VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

VCAT REFERENCE NO. D188/2007

DOMESTIC BUILDING LIST

CATCHWORDS

Application for joinder – concurrent wrongdoers – Part IVAA of *Wrongs Act* 1958 – whether applicant for joinder required to file Points of Claim as against concurrent wrongdoers

APPLICANT	Salta Constructions Pty Ltd (ACN: 006 261 301)
FIRST RESPONDENT	Solid Investments Australia Pty Ltd (ACN 085-467-125)
SECOND RESPONDENT BY COUNTERCLAIM	Vibro-Pile Aust Pty Ltd
WHERE HELD	Melbourne
BEFORE	Deputy President C. Aird
HEARING TYPE	Directions hearing
DATE OF HEARING	24 February 2009
DATE OF ORDER	31 March 2009
CITATION	Salta Constructions Pty Ltd v Solid Investments Australia Pty Ltd & Anor (Domestic Building) [2009] VCAT 464

ORDER

1. Under s126 of the *Victorian Civil and Administrative Tribunal Act* 1998 I extend time for the second respondent by counterclaim to apply for joinder of other parties to 23 December 2008.
2. Under s60 of the *Victorian Civil and Administrative Tribunal Act* 1998 and upon application by the second respondent by counterclaim I join as parties to this proceeding Golder Associates Pty Ltd of Level 3, 50 Burwood Road, Hawthorn 3122 and Hickory Developments Pty Ltd c/- Giannakopoulos Solicitors, Level 6, 250 Queen Street Melbourne 3000 (DX 120 Melbourne) as the third and fourth respondents by counterclaim respectively.
3. By 4 April 2009 the second respondent by counterclaim has leave to amend, and must file and serve, its second further Amended Points of Defence and Amended Counterclaim having regard to these reasons for decision.

4. **This proceeding is referred to a further directions hearing before Deputy President Aird on 8 April 2009 at 9.30 a.m. at 55 King Street Melbourne – allow 1 hour.**
5. Costs reserved – liberty to apply.

DEPUTY PRESIDENT C. AIRD

APPEARANCES:

For the Applicant	Mr J. Twigg of Counsel
For the First Respondent	Mr R. Manly SC with Mr Whitten of Counsel
For Second Respondent by Counterclaim:	Mr P. Graham, Solicitor
For proposed Third Respondent by Counterclaim	Ms Lombardi, General Counsel, Australasia
For proposed Fourth Respondent by Counterclaim	Mr H. Foxcroft SC

REASONS

1 In December 2006, the applicant ('Salta') was engaged by the owner/developer ('Solid') to carry out the Authorised Work (as defined in the agreement) at a site in Geelong. The second respondent by counterclaim ('Vibro-pile') was engaged as the piling contractor. Application is made by the Vibro-pile under s60 of the *Victorian Civil and Administrative Tribunal Act* 1998 and s24AL of the *Wrongs Act* 1958 to join Golder Associates Pty Ltd ('Golder') and Hickory Developments Pty Ltd ('Hickory') as the third and fourth respondents by counterclaim respectively.

2 Vibro-pile relies on an affidavit in support of its application sworn by its solicitor, Paul Graham, sworn 23 December 2008. Exhibited to the affidavit are a lever arch file of supporting documents, together with proposed Second Further Amended Points of Defence and Amended Points of Counterclaim. In accordance with paragraph 9 of PNDB1(2007) and the notes on the 'Application for Orders/Directions' copies were served on the other parties and the proposed parties.

3 Vibro-pile was represented by its solicitor, Mr Paul Graham. Salta was represented by Mr Twigg of Counsel; Solid by Mr Manly SC with Mr Whitten of Counsel; Golder by Ms Lombardi, its General Counsel, Australasia; and Hickory by Mr Foxcroft SC.

4 Written submissions opposing the application had been filed by Golder and these were accompanied by extensive supporting materials. An affidavit by its solicitor, Ajai Lyndon Thapliyal sworn 19 February 2009 was relied on by Solid. Solid and Hickory handed up written submissions at the commencement of the directions hearing opposing the application. Salta also opposes joinder essentially adopting Solid's submissions.

5 After hearing the submissions, Mr Graham sought and was given leave to file written submissions in reply. A twenty page submission, accompanied by draft Points of Claim as against each of the proposed parties, prepared by Mr Anthony Graham QC with Ms Kirton of Counsel, was filed on 27 February 2009.

PNDB1(2007)

6 Solid and Hickory contend that as Vibro-pile has not complied with paragraph 9 of the Domestic Building List practice note, PNDB1(2007), its application must fail. Paragraph 9 provides:

> 9.1 Parties should take all reasonable steps to identify potential parties to a proceeding as soon as practicable, and make applications for joinder in a timely manner and in accordance with this Practice Note and any directions that may be made.

9.2 Leave of the Tribunal is required for joinder of parties. Any application for joinder of parties, whether as respondent or joined party, should be made on the Application for Orders/Directions form which must be accompanied by affidavit material in support and draft Points of Claim as against the proposed party.

9.3 Subject to clause 9.6, an application for joinder will be listed for a directions hearing at which time the parties should expect the application to be heard and determined, subject to the discretion and direction of the Tribunal. Where the proposed party consents to joinder, orders in chambers may be made at the discretion of the tribunal. Where the Tribunal declines to make such orders in chambers the directions hearing will proceed.

9.4 A copy of such application together with the supporting material must be served by the applicant for joinder on all parties to the proceeding, and the proposed party (who must also be advised of the date and time of the directions hearing at which the application will be heard) by 12 noon at least four (4) business days prior to the directions hearing (or as otherwise ordered).

9.5 Should any party to the proceeding, or the proposed party, oppose such application for joinder they must, where practicable, file and serve affidavit material in reply by 12 noon at least two (2) business days prior to the directions hearing.

9.6 Where the proceeding relates to an appeal by an owner or a builder of a decision of a warranty insurer, it is generally desirable that the owner or the builder as the case may be, is a party to the proceeding. Where they are not named as a party in the original application, orders for their joinder may be sought.

Contrary to the requirements of 9.5, Hickory has not filed any affidavit material in opposition, although it relies on the material exhibited to the affidavits filed by Solid and Vibro-pile.

7 The preamble to the Practice Note provides:

> This Practice Note applies to the practice of the Tribunal in exercising a function allocated by the Rules to the Domestic Building List of the Civil Division and comes into effect on 13 June 2007**.** <u>In any proceeding the operation of the Practice Note may be varied by order of the Tribunal at its discretion.</u> (emphasis added)

8 Further, directions were made by the tribunal on 17 March 2008 ordering that any application for joinder should be made by 23 May 2008, and this date was later extended to 1 July 2008. Vibro-pile's only explanation for its late application, which I note was not foreshadowed when the matter was before me for directions on 18 November 2008, was that it had not made a

commercial decision to do so until after the unsuccessful compulsory conference held on 6 November 2008, following which Solid's counterclaim quadrupled from approximately $1m to nearly $4m.

9 In considering this application regard must be had to the principles set out *Queensland v JL Holdings Pty Ltd* (1997) ALJR 294 and in particular the comments of the joint majority at page 296 that "*it ought always to be borne in mind, even in changing times, that the ultimate aim of a court is the attainment of justice and no principle of case management can be allowed to supplant that aim.*"

10 Whilst this may not seem to the other parties to be a compelling explanation for the delay, I am satisfied that the potential prejudice to Vibro-pile if I do not allow this joinder application, which I propose to do for the reasons which I will discuss shortly, is much greater than any disadvantage which either Salta or Solid might suffer if there is an adjournment of the hearing. The hearing is scheduled to commence on 17 August 2009 with an estimated hearing time of 30 days. Whether the existing timetable can be met, and the hearing date kept, is a matter which will become clear when Salta indicates whether it intends to seek relief as against Golder and/or Hickory, and if not, whether Golder and Hickory wish to participate and if so, the time they require to prepare including the obtaining of any necessary expert reports.

11 I further note that this proceeding has already had a fairly lengthy interlocutory history having been commenced in March 2007. Although Solid's Points of Defence and Counterclaim were filed on 6 July 2007, Vibro-pile was not joined as a party until 17 March 2008, some nine months later.

Vibro-pile's application for joinder

12 As noted above, Vibro-pile seeks to join Golder and Hickory to the proceedings so that it may take advantage of the proportionate liability regime established under part IVAA of the *Wrongs Act*. The application is made under s60 of the *VCAT Act* and s24AL of the *Wrongs Act* which simply provides that a court [which includes a tribunal] may join non-party concurrent wrongdoers as parties to a proceeding. Section 60 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.

13 That this application for joinder is made for the purposes of Part IVAA is clear from the proposed Second Further Amended Points of Defence and Amended Counterclaim viz:

> 41. (j) In the premises,
>
> (i) Solid's claim is for economic loss arising from a failure to take reasonable care;
>
> (ii) By reason of (i) Solid's claim is an apportionable claim within the meaning of section 24AG of the Wrongs Act;
>
> (iii) Vibro-pile is one of two or more persons including Salta, Golder Associates and Hickory, whose acts or omissions caused, independently of each other, or jointly, the loss and damage the subject of this claim;
>
> (iv) Accordingly, Vibro-pile's liability (if any) as a concurrent wrongdoer, is limited to an amount reflecting that proportion of loss and damage claimed as the Tribunal considers just having regard to Vibro-pile's responsibilities for such loss and damage; and
>
> (v) The Tribunal is required to apportion loss in accordance with s24AI of the Wrongs Act.
>
> Vibro-pile is unable to plead further until after receipt of Further and Better Particulars of the allegations from Solid.

14 Each of the parties, and proposed parties, in opposing the application for joinder, was primarily focussed on whether I could be satisfied that the draft pleadings and the material exhibited to Mr Graham's affidavit, demonstrated an open and arguable case that Golder and/or Hickory had breached their duty of care to Solid. It was only after I invited them to do so that any submissions were made about the application of Part IVAA. These were brief and to the effect that Vibro-pile would not suffer any particular disadvantage if this application were unsuccessful because it had failed to make it within time. It could simply institute separate proceedings seeking contribution which for the reasons which I will discuss is undesirable.

15 Both Golder and Hickory are critical of the pleadings contending they do not set out a proper basis for alleging that a duty of care was owed, that the breaches are not identified, nor how it is alleged that those breaches caused or contributed to Solid's loss and damage. The recent comments of Pagone J in *Solak v Bank of Western Australia Ltd & Ors* [2009] VSC 82 at [35] are pertinent:

> In Dartberg Pty Ltd v Wealthcare Financial Planning Pty Ltd Middleton J said that the words "arising from a failure to take reasonable care" should be interpreted broadly. In my view the State regimes providing for apportionment of liability between concurrent wrongdoers requires a broad interpretation of the condition upon which 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. Support for that conclusion may be found by the circumstance that a "failure to take reasonable care" can arise as much from an obligation in tort as in contract.

and at [38]

> The task in apportioning liability amongst concurrent wrongdoers is to be undertaken in a real and pragmatic sense to identify who is to blame for the loss and who should bear the liability [*Yates v Mobile Marine Repairs Pty Ltd* [2007] NSWSC 1463 [94] (Palmer J), *Vella v Permanent Mortgages Pty Ltd* [2008] NSWSC 505, [591] (Young CJ in Eq).] The primary focus in that undertaking is to determine, as best as may be possible, the "causal potency" of the various factors which singularly or together went to bring about the loss caused.

Factors to be taken into account when considering an application for joinder for the purposes of Part IVAA

16 As with all applications for joinder the tribunal must be satisfied that there is an 'open and arguable' case, in this instance that Golder and Hickory are concurrent wrongdoers, and that they failed to take reasonable care. Section 24AF(1) provides:

> 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;

17 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* [2007] FCA 1216 (10 August 2007) are pertinent. Whilst finding that Part IVAA did not apply to the particular circumstances of that case, she 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 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. (emphasis added)

18 It will be for Vibro-pile to persuade the tribunal as to the appropriate apportionment of responsibility for Solid's loss and damage to thereby reduce its liability to Solid. It will be a matter for Golder and Hickory whether they wish to participate in this proceeding, although one might well expect them to do so considering s24AK (1) of the *Wrongs Act* which provides:

> In relation to an apportionable claim, nothing in this Part or any other law prevents a plaintiff who has previously recovered judgment against a concurrent wrongdoer for an apportionable part of any loss or damage from bringing another action against any other concurrent wrongdoer for that loss or damage.

19 It is clearly desirable that Golder and Hickory be bound by or have the benefit of the tribunal's determination in this proceeding. For this reason joinder is warranted under s60 of the *VCAT Act* so that they can take whatever steps they consider appropriate to limit their potential liability to Solid. As I said in *Brady Constructions Pty Ltd v Andrew Lingard & Associates* [2008] VCAT 851 at [24]:

> It seems to me that once the tribunal has apportioned responsibility for the applicant's loss and damage any subsequent application would be by the applicant, seeking to recover from the second and third respondents, that proportion of their loss for which the tribunal had found them responsible. It might be than an estoppel would arise in relation to the question of responsibility which could not then be reventilated. Notwithstanding Mr Horan's submissions about the provisions of s24AK overriding any Anshun Estoppel, it is difficult to conceive of a finding that a party is not liable for the proportion of loss and damage for which it has been found responsible.

20 In *Reinhold v New South Wales Lotteries Corporation [No 2]* [2008] NSWSC 187 when considering the operation of Part 4 of the *Civil Liability Act* which is in similar terms to Part IVAA, Barrett J made the following observations at [32]:

> The provisions of Part 4 are compulsory. They change substantive rights, so that a plaintiff's ability to obtain an adjudication of joint and several liability is removed where the circumstances are of the type to which the alternative regime of proportionate liability is applied. A

> case no doubt needs to be pleaded and proved by one or more defendants so as to engage the statutory provisions. But it will be the findings ultimately made that determine whether the statutory conditions compelling the court to adopt the proportionate approach are satisfied. (emphasis added)

21 In considering any application for joinder and whether the proposed pleading demonstrates an 'open and arguable' case against the background of the factual evidence, the tribunal is not required to determine the merits of the case before hearing all the evidence. As Young SM said in *Seachange Management Pty Ltd v Bevnol Constructons & Developments Pty Ltd* [2007] 1980 at [17]:

> From these legal principles I deduce that I should accept the allegations in the draft pleading of the party seeking joinder and then assess if there is sufficient evidence from that party that if true would ground such allegations in fact and law such the allegations are "open and arguable": *Zervos* (supra); similar to the assessment of a claim for summary dismissal of unjustified proceedings, s75 of the Act, on the basis that the claim discloses no reasonable course of action. This is not a trial of the allegations, this exercise is to assess whether such allegations can be regarded as "open and arguable" and not "misconceived or hopeless": Bowman J in *Age Old Builders v Swintons Pty Ltd* [2006] VCAT 871 at [55]. This means that the party opposing the joinder needs to adduce factual evidence to establish that allegations by the parties seeking joinder are without foundation. However, if such evidence does not completely render the existence of an allegation as untenable, being hopeless or misconceived, then such an allegation must remain "open and arguable" and therefore, the joinder may be appropriate (emphasis added)
>
> It is sufficient that I be satisfied that the claims/allegations are not misconceived or hopeless, in much the same way as a consideration of a strike out application.

Solid's position

22 Solid's primary reason for opposing the application seems to be Vibro-pile's delay in making the application by what counsel described as the 'drop dead' date of 1 July 2008, and its failure to do so in a timely manner in accordance with paragraph 9.1 of PNDB1(2007). Further to my observations above, to remove any uncertainty I will extend time for the making of the application under s126 of the *VCAT Act* to 23 December 2008.

23 It is submitted on behalf of Solid that whilst it is desirable to avoid multiplicity of proceedings, there would be no impediment to Vibro-pile instituting separate contribution/indemnity proceedings under Part IV of the *Wrongs* Act. Separate proceedings seeking contribution, if they can be brought, and that is by no means clear, lead to the possibility of inconsistent

findings which is clearly undesirable. My observations in *Browne v Greenleaf Nominees Pty Ltd* [2006] VCAT 1646 at [19] are apposite:

> …It seems to me that taking into account the provisions of s60 of the *VCAT Act* it is desirable that all matters be determined at the same time and it would not be just and convenient to do otherwise. The Respondents' interests will clearly be affected by the outcome, and they should have the benefit of any decision that is made. One might expect in such circumstances that they would welcome an opportunity to be heard so as to minimise any potential liability.

24 Whilst this matter is well progressed there are a number of interlocutory steps still to be completed. I am not satisfied that any additional complexity, delay or interlocutory costs are not compensable by an order for costs, bearing in mind of course the provisions of s109 of the *VCAT Act.*

Opposition by Golder Associates Pty Ltd

25 Golder was engaged by Solid to provide certain geotechnical advice. The application for joinder is opposed by Golder on the following grounds:

i It is not a concurrent wrongdoer under Part IVAA of the *Wrongs Act* 1958; and

ii It is against the interests of justice and efficiency for the court [tribunal] to do so.

Further it denies any liability.

26 Golder's submission is extensive and more in the nature of a defence, than an opposition to joinder. Generally, whether Golder has a defence to any claim against it (if one is made) is a matter to be determined at the final hearing after the hearing of the evidence, and submissions.

27 In addition to the material set out in its submission and supporting documentation, Golder seeks to rely on an opinion expressed in what it describes as the 'expert report' prepared by Michael Broise for Vibro-pile. In particular:

> The main geotechnical investigation report [Golder June 2006] prepared as information for design and execution of the piling work was performed in an appropriate manner to a standard commensurate with current practice for a development of this type.
>
> The inferred ground conditions were a reasonable description of what could be expected based on the available factual date at the time. [Section 1.8]

And in relation to the depth of the secant piles which were allegedly not driven into the clay at the requisite level:

> Based on the more current information, it is considered likely that the secant pile wall terminated partly in the sandy soils and did not reach the underlying clay at every point along the base of the [north] wall [Section 1.8]

However, this is an extract from Mr Broise's report and I cannot be certain whether it has been quoted in context. It would be inappropriate for me to speculate about this or make any determination as to whether Golder has failed to take reasonable care, without hearing all the evidence.

28 That Golder's submissions set out its defence to any allegations of responsibility against it, rather than opposition to the application for joinder, is best demonstrated by the un-numbered paragraph which follows paragraph 30 of its written submissions:

> In sum, Golder did not breach its duty of care to Solid Investments, It provided competent geotechnical advice on the conditions of the site, provided prudent recommendations to take into account the variability of the site conditions, acted on the information provided to it to provide a limited assessment of the piling contractor's work, and conducted additional investigation when requested to confirm the shortfalls in the contractor's work.

29 It would be entirely inappropriate for me to make any findings about the merits of the allegations that Golder is a concurrent wrongdoer on the material before me. A denial is not enough nor is reference to extracts from Mr Broise's report. I must simply be satisfied that on the face of the pleadings they reveal an open and arguable case that Golder is a concurrent wrongdoer.

Opposition by Hickory Developments Pty Ltd

30 Vibro-pile also seeks to join Hickory as a party. Hickory was engaged by Solid as the principal building contractor. Hickory relies on the affidavit material filed by Vibro-pile and by Solid in support of its opposition to the application to join it as a party to this proceeding.

31 It also raises the issue of delay in the making of the application for joinder in respect of which I repeat my earlier comments. In addition it contends that the proposed pleading as set out in paragraph 41(h) the Second Further Amended Points of Defence and Amended Points of Counterclaim is deficient because it fails:

(a) to allege any breach of the pleaded clauses of the Hickory Agreement;'

(b) to address the elements of the clauses of the Hickory Agreement;

(c) to set out how it is alleged that Hickory has breached obligations it was required to fulfil as part of the Hickory Agreement;

(d) to plead the material facts upon which it intends to rely to show that any act or acts of Hickory were negligent; and

(e) to plead the material facts upon which it intends to show that Solid suffered loss and damage by any act or acts of Hickory.

32 However, as Judge Bowman observed in *Arrow International Australia Pty Ltd v Indevelco Pty Ltd* [2005] VCAT 2710:

> … Section 98 of the [VCAT] Act requires this Tribunal to conduct each proceeding with as little formality and technicality, and to determine each proceeding with as much speed as the requirements of the Act and the enabling enactment and a proper consideration of the matters before it permit. This Tribunal 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 such rules, practices and procedures. The second reading speech of the Minister delivered when the *Victorian Civil and Administrative Tribunal Bill* was introduced refers to the establishment of a system which is modern, accessible, efficient and cost effective. Certainly, as I have earlier stated, in appropriate cases documents akin to pleadings will be ordered and more formal case management structures put in place. That has occurred in the present case. However, the basic aim remains the disposal of matters with such speed and with such lack of formality and technicality that can be achieved consistent with compliance with the rules of natural justice and the obtaining of a fair result in accordance with the substantial merits of the case – see s.97. It is important that each party understands the case which it is to meet. However, this does not mean that matters should become enmeshed in a web of technicalities. The fact remains that this Tribunal is not a court of pleadings. Whilst a party must know and understand the case it has to answer, this does not mean that exhaustive particulars must be given for every allegation.

33 In my view, many of its objections about the pleadings have been addressed by the draft Points of Claim attached to Vibro-pile's submissions. Bearing in mind Pagone J's comments in *Solak* I am satisfied that if the Second Further Amended Points of Defence and Amended Points of Counterclaim were amended to reflect the allegations set out in the draft Points of Claim they disclose an open and arguable case that Hickory is a concurrent wrongdoer.

Are Points of Claim as against the proposed parties required?

34 I am referred to a number of Supreme Court authorities in support of the submission that Vibro-pile is not required to file Points of Claim in support of its joinder application. Unlike in this proceeding, where the proposed parties were given leave to intervene so they could be heard on the question of joinder, in each of those cases, the proposed party was not served with the application nor the supporting material and was not heard on the question of joinder. As I understand it, neither Golder nor Hickory argue they should have been served with Points of Claim.

35 In *P & V Industries Pty Ltd v Secombs (a firm)* [2008] VSC 209 Judd J said:

> 9 Merely because the solicitors choose not to make a claim for relief against the barristers does not relieve them of the obligation to sufficiently plead material facts upon which they rely to make out their defence. While it is true that their primary obligation is to do

> so in their defence, the obligation may also extend to providing the barristers with an opportunity to respond to the allegation made in respect of them and to participate in the proceeding. The question before me is, however, whether a direction for such a pleading ought to be made when joining defendants under Part IVAA of the Act.
>
> 10 In my opinion, any defendant joined under Part IVAA of the Act should have the right to participate in the proceeding if so advised. They are, after all, a joined party and presumably bound by the outcome which may have foreseen and unforeseen consequences for them

In *Cowan v Greatorex & Anor* [2008] VSC 401at [35] Hollingworth J said:

> I agree with Judd J [in *P v V Industries*] that it is not necessary for an existing defendant to deliver a pleading to the additional defendant at the time of ordering joinder, although it may be necessary to do so subsequently. What procedure should be followed after joinder will depend on the facts of each case. For example, whether or not the plaintiff will wish to bring a claim against the concurrent wrongdoer, once it has been joined as a defendant, will vary from case to case. Whether and how the concurrent wrongdoer may wish to participate in the proceeding will vary from case to case. Case management issues, including further pleadings and discovery, can be resolved by appropriate directions, once such decisions and steps have been taken.

36 In seeking to take advantage of apportionment provisions under Part IVAA it is simply necessary for a respondent to set out the basis upon which it alleges a person is a concurrent wrongdoer, set out how it is that person has failed to take reasonable care, and how it has caused or contributed to the claimant's loss and damage. In this case Vibro-pile is not seeking any relief against Golder or Hickory, it is simply seeking to join them as parties to the proceeding so that it may avail itself of the benefits of Part IVAA.

37 Exhibited to the affidavit filed in support of its application for joinder, are Vibro-pile's proposed second further amended Points of Defence and amended Counterclaim pleading a duty of care owed by Golder and Hickory to Solid. Whilst contending that it is not required to serve Points of Claim as against each of the proposed parties if they are joined, Vibro-pile has nevertheless attached draft Points of Claim against Golder and Hickory to its written submissions. No objection to these have been received, nor has any party or proposed party sought leave to be heard in relation to them.

38 In these draft Points of Claim Vibro-pile has alleged an implied term that each of the proposed parties would *'exercise reasonable care in carrying out its work'*, further and/alternatively that they each owed Solid *'a duty of care to exercise reasonable care and skill in performing its work'* and the alleged breaches of the implied term and failure to exercise reasonable care. It is unfortunate that the specific allegations of failure to take reasonable care, the particulars of breach and the further allegation that these caused

Solid's loss and damage (as set out in paragraph 10 and 11 of the draft Points of Claim against Golder and paragraphs 7 and 8 of the draft Points of Claim against Hickory) were not included in the draft Second Further Amended Points of Defence and Amended Counterclaim exhibited to Mr Graham's affidavit. It seems to me that if these are incorporated into the Second Further Amended Points of Defence and Amended Counterclaim, they will demonstrate an open and arguable case that Golder and Hickory are concurrent wrongdoers. As the Second Further Amended Points of Defence and Amended Counterclaim now stand they do little more that assert a duty of care and a breach of that duty

Conclusion

39 Whilst it is necessary under Part IVAA that all persons who might be concurrent wrongdoers be parties to a proceeding, this does not mean that a scatter gun approach should be adopted and parties joined without a proper consideration of the material and, in particular, whether there is an open and arguable case that the proposed party is a concurrent wrongdoer.

40 I am satisfied that the proposed Second Further Amended Points of Defence and Amended Counterclaim if amended to incorporate the additional pleadings included in the draft Points of Claim as against Golder and Hickory, will disclose an open and arguable case that they are concurrent wrongdoers. Further, Golder's and Hickory's interests are clearly affected by this proceeding and it is desirable they be joined under s60 of the *VCAT Act*.

41 I will reserve the question of costs with liberty to apply.

DEPUTY PRESIDENT C. AIRD