

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST

VCAT REFERENCE NO. BP663/2018

CATCHWORDS

Domestic building – application for joinder – *Wrongs Act 1958* – s23B and Part IVAA – claim for contribution is not a defence – whether arguable that architect and subcontractor are concurrent wrongdoers – joinder considerations

APPLICANT	Owners Corporation 1 Plan No PS63800J
FIRST RESPONDENT	Equiset Construction Melbourne Pty Ltd (ACN: 127 493 136)
SECOND RESPONDENT	Bates Smart Pty Ltd (ACN 004 999 400)
WHERE HELD	Melbourne
BEFORE	Deputy President C. Aird
HEARING TYPE	Directions hearing
DATE OF HEARING	16 April 2019
DATE OF ORDER	10 May 2019
CITATION	Owners Corporation 1 Plan No PS63800J v Equiset Construction Melbourne Pty Ltd (Building and Property) [2019] VCAT 671

ORDERS

1. Under s60 of the *Victorian Civil and Administrative Tribunal Act 1998* and upon application by the first respondent I join Bates Smart Pty Ltd (ACN 004 999 400) c/- Norton Rose Fulbright, Level 15, RACV Tower, 485 Bourke Street, Melbourne 3000 (tel: 8686 6000, email: jonathan.sumskas@nortonrosefulbright.com, adrian.sella@nortonrosefulbright.com) as the second respondent.
2. By 21 May 2019 the first respondent must file and serve Amended Points of Defence in substantially the form filed in support of its joinder application (with further particulars as identified in paragraph 21), save for all paragraphs relating to its allegation that Metanovus Teasco Pty Ltd (deregistered) is a concurrent wrongdoer, and its claim for contribution against the second respondent.
3. By 21 May 2019 the first respondent must file and serve Points of Claim as against the second respondent.

4. Liberty to the first respondent to apply to file and serve amended Points of Defence alleging that Metanovus Teasco Pty Ltd is a concurrent wrongdoer. Any such application must be filed and served by 31 May 2019 and must be accompanied by proposed Further Amended Points of Defence.
5. **This proceeding is listed for a further directions hearing before Deputy President Aird at 9.30am on 26 June 2019 at 55 King Street Melbourne.**
6. Liberty to apply.
7. Costs reserved

DEPUTY PRESIDENT C AIRD

APPEARANCES:

For Applicant	Mr N J Phillpott of Counsel
For First Respondent	Mr B Reid of Counsel
For Second Respondent	Mr J Sumskas, solicitor

REASONS

- 1 In 2010 the respondent builder entered into a contract with the developer to construct a multi-storey residential building in Queens Road Melbourne, comprising 12 storeys, including ground level, and a two-level basement carpark. The occupancy permit was issued on 31 January 2013, and these proceedings were commenced by the applicant owners corporation ('the OC') on 10 May 2018. The OC alleges there are a number of defects in the common property. A significant claim concerns the external operable louvres on the building.
- 2 The builder has applied to join Bates Smart Pty Ltd ('the architect') and Metanovus Teasco Pty Ltd (deregistered) ('the contractor'), the contractor responsible for the installation of the louvre system, alleging they are concurrent wrongdoers, and seeking to rely on a proportionate liability defence under Part IVAA of the *Wrongs Act 1958*. In the alternative, the builder seeks contribution from the architect under s23B of the *Wrongs Act*.
- 3 The application for joinder was filed on 26 March 2019 and is supported by an affidavit from the builder's solicitor, Rebecca Pickering, dated 25 March 2019 to which a number of relevant documents are exhibited, including proposed Amended Points of Defence ('proposed APOD').
- 4 Mr Reid of Counsel appeared on behalf of the builder. Mr Sumskas, solicitor, appeared on behalf of the architect and indicated that it neither consented to nor opposed the application for joinder. Mr Phillipott of Counsel appeared on behalf of the OC and indicated that it opposed the application.
- 5 For the reasons which follow I am satisfied the builder's claim against the architect for contribution under s23B of the *Wrongs Act 1958* and its defence that it is a concurrent wrongdoer are open and arguable. However, I am not persuaded that the proposed APOD demonstrate an open and arguable defence that the contractor is a concurrent wrongdoer.
- 6 As discussed at the directions hearing, reliance on the apportionment regime under Part IVAA is properly a defence, and any claim for contribution under s23B should properly be included in Points of Claim, not in Points of Defence.

LEGISLATION

- 7 The proportionate liability regime in Victoria is governed by Part IVAA of the *Wrongs Act 1958*. The following sections are particularly relevant:

Section 24AF(1):

This Part [Part IVAA] applies to—

- (a) a claim for economic loss or damage to property in an action for damages (whether in tort, in contract, under statute or otherwise) arising from a failure to take reasonable care;

Section 24AH:

- (1) A concurrent wrongdoer, in relation to a claim, is a person who is one of 2 or more persons whose acts or omissions caused, independently of each other or jointly, the loss or damage that is the subject of the claim.
- (2) For the purposes of this Part it does not matter that a concurrent wrongdoer is insolvent, is being wound up, has ceased to exist or has died.

Section 24AI:

- (1) In any proceeding involving an apportionable claim—
 - (a) the liability of a defendant who is a concurrent wrongdoer in relation to that claim is limited to an amount reflecting that proportion of the loss or damage claimed that the court considers just having regard to the extent of the defendant's responsibility for the loss or damage; and
 - (b) judgment must not be given against the defendant for more than that amount in relation to that claim.
- ...
- (3) In apportioning responsibility between defendants in the proceeding the court must not have regard to the comparative responsibility of any person who is not a party to the proceeding unless the person is not a party to the proceeding because the person is dead or, if the person is a corporation, the corporation has been wound-up.

8 The Tribunal's power to order joinder of parties is found in s60 of the *Victorian Civil and Administrative Tribunal Act 1998* ('the VCAT Act'):

- (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.

9 It is clear that the Tribunal's power to order joinder under s60 of the VCAT Act are very wide. The power is discretionary and, considering the possible implications for the parties (including costs), it is not a discretion that should ever be exercised lightly.

10 As I said in *Perry v Binios*¹ at [17]:

¹ [2006] VCAT 1604

In considering any application for joinder where proposed Points of Claim have been filed, the Tribunal must be satisfied that they reveal an *'open and arguable'* case (*Zervos v Perpetual Nominees Limited* [2005] VSC 380 per Cummins J at paragraph 11).

JOINDER CONSIDERATIONS

- 11 In considering any application for joinder the Tribunal will not be concerned with the substantive merits of the allegations that the proposed respondent is a concurrent wrongdoer for the purposes of an apportionment defence under Part IVAA of the *Wrongs Act 1958*, or a claim for contribution and indemnity under that Act. Nor is the hearing of a joinder application the time to determine contested questions of fact or law including questions of statutory interpretation.
- 12 The Tribunal is not a court of pleadings² and the tendency by many proposed parties in seeking to oppose joinder applications by focussing on pleading nuances is discouraged. In allowing an application for joinder the Tribunal must be satisfied that the proposed pleadings reveal an *open and arguable* case supported by particulars, such that:
 - i. the proposed Points of Defence where a respondent seeks to take advantage of Part IVAA clearly articulate a legal cause of action the applicant has, or would have had, but for the proposed respondent being dead or wound up or the expiry of any relevant limitations period, against the proposed respondent;
 - ii. the proposed Points of Claim, where a respondent claims contribution and/or indemnity under s23B, clearly sets out the respondent's claim against the proposed party; and
 - iii. the affidavit material filed in support of the application for joinder demonstrates there is some evidence that, if proven at the final hearing, supports the allegations set out in the proposed pleading. It is not necessary or desirable for comprehensive affidavit material containing all of the evidence to be filed in support of a joinder application.
- 13 Relevant particulars are important. Generally, a pleading which simply states that a duty of care is owed, or a contractual relationship exists, without giving particulars of the duty or the contract and the alleged breach, will not reveal an *open and arguable* case.³
- 14 As I said in *Thurin v Krongold Constructions (Aust) Pty Ltd*⁴
 35. Affidavit material in support of an application for joinder is required to briefly set out the facts and circumstances giving rise to the application, and should exhibit any available, relevant

² *Barbon v West Hoomes Australia Pty Ltd* [2001] VSC 405, *Age Old Builders Pty Ltd v Swintons* (2003) 20 VAR 200; [2003] VSC 307 at [90]

³ *Perry v Binios trading as Building Inspirations of Australia* [2006] VCAT 1922 at [11]

⁴ [2018] VCAT 1756

material. The proposed party will generally be given leave to intervene so that they may be heard in relation to any application for joinder, and, in particular, to indicate to the Tribunal and to the applicant for joinder any obvious inaccuracies, for instance, where the application relates to the ‘wrong’ person. There have been numerous instances where an application for joinder has been withdrawn or amended when the proposed party has been able to establish either before, or at the directions hearing when the application was heard that it was not, for example, the contracting party or the person who carried out the work, the subject of the claim. In *Watson v Richwall Pty Ltd*⁵ Senior Member Lothian said at [31]

To show that there is an open and arguable case against a proposed joined party it is necessary to plead facts and law that support a successful case without proving the facts – to demonstrate a prima facie case. Nevertheless, it is not sufficient to merely assert the facts without demonstrating how those facts are supported.

36. *Watson* is an example of the situation I referred to above, where the only material provided in support of the joinder application was an ‘expert’ report which it was acknowledged by the applicant for joinder did not apply to or relate to the property the subject of that proceeding. Therefore, there was no relevant evidence.

And:

40. Further, it is not appropriate to consider the substantive merits of a case, and make any finding about the adequacy of any limited evidence which might have been provided in support of the application, at the directions hearing when the application for joinder is heard. The first step is to consider whether the pleadings are open and arguable, and by reference to the affidavit material whether they relate to the issues in dispute in the proceeding.

- 15 I also note the comments of Hargrave J in *Atkins v Interpract and Crole (No 2)*⁶ where he said at [12]:

... On an application such as this, the [applicants for joinder] need only establish that the proposed pleadings contain factual allegations which, if established at trial, could arguably found one or more of the causes of actions alleged.

- 16 In *Adams v Clark Homes Pty Ltd*⁷ Judge Jenkins set out the approach to be followed in considering applications for joinder for the purposes of a proportionate liability defence. At [49] she said:

⁵ [2014] VCAT 1127

⁶ [2008] VSC 99

⁷ [2015] VCAT 1658

Similarly, in *Suncorp Metway Pty Ltd v Panagiotidis*,⁸ Associate Justice Evans cited with approval the observations of Pagone J in *Solak v Bank of Western Australia*,⁹ as to the proper approach in determining whether or not a proceeding relates to an apportionable claim under Part IVAA and similar regimes, as follows:

The factual precondition to the operation of the relevant statutory regimes does not depend upon how a claim is pleaded but whether the statutory precondition exists, namely whether the claim arises from a failure to take reasonable care. In *Dartberg Pty Ltd v Wealthcare Financial Planning Pty Ltd* [2007] FCA 1216; ((2007) 164 FCR 450) Middleton J said that the words arising from the failure to take reasonable care should be interpreted broadly (ibid) [29]. In my view the State regimes providing for the apportionment of liability between concurrent wrongdoers require a broad interpretation of the condition upon which the apportionment provision depends to enable courts to determine how the claim should be apportioned between those found responsible for the damage. The policy in the legislation is to ensure that those in fact who caused the actionable loss are required to bear the portion of the loss referable to their cause. That task ought not to be frustrated by arid disputes about pleadings. [my emphasis]

- 17 Unless the affidavit material clearly establishes that the application is misconceived, for instance because the proposed party was not incorporated until after the date of the contract, extensive affidavit material filed in opposition to a joinder application generally does no more than reinforce that there is an open and arguable case to which the proposed party has a defence.
- 18 In *Evans v Fynnan Pty Ltd*¹⁰, I refused a second application for joinder because of a number of deficiencies in the proposed pleading, and a lack of evidence supporting the allegations that were made, and said:
 25. Not only do the draft APOC fail to disclose any discernible cause of action, the affidavit material filed in support of the application provides little, if any, reliable evidence to support any claim which might be made against Cassar Constructions and/or Mr Cassar...

Is it arguable that the architect is a concurrent wrongdoer?

- 19 The allegations concerning the architect commence at paragraph 42 which includes the terms of the 'Design Agreement' between the developer and the architect dated 20 September 2010 and the Architectural Services to be provided under that agreement. In summary the allegations in relation to the architect are:

⁸ [2009] VSC 126 at [20].

⁹ [2009] VSC 82 at [35].

¹⁰ [2018] VCAT 1335

- i. the design agreement contained a number of obligations to be performed by the architect in performing the Architectural Services including obligations to carry out the works with due care, skill and diligence, in a competent manner and to a professional standard, and to comply with its statutory duties and obligations pursuant to all relevant legal requirements, regulations, orders, building codes and Australian Standards ('the specified obligations')
 - ii. it was responsible for reviewing, correcting and providing final approval of all shop drawings
 - iii. as part of its design it considered the suitability and/or fitness for purpose of the louvre system and the type, method and location of the winding system
 - iv. that it carried out the Design and Specification for the Works including nominating and/or specifying the installation of the louvre system, and approving the system which was installed
 - v. that it breached the terms of the design agreement by failing to perform its works in accordance with the specified obligations when it specified and approved the installation of the louvre system which is not fit for purpose
 - vi. by reason of the architect's breach of the Design Agreement the builder has suffered loss and damage comprising the builder's exposure to the OC's claims and its costs incurred to date, and future costs and any award that may be made in this proceeding
 - vii. by reason of the breaches of the Design Agreement the OC has suffered loss and damage as the louvre system will require partial and/or complete replacement and/or rectification.
- 20 The allegations in paragraph 23(vi) appear to relate to the builder's claim for contribution under s23B. It is unclear how they could relate to its Part IVAA apportionment defence.
- 21 Commencing at paragraph 49 the builder makes the following allegations, a number of which Mr Phillipott submitted, on behalf of the OC, required particulars before I could be satisfied the proposed APOD disclosed an open and arguable Part IVAA defence. However, where the pleading is clear, although further particulars might be warranted, I am not persuaded this is a reason to refuse joinder in this instance. My comments are in square brackets at the end of each allegation.
- i. the architect held itself out as a company which, amongst other things, specialises in providing architectural services including the preparation of drawings, plans and specifications for the performance of building works such as the works undertaken on the Property [I reject Mr Phillipott's submission that particulars are required of this allegation, which seems self-evident from that material exhibited to

Ms Pickering's affidavit. However, they may be requested later, if considered necessary.]

- ii. the architect knew that the works to be constructed were to include residential apartments, common property and basement carparking [This seems to be self-evident from the architect's retainer.]
- iii. the architect was aware or ought to have been aware that an OC and owners would or might become owners of various parties of the works following the issue of the occupancy permits [This seems self-evident from the architect's retainer.]
- iv. the architect was aware or ought to have been aware that the developer and any subsequent owners including the OC would or might have an interest in the architectural services being performed:
 - a. with care skill and diligence
 - b. in a competent manner and to a professional standard
 - c. in accordance with all applicable laws and regulations
 - d. to the standard to be expected of a person in the architect's position(‘the specified manner’) [I am satisfied this allegation is clear]
- v. the architect knew or ought reasonably to have known that the developer and any subsequent owner including the OC would rely on the architect to perform the works in accordance with the specified manner [I am satisfied this allegation is clear]
- vi. the architect knew that the developer and any subsequent owner including the OC were vulnerable in respect of any failure by the architect to carry out its works in accordance with the specified manner [particulars as to how it said they were vulnerable would assist here, but are not essential to understanding the defence]
- vii. it was reasonably foreseeable that the developer and/or the OC or a person in the OC's position would rely on the architect to perform the architectural services in the specified manner, and the OC did so rely [particulars would assist but are not essential to understanding the defence]
- viii. the architect assumed responsibility for the architectural services and was paid for its services [this seems self-evident from the architect having been retained to provide the services]
- ix. the nature of the harm alleged (the defects in the louvre system, when, it is alleged, no approval should have been given by the architect) is such that it is appropriate to impute a legal duty to the architect to take reasonable care to avoid harm [particulars of this allegation are required]

- x. the relationship between the OC and/or the developer was proximate in a physical, temporal and relational sense in that the works designed by the architect are in the same property in which the OC has an interest, which is the subject of this proceeding and where the alleged defects have arisen after the architectural services were performed by the architect [I am satisfied this allegation is clear]
- xi. the architect was in a position of control in that it was able directly to take steps to avoid the harm alleged [particulars are required]
- xii. the nature of the architect's works in designing and approving the works to be undertaken on the property is such that it is appropriate to impute a legal duty to the architect to take reasonable care to avoid the harm alleged [I am satisfied that this allegation is clear]
- xiii. it was reasonably foreseeable that if the architect failed to comply with the specified requirements that the developer and any subsequent owner would suffer loss and damage [particulars would assist]
- xiv. therefore, the architect owed the developer and any subsequent owner of the works a duty to perform the architectural services in accordance with the specified requirements [this allegation is clear]
- xv. in breach of the duty the architect failed to perform the architectural services in accordance with the specified requirements [particulars are required]
- xvi. and as a result of the architect's breach of this duty of care, the OC has suffered loss and damage.

Discussion

- 22 As noted above, the threshold for joinder of parties is low. All that is necessary is for the tribunal to be satisfied that there is an open and arguable case. In my view, whilst further particulars of the requisite reliance and vulnerability are required, I am not persuaded this is a reason to refuse the builder's application for joinder of the architect. The bases of the builder's allegation that the architect is a concurrent wrongdoer are clear from a careful consideration of the proposed APOD. Vulnerability and reliance by the OC are pleaded at paragraph 60, with in my view, sufficient particularity for me to identify the OC's legal cause of action against the architect, founded in negligence. It is, of course, a matter for the OC whether it wishes to make a direct claim against the architect and it can, of course request further particulars.
- 23 Further, as the authorities referred to have made clear, where a respondent seeks to join other parties to take advantage of an apportionment defence under Part IVAA, it will often be impossible to determine whether there can, or should, be any apportionment until the evidence has been heard, and the facts and circumstances determined.

Is it arguable that the contractor is a concurrent wrongdoer?

- 24 As the contractor has been wound up, it is not necessary for it to be joined as a party to the proceeding for the builder to take advantage of a Part IVAA defence.
- 25 Mr Phillipott indicated that if the builder was given leave to file the proposed APOD in relation to the contractor, the OC would make an application under s75 of the VCAT Act for it to be struck out.
- 26 Although under s24AI(3) it is not necessary for a person who is dead or in the case of a corporation ‘wound up’ to be a party to the proceeding for responsibility to be apportioned between concurrent wrongdoers, it is important to give careful consideration to any proposed pleading seeking to rely on a Part IVAA defence.
- 27 Whilst I accept that Part IVAA should be given a broad interpretation and it will often not be possible to determine whether a party is a concurrent wrongdoer until all of the evidence has been heard, if joinder were simply allowed without the proposed pleading being considered, there is a risk of prejudice to an applicant. Although where an alleged concurrent wrongdoer is dead or in the case of a corporation ‘wound up’ an applicant cannot make a claim against it, a prudent applicant will nevertheless take all necessary steps to protect itself from the possibility of responsibility being apportioned to such alleged concurrent wrongdoer. This takes on an added import in the Tribunal where any application for costs must always be considered in the context of s109 of the VCAT Act.
- 28 The allegations concerning the contractor commence at paragraph 54 of the proposed APOD. In summary the builder alleges:
- i. the builder engaged the contractor on 22 November 2011 to supply and install the façade elliptical louvres, awnings, metal grills and screens (‘the subcontract works’)
 - ii. the terms of the subcontract included terms that the contractor would:
 - a. undertake the work using reasonable skill and care
 - b. complete the work in a competent manner and to a professional standard
 - c. complete the works in a manner which is fit for the intended purpose, and to ensure compliance with all applicable legislative requirements
 - d. complete the works using industry best practice
- all of which obligations, the builder alleges the contractor breached in carrying out the subcontract works. In support of these allegations the builder refers to expert reports prepared by Mr P Smithson of BG&F Facade and by Mr P Naughton who, the builder says, opine that the

design and/or installation of the Approved Louvres is defective (details of the defects are set out in the particulars to paragraph 46)

- iii. the works were carried out between February 2012 and March 2013
 - iv. that if, as alleged by the OC, the builder has breached the building contract, the section 8 warranties and/or the Alleged Duty [the duty which the OC alleges the builder owes it] then the contractor has breached the subcontract;
 - v. by reason of the breaches of the subcontract, the builder has suffered loss and damage, comprising the builder's exposure to the OC's claims and its costs incurred to date, and future costs and any award that may be made in this proceeding;
- 29 The allegations against the contractor, as set out above, would, in my view, support a claim for contribution under s23B. It is unclear to me how they support a proportionate liability defence under Part IVAA, and for this reason they should not be included in the APOD, when filed.
- 30 The allegations which, it seems, are intended to support a Part IVAA proportionate liability defence commence at paragraph 60 and are that the contractor:
- i. held itself out as a company which specialised in the application and installation of façade elliptical louvres
 - ii. was aware or ought to have been aware that an owners corporation and owners would or might become the owners of various parts of the works
 - iii. was aware or ought to have been aware that the developer and/or subsequent owners including the OC would or might have an interest in the subcontract works being constructed:
 - a. with care, skill and diligence
 - b. in a good and workmanlike manner
 - c. in accordance with all applicable laws and regulations
 - d. in accordance with the relevant drawings, plans and specifications
 - e. so as to ensure that they were free from defects
 - f. so as to ensure they were fit for purpose
 - g. in a competent manner and to a professional standard and
 - h. to the standard expected of a person in the contractor's position (all of which for the ease of reference, I will refer to as the 'manner specified', consistent with the builder's allegations without referring each time to paragraph 60(c)).

- iv knew or ought reasonably to have known that the developer and any subsequent owners including the OC would rely on the contractor to undertake the subcontract works in the manner specified
- v the developer and/or the OC were in a position of vulnerability in relation to:
 - a. the sufficiency of the contractor's qualifications and skills to carry out and complete the subcontract works in the specified manner
 - b. their ability to protect themselves given that the OC was registered as a legal entity and/or registered as the owner of part of the constructed works after the subcontract works were completed and it relied upon the contractor to perform the subcontract works properly, accurately and completely with due care and skill
 - c. the alleged louvre defects could not have been discovered through investigation when or before the OC was registered, or when or before its interest in the property crystallised
 - d. it was reasonably foreseeable that the developer and/or the OC would rely on the contractor to carry out the work in the manner specified; and the OC did rely on it to have done so
 - e. the contractor assumed responsibility for completing the works in the manner specified
 - f. the nature of the harm [caused by] the alleged defects, is such that it is appropriate to impute a legal duty to the contractor to take reasonable care to avoid harm
 - g. the relationship between the OC and/or the developer was primate in a physical, temporal and relational sense in that the property where the works were carried out is the same physical property in which the OC has an interest, and which is the subject of this proceeding and the alleged defects have arisen after the contractor completed the works
 - h. the contractor was in a position of control in that it was able, directly to take steps to avoid the harm alleged
 - i. the nature of the works undertaken by the contractor is such that it is appropriate to impute a legal duty to the contractor to take reasonable care to avoid the harm alleged
 - j. it was reasonably foreseeable that if the contractor did not complete the works in the manner specified that the developer and/or the OC would or might suffer loss and damage
 - k. therefore, at all material times the contractor owed the developer and each registered proprietor in the development and their

successors in title, including the OC, a duty of care in undertaking and/or supervising the works to:

- (i) exercise all due skill, care and diligence in undertaking and/or supervising the works so as to ensure the works were completed in the manner specified
 - (ii) to act in a competent and to a professional standard
- l. in breach of that duty the contractor failed to carry out the works in the manner specified and to act in a competent and to a professional standard
 - m. as a result of the alleged breaches of the duty the OC has suffered loss and damage

31 In paragraph 39 of the proposed APOD the builder alleges that the OC's claim is an apportionable claim (which is not disputed), and in paragraph 40 alleges that the loss and damaged suffered by the OC has been *caused by and/or exacerbated and/or contributed to by ...the architect and the contractor* and that s24AF(1) applies. At paragraph 41 the builder alleges that *The following actions and/or omissions of the concurrent wrongdoers caused independently of each other and/or jointly the loss and damage claimed by the OC*. The loss and damaged allegedly caused by each of the architect and the contractor are set out separately.

32 The OC relies on a decision of Judge Shelton of the County Court in *Bevendale Pty Ltd v Equiset Construction (Epping) Pty Ltd*¹¹ where his Honour refused an application by the defendant builder to join the contractor which supplied and installed structural steel during the construction by the builder of the Epping Plaza Regional Shopping Centre. His Honour said:

- 24. ...I agree with Mr Andrew's submission that to allow joinder of GFC would dilute the effect of the contractual warranties given by the defendant to the plaintiff and would substantially change the long-established contractual relationships which exist in the building industry.
- 25. It is clear, in my view, that the plaintiff was not owed a duty of care by GFC, that this is not even an arguable proposition and that any claim against GFC could be described as "hopeless"

33 The situation here in relation to the contractor is analogous. Mr Reid sought to effectively give evidence from the bar table when he submitted that it is arguable that the contractor is a concurrent wrongdoer because:

- i. of the specialised nature of the subcontract work as there were only a few subcontractors who supplied and installed louvre systems
- ii. that new methodology was employed by the contractor when installing the louvres, as they were a unique design

¹¹ [2010] VCC 0805

- iii. under the terms of the subcontract the contractor was required to provide a compliance certificate which the builder has been unable to locate
- iv. and that because of the specialist nature of the subcontract works the contractor assumed responsibility for its satisfactory completion, which the builder relied on, and which the OC could eventually rely on.

34 Unfortunately, none of this is in the affidavit filed in support of the application nor pleaded. Rather, the allegations against the contractor are simply allegations that because it did the work, it owed a duty of care to the builder, the developer and the subsequent owners including the OC. Although the Tribunal has allowed joinder of subcontractors as respondents for the purposes of Part IVAA defences in other proceedings, in each instance there has been a special or unique circumstance rendering an allegation they owed a duty of care to the owners arguable. For instance; tiling and waterproofing subcontractors where, under the relevant subcontracts, each of the subcontractors provided a warranty to the builder and the developer¹²

35 As Senior Member Farrelly recently determined in *McClafferty v Greg Smith Pty Ltd*¹³ for a respondent to rely on a Part IVAA defence it must identify and articulate the legal cause of action the applicant has against the proposed party (or would have had but for the proposed party being dead or in the case of a corporation ‘wound up’) which the respondent alleges is a concurrent wrongdoer. It is not enough to simply assert that the proposed party contributed to or caused the applicant’s loss and damage. In this instance, the proposed APOD do not disclose any legal cause of action which the OC would have had against the contractor but for it being deregistered.

36 However, it may be that the builder can demonstrate that it is arguable that the contractor is a concurrent wrongdoer by repleading and accordingly I will grant it leave to renew the application to file Further Amended Points of Defence insofar as they concern the contractor.

CONCLUSION

37 I will therefore grant the builder’s application to join the architect as a party to this proceeding, and will give it leave to make an application for leave to file Further Amended Points of Defence in relation to its allegation that the contractor is a concurrent wrongdoer.

DEPUTY PRESIDENT C. AIRD

¹² *LU Simons Builders Proprietary Limited v Allianz Australia Insurance Ltd* [2013] VCAT 468

¹³ [2019] VCAT 299