Brookfield Multiplex Ltd v The Owners – Strata Plan No 61288

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In a decision that will no doubt be greeted with relief by builders, the High Court of Australia has delivered its much awaited decision in ***Brookfield Multiplex Ltd v The Owners – Strata Plan No 61288*** [2014] HCA 36 and determined that there is no common law duty of care owed by a builder to the ultimate holder of common property in strata complexes or to subsequent owners of units to takes steps to prevent purely economic loss that might arise from having to repair latent defects.

Background

Brookfield Multiplex Ltd (**Brookfield**) was the principal builder for the construction of a unit complex at Chatswood which was completed in 1999. Upon completion of the building and registration of the strata plan for the complex the Owners Corporation came into existence. The units in question were commercially operated as serviced apartments available for public letting.

In 2008, after discovery of latent defects the Owners Corporation commenced proceedings against the builder claiming damages for the economic loss suffered as a result of those defects.

Supreme Court Decision

At first instance Justice McDougall was asked to determine, as a separate question, whether a builder, such as Brookfield, owed a common law duty of care to the Owners Corporation to avoid a reasonably foreseeable economic loss arising from the need to make good latent defects caused by defective design and or construction.

Justice McDougall determined[1] that no such duty of care was owed by the builder where:

+ the detailed contract between the builder and the original developer allocated risks between them and affected their common law rights. The terms of that agreement were such that the builder owed no common law duty to the developer and the rights of the Owners Corporation could rise no higher than those of the developer;
+ the duty of care sought to be invoked was "*novel*" and it was not appropriate for a judge of first instance to impose such a duty;
+ in providing residential owners with statutory warranties under the **Home Building Act 1989 (NSW)** (**HBA**), and in particular the Regulations in force under the HBA[2], Parliament had excluded from its scope, serviced apartments and the Court should not impose a duty contrary to legislative policy.

Court of Appeal Decision

Upon appeal by the Owners Corporation to the NSW Court of Appeal[3] the first instance decision of Justice McDougall was reversed.

The Court held that the builder did in fact owe a duty to exercise reasonable care to avoid causing the Owners Corporation to suffer economic loss resulting from latent defects in the common property where those defects:

+ were structural;
+ constituted a danger to persons or property; or
+ made those apartments uninhabitable.

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[1] ***Owners Corporation Strata Plan 61288 v Brookfield Multiplex*** [2012] NSWSC 1219

[2] **Home Building Regulations 1997**

[3] ***The Owners - Strata Plan No 61288 v Brookfield Australia Investments Ltd*** [2013] NSWCA 317

Consequently the Court of Appeal ordered that the matter be remitted for trial of outstanding issues.[4]

High Court Decision

In its decision delivered on 8 October 2014 the 7 members of the High Court agreed that the duty of care for which the Owners Corporation contended, and that held by the Court of Appeal to be owed, did not in fact exist.

While there are distinctions to be drawn from the separate reasons delivered by various members of the Court, each of the judgments referred with approval to the decision of the Court in ***Woolcock Street Investments v CDG***[5]. That case also involved a claim for economic loss by a subsequent purchaser arising from defective design and construction of commercial premises that was also dismissed because the requisite duty was held not to be owed and was considered to be analogous to the claim by the Owners Corporation.

As Justice McDougall had done at first instance, the members of the Court all made reference the detailed contractual arrangements between Brookfield and the developer, and concluded that the detailed terms of the contract dealt with the allocation of risk for economic loss flowing from any defective works such that the builder owned no common law duty to the developer for pure economic loss.

As was noted in the joint reasoning of Justices Crennan, Bell and Keane:[6]

> "*...the liability of* [Brookfield] *to the developer was the subject of detailed provisions relating to the risk of latent defects in* [Brookfield's] *work... To supplement them with an obligation to take reasonable care to avoid reasonably foreseeable economic loss ... in having to make good ... latent defects....would be to alter the allocation of risks effected by the parties contract.*"

Justice Gageler specifically noted that the authority of ***Bryan v Maloney***[7] should be confined to the limited class addressed in that case, namely subsequent purchasers of dwelling houses who can demonstrate by evidence that they were "*incapable of protecting themselves from the economic consequences of builders want of reasonable care*" and that outside that category of claimants it should be acknowledged that a builder has no duty in tort to avoid a subsequent owner from incurring costs of repairing latent defects.

Comment

In rejecting the existence of the duty of care for which the Owners Corporation contended the High Court has given further guidance on how "*novel*" duties of care will be assessed by Courts, particularly those said to arise in relation to pure economic loss. Parties will need to have regard to any contractual terms that are intended to allocate and limit risk and which are likely to limit the potential for new categories of duty of care to arise.

The conclusion of the Court will be welcomed by professionals operating in the construction industry and by liability insurers of those operators who will now have greater certainty that well drafted contractual terms allocating, limiting or excluding common law tort risks under contract that those terms are unlikely to be circumvented by novel claims intended to be excluded. ▪

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[4] For a more detailed discussion of the Court of Appeal judgement, please refer to page 128 of our 2013 IYIR publication: http://www.wottonkearney.com.au/wotton-kearney-insurance-year-review-2013/

[5] (2004) 216 CLR 515

[6] at paragraph 144

[7] (1995) 182 CLR 609

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