IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S66 of 2014

BETWEEN:

BROOKFIELD MULTIPLEX LTD
Appellant

and

OWNERS CORPORATION STRATA PLAN 61288
First Respondent

MULTIPLEX CORPORATE AGENCY PTY LTD
Second Respondent

RESPONDENT'S SUBMISSIONS

Part I: Certification for Publication

1 We certify that the First Respondent's submissions are in a form suitable for publication on the internet.

Part II: Issues the Respondent Contends the Appeal Presents

2 The First Respondent ("**the Owners Corporation**") is the owners corporation of a strata title development at Chatswood in Sydney, NSW. The apartment complex, of which the development forms part, was constructed by the Appellant ("**Brookfield**") pursuant to a design and construct contract made with the developer of the complex, Chelsea Apartments Pty Ltd ("**Chelsea**"). In those circumstances, whether:

(a) Brookfield, as builder, owed the Owners Corporation a duty to take reasonable care to avoid 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 or construction; and

(b) if so, that duty is limited to defects that were either structural or constituted a danger to persons or property in, or in the vicinity of, the apartments.

3 Whether, having regard to the reasoning in *Woolcock Street Investments Pty Ltd v CDG Pty Ltd* (2004) 216 CLR 515 at [14], and in particular the Court's finding as the duty of care established in *Bryan v Maloney* (1995) 182 CLR 609:

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(a) the existence there can be no finding of a duty of care between Brookfield and the Owners Corporation, unless there is a finding of a equivalent duty owed by the Brookfield to Chelsea, the original developer; and

(b) If so, whether Brookfield did we Chelsea such a duty of care.

4 Whether the parties to a contract (in the present case Chelsea and Brookfield) could by entering into a complex building arrangement, effectively bargained away the existence of a duty of care imposed for the benefit of third parties (in this case the Owners Corporation).

Part III: Sec 78B *Judiciary Act 1903* Notice Not Required

5 The First Respondent considers that notice pursuant to sec 78B of the Judiciary Act 1903 is not required in this case.

Part IV: Contested Material Facts or Chronology Otherwise Relevant

6 Pursuant to clause 65 of the D&C Contract, as identified in [12] of Part V of the Appellant's Submissions, **(AB vol 2, 685(45))**, Brookfield was obliged to register the strata plan, which by section 11 of the *Strata Schemes Management Act* 1996 (**SSMA**) and sec 18 of the *Strata Schemes (Freehold Development) Act* 1973 (**SSFDA**) brought the Owners Corporation into existence.

7 From the moment of its coming into existence, the Owners Corporation was the registered proprietor of the common property in the apartment complex, and was immediately liable for the administration of the common property in it (per sec 61 of the SSMA) and carried an absolute liability and immediate to rectify any defects found in it (per sec 62 of the SSMA): see *Ridis v Strata Plan 10308* (2005) 63 NSWLR 449, per Hodgson JA at [5], *Seiwa Pty Ltd v Owners Strata Plan 35042* [2006] NSWSC 1157 (6 November 2006) per Brereton J at [5], and *Stolfa v Owners Strata Plan 4366* [2010] NSWSC 1507.

8 By their nature, the latent defects are defects that were not known and could not be known before they manifest.

9 The defects in these proceedings are "*latent defects and were not susceptible or discoverable on reasonable examination (either by the Owners Corporation, which of course had no opportunity to accept or reject the vesting in it of the common*

property, of by subsequent purchasers of the lots)", see para [26-27] of the McDougall J judgment (**AB, v4, 1467(40-50)**).

Part V: Legislation

10 The Owners Corporation agrees that Brookfield has correctly identified the relevant statutory provisions. There are no constitutional provisions arising in this case.

11 In addition to the statutory provisions to which Brookfield refers, section 7(2) of the *Strata Titles Act 1973* (now the *Strata Schemes (Freehold Management) Act 1973*) which provides for the subdivision of land and the creation of common property by registration of a strata plan should also be included.

Part VI: The Respondent's Statement of Argument

12 The basis of McDougall J's reasoning at first instance, viz that the legislative enactment of consumer protection in the *Home Building Act 1989* negated the existence of a duty of care at common law for other building work, to which that Act did not apply, see [102-103] at AB v4, 1492 (10-30), was, with respect, correctly rejected by the NSW Court of Appeal (**CA**): [101-106] (AB 1547-1549) and is not been pressed by the Appellant to justify the rejection of the duty of care contended for by the Owners Corporation. Accordingly, the duty of care issues in the present case fall to be determined by reference to the general law principles pertaining to the duty of care to avoid economic loss.

13 The CA's decision on the duty of care issue was not a '*significant development*' of the law relating to negligent liability for defective building work. It was not even a '*radical change*' to the law, see Leeming JA in CA [146], AB v4, 1563. Properly construed, the CA merely applied conventional principles, involved in the 'salient features' approach adopting by analogy the reasoning in *Bryan v Maloney* (1995) 182 CLR 609, taking into account the further analysis required by *Woolcock Street Investments Pty Ltd v CDG Pty Ltd* (2004) 216 CLR 515. The CA's approach in determining the duty of care issue, was consistent with the approach taken in other cases at intermediate appellate level: *Moorabool Shire Council v Taitapanui* (2006) 14 VR 55 and *Apache Energy Ltd v Alcoa of Australia Ltd* (No 2) [2013] WASCA 213.

14 The CA's findings followed the recognition of a builder's liability for latent defects in building work made in other cases, such as *Pullen v Gutteridge Haskins and Davey* [1993] 1 VR 27 (where the Victorian Court of Appeal recognised the existence of a duty of care to avoid similar economic loss to a building owner, in circumstances where the relationship was one that featured work undertaken for a sophisticated owner under a building contract.) and *Bryan v Maloney* (1995) 182 CLR 609 (which involved a similar duty and a similar type of damage.

15 The High Court's move away from the notion of proximity as the "*conceptual determinant*" of a duty of care in *Woolcock Street* did not negate *Bryan v Maloney* as having established that a builder owes a duty of care to a successor in title, in the position of the Owners Corporation. The fact that *Bryan* used the language of 'proximity' does not mean that viewed from the prism of "*vulnerability*" that there was no duty of care: see *Woolcock Street* at [24].

16 The CA's use of the salient features approach in the present case is consistent with the approach to duty of care issues since *Sullivan v Moody* (2001) 207 CLR 562 and was consistent with the approach advocated by this Court in *Woolcock Street,* as correctly and conveniently summarized by Allsop P in *Caltex Refineries (Qld) Pty Ltd v Stavar* (2009) 75 NSWLR 649 at [102-103].

17 The premise of Brookfield's argument is acceptance of the proposition arising from para [14] of *Woolcock Street,* namely that the reasoning in *Bryan* meant that the finding of a duty of care to the successor in title depended upon the anterior step of finding duty of care to the original owner (the developer). The Owners Corporation contests this, as set out below.

Concurrent Duty

18 Assuming that Brookfield is correct in submitting that a duty of care to Chelsea's successor in title, the Owners Corporation, does depend upon the antecedent step of finding a duty of care in Brookfield to Chelsea, the issue that then arises is whether in the light of the D&C Contract, Brookfield owed Chelsea a concurrent duty of care in tort.

19 Brookfield does not challenge on appeal that common law duties of care can arise concurrently with contractual relationships. Accordingly, Brookfield does not suggest that the mere existence, or possibility, of a contract does not, of itself, negate the recognition of a duty of care contended for by the Owners Corporation.

An argument to that effect was not favoured by this Court in *Barclay v Penberthy* (2012) 246 CLR 258 at [46] to [48].

20 The Appellant's argument is also premised upon the proposition that '*the contract defines the relationship between the parties*' (to the exclusion of any tortious duty) citing *Astley v Austrust* (1999) 197 CLR 1 at 22 in support of that contention. However, the foundation for the existence of a duty of care is independent of the existence of a contract, see eg *Voli v Inglewod Shire Council* (1963) 110 CLR 74 at 84 [11] and *Astley* at [48]. In *Astley*, this Court specifically rejected the proposition that the contractual regime between parties effectively trumps the operation of the law of negligence, see *Astley* at [46-48], and *Bryan* at [13]. Brookfield does not challenge this on appeal.

21 The Court in *Bryan* at [10] was dealing with the role of the contract in the duty of care issue. Citing *Central Trust Co v Rafuse* (1986) 20 DLR (4th) at 521, the Court was careful to note that the existence of a duty of care could not be used to circumvent or escape a contractual exclusion of tort liability, but this raises the question as to the difference between concurrent duties of care on the one hand, and duties of care to third parties on the other. There was no suggestion in that case that the existence of the building contract per se precluded the duty of care from arising. At [15] of *Bryan*, the Court recognized the '*obvious force*' to Windeyer J's conclusion in *Voli* that such a contractual exclusion ought not be held to directly discharge a duty of care to third parties (not privy to the contract) who are affected by the work.

22 So, in the present case, the Owners Corporation, not a party to the original contract is intimately affected by the building work done. It is in no different position from the "*third party*" affected by the work in the *Voli* sense, or in no different a position from the beneficiary under the will in *Hawkins v Clayton* (1988) 164 CLR 539 and *Hill v Van Erp* (1996-97) 188 CLR 159.

23 A building contract in general, and the D&C Contract here in particular, provides the venue for the undertaking of the work and the relationship between the builder and the original owner; does not exclusively define it. In this case, common law duties of care were not expressly contracted away, and there is no warrant to say that the duty of care to the successor in title were negative by the D&C Contract.

24 This is not to say that the contract and its terms are irrelevant. The Owners Corporation accepts that the '*contractual matrix*' is "*not an irrrelevant circumstance*", consistent with *Woolcock* at [28], to the question of vulnerability of

the developer in this case, but that is not to say that it is decisive as Brookfield submits. The contract and its terms are merely a factor relevant to the determination of "v*ulnerability*", as identified in *Caltex v Stavar* and in *Woolcock Street,* where the Court dealt with assumption of responsibility and reliance (at [12]) which was a feature of the case that told against a duty of care in that case (see [26]).

25 The plurality in *Woolcock Street* considered the role of the contract with the original owner at [28-30], and despite it being a contract for the construction of a commercial building, with all that can be implied from it, the fact (or possibility) of that contract did not decide that case, and there was no suggestion that the contract precluded the relevant finding of duty.

26 At the end of the day, the issue is whether the salient features that give rise to vulnerability and the finding of a duty of care arise in the present case. The CA correctly observed that, as a matter of law and as a matter of practicality, it did, see [118] and [120] (**AB v4, 1554**). Chelsea did what it could, but the Court found that given the nature of the work, there was necessarily "*a reliance by the developer on the exercise of responsibility by the builder*", see [120]. This was obviously so.

27 A design and construct contract takes all but a relatively modest role away from the principal, and is a matter of trust being reposed in the builder. This in design as well as construction. Brookfield, as a skilled professional executing so complicated a process as the construction of a high rise building, was relied upon, and had to be relied upon, by Chelsea in that activity.

28 It was neither practicable, nor would there be any social utility, in having a developer being forced to employ an army of overseers and consultants to shadow and second guess ever move that a builder (or its sub-contractors or consultants) make in the construction of a building. And even if the developer did so, the interference in the building process that such overseers and consultants would cause, would mean an enormous loss of cost and time.

29 A builder in a design and construct contract takes responsibility, and encourages the developer to rely upon the builder's skill. A specialized skill. To this extent, the builder is in the same position as a lawyer, a doctor, an architect, a valuer or any other specilised professional that the Court has already recognized is subject of concurrent duties.

30 As a matter of fact, the relationship between Brookfield, as builder, and Chelsea, as the developer, was one turning upon an assumption of responsibility and of known reliance. And a dependence upon the builder executing the building work properly, in a way in which, in respect of latent defects at least, a breach would not be obvious, but would only emerge in time.

31 If the duty of care emerges from a matrix of considerations, some of which include '*vulnerability*' as a concept, and some of which feature as part of the concept of vulnerability, then the approach to the issue taken by the CA was correct. It considered the nature of the relationship between Chelsea and Brookfield, and concluded that, by reason of the terms of the D&C or by the simple practicality of the task, Brookfield was engaged in a task that involved an assumption of responsibility and relationship of reliance, such as to give rise to a concurrent duty of care.

32 The CA correctly observed that assumption of responsibility and known reliance were facets of Chelsea's vulnerability in the relevant sense (per Basten JA at [21] and [22], **AB v 4, 1517.25-44**). In *Perre v Apand* (1999) 198 CLR 180 (per McHugh J at [124] – [127]) reliance and assumption of responsibility (on which the concurrent duties in *Astley* arose) were considered to be indicators of the plaintiff's vulnerability to harm from the defendant's conduct. Therefore, although this Court decided *Astley* some months before *Perre* both cases recognized the significance of reliance and assumption of responsibility as factors in the determination of the existence of the duty of care issue.

33 The CA's finding as to the existence of the duty of care between Chelsea and Brookfield was correct. It is consistent with community expectations and with the views on this issue in other jurisdictions, as identified in Basten JA's judgment below at [108] – [112] (AB, v4, 1550 – 1151). In particular, in *RSP Architects Planners & Engineers (Raglan Squire & Partners FE) v Management Corporation Strata Title Plan No 1075* [1999] 2 SLR 449, liability was found by the Court of Appeal of Singapore in very similar circumstances to the present case.

Part VII: Statement of Argument on the Cross-Appeal

The Duty Contended For

34 The Owners Corporation contended for the existence of a duty which was broader than that found by the CA. The duty of care contended for at first instance is at [18] of McDougall J's judgment (**AB, v4, p1465.31-40**). The CA found a more

limited duty, limiting the Owners Corporation's right of recovery to structural defects or defects giving rise to safety issues: [17] and [132(2)] of the CA's judgment (**AB, v4, p 1515.42** and **AB, v4, p 1558.42**).

35 The CA limited the duty of care due to the potential issue of temporal indeterminancy, and the necessity to impose a limitation period on claims.

36 If economic loss is triggered by the existence of defects that entail either a diminution in value of property, or the need to expend money to make good, it is the significance of the expenditure or loss in value that is germane, rather than the characterization of the defect as structural or a safety item leading to the economic loss. An expensive "*non structural defect*" may have a greater significance to the loss in value of a property, or a requirement to make good where a corporation has an absolute obligation, as in the present case, than the label attached to the defect.

37 Accordingly, there was no warrant for the CA to limit the duty contended for as it did.

The Anterior Duty to the Developer

38 The CA, following para [14] of *Woolcock Street*, found that in order to find a duty of care to a successor in title, it was necessary to find a duty of care to the original owner, the developer, see [115] (AB v4, 1553).

39 It is submitted that a correct reading of *Woolcock Street* and of *Bryan* does not compel this finding.

40 The part of *Bryan* dealing with the duties to the original owner were raised by analogy, see [18] thereof. It is submitted that the analysis of the relationship between the builder and the first owner is directed to determining whether the imposition of a duty of care to the successor gives rise to a disconformity with the nature of the relationship (in contract or tort) between the builder and the original owner.

41 The Owners Corporation submits that the CA should have found that duty, irrespective of the CA's view as to the duty issue between Chelsea and Brookfield. The appropriate analysis was to view the relationship between the Owners Corporation and Brookfield as distinct and having the salient features set out in [69(e)] of the Amended List Statement (**AB, v1, 151.20-156.26**), consistent with the approach summarized by Allsop P in *Stavar*. Had the CA adopted that

approach it would have found the duty of care contended for, irrespective of any duty of care that Brookfield may have owed Chelsea.

Part VIII: Estimate for Oral Argument

42 The First Respondent estimates that 3 hours would be required for the presentation of its oral argument.

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