Negligence - Engineers' Liability To Subsequent Purchasers

National Mutual Life Association of Australia Ltd v Coffey & Partners Pty Ltd & Ors, Supreme Court of Queensland, Full Court, 30 August 1990, (1990) Aust. Torts Reports ¶81-057.

The judgement of Derrington J. in the Supreme Court of Queensland, is reported in Issue #13 of the Newsletter at page 48. In that action, Derrington J. dismissed an appeal from Master Horton QC's order that the plaintiff's statement of claim be struck out against several of the defendants as disclosing no cause of action.

This appeal from that decision arose out of the purchase by T & G Mutual Life Association Ltd ("T & G") from Philips Industries Holdings Ltd ("Philips") of land at South Brisbane on which was erected an industrial building.

Philips had engaged Coffey & Partners Pty Ltd ("Coffey & Partners", the first defendant), consulting civil engineers specialising in soil mechanics and foundation design, to investigate the land and determine the appropriate foundation system for the building.

The construction was undertaken by the Fletcher Organisation Pty Ltd (the fourth defendant), which also retained consulting engineers who were experts in soil mechanics and foundation design - John Connell Holdings Pty Ltd ("John Connell", the second defendant) and Conasoc (Qld) Pty Ltd ("Conasoc", the fifth defendant).

The statement of claim alleged that Coffey & Partners had negligently advised Philips as to the foundations which would be adequate for the industrial building to be constructed and that both Coffey and Partners and Conasoc negligently designed the foundations and thereafter negligently supervised the construction of the foundations. It was further alleged that all three consulting engineers, Coffey & Partners, John Connell and Conasoc had negligently failed to appreciate that movements which had occurred in the building were caused by faulty foundations and that, in consequence, each of them had negligently failed to take steps to rectify by re-design or to advise what steps should be taken.

The action was taken on the basis that loss to the purchaser from Philips was foreseeable as a result of the negligence alleged against the engineers and that NML, T & G's successor, standing in the shoes of T & G suffered loss in consequence of that negligence. The plaintiff claimed the expenses incurred in repairs to the building prior to sale of the land, loss on this sale of the order of $2,600,000, loss of rents and of other income.

Prior to purchasing the building from Philips, T & G had engaged Rankine & Hill Pty Ltd to carry out a pre-purchase inspection. Rankine & Hill had discovered localised cracking on a piercap beam in a corner of the building. In consequence, prior to purchase, T & G had been aware that movement had occurred in the building and that cracks in the foundations, which had occurred during construction, were due to the inadequacy of the foundations and fill in one corner of the site.

In the previous action before Derrington J., the consulting engineers had argued successfully that the Court should strike out the claim on the ground that it disclosed no cause of action. The plaintiff's problem had been to establish the requisite element of proximity in the relationship between the consultants and the plaintiff. The plaintiff had no contract with the consultants, nor with the builder, and had not acquired the building until after the building had been completed and the faulty foundations first detected.

Having categorised the loss as economic, Derrington J. relied upon *Sutherland Shire Council v Heyman* (1985) 157 CLR 424, where the High Court decided that a council was not in a relationship of proximity to a subsequent owner of an house; *D & F Estates Ltd v Church Commissioners for England* (1989) AC 177, where the House of Lords held that a builder was not in a sufficient relationship of proximity to lessees from the building owner; and *Simaan General Contracting Co v Pilkington Glass (No2)* [1989] 2 WLR 761, where the Court of Appeal decided that a supplier of glass to a subcontractor was not in a sufficient relationship of proximity to the head contractor.

Whilst NML conceded that its loss was properly characterised as economic loss, the Full Court noted that this did not preclude recovery of damages for negligence due to the High Courts decision in *Caltex Oil (Australia) Pty Ltd v The Dredge "Willemstad"* (1975-1976) 136 CLR 529. In delivering the Full Court's judgement, Connolly J. said:

> "Now forseeability of damage as likely to be sustained by a subsequent purchaser of a building erected upon unsatisfactory foundations is obvious enough. The question is whether the relationship between the engineers and the purchaser is sufficiently close."

Connolly J. noted that *Sutherland Shire Council v Heyman* superficially resembled this case. Further, that *Sutherland* was important for the recognition that the Council, in so far as it had any duty in the matter, owed it to subsequent purchasers. In that case the plaintiffs failed because there had been no evidence of a failure to give proper consideration whether to inspect.

Connolly J. noted that the extent to which it may be said that a subsequent purchaser relies upon the due exercise of professional skill and judgement by designing engineers is not the subject of binding authority in Australia.

The engineers contended that there could be no reliance on the skill and judgement of the engineers because

it was plain on the face of the pleading that the foundations were defective and the contract of sale and purchase made provision for the cost of remedying further defects as and when they should materialise.

The Full Court held:

1. The pleading could not have been struck out on the basis that the necessary relationship to found the cause of action in negligence could not exist between the designing and supervising engineers and the subsequent purchaser.
2. There were powerful reasons for believing that a duty was owed by the engineers and that succession to the ownership of the subject matter of the professional design should be regarded as creating a relationship of proximity. The reliance which a prospective purchaser of a building, which is seen to be standing in good order, places on the exercise of due care by the doubtless unknown designers and builders is at least as real as the reliance placed by the public on the due performance of public duties.
3. T & G was aware that there were problems in the foundations when it purchased the building and that the placement of fill had caused problems; the action was far from promising and the purchaser would face problems. However, in determining whether to strike out the pleading, it was relevant that it had not been established that T & G's knowledge would deprive it of a cause of action. The evidence might reveal that the knowledge T & G had did not go to the whole of the loss which it sustained. It was not a function of this Court, on an appeal from an order striking out a pleading, to do more than see whether there was a real question of fact or law to be determined.
4. The decision in *D & F Estate Ltd v Church Commissioners of England*, that pure economic loss is not recoverable as damages for negligence, is in fundamental conflict with a long line of authority in the High Court commencing with the *Caltex* case. Consequently, *D & F Estates* cannot be regarded as a secure basis for the resolution of a problem in this case.

The Full Court allowed the appeal and set aside the orders of Master Horton and of Derrington J. and dismissed the application by Coffey & Partners, John Connell and Conasoc that the pleadings be struck out as disclosing no cause of action.

- John Tyrril

Notice Requirements - Estoppel

Update Constructions Pty Ltd v Rozelle Child Care Centre Ltd, New South Wales Supreme Court, Court of Appeal, 27 March 1990, [1990] NSWLR 251

This appeal "illustrates the melancholy fate which sometimes awaits parties to a building dispute who submit their dispute to arbitration" (Kirby P. at p253). Perhaps more importantly, it deals with the issue of compliance with a contract's notice requirements.

Less than $20,000 was in issue between the parties in a dispute arising out of the construction of child care premises under a modified BC3 contract. An arbitration took place between the proprietor and the builder over eight days before Mr E.E. Morris, arbitrator. The arbitrator's award determined whether the proprietor was liable to the builder for the costs of variations, notwithstanding certain provisions of the parties' agreement. The proprietor sought leave to appeal pursuant to the Commercial Arbitration Act 1984 (NSW) (the Act) on the grounds of error in law.

Rogers C.J., Commercial Division, granted leave to appeal, allowed the appeal, set aside the arbitrator's interim award and returned the award to the arbitrator to dispose of the costs of the proceedings. The builder then sought, and was granted, leave to appeal to the Court of Appeal. Kirby P. commented:

> "... The consequence is that for a dispute in which there is in issue less than $20,000, it has taken the representatives of the parties and the legal system eight days of arbitrations and five days in court to reach a conclusion. And the proceedings are not yet concluded. ... it is little wonder that litigants despair of the system of justice and dispassionate observers search for procedures of dispute resolution which are more effective, less expensive and less time consuming ..."

The building contract required the builder to give written notice if a variation was required. Whilst the proprietor warranted that the site would support the building works, the builder was required to give written notice if the conditions encountered differed from those described and to obtain the proprietor's instructions before proceeding. If the builder considered that the conditions encountered required that the works be varied, the builder was required to forthwith notify the proprietor and obtain his instructions before proceeding.

The builder encountered an old well just under ground level and was concerned that the bearing value was uncertain. The builder obtained advice from a structural engineer who considered that new footings and additional reinforcing steel were required. The builder did not give the written notice required by the contract. This notice was clearly required for variations but not so clearly for latent