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## Court of Appeal holds developers and builders liable for design defects

In the *Owners—Strata Plan No 66375 v King* [2018] NSWCA 170 the Court of Appeal considered a number of issues including the vexed question of liability for design defects.

In allowing the Owners Corporation's appeal against developers, the Court determined that both developers and builders will be liable for design defects in buildings where the relevant contract was entered into before 15 January 2015.

This key finding gives welcome certainty in this area but has onerous consequences for builders and developers alike.

The Court of Appeal considered several other issues including the scope of the section 18 C notional contract between developers and home owners.

The Court of Appeal's reasoning and the potential impact of this decision is discussed overleaf at page 2.



## District Court jurisdiction in doubt

It has long been thought that the jurisdiction of the District Court extended to matters arising out of commercial transactions.

A number of recent cases have thrown this view into doubt, raising practical, legal and logistic concerns.

The result has been described by judges of the Supreme Court as both “*surprising*” and “*unwelcome*”.

It is understood that this issue has been raised with the A-G with a view to reforms being made in the area. The timing for these reforms is as yet unknown.

*“a most inconvenient and unfortunate outcome for litigants in this State” -*

His Honour Justice Rein  
[35] *Nova 96.9 Pty Ltd v Nativa Pty Ltd* [2018] NSWSC 1288.

## Northern Beaches CONSTRUCTION LAWYERS

### Design Defects and *King*—a cautionary tale continued...

#### Facts

In 1990 David King and his mother acquired land housing a 1928 warehouse complex in Camperdown. A few years later, the Kings, as sole directors of Meridian, a development company, converted the warehouse to a mixed residential and commercial strata scheme.

The conversion works were performed by a builder, Beach, engaged under a contract by Meridian and allegedly executed by the Kings personally. The Kings provided the design and Suncorp Metway the Home Warranty Insurance.

Significant defects and non-compliant work later emerged, including to waterproofing and fire safety systems. Non-compliance of the work with the law was the result of design defects.

The Owners Corporation, as a successor in title to a developer enjoyed the benefit of the s18B Home Building Act statutory warranties against both the builder and the developer. So, in 2007, the OC sued the Kings, Meridian, Beach and Suncorp in the Supreme Court for breach of the statutory warranties.

#### Findings at first instance

His Honour Justice Ball found the Kings were not developers under s3A of the HBA because they were not parties to the

building contract as individuals. Ball J then held that even if the Kings were developers they could not be liable for design defects because the builder was not liable.

By the time of the OC's appeal both Meridian and Beach were in liquidation. Suncorp had settled the proceedings leaving the Kings as the only possible respondents.

#### Appeal Findings

The OC appealed on 4 grounds.

First, grounds 1 and 2 argued that the Kings were in fact parties to the contract as individuals and therefore developers subject to the statutory warranties.

Second, grounds 3 and 4 argued that the builder was liable for design defects and thus so were the developers under the notional contract.

Grounds 1 and 2 were allowed unanimously.

Grounds 3 and 4 were also allowed. The Honourable Justice Ward, Chief Judge in Equity and the Honourable Justice White agreed that a developer was liable for design defects, although for slightly different reasons. Leeming JA dissented, but did not reach an expressly contrary conclusion.

#### Design Defects

The Kings argued that the liability of a developer can be equal to but

not greater than that of a builder. In other words if the builder was not liable, because it built to the plans, neither were they.

The Court considered the potential conflict between the warranties that the work will be carried out in accordance with the plans/specifications and that the work will comply with the law, and decided that the warranties operated together. The work had to be built in accordance with the plans and the law.

The Court then reviewed a developer's liability for design defects under the notional contract and concluded that developers were liable for defective work arising from their non-compliant plans under section 18C.

Ward AJ determined that a developer's liability under the notional contract was not limited to that of the builder and it was liable for supplying the design.

White AJ found the notional contract between the developer and OC was on the same terms as that between the builder and the OC. The work had not been built in accordance with the law and the developer was liable.

This decision affects developers and builders. It may be that s18F may provide a defence where contracts post date 15 January 2015 but that question has yet to be considered.

## Northern Beaches CONSTRUCTION LAWYERS

### Quandary over District Court jurisdiction

The jurisdiction of the District Court is limited by value and subject matter. The general grant of power is by statute.

Section 44 of the *District Court Act 1973 (NSW)* says that the Court has jurisdiction to hear and dispose of: ‘any action of a kind...which, if brought in the Supreme Court, would be assigned to the Common Law Division of that Court.’

Section 44 was introduced in this form with effect from 2 February 1998. The question of how particular actions were allocated was considered by His Honour Justice Parker in *The NTF Group Pty Ltd v PA Putney Finance Australia Pty Ltd* [2017] NSWSC 1194.

His Honour concluded that the question was ‘to be answered by reference to the provisions governing assignment in force at the time the claim was made’ [42].

As at 2 February 1998 the assignment of the Court’s business into divisions was regulated by the Supreme Court Act 1970 and included Common Law, Equity and Commercial Divisions. Where proceedings arose out of ‘commercial transactions’ or which involved an issue ‘in trade and commerce’ they were to be assigned to the Commercial Division.

*The NTF Group* concerned a contractual claim in debt.

Parker J said: at [45]:

“it appears to me that the proceedings would not have been assigned to the Common Law Division. The principal claim ... is between two corporate entities and on the face of it, the goods in question were leased for business purposes. Accordingly ..the proceedings fall within the description of proceedings “arising out of commercial transactions” and would have been assigned to the Commercial Division.”

[46]: “Accordingly, the District Court would not have had jurisdiction. This is...a surprising and unwelcome result”.

### Building News in Brief— Trader Check

‘Trader Check’ is one part of the Government’s Better Business Reforms and aims to provide consumers with a free, online ‘one-stop shop’ of information about traders. The Better Business Reforms are scheduled to be introduced into the NSW-Parliament this month.

Currently, consumers search multiple websites to identify business histories and other relevant information about licensees. Not all information is currently public.

The new online register is slated to include extensive details about licences including holder name, class, number, expiry, details of surrender, public warnings, cancellations, suspensions, disciplinary action, the results of successful Fair Trading prosecutions and NCAT orders.

The Reforms will also give licence holders the opportunity to choose between a one, two or three year licence.

“This is great news for NSW consumers. This website will become the first port of call for anyone who needs to hire a trade or buy from a business. We’re making it easier for Consumers to check whether the tradie they’re hiring is fair dinkum before they let them into their homes and hand over their hard-earned cash.”

Matt Kean, Minister for Better Regulation



## STRATA MEDIATION PORTAL

The mediation service offered by Fair Trading can be invaluable in resolving the most common strata disputes involving the use of common property, pets and parking.

Overseen by experienced and impartial mediators, the process is free and widely available to occupiers, residents and workers in strata schemes.

This process has now been made easier with the ability to lodge an application for mediation online via Fair Trading's new online portal.

<https://www.fairtrading.nsw.gov.au/help-centre/online-tools/apply-for-strata-mediation>



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# Northern Beaches CONSTRUCTION LAWYERS

## Insolvent Builders & the Contractors Debts Act 1997

The *Contractors Debts Act 1997* is often overlooked but, used correctly, can assist unpaid subcontractors, typically tradesmen, suppliers or labourers, when they are owed money by a builder.

In these circumstances, the CDA entitles a subcontractor to leapfrog over the builder and obtain payment directly from the principal (or homeowner) who engaged the defaulting contractor.

In other words, the CDA assigns the debt due from the principal to the contractor, to the subcontractor. Parties cannot contract out of the CDA.

The CDA provides a two stage process: Attachment and Assignment.

First, an 'unpaid person' issues recovery proceeding in a court or applies for adjudication under Security of Payment legislation. As soon as proceedings are started the 'unpaid person' can apply for an attachment order. If made, the order freezes monies in the principal's hands, preventing it paying money to the contractor until the subcontractor has had the opportunity to obtain judgment for the monies it is owed from the contractor.

Once the subcontractor has established the debt it obtains a debt certificate from the court and serves a notice of claim upon the principal. The notice of claim acts to assign the debt and the principal must pay the subcontractor. If it does not the subcontractor can sue the principal directly.



Time limits apply. A claim on a principal must be made within 12 months of the debt arising.

**CLARE PEACOCK** LL.B. (Hons)  
Principal Solicitor



0408 277 073



clare@nbcl.com.au



3/7 Grosvenor Place, Brookvale, NSW 2100



[www.nbcl.com.au](http://www.nbcl.com.au)