

QLD Supreme Court applies the vulnerability test to defeat pure economic loss claim

Actron Investments Queensland Pty Limited v D.S.S Project Management Pty Ltd & Ors
[2016] QSC 306

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Summary

In a claim for pure economic loss against a builder and engineers, the Supreme Court of Queensland has affirmed the necessity for a plaintiff bringing a claim for pure economic loss in negligence to be able to demonstrate that it was not in a position to protect itself from the consequences of the defendant's lack of care.

Background

Vulnerability and Negligence

The High Court has emphasised the importance of the plaintiff establishing 'vulnerability' where a duty of care to avoid pure economic loss is alleged. In the 2004 case of *Woolcock Street Investments Pty Ltd v CDG Pty Ltd* ('Woolcock')¹ the plurality found that 'vulnerability' is "a reference to the plaintiff's inability to protect itself from the consequences of a defendant's want of reasonable care."

This principle was confirmed in the unanimous 2014 decision of *Brookfield Multiplex Ltd v Owners Corporation Strata Plan 61288* ('Brookfield')². In a case where the contract contained detailed provisions limiting liability for defects between the builder and the developer, the High Court unanimously found that the builder owed no duty of care to the plaintiff, emphasising that the Owners Corporation was not "vulnerable" in the sense defined in *Woolcock*.

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In April 2007, the Plaintiff purchased a commercial warehouse constructed by the First Defendant. The First Defendant used structural drawings for the building, including a concrete slab, that had been created and certified by the Second and Third Defendants.

At the time of sale, the marketing material made specific reference to the floor, in that:

- a) the warehouse floor had been designed for loading of a 6 Ton rubber tyre forklift;
- b) no allowance had been made for pallet racking or punching; and
- c) that reference should be made to the engineering design drawings for pallet racking requirements/ loadings.

The warehouse was sold under the standard form contract but the clause which normally operates to make the contract conditional on building condition reports was deleted. A special condition was included whereby the Plaintiff was permitted to notify the First Defendant of any defects during a six calendar month period, the "Defect Liability Period." If notification was made, the First Defendant had acknowledged that it would be liable to rectify any defect.

The Plaintiff, after purchasing the property, installed pallet racking and used the warehouse as "a warehouse for the storage of air-conditioning units and parts."³

The concrete slab which was built by the First Defendant and designed by the Second Defendant began to subside during the Plaintiff's use of the warehouse.

The central issue for the trial judge to determine was whether the Second and Third Defendants owed a duty of care in tort for the design and certification of the concrete slab. This question ultimately turned on whether the plaintiff was "affected by vulnerability in the sense referred to in *Woolcock and Brookfield*."⁴

Outcome

The Plaintiff was ultimately unsuccessful in this matter.

By reason of the conduct of the parties, both pre- and post-contractually, the Court found that negligence against the Defendants could not be established.

Further, the Court found that even if the Plaintiff had established negligence against the Second and Third Defendants, the Plaintiff had "failed to establish vulnerability in the sense explained in *Woolcock and Brookfield* to permit the imposition of a duty of care."⁵

Implications

- Her Honour Justice Mullins has confirmed that the vulnerability of a plaintiff will be a critical issue for determining whether a negligence claim made for pure economic loss should succeed against a defendant even if there was a want of reasonable care by the defendant.
- For those seeking to recover for pure economic loss as a result of negligence, this decision highlights that a duty of care must first be established.
- This in turn raises the issue of vulnerability and the importance of obtaining building contracts and other contractual documents at an early stage and carefully considering whether the plaintiff's position would satisfy the *Woolcock* test of vulnerability.

¹ (2004) 216 CLR 515.

² (2014) 254 CLR 185.

³ *Actron Investments Queensland Pty Limited v D.S.S Project Management Pty Ltd & Ors* [2016] QSC 306, [22].

⁴ *Ibid*, [126].

⁵ *Ibid*, [163].

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