VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST

VCAT REFERENCE NO. BP1591/2017

CATCHWORDS

Domestic building – application for joinder – *Wrongs Act* 1958 – s23B and Part IVAA - joinder considerations

APPLICANTS:	Owners Corporation PS646781P, Subramanyam & Anirudh Vemulpad, Gurmet Singh, David and Loretta Parker, Fenny Yong & Indra Tahumihardja, Kiing Tung Lau & Sie Lim Ting, Joseph Hoi-Tong Fung & Yim Yi Fung, Madumsudan Chhiboo & Rupa Narsi, Joseph Coen, Jeetesh M Chhiboo & Rupa Narsi, Tan Hee Choon & Rupa Narsi, David Miller, Heather Marasco, Amanda Stanley, Judith Coates, Vivien Chen, Diana M Doidge, Janine Lisa Reymers, Ganeshbabu Narsi, Adam Kowalewski
FIRST RESPONDENT:	Verve Constructions Pty Ltd (ACN 132 046 827)
SECOND RESPONDENT:	Crowntex Pty Ltd (ABN 63 136 598 966)
THIRD RESPONDENT:	Danlaid Contracting Pty Ltd (ABN 76 079 777 914)
FOURTH RESPONDENT:	Sonata Tiling Pty Ltd (ACN 162 097 896)
FIFTH RESPONDENT:	Alan Lorenzini
SIXTH RESPONDENT:	A.A. & A.S. Lorenzini Pty Ltd
SEVENTH RESPONDENT:	Hayball Pty Ltd (ABN 84 006 394 261)
EIGHTH RESPONDENT:	Garry Keith Weir
NINTH RESPONDENT:	Sando Razzi
WHERE HELD	Melbourne
BEFORE	Deputy President C Aird
HEARING TYPE	Directions hearing
DATE OF HEARING	2 April 2019
DATE OF ORDER	10 May 2019
CITATION	Owners Corporation PS646781P v Verve Constructions Pty Ltd (Building and Property) [2019] VCAT 642

ORDER

1. Under s60 of the *Victorian Civil and Administrative Tribunal Act 1998* and upon application by the fifth and sixth respondents I join Garry Keith Weir and Sando Razzi both c/- Barry Nilsson Lawyers, Level 6, 600 Bourke Street Melbourne 3000 (tel: 9909 6340, email: Emily.Schneider@bnlaw.com.au, Lachlan.Doran@bnlaw.com.au) as the eighth and ninth respondents respectively.

2. By 15 May 2019 the fifth and sixth respondents must file and serve Points of Defence in substantially the form filed in support of their joinder application excluding paragraphs 34 to 46.

3. By 15 May 2019 the fifth and sixth respondents must file and serve Points of Claim as against the eighth and ninth respondents in substantially the form filed in support of their joinder application excluding all references to "or in the alternative by Weir" in the misleading and deceptive conduct allegations.

4. **The directions hearing listed for 24 September 2019 at 2.15pm at 55 King Street Melbourne is confirmed.**

5. The Tribunal's orders dated 23 April 2019 are confirmed, including the orders made in relation to the eighth and ninth respondents. **I direct the principal registrar to send a copy of those orders to the eighth and ninth respondents with these orders.**

6. Liberty to apply.

7. Costs reserved.

DEPUTY PRESIDENT C AIRD

For the Applicants:	Mr K. Oliver, of Counsel
For the First Respondent:	Mr B. Reid, of Counsel
For the Second Respondent:	Mr E. Bateman, of Counsel
For the Third Respondent:	Ms A. Hawkins, Solicitor
For the Fourth Respondent:	Mr I. Connolly, of Counsel
For the Fifth and Sixth Respondent:	Mr S. Donley, Solicitor
For the Seventh Respondent:	Mr J. Chew, Solicitor
For the Eighth and Ninth Respondents	Mr J Twigg QC

REASONS

1 This proceeding concerns alleged defective works, including the wall cladding, at a five level apartment building (basement carpark and four apartment levels) in Blackburn which was constructed by the first respondent builder. The applicants are the owners corporation ('the OC') which was established upon registration of the plan of subdivision, and a number of individual lot owners.

2 On 29 October 2018 the building surveyor and his company ('the building surveyor') were joined as the fifth and sixth respondents upon application by the first respondent builder – both for the purposes of a proportionate liability defence under Part IVAA of the *Wrongs Act 1958* and to seek contribution under s23B of that Act.

3 The building surveyor has now applied to join Garry Keith Weir ('Weir') and Sandro Razzi ('Razzi') as the eighth and ninth respondents. It is alleged by the building surveyor that Weir and Razzi were partners in a business operating under the name 'Raw Fire Engineering Services ('Raw Fire') which was engaged by the developer to provide fire safety services for the development in May 2011.

4 Mr Donley, solicitor, appeared on behalf of the building surveyor and Mr Twigg QC appeared on behalf of Weir and Razzi; both spoke to written submissions which had been filed prior to the directions hearing.

5 The other parties did not make any submissions in relation to the joinder application.

6 For the reasons which follow I will allow the joinder application with some paragraphs of the proposed Amended Points of Defence struck out.

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.

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]:

> 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 Also, the tendency by many proposed parties in seeking to oppose joinder applications by focussing on pleading nuances is discouraged.

13 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

[1] [2006] VCAT 1604

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.

14 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.[2]

15 As I said in *Thurin v Krongold Constructions (Aust) Pty Ltd*[3]

> 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*[4] 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:

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

> 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.

16 I also note the comments of Hargrave J in *Atkins v Interpract and Crole (No 2)*[5] 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.

17 In *Adams v Clark Homes Pty Ltd*[6] 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*,[7] Associate Justice Evans cited with approval the observations of Pagone J in *Solak v Bank of Western Australia*,[8] 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]

18 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.

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[5] [2008] VSC 99
[6] [2015] VCAT 1658
[7] [2009] VSC 126 at [20].
[8] [2009] VSC 82 at [35].

19 In *Evans v Fynnan Pty Ltd*[9], 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

20 The building surveyor's application for joinder is supported by an affidavit by its solicitor, Stephen Donley, dated 16 January 2019 to which there are a number of exhibits including:

i. a letter dated 24 May 2011 from the building surveyor addressed to 'Garry Weir, Rawfire'

ii. Fee Engineering Proposal ('the Proposal') from Rawfire Fire Safety Engineering which indicates that payments are to be made by Electronic Funds Transfer to Razzi Weir & Associates.

iii. Fire Engineering Report ('the Report') which again refers to it having been issued by Rawfire Fire Safety Engineering.

iv. Current Business Name Extract for Raw Fire Safety Engineering dated 10 January 2019 which shows the business name was registered to Weir and Razzi on 6 June 2016 and that the owner type was 'partnership'

v. ABN lookup which shows that the entity name was the 'Razzi Weir Group Unit Trust', the trading name was 'RAW Fire Safety Engineering', and that the ABN was cancelled from 23 October 2017.

21 Included in the Proposal is a page headed 'Engagement terms and acceptance'; a signed copy of which is included in the copy of the Proposal exhibited to Weir's affidavit. I note that there is no reference to Raw Fire's ABN on this page.

22 The building surveyor alleges in their proposed Points of Defence ('proposed POD') commencing at paragraph 25, that:

i. Weir and Razzi are and were at all material times registered under the *Building Act 1993* as building practitioners under the category 'Engineer- Fire Safety'

ii. carried on business in partnership as fire safety engineers between 6 June 2006 and 23 October 2017 under the business name Raw Fire Services Engineering (as evidenced by a Current Business Name Extract)

iii. Weir and Razzi entered in a contract with the developer for the supply of fire safety engineering services

iv. they are concurrent wrongdoers

[9] [2018] VCAT 1335

v. alternatively, the developer entered into a contract with Razzi Weir & Associates Pty Ltd ('RWA') for the supply of the fire safety engineering services – the FSE Agreement

vi. Weir was a director of RWA between 19 May 2006 and 27 January 2019

vii. if RWA was the contracting party, then Weir, as the person who supplied the services on behalf of RWA is personally liable to the owners.

23 Although it is not necessary, for present purposes, to refer to all of the allegations and particulars of the FSE Agreement relied upon by the building surveyor, and set out in the proposed POD, the following allegations set out in paragraph 38 are relevant:

i. the FSE Agreement contained implied terms that:

a. there was a guarantee that the services would be supplied with due care and skill (implied by s61 of the *Australian Consumer Law* ('the ACL'))

b. that the services would be reasonably fit for the purpose that the developer and/or the building surveyor on behalf of the developer, made known to the alleged fire engineers or in the alternative to RWA (implied by s62 of the ACL)

c. that the building surveyor informed Weir and Razzi, alternatively RWA (in identified written communications) that the particular purposes for which the services were being acquired for the developer were to determine whether the design complied with the applicable BCA provisions concerning fire; and to enable a building permit to be issued for the works

24 The services provided to the building surveyor and/or the developer are set out at paragraph 39.

25 In paragraph 40 it is alleged Weir and Razzi owed a duty of care to the developer to exercise reasonable care and skill when providing the services under the FSE Agreement.

26 In paragraph 41 it is alleged that Weir and Razzi owed a duty of care to the owners to exercise reasonable care and skill when providing the services together with particulars of the owners' vulnerability, and reliance. It is also alleged that Weir and Razzi were required under Regulation 1502 of the *Building Regulations* to supply their services in a competent manner and to a professional standard.

27 The breaches of the alleged duty of care owed to the owners are set out at paragraph 42.

28 At paragraph 43 – 46 similar allegations to those made against Weir and Razzi are made, in the alternative, against Weir only (on the premise that if the contracting party was RWA, he supplied the services).

29 Commencing at paragraph 47 the building surveyor alleges that if the FSE Agreement was with RWA it owed and breached a duty of care to the owners *'to take reasonable care when supplying services under the FSE Agreement to protect the applicants from suffering economic loss caused by defects in the LSE Services'* and relies on the particulars provided to similar allegations made against Weir and Razzi, and Weir.

The position of the proposed parties

30 The application for joinder is opposed by Weir and Razzi who have each sworn affidavits deposing to their business relationship, and exhibiting documents evidencing that relationship. There are 237 pages of exhibits to Razzi's affidavit and 236 pages of exhibits to Weir's affidavit. Weir and Razzi deny that they were carrying on business as a partnership or that they provided the services under the business name Raw Fire. They contend that the FSE Agreement was entered into by RWA which was wound up on 30 June 2017 and deregistered on 27 January 2018.

31 In his affidavit Weir relevantly deposes:

i. The company, RWA, was incorporated on 19 May 2006 ('RWA')

ii. the Razzi Weir Group Unit Trust (the Trust) was settled on 19 May 2006 ('the Trust Deed')

iii. RWA was appointed and remained Trustee of the Trust until the separation of the business in 2016

iv. Weir and Razzi were the unit holders in the Trust, each holding one unit.

v. on 24 May 2008 the relevant ABN was registered to the Razzi Weir Group Unit Trust, trading as RAW Fire Safety Engineering

vi. although the Business Name Extract records that the business name Raw Fire Safety Engineering was registered to Weir and Razzi on 6 June 2006 and the owner type is recorded as 'partnership', that at no time did he and Razzi carry on business as partners under the trading name Raw Fire Services Engineering or otherwise. At all times the business relationship was conducted through the Trust, of which RWA was the Trustee.

Discussion

Relevance of the ABN Lookup Search

32 Weir and Razzi rely on the ABN Lookup Search which reveals that:

- the holder of the relevant ABN was 'Razzi Weir Group Unit Trust
- the trading name was RAW Fire Safety Engineering and
- the ABN was cancelled on 23 October 2017.

33 Weir and Razzi contend that this confirms that the entity conducting the business under the name Raw Fire was the Trust and not the partnership, as alleged. However, a Trust is not a legal entity. There must be a legal entity

which is the trustee for the Trust and details of the trustee are not apparent from the ABN Search.

The ABN on the Proposal and the Report

34 Weir and Razzi also contend that the inclusion of the relevant ABN on the Proposal and the Report in close proximity to the name Raw Fire confirms that the contracting party was the company and not the partnership.

35 Although the copies of the front and back pages of the Proposal exhibited to the affidavits are poor quality, it seems that the ABN is in small type under the Rawfire web address on the back page. This is the only place I can find it in the Proposal. The copies of the Report, which is identified as having been provided by Raw Fire, are also of poor quality and it seems that the ABN may be on the front cover, although I cannot be certain whether or not it is. I have been unable to find any reference to the ABN in the body of either document.

Weir identified as a Director in the Proposal

36 Although Weir is identified as a Director in the proposal, not partner, I am not persuaded this is conclusive of him being a director of a trustee company. It is not unusual for businesses to have positions called 'director' which is not indicative of the incumbent being a director of a company. For instance, there are a number of 'director' positions in the Tribunal, which are simply position titleS.

Relevance of the Current Business Name Extract

37 The Current Business Name Extract shows that Weir and Razzi carried on business as partners under the business name Raw Fire between 6 June 2006 and 23 October 2017. There is no explanation in either of the affidavits by Weir or Razzi as to how the business name came to be registered to them personally, or its cancellation at the time of the dissolution of their business arrangements, including the cancellation of the ABN on the same date as the cancellation of the business name.

The FSE Agreement

38 The FSE Agreement was included in the Proposal. A signed copy has been exhibited by Weir to his affidavit. It clearly shows that payments are to be made by EFT to 'Razzi Weir & Associates'. It is submitted on behalf of Weir and Razzi that this is further evidence of the contracting party being the company. However, there is nothing to indicate that the entity to whom the payments were to be made is a company, or even that it is the contracting party. This is simply the name of the Bank Account. Further, there is no ABN on the FSE Agreement.

Conclusion

39 In my view, nothing in the affidavits or the exhibits demonstrates that the information about Weir and Razzi's business arrangements was or could have been known by the building surveyor at the time Raw Fire was engaged to provide the fire safety services. Although this material might

provide the basis for a defence for each of Weir and Razzi, it is not in my view sufficient to rebut what I am satisfied is an open and arguable case that they were the fire engineers. I note that there is no indication on the fee proposal or the fire report as to the owner of the business name, in the absence of which, and having regard to the Current Business Name Extract, I am satisfied it is arguable that the contract was with them personally and not with the company. Determination of the contracting parties will only be possible after all of the evidence has been considered and tested at the final hearing.

40 Weir and Razzi contend that the proposed pleadings do not include any detail as to how it is proposed to establish the existence of a partnership or how that partnership entered into the contract. I reject the submission that such details are required. In my view it is arguable, and sufficient for the purposes of this joinder application, for the building surveyor to rely on the Current Business Name Extract in the absence of any other information from Weir and Razzi at the time the contract was entered into, including a clear identification in the written documents as to who was entering into the contract with the developer.

IS THE CLAIM AGAINST THE FIRE ENGINEER APPORTIONABLE?

41 There is no dispute that the owners' claim is an apportionable claim, as it is a claim for economic loss. However, the fire engineers, contending the OC owns the wall cladding, submit that in its defence the builder only seeks to apportion the individual owners' claims. I reject this. On my reading of the builder's Points of Defence, the builder is seeking to apportion responsibility for the owners' claim for loss and damage, which includes the OC's claim for loss and damage, noting the OC is the first applicant.

42 In opposing joinder for the purposes of the building surveyor's Part IVAA apportionment defence, much of the fire engineers' submissions are predicated on the proposition that they did not owe a duty of care to the OC, as the owner of the wall cladding. Although Weir and Razzi state in their respective affidavits that it is clear from the Plan of Subdivision that the wall cladding is owned by the OC, in my view, the respective claims of the owners, including whether the individual lot owners have any claims in relation to wall cladding, is a matter to be determined after the final hearing when all of the evidence has been considered.

43 In their written submissions the fire engineers refer to my comments in *LU Simon Builders Pty Ltd v Allianz Australia Insurance Ltd & Ors*[10] where I confirmed that a decision on proportionate liability should not be made until all of the evidence has been heard. Further, the question of whether the parties to be joined are concurrent wrongdoers in the sense that their actions caused the same loss or damage as the other respondents, falls to be determined at trial: *Adams v Clark Homes*[11]

44 The fire engineers also submit that it is novel to suggest that a duty of care is owned by an engineer to an OC in respect of design defects in this regard.

[10] [2013] VCAT 468 at [31-34]
[11] [2015] VCAT 1658 T [72].

The fire engineers seek to rely on *Brookfield Multiplex Ltd v Owners Corporation Strata Plan 61288*[12]. I refer to and repeat my comments in *Owners Corporation 1 PS523454S v L.U Simon Builders Pty Ltd*[13]

> 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*[14] and the decision of the NSW Supreme Court in *The Owners – Strata Plan No 74602 v Brookfield Australia Investments Ltd*[15]. For the purposes of these Reasons only I will refer to these as 'Brookfield Multiplex' and 'Brookfield Investments'.
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> 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.
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> 38. Mr Forrest referred me to *Chan v Acres*[16], where McDougall J held that whether an engineer, engaged to prepare structural drawings and to carry out inspections as requested, owed a duty 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

[12] (2014) 254 CLR 185
[13] [2018] VCAT 987
[14] (2014) 254 CLR 185
[15] [2015] NSWSC 1916
[16] [2015] NSWSC 1885

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.

41. 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*[17] at [11].

45 Further, they submit that the proposed pleading does no more than identify foreseeability and does not identify vulnerability. In paragraph 41 of the proposed APOD the building surveyor pleads:

> 41. The Fire Engineers owed a duty of care to the applicants to exercise reasonable care when supplying services under the FSE Agreement to protect the applicants from suffering economic loss caused by defects in the FSE Services.

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17 [2018] NSWSC 266

Particulars

(a) The Fire Engineers knew, or ought to have known, that the first applicant would be vulnerable to suffering economic loss because it would acquire ownership of the common property upon registration of the plan of subdivision.

(b) The Fire Engineers knew, or ought to have known, that the second to twentieth applicants would be vulnerable to suffering economic loss because in the course of acquiring their private lots they would not:

(i) be provided with a practical opportunity to identify or assess the fire safety defects in the premises; or

(ii) have the necessary expertise to identify or assess fire safety defects in the premises/

(c) The Fire Engineers were required under Regulation 1502 of the *Building Regulations* to supply their services in a competent manner and to a professional standard.

(d) The Fire Engineers knew, or ought to have known, that the applicants would rely on the Fire Engineers to provide the FSE Services in a competent manner and to a professional standard.

46 These proposed pleadings are very similar to those set out by the builder in its Amended Points of Defence dated 8 November 2018 where generally no concerns as to their adequacy was raised by any of the respondents joined upon the builder's application. In any event, I am not persuaded that the vulnerability of the owners including the OC is not pleaded. If the fire engineers require further particulars then they can, of course, request them.

47 The fire engineers submit that *there is no case in which vulnerability had been proven as the determining factor sufficient to establish a duty of care was owed by an engineer to an owners corporation for pure economic loss.*[18] However, they do not refer to any authority to the contrary. As I indicated earlier in these Reasons, the hearing of a joinder application is generally not the time to determine contested questions of law.

48 The fire engineers' submission that the duty allegedly owed by them to the OC is inconsistent with any duty that could be owed to the developer, is also a question of law to be determined following the final hearing. In this regard I note the comments of French CJ in *Brookfield Multiplex* at [] where he said at [39]:

> … There is no reason to regard the existence, or non-existence, of an anterior duty of care to a prior owner as more than an important factor relevant to the existence of a duty of care in respect of pure economic loss to a subsequent purchaser.

49 Similarly, their submission as to the meaning and effect of clause 8(c) of the ACEA Guidelines Terms and Conditions which they say was incorporated into the proposal, which they contend discharges the fire

[18] Fire engineers' written submissions at [62]

engineers from liability to the developer from 2015, is a matter to be determined following the final hearing.

Is it arguable that the OC suffered economic loss?

50 The fire engineers submit that the OC cannot have suffered any pure economic loss because they did not acquire the common property for value, and again rely on the reasoning in *Brookfield Multiplex.* I note that the OC's claim for the cost of rectification of the alleged defective wall cladding appears to fall squarely within s24AF(1) which provides that Part IVAA applies to a *claim for economic loss or damage to property.* As is apparent from a careful consideration of *Brookfield Multiplex* the High Court in determining the builder (not the architect or another building professional) did not owe a duty of care to the subsequent owners, including the owners corporation, had regard to the specific terms of the building contract and the sales contracts. That the development in *Brookfield Multiplex* was mixed used restaurant, retail, serviced and private apartments may also be relevant in considering its broader application.

51 In this respect I note the comments of French CJ in *Brookfield Multiplex* at [23]:

> … the point should be made that there are special features of the present case, generated by the contractual and statutory matrix in which the duty of care is asserted, that give it an element of novelty not overcome by a straightforward application of precedent.

Allegations that Weir, personally, is a concurrent wrongdoer

52 At paragraph 43 the building surveyor alleges that *in the alternative [to the services being provided by Weir and Razzi] the FSE Services were provided by Weir on behalf of RWA P/L to the Developer.*

53 At paragraph 44 it pleads, in the alternative, that Weir owed the duty of care to the developer, and at paragraph 45 to the owners.

54 However, nowhere does the building surveyor set out the basis upon which Weir personally owed the owners a duty of care for work carried out on behalf of the company. Further, I was not referred to any authorities supporting this allegation, and note there have been a number of decisions of this Tribunal determining that a director, when carrying out work on behalf of a contracting company, does not independently owe a duty of care.[19]

55 As Senior Member Lothian said in *Luo & Anor v Reynson Concepts Pty Ltd*[20]

> 13. There is little doubt that Mr Ferguson and Mr Armstrong provide the hands and minds that did the work for Reynson, and it is possible that either or both could have a duty to the Applicants separate from that of Reynson, but this has not been

[19] G Rocca Pty Ltd v Timetrex Pty Ltd (Building and Property) [2017] VCAT 261
[20] [2009] VCAT 139

pleaded. As Senior Member Walker said in *Korfiatis v Tremaine Developments Pty Ltd* [2008] VCAT 403 at [46]:

> What [the director] is said to have done would suggest nothing more than his acting as an employee and director of [the company]. It is not suggested that he had any independent arrangement or agreement with any of the Applicants or undertook any personal responsibility directly to them. His actions did not extend beyond the contractual obligations that [the company] assumed by entering into the building contract. This is not sufficient to show an assumption by [the director] of any duty of care to the Applicants or to any of them.

14. In accordance with Korfiatis and for the reasons I gave in *Rosenthal Munckton & Shields Pty Ltd v McGregor* [2005] VCAT 1702 I am satisfied that the Applicants have not pleaded a duty of care and a breach of that duty sufficient to enable them to recover against either Mr Ferguson or Mr Armstrong.

56 Accordingly, I am not persuaded that the allegations in paragraphs 34 to 46 of the building surveyor's proposed POD are arguable, and when filing the Points of Defence these paragraphs must not be included.

Claim for contribution under s23B

57 The building surveyor also makes a claim for contribution against the architect and the fire engineers, in the event the apportionment defence is not successful. This claim is made under s23B of the *Wrongs* Act. The building surveyor has filed proposed Points of Claim ('proposed POC') in support of this application.

58 In my view, in circumstances where the building surveyor could simply commence separate proceedings against each of these respondents, unless the claims are so obviously hopeless and lacking in substance, there is no reason to refuse leave to file and serve the contribution claim, and leave should be granted to join them for the purposes of the s23B claims.

59 Neither the builder nor the architect made any submissions about the s23B claim.

60 Section 23B relevantly provides:

> (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.
>
> …

61 Having considered the allegations against the builder at paragraphs 9-13, and against the architect at paragraphs 14-18 of the proposed POC I am satisfied they disclose an open and arguable case that the builder and the architect are liable to pay the building surveyor contribution in the event the Part IVAA apportionment defence is unsuccessful;

Misleading and Deceptive Conduct

Are the allegations of misleading and deceptive conduct against Weir open and arguable?

62 A number of allegations are made against the fire engineers and Weir, personally, on behalf of RWA Pty Ltd. These commence at paragraph 23 of the proposed POC, and refer to four alleged representations. In paragraph 31 the building surveyor alleges that each of the representations were made by the fire engineers, or in the alternative by Weir on behalf of RWA Pty Ltd.

63 After setting out details of the alleged misleading and deceptive conduct, the building surveyor pleads at paragraph 40 under the heading 'ACL Damages' that *The Fire Engineers, or in the alternative Weir, are liable to pay damages to Lorenzini (the building surveyor) under section 236 of the Australian Consumer Law*. However, there are no pleadings setting out how Weir is liable for the alleged misleading and deceptive conduct. It is not enough to simply make the allegations; they need to be supported.

64 I am therefore not persuaded that the allegations against Weir are open and arguable and accordingly, when filing the s23B Points of Claim, all references to *or in the alternative Weir* must be removed from all allegations concerning the alleged misleading and deceptive conduct by the fire engineers.

The fire engineers' contention that the misleading and deceptive conduct is statute barred

65 The fire engineers contend that that any liability for misleading and deceptive conduct must have arisen when the second stage building permit was issued in in June 2012 so the claim for contribution is more than a year after the limitations period expired. However, in my view, this is a defence, and irrespective of what has been decided in other cases, noting I was referred to a number of authorities, these do not determine when the cause of action for misleading and deceptive conduct arose in the circumstances of this proceeding. That cannot be determined until the evidence has been heard and considered following the final hearing.

66 In this regard, I note the comments of Ginnane J in *Baker v Culvenor*[21], which although concerned with an appeal from a decision from the Tribunal on a summary dismissal application under s75 of the VCAT Act is, in my view, equally relevant when considering a joinder application:

> 31. …The approach to be adopted on a summary dismissal application was stated in the High Court decision in *Wardley Australia Ltd v Western Australia*,[22] which concerned a claim for damages under the *Trade Practices Act 1974*, in the following terms:
>
> > We should, however, state in the plainest of terms that we regard it as undesirable that limitation questions of the kind under consideration should be decided in interlocutory proceedings in advance of the hearing of the action, except in the clearest of cases. Generally speaking, in such proceedings, insufficient is known of the damage sustained by the plaintiff and of the circumstances in which it was sustained to justify a confident answer to the question.[23]
>
> 32. This statement of principle can be applied to summary judgment applications made under s 75 of the VCAT Act, whether the limitation provision relied on is contained in the Limitation of Actions Act or the Fair Trading Act.
>
> …
>
> 34. …Rather a limitation period provides a defence and must be pleaded, or in the Tribunal expressly relied on, before it can defeat a claim. It does not prohibit a person from issuing civil proceedings.[24]

CONCLUSION

67 Accordingly, I will allow the building surveyor's application and join the fire engineers as the eighth and ninth respondents.

DEPUTY PRESIDENT C. AIRD

[21] [2019] VSC 224
[22] (1992) 175 CLR 514.
[23] Ibid 533 (Mason CJ, Dawson, Gaudron and McHugh JJ).
[24] *Pullen v Gutteridge Haskins & Davey Pty Ltd* [1993] 1 VR 27 at 75; Peter Handford, *Limitation of Actions Laws of Australia* (Thomson Reuter, 4th ed, 2017) 377-8 ('*Hanford*').