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SUPREME COURT FINDS CERTIFIER LIABLE FOR BUILDING DEFECTS

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SUPREME COURT FINDS CERTIFIER LIABLE FOR BUILDING DEFECTS

The NSW Supreme Court recently found a Local Council which acted as the certifier of a house, liable to the home owner for structural defects. This case offers hope to owners corporations whose buildings are affected by defects.

Introduction

In 2014, the High Court decided in the *Brookfield* case that a builder responsible for defects in the construction of a serviced apartment building in Chatswood did not owe the owners corporation of the building a duty of care to avoid economic loss, essentially because the builder and developer entered into a detailed building contract which limited the builder's liability for defects and the owners could have taken steps to protect themselves from financial harm caused by the builder's negligence: see *Brookfield Multiplex Ltd -v- Owners – Strata Plan 61288 [2014] HCA 36*.

The decision in the *Brookfield* case was thought to put an end to negligence claims by owners corporations against professionals associated with the construction of their buildings such as builders, developers, engineers and building certifiers. However the recent decision of the NSW Supreme Court in *Chan -v- Acres [2015] NSWSC 1885* has breathed life back into negligence claims by owners corporations particularly against building certifiers. In that case the Supreme Court held that Kuringai Council was liable to the purchasers of a house in Wahroonga for structural defects in the house which the Council negligently certified during the renovation of the house.

The Facts

Ms Chan and Mr Cox bought the house from Mr Acres. Mr Acres, as an owner-builder, carried out significant renovations to the house. He engaged Kuringai Council as principal certifying authority in respect of those renovations. The Council inspected the house during the renovations and when the renovations were completed issued an occupation certificate for the house to certify that it was suitable for occupation and use.

The Problem

The renovations contained serious structural defects such that the house was unfit for occupation and use. Ms Chan and Mr Cox bought the house knowing of some defects. However after they moved into the house, they discovered very serious structural and other defects, particularly in the work that Mr Acres had carried out.

The Claim

Ms Chan and Mr Cox sued Mr Acres, an engineer, a building inspector and the Council. They sued the Council for breach of a common law duty of care they claimed was owed by it to them in its capacity as principal certifying authority in respect of inspections and certifications carried out and given by a Council building surveyor, and in respect of the occupation certificate issued by the Council, again in its capacity as principal certifying authority, in respect of the renovations done to the house.



The Result

The Court held that the Council owed Ms Chan and Mr Cox a duty to use reasonable care in performing its critical stage inspections during the renovation of the house, and in issuing the final occupation certificate for the house once the renovations had been completed, because it was clear to the Council that the negligent performance of its functions as certifier could well injure the economic interests of the purchasers of the house, who it knew would rely on the occupation certificate.

The Court's Reasoning

More specifically, the Court said that the Council owed a duty of care to Ms Chan and Mrs Cox because:

- the planning legislation under which the Council acted as certifier was intended to ensure that work the subject of the Council's inspections was carried out satisfactorily;
- under that legislation, unless the Council was satisfied that the work had been carried out satisfactorily it could not be satisfied that the house was suitable for occupation or use in accordance with its classification under the BCA and therefore it could not issue an occupation certificate (without which the house could not be occupied);
- Ms Chan and Mr Cox were "vulnerable" to the conduct of the Council because to the knowledge of the Council, they relied on it to perform its functions as a certifier with appropriate care and skill;
- the Council must have recognised that purchasers of the house would be likely to suffer economic loss if, contrary to the state of affairs certified in the occupation certificate, the property was not fit for use as a dwelling house (at least the part affected by the renovations);
- it was reasonably foreseeable that purchasers such as Ms Chan and Mr Cox would suffer loss if the Council carried out its inspections negligently, failed to detect obviously non-compliant work, and as a result certified (wrongly) that a building riddled with structural defects was fit for use and occupation as a dwelling house;
- it was not reasonably practicable for Ms Chan and Mr Cox to undertake the kind of testing that would be necessary to uncover the defects that the Council should have picked up, but did not;
- in those circumstances, imposing on the Council a duty of care in respect of the performance of its functions that led to the issue of the occupation certificate, specifically performing its critical stage inspections of the house, and issuing the occupation certificate, could be justified.

Conclusion

The *Brookfield* case put an end to many negligence claims by owners corporations against builders, developers, engineers and building certifiers. This left many owners corporations whose buildings suffered from defects with no remedy particularly in the case of commercial buildings where no home



building legislation warranties are available or where the original builder and developer had become insolvent. The decision in *Chan -v- Acres* should breathe life back into negligence claims by owners corporations particularly against certifiers of residential buildings.

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