

Case Alert

Shaping the future of insurance law

Side-stepping *Brookfield* strategy fails in NSW Supreme Court

***Mistrina Pty Ltd v Australian Consulting Engineers Pty Ltd* [2020] NSWSC 130**

28 FEBRUARY 2020

AT A GLANCE

- The NSW Supreme Court's recent decision in *Mistrina Pty Ltd v Australian Consulting Engineers Pty Ltd* [2020] NSWSC 130 involved a novel indirect causation and loss of opportunity claim brought in the context of a defective building dispute.
- The primary obstacle for claimants in many defective building claims is that they do not have a direct cause of action against the building professional responsible for the defective work.
- In *Mistrina*, the plaintiffs unsuccessfully attempted to side-step that obstacle by relying solely on an indirect misleading and deceptive conduct claim at trial.
- For insurers, this case highlights that causation issues are central in determining claims based on indirect causation or framed as a loss of opportunity.
- Wotton + Kearney acted for the successful defendant.

With its recent decision in *Mistrina Pty Ltd v Australian Consulting Engineers Pty Ltd* [2020] NSWSC 130, the NSW Supreme Court highlighted the challenges faced by plaintiffs who rely on principles of indirect causation and loss of opportunity to bring defective building claims.

BACKGROUND

In this matter, the plaintiffs were the developers of a commercial and residential development in Sydney who had borrowed from a bank to fund the project. The builder was the developers' design and construct contractor. The defendant was the engineer who was retained by the builder as its subcontractor to provide a foundation design for the development.

The developers claimed that the engineer's defective foundation design caused the development to fail and led the bank to call in its loan and exercise its right to sell the development. However, there was no contract between the developers and the engineer.

The developers only made a claim against the engineer and did not sue the builder. The engineer's defence focused on a legal argument that the developers had no viable cause of action, rather than defending its foundation design based on engineering principles.

The developers initially pleaded that the engineer owed them a duty of care. The engineer denied the existence of a duty of care on the basis that the developers did not rely on the engineer.

The developers had contracted with the builder who had assumed all design and construct responsibility for the development. In doing so, the engineer relied on the High Court decision in *Brookfield Multiplex Ltd v Owners Corporation Strata Plan 61288* to resist the breach of duty claim.¹ Shortly before the trial commenced, the developers abandoned the duty of care claim.

INDIRECT CAUSATION

At trial, the developers relied solely on a claim for misleading and deceptive conduct. The challenge for the developers was that there was no direct misleading and deceptive conduct between the developers and the engineer.

Typically, in cases involving a contravention of section 52 of the *Trade Practices Act 1974* (Cth),² a plaintiff will claim to have relied on the representation of a defendant. However, this is not the only situation where a claim for misleading and deceptive conduct is available. A plaintiff can still demonstrate that conduct caused loss or damage, even if the plaintiff did not rely on the misleading or deceptive activity. This subcategory of causation is called “indirect causation”. It is commonly pleaded in passing off claims.



Causation issues are central in determining claims based on indirect causation or framed as a loss of opportunity.

The developers alleged that the relevant misleading and deceptive conduct was a certificate supplied by the engineer to the builder certifying that the foundation design complied with the Building Code of Australia and Australian Standards. While the builder relied on the certificate when it constructed the foundations in line with the engineer’s designs, the developers did not rely on that certificate.

Given that there was no direct representation made by the engineer to the developers, the developers argued indirect causation – they said that the builder relied on the certificate to construct the foundations, and that the developers in turn relied on the builder to construct adequate foundations.

The developers took it no higher than saying that they would have acted differently had they known that the foundation design was defective.

LOSS OF OPPORTUNITY

At trial the developers did not focus their claim on indirect causation. Instead, they argued that the defective foundation design caused them the loss of a commercial opportunity, which was the chance to complete the development on time and with a profit.

The central issue was whether the defective foundation design played a material role in the bank’s decision to call in the loan. The developers had the evidential onus of establishing a sufficient causal connection between the conduct complained of (defective foundation design) and the damage claimed (loss of a commercial opportunity).

The developers did not establish, with admissible evidence, a causal connection between the defective foundation design and the bank stepping in. The trial judge found that:

- there was no evidence from the developers about why the bank called in the loan – the bank could have called in the loan because of the delay and increased costs caused by the defective foundation design, or for other reasons
- the trial judge thought that bank records probably existed that might have revealed the bank’s motivation for calling in the loan, however the relevant bank records were not subpoenaed by the developers
- the evidence and the submissions from the developers went no higher than assumption and conjecture, and
- the trial judge required admissible evidence and rejected the developers’ argument that the objective background facts, along with commonsense and experience, were enough to allow the court to infer that the defective foundation design was the reason why the bank called in the loan and caused the developers to lose a commercial opportunity.

¹ The engineer contended that the “salient features” referred to in *Brookfield Multiplex Ltd v Owners Corporation Strata Plan 61288 & Anor* [2014] HCA 36 were absent in this case.

² Now section 18 of the *Australian Consumer Law* (*Competition and Consumer Act 2010* – Schedule 2).

SUMMARY

The *Mistrina* case is novel as it involved an indirect causation and loss of opportunity claim brought in the context of a defective building dispute. While the case turned on evidential issues, it highlights the challenges faced when bringing claims for defective building work in circumstances where the claimant does not have a contract or any direct dealings with the building professional.

For insurers, this case clarifies that causation issues are central in determining claims based on indirect causation or framed as a loss of opportunity. Plaintiffs need admissible evidence that the conduct complained of was causative of the loss.

However, it is worth noting the proposed statutory duty of care set out in the *Design and Building Practitioners Bill* (NSW) 2019 will make it easier for subsequent purchasers and non-contracting parties to bring claims against building professionals. That statutory duty of care is expected to become law later this year.

Wotton + Kearney will continue to provide updates on further developments.

NEED TO KNOW MORE?

For more information please contact us.



Adam Chylek

Partner, Sydney

T: +61 2 8273 9940

E: adam.chylek@wottonkearney.com.au



Robert Finnigan

Special Counsel, Sydney

T: +61 2 8273 9850

E: robert.finnigan@wottonkearney.com.au

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