

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST

VCAT REFERENCE NO. BP502/2018

CATCHWORDS

Domestic building, respondent – owner-builder, joinder, engineer in liquidation, permission of the Supreme Court for the respondent to join the engineer to this proceeding, whether there is an open and arguable case that any loss is apportionable between the respondent and his engineer under Part IVAA of the *Wrongs Act 1958*, whether the respondent has a claim for contribution or indemnity against his engineer under Part IV of the *Wrongs Act*.

APPLICANT	Luigi Gigliuto
FIRST RESPONDENT	Christopher Sassella
SECOND RESPONDENT	Dome Consulting Pty Ltd (ACN: 097 488 090) (in liquidation)
WHERE HELD	Melbourne
BEFORE	Senior Member M. Lothian
HEARING TYPE	Hearing
DATE OF HEARING	15 November 2018
DATE OF ORDER	7 December 2018
CITATION	Gigliuto v Sassella (Building and Property) [2018] VCAT 1946

ORDERS

- 1 Pursuant to section 60 of the *Victorian Civil and Administrative Tribunal Act 1998* (Vic), and upon application by the first respondent, Dome Consulting Pty Ltd (ACN 097 488 090) (in liquidation) is joined to this proceeding as second respondent.
- 2 By 12 December 2018 the first respondent must file and serve the name and address of the second respondent's liquidator.
- 3 By 12 December 2018 the first respondent must serve a copy of these Orders and Reasons on the second respondent and thereafter file a proof of service.
- 4 The second respondent's liquidator is requested to file and serve a notice stating whether the second respondent will defend the claim for indemnity

or contribution. Should such a notice not be received by 16 December 2018, the inference will be drawn that the second respondent does not intend to take an active part in this proceeding.

- 5 By 12 December 2018 the first respondent must file and serve Points of Claim against the Second Respondent in general accordance with exhibit MTC 4 to the affidavit of Mark Thomas Croft of 9 November 2018 and any Amended Points of Defence.
- 6 The proceeding is set down for a directions hearing before Senior Member Lothian on 17 December 2018 at 9:30 am at 55 King Street Melbourne to make further directions for the conduct of the proceeding and to hear any application for costs.**
- 7 I direct the Principal Registrar to send copies of these orders to the applicant and the first respondent by email marked "Urgent".**
- 8 There is liberty to apply.
- 9 Costs reserved with liberty to apply. Any application for costs will be heard at the directions hearing on 17 December 2018.

SENIOR MEMBER M. LOTHIAN

APPEARANCES:

For the Applicant:	Ms C. Stajcer, solicitor
For the First Respondent:	Mr A. Beck-Godoy of counsel
For the Second Respondent:	No appearance

REASONS

- 1 Dome Consulting Pty Ltd (“Dome”) was the second respondent to this proceeding until struck out by orders in chambers on 2 May 2018 as it had gone into liquidation.
- 2 The first respondent, Mr Sassella, (“respondent”) seeks to rejoin Dome to the proceeding to enable him to claim for contribution or indemnity and also to plead Part IVAA of the *Wrongs Act 1958*, in his points of defence against the applicant.
- 3 The applicant, Mr Gigliuto, resists the application.
- 4 Ms C. Stajcer, solicitor, appeared for the applicant and Mr A. Beck-Godoy of Counsel appeared for the respondent. There was no appearance for Dome.

HISTORY

- 5 The applicant commenced his proceeding on 9 April 2018. In his Points of Claim filed with his application the applicant pleaded that he is the owner of land and improvements in Ivanhoe. The respondent was the previous owner and Dome was the engineer engaged by the respondent.
- 6 The applicant pleaded that the respondent carried out domestic building work at the property as owner-builder and Dome provided the structural design for the slab construction and garage included in the works undertaken by the respondent.
- 7 He pleaded that since taking possession he noticed significant movement in floors, walls, roof coverings and flashings with cracking and movement to brickwork, plaster and roof tiles and water entry through the roof, and movement to the associated swimming pool. I accept the respondent’s submission that the applicant’s proceeding is for building defects and in particular there are allegations of subsidence of the slab for which Dome is alleged to have been the relevant designer.
- 8 The applicant pleaded that the respondent breached the warranties implied by virtue of sections 137B and 137C of the *Building Act 1993* when an owner-builder sells a property. He has not pleaded that the first respondent owes him, or has breached, a duty of care.
- 9 From paragraph 17 to 21 of the Points of Claim the applicant pleaded against Dome. He pleaded in general terms that:
 - Dome had a duty to provide engineering services properly, in accordance with accepted standards of engineering practice and in accordance with all laws and legal requirements;
 - the duty was a statutory duty and also a duty of care was owed to the applicant as subsequent purchaser;

- in reliance on the duty owed by Dome, the applicant purchased the property with the expectation that Dome had performed his duties as necessary;
 - Dome breached its duty of care and in particular failed to ensure that the design would enable the works to be completed substantially in accordance with the Building Act and building regulations, but instead the structural drawings were not suitable as they were not specific to the site conditions and should have offered a piling system or other method to achieve acceptable bearing capacity of the each beam;
 - because of Dome's breach of statutory duty and duty of care the owner suffered loss and damage.
- 10 Although the proceeding against Dome has been struck out with a right to apply for reinstatement, the applicant has not filed amended points of claim.
- 11 The applicant pleaded against the respondent that the contract of sale contained the following warranties for the work undertaken by the first respondent:
- a. All domestic building work carried out in relation to the construction by or on behalf of the [first respondent] of the home was carried out in a proper and workmanlike manner;
 - b. All materials used in the domestic building work were good and suitable for the purpose for which they were used and that, unless otherwise stated in the contract [or] in the Building Inspection Report included in the attached [first respondent's] Section 32 Statement those materials were new; and
 - c. The domestic building work was carried out in accordance with all laws and legal requirements including without limiting the generality of this warranty the Building Act 1993 and the regulations made under the Building Act 1993.
- 12 The applicant also pleaded that the warranties set out in s 137C of the Building Act apply to the sale of the property. The warranties are to the same effect as those contained in the contract of sale.
- 13 On 12 April 2018 the Tribunal made orders in chambers noting that Dome, which was named as the second respondent in the application, was shown in the ASIC company extract provided by the applicant to be in liquidation. The first order was to require the applicant to notify the Tribunal whether he proposed to seek leave of the Federal Court of Australia or the Supreme Court of Victoria to proceed against Dome, failing which the proceeding against Dome would be struck out.
- 14 On 1 May 2018 the applicant wrote to the Tribunal and to the first respondent to say that he did not intend to seek permission of the Federal Court of Australia or Supreme Court of Victoria to proceed against the second respondent. As mentioned above, the proceeding was struck out against Dome.

- 15 The respondent subsequently sought leave of the Supreme Court to join Dome, while in liquidation, to this proceeding. The orders of Associate Justice Randall of 5 October 2018 are relevantly:
1. The Plaintiff [the respondent] have leave pursuant to section 500(2) of the *Corporations Act* 2001 (Cth) to join the Defendant [Dome] as a co-respondent or, alternatively, as a joined party to the proceeding number BP502/2018 in the Victorian Civil and Administrative Tribunal, and for that proceeding to proceed.
 2. The Plaintiff take no step to enforce against the Defendant any order made or judgement given in any proceeding by the Plaintiff against the Defendant for the purpose of payment or recovery of money without leave of this Honourable Court.
- 16 The hearing before Associate Justice Randall was ex parte. There was no appearance for Dome or for the applicant. His Honour’s decision contemplates that the respondent might claim against Dome, and while the respondent must still obtain the consent of the Supreme Court before enforcing any order, the Supreme Court orders do not prevent him from seeking a judgement against Dome.
- 17 The respondent filed Points of Defence dated 10 September 2018 which include, at paragraph 16, a pleading that the claim against him is an apportionable claim because at least part of the loss and damage was caused or contributed to by acts of Dome, described in that pleading as the “proposed Second Respondent”.
- 18 The respondent sought to join Dome to the proceeding for the purposes of Part IV of the Wrongs Act, and to plead apportionment as a defence to the applicant’s claim, under Part IVA. In accordance with orders in chambers of 17 September 2018 the proceeding was listed for directions on 15 November 2018 to consider the first respondent’s application to join Dome to this proceeding.
- 19 The respondent filed an affidavit of Mr Mark Croft, solicitor, of 9 November 2018 in support of his application to join Dome.
- 20 Mr Croft’s affidavit repeats the history of this proceeding and adds at paragraph 11 that Dome was engaged by the respondent to provide design services, issue a form 13 certificate, a revised form 12 certificate and a form 11 certificate in respect of the design services.
- 21 At paragraph 8 of the Proposed Points of Claim, the respondent pleads:
- In or about May or June 2005, the [respondent] and [Dome] entered into an agreement pursuant to which [Dome] agreed to provide engineering services for the construction of a dwelling at the property. [Dome’s] engineering services included:
- (a) preparation of drawings;
 - (b) preparation of computations;

- (c) issuing certificates of design compliance; and
- (d) inspection of the [respondent's] footings...

22 And at paragraph 26:

... if the [applicant] has suffered loss and damage it arises as a consequence of [Dome's] breaches of:

- a. its duty of care to the [respondent] and the [applicant]; and
- b. the Engineering Design Services Contract. [The contract between Dome and the first respondent].

23 And at paragraph 27:

In the premises, the [respondent] is entitled to recover contribution or indemnity from [Dome] pursuant to Part IV of the *Wrongs Act 1958* (Vic) to the extent (if any) that part IVAA of the *Wrongs Act 1958* (Vic) does not apply.

24 In brief, the respondent claims apportionment in its Points of Defence and contribution or indemnity in the Proposed Points of Claim against Dome.

BASIS OF JOINDER

25 The parties agree that all that is necessary to join a party to a proceeding is that the claim against it be "open and arguable". Mr Beck-Godoy submitted that the statutory regime under the *Victorian Civil and Administrative Tribunal Act 1998* (VCAT Act) requires broad interpretation and the Tribunal should be reticent to make findings against joinder at an early stage. I find that the "open and arguable" test is sufficient without any further considerations.

APPLICANT'S OBJECTIONS

26 The applicant argued that Dome could no longer be joined to this proceeding because the claim against it is now statute barred. It was also submitted that the warranties upon which the applicant seeks to rely against the respondent as owner-builder are, unlike the warranties given by a builder to an owner, particularly under s 8(d) of the *Domestic Building Contracts Act 1995*, not apportionable and the applicant has only pleaded his statutory rights against the first respondent; he has not alleged a duty of care.

Limitation period

27 The parties agree that over 10 years has expired since the occupancy permit was granted and that if a party was seeking to rely on s 134 of the Building Act, time would have expired.

28 Section 134 of the Building Act provides:

134 Limitation on time when building action may be brought

Despite anything to the contrary in the **Limitation of Actions Act 1958** or in any other Act or law, a building action cannot be

brought more than 10 years after the date of issue of the occupancy permit in respect of the building work (whether or not the occupancy permit is subsequently cancelled or varied) or, if an occupancy permit is not issued, the date of issue under Part 4 of the certificate of final inspection of the building work.

Apportionment

29 The respondent relied on the decision of Senior Member Riegler in *Nguyen v Dradicevic (Building and Property)* [2015] VCAT 1629¹, to argue that joinder for the purposes of apportionment does not constitute a building action as it is not an action for loss or damage; that Part IVAA of the Wrongs Act is not subject to s 134 of the Building Act; and the fact that an applicant might be precluded from bringing a claim against a joined party is of no consequence as the Wrongs Act is not designed to provide relief to claimants.

30 At paragraph 13 of *Nguyen*, Senior Member Riegler said of Part IVAA of the Wrongs Act:

Part IVAA was introduced into the *Wrongs Act 1958* by the *Wrongs and Limitation of Actions Acts (Insurance Reform) Act 2003*. The stated purpose of that amending Act was to set out a regime for apportioning liability in proceedings for economic loss. Its objectives were not to preserve a claimant's rights but rather, to ensure that a respondent's liability was commensurate with its responsibility for the loss and damage suffered by the claimant. In that sense, the legislation was tailored to benefit respondents by abolishing joint and several liability in certain cases. The consequences of legislation which apportions liability is that it places a heavier onus on claimants to ensure that the proper respondents are made parties to a proceeding (before the expiration of any statutory limitation period).

31 He expressed the view at paragraph 15 that:

... joinder for the purpose of taking advantage of the apportionment legislation is not, in my view, an *action for damages for loss or damage*. Loss and damage is not being claimed by the party seeking the joinder of another concurrent wrongdoer. Therefore, I do not consider that the joinder of a concurrent wrongdoer, solely for the purpose of apportioning liability, constitutes a *building action*, within the meaning of that term as defined under s 129 of the *Building Act 1993*.

32 He went on to conclude at paragraph 16:

That being the case, I do not find that Part IVAA of the *Wrongs Act 1958* is subject to s 134 of the *Building Act 1993*. The mere fact that the Owners may not be able to successfully claim against Soiltest² is of no consequence because the legislative regime is not designed to

¹ Cited with approval by Vice President Judge Jenkins in *Adams v Clark Homes Pty Ltd (Building and Property)* [2015] VCAT 1658

² The proposed joined party in that proceeding.

provide relief or remedies to a claimant. Indeed, this proposition is reinforced by the fact that Part IVAA of the *Wrongs Act 1958* provides that a concurrent wrongdoer may be insolvent, in the process of being wound up, ceased to exist or has died.

Conclusion regarding whether s134 acts as a time bar to apportionment

- 33 I am satisfied that the expiration of time under s134 does not, by itself, prevent there from being an open and arguable case that the applicant's loss can be apportioned to Dome.

Contribution or indemnity

- 34 The respondent pleads in the Proposed Points of Claim against the Second Respondent at paragraph 7:

... to the extent that [the applicant's] claim is not an apportionable claim... the first respondent is entitled to contribution and/or indemnity from [Dome pursuant to section 23B of the *Wrongs Act*]...

- 35 Section 23B provides as follows:

23B Entitlement to contribution

- (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).
- (2) A person shall be entitled to recover 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 provided that that person was so liable immediately before that person made or was ordered or agreed to make the payment in respect of which the contribution is sought.
- (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 a period of limitation or prescription which extinguished the right on which the claim against that person in respect of the damage was based.

...

- 36 For the purpose of recovering contribution, s 24(4) provides:

24 Recovery of contribution

...

- (4) 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 –

(b) 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]

Conclusion regarding whether s134 acts as a time bar to contribution or indemnity

37 I note that the applicant commenced this proceeding on 9 April 2018 and that the Tribunal served it on the first respondent by letter posted 23 April 2018. I am satisfied that it is arguable that the first respondent’s claim for contribution or indemnity against Dome has been commenced within time, particularly having regard to s 24(4)(a)(ii).

Owner-Builder warranties and apportionability

38 Ms Stajcer drew my attention to paragraph 63 of Judge Jenkins’ decision in *Adams v Clark Homes Pty Ltd (Building and Property)* [2015] VCAT 1658, where her Honour said:

Where a defendant seeks to join a party to a proceeding in the Tribunal, raising Part IVAA, the defendant is required, at the time of such joinder application, to attest to the basis upon which it is alleged that the claim is an apportionable claim and the proposed joined party is a concurrent wrongdoer.

“Apportionable claim”

39 Under s 24AE of the Wrongs Act, an “apportionable claim” is “a claim to which this part [IVAA] applies”. The definition become somewhat less circular under s 24AF which 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 [Underlining added]

40 There is no question that it is open and arguable that the applicant has a claim for failing to take care against Dome, because that is part of what the applicant pleaded against Dome. This is also pleaded by the respondent in

the Proposed Points of Claim against the Second Respondent. The issue is whether the applicant's claim against the respondent also includes an element of failure to take care, because if it does not, it may be that the Wrongs Act precludes the respondent from being a "concurrent wrongdoer" with Dome for the purpose of apportionment.

41 Section 24AH defines a concurrent wrongdoer as follows:

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.
- (2) For the purposes of this Part it does not matter that a concurrent wrongdoer is insolvent, is being wound up, has ceased to exist or has died.

42 Neither party drew my attention to decisions of the Tribunal or the courts which dealt with the question of whether it is arguable that the first respondent's obligations under the contract of sale of land and also s 137C of the Building Act arise in part from a failure to take reasonable care.

43 In *Hardiman v Gory* [2008] VCAT 267 Deputy President Aird considered whether a proceeding against owner-builders was statute barred and also turned her attention to whether the claim by the subsequent owner against the owner-builders was an apportionable claim but the question is yet to be determined.

44 At paragraph 18 she said:

Having regard to the provisions of ss 97 and 98 of the *Victorian Civil and Administrative Tribunal Act 1998*, it is not appropriate that the question as to whether this is an apportionable claim be determined prior to the hearing.

45 Whether the s 137C warranties are apportionable has not yet been determined by this Tribunal or the courts as far as I am aware. In any event, as I am allowing the application for joinder for the purposes of contribution and indemnity, it is necessary for me to determine whether the warranties are apportionable. I am satisfied that this is an open and arguable case.

Builder's claim for contribution or indemnity against Dome

46 In the Proposed Points of Claim against the Second Respondent, the respondent recited that in May or June 2005 he entered a contract with Dome for the latter to provide engineering services. The respondent has pleaded that Dome has breached its contract with him or acted negligently. Details of the breaches are set out but it is not necessary to include them in these Reasons.

47 I am satisfied that those pleadings are sufficient for an open and arguable case.

Conclusion

- 48 As stated above I am satisfied that there is an open and arguable case by the first respondent against Dome for contribution or indemnity and that it is open and arguable that Dome is a concurrent wrongdoer
- 49 I will order that Dome be joined as the second respondent.

SENIOR MEMBER M. LOTHIAN