

Civil Litigation Committee NEWSLETTER

No 7, August/September 2011

STOP PRESS: NSW Pre-litigation protocols on hold for 18 months

By Elias Yamine (our ever trusty Chair)

In our March 2011 newsletter, I wrote an article titled "*Pre-litigation protocols*" which summarised the effect of the new Part 2A *Steps to be taken before the commencement of proceedings* that was to be inserted into *Civil Procedure Act 2005* from 1 April 2011.

The general effect of the new requirements was to require parties to take "reasonable steps" prior to the commencement of proceedings to either resolve the dispute or narrow the issues in dispute. If proceedings were to be commenced in New South Wales, parties would be required to file a dispute resolution statement detailing their compliance with the pre-litigation requirements at the same time as the first substantive pleading was filed. There were to be a number of exclusions applicable to this requirement.

Transitional provisions had been put in place so that parties were not required to comply with the pre-litigation protocols for proceedings commenced prior to 1 October 2011.

On 23 August 2011, the NSW Attorney General, the Honourable Greg Smith SC MP, announced that the NSW Government would postpone the introduction of Part 2A by 18 months to "...enable NSW to monitor the success of similar provisions that commenced in Federal courts on August 1". The media release explained that:

- "A large number of lawyers and clients already take reasonable steps to resolve a civil dispute before resorting to litigation. The new laws were designed to encourage the remainder to do the same"
- "Compliance with pre-trial obligations should reduce, not add to, the cost of resolving disputes. The purpose of this postponement is to ensure this is the case."

The Committee has previously expressed its view in relation to the pre-litigation protocols. On 1 April 2011, the Committee made a submission in relation to the NSW Department of Justice and Attorney General's request for submissions for its 5 year review of the *Civil Procedure Act 2005*. In that submission, the Committee expressed the following views:

- The protocols will cause parties to usefully consider non-litigious alternatives to resolve disputes. However, the Committee notes that prudent legal representatives would normally carry out such pre-litigation steps, irrespective of the protocols.
- Not all disputes may benefit from pre-litigation procedures to support the just, quick and cheap resolution of proceedings. To this end, the Committee recommended that there should be further identification and particularisation of those classes of claims which do and which do not benefit from the pre-litigation procedures. For example, large-scale commercial disputes between commercial parties (such as those within the Supreme Court Commercial List or Technology and Construction

- List), cross-border disputes, or insolvency disputes and proceedings.
- Pre-action protocols should only be adopted where such front-loading is considered justifiable in that the benefits of early settlement resulting from the protocol are likely to outweigh the disadvantages from such front-loading.
 - As parties are required to pay their own costs of compliance with pre-litigation procedure, practitioners will encounter difficulties in delineating between pre-litigation procedure steps, and those steps relating to preliminary advice and research, which are integral steps in assessing a client's legal position.

From a practical perspective, there was a justifiable concern that the requirement that the parties bear their own costs of compliance with the pre-litigation protocols, unless the Court ordered otherwise, would prove to be a disincentive to parties who were forced to unnecessarily front-load the costs of proceedings.

It is clear that the NSW Government has carefully considered, and accepted, the concerns identified by stakeholders in relation to the application of the pre-litigation protocols in NSW.

In my view, common sense has prevailed in the adoption of the 'wait and see' approach. You might be thinking what most of us are thinking – is this just another example of the NSW Government's reluctance to act which will ultimately lead to *another* 'inquiry'? I don't agree with that. It will be useful to consider the practical effect that the pre-litigation protocols will have in the Federal jurisdiction following the commencement of the *Federal Court Rules 2011* since 1 August 2011.

I am interested to hear your views on this issue. What do you think about the NSW Government's stance? Have you worked on a matter in the Federal Court which required you to file a "genuine steps" statement? What do your clients think about the new Federal Court pre-litigation requirements? Please drop me an email to civillit.chair@younglawyers.com.au.

The Committee will continue to follow this area with great interest....

WHO PAYS: The applicability of the Proportionate Liability Regime to disputes arising out of breaches of the statutory warranties under the Home Building Act 1989

By Lelien Chua

The applicability of the proportionate liability regime to home building disputes arising out of defective construction works remains in a state of flux following the recent decision of the NSW Court of Appeal in *The Owners-Strata Plan No. 64757 v MJA Group Pty Limited*, on 24 June 2011.

What is the Proportionate Liability Regime

Commencing on 1 December 2004, the proportionate liability provisions contained in Part 4 of the *Civil Liability Act 2002* ("the CL Act"), in essence, allows the liability of a wrongdoer to be apportioned amongst one or more other persons:

"whose acts or omissions caused, independently of each other or jointly, the damage or loss that is the subject of a claim" (Section 3492) of the CL Act).

This means that the amount of damages payable by any one of the concurrent wrongdoers can be limited to a portion of the total claim, for which that person can be said to be responsible.

The regime applies to an *"apportionable claim"* for *"economic loss or damage to property, in an action for damages (whether in contract, tort or otherwise) arising out of a failure to exercise reasonable care"* (Section 34(1)(a) CL Act). These provisions take effect regardless of whether all concurrent wrongdoers are parties to the legal action or not. However, a plaintiff cannot enforce the judgment against a person who is not a party to an action. The plaintiff will have to bring further legal action against that non-party concurrent wrongdoer for that portion of the claim.

Key question within the Industry

The pressing question within the building and construction industry is how these proportionate liability provisions affect a claim arising out of alleged breaches of the statutory warranties implied by Section 18B of the *Home Building Act 1989* ("HB Act"). One of the statutory warranties includes a warranty that works will be carried out *"in a proper and workmanlike manner and in accordance with the plans and specifications set out in the contract"* (Section 18B(a) of the HB Act). There have been a number of cases in which this question was argued before the NSW Courts. However, none of these cases provide a clear answer.

NSW Court of Appeal Casts Doubt on Applicability of Regime

In *The Owners-Strata Plan No. 64757 v MJA Group Pty Limited* [2011] CA 236, the Owners Corporation claimed against the developer for defective building works in breach of Section 18B of the HB Act. The developer entered into a construction contract with a builder to convert a building at Dee Why into 12 residential units. The builder completed the works under the construction contract on or about 8 January 2001.

The parties agreed that the works by the builder were defective. The builder became insolvent and the Owners Corporation looked to the developer for compensation. Section 18E of the HB Act requires that a claim for a breach of the statutory warranties be brought within 7 years after the completion of the work. The Owners Corporation did not comply with this limitation period and the case was dismissed on that basis.

During the hearing, lawyers for the developer submitted that the Owners Corporation's claim was an "apportionable claim" to which Pt 4 of the CL Act applies. As the claim was made out of time, the NSW Court of Appeal did not consider it necessary to deal with this issue. However, his Honour, Allsopp J commented that:-

"....the present point is an extremely significant one and it is not in the public interest that, without full argument on it, a definitive decision should be given. Accordingly, I will content myself by saying that there is much to be said for the view that a

claim under Section 18C of the [HB Act] is not an action for damages from a failure to take reasonable care within the meaning of s34(1) of the [CL Act]. One principal reason for taking this view is that to take any other view would completely negate the whole purpose of s18C in the case where the builder has become insolvent."

Later Cases apply Proportionate Liability Regime

His Honour Allsopp J's opinion is contrary to that of the NSW District Court in the subsequent case of *Pastovic & Co Pty Limited v Farrington*, which was heard on 7 July 2011.

In this case, the owner claimed against the builder in the Consumer, Trader & Tenancy Tribunal for alleged defective building works in breach of the statutory warranties. The builder appealed to the District Court on a number of points of law, including that:

1. *The Tribunal erred in construing Part 4 of the [CL Act] to apply only in circumstances where notice was given by the builder to the owner of concurrent wrongdoers; and*
2. *The Tribunal erred in failing ... apportion liability amongst concurrent tortfeasors including Wollongong City Council, the developer Johnson Property Group Pty Limited, and the landscaping contractors for the sub-division and the site."*

There was no dispute amongst the parties that the owner's claim was an "apportionable claim". However, the builder had failed to give the owner prior notice of the identity of the other concurrent wrongdoers as required by Part 4 of the CL Act. The Tribunal found this failure to be fatal to the builder's position. The District Court disagreed and ruled in favour of the builder on these points of appeal.

The pertinent issue in this case is that both the Tribunal and the NSW District Court accepted that the proportionate liability regime applies to a home building claim arising out of alleged breaches of the statutory warranties under the HB Act.

The opinions of the District Court and the Tribunal are similar to the view taken by his Honour Einstein J of the NSW Supreme Court in the case of *The Owners-Strata Plan No. 72357 v Dasco Constructions Pty Limited & Ors* [2010] NSWSC 819, which was heard on 23 July 2010.

In that case, his Honour Einstein J found that the Owners Corporation's claim was an "apportionable claim" as it was a claim for "economic loss" in an "action for damages in contract" which arose out of a "failure to take reasonable care".

The Owners Corporation tried to rely on an exemption under Section 39(c) of the CL Act which states that nothing in Part 4 of the CL Act "affects the operation of any other Act to the extent that it imposes several liability on any person in respect of what would otherwise be an apportionable claim." However, his Honour reasoned that Section 18B did not impose liabilities on a builder or a contractor nor does it create a cause of action for a plaintiff. Rather, Section 18B provides for particular terms to be implied into certain construction contracts. Section 18D then allows a successor in title the benefit of those terms. For these reasons, Section 39(c) does not assist the Owners Corporation's claim. His Honour further reasoned that if Parliament had intended to exclude home building defects claims from the proportionate liability regime, it would have expressed that exemption in the legislation. For these reasons, his Honour decided that Part 4 of the CL Act applied to the dispute before him.

The Safe Approach

These decisions and the contrary opinion of his Honour Allsopp J in the higher NSW Court of Appeal do not provide any certainty as to whether the proportionate liability regime under the CL Act applies to claims for breaches of the statutory warranties under the HB Act. In the present state of flux, a party may be wise to conduct its legal action as if those provisions apply, until proven otherwise.

This article was originally drafted for the Maters Builder's Association.

Around the Courts: Drafting consent orders: exercise caution!

Case In Focus – *Mills v Futhem Pty Ltd* [2011] NSWCA 252

By *Elias Yamine*

The NSW Court of Appeal has recently considered the effectiveness of consent orders entered by the District Court for the purposes of enforcement. This case serves as a timely warning to practitioners to take care when drafting consent orders so that they comply with the UCPR.

This case was an application for leave to appeal from the dismissal of a motion of the defendant in the District Court for a stay of the enforcement of *terms of settlement* which had been filed in the District Court.

The application required the Court of Appeal to consider when a judgment or order is taken to be entered and what is required to be recorded for the purposes of UCPR 36.11.

The background facts

The plaintiff (respondent) commenced proceedings in the District Court against the defendant (appellant) as guarantor under a retail lease. The plaintiff claimed that the defendant owed \$125,415 plus costs and interest in accordance with the guarantee. The defendant denied liability for the claim and claimed that the plaintiff had wrongfully terminated the lease.

On 23 October 2008, when the matter was listed before the primary judge of the District Court, it was noted on the file that the action had settled and that the proceedings were stood over on the basis that terms of settlement would be filed with the Registrar. The matter was listed for hearing before Justice Delaney on 3 December 2008 in the event that terms of settlement were not filed with the Registrar.

The parties signed a document entitled "Terms of settlement". The document was prepared using the format of the UCPR forms but was not a prescribed form. In the top left hand corner of the document, the words "Form 33 (version 2) UCPR, r36.11" appeared. No such prescribed form exists. Within the body of the terms of settlement, appeared the following:

"BY CONSENT AND WITHOUT ADMISSION

1. *Verdict and Judgment for the Plaintiff in the sum of \$76,000.00 inclusive of costs.*

2. *Provided however, the defendant pays the sum of \$60,000 by way of 36 equal monthly instalments of \$1,666.67, first payment to be made on 30 November 2008, the judgment debt shall be deemed satisfied.*
3. *If the Defendant defaults on any two monthly instalment payments the Plaintiff may seek leave to issue a Writ of Execution forthwith for the full amount of the judgment debt.*
4. *These terms not to be disclosed."*

The District Court's computerised court record system recorded the following notation "[P-D1] Consent Order Filed Terms: AS PER TERMS FILED, TERMS SB348".

The Court did not have any records of the filing of terms of settlement and the matter was listed for hearing on 3 December 2008. The matter was stood over to 18 December 2008. On 16 December 2008, the Registrar endorsed the file *Judgment for the plaintiff in accordance with terms of settlement filed* by inserting the date on the terms and by affixing the Court's seal.

The defendant defaulted in the repayment plan set out in the terms of settlement. The plaintiff commenced bankruptcy proceedings against the defendant. The first bankruptcy proceedings were dismissed on the basis that the District Court had not entered a judgment in favour of the plaintiff. The plaintiff subsequently obtained a sealed judgment from the District Court on 29 April 2010. A second bankruptcy proceeding was commenced against the defendant.

The defendant brought an application in the District Court seeking to stay the orders made in relation to the terms of settlement and seeking to set aside the orders made by the District Court on 16 December 2008 and 29 April 2010. The defendant asserted that both judgments were entered irregularly. The application was unsuccessful.

Appeal

The defendant appealed the decision of the District Court refusing to stay the orders and refusing to set aside the orders.

The defendant submitted as follows:

1. No judgment had been entered by the District Court in fact or in law.
2. The judgment, if entered, was a breach of UCPR 36.1A(2) which prohibited non-disclosure of the judgment.
3. No judgment was signed by the Registrar as required by UCPR 36.11(2A).

The Court of Appeal held:

1. The terms of settlement were not entered into the computerised court record system as the precise terms were not entered but merely a notation was made that consent orders had been filed.
2. The orders themselves must be set out in the Court's computerised court record system for the orders to be entered in accordance with UCPR 36.11.
3. The orders entered on 29 April 2010 are not a copy of the orders made on 16 December 2008 as no judgment or order had been entered on 16 December 2008.
4. The *terms of settlement* document was inaccurate as the only judgment was order 1.
5. As no orders had been entered, no orders were capable of enforcement in accordance with section 133 of the *Civil Procedure Act*.

The Court of Appeal highlighted that it was for the District Court to determine whether paragraphs 1 and 4 of the terms of settlement constituted the proposed orders and whether paragraphs 2 and 3 constituted a side agreement. The proceedings were remitted to the District Court for resolution of the question as to the proper form of orders to be entered.

Accordingly, the Court of Appeal restrained the respondent from enforcing the terms of settlement dated 16 December 2008 and the orders dated 29 April 2010 until such time as orders were entered by the District Court. The respondent was ordered to pay the applicant's costs of the appeal.

Lessons

The lessons to be learned from this case can be summarised as follows:

1. Ensure that either the prescribed consent judgment/order (form 44) or judgment/order (form 43) are used to record the terms of settlement reached in proceedings.
2. Ensure that you accurately differentiate between the orders that you are seeking and the terms of any side agreement which you wish the Court to note.

Before taking steps to enforce any judgment/order, such as commencing bankruptcy proceedings, contact the Court Registry to confirm that the precise orders have been entered in the Court's computerised court record system not simply a notation that the proceedings had settled on the basis of terms which had been filed by the Court.

Feedback on Submissions

*Brenda Tronson
Chair, Submissions Sub-Committee*

The Civil Litigation Committee has been particularly busy with submissions, having sent off a number over the past few months with the most recent in collaboration with the Environmental Law Committee. We put together a submission to the NSW Law Reform Commission in relation to its Consultation Paper on security for costs.

Our submission addressed issues such as the grounds on which security for costs orders should be made (and the extent to which these should be included in legislation), whether corporate plaintiffs should continue to be treated differently from natural persons, how the issues change where litigation funders are involved or where pro bono practitioners are acting, security for costs in public interest matters, and appeals and variations of orders. We built on the preliminary submission on this topic, which was drafted by Peter Gaffney in February last year, and which dealt with a wide range of issues.

Thanks go to Alexander Edwards who co-ordinated the submission, and to the contributors and editors: Cyrus Aftasi, Francois Brun, Scott Chambers, Chao Deng, Peter Fagan, Peter Gaffney, Hilary Kincaid, Clara MacDermott, Kathryn Millist-Spendlove, Jenny (Jun Wei) Ng, Sonya Redman, Charu Shankar and Elias Yamine.

I should note that the NSWLRC was very keen to have a submission from Young Lawyers – when I spoke with the person co-ordinating the inquiry earlier this year, he made that very clear. This was on the basis of other submissions Young Lawyers have made to the NSWLRC. This submission is certainly one that we can be proud of, and will reinforce the view that submissions from Young Lawyers are valuable.

Thanks again to all involved.

(Brenda is always on the lookout for further opportunities to partake in submissions. If you come across anything that may be of interest, please contact Brenda at btronson@sixthfloor.com.au

I must also add that Brenda put on some very fine drinks (with the hotel throwing in some free bottles of champagne) as a thank you to those who had volunteered their time in drafting submissions over the past few months. Ed.)

Law Society Committee Reports

Dispute Resolution Committee
NSWYL Representative, Christina Kafalias

The Dispute Resolution Committee has been working hard on re-developing a mediation competition for high school students (years 9 and 10) – a competition which has been running for some years, but has not previously been very successful.

The competition has now been re-branded to run parallel with the popular Mock Trial competition. "Mock Mediation" (as it is now known) is available for slightly younger students than Mock Trial, to help them develop skills in problem-solving, identification of issues in dispute, generate options and negotiate agreements. The idea is to teach students about the value of mediation in the current legal climate, but also to assist them in their own personal development in relation to conflict and communication.

The new competition will be launched next year, however in the meantime, students are encouraged to participate in a scenario/script writing competition for use in 2012.

You can read all about it on the Law Society website at the following link: <http://www.lawsociety.com.au/community/forums/mockmediation/index.htm>

Medico-Legal Liaison Committee

NSWYL Representative, Renée Bianchi

I am currently filling a casual vacancy left by Roshaan Raina who has moved to the miserable city of Melbourne! We do wish Roshaan well.

The Young Lawyers President has sent around an email calling for nominations for Law Society Committees – members of the Young Lawyers Civil Litigation Committee are able to nominate to be the Young Lawyers representative on the Costs, Dispute Resolution, Injury Compensation, Litigation Law & Practice and Medico-Legal Liaison. Expressions of interest are due to the secretary@younglawyers.com.au by COB **Friday 7 October 2011** advising the secretary of your interest and the Committee you are interested in.

Committee Events

State of the Profession Address
17 October 2011

The State of the Profession Address, given by the Patron of NSW Young Lawyers, His Honour Justice Harrison, is taking place on 17 October 2011. This is one of the premier events of the Young Lawyers' Calendar so don't miss out. If you would like to attend, please send your rsvp by 13 October 2011 to civillit.chair@younglawyers.com.au. Spaces are limited so do not delay!

Mooting Competition

Please keep an eye out for further information on the Committee's 3rd Annual Mooting Competition. The date has been tentatively set for 1 December 2011. Save the date!

Annual Assembly

A number of representatives of the Committee will be attending the Annual Assembly of NSW Young Lawyers on 12-13 November 2011. Please forward any questions and/or comments to Elias, Talitha or Renée.

Next meeting

Wednesday, 26 October 2011 at 1:05pm. We are pleased to announce that two representatives from Hudson Legal will be giving a presentation on *Commercial Litigation Careers* both here and abroad. Further details will be provided shortly. This is a meeting you cannot miss!

Contact us

We are always interested in receiving your feedback, comments or ideas. Feel free to contact us on the details below.

1. Elias Yamine, Chair
civillit.chair@younglawyers.com.au
2. Renée Bianchi, Co- Vice Chair/Newsletter editor
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3. Talitha Fishburn, Co-Vice Chair
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4. Brenda Tronson, Chair of Submissions Subcommittee
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