The Owners Strata Plan No 66375 v Suncorp Metway Insurance Ltd - [2016] NSWSC 549

Supreme Court

New South Wales

Medium Neutral Citation:	**The Owners Strata Plan No 66375 v Suncorp Metway Insurance Ltd [2016] NSWSC 549**
Hearing dates:	29/04/2016
Date of orders:	29 April 2016
Decision date:	29 April 2016
Jurisdiction:	Equity - Technology and Construction List
Before:	McDougall J
Decision:	Grant third and fourth defendants leave to continue their cross-claim against second defendant and leave to amend
Catchwords:	PROCEDURE – notice of motion – leave sought to continue cross-claim and amend pleadings – leave granted
Legislation Cited:	Civil Procedure Act 2005 (NSW)
Cases Cited:	Issitch v Worrell [2000] FCA 477 Owners Corporation SP 78422 v Ware Building Pty Ltd [2015] NSWSC 1384
Category:	Procedural and other rulings
Parties:	The Owners Strata Plan No 66375 (Plaintiff) Suncorp Metway Insurance Ltd (First Defendant) Beach Constructions Pty Ltd ACN 003 951 022 (Second Defendant) David Russell King (Third Defendant) Gwendoline Louise King (Fourth Defendant)
Representation:	Counsel: T J Davie (Plaintiff) P J Bambagiotti (First Defendant) I G Roberts SC / L Shipway (Third and Fourth Defendants) Solicitors: Bannermans (Plaintiff) Mills Oakley Lawyers (First Defendant) William Roberts Lawyers (Third and Fourth Defendants)
File Number(s):	2007/266631

Judgment (eX TEMPORE – REVISED 29 APRIL 2016)

1. **HIS HONOUR:** The plaintiff is the Owners Corporation of a strata title complex at Camperdown. It seeks large sums by way of damages for alleged defects in construction. The construction work was carried out by the Second Defendant, formerly and in these reasons known as Beach Constructions. It is now in liquidation. The First Defendant (Suncorp Metway) is said to have been the home warranty insurer for Beach Constructions. The Third and Fourth Defendants (Mr and Mrs King) are said to have been developers, and thus liable for the defects in construction on the basis that the Owners Corporation is, as to common property, their successor in title.

2. Mr and Mrs King deny, and have always denied, that they were parties to the construction contract. They say that they caused a company known as Meridian Estates to be incorporated, entered into a development contract with Meridian Estates, and caused Meridian Estates to enter

into the construction contract with Beach Constructions. That position has been articulated clearly since 2009.

3. The construction contract that is in evidence is a curious document. It states that Beach Constructions is the contractor and that "David and Gwen King/Meridian Estates P/L ACN 003 922 012" is (or are) the “Principal”. The contract has not been signed on behalf of the Principal, although it has been signed by the “Contractor”. There are initials here and there on the contract documents. Mr and Mrs King each says that the initials are not his or hers, and that they do not know whose initials they are. They say, further, that the initials were not placed there with their knowledge or consent or at their direction.

4. There are other documents (such as the application for development consent, the consent itself, progress claims and certifications, and the certificate of occupancy) that could be taken to indicate that Meridian Estates was the Principal, and the contracting party with Beach Constructions. That, however, is a matter for a final hearing.

5. The application today is brought by Mr and Mrs King. They seek leave to proceed against Beach Constructions on their cross-claim, and leave to amend their cross summons, cross-claim list statement, and list response. The purpose of the amendments is to articulate with greater clarity their case that they were not parties to the construction contract, and that Meridian Estates entered into the construction contract in its own right. However, and significantly, the application to amend their cross-claim against Beach Constructions includes amending it so as to allege, among other things, that if they are held to have executed the construction contract or to be parties to it, that contract should be rectified so as to reflect the common contracting intention (said to be of Beach Constructions and Meridian Estates) that it was to be Meridian Estates and not Mr and Mrs King, who was the counterparty to Beach Constructions.

6. I have some difficulty in seeing how rectification could be granted, in the premise on which the prayer for rectification is predicated. Rectification can only be sought by and given to a party to a contract. If the conclusion of the Court, at a final hearing, is that Mr and Mrs King were parties to the contract, then that would seem to carry with it necessarily a conclusion that, objectively, they intended to contract with Beach Constructions on the terms of the document to which I have referred. However, since this is an interlocutory application, I would not decide it on that basis. I should note that neither the Owners Corporation nor Suncorp Metway opposed the application on the ground that the claim is bound to fail. Nor did they oppose it on the basis often articulated, that the proposed pleadings were truly inconsistent, so that one or the other must be "false" and thus embarrassing. See, by way of example only, *Issitch v Worrell* [2000] FCA 477 at 32 (Drummond J, with whom Spencer and Katz JJ agreed).

7. Mr Davie of Counsel, who appeared for the Owners Corporation, said that his client neither consented to nor opposed the application. Its only interest was to procure an order that its costs of and incidental to and thrown away by reason of the amendment (as distinct from the costs of the application for leave to amend) be paid as a condition of granting leave. Mr Roberts of Senior Counsel, who appeared with Mr Shipway of Counsel for the applicant Mr and Mrs King, did not oppose such an order being made (and would have had little success had he tried to do so). I add

that Beach Construction's liquidator neither consented to nor opposed the application. He indicated that he would not take part in the hearing.

8. The opposition came from Mr Bambagiotti of Counsel, who appeared for Suncorp Metway. His objection was based on the asserted delay in seeking leave for the amendment to be made. He pointed to the fact that the proceedings had been commenced in 2007, and to the fact that Mr and Mrs King had filed their list response in March 2009. He said that there was no explanation of the delay from then until now in seeking the leave that is sought. He noted, quite correctly of course, that up until relatively recently, Beach Constructions was, if not active, at least extant. It had been placed into liquidation, by way of a creditors' voluntary winding-up, only in September 2015: before the application was made.

9. Mr Bambagiotti relied on my decision in *Owners Corporation SP 78422 v Ware Building Pty Ltd* [2015] NSWSC 1384. I should say at the outset that I find it very difficult to understand how a decision on an application involving specific facts and the exercise of a discretion can be authority (to the extent that interlocutory decisions are authorities at all) for any general proposition. That may be so, a fortiori, where the decision is given (as this one is) ex tempore, in the course of a Friday motions list.

10. Regardless, the case in question was one where the evidence was complete, and where the issue in respect of which amendment was sought had been clearly identified. It was also a matter where a hearing date had been allocated. I took into account the delay in bringing the application, the want of any satisfactory explanation for that delay, and the fact that to grant the application would of necessity lead to the vacation of the hearing date and yet further delay. I pointed out that the plaintiff, as an Owners Corporation, was "in substance ... the aggregate of proprietors from time to time of lots in the strata scheme"; "the aggregate of the individuals ... whose property and property rights have been detrimentally affected ... by the alleged defects in construction". In those circumstances, I said, the delay "would be a rank injustice to those individuals".

11. In the present case no hearing date has been allocated. The Owners Corporation and Suncorp Metway are subject to directions to serve their evidence by, I think, 22 June 2016. There has been no submission that to grant the orders sought would mean any, let alone any significant, delay in the service of that evidence. Thus, to grant the orders sought would be unlikely to delay the hearing date that, I assume, will be allocated when next the matter comes before the Court.

12. Further, it is unlikely that to grant the leave sought would extend the hearing in any real way. The issues sought to be agitated will be fought out on the basis of Mr and Mrs King's evidence as it stands (and such other evidence as has been served), and on the basis of the evidence that the Owners Corporation and Suncorp Metway are to serve. The point relied upon is really one that will be examined thoroughly in the course of looking at their primary claim, which is that they were not parties to the construction contract in any way. Although the alternative claim seems to me to have some legal difficulty attending it, it is difficult to see that it would take a great deal of hearing time to argue it.

13. There is of course the fact, a matter on which I remarked in *Ware Building* , that since Beach Constructions is now in liquidation, those who had stood behind it, and who were responsible for its performance of work under the construction contract in question, might not feel inclined to come to its assistance, or indeed to the assistance of Suncorp Metway, in any hearing that is to take place. That is a matter of some significance where, as Mr Bambagiotti submitted, if his client were bound to the policy (and liability under the policy is disputed), it would have rights of subrogation, and would be entitled to call upon the putative insured to assist it in the conduct of its defence.

14. However, as Mr Roberts pointed out, affidavits were filed on behalf of Beach Constructions as long ago as June 2009. One of those appears to be a relativity lengthy affidavit (or at least lengthy in its exhibit) sworn by Mr Fredericks, who was a director. The other was sworn by the project manager who apparently worked on the particular project. No doubt, there may be some difficulty in contacting those witnesses. But they would be witnesses whose evidence is desirable even if leave to amend were not granted, and the grant of the leave sought is hardly likely to make them any more difficult to contact than at present they might be.

15. The only explanation offered for the delay is that Mr and Mrs King changed their solicitors, and that after that happened and the new solicitors had got on top of the matter, it became apparent that it might be desirable, to protect their interests, to amend the pleadings as sought. That explanation might not be sufficient if the delay consequent upon amendment were likely to be productive of real prejudice. In the present case, where it is not as I see it productive of any prejudice (let alone real prejudice), the somewhat skimpy nature of the explanation does not concern me. The obligation that the Court has under s 56 of the *Civil Procedure Act 2005* (NSW) is to seek to ensure the identification and resolution, justly and as quickly and cheaply as possible, of the real issues in dispute. I do not think that the exercise of that discretion is to be constrained by ritual incantations of the necessity for a detailed explanation of delay.

16. In the circumstances, I have come to the conclusion that Mr and Mrs King should have the leave that they seek. The consequence is that I make an order in terms of prayer 1 of the notice of motion filed on 24 March 2016. That order is made on the terms set out in prayer 2. I make an order in terms of prayer 3. I order the applicants to pay the respondents' costs of and incidental to and thrown away by reason of the amendments. I direct that the amended cross-summons list statement and list response be filed and served by 5pm on 2 May 2016.

(Counsel addressed)

17. The costs of the notice of motion are to be the parties' costs in the proceedings.

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Decision last updated: 03 May 2016