

# VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

## CIVIL DIVISION

### BUILDING AND PROPERTY LIST

VCAT REFERENCE NO. D531/2014

### CATCHWORDS

Domestic building, joinder, s60 of the *Victorian Civil and Administrative Tribunal Act 1998*, “open and arguable” or “not hopeless”, Part IVAA of the *Wrongs Act 1958*, “apportionable claim”, whether pleading s8 of the *Domestic Building Contracts Act 1995* is necessarily a pleading of failure to take reasonable care, whether pleading a breach of contract is necessarily a failure to take reasonable care, s16 of the *Water Act 1958* flow of water that is not a reasonable flow, whether sufficient pleading to demonstrate an open and arguable case that the proposed joined parties are concurrent wrongdoers.

<b>APPLICANT</b>	Ms Nancy Cannuli
<b>RESPONDENT</b>	Mr Zlato Kojdovski t/as Sureline Construction
<b>WHERE HELD</b>	Melbourne
<b>BEFORE</b>	Senior Member M. Lothian
<b>HEARING TYPE</b>	Hearing
<b>DATE OF HEARING</b>	28 May 2015
<b>DATE OF ORDER</b>	19 June 2015
<b>CITATION</b>	Cannuli v Kojdovski trading as Sureline Construction (Building and Property) [2015] VCAT 889

### ORDERS

- 1 The application to join Vincenzo Cannuli and Flavia Cannuli to this proceeding is dismissed.
- 2 Leave is refused to the respondent to file and serve Amended Points of Defence in the form exhibited to the affidavit of Leslie Michael Schwarz of 21 May 2015.
- 3 By consent, the parties must promptly exchange copies of all documents and correspondence referred to in all reports which they have filed by their experts, Mr Gentisaris and Mr Casamento respectively.
- 4 By consent, Mr Casamento is permitted to excavate a bore hole in the garage slab at 32 Wood Street Avondale Heights and must reinstate the core of that hole at the Respondent’s cost.
- 5 The bore hole must be excavated at a mutually convenient time and it is recommended that the parties arrange for Mr Gentisaris to also be present.

- 6 By consent, Mr Casamento is permitted to take water samples at 32 and 32A Wood Street Avondale Heights.
- 7 Costs are reserved with liberty to apply.
- 8 The orders sought are otherwise refused.
- 9 **The proceeding is listed for directions before Senior Member Lothian at 10:00 a.m. on 29 June 2015 at 55 King Street Melbourne to make directions for the further conduct of the proceeding and hear any application for costs, with an estimated duration of 1 hour.**
- 10 **I direct the Principal Registrar to send copies of these orders to the parties by facsimile, email or express post.**

**SENIOR MEMBER M. LOTHIAN**

**APPEARANCES:**

For Applicant	Mr A. Beck-Godoy of Counsel
For Respondent	Mr S. Stuckey of Counsel

## REASONS

- 1 The respondent Builder seeks to join Vincenzo and Flavia Cannuli (“Neighbours”) to this proceeding to take advantage of the apportionment regime set out in Part IVAA of the *Wrongs Act* 1958.
- 2 Mr Stuckey of Counsel appeared for the Builder, Mr Beck-Godoy of Counsel appeared for the Owner and I gave Ms Rita Cannuli leave to intervene on behalf of the Neighbours. The Neighbours are the parents of the Owner and of Ms Rita Cannuli.
- 3 The Builder also seeks a number of other orders for the further conduct of the proceeding.

## HISTORY

- 4 The Owner owns two houses at 32 and 32A Wood Street. The Neighbours own 30 Wood Street, which is immediately to the east of 32 Wood Street. According to the Owner’s Amended Points of Claim of 21 August 2014 (“APoC”), the Owner and Builder entered a contract dated 23 March 2010 for the Builder to construct the two houses.
- 5 Part of the Owner’s claim is that water ponds in various areas under the houses. This is the basis of the Builder’s application to join the Neighbours, as the Builder alleges that the ponding water is caused by an unreasonable flow of water from 30 Wood Street to 32 and thence to 32A, in breach of s16 of the *Water Act* 1989.
- 6 The APoC provide in part:
  3. [The Builder] applied on behalf of [the Owner] ... for planning and building permits ...
  4. As part of the ... process [the Builder]:
    - ...
    - (a) obtained a report on site classification ... (“the soil report”);
    - ...
    6. The soil report contained the following warnings, among others:
      - ...
      - (b) soil profiles under demolished buildings may have abnormal moisture content (ranging from excessively dry to excessively moist). Abnormal moisture conditions require a period of exposure to regain normal moisture balance;
      - ...
    7. It was a term of the Contract that the Builder gives to the Owner the warranties contained in section 8 of the *Domestic Building Contracts Act* 1995.
    - ...

10. ... by over-excavation of the site the subfloor space and garages are attracting sub-surface water and the resultant ponding of water requires constant pumping out. These defects, and others, need to be rectified and the cost of doing so is at least \$241,458.

**Particulars of breach of building standards and the builder's statutory warranties**

12. The breaches are detailed in section 5 (A to J) of the BSS Group report, and the applicant seeks leave to refer to and adopt section 5 of the report without restatement of its entire contents, but in summary, breaches are evident in respect of the following items:

...

B. Subfloor space level (by over-excavation the finished level is well below external footpath and natural ground levels, and as a result there is a "hole in the ground effect" which attracts sub-surface water from all directions. Moreover, venting to the subfloor space is inadequate and so its air smells foul)

...

J. Future excessive building movements (once the issue of excessive water in the subfloor space has been addressed the founding clays will shrink and building movement will occur).

...

13. The buildings are unsatisfactory and the applicant is presented with difficult building and engineering problems for their remediation. In the meanwhile she is put to the trouble and stress of having to constantly pump water from the subfloor and garage of her own dwelling, number 32, and of having to cope with odours emanating from its subfloor. She has the additional anxiety that her adjoining unit, number 32A, is presently tenanted and so she cannot monitor its condition and movements, and she cannot be confident that it will remain suitable for tenancy in the future. [Emphasis added]

## **THE APPLICATION**

### **Orders sought**

- 7 In addition to seeking to join the Neighbours to this proceeding, in the application received at the Tribunal on 21 May 2015, the Builder seeks the following orders:
  2. That the Respondent have leave to file and serve an Amended Defence in the form annexed to the Affidavit in support of this application.
  3. That the Applicant provide to the Respondent copies of all documents and correspondence provided to Mr Genitsaris of BSS Group [the Applicant's engineering expert witness] referred to in item 1(7) of his report dated 1 May 2014 and provided subsequent thereto.

4. That the Respondent be permitted to engage a plumbing expert to carry out investigations including an inspection of the below ground PVC sewer and stormwater pipes and also to test domestic hot and cold water at 30 Wood Street...
5. That Tom Casamento be permitted access to 30 Wood Street... to excavate at his requested locations three (3) bore holes in the concrete paving located along the west boundary of the property and reinstate those concrete cores at the Respondent's cost and to investigate the soil moisture at the property.
6. That the Respondent, his Solicitors and agents, including Tom Casamento, be permitted full and unrestricted internal and external access to all parts of the neighbouring property at 32 Wood Street... for the entire duration of the inspection and destructive testing at 30 Wood Street...
7. That Tom Casamento be permitted to excavate a bore hole in the garage slab at 32 Wood Street ... and reinstate the core of that hole at the Respondent's cost.
8. That Tom Casamento be permitted to take water samples for 30 Wood Street... and 32 Wood Street...

#### **Affidavit of Leslie Michael Schwarz**

- 8 The joinder application was supported by an affidavit by Mr Schwarz of 21 May 2015 to which there were an number of exhibits, including draft Amended Points of Defence, discussed below,
- 9 Mr Schwarz deposed, among other things, that:
  - the Neighbours own the property at 30 Wood Street,
  - 30 Wood Street shares a boundary with 32 Wood Street,
  - 7. The Respondent's engineer, Mr Tom Casamento has identified the presence of water beneath the garage slab where a section has been cut from it, saturated soil present in the garden bed along the boundary between number 32 and 30 at the front of the block and water in the subfloor space which is concentrated at the front of number 32 with some passage of that moisture through a wall space between the subfloors of 32 and 32A.
  - 8. Mr Casamento has taken samples of water present beneath the house and has had the same tested by a consulting chemist. The chemist has identified that the water contains levels of fluoride which are indicative of tap water....
  - Pressure tests at numbers 30, 32 and 32A indicate that there are no leaks in the mains water systems of any of the properties.
  - 9. ... Nevertheless, as there is a moisture differential between soil saturated at the boundary between number 30 and number 32, reducing as one moves west to the point where there is little or

no moisture present in number 32A, Mr Casamento has expressed the view, ... That the source of the moisture must be somewhere on the property number 30. [Emphasis added]

...

11. Because of the above circumstances I believe that it is strongly arguable that the occupants of number 30 Wood Street have caused an unreasonable flow of water from that property onto number 32 and number 32A, which flow is causing injury to the Applicant. Equally I believe that it is strongly arguable that the occupants have, by negligent conduct, interfered with the flow of water onto the land of the Applicant which is not reasonable.
  12. As such it is, in my opinion, arguable that the liability of the occupants of number 30 to the Applicant are apportionable claims under the Wrongs Act 1958 (Vic) in respect of which the Respondent's liability is susceptible to reduction. Alternatively, if the same are not apportionable claims then the Respondent is nonetheless entitled to obtain contribution from them in respect of any liability that he has to the Applicant as a result of the flow of water.
- 10 I note that Mr Schwarz does not positively attest to the source of water, only that it "must" have come from 30 Wood Street, because a garden bed "along the boundary" of the properties is saturated, without saying which property the garden bed is in. Photographs and a plan annexed to the Casamento report of 23 October 2014 as attachment D, entitled "Proposed Drainage Rectification" indicate that near the allegedly saturated area, 30 Wood Street is concreted from the house, and the garden in front of the house, to the boundary with 32.
- 11 Mr Schwarz exhibited Mr Casamento's third structural report dated 4 March 2015 to his affidavit. Mr Casamento's report does not mention the garden bed on the boundary but says at paragraph 5.4:
- It was also observed that water was still ponding in the garage area under the stormwater drain connection point of unit 32. The soil under the east strip footing of the garage wall on boundary with 30 Wood Street was saturated, as well as in front of the garage along the same boundary fence line.
- 12 Mr Casamento's conclusions included:
- 6.2. From my observations, testing and evidence that has come to light, I am strongly of the opinion that sub-surface water flow from the neighbouring property to the east (number 30 Wood Street) is the cause of mains pressure water ingress into unit 32, which also infiltrates unit 32A via a brickwork opening in the party wall.
  - 6.3. Having eliminated all other possible sources of mains pressure water entering unit 32, the only other possible source is via the overwatering of the sizeable vegetable patch at the rear and front

of the building at 30 Wood Street. It is my understanding that the elderly parents who own 30 Wood Street are avid gardeners and unsuspectingly could be causing the problem to the adjacent properties.

The land is virtually flat, and water can easily permeate through the short distance to unit 32. The evidence suggests that mains pressure water is coming from the property at 30 Wood Street.  
[Emphasis added]

- 13 A substantial stretch of the imagination is necessary to describe the distance between the vegetable garden at the rear of 30 Wood Street as "a short distance" to the area where the water is alleged to collect at the front of number 32. Even the driveway of number 30 at the front is approximately 60% wider than the driveway in number 32, assuming the accuracy of the drawing at attachment D to Mr Casamento's report.
- 14 Further, the finding by the chemist that the water contains fluoride and is therefore probably tap water does not necessarily support the conclusion that it is "mains pressure" water.

### **Draft Amended Points of Defence**

- 15 The part of the of the proposed Amended Points of Defence relevant to this joinder application are as follows:
  31. Alternatively, if [the Builder] is liable to the Applicant in respect of any water penetration below 32 or 32A (which is not admitted but expressly denied) then the Applicant's claim in respect thereof is an apportionable claim within the meaning of section 24AF of the Wrongs Act 1958.
  32. Cannuli ("Mr and Mrs Cannuli") are and were at all material times the owners and occupiers of number 30 Wood Street ... which property is adjacent to and to the east of number 32 Wood Street.
  33. The water which [is] penetrating below the properties at 32 and 32A is originating on and flowing from number 30 Wood Street as a result of:
    - (a) an unreasonable flow of water caused by Mr and Mrs Cannuli;
    - (b) the negligent interference by Mr and Mrs Cannuli with a flow of water;within the meaning of section 16 of the Water Act 1989.
  34. The loss and damage, if any, caused by the water penetration under 32 and 32A is loss that has been caused by the act and omissions of Mr and Mrs Cannuli as well is the act and omissions alleged by the Applicant against the Respondent.
  35. The liability of the Respondent is limited to an amount reflecting that proportion of the loss and damage claimed as the

Tribunal considers just having regard to the extent of Respondent's responsibility for the loss and damage.

## VCAT ACT S 60

16 Section 60 of the *Victorian Civil and Administrative Tribunal Act 1998* ('the VCAT Act') empowers the Tribunal to order joinder.

- (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.

### "Not hopeless"/ "Open and arguable"

17 Mr Stuckey submitted that the relevant test regarding joinder of a concurrent wrongdoer for the purpose of apportionment is whether it is "at least arguable" [*Woods v De Gabrielle* [2007] VSC 177, paragraph 9] or "not hopeless" [*Atkins v Interprac Financial Planning Pty Ltd and Cole* [2007] VSC 445].

18 Mr Beck-Godoy submitted that the requirement for joinder is the slightly more rigorous test that the pleading concerning the proposed joined parties be "open and arguable".

19 As I said in *Watson v Richwall Pty Ltd* [2014] VCAT 1127 at paragraphs 27 and 28:

I accept Mr Bennett's ... submission that the test provided for joinder in the Supreme Court under the *Rules* is not automatically applicable to joinder under s60 of the VCAT Act.

I prefer Deputy President Aird's formulation in *Perry v Binios*<sup>1</sup> [2006] VCAT 1604 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).

20 The test for joinder in this application is that the pleadings regarding the Neighbours' responsibility must be open and arguable.

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<sup>1</sup> [2006] VCAT 1604



## “Open and arguable” as distinct from proof

21 As I said at paragraph 20 of *O’Donnell v Absolute Builders* [2014] VCAT 952:

If everything [that proposed joined party] says in his affidavit is proven he has a good defence to the Builder’s action against him. However, a good defence is not a sufficient reason to refuse to join a proposed party. The facts of a case are proven at the hearing, not at the point where a party is seeking to join another. Until those facts are proven, a properly pleaded case can still be “open and arguable”.

22 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.

## WRONGS ACT

23 Part IV AA of the *Wrongs Act* 1958 provides in part:

### **24AF Application of Part**

- (1) This Part 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; and
  - (b) a claim for damages for a contravention of section 18 of the Australian Consumer Law (Victoria). [Emphasis added]

...

### **24AH Who is a concurrent wrongdoer?**

- (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.

...

### **24AI Proportionate liability for apportionable claims**

- (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.

24 The Neighbours can only be joined to this proceeding if the claim by the Owner against the Builder is an apportionable claim and the Neighbours are concurrent wrongdoers. The effect would then be that if the Neighbours

were found to be at least partly responsible to the Owner for her loss, the Builder would only be liable to the Owner for his proportion of responsibility for the loss suffered.

Apportionable claim?

- 25 There is no pleading of a breach of the Australian Consumer Law, so for the Owner's claim against the Builder to be apportionable, it must be founded on a failure to take reasonable care.
- 26 As Mr Beck-Godoy said, the Owner has not expressly pleaded a failure to take care; she has pleaded breaches of contract. She has, however, pleaded that s8 of the *Domestic Building Contracts Act 1995* gives her warranties in this contract. She does not detail what those warranties are.
- 27 Section 8(d) of the *Domestic Building Contracts Act 1995* provides:
- (d) the builder warrants that the work will be carried out with reasonable care and skill and will be completed by the date (or within the period) specified by the contract; [emphasis added]
- 28 *In LU Simon Builders Pty Ltd v Allianz Australia Insurance Ltd & Ors* (Domestic Building) [2013] VCAT 468, Deputy President Aird found that a claim for breach of the warranty to take reasonable care – s8(d) – is arguably an apportionable claim<sup>2</sup>. I note that in *LU Simon* the owners corporation alleged that the builder failed *to carry out the work with reasonable care and skill*.
- 29 I accept Deputy President Aird's view that an alleged breach of the s8(d) warranty might form the basis of an apportionable claim. I note that there is no equivalent pleading by the Owner in this proceeding that the Builder failed to carry out the work with reasonable skill and care. However, paragraph 12 of the APoC, underlined above, at paragraph 6, necessarily implies that there has been a breach of the contract (or other obligations) between the parties and the APoC does not exclude the s8(d) warranty.
- 30 Mr Stuckey submitted that the Owner's allegation that the site was over-excavated is necessarily a claim for negligence. There are explanations for breaches of contract other than negligence. But for the s8(d) warranty I would not be satisfied that it is open and arguable that the APoC includes a pleading that the Builder has failed to take reasonable care.
- 31 I am satisfied that the Builder has demonstrated an open and arguable case that the Owner's claim against him includes a claim for breach of obligation to take reasonable care, and therefore the claim by the Owner against the Builder is an apportionable claim.

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<sup>2</sup> The question of whether the breach of warranty is or is not an apportionable claim was not determined in *LU Simon* as the proceeding settled.

## Concurrent wrongdoer?

### Allegations about the concurrent wrongdoer

- 32 I raised the issue of whether a concurrent wrongdoer who it is proposed to join must also be shown to have failed to take reasonable care or breached s18 of the *Australian Consumer Law*. Mr Stuckey submitted that this is not necessary and referred me to *Hunt & Hunt Lawyers v Mitchell Morgan Nominees Pty Ltd & Ors* [2012] HCAASP 58 where the concurrent wrongdoer was a forger. I am satisfied that it is open and arguable that a proposed joined party need not fulfil the requirements of s24AF(1) of the *Wrongs Act 1958*.

## Water Act

- 33 As mentioned above, the draft pleading concerning the Neighbours is that they have breached s16 of the *Water Act*.

### Same loss?

- 34 I raised this issue of whether an alleged breach of the *Water Act 1958* gives rise to the same loss as an alleged breach of a building contract. Mr Stuckey submitted that both concern water ingress, and that is sufficient. The parties did not argue this issue in detail.

### Section 16

- 35 Section 16 of the *Water Act 1958* is entitled “Liability arising out of flow of water etc.” S16(1) relevantly provides:

- (1) If—
  - (a) there is a flow of water from the land of a person onto any other land; and
  - (b) that flow is not reasonable; and
  - (c) the water causes—
    - (i) injury to any other person; or
    - (ii) damage to the property (whether real or personal) of any other person; or
    - (iii) any other person to suffer economic loss—

the person who caused the flow is liable to pay damages to that other person in respect of that injury, damage or loss.

- 36 Section 16 does not state that any flow of water emanating from a property and flowing to another is necessarily unreasonable, and also contemplates that there might be a flow of water from one property to another that causes damage but is reasonable.
- 37 As demonstrated by Mr Schwartz’ affidavit, the Builder’s pleading regarding the source of the water and the cause of the alleged flow is speculative and does not give particulars to paragraph 33 regarding that

flow. Further, the Builder does not set out the basis upon which he alleges that the flow of water is not reasonable.

- 38 I am not satisfied that the Builder has pleaded an open and arguable case that the Neighbours are concurrent wrongdoers.

### **The Neighbours' submission**

- 39 Ms Rita Cannuli submitted that the application to join her parents, the Neighbours, was an unreasonable attempt by the Builder to put pressure on the Owner to reduce her claim against the Builder. While common sense dictates that this is a possible motivation of the Builder, there is no proof that the Builder is behaving in a manner that is vexatious or an abuse of process. As I said during the hearing, I appreciate Ms Cannuli's concerns, but I disregard her submissions on this point.

### **Conclusion regarding joinder**

- 40 I am not satisfied that the Builder has demonstrated an open and arguable case for the joinder of the Neighbours. The application of 21 May 2015 is dismissed to the extent that it seeks to join the Neighbours to this proceeding.

### **OTHER ORDERS**

- 41 As stated at paragraph 7 above, the Builder sought other orders.

- 42 The second order sought was

2. That the Respondent have leave to file and serve an Amended Defence in the form annexed to the Affidavit in support of this application.

For the reasons given above, leave is refused.

- 43 The third order sought was

That the Applicant provide to the Respondent copies of all documents and correspondence provided to Mr Genitsaris of BSS Group referred to in item 1(7) of his report dated 1 May 2014 and provided subsequent thereto.

Mr Beck-Godoy and Mr Stuckey consented that both parties must exchange copies of all documents and correspondence referred to by their experts, Mr Genitsaris and Mr Casamento respectively.

- 44 I refuse the application for orders 4, 5 and 6 sought in the application.

- 45 The Owner consented to proposed order 7:

That Tom Casamento be permitted to excavate a bore hole in the garage slab at 32 Wood Street... and reinstate the core of that hole at the Respondent's cost.

- 46 Proposed order 8 was:

That Tom Casamento be permitted to take water samples for 30 Wood Street... and 32 Wood Street...

The Owner consented to samples of water being taken from 32 and 32A Wood Street.

**COSTS**

- 47 No application for costs was made at the directions hearing. Costs are reserved with liberty to apply.

**SENIOR MEMBER M. LOTHIAN**