



## CONSTRUCTION LAW UPDATE No. 904

### Can an owner successfully sue a subcontractor in negligence?

#### Introduction

A recent Victorian Supreme Court decision illustrates the dilemma faced by subsequent owners of a defective building when a subcontractor is thought to have negligently caused damage.<sup>1</sup>

#### The history

In 1998, Terrace Constructions (“**the Developer**”) demolished an existing house on its own land. An associated company, Terrace Designs (“**the Builder**”), then built two townhouses on the land. On completion, the houses were each sold to new owners. The new owners subsequently resold their homes, one to Ms Lawley and the other to Ms Baines (“**the Owners**”). By 2002, the homes showed substantial cracking and distortion, together with other defects.

In 2004, the Owners commenced proceedings in the Victorian Civil and Administrative Tribunal (“**Tribunal**”). The proceedings developed into a complex set of claims including the Builder, the architectural draftsman (“**Mr Gunston**”), the soil engineer and the building surveyor.

#### The cause of the cracking

The Tribunal hearing lasted 11 days. The Builder did not appear. The Tribunal found that the cause of the cracking was due to soil movement and an insufficient depth in a footing. Contributing factors were insufficient control joints, improperly installed brick ties and the planting of a number of large plants close to the building.

The Tribunal found that the Builder, Mr Gunston and the building surveyor were all partly liable for damages totalling about \$500,000 plus costs, apportioning about \$80,000 plus costs of that amount against Mr Gunston.

#### The case against Mr Gunston

The Tribunal found that Mr Gunston had prepared working drawings that showed proposed plants adjacent to the building. The drawings failed to specify the type of plants or to give a warning to the Builder to select only appropriate plants.

Some of the plants were noted as “large”. The drawings included a notation that the landscaping was to be to a later detail but no detail was ever prepared. The drawings also failed to show the number or locations of the required expansion joints in three of the walls.

The Tribunal found that specifying the plants so close to the building without qualification was negligent. Mr Gunston should have known that the plantings might cause significant diminution of the subsurface moisture. The highly reactive soils on this site could lead to significant and substantial damage to the building. He should have included a warning on the drawings as to the size and nature of the proposed plantings.

#### The Appeal

Mr Gunston appealed to the Supreme Court on a large number of grounds. Most of the appeal grounds related to factual findings by the Tribunal. In general, where a specialist Tribunal makes a finding of fact, an appeal Court will be reluctant to examine the finding.

The Court commented that an appeal from the Tribunal is only permitted on a question of law. Hence to overturn a finding of fact, an appeal Court has to be persuaded that there was no evidence to support the finding. In all cases where the Tribunal had made findings of fact, the Court concluded that there was some evidence to support the finding.

The Court then turned to consider the legal issue relating to the duty of care of Mr Gunston to the Owners.

<sup>1</sup> *Gunston v Lawley* [2008] VSC 97

## The duty of care

The Victorian Building Regulations provide that a building practitioner must:-

*perform his or her work as a building practitioner in a competent manner and to a professional standard.*

At the Tribunal, the Owners had successfully argued that this established a common law duty of care of Mr Gunston to them as subsequent owners. The Court commented that the Owners had not also claimed that Mr Gunston had breached the statute, a claim which if made out may have resulted in a far greater award of damages against Mr Gunston.

Justice Byrne considered the relevant authorities on the duty of care of builders and subcontractors. He noted that in this particular case, Mr Gunston was engaged by the Builder, not the Developer.

### Analysing the duty of care in this case

The first question was whether Mr Gunston owed a duty of care to the Developer. If he did not, then there would be no duty of care to any subsequent owner, such as the Owners.

In order to determine whether Mr Gunston owed a duty of care to the Developer, the Court considered the “salient features” test. The Court said the features included reliance by the Developer, the acceptance of responsibility by Mr Gunston and the vulnerability of the Developer.

The Court said that the feature of the greatest significance is vulnerability. This is an assessment of the degree of the ability of the Developer to protect itself from the consequences of Mr Gunston’s lack of due care.

Although there is no general principle of law that a subcontractor cannot owe a duty of care to an owner with whom it has no contract, the Court said it has to examine the relationship between the parties and the loss suffered because of the negligent activity in order to determine whether the duty exists.

Justice Byrne was referred to cases that found a subcontractor owed such a duty, and to others that found it did not. He concluded:-

*It seems to me that the present law in Australia does not admit a cut and dried answer to the existence of this duty. What can be said with some confidence is that, in a typical domestic building contract where the proprietor is a developer rather than a layperson with little or no*

*experience or expertise in construction matters, the proprietor’s assertion that a sub-contractor owes a duty of care to it with respect to the quality of the work performed by the subcontractor will ordinarily face difficulty in establishing the requirements of vulnerability or reliance.*

In this case, he concluded that the Developer was close to the Builder and played a significant role in aspects of the works. He found that Mr Gunston did not owe it a duty of care. Therefore, he could not owe a duty of care to the Owners and was not liable to them.

### Conclusion

A subcontractor’s failure to exercise reasonable care in its work will not necessarily render it liable in negligence to a subsequent owner. While this case involved domestic building works, there is no reason that the same principles would not apply to commercial or industrial works.

Purchasers from experienced developers are less likely to recover in negligence against the subcontractors who performed the work for the developer.

Purchasers from a developer could seek to protect themselves from this risk by appropriate contractual mechanisms.

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