



Supreme Court
New South Wales

Case Name: Boulus Constructions Pty Ltd v Warrumbungle Shire Council

Medium Neutral Citation: [2022] NSWSC 1368

Hearing Date(s): 30 September 2022; further written submissions 5 October 2022

Date of Orders: 12 October 2022

Decision Date: 12 October 2022

Jurisdiction: Equity - Technology and Construction List

Before: Stevenson J

Decision: Leave granted to amend Cross-Claim Cross-Summons and Cross-Claim List Statement. Submissions invited as to the terms as to costs on which such leave should be granted.

Catchwords: BUILDING AND CONSTRUCTION – where no valid development consent or construction certificate in relation to building works – whether defence of illegality available in relation to claim for breach of statutory duty under s 37 of the Design and Building Practitioners Act 2020 (NSW) – whether managing director and project site supervisor of builder capable of being persons for the purposes of s 37 of that Act

PRACTICE AND PROCEDURE – whether cross-claimant should have leave to amend Cross-Claim List Statement – where cross-claimant seeks to introduce claim for breach of statutory duty under s 37 of the Design and Building Practitioners Act 2020 (NSW) – whether leave should be refused because of availability of defence of illegality – whether amendment should be disallowed against proposed individual cross-

defendants because they are not persons for the purposes of s 37 of that Act – whether amendment should be disallowed on the basis of prejudice to the proposed cross-defendants

Legislation Cited:	Civil Liability Act 2002 (NSW) Corporations Act 2001 (Cth) Design and Building Practitioners Act 2020 (NSW) Environmental Planning and Assessment Act 1979 (NSW) Interpretation Act 1987 (NSW)
Cases Cited:	Bevan v Coolahan (2019) 101 NSWLR 86; [2019] NSWCA 217 Brookfield Multiplex Ltd v Owners Corporation Strata Plan 61288 (2014) 254 CLR 185; [2014] HCA 36 Goodwin Street Developments Pty Ltd atf Jesmond Unit Trust v DSD Builders Pty Ltd (in liq) [2022] NSWSC 624 Miller v Miller (2011) 242 CLR 446; [2011] HCA 9 The Owners – Strata Plan No 84674 v Pafburn Pty Ltd [2022] NSWSC 659 The Owners – Strata Plan No 84674 v Pafburn Pty Ltd (No 2) [2022] NSWSC 1002 The Owners – Strata Plan No 87060 v Loulach Developments Pty Ltd (No 2) (2021) 250 LGERA 114; [2021] NSWSC 1068
Texts Cited:	New South Wales Legislative Council, Parliamentary Debates (Hansard), 19 November 2019 P Herzfeld and T Prince, Interpretation (2nd ed, 2020, Thomson Reuters)
Category:	Procedural rulings
Parties:	Boulus Constructions Pty Limited (Plaintiff/Cross-Defendant) Warrumbungle Shire Council (Defendant/Cross-Claimant)
Representation:	Counsel: G Campbell with A Khoury (Plaintiff/Cross-Defendant) D Feller SC with W Marshall (Defendant/Cross-Claimant) Solicitors: APJ Law (Plaintiff/Cross-Defendant)

File Number(s): 2018/340246

JUDGMENT

- 1 These longstanding proceedings arise from the construction by the plaintiff/cross-defendant, Boulus Constructions Pty Limited (“the Builder”), of a retirement village known as the Three Rivers Regional Retirement Community on behalf of the defendant/cross-claimant, Warrumbungle Shire Council (“the Council”), on a former hospital site in Dunedoo.
- 2 The Builder commenced these proceedings almost four years ago, on 6 November 2018. The Builder seeks to be paid what it asserts is due for the construction work. The Council has brought a Cross-Claim alleging defective works. The Council alleges some 300 defects in total which, I was informed, comprise some 30 different kinds of defect in multiple locations in the units within the retirement village.
- 3 A complex range of factual, legal and procedural issues has arisen. The matter was set down for a hearing to take place in July of last year. That hearing was vacated for a number of reasons not necessary to recite here. There is no current hearing date.
- 4 On 20 April 2022, the Builder served a Second Further Amended Technology and Construction List Statement and a Third Further Amended Technology and Construction Cross-Claim List Response. The Builder alleges that, in effect, the Council is not entitled to any remedy for the allegedly defective works in the retirement village due to the failure by the Council to obtain a valid Development Consent and Construction Certificate. The Builder had made allegations to similar effect in earlier iterations of its List Statement on what Mr Feller SC, who appeared with Mr Marshall for the Council, described as a “progressive and escalating basis”.
- 5 Mr Feller accepted that, if the Builder makes out its allegation arising from the lack of a valid Development Consent and Construction Certificate, the Council may fail in its defective work claim. Obviously, I make no findings about that matter on this application.

6 Against that possibility, by Notice of Motion filed on 4 August 2022, the Council now seeks to amend its Cross-Claim Cross-Summons and Cross-Claim List Statement (in accordance with the document circulated on 21 July 2022) to include a claim under s 37 of the *Design and Building Practitioners Act 2020* (NSW) (“the Act”) against the Builder itself (already a cross-defendant), as well as against the Managing Director of the Builder, Mr Brian Boulus, and the Project Site Supervisor, Mr Bradley McCarthy. Mr Boulus and Mr McCarthy are not presently cross-defendants.

7 Section 37 of the Act provides:

“37 Extension of duty of care

(1) A person who carries out construction work has a duty to exercise reasonable care to avoid economic loss caused by defects—

(a) in or related to a building for which the work is done, and

(b) arising from the construction work.

(2) The duty of care is owed to each owner of the land in relation to which the construction work is carried out and to each subsequent owner of the land.

(3) A person to whom the duty of care is owed is entitled to damages for the breach of the duty as if the duty were a duty established by the common law.

(4) The duty of care is owed to an owner whether or not the construction work was carried out—

(a) under a contract or other arrangement entered into with the owner or another person, or

(b) otherwise than under a contract or arrangement.” (Emphasis in original.)

8 “Construction work” is defined in s 36 of the Act as follows:

“construction work means any of the following—

(a) building work,

(b) the preparation of regulated designs and other designs for building work,

(c) the manufacture or supply of a building product used for building work,

(d) supervising, coordinating, project managing or otherwise having substantive control over the carrying out of any work referred to in paragraph (a), (b) or (c).” (Emphasis in original.)

9 Sections 36 and 37 of the Act commenced operation on 10 June 2020 and have retrospective effect.¹

¹ Schedule 1, s 5 of the Act.

- 10 I have considered the operation of the Act in four decisions: *The Owners – Strata Plan No 87060 v Loulach Developments Pty Ltd (No 2)*;² *Goodwin Street Developments Pty Ltd atf Jesmond Unit Trust v DSD Builders Pty Ltd (in liq)*;³ *The Owners – Strata Plan No 84674 v Pafburn Pty Ltd*;⁴ and *The Owners – Strata Plan No 84674 v Pafburn Pty Ltd (No 2)*.⁵
- 11 I am satisfied that the Council has brought this application timeously, bearing in mind the timing of the Builder’s allegations of illegality, the fact that the cause of action under s 37 has only been available since June 2020, and the relatively recent elucidation, such as it is, that my decisions have given as to the operation of the relevant provisions in the Act.
- 12 Mr Campbell, who appeared with Mr Khoury⁶ for the Builder, submitted that the Council should nonetheless not have leave to make the proposed amendments because the claims were bound to fail for two reasons.

The “defence of illegality”

- 13 First, Mr Campbell submitted that by reason of the absence of Development Consent and a Construction Certificate, the building work was “illegal” and the Builder would have a complete “defence of illegality” to the claim under s 37 of the Act.
- 14 Mr Campbell relied on the principles discussed by the High Court of Australia in *Miller v Miller*.⁷
- 15 In that case, the Court considered whether a participant in a joint criminal enterprise owed an accomplice a duty to drive with care a car in the course of that criminal enterprise.
- 16 In that context, the Court⁸ posed the question of:

“... whether it is incongruous for the law to provide that the driver should not be using the vehicle at all and yet say that, if the driver and another jointly

² (2021) 250 LGERA 114; [2021] NSWSC 1068.

³ [2022] NSWSC 624.

⁴ [2022] NSWSC 659.

⁵ [2022] NSWSC 1002.

⁶ Mr Khoury appearing with leave.

⁷ (2011) 242 CLR 446; [2011] HCA 9.

⁸ French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ; Heydon J agreeing although dissenting on the facts.

undertake the crime of using a vehicle illegally, the driver owes the confederate a duty to use it carefully when neither should be using it at all.”⁹

17 In my opinion, this authority does not assist the Builder. Although the Court used the expression “defence of illegality”,¹⁰ what the Court was considering was whether, in the circumstances before it, a duty should be held to arise at all.¹¹

18 That question does not arise here because, by s 37 of the Act, the Parliament has stated that there is a duty.

19 As Leeming JA explained in *Bevan v Coolahan*:

“... Statute can always modify or abrogate common law. The rules governing the effect of illegality upon a claim in tort as stated in *Miller v Miller* – which operate to diminish the scope of a duty of care in the face of an inconsistent or incoherent criminal statute – are themselves rules of common law, which may be modified by statute.”¹²

20 Leeming JA then referred to s 54 of the *Civil Liability Act 2002* (NSW) which provides that the Court is not to award damages in certain circumstances involving the commission of a “serious offence”. Leeming JA said that “s 54 is such a statute”. Section 37 of the Act is also “such a statute”.

21 I cannot see how the alleged fact that the building work was performed in breach of provisions of the *Environmental Planning and Assessment Act 1979* (NSW),¹³ and thus “illegally”, can affect the existence of the statutory duty prescribed by s 37 of the Act. Whether or not such “illegality” affects the relief to which the Council may be entitled were it to establish a breach of that duty is not a matter that arises on this application.

22 Accordingly, I do not see the “illegality” alleged by the Builder in this matter to be, itself, a reason to deny the Council the leave it now seeks.

Whether Mr Boulus and Mr McCarthy are “persons” for the purposes of s 37

23 Alternatively, Mr Campbell submitted that Mr Boulus and Mr McCarthy are not “persons” for the purposes of s 37 of the Act.

⁹ At [73].

¹⁰ For example, at [37] and [39].

¹¹ See, for example, [70], [101] and [108]; see also the observations of Leeming JA in *Bevan v Coolahan* at (2019) 101 NSWLR 86; [2019] NSWCA 217 at [45].

¹² At [66].

¹³ Mr Campbell referred to ss 76A, 81A(2)(a) and 109E(3)(a).

24 Neither Mr Boulus nor Mr McCarthy is currently a party to the proceedings. Mr Campbell did not appear for Mr McCarthy. Mr Campbell did not dispute that the Builder itself is a “person” for the purposes of s 37 of the Act.

25 In *Pafburn*, I held that a person “having substantive control over the carrying out of any work” for the purpose of cl (d) of the definition of “construction work” in s 36(1) of the Act included a person able to control how the work was carried out.¹⁴

26 In the proposed Technology and Construction Cross-Claim List Statement, the Council alleges that Mr Boulus and Mr McCarthy were both able to, and in fact did, exercise control over the carrying out of the building work.

27 Thus, it is alleged that:

“ ... [i]n his capacity as the managing director of [the Builder], [Mr Boulus] had the power and ability to and did substantively control all of the building works comprising the entire project, such control including the appointment and control of the project delivery staff working for [the Builder] (including the appointment and control of [Mr McCarthy]), the supervision of the adequacy of the works performed by such project delivery staff, the selection and appointment of subcontractors to perform elements of the Works for which [the Builder] was ultimately responsible, and the overall supervision and acceptance of the works performed by [the Builder’s] employees and subcontractors, for the ultimate benefit of [the Council]. Further, as the managing director of [the Builder], [Mr Boulus] had the ultimate ability to control how the Works performed by [the Builder] were carried out.”

28 In relation to Mr McCarthy, it is alleged:

“As the site supervisor for the Project, [Mr McCarthy] actively supervised, coordinated and project managed all of the primary elements of the building works comprising the project, and coordinated and directed how the Works performed by [the Builder] were carried out, including by directing and engaging with [the Builder’s] subcontractors in the performance of their works.”

29 Mr Campbell pointed to the potentially wide-ranging consequences of construing “persons” in s 37 to cover a director of a builder, such as Mr Boulus, or an employee of a builder, such as Mr McCarthy.

30 Thus, Mr Campbell submitted:

“Every person on a construction site has substantive control or supervision over some building work performed at that site, often the work that they themselves directly perform, and accordingly, taking section 37 at its broadest interpretation, every such person could potentially come within the ambit of a

¹⁴ At [26].

'person who carries out construction work', and be the subject of an automatic statutory duty of care to the current and future owners of a project where no such duty previously existed. Such a broad interpretation could make hundreds, or on a very large job even thousands, of people personally liable in respect of the construction work over which they have control or supervision, which would have far reaching and negative impacts on the construction industry.

When one considers the fact that construction cases often involve claims for hundreds of defects, which may involve the work of multiple subcontractors, consultants, and supervisors in addition to employees and officers of the builder, a broad interpretation of section 37 would also result in building cases that balloon to include huge numbers of defendants, increasing the cost and complexity of what is already a costly and complex area of litigation. This is especially so when one considers the potential for the defence of proportionate liability that can be pleaded in defence of a claim under [the Act] to raise the same issues of liability of multiple third parties even if the plaintiff does not join all potential defendants to their claim." (Emphasis in original.)

- 31 In those circumstances, Mr Campbell submitted that "persons" should be construed more narrowly.
- 32 Mr Campbell submitted that the reference in s 37 to a "person" who carries out "construction work", when read with the definition of "construction work" in s 36, is:
- "... obviously intended to refer to more than just a builder, and by reference to their function encompasses roles such as the architect, the project manager, the design consultants and possibly sub-contractors..."
- 33 Mr Campbell submitted that "person" should be construed as "a person who carries out construction work in their own capacity", and as not including a person who acts as agent for another.
- 34 In the Second Reading Speech¹⁵ delivered by the Minister on introduction of the Design and Building Practitioners Bill 2019, the Minister said that the Bill was designed "to introduce a suite of new obligations on design and building practitioners to ensure that each step of construction is well documented and compliant". The Minister continued that the Bill introduces "a number of new requirements, which will ensure that key practitioners are held accountable for their work across planning, design and construction stages."
- 35 The Minister also said, speaking of the clause in the Bill that became s 37 of the Act:

¹⁵ New South Wales Legislative Council, Parliamentary Debates (Hansard), 19 November 2019 at 1776 (Damien Tudehope, Minister for Finance and Small Business).

“For the first time in New South Wales, [s 37] establishes a statutory duty of care that eradicates any uncertainty that may exist in the common law that a duty is owed to the end user and in respect to liability for defective building work. Any *person who carries out construction work* will, under the provisions of the bill and for the first time, have an automatic duty to exercise reasonable care to avoid economic loss caused by defects in or related to a building for which the construction work is done or arising out of that work.” (Emphasis added.)

- 36 As the Minister, here, did no more than recite the language of the relevant clause, this passage casts no light on the question before me.
- 37 The “uncertainty” to which the Minister referred arose from the decision of the High Court in *Brookfield Multiplex Ltd v Owners Corporation Strata Plan 61288*.¹⁶ In that case, the Court found that, in the particular circumstances before it, the owners corporation could not maintain a claim in negligence against the builder as successor in title to the developer. It is true, as Mr Campbell submitted, that the case was not concerned with the owners corporation’s claim against directors and employees of the builder but rather whether any action lay against the builder at all. However, I do not see what light that casts on the question of whether “owner” in s 37 extends to such directors and employees.
- 38 Ultimately, the question as to the meaning to be given to “person” in the expression in s 37 “a person who carries out construction work” requires that careful attention be paid to the words used in the Act.
- 39 The Act deals with the obligations and registration of the “practitioners” to which the Minister referred.
- 40 “Practitioner” is defined in the Act to mean:
- “... a design practitioner, principal design practitioner, professional engineer, specialist practitioner or building practitioner.”¹⁷
- 41 Each of the expressions in that definition is itself defined in the Act.
- 42 A “design practitioner” is defined to be a “person who prepares regulated designs”.¹⁸ Division 1 of Pt 2 of the Act deals with the “obligations of design

¹⁶ (2014) 254 CLR 185; [2014] HCA 36 (French CJ, Hayne, Crennan, Kiefel, Bell, Gageler and Keane JJ).

¹⁷ Section 3.

¹⁸ *Ibid.*

practitioners” including the making of “design compliance declaration[s]”¹⁹ or “further design compliance declaration[s]”.²⁰

- 43 A “principal design practitioner” is defined to be a “person who coordinates the provision of design compliance declarations for the purposes of building work done by a building practitioner”.²¹ Division 2 of Pt 2 of the Act deals with the “obligations of principal design practitioners”. The Act provides that “a person must not make a principal compliance declaration” unless that “person” is a “registered principal design practitioner” under the Act.²²
- 44 A “professional engineer” is defined to mean “a person who carries out professional engineering work in a prescribed area of engineering within the meaning of section 32”,²³ that is, relevantly, structural, civil, mechanical, fire safety or electrical engineering.²⁴ Such a “person” must not carry out professional engineering work unless that “person” is a “registered professional engineer” under the Act.²⁵
- 45 A “specialist practitioner” is defined to mean “a person who carries out specialist work”²⁶ which, in turn, is defined to mean, relevantly, “the design, construction, installation or maintenance of a building element”.²⁷ Such a “person” must not carry out specialist work unless that “person” is a “registered specialist practitioner” under the Act.²⁸
- 46 A “building practitioner” is defined to be “a person who agrees under a contract or other arrangement to do building work” or “if more than one person agrees to do building work, a person who is the principal contractor for the work”.²⁹ Division 3 of Pt 2 of the Act deals with the “obligations of building practitioners”.

¹⁹ Section 9(1); “design compliance declaration[s]” are defined in s 8(1).

²⁰ Sections 9(2) and (3).

²¹ Section 3; “building practitioner” is defined in s 7.

²² Section 13.

²³ Section 3.

²⁴ Section 32(3).

²⁵ Section 32.

²⁶ Section 3.

²⁷ Section 34.

²⁸ Section 35.

²⁹ Sections 3 and 7.

- 47 There is a presumption that a word has the same meaning throughout an Act in which it appears, although it has been said that the presumption is “of the mildest kind” and “readily yields to the context”.³⁰
- 48 “Person” is not defined in the Act. In particular, the Act does not define “persons” to include or be “practitioners”. By reason of s 21(1) of the *Interpretation Act 1987* (NSW) “person” includes a body corporate.
- 49 In the provisions I have set out, “persons” who carry out particular functions are deemed to be “practitioners” of one kind or other for the purposes of the Act. These provisions thus contemplate that “persons” will also be “practitioners” if they carry out work of the kind described.
- 50 There are other provisions of the Act where reference is made to “persons” who, because of the context in which they are referred, could not be “practitioners”.
- 51 For example, s 9(1) provides that a registered design practitioner must provide a design compliance declaration “to a person” in certain circumstances. Section 16(1) provides that “a person” must, before making an application for an occupation certificate, give written notice to the relevant “registered building practitioner who did the building work”. Section 29(3) provides that “a person” must not unduly influence, or attempt to unduly influence, a “registered practitioner” for the purpose of prevailing on the practitioner to act otherwise than impartially. It is obvious that the “person” referred to in these provisions is not a “practitioner” for the purposes of the Act.
- 52 Thus the word “persons” is sometimes used in the Act to mean a person deemed to be a “practitioner”; and sometimes it is not.
- 53 In the critical part of the Act, Pt 4 (entitled “Duty of care”), there are a number of references to a “person” other than the “person” having the statutory duty under s 37(1) to carry out construction work with reasonable care.
- 54 Thus, each of ss 37(3) and 41(2) speak of the “person” to whom the statutory duty is owed. Section 37(3) provides that such a “person” is “entitled to damages for the breach of the duty as if the duty were a duty established by

³⁰ P Herzfeld and T Prince, *Interpretation* (2nd ed, 2020, Thomson Reuters) at [5.170] and the cases there cited.

the common law”. Section 41(2) provides that nothing in Pt 4 of the Act limits “damages or other compensation that may be available” to such a “person under another Act or at common law”.

55 The references in Pt 4 to the “person” owing the statutory duty are in ss 37 and 41(2), to which I have just referred, as well as s 39, which provides that “[a] person who owes a duty of care under this Part is not entitled to delegate that duty”.

56 As I have stated above, the definition of “construction work” is:

“**construction work** means any of the following—

(a) building work,

(b) the preparation of regulated designs and other designs for building work,

(c) the manufacture or supply of a building product used for building work,

(d) supervising, coordinating, project managing or otherwise having substantive control over the carrying out of any work referred to in paragraph (a), (b) or (c).” (Emphasis in original.)

57 The definition, at (a), refers to “building work” and thus to work that a “building practitioner” would undertake.

58 The definition then, at (b), refers to the preparation of “designs ... for building work” and thus to work that a “design practitioner” or a “principal design practitioner” would undertake.

59 The definition then refers, at (c), to the “manufacture or supply of a building product” for use in building work. In that regard, s 36(4) provides that “a person who carries out construction work includes a reference to a person who manufactures, or is a supplier ... of, a building product used for building work”. That “person” could only be the manufacturer or supplier itself.

60 Finally, the definition of “construction work” refers at (d) to the supervision, coordination and project management or having substantive control over the carrying out of “any” work referred to in the three previous elements of the definition; that is “any” “building work”, “any” “preparation of ... designs” and “any” “manufacture or supply of a building product”.

61 The potential ambit of this aspect of the definition of “construction work” is wide. It necessarily encompasses a wider range of activity than is described in

subpars (a), (b) and (c) of the definition. It also contemplates a wider range of actors carrying out those activities. Relevantly, the supervision, coordination, project management and having substantive control over building work could be effected by a wide range of actors. The word the Parliament has used to determine who those actors are is “person”. I am unable to see by what process of statutory interpretation that word could be read down to mean a person acting “in their own capacity”. That would, in effect, involve reading “person” in s 37(1) as meaning “practitioner”. Although, as I have said, Parliament has taken care to define “practitioner” and to define the various activities within that definition by reference to “persons” carrying out those activities, it has used the expression “person” in s 37(1). That must mean someone who is not necessarily a “practitioner” and not necessarily a person acting in their capacity as a “practitioner”; nor necessarily acting “in their own capacity”. As I said in *Pafbun*,³¹ this will be a question of fact in each case.

62 It is true, as Mr Campbell pointed out, that the Minister, referring to the provisions in the Bill that became ss 39 and 40 of the Act,³² said:

“The bill continues to safeguard the rights of owners through [ss 39 and 40] by preventing a person who performs construction work from delegating or contracting of their duty.

This is important, as *practitioners* will need to accept individual and collective responsibility for their work.” (Emphasis added.)

63 Mr Campbell submitted that the Minister’s reference in this passage to “practitioners” rather than “persons” suggests that Parliament’s intention was that s 37 “was intended to apply primarily to practitioners”. That may be so. But the fact is that the word used in s 37(1) is “person”, not “practitioner”.

64 The Act is expressed to be subject to the *Civil Liability Act*.³³ The proportionate liability regime under Pt 4 of the *Civil Liability Act* thus applies to actions for breach of the s 37 statutory duty. This enables persons in the position of Mr Boulus and Mr McCarthy to identify concurrent wrongdoers and seek to have their liability for breach of the statutory duty limited under s 35 of the *Civil*

³¹ At [26].

³² Which provide that a person who owes a duty of care under s 37 may not delegate that duty and that no contract can vary or exclude the duty.

³³ Section 41(3) of the Act.

Liability Act. This appears to be the means by which Parliament has sought to address the matters to which Mr Campbell referred, as set out at [30] above.

65 Accordingly, I do not see the Council's proposed identification of Mr Boulus and Mr McCarthy as "persons" for the purposes of s 37 of the Act to be a reason to refuse it leave to make the amendments sought.

"Conflict of laws"

66 Mr Campbell also submitted that "the automatic duty owed by directors of building companies is relevantly in conflict with the *Corporations Act 2001* (Cth), and in particular sections 119, 124 and 516 and the definition of 'a company limited by shares' in section 9". Those sections deal with the questions of when a company comes into existence (s 119), the legal capacity and powers of the company (s 124) and the obligations of contributories in a company limited by shares (s 516). I am unable to see what relevance those sections have to the issues here.

67 Mr Campbell also submitted that the imposition on "company directors" of the "automatic duty" under s 37 "is contrary to the independence of a corporation from its directors and members, a central [tenet] of corporations legislation". Mr Campbell did not develop that submission. I do not see how s 37 has any such consequence. The duty imposed on a director of the company who engages in "construction work" by s 37 is the same duty as is imposed on the company itself.

Prejudice

68 I accept that some prejudice will be caused to the Builder, as well as to Mr Boulus and Mr McCarthy, by granting the Council leave to make the amendment it proposes.

69 Mr Campbell submitted that:

"Boulus Constructions, unlike the Council, is a small privately owned company that does not have the resources of the Council to undertake protracted and costly litigation."

70 However, my attention was not drawn to any evidence adduced by the Builder to this effect.

- 71 I will order that the Council pay the Builder's costs thrown away by the proposed amendment.
- 72 It is apparent that the Builder will incur further costs to adduce evidence to meet the Council's case now being formulated as a breach of duty under s 37 of the Act.
- 73 I will invite submissions from the parties as to what, if any, orders I should make concerning those costs.

Conclusion

- 74 I grant the Council the leave it seeks to amend its Cross-Claim Cross-Summons and Cross-Claim List Statement.
- 75 I direct that the Council file and serve its Further Amended First Cross-Claim Cross-Summons and its Third Further Amended Technology and Construction List Cross-Claim List Statement, in the form annexed as "Exhibit BV-02" to the affidavit of Brett Kenneth Vincent affirmed 4 August 2022, by 5.00pm on 14 October 2022.
- 76 I direct that the Builder serve and provide by email to my Associate its submissions as to the costs orders it contends I should make arising from the amendments by 5.00 pm on 14 October 2022 and that the Council serve and provide by email to my Associate submissions in reply by 5.00 pm on 21 October 2022.
- 77 I stand the matter over for further directions on 28 October 2022 before the Technology and Construction List Judge.

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