

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL CLAIMS DIVISION

DOMESTIC BUILDING LIST

VCAT REFERENCE NO. D879/2006

CATCHWORDS

Application by applicant for leave to amend to seek relief from second and third respondents – Part IVAA of the *Wrongs Act* 1958 – relevant considerations – applicant not required to ‘plead’ claim as against the second and third respondents – seeking of relief adequate

APPLICANT	Brady Constructions Pty Ltd (ACN: 055 285 259)
FIRST RESPONDENT	Andrew Lingard & Associates Pty Ltd (ACN: 006 146 541)
SECOND RESPONDENT	Philip Chun & Associates Pty Ltd (ACN: 007 401 649)
THIRD RESPONDENT	Viviana Floreancig
WHERE HELD	Melbourne
BEFORE	Deputy President C. Aird
HEARING TYPE	Directions hearing
DATE OF HEARING	23 April 2008
DATE OF ORDER	16 May 2008
CITATION	Brady Constructions Pty Ltd v Andrew Lingard & Associates Pty Ltd and Ors (Domestic Building) [2008] VCAT 851

ORDER

1. The applicant is given leave to file and serve amended Points of Claim substantially in the form attached to the letter from its solicitor dated 22 April 2008. Such amended Points of Claim must be filed and served by 26 May 2008.
2. **The proceeding is referred to a directions hearing before Deputy President Aird on 29 May 2008 at 2.15 p.m. at which time any application for costs will be heard, and directions made for the further conduct of the proceeding - allow 2 hours.**
3. Costs reserved with liberty to apply.

REASONS

- 1 In August 2004 the first respondent was engaged by Dominion Lifestyle Tower Apartments Pty Ltd ('Dominion'), under a consultant agreement, to provide certain specified engineering services in relation to the construction of an apartment building at Southbank. In September 2004 the first respondent entered into a Deed of Novation with the applicant builder, and Dominion, under which, the applicant alleges, the consultant agreement would be construed as if it had been entered into between it and the first respondent.
- 2 This proceeding was commenced in December 2006 by the applicant seeking recovery of the costs incurred in the relocation of the fire isolation valves from the mechanical services room to the fire isolated stair alleging a breach of a duty of care owed to it by the first respondent in relation to the design and instructions as to installation of the fire isolation valve. Particulars of the alleged breaches have been provided.
- 3 In May 2007, upon application by the first respondent, the building surveyor, Philip Chun and Associates (Vic) and Viviana Floreancig, the relevant building surveyor who was employed by Chun, were joined as second and third respondents. In its Points of Claim, as against the second and third respondents dated 19 June 2007, the first respondent sets out a breach of a duty of care it says was owed by the second and third respondents to the applicant as a consequence of which it alleges the second and third respondents are concurrent wrongdoers under Part IVAA of the *Wrongs Act* 1958. It seeks the following relief against each of them:
 13. Further in the circumstances, the Respondent seeks an order against the Second Respondent pursuant to section 24AI of the *Wrongs Act* 1958:
 - (a) in respect of its liability as a concurrent wrongdoer relating to the claims made in the Applicant's Points of Claim in this proceeding for an amount which reflects that proportion of the loss or damage claimed that the Tribunal considers just having regard to the extent of the Second Respondent's responsibility for the loss or damage; and
 - (b) for judgement against the Second Respondent for the amount referred to in (a) above in relation to the Applicant's Points of Claim.The relief sought against the third respondent is in identical terms.
- 4 The following order was also made on 5 June 2007:
 4. By 31 July 2007 the Applicant if it wishes to make a claim against the Second and Third Respondents must file and serve Points of Claim.
- 5 Points of Defence were filed on behalf of the second and third respondents on 9 August 2007 whereby, relying on s 24AJ of the *WrongAct*, they maintained they could not be liable to the first respondent as alleged.

6 Further orders were made by the tribunal on 17 August 2007 and the date by which the applicant was to file and serve Points of Claim, if it wished to make any claim against the second and third respondents, was extended to 27 August 2007. On 29 October 2007 the second and third respondents advised they would not be relying on any expert evidence, and would therefore not be filing an expert report.

7 Following an unsuccessful compulsory conference on 22 November 2007, the first respondent was given leave to file and serve amended Points of Claim as against the second and third respondents by 20 December 2007. Amended Points of Claim were filed containing significant amendments including a complete reframing of the prayer for relief such that the following was sought by the first respondent as against the second and third respondents:

A declaration that the liability of the First Respondent is limited to an amount reflecting that proportion of the loss and damage claimed by the Applicant that this Court considers just having regard to the extent of the responsibility of the Second [and Third] Respondent for the loss and damage.

8 In its amended Points of Defence to the applicant's amended Points of Claim the first respondent says:

24. Further the First Respondent says:

- (a) The Applicant's claim is an apportionable claim within the meaning of section 24AE of the Wrongs Act 1958.
- (b) If the First Respondent is liable to the Applicant for the alleged breaches, which is expressly denied, then the Second and Third Respondents are concurrent wrongdoers within the meaning of section 24AH of the Wrongs Act 1958.
- (c) In the premises and by reason of the operation of section 24AI (1) and (2) of the Wrongs Act 1958, the liability of the First Respondent is limited to an amount reflecting that proportion of the loss and damage claimed that the Tribunal considers just having regard to the First Respondent's liability for the loss and damage and judgement must not be given against the First Respondent for more than that amount in relation to the claim.

In their amended Points of Defence the second and third respondents simply deny the allegations.

9 On 26 March 2008 the second and third respondents advised the tribunal they would not be relying on any expert reports. On 27 March 2008 the date for the filing and service of witness statements was extended, by consent, to 7 April 2008 and on 9 April 2008 the second and third respondents advised they would not be filing and serving any witness statements '*on the basis of the current pleadings*'. This was clarified by a letter from their solicitors to the tribunal and the other parties dated 10 April 2008. The last paragraph on the first page is relevant:

In the circumstances where neither Brady nor Lingard [the applicant and the first respondent] seeks any relief by way of compensation from our clients, they do not intend to file and serve any witness statements nor take an active part in the hearing which is scheduled to commence on 28 April 2008, save that they will to be heard in respect of Lingard's claim for costs referred to above (the first respondent having sought an order for costs against the second and third respondents).

To this end, we propose to appear on behalf of our clients at the commencement of the hearing to explain our clients' position and then withdraw from the hearing until Lingard's claim for costs against our clients is raised before the Tribunal.

- 10 I understand from Mr Roberts of counsel, who appears on behalf of the first respondent, that at a compliance hearing on 17 April 2008, he raised the issue and counsel for the applicant, Mr Schlicht, confirmed that the applicant was not making any direct claim against the second and third respondents, notwithstanding the first respondent's reliance on Part IVAA of the *Wrongs Act* to limit its liability to the applicant.
- 11 Subsequently, on 22 April 2008, the applicant filed an urgent application for leave to amend its Points of Claim to include the following:

Claims:

23. The Applicant has brought a claim against the First Respondent as set out in the Application and Points of Claim dated 12 December 2006 (a copy is Annexure A).
24. The First Respondent disputes the claim and, inter alia, in its Amended Points of Defence dated 20 December 2007 (a copy is Annexure B) alleges that:-
 - (a) the Second and Third Respondents are concurrent wrongdoers within the meaning of Section 24AH of the *Wrongs Act* 1958;
 - (b) by reason of Section 24A(1) and (2) of the *Wrongs Act* 1958, the liability of the First Respondent is limited to an amount reflecting that proportion of the loss and damage claimed that the Tribunal considers just having regard to the First Respondent's responsibility for the loss and damage.
25. The First Respondent in its Amended Points of Claim against the Second and Third Respondents dated 20 December 2007 (a copy of which is Annexure C) claims, inter alia:-
 - (a) that the Second and Third Respondents owed a duty of care to the Applicant;
 - (b) they breached their duty of care to the Applicant;
 - (c) the Second and Third Respondents are concurrent wrongdoers in accordance with Part IVAA of the *Wrongs Act* 1958;
 - (d) the Second and Third Respondents are responsible for all, or alternatively part, of the loss and damage claimed by the Applicant;

- (e) a declaration that the liability of the First Respondent is limited to an amount reflecting that proportion of the loss or damaged claimed by the Applicant that this Court considers just having regard to the extent of the responsibility of the Second and Third Respondents for the loss and damage.

26. In the circumstances if the Tribunal considers and finds:-

- (a) that the liability of the First Respondent, by reason of Part IVAA of the Wrongs Act 1958 is reduced and/or limited to an amount because of some responsibility and/or liability of the Second and Third Respondents; and/or
- (b) that the First Respondent succeeds in its Amended Points of Claim against the Second and Third Respondents and thereby reduces its liability to the Applicant; and/or
- (c) that the claim of the Applicant against the First Respondent is reduced by reason of Part IVAA of the Wrongs Act 1958 and/or by reason of an apportionment of liability as between the First Respondent, on the one hand and the Second and Third Respondents, on the other hand –

Relief

Then the Applicant claims against the Second and Third Respondents:-

- 6. Such amount as Tribunal finds that the claim of the Applicant against the First Respondent is reduced by reason of either:-
 - (a) Part IVAA of the Wrongs Act 1958; and/or
 - (b) an apportionment of liability of the Applicant's claim between the First Respondent on the one hand, and the Second and Third Respondents on the other hand.
- 7. Costs.
- 8. Such further orders as the Tribunal deems fit.

(I have omitted the underlining showing these are amendments).

The Second and Third Respondents' position

12 Mr Horan of Counsel appeared on behalf of the second and third respondents with carefully prepared submissions in relation to the applicant's application for leave to amend, and, what he submitted was the appropriate way for the applicant to pursue the second and third respondents. He also referred me to the affidavit of their solicitor, Hubert Wajszel sworn 23 April 2004. Mr Horan said the second and third respondent, in deciding not to rely on any expert or lay evidence, had done so in the absence of any claim against them by the first respondent or applicant.

13 The second and third respondents rely on s24AI which 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.
- (2) If the proceeding involves both an apportionable claim and a claim that is not an apportionable claim—
 - (a) liability for the apportionable claim is to be determined in accordance with this Part; and
 - (b) liability for the other claim is to be determined in accordance with the legal rules, if any, that (apart from this Part) are relevant.
 - (3) In apportioning responsibility between defendants in the proceeding the court must not have regard to the comparative responsibility of any person who is not a party to the proceeding unless the person is not a party to the proceeding because the person is dead or, if the person is a corporation, the corporation has been wound-up

14 Mr Horan identified and addressed me about a number of issues:

- There is no claim by the applicant or the first respondent as against the second and third respondents and the tribunal is not asked to make any finding of liability as against them. The claim should be put in the usual way i.e. properly pleaded by the applicant as against the second and third respondents setting out particulars of loss and damage claimed against each of them.
- There is no claim currently put by the applicants to which the first and second respondents can seek to limit their liability. Whilst under s24AI the tribunal must apportion responsibility, the applicant must elect whether to take action against the second and third respondents. Now that it wishes to seek relief against the second and third respondents, the applicant should file and serve Points of Claim as against each of them, the second and third respondents should then file and serve Points of Defence, and then, and only then, could the second and third respondents take the necessary steps to protect themselves by, for instance, claiming contributory negligence. Mr Horan noted that the second and/or third respondents would challenge any allegation that they owed a duty of care to the applicant.
- Section 24AF contemplates a claim for damages, that the seeking of declaratory relief by the first respondent is not a claim for damages, and is therefore not an apportionable claim and does not visit any rights on the applicant.
- Under s24AK the applicant can bring a subsequent action against the second and third respondents as concurrent wrongdoers.
- The relief sought by the applicant in the proposed amendment is not a claim known to law. The applicant must set out its cause of action against

the second and third respondents, its loss and damage, and then the relief sought.

The First Respondent's position

- 15 Mr Roberts of Counsel appeared on behalf of the first respondent and whilst urging me to grant the applicant leave to amend, said that he would be arguing at the final hearing that the amendment did not enable the tribunal to make any order for damages as against the second and third respondent, in respect of any responsibility apportioned to them, for the applicant's loss. He suggested that it was premature and unnecessary to consider whether the amendment would entitle the applicant to an order for damages as against the second and third respondents; that I only had to be satisfied that the amendment was 'open and arguable'; not whether the amendments were 'adequate'.
- 16 It seems to me that it would be a nonsense if the applicant was granted leave to amend its Points of Claim without a consideration of whether it was arguable that such amendment would enable it to obtain an order for damages against the second and third respondents, particularly in circumstances where the first respondent has indicated it will argue the contrary position at the hearing.

Is it enough for an applicant simply to seek relief against a respondent?

- 17 This is difficult legislation which has been subject to much comment, and numerous articles and seminars, but very few decisions. One of the fundamental questions since its introduction has been whether an applicant can recover from a respondent, who has been joined by another respondent for the purposes of Part IVAA, in the absence of pleading out a case and/or seeking relief against that respondent.
- 18 In this matter the applicant has proceeded, until now, on the basis that it is not necessary even to seek relief against the second and third respondents, to obtain a judgement in its favour for any proportion for which they are found to be responsible for its loss. This cannot be right. The wording of s24AI is quite clear, a court (which is defined to include tribunal) is required to apportion responsibility not liability. If required to apportion liability there would be no difficulty with awarding damages in favour of an applicant but that is not the case. At the very least, an applicant, seeking to protect itself as to damages must seek relief against all respondents. Is that enough or is it also required to plead out a case against them?
- 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. I am fortified in my view by the observations of Middleton J in *Dartberg Pty Ltd v Wealthcare Financial Planning Pty Ltd* [2007] FCA 1216 (10 August 2007) who, whilst finding that Part IVAA did not apply to the particular circumstances of that case 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 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. (emphasis added)

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 missions caused, independently of each other or jointly, the loss or damage that is the subject of the claim (emphasis added).

Here the claim is, in my view, the claim made by the applicant seeking recovery of the costs incurred in the relocation of the fire isolation valves from the mechanical services room to the fire isolated stair. This is clearly a claim for economic loss or damage as set out in s24AF. 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)
- 21 Mr Wajszel has deposed in his affidavit to being unable to advise his clients in the absence of any allegations or particulars from the applicant as to *'the loss caused by them, not how that loss is calculated, nor how the second and third respondents is alleged to have caused that loss'* (sic). However, it is not as if the second and third respondents do not now, and have not for many months, know the case they have to answer. The applicant's loss and damage is set out and particularised in its Points of Claim. The first respondent has clearly set out, in its Points of Claim as against the second and third respondents, the duty of care it alleges they owe the applicant, and the alleged breach of the duty such that they are concurrent wrongdoers. Particulars have been provided. It is for the tribunal, not the applicant, to apportion responsibility after determining whether the respondents, or any of them, are concurrent wrongdoers.
- 22 Further, it is for the second and third respondents to take whatever steps they consider appropriate to limit their potential liability. Choosing not to take an active part in these proceedings, where their interests will clearly be affected by the outcome was, in my view, a bold, and potentially risky, move, particularly insofar as they rely on s24AK.
- 23 The second and third respondents assert that s24AK allows the applicant to bring separate proceedings against them following determination of this proceeding. Section 24AK provides
- (1) In relation to an apportionable claim, nothing in this Part or any other law prevents a plaintiff who has previously recovered judgment against a concurrent wrongdoer for an apportionable part of any loss or damage from bringing another action against any other concurrent wrongdoer for that loss or damage.
 - (2) However, in any proceeding in respect of any such action the plaintiff cannot recover an amount of damages that, having regard to any damages previously recovered by the plaintiff in respect of the loss or damage, would result in the plaintiff receiving compensation for loss or damage that is greater than the loss or damage actually suffered by the plaintiff.
- 24 It seems to me that once the tribunal has apportioned responsibility for the applicant's loss and damage any subsequent application would be by the applicant, seeking to recover from the second and third respondents, that proportion of their loss for which the tribunal had found them responsible. It might be that an estoppel would arise in relation to the question of

responsibility which could not then be reventilated. Notwithstanding Mr Horan's submissions about the provisions of s24AK overriding any Anshun Estoppel, it is difficult to conceive of a finding that a party is not liable for the proportion of loss and damage for which it has been found responsible. I mention this in passing now, but it may well be a matter which is relevant in considering any application for costs of the adjournment of the hearing, and/or arising from these Reasons.

- 25 Mr Schlicht foreshadowed that, if leave to amend were granted, the applicant may also wish to further amend the prayer for relief to claim damages from the second and third respondents. That is a matter for the applicant, about which I do not express a view at this time, other than to confirm that I will grant leave to amend and to include the foreshadowed amendment if the applicant so wishes. It must be understood that in allowing the amendment I make no finding as to whether the second and/or third respondents owed a duty of care to the applicant, or whether Part IVAA of the *Wrongs Act* applies.

The applicant's conduct

- 26 I mention in passing that I consider it is most unfortunate that the applicant did not seek leave to amend its Points of Claim until four days prior to the scheduled commencement date for the hearing. It had been given more than one opportunity to do so (the orders of 5 June and 17 August 2007). Further, its solicitors wrote to the respondents' solicitors on 11 September 2007 advising '*our client does not mean to bring any direct claim against either of the joined parties*'. It seems that by joined parties they were referring to the second and third respondents. The issue was apparently also raised by Mr Roberts at the compliance hearing held on 17 April 2008. However, this is not a reason to refuse leave to amend but may be relevant in considering any application for costs.

DEPUTY PRESIDENT C. AIRD