VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST VCAT REFERENCE NO. D1239/2013

CATCHWORDS

Domestic Building, joinder, 'open and arguable', prima facie case as distinct from proven facts, costs

APPLICANT	Ms Annette Watson
RESPONDENT	Richwall Pty Ltd (ACN:060 578 716)
WHERE HELD	Melbourne
BEFORE	Senior Member Lothian
HEARING TYPE	Hearing
DATE OF HEARING	5 June 2014 and 26 August 2014
DATE OF ORDERS	26 August 2014
DATE OF COSTS ORDERS	2 September 2014
DATE OF REASONS	2 September 2014
CITATION	Watson v Richwall Pty Ltd (Building and Property) [2014] VCAT 1127

ORDERS

Further to the Orders of 26 August 2014:

1 The First Respondent must pay the costs of the Applicant of and associated with the application to join the Melton City Council and DM Lawrance Soil Testing Pty Ltd, but not concerning the application to join McFarlane & Partners Pty Ltd or subsequent directions.

2 The First Respondent must pay the costs of the proposed joined party, Melton City Council, of and associated with the application to join it to the proceeding.

3 The First Respondent must pay the costs (if any) of DM Lawrance Soil Testing Pty Ltd of and associated with the application to join it to the proceeding.

4 If costs are not agreed, they are to be fixed by the Costs Court on a party-party basis on the County Court Scale.

SENIOR MEMBER M. LOTHIAN

APPEARANCES:

For Applicant	On 5 June 2014, Mr Scheid of Counsel On 26 August 2014, Mr Auricchio, Solicitor
For Respondent	Mr R Squirrell of Counsel
For Melton City Council	Mr R Bennett, Solicitor
For McFarlane & Partners Pty Ltd	Mr Wajszel, Solicitor
For DM Lawrance Soil Testing Pty Ltd	Mr D Lawrance, director

REASONS

1 This interlocutory application was by the Respondent-Builder to join to the proceeding the Melton City Council ("MCC"), McFarlane & Partners Pty Ltd ("McFarlane") and DM Lawrance Soil Testing Pty Ltd ("Lawrance") as respondents.

2 On 26 August 2014 I made orders joining McFarlane to the proceeding, but dismissing the application to join MCC and Lawrance. I reserved the costs of the Applicant, MCC and Lawrance for determination. I made subsequent procedural directions and undertook to provide reasons.

HISTORY

3 The Applicant-Owner, Ms Watson, owns land in Northgate Drive, Melton West. In 2007 the Builder constructed a single storey home on her land, pursuant to a contract dated 7 July 2007. She pleads, and the Builder admits, that the building contract included designs and calculations by McFarlane based on the geotechnical site report by Lawrance.

4 The Owner's home is brick veneer, constructed on a waffle raft slab. She pleads that the home has been built in breach of the Builder's obligations under the contract, and because of the breaches it has suffered damage and continues to suffer damage.

5 The Builder claims that each of the proposed joined parties owes a duty to the Owner and/or to itself[1], which entitles the Builder to an order under s24AI of the *Wrongs Act* 1958 that the amount payable by it to the Owner is limited to the proportion of the loss caused by it.

6 The unusual nature of this waffle raft slab claim is that it is relatively modest as pleaded. Without taking interest and costs into account, the Owner's claim is for $29,925. The cost to prosecute and defend the claim could be significantly greater for each party.

7 Until the directions hearing of 26 August 2014 the application to join MCC and Lawrance relied entirely upon the applicability to the Owner's land of a report by Peter Dahlhaus of 1985 entitled "An engineering geological investigation of the Urban Land Authority's property, Melton." ("Dahlhaus report").

HEARINGS

5 June 2014

8 At the directions hearing of 5 June 2014 Mr Scheid of Counsel appeared for the Owner, Mr Squirrel of Counsel appeared for the Builder, Mr Bennett, solicitor, appeared for the MCC, Mr Lawrance appeared in person as a director of Lawrance and Mr Wajszel, solicitor, appeared for

[1] See paragraph 13 of the First Respondent's Points of Claim which commences:
"In breach of its duty of care owed to the [Owner] and/or to the [Builder] the MCC …"

McFarlane. On that day Mr Bennett neither objected nor consented to joinder on behalf of the MCC, but there were objections from the other proposed joined parties, and also from the Owner.

9 At the hearing the Owner objected to joinder of the engineer and the MCC, pointing out the significant costs that are likely to be incurred by her if additional parties were joined.

10 Mr Squirrel submitted a folder of materials in support of the Builder's application. I expressed my concern that the amount apparently in dispute is disproportionate to the likely amount of resources expended on it. Mr Squirrell pointed out that from the Builder's point of view it is not just one relatively small claim, but the home is one of a significant number of homes built by the Builder in this area.

11 I set the matter down for mediation and reserved my decision on joinder until after the mediation. I also invited the Owner and the proposed joined parties to file and serve submissions in response to those of the Builder.

12 I have been advised that it did not settle at mediation.

Written submissions

13 Submissions were received from each of the parties invited to make them together with an affidavit from Mr Findlay for MCC. Lawrance and McFarlane continued to object to being joined. The MCC changed its views to submitting that the application to join it should be dismissed, with costs. The submission on behalf of the Owner was that she neither objected nor consented to Lawrance and McFarlane being joined, but she maintained her objection to the joinder of the MCC.

26 August 2014

14 On 2 July 2014 the Builder sought permission to make written submissions in response to the submissions of the other parties. By order in chambers of 14 August 2014 I ordered that any further written submissions be filed and served by 4:00pm on 20 August 2014 and that the proceeding be listed for a further hearing by me at 9:00am on 26 August 2014. Order 3 was:

> The directions hearing is to hear any further matters arising out of the further written submissions, not to introduce any new material.

15 Further written submissions were received from the Builder on 18 August 2014 dated 15 August 2014, and from MCC on 20 August 2014. At paragraph 30 of the Builder's further written submissions Mr Squirrell referred to a proposed affidavit by Dr Dahlhaus, adding:

> A copy of the affidavit will be available at the directions hearing on 26 August.

16 At the hearing of 26 August 2014 the representation for the parties was the same as on 5 June 2014 except Mr Auricchio, solicitor, appeared for the Owner.

17 I permitted Mr Squirrell to rely on the Dahlhaus' affidavit of 15 August 2014, distributed at the directions hearing to the Tribunal, the Owner and the proposed joined parties. The Dahlhaus affidavit and Mr Squirrell's submissions do not link the Owner's land to the land described in the Dahlhaus report, a point Mr Squirrell admitted in his oral submissions. Rather, the Dahlhaus affidavit tends to confuse the issue of what the Dahlhaus report consists of.

18 The Dahlhaus affidavit refers at paragraph 3 to Mr Finlay's affidavit and then continues:

> …in which it is submitted at paragraph 18 that "the [Owner's] property is not within the area referred to and covered by the Dahlhaus Report".
>
> 4. The geological investigations contained within my reports (referenced in the application collectively as "the Dahlhaus report") are referred to in the Geological Survey of Victoria unpublished report series and are into the land that is included in the Melton Development Area. [Underlining added]

19 There is no "application" referred to earlier in the Dahlhaus affidavit, so it follows that it can only be the application to join the three proposed joined parties to the proceeding. The Dahlhaus affidavit and Mr Squirrell's second written submissions were both dated 15 August 2014, and yet there was no indication by the Builder before 26 August 2014 that the "Dahlhaus Report" meant anything other than the meaning attributed to it in all the documents filed for the Builder before that date. I refer in particular to paragraph 9(c)(i) of the Builder's first written submissions, to the particulars to paragraph 13(g) of its Points of Defence of 20 January 2014 ("PoD") and to paragraph 6(a) of its document entitled "First Respondent Points of Claim" ("R1PoC") dated 5 May 2014.

20 Mr Squirrell sought leave to amend the application for joinder and all supporting documents to refer to all nine of the reports of Dr Dahlhaus listed at paragraph 10 of his affidavit. In accordance with Mr Bennett's submission I declined leave, particularly as the Builder's representatives did not have any of the other reports at the directions hearing and the contents of those reports remains unknown.

JURISDICTION

21 Section 60 of the *Victorian Civil and Administrative Tribunal Act 1998* ('the VCAT Act') empowers the Tribunal to order joinder.

> (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.

22 Mr Squirrell submitted that "there can be no real dispute that the [Owner's] claim is ... apportionable" and said that the Tribunal should join each of the three proposed joined parties "if on consideration of the material presented it is of the view that the case is not hopeless." In the MCC's first written submissions, Mr Bennett referred to apportionability and said that his client "does not cavil with that assessment".

23 In the Builder's first written submissions Mr Squirrell referred to the decision of the Court of Appeal in *Boral Resources (Vic) P/L v Robak Engineering and Construction P/L* [1999] VSC 65 which related not to Part IVAA of the Wrongs Act, but to s131 of the *Building Act* 1993, which was to similar effect. Mr Squirrell also quoted Hargrave J in *Atkins v Interpract and Crole (No 2)*[2008] VSC 99 where his Honour said:

> ... 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]

24 The Owner's written submission referred to whether the case against the MCC is "open and arguable" but then on the last page, considered whether joining MCC would be "just and convenient" without stating why these considerations might be relevant. I note that "just and convenient" is a phrase found in Rule 9.06(b)(ii) of the *Supreme Court (General Procedure) Rules* 2005 and the equivalent rule relevant to *Boral*.

25 I accept Mr Squirrell's submission that the issue of disproportionate costs is unlikely to be relevant to the question of whether a particular party should be joined to a particular proceeding. As I said during the directions hearing of 26 August 2014, it is a matter for the parties to take into account when they are negotiating.

26 In his first written submissions on behalf of MCC, Mr Bennett said that the *Boral* test was not the appropriate one as it was not factually analogous, it was decided in a different forum under different rules and, as remarked above, decided under different legislation. He submitted that the test for joinder at VCAT is higher – a party should not be joined "unless there is a case" as per *Lawley v Terrace Designs Pty Ltd* [2004] VCAT 1825.

27 I accept Mr Bennett's second written submission that the test provided for joinder in the Supreme Court under the *Rules* is not automatically applicable to joinder under s60 of the VCAT Act.

28 I prefer Deputy President Aird's formulation in *Perry v Binios*[2] [2006] VCAT 1604 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).

29 Mr Bennett also mentioned *Zervos* in the MCC's second written submissions. I note that the words underlined above in *Atkins* are similar to considering whether there is an open and arguable case. I also note that Mr Bennett said at the directions hearing on 26 August 2014 that regardless of the test, the application to join MCC fails.

"Open and arguable" as distinct from proof

30 As I said at paragraph 20 of *O'Donnell v Absolute Builders* [2014] VCAT 952:

> If everything [that proposed joined party] says in his affidavit is proven he has a good defence to the Builder's action against him. However, a good defence is not a sufficient reason to refuse to join a proposed party. The facts of a case are proven at the hearing, not at the point where a party is seeking to join another. Until those facts are proven, a properly pleaded case can still be "open and arguable".

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.

WRONGS ACT

32 At paragraph 21 of its PoD the Builder pleads that the claim against it is apportionable within the meaning of Part IVAA of the *Wrongs Act* 1958. At paragraph 22 it pleads that both the MCC and Lawrance are concurrent wrongdoers within the meaning of s24AH of the Wrongs Act. It pleads that if the Builder is liable to the Owner (which it denies) then the liability of the Builder is limited to an amount reflecting the proportion of loss or damage claimed by the Owner that the Tribunal considers just, having regard to the extent of the Builder's responsibility for the loss or damage.

[2] [2006] VCAT 1604

THE PROPOSED PARTIES

MCC

33 Two elements necessary to impose potential liability upon MCC are that the Owner's site is not class H, as it was classed by Lawrance, and that MCC was uniquely, or peculiarly, placed to know of this and/or to act upon it. If the site is class H, MCC's alleged failure to act on the Dahlhaus report, or bring it to the attention of anyone else, has not caused the Owner's or Builder's loss.

34 I note with concern that there is no expert report that claims the Owner's land is other than H. Further, at paragraph 11 of his affidavit Dr Dahlhaus states:

> The land developed for intensive housing [in the area including the Owner's land] was mapped as a "Gilgaied[3] Basalt Plain" in a 1978 Soil Conservation Authority report … These areas are mapped as Highly to Extremely (H to E) reactive soils …

The Dahlhaus affidavit did not identify the location of the Owner's land and relate it to any of the reports. If the Owner's land identified by Dr Dahlhaus is H, his various reports do not support a case against MCC or Lawrance.

35 Dr Dahlhaus stated in his affidavit that his reports were provided to the then Shire of Melton. The Builder relied on a letter dated 7 March [1988] from Mr Merritt, Deputy Shire Manager to the General Manager Minerals at the Department of Industry, Technology & Resources. The letter thanks Mr Neilson of the department for sending the seven (not nine) unpublished reports. Mr Squirrell said it is likely that the two reports not sent dealt with the land allocated to a proposed cemetery, but I note that only one report of the nine, the one mentioned at paragraph 10(i), mentions the cemetery in its title.

Pleading by the Owner

36 There is no specific mention of the MCC in the Owner's Points of Claim ("OPoC"), and it is noted that the relevant building surveyor was Mr Albert Mitchell. However at paragraph 2.18 the Owner pleads:

> At all material times and during the course of construction the [Builder] was aware of the soil volatility, including but not limited to reactivity and the potential for slab heaving beyond acceptable tolerances. The respondent is an experienced builder having constructed many homes and in full knowledge of prior difficulties associated with slab heave, waffle slabs and highly reactive soils were at all material times in possession of skill experience and expertise that could have avoided the building distress suffered by the applicant.

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[3] Gilgai is an Aboriginal word for small waterholes and describes small scale undulations in the land surface.

> Clarendon [sic] refused, failed or neglected to take preventative measures to avoid building distress.

Pleading by the Builder

PoD

37 In its PoD at paragraph 13 (g) the Builder states that slab heave was caused by factors outside its knowledge and control. The Builder's particulars refer to the Dahlhaus report.

38 Although the Builder now acknowledges that the Dahlhaus report is not relevant, the Builder claimed that the Dahlhaus report:

> … Sets out in detail the inherent instability of the underlying soils and the unsuitability of the land for residential development.

39 It claimed that MCC zoned "the land":

> … for residential use without requiring reasonable engineering solutions for building works, notwithstanding its knowledge of the Dahlhouse report.

R1PoC

40 The Builder's application to join the proposed joined parties to the proceeding is supported by R1PoC. The relief it seeks is apportionment alone, although it pleads at paragraph 13 that the MCC breached a duty of care to it, and at paragraph 29 that McFarlane breached a duty of care to it.

41 The Builder said of MCC in R1POC that MSC issued a planning permit in an area containing the Owner's land. It also refers to the Dahlhaus report and relies on the recommendation in the report that:

> … buildings should be sited on shallow soils where feasible and constructed using either pier-and-beam footings or an engineering design slab over an adequate layer of non-plastic soil.

42 The Builder pleaded that MSC/MCC was aware or should have been aware that the then owner of the land, or the developer of the land, or the Builder did not know of the existence of the Dahlhaus report whereas MSC was aware of the report when it issued the relevant planning permit. The Builder claims that MSC/MCC breached its duty of care to the Builder and/or to the Owner by failing to disclose the Dahlhaus report as part of the planning permit, or giving any warning of its contents and recommendations. In the alternative, the Builder pleaded that the MSC issued the planning permit without including conditions reasonably necessary to ensure that residential buildings "were constructed in such a manner as to have due regard for the geology of the land".

Submissions by the Builder

The Dargan affidavit

43 The Builder's application to join the additional parties is also supported by an affidavit by its director, Mr Christopher Dargan, dated 2 May 2014. Mr Dargan mentioned the Dahlhaus report and it was exhibit CD-8 to his affidavit. Reference to the report itself shows that the area under consideration was approximately 50 Ha:

> ... bounded by Harkness Road to the west, farmland to the north and a proposed regional cemetery to the south and east.

44 The affidavit of Mr Finlay and the submissions by Mr Lawrance for his company raised the issue that the Builder was mistaken in identifying the Dahlhaus report as relevant to the Owner's land.

45 The unusual aspect about the site considered in the Dahlhaus report is not just the highly reactive clay, common to a number of areas to Melbourne's west, but the presence of sink holes.

Written submissions

46 In paragraph 10 of the first written submissions for the Builder, Mr Squirrell stated:

> In the case of allegations against the MCC the allegation is not one of inaction or a failure to act but it is of the positive action of zoning land for residential use and then failing to disclose highly relevant information necessary to be known by owners and builders in order to build a stable house.

And at paragraph 11:

> ...
>
> The MCC must have known that absent of any warning about the Dahlhaus Report findings that no additional investigations other than the usual minimal bore logs would be taken.

47 After the analysis of a number of decisions, Mr Squirrell concluded:

> 41. It can be seen that the situation of the MCC differs from that of the Hawkesbury City Council [*Precision Products (NSW) Pty Ltd v Hawkesbury City Council* [2008] NSWCA 278]. The MCC was under positive obligations with respect to prospective rezoning of the land if it chose to rezone the land. It was reasonably necessary in conformity with the *Planning and Environment Act* 1987 to take into account of the contents of Dahlhaus report and import the findings in zoning and planning permissions. ...
>
> 42. The [Owner] was reliant upon the MCC in the circumstances to disclose the nature of the land being rezoned, and she was vulnerable to the MCC in the circumstances.

43. It is arguable that the MCC was under a duty to disclose the Dahlhaus Report when planning and administering the development of the subject land, so that the [Owner] and her builder could take appropriate steps to ensure that the house was built without subsequent heave. ...

Submissions by the Owner

48 I accept the written submission for the Owner where it is stated at paragraph 16:

> It was incumbent upon the [Builder] to provide evidence that the site classification was incorrect to establish an arguable case or that it was not hopeless. The [Builder] has failed to provide any evidence that the conduct of [MCC] in its failure to disclose the report or the act of "rezoning" has caused the distress to the [Owner's] home.

Submissions by MCC

49 Mr Bennett's written submission is that the Builder's case that MCC owes a duty of care to the Owner and/or the Builder for the functions it performed founders on its facts and also at law. He submitted that there was no such duty where the power to act was discretionary, the Owner's land is not within the area considered in the Dahlhaus report and that on the Builder's pleading it relied on Lawrance.

50 The Builder has acknowledged the facts that result in a failure of the Builder on the facts, and it is not necessary to consider the submissions further. However, even if the Builder had not made that acknowledgement, I was not satisfied that the Builder had pleaded a sufficient connection between the Dahlhaus report and the Owner's land to demonstrate a prima facie case against MCC.

Conclusions

The Builder's application to join MCC relied entirely upon its assertion that the Dahlhaus report is relevant to the Owner's site, which has been acknowledged does not relate to the Owner's land. I therefore dismissed the application to join MCC as a party to this proceeding.

Lawrance

Pleading by the Owner

51 In the particulars to paragraph 2.1 of the OPoC, the Owner pleads that one component of the building agreement between her and the Builder was a site investigation report dated 13 April 2007 by Lawrance.

52 At paragraph 2.3 of the OPoC she pleads:

> In purported performance of [the building agreement the Builder] engaged [Lawrance] to conduct a foundation investigation and provide a report with respect to that investigation.

53 At paragraph 2.4 she pleads that clause 4.0(b) of the site investigation report required the Builder to "put in place a proper site drainage system".

54 The Owner makes no criticism of Lawrance in the OPoC.

Pleading by the Builder

PoD

55 The PoD admits that the Builder engaged Lawrance, but said that it did so acting as agent of the Owner. It denies that it breached the building contract. At paragraph 22 the Builder pleads that both MCC and Lawrance are concurrent wrongdoers and states in the particulars:

> The classification of the site as "H" was not in all the circumstances appropriate.

As mentioned above, there is no evidence that the Owner's site was other than H.

R1PoC

56 Paragraph 17 of R1PoC appears inconsistent with the PoD, in that the Builder pleads Lawrance provided the report to it, and makes no mention of doing so on behalf of the Owner. It continues, pleading that either it, the Builder, or the Owner would rely on Lawrance's expertise and that Lawrence owed the Owner a duty of care.

57 The breach alleged is at paragraph 20:

> The site investigation report did not disclose those matters contained within the Dahlhaus report relevant to the construction of the Applicant's house, namely the inherent instability of the land and its unsuitability for housing without a suitable engineered foundation.

58 The Builder also pleads that before it entered the building contract with the Owner, it provided a copy of the site investigation report to McFarlane.

Submissions by the Builder

59 Paragraphs 45 to 55 of Mr Squirrell's written submissions allege that the site should have been classified 'P' or 'E', but solely on the basis that the Dahlhaus report raises this possibility.

60 At paragraph 53 Mr Squirrell submitted:

> The report of Yttrup [for the Owner] asserts that the slab has failed due to soil movement. This is arguably due to incorrect soil classification.

61 The report was by Mr McLaren of Yttrup and Associates Pty Ltd, and Mr Squirrell's assertion appears to be mistaken as Mr McLaren discusses the site classification at part 6 of his report and concludes in the last paragraph:

> I agree that the classification for the site is Class H - Highly Reactive in accordance with AS2870-1996.

Submissions by the Owner

62 The Owner's written submissions neither consent nor object to joining Lawrance.

Submissions by Lawrance

63 As mentioned with reference to MCC, Lawrance disputes the link between the land contemplated in the Dahlhaus report and the Owner's land. I accept Mr Lawrance's written submission that the Builder's pleading against Lawrance is entirely based on Lawrance's alleged failure to take the Dahlhaus report into consideration.

Conclusions

64 I am not satisfied that the Builder has demonstrated an open and arguable case that Lawrance has misclassified the site I therefore dismissed the application to join Lawrance as a party to this proceeding.

McFarlane

Pleading by the Owner

65 In the particulars to paragraph 2.1 of the OPoC, the Owner pleads that one component of the building agreement between her and the Builder was an engineer's design by McFarlane dated 20 April 2007.

66 In the particulars to paragraph 2.2, at (ii)(c) she quotes clause 1 of the building agreement:

> "Engineer's Design" includes a footing design or other structural design that has been prepared by a qualified Engineer for the concrete footings, stumps, piers or slab construction, or for a particular part of the Building Works that require structural design, drainage design where appropriate and computations accompanying the foregoing;

67 At paragraph 2.9(d) she pleads:

> In breach of the terms of the Building Contract, [the Builder] failed or neglected to:
>
> ...
>
> (d) Comply with the requirements of the Australian Standard [...] Residential slabs and footings – Construction AS2870-1996 ...

The particulars to this paragraph mention, among other things, the alleged absence or inadequacy of site drainage, use of silt rather than moist clay as backfill and the probability that service trenches were not backfilled with compacted clay.

68 At paragraph 2.11 she attributes the loss she alleges she has suffered to a number of causes including failure to comply with AS2870.

McLaren report

69 I note that there are at least two aspects of the footing system that Mr McLaren criticised. At part 7 he referred to:

> ... no reference to the requirement for flexible service joints as discussed in the site classification report and 5.5.4 of AS2870.

He continues:

> It is my opinion that the site drainage has not been addressed sufficiently on the engineer's drawing.

Pleading by the Builder

PoD

70 The Builder does not name McFarlane as a concurrent wrongdoer in the PoD, but it appears that it intended to do so and the directions of 26 August 2014 require the Buider to file and serve amended Points of Defence.

71 At paragraph 11 of the PoD the Builder pleads that the waffle slab was built in accordance with the engineering requirements of McFarlane. The Builder also pleads that the notes on the McFarlane drawings do not call for compaction of backfill.

R1PoC

72 The Builder does not plead who contracted with McFarlane, but does plead a duty of care by McFarlane to the Owner. It pleads that McFarlane was obliged to design a waffle slab "suitable to the geology of the subject land" and that the Builder built the waffle slab in accordance with the design.

Submissions by the Builder

73 At paragraph 58 of Mr Squirrell's first written submissions he states there are two possibilities when the builder has complied with the engineering drawings, yet there is distress caused by slab heave. One is that the engineering drawings were inadequate for a site correctly classified as H. The other is that the site was incorrectly classified, so the vulnerability of the slab to heave might have been due to a failure of the site classification, the engineering design, or both.

Submissions by the Owner

74 The Owner's written submission was that she neither consented nor objected to McFarlane being joined.

Submissions by McFarlane

75 Mr Wajszel's written submissions on behalf of McFarlane state that Mr McLaren's view about the adequacy of drainage design are in error because there was other material provided to the Builder. While this might

be a good point for defence, it is a matter to be determined at the hearing. It does not prevent the Builder's pleadings against McFarlane being open and arguable.

Conclusions

76 If the Owner is correct, that her waffle slab is defective as built, and if the Builder is correct, that it was built in accordance with the McFarlane design, there is an open and arguable case that any loss suffered by the Owner is wholly or partly the responsibility of McFarlane. This is sufficient to make the Builder's Wrongs Act defence open and arguable. I therefore join McFarlane as second respondent to the proceeding.

COSTS

77 The Owner, the Melton City Council and Lawrance sought their costs of and associated with the Builder's application for joinder. At the commencement of the hearing on 5 June 2014, I gave each of the proposed joined parties leave to intervene. In accordance with the decision in *Kyrou v Contractors Bonding* [2006] VCAT 597, interveners are entitled to seek costs under s109 of the VCAT Act.

78 Section 109 of the *Victorian Civil and Administrative Tribunal Act* 1998 says in part:

s.109:

(1) Subject to this Division, each party is to bear their own costs in the proceeding.

(2) At any time, the Tribunal may order that a party pay all or a specified part of the costs of another party in a proceeding.

(3) The Tribunal may make an order under subsection (2) only if satisfied that it is fair to do so, having regard to-

(a) whether a party has conducted the proceeding in a way that unnecessarily disadvantaged another party to the proceeding by conduct such as –

(i) failing to comply with an order or direction of the Tribunal without reasonable excuse;

(ii) failing to comply with this Act, the regulations, the rules or an enabling enactment;

(iii) asking for an adjournment as a result of (i) or (ii);

(iv) causing an adjournment;

(v) attempting to deceive another party or the Tribunal;

(vi) vexatiously conducting the proceeding;

(b) whether a party has been responsible for prolonging unreasonably the time taken to complete the proceeding;

(c) the relative strengths of the claims made by each of the parties, including whether a party has made a claim that has no tenable basis in fact or law;

(d) the nature and complexity of the proceeding;

(e) any other matter the Tribunal considers relevant.

79 As emphasised by the Supreme Court in the matter of *Vero Insurance Limited v Gombac Group* [2007] VSC 117 at [20], the Tribunal should approach the question of entitlement to costs on a step-by-step basis:

(i) The prima facie rule is that each party should bear their own costs of the proceeding.

(ii) The Tribunal should make an order awarding costs being all or a specified part of costs, only if it is satisfied that it is fair to do so; that is a finding essential to making an order.

(iii) In determining whether it is fair to do so, that is, to award costs, the Tribunal must have regard to the matters stated in s.109(3). The Tribunal must have regard to the specified matters in determining the question, and by reason of (e) the Tribunal may also take into account any other matter that it considers relevant to the question.

80 I am satisfied that the application to join MCC and Lawrance, which was based on the Dahlhaus report, since admitted to be irrelevant, had no tenable basis in fact.

81 In consequence, I order that the Builder pay the Owner's costs of and associated with the application, to the extent that they concern her submissions regarding the joinder of MCC and Lawrance. I order that the Builder pay MCC's costs of and associated with those parts of the application.

82 Mr Lawrance appeared for Lawrance, and there is no solicitor on the record for him. He applied for costs and said that his firm's insurer had allowed him to appear "to reduce costs as much as possible". If Lawrance has incurred legal costs in preparation, they are allowed. Mr Lawrance's own time is not allowed.

83 In accordance with the submissions of Mr Bennett and Mr Auricchio, costs of the Owner, MCC and Lawrance are to be agreed, or failing agreement, to be assessed on a party-party basis on the County Court Scale by the Costs Court.

SENIOR MEMBER M. LOTHIAN