IN THE HIGH COURT OF AUSTRALIA
SYDNEY OFFICE OF THE REGISTRY

No S66 of 2014

Between

Brookfield Multiplex Ltd
(ACN 008 687 063)
Appellant

and

Owners Corporation Strata Plan 61288
First Respondent

Multiplex Corporate Agency Pty Ltd
Second Respondent

APPELLANT'S REPLY

Part I - Certification for publication

1 We certify that this reply is in a form suitable for publication on the internet.

Part II - Reply to the first respondent's submissions ("RS")

2 *Re RS [4]:* The first respondent's characterisation of the issue makes a large assumption as to the existence of the "duty of care imposed for the benefit of third parties" as there referred to. In the present case the contractual matrix has the result that no duty of care arises in the first place: see the Appellant's Submissions ("**AS**") at [27].

3 *Re RS [9]:* The First Respondent's reference is to a passage in which McDougall J was recording the party's submissions. The admission made by the appellant and McDougall J's findings in relation to latency can be found at SC [67]-[71] (**AB 1479**).

4 *Re RS [12]:* The appellant agrees with the final sentence of this paragraph.

5 *Re RS [13]:* The CA's decision did effect a radical change. It did so because it skewed the relationship between contract and tort in a manner which significantly diminished the role of contract. It treats the contract between the appellant and Chelsea as of only minor

Filed on behalf of the Appellant
ADDRESS FOR SERVICE
Gilbert + Tobin
Level 37, 2 Park St
Sydney NSW 2000

Date of Filing:
Tel (02) 9263 4059
Fax (02) 9263 4111
DX 10348 SSE
Ref Emanuel Confos

significance when that agreement was the source of, and defined the ambit of, the obligations of the appellant.

6 *Re RS [16]:* The approach taken by the CA in its use of salient features in a situation where there are also contractual provisions relating to liability significantly diminished the relevance of the contract and its provisions.

7 *Re RS [19]:* The only part of the cited paragraphs from *Barclay v Penberthy* of present relevance is the last sentence of [47]. That sentence does not go beyond a general statement that the presence or absence of a contractual claim will not be determinative. It does not follow that the contract is not very relevant.

8 *Re RS [20]:* The issue in *Astley* was the inverse of the present case. The statement in the penultimate sentence of RS [20] is not correct and cannot be found in *Astley* at [46]-[48]. Those paragraphs turn on the historical basis for the implication by law of a term of reasonable care into contracts for professional services. The present contract is not in that category.

9 *Re RS [21]: Rafuse* goes too far in favour of tort rather than contract, but is in any event distinguishable as a solicitors' professional negligence case. In *Bryan v Maloney* it was recognised that the contents of a contract may militate against recognition of a duty of care[1]. *Voli* is a case in a different category, being a claim for personal injury, not pure economic loss. But even there it can be seen that the builder who constructed the stage that collapsed was not liable to third parties because his contract confined his obligation to constructing in accordance with the architect's plans[2]. The standard of work cannot be divorced from the terms of the contract[3].

10 *Re RS [25]:* The first respondent refers to *Woolcock* at [28-30] but omits [31] which establishes the centrality of contractual terms to assessment of vulnerability.

11 *Re RS [28]:* The first respondent's submission misses the central point, being that the developer protected itself by express contractual provisions.

---

[1] (1995) 182 CLR 609 at 621 (point 2 on the page)
[2] (1963) 110 CLR 74 at 81 (point 5 on the page)
[3] *Woolcock Street Investments v CDG* (2004) 216 CLR 515 at 554 [100]; *Zumpano v Montagnese* [1997] 2 VR 525 at 533 per Brooking JA

12 *Re RS [29]:* Builders have never been recognised by the law as being in the same position as these established categories of professional persons[4]. Almost inevitably building work will be done pursuant to a series of contracts. A contract with a builder is not a recognised category of contract in which there is implied by law a term of reasonable care.

13 *Re RS [33]:* The decisions of the Singapore Court of Appeal are not analogous. The case of *RSP Architects v Management Corporation* referred to involved an architect, not a builder. The earlier decision in *RSP Architects Planners & Engineers v Ocean Front Pty Ltd*[5] involved a developer, not a builder. The court found that the management corporation was the "*alter ego*" of the developer and that the parties had a relationship "*as close as it could be short of actual privity*"[6]. The reasoning in both cases reflects an approach which Australia has moved away from for almost 30 years[7].

14 *Re RS [34]-[36]:* The CA's need to restrain the ambit of liability in the way that it did provide some indication that the underlying nature of duty is doubtful.

15 *Re RS [38]-[41]:* The approach taken by the Court in *Woolcock* should not be departed from. The contract between the original parties defines the task and the consequences of non-performance in accordance with that contract. See paragraph [9] above and AS [27] and [36].

16 *Re AS [42] – [50]:* The first respondent does not appear to have responded to the contentions made by the appellant in AS [42]-[50].

---

[4] *Robinson v P.E. Jones Contractors* [2012] QB 44 at 61 [75]-[76]
[5] [1996] 1 SLR 113
[6] [1996] 1 SLR 113 at 140F and 142A
[7] Since *Sutherland Shire Council v Heyman* (1985) 157 CLR 424

Dated: 27 May 2014

D.F. Jackson QC
T: (02) 8224 3009
F: (02) 9233 1850
jacksonqc@sevenwentworth.com.au

T.J. Breakspear
T: (02) 9376 0677
F: (02) 9101 9332
tim.breakspear@banco.net.au