VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

VCAT REFERENCE NO. D849/2006

DOMESTIC BUILDING LIST

CATCHWORDS

Domestic building – joinder of parties – duty of care – party carrying out works.

APPLICANT	Thomas McEwan Properties Pty Ltd (ACN: 094 569 196)
FIRST RESPONDENT	Pantirer Pty Ltd (ACN: 074 355 981)
SECOND RESPONDENT	Fass Pty Ltd
WHERE HELD	Melbourne
BEFORE	Senior Member D. Cremean
HEARING TYPE	Hearing
DATE OF HEARING	13 May 2008
DATE OF ORDER	26 May 2008
CITATION	Thomas McEwan Properties Pty Ltd v Pantirer Pty Ltd (Domestic Building) [2008] VCAT 915

ORDER

1 I join as parties to this proceeding A W Tierney Pty and Maverick Consulting Pty Ltd as respectively Second and Third Respondents to the Counterclaim.

2 I direct this matter to be listed for further directions before me at 10.00 a.m. on 10 June 2008 at 55 King Street Melbourne – allow 2 hours.

3 I reserve costs.

SENIOR MEMBER D. CREMEAN

APPEARANCES:

For the Applicant	Mr R. Craig of Counsel
For the First and Second Respondents	Mr J. Forrest of Counsel

REASONS

1 The Respondent makes application to join as parties to this proceeding the following companies: A W Tierney Pty Ltd and Maverick Consulting Pty Ltd. Both such companies own the business name – "Thomas McEwan Homes". The Applicant in the proceedings is of course Thomas McEwan Properties Pty Ltd.

2 Reliance is placed on the Affidavit of Albert Sattler sworn 7 April 2008. Mr Sattler is a director of the Respondent.

3 The joinder is opposed and reliance is placed on the affidavit of Thomas Bruen sworn 8 May 2008. Mr Bruen is a director of the Applicant.

4 Mr Bruen deposes that the other director of the Applicant is Mr Allan Tierney.

5 If I return to the Affidavit of Mr Sattler he deposes that Mr Tierney is a director of A W Tierney Pty Ltd whilst Mr Bruen is a director of Maverick Consulting Pty Ltd. As I have noted each of those companies is sought to be joined as a party to the proceedings.

6 In earlier Reasons given in this proceeding I referred to s60 of the *Victorian Civil and Administrative Tribunal Act* 1998 which I now set out as follows:

> (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.

7 In those Reasons I also referred to the test for joinder stated by Cummins J in *Zervos v Perpetual Nominees Pty Ltd* [2005] VSC 380. The case for joinder against a proposed party must be "open and arguable" to quote his Honour.

8 I am satisfied that the Respondent has met that test in this case in respect of both A W Tierney Pty Ltd and Maverick Consulting Pty Ltd.

9 I make that finding based on the affidavit materials and having heard Counsel's submissions.

10 The case against both such companies, I am satisfied, is "open and arguable" in the way required. I am satisfied, further, that each should be made a party to the proceedings. It is just and proper that that should be so, in my view. I bear in mind the duty of the tribunal under s97 of the Act.

11 Opposition to their joinder was based on a number of grounds.

12 The principal ground, as I make it out to be, came down to those companies not being contracting parties with the Applicant. The contract in the

proceedings, it was submitted, was between the Applicant and the Respondent and no one else. No novation was being pleaded. Reference then was made to clause 45 of the contract by which it is provided "The Builder may subcontract any part of the Building Works but such subcontracting does not relieve the Builder from the Builder's obligations under this Contract". The Builder named in the contract is the Applicant. It was pointed out that clause 11 of the Contract provides for warranties by the Builder thereby giving the Applicant protection, for instance, against defective workmanship.

13 Thus was it said that if the Applicant involved Thomas McEwan Homes (constituted as I say by A W Tierney Pty Ltd and Maverick Consulting Pty Ltd) in the Respondent's house construction then it was on a basis allowed for by clause 45. In effect the Applicant was subcontracting works out as it was contractually permitted to do.

14 It is not appropriate at this stage to make final findings of fact. They should only be made at a hearing after evidence. However I am concerned that the Applicant's submission may not represent the correct state of affairs. The materials before me would indicate that Thomas McEwan Homes was no mere subcontractor. For example, the Banyule Building Permit (dated 31 July 2006) names as Builder "Thomas McEwan Homes" and not the Applicant at all. The Certificate of Insurance also identifies "Thomas McEwan Homes" as the party in whose name the insurance is issued and not the Applicant.

15 Given those considerations, which seem to implicate "Thomas McEwan Homes" more directly than as a mere subcontractor, I do not see why it is not open and arguable that the two companies carrying on business as "Thomas McEwan Homes" should not each be a party. Their roles, respectively, seem to have been understated to me. The submission that their joinder is not open and arguable for this reason is, accordingly, rejected.

16 It was also argued, as I understand it, that no authority supports a view that an owner may sue a sub-contractor. Reference was made in that regard to a number of cases. I refer also to *Woolcook St Investments Pty Ltd v CDG Pty Ltd* (2004) 216 CLR 515 and to *Aquatec Maxon Pty Ltd v Barwon Region Water Authority (No 2)* [2006] VSC 117 which were specifically drawn to my attention.

17 If that represents the state of the law relating to a duty of care, and I am not satisfied it is quite to that affect without qualification, I am not satisfied at this point that the companies trading as Thomas McEwan Homes can properly be described as sub contractors. See paragraphs 14 and 15 above and my comments therein.

18 Moreover, vulnerability is the central element in a duty of care according to recent authorities and I am not satisfied that it is maintainable that the Applicant was not in a position of vulnerability in respect of Thomas McEwan Homes as appeared to be the Applicant's contention. If they are not property described as sub-contractors, they are outside the ambit of the

proposition in any event. Much must depend, of course, on how one defines "vulnerability" but in *Northern Territory of Australia v John Holland Pty Ltd* [2008] NTSC 4 at [32] Angel J said:

> In *Woolcock Street Investments Pty Ltd v CDG Pty Ltd [2004] HCA 16;* (2004) 216 CLR 515 at 530 [23], 533 [31] Gleeson CJ, Gummow, Hayne and Heydon JJ referred to matters which must be established to disclose a cause of action where a claim is made for pure economic loss arising out of negligence. See, also per McHugh J at 548 – 549 [80], per Kirby J at 575 [168] and per Callinan J at 592 [222]. The court confirmed that damages for pure economic loss are not recoverable if all that is shown is that the defendant's want of reasonable care was a cause of the loss and the loss was reasonably foreseeable. The court held, as had previously been held in *Perre v Apand Pty Ltd [1999] HCA 36;* (1999) 198 CLR 180, that vulnerability of the plaintiff had emerged as a necessary requirement. "Vulnerability" in this context is to be understood as a reference to the plaintiff's inability to protect itself from the consequence of a defendant's want of reasonable care either entirely or at least in a way which would cast the consequences of loss on the defendant.

19 Accepting what his Honour has said (particularly his last observation) I cannot see how the Respondent is not exposed, and in a position of vulnerability, if unable to join as parties to the proceedings the companies carrying on business as Thomas McEwan Homes. It is little comfort in my view to point to the provision of the Contract – in particular clause 11. Should, for some reason, the Applicant become impecunious or go out of business, the Respondent, on its Counterclaim, should it succeed, may end up with no remedy at all. Yet this seems to be within the concept of vulnerability explained by his Honour. In this respect it does not seem to matter even if they were subcontractors should that be so.

20 It was also submitted that if I joined Thomas McEwan Homes the Tribunal could expect an application under s75 of the Act. Whether such an application is made must be for someone else to decide, properly advised. But I would point out, as I said in my earlier Reasons in this case – under s60 the "threshold is not high – in the way, for instance, it is for a strike out under s75". That remains my view.

21 No application was made to join either Mr Bruen or Mr Tierney personally as a party to the proceedings. The time may be coming when, in this area, or in others, directors may be held personally liable independent of statute. But I say nothing further about that as it does not arise in this case.

22 I am satisfied I should join the parties concerned as respectively Second and Third Respondents to the Counterclaim. The arguments of the Applicant, considering in particular the materials, do not persuade me otherwise.

23 I so order.

SENIOR MEMBER D. CREMEAN