Negligence - Proprietor's Claim Against Manufacturer and Supplier of Allegedly Defective Tiles.

CBD Investments Pty Ltd v Ace Ceramics Pty Ltd, unreported,
Supreme Court of New South Wales, Giles J, 50021 of 1992, 12 June 1992.

CBD alleged that Ace Ceramics had agreed to supply and fix floor tiles in a building, but the tiles were defective. CBD claimed the cost of replacing the tiles and consequential losses.

Ace Ceramics alleged that it bought the tiles from the cross-defendant, Johnson. CBD applied for leave to amend to claim directly against Johnson. The application was opposed.

CBD alleged against Johnson a duty not to supply tiles which were faulty because they lacked particular characteristics. CBD alleged a duty to avoid harm to CBD's building and a duty to avoid economic loss to CBD. CBD cited the case of J*unior Books Limited v Veitchi Co. Ltd* (1983) 1 AC 520 in support of its application.

The judge observed that a supplier of goods used in building work is not, without more, in the relationship with every building owner described by the words of Lord Roskill in J*unior Books* (at 546) "as close as it could be short of actual privity".

The judge also observed that the relationship between a nominated subcontractor and a building owner is very different from that between an innominate supplier of building materials to a contractor and the building owner.

After considering the principal authorities in England and Australia relating to claims in tort for economic loss the judge concluded that, in the present case, the question to be asked was whether there was a relationship of proximity between Johnson and CBD with respect to Johnson's supply of tiles to Ace Ceramics, where the damage suffered by CBD was the cost of replacing the tiles and the consequential losses, or diminution in value of the building. There was no suggestion of the defective tiles causing injury to anyone, or of any damage to real property other than by the tiles becoming detached because they lacked the particular characteristics.

In the judge's view there was no relationship of proximity. According to the allegations in the summons, at best Johnson knew that the tiles were bought by Ace Ceramics to fulfil contractual obligations by fixing them in premises and that they would be so fixed, but it did not know anything of the building or of CBD - it could have been any building and any building owner. There was nothing else alleged by way of CBD's knowledge of Johnson or anyone else as a supplier of the tiles. Important for proximity in the present circumstances was the plaintiff's reliance on the defendant taking care and the defendant's awareness of the reliance - there was no allegation in this case of either.

The case propounded by the summons required that, without more, a supplier of goods to a builder for use in building work owes a duty to any building owner in whose building work the goods might be used not to cause that person loss through the goods being unsuitable for their purposes or defective in some manner so that they would have to be replaced.

Giles J found such a duty of care would go far beyond the high-water mark of Junior *Books Ltd v Veitchi Co. Ltd*, would be contrary to the position as now recognised in England, and would not be justified by the notion of proximity expounded in *Jaensch v Coffey* (1984) 155 CLR 549 and the subsequent cases in Australia.

Accepting CBD's allegations as correct for the purposes of the application, they must be taken to embody the best case which CBD could properly put forward. Investigations of the facts underlying the allegations would not improve them, and if the test in *General Steel Industries Inc. v Commission for Railways* (1964) 112 CLR 125 were satisfied Johnson should not be put to the expense of litigating issues much wider than those presently in the proceedings. Giles J found CBD's claim against Johnson should fail and leave to amend should be refused.

- **Tom Davie, Allen Allen & Hemsley, Solicitors.**