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Précis Paper

The Duty of Care of Owners, Agents, and Tenants

Discussion of the recent NSW Court of Appeal decision in *Libra Collaroy Pty Ltd v Bhide* [2017] NSWCA 196

Discussion Includes

- Key facts
- Findings at trial
- Findings on appeal
- Key takeaways for practitioners

1. In this edition of BenchTV, Dominic Priestley SC (Barrister, New Chambers, Sydney) and Paul Kozub (Principal, Gilchrist Connell, Sydney) discuss the recent NSW Court of Appeal decision in *Libra Collaroy Pty Ltd v Bhide* [2017] NSWCA 196, and what practitioners can takeaway from the case.

Key facts

2. *Libra Collaroy Pty Ltd v Bhide* [2017] NSWCA 196 was an occupiers' liability professional negligence case involving a landlord, tenant, managing agent, and personal injury arising from the collapse of a balcony. The case involved a series of actions that were brought together by plaintiffs seeking damages for personal injury as a result of a collapsed balcony at a residential house.

3. There were four young adults on the balcony when it collapsed, and they all sustained personal injuries. There was a fifth plaintiff who, importantly, was the tenant of the property. She was the mother of one of the four people injured. She was not physically injured herself but she brought a claim for damages for psychiatric injury/nervous shock.

4. The plaintiffs sued the owner of the property for failure to adequately maintain the property, and the managing agents, who were agents pursuant to a management agency agreement in standard from (between themselves and the owners). Both those parties were sued in negligence.

5. There were also cross-claims between the agents and the owners, both in tort, seeking contribution under the *Law Reform (Miscellaneous Provisions) Act* 1946 (NSW), and both pursuant to the contract (there was an indemnity clause in favour of the agent whereby the agent had to establish it had properly performed its duties in order to have the benefit of that clause). And the owners sued the agency by way of cross-claim for breach of the agency agreement in failing to properly perform the management services, which included, to some extent, dealing with the tenants and arranging repairs as necessary.

6. The balcony collapsed because of excessive weathering to the structural timber beams and the metal fixings. There was a question as to whether or not the owners, agents and tenants should have been on notice of that defect over time. The essential allegation in negligence against both the owners and agents was that the balcony did not collapse out of the blue.

7. There had been a long history of circumstances (around 7 years) that had put the various parties on notice that the structural condition of the balcony was deteriorating. So the

agents, the owners, and the tenant were all aware of the condition of the balcony, and there was evidence of that.

Findings at trial

8. The trial judge found that there was negligence on the part of the managing agent in failing to take adequate steps to respond to the risk, which had been developing over time. This finding was not challenged on appeal.

9. The trial judge found that there was no negligence on the part of the owners, which was based on the related finding that the owners had delegated their duty of care to entrance to their property to the managing agents under the management agency agreement.

10. As the agreement provided that the agents were responsible for the repair and maintenance of the property, the trial judge took the view that the owners were free of any responsibility, notwithstanding the fact that the owners were on notice of the structural defect, and did not take any steps to make sure the agents saw to its repair. This finding was the most controversial and appellable point, as far as the agents were concerned, because although the agents accepted at trial and on appeal that the duty of care owed by owners of a *Jones v Bartlett* type can be delegated as a matter of law, and was delegated to some extent in this case in the ordinary way by the contract, it was contended that in the more detailed factual circumstances of the case, there had not been a complete and effective delegation, because the owners had kept involvement in the property up (by way of visits, contact with the agents about the deck, appointment of tradesmen to deal with it, etc.).

11. The trial judge was satisfied that there had been a delegation in accordance with the decisions in *Leighton Contractors Pty Ltd v Fox* and *Laresu Pty Ltd v Clark*. He held that unless the owners had given some specific instruction to their agents that limits the degree of delegation, then the delegation will be effective in discharging the duty of care.

12. He then went on to find that there was no negligence on the part of the handyman carpenter. He found that the handyman was engaged just to do work on the decking boards, and did not have the level of expertise to identify the structural defect. Neither the owners nor the agents considered it appropriate to appeal the finding in favour of the handyman.

13. The trial judge went on to find that there was no negligence on the part of the tenant (who was a practising architect). Although the evidence revealed that the tenant had herself considered that there were structural defects for a number of years, the trial judge

accepted her response that she would never have let anyone use her deck if she thought there was any risk that it would collapse.

14. The agents appealed against that finding on the basis that a reasonable person in her position should have responded to risk of harm in some substantive way, and that her subjective view about the likelihood of risk coming to pass was irrelevant to the determination of negligence. The agents appealed (not against the finding of its own liability) two findings:
    - that the owners were not liable
    - that the tenant was not liable

Findings on appeal

15. The Court of Appeal upheld that aspect of the appeal, finding both the owners and tenant to have been negligent. The argument on appeal was the same by the agent as it had been at trial – that is, although the duty can be delegated, and was delegated to some extent, it was not a complete and effective delegation. The submission at trial and on appeal was that the terms of the delegation needed to be looked at closely.

16. The terms of the delegation were confined by the written contract between the parties. In the terms was an authority for the managing agents to attend to repairs, but that did not constitute any particular obligation on the agents to examine or inspect for structural defects, or address any risks of harm.

17. The owners would visit the property from time to time - even engage tradesmen for its repair and maintenance - and the structural issues were raised with them. So there was an ongoing relationship that was not necessarily consistent with this concept that the duty had been completely delegated under the contract.

18. The primary finding on appeal was that there had been delegation, and it had been effective and complete. However, it was further found that the owners had a duty to take reasonable steps to choose an agent, and ensure that they would be capable of discharging the relevant duty, and to take reasonable steps to monitor whether or not the agent does discharge its duty. The difficulty for the owners was that they had been on notice of the structural issue, and of the fact that the agents were not doing enough about it. Ultimately, the Court of Appeal held that the owners had been negligent.

19. The tenant was also found liable by the Court of Appeal on the basis that she had been sufficiently on notice. The fact that the tenant was qualified as an architect was not a relevant factor in the reasoning. The Court of Appeal specifically rejected the notion that

the tenant's subjective view about the likelihood of the balcony collapsing could answer the question on its own as to her negligence. So the Court of Appeal found that the tenant and owners were both joint tortfeasors.

20. The Court of Appeal then went on to find, despite its finding in respect of the owner's tortfeasor exposure, that the owners were still entitled to be indemnified by the agent by reason of the terms of the managing agency contract.

21. The trial judge found that the contractual indemnity clause in favour of the agent was not effective based on his finding that the agents had not properly performed their duties. This finding was not argued against on appeal.

22. The trial judge also found that there was no negligence on the part of the owners. He found that the owners only owed a contractual duty of care to the tenant, arising under the tenancy agreement, and that there was a breach of the tenancy agreement. So he found that the owners were entitled to a contractual indemnity from the agents for breach of the management agency agreement.

23. The Court of Appeal upheld the position that although the owners were a joint tortfeasor, and because the agents had breached the managing agency agreement, the agents were liable to indemnify the owners for their joint tortfeasor exposure. It therefore held that the owners were entitled to a full indemnity for their liability, notwithstanding their joint tortfeasor exposure.

24. The decision of the Court of Appeal considered in some detail the question of how a finding of contributory negligence should be considered in the context of a claim in contract. The decision in *Astley v Austrust Ltd* [1999] led to the *Law Reform (Miscellaneous Provisions) Amendment Act* 2000 (NSW) to amend the Act's apportionment provisions. Such amendments were introduced across the states in order to align the statutory law of contributory negligence for torts with that as for contracts.

25. The Court had to consider whether the agents in this case could properly mount a defence of contributory negligence. The question was whether the negligence on the part of the owners could constitute contributory negligence, and to what degree. The Court found that the owners' acts or omissions amounted to a breach of a contractual duty of care that is concurrent and co-extensive with a duty of care in tort under s 8 of the Act.

26. Causation was not the subject of any serious debate, either at trial or on appeal.

Key takeaways for practitioners

27. Two key takeaways for practitioners in this case are:
    - firstly, the basic but helpful outline it provides of the way in which the apportionment provision can and should be applied to claims in contract, and
    - secondly, that there is no reason to think that the deduction for contributory negligence in a claim for contract by someone who is otherwise a joint tortfeasor would necessarily lead to a lesser deduction than might be expected between tortfeasors on the available facts

28. We are seeing time and again the Court of Appeal pointing to the importance of the trial process properly considering the relevant provisions of the *Civil Liability Act* that govern negligence. The point has been made numerous times in the last 5 to 10 years that without adverting to those provisions, there is a real risk that the fact-finding process in relation to negligence can miscarry.

29. The trial judge in this case had not referred to s 5B at all in his reasoning in terms of negligence. The Court of Appeal held that the first and most important step is to identify the relevant risk of harm for the purposes of s 5B, because only then can the Court confidently turn to consider what reasonable precautions under s 5B should be taken by a prospective defendant.

30. This case serves as a reminder to trial judges, parties to a dispute, and practitioners on both sides alike, of the importance of identifying the risk of harm, and then considering the relevant elements of s 5B in order to determine properly whether there has been a breach of duty. Practitioners on both sides must remember that s 5B *will* be applied, and it *must* be considered. The Courts have said in recent times that the risk of harm and the precautions should now, as a matter of best practice, be pleaded by plaintiff lawyers, and considered by defence lawyers.

31. The Court of Appeal also noted that it was important to apply s 10 of the *Law Reform (Miscellaneous Provisions) Act* 1965 (NSW) having regard to how is affected by s 5R of the *Civil Liability Act* 2002 (NSW).

BIOGRAPHY

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Cases

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Legislation

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