

“Riddled with Structural Defects”: Certifier Liability



Summary

The Supreme Court of NSW recently found that Ku-ring-gai Council (the “**Council**”) as the principal certifying authority (“**PCA**”) who issued a certificate that authorised the use and occupation of a dwelling “riddled with structural defects” breached a duty of care it owed to the subsequent owners of that dwelling. The Court found that the subsequent owners relied on the Council as the PCA and were sufficiently vulnerable to the conduct of the Council. The Council breached its duty of care to the subsequent owners and accordingly, was liable in damages.

This case has potentially significant ramifications on the liability of certifiers in building defects claims involving owners corporations and other subsequent owners. Those involved in current or potential building defects cases should seek legal advice in relation to the potential liability of the PCA who certified their building.

However it should also be noted that each case turns upon its own particular facts and circumstances. It is also yet to be seen whether the decision is appealed (and if so, whether it will be overturned on appeal).

Facts

The first defendant (“**Acres**”) was an owner–builder who constructed a dwelling in Wahroonga. Acres engaged a number of contractors and professionals to assist in the construction of the dwelling. One of those professionals was the third defendant (“**MHE**”) who was engaged as a structural engineer to prepare certain structural drawings and to carry out inspections of the structural work as requested from time to time: [4].

Acres engaged the Council as the PCA to carry out critical stage inspections and certify the building works.

The plaintiffs purchased the dwelling knowing of some defects in the construction (discovered by way of a pre-purchase report) but after moving into the property discovered some serious structural and other defects: [7].

The plaintiffs commenced proceedings against:

- Acres for breach of the statutory warranties under section 18B of the Home Building Act 1989;
- MHE for breach of a common law duty of care alleged to be owed by it in respect of inspections of elements of the structural work; and
- the Council for breach of its alleged common law duty of care and statutory duties in its role as PCA in respect of inspections it carried out and the issuance of the final occupation certificate: [8].

Finding by the Court

The Court found that MHE did not owe the plaintiffs a duty of care: [255]. The plaintiffs did not demonstrate that they had relied on

anything done or omitted to be done by MHE. MHE were engaged to provide limited professional services to Acres in the form of certain structural drawings and the inspection of works only in response to requests by Acres: [210]. Even in the event that such a duty could be found to be owed and breached, the Court found that factual causation was proven in relation to the action: [324]

The Court, however, did find that the Council owed the plaintiffs a duty of care in its role as the PCA. The Court considered that it would have been clear to the Council that the negligent performance of its functions as PCA could well injure the economic interests of subsequent purchasers: [364]. In particular, it was reasonable for purchasers (including the plaintiffs) to rely on the Council to properly discharge its functions based on the independence of the Council, the statutory scheme pursuant to which it acted and because it was not reasonably practicable for the purchasers to undertake the kind of testing that would be necessary to uncover the defects that the Council should have picked up, but did not: [350].

The Court held that the Council breached its duty of care when it carried out its inspections negligently, failed to detect non-compliant work and as a result wrongly certified that a building “riddled with structural defects” was fit for use and occupation as a dwelling house: [365].

Implications

A recent decision of the High Court of Australia in Brookfield Multiplex Ltd v Owners Corporation Strata Plan 61288 [2014] HCA 36 determined that the builder (in that case) did not owe a duty of care to the owners corporation of the building to take reasonable care to avoid the existence of defects in common property. Further, recent amendments to the Home Building Act 1989 are widely considered to have reduced the consumer protection mechanisms afforded by that legislation. It is in that context that this decision may be welcomed by plaintiffs to building defect litigation given that it highlights another potential avenue for subsequent owners seeking compensation for defects in their property.



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