BUILDING CERTIFIER LIABILITY AFTER *BROOKFIELD*—WHERE TO NOW?

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BACKGROUND

On 8 October 2014, the High Court handed down its decision in *Brookfield Multiplex Ltd v Owners Corporation Strata Plan 61288 & Anor* [2014] HCA 36 which curtails the rights of apartment owners to sue builders in negligence.

The case involved a long–running dispute between the builder, Brookfield Multiplex, and the Owners Corporation with respect to building defects in the common property of a commercial building, The Mantra Chatswood Hotel, run as a serviced apartment business.

The High Court adopted a case–by–case approach prescribed by previous judgments including *Bryan v Maloney* (1995) 182 CLR 609 (*Bryan v Maloney*) and *Woolcock Street Investments Pty Ltd v CDG Pty Ltd* (2004) 216 CLR 515 (*Woolcock*), holding that the builder did not owe the owners corporation a duty of care in these circumstances.

REASONING

There were two questions that the court answered in coming to its ruling: firstly, whether the builder owed a duty of care to the developer and, secondly, whether the builder owed a duty of care to the owners corporation independently of any duty of care owed to the developer.[1]

A duty of care must be established in order for an action in negligence to be successful.

For the first question, the court held that the developer sufficiently protected itself and was not vulnerable to the builder's conduct. The court pointed out that the contract between the builder and the developer contained numerous stringent clauses holding the builder accountable for building defects. It stated that to supplement the contractual provisions with a duty of care towards the developer would inappropriately alter the allocation of economic risk effected by the parties' contract.[2] Therefore, there was no duty of care.

In relation to the second question, the court held that the builder did not owe a duty of care to the owners corporation independently of its obligations to the developer. The court held that, as the owners corporation did not exist at the time the defective work was carried out, there could not have been any reliance by the owners corporation upon the builder.[3] Furthermore, the court held that the owners corporation did not suffer any loss because it acquired the common property without any financial outlay on its part.[4]

Consistent with its case–by–case approach, the court distinguished this case from *Bryan v Maloney* where a subsequent owner successfully argued that a builder of a residential house was liable for economic loss arising from building defects. The court held that the contractual protections provided to the original owner and subsequent purchaser in *Bryan v Maloney* were far less than those in the current case.[5]

However, the court also made it clear that it was inappropriate to use the mere nature of the purchase (i.e. whether it was a commercial or residential property) as the decisive factor in determining whether a duty of care exists.[6] Rather, the salient features of the relationship between the owners corporation and the builder, including whether the builder owed the developer a relevant duty of care, must be considered.[7] Nevertheless, the court did draw analogies between this case and *Woolcock*.[8]

The court added that it was irrelevant that the owners corporation had no option but to be brought into existence as the legal owner of common property and that legal protection of subsequent purchasers was

'best done by legislative extension of those statutory forms of protection'.[9]

IMPLICATIONS

This case does not have immediate or obvious implications in relation to issues such as duties of care for private certifiers (PCAs) (in contrast to builders) because it does not address them directly. However, in view of the greater difficulty to now sue builders in negligence, the question is: are PCAs more or less exposed to legal liability?

NEGLIGENCE

The court has made it clear, by essentially affirming *Woolcock*, that the approach for determining whether a duty of care exists hinges on determining whether the aggrieved party (e.g. an owners corporation) was vulnerable to the actions of the alleged wrongdoer (e.g. a private certifier).

Given that PCAs generally contract with developers, any duty of care that a PCA may owe to the developer will be shaped by the terms of the contract between the PCA and the developer. In particular, a court will gauge vulnerability by looking at the strength of any contractual protections. In practice, most contracts between PCAs and developers will contain general provisions in relation to defects or inadequate certification.

It is clear from the *Brookfield* case that a court would be reluctant to impose a duty of care on a PCA where there are strong contractual protections afforded to the developer.

Furthermore, the same issues which were raised in the High Court decision in relation to any independent duty owed by the builder to an owners corporation or body corporate will equally apply to PCAs. That is, the owners corporation did not exist when the PCA contracted with the developer and did not suffer loss because it acquired common property without consideration.

However, a favourable factor from the perspective of an apartment owner or an owners corporation is that a court may take into account the fact that, unlike builders, certifiers are not governed by various state or territorial statutory warranties such as those contained in the *Home Building Act 1989* (NSW), the *Building Act 2004* (ACT), and the *Domestic Building Contracts Act 1995* (VIC).

In any event, if PCAs were to be sued, it is open to them to invoke the principle of proportionate liability to mitigate any potential adverse verdict against them. Proportionate liability is a legal principle that where two or more people are concurrently responsible (usually referred to as 'concurrent wrongdoers') for certain types of economic loss, their liability is limited to the extent that they are responsible for it.

In cases involving defects caused by poor workmanship, the builder will be a prime candidate as a concurrent wrongdoer. Architects and engineers, whose opinions influence a PCA's decisions, can also serve as potential concurrent wrongdoers.

Therefore, the liability of a PCA in negligence can only be determined on a case–by–case basis.

STATUTORY DUTIES

Nevertheless, PCAs may still be held liable for defects, in particular fire and life safety defects and inadequate compliance by the builder with design drawings by virtue of breaches of statutory duties under building and/or planning legislation. Whilst the notion that a breach of statutory duty may itself give rise to a civil cause of action (such as negligence) is settled law,[10] the case law surrounding this issue in relation to its specific application to PCAs is not settled.

There appears to be one recorded instance in New South Wales where a certifier was held liable for breaches of statutory duty under the *Environmental Planning and Assessment Act 1979* (NSW).[11] While the Brookfield decision does not touch on the issue of statutory duties at all and this New South Wales case involved a council rather than a private certifier, assessing whether there is a breach of statutory duty involves a 'multifaceted enquiry' and a consideration of the salient features of the relationship.[12]

In the ACT, a public utility body unsuccessfully argued that the certifier breached a purported statutory duty under the *Building Act 1972* (ACT) (as it then was).[13] This case demonstrates that interpretation of the statutory provisions is an important factor in determining whether there is a statutory duty in the first place let alone whether that statutory duty has been breached. Furthermore, this particular case examined the duty owed by a certifier to a public body rather than an apartment owner, owners corporation or body corporate.

However, the situation appears to be more owner friendly in Victoria. In the case of *Moorabool Shire Council and Anor v Taitapanui* [2006] VSCA 30, the Victorian Court of Appeal made a finding that the certifier had statutory duties under *Building Act 1993* (VIC) which extended to subsequent owners.[14]

Nevertheless, given that building legislation differs between states, this case should not be taken to apply to all PCAs in a blanket manner. As with negligence cases, each claim for breach of statutory duties must be determined on its merits.

AUSTRALIAN CONSUMER LAW

Misleading and deceptive conduct is a commonly used civil remedy governed by section 18 of Schedule 2 of the *Competition and Consumer Act 2010* (Cth). PCAs are most vulnerable to misleading and deceptive conduct claims from the developer who retained them.

Nevertheless, a typical claim that an owners corporation might make against a PCA is where the owners corporation alleges that, by issuing an occupation certificate which states that the building conforms with the BCA (and building defects arising from non–compliance with the BCA later manifest themselves), the PCA engaged in misleading and deceptive conduct.

In the *Owners–SP 69567 v Landson Alliance Australia* [2014] NSWSC 1592 (*SP 69567*), the certifier sought to strike out an argument by the owners corporation that by issuing the occupation certificate the certifier engaged in misleading and deceptive conduct.

The owners corporation argued that it was a passive victim of misleading conduct which did not cause the owners corporation to act, or refrain from acting, but nonetheless caused damage because the builder relied on the false certification by the certifier to not require the rectification of allegedly defective work.

This argument sought to rely on a series of 'indirect reliance' cases and avoided the difficulty an owners corporation has in arguing that it was misled when it did not exist when the certifier engaged in the alleged misleading and deceptive conduct.

The second objection raised by the certifier addressed the remarks of some judges in *Brookfield* regarding the owners corporation not incurring loss when acquiring the common property without charge. McDougall, J in *SP 69567* distinguished the remarks of the High Court judges in this regard by observing that the analysis in relation to loss was undertaken for the purpose of analysing vulnerability and it did not follow that this analysis was applicable to all cases where a claim is made for economic loss.

Whilst the strike out application of the certifier in *SP 69567* failed, it remains to be seen whether such an argument by an owners corporation would be successful on a final hearing. Having said that, individual lot owners are more likely to be able to rely upon misleading and deceptive conduct.

Finally, guarantees relating to the supply of services for the benefit of consumers under section 61 of Schedule 2 (a separate and distinct regime from misleading and deceptive conduct) are unlikely to apply. That is, there is a practical difficulty in an owners corporation arguing that it was supplied with certification services when it did not exist at the time those services were provided.

CONCLUSION

The law is still far from settled in relation to the liability of PCAs. An incremental case–by–case approach nuanced by jurisdiction appears to be the approach taken by the courts unless and until the High Court makes a definitive ruling in relation to PCAs as it has for builders in *Brookfield*.

REFERENCES

1. *Brookfield Multiplex Ltd v Owners Corporation Strata Plan 61288 & Anor* [2014] HCA 36 at [8], [141] and [146]

2. [2014] HCA 36 at [132]

3. [2014] HCA 36 at [150]

4. [2014] HCA 36 at [150]

5. [2014] HCA 36 at [136]

6. [2014] HCA 36 at [135]

7. [2014] HCA 36 at [30]

8. [2014] HCA 36 at [35]

9. [2014] HCA 36 at [186]

10. *Sutherland Shire Council v Heyman* (1985) 157 CLR 424 at 459

11. *The Owners Corporation of Strata Plan 62254 v Rockdale City Council* [2008] NSWSC 392

12. [2008] NSWSC 392 at [67]

13. *ACTEW Corporation Limited v Mihaljevic and Ors* [2011] ACTSC 23

14. *Moorabool Shire Council & Anor v Taitapanui & Ors* [2006] VSCA 30 at [154]