VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST **VCAT REFERENCE NO. BP184/2014**

CATCHWORDS

Domestic Building, Victorian Civil and Administrative Tribunal Act 1998, s 75, s 126, s 127; *Building Act 1993*, s 134.

APPLICANT:	Ms Christina Tsobanis
FIRST RESPONDENT:	Mr Chris Katsouranis t/as CT Properties
SECOND RESPONDENT:	Mr Blagojce Romanovski t/as Checkpoint Building Surveyors
THIRD RESPONDENT:	Mr John Richardson
FOURTH RESPONDENT:	Mr David Bosnar
FIFTH RESPONDENT:	Mr Peter Bozinovki
SIXTH RESPONDENT:	Northern Building Surveying Services Pty Ltd (ACN 122 666 246)
SEVENTH RESPONDENT:	BCG (AUST) Pty Ltd (ACN 114 332 017)
WHERE HELD	Melbourne
BEFORE	Member C Edquist
HEARING TYPE	Interlocutory Hearing
DATE OF HEARING	6 March 2015
DATE OF ORDER	7 May 2015
DATE OF REASONS	26 May 2015
CITATION	Tsobanis v Katsouranis trading as CT Properties [2015] VCAT 1000

ORDERS

1 The Tribunal finds and declares that the following parties were validly joined as respondents when the applicant commenced proceedings on 7 August 2014 and directs the registrar to amend the register accordingly:

(a) Mr Chris Katsouranis t/as C T Properties, to be named the first respondent.

(b) BCG (AUST) PTY LTD (ACN 114 332 017) trading as Checkpoint Building Surveyors, to be named the second respondent.

(c) Mr John Richardson, to be named the third respondent;

(d) D&L Bosnar Plumbing Pty Ltd (ACN 079 558 651), to be named the fourth respondent;

(e) Mr Peter Bozinovki, to be named the fifth respondent.

2 The Tribunal finds and declares that the following parties have not been joined as respondents since 7 August 2014 and directs the registrar to remove each of these parties from the register pursuant to s 60A of the *Victorian Civil and Administrative Tribunal Act 1998*, ('the VCAT Act'):

(a) Mr Blagojce Romanovski t/as Checkpoint Building Surveyors;

(b) Mr David Bosnar;

(c) Northern Building Surveying Services Pty Ltd (ACN 122 666 246);

3 The Tribunal dismisses the application made by the first respondent (Mr Chris Katsouranis t/as C T Properties) for an order under s 75 of the VCAT Act striking out the proceeding against him.

4 The Tribunal dismisses the application made by third respondent (Mr John Richardson) for an order under s 75 of the VCAT Act striking out the proceeding against him.

5 **This proceeding is listed for a directions hearing at 2.15 pm on 12 June 2015 at 55 King Street, Melbourne before Member C Edquist, with an allowance of two hours at which**:

(a) Submissions can be made by or on behalf of BCG (AUST) PTY LTD (ACN 114 332 017) and by the applicant as to whether it is appropriate that the Tribunal should now remove that company as a respondent;

(b) submissions can be made by or on behalf of D&L Bosnar Plumbing Pty Ltd (ACN 079 558 651) and by the applicant as to whether it is appropriate that the Tribunal should now remove that company as a respondent;

(c) further directions for the conduct of the matter can be made; and

(c) any application for costs arising out of the hearing on 6 March 2015 will be heard and considered.

MEMBER C EDQUIST

APPEARANCES:

FOR THE APPLICANT MS TSOBANIS	Mr J Gray, Solicitor
FOR THE FIRST NAMED RESPONDENT MR CHRIS KATSOURANIS:	Mr T Mitchell of Counsel
FOR THE SECOND NAMED RESPONDENT MR BLAGOJCE ROMANOVSKI:	Mr S Matters of Counsel
FOR THE THIRD NAMED RESPONDENT MR JOHN RICHARDSON:	Mr A Woods of Counsel
FOR THE FOURTH NAMED RESPONDENT MR DAVID BOSNAR:	In person
FOR THE FIFTH NAMED RESPONDENT MR PETER BOZINOVKI:	No appearance
FOR THE SIXTH NAMED RESPONDENT NORTHERN BUILDING SURVEYING SERVICES PTY LTD (ACN 122 666 246):	Mr A Woods of Counsel
FOR THE SEVENTH NAMED RESPONDENT BCG (AUST) PTY LTD:	Mr S Matters of Counsel

REASONS

INTRODUCTION

1. Christina Tsobanis owns a house in Hick Street, Spotswood, Victoria.
2. On 7 August 2014, she instituted proceedings against the first respondent Chris Katsouranis, and a number of other parties, in respect of defects in the house.
3. Two of the original respondents, namely, Mr Katsouranis and Mr Richardson, together with others who have after 21 October 2014 been shown on VCAT's file as respondents, have come today to the Tribunal for orders under s 75 of the *Victorian Civil and Administrative Tribunal Act 1998*, ('the VCAT Act') that the proceedings against them be summarily dismissed or struck out, and for ancillary orders.

Background

4. Mr Katsouranis built the house as an owner builder. The occupancy permit issued on 17 August 2004.
5. Mr Katsouranis initially leased the house to Ms Tsobanis but, after some months, he agreed to sell the property to her. The transfer of land was signed on 14 February 2005, and was registered after stamp duty was paid on 3 March 2005.
6. Ms Tsobanis issued proceedings on 7 August 2014, which it is to be noted was just 10 days before the tenth anniversary of the issue of the occupancy permit.
7. Central to the some of the s 75 applications made today are the propositions that:

   (a) the respondents making those applications were not properly joined as respondents when the proceedings were issued;

   (b) the attempt to join them made after 7 August 2014 has been ineffective because the joinder has not been effected by a member of the Tribunal;

   (c) the proceeding is a building action for the purposes of the *Building Act 1993*;

   (d) the 10 year time limit on the bringing of a building action imposed by s 134 of that Act is absolute and cannot be extended;

   (e) no respondent can now (indeed, at any time after 17 August 2014) be joined because of the operation of s134 *Building Act 1993*;

   .

8. At the hearing the presently identified fourth named respondent, Mr David Bosnar, who represented himself, orally made an application for the applicant's claim against him to be dismissed under s 75, and he adopted the submissions made by the other respondents in making that application. Ms Tsobanis objected to Mr Bosnar making his application on the basis that the Tribunal had previously ordered that any s 75 application had to be made by 13 February 2015.

9. On the return of the applications today, Ms Tsobanis made submissions as to why the proceedings should not be dismissed under s 75. Furthermore, in the event that the Tribunal ruled that Ms Tsobanis' claim against any party had been made out of time, the Tribunal was urged to grant an extension of time for the commencement of the proceeding under s 126 of the VCAT Act.

10. The relevant issues for determination by the Tribunal can be summarised as follows:

    (a) Who are the current parties to the proceeding? This raises threshold questions. Which parties were joined at the outset on 7 August 2014? Should the identity of any of the respondents be amended? Has any other party validly been added to the proceeding since it began? Has any of those parties been properly removed since that date?

    (b) If the presently named fourth respondent Mr David Bosnar is a party, should he be allowed today to make a late s 75 application for Ms Tsobanis' claim against him to be dismissed?

    (c) Has the 10 year time limit imposed by s 134 of the *Building Act* expired?

    (d) If Ms Tsobanis failed to effectively join a party as a respondent who she had intended to join, is this a procedural error which can readily be fixed?

    (e) Can an existing claim be amended so as to get around the s 134 time limit by operation of the doctrine of 'relation back', as in *Agtrack (NT) Pty Ltd (t/as Spring Air) v Hatfield* [2003] VSCA 6.

    (f) Can any new party now be added to the proceeding? This involves an analysis of whether Ms Tsobanis is now barred from joining a new respondent by the operation of s 134 of the *Building Act 1993* or by any other Act?

    (g) If Ms Tsobanis is barred by statute from joining a new respondent, has the Tribunal power in any event to extend time in which the proceedings can be brought under s 126 of the VCAT Act.

    (h) What are the principles to be applied in the s 75 strike out applications being made?

(i) Is the first named respondent, Mr Katsouranis, entitled to a s 75 strike out order on the basis he has already been completely released by Ms Tsobanis, or on any other basis?

(i) Is the third named respondent, Mr Richardson, in a different category to the other respondents as the services he performed do not give rise to a 'building action'.

(j) Alternatively, is the claim against Mr Richardson to be struck out under s 75 on the basis that the pleading against him is vague and embarrassing, or because Ms Tsobanis did not rely on his report, or because it is statute barred?

(k) Was the occupancy certificate validly issued?

Who are the current parties to the proceeding?

11. This proceeding arises under the Tribunal's original jurisdiction.

12. Section 59 of the VCAT Act provides in part:

> (1) The parties to a proceeding are—
>
> (a) in a proceeding in the Tribunal's original jurisdiction—
>
> (i) the person who applies to the Tribunal, or who requests or requires a matter to be referred to the Tribunal; and
>
> (ii) in the case of an inquiry by the Tribunal, the person who is the subject of the inquiry; and
>
> (iii) any person joined as a party to the proceeding by the Tribunal; and
>
> (iv) any other person specified by or under this Act or the enabling enactment as a party;

13. The respondents originally named in the VCAT application filed by Ms Tsobanis were:

(a) Mr Chris Katsouranis t/as C T Properties;

(b) Checkpoint Building Surveyors (ACN 096 590 184);

(c) Mr John Richardson;

(d) D&L Bosnar Plumbing Pty Ltd (ACN 079 558 651);

(e) Mr Peter Bozinovki.

Which parties were joined at the outset on 7 August 2014?

14. The first respondent Mr Chris Katsouranis and the third respondent Mr John Richardson and the fifth respondent, Mr Peter Bozinovki, have made no complaint about the manner in which they were joined. I find that they are respondents, and have been since the outset.

15. However, the original second respondent, Checkpoint Building Surveyors (ACN 096 590 184), disputes that it was validly made a respondent when the proceedings were issued.

16. D&L Bosnar Plumbing Pty Ltd made no submission about whether it had been joined. Mr Bosnar appeared on his own behalf, not on behalf of the company, which suggests he does not think the company is currently a respondent.

Was Checkpoint Building Surveyors (ACN 096 590 184) validly joined on 7 August 2014?

17. Checkpoint Building Surveyors contends that it was not effectively made a respondent on 7 August 2014 because:

    (a) The original VCAT application lodged by Ms Tsobanis identified the second named respondent as a company;

    (b) Ms Tsobanis' application lodged at the Tribunal on '8 August 2014' (sic) did not comply with Rule 4.05A as an ASIC record showing the company's name and registered office did not accompany the application; [Note: the application was in fact lodged on 7 August 2014, not 8 August 2014.]

    (c) The application therefore did not comply with s 67;

    (d) Thus the original jurisdiction of the Tribunal was not invoked under s 43(a) of the VCAT Act.

18. The submissions made by Ms Tsobanis in response do not address in a substantive way the defect in the original application insofar as it concerned a company. The thrust of the submissions made on behalf of Ms Tsobanis is that, even among building lawyers, there is uncertainty as to which party to sue when a building surveyor operates a corporate vehicle associated with the business; that it is clear she intended to sue the building surveyor; that Ms Tsobanis was unrepresented at the time she lodged the application; that at the time she was undergoing treatment for stress, anxiety and depression; and as a lay person she should not be held to a higher standard than a legal practitioner. The Tribunal was urged to allow Ms Tsobanis to sue both the individual building surveyor (Mr Romanovski) and his company.

19. The Tribunal's file confirms the facts as asserted by Mr Romanovski, namely:

    (a) The original VCAT application lodged by Ms Tsobanis identified the second named respondent as a company.

    (b) The name given was Checkpoint Building Surveyors and the ACN specified was 096 590 184.

    (c) Mr Blagojce (Bill) Romanovski was identified as the contact.

20. However, I consider the consequences contended for by Mr Romanovski do not flow from those facts. The flaw in his argument is that Checkpoint

Building Surveyors ACN 096 590 184 is not a company. Rather, as demonstrated by the ASIC business name extract filed by Ms Tsobanis, it is a business name. The fact that an ASIC company search was not filed with the original application is therefore not relevant.

21. The issue arises as to whether Ms Tsobanis can now ask the Tribunal to amend the original application to clarify that Checkpoint Building Surveyors is a business name.

22. The relevant provision in the VCAT Act is s 127, which provides:

> **Power to amend documents**
>
> (1) At any time, the Tribunal may order that any document in a proceeding be amended.
>
> (2) An order under subsection (1) may be made on the application of a party or on the Tribunal's own initiative.

23. The document which Ms Tsobanis seek to amend is her application. She says in her email to the Tribunal dated 18 September 2015:

> When completing the initial application I had selected the incorrect options on the form. Can I please ask for the following to be amended to correctly reflect the following information:
>
> 1. Checkpoint Building Surveyors-ABN 990 096 580 184
>
> 2. I have enclosed scanned print outs from the ABN lookup site showing they are an active trading Business with an active ABN. I had inadvertently used the ACN to the group company which was incorrect however Checkpoint Building Surveyors is correct. Checkpoint is the correct Business with ABN.

24. On its face, the power to amend a document given by s 127 in a proceeding is unrestricted. The provision obviously gives rise to an exercise of discretion. The question is: what factors should be taken into account by the Tribunal in exercising that discretion?

25. Some guidance is available. In *Pizer's Annotated VCAT Act*, 4th Edition, it is said at p 673:

> The purpose of s 127 is to enable documents to be amended where it is just and appropriate to do so: *Woodcock v Northern Grampians SC* [2005] VCAT 1823 at [5].

26. Pizer notes also at p 676 that:

> In exercising [the] discretion [under s 127] VCAT may take into account whatever factors it considers relevant: *Yim v Victoria* [2000] VCAT 821.

27. Here, I consider the following factors to be relevant:

(a) As submitted by Ms Tsobanis, it is clear that at the outset of her proceeding she wished to sue Checkpoint Building Surveyors.

(b) This is demonstrated because Ms Tsobanis emailed Checkpoint Building Surveyors at the email address enquiries@check-point.com.au on 17 March 2014 indicating that it was her intention to seek compensation in respect of issues with her house 'based on the clear breaches and negligence in relation to surveyors responsibilities'. She invited a response.

(c) On 28 March 2014 Ms Tsobanis received a letter from Griffin Law Firm which confirmed that they acted for Checkpoint Building Surveyors. On behalf of their client they advised:

> …your demands are refused and any allegation of wrongdoing or liability is also denied… Our client has carried out its duties in accordance with the statutory regime applicable and in a manner expected of a building surveyor.

(d) Ms Tsobanis was unrepresented when she completed the original VCAT application form.

(e) However, it is clear she intended to join the surveyor.

(f) She named Checkpoint Building Surveyors as the second respondent but misdescribed the entity as a company. She gave the ACN as 096 590 184. This was an error as Checkpoint Building Surveyors does not have an ACN, but has an ABN.

(g) If the Tribunal allows an amendment to be made to the application to properly identify Checkpoint Building Surveyors as a business name, there will be no prejudice to the proprietor of the business name other that the fact of joinder arising from the amendment. There will be no prejudice arising because the proprietor of the business name has been on notice since March last year that Ms Tsobanis was holding the business responsible for breach of duty as a surveyor.

28. The Tribunal is required under s 97 of the VCAT Act 'to act fairly and according to the substantial merits of the case in all proceedings'.

29. Although under s 98 of the VCAT Act the Tribunal is bound by the rules of natural justice, it is not bound by the rules of evidence or any practices or procedures applicable to courts of record, except to the extent that it adopts those rules, practices or procedures.

30. It is well established that the Tribunal is not a court of pleading.

31. In the circumstances I find that it is appropriate that I should exercise my discretion to amend the application to identify the second respondent as the registered business name Checkpoint Building Surveyors as this is the fair thing to do according to the substantial merits of the case, in all the circumstances outlined above.

32. Changing the identity of the second respondent from a company to a business name has a consequence in that a business name is not a legal entity capable of being sued. If it is appropriate that the description of the

second respondent should be changed from Checkpoint Building Surveyors ACN 096 590 184 to Checkpoint Building Surveyors the registered business name it is appropriate that the name of the second respondent should be further amended to reflect the name of the proprietor of the business name Checkpoint Building Surveyors.

33. It accordingly becomes necessary to identify the relevant proprietor. In this connection it is to be noted that when Ms Tsobanis, on 18 September 2014, emailed the registry advising that she wished to join the Checkpoint Building Surveyors she provided an ASIC historical business name extract which identified the holder of the business name as BCG (AUST) PTY LTD (ACN 114 352 017). I find and declare that this company, trading as Checkpoint Building Surveyors is to be named the second named respondent.

Should the amendment of the application be back-dated so as to take effect as at 7 August 2014?

34. It was held in this Tribunal in *Riga v Peninsula Home Improvements* [2000] VCAT 56 that this would not amount to the joinder of a new party but would amount to the replacement of a business name in the title to the application with the name of the legal entity that business name represents. As the effect of the amendment making the proprietor of the business name Checkpoint Building Surveyors a respondent is not to add a new party but to correct the identity of an existing party, the correction of the name of the second respondent to BCG (AUST) PTY LTD (ACN 114 332 017) trading as Checkpoint Building Surveyors must take effect from 7 August 2014, as this is the date the proceeding was commenced against the business name. Section 134 is accordingly not relevant to this particular respondent.

D&L Bosnar Plumbing Pty Ltd

35. The position of the fourth respondent, D&L Bosnar Plumbing Pty Ltd, is subject to the argument regarding the operation of Rule 4.05A put forward with respect to Checkpoint Building Surveyors, as an ASIC search for D&L Bosnar Plumbing Pty Ltd was not filed with the original application. I was not addressed on this point as the argument was not raised by Mr Bosnar who seemed to assume that he had already been substituted for D&L Bosnar Plumbing Pty Ltd as a respondent. The VCAT file suggests that an ASIC search of this company was not filed on 7 August 2014 but was sent to the Tribunal on 27 August 2014. Accordingly, I accept that D&L Bosnar Plumbing Pty Ltd will not have been effectively joined on 7 August 2014 unless I retrospectively exercise my discretion under Rule 1.06 of the VCAT Rules and regularise the issuing of proceedings against the company on that date by waiving compliance by the applicant of her obligation under Rule 4.05A to file with her application an ASIC company search.

36. In connection with the issue as to whether I should exercise my discretion under rule 1.06, I note:

(a) Rule 1.06 was drawn to my attention by Ms Tsobanis' lawyer at the hearing. He did not make any application that I exercise my discretion under this Rule 1.06 with effect from 7 August 2014 with respect to D&L Bosnar Plumbing Pty Ltd as he did not consider the company to be a party.

(b) These circumstances exist:

(i) as previously observed, it is the Tribunal's responsibility under s 97 of the VCAT Act to act fairly and in accordance with the substantial merits of the case;

(ii) the intention of Ms Tsobanis when she issued proceedings was to join D&L Bosnar Plumbing Pty Ltd as a respondent;

(iii) Ms Tsobanis has provided the ASIC company search required by Rule 4.05A (2) (a), albeit late;

(iv) the non provision of the company search on the day the application is filed is a requirement of the Rules and accordingly is a requirement which can be dispensed with under Rule 1.06, even after the occasion for compliance has arisen.

37. In all these circumstances, I am prepared to waive compliance with Rule 4.05A (2)(a) as at the date this proceeding was commenced against D&L Bosnar Plumbing Pty Ltd and to extend the time for the provision of the required company search to 28 August 2014, being the day after it was filed at the Registry.

38. Accordingly, I find and declare that D&L Bosnar Plumbing Pty Ltd (ACN 079 558 651) is and has been a respondent since 7 August 2014

Has any party been validly added to the proceeding since it began?

39. Since at least 21 October 2014, the file maintained by the VCAT registry has identified the respondents as follows:

(a) Mr Chris Katsouranis t/as CT Properties;

(b) Mr Blagojce Romanovski;

(c) Mr John Richardson;

(d) Mr David Bosnar;

(e) Mr Peter Bozinovki;

(f) Northern Building Surveying Services Pty Ltd (ACN 122 666 246);

(g) BCG (AUST) PTY LTD (ACN 114 332 017);

40. There is a clear discrepancy between that list of respondents and the list of respondents on the original application filed by Ms Tsobanis. For instance, the identity of the second respondent has been changed from Checkpoint Building Surveyors (ACN 096 590 184) to Mr Blagojce Romanovski.

Furthermore, the identity of the fourth respondent has changed from D&L Bosnar Plumbing Pty Ltd (ACN 079 558 651) to Mr David Bosnar.

41. Ms Tsobanis sent an email to the registry on 18 September 2014 in which she:

    (a) said she had been able to clarify some information regarding 'Checkpoint Building Surveyors and D&L Bosnar Plumbing';

    (b) explained that regarding Checkpoint Building Surveyors ABN 90 096 580184 'I had inadvertently used the ACN to the group company which was incorrect however Checkpoint Building Surveyors is correct. Checkpoint is the correct business with ABN';

    (c) asked 'if it would be possible to add Mr Blagojce (Bill) Romanovski as an Individual (sic) who was the Surveyor (sic) who authorised the occupancy certificate. Licence number BS15181. Can this be done?;

    (d) said a correction to the information provided for D&L Bosnar Plumbing was also requested 'This will need to change to an individual, plumber with licence number 31914';

42. Ms Tsobanis' email of 18 September 2014 was formally acknowledged by VCAT's registrar, in a letter dated 22 September 2014. The letter advised:

> "Please clarify in writing the name/number of respondents you wish to proceed against in this application and provide a registered address for service for each respondent."

43. Ms Tsobanis emailed the registry on 14 October 2014 and provided:

> '1 Amended respondent information 2 Multiple ASIC current and Historical company extracts ...'

44. The VCAT file reveals the extracts provided were the business name extract for Checkpoint Building Surveyors which indicated that the holder of the business name was BCG (AUST) PTY LTD (ACN 114 332 017); the company extract for BCG (AUST) PTY LTD (ACN 114 332 017); and the company extract for Northern Building Surveying Services Pty Ltd (ACN 122 666 246).

45. On another part of the VCAT file there is a second Application in Ms Tsobanis' name. It identifies the respondents as Mr Chris Katsouranis, Mr Blagojce Romanovski, Mr John Richardson, Mr David Bosnar, Mr Peter Bozinovki, Northern Building Surveyor Services (ACN 122 666 246) and BCG (AUST) PTY LTD (ACN 114 332 017).

46. This application was marked as having been received by VCAT on '15/10" but was not given a file number. It was clearly not treated as a new application by the Registry, and was filed on the file BP184/2014, which had been opened for Ms Tsobanis' original application.

47. Ms Tsobanis submits that this second application form 'does not introduce "a new cause of action" but merely clarifies or alters the party/ies to be held liable'.

48. I accept that the second application form does not introduce a new cause of action. I disagree, however, that it clarifies or alters the parties to be sued. I find that it has no status, and effected no change in the proceeding. It merely reflected Ms Tsobanis' intentions on the day she filed it.

The letter of 21 October 2014 to Ms Tsobanis

49. VCAT wrote to Ms Tsobanis on 21 October 2014. The letter in the first part of its heading referred to the parties as 'Ms Christina Tsobanis v Mr Chris Katsouranis t/as CT Properties, Mr Blagojce Romanovski t/as Checkpoint Building Surveyors, Mr John Richardson, Mr David Bosnar, Mr Peter Bozinovki, Northern Building Survey Services (ACN 122 666 246), BCG (AUST) PTY LTD (ACN 114 332 017)'.

    The heading continued:

    > 'Acnowledgement of Application
    >
    > Notice of Date of Directions Hearing'.

    The letter advised:

    > 'VCAT has received your application. We have posted a copy of your application to the party/parties you have identified at the address/es you have provided.'

The letters of 21 October 2014 to the Respondents

50. Each of the respondents named in paragraph 52 also got a letter headed:

    > 'Notice of Application
    >
    > Notice of Date of Directions Hearing'

    However, in contradistinction to the letter addressed to Ms Tsobanis, each of the letters to the respective respondents said:

    > An application has been made against you in the Victorian Civil and Administrative Tribunal (VCAT) in the Building and Property List. A copy of the application is enclosed.

Section 60 of the VCAT Act

51. It is relevant to note at this point that joinder of parties is dealt with in s 60 of the Act as follows:

    > (1) The Tribunal may order that a person be joined as a party to a proceeding if the Tribunal considers that—
    >
    > (a) the person ought to be bound by, or have the benefit of, an order of the Tribunal in the proceeding; or
    >
    > (b) the person's interests are affected by the proceeding; or

(c) for any other reason it is desirable that the person be joined as a party.

(2) The Tribunal may make an order under subsection (1) on its own initiative or on the application of any person.

Joinder of Mr Romanovski

52. It is necessary to consider the effect of the request made by Ms Tsobanis to the VCAT registry's staff on 18 September 2014 to make Mr Blagojce Romanovski a respondent

53. The argument put forward on behalf of Ms Tsobanis is that, although Mr Romanovski may not have been joined on 7 August 2014, it was clear the intention was 'to sue the building surveyor, that is, the entity with ultimate responsibility for issuing the building permit and occupancy certificate; however identification of the correct entity to sue was in error'.

54. The argument put forward on behalf of Mr Romanovski is as follows:

    (a) When, on 14 October 2014, Ms Tsobanis lodged an ASIC company search for Checkpoint Building Surveyors, the covering email asked for the application to be 'amended' to reflect further information regarding Checkpoint Building Surveyors and also to 'add' Blagojce (Bill) Romanovski as a respondent. (I note in passing that this request was actually made in Ms Tsobanis' email of 18 September 2014, but this is not a material matter.)
    (b) Mr Romanovski, by 21 October 2014, was identified in the Tribunal's correspondence as the second respondent. It is not clear who amended the VCAT register in this respect.
    (c) The power of the Tribunal to amend proceedings under s 127 of the Act must be exercised by a Tribunal Member and a purported exercise of this power by a member of the Tribunal's administrative staff is ultra vires.
    (d) Once a proceeding has been commenced, a new party can only be joined with the leave of the Tribunal pursuant to s 60. There is no power in the Tribunal's registry staff to join a party to a proceeding.
    (e) There is no evidence on the file that a Tribunal Member has added Mr Romanovski as a respondent, and therefore he is not properly joined as a respondent.

55. A review of VCAT's file maintained by the registry indicates that no order joining Mr Romanovski by any Member was made between the date of issue of proceedings on 7 August 2014 and 21 October 2014. It appears therefore that the parties were identified in the manner set out in the letter of 21 October by a member of the registry staff in order to reflect Ms Tsobanis' requests rather than any orders of the Tribunal.

56. In *Leonora Group (Wonthaggi) Pty Ltd v Bass Shire Council* [2002]VCAT 1441, Senior Member Byard had to rule on the effect of an amendment to

the identity of an applicant which had been suggested by letter. The letter had sought to substitute one company for another as applicant, pursuant to s 127 of the VCAT Act. A member of the administrative staff had, in the words of Senior Member Byard, 'obligingly entered this amendment on the computer and other records of the Tribunal'. Senior Member Byard said that 'I do not think that a member of the administrative staff has the power to make an amendment to a proceeding under s 127 of the VCAT Act or otherwise. A member of the Tribunal is needed for the making of such an amendment.'

57. I respectfully agree with this view. Accordingly, I find and declare that Mr Romanovski is not currently joined as a respondent.

The position of Mr David Bosnar

58. There is no order under s 60 made by a Member of the Tribunal joining Mr David Bosnar as respondent. It appears that the VCAT registry staff have purported to make him a respondent in accordance with Ms Tsobanis' wishes. I find and declare that he is not a respondent.

The position of Northern Building Surveying Services Pty Ltd (ACN 122 666 246)

59. The VCAT registry staff added this company to the register as a respondent after Ms Tsobanis sent the company extract to the registry on 21 October 2014. This did not mean the company was effectively joined. The analysis of the position of Mr Romanovski applies equally to Northern Building Surveying Services (ACN 122 666 246). As a Member of the Tribunal has not joined Northern Building Surveying Services Pty Ltd (ACN 122 666 246), I find and declare that it is not a respondent.

The position of BCG (AUST) PTY LTD (ACN 114 332 017)

60. The position of BCG (AUST) PTY LTD differs from that of Mr Romanovski, Mr Bosnar and Northern Building Surveying Services because, although BCG (AUST) PTY LTD was not made a respondent by virtue of being named as one by the registry in the letter to the company dated 21 October 2014, the company *is* a respondent as a result of the finding and declaration made in paragraph 33 above.

Have any of the original parties has been properly removed since the inception of the proceedings?

61. Removal of parties is dealt with in **s 60A of the VCAT Act** as follows:

> (1) The Tribunal may order that a person cease to be a party to a proceeding if the Tribunal considers that—
>
> (a) the person's interests are not, or are no longer, affected by the proceeding; or
>
> (b) the person is not a proper or necessary party to the proceeding, whether or not the person was one originally.

(2) An order under subsection (1) may include any other matters of a consequential or ancillary nature that the Tribunal considers appropriate.

(3) The Tribunal may make an order under subsection (1) on its own initiative or on the application of a party.

62. The VCAT file does not contain any order by a member removing the originally named party Checkpoint Building Surveyors (ACN 096 590 184) as a party. However, as Checkpoint Building Surveyors is a registered business name and not a company, that entity does not exist and it must be removed as a respondent party. As found and declared at paragraph 33, BCG (AUST) PTY LTD (ACN 114 352 017) trading as Checkpoint Building Surveyors is named in its place.

63. The original application named D&L Bosnar Plumbing Pty Ltd (ACN 079 558 651) as the fourth named respondent. There is no order under s 60A removing the company as a party. There is also no order under s 127 amending the heading of the action insofar as it relates to that party. Accordingly, I find and declare that D&L Bosnar Plumbing Pty Ltd (ACN 079 558 651) is still a respondent.

64. As indicated above at paragraphs 37 and 38, the institution of proceedings on 7 August 2014 against D&L Bosnar Plumbing Pty Ltd (ACN 079 558 651) is to be regularised. Accordingly, no order for the removal of that company as a respondent is appropriate at this stage.

Should Mr Bosnar be allowed today to make a late section 75 application?

65. I consider the question does not arise. Mr Bosnar does not need to make any application under s 75. As found and declared at paragraph 58, he is simply not a party to the proceeding.

Has the 10 year time limit imposed by s 134 of the Building Act expired?

66. Section 134 of the Building provides:

> **134 Limitation on time when building action may be brought**
>
> Despite any thing to the contrary in the *Limitation of Actions Act 1958* or in any other Act or law, a building action cannot be brought more than 10 years after the date of issue of the occupancy permit in respect of the building work (whether or not the occupancy permit is subsequently cancelled or varied) or, if an occupancy permit is not issued, the date of issue under Part 4 of the certificate of final inspection of the building work.

67. In *Brirek Industries Pty Ltd v McKenzie Group Consulting Pty Ltd*, the Court of Appeal held that s 134 provides an absolute bar on a building action being brought after ten years from the date of the occupancy permit or the date of issue of the final certificate.

68. This finding will preclude the Tribunal from allowing any new respondent to be joined, unless Ms Tsobanis can demonstrate there is a way around s 134.

Is the failure to join Mr Romanovski properly a procedural error which can be readily fixed?

69. Ms Tsobanis submitted that her failure to properly identify Mr Romanovski as the correct respondent is a procedural error or irregularity which can readily be corrected, by analogy with the situation in a case where an owners corporation has instituted proceedings without the requisite special resolution having been passed.

70. I do not accept this contention. The fact is that Mr Romanovski was not made a respondent on 7 August 2014. By the time he was joined in October 2014, the claim against him was well out of time. Limitation periods are substantive, rather than procedural. This principle was confirmed in *John Pfeiffer Pty Ltd v Rogerson* 203 CLR 503; 74 ALJR 1109: 172 ALR 625. Accordingly, the late issuing of proceedings is not a procedural issue which the Tribunal can readily cure under s 127, or any other provision of the VCAT Act.

Can an amendment be made now to the pleading so that Mr Romanovski will be deemed to have been joined as at the date of issue?

71. Ms Tsobanis argues that the Victorian Court of Appeal decision in *Agtrack (NT) Pty Ltd (t/as Spring Air) v Hatfield* [2003] VSCA 6 assists her because in that case the plaintiff was allowed to make an amendment which raised a new claim under statute beyond a time bar. The judgment of Ormiston JA was relied on where he said at [83]:

> What is here in issue is an amendment seeking to add or vary a few minor details and to give the existing claim a new characterisation, closely akin and by no means remote from the subject matter of the original claim. That is a true amendment and the very kind which the Court ought to be free to give effect to. It affects only an action already on foot.

72. Reference to the full *Agtrack* judgment makes it clear that the reliance on it by the applicant is misconceived. In *Agtrack* the respondent was the widow of a man who was killed when a Cessna 210, in which he was a passenger on a sight seeing tour in the Northern Territory crashed. Ms Hatfield had brought an action against the appellant which had contracted to carry Mr Hatfield, originally in negligence and breach of statutory duty. There was no dispute that these proceedings were validly issued. Ms Hatfield later became aware that a claim was only available under Part IV the *Civil Aviation (Carriers Liability) Act 1959* and sought to amend to plead a claim under that Act even though the time limit for bringing such an action had expired. The amendment was allowed with effect from the date the action

began, in accordance with the usual 'well accepted' principle. The decision is explained in this passage, also drawn from the judgment of Ormiston JA, at [77]:

> The present case, however, is not a case where a completely new claim, said to have been extinguished by the Act, is sought to be added by away (sic) of amendment where no like claim previously was asserted. As I have previously sought to explain, all that the amendments in the present case sought to achieve was to add an existing claim, which was already foot, certain (effectively) jurisdictional allegations, together with an allegation that the proceeding was brought pursuant to Part IV of the Act.

The key point for present purposes is that the amendments were made to an existing action.

73. As Mr Romanovski was not a respondent at the time the proceedings were issued within time, and as he has not been made a respondent validly after the 7 August 2014, and this cannot be simply cured as a procedural matter, Mr Romanovski is not and cannot be made a respondent. There is, accordingly, no scope for the application of the 'relation back' principle applied in *Agtrack*.

Can section 126 of the VCAT Act be used to extend time?

74. The final argument raised by Ms Tsobanis to get around s 134 of the *Building Act* is that s 126 of the VCAT Act can be used to extend the time imposed by s 134.

75. Section 126 of the VCAT Act provides:

> (1) The Tribunal, on application by any person or on its own initiative, may extend any time limit fixed by or under an enabling enactment for the commencement of a proceeding.
>
> (2) If the rules permit, the Tribunal, on application by a party or on its own initiative, may—
>
> (a) extend or abridge any time limit fixed by or under this Act, the regulations, the rules or a relevant enactment for the doing of any act in a proceeding; or
>
> (b) waive compliance with any procedural requirement, other than a time limit that the Tribunal does not have power to extend or abridge.
>
> (3) The Tribunal may extend time or waive compliance under this section even if the time or period for compliance had expired before an application for extension or waiver was made.
>
> (4) The Tribunal may not extend or abridge time or waive compliance if to do so would cause any prejudice or detriment to a party or potential party that cannot be remedied by an appropriate order for costs or damages.
>
> (5) In this section—

relevant enactment means an enactment specified in the rules to be a relevant enactment for the purposes of this section.

76. Clearly, on its face, s 126 (1) empowers the Tribunal to extend the time in which a person may initiate a proceeding. Although the power has been given broad scope, it is not unlimited.

77. The time limit which Ms Tsobanis would have the Tribunal extend is the 10 year time limit in which a party may commence a building action contained in s 134 of the *Building Act 1993*.

78. A hurdle for Ms Tsobanis to overcome, however, is that s 134 begins with the declaration 'Despite any thing to the contrary in the *Limitation of Actions Act 1958* or in any other enactment or law, a building action cannot be brought more than 10 years after…'

79. The Court of Appeal in its unanimous judgment in *Brirek v McKenzie*, at [115], thought that these words had work to do. Accordingly, I conclude that the operation of s 126(1) of the VCAT is displaced by s 134 of the *Building Act 1993*. I find that VCAT has no power to extend the time in which proceedings can now be issued against new parties.

80. It remains to consider the final issues which almost entirely relate to the first respondent Mr Katsouranis trading as CT Properties and the third named respondent Mr Richardson.

What are the principles to be applied in a section 75 strike out application?

81. Section 75 of the VCAT Act provides:

> 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.
>
> (3) The Tribunal's power to make an order under subsection (1) or (2) is exercisable by—
>
> (a) the Tribunal as constituted for the proceeding; or
>
> (b) a presidential member; or
>
> (c) a member who is a legal practitioner.

(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.

82. The operation of s 75 has been considered many times in this Tribunal, including in the very recent case of *Graham v McNab* (Building and Property) [2015] VCAT 353, a decision delivered on 26 March 2015. In that case Deputy President Aird quoted a passage from the decision in *Norman v Australian Red Cross Society* [1998] 14 VAR 243 where, after considering the judgment of the Court of Appeal in *Rabel v State Electricity Commission of Victoria* [1998] 1 VR p 102 Deputy President McKenzie said:

> …
>
> (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 r23.01 (see also commentary on this rule Williams, Civil Procedure Victoria). Both applications are designed to prevent abuses of process. However, it is a serious matter for a Tribunal, in interlocutory proceedings which would generally not involve the hearing of oral evidence, to deprive a litigant of his or her chance to have a claim heard in the ordinary course.
>
> (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 complainant can be said to disclose no reasonable cause of action, or where a Respondent can show a good defence sufficient to warrant the summary termination of the proceeding.

Is the first named respondent, Mr Katsouranis, entitled to a strike out order on the basis he has been completely released already by Ms Tsobanis?

83. A submission made solely by the first respondent (Mr Katsouranis) is that he has been released by Ms Tsobanis. Reliance is placed by him on a release dated 12 March 2014 which is exhibited to the affidavit sworn on his behalf by Nicholas Giasoumi on 12 February 2015. At paragraph 9 of his affidavit, Mr Giasoumi deposes that after the settlement agreement was entered into Mr Katsouranis paid $25,000 to Ms Tsobanis.

84. It is argued that, under this document, Ms Tsobanis released Katsouranis from a number of claims including:

(a) render damage around balcony walls;

(b) floor boards damage;

(c) balcony leaks;

(d) robe damage in front roof;

(e) front room and hallway damage;

(f) BSS Design Group report on defects;

(g) Building Commission report on defects.

85. The proposition advanced by Mr Katsouranis is that just because Ms Tsobanis is now dissatisfied with that settlement she should not be allowed to ventilate further complaints about the quality of Mr Katsouranis' workmanship during the course of construction of the house.

Have all Ms Tsobanis' claims been released already as a matter of fact?

86. In the application filed by Ms Tsobanis on 7 August 2014, she attached a number of documents including one headed 'Requested Action From VCAT'. This section began by asking for complete rectification and compensation for defective and non-compliant building works including new guarantees, warranties and compliance certificates covering a number of items.

87. In order to determine whether the release signed by Ms Tsobanis on 12 March 2014 covers the subject matter of Ms Tsobanis' initial VCAT application, it will be necessary to hear evidence as to what defects are intended to be covered by the release. When the coverage of the release has been determined, it will be necessary to compare that coverage with the large number of claims that are potentially included in Ms Tsobanis' initial application.

88. A relevant consideration is that the coverage of the 12 March 2014 release is in at least in one respect ambiguous, as pointed out by Ms Tsobanis' lawyer at the hearing. Specifically, there were two BSS Design Group reports in existence on 12 March 2014.

89. It is useful to recount how these reports came into existence. The first BSS report, described as a 'Building Inspection Report - Pre-settlement', was commissioned by Ms Tsobanis after the property was sold, but before the transfer of land was signed. This report was prepared by David Gairns and was dated 31 January 2005. The purpose of this report was to comment '*on whether any maintenance items or building defects exist which may be the responsibility of the Builder (Note: engagement is confined to that of a Building Consultant and does not constitute engagement of a Building Surveyor carrying out functions/mandatory inspections required under the Building Act, 1993)*'.

90. BSS produced a further report on 17 November 2009. This report contained BSS's 'opinion regarding various matters which are considered defective by

the owner'. Accordingly, it was concerned with the condition of the house at the time of publication.

91. A number of questions present themselves. Which BSS report is covered by the release? Was the intention that the defects referred to in both reports should be released? What about defects discovered after the second report was published? This last question may be a very important one as Ms Tsobanis contends that a relatively new report she has received from Russell Brown identifies defects which go far beyond the March 2014 settlement with Mr Katsouranis.

92. No evidence was presented about these matters on 6 March 2015. They are matters for Mr Katsouranis to raise in his defence. They should be the subject of evidence and argument in a hearing. The fact that they are issues to be considered makes it clear that a strike out order should not be made in Mr Katsouranis' favour at this point.

93. For these reasons the application of the first respondent (Mr Katsouranis) for a strike out order under s 75, based on the settlement agreement of 12 March 2014, is dismissed.

The rule in *Weldon v Neal* and s 134 of the *Building Act* 1993?

94. Mr Katsouranis had a further argument, as follows:

(a) The rule in *Weldon v Neal* (1887) 19 QBD 394 precludes the making of an amendment to a pleading which would have the effect of introducing a cause of action in respect of which the relevant limitation period has expired.

(b) The rule in *Weldon v Neal* was abrogated for the purposes of court proceedings by s 34 of the *Limitation of Actions Act* and the concurrent amendment of Rule 36.01 of the Supreme Court Rules.

(c) However, because the 10 year time limit on the institution of a building action imposed by s 134 of the *Building Act* is to apply 'despite anything to the contrary in the Limitation of Actions Act 1958 or in any other Act of law', the rule in *Weldon v Neal* has not been abrogated for the purposes of s 134 of the *Building Act*.

(d) Furthermore, s 34 of the *Limitation of Actions Act* applies to Courts, but not the Tribunal.

(e) Mr Katsouranis' submissions referred to the full Court of the Supreme Court of Victoria in *Ruzeu v Massey Ferguson (Aust) Ltd* [1983] VR 733 at 738 which held that:

> to plead a cause of action not contained in an endorsement of claim amounts to making a new claim that attracts the operation of the rule in *Weldon v Neal*.

(f) Mr Katsouranis' submission goes on:

> By parity of reasoning, when a proceeding is commenced at VCAT by an application form including a summary of claims, that functions as an endorsement of claim would. It sets the boundaries of the issues that have been raised by an applicant. Anything sought to be included in points of claim filed later which goes beyond the scope of the initial application is a building action newly brought on the date it is introduced into the proceeding.

(g) The submission concludes with the contention that the points of claim filed on 19 December 2014 raise claims which were not referred to in the three page summary of claims lodged by Ms Tsobanis in August 2014, including claims based on reports by Russell Brown and Tom Brown. These new claims are new, and cannot now be brought because they are time barred.

Does each defect give rise to a new cause of action?

95. Inherent in Mr Katsouranis' argument is the proposition that the assertion of each new defect amounts to the making of a new cause of action.

96. This issue has been canvassed very recently by Senior Member Walker in this Tribunal in *Meier v Balbin* (Building and Property) [2015] VCAT 306 in which the said:

> 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.

97. I respectfully adopt the view expressed by Senior Member Walker and find that the warranties implied into Ms Tsobanis' contract for the purchase of her home by s 137C of the *Building Act 1993* create a separate cause of action for each breach.

98. I consider that it must be open to Ms Tsobanis to bring claims now which have not been released by the agreement of March 2012, provided she does so within time. This brings us to the issue of whether Ms Tsobanis has brought her new claims within time.

Does a VCAT application form function as an endorsement of claim

99. Mr Katsouranis argues that the application filed by Ms Tsobanis on 7 August 2014 identified a set of claims, and that some of the claims identified in the Points of Claim filed on 19 December 2014 are outside the original set of claims and, having been made after 17 Augusts 2014, are statute barred.

100. Insofar as Mr Katsouranis' argument is based on the proposition that a VCAT application form is akin to an endorsement of the claim in a Supreme Court Writ, I comment that there may be something in the point.

101. However, the question of whether the Points of Claim contain claims which are outside the original set of claims referred to in the application is a question of fact to be determined at a hearing. It was asserted at the hearing on 6 March 2015 that this was the case, but the matter was not canvassed in detail.

102. Prior to a hearing, Mr Katsouranis will need to file a defence which sets out the claims which he says are 'new' in the sense that they are outside the set of claims referred to in the application. Ms Tsobanis can then reply to the defence. Evidence can then be introduced by the parties at the hearing to support their respective positions.

103. No order striking out the proceeding under s 75 of the VCAT Act will be made in Mr Katsouranis' favour based on the argument that Ms Tsobanis is raising new claims which are now statute barred.

Application of s 34 of the *Limitation of Actions Act 1958* to VCAT

104. I do not necessarily accept that s 34 of the *Limitation of Actions Act* does not apply to the Tribunal. I merely note that the issue is open to argument and it was not fully canvassed at the hearing on 6 March 2015.
105. It is sufficient for me merely to find that this is an issue yet to be determined in order to deal with this aspect of Mr Katsouranis' s 75 application because:

    (a) If s 34 does apply to the Tribunal, then in an *appropriate case* an amendment, which but for the operation of s 34 would have been precluded by the rule in *Weldon v Neal*, might be made in a building action being heard in the Tribunal.

    (b) If such an amendment were permitted, the principle that the new claim is to 'relate back' to the time of institution of the proceeding exemplified in *Agtrack v Hatfield* [2003] VSCA 6 would presumably enable Ms Tsobanis to proceed with the amended claim despite the existence of the 10 year time limit for a building action arising under s 134 of the *Building Act*. There would accordingly be no inconsistency between the new pleading and s 134.

    (c) As there is at least a basis for Ms Tsobanis to argue that she can amend her claim now and get around s 134 of the *Building Act*, Mr Katsouranis' s 75 application based on the argument that s 34 of the *Limitation of Actions Act* does not apply to the Tribunal must be dismissed.

Other criticisms of the points of claim

106. As Mr Katsouranis remains a respondent, it will be necessary, in due course, to address his complaints about Ms Tsobanis' points of claim, which he says are defective. At that point, any jurisdictional issues which Mr

Katsouranis wishes to raise regarding any claim for trespass (if it is pressed) can be addressed.

107. This can be done when the matter is next before the Tribunal, as it may be that the other respondents in the proceeding will have comments to make about the points of claim also.

Is the third named respondent in a different category to the other respondents as his services do not give rise to a 'building action'?

108. Mr Richardson's argument, as articulated by Mr Wood on his behalf at the hearing, is that the report he prepared was a report prepared in respect of s 137B of the *Building Act*, and that the preparation of this report was not 'building work' for the purposes of a building action under s 134 of the *Building Act 1993*.

109. A building action is defined in s 129 of the *Building Act 1993* as 'an action (including a counter-claim) for damages for loss or damage arising out of or concerning defective building work'. Building work, in turn, is defined in the same section as including the design, inspection and issuing of a permit in respect of building work.

110. To understand what kind of report was prepared by Mr Richardson, it is necessary to consider s 137B of the *Building Act 1993*, which relevantly provides:

> 137B Offence for owner-builder to sell building without report or insurance
>
> …
>
> (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.

111. Accordingly, the report required is a report on the building from a prescribed building practitioner that contains certain matters that are required by the Minister by notice published in the Government Gazette.

112. I consider that the preparation of such a report would necessitate the inspection of building work and would therefore fall within the specific definition of building work set out in s 129 of the *Building Act*. This finding means that the third named respondent (Mr Richardson)'s application for a strike out order on his first argument fails.

113. If I am wrong about the inspection of building work falling within the definition of building work for the purposes of s 129, I do not think the position regarding Mr Richardson's s 75 application would be altered because if s 134 does not apply, then s 5 of the *Limitation of Actions Act* does apply. It may well be that Ms Tsobanis would be well within time in which to issue. The matter was not argued before me, and the parties should have an opportunity to dispute the matter if they want to at a hearing.

Pleading against Mr Richardson said to be vague and embarrassing

114. The Mr Richardson also seeks a strike out on the basis that the allegations against him are vague and embarrassing.

115. I query if a finding that the pleading against any respondent is vague and embarrassing would properly found an application under s 75. Having made that observation, I comment that the proposition that the pleading is vague and embarrassing is not made out by Mr Richardson anyway.

116. The allegations against the third named respondent Mr Richardson made in paragraph 20 of the Points of Claim are that he was negligent in that he failed to ensure:

(a) he considered and determined the correct soil classification of the site in accordance with the Australian Standard;

(b) he sighted all relevant compliance certificates, including the waterproofing certificate, prior to reporting the building had no defects;

(c) he conducted a proper and reasonable investigation into whether the building had any defects.

117. I consider that Mr Richardson can understand the claim which is being made against him even though there is clearly scope for particularisation of each of these allegations. I reject the application for a strike out order insofar as it is based on a plea that the application is vague and embarrassing.

Ms Tsobanis allegedly did not rely on Mr Richardson's report

118. A third contention put forward by the third named respondent Mr Richardson is that the claim by Ms Tsobanis against him is hopeless because she did not rely on his report as she subsequently received a report from BSS Design Group and it was on the basis of that report she purchased the property. Also, it is said that on the basis of a second report from BSS she then settled with Mr Katsouranis for $25,000.00.

119. I comment that there may be something in these arguments but the relevant evidence needs to come out. There must be a hearing about the issues. This means the argument does not justify a strike out order under s 75 of the VCAT Act.

120. Finally, the third named respondent Mr Richardson says the claim against him is statute barred. This is merely asserted, but not argued properly, let alone demonstrated. I do not, for the purposes of this application, accept the argument. The issue will have to be determined at a hearing.

121. The third named respondent's application for summary dismissal of the claim against him pursuant to s 75 of the VCAT Act is itself dismissed.

Was the Occupancy Permit Invalidly Issued?

122. A further argument put forward on behalf of Ms Tsobanis at the hearing is that the occupancy permit was not validly issued by the surveyor because the certificate of compliance in respect of plumbing work, which should have been sighted by the building surveyor before he issued the occupancy permit, was not issued until 2011. Accordingly, s 134 of the *Building Act* was not enlivened, and therefore time had not run out for the institution of proceedings.

123. The argument was raised in passing but was not pursued. I accordingly will not have further regard to it for the purposes of today's interlocutory application. It is a matter for Ms Tsobanis to argue, if she sees fit, at the hearing.

124. Having reached the findings set out in these reasons, I pronounce the following orders:

ORDERS

1 The Tribunal finds and declares that the following parties were validly joined as respondents when the applicant commenced proceedings on 7 August 2014 and directs the registrar to amend the register accordingly:

   (a) Mr Chris Katsouranis t/as C T Properties, to be named the first respondent.

   (b) BCG (AUST) PTY LTD (ACN 114 332 017) trading as Checkpoint Building Surveyors, to be named the second respondent.

   (c) Mr John Richardson, to be named the third respondent;

(d) D&L Bosnar Plumbing Pty Ltd (ACN 079 558 651), to be named the fourth respondent;

(e) Mr Peter Bozinovki, to be named the fifth respondent.

2 The Tribunal finds and declares that the following parties have not been joined as respondents since 7 August 2014 and directs the registrar to remove each of these parties from the register pursuant to s 60A of the *Victorian Civil and Administrative Tribunal Act 1998*, ('the VCAT Act'):

(a) Mr Blagojce Romanovski t/as Checkpoint Building Surveyors;

(b) Mr David Bosnar;

(c) Northern Building Surveying Services Pty Ltd (ACN 122 666 246);

3 The Tribunal dismisses the application made by the first respondent (Mr Chris Katsouranis t/as C T Properties) for an order under s 75 of the VCAT Act striking out the proceeding against him.

4 The Tribunal dismisses the application made by third respondent (Mr John Richardson) for an order under s 75 of the VCAT Act striking out the proceeding against him.

5 This proceeding is listed for a directions hearing at 2.15 pm on 12 June 2015 at 55 King Street, Melbourne before Member C Edquist, with an allowance of two hours at which:

(a) Submissions can be made by or on behalf of BCG (AUST) PTY LTD (ACN 114 332 017) and by the applicant as to whether it is appropriate that the Tribunal should now remove that company as a respondent;

(b) submissions can be made by or on behalf of D&L Bosnar Plumbing Pty Ltd (ACN 079 558 651) and by the applicant as to whether it is appropriate that the Tribunal should now remove that company as a respondent;

(b) further directions for the conduct of the matter can be made; and

(c) any application for costs arising out of the hearing on 6 March 2015 will be heard and considered.

MEMBER C EDQUIST