

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

DOMESTIC BUILDING LIST

VCAT REFERENCE NO. D275/2007

CATCHWORDS

Domestic building – intervention – joinder.

APPLICANT	Vero Insurance Limited (ACN: 005 297 807)
FIRST RESPONDENT	Peter Eckberg
SECOND RESPONDENT	Hassall & Byrne
WHERE HELD	Melbourne
BEFORE	Senior Member D. Cremean
HEARING TYPE	Directions Hearing
DATE OF HEARING	17 July 2007
DATE OF ORDER	17 July 2007
CITATION	Vero Insurance v Eckberg (Domestic Building) [2007] VCAT 1317

ORDER

- 1 Pursuant to s60 of the *Victorian Civil and Administrative Tribunal Act 1998* I join as a party to the proceedings Hassall & Byrne, solicitors of 308 Highett Road Highett (to be known as the Second Respondent) with effect from this day. Peter Eckberg shall be known as the First Respondent.
- 2 By 7 August 2007 the Applicant must file and serve Points of Claim.
- 3 By 31 August 2007 the First Respondent must file and serve Points of Defence and Points of Counterclaim (if any).
- 4 By 14 September 2007 the Second Respondent must file and serve Points of Defence, if minded to do so, on the Applicant.
- 5 By 31 August 2007 the First Respondent must file and serve any application for joinder under s60 of the *Victorian Civil and Administrative Tribunal Act 1998* against any other proposed party or parties. Such applications must be supported by affidavit.

- 6 I refer this matter to a directions hearing before me (if available) on 25 September 2007 at 9.30 a.m. at 55 King Street Melbourne at which time any application for joinder shall be heard and determined. The Respondents by such directions hearing will have made available to the joined party and to any other proposed party/parties and to the Applicant draft Points of Claim.
- 7 Reserve costs.
- 8 Reserve liberty to apply.

SENIOR MEMBER D. CREMEAN

APPEARANCES:

For the Applicant	Mr S. Waldren of Counsel
For the First Respondent	Mr L.M. Schwarz, Solicitor
For the Second Respondent	Mr D. Masel, Solicitor

REASONS

- 1 Application is made by the Insurer for declaratory relief as set out in the Application dated 1 May 2007 arising out of Terms of Settlement.
- 2 The granting of such relief is opposed by the Respondent.
- 3 Further, the Respondent, by his Counsel, indicates an intention to bring proceedings, arising out of those Terms, against the law firm involved (Hassall & Byrne, solicitors), against Counsel (Mr Squirrel) and possibly against the builder (Mr Wharrington).
- 4 The law firm, by Counsel, applies for leave to intervene under s73(3) of the *Victorian Civil and Administrative Tribunal Act 1998*. That provides as follows:

The Tribunal may give leave at any time for a person to intervene in a proceeding subject to any conditions the Tribunal thinks fit.

A “fall back position”, as it was described to me, is that the firm be joined under s60 of the Act which reads:

- (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.
- 5 The position of the law firm is supported by the Respondent – particularly as regards its joinder under s60. The Applicant, however, opposes either leave being given under s73(3) or joinder.
 - 6 The Applicant, instead, invites me to regard the proceedings as susceptible of simple solution – a declaration to be made either that payment be made or not.
 - 7 I cannot agree with that summation in light of what I have heard from the other party and from Counsel for the law firm. The result may be straightforwardly able to be stated in such unqualified terms, but the path leading to it is not straightforward, as I am persuaded. In my view, the matter is one which is considerably complex.
 - 8 Having heard from the parties (that is, the Applicant and the Respondent) and from Counsel for the law firm, and having considered the affidavit materials on file, I am satisfied it is proper to involve the law firm in the proceedings.

- 9 I decline, however to do so under s73(3), for reasons I will give shortly. In my view the law firm should be joined as a party under s60(1) – having regard, in particular, to paragraphs (a) and (c).
- 10 I should indicate that it is plain that the power given by s60 to order joinder is “very large” as it has been said. See *Henley Arch Pty Ltd v Hannagan* [1999] VCAT 29. It is true that the Applicant makes no claim, as such, against the law firm but I do not consider that to be a critical element in deciding whether s60(1)(a) or (c) applies. By the relief it is seeking the Applicant is, in effect, drawing the law firm into the proceedings in any event, given the Respondent’s stance.
- 11 In deciding to join the law firm under s60(1), I have had regard to a number of considerations based on the materials and the submissions. It seems to me to be important that the Tribunal attempt to “do justice as between all parties” – to quote from the judgment of Brennan CJ in *Levy v State of Victoria* (1997) 189 CLR 579 at 603. It should seek to provide all relief it legitimately can provide. Compare per Brandon J in *The Conoco Britannia* [1972] 2 QB 543 at 554. Further, it seems to me that there is a very clear need to avoid the possibility of a multiplicity of proceedings and to avoid any possible prejudice to the law firm out of it not being able to participate meaningfully in the present matter. Finally, I have had regard to s97 of the Act by which I have a duty to proceed according to the “substantial merits” of the case – and I do not consider that the substantial merits of the case can be determined without the law firm being involved in the case, in light of the Respondent’s contentions.
- 12 I consider I should decline to order under s73(3) because I am not satisfied that injustices will not result, in terms of possible costs orders, if I do order under that provision. I was referred to the decision of *Kyrou v Contractors Bonding Ltd* [2006] VCAT 597. But I am yet to hear full argument on the question whether, under the regime of the 1998 Act, as opposed to court practices and procedures, an intervening person necessarily becomes a party under s109 of the Act for the purpose of obtaining costs orders or for having costs orders made against them. I have my doubts about this. Compare s73(3) and the position of the Attorney-General intervening. For example, may costs be ordered against the Attorney General under s109? May they be ordered against the Crown? – even though the Act binds the Crown (s7). To avoid any possible injustice, I think I should use the facility afforded by s60(1) rather than s73(3).
- 13 Accordingly I have made the orders and directions set out.

SENIOR MEMBER D. CREMEAN