A history of the duty of care cases under the Design & Building Practitioners Act 2020

Whilst the NSW Design and Building Practitioners Act 2020 ("**D&BPA**") has been in force since 10 June 2020 and the rest of the Act since July 2021 it is relevant to keep up to date with how the legislation is constantly being trialled and tested practically in the courts and tribunals.

Ultimately, the courts and tribunal's adoption and interpretation of legislation is always going to be subject to change based upon how the tribunal and courts deal with proceedings commenced under the D&BPA and how these interpretations affect owners corporations and their claims against design and building practitioners.

To date, the NSW Supreme Court has provided clarity over the D&BPA and its practical application in the courts, such as:

- section 37 duty of care can be applied broadly to include buildings such as boarding houses and commercial buildings;
- building practitioners being found personally liable for damages under section 37 and project managers and supervisors of the building works found to be a "person" who carried out "construction work" within the meaning of section 36 of the D&BPA;
- those who possess the ability to wield "substantive control" may owe the statutory duty under the D&BPA and it was not the intention of the D&BPA to exclude developers from owing a statutory duty of care; and
- the duty imposed on a director of the company who engages in "construction work" by section 37 is the same duty as is imposed on the company itself.

The D&BPA is currently being tested in the Court but there still remains ambiguity in its interpretation, for example the word "persons" is sometimes used in the D&BPA to mean a person deemed to be a "practitioner", and sometimes it is not.

More recently, the tribunal and courts have delved further into the interpretation and practical implications of the D&BPA.

McLachlan v Edwards Landscapes Pty Ltd [2023] NSWSC 532

This is an appeal from a decision of a Local Court Magistrate transferring a home building dispute that had been commenced in that Court to the NSW Civil and Administrative Tribunal (**NCAT**). The transfer was sought by the builder, but resisted by the homeowners.

The issue raised on appeal was whether the building dispute that had been commenced in the Local Court was one that could be heard by the Tribunal, relying on section 48L of the HBA.

> **48L Tribunal to be chiefly responsible for resolving building claims**

BANNERMANS LAWYERS

T: (02) 9929 0226 M: 0403 738 996 ABN: 61 649 876 437
E: dbannerman@bannermans.com.au W: www.bannermans.com.au
P: PO Box 514 NORTH SYDNEY NSW 2059 AUSTRALIA

(1) This section applies if a person starts any proceedings in or before any court in respect of a building claim and the building claim is one that could be heard by the Tribunal under this Division.

(2) If a defendant in proceedings to which this section applies makes an application for the proceedings to be transferred, the proceedings must be transferred to the Tribunal in accordance with the regulations and are to continue before the Tribunal as if they had been instituted there.

The plaintiff's claim involved numerous causes of action, such as

- breaches of the Home Building Act 1989 (NSW) (**HBA**);
- negligence under the D&BPA;
- the Australian Consumer Law; and
- Contract Law.

It was not in dispute that the definition of '*building claim'* was satisfied, the plaintiffs agreeing to this conclusion was significant to the Courts findings. The Local Court made the transfer order, finding that the claim for the breach of the statutory warranties in the HBA was "*front and centre*" of the multiple causes of action.

The plaintiff argued that its case went beyond the HBA and relied on causes of action including under the D&BPA which were out of time in the Tribunal (but not a court) under section 48K(3) of the HBA.

48K Jurisdiction of Tribunal in relation to building claims

(3) The Tribunal does not have jurisdiction in respect of a building claim relating to building goods or services that have been supplied to or for the claimant if the date on which the claim was lodged is more than 3 years after the date on which the supply was made (or, if made in instalments, the date on which the supply was last made).

The defendant argued that section 48K(7) of the HBA applied to the case:

(7) The Tribunal does not have jurisdiction in respect of a building claim arising from a breach of a statutory warranty implied under Part 2C if the date on which the claim is lodged is after the end of the period within which proceedings for a breach of the statutory warranty must be commenced (as provided by section 18E).

The Magistrate made the finding that *"…I've had a look at this claim and certainly the home building statutory warranties in my view <u>are front and centre of this claim</u>"*. That is a finding characterising the nature of the plaintiffs' claim, which the Magistrate had earlier found was "*a claim in relation to the building of a swimming pool*" against the defendant, based upon the Magistrate's assessment of the SOC.

The Appeal Panel made the following statement:

At [48] In my view, leave should be refused for the following reasons.

(1) First, I do not consider that there is an issue of principle that arises – merely an application of facts found to the statutory criteria.

(2) Secondly, I do not consider there is any arguable error nor – even if it be assumed that there is arguable error – that any practical injustice has arisen if there were, bearing in mind the Magistrate's assessment (and finding) about the essential character of the

> plaintiffs' claim as being one for breach of a statutory warranty under the HBA, and the analysis of the plaintiffs' claim at [28]-[30], above. **Put simply, the dispute between the parties will be quelled by the decision of the Tribunal on the claim that has been transferred to it. Furthermore, it was expressly accepted by the defendant that if, ultimately, the plaintiffs' case somehow managed to go beyond the claim for breach of the statutory warranties claim, then the plaintiff could continue litigating them**.

The above can be interpreted generally as the claims for breach of the statutory warranties under the HBA would be dealt with by NCAT and the plaintiff could continue litigating the remainder of the issues in the Local Court of NSW, one being the D&BPA.

Given that the findings in the case were that it was agreed that the 6 year warranty applied, it is difficult to see how a case under the alternative causes of action could be successfully litigated in the Local Court if an action in the NCAT under the HBA were to fail.

In the circumstances if there had not been agreement that the 6 year warranty applied, the Court may have had difficulty reaching the same result in a context where (if the defect was found not to be a major defect in the NCAT) successive actions may be required in the NCAT and then the Local Court.

Whilst it appears unintentional from the outset, the Appeal Panel appeared to accept that NCAT could deal with a claim under the D&BPA as a building claim, if the claim was brought under the 6 year warranty period in the HBA.

It is our opinion that this decision is likely to be overturned in the future.

The Owners - Strata Plan 86807 v Crown Group Constructions Pty Ltd [2023] NSWSC 44

The NSW Supreme Court emphasised their discretionary powers under the *Civil Procedure Act 2005* (NSW) (**CPA**) to allow a party to amend their pleadings at any stage of the proceedings, subject to issues of delay in adding the claim, whether the claim has reasonable prospects of success, prejudice suffered by the other party if the amendment is allowed and prejudice suffered by the applicant if it is not.

The plaintiff in the proceedings, being the owners corporation sought leave to file an amended summons and Amended Technology & Construction List Statement, which in essence:

- Expanded the claim against the builder, Crown Group Construction Pty Ltd and the developer, Crown W Pty Ltd for breaches of the warranties implied by section 18B of the *Home Building Act 1989* (NSW) (**HBA**) to add a claim in respect of the cladding on the façade of the building; and

- Secondly, the addition of a claim against the defendants for breach of a duty of care implied by section 37 of the *Design and Building Practitioners Act 2020* (NSW) (**D&BPA**) in respect of the cladding.

His Honour Justice Ball, denied the owners corporation leave to amend their claim under the D&BPA focusing on the lack of evidence and appropriate particularisation of the claim led by the owners corporation to support the new claim, the loss by the builder and developer of a the opportunity to cross-claim through to the liability of subcontractors and the owners corporation's delay.

However Justice Ball did provide the owners corporation with an opportunity to replead their case if they wished to do so.

T: (02) 9929 0226 M: 0403 738 996 ABN: 61 649 876 437
E: dbannerman@bannermans.com.au W: www.bannermans.com.au
P: PO Box 514 NORTH SYDNEY NSW 2059 AUSTRALIA

When the proceedings commenced in 2018, the owners corporation engaged BCA Logic to inspect and assess the suitability of the cladding at the property in question. The owners corporation then sought a secondary opinion on the cladding by Enercon Engineering, who expressed the opinion that the cladding was compliant.

In 2021, the owners corporation engaged Credwell Consulting to further investigate the cladding at the property in question and it was at this time that the owners corporation sought to add the issue of cladding to their claim against the builder and developer.

The builder and developer opposed the owners corporation's amendments on the basis of:

- the claim for breaches of the warranties implied by section 18B of the HBA were out of time;
- the owners corporation had not produced any evidence that the cladding was defective and did not comply with the Building Code of Australia (**BCA**) at the time that it was installed;
- the Court in the exercise of its discretion should refuse leave to amend because no adequate explanation had been given for the delay and the amendments are likely to cause the defendants prejudice; and
- the claims were liable to be struck out because they are inadequately pleaded.

The Court opined that the issues for consideration on the owners corporation's request to amend their claim were:

1) whether there has been an adequate explanation for the delay in adding the new claim, given the owners corporation being aware of the issue as early as 2018;
2) whether the claim had reasonable prospects of success; and
3) the prejudice the builder and developer would suffer if the amendment was allowed and the prejudice the owners corporation would suffer if it is not.

The Court found in favour of the builder and developer in all three issues identified as a result of:

1) the owners corporation's lack of evidence that the cladding did not conform with the BCA at the time it was installed;
2) the owners corporation's failure to adequately investigate the issue when it was first identified in 2018; and
3) the evidential prejudice that would be suffered by the builder and developer.

Owners Corporation's should take proactive steps to identify and investigate defective items of work as soon as practicable to avoid costly and seemingly detrimental arguments late in proceedings against a builder and developer. As well as, carefully consider their pleadings when seeking a claim in negligence under the D&BPA.

For more information and to see other cases dealing with the D&BPA, such as:

- *Goodwin Street Developments Pty Ltd atf Jesmond Unit Trust v DSD Builders Pty Ltd (in liq)* [2022] NSWSC 624;

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- *The Owners – Strata Plan No 84674 v Pafburn Pty Ltd* [2022] NSWSC 659; and
- *Boulus Constructions Pty Ltd v Warrumbungle Shire Council* [2022] NSWSC 1368.

Please click the link below for more information.

Piercing the corporate veil with the duty of care under the Design and Building Practitioners Act 2020

Prepared by Bannermans Lawyers
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BANNERMANS LAWYERS

T: (02) 9929 0226 M: 0403 738 996 ABN: 61 649 876 437
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