VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL
CIVIL DIVISION

VCAT REFERENCE NO. D457/2014

BUILDING AND PROPERTY LIST

CATCHWORDS

DOMESTIC BUILDING – Section 75 of the *Victorian Civil and Administrative Tribunal Act 1998* – relevant criteria considered – whether it is open and arguable that the policy of warranty insurance indemnifies the home owners where the contracted builder is not specifically named in the certificate of insurance – whether it is open and arguable that the insurer owed the home owners a duty to warn that the policy of insurance did not respond to work undertaken by the contracted builder – whether the claim for misleading and deceptive conduct is open and arguable.

FIRST APPLICANT	Priya Palachanda
SECOND APPLICANT	Madappa Palachanda
FIRST RESPONDENT:	John Carreras t/as Carreras Construction Group
SECOND RESPONDENT:	Jacqui Carreras t/as Carreras Design & Construct
FOURTH RESPONDENT:	Samuel Perna
FIFTH RESPONDENT:	Samuel Perna & Associates Pty Ltd (ACN:078 865 059)
SIXTH RESPONDENT:	QBE Insurance (Australia) Limited (ACN: 003 191 035)
SEVENTH RESPONDENT:	Victorian Managed Insurance Authority (ABN 396 824 978 41)
WHERE HELD:	Melbourne
BEFORE:	Senior Member E. Riegler
HEARING TYPE	Interlocutory hearing
DATE OF HEARING	14 May 2015
DATE OF ORDER	26 May 2015
CITATION	Palachanda v Carreras trading as Carreras Construction Group (Building and Property) [2015] VCAT 748

ORDERS

1. The Sixth and Seventh Respondents' application to dismiss or strike out the Applicant's claim against them is dismissed.
2. Costs reserved.

SENIOR MEMBER E. RIEGLER

APPEARANCES:

For the Applicants	Mr C Northrop of counsel
For the First Respondent	No appearance
For the Second Respondent	No appearance
For the Fourth Respondent	No appearance
For the Fifth Respondent	Ms S Kirton of counsel
For the Sixth Respondent	Ms S Kirton of counsel

REASONS

1. This interlocutory hearing concerns an application by the Sixth and Seventh Respondents (**'the Insurers'**) seeking orders that the Applicants' claims against them be struck out or dismissed pursuant to s 75 of the *Victorian Civil and Administrative Tribunal Act* 1998 (**'the Act'**)..

Section 75

2. Section 75 of the Act empowers the Tribunal to strike out a claim found in a pleading.[1] The test to be applied in determining an application under s 75 is one that should be exercised with great care and should never be exercised unless it is clear that there is no question to be tried.[2]

3. Section 75 does not allow the Tribunal to strike out a pleading that merely displays poor drafting.[3] Therefore, s 75 is not to be used as a mechanism to have a 'pleadings' summons only.[4] It must be exercised when there are no merits to the claim, rather than when the pleadings have not been sufficiently detailed. In *West Homes (Australia) Pty Ltd v Crebar Pty Ltd & Ors* the Tribunal stated:

> [11] It is basic that the Tribunal should require that this duty be observed. Otherwise, natural justice will be denied. Often, though, it is quite possible for a party to make its case known sufficiently without having to resort to fine legalese. Indeed, fine legalese can often obscure. Moreover, the Tribunal is not bound to proceed with all technicality and undue formality. A so-called *"pleading"* summons invites excessive semantical debate. Ideally, Points of Claim, or of Defence, should normally be able to be understood by the average person.[5]

4. The general principles applicable to applications made under s 75 of the Act were succinctly set out in *Norman v Australian Red Cross Society*.[6] Those principles are summarised as follows:

   (a) The application is for the summary termination of the proceeding; it is not the full hearing of the proceeding.

   (b) The Tribunal's procedure on the application is in its discretion. The application may be determined on the pleadings or by way of submissions, or by allowing the parties to put forward affidavit material or oral evidence.

   (c) If a party indicates to the Tribunal that the whole of their case is contained in the material put before the Tribunal, the Tribunal is entitled to determine the matter by asking whether, on all the material

[1] *Yim v State of Victoria* [2000] VCAT 821.
[2] *Fancourt v Mercantile Credits Ltd* (1983) 154 CLR 87 at [99].
[3] *West Homes (Australia) Pty Ltd v Crebar Pty Ltd & Ors* [2001] VCAT 46.
[4] *Barbon v West Homes Australia Pty Ltd* [2001] VSC 405.
[5] *West Homes (Australia) Pty Ltd v Crebar Pty Ltd & Ors* [2001] VCAT 46 at [11].
[6] (1998) 14 VAR 243.

placed before it, there is a question of real substance to go to a full hearing.

(d) The Tribunal should exercise caution before summarily terminating a proceeding.

(e) For a dismissal or strike out to succeed, the proceeding must be obviously hopeless, obviously unsustainable in fact or in law, can on no reasonable view justify relief, or be bound to fail.

(f) A complaint cannot be struck out as lacking in substance merely because it does not in itself contain the evidence supporting the claims made.

5. Further, in *Forrester v AIMS Corporation*,[7] Kaye J stated that:

> It was not for the Tribunal, at least at an interlocutory stage of the proceedings, to conduct a pre-trial assessment of the complainant's evidence to determine whether the complainant can prove his case. Such an approach is incorrect and inappropriate unless the complainant clearly concedes that the material he or she has placed before the Tribunal contains the whole of the complainant's case.

6. Indeed, the correct approach to adopt on an application under s 75 is to assume that the applicant will be able to prove each fact alleged in the claim in question.[8] In other words, a proceeding should not be dismissed or struck out under s 75 if the ultimate fate of the proceeding depends upon contested questions of fact that would be established or eliminated by cross-examination.[9]

Background facts

7. On 27 November 2011, the Applicants (**'the Owners'**) entered into a building contract with an entity named Primary Building Group Pty Ltd (**'PBG'**) for the construction of a dwelling on their property located in Balwyn North.

8. In accordance with the provisions of the *Building Act 1993*, PBG was required to procure warranty insurance indemnifying the Owners in respect of any breach of the warranties given by it pursuant to s 8 of the *Domestic Building Contracts Act 1995*. In order to procure that warranty insurance, PBG applied to the Insurers for the requisite insurance facility. However, its application for an insurance facility was rejected by the Insurers.

9. On 14 May 2012, the First Respondent, who at that time was also a director of PBG, together with the Second Respondent, formed a partnership under the trading name Carreras Construction Group (ABN 70 586 490 090).

[7] (2004) 22 VAR 97.
[8] *Boek v Australian Casualty and Life* [2001] VCAT 39.
[9] *Evans v Douglas* [2003] VCAT 377 at [9].

10. Following the formation of that partnership, the First and Second Respondents submitted another application for warranty insurance eligibility. On 17 May 2012, the Insurers provided Carreras Construction Group with an insurance facility for domestic building projects that it proposed to undertake. The certificate of eligibility named the First and Second Respondents personally, given that they were the legal entities behind that trading name.

11. On 17 May 2012, the Insurers forwarded an email to the First and Second Respondents' insurance broker stating, amongst other things:

> *Please note that an amended/new building contract will need to be executed to reflect new building entity*.

12. The Owners contend that this email correspondence evidences that the Insurer had knowledge of the contract previously entered into between the Owners and PBG. Otherwise, there was no need to note that a new building contract reflecting the new building entity would need to be to be executed.

13. On 21 May 2012, the Insurers issued a certificate of domestic building insurance which identified the Owners as the home owners, their property as the relevant building site and that domestic building work was to be carried out by the First and Second Respondents. The First and Second Respondents were identified on the certificate by their names and also by reference to their ABN 70 586 490 090.

14. PBG did not complete the building works and as a consequence, the Owners terminated the building contract on or about 23 December 2013.

15. Subsequently, the Owners lodged a claim for indemnity with the Insurers. Initially, the claim was denied on the ground that the First and Second Respondents were not insolvent and as a consequence, no insurable event had crystallised. However, the Insurers subsequently amended their defence and now further deny the claim on the ground that the Owners did not enter into a building contract with the insured entity.

The claims as pleaded

16. The Owners *Amended Points of Claim* dated 27 February 2015 couch the claims against the Insurers as follows:

    (a) First, the Owners claim against the Insurers pursuant to the contract of insurance (paragraphs 27 to 41). In that respect, the Owners contend that the policy of insurance extends to work undertaken by the PBG, notwithstanding that the certificate of insurance names the First and Second Respondents and does not specifically state PBG.

    (b) Second and alternatively, the Owners claim that the Insurers were under a duty to warn the Owners that the policy of

insurance did not apply to work performed by PBG under the building contract.

(c) Third and alternatively, the Owners claim that the Insurers engaged in misleading and deceptive conduct contrary to s 18 of the *Australian Consumer Law and Fair Trading Act 2012* by not disclosing to the Owners that the policy of insurance did not respond to work performed by the builder named in the building contract (PBG).

Contractual Claim

17. In paragraph 29 of *Amended Points of Claim* it is alleged that there was a common intention between the Owners and the Insurers at the time the policy of insurance was procured that indemnity would be provided in respect of the domestic building work carried out by PBG. The particulars subjoined to that paragraph state:

> The intention is to be inferred from the fact that the certificate referred to the building contract and that the letter of 21 May 2012 refers to building works the applicants had agreed to have carried out.

18. It is alleged that the certificate of insurance, on its face, expressly identifies the Builder. In particular, the certificate of insurance issued by the Insurer stated:

Domestic Building Work	NEW SINGLE DWELLING CONSTRUCTION CONTRACT
At	MOUNTAIN VIEW ROAD BALWYN EAST VIC 3103
Carried out by the builder	BUILDER
	JOHN PETER & JACQUI CARRERAS
	ABN: 70 586 490 090
For the building owner	MADAPPA & PRIYA PALACHANDA
Pursuant to a domestic building contract dated	27/11/2011

19. At paragraph 35 of the *Amended Points of Claim*, it is alleged that the word *BUILDER* is to be interpreted to mean or identify PBG. It is further alleged that if the word BUILDER does expressly identify PBG, then by reason of the 'common intention' of the parties, the certificate of insurance should be rectified to record the name of the builder as PBG.

20. Mr Northrop of counsel, who appeared on behalf of the Owners submitted that the covering letter to the certificate of insurance dated 21 May 2012 sent by the Insurers begins with the sentence:

> Your builder has requested that QBE insurance (Australia) Limited issue domestic building insurance for the building that you have agreed to have the builder carry out.

21. Mr Northrop argued that the expression 'your builder' could only mean PBG because it was the only entity which had contracted with the Owners under a contract dated 27 November 2011, being the date of the contract referred to in the certificate of insurance. Mr Northrop submitted that this proposition is more than merely arguable having regard to the fact that the Insurers were aware that the building contract dated 27 November 2011 named PBG. As indicated above, this is said to be inferred from the fact that the Insurers wrote to the First and Second Respondents' insurance broker by letter dated 17 May 2012 stating that the contract needed to be amended to reflect the partnership of the First and Second Respondents as the building entity. Mr Northrop further submitted that if there is any ambiguity in the certificate of insurance, then it will be construed *contra proferentum*.

22. Ms Kirton of counsel, who appeared on behalf of the Insurers, submitted that as a matter of law, the policy of warranty insurance could not apply if there was no building contract with the entity named in the certificate of insurance. In that regard, she drew my attention to the judgment of Judd J. in *Zephyr Property Developments Pty Ltd v Contractors Bonding Limited*.[10] In *Zephyr*, the relevant certificate of insurance named a different corporate entity to the corporate entity which had contracted with the homeowner. Despite the fact that both corporate entities shared a common director, being the relevant registered building practitioner, his Honour stated:

> [49] The reference to Mr Bordin in the Certificate of Insurance as builder is probably a reflection of the requirement that the company entering into a building contract must identify its directors who qualify the company as a "building practitioner" entitled to enter into a building contract.[11] In any event, Mr Bordin did not enter into the contracts or purport to carry out the work.
>
> …
>
> [51] In my opinion, the legislative scheme under which s 135 was introduced establishes a regime requiring builders, such as P3, to be covered by the required insurance. The regime does not purport to otherwise interfere with the contractual relationship between the parties to a contract of insurance, except to prescribe the terms

[10] [2008] VSC 122.
[11] Section 29 (c) of the *Domestic Building Contracts Act 1995*; see also s 31(1)(iii) of that Act.

upon which the cover must be provided. In particular, it does not purport to increase or vary the risk undertaken by an insurer, so as to extend cover to work done by a builder who did not comply with its obligations to obtain insurance cover on whose behalf insurance cover was never obtained from an insurer.

23. *Zephyr* was followed by this Tribunal in *Elturan v Unicon Property Group Pty Ltd*.[12] The facts in *Elturan* are somewhat similar to those in *Zephyr*. In *Elturan* the certificate of insurance named Mick Cvetkovski, trading as Miva Constructions Pty Ltd as the relevant builder. However, the building contract named Unicorn Property Group Pty Ltd as the builder. Mr Cvetkovski was a director of both Miva Constructions Pty Ltd and Unicorn Property Group Pty Ltd. He was also the registered building practitioner. The Tribunal stated:

> [95] The Calliden insurance policy provides insurance cover in respect of loss or damage resulting from defective or incomplete *work*. The policy defines *work* as the domestic building work which is carried out or to be carried out by the builder to the dwelling *under the contract* and the *contract* means the contract between [the owners] and the builder *pursuant to which* the work is being, or is about to be, carried out.
>
> [96] The builder *under the contract* with the owners was Unicorn, not Mr Cvetkovski or Miva Constructions Pty Limited. The insurance certificate refers to works to be carried out by Miva Constructions Pty Ltd, not Unicorn.

24. The facts in the present case are distinguishable from both *Zephyr* and *Elturan.* In the present case, it is not said that the policy of insurance responds merely because the director (and relevant registered building practitioner) of PBG is the same person named on the certificate of insurance. Here, it is contended that the word *BUILDER* in the certificate of insurance is a specific reference to PBG, such that the policy of insurance expressly names not only the registered building practitioner (albeit under the trading name of Carreras Construction Group) but also PBG.

25. In my view, the proposition advanced by the pleading is, at the very least, arguable. Therefore, I am not satisfied that, in the context of this interlocutory hearing, it can be said with certainty that the allegation that the word *BUILDER* means PBG is so *obviously hopeless, obviously unsustainable in fact or in law, can on no reasonable view justify relief, or be bound to fail*. Indeed, the question arises why the section of the certificate of insurance which states: *Carried out by the builder* is answered by both the word *BUILDER* and the words *John Peter & Jacqui Carreras*. It is arguable that to give the word *BUILDER* no

[12] [2013] VCAT 924.

separate and distinct meaning would make its inclusion in the certificate of insurance otiose.

Alternative claims

26. As indicated above, the Owners' alternative claims are couched in terms of a duty to warn or alternatively, a claim for misleading and deceptive conduct on the part of the Insurers. The facts, as pleaded (or particularised), allege that the Insurers were aware that a building contract had been entered into between the Owners and PBG but nevertheless issued a certificate of insurance which expressly referred to a building contract dated 27 November 2011, the Owners, and the relevant building site. The only difference between the particulars described in the certificate of insurance and the building contract was that it named a different building entity (assuming the Owners' contention that the word *BUILDER* is not construed to mean PBG).

27. Mr Northrop submitted that in circumstances where the Insurers were aware that a contract had been entered into between the Owners and PBG, it was incumbent upon them to unambiguously warn the Owners that the policy did not respond to work undertaken by PBG. He referred to the joint judgment of French CJ and Kiefel J in *Miller & Associates v BMW Australia*,[13] where their Honours stated:

> 14. In determining whether there has been a contravention of s 52 of the *Trade Practices Act*, it is necessary to determine "whether in the light of all relevant circumstances constituted by acts, omissions, statements or silence, there has been conduct which is or is likely to be misleading or deceptive" (45). The term "conduct" is to be understood according to its definition in s 4(2)(a) and (b) of the *Trade Practices Act*, which includes a reference to "refusing to do any act". That, in turn, includes a reference to "refraining (otherwise than inadvertently) from doing that act" (46).

28. Ms Kirton submitted that, even if it could be proven that a duty to warn was owed by the Insurers to the Owners, it is clear that such a duty has been discharged in the present case. In that respect, she referred me to the covering letter to the certificate of insurance forwarded to the Owners dated 21 May 2012 which stated:

> You will need to carefully review the information contained on the Certificate of Insurance and ensure that it accurately reflects the building works being performed. In particular, you should check the information listed on the Certificate of Insurance against your building contract as follows:
>
> - Is the builder name correct?

[13] (2010) 241 CLR 357 at [14]. Footnotes omitted.

- Is the declared contract price on the certificate the same as the price listed in your building contract?

If the answer to either of these questions is no, or you are unsure, please contact QBE on 1300 790 723 for advice.

29. Ms Kirton referred to an earlier decision of the Tribunal in *Shumsky v Visintin*,[14] where I found that the owners in that case had been sufficiently informed of the need to check any discrepancy between the building contract and the certificate of insurance by reference to the same words, as set out above.

30. The facts and the matters under consideration in the present case are somewhat different to those in *Shumsky*. Here, the facts are complicated by the allegation that the Insurers knew that a contract naming PBG had already been entered into between the Owners and that building entity. It may be that those facts are relevant to the question whether the Owners had been sufficiently informed. In my view, it is premature to judge that aspect of the Owners' claim, especially in circumstances where evidence is yet to be heard.

31. Consequently, I do not consider that the alternative claims set forth in the pleading can be said to be unarguable. Further evidence would need to be adduced in order to allow the Tribunal to fully consider the alternative claims made by the Owners and it is inappropriate to summarily dismiss those claims in the context of this interlocutory application.

32. Accordingly, the application to dismiss or strike out the Owners' claim is dismissed.

SENIOR MEMBER E. RIEGLER

[14] [2015] VCAT 172.