

COMMERCIAL LIST STATEMENT

COURT DETAILS

Court	Supreme Court of New South Wales
Division	Equity
List	Commercial List
Registry	Sydney
Case number	

TITLE OF PROCEEDINGS

First Plaintiff	BMC Super Holdings No.3 Pty Ltd (ACN 609 901 617)
First Defendant	Mariners FC Developments Pty Ltd (ACN 141 144 158)
Second Defendant	North Construction & Building Pty Ltd (ACN 147 507 702)

FILING DETAILS

Filed for	BMC Super Holdings No.3 Pty Ltd, Plaintiff
Legal representative	Brendan Hoffman, Bradbury Legal
Legal representative reference	190762
Contact name and telephone	Brendan Hoffman, (02) 9030 7400
Contact email	brendan@bradburylegal.com.au

TYPE OF CLAIM

Equity – Building Dispute

Representative proceeding under Part 10 of the *Civil Procedure Act 2005* (NSW).

These proceedings will be listed for an initial case conference at 9 am 17 August 2022.

NATURE OF THE DISPUTE

- 1 The proceedings arise out of the construction of a building (**Building**) in a commercial strata development (**Strata Scheme**) at Strata Plan 93145, located at 1 Bryant Drive, Tuggerah, in the state of New South Wales (**Property**). The Strata Scheme comprises 69 commercial lots and common property (**Common Property**).
- 2 The Owners Corporation is the successor in title in respect to the Common Property at the Property and has the management and control of the Strata Scheme and has a strict obligation to maintain and repair the Common Property in the Strata Scheme.
- 3 The Plaintiff owns one of the commercial lots in the building. The First Defendant formerly owned the site on which the Building now stands, and it procured the development of the Building. The Second Defendant entered a design and construct contract with the First Defendant and constructed the Building.
- 4 The Building suffers from substantial defects in the Common Property (**Defects**).
- 5 On its own behalf, and as representatives for persons (other than the Defendants or their related entities) who owned, as at 29 June 2022, one or more lots in the Building or the common property, the Plaintiff sues the First and Second Defendant for damages and loss suffered by the Plaintiff and the Group Members against the Defendants by reason of the Defendants' breach of its statutory duty of care under Part 4 of the *Design and Building Practitioners Act 2020* (NSW) (**DBP Act**).
- 6 On its own behalf, and as representatives for persons (other than the Defendants or their related entities) who owned, as at 29 June 2022, one or more lots in the Building or the common property, the Plaintiff sues the First and Second Defendant for damages and loss suffered by the Plaintiff and the Group Members against the Defendants by reason of the Defendants' breach of contract.
- 7 On its own behalf, and as representatives for persons (other than the Defendants or their related entities) who owned, as at 29 June 2022, one or more lots in the Building or the common property, the Plaintiff sues the First and Second Defendant for damages and loss suffered by the Plaintiff and the Group Members against the Defendants by reason of the Defendants' breach of s.18 of the Australian Consumer Law; Schedule 2 of the *Competition and Consumer Act 2010* (Cth)(**The ACL**).

CONTENTIONS

A. DRAMATIS PERSONAE

1 The Plaintiff:

- (a) Is a corporation duly incorporated pursuant to the *Corporations Act 2001* (Cth) and is entitled to sue and be sued in its own corporate name and style.
- (b) At all material times owned, and continue to own, Lot 3 in the Building at Strata Plan 93145, located at 1 Bryant Drive, Tuggerah, in the state of New South Wales (**Lot 3**).

2 The Owners Corporation:

- (a) is the registered proprietor of the common property (**Common Property**) in the land the subject of Strata Plan No. 93145 (**Strata Plan**), located at 1 Bryant Drive, Tuggerah, in the state of New South Wales (**Property**); and
- (b) was vested with the Common Property upon registration of the Strata Plan on 23 March 2015 pursuant to s 24(2)(a) of the *Strata Schemes Development Act 2015* (NSW).

3 The Developer, Mariners FC Developments Pty Ltd (**Mariners FC**), was, at all material times:

- (a) until 30 June 2016, when the Strata Plan was registered:
 - (i) the registered proprietor of the Property; and
 - (ii) was the owner of all of the commercial lots on the Property as well as of the land and improvements that were to become the Common Property,
- (b) carrying on the business of property development
- (c) upon registration of the Strata Plan owned at least one of the commercial lots within the Strata Plan.

4 The Builder, North Construction & Building Pty Ltd, (**North Construction**):

- (a) is a corporation within the meaning of the *Corporations Act 2001* (Cth) and is capable of being sued in its corporate name.
- (b) at all material times was a company whose business undertaking was construction.
- (c) in or around 2017, purchased two lots from Mariners FC.

B. REPRESENTATIVE PROCEEDINGS

5 The Plaintiff brings these proceedings on its own behalf and as a representative proceeding pursuant to Part 10 of the Civil Procedure Act 2005 (NSW) on behalf of all other persons (other than the Defendants or their related entities) who, as at 30 June 2022, owned one or more lots in Strata Plan 93145 or the Common Property (the **Group Members**).

C. DEVELOPMENT OF BUILDING

6 The Building stands on the land that was located at 1 Bryant Drive, Tuggerah NSW.

7 At all material times prior to the registration of the Strata Plan 93145, Mariners FC was the registered proprietor of the Original Site.

8 On or around 9 February 2015, Mariners FC entered into an amended form of AS 4902-2000 Design and Construct Contract with North Construction, pursuant to which Mariners FC engaged North Construction to carry out the Works (as defined in the D&C Contract)(**Building Work**) in accordance with the D&C Contract.

9 Between February 2015 and June 2016, North Construction both directly, and through engaging subcontractors and consultants, purported to carry out the Building Works.

10 On 1 April 2016, the final occupation certificate was issued in respect of the Building.

11 On 30 June 2016 the Strata Plan 93145 was registered.

D. PURCHASE OF PROPERTY

12 On 29 January 2016 the Plaintiff entered into an agreement styled "Contract for the Sale of Land" with Mariners FC to acquire Lot 3 (**Plaintiff's Contract of Sale**).

13 The Agreement was wholly in writing.

14 The Purchase price was \$1,437,691.00.

15 On or about 15 July 2016, the Plaintiff's Contract of Sale Completed.

E. DEFECTS***Air Conditioning***

16 The Building as designed and constructed was to possess, but failed to possess, the following features:

- (a) An air conditioning system that is complete.
- (b) An electrical system that is adequate to power the air conditioning system, both as designed and as built.

- (c) The Building was required to comply with 4.5 NABERS Energy rating.
- (d) The Building was required to comply with Section J of the Building Code of Australia as designed and certified.

Fire and Protection

- (e) The Building was to have cladding installed that complied with the requirements of the Building Code of Australia.
- (f) The Building was to have spandrels installed that were 60/60/60.

(collectively, the **Defects**)

F. BREACH OF STATUTORY DUTIES

- 17 The Building Works are defective (**Defects**) as set out in paragraph 16 above.

Particulars

The paragraph contains a non-exhaustive list. Further and better particulars of the Defects will be provided after discovery and/or evidence.

- 18 The Owners Corporation:

- (a) repeats the matters pleaded at paragraph 2 above and, thereby, is an 'owners corporation' for the purpose of s 36(1) of the DBP Act; and
- (b) is the successor in title to Mariners FC in respect of the Common Property and, thereby, is an 'owner of land' for the purpose of 36(3)(a) of the DBP Act.

- 19 The Plaintiff and the Group Members:

- (a) Repeat the matters pleaded at paragraphs 1 and 5 above, and thereby are owners for the purpose of s36(1) of the DBP Act.

- 20 North Construction:

- (a) is a corporation as pleaded at paragraph 3 above and is a 'person' for the purpose of s 37(1) of the DBP Act and s 8(d) of the Interpretation Act 1987 (NSW); and
- (b) carried out the Works at the Property.

- 21 Mariners FC:

- (a) is a corporation as pleaded at paragraph 3 above and is a 'person' for the purpose of s 37(1) of the DBP Act and s 8(d) of the Interpretation Act 1987 (NSW); and

- (b) supervised, co-ordinated, project-managed, or otherwise had substantive control over the carrying out of the Works at the Property.
- 22 The Building Works as pleaded at paragraph 16 above:
- (a) Is 'building work' for the purpose of s 36(1) of the DBP Act; and
- (b) Is 'construction work' for the purpose of s 36(1) of the DBP Act,
- (c) Resulted in the construction of the Building:
- (i) being the erection of a permanent structure for the purpose of residential dwellings, which includes the Common Property; and
- (ii) is a 'building' for the purpose of section 36(1) of the DBP Act and s 1.4(1) of the *Environmental Planning and Assessment Act 1979* (NSW).
- 23 In the premises above, at all material times pursuant to s 37 of the DBP Act, North Construction and/or Mariners FC owed the Owners Corporation and/or the Plaintiff and Group Members a duty to exercise reasonable care to avoid economic loss caused by defects:
- (a) in or related to the Building for which the work is done; and
- (b) arising from the construction work.
- 24 In constructing the Building Works containing the Defects, North Construction and/or Mariners FC breached the Statutory Duty of Care.
- 25 North Construction and/or Mariners FC breached the Statutory Duty of Care by failing to exercise reasonable care and thereby failed to take precautions against a risk of harm to the Owners Corporation and/or the Plaintiff and Group Members in that, North Construction and/or Mariners FC:
- (a) was in a position to supervise, coordinate, project manage and/or have substantive control over the undertaking of the Works including, but not limited to, performing the Works;
- (b) knew or ought to have known that if the Works were not done or adequately done there was a high risk the Works would be defective;
- (c) knew or ought to have known that the Works are defective and the Common Property contains the Defects;
- (d) knew or ought to have known that the Property was not suitable for occupation at the time the Interim Occupation Certificate was issued; and

- (e) knew, or ought to have known, that the Works were being undertaken with a view to register the Strata Plan and the creation of the Common Property:
- (i) with all attendance rights and obligations accruing thereby to the Owners Corporation;
 - (ii) that the Owners Corporation were vulnerable such that the Owners Corporation had no or no practicable ability to prevent, avoid or minimise suffering damage to the Property or economic loss as a result of the Defects;
 - (iii) that the risk of harm to the Owners Corporation:
 - A was foreseeable;
 - B not insignificant; and
 - C in the circumstances a reasonable person in the position of North Construction and/or Mariners FC would have taken precautions;
 - (1) to properly perform, supervise, coordinate and/or project manage the Works to ensure:
 - I. the Works complied with the Building Contract or the Agreement; and
 - II. the Property, including the Common Property was suitable for occupation and
 - III. adequate inspection and approval of the Works prior to the registration of the Strata Plan,
 which North Construction and/or Mariners FC did not do;
 - (2) the probability and likely seriousness of harm that would occur if North Construction and/or Mariners FC did not take the requisite care in discharge of the Statutory Duty of Care was high;
 - (3) the burden of taking precautions to avoid the risk of harm to the Owners Corporation was low; and
 - (4) the Works had social utility.

Particulars

Further and better particulars of the Defects will be provided after discovery and/or evidence.

26 By reason of North Constructions' and/or Mariners FC breach of the Statutory Duty of Care:

- (a) the Works contains the Defects as set out in paragraph 16 hereof;
- (b) the Building is defective; and
- (c) the Owners Corporation, which is liable to meet the cost of rectifying the Defects to the Common Property and any consequent damage suffered by reason of those Defects, pursuant to s 106 of the SSM Act, has suffered and will continue to suffer loss and damage, including:
 - (i) the costs associated with rectifying and otherwise making good the Defects and as further particularised after further investigations, discovery and/or evidence;
 - (ii) the diminution in value of the Building arising from the Defects; and
 - (iii) the costs associated with engaging experts to investigate and identify the Defects,

which is 'economic loss' for the purpose of s 38 of the DBP Act and which the Owners Corporation is entitled to recover from North Construction and/or Mariners FC pursuant to s 37(3) of the DBP Act.

27 North Constructions' and/or Mariners FC's negligence caused the loss and damaged suffered by the Owners Corporation as:

- (a) North Constructions' negligence was a necessary condition of the occurrence of the economic loss to the Owners Corporation; and
- (b) it is appropriate for the scope of North Constructions' liability to extend to the economic loss caused.

Damage

28 The Owners Corporation, Plaintiff and the Group Members have each suffered loss and damage, and will continue to suffer loss and damage, by reason of the First and Second Defendant's breaches of the Statutory Duties.

Particulars

The Plaintiff's loss and damage includes:

- (a) The costs associated with rectifying Lot 3 and the common areas and otherwise making good the Defects and as further particularised after further investigations, discovery and/or evidence, including strata fees and levies payable by the Plaintiff to fund the rectification costs;
- (b) The diminution in the value of Lot 3 resulting from the Defects;
- (c) Out-of-pocket expenses incurred by the Plaintiff during the period it was unable to utilise Lot 3;
- (d) Loss of rental income under any present or future lease;
- (e) Strata fees paid or payable by the Plaintiffs to fund increased insurance premiums, legal and other professional costs incurred by the Owners Strata Plan No. 93145 as a result of the Defects,
- (f) Damages for inconvenience, stress and vexation
- (g) The diminution in value of the Building arising from the Defects; and
- (h) The costs associated with engaging experts to investigate and identify the Defects.

The Group Members' loss and damage includes:

- (i) The cost of rectifying their Lots and the common areas and otherwise making good the Defects and as further particularised after further investigations, discovery and/or evidence, including strata fees and levies payable by the Plaintiff to fund the rectification costs to the extent such rectification costs are borne by them;
- (j) The diminution in the value of their Lots resulting from the Defects,
- (k) Out-of-pocket expenses incurred by them during the period they are unable to access their Lots and as a result of that lack of access
- (l) Loss of rental income;
- (m) Loss of rental income under any future lease;

- (n) Strata fees to paid or payable by the Group Members' to fund increased insurance premiums, legal and other professional costs incurred by The Owners - Strata Plan No. 93145 as a result of the Defects.
- (o) Damages for inconvenience, stress and vexation; and
- (p) In the case of the Owners - Strata Plan No. 93145, the costs of rectifying the common property to the extent that such rectification costs are borne by it, and any increased insurance premiums, legal and other professional costs incurred by it as a result of the Defects.

29 In the premises above at paragraphs 25–27, The Owners Corporation, the Plaintiff and the Group Members are each entitled to recover from North Construction and/or Mariners FC damages for any loss and damage suffered by the Plaintiff or the Group Members, as a consequence of any breach of the duties owed by North Construction and/or Mariners FC.

Sale Contract

30 In the alternative to the DBP Act claim, it was an implied term and condition of the Plaintiff's Contract of Sale, and for some Group Members an express or implied term and condition of the Contract of Sale, that the vendor must, prior to the completion date, cause the building, the common property and the property to be constructed in accordance with the Development Consent, the draft Strata Plan, the final floor plan attached to the Contract, the Schedule of finishes and the schedule of construction requirements.

Air Conditioning

31 It was a term and condition that the Building would contain an air conditioning system, including the system that powered the air conditioning system:

- (a) That complied with NABERS energy rating and engineering certifications.
- (b) That complied with the construction requirements and schedule of finishes
- (c) That was complete, fit for purpose and free from defects.

Fire Protection and Fire Rating

32 It was an express, or, in the alternative implied term and condition of the Contract that the materials installed in the Building would comply with the schedule of construction requirements, development consent and the Building Code of Australia.

Car Park Allocation

33 It was an express, or in the alternative, an implied term and condition of the Contract that:

- (a) a specific number of car spaces would be allocated for each Lot.
- (b) The Building would include a specific number of car spaces in total.

G. BREACH OF CONTRACT

34 In breach of the express, or, in the alternative implied terms and conditions of the contract;

- (a) The air conditioning system installed in the Building,
 - (i) did not conform with the Contract.
 - (ii) did not comply with the Schedule of finishes.
 - (iii) did not comply with the Development Consent.
 - (iv) was not complete, fit for purpose, free from defects and of merchantable quality.
- (b) The cladding installed in the Building:
 - (i) Did not comply with the Building Code of Australia.
 - (ii) Did not comply with the Development Consent.
- (c) The spandrels installed in the Building
 - (i) Did not comply with the Building Code of Australia,
 - (ii) Did not comply with the Development Consent and Construction Certificate.
- (d) The car spaces allocated to each Lot did not accord with the specific number nominated in the Contract.
- (e) There were fewer total car spaces included in the Building than set out in the Contract.

35 By reason of the breaches set out in paragraph 34, and in the premises, the Plaintiff and the Group Members have suffered loss and damage.

H. MISLEADING AND DECEPTIVE CONDUCT

36 Further, in the alternative to the claims set out above, Mariners FC, by its servants or agents, represented that:

- (a) The Building would contain, or in the alternative, did contain, an air conditioning system
 - (i) That complied with NABERS energy rating and engineering certifications.
 - (ii) That complied with the construction requirements and schedule of finishes
 - (iii) That was complete, fit for purpose and free from defects.
- (b) That the Building would be built using materials that were fit for purpose and of merchantable quality.
- (c) That a specific number of car spaces would be allocated for each Lot.
- (d) That the Building would contain a specific number of car spaces.

(Collectively, The Representations)

37 At the time of making the Representations Mariners FC knew or ought to have reasonably known that:

- (a) Mariners FC was being relied upon by the Plaintiff to exercise all due care, skill and diligence in and about making the Representation
- (b) The Plaintiff would or might act upon the Representations
- (c) If the Plaintiff acted upon the Representations and any or all of those representations proved to be untrue The Plaintiff would or might suffer loss and damage; in consequence whereof Mariners FC owed a duty in making the Representations to exercise all due care, skill and diligence

38 Contrary to the Representations:

- (a) The air conditioning system installed in the Building did not comply with NABERS energy rating, engineering certification, construction requirements and schedule of finishes.
- (b) The air conditioning system installed in the Building was not complete, fit for purpose and free from defects.
- (c) The cladding installed in the Building was not fit for purpose and did not comply with the Building Code of Australia and the Contract.
- (d) The spandrels installed in the Building were not fit for purpose and did not comply with the Building Code of Australia and the Contract.
- (e) The specific number of car spaces were not allocated for each Lot.

(f) There were fewer total car spaces included in the Building.

39 Acting upon the representations referred to in paragraph 36 herein, and induced thereby, The Plaintiff entered into the Plaintiff's Sale Contract with Mariners FC and agreed to the terms contained therein.

40 The representations contained in paragraph 36 above were made by Mariners FC, either knowing they were false, or, alternatively, with reckless indifference to whether they were true or false.

41 Each of the representations set out in paragraph 36 hereof was made by Mariners FC in trade and commerce.

42 By the making of the representations contained in paragraph 36 hereof Mariners FC, engaged in conduct in trade and commerce which was;

(a) Misleading and deceptive; and

(b) A contravention of section 18 of the Australian Consumer Law, Schedule 2 of the *Competition and Consumer Act 2010* (Cth)

43 As a result of its acting in reliance upon the express representations the Plaintiff and the Group Members have suffered loss and damage.

44 The Plaintiff and the Group Members claim against Mariners FC pursuant to s.236 of the Australian Consumer Law, Schedule 2 of the *Competition and Consumer Act 2010* (Cth) **(Damages for Misleading and Deceptive Conduct)**

RELIEF CLAIMED

68. The Plaintiff, on its own behalf and on behalf of the other Group Members, claim:

- a. Damages;
- b. Damages pursuant to s.236 of the Australian Consumer Law, Schedule 2 of the *Competition and Consumer Act 2010* (Cth);
- c. Interest in accordance with s100 of the *Civil Procedure Act 2005* (NSW);
- d. Costs;
- e. Interest on Costs; and
- f. Such other order as the Court considers appropriate.

SIGNATURE OF LEGAL REPRESENTATIVE

I certify under clause 4 of Schedule 2 to the Legal Profession Uniform Law Application Act 2014 that there are reasonable grounds for believing on the basis of provable facts and a reasonably arguable view of the law that the claim for damages in these proceedings has reasonable prospects of success.

I have advised the plaintiffs that court fees may be payable during these proceedings. These fees may include a hearing allocation fee.

Signature



Capacity

Solicitor in the employ of the Solicitor on Record

Date of signature

29 June 2022

NOTICE TO DEFENDANT

If you do not file a defence within 28 days of being served with this statement of claim:

- **You will be in default in these proceedings.**
- **The court may enter judgment against you without any further notice to you.**

The judgment may be for the relief claimed in the statement of claim and for the plaintiff's costs of bringing these proceedings. The court may provide third parties with details of any default judgment entered against you.

HOW TO RESPOND

Please read this statement of claim very carefully. If you have any trouble understanding it or require assistance on how to respond to the claim you should get legal advice as soon as possible.

You can get further information about what you need to do to respond to the claim from:

- A legal practitioner.
- LawAccess NSW on 1300 888 529 or at www.lawaccess.nsw.gov.au.
- The court registry for limited procedural information.

You can respond in one of the following ways:

- 1 **If you intend to dispute the claim or part of the claim, by filing a defence and/or making a cross-claim.**
- 2 **If money is claimed, and you believe you owe the money claimed, by:**

- Paying the plaintiff all of the money and interest claimed. If you file a notice of payment under UCPR 6.17 further proceedings against you will be stayed unless the court otherwise orders.
- Filing an acknowledgement of the claim.
- Applying to the court for further time to pay the claim.

3 If money is claimed, and you believe you owe part of the money claimed, by:

- Paying the plaintiff that part of the money that is claimed.
- Filing a defence in relation to the part that you do not believe is owed.

Court forms are available on the UCPR website at www.ucprforms.nsw.gov.au or at any NSW court registry.

REGISTRY ADDRESS

Street address	Supreme Court of New South Wales Law Courts Building 84 Phillip Street Sydney NSW 2000
Postal address	Supreme Court of New South Wales GPO Box 3 Sydney NSW 2001
Telephone	1300 679 272

AFFIDAVIT VERIFYING

Name Bradley Stephen Cranney
 Address 34 Matcham Road, Matcham, NSW 2250
 Occupation Director
 Date 29 June 2022

I affirm:

- 1 I am the director of the plaintiff and am authorised to affirm this affidavit on behalf of the Plaintiff.
- 2 I believe that the allegations of fact in the statement of claim are true.

AFFIRMED at

Signature of deponent

Name of witness

Address of witness

Capacity of witness

Vinesh Singh

Ground Floor, 437 Kent Street, Sydney NSW 2000

Solicitor

And as a witness, I certify the following matters concerning the person who made this affidavit (the deponent):

- 1 I saw the face of the deponent.
- 2 I have confirmed the deponent's identity using the following identification document:

3342RR
 Identification document relied on (may be original or certified copy) †

Signature of witness

Note: The deponent and witness must sign each page of the affidavit. See UCPR 35.7B.

[†"Identification documents" include current driver licence, proof of age card, Medicare card, credit card, Centrelink pension card, Veterans Affairs entitlement card, student identity card, citizenship certificate, birth certificate, passport or see Oaths Regulation 2011.]

This document was signed in counterpart and witnessed over audio visual link in accordance with clause 2 of the schedule 1 of the Electronic Transactions Regulation 2017 (NSW).

FURTHER DETAILS ABOUT PLAINTIFF**Plaintiff**

Name BMC SUPER HOLDINGS NO.3 PTY LIMITED
Address LEVEL 3 130 PARRY STREET NEWCASTLE WEST
NSW 2302

Legal representative for plaintiff

Name Brendan Hoffman
Practising certificate number 29984
Firm Bradbury Legal
Contact solicitor Brendan Hoffman
Address Ground Floor, 437 Kent Street, Sydney NSW

Telephone (02) 9030 7400
Email brendan@bradburylegal.com.au

DETAILS ABOUT DEFENDANTS**First defendant**

Name MARINERS FC DEVELOPMENTS PTY LTD
Address UNIT 1 1 PIONEER AVENUE TUGGERAH NSW 2259

Second defendant

Name NORTH CONSTRUCTION & BUILDING PTY LTD
Address 755 HUNTER STREET NEWCASTLE WEST NSW 2302