VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

VCAT REFERENCE NO. D270/2005

DOMESTIC BUILDING LIST

CATCHWORDS

Domestic building – amendment of claim – disallowed.

APPLICANT	Construction Engineering (Aust) Pty Ltd (ACN 005 490 773)
RESPONDENT	Victorian Managed Insurance Authority
JOINED PARTIES	David Mitchell, Wendy Cole, Matthew McNeill, Elliott Friedman, Joshua Friedman, Peter Papadopoulos, Rachel Bloom, Geoffrey Moar, Lesley Moar, George Mariotto, June Burchell (Withdrawn by consent), Mr. Fung, Mrs. Fung, Tom Tangas, Helen Davidson, David Graham, David Spedding, Mary Harper, Michael Heath, Marie Malcolmson, Rita Hollins
WHERE HELD	Melbourne
BEFORE	Senior Member D. Cremean
HEARING TYPE	Directions Hearing
DATE OF HEARING	15 May 2007
DATE OF ORDER	24 May 2007
CITATION	Construction Engineering v Victorian Managed Insurance Authority (Domestic Building) [2007] VCAT 875

ORDER

1 I refuse leave to amend the Points of Claim in D270/2005; D429/2005; D891/2005 and D384/2006.

2 I strike out paragraph 10(a) in the Points of Claim in D266/2007.

3 Reserve costs.

4 I direct that this matter be returned before me on 13 June 2007 at 2.15 p.m. at 55 King Street Melbourne- allow 2 hours.

SENIOR MEMBER D. CREMEAN

APPEARANCES:

For the Applicant	Mr N. Frenkel of Counsel
For the Respondent	Mr S. Stuckey of Counsel
For the Joined Parties	No appearance

REASONS

1 The following matters are before me – D270/2005; D429/2005; D891/2005; D384/2006. Also before me is D266/2007.

2 I am asked to order that each of these matters be heard and determined together. I think this is appropriate as they all seem to arise out of the same facts and matters.

3 I am also asked to make various other orders and directions. One of those is that the Applicant be given leave to amend its Points of Claim in D270/2005; D429/2005, D891/2005; and D384/2006. The amendment in each of those is to take the form, as I understand it, of paragraph 10(a) of the Points of Claim in D266/2007. That paragraph reads as follows:

> (a) Section 2 of the Third Insurance Policy applies to the Works to indemnify the insured (ie. the home owners). However, the existence and extent of the builder's obligations are provided in section 3. In *every* case, the obligations of the builder in Section 3 are expressly confined to where there is a "Major Domestic Building Contract". Most importantly, Special Condition 2(c) of Section 3 is expressly confined to where there is a "Major Domestic Building Contract". By virtue of the definition of "Major Domestic Building Contract", insofar as the builder is concerned (as opposed to the insured), the Third Insurance Policy does not apply to the Works. Clause C of Section 2 is expressly limited as follows: "*For the purposes of the indemnity referred to in Clause A of this Section*, any reference in this policy to Major Domestic Building Contract means the major domestic building contract referred to in that Clause A." (emphasis added). The extension of the definition of Major Domestic Building Contract does not apply for any purpose other than for the indemnity provided to the home-owner in Clause A of Section 2.

4 Leave to amend was opposed. I heard the parties on the question and reserved my decision.

5 Having given the matter due consideration, my decision is that the leave sought should not be given. My reasons for that, extend to D266/2007 such that paragraph 10(a) of the Points of Claim in that proceeding cannot be allowed to stand.

6 In support of the application I was referred to s127(1) of the *Victorian Civil and Administrative Tribunal Act* 1998 by which at "any time, the Tribunal may order that any documents in a proceeding be amended". I am satisfied that Points of Claim filed in a proceeding constitute a "document" filed in that proceeding. However, s127(1) confers only a power to order amendment which, by its very nature, need not be exercised. It is a discretionary matter for the Tribunal in each particular case whether to allow an amendment under s127(1) or whether not to do so.

7 It is perfectly true, as was quoted to me by Counsel, that Gowans J in *Hall v National + General Insurance Co Ltd* [1966] VR 355 at 367 said this: "I should allow all such amendments to be made as are necessary for the purpose of determining the real questions in controversy". As his Honour also said in that case: "A claim sought to be raised by amendment may appear to have not much chance of success, but unless that is demonstrably so, the amendment should not be refused".

8 I consider, consistently with his Honour's remarks, that it is "demonstrably so" in this case that the amendments sought should not be allowed. I think this is so because of a previous determination made in each of the proceedings in question by Deputy President Aird. The statement made by Winneke P in *Howarth v Adley* [1996] 2 VR 535 at 542 must be understood in the light of other legal principles which apply. He there said that the "fundamental principle which … should guide a trial judge upon an application by a party to amend his pleadings so as to plead a new or alternative claim or defence is that such an application should ordinarily be allowed provided that any injustice arising to the other party from so doing can be compensated by the imposition of terms". I cannot think that the learned President intended to be saying that a party might amend even though previously having been unsuccessful in obtaining orders supportive of the substance of the amendment. Indeed, I think this is allowed for by his Honour's use of the word "ordinarily" – an application to amend should be allowed only "ordinarily". I cannot think that his Honour would have allowed the amendments sought in this case in light of the previous determination made in these proceedings by the learned Deputy President.

9 The learned Deputy President in a reserved decision given on 23 January 2007 determined as follows: "The Tribunal being satisfied the Respondent had power to give the directions the subject of this proceeding, the preliminary applications by the Applicant are dismissed". In paragraphs 21, 22 and 23 of her Reasons for Decision she said:

> 21. Further I accept the Respondent's submission that it is unthinkable that the legislature would have enacted s44 if its effect and intent were not capable of performance. Section s44 enables the VMIA to 'give reasonable directions to the builder' to carry out rectification and completion works, to the extent that HIH was able to give such direction under the terms of a relevant policy. There would have been little point in including in the legislation to give effect to the HIH Recovery Scheme a provision that was not capable of performance.
>
> 22. This power to direct and all of Section 3 is additional to the provisions set out in Sections 1 and 2 relating to the relationship with the owners. It is clearly stated in the Special Conditions that these provisions are not subject to the Ministerial Order. There is nothing in the Ministerial order that states that any policy can <u>only</u> include the specified provisions and must not include additional provisions.

> 23. Although I am satisfied the Respondent is empowered under s44 and the relevant policy to direct the builder to carry out rectification works, I make no finding as to whether the direction was reasonable or appropriate in this case. That is a matter to be determined at another time. As I have not heard argument on the question of costs, I will reserve costs with liberty to apply.

10 I was provided with a copy of the Application dated 4 August 2006 which was what was addressed by the Deputy President in her Reasons. That application reads as follows:

> The Applicant applies to the Victorian and Civil Administrative Tribunal for the following orders or declarations:
>
> 1. A declaration that the Respondent had no power to give the directions the subject of the proceeding.
>
> 2. Alternatively to paragraph 1 above, an order that the Respondent's directions the subject of the proceeding be struck out.
>
> 3. An order that the Respondent pay the Applicant's cost of the proceeding.
>
> The basis for the Application is that the Respondent had no power to give the directions the subject of the proceeding.

11 I was also provided with a copy of the Statement of Legal Contentions of the First Respondent which clearly addresses, in various paragraphs, the orders or declarations sought by the Applicant. That Statement, I understand, was before the Deputy President.

12 In these circumstances, it seems to me that Deputy President Aird, in a carefully reasoned decision, has addressed, already, the very issue sought to be re-agitated by the Applicant by the leave sought. And she has decided the matter against the Applicant, in no uncertain terms. Counsel, admitted the argument now sought to be raised was one which could have been raised previously, but was not.

13 I think it follows that to seek, in effect, to re-litigate the same issue is an abuse of process. I refer to what the Full Court said in *Shillito v Bent* [1973] VR 762 at 765 which was quoted to me: "It is, in our view, plain that those issues [referred to by their Honours] have already been finally determined against the present plaintiffs in the former action, and to seek to relitigate them in the present proceedings is, we think, clearly an abuse of process of the Court".

14 No appeal has been taken from the Deputy President's determination and it seems to me that the matter, therefore, falls within the doctrine of issue estoppel. That doctrine applies in the Tribunal. I refer to the remarks of Dixon J in *Blair v Curran* (1939) 62 CLR 464 at 531-2 (quoted by Gyles J in *Shephard v Chiquita Brands (South Pacific) Ltd* [2002] FCA 466 at [247]) who said:

> "A judicial determination directly involving an issue of fact or of law disposes once and for all of the issue so that it cannot afterwards be raised between the same parties or their privies. The estoppel covers only those matters which the prior judgment, decree or order necessarily established as the legal foundation or justification of its conclusion …. Nothing but what is legally indispensable to the conclusion is thus finally closed or precluded".

To this reference I might add remarks of Lloyd J in *Helmville Ltd v Astilleros Espanoles J A* [1984] 2 Lloyd's Rep 569 at 572, which were not cited to me.

15 It seems to me that the learned Deputy President's determination must necessarily defeat the leave application now sought. It is true as Gillard J mentions in *Kingston City Council v Monash City Council* [2001] VSC 41 at [137] that: "A court may refuse to apply the plea [of issue estoppel] where there are special circumstances and to do so would produce an injustice", I was, however, unable to identify any "special circumstances" which could arise in this case. The matter was fully argued before the Deputy President. The central issue of concern to her was the First Respondent's power to give directions. She determined that point – adversely, as I have noted, to the Applicant. And, as I have also already noted, also, the opportunity was there for the Applicant to argue the point now sought to be raised. But it was not argued. If there is any injustice to the Applicant – and I am not satisfied of that – in not being allowed to re-agitate a matter, and argue a point which could have been argued in the first place but was not, then I am satisfied that the cause of the same is the Applicant itself. The matter, however, having previously been argued fully – except as to the point now sought to be raised – it would work a considerable injustice on the First Respondent to have to face the matter again and re-argue for the determination already made. That, in my view, is where the abuse of process comes in: a party having succeeded on a point of principle, in a properly argued case, being called on to argue the matter again to counter a point which should have been put in the first place but which, evidently, was overlooked or not thought of. This is not conducive to proceeding expeditiously or fairly or, for that matter, economically.

16 I have indicated that the Deputy President, in my view, disposed of the proposition underlying the present application for leave to amend – and did so unfavourably to the Applicant. It would not be proper to allow the matter to be re-argued in the circumstances I have set out. There is nothing special about the matter which would induce me to hold otherwise.

17 The Deputy President's ruling followed the opportunity of full argument and full submissions. It responded directly to the application made to her. The present leave applications seem to proceed on the basis that what she determined may now be revisited.

18 I disagree for the reasons I have given.

19 In proceedings D270/2005; D429/2005; D891/2005; and D384/2006 I decline to give leave. My reasons for refusing leave, lead me to hold that paragraph 10(a) in the Points of Claim in D266/2007 cannot stand and must be struck out.

20 I reserve costs.

21 I direct that this matter be returned before me for the making of further orders and directions. I would be hopeful that this matter could now be expedited, somewhat. It first began, after all, 2 years ago.

SENIOR MEMBER D. CREMEAN