

20 October 2014

Practice Group(s):

*Real Estate -
Construction*

High Court Finds No Duty of Care From Builder to Owners Corporation

By Sandra Steele, Belinda Montgomery, Marcel Marquardt and Matthew Sier

Introduction

The High Court has held that a builder of a serviced apartment complex does not owe a duty of care in negligence for financial loss arising from defects in common property to an owner's corporation (Brookfield Case).¹

The serviced apartments were built by the builder under a design and construction contract with a developer. The owner's corporation was a subsequent owner of the land.

This is an important decision for the building and construction industry as it has defined the circumstances in which a commercial builder will be found liable for defective works in negligence.

Key points:

- A builder is less likely to owe a duty of care in negligence for defective work to a subsequent owner if:
 - the subsequent owner is a sophisticated commercial party and is not perceived to be vulnerable
 - the contract contains comprehensive provisions about defects liability.
- Builders should be aware that, if a subsequent owner of land is considered vulnerable, they may still owe that party a duty of care in negligence to avoid financial loss for defective work.

Background

The case concerned the construction and development of a strata-titled serviced apartment complex by Brookfield Multiplex Limited (Brookfield).

The development was part of a wider scheme whereby the land developer/owner sold the strata-lots to individual investors, subject to a lease to Park Hotel Management Pty Ltd that would operate the serviced apartment complex under the 'Holiday Inn' brand.

After discovering defects in the common property, the owner's corporation (Corporation) sued Brookfield for negligence.

At first instance, the New South Wales Supreme Court dismissed the Corporation's claim.² This was reversed by the Court of Appeal which held that the Corporation was owed a duty of care by Brookfield as the Corporation was vulnerable and reliant on Brookfield's expertise, care and honesty in performing its obligations under the design and construct contract.³

¹ *Brookfield Multiplex Ltd v Owners Corporation Strata Plan 61288* [2014] HCA 36 ('Brookfield Case').

² *Owners Corporation Strata Plan 61288 v Brookfield Multiplex* [2012] NSWSC 1219, [109].

³ *The Owners – Strata Plan No 61288 v Brookfield Australia Investments Ltd* (2013) 85 NSWLR 479, 508 [118]-[120].

High Court Finds no Tortious Duty of Care From Builder to Owners Corporation

High Court Appeal

In a final twist, the High Court unanimously held that Brookfield did not owe the Corporation a duty of care in negligence. The key factors in coming to this conclusion were as follows.

- The parties involved were sophisticated commercial parties capable of protecting themselves from the consequences of Brookfield's lack of reasonable care.⁴
- Purchasers of the strata lots were effectively investors in a hotel venture and neither they nor the Corporation (as their statutory agent) could be considered vulnerable to give rise to a duty of care.⁵
- The design and construct contract between Brookfield and the developer contained detailed provisions for dealing with and limiting defects liability.⁶
- The contracts for the sale of the apartments gave successors in title of the strata units specific rights against the developer in relation to defects in the common property for a specified period of time.⁷

Conclusion

In this case, the statutory warranties in the *Home Building Act 1989 (NSW)* (Act) did not apply as the dispute involved serviced apartments. From 1 December 2014, the statutory warranties in the Act will be watered down, meaning fewer defects will fall within the six year defect period under the Act and will instead fall within the two year defect period.

Subsequent purchasers outside that two year defect period will be less able to look to the Act for assistance with defects. As subsequent purchasers are not able to rely on a contract with a builder, they will look to the law of negligence for a remedy, making the decision from the Brookfield Case of increased significance in relation to all property.

Authors:

Sandra Steele

sandra.steele@klgates.com
+61.2.9513.2528

Belinda Montgomery

belinda.montgomery@klgates.com
+61.2.9513.2423

Marcel Marquardt

marcel.marquardt@klgates.com
+61.2.9513.2524

Matthew Sier

matthew.sier@klgates.com
+61.2.9513.2534

⁴ *Brookfield Case* [2014] HCA 36, [3] (French CJ), [59] (Hayne & Kiefel JJ), [186] (Gageler J).

⁵ *Brookfield Case* [2014] HCA 36, [12] and [34] (French CJ).

⁶ *Brookfield Case* [2014] HCA 36, [3] (French CJ), [59] (Hayne & Kiefel JJ).

⁷ *Brookfield Case* [2014] HCA 36, [3] (French CJ), [156] – [157] (Crennan, Bell and Keane JJ).

High Court Finds no Tortious Duty of Care From Builder to Owners Corporation

K&L GATES

Anchorage Austin Beijing Berlin Boston Brisbane Brussels Charleston Charlotte Chicago Dallas Doha Dubai Fort Worth Frankfurt Harrisburg Hong Kong Houston London Los Angeles Melbourne Miami Milan Moscow Newark New York Orange County Palo Alto Paris Perth Pittsburgh Portland Raleigh Research Triangle Park San Francisco São Paulo Seattle Seoul Shanghai Singapore Spokane Sydney Taipei Tokyo Warsaw Washington, D.C. Wilmington

K&L Gates comprises more than 2,000 lawyers globally who practice in fully integrated offices located on five continents. The firm represents leading multinational corporations, growth and middle-market companies, capital markets participants and entrepreneurs in every major industry group as well as public sector entities, educational institutions, philanthropic organizations and individuals. For more information about K&L Gates or its locations, practices and registrations, visit www.klgates.com.

This publication is for informational purposes and does not contain or convey legal advice. The information herein should not be used or relied upon in regard to any particular facts or circumstances without first consulting a lawyer.

© 2014 K&L Gates LLP. All Rights Reserved.