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Builders' liability to Owners Corporations: the recent High Court decision

by Alec Bombell

1. Introduction

On Wednesday 8 October 2014, in *Brookfield Multiplex Ltd v Owners Corporation Strata Plan 61288*[1] (*Brookfield*) the High Court held that a builder of a strata-titled serviced apartment building did not owe a duty of care to the Owners Corporation to take reasonable care to avoid purely economic loss arising from latent defects in the building's construction. The builder was therefore not liable in negligence to the Owners Corporation.

This e-brief provides a summary of the High Court decision and the stakeholder reaction to it. It also explores the possible relationship between the decision and the amendments to the *Home Building Act 1989* which are about to come into force.

2. Factual Background

The proceedings in *Brookfield* concerned a 22 storey building in Chatswood. Floors one to nine were serviced apartments, and floors 10 to 22 were residential apartments. The proceedings related to only the serviced apartments on floors one to nine. The Owners Corporation of the residential units on floors 10 to 22 was initially part of the proceedings, but settled its claim against the builder.

The building was constructed by Brookfield Multiplex Ltd (the builder), pursuant to a "design and construct" contract with Chelsea Apartments Pty Ltd (the developer), the initial owner of the land.

The "design and construct" contract required the builder to construct the building in general accordance with detailed plans and specifications for a set contract price. It also incorporated detailed provisions regulating the performance of the work by the builder, and provided for the developer to appoint a superintendent to supervise the builder's work and raise any issues during construction.

The building was completed and a strata plan was registered, creating the Owners Corporation.[2] Initially, the developer owned all the units or "lots" in the strata scheme on floors one to nine. The units were leased to a company to be operated as serviced apartments. The developer then sold the units one by one to investors under standard form contracts. These investors then owned the serviced apartments, subject to the leases to the company which operated the apartments.[3] The sales to investors were made pursuant to standard form contracts.[4]

3. The NSW Supreme Court and Court of Appeal Decisions

The Owners Corporation commenced proceedings in the Supreme Court of NSW against Brookfield in 2008 to recover the cost of rectifying alleged "latent defects"[5] in the construction of the common property of the building.[6] The action was based on the tort of negligence. It alleged that the builder owed it a duty:

> to take reasonable care to avoid a reasonably foreseeable economic loss to the [Owners Corporation] in having to make good the consequences of latent defects caused by the building's defective design and/or construction.[7]

The Owners Corporation claimed that this duty had been breached, identifying several defects in construction of the common property. It claimed that, as a consequence, it had suffered loss and damage, including the cost of rectifying the defects and the loss in value of the building.[8] The claim was therefore for "pure economic loss", in that the defects in question were not alleged to have caused any actual damage to persons or property.[9]

The negligence claim based on pure economic loss was the only recourse available to the Owners Corporation against the builder. It was common ground at the trial that the Owners Corporation could not rely on the statutory warranties under Part 2C of the *Home Building Act 1989* with respect to "residential building work" to claim relief from the builder.[10] This was because the serviced apartments were not covered by that statutory regime which only applies to "residential building work", and excludes certain commercial uses (such as motels, hotels and hostels).[11] Further, the Owners Corporation also could not sue the builder under the "design and construct" contract, because the Owners Corporation was not a party to that contract.[12]

The Trial Judge held that the builder did not owe the Owners Corporation the duty of care alleged.[13] The Owners Corporation appealed to the NSW Court of Appeal. The Court of Appeal overturned the Trial Judge's decision and held that:

> the [builder] owed the [Owners Corporation] a duty to exercise reasonable care in the construction of the building to avoid causing the [Owners Corporation] to suffer loss resulting from latent defects in the common property vested in the [Owners Corporation], which defects were (a) structural, or (b) constituted a danger to persons or property in, or in the vicinity of, the serviced apartments, or (c) made those apartments uninhabitable.[14]

The builder appealed to the High Court.

4. The High Court’s Reasoning

The High Court held unanimously, over four separate judgments, that the builder did not owe the duty of care alleged by the Owners Corporation, overturning the decision of the NSW Court of Appeal.

A critical element in the decision is that the Court was asked to find a duty of care to avoid “pure economic loss”, as discussed above. [**3**]

The duty of care to avoid the pure economic loss alleged by the Owners Corporation could have arisen in two ways:

1. Where the builder owed an equivalent duty of care to the original owner (the developer) who on-sold the units to the individual owners making up the Owners Corporation;[15] and/or
2. Where the builder could be said to have owed a duty to avoid pure economic loss arising from latent defects *directly to* the Owners Corporation, irrespective of the relationship between the builder and the developer.[16]

The protection provided by the law of negligence from unintentionally inflicted economic loss has only been recognised since the 1960s.[17] Generally speaking, it is through the law of contract that the common law protects the interest of a party in having its contractual expectations met; the failure of a purchaser to receive the benefit of its bargain is traditionally the core concern of contract law, not the tort of negligence.[18] The role played by the law of negligence in this context, with the recognition of a duty of care to avoid pure economic loss, has generally been restricted to those special circumstances not covered by contract or statutory law.[19] Findings of duties to avoid pure economic loss have been made sparingly by the courts, wary of “opening the floodgates” of litigation.

As the High Court noted in *Brookfield*, the special circumstances necessary to establish the existence of such a duty of care usually require some level of “vulnerability” in the plaintiff to economic loss caused by the defendant. Vulnerability, in this sense, means the plaintiff’s incapacity or limited capacity to take steps to protect itself from economic loss arising from the defendant’s conduct.[20]

The High Court held that the developer (the original owner) was not vulnerable to the builder with respect to latent defects caused by inadequate construction. This was because of the detailed contractual provisions between the builder and developer which, essentially, indicated that the developer was more than able to protect itself from economic loss arising from latent defects in construction.[21]

Further, the High Court held that the individual owners of the units purchased from the developer (making up, together, the Owners Corporation) were not “vulnerable” to the economic loss caused by the builder’s inadequate construction of the building.[22] According to the High Court, the individual owners *were* able to take steps to protect themselves from economic loss caused by latent defects in the building, namely through the terms in the contracts they entered into with the developer when purchasing the units.[23]

The sale contracts gave the purchasers the right to require the developer to repair (at its expense) any defects or faults in the building due to faulty materials or workmanship within certain time periods.[24] As Justices Crennan, Bell and Keane stated in their joint judgment:

> [E]ach purchaser from the developer exercised its contractual wisdom to bargain for protection against the risk of defects in the work. Purchasers of units in the serviced apartment complex from the developer, and the [Owners Corporation], were protected by the developer's promises in cll 32.6 and 32.7 of the sales contracts against the risk of economic loss because of defects of quality. It is true that these provisions did not protect purchasers or the [Owners Corporation] against the possibilities that the developer would not be of sufficient substance to meet the liability or that any defect would not be discovered within time to make a claim under the warranty. But as to these possibilities, the [builder] had nothing to do with the purchaser's decision to accept the value of the developer's warranty or with the decision by the purchaser not to investigate for defects. Had a purchaser not been satisfied that its investment was adequately protected in this way, it could have avoided the risk of loss by taking its capital and investing elsewhere.[25]

As such, because both the developer and the individual owners who purchased the units were able to protect themselves contractually against economic loss arising from latent defects, the necessary element of vulnerability did not exist.[26] Accordingly, the High Court could not uphold a finding that a duty of care of the kind asserted was owed by the builder to the Owners Corporation, using either of the approaches outlined above.

Part of the underlying rationale of the High Court's decision was that, in the given circumstances, it was not appropriate to use the law of negligence to alter or add to the bargain struck by the various parties in their respective contracts. Justices Crennan, Bell and Keane stated that:

> The common law has not developed with a view to altering the allocation of economic risks between parties to a contract by supplementing or supplanting the terms of the contract by duties imposed by the law of tort.[27]

Further, their honours suggested that to the extent this was desirable, as a matter of policy, it would be better addressed by the Parliament, not the courts:

> By enacting the scheme of statutory warranties [under part 2C of the *Home Building Act 1989*], the legislature adopted a policy of consumer protection for those who acquire buildings as dwellings. To observe that the *Home Building Act* does not cover claims by purchasers of serviced apartments is not to assert that the Act contains an implied denial of the duty [of care asserted by the Owners Corporation]. Rather, it is to recognise that the legislature has made a policy choice to differentiate between consumers and investors in favour of the former. That is not the kind of policy choice with which courts responsible for the incremental development of the common law are familiar… [28]

Justice Gaegler went further than the other judges when considering whether the duty of care should be imposed. He considered a duty of the nature suggested by the Owners Corporation (between a builder and a subsequent owner) should only ever be found where the building is a dwelling house and where the subsequent owner falls within a class of

persons incapable of protecting themselves from the consequences of the builder's want of reasonable care:[29]

> Outside that category of case, it should now be acknowledged that a builder has no duty in tort to exercise reasonable care, in the execution of building work, to avoid a subsequent owner incurring the costs of repairing latent defects in the building. That is because, by virtue of the freedom they have to choose the price and non-price terms on which they are prepared to contract to purchase, there is no reason to consider that subsequent owners cannot ordinarily be expected to be able to protect themselves against incurring economic loss of that nature.[30]

The other six justices of the High Court confined their reasoning to the facts of the case at hand.

5. Stakeholder and Opposition reaction

Groups representing the interests of owners of strata title units have called on the NSW Government to take action to protect owners who fall outside the warranty and insurance provisions of the *Home Building Act 1989*. Owners Corporation Network chairman and strata lawyer, Stephen Goddard, was reported as stating that about 85% of new buildings contained defects, and that the High Court's reasoning, whilst sound, underlined the need for additional statutory protections for consumers.[31]

Kate Clarke, Special Counsel of Landers & Rogers Lawyers, emphasised that the majority of the High Court:

> did not make a blanket ruling that builders do not owe a duty of care in tort to subsequent owners of property to avoid causing the pure economic loss. The majority did, however, emphasise that the ability of subsequent purchasers to protect themselves from the consequences of a builder's lack of reasonable care will be a very important, if not determinative, factor in deciding whether such a duty of care exists.[32]

Without distinguishing between commercial and residential unit owners, Leighton O'Brien and William Coote of Allens Linklaters take a more pessimistic view. They emphasise the difficulty of mounting claims in negligence for defects in construction where the parties involved have corresponding contractual arrangements:

> The case very much confirms the thread of common law…that where the plaintiff owner is party to a contract (even if it is with the defendant builder) it cannot be vulnerable and cannot therefore sue the builder in negligence. Unless and until the High Court recategorises damages for defects as not being pure economic loss, defects claims in negligence have no future.
>
> The immediate implication from the High Court's decision is the fact that it will be very difficult, if not impossible, for subsequent owners of buildings to bring actions against builders outside of any direct contractual right. This implies that the risks for builders, particularly where the construction is for strata complexes, will be limited in large part only to their agreement with the developer. The rights of subsequent owners will be limited to those under their contractual agreement with the previous owner. It should be noted, however, that the decision does not affect any statutory rights or obligations that may be available to plaintiffs (eg those that exist under the *Home Building Act 1989* (NSW)).[33]

Other legal experts and commentators, such as Colin Grace, the solicitor who acted for the Owners Corporation in *Brookfield*, and Jimmy Thomson, Sydney Morning Herald (Domain) "Flat Chat" Columnist, have also expressed concern about the impact of the High Court decision on consumer rights when the decision is combined with the impact of amendments to the *Home Building Act 1989* set to commence in December 2014.[34]

These concerns have been echoed by the Shadow Minister for Fair Trade, Tania Mihailuk MP, who stated in a media release the day after the decision was published:

> In light of the High Court decision … the Government should not be proceeding with this change of laws that will further erode home owners and owner corporations' [sic] ability to seek redress.
>
> The NSW opposition does not want homeowners trapped in costly disputes and out of pocket expenses over defective work to their home because of shoddy workmanship.[35]

Comments of this nature call for analysis of the relationship, if any, between the amendments and the High Court's decision in *Brookfield*.[36]

6. Upcoming amendments to the Home Building Act 1989

The *Home Building Amendment Act 2014 No. 24* will (inter alia) amend the definitions used to determine whether a claim under the statutory warranty provisions of the *Home Building Act 1989* in respect of certain defects must be brought within two or six years from completion of the relevant work.[37]

Part 2C of the *Home Building Act 1989* implies a series of warranties into contracts for "residential building work" (this includes, broadly speaking, contracts to build residential flats, townhouses, houses, etc.).[38] For instance, one of the current warranties implied is that the work will be performed in a proper and workmanlike manner and in accordance with the plans and specifications set out in the contract.[39]

In a situation where a developer-owner of land contracts with a builder to construct a residential flat building, and the developer then sells the units to individual owners, those individual owners, as the immediate successors in title to the developer-owner, are also covered by the statutory warranty provisions of the *Home Building Act 1989* and are given the same statutory rights against the builder as provided to the developer-owner.[40]

Under section 18E of the Act, proceedings claiming under a statutory warranty must be commenced before the end of the warranty period for the breach.[41] Currently, the Act provides that the warranty period is six years for a breach that results in a "**structural defect**" (as defined in the regulations) or two years in any other case.[42]

Therefore the question of whether a claim must be brought within two or six years currently depends upon the classification of the particular defect as a "**structural defect**".

Clause 71(1) of the Home Building Regulation 2004 defines "**structural defect**" as:

any defect in a structural element of a building that is attributable to defective design, defective or faulty workmanship or defective materials (or any combination of these) and that:

(a) results in, or is likely to result in, the building or any part of the building being required by or under any law to be closed or prohibited from being used; or

(b) prevents, or is likely to prevent, the continued practical use of the building or any part of the building; or

(c) results in, or is likely to result in:

i. the destruction of the building or any part of the building; or

ii. physical damage to the building or any part of the building, or

(d) results in, or is likely to result in, a threat of imminent collapse that may reasonably be considered to cause destruction of the building or physical damage to the building or any part of the building.

Clause 71(2) of the *Home Building Act 1989*, defines "**structural element of a building**" as:

(a) any internal or external load-bearing component of the building that is essential to the stability of the building or any part of it, including things such as foundations, floors, walls, roofs, columns and beams; and

(b) any component (including weatherproofing) that forms part of the external walls or roof of the building.

Upon commencement, the *Home Building Amendment Act 2014 No. 24* will replace "**structural defect**" with the concept of a "**major defect**" in residential building work as the determining factor for the length of the warranty period.[43] That is, the amended section 18E(1)(b) will provide that "the warranty period is six years for a breach that results in a **major defect** in residential building work or two years in any other case".

"**Major defect**" is defined as:

(a) a defect in a major element of a building that is attributable to defective design, defective or faulty workmanship, defective materials, or a failure to comply with the structural performance requirements of the National Construction Code (or any combination of these), and that causes, or is likely to cause:

i. the inability to inhabit or use the building (or part of the building) for its intended purpose; or

ii. the destruction of the building or any part of the building; or

(b) a defect of the kind that is prescribed by the regulations as a major defect.

"**Major element of a building**" is defined as:

(a) an internal or external load-bearing component of a building that is essential to the stability of the building, or any part of it (including but not limited to foundations and footings, floors, walls, roofs, columns and beams); or

(b) a fire safety system; or

(c) waterproofing; or

(d) any other element that is prescribed by the regulations as a major element of a building.

During the second reading speech debate on the Home Building Amendment Bill 2014 in the Legislative Assembly in May 2014, it was suggested by the Shadow Minister for Fair Trading that these changes to the definitions would lead to an increase in the types of situations where claimants would face a tighter time limit on commencing proceedings under statutory warranties – from six years down to two years.[44] It is in this context that stakeholders have now raised concerns with the combined effect of the amendments and the decision in *Brookfield.*[45]

According to the Shadow Minister, one issue created by the amendments is that, whereas previously a "structural defect" included a defect that results or is likely to result in "physical damage" to a building, the new definition of "major defect" does not.[46] Subject to the regulations (which are still being developed), a "major defect" will be limited to the situations where a defect in a major element of the building causes, or is likely to cause, an inability to inhabit or use the building (or part of the building) for its intended purpose, or the destruction of the building or any part of the building. Any claims for defects causing physical damage but that fall short of this new definition, it is suggested, will need to be brought within two years as opposed to six years once the amendments take effect.

The question remains how this relates to the *Brookfield* decision. The suggestion may be that the amendments will lead to more residential unit owners having to bring claims outside the statutory warranty provisions of the *Home Building Act 1989* (if fewer defects will be covered by a six-year warranty[47]). The further suggestion would seem to be that such owners would be in a similar position as the owners of the serviced apartments in *Brookfield* (whose apartments fell outside the ambit of the statutory warranties in the Act, as explained above). The upshot would be that, in some cases, residential dwelling owners would need to fall back on an action in negligence for pure economic loss against the builder.

However, it is not immediately apparent that the changes to the definitions used to determine the warranty period ("structural defect" to "major defect") will, in practice, lead to more residential home owners losing the protection of the *Home Building Act 1989*. A key concern seems to focus on the omission of the words "physical damage" from the new definition. The precise legal effect of this change will depend both on the developing case law and on the regulations which are currently being prepared and may flesh out the scope of the amended warranty provisions.

If the amendments do lead to more residential unit owners losing protection under the *Home Building Act 1989* statutory warranties, the High Court decision in *Brookfield* emphasises that where no actual loss or damage has been caused, it is difficult for plaintiffs to successfully mount an action for pure economic loss in negligence against a builder. However, it must be borne in mind that High Court in *Brookfield* (with the exception of Justice Gaegler) ruled only whether a duty of care to avoid pure economic loss existed in the particular circumstances and between the parties involved in that case. They were not considering, nor did they purport to rule on, a duty of care alleged to be owed to an owners corporation comprised of owners

of residential apartments, who have lost the protection of the *Home Building Act 1989*.[48]

Ultimately, residential unit owners' chances of success would depend on how the factor of vulnerability would be considered by a court in the context of the specific circumstances of their case. This issue may be hard enough to resolve where an owners corporation is comprised solely of residential owners; it may be more difficult still in respect of owners corporations for mixed use strata schemes comprising owners of residential and commercial units.

7. Government responses

In response to the stakeholder and opposition comments, Fair Trading Minister Matthew Mason-Cox MLC reportedly stated that:

> [The changes to the *Home Building Act 1989*] would not limit the rights of apartment owners to seek redress for faults.
>
> …
>
> NSW Fair Trading has received more than 80 submissions in response to the draft regulation that will support the provisions coming into effect later this year.
>
> We will carefully consider these submissions and potential implications of the High Court decision, before the regulation is finalised.[49]

During question time in the Legislative Council on 16 October 2014, Ernest Wong, Labor MLC, asked the Minister for Fair Trading whether the proposed amendments to the *Home Building Act 1989* would be wound back in light of the *Brookfield* decision. The Minister responded as follows:

> If one looks at the statutory and contractual issues [in the *Brookfield* decision], including the High Court judgments and the dicta therein, one will see that I cannot ascertain at this point in time anything that relates to the Home Building Act. As I said, I am getting detailed legal advice in that regard because naturally I would be very concerned if there was an implication of the Home Building Act. When we are dealing with the Home Building Act we must be cognisant of the fact that changes have recently been brought in that change the definition of "structural defects" into two very precise definitions of major and minor defect. There has been a lot of concern raised by some stakeholders in relation to how "major defect" is defined.
>
> …
>
> The regulations are being settled as we speak, which will help to clarify that issue. I think that some of the stakeholders in this area need to be conscious of the detail on this issue and not try to simplify or conflate issues because they happen to be contemporaneous. There are significant differences in how these provisions apply. Commercial relationships are different to the Home Building Act, which provides protections to people who buy their home as well as people who buy a home in a strata unit complex.

8. Conclusion

The High Court decision in *Brookfield* suggests that, where owners are not covered by or have lost the protection of the *Home Building Act 1989*, actions against a builder in negligence for pure economic loss may be difficult to run successfully, depending on the interpretation of the factor of vulnerability. Legal experts have expressed differing views on the implications of the decision, some even suggesting that "defect claims in negligence have no future" when there is a relevant contract.[50]

Further, some commentators have expressed concerns about the combined impact of the decision in *Brookfield* and amendments to the *Home Building Act 1989*. Whether or not this is in fact the case warrants closer analysis. The Minister for Fair Trading has indicated consideration will be given to any relevant implications of the *Brookfield* decision during the formulation of the relevant regulations to accompany the amendments to the *Home Building Act 1989*.

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[1] [2014] HCA 36.

[2] *Brookfield Multiplex Ltd v Owners Corporation Strata Plan 61288* [2014] HCA 36 at [44]. The residential apartments on levels 10 to 22 were under a second, separate strata plan and Owners Corporation to the Owners Corporation that brought the proceedings.

[3] *Brookfield Multiplex Ltd v Owners Corporation Strata Plan 61288* [2014] HCA 36 at [72].

[4] *Brookfield Multiplex Ltd v Owners Corporation Strata Plan 61288* [2014] HCA 36 at [86]-[89].

[5] "Latent defects" being described by the Trial Judge as defects that are not readily detectable by any reasonable process of inspection – in this case, the defects alleged were failure to comply with the specifications with respect to the steel lintels and windows, defective external render, unsuitable coatings for certain surfaces, and water leaks from a spa (see *Owners Corporation Strata Plan 61288 v Brookfield Multiplex* [2012] NSWSC 1219 at [65] – [71] and *Brookfield Multiplex Ltd v Owners Corporation Strata Plan 61288* [2014] HCA 36 at [96]).

[6] *Brookfield Multiplex Ltd v Owners Corporation Strata Plan 61288* [2014] HCA 36 at [95].

[7] *Owners Corporation Strata Plan 61288 v Brookfield Multiplex* [2012] NSWSC 1219 at [18].

[8] *Brookfield Multiplex Ltd v Owners Corporation Strata Plan 61288* [2014] HCA 36 at [38].

[9] Justices Crennan, Bell and Keane at [67] illustrated the distinction citing by citing Lord Justice Stanley Burnton in *Robinson v P E Jones (Contractors) Ltd* [2012] QB 44 at p. 64-65: "[T]he crucial distinction is between a person who supplies something which is defective and a person who supplies something (whether a builder, goods or a service) which, because of its defects, causes loss or damage to something else". In the former case, the law of negligence considers the cost of repairing the defects to be "pure economic loss". In the latter case, where the defects have given rise to actual damage to persons or property, the law of negligence will consider the damage as the loss, not the cost of repairing it.

[10] *Owners Corporation Strata Plan 61288 v Brookfield Multiplex* [2012] NSWSC 1219 at [8]. The residential apartments on levels 10 to 22 were covered by the statutory warranties under the *Home Building Act 1989*, and the Owners Corporation with respect to those apartments was able to settle its dispute with the builder.

[11] See Brookfield Multiplex Ltd v Owners Corporation Strata Plan 61288 & Anor [2014] HCATrans 126 (18 June 2014). The relevant legislation is section 3 of the *Home Building Act 1989* (definitions of "residential building work" and "dwelling") and clause 6 of the Home Building Regulation 2004.

[12] *Owners Corporation Strata Plan 61288 v Brookfield Multiplex* [2012] NSWSC 1219 at [9].

[13] *Owners Corporation Strata Plan 61288 v Brookfield Multiplex* [2012] NSWSC 1219 at [190].

[14] *The Owners – Strata Plan No. 62188 v Brookfield Australia Investments Ltd* (2013) 85 NSWLR 479; [2013] NSWCA 317 at [132].

[15] In line with principles discussed by the High Court in *Brian v Maloney* (1995) 182 CLR 609; [1995] HCA 17 and *Woolcock Street Investments v CDG Pty Ltd* (2004) 216 CLR 515; [2004] HCA 16.

[16] *Brookfield Multiplex Ltd v Owners Corporation Strata Plan 61288* [2014] HCA 46 at [8] (French CJ).

[17] *Brookfield Multiplex Ltd v Owners Corporation Strata Plan 61288* [2014] HCA 46 at [122] (Crennan, Bell and Keane JJ, referring to *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465). Torts other than negligence did protect against economic loss before then, but only where the defendant intentionally inflicted harm on the plaintiff by conduct that was unlawful for reasons other than that it was likely to cause economic loss (at [122]).

[18] *Brookfield Multiplex Ltd v Owners Corporation Strata Plan 61288* [2014] HCA 46 at [121] (Crennan, Bell and Keane JJ).

[19] *Brookfield Multiplex Ltd v Owners Corporation Strata Plan 61288* [2014] HCA 46 at [22] (French CJ); [122] (Crennan, Bell and Keane JJ).

[20] *Brookfield Multiplex Ltd v Owners Corporation Strata Plan 61288* [2014] HCA 36 at [22] (French CJ); [128]-[130] (Crennan, Bell and Keane JJ).

[21] *Brookfield Multiplex Ltd v Owners Corporation Strata Plan 61288* [2014] HCA 46 at [33] (French CJ); [55] (Hayne and Kiefel JJ); [141]-[145] (Crennan, Bell and Keane JJ).

[22] See variously: *Brookfield Multiplex Ltd v Owners Corporation Strata Plan 61288* [2014] HCA 46 at [34]-[36] (French CJ); [55] and [58] (Hayne and Kiefel JJ); [140] and [148]-[155] (Crennan, Bell and Keane JJ); [186] (Gaegler J).

[23] Ibid.

[24] *Brookfield Multiplex Ltd v Owners Corporation Strata Plan 61288* [2014] HCA 36 at [86]-[89].

[25] *Brookfield Multiplex Ltd v Owners Corporation Strata Plan 61288* [2014] HCA 36 at [140].

[26] See variously: *Brookfield Multiplex Ltd v Owners Corporation Strata Plan 61288* [2014] HCA 46 at [34]-[36] (French CJ); [55] and [58] (Hayne and Kiefel JJ); [140] and [148]-[155] (Crennan, Bell and Keane JJ); [186] (Gaegler J).

[27] *Brookfield Multiplex Ltd v Owners Corporation Strata Plan 61288* [2014] HCA 46 at [132].

[28] *Brookfield Multiplex Ltd v Owners Corporation Strata Plan 61288* [2014] HCA 46 at [134].

[29] This was the position in *Brian v Maloney* (1995) 182 CLR 609; [1995] HCA 17, as interpreted in *Woolcock Street Investments v CDG Pty Ltd* (2004) 216 CLR 515; [2004] HCA 16. Gaegler J accepted the interpretation on *Bryan v Maloney* in the *Woolcock* decision by McHugh J.

[30] *Brookfield Multiplex Ltd v Owners Corporation Strata Plan 61288* [2014] HCA 46 at [185].

[31] Sydney Morning Herald, "High Court decision bad news for apartment owners", 9 October 2014, accessed online on 10 October 2014.

[32] Kate Clark, "High Court rules builder does not owe duty to prevent pure economic loss to owners corporation", 8 October 2014, accessed online on 10 October 2014.

[33] Leighton O'Brien, William Coote, "Focus: the window closes – no vulnerability where a contract exists", Allens Linklaters, 20 October 2014, accessed online on 21 October 2014.

[34] Sydney Morning Herald (Domain), "Apartment owners left with no protection", 9 October 2014, accessed online on 10 October 2014; Sydney Morning Herald, "Government urged to act after court ruling hits apartment owners", 10 October 2014, accessed online on 10 October 2014.

[35] Tania Mihailuk MP, Shadow Minister for Fair Trading, "Liberal Government must protect homeowners from shoddy construction", media release, 9 October 2014.

[36] Sydney Morning Herald (Domain), "Apartment owners left with no protection", 9 October 2014, accessed online on 10 October 2014; Sydney Morning Herald, "Government urged to act after court ruling hits apartment owners", 10 October 2014, accessed online on 10 October 2014.

[37] *Home Building Amendment Act 2014 No. 24* Schedule 1 [28]-[29].

[38] "Residential building work" is currently defined as:

> any work involved in, or involved in co-ordinating or supervising any work involved in:
>
> (a) the construction of a dwelling; or
>
> (b) the making of alterations or additions to a dwelling; or
>
> (c) the repairing, renovation, decoration, or protective treatment of a dwelling.
>
> It includes work declared by the regulations to be roof plumbing work or specialist work done in connection with a dwelling and work concerned in installing a prescribed fixture or

apparatus in a dwelling (or in adding to, altering or repairing any such installation). It does not include work that is declared by the regulations to be excluded from this definition.[38]

"Dwelling" is currently defined as:

> a building or portion of a building that is designed, constructed or adapted for use as a dwelling (such as a detached or semi-detached house, transportable house, terrace or town house, duplex, villa-home, strata or company title home unit or residential flat).
>
> It includes any swimming pool or spa constructed for use in conjunction with a dwelling and such additional structures and improvements as are declared by the regulations to form part of a dwelling.
>
> It does not include buildings or portions of buildings declared by the regulations to be excluded from this definition.

Note that these definitions will be amended when the *Home Building Amendment Act 2014* commences.

[39] Section 18B of the *Home Building Act 1989*. Note that this particular warranty will be amended by the *Home Building Amendment Act 2014* when it commences, and will then read "will be *done with due care and skill* and in accordance with the plans and specifications set out in the contract" (emphasis added).

[40] Section 18D of the *Home Building Act 1989*.

[41] Section 18E(1)(a) of the *Home Building Act 1989*.

[42] Section 18E(1)(b) of the *Home Building Act 1989*.

[43] Schedule 1 [28] of the *Home Building Amendment Act 2014*.

[44] Tania Mihailuk MP, Shadow Minister for Fair Trading, *NSWPD* 14 May 2014, page 28784.

[45] Sydney Morning Herald, above n36.

[46] Tania Mihailuk MP, Shadow Minister for Fair Trading, *NSWPD* 14 May 2014, page 28784; Tania Mihailuk MP, Shadow Minister for Fair Trading, "Liberal Government must protect homeowners from shoddy construction", media release, 9 October 2014; Sydney Morning Herald, "Government urged to act after court ruling hits apartment owners", 10 October 2014, accessed online on 10 October 2014.

[47] Tania Mihailuk MP, Shadow Minister for Fair Trading, *NSWPD* 14 May 2014, page 28784.

[48] Justice Gaegler considered that the duty of care to avoid economic loss ought only cover situations where the building is a dwelling house and where the subsequent owner falls within a class of persons incapable of protecting themselves from the consequences of the builder's want of reasonable care.

[49] Sydney Morning Herald, "Government urged to act after court ruling hits apartment owners", 10 October 2014, accessed online on 10 October 2014.

[50] Leighton O'Brien, William Coote, "Focus: the window closes – no vulnerability where a contract exists", Allens Linklaters, 20 October 2014, accessed online on 21 October 2014.

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