VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

DOMESTIC BUILDING LIST **VCAT REFERENCE NO. D807/2002**

CATCHWORDS

Domestic building – declaratory relief – whether pleading sustainable

[2005] VCAT 1101

APPLICANT	Maria Koromilas
FIRST RESPONDENT	Housing Guarantee Fund Ltd
SECOND RESPONDENT	Brady Constructions Pty Ltd (formerly trading as Brady Construction Company Pty Ltd)
THIRD RESPONDENT	T S Services Pty Ltd (ACN 005 162 452)
FOURTH RESPONDENT	Warren & Rowe Pty Ltd (ACN 059 511 125)
FIFTH RESPONDENT	Koukourou & Partners Pty Ltd (ACN 007 739 157) In liquidation
SIXTH RESPONDENT	A A & S Lorenzini Pty Ltd (ACN 050 277 168)
JOINED PARTY	Gerling Insurance Australia Pty Ltd
WHERE HELD	Melbourne
BEFORE	Senior Member D Cremean
HEARING TYPE	Hearing
DATE OF HEARING	20 May 2005
DATE OF ORDER	14 June 2005

ORDER

1. Leave to file and serve the proposed Points of Claim is refused.

2. I reserve liberty to the Second Respondent to make any application for costs.

3. I direct the Principal Registrar to re-list this matter for further directions before me on a convenient early date. Allow 2 hours.

SENIOR MEMBER D CREMEAN

APPEARANCES:

For Applicant	No appearance
For 1st Respondent	No appearance
For 2nd Respondent	Mr J T Isles of Counsel
For 3rd Respondent	No appearance
For 4th Respondent	No appearance
For 5th Respondent	Mr M N Whitten of Counsel
For 6th Respondent	No appearance
For Joined Party	Mr M N Whitten of Counsel

REASONS

1. On 10 March 2005, in light of objection then being taken, I set aside for separate hearing the question whether, in law, the Fifth Respondent and Joined Party may file and serve Points of Claim as against the Second Respondent as set out in the document delivered on or about 9 March 2005.

2. That question was heard by me on 20 May 2005, having been previously set aside for hearing on 19 April 2005.

3. It is important to recount, for this purpose, the orders I made on 8 November 2004 and also on 31 January 2005. On the former date, I dismissed an application by the Fifth Respondent under s120 of the *Victorian Civil and Administrative Tribunal Act* 1998 to have orders made on 5 March 2004 set aside. By those orders I provided that, as between the Second and Fifth Respondents, the proceeding was to stand determined in favour of the former. I also ordered that the Fifth Respondent pay the Second Respondent's costs of the proceeding. Then, on 31 January 2005, I dismissed an application by the Joined Party. The Joined Party had contended that the orders I made on 5 March 2004 were bad in law and that the orders I made on 8 November 2004 are in error.

4. The orders made on 5 March 2004 thus remain in force.

5. By the proposed Points of Claim the Fifth Respondent and Joined Party are seeking declarations that:

> *"(i) Brady* [the Second Respondent] *is not entitled to any contribution or indemnity from Koukourou* [the Fifth Respondent] *in respect of any amount for which Brady may be adjudged liable to the Applicant;*
>
> *(ii) further or alternatively, that the 5 March orders do not confer on Brady any entitlement to contribution or indemnity against Koukourou in respect of any amount which Brady may be adjudged liable to the Applicant; and*
>
> *(iii) Koukourou's liability, if any, is limited solely to that proportion of the Applicant's loss and damage which the Tribunal considers to be just and*

equitable having regard to the extent of Koukourou's responsibility for that loss and damage."

They also claim costs and any further or other relief as the Tribunal considers appropriate.

6. The filing of these proposed Points of Claim is opposed by the Second Respondent. No other party has expressed opposition. It is submitted by the Second Respondent that the proposed Points of Claim fail to plead material facts, fail to disclose a cause of action and "merely plead errors of the Tribunal which Brady is complicit in and culpable in not agreeing to set aside." It is also submitted that the proposed Points of Claim are, therefore, embarrassing and an abuse of process. Further it is submitted that no authority of the liquidator to pursue proceedings (on behalf of the Fifth Respondent) is evident.

7. At the hearing on 20 May I was taken through the various paragraphs of the proposed Points of Claim. Amongst other things they allege:
   (a) para 8: that the orders I made on 5 March 2004 were made;
   (b) para 9: that the Joined Party became aware of those orders on 10 March 2004;
   (c) para 10: that Joined Party's interests are affected by any claims made in the proceeding against the Fifth Respondent and by the 5 March orders;
   (d) para 11: that the Joined Party admitted indemnity in respect of the Second Respondent's claims against the Fifth Respondent subject to terms;
   (e) para 12: that the Joined Party is entitled to conduct the Fifth Respondent's defence. (I interpolate that, if this is so, how is it that the Fifth Respondent also is seeking to proceed?);
   (f) para 13: that ss131-133 of the *Building Act* 1993 apply to the proceedings;
   (g) para 14: that the proceeding falls within s129 of that Act;
   (h) para 15: that after determining an award of damages in a building action, the Tribunal must follow out s131 of that Act;
   (i) para 16: that s132 of such Act prohibits the Second Respondent claiming any entitlement to contribution or indemnity from the Fifth Respondent and

that the orders of 5 March or those orders assert an entitlement to contribution or indemnity which is prohibited by s132;

(j) para 17: that, in the premises, the Second Respondent is not entitled to any right of contribution or indemnity from the Fifth Respondent;

(k) para 18: that the Second Respondent has failed to acknowledge it is not entitled to contribution or indemnity from the Fifth Respondent by amending its Points of Claim, by seeking to have the 5 March orders set aside or by disallowing any such entitlement arising out of the claims against the Fifth Respondent or arising out of the 5 March orders.

In light of all these allegations, and others in paras 1-7, the Fifth Respondent and Joined Party claim the declarations I have set out.

8. In support of their position, the Fifth Respondent and Joined Party referred me to s136 of the *Supreme Court Act* 1986 by which it is provided that a "proceeding is not open to objection on the ground that a merely declaratory judgment is sought, and the Court may make binding declarations of right without granting consequential relief." They also referred to remarks of Brooking J in *Arthur Young v Brunswick NL* [1999] 1 VR 387 at 394 that:

> *"In so far as a money sum is claimed, the statement of claim must … disclose a cause of action. But this rule has no application where only a declaration is sought; I forebear from citing authority for a proposition which has become so well established."*

9. In response, the Second Respondent referred me to another passage in his Honour's judgment which says:

> *"Nevertheless the fact that … it would, so far as the matter of the sufficiency of the pleading is concerned, be competent to the court to grant a declaration that a plaintiff was entitled to contribution in a certain sum would not be enough to make the action a satisfactory vehicle for the making of the claim for contribution."*

His Honour, it was pointed out, continues:

> *"For such a declaration would not give rise to an enforceable right to payment: an order for payment would be necessary, and so, to obtain such an order it would be necessary for the statement of claim to allege the existence of the cause of action created by Pt IV of the Wrongs Act."*

10. I cannot think that the draft Points of Claim in this case are in accord with these latter observations of his Honour. I consider that the draft Points of Claim fail in their "sufficiency" in that, in merely seeking declarations of entitlement to contribution or seeking declarations that a party is not entitled to contribution, they are not "*a satisfactory vehicle for the making of the claim for contribution*" or, it might be said, for the making of the claim that a party is not entitled to contribution. This is not to deny s36 of the *Supreme Court Act*. It was not made clear to me that that provision applies to the Tribunal (see s98(1)(b) of the *Victorian Civil and Administrative Tribunal Act* 1998) but, even if it does, the "proceeding" it refers to, I would think, must be one that satisfies the rules of pleading and I do not consider the present draft Points of Claim do that.

11. Nor, to the extent I indicate, am I persuaded that the Tribunal should give countenance to the filing and service of the proposed Points of Claim. I say this to the extent that they claim a declaration or declarations that the Second Respondent has no right or entitlement to contribution or indemnity conferred by the orders made on 5 March. To that extent, I consider that, if filed and served, they would constitute abuse of process.

12. The orders made on 2 March remain in force. They have never been set aside on appeal or otherwise. As Gray J said of his orders in *Mees v Roads Corporation* [2003] FCA 410 at [8]: *"They must stand or fall according to their terms."* The orders I made on 5 March, which remain in force and effective, operate according to their tenor. They may or may not have a particular effect contended for by a party. They may or may not give the Second Respondent a right or entitlement to contribution or indemnity. That must depend on the overall outcome of the proceedings which are yet to be heard. But it seems to me to be quite inappropriate to be asking the Tribunal to make a declaration (as under para (ii)) to the effect that its previous ruling does not have a particular effect. It seems to me that that is a matter for submissions – not for declaration. It is not for the

Tribunal to interpret its prior rulings by way of the granting of declaratory relief. The document, if filed and served, would, in my view, constitute an abuse of process – perhaps as in substance a collateral attack upon the orders made on 5 March which validly stand (and which the Fifth Respondent and Joined Party have either chosen not to appeal or not been able to appeal though clearly dissatisfied with the same) or as an interpretive exercise. See *Second Life Décor Pty Ltd v Comptroller – General of Customs* (1994) 53 FCR 78. As French J observed in *Sea Culture International Pty Ltd v Scoles* (1991) 32 FCR 275 at 279: *"The possible varieties of abuse of process are only limited by human ingenuity and the categories are not closed."* There is no denying the width of the power to grant declaratory relief (see *Ainsworth v Criminal Justice Commission* (1991) 106 ALR 11 at 22) but para (ii) of the relief sought in this case, in my view, goes well beyond the bounds of what is properly allowable.

13. Nor, to any other extent, do I consider I should allow the proposed Points of Claim to be filed. The remedy of declaration states the rights of parties with respect to a particular matter "*with precision*" and in a binding way: see *Warramunda Village Inc v Pryde* (2001) 105 FCR 437. A declaration must "*finally*" declare the rights of the parties: *International General Electric Co of New York Ltd v Commissioners of Customs and Excise* [1962] 1 Ch 784 at 790. However, in para (i) of the relief sought the declaration claimed is entirely negative in form – a declaration, not of rights, but of non-entitlement, only, is sought. Moreover, it is not the Fifth Respondent's lack of rights but the Second Respondent's lack of rights. It is not, in my view, possible to regard para (ii) as a positive averment. This seems to be a serious flaw. Para (ii) suffers the same defect in addition to its other failings. Para (iii) does not seem to me to go anywhere near far enough for it to be able to be said that the declaration sought, if granted, would state the Fifth Respondent's rights "*with precision*" or "*finally*". The declaration could not be made in the terms sought because the terms sought do not fix any rights. They contain numerous imponderables – "if any", "limited", "just and equitable" and "responsibility." To make a declaration in the

terms sought, in my view, would be, in reality, to declare nothing at all. The exercise would be futile.

14. In any event para (iii), and to a lesser degree para (i), merely relates to what the Tribunal must do by way of statute. This is what the Tribunal is required to do under s131 of the *Building Act* 1993. It is not strictly a right which arises *inter partes*. There is a marked inutility in claiming a declaration that the Tribunal must perform its duty. On what possible basis might it be put that the Tribunal may make a declaration concerning its duties? That is not the purpose of a declaration. Declaratory relief seems to me to be quite out of place. Moreover, the whole exercise is hypothetical until after the Tribunal makes an award of damages in the action in any event. Who can say, at this point, that, after the hearing has taken place, damages will be awarded? The hearing has not yet occurred. What is claimed as an entitlement to declaratory relief is flawed in this way as well.

15. For these reasons I consider I should determine that, in law, the Fifth Respondent and Joined Party should not be given leave to file and serve the proposed Points of Claim in question. They fail in the various ways I have indicated.

16. I do not need to comment, in the circumstances, on the sufficiency of the liquidator's response. In some respects, though, his response is, I agree, unsatisfactory. I offer no comment on whether the Joined Party, in the circumstances of this case, truly does have a right of subrogation in respect of the Fifth Respondent – despite what the Joined Party may assert. This would be a matter for its proofs at trial presumably.

16. I make the directions and orders set out.

17. I do not give leave to file and serve the proposed Points of Claim.

18. I reserve liberty to the Second Respondent to make any application for costs.

19. I direct the Principal Registrar to re-list this matter for further directions before me on a convenient early date. Allow 2 hours.

SENIOR MEMBER D CREMEAN