VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST VCAT REFERENCE NO. BP619/2017

CATCHWORDS

Domestic Building – s75 – *Victorian Civil and Administrative Tribunal Act 1998* – whether claim for contribution under s23B of the *Wrongs Act 1958* arguable

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 August 2019
DATE OF ORDER	23 September 2019
CITATION	Owners Corporation 1 PS538430Y v H Building Pty Ltd (Under external administration) and Ors (Building and Property) [2019] VCAT 1485

ORDERS

1. The fourth respondent's application under s75 of the *Victorian Civil and Administrative Tribunal Act 1998* is dismissed.

2. Costs reserved. **I direct the principal registrar to refer any application for costs to Deputy President Aird so that orders may be made for its hearing and determination.**

DEPUTY PRESIDENT C AIRD

APPEARANCES:

For Second and Third Respondents	Mr J M Forrest of Counsel
For Fourth Respondent	Mr D A Klempfner of Counsel

Note: Other parties were excused from attending.

REASONS

1 On 10 May 2019 I joined the architect as the fourth respondent to this and the related proceedings commenced by individual lot owners, upon the application of the second and third respondent building surveyor[1] ('the Joinder Reasons') for the purposes of a defence under Part IVAA of the *Wrongs Act 1958* ('the Wrongs Act') and for contribution and indemnity claims under s23B of that Act ('the contribution claims'). The architect filed an Application for Directions Hearing or Orders dated 29 May 2019 seeking orders under s75 of the *Victorian Civil and Administrative Tribunal Act 1998* ('the VCAT Act') that the contribution claim be summarily dismissed.

2 The architect relies on affidavits by its solicitor Sarah Metcalfe dated 28 May 2019 and 20 August 2019; its Outline of Submissions dated 28 June 2019, and its reply Submissions dated 6 August 2019. The building surveyor relies on an affidavit by its solicitor Heidi Edwards dated 12 July 2019 and its Outline of Submissions dated 12 July 2018. Mr Klempfner of Counsel appeared on behalf of the architect, and Mr Forrest of Counsel appeared on behalf of the building surveyors. The other parties were excused from attending the directions hearing.

3 It is surprising that this application was made so soon after the architect was joined to the proceeding. The threshold for joinder is low – the Tribunal simply needing to be satisfied that a claim against a proposed party, or an allegation that the proposed party is a concurrent wrongdoer for the purposes of a Part IVAA defence, is arguable. Conversely, as a similar test applies when considering a s75 application, there is a high hurdle to be overcome to persuade the Tribunal that a claim or a Part IVAA defence is not arguable. I am not persuaded that there has been any material change since I allowed the building surveyor's joinder application which would cause me to revise my earlier view that the building surveyor's claim for contribution from the architect is arguable.

4 It must always be remembered that the Tribunal is not a court of pleadings, and that so long as a claim or a defence are clear from the pleadings or proposed pleadings, s97 of the VCAT Act requires the Tribunal to deal with matters with as little formality as possible.

5 For the Reasons which follow (which apply to this proceeding and the related proceedings) the architect's application will be dismissed.

[1] *Owners Corporation 1 PS538430Y v H Building Pty Ltd (ACN 091 236 912) (under external administration)* [2019] VCAT 680

SECTION 75

6 I have previously set out the principles to be applied in considering a s75 application[2] and I restate them here.

7 Section 75 of the VCAT Act provides:

> (1) At any time, the Tribunal may make an order summarily dismissing or striking out all, or any part, of a proceeding that, in its opinion—
>
> (a) is frivolous, vexatious, misconceived or lacking in substance; or
>
> (b) is otherwise an abuse of process.
>
> (2) If the Tribunal makes an order under sub-section (1), it may order the applicant to pay any other party an amount to compensate that party for any costs, expenses, loss, inconvenience and embarrassment resulting from the proceeding.
>
> …
>
> (5) For the purposes of this Act, the question whether or not an application is frivolous, vexatious, misconceived or lacking in substance or is otherwise an abuse of process is a question of law.

8 The power under s75 is discretionary. It is well established that any exercise of this discretion must be approached with caution, noting that the hurdle to be overcome by a party making an application under s75 is very high. As Judge Bowman said in *Arrow International Australia Pty Ltd v Indevelco Pty Ltd*[3] at [32 and 34]:

> 31. There have been a number of decisions of the courts generally and of this Tribunal in relation to the principles which operate when applying a provision such as S.75 of the Act. In relation to this Tribunal, these were summarised by Deputy President McKenzie in *Norman v Australian Red Cross Society* (1998) 14 VAR 243. One such principle is that, <u>for a dismissal or strike out application to succeed, the proceeding must be obviously hopeless, obviously unsustainable in fact or in law, on no reasonable view justify relief, or be bound to fail</u>. This is consistent with the approach adopted by the courts over the years. As was stated by Dixon J in *Dey v Victorian Railways Commissioners* (1949) 78 CLR 62:-
>
> > "The application is really made to the inherent jurisdiction of the court to stop the abuse of its process when it is employed for groundless claims. The principles upon which that jurisdiction is exercisable are well settled. A case must be very clear indeed to justify the summary intervention of the court to prevent a

[2] *Owners Corporation PS No. 1 PS 519798G v May* [2016] VCAT 399; *Owners Corporation PS 542601Y v Phenix Holdings Pty Ltd* [2017] VCAT 1235;
[3] [2005] VCAT 306

> plaintiff submitting his case for determination in the appointed manner by the court …".
>
> …
>
> 34. Whether or not a burden of proof in the strict sense exists in proceedings before this Tribunal, I am also of the view that the party making an application such as this is required to induce in my mind a state of satisfaction that the claim is obviously hopeless, unsustainable, and bound to fail, and that it is "very clear indeed" that this is so. [emphasis added]

9 Justice Garde in considering a s75 application in *Owners Corporation No. 1 PS537642N v Hickory Group Pty Ltd*[4] considered recent authorities:

> 8. In *Forrester v AIMS Corporation*, Kaye J considered the principles applicable to s 75(1) applications. Before a proceeding can be summarily dismissed:
>
> (a) it must be 'very clear indeed' that the action is 'absolutely hopeless'; or
>
> (b) the action must be 'so clearly untenable that it cannot possibly succeed'.
>
> Kaye J also held that:
>
> (c) the strike out power 'may not be invoked where all that is shown is that, on the material currently put before the Tribunal, the complainant may fail to adduce evidence substantiating an essential element of the complaint'; and
>
> (d) the respondent to a complaint has the onus of showing 'that the complaint is undoubtedly hopeless'.
>
> 9 In *Ausecon Developments Pty Ltd v Kamil*, Judge Davis noted that for a strike out application to be successful, the proceeding must:
>
> … must be obviously unsustainable in fact or in law, can on no reasonable view justify relief, or must be bound to fail. A claim would be regarded as frivolous or vexatious or misconceived if it is obviously groundless, made by a person without standing, or in respect of a matter which lies outside the VCAT's jurisdiction. A claim may be regarded as lacking in substance if an applicant cannot possibly succeed in establishing its claim, or the respondent has a complete defence. The power to strike out should be exercised with great caution.
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> 10 In *Fancourt v Mercantile Credits Pty Ltd* ('Fancourt'), the High Court held that:
>
> … the power to order summary or final judgment is one that should be exercised with great care and should never be exercised unless it is clear that there is no real question to be tried.

[4] [2015] VCAT 1683

> 11 In *Lay v Alliswell Pty Ltd*, Balmford J accepted that the High Court's observations in *Fancourt* are applicable to applications under s 75 of the VCAT Act.
>
> [citations omitted]

10 Further, and relevantly in the circumstances of this proceeding, in *Smeaton v WorkSafe Victoria*[5] the Tribunal said at [18]

> …no summary dismissal … should be made in a case where there is any doubt as to the arguable nature of a claim. If a claim is at all arguable it should not be met with summary dismissal … in effect nothing should be summarily dismissed unless it is conclusively shown that it is doomed to fail.

THE APPLICATION

11 The architect contends that the building surveyor's claim for contribution and indemnity against it should be summarily dismissed because:

i. the claims are statute barred by reason of the combined effect of s134 of the *Building Act 1993* ('the B Act') and s24(4)(a) of the Wrongs Act ('the Limitation Ground'); and

ii. the claims are made contrary to s24AJ of the Wrongs Act ('the Inconsistency Ground').

The Limitation Ground

12 The contribution claim is made under s23B of the Wrongs Act which 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).
>
> …
>
> (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 limitation or prescription which extinguished the right on which the claim against that person in respect of the damage was based.

13 The time for making a claim for contribution is set out in s24(4)(a) of the Wrongs Act. Relevantly s24(4)(a) provides:

[5] [2010] VCAT 437

24 Recovery of contribution

…

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

whichever is the longer; or

… [Underlining added]

14 The architect contends that as the building surveyor's claim for contribution is a 'building action' as defined in s129 of the B Act, when s24(4)(a)(i) is considered in conjunction with s134 of the B Act the date by which the building surveyor had to commence proceedings to claim contribution against the architect was 20 March 2018 in respect of the Stage 1 building works and 6 May 2018 for the Stage 2 building works.

15 As the contribution proceedings were not commenced within the 10 year limitation period for the bringing of a 'building action' under s24(4)(a)(ii) the date by which the building surveyor had to commence the contribution proceedings in respect of the OC proceeding was 15 March 2019 and in respect of the individual owners' proceedings was 19 April 2019.

16 The following dates are relevant:

- the occupancy permit for the Stage 1 works was issued on 20 March 2008,
- the occupancy permit for the Stage 2 works was issued on 6 May 2008
- the application for joinder of the building surveyor to the OC proceeding was filed on 2 March 2018
- the building surveyor was joined as the second and third respondent to the OC proceeding by order dated 8 March 2018
- the further Amended Points of Claim, including the OC's claims against the building surveyor, were filed on 14 March 2018
- the individual lot owners' proceedings were commenced on 6 March 2018

- the building surveyor was notified that the individual lot owners claims had been lodged by email from the Tribunal dated 19 April 2018 enclosing a Notice of Compulsory Conference together with Orders and a Schedule of Parties relating to the lot owners proceedings;
- the Tribunal emailed the builder and the building surveyor on 20 April 2019 confirming that the individual lot owners' applications would be posted in 6 separate letters. There is a stamp on the email indicating the application were posted by ordinary mail on 23 April 2019.;
- on 27 April 2018 Simon Harders, Senior Legal Counsel for the builder emailed a letter to the Tribunal countersigned by the solicitors for the individual lot owners and the building surveyor requesting that Points of Claim filed in BP279/2018 be *taken as the representative pleading* [for each of the individual lot owners claims] *to which the Respondents are to file a defence. That defence, when filed and served, is to be taken as having been filed and served* for the individual lot owners' claims.

When was the contribution claim commenced?

17 The architect contends that the contribution claim was commenced on 20 May 2019 when the building surveyor's Points of Claim against it were filed and served.

18 When the application for joinder was made it was accompanied by draft Points of Defence against the architect. At paragraph 27 of the Joinder Reasons I observed:

> …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.

19 I am not persuaded that the date of commencement of the contribution claim is as clear and definite as contended by the architect. The building surveyor's Points of Claim against the architect are dated 20 May 2019. The allegations are substantially the same as those that were set out in the proposed APOD filed in support of the joinder application. Although, in my view, a claim for contribution should properly be in Points of Claim and not in a defence, it is not unusual, and I would go as far as to say, it is quite common for a claim for contribution to be made in the alternative to a Part IVAA defence in Points of Defence. I note, in passing, that the Tribunal's standard orders allow for Points of Counterclaim to accompany Points of Defence in the same document, and it could be argued that including a claim for contribution as an alternative to a Part IVAA defence in Points of Defence, is reflective of this approach.

20 Whether a contribution claim is made in the alternative to a Part IVAA defence in Points of Defence or more properly in Points of Claim is, in my view, a procedural formality which does not change the fact that the substance of the contribution claim was clear in the proposed APOD. It is immaterial that the building surveyor did not apply to file and serve Points of Claim against the architect in its joinder application, or at the hearing of the application. That the architect clearly understood that one of the reasons for the joinder application was to claim contribution as articulated in the proposed APOD is evidenced by the submissions it made in opposition to its joinder, as discussed in my Joinder Reasons.

21 Further, as noted by the building surveyor in its 12 July submissions, not only was it clear from the proposed APOD that the building surveyor was seeking contribution from the architect, this was reinforced by the affidavit of its solicitor, affirmed on 22 February 2019 where at paragraph 20 Ms Stojanovich states that the purpose of the joinder application included seeking contribution from the architect.

22 The architect made extensive submissions by reference to a number of authorities and also to the Supreme Court of Victoria Rules about the meaning of commencement of third party proceedings in other jurisdictions. It also stressed the importance of ensuring there was consistency in the application of the relevant provisions of the Wrongs Act across jurisdictions. However, in circumstances where the Wrongs Act does not prescribe how a contribution proceeding is to be commenced, it would appear that the legislature intended that each jurisdiction be free to determine its own processes for the commencement of contribution proceedings.

23 It is also important to have regard to s98(1) of the VCAT Act which provides:

> The Tribunal—
>
> (a) is bound by the rules of natural justice;
>
> (b) is not bound by the rules of evidence or any practices or procedures applicable to courts of record, except to the extent that it adopts those rules, practices or procedures;
>
> (c) may inform itself on any matter as it sees fit;
>
> (d) must conduct each proceeding with as little formality and technicality, and determine each proceeding with as much speed, as the requirements of this Act and the enabling enactment and a proper consideration of the matters before it permit.

24 The building surveyor submits that the meaning of the term ‘commence’ in the Wrongs Act is unclear, as it is not defined. There is no definition in s3 of the VCAT of ‘commence’ or ‘commencement’. Further, there is no provision in the VCAT Act or the enabling enactments referring to the institution of a third party claim for contribution.

25 Rather, joinder of parties in the Building and Property List is governed by paragraphs 21 to 24 of Practice Note VCAT BP1 which provides:

> 21. An order of the Tribunal is required for joinder of parties. Parties should take all reasonable steps to identify potential parties to a proceeding as soon as practicable, and make applications for joinder in a timely manner and in accordance with this practice note and any directions that may be made.
>
> 22. Any application for joinder of a party, whether as respondent or joined party, should be made using the Application for Directions Hearing or Orders form. The application for joinder must be accompanied by affidavit material in support and 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.
>
> 23. The applicant for joinder must serve a copy of the joinder application and the supporting material on the proposed party and must advise them of the date and time when it will be heard.
>
> 24. An application for joinder will be listed for a directions hearing at which time the parties should expect the application to be heard and determined and directions made for the further conduct of the proceeding.

26 Accordingly, the building surveyor submits, it is arguable that the date of commencement of a claim for contribution is the date on which the application for joinder is filed with the Tribunal. I accept it is arguable this, is the relevant date, particularly in circumstances where the Practice Notes and the Tribunal's standard directions, which are made in anticipation of a joinder application being made, contemplate the application for joinder and the supporting material, including a draft pleading, is not only filed, but also served on the proposed party. The proposed party is then given an opportunity of making submissions at the directions hearing when the joinder application is heard. Once the proposed party is given an opportunity to be heard, they have been given leave to intervene in the proceeding under 71 of the VCAT Act. This means, that at the time of the directions hearing when the joinder application is heard, they are an intervening party, who, if the application for joinder is unsuccessful may persuade the Tribunal to make an order for costs in their favour.[6]

27 In my view, this interpretation is consistent with s59(1) of the VCAT Act which defines a party (although the architect only seeks to rely on s59(1)(a)(iii)) as:

> (1) The parties to a proceeding are—
>
> (a) in a proceeding in the Tribunal's original jurisdiction—

[6] Laughlin v Certainteed Windows Pty Ltd [2016] VCAT 1793

(i) the person who applies to the Tribunal, or who requests or requires a matter to be referred to the Tribunal; and

(ii) in the case of an inquiry by the Tribunal, the person who is the subject of the inquiry; and

(iii) any person joined as a party to the proceeding by the Tribunal; and

(iv) any other person specified by or under this Act or the enabling enactment as a party;

28 The architect seeks to rely on rule 11.04(1) of *Supreme Court (General Civil Procedure) Rules* 2015 ('the SC Rules) which make it clear that a third party claim is commenced upon the filing of a third party notice, as confirming that an application for joinder in the Tribunal cannot be properly regarded as the commencement of contribution proceedings.

29 However, section 98(1) of the VCAT Act requires the Tribunal to conduct each proceeding with *as little formality and technicality as …a proper consideration of the matters before it permits* and [it] *is not bound by any practices or procedures applicable to courts of record, except to the extent that it adopts* them. Here, the rules and practices of the Supreme Court in relation to third party claims have not been adopted by the Tribunal. Rather, in the Building and Property List, procedures which are not otherwise specified in the VCAT Act or the VCAT Rules or an enabling enactment, are dealt with in the Practice Notes.

30 The Tribunal's requirements for a party to obtain leave to join a party to a proceeding whether for the purpose of seeking contribution or relying in a Part IVAA defence, are unique to the Tribunal.

31 The building surveyor also submits, that if the date of filing of an application for joinder for the purposes of contribution was not construed as the date of commencement of the claim for contribution an applicant for joinder would have less than 12 months as contemplated by s24(4)(a)(ii) to commence contribution proceedings. I agree.

32 The architect submits that filing of an application for joinder, or joinder of a party could never be regarded as the commencement of a claim for contribution. However, where orders are made that any application for joinder be made in accordance with the Practice Note and be accompanied by supporting affidavit material, and proposed Points of Defence or Points of Claim, as the case may be, I am satisfied it is arguable, that the making of the application for joinder, in accordance with those directions, is the commencement of the contribution proceeding.

33 I am satisfied therefore that it is arguable that the date the application for joinder was served on the architect, noting that date is unclear, is the date on which the contribution claim was commenced.

When were the individual lot owners applications served on the building surveyor?

34 The stamp on the Tribunal's copy of the email dated 20 April 2019 indicating the applications were posted by ordinary mail on 23 April 2019, is indicative only, as it is the date on which registry processed the applications by placing them in an envelope ready for posting.

35 Although in her affidavit of 20 August Ms Metcalfe states at [7]:

> The correspondence on the VCAT file referred to in paragraph 6 above demonstrates that the Building Surveyor became aware of the individual lot owners proceedings on 19 April 2018 and that the Building Surveyor was served with the individual owners' application and points of claim on a date between 23 April 2018 and 26 April 2018.

36 However, I am not persuaded that there is any evidence to support the conclusion that service was effected *on a date between 23 April 2018 and 26 April 2018.* To make any finding as to the date of service would require me to speculate, which would be in breach of the Tribunal's obligations under s98 of the VCAT Act. The letter filed under cover of the email from Mr Harders dated 27 April 2019 is dated 23 April 2019, being the same day the applications were recorded as having been posted to the respondents so, unless copies of the individual lot owners' applications were served on the respondents by the applicants' solicitor (and there is no evidence before me in this regard) it is impossible for the applications posted to the respondents by the Tribunal to have been received by them on the day they were posted. The letter was countersigned by the solicitor for the individual lot owners on 23 April 2018 and by the solicitor for the building surveyor on 26 April 2018.

37 I note applications by the individual lot owners were contemplated and provided for by the Tribunal's orders of 8 March 2018 where I ordered:

> 3. In circumstances where the limitation period for numbers 59 and 61 Stawell Street Richmond ends on 20 March 2018 and for numbers 63 and 65 Stawell Street Richmond ends on 6 May 2018 any application by a private lot owner to either join this proceeding as an applicant or to commence a separate proceeding must be made on or before the relevant limitations date.
>
> 4. The applicant must promptly send a copy of this order to each of the joined parties other than those that are represented by Mr Powell Solicitor.
>
> 5. I order any related proceedings to be heard and determined with this proceeding. Upon receipt of any related proceedings I direct the Principal Registrar to refer them to Deputy President Aird to make orders in chambers consistent with the timetable in these orders.

38 I reject the architect's submission that I should draw a *Jones v Dunkel* inference from the failure of the building surveyor to provide any affidavit material deposing as to when the proceedings were served. The party making a s75 application has the onus of demonstrating that the claim against them should be summarily dismissed or struck out. This is not the final hearing, when a consideration of the evidence will be relevant. The respondent to a s75 application is not obliged to provide sworn evidence in defending the application, although it may choose to do so.

Conclusion

39 As I observed in the Joinder Reasons:

> 40. … 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.
>
> …
>
> 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…

40 Although the architect has now filed its defence in which it contends that the building surveyor's claim for contribution is statute barred, I am not persuaded that the hearing of a s75 application is the appropriate time to determine the question, before all of the evidence has been heard. Although the architect's application is supported by affidavit material from the architect's solicitor, in which she speculates about the date of service of the proceedings on the building surveyors, there is no definitive evidence before me as to the date of service of on the building surveyor of the individual lot owners claims.

The inconsistency ground

41 The architect submits that a claim under s24B of the Wrongs Act for contribution is inconsistent with a Part IVAA defence. I do not propose to consider this submission in any detail again, having already indicated in my Reasons for joinder at [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.

42 However, I do consider it appropriate to make some observations. First, I accept that the Tribunal has not yet decided whether the owners' claim is an apportionable claim. The owners claims against the building surveyor is set

out in paragraph 20 of the Further Amended Points of Claim ('FAPOC') dated 14 March 2018 where they allege;

> 19. From the date he accepted appointment as the relevant building surveyor for the Project, Capouleas [the second respondent] owed the Applicants a duty to exercise reasonable care when performing his duties as the relevant building surveyor for the Project (the Capouleas duty of Care).
>
> 20. PLP [the third respondent] was at all material times vicariously liable for the acts or omissions of its employee Capouleas.

43 It is well established that it would be premature to determine whether a person is a concurrent wrongdoer before the evidence is heard and refer to paragraph 24 of the Joinder Reasons:

> 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. <u>That task ought not to be frustrated by arid disputes about pleadings.</u> [my emphasis]

44 I reject the architect's submission that as the applicants' claims are, on their face, apportionable claims as they are claims for pure economic loss, there are no possible circumstances in which the building surveyor can possibly have a claim against it for contribution. However, it would be premature for me to pre-empt the findings the Tribunal might make when it has heard all the evidence, and considered the submissions made by the parties.

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

CONCLUSION

45 Accordingly, I will make orders dismissing the architect's s75 application and reserving costs with liberty to apply.

DEPUTY PRESIDENT C AIRD