Supreme Court

New South Wales

Case Name:	The Owners-Strata Plan 91349 v Hallmark Construction Pty Ltd
Medium Neutral Citation:	[2019] NSWSC 591
Hearing Date(s):	15 May 2019
Decision Date:	22 May 2019
Jurisdiction:	Equity - Technology and Construction List
Before:	Ball J
Decision:	(1) The following paragraphs of the amended technology and construction list statement filed on 15 March 2019 be struck out: (a) as against the first defendant: 26, 27(e), 28, 58-59, 63-64, 91-95, 96-98 and 113-117; (b) as against the second defendant: 5(b), 27(a), 56-59, 63, 108(n) – 112, 113-117; (c) as against the ninth defendant: 41-42, 67-68, 91-95, 102-104, 108(f)-112, 113-117, Schedule 1, Defect nos. 12, 13, 14, 25 and 26; (d) as against the twelfth defendant: 52-54, 65-66, 99-101, 108(l)-111, 113-117; (e) generally: 118-123, 124-130 and 131-134. 2. The plaintiff be given leave to file a notice of motion returnable on 28 June 2019 seeking to file a further amended list statement, such motion and any supporting affidavit to be served no later than 14 June 2019. 3. The plaintiff pay the first to fourth and twelfth defendants' costs of their notice of motion filed on 9 April 2019 and the ninth defendant's costs of its

	amended notice of motion filed on 15 May 2019.
Catchwords:	CIVIL PROCEDURE – Pleadings – Striking Out – whether form and content of pleadings defective – embarrassing pleadings – insufficient or inadequate particulars – whether reasonable cause of action disclosed
Legislation Cited:	Australian Consumer Law Environmental Planning & Assessment Regulation 2000 (NSW) Home Building Act 1989 (NSW) Practice Note SC Eq 3 – Commercial List and Technology and Construction List
Cases Cited:	Brookfield Multiplex Ltd v Owners Corporation Strata Plan 61288 (2014) 254 CLR 185; [2014] HCA 36 McKernan v Fraser (1931) 46 CLR 343 Re FG (Films) Ltd [1953] 1 WLR 483 Smith, Stone & Knight Ltd v Birmingham Corporation [1939] 4 All ER 116; Re FG (Films) Ltd [1953] 1 WLR 483 Spreag v Paeson Pty Ltd (1990) 94 ALR 679 The Commercial Bank of Australia Limited v Amadio (1983) 151 CLR 447 Ucak v Avante Developments [2007] NSWSC 867 Williams v Hursey (1959) 103 CLR 30
Texts Cited:	Building Code of Australia
Category:	Procedural and other rulings
Parties:	The Owners-Strata Plan 91349 (Plaintiff) Hallmark Construction Pty Ltd (ACN 066 609 729) (First Defendant) Raymond Michael Raad (Second Defendant) Anthony Bruce Crane (Third Defendant) Raad Holdings Pty Ltd (ACN 079 065 124) (Fourth Defendant) PNT Group Pty Ltd (ACN 165 795 602) ATF PNT Family Trust (ABN 50 650 103 404) t/as New Style Aluminium (Fifth Defendant) George Khalil & Associates Pty Ltd (ACN 098 851 211) ATF George Khalil Family Trust (ABN 44 936 164 688) t/as ACSES Engineers (Sixth Defendant) Duro Building Construction Pty Ltd (ACN 092 138 835)

	(Seventh Defendant) FB Masonry Pty Ltd (ACN 113 140 195) (Eighth Defendant) Mance Arraj Engineering Pty Ltd (ACN 153 123 865) ATF Mance Arraj Engineering Unit Trust (ABN 58 244 208 422) t/as HKMA Engineers (Ninth Defendant) Certified Building Specialists Pty Ltd (ACN 151 732 928) (Tenth Defendant) Kwik Flo Pty Ltd (ACN 131 073 204) (Eleventh Defendant) Michael Raad Architect Pty Ltd (ACN 082 247 845) (Twelfth Defendant) Universal Fire Systems Pty Ltd (ACN 119 766 246) (Thirteenth Defendant) Blue Dragon Interior Pty Ltd (ACN 156 259 219) (Fourteenth Defendant) Electrical Energy Group Pty Ltd (ACN 135 894 530) (Fifteenth Defendant)
Representation:	Counsel: P Bambagiotti with P Horobin (Plaintiff) M Ashhurst SC (First to Fourth and Twelfth Defendants) HJA Neal (Ninth Defendant) Solicitors: Streeterlaw (Plaintiff) Milad S Raad & Associates (First to Fourth and Twelfth Defendants) Lander & Rogers Lawyers (Ninth Defendant)
File Number(s):	2018/73395

JUDGMENT

Introduction

1 By a notice of motion filed on 9 April 2019, the first to fourth and twelfth defendants seek to strike out various paragraphs of the plaintiff's amended technology and construction list statement (***ALS***). By an amended notice of motion filed in court on 15 May 2019, the ninth defendant seeks to strike out certain paragraphs of the ALS which concern it. It will be convenient to refer to the first to fourth, ninth and twelfth defendants together as "the ***Relevant Defendants***".

2 At the hearing of the matter, the plaintiff provided the Court with what was described as a further amended technology and construction list statement (***FALS***) which sought to address some of the defects which the Relevant Defendants contended existed with the ALS. The parties sensibly agreed that the notices of motion should proceed by reference to that document.

Background

3 The plaintiff (the ***Owners Corporation***) is the owners corporation in respect of a residential strata development in Silverwater, New South Wales. It commenced these proceedings on 6 March 2018 against the first defendant, Hallmark Construction Pty Ltd (***Hallmark***), claiming damages in respect of various defects said to exist with the building comprising the strata development (the ***Building***) on the basis that Hallmark was the builder of the Building. The developer of the project was Beaconsfield Street Pty Ltd (***BSPL***). The claim was brought by the Owners Corporation as successor in title to Beaconsfield relying on the statutory warranties (the ***Statutory Warranties***) implied by s 18B of the *Home Building Act 1989* (NSW) (the ***HBA***) and the extension of those warranties to successors in title under s 18D of that Act.

4 By an amended summons filed on 18 March 2019 and the ALS, the Owners Corporation advances claims against 14 additional defendants involved in the construction of the Building and makes claims against each defendant on a number of bases. The amended summons and ALS were filed following the filing of a technology and construction list response by Hallmark in which it claimed that the building work it performed was limited to "excavation and piling work" and that the remainder of the work was carried out by BSPL. BSPL was placed into liquidation following completion of the work and has since been deregistered.

5 The paragraphs that the Relevant Defendants seek to strike out are the following:

(a) as against the first defendant: 26, 27(e), 28, 58-9, 63-4, 91-5, 96-8 and 113-7;

(b) as against the second defendant: 5(b), 27(a), 56-9, 63, 108(n) – 112, 113-7;

(c) as against the ninth defendant: 41-2, 67-8, 91-5, 102-4, 108(f)-12, 113-7, Schedule 1, Defect nos. 12, 13, 14, 25 and 26;

(d) as against the twelfth defendant: 52-4, 65-6, 99-101, 108(l)-111, 113-7;

(e) generally: 118-123, 124-130 and 131-4.

6 The fourth defendant, Raad Holdings Pty Ltd (***RHPL***), is the holding company of Hallmark. The third defendant, Mr Anthony Crane, was a director of each of Hallmark, RHPL and BSPL and is said by the Owners Corporation to be the controlling mind of each company. The second defendant, Mr Raymond Michael Raad, was an employee of Hallmark and BSPL and is said by the Owners Corporation to have acted as the project manager for the project. The ninth defendant, Mance Arraj Engineering Pty Ltd, which trades as HKMA Engineers (***HKMA***), was a subcontractor which provided structural engineering services in respect of the project. The twelfth defendant, Michael Raad Architect Pty Ltd (***MRPL***), provided architectural services in respect of the project. In para 19(a) of the FALS, it is pleaded that BSPL, Hallmark and RHPL "were all members of a group of companies known as, and holding themselves out collectively, as the Raad Group".

7 Most of the other defendants are other subcontractors who provided services in connection with the project. The tenth defendant, Certified Building Specialists Pty Ltd, was the principal certifying authority (***PCA***) for the project. None of them appeared at the hearing of the motions and nothing more needs to be said about them.

8 The paragraphs that the Relevant Defendants seek to strike out raise seven claims:

(a) claims based on breaches of the Statutory Warranties;

(b) claims for negligence;

(c) claims for misleading and deceptive conduct;

(d) claims for negligent misstatement;

(e) claims that Mr Crane and RHPL engaged in unconscionable conduct in contravention of s 20 or s 21 of the *Australian Consumer Law* (***ACL***);

(f) claims that Mr Crane, RHPL and BSPL committed the tort of interfering with contractual relations; and

(g) claims that BSPL, RHPL and Mr Crane committed the tort of conspiracy.

The claims for breach of statutory warranty

9 The plaintiff pleads in paras 91 to 95 of the FALS that each of Hallmark and HKMA breached the statutory warranties implied by s 18B of the HBA. They claim damages against each of "Hallmark (as builder and/or principal of BSPL), RHPL (as principal of BSPL and/or Hallmark)" and HKMA.

10 The pleading is abbreviated to say the least. Paragraph 91 relevantly pleads:

> The Defects in the common property arise from breaches of the Statutory Warranties in sec 18B HBA by each of Hallmark … [and HKMA] …in respect of the residential building work undertaken by each of them respectively.

"Defects" is defined in the FALS to be various defects set out in Schedule 1 to the Amended List Statement.

11 Paragraph 92 of the FALS pleads that the Owners Corporation, as a successor in title to BSPL, has the benefit of the statutory warranties pursuant to s 18D of the HBA.

12 Paragraph 93 pleads:

> The Defects collectively comprise a breach of the Statutory Warranties given by BSPL (separately or together with Hallmark) arising pursuant to sec 18C HBA.

13 Paragraphs 94 and 95 plead that the Owners Corporation has suffered loss as a consequence of the breaches, including the cost of rectifying the Defects.

14 In my opinion, this is not a proper pleading.

15 The FALS is not strictly a pleading. However, it serves a similar function: see *Ucak v Avante Developments* [2007] NSWSC 867 at [3]-[7] per Hammerschlag J. It must provide sufficient details so that the defendant can understand the case it has to meet. That point is reinforced by para 9 of *Practice Note SC Eq 3* – Commercial List and Technology and Construction List, which states that a list statement must "state the allegations the plaintiff makes with adequate particulars".

16 An obvious defect is that the pleading does not identify the conduct of each of the Relevant Defendants that is said to amount to a breach of the implied warranties. Nor does the pleading identify how that conduct is said to have

caused the defects in respect of which the plaintiff sues. All that is pleaded are conclusory allegations of breach and causation. That is plainly insufficient. There may be a question concerning the extent to which a claim must be particularised. However, at a minimum, Hallmark and HKMA are entitled to know with a reasonable degree of specificity what they did and did not do in breach of the Statutory Warranties and how that conduct caused the defects about which the Owners Corporation complains.

17 There is a further problem with the claim against HKMA. The introductory words to s 18B(1) of the HBA state:

> The following warranties by the holder of a contractor licence, or a person required to hold a contractor licence before entering into a contract, are implied in every contract to do residential building work …

It is pleaded in the FALS that HKMA does not hold a contractor licence. Nowhere, however, is it pleaded that HKMA is a person required to hold a contractor licence before entering into a contract, let alone the facts and matters from which such an obligation arises. It is essential for those facts and matters to be pleaded.

18 There is also a further problem with the claim against Hallmark and RHPL. In para 25 of the FALS, it is pleaded that BSPL contracted with Hallmark, among others, to undertake residential building work. No particulars of the contract are given and no allegation is made concerning the nature of the work that Hallmark was contracted to undertake. In para 27(e), it is alleged that "Hallmark was identified to the public as being the principal contractor and, in general terms, the 'builder' of the Building". How that pleading is relevant to any of the claims is not readily apparent. The fact (if it is one) that Hallmark was identified by some unspecified person to the public as being the principal contractor is not relevant to the terms on which Hallmark was engaged to carry out residential building work. In para 95, the claim against Hallmark is described as a claim against it "as builder and/or principal of BSPL", whatever that means.

19 In para 19 of the FALS, the Owners Corporation pleads that BSPL, Hallmark and RHPL were members of the same group of companies which, among other things:

(a) Operated out of the same premises;

(b) Had Mr Crane as a common director;

(c) Shared employees;

(d) Had the same email address and telephone number;

(e) Allowed Hallmark to be identified as the builder/developer of the building in correspondence;

(f) Conducted themselves as one economic unit with respect to the construction of the building;

(g) Together declared a fully franked dividend of $26 million; and

(h) Agreed that the proceeds of sale of the units were to be paid to RHPL rather than BSPL, although BSPL was nominally the vendor of the units.

20 In para 20 of the FALS, it is alleged that by reason of those matters "the actor in each case (be it BSPL or Hallmark) did so as agent or representative or on behalf of both of them, or RHPL" with the result that "the conduct of any is the conduct of all and, therefore, all are parties to contracts nominally entered into by one of them were at law entered into by all so that the corporate veil between Hallmark and/or RHPL and BSPL is to be set aside".

21 It appears to be on that basis that it is said RHPL is liable for breach of the statutory warranties.

22 However, in my opinion, this pleading is confused and embarrassing. In some cases, courts speak of "lifting the corporate veil". However, that phrase is a metaphor to describe the practical result of a finding that one entity is liable for the conduct of another or entitled to the benefits conferred on another. That liability most often arises because the court concludes that the separation of the two entities is a sham or because it can be concluded on the particular facts of the case, that one entity is the agent for the other: see *Spreag v Paeson Pty Ltd* (1990) 94 ALR 679; *Smith, Stone & Knight Ltd v Birmingham Corporation* [1939] 4 All ER 116; *Re FG (Films) Ltd* [1953] 1 WLR 483. However, the Court has no power to "set aside" the corporate veil (whatever precisely that means).

23 It is unclear, but it appears that what is asserted is that Hallmark acted for itself and as agent for RHPL in entering into a contract to build the Building and for that reason RHPL is bound by the Statutory Warranties. If that is what is

asserted, it must be specifically pleaded, including the facts which are said to give rise to the alleged agency. Paragraph 19 of the FALS does not satisfy that requirement. A number of the facts pleaded (such as sharing of offices and telephone numbers etc) appear to be irrelevant to that question. Some of the facts (such as the payment of a dividend) occurred after the alleged agency is said to have arisen.

24 Mr Bambagiotti, who appeared for the Owners Corporation, pointed to the fact that the Owners Corporation had not yet had discovery and consequently was not in a position to plead its case fully. That may be so, but the absence of discovery cannot provide a justification for a claim that does no more than assert conclusions. If the Owners Corporation has no more information concerning its claim than what is currently pleaded, that raises the question whether the claim is properly brought in the first place.

The claims in negligence

25 The claims in negligence are brought against each of "Hallmark and/or Raymond", MRPL and HKMA.

26 The structure of each claim is similar.

27 In para 63 of the FALS, it is alleged that:

> … Raymond, acting as project manager, and/or Hallmark (acting through Raymond as project manager) owed the Owners Corporation a duty to exercise reasonable care, skill and expertise in, and with respect to, performing its functions as project manager of the construction and certification by CBS of the Building so that:
>
> (a) All the contractors engaged to undertake residential building work for the construction of the Building would be licensed for the purposes of the HBA;
>
> (b) The residential building work would comply with the requirements of the DA, including compliance with the BCA and all applicable Australian Standards;
>
> (c) That the Building, as constructed, would be reasonably free from major or substantial defects and deficiencies so as to be suitable for use and occupation as it had been marketed to the public.

The duty is said to arise from various facts pleaded in para 64. The critical allegation in para 64 appears to be the allegation (in sub-para (i)) that "The Owners Corporation was in no position to protect itself and was vulnerable to defaults in the quality of work or material used in the construction of the

common property". It appears that that is said to be so because the Owners Corporation could not inspect the Building and could not negotiate the terms or conditions subject to which it would take the common property.

28 In paragraph 96, it is pleaded that "Hallmark and/or Raymond" breached their duty of care. The following particulars are given:

> Failed to ensure that each of Blue Dragon, New Style, ACSES, and Universal, being contractors that undertook residential building work in the construction of the Building, did not hold licences for the purposes of the HBA.
>
> Failed to effectively oversee the conduct and co-ordination of the work and to take reasonable steps to ensure that the work complied with the requirements of the DA, including the BCA.
>
> Failed to adequately supervise or to inspect, or to cause the inspection, of the work so that the Defects be detected and corrected.
>
> Issued the Occupation Certificate Application attaching certification that was incorrect and without paying due and reasonable regard to the content and reliability thereof.

29 In para 97, it is pleaded that:

> Hallmark and/or Raymond's breach of that duty led to the common property being burdened by the Defects in a circumstance by which the Owners Corporation has suffered and stands to suffer loss and damage, including in having those Defects rectified.

30 In para 65, it is alleged that MRPL owed a duty to exercise reasonable care, skill and expertise in and with respect to:

> (a) designing and preparing the architectural plans, particularly in respect of the elements of the design that bear upon fire safety including fire separation; compliance with conditions of the DA including compliance with the requirements of the BCA;
>
> (b) supervision of the building design and construction including the procurement of engineering services and communications with the engineer;
>
> (c) designing and supervision the work in the construction of the Building so that the Building, including the common property, would be suitable and fit for use and occupation as it had been marketed;
>
> (d) the documentation and certification issued with respect to the work, including those certificates that were to be used in the process of obtaining an occupation certificate.

Again, para 66 sets out various matters from which it is said that duty of care arose.

31 Paragraph 99 pleads that MRPL failed to exercise due and reasonable skill and care and thereby breached its duty of care to the Owners Corporation. It gives the following particulars:

> Failure to prepare and distribute architectural plans to the standard of a reasonably competent architect.
>
> Failure to adequately supervise and inspect the building design and construction to the standard expected of a reasonably competent architect.
>
> Issuing certification without paying due or sufficient regard to the content or reliability thereof.

32 Paragraph 100 pleads causation in similar terms to para 97.

33 Paragraph 67 alleges that HKMA owed a duty to exercise reasonable care, skill and expertise in and with respect to:

> (a) the structural design of the work;
>
> (b) the inspection, investigation, and certification of the structural design aspects of the work

Paragraph 68 sets out the facts from which it is said that duty of care arose.

34 Paragraph 102 alleges that HKMA failed to exercise due and reasonable skill and care and thereby breached its duty of care to the Owners Corporation. The following particulars are given:

> Failure to properly inspect the balustrades to the standard of a reasonably competent engineer;
>
> Issuing certification without paying due or sufficient regard to the content or reliability thereof.

35 Again, para 103 pleads causation in similar terms to para 97.

36 In my opinion, these pleadings are deficient.

37 First, starting with the claim against Hallmark and Mr Raad, no facts are pleaded in support of the allegation that Mr Raad assumed personal responsibility to the Owners Corporation. The fact that he acted as the project manager does not without more establish that he assumed personal responsibility when it appears that on the face of the pleading he is said to have acted in that capacity as an employee of Hallmark.

38 Second, it is unclear on the facts as pleaded how it is said this case differs from the decision of *Brookfield Multiplex Ltd v Owners Corporation Strata Plan*

61288 (2014) 254 CLR 185; [2014] HCA 36, where the High Court held that a contractor did not owe a duty to an owners corporation to take reasonable care to avoid economic loss suffered by the owners corporation in having to make good the consequences of latent defects caused by the building's defective design and/or construction.

39 Third, the duty is not pleaded as a duty to take reasonable care to avoid an identified risk of harm. Rather, it is pleaded as a duty to take reasonable care to bring about certain events (that all contractors would be licensed, that the work would comply with the Building Code of Australia and that the Building would be reasonably free from major or substantial defects). Expressed in those terms, the duty appears to be something closer to an absolute duty to ensure certain things happen.

40 Fourth, the particulars of breach are plainly inadequate. They simply assert in a conclusory form that Hallmark and Mr Raad failed to comply with the pleaded duties without identifying how they did so.

41 Fifth, there is no adequate pleading of causation. It is unclear what is meant by the curious formulation "led to the common property being burdened by the Defects"; and it is hard to see how it could be said that but for the alleged breaches none of the Defects would have existed. For example, it appears to be pleaded that the failure to ensure that certain subcontractors had licences caused the Defects. It is not pleaded that those subcontractors did not have licences. But assuming it was and assuming that allegation was true, how did the absence of licences cause the Defects?

42 Similar problems exist with the claims against MRPL and HKMA, although the problems with the pleading of causation are even more acute in their cases because it is unclear which Defects are said to have been caused by their breaches. To take an example, it is said that MPRL failed to prepare and distribute architectural plans to the standard of a reasonably competent architect. No particulars are given for why the plans were sub-standard. Nor is there any pleaded connection between the plans and any particular Defect. However, it is difficult to see how it could be suggested that all the Defects were caused by sub-standard plans. Similarly, it is pleaded that HKMA failed to

carry out proper inspections and issued certification "without paying due or sufficient regard to the content or reliability thereof". However, there is no pleading of how those failures caused the loss in respect of which the Owners Corporation sues. Presumably, it is said that had the inspections been carried out or proper certificates been issued, the Defects would have been rectified by presumably BSPL at some unidentified time. If that is what is alleged, it must be properly pleaded.

Misleading or deceptive conduct

43 Paragraphs 30 to 56 of the FALS plead that various subcontractors issued certificates concerning work that they each performed. Each certificate is said to contain representations relating to that work. It is not necessary to describe each of those certificates. They include a structural engineering certificate of inspection dated 22 October 2014 issued by HKMA which is alleged (in para 42) to have included representations (the ***Structural Engineering Representations***) that the construction of the basement and ground floor slabs, the cantilevered balconies and the placement of the blockwork on level 3:

> (a) Had been carried out in accordance with the approved structural documentation and was structurally adequate for its purpose and function in relation to the Building;
>
> (b) and so impliedly represented that the construction of the basement slabs and the ground floor slabs, and the cantilevered balconies, and the placement of the blockwork on level 3 was undertaken in a proper & workmanlike manner, using suitable materials, and that complied with the requirements of the DA (to the extent of compliance with the BCA) and was fit for its intended use.

44 They also include a design verification statement dated 8 July 2015 issued by MRPL which is alleged (in para 54) to contain the following representations (***the Design Standard Representations***):

> (a) it was a statement pursuant to the provisions of cl 50(1A) of the EPAR [the *Environmental Planning & Assessment Regulation 2000* (NSW)].
>
> (b) the plans and specification lodge [sic] with the Construction Certificate achieve or improve the design quality of the development for which the subject development consent was granted, having regard to the design principles set out in Part 2 of the State Environmental Planning Policy No. 65.
>
> (c) by implication, that the Building, including the SOUs, was and were constructed in a manner that satisfied the requirements of the BCA and relevant Australian Standards, which included the requirements in BCA

> Section C which required dual key units to be constructed as two SOUs with adequate fire separation between them.
>
> (d) complied with the requirements architectural/services/structural plans and specifications approved by the Accredited Certifier and released for construction.
>
> (e) and so impliedly represented that the SOUs were constructed using fire-rated plasterboard walls and ceilings and with the use of fire doors and fire frames in the shared air-lock between the dual key units, and the provision of fire seals to the service penetrations in the said air-lock areas.
>
> (f) and so impliedly represented that the construction of the SOUs was undertaken in a proper & workmanlike manner, using suitable materials, and that complied with the requirements of the DA (to the extent of compliance with the BCA) and was fit for its intended use.

45 In addition, they include a Certificate of Compliance dated 8 July 2015 given by Mr Raad "as an employee and/or representative of BSPL and/or Hallmark", which is alleged (in para 57) to contain the following representation (***the Builder's Compliance Representations***):

> … all of the work undertaken in the construction of the Building had been carried out in a good and workmanlike manner and by appropriately licensed contractors and that all of the work involved in the construction of the Building satisfied the requirements of all the relevant Australian Standards, the BCA [Building Code of Australia], and the conditions of the DA.

46 Each of the representations is pleaded in para 108 to be incorrect "so as to amount to conduct by each such author that was, in the circumstances, misleading and/or deceptive and/or were likely to mislead or deceive or to deceive contrary to sec 18 ACL".

47 The particulars given in relation to the Structural Engineering Representations are:

> the Structural Engineering Representations were wrong in that the work was not carried out in accordance with the approved structural documentation and was not structurally adequate for its purpose or function, and did not reflect the implied representation.

48 The particulars given in relation to the Design Standard Representations are:

> the Design Standard Representations, were wrong in that the work did not comply with the asserted Australian Standards and the BCA and the work did not achieve or improve the design quality of the development, or the plans and specifications, and did not reflect the implied representations.

49 The particulars given in relation to the Builder's Compliance Representations are:

> Builder's Compliance Representations were wrong in that the work was not all carried out in a good and workmanlike manner and by appropriately licensed contractors and that all of the work involved in the construction of the Building satisfied the requirements of all the relevant Australian Standards, the BCA, and the conditions of the DA.

50 Paragraph 109 pleads that "The above-mentioned representations were relied upon in the course of the construction of the Building, by the PCA and persons in the class that would be reasonably be expected to rely upon those representations, including in the settlement of the off-the-plan sales of home units, the issue of the Occupation Certificate, the acceptance and reliance of the Occupation Certificate by the Council".

51 Paragraph 110 pleads:

> The errors and incorrect aspects of the said Representations led to the construction of the Building being completed and handed over to the Owners Corporation with the Defects being present and having not been detected and corrected in circumstances that led the Owners Corporation to suffer loss and damage, including by reference to the cost of rectifying those defects.

52 These pleadings are defective for a number of reasons.

53 First, it is alleged that a number of the Design Standard Representations are implied but the pleading does not allege the facts and matters from which the implications arise; and it is difficult to see how they could arise simply from the pleaded express representations.

54 Second, inadequate particulars are given for why the representations were "wrong". A conclusory assertion that the representations were wrong because what was represented was not true is plainly inadequate.

55 Third, the pleading of causation is inadequate. It is not sufficient to plead that those who might have been expected to rely on the representations did so and that somehow or another that caused the Owners Corporation loss. Rather, it is necessary to plead who relied on the representations and how that person's reliance led to the loss in respect of which the claim for damages is made.

Negligent Misstatement

56 A similar case to the case based on misleading and deceptive conduct is pleaded in negligent misstatement.

57 In para 113(b), it is pleaded that each of the representations were "received and relied upon, inter alia, by persons or classes of persons in circumstances in which it was reasonable to rely upon the terms of the Representations as being accurate … which persons included the PCA and ultimately the Owners Corporation by consequence of the issue of the Occupation Certificate". Paragraph 113(c) pleads that each of the representations "Were incorrect, unreliable and otherwise wrong in the manner particularised in para 108 herein".

58 Paragraph 114 pleads:

> Each of the Aggregate Representations, severally, were relied upon, inter alia, by the PCA in considering and issuing the Occupation Certificate and thereafter by the Council in receiving the same, the purchasers of the home units in the completion of the off-the-plan sales, and ultimately by the Owners Corporation through the preceding reliances.

59 Paragraph 115 pleads:

> Accordingly, in making each of the representations … the author of each such representation made negligent misrepresentations.

60 Paragraph 117 pleads:

> Because of the making of the negligent misrepresentations, the Owners Corporation have, and stand to suffer, loss and damage arising from the presence of the Defects in the common property, and they claim damages from each of the authors of each such representation for the losses associated with each such misrepresentation.

61 This pleading suffers from the same faults as the pleading in relation to misleading and deceptive conduct. But it also suffers from an additional fault. The mere fact that the representations were "wrong" does not mean that they were made negligently. It is necessary for the Owners Corporation to plead the facts which are said to demonstrate that the representations were made negligently.

Unconscionability

62 Paragraph 118 of the FALS pleads that "The directions given by Crane as the director of BSPL, with the acquiescence of RHPL as the holding company, for the payment directly to RHPL of the proceeds of the sale of the various home unit lots rather than to BSPL" had the results that BSPL could not satisfy its obligations in respect of the statutory warranties. In para 119, it is pleaded that

"the conduct of Crane and/or RHPL, were such as to constitute unconscionable conduct for the purposes of the unwritten law and/or pursuant to sec 20 ACL and/or sec 21 ACL". The Owners Corporation is said to have suffered loss and damage as a consequence of that unconscionable conduct because it cannot now enforce its Statutory Warranties. Paragraph 123 pleads that Hallmark was a person involved in that contravention and therefore is liable to damages under s 236 of the ACL.

63 This pleading is unsatisfactory for a number of reasons.

64 First, no facts are pleaded from which it could be concluded that Mr Crane, by giving a direction that the proceeds of sale of the units be paid directly to RHPL (assuming that Mr Crane gave such a direction), acted unconscionably. Section 20 of the ACL provides that "A person must not, in trade or commerce, engage in conduct that is unconscionable, within the meaning of the unwritten law from time to time". In order for conduct to be unconscionable within the meaning of the unwritten law, the person who is the object of the unconscionable conduct must suffer from a special disadvantage and the person engaging in the conduct must take advantage of that disability: see *The Commercial Bank of Australia Limited v Amadio* (1983) 151 CLR 447 at 461 per Mason J; at 474 per Deane J (with Wilson J agreeing). Consequently, at a minimum it would be necessary for the Owners Corporation to plead the special disability it relies on and how Mr Crane took advantage of that disability. In order to make out a case of unconscionable conduct under s 21 of the ACL, it is necessary to prove that the conduct involved a lack of good conscience by reference to the norms of society. Consequently, at a minimum, it would be necessary to plead the facts which it is said satisfy that criterion.

65 Second, in order to make out a claim under s 21, it is necessary that the conduct occur in connection with the supply or possible supply of goods or services. Consequently, it is necessary for the Owners Corporation to plead the relevant supply and the facts that support a conclusion that the unconscionable conduct occurred in connection with that supply.

66 Third, there is no adequate pleading of causation. It appears to be implicit in the pleading that if the proceeds of sale had not been paid to RHPL, they

would have been retained by BSPL to meet claims in respect of defects with the Building. If that is what is alleged, it should be pleaded. Such a pleading, however, would be difficult to reconcile with the pleading that the Raad Group paid a dividend to shareholders of $26 million, presumably from the sale of the units.

67 Fourth, there is no pleading of the facts and matters relied on for the assertion that Hallmark was a person involved in the unconscionable conduct.

Interference with contractual relations

68 In para 124 of the FALS, it is pleaded that Mr Crane, RHPL and BSPL knew that "BSPL would, pursuant to sec 3A and 18C HBA owe to, inter alia, the Owners Corporation the Statutory Warranties provided for in Part 2C HBA as if BSPL had undertaken the construction of the Building itself pursuant to a contract with the Owners Corporation …".

69 In para 125, it is alleged that from about mid 2014 BSPL "and thereby RHPL" knew that there were defects in the common property of the Building that amounted to a breach of the Statutory Warranties. In subsequent paragraphs, it is alleged that Mr Crane, RHPL and BSPL, by diverting the proceeds of sale of the units in the Building to RHPL left BSPL without adequate means to meet any claims for breach of the Statutory Warranties, and in doing so committed the tort of interfering with contractual relations because it "was undertaken wrongfully and with an intent to injure the Owners Corporation by assisting and/or inducing BSPL to breach its Statutory Warranties by rendering itself incapable of answering any claim upon them".

70 There are a number of difficulties with this pleading.

71 First, the pleading does not plead adequately the basis on which RHPL is said to be responsible for the conduct of BSPL and the basis on which Mr Crane has personal responsibility for acts he did as an employee of BSPL.

72 Second, the pleading assumes that there was a contract between BSPL and the Owners Corporation for the construction of the Building, relying on the Statutory Warranties. But that is plainly not the case. The HBA does not create

a contract. Rather, it imposes a liability for breach of warranties as if there had been such a contract.

73 Third, it is difficult to see how the conduct complained of could be said to have interfered with even a notional contract. It is not alleged, nor could it be alleged, that it was a term of any such contract that BSPL would retain sufficient funds from the proceeds of sale of the units to meet any claim for breach of warranty. But unless there was a term of that type in the contract, it is difficult to see how the conduct complained of interfered with the contract.

Conspiracy

74 The same conduct is also said to amount to the tort of conspiracy. Paragraph 131 of the FALS pleads:

> In the further alternative:
>
> (a) The directions given by Crane for BSPL, with the agreement and acquiescence of RHPL for payment of the proceeds of the sale of the off-the-plan home unit lots directly to RHPL, rather than to BSPL as vendor and as having provided the Statutory Warranties; and
>
> (b) Thereafter the steps taken by Crane, with the acquiescence of BSPL and RHPL for BSPL to be placed into voluntary liquidation and thereafter deregistration without having regard to BSPL's obligations in giving the Statutory Warranties pursuant to Part 2C HBA to, inter alia, the Owners Corporation;
>
> (c) Comprised a sequence of conduct that was the subject of agreement, conspiracy, or combination (Agreement) between BSPL, RHPL, and Crane to render BSPL in a position in which it could not honour or satisfy its obligations with respect to those Statutory Warranties with the intention of causing damage, loss, and/or detriment to the Owners Corporation by depriving it of the benefit of such warranties.

75 Paragraph 132 pleads:

> In amplification of the allegation in para 131, the Owners Corporation says that:
>
> (a) the diversion of the funds, and the liquidation of BSPL in circumstances that did not take into account or otherwise to defeat its obligations by giving the Statutory Warranties and with respect to defects that were, at that time, known and otherwise reasonably to be supposed to exist in the common property amounts to unlawful means for the purposes of the tort subject of this claim;
>
> (b) and in the alternative, the deprivation of BSPL's ability to honour its Statutory Warranties and so deprive the Owners Corporation of the benefit of such warranties, in circumstances in which some of the Defects were known at the relevant time and others of the Defects were likely, amounts to an unlawful object for the purposes of the tort subject of this claim.

76 Paragraph 133 pleads that "Crane and RHPL brought that Agreement into effect by effecting the said diversion of the proceeds …". Paragraph 134 pleads that the Owners Corporation claims damages "being the value of the lost Statutory Warranties including the cost of rectifying the Defects".

77 In order to make out a claim for conspiracy, it is necessary to prove an agreement between the co-conspirators, which is either (1) unlawful and has the effect of injuring the plaintiff; or (2) made for the purpose of injuring the plaintiff and has that effect: *Williams* v *Hursey* (1959) 103 CLR 30 at 122 per Menzies J; *McKernan v Fraser* (1931) 46 CLR 343 at 362 per Dixon J (with Rich and McTiernan JJ agreeing). It appears that the Owners Corporation relies on both limbs of the tort.

78 In my opinion, this pleading is defective for three main reasons.

79 First, there is no proper pleading of the agreement between the co-conspirators. Paragraph 131(c) asserts an "agreement, conspiracy, or combination", which is defined as the "Agreement", but even assuming that what is intended to be identified is an agreement, it is inadequately particularised and the pleading of it is confused. The parties to the agreement appear to be BSPL, RHPL and Mr Crane. But in other parts of the pleading it seems to be alleged that BSPL and RHPL acted on the directions of Mr Crane. Certainly, no particulars are alleged of when the agreement was made and who on behalf of each of the corporate parties entered into it.

80 Second, para 132 makes little sense and is conclusory in form. Paragraph 132(a) makes no grammatical sense; and it is unclear what is intended to be asserted in that paragraph. Paragraph 132(b) states a conclusion without pleading any material facts. It simply assumes facts which are said to amount to the tort.

81 Third, it is unclear what is said to be the unlawful conduct and how it is said to be unlawful.

Conclusion and orders

82 It follows from what I have said that the paragraphs to which objection is taken should be struck out.

83 The Owners Corporation should be given an opportunity to replead. It was submitted on behalf of the Relevant Defendants that the Owners Corporation should not be entitled to advance some of the causes of action that are struck out. The Owners Corporation, on the other hand, submitted that it should be given general leave to replead.

84 In my opinion, the appropriate course in this case is to give leave to the Owners Corporation to file a motion seeking leave to file a further amended technology and construction list statement by a specified date. I would expect the motion or supporting affidavit to attach the form of the proposed amended list statement. If the amended pleading is opposed, the Owners Corporation should bear the onus of satisfying the Court that it is in a form appropriate to be filed.

85 In my opinion, it would not be appropriate to prevent the Owners Corporation in advance from seeking to raise certain causes of action. Having regard to what I have said, there must be a real question whether some of the causes of action sought to be raised by the Owners Corporation are arguable. However, it is a matter for the Owners Corporation to determine what causes of action it should advance; and the question whether they are arguable or not should be determined by reference to any amended pleading the Owners Corporation seeks to file.

86 The Relevant Defendants have been successful on their motions to strike out the paragraphs of the pleading the subject of their motions. There is no reason in those circumstances why the Owners Corporation should not pay their costs.

87 It follows that the orders of the Court are:

(1) The following paragraphs of the amended technology and construction list statement filed on 15 March 2019 be struck out:

(a) as against the first defendant: 26, 27(e), 28, 58-59, 63-64, 91-95, 96-98 and 113-117;

(b) as against the second defendant: 5(b), 27(a), 56-59, 63, 108(n)-112, 113-117;

(c) as against the ninth defendant: 41-42, 67-68, 91-95, 102-104, 108(f)-112, 113-117, Schedule 1, Defect nos. 12, 13, 14, 25 and 26;

(d) as against the twelfth defendant: 52-54, 65-66, 99-101, 108(l)-111, 113-117;

(e) generally: 118-123, 124-130 and 131-134.

(2) The plaintiff be given leave to file a notice of motion returnable on 28 June 2019 seeking to file a further amended list statement, such motion and any supporting affidavit to be served no later than 14 June 2019.

(3) The plaintiff pay the first to fourth and twelfth defendants' costs of their notice of motion filed on 9 April 2019 and the ninth defendant's costs of its amended notice of motion filed on 15 May 2019.

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