



## BODY CORPORATES & BUILDING DEFECTS

*Author: Jessica Cannon*

### Hope for Bodies Corporate when Pursuing Building Defects . . .

Building defects within bodies corporate are becoming more frequent and complicated. Body corporates are finding themselves facing significant, expansive and expensive building defects which are resulting in both slow sales and disgruntled owners. We provide the below summary of the leading case in Australia concerning building defects and the causes of action available in pursuing the builder and/or developer.

### Case Law

*Melisavon Pty Ltd v Springfield Land Development Corporation Pty Limited [2014] QCA 233 (16 September 2014) (Melisavon)*

Springfield Land Development Corporation (Developer) leased land on which it developed a residential golf course community.

In January 2000 the Developer contracted with Melisavon Pty Ltd, civil and structural engineering consultants (Consultants) to design a clubhouse and surrounds. The Consultants completed the design in mid-2003 and the Developer completed the works in accordance with the design.

On 16 June 2011 the Developer filed a claim and statement of claim alleging that the Consultants negligently caused the Developer economic loss of \$866,258.00 flowing from the latent defect, namely the Consultants negligent engineering design.

It was the Consultants position that the Developers cause of action was statute-barred under s10 of the Limitation of Actions Act 1974 as more than six years had passed since it arose. The Consultants applied for summary judgment to dismiss the Developers claim with costs. The Primary Judge dismissed the Consultants application with costs. The Consultant then sought to appeal the primary judge's decision.

Melisavon appeal had five limbs [21-25]:

1. That the cause of action arose when the cracking caused by ground leave (the defect pleaded in the ASOC para 18k) first appeared;
2. That the limitation period did not commence until the respondent (Developer) first became aware or ought to have become aware that it had sustained loss because of the alleged defective design of the clubhouse and surrounds;
3. That the Primary Judge erred insofar as it regarded the decision in Pullen as authority for the proposition that the limitation period did not commence until the respondent (developer) first became, or ought to have become aware, that it had sustained loss because of the alleged defective design;
4. That the judge erred in not finding that Pullen was clearly wrong in this respect; and
5. That the limitation period commenced more than six years before the respondent (developer) commenced its claim because

the respondent knew that the cracking of the clubhouse was caused by ground heave.

Key things the Court of Appeal Concluded:-

1. The purposes of section 10(1)(a) of the Limitations Act to a plaintiff's case is that the cause of action arose when it suffered economic loss, that is, when the latent defect, the alleged negligence, first became known or manifest in the sense of being discoverable by reasonable diligence. This is because it was only then that the plaintiff suffered an actual diminution in the market value of the property.
2. Accordingly, a body corporate's ability to commence proceedings for a claim in negligence against a builder and/or developer, commences upon the body corporate becoming aware of the latent defective. While the date of when the body corporate become aware of the damage is still important, the six year time clock does not commence until the body corporate was aware of the actual cause of the damage, and therefore the latent in the building. With that said, this case proves the importance of committee members, owners and onsite managers being diligent in their inspections of the scheme. Should damage be noticed further investigations are required and encouraged.

*Brookfield Multiplex Ltd v Owners Corporation Strata Plan 61288* [2014] HCA 36 (**Brookfield**)

Brookfield built a 22 storey apartment block for Chelsea Apartments Pty Ltd (**Developer**) under a design and construct contract made in November 1997.

Levels 1-9 were serviced apartments (lots). The Developer registered a strata scheme which created a Body Corporate. The Developer owned all of the lots subject to leases given by the Developer to Park Hotel Management Pty Ltd ("Park Hotel") which was to operate them as a serviced apartment hotel under the "Holiday Inn" brand.

The Developer then sold the lots to lot owners who would have received rent for their leases.

The Body Corporate brought proceedings against Brookfield, saying that it breached its duty of care to avoid a reasonably foreseeable economic loss (and everyone agreed it was only economic loss) to the Body Corporate who had to repair latent defects in common property caused by the building's defective design and/or construction.

The Body Corporate's claim was based on the failure of the subsequent lot owners to get value for money from the Developer rather than on Brookfield causing damage to their property.

Brookfield's appeal had two limbs [111-112]:

1. The contract was so specific that there was no room for a claim in negligence; and
2. Brookfield owed no duty of care to the Body Corporate.

Key things that the High Court concluded were:

1. Negligence claims should not supplant contractually made bargains [132]. In *Bryan v Maloney*, the design and construct obligations were not in the contract;
2. Since the Body Corporate was created *after* the alleged negligence, the Body Corporate could not have relied on Brookfield [150]. Furthermore the Body Corporate did not pay for the common areas, and so could not have suffered an economic loss [150]; and
3. The Court said its decision in *Bryan v Maloney* does not sustain the proposition that a builder that breaches its contractual obligations to the first owner of a building is to be held responsible for the consequences of what is really a bad bargain made by subsequent purchasers of the building [69].

## What does this mean for you?

For bodies corporate this means that recourse against builders and developers is not limited by a strict interpretation of the six years from the date of practical completion.

A cause of action in negligence may exist and should be investigated by the body corporate.

We strongly urge for committees to be active in their approach to building defects and obtain legal advice as to their possible causes of action.

## HOW TO CONTACT MBA

### ADDRESS:

The Point @ Varsity  
47 Watts Drive, Varsity Lakes,  
Queensland Australia 4227  
P O Box 398,  
Varsity Lakes Qld 4227

### Contact

Phone: 07 5539 9688  
Fax: 07 5538 2651  
E-Mail: [jessica@mba-lawyers.com.au](mailto:jessica@mba-lawyers.com.au) (Associate)  
E-mail: [info@mba-lawyers.com.au](mailto:info@mba-lawyers.com.au)  
Website: [www.mba-lawyers.com.au](http://www.mba-lawyers.com.au)