Johns Lyng Commercial Builders Pty Ltd v Carrington International Pty Ltd (Building and Property) - [2016] VCAT 1821

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST VCAT REFERENCE NO. BP399/2014

CATCHWORDS

Domestic building, application to join a party under s 60 of the *Victorian Civil And Administrative Tribunal Act 1998* , application to join as an interested party without draft pleadings, oral application concerning s 165(1)(ba) of the *Owners Corporations Act 2006* , alleged delay seeking joinder, no consent from the proposed joint party, potential risks to the proposed joined party of both being joined or not being joined including risk of costs order, incurring costs, *Anshun* estoppel, res judicata, solicitors for the party seeking joinder potentially acting as de facto solicitors for the proposed joined party, potential for conflict of interest, application to adjourn a long hearing, alleged prejudice to the party resisting the application for adjournment, whether the application to join the proposed joint party was bona fide.

APPLICANT	Johns Lyng Commercial Builders Pty Ltd
RESPONDENT	Carrington International Pty Ltd (ACN: 127 201 709)
WHERE HELD	Melbourne
BEFORE	Senior Member M. Lothian
HEARING TYPE	Directions Hearing
DATE OF HEARING	24 October 2016

DATE OF ORDER 28 October 2016

CITATION Johns Lyng Commercial Builders Pty Ltd v Carrington International Pty Ltd (Building and Property) [2016] VCAT 1821

ORDERS

1. The respondent's application to join Owners Corporation PS7099991E to this proceeding is dismissed.

2. **The hearing commencing 14 November 2016 is confirmed.**

3. **I direct the Principal Registrar to send copies of these orders to the parties by email and also to the manager of Owners Corporation PS7099991E at manager@mbcmboxhill.com.au.**

4. **I direct the Principal Registrar to send copies of these orders and reasons to the applicants in each of proceedings BP580/2016, BP582/2016, BP583/2016 and BP584/2016.**

5. Upon receipt of these orders and reasons, the respondent must promptly arrange for Owners Corporation PS7099991E to send copies of these orders and reasons to each of the owners of the units who are not parties to proceedings BP580/2016, BP582/2016, BP583/2016 and BP584/2016, to the current address for service for each such owner, which might not be the relevant lot number.

6. Costs are reserved with liberty to apply.

SENIOR MEMBER M. LOTHIAN

APPEARANCES:

For Applicant Mr T. Sedal of Counsel

For Respondent Mr J. Bowers-Taylor, Solicitor

REASONS

1. This proceeding and the related proceedings BP580/2016, BP582/2016, BP583/2016 and BP584/2016 are listed for a 15 day hearing commencing on 14 November 2016. The respondent in this proceeding is the developer of a property in Box Hill ("Developer"). It is represented by JBT Lawyers, who also represent owner-applicants in each of the four related proceedings ("the 2016 proceedings"). Between them, the Owners own 4 of 25 units in the development which was the subject of the contract between the Developer and Builder, the latter being the applicant in this proceeding and the respondent in each of the 2016 proceedings.

2. On 14 October 2016 the Tribunal received applications by JBT Lawyers in each of the five proceedings to join the relevant owners corporation ("OC") to each proceeding.

3. Annexure A to each of the applications includes the following:

> A. Orders sought:
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> 1. That Owners Corporation 1 PS709991E ("the OC") be joined to the proceeding.
>
> 2. The hearing listed on 14 November 2016 be vacated.
>
> 3. Further directions.
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> B. Is the application urgent?
>
> 1. The OC is a necessary or affected party.
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> 2. There is a final hearing listed on 14 November 2016 (on an estimate of 15 days).

4. Ms Clare Jordan of JBT Lawyers swore an affidavit dated 14 October 2016 ("Ms Jordan's first affidavit") and an affidavit dated 21 October 2016 ("Ms Jordan's second affidavit"). Both affidavits state that they are for proceeding BP582/2016 only, although copies of the first affidavit have been placed on the file for each proceeding. Ms Jordan's second affidavit was emailed to the Tribunal after 5pm on Friday 21 October 2016 and delivered to me in the hearing room at the commencement of the directions hearing.

5. Mr Alan Bidychak of the Builder's solicitors made an affidavit on 21 October 2016 in support of the Builder's opposition to joinder and particular opposition to adjourning the hearing.

6. Mr T Sedal of Counsel appeared for the Builder at the directions hearing. Mr J Bowers-Taylor, solicitor, appeared for the Developer and the Owners in the 2016 proceedings.

7. Regrettably, there was no representation for the OC at the directions hearing, although I am satisfied that JBT lawyers sent copies of the notices of directions hearing to Ms Bowcock of Melbourne Body Corporate Management Box Hill, the relevant manager of the OC, by email on 20 October 2016.

Basis for joinder

8. At paragraph 8 of her first affidavit Ms Jordan somewhat surprisingly said:

> It is not the applicant's present intention to make any claims against the OC, but the OC should be given the opportunity to deal with this.

9. The "this" referred to is the possibility that there might be defects in the property for which the OC would be the appropriate applicant against the Builder.

10. Mr Bowers-Taylor submitted at the directions hearing that there are issues with various aspects of the property that necessitate joinder of the OC as an interested party. He said that the plan of subdivision defines the boundary of each property as the median line between properties so that in the case of the balustrades, which have been identified by the Developer's expert, Mr Browning, as defective, the parts that are located on the property of each of the Owners can be the subject of claims but the parts that are on the common property cannot unless the OC is joined.

11. I remarked that if the OC were joined, it might be to the benefit of the four Owners who have commenced proceedings, but it would not be to the benefit of the 21 who have not. The problem of only half the balustrades being subject to claim would apply to all of their properties.

12. Mr Bowers-Taylor submitted that, despite orders referred to below, it is not necessary to file and serve proposed points of claim or proposed points of defence, because all that is necessary is that the OC's interests should be affected.

13. Mr Bowers-Taylor also said that it is not necessary for the OC to plead or to participate although he raised the possibility that in addition to the issue concerning balustrades there is some paving apparently entirely within the common property which sheds water into the lots of one or more of the Owners under the 2016 proceedings and there is a potential issue with balcony flashings.

14. Mr Sedal drew my attention to page 219 of the fifth edition of *Pizer's Annotated VCAT Act,* where the learned authors Pizer and Nekvapil say of domestic building disputes that it is:

> … a "serious matter" to join a party to a proceeding in the VCAT; … It should not be done lightly, particularly if the proceeding involves a building dispute; … That is because "building disputes are notoriously lengthy and costly to dispose of and the more parties to such a dispute, the greater that expense and the greater the time taken to determine it".

Orders concerning joinder

15. As Mr Bowers-Taylor correctly stated, an application for joinder can be made under section 60 of the *Victorian Civil and Administrative Tribunal Act 1998* without obtaining a prior order regarding when joinder should be sought.

16. Nevertheless, numerous orders have been made concerning potential joinder in this proceeding and three orders concerning the procedure for joinder have been made in each of the 2016 proceedings, discussed below.

17. The purpose of making orders regarding the date for joinder applications is to avoid delay and in particular to avoid the possibility of a late joinder which necessitates adjournment of a hearing.

18. The first order for joinder was made on 29 April 2015 which provided that the directions hearing at which the application would be heard was 31 July 2015.

19. The second order regarding joinder was made on 29 October 2015 where it was ordered that any such application would be heard on 3 December 2015.

20. On 3 December 2015 the proceeding came before me and I ordered that the Developer file and serve any application for joinder together with supporting material by 29 January 2016 and listed the directions hearing for 9 March 2016.

21. Other matters, including an application for security for costs, seem to have diverted the attention of the parties from the possibility of joinder for some time but on 26 April 2016 Deputy President Aird ordered as follows:

> 21. By 27 May 2016 the respondent must send a copy of these orders together with a copy of the pleadings to each of the owners of the units in the subject property and the Owners Corporation. Any claim by the current owners and the Owners Corporation must be by way of separate application which should be filed as soon as possible. Any application to be joined to this proceeding as an interested party, noting that claims by current owners cannot be made in this proceeding, should be made by 10 June 2016. [Underlining added]

22. On 9 June 2016, Senior Member Riegler ordered that any application for joinder must be filed and served by 12 August 2016.

23. Deputy President Aird conducted a compliance hearing on 10 August 2016 concerning the Developer's apparent action in sending notices to the lots owned by each owner, rather than to the registered offices of proprietary limited companies who own some of the lots. Again, it was emphasised that any claim by the current owners and/or the OC must be by way of separate application.

The 2016 proceedings

24. Each of the 2016 proceedings was commenced on 2 May 2016 and in each there have been three orders concerning applications for joinder.

25. On 9 June 2016, Senior Member Riegler ordered that any application for joinder be made by 12 August 2016 and be in accordance with paragraphs 22 and 23 of PNBP1. The order spelled out this obligation:

> The applicant for joinder must:
>
> (i) *serve* on the proposed party a copy of the application and the supporting material including draft Points of Claim as against the proposed party or draft Points of Defence where the proposed party is to be joined as a concurrent wrongdoer for the purposes of Part IVAA of the *Wrongs Act 1958* , [underlining added]

26. At paragraph 22 of his affidavit, Mr Bidychak stated that the orders regarding joinder made in the 2016 proceedings on 9 June 2016 were sought by the Builder to enable it to join any subcontractors or suppliers against whom it might seek to claim following examination of the Owners' expert reports, although I note that the orders do not limit any possible applications for joinder to the Builder.

27. I note Mr Bowers-Taylor's statement that his clients were not represented on 9 June 2016 because of an error which led to them being unaware of the directions hearing.

28. The orders of 10 August 2016 extended the date for application for joinder to 5 October 2016. In other words, the procedural obligations of a party seeking joinder was the same as it was in the orders of 9 June 2016.

29. The orders of 20 September 2016 again extended the date for application for joinder to 14 October 2016. Again, it imported the procedural obligations of the orders of 9 June 2016.

Oral application to join concerning s 165(1)(ba) of the *Owners Corporations Act*

30. In the course of the directions hearing, Mr Bowers-Taylor made an oral application to join the OC for the purpose of considering an owners corporation dispute under section 165(1)(ba) of the *Owners Corporations Act 2006* ("the OC Act "). In response to my question, Mr Bowers-Taylor said that notification of this potential oral application had not been given to the OC.

31. The section provides:

> In determining an owners corporation dispute, VCAT may make any order it considers fair including one or more of the following –
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> ...
>
> (ba) an order authorising a lot owner to institute, prosecute, defend or discontinue specified proceedings on behalf of the owners corporation;

32. Section 163 of the OC Act includes the definition of an owners corporation dispute:

> VCAT may hear and determine a dispute or other matter arising under this Act or the regulations or the rules of an owners corporation that affects an owners corporation (***an owners corporation dispute***) including a dispute or matter relating to—
>
> (a) the operation of an owners corporation; or
>
> (b) an alleged breach by a lot owner or an occupier of a lot of an obligation imposed on that person by this Act or the regulations or the rules of the owners corporation; or
>
> (c) the exercise of a function by a manager in respect of the owners corporation.

33. The nature of all these disputes listed is that they are between lot owners, or one or more lot owners or occupiers and the owners corporation, or concerning the manager. They are internecine, rather than disputes between the owners corporation and a stranger to it.

34. On the basis of the evidence before me and Mr Bowers-Taylor's submissions, I cannot be satisfied that there is an owners corporation dispute. Ms Jordan's affidavits point, at most, to inaction by the OC.

35. This proceeding is distinguishable from *Mission Express Pty Ltd v Hewcon Pty Ltd* [2016] VCAT 69, where it is apparent that efforts were made to obtain a special resolution of the owners corporation to commence proceedings, some owners corporation members voted for the resolution, some against and a little over half did not vote at all.

36. I dismiss the application to join the OC based on the allegation that there is an owners corporation dispute.

Basis of objection

37. Mr Sedal objected to joinder on the basis that:

    (a) The application is too late;

    (b) the builder will suffer prejudice;

    (c) the OC should not be joined without its consent; and

    (d) the Developer's purpose is to cause an adjournment and it is not a bona fide application for joinder.

Alleged delay in seeking joinder

38. Mr Bowers-Taylor's submission was that the owners in each of the 2016 proceedings have not been late in applying for joinder. He said that expert reports by Mr Browning were received in September 2016. I note that this is true of the 2016 proceedings, but is not true of this proceeding.

39. I am not satisfied that the Owners in the 2016 proceedings have been late in seeking to join the OC, but I am satisfied that the Developer in this proceeding has been very late.

Lack of involvement of the OC

40. The OC has not sought to be joined and neither has it commenced proceedings. This is not through lack of information received by it from the Developer and/or the Owners in the 2016 proceedings.

41. In her second affidavit, Ms Jordan states that on 27 May 2016, JBT lawyers sent a letter to relevant manager of the OC. The letter enclosed copies of the Tribunal orders of 26 April 2016 in this proceeding. As stated above, order 21 provided that any owner wishing to commence proceeding, or the OC, should do so without delay.

42. Ms Jordan's second affidavit goes on to describe a number of contacts between JBT Lawyers and managers for the OC.

43. Exhibit CJ2 to Ms Jordan's first affidavit is a copy of an email that she apparently sent to Ms Bowcock of the OC's manager on 3 October 2016. The email describes the litigation and sets out reasons why it would be advantageous for the OC to take part and suggests that the OC might wish to take part in the proceedings.

44. The first paragraph on the last page of the printed email advises Ms Bowcock as follows:

> Please note that the Tribunal has ordered (in each of the 4 new proceedings) that any application for joinder is to be filed and served by 14 October 2016 (see paragraph 4 of the enclosed orders made on 20 September 2016 in proceeding BP582/2016 - an identical order was made in each of the other 3 proceedings by the individual apartment owners)

45. Ms Jordan omitted to point out clearly in her email that there was no invitation to seek joinder in this proceeding BP399/2014, although, as can be seen in the passage quoted above, she did state that orders concerning joinder were made in the four 2016 proceedings.

46. The last communication from Ms Bowcock of the OC manager was on 21 October 2016 when she advised that the OC had not yet engaged legal representation, but had sought advice from LFS Legal.

47. There is no indication that, despite having known of this litigation for many months, the OC demonstrates any interest in participating.

Anshun estoppel?

48. Mr Bowers-Taylor submitted that if the OC is not joined and the other proceedings are heard together, the OC could be subject to Anshun estoppel [1] , which would prevent it from claiming for various matters in future.

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[1] *Port of Melbourne Authority v Anshun Pty Ltd* [1981] HCA 45

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49. I prefer Mr Sedal's analysis where he submitted that a person who is not a party to a proceeding cannot be estopped and is not subject to res judicata, whereas if the OC is joined, the risk of estoppel or res judicata is real. In any event, these are matters for the OC, not the Developer or the Owners.

"De Facto" representation of the OC and potential conflict

50. I raised with Mr Bowers-Taylor the possibility that if the OC were joined and continued not to be involved, his firm would become its de facto advocate. This is consistent with Mr Bowers-Taylor's discussion of the possibility that damages awarded for a common property defect could be paid to the OC by the Developer or Owner(s).

51. At the commencement of the directions hearing I raised my concern that a single firm of solicitors is acting for the Developer and for the Owners in the 2016 proceedings. I said that sometimes in proceedings of this nature, there are allegations that deficiencies in homes bought off the plan are because of changes ordered by the developer rather than necessarily by the builder's failure to build in accordance with the contract documents. I added that any owner's solicitor must be in a position to contemplate the possibility of a failure by the developer as well as the possibility of a failure by the builder.

52. Mr Bowers-Taylor responded that the director of the Owner of unit 25 is also a director of the Developer. I accept that there is minimal potential conflict of interest for that proceeding, which is BP580/2016, but the same cannot be said for any other Owner including the OC.

53. Where there are neither points of claim nor points of defence naming the OC, the uncertainty of its role, if joined, gives rise to a real cause for concern that there might be a conflict of interest for the solicitors acting for the Developer and Owners.

Risk of a costs order

54. Mr Sedal said that if the OC were joined there is a risk to it that a costs order might be made against it. This is a real risk, particularly if the OC participates in the proceeding, and the risk militates against joining the OC without its consent.

Lack of consent to joinder from the OC

55. There is no indication that the Developer or any of the Owners sought the OC's consent to join it to any of the proceedings. That consent has not been volunteered. Mr Sedal submitted that the OC should not be joined without its consent. He said that if the OC is joined it will incur costs because it will be forced, at very least, to obtain advice about the effect of being joined to the proceeding.

56. At paragraph 6 of her first affidavit, Ms Jordan recounted a telephone conversation with Ms Bowcock of 11 October 2016 where there was discussion about whether the OC wanted to join in the litigation and the telephone conversation apparently concluded with Ms Bowcock saying:

> The OC will have to decide what to do, obtain some quotes for legal fees and expert fees et cetera.

57. I consider that if it is the intention of the Developer in this proceeding, and the Owners in the 2016 proceedings, to act on behalf of the OC, they must take proper steps to involve it, including seeking a special resolution of the OC under s 18 of the OC Act . However I also note the repeated orders of Deputy President Aird of 26 April and 10 August 2016 that current owners and the OC should commence their own proceedings rather than seeking to be joined to this proceeding, BP399/2014.

58. Mr Bowers-Taylor correctly submitted that it is not necessary that a proposed joined party should consent to joinder or even, in some cases, be aware that there is an application to join them. Nevertheless, it is the practice of the Building and Property List to require the person applying for joinder to given the proposed joined party notice of the application, basis and hearing date for joinder, as is reflected in Practice Note PNBP1.

59. Further, I consider the party in the best position to determine the interests of the OC is the OC itself.

Alleged prejudice to the Builder

60. I said in the directions hearing that if the 15 day hearing were to be adjourned, it would be expected to be heard in around June 2017.

61. I note Mr Bidychak's affidavit particularly with respect to concerns regarding the possible adjournment of the hearing date. This proceeding, BP399/2014 commenced when the Developer cashed bank guarantees for a total of $260,000. That sum has since been paid into the Domestic Builders Fund in accordance with the orders of Vice President Judge Macnamara of 2 October 2014.

62. I note paragraph 31 of Mr Bidychak's affidavit where he states:

> If the trial was to be vacated at this late stage there would be a lengthy delay before a suitable date was obtained for a rescheduled hearing. In addition to the delay in the resolution of the dispute and the cost that would be thrown away, and adjournment would likely result in additional procedural steps and therefore increase cost to all the existing parties in the proceedings.

63. At the directions hearing Mr Sedal raised the issue of the sum which is held in trust. He also said that there are likely to be substantial costs thrown away as the hearing is less than a month away and preparation is underway. He said that the Builder is finalising witness statements and if the proceeding were adjourned, significant amounts of work would need to be refreshed.

64. Mr Bowers-Taylor expressed the view that there would not be more than about $6,000 worth of interest forgone until the next likely hearing date on the $260,000 which is held in a non-interest earning trust. He also suggested that there would be no costs thrown away as the trial is not due to start for "a month" and that very little legal preparation would be lost.

65. I am satisfied that the prejudice to the builder is potentially grave, both concerning money in trust and concerning potential legal costs thrown away.

66. Mr Sedal sought to raise the question of whether such an adjournment would interfere with the reasonable administration of the Tribunal in accordance with *Aon Risk Services Australia Limited v Australian National University* [2009] HCA 27. However this did not proceed where I considered that the matters raised by the parties concerning their own interests were of greater importance in the limited time available.

Application to join alleged not to be bona fide

67. Mr Sedal submitted that the application to join the OC to these various proceedings is not bona fide, but is an abuse of process whose aim is to obtain an adjournment of the 15 day hearing. He raised the issue of inviting the OC to consider commencing proceedings and then seeking to join them to these proceedings without their consent.

Owners

68. The ostensible motivation of the Owners appears to be twofold. The Owners appear to wish to ensure that there can be meaningful orders for items for which they claim and in respect of which the OC own half. They also appear to wish to protect the interests of the OC itself. As to the former, the argument is new and appears not to have been put to the manager of the OC. As to the latter, as I said earlier, the party best placed to decide how to protect the interests of the OC is the OC itself.

69. While these motivations are less than convincing, neither can I be satisfied that the Owners have acted in a way that is not bona fide.

Developer

70. Mr Sedal said that in this proceeding, BP399/2014, the Developer seeks damages including for alleged defects in the common property. Mr Sedal submitted that if the OC were a party it would also be seeking damages for the same alleged loss. He submitted that the OC therefore has an interest which competes with the interest of the Developer.

71. Mr Sedal's submission is supported by Deputy President Aird's decision in *Mission Express* commencing at paragraph 41 where she said, regarding a similar application:

> ... if the developer were to be successful in its contractual claims in respect of the common property defects, the rights of the OCs to claim against the builder for these defects may be compromised.
>
> 42. Further, I accept the submission on behalf of the builder, that it would not be fair to the OCs, if an order was made under s165(1)(ba) as any amount awarded as damages, could be set off against the outstanding contract sum, and there could be no certainty it will be used for rectification of common property defects.

72. I accept the logic of Mr Sedal's submissions. I am not satisfied that the application to join the OC to this proceeding, BP399/2014, is a bona fide application.

The possibility of not hearing this proceeding and the 2016 proceedings together

73. There was no written or oral application to separate the hearing of the proceedings, but Mr Bowers-Taylor remarked on that possibility, and I note that the Tribunal has ordered that they will be heard and determined together. I make no further comment about this issue.

Conclusion

74. I will therefore dismiss the applications to join the OC as a party to this proceeding and to the related 2016 proceedings.

Costs

75. Costs are reserved with liberty to apply.

SENIOR MEMBER M. LOTHIAN