

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST

VCAT REFERENCE NO. BP528/2014

CATCHWORDS

Application for joinder for the purposes of Part IVAA of the *Wrongs Act 1958* – failure to articulate defence that the proposed parties are concurrent wrongdoers – whether particulars of defence for purposes of apportionment are clear – application refused

APPLICANTS	Vince Sartor & Sandra Sartor
FIRST RESPONDENT	George Theos
SECOND RESPONDENT	BCG (Aust) Pty Ltd (ACN 114 332 017)
THIRD RESPONDENT	Blagojce Romanovski
WHERE HELD	Melbourne
BEFORE	Deputy President C Aird
HEARING TYPE	Directions hearing
DATE OF HEARING	21 July 2015
DATE OF ORDER	26 August 2015
CITATION	Sartor v Theos (Building and Property) [2015] VCAT 1312

ORDER

1. The application by the second and third respondents to join the proposed fourth and fifth respondents as parties to the proceeding is refused.
2. By 21 September 2015 or such later date as may be ordered the second and third respondents may renew the application for joinder by filing and serving further proposed draft Points of Defence and advising the principal registrar, the first respondent and the proposed fourth and fifth respondent in writing of their intention to do so.
3. **This proceeding is listed for a directions hearing before any member on 17 September 2015 at 12noon at 55 King Street Melbourne to hear any renewed application for joinder and make directions for its further conduct – allow 1 hour.**
4. Costs reserved with liberty to apply. **I direct the principal registrar to list any application for costs for hearing before Deputy President Aird after 5 November 2015.**

5. **I direct the principal registrar to send a copy of these orders to Collins Bigger & Paisley, Lawyers (Attention: Ms A Goricanec), GPO Box 4542, Melbourne 3001 (solicitors for the proposed fourth respondent) and HWL Ebsworth Lawyers (Attention: Ben Hall) 530 Collins Street Melbourne (solicitors for the proposed fifth respondent).**
6. Liberty to apply.
7. Costs reserved.

DEPUTY PRESIDENT C AIRD

APPEARANCES:

For Applicants	Mr N Phillipott. solicitor
For First Respondent	No appearance
For Second Respondent	Mr T Sedal of Counsel
For Third Respondent	Mr T Sedal of Counsel
For proposed Fourth Respondent	Ms A Goricanec, solicitor
For proposed Fifth Respondent	Mr B Hall, solicitor

REASONS

- 1 The applicant owners ('the Sartors') purchased their home in Mernda from the first respondent owner-builder ('Theos') in 2010. They commenced this proceeding on 20 October 2014 claiming \$234,445.00 for the rectification of alleged defects. Theos and the second respondent (which provides building surveying services under the name 'Checkpoint Building Surveyors') ('Checkpoint') were the named respondents in the Application when it was filed. On 25 March 2015 the third respondent ('Romanovski') was joined as a party to the proceeding upon application by the Sartors. Romanovski is a registered building practitioner under the category of building surveyor unlimited.
- 2 On 8 July 2015 Checkpoint and Romanovski filed an Application for Directions Hearing or Orders seeking orders for the joinder of two further parties to the proceeding, for the purposes of apportionment under Part IVAA of the *Wrongs Act 1958*. The application was accompanied by an affidavit in support by their solicitor, Karolina Marija Juric dated 7 July 2015, and draft 'Defence of Second Respondent and Third Respondent to the Applicant's Substituted Points of Claim' ('draft POD').
- 3 Mr Sedal of Counsel appeared on behalf of Checkpoint and Romanovski. Ms Goricanec, solicitor, who appeared on behalf of the proposed fourth respondent indicated at the commencement of the directions hearing that her client neither opposed nor consented to being joined as a party. Mr Hall, solicitor, who appeared on behalf of Mr Biviano, the proposed fifth respondent indicated that his client opposed the application. Mr Phillpott, solicitor, who appeared on behalf of the Sartors made some brief oral submissions.

THE APPLICATION FOR JOINDER

- 4 The tribunal's power to join parties to a proceeding is found in s60 of the *Victorian Civil and Administrative Tribunal Act 1998* which provides:
 - (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.
- 5 In considering an application for joinder I am not required to determine the issues, rather I am simply required to have regard to the various matters set out in s60 of the VCAT Act. The broad scope of the tribunal's powers

under s60 were considered in *Zervos v Perpetual Nominees Limited*¹ where Cummins J said at [11]:

Whether it [the allegation] is sustained in the end is a matter for trial. The application for joinder is not an application for summary judgment and whilst I agree with Mr Herskope that the test is higher than that apposite to a mere pleading matter because it involves joinder of a party, on the other hand Mr Frenkel is entirely right that the bar is set lower than on an application for summary judgment.

6 In considering an application for joinder for the purposes of apportionment it is necessary to have regard to Part IVAA of the *Wrongs Act*. The following sections are relevant to this application.

7 Section 24AF(1) of the *Wrongs Act* provides:

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;

8 Section 24AH provides:

- (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.

9 Section 24AI provides:

- (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.

10 Applications for joinder for the purposes of Part IVAA have their own peculiarities. The observations of Middleton J in *Dartberg Pty Ltd v Wealthcare Financial Planning Pty Ltd*² are pertinent. Whilst finding that Part IVAA did not apply to the particular circumstances of that case, his Honour made the following observations about its operation:

30. ... Where a claim brought by an applicant does not have as one of its necessary elements any allegation of failing to take reasonable care, an additional enquiry into the failure to take reasonable care

¹ [2005] VSC 380

² [2007] FCA 1216 (10 August 2007)

may become relevant in the course of a trial to determine the application of Pt IVAA. Even though the claims in this proceeding themselves do not rely upon any plea of negligence or a "failure to take reasonable care" in a strict sense, a failure to take reasonable care may form part of the allegations or the evidence that is tendered in the proceedings. At the end of the trial, after hearing all the evidence, it may be found that Pt IVAA applies.

31. In these circumstances, where a respondent desires to rely upon Pt IVAA of the Wrongs Act, it will need to plead and prove each of the statutory elements, including the failure to take reasonable care. In a proceeding where the applicant does not rely upon any such failure, then the need for a particularised plea by a respondent may be particularly important for the proper case management of the proceedings: see eg *Ucak v Avante Developments Pty Ltd* [2007] NSWSC 367 at [41]. It would be desirable at an early stage of proceedings for a respondent to put forward the facts upon which it relies in support of the allocation of responsibility it contends should be ordered. If a respondent calls in aid the benefit of the limitation on liability provided for in Pt IVAA of the Wrongs Act, then the respondent has the onus of pleading and proving the required elements. The court, after hearing all the evidence, will then need to determine, as a matter of fact, whether the relevant claim brought by the applicant is a claim arising from a failure to take reasonable care. [underlining added]
- 11 In 2013, in *Hunt & Hunt Lawyers v Mitchell Morgan Nominees Pty Ltd & Ors*³ the High Court established that in determining whether persons are concurrent wrongdoers there are two questions to be answered:
 - (i) What is the loss or damage that is the subject of the claim? and
 - (ii) Is there a person, other than the defendant, whose acts or omissions also caused that damage or loss?
- 12 The loss and damage claimed by the Sartors is the cost of rectifying the alleged defects in the sum of \$234,445.00 plus \$5,000.00 for *loss, amenity, use and enjoyment of a home and inconvenience*. Therefore, in considering this application I need only be satisfied, on the material before me, that the draft POD demonstrate an *open and arguable* Part IVAA defence; in other words that the proposed fourth and fifth respondents caused part or all of the loss and damage claimed by the Sartors (if proven).

THE OWNERS' CLAIMS

- 13 The owners' claims are set out in Substituted Points of Claim dated 4 February 2015 ('the SPOC').

³ [2013] HCA 10

The claim against Checkpoint

14 First, the owners allege that Checkpoint breached its contract with Theos and, then at paragraph 20 of the SPOC plead that it owed a duty of care to them, as subsequent owners, *to provide the building consultancy services the subject of the Retainer with the care and skill of a reasonable provider of building surveying services in the profession.*

15 The alleged breaches of the duty of care are set out in paragraph 23. In clause C of the Particulars to paragraph 23 the Sartors plead:

...Checkpoint issued the Building Permit negligently by permitting the construction of the Domestic Dwelling as set forth in the Architectural Drawings and the Engineering Drawings which were flawed, deficient, incomplete and included design elements which did not comply with all laws including the Act and the regulations to the Act. Examples include ⁴].

16 Clause E of the Particulars to paragraph 18 is relevant:

...Checkpoint did not arrange for [Romanovski] to inspect or cause to be inspected the frame of the Domestic Dwelling constructed by Theos notwithstanding that completion of the frame was stated in the Building Permit as a mandatory inspection stage.

And at clause F:

Checkpoint did not arrange for [Romanovski] to cause the construction of the Domestic Dwelling to be inspected properly or at all during the course of the construction or at any mandatory stages...There were numerous instances of defective or non-compliant works performed which should have resulted in a direction or order being issued by [Romanovski] pursuant to Part 8 of the Act. For example [55 items of alleged defective or non-compliant works are set out in sub clauses (a) to (ccc) again cross referenced to the two expert reports referred to above].

Further particulars are set out in clauses G to J of the Particulars.

17 At paragraph 23 the Sartors plead that as a result of Checkpoint's alleged breaches of contract with Theos and the duty of care which they say Checkpoint owed to them as subsequent owners, that they have suffered loss and damage. I making no finding as to whether Checkpoint owed the Sartors a duty of care, but am satisfied it is arguable it did. As their primary claim for loss and damage is the cost of rectification of the alleged defects, I am satisfied that it is arguable that the Sartors' claim against it is an apportionable claim for the purposes of s24AF(1).

⁴ 19 alleged deficiencies are set out, cross referenced to a page number in one of two expert reports relied upon by the Sartors: a report of Roland Black & Associates dated 30 July 2014 and another by JWB & Associates dated 8 October 2014

Claims against Romanovski

- 18 In paragraph 25 and 26 the Sartors allege that Romanovski accepted the appointment as a private building surveyor in relation to the construction of the home in or about April 2007, and that he owed a statutory duty to them *to perform the functions of the private building surveyor in a competent manner and to a professional standard*. In the Particulars they plead that this duty arises from regulation 1502 of the *Building Regulations 2006*.
- 19 Details of the Sartors alleged vulnerability and the foreseeability of such vulnerability are set out in paragraphs 26 and 27, and at paragraph 28 it is alleged that Romanovski therefore owed them a duty of care *to perform the functions of a private building surveyor in accordance with the Act and with the care and skill of a reasonable private building surveyor in the profession*.
- 20 In paragraph 31 the Sartors allege that Romanovski *performed the functions of private building surveyor negligently and contrary to his statutory duty and the care and skill of a private building surveyor in the profession*.
- 21 The Particulars to paragraph 31 are relevant:
- A. [Romanovski] permitted a person other than the relevant building surveyor appointed pursuant to the Act to issue the Building Permit...
 - B. Further if the Building Permit was valid and legitimate (which is denied) [Romanovski] issued the Building Permit negligently by failing to identify the drawings or documents that had been approved when issuing the Building Permit;
 - C. Further if the Building Permit was valid and legitimate (which is denied), the Building Permit permitted construction of the Domestic Dwelling as set forth in the Architectural Drawings and the Engineering Drawings which were flawed, deficient, incomplete and included design elements which did not comply with all laws including the Act and the regulations to the Act. Examples are referred to in paragraph C of the particulars to paragraph 23 herein.
 - D. ...
 - E. If the Building Permit was valid and legitimate (which is denied), [Romanovski] did not inspect or cause to be inspected the frame of the Domestic Dwelling constructed by Theos notwithstanding that completion of the frame was stated in the Building Permit as a mandatory inspection stage.
- 22 At paragraph 27 the Sartors allege that as a result of Romanovski's alleged breach of the duty of care which they say he owed to them as subsequent owners, that they have suffered loss and damage. I making no finding as to whether Romanovski owed the Sartors a duty of care, but am satisfied it is arguable it did. As their primary claim for loss and damage is the cost of rectification of the alleged defects, I am satisfied that it is arguable that the

Sartors' claim against Romanovski is an apportionable claim for the purposes of s24AF(1).

THE APPLICATION TO JOIN PTL ENGINEERING

- 23 Checkpoint and Romanovski plead at paragraph 44 of the proposed POD that Lamicon Proprietary Limited trading as P.T.L. Engineering Services ('PTL') was engaged by Theos to:
- (a) prepare a structural design and computations for the construction of the home; and
 - (b) procure the issuing of a Certificate of Compliance – Design in relation to the design.
- 24 In my view the draft pleadings are difficult to follow, and seem to me to confuse a pleading supporting a claim for contribution and indemnity, although no such claim is made here, and a defence seeking to rely on Part IVAA.

Whether it is alleged that PTL is a concurrent wrongdoer

- 25 As Checkpoint and Romanovski have applied to join PTL as a party for the purposes of an apportionment defence under Part IVAA it is necessary to consider whether they have demonstrated in the draft POD that PTL is a concurrent wrongdoer. Section 24AI allows for apportionment of responsibility between concurrent wrongdoers which are defined in s24AH as *one of 2 or more persons whose acts or omissions caused...the loss or damage that is the subject of the claim.*
- 26 At paragraphs 45 and 46 of the draft POD Checkpoint and Romanovski plead:
- 45. Further, if the Second and/or Third Respondent is liable to the Applicants (which is denied) it was reasonably foreseeable that if the Fifth Respondent failed to take reasonable care and/or exercise reasonable skill in performing the Engineering Services, subsequent owners of the Proposed Building such as the Applicants might suffer loss and damage.
 - 46. Further, if (which is denied) the Applicants were vulnerable as alleged in paragraphs 19(b) and 27(b) of the Applicants' Substituted Points of Claim and the particulars thereto, the Applicants were similarly vulnerable in respect of the performance of the Engineering Services by the Fifth Respondent.
 - 47. Further, if (which is denied) the Applicants relied on the Second Respondent, as alleged in paragraphs 19(c) of the Applicants' Substituted Points of Claim and the particulars thereto, and/or the Applicants relied upon the Third Respondent, as alleged in paragraph 27(c) of the Applicants' Substituted Points of Claim and the particulars thereto, the Applicants similarly relied upon

the Fifth Respondent to perform the Engineering Services with reasonable care and skill.

48. By reason of the matters aforesaid, if the Second and/or Third Respondent owed a duty of care to the Applicants to prevent the loss and damaged claimed by the Applicants in this proceeding (which is denied), the Fifth Respondent owed a duty of care to the Applicants to prevent the loss and damage claimed by the Applicants in this proceeding.

Discussion

- 27 Mr Hall submitted that it would be a denial of natural justice to join PRL as a party to the proceeding, until the claims against it are properly particularised. I agree.
- 28 Curiously, there is no allegation that Checkpoint and/or Romanovski and PTL are concurrent wrongdoers. A respondent can only rely on a proportionate liability defence where it contends that, if it is liable at all to an applicant, it is a concurrent wrongdoer with one or more other persons.
- 29 Here, it seems that Checkpoint and/or Romanovski are alleging that if they owed a duty of care to the owners, PTL similarly owed a duty of care. There is no allegation that PTL owed an independent duty of care to subsequent owners of the property or how it is alleged that it breached any such duty of care. Rather there are simply some bald assertions in paragraph 49 that:

Further, if the documents prepared by the Fifth Respondent were *'flawed, deficient, incomplete and included design elements which did not comply with all laws including the Act and the regulations to the Act'* as alleged at paragraph C of the particulars to paragraph 23 of the Applicants' Substituted Points of Claim (which is not admitted) the Fifth Respondent failed to perform the Engineering Services with reasonable care and skill.

There are no particulars as to how, if the documents prepared by PTL are 'flawed' that PTL caused the loss and damage claimed by the Sartors. An essential ingredient in any defence seeking to rely on Part IVAA is for 'the defending respondent' to clearly plead how it is said the alleged concurrent wrongdoers caused the loss and damage claimed by the applicant.

- 30 In *Hunt v Hunt* their Honours said at [53]

...it is not a requirement of proportionate liability that the actions of one independent concurrent wrongdoer contribute to the negligence of another. The question is whether each of them, separately, materially contributed to the loss or damage suffered.

- 31 Further, in circumstances where Part IVAA contemplates apportionment of responsibility amongst concurrent wrongdoers, it is important that an applicant understand the claim the 'joining' respondent alleges it has

against the alleged concurrent wrongdoer so that it can decide whether or not to make a separate claim to protect its interests in the event responsibility is apportioned. As I said in *Brady Constructions Pty Ltd v Andrew Lingard & Associates Pty Ltd and Ors*⁵:

19. Part IVAA enables a respondent to take steps to reduce its potential liability to an applicant. It would, in my view, add unnecessarily to the complexity of proceedings if an applicant was required to do anything more than seek relief in the event that a respondent satisfied the tribunal that responsibility should be apportioned and its liability thereby reduced. Why, I ask myself, should an applicant be put to the cost and expense of preparing a case against a party which it had no part in taking proceedings against? It might be said that if it wants the benefit of that party being joined to the proceeding it should plead out its case, but that seems to me to be grossly unfair in relation to a situation it finds itself in because of legislation which is there for the benefit of respondents. Let the respondent who wishes to minimise its potential liability incur the costs of pleading and proving the case against the joined respondents.

...

- 20 Further s24AH (1) relevantly provides:

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 (emphasis added).

... In *Reinhold v New South Wales Lotteries Corporation [No 2]* [2008] NSWSC 187 when considering the operation of Part 4 of the *Civil Liability Act* which is in similar terms to Part IVAA, Barrett J made the following observations:

32. The provisions of Part 4 are compulsory. They change substantive rights, so that a plaintiff's ability to obtain an adjudication of joint and several liability is removed where the circumstances are of the type to which the alternative regime of proportionate liability is applied. A case no doubt needs to be pleaded and proved by one or more defendants so as to engage the statutory provisions. But it will be the findings ultimately made that determine whether the statutory conditions compelling the court to adopt the proportionate approach are satisfied. (emphasis added)

- 32 I am fortified in my view that this is the approach to be taken by a respondent seeking to rely on Part IVAA by the comments by the majority in *Hunt & Hunt* at [10] where their Honours said:

...under a regime of proportionate liability, liability is apportioned to each wrongdoer according to the court's assessment of the extent of their responsibility. It is therefore necessary that the plaintiff sue all

⁵ [2008] VCAT 851

of the wrongdoers in order to recover the total loss and, of course, the risk that one of them may be insolvent shifts to the plaintiff.

- 33 When discussing the operation of the proportionate liability provisions under the *Civil Liability Act 2002 (NSW)* their Honours said at [18]:

...Section 34(1A) [which is substantially the same as s24AI] provides that there is a single apportionable claim in proceedings in respect of the same loss or damage even if the claim for the loss or damage is based on more than one cause of action, whether of the same or a different kind. There is no express limitation on the nature of the claim which might have been brought by the plaintiff against a concurrent wrongdoer, except the requirement of s 34(2) that the acts or omissions of all concurrent wrongdoers have caused the damage in question. [underlining added]

- 34 I am not satisfied that the draft POD disclose an arguable defence under Part IVAA and accordingly, the application to join PTL as a respondent to take advantage of the proportionate liability regime will be refused.

THE APPLICATION TO JOIN BIVIANO

- 35 As noted above, the solicitor who appeared on behalf of Biviano indicated that the application for joinder was neither consented to nor opposed. However, the draft pleadings suffer from the same limitations as those against PTL, and accordingly, I am not satisfied he should be joined until the claim against him is clearly articulated and particularized.

SHOULD PTL AND BIVIANO BE OTHERWISE JOINED UNDER S60 OF THE VCAT ACT?

- 36 Mr Sedal submitted that in any event PTL and Biviano should be joined as parties under s60 of the VCAT Act as persons whose interests were affected by this proceeding, and who ought to be bound by and have the benefit of the decision. However, in circumstances where Checkpoint and Romanovski have applied to join PTL solely for the purposes of a Part IVAA defence, I am not persuaded they should otherwise be joined as parties.

- 37 As Walker SM said in *Snowden Developments Pty Ltd v Actpen*⁶

21. ...it is a serious matter to join a party to a substantial building dispute. Not only will that party incur substantial expense in defending the proceeding but it will also prolong the proceeding for other parties and consequently, increase the expense of the litigation.

CONCLUSION

- 38 The application for joinder will therefore be refused. However, I will grant Checkpoint and Romanovski leave to make renew their application to be

⁶ [2005] VCAT 2910

accompanied by further draft POD taking into account the observations I have made. I will also reserve the question of costs with liberty to apply.

DEPUTY PRESIDENT C AIRD