



## Précis Paper

### Negligence in relation to asbestos-contaminated waste

A discussion of the recent decision in *Bettergrow Pty Limited v NSW Electricity Networks Operations Pty Ltd as trustee for NSW Electricity Networks Operations Trust t/as TransGrid (No 2)* [2018] NSWSC 514.

#### Discussion Includes

- Key facts
- Principal issues in disputing the case
- Non-delegable duty of care
- Ordinary duty of care
- Had there been a duty of care owed, would there have been a breach?
- Breach of Contract
- Takeaways from case

## Précis Paper

### Negligence in relation to asbestos-contaminated waste

1. In this edition of BenchTV, Dominic Priestley SC (Barrister – New Chambers, Sydney) and Robert Crittenden (Principal Solicitor- Meridian Lawyers, Sydney) discuss the recent decision in *Bettergrow Pty Limited v NSW Electricity Networks Operations Pty Ltd as trustee for NSW Electricity Networks Operations Trust t/as TransGrid (No 2)* [2018] NSWSC 514.

#### Key facts

2. TransGrid, the first defendant conducted various tests on the site of an electrical sub-station which it owned, before commencing refurbishment works.
3. A test of the soil concluded evidence of asbestos contamination on parts of the site.
4. TransGrid contracted Powercor Network Services to oversee the refurbishment works after advising Powercor of the results of the tests.
5. Powercor subcontracted some of the civil works to TTR who then subcontracted some of those works to Online.
6. Online dug up the soil, which it then transported off the site.
7. The testing that had been conducted had not revealed asbestos in the area but TransGrid had required Powercor to treat all the soil on the site as if it were asbestos contaminated.
8. Powercor passed this information on the TTR and TTR claimed that it had told Online that it must deal with all the soil as if it were contaminated with asbestos.
9. Online maintained that it had never been told of the asbestos contamination on the site.
10. Online took the soil to Bettergrow's facility however Bettergrow was not licensed to deal with asbestos contaminated waste.
11. Bettergrow conducted its own tests of the soil and found it was contaminated with asbestos.
12. Bettergrow had to shut down the facility for about two months and claimed that they had suffered loss in two ways;
  - a. The cost of decontaminating the site and
  - b. The cost of shutting down the site i.e. the revenue
13. Bettergrow commenced proceedings in Supreme Court against; TransGrid as the first defendant, Powercor as the second defendant, TTR as the third defendant and Online as fourth defendant.
14. Each were sued in negligence and there was a contractual claim against Online.

#### Principal issues in disputing the case

15. Bettergrow sued TransGrid and Powercor for negligence but also the existence of a non-delegable duty of care by TransGrid to Bettergrow to ensure that care is taken by others due to the hazardous nature in dealing with asbestos.

16. The issues faced by Online was whether there was a breach of an express or implied term of contract as well as being sued for negligence.

#### Non-delegable duty of care

17. The High Court in the case of *Kondis v State Transit Authority* (1984) 154 CLR 672 held there can arise a special element of control where a party has assumed responsibility for the safety of another person or property or is otherwise placed in relation to that other party such as that they come under such a responsibility where their duty of care cannot be delegated.
18. Bettergrow alleged that asbestos was so hazardous that TransGrid owed a non-delegable duty of care.
19. Justice Ball found that there was no non-delegable duty of care.
20. This was because Justice Ball held that the hazardous activities carried out were hazardous to human health, not economic loss which is what Bettergrow was suing for.
21. Further, Justice Ball held that there needs to be some vulnerability as part of the special relationship between the parties such that the vulnerable party could not adequately protect itself.
22. As Bettergrow, as part of its commercial activities accepted waste onto its site and was in a position to regulate what it took onto its site, it was in a position to draw contractual terms to protect itself from what was brought into the facility, for example by making the deliverer strictly liable.
23. The decision in *Leichhardt Municipal Council v Montgomery* (2007) HCA 6 found that Courts should not be adding to the categories of non-delegable duty of care unless there was a sound doctrinal basis to do so.
24. There was no existing category for a non-delegable duty to be found in the relationship between Bettergrow and TransGrid and there was no proper basis to add to the existing categories.
25. Justice Ball also noted that TransGrid and Powercor were far removed from Online's activities and did not even know of Bettergrow's existence.
26. He noted that it would be rare for a situation to arise where subcontractors would come under a non-delegable duty of care.

#### Was there a breach of an ordinary duty of care?

27. Justice Ball considered the question of whether or not there was a duty of care on the basis of physical damage to property or did the particulars of the case make it a case for pure economic loss.
28. He found that this was a case of economic loss arising from physical damage to property.

29. The difference being that where there is injury in recognised categories of cases arising from damage to person or property usual reasonable foreseeability for that type of injury will be sufficient to establish a duty of care.
30. When there is a claim for pure economic loss, the test of reasonable foreseeability is not enough.
31. The claim in the present case was damage to property in the facility that resulted in both remediation costs and loss of revenue.
32. Justice Ball accepted that the mud already in the facility had been damaged by the introduction of asbestos.
33. However, he was not satisfied that this was a proper basis for determining that this was a case for physical damage to property as the damaged mud was not really the source of the loss.
34. This is because they weren't actually trying to sell the mud and therefore the mud being damaged was not the cause of the loss.
35. Therefore, he held that there had been no physical changed to any of the property in the facility and therefore there was nothing that constituted physical damage at law.
36. As per the case of *Caltex Refineries (Qld) Pty Limited v Stavar* (2009) NSWCA 258 the signs of duty of care include foreseeability, vulnerability, reliance among others.
37. His Honour held that TransGrid did not know of Bettergrow's existence and there was no vulnerability as Bettergrow was well placed to protect itself from the risk.
38. His Honour thus found that there was no physical damage at the facility and therefore that this was a claim for pure economic loss.

Had there been a duty of care owed, would it have been breached?

39. His Honour held that even if there had been a duty of care owed by TransGrid, there was no breach of that duty as TransGrid had taken appropriate steps to address the risk of harm by including sufficient requirements in the contract with Powercor to deal with the asbestos.
40. There was also no breach of duty by Powercor as they had taken appropriate steps to make their subcontractors aware of the risk of asbestos.
41. Bettergrow pleaded various particulars against TransGrid and Powercor for failure to comply with various regulations in relation to handling of asbestos.
42. His Honour found that these regulations are for the protection of human health and therefore there was no causation in failing to comply with those regulations which led to economic loss.

Breach of Contract

43. The case against Online in contract was on two grounds
  - a. That there was an express term that was breached and;

b. That there was an implied term that was breached.

44. In relation to the breach of an express term, the written terms of trade provided by Bettergrow to Online contained a clause that required Online not to deliver waste material that had any of the specific contaminants referred to or other obvious rubbish.
45. The asbestos in the mud did not fit with any of the descriptions and therefore there hadn't been any breach of the express terms of the contract.
46. Bettergrow also argued an implied term that the deliverers would not deliver asbestos contaminated waste.
47. The implied term must be practically necessary for the operation of the contract and this was not the case here.
48. There was no express or implied term that had been breached by Online and therefore the claim in contract failed.
49. Further, as the parties contracted on commercial terms and as Bettergrow was well placed to protect itself from the risk of asbestos, there was no sufficient evidence to show that Online owed a duty of care in those circumstances.

#### Takeaways from case

50. Entities must protect themselves from deliverers either by way of contract or by testing or enquiry themselves because if they receive contaminated waste it is not going to be easy to attribute liability in tort to anyone.
51. Further, in such a case, they will be unable to put themselves in the position of personal injury and then draw upon all the personal injury principles to attribute duties of care.

## **BIOGRAPHY**

### Dominic Priestley SC

Barrister – New Chambers, Sydney

Dominic Priestley was appointed Senior Counsel in NSW in 2015. He practices in insurance, common law, professional indemnity, construction and property law.

### Robert Crittenden

Principal Solicitor – Meridian Lawyers, Sydney

Robert Crittenden was admitted as a solicitor in 1987. He is a New South Wales Board Member and Chair of the Liaison Sub-Committee for the Australian Insurance Law Association (AILA) and is a member of the Product Liability Law Association. Robert practises in insurance law and litigation, with a focus on professional indemnity and product liability insurance.

## **BIBLIOGRAPHY**

### Focus Case

*Bettergrow Pty Limited v NSW Electricity Networks Operations Pty Ltd as trustee for NSW Electricity Networks Operations Trust t/as TransGrid (No 2)* [2018] NSWSC 514.

### Cases

*Kondis v State Transit Authority* [1984] 154 CLR 672  
*Burnie Port Authority v General Jones Pty Ltd* [1994] HCA 13  
*Leichhardt Municipal Council v Montgomery* [2007] HCA 6  
*Leighton Contractors Pty Ltd v Fox* [2009] HCA 35  
*Bryan v Maloney* [1995] 182 CLR 609  
*Caltex Refineries (Qld) Pty Limited v Stavar* [2009] NSWCA 258  
*Perre v Appand Pty Ltd* [1999] HCA 36

### Legislation

Civil Liability Act 2002 (NSW) s5b