IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMERCIAL COURT
TECHNOLOGY, ENGINEERING AND CONSTRUCTION LIST

Not Restricted

S ECI 2023 02618

FAIRBANK HAVEN PTY LTD (ACN 085 352 530) Plaintiff

v

MERKON CONSTRUCTIONS PTY LTD (ACN 006 587 319) Defendants
(and others according to the attached schedule)

JUDGE:	Delany J
WHERE HELD:	Melbourne
DATE OF HEARING:	1 February 2024
DATE OF RULING:	9 February 2024
CASE MAY BE CITED AS:	Fairbank Haven Pty Ltd v Merkon Constructions Pty Ltd
MEDIUM NEUTRAL CITATION:	[2024] VSC 32

PRACTICE AND PROCEDURE — Application to amend pleading and to substitute another person as party — Whether a mistake in the name of a party — Whether person answers a particular description — Mistake as to identity of insurer — Amendment refers to a different period of insurance — Application refused — *Supreme Court (General Civil Procedure) Rules 2015* (Vic), s 36.01 — *Bridge Shipping Pty Ltd v Grand Shipping SA* (1991) 173 CLR 231, applied; *PD Enterprise Ltd v Pacific Brands Clothing Pty Ltd* [2012] VSC 494; *Evans Constructions Co Ltd v Charrington & Co Ltd* [1983] QB 810, referred to.

PRACTICE AND PROCEDURE — Application to amend — No real prospects of success — Amendment refused — *ABL Nominees Pty Ltd v Mackenzie (No 2)* [2014] VSC 529, applied.

INSURANCE — Indemnity — 'Claims made' policy — No 'Claim' made during policy period — Statutory relief against disentitlement — Requirements for relief — No notification by insured of facts which could give rise to liability under policy within period covered by policy — Insurer not prohibited from denying indemnity — *Insurance Contracts Act 1984* (Cth), ss 40(3), 54 — *Darshn v Avant Insurance Ltd* (2021) 154 ACSR 1; *CA & MEC McInally Nominees Pty Ltd v HTW Valuers (Brisbane) Pty Ltd* [2009] 2 Qd R 1; *Gosford City Council v GIO General Ltd* (2003) 56 NSWLR 542, applied — *Einfeld v HIH Casualty & General Insurance Ltd* (1999) 166 ALR 714, considered.

APPEARANCES:	Counsel	Solicitors
For the Plaintiff	M Roberts KC with F Cameron	Wainwright Ryan Eid Lawyers
For the Fifth Defendant	F Brimfield	Ganci Huggett Lawyers
For Berkley Insurance Company (trading as Berkley Insurance Australia)	A Strahan KC with A Christophersen	DLA Piper

TABLE OF CONTENTS

HIS HONOUR:

Introduction

1 By summons filed 8 December 2023, the plaintiff, Fairbank Haven Pty Ltd ('Fairbank'), seeks the following orders:

(a) Pursuant to r 36.01 of the *Supreme Court (General Civil Procedure) Rules 2015* (Vic) ('Rules'), Berkley Insurance Company (trading as Berkley Insurance Australia) ('Berkley') be substituted as the sixth defendant to the proceeding.

(b) Fairbank has leave to file its proposed second further amended writ and further amended statement of claim dated 22 November 2023.

2 The application is supported by the fifth defendant, Amanda Jane Sgourakis as executor and trustee of the will and estate of Peter Sgourakis, deceased ('the Estate'). It is opposed by Berkley.

3 The proceeding concerns alleged defects in a building. There are three issues arising on the application, the first of which, if decided against Fairbank, the owner of the building at the time of construction, is dispositive:

(1) Whether the application satisfies the criteria for the operation of r 36.01.

(2) Whether Fairbank made a 'Claim' against, or gave 'notice of any Claim' to, Peter Sgourakis Architect Pty Ltd (the 'Architect'), from 26 October 2022 a deregistered company, within the meaning of 'Claim' in a professional indemnity policy of insurance issued by Berkley to the Architect between 31 October 2011 and 14 November 2019 such that Berkley may not, by reason of s 54 of the *Insurance Contracts Act 1984* (Cth) (the '*Insurance Contracts Act*'), refuse to indemnify.

(3) Assuming Fairbank did not make a 'Claim' against, or give 'notice of any Claim' to, the Architect, whether Fairbank can rely on the combined operation of ss 40(3) and 54 of the *Insurance Contracts Act* such that Berkley may not refuse to indemnify.

Some procedural history

4 On 19 June 2023, Fairbank issued a generally indorsed writ seeking relief against five defendants: Merkon Constructions Pty Ltd (the builder), AssetInsure Pty Limited as the insurer of the (deregistered) project manager, Berkley as the professional indemnity insurer and run off insurance provider for the Architect, Daniel John Collier as an associate director of the project manager, and the Estate.

5 The general indorsement included the following:

> II. This proceeding concerns a building project undertaken by the First Defendant, Merkon Constructions Pty. Ltd. (ACN 006 587 319) (**the Builder**) on the Owner's property at 5-9 Strabane Avenue Mont Albert, Victoria (**the Property**).
>
> III. On 22 July 2020 the Owner commenced proceedings against the Builder in the Victorian Civil and Administrative Tribunal (**VCAT**) proceedings numbered BP 2078/2019 (**the Proceeding**) concerning breaches of the major domestic building contract between them as a consequence of the Property suffering from the various defects identified in those proceedings.
>
> IV. The Owner wishes to commence proceedings against the following other persons and companies associated with the building project:
>
> a. the project architect, Peter Sgourakis Architect Pty Ltd and Mr Peter Sgourakis personally;
>
> b. the project manager and quantity surveyor, Thomson Maloney & Partners Pty. Ltd. t/as Charter Keck Kramer; and
>
> c. the project superintendent; Mr Dan Collier of Charter Keck Kramer.

6 The general indorsement relevantly alleged:

(a) Berkley was 'the professional indemnity insurer' of the Architect; and

(b) Berkley was liable to Fairbank because Fairbank's loss and damage 'was covered by an insurance contract between the Architect and the Second Insurer [Berkley], prior to the Architect's deregistration'.

7 Fairbank did not serve the writ on Berkley, and nor did it make any demand on Berkley before the writ was issued.

8 On 31 August 2023, Fairbank filed an amended writ that:

(a) withdrew its claim against Berkley and removed Berkley as the third defendant; and

(b) named AAI Limited (ACN 005 297 807) (trading as Vero Insurance) ('Vero') as the sixth defendant in substitution for Berkley.

9 Fairbank has now determined that its loss and damage was not covered by an insurance contract between the Architect and Vero.

10 On 24 November 2023, I made orders that Vero be removed as a party to the proceeding pursuant to r 9.06(a) of the Rules, such order being made without prejudice to Fairbank's proposed application to seek the substitution of Berkley for Vero as the sixth defendant.

The evidence

11 Two affidavits are relied on by Fairbank in support of the application. An affidavit of Sui-Lee (Patricia) Kiang, the sole director of Fairbank, dated 7 December 2023 and an affidavit of Jeannette Eid, a solicitor, dated 21 November 2023. Fairbank relies on its proposed amended statement of claim where its claim against Berkley is pleaded and on its written submissions dated 8 December 2023.

12 In opposition to the application, Berkley relies on an affidavit of Sarah Elizabeth Fountain, a solicitor, dated 22 January 2024 and on written submissions dated 22 January 2024.

13 Fairbank, Berkley and the Estate were represented by counsel at the hearing of the application.

The Rules

14 Fairbank relies on r 36.01 of the Rules, in particular rr 36.01(1)(b), (4) and (5). Rule 36.01 provides:

> **36.01 General**
>
> (1) For the purpose of—
>
> (a) determining the real question in controversy between the parties to any proceeding; or
>
> (b) correcting any defect or error in any proceeding; or
>
> (c) avoiding multiplicity of proceedings—
>
> the Court may, at any stage order that any document in the proceeding be amended or that any party have leave to amend any document in the proceeding.
>
> (2) In this Order document includes—
>
> (a) originating process;
>
> (b) an indorsement of claim on originating process; and
>
> (c) a pleading.
>
> (3) An indorsement of claim or pleading may be amended under paragraph (1) notwithstanding that the effect is to add or substitute a cause of action arising after the commencement of the proceeding.
>
> (4) A mistake in the name of a party may be corrected under paragraph (1), whether or not the effect is to substitute another person as a party.
>
> (5) Where an order to correct a mistake in the name of a party has the effect of substituting another person as a party, the proceeding shall be taken to have commenced with respect to that person on the day the proceeding commenced.
>
> (6) Notwithstanding the expiry of any relevant limitation period after the day a proceeding is commenced, the Court may make an order under paragraph (1) where it is satisfied that any other party to the proceeding would not by reason of the order be prejudiced in the conduct of that party's claim or defence in a way that could not be fairly met by an adjournment, an award of costs or otherwise.

15 In its written submissions Fairbank expressly disavowed reliance on r 9.06 of the Rules. Rule 9.06 is also concerned with the substitution of a party. That rule provides:

> **9.06 Addition, removal, substitution of party**
>
> At any stage of a proceeding the Court may order that—
>
> (a) any person who is not a proper or necessary party, whether or not that person was one originally, cease to be a party;
>
> (b) any of the following persons be added as a party—
>
> (i) a person who ought to have been joined as a party or whose presence before the Court is necessary to ensure that all questions in the proceeding are effectually and completely determined and adjudicated upon; or
>
> (ii) a person between whom and any party to the proceeding there may exist a question arising out of, or relating to, or connected with, any claim in the proceeding which it is just and convenient to determine as between that person and that party as well as between the parties to the proceeding;
>
> (c) a person to whom paragraph (b) applies be substituted for one to whom paragraph (a) applies.

16 The reason Fairbank does not seek to rely on r 9.06 is candidly stated in footnote 1 of its submissions:

> The Court has a similar power of substitution under r 9.06(c), save that that rule does not have retrospective effect. For this reason, in circumstances where the relevant limitation period for the Plaintiff's claims expired on 27 September 2023, the Plaintiff does not seek to rely upon r 9.06(c).

Retrospectivity is a key feature of r 36.01(5) set out above.

Relevant legislation

17 Section 601AG of the *Corporations Act 2001* (Cth) provides a potential statutory basis for Fairbank to bring proceedings against Berkley in circumstances where the Architect has been deregistered. That section provides:

> **601AG Claims against insurers of deregistered company**
>
> A person may recover from the insurer of a company that is deregistered an amount that was payable to the company under the insurance contract if:
>
> (a) the company had a liability to the person; and

(b) the insurance contract covered that liability immediately before deregistration.

18 Berkley did not contend that s 601AG could not be relied on by Fairbank. No argument was directed to whether subsection (b) was satisfied or to the question of whether the insurance contract to which Berkley was a party, which expired in 2019, 'covered that liability immediately before deregistration', an event that took place in 2022. I proceed on the basis that no issue arises as to these matters.

19 Sections 40(3) and 54(1) of the *Insurance Contracts Act* are relied upon by Fairbank in relation to the second and third issues. Berkley contests the availability of those sections or either of them to aid Fairbank to establish a proper basis for a claim against it. Those sections relevantly provide:

40 Certain contracts of liability insurance

(3) Where the insured gave notice in writing to the insurer of facts that might give rise to a claim against the insured as soon as was reasonably practicable after the insured became aware of those facts but before the insurance cover provided by the contract expired, the insurer is not relieved of liability under the contract in respect of the claim, when made, by reason only that it was made after the expiration of the period of the insurance cover provided by the contract.

54 Insurer may not refuse to pay claims in certain circumstances

(1) Subject to this section, where the effect of a contract of insurance would, but for this section, be that the insurer may refuse to pay a claim, either in whole or in part, by reason of some act of the insured or of some other person, being an act that occurred after the contract was entered into but not being an act in respect of which subsection (2) applies, the insurer may not refuse to pay the claim by reason only of that act but the insurer's liability in respect of the claim is reduced by the amount that fairly represents the extent to which the insurer's interests were prejudiced as a result of that act.

Proposed amended statement of claim

20 It is appropriate to set out those paragraphs of the proposed amended statement of claim upon which Fairbank relies for its claim against Berkley in their entirety.

6 Peter Sgourakis Architect Pty Ltd (ACN 104 485 501) (**the Architect**) was until on or about 26 October 2022:

(a) incorporated pursuant to the Corporations Act and liable to be sued in its corporate name;

(b) trading as "Sgourakis Architects"; and

(c) carrying on business as an architect.

7 On or about 26 October 2022, the Architect became deregistered.

8 The Sixth Defendant, Berkley Insurance Company (ARBN 126 559 706) ~~AAI LIMITED (trading as Vero Insurance) (ACN 005 297 807)~~ (**the Second Insurer**) is and was:

(a) a foreign company ~~incorporated pursuant to the Corporations Act and~~ liable to be sued in its corporate name;

(b) authorised as a general insurer pursuant to s 12 of the *Insurance Act 1972* (Cth); and

(c) between 31 October 2011 and 14 November 2019 ~~from at least 6 January 2021 to 6 January 2022~~, the professional indemnity insurer of the Architect.

Particulars

The Owner refers to and relies upon a letter from the solicitors for Berkley Insurance Australia dated 12 October 2013 and attached professional indemnity policies issued in respect of the Architect. ~~a Professional Indemnity Insurance Schedule dated 6 January 2021 in respect of Policy Number ARC201694, in respect of which the Insured is 'Peter Sgourakis Architect Pty Ltd T/As Sgourakis Architects', and the Insurer is 'AAI Limited trading as Vero Insurance Via Focus Underwriting Agency'.~~

…

43 The loss and damage referred to at paragraph 41 above was covered by an insurance contract between the Architect and the Second Insurer, prior to the Architect's deregistration.

44 Therefore, further to paragraphs 6 to 8 above, and s 601AG of the *Corporations Act 2001* (Cth), the Owner hereby claims to recover an amount for the loss and damage directly against the Second Insurer.

45 Further, the Owner relies upon ss 40 and 54 of the *Insurance Contracts Act 1984* (Cth) and says that:

(a) the Owner raised its claim against the Architect by no later than 7 June 2019;

(b) in the circumstances, the Architect ought to have notified the Second Insurer of the claim; and

(c) the Second Insurer is not entitled to deny responsibility for the loss and damage claimed in paragraph 44 above on the basis that it was not notified of the claim, or not notified prior to the expiry of the policy referred to in the particulars to paragraph 8 above.

Particulars

The Owner refers to an email from Patricia Kiang of the Owner to Peter Sgourakis of the Architect dated 7 June 2019 in which Mrs Kiang, among other things, stated that the Architect "[had] probably heard from my building consultant by now", expressed her concern regarding the cladding material used for the Works, stated that Mr Sgourakis "had the responsibility of supervising the project" and referred to ongoing leaks in the building.

The first issue: Has Fairbank satisfied the criteria in r 36.01?

21 In *PD Enterprise Ltd v Pacific Brands Clothing Pty Ltd* ('*PD Enterprise*'),[1] by reference to the decision of High Court in *Bridge Shipping Pty Ltd v Grand Shipping SA* ('*Bridge Shipping*'),[2] Kyrou J identified the limitations of r 36.01(4):[3]

> 18 The following principles established by the High Court in *Bridge Shipping* are relevant to the determination of the present application:
>
> (a) Rule 36.01(4) of the Rules imposes three limitations on a person's right to amend. First, there must be a mistake. Secondly, the mistake must be 'in the name of a party'. Thirdly, the Court may only make the order where it is satisfied that any other party to the proceeding would not by reason of the order be prejudiced in the conduct of his or her claim or defence in a way that could not be fairly met by an adjournment, an award of costs or otherwise.
>
> ….
>
> (d) A plaintiff may make 'a mistake in the name of a party' not only because the plaintiff mistakenly believes that a certain person, whom the plaintiff can otherwise identify, bears a certain name but also because the plaintiff mistakenly believes that a person who answers a particular description bears a certain name.
>
> ….
>
> (f) To establish a mistake in the name of a party, it if [sic] not sufficient for a plaintiff to simply assert that it intended to sue the person who was legally liable to it because, if that were the test, leave to amend under r 36.01(4) of the Rules could never be refused.

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1 [2012] VSC 494.

2 [1991] HCA 45; (1991) 173 CLR 231.

3 *PD Enterprise Ltd v Pacific Brands Clothing Pty Ltd* [2012] VSC 494, [18] (citations omitted).

22 Fairbank says that it made a mistake. I am satisfied that is the case. The circumstances in which Berkley came to be named as a defendant in the generally indorsed writ and the deletion of it as a party and the addition of Vero as a party are set out in the affidavit of Ms Eid:

> 7 At the time of filing the Writ and General Indorsement of Claim in this proceeding on 19 June 2023, the former Third Defendant [Berkley] was named as a defendant to the proceeding based on a certificate of currency provided to the Plaintiff during the Project, as an attachment to the Quantity Surveying 3rd Progress Report dated 12 November 2012. The certificate appeared to indicate that the insurer of the Architect at that time was 'Berkley Insurance Australia' based on the logo included on that certificate. …
>
> 8 Prior to serving the Writ and General Indorsement of Claim, I wrote to the Fifth Defendant [the Estate] on 22 June 2023 requesting additional details of the Architect's insurance position. …
>
> 9 The solicitors for the Fifth Defendant responded by letter dated 5 July 2023, stating (among other things) that the Fifth Defendant had located a policy schedule issued by 'W.R. Berkley Insurance Australia', but that the policy did not appear to be current at the time the Architect was deregistered on 26 October 2022. The letter stated that the last insurance policy held by the Architect was issued by Vero Insurance and attached a copy of the certificate of currency for that policy. …
>
> 10 Following receipt of the letter from the solicitors for the Fifth Defendant, further searches in respect of the business name 'W. R. Berkley Insurance Australia' indicated that it was associated with an entity W. R. Berkley Insurance (Europe) PLC and with ABN 81 126483681, and that the ABN was cancelled on 1 December 2019. …
>
> 11 Accordingly, the Plaintiff substituted the former Third Defendant for the Sixth Defendant, AAI Limited trading as Vero Insurance (**Vero**) by an Amended Writ and Statement of Claim dated 31 August 2023, as Vero appeared to be the more likely insurer of the Architect as at June 2019. The Amended Writ was filed prior to service of the proceeding based upon r 36.03 of the *Supreme Court (General Civil Procedure) Rules 2015* (Vic).

23 In *PD Enterprise*, Kyrou J said:[4]

> The relevant time for assessing whether the plaintiff has made a 'mistake in the name of a party' for the purposes of r 36.01(4) of the Rules is the time that the proceeding was commenced.

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4 Ibid [19].

24 The time at which Fairbank made the mistake was on 31 August 2023, six weeks after it filed the generally indorsed writ. Initially it sued Berkley. It made its mistake when it withdrew its claim against Berkley and removed it as a defendant.

25 If the relevant time for assessing whether the plaintiff made a 'mistake in the name of a party' is the time at which the proceeding was commenced, the criteria that must be established by an applicant relying upon r 36.01(1)(b) are not satisfied in this case. However, to proceed on that basis is to pay insufficient regard to the language of r 36.01(5) and how that language has application in the circumstances of this case.

26 Subrule 5 is intended to place the correct party in the same position as the party for whom that person is being substituted. Placing Berkley in the same position as Vero for whom it is proposed to be substituted requires that the substitution take effect from the first day on which Vero was initially a party, 31 August 2023. That is, the date on which the amended writ was filed, and not 19 June 2023 when the proceeding was commenced. If the effect of a substitution order in this case was that a substitution of Berkley would take effect as if Berkley had been a party on the day the proceeding commenced, that would be to backdate Berkley as a party to a date before Vero was itself a party. That is not the intention of r 36.01.

27 I agree with Fairbank that the appropriate way to read subrule 5 in the circumstances that have occurred here is as follows:

> Where an order to correct a mistake in the name of a party **(Vero)** has the effect of substituting another person as a party **(Berkley),** the proceeding shall be taken to have commenced with respect to that person **(Berkley**) on the day the proceeding commenced (**against Vero**).

28 If it is otherwise appropriate to order that Berkley be substituted for Vero, the date the proceeding shall be taken to have commenced against Berkley is 31 August 2023.

29 Berkley submitted the requirement of r 36.01(4) that the mistake be 'in the name of a party' is not satisfied. It submitted the substitution for which Fairbank contends is to substitute:

(a) a person with a different name, not merely the correction of a spelling or similar error;

(b) an insurer not under the same policy as the Vero policy, not in respect of the same policy period as the Vero policy period and not in respect of the same cause of action as previously alleged against Vero.

30 In support of its submission, Berkley referred to *Bridge Shipping*, which concerned an application to substitute a ship's charterer as a party in place of the ship's owner relying on r 36.01. It is convenient to reproduce part of the headnote in *Bridge Shipping*:

> Goods were damaged in transit by sea from Brazil to Melbourne. The owner of the goods sued the company it had engaged to arrange the carriage. The defendant issued a third party notice against the registered owner of the vessel. The defendant later discovered that at the time of the carriage the vessel had been under charter to another company which had therefore been the carrier of the goods. The defendant applied under r. 36.01 to substitute the charterer as third party in place of the owner.
>
> *Held*, that in issuing the third party notice against the owner the company had not made a mistake "in the name of a party" within sub-r. (4) because it had intended to sue the owner of the vessel believing that its right of action lay against the owner.

31 Parts of McHugh J's judgment, with whom Brennan J and Deane J agreed, to which Berkley drew attention include the following:[5]

> Moreover, a plaintiff may make "a mistake in the name of a party" not only because the plaintiff mistakenly believes that a certain person, whom the plaintiff can otherwise identify, bears a certain name but also because the plaintiff mistakenly believes that a person who answers a particular description bears a certain name. Thus, a plaintiff may make a mistake "in the name of a party" because, although intending to sue a particular person whom the plaintiff knows by sight, the plaintiff is mistaken as to that person's name. Equally, the plaintiff may make a mistake "in the name of a party" because, although intending to sue a person whom the plaintiff knows by a particular description, e.g. the driver of a certain car, the plaintiff is mistaken as to the name of the person who answers that description. In both cases, the plaintiff knows the person intended to be sued by reference to some property or properties which is or are peculiar to that person but is mistaken as to the name of that person. In the first case, the properties which identify the person are personal characteristics; in the second case, they are the properties which

5 *Bridge Shipping Pty Ltd v Grand Shipping SA* [1991] HCA 45; (1991) 173 CLR 231, 260.

> are of the essence of the description of that person. But for the purpose of sub-r. (4) that distinction is irrelevant. In both cases, the plaintiff was mistaken only as to the name of the person intended to be sued. There is no warrant for treating sub-r. (4) as dealing only with the case where the properties which identify the party are inherent properties. That is, there is no warrant for treating sub-r. (4) as dealing only with the case where the plaintiff says: "The person I wish to substitute as a party is that entity which I identified by certain inherent properties peculiar to it but whose name I mistakenly believed was X." The sub-role applies equally to the case where the plaintiff says: "The person I wish to substitute as a party is that entity which I identified by reference to certain properties which are true of it and of no one else and whose name I mistakenly believed was X." In both cases, a mistake in the name of the party has occurred and can be seen to have occurred only because the person sued does not have or is not identified by some property or properties which is or are peculiar to the person intended to be sued and to no one else.

32 Berkley submitted that the respective positions of Vero and of Berkley are akin to those where a plaintiff sues the driver of a red car and then wishes to change to sue the driver of a blue car, a car that does not correspond to the same description. It submitted the differences between the causes of action against Berkley and against Vero, assessed by reference to the proposed amended pleading, are such that Berkley does not answer the 'particular description' to which McHugh J referred. Instead, Fairbank is asserting that it intended to sue the person who was legally liable which, as Lloyd L.J. observed in *The Owners of the Ship or Vessell "Sardinia Sulcis" The Owners of the Ship or Vessel "Al Tawwab"*,[6] is not a permissible application of the rule:[7]

> In one sense a plaintiff always intends to sue the person who is liable for the wrong which he has suffered. But the test cannot be as wide as that. Otherwise there could never be any doubt as to the person intended to be sued, and leave to amend would always be given.

33 In *Bridge Shipping*, Toohey J, who in separate reasons agreed in the result, said that where an application under r 36.01(4) is resisted, the task for the Court is to characterise the mistake which the applicant claims to have made.[8] In *Bridge Shipping*, the third-party notice did not assert that Grand Shipping was the carrier of the goods, rather, it pleaded that Grand Shipping was the owner of the ship and for

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6 [1991] 1 Lloyd's Rep 201.
7 Ibid 207.
8 *Bridge Shipping Pty Ltd v Grand Shipping SA* [1991] HCA 45; (1991) 173 CLR 231, 251.

that reason owed a duty of care.[9] The mistake was not a mistake about the person believed to be the carrier of the goods. The pleading was not framed on that basis. In the present case the proposed pleading, although criticised by Berkley for its level of generality, is a pleading that makes allegations against the professional indemnity insurer of the Architect in its capacity as insurer. Viewed at this level, the amendment is not one that changes the nature of the pleaded claim. However, as discussed below, it is necessary to consider the pleaded and amended case in detail.

34 In *Bridge Shipping*, both McHugh J and Toohey J referred to the earlier English decision of *Evans Constructions Co Ltd v Charrington & Co Ltd* ('*Evans v Charrington*').[10] In the decision under appeal before the High Court in *Bridge Shipping*, the Full Court had refused to follow that decision.[11] McHugh J held that *Evans v Charrington* was correctly decided.[12]

35 Toohey J described the decision in *Evans v Charrington*:[13]

> In *Evans Constructions Co. Ltd. v. Charrington & Co. Ltd*. the Court of Appeal allowed a lessee, where the lessor had assigned the reversion and the lessee applied for a new tenancy from the original lessor, to add the name of the assignee of the reversion as a defendant in proceedings for a new tenancy. In a very real sense there was no mistake as to the name of the person against whom the application for a new tenancy was made. The lessee was not confused as to the name; it intended to sue the original lessor, not the assignee of the reversion. It was for that reason that Waller L.J. was in dissent. However, Donaldson L.J., who was one of the majority, thought that the application fell within O. 20, r. 5(3) because it was the lessee's intention to proceed against the "relevant landlord", whoever answered that description, and the lessee had made a mistake in the person it so identified.

36 McHugh J said:[14]

> On appeal, Donaldson L.J. accepted that it was the intention of the solicitor for Evans to sue the relevant landlord. Accordingly, his Lordship found that there was a genuine mistake of a character to which O. 20, r. 5(3) could apply. Donaldson L.J. said:

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9 Ibid 247.
10 [1983] QB 810.
11 *Bridge Shipping Pty Ltd v Grand Shipping SA* [1991] HCA 45; (1991) 173 CLR 231, 258.
12 Ibid 261.
13 Ibid 250 (citations omitted).
14 Ibid 257 (citations omitted).

> "In applying Ord. 20, r. 5(3) it is, in my judgment, important to bear in mind that there is a real distinction between suing A in the mistaken belief that A is the party who is responsible for the matters complained of and seeking to sue B, but mistakenly describing or naming him as A, and thereby ending up suing A instead of B. The rule is designed to correct the latter and not the former category of mistake. Which category is involved in any particular case depends upon the intentions of the person making the mistake and they have to be determined on the evidence in the light of all the surrounding circumstances."

37 Later McHugh J said:[15]

> Rule 36.01(4) is a remedial rule and should be given a beneficial interpretation. It is proper to give it the widest interpretation which its language will permit. It should be interpreted to cover not only cases of misnomer, clerical error and misdescription but also cases where the plaintiff, intending to sue a person he or she identifies by a particular description, was mistaken as to the name of the person who answers that description.

38 In this case Fairbank intended to sue the insurer on risk in 2019. It made enquiries. Initially it thought Berkley was that insurer and then, as a result of further information provided by the Estate, it believed that Vero was that insurer. After Vero was joined as a defendant Fairbank learned that was not the case. The character of the mistake made by Fairbank in this case is similar to the character of mistake in *Evans v Charrington*.

39 Notwithstanding the similarities between the character of the mistake in this case and the character of the mistake in *Evans v Charrington*, there is an additional factor in the manner in which the claim is pleaded which means that Fairbank has not satisfied the criteria for the application of r 36.01.

40 The qualification concerns the period in which it was alleged Vero was the professional indemnity insurer of the Architect compared to the period in which it is alleged Berkley was the professional indemnity insurer of the Architect. Not only are the dates different, in the case of Vero 'from at least 6 January 2021 to 6 January 2022' and in the case of Berkley, 'between 31 October 2011 and 14 November 2019', there is no overlap between the dates pleaded. This is not a situation, as Fairbank

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15 Ibid 260-261 (citations omitted).

submitted, where it 'incorrectly believed that the "Second Insurer" bore a particular name'.

41 Accepting that a mistake about the identity of the insurer might otherwise be sufficient to satisfy the rule, it is a different matter when the proposed pleading alleges not only a different insurer, but also an insurer in respect of a different policy period.

42 The affidavit of Ms Eid explains by reference to correspondence on behalf of the Estate that the Berkley policy 'did not appear to be current at the time the Architect was deregistered on 26 October 2022'. That is the circumstance in which the proceeding as issued was discontinued against Berkley and Vero was substituted in its place. Vero was the insurer whose policy insured the Architect between 6 January 2021 and 6 January 2022. Berkley was the insurer between 2011 and 2019. This is not a case where the plaintiff intended to sue a person identified by a particular description, for example, the insurer between 2011 and 2019, and was mistaken as to the name of the person who answers that description. Here the insurer proposed to be substituted is an insurer both with a different policy and whose policy was current in a different time period. Taking the beneficial interpretation of r 36.01 to which McHugh J referred in *Bridge Shipping*, the application nevertheless falls outside r 36.01 and must be refused.

The second issue: Was there a 'Claim'?

43 On the assumption I am wrong and r 36.01(1)(b) is satisfied, the next question is whether a 'Claim' was made for the purposes of the policy.

44 The criteria to be applied when determining the second and third issues, both of which concern the power to allow an amendment, are as stated by Derham AsJ in *ABL Nominees Pty Ltd v Mackenzie (No 2)* ('*ABL Nominees*'):[16]

> 18 … [A]n amendment which is futile because it is obviously bad in law will not be allowed: *Commonwealth v Verwayen*. Similarly, if a proposed pleading would be liable to be struck out if it had been

16 [2014] VSC 529, [18]-[19] (citations omitted).

> contained in an original pleading, either because the pleading is bad in law or is defective as a pleading, then leave to file the proposed pleading will not be allowed: *Horton v Jones (No 2)*; *Gimson v Victorian WorkCover Authority*. …
>
> 19 As J Forrest J observed in *Matthews v SPI Electricity Pty Ltd (Ruling No 6)*, having regard to the terms of the Civil Procedure Act … the test is best expressed in the words of s 63 of that Act: if the amendment has no real prospect of success at trial then that would be a highly relevant factor in the exercise of the discretion to refuse the application.

45 As held in *ABL Nominees*, an amendment will generally be allowed to go forward to trial unless it has no real prospect of success.

46 Fairbank put the 'Claim' argument three different ways. First, it submitted a 'Claim' was made falling within the definition in clause 7.2.2 of the policy. Second, and in the alternative, even if there was not a 'Claim', notice was given of a Claim which is sufficient having regard to the obligation in clause 4.1 of the policy. Third and also in the alternative, even if there was not a 'Claim' or notice of a Claim, the Architect was at liberty to notify Berkley of circumstances that may give rise to a claim, such that Berkley would have been precluded by reason of s 40(3) of the *Insurance Contracts Act* from refusing to indemnify. Fairbank submitted that, while there was no direct authority on the question, it is open to the Court relying on *Einfeld v HIH Casualty & General Insurance Ltd* ('*Einfeld*') to find at trial that the Architect's failure to notify of such circumstances attracts the operation of s 54 of the *Insurance Contracts Act*.

47 The first and second alternatives concern the second issue, the third alternative concerns the third issue.

48 The Berkley policy provided cover to the Architect for 'civil liability for compensation including the claimant's legal costs and expenses arising from any Claim first made against the Insured during the Policy Period', subject to the full terms and conditions of the policies. The policy relevantly defined 'Claim' as:

> 7.2.1 any writ, application, summons or other originating legal process, cross claim or counter claim issued against or served on the Insured claiming damages or other compensatory relief;

> 7.2.2 the positive assertion in writing of a legal entitlement to damages or other compensatory relief in connection with an alleged civil liability on the part of the insured, in terms evincing an intention to pursue such legal entitlement; …

49 There was no writ or legal process in this case. Clause 7.2.1 of the definition is not relevant.

50 While senior counsel for Berkley identified four elements of the clause 7.2.2 definition that must be satisfied, I consider two elements of the definition to be determinative. The first, whether there was a communication containing a positive assertion of a legal entitlement to damages or other compensatory relief against the Architect. The second, whether the terms of the written communication evinced an intention to pursue such a legal entitlement against the Architect. In this case neither of those criteria were satisfied.

51 The particulars in the proposed amended pleading rely on an email dated 7 June 2019 from Ms Kiang to Mr Sgourakis. During the hearing, senior counsel for Fairbank submitted the question of whether the definition in clause 7.2.2 is satisfied should be approached more broadly and in the context of communications that preceded the 7 June 2019 letter, beginning with an email sent on 29 April 2019. I do not agree. The communications to which reference was made in submissions going beyond the email itself are not referenced or relied on in either the existing or the proposed pleading.

52 Ms Kiang exhibited the email dated 7 June 2019. It is in the following terms:

> Dear Peter,
>
> You have probably heard from my building consultant by now.
>
> The residents and especially myself are very concerned with the cladding material used for the village. Cracks in the cladding are appearing everywhere.There is a section where white liquid is dripping down the wall ,down the glass windows. It looked awful and disgusting.It has taken more than 3 years now from when I first report to Merkon.
>
> Peter can you email me the material you specify for the cladding that you have designed for the outside cladding walls of the building. When I spoke to you sometime ago regarding the glue like material that was taken down from apt13, you mention that Merkon could have change the material you specify.

> I have responsibility to the residents I have sold the apts. I have 2 more buyers but they want to know why the cladding are so badly cracked.When they saw the material taken down from apt 13 and 16, they were shocked! They saw it in the dumpster bin.It was like dough and glue!
>
> Peter you had the responsibility of supervising the project.Let me know if Merkon had used something else instead other than you specify.
>
> I am so sad and disappointed at Jim and Peter.I put 100 percent trust and confidence in them that they would deliver me a good and solid project especially knowing it is for the elderly residents.As you well know I paid good money for it.
>
> 2 residents were badly affected.Apt 7 their 2 bedrooms were flooded.
>
> Apt 5 , 2 times in the summertime, water pouring down the bedhead area and wet her in her sleep! There is continuing water dripping from the courtyard onto the ceiling of the basement onto the floor in the basement! The whole building is leaking.
>
> Still up to now Merkon has not fixed it correctly.Peter Mercoulia does not respond to my email.
>
> As you know I am not well, and has lost another 3 kgs.So my solicitor has taken over the project now with the building consultant.I am not allowed to be involve anymore.

53 In the course of submissions, reference was made on behalf of Berkley to whether or not the email made a demand. I do not consider that to be a relevant enquiry. If the definition of 'Claim' in clause 7.2.2 wanted to refer to whether or not a demand was made it would have said so.

54 I do not consider the email satisfies either of the clause 7.2.2 criteria to which I have referred.

55 As to the first requirement, the email contains no assertion of a legal entitlement to damages or compensation from the Architect. It seeks information from the Architect, 'the material you specify for the cladding'. It asks the Architect to email that material. The email asserts the Architect 'had the responsibility of supervising the project' but it goes no further than to assert such responsibility. It is no part of the email to say that, because of such responsibility, Fairbank has an entitlement to damages or relief against the Architect.

56 As to the second requirement, the email does not evince an intention to pursue a legal entitlement against the Architect. It refers to the 'project' having now been taken over by Fairbank's solicitor and building consultant. However, there is no reference to the solicitor being engaged to pursue a legal entitlement against the Architect. The author expresses her sadness and disappointment at 'Jim and Peter' in whom she put '100 percent trust and confidence' but there is no expression of disappointment or sadness concerning the Architect.

57 Because the email fails to meet both of the requirements that I have identified, the primary basis on which Fairbank puts its 'Claim' argument has no real prospect of success at trial.

58 For completeness, the position would have been no different if the additional communications referred to by Fairbank in argument were also taken into account.

59 It is necessary to consider the second Fairbank alternative argument. That argument relied on clause 4.1 of the policy and the obligation of the Insured, the Architect, to notify. Clause 4.1 of the Berkley policy is relevantly in the following terms:

> If during the Policy Period the Insured receives notice of any Claim that may be covered under this insurance the Insured will give notice to Us as soon as practicable and before the expiry of the Policy Period.

60 The definition of 'Claim' in clause 4.1 is the same definition that has application to the policy more generally, and includes clauses 7.2.1 and 7.2.2. To the extent the second alternative argument relies on a 'Claim' having been notified by Fairbank, that argument goes nowhere. Because there was no 'Claim' as defined in clause 7.2.2 there was no failure to notify as required by clause 4.1.

61 However, Fairbank submitted clause 4.1 requires the Architect to give notice to Berkley if the Architect receives 'notice of any Claim', which, it submits, is different to the Architect receiving a 'Claim' as defined. It submitted the words 'notice of' must be given meaning. Fairbank submitted the email was 'notice' of a Claim, given it foreshadowed legal action in respect of the Architect's responsibility for supervising the project and 'the clear implication of what had been said by …

[Fairbank's] Building Consultant regarding Mr Sgourakis's supervisory role in the Project'. This argument runs into the problem that the email did not foreshadow legal action in respect of the Architect. Contrary to Fairbank's submission, it is not accurate to say that the clear implication of the 7 June 2019 email or the other emails if regard is had to them is a foreshadowing of legal action because of Mr Sgourakis's supervisory role on the project. To the extent legal action was foreshadowed, it was against other persons.

62 For those reasons, the second alternative argument relied on by Fairbank, like the first, does not disclose a cause of action that has a real prospect of success at trial.

The third issue: Do ss 40 and 54(1) assist Fairbank?

63 The third alternative on which Fairbank relies is the decision of Rolfe J in *Einfeld* concerning ss 40 and 54 of the *Insurance Contacts Act*.

64 In *Newcastle City Council v GIO General Limited*,[17] the High Court held that s 40 applies to a 'claims made' policy.

65 Fairbank put its reliance on *Einfeld* in the following terms:

> So the issue here … was the argument that, although the insurance contracts did not require notification of these circumstances, … the plaintiff … relied upon a combination of ss40 and 54 to say that, we could've given notice, we had an opportunity to give notice under s40, we didn't; that was an omission on our part and as a result of s54 we can still make a claim under the policy and the insurer is not permitted to decline cover.

66 The headnote in *Einfeld* relevantly states:[18]

> The failure of the plaintiffs to notify the insurer of the circumstances of the claim within the period of insurance was an omission within the meaning of s 54(1) of the Insurance Contracts Act 1984 (Cth), in consequence of which the defendants were not entitled to refuse to indemnify the plaintiffs.

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17 [1997] HCA 53; (1997) 191 CLR 85.

18 *Einfeld v HIH Casualty & General Insurance Ltd* [1999] NSWSC 867; (1999) 166 ALR 714.

67 Rolfe J observed:[19]

> In the case of a claim made or of becoming aware of circumstances which may give rise to a claim, notice must be given. If, in the first case, the failure to give notice is an "omission", as has been authoritatively determined, it seems to me that it is very strongly arguable that it also is in the second case. Indeed, in my respectful opinion, consistency would demand that approach. In each case there is a failure to give notice in circumstances where an event potentially triggering the policy has occurred and, if notice is given of that event, the policy will respond. I do not see why the nature of the event, provided it happens within the policy year, affects the consequence of the failure to give notice of it, where the omission is the failure to give notice.

68 Rolfe J held:[20]

> I do not consider that there is an inconsistency between s 40 and s 54. I am of the view that Mr Marshall has correctly characterised the role of s 40 in the terms to which I have referred. In my opinion, to the extent that that section provides a statutory extension to the policy there is no reason why the ameliorating provisions of s 54 cannot apply to it.

69 As senior counsel appropriately informed the Court, there are other decisions which do not agree with Rolfe J concerning the combined effect of ss 40(3) and 54(1), including most recently Moshinsky J in *Darshn v Avant Insurance Ltd* ('*Darshn*').[21]

70 In *Darshn*, the relevant submission was as follows:[22]

> It has been recognised that s 54 applies to policies that provide cover for claims made *outside* of the policy period where the insured gives notice of facts or circumstances *during* the policy period. In such cases, the failure to give any such notification has been held to be an "omission" within s 54(6)(a) and relief was available to the insured in accordance with s 54(1)…. The same result ought to follow where, by reason of a statutory expansion of the insurance policy under s 40(3), an insured would be covered if notification had been given during the policy period but the insured omitted to do so.

71 Moshinsky J rejected the submission by the applicant, Dr Darshn:[23]

> 192 In my view, the preferable construction of the provisions is that ss 40(3) and 54 stand alone as ameliorative provisions, and their operation cannot be combined in the way that Dr Darshn [the insured] seeks to do in his submissions.

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19 Ibid 725 [36].
20 Ibid 728 [46].
21 [2021] FCA 706; (2021) 154 ACSR 1.
22 Ibid 52 [190(a)] (citations omitted).
23 Ibid 54-55 [192], [194]-[195], [197]-[198].

…

194 Dr Darshn seeks to combine the operation of ss 40(3) and 54 such that, where an insured gives notice to an insurer of "facts that might give rise to a claim against the insured" during the policy period, and would be able to rely on s 40(3) save for the fact that the notice was given *orally* rather than in *writing*, the omission to give the notice *in writing* can be the subject of the ameliorative operation of s 54.

195 … Thus, I consider the better view to be that each of ss 40(3) and 54 operates according to its own terms, and that they are not capable of operation in a combined way as contended.

…

197 I accept that this construction means that there may be a different outcome as between: (a) a case where a contract of insurance contains a clause to the same or similar effect as s 40(3); and (b) a case where the contract does not contain such a term and the insured must rely on s 40(3). In the former case, s 54 would be capable of operation in circumstances where, for example, an insured gives an *oral* (but not written) notification of facts that might give rise to a claim during the policy period; in the latter case, s 54 would not be capable of operation in such circumstances. However, I consider the difference in the outcomes to be a product of the text, and the intended scope of operation, of s 54.

198 The construction that I prefer, as outlined above, is consistent with the judgment of the New South Wales Court of Appeal in *Gosford*: see at [36]–[37] per Sheller JA, Spigelman CJ and Meagher JA agreeing; see also *Guild* at [23] per Macfarlan JA, Gleeson JA agreeing. ….

72 Berkley submitted the argument upon which Fairbank seeks to rely was addressed and dismissed in *CA & MEC McInally Nominees Pty Ltd v HTW Valuers (Brisbane) Pty Ltd* ('*CA & MEC McInally Nominees*').[24] In that case, Chesterman J considered a 'claims made and notified' professional indemnity policy. His Honour observed:[25]

32 … No claim was made against HTW while the policy was in force and no notice, written or otherwise, of a claim was given to CUA while the policy was in force. HTW seeks to overcome this embarrassment by a combination of s 40 and s 54 of the *Insurance Contracts Act* 1984 (Cth) ("the Act"). …

The alleviation of an insured's plight suffered when it does not give its insurer notice of a claim against it before the expiration of the cover which is found in subs (3) applies only where the insured gave written notice of facts that might give rise to a claim against it as soon as practicable after becoming aware of the fact and during the period of

24 [2001] QSC 388; [2009] 2 Qd R 1.
25 Ibid 8-9 [32]-[34], 11-12 [44]-[45].

> insurance. HTW did not give such notice to CUA. To obtain the benefit of s 40(3) HTW calls in aid s 54 of the Act. …
>
> 33 HTW argues that not giving the notice required by s 40(3) was an omission the effect of which was that CUA could refuse to pay the policy indemnity. Section 54 operates so that it may not refuse to pay.
>
> 34 The argument is novel. The researches of counsel have not found any case in which an insured has been brave enough or necessitous enough to use the sections in combination to this effect. The argument seeks to extend the operation of the decision of the High Court in *FAI General Insurance Company Limited v Australian Hospital Care Pty Ltd* (2001) 204 CLR 641.
>
> …
>
> 44 Section 40(3) does not imply into contracts of insurance a term to the same effect as the subsection. …
>
> 45 Section 40(3) confers rights on an insured and obligations on an insurer, but to obtain the subsection's protection an insured must comply with its terms, by giving notice. …

73 In *Gosford City Council v GIO General Ltd* ('*Gosford City Council*'),[26] Sheller JA (with whom Spigelman CJ and Meagher JA agreed) said:[27]

> 36 Section 54 does not permit the reformulation of the claim. It operates to prevent an insurer relying on certain acts or omissions to refuse to pay that particular claim. The actual claim made by the insured is one of the premises from which consideration of the application of s 54 must proceed. The section does not operate to relieve the insured of restrictions or limitations, such as the temporal limits within which the claim must be made upon the insured in a claims made policy, that are inherent in that claim.
>
> 37 As was said in the passage that I have quoted from *FAI General Insurance Co Ltd v Australian Hospital Care Pty Ltd*, the contract of insurance was a claims made policy. No claim was made against the insured within the temporal limits of the period of insurance. The insured's right to indemnity depended upon the third party's demand on it being made within the period of cover. The claim that was made on the insured was made outside that period. That fact was decisive unless s 40(3) applied. If the subsection operates it denies the insurer escape from liability because the claim against the insured was not made within the temporal limits. To invoke s 40(3) the insured must have given notice in writing to the insurer of facts that might give rise to a claim against the insured as soon as was reasonably practicable after the insured became aware of those facts but before the insurance cover provided by the contract expired. This was not done. In my

[26] [2003] NSWCA 34; (2003) 56 NSWLR 542.
[27] Ibid 553-554 [36]-[37].

> opinion, that is the end of the matter. The occasion for s 40(3) to operate did not happen. Accordingly, the subsection does not apply to prevent the insurer contending that the claim is not within the policy.

74 Having regard to the more recent decision in *Darshn* and *CA & MEC McInally Nominees* and the views expressed by the Court of Appeal in *Gosford City Council* concerning ss 40(3) and 54, the approach adopted some years ago now by Rolfe J in *Einfeld* is inconsistent with more recent authority. The argument relied on by Fairbank might appropriately be described as Chesterman J described a similar argument put in *CA & MEC McInally Nominees*, 'novel'.

75 I do not consider the third alternative relied on by Fairbank enjoys any real prospect of success. It does not provide an appropriate basis to permit the proposed amendment.

76 Even if Fairbank had succeeded in passing through the r 36.01 gateway, I would not have allowed the proposed further amended statement of claim.

Disposition

77 The summons dated 8 December 2023 is dismissed.

78 Unless by **4:00pm** on **15 February 2024** Berkley files submissions seeking its costs other than on a standard basis, Fairbank is ordered to pay Berkley's costs of the summons on a standard basis. I will order the Estate which had a supporting role only pay its own costs of the summons.

SCHEDULE OF PARTIES

S ECI 2023 02618

FAIRBANK HAVEN PTY LTD (ACN 085 352 530)	Plaintiff
v	
MERKON CONSTRUCTIONS PTY LTD (ACN 006 587 319)	First Defendant
~~ASSETINSURE PTY LIMITED (ACN 066 463 803)~~	~~Second Defendant~~
~~BERKLEY INSURANCE COMPANY (ARBN 126 559 706)~~	~~Third Defendant~~
DANIEL JOHN COLLIER	Fourth Defendant
AMANDA JANE SGOURAKIS (AS EXECUTOR AND TRUSTEE OF THE WILL AND ESTATE OF PETER SGOURAKIS, DECEASED)	Fifth Defendant
AAI LIMITED (TRADING AS VERO INSURANCE) (IN SUBSTITUTION FOR THE THIRD DEFENDANT) (ACN 005 297 807)	Sixth Defendant
XL INSURANCE COMPANY SE (TRADING AS AXA INSURANCE) (IN SUBSTITUTION FOR THE SECOND DEFENDANT) (ABN 36 083 570 441)	Seventh Defendant