Northern Beaches
CONSTRUCTION LAWYERS

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Court of Appeal revisits negligence against certifiers in relation to defective works

The point of certification appears unclear after the NSW Court of Appeal's landmark decision in *Ku-ring-gai Council v Chan* [2017] NSWCA 226.

What is clear is that a certifier, including a council, does not owe a duty of care to subsequent purchasers of property in relation to the manner in which it discharges its obligation as a certifier under the Environmental Planning and Assessment Act 1979 ('the EPA').

This is so even though part of the certification process may be whether the property complies with the Building Code of Australia and in circumstances where the occupation certificate is annexed to the contract for sale.

So if defects emerge after the sale, a purchaser has no claim in negligence against the certifier.

The facts of this case and the reasoning of the Court of Appeal are discussed over-leaf.

Senate inquiry calls for ban on flammable cladding

The widespread use of flammable cladding on high rises has been making headlines in Australia and indeed was subject to a recent investigation on the ABC's *Four Corners*. The use of this potentially life threatening building material has now been scrutinized by a Senate Committee which released its findings on 6 September.

> *"There must be an end to buck-passing and abrogation of responsibility. This is not something that can, or should, be swept under the rug"* - Senators Kim Carr and Chris Ketter in a joint statement.

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Chan v Acres continued...

Facts

Mr Acres carried out significant renovations to the house as an owner-builder. He then sold the house to a Ms Chan and Mr Cox.

Mr Acres engaged his local council as the Principal Certifying Authority (PCA). During the course of the renovations the Council inspected the works several times but failed to identify defects, some structural. The Council also failed to identify several non-compliances with the approved plans. Yet on 10 July 2009 the Council issued a final occupation certificate pursuant to section 109E (3) of the EPA.

The certification included that the building was *'suitable for occupation or use in accordance with its classification under the Building Code of Australia*.'

A significant amount of structural and non-structural defects were identified after the sale resulting in a substantial rectification bill.

Proceedings

As Ms Chan and Mr Cox enjoyed the benefit of the statutory warranties prescribed by the *Home Building Act 1989* as against Mr Acres as an owner-builder, they issued proceedings against Mr Acres in the Supreme Court claiming damages for breach of the statutory warranties.

Additionally, Ms Chan and Mr Cox claimed, against the Council as certifier and the structural engineer, damages for pure economic loss being the cost of repairing the latent defects. Mr Acres cross-claimed against the Council and the engineer.

Issue

The pertinent issue was whether the Council, as a *'principal certifying authority'*, owed the purchasers a duty to take reasonable care in the issue of an occupation certificate to avoid those purchasers suffering economic loss as a result of the previous owner-builder's defective building work.

Findings

The Court of Appeal overturned McDougall J at first instance, holding that the Council did not owe a duty of care to the purchasers as there was no reliance by them or assumption of responsibility by the Council that would give rise to such a duty.

Moreover, Ms Chan and Mr Cox were not vulnerable in the sense that they were exposed to, but not able to protect themselves from, the Council's want of reasonable care in issuing the certificate. The purchasers had the ability to protect themselves against any such failure as they had the protection of the HBA warranties and the, albeit limited, protection of Mr Acres' home warranty insurance. If the Council had been liable for breach of duty involving reliance on the occupation certificate, it would have been necessary to take into account the value of these rights of the purchasers.

In considering Mr Acres' claim against the Council the Court found that even though there may have been an action available to Mr Acres in relation to the Council's lack of reasonable care in issuing the certificate, as Mr Acres had sold for full value he had not suffered any loss.

Mr Acres' was found liable to the purchasers for breach of the statutory warranties.

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Common property and maintenance obligations —have the floodgates opened on S106 (5) claims?

It's been a big month for strata, with two Court of Appeal decisions extending potential claims available to lot owners.

On 30 August 2017, in *Shum v the Owners Corporation SP30621* [2017] NSWCATCD 68 Member Grew awarded a lot owner damages for breach of the OC's duty to maintain and repair common property under s 106 of the *Strata Schemes Management Act 2015* (***SSMA***).

S106 establishes the strict liability of an OC to maintain and repair its common property. Whilst it is in the same terms as its predecessor (s62 of the *Strata Schemes Management Act 1996 (NSW)*), section 106 (5) created, from 30 November 2016, a new statutory cause of action for a lot owner to sue the OC for damages for breach of the duty to maintain and repair.

Prior to this enactment the Court of Appeal in *The Owners Strata Plan 50276 v Thoo* [2013] NSWCA 270 established that a lot owner had no common law right to sue the OC for damages for breach of s62.

Mr Shum, a lot owner, first notified the OC, in January 2016, that the roof was leaking into his tenanted unit. The OC did not repair the roof. Mr Shum sought orders for the repair of the roof, and the windows and interiors of his lot. NCAT ordered the OC to repair the roof to stop it leaking into Mr Shum's unit.

Mr Shum claimed the OC had breached its duty under s106 by delaying the repair of the roof from January 2016 to May 2017. NCAT agreed. The damages sought, and awarded, of over $55,000 were for sums that Mr Shum's commercial tenant had refused to pay due to the condition of the unit, including rent, water, council rates, levies, and interest.

The new action is available for up to two years after the lot owner becomes aware of their loss. Whilst s106 may provide relief to lot owners with claims suffered after 30 November 2016, it cannot assist those with claims preceding this date, or those outside the 2 year period.

Prior to the enactment of s106 (5) lot owners had attempted claims in nuisance but had been thwarted by the decision in *The Owners Strata Plan 50276 v Thoo* [2013] NSWCA 270.

In another win for lot owners, the NSW Court of Appeal in *McElwaine v The Owners – Strata Plan No. 75975* [2017] NSWCA 239 determined that nuisance claims are available to lot owners thus reversing Thoo.

The OC argued that Mr McElwaine's claim under s62 of the former SSMA was flawed as Chapter 5's dispute resolution regime abrogated a lot owner's ability to make a common law claim. The Supreme Court summarily dismissed Mr McElwaine's claim at first instance. The Court of Appeal agreed with the lot owner and sent the case back to the Supreme Court for determination of the nuisance question.

> *"an owners corporation, as legal owner of the common property, may owe a general law duty of care or a general law duty not to create a nuisance, and not merely a statutory duty that can be enforced only through the mechanisms provided in Ch 5"* and *"the rights of a lot owner or occupier of a lot to enforce an owners corporation's duty in respect of the management or repair of the common property that is owed to an owner or occupier of a lot in that capacity" is not negated by the 1996 Act."* White AJ [26]

Check your inboxes each day! As Security of Payment claims can now be served by email —*s 31 Building & Construction Security for Payment Act 1999*

(thanks to the Electronic Transactions Legislation Amendment (Government Transactions) Act 2017)

NCAT has jurisdiction to award damages for breach of s106 SSMA—*Rosenthal v The Owners - SP 20211* [2017] NSWCATCD 68.

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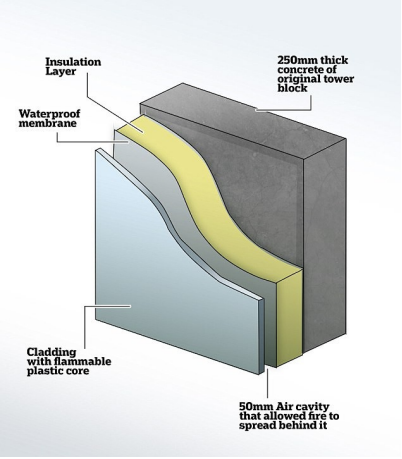
Senate inquiry calls for ban on flammable cladding

ACP or Aluminium Composite Cladding has been used extensively in Australia on medium and high rise buildings despite the availability of more fire-resistant materials. The choice is likely due to ACP's versatility and the fact that it is more light weight, stylish and cheaper than alternative, but less flammable, materials.

But there is a cost to such advantages. ACP's core is of a highly flammable polyethylene core. The age old conflict between safety and economy, combined with ambiguous standards and poor enforcement may have created numbers of potentially dangerous buildings.

Melbourne's Lacrosse Building fire, in November 2014, prompted the Australian Senate Economics References Committee inquiry into unsafe building materials. The tragedy of Grenfell Towers gave new urgency to the release of the Senate's interim report.



The Senate has made several recommendations to the Federal Government.

These include a total ban on the importation, sale and use of ACP with polyethylene core as a matter of urgency. A national licensing scheme, penalties and a national approach are also suggested measures.

All very well, but identifying liability for installing the non-compliant material may be difficult as a result of limitation periods. The cast of potential defendants includes developers, builders, subbies, suppliers and certifiers. The buck passing may have only just started.