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HIGH COURT CLARIFIES DUTIES TO SUBSEQUENT PURCHASERS – BROOKFIELD MULTIPLEX V OWNERS CORPORATION

The duty of care owed by a builder to subsequent purchasers of a building has long been a source of contention. In a decision handed down on 8 October 2014, the High Court in *Brookfield Multiplex Limited v Owners Corporation Strata Plan 61288& Anor* [2014] HCA 36 found that a builder of a commercial building does not owe a duty of care beyond the duty defined in the contract. This is good news for builders and their insurers but perhaps not great news for purchasers of apartments. It shows the determination of the current High Court to confine the scope of duty of care. In its unanimous decision, the High Court overturned the NSW Court of Appeal's unanimous decision.. The High Court has clarified any perceived inconsistency between in its previous decisions on this issue.

DECISION IN BRIEF

The facts concern a conventional commercial apartment development. Brookfield built the apartments pursuant to a design and construction contract with the developer, Chelsea Apartments Pty Ltd. The contract price was just over $57 million. The contract between Brookfield and Chelsea contained the usual detailed provisions relating to the quality of services and remedies for default. Most significantly, Brookfield's liability ceased on completion of the defects liability period.

Chelsea sold the apartments to individual purchasers. As usual, there was an owners corporation that was responsible for managing the common property. Latent defects arose. The purchasers had rights against the developer in relation to the repair of those defects. The cost of those repairs **were not** the subject matter of this proceeding. Rather, the common property had defects. The owners corporation responsible for the common property, repaired those defects then sued Brookfield for the cost of those repairs. The owners corporation argued that Brookfield should be liable in negligence for a breach of duty to take reasonable care in construction of the apartments to avoid a reasonably foreseeable economic loss to the owners corporation in having to rectify these defects.

PREVIOUS RELEVANT HIGH COURT DECISIONS

In what is clearly now a "*high watermark*" decision, the High Court in *Bryan v Maloney [1995] HCA 17* found that the builder of a domestic dwelling, assumed responsibility for the construction and the subsequent purchaser relied on that. As such, the subsequent purchaser was owed a duty of care by the builder and had an effective remedy against the builder. Builders could be sued many, many years after construction.

However, in *Woolcock Street Investments Pty Ltd v CDG Pty Ltd* [2004] HCA 16, the High Court found that in relation to a commercial building, a subsequent purchaser was not owed a duty by the builder as it had the capacity to protect itself against economic loss.

In simple terms, the Court's distinction is that commercial entities are big and ugly enough to look after themselves, whereas, individual property owners generally are not.

RECONCILING *BRYAN* AND *WOOLCOCK*

This case concerned an apartment complex which is an amalgam of the two positions. Whilst the developer is a commercial entity, the end purchasers of the apartments are often individuals acquiring a property for residential purposes. Nevertheless, the High Court has found that Brookfield and Chelsea defined its obligations in the commercial contract and, in effect, this contract "*covered the field*". There was no entitlement of any subsequent purchaser to infer a duty beyond the contract between Chelsea and Brookfield. As such, the claim for the cost of repairs of the common property failed, because Brookfield did not owe a duty of care to the current owner of the common property.

There are four separate decisions of the seven justices of the High Court. The four decisions reach the same conclusion via different routes. Three judges considered that the vulnerability of the subsequent purchaser was decisive. However those judges considered that the subsequent purchasers in this instance were not vulnerable as they were able to protect themselves.

The other four judges focused on the contract between Chelsea and Brookfield. They were less concerned with the vulnerability of the subsequent purchaser, nor did they make any clear distinction between domestic dwellings and commercial buildings. Perhaps the take home quotation is from the decision of Crennan, Bell and Keane JJ which states:

> "*To impose upon a defendant builder greater liability to a disappointed purchaser than to the party for whom the building was made and by whom the defendant was paid for its work would reduce the common law to incoherence*."

In short, the terms of a contract between a builder and developer will be paramount where the respective rights and obligations of the contracting parties are comprehensive. The risk of latent defects can be transferred to the developer and, in this case, was successfully done. In practical terms, it means that developers and subsequent purchasers need to either take the risk of latent defects, or purchase insurance to cover those potential problems. It is possible that this reasoning could be applied to a matter involving a domestic dwelling in certain circumstances.

This is good news for the construction industry. Builders can now close off jobs at the end of the defects liability period, with some confidence that long tail liabilities will not come back to bite them in the future. Just make sure that the contract is clear, because the contract is king.

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