YELDHAM PRICE O'BRIEN LUSK

CHAN V ACRES [2015] NSWSC 1885

Summary

In the wake of *Brookfield*[1], this case revisits the issue of what makes a plaintiff sufficiently vulnerable to the acts or omissions by a defendant for a court to impose a duty of care to avoid causing the plaintiff economic loss. It is clear from this case that the court must look at all the salient features of the relationship between the parties, with a focus on vulnerability, before it can determine if such a duty exists. In this case, the existence of known reliance by the plaintiff and the assumption of responsibility by the defendant were key features on which the court relied to impose such a duty.

The case

On 11 December 2015 the Supreme Court of NSW (McDougall J) awarded damages against the Ku-ring-gai Council (**Council**) to a couple who had purchased a house which was later discovered to have been defectively renovated. The Council was found to have owed a duty of care to the Plaintiffs to avoid economic loss in circumstances where the Plaintiffs were relevantly vulnerable to the actions of the Council. Whilst the owner/builder was found to have breached his statutory warranties to the Plaintiffs, the court found that he should be fully indemnified by the Council.

The Plaintiffs purchased a house from the First Defendant (**Mr Acres**). Mr Acres was an owner/builder who carried out significant renovations to the property shortly before it was sold to the Plaintiffs. Mr Acres retained the Third Defendant (**MHE**) to prepare structural drawings and to carry out inspections of the structural work from time to time. Mr Acres also engaged the Council as Principal Certifying Authority (**PCA**) for the purposes of the *Environmental Planning and Assessment Act* 1979 (NSW) and regulations.

The defective building work primarily related to the waterproofing of wet areas and the extension at the rear of the house which had numerous defects (to the point it was at risk of collapse and was unsafe for use). Notably, the defects included structural failings which were not visible after construction.

The Plaintiffs sued Mr Acres for breach of statutory warranties set out in s18B of the *Home Building Act* 1989 (NSW). The case against Mr Acres was uncontroversial - the statutory warranties applied, the defects were proved and, as such, breach was made good.

The real issue in the case was whether a common law duty of care existed which made MHE and/or the Council responsible for all or some of the economic loss suffered by the Plaintiffs. McDougall J provided a detailed and thorough analysis of the legal principles and case law in the wake of Brookfield. Whilst the issue will always be determined on the particular facts of a case, the analysis by McDougall J provides a very useful guide on the topic.

It was found that MHE did not owe the Plaintiffs a duty of care to avoid economic loss (and even if it had, the breach was not causative of the loss). In forming this view, McDougall J gave weight to the following features of the relationship between MHE and the Plaintiffs:

- the Plaintiffs had the benefit of a statutory scheme for certification by a PCA, statutory warranties by Mr Acres and a written contract between the Plaintiffs and Mr Acres with an express obligation on Mr Acres to make good a particular defect;

[1] *Brookfield Multiplex Ltd v Owners Corporation Strata Plan 61288 and another* [2014] HCA 36. A short summary of this case is set out at the end of this document.

- MHE provided limited professional services to Mr Acres which were the preparation of structural drawings and an inspection of the works from time to time in response to specific requests from Mr Acres. It did not undertake any general obligation of supervision, it was not retained to supervise the execution of, and certify the sufficiency of, the works undertaken by Mr Acres;
- MHE had no real control over the works or the contractors (MHE were not in a position to stop or direct the work);
- whilst the risk of loss to the plaintiffs was foreseeable if MHE did not perform its duties properly, foresee ability of damage is insufficient of itself to justify the imposition of a duty of care to prevent economic loss;
- the plaintiffs gave no evidence of assumption of responsibility by MHE or actual reliance on anything done or omitted to be done by MHE. The plaintiffs did not appear even to have considered whether Mr Acres retained an engineer, let alone any work done by an engineer.

By contrast, it was found the Council did owe the Plaintiffs a duty of care to avoid economic loss on the basis that the relationship between the Council and the Plaintiff was 'distinctly different' to the relationship with MHE. McDougall J relied on the following features of the relationship between the Council and the Plaintiffs which made the Plaintiffs relevantly vulnerable:

- the statutory scheme under which the Council performed its functions as PCA imputed the Council had actual knowledge of reliance by purchasers and that the Council assumed responsibility towards purchasers;
- it was reasonable for purchasers to rely on the Council to discharge its functions properly because of its independence and the statutory scheme under which it acted;
- it was not reasonably practicable for the Plaintiffs to undertake the kind of testing that would be necessary to uncover the defects that the Council should have, but failed to, identify. It was a feature of the inspections by the certifier (and understood by the certifier) that they were carried out at a particular point in time because otherwise the work to be inspected would be covered up. One of the functions of the inspections was to ensure that work was done satisfactorily so as to lead to the issue of a final occupation certificate;
- the Plaintiffs did look at the occupation certificate and did draw comfort from it. The occupation certificate certified that (contrary to the fact) the work done my Mr Acres was fit for occupation and use as a dwelling house;
- there was both the expectation of reliance (the certifier knew that prospective purchasers would rely on the occupation certificate) and actual reliance. The Council assumed responsibility for certifying accurately;
- it was unlikely 'in the extreme' that invasive or destructing testing would be undertaken to verify the state of affairs certified by the final occupation certificate;
- it was reasonably foreseeable the Plaintiffs would suffer loss if the Council carried out its inspections negligently. The Council was well placed to know of the possible consequences of negligent inspection and certification;
- the finding of a duty of care did not give rise to the 'floodgates' argument or disproportionate liability.

The Council was found to have breached its duty based on the certifier's evidence (which showed 'a wholesale dereliction of duty' and 'such gross disparity with the exercise of reasonable care'). The breach was found to have caused the loss (as the certifier had authority to control the works, require the correction of defects or stop the works).

Mr Acres cross-claimed against MHE and the Council. The court found Mr Acres did not act in any way unreasonably and had no real culpability (his liability was imposed by statute). He was fully indemnified for any liability.

Conclusion

This case (and preceding authorities) make it clear that the question of whether a defendant owes a plaintiff a duty of care to prevent the plaintiff suffering economic loss depends on whether the plaintiff is relevantly vulnerable to the defendant's acts or omissions. This does not only mean the plaintiff is susceptible to harm as a result of the defendant's acts or omissions but also (and importantly) that the plaintiff is reasonably unable to take steps to protect itself from that risk of harm. Whether or not a person is vulnerable requires a close examination of all the relevant features of the relationship between a plaintiff and defendant – and this is where the authorities will often differ and be difficult to reconcile (which is why the analysis by McDougall J in this case is so useful).

In this case, vulnerability arose due to the reliance by the Plaintiffs on the certification requirements imposed by statute on the Council (which was known by Council) and the assumed responsibility by the Council of undertaking those inspections and to issue an occupation certificate. The statutory scheme and the role of the Council as PCA are distinguishing features of this case. It cannot be assumed that all cases involving some form of known reliance and assumed responsibility will have the same result. However, it is probably safe to conclude that any PCA who issues an occupation certificate will be likely to owe a subsequent purchaser a duty of care to avoid economic loss.

Post Script

The case is under appeal to the New South Wales Court of Appeal. We understand that one issue on appeal will be the anterior duty as between Mr Acres and the Council. That is, whether Mr Acres was owed a duty of care by the Council to avoid economic loss, whether Mr Acres was vulnerable to the acts of the Council, and whether the contract between Mr Acres and the Council placed any obligations on Mr Acres which were not considered by McDougall J.

Brookfield Multiplex Ltd v Owners Corporation Strata Plan 61288 and another [2014] HCA 36

On 8 October 2014 the High Court handed down its decision in *Brookfield* which unanimously dismissed an action by an Owners Corporation against a builder for recovery of economic loss arising from defective building work to commercial premises. This decision, together with recent amendments to the *Home Building Act* 1989 (NSW), has narrowed the legal avenues available to subsequent property owners to recover losses for defective work.

The Court endorsed the case-by-case approach adopted in previous judgments (including *Bryan v Maloney*[2] and *Woolcock Street Investments*[3]), that is, that in each case it is the salient features of the relationship between the parties that must be considered. The Court held that, on the facts of this case, the builder did not owe the Owners Corporation a duty of care. The reasoning included the following:

- the developer (with whom Brookfield was contracted to do the building works) had sufficiently protected itself and was not vulnerable to Brookfield's conduct. The contract contained numerous clauses requiring Brookfield to rectify defects. The Court held that if it were to supplement the contractual provisions with a duty of care, it would inappropriately alter the allocation of risk agreed by the parties to the contract;
- Brookfield did not owe the Owners Corporation a duty independently of its obligations to the developer. Crennan, Bell and Keane JJ held that, given 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;
- the Owners Corporation did not suffer any loss because it acquired the common property without any outlay on its part;

[2] (1995) 182 CLR 609

[3] *Woolcock Street Investments Pty Ltd v CDG Pty Ltd* (2004) 216 CLR 515

- legal protection of subsequent purchasers was 'best done by legislative extension of those statutory forms of protection'.

March 2016

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