THE HIGH COURT DECIDES: WHEN DOES A BUILDER OWE A SUBSEQUENT OWNER A DUTY OF CARE?

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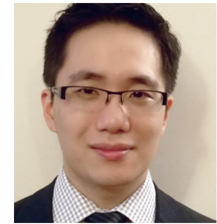

On 8 October, the High Court handed down its decision in *Brookfield Multiplex Ltd v Owners Corporation Strata Plan 61288 & Anor* [2014] HCA 36, which curtails the rights of apartment owners to sue builders in negligence. The case involved a long-running dispute between the appellant builder, Brookfield, and the respondent owners corporation with respect to building defects in the common property of a commercial building, The Mantra Chatswood Hotel, which was run as a serviced apartment business.

First instance

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 Brookfield did not owe a duty of care to the owners corporation to take reasonable care to avoid a reasonably foreseeable economic loss to the owners corporation 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 there was no reason for a tortious duty of care where Brookfield and the developer had negotiated contractual rights comprehensively (at [90]). Further, his Honour refused to identify or impose a 'novel duty of care' between Brookfield and the owners corporation (at [91]).

His Honour also stated that to rule in favour of the owners corporation 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 apply to residential building works, expressly excluded non-residential building works such as in this case (at [94]).

Court of Appeal

The NSW Court of Appeal in *The Owners – Strata Plan No. 61288 v Brookfield Australia Investments Ltd* [2013] NSWCA 317 then overturned the first instance decision but imposed a narrower duty than that argued by the owners corporation, restricting its scope to building defects that were structural, constituted a danger to persons or property or made the apartments uninhabitable (at [132]).

Basten JA held that the contract between Brookfield 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 (at [98]), meaning the developer was 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 owners corporation), may be vulnerable even where the original owner (the developer) was not (at [100]). His Honour then reasoned that the owners corporation was at least as vulnerable as the developer (at [122]). In addition, Macfarlan JA noted that the owners corporation could not protect itself because it only came into existence on registration of the strata plan (at [135]).

Snapshot

- The High Court's recent decision in *Brookfield Multiplex Ltd v Owners Corporation Strata Plan 61288 & Anor* [2014] HCA 36 has curtailed the rights of apartment owners to sue builders in negligence
- From 1 December 2014, it is anticipated that the vast majority of new apartment owners suffering lot and common property building defects will in effect have only two years to sue builders and developers due to the latest round of amendments to the *Home Building Act 1989*
- Practitioners will need to act rapidly on behalf of clients so they do not fall foul of limitation periods

High Court

The High Court unanimously overturned the decision of 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 Brookfield 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: first, whether Brookfield owed a duty of care to the developer and, second, whether Brookfield owed a duty of care to the owners corporation independently of any duty of care to the developer (at [8], [141] and [146]).

For the first question, the court held that the developer sufficiently protected itself and was not vulnerable to Brookfield's conduct. The court pointed out that the contract between Brookfield and the developer contained numerous stringent clauses holding Brookfield 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 (at [132]). Therefore, there was no duty of care.

The court did not explicitly state that, if there was no duty of care owed by Brookfield 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' (at [28]). In relation to the second question, the court held that Brookfield did not owe a duty of care to the owners corporation independently of

its obligations to the developer. Crennan, Bell, and Keane JJ 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 Brookfield (at [150]). Furthermore, the court held that the owners corporation did not suffer any loss because it acquired the common property without any outlay on its part (at [150]).

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 (at [136]).

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 (at [135]). Rather, as stated by French CJ, the salient features of the relationship between the owners corporation and Brookfield, including whether Brookfield owed the developer a relevant duty of care must be considered (at [30]). The court did draw analogies between this case and Woolcock (at [35]).

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 (at [160]).

Gageler J 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. 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' (at [172]). In obiter, His Honour also held that legal protection of subsequent purchasers was 'best done by legislative extension of those statutory forms of protection' (at [186]).

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 feasibility (or otherwise) of state and territorial government statutory warranty regimes. Unfortunately, these statutory warranty regimes tend to be more limited in scope than negligence and it appears they are becoming more and more restrictive over time. In particular, from 1 December 2014, it is anticipated that the majority of new apartment owners suffering lot and common property building defects will in effect have only two years from completion to sue builders and developers due to the latest round of amendments to the *Home Building Act 1989*. Evidently, practitioners will need to act rapidly on behalf of clients so that clients do not fall foul of limitation periods. **LSJ**

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