing the development to scale. Hence, version F of the plans, which was endorsed by the Council as part of the permit (“the Endorsed Plans”), can be superimposed over version E and the two sketches are exactly the same, although the numbered dimensions differ. On the endorsed plans, under the dimension for the setback namely, 5,400, are the letters “NTS” which I am told mean “Not to Scale” although in two parts of the plan there is a scale of “1:100”.
7. On 27 June 2002 Douglas forwarded a copy of the notice of the decision to grant a permit to Actpen. The covering letter includes the following paragraph:

“I suggest you read the conditions carefully to make sure they are to your satisfaction and you can comply with the same. A copy should be attached to your building agreement so that the builder, engineer and the draftsman include all or any of the requirements into the documentation and building programs”.
8. On 29 July 2002 Douglas sent a copy of the planning permit to Actpen with a letter containing similar comments.

9. On 12 August 2002 Douglas sent a copy of the endorsed plans to Actpen. The covering letter stated:

“As previously advised, I suggest you study all the conditions to ensure you accept same. I have amended the drawings to satisfy condition (1) one and other matters. It is now up to Council to stamp the drawings as part of the planning permit. Once that has happened you can finalise the building permit application and ensure that building plans accord with the endorsed town planning drawings. Your builder or draftsman may like to contact me in regard to any amendments and the engineering component as discussed at our last meeting”.

10. Hence it was not until August 2002 that Actpen received a copy of the endorsed plans. In the meantime, working drawings had been prepared by Thomas in, it seems, May 2002. These would need to be altered to accord with the endorsed plans but that was never done. Indeed, a building contract had already been entered into requiring the development to be constructed in accordance with earlier plans. The plans submitted to Mr Hogan for the grant of a building permit did not include the amendments made in the endorsed plans. The sketch may have looked the same but the figures were different. Mr Hogan nonetheless granted the building permit notwithstanding that the plans with respect to which he had granted the permit did not comply with the town planning permit in the manner described. It is on this basis that Actpen has sued Mr Hogan.

The joinder proposed

11. Mr Hogan now applies to join Douglas and serve Points of Claim in accordance with the draft exhibited to the affidavit in support of this application. The claim against Douglas is set out in paragraphs 8-14. Paragraphs 8 and 9 plead the retainer of Douglas by Actpen and assert that it was a term of that retainer that, in carrying out its duties, Douglas would exercise the due skill, care and attention of a reasonably experienced draftsman and town planning consultant. The breaches of duty pleaded in paragraph 11 are as follows:

(a) *Douglas failed to provide advice to Actpen in a proper and professional manner, including but not limited to giving a warning or other information [to] Actpen in respect of a risk or other matter relating to the Douglas services;*

- (b) *Douglas failed to prepare all drawings in a proper and professional manner;*
- (c) *In arranging for the drawings to be endorsed by the Moreland City Council, Douglas failed to exercise the due skill, care and attention of a reasonably experienced draftsman and town planning consultant.*

Particulars

Douglas's drawings originally provided for a 4500mm set back from Brunswick Road. After the Moreland City Council issued the planning permit in July 2002, Douglas amended the drawings to comply with condition 1 (c) of the planning permit, which increased the setback to 5400mm, by merely changing the dimension of "4500" to "5400" without making any necessary consequential or other amendments to the drawings. Specifically, the increased setback required by condition 1 (c) of the whole development to be set out approximately 900 mm south of the original position, which set out was impossible to achieve because of, inter-alia, an easement on the southern boundary and other town planning and building considerations. Hogan says that the development as planned by Douglas was not capable of conforming to the town planning permit as used and required substantial amendments. Hogan says that Douglas failed to provide any, or any adequate or proper, warnings or information to Actpen in relation to these issues. Full particulars of the breaches will be provided in an expert's report to be filed and served in due course".

12. As Mr Whitten pointed out in opposing the application on behalf of Douglas, the particulars supplied are in error, in that, as well as changing the dimension of 4500 to 5400, Douglas reduced certain other dimensions of the units to a distance of 18.6 metres from the street. Beyond that distance the remaining dimensions are unaltered and so the completed building, according to the endorsed plans, will not encroach upon the easement at the rear. It was therefore possible, it seems, to achieve the setback required by the endorsed plans. That being so, it is not possible to say the development as portrayed in the endorsed plans was not capable of conforming to the town planning permit as issued or required substantial amendment. They could have also been amended by redrawing the units to scale using the new numbered dimensions and this

was not done but the dimensions certainly appear on the endorsed plans.

13. The other allegation is the failure to provide any or any adequate or proper warning or information to Actpen “*in relation to these issues*”. It appears from the correspondence exhibited to Mr Douglas’s affidavit that the warnings I have set out earlier were given.
14. In support of the application for joinder Mr Andrew said that by merely altering the dimensions on the plans submitted for endorsement by the Council without making corresponding alterations to the drawings, Douglas produced plans that were misleading in that they had the same appearance as the earlier plans. He also described the advice contained in the letters referred to as very vague and said that it did not direct the attention of Actpen to the real issue, which was that the construction documents would need to be amended. Douglas also failed, he said, to warn Actpen of the consequences of the changes required by the Council.
15. It appears that certain of the documents exhibited to the Douglas affidavit had not been discovered by Actpen and in the light of the documents produced in regard to this application, the claim as articulated in the draft Points of Claim would need some slight amendment.

The law

16. Section 60 of the *Victorian Civil and Administrative Tribunal Act 1998* is in the following terms:

- “(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.*”

17. It is a serious matter to join a party to a proceeding and the Tribunal must be satisfied that it is appropriate to do so. Mr Whitten referred me to the decision of Byrne J in **Wimmera-Mallee Rural Water Authority v FCH Consulting Pty Ltd** [2000] VSC 102 where his Honour dealt with an application to join a party to a building action for the purposes of s.131 of the **Building Act 1993**. His Honour said (at paragraph 8):

“In Boral Resources Pty Ltd v Robak Engineering and Construction Pty Ltd the Court of Appeal has held that a joinder in circumstances similar to the present is permitted by Rule 9.06 (b) (ii). What was submitted to me on behalf of the authority was that FCH must demonstrate that there exists a viable cause of action in the authority against MGZ and that this demonstration must be based on proper material. In my opinion, the question of whether a cause of action is viable in this sense requires the application of a conventional pleading test. Accordingly, I should treat the cause of action as viable unless I am satisfied that it is clearly hopeless. In a case such as the present, FCH must show to that standard that MGZ owed a duty of care to the authority, that it was in breach of that duty and that the damages which the authority claims, were, in part at least, caused by this breach. 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”.

18. That was a case that related to an application by a Defendant to join a co-defendant to take advantage of s.131 of the **Building Act 1993**. In the present case the joinder of Douglas is sought for the purpose of taking advantage of different provisions under the **Wrongs Act** but the thrust of the legislation is similar and I think the same principles would apply.

19. A more recent statement of the principles for joining a party under s.60 is to be found in the decision of **Zervos v Perpetual Nominees Limited** [2005] VSC 380 (1 July 2005) where Cummins J said:

“I agree with Mr Frenkel that this is a case where the claim on behalf of the defendant to join is open and arguable. Whether it is sustained in the end is a matter

for trial. The application for joinder is not an application for summary judgment and whilst I agree with Mr Herskope that the test is higher than that apposite to a mere pleading matter because it involves joinder of a party, on the other hand Mr Frenkel is entirely right that the bar is set lower than on an application for summary judgment.”.

20. In looking at the advice given to Actpen by Douglas following the granting of the permit and the endorsement of the plans I must bear in mind that at the time the permit was obtained the construction drawings had already been prepared and a building contract had already been entered into. Douglas makes it quite clear in the correspondence referred to that the Council had required changes and these are quite clearly spelt out in the permit which Douglas gave Actpen. In addition, Douglas has invited Actpen to have Thomas contacted it in regard to the matter. Although I appreciate Mr Andrews’s point that I should not assume that Actpen has any particular knowledge or sophistication in building matters it is the developer of a substantial unit development and Douglas would be entitled to assume that those directing its business had some degree of business sense or at least, sufficient common sense to know that, if the Council has required the existing plans to be altered, the working drawings will need to be altered accordingly. The need to amend the plans was so obvious that it does not seem to me that there is any real prospect of Actpen being able to blame Douglas for its failure to do so.

Conclusion

21. It does not seem to me that there is a sufficient case as between Actpen and Douglas to warrant joining Douglas to these proceedings. As stated above, it is a serious matter to join a party to a substantial building dispute. Not only will that party incur substantial expense in defending the proceeding but it will also prolong the proceeding for other parties and consequently, increase the expense of the litigation.
22. Prima facie, a party wishing to bring a proceeding against another party should have the opportunity to do so provided the case sought to be litigated is open and arguable. Here I do not think that that has been demonstrated. In regard to the application to join Thomas to the proceeding that was not opposed by Mr Sorenson and so an order joining

that party will be made.

23. I shall direct the Registry to list the matter for directions as to the future conduct of the proceeding.

SENIOR MEMBER R. WALKER