High Court Rules No Duty of Care for Builders

The landmark decision could have far-reaching implications for builders, developers, body corporates and owners

The High Court has ruled that builders of an apartment complex were not liable to an owners corporation for building defects later found in the property's common areas. The decision referred to the matter of Brookfield Multiplex Limited v Owners Corporation Strata Plan 61288 [2014] HCA 36.

The High Court overruled the Court of Appeal's finding that Brookfield did owe a duty of care to avoid loss resulting from latent defects.

The case concerned a 22-storey apartment complex built under a D & C contract between the appellant, Brookfield Multiplex, and property developer Chelsea Apartments.

Following the building's completion, the Owners Corporation discovered a number of defects in the common property and in 2012 commenced legal action in the Supreme Court of NSW against the builder in a bid to recover damages, including the cost of repairs.

The Owners Corporation claimed that Brookfield had breached a duty under the common law to take reasonable care to avoid reasonably foreseeable economic loss to the Owners Corporation in relation to defects caused by the building's defective design or construction or both.

Justice McDougall initially held that Brookfield did not owe a duty of care to the Owners Corporation, finding that the owners had not established that Brookfield owed and had breached a duty of care under the common law.

The Court reasoned that as the builder and developer had entered into a carefully negotiated agreement, it was not considered that the builder owed an additional duty of care and that consequently no such duty of care was therefore owed to a successor in title, such as the Owners Corporation.

Decision overturned on appeal

The NSW Court of Appeal later overturned Justice McDougall's decision on the basis the owner was in a sufficiently vulnerable position to the builder so as to warrant a duty of care - albeit a narrower duty to avoid causing loss resulting from latent defects which were structural and dangerous or which made the serviced apartments uninhabitable.

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Brookfield challenged the finding of the Court of Appeal and sought special leave to appeal to the High Court. Under the standard form contract for sale entered into between Chelsea and the subsequent owners, the Owners Corporation was entitled to notify Chelsea of any defects in the property caused by faulty workmanship or materials for a period of seven months after the date of registration of the strata plan. Upon receipt of such notification Chelsea was required to rectify the defects at its own expense.

However, the defects were only discovered five years after the registration of the strata plans.

Brookfield argued that the parties had negotiated detailed provisions in their D & C contract dealing with defects and limiting liability and that the contract of sale for the apartments conferred specific rights against the developer only in relation to defects for a specified period.

High Court finds against owners corporation

In a unanimous decision handed down on 8 October, the High Court found that in these circumstances the seminal case of Bryan v Maloney (1995) 182 CLR 609, which recognised the potential vulnerability of owners for defects in a domestic home and held that a builder did owe a duty of care to subsequent owners, did not apply here.

The Court made the distinction that in Bryan v Maloney the prior owner had placed reliance upon the builder, whereas the same duty did not extend to purchasers of commercial properties, particularly in circumstances where the parties have had the opportunity to protect their interests against defective work when negotiating contracts.

It also noted that provisions contained in the contract relating to the defects liability period and Chelsea's entitlement to superintendence over the construction demonstrates that Chelsea was not vulnerable to Brookfield and not reliant upon it.

Edward Hock of Moray and Agnew Lawyers said it should be noted that in circumstances where a prior owner can prove reliance upon the builder, and the subsequent purchaser was in a position of vulnerability, the principle in Bryan v Maloney continues to apply and a builder may owe a duty of care to the subsequent purchaser in that situation.

"The High Court's decision essentially undermines that a builder does not owe a subsequent purchaser a duty of care for latent defects," Mr Hock said. "However, the decision is predicated upon the basis that there is a level protection provided in the contracts for purchase. The High Court declined to offer the protection of a common law duty of care for what it said amounted to a failure by the purchasers to negotiate a suitable bargain."

Take action

While there has been some relation of the commencement date of the home-building amendments, owners corporations may wish to consider the following measures in order to preserve existing rights:

- Engage experts to carry out a building defect audit to ensure that any latent defects, such as fire and life-safety system defects are identified.
- Commence proceedings for breach of statutory warranty to preserve the existing six-year statutory warranty rights for building defect claims and to avoid a court or a tribunal having regard to the principle that rectification of defective work by the responsible party is the preferred outcome as opposed to awarding damages.
- Lodge any home warranty insurance claims where a builder has become insolvent, died or disappeared to preserve existing rights under the policy of insurance, and consider whether the home warranty insurance policy contains other applicable triggers for claims such as the builder becoming unlicensed.
- Give consideration to entering into any rectification building work contracts being negotiated with a builder as a priority.
- Check that independent experts such as architects, surveyors and engineers have professional indemnity insurance and that the terms of their engagement do not unreasonably limit their liability.
- Make a home warranty insurance claim if the builder has 'disappeared' interstate, as under the new definition a builder has to have left Australia. Note: the amendment will not affect home warranty insurance claims that are made prior to the legislative amendment being proclaimed.

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