CIVIL AND ADMINISTRATIVE TRIBUNAL
CIVIL DIVISION
BUILDING AND PROPERTY LIST VCAT REFERENCE NO BP408/2014

CATCHWORDS

DOMESTIC BUILDING DISPUTE – s 75 of the *Victorian Civil and Administrative Tribunal Act 1998*; application to summarily dismiss claims made in the proceeding; relevant principles discussed; Terms of settlement – whether release operates as a bar against further litigation; *Anshun* estoppel; Jurisdiction of the Tribunal – whether claim for misleading and deceptive conduct brought under the *Australian Consumer Law and Fair Trading Act 2012* justiciable in the Tribunal.

FIRST APPLICANT	Mr Alex Shumsky
SECOND APPLICANT	Ms Penny Nolan
FIRST RESPONDENT	Mr Lino Visintin
SECOND RESPONDENT	Mr Anthony Lovelock
THIRD RESPONDENT	Leon Moulton Pty Ltd
FOURTH RESPONDENT	Mr Samuel Perna
FIFTH RESPONDENT	Victorian Managed Insurance Authority
WHERE HELD	Melbourne
BEFORE	Senior Member E. Riegler
HEARING TYPE	Interlocutory Hearing
DATE OF HEARING	10 February 2015
DATE OF ORDER	19 February 2015
CITATION	Shumsky v Visintin (Building and Property) [2015] VCAT 172

ORDER

1. The Applicants' claim as against the Third Respondent is dismissed pursuant to s 75 of the *Victorian Civil and Administrative Tribunal Act 1998***.**
2. The Applicants' claim as against the Fourth Respondent is dismissed pursuant to s 75 of the *Victorian Civil and Administrative Tribunal Act 1998***.**
3. By **20 March 2014**, the Applicants must file and serve *Amended Points of Claim*.
4. **The proceeding is listed for a further directions hearing before Senior Member E Riegler (if available) at 9.30 AM on 24 March at**

55 King Street, Melbourne, at which time further orders will be made as to the future conduct of the proceeding.

SENIOR MEMBER E. RIEGLER

APPEARANCES:

For the Applicants	Mr A Ritchie of counsel
For the First Respondent	No appearance
For the Second Respondent	Susan Porter of counsel
For the Third Respondent	Ms S Kirton of counsel
For the Fourth Respondent	Mr D Klempfner of counsel
For the Fifth Respondent	Mr Phil Atkin, solicitor

REASONS

INTORDUCTION

1. In this proceeding the Applicants (**'the Owners**') claim against a number of building practitioners, and the Victorian Managed Insurance Authority, in relation to loss and damage said to have been suffered by them and arising out of the design and construction of domestic building work at their property.

2. This directions hearing has been convened to hear three separate interlocutory applications made by the Second, Third and Fourth Respondents, wherein they seek orders summarily dismissing or striking out the claims made against them by the Owners pursuant to s 75 of the *Victorian Civil and Administrative Tribunal Act 1998* (**'the Act'**).

3. The dispute between the Owners and the Third and Fourth Respondents was previously the subject of litigation in this Tribunal. That proceeding was commenced by the Owners against Real Prop Investments Pty Ltd (**'the Builder'**), the Third Respondent in this proceeding (**'the Architect'**) and the Fourth Respondent in this proceeding (**'the Building Surveyor'**). The loss and damage claimed by the Owners in that proceeding related to the cost to repair and complete building works undertaken by the Builder and administered by the Architect. The Building Surveyor was responsible for issuing the relevant building permit and undertaking the mandatory inspections, as required under the *Building Act 1993*.

4. The claims against the Architect and the Building Surveyor were settled and separate terms of settlement were executed between the Owners and each of those parties.

5. According to the Owners, the claims made in the current proceeding against the Architect, Building Surveyor and Second Respondent arise from a fresh cause of action, which was not the subject of any release given in the terms of settlement executed between the parties, nor was it the subject of litigation in the first proceeding. In essence, the claims made in the current proceeding concern an allegation that, by reason of the acts or omissions on the part of the Second, Third and Fourth Respondents, warranty insurance, indemnifying the Owners against loss and damage suffered as a consequence of the Builder breaching its warranties given under s 8 of the *Domestic Building Contracts Act 1995*, was not procured or at least properly procured. In particular, the policy of insurance issued in favour of the Owners incorrectly named Anthony Lovelock, the Second Respondent in this proceeding, as the relevant builder. However, the building contract entered into by the Owners named the Builder as the contracting party.

6. The inconsistency between the identity of the builder named in the policy of insurance and the builder named in the building contract has now become critical because the Builder has been placed into liquidation. This factor would have crystallised an insurable event, allowing the Owners to claim

against the warranty insurance policy, had the policy named the Builder, rather than the Second Respondent, as being the entity contracted to carry out the building work.

7. By their *Points of Claim* dated 24 September 2014 and filed in the current proceeding, the Owners allege that the Second Respondent made representations to the warranty insurer, QBE Insurance, that he was the builder contracted to carry out the works. Similarly, in that pleading, the Owners allege that both the Building Surveyor and the Architect breached their respective retainers and/or duties of care. In the case of the Building Surveyor, the Owners allege that he should not have issued the building permit in circumstances where he could not be satisfied that the named builder had taken out warranty insurance. In the case of the Architect, the Owners contend that it failed to properly administer the building contract by not ensuring that the Builder had taken out the requisite insurance.

SECTION 75

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

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

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

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

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

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

(b) The Tribunal may deal with the application on the pleadings or submissions alone, or by allowing the parties to put forward affidavit material or oral evidence. The Tribunal's procedure is in its discretion and will depend on the circumstances of the particular case.

(c) If the complainant indicates to the Tribunal that the whole of his or her case is contained in the material put before the Tribunal, the Tribunal is entitled to determine whether the complaint lacked substance by asking whether, on all the material placed before it, there is a question of real substance to go to a full hearing. However, if a complainant indicates to the Tribunal that there is other evidence that he or she can call to support the claim and the Tribunal, on the application, does not permit that evidence to be called, then the Tribunal cannot determine the application on the basis that the complainant's material contains the whole of his or her case.

(d) An application to strike out a complaint is similar to an application to the Supreme Court for summary dismissal of civil proceedings under RSC Respondent 23.01 …

(e) The Tribunal should exercise caution before summarily terminating a proceeding. It should only do so if the proceeding is obviously hopeless, obviously unsustainable in fact or in law, or on no reasonable view can justify relief, or is bound to fail. This will include, but is not limited to, a case where a complaint can be said to disclose no reasonable cause of action, albeit a respondent can show a good defence sufficient to warrant the summary termination of the proceeding.

(f) On an application to terminate a complaint summarily, the Tribunal must clearly distinguish between the complaint itself and the evidence which is to be given in support of it. A complaint cannot be struck out as lacking in substance because it does not itself contain the evidence which supports the claims it makes.

(g) …

(h) The Tribunal should not apply technical, artificial or mechanical rules in construing a complaint or coming to a view about the case a complainant wishes to advance.[7]

11. Further, in *Forrester v AIMS Corporation*,[8] Kay J stated that:

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

[7] Ibid at 247-248.
[8] (2004) 22 VAR 97; [2004] VSC 506.

the material he or she has placed before the Tribunal contains the whole of the complainant's case.[9]

12. Indeed, the correct approach to adopt on an application under s 75 is to assume that the applicant will be able to prove each fact alleged in the claim in question.[10] In other words, a proceeding should not be dismissed or struck out under s 75 if the ultimate fate of the proceeding depends upon contested questions of fact that would be established or eliminated by cross-examination.[11]

THE SECOND RESPONDENT'S APPLICATION

13. Ms Porter of counsel, who appeared on behalf of the Second Respondent, submitted that the Tribunal did not have jurisdiction to determine the claim made against the Second Respondent. The relevant parts of the Owner's *Points of Claim* dated 24 September 2014, which make allegations against the Architect state:

> 51. Lovelock made representations to QBE Insurance that he was the builder to carry out the Works at the Property for the Owners pursuant to a contract dated 30 June 2011 for a declared contract price of $361,917.00 (**'the Lovelock Representations'**).
>
> 52. In reliance upon the Lovelock Representations QBE issued the Policy to be administered by the VMIA.
>
> 53. Lovelock made the Lovelock Representations in trade or commerce.
>
> 54. The Lovelock Representations were false and untrue as Lovelock was not the builder to carry out the Works at the Property for the Owners pursuant to a contract dated 30 June 2011 for a declared contract price of $361,917.00 or pursuant to any contract at all.
>
> 55. In making the Lovelock Representations Lovelock engaged in conduct that was misleading or deceptive or likely to mislead or deceive contrary to section 18 of the Australian Consumer Law.
>
> 56. Further, Lovelock in making the Lovelock Representations to obtain the Policy was carrying out work as a building practitioner.
>
> 57. Lovelock owed a duty of care to the Owners with respect to his work as a building practitioner that he carried out with respect to or relating to the Property.
>
> 58. In making the Lovelock Representations to obtain the Policy, Lovelock breached his duty of care to the Owners and his duty as a registered building practitioner to perform his work as a building practitioner in a competent manner and to a professional standard as he was not the builder for the Works at the Property.
>
> …

[9] [2004] VSC 506 at [33].
[10] *Boek v Australian Casualty and Life* [2001] VCAT 39.
[11] *Evans v Douglas* [2003] VCAT 377 at [9].

Does the Tribunal have jurisdiction?

14. Ms Porter submitted that the dispute as between the Owners and the Second Respondent was not a *domestic building dispute*, within the meaning of that term as defined under s 54 of the *Domestic Building Contracts Act 1995*, as the Owners did not allege that the Second Respondent was a party to the building contract or undertook the building work. Therefore, she argued that jurisdiction could not be found under that Act.

15. Ms Porter further submitted that the Tribunal did not have jurisdiction under the *Australian Consumer Law and Fair Trading Act 2012* (**'the ACL'**) because no goods or services were provided by the Second Respondent.

16. Finally, she argued that even if jurisdiction could be found, the pleading itself was defective in that it failed to establish any nexus between the loss and damage suffered by the Owners and the misleading and deceptive conduct alleged against the Second Respondent. In particular, she argued that it was not alleged that the misleading and deceptive conduct led to the issuing of the policy of insurance, which then led to the issuing of a building permit and finally to building work being performed defectively.

17. I do not accept that the Tribunal does not have jurisdiction to hear and determine the claim made against the Second Respondent. The claim pleaded against the Second Respondent relies upon the ACL as founding the Tribunal's jurisdiction. Section 18 of the *Australian Consumer Law (Victoria)* states:

> **18 Misleading or deceptive conduct**
>
> (1) A person must not, in trade or commerce, engage in conduct that is misleading or deceptive or likely to mislead or deceive.

18. Section 224 of the ACL states:

> **224. Jurisdiction of courts and VCAT**
>
> Subject to section 223, VCAT or any court of competent jurisdiction may hear and determine a cause of action arising under any provision of the Australian Consumer Law (Victoria).

19. In determining the question of jurisdiction, it is immaterial that goods or services were not supplied by the Second Respondent, as the supply of goods or services is not a necessary element in proving a breach of s 18 of the *Australian Consumer Law (Victoria).* Accordingly, the Tribunal is, *prima facie*, vested with jurisdiction to hear and determine the claim against the Second Respondent made under the ACL. Having said that, it seems to me that the critical question is whether or not the alleged conduct on the part of the Second Respondent can be said to be conduct in *trade or commerce*.

20. In the present case, it is not alleged that the Second Respondent had any commercial arrangement with the Owners. In those circumstances, can it be

said that the alleged representation to QBE Insurance, that he was the builder to carry out the works, is conduct in trade or commerce? In *Concrete Constructions (NSW) Pty Ltd v Nelson*,[12] Mason CJ stated in the context of s 52 of the *Trade Practices Act 1974* (Cth):

> (196) The phrase "in trade or commerce" in s 52 has a restrictive operation. It qualifies the prohibition against engaging in conduct of the specified kind….
>
> (197) Put differently, the section was not intended to impose, by a side-wind, an overlay of Commonwealth law upon every field of legislative control into which a corporation might stray for the purposes of, or in connection with, carrying on its trading or commercial activities. What this section is concerned with is the conduct of a corporation towards persons, be they consumers or not, with whom it (or those whose interests it represents or is seeking to promote) has or may have dealings in the course of those activities or transactions which, of their nature, bear a trading or commercial character. Such conduct includes, of course, promotional activities in relation to, or for the purposes of, the supply of goods or services to actual or potential consumers, be they identified persons or merely an unidentifiable section of the public. In some areas, the dividing line between what is and what is not conduct "in trade or commerce" may be less clear and may require the identification of what imports a trading or commercial character to an activity which is not, without more, of that character.[13]

21. In the present case, it is not clear whether the alleged conduct on the part of the Second Respondent is conduct which can properly be said to have occurred in trade or commerce. Nevertheless, I do not consider that the contention is unarguable. Further evidence will need to be adduced in order to fully understand the context in which the alleged representation was made. Given that this interlocutory application is not the forum by which contested facts are to be determined, I proffer no concluded view on that question.

22. However, I am of the view that the claim, insofar as it relates to a breach of duty of care, is not maintainable in the Tribunal. The enabling enactment relied upon to give jurisdiction to the misleading or deceptive conduct claim confines the enquiry to determining whether or not the Second Respondent's conduct misled or deceived QBE Insurance into issuing an incorrect policy of insurance, which ultimately led to the loss and damage suffered by the Owners. It does not vest the Tribunal with ancillary jurisdiction to entertain a claim in negligence.

Is there a causal nexus?

23. As to the submissions that the pleading fails to disclose any causal nexus, Mr Ritchie of counsel, who appeared on behalf of the Owners, drew my attention to paragraph 90 of the pleading which states, in part:

[12] (1990) 92 ALR 193.
[13] Ibid at 196-197.

90. The loss and damage suffered by the Owners is as a consequence of:

…

d) the Lovelock Representations and his breach of duty of care owed the Owners; and…

24. I accept that the pleading provides very little information as to how the loss and damage suffered by the Owners arose as a consequence of the *Lovelock Representations* or the alleged breach of duty of care. However, that factor alone is insufficient to persuade me that the claim should be struck out or dismissed. In my view, such a defect can be remedied by either amending the pleading of providing adequate particulars.

25. Having regard to my findings set out above, I do not consider it appropriate to order that the claim against the Second Respondent be struck out or dismissed. However, I will order that the Owners amend their pleading to take into account my findings and observations set out above.

THE ARCHITECT'S APPLICATION

26. The grounds upon which the Architect (and the Building Surveyor) rely in their applications to strike out or dismiss the claims made against them rest on the fact that both those parties have settled their disputes with the Owners.

27. In relation to the claim previously made against the Architect, terms of settlement were executed by the Architect and the Owners on 2 April 2014. Those terms of settlement provided, in part:

1. In full and final settlement of all claims in the proceeding against the Architect:

1.1 The Architect will pay the Owners the sum of $75,000…

…

4. No relief or remedy of any material facts will be alleged against the Architect by the Owners after the making of any orders referred to in paragraph 3.

…

7. In consideration of the Owners and the Architect entering into these terms of settlement and subject to their performance, they mutually release and discharge each other for further claims, demands, suits and costs of whatsoever nature, however arising out of or connected with the subject matter of the dispute and the proceedings between them. Where the Owner is a party, this release does not apply to a breach other than a breach that was known, or ought reasonably to have been known, to the Owner to exist at the time these Terms of Settlement were executed. [emphasis added]

28. Ms Kirton of counsel, who appeared on behalf of the Architect, submitted that the release given pursuant to the terms of settlement act as a bar against further litigation against the Architect. She argued that the proviso in the

release given under paragraph 7 of the terms of settlement did not operate in the present case because the Owners were either aware or ought reasonably to have been aware, prior to executing the terms of settlement, that the policy of insurance named the wrong builder.

29. Ms Kirton made reference to the affidavit of Sandra Keysers dated 17 December 2014 filed by the Second Respondent, which exhibited correspondence from the VMIA/QBE Insurance dated 18 July 2011, together with a certificate of insurance issued by QBE Insurance (Australia) Ltd also dated 18 July 2011. The certificate of insurance was addressed to the Owners and stated:

> **Policy Schedule Details**
>
> **Certificate in Respect of Insurance**
>
> Domestic Building Contract
>
> A contract of insurance … has been issued by QBE Insurance (Australia) Ltd … for and on behalf of the insurer Victorian Managed Insurance Authority … in respect of Domestic Building Work described in the Schedule herein.

Works	ALTERATIONS AND ADDITIONS STRUCTURAL
At	… ELSTERNWICK VIC 3185
Carried out by	BUILDER ANTHONY LOVELOCK ABN: 65 124 252 022
Declared Contract price	$361,917.00
Building Contract Date	30/06/2011
Builders Registration No.	DBU 12027
Building Owner/Beneficiary	ALEX SHUMSKY & PENNY NOLAN

30. The accompanying letter dated 18 July 2011, which was also addressed to the Owners, stated: in part:

> Enclosed you will find the following documents that you should read and keep it in a safe place:
>
> - Certificate of Insurance
> - Policy wording that details the cover provided
>
> …
>
> **What do I need to do?**
>
> You will need to carefully review the information contained on the Certificate of Insurance and ensure that it accurately reflects the building works being performed. In particular, you should check the information listed on the Certificate of Insurance against your building contract as follows:
>
> - Is the builder name correct?

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

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

31. It is not in contention that the Owners were in possession of those two documents prior to executing the terms of settlement in April 2014.[14]

32. Given that the name of the builder on the Certificate of Insurance is not the same as the contracting Builder, Ms Kirton submitted that, on any view, it was not open and arguable to allege that the Owners were not aware or ought not reasonably to have been aware of the discrepancy giving rise to the denial of their insurance claim. Therefore, the proviso in the release given under the terms of settlement did not operate in the present case.

33. The *Points of Claim* filed in this proceeding make the following allegations against the Architect:

> 7. On or about 23 November 2010 the Owners entered into an agreement with the Architect …
>
> 8. It was a specific term of the Architects Agreement that the Architect would provide the Architectural Services with the exercise of the skill and professionalism of a reasonable, qualified, registered architect.
>
> …
>
> 11. Prior to the Owners entering a contract for the works with Real Prop the Architect made representations to the Owners (**"the Architect's Representations"**):
>
> a) on several occasions that Visintin had the relevant experience and qualifications to carry out and complete the Works; and
>
> b) that they should engage Visintin for the Works.
>
> 12. Prior to the Owners entering a contract for the Works with Real Prop the Architect and Visintin made representations to the Owners (**"the Architect's and Visintin's Representations"**):
>
> a) that Real Prop was a registered builder that was capable of completing the Work; and
>
> b) that the Owners would be required to execute a building contract and make payment of the deposit to Real Prop before any warranty insurance could be provided.
>
> …
>
> 18. Under the terms of the Domestic Building Contract administered by the Architect, Real Prop was to take out the required Domestic Building Insurance policy and if that policy was not issued before the contract was executed, then until the Architect received

[14] Admitted in paragraph 24 of the Owners' *Points of Claim* dated 24 September 2014.

satisfactory evidence that the Domestic Building Insurance policy had been issued Real Prop:

a) could not enforce any provision of the contract;

b) could not carry out any work under the contract; and

c) was not entitled to be paid any money under the contract.

21. Real Prop did not take out the required Domestic Building Insurance policy for the Domestic Building Contract prior to the contract being executed.

22. On or about 18 July 2011 and before the Domestic Building Contract was executed QBE Insurance issued a policy to be administered by the VMIA for domestic building insurance or works at the Property.

23. The Policy is not for the works to be carried out by Real Prop under the Domestic Building Contract administered by the Architect.

…

28. The Architect' Representations and the Architect's and Visitant's Representations were made in trade or commerce.

29. The Architect' Representations and the Architect's and Visitant's Representations were untrue as Visintin or Real Prop did not have the relevant registration or any registration and have not obtained and could not obtain the required warranty insurance policy to be able to carry out the Works under the Domestic Building Contract administered by the Architect.

30. In making the Architect' Representations and the Architect's and Visitant's Representations the Architect engaged in conduct that was misleading and deceptive or likely to mislead or deceive contrary to section 18 of the Australian Consumer Law.

31. The Architects failure to ensure Real Prop had:

a) the relevant registration; and

b) provided the required Domestic Building Insurance

before allowing Real Prop to commence and proceed with the Works was in breach of the terms of the Architects Agreement to exercise the skill and professionalism of a reasonable, qualified, registered architect.

34. By contrast, the *Amended Points of Counterclaim* filed in the previous proceeding alleged:

23. The Architect has failed to comply with the contractual duties and obligations.

PARTICULARS

a) The Architect failed to properly and adequately administer the Contract; …

35. The balance of the particulars of breach of contract alleged against the Architect in the earlier proceeding predominately relate to a failure to properly administer the contract after the building work had already commenced. In essence, the Owners alleged that the Architect was partly responsible for the Builder's failure to properly construct the works. The particulars made no mention of the Architect's failure to ensure that the Builder was registered or that proper warranty insurance had been procured.

36. Mr Ritchie submitted that the current claim against the Architect is different to the claim that was previously prosecuted against the Architect. He argued that the current claim relates to a different breach of contract and that the Owners were not aware of that breach at the time when they signed the terms of settlement on 2 April 2014.

37. Ms Kirton submitted that the Owners' contention that they did not have actual knowledge of the breach is inconsistent with the allegation set out in the *Points of Claim*, which allege that they were in possession of both the relevant building contract and policy of insurance in 2011, well before the terms of settlement were executed. Further, she argued that even if actual knowledge could not be proved, the fact that the Owners were in possession of those two inconsistent documents meant that the breach *ought to reasonably have been known* to them at the relevant time.

38. In my view, the proviso within the release does not operate in the present case, even if it could be shown that the Owners did not have *actual* knowledge of the alleged breach prior to executing the terms of settlement. I have formed this view because I consider that any failing on the part of the Architect to ensure that the warranty insurance correctly identified the contracting Builder was patently obvious when one considers the correspondence and policy of insurance, both of which were in the possession of the Owners in 2011. As the extract of a policy of insurance above illustrates, there is no mention of the contracting Builder. It names the Second Respondent and not the Builder. Moreover, the covering letter specifically draws the Owners' attention to the fact that any such inconsistency requires the Owners to contact the insurer for advice. Therefore, I find that, based on the matters admitted by the Owners in their *Points of Claim* dated 24 September 2014, the breach by the Architect ought reasonably to have been known to the Owners, prior to them executing the terms of settlement.

39. Moreover, I do not consider that the allegations of misleading and deceptive conduct take the matter any further. In particular, the Architect's Representations, as set out in paragraph 11 of the pleading make no mention of any representation that the Builder had the requisite eligibility for insurance. Similarly, the allegations in paragraph 12 of the pleading do not allege any representation on the part of the Architect that the Builder had the requisite eligibility for insurance. All that is alleged; and which is said to be untrue, is that the Architect represented that the Builder was registered when in fact he was not. However, there is no causal connection between

that fact and the loss and damage suffered by the Owners, which is alleged to arise by reason of the Owners being deprived of being able to claim under a valid policy of warranty insurance.

40. Mr Richie drew my attention to a decision of the High Court of Australia in *Grant v John Grant & Sons Pty Ltd*,[15] in which the joint judgment of Dixon CJ, Fullagar, Kitto and Taylor JJ stated:

> The principle which it is thus sought to apply was expressed by Lord *Westbury* in *London & South-Western Railway Co v Blackmore* (4) as follows: "The general words in a release are limited always to that thing or those things which were specially in the contemplation of the parties at the time when the release was given" (1). It was expressed by *Taunton* J in *Upton v Upton* (2) in this way: "… the general words of a release may be limited by the particular matter out of which the release springs and the particular intent of the parties by whom the release is executed" (3).
>
> It was decided in the Supreme Court that the second replication was good and sufficient because when these principles were applied the release should be construed as not including liabilities which were not the subject of any dispute between the actual releasor or the actual releasee.[16]

41. In my view, *Grant* is to be distinguished from the facts in the present case for a number of reasons. First, the release given in the terms of settlement is not expressed in a general way, as it is specifically confined to *matters arising out of or connected with the subject matter of the dispute and the proceedings between* the parties. In both proceedings, the Owners allege that the Architect has breached its retainer, it being the same retainer alleged in both proceedings, albeit that the particulars of breach differ from one case to the next. Second, the loss and damage claimed is essentially the same. In both cases, the Owners claim damages commensurate with the cost to repair and make good defective work. It is that loss and damage which is the subject of the release. The present case is to be distinguished from a situation where the parties have more than one contractual relationship and separate causes of action accrue in respect of each of those contractual relationships. In those circumstances, it may well be the case that a general release given to discharge a cause of action arsing under one of those contractual relationships may be read down so that it only operates to extinguish claims brought under that contractual relationship.

42. Accordingly, I find that the release given in the present case operates to discharge all causes of action as between the Owners and the Architect arising out of or connected with the subject-matter of the dispute and the earlier proceedings between them. That includes the current claim.

43. Although not pressed with any great vigour during the course of the interlocutory application, I further consider that the Owners are estopped from raising in the current proceeding an issue which was not but which

[15] [1954] 91 CLR 112.
[16] Ibid at 123-124.

could and should have been litigated in the earlier proceeding. Clearly, the alleged breach (in failing to ensure that adequate warranty insurance was in place), was a matter that could have been raised in the earlier proceeding. In *Port of Melbourne Authority v Anshun Pty Ltd*,[17] the joint judgment of Gibbs CJ, Mason and Aickin JJ stated:

> It has generally been accepted that a party will be estopped from bringing an action which, if it succeeds, will result in a judgment which conflicts with an earlier judgment.[18]

44. Although the extract of the joint judgment in *Anshun* refers to conflicts between earlier and later judgments, I am of the opinion that the same applies in circumstances where the causes of action in the earlier litigation are compromised through negotiated settlement.[19]

45. Accordingly, I find that by reason of the terms of settlement entered into between the parties, the claim made against the Architect in the current proceeding is barred and should be dismissed.

THE BUILDING SURVEYOR'S APPLICATION

46. Mr Klempfner, of counsel, appeared on behalf of the Building Surveyor. He argued that the current claim against the Building Surveyor should be summarily dismissed, essentially on the same grounds as advanced by the Architect. In particular, he relied on the affidavit of Rohan Bennett dated 11 November 2014, which exhibited terms of settlement as between the Owners and the Building Surveyor.

47. Those terms of settlement also contain mutual releases, albeit that the release is not subject to any proviso to carve out any breach which was not known or ought reasonably not to have been known to the Owners at the time when they executed the terms of settlement. The terms of settlement state, in part:

> 6 In full and final settlement of all claims in the proceeding against Perna:
>
> 6.1 Perna will pay the Owners, who accept, the amount of $15,000 inclusive of all costs, interest, disbursements and taxes (the settlement sum);
>
> …
>
> 9 No relief or remedy of any material facts will be alleged against Perna is [sic.] the Owners after the making of any of the orders referred to in paragraph 8.
>
> 14 The Owners will not bring any other claim or proceeding against Perna that is in any way connected with or arises out of the circumstances that gave rise to the claims alleged in the proceeding.

[17] (1981) 86 ALR 3.
[18] Ibid at 12.
[19] See further *Wells v D'Amico* (1961) VR 672 at 675; *Prestwich v Hirschfeld* [2001] VCAT 2416..

…

Release

16 In consideration of these terms of settlement and subject to payment of the settlement sum:

16.1 each of the parties herein releases and forever discharge of the other, their past and present employees, servants, agents, successors and assigns, from all payments, obligations, duties, claims, demands, suits, causes of action, interlocutory costs orders (if any), orders, judgements or determinations (if any), which the parties have made in the proceeding or obtained or could, now or hereafter, have made or obtained after this agreement against each other arising out or in relation to the subject matter of the proceeding.

48. Mr Ritchie submitted that the cause of action in the current proceeding is different to that alleged and prosecuted in the earlier proceeding. In particular, the claim made against the Building Surveyor in the earlier proceeding was based upon a failure to properly inspect the building works. By contrast, the allegations raised against the Building Surveyor in the current proceeding relate to his obligations under the *Building Act 1993* in issuing the building permit. In that regard, s 24 of the *Building Act 1993* requires that a building surveyor not issue a building permit unless he or she is satisfied that the proposed building work and the building permit would comply with the *Building Act 1993*. That Act requires domestic building warranty insurance to be in place in circumstances where the parties enter into a major domestic building contract.

49. For the reasons which I have already set out in my discussion and findings concerning the liability of the Architect, I am of the opinion that the claim as against the Building Surveyor is not sustainable. Both in the earlier proceeding and in the current proceeding, the principal allegation raised against the Building Surveyor is that he breached the terms of his retainer and the duty of care which he owed to the Owners, albeit that the breach currently alleged is of a different nature to what was previously alleged.

50. Nevertheless, the release given under the terms of settlement operate as a bar to prosecute claims against the Building Surveyor in relation to or connected with the subject matter of the earlier proceeding. The earlier proceeding focused on the Building Surveyor's obligations in relation to the same building project and the same parties, which are the subject of the current proceeding. As I have already indicated, the facts in the present case are to be distinguished from the facts in *Grant v John Grant & Sons*, referred to above.

51. Moreover, I accept the submissions made by Mr Klempfner that, in the present case, the Owners are estopped from bringing the current proceeding by reason of them having compromised the earlier proceeding. In that regard, Mr Klempfner drew my attention to two authorities.

52. In *Wells v D'Amico*,[20] the defendant accidentally drove his vehicle into the appellant's shop, causing damage to the shop and stock. Initially, the appellant claimed for the value of the stock damaged. That claim was settled. The appellant subsequently issued another proceeding, claiming damage to the shop. Gavan Duffy J. first considered whether the claim for damages to the shop arose out of the same cause of action. He stated:

> What I have to determine, therefore, is whether the claim of damages done to the complainant's stock is in substance the same cause of action as the claim for damages done to his shop. I think on the whole that it is. The evidence would be substantially the same, namely, proof of negligence and of the amount of damage suffered in consequence of it.

53. The circumstances in the present case differ slightly to what was before the court in *Wells v D'Amico*. In particular, in *Wells v D'Amico* the same act was the cause of damage to the shop and the stock; namely, driving the vehicle into the shop. However, in the present case, it is alleged that there are two separate acts that give rise to damages. The *first act*, which is relied upon in this proceeding, relates to the process of granting the building permit and the *second act* relates to the inspection process, which occurred after the building permit had been issued. Nevertheless, apart from evidence going to the issue of granting the building permit (which on any view, would be narrow in compass), the balance of the proceeding would canvass the same evidence required to prove loss and damage, as what would have been canvassed in the earlier proceeding; namely, the cost to repair and complete the building works. In my view, the distinction is marginal, at best.

54. Even if two separate causes of action can be isolated from the conduct of the Building Surveyor, I nevertheless find that an estoppel still arises because the alleged negligence or breach of contract flowing from the *first act* could have and should have been litigated in the earlier proceeding. As I have already found, based on the admissions made by the Owners in their *Points of Claim* dated 24 September 2014, the Owners were possessed with sufficient information in 2011 to know that the builder named on the policy of insurance did not match the builder named in the building contract.

55. The only thing that the Owners did not *actually* know was that this factor would eventually lead to a denial of their warranty insurance claim. However, as I have already indicated, the Owners ought reasonably to have known that fact, especially when one considers the warning given in the covering letter to the certificate of insurance forwarded to the Owners.

56. It is beyond doubt that the cause of action in contract accrued when the building permit was issued. Moreover, I am of the view that the cause of action in negligence accrued no later than when the Owners were possessed with both a copy of the building contract and a copy of the certificate of insurance, naming the wrong builder. Both those causes of action accrued

[20] *Wells v D'Amico* [1961] VR 672.

well before the earlier proceeding was commenced and in my view, should have formed part of that proceeding.

57. As I have already indicated, an estoppel arises in accordance with the principles set out in *Port of Melbourne Authority v Anshun*,[21] notwithstanding the fact that the earlier proceeding was compromised, rather than curially determined. In that regard, Mr Klempfner again relied on *Wells v D'Amico*, where that same issue arose for consideration. Gavan Duffy J. stated:

> I shall first consider whether the complainant was estopped by the settlement of the first claim. In *Darley Main Colliery Liminted v Mitchell* (1886) 11 App Cas 127, 149 Lord Fitzgerald said: "He accepted compensation which it seems agreed is equal to a recovery of damages in an action if such an action has been instituted." It seems to me sufficiently clear that the settlement of compromise for an action in being is certainly equivalent to judgment for the purposes of producing an estoppel.[22]

58. *Wells v D'Amico* was followed in this Tribunal in *Prestwich v Hirschfeld*,[23] a case which also involved a claim against a building surveyor. In *Prestwich*, the homeowners had initially claimed against the builder in respect of defective work but compromised that proceeding. They subsequently claimed against the building surveyor in respect of the costs of the earlier litigation and again, compromised that proceeding. Thereafter rectification work commenced on their dwelling, which ultimately revealed that the cost of rectification was far in excess of the settlement monies received. Proceedings were then re-issued against the building surveyor to recover the costs of rectification. However, the Tribunal found that, on the facts of that case, an estoppel operated automatically and without discretion.

59. In my view, the same situation arises in the present case. Therefore, I accept the submission made by Mr Klempfner, the consequence is that the proceeding as against the Building Surveyor is barred.

SENIOR MEMBER E. RIEGLER

[21] (1981) 36 ALR 3.
[22] *Wells v D'Amico* [1961] VR 672 at 675.
[23] [2001] VCAT 2416.