The High Court Decides

When does a builder owe a subsequent owner a duty of care?

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.

As previously reported in the December 2013 edition of *Ethos*,[1] the case involved a long-running dispute between the appellant builder, Brookfield, and the respondent 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.

At first instance in the NSW Supreme Court in *The Owners – Strata Plan No. 61288 v Brookfield Australia Investments Ltd* [2012] NSWSC 1219, McDougall J held that the appellant did not owe a duty of care to the respondent to take reasonable care to avoid a reasonably foreseeable economic loss to the respondent in having to make good the consequences of latent defects in the common property caused by the building's defective design and/or construction.

His Honour held that there was no reason for a tortious duty of care where the appellant and the developer had negotiated contractual rights comprehensively.[2] Further, his Honour refused to identify or impose, a "novel duty of care" between the appellant and the respondent.[3]

His Honour also stated that to rule in favour of the respondent would result in the Court encroaching into an area in which the legislature did not wish to venture. The statutory warranty provisions in Part 2C of the *Home Building Act 1989*, which specifically applies to residential building works, expressly excluded non-residential building works such as in this case.[4]

The NSW Court of Appeal in *The Owners – Strata Plan No. 61288 v Brookfield Australia Investments Ltd* [2013] NSWCA 317 overturned the first instance decision but imposed a narrower duty than that argued by the respondent, restricting its scope to building defects which were structural, constituted a danger to persons or property or made the apartments uninhabitable.[5]

Basten JA held that the contract between the appellant and the developer did not deal so comprehensively with the relationship between them that there was no room for the imposition of a duty of care in tort[6] meaning the developer was, in fact, vulnerable to the risk of economic loss from defects.

The Court of Appeal went on to indicate that a critical issue was whether a subsequent owner (the respondent) may be vulnerable even where the original owner (the developer) was not.[7] His Honour then reasoned that the respondent was at least as vulnerable as the developer[8]. In addition, Macfarlan JA noted that the respondent could not protect itself because it only came into existence on registration of the strata plan.[9]

The High Court unanimously overturned the decision by the Court of Appeal by adopting the case-by-case approach prescribed by previous judgments in this area 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 appellant did not owe the respondent a duty of care in these circumstances.

Reasoning

There were two questions that the Court answered in coming to its ruling: firstly, whether the appellant owed a duty of care to the developer and, secondly, whether the appellant owed a duty of care to the respondent independently of any duty of care to the developer.[10]

For the first question, the Court held that the developer sufficiently protected itself and was not vulnerable to the appellant's conduct. The Court pointed out that the contract between the appellant and the developer contained numerous stringent clauses holding the appellant 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.[11] Therefore, there was no duty of care.

The Court did not explicitly state that, if there was no duty of care owed by the appellant to the original owner, the developer, no duty of care should flow to a subsequent owner, the owners corporation. However, French CJ did state that "there is no reason to regard the existence, or non-existence of an anterior duty of care to a prior owner as more than an important factor relevant to the existence of a duty of care in respect of pure economic loss to a subsequent purchaser."[12]

In relation to the second question, the Court held that the appellant did not owe a duty of care to the respondent independently of its obligations to the developer. Crennan, Bell, and Keane JJ held that, as the respondent did not exist at the time the defective work was carried out, there could not have been any reliance by the respondent upon the appellant.[13] Furthermore, the Court held that the respondent did not suffer any loss because it acquired the common property without any outlay on its part.[14]

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 offered in the current case.[15]

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.[16] Rather, as stated by French CJ, the salient features of the relationship between the respondent and the appellant, including whether the appellant owed the developer a relevant duty of care, must be considered.[17] Nevertheless, the Court did draw analogies between this case and *Woolcock*.[18]

The Court also considered the Canadian case of *Winnipeg Condominium Corporation No. 36 v Bird Construction Co* [1995] 1 SCR 85 which was used by the NSW Court of Appeal to support its decision and held that it was not followed in *Bryan v Maloney* or *Woolcock* and that no other Australian authority had previously adopted it.[19]

Gageler J added that it was irrelevant that the respondent had no option but to be brought into existence as the legal owner of common property. He ruled that "it is not a function of the common law to fashion a principle of tortious liability which would confer a right to compensation exclusively on the unique statutory creation of a particular statutory scheme."[20] In obiter, His Honour also held that legal protection of subsequent purchasers was "best done by legislative extension of those statutory forms of protection."[21]

Implications

In the aftermath of this decision, the main practical outcome for practitioners acting for residential apartment owners is that practitioners will need to act diligently to assist their clients when suing builders in negligence for building defects in lot or common property. In particular, practitioners will need to carefully analyse the contracts relating to the development, construction and conveyance of apartments to determine the precise level of contractual protection afforded to the relevant parties.

Practitioners will also need to ensure that clients are informed of the application (or otherwise) of the statutory warranty regime in the ACT. That is, statutory warranties under the *Building Act 2004* do not apply to buildings over three storeys in height. Consequently, owners of apartments in larger buildings will either need to argue that their situation falls into a category where a duty of care exists, or alternatively, find some other non-tortious cause of action to rely upon. It should be noted that the larger the apartment development, the more unlikely a duty of care exists as the participants will be more likely to be larger commercial entities using sophisticated contracts. Therefore, urgent legislative reform is required to extend the application of statutory warranties to buildings which are more than three storeys in height. Otherwise, large owners corporations will very likely be without remedy against builders (subject to the paragraph which follows).

Whilst it is true that an owners corporation may apply to the ACT Government's Environment and Planning Directorate for a rectification order compelling a builder to rectify defective building works, such orders are inherently discretionary and may be appealed to the ACAT and beyond. This process of obtaining a rectification order is also time-consuming in that it currently takes years to run its course.

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Endnotes

1 See 'Feeling vulnerable or without a care?', *Ethos*, ACT Law Society, Issue 230 at pages 26-28.
2 *The Owners – Strata Plan No. 61288 v Brookfield Australia Investments Ltd* [2012] NSWSC 1219 at [90].
3 Ibid. at [91].
4 Ibid. at [94].
5 *The Owners – Strata Plan No. 61288 v Brookfield Australia Investments Ltd* [2013] NSWCA 317 at [132].
6 Ibid. at [98].
7 Ibid. at [100].
8 Ibid. at [122].
9 Ibid. at [135].
10 *Brookfield Multiplex Ltd v Owners Corporation Strata Plan 61288 & Anor* [2014] HCA 36 at [8], [141] and [146].
11 Ibid. at [132].
12 Ibid. at [28].
13 Ibid. at [150].
14 Ibid. at [150].
15 Ibid. at [136].
16 Ibid. at [135].
17 Ibid. at [30].
18 Ibid. at [35].
19 Ibid. at [160].
20 Ibid. at [172].
21 Ibid. at [186].