

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

DOMESTIC BUILDING LIST

VCAT REFERENCE NO. D881/2009
D882/2009
D883/2009

CATCHWORDS

Joinder, provision of affidavits, sufficiency of material

| | |
|------------------------|--|
| APPLICANTS | Dharmesh Adeshara, Tejalben Adeshara |
| RESPONDENT | Rashid Ismail Mpota trading as Bora Homes Australia, Emerald David Komba trading as Bora Homes Australia |
| WHERE HELD | Melbourne |
| BEFORE | Senior Member R. Young |
| HEARING TYPE | Hearing |
| DATE OF HEARING | 28 June 2010 |
| DATE OF ORDER | 25 August 2010 |
| CITATION | Adeshara v Mpota & Anor trading as Bora Homes Australia (Domestic Building) [2010] VCAT 1430 |

REASONS

- 1 This is an application by the respondent builders, constructing three dwellings for the applicants, each of which have given rise to a proceeding in the Tribunal under the file numbers set out above, to join the building surveyor, Mr R. Goddard, and his company, Advanced Building Solutions Pty Ltd of 14 Overton Road, Frankston 3199, as parties to the three proceedings. The building surveyor and his company were engaged by the respondents.
- 2 The history of this application for joinder is lengthy and complicated having been dealt with at a number of hearings and directions hearings. There have been a number of orders requiring further material to be produced by the respondents. This history bears to some extent upon my determination and it is necessary to set it out in some detail.
- 3 The first time that the joinder of the building surveyor was raised was in the the hearing of 19 April 2010; at which hearing the three proceedings were set down for a 1 day hearing. The substantive hearing did not take place as one of the respondents claimed that he had not received a copy of the application. In relation to the respondents submission that they wished to join the building surveyor, the member made Order 1 that was a general

approval to join additional parties by Tuesday 11 May 2010. I do not consider that this order gave a general right to join parties; rather, it was a right that a party could make application and file the necessary supporting material to ground the application by the date stated. No material was filed by the respondents in compliance with this order.

- 4 On 20 April 2010 the respondents lodged an application for an injunction and on 23 April 2010 they lodged an application to join the building surveyor and his company. At the hearing which dismissed the application for the injunction, the Deputy President at Order 5 required that by 11 May 2010 the respondents file and serve any affidavit material in support of such application for joinder, including service on each of the parties proposed to be joined. In compliance with the orders of the Deputy President of 28 April 2010, the respondents filed and served an affidavit dated 13 May 2010 and filed on 14 May 2010.
- 5 The application was heard on 1 June 2010; and, at Order 1 the Senior Member refused the joinder and ordered that any further application for joinder had to be filed and served on or before 8 June 2010. The respondents filed a further affidavit on 9 June 2010. Mr Gordon, Counsel for the applicants, submitted that the Senior Member refused the application for joinder on the basis that the affidavit of 13 May 2010 did not sufficiently identify and particularise the allegations against the parties proposed to be joined, such as to ground an action against them; and, nor, were the particulars of the remedies sought against such parties clearly set out. The respondents did not dispute that these were the reasons that the Senior Member gave for making Order 1.
- 6 Both the affidavits were prepared and attested to by both respondents, being Mr E. Komba and Mr R.I. Mpota. As such these affidavits are not in proper form and at this hearing of the joinder application both respondents entered the witness box and attested that the material in the affidavit of 9 June 2010 was true and correct.
- 7 Orders in Chambers were made by the Senior Member on 17 June 2010 which fixed the date of this hearing and at Order 2 he required the respondents to file and serve affidavit material in support of their application for joinder of the building surveyor and his company, such affidavits to have fully itemised particulars of their claims against each of the proposed parties and the basis upon which they are entitled to make those claims. No further material was filed by the respondents.
- 8 The only evidence before me upon which to ground the joinder of the building surveyor and his company are the affidavits of the respondents of 13 May 2010 and 9 June 2010. These affidavits, except for some changes I will refer to and some re-arrangement of paragraphs are almost exactly the same. The major changes are that the section headed "Conclusion" at paragraphs 31-36 inclusive in the affidavit of 13 May 2010 is deleted. However, paragraphs 31-34 inclusive are inserted as paragraphs 4-7

inclusive in the affidavit of 9 June 2010. Paragraph 36 in the affidavit of 13 May 2010 is reproduced as paragraph 11 of the affidavit of 9 June 2010. The major variation between the affidavits is that paragraph 35 in the affidavit of 13 May 2010 has been deleted. Paragraph 35 dealt with allegations of “ignorance of the Building Act knowledge by the rbs”; i.e. registered building surveyor. This paragraph has been reconstituted in the affidavit of 9 June 2010 at paragraphs 8-10 inclusive, where the allegations now are made on the basis of the building surveyor having a duty of care to the respondents and negligently breaching such duty. I find there is no factual difference between the contents of the affidavit of 13 May 2010 and the affidavit of 9 June 2010. Therefore, given that the Senior Member refused to join the respondents after consideration of the affidavit of 13 May 2010 at the directions hearing of 1 June 2010; then I consider that I am required to refuse this application for joinder. However, in case I am incorrect I will consider the affidavit material and the respondents’ submissions.

- 9 In relation to the affidavit material, the allegations of the respondents against the building surveyor and his company are not clearly and distinctly drawn. Neither of the respondents has legal training and this confusion is to some extent understandable. Mr Komba admitted that notwithstanding the repeated chances given to them to particularise the allegations against the building surveyor and his company and to clearly delineate the claims being made against them, the respondents could not understand what was required of them and he did not consider that they could comply with the orders of the Tribunal for the provision of this information. To my urgings that they needed legal advice in this matter their reply was that they had no money.
- 10 The respondents also submitted by way of confession of avoidance, that the defects noted on the frame inspection starting with the first frame inspection of 5 May 2009 were not in effect defects; but, were as a result of work that could not be carried out on the frame until a specific amount of brickwork had been erected. And, that in effect these inspection notices established approval of the frame in part such as to ground a claim for payment of the frame stage.
- 11 In relation to the remedies claimed against the builder the respondents have attached to the rear of their affidavit of 9 June 2010, a document headed “Amended Points of Counterclaim” and this details various heads of damage giving a total claim of \$2,550,000.00. At my request to identify what specific remedies were being sought against and in what quantum were being sought against the building surveyor and his company the respondents replied that the total amount was being sought against the building surveyor.
- 12 The respondents are also submitting in the affidavits that the building surveyor is guilty of a criminal offence for wrongly amending the stop work order on the basis that the amended order contained false and misleading information pursuant to s83A of the *Crimes Act 1958* (“the Act”). In the

same paragraph they also accused the building surveyor of committing an offence under s86 of the Act.

- 13 Section 83A of the Act relates to the falsification of documents. Nowhere in the affidavits do the respondents indicate how or in what manner the building surveyor allegedly falsified the documents. Section 86 of the Crimes Act relates to the offence of the suppression of documents by destroying, defacing or concealing a valuable security, will or any other original document filed in a court or government department. The affidavits contain no specific factual allegations to ground these criminal allegations.
- 14 In their oral submissions to the Tribunal the respondents said that they had made an application to the Building Appeals Board to have the building surveyor's allegations of defects in the frame removed but that the Building Appeals Board had refused to hear the application on the basis that the owners of the properties were required to be parties to such an application and the owners had refused to allow their joinder. I note that this does not accord with a letter from the Building Appeals Board exhibited to the affidavits at exhibit PPG120, where the Registrar of the Building Appeals Board in his letter to the respondents of 22 September 2009 said that their application would be held pending the receipt of any relevant plans, drawings and photographs that may assist the Board in making a decision. This difference between the exhibits to the affidavit and their verbal submissions was not addressed by the respondents.
- 15 I refused the application for joinder on the basis of the affidavit material and the respondents' submissions because there were no proper particulars as to the failings, either tortious or contractual, of the building surveyor or his company, such as to ground an action against him or the company. Secondly, there were no specific allegations as to what remedies were to be sought against himself or his company. Further, the respondents had been given many opportunities to prepare such specific allegations as to breach and as to heads of damage and they had failed to provide the necessary factual particulars.
- 16 The major claim grounding what they say is their proper performance of the building works is that they submitted that the frame inspections carried out by the delegate of the building surveyor did not indicate any real defects, as set out above, they merely detailed work remaining to be completed as the respondents submitted the frame couldn't be completed until some brickwork had been carried out which was properly the part of the lock up stage. This is not borne out by the exhibits attached to both affidavits, the first being exhibit PPG101, which is a report of a frame inspection by CBI Services, the delegate of the building surveyor, headed "Notice of Defect - Building Work", dated 5 May 2009, and it goes on to list some 17 allegations of non complying or defective work. I do not accept that all of these are as a result of work not completed, for example: beam supports not constructed as per the approved drawings, many instances of bracing

missing, etc. Further, even if the allegation is true it does not assist the respondents' case; because, the respondents should not have sought a frame inspection unless the frame was complete.

- 17 After receiving a number of reports detailing defects in the frames of the dwellings, the building surveyor engaged Mr S. Schake to carry out an inspection of the frames of the three dwellings. His report of 17 July 2009 details some 35 shortcomings in relation to the three frames. Again, bracing appears to be largely defective and there are obvious errors such as a steel beam in the stairwell protruding into an area where plaster sheet is required to be fastened. The report of Mr Schake was an exhibit to both of the affidavits submitted by the respondents.
- 18 The respondents submit that the previous frame inspection reports had approved the frame and therefore the inspection report by Mr Schake had no standing. I disagree that the previous frame inspection reports which were issued as "Notice of Defect – Building Work", constitute an approval of the frame; such a notice by its heading and detailing of defects can not in any way constitute an approval of its subject matter. Further, in their oral submissions, the respondents submitted that the report of Mr Schake could not be put before the tribunal as he was not there to give evidence. I disagree, the report was an exhibit to the respondents affidavits and as such I can take it into account and I do.
- 19 Taking into account the notices and the Schake report, I do not consider there is any veracity in the allegations of the respondents in relation to the carrying out of the works and in the actions of the building inspector and his delegates. Further, for the allegations of criminal conduct to be sustainable they must be properly elucidated and clearly understandable by the party proposed to be joined; whereas, the criminal allegations in the affidavits are mere statements that the building surveyor is guilty of criminal offences. This is entirely insufficient to ground such offences. Therefore, I refused the respondents' application for joinder.
- 20 Given that the respondents have been given a number of opportunities, and accepting that they have very little legal knowledge or ability to understand and put together legal documents; I consider that they made no attempt between the preparation of the original affidavit of 13 May 2010 and the subsequent affidavit of 9 June 2010; where they merely reordered the material in the affidavit. They did take the opportunity to provide further information by 25 June 2010 as allowed in the chambers orders of 17 June 2010. This meant that the applicants were unnecessarily put to a number of hearings which caused them to incur significant costs and I consider that the respondents jointly and severally should pay the applicant's costs of this day which I fix in the sum of \$900.

SENIOR MEMBER R. YOUNG