VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

VCAT REFERENCE NO BP644/2015

BUILDING AND PROPERTY LIST

CATCHWORDS

DOMESTIC BUILDING – application for joinder –*Wrongs Act 1958* - Part IVAA – *Victorian Civil and Administrative Tribunal Act 1998* s60

APPLICANT	Amanda Roach
RESPONDENT	Nava Homes Pty Ltd
WHERE HELD	Melbourne
BEFORE	Deputy President C Aird
HEARING TYPE	Directions hearing
DATE OF HEARING	11 October 2016
DATE OF ORDER	4 November 2016
CITATION	Roach v Nava Homes Pty Ltd (Building and Property) [2016] VCAT 1861

ORDERS

1. The proposed second respondent/joined party is given leave to intervene so they may be heard in relation to any joinder and associated applications.
2. The respondent's application for joinder dated 20 September 2016 is refused.
3. By 22 November 2106 the respondent may renew the application for joinder by filing and serving (including on the proposed respondent) further proposed draft Points of Defence and/or Points of Claim and advising the principal registrar and the proposed parties in writing of their intention to do so. The respondent must advise the proposed respondents of the date and time when the application will be heard.
4. **This proceeding is listed for a further directions hearing before Deputy President Aird on 1 December 2016 at 2:15 p.m. at 55 King Street Melbourne, at which any further application for joinder will be heard, and directions made for its further conduct – allow 90 minutes.**
5. Costs reserved with liberty to apply. Any application for costs will be heard at the directions on 1 December 2016, time permitting.

DEPUTY PRESIDENT C AIRD

APPEARANCES:

For Applicant	Mr J Gray, solicitor
For Respondent	Mr A Klotz of Counsel
For proposed Joined Party	Mr T Mullen, solicitor

REASONS

1 The respondent builder entered into a domestic building contract with the previous owner of the subject property in August 2010 for renovation and extensions to their home. The applicant owner settled on the purchase of the home in October 2013. She commenced this proceeding on 3 May 2016 alleging that the works carried out by the builder are defective, and seeking damages in excess of $180,000 for the cost of rectification, alternative accommodation and costs.

2 On 20 September 2016 the builder filed an Application for Directions Hearing or Orders ('the application') wherein it applies to join the engineer, Intrax Consulting Engineers Pty Ltd ('the engineer') as a party. The application is accompanied by a supporting affidavit sworn by the builder's solicitor, Steven Ronald Weybury on 20 September 2016, and Proposed Amended Points of Defence pleading a defence under Part IVAA of the *Wrongs Act 1958* and Points of Claim seeking contribution and indemnity from the engineer.

3 Mr Klotz of Counsel appeared on behalf of the builder and Mr Mullen of Counsel appeared on behalf of the engineer to oppose the application. Mr Gray, solicitor, appeared on behalf of the owners but did not make any submissions in relation to the joinder application.

4 For the reasons which follow, the applications to join the engineer as a respondent or as a joined party are refused.

JURISDICTION

5 The Tribunal's power to order joinder of parties is found in s60 of the *Victorian Civil and Administrative Tribunal Act 1998* ('the VCAT Act').

> (1) The Tribunal may order that a person be joined as a party to a proceeding if the Tribunal considers that—
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> (a) The person ought to be bound by, or have the benefit of, an order of the Tribunal in the proceeding; or
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> (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.

6 It is clear that the Tribunal's powers to order joinder under s60 of the VCAT Act are very wide. The power is discretionary and considering the possible implications for the parties (including costs) it is not a discretion that should be exercised lightly, particularly where supporting material and proposed pleadings have been filed.

7 As I said in *Perry v Binios*[1] at [17] :

> In considering any application for joinder where proposed Points of Claim have been filed, the Tribunal must be satisfied that they reveal an *'open and arguable'* case (*Zervos v Perpetual Nominees Limited* [2005] VSC 380 per Cummins J at paragraph 11).

THE PROPOSED PLEADINGS

8 In the Proposed Points of Defence, after setting out that the engineer designed the stumps and prepared a geotechnical investigation report dated 24 June 2010 in which the builder is identified as the client, it is alleged:

> 20. Intrax was under a duty of care to the applicant as the current owner and occupier of the property to carry out the work described in paragraph 19 [the geotechnical investigation and stump design] hereof with reasonable competence and skill.
>
> 21. For the purposes of section 24AH of the *Wrongs Act*, Intrax's acts or omissions, alleged in the Points of claim and described in the *attached* reports of Russell Brown dated 11 November 2015 and 8 December 2015 and Harry Giofkou dated 5 September 2016 were:
>
> (a) in breach of the duty of the care owed to the applicant and negligent; and
>
> (b) a cause of the applicant's loss and damage that is the subject of the applicant's claim against the respondent.
>
> 22. The applicant's claim against the respondent is for economic loss or damage to property arising from a failure to take reasonable care.
>
> 23. Accordingly, if the respondent's acts or omissions are found by the Tribunal to have been a cause of the same loss or damage caused by Intrax -
>
> (a) Intrax is a 'concurrent wrongdoer(s)' for the purposes of section 24AH of the *Wrongs Act*
>
> (b) the applicant's claim against the respondent is an apportionable claim within the meaning of Part IVAA of the *Wrongs Act* and
>
> (c) by reason of section 24AI of the *Wrongs Act* the respondent's liability is limited to an amount reflecting that proportion of the loss or damage claimed that the Tribunal considers just having regard to the extent of the responsibility of Intrax for the loss or damage.

9 In the Proposed POC filed in support of the application to join the engineer to claim contribution and indemnity, the builder alleges:

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[1] [2006] VCAT 1604

- that the engineer designed the stumps for the works, and provided Engineering Drawings and Computations dated August 2010 to the builder
- the engineer conducted a geotechnical investigation of the property and prepared a Geotechincal Investigation Report dated 24 June 2010 prior to designing the stumps
- the Geotechnical Investigation Report and the Engineering Drawings and Computations identify the builder as the engineer's client and the property for which they were prepared
- then:

> 4. In the circumstances, Intrax was under a duty of care to the respondent [the builder] as the client to whom it supplied the engineering work and documentation to carry out the engineering work and documentation with reasonable competence and skill.
> 5. Further and alternatively, the respondent engaged Intrax to carry out the engineering work and documentation
>
> PARTICULARS
>
> The engagement is evidenced by the engineering work and documentation. Further particulars will be provided prior to the final hearing in this proceeding.
>
> 6. There was a terms of such engagement that Intrax would carry out the engineering work and documentation with reasonable competence and skill.
> 7. Intrax's acts or omissions, alleged in the Points of Claim and described in the *attached* reports of Russell Brown dated 11 November 2015 and 8 December 2015 and Harry Giofkou dated 5 September 2016, were:
>
> (a) a breach of a duty of care owed to the respondent and negligent and/or
>
> (b) a breach of the term of its engagement by the respondent to carry out the engineering work with reasonable competence and skill; and
>
> (c) caused the respondent to suffer loss and damage.
>
> 8. If the respondent is adjudged liable to the applicant by reasons of the matters set out in the applicant's points of claim, such liability arises by reason of the conduct of Intrax.
>
> …

DISCUSSION

10 It is well established that a party (or a proposed party) has a right to know the case it has to answer. In *Barbon v West Homes Australia Pty Ltd* [2001]

VSC 405 Ashley J held that whilst pleading summonses should be discouraged a party has a right to know the case it has to answer:

> I would not want it thought for a moment, because the Tribunal is not a court of pleading, and because the Act encourages a degree of informality in proceedings, that Rafferty's Rules should prevail. They should not. Any party, perhaps particularly a party facing a long, drawn-out hearing in the Tribunal - and I note in this case an estimate that the Tribunal hearing would extend for some nine weeks - is well entitled to know what case it must meet before the hearing commences. That is not to say that the case must be outlined with exquisite particularity. It is not to say that a defendant is entitled to evidence rather than particularisation. None the less a defendant is entitled to expect that a claim will be laid out with a degree of specificity such that, if it is obvious that the claimant seeks to pursue a claim which is untenable, that can be the subject of an application before trial; such that, moreover, if adequate particularisation is not provided, the matter will be clear to the Tribunal on application by an aggrieved party.[6]

11 The Proposed Points of Defence and the Proposed Points of Claim suffer from the same mischief. They simply make a number of bald assertions but do not plead out fully the legal basis for the allegations, the material facts relied upon and/or provide any particulars.

12 Whilst reference to expert reports may be appropriate in certain circumstances, this is not sufficient in the proposed pleadings. The difficulty is that the references in the proposed pleadings are not to specific extracts to the expert reports or to specific allegations in the owner's Points of Claim ('the owner's POC'). Allegations in the owner's POC are simply that the builder has breached certain of the s8 warranties, by reference to the expert reports. Relevantly, there are no allegations in the owner's POC pleading deficiencies in the engineering drawings and documentation. It is not enough to rely on extracts from the expert reports set out in the supporting affidavit – these do not set out the legal basis upon which the allegations are made.

13 It is not enough to simply assert that a duty of care was owed, or that it was breached. Pleadings setting out how the duty of care arose and the particulars of breach are some of the matters that need to be properly addressed.

14 My comments in *Hawkins v Holland*[2] are apt:

> 5. In **Wimmera Mallee 2** His Honour in refusing the application for joinder as a Defendant said that *"the question still remains whether it is fairly arguable that, in the circumstances of this case the sub-contractor designer owed a duty of care to the [Plaintiff].."* and *"It is not sufficient for the applicant merely to proffer a pleading containing allegations which, if found to be justified, would make*

[2] [2003] VCAT 1838

out the cause of action." It is clear that for this application to succeed there must be an arguable case – and that it is not sufficient to merely state that a duty of care was owed by the proposed Third Respondent to the Applicant as is alleged in paragraphs 4 and 5 of the proposed Points of Claim but to provide some particulars as to how such duty of care arises and how it has been breached. Byrne J in rejecting the application for joinder in the first **Wimmera Mallee** case where there was a lengthy proposed Statement of Claim said "...there are no facts alleged in the pleading or by way of particulars *which support the existence of the alleged duty of care or which show that the Authority's loss was caused by any breach of such duty of care."* Further in **Wimmera Mallee 2** his Honour said:

> "...a party seeking to add a defendant must satisfy the court that the joinder is proper. This may not be a heavy burden since r9.06(b)(ii) requires no more that there may exist a question. Where such a question is based on a breach of a duty of care, the existence of that duty will often be self evident. Where, as here this is not the case and where the application is opposed, the onus lies on the applicant to discharge this burden offering material in support where this is necessary".

6. The proposed Points of Claim do not provide any particulars to support the allegations that a duty of care was owed to the Applicant by a sub-contractor to the Second Respondent, how that duty has been breached and that the damages claimed by the Applicant were at least, in part, caused by that breach.

15 It may be that the engineer is a concurrent wrongdoer, or that it owed a duty of care to the owner and/or the builder, but an arguable case is not disclosed from the proposed pleadings.

Is the owner's claim an apportionable claim?

16 In the owner's POC it is alleged that the builder has breached the statutory warranties set out in s8(a), (b) and (d) of the *Domestic Building Contracts Act 1998* which relevantly provide:

> The following warranties about the work to be carried out under a domestic building contract are part of every domestic building contract—
>
> (a) the builder warrants that the work will be carried out in a proper and workmanlike manner and in accordance with the plans and specifications set out in the contract;
>
> (b) the builder warrants that all materials to be supplied by the builder for use in the work will be good and suitable for the purpose for which they are used and that, unless otherwise stated in the contract, those materials will be new;

(c) the builder warrants that the work will be carried out in accordance with, and will comply with, all laws and legal requirements including, without limiting the generality of this warranty, the Building Act 1993 and the regulations made under that Act.

17 The owner makes no claim against the builder for a breach of the warranty contained in s8(d) – that the work will be carried out with reasonable care, and makes no claim in negligence against the builder.

18 For the proportionate liability regime under Part IVAA of the *Wrongs Act 1958* to be enlivened the owner's claim must be for economic loss or damage to property arising from a failure to take reasonable care. Section 24AF of the *Wrongs Act* provides:

(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)

(2) If a proceeding involves 2 or more apportionable claims arising out of different causes of action, liability for the apportionable claims is to be determined in accordance with this Part as if the claims were a single claim.

(3) A provision of this Part that gives protection from civil liability does not limit or otherwise affect any protection from liability given by any other provision of this Act or by another Act or law.

19 Section 24AH defines a concurrent wrongdoer as:

(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.

20 In *Serong v Dependable Developments Pty Ltd*[3] Macnamara DP (as he then was) said at [349]:

> The contractual claim against Dependable does not arise from a claim for misleading and deceptive conduct contrary to Section 9 of the *Fair Trading Act* nor does it arise from an alleged failure to take reasonable care. Rather it arises out of allegations that Dependable has failed to meet certain absolute standards arising out of the contract including

[3] [2009] VCAT 760

> the due completion of the works within a specified time and the employment of proper workmanship in the construction of those works. Dependable's liability under the contract is to perform its terms not to use reasonable care to perform them. Mr Gurr submits that the effect of Section 24AI is that there should be no apportionment as between the contractual claim against Dependable and the claims for misleading and deceptive conduct. I agree with this submission.

21 In *Spiteri & Ors v Stonehenge Homes & Associates Pty Ltd*[4] Judge Lacava said at [136-138]

> 136. Mr Laird submitted that the claims made against Homes in the primary proceedings are brought under the statutory warranties in the case of the Owners and in contract in the case of Wesfarmers. He correctly, in my view, submits that claims brought under the statutory warranties contained in the Act and the claim in contract are not apportionable claims within the meaning of the *Wrongs Act* 1958.[5]
>
> 137. With respect, that submission must be correct. Part IVAA of the *Wrongs Act* 1958 requires a court or tribunal when apportioning a claim, to assess from the facts, the degree of responsibility or liability between concurrent wrongdoers. That can be done in the context of a negligence claim but not in a claim in contract or where the claim is based in breach of warranty.
>
> 138. In my judgment, the claims that Wesfarmers and the owners bring against Homes are not apportionable claims within the meaning of the *Wrongs Act* 1958.
>
> 139. I note that Homes made no submissions contrary to those advanced by the applicants on this question.

22 Applications for joinder for the purposes of Part IVAA have their own peculiarities. The observations of Middleton J in *Dartberg Pty Ltd v Wealthcare Financial Planning Pty Ltd*[6] are pertinent. Whilst finding that Part IVAA did not apply to the particular circumstances of that case, his Honour made the following observations about its operation:

> 30. ... Where a claim brought by an applicant does not have as one of its necessary elements any allegation of failing to take reasonable care, an additional enquiry into the failure to take reasonable care may become relevant in the course of a trial to determine the application of Pt IVAA. Even though the claims in this proceeding themselves do not rely upon any plea of negligence or a "failure to take reasonable care" in a strict sense, a failure to take reasonable care may form part of the allegations or the evidence that is

[4] [2011] VCAT 2267
[5] *Serong v Dependable Developments Pty Ltd (Domestic Building)* [2009] VCAT 760 at [66 and 349] and *Lawley v Terrace Designs Pty Ltd (Domestic Building)* [2006] VCAT 1363 at [318].
[6] [2007] FCA 1216 (10 August 2007)

tendered in the proceedings. At the end of the trial, after hearing all the evidence, it may be found that Pt IVAA applies.

31. In these circumstances, where a respondent desires to rely upon Pt IVAA of the Wrongs Act, it will need to plead and prove each of the statutory elements, including the failure to take reasonable care. In a proceeding where the applicant does not rely upon any such failure, then the need for a particularised plea by a respondent may be particularly important for the proper case management of the proceedings: see eg *Ucak v Avante Developments Pty Ltd* [2007] NSWSC 367 at [41]. It would be desirable at an early stage of proceedings for a respondent to put forward the facts upon which it relies in support of the allocation of responsibility it contends should be ordered. If a respondent calls in aid the benefit of the limitation on liability provided for in Pt IVAA of the Wrongs Act, then the respondent has the onus of pleading and proving the required elements. The court, after hearing all the evidence, will then need to determine, as a matter of fact, whether the relevant claim brought by the applicant is a claim arising from a failure to take reasonable care.

23 Mr Klotz referred me to the comments by Judge Jenkins in *Adams v Clark Homes Pty Ltd*[7] where she set out the approach to be followed in considering applications for joinder for the purposes of a proportionate liability defence. At [49] she said:

> Similarly, in *Suncorp Metway Pty Ltd v Panagiotidis*,[8] Associate Justice Evans cited with approval the observations of Pagone J in *Solak v Bank of Western Australia*,[9] as to the proper approach in determining whether or not a proceeding relates to an apportionable claim under Part IVAA and similar regimes, as follows:
>
> > The factual precondition to the operation of the relevant statutory regimes does not depend upon how a claim is pleaded but whether the statutory precondition exists, namely whether the claim arises from a failure to take reasonable care. In *Dartberg Pty Ltd v Wealthcare Financial Planning Pty Ltd* [2007] FCA 1216; ((2007) 164 FCR 450) Middleton J said that the words arising from the failure to take reasonable care should be interpreted broadly (ibid) [29]. In my view the State regimes providing for the apportionment of liability between concurrent wrongdoers require a broad interpretation of the condition upon which the apportionment provision depends to enable courts to determine how the claim should be apportioned between those found responsible for the damage. The policy in the legislation is to ensure that those in fact who caused the actionable loss are required to bear the portion of the loss referable to their cause. That task ought not to be frustrated by arid disputes about pleadings. [my emphasis]

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[7] [2015] VCAT 1658
[8] [2009] VSC 126 at [20].
[9] [2009] VSC 82 at [35].

24 In circumstances where the owner's claims do not include any claim arising from a failure by the builder to take reasonable care, if the builder wishes to rely on the proportionate liability provisions set out in Part IVAA, it needs to clearly plead and particularise the failure to take reasonable care which it says caused the owners' loss and damage. The Proposed POD do not do this. They are silent on the essential elements on which the builder relies to support its allegations that the owner's claim is an apportionable claim, and the engineer is a concurrent wrongdoer, including the legal basis upon which it alleges the proposed respondent is a concurrent wrongdoer, and how it has caused or contributed to the owner's claimed loss and damage. Where it alleges that the proposed respondent owed the owner a duty of care, it is necessary to set out the relevant factors which found a claim in negligence.

THE BUILDER'S CLAIM FOR CONTRIBUTION AND INDEMNITY

25 The Proposed POC merely set out a number of bald assertions with few relevant particulars. For instance, the builder alleges it engaged the engineer to carry out the engineering work and documentation but there are no particulars of the contract details. It is alleged that the engineer's acts or omissions alleged in the owner's POC and described in the referenced expert reports, were a breach of a duty of care owed to the respondent, and were negligent. The relevant factors to found a claim in negligence are not pleaded. Further, it is not said how the duty of care arose, nor are the particulars of breach of the alleged duty pleaded.

26 As noted above, it is not sufficient to simply rely on short extracts from the expert reports referred to in the affidavit filed in support of the joinder applications.

27 I cannot be satisfied that the Proposed Points of Claim disclose an *open and arguable* case against the engineer, and accordingly the application for joinder is refused.

WHY ADEQUATE PLEADINGS ARE REQUIRED FOR JOINDER

28 I reject the submission on behalf of the builder, that requiring more detailed pleadings to support a joinder application is to take an overly technical approach. The process of generally requiring applications for joinder to be accompanied by supporting affidavit material and draft pleadings, to be served on the proposed party, was introduced many years ago. Proposed parties will usually be granted leave to intervene so they may be heard in relation to the joinder application, thus avoiding the delay and cost associated with unnecessary applications under s75 of the VCAT Act. It is a serious matter to join a party to a proceeding in the tribunal where, by virtue of the operation of s109 of the VCAT Act, costs do not automatically follow the event as they do in the courts,

CONCLUSION

29 Having regard to the expert reports I consider it appropriate to grant the builder leave to renew its application for joinder by filing and serving further proposed pleadings, with any application to be heard at the next directions hearing.

30 I will reserve costs with liberty to apply.

DEPUTY PRESIDENT C AIRD