

# ALERT

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## THE HIGH COURT OF AUSTRALIA HOLDS THAT BUILDER DID NOT OWE A DUTY OF CARE TO THE OWNERS CORPORATION

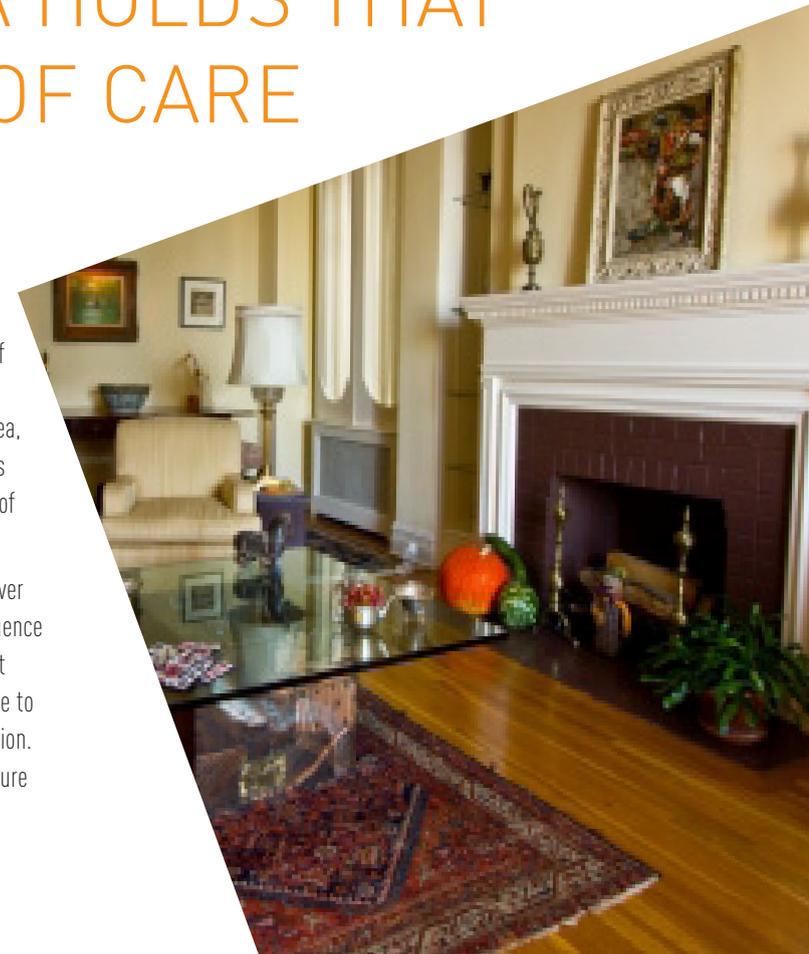
In a unanimous decision, the High Court of Australia (**High Court**) has rejected the NSW Court of Appeal's finding that Brookfield Multiplex Ltd (**Brookfield**), the builder of a strata plan development, owed a duty of care to the Owners Corporation Strata Plan 61288 (**OC**) for economic loss caused by latent defects in the common property. This decision underlines the ability of parties to limit liability through detailed risk allocation provisions, which should provide comfort to those involved in the property development and construction industries.

### Background

Chelsea Apartments Pty Ltd (**Chelsea**) engaged Brookfield under a design and construct contract to build a 22 storey development comprising serviced and residential apartments. Upon completion of the serviced apartments, Chelsea registered the strata plan for those apartments. By virtue of that registration, the OC was brought into existence and the common property in the serviced apartment complex was vested in it.

The serviced apartments were sold to investors by Chelsea under a standard form contract and subject to leases that enabled Park Hotel Management Pty Ltd (**Park**), a subsidiary of the Stockland Group, to operate the serviced apartments under the 'Holiday Inn' brand. Each of the agreements between Chelsea, Brookfield, Park and the investors contained detailed provisions defining the standard of work required and defining the extent of each party's liability.

The OC brought proceedings against Brookfield seeking to recover for the loss and damage it alleged it had suffered as a consequence of Brookfield's breach of a duty of care, which the OC claimed it was owed. The negligence alleged concerned Brookfield's failure to ensure structural steel was properly galvanised before installation. The defect had been latent for some 9 years. The OC suffered pure financial loss as a result of the latent defect.



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## Previous decisions

At first instance, Justice McDougall in the Supreme Court of New South Wales found in favour of Brookfield on the basis that it did not owe a duty to the OC to avoid causing it pure economic loss. His Honour held that:

*'where the parties have negotiated in full their rights and obligations, there is no reason for the law to intervene by imposing some general law duty of care.'*

On appeal, the New South Wales Supreme Court of Appeal overturned Justice McDougall's decision and held that Brookfield did owe the OC a duty *'to exercise reasonable care in the construction of the building to avoid causing the OC to suffer loss resulting from latent defects.'* However the Court of Appeal limited that duty to latent

defects that were *'structural, constituted a danger to persons or property ... or made those apartments uninhabitable.'*

## High Court decision

Brookfield was granted special leave to appeal the decision of the Court of Appeal and the OC was granted special leave to cross-appeal against the limited ambit of the duty as defined by the Court of Appeal.

All seven justices of the High Court allowed Brookfield's appeal and dismissed the OC's cross appeal on the basis that Brookfield did not owe the OC a duty of care. The requisite element of vulnerability to the defective work of Brookfield was not established.

The key feature of each of the judgments was a focus on the detailed contractual provisions that specified the quality of the services to be provided. It was held that the inclusion of these provisions:

*'demonstrates the ability of the parties to protect against, and denies their vulnerability to, any lack of care by the builder in performance of its contractual obligations.'*

It was also held that to impose a duty of care in tort which was outside the responsibilities contained in the contracts would be to *'alter the allocation of risks effected by the parties' contract.'*

On that basis, the High Court unanimously held that Brookfield did not owe the OC a duty of care to avoid causing it economic loss resulting from latent defects in the common property.

While it was a unanimous decision and the justices were generally in agreement, four separate judgments were given, each with their own interesting insights.

- Chief Justice French held that the *'interaction of the contractual and statutory frameworks was antithetical to the proposition that Brookfield owed the [OC] the duty of care found to exist by the Court of Appeal.'*
- Justices Hayne and Kiefel held that the plaintiff's circumstances did not meet the definition of vulnerability as set out in *Woolcock Street Investments Pty Ltd v CDG Pty Ltd*.<sup>1</sup> In that case, vulnerability was said to refer to a *'plaintiff's inability to protect itself from the defendant's want of reasonable care, either entirely or at least in a way which would cast the consequences of loss on the defendant.'*
- Justices Crennan, Bell and Keane found that it was impossible for the OC to have suffered any loss by reason of the quality of the common property vested in it because it had acquired that common property without any outlay on its part.
- Justice Gageler held that in all situations, other than in the case of a *'dwelling house'* in which the subsequent purchaser is incapable of protecting itself, a builder has *'no duty in tort to exercise reasonable care ... to avoid a subsequent owner incurring the cost of repairing latent defects in the building.'* This finding would serve to severely limit the future application of *Bryan v Maloney*,<sup>2</sup> by confining it to its particular facts.

## Impact

The High Court's decision should provide sophisticated developers, builders and property investors with some comfort because it reinforces their ability to limit liability through detailed contractual

1 (2004) 216 CLR 515

2 (1995) 182 CLR 609



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risk allocation. This is of crucial importance in the property development and construction industries where detailed contracts that attempt to define the parties' obligations and potential liability are commonplace.

The decision also reinforces the importance of ensuring that the contracts underpinning the relationships between the parties accurately reflect their respective obligations and potential liability. Failing to address this at the start of the project may result in undesired consequences if or when any issues arise.

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