The Owners – Strata Plan 70030 v Decon Australia - [2016] NSWSC 19

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Supreme Court

New South Wales

Medium Neutral Citation:	**The Owners – Strata Plan 70030 v Decon Australia [2016] NSWSC 19**
Hearing dates:	1 February 2016
Date of orders:	01 February 2016
Decision date:	01 February 2016
Jurisdiction:	Equity - Technology and Construction List
Before:	McDougall J
Decision:	Grant plaintiff leave to amend list statement and to rely upon further evidence.
Catchwords:	PRACTICE AND PROCEDURE – Claim for defective work – Notice of Motion application to rely on Amended List Statement – Whether leave should be granted to plaintiff rely on Amended List Statement and further allegations of defective work – Whether leave should be granted to rely upon further export reports – Balance of justice weighted in favour of plaintiff – Leave granted
Legislation Cited:	Home Building Act 1989 (NSW)
Cases Cited:	Onerati v Phillips Constructions Pty Ltd (1989) 16 NSWLR 730
Category:	Procedural and other rulings
Parties:	The Owners – Strata Plan No 70030 (Plaintiff) Decon Australia Pty Ltd (First Defendant) Eissa Soliman Tadros (Second Defendant) Afaf Aziz Tadros (Third Defendant) Shawki Hanna Gad (Fourth Defendant) Lily Aziz Gad (Fifth Defendant)
Representation:	Counsel: D Feller SC / I D George (Plaintiff) T J Davie (Second to Fifth Defendants) Solicitors: Spinks Elphick Ho (Second to fifth defendants) Peter Merity Solicitor Pty Limited (Plaintiff)
File Number(s):	2014/179564

Judgment (ex tempore – revised 1 february 2016)

1. **HIS HONOUR:** The plaintiff (the Owners Corporation) is the owners corporation of a strata title development at Narrabeen. The second to fifth defendants (the developers) are (or at least I assume that they may be regarded as) the "developers", for the purposes of the *Home Building Act* 1989 (NSW), for whom that development was undertaken. The first defendant (Decon) was the builder who carried out the work. It did so pursuant to a contract with the developers, who were at the relevant time the proprietors of the land on which the work was executed. The developers are, in proportions which it is unnecessary to set out, proprietors of some six of the fifteen residential lots in the development.

2. The Owners Corporation's claim is for defective work. It sues on the statutory warranties given by s 18B of the *Home Building Act* .

3. The proceedings have a history which can best be described as appalling. Practical completion occurred on 11 February 2003. The occupation certificate was issued seven days later, and the strata plan was registered on 20 March 2003. The application was not filed until 24 August 2009. It was filed in the Consumer, Trader and Tenancy Tribunal (CTTT). A Mr Ian Jones acted for the Owners Corporation.

4. Notwithstanding the delayed commencement of proceedings (which might be thought to indicate some reflection by the Owners Corporation and Mr Jones upon the subject matters of their complaints), the Owners Corporation failed lamentably to comply with directions given from time to time by the CTTT. It appears to be uncontentious that the Owners Corporation failed to comply with directions given on nine occasions between 15 March 2010 and 17 October 2012.

5. In the result, the developers (and, it may be, Decon) made application for summary dismissal. The CTTT was convinced of the merits of that application. Speaking through Senior Member Smith, it concluded that the application should be dismissed. In doing so, the Senior Member considered the conduct of Mr Jones. He said at [75] of those reasons that it was Mr Jones who had "without any meaningful excuse repeatedly failed to comply with tribunal directions over a period of years". The result of that inaction, the Senior Member said, was that “[Mr Jones’] client’s application is now dismissed without any determination of the merit of the application".

6. Perhaps not surprisingly, the Owners Corporation has commenced separate proceedings against Mr Jones. Those proceedings are travelling together with the current proceedings.

7. The Owners Corporation took the view that the Senior Member had denied it procedural fairness. Accordingly, it appealed to this court, seeking orders that the CTTT's orders be quashed. On 28 March 2014, Schmidt J made those orders. Her reasons for decision ([2013] NSWSC 347) explain why there was a significant denial of procedural fairness.

8. I note in passing that Mr Davie of counsel, for the developers, contended that it should not be assumed from what her Honour said that there was any factual error in the decision that the delays in the CTTT justified the order that it made. Whilst I accept that her Honour did not need to consider the merits of the decision (and in fact could not do so), her reasons do not appear to endorse the CTTT’s view of the underlying factual issues.

9. When the matter was remitted to the CTTT, it transferred the proceedings to this Court. That was done by consent, but on terms as to costs.

10. Since the matter was transferred to this Court (which occurred on 23 May 2014), it has been listed for directions on a number of occasions. On one of those occasions, on 17

October 2014, the developers sought orders that the Owners Corporation should show cause why its claim should not be struck out. Ball J declined to make such an order. His Honour said that he was satisfied that the Owners Corporation and its current lawyers were "making a very genuine attempt to comply with the orders that have been made by the Court".

11. When the matter came back before the Court later that month, directions were given which appeared to endorse the view taken by his Honour.

12. There has been significant delay between late 2014 and the present time, mainly because of a protracted but unfortunately unsuccessful mediation.

13. The matter came before me in October 2015, on the Owners Corporation's application, by Notice of Motion, for leave to rely on an Amended List Statement and on certain evidence. Decon and the developers responded with their own Notices of Motion seeking orders for dismissal for want of prosecution or, alternatively, orders restricting the evidence on which the Owners Corporation could rely.

14. The Owners Corporation contended, in substance, that the amendments that it sought to make, and the further evidence on which it sought to rely, could all be traced back to the claim originally propounded. That was certainly not apparent from what I will call the "Scott Schedule" that it propounded. Accordingly, I directed the Owners Corporation to amend that document so as to show precisely how, in respect of every defect pressed, the “chain of title” could be established back to the evidence that was before the CTTT. That has been done. Whether it has been done adequately is a matter that remains contentious.

15. The matter has come back for resolution of the competing Notices of Motion. Decon has not appeared today, although it received notice of the date.

16. Many of the submissions for the developers (Decon having ceased to take an active part in the litigation) appeared to assume that what was being sought was either to amend, or to plead fresh causes of action. On the face of things, that does not appear to be correct. As Giles J said in *Onerati v Phillips Constructions Pty Ltd* (1989) 16 NSWLR 730 at 746, “there is but one cause of action for breach of contract founded upon breach of a promise such as to carry out [building] work in a good and workmanlike manner. There is not, his Honour said, a number of causes of action according to particular defects or classes of defect resulting from [that] breach.”

17. I do not think that Mr Davie of Counsel, who appeared for the developers, contested the correctness or applicability of that principle.

18. Ultimately, Mr Davie contended that to permit the expanded particularization of the Owners Corporation's case would work very substantial injustice on the developers, because it would result in a very significant expansion of the scope and monetary value

of the litigation which had been in progress for many years. He pointed to the fact that they were of relatively advanced years, self-funded retirees, and that they were entitled to have the matter brought to an end expeditiously.

19. Mr Feller of Senior Counsel, who appeared with Mr George of Counsel for the Owners Corporation, contended that to limit the case or to make the orders sought by the developers would wreak equal prejudice upon the proprietors of nine of the lots (that is to say, of the nine lots not owned by the developers).

20. There was some dispute as to the extent to which responsibility for the undoubted appalling delays that have occurred should be attributed to the Owners Corporation's former solicitor. Mr Davie said that, if that were the case, the Owners Corporation would not be left without remedy. It could recover, from its former solicitor, the value of the lost cause of action.

21. Mr Feller submitted that it should not be assumed that this was the case. First, he said, there would be a very difficult question as to the applicability of the principle of advocates' immunity. Secondly, he submitted, there could be questions as to the ability of the Owners Corporation to have recourse to any insurance that the solicitor might have taken out.

22. I think that Mr Feller's points are substantial. Whilst it is inappropriate to express a concluded view, there does appear to be some bases for perceiving that Mr Jones acted both as a solicitor and as an advocate. In those circumstances, it may very well be, the doctrine of advocates' immunity might apply.

23. What cannot be contested (despite Mr Davie's submissions to the contrary) is that (at least in the view of the person who examined the relevant facts most closely, Senior Member Smith) actual responsibility for the defaults should be attributed personally to Mr Jones. Since Mr Davie submitted that I should take as correct the factual findings made by the Senior Member, and the reasons that he gave based on them for striking out the application, it would seem to follow that Mr Davie accepts that those aspects of the factual findings were correct. On that basis, it would appear to be the fact that to make the orders sought by the developers would have the effect of punishing the Owners Corporation for its solicitor's defaults, for which it is vicariously but not personally liable. If that happened then, bearing in mind what I have said as to the possible defences to its claim against Mr Jones and to the prospects of recovery, it may very well be the case that a significant injustice would be inflicted on the Owners Corporation and on nine of the sixteen proprietors if the claim were struck out or restricted in the way sought by the developers.

24. It is not possible to make any analytical comparison or analysis of the various prejudices that each side has established. I do accept that it is a harsh, indeed cruel, thing for the developers, at their stages of life, to have proceedings hanging over them.

Equally, I accept, it would be a very significant disadvantage to the proprietors, for the reasons I have given, to take the course suggested by the developers. The two kinds of prejudice are, qualitatively at least, incommensurable.

25. What is certain is that unless I strike the proceedings out or give judgment for want of prosecution, the matter will continue, but on a restricted basis. Thus, in the absence of judgment for want of prosecution, the developers will be subject to the stresses, strains and expense of continuing litigation.

26. As was Ball J, I am satisfied that the Owners Corporation and its current legal advisers have taken very genuine and significant steps to reform the case that the Owners Corporation wishes to advance, to make it comprehensible, and to lay out in detail the evidence on which the Owners Corporation will rely. I am satisfied that matters have now got to a stage where the developers (and, if it continues to contest the proceedings, Decon) can understand and meet the cases sought to be made against them. In this context, I do note that the developer's solicitor has replied to the updated schedule provided by the Owners Corporation pursuant to the directions that I gave last year. It appears from her replies that it does not now appear to be contentious that many of the particularised defects can be traced back to the reports originally provided. To the extent that there is a dispute about this, it appears to be a dispute as to whether a particular defect is a manifestation or cause of something that was observed and commented on in the initial reports.

27. In those circumstances, I conclude that the claim now being put is in truth a properly particularised and (to the extent that the evidence does so) sustantiable claim, and one that is capable of being met.

28. Balancing the undoubted injustices that will occur one way or the other, and bearing in mind that since the matter has been in this Court and up until the filing of the developer's Notice of Motion following abandonment of mediation, there has been no application to strike out, I think that the balance of justice requires granting the Owners Corporation the leave that it seeks in its Amended Notice of Motion.

29. One prayer of that Notice of Motion seeks an order that the Owners Corporation have leave to rely on the Amended List Statement, including the schedule to it. For the reasons I have given, that order should be made.

30. The Amended Notice of Motion also seeks orders that the Owners Corporation should have leave to rely on expert reports that have been described. Again for the reasons I have given, I think that those reports go to substantiate a case that is in substance the case that has always been made out. Accordingly, for the reasons I have given, the Owners Corporation should have that relief.

31. It will be necessary for directions to be given to get this matter on track so it can proceed to hearing either before a referee (which in my view is the appropriate course)

or before a judge of this Court. Accordingly, the matter should be stood over to enable the parties to consider what directions should be given.

32. There is also a very significant question as to costs. Bearing in mind the history of the matter, and acknowledging that I have not heard from counsel, my tentative view is that this is not a case where costs should follow the event of the order that I am about to make. On the contrary, although I will hear from counsel, my tentative view is that the Owners Corporation should pay the developers' costs of the Amended Notice of Motion. That Notice of Motion simply would not have been necessary had the Owners Corporation made any attempt to get its case together in a reasonable way.

33. I make orders in accordance with paras one to three of the Amended Notice of Motion filed on 16 December 2015 for the plaintiff in these proceedings. I order that the second to fifth defendants' Amended Notice of Motion filed in Court today be dismissed. I reserve the costs of both Notices of Motion. I stand the matter over to the Directions List on 12 February 2016 for directions. I direct the plaintiff's solicitors to notify the first defendant forthwith of these orders.

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Decision last updated: 03 February 2016