

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST

VCAT REFERENCE NO. BP265/2017

CATCHWORDS

Domestic building – application for joinder – relevant considerations – no ‘open and arguable’ case – application dismissed

APPLICANT	Mr John Evans
RESPONDENT	Fynnan Pty Ltd (ACN 079 169 476)
WHERE HELD	Melbourne
BEFORE	Deputy President C Aird
HEARING TYPE	Directions Hearing
DATE OF HEARING	13 August 2018
DATE OF ORDER	28 August 2018
CITATION	Evans v Fynnan Pty Ltd (Building and Property) [2018] VCAT 1335

ORDER

1. The respondent’s further application for joinder is dismissed.
2. **The proceeding is listed for a further directions hearing before Deputy President Aird at 11 am on 18 October 2018 at 55 King Street Melbourne – allow 1 hour.**
3. **I direct the principal registrar to email this order and Reasons to the parties and to the solicitor for the proposed joined parties jacqueline.ivošević@rotsteins.com.au and mark@rotsteins.com.au.**
4. Costs reserved with liberty to apply. Any application for costs will be heard at the directions hearing on 18 October 2018.

DEPUTY PRESIDENT C AIRD

APPEARANCES:

For Applicant	Mr D Oldham, solicitor
For Respondent	Mr P W Lithgow of Counsel
For proposed joined parties	Ms M Rozner of Counsel

REASONS

- 1 The applicant owner ('Mr Evans') is the second owner of a property in Beach Road Black Rock which was developed as a two-lot subdivision by Cassar Constructions Pty Ltd ('Cassar Constructions') which engaged the respondent builder ('Fynnan') to construct two homes on the property with a shared underground carpark and driveway. Mr Evans purchased his home in March 2011.
- 2 This proceeding was commenced by Mr Evans in February 2017 seeking orders that Fynnan pay him damages for the cost of rectification of defects. The amount claimed in the application is \$33,862. When he made the application, Mr Evans did not have legal representation. The claim has since been amended twice, such that Mr Evans now claims damages of \$320,894.80 for the cost of rectification.
- 3 A significant proportion of Mr Evans' claim relates to water ingress arising from works which Fynnan denies having carried out including: \$176,476.30 for faulty weatherproof material to the top of the roof which I understand to relate to the rooftop terrace, \$19,769.75 for water ingress into bedroom 2, \$6,392.10 for water penetration to rear of the ground level and \$5,984.55 for water damage to the driveway and surrounding walls.¹
- 4 Fynnan filed a Defence dated 27 November 2017 in which it sets out various works which it says it did not carry out, and which it contends were carried out by Cassar Constructions and/or Cassar including:
 - i waterproofing to the rooftop
 - ii installation of rock garden in lieu of paved area
 - iii balcony waterproofing
 - iv front entry steps, tiling and waterproofing('the excluded works').
- 5 Following an unsuccessful compulsory conference in March 2018 orders were made for the filing and hearing of any application for joinder. The first joinder application, where Fynnan applied to join Cassar Constructions and its director, Matthew Cassar ('Mr Cassar') as parties, was heard at a directions hearing on 18 June 2018 when I gave the proposed parties leave to intervene to be heard in relation to that application and any further application for joinder. I refused the application, not being satisfied that the draft Points of Claim against the proposed joined parties disclosed an open and arguable case.
- 6 The first joinder application was supported by an affidavit by Mr McPhee dated 13 May 2018, Fynnan's solicitor, the exhibits to which included draft Points of Claim against the proposed parties which sought indemnity or

¹ VPCO Pty Ltd report dated 20 October 2017 at 81

contribution from them *to the extent the Tribunal finds they are responsible for the Applicant's loss and damage* and also sought to rely on ss24AF and 24AH of the *Wrongs Act 1958* alleging that each of the proposed parties is a concurrent wrongdoer and seeking *apportionment of liability pursuant to Part IVAA of the Wrongs Act 1958*. As indicated at the directions hearing on 18 June 2018, and reflected in the directions made that day, any reliance on Part IVAA of the *Wrongs Act 1958* ('Part IVAA') is properly a defence, not a claim against joined parties or respondents.

- 7 I gave the respondent leave to make a further application for joinder. Order 3 of the orders dated 18 June 2018 provide:

Liberty to the respondent to renew the application for joinder until 4pm on 2 July 2018. Any further application for joinder must be accompanied by further affidavit material in support, draft Points of Claim against the proposed joined parties, and if the respondent seeks to rely on Part IVAA of the *Wrongs Act 1958*, draft amended Points of Defence.

- 8 The second joinder application was made on 10 July 2018 and is supported by an affidavit of Jamie Carabott dated 9 July 2018, the exhibits to which include draft Amended Points of Claim against Joined parties ('draft APOC'). Despite the indications I gave at the directions hearing on 18 June 2018 and in the orders made that day, Fynann still includes the Part IVAA defence in the draft APOC rather than seeking to file amended Points of Defence.
- 9 The second joinder application was heard at a directions hearing on 13 August 2018 when Mr Oldham, solicitor appeared on behalf of Mr Evans, Mr Lithgow of Counsel appeared on behalf of Fynnan and Ms Rozner of Counsel again appeared on behalf of the proposed parties.
- 10 Ms Rozner confirmed that the proposed parties again opposed the application for joinder, essentially for the same reasons as had been submitted at the hearing of the first joinder application. Mr Oldham indicated that Mr Evans neither opposed nor consented to the application but expressed concern that having regard to the current form of the draft APOC it was difficult to identify what cause of action, if any, Mr Evans might have against the proposed parties to enable him to file Points of Claim to protect himself if the proposed parties were found to be concurrent wrongdoers.
- 11 In his affidavit, Mr Carabott states that he was a director of Fynnan at all material times, although he is no longer a director. At the commencement of the directions hearing, on 13 August 2018, a Corrective Affidavit by Mr Carabott was handed up, in which he states that he is no longer a director of Fynnan, having been a director from 19 April to 13 September 2017 only. Further that *I was at all material times an employee of the respondent, employed as the on-site project manager and was intimately involved in the project and the works.*

- 12 The proposed parties rely on affidavits of their solicitor Jacqueline Ivošević dated 21 May 2018 and Matthew Cassar dated 21 May 2018 filed in response to the first application for joinder. They have not filed any further affidavit material.

When should joinder be ordered?

- 13 I accept that the Tribunal's powers under s60 of the *Victorian Civil and Administrative Tribunal Act 1998* are very wide. Section 60 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.
- 14 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.²
- 15 Further, it is well established that a party (or a proposed party) has a right to know the case it has to answer. In *Barbon v West Homes Australia Pty Ltd*³ Ashley J held that, whilst pleading summonses should be discouraged, a party has a right to know the case it has to answer:

I would not want it thought for a moment, because the Tribunal is not a court of pleading, and because the Act encourages a degree of informality in proceedings, that Rafferty's Rules should prevail. They should not. Any party, perhaps particularly a party facing a long, drawn-out hearing in the Tribunal - and I note in this case an estimate that the Tribunal hearing would extend for some nine weeks - is well entitled to know what case it must meet before the hearing commences. That is not to say that the case must be outlined with exquisite particularity. It is not to say that a defendant is entitled to evidence rather than particularisation. None the less a defendant is entitled to expect that a claim will be laid out with a degree of specificity such that, if it is obvious that the claimant seeks to pursue a claim which is untenable, that can be the subject of an application before trial; such that, moreover, if adequate particularisation is not provided, the matter will be clear to the Tribunal on application by an aggrieved party.

² *Zervos v Perpetual Nominees Limited* [2005] VSC 380 per Cummins J at paragraph 11

³ [2001] VSC 405 at [6]

WHAT IS REQUIRED TO SUPPORT A PART IVAA DEFENCE?

- 16 In 2013, in *Hunt & Hunt Lawyers v Mitchell Morgan Nominees Pty Ltd & Ors*⁴ the High Court established that in determining whether persons are concurrent wrongdoers there are two questions to be answered:
- a. What is the loss or damage that is the subject of the claim? and
 - b. Is there a person, other than the defendant, whose acts or omissions also caused that damage or loss?
- 17 The loss and damage claimed by Mr Evans is the cost of rectifying the alleged defects. Therefore, notwithstanding that in my view, if Fynnan seeks to rely on a Part IVAA defence it needs to file amended Points of Defence, if I was satisfied on the material before me, that the draft APOC demonstrate an *open and arguable* Part IVAA defence, I could allow the application and order that amended Points of Defence be filed and served. However, first, I must be satisfied on the material before me that it is arguable that Cassar Constructions and/or Cassar also caused the loss and damage claimed by Mr Evans (if proven).
- 18 For the reasons which follow, I am not satisfied that the draft APOC demonstrate that there is an ‘open and arguable’ case against the proposed parties, and the application for joinder will be dismissed.

THE DRAFT APOC

- 19 Surprisingly, although I gave detailed oral reasons for refusing the first joinder application, there have been very few amendments to the draft APOC from those filed in support of the first joinder application, other than to add some further particulars, the last allegation and an additional item in the Prayer for Relief.
- 20 The following is a summary of the relevant allegations made in the draft APOC:
- i Mr Cassar is a builder and *the principal of the respondent pursuant to a principal/agent relationship arising from the Administration Contract as set out in paragraph 5 hereof*;
 - ii Mr Cassar is a director, secretary and shareholder of Cassar Constructions, and a builder;
 - iii Cassar Constructions was the developer of the property which it sold to Mr Evans by contract dated 18 February 2011;
 - iv by contract made in November 2008 Fynnan agreed to administer and co-ordinate building works (being the entire construction of two townhouses) as agent and construction manager for Cassar Constructions;

⁴ [2013] HCA 10

- v Fynann's responsibility for the building works was as agent and construction manager for Cassar Constructions and limited to the administration and co-ordination of the building works;
- vi during the course of the building works, between October 2009 to October 2010 Cassar Constructions and/or Mr Cassar carried out (or employed and supervised others to carry out) certain of the building works including:
 - a. the initial supply and installation of the waterproofing membrane system for the terrace/balcony area; and
 - b. subsequent rectification works to the terrace/balcony area
- vi the initial installation of the waterproofing membrane was not carried out in a proper and workmanlike manner and was defective
- vii rectification works were carried out in relation to the waterproofing membrane for the terrace/balcony area by other employed by and supervised by Cassar Constructions and/or Mr Cassar, using materials selected by and paid for by both or one of them
- viii as a result of the defective waterproofing works Mr Evans has suffered loss and damage
- ix further, Mr Evans has suffered loss and damage caused by Mr Cassar's failure to properly supervise and ensure the adequacy of the waterproofing works
- x Mr Evans has brought a claim against Fynnan which includes a claim in respect of the failure of the terrace/balcony waterproofing works
- xi Fynnan claims an indemnity or contribution from Cassar Constructions and/or Mr Cassar to the extent the Tribunal finds they are responsible for his loss
- xii further, Mr Evans' claim is a claim for economic loss or damage to property in a proceeding (whether in tort, contract, under statute or otherwise) arising from a failure to take reasonable care and accordingly is an apportionable claim for the purposes of Part IVAA of the *Wrongs Act*
- xii each of Cassar Constructions and Mr Cassar are concurrent wrongdoers, as their acts or omissions caused the loss and damage claimed by Mr Evans
- xiii Fynnan's liability to Mr Evans is limited to an amount reflecting the portion of loss and damage that the Tribunal considers just having regard to the extent of the responsibility of Cassar Constructions and Mr Cassar for his loss and damage
- xiv further, Cassar Constructions and/or Mr Cassar have by the conduct referred to [in these Points of Claim] interfered with the performance of the Administration Contract to Mr Evan's detriment (this is the new

allegation included for the second joinder application and there are no particulars to this allegation).

xv item E has been added to the Prayer for Relief whereby Fynann seeks:

An indemnity to the Respondent for damages occasioned by:

- i. the conduct of the waterproofing building works; and
- ii. the interference with the Respondent's performance of the Administration Contract

by the First Joined Party and/or Second Joined Party

21 It is difficult to identify any cause of action against either Cassar Constructions or Mr Cassar personally in the draft APOC. They are no more than a recitation of various allegations about work which Fynann alleges was carried out by Cassar Constructions and/or Mr Cassar.

Does the material demonstrate an 'open and arguable' claim?

22 As has been said a number of times by this Tribunal, it is a serious matter to join another party to a proceeding.⁵ As required by paragraph 22 of Practice Note PNB1 and as ordered in this proceeding, all applications for joinder in the Building and Property List must be accompanied by supporting affidavit material together with draft Points of Claim and/or Points of Defence as the case may be.

23 When considering an application for joinder, and whether the proposed pleading demonstrates an 'open and arguable' case against the background of the factual evidence, the Tribunal is not required to determine the merits of the case before hearing all of the evidence. As Young SM said in *Seachange Management Pty Ltd v Bevnol Constructions & Developments Pty Ltd*⁶:

From these legal principles I deduce that I should accept the allegations in the draft pleading of the party seeking joinder and then assess if there is sufficient evidence from that party that if true would ground such allegations in fact and law such the allegations are "open and arguable": *Zervos* (supra); similar to the assessment of a claim for summary dismissal of unjustified proceedings, s75 of the Act, on the basis that the claim discloses no reasonable course of action. This is not a trial of the allegations, this exercise is to assess whether such allegations can be regarded as "open and arguable" and not "misconceived or hopeless": Bowman J in *Age Old Builders v Swintons Pty Ltd* [2006] VCAT 871 at [55]. This means that the party opposing the joinder needs to adduce factual evidence to establish that allegations by the parties seeking joinder are without foundation. However, if such evidence does not completely render the existence of an allegation as untenable, being hopeless or misconceived, then such

⁵ *Snowden Developments Pty Ltd v Actpen Pty Ltd* [2005] VCAT 2910 at [17]

⁶ [2007] 1980 at [17]

an allegation must remain “open and arguable” and therefore, the joinder may be appropriate (emphasis added)

It is sufficient that I be satisfied that the claims/allegations are not misconceived or hopeless, in much the same way as a consideration of a strike out application.

- 24 The comments by Byrne J in *Wimmera-Mallee Rural Water Authority v FCH Consulting Pty Ltd*⁷ are apt. After confirming that in considering an application for joinder what he described as ‘*the conventional pleading test*’ should be applied, he said:

...Since the application is not a true pleading application, but an application to join a party, the Applicant must adduce material, including, if need be, hearsay in accordance with rule 43.03 (2) sufficient to satisfy the Court to these matters as well as to the matters which may be relevant to the exercise of the discretion of the Court.

- 25 Not only do the draft APOC fail to disclose any discernible cause of action, the affidavit material filed in support of the application provides little, if any, reliable evidence to support any claim which might be made against Cassar Constructions and/or Mr Cassar. For instance, in relation to the waterproofing defects there are no allegations at all as to when and how Cassar Constructions and/or Mr Cassar paid for the waterproof membrane works, the nature and extent of the defects in the original waterproof membrane works or when and by whom any rectification works were carried out. The broad allegation and particulars in the draft APOC that the original waterproof membrane works were carried out in October 2009 and the rectification works were carried out in the 12 month period commencing October 2009 lack substance.
- 26 Fynann relies on a statement from Noel Murphy dated 15 March 2011 in which he states that Bartucca Tiling and Construction arranged for his company to supply the waterproofing system for the apartments at the subject site. He states that he arranged to attend site on 12 October 2009 to oversee one of Bartucca’s employees in the installation process, and that when he attend on 12 October 2009 he observed that his company’s waterproofing system had been installed to the southeast side of the terrace in the absence of him or any of his employees. Further, that he *obtained hearsay evidence that the installation had taken place on the previous Saturday and was conducted by one of Mr Bartucca’s employees, under Mr Matt Cassar’s instructions*. The circumstances under which, and the purpose for which, Mr Murphy’s statement was given are not disclosed, nor does he identify who he obtained the *hearsay evidence* from. Again, I accept that if there were properly pleaded allegations, Mr Murphy’s evidence could be tested under cross examination. However, there are no relevant pleadings.

⁷ [2000] VSC 102

27 The only evidence about the original waterproof membrane works being carried out is contained in the affidavit of Jamie Carabott on behalf of Fynnan, dated 9 July 2018 in which he states that:

7. The contract set out the scope of the works in respect of which the respondent was to carry out the management works ('the scope of works').
8. For the reasons stated herein the respondent was not afforded the opportunity to carry out the management works in respect of all of the scope of works set out in the contract.
9. The respondent commenced the management works in or about October 2008.
10. During the course of the respondent performing the management works the proposed first joined party and/or the proposed second joined party undertook and performed a part of the scope of the building works without the prior knowledge or consent of the respondent and thereby breached the contract under with the respondent was to carry out the management works ('the building works'). (sic)
11. The building works carried out and performed by the proposed first joined party and/or the second joined party comprised the following building works
 - a. The supply and installation of the waterproofing membrane system for the terrace/balcony system, undertaken whilst the respondent was on site but performed on weekends.
 - b. Subsequent rectification works to the terrace/balcony area as a result of inadequate installation of the waterproofing membrane system undertaken after the respondent left the site.
 - c. Balcony waterproofing undertaken whilst the respondent was on site but performed on weekends
 - d. installation of a rock garden, landscaping and timber paling fencing undertaken after the respondent left the site.
 - e. Basement ramp undertaken after the respondent left the site.
 - f. Privacy screens undertaken whilst the respondent was on site but performed on weekends.
 - g. Insulation of internal doors undertaken after the respondent left the site.
 - h. Carpentry fit-off undertaken after the respondent left the site.
12. I can say that the proposed first joined party and/or the proposed second joined party carried out the building works because I saw the work being undertaken by the proposed first joined party and/or the proposed second joined party. I saw this work being undertaken on a Saturday morning in company with Bartucca Tiles. I saw this as a result of driving past the site.

...

17. Further, after the respondent left the property on or about 13 March 2010, the proposed first and/or second joined parties undertook further works over the course of a period of approximately 6 months ('the further building works').
 18. The further building works comprised the construction of the driveway, the landscaping, painting and sealing of the basement, completion of internal painting and plumbing fitoffs.
 19. As a result of the breach of the contract and the building works and the further building works the respondent has suffered loss and damage, being the inability to perform and undertake the management works in respect of the entire scope of works and as a result of the claim brought against it by the applicant, which the respondent says is attributable to the building works and further building works undertaken by the proposed first and/or second joined party.
- 28 The only reference in this affidavit relating to the extensive works said to have been carried out by or at the direction of Cassar Constructions and/or Mr Cassar is Mr Carrabot's evidence that he saw Mr Cassar and a representative onsite one, unidentified, Saturday morning when he drove past the site. Not only is the date of this observation not included, given the extent of the works said to have been carried out by Cassar Constructions and/or Mr Cassar it seems highly unlikely that these would have been completed on one Saturday.
- 29 Mr Cassar has also made an affidavit dated 21 May 2018 in which he denies that any works were carried out by him or Cassar Constructions *save that my son and I planted approximately 7 shrubs in front of the units in natural ground and placed pebbles around them*. He also states that he ceased to be a registered domestic builder on or about 30 November 2003 and ceased to be a registered commercial builder on 1 August 2003, that Cassar Constructions was the developer, and that at no time did he, Cassar Constructions or the builder seek to terminate the building contract as provided for in the terms of the building contract.
- 30 The issues identified in relation to the pleadings concerning the waterproof membrane are not the only gaps in the draft APOC. For instance, and this is not an exhaustive list:
- i the terms of the building contract are not identified, although it is referred to in the draft Points of Claim as 'the Administration Contract' and it is alleged that Cassar Constructions was *the principal of the Respondent pursuant to a principal/agent relationship arising from the Administration Contract*.... I note the contract which is exhibited to Mr Carrabot's affidavit is a standard MBA New Homes Contract which identifies Fynnan as the builder and Cassar Constructions as the owner, and specifies a contract price of \$1,760,000. It was conceded at the hearing of the first joinder

application that the description of Fynnan in Special Condition SC1 of the building contract as ‘the construction manager’ does not mean it was not a builder as defined in s3 of the *Domestic Building Contracts Act 1995* (‘DBCA’);

- ii there are no pleadings supporting the bald assertion that Cassar Constructions and Mr Cassar are each ‘a builder’;
- iii there are no pleadings about the circumstances in which Fynnan left the site, the stage of the works when it left, how the ‘excluded works’ came to be carried out by Cassar, or even how it was that they were not carried out by Fynnan;
- iv although it is alleged that Cassar Constructions and/or Mr Cassar carried out certain works, which it was conceded at the hearing of the first joinder application are ‘contract works’, there are no pleadings as to the circumstances giving rise to those works being excluded from the contract. There are no variations pleaded and no indication of a reduction in the contract price (particularly as Mr Cassar exhibits to his affidavit an invoice from Bartucca Tiling & Construction dated 14 October 2009 addressed to Fynnan for *labour and material to lay membrane on balcony – unit 2 \$53,984.60*). Although it was suggested at the hearing of the first joinder application that this invoice was addressed to Fynnan in its role as construction manager in accordance with special condition SC1, there are no pleadings in relation to it in the draft Amended Points of Claim;
- v there are no specific pleadings against Mr Cassar demonstrating how it is said that he was acting independently of Cassar Constructions or is otherwise responsible for Mr Evan’s loss and damage;
- vi there are no pleadings supporting the claim for contribution and indemnity;
- vii although it is contended that Mr Evans’ claim is an apportionable claim and that Cassar and Mr Cassar are concurrent wrongdoers, there are no pleadings supporting this.

CONCLUSION

- 31 The application will be dismissed. Noting this is Fynnan’s second application to join Cassar Constructions and Mr Cassar I do not consider it fair to Mr Evans to prolong this proceeding any further by granting Fynnan leave to make any further application for joinder. Mr McPhee indicated at the hearing of the first joinder application that if the application was refused, then Fynnan would simply commence a separate proceeding against Cassar Constructions and Mr Cassar and then apply for both proceedings to be heard and determined together. Whether a separate proceeding is issued is, of course, a matter for Fynnan. I encourage Fynnan to have regard to these Reasons when commencing any separate proceeding to avoid any unnecessary applications under s75 of the VCAT Act.

32 I will reserve the question of costs, noting that following the hearing of the first joinder application I ordered Fynnan to pay the costs of the proposed parties fixed in the sum of \$750.

DEPUTY PRESIDENT C AIRD