Pure Economic Loss Following Brookfield Multiplex v Owners Corporation Strata Plan 61288 (2014) 254 CLR 185

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PURE ECONOMIC LOSS FOLLOWING *BROOKFIELD MULTIPLEX LTD V OWNERS CORPORATION STRATA PLAN 61288* (2014) 254 CLR 185

I INTRODUCTION

Now that the dust has settled on the seminal decision in *Brookfield Multiplex Ltd v Owners Corporation Strata Plan 61288*[1] ('*Brookfield'),* it is appropriate to consider the cases that have been determined following it. This decision determines the extent to which contract limits or otherwise constrains the recovery of pure economic loss in tort. It is a case which has general application where the remedy sought is pure economic loss, and has application beyond cases involving defective building work as has been demonstrated in subsequent decisions citing *Brookfield*.

II FACTS OF BROOKFIELD

The dispute in question concerned an alleged defect to the common property of an apartment development that the builder had built for Chelsea Apartments Pty Ltd (the developer) under a design and construct contract. The Owners Corporation is agent of the strata scheme for the serviced apartments on levels one through nine of the 22 storey building in question. The action was brought by the Owners Corporation against the builder seeking damages in respect of defective building work. Previous authority[2] establishes that defective building work gives rise to pure economic loss. This is notwithstanding the fact that there may be a physical manifestation of the loss, such as cracks appearing in the wall as a result of poor foundations. Such defects give rise to diminution in the value of the building and the economic consequences of rectification, which is regarded by Australian law as pure economic loss.

III PURE ECONOMIC LOSS

Pure economic loss first surfaced curially in the 1964 House of Lords decision of *Hedley Byrne & Co Ltd v Heller & Partners Ltd,*[3] and was followed by the High Court of Australia in *Mutual Life & Citizens' Assurance Co Ltd v Evatt.*[4] All common law systems have attempted to limit liability in tort for pure economic loss as it gives rise to an unacceptable level of liability, because the liability is for 'an indeterminate

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[1] (2014) 254 CLR 185.
[2] *Hawkins v Clayton* (1988) 164 CLR 539, 577- 578 (Deane J).
[3] [1964] AC 465.
[4] (1968) 122 CLR 556, 568 (Barwick CJ).

amount for an indeterminate time to an indeterminate class.'[5] In relation to its discussion of pure economic loss, *Brookfield* raises two issues of interest:

(a) What, in addition to the usual 'foreseeability' test, is required to establish that a duty of care arises to prevent pure economic loss; and

(b) What is the relevance of a contract or chain of contracts to the existence of such a duty of care?

While the decision was unanimous, there were four judgments delivered by the Court. Each judgment considered *Bryan v Maloney*[6] (where the High Court found that a duty of care did arise to prevent pure economic loss arising from defective building work in respect of a domestic building) and *Woolcock Street Investments Pty Ltd v CDG Pty Ltd*[7] ('*Woolcock Street Investments'*) (where the High Court found that no duty arose in tort to prevent economic loss arising from defective building work in respect of a commercial building). In *Brookfield,* each judgment adopted the previous established concept of 'vulnerability' as being the touchstone by which to determine whether a duty of care was owed in tort to prevent pure economic loss. The High Court did not overturn *Bryan v Maloney*, but the circumstances where it may be applied have been narrowed considerably. Interestingly, in a recent decision in the Appeal Division of the Queensland Civil Appeals Tribunal (QCAT), *Bryan v Maloney* was applied based on the factually analogous connection to the dispute in question.[8] While this is not binding precedent outside of the QCAT context, it does suggest that there remains a place for the protection offered to vulnerable home owners as espoused in *Bryan v Maloney.*

IV BROOKFIELD JUDGMENTS

A *French CJ*

French CJ considered the decisions in *Bryan v Maloney,* noting that the duty of care owed to the purchaser from the owner who had originally contracted with the builder was supported by the finding of an anterior duty of care to the original owner of the building.[9] The High Court decision in *Woolcock* did not determine whether a disconformity between the duty owed to the first owner and that asserted by the subsequent purchaser would be fatal to establishing a duty of care

[5] *Ultramares Corporation v Touche,* 174 NE 441, 444 (Cardozo CJ) (NY, 1931).
[6] (1995) 182 CLR 609.
[7] (2004) 216 CLR 515.
[8] *Olindaridge Pty Ltd and Anors v Tracey and Anor* [2016] QCATA 23.
[9] *Brookfield Multiplex Ltd v Owners Corporation Strata Plan 61288* (2014) 254 CLR 185, [28] (French CJ).

in favour of the subsequent purchaser.[10] According to French CJ the existence or otherwise of this anterior duty was no more than an 'important factor relevant to the existence of a duty of care in respect of pure economic loss to a subsequent purchaser.'[11] However, in this case French CJ concluded that **no** duty of care in tort was owed by the builder to the original developer to prevent pure economic loss. That is, liability to the developer was purely regulated by the Contract:

> [The developer] cannot be taken to have relied upon any responsibility on the part of Brookfield [the builder], and Brookfield assumed none, in relation to pure economic loss flowing from latent conditions extending beyond the limits imposed by the Contract. [12]

The quote above is susceptible to two interpretations. First, it might be argued that any duty imposed in tort must be co-extensive with the duty in contract. That is, there will not be a breach of a duty of care unless there is a breach of contract and even then, liability in tort will be co-extensive with the liability in tort. The alternative argument is that the existence of the Contract between the plaintiff and defendant excludes the possibility of a duty arising irrespective of the nature of the contractual duty.

The opening words of the quote which suggest there must be an assumption of responsibility and reliance, suggests that the second interpretation is correct. Reliance and an assumption of responsibility have been key elements used by the High Court in determining whether there is sufficient vulnerability to give rise to a duty of care. The express finding that there was no reliance (presumably on a tortuous remedy – there must have been reliance to the extent specified by the Contract) and no assumption of responsibility (again this must be in the context of tort given that the Contract gives rise to an assumption liability, at least to the extent prescribed by that Contract) suggests that French CJ considered that no duty of care was owed to the original purchaser, because the existence of the contract precluded it. If correct, this is a radical conclusion because for many years, it has been accepted that liability in tort and contract is often concurrent.[13] His Honour's

[10] *Brookfield Multiplex Ltd v Owners Corporation Strata Plan 61288* (2014) 254 CLR 185, [28] (French CJ).
[11] *Brookfield Multiplex Ltd v Owners Corporation Strata Plan 61288* (2014) 254 CLR 185, [28] (French CJ).
[12] *Brookfield Multiplex Ltd v Owners Corporation Strata Plan 61288* (2014) 254 CLR 185, [33] (French CJ).
[13] See *Astley v Austrust Ltd* (1999) 197 CLR, [44]-[48] (Gleeson CJ, McHugh, Gummow and Hayne JJ); *Hawkins v Clayton* (1988) 164 CLR 539, 585 (Deane J).

position does not appear to have had traction in subsequent decisions. McDougall J in the New South Wales Supreme Court decision *Chan v Acres*[14] saw

> no reason for declining to hold (to the extent that it may be relevant) that [third defendant] owed Mr Acres concurrent duties in tort and contract. It seems to be to follow from the decision in *Astley v Austrust Ltd* (1999) 197 CLR 1 that the common law recognises that concurrent liability may exist in contract and tort.[15]

While the comments of McDougall J are purely *obiter* and did not result in a duty ultimate being owed by the respective defendant,[16] they nonetheless draw on established precedent in Australia that there can be concurrent duties in contract and tort in relation to pure economic loss. The difference between the two possible outcomes is not merely academic. It has practical consequences, particularly in the context of limitation periods. In those States where the limitation period in tort starts from the date upon which the cause of action accrued, an action in tort often will be statute barred after the cause of action in contract is statute barred. Sometimes the difference will be significantly, measured in years.

The Chief Justice went on to consider whether the builder had a duty in tort that could arise in favour of a subsequent purchaser who obviously did not have a contract with the builder:

> The purchasers of lots from the [developer] were effectively investors in a hotel venture under standard form contracts which were an integral part of the overall contractual arrangements. The standard form contracts contained specific provisions relating to the construction of the buildings and the [developer's] obligations [to the owner's corporation] to undertaken repairs ... This is not a case in which, for the purposes of the subsistence of a duty of care, the subsequent owners could be regarded as vulnerable ... The position of subsequent owners and the interaction of the contractual and statutory frameworks are antithetical to the proposition that Brookfield owed the [owners] corporation a duty of care found to exist by the Court of Appeal. [17]

Again the Chief Justice regarded the existence of a contractual obligation in the standard form purchaser's contract (requiring the original developer, not the

[14] *Chan v Acres* [2015] NSWSC 1885, [203] (McDougall J).
[15] *Chan v Acres* [2015] NSWSC 1885, [203] (McDougall J).
[16] *Chan v Acres* [2015] NSWSC 1885, [255] (McDougall J).
[17] *Brookfield Multiplex Ltd v Owners Corporation Strata Plan 61288* (2014) 254 CLR 185, [34] (French CJ).

builder, to rectify defects notified to it within a six month period) as determinative of the question whether the builder owed a duty of care to the purchasers to prevent pure economic loss.

This part of the decision does not focus on the obligation owed by the builder to the developer in contract. Rather it is focusing on the contractual obligation between the developer and the purchasers of lots. That contract created a contractual liability in the developer for defective building work, who would not, without such an express term, be liable as a vendor of real estate. However, that liability was subject to a temporal cap of 6 months. It would be unusual for the contractual remedy in a standard building contract to be so limited. Traditionally the defects liability periods stipulated in such contracts are interpreted as being in addition to and not derogating from, the common law remedy of breach of contract.[18] Therefore, it was not the building contract but the sale agreement, to which the builder was not a party, which led to the conclusion that there was no vulnerability. The purchasers had an opportunity to protect their interests but failed to do so. On this basis French CJ determined that no duty of care arose.

B *Hayne and Kiefel JJ*

Hayne and Kiefel JJ acknowledged that both the developer and purchaser of the lots from the developer would have relied on the builder to do its work properly and neither was in a better position to check the quality of the builder's work as it was being done. Accordingly, Their Honours concluded that 'each relied on the builder to do its work properly.'[19]

At paragraph 57 Hayne and Kiefel JJ noted that reliance was a necessary element in demonstrating vulnerability but was not a sufficient element. As to what would constitute sufficient vulnerability to give rise to a duty of care, they noted at paragraph 58 as follows:

> It is neither necessary nor profitable to attempt to define what would or would not constitute vulnerability. It is enough to observe that both the developer and the original purchasers made contracts, including standard contracts which gave rights to each to have remedied defects in the common property vested in the Owner's Corporation. The making of contracts which expressly provide for what quality of work was promised demonstrates the ability of the parties to protect against, and denies their

[18] *Hancock v B. W. Brazier (Annerley) Ltd* [1966] 1 WLR 1317, 1327-1329 (Diplock LJ).
[19] *Brookfield Multiplex Ltd v Owners Corporation Strata Plan 61288* (2014) 254 CLR 185, [56] (Hayne and Kiefel JJ).

> vulnerability to, any lack of care by the builder in performance of its contractual obligations. It was not suggested that the parties could not protect their own interests. The builder did not owe the Owners Corporation a duty of care.[20]

Accordingly, it can be seen in this judgment again that the existence of the contracts and the ability to regulate liability via those contracts, was an essential element in determining that no duty of care arose. The ability to properly protect oneself by way of contract means that there is insufficient vulnerability to give rise to a duty of care in the circumstances.

However, at least in the judgment of Hayne and Kiefel JJ, the existence of a contractual framework will not, in every case, exclude the implication of a duty of care in tort. Their Honours say:

> The conclusion just expressed denies the existence of a duty of care. The conclusion does not depend, however upon making an a priori assumption about the proper provinces of the law of contract and the law of tort. As McHugh J pointed out in Woolcock Street 'the decision in Hedley Byrne [& Co Ltd v Heller & Partners Ltd], Donoghue [v Stevenson], White [v Jones] and Hill [the Van Erp] makes it difficult to argue that claims in negligence for pure economic loss should be excluded merely because such claims may out flank or undermine fundamental doctrines of the law of contract.[21]

It therefore remains the case that pursuant to the logic in this judgment, there will be no simple formula for determining the circumstances in which a duty of care in respect of pure economic loss will arise in tort, where there is a contract or a series of contracts (as was the case here). However, the existence of a contract between a plaintiff and a defendant (or a series of contracts that link a plaintiff and defendant) suggests that the plaintiff, particularly a sophisticated plaintiff (or one that seeks independent advice) will have had an opportunity to protect its interests and therefore not be vulnerable. According, where a contract exists it seems that some very special circumstances will be required. Examples of such circumstances will have to await subsequent cases.

C *Crennan, Bell and Keane JJ*

[20] *Brookfield Multiplex Ltd v Owners Corporation Strata Plan 61288* (2014) 254 CLR 185, [58] (Hayne and Kiefel JJ).
[21] *Brookfield Multiplex Ltd v Owners Corporation Strata Plan 61288* (2014) 254 CLR 185, [59] (Hayne and Kiefel JJ).

When drawing a distinction between *Bryan v Maloney* and the facts in this case, Crennan, Bell and Keane JJ had regard to two matters.

These matters are discussed at paragraph 136:

> The material distinction between the present case and Bryan v Maloney lie, first, in the detailed prescriptions of the D&C Contract between the appellant and the developer, in contrast to the simple obligation in Bryan v Maloney between the builder and the original owner to exercise reasonable care and diligence in the construction of the dwelling; and second to the express promises in cll 32.6 and 32.7 of the sales contract, in contrast to the situation in Bryan v Maloney where there was no promise as to the quality given to Mrs Maloney when she acquired the dwelling.[22]

Crennan Bell and Keane JJ expanded upon the second issue at paragraph 140:

> in the present case each purchaser from the developer exercised its contractual wisdom to bargain for protection against the risk of defects in the work. Purchasers of units in the serviced apartment complex from the developer and the respondent, were protected by reason of the developer's promises in cll 32.6 and 32.7 of the sales contracts against the risk of economic loss because of defects of quality. It is true that these provisions did not protect the purchasers or the respondent against the possibility that the developer would not be of sufficient substance to meet liability or that any defect would not be discovered within the time to make a claim under the warranty. But as to these possibilities, the appellant had nothing to do with the purchasers' decision to accept the value of the developer's warranty or with the decision by the purchaser not to investigate for defects. Had a purchaser not been satisfied that the investment was adequately protected in this way, it could have avoided the risk of loss by taking its capital and investing it elsewhere.[23]

These Justices went on to analyse the situation by reference to:

(i) the obligations of the builder to the developer; and

(ii) the obligations of the developer to the purchasers.

In respect of the obligations of the builder to the developer, they noted as follows:

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[22] *Brookfield Multiplex Ltd v Owners Corporation Strata Plan 61288* (2014) 254 CLR 185, [136] (Crennan, Bell and Keane JJ).

[23] *Brookfield Multiplex Ltd v Owners Corporation Strata Plan 61288* (2014) 254 CLR 185, [140] (Crennan, Bell and Keane JJ).

> The provisions of the D&C Contract regulate the appellants' obligations to the developer and the extent of the appellant's liability for failure to meet those obligations. To the extent that the respondents' complaints in relation to the steel lintels and windows are grounded in an alleged failure to comply with the contract specification, reliance on a duty in the terms propounded by the respondent [the owners] would be unnecessary and indeed embarrassing. Either the work and materials of the appellant complied with the specifications, in which case the appellant had fulfilled its obligations to the developer, or they did not. In relation to the other categories of alleged defect, whether the respondents' claims of defective work could be established would necessarily depend upon the specifications and other documents referred to in clause 55 of the D&C Contract, rather than the upon general duty propounded by the respondent.[24]

Accordingly, these Judges were not prepared to accept that there was a duty of care owed by the builder to the original developer to prevent pure economic loss. Their reasoning does not preclude the possibility of concurrent liability in tort and contract, but makes it very unlikely, unless the contractual obligation and the obligation in tort are co-extensive. Given the detail found in most building contracts this is very unlikely. Importantly, the terms of the building contract impost strict liability to build to the standard specified in the contract. Therefore, such contracts are likely to impose a higher level of liability than that arising from a potential claim for breach of duty in tort, because it is necessary to prove a failure to exercise reasonable care. Accordingly, it is the difference in the nature of the contractual obligation which excludes the possibility of duty in tort to prevent pure economic loss. It is not necessary to demonstrate that the liability in contract was lower than what would have been the case in tort (because, for example, of an exclusion clause or limit of liability) to negative the existence of a duty of care in tort. It is sufficient to show that the contract is different. Given this conclusion it is difficult to see how concurrent liability in tort and contract can arise, except where the contractual term (whether implied or express) is co-extensive with a duty of care in tort.

These Judges then went on to consider the position between the builder and the purchasers of the units from the developer.

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[24] *Brookfield Multiplex Ltd v Owners Corporation Strata Plan 61288* (2014) 254 CLR 185, [145] (Crennan, Bell and Keane JJ).

Again, the existence of a contract and in a particular the ability of the purchasers to protect themselves by either negotiating more favourable terms in the contract of sale or walking away from the investment influenced the conclusion that no duty of care arose in the circumstances.

Counsel for the respondents contended that:

(a) clause 32.7 which required the developer to repair defects notified within six months, was intended to confer a right on the developer to repair defects, thereby mitigate damages which might otherwise be recovered by the purchasers. This argument was apparently put to lessen the force of the appellant's argument that the tortuous duty propounded by the respondents was more extensive than the contractual protection provided to the purchasers; and

(b) the contractual remedy did not provide complete protection in the circumstances. There remained a risk that the developer would not have the financial resources to meet its obligations, if notice had been given within six month period and also a risk that defects would become apparent after the six month period.[25]

These Judges concluded that none of these arguments improved the position for the owners. Their Honours say:

> But these arguments serve only to make the point that the contractual rights of individual purchasers for which they bargain were cast in terms which expressly limit their scope and duration in a manner inconsistent with the open ended liability now asserted by the respondents.[26]

D *Gageler J*

Gageler J dealt with the question as to whether a duty of tort can arise concurrently in contract and tort in the following terms:

> It has long been accepted that a common law duty of care can co-exist with a duty in contract and that a duty of care can be to avoid economic loss. That being so, legal taxonomy alone cannot assign such common law liability as a builder may have to a subsequent owner of a building to the provinces of contract to the exclusion of the province of tort. Nor is it recognition of a duty on the part of the builder to avoid a subsequent

[25] *Brookfield Multiplex Ltd v Owners Corporation Strata Plan 61288* (2014) 254 CLR 185, [155] (Crennan, Bell and Keane JJ).
[26] *Brookfield Multiplex Ltd v Owners Corporation Strata Plan 61288* (2014) 254 CLR 185, [156] (Crennan, Bell and Keane JJ).

> owner incurring the costs of remedying a latent defect in the building open to criticism on indeterminacy which often counts against the recognition of a common law duty of care to avoid economic loss.[27]

While His Honour was prepared to accept the possibility of concurrent liability in tort and contract for pure economic loss, the circumstances in which such concurrent liability could arise were, as a consequence of the reasoning which followed, limited.

Gageler J accepted the approach of McHugh J in *Woolcock Street Investments*, in particular, whether a duty of care should be imposed depended upon the concept of vulnerability. In the context of this case, quoting McHugh J from *Woolcock Street Investments,* Gageler J observed:

> The capacity of a person to protect him or herself from damage by means of contractual obligations is merely one – although often a decisive – reason for rejecting the existence of duty of care in tort in cases of pure economic loss.

In respect of reconciling the judgments in *Woolcock Street Investments* and *Bryan v Maloney*, Gageler J at paragraph 185 states as follows:

> Absence any application that *Bryan v Maloney* should be overruled, and absent data which might permit the making of a valued judgment different from that made in *Woolcock Street Investments*, the view expressed by McHugh in *Woolcock Street Investments* should in my opinion be accepted. The continuing authority of *Bryan v Maloney* should be confined to category of case in which the building is a dwelling and which the subsequent owner can be shown by evidence to fall within a class of persons incapable of protecting themselves from the consequences of the builders want of reasonable care. Outside that category of case, it should now be acknowledged that a builder has no duty in tort to exercise reasonable care, in the execution of building work, to avoid a subsequent owner incurring the cost of repairing latent defects in the building. That is because, by virtue of the freedom they have to choose the price and non-price terms on which they are prepared to contract to purchase, there is no reason to consider that subsequent owners cannot ordinarily be expected to be able to protect themselves against incurring loss of that nature.

[27] *Brookfield Multiplex Ltd v Owners Corporation Strata Plan 61288* (2014) 254 CLR 185, [175] (Gageler J).

Reconciling these two landmark decisions has continued beyond *Brookfield,* where particular focus has been given to highlighting the presence, albeit a limited one, of the circumstances of vulnerability articulated in *Bryan v Maloney.* It has been curially noted that the High Court of Australia has had at least two opportunities to consider the decision in matters concerning building defects, these being *Woolcock Street Investments* and *Brookfield,* but that it declined to overrule the decision in each instance.[28]

V The Application of Brookfield in Subsequent Decisions

The majority of the decisions that have considered *Brookfield* and its discussion on duties to protect against pure economic loss have been in New South Wales' superior courts, but it has also been considered in one New Zealand Court of Appeal decision. The New South Wales Supreme Court decision in *Chan v Acres*[29] provides what has been described as a 'pellucid' summary of the present state of the law following *Brookfield.*[30] In that case, McDougall J noted that *Brookfield* reinforced the importance of examining the salient features when determining whether a duty of care existed, with an emphasis on vulnerability.[31] His Honour stated that the case demonstrated that

> in determining whether to impose a common law duty of care to avoid pure economic loss, in facts for which there is no precise authority... the Court must look at the relevant features of the relationship between the plaintiff and the defendant. An essential feature is that the plaintiff must be shown to have been "vulnerable" in the sense explained. Reliance on the defendant, and knowledge by the defendant of that reliance, will be at least an important, and perhaps a necessary, condition of vulnerability.[32]

His Honour also stated that the relevance of known reliance and assumption of responsibility, in considering vulnerability, was an important matter emerging from the *Brookfield* judgments.[33]

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[28] *Chan v Acres* [2015] NSWSC 1885, [104] (McDougall J).
[29] [2015] NSWSC 1885 (McDougall J).
[30] *Owners Strata Plan No 74602 v Brookfield Australia Investments Ltd* [2015] NSWSC 1916, [101] (Stevenson J).
[31] *Chan v Acres* [2015] NSWSC 1885, [118] - [119] (McDougall J).
[32] *Chan v Acres* [2015] NSWSC 1885, [125] (McDougall J).
[33] *Chan v Acres* [2015] NSWSC 1885, [104] (McDougall J).

Interestingly, His Honour considered that the judgments did not go so far as to say that reliance is a *necessary* element of vulnerability. [34] His Honour pointed to a developed line of High Court precedent that strongly suggested the contrary, including *Perre v Apand Pty Ltd*[35] and *Caltex Oil (Australia) Pty Ltd v The Dredge "Willemstad."*"[36] In these decisions, McDougall J contended that neither reliance nor an assumption of responsibility was a necessary condition for imposing a common law duty of care.[37] Notably, His Honour echoed the policy concerns articulated in *Brookfield* by Crennan, Bell and Keane JJ when Their Honours stated that 'to impose upon a defendant builder a greater liability to a disappointed purchaser than to the party for whom the building was made and by whom the defendant was paid for its work would reduce the common law to incoherence.'[38]

In a recent New Zealand Court of Appeal decision concerning a manufacturer's liability for negligence, the approach to vulnerability taken in *Brookfield* was noted to be one that had not found favour in New Zealand.[39] In that case, the judge at first instance had queried 'whether the respondents could have been expected to know of, and take steps to protect itself against' the risk in question.[40] On appeal, the court was unconvinced that vulnerability significantly affected the issue of proximity. Proximity is the test applied in New Zealand when determining whether a duty of care to prevent pure economic loss arises.[41] The court considered the principal issue being the 'existence or otherwise of a tortuous duty of care to which different considerations apply.'[42] The point of distinction to the Australian position is that the ability of a plaintiff to contractually negotiate for warranties does not remove any potential duty that may be owed to it in New Zealand.

The *Brookfield* decision has also extended its reach to being considered in cases involving negligence arising out of a superannuation scheme. Obiter comments in *Brewer v AAL Aviation Limited (Brewer v AAL)*[43] note that *Brookfield* contains a number of observations that can be used to give primacy to the law of contract, specifically the judgment of Crennan, Bell and Keane JJ:

[34] *Chan v Acres* [2015] NSWSC 1885, [144] (McDougall J).
[35] (1999) 198 CLR 180, [124] (McHugh J).
[36] (1976) 136 CLR 529.
[37] *Chan v Acres* [2015] NSWSC 1885, [148] (McDougall J).
[38] *Brookfield Multiplex Ltd v Owners Corporation Strata Plan 61288* (2014) 254 CLR 185, [69] Crennan, Bell and Keane JJ.
[39] *Carter Holt Harvey Ltd v Minister of Education* [2015] NZCA 321, [73] – [74] (Stevens J).
[40] *Carter Holt Harvey Ltd v Minister of Education* [2015] NZCA 321, [74] (Stevens J).
[41] See, eg, *Carter Holt Harvey Ltd v Minister of Education* [2015] NZCA 321, [23] (Stevens J).
[42] *Carter Holt Harvey Ltd v Minister of Education* [2015] NZCA 321, [75] (Stevens J).
[43] [2016] FCA 93, [126] (Buchanan J).

> These passages accord with the primacy of the law of contract in the protection afforded by the common law against unintended harm to economic interests where the particular harm consists of disappointed expectations under a contract. The common law has not developed with a view to altering the allocation of economic risks between parties to a contract by supplementing or supplanting the terms of the contract by duties imposed by the law of tort.[44]

VI CONCLUSION

This case will determine the circumstances in which a duty of care to prevent pure economic loss will arise, not only in the context of defective building cases, but all cases of pure economic loss. Despite there being a number of judgments there is broad consensus in respect of a number of issues that needed clarification. Firstly, the concept of 'vulnerability' as developed by McHugh J in *Woolcock Street Investments* is now the entrenched touchstone for determining whether a duty of care to prevent pure economic loss will arise in tort. Secondly, while the court has not excluded the possibility of there being concurrent liability in tort and contract for pure economic loss, the circumstances in which concurrent liability arises are likely to be very rare. Perhaps those circumstances are limited to a situation where the express or implied term in contract is co-extensive with duty in tort. While ultimately no duty was found in *Chan v Acres,* the obiter comments of McDougall J provide an example of a factual matrix in which such concurrent duties could exist. Finally, the fact that a plaintiff suing for pure economic loss had an opportunity to protect itself by entering into appropriate contracts, will mean in most cases that there is not sufficient vulnerability to justify there being a duty of care in tort to prevent pure economic loss.

The High Court has now provided its clearest guidance to date as to when a duty of care to prevent pure economic loss will arise. In doing so, it concentrates on the circumstances of the plaintiff. In theory it remains possible for a defendant that is unaware of the existence of the plaintiff or the circumstance which makes it vulnerable, to be liable for pure economic loss. This is so because, where there is a chain of contracts, the plaintiff's vulnerability will depend upon factors which are likely to be idiosyncratic to the plaintiff. Accordingly, this new test marks a

[44] *Brookfield Multiplex Ltd v Owners Corporation Strata Plan 61288* (2014) 254 CLR 185, [132] Crennan, Bell and Keane JJ.

continuation of the development of the law of tort in Australia in respect of a duty of care to prevent pure economic loss, which moves the consideration:

(a) from whether the defendant should, having regard to its knowledge of the plaintiff, take care of the defendant's interests (i.e. the foreseeability test – which remains a necessary but not sufficient element for establishing the existence of a duty of care to prevent pure economic loss);

(b) to whether the plaintiff is vulnerable, even where the defendant is unaware of that vulnerability.

As a consequence, some plaintiffs, because of vulnerability associated with their unusual position, will have the benefit of a duty of care, while non-vulnerable plaintiffs in substantially the same position will not. Therefore, from the defendant's point of view it will be difficult to predict, at the time of the relevant act or omission, whether it will be subsequently held to have a duty of care to prevent pure economic loss to a particular unidentified plaintiff. While in theory at least, this may be uncomfortable for potential defendants, the reality is that the device of 'vulnerability' in circumstances where there is a contract or series of contracts, significantly limits the defendant's potential exposure to actions in tort for pure economic loss.

Word Count: 5,563