



Précis Paper

Strata Defects Claims

Introduction

In this edition of BenchTV, Paul Jurdeczka, Solicitor, and Carlos Mobellan, Barrister, present an in-depth discussion on the subject of strata defect claims. The discussion covers a number of key areas, including typical causes of action in relation to defects in common property, parties who are potentially liable for defects, defences on which builders and developers might rely, the duty to mitigate, other causes of action, the limitation regime, and considerations to keep in mind when deciding whether to make claims.

Key areas of presenters' discussion

1. Typical causes of action in relation to defects in common property.

The cause of action which the presenters focus on is that pursuant to the statutory warranties contained in the Home Building Act 1989 (NSW). The Home Building Act deals with residential building work and the statutory warranties are contained in Part 2C of the Act. The statutory warranties require work to be done to a certain level of quality. The warranties are implied into building contracts by law or they are placed into the contract.

The presentation further describes the standard of work required by the statutory warranties. The warranties require work to be done with due skill and care, in compliance with plans, specifications and the law. Warranties also require that the work be fit for purpose. The presenters discuss who may be sued under the warranties. Suing a Head Contractor is one possibility but it is also noted that the Home Building Act creates a statutory liability on the part of the developer as if it were the builder. The presenters note that practitioners need to be aware of complicating factors in relation to a developer's liability, for example about what happens when land is owned an entity separate to the entity which is contracted to do the work. The presenters note that practitioners should be aware 3A, which deals with the definition of a developer, and that they should also look at Schedule 1, which ties back in with the dictionary or definitions in section 3.

2. Parties other than the builder and developer who might be liable for defects which might be liable for defects other than the builder and the developer

Subcontractors: The presenters note that subcontracts have warranties to do the work properly implied into them, and that not only the builder, but also the non-contracting owner, gets the benefit of the warranties against a subcontractor. The presenters also note that subcontractors may not have assets to meet a judgment, or insurance that will respond.

3. Defences upon which a builder or developer could rely

The defence in s18F Home Building Act is discussed. s18F provides defences on which builder many rely. One defence is that a builder was instructed by a client to go ahead with work despite the fact that the builder has given advice to the client to do the work differently. Another defence is that the builder was following a professional's advice.

4. Duty to mitigate:

The presenters discuss the duty to mitigate with reference to the judgment in *The Owners - Strata Plan No 76674 v Di Blasio Constructions Pty Ltd* [2014] NSWSC 1067. In *Di Blasio* it was held that in certain circumstances the plaintiff was obliged to provide the original contractor contract with an opportunity to come back and fix defects. It is noted that where the defence of duty to mitigate is established it doesn't reduce liability to nil, but to what it would have cost the builder. Onus of proof is discussed, with the presenters noting that the onus is on the builder when raising the defence of duty to mitigate. Arguments concerning costs of work and the scope of work are noted as issues which arise.

5. Other causes of action

The presenters discuss the potential for a claims in negligence and under Australian Consumer Law. The presenters note that there is a question mark over claiming in negligence against a builder due to the decision in *Brookfield Multiplex Ltd v Owners Corporation Strata Plan 61288* [2014] HCA 36 but that professionals may also be sued in negligence. It is noted that statutory warranties are not subject to the proportionate liability regime under the Civil Liability Act 2005 (NSW) but that if you make a claim in negligence, or under trade practices legislation, the proportionate liability defences may be raised. This possibility of proportionate liability defences is noted as is a risk factor which owners corporations need to take into account.

6. Limitation regime

The presenters discuss the regime of limitations applicable to bringing claims under statutory warranties. Since January 2015 people with benefit of statutory warranties are able to bring claims for 'major defects' and the limitation period is 6 years from completion. For defects other than major defects the limitation period within which to sue is two years from completion. Section 3C of the Home Building Act, which deals with completion of work, is discussed, as are the limits on amounts of claims

which may be heard in the New South Wales Civil and Administrative Tribunal and the various Courts. Potential problems arising from commencing an action in the wrong Court or Tribunal are discussed.

7. Considerations to keep in mind when deciding whether to make claims

The presenters note that an owners corporations must concern itself with having a reasonable estimate of costs of bringing the litigation and authorising that spending subject to the various exemptions. The long stop defence is also discussed, as is the 10 year limitation under the Environmental Planning and Assessment Act 1979 (NSW) for bringing a claim. Parties are also advised to be aware of provisions in Australian Consumer Law concerning manufacturers and importers of goods. Part 11 of the Strata Schemes Management Act is also discussed in relation to the complex scheme it puts in place which will commence for contracts entered into or work commenced from 1/1/18. By the scheme developers or builders working for them will put a 2% bond up to protect against defects in construction of residential or mixed used strata schemes. It is noted that the scheme will provide another avenue for owners corporations to consider but only for 2% of the contract price. The issue of insurance is also discussed: if insurance is present then an owners corporations will need to take notice of obligations, such as the requirement to provide notice of defects. Finally it is noted that it might be possible to get behind the corporate veil and sue directors.

Presenters' Biographies:

Paul Jurdeczka is a Partner at Mills Oakley, Sydney. Paul holds a Bachelor of Arts and a Bachelor of Laws from Macquarie University and was admitted as a solicitor in New South Wales in 1999. He practices primarily in insurance, construction and strata law, specializing in home warranty insurance, residential construction disputes and defects claims, as well as strata advice and disputes.

Carlos Mobellan is a Barrister at 3 St James Hall Chambers and specializes in building cases with an emphasis on matters arising under the Home Building Act 1989 (NSW). The Building and Construction Industry Security of Payment Act 1999 (NSW) and the Strata Schemes Management Act 2015 (NSW). Carlos was admitted as a solicitor in 1997 and was called to the Bar in 2004 where he was awarded the Bar Practice Course prize. Carlos has appeared for and against home owners, Owners Corporations, builders, government agencies, and property development companies.

Bibliography:

Home Building Act 1989 (NSW)

Environmental Planning and Assessment Act 1979 (NSW)

Local Government Act 1993 (NSW)

Civil Liability Act 2005 (NSW)

Trade Practices Act 1974 (Cth)

Strata Schemes Management Act 2015 (NSW)

National Construction Code

The Owners - Strata Plan No 76674 v Di Blasio Constructions Pty Ltd [2014] NSWSC 1067

Owners Strata Plan 73162 v Dyldam Developments Pty Limited [2014] NSWSC 1789

Brookfield Multiplex Ltd v Owners Corporation Strata Plan 61288 [2014] HCA 36

In the matter of HIH Insurance Limited (In Liquidation) (ACN 008 636 575) and others; Smith and Others v Anthony Gregory McGrath (in his capacity as Liquidator of HIH Insurance Limited (in liquidation)) and Others; Baldock and Others v Anthony Gregory McGrath (in his capacity as Liquidator of HIH Insurance Limited (in liquidation)) and Others;; De Bortoli Wines (Superannuation) Pty Ltd and Others v Anthony Gregory McGrath (in his capacity as Liquidator of HIH Insurance Limited (in liquidation)) and

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