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Concerning the Builder's Duty of Care for Economic Loss

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# BROOKFIELD MULTIPLEX LTD V OWNERS CORPORATION STRATA PLAN 61288: MORE CERTAINTY CONCERNING THE BUILDER'S DUTY OF CARE FOR ECONOMIC LOSS

BRITTANY CHERRY\*

## I INTRODUCTION

In an ever expanding world of commercial development and enterprise, concurrent claims for breach of contract and damage in tort for pure economic loss reflect a modern reality. The burden of this developing norm on those in commerce is evident. The 2014 case of *Brookfield Multiplex Ltd v Owners Corporation Strata Plan 61288* ('*Brookfield*')<sup>1</sup> brings more certainty to the scope and ambit of the builder's duty of care for economic loss. The High Court held unanimously in this case that the builder of a serviced apartment hotel did not owe the strata corporation a duty of care in tort in respect of economic loss caused by latent defects in the common property.<sup>2</sup> In delivering its decision the High Court overturned the NSW Court of Appeal decision,<sup>3</sup> and reached the same conclusion as the primary judge.<sup>4</sup>

Recovery in tort for pure economic loss has only been possible since 1964.<sup>5</sup> Since then the law surrounding the precise requirements for recovery have been somewhat obscured by subsequent cases, including *Bryan v Maloney* ('*Bryan*')<sup>6</sup> and *Woolcock Street Investments Pty Ltd v CDG Pty Ltd* ('*Woolcock*').<sup>7</sup> Eleven years have passed since *Woolcock*<sup>8</sup> and the position is now made clearer with the High Court's decision in *Brookfield*. To find a duty of care in tort for pure economic loss, a combination of salient features of the relationship between the parties must exist, including, vulnerability, an assumption of responsibility and known reliance.<sup>9</sup> The High Court also made it abundantly clear that in regards to negligence causing pure economic loss the 'common law has not developed with a view to alter[ing] the allocation of

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<sup>1</sup> (2014) 313 ALR 408; [2014] HCA 36.

<sup>2</sup> *Ibid* 420 [36] (French CJ). Four separate judgements were delivered under the High Court's unanimous decision. See also the following relating to this case, Domenic Cucinotta, 'Brookfield Multiplex v Owners Corporation Strata Plan No 61288 (2014) 88 ALJR 911: Contractual Allocation of Risk and Claims for Pure Economic Loss' (2014) 3 *Journal of Civil Litigation and Practice* 140; Christopher Blue and Sarah Merrett, 'Defective Buildings and Pure Economic Loss: Builder Does Not Owe a Duty of Care to Subsequent Owners' (2014) 29 *Australian Property Law Bulletin* 174; Peter Ross and Eli Ball, 'Strata Claims in the High Court: No Duty to Protect Owners Corporations from Pure Economic Loss' (2014) 11 (10) *Australian Civil Liability* (newsletter) 126.

<sup>3</sup> *The Owners - Strata Plan No 61288 v Brookfield Australia Investments Ltd* [2013] NSWCA 317; (2013) 85 NSWLR 479 ('Court of Appeal Decision').

<sup>4</sup> *Owners Corporation Strata Plan 61288 v Brookfield Multiplex* [2012] NSWSC 1219 ('First Instance Decision').

<sup>5</sup> See *Caltex Oil (Aust) Pty Ltd v The Dredge 'Willemstad'* (1976) 136 CLR 529; *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465. See also, Cucinotta, above n 2, 145.

<sup>6</sup> (1995) 182 CLR 609.

<sup>7</sup> (2004) 216 CLR 515.

<sup>8</sup> *Ibid*.

<sup>9</sup> See also, Blue and Merrett, above n 2, 175.

economic risks between parties to a contract by supplementing or supplanting the terms of the contract by duties imposed by the law of tort'.<sup>10</sup>

## II BACKGROUND TO THE CASE

In August 1997 Chelsea Apartments Pty Ltd ('the developer'), the registered proprietor and property developer, entered into a Master Agreement with an investor, Stockland Trust Group ('Stockland'). Under the Master Agreement, the developer leased the apartments to Park Hotel Management Pty Ltd ('Park Hotel'), a subsidiary of Stockland, which operated the apartments collectively as a 'serviced apartment hotel' under the Holiday Inn brand.<sup>11</sup>

### A *The Master Agreement*

The Master Agreement dictated that the apartments were to be sold subject to the leases granted to Park Hotel. Under the terms of the leases, Park Hotel acquired the developer's rights to direct the operation of the Owners Corporation; requiring the purchasers to yield their voting rights in the Owners Corporation to the operator, by appointing it as their proxy.<sup>12</sup> The Master Agreement clearly outlined that the developers warranted the quality of its building work to Stockland.<sup>13</sup>

### B *The Design and Construct Contract ('D&C Contract')*

In November of the same year, the developer entered into a design and construct contract ('D&C contract') with Brookfield Multiplex Ltd ('the builder') for about \$57.5 million.<sup>14</sup> The D&C contract outlined the standard of services that would be provided by the builder;<sup>15</sup> the builder would provide warranties for the work and remedy any defects or omissions in the work.<sup>16</sup> The D&C contract also provided for a 52 week defects liability period, which commenced upon the completion of the works.<sup>17</sup> During this period, the builder would be liable to rectify construction defects.

At the expiry of the period, a Final Certificate was to be issued by the Superintendent verifying that the finished product aligned with the D&C contract;<sup>18</sup> its issuance would release the builder from all liability for defects that could have been identified before the receipt of the Final Certificate. After issuance, the developer was required, at its own expense, to repair any defects in the common property as identified in the purchasers' defect notices.<sup>19</sup> An exception was made in clause 42.6(b) of the D&C contract, providing contractual protection for the developer in respect of any expense incurred from repairing latent defects in the building *after* the defect liability period

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<sup>10</sup> *Brookfield* (2014) 313 ALR 408, 438 [132] (Crennan, Bell and Keane JJ) citing *Downsview Nominees Ltd v First City Corporation Ltd* [1993] AC 295, 316.

<sup>11</sup> *Brookfield* (2014) 313 ALR 408, 413 [13] (French CJ).

<sup>12</sup> *Ibid.*

<sup>13</sup> *Ibid* 428 [73] (Crennan, Bell and Keane JJ).

<sup>14</sup> *Ibid* 414 [14] (French CJ).

<sup>15</sup> *Ibid.*

<sup>16</sup> *Ibid* 414 [15] (French CJ); 421, [42] (Hayne and Kiefel JJ).

<sup>17</sup> *Ibid* 414 [15] (French CJ); 429 [80] (Crennan, Bell and Keane JJ).

<sup>18</sup> *Ibid* 429 [82] (Crennan, Bell and Keane JJ).

<sup>19</sup> *Ibid* 414 [16] (French CJ).

had expired.<sup>20</sup> Finally, it was ‘common ground’ that this contract ‘was negotiated between sophisticated and experienced parties at arms’ length and on an equal footing.’<sup>21</sup>

### C *Standard Sales Contract*

Annexed to the D&C contract was a standard form contract of sale (‘the sale contract’) for purchasers of the apartments. Clause 26.1 of the sale contract outlined that the purchaser warranted that it did not rely on any representations or warranties about the subject matter of the sale contract, except those set out in the sale contract.<sup>22</sup> Further, clause 26.1 confirmed that the purchaser had ‘obtained appropriate independent advice on its obligations under the contract.’<sup>23</sup> Clause 32.1 of the sale contract set out the purchaser’s rights in respect of the quality of construction; it obliged the developer, before completion, to ‘cause the property and the Common Property to be finished as specified in the Schedule of Finishes’ and ‘in a proper and workmanlike manner’.<sup>24</sup> Under clause 32.7, the developer was obliged to repair defects or faults in the common property due to faulty material or workmanship.<sup>25</sup>

### D *The Strata Scheme Legislation: Owners Corporation*

Before the Final Certificate was issued, the strata plan was registered for the serviced apartments.<sup>26</sup> Upon the registration, the Owners Corporation was brought into existence and operated under s 8(1) of the *Strata Schemes Management Act 1996* (NSW) (‘SSM Act’) and common property was vested in it.<sup>27</sup> The Owners Corporation was bound under a statutory duty to properly maintain and keep in a state of good and serviceable repair the common property and personal property vested in them.<sup>28</sup>

Initially, the Owners Corporation acted as agent for the owner of the lots subject to the strata scheme.<sup>29</sup> However, as the lots were sold to other proprietors, the Owners Corporation held the common property as agent for those purchasers as tenants in common in shares proportional to their unit entitlements.<sup>30</sup> Importantly, the Owners Corporation had no contractual relationship with the builder or the developer.<sup>31</sup>

Predictably, a dispute arose in regards to latent defects in the common property, which were grouped into five categories: non-compliant steel lintels; non-compliant picture windows; defective external render; unsuitable cowlings to fire services shutters; and inadequate waterproofing and waste connection to a communal spa.<sup>32</sup> In 2008 the

<sup>20</sup> Ibid 414 [15] (French CJ).

<sup>21</sup> Ibid 428 [74] (Crennan, Bell and Keane JJ).

<sup>22</sup> Ibid 430 [86] (Crennan, Bell and Keane JJ).

<sup>23</sup> Ibid.

<sup>24</sup> Ibid 430 [87] (Crennan, Bell and Keane JJ); 414 [16] (French CJ).

<sup>25</sup> Ibid 430 [89] (Crennan, Bell and Keane JJ); 414 [16] (French CJ).

<sup>26</sup> Ibid 430 [90] (Crennan, Bell and Keane JJ).

<sup>27</sup> Ibid. See, *Strata Schemes (Freehold Development) Act 1973* (NSW) s 18 (‘SSFD Act’).

<sup>28</sup> Ibid 422 [44] (Hayne and Kiefel JJ). See, *SSM Act* s 62.

<sup>29</sup> Ibid. See, *SSFD Act* s 20.

<sup>30</sup> Ibid. See, *SSFD Act* s 20(b).

<sup>31</sup> See, Cucinotta, above n 2, 141.

<sup>32</sup> *Brookfield* (2014) ALR 408, 431 [96] (Crennan, Bell and Keane JJ).

Owners Corporation brought proceedings against the builder to recover the costs of rectifying the alleged defects in the common property.<sup>33</sup>

### III DECISION OF THE PRIMARY JUDGE

The primary judge, McDougall J was asked to determine whether the 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.<sup>34</sup> The damage was characterised as economic loss because the defects did not cause damage to person or property.<sup>35</sup> In order for the Owners Corporation to establish that the builder owed the duty of care alleged, it had to demonstrate that it was reasonably foreseeable that the Owners Corporation would not only suffer loss, but that it was ‘vulnerable’ to the economic consequences of such a failure by the builder.

At first instance it was held that no duty of care existed to avoid pure economic loss as a consequence of the latent defects caused by the building’s design and construction. As no duty of care arose in respect to the developer, no duty passed to the successive title owners, such as the Owners Corporation.

Noting that the duty of care alleged is one to avoid causing economic loss, McDougall J found that ‘the duty is novel’ as no case was cited to establish such a duty of care of the kind alleged.<sup>36</sup> He also pointed out that *Bryan*<sup>37</sup> was no authority for imposition of the duty alleged.<sup>38</sup>

Although McDougall J accepted ‘the proposition that contractual and common law duties could coexist between parties to a contract’ he was of the view that it was ‘not so as a matter of absolute or general application’ and that ‘there is neither reason nor room for the imposition of a duty of care in the case of a contract negotiated at arm’s length between parties of equal standing, who are able to bargain for and obtain the benefits that they seek, and to pay the price that they think appropriate’.<sup>39</sup> In relation to the provision of specialist services of the kind which the developer agreed to, McDougall J 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’.<sup>40</sup> McDougall J (in endorsing Brennan J’s views expressed in *Bryan*) remarked that an ‘extension of remedies’ under a duty of care by a builder to subsequent purchasers in tort is ‘properly a matter for Parliament’.<sup>41</sup> He also raised the matter of ‘policy’, pointing out that ‘the critical questions to be considered [lie] in deciding whether, as a matter of policy, the law should impose, on a builder in the

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<sup>33</sup> *Ibid.*

<sup>34</sup> *Ibid* 411 [6] (French CJ)

<sup>35</sup> *Ibid* 426 [67] (Crennan, Bell and Keane JJ).

<sup>36</sup> First Instance Decision [2012] NSWSC 1219, 87-88.

<sup>37</sup> (1995) 182 CLR 609.

<sup>38</sup> First Instance Decision [2012] NSWSC 1219, 88.

<sup>39</sup> *Ibid* 89.

<sup>40</sup> *Ibid* 90.

<sup>41</sup> *Ibid* 92. See *Bryan* (1995) 182 CLR 609, 644 (Brennan J).

position of Brookfield, a duty of care (over and above the statutory warranties) in favour of a successor in title to the developer, such as the Owners Corporation.<sup>42</sup>

#### IV DECISION OF THE COURT OF APPEAL

On 25 September 2013 the Owners Corporation appealed to the New South Wales Court of Appeal.<sup>43</sup> The appeal was allowed and the orders of the primary judge were set aside. The court held that the duty of care propounded by the Owners Corporation, matched an equivalent tortious duty of care owed by the builder to the developer.<sup>44</sup> As such, the builder owed the Owners Corporation a duty to exercise reasonable care in the construction of the building, to avoid causing the Owners Corporation to suffer loss resulting from the latent defects in the common property vested in them.<sup>45</sup> The court, however, confined the scope of the duty to building defects that were structural, constituted a danger to persons or property in or in the vicinity of the serviced apartments, or made the apartments uninhabitable.<sup>46</sup>

As regards the ‘vulnerability’ requirement, Basten JA declared that ‘there can be no doubt that the developer relied upon the expertise, care and honesty of the builder in performing its obligations under the contract’.<sup>47</sup> He pointed out though that ‘the fact that the vulnerability arose with respect to its commercial interests rather than any personal interests of individuals, was not suggested to be a relevant consideration.’<sup>48</sup>

The builder, by special leave, appealed to the High Court of Australia.

#### V THE DECISION OF THE HIGH COURT

The High Court unanimously allowed the builder’s appeal under four separate judgments, finding that the builder did not owe a duty of care to the Owners Corporation. There was a common finding that the parties had expressly addressed in detail their obligations under the relevant contracts, evidencing that they had consciously and deliberately decided to allocate the relevant risks between them in the manner set out.

##### A *The Appellant’s Submissions*

The builder argued that no concurrent tortious duty of care should be imposed on the developer as the parties had reached a comprehensive agreement at arm’s length which outlined their relationship and the associated risks.<sup>49</sup> It also submitted that whatever its obligations were to the developer, it did not owe the Owners Corporation the duty of care alleged.<sup>50</sup>

<sup>42</sup> First Instance Decision [2012] NSWSC 1219, 93.

<sup>43</sup> The Court of Appeal consisted of Basten, Macfarlan and Leeming JJA.

<sup>44</sup> Court of Appeal Decision (2013) 85 NSWLR 479, 508-509 [122]. See also, *Brookfield* (2014) ALR 408, 426 [64] (Crennan, Bell and Keane JJ).

<sup>45</sup> Court of Appeal Decision (2013) 85 NSWLR 479, 510 [132], 511 [133], 512 [139].

<sup>46</sup> *Ibid.*

<sup>47</sup> Court of Appeal Decision (2013) 85 NSWLR 479, 508 [120]. See also, *Brookfield* (2014) ALR 408, 432 [102] (Crennan, Bell and Keane JJ).

<sup>48</sup> Court of Appeal Decision (2013) 85 NSWLR 479, 508 [120].

<sup>49</sup> *Brookfield* (2014) ALR 408, 434 [113] (Crennan, Bell and Keane JJ).

<sup>50</sup> *Ibid* 434 [114] (Crennan, Bell and Keane JJ).

## B *The Respondent's Submissions*

The Owners Corporation cross-appealed on four matters.

### 1 *Each Entity should be Viewed Separately*

The Owners Corporation submitted that the 'duty of care propounded by it does not depend on finding an equivalent duty of care' owed by the builder to the developer and therefore, the salient features of the relationship between the builder and the Owners Corporation should be viewed separately from the relationship between the builder and the developer.<sup>51</sup>

### 2 *The Owners Corporation Was Vulnerable*

In light that the Owners Corporation had not come into existence until the registration of the strata plan, it was vulnerable to the risk of loss from latent defects in the common property as it had no prior opportunity to protect itself.<sup>52</sup>

### 3 *Assumptions of Responsibility and Reliance*

Alternatively, there was an assumption of liability by the builder to the developer for latent defects, and reliance by the developer on the builder. Therefore, a duty of care in tort arises, equivalent to the duty propounded by the Owners Corporation.<sup>53</sup>

### 4 *Dangerous Defects*

The Owners Corporation also contended, contrary to the Court of Appeal's finding, that the nature and scope of the propounded duty should not be restricted to latent defects that were 'dangerous'.<sup>54</sup>

## C *Applicable Principles and Precedents*

Members of the High Court undertook an examination of the applicable principles and precedents in relation to a duty of care for pure economic loss.

In remarking that part of the difficulty that the Court of Appeal faced was 'in discerning the principle' for which *Bryan* 'remains authority'<sup>55</sup> after *Woolcock*, Gageler J referred to the 'net cost to society' that arises from uncertainty as to the principles to apply in economic loss cases.<sup>56</sup> He agreed with the proposition that if

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<sup>51</sup> *Ibid* 434 [115] (Crennan, Bell and Keane JJ). The salient features relied upon by the Owners Corporation included: the builder's power of administration in regards to the D&C contract; the expertise of the developer in business; the commercial cost to the developer to monitor construction work; and general notions of assumption of responsibility and reliance.

<sup>52</sup> *Ibid* 435 [116] (Crennan, Bell and Keane JJ).

<sup>53</sup> *Ibid* 435 [118] (Crennan, Bell and Keane JJ).

<sup>54</sup> *Ibid*.

<sup>55</sup> *Ibid* 448 [178] (Gageler J).

<sup>56</sup> *Ibid* 447 [177].

negligence law is to serve its purpose in corrective justice, the principles and rules governing the area must be clear and easy to apply.<sup>57</sup>

As highlighted by French CJ, a finding of liability in negligence, is predicated upon a duty of care existing.<sup>58</sup> A failure to take reasonable care to prevent a foreseeable harm will result in liability where there was a duty to take such care.<sup>59</sup> Prior to 1964 pure economic loss was not recoverable in tort, leaving a party to rely on contract law remedies.<sup>60</sup> However, precedents have since developed and for the purpose of this appeal, French CJ narrowed the applicable cases to *Bryan*<sup>61</sup> and *Woolcock*.<sup>62</sup>

### 1 *Consideration of Bryan*

In *Bryan* the court considered whether under the law of negligence a professional builder who constructs a house for an owner of the land owes a prima facie duty to a subsequent owner to exercise reasonable care to avoid foreseeable damage.<sup>63</sup> A breach of the duty, by the careless construction of the builder which gives rise to latent defects, supports an action in negligence for economic loss.<sup>64</sup> The court held that the builder of a dwelling house owed a duty of care to the subsequent purchaser. This decision was founded on the existence of an anterior duty of care to the prior owner, which supported the existence of a duty of care to the subsequent owner;<sup>65</sup> no disconformity existed between these duties.<sup>66</sup> The presence of an anterior duty overcame ‘policy concerns’ that liability to a subsequent owner would be inconsistent with the defendant’s ‘legitimate pursuit of its freedom to protect its own financial interests by limiting its liability to the prior owner.’<sup>67</sup> Additionally, the building contract allowed for concurrent tortious liability to the prior owner.<sup>68</sup>

To find a duty of care for pure economic loss the case must be considered ‘special.’ Special cases involve an element of known reliance or dependence on the part of the plaintiff, or the assumption of responsibility by the defendant.<sup>69</sup> The plurality in *Bryan* referred to the relationship between the builder and the subsequent owner as being characterised by an assumption of responsibility on the part of the builder and likely reliance on the part of the owner.<sup>70</sup> The relevant factors supporting this finding revolved around considerations of vulnerability; including the existence of a ‘non-detailed contract’ between the prior owner and the builder that contains no exclusion or limitation of liability.<sup>71</sup> In addition, if the subsequent owner of the property would ordinarily be unskilled in building and real property investment, and such an owner

<sup>57</sup> Ibid citing *Perre v Apand Pty Ltd* (1999) 198 CLR 180, 216 [91].

<sup>58</sup> *Brookfield* (2014) ALR 408, 415[19] (French CJ)

<sup>59</sup> Ibid 415-16 [19]-[21] (French CJ), citing *Sullivan v Moody* (2001) 207 CLR 562, 576 [42].

<sup>60</sup> See *Hedley Bryne & Co Ltd v Heller & Partners Ltd* [1964] AC 465.

<sup>61</sup> (1995) 182 CLR 609.

<sup>62</sup> (2004) 216 CLR 515.

<sup>63</sup> (1995) 182 CLR 609, 616-17. See *Brookfield* (2014) ALR 408, 448 [179] (Gageler J).

<sup>64</sup> *Brookfield* (2014) ALR 408, 416 [21] (French CJ).

<sup>65</sup> Ibid 418 [28].

<sup>66</sup> *Bryan* (1995) 182 CLR 609, 665 (Toohey J).

<sup>67</sup> *Brookfield* (2014) ALR 408, 418 [28] (French CJ); *Bryan v Maloney* (1995) 182 CLR 609, 623-24 (Mason CJ, Deane and Gaudron JJ).

<sup>68</sup> *Brookfield* (2014) ALR 408, 418 [28] (French CJ).

<sup>69</sup> Ibid 417 [22].

<sup>70</sup> Ibid 448 [180] (Gageler J) citing *Bryan* (1995) 182 CLR 609, 627.

<sup>71</sup> Ibid 417 [22] (French CJ).



would assume the building had been competently built, this must be taken into consideration.<sup>72</sup> French CJ concluded that when these factors are found to exist, they will support the existence of a duty of care for pure economic loss.

While such considerations remain paramount, the court in *Woolcock* expressed concern that *Bryan*'s drew a distinction between cases involving the construction of a dwelling and those concerning the construction of other buildings.<sup>73</sup> Gageler J who was equally concerned, dedicated a substantial part of his judgement towards articulating why the principles in *Bryan* remain authority after *Woolcock*, yet why *Woolcock* should be followed in the present appeal. In light of this, the judges in *Brookfield* confined the application of *Bryan* to its facts.

The justices in *Brookfield* distinguished *Bryan* due to the detailed provisions in the D&C contract, as opposed to the basic obligation to exercise reasonable skill and diligence in *Bryan*. Additionally, the express promises in the sale contract differed from the absence of a promise as to the building quality in *Bryan*.<sup>74</sup>

*Bryan* demonstrated no disconformity between the duty owed to the original owner and the duty owed to the subsequent owner. By contrast in *Brookfield* there was no substantial equivalence between the obligations of the builder to the developer and the duty propounded by the Owners Corporation due to the terms of the contract.<sup>75</sup> In addition, the purchaser exercised 'contractual wisdom' to bargain for protection against the risk of defects, and the builder was not involved with the purchaser's decision to accept the value of the warranty.<sup>76</sup> As McHugh J similarly stated in *Woolcock*, had the purchaser not been satisfied that its investment was adequately protected, it could have taken its capital elsewhere.<sup>77</sup>

Gageler J confined the authority in *Bryan* to cases where the building involved is a 'dwelling house' and subsequent purchasers can show that they fall within 'a class of persons incapable of protecting themselves from the consequences of the builder's want of reasonable care.'<sup>78</sup> Outside of that category, his Honour held that it should now be acknowledged that a builder has *no duty* in tort to exercise reasonable care in executing building work, to avoid subsequent purchasers incurring the cost of repairing latent defects.<sup>79</sup> By virtue of the 'freedom they have to choose the price and non-price terms' of the contract to purchase, there is no reason why subsequent purchasers cannot be expected to protect themselves against economic loss.<sup>80</sup>

## 2 *Consideration of Woolcock*

All members of the High Court in *Brookfield* reasoned by analogy that it aligned closer with *Woolcock* than *Bryan*. *Woolcock*<sup>81</sup> concerned an engineering company which

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<sup>72</sup> *Ibid.*

<sup>73</sup> *Woolcock* (2004) 216 CLR 515, 528 [17].

<sup>74</sup> *Brookfield* (2014) ALR 408, 439 [136] (Crennan, Bell and Keane JJ).

<sup>75</sup> *Ibid* 440 [139].

<sup>76</sup> *Ibid* [140].

<sup>77</sup> *Brookfield* (2014) ALR 408, 440 [140] (Crennan, Bell and Keane JJ), citing McHugh J in *Bryan* (2004) 216 CLR 515, 558 [110].

<sup>78</sup> *Brookfield* (2014) ALR 408, 450 [185] (Gageler J).

<sup>79</sup> *Ibid.*

<sup>80</sup> *Ibid.*

<sup>81</sup> (2004) 216 CLR 515.

had designed the foundations of a warehouse and office complex. After the purchase was completed it became apparent that the building was suffering ‘substantial structural distress.’<sup>82</sup> The question addressed by the court concerned whether the engineering company owed a duty to exercise reasonable care to avoid a subsequent purchaser sustaining economic loss. The engineering company had designed the foundations in conditions where the original owner asserted control over all geotechnical investigations that the engineer undertook to perform its work.<sup>83</sup> In addition, there was no allegation of any assumption of responsibility by the engineering company or of any known reliance by the prior owner.<sup>84</sup> In light of this the court found that the scope of the work undertaken included consideration for alleged defects in the design of the foundations. Therefore, the engineering company was found not to owe the putative duty of care for economic loss.<sup>85</sup>

Furthermore, the subsequent owner in *Woolcock* did not allege that it could not protect itself against the economic loss.<sup>86</sup> While the High Court in *Woolcock* could not answer definitively whether the plaintiff was vulnerable, the following factors were extracted and highlighted by French CJ<sup>87</sup> as being *insufficient* to demonstrate ‘vulnerability’ in *Woolcock*.<sup>88</sup>

- 1) that the plaintiff could have protected itself against the economic loss it suffered;
- 2) that a warranty of freedom from defect was included in the contract entered into by the plaintiff in purchasing the complex;
- 3) that the prior owner assigned its rights in respect of any claim for defects to the plaintiff;
- 4) that there was evidence evincing circumstances that would cast onto the engineering company the burden of any economic consequences due to its own negligence; and
- 5) that there was evidence supporting the plaintiff being able to obtain the benefit of the terms of that kind in the contract.

Gagler J in *Brookfield* identified examples from *Woolcock* that demonstrated how subsequent purchasers may protect themselves against the risk of latent defects including, adjusting the terms of the contract between the purchaser and vendor and commissioning expert investigation before purchase.<sup>89</sup> A decisive factor for rejecting the existence of a duty of care in tort for pure economic loss is whether a person can be protected from damage by means of contractual obligations.<sup>90</sup>

The judges in *Brookfield* made a clear distinction between the reasoning in *Bryan* and *Woolcock*, with Hayne and Kiefel JJ focusing on the departing circumstances of each case. The decision in *Bryan* depended upon the existence of an anterior duty of

<sup>82</sup> See *Brookfield* (2014) ALR 408, 449 [181] (Gageler J).

<sup>83</sup> *Woolcock* (2004) 216 CLR 515, 531-532 [25].

<sup>84</sup> See *Brookfield* (2014) ALR 408, 418 [27] (French CJ).

<sup>85</sup> *Woolcock* (2004) 216 CLR 515, 532 [27] (Gleeson CJ, Gummow, Hayne and Heydon JJ) cited in *Brookfield* (2014) ALR 408, 418 [26] (French CJ), 423 [49] (Hayne and Kiefel JJ).

<sup>86</sup> *Woolcock* (2004) 216 CLR 515, 533 [31].

<sup>87</sup> *Brookfield* (2014) ALR 408, 418 [29] (French CJ).

<sup>88</sup> *Woolcock* (2004) 216 CLR 515, 533 [31] (Gleeson CJ, Gummow, Hayne and Heydon JJ).

<sup>89</sup> *Brookfield* (2014) ALR 408, 449 [183] citing *Woolcock* (2004) 216 CLR 515, 550 [85], 558-559 [111].

<sup>90</sup> *Brookfield* (2014) ALR 408, 449 [182] (Gageler J) citing *Woolcock* (2004) 216 CLR 515, 552 [94].

care to avoid economic loss to the original owner of the kind suffered by the subsequent purchaser.<sup>91</sup> While in *Woolcock*, neither reliance by the original owner on, nor the assumption of responsibility by, the engineering company existed.<sup>92</sup> Therefore, the plurality held that the extension of an original duty owed by the builder to the owner, as found in *Bryan*, could not be applied to *Woolcock*. It appears that *Woolcock* used the case of *Bryan* as an example of a decision that was based on ‘notions of assumption of responsibility and known reliance.’<sup>93</sup>

*Woolcock* also clarified that ‘vulnerability’ could be used as rationale for the exceptions to the general rule, demonstrating that vulnerability is concerned not only with the reasonable foreseeability of loss where reasonable care is not taken, but also with the inability of the plaintiff to take steps to protect itself from the risk of loss.<sup>94</sup> It was on these grounds and its factual similarity that the High Court in *Brookfield* used this precedent.

### 3 *Was the Owners Corporation ‘Vulnerable’?*

The notion of ‘vulnerability’ is a paramount consideration in determining the existence of a duty of care for pure economic loss.<sup>95</sup> The High Court found vulnerability to refer to a plaintiff’s ‘inability to protect itself from the defendant’s want of reasonable care.’<sup>96</sup> This inability can be absolute or sufficient enough to cast the consequences of the loss on the defendant.<sup>97</sup> The justices in *Brookfield* found that the question of vulnerability, consistent with the decision in *Woolcock*, would determine the outcome of the appeal.<sup>98</sup>

Hayne and Kiefel JJ made two assumptions in their assessment of vulnerability. Firstly, the developer and the purchasers relied on the builder to do its work properly. This assumption was also made in regards to the Owners Corporation which ‘was in no better position to check the quality of the builder’s work’ as it was being carried out by the original purchaser of the lot.<sup>99</sup>

Intrinsic to an assessment of vulnerability are factors supporting reliance. However, Hayne and Kiefel JJ deemed the element of reliance as being insufficient on its own.<sup>100</sup> Both judges agreed that the existence of the Master Agreement, the D&C and the sale contracts, all of which provided for defects in the common property which was vested in the Owners Corporation, militated against a finding that the parties could not protect their own interests.<sup>101</sup> On this observation, the builder did not owe the Owners Corporation a duty of care. Their Honours closed their judgement by stating that a

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<sup>91</sup> *Ibid* 423 [50] (Hayne and Kiefel JJ).

<sup>92</sup> *Ibid*.

<sup>93</sup> (2004) 216 CLR 515, 531 [24]; *Brookfield* (2014) ALR 408, 437 [129] (Crennan, Bell and Keane JJ).

<sup>94</sup> *Woolcock* (2004) 216 CLR 515, 530-531 [23]; *Brookfield* (2014) ALR 408, 438 [130] (Crennan, Bell and Keane JJ).

<sup>95</sup> *Brookfield* (2014) ALR 408, 416 [22] (French CJ).

<sup>96</sup> *Brookfield* (2014) ALR 408, 416 [22] (French CJ) quoting *Woolcock* (2004) 216 CLR 515, 530 [23] (Gleeson CJ, Gummow, Hayne and Heydon JJ).

<sup>97</sup> *Brookfield* (2014) ALR 408, 423 [51] (Hayne and Kiefel JJ).

<sup>98</sup> *Ibid*.

<sup>99</sup> *Ibid* 424 [56] (Hayne and Kiefel JJ).

<sup>100</sup> *Ibid* 424 [57] (Hayne and Kiefel JJ).

<sup>101</sup> *Ibid* [58]; cf *Smith v Eric S Bush* [1990] 1 AC 831.

conclusion about the absence of vulnerability does not depend upon ‘detailed analysis of the particular content of the contracts the parties made’.<sup>102</sup>

Crennan, Bell and Keane JJ were at odds with the opinion of the Court of Appeal that the developer, by relying on the expertise of the builder in performing its obligations, was vulnerable.<sup>103</sup> This position was taken after a consideration of the role of the Superintendent, who was responsible for issuing the Final Certificates under the D&C contract. Due to this role, the Superintendent acted as a protection mechanism for the developer and as such, no vulnerability could be alleged.<sup>104</sup>

*(a) Salient Features of the Relationship*

The strict application of precedent resulted from what French CJ determined to be ‘an element of novelty’ involving the intertwined relationship between the parties.<sup>105</sup> Therefore, in addition to factors supporting vulnerability, French CJ considered the salient features of the relationship between the Owners Corporation and the builder.<sup>106</sup>

French CJ first held that in light of the D&C contract, the developer would not be taken to have relied upon any responsibility on the part of the builder in relation to pure economic loss flowing from latent defects, beyond the responsibility imposed on it by the D&C contract.<sup>107</sup> This decision was reached as the Owners Corporation was controlled by the developer and Park Hotel, who were party to, and therefore aware of, the contract and the extent of the builder’s obligations and liabilities in respect to defects in the common property.<sup>108</sup>

Secondly, in relation to whether a duty of care was owed to the Owners Corporation by virtue of its relationship to subsequent purchasers from the developer,<sup>109</sup> French CJ answered in the negative. The purchasers of the apartments were ‘effectively investors’ in the hotel under the sale contracts, which contained provisions relating to the developer’s obligation to undertake repairs. Therefore, such provisions provided the reason as to why the purchasers could not be found to be vulnerable.<sup>110</sup> The position of the purchasers and the interaction between the contractual and statutory matrix was antithetical to a finding that the builder owed the Owners Corporation a duty.<sup>111</sup> Therefore, French CJ concluded that no duty of care existed in respect of pure economic loss flowing from latent defects owed by the builder to the developer. Correspondingly, no duty of care was owed by the builder to any subsequent owners.<sup>112</sup>

#### 4 *Assumption of Responsibility and Known Reliance*

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<sup>102</sup> *Brookfield* (2014) ALR 408, 425 [60] (Hayne and Kiefel JJ).

<sup>103</sup> Court of Appeal Decision (2013) 85 NSWLR 479, 508 [120] (Basten JA).

<sup>104</sup> *Brookfield* (2014) ALR 408, 440 [142] (Crennan, Bell and Keane JJ).

<sup>105</sup> *Ibid* 417 [23] (French CJ).

<sup>106</sup> *Ibid* 419 [30].

<sup>107</sup> *Ibid* [33].

<sup>108</sup> *Ibid* [32].

<sup>109</sup> *Ibid* [33].

<sup>110</sup> *Ibid* 420 [34] (French CJ).

<sup>111</sup> *Ibid*.

<sup>112</sup> *Ibid* [36].

French CJ dealt succinctly with the assumption of responsibility and reliance by pointing to the D&C contract. His Honour found that the responsibility assumed by the builder, in regards to the developer, was detailed in the D&C contract and therefore, the developer could not have relied upon any responsibility on the builder's behalf in relation to pure economic loss flowing from latent defects outside of the limits imposed by the contract.<sup>113</sup>

In addition, the fact that the Owners Corporation did not exist at the time the defective work occurred went against a finding that the Owners Corporation could have relied upon the builder in any way;<sup>114</sup> there was no assumption of responsibility by the builder in favour of the Owners Corporation, nor known reliance on the builder by it.

### 5 *Existence of a Duty of Care*

Crennan, Bell and Keane JJ disagreed with the argument that the duty propounded by the Owners Corporation was owed by the builder to the developer concurrently in contract and tort. The liability of the builder to the developer was the subject of detailed provisions in the D&C contract, regarding the risk of latent defects in the builder's work. These provisions expressly cast onto the builder the risk of expense to make good defects, and secured performance of the D&C contract. Their Honours found that to force upon such provisions an obligation to take reasonable care to avoid 'a reasonably foreseeable economic loss to the developer' in having to make good the consequences of the defects, would be to alter the allocation of risk and liability effected by the contract.<sup>115</sup>

Crennan, Bell and Keane JJ found the reasoning of the Court of Appeal to be inconsistent with *Woolcock* as to whether there was a duty owed by the builder to the Owners Corporation independent of its obligations to the developer. As the purchasers insisted on contractual rights against the developer in the sale contract, there existed no evidence that the purchaser was deprived of negotiating for a more extensive warranty with the developer, by virtue of the builder's conduct.<sup>116</sup> In addition, the builder did not assume responsibility to the purchaser for its decision.<sup>117</sup>

### 6 *A Question of Dangerous Defects?*

Crennan, Bell and Keane JJ dispelled the notion that a builder owes a duty of care in tort to subsequent purchasers if it is foreseeable that a failure to take reasonable care in the building work would create dangerous defects. While the Owners Corporation relied on the Canadian case of *Winnipeg Condominium*,<sup>118</sup> their Honours saw practical difficulty with its application for two reasons. Firstly, the existence of such a duty will not be known until after the defects occur and are categorised.<sup>119</sup> Secondly, relying on

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<sup>113</sup> *Ibid* 419 [33].

<sup>114</sup> *Ibid* 442 [150] (Crennan, Bell and Keane JJ).

<sup>115</sup> *Ibid* 441 [144].

<sup>116</sup> *Ibid* 442 [148].

<sup>117</sup> *Ibid*.

<sup>118</sup> *Winnipeg Condominium Corporation No 36 v Bird Construction Co* [1995] 1 SCR 85.

<sup>119</sup> *Brookfield* (2014) ALR 408, 445 [161] (Crennan, Bell and Keane JJ) citing *Fangrove Pty Ltd v Tod Group Holdings Pty Ltd* [1999] 2 Qd R 236, 248 [46].

the judgement of Lord Oliver in *Murphy v Brentwood District Council*,<sup>120</sup> they found the distinction between *defect* and *dangerous defect* fallacious.<sup>121</sup>

## VI CONCLUSION

The *Brookfield* decision is significant as it clarified the uncertainty surrounding recovery for pure economic loss in tort. The High Court affirmed the relevance of an assessment of vulnerability, the assumption of responsibility and known reliance in claims for pure economic loss. It also dealt with how past precedents such as *Bryan* and *Woolcock* should be approached. It addressed the difficulty in arguing that negligence for pure economic loss should be excluded on the basis that a claim may undermine doctrines of law or contract.<sup>122</sup> It refused, however, to acknowledge a general test for pure economic loss, rejecting the notion that it would be an error to give remedy in tort for economic loss due to the compartmentalisation of contract and tort law in Australia.<sup>123</sup> Crennan, Bell and Keane JJ made it clear that recovery for economic loss should be seen as an exception to the general rule, that damages for economic loss which are not consequential upon damage to person or property are not recoverable in negligence even if the loss is foreseeable.<sup>124</sup> In addition to reaffirming the importance of allocating risk in contracts, the High Court definitively concluded that a builder will not have a duty to exercise reasonable care in executing building work to avoid a subsequent purchaser incurring the cost of repairing latent defects.<sup>125</sup>

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<sup>120</sup> [1991] 1 AC 398, 488-489.

<sup>121</sup> *Brookfield* (2014) ALR 408, 445 [161].

<sup>122</sup> *Ibid* 424 [59] (Hayne and Kiefel JJ).

<sup>123</sup> *Ibid*.

<sup>124</sup> See *Caltex Oil (Australia) Pty Ltd v The Dredge 'Willemstad'* (1976) 136 CLR 529; *Cattle v Stockton Waterworks* (1875) LR 10 QB 453; *Woolcock* (2004) 216 CLR 515, 530 [22]; *Brookfield* (2014) ALR 408, 437 [127] (Crennan, Bell and Keane JJ).

<sup>125</sup> See Cucinotta, above n 2, 145.