



Supreme Court  
New South Wales

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Case Name: The Owners - Strata Plan 89412 v Brookfield Residential Developments Australia Pty Ltd

Medium Neutral Citation: [2023] NSWSC 1420

Hearing Date(s): 17 November 2023

Date of Orders: 21 November 2023

Decision Date: 21 November 2023

Jurisdiction: Equity - Technology and Construction List

Before: Stevenson J

Decision: Leave to amend Technology and Construction List Statement as against first defendant refused

Catchwords: BUILDING AND CONSTRUCTION – Design and Building Practitioners Act 2020 (NSW) – statutory duty under s 37 – application to amend Technology and Construction List Statement

Legislation Cited: Design and Building Practitioners Act 2020 (NSW)  
Home Building Act 1989 (NSW)

Category: Procedural rulings

Parties: The Owners - Strata Plan 89412 (Plaintiff/Applicant)  
Brookfield Residential Developments Australia Pty Ltd (First Defendant/Respondent)  
Wandere Pty Ltd trading as Landmark Masonry (Second Defendant/Respondent)  
SRDA Waterproofing Pty Limited trading as Zenron Waterproofing (Third Defendant)  
John Nigem (Fourth Defendant/Respondent)  
Darrin Gale (Fifth Defendant/Respondent)  
Robert Slobodan Tosich (Sixth Defendant/Respondent)  
Terry Gale (Seventh Defendant/Respondent)

Nicholas Turner Pty Ltd (ACN 064 084 911) trading as  
"Turner" (Eighth Defendant/Respondent)  
Nicholas Peter Turner (Ninth Defendant/Respondent)

Representation:

Counsel:

A Di Francesco (Plaintiff/Applicant)

M G Lyons (First Defendant/Respondent)

Solicitors:

Bannermans Lawyers (Plaintiff/Applicant)

Baker McKenzie (First Defendant/Respondent)

File Number(s):

2022/158814

## **JUDGMENT**

- 1 The plaintiff is the Owners Corporation in respect of a five-storey block of 55 apartments at Little Bay.
- 2 The development was designed and constructed by Pimas Gale Constructions Pty Ltd (the "Builder") under a "D&C Agreement" (the "Contract") made on 13 May 2014 with Little Bay South 4 Pty Ltd (the "Developer"). The first defendant, Brookfield Residential Developments Australia Pty Ltd, was the Superintendent named in the Contract.
- 3 The Builder is now under external administration. The Developer is deregistered.
- 4 The Builder subcontracted the works to, amongst others, the second defendant (masonry works), the third defendant (waterproofing) and the fourth defendant (window installation). The Builder also engaged the eighth defendant to provide architectural and consulting services, which included monthly defect inspections. The ninth defendant is a director of the eighth defendant.
- 5 The Owners Corporation contends that the construction of the building was defective, that there are issues relating to the flashings of the external brick walls, balconies, courtyards and roof, and that this has caused water penetration.

- 6 By Notice of Motion filed on 19 October 2023, the Owners Corporation seeks leave to file a Second Amended Technology and Construction List Statement, as well as a Further Amended Scott Schedule.
- 7 Brookfield opposes the grant of leave.
- 8 I was informed that the other active defendants either consent to, or do not oppose, leave being granted.
- 9 Brookfield was not a party to the Contract.
- 10 As I have said, it was named as Superintendent.
- 11 In that capacity, the Contract contained the usual provision that the Superintendent acted as the agent of the Developer, and provided for the usual superintendent functions of certification and determination, dealing with payment claims, issuing payment certificates and issuing a certificate of practical completion if appropriate.
- 12 As Superintendent, Brookfield also had powers in respect of defective material or work and testing as set out in cll 30.3, 31.1 and 31.2 of the Contract as follows:

**“30.3 Defective Material or Work**

If on or before expiry of the last Defects Liability Period, the Superintendent discovers material or work provided by the Contractor which is not in accordance with the Contract, the Superintendent shall as soon as practicable notify the Contractor. The Superintendent may direct the Contractor:

- (a) to remove the material from the Site;
- (b) to demolish the work;
- (c) to redesign, reconstruct, replace or correct the material or work; or
- (d) not to deliver the material or work to the Site.

The Superintendent may direct the times within which the Contractor must commence and complete the removal, demolition, redesign, reconstruction, replacement or correction. The Contractor must comply with the direction and undertake the subject work in a timely manner.

**31.1 Superintendent May Order Tests**

At any time before the expiry of the Defects Liability Period the Superintendent may direct that any material or work under the Contract be tested. The Contractor shall provide such assistance and samples and make accessible such parts of the work under the Contract as may be required by the Superintendent. On completion of the tests, the Contractor shall promptly make good the work tested so that it fully complies with the Contract.

### 31.2 Covering Up of Work

The Superintendent may direct that any part of the work under the Contract shall not be covered up or made inaccessible without the Superintendent's prior approval." (Emphasis in original.)

13 In the proposed List Statement, the Owners Corporation seeks to propound a case against Brookfield under s 37 of the *Design and Building Practitioners Act 2020* (NSW) (the "DBP Act").

14 Section 37 of the DBP Act provides, relevantly:

#### "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. ..."  
(Emphasis in original.)

15 "Construction work" is defined, relevantly, in s 36(1) of the DBP Act as follows:

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

(a) building work,

...

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

16 "Building work" is defined in s 36(1) of the DBP Act to include residential building work within the meaning of that expression as defined in the *Home Building Act 1989* (NSW) and thus to include work involved in, or involved in coordinating or supervising, any work involved in the construction of a dwelling, including a strata title home unit.<sup>1</sup>

17 I attach to these reasons the proposed amendments to the List Statement referable to Brookfield.

18 The Owners Corporation seeks to allege that, for the purposes of s 37(1) of the DBP Act, Brookfield engaged in "construction work" of the kind referred to in subpars (a) and (d) of the definition of "construction work" in s 36(1) of the DBP

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<sup>1</sup> Schedule 1, cl 2 and 3 of the Home Building Act.

Act; namely “building work” (that is, here, residential building work) and “supervising, coordinating, project managing or otherwise having substantive control over the carrying out of” such building work.

- 19 The Owners Corporation seeks to do so “in the premises pleaded and particularised in pars C3, C4, C4A and C11A of this List Statement”.<sup>2</sup>
- 20 Paragraphs C3 and C4 of the proposed List Statement simply allege Brookfield’s incorporation and that Brookfield was named as Superintendent in the Contract.
- 21 Paragraph C4A alleges that “from around 2014 to around 2017” Brookfield “carried out the role of the Superintendent the subject of the [Contract] in respect of the construction of the Building”. This is referred to as the “Superintendent Arrangement”. That allegation is particularised by reference to the powers given to Brookfield as Superintendent under cll 30 and 31 of the Contract.<sup>3</sup> I have set out those clauses above. The allegations in par C4A are not particularised by reference to any allegations as to what Brookfield did or did not do or should or should not have done.
- 22 Paragraph C11A takes the matter no further and, in effect, repeats pars C4 and C4A.
- 23 It is then said, in par C11B, that it follows that:
  - (a) for the purposes of subpar (a) of the definition of “construction work” in s 36(1) of the DBP Act, Brookfield carried out “building work”, comprising residential building work for the purposes of the *Home Building Act*, because it:
    - (i) performed “work involved in ... the construction of a dwelling”; or
    - (ii) was “involved in coordinating or supervising any work involved in ... the construction of a dwelling”;<sup>4</sup> or
  - (b) for the purposes of subpar (d) of that definition, it supervised, coordinated, project managed or otherwise had substantive control over such building work.<sup>5</sup>

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<sup>2</sup> C11B(b).

<sup>3</sup> Although the effect of cl 30 is misstated; the power is to give certain directions to the Builder if Brookfield discovers material or work not in accordance with the Contract; not the “responsibility ... to consider whether there were defects” as is alleged.

<sup>4</sup> See subpar (b) of the particulars to C11B.

- 24 But the allegations in pars C3, C4, C4A and C11A rise no higher than an unparticularised allegation that Brookfield “carried out the role of Superintendent” in the three-year period referred to.
- 25 No allegation is made in the List Statement as to how it could follow, in this case, from the asserted fact that Brookfield “carried out the role of Superintendent” under the Contract that it “performed” or “coordinated and supervised” the work involved in the construction of the Building, or otherwise supervised, coordinated, project managed or otherwise had substantive control over such work.
- 26 Although the List Statement makes reference to Brookfield’s powers under cll 30 and 31 of the Contract, the List Statement contains no allegation as to what Brookfield did or did not do under those clauses, or under any other provision of the Contract, that could lead to the posited conclusion that it was engaging in “construction work” in either of the two ways the subject of the contentions.
- 27 As can be seen, the allegations in the operative part of par C11B are particularised by reference to “Sections 8 and 10 of the Spratling Report”.
- 28 The “Spratling Report” is a building defects report prepared by Craig Spratling and Associates Pty Ltd, described as building and civil engineering consultants.
- 29 Section 8 of the Spratling Report is a “Tabular Form Report” which sets out, over 28 pages, a series of alleged defects and associated “nominated breach[es]” and statements of “required remediation”. None of the detail in section 8 is directed to any act or omission of Brookfield.
- 30 Section 10 of the Spratling Report contains a range of *ipse dixit* assertions by its author, including as to the role of a building superintendent, alleged obligations of a superintendent to “attend regular site meetings to facilitate program aims” and “inspect the progress of works”, and to supervise “the workmanship of the contractor”. It also contains allegations as to what the author contends should have been “obvious” to Brookfield as Superintendent.

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<sup>5</sup> See subpar (c) of the particulars to C11B.

31 Thus, in order to understand the nature of the case made against it, Brookfield is left to search through Mr Spratling's assertions to endeavour to ascertain what it is that the Owners Corporation is alleging against it.

32 The absence of particularity in the List Statement, save what can perhaps be divined from the incorporation by reference of the nominated parts of the Spratling Report, is itself a reason to refuse the Owners Corporation the leave it seeks.

33 There are further difficulties.

34 Paragraph C11D deals with the "standard of care" that the Owners Corporation contends was to be exercised by Brookfield. This includes an obligation to:

- (1) "inspect the construction works" of the Builder;
- (2) "take reasonable steps to ensure detection by Brookfield of where the construction works" of the Builder failed to comply with the Contract;
- (3) consider, with reasonable care to avoid defects in the Building, whether "the construction works" were complete and in compliance with the Contract;
- (4) issue "directions" to the Builder with reasonable care to avoid defects;
- (5) inform the Developer of defects; and
- (6) participate, with reasonable care and to avoid defects in the Building, in regular site meetings and inspections of the construction works.

35 No factual basis is identified for any of these allegations which are particularised only by reference to "Section 10" of the Spratling Report.

36 Paragraph C12 deals with allegations as to what was "reasonably foreseeable" to Brookfield. In effect, it is alleged that it was reasonably foreseeable to Brookfield that if it failed to exercise reasonable care it would have "exposed the Building to the risk of the continued presence" of the claimed defects. This is particularised by reference only to (the whole of) sections 8 and 10 of the Spratling Report and the attached Scott Schedule (which is some 60 pages long).

37 Paragraph C13 recites the alleged defects in the Building.

38 Paragraph C14 alleges that, in relation to those defects, Brookfield either:

- (a) did not conduct "visual inspections" to look for the defects; or

- (b) if it did conduct inspections, failed to identify the defects; or
- (c) if it did identify defects, failed to identify that they had not been rectified or informed the Developer of the position.

39 These allegations assume the correctness of the earlier allegations concerning an obligation to inspect, the foundation of which allegations is not made out in the proposed List Statement.

40 Such case as the Owners Corporation has against Brookfield cannot proceed on this basis.

41 I decline to give the Owners Corporation leave to amend its List Statement as against Brookfield in the manner proposed.

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Second Amended List Statement pars A1, B1-4, C1-4A, C11A-C15A

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