VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

DOMESTIC BUILDING LIST VCAT REFERENCE NO. D656/2006

CATCHWORDS

Section 75 of *Victorian Civil and Administrative Tribunal Act* 1998 – strike out application – allegation that insurer: 'elected to make good', 'breach of duty of utmost good faith owed to the applicant owners', 'is a builder within the meaning of s3 of the *Domestic Building Contracts Act* 1995' – whether allegations *'frivolous, vexatious, misconceived or lacking in substance'*,

APPLICANTS	Gavin Wood, Sarah Wood
FIRST RESPONDENT	Calliden Insurance Limited (ACN 004 125 268)
SECOND RESPONDENT	Archicentre Ltd
THIRD AND FOURTH RESPONDENTS	John Sinnott, Vicki Sinnott
FIFTH AND SIXTH RESPONDENTS	Craig Donald Knell, Peta Jane Knell
SEVENTH AND EIGHTH RESPONDENTS	Aleks Kulesza, PBC Shell Pty Ltd (formerly known as Precision Building Consultants Pty Ltd) (ACN 006 846 713)
NINTH AND TENTH RESPONDENTS	Joseph Barbalaco, Design Guide Consultants Pty Ltd (ACN 066 168 009)
ELEVENTH RESPONDENT	Nicholas Palamaras
WHERE HELD	Melbourne
BEFORE	Deputy President C. Aird
HEARING TYPE	Hearing
DATE OF HEARING	21 May 2008
DATE OF ORDER	4 July 2008
CITATION	Wood v Calliden Insurance Limited & Ors (Domestic Building) [2008] VCAT 1339

ORDER

1. Paragraphs 43 – 47 of the Applicant's Further Amended Points of Claim filed 7 February 2008 are struck out.

2. The First Respondent's application under s75 of the *Victorian Civil and Administrative Tribunal Act* 1998 filed on 22 February 2008 is otherwise dismissed.

3. The applicants' application that the first respondent make further discovery dated 27 February 2008 is listed for hearing before Deputy President Aird on 22 July 2008 at 55 King Street, Melbourne at 10.00 a.m. The second to eleventh respondents are excused from attending but may do so.

4. Costs reserved – liberty to apply. I direct that any application for costs be listed for hearing before Deputy President Aird. Time permitting, any application for costs may be heard at the directions hearing scheduled for 22 July 2008.

DEPUTY PRESIDENT C. AIRD

APPEARANCES:

For Applicant	Mr J. Forrest of Counsel
For First Respondent	Mr D.A. Klempfner of Counsel
For Second to Eleventh Respondents	Excused from attendance

REASONS

1 In May 2002 the first respondent insurer issued a policy of owner-builder warranty insurance in respect of works carried out to the subject property by the third and fourth respondents ('the Sinnotts'). The property was then sold by the Sinnotts to the fifth and sixth respondents ('the Knells'). In November 2002 the Knells made a claim under the policy alleging various items of defective works. The Knells sought a review of the insurer's decision ('the earlier proceeding'). The Sinnotts and BSS Design Group Pty Ltd were also respondents. Settlement was achieved in July 2004. Clause 1 of the Terms of Settlement provides:

> 1. In full and final settlement of the VCAT claim against the First Respondent [the insurer] the Applicants [the Knells] will:
>
> (a) bear their owns costs of that part of the VCAT proceeding as between the [the insurer] and [the Knells];
>
> (b) rectify, by 31 August 2004, all defects identified in the Report dated 25 March 2003 prepared by John Atchison of Buildcheck ('the rectification works');
>
> (c) ensure that the building practitioners who carry out the rectification works hold appropriate warranty insurance.
>
> (d) within 28 days of completion of the rectification works, produce a certification from John Atchison of Buildcheck, to the effect that the rectification works have been satisfactorily completed;
>
> and [the insurer] will bear its own costs of the VCAT proceeding.

Clause 8 provides:

> In consideration of the parties entering into these Terms of Settlement, effective upon receipt by [the Knells] of the said sums [the Knells] forever release [the insurer] from all claims suits demands and causes of action made by [the insurer] in the VCAT proceeding, including a claim for costs, against [the insurer] or arising out of or incidental to the subject matter of the VCAT claim.

Clause 10 provides:

> In consideration of the parties entering into these Terms of Settlement, effective upon receipt of the certificate referred to in clause 1(d) [John Atchison's certification that the works had been satisfactorily completed], [the insurer] forever releases [the Knells] from all claims suits demands and causes of action made by [the insurer] in the VCAT proceeding, including a claim for costs, against [the Knells] or arising out of or incidental to the subject matter of the VCAT claim.

2 Work was carried out and on 24 September 2004 the Knells sought an extension of time from the insurer for the provision of the final report due on 28 September *'due to the difficult of getting tradespeople and the inspector back'* (sic).

3 On 5 October 2004 John Atchison wrote to the Knells advising:

> At your request we attended the above-mentioned property on the 28th September 2004, to inspect the completed repair works of those items detailed in our report 10097.
>
> As the works have been completed we can only comment on the end result and not on the quality of execution. (emphasis added)

He also identified some outstanding works.

4 On 18 October 2004 Craig Knell made a Statutory Declaration confirming that all outstanding items contained in the Buildcheck Report dated 5 October 2004 had been completed.

5 By contract of sale dated 6 November 2004 the Knells sold the property to the applicants in this proceeding ('the Woods'). On 7 June 2006 the Woods made a claim under the relevant policy of warranty insurance and subsequently commenced these proceedings seeking a review of the insurer's decision.

6 At a directions hearing in January 2008 I joined a number of parties to the proceeding, and gave the Woods leave to file and serve Further Amended Points of Claim. At the time, Mr Klempfner of counsel who appeared on behalf of the first respondent insurer, indicated the insurer had concerns about some of the paragraphs in the proposed Further Amended Points of Claim. I expressly reserved liberty to it (and the Third and Fourth Respondents) *'to apply in relation to any objections they may have in relation to such Amended Points of Claim'*. (There was insufficient time for the hearing of the objections at that time). However, I suggested to counsel that the insurer might consider deferring any application until after the compulsory conference which was foreshadowed at the directions hearing. Orders were not made for a compulsory conference then so as to enable the additional respondents to consider the material and, in particular, the experts reports which had previously been filed. The matter was set down for a further directions hearing on 28 February 2008.

7 On 22 February 2008 the insurer filed an Application for Orders/Directions seeking that paragraphs 40-47 of the Further Amended Points of Claim be struck out under s75 of the *Victorian Civil and Administrative Tribunal Act* 1998. This application was accompanied by an affidavit in support from its solicitor, Mr Rodriguez. On 27 February 2008 the Woods filed an Application for Orders/Directions seeking further discovery. This application was accompanied by an affidavit in support from their solicitor, Ms Hodges.

8 When the matter came before me for directions on 28 February 2008 concern was expressed by Mr Forrest of counsel, appearing on behalf of the Woods, that the s75 application had been made notwithstanding my comments and observations made at the directions hearing in January. Mr Klempfner conceded he had not passed on those comments to his instructor

but confirmed the insurer wished to proceed with its application for *'tactical reasons'*.

9 The insurer's strike out application and the Woods' application for further discovery were set down for hearing on 21 May 2008. As these applications only concerned the Woods and the insurer, the other parties were excused from attending. Orders were made for the filing and exchange of legal contentions and legal contentions in reply. At the s75 hearing, counsel spoke to these carefully prepared and helpful contentions.

10 At the s75 hearing leave was granted to the Woods to file and serve further written contentions in response to the insurer's oral submissions that the allegation that the insurer had breached its duty of utmost good faith to them was untenable and should be struck out. Counsel for the Woods and the insurer agreed it was inappropriate to hear the Woods application for further discovery until the insurer's s75 application had been determined.

The insurer's s75 application

11 The insurer contends that the paragraphs in the Further Amended Points of Claim relating to the following allegations should be struck out pursuant to s75 of the *VCAT Act*:

i That the insurer breached a duty of good faith owed to the Woods and an implied term of a policy of insurance issued by the insurer (paragraphs 38 – 42); and

ii That the insurer is a builder as defined in s3 of the *Domestic Building Contracts Act* 1995 ('the *DBC Act*') and breached a duty of care it owed to the Woods as a builder (paragraphs 43 – 47).

12 Section 75 of the *VCAT Act* provides:

> (1) At any time, the Tribunal may make an order summarily dismissing or striking out all, or any part, of a proceeding that, in its opinion—
>
> (a) is frivolous, vexatious, misconceived or lacking in substance; or
>
> (b) is otherwise an abuse of process.
>
> (2) If the Tribunal makes an order under sub-section (1), it may order the applicant to pay any other party an amount to compensate that party for any costs, expenses, loss, inconvenience and embarrassment resulting from the proceeding.
>
> …
>
> (5) For the purposes of this Act, the question whether or not an application is frivolous, vexatious, misconceived or lacking in substance or is otherwise an abuse of process is a question of law".

13 The hurdle to be overcome by a party making an application under s75 is very high. As Judge Bowman said in *Arrow International Australia Pty Ltd v Indevelco Pty Ltd* [2005] VCAT 306 at [32 and 34]:

> 31. There have been a number of decisions of the courts generally and of this Tribunal in relation to the principles which operate when applying a provision such as S.75 of the Act. In relation to this Tribunal, these were summarised by Deputy President McKenzie in *Norman v Australian Red Cross Society* (1998) 14 VAR 243. One such principle is that, for a dismissal or strike out application to succeed, the proceeding must be obviously hopeless, obviously unsustainable in fact or in law, on no reasonable view justify relief, or be bound to fail. This is consistent with the approach adopted by the courts over the years. As was stated by Dixon J in *Dey v Victorian Railways Commissioners* (1949) 78 CLR 62:-
>
> > "The application is really made to the inherent jurisdiction of the court to stop the abuse of its process when it is employed for groundless claims. The principles upon which that jurisdiction is exercisable are well settled. A case must be very clear indeed to justify the summary intervention of the court to prevent a plaintiff submitting his case for determination in the appointed manner by the court …".
>
> …
>
> 34. Whether or not a burden of proof in the strict sense exists in proceedings before this Tribunal, I am also of the view that the party making an application such as this is required to induce in my mind a state of satisfaction that the claim is obviously hopeless, unsustainable, and bound to fail, and that it is "very clear indeed" that this is so. (emphasis added)

14 Although at the commencement of the hearing Mr Kelmpfner indicated this was not a pleading summons it is clear that is exactly what it is. The submissions on behalf of the insurer concentrate on the specific wording used by the applicants in their Further Amended Points of Claim, and whether they disclose a tenable cause of action against the insurer. However, I reject the suggestion by Mr Forrest that the insurer should have sought particulars before making its s75 application. Particulars will not remedy an allegation which is *'frivolous, vexatious, misconceived or lacking in substance'*,.

15 It must be remembered that in considering an application under s75 I am not required to consider or be satisfied as to the likely success of the Woods' claim. I am required to consider whether the allegations are *'frivolous, vexatious, misconceived or lacking in substance'*, in other words, whether they are doomed to fail. This does not contemplate a detailed consideration of the evidence. As Senior Member Cremean observed in *Johnston v Victorian Managed Insurance Authority* [2008] VCAT 402 at [15-17]:

15. …. I do not think Parliament intended that the Tribunal should be functioning as a court of pleadings. From time to time, of course, and contained within the Sixth Respondent's submissions, it is expressly disclaimed that the Tribunal is a court of pleadings. And that remains the reality: the Tribunal is not a court in the normal sense of that word and is not, most definitely, a court of pleadings.
16. There is also this point. The primary function of the tribunal, apart from alternative dispute resolution, is to conduct hearings. A hearing is a trial of the action. There should not be a trial before a trial.
17. It is convenient to deal with the Sixth Respondent's application under s75. The hurdle to be overcome under s75 is very high. The case for strike out or dismissal must be plain and obvious; clear untenability must be quite apparent: see *General Steel Industries Inc v Commissioner for Railways* (NSW) (1964) 112 CLR 125 at 129-30. As Barwick C J said in that case a "plaintiff ought not to be denied access to the customary tribunal which deals with actions of the kind he [she] brings unless his [her] lack of a cause of action ... is clearly demonstrated": at p129. For, as Kirby J said in *Lindon v Commonwealth of Australia (No 2)* (1996) 136 ALR 251 at 256 it is "a serious matter to deprive a person of access to the courts of law for it is there that the rule of law is upheld ..." (emphasis added)

16 In *Lindon v Commonwealth (No 2)* (1996) 136 ALR 251, Kirby J in considering the relevant principles to be applied in an application for summary dismissal said at [14]:

> …
>
> …If there is a serious legal question to be determined, it should ordinarily be determined at a trial for the proof of facts may sometimes assist the judicial mind to understand and apply the law that is invoked and to do so in circumstances more conductive to deciding a real case involving actual litigants rather than one determined on imagined or assumed fact.

and

> …If it is clear that proceedings within the concept of the pleading under scrutiny are doomed to fail, the Court should dismiss the action to protect the defendant from being further troubled, to save the plaintiff the further costs and disappointment …

The allegation that the insurer breached a duty of utmost good faith owed to the Woods and an implied term of a policy of insurance issued by the insurer

17 In paragraphs 38 – 42 of the Further Amended Points of Claim the Woods allege:

38. Further or alternatively, pursuant to the policy of insurance, the First Respondent:

(a) owed the Knells and the Applicants and any subsequent owner of the property for the life of the policy a duty of utmost good faith;

(b) owed the Knells and the Applicants and any subsequent owner of the property for the life of the policy an explicit duty of utmost good faith pursuant to section 13 of the *Insurance Contracts Act* 1984 (Cth); and

(c) could elect to make good defective workmanship undertaken by the Sinnotts or pay damages in respect of the loss and damage suffered by the Knells as a result of the defective workmanship undertaken by the Sinnotts.

39. It was an implied term of the policy that the election to make good would be exercised by the First Respondent:

(a) in good faith;

(b) in a proper and workmanlike manner and in accordance with the plans and specifications;

(c) with reasonable care and skill;

(d) in accordance with all relevant laws (including the Building Act 1993 and the Building Regulations 1999), permits, the Australian Standards and the Building Code of Australia; and

(e) so as to ensure the proper rectification of the defective workmanship the subject of the indemnity under the policy.

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The term is implied by law.

The allegation that the insurer 'elected to make good'

18 Under paragraph 40 of the Further Amended Points of Claim the Woods allege:

40. The First Applicant elected to make good the defective workmanship undertaken by the Sinnotts which included the rectification of the defective workmanship referred to in paragraph 33 hereof.

PARTICULARS

The election to make good was evidenced by the First Respondent's execution of the Terms of Settlement.

The Terms of Settlement provided for the works which were to be undertaken to make good the defective workmanship of the Sinnotts and included the defects referred to in the Buildcheck report and included the restumping of the property.

A copy of this documentation is in the possession of the Applicants' solicitors and is available for inspection by prior appointment.

19 Counsel for the insurer effectively dissected the wording and phraseology used in paragraphs 38 and 40 after referring me to various earlier paragraphs. Much was made by him of the allegation that the insurer's

election to make good was *' evidenced by the … execution of the Terms of Settlement'*, and he argued that this allegation was factually incorrect. The insurer contends that it was not obliged under the Terms of Settlement to do anything other than to bear its own costs of the earlier proceeding.

20 In support of their contention that the insurer elected to make good, the Woods rely on:

(i) the insurer's decisions of 24 and 26 February 2006

(ii) the insurer not withdrawing or amending its decision which they allege was an election to make good the loss

(iii) the Terms of Settlement which they contend required that the election to make good the loss be undertaken by the Knells.

21 The Woods submit that the insurer's position appears predicated on an assumption that the election to make good occurred when the parties entered into the Terms of Settlement. The Woods refute this. They allege that the election to make good is *'evidenced by the insurer entering into the Terms of Settlement'* and that this refers to more than the Terms of Settlement. There appears to be a very real debate about the meaning, interpretation and extent of the phrase 'evidenced by'.

22 Whether the insurer elected to make good requires, amongst other things, an interpretation of the relevant policy wording, the Terms of Settlement and the conduct of the parties prior to and after entering into the Terms. It is inappropriate to decide those questions without hearing the evidence. I cannot be satisfied that the allegation is *'frivolous, vexatious, misconceived or lacking in substance'*

The allegation that the insurer has breached its duty of good faith

23 In clauses 41 – 42 of the Further Amended Points of Claim the Woods allege:

41. The election to make good referred to in paragraph 40 hereof was in breach of the implied term of the policy and the First Applicant's duty of utmost good faith:

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(a) The Knells were not registered domestic builders and were not qualified to perform domestic building works.

(b) The First Respondent did not engage its own registered domestic builder to perform the rectification works the subject of the Terms of Settlement.

(c) The Buildcheck report:

(i) noted that the expert's inspection of the subfloor area of the property was limited; and

(ii) did not identify the precise cause of the excessive foundation movement in the property;

(iii) did not include a geotechnical/structural engineering investigation of the cause of the movement in the property.

(d) Despite the recommendations of its loss adjuster, LAC Building Consultants, in its report dated 10 February 2003 that "*the precise cause of the excessive subsidence should be further investigated as part of the rectification procedure:* (sic*) to ensure that further footing subsidence and superstructure distress does not occur*", the First Respondent did not undertake any such investigations.

The report is in writing and is in the possession of the Applicants' solicitors and is available for inspection by prior appointment.

(e) The cause of the distress and movement to the property was not repaired by the First Respondent.

(f) The works requiring rectification referred to in the Terms of Settlement were not repaired by the First Respondent or the Knells.

(g) The works requiring rectification referred to in the Terms of Settlement were not repaired by the First Respondent or the Knells in accordance with the policy or the Terms of Settlement.

(h) The First Respondent did not undertake any investigation to determine whether the works requiring rectification referred to in the Terms of Settlement had been repaired satisfactorily or at all.

The Applicants refer to paragraphs 24 and 36 hereof.

42. As a result the Applicants have suffered loss and damage.

PARTICULARS

The Applicants refer to paragraph 37 hereof.

24 Counsel for the insurer submitted that the execution by the insurer of the Terms of Settlement could not be a breach of its duty of utmost good faith owed to the Woods because, at the time the Terms of Settlement were executed, the insurer did not owe them a duty of the utmost good faith. I note in passing that the insurer's solicitors appear to have been actively involved in the settlement negotiations in the earlier proceeding, and drafted the Terms of Settlement. Further, the insurer contends that the evidence does not substantiate the Woods' allegations, but as noted above, a strike out application is not a trial before a trial. An assessment of the evidence can only occur after it has been heard and tested and is a matter for the final hearing.

25 These propositions are sufficient to satisfy me that this allegation is not untenable or doomed to fail. Whether, under the statutory regime of builders warranty insurance, the insurer owes subsequent owners a duty of utmost good faith does not appear to have been determined. I was referred to a number of authorities by the insurer but these are concerned with the duty of utmost good faith owed by an insurer to the party with which it is engaged in litigation. They are not concerned with how this might affect the insurer's duties and obligations to subsequent owners under a policy of

builders' warranty insurance. In *Manifest Shipping Co v Uni-Polaris Insurance Co Ltd* [2003] 1 AC 469 the court was concerned with the extent of disclosure by the insured during the course of litigation and *Allianz Australia Insurance Ltd v Douralis & Ors* [2008] VSCA 72 was concerned with the conduct of the insured during the course of litigation. *Imaging Applications Pty Ltd & Anor v Vero Insurance Limited & Ors* [2008] VSC 178, a very recent decision of the Supreme Court forwarded to the Tribunal by the insurer's solicitors, was concerned with the conduct of the insurer during the course of litigation. After considering whether the duty of utmost good faith continued to apply during the course of litigation, Vickery J concluded that *'…the conduct did not constitute a breach of the duty of utmost good faith even if the duty did continue to apply during the course of the litigation'*.

26 Whether the insurer breached its duty of utmost good faith to the Woods, if such a duty was owed to them at the time the Terms of Settlement were entered into, and whether it elected to make good as alleged by the Woods, are not questions to be determined in the absence of hearing all of the evidence and legal submissions. I cannot be satisfied on the material before me that these allegations are *'frivolous, vexatious, misconceived or lacking in substance'*.

The allegations that the insurer is a builder under the definition in s3 of the *Domestic Building Contracts Act* 1995

27 In paragraphs 43 – 47 of the Further Amended Points of Claim the Woods allege:

> 43. Further or alternatively, the First Applicant arranged and/or managed the performance of domestic building works on the property.
>
> **PARTICULARS**
>
> The First Respondent entered into the Terms of Settlement with the Sinnotts and the Knells which required the Knells to perform the domestic building works the subject of the Terms of Settlement.
>
> Otherwise the Applicants refer to paragraph 40 hereof.
>
> 44. As a result, the First Respondent was a builder as defined by s3 of the Domestic Building Contracts Act 1995.
>
> 45. In the circumstances, the First Respondent owed the Applicants a duty of care to arrange and/or manage the performance of the domestic building works the subject of the Terms of Settlement:
>
> (a) in a proper and workmanlike manner and in accordance with Plans and Specifications;
>
> (b) with reasonable care and skill;
>
> (c) in accordance with all relevant laws (including the Building Act 1993 and the Building Regulations 1999), permits, the Australian Standards and the Building Code of Australia; and

(d) so as to ensure the proper rectification of the defective workmanship the subject of the indemnity under the policy.

46. The First Respondent arranged and/or managed the performance of the domestic building works in breach of its duty of care.

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The Applicants refer to the particulars referred to in paragraph 41 hereof.

47. As a result the Applicants have suffered loss and damage.

28 In seems to me quite extraordinary to suggest that an insurer, in entering into terms of settlement under which work is to be carried out for the benefit of the insured, whether by the original builder or a nominated builder, manages and arranges the carrying out of building work. I do not consider that this is a matter of evidence, as suggested by Mr Forrest. As indicated to counsel during the hearing, following the decision of the Court of Appeal in *Shaw v Yarranova* [2006] VSCA 291 it is, in my view, clear that to fall within that definition a person must in colloquial terms be 'getting his hands dirty'. I do not accept the submission by counsel for the Woods that *Yarranova* is to be read in the context of the dispute before the Court of Appeal: insofar as the definition related to developers under contracts of sale of real estate. As Neave JA observed, after considering the policy goals, and legislative context of the *Domestic Building Contracts Act* 1995 ('the *DBC Act*') and, most importantly, the interrelationship between it and the registration and insurance requirements for builders under the *Building Act* 1993:

> I agree with the learned judge below that this requires the words "manage or arrange" and "carrying out of domestic building work" to be read as referring to the "practical activities involved in the work of constructing a building". (emphasis added). [84]

29 It would, in my view, create an entirely unworkable and meaningless regime if an insurer, who entered into terms of settlement such as in the earlier proceeding, was considered to be a builder within the definition of s3 of the *DBC Act*. This would render the terms of settlement a major domestic building contract and would mean that the insurer, who already has a defined statutory role under s137 of the *Building Act* 1995 would, in turn, be required to be registered as a builder, and might even be required to take out insurance and so it would go on. This would create an absurd situation which is surely not within the policy objectives and legislative context of the *DBC Act*.

30 I reject any suggestion that the relevant paragraphs should not be struck out at this time. They are manifestly without merit and doomed to fail, and I will therefore order they be struck out.

Section 137(C) of the *Building Act* 1993

31 Section 137(C) of the *Building Act* 1993 provides:

(1) The following warranties are part of every contract to which section 137B applies which relates to the sale of a home—

(a) the vendor warrants that all domestic building work carried out in relation to the construction by or on behalf of the vendor of the home was carried out in a proper and workmanlike manner; and

(b) the vendor warrants that all materials used in that domestic building work were good and suitable for the purpose for which they were used and that, unless otherwise stated in the contract, those materials were new; and

(c) the vendor warrants that that domestic building work was carried out in accordance with all laws and legal requirements, including, without limiting the generality of this warranty, this Act and the regulations.

(2) In addition to the purchaser under a contract to which section 137B applies, any person who is a successor in title to the purchaser may take proceedings for a breach of the warranties listed in subsection (1) as if that person were a party to the contract.

(3) A provision of an agreement or instrument that purports to restrict or remove the right of a person to take proceedings for a breach of any of the warranties listed in subsection (1) is void to the extent that it applies to a breach other than a breach that was known or ought reasonably to have been known to the person to exist at the time the agreement or instrument was executed.

32 In its written contentions the insurer contends that the *'statutory warranties were signed away by the Knells on entry into the Terms of Settlement on 19 July 2004…'* and *'the breaches, insofar as they affect the First Respondent [the insurer] are the same breaches now sought to be raised by the Applicants [the Woods] in the current proceeding'*. I understood counsel for the insurer to concede that this was not the insurer's strongest point in relation to its s75 application and I have proceeded on the basis of that concession. In any event, in the context of the statutory regime whereby subsequent owners can seek indemnity under a relevant policy of warranty insurance, this is properly a matter for evidence and further argument, particularly as the Woods refute the contention by reference to the Knell's claim, and the expert report relied on by the Knells in the earlier proceeding. The allegations cannot be considered *'frivolous, vexatious, misconceived or lacking in substance'*.

Discussion

33 For the reasons set out above I am satisfied that the allegations set out in paragraphs 43 – 47 are manifestly without merit and doomed to fail. I am not persuaded there is any reason at all as to why they should not be struck out at this time, as submitted by Mr Forrest, and I will so order.

34 In relation to the allegations set out in paragraphs 38 – 42 I am not satisfied that they are doomed to fail. However, the insurer may, of course, seek further particulars of any or all of the allegations.

35 I will reserve the costs of this application with liberty to apply.

DEPUTY PRESIDENT C. AIRD