31 March 2016

The Owners – Strata Plan No 74602 v Brookfield Australia Investments Ltd

Case note

Chambers Russell LAWYERS

In December 2015, the Supreme Court of New South Wales handed down its decision in respect of a claim brought by an owners corporation, The Owners – Strata Plan No 74602 ("**Plaintiff**"), against Brookfield Australia Investments Limited, the first defendant ("**Builder**"), and the Builder's façade sub-contractor, G James Glass & Aluminium Pty Limited, the fourth defendant ("**Sub-contractor**"), being the two active defendants in the proceedings, for breaches of the statutory warranties under section 18B of the Home Building Act 1989 (NSW) ("**HBA**"), breach of contract, and breach of duty of care at common law (negligence).

Background

The Plaintiff was the registered proprietor of the common property in a strata scheme which forms part of a residential development known as "Beau Monde" in North Sydney ("**Strata Scheme**"). The Strata Scheme was built by the Builder pursuant to a design and construct contract ("**Contract**") made between it and the developer, Eastmark Holdings Pty Ltd (which was, at the time of the proceedings, subject to a deed of company arrangement). The Sub-contractor designed and constructed certain elements of the facade of the building, pursuant to a sub-contract agreement ("**Sub-contract**") with the Builder. The building works achieved practical completion in accordance with the Contract on or about 21 March 2005, on which date an interim occupation certificate was issued. The Plaintiff claimed the building was affected by various defects and commenced the proceedings on 8 March 2012.

Findings of the Court

Negligence

The Court applied the reasoning of the High Court in *Brookfield Multiplex Ltd v Owners – Strata Plan No 61288* [2014] HCA 36 ("**Brookfield**") in holding that no duty of care was owed by the Builder and Sub-contractor to the owners corporation as the owners corporation was not "vulnerable" to the risk of economic loss arising from the Builder's or Subcontractor's breach of the alleged duty of care, being a central factor in establishing the existence of a duty of care in cases of pure economic loss.

The Court held that the Plaintiff's position could not meaningfully be distinguished from that of the Plaintiff in Brookfield, even though in this case the development was for residential (rather than investment) purposes. The Court also took the view that the fact that the Plaintiff had the benefit of the statutory warranties under the HBA made this "an even stronger case than Brookfield for denying the existence of a duty of care", in the process distinguishing the decision of the Victorian Court of Appeal in *Moorabool Shire Council v Taitapanui* [2006] VSCA 30, where the Court of Appeal had said that the Victorian equivalent of the HBA warranties should not be taken to "displace the common law as it should otherwise apply".

Builder's Liability under the HBA

The Court however held that the Builder owed the Plaintiff the statutory warranties imposed under section 18B of the HBA and had breached those warranties in certain respects. In respect of many of these issues the Builder had already agreed it was liable, in certain terms, prior to the matter being heard by the Court.

The most significant of the claims brought by the Plaintiff was in relation to water ingress through the window assemblies which comprise the façade. The Court rejected the Plaintiff's arguments that this defect was systemic throughout the building, or that it resulted from a failure to comply with the specifications for preparation of the design, resulting in a very substantial reduction of the Plaintiff's claim for damages. This element of the claim was decided primarily on evidentiary grounds.

Sub-contractor liability under the HBA

Section 18D (1A) of the HBA was introduced as part of a series of amendments aimed at closing certain perceived "loop holes" resulting from the manner in which the HBA traced liability through contractual arrangements. One of those "loop holes" permitted builders to avoid liability to subsequent owners of land under the HBA if the builder had not entered into the building contract with the land owner, but instead had entered a contract with a third party with no interest in the land. The HBA only granted a subsequent owner of land the same rights against the builder as the previous owner of the land, so if that previous owner had no rights against the builder (because they had not contracted with the builder) then neither would the subsequent owner.

The insertion into the HBA of section 18D (1A) and a related definition of a "non-contracting owner" sought to close this loop hole, by effectively providing that, if a builder contracted to do work on land, the "non-contracting" owner of the land still had rights against the builder. This then allowed for the rights of that "non-contracting owner" to be passed on to the subsequent owners of the land by the HBA.

However the definition of which "contracts" the amendment applies to is broad enough, on its face, to encompass any contract to do work on the land (that is, not just the head building contract but also sub-contracts underneath it). On that basis, the Plaintiffs argued that the HBA granted them rights against the Sub-contractor.

However the Court rejected the Plaintiff's argument, taking the view that the definition of "contract" for these purposes, although broad on its terms, should be read as being limited only to a head building contract. The Court formed this view on the basis of its perception of the intention of the relevant amendments to the HBA as being specifically to close the "loop hole" mentioned above. The Court stated that the Plaintiff's view would produce the "dramatic" result that a successor in title could pursue "not only the builder that contracted with the developer, but the builder's sub-contractors, the sub-contractor's sub-contractors and so on".

The judge also found that section 18C of the HBA was not of any assistance in establishing a liability of the Sub-contractor to the Plaintiff as the section merely concerned the developer's liability to the Plaintiff. His Honour also found the term "successor-in-title" in the section refers to a successor-in-title to the land as opposed to the works, an argument the Plaintiff had put in the alternative.

Even if the claim against the Sub-contractor was established by the Plaintiff, his Honour found that the claim had been brought out of time.

Implications

The Court's decision, if it is to be followed, will act as a bar to claims by successors in title against sub-contractors for breach of the statutory warranties under the HBA.

The case also tends to confirm that the High Court's decision in Brookfield is broad enough to prevent a claim in negligence by an owners corporation of a residential strata scheme against the builder and their sub-contractors for defects, and may in fact take it further, suggesting that a claim in negligence cannot arise in any case where the Plaintiff has (or had) the benefit of the statutory warranties under the HBA.

Daniel Russell
Partner
drussell@chambersrussell.com.au

Haz Zainal-Grote
Lawyer
hgrote@chambersrussell.com.au