VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST VCAT REFERENCE NO BP1725/2018

CATCHWORDS

WATER ACT - PRACTICE AND PROCEDURE -Part IVAA and s 23B of the *Wrongs Act 1958*. Application to join additional parties to take advantage of an apportionment defence under Part IVAA of the *Wrongs Act 1958* or claim contribution under s 23B of the *Wrongs Act 1958*. Relevant factors to consider. Whether an open and arguable case has been demonstrated.

FIRST APPLICANT	Ramesh Singh
SECOND APPLICANT	Manju Singh
FIRST RESPONDENT	Beaumont Webb
SECOND RESPONDENT	Michael Devitt
FIRST INTERVENER	Brady Residential Pty Ltd (ACN 090 482 714)
SECOND INTERVENER	Victorian Body Corporate Services Pty Ltd (ACN 007 034 522)
WHERE HELD	Melbourne
BEFORE	Deputy President E. Riegler
HEARING TYPE	Directions Hearing
DATE OF HEARING	18 November 2019
DATE OF ORDER	21 November 2019
CITATION	Singh v Webb and Anor (Building and Property) [2019] VCAT 1834

ORDER

1. Pursuant to 73 of the *Victorian Civil and Administrative Tribunal Act 1998* leave is given to the First Intervener (Brady Residential Pty Ltd) to intervene for the purpose of opposing the Second Respondent's joinder application, such leave given *nun pro tunc*.
2. Pursuant to 73 of the *Victorian Civil and Administrative Tribunal Act 1998* leave is given to the Second Intervener (Victorian Body Corporate Services Pty Ltd) to intervene for the purpose of opposing the Second Respondent's joinder application, such leave given *nun pro tunc*.

3. The Second Respondent's application to join Brady Residential Pty Ltd as a party to this proceeding is dismissed.

4. The Second Respondent's application to join Victorian Body Corporate Services Pty Ltd as a party to this proceeding is dismissed.

5. **I direct the Principal Registrar to note that the address for service of the Interveners is as follows**:

   (a) the First Intervener: *Colin Biggers & Paisley Lawyers*, Level 23, 181 William Street, Melbourne, 3000 (email: sarah.charters@cbp.com.au); and

   (b) the Second Intervener: *Tisher Liner FC Law*, Level 2, 333 Queen Street Melbourne, 3000 (email: ylim@tlfc.com.au).

6. Costs reserved with liberty to apply.

7. Liberty to apply (generally).

DEPUTY PRESIDENT E. RIEGLER

APPEARANCES:

For the Applicants	Ms N Strauch, solicitor
For the First Respondent	Mr M Schnookal, solicitor
For the Second Respondent	Mr J Corbett of Counsel
For the First Intervener	Ms S Charters, solicitor
For the Second Intervener	Ms Y Lim, solicitor

REASONS

1. The Applicants are the owners of an apartment within a four-level residential complex located in North Melbourne. The Respondents separately own two adjoining apartments which are located directly above the Applicants' apartment. According to the Applicants, since 2013, water has leaked into their apartment from the balconies forming part of the Respondents' apartments.

2. The Applicants claim damages from both Respondents for loss which they allege was caused by the unreasonable flow of water emanating from the Respondents' balconies, together with orders compelling the Respondents to undertake remedial work. Their claim is couched under s 16 of the *Water Act 1989*.

3. The Second Respondent contends that if it is proven that an unreasonable flow of water emanating from his balcony caused damage to the Applicants' apartment, then:

   (a) Brady Residential Pty Ltd (**'Brady'**) and Victorian Body Corporate Services Pty Ltd (**'VBCS'**) have either wholly or partly caused that unreasonable flow of water; and

   (b) Brady and VBCS are proportionally responsible for any of the Applicants' loss, pursuant to Part IVAA of the *Wrongs Act 1958*; and/or

   (c) it is entitled to claim contribution from either or both of Brady and VBCS, pursuant to 23B of the *Wrongs Act 1958*.

4. The Second Respondent seeks an order that Brady and VBCS be joined to this proceeding to enable it to take advantage of the apportionment provisions under Part IVAA of the *Wrongs Act 1958* and/or claim contribution for any of the loss which it is liable to pay, pursuant to 23B of the *Wrongs Act 1958*. Both Brady and VBCS oppose the joinder applications.

JOINDER

5. Section 60 of the *Victorian Civil and Administrative Tribunal Act 1998* (**'the VCAT Act'**) states:

   > (1) The Tribunal may order that a person be joined as a party to a proceeding with 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.

6. In *Independent Cement & Lime Pty Ltd v Victorian Civil and Administrative Tribunal & Ors*,[1] Byrne J commented that a party is to be joined if one of the preconditions to s 60(1) of the VCAT Act were met, however, there is then a discretion as to whether this power is to be exercised by the Tribunal. The power must be exercised reasonably in the circumstances. The reasonableness of the exercise of the discretion will depend on the particular circumstances of the case.

7. In *Age Old Builders Pty Ltd v Swintons Pty Ltd*,[2] Judge Bowman stated:

> As I have stated in previous decisions, the discretion contained in section 60 of the Act is a broad one. As I stated in *Maryvell Investments Pty Ltd v Sigma Constructions Pty Ltd* [2006] VCAT 74 … The discretion should not be exercised in favour of joinder if the same would enable a person to bring a claim that was clearly misconceived or doomed to failure…[3]

8. Conversely, in considering an application for joinder, the Tribunal must be satisfied that proposed Points of Claim or Points of Defence, reveal *an open and arguable case*.[4]

9. More recently, Deputy President Aird in *Owners Corporation I Plan No PS6380 pop J v Equiset Construction Melbourne Pty Ltd*,[5] helpfully set out some of the relevant factors to be considered by the Tribunal in exercising its discretion on joinder:

> 11 In considering any application for joinder the Tribunal will not be concerned with the substantive merits of the allegations that the proposed respondent is a concurrent wrongdoer for the purposes of an apportionment defence under Part IVAA of the *Wrongs Act 1958*, or a claim for contribution and indemnity under that Act. Nor is the hearing of a joinder application the time to determine contested questions of fact or law including questions of statutory interpretation.
>
> 12 The Tribunal is not a court of pleadings[6] and the tendency by many proposed parties in seeking to oppose joinder applications by focussing on pleading nuances is discouraged. In allowing an application for joinder the Tribunal must be

[1] [2000] VSC 355.
[2] [2006] VCAT 871.
[3] Ibid, [55].
[4] *Zervos v Perpetual Nominees Limited* [2005] VSC 380, [11].
[5] [2019] VCAT 671.
[6] *Barbon v West Homes Australia Pty* Ltd [2001] VSC 405, *Age Old Builders Pty Ltd v Swintons* (2003) 20 VAR 200; [2003] VSC 307, [90].

satisfied that the proposed pleadings reveal an *open and arguable* case supported by particulars, such that:

i. the proposed Points of Defence where a respondent seeks to take advantage of Part IVAA clearly articulate a legal cause of action the applicant has, or would have had, but for the proposed respondent being dead or wound up or the expiry of any relevant limitations period, against the proposed respondent;

ii. the proposed Points of Claim, where a respondent claims contribution and/or indemnity under s23B, clearly sets out the respondent's claim against the proposed party; and

iii. the affidavit material filed in support of the application for joinder demonstrates there is some evidence that, if proven at the final hearing, supports the allegations set out in the proposed pleading. It is not necessary or desirable for comprehensive affidavit material containing all of the evidence to be filed in support of a joinder application.

13 Relevant particulars are important. Generally, a pleading which simply states that a duty of care is owed, or a contractual relationship exists, without giving particulars of the duty or the contract and the alleged breach, will not reveal an *open and arguable* case.[7]

14 As I said in *Thurin v Krongold Constructions (Aust) Pty Ltd*[8]

> 35. Affidavit material in support of an application for joinder is required to briefly set out the facts and circumstances giving rise to the application, and should exhibit any available, relevant material. The proposed party will generally be given leave to intervene so that they may be heard in relation to any application for joinder, and, in particular, to indicate to the Tribunal and to the applicant for joinder any obvious inaccuracies, for instance, where the application relates to the 'wrong' person. There have been numerous instances where an application for joinder has been withdrawn or amended when the proposed party has been able to establish either before, or at the directions hearing when the application was heard that it was not, for example, the contracting party or the person who carried

[7] *Perry v Binios trading as Building Inspirations of Australia* [2006] VCAT 1922 at [11].
[8] [2018] VCAT 1756.

out the work, the subject of the claim. In *Watson v Richwall Pty Ltd*[9] Senior Member Lothian said at [31]

> To show that there is an open and arguable case against a proposed joined party it is necessary to plead facts and law that support a successful case without proving the facts – to demonstrate a prima facie case. Nevertheless, it is not sufficient to merely assert the facts without demonstrating how those facts are supported.

36. *Watson* is an example of the situation I referred to above, where the only material provided in support of the joinder application was an 'expert' report which it was acknowledged by the applicant for joinder did not apply to or relate to the property the subject of that proceeding. Therefore, there was no relevant evidence.

And:

40. Further, it is not appropriate to consider the substantive merits of a case, and make any finding about the adequacy of any limited evidence which might have been provided in support of the application, at the directions hearing when the application for joinder is heard. The first step is to consider whether the pleadings are open and arguable, and by reference to the affidavit material whether they relate to the issues in dispute in the proceeding.

15 I also note the comments of Hargrave J in *Atkins v Interpract and Crole (No 2)*[10] where he said at [12]:

> … On an application such as this, the [applicants for joinder] need only establish that the proposed pleadings contain factual allegations which, if established at trial, could arguably found one or more of the causes of actions alleged.

16 In *Adams v Clark Homes Pty Ltd*[11] Judge Jenkins 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*,[12] Associate Justice Evans cited with approval the observations of Pagone J in *Solak v Bank of Western Australia*,[13] 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

[9] [2014] VCAT 1127.
[10] [2008] VSC 99.
[11] [2015] VCAT 1658.
[12] [2009] VSC 126 at [20].
[13] [2009] VSC 82 at [35].

> 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]

17 Unless the affidavit material clearly establishes that the application is misconceived, for instance because the proposed party was not incorporated until after the date of the contract, extensive affidavit material filed in opposition to a joinder application generally does no more than reinforce that there is an open and arguable case to which the proposed party has a defence.

18 In *Evans v Fynnan Pty Ltd*[14], I refused a second application for joinder because of a number of deficiencies in the proposed pleading, and a lack of evidence supporting the allegations that were made, and said:

> 25. Not only do the draft APOC fail to disclose any discernible cause of action, the affidavit material filed in support of the application provides little, if any, reliable evidence to support any claim which might be made against Cassar Constructions and/or Mr Cassar…

10. I respectfully adopt the observations and opinion of Deputy President Aird set out above. Consequently, I approach the Second Respondent's joinder application having regard to the Tribunal's observations and guidance set out in *Equiset*, together with the authorities referred to therein.

SHOULD BRADY BE JOINED?

11. The affidavit material filed in support of the Second Respondent's application and draft *Proposed Amended Points of Defence* allege that Brady was engaged by the Second Respondent as its *property manager to ensure that the Devitt Property* [the Second Respondent's apartment] *was maintained in a state of good repair.* The draft pleading further describes that retainer as follows:

> 30B. Further, the Second Respondent says:

[14] [2018] VCAT 1335

(a) on or about 27 October 2004, the Second Respondent entered into an exclusive leasing and managing authority with Brady Residential Pty Limited (Brady) (the managing agreement) in relation to unit 28;

(b) pursuant to the managing agreement, and at all relevant times from on or about 27 October 2004 Brady was the relevant managing agent for unit 28 and had obligations managing unit 28 including (but not limited to):

(i) managing the tenancy of unit 28;

(ii) conducting regular inspections of unit 28 and informing the Second Respondent of the outcome of those inspections;

(iii) liaising with the Owners Corporation manager;

(iv) keeping the Second Respondent updated of any matters concerning unit 28 of which it became aware;

(v) arranging any repair or maintenance works required to unit 28

(the managing services);

(vi) exercising due care and skill in providing the managing services.

12. Although the draft pleading does not specifically allege that the *managing agreement* was breached, it does state under the heading *Negligence of Brady Residential* that:

(iii) Brady Residential:

(A) fail to ensure that DSM Pty Ltd undertook all works required;

(B) failed to check or properly to check in or around October/November 2014 that DSM Pty Ltd had undertaken all works required to the Devitt Property, despite being directed to do so by the Second Respondent;

(C) informed the Second Respondent in or around October/November 2014 that DSM Pty Ltd had undertaken all works required to the Devitt Property, when that was incorrect;

(D) failed to notify the Second Respondent that on 2 December 2014 the Applicants had informed it of water leaking through the roof of the bathroom of unit 27;

(E) failed to inform the Second Responded that on 22 February 2015 the Applicants had informed it of water leaking through the roof of unit 27 on 13 February 2015;

13. The Second Respondent further alleges that the Applicants' claim is:

(a) a claim for economic loss or property damage within the meaning of s 24AF of the *Wrongs Act 1958*;

(b) an apportionable claim as defined under s 24AE of the *Wrongs Act 1958*; and

(c) Brady is a concurrent wrongdoer under s 24AH(1) of the *Wrongs Act 1958*.

14. The Second Respondent concludes that if the Applicants' claim is not an apportionable claim, then it will seek contribution from Brady under s 23B of the *Wrongs Act 1958*.

Apportionable claim

15. In *McClafferty v Greg Smith Pty Ltd*,[15] Senior Member Farrelly considered what factors were necessary in order to establish an open and arguable case, in the context of an apportionment defence under Part IVAA of the *Wrongs Act 1958*. In so doing, he considered various authorities before forming the opinion and finding that:

> … for a person to be a concurrent wrongdoer sharing responsibility in respect of a plaintiff's claim, the person must be liable (by way of cause of action known to law) for the damage that is the subject of the plaintiff's claim (or in the case of a person who is dead or a company that has been wound up, that person or company would have been *liable* for the damage if not dead or wound up).[16]

16. Senior Member Farrelly summarised his findings as follows:

> 66 In my view, a respondent seeking to limit its liability by an apportionment defence must present an arguable case as to the existence of that nexus. The respondent must say why the alleged other concurrent wrongdoer is liable to the applicant, or would be liable if not dead or wound up, for the loss and damage being claimed by the applicant. If the respondent presents an arguable case in

[15] [2019] VCAT 299.
[16] Ibid, [2].

> this regard, the alleged concurrent wrongdoer (if alive and solvent) will be joined as a respondent in the proceeding, and the onus falls on the applicant to then decide whether to bring a claim against that further respondent.[17]

17. I respectfully adopt Senior Member Farrelly's comments and findings in *McClafferty*. Without establishing a causal nexus (recognised at law) between the party proposed to be joined and the primary applicant in respect of the same damage claimed against the party moving for the joinder, the joinder application, insofar as it relies upon Part IVAA of the *Wrongs Act 1958* as the basis for joinder, should be refused.

18. In the present case, neither the affidavit of Anna Morris dated 1 November 2019 and supplementary affidavit of Anna Morris dated 18 November 2019; nor the draft *Proposed Amended Points of Defence* sufficiently allege or evidence any legal causal nexus between Brady and the Applicants. For that reason, I am not satisfied that it is arguable that Brady is a *concurrent wrongdoer*, within the meaning of that expression as defined in the *Wrongs act 1958*.

Contribution

19. Section 23B of the *Wrongs Act 1958*, states, in part:

> (1) Subject to the following provisions of this section, a person liable in respect of any damage suffered by another person may recover contribution from another person liable in respect of the same damage (whether jointly with the first-mentioned person or otherwise).

20. As I understand the Second Respondent's submission, there exists or existed a contractual relationship between Brady and the Second Respondent, the terms of which required Brady to manage any repair or maintenance to his apartment and to exercise due care and skill in providing that service.

21. The *Proposed Amended Points of Defence* do not allege any breach of that retainer. What is alleged, under the heading *Negligence of Brady Residential*, is that Brady was *negligent* because:

    (a) it failed to ensure that the actual contractor carrying out waterproofing work (presumably *DSM Building Maintenance*) to the Second Respondent's apartment undertook all works required, although nothing is said as to how that work was deficient;

    (b) informed the Second Respondent that the contractor carrying out the waterproofing work had undertaken all works required,

[17] Ibid, [66].

when that was incorrect; although nothing is said as to what work was not undertaken;

(c) failed to inform the Second Respondent that in December 2014 and February 2015 the Applicants had informed Brady of further water leaks into their apartment; although it is not clear how this alleged act of *negligence* caused the Applicants' loss.

22. There is no allegation in the *Proposed Amended Points of Defence* that Brady owed a duty of care to the Second Respondent. It appears from the draft pleading that the only legal causal nexus between the Second Respondent and Brady lies in contract. Similarly, there is no evidence or allegation raised in the *Proposed Amended Points of Defence* that the acts or omissions on the part of Brady caused the Applicants' loss.

23. At its best, what is alleged is that Brady was contractually obligated to ensure that the waterproofing contractor undertook all works required. What was required has not been specified, albeit that reference was made to a quotation from *DSM Building Maintenance* to carry out work described as:

Unit 28 –	Waterproofing and tiles	$9,400
	Standard balustrading	$4,900 to match existing

24. However, there is no allegation that the scope of work under that quotation was not undertaken. There is no allegation that Brady warranted that the work undertaken by *DSM Building Maintenance* would be performed to any particular standard. All that is alleged is that Brady was responsible to ensure that the work was carried out. Although there is a bare allegation that Brady failed to ensure that all work *required* was carried out, there are no details provided as to what part of the waterproofing contract was not carried out and very little detail as to what work was actually required, save and except for the reference to the quotation provided by *DSM Building Maintenance*.

25. In my view, the bare, unparticularised and somewhat ambiguous allegations set out in the affidavit material and the documents exhibited (including the *Proposed Amended Points of Defence*) do not go far enough to satisfy me that there is an open an arguable case that Brady caused the Applicants' loss and damage.

26. Consequently, I refuse the Second Respondent's Application to join Brady as a party to this proceeding.

SHOULD VBCS BE JOINED?

27. VBCS is the owners corporation manager. According to the Second Respondent, it was retained by the owners corporation from around 18 May 2014, although that is disputed by VBCS, which says that it was

retained in 2018. In the *Proposed Amended Points of Defence*, the Second Respondent alleges, somewhat obliquely, that:

> 25. Insofar as paragraph 25 raises allegations against it, the Second Respondent denies the paragraph. Further the Second Respondent says that:
>
> (a) …
>
> (b) …
>
> (ii) the Applicants were aware or ought reasonably to have been aware that, on behalf of the owners of 1-9 Villiers, including the Second Respondent, the Owners Corporation Manager had assumed responsibility for steps to address leaks, including to the Singh property, including:
>
> (A) arranging inspection by Buildcheck and water testing of balconies, including to the balconies of the Devitt Property;
>
> (B) arranging for quotations for rectification work;
>
> (C) arranging for rectification works;

28. It is not clear what is meant by the words *assumed responsibility for steps to address leaks*, referred to in the draft pleading. There is no allegation of any contractual relationship between VBCS and the Second Respondent; nor is there any allegation of any contractual relationship between VBCS and the Applicants.

29. Similarly, there is no allegation that VBCS owed the Second Respondent or the Applicants a duty of care recognised at law. Nevertheless, the *Proposed Amended Points of Defence* states, under the heading *Negligence of Victorian Body Corporate Services Pty Ltd*:

> Negligence of Victorian Body Corporate Services Pty Ltd
>
> (iv) VBCS:
>
> (A) failed to ensure that the quotation provided by DSM Pty Ltd included or clearly included all balconies requiring repair;
>
> (B) failed to ensure that DSM Pty Ltd undertook all works required;
>
> (C) failed to inform the Second Respondent that on 2 December 2014 the Applicants had informed it

that water was leaking through the roof of the bathroom of unit 27;

(D) failed to inform the Second Respondent that on 22 February 2015 the Applicants had notified it that the roof of their apartment leaked on 13 February 2015;

(E) failed to inform the Second Respondent or Brady Residential of the Applicants' complaint in round March 2015.

30. It is not clear from the affidavit material or the draft pleading how VBCS, as the owners corporation manager, is personally liable. In my view, the allegation that VBCS assumed responsibility completely ignores the fact that VBCS was retained by the owners corporation. In that sense, and absent any allegation that VBCS was acting outside of the scope of its retainer, VBCS was the agent of the owners corporation. It is unclear on the face of the affidavit material or draft pleading how VBCS, as agent of the owners corporation, is personally liable. In particular, there is no allegation that the acts or omissions on the part of VBCS were outside of its retainer or not authorised by the owners corporation.

31. Further, the allegations of *negligence* fail to demonstrate any legal cause of action that the Applicants would have against VBCS and importantly, fail to provide any nexus between the Applicants' loss and the acts or omissions on the part of VBCS.

32. In particular, the allegation that VBCS failed to ensure that the quotation provided by DSM Pty Ltd included all balconies requiring repair is left hanging. There is no nexus between that allegation and the Applicants' claim for loss or damage. For example, it is not pleaded that VBCS was under any tortious or contractual obligation to do this. What is pleaded and set out in the affidavit material in support of the application is that VBCS organised for *BuildCheck* to inspect and prepare a scope of works, which it did; and then to obtain quotations to undertake that scope of works. However, it is not alleged that VBCS failed to obtain quotations or quotations that did not accord with that scope of remedial work.

33. Similarly, the allegation that VBCS failed to ensure that DSM Pty Ltd undertook all works *required* provides no detail as to what work was not carried out. Further, it is not clear from that allegation whether what is alleged is that the agreed scope of work was not performed or rather, whether the scope of work was deficient. In the supplementary affidavit of Anna Morris, she exhibits an email from Stephen Hudson, which the Second Respondent contends is the controlling mind of VBCS, stating:

> I am not qualified to be able to tell of the balconies have been repaired correctly.

34. In my view, that email, even if it could be construed as an email from VBCS, is at odds with the allegation that VBCS in some way assumed responsibility for ensuring that the waterproofing works were properly carried out.

35. Further, the allegations that VBCS failed to notify the Second Respondent that further leaks were experienced by the Applicants does not disclose how VBCS caused those leaks or caused any consequential damage as a result of those leaks.

36. In my view, the *Proposed Amended Points of Defence* and supporting affidavit material do not disclose an open an arguable claim either as between VBCS and the Applicant or as between VBCS and the Second Respondent. The bare factual allegations, even if they were accepted as proven for the purpose of this joinder application, do not go far enough to establish any causal link identifying responsibility or liability on the part of VBCS for the loss and damage suffered by the Applicants; nor do those documents provide any reasonable basis to claim contribution under s 23B of the *Wrongs Act 1958*.

37. Consequently, I refuse to join VBCS as a party to this proceeding.

CONCLUSION

38. Having regard to my findings set out above, I will order that both joinder applications be dismissed.

39. The costs of and associated with the joinder applications will be reserved with liberty to apply.

DEPUTY PRESIDENT E. RIEGLER