

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST

VCAT REFERENCE NO. BP715/2018

CATCHWORDS

Domestic Building – application for joinder of alleged concurrent wrongdoers – adequacy of supporting material - adequacy of particulars – relevant considerations.

APPLICANTS: David Thurin, Lisa Thurin

FIRST RESPONDENT: Krongold Constructions (Aust) Pty Ltd (ACN: 103 839 149)

SECOND RESPONDENT: Swan Hardware & Staff Pty Ltd

THIRD RESPONDENT: Casper Architecture and Design Pty Ltd (ACN 078 809 604)

FOURTH RESPONDENT: Bicon Pty Ltd (ACN 070 741 374)

FIFTH RESPONDENT: PRB Design Group Pty Ltd (ACN 066 291 076)

SIXTH RESPONDENT: Paul Shaw Landscapes Pty Ltd (ACN 098 693 933)

SEVENTH RESPONDENT: Tigcorp Pty Ltd (ACN 122 478 862)

WHERE HELD: Melbourne

BEFORE: Deputy President C. Aird

HEARING TYPE: Directions Hearing

DATE OF HEARING: 15 October 2018

DATE OF ORDER: 7 November 2018

CITATION Thurin v Krongold Constructions (Aust) Pty Ltd (Building and Property) [2018] VCAT 1756

ORDERS

- 1 Under s60 of the *Victorian Civil and Administrative Tribunal Act 1998* and upon application by the first respondent I join the following parties to this proceeding:
 - (i) Bicon Pty Ltd (ACN 070 741 374) c/- Holdstock Fittipaldi Law, 13 Dudley Street, West Melbourne 3003 (tel: 9999 1960, email: jennifer@hflaw.com.au) ('the fourth respondent')
 - (ii) PRB Design Group Pty Ltd (ACN 066 291 076) c/- Lander & Rogers, Level 12 Bourke Place, 600 Bourke Street, Melbourne 3000 (tel: 9269 9000, email: nstojanovich@landers.com.au) ('the fifth respondent')
 - (iii) Paul Shaw Landscapes Pty Ltd (ACN 098 693 933) c/- NextGen Legal Lawyers & Advisors, First Floor, 437 Canterbury Road, Surrey Hills 3127 (email: cjones@nextgenlegal.com.au) (tel: 9039 2142), ('the sixth respondent')
 - (iv) Tigcorp Pty Ltd (ACN 122 478 862), Pitcher Partners, Level 13, 664 Collins Street, Docklands, Vic 3008 ('the seventh respondent')('the joined respondents').
2. The second to seventh respondents are not required to take any further steps in this proceeding until further notice or order.
3. By 16 November 2018 the applicants must file and serve Second Further Amended Points of Claim if they seek to make claims against the joined respondents.
4. Liberty to apply.
5. Costs reserved.

DEPUTY PRESIDENT C AIRD

APPEARANCES:

For applicants	Mr M G Roberts, QC with Mr L Stanistreet of Counsel
For first respondent	Mr P Murdoch QC and Mr J Twigg, QC with Dr K Weston-Scheuber of Counsel
For second respondent	Excused by order dated 29 August 2018
For third respondent	Excused by order dated 29 August 2018
For PRB Design Group Pty Ltd	Ms N Stojanovich, solicitor
For other proposed parties	No appearance

REASONS

- 1 The applicant owners ('the Thurins') entered into a contract with the respondent builder ('Krongold') for the construction of a new home and associated works in or about September 2006. The contract price was approximately \$10 million. Various disputes arose between the parties in relation to alleged defective works, including a claim for the replacement of all of the pipes used in the internal plumbing works, and rectification of bathroom works and miscellaneous installations. The Thurins also allege that there are defects in the irrigation system and the lawn. When the parties were unable to resolve their differences the Thurins invoked the dispute resolution clause in the contract. Krongold did not participate in the expert determination process. Mr Manly QC's Determination ('the Determination') is dated 15 May 2018.
- 2 On 22 May the Thurins lodged an application seeking a mandatory injunction requiring Krongold to comply with clause 15 of the contract and to pay them the sum of \$3,583,427.88 in accordance with the Determination. In the alternative, the Thurins claim damages for Krongold's alleged breaches of the contractual and statutory warranties relating to the alleged defective works referred to in paragraph 1 above ('the Thurins' alternative claims').
- 3 Krongold disputes the validity of the Determination and has counterclaimed seeking orders and/or declarations including to the effect that the expert determination process set out in clause 15 does not apply to the 'current' dispute between the parties, and the Determination is void and/or a nullity. Krongold also seeks an injunction restraining the Thurins from taking any steps or action to give effect to the Determination, and restraining them from further proceeding with their applications in this proceeding.
- 4 The validity of the Expert Determination, and, what I will loosely refer to as 'the process', were considered over a three day hearing, and are the subject of a reserved decision.
- 5 These Reasons are concerned with Krongold's application for joinder only, which relate to the Thurins' alternative claims.
- 6 On 20 August 2018 Krongold filed an Application for Directions Hearing or Orders seeking orders for joinder of 7 additional respondents to the proceeding ('the joinder application'), alleging the proposed respondents are concurrent wrongdoers, relying on Part IVAA of the *Wrongs Act 1958*, alternatively, contribution under Part IV of the *Wrongs Act*. The joinder application was accompanied by an Affidavit in Support by Jonathan Greaves, the General Manager of Krongold in which he sets out:
 - the background to the contract with the Thurins;

- the circumstances in which the various materials and/or works the subject of the Thurins' claims were supplied and/or carried out, and by whom;
 - how and why Krongold says that each of the proposed parties is responsible for specific items of the Thurins' claims.
- 7 On 30 August 2018 I joined two of the proposed parties as respondents: Swan Hardware & Staff Pty Ltd and Casper Architecture and Design Pty Ltd, after first relevantly recording under 'Other Matters':
1. On 20 August 2018 the respondent filed an Application for Directions Hearing or Orders seeking orders for joinder of 7 additional respondents to the proceeding ('the joinder application') for the purposes of a defence under Part IVAA of the *Wrongs Act 1958*, alleging the proposed respondents are concurrent wrongdoers, and also seeking contribution from each of them.
 2. The joinder application was listed for hearing at a directions hearing today.
 3. As John William Armstrong is deceased the respondent will not be proceeding with its application to join him as a party to the proceeding and seeks leave to amend its Defence and Counterclaim accordingly whilst maintaining he is a concurrent wrongdoer.
 4. There is a possibility of the limitation period for bringing of an action in relation to 'plumbing' defects expiring on 8 September 2018 (I make no finding as to whether this is the relevant date) which only relates to the claims against two of the proposed respondents: Swan Hardware & Staff Pty Ltd and Casper Architecture and Design Pty Ltd.
 5. Being mindful of the Tribunal's obligations under ss97 and 98 of the *Victorian Civil and Administrative Tribunal Act 1998* ('the VCAT Act') and being mindful of the possible expiration of the limitation period in relation to the claims against the two proposed respondents, the Tribunal considers it appropriate they be joined with a reservation of their rights to bring any application under s75 of the VCAT Act at a later date, with the application for joinder of the other proposed respondents to be adjourned to 15 October 2018 when a three day hearing in relation to a preliminary issue between the applicants and the respondents is listed.
- 8 At the directions hearing on 29 August 2018 I considered the application to join the following parties as respondents:
- (i) Bicon Pty Ltd (ACN 070 741 374 ('Bicon'));
 - (ii) PRB Design Group Pty Ltd (ACN 066 291 076) ('PRB');
 - (iii) Paul Shaw Landscapes Pty Ltd (ACN 098 693 933) ('PSL');
 - (iv) Tigcorp Pty Ltd (ACN 122 478 862) ('Tigcorp').

- 9 Although PSL was represented by counsel at the directions hearing on 29 August 2018, who indicated that the application was opposed, it did not appear and was not represented at the directions hearing on 15 October 2018. Only PRB appeared, when it was represented by Ms Stojanovch, solicitor who indicated the application for joinder was opposed. Solicitors for the proposed third respondent, Bicon Pty Ltd advised the Tribunal by email dated 10 October 2018 that the application for joinder was neither consented to, nor opposed and that it did not have instructions to attend the directions hearing.
- 10 Amended Points of Defence to Further Amended Points of Claim and Amended Points of Counterclaim dated 6 September 2018 ('APOD & CC'). have been filed by Krongold in accordance with the orders made on 29 August 2018.
- 11 The Thurins have filed Further Amended Points of Claim ('FAPOC') dated 6 September 2018 in which, they make an alternative claim (if the application for a mandatory injunction is unsuccessful) whereby if it is found that their claims are apportionable claims, they seek relief against Casper (the architect) to the extent it is found responsible for their loss and damage. They make no claim in the FAPOC against Swan Hardware which, as noted above, was joined as a respondent on 29 August 2018. I will refer to the FAPOC in these Reasons, as the relevant paragraph numbers remain unchanged from the previous version.
- 12 Dr Weston-Scheuber of Counsel for Krongold, and Mr Roberts, QC for the Thurins, spoke to written submissions filed in late August. The Thurins did not oppose the application to join the parties joined on 29 August 2018, but otherwise oppose the joinder application.

JURISDICTION

- 13 The proportionate liability regime in Victoria is governed by Part IVAA of the *Wrongs Act 1958*. The following sections are particularly relevant:

Section 24AF(1):

This Part [Part IVAA] 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;

Section 24AH:

- (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.

Section 24AI:

- (1) In any proceeding involving an apportionable claim—
 - (a) the liability of a defendant who is a concurrent wrongdoer in relation to that claim is limited to an amount reflecting that proportion of the loss or damage claimed that the court considers just having regard to the extent of the defendant's responsibility for the loss or damage; and
 - (b) judgment must not be given against the defendant for more than that amount in relation to that claim.

14 The Tribunal's power to order joinder of parties is found in s60 of the VCAT Act:

- (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.

15 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, particularly where supporting material and proposed pleadings have been filed.

16 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 Amended Points of Defence and Amended Points of Counterclaim

17 As noted above, Krongold has filed APOD & CC dated 6 September 2018. Counsel's names and the name and signature of Krongold's General Counsel appear at their end. Rather than setting out its Part IVAA defence/s in Points of Defence, Krongold has set out the allegations that each of the respondents/proposed respondents is a concurrent wrongdoer in its Amended Points of Counterclaim. In the Prayer for Relief it seeks declarations that each of the respondents/proposed respondents is a concurrent wrongdoer or alternatively seeks an order for contribution from each of them.

¹ [2006] VCAT 1604

The proposed pleading

- 18 In relation to each of the proposed parties, Krongold has referred to the relevant allegations in the FAPOC by reference to each of the Thurin's claims, and then set out its allegations that the relevant proposed party is a concurrent wrongdoer, together with its contribution claim.
- 19 Apart from reference to the specific claims, the allegations against each of the proposed parties are similarly worded. It is convenient to set out the allegations against PRB which, as noted above, was the only one of the proposed parties to attend the directions hearing, and which by its solicitor objected to its joinder:

Irrigation System

Irrigation design – PRB Design

92. The landscape specification for the Property (**Bangay Planting Plan**) was prepared by Paul Bangay of PRB Design Pty Ltd (ACN 066 291 076)

Particulars

The landscape specification is a document entitled Paul Bangay Garden Design Planting Plan dated 8 September 2009 referred to in the Particulars to paragraph 11 of the Amended Points of Claim as the "Bangay Planting Plan.

93. PRB Design Pty Ltd (**PRB**) was at the relevant time incorporated.
94. When preparing the Bangay Planting Plan, PRB Design owed the applicants a duty to prepare the Bangay Planting Plan with due skill and care, and in accordance with the Contract.

Particulars

The duty arose at law because:

- (a) the applicants necessarily relied upon PRB Design to prepare the Bangay Planting Plan
 - (b) it was not unreasonable to impose a duty;
 - (c) if skill and care were not taken when preparing the Bangay Planting Plan, it was foreseeable that the applicants would suffer loss; and
 - (d) the applicants are from a class of persons who could incur loss if care was not taken, and the class is not indeterminate.
95. If, which is denied, the irrigation was in breach of any of the terms pleaded at paragraph 11, in breach of its duty, PRB Design did not prepare the Bangay Planting Plan with care and skill.
96. If, which is denied, the respondent is liable to the applicants in relation to their claims set out in paragraph 11 of the Amended

Points of Claim, the respondent says that any loss or damage suffered by the applicants in relation to the irrigation was caused by PRB Design's breach of duty referred to in the preceding paragraph.

20 As these allegations are cross-referenced to paragraph 11 of the FAPOC it is helpful to also set out paragraph 11, noting that each of the 'Terms' have been defined earlier in the FAPOC:

11. In breach of the Materials Term, alternatively the Workmanship Terms, further or alternatively the Requirements Term, further or alternatively the Contractual Warranties, further or alternatively the Statutory Warranties:

- (a) the irrigation system and the lawn:
 - (i) do not comply with the requirements of the Construction Contract;
 - (ii) insofar as the requirements were not fully described in the Construction Contract, the installations were not carried out with materials consistent with best industry standards for work of a similar nature;
 - (iii) are not fit for purpose and consistent with the nature and character of the Works;
- (b) the installation of the irrigation system and the lawn;
 - (i) was not carried out to the standard prescribed in the Construction Contract;
 - (ii) to the extent that a standard was not so prescribed in the Construction Contract, was not of a standard consistent with the best industry standards for work of a similar nature;
 - (iii) was not fit for purpose;
 - (iv) was not carried out in a proper and workmanlike manner and in accordance with the plans and specifications set out in the Construction Contract; and
 - (v) was not carried out with reasonable care and skill.

Particulars

Irrigation System

The irrigation system did not comply with the Paul Bangay Garden Design Planting Plan dated 8 September 1009 ('**the Bangay Planting Plan**') in relation to irrigation in the Construction Contract in that:

- (i) A variety of sprinkler types and brands were used and too many sprinklers were installed per zone;
- (ii) The water supply (pressure) to the irrigation system was inadequate.

Lawn

The treatment of the subsurface of the lawn did not comply with the Paul Bangay Specification dated 11 April 2006 (**‘the Bangay Specification’**) or the detailed notes contained on the Bangay Planting Plan included within the contractual documents which provided:

[various details are provided]

- 21 Without making any finding, I note that Dr Weston-Scheuber indicated that the allegations in paragraph 11 are to the effect that PRB’s Design in relation to the irrigation and the lawn were deficient because they allowed for inadequate water pressure and poor drainage.
- 22 Similar allegations in relation to PRB are made in relation to the Lawn Specification².
- 23 Krongold seeks to join PSL as the installer of the lawn and irrigation system, Bicon as the installer of the waterproof membrane in the main ensuite shower and Tigcorp, primarily in relation to the Thurins’ claims in relation to stormwater drainage. The particulars of the duty said to be owed to the Thurins by each of them are in similar terms to the particulars of the duty it is alleged PRB owes to them.
- 24 In paragraph 120 of the APOD & CC Krongold, alleges in relation to the ‘irrigation defects’:
 119. If, which is denied, the respondent is liable to the applicants,
 - (a) PRB Design, Paul Shaw, Casper Architecture, JWA and Tigcorp are concurrent wrongdoers within the meaning of s24AH of the *Wrongs Act 1958*;
 - (b) the respondent’s liability is limited to an amount that reflects the proportion of loss and damage claimed that the Tribunal considers just, having regard to the respective responsibilities of the respondent, PRB Design, Paul Shaw, Casper Architecture, JWA and Tigcorp; and
 - (c) judgement must not be given against the respondent for more than the amount referred to at paragraph (b).
 120. In the alternative, if, which is denied, the respondent is liable to the applicant:
 - (a) PRB Design, Paul Shaw, Casper Architecture and Tigcorp are liable in respect of the same damage; and
 - (b) pursuant to Part IV of the *Wrongs Act*, the respondent is entitled to recover contribution from PRB Design, Paul Shaw, Casper Architecture and Tigcorp in the amount that the Tribunal finds to be just and equitable having regard to

² From paragraph 122 to 125 of the APOD & CC

the respective responsibilities of the respondent, PRB Design, Paul Shaw, Casper Architecture and Tigcorp for the damage.

- 25 Similar allegations (including the pleading of duties owed to the Thurins), allegations they are concurrent wrongdoers or alternatively that Krongold is entitled to recover contribution, in relation to each of the Thurins' specific claims, cross-referenced to the relevant allegations in the FAPOC are made against each of the other proposed parties,
- 26 In the Prayer for Relief Krongold seek, in the alternative to their application in relation to the Determination referred to above, the following orders in relation to each of the respondents joined at the last directions hearing, and the proposed respondents, again using the relief sought against PRB by way of example:
- L. As against PRB Design:
- (a) A declaration that PRB Design is a concurrent wrongdoer within the meaning of s24AH of the *Wrongs Act 1958*;
 - (b) Alternatively, contribution;
 - (c) Costs.

PRB's opposition

- 27 The application for joinder is opposed by PRB Design because of the lack of particulars. Ms Stojanovich submitted that in the absence of particulars as to the alleged deficiencies in its design, and the causal link between any deficiencies and the loss and damage claimed by the Thurins, PRB Design does not know the case it has to answer. I accept that particulars in the nature of those identified by Ms Stojanovich are desirable. However, Krongold has cross-referenced its allegations regarding each of the proposed parties to the relevant paragraphs of the FAPOC, and is, in effect, saying 'if there are defects in the works, they are the responsibility of the person who carried out those works, not me'. This, after all, is the intention of Part IVAA – to allow respondents to join to a proceeding those persons who it contends are wholly or partly responsible for an applicant's claims.

The Thurins' position

- 28 The Thurins oppose joinder of the proposed parties. In relation to the application to join Bicon and PSL, which were sub-contractors to Krongold, the Thurins rely on clause 8.5(c) of the construction contract which provides:

For this purpose, but without limiting the generality of the foregoing, it [Krongold] will subject to clause 8.27, bear absolutely the risk of any defects in the works arising from the contractor's activities which may arise whether directly or indirectly as a result of types of materials or/and methods of work.

The Thurins contend this means that Krongold has assumed all responsibility for any defects in materials supplied or works carried out by their subcontractors.

- 29 They also submit that, having regard to the decisions of the High Court in *Woolcock Street Investments Pty Ltd v CDG Pty Ltd*³ and *Brookfield Multiplex Ltd v Owners Corporation Strata Plan 61288*⁴ and a decision of the Victorian Supreme Court in *Gunston v Lawley*⁵ it will be difficult for Krongold to establish the alleged duty.
- 30 In relation to Bicon the Thurins also submit that the claim in relation to the waterproofing in the main ensuite is ‘extremely minor’.
- 31 In relation to PRB Design, the Thurins contend that it was engaged by the architect (Casper Architecture, the second respondent), and referred me to three variations to the landscaping works which, they contend, demonstrates that the works were not carried out in accordance with PRB Design’s design.

Material required to support a joinder application

- 32 The Thurins rely on what, they contend, has been the practice in this List for many years of requiring an applicant for joinder to file affidavit material setting out in detail the evidence relied upon in support of a joinder application.
- 33 Dr Weston-Scheuber submitted, on behalf of Krongold, that in considering any application for joinder, providing the Tribunal could be satisfied that the proposed pleading revealed an ‘open and arguable’ case, that evidence verifying the pleading was not required. Rather, it was sufficient that as proposed pleading is ‘signed by’ counsel, I could be satisfied that counsel had certified that there was a proper basis for the allegations made in the proposed pleading.⁶
- 34 The Thurins’ contention is to misunderstand the relevant provisions of clauses 22 and 23 of PNBP1 which provide:
 22. Any application for joinder of a party, whether as respondent or joined party, should be made using the Application for Directions Hearing or Orders form. The application for joinder must be accompanied by affidavit material in support and draft Points of Claim as against the proposed party or draft Points of Defence where the proposed party is to be joined as a concurrent wrongdoer for the purposes of Part IVAA of the Wrongs Act 1958.

³ (2004) 216 CLR 515

⁴ (2014) 254 CLR 185

⁵ (2008) 20 VR 33

⁶ *Fabfloor (Vic) Pty Ltd v BNY Trust* [2016] VSC 79 at [19]

23. The applicant for joinder must serve a copy of the joinder application and the supporting material on the proposed party and must advise them of the date and time when it will be heard.
- 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 out the work, the subject of the claim. In *Watson v Richwall Pty Ltd*⁷ 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. The situation here is quite different. The Thurins’ claims both in the Notice of Dispute they relied on in the ‘expert determination process’, the validity of which remains to be determined, and their alternative claims, are based on alleged defective work. There seems to be no contest that the work was, in part at least, carried out by the proposed respondents.

Discussion

- 37 Whether Bicon and PSL are concurrent wrongdoers, the meaning and effect of clause 8.5 and whether any responsibility for defects should be apportioned to them is, in my view, a matter for the final hearing when all of the evidence is before the Tribunal. Any perceived difficulty in Krongold establishing that these subcontractors to Krongold owed the Thurins a duty, is not enough to refuse a joinder application for the purposes of apportionment under Part IVAA.
- 38 The extent of any proposed party’s responsibility for defective works, however minor, as suggested by the Thurins in relation to the application to

⁷ [2014] VCAT 1127

join Bicon, is not a relevant consideration in any joinder application for the purposes of apportionment under Part IVAA.

- 39 I note the comments of Croft J in *Main Road Property Group Pty & Ors v Pelligra & Sons Pty Ltd & Ors*⁸ at [10] where he said:

As was emphasised by Middleton J in *Dartberg* the assessment of the application or otherwise of Part IVAA of the Wrongs Act at a preliminary stage of the proceedings does not pre-empt the further consideration and final determination of the issue in the course of the trial, in light of a full hearing of the evidence and submissions. This process at trial will involve the determination whether or not a claim is an “apportionable claim” under Part IVAA and, if so, the consequences in the particular circumstances with respect to the apportionment of liability among each of the defendants subject to such a claim. In my view the final determination of the issue at an earlier stage of proceedings carries a significant risk of injustice when the result is to preclude the reduction of proportionate liability of a defendant or defendants as a result. [underlining added]

- 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.
- 41 In this proceeding, the Thurins have made a number of claims about works which they allege are defective. Krongold seeks to join as respondents to the proceeding those persons who actually carried out the work which the Thurins allege is defective. In the draft pleadings Krongold has cross-referenced each of the Thurins’ claims as set out in the relevant paragraphs in the FAPOC, such that Krongold is alleging that if the Thurins’ claims are proven then the proposed parties are responsible for the defects.
- 42 As Hargrave J said in *Atkins v Interpract and Crole (No 2)* [2008] VSC 99:
- ... I am now of the view that the proposed pleadings [against the proposed joined party] do not raise a case which is so hopeless that it does not admit of argument. ... 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. [Underlining added]
- 43 Whilst I accept that it is desirable for clear particulars of alleged breaches to be provided, I accept this is not always possible for a respondent builder seeking to join persons it alleges are concurrent wrongdoers. The decision to make a joinder application is usually made after a consideration of an

⁸ [2010] VSC 5

owner's Points of Claim/Points of Counterclaim, and any available expert reports. Frequently, the builder will wish to obtain its own expert report/s before making an application for joinder. However, this will not always be feasible, particularly if the expiry of the relevant limitation period is looming.

- 44 In circumstances where the APOD & CC plead a duty owed to the Thurins by the proposed parties, and set out the alleged breach of such duty, I am satisfied that the allegations that the proposed parties are concurrent wrongdoers is arguable. There is, of course, no impediment to those parties seeking further particulars from Krongold in relation to the claim for contribution, or from the Thurins should they decide to further amend their Points of Claim to include a claim against any or all of the proposed parties.
- 45 Although the Thurins contend that the irrigation and landscaping works are not subject to the 10 year limitation period for building actions, the expiry date of the limitation period is not a matter to be determined at this time. There is a possibility of the limitation period against one or more of the proposed respondents expiring on 17 November 2018. Whilst there is no impediment to a respondent raising a Part IVAA defence after the expiration of the relevant limitation period, if Krongold were to do so, the Thurins could not then make a claim against the alleged concurrent wrongdoers 'piggybacking' on Krongold's allegations. Being mindful of the Tribunal's obligations under ss97 and 98 of the VCAT Act, whilst noting the objections raised on behalf of the Thurins and PRB Design, I consider it appropriate the proposed parties be joined as respondents at this time.
- 46 It is a matter for the Thurins whether they wish to file Second Further Amended Points of Claim against each of the respondents in the event they are found to be concurrent wrongdoers. I will grant them leave to do so if they wish.
- 47 I will also order that the joined respondents are not required to participate in the proceeding until further Notice or order.

DEPUTY PRESIDENT C. AIRD