VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

DOMESTIC BUILDING LIST VCAT REFERENCE NO. D685/2007

CATCHWORDS

Domestic building, joinder, s60 of the *Victorian Civil and Administrative Tribunal Act* 1998, Part IVAA of the *Wrongs Act* 1958, sub-consultant.

APPLICANT	Owners Corporation PS 414106B
FIRST RESPONDENT	Victorian Managed Insurance Authority
SECOND RESPONDENT	Hallmarc Construction Pty Ltd (formerly Adamco Constructions Pty Ltd)
THIRD RESPONDENT	MEA Australia Pty Ltd (ACN 076 338 399) trading as Malcolm Elliott Architects
FOURTH RESPONDENT	Irwinconsult Pty Ltd (ACN 050 214 894)
FIFTH RESPONDENT	Philip Chun & Associates Pty Ltd (ACN 007 401 649)
SIXTH RESPONDENT	Belrose Landscaping Pty Ltd (ACN 072 529 401)
WHERE HELD	Melbourne
BEFORE	Senior Member M. Lothian
HEARING TYPE	Hearing
DATE OF HEARING	12 February 2009
DATE OF REASONS	16 March 2009
CITATION	Owners Corporation PS 414106B v Victorian Managed Insurance Authority & Ors (Domestic Building) [2009] VCAT 413

REASONS

1 On 12 February 2009 I made various directions in this proceeding. The matter of significance on that day was that I joined four parties to the proceeding under s60 of the *Victorian Civil and Administrative Tribunal Act* 1998 ("VCAT Act"). One was the engineer, Irwinconsult Pty Ltd ("Irwinconsult"), who was joined as the fourth respondent. On 13 February 2009, solicitors for Irwinconsult sought reasons in writing for joining it, and also sought clarification of whether the joinder was pursuant to s24AL of

the *Wrongs Act* 1958 ("Wrongs Act") rather than under s60 of the VCAT Act. S60 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.

2 S24AL of the Wrongs Act provides:

> **24AL. Joining non-party concurrent wrongdoer in the action**
>
> (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.
>
> (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.

3 As the learned author Pizer [*Annotated VCAT Act 3rd Edition*] says at paragraph 2793:

> There is no requirement in the section that the joined party must be seeking any claim or relief from the proceeding ... Nor is there any requirement that any claim or relief be sought against the joined party.

Further, as Deputy President Aird said in *Brady Constructions Pty Ltd v Andrew Lingard & Associates Pty Ltd and Ors* [2008] VCAT 851 at paragraph 18:

> The wording of s24AI is quite clear, a court (which is defined to include tribunal) is required to apportion responsibility not liability.

4 Nevertheless, consideration is had to whether the claim against any joined party is "open and arguable" in accordance with *Zervos v Perpetual Nominees Ltd* (2005) VAR 145 and the antithesis is that I would not join a party if the case against it were doomed to fail.

5 Ms S. Kirton of Counsel appeared for the Second Respondent ("Hallmarc"), who made the application for joinder. According to the affidavit of Mr David Brown of Hallmarc's solicitors of 19 January 2009, Hallmarc carried out building work at the property the subject of the proceeding. The Applicant owns the common property at this multi-unit development. It is a subsequent owner from the party who did (or might have) entered a contract with Hallmarc and it has pleaded certain defects. Many concern water penetration from a court-yard to the car park below and premature rusting

of light bollards in the courtyard, also caused by drainage issues. The points of claim plead against Hallmarc both breach of warranties under the *Domestic Building Contracts Act* 1995 and negligence.

6 Hallmarc's proposed amended points of defence are exhibit DSB 2 to Mr Brown's affidavit. They are 38 pages long and contain a number of amendments. One of the major amendment themes is the joinder of four new respondents - the architect, engineer, building surveyor and the landscaper. As Ms Kirton said at the hearing and as expressed in paragraph 18 of the proposed amended points of claim, Hallmarc does not seek to recover any amount from the joined parties. It seeks to limit any loss and damage for which it is found liable to the amount that reflects the proportion that it should justly bear having regard to its responsibility for the loss and damage, in accordance with Part IVAA of the Wrongs Act.

7 Ms Kirton submitted that Hoppe Pty Ltd ("Hoppe"), which is now dissolved, was the "principal" in a construction management agreement that described Hallmarc as "construction manager". She also submitted that Hoppe engaged each of the four joined parties and therefore there was no contractual link between Hallmarc and the proposed joined parties. In paragraphs 40, 41 and 42 of the proposed amended Points of Defence, Hallmarc pleaded that Irwinconsult owed a duty to both Hoppe and the body corporate which is the Applicant in this proceeding, and that it has breached the duty.

8 Mr Attard, solicitor for Irwinconsult, opposed the joinder application. There was no appearance on behalf of the landscaper, Belrose Landscaping Pty Ltd ("Belrose"), now the Sixth Respondent. Ms Kirton reported that her instructing solicitors received a letter from Belrose saying that it was not responsible for any defects in falls in levels, drainage etc. I accept Ms Kirton's submission that the matters addressed in the letter from Belrose are factual issues that would be relevant to its defence, rather than to whether it should be joined.

9 Early in the hearing the representatives for the Applicant, the First Respondent and the architect, MEA Australia Pty Ltd (now the Third Respondent) neither consented to nor opposed joinder. After hearing Mr Attard's submissions, the Third Respondent adopted them.

10 Mr Attard opposed joinder on the basis that it is premature and also that there is no open and arguable case against Irwinconsult. Mr Willoughby, solicitor, also adopted Mr Attard's arguments and made other submissions on behalf of his client, Philip Chun & Associates**,** now the Fifth Respondent.

IS JOINDER PREMATURE?

11 Mr Attard submitted that joinder is premature on four grounds which are pleaded in the proposed amended Points of Defence. First, there is a question about whether the body corporate has standing to bring the

proceeding. Secondly, there is a question about whether the contract is a domestic building contract. Thirdly, there is a question about whether Hallmarc is a builder and fourthly, there is a question about whether the project is a home.

12 He went on to suggest that efficient case management would be best served if the joinder issue were put on hold pending resolution of these issues at a preliminary hearing. He acknowledged that the ten year "long stop" limitation period is due to expire in April, and said that his client would not rely on the expiration of the ten years, although he says that the case against his client is otherwise already statute barred.

13 The other proposed joined parties present were seeking instructions on whether they, too, would waive the ten-year defence and had not informed me of their decisions when Ms Kirton said that her client could not justify arguing a preliminary point in circumstances where it is also facing a claim in negligence. I accepted her submissions. A preliminary hearing has not been sought by Hallmarc and would not resolve the whole case against it. It therefore follows that the application for joinder is not premature.

IS THERE AN ARGUABLE CASE AGAINST IRWINCONSULT?

14 Part of Hallmarc's evidence will be an expert report by Mr Lorich, where he says that water penetrating through the slab has caused damage to the concrete in the slab. There was no sworn evidence from Mr Lorich before me, but each proposed joined party present accepted that such evidence exists without necessarily admitting to the accuracy of that evidence.

15 Ms Kirton said Irwinconsult's services were to prepare the civil, structural and hydraulic designs. The breaches alleged include failure to specify adequate waterproofing for the slab forming the car-park roof, failing to specify adequate drainage and failing to provide for slab level drainage.

16 Mr Attard submitted that if all the facts pleaded by Hallmarc against Irwinconsult in its proposed amended points of defence were proven, it would still not make out a cause of action that would find Irwinconsult liable or entitle Hallmarc to apportion its liability with Irwinconsult.

17 He said that for Irwinconsult to be joined:

- the pleadings would need to support a finding that it is a concurrent wrongdoer under the *Wrongs Act*, and to be a concurrent wrongdoer the person must have a legal liability to the party who suffered the loss or damage, and
- that in accordance with *Gunston v Lawley & Ors* [2008] VSC 97, the Supreme Court has held that a sub-contractor to a builder does not owe a duty of care to a subsequent owner.

18 On the first point, I am not satisfied that the definition of "concurrent wrongdoer" is fixed to the degree that this point in itself is not open and

arguable. It also appears to be inconsistent with s24AI which calls for responsibility rather than liability.

19 On the second point, Mr Attard was correct to say that in *Gunston* an architectural draftsman was found not to owe a duty of care to the original proprietor and therefore to later owners. However, his Honour was circumspect about pronouncing an all-encompassing rule. For example, at paragraph 32 he said:

> It seems to me that the present law in Australia does not admit a cut and dried answer to the existence of this duty. What can be said with some confidence is that, in a typical domestic building contract where the proprietor is a developer rather than a layperson with little or no experience or expertise in construction matters, the proprietor's assertion that a sub-contractor owes a duty of care to it with respect to the quality of the work performed by the sub-contractor will ordinarily face difficulty in establishing the requirements of vulnerability or reliance.

20 I accept Ms Kirton's submission that the case before me is not sufficiently similar to *Gunston* to convince me that Irwinconsult should not be joined. I note that at paragraph 27 of *Gunston*, Byrne J said:

> There is no general principle of law that a sub-contractor cannot owe a duty of care to a proprietor with which it has no direct contractual relationship. Furthermore, it is not helpful to consider the existence of a duty of care in a vacuum; it will depend upon the relationship between the parties with respect to the negligent activity in question and with respect to the loss which the proprietor has suffered as a consequence.

21 As Ms Kirton submitted, there is evidence which if proven will support the finding that Irwinconsult was one of the consultants from whom the then owner, Hoppe, sought advice about whether a waterproof membrane was needed on top of the slab, and was one of the consultants that said it was not necessary.

22 Hallmarc has a number of hurdles to leap to establish that Irwinconsult should share any responsibility with it. For example, it must prove that Irwinconsult is a concurrent wrongdoer. However the difficulties it faces do not make the case against Irwinconsult misconceived and hopeless. I accept that in accordance with the formulation in *Zervos* there is an open and arguable case against Irwinconsult that, if proven, could sustain a finding that at least part of the responsibility for matters alleged by the Applicant falls on Irwinconsult rather than Hallmarc.

WRONGS ACT OR VCAT ACT?

23 In their letter of 13 February 2009, solicitors for Irwinconsult relevantly wrote:

> We also seek clarification … that the joinder of our client (and other parties) was pursuant to section 24AL of the *Wrongs Act 1958* and not

pursuant to section 60 of the *Victorian Civil & Administrative Tribunal Act 1998.*

24 The application for joinder stated in part:

(1) That pursuant to section 60 of the *Victorian Civil and Administrative Tribunal Act* 1998:

…

(b) Irwinconsult …

be joined as parties to this proceeding and as defendants to the applicant's points of claim.

25 Having decided that there is an open and arguable case against each of the parties joined I dictated order 1 which says in part:

Under section 60 of the Act upon the application of the Second Respondent I join as a [sic] parties to these proceedings … Irwinconsult …

26 There was no suggestion by any person present at the directions hearing that the joinder should have been under the Wrongs Act rather than the VCAT Act and the broad powers under s60 and particularly under s60(1)(c) permit joinder to enable Hallmarc to seek the benefit conferred by Part IVAA of the Wrongs Act. I confirm that the Third, Fourth, Fifth and Sixth Respondents have been joined under the VCAT Act, but for the purpose of Part IVAA of the Wrongs Act.

SENIOR MEMBER M. LOTHIAN