VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST VCAT REFERENCE NO. BP183/2014

CATCHWORDS

Victorian Civil and Administrative Tribunal Act 1998 – s. 75 – application to strike out or dismiss proceeding – must appear that the proceeding is manifestly hopeless or has no chance of success – Res Judicata – Issue Estoppel and "Anshun" estoppel – principles - *Building Act* 1993 s.137C – implied warranties – whether they apply to each item of domestic building work or to the work as a whole – whether one cause of action or a separate cause of action for each breach - *Domestic Building Contracts Act* 1995 – s.8 – s.9 – s,10 – meaning – warranties are terms of the contract – not a statutory remedy – interpretation – intention of parliament – *Conquer v Boot* [1928] 2 KB 336 – *Onerati v. Phillips Constructions Pty Ltd* (1989) 16 NSWLR 730– *Honeywood v Munnings & Anor* [2006] NSWCA 215 – principle not applicable to prevent successive claims for defective "domestic building work" within the meaning of *Domestic Building Contracts Act* 1995 – Points of Claim – breaches alleged must be identified – consequence of breach not in itself a breach

APPLICANTS	Mr Martin Robert Meier, Mrs Lisa Caroline Meier
RESPONDENTS	Mr Ignacy Balbin, Mrs Maya Balbin
WHERE HELD	Melbourne
BEFORE	Senior Member R. Walker
HEARING TYPE	Hearing
DATE OF HEARING	5 February 2015
DATE OF ORDER	20 March 2015
CITATION	Meier v Balbin (Building and Property) [2015] VCAT 306

ORDER

1. By 17 April 2015 the Applicants must file and serve Amended Points of Claim identifying in clear terms each breach of contract relied upon, and in regard to each such breach, each item of loss and damage said to have been suffered as a result of it and the relief or remedy sought with respect to it.
2. **This proceeding is fixed for a directions hearing at 9.30 am on 28 April 2015 at 55 King Street, Melbourne.**
3. Liberty to apply.
4. Costs reserved.

SENIOR MEMBER R. WALKER

APPEARANCES:

For the Applicants	Mr T B Maxwell of Counsel
For the Respondents	Mr J M Forrest of Counsel

REASONS

Background

1 The Applicants ("the Owners") are the owners of a house in North Caulfield ("the House") which they purchased from the Respondents.

2 The House was constructed by the Respondents. A certificate of occupancy was issued with respect to it on 12 December 2007 and they lived in it for a short while before selling it to the Owners pursuant to a contract of sale dated 13 August 2008. The sale was settled on 8 December 2008 and the Owners moved in shortly thereafter.

3 The Owners were concerned about defects in the House. They engaged a building expert, Mr R. Lees, who investigated their concerns and provided a detailed report dated 20 September 201. In his report Mr Lees listed 249 defects.

4 The Respondents also engaged a building expert, a Mr R. Lorich, and he also prepared a report in which he agreed in some respects with Mr Lees' observations and disagreed in others.

The first proceeding

5 The Owners issued an application in this Tribunal, being proceeding numbered D298/2012, which the Respondents defended. That proceeding came on for hearing before the Tribunal on 10 December 2012 with three days allocated.

6 Following that hearing, which included an on-site inspection, the Tribunal ordered the Respondents to pay to the Owners $111,971.51. Certain other orders were also made, including a subsequent order that the Respondents pay the Owners' costs, which were ultimately agreed at a little over $90,000.

Further complaints

7 By a letter dated 9 July 2014 the Owners' solicitors informed the Respondents' solicitors that the Owners had discovered mould in the House. They said in the letter that the Owners had so far expended $346,665 in remediation works, which included stripping out of internal linings of the House and various other things which are detailed in the letter.

8 Paragraph 2 of this letter reads as follows:

> "Following the hearing of that proceeding my clients discovered that the house had been infested by mould, the cause of which was dampness and water below the floor of the House and in the walls and floors of the bathrooms, the laundry and the powder room. Signs of mould were not detected by either of the experts retained in the proceeding or by Member Farrelly on his inspection of the

property. Accordingly, no claim was made in the proceeding in respect of mould."

9 The letter asserted that the claim made with respect to the mould was "a totally new claim which they could not have made in the proceeding because they did not then know of the problem."

This proceeding

10 This proceeding was issued on 8 August 2014 claiming damages of $346,665 with respect to this further claim. The Points of Claim filed with the application were substantially the same as the Owners' Amended Points of Claim in the earlier action, except for the amounts claimed and the details of the breaches alleged.

11 In the earlier proceeding the breaches alleged were those detailed in Mr Lees' report. In the current proceeding the initial Points of Claim gave as the particulars of breach:

> "Active mould growth, including species known to be either allergenic and/or mycotoxin producers, was found in a number of areas of the House constituting a potential health hazard requiring remediation by an appropriately qualified person."

The strike out / dismissal application

12 By an application dated 5 December 2014 the Respondents sought an order pursuant to s 75 of the *Victorian Civil and Administrative Tribunal Act* 1998 ("the Act") that the proceeding be dismissed or struck out on the ground of res judicata, issue estoppel or "Anshun" estoppel. Alternatively, it was said that this proceeding is misconceived, lacking in substance or an abuse of process.

13 In essence, the ground of the application was that the Owners' claim for defects in the House had already been dealt with in the earlier proceeding, particularly having regard to the findings of water beneath the House.

Amended Points of Claim

14 On 18 December 2014, Amended Points of Claim were filed on behalf of the Owners in which the particulars of breach were stated as follows:

> "1. Failure to prevent water ingress from the roof and bedroom two en suite to the music room.
>
> 2. Failure to prevent long term water escape from the laundry trough and associated tap.
>
> 3. Failing to connect the waste water drain in the laundry to the waste water system and/or directing it to discharge externally, meaning that in the event of a water escape or floor event in the laundry, water going down the floor waste would dump into the sub-floor/crawl space area below the laundry.

4. Failure to prevent water escaping from the bedroom four en suite shower recess and/or water entry through the rear section of the ground floor tiled roof.

5. Failure to prevent water escaping from the bedroom one en suite shower recess, in particular, failure to provide a waterproofing membrane and associated drainage flange under the channel drain in violation of AS3740-2010 Section 3.14.3 – Termination through a drainage channel; and use of any timber product to form a shower screen hob in violation of AS3740 Section 3.16.1.2 – Showers with hobs.

6. Failure to prevent water escape from the bedroom two en suite show[er] recess, in particular failure to provide a waterproofing membrane and associated drainage flange under the channel drain in violation of AS3740-2010 Section 3.14.3 – Termination to a drainage channel; and use of any timber product to form a shower screen hob in violation of AS3740 Section 3.16.1.2 – Showers with hobs.

7. All of these defects caused active mould growth, including species known to be either allergenic and/or mycotoxin producers, was found in a number of areas in the House constituting a potential health hazard." (sic)

The hearing

15 The application to strike out or dismiss the proceeding came before me for hearing at 10.00 am on 5 February 2015. Mr J M Forrest of Counsel appeared for the Respondents to make the application and Mr T B Maxwell of Counsel appeared on behalf of the Owners. Argument proceeded until shortly before 3.15 pm and I then informed the parties that I would provide a written decision.

16 I was greatly assisted by the degree of preparation by both counsel and copies of the relevant authorities that they gave me.

Section 75

17 Where relevant, s.75 of the Act provides as follows:

"Summary dismissal of unjustified proceedings

(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 subsection (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.

……..

(4) An order under subsection (1) or (2) may be made on the application of a party or on the Tribunal's own initiative.

(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."

18 It is well established that before striking out or dismissing a proceeding under the powers contained in this section the Tribunal ought to be satisfied that the proceeding is manifestly hopeless or has no chance of success. (See *Pizers Annotated VCAT Act* 4th Edition page 274 et seq. and the cases there cited). In general, a party is entitled to present his evidence and have his case heard in the usual way and that right should only be denied in the clearest of cases.

19 In the present case the Respondents contend that the claim is manifestly hopeless because it has been determined in the earlier proceeding. Alternatively, it is said that it is barred by an issue estoppel or by an Anshun estoppel.

20 If matters in contention in a proceeding have already been determined as between the parties then to seek to litigate them again in subsequent proceedings would be an abuse of process (see *Knight v. Core* [2003] VCAT 501 at para. 16.). That might apply to the whole dispute or as to particular issues.

21 Mr Forrest submitted that the matters now sought to be raised had been so determined and that the Respondents were estopped from raising them again, whether by res judicata, issue estoppel or Anshun estoppel.

Res judicata, issue estoppel and Anshun estoppel

22 The relevant principles are conveniently set out in the following passage relied upon by Mr Forrest from the judgment of Einstein J in *John Anthony Jeans v John Richard Bruce and Ors* [2004] NSWSC 539 (at para 304):

> "304 Authorities from recent decades have concentrated on defining precisely which aspects of a *res judicata* remain binding on the parties and their privies. It is now settled that this area involves the potential operation of three interrelated- but nonetheless conceptually distinct- estoppels:
> (a) 'Cause of Action Estoppel' (alternatively, *res judicata* or estoppel *per rem judicatam*): As expressed by Fullagar J in *Jackson v Goldsmith* [1950] HCA 22; (1950) 81 CLR 446 at 466 (approved by Gibbs CJ, Mason and Aickin JJ in *Port of Melbourne Authority v Anshun Pty Ltd* [1981] HCA 45; (1981) 147 CLR 589 at 597), "where an action has been brought and judgment has been entered in that action, no other proceedings can thereafter be maintained on the same cause of action." As Fullagar J put the matter (at 467), the critical question that arises when such a cause of action estoppel is pleaded is "whether the cause of action in the later proceedings is the same as that which was litigated in the former proceedings." If the prior cause is indeed identical to the subsequent, then it has been deprived of any independent existence and cannot be averred as between the same parties or their privies; if established the cause merges in the judgment, and if defeated it is extinguished ad infinitum: *Blair & Anor v Curran* [1939] HCA 23; (1939) 62 CLR 464 at 532, per Dixon J.

(b) 'Issue Estoppel' (alternatively, 'estoppel by record'): An issue estoppel, as put by Higgins J in *Hoysted v Federal Commissioner of Taxation* [1921] HCA 56; (1921) 29 CLR 537 at 561, differs from a cause of action estoppel in that the scope of its operation is not confined to the final conclusions of law reached in the prior proceedings. Rather, as stated by Dixon J in *Blair v Curran* at 532-533, an issue estoppel arises in subsequent proceedings when "a state of fact or law is alleged or denied the existence of which is a matter necessarily decided by the prior judgment, decree or order", provided always that the issues in question were "fundamental or cardinal" to the prior decision rather than merely "subsidiary or collateral." While manifold judicial clarifications of this dichotomy have since been formulated, it is sufficient for present purposes to underscore that the estoppel extends only to those matters upon which it was *necessary* for the court to reach a conclusion, typically being matters against which an avenue of appeal lies: *Murphy & Ors v Abi-Saab & Ors* (1995) 37 NSWLR 280 at 288, per Gleeson CJ (with whom Kirby P and Rolfe AJA agreed).

(c) *'Anshun* Estopel': The extended application of the *res judicata* estoppels primarily associated in Australia with the decision in *Port of Melbourne Authority v Anshun Pty Ltd* has its origins in the judgment of Wigram VC in *Henderson v Henderson* [1843] EngR 917; (1843) 3 Hare 100 at 114-5, where the Vice Chancellor said:

"The plea of *res judicata* applies, except in special circumstances, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time."

305 In *Anshun*, Gibbs CJ, Mason and Aickin JJ similarly held (at 602) that parties and their privies will be estopped from presenting a claim or defence in subsequent proceedings when, although not actually raised in the first action, that matter was "so relevant to the subject matter of the first action that it would have been unreasonable not to rely on it." While the application of this test is largely a matter of fact- turning on considerations of (inter alia) expense to the parties, the importance of the issue to the prior proceedings and the motives of the party in failing to raise it- its intended strictness is evident in their Honours express rejection (at 601-2) of the equivalent English formulation to the effect that all matters which "could and therefore should have been litigated in the earlier proceedings" will be caught by this form of *res judicata* estoppel: *Yat Tung Investment Co Ltd v Dao Heng Bank Ltd* [1975] AC 581 at 590, per Lord Kilbrandon."

23 As to how one should determine whether the cause of action now brought is the same as that brought previously, Mr Forrest referred me to the following passage from the judgment of Gummow J in *Re Trawl Industries of Australia Pty Limited; (Receivers and Managers Appointed) (In Liquidation) & ors v Effem Foods Pty Limited* [1992] FCA 272 (at para 51):

"…It is said that for the estoppel to operate, the cause of action in each proceeding must be the same: *Ramsay v Pigram* [1968] HCA 34; (1968) 118 CLR 271 at 280. But, as Brennan J. pointed out in *Anshun* … the phrase "cause of action" is used imprecisely and in several senses. These include (i) the series of facts which the

plaintiff must allege and prove to substantiate a right to judgment, (ii) the legal right which has been infringed, and (iii) the substance of the action as distinct from its form.

52. Sir William Brett M.R. directed attention to this third sense by asking "whether the same sort of evidence would prove the plaintiff's case in the two actions": *Brunsden v Humphrey* (1884) 14 QBD 141 at 146. In that litigation the first action had been brought in a county court and the second in the High Court. In *Chamberlain v Deputy Commissioner of Taxation*, supra at 508, Deane, Gaudron, Toohey JJ. drew attention to what Brennan J. had said as to the imprecision of the phrase "cause of action", but did not espouse any particular formulation.

53. However, as indicated above, for the law of Australia it is most suitable to focus upon the substance of the two proceedings as distinct from their form. This reflects the constitutional basis of federal jurisdiction, to which I have referred earlier in these reasons. Also, it allows for the very many controversies which now come before superior courts, federal and State, without pleadings. And even where pleadings are necessary or are ordered, the effect of the Judicature system of pleading, now in general operation in Australia, is as described by Barwick C.J.:

> "(T)here is no necessity to assert or identify a legal category of action . . . It is sufficient in matters in the Federal Court to assert the facts on which the plaintiff or applicant party relies and to nominate the remedies which he seeks as a consequence of the occurrence of those facts." (*Philip Morris Incorporated v Adam P. Brown Male Fashions Proprietary Limited* (1981) 148 CLR 457 at 473)"

Further, characterisation by regard to substance rather than form assists in cases where the first action was brought in a foreign forum, for the doctrine applies in such circumstances, as *Carl Zeiss* and *House of Spring Gardens* show."

Application of the principles

24 These observations are particularly appropriate to this Tribunal, which is not a court of pleading and must act fairly and in accordance with the substantial merits of the case in all proceedings (See s.97 of the Act).

25 Mr Forrest points first to the allegations that are now made and argues that, in order to establish the present claim, the Owners must rely upon the same sort of evidence as proved their case in the earlier proceeding. To deal with that submission would requires a careful examination of what is now alleged and a comparison of that with the subject of the earlier proceeding.

26 It is not sufficient for the Respondents to assert that it is a similar type of claim. It must be in substance, whether or not in form, the same cause of action. Moreover, for the Respondents to succeed in an application under s. 75 it must appear to be beyond argument that it is. If it is arguable that it is not, then the Owners are entitled to present their argument to the Tribunal at a full hearing in the ordinary way.

27 Secondly, Mr Forrest argues that breach of the warranties appearing in the Contract, and which are also included in it by force of s.137C of the *Building Act* 1993, give rise to a single cause of action. In support of that proposition he relied

upon a substantial body of authority. To do justice to his argument I should set this out in some detail and because this is his stronger argument I will deal with it first..

Is there only one cause of action for breach of a domestic building contract?

28 In *Conquer v Boot* [1928] 2 KB 336 a builder contracted to construct a house in a proper and workmanlike manner and with proper materials. The owner for whom the house was constructed took proceedings for defective workmanship and recovered damages. He subsequently discovered further defects that he had not known about. He brought a second action and recovered a further award of damages for the cost of rectifying them. The builder appealed, arguing that the owner's cause of action for breach of the contract had already been determined. The Divisional Court held that the owner only had one cause of action for breach of the contract to build the house and allowed the appeal.

29 Sankey LJ said (at p.342):

> "The cause of action here is: (1) the contract to complete in a good and workmanlike manner a bungalow and (2) the breach of it. I do not think that every breach of it – every particular brick or particular room that is faulty – gives rise to a separate cause of action."

30 Talbot J said (at p.344):

> "Here there is but one promise, to complete the bungalow; and the question whether or not it has been performed is to be decided by the state in which the bungalow was when it was handed over by the defendant to the plaintiff as complete. From that moment the statute of limitations began to run as to the whole. The plaintiff could not alter the fact that he was recovering damages for the breach of the single promise by failing to specify in his action all the particulars of the breach and all the damages to which he was entitled. The test whether a previous action is a bar is not whether the damages sought to be recovered are different, but whether the cause of action is the same."

31 The case turned on the interpretation of the contractual obligation of the builder, which was found to be a single obligation to complete the bungalow in a good and workmanlike manner.

32 The reasoning was adopted and applied by Giles J in the Supreme Court of New South Wales in *Onerati v. Phillips Constructions Pty Ltd* (1989) 16 NSWLR 730. As a result of this decision the principle has been referred to as "the *Onerati* principle" and I shall refer to it as such.

33 A similar interpretation was given to a building contract by the New South Wales Court of Appeal in *Honeywood v Munnings & Anor* [2006] NSWCA 215. In that case the Court considered whether the New South Wales *Home Building Act* 1995, disclosed an intention on the part of Parliament to displace the *Onerati* principle. That Act contained somewhat similar provisions to the Victorian legislation set out below but it was in different terms. Section 18B of the New South Wales Act implied warranties into a building contract that are similar to

those implied into similar contracts in Victoria. Section 18D, which was enacted after *Onerati*, provided:

> "A person who is a successor in title to a person entitled to the benefit of a statutory warranty under this Act is entitled to the same rights as the person's predecessor in title in respect of the statutory warranty, except for work and materials in respect of which the person's predecessor has enforced the warranty."

34. That section did not apply to the case before the Court of Appeal in *Honeywood* because the Plaintiff was the party for whom the work was done. Nevertheless, in considering its effect in other cases, the Court said (at paras. 27 - 36):

> "27.Section 18D must be given some effective operation where the proprietor transfers the property to a successor within 7 years from completion of the work. If the principle in *Onerati* applied in such a case the successor would acquire no rights under a warranty that has been partially enforced by the predecessor because the latter would no longer have any rights and would no longer be a person entitled to the benefit of that warranty. The whole cause of action will have merged in that judgment.
>
> 28 Where the predecessor has enforced the warranty the successor is entitled to the same rights subject to the exception. Since s 18D is the only section in Pt 2C which confers rights on the successor it follows that the successor has no rights under a statutory warranty for that part of the work and materials "in respect of which" the predecessor has enforced the warranty.
>
> 29 The scope of the exception is not altogether clear. The meaning of the expression "in respect of" is heavily dependent on its context which may limit the wide meaning of which it is otherwise capable: *State Government Insurance Office (Q) v Rees* [1979] HCA 52; (1979) 144 CLR 549, 561. In this case the context excludes the wider meanings of which the expression is capable.
>
> 30 The warranty of the builder is given in respect of all the work and all the materials but the exception would be meaningless if enforcement of the warranty in respect of some of the work and materials was held to be "in respect of" all the work and all the materials. It is not clear whether enforcement of the warranty for example in respect of some of the brickwork and some of the bricks would exclude a later claim for other brickwork and other bricks. That question can be left for decision if and when the point is squarely raised.
>
> 31 It follows therefore that where the exception in s 18D applies it does not destroy the general rule in the first part of the section. A successor can become entitled to rights under a warranty in respect of work and materials, although his predecessor has enforced it against the builder.
>
> 32 In this case the second claim is not made by a successor, but by the original proprietors, and s 18D has no direct application. The proprietors' submission is that the section has not only abolished the *Onerati* principle in favour of a successor, it has also abolished it in favour of the predecessor.

33 It is not apparent how s 18D can have such an operation. The general provision that the successor is entitled to the same rights in respect of the statutory warranty as the predecessor does not purport to enlarge the rights of the predecessor. It does no more than confer the same rights on the successor subject to the exception. The general rule created by the section does not displace the *Onerati* principle in favour of the predecessor.

34 That principle is displaced by the exception, but only for the benefit of the successor. There is nothing in the exception which displaces that principle for the benefit of the predecessor where there is no successor within the 7 years or before there is a successor.

35 It appears that the section was intended to give a successor greater rights in respect of latent defects due to a breach of the statutory warranty than a predecessor who had enforced that warranty. There are rational policy reasons for doing this because the predecessor could have inspected or arranged for the work to be inspected during construction and become aware of the defective workmanship or materials before they were covered up. The predecessor had a further opportunity of discovering defects when he enforced the warranty. A successor has no such opportunities.

36 Thus there is nothing in the text which discloses an intention on the part of Parliament to displace the *Onerati* principle as between the proprietor and the builder. This could have been done directly, rather than by a side wind, if Parliamentary Counsel had been instructed to do this and if this had been Parliament's intention. Not only is there nothing to this effect in the text itself, there is also nothing in the Second Reading Speech or Explanatory Statement which discloses such an intention. In this context the remarks of a Government backbencher in the debate on the Bill are of no weight in construing ""

35. It appears from this passage that the court accepted that the *Onerati* principle would not apply to the extent that it was inconsistent with the provisions of the Act. I respectfully agree.

36. Further, as the above references show, the contract in *Conquer v. Boot* and the other two cases were found to be entire contracts creating a single obligation. In this case, both the earlier proceeding and this proceeding are brought seeking damages for defective workmanship said to be in breach of warranties which are both set out in the Contract of Sale and also imposed by s 137C of the *Building Act* 1993.

The Building Act 1993

37. Section 137C of the *Building Act* 1993 provides as follows:

"137C Warranties for purposes of homes under section 137B

(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."

38. By force of this section the above warranties are part of every contract to which s 137B applies. It is common ground that section 137B applies to the present contract. The section operates to import these warranties into such contracts and so they derive their force as terms of the contract, not as independent statutory obligations.

39. Sub-section (3) of s.137C shows that it was contemplated by Parliament that:

(a) there may well be more than one breach of these terms;

(b) an occasion might arise where the purchaser entitled to the benefit of the warranty executes an agreement or instrument restricting the purchaser's right to take proceedings for a breach of that warranty;

(c) there might then be further breaches of warranty after the document is executed that the purchaser did not know nor ought reasonably to have known about at the time that the document was executed.

40. It was therefore the intention of Parliament that successive proceedings might be taken, or successive claims might be made, for breach of warranty.

41. The section follows and refers to s.137B, which is in the following terms (where relevant):

"137B Offence for owner-builder to sell building without report or insurance

(1) This section does not apply to—

(a) the construction of a building (other than a home) by—

(i) a registered building practitioner; or

(ii) an architect registered under the **Architects Act 1991** ; or

(b) except as provided in subsection (5), the construction of a home under a major domestic building contract; or

……

(2) A person who constructs a building must not enter into a contract to sell the building under which the purchaser will become entitled to possess the building (or to receive the rent and profits from the building) within the prescribed period unless—

(a) in the case of a person other than a registered building practitioner—

(i) the person has obtained a report on the building from a prescribed building practitioner that contains the matters that are required by the Minister by notice published in the Government Gazette; and

(ii) the person obtained the report not more than 6 months before the person enters into the contract to sell the building; and

(iii) the person has given a copy of the report to the intending purchaser; and

(b) the person is covered by the required insurance (if any); and

(c) the person has given the purchaser a certificate evidencing the existence of that insurance; and

(d) in the case of a contract for the sale of a home, the contract sets out the warranties implied into the contract by section 137C.

Penalty: 100 penalty units.

(3) A contract entered into in contravention of subsection (2) is not void by reason only of the contravention but is voidable at the option of the purchaser at any time before completion of the contract.

……

(6) This section applies whether or not the construction of the building is complete at the date of the contract of sale.

(7) In this section—

……..

"construct" in relation to a building, means—

(a) build, rebuild, erect or re-erect the building; or

(b) make alterations to the building; or

(c) enlarge or extend the building; or

(d) cause any other person to do anything referred to in paragraph (a), (b) or (c) in relation to the building; or

(e) manage or arrange the doing of anything referred to in paragraph (a), (b) or (c) in relation to the building;

"home" has the same meaning as it has in the *Domestic Building Contracts Act* 1995 ;

prescribed period means—

(a) in relation to a contract for the sale of a building on which domestic building work has been carried out—

(i) 6 years and 6 months (or such longer period (not exceeding 10 years) as is prescribed) after the completion date for the construction of the building; or

……..

(b) in relation to a contract for the sale of any other building—10 years after the completion date for the construction of that building;

……"

Domestic Building Contracts and Tribunal Act 1995

42. The foregoing sections were inserted into the *Building Act* 1993 by the *Domestic Building Contracts and Tribunal Act* 1995 (as it was then called) as part of a legislative scheme to provide protection to purchasers of dwelling houses and also to persons for whom domestic building work was undertaken.

43. The legislation regulates "Domestic Building Work. That term is defined in s.3 and s.5 of that Act in the following terms:

Section 3:

"domestic building work" means any work referred to in section 5 that is not excluded from the operation of this Act by section 6;

Section 5:

"Building work to which this Act applies

(1) This Act applies to the following work—

(a) the erection or construction of a home, including—

(i) any associated work including, but not limited to, landscaping, paving and the erection or construction of any building or fixture associated with the home (such as retaining structures, driveways, fencing, garages, carports, workshops, swimming pools or spas); and

(ii) the provision of lighting, heating, ventilation, air conditioning, water supply, sewerage or drainage to the home or the property on which the home is, or is to be;

(b) the renovation, alteration, extension, improvement or repair of a home;

(c) any work such as landscaping, paving or the erection or construction of retaining structures, driveways, fencing, garages, workshops, swimming pools or spas that is to be carried out in conjunction with the renovation, alteration, extension, improvement or repair of a home;

(d) the demolition or removal of a home;

(e) any work associated with the construction or erection of a building—

(i) on land that is zoned for residential purposes under a planning scheme under the *Planning and Environment Act* 1987 ; and

(ii) in respect of which a building permit is required under the *Building Act* 1993 ;

(f) any site work (including work required to gain access, or to remove impediments to access, to a site) related to work referred to in paragraphs (a) to (e);

(g) the preparation of plans or specifications for the carrying out of work referred to in paragraphs (a) to (f);

(h) any work that the regulations state is building work for the purposes of this Act.

(2) A reference to a home in subsection (1) includes a reference to any part of a home."

44. For the purpose of this proceeding, the most relevant sections of the scheme to be found in the *Domestic Building Contracts Act* 1995, as it is now called, are sections 8, 9 and 10, which are as follows:

"8. Implied warranties concerning all domestic building work

The following warranties about the work to be carried out under a domestic building contract are part of every domestic building contract—

(a) the builder warrants that the work will be carried out in a proper and workmanlike manner and in accordance with the plans and specifications set out in the contract;

(b) the builder warrants that all materials to be supplied by the builder for use in the work will be good and suitable for the purpose for which they are used and that, unless otherwise stated in the contract, those materials will be new;

(c) the builder warrants that the work will be carried out in accordance with, and will comply with, all laws and legal requirements including, without limiting the generality of this warranty, the *Building Act 1993* and the regulations made under that Act [4] ;

(d) the builder warrants that the work will be carried out with reasonable care and skill and will be completed by the date (or within the period) specified by the contract;

(e) the builder warrants that if the work consists of the erection or construction of a home, or is work intended to renovate, alter, extend, improve or repair a home to a stage suitable for occupation, the home will be suitable for occupation at the time the work is completed;

(f) if the contract states the particular purpose for which the work is required, or the result which the building owner wishes the work to achieve, so as to show that the building owner relies on the builder's skill and judgement, the builder warrants that the work and any material used in carrying out the work will be reasonably fit for that

purpose or will be of such a nature and quality that they might reasonably be expected to achieve that result."

9. Warranties to run with the building

In addition to the building owner who was a party to a domestic building contract, any person who is the owner for the time being of the building or land in respect of which the domestic building work was carried out under the contract may take proceedings for a breach of any of the warranties listed in section 8 as if that person was a party to the contract ".

10. Person cannot sign away a right to take advantage of a warranty

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 section 8 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."

45. Section 10 is almost identical terms to, and is substantially the same as, s.137C (3) of the *Building Act* 1993. It contemplates that an owner entitled to the benefit of a warranty might, by an agreement or instrument, remove or restrict the right to rely upon it in regard to some breach of which the owner is aware. If that should occur the section provides that such a release does not apply to a breach that was not known or ought reasonably to have been known to the owner to exist at the time the agreement or instrument was executed. If the contract were to be construed so that several items of defective workmanship amounted a single breach, there would be no room for the operation of this section. The release of one breach would be a complete release because there could only be a single breach of the contract.

46. The statutory warranties are said to apply to "the work". The heading in s.8 indicates that they are to apply to "…all domestic building work". The definition of that term is very wide and the words "any work" are used several times in s.5. Nevertheless the situation might arise in regard to a particular contract where not all work required to be done under it will fall into the definition. Nevertheless, by the opening words of s.8, the warranties will apply to those items that do.

47. It must be borne in mind that the legislation does not create a legislative remedy, Rather, it operates to insert warranties into a contract. Those warranties then become part of the contract and derive their force from the contract, not the Act. If a warranty is broken any claim is in contract for breach of warranty. It seems to me that the warranties in s.8 apply to any work falling within the definition of domestic building work rather than the whole of the work contemplated by a particular contract. That is not the *Onerati* situation.

48. The document the parties have signed is not a complete record of their agreement because parliament has incorporated into it something extra namely, these additional warranties. Since the document is not a complete record of the

agreement extrinsic evidence is admissible to resolve any ambiguity as to what parliament meant by those terms. There is no relevant intention of the parties in this regard. Their intention was to enter into an agreement in the terms of the document they signed, as affected by the legislation. In determining what those legislated warranties mean the relevant intention is that of parliament, since it was parliament that inserted these warranties into the contract.

49. In introducing the legislation the Minister said, (inter alia) in the second reading speech:

> "The reforms contained in this Bill constitute a comprehensive and integrated package comprising first, a domestic building disputes tribunal, providing a means by which builder and consumer disputes can be expeditiously and inexpensively handled at any stage of the building process or after; secondly, registration under the HGF scheme will be replaced by an extension of the *Building Act* 1993 to cover domestic builders; thirdly, the insurance cover for building owners will be privatised; and finally to contain certain minimum terms and conditions and statutory warranties".*(my emphasis)*

50. The intention as expressed in this passage includes the notion that what was being set up was a comprehensive and integrated package, that the disputes were regarded as being in the nature of consumer disputes and that the enforcement mechanism was to be available at any stage of the building process. It seems to me that, being for the expressed purpose of consumer protection, the legislation should be given a beneficial interpretation consistent with these intentions. Moreover, if the consumer's rights are intended to be enforceable "at any stage of the building process" then it must follow that it was also intended that each part of the building work would give rise to enforceable obligations. That is quite different from the *Onerati* principle which assumes that the contract gives rise to a single obligation to perform the whole of the work.

51. The cases of *Conquer v. Boot* and *Onerati* were referred to by Ashley J in *Ewert v Audehm* [2001] VSC 380 although his Honour did not need to consider the applicability or otherwise of the *Onerati* principle to the legislative regime concerning domestic building in Victoria..

52. In *Siddalls v Housing Guarantee Fund Limited* [2004] VCAT 701, Deputy President McNamara (as his Honour then was) said that it was open to an owner to reinstate a domestic building proceeding that had been struck out following a compromise agreement, in order to claim damages with respect to defects that had been discovered after the agreement was entered into and were not the subject of the compromise. In *Graham v Marinovic & Anor* [2011] VCAT 2264 Senior Member Lothian held that a second proceeding could be brought claiming damages for further breaches of warranty that had come to light since an earlier proceeding in which damages were recovered for other breaches, although she added:

> "… if the applicant were aware of a potential claim at the time of the first proceeding but chose to bring it in this proceedings, such behaviour would be vexatious."

Conclusion as to the *Onerati* principle

53. From the wording of the legislation and the Second Reading speech referred to, it seems to me that it was the clear intention of Parliament that the warranties implied into a domestic building contract by s.8 of the *Domestic Building Contracts Act* 1995 or into a contract of sale by s.137C of the *Building Act* 1993 do not create a single indivisible obligation on behalf of the party upon whom the burden of the warranties is imposed. The warranties apply to each and every part of the building work.

54. For these reasons I must find that the *Onerati* principle is inconsistent with the legislative scheme created by the *Domestic Building Contracts and Tribunal Act* 1995. Under the legislative framework in Victoria it is open to a party, subject of course to any other available defences, to take multiple proceedings for different breaches of the warranties imported into a contract by s.8 of the *Domestic Building Contracts Act* 1995 or by s.137C of the *Building Act* 1993.

55. I now turn to Mr Forrest's other argument.

The same cause of action?

56. In support of the application Mr Forrest relied upon an affidavit by the second respondent, Maya Balbin sworn 7 November 2014. This affidavit set out details of the earlier proceeding, the report of the experts and the determination that was then made by the Tribunal. The deponent also went into issues of what causes mould and matters of personal opinion. Mr Maxwell objected to this material and I need not have any regard to it.

57. Expert reports as to the extent and cause of the mould have been filed and served by both sides. The Owners rely upon a an expert witness report dated 28 January 2015 by a Mr Lark, a consultant mycologist and the Respondents rely upon reports by Dr W D Black dated 18 November 2014 and 4 December 2014.

58. In his report, dated 28 January 2015, Mr Lark, refers to the findings set out in a building defects report from Boongalla Group dated 17 December 2013. He also refers to a report of Robert Lorich dated 18 November 2014 as well as various referenced literature.

59. Mr Lark states that, in his opinion, the mould described in paragraphs 3.2, 3.3, 3.4, 3.5, 3.7, 3.8 and 3.9 of the Boongalla report was caused by the excessively high moisture found in the mould affected building materials associated with the water leaks described in that report. He said that he was unable to provide an informed opinion as to the likely date when the mould resulting from those leaks would have commenced.

60. In his report Mr Lark is quite disparaging of the contrary report of Dr Black filed on behalf of the Respondents and seems somewhat partisan in his terms. He summarized his conclusions as follows:

> 6.1 It is common knowledge that mould, like all viable life forms, requires moisture for growth – the question is, what was its origin?

6.2 Where substantial mould growth is evident, together with water staining adjacent to or vertically below areas where water leaks have been detected and confirmed by the presence of very high moisture levels over wide areas, this picture is synonymous with water leaks occurring over time, rather than condensation occurring, for example, from poor under-floor ventilation.

6.3 Therefore, as stated above, I remain of the opinion that the moisture which facilitated the majority of the mould amplification the subject property stemmed from water ingress issues indicated to be present within the upper floors of this property."

61. Two particular points to be gleaned from his report are that certain of the spoors are more likely to be found in the spectrum of moulds which grow on glass where condensation occurs.

62. He also points to Dr Black's opinion that it is very difficult to determine a direct causal link between the sub-floor moisture and mould growth which occurs well away from the sub-floor.

63. Whether and to what extent the opinion of Mr Lark will be accepted at a hearing is impossible to say. For the purpose of this application under s.75 I have to assume that the Owners' evidence will be accepted at a full hearing.

64. Essentially, Mr Lark's opinion concerns the cause of the mould described in paragraphs 3.2, 3.3, 3.4, 3.5, 3.7, 3.8 and 3.9 of the Boongalla report. Mr Forrest compared the claim now brought, as it is articulated in the Amended Points of Claim, with the claim made in the earlier proceeding. He provided a useful chart in which he attempted to match the claim now made with the Boongalla report, what was claimed in the earlier proceeding, Mr Lee's report and the Tribunal's earlier decision. I have attempted to do likewise but without success.

What is now claimed and what is already decided

65. Any cause of action in contract must arise from a breach. The breach alleged in the initial Points of Claim was alleged to be "Active mould growth". Quite obviously, unless the Respondents had warranted that there was no active mould growth in the House, the mere presence of active mould growth would not be a breach. No such warranty has been pleaded.

66. The current particulars of breach are not much better. The allegation is that the Builder "failed to prevent":

a water ingress from the roof and bedroom two en suite to the music room;

b long term water escape from the laundry trough and associated tap;

c water escaping from the bedroom four en suite shower recess and/or water entry through the rear section of the ground floor tiled roof;

d water escaping from the bedroom one en suite shower recess, in particular, failure to provide a waterproofing membrane and associated drainage flange under the channel drain in violation of

AS3740-2010 Section 3.14.3 – Termination through a drainage channel; and use of any timber product to form a shower screen hob in violation of AS3740 Section 3.16.1.2 – Showers with hobs;

e water escape from the bedroom two en suite show[er] recess, in particular failure to provide a waterproofing membrane and associated drainage flange under the channel drain in violation of AS3740-2010 Section 3.14.3 – Termination to a drainage channel; and use of any timber product to form a shower screen hob in violation of AS3740 Section 3.16.1.2 – Showers with hobs;

and that it failed to connect the waste water drain in the laundry to the waste water system and/or directed it to discharge externally, meaning that in the event of a water escape or floor event in the laundry, water going down the floor waste would dump into the sub-floor/crawl space area below the laundry.

67. Failure to provide waterproofing membranes and associated drainage flanges under channel drains in violation of the standard referred to and use of a timber product to form shower screen hobs might be breaches. Otherwise, it was not pleaded, nor was it suggested, that the Respondents assumed any contractual obligation to prevent any of the other matters alleged in clauses a to e above. These are not particulars of breach although they <u>might</u> be the consequence of a breach of one or more the warranties in the Contract of Sale. If this litigation proceeds further, proper particulars of breach must be given.

68. For the purpose of the present application I have endeavoured to ascertain what it is that the Owners are claiming from the material before me and compare that with what they claimed in the earlier proceeding. Insofar as any of the claims are founded upon breaches that were alleged and determined previously the claim is Res Judicata.

69. The difficulty that I have had with this task is that the breaches relied upon are not identified clearly enough for me to be able to make such a comparison. One example of this difficulty will suffice to illustrate the point.

70. As to the claim about water ingress from the roof and bedroom two en suite to the music room, this relates to Item 3.3 of the Boongalla report. According to that report the source of the water ingress is thought to be through the roof linings and water escape from the bedroom 2 en suite shower recess directly above

71. It states that there was water damage to the underside of particle board flooring around the elongated grate drain of the bedroom 2 en suite shower recess directly above. However, on the west wall there was water staining and drip marks on the underside of a steel beam and the allegation is that there was high humidity within the west wall or bulkhead over an extended period of time causing moisture to condense on the sisal paper resulting in microbial growth. It was suggested that the high humidity could be the result of water ingress from the roof and the bedroom 2 en suite and from the effects of two air conditioning units positioned within the west wall bulkhead.

72. Item 101 of Schedule A to the Points of Claim in the earlier proceeding complains of "shower leaking causing damage to the ceiling below under the heading "Becky's bathroom". In amended particulars supplied by letter dated 4 February 2015 the Owners said that the bedroom two en suite was "Becky's bathroom".

73. Mr Forrest referred me to the comments of Mr Lees and proposed rectifications in his report concerning this and the surrounding items. As to the grille in the shower waste in Becky's bathroom he said that it was being supported on lumps of silicon and that would have to be removed and refitted as part of the shower rectifications.

74. Mr Lees said that the shower drain was not installed properly or finished properly, that there was evidence that the shower was leaking and causing damage to the ceiling below and that a further investigation should take place by removing sections of the ground floor plaster ceiling to determine the exact location of the leak. He said the most likely cause of the leak was a failure in the waterproof membrane. He said the shower would require to be re-waterproofed and re-tiled.

75. There is no mention here of water ingress from the roof to the music room but water ingress from the bedroom two en suite to the music room was part of the subject of the earlier proceeding. Insofar as the mould is alleged to have been caused by water entry from the roof that cause of action might still be open. Insofar as it relates to water ingress from the bathroom of Bedroom 2 it would seem to be Res Judicata.

76. The same terminology is not used in the different reports and documents and whether a defect now complained of is one that was complained of previously or a new defect is something about which I would need expert evidence.

77. Where evidence is required in order to determine whether a party is estopped from making a claim, that is something that should be done at a hearing on the merits. A hearing under s.75 is not the occasion for making final determinations of fact unless those facts are so obvious that it would be vexatious to require them to be formally proven.

78. Before the proceeding goes any further the Applicants must set out properly and fully what breaches of contract they are alleging and say what damages they are claiming. It is not sufficient to simply say: "There is mould in the House that we were previously unaware of". If all of that mould was a consequence of the breaches alleged in the previous proceeding then the claim with respect to those breaches has already been decided and they are estopped from claiming any more damages with respect to them. If none of it is the result of any of the previous breaches then all of the resulting damage is actionable. Whether any of the mould that is now complained of is due to previously undiscovered defects will need to be established by expert evidence at a full hearing. It cannot be dealt with in an application such as this.

79. I considered whether I should order that the present Amended Points of Claim be struck out but s.75 is concerned with striking out or dismissing proceedings. It is sufficient simply to order the filing and service of proper points of Claim.

Order to be made

80. There will be an order that the Owners file and serve proper Points of Claim and the matter must then return for directions to determine its future conduct.

SENIOR MEMBER R. WALKER