Barouche v Owners Corporation No. 409234V (Owners Corporations) - [2016] VCAT 938

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL
CIVIL DIVISION

OWNERS CORPORATIONS LIST VCAT REFERENCE: OC1946/2015

CATCHWORDS

Proportionate liability – respondent's application for joinder of alleged concurrent wrongdoers – applicant lot owners claim that owners corporation breached statutory duties by granting leases of common property car spaces to others – owners corporation applies to join the solicitors who acted for the applicants – whether evidence required to support the application – whether the solicitors caused the loss which is the subject of the applicants' claims – no tenable allegation that the solicitors breached a duty to take reasonable care – *Wrongs Act 1958* ss 24AE, 24AF, 24AH – *Owners Corporations Act 2006* s 5.

FIRST APPLICANT:	Lisa Raianne Barouche
SECOND APPLICANT:	Stephanie Krezel
RESPONDENT:	Owners Corporation No. 409234V
WHERE HELD:	VCAT, 55 King Street, Melbourne
BEFORE:	Senior Member A. Vassie
HEARING TYPE:	Directions Hearing
DATE OF HEARING:	26 May 2016
DATE OF ORDER:	15 June 2016
DATE OF REASONS:	15 June 2016
CITATION:	Barouche v Owners Corporation No. 409234V (Owners Corporations) [2016] VCAT 938

ORDERS

1. The respondent's application dated 16 May 2016 is dismissed.

2. There shall be a directions hearing in the proceeding on a date as soon as practicable and at a time to be fixed.

A. Vassie
Senior Member

APPEARANCES:

For the Applicants:	Mr. J. Cohen, Solicitor
For the First and Second Respondents:	Mr. S. Abraham and Ms. N. Wilde, Solicitors
For the Proposed Joined Parties:	Ms. L. Hannon of Counsel

REASONS

1. I have heard an application dated 16 May 2016 by the respondent, Owners Corporation Plan No. PS409234V ("the owners corporation"), for leave to join two firms of solicitors as additional respondents, so that by operation of Part IVAA of the *Wrongs Act 1958* – the proportionate liability provisions of that Act – the liability of the owners corporation (if it has any) in damages to the applicants is limited to an amount that reflects the proportion of the damages for which it is held to be responsible.

2. The applicants Ms Barouche and Ms Krezel each own a lot on plan of subdivision 409234V. There are 32 lots altogether. Ms Barouche purchased lot 22 in early 2013. Ms Krezel purchased lot 14 in late 2014. Each had a firm of solicitors acting for her in the purchase. These are the firms of solicitors which the owners corporation seeks to have joined as respondents.

3. This proceeding arises out of the way in which the owners corporation has dealt with car spaces on the common property in the plan of subdivision. There are 24 car spaces delineated on the common property (although not on the registered plan of subdivision): not enough for every lot owner or occupier to be able to park a car at the same time. The applicants allege that before their purchase the car spaces were being used on a "first come first served" basis, with no lot owner or lot occupier having a greater right than any other to occupy a car space.

4. At a special general meeting held on 9 July 2015 the owners corporation's members either passed (according to the owners corporation) or purported to pass (according to the applicants) a special resolution to lease the 24 car spaces by granting a lease of a car space to each of 24 lot owners. The applicants were not amongst those 24 owners. Thereafter the owners corporation executed leases to those owners.

5. In this proceeding the applicants attack the validity of the meeting, of the special resolution and of the leases. In their Points of Claim they allege that the meeting was not properly convened and that insufficient notice of the meeting was given; they also allege that the grant of the leases was not made in good faith, was discriminatory and amounted to oppression of a minority of members. They seek a declaration that the purported resolution was invalid and that the leases be "set aside".

6. The Points of Claim include what, on a proper construction of them, is an alternative claim: that in purporting to grant the leases the owners corporation breached its duty, under s 5 of the *Owners Corporations Act 2006* , to act honestly and in good faith and to exercise due care and diligence. The applicants claim

"damages". By implication, although not expressly, they allege that they suffered loss or damage as a result of the breach of statutory duty. The owners corporation maintains that this claim for

damages for breach of a duty to exercise due care is an "apportionable claim" within the meaning of Part IVAA.

7. The allegation that the owners corporation wishes to make against each firm of solicitors is that the firm breached a duty of care to its client by failing to advise her of certain matters of which it ought to have advised her, and that the breach of the duty of care caused her loss or damage. That allegation amounts to an "apportionable claim". It was one that it would have been open to each applicant to make against her solicitor, had she seen fit to make it. The owners corporation also alleges that the loss or damage caused by the solicitor's breach of duty was the same loss or damage for which that applicant seeks compensation from the owners corporation. Accordingly, says the owners corporation, if it is a wrongdoer at all, it and each firm of solicitors is a "concurrent wrongdoer" within the meaning of Part IVAA and it is entitled to an order joining the two firms as respondents and, ultimately, to a determination of proportionate liability of each wrongdoer.

8. I have decided to dismiss the application for joinder of the two firms. There is therefore no need for me to name them in these reasons or in the order I make.

9. In proposed Amended Points of Defence the owners corporation set out the allegations against the two firms of solicitors. Very properly, although they were not obliged to have done so, the owners corporation's solicitors served the two firms of solicitors with a copy of the proposed Amended Points of Defence, a copy of the application for the joinder order and a copy of a short affidavit in support of the application, and notified them of the hearing date. So it came about that at the hearing of the application on 26 May 2016 Ms Hannon of Counsel appeared on behalf of the two firms of solicitors, instructed by the Legal Practitioners' Liability Committee. Without objection from either party, Ms Hannon addressed me and spoke to a written outline of submission in opposition to the application. Ms Abraham and Ms Wilde, solicitors for the owners corporation, also spoke to a written submission in support of the application. Mr Cohen, solicitor for the applicants addressed me orally in opposition to the owners corporation application. I reserved my decision.

10. The allegations against the two firms of solicitors depend upon the existence of a document to which the applicants referred in their Points of Claim. The document is a draft plan dated 26 August 1988. According to the Points of Claim, the draft plan was one which was for an amendment to the registered plan of subdivision and provided for there to be 24 car spaces. The draft plan was never registered, but it was described in the text of the proposed resolution set out in the notice to members of the special general meeting. The text, according to the Points of Claim, was:

> Resolution re – Carpark Spaces
>
> That the 24 car spaces on common property be leased to the lot owners presently using those car spaces in accordance with the allocation on sheet 2 of a draft plan under section 32 of the *Subdivision Act 1998* [sic] by Reeds Consulting (ref: 18661 – TT version B dated 26 August 1998) [sic] where each car space is given a lot number followed by the A, tabled at the special general meeting and on terms and conditions including a term of 99 years at a nominal rental of $1 set out in the master lease also tabled at the meeting; and

That each lease be registered as an encumbrance on the certificate of title for the common property; and

That the 24 lot owners be levied for their share of the cost of each lease.

11. Paragraph 21 of the Points of Claim made one of the attacks upon the validity of the leases that were granted after the special general meeting was held. Paragraph 22 contained the allegation of breach of statutory duties. Those paragraphs were:

> 21. The purported grant of a 99 year lease of each car space at a nominal rental of $1 to only 24 owners out of 32 lot owners:
>
> a) constituted a disposition of title in the common property car park land;
>
> b) was not made in good faith in the best interests of the Owners Corporation and for a proper purpose;
>
> c) was discriminatory; and
>
> d) constituted an oppression by the majority of the owners on the minority of owners who did not receive leases of car spaces; and
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> e) was unfair to those owners who did not receive leases of car spaces.
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> 22. The Owners Corporation in purporting to grant a 99 year lease failed to act honestly and in good faith and exercise due care and diligence in the carrying out of its functions and powers in breach of section 5 under the Act because:
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> a) they improperly used their position to gain an advantage for themselves or someone else or cause detriment to the Owners Corporation;
>
> b) there was no proper basis upon which the grant of such leases could or should have been made to the 24 lot owners in question;
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> c) such leases were not on commercial terms and in effect were tantamount to the grant to those owners of a gift;
>
> d) there is no proper basis upon which any possession of land, which is common property, adverse to the owners corporation or a lot owner could support the discriminatory grant of leases pursuant to section 7C of the *Limitation of Actions Act 1958* ;
>
> e) the purported resolution failed to take into account the interest of the applicants and other owners in the common property and its value;
>
> f) the purported resolution was unlawful and invalid.

12. The Points of Claim did not go on to make any express allegation that as a result of the breach of the duties the applicants suffered loss or damage. In the claims for relief at the end of Points of Claim, however, they included: "C. Damages". The only allegations in the Points of Claim that could have been part of a chain of allegations that led logically to a claim for damages were those

in paragraph 22. That is why I said above that, by implication, the applicants alleged in the Points of Claim that they had suffered loss or damage as a result of the owners corporation's breach of a duty to take reasonable care.

13. Three other paragraphs in the Points of Claim illuminate not only the allegations made in paragraph 21 and 22 but also the allegations that the owners corporation has made against the two firms of solicitors in the proposed Amended Points of Defence. Those three paragraphs in the Points of Claim are paragraphs 14, 15 and 16:

> 14. Sixteen Lots on the Plan of Subdivision were sold and transferred after the date of registration of the Plan of Subdivision on 10 March 1998 and all such subsequent owners purchased at a time when, and on the basis that, the common property was unencumbered and car spaces were being used on an informal or first-come first-served basis and the applicants personally used car spaces without any other owner or occupier producing evidence of any superior right or priority over the spaces.
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> 15. Each subsequent purchaser obtained unfettered title and were and are entitled to the use and enjoyment of the common property and its carpark which vests in all owners for the time being of the lots as tenants in common in share proportional to their lot entitlement in accordance with section 30 under the *Subdivision Act 1988* ;
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> 16. The Owners Corporation Certificates provided at the time of purchase to the first and second applicants did not disclose any lease or licence of the car spaces or that any other owners had vested rights or interests in the common property or any exclusive right to use any car spaces.

14. One may discern from those three paragraphs that each applicant maintains that at the time that she purchased her lot she believed that each lot owner or occupier had just as much right as any other to use a car space in common property on a "first come first serve" basis, and had no knowledge of any intention to confer upon some lot owners a greater right than others had to use such a car space.

15. In the proposed Amended Points of Defence, the owners corporation was called "the first respondent". The firm of solicitors which acted for the first applicant Ms Barouche was called "the second respondent" and the allegations against it were set out in paragraph 27. The firm which acted for the second applicant Ms

Krezel was called "the third respondent" and the allegations against it were set out in paragraph 28. The two paragraphs were identical except for the difference in the numbering of applicants and of respondents. I reproduce one of them: paragraph 27.

> 27. The first respondent says in the alternative:
>
> (a) The first applicant's claim against the first respondent is an apportionable claim.
>
> (b) The second respondent is a concurrent wrongdoer within the meaning of Part IVAA of the *Wrongs Act 1958* .

(c) The second respondent owed the first applicant a duty of care in performing conveyancing work as that term is meant in section 4 of the *Conveyancers Act 2006* including providing the first applicant with advice that was consequential to or ancillary to the first applicant's purchase of Lot 22 including but not limited to:

i. Advising the first applicant that she was not purchasing the right to use a car space at 403 Toorak Road, South Yarra;

ii. Advising the first applicant that upon signing the Contract of Sale for Lot 22 the first applicant had a legal right under section 146 of the *Owners Corporations Act 2006* to inspect he first respondent's records free of charge and take a copy of any record upon payment of a reasonable fee, and she should avail herself of that right in order to confirm she was satisfied with the contents of the section 32 vendor's statement;

iii. Advising the first applicant that:

a. There are only 24 car spaces on the common property at 403 Toorak Road, South Yarra; and

b. The first respondent as the legal owner of the common property has the power under regulation 3.2, Schedule 2 of the *Owners Corporations Regulations 2007* to allocate common property to other lots; and

c. The first respondent as the legal owner of the common property has the power under section 14 of the *Owners Corporations Act 2006* to lease or licence any part of the common property to a lot owner or any other person.

Particulars

The duty of care arose as a result of the first applicant engaging the second respondent to provide legal and conveyancing services to the first applicant in the purchase of Lot 22 at 403 Toorak Road, South Yarra in the context of the statutory scheme for conveyancing work under the *Conveyancers Act 2006* .

d. The second respondent breached its duty of care the first applicant:

Particulars

The first applicant alleges at paragraph 15 of its Points of Claim dated 9 February 2016 that "each subsequent purchaser obtained unfettered title and were and are entitled to the use and enjoyment of the common property and its car part which

vests in all owners for the time being of the lots as tenants in common in shares proportional to their lot entitlement in accordance with section 30 under the *Subdivisions Act 1988* ..."(the first applicant's allegation").

The first applicant's allegation suggests that the second respondent did not provide the first applicant with the advice referred to in paragraphs 27(c) above.

e. The second respondent's omissions caused independently of each other or jointly, the loss and damage claimed by the first applicant in its points of claim dated 9 January 2016 at paragraph A to G (both inclusive).

16. That paragraph of the proposed Amended Points of Defence correctly described the right under s146 to inspect the owners corporation's records and the power under s14 to lease or license. It did not correctly describe the effect of Schedule 2 of the *Owners Corporations Regulations 2007* . Schedule 2 contains model rules for an owners corporation. Rule 3.2 (which is not a "regulation") prohibits a lot owner or occupier from parking in "parking spaces situated on common property and allocated for other lots". It does not confer any "power" to do anything. It merely recognises the circumstance of allocation of lots, however that has occurred, if it has occurred.

17. The paragraph did not allege any fact or matter that could have brought to the solicitors' notice that some lot owners claimed to have, or might be granted in future, a greater right to use common property for car parking than their client might have once she purchased her lot. It did not allege any fact or circumstance which might have put the solicitors on enquiry as to whether there might be such a claim or such a possible future grant.

18. The owners corporation can succeed in its joinder application only if the proposed Amended Points of Defence have raised a "tenable proportionate liability defence". [1] In setting out what I consider that the owners corporation needs to have done to have raised a tenable proportionate liability defence, I endeavour to paraphrase and to adapt to the circumstances of the present case what Dixon AJA said, in *Utility Services Corporation Limited v SPI Electricity Pty Ltd*,[2] had to be alleged in order to raise a tenable proportionate liability defence: the owners corporation has to allege

(i) that the claim against it is an "apportionable claim" for the purposes of Part IVAA of the *Wrongs Act 1958* ;

(ii) that in relation to that claim it is a "concurrent wrongdoer" for the purposes of Part IVAA;

(iii) that each of the two firms of solicitors is a "concurrent wrongdoer" in relation to an applicant's claimed loss and damage; and

(iv) the material facts that establish the responsibility of each of the two firms of solicitors for the loss and damage claimed by an applicant.

[1] *Utility Services Corporation Limited v SPI Electricity Pty Ltd* [2012] VSCA 158 at [24].
[2] See footnote 1. Bongiorno JA and Beach JA agreed with Dixon AJA's judgment.

19. In a footnote to the relevant paragraph in the judgment,[3] Dixon AJA stated that a "tenable" defence meant one that had a real, not a fanciful, prospect of success.

[3] See footnote 1.

20. In opposing the owners corporation's joinder application, Ms Hannon submitted that the applicants' claim against the owners corporation was not an "apportionable claim", and both Ms Hannon and Mr Cohen submitted that there was no tenable allegation that either of the two firms of solicitors was a "concurrent wrongdoer".

21. Within Part IVAA, s 24AE defines "apportionable claim" as meaning a claim to which the Part applies, and s24AI, so far as presently relevant in this proceeding, provides:

> 24AF Application of Part
>
> (1) This Part applies to –
>
> (a) a claim for economic loss or damage to property in an action for damages (whether in tort, in contract, under statute or otherwise) arising from a failure to take reasonable care.

22. Paragraph 22 of the Points of Claim alleged a breach of statutory duty to take reasonable care. Nevertheless, submitted Ms Hannon, the proceeding was not an "apportionable claim", for two reasons.

23. The first reason was that there was no allegation that the breach of duty caused any economic loss to an applicant and no allegation of any facts that would support a conclusion that an applicant had suffered economic loss. Those criticisms of the Points of Claim are appropriate. The respondent owners corporation, and the Tribunal, have been left to guess at what any economic loss might be. But, as I have stated above, the Points of Claim included a claim for relief in the form of "Damages". When that claim for relief is coupled with paragraph 22, an allegation is implicit that the alleged breach of duty caused economic loss to an applicant; there is no logical connection between the claim for "Damages" and anything else in the Points of Claim. The Tribunal is not a court of pleading. The coupling and the implication are permissible. The allegation that the breach of duty caused economic loss to the applicants emerges from the Points of Claim, although not in an ideal fashion.

24. The second reason appeared to be that a claim that economic loss flowed from a breach of duty was not tenable. Ms Hannon submitted, correctly, that if any of the attacks on the validity of what the owners corporation has done succeeds, the applicants will be in the position that they were in before any leases were granted, and could not suffer any economic loss. Ms Hannon went on to submit that if all of the attacks failed and the leases remained on foot, the owners corporation could not have caused any economic loss to the applicants "because it has acted validly". I do not accept that proposition. I recognise that there is a degree of implausibility about the claim for damages. If the allegations in paragraph 22 are made out at a hearing of the proceeding, the likelihood is that most of the allegations in paragraph 21 will have been made out too, so that the attack on the validity of the leases succeeds. It is possible, however, that the Tribunal finds that the conduct alleged in those paragraphs did occur but decides that it does not have the consequence that the leases are invalid; in that event, the claim for damages would remain open, at least in theory.

25. In my view, therefore, insofar as it consists of paragraph 22 and item C of the claim for relief in the Points of Claim, this proceeding is an "apportionable claim".

26. Mr Cohen and Ms Hannon both argued that neither of the two firms of solicitors can be a "concurrent wrongdoer". Section 24AH, to the extent that it is presently relevant, provides:

> 24AH Who is a concurrent wrongdoer?
>
> (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.

27. Mr Cohen argued that the owners corporation had not made any tenable claim that either of the two firms was a wrongdoer because there was no affidavit evidence of any alleged facts that might lead to a conclusion that either firm had failed in a duty to take reasonable care. There was a short affidavit[4] filed in support of the owners corporation's application which proved only that each of the two firms acted for one of the applicants at the time of her purchase of her lot. I have some sympathy for the argument. To accept it, though would be contrary to authority which binds me.

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[4] Affidavit of Julia Reid dated 16 May 2016.

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28. In *Fabfloor (Vic) Pty Ltd & ors v BNY Trust Company of Australia Limited & ors* [5] , John Dixon J considered and rejected the very same argument. An Associate Justice had refused an application by a defendant for joinder of alleged concurrent wrongdoers so that it could pursue a proportionate liability defence. The reason for the refusal had been that, as the plaintiff had argued, the defendant applicant had not, in evidence filed in support of the application, shown that there was substance to the claims proposed to be made so as to provide a foundation for allegations of negligence. John Dixon J allowed an appeal and granted the application for joinder. Near the conclusion of the judgment his Honour stated:

> 74 The primary judge erred in holding that where a defendant applies to add other persons on the basis that they are concurrent wrongdoers with the defendant under

Part IVAA of the Wrongs Act so as to limit their liability to the plaintiffs, there is a positive requirement to lead some evidence showing that there is substance to the claims proposed to be raised and that the claims are not hopeless. There is no such requirement.

75 It is sufficient for a defendant to establish that the proposed pleadings contain facts or allegations which, if established at trial, could arguably found one or more of the causes of action alleged and that if the Court is satisfied such an arguable case has been put forward, joinder should be allowed.

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[5] [2016] VSC 99 .

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29. In reaching that conclusion, John Dixon J referred to a "long standing principle" that a party or a party's legal representatives must certify that there is a proper basis for allegations made in the pleading – reflected in rules of court that require that the pleading must be signed by Counsel who settled it, or by the party's solicitor – and to the obligation that the *Civil Procedure Act 2010* imposes upon a party and the party's legal representatives not to make any claim that does not have a proper basis.[6] Points of Claim and Points of Defence in VCAT proceedings do not have the status of pleadings and frequently have been prepared by self represented parties. The *Civil Procedure Act 2010* does not apply to VCAT proceedings.[7] If those should become reasons why the decision in the *Fabfloor* case does not apply to VCAT proceedings, it must be for the Supreme Court to say so, not a VCAT member.

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[6] [2016] VSC 99 at [42] – [45] .
[7] In s3, "civil proceedings" is defined to mean any proceeding in a court other than a criminal proceeding or a quasi-criminal proceeding, and the definition of "court" does not include VCAT.

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30. My task, therefore, is to consider whether the proposed Amended Points of Defence could arguably found a cause of action in negligence against the two firms of solicitors and found a tenable case that they are concurrent wrongdoers. In performing that task, I consider that I am required to assume, for the purpose, that any facts alleged in paragraphs 27 and 28 of the proposed Amended Points of Defence will be established at a hearing of the proceeding, but I am not required to assume that any proposition of law set out in those paragraphs, or any conclusion or reasoning set out in them, is correct.

31. I repeat the "particulars" given, under paragraph 27(d) of the proposed Amended Points of Defence, of the alleged breach of the solicitor's duty of care:

The first applicant alleges at paragraph 14 of its Points of Claim dated 9 February 2016 that "...Each subsequent purchaser obtained unfettered title and were and are entitled to the use and enjoyment of the common property and its car park which vests in all owners for the time being of the lots as

tenants in common in shares proportional to their lot entitlement in accordance with section 30 under the *Subdivision Act 1988* ..."(the first applicant's allegation").

The first applicant's allegation suggests that the second respondent did not provide the first applicant with the advice referred to in paragraph 27(c) above.

The advice referred to in paragraph 27(c) was advice that an owners corporation has a power to lease or license any part of the common property.

32. Ms Hannon submitted that what was set out in paragraph 27(d) was speculation, not an allegation of fact, and displayed a leap to a conclusion that the client's allegation (in paragraph 15 of the Points of Claim) about her rights to use common property was somehow connected to what her solicitor advised her or did not advise her. I agree. Let it be assumed that paragraphs 14, 15 and 16 of the Points of Claim mean that neither applicant had any reason to suppose at the time of her purchase that in future the owners corporation might do something to confer upon other lot owners a greater right to use parts of the common property for car parking than the right that she would have. It just does not follow at all that her solicitors had not given her any advice about the power to lease or license.

33. There is a more fundamental reason, however, why I consider that there has been no tenable claim in the proposed Amended Points of Defence that the two firms of solicitors were in breach of a duty to take reasonable care. The only context given for the alleged breach of duty was that the firms' clients were purchasing lots on a plan of subdivision for which there was common property, with the consequence that the owners corporation affected the lots and the common property and that the *Owners Corporations Act 2006* was applicable. The Points of Claim had given no indication, and the proposed Amended Points of Defence contained no allegation, of what instructions either applicant had given to her solicitors or of what facts or matters the solicitors knew or ought to have investigated. All that the proposed Amended Points of Defence did was to reveal the context to which I have referred and to leap to the conclusion, from what one may infer was an applicant's belief as to her rights, that there had been a breach of a duty to advise the applicant properly.

34. To accept that the owners corporation is making a tenable claim against the two firms of solicitors would amount, in my opinion, to accepting that every conveyancing solicitor in Victoria who is retained by a client who has purchased or who intends to purchase a lot on plan of subdivision affected by an owners corporation must advise the client

    (a) that the owners corporation has a power to lease or license common property;

    (b) of all provisions of the *Owners Corporations Act 2006* (including s 14, which confers the power to lease or license) which might conceivably affect the client's right to enter upon or occupy or use common property; and

    (c) that the client ought to inspect the records of the owners corporation on the off-chance that they contain a document which might point to the risk of some lot owners being granted in future a greater right to enter upon or occupy common property than the client would have as a lot owner.

35. I cannot accept that it is arguable or tenable that a solicitor's duty of care imposes such an unrealistic standard. The proposed Amended Points of Defence acknowledges that each applicant had had the benefit of a vendor's statement given under s 32 of the *Sale of Land Act 1962* . Full compliance with that Act requires the provision of an owners corporation certificate giving details of any contracts, leases, licences and agreements affecting the common property. [8] If there had been no adequate compliance in that regard, or if an owners corporation certificate had contained details which ought to have indicated a need

to enquire about possible future leasing or licensing of common property, matters would be different. If (for example) one of the applicants had instructed her solicitor that car spaces appeared to have been allocated on common property but there seemed to be too few of them, matters might also be different. But in the absence of any allegation that the case has any features such as those, it is fanciful to claim that either firm of solicitors breached a duty to take reasonable care.

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[8] *Sale of Land Act 1962* s 32F , *Owners Corporation Act 2006* s151(4)(a)(viii), *Owners Corporation Regulations 2007* reg 11(j).

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36. The case sought to be made against the two firms of solicitors bears some similarities to the case sought to be made in a South Australian case. [9] Vendors of a dwelling house and five small units engaged a land agent to sell them. Each unit contained a stove. Local municipal council by-laws regulated where stoves could be installed in a lodging house, and classed the premises a lodging house. The stoves had been installed in contravention of the by-laws. The vendors knew of the classification as a lodging house but did not tell the land agent. When the purchaser was about to sign the contract, the land agent told him that there was no need for him to engage a solicitor and that the land agent could do all the legal work for him. Thereby, held the trial Judge Bray CJ, the land agent took upon itself the same duty of care as a solicitor would have had if acting for the purchaser. When, after settlement of the contract, the purchaser discovered the contravention of the by-laws, he sued not only the vendors but also the land agent. He succeeded against the vendors but failed against the land agent. Bray CJ held that there had been no breach of a solicitor's duty of care, stating (Coombe being the name of the land agent's salesman):

> I have found a contract: it remains, however, to find a breach. I have not been able to find that Coombe possessed before settlement any specific knowledge of the facts relating to the status of the units and the stoves which were known to the female defendant. Ought he to have found them out? Would a solicitor acting on behalf of the plaintiff with reasonable skill and competence have found them out? That is the test which, in my view, has to be applied. A professional man is only liable for the use of ordinary care and skill. He is not bound to guarantee against all mistakes or omissions or to be gifted with powers or divination or to exercise extraordinary foresight, learning or vigilance.....
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> .....
>
> I do not think a solicitor is bound to know the provisions of all the by-laws of all the local government authorities in South Australia, or even to inquire into the possible existence of relevant by-laws unless there is something to direct his attention to the desirability of such an inquiry. Coombe said he had never heard of lodging houses in contemporary life before this case and I see no reason to disbelieve

him or to think that when a solicitor is advising someone in connection with the purchase of land on which buildings are erected he is bound to enquire into the history of their erection in order to see whether the Building Act and regulations have been in all respects complied with, even though it is perfectly true that a building erected or used in defiance of the provisions of the Act can in theory ultimately be pulled down in certain circumstances (s85 of the Building Act), unless, again, there is something to direct his attention to the necessity for such an inquiry. Nor, in my view, is the mere statement that the property proposed to be purchased includes flats a sufficient warning to put the solicitor on inquiry about these matters. [10]

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[9] Jennings v Zihali-Kiss (1972) 2 SASR 493 .
[10] (1972) 2 SASR 493 at 512 – 514 .

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37. Adopting the language of Bray CJ in that case, I consider that the case that the owners corporation is putting forward against the two firms of solicitors attempts to attribute to conveyancing solicitors powers of divination and an obligation to exercise extraordinary foresight or vigilance. The case is fanciful and, in my view, untenable.

38. Ms Hannon put a further argument as to why neither of the two firms of solicitors can be a "concurrent wrongdoer" as described in s 24AH(1) . The argument was that, even if they were wrongdoers, they were not wrongdoers concurrently with the owners corporation, because they did not concurrently with the owners corporation cause "the loss or damage that is the subject of the claim". Rather, she submitted, because the alleged wrongdoing was done at different times the loss or damage caused by each act of wrongdoing would have to be different: any loss or damage suffered at the time that each applicant entered into her contract to purchase her lot – loss or damage caused by her solicitor's negligence – could not be the same as any loss or damage suffered at a later date, when the owners corporation granted leases to some lot owners but not to the applicants.

39. There are two difficulties with that submission. The first is that the very lack of information in the Points of Claim as to what loss or damage the applicants allege that they have suffered as a result of the owners corporation's alleged breach of the statutory duty to take reasonable care makes it hard to establish that something that the solicitors' firms did or failed to do resulted in different loss or damage. The onus, however, is not upon those opposing an application for joinder to satisfy the Tribunal that each firm of solicitors did not cause the loss or damage that its client alleged that the owners corporation caused; the onus is upon the owners corporation to satisfy the Tribunal that, arguably, each firm of solicitors did cause that loss or damage and so, arguably, were concurrent wrongdoers along with it. So I do not think that that first difficulty stands in the way of the submission being accepted.

40. The second difficulty, however, does. It is that the argument asks me, impermissibly, to reverse the questions of damage and causation by addressing the question of causation before the question of what loss or damage is the subject of the applicants' claim. In *Hunt & Hunt Lawyers v Mitchell Morgan*

Nominees Pty Ltd [11] the High Court was considering a section (s34(2)) of the legislation in New South Wales [12] which is in very similar terms to s 24AH(1) of the Wrongs Act . At paragraph [19], the plurality of the court stated:

> [19] Section 34(2) poses two questions for the court: what is the damage or loss that is the subject of the claim? Is there a person, other than the defendant, whose acts or omissions also caused that damage or loss? Logically, the identification of the "damage or loss that is the subject of the claim" is anterior to the question of causation.

In that case, the plurality identified the loss or damage that was the subject of a mortgagee-lender's claim as being the inability to recover the money it had advanced to a fraudster [13] , and concluded that the fraudster and the solicitors for the lender's broker were concurrent wrongdoers, having caused that loss or damage even though the fraudster had caused the lender to pay out money when it would not have done so but for the fraud, and the solicitors for the lender's broker had not done that but had caused the lender not to have the benefit of any security for the money paid out.

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[11] (2013) 296 ALR 3 .
[12] *Civil Liability Act 2002* (NSW) .
[13] (2013) 296 ALR 3 at [9] .

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41. Despite the lack of information in the Points of Claim about what loss or damage the applicants allege that they suffered as a result of the owners corporation's breach of statutory duties, the only conceivable loss would be an economic loss: a loss measured by the value of an applicant's lot when that applicant had a right to park in an allocated car space on common property, less the value of that lot once the applicant did not have that right. The value of her loss is the economic interest of each applicant which would have been harmed[14] by the wrongdoing of

the owners corporation, if there had been any, and by the wrongdoing of that applicant's solicitor, if there had been any. That is enough to make out a tenable claim that both wrongdoers caused the loss or damage that is the subject of the applicant's claim. The strong likelihood that the amount of the difference in value was different at the time of purchase of the lot from what it was at the time that the leases were granted over the allocated car spaces does not make that claim untenable. So I do not accept that final argument that Ms Hannon advanced.

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[14] (2013) 296 AlR 3 at [24].

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42. For other reasons given above, however, I have concluded that the claim that the owners corporation and the two firms of solicitors are concurrent wrongdoers is untenable, and so the application for joinder of the two firms of solicitors, and for leave to amend the Points of Defence, is dismissed.

43. In accordance with orders I made on 26 May 2016, there will now be a directions hearing in the proceeding.

A. Vassie
Senior Member

15 June 2016