VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST VCAT REFERENCE NO. BP619/2017

CATCHWORDS

Domestic building – application for joinder – *Wrongs Act 1958* – Part IVAA and sections 23B and 24 – whether arguable that the architect is a concurrent wrongdoer – practice in the Building and Property List for joinder applications – joinder considerations

APPLICANTS	Owners Corporation 1 PS538430Y, Owners Corporation 2 PS539430Y, Owners Corporation 3 PS538430Y, Owners Corporation 4 PS538430Y, Owners Corporation 5 PS538430Y
FIRST RESPONDENT	H Building Pty Ltd (ACN 091 236 912) (under external administration)
SECOND RESPONDENT	PLP Building Surveyors & Consultants Pty Ltd (ACN: 084 420 477)
THIRD RESPONDENT	Socrates Capouleas
FOURTH RESPONDENT	Interlandi Mantesso Pty Ltd (ACN 105 462 922)
WHERE HELD	Melbourne
BEFORE	Deputy President C Aird
HEARING TYPE	Directions hearing
DATE OF HEARING	26 March 2019
DATE OF ORDER	10 May 2019
CITATION	Owners Corporation 1 PS538430Y v H Building Pty Ltd (ACN 091 236 912) (under external administration) (Building and Property) [2019] VCAT 680

ORDERS

1. Under s60 of the *Victorian Civil and Administrative Tribunal Act 1998* and upon application by the second and third respondents I join as a party to this proceeding Interlandi Mantesso Pty Ltd (ACN 105 462 922) c/- Norton Rose Fulbright Australia, RACV Tower, 485 Bourke Street,

Melbourne (tel: 8686 6000, email: sarah.metcalfe@nortonrosefulbright.com) ('the fourth respondent').

2. By 18 May 2019 the second and third respondents must file and serve amended Points of Defence substantially in the form filed in support of the joinder application, not including the claim for contribution and indemnity under s23B of the *Wrongs Act 1958*.

3. By 18 May 2019 the second and third respondents must file and serve Points of Claim against the fourth respondent.

4. **The proceeding is listed for a further directions hearing before Senior Member Farrelly on 31 May 2019 at 9.30am at 55 King Street Melbourne** (noting Deputy President Aird will be on leave from 17 May – 21 June 2019 inclusive) at which time directions will be made for its further conduct, particularly in relation to the fourth respondent, noting this proceeding is currently listed with the related proceedings for a compulsory conference to be conducted by Senior Member Levine on 1 August 2019.

5. Liberty to apply.

6. Costs reserved.

7. **These orders also apply to BP279/2018 and its related files.**

DEPUTY PRESIDENT C AIRD

APPEARANCES:

For Applicants	Mr R Andrew of Counsel
For First Respondent	Mr J M Forrest of Counsel
For the Schedule 1 Joined Parties (the applicants in BP279/2018 and its related files)	Mr Powell, solicitor
For the 71st and 135th Joined Parties (and the applicants in BP288/2018 and BP328/2018):	Mr A Baker of Counsel
For Fourth Respondent	Mr D Klempfner of Counsel

REASONS

Note: These Reasons also apply to BP279/2018 and its related proceedings.

1 These proceedings were commenced in April 2017 by five owners corporations ('the OCs') in relation to defects in the common property in an apartment complex in Stawell Street Richmond. The apartment complex was constructed in two stages by H Buildings Pty Ltd (formerly Hickory Group Pty Ltd) ('the builder') in 2008. The occupancy permit for Stage 1 is dated 20 March 2008 and the occupancy permit for Stage 2 is dated 6 May 2008.

2 By order dated 8 March 2018, upon application by the OCs, the individual building surveyor and the building surveyor company ('the building surveyor') were joined as the second and third respondents. Each of the 133 individual lot owners were joined as joined parties, the Tribunal being satisfied, having regard to s60 of the *Victorian Civil and Administrative Tribunal Act 1998* ('the VCAT Act'), that their interests were affected by, and they should be bound by any decision of the Tribunal.

3 On 6 March 2018, 63 of the individual lot owners commenced separate proceedings in relation to defects in their individual lots. The builder and the building surveyor are respondents to those proceedings. BP279/2018 has been treated as the 'master' file for the individual lot owners proceedings. In considering the application for joinder I will collectively refer to the OCs and the individual lot owners as the 'owners'.

4 The builder has subsequently gone into administration. A Deed of Company Arrangement has been entered into, resulting in settlement with the builder. The proceeding against the builder was struck out although it remains a party for the purposes of the other respondents' apportionment defences under Part IVAA of the *Wrongs Act 1958* ('Part IVAA').

5 On 22 February 2019 the building surveyor filed an Application for Directions Hearing or Orders seeking to join the architect, Interlandi Mantesso Pty Ltd, as the fourth respondent to this, and the related proceedings, to take advantage of an apportionment defence under Part IVAA, alternatively contribution and/or indemnity under s23B of the *Wrongs Act*. The application is opposed by the architect, the OCs and the individual lot owners.

6 The application for joinder is supported by an affidavit by the building surveyor's solicitor, Natasha Eloise Stojanovich dated 22 February 2019 to which is exhibited Proposed Amended Points of Defence to Points of Claim. Subsequently, following orders made by the Tribunal on 5 March 2019 a document headed Amended Points of Defence dated 14 March 2019 was filed and served. As indicated to the parties at the directions hearing this has been treated as the proposed pleading ('proposed APOD'). (I have not separately considered the proposed pleading for BP279/2018 and the related proceedings as, although the numbering is different, the relevant

paragraphs in relation to this application for joinder are substantially the same).

7 The architect's opposition to the joinder application is supported by an affidavit by its solicitor, Sarah Louise Metcalfe dated 25 March 2019.

8 Mr Klempfner of Counsel appeared on behalf of the architect, Mr Forrest of Counsel appeared on behalf of the building surveyor, Mr Andrew of Counsel appeared on behalf of the OCs and Mr Powell, solicitor appeared on behalf of the applicant in BP279/2018 and the related proceedings, with the exception of BP288/2018 and BP328/2018 where the applicants were represented by Mr Baker of Counsel. Surprisingly, the applicants in those proceedings had not been served with the application or any of the material.

9 For the reasons which follow I will allow the joinder applications.

LEGISLATION

10 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.

11 The following provisions of sections 23B and 24(4) are also relevant in considering these applications:

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

…

(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 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) <u>within the period of twelve months after the writ in the action against the first-mentioned person was served on him</u> –

whichever is the longer; or

… [Underlining added]

12 The Tribunal's power to order joinder of parties is found in s60 of 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.

13 It is clear that the Tribunal's powers 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.

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

> 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 APPLICATIONS IN THE BUILDING AND PROPERTY LIST

15 Ms Metcalfe refers to a number of matters in her affidavit, which I consider it appropriate to address to ensure there are no misunderstandings about the Tribunal's practices in relation to applications for joinder in the Building and Property List.

16 In paragraph 12 of her affidavit Ms Metcalf refers to order 3 of the orders made by Senior Member Farrelly in chambers on 5 March 2019 requiring:

> The second and third respondents Proposed Amended Points of Defence must be filed and served, including service on the proposed further party, as soon as practicable … [underlining added]

She continues at paragraph 13:

> It is unclear why the Orders of 5 March 2019 were made by the Tribunal providing the Building Surveyor to file and serve its amended points of defence in circumstances where the Building Surveyor's application to join my client to the Proceedings had not yet been heard. In addition, the proposed amended defences provide for the Building Surveyor to make a claim for contribution and indemnity against my client, when the Building Surveyor is statute barred from making such claims. Ms Edwards [of the solicitors for the second and third respondents] explained in her email to me dated 20 March 2019 that the order to file the Proposed Amended Points of Defence appears 'unorthodox in circumstances where the joinder application is listed for hearing next week'.

[1] [2006] VCAT 1604

17 Notwithstanding that the second and third respondents failed to properly designate the Amended Points of Defence dated 14 March 2019 as Proposed Amended Points of Defence, the order to file and serve the Proposed Amended Points of Defence is consistent with paragraph 22 of Practice Note – PNBP1, and with order 2 of the Tribunal's orders dated 25 October 2018 which provide:

> (2) By **18 December 2018** or such later date as may be ordered by the Tribunal any application for joinder must be *filed and served* in accordance with paragraph s 22 and 23 of PNBP1. The applicant for joinder must:
>
> (a) *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*, and
>
> (b) serve on the proposed party a copy of these orders
>
> (c) advise the proposed party of the date and time when the application will be heard
>
> confirm in writing to the principal registrar that this order has been complied with.

18 The practice in the Building and Property List, and the Domestic Building List before it, of requiring applications for joinder to be served on proposed parties, and giving them an opportunity to be heard, was introduced in 2004 to avoid the delays and costs caused by meritorious s75 applications.

JOINDER CONSIDERATIONS

19 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.

20 The Tribunal is not a court of pleadings[2] 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

[2] *Barbon v West Ho0mes Australia Pty* Ltd [2001] VSC 405, *Age Old Builders Pty Ltd v Swintons* (2003) 20 VAR 200; [2003] VSC 307 at [90]

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.

21 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]

22 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 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

[3] *Perry v Binios trading as Building Inspirations of Australia* [2006] VCAT 1922 at [11]
[4] [2018] VCAT 1756
[5] [2014] VCAT 1127

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.

23 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.

24 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:

> 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]

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[6] [2008] VSC 99
[7] [2015] VCAT 1658
[8] [2009] VSC 126 at [20].
[9] [2009] VSC 82 at [35].

25 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.

26 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…

THE APPLICATION FOR JOINDER

27 The building surveyor seeks to join the architect for the purposes of a Part IVAA defence on the basis that the architect is a concurrent wrongdoer which caused or contributed to the owners' loss; alternatively, to claim contribution under s23B, in relation to the owners' claims concerning the wall cladding. Surprisingly, the proposed s23B claim has been made in the proposed APOD although it is not a defence. Therefore, in allowing the application for joinder, I will order that the building surveyor file Points of Claim against the architect if it wishes to pursue its s23B claim for contribution and/or indemnity.

The proposed Amended Points of Defence

28 It is helpful to set out relevant extracts from the proposed APOD.

29 In paragraph 51 the building surveyor pleads that the architect was *retained to provide architectural services in respect of the design and construction of the building* and in paragraph 52 that *there was an implied term of the Architect's retainer that it would provide the architectural services…with the care and skill of a reasonable architect in the profession (the implied term).*

30 In paragraph 53 the building surveyor alleges that the architect owed the owners a duty of care *to provide the architectural services with the care and skill of a reasonable architect*. There are 9 particulars to this allegation including that the architect *was aware and/or ought to have been aware that:*

(i) an owners corporation/s would become owners of the common property and that individuals would become owners of the individual lots following the issue of occupancy permits and completion of the building/s;

[10] [2018] VCAT 1335

(ii) the registered owners corporation/s and the individual lot owners *would rely upon Interlandi to provide the architectural services exercising care and skill of a reasonable architect in the profession*

(iii) that owners corporation/s and the individual lot owners *were in a position of vulnerability in respect of ensuring that the design of the building was undertaken in accordance with the Architect's Retainer and with competence and skill of a reasonable architect in the profession given that* they became owners after the building was completed and were not privy to the Architect's retainer

(iv) *assumed responsibility for the provision of the architectural services concerning the construction of the building which required exercising the care and skill of a reasonable architect in the profession*

(v) *was aware that it was reasonably foreseeable that in the event that it provided its architectural services in contravention of the Architect's retainer and negligently, the applicants would or might suffer loss or damage*.

31 In paragraph 54 the building surveyor alleges the architect provided the architectural services including the architectural drawings and the Specification for the building contract.

32 In paragraph 55 the building surveyor alleges that if the owners' allegations [in relation to the cladding] are correct, which they deny, *then the architectural design of the building was deficient and was prepared negligently in contravention of the implied term and its duty of care to the applicants* [particulars are provided].

33 In paragraph 56 the building surveyor alleges that if the owners' allegations are correct [which it denies] *then in contravention of its duty of care to the applicants Interlandi failed to warn or advise the Surveyor that the architectural design did not comply with the Building Code of Australia.*

34 In paragraph 57 the building surveyor alleges that, in the alternative, in contravention of the implied term and in breach of its duty of care to the owners, during the course of the works the architect approved certain amendments to the architectural design allowing for the particular cladding to be used, and further that it *failed to warn or advise the Surveyor that it had required or approved the amendment of the architectural design by the substitution of the cladding… which was in contravention of the Building Code of Australia.*

35 In paragraph 58 the builder surveyor pleads that the architect is therefore a concurrent wrongdoer and seeks that its liability be limited to its portion of the responsibility for the owner's loss and damage.

36 In paragraph 59 the building surveyor alternatively seeks contribution from the architect under s23B.

The architect's position

37 The architect opposes the joinder on the following grounds:

(a) the building surveyor is statute barred from making a claim for contribution and indemnity against the architect

(b) the building surveyor cannot rely on a defence under Part IVAA and seek contribution under s23B

(c) the architect will suffer prejudice if an order is made joining it to the proceeding given the lapse in time since the project concluded.

38 Mr Klempfner also raised some concerns about pleadings, which I do not consider it necessary to deal with here. As noted above, the hearing of a joinder application is not the time to dwell on the nuances of the proposed pleadings, and in my view, the concerns raised can be dealt with by a request for particulars, if considered necessary.

Is the s23B contribution claim statute barred?

39 The architect contends that the s23B contribution claim is statute barred, and that accordingly it should not be joined to this proceeding for the purposes of contribution. Whilst I accept Mr Forrest's submission that this is a defence, in circumstances where it has been squarely raised by the architect, and it is a serious matter to join a party to a proceeding, I am satisfied it is a relevant matter to take into consideration when determining the application for joinder. Any joinder of a party for the purposes of contribution under s23B effectively imposes on that party an obligation to participate in the proceeding to take whatever steps are necessary to defend the claim and protect its interests.

40 However, where there is any doubt or contest about whether a claim is statute barred, as there is here, it is appropriate to allow the joinder application, and for the party joined to raise a limitations defence, with the issue to be determined at the final hearing.

Sections 23B(3) and 24(4)(a)(ii)

41 The architect relies on sections 23B(3) and s24(4)(a)(ii) of the *Wrongs Act*. Section 23B(3) provides, in effect, that contribution cannot be recovered from a person where the cause of action against them is statute barred, Section 24(4)(a)(ii) provides that any application for contribution must be made within 12 months of the initial application being served on the party seeking contribution.

42 The application by the applicants to join the building surveyor as the second and third respondents was filed on 2 March 2018. The building surveyor was joined as a party to this proceeding by order of the Tribunal made at a directions hearing on 8 March 2019, at which the building surveyor was represented.

43 From the Tribunal's records it appears that the OCs' further amended Points of Claim were filed on 14 March 2018 in compliance with the Tribunal's orders of 8 March 2019.

44 As noted above, 63 individual lot owners commenced separate proceedings in relation to defects in their individual lots. The respondents named in the individual lot owners' applications include the building surveyor. Although the individual lot owner proceedings were commenced on 6 March 2019, the first listing notices were not sent to the respondent until after 16 April 2018 when orders were made listing the proceedings for a compulsory conference with the OCs proceeding. The respondents were advised of the compulsory conference by email dated 19 April 2019 and advised that copies of the applications would be posted to them due to the large number of applications and supporting material.

45 The building surveyor's application for joinder was filed on 22 February 2019, less than 12 months:

- after the builder applied to join the building surveyor (on 2 March 2018),
- since the building surveyor was joined as a party to the OC proceeding (on 8 March 2018),
- after the commencement of the individual lot owners' proceedings' (on 6 March 2018), and
- after the building surveyor was served with the individual lot owners' applications (after 16 April 2018)

46 Although the applications for joinder were not heard until 29 March 2019, no submissions were made by any of the parties or the proposed party by reference to the dates I have set out above, although there were submissions about the date the OC proceeding was commenced. However, it is arguable whether this is the relevant date, having regard to s24(4)(a)(ii). Accordingly, the question of whether proceedings were commenced by the building surveyor against the architect within the requisite 12 month period is a matter to be determined at the final hearing.

Section 134

47 The architect also relies on s134 of the *Building Act 1993* in submitting that the claim for contribution is statute barred, arguing that the building surveyor's claim against it is a building action, and is therefore subject to the 10 year limitation period set out in that section. However, the interrelationship between s24(4) of the *Wrongs Act* and s134 of the *Building Act* is a question which is yet to be determined. I respectfully agree with and adopt the comments by Senior Member Riegler, as he then was, about a similar submission in *Nguyen v Dragicevic*[11] when considering a strike out application under s75 of the *Victorian Civil and Administrative Tribunal Act 1998*:

[11] [2015] VCAT 1629

31. 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.

32. 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.

33. 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.

34. …

35. 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.

Can a respondent rely on an apportionment defence under Part IVAA and also seek contribution under s23B?

48 Mr Klempfner submitted there is an inconsistency between joinder for the purposes of an apportionment defence under Part IVAA and a claim for contribution under s23B. Accordingly, he submitted, both remedies cannot be sought. He made a number of eloquent submissions about the operation of Part IVAA having precedence, including that because s23B(1) and s24AH cover the same field, Part IV is subsumed into Part IVAA. However, in my view, these are submissions for the final hearing. Although both cannot succeed, it is not unusual, and in fact, it is prudent for an applicant or, in this case, a respondent to seek alternative remedies. Here, the respondent building surveyor seeks to take advantage of the proportionate liability regime set out in Part IVAA on the one hand, and on the other, in the event that defence is unsuccessful, seeks contribution from the architect.

49 It will be a matter for the Tribunal at the final hearing to consider whether the applicant's claim is apportionable, and, if not, whether the contribution claim has merit.

Prejudice

50 As I indicated to Mr Klempfner at the directions hearing, I am not persuaded that any possible prejudice which may be suffered by the architect, due to the lapse of time since the project concluded, is a reason to refuse joinder.

51 In her affidavit Ms Metcalfe states that:

i. in 2015 the architect destroyed project files for projects which had concluded more than 7 years prior to 2015 although it has retained some hard copy and electronic files in relation to the project;

ii. documents which have been destroyed may have assisted the architect in defending allegations against it, or clarified issues in the proceeding;

iii. the staff members with primary responsibility and involvement in the project are no longer employed by it;

iv. persons involved in the project are unlikely to have any recollection or any recollection of events that took place over 13 years ago;

v. that documents in the Aconex archives could be retrieved, but at a cost of $750 although it will take 4-6 weeks after payment for these to be retrieved.

52 The occupancy certificates were issued on 28 March 2008 and 6 May 2008 and this application was heard approximately one year after the expiry of the 10 year limitation period (for stage 1) for the commencement of a building action as set out in s134 of the *Building Act*. Any possible prejudice because the architect destroyed project files for projects that concluded more than 7 years prior to 2015 is a matter for the architect.

53 It is a reality of building litigation, that a building practitioner might find themselves involved in a building action, at least up to 10 years after an occupancy permit was issued, and possibly longer (if a contribution claim is made against them).

The OCs' position

54 The applicant also opposes the application for joinder. Mr Andrew of Counsel who appeared on behalf of the OC, spoke to written submissions which he handed up at the commencement of the directions hearing.

55 The OCs oppose the joinder of the architect on two bases:

(i) that it is not arguable that the architect owes the OCs a duty of care

(ii) that the architect does not owe a legal liability to the OCs for breach of any duty of care, because pursuant to s134 of the *Building Act* any claim by the OCs is statute barred.

Is it arguable that the architect owes the OCs a duty of care?

56 In *Owners Corporation 1 PS523454S v L.U Simon Builders Pty Ltd*[12] when determining a strike out application under s75 of the *Victorian Civil and Administrative Tribunal Act 1998*, I found that it was arguable that an architect owes an owners corporation a duty of care. In *LU Simon* I said:

> 33. In relation to the OCs claim the architect relies on the High Court decision in *Brookfield Multiplex Ltd v Owners Corporation Strata Plan 61288*[13] and the decision of the NSW Supreme Court in *The Owners – Strata Plan No 74602 v Brookfield Australia Investments Ltd*[14]. For the purposes of these Reasons only I will refer to these as 'Brookfield Multiplex' and 'Brookfield Investments'.
>
> 34. In Brookfield Multiplex, the High Court held that the builder which constructed a serviced apartment complex, under a design and construct contract, did not owe a duty of care to the owners corporation to avoid pure economic loss. Mr Klempfner submitted, on behalf of the architect, that applying the same reasoning as the High Court in Brookfield Multiplex, that an architect does not owe a duty of care to an owners corporation.
>
> 35. In Brookfield Investments the court held that no duty of care was owed to the owners corporation by Brookfield, which once again constructed an apartment building under a design and construct contract.
>
> 36. In Brookfield Investments, Stevenson J, in discussing the High Court's determination that no duty of care was owed to the owners corporation relevantly said at [111]
>
> > Each member of the Court concluded that the owners corporation was not relevantly vulnerable, essentially because those that the owners corporation represented were adequately protected by contract and were sophisticated investors.
>
> 37. In particular, the court held that the owners corporation was not in a position of vulnerability because the statutory warranties under the *Home Building Act 1989* (NSW) (similar to the s8 warranties) enured for the benefit of subsequent owners. However, once again, Brookfield Investments is concerned with a duty of care owed by a builder under a design and construct contract where the OC had the benefit of the statutory warranties owed to it by the builder. It is not concerned with a duty which may or may not be owed by an architect.
>
> 38. Mr Forrest referred me to *Chan v Acres*[15], where McDougall J held that whether an engineer, engaged to prepare structural drawings and to carry out inspections as requested, owed a duty

12 [2018] VCAT 987
13 (2014) 254 CLR 185
14 [2015] NSWSC 1916
15 [2015] NSWSC 1885

of care to a subsequent owner could only be determined after the relationship between the parties had been examined.

39. In *Chan* the applicant home owner brought a claim against the owner-builder vendor who had renovated the home, the engineer who had been engaged by the vendor to prepare certain structural drawings and to carry out inspections of the structural work, as requested, and the local council which had been engaged by the vendor as the Principal Certifying Authority.

40. At [98] his Honour said:

> Knowing that the other person may suffer loss is saying, in different words, that the other is, in the general sense of the work "vulnerable" to that loss. What is required to convert vulnerability from its generally accepted English meaning to the more limited and precise meaning that it has in this field of discourse? The answer is to be found, not at some abstract level of principle, but through detailed examination of the relationship.

And at [99]

> What, then, are the detailed features of the relationship that create vulnerability in this special sense? Again, in my view, the question is not capable of answer at a high level of abstraction. Again, it requires analysis of all salient features of the relationship, with that analysis informed analogically, by reference to precedent.

And at [118]

> The judgments in *Brookfield [Multiplex]* reinforce the importance of examining "the salient features of the relationship"… It is only in doing so … that the Court can determine whether one party was vulnerable, in the relevant sense and whether the other owed it a duty of care.

And at [125]

> To my mind the reasoning in *Brookfield* shows that, in determining whether to impose a common law duty of care to avoid pure economic loss, in facts for which there is not precise authority (that is, where the precise duty of care has not been recognised in decided cases) the Court must look at the relevant features of the relationship between the plaintiff and the defendant. An essential feature is that the plaintiff must be shown to have been "vulnerable" in the sense explained, Reliance on the defendant and knowledge by the defendant of that reliance, will be at least an important and perhaps a necessary condition of vulnerability.

40. Justice McDougall confirmed the necessity of considering the precise facts to determine the existence of a duty of care in *Owners Corporation SP 80609 v Paragon Construction (NSW) Pty Limited*[16] at [11].

[16] [2018] NSWSC 266

> 41. I accept that to prove their claims the OCs must be able to establish that the architect owed them a duty of care which it breached and that, as a consequence, they have suffered damage. I also accept the submission on behalf of the OCs that whether the architect owed them a duty of care can only be determined after hearing the evidence. [emphasis added]

57 Whilst the comments in *LU Simon* were made in the context of a s75 application, I adopt them in considering the current application. In my view, many of the factors which are taken into account when considering a s75 application are relevant in considering a joinder application. Most relevant is whether the allegations as set out in the proposed pleading are 'open and arguable' and supported by the affidavit material filed in support of the application.

58 When considering an application for joinder, and whether the proposed pleading demonstrates an 'open and arguable' case against the background of the factual evidence, the Tribunal is not required to determine the merits of the case before hearing all of the evidence. It is sufficient that I be satisfied that the claims/allegations are not misconceived or hopeless, in much the same way as a consideration of a strike out application.

Is it arguable that the architect is a concurrent wrongdoer?

59 Mr Andrew relies on the decision of the Court of Appeal in *St George Bank Ltd v Quinerts Pty Ltd*[17] in submitting that the architect must have a legal liability to the OCs for the breach of any such duty (which he contends is not owed in any event) for joinder of a respondent as an alleged concurrent wrongdoer. He submitted that the architect cannot owe any legal liability to the OCs: first because the architect does not owe them a duty of care and second, because any claim the OCs may have had against the architect is statute barred by virtue of s134 of the *Building Act 1993.*

60 I have already found that it is arguable that the architect owes the OCs a duty of care, when considering a similar submission on behalf of the architect.

61 Although *Quinerts* was decided in 2009, there have been decisions of this Tribunal and the County Court since, where a person has been found to be a concurrent wrongdoer even though the applicant's claim against them was statute barred. [18] As a determination of this issue will have a significant impact on the application of Part IVAA to proceedings, at least in this Tribunal, it is a matter which, in my view, should be properly determined at the final hearing, after the parties have had an opportunity to make considered submissions.

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[17] [2009] VSCA 245

[18] *Adams v Clark Homes Pty Ltd* supra, *Hiss & Ors v Galea & Ors* [2012] VCC 2010

CONCLUSION

62 I will allow the building surveyor's application and join the architect to the proceeding as the fourth respondent.

DEPUTY PRESIDENT C AIRD