VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

DOMESTIC BUILDING LIST VCAT REFERENCE NO. D31/2007

CATCHWORDS

Domestic building, joinder, claim against directors, statutory obligations and private rights, limitation period, delay in seeking joinder.

APPLICANT	Diane Kierce
FIRST RESPONDENT	Morris Architects Pty Ltd (ACN: 055 386 797)
SECOND RESPONDENT	A & J Lindsey Pty Ltd (ACN: 054 233 984)
THIRD RESPONDENT	Morris Partnership Pty Ltd (ACN 096 617 551)
FOURTH RESPONDENT	Antonov & Snashall Pty Ltd (ACN 065 407 605)
FIFTH RESPONDENT	AA & AS Lorenzini Pty Ltd (ACN 050 277 168)
WHERE HELD	Melbourne
BEFORE	Senior Member M. Lothian
HEARING TYPE	Hearing
DATE OF HEARING	6 August 2010
DATE OF ORDER	18 October 2010
CITATION	Kierce v Morris Architects Pty Ltd & Ors (Domestic Building) [2010] VCAT 1740

ORDER

1 The application to join Mr Michael Morris and Mr Alan Lorenzini as parties to this proceeding is dismissed.

2 Costs are reserved and there is liberty to the parties who appeared at the directions hearing on 6 August 2010 to apply.

3 Any application for costs will be considered at a directions hearing before Senior Member Lothian on 4 November 2010 at 9:30 a.m. at 55 King Street Melbourne with an estimated hearing time of one hour at which further directions for the conduct of the proceeding will be made.

SENIOR MEMBER M. LOTHIAN

APPEARANCES:

For Applicant	Mr S. Waldren of Counsel
For Respondents	Mr A. Horan of Counsel
For Second Respondent	No appearance
For Third Respondent	Mr A. Horan of Counsel
For Fourth Respondent:	No appearance
For Fifth Respondent	Mr M. Holmes, Solicitor
For Proposed Joined Party - Michael Morris	Mr A. Horan of Counsel

REASONS

1 The Applicant home owner applied to join Alan Lorenzini and Michael Morris as sixth and seventh respondents respectively. She previously applied unsuccessfully to join Mr Morris to the proceeding in 2008. At a directions hearing on 13 May 2008, Deputy President Aird joined Morris Partnership Pty Ltd ("Morris Partnership") now the third respondent and AA & AS Lorenzini Pty Ltd, now the fifth respondent. Deputy President Aird did not join Mr Morris and ordered that there be no order as to costs in relation to the application to join him.

2 Mr Waldren of Counsel represented the Applicant. Mr Horan of Counsel represented Mr Morris and the Morris companies: the first respondent ("Morris Architects") and the third respondent ("Morris Partnership"). Mr Holmes, solicitor, represented Mr Lorenzini and his company, ("Lorenzini"). There was no appearance by the second or fourth respondents.

3 The parties who appeared at the directions hearing acknowledge that the Tribunal has a discretion to join parties under s60 of the *Victorian Civil and Administrative Tribunal Act 1998* ("VCAT Act") which provides:

> (1) The Tribunal may order that a person be joined as a party to a proceeding if the Tribunal considers that-
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> (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.

4 In order to consider whether to exercise my discretion in favour of the party seeking to join further parties I must consider if the case against each proposed joined party is "open and arguable" in accordance with the judgement of the Supreme Court in *Zervos v Perpetual Nominees Ltd*[1].

5 During the hearing I mentioned the possibility of applying a test such as that in *Norman v Australian Red Cross Society* [2] but no party submitted that this was appropriate and on further consideration, neither do I.

NOVELTY

6 As I said at the hearing, the Applicant's basis of claim against both Mr Morris and Mr Lorenzini is novel. They are both directors of the companies through which they practise. In his submissions on behalf of Mr Morris and the Morris companies, Mr Horan described the basis of claim as "a separate

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1 [2005] VSC 380
2 (1998) 14 VAR 243

and novel private cause of action of strict liability for a breach of a statutory duty". I agree with his characterisation.

7 Further, in the absence of an allegation of misrepresentation, it is only in unusual circumstances that applicants or plaintiffs succeed in tort against directors, even of one-principal companies. For example, Justice Sundberg, in *Pioneer Electronics Australia Pty Ltd v Lee*[3], discussed the criteria that can be applied to find a director liable and concluded that:

> A director will be liable along with the company when he has procured or directed it to commit the tort ...

He also cited Finklestein J in *Root Quality Pty Ltd v Root Control Technologies Pty Ltd*[4] who required, for a director to be personally liable:

> ... deliberateness or recklessness and knowledge or means of knowledge that the act or conduct is likely to be tortious.

8 If the Applicant's submissions were to succeed, the usual circumstances would reverse, at least for architects and building surveyors. Further, if Mr Waldren is correct that there is a statutory scheme to ensure insurance will be available for the benefit of those who contract with building industry professionals, but that it can be defeated unless directors of professional companies are parties to building cases, this is a serious flaw in the legislation.

9 As appears in paragraph 5 of the applicant's written submissions:

> The basis for joinder is that each of the proposed parties as a registered building practitioner and a registered architect, owe statutory duties to the applicant in relation to the work to be carried out or performed for her benefit.

10 Mr Waldren's submissions depend on the alleged statutory obligations of both the proposed joined parties to perform works in a competent manner and to a professional standard, and to hold insurance as individuals. He raised the possibility that if the individuals are not liable, the Applicant might not have access to the insurance to satisfy any order in her favour. He did not refer me to any authority where a party had succeeded against or had even sucessfully joined another on that basis. Neither did he give an example of a case where a home owner has been denied recovery in the manner he described.

11 The Proposed Third Amended Points of Claim filed with the exhibits to the affidavit of Paul Rodriguez on 6 August 2010 ("P3") makes no mention of insurance.

MR MORRIS

12 Although the Applicant seeks to join Mr Morris as the seventh respondent and Mr Lorenzini as the sixth, I will consider the application to join Mr

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3 (2001) 108 FCR 216 at 233

4 [2000] FCA 980

Morris first as extensive submissions were made on his behalf by Mr Horan, which were substantially adopted by Mr Holmes on behalf of Mr Lorenzini.

Previous application

13 Mr Horan briefly remarked that he would not take the point that an earlier application had been made to join Mr Morris. His approach is correct because, although the facts pleaded concerning Mr Morris are substantially the same in the P3 and the draft points of claim of 2008, the legal basis is different.

Proposed pleading against Mr Morris

14 The relevant proposed pleadings against Mr Morris in P3 are as follows:

> 6B [Mr Morris] is and was at all material times:
>
> (a) a registered architect under the Architects Act 1991 (the "Architects Act") (registration number 12201)
>
> (b) the sole director and shareholder of Morris Architects
>
> (c) the sole director and shareholder of Morris Partnership
>
> (d) carrying on business as an architect through, alternatively, for, Morris Architects, further or alternatively Morris Partnership.

15 Paragraphs 7 and 8 (which were substantially the same in earlier points of claim) plead that there was an agreement in or about April 2001 between the Applicant and Morris Architects, that Morris Architects would design and supervise or administer construction of the Applicant's home, using proper skill and care. Paragraph 8A pleads that Morris Architects agreed to cause Mr Morris to "perform or supervise" its obligations.

> 8B … each of Morris Architects and [Mr Morris] owed a duty to the applicant to perform its or his work as an architect in a competent manner and to a professional standard.

16 Paragraph 9 pleads alleged breaches of obligations by Morris Architects. Paragraph 10 pleads that the alleged breaches have caused the Applicant to suffer loss of approximately $876,000.

17 A pleading included for the first time in P3 is 12A:

> By reason of the matters referred to in paragraphs 6 to 9 herein, each of Morris Architects and [Mr Morris] failed to perform its or his work in a competent manner and to a professional standard.
>
> **Particulars**
>
> The particulars subjoined to paragraph 9 are repeated.

18 Paragraph 14 pleads that Morris Partnership was added as a party to the architectural agreement, or became the agent of Morris Architects for the purpose of carrying out its obligations, or was substituted for Morris

Architects in or about July 2002. Paragraph 14(a) refers to obligations still to be performed, including contract administration and checking the construction of the home.

19 Paragraph 15 pleads that the Morris companies breached the architectural agreement, or Mr Morris and the Morris companies or Mr Morris and Morris Partnership breached "their statutory duties as architects" in their alleged failure to:

> … use proper skill or care as architects in rendering their or its services to the Applicant in checking that the builder constructed the house in accordance with the Building Agreement.

When the work was undertaken

20 As indicated above, the architectural agreement was entered in or about April 2001. An occupancy permit was issued and dated 16 April 2003.

Applicant's submissions regarding Mr Morris

21 Although P3 makes no mention of insurance, it is at the heart of the Applicant's attempts to join Mr Morris, and also Mr Lorenzini, of whom more is said later. At paragraph 33[5] of the applicant's written submissions, Mr Waldren says:

> For the Tribunal to find that Michael Morris was not susceptible to joinder to this proceeding would enable Michael Morris to use the corporate veil to defeat the intentions of the statutory scheme, namely that:
>
> (a) architectural work was only to be carried out by a registered architect or … by a registered architect trading through an approved company;
>
> (b) a registered architect owes the duties to the client *to perform his or her work as an architect in a competent manner and to a professional standard* pursuant to the Architects Regulations; and
>
> (c) a registered architect must have effected the required insurance.[Mr Waldren's emphasis]

22 He continues at paragraph 35:

> … by reason of the mandatory provisions of the required insurance, it is only if the applicant establishes a breach of statutory duty against Michael Morris that the applicant will have access to the required insurance affected by Michael Morris as required by the *Architects Act.* This is consistent with the intention of that Act – namely that consumers of architectural services would be protected because the registered architect would be covered by the required insurance.

23 It is common ground that Morris Architects was engaged to provide architectural services, some of the services were "purportedly" performed

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[5] Mr Waldren's submissions concerning Mr Lorenzini are in very similar words at paragraph 57.

by Morris Partnership and that the Morris companies were obliged to provide architectural services with the skill and care of an ordinary skilled architect.

24 Mr Waldren described the "statutory scheme" he postulated by reference to the *Architects Act 1991*. Section 10 entitles a natural person to be registered as an architect under s11 of the Architects Act on certain conditions including qualification and good character. Until 2005 there was no obligation in the Architects Act that an architect be insured. By Act No 35 of 2004[6], section 9(2)(e) was added, among other provisions. It provides that if an application for registration is made:

> (e) if the applicant is required by an order under section 17A to be covered by insurance, include proof that the applicant is covered by the required insurance.

25 Section 17A(1) provides:

> The Minister may, by order published in the Government Gazette-
>
> (a) require architects or any specified class or classes or architects to be covered by insurance; and
>
> (b) specify the kind and amount of insurance by which architects or architects in a specified class of architect are required to be covered.

26 The Ministerial Order relevant to s17A was published on 12 May 2005 and took effect on 14 June 2005. Clause 3.1 of the order provides:

> The class of architects required to [be] covered by insurance under this Order is all architects who are registered under section 11 of the [Architects] Act and who carry out work as an architect or intend to carry out work as an architect. [Emphasis added]

27 The insurance referred to in the Ministerial Order is professional indemnity. Clause 5 specifies:

> 5.1 The policy … must indemnify the Architect against any civil liability in respect of any claim first made against the Architect during the period of insurance and notified to the insurer during such period which arises out of any breach of the professional duty of care of the Architect in the conduct of the Architect's business as an architect or the business as an architect of … an Approved Company of which the Architect is or was a … director …
>
> …
>
> 5.3 The policy may name as the insured either the Architect or the Approved Company … of which the Architect is a director … provided that the policy must provide indemnity to-

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6 Which came into effect, at latest, by 1 July 2005.

> (a) persons who are … directors … principals .. or employees of the … Approved Company or employees of a sole practitioner and who are registered Architects; and
>
> (b) persons who are the former principals … directors of employees of the … Approved Company … and who are or have been, but no longer are registered Architects;
>
> In respect of any breach of a professional duty of care committed or allegedly committed by them whilst they were principals … directors or employees …

In other words, the professional indemnity policy required to fulfil the obligations under the Ministerial Order is a "claims made" policy with retroactive cover for previous directors, principals, employees and others, if they are registered architects.

"Approved company"

28 Since 1991, under section 14 of the Architects Act the Architects Registration Board has been able to "approve a company as an architectural company". The 1991 Act required the principal executive officer to be an architect, the directors to be natural persons and either two-thirds of the directors to be architects, or for a two-person board, the directors to be an architect and his or her "prescribed relative."

29 The amendments of 2004 simplified the provisions relating to companies and included at s14(1):

> The Board may approve a company for the purpose of this Act if satisfied that-
>
> …
>
> (b) At least one director is an architect who is covered by the required insurance.

30 Section 6 of the Architects Act provides that a body corporate other than an approved architectural company must not hold itself out as being an architect, as engaging in architectural practice or use the words "architect", "architecture" or "architectural" in relation to building design.

Insurance and the "Approved Company"

31 At paragraph 19 of the Applicant's written submission Mr Waldren said:

> In summary, the legislative scheme for professional indemnity insurance for registered architects requires that they effect and maintain professional indemnity insurance cover only for their personal liability (as individuals) and not (necessarily) for the corporations (approved or otherwise) through which they may trade.

32 Mr Waldren's submissions could be seen as pleading a retrospective obligation upon an architect to obtain insurance years after the work is finished. The "legislative scheme" described by Mr Waldren was not part of

the Architects Act until after the architect or architects in this case had completed their work for the Applicant. Further, before 2005 there was no equivalent of s14(1)(b) of the Architects Act – the need for an approved company to have "at least one director [who] is an architect who is covered by the required insurance".

33 However the Architects Act was not the only possible source of an obligation to insure imposed upon an architect. From 1 July 1996, in accordance with Ministerial Order s52 of 16 May 1996, architects were one class of eight in the building industry obliged to hold insurance under section 135 of the *Building Act 1993* ("Building Act).

34 At paragraph 20 of the Applicant's submissions, Mr Waldren said:

> This is consistent with the statutory requirements in regulation 5 of the *Architects Regulations 1993,* being the regulations that were in place at the time that the architectural services in question were provided to the applicant. The regulation stated:
>
> > *An architect must perform his or her work as an architect in a competent manner and to a professional standard.*

35 Mr Waldren then referred to the judgement of Justice Byrne in *Gunston v Lawley*[7] where his Honour quoted regulation 15.2 of the *Building Regulations 1994.* The professional in question was not an architect but an architectural draftsperson. By substituting for the first "architect", "registered building practitioner" and for the second "building practitioner", the words are identical.

36 His Honour commenced paragraph 20:

> As a matter of legal analysis this regulation might impose a statutory obligation whose breach confers upon a person a right of action for damages, it might give rise to an implied term in a contract between the practitioner and the client; or it might provide a standard which informs the common law duty of care owed by the practitioner to the client and, perhaps, to third parties. [Emphasis added]

37 He went on to explain that this was not the way the Owners' cases had been put against the architectural draftsman and concluded this paragraph:

> Perhaps the architectural draftsman should be grateful that they did not: if such a case were made out, it may be that it would not have entitled him to dilute his liability by the application of a proportionate liability regime established by Part IVAA of the Wrongs Act.

38 In the light of his Honour's remarks it is open and arguable that an architect who is alleged to have breached this statutory obligation could be liable to a person with whom he or she contracts, or possibly even to third parties to such a contract, although it is by no means certain to succeed. An important difference is that it is not pleaded that Mr Morris was a party to any contract relevant to this proceeding. In contrast, the architectural draftsman in

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7 [2008] VSC 97 at paragraphs 19 and 20.

Gunston contracted as an individual with a previous owner of the subject premises.

Statutory obligations of non-contracting individuals

39 Mr Waldren submitted that:

> The statutory duties referred to are owned only by natural persons who are registered architects and registered building practitioners. [Mr Waldren's emphasis]

While this statement might also be open and arguable, it does not follow that the next step is; that a non-contracting person who owes a statutory duty might therefore be personally liable to a person who suffers by reason of a breach of the statutory duty.

40 As Mr Waldren said at paragraph 38 of the submissions:

> The authorities [concerning tortuous liability of directors] do not address the proposition that irrespective of incorporation, a registered architect owes the statutory duty as a consequence of his or her registration and that the compulsory insurance regime both contemplates and requires that the architect may be liable to a consumer of architectural services in the case of a breach of that duty and should have recourse to a policy of insurance in the event of such breach.

41 I conclude that Mr Waldren's submissions concerning the obligations of a non-contracting building professional are, at best, speculative.

Statutory insurance and a duty to the Applicant?

42 Mr Waldren said at paragraph 23 and following of the written submissions:

> 23. The legislative requirement for such individuals to effect the required insurance as a condition of their registration in each case indicates that as a matter of public policy, the required insurance should be available to litigants in the event of liability of the registered architect being established.
>
> 24. Further, by the terms of the Ministerial Order requiring insurance, the required insurance coverage is available only if a finding is made against the individual registered architect.
>
> 25. It may or may not be the case that this cover would also extend to a finding made against (in the case of Michael Morris), an Approved Company of which he was a director or other employee.

43 Mr Waldren has not said that the express purposes of any legislation include the "public policy" considerations he refers to. They do not. The pre-2005 link between the obligation of architects to work competently and professionally under the Architects Regulations and the obligation of individual architects to be insured under the Ministerial Order made under

the Building Act, does not have the appearance of a statutory scheme at all, but rather of two separate obligations, both of which applied to architects.

44 As Mr Horan said, the express objectives of the Architects Act and regulations make no mention of a tortUous or other private right for breach of statutory duty, but speak of regulating professional conduct of architects and protecting the public.

45 I accept Mr Horan's submission, based on the judgement of Phillips JA in *Gardiner v State of Victoria*[8] that the tort of breach of statutory duty is one of strict liability. Secondly, I note his submission that because the standard of care is not specific and is "commensurate with the common law duty to exercise due skill and care" and does not set a higher duty or identify a class of people to be protected, the purpose of the statute is to regulate behaviour rather than to grant a right. Thirdly, I accept his submission that there is express legislation[9] which implies conditions into contracts for services requiring the exercise of care and skill and which makes provisions for entitlement to recover damages for breach. Finally, I find his submission at paragraph 8(a)(iv) persuasive:

> it cannot have been parliament's intention to permit a right of action of strict liability for failure to act competently and to a professional standard which effectively sidelines not only common law contract and tort, but also statutory regulation of the common law, particularly under the FTA, the Wrongs Act and the TPA.

Alleged facts concerning Mr Morris

46 As mentioned above, in P3 the Applicant makes no allegation about insurance and in particular does not allege that Mr Morris failed to ensure that the companies of which he is the director are insured. She also makes no allegation that Mr Morris breached section 6 of the Architects Act concerning the use of the word "architect" or associated expressions in association with the provision of services associated with building design.

47 Nevertheless, at paragraph 27 of the Applicant's written submissions, Mr Waldren said that Morris Architects admitted that it entered a contract with the applicant to provide architectural services in April 2001:

> … it is clear that [Morris Architects] was not at that time or at any material time an approved company to enter into that contract as required by the Architects Act.

48 I note that in 2001 s6 of the Architects Act did not prevent anything other than using the word "architect" and its variations in association with the practice of architecture – it did not regulate who could enter a contract.

49 Mr Waldren made similar submissions regarding Morris Partnership.

50 At paragraph 29 of the written submissions Mr Waldren said:

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8 [1999] VSCA 100 at [21]

9 s74(1) of the *Trade Practices Act 1974* and s32J of the *Fair Trading Act 1999.*

> The only registered architect involved and it follows, the only person covered by the required insurance at the time of performing the architectural services ... on 30 October 2006 when the applicant first made [her] claim (to which the required insurance would respond) was the proposed seventh respondent Michael Morris. [emphasis added]

51 First, it does not follow that even if the Morris companies were not obliged to be insured that they were not insured. Second, as submitted by Mr Horan, although there is evidence of a reference to a demand on 30 October 2006, there is no evidence that this was the first date upon which a claim was made by or on behalf of the Applicant, nor that it was the earliest date upon which Mr Morris or his companies might have notified a claim on this project to a hypothetical insurer.

52 Further, as Mr Horan submits, as insurance is not referred to in P3, the Applicant's submissions concerning insurance requirements are irrelevant. The allegations against Mr Morris are, in Mr Horan's words:

> ... consistent with Mr Morris acting as director and employee of [the Morris companies]. The applicant does not identify any separate conduct or behaviour which might support an allegation of personal assumption of a duty of care or some other legal obligation.

I also accept Mr Horan's submission during the hearing that having taken out professional indemnity insurance does not ensure that there will be effective insurance at any particular time.

MR LORENZINI

53 P3 pleads that Mr Lorenzini was the sole director of Lorenzini and that, among other things, the obligations of Lorenzini could only be performed by a registered building surveyor, and that the registered building surveyor has a duty to perform work in a competent manner and to a professional standard. The Applicant further pleads that Mr Lorenzini was personally obliged to obtain and maintain statutory insurance and that Lorenzini would be vicariously liable for Mr Lorenzini's acts and omissions.

54 Similarly to the submissions concerning Mr Morris, the Applicant raises the possibility that if she were to succeed against Lorenzini, unless there is a finding that Mr Lorenzini breached his duty to her and is bound by the finding, she might be deprived of access to the statutory insurance that Mr Lorenzini was obliged to hold.

55 Mr Waldren submits on behalf of the Applicant that under s169 of the Building Act only a natural person is eligible to be registered as a building practitioner. Section 169(2)(e) provides that if Part 9 of the Building Act requires an applicant for registration to be covered by insurance, the applicant must include proof of the required insurance and specifically, proof of eligibility for the insurance called for if the applicant is engaged in domestic building work.

56 Section 135 is in Part 9 of the Building Act. It permits the Minister to require building practitioners, including building surveyors, to hold insurance. The Minister does so by order published in the Government Gazette. Mr Waldren quoted the Ministerial Order of 16 May 1996 which required the relevant insurance policy to:

> indemnify the Building Practitioner against any civil liability in respect of any claim first made against the Building Practitioner during the period of insurance or during the period of any run-off cover and first notified to the insurer during such period and arising out of any act, error or omission on the part of the Building Practitioner in the conduct of the Building Practitioner's business as a building surveyor ... or in relation to the conduct of business as a building surveyor ... of a company or firm of which the Building Practitioner is a director, principal, partner or employee. [Mr Waldren's emphasis and contractions]

57 Mr Waldren emphasised that only a registered building practitioner is required to be covered by insurance and the insurance need only respond to liability of a registered building practitioner. Similarly to regulation 5 of the *Architects Regulations 1993*, regulation 15.2(a) of the *Building Regulations 1994* requires a registered building practitioner to perform his or her work in a competent manner and to a professional standard.

58 A point of difference between the obligations of architects and those of building surveyors is alleged by Mr Waldren at paragraph 47 of his written submissions where he quoted Justice Eames in *Toomey v Scolaro's Concrete Constructions Pty Ltd (In liquidation) and others*[10]. His Honour found that the building surveyor for a project can only be an individual – it cannot be a company. His Honour went on to find that an individual building surveyor acting in good faith is entitled to the immunities provided by s128 of the Building Act, but that immunity "is not expressed as applying to the corporate surveyor."

59 The statutory duty in *Toomey* was very different from that postulated in this proceeding. The obligation to perform competently and professionally is vague and general, as distinct from the obligation to construct a balustrade so that it is at least a meter above floor level. I accept Mr Horan's submission[11], based on the decision of the Court of Appeal of the Supreme Court of Queensland in *Soutter v P&O Cruises*[12] that the "vagueness of the statutory obligation militates against drawing an inference that it gives rise to a private civil cause of action."

60 Repeating his submission at paragraph 23 regarding Mr Morris, Mr Waldren said of Mr Lorenzini at paragraph 52:

> The legislative requirements for such individuals to effect the required insurance as a condition of their registration in each case, indicates

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10 [2001] VSC 279

11 Paragraph 18(c) of his written submissions

12 [1998]QCA 51 at [9]

> that as a matter of public policy the required insurance should be available to litigants in the event of liability being established.

Alleged facts concerning Mr Lorenzini

61 The parties who appeared on 6 August 2010 agree that the building permit and occupancy permit were issued by Lorenzini and signed by Mr Lorenzini. Mr Waldren went on to submit that the duties to perform work competently are owed to the client – the person in the position of the Applicant – and that "those duties are non-delegable save as permitted by the Building Act." The Applicant also alleges that Mr Lorenzini was the only registered building surveyor involved in the project and therefore the only person who could fulfil the building surveyor's duties.

Limitation period

62 Mr Lorenzini had foreshadowed that as the basis of the Applicant's claim occurred during the period May 2002 to April 2003, her action against him is barred by reason of section 5 of the *Limitation of Actions Act 1958* ("LA Act"). Mr Holmes did not press it at the hearing. It is open and arguable that the period is either six years under the LA Act, or ten under s134 of the Building Act in accordance with decisions of the Tribunal[13]. The matter would be a point for Mr Lorenzini's defence, rather than an automatic bar to commencing an action against him.

DELAY

63 On behalf of Mr Morris and the Morris companies, Mr Horan also submitted that the Applicant's delay in seeking to join Mr Morris on the current basis should be taken into account in the exercise of my discretion. The case is already more than three years old and it is more than two years since the Applicant's previous application to join Mr Morris. Although a delay in seeking joinder is undesirable, the similarity of pleadings against Mr Morris and the Morris companies, and Mr Lorenzini and the Lorenzini company do not affect the outcome of this application.

CONCLUSION

64 As Senior Member Walker said in *Kyrou v Contractors Bonding Ltd*[14] :

> 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.

I therefore do not take lightly the consideration of whether another party should be joined.

65 I consider that the Applicant's submissions concerning each of Mr Morris and Mr Lorenzini regarding postulated statutory schemes, which in turn rest upon assumed public policy are tenuous, given the current state of the law

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13 For example, *Thurston v Campbell* [2007] VCAT 340,

14 [2006]VCAT 597 at [10]

concerning the liability of directors and office-bearers of contracting companies. I conclude that, although the proposition put by Mr Waldren might some day be the law, it is so novel and tenuous that for the purpose of this application to join Mr Morris and Mr Lorenzini, it is not open and arguable. I dismiss the application to join them.

COSTS

66 I reserve liberty to the parties who appeared before me to apply for costs.

SENIOR MEMBER M. LOTHIAN