Australian Society of Building Consultants

Presented by Mario Rashid-Ring

8 April 2025

Overview

Identifying and dealing with new defects

Australian Standards and the DBPA

Systematic defect claims

Identifying and dealing with new defects after an initial inspection

The Owners – Strata Plan No 90018 v Parkview Constructions Pty Ltd [2022] NSWSC 1123

Background

- 286 residential apartments and associated facilities in Haymarket, Sydney
- constructed by Parkview Constructions Pty Ltd
- The Quay Haymarket Pty Ltd, the developer
- The construction was completed, and a final occupation certificate was issued on 15 December 2014
- The Owners Corporation **commenced proceedings on 26 August 2016**
- 85 defects in the common property

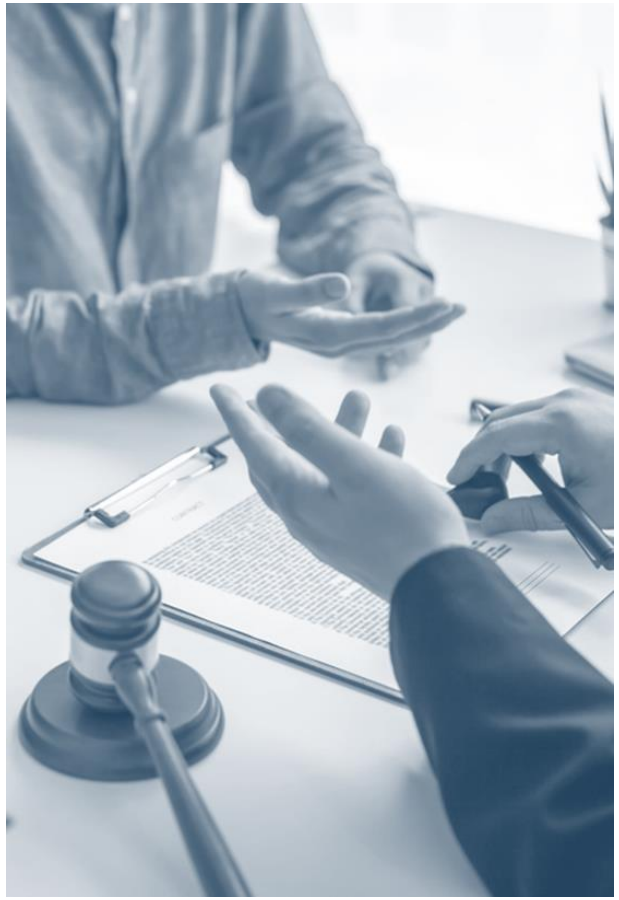
The Owners – Strata Plan No 90018 v Parkview Constructions Pty Ltd [2022] NSWSC 1123

On 16 July 2021, the Owners Corporation filed a Notice of Motion seeking leave to amend its Technology and Construction List Statement.

The proposed amendments included:

- adding a claim against Parkview for breach of the statutory warranty under section 37 of the DBP Act;

- adding claims concerning new defects under the HBA; and



The Owners – Strata Plan No 90018 v Parkview Constructions Pty Ltd [2022] NSWSC 1123

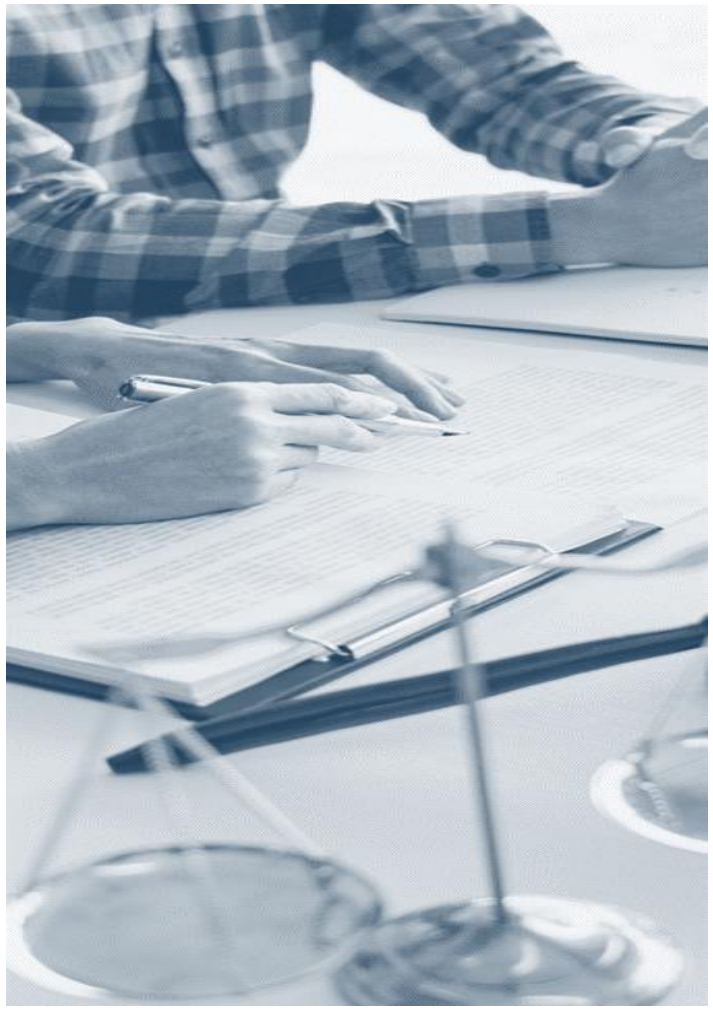
Key findings

Leave to Amend

The Court granted the Owners Corporation leave to amend its List Statement. The Court found that the proposed amendments did not introduce new causes of action **but rather expanded on the existing claims**.

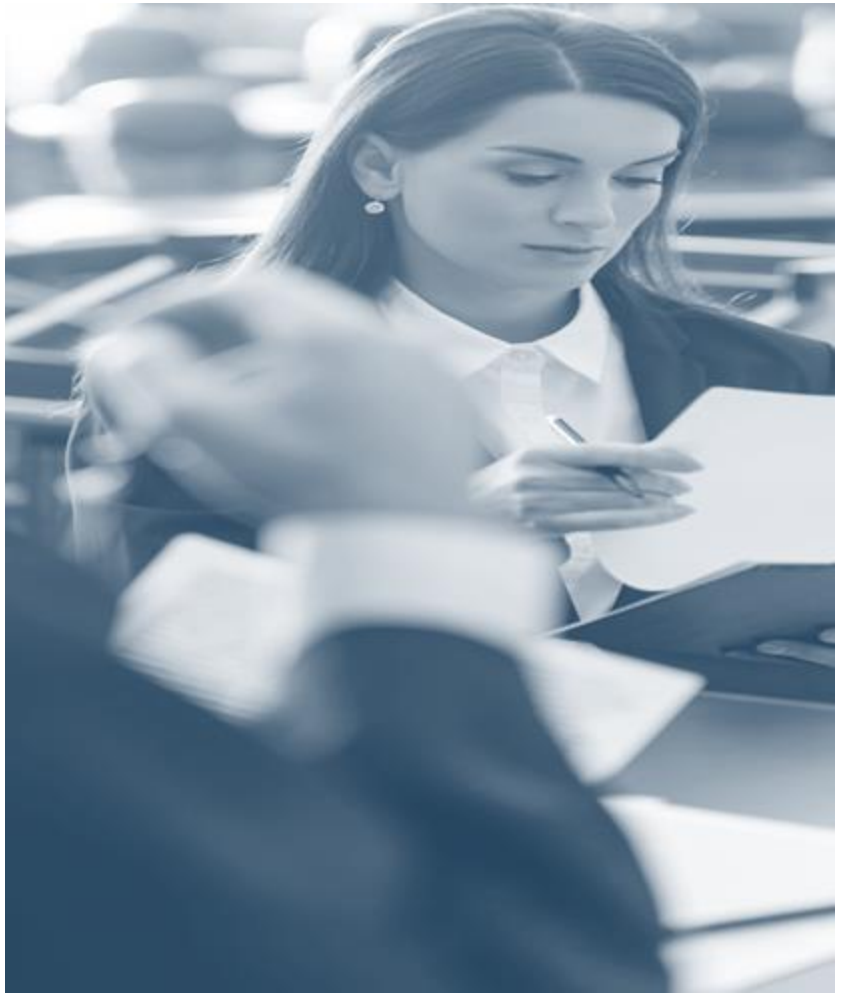
*Application of Onerati Principle: d*erived from the case *Onerati v Phillips Constructions Pty Ltd (in liq)* (1989) 16 NSWLR 730, which holds that there **is one cause of action for breaches of statutory warranties under the Home Building Act, rather than separate causes of action for each defect**.

The court concluded that the *Onerati* principle applies to the Owners Corporation's claims, **effectively meaning that the amendments did not introduce new causes of action.**



Crystele Designer Homes Pty Ltd v Wood [2024] NSWSC 1438

Background



- Practical completion of the construction work had been achieved on **9 November 2018** and an occupation certificate issued on 6 November 2018.
- On **14 October 2020**, Mr Wood initiated Tribunal proceedings against Crystele, alleging breaches of statutory warranties under the HBA.
- The alleged defects were described as "*major ingress of water through walls and windows both on the ground and first floor. Painting defects. Expert report to be provided upon service of evidence*."
- The application also noted the possibility of "*other defects to be identified.*"

Crystele Designer Homes Pty Ltd v Wood [2024] NSWSC 1438

Background

- Subsequently, on **13 November 2020**, the owner submitted Points of Claim that included 22 additional defects identified in Annexure A as “preliminary defect list…preliminary only. Requires further inspection.”. This filing occurred 4 days beyond the 2-year statutory time limit for non-major defect claims.

- The Tribunal ultimately ordered Crystele to compensate Mr Wood for the cost of rectifying the defects with a money order of $194,909.34.

- On 13 June 2023, Crystele applied for an internal appeal, which was heard on 14 August 2023 and the Appeal Panel refused leave to appeal and otherwise dismissed the appeal, ordering Crystele to pay Mr Wood’s costs.

- Crystele then sought leave to appeal the NCAT decision with a judicial review in the Supreme Court, raising issues on four grounds.

Crystele Designer Homes Pty Ltd v Wood [2024] NSWSC 1438

Key findings

> At [128], *"the Tribunal is, by operation of s 41 of the NCAT Act, of its own motion or on application, empowered to extend the period for doing anything under any legislation in respect of which it has jurisdiction, despite anything to the contrary under that legislation."*

> At [136], *"the clear legislative intention is that the Tribunal ought to be able to deal with matters of fact and questions of law that come before it. Only in relation to questions of law that give rise to issues of principle or some manifest injustice or otherwise warrant interference by leave, are decisions of the Tribunal to be the subject of interference. Any other attitude would undermine the express intention of the legislature.*

Australian Standards and the Duty of Care under the DPBA

The Owners – Strata Plan 80867 v Da Silva [2024] NSWDC 263

Background

The Owners Corporation engaged Da Silva to undertake waterproofing and tiling work on the common balcony terrace for various units.

The work was carried out between late July 2014 and early April 2015.

The Owners Corporation claimed that Da Silva's work was defective, causing water ingress.

The Owners Corporation sued Da Silva for breach of contract and alternatively for breach of a statutory duty of care under section 37 of the DBPA.

The Owners – Strata Plan 80867 v Da Silva [2024] NSWDC 263

Background

Mr Da Silva raised a *non est factum defence.*

Da Silva also contended that even if the contract was valid, the terms were varied during the course of the work such that it absolved him of the requirement to comply with the Building Code of Australia and the relevant Australian Standards.

The Owners – Strata Plan 80867 v Da Silva [2024] NSWDC 263

Statutory Duty of Care

> *[253] I find that Mr Da Silva owed the Owners Corporation a duty to exercise reasonable care to avoid economic loss caused by defects in or related to the Lamia building and arising from the construction work performed by Mr Da Silva. This duty of care arises from section 37 of the DBP Act.*

> *[254] I find that in order to meet that duty of care Mr Da Silva was required to perform the construction works in accordance with the Building Code of Australia and the relevant Australian Standard (AS 4654.2–2012). That requirement is consistent with the evidence of the 3 expert witnesses and Mr Da Silva's obligations under the contract.*

> *[255] I find that Mr Da Silva breached that duty of care by failing to perform the construction works in accordance with the Building Code of Australia and the relevant Australian Standard. I have already made findings in that regard when considering the breach of contract.*

Systemic defect claims and the investigations required

The Owners – Strata Plan 99960 v SPS Building Contractors Pty Ltd [2024] NSWSC 687

Background

- alleging various defects in the construction of 45 townhouses in Tweed Heads
- complaints related to water ingress
- commencement of proceedings in August 2021
- the Court sought to clarify the substantiation of 50 alleged defects which remained in dispute and the extent of necessary rectification work where there was no consensus by the parties' experts

The Owners – Strata Plan 99960 v SPS Building Contractors Pty Ltd [2024] NSWSC 687

Key findings

> *'the fact that the subcontractor defectively performed work in a small number of units does not warrant a conclusion that it did so everywhere else'* - Ward J in *The Owners – Strata Plan No 62930 v Kell & Rigby Holdings Pty Ltd [2010] NSWSC 612*

> At [83], *"Her Honour noted (at [180]) that the burden of proof lay on the owners corporation and that it had chosen to carry out limited destructive testing in three bathrooms and that there was no apparent reason why it could not have done so in all of the units"*

> At [100], *"If no defect has been established, then no breach has been established. Before any question arises of the measure of damages, and whether the proposed scope of rectification work is reasonable, it is first necessary to establish a breach. Damages cannot be awarded on the basis of a "risk" of a breach which, if realised, would give rise to a risk of damage"*

Questions?

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