VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST VCAT REFERENCE NO BP60/2015

CATCHWORDS

BUILDING ACTION – Joinder of a party for the purpose of apportionment and contribution; Whether joinder should be ordered in circumstances where the statutory limitation period has expired – Whether s 134 of the *Building Act 1993* operates to time bar apportionment under Part IVAA of the *Wrongs Act 1958* or contribution under 23B of the *Wrongs Act 1958*.

FIRST APPLICANT	Mr Michael Jonathon Kottmeier
SECOND APPLICANT	Mr Anthony Malouf
FIRST RESPONDENT	Mr Ilija Dragicevic
SECOND RESPONDENT	Mrs Zaenka Jackanic
THIRD RESPONDENT	Mr Michael Jackanic
FOURTH RESPONDENT	Mr Steven Bebic
FIFTH RESPONDENT	Mr Miljenko Bebic
SIXTH RESPONDENT	Home and Industrial Soiltest Pty Ltd (ACN 050 023 955)
WHERE HELD	Melbourne
BEFORE	Senior Member E. Riegler
HEARING TYPE	Hearing
DATE OF HEARING	29 September 2015
DATE OF ORDER	14 October 2015
CITATION	Kottmeier v Dragicevic (Building and Property) [2015] VCAT 1628

ORDER

1. Under s 60 of the *Victorian Civil and Administrative Tribunal Act 1998* and upon application by the First to Fifth Respondents, Home and Industrial Soiltest Pty Ltd (ACN 050 023 955) care of Wotton and Kearney, Level 15 600 Bourke Street, Melbourne, 3000 is joined as a party to this proceeding to be named as the Sixth Respondent.
2. **By 23 October 2015,** the First to Fifth Respondents must file and serve Third Party Points of Claim as against the Sixth Respondent.

3. **By 23 October 2015,** the First to Fifth Respondents must file and serve *Amended Points of Defence* in substantially the form exhibited to the affidavit of Pei Chin Yau dated 27 August 2015.

4. **By 23 October 2015** the First to Fifth Respondents must serve on the Sixth Respondent:

   (a) copies of documents which have been filed and/or served in the proceeding;

   (b) copies of all orders made by the Tribunal in the proceeding; and

   (c) must advise the [party joined] the addresses for service and contact details for each of the parties to the proceeding.

5. **By 13 November 2015,** the applicants may file and serve Amended Points of Claim setting out any claim which it may have against the Sixth Respondent.

6. **By 20 November 2015,** the Sixth Respondent must file and serve:

   (a) *Points of Defence* to the First to Fifth Respondents' *Third Party Points of Claim* specifying the material facts relied upon. Any set-off claimed must be fully set out; and

   (b) *Points of Defence* to the Applicant's *Amended Points of Defence* (if any).

7. **This proceeding and proceeding BP59/2015 are listed for a further directions hearing at 9.30 AM on 10 November 2015 at 55 King Street, Melbourne at which time further orders will be made as to the future conduct of the proceeding.**

SENIOR MEMBER E. RIEGLER

APPEARANCES:

For the Applicants	Mr E Zlotnick, solicitor.
For the First to Fifth Respondents	Mr L Connolly of counsel
For the Sixth Respondent	Mr S Hay of counsel

REASONS BP59/2015 AND BP60/2015

1. This proceeding and proceeding BP59/2015 concern separate applications issued by the owners of two properties (**'the Owner's'**) against the First to Fifth Respondents (**'the Respondents'**) in relation the construction of two residential dwellings constructed on each of those properties. The two properties are on separate titles but are located adjacent to each other. In both proceedings, each of the Owners claim that the dwelling constructed on their Property suffers from building distress, requiring substantial remedial work at great cost. Given the common facts between the two applications, the Tribunal has case managed both proceedings as if they were one consolidated proceeding.

2. Both proceedings were commenced on 16 January 2015. This date is critical because the certificates of occupancy in respect of both properties were issued on 25 January 2005, just short of the 10 year limitation period prescribed under s 134 of the *Building Act 1993*.

3. On 27 August 2016, the Respondents filed an application to join Home and Industrial Soiltest Pty Ltd (**'Soiltest'**) as an additional respondent to the proceedings. The application for joinder was made on two grounds; namely:

   (a) to enable the Respondents to claim contribution or indemnity against Soiltest under s 23B of the *Wrongs Act 1958*; and

   (b) to enable the Respondents to amend their defences so as to take advantage of the apportionment provisions under Part IVAA of the *Wrongs Act 1958*, and name Soiltest as a concurrent wrongdoer.

4. The Respondents allege that the First Respondent entered into a contract with Soiltest, under which it provided geotechnical and structural engineering drawings which the Respondents relied upon in the construction of each of the dwellings. The Respondents contend that if the Owners' claims against them are found proven, then Soiltest breached its duty of care owed to the Owners and the Respondents or had failed to comply with the terms of its retainer with the Respondents. In particular, the Respondents point to the expert report of Peter Paris, the consulting engineer engaged by the Owners, which suggests that there are deficiencies in the engineering design of the two dwellings which either wholly or partly caused the building defects now the subject of the Owners' claims.

5. Although Soiltest does not admit that there are deficiencies in its engineering design, it nevertheless concedes that for the purpose of a joinder application, the Respondents' third party claim or apportionable defence is open and arguable, if viewed purely on its technical merits. However, Soiltest still opposes being joined to the proceedings. It does so on the ground that joinder would be pointless because any claim brought against it would be statute

barred, given that the limitation period prescribed under s 134 of the *Building Act 1993* has now expired.

6. Therefore, the proceedings raise two issues; namely:

   (a) Does s 134 of the *Building Act 1993* apply to bar apportionment under Part IVAA of the *Wrongs Act 1958*?

   (b) Does s 134 of the *Building Act 1993* apply to bar a claim for contribution and indemnity under s 23B of the *Wrongs Act 1958*?

DOES S 134 OF THE *BUILDING ACT 1993* APPLY TO APPORTIONABLE DEFENCES?

7. Section 134 of the *Building Act 1993* states:

> **134 Limitation on time when building action may be brought**
>
> Despite any thing to the contrary in the **Limitation of Actions Act 1958** or in any other Act or law, a building action cannot be brought more than 10 years after the date of issue of the occupancy permit in respect of the building work (whether or not the occupancy permit is subsequently cancelled or varied) or, if an occupancy permit is not issued, the date of issue under Part 4 of the certificate of final inspection of the building work.

8. Part IVAA of the *Wrongs Act 1958* commenced on 1 January 2014. The central provision of the legislative scheme is that it limits the liability of a respondent who is a concurrent wrongdoer to only that proportion of the applicant's loss which the Tribunal considers just, having regard to the extent of that respondent's responsibility for that same loss and damage.

9. Prior to the introduction of Part IVAA, the *Building Act 1993* also operated to limit liability of persons who were jointly or severally liable, although the operative provisions, which required a court or the Tribunal to apportion responsibility, only applied to building actions.[1]

10. Mr Hay of counsel, who appeared on behalf of Soiltest, submitted that s 134 of the *Building Act 1993* expressly provided that the 10 year limitation period was to operate *despite anything to the contrary in the Limitation of Actions Act 1958 or in any other Act or law*. He argued that the provisions of the *Wrongs Act 1958* were subordinate to that 10 year limitation period. Therefore, it was not possible to raise an apportionable defence after the 10 year limitation period had expired, even if the originating claim was commenced within the limitation period.

11. Mr Connolly of counsel, who appeared on behalf of the Respondents, submitted that s 134 of the *Building Act 1993* did not apply to apportionment under Part IVAA of the *Wrongs Act 1958*. He submitted that the Respondents' interpretation is contrary to the objects of Part IVAA of the *Wrongs Act 1958.* In particular, he submitted that if a limitation period

[1] See repealed ss 131 and 132 of the *Building Act 1993*.

applied to apportionment legislation, a strategically astute claimant could avoid apportionment of its loss and damage by simply issuing proceedings close to the end of the limitation period and thereby deprive a respondent of sufficient time to join other parties. Mr Connolly argued that this is precisely what occurred in the present case. He said that there was insufficient time for the Respondents to consider the Owners' claim, instruct solicitors, obtain expert opinion and then issue the joinder application before the expiration of the limitation period.

12. In response, Mr Hay submitted that the Respondents' interpretation of Part IVAA of the *Wrongs Act 1958* acted with equal injustice on the Owner's rights. In particular, he argued that if a respondent was able to apportion a claim made against it against a party joined to the proceeding after the expiration of the 10 year limitation period, there would be no opportunity for the applicant to claim against that joined concurrent wrongdoer, which would result in a significant part of the applicant's claim being unrecoverable.

13. Part IVAA was introduced into the *Wrongs Act 1958* by the *Wrongs and Limitation of Actions Acts (Insurance Reform) Act 2003*. The stated purpose of that amending Act was to set out a regime for apportioning liability in proceedings for economic loss. Its objectives were not to preserve a claimant's rights but rather, to ensure that a respondent's liability was commensurate with its responsibility for the loss and damage suffered by the claimant. In that sense, the legislation was tailored to benefit respondents by abolishing joint and several liability in certain cases. The consequences of legislation which apportions liability is that it places a heavier onus on claimants to ensure that the proper respondents are made parties to a proceeding (before the expiration of any statutory limitation period).

14. Importantly, however, I do not consider that the wording of s 134 of the *Building Act 1993* supports the argument advanced by the Owners. Section 134 of the *Building Act 1993* states that a *building action* cannot be brought outside of the statutory limitation period. A *building action* is defined in s 129 of the *Building Act 1993* as an *action (including a counter-claim) for damages for loss or damage arising out of or concerning defective building work*. *Building work* is defined to include design, inspection and issuing of a permit in respect of building work.

15. However, joinder for the purpose of taking advantage of the apportionment legislation is not, in my view, an *action for damages for loss or damage*. Loss and damage is not being claimed by the party seeking the joinder of another concurrent wrongdoer. Therefore, I do not consider that the joinder of a concurrent wrongdoer, solely for the purpose of apportioning liability, constitutes a *building action*, within the meaning of that term as defined under s 129 of the *Building Act 1993*.

16. That being the case, I do not find that Part IVAA of the *Wrongs Act 1958* is subject to s 134 of the *Building Act 1993*. The mere fact that the Owners may

not be able to successfully claim against Soiltest is of no consequence because the legislative regime is not designed to provide relief or remedies to a claimant. Indeed, this proposition is reinforced by the fact that Part IVAA of the *Wrongs Act 1958* provides that a concurrent wrongdoer may be insolvent, in the process of being wound up, ceased to exist or has died.[2]

17. Therefore, I will order that Soil test be joined as a party to the proceeding and give leave to the Respondents to amend their *Points of Defence*, so as to include the allegations that the loss suffered by the Owners should be apportioned.

DOES S 134 OF THE *BUILDING ACT 1993* APPLY TO CONTRIBUTION PROCEEDINGS?

18. As indicated above, the Respondents also seek leave to prosecute a third party claim against Soiltest, pursuant to s 23B of the *Wrongs Act 1958*. The relevant provisions of s 23B are:

> **23B Entitlement to contribution**
>
> (1) Subject to the following provisions of this section, a person liable in respect of any damage suffered by another person may recover contribution from any other person liable in respect of the same damage (whether jointly with the first-mentioned person or otherwise).
>
> (2) A person shall be entitled to recover contribution by virtue of subsection (1) notwithstanding that that person has ceased to be liable in respect of the damage in question since the time when the damage occurred provided that that person was so liable immediately before that person made or was ordered or agreed to make the payment in respect of which the contribution is sought.
>
> (3) A person shall be liable to make contribution by virtue of subsection (1) notwithstanding that that person has ceased to be liable in respect of the damage in question since the time when the damage occurred unless that person ceased to be liable by virtue of the expiry of a period of limitation or prescription which extinguished the right on which the claim against that person in respect of the damage was based.
>
> …
>
> **24 Recovery of contribution**
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> …
>
> (4) Notwithstanding any provision in any statute requiring a notice to be given before action or prescribing the period within which an action may be brought, where under section 23B any person becomes entitled to a right to recover

[22] Section 24AH of the *Wrongs Act 1958*.

> contribution in respect of any damage from any other person, proceedings to recover contribution by virtue of that right may be commenced by the first-mentioned person –
>
> (a) at any time within the period –
>
> (i) within which the action against the first-mentioned person might have been commenced; or
>
> (ii) within the period of twelve months after the writ in the action against the first-mentioned person was served on him –
>
> whichever is the longer; or
>
> …

19. Mr Connell submitted that ss 23 and 24(4) of the *Wrongs Act 1958* provide that, notwithstanding the expiration of the statutory limitation period, contribution proceedings are able to be brought within 12 months after the Owner's originating application was filed. That being the case, he submits that it would not be open for Soiltest to defend the contribution proceeding on the ground that it is statute barred.

20. As indicated above, the joinder application is not opposed on the ground that the third party claim is not open and arguable, if viewed purely on its technical merits. It is opposed on the ground that joinder (for the purpose of contribution proceedings) would be futile because Soiltest would have a statutory defence to the third party claim. In that respect Mr Hay submitted that ss 23 and 24 of the *Wrongs Act 1958* were subordinate to s 134 of the *Building Act 1993*.

21. Mr Hay submitted that although s 24(4) appeared in the *Wrongs Act 1958* from its commencement date on 1 April 1959, there have been several amendments made to that subsection, the last of which occurred under the *Wrongs (Contribution) Act 1985*, which was assented to on 10 December 1985 and commenced on 12 February 1986. However, the *Building Act 1993* was assented to on 14 December 1993 and s 134 came into operation on 1 July 1994. That provision has remained unchanged since its enactment. Mr Hay submitted that as s 134 of the *Building Act 1993* was enacted subsequent to s 24(4) of the *Wrongs Act 1958*, Parliament must have been conscious of s 24(4) at the time when s 134 was enacted. In those circumstances, it was open for Parliament to have made s 134 subject to s 24(4). However, s 134 is expressed in absolute terms. It commences with the following words:

> Despite anything to the contrary in the **Limitation of Actions Act 1958** or in any other Act or law… [emphasis added]

22. Therefore, he submitted that the intention of Parliament was to make s 134 of the *Building Act 1993* dominant, such that contribution proceedings under s 23B of the *Wrongs Act 1958* were subject to the limitation period in s 134 of

the *Building Act 1993*, if the proceedings concerned a claim for damages in a building action.

23. Mr Hay reinforced his argument by reference to the *Wrongs and Limitation of Actions Act (Insurance Reform) Act 2003*, which commenced on 1 January 2004. That amending legislation repealed ss 130 to 133 of the *Building Act 1993*. Those provisions had previously required apportionment in building actions but were superseded by the introduction of Part IVAA of the *Wrongs Act 1958*. Section s 133 of that suite of repealed provisions stated:

> 133. *Operation of Wrongs Act 1958*
>
> Except as provided in section 132, nothing in this Division affects the operation of Part IV of the *Wrongs Act 1958*.

24. Interestingly, no counterpart to s 133 of the *Building Act 1993* is found within Part IVAA of the *Wrongs Act 1958*. Consequently, Mr Hay submitted that this factor lends support to his submission that Parliament intended s 134 of the *Building Act 1993* to place a statutory time limit on all building action claims, including third party claims made under s 23B of the *Wrongs Act 1958*. Mr Hay referred to the recent decision of the supreme Court of Appeal in *Brirek Industries Pty Ltd v McKenzie Group Consulting (Vic) Pty Ltd*,[3] where the Court stated:

> [126] The repealing of the very sections between ss 130 and 134 of the *Building Act* by the amending Act, lends further support to the view that the legislature turned its mind to the question of 'long-stop' liability exceptions in the amending Act.

25. Although there is merit in the argument advanced by Mr Hay, Mr Connolly submitted that it was unnecessary for the Tribunal to make a final determination as to the interplay between s 134 and s 23B of the *Building Act 1993* in the context of this application directions hearing. He submitted that the Respondents merely had to demonstrate that the third party claim was open and arguable.[4]

26. In response, Mr Hay referred me to *Sugar Australia Pty Ltd v Lend Lease Services Pty Ltd*, another decision of the Court of Appeal. *Sugar Australia Pty Ltd* concerned an appeal of a decision to grant an interlocutory injunction restraining recourse to two bank guarantees provided by way of performance bonds by a builder to an owner under a building contract. The relief sought depended, in part, on the construction of a contractual clause. At first instance, the trial judge granted the injunction but held over until final hearing, the question of the construction of the relevant clause.

27. Their Honours Osborne JA and Ferguson JA, commented:

> It follows that his Honour was incorrect to put off the question of construction of the contract until the trial of the proceeding and to regard

[3] [2014] VSCA 165.
[4] *Zervos v Perpetual Nominees Ltd* (2005) 23 VAR 145.

> the issues which arose with respect to construction as giving rise to a serious issue which could be tried subsequently.

28. Mr Hay submitted that an analogy could be drawn with the present case, in that no further evidence was required in order to determine the statutory interpretation question.

29. In my view, the circumstances surrounding *Sugar Australia Pty Ltd* are very different to the present case. In particular, the present case does not involve relief in the form of an injunction restraining a party from exercising what they believe to be their contractual right. Moreover, I have already determined that Soiltest is to be joined to the proceeding for the purpose of apportionment. The only remaining question is whether the Respondents are to be given leave to also prosecute a third party claim against it.

30. In my view, a determination of the operation of s 134 of the *Building Act 1993* is best left for final hearing or at the very least, a preliminary hearing or summary judgment hearing dedicated to determining that question alone. I have formed this view based on a number of considerations.

31. First, s 134 of the *Building Act 1993* merely provides Soiltest with a defence, should it choose to raise it. Notwithstanding what has been foreshadowed by Mr Hay, whether Soiltest ultimately pleads that the third party claim is statute barred is a matter that will only be known once its defence is filed. At present, the issue is hypothetical.

32. Second, the question is important and will certainly have consequences that will extend well beyond the matters comprising the current proceedings. In my view, the Respondents should be given an opportunity to put forward more comprehensive submissions and any relevant case law, rather than having to rely on what were abridged oral submissions in reply, given during the course of the application directions hearing.

33. Finally, I note that Soiltest is to be made a party to the proceeding, in any event. This is to allow the Tribunal to consider whether liability should be apportioned against it. Even if it is determined that claims against it are statute barred, it may still choose to participate in the proceeding, if only to protect its reputation.

34. Therefore, I am satisfied that the third party claim foreshadowed by the Respondents and articulated in the draft pleading, together with the affidavit material submitted in support of the application, demonstrate an open and arguable claim under s 23B of the *Wrongs Act 1958*. This is despite the defence foreshadowed by Soiltest that s 134 of the *Building Act 1993* may operate to bar such a claim.

SENIOR MEMBER E. RIEGLER