VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST VCAT REFERENCE NO. BP 1022/2017

CATCHWORDS

DOMESTIC BUILDING - PRACTICE AND PROCEDURE – PART IVAA *WRONGS ACT* 1958. Claim by homeowner applicants against a respondent builder. A sub-contractor of the builder, who manufactured and supplied the windows and doors for the subject building project, joined as a party to the proceeding, on the application of the respondent, for the purpose of the respondent's third-party contribution claim against the sub-contractor. Respondent application to amend its Points of Defence in the proceeding to include an apportionment defence under Part IVAA of the *Wrongs Act* 1958, alleging the sub-contractor to be a *concurrent wrongdoer*. Application refused because the proposed amended Points of Defence fails to articulate a legal cause of action as between the applicants and the sub-contractor. Consideration of the Court of Appeal decision in *St George Bank Ltd v Quinerts Pty Ltd* and the High Court decision in *Hunt & Hunt v Mitchell Morgan Nominees Pty Ltd*.

APPLICANTS	Mark and Joanne McClafferty
FIRST RESPONDENT	Greg Smith Pty Ltd (ACN 005 721 942)
SECOND RESPONDENT	Peter Vernon t/as Peter Vernon Architects
JOINED PARTY	Glen Hatfield t/as Redfern Joinery
WHERE HELD	Melbourne
BEFORE	Senior Member M. Farrelly
HEARING TYPE	Directions Hearing
DATE OF HEARING	6 December 2018
DATE OF ORDER	4 March 2019
CITATION	McClafferty v Greg Smith Pty Ltd (Building and Property) [2019] VCAT 299

ORDER

1. The respondent's application to join Mr Glen Hatfield as a respondent to the proceeding and to file and serve Further Amended Points of Defence, in the form of the proposed Further Amended Points of Defence dated 9 November 2018, is refused.

SENIOR MEMBER M. FARRELLY

APPEARANCES:

For the Applicants	Mr J M Shaw of Counsel
For the First Respondent	Mr N J Phillpott of Counsel
For the Second Respondent	Mr J Chew, Solicitor
For the Joined Party	Mr M J Campbell of Counsel

REASONS

1 The applicants ('**the owners**') are the owners of a home in Cardigan, Victoria which was constructed by the first respondent ('**the builder**') pursuant to a building contract between the owners and the builder. The owners bring a claim against the builder for, amongst other things, damages in respect of alleged defective building works.

2 Under the building contract, the second respondent ('**the architect**') was, amongst other things, appointed to administer the contract and to be the owners' agent for the purpose of giving instructions to the builder.

3 At a directions hearing before me on 6 December 2018, the builder brought an application under section 60 of the *Victorian Civil and Administrative Tribunal Act* 1998 that a further party, Mr Glen Hatfield trading as Redfern Joinery, be joined as a party to the proceeding. Mr Hatfield was the supplier of windows and doors used in the building works.

4 The proposed joinder of Mr Hatfield was put on two bases.

5 On one basis, the builder sought damages from Mr Hatfield in the event the builder was found liable to the owners for some of the claims brought against it by the owners. The builder presented proposed Points of Claim against Mr Hatfield which assert a contract between the builder and Mr Hatfield for the supply of windows and doors, and alleges a breach of implied terms of that contract on the part of Mr Hatfield. For ease of reference, I refer to this claim as the '**third- party claim**'.

6 On a further basis, the builder sought the joinder of Mr Hatfield as a further *respondent* in the proceeding to attract the operation of provisions under Part IVAA of the *Wrongs Act* 1958 ('**the Act'**). In this regard the builder alleges:

- the claim brought by the owners against the builder is an '*apportionable claim'* within the meaning of sections 24AE and 24F of the Act; and
- Mr Hatfield is, in respect of the apportionable claim, a '*concurrent wrongdoer'* within the meaning of section 24 AH of the Act; and
- under section 24 AI of the Act, the liability (if any) of the builder in respect of the owners' claim should be limited having regard to the comparative responsibility of Mr Hatfield as a concurrent wrongdoer.

7 For ease of reference, I refer to the alternative joinder basis as the '**apportionment defence**'. The builder presented a proposed Further Amended Points of Defence dated 9 November 2018 ('**the proposed FAPD'**) naming Mr Hatfield as a further respondent and setting out the apportionment defence.

8 In respect of the third-party claim, Mr Hatfield and the owners, through their respective lawyers, concede that the third-party claim is clearly arguable, and for that reason they did not oppose the joinder of Mr Hatfield

for the purpose of that third-party claim. They do, however, oppose the joinder of Mr Hatfield for the purpose of the apportionment defence.

9 The second respondent ('**the architect'**), through his lawyer, takes a neutral stance, neither consenting to nor opposing the joinder application.

10 I allowed the joinder of Mr Hatfield as a party (the 'Joined Party') to the proceeding for the purpose of the third-party claim, and I made appropriate orders including the file and service of the builder's Points of Claim against Mr Hatfield.

11 I reserved my decision on the application to join Mr Hatfield as a respondent for the purpose of the apportionment defence as set out in the proposed FAPD. For the reasons set out below, I refuse that application.

BACKGROUND

12 In 2010, the owners entered the building contract with the builder.

13 Works under the contract were carried out, and an occupancy permit was issued on 12 December 2011.

14 By their Points of Claim dated 21 December 2017, the owners bring a claim against the builder alleging breach of contract, including breach of the express warranty that the building works must be carried out with reasonable care and skill. They seek damages in respect of alleged defective building work. They also seek delay damages.

15 The alleged defective building work includes alleged defective windows and doors which have resulted in water leaks and gaps and cracks around window and door frames. The owners rely on expert reports.

16 In its Points of Defence, the builder denies liability and asserts, amongst other things, a deficiency in the design (prepared by the architect) of the home. The builder relies on expert reports in asserting, amongst other things, the failure of the architect in respect of the design and specification of the windows. It is alleged the specified windows are unsuitable having regard to the home's exposure to prevailing weather conditions.

17 At a directions hearing before me on 12 October 2018, the builder made application to join both the architect and Mr Hatfield as further respondents to the proceeding for the purpose of an apportionment defence in respect of each of them. Proposed Amended Points of Defence set out the apportionment defences. In respect of the architect, the proposed pleading alleged, amongst other things:

- the engagement of the architect by the owners to provide a range of services including preparation of design documentation, building permit documentation and the provision of contract administration services,
- a term of such engagement which required that the services be provided with the skill and professionalism of a reasonable, qualified and registered architect, and

- the architect's breach of such term by his:

  a) failure to prepare plans and specifications for the home with care and skill;

  b) failure to properly inspect the works carried out by the builder prior to completion of the works; and

  c) failure to exercise care and skill when recommending tradesmen or suppliers. This allegation relates to the architect's recommendation that the builder obtain the doors and windows for the home from Mr Hatfield.

18 I was satisfied that the proposed amended pleading presented an arguable apportionment defence in respect of the architect, and as such I ordered the joinder of the architect as a party to the proceeding, to be named the second respondent. I ordered the file and service of Amended Points of Defence which would include the proposed apportionment defence in respect of the architect.

19 I was not, however, satisfied that the proposed pleading presented an arguable apportionment defence in respect of Mr Hatfield. At that time, the builder had not sought to bring the third-party claim against Mr Hatfield. I adjourned the application for the joinder of Mr Hatfield for further hearing on 6 December 2018.

20 When the matter returned before me on 6 December 2018, in addition to its application that Mr Hatfield be joined as a respondent for the purpose of the apportionment defence, the builder also presented proposed Points of Claim against Mr Hatfield to support the further application that Mr Hatfield be joined for the purpose of the third-party claim. As noted above, I ordered the joinder of Mr Hatfield for the purpose of the third-party claim.

21 The builder presented the proposed FAPD in support of its application that Mr Hatfield be joined to the proceeding as a further respondent for the purpose of the apportionment defence. I do not accept that the proposed FAPD sets out an open and arguable apportionment defence in respect of Mr Hatfield.

THE ACT

22 Relevant provisions of the Act provide:

> **24AE Definitions**
>
> In this Part –
>
> *apportionable claim* means a claim to which this Part applies;
>
> …
>
> **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).

…

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.

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.

(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.

THE PROPOSED APPORTIONMENT DEFENCE PLEADING

23 The proposed FAPD sets out the apportionment defence in respect of Mr Hatfield:

10. Further, the First Respondent [the builder] says that the claim brought by the Applicants [the owners] against the First Respondent is an apportionable claim within the meaning of sections 24 AE and 24 AF of the *Wrongs Act* 1985 (Vic) (**the Act**)

Particulars

In bringing this proceeding against the First Respondent, the Applicants allege, inter alia, that the First Respondent breached the warranties arising out of section 8 of the *Domestic Building Contracts Act* 1995 (**the DBC Act**), including, but not limited to, a warranty that the work will be carried out by the First Respondent with reasonable care and skill.

Further, the applicants allege that they have suffered loss and damage as a result of the alleged breach in the total sum of $321,015.00.

…

19. The Proposed Joined Party/Proposed Third Respondent (**the Joiner**) [Mr Hatfield] is and was at all material times:

    (a) registered as a sole trader, trading as Redfern Joinery;

    (b) capable of suing and being sued; and

    (c) carrying on business as a joiner and manufacturer of windows and doors.

20. In or about mid 2010, the Applicants accepted the First Respondent's tender to construct a two-storey home on the Property, save for the First Respondent's quotation with respect to the manufacture and supply of windows and doors, which was expressly rejected by the Applicants.

Particulars

The First Respondent relies upon the email from the Second Respondent to the Builder dated 19 August 2010.

21. Following the Applicants' rejection of the First Respondent's quotation with respect to the manufacture and supply of windows and doors, the Architect instructed the First Respondent to engage the Joiner to manufacture and supply the windows and doors for the Property.

Particulars

The Builder relies upon oral conversations between Mr Greg Smith of the Builder and Mr Peter Vernon of the Architect, on or about late August or early September 2010. the substance of which the Architect the Architect [sic] instructed the Builder to engage the Joiner to manufacture and supply the windows and doors for the Property.

22. On or about 16 July 2010, the Joiner provided a quotation to the First Respondent to manufacture and supply the windows and doors for the Property.

23. On or about 15 September 2010, the First Respondent accepted the Joiner's quotation to manufacture and supply the windows and doors for the Property by sending the Joiner a purchase order (**the Agreement**).

Particulars

The First Respondent relies upon the Purchase Order No. 1486 dated 15 September from it to the Joiner.

24. There were terms of the Agreement, inter alia, that the Joiner would manufacture and supply the windows and doors for the Property:

    (a) in a proper and workmanlike manner:

    (b) in accordance with all laws and legal requirements: and

    (c) with due skill and care.

Particulars

The above terms were implied and they were so implied by law and they were further implied by the parties entering into the Agreement.

25. Between November 2010 and mid-2011, the Joiner manufactured and supplied the windows and doors for the Property.

26. In breach of the Agreement, the Joiner failed to complete the works the subject of the Agreement:

    (a) in a proper and workmanlike manner;
    (b) in accordance with all laws and legal requirements; and
    (c) with due skill and care.

Particulars

The First Respondent relies on the Applicants' Points of Claim dated 21 December 2017, in particular, paragraphs 6 and 7 therein and the particulars thereto.

By reference to the expert reports filed in this proceeding, the First Respondent refers to Item 1.0 (pages 2 to 16) of the Buildwise Report, Item I (pages 5 to 12) of the Croucher Report and Item E (pages 6 and 7) of the Second Cossins Report.

27. By reason of the matters contained in paragraph 26 herein, and the particulars thereto, the Joiner is a concurrent wrongdoer within the meaning of section 24AH of the Act, that is, the Joiner 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 Applicants' claim.

28. By reason of the matters contained in paragraphs 10 and 19 to 27 herein and the particulars thereto, pursuant to section 24AI of the Act, the First Respondent's liability, if any, to the Applicants, which is expressly denied, should be limited to that proportion which the Tribunal considers just, that is, an amount reflecting a proportion of the damage or loss

claimed by the Applicants for which the First Respondent is responsible, compared to the Joiner.

DISCUSSION

24 I accept it is arguable, as asserted in paragraph 10 of the proposed FAPD, that the owners' claim against the builder is an apportionable claim within the meaning of section 24 AF(a) of the Act. That is, 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.

25 The issue is whether the proposed FAPD adequately sets out the basis upon which it might be found that Mr Hatfield is a *concurrent wrongdoer* within the meaning of the Act. That is, assuming the facts and matters pleaded can be proved, will that be sufficient for a finding that Mr Hatfield is a concurrent wrongdoer within the meaning of the Act? In my view the answer is no.

26 The matters pleaded in the proposed FAPD, relevant to the assertion that Mr Hatfield is a concurrent wrongdoer within the meaning of the Act, can be briefly summarised as follows:

- the owners claim damages from the builder in respect of alleged unsuitable/unsatisfactory doors and windows;
- the builder selected Mr Hatfield (on the instruction of the architect) to manufacture and supply the doors and windows. The contract between the builder and Mr Hatfield included implied terms that the windows and doors would be manufactured and supplied in a proper and workmanlike manner and in accordance with all laws and legal requirements and with due skill and care;
- the doors and windows are unsuitable and/or unsatisfactory for a number of reasons as set out in the owners' Points of Claim and the expert reports; and
- accordingly, in respect of the owners' damages claim, Mr Hatfield is a concurrent wrongdoer within the meaning of the Act.

27 In effect, the builder says there is a causal connection between the damages claim of the owners and the actions or omissions of Mr Hatfield, and that that is enough to make Mr Hatfield a *concurrent wrongdoer* within the meaning of the Act.

28 Mr Hatfield and the owners say that the causal connection, that is the alleged factual causation between the acts or omissions of Mr Hatfield and the loss and damage claimed by the owners, is, on its own, not enough. They say that, for Mr Hatfield to be a concurrent wrongdoer within the meaning of the Act, there must be a legal cause of action in the hands of the owners as against Mr Hatfield. That is, the alleged acts or omissions of Mr Hatfield must be, in the hands of the owners, legally actionable acts or

omissions. In this regard they rely on the decision of the Court of Appeal in *St George Bank Ltd v Quinerts Pty Ltd* [2009] VSCA 245.

QUINERTS* and *HUNT & HUNT

29 In *Quinerts*, the plaintiff, a bank, alleged that the defendant (Quinerts), a valuer, had negligently overvalued premises used as security for a loan by the bank to a borrower. After the borrower defaulted on the loan, the mortgaged premises proved to be inadequate security for the loan and the bank suffered loss in excess of $100,000. The bank brought a claim against Quinerts alleging negligent overvaluation of the premises. Although Quinerts admitted incompetence in overvaluing the premises, it defended the claim alleging contributory negligence on the part of the bank in failing to properly assess the borrower's capacity to service the loan.

30 As part of its defence, Quinerts also claimed that the failure of the borrower, and a guarantor, to repay the loan had caused the loss and damage the subject of the claim, and that the borrower and the guarantor were *concurrent wrongdoers* within the meaning of the Act. Quinerts submitted that its liability ought be limited to an amount reflecting a just proportion having regard to its responsibility, as one of several concurrent wrongdoers, for the loss and damage claimed. This contention was rejected by the trial judge in the County Court, and was one of the issues before the Court of Appeal.

31 Nettle JA, whose reasons Mandie JA and Beach AJA agreed with, looked at the purpose of the apportionment of liability provisions under Part IVAA of the Act having regard to, amongst other things, Part IV of the Act which makes provisions in respect of *contribution* claims.

32 Section 23B, under Part IV of the Act, provides that a person who is liable for damage suffered by a claimant may recover contribution from any other person *liable* in respect of the same damage. Section 24 AH(1), which provides the definition of a '*concurrent wrongdoer'*, does not use the word 'liable'. It provides that a concurrent wrongdoer is a person whose acts or omissions *caused* the loss or damage that is the subject of the claim.

33 Nettle JA concluded that the term '*loss or damage that is the subject of the claim*' as provided in section 24AH of the Act has the same meaning as '*the same damage*' in section 23B.

34 As to the use of the term '*liable*' in section 23B, compared to use of the term '*caused*' in section 24 AH(1), Nettle JA rejected the proposition that the difference in terminology was intended to signify that *liability* (for the same damage) was not required for a finding that a person was a concurrent wrongdoer:

> It might be thought that the differences were intended to signify that 'a person whose acts or omissions caused… the loss or damage that is the subject of the [plaintiff's] claim' within the meaning of s24AH is

> something other than a 'person liable in respect of the same damage' within the meaning of s23B.
>
> In my view however, that is not the case. As Besanko J held in *Shrimp v Landmark Operations*[1], a 'concurrent wrongdoer' includes a person whose acts or omissions caused the damage or loss that is the subject of the plaintiff's claim only if the person is 'liable' to the plaintiff for that loss and damage.[2]

35 Nettle JA considered that the different terminology in section 24 AH(1) was required to accommodate section 24AH (2) which provides that, for the purpose of Part IVAA, it does not matter that a concurrent wrongdoer has ceased to exist:

> Hence, it appears to me that the drafter of s24AH chose 'cause' rather than 'liable' to accommodate the possibility that apportionment may be ordered in relation to a concurrent wrongdoer who is not presently liable but who was liable and, but for ceasing to exist, would still be liable.[3]

36 Nettle JA went on to find that the loss and damage caused by the borrower and the guarantor was not the same damage that was the subject of the claim of the bank against Quinerts, and that as such, the borrower and the guarantor were not concurrent wrongdoers in respect of such claim:

> The loss or damage caused by the Borrower and the guarantor was their failure to repay the loan. Nothing which Quinerts did or failed to do caused the Borrower or the lender to fail to repay the loan. The damage caused by Quinerts was to cause the bank to accept inadequate security from which to recover the amount of the loan. Nothing which the Borrower … did or failed to do caused the bank to accept inadequate security for the loan…
>
> I conclude that the Borrower and the guarantor were not persons whose acts or omissions caused the loss or damage the subject of the Bank's claim against Quinerts and, therefore, they were not concurrent wrongdoers in relation to that claim.[4]

37 The builder says that *Quinerts* has been rejected or overturned by the High Court in *Hunt & Hunt v Mitchell Morgan Nominees Pty Ltd*[5].

38 *Hunt & Hunt* involves analysis of apportionment between concurrent wrongdoers under Part 4 of the New South Wales *Civil Liability Act* 2002. Part 4 of The NSW Act is similar to Part IVAA in the Victorian Act, but there are differences.

39 In *Hunt & Hunt,* Morgan Nominees Pty Ltd (Morgan) provided a loan on the application of two persons, Mr C and Mr V. Mr C had forged Mr V's signature on the loan application and mortgage documentation. The loan

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1 (2007) 163 FCR 510,521
2 [2009] VSCA 245, at paragraphs 63 and 64
3 *Quinerts* at [64]
4 *Quinerts* at [76] and [77]
5 (2013) 247 CLR 613

and mortgage documentation had been drawn by Morgan's solicitors, Hunt & Hunt. Mr C's cousin, a solicitor Mr F, provided false certification that he had witnessed Mr V's signature to the documentation. The loan monies were paid into a joint account in the name of Mr C and Mr V. Forging Mr V's signature, Mr C withdrew the money over a period of a few months. By the time Mr V became aware of the fraud, all the loan monies advanced had been withdrawn by Mr C. In a proceeding brought by Mr V, at which time Mr C and Mr F had both become bankrupt, it was held that the loan agreement was void by reason of the forgery and Mr V was not liable to Morgan. It was also held that because the mortgage purported to secure Mr V's indebtedness by reference to the void loan agreement, it secured nothing and was liable to be discharged.

40 Morgan brought a proceeding against Hunt & Hunt alleging negligence in preparation of the mortgage documentation. Young CJ, in the New South Wales Supreme Court, found that Hunt & Hunt had breached their duty of care owed to Morgan in that they failed to prepare a mortgage containing a covenant to repay a stated amount.

41 Young CJ also found that Mr C and Mr F were, in respect of Morgan's claim against Hunt & Hunt, concurrent wrongdoers under the relevant provisions of the NSW Act. Young CJ assessed Hunt & Hunt's liability as a concurrent wrongdoer to be limited to 12.5% of Morgan's loss, with the remaining 77.5% of the loss apportioned to Mr C and Mr F. That judgement was set aside by the NSW Court of Appeal which held that because the loss suffered by Morgan as a result of Hunt & Hunt's negligence was different from the loss caused by the fraudulent acts of Mr C and Mr F, Mr C and Mr F were not concurrent wrongdoers in respect of Morgan's claim against Hunt & Hunt. Hunt & Hunt appealed the Court of Appeal's decision in this regard.

42 The High Court, by the majority joint decision of French CJ, Hayne and Kiefel JJs, allowed the appeal. They found that the Court of Appeal had erred in its finding that the loss and damage caused by Mr C and Mr F was not the loss and damage caused by Hunt & Hunt. The High Court found that Morgan's loss or damage was properly characterised as its inability to recover monies it had advanced, and although Morgan's cause of action against Hunt & Hunt was different to the cause of action Morgan would have had against Mr C and Mr F, the acts and omissions of each of Hunt & Hunt, Mr C and Mr F materially contributed to Morgan's inability to recover the monies advanced. As such, Hunt and Hunt, Mr C and Mr F were concurrent wrongdoers in respect of Morgan's claim for loss or damage.

43 In reaching its decision, the High Court considered Nettle JA's reasoning in *Quinerts* as to the characterisation of damages. The NSW Court of Appeal had referenced *Quinerts* with approval. As to Nettle JA's reasoning that *the*

loss or damage that is the subject of the claim' means *the same damage*, the High Court said[6]:

> Section 34(2) [of the NSW Act] poses two questions for the court: what is the damage or loss that is the subject of the claim? Is there a person, other than the defendant, whose acts or omissions also caused that damage or loss? Logically, the identification of the "damage or loss that is the subject of the claim" is anterior to the question of causation. "Damage" is not a defined term, but damage to property and economic loss are included in the definition of "harm" in s 5.
>
> Something more needs to be said concerning the words "the damage or loss that is the subject of the claim" in s 34(2). Similar words appear in s 35(1). It is necessary because it was the view of the Court of Appeal[7], following a decision of the Victorian Court of Appeal in *St George Bank Ltd v Quinerts Pty Ltd*[8] ("*Quinerts*"), that, so far as concerns concurrent wrongdoers, the loss or damage they caused must be "the same damage". This would be consistent with the requirement in s 5(1)(c) of the *Law Reform (Miscellaneous Provisions) Act* 1946 (NSW)[9], with respect to contribution as between joint tortfeasors, that a tortfeasor would if sued have been liable in respect of the same damage.
>
> It is difficult to see that, as between concurrent wrongdoers, the damage they have caused can be other than the same for the purposes of s 34(2), since it is identified in each case as that which is the subject of the plaintiff's claim. Moreover, s 34(1A) refers to there being a single apportionable claim "in proceedings in respect of the same loss or damage". However, it is generally considered preferable, on settled principles of construction, to adhere to the language of the statute in question unless there is a warrant for doing otherwise. None is evident from the provisions of Pt 4, which have a different purpose and operation from the provisions of the Law Reform (Miscellaneous Provisions) Act. The relationship between the contribution provisions of the Law Reform (Miscellaneous Provisions) Act and Pt 4 of the Civil Liability Act is expressed in s 36 of the latter Act. It provides that if judgment is given under Pt 4 against a concurrent wrongdoer, that defendant cannot be required to contribute to any damages recovered from any other concurrent wrongdoer or to indemnify that wrongdoer. In any event, it would seem that the purpose of the Court of Appeal in this case, and of the Victorian Court of Appeal in Quinerts, in referring to "the same damage", was merely to draw attention to the fact that in some cases the acts or omissions of wrongdoers may result in different damage to the same plaintiff. So much may be accepted.

44 The Court went on to analyse the loss or damage claimed by Morgan noting, as a starting point, that damages, properly understood, is the injury

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6 *Hunt & Hunt,* at [20] and [21]

7 *Mitchell Morgan Nominees Pty Ltd v Vella* (2011) 16 BPR 30,189 at 30,199-30,200 [48]-[49].

8 (2009) 25 VR 666.

9 And the *Wrongs Act* 1958 (Vic), s 23B.

and other foreseeable consequence suffered by a plaintiff, and in the context of economic loss, may be understood as the harm suffered to a plaintiff's economic interests.[10]

45 As to Nettle JA's finding in *Quinerts* that the damage caused by Quinerts (the subject of the claim) was not the same as the damage caused by the borrower and the guarantor, the Court commented that Nettle JA appeared to have assumed that there is some requirement that one wrongdoer contribute to the wrongful actions of the other wrongdoer in order that they may be found to have caused the same damage.[11] In my view, this is the extent to which it can be said that the High Court (majority) disapproved the reasoning in *Quinerts*.

46 In my view, there is no disapproval of Nettle JA's reasoning that, under the Act, for a person to be a concurrent wrongdoer sharing responsibility in respect of a plaintiff's claim, the person must be *liable* for the damage that is the subject of the plaintiff's claim (or, in the case of a person who is dead or a company that has been wound up, that person or company would have been *liable* for the damage if not dead or wound up). *Liable* here meaning liable by way of cause of action known to the law.

47 The builder submits that, while the High Court (majority) did not expressly disagree with Nettle JA's reasoning in this regard, it can be implied from statements in the decision that the Court considered causation of damage, alone, as the prerequisite for a finding of *concurrent wrongdoer*. The builder refers to the following paragraph[12] in the majority decision as illustrative in this regard:

> The word "caused", in a statutory provision in terms similar to s 34(2), has been read as connoting the legal liability of a wrongdoer to the plaintiff[13]. The language of liability is used in contribution legislation[14], but not in Pt 4 of the *Civil Liability Act*. Nevertheless, it would usually be the case that a person who is found to have caused another's loss or damage is liable for it. References to the liability of a wrongdoer should not, however, distract attention from the essential nature of the enquiry at this point, which is one of fact.

48 I do not accept the builder's submission.

49 In my view, the High Court majority decision is focused on analysis of damages and the requirement, to be a concurrent wrongdoer under Part 4 of the NSW Act, that the acts or omissions of each of the concurrent wrongdoers has caused the damage that is the subject of the plaintiff's claim, as opposed to some other type of damage. And that requirement may

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10 *Hunt & Hunt*, at [24]
11 *Hunt & Hunt*, at [41]
12 Ibid at [47]
13 *Shrimp v Landmark Operations Ltd* (2007) 163 FCR 510 at 523 [62], which concerned the *Trade Practices Act* 1974 (Cth), s 87CB(3).
14 For instance, the *Law Reform (Miscellaneous Provisions) Act* 1946, s 5(1)(c).

be met even though there may be different causes of action between the plaintiff and the differing concurrent wrongdoers.

50 In my view, statements in the majority decision on 'causation' should be read in such context. That is, the context of analysing the nature of the damages claimed by a plaintiff and the nature of damages caused by concurrent wrongdoers. In such context, the statements do not, in my view, disturb the reasoning in *Quinerts* as to the requirement of legal liability of a concurrent wrongdoer to a plaintiff.

51 I note for completeness that Bell and Gageler JJs, in minority, express a clear view on 'causation' in the sense that it was raised by Nettle JA in *Quinerts*. In their view, acts or omissions causing the damage that is the subject of the claim means 'legally actionable acts or omissions'.[15]

52 Accordingly, in my view *Quinerts* remains authority for the proposition that, under the Act, for a person to be a concurrent wrongdoer sharing responsibility in respect of a plaintiff's claim, the person must be *liable* (by way of cause of action known to law) for the damage that is the subject of the plaintiff's claim (or in the case of a person who is dead or a company that has been wound up, that person or company would have been *liable* for the damage if not dead or wound up).

JOINDER

53 In Victoria, the apportionment of responsibility between concurrent wrongdoers, such that the liability of any one of them may be limited having regard to his/her/its comparative responsibility, requires that each of the concurrent wrongdoers be a *defendant* in the proceeding ['*respondent'* in a proceeding in the Tribunal] unless the concurrent wrongdoer is dead, or in the case of corporation, has been wound up.[16]

54 Accordingly, a respondent seeking to limit its liability on the basis that one or more other concurrent wrongdoers share responsibility for the loss and damage claimed by the applicant, must seek to join the other alleged concurrent wrongdoers as respondents to the proceeding, unless the other concurrent wrongdoers are dead or wound up.

55 Section 24AL(1) of the Act provides:

> (1) Subject to subsection (2), the court may give leave for any one or more persons who are concurrent wrongdoers in relation to an apportionable claim to be joined as defendants in a proceeding in relation to that claim.

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15 Hunt & Hunt at [91]

16 Section 24 AI(1)(a) makes provision for the limitation of liability of a '*defendant*' who is a concurrent wrongdoer. Section 24 AI (3) provides that in apportioning responsibility between defendants, a court must not have regard to the comparative responsibility of a person who is not a party to the proceeding unless that person is not a party because the person is dead or, in the case of a corporation, has been wound up.

(2) The court is not to give leave for the joinder of any person who was a party to any previously concluded proceeding in relation to the apportionable claim.

56 Section 60 of the *Victorian Civil and Administrative Tribunal Act* 1998 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 subsection (1) on its own initiative or on the application of any person.

57 On an application for joinder, the Tribunal must be satisfied that the claim sought to be brought against the proposed further party is *open and arguable*.[17]

58 A respondent, who seeks to join a concurrent wrongdoer as a further respondent to a proceeding, is not seeking damages or other relief as *against* the concurrent wrongdoer. Rather, the respondent is seeking to limit its liability in respect of the claim brought against it by the applicant. Nevertheless, in my view the respondent's assertion in respect of the alleged concurrent wrongdoer must be open and arguable. That is, it must be open and arguable that the party sought to be joined is a *concurrent wrongdoer* within the meaning of the Act.

59 It is the practice of this Tribunal in proceedings involving building disputes that an application to join another party to a proceeding include a draft pleading setting out the claim sought to be brought in respect of the proposed further party. In the case of a third-party claim, the proposed pleading will be Points of Claim as against the proposed further party. In the case of an apportionment defence, the proposed pleading will be amended Points of Defence setting out the apportionment defence.[18] The proposed pleading should set out the open and arguable claim, or apportionment defence, in respect of the proposed further party.

60 In this case, the proposed pleading in respect of the apportionment defence is the proposed FAPD. I am not satisfied that the proposed FAPD sets out an open and arguable apportionment defence in respect of Mr Hatfield.

61 As discussed above, the draft pleading sets out the alleged factual causal connection between the damages claimed by the owners and the acts or omissions of Mr Hatfield. But that is not enough. It does not plead a matter

[17] *Zervos v Perpetual Nominees Limited* [2005] VSC 380 per Cummins J at [11].
[18] see paragraphs 21 – 24 in VCAT practice note PNBP1

essential to a finding that Mr Hatfield is a concurrent wrongdoer in respect of the applicants' claim. That is, it does not plead a legal cause of action as between the owners and Mr Hatfield in respect of which Mr Hatfield may be found liable to the owners for the loss and damage the owners are claiming.

62 The deficiency in the proposed pleading is not an oversight on the part of the builder. The issue was raised at the directions hearing before me on 12 October 2018. At the further directions hearing on 6 December 2018, the builder, through its lawyers, remained steadfast to the submission that legal liability, in the *Quinerts* sense, between an alleged concurrent wrongdoer and a plaintiff/applicant was not a requirement of an apportionment defence, and as such there could be no requirement to plead it.

63 For the reasons set out above, I do not accept the submission. In my view, the respondent must present an arguable cause of action in law as between the applicant and the proposed (concurrent wrongdoer) further party in respect of which the proposed further party is arguably liable for the loss and damage being claimed by the applicant.

64 In my view, the *Quinerts* requirement in respect of a concurrent wrongdoer is sensible and fair. Part IVAA of the Act does not entitle an applicant to an order for damages against concurrent wrongdoers. It provides for the limitation of liability of concurrent wrongdoers who are respondents in the proceeding. Their respective liability is assessed having regard to the comparative responsibility of each of them, and other identified concurrent wrongdoers who are not respondents in the proceeding because they are dead or wound up, for the loss and damage claimed by the applicant.

65 To recover damages from any concurrent wrongdoer, the applicant must succeed in an action the applicant has brought against that concurrent wrongdoer.[19] It seems to me that it cannot have been the intention of the legislature to provide for the limitation of a respondent's liability to an applicant, by reason of the responsibility of another concurrent wrongdoer (who is alive and solvent) for the applicant's loss and damage, when the applicant has no sustainable cause of action against that other wrongdoer for such loss and damage.

66 In my view, there is a necessary nexus between the apportionment of responsibility between concurrent wrongdoers, and the existence of a cause of action known to law in the hands of the applicant as against each concurrent wrongdoer. In the case of the concurrent wrongdoer who is dead or wound up, the cause of action is that which the applicant would have had against the concurrent wrongdoer if it was not dead or wound up. In my view, a respondent seeking to limit its liability by an apportionment defence must present an arguable case as to the existence of that nexus. The

[19] and section 24 AK of the Act contemplates that an applicant may bring a subsequent proceeding against a concurrent wrongdoer, in which case the damages recoverable by the applicant will be limited having regard to the damages already recovered by the applicant

respondent must say why the alleged other concurrent wrongdoer is *liable* to the applicant, or would be liable if not dead or wound up, for the loss and damage being claimed by the applicant. If the respondent presents an arguable case in this regard, the alleged concurrent wrongdoer (if alive and solvent) will be joined as a respondent in the proceeding, and the onus falls on the applicant to then decide whether to bring a claim against that further respondent.

CONCLUSION

67 For the reasons set out above, I will order that the respondent's application to join Mr Hatfield as a respondent to the proceeding, and to file and serve Further Amended Points of Defence in the form of the proposed Further Amended Points of Defence dated 9 November 2018, is refused.

SENIOR MEMBER M. FARRELLY