Supreme Court

New South Wales

Case Name:	Owners Corporation SP 80609 v Paragon Construction (NSW) Pty Limited
Medium Neutral Citation:	[2018] NSWSC 266
Hearing Date(s):	02/03/2018
Date of Orders:	2 March 2018
Decision Date:	2 March 2018
Jurisdiction:	Equity - Technology and Construction List
Before:	McDougall J
Decision:	Grant leave to file cross-claim.
Catchwords:	CIVIL PROCEDURE – application by builder and developer for leave to bring cross claim against principal certifying authority – whether cross claim maintainable at law – whether principal certifying authority owes duty of care to first plaintiff – whether any liabilities which exist are coordinate – where prior questions of law unable to be quickly and easily resolved – where no prejudice to the principal certifying authority exists aside from costs and inconvenience – leave granted CIVIL PROCEDURE – offer of compromise accepted between first plaintiff and third defendant – whether judgment should be entered now in accordance with UCPR 20.27 – where issue of potential prejudice or estoppel may arise if judgment is entered – no prejudice in delaying entry of judgment until trial – judgment not entered
Legislation Cited:	Civil Liability Act 2002 (NSW) Home Building Act 1989 (NSW)

	Uniform Civil Procedure Rules 2005 (NSW)
Cases Cited:	Brookfield Multiplex Ltd v Owners' Corporation Strata Plan 61288 (2014) 254 CLR 185 Burke v LFOT Pty Limited (2002) 209 CLR 282 Chan v Acres [2015] NSWSC 1885 Ku-ring-gai Council v Chan (2017) 224 LGERA 330
Category:	Procedural and other rulings
Parties:	Owners Corporation Strata Plan No. 80609 (First Plaintiff) Ann Marie Morris (Second Plaintiff) Adam Severin Connery (Third Plaintiff) Paragon Construction (NSW) Pty Ltd (First Defendant) Glenvine Pty Ltd (Second Defendant) Alexander James Lovat (Third Defendant)
Representation:	Counsel: R J Cheney SC (Plaintiffs) F Corsaro SC / L Shipway (First and Second Defendants) M S White SC (Third Defendant) Solicitors: Doyle Edwards Anderson Lawyers (Plaintiffs) Hartmann & Associates (First and Second Defendants) DLA Piper Australia (Third Defendant)
File Number(s):	2015/200096

JUDGMENT (EX TEMPORE – REVISED 2 MARCH 2018)

1 **HIS HONOUR:** The first plaintiff is the Owners Corporation at a strata title development at Jindabyne. The other plaintiffs are proprietors of lots in that development. The first and second defendants are respectively the builder who constructed, and the developer of, the property. The third defendant (Mr Alexander) is said to have been the principal certifying authority (PCA) engaged by the developer.

2 The plaintiffs allege that the work done was defective in various ways. They sue the builder and the developer upon the warranties implied pursuant to s 18B of the *Home Building Act 1989* (NSW). However, more fundamentally, the Owners Corporation says that Mr Alexander failed to exercise his

responsibilities appropriately, and issued an occupation certificate when, by reason of various matters, he should not have done so. In essence, that debate, which is extremely complex, concerns the proper classification of the building and hence the fire and life safety measures that should have been incorporated. It is the Owners Corporation's case that the building should be demolished and rebuilt. I should add that the individual proprietors do not bring any claim against Mr Alexander.

3 Until the present day, the matter has proceeded on the basis that the defendants were sued individually. There was no cross-claim between them. It has been suggested, in the course of argument, that the proportionate liability regime established by the *Civil Liability Act 2002* (NSW) may not apply. If those doubts were entertained, then it is very difficult to see why there was no cross-claim brought (for example, by the builder and the developer against Mr Alexander).

4 I mention that matter because the application before me today is one brought by the builder and the developer for leave to cross-claim against Mr Alexander. That application has been prompted because Mr Alexander and the Owners Corporation have agreed to resolve their dispute. Mr Alexander made an offer of settlement to the Owners Corporation, and the Owners Corporation accepted that offer. It follows that the Owners' Corporation or Mr Alexander can have judgment entered accordingly: UCPR r 20.27(3).

5 The cross-claim repeats, for the purposes only of the cross-claim, the "pleading" of the Owners Corporation's case against Mr Alexander. It says that if the builder or the developer are liable for the loss and damage in respect of the classification issue, then they are coordinately liable with Mr Alexander. Accordingly, they say, they are entitled to equitable contribution from Mr Alexander.

6 Mr MS White of Senior Counsel, who appeared for Mr Alexander, submitted that leave to cross-claim should be refused because the cross-claim was not maintainable. He submitted, relying on the decision of the Court of Appeal in *Ku-ring-gai Council v Chan*[1] and, more fundamentally, the decision of the High

[1] (2017) 224 LGERA 330.

Court in *Brookfield Multiplex Ltd v Owners' Corporation Strata Plan 61288*[2], that the cross-claim based on existence of any duty of care owed by Mr Alexander as PCA to the Owners' Corporation was not maintainable as a matter of law. To the extent the Owners' Corporation relies also on breach of statutory duty, Mr White submitted, in part relying (perhaps rather foolishly) on what I had said in *Chan v Acres*[3] (which was the case that, on appeal, became *Ku-ring-gai Council v Chan*) that the statutory scheme in question did not evince any entitlement in individual proprietors affected by breaches of duty on the part of a PCA to sue to recover damages.

7 As a backup and final point, Mr White submitted that the case in any event was not one where the liabilities (assuming any existed) could be said to be coordinate in the relevant sense, so as to give rise to any equity of contribution. He relied on the judgment of the High Court in *Burke v LFOT Pty Limited*[4]. He referred in particular to the judgment of McHugh J at [60], [61] and to the judgment of Callinan J at [138], [139]. It may be observed, as Mr White submitted, that their Honours, along with Gaudron ACJ and Hayne J (who gave a joint judgment) constituted the majority in that case.

8 The matter is fixed for hearing to commence on 26 March 2018, with an estimate of five days. There are obvious reasons why, if the claim is bad as a matter of law (that is to say, if it is plainly unarguable on one or more of the bases assigned), the leave sought by the builder and the developer should be refused. Mr Alexander will be extricated from a five-day hearing. The hearing in all likelihood will finish more quickly, with a consequent saving in costs as between those parties who will remain opposed.

9 The real difficulty, as I see it, is that this argument has come up for resolution in the course of the Friday "practice" list. The notice of motion has been referred to me to deal with. There is no point in adjourning, because the very benefits of a prompt decision will be lost.

10 The arguments are, as I have indicated, complex. A proper understanding of them would require a detailed study of the Owners Corporation's proposed

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[2] (2014) 254 CLR 185.
[3] [2015] NSWSC 1885.
[4] (2002) 209 CLR 282.

pleading against Mr Alexander, and of its pleading against the builder and the developer. It would require close analysis of those pleadings to understand whether the facts alleged could be said to give rise to coordinate liability for the purposes of the doctrine of contribution.

11 Stepping back a stage from that, the question of the existence of any duty of care as alleged would require detailed analysis of the allegations made against Mr Alexander, and a comparison of what emerges with the facts on the basis of which the Court of Appeal in *Ku-ring-gai Council v Chan* held that the PCA in that case owed no duty of care to the subsequent owners. I accept, as Mr White submitted, that Meagher JA (with whom McColl JA and Sackville AJA agreed) made it clear in his reasons from [94] to [97] that the position of the subsequent purchasers did not entail vulnerability to, among other things, any want of care on the part of the PCA. On the face of things, that would seem to close off the argument based on duty of care. But as Mr Corsaro of Senior Counsel (for the builder and the developer), in my view correctly, submitted, before one applies a broad test of that nature it is necessary to look at the precise facts. The precise facts that gave rise to that conclusion in *Ku-ring-gai Council v Chan* are available in the judgment. The facts that will be proved in this case, by definition, are not.

12 Equally, analysis of the argument based on breach of statutory duty would require more time and more detail than I have at present.

13 It cannot be said that Mr Alexander is unable to run the case: at least, no such submission was put. One would have thought that up until the very recent conclusion of the settlement between him and the Owners Corporation, he was ready to run it. It may be accepted that in being forced to run it, he (or his insurers) will be put to expense that he or they had hoped to avoid. But, as Mr Corsaro correctly submitted, that is something that can be compensated in costs. Further, to the extent costs on the ordinary basis are not an adequate remedy, it may very well be that if I grant leave to proceed in the manner sought by the builder and the developer and the arguments propounded by Mr White succeed at trial, they may found an application for costs to be assessed on the indemnity basis.

14 As against that, there is no explanation whatsoever of the failure to bring any cross-claim until the notice of motion was filed a week or so ago. It is very difficult to understand that delay, particularly when the view appears to have been taken that the proportionate liability regime does not apply to claims under the Home Building Act. I suppose it may be that the particular claim against Mr Alexander may not be such a claim, but that point was not argued and I certainly do not wish to express even a tentative view upon it.

15 However, since the delay has not been productive of any prejudice apart from the kind to which I have referred, that probably does not go too far.

16 I have a very strong feeling that the arguments put by Mr White are well founded, and likely to prevail at trial. My difficulty is that having regard to the time at which the application was brought and the need to decide it on the spot, I have not had the opportunity to consider those arguments properly, and the facts that are applicable to them.

17 For those reasons, and with very considerable reluctance, I have come to the conclusion it is appropriate to grant the relief sought by the builder and the developer in their notice of motion.

18 That leaves the question of whether judgment should be entered now, as between the Owners Corporation and Mr Alexander, pursuant to the former's acceptance of the latter's offer of compromise. In the ordinary way, I would have no hesitation in doing so. Mr Corsaro submitted that some prejudice might follow, by reason of estoppels that would flow from the entry of judgment. Mr White responded that as the builder and the developer were not parties to the settlement, did not consent to it, and did not consent to the entry of judgment, they could not be affected. Again, he may very well be right. Regardless, in circumstances where Mr Alexander is to remain a party, the practical consequence is that nothing is gained or lost by putting off to the trial judge the question of entry of judgment upon the accepted offer of compromise.

19 The consequences are that the builder and developer should have the leave sought, and the application for entry of judgment should be adjourned to be considered by the trial judge.

20 There is, however, another issue raised by the notice of motion, which is one that arises as between the Owners Corporation on the one hand and the builder and the developer between them on the other. Apparently, that is not ready to be dealt with today. The application is that it should be referred back to the list judge for allocation of a hearing date.

21 That would leave the question of costs. To the extent I have dealt with the notice of motion, the obvious outcome is that the costs should be costs in the proceedings. To the extent there remain aspects of the notice of motion to be dealt with, they can be considered by whoever deals with prayer 1.

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