

Building Defects and Recent Case Studies

Presenter David Bannerman

7 October 2011

T (02) 9929 0226 **F** (02) 8920 2427

M 0403 738 996 **E** dbannerman@bannermans.com.au

A Suite 702, 2 Elizabeth Plaza, North Sydney, NSW 2060

PO Box 514, North Sydney, NSW 2059



Introduction

1. Steps for managing agents to consider
2. Typical contractual relationships and parties
3. Recent legislative amendments
4. Case studies
5. Rectification contracts

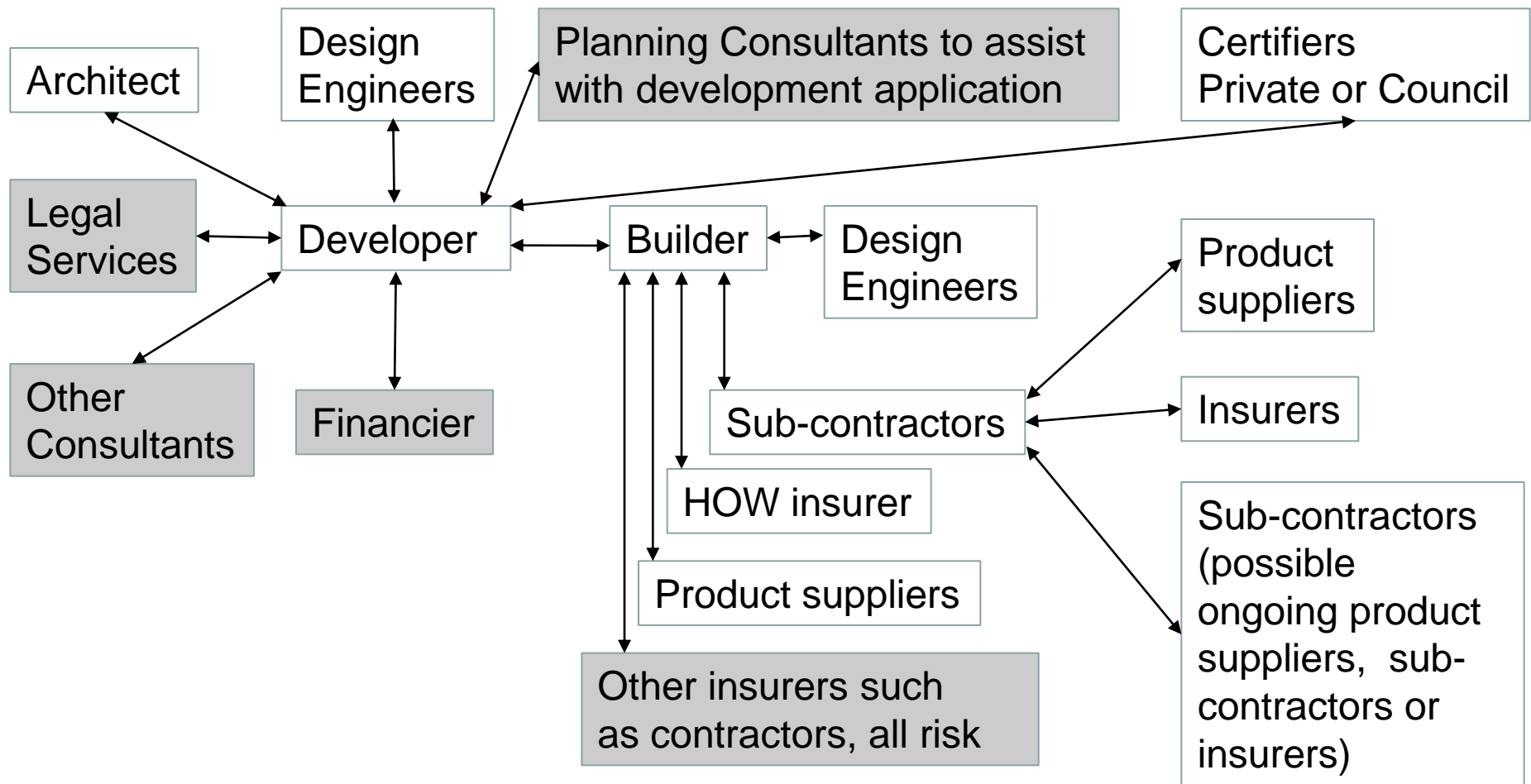
Steps for strata managing agents to consider

1. Consider obligations under your agency agreement to manage risk.
2. Obtain development documents in accordance with clause 4 of Schedule 2 of the *Strata Schemes Management Act 1996*.
3. Consider providing motions to the owners corporation during the 10 year period. Motions to consider engagement of lawyer to:
 - a) Provide advice on key dates and time limits;
 - b) Brief experts for litigation compliant reports;
 - c) Investigate solvency of builder and/or developer; and
 - d) Notifying relevant insurers.

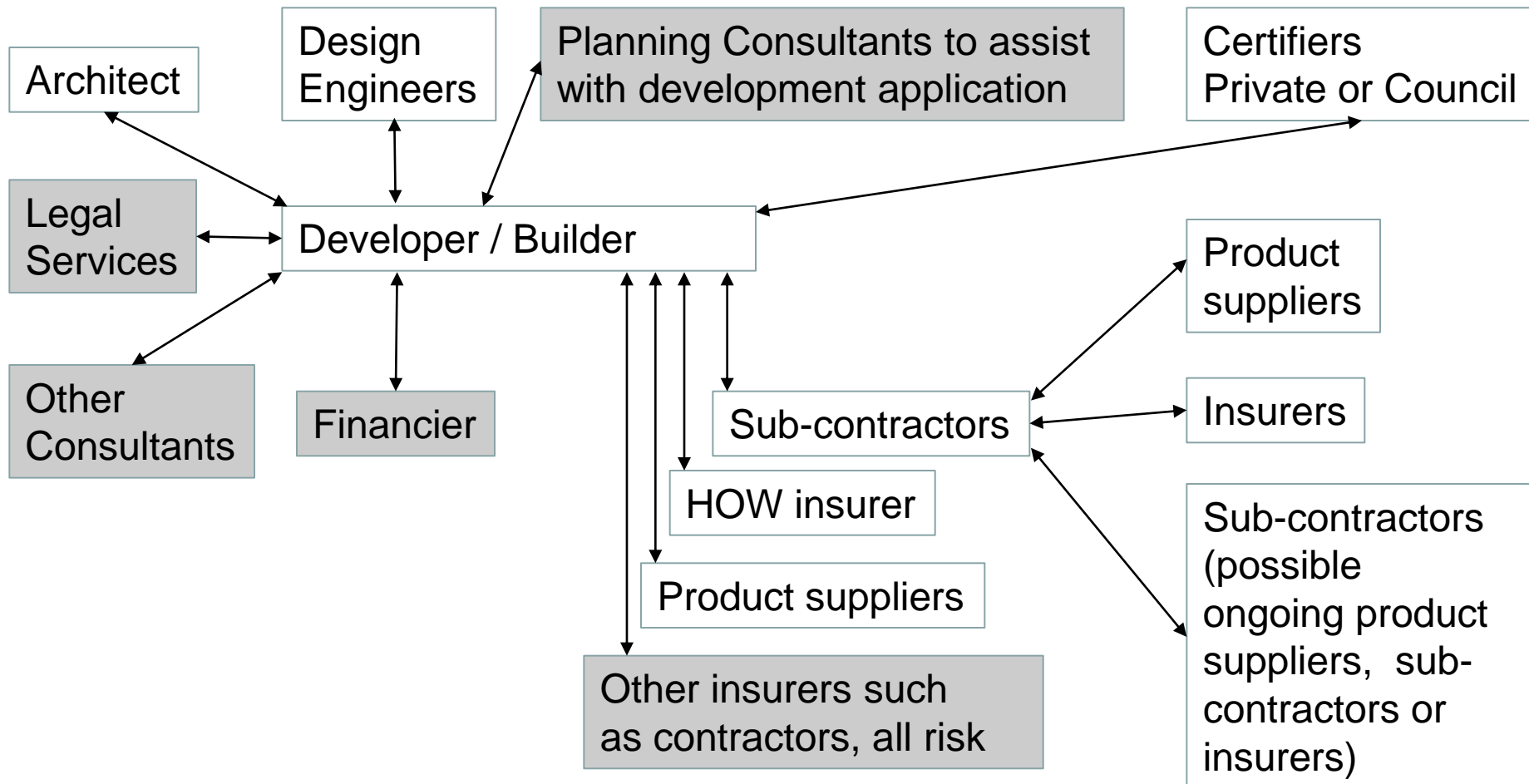
The various parties

- Owners corporation & Owners
- Developer (as defined under the HBA)
- Architect / design engineer & consultants
- Builders
- Subcontractors
- HOW insurers (not covering Fair Trading Administration Corporation)
- Council / Private certifiers

Typical contractual relationships with Developer and Builder



Typical contractual relationships with Developer/Builder



Recent legislative amendments

Recent legislative amendments to the *Home Building Act 1989* due to the case of *Ace Woollahra Pty Ltd v The Owners – Strata Plan 61424 & Anor [2010] NSWCA 101*

Amendments in part allow the right to claim against builders and insurers where the builder contracted with a non-land owning joint venturer.

Liability of a developer and joint venturer is not clear. Also unclear whether or not a subcontractor is liable under the amendments

Case law on statutory warranty and HOW Insurance time limits

➤ **McBride v Hunt (CTTT - March 2008)**

- Practical completion in a contract does not determine when works are completed under section 48K of the HBA.

➤ **SP61404 (CTTT - May 2008)**

- Insurance case
- No contract, therefore clause 61(1)(a) HBR (previously s48(a)) does not apply
- Inspection under clause 61(1)(b) HBR (previously s48(b)) means physical inspection

Case law on statutory warranty and HOW Insurance time limits

➤ **SP64096 (CTTT – June 2008)**

- Council inspection 1 September 2000 identified 5 items to be completed
- Occupation certificate issued on 21 September 2000
- Lack of evidence but Tribunal accepted 21 September 2000 as date of completion of the works for s48K

Case law on statutory warranty and HOW Insurance time limits

➤ **SP66090 (CTTT – June 2008)**

- Occupation certificate issued on 15 May 2001
- Correspondence from builder to architect stating works completed on 31 October 2000 and seeking final payment
- Builder providing certificates after 31 October 2000 ≠ doing building works
- Builder returning to rectify defects pursuant to statutory warranties does not extend the completion date
- Held completion - 31 October 2000 for s48K

Case law on statutory warranty and HOW Insurance time limits

➤ **Abrahams & Anor v Degan (DC – 2009)**

- Owner builder
- Completion is as per regulation for determining period of cover (clause 61 HBR (previously clause 48 HBR))
- Contrary to earlier cases about physical completion of the works and contrary to our opinion
- Held that date of completion was the date of inspection by certifier for final occupation certificate for s18E

Case law on statutory warranty and HOW Insurance time limits

➤ **SP69123 (CTTT – Jan 2010)**

- Bound to follow *Abrahams v Degan*
- Date of registration of strata plan not relevant
- Builder returning to rectify defects did not extend completion date
- Builder failing to comply with undertaking did not extend period

➤ **Mortimer v Bitic (CTTT - 11 Jan 2011)**

- Bound to follow *Abrahams v Degan*

Case law on statutory warranty and HOW Insurance time limits

- **Owners Corporation Strata Plan 64757 v MJA Group Pty Ltd [2011] NSWCA 236**
 - Case considering ‘completion’
 - Two builders where Builder A did majority of work and Builder B did small amount of work
 - The question of completion is one of fact
 - Proceedings against the developer were statute barred for works done by Builder A
 - Also considered proportionate liability – probably not apply to developers

Recent case law

- **Cyril Smith & Associates Pty Ltd v The Owners - Strata Plan No. 64970 [2011] NSWCA 181**
 - Date on which cause of action first accrues - negligence
 - 6 years from when defect manifests
- **The Owners Strata Plan 56963 v Australand [2011] NSWSC 710**
 - Case considering s109ZK – 10 year time limit
 - Found outside 10 year time limit as against the builder and developer
 - Strata managing agent the only remaining party

Recent case law on certifiers

- **The Owners Corporation of Strata Plan 62254 v Rockdale City Council [2008] NSWSC 392**
 - Council incorrectly certified the building
 - Council, as principal certifying authority, found to owe owners corporation a duty of care
 - Council liable for negligence and breach of statutory duty
- **The Owners, SP75903 v Dix & Anor [2011] NSWSC 245**
 - Whether building has a rise in storeys of more than three
 - Certifier incorrectly provided advice to the developer that rise in storeys was greater than 3
 - Issue of negligence a matter for the trial judge

Rectification process – construction contracts

Use of industry standard contracts may raise issues:

- The price, nature of works, role and liability of particular parties, scheme's particular circumstances
- Requirements under the *Home Building Act 1989*
- Access to lot and common property
- Home owners warranty insurance
- Strata insurance and disclosure obligations
- Occupational Health and Safety requirements
- Variation of the contract price or construction period
- Certification of works
- Proportionate liability

Key steps for strata managing agents

- Consider obligations under your agency agreement
- Obtain development documents in accordance with clause 4 of Schedule 2 of the *Strata Schemes Management Act 1996*.
- Contact lawyers and/or building consultants to obtain fee proposals
- Obtain motions for the executive committee meeting or general meeting
- Convene meeting and relevant motions determined

Overview

1. Specialist area of law
2. Strata managing agents should consider their obligations
3. Review agency agreement
4. Develop process of risk management

Disclaimer

- This is not a legal advice and you should seek legal advice regarding any time limits or issues referred to.
- This area of law is regularly amended or new cases decided, requiring updated information.
- This presentation does not include:
 - claims for incomplete works;
 - Fair Trading Administration Insurance Scheme claims;
 - claims where the insurance contract was entered into before 1 May 1997; and
 - all possible steps, remedies, defences and time limitations.

Thank you

T (02) 9929 0226 **F** (02) 8920 2427

M 0403 738 996 **E** dbannerman@bannermans.com.au

A Suite 702, 2 Elizabeth Plaza, North Sydney, NSW 2060

PO Box 514, North Sydney, NSW 2059

