

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST

VCAT REFERENCE NO. BP1979/2018

CATCHWORDS

Domestic building –contribution claim under s23B of the *Wrongs Act 1958* is not a ‘building action’ as defined in s129 of the *Building Act 1993*

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|--------------------------|---|
| APPLICANT | Danielle Smith |
| FIRST RESPONDENT | Henley Arch Pty Ltd (ACN: 007 316 930) t/as Henley Properties |
| SECOND RESPONDENT | V.H.C. (Aust) Pty Ltd (ACN 062 784 909) |
| THIRD RESPONDENT | Citywide Service Solutions Pty Ltd (ACN 066 960 085) |
| WHERE HELD | Melbourne |
| BEFORE | Deputy President C Aird |
| HEARING TYPE | Directions hearing |
| DATE OF HEARING | 20 November 2019 |
| DATE OF ORDER | 19 December 2019 |
| CITATION | Smith v Henley Arch Pty Ltd (Building and Property) [2019] VCAT 2024 |

ORDERS

1. The Tribunal declares that the first respondent’s claim for contribution against the second and third respondents is not a ‘building action’ as defined in s129 of the *Building Act 1993*.
2. Costs reserved with liberty to apply.

DEPUTY PRESIDENT C AIRD

APPEARANCES:

| | |
|-----------------------|-----------------------------|
| For Applicant | Mr P Franzese, solicitor |
| For First Respondent | Mr J Mulcahy, solicitor |
| For Second Respondent | Mr A Thangarajah, solicitor |
| For Third Respondent | Ms S George, solicitor |

REASONS

- 1 This proceeding was commenced by the applicant owner ('the Owner') on 18 December 2018 shortly prior to the expiration of the 10 year limitations period for the bringing of a building action prescribed by s134 of the *Building Act 1993* ('the B Act').
- 2 At the time she commenced the proceeding the owner was self-represented. She has since instructed solicitors to act on her behalf, who filed Points of Claim dated 7 June 2019 in which the following allegations and claims are made:
 - (i) the respondent builder ('the Builder') built the home under a Major Domestic Building Contract;
 - (ii) the occupancy permit was issued on 22 December 2008;
 - (iii) the Owner purchased the property in 2011;
 - (iv) there are significant defects with the waffle slab (both in its design and construction) such that the house needs to be demolished and rebuilt. The cost of demolition and rebuilding is \$334,000. The Owner also claims certain consequential damages totalling \$36,900.
- 3 The Builder applied to join the Engineer which designed the footing system, and the Arborist engaged by it to provide arborist advisory services prior to construction, including whether *the concrete slab might be influenced by the presence of trees over time*. Joinder of both was sought for the purposes of a proportionate liability defence under Part IVAA of the *Wrongs Act 1958* and a claim for contribution under s23B of the *Wrongs Act* ('the s23B claim').
- 4 Mr Thangarajah, solicitor for the Engineer, appeared on its behalf at the directions hearing on 29 November 2019 and opposed the application for joinder for the purposes of the s23B claim, contending that it was a building action as defined in s129 of the *Building Act 1993* ('the B Act') and therefore statute barred under s134 of the B Act. At the conclusion of his oral submissions, Mr Mulcahy, solicitor who appeared on behalf of the Builder sought time to respond. Orders were made for the filing of submissions by both parties. Mr George, solicitor, who appeared on behalf of the Arborist indicated that he joined in with the submissions made on behalf of the Engineer.
- 5 I allowed the application for joinder for the purposes of the apportionment defence, and reserved my decision on whether the Builder's s23B claim is a building action as defined in s129 of the B Act and therefore statute barred.
- 6 Although I have previously declined to determine whether a s23B claim is a building action as defined in s129 of the B Act,¹ I consider that it is now

¹ *Owners Corporation 1 PS538430Y v H Building Pty Ltd (ACN 091 236 912) (under external administration)* [2019] VCAT 680 at [39]

appropriate to do so, being mindful that it is a serious matter to join a party to a proceeding.² Although joined for the purpose of the Builder's apportionment defence, the Engineer and the Arborist will not be required to participate in the proceeding unless they are joined for the purposes of the Builder's s23B claims.

JOINDER PRINCIPLES

7 The Tribunal's power to order joinder of parties is found in s60 of the *Victorian Civil and Administrative Tribunal Act 1998*:

- (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.

8 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 ever be exercised lightly.

9 As I said in *Perry v Binios*³ 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 POINTS OF CLAIM

10 In the proposed Points of Claim after setting out details of the Owner's claims against it and denying liability for those claims, the Builder alleges that the Engineer and the Arborist *caused or contributed to Ms Smith's loss and damage*. The Builder alleges as against the Engineer⁴:

- (i) it engaged the Engineer in or about November 2007 to carry out certain engineering works, including undertaking foundation investigations and preparing a footing design, which services it provided;

² *Owners Corporation PS 517 029T v Hickory Group Pty Ltd* [2016] VCAT 731 at [17]

³ [2006] VCAT 1604

⁴ For the purpose of the present application I will only consider the claims against the Engineer, as those against the Arborist are in similar terms, and Mr George, solicitor for the Arborist has joined with the submissions made on behalf of the Engineer. The allegations are found at paragraphs 8 to 16 of the proposed Points of Claim.

- (ii) it was a term of the retainer that the Engineer would provide the engineering services with the care and skill of a reasonable engineer in the profession;
- (iii) if the Owner's allegations are correct, which the Builder denies, then the design was deficient and in contravention of that term (particulars are provided);
- (iv) if the Owner is successful in her claims against the Builder, then the Builder is entitled to contribution and indemnity from the Engineer to the extent determined in accordance with s23B.

IS A CLAIM FOR CONTRIBUTION A 'BUILDING ACTION'?

Sections 23B and 24 of the *Wrongs Act 1958*

11 Sections 23B and 24(4) are relevant:

Entitlement to contribution

- (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 any other person liable in respect of the same damage (whether jointly with the first-mentioned person or otherwise).
- (2) A person shall be entitled to recover contribution by virtue of subsection (1) notwithstanding that that person has ceased to be liable in respect of the damage in question since the time when the damage occurred provided that that person was so liable immediately before that person made or was ordered or agreed to make the payment in respect of which the contribution is sought.
- (3) A person shall be liable to make contribution by virtue of subsection (1) notwithstanding that that person has ceased to be liable in respect of the damage in question since the time when the damage occurred unless that person ceased to be liable by virtue of the expiry of a period of limitation or prescription which extinguished the right on which the claim against that person in respect of the damage was based.

...

24 Recovery of contribution

...

- (4) Notwithstanding any provision in any statute requiring a notice to be given before action or prescribing the period within which an action may be brought, where under section 23B any person becomes entitled to a right to recover contribution in respect of any damage from any other person, proceedings to recover contribution by virtue

of that right may be commenced by the first-mentioned person –

- (a) at any time within the period –
 - (i) within which the action against the first-mentioned person might have been commenced;
 - or
 - (ii) within the period of twelve months after the writ in the action against the first-mentioned person was served on him –

whichever is the longer; or

... [Underlining added]

The Engineer's position

12 The Engineer contends that a s23B claim is a 'building action' as defined in s129 of the B Act as, it says, it arises out of and concerns building work. It says it was engaged by the Builder as a building practitioner to provide engineering services including design services in respect of building work (the construction of the slab).

13 'Building action' is defined in s129 of the B Act:

... an action (including a counter-claim) for damages for loss or damage arising out of or concerning defective building work;

14 Accordingly, the Builder's s23B claim is statute barred having been brought more than 10 years after the date of issue of the occupancy permit, being the limitations period for the bringing of a building action as set out in s134 of the B Act:

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 issue of the occupancy permit in respect of the building work (whether or not the occupancy permit is subsequently cancelled or varied) or, if an occupancy permit is not issued, the date of issue under Part 4 of the certificate of final inspection of the building work.

The Builder's position

15 The Builder submits that a s23B claim is not an action for damages and therefore does not constitute a 'building action' as defined in s129 of the B Act. It submits that it is the Owner's claim against the Builder which is *an action for damages arising out of or concerning defective building work* and therefore a 'building action' as defined in s129. The Builder relies on the comments by Barwick CJ in *Brambles Constructions Pty Ltd v Helmers*⁵:

... that the claim of the tort-feasor for contribution is a cause of action apart from and independent of the cause of action which the injured

⁵ (1965-1966) 114 CLR 213 at p218

party has or would have had against the tort-feasor from whom contribution is sought...

- 16 The Builder also referred me to the decision of the Supreme Court of Victoria in *National Safety Council of Australia Victorian Division (in liq) v Fordham & Ors*⁶ where McDonald J said at [39]:

The statutory right to recover contribution is provided by s23B(1) of the Act. That is a statutory right that a person, who is liable in respect of damage suffered by another, has to recover contribution from a third or subsequent number of persons who are liable in respect of that damage. The right is a right to recover contribution. That is a right to obtain or recover from another person contribution towards the liability of the person claiming contribution to either the person who suffered the damage or to another person liable in respect of that damage.

- 17 Further, it submits,

...a claim for contribution is a right to obtain or recover from another person contribution towards the liability of the person claiming contribution to either the person who suffered the damage or to another person liable in respect of that damage. It is not, of itself, a claim for damages.⁷

- 18 The Builder also referred me to the comments by Judge Jenkins in *Adams v Clark Homes Pty Ltd*⁸ where she determined that a proportionate liability defence under Part IVAA of the *Wrongs Act* did not constitute a building action, as it is not *an action for damages for loss or damage*.⁹ Applying this reasoning, the Builder submits that

In a contribution claim, what is being claimed is contribution by a liable party from another party to a claim for damages by a plaintiff/applicant against the liable party. There is only one claim for damages which is made by the applicant/plaintiff against the respondent/defendant.¹⁰

Discussion

- 19 I am not persuaded that a s23B claim is a building action.
- 20 I accept and agree with the submission on behalf of the Engineer, that a claim for contribution involves:
- (a) the recovery of compensation from the alleged contributor for loss/damage suffered by the claimant for the contributor's wrong; and

⁶ Unreported, 19 September 1992

⁷ Respondent's submissions at [27]

⁸ [2015] VCAT 1658

⁹ *Adams* ibid at [90]

¹⁰ First respondent's submissions dated 6 December 2019 at [10]

(b) the payment of a monetary sum to meet any entitlement to contribution.¹¹

- 21 However, I reject the submission on behalf of the Engineer that the s23B claim ‘arises out of and concerns’ building work. The s23B claim arises out of the Owner’s claim against the Builder. The building action in this case is the Owner’s claim against the Builder. The Builder would not have a claim against the Engineer or the Arborist but for the Owner’s claim against it - liability for which it denies
- 22 Although in its proposed Points of Claim, the Builder refers to building works carried out by the Engineer, it does so under cover of a denial of liability for the Owner’s claims. Further, it makes it clear that its claim against the Engineer and the Arborist is, in effect a conditional claim, which will only succeed if it is found liable to the Owner. It is not, of itself, an *action for damages for loss or damage*.
- 23 The limitation period in s24(4)(4) is clearly intended to afford a respondent/defendant an opportunity to take the appropriate steps to make a claim for contribution within a defined limitation period of 12 months from the date on which they were served with an application. When a proceeding is commenced shortly prior to the expiration of the relevant limitation period, the 12 month limitation period in s24(4) allows a respondent to make the necessary enquiries and to take the necessary steps to protect its interests after it is served with the application – which may well be after the expiration of the limitation period for the bringing of the substantive action.
- 24 Sections 23B and Part IVAA of the *Wrongs Act* enable respondents to take steps to protect their interests with s24(4) setting a limitation period of 12 months for a respondent to make a claim for contribution. Unlike an applicant a respondent cannot take steps to protect themselves before the expiry of the relevant limitation period. It is within an applicant’s power to decide who to bring proceedings against. A respondent may not become aware of any action against them until served with the application, which as noted above, may be outside the relevant limitation period for the bringing of the substantive claim.
- 25 Accordingly, I will allow the Builder’s application and order that it file and serve Points of Claim as against each of the second and third respondents.

DEPUTY PRESIDENT C AIRD

¹¹ Proposed Second Respondent’s Submissions dated 29 November 2019 at [21]