

One for the record – landlords prevail in tenant’s claim with negligence finding against agents

Than v Galletta & Ors [2019] NSWDC 9

Roger Walter & Victoria Pappas | February 2019 | General Insurance

Summary

The District Court of New South Wales (Levy DCJ) had occasion this month to find for landlords against their managing agents. This ruling was in respect of cross-claims exchanged in negligence proceedings brought by an injured tenant. The express indemnity in the managing agency agreement, which turned on the agents’ proper performance of duties, was not engaged. The court held that the agents by their inaction had breached their duty of care to the tenant, with the result that the agents alone bore liability for the tenant’s claim for damages.

The plaintiff’s claim for future economic loss raised some interesting issues, given the office-based and professional nature of her work.

Background

The plaintiff, a lawyer, was injured in a fall on external steps on the common property of flats at Bondi Beach, where she was a tenant. In the early hours of 2 August 2015 she lost her footing and fractured her left foot when lighting over the steps was not functioning. She sued the landlords and their managing agents.

There was a history of the lighting over the steps not working; the plaintiff’s flatmate had notified the managing agents of a problem on at least two occasions, the second of which was 23 days before the plaintiff’s injury.

Contractual Indemnity

The landlords brought a cross-claim against the managing agents, seeking indemnity or alternatively contribution on joint tortfeasor principles. In their own cross-claim, the managing agents sought indemnity from the landlords, primarily under the indemnity expressly granted in the managing agency agreement. It provided indemnity in respect of claims and actions against the agents in the course of or arising out of their proper performance or exercise of powers, duties or authorities under the agreement.

The managing agents and the electrician they regularly engaged gave evidence that the flatmate’s complaint some 23 days prior to the incident was actioned. The court was not persuaded by this evidence as there was no corroborating evidence, including no evidence of any relevant invoice from the electrician. The court also found that the landlords were not notified of the issues with the lighting.

In reaching its decision the court had regard to *Laresu Pty Ltd v Clark* [2010] NSWCA 180, a case involving the failure of an automatic light switch on rental property, where it was held that the agent’s negligent conduct constituted a failure to perform its duties and rendered an indemnity clause such as that relied upon here inapplicable (even if the word ‘proper’ had not been used to qualify the word ‘performance’).

In reaching its finding concerning the agents’ inaction and breach of duty of care, the court drew particular focus upon the agents’ failure to keep contemporaneous records of their actions in responding to notifications from the tenants, as well as the ordinary steps (which

involved relatively little burden on the managing agents and were consistent with their management responsibilities) to remediate the lighting issue. It was observed that the agents were not only familiar with the premises, such that they should have been aware of the urgent remedial action required, but that in failing to notify the landlords of the lighting issues, they were the party with the 'last opportunity to avoid the adverse outcome.'

Future Economic Loss

The plaintiff's claim for future economic loss assumed some significance because there was evidence to suggest that the plaintiff's current public service employer would soon undergo restructure, with the associated risk that the plaintiff's position might be made redundant. There was also some prospect of surgery in the future to treat osteoarthritis should it develop. The court accepted that as a result of her injuries, the plaintiff had reduced standing and walking tolerances, embarrassment over the manner in which she was required to negotiate stairs, discomfort on prolonged walking (such as between meetings) and an inability to wear high heeled shoes.

In awarding \$75,000 by way of a 'cushion' for future economic loss, the court expressly allowed for the fact that the proposed restructure was not imminent. The court found that the plaintiff would in future be disadvantaged on the open labour market, where she would be in competition with more 'able bodied persons,' and that this was not only likely but significant, even though her work was office-based. The court also held that it was significant that such disadvantage would likely involve some career restriction in that the plaintiff's ability to change employment would be inhibited.

Implications

- The case illustrates that the indemnity conferred expressly in favour of agents in many managing agency agreements is sometimes not engaged.
- A managing agency agreement will in some circumstances and in some respects have the effect of delegating to the managing agent the obligations and responsibilities landlords must attend to in discharging

their duty of care as occupier. This was an example of such a case. The agents' knowledge of the relevant defect was not conveyed to the landlords and the agents' inaction in respect of the risk of injury created by the notified defect was held to be a breach of the duty of care owed to the tenants.

- The lack of any business record consistent with the agents' claims of having engaged their regular electrician in response to a tenant's notification of the lighting issue in this case was instrumental in the finding of breach of duty.
- When assessing whether to award damages for future economic loss, a court will take into consideration the prospect of the injury impacting in various ways on the plaintiff's capacity to earn in the future, even though there is no present manifestation of foregone earnings and the sedentary and professional nature of the plaintiff's employment might be thought to insulate her from the effects of the injury.

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