CITATION:	*Northern Territory of Australia v Bellamack Pty Ltd* [2024] NTSC 66
PARTIES:	NORTHERN TERRITORY OF AUSTRALIA v BELLAMACK PTY LTD (ACN 135 043 033)
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT exercising Territory jurisdiction
FILE NO:	2023-00175-SC
DELIVERED:	23 August 2024
HEARING DATE:	3 November 2023
JUDGMENT OF:	Huntingford J

CATCHWORDS:

Application for summary judgment – breach of contract – whether reasonable prospects of success – whether plaintiff suffered loss – whether plaintiff incurred liability – reasonable claim for nominal damages in respect of breach – interpretation of insurance policy – significant public interest – limitation period – application dismissed

Application to strike out paragraphs of amended Statement of Claim – failure to plead material facts – irrelevant facts – notice to produce – whether documents relevant to summary judgment application – notice set aside

Building Act 1993 (NT)
Limitation Act 1981 (NT)
Supreme Court Amendment (Miscellaneous) Rules 2018 (NT)
Supreme Court Rules 1987 (NT)
Territory Insurance Office Act 1979 (NT) (repealed)

Bellgrove v Eldridge (1954) 90 CLR 613; *Cell Tech Communications Pty Ltd v Nokia Mobile Phones (UK) Ltd* (1995) 136 ALR 733; *Central Coat Council v Norcross Pictorial Calendars Pty Ltd* (2021) 391 ALR 157; *Hungerfords v Walker* (1989) 171 CLR 125; *Linden Gardens Trust Ltd v Lenestra Sludge Disposals Ltd* [1993] 3 All ER 417; *Luna Park (NSW) Ltd v Tramways Advertising Pty Ltd* (1938) 61 CLR 286; *Motor Accidents (Compensation) Commission v Toyota Motor Corporation Australia Limited* [2023] NTSC 65; *McCasker v Omad (NT) Pty Ltd* [2023] NTSC 1
New South Wales v Stevens [2012] NSWCA 415; *Panatown Ltd v Alfred McAlpine Construction Ltd* [2000] 4 All ER 97; *Roxborough v Rothmans of Pall Mall Australia Ltd* (2001) 208 CLR 516; *Spencer v The Commonwealth* (2010) 241 CLR 118; *St Martins v McAlpine* [1994] 1 AC 85, referred to.

REPRESENTATION:

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Defendant:	D Robinson SC

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Defendant:	Clayton Utz

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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Northern Territory of Australia v Bellamack Pty Ltd [2024] NTSC 66
No. 2023-00175-SC

BETWEEN:

NORTHERN TERRITORY OF AUSTRALIA
Plaintiff

AND:

BELLAMACK PTY LTD (ACN 135 043 033)
Defendant

CORAM: Huntingford J

REASONS FOR DECISION

(Delivered 23 August 2024)

Introduction

[1] By summons filed 12 July 2023 the defendant (Bellamack) seeks, pursuant to r 22.01(2) of the *Supreme Court Rules 1987* (NT) (SCR), summary judgment for the whole of the proceeding or, in the alternative, pursuant to r 23.02(a) or (d) that paragraphs [12], [13], [18]-[20], [23] and [24] of the plaintiff's (the Territory) amended statement of claim (ASOC) be struck out.

[2] The substantive proceeding was commenced by writ on 24 January 2023. The ASOC was filed on 21 June 2023. No defence has yet been filed.[1]

Background

[3] The essential facts, as alleged in the ASOC, are not in dispute for the purposes of this application.

[4] Sometime before 1 June 2009, the Territory decided to develop a suburban subdivision on Crown land in Palmerston, to be known as the suburb of Bellamack. The Territory was the registered proprietor of the land which was referred to as the "lease area". There was a call for expressions of interest for proponents to develop the lease area and a competitive selection process was conducted. Bellamack was selected as the preferred proponent.[2]

[5] On 1 June 2009, the Territory and Bellamack entered into a development agreement. The scheme of the development agreement was that Bellamack was initially granted a Crown lease over the area of land to be developed, subject to the terms and conditions in the development agreement and the lease.

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1 Except where otherwise defined, or apparent from the context, these reasons use the terms defined in the ASOC and, as referenced there, the development agreement. Capitalisation of defined terms has been omitted to enhance readability, except where directly quoted.

2 Development Agreement 1 June 2009, recitals A and B and clause 6.1.

[6] As part of its obligations under the development agreement (developer's works) Bellamack was required to develop, *inter alia*, residential housing blocks in the lease area, together with a number of house and land packages (affordable homes) which were to be sold to qualified low-income consumers (eligible purchasers).

[7] In accordance with the development agreement, Bellamack was to complete the subdivision works in stages over six years. As each stage was practically complete, areas of the Crown lease were converted into titles to the developed lots registered in the name of Bellamack. As the development went on, some lots were further subdivided and additional titles were issued. Bellamack then sold the titled lots to third parties (purchasers) and remitted a percentage of the sale price of each lot[3] to the Territory upon settlement. After issue of a certificate of title, and pending the sale of each lot, the Territory was entitled to register a caveat to protect its interest.[4] The caveat on each lot was removed upon completion of sale to a purchaser.

[8] The consideration payable to Bellamack is set out in special condition 2 of schedule 4 of the development agreement. In practical terms, Bellamack's payment came from monies received on the sale of the

3 Which was 26% in the case of vacant lots and 9% in the case of the house and land packages (affordable homes).

4 Development agreement clause 31(b) and (d).

lots.[5] The development agreement also stipulated that the minimum consideration payable to Bellamack upon completion of all lots was to be $14,450,000.[6]

[9] It is not in dispute that, after the sale of each lot had taken place, and the amount payable under the development agreement had been paid, the Territory had no ongoing proprietary or beneficial interest in the land the subject of a sold lot.[7]

[10] Bellamack was obliged, in accordance with clause 3 of schedule 4 of the development agreement, to allocate 67 lots as "affordable allotments". The location of those allotments was required to be approved by the Territory. Bellamack was also obliged to make available to eligible purchasers the maximum number of affordable homes capable of being constructed on the affordable allotments, which was said to be between 77 and 114 houses. An eligible purchaser is defined in the development agreement as "a purchaser determined by the Territory (in its absolute discretion) who has pre-approval for finance to purchase an Affordable Allotment and Affordable Home under this special condition".[8]

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5 Development agreement, clause 11.6. There was some restriction as to price which is not relevant in this application.

6 Development agreement, schedule 4, special condition 2.6.

7 In some cases, for example houses numbered 17 and 18, a lot issued in substitution for the Crown lease part was further subdivided and separate titles issued prior to sale. This does not materially affect the analysis.

8 Development agreement schedule 4, special condition 3.1(c).

[11] The Territory's obligation in relation to identification of eligible purchasers was set out in the development agreement in these terms:

> The Territory must at all times during the Term make its best endeavours to nominate and refer to the Developer a sufficient number of Eligible Purchasers to enable the Developer to fulfil its obligations under this special condition 3.[9]

[12] That clause is followed by clause 3.4 which provides, in summary, that if an affordable lot or home was unsold after three months from issue of the title, Bellamack was required to offer it to the Territory for purchase on the same terms as the property would have been sold to an eligible purchaser. If the Territory failed or refused to purchase the property, Bellamack could then offer it for sale on the open market at market price.[10]

[13] Bellamack's obligations under the development agreement as pleaded in the ASOC also included:

a. An indemnity to the Territory in relation to certain stipulated liabilities, including for any loss or damage to any property caused by any errors, omissions, faulty workmanship or any negligent act or omission or wilful misconduct of Bellamack or its subcontractors and any costs (on a solicitor and own client basis, and whether incurred by or awarded against the Territory) that the Territory may sustain or incur as a result (clause 8.2);

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9 Development agreement, schedule 4, special condition 3.4.

10 Development agreement, schedule 4, clause 3.5.

b. To carry out the work in a proper and workmanlike manner and in accordance with the development agreement (clause 11.2(b));

c. At all times during the construction of the developer's works, to ensure that they complied with the *Building Act 1993* (NT) (*Building Act*), Building Regulations and/or Building Code of Australia (the Code) (clause 11.2(c)(ii));

d. To make affordable homes, constructed to comply with the Code, available to the eligible purchasers (schedule 4 special conditions 3.1(b) and (c), 3.3 and 3.13);

e. To take all steps reasonably necessary or appropriate to ensure that the affordable homes were constructed in a proper and workmanlike manner (Schedule 4 special condition 3.14); and

f. To design and construct the affordable homes in accordance with the requirements of the *Building Act* (including obtaining building certification); carry out all works in accordance with the building permit; and ensure the affordable homes comply with and meet the Code and other relevant standards, including the then current Code requirements for the tropical cyclone region (Annexure F Part 1.2).

[14] In 2012, by separate contract, Bellamack sub-contracted that part of its obligations under the development agreement which related to

construction of the 18 houses the subject of this proceeding to San Industries Pty Ltd trading as Titan Building Systems (San Industries). The houses were constructed between 2012 and 2014. San Industries is now insolvent.

[15] Ten of the 18 homes built by San Industries were subject to the compulsory home warranty protection scheme known as the Home Building Certification Fund (HBCF) then in place in the Northern Territory. The HBCF was the scheme of insurance approved by the Director of Building Control pursuant to s 61 of the *Building Act* at the relevant time. The HBCF was financed largely by the Territory, with some contribution through premiums paid by builders and owners. Initially, the HBCF was managed by the Territory Insurance Office[11] on behalf of the Territory.

[16] The remainder of the houses built by San Industries were covered by the Master Builders Association Fidelity Fund Scheme (MBA Fidelity Fund) insurance arrangement which replaced the HBCF scheme as the approved insurance pursuant to s 61 of the *Building Act* from 1 January 2013.

[17] In the period from about 2013 to 2014, Bellamack sold 17 of the affordable homes constructed by San Industries to eligible purchasers pursuant to individual contracts of sale between it and the relevant

11 Territory Insurance Office (TIO) was established by s 4 of the *Territory Insurance Office Act*, (NT), (repealed). After the insurance business of the TIO was sold in 2014 the Territory took over as the direct fund manager of the HBCF. See affidavit of Ryan Sanders sworn 11 August 2023, [12].

purchaser(s) (home owners). Bellamack retained ownership of one lot on which San Industries had constructed a house (house 9) and made the relevant payment to the Territory in accordance with the development agreement.

[18] From about 2015, serious construction defects became apparent in all of the houses constructed by San Industries. In about July 2015 Bellamack wrote to the purchasers of the houses acknowledging the defects, and stating that it had written to San Industries to rectify the faults and had engaged a structural engineer. The defects were not rectified. In 2019 Bellamack commenced proceedings against San Industries claiming damages in respect of the defects in the houses.[12]

[19] The owners of each of the ten houses covered by the HBCF scheme (including Bellamack in relation to house 9) have made a claim under that scheme for rectification of defects. The Territory has, so far, assessed that the HBCF scheme covers all of the claims, other than that made by Bellamack which remains outstanding. On the basis that none of the houses could be economically repaired, the Territory has provided purchasers with an option to either rebuild their homes or sell them to the Territory. As a result, six of the nine lots were purchased by the Territory and three houses were rebuilt. The claim in relation to the property owned by Bellamack has not been finalised.

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12 Territory's submissions, [10]. The action was settled and San Industries subsequently went into liquidation. Territory's oral submissions, Transcript 3/11/23, p12.

[20] The eight houses insured under the MBA Fidelity Fund scheme have not been purchased or rebuilt at the expense of the Territory.[13]

[21] For the purpose of this application, Bellamack asks the Court to assume that the 18 affordable homes built by San Industries did not meet the contractual definition and specifications of an affordable home prescribed by the development agreement in accordance with clauses 3.3 and 3.14 of the special conditions and clauses 1.2 and 2.3 of Annexure F (functional design guidelines).[14] The obvious consequence is that for the purpose of this application it is assumed that Bellamack breached its contract with the Territory. Bellamack does not, however, admit the breach of the development agreement for the purpose of the proceeding generally.

The Amended Statement of Claim

[22] The Territory seeks damages for breach of the development agreement, measured by the cost of rectifying or acquiring the 18 affordable homes built by San Industries.

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13 The MBA Fidelity Fund arrangements commenced consequent upon a suite of legislative amendments to the *Building Act*, which also introduced certain consumer guarantees and dispute resolution procedures. Five purchasers appear to have utilised the procedure under that legislation to seek compensation directly from Mr Milatos, a director of San Industries, as described in the decision of the Northern Territory Civil and Administrative Tribunal (NTCAT) in *Various Applicants v Milatos* [2023] NTCAT 18. That decision, which is subject to an appeal, is not relevant to this proceeding, except to the very limited extent that there may be, in the future, a need to consider double recovery. There was no evidence in this application that any monies had been paid to any of the applicants in the NTCAT proceeding.

14 Bellamack's written submissions, 9 October 2023, [16]. Breach of contract is not admitted in the substantive proceeding. For the purposes of this application it may also be assumed that San Industries breached its contract with Bellamack, because it did not construct the houses in accordance with the relevant standards. However, whether there was a breach by San Industries or not depends upon a number of factors, including what San Industries was contracted to do.

[23] In the alternative, in relation to the ten houses subject to the HBCF insurance scheme, the Territory seeks that Bellamack indemnify it for the cost to the Territory of rectifying, or acquiring, those properties in accordance with that scheme. The indemnity claim relies upon clause 8.2 of the development agreement.

[24] The Territory's pleading as to loss is at paragraphs [21] to [23] of the ASOC. The pleading at paragraphs [21] and [22] is to the effect that by virtue of Bellamack's breaches, the Territory could not make available to the eligible purchasers the affordable homes which Bellamack had agreed to supply under the development agreement.

[25] At paragraph [23] of the ASOC the Territory seeks damages for the costs incurred in either demolishing and rebuilding or purchasing, demolishing and reselling as a vacant lot (less the amount realised on resale) each of the affordable homes described in the table at paragraph [6]. The Territory also seeks damages for amounts incurred in investigating Bellamack's failures. A schedule of incurred and anticipated expenditure is attached to the ASOC. The total amount claimed in the schedule, as at January 2023, is $4,422,323.78.

Summary Judgment – Legal Principles

[26] There is no dispute between the parties as to the legal test on an application for summary judgment pursuant to r 22.01(2). In order to

succeed, Bellamack must establish that the Territory has no reasonable prospect of successfully prosecuting the claim.

[27] Although the introduction of the "no reasonable prospects" test[15] may be said to lower the threshold for summary judgment compared with earlier regimes,[16] it remains the case that the power to grant summary judgment is not to be exercised lightly.[17]

[28] In addition, even if the Court finds that a claim has no reasonable prospect of success, there is a discretion in r 22.06(1)(b) to allow a question to be tried if the respondent (the Territory), who bears the onus at that stage of the inquiry, satisfies the Court that leave should be given.

Summary Judgment - the Territory's claim for breach of the Development Agreement

[29] Bellamack argues that the Territory has no reasonable prospect of success in the proceeding, notwithstanding (and assuming) a breach of the development agreement by it, because the Territory has suffered no loss. They argue that the Territory has no obligation to any of the owners of the 18 houses and, as it has no proprietary or equitable

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15 *Supreme Court Amendment (Miscellaneous) Rules 2018* (NT), r 6 which commenced on 14 March 2018.

16 *McCasker v Omad (NT) Pty Ltd* [2023] NTSC 1, [13] – [14].

17 *Spencer v The Commonwealth* (2010) 241 CLR 118, 138 to 141, [50] – [60] per Hayne, Crennan, Kiefel and Bell JJ.

interest in the land, cannot demonstrate that it has itself suffered any economic loss as a result of Bellamack's breach.[18]

[30] The eligible purchasers obtained their rights to the land under a contract of sale with Bellamack, to which the Territory was not a party.[19] Bellamack argues that, notwithstanding that Bellamack did not fulfil its obligations as to the manner of construction of the houses, the Territory was only entitled under the development agreement to the amount which it was paid on the sale of the affordable homes, which was 9% of the purchase price.[20]

[31] Bellamack's position is that once the Territory received the amount paid under the development agreement, and released its caveat over each parcel of land upon each sale by Bellamack to an eligible purchaser, it ceased to have any proprietary or beneficial interest in that land or the house built upon it, and had no obligation to any subsequent purchaser.[21]

[32] A breach of contract is actionable without proof of loss. Therefore, a party shown to be in breach of a contract may be ordered to pay nominal damages, even where no loss is proven.[22] The award of

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18 Bellamack's written submissions, [92].

19 Bellamack's written submissions, [95]. [There is no claim by any of the purchasers directly against Bellamack in this proceeding].

20 It is not in dispute that that amount was paid when each of the houses sold.

21 There is no evidence that any eligible purchaser has taken proceedings against Bellamack for breach of contract, or otherwise.

22 *Luna Park (NSW) Ltd v Tramways Advertising Pty Ltd* (1938) 61 CLR 286.

nominal damages vindicates the enforcement of a legally enforceable right and marks its infringement.[23] Nominal damages are vindicatory, not compensatory, in nature, and serve a different purpose from compensatory (substantial) damages.[24] As Bellamack has not, for the purposes of the substantive proceeding, conceded a breach of contract on its part, the Territory would appear to be entitled to pursue its case against Bellamack, unless there is a compelling reason why it should be prevented from doing so.

[33] As to substantial damages, a successful plaintiff is entitled, on proof of breach of contract, to:

> full compensation for the loss which he sustains in consequence for the defendant's [breach], subject to the rules as to remoteness of damage and to the plaintiff's duty to mitigate his loss.[25]

The measure of compensatory damages will be the amount that, so far as money can do it, places the innocent party in the same situation as if the contract had been performed. Where the breach is defective work arising from a building contract, the measure of damages will generally be the cost of rectification, provided that the rectification work is both necessary and reasonable.[26] If the only reasonable cure is to demolish

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23 *Cell Tech Communications Pty Ltd v Nokia Mobile Phones (UK) Ltd* (1995) 136 ALR 733, 751.

24 *New South Wales v Stevens* [2012] NSWCA 415, [26] per McColl JA.

25 *Hungerfords v Walker* (1989) 171 CLR 125, 143 per Mason CJ and Wilson J.

26 *Bellgrove v Eldridge* (1954) 90 CLR 613, [618] per Dixon CJ, Webb J and Taylor J.

and rebuild the structure, then the cost of that undertaking will be the appropriate measure.[27]

[34] A party to a contract is generally only able to recover compensation for their own loss flowing from another party's breach. That is the natural consequence of the basic theory of contract.[28] There is some English authority for the proposition that in building cases where the contract is entered into in contemplation of conferring a benefit upon persons not parties, in the event of a breach, a contracting party can sue for substantial damages on behalf of those intended to benefit, and is obliged to pass on any damages recovered.[29] Among other things, there is a need to identify the third party or parties in respect of whom the benefit is conferred. However, the Territory's pleading in this matter is not drafted in those terms, and the point was not argued.

[35] Even if, on the present state of the pleadings, the Territory can recover no more than nominal damages, based upon its primary claim of breach of the development agreement by Bellamack, I am not convinced that in the circumstances of this matter that that equates to a finding that the Territory has no reasonable prospect of success for the purpose of

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27 I have not addressed, because it was not argued, except indirectly in relation to limitation periods, whether this contract is a building contract. The point is, I think, live in the litigation.

28 See Ceshire and Fifoot, *Law of Contract*, online, [7.1]. The problem of a remedy for contract entered into for the benefit of a third party has been described as a "legal black hole".

29 See *Panatown Ltd v Alfred McAlpine Construction Ltd* [2000] 4 All ER 97, 111 per Clyde LJ; *Linden Gardens Trust Ltd v Lenestra Sludge Disposals Ltd* [1993] 3 All ER 417,421 per Griffiths LJ. As to the principle not forming part of the law in Australia see *Central Coat Council v Norcross Pictorial Calendars Pty Ltd* (2021) 391 ALR 157, [153] per Bathurst CJ.

r 22.02. The Territory is entitled to seek to vindicate its rights under the contract by proving that Bellamack was in breach of the development agreement. The particular features of this case mean that that right is not without some importance.

The Indemnity Claim

[36] The Territory's second, additional and limited, basis for its claim relies upon the indemnity at clause 8.2 of the development agreement. The Territory says that as a result of Bellamack's breaches it has separately incurred liability to each of the (10) purchasers of the San Industries houses which were covered by the HBCF scheme. That liability is said to arise directly as a result of the breach of contract by Bellamack in failing to deliver the houses in accordance with the development agreement, and therefore to come within the terms of the indemnity.

[37] Much of Bellamack's argument on the application for summary judgment was focused upon the asserted hopelessness of the Territory's claim for indemnity for monies paid, or payable, to eligible purchasers pursuant to the HBCF scheme. Bellamack argues that the Territory has no obligation to indemnify the purchasers of houses covered by the HBCF scheme and, therefore, any payment made by the Territory to those persons is not a claim or loss to which the indemnity in clause 8.2 of the development agreement can attach.

[38] There is a real question as to the Territory's liability to the eligible purchasers under the HBCF scheme. Bellamack argues that the policy is for the benefit of the 'owner' as defined in the insurance policy document entitled "Domestic Building Works Compliance Indemnity for Owner".[30]

[39] That document defines owner in these terms:

> "Owner" means
>
> (a) If the responsible Builder or Plumber and Drainer is not the owner of the land, the owner in title.
>
> (b) If the responsible builder or plumber and drainer is the owner of the land, the Builder's or Plumber and Drainer's successor in title.

[40] Bellamack's argument is that the only "owner" within the definition in the policy is Bellamack, and not any successor in title. This is because, at the time that the houses were built, Bellamack was the registered proprietor and the builder, as defined in the policy and the *Building Act*, was San Industries. The application for the HBCF policy[31] and the certificate of indemnity,[32] describe the owner as Bellamack and the builder as San Industries.

[41] If Bellamack is correct as to the interpretation of the terms of the insurance policy, the only party currently entitled to claim under the

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30 Court Book, p 305.

31 On the example document for 7 Clarke Street included at Court Book, p 302. The policy was approved by the Director of Building Control for the purposes of s 8(2) and 61 of the *Building Act*.

32 Ibid, 304.

HBCF scheme policies is Bellamack. This would be the case notwithstanding that Bellamack was required to build the homes under an agreement with the Territory which also required Bellamack to almost immediately sell them to eligible purchasers. The benefit of the policy, which notionally provided indemnity for defective workmanship for ten years from either the issue of the occupancy permit or transfer from the builder to the owner (depending upon the circumstances), to the purchasers of the affordable houses would therefore be nil. If that is correct, in the particular circumstances of this case, a scheme set up to protect consumers in fact protects only the developer who (leaving aside house 9) has suffered no loss.

[42] The practical impact of Bellamack's position, if it is correct, is that the rights of the nine purchasers[33] to seek redress for the compliance defects of the builder will fall into a legal "black hole". They have no contract with San Industries and cannot sue on that basis. Even if a claim based upon another cause of action could be made, [34] in circumstances where the builder is insolvent, the innocent purchasers are left without practical remedy. This is the case notwithstanding that avoidance of loss to consumers as a result of defective building works

33 Excluding the house owned by Bellamack.

34 For example for unjust enrichment/failure of consideration: *Roxborough v Rothmans of Pall Mall Australia Ltd* (2001) 208 CLR 516.

and insolvency is the very mischief which s 61 of the *Building Act* scheme was designed to address.[35]

[43] The Territory argues that the successors in title (the eligible purchasers) are the "owners" for the purposes of the HBCF insurance policy and are entitled to claim. The Territory says that the narrow interpretation of the policy urged by Bellamack is not correct and argues that a construction which takes into account both the scheme of the legislation and the terms of the development agreement, should be preferred. This approach could mean that, either, the builder is taken to be Bellamack as owner of the land, and the subcontract between Bellamack and San Industries for the actual construction of the houses is effectively subsumed in that arrangement, or, the original owner was Bellamack but the policy extends to protect successors in title, such as the eligible purchasers, in any event.

[44] There is nothing in the policy wording[36] which expressly states that the benefit of the HBCF policy does not transfer on sale of a property. As set out above, Bellamack argues that as a matter of construction of the policy document no successor in title can obtain a beneficial interest.[37]

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35 Northern Territory, *Parliamentary Debates*, Legislative Assembly, Tuesday 2 March 1993, [67-71], (SP Hatton, Minister for Industries and Development); Northern Territory, *Parliamentary Debates*, Legislative Assembly, Tuesday 25 May 1993, [58-90].

36 Court Book, p 305.

37 Bellamack's written submissions, [80]. There is a further argument at [89] of Bellamack's written submissions in relation to the Territory's payments to purchasers under the HBCF policies drawing a distinction between payments made for rectification works, and the "option" to re-acquire the properties which Bellamack argues is not an option under the HBCF policy and therefore would amount to a

[45] The policy wording under the heading "period of indemnity" states that if the builder is not the owner of the land, the period of indemnity is ten years from the issue of the certificate of occupancy.[38] If the builder is the owner, then the indemnity period is ten years from the transfer of the title. It is at least arguable that the ten year period in the policy, which is directly linked to the *Building Act* scheme, is referable to the ten year limitation period for defective building work at s 160 of the *Building Act*. The purpose of the scheme is to protect consumers. The policy wording needs to be read as a whole and in light of the provisions of the *Building Act*. When these matters are taken into account the interpretation urged by the Territory is arguable.

[46] On Bellamack's argument, the claim which it has made in relation to house 9, alone among the ten claims under the HBCF scheme, should still logically be paid by the Territory since Bellamack is the (only) party who can take advantage of the policy.[39] If that is the case then the Territory may seek to rely upon its right to indemnity in clause 8.2 of the development agreement in relation to the claim for house 9.[40] That right would be enforceable, including by seeking declaratory relief. A declaration as to the indemnity could prevent any payment being made

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voluntary payment by the Territory in any event. The argument raises a point as to quantum which will need to be addressed in due course, however, it is not necessary to consider it for the purpose of this decision.

38 Court Book, p 305.

39 Bellamack's written submissions [90].

40 It was conceded in argument that this is the case, [Transcript 3/11/23, 53] however as there are no pleadings, no formal admission has been made and there was no evidence before the Court that the HBCF application by Bellamack has been withdrawn.

to Bellamack. Therefore, at least as far as any payment which might fall due under the HBCF policy relating to house 9 is concerned, it does not appear that there is no reasonable prospect that the Territory would be without at least a partial remedy against Bellamack.

[47] The interpretation of the HBCF policy raises difficult points of construction which I think would benefit from full argument and should not be decided on this application for summary judgment at this very early stage of the proceeding.

Limitation Period

[48] Pursuant to s 12(1) of the *Limitation Act 1981* (NT) (*Limitation Act)* an action founded on contract is not maintainable after three years from the date on which the cause of action first accrued to a plaintiff or a person through whom they claim. However, ss 159 and 160 of the *Building Act* provide that an action for damages for economic loss and rectification costs resulting from defective construction of building work is not maintainable after ten years from the grant of the occupancy certificate for the building work that is the subject of the action, or from the first occupation where there is no occupancy certificate.

[49] The breach of the development agreement relied upon by the Territory is the failure of Bellamack to make available affordable homes constructed in accordance with the requirements of the contract. The

breaches occurred at various times, dependent upon the completion and transfer (settlement) of the particular house, between 2013 and 2014. This proceeding was commenced on 24 January 2023.

[50] Bellamack argued that the limitation period in s 12(1) of the *Limitation Act* applies because the development agreement is not a building contract which comes within s 160 of the *Building Act*. If so, the limitation period expired, at the latest, at various times in 2017.

[51] The Territory maintain that the ten year limitation in the *Building Act* is applicable, because the action is for damages for economic loss and rectification costs resulting from defective construction as described in s 159 of the *Building Act*.

[52] The Territory has not made an application for an extension of time pursuant to s 44 of the *Limitation Act*. The question of the applicable limitation period was not fully argued on this application. The point is not without difficulty. "Building contract" is not a defined term in the *Building Act*. For the purposes of s 160, however, the test is whether the claim arises in the circumstances set out in s 159, that it is an action founded in contract or tort (including an action for breach of statutory duty) which seeks damages for economic loss and rectification costs resulting from defective construction of building work. So far as the Territory's primary claim is concerned, the limitation question, setting aside any application for extension of time,

will resolve alongside the primary argument of the Territory that it is entitled to damages for economic loss for defective building work as a result of Bellamack's breach. That question is therefore best considered either at trial, or, at least, at a later stage of the proceeding when pleadings are closed and discovery complete.

[53] In so far as the Territory's action is based upon the indemnity in clause 8.2 of the development agreement, the cause of action accrues when the obligation to make payments to the various claimants crystallised. There was insufficient evidence to determine that question on this application. The question is also dependent upon the resolution of the question of liability for the indemnity claims, and is therefore more appropriately determined at trial.

Conclusion on Summary Judgment

[54] In the exercise of the discretion, this is a case where I do not think that it is appropriate to grant summary judgment at this time. The Territory should have unconditional leave to proceed. In summary, there are five reasons for this. First, the summary judgment application has been brought at a very early time. Pleadings have not closed and there has been no discovery. Complex issues of law arise and it is appropriate that the Territory should have the opportunity to develop its case with the benefit of pleadings and discovery. Second, as discussed above, the Territory appears to have, at least, a reasonable claim for nominal

damages in respect of the breach of contract. The special circumstances of this case are that this is a matter of significant public interest involving the development by the Territory of a new suburb through a commercial agreement which was intended to produce social as well as financial benefit. There is more than illusory benefit in the Territory seeking to vindicate its rights under the development agreement. Third, the Territory, for the reasons set out above, is entitled to have its liability for the HBCF claim by Bellamack, if any, determined. The quantum of that claim, so far as it can be estimated at this early stage, is unlikely to be trivial. Fourth, if the Territory is correct as to its interpretation of the definition of "owner" in the HBCF policy it has an argument for indemnity for the other nine houses covered by that arrangement. In those circumstances, there seems very little to gain in terms of savings or efficiency at this early stage in preventing the Territory proceeding in relation to all 18 houses. Finally, this is a case where, if a breach is proven, the Territory clearly did not get what it bargained for in the development agreement. The loss currently pleaded is the cost of rectification (or rebuilding) of the defective houses. Other bases of quantification may be available. The fact that quantification of loss may be difficult should not be prevent the Territory from pursuing its claim at this point.

Strike out application

[55] Bellamack argues that paragraphs [12] – [13], [18] – [20], [23] and [24] of the ASOC should be struck out. The application is said to be made in pursuance of r 23.02(a) or (d). Rule 23.02(d) relates to a pleading which is an abuse of process. That ground was not ultimately argued and, in any event, I can see no basis for it. These reasons therefore deal only in the application pursuant to r 23.02(a), which is the ground that the impugned parts of the pleading should be struck out because they do not disclose a cause of action. There was no dispute that the test for failure to disclose a cause of action on the strike out application was the "no reasonable prospects of success" test.[41]

[56] In accordance with r 23.04(2), the decision in relation to the strike out application is based only upon the wording of the pleading.

[57] Bellamack does not dispute that the Territory's claim properly identifies the existence of the development agreement, the relevant obligations and the alleged breaches.

[58] Bellamack argues that the Territory's ASOC is defective because it fails to plead material facts which, if proved, would establish that Bellamack's breaches caused the Territory's alleged loss by connecting the alleged breaches of contract to the alleged losses flowing from the defective construction of the 18 houses, and because it fails to include

41 *Motor Accidents (Compensation) Commission v Toyota Motor Corporation Australia Limited* [2023] NTSC 65, [93].

material facts which are relevant to why the categories of loss claimed by the Territory are not too remote.

[59] The Territory's pleading as to breach of the development agreement by defective construction is at paragraphs [12] – [20]. Paragraph [12] sets out the ways in which the Territory claims that each of the homes did not comply with the requirements of the Building Code of Australia, the building permits and applicable Northern Territory laws and standards. Paragraph [13] sets out how each of those failures (High Wind Area Failures; Corrosion Failure, Windows Failure; and Weatherproofing Failure described at [12]) breached particular clauses of the development agreement because the failures meant that the homes which Bellamack constructed did not meet the requirements of various clauses of the contract.

[60] At paragraphs [14] – [17] the Territory pleads that as a result of the failures set out in the preceding paragraphs, the houses were not structurally stable, suffered water penetration which caused extensive corrosion damage, were not fit for habitation, were likely to disintegrate in high winds and presented a safety risk. The pleading goes on to allege that, by reason of the structural defects, extensive corrosion damage, and lack of safety, it was necessary for the houses to be demolished and 'in most cases' rebuilt.

[61] At paragraph [23] the Territory sets out its alleged losses, namely the cost of demolishing and rebuilding, or alternatively acquiring, various houses in the table set out at [6] of the ASOC.

[62] Leaving aside the HBCF indemnity claims, which are a separate cause of action, there is no pleading of material facts which link the loss in paragraph [23] to the failures of Bellamack in circumstances where it is unclear why the Territory was required to replace or rebuild the houses. There is no pleading, for example, that the contract was entered into for the benefit of the ultimate purchasers or that the Territory has an obligation to them in some other way, such as misrepresentation/reliance.

[63] The pleading at paragraphs [21] and [22] that the failures of Bellamack meant that it did not make affordable homes available which complied with the requirements of the development agreement does not in my view sufficiently link the alleged failure with the loss which is alleged at paragraph [23].

[64] There is, however, no need for the Territory to separately plead matters relevant to the development agreement and the linkage to the loss for each individual house. The Territory's claim for breach of contract is for loss associated with all of the houses due to Bellamack's failure to deliver what it was contracted to do.

[65] Nor is there a requirement that the Territory plead each separate item of damage in relation to each house where they have clearly pleaded that each and every home had exactly the same defects. Bellamack seems to assume in its submissions that that cannot be the case. However, the Territory is able to put its case in the way that it does and it will be a matter for evidence whether it is able to prove the defects it alleges in relation to each of the houses, or not. There may well be a need to provide detailed particulars in due course, but that is not a reason to strike out the pleading at this time.

[66] Bellamack also complains that, in so far as the loss pleaded in paragraph [23] relates to the contractual failure of Bellamack (i.e. not the indemnity claim), the reference to paragraphs [18] – [20] is irrelevant. I agree. The pleading in paragraph [23] is confusing because it conflates losses flowing from the breach of contract claim and the indemnity claim. The Territory should set out separately how the loss arises in relation to each of those two bases for its claim. Different issues arise in relation to the separate claims, including as to the issue of entitlement to the cost of demolition/rebuild compared to acquisition. Paragraph [24] claims an indemnity for the HBCF houses, this is appropriate so far as it goes, but it does not cure the confusion in paragraph [23].

[67] Bellamack also complain about the claim at paragraph [23](d) for cost of the experts investigating and reporting on the affordable homes.

This part of the pleading is too vague, and it is not saved by the reference to the schedule in the particulars.

Notice to Produce

[68] At the hearing of this application Bellamack sought to call on a notice to produce which had been served on 26 October 2023, eight days before the interlocutory hearing. By summons filed 2 November 2023, the Territory sought to set aside that notice. At the hearing on 3 November 2023 I acceded to the Territory's application with reasons to be delivered later. These are those reasons.

[69] A notice to produce, on an application to set aside, raises the same issues as a subpoena. That is, whether there is a legitimate forensic purpose, whether the notice is too broad and amounts to fishing or whether it is more appropriate that the documents be produced by way of discovery in the ordinary course. The onus is on the party requiring production to demonstrate that the documents are sufficiently relevant.

[70] By virtue of r 23.04 the documents can only have been relevant to the summary judgment application. The documents sought related to the assessment and administration of the HBCF claims. It is likely that those documents will ultimately be discoverable. However, in the context of the summary judgment claim which relied upon a legal argument about the construction of the HBCF policy document, I was not convinced that there was any purpose which they could serve. The

reasons why the Territory made payments to the various claimants are, for the purpose of the argument as to the construction of the term "owner" in the policy document, irrelevant. That is because whatever the Territory thought about why they were making a particular payment does not change the legal interpretation of that document.

Costs

[71] The usual position in interlocutory applications is that costs are in the proceeding in accordance with r 63.18. In this application neither party has been entirely successful. However, should either party wish to make an application for costs, they should file and serve submissions as to costs within four weeks on the date of this judgment. Submissions in reply should be filed within a further two weeks. A decision on costs will be made on the papers.

Disposition

[72] The orders are as follows:

a. Bellamack's application for summary judgment is dismissed.

b. Paragraph [23] of the Territory's ASOC is struck out.

c. The Territory has leave to file and serve a further amended statement of claim within six weeks.

d. Costs are reserved.
