VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST

VCAT REFERENCE NO. D578/2012

CATCHWORDS

DOMESTIC BUILDING-PROCEDURE-LIMITATION OF ACTIONS: s134 of the *Building Act 1993*: applicant filed in an existing proceeding proposed points of claim bringing building actions against a party and a proposed joined party-whether, without having first obtained leave to do so, the applicant had brought building actions prior to the expiration of the 10 year period after the issue of the occupancy permit as to defeat a s134 limitations defence-held that it did so, where the bringing of a claim against the existing respondent was constrained by the terms of orders previously made in the Tribunal–held that it did not do so where, instead of seeking leave to join a proposed joined party, a separate proceeding could simply have been commenced.

PROCEDURE-whether draft Points of Claim disclosed an open and arguable case sufficient to grant leave to file and serve on the existing respondent-held that the draft Points of Claim were not so deficient that it could not be cured by provision of further particulars.

APPLICANTS	(No applicant 1)
	Jeremy Michael Parsons and Helen Janet Parsons (Applicant 2)
	Sean O'Hare (Applicant 3)
	Trevor Stephen Trotter (Applicant 4)
	Mark Whitelock (Applicant 5)
	Mark Christopher Chapman (Applicant 6)
	Phillip Alexander Keed and Amy Elizabeth Keed(Applicant 7)
	James Edgar Coyle and Irene Coyle (Applicant 8)
	Heidi Nerissa Jesse and Lily-Anne Jesse (Applicant 9)
	Power Systems Pty Ltd (ACN: 119 538 386) (Applicant 10)
	Olaf Aadrian de Bree and Malgorzata Jadwiga Marian (Applicant 11)
	Nathan Francis Theisz and Myra-Kate Crosbie-Theisz (Applicant 12)
	Christiaan Jacobus Steenkamp (Applicant 13)
	Timothy Brooks Cox (Applicant 14)
	Jessica Kate Strachan (Applicant 15)
	Kidz'n Sport Pty Ltd (ACN: 089 774 247) (Applicant 16)

	Bret Richard Downey and Denielle Simone Brennan (Applicant 17)
	Gregory John Faulkner and **Wendy Faulkner** (Applicant 18)
	Stephen Corradio Paisio and Dianne Rosemarie Rogers (Applicant 19)
	David William Robertson and Erin Margaret Lee Hammett (Applicant 20)
	Stephen Euean Carroll and Valma Carroll (Applicant 21)
	Shane Peter Costantino and Claire Harvey-Beavis (Applicant 22)
	Yee Mun Ng (Applicant 23)
	Nigel William Polak and Anna Bridget Murphy (Applicant 24)
	Abram Johannes Joubert and Lelitia Joubert (Applicant 25)
	Mark Steven Nichols and Sarah Louise Nichols (Applicant 26)
	Mark Ashley Strachan and Andrea Bettina Strachan (Applicant 27)
	Timothy Keith Llewellyn (Applicant 28)
	Mr Andre Grayson Rhodes and Ms Nicola Jane Rhodes (Applicant 29)
	Ms Natasha Panagiotopoulos and Ms Zoe Butler (Applicant 30)
	Mr Tomas Acton (Applicant 31)
	Mr Michael James Forbes and Ms Lisa-Marie Therese King (Applicant 32)
FIRST RESPONDENT	Stat Bay Pty Ltd (ACN 007 277 714). (Stayed by order dated 19 March 2015)
SECOND RESPONDENT (Joined Party 1)	Reddo Pty Ltd (ACN 097 559 147)
THIRD RESPONDENT (Joined Party 2)	LGE Contracting Pty Ltd (ACN 121 962 294)
FOURTH RESPONDENT (Joined Party 3)	Acon Fields Pty Ltd (ACN 122 366 876)
FOURTH JOINED PARTY	Peter Steel

WHERE HELD	Melbourne
BEFORE	A T Kincaid, Member
HEARING TYPE	Application to file and serve points of claim on second respondent, and on a proposed joined party.
DATE OF HEARING	16 August 2019.
DATE OF ORDER	7 October 2019
CITATION	Parsons v Stat Bay Pty Ltd (Building and Property) (No 2) [2019] VCAT 1563

ORDER

1. Leave is granted to the second 18th applicant to commence a building action in this proceeding against the second respondent on 30 January 2019 (now for then).
2. The application by the second 18th applicant to join Peter Eyers to the proceeding pursuant to section 60 of the *Victorian Civil and Administrative Tribunal Act 1998* is refused.
3. Leave is given to the second 18th applicant to file and serve points of claim on the second respondent by **21 October 2019** substantially in the form of draft points of claim filed by the second 18th applicant on 30 January 2019, but:
   (a) making no claim against Peter Eyers;
   (b) clarifying to what extent (if at all) the alleged defects in paragraph 7(a)(i)-(xiii) of the draft points of claim are the subject of the monetary claims made in the particulars to paragraph 8 draft points of claim, and excluding those that are not; and
   (c) confirming, in the case of any claimed defect, that the second 18th applicant has not been indemnified by the relevant home owner's warranty insurer in respect of the defect.
4. The proceeding is fixed for directions at **9:30am on 28 October 2019** before Deputy President Aird, if available, to make further orders for the conduct of the proceeding, estimated duration 30 minutes.
5. Costs reserved.

A T Kincaid
Member

APPEARANCES:

For the second 18th applicant:	Ms W Faulkner, in person.
For the second respondent and the proposed joined party	Mr R Bennett, Solicitor.

REASONS

1 I heard this application on 16 August 2019, and both parties also filed written submissions.

2 In issue is whether the second 18th applicant Ms Faulkner ("**Ms Faulkner**"), by her filing on 30 January 2019 of draft points of claim ("**DPC**") bringing building actions prior to the now expired 10 year limitation period prescribed by s134 of the *Building Act 1993*, should now be granted leave:

(a) to bring a new building action in the proceeding against the second respondent, the relevant building surveyor Reddo Pty Ltd ("**Reddo**"); and

(b) to bring a new building action in the proceeding against a person not previously a party, a director of Reddo, Mr Peter Eyers.

Background

3 On 25 June 2012, thirty-one lot owners at a residential development that became known as "Rangeview Estate" ("**the applicants**") commenced a proceeding in the Tribunal against the builder of the development, claiming loss and damage in respect of alleged defective works carried out by the builder ("**the proceeding**").

4 By order in the proceeding dated 19 February 2014, and upon the builder's application, Reddo and two other parties were joined to the proceeding as alleged concurrent wrongdoers to the applicants within the meaning of Part IVAA of the *Wrongs Act 1958*.[1] By its amended defence dated 7 March 2014, the builder accordingly sought to have its liability to the applicants reduced pursuant to the apportionment provisions of Part IVAA of the *Wrongs Act 1958*.

5 By further amended points of claim dated 15 May 2014, the applicants gave notice that if the Tribunal finds that the builder's liability to the applicants is reduced by reason of Part IVAA of the *Wrongs Act 1958*, then they would seek orders against the three joined parties (including Reddo) as alleged concurrent wrongdoers and as reflected in their found responsibilities for the applicants' loss and damage.

6 In other words, as things stand, the claims made by the applicants (including Ms Faulkner) against the joined parties were contingent upon the joined parties, or one of them, being found liable to the applicants, upon the builder's suit, under the concurrent wrongdoer provisions of the *Wrongs Act 1958*.

7 Consequent upon the builder being placed in external administration on 23 February 2015, by order dated 19 March 2015 the Tribunal stayed the

[1] The three joined parties were subsequently referred to by the Tribunal as "respondents", but ought perhaps to have been referred to as joined parties.

proceeding against the builder. The Tribunal also ordered that the proceeding be stayed, with liberty to apply for reinstatement.

8 Of the thirty-one applicants, by her filing of the DPC on 30 January 2019, almost 4 years after the proceeding was struck out, Ms Faulkner gave notice that she wished to pursue claims.[2] She wishes the proceeding to be continued for the purpose of bringing claims in negligence against both Reddo, and a further proposed respondent Mr Eyers.

9 The filing and service of the DPC against Mr Eyers must therefore be taken to stand as an application by Ms Faulkner to join him to the proceeding pursuant to s60 of the *Victorian Civil and Administrative Tribunal Act 1998* (the "**VCAT Act**").

10 The 4 year hiatus, subsequent to the strike-out order on 19 March 2015, is partially explained by an affidavit of Ms Faulkner sworn 3 June 2019. It is to the effect that there was an extensive enquiry by the Building Practitioners' Board into the conduct of the relevant director of the builder, resulting in its decision dated 15 February 2016. In or about February 2017, the Victorian Building Authority also made findings against Reddo and Mr Eyers, resulting in a disciplinary order against Mr Eyers dated 4 April 2017.

11 Ms Faulkner deposes that during this period, she also submitted a claim to Vero, the builder's warranty insurer. Vero subsequently appointed Sergon Building Consultants to conduct a site inspection, and to make an assessment of the total rectification costs. A report subsequently issued by Sergon Building Consultants provided a total rectification cost estimate of $399,300 for all defects. Ms Faulkner states that Vero only accepted liability for defects that had a total rectification cost estimate of $213,000 and denied liability in respect of $186,000 worth of defects due to the time that had elapsed since notification of a relevant defect and/or by reason of their non-structural nature.

12 Ms Faulkner was subsequently paid $199,000 by the insurer, being the $200,000 capped indemnity amount under the policy, less an excess of $1,000.

13 Ms Faulkner now claims $138,907 for alleged defects, legal and experts' costs in respect of which she has allegedly not been indemnified by Vero, plus $150,000 for alleged diminution in value of her property consequent upon alleged "considerable negative publicity surrounding the defective building works".

Finding

14 For the reasons given below, I find that the claim against Reddo, being a building action, was brought against Reddo within 10 years after the date of

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[2] The circumstances of the other applicants are helpfully described in a letter dated 5 June 2019 from Ms Faulkner to Mr Bennett, the solicitor for Reddo and Mr Eyers.

the issue of the occupancy permit within the meaning of s134 of the *Building Act 1993*. It should therefore be allowed to proceed.

15 I refuse Ms Faulkner's application to join Mr Eyers to the proceeding.

Proposed Claim against Reddo

16 Section 134 of the *Building Act 1993* provides:

> Despite any thing 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 the occupancy permit in respect of the building work…"

17 On 19 February 2009, Reddo granted a certificate of occupancy in respect of Ms Faulkner's lot. The 10 year limitation period therefore expired on 19 February 2019.

18 The question arises whether Ms Faulkner, by her filing on 30 January 2019 of the DPC against Reddo, being a "building action" within the meaning of the Act, is to be regarded as having then "brought" the action within the meaning of the Act, such that it cannot be defeated by the 10 year limitation period prescribed by the Act.

19 It is necessary for Ms Faulkner to obtain leave of the Tribunal to bring a proceeding against Reddo, pursuant to the earlier order of the Tribunal, which I set out below. It is contended by Mr Bennett, who appeared on behalf of Reddo, that Ms Faulkner should not be given leave to do so, because Ms Faulkner had previously made no claim against Reddo other than to make a claim contingent on another respondent, the builder,[3] proving that it was entitled to have any of its liability for the applicants' claim apportioned pursuant to the provisions of Part IVAA of the *Wrongs Act 1958*. Reddo submits that it was therefore necessary for Ms Faulkner, where she sought for the first time to bring a direct claim against Reddo, to have done more than file and serve the proposed DPC prior to the expiration of the 10 year limitation period. Namely, Reddo submits, Ms Faulkner was required, prior to the expiration of the limitation period, to obtain leave of the Tribunal to serve points of claim upon Reddo, and to serve points of claim upon Reddo.

20 It is further contended by Reddo that the proceeding is not the right vehicle for Ms Faulkner alone bringing a claim against an existing respondent, the Tribunal not having previously sanctioned the proceeding being maintained by a single applicant.

21 Ms Faulkner submits, on the other hand, that in the interests of justice, and for the reasons set out in her written submission, her action against Reddo should be allowed to proceed as having been brought within the required 10 year period.

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[3] The proceeding against which was stayed by order dated 19 March 2015.

22 Some further background is necessary. At the directions hearing on 26 February 2015 which preceded the stay order, the applicants sought an adjournment of the proceeding until after the determination of their claims against the warranty insurer (which, naturally, had not then been made), alternatively an adjournment for a shorter time whilst they decided whether to bring a direct claim against Reddo, or any other then joined party. An affidavit sworn by the applicants' solicitor on 25 February 2015 stated:

> The [applicants] have obtained preliminary expert advice on the liability of Reddo,but will require a full report in order to decide whether to commence an independent claim against Reddo (i.e. a claim not dependent on a finding of proportionate liability under Part IVAA of the *Wrongs Act*). The response of Vero…to the [applicants'] owners' insurance claims may also be relevant to their decision.

23 By her orders dated 19 March 2015, Deputy President Aird also made the following order:

> [2] The proceeding is struck out with a right to apply for reinstatement. Any application for reinstatement must be accompanied by draft Points of Claim against the party to which the application relates.

24 Deputy President Aird stated in her Reasons accompanying her orders:

> [18] As I have decided not to dismiss the builder's claims against Reddo for the reasons which follow, and noting that this proceeding has been on foot for nearly three years, in my view, the appropriate order is that the proceeding be struck out with a right to apply for reinstatement. There can be no prejudice to the [applicants] by this order being made. If they decide to make a direct claim against any of the joined respondents, they can either apply to do so in this proceeding, or commence a new proceeding.
>
> [19] As Judge Macnamara recently said in *Luck v Victoria Police*[4] at [10]:
>
> > An order of strike out does not terminate a proceeding, it merely removes it from the list of active matters, leaving open the possibility of reinstatement should justice require.
>
> [20] If the owners apply to reinstate the proceeding against any of the joined respondents, any such application should be accompanied by proposed Points of Claim against such respondent.

25 It follows from the above that the building action brought by Ms Faulkner against Reddo is contained in proposed DPC filed and served by her in an existing proceeding, and where previously only a contingent claim has been made by her against Reddo. It is expressly subject to the granting of leave by the Tribunal, as required by the order of DP Aird dated 19 March 2015.

26 An analysis is required to determine whether a building action against Reddo has been "brought" in such circumstances.

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4 [2015] VCAT 71.

27 I first observe that the *Building Act 1993* does not prescribe how a building action is to be "brought" within the meaning of section 134.

28 I have been assisted by the observations and findings of Deputy President Aird in *Owners Corporation 1 PS538430Y v H Building Pty Ltd (under external administration) and Ors (Building and Property)*.[5] That was an interlocutory application under s75 of the *Victorian Civil and Administrative Tribunal Act 1998* (the "**VCAT Act**") for dismissal of s23B *Wrongs Act 1958* contribution proceedings. The question before the Tribunal was whether it was arguable that a s23B contribution claim could be regarded as having been "commenced" within the meaning of s24 of the *Wrongs Act 1958* by the respondents, prior to the expiration of the relevant 12 month limitation period, simply having applied for joinder with draft Points of Defence.

29 The second and third respondents in that proceeding, both building surveyor entities, served points of claim on 20 May 2019 against the fourth respondent architect seeking contribution under s23B of the *Wrongs Act 1958* pursuant to orders of the Tribunal dated 10 May 2019.

30 The points of claim sought contribution in respect of an Owners Corporation proceeding against the second and third respondents that was filed on 15 March 2018, and in respect of individual lot owners' claims against the second and third respondents, notice of which had first come to the attention of the second and third respondents on 19 April 2019.

31 The fourth respondent sought summary dismissal of the contribution claim in respect of the Owners Corporation proceeding on the basis that the second and third respondents should have commenced their contribution proceeding on 15 March 2019, being 12 months after the OC served the amended Points of Claim on the second and third respondents.[6] The fourth respondent sought summary dismissal of the contribution claim in respect of the lot owners' proceeding on the grounds that it was not commenced by 19 April 2019, being 12 months after the second and third respondents became aware of the lot owners' proceeding against them.

32 Deputy President Aird, in dismissing the s75 application, held that it was arguable that the date of the commencement of the claim for contribution was the date on which the second and third respondents made their earlier application for joinder under s23B against the architect within the required 12 month period.[7] She noted in her Reasons that that application was accompanied by draft Amended Points of Defence that included the s23B joinder claim. [8]

33 The Deputy President stated:

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5 [2019] VCAT 1485.

6 See section 24(1)(a)(ii) *Wrongs Act 1958*.

7 The date does not appear to be included in the Reasons.

8 The Deputy President noted at [19] that a s23B claim for contribution would normally be in points of claim.

[20] The substance of the contribution claim was clear in the proposed APOD. It is immaterial that the [second and third respondents] did not apply to file and serve Points of Claim against the architect in its joinder application, or at the hearing of the application. That the architect clearly understood that one of the reasons for the joinder application was to claim contribution as articulated in the proposed APOD is evidenced by the submissions it made in opposition to its joinder, as discussed in my Joinder Reasons.

…

[22] The architect made extensive submissions by reference to a number of authorities and also to the Supreme Court of Victoria Rules about the meaning of commencement of third party proceedings in other jurisdictions. It also stressed the importance of ensuring there was consistency in the application of the relevant provisions of the *Wrongs Act* across jurisdictions. However, in circumstances where the *Wrongs Act* does not prescribe how a contribution proceeding is to be commenced, it would appear that the legislature intended that each jurisdiction be free to determine its own processes for the commencement of contribution proceedings.

…

[24] The building surveyor submits that the meaning of the term 'commence' in the *Wrongs Act* is unclear, as it is not defined. There is no definition in s3 of the VCAT Act of 'commence' or 'commencement'. Further, there is no provision in the VCAT Act or the enabling enactments referring to the institution of a third party claim for contribution.

…

[26] Accordingly, the building surveyor submits, it is arguable that the date of commencement of a claim for contribution is the date on which the application for joinder is filed with the Tribunal.

…

[32] …where orders are made that any application for joinder be made in accordance with the Practice Note and be accompanied by supporting affidavit material, and proposed points of defence or Points of Claim, as the case may be, I am satisfied that it is arguable, that the making of the application for joinder, in accordance with these directions, is the commencement of the contribution proceeding [within the meaning of section 24(1) of the Wrongs Act 1958].

34 The Deputy President therefore took a broad approach to the meaning of the word "commenced" in section 24 of the *Wrongs Act 1958*. She considered that she was supported in her conclusion by s97 of the VCAT Act, which provides:

97 **Tribunal must act fairly**

> The Tribunal must act fairly and according to the substantial merits of the case in all proceedings.

35 She also drew support for her approach by s98(1) of the VCAT Act, which provides:

> 98 **General procedure**
>
> (1)` The Tribunal–
>
> (a) is bound by the rules of natural justice;
>
> (b) is not bound by the rules of evidence or any practices or procedures applicable to courts of record, except to the extent that it adopts those rules, practices or procedures;
>
> (c) may inform itself on any manner as it sees fit;
>
> (d) must conduct each proceeding with as little formality and technicality, and determine each proceeding with as much speed, as the requirements of this Act and the enabling enactment and a proper consideration of the matters before it permit.

36 The Deputy President also observed that the rules and practices of the Supreme Court in relation to third party claims have not been adopted by the Tribunal within the meaning of section 98(1)(b). Rather, in the Building and Property List, procedures which are not otherwise specified in the VCAT Act or the VCAT Rules are dealt with in the Practice Notes which, in the case of an application for joinder, she explained, involve an opportunity for the proposed joined party to make submissions.[9]

37 I agree with the observations of the Deputy President. Having regard to the special procedures adopted by the Tribunal, and the nature of the strike out order made in the proceeding on 19 March 2015, I consider that Ms Faulkner was not in a position to bring a building action as of right. The cases to the effect that, for the purpose of the statutes of limitation, actions are brought when a writ is issued (or, more specifically, when it is sealed)[10] or, by analogy (and as the second respondent would contend) when the proceeding is filed in the Tribunal, are therefore not strictly analogous to the present circumstances.

38 I have concluded that where, as in this case, a proceeding is struck out, but leave is given to applicants to apply for reinstatement provided it is accompanied by draft Points of Claim against the party to which the application relates then, in the event that leave to serve is subsequently granted by the Tribunal after the 10 year limitation period has expired, the filing of draft Points of Claim is to be regarded as the date that the action was "brought" within the meaning of section 134 of the *Building Act 1993*. The situation in which Ms Faulkner found herself, upon resolving to bring a

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9 Ibid. at [26] and [29]-[30].

10 See *Law of Limitation* by GE Dal Pont LexisNexus Butterworths (2016) at [4.50] and *Limitation of Actions-The Laws of Australia* (4th edition) (2017) by P Hannaford at [5.10.460].

building action against Reddo was that she was facing a procedural bar to formally bringing the action: that was the need to obtain leave of the Tribunal pursuant to the previous order. The learned author of *Law of Limitation*[11] states:

> ***Impact of unfulfilled procedural steps***
>
> [4.7] There arises, in this context, the legitimate question as to whether some 'procedural' bar to the action should, for limitations purposes, be seen as precluding a cause of action, and the running of time, until that bar is overcome. The case law here broadly recognises a distinction between a procedural bar and the elements of the cause of action…"

39 I accept Ms Faulkner's submissions that were the Tribunal to hold otherwise, and require that leave to bring a building action must have been obtained prior to the expiration of the limitation period, it would work an injustice upon a party such as herself who seeks to bring a building action within the required 10 year period but who, for reasons out of its control and related to the Tribunal's own workload, cannot be heard on a leave application prior to the expiration of the 10 year limitation period.

40 Reddo relies on the decision of the Tribunal in *Adams v Clark Homes Pty Ltd.*[12] In that case, the applicants caused 3 townhouses to be constructed in Torquay. Occupancy Permits were issued on 29 July 2004 for units 1 and 2, and on 30 July 2014 for unit 3. The 10 year limitation period therefore expired on 29 July 2014 in regard to units 1 and 2, and 30 July 2014 in regard to unit 3.

41 On 11 April 2014, the applicants filed an application against the builder claiming damages for breach of contractual warranties and/or negligence.

42 On 16 July 2014 on the builder's application, the Tribunal ordered joinder of the plumber.

43 On 17 July 2014, the builder filed an application to join the architects.

44 Perhaps for concern that the 10 year limitation period was about to expire, and considering that a claim for apportionment under Part IVAA of the *Wrongs Act 1958* is a "building action" within the meaning of section 134 of the Act[13], the builder and the plumber filed a fresh proceeding against the architect on 25 July 2014 (the "**fresh proceeding**").

45 Subsequent events were to confirm that the fresh proceeding was a claim for apportionment. On 5 August 2014, the builder filed a defence in the proceeding, in which it was alleged for the purpose of Part IVAA of the *Wrongs Act 1958* that the applicants' claim in the proceeding was an apportionable claim, and that the architect and the plumber were concurrent wrongdoers. Amended defences were subsequently filed by the builder and

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11 G E Dal Pont (LexisNexus Butterworths 2016).
12 [2015] VCAT 1658
13 Which must be doubted, given that it is a defence, not a "building action".

the plumber on 5 September 2014, in which the only remedy sought by the builder against each of the architect and the plumber was apportionment pursuant to Part IVAA of the *Wrongs Act 1958.*

46 At a directions hearing on 22 October 2014, the applicants indicated (apparently for the first time) an intention to amend their points of claim to include a claim against the architects, and on 5 November 2014 they filed and served points of claim against the architects relying on an alleged breach of contract and/or negligence. On the application of the architects, Judge Jenkins, Vice President of the Tribunal as she was then, struck out the points of claim on the basis that the claim against the architects was brought after the expiration of the 10 year limitation period.

47 Reddo relies on the following extract from the reasons of Vice President Jenkins in *Adams*:

> [93] In my view, the policy and intent contained within the express wording of s 134 is clear and unambiguous and confirmed in *Brirek's* case. Accordingly, the 10 year limitation period for any claims to be made by the Applicants in this case expired prior to any claims having been made by them against the Architects. Furthermore, it does not assist the Applicants that there was already a proceeding on foot which was commenced prior to the expiration of such limitation period…
>
> [94] **It is worth noting that the architects were joined on the application of the Builder and the Plumber, for the express purpose of invoking of Part IVAA. The joinder for that purpose does not of itself create an opportunity for the Applicants to file a claim, beyond the limitation period**. Equally, if the Architects had not been joined as defendants in the proceeding, and the Applicants sought to join them as defendants after the expiration of the limitation period, the Architects could have resisted such joinder on the basis that any such claim by the Applicants against them was statute barred [emphasis added by Reddo].

48 I respectfully agree with the learned Vice President's observations in her reasons for not permitting the applicants to amend their claim, at the time they did, so as to bring a claim for the first time against the architects.[14] It follows, however, from my finding that Ms Faulkner brought her building action against Reddo within the 10 year limitation period, and does not need to rely on having already brought a contingent claim against Reddo, that *Adams* and like decisions have no application.

49 I do not see the proceeding now being used as a vehicle only for the purpose of Ms Faulkner bringing a building action as an impediment to the proceeding being reinstated for this purpose.

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[14] See her Honour's Reasons (ibid) at [73]-[84] and [93]-[94], and see also decision of Member Edquist, also relied on by her Honour, in *Tsobanis v Katsouranis* [2015] VCAT 739

Do the proposed DPC disclose an open and arguable case?

50 Reddo submits that if Ms Faulkner's application to file the proposed DPC dated 30 January 2019 is within time, the proposed APC should not be filed because they fail to disclose an "open and arguable case".[15]

51 First, it is submitted that I accept Ms Faulkner's submission that the proposition that Reddo as the relevant building surveyor owed Ms Faulkner as a subsequent purchaser a duty to undertake its services with due care and skill has already been the subject of consideration when, on 19 February 2014, Reddo and other parties were joined to the proceeding as alleged concurrent wrongdoers to the applicants within the meaning of Part IVAA of the *Wrongs Act 1958*.[16]

52 I am satisfied that satisfactory particulars of the alleged duty of care have been provided in paragraph 5 of the proposed DPC. It is also well-established that a building surveyor owes a duty of care to a subsequent owner.[17]

53 Secondly, Reddo submits that there is inadequate particularisation of the alleged breach of duty. I am satisfied that the breach is adequately pleaded in paragraph 7 of the proposed DPC. Ms Faulkner alleges that Reddo failed to carry out its inspection duties properly.[18]

54 Thirdly, Reddo submits that it is not sufficient, as has occurred here, for Ms Faulkner to provide particulars of claimed defects by reference to an expert report of Sergon dated 1 September 2019, relying on the authority of *Roach v Nova Homes*. I agree. I also consider that there is a disconformity between the description of defects in paragraph 7(a)(i)-(xiii) of the proposed DPC, alleged to have resulted from the alleged failure of Reddo to inspect or to inspect properly, and the defects set out in the particulars to paragraph 8 of the proposed DPC for which monetary claims are made by way of damages. There will be an order requiring this to be clarified in the points of claim served. I do not consider, however, that this is a reason for not granting leave to Ms Faulkner to serve the proposed DPC.

55 I do not accept the further submission that Ms Faulkner is seeking to use a group proceeding by the owners of private properties and the owner of common property as a vehicle for her own claim, and thereby try to avoid the operation of section 134 of the *Building Act 1993*. Given the findings I have made, Ms Faulkner does not need to rely on any aspect of the proceeding, particularly her contingent claim against the respondents, in order to bring a building action on 30 January 2019 against an existing respondent.

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15 See cases relied on by Reddo *5 Rivoli Court Mt Waverly v USI Homes Pty Ltd* [2014] VCAT 553 at [6]-[7] and [16]-[17]; *Roach v Nava Homes Pty Ltd* [2016] VCAT 1861 at [12]-[14] and [25]-[28].

16 See the particulars later provided in paragraph 26 of the Amended defence dated 24 April 2014.

17 See *Moorabool Shire Council and Anor v Taitapanui and Ors* [2006] VSCA 30 at 45 (per Maxwell P).

18 See paragraph 7(a) of the proposed DPC.

56 I also consider that in the circumstances, the proceeding may continue notwithstanding that it only involves a single applicant now seeking final relief.

Proposed claim against Mr Eyers

57 The orders of the Tribunal dated 19 March 2015 made no allowance for the bringing of a proceeding by the applicants or, as I have found, an applicant against a person not already a party to the proceeding. There was, therefore, no procedural bar to Ms Faulkner doing so.

58 Unlike the claim against Reddo, the claim by Ms Faulkner against Mr Eyers, a new party, could have been brought as of right by Ms Faulkner before the expiration of the 10 year limitation period on 19 February 2019.

59 In such circumstances, I find that by her filing of the DPC, a building action was not brought by Ms Faulkner against Mr Eyers within the meaning of section 134 of the *Building Act 1993*. Leave to do so must be refused.

A T Kincaid
Member