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HIGH COURT OF AUSTRALIA DELIVERS JUDGMENT IN *BROOKFIELD MULTIPLEX LTD V OWNERS CORPORATION STRATA PLAN 61288 & ANOR*

The long wait to find out whether a builder of strata-titled apartments owed a duty of care to the owners corporation to avoid causing it to suffer economic loss due to latent defects in the common property is over. The High Court of Australia has unanimously decided that the answer is no.

The Facts

Brookfield Multiplex Ltd ("Builder") constructed serviced apartments in New South Wales (NSW) as part of a commercial agreement between Chelsea Apartments Pty Ltd ("Developer") and various companies in the Stockland Group (Stockland).

In accordance with a Deed of Master Services Agreement between the Developer and Stockland, the Developer agreed to design and construct a high-rise, mixed use development on land owned by the Developer which would consist of two major components: a serviced apartment complex on floors one to nine, and residential apartments from floors 10 to 22. The Developer agreed that it would lease all of the serviced apartments to a subsidiary of Stockland, Park Hotel Management Pty Ltd (Park Hotel), which apartments would then be sold to individual purchasers (subject to the leases granted to Park Hotel) and operated collectively by Park Hotel as serviced apartments.[1] Under the Deed of Master Services Agreement, the Developer provided detailed warranties to Stockland regarding the quality of the building work.

The development, including the serviced apartments, was subsequently constructed by the Builder pursuant to a design and construct contract between the Builder and the Developer. The contract contained detailed provisions regarding the quality of services to be provided by the Builder, the performance and superintendence of the work, the provision of certain warranties from the Builder to the Developer, and requirements for the Builder to remedy defects and omissions in the work within a defined defects liability period. Further, the contract contemplated the sale of the apartments by the Developer to individual investors, and annexed a standard form contract of sale which included provisions regulating the quality of work and obliged the Developer to repair defects or faults in the common property brought to their attention within a specified period.

The respondent to the High Court appeal was the owners corporation for the serviced apartments ("Owners Corporation") (there exists a separate owners corporation for the residential apartments on the higher levels).

The Owners Corporation was created by statute upon registration of the strata plan by the Builder,[2] at which time the common property in the serviced apartments was vested in it.[3] Several years following construction, the Owners Corporation alleged that the Builder's work was defective, and that there were many latent defects in the common property which required rectification.

The Owners Corporation commenced proceedings against the Builder in the Supreme Court of NSW to recover damages, including the cost of rectifying the latent defects. Because of the purpose for which the common property was developed and used (as serviced apartments available for public letting), the Owners Corporation did not have the benefit of the statutory warranties under section 18B of the Home Building Act 1989 (NSW) and therefore relied on a duty of care at common law. The cause of action was based on the Builder's breach of duty to "take reasonable care to avoid a reasonable foreseeable economic loss in the Owner's Corporation in having to make good the consequences of latent defects caused by the building's defective design and/or construction." The primary judge held that the Builder did not owe the Owner's Corporation the duty of care alleged; however, this was overturned on appeal to the Court of Appeal of the Supreme Court of NSW.

1 [2014] HCA 36 at [1] and [13] per French CJ; [70]-[74] per Crennan, Bell and Keane JJ.

2 Strata Schemes Management Act 1996 (NSW), s 8(1).

3 Strata Schemes (Freehold Development) Act 1973 (NSW), s 18.

The High Court Judgment

The High Court held that the Builder did not owe the duty of care alleged by the Owners Corporation or found by the Court of Appeal. The reasoning employed by the various judges to reach this conclusion was not uniform and will be analysed by us in a more detailed article later. What is clear from their Honours' judgments though is that:

- Where there is a detailed contract between a developer and a builder which sets out the builder's obligations and liability to the developer with respect to defective work, there is no scope for imposing an additional duty of care in tort upon the builder to the developer to take reasonable care to avoid a reasonably foreseeable economic loss to the developer in having to make good the consequences of latent defects.
- Similarly, the builder would not independently owe a duty of care to an owners corporation (which acts as the "agent" of subsequent purchasers, and which does not have the direct benefit of the building contract between the developer and the builder) in circumstances where the purchasers entered into contracts of sale with the developer which gave the purchasers' rights to have defects rectified in specified circumstances. This has special implication for subsequent purchasers of residential properties outside of NSW, where the statutory protection provided under section 18B of the Home Building Act 1989 (NSW) is not available. Of course, in NSW such purchasers not only have the rights under the contract of sale, but also the statutory protection of section 18B.

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