Negligence in design and construction:
The impact of the contractual matrix

Lucas Shipway[1]

Introduction

1 The doctrine of concurrent liability – that is, the potential for the same conduct to found liability in tort and in contract – has been well established in Australia since the High Court decided *Astley v Austrust*[2] in 1999. That is not to say, however, that the doctrine has not given rise to some controversy. One area of difficulty relates to the impact on tort liability of contractual terms that govern the parties' relationship or otherwise provide the context for the dispute (often called, for convenience, the "contractual matrix").

2 It is trite that the duty of care that the law imposes will be subject to any binding contractual terms that modify or exclude that duty. It is generally accepted that the contractual terms that parties choose to regulate their relationship will "trump" the duty of care that might otherwise arise by operation of the law of tort. Thus, for example, a building contract may contain a clause that limits the builder's liability for damages for negligence to a particular amount. Provided clear words are used, such terms will generally be enforceable according to their terms.

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1 BA/LLB (Hons), LLM, barrister, Greenway Chambers, Sydney

2 (1999) 197 CLR 1

3 A more interesting issue is whether – and if so, how – the contractual matrix has the capacity *by implication* to modify a duty of care or even preclude a duty of care from arising in the first place. This article examines that issue.

4 The article focuses on duties of care relating to defects in design and construction. Disputes in relation to such defects frequently are fought out against the background of a contractual matrix. This might consist simply of the contract under which the work in question was performed. But it may also include other agreements, such as the contract under which a claimant acquired a defective building.

5 As the article explains, the High Court's recent decisions establish two principles reasonably clearly. First, the existence of an opportunity to negotiate contractual terms of the kind referred to above (that is, aimed at protecting a person from the consequences of another's negligence) can, it seems, prevent a duty of care from arising in the first place. That result can flow even if such protective terms were not in fact put in place. The critical question is whether an *opportunity* to negotiate protection was available, not whether it was in fact taken up.

6 Secondly, any contractual limits that apply to the duty owed under the original retainer of an engineer or similar professional will generally also limit the duty owed by that professional to a third party, such as a subsequent owner.

Concurrent liability and the interaction between contract and tort

7 Writing in 1995, Professor Fleming described the rationale for the English common law's recognition of concurrent liability as follows:[3]

> English law … eventually took the view that a contractual obligation between the parties does not preclude the concurrence of a tort duty in the same respect, so that the injured party has the option to pursue either a contractual or a tortious remedy. … The motivation behind this development seems to have been to make procedural and other advantages of tort, such as contribution or a more favourable starting point for the period of limitation,

[3] J Fleming, "Tort in a Contractual Matrix" (1995) 33(4) *Osgoode Hall LJ* 661 at 663

> available to the claimant. Moreover, it makes no sense to withhold these advantages from recipients of contractual, as opposed to gratuitous, services.

8 Fleming noted that, as a general rule, courts in common law jurisdictions have since held that contract prevails over tort where the two produce different outcomes for the same conduct:[4]

> [T]he tort duty is subject to contractual modifications, such as a lower standard of care or limitation of liability, in deference to the belief in the primacy of private ordering. In short, the starting point for tort in a contractual matrix is … that "contract trumps tort."

9 Fleming pointed out that the principle that contract trumps tort found expression in cases such as *British Columbia Hydro and Power Authority v BG Checo International Ltd*.[5] In that case, La Forest and McLachlin JJ, who delivered the judgment of the majority, said that "where a given wrong prima facie supports an action in contract and in tort, the party may sue in either or both, except where the contract indicates that the parties intended to limit or negative the right to sue in tort."[6] The reason for this, according to their Honours, was:[7]

> This limitation on the general rule of concurrency arises because it is always open to parties to limit or waive the duties which the common law would impose on them for negligence. This principle is of great importance in preserving a sphere of individual liberty and commercial flexibility ….

10 This approach has been followed by the Supreme Court of Canada in subsequent cases.[8] The Australian High Court has not considered *British Columbia Hydro and Power Authority*[9] but (as we will see below) the law in Australia has developed along the same lines.

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4 Ibid
5 [1993] 1 SCR 12
6 [1993] 1 SCR 12 at 26
7 [1993] 1 SCR 12 at 26 - 27
8 Eg *Winnipeg Condominium Corporation No 36 v Bird Construction Co Ltd* [1995] 1 SCR 85.
9 It was referred to, apparently with approval, by Buss JA in *Apache Energy Ltd v Alcoa of Australia Ltd [No 2]* (2013) 45 WAR 379 at 417 [185]ff

11 A potential corollary of the proposition that contract trumps tort is the notion that a duty of care will not arise where the claimant could have taken some step to guard against the risk via a self-protective measure in a contract. Just as it is open to parties to limit or waive the duties which the common law would impose for negligence, so it is also possible to make positive provision for the consequences of such conduct. A failure to do so might be taken to indicate that the parties did not intend any consequences to flow from a breach by one of them of the duty of care that would otherwise arise.

12 According to Fleming, this view was first voiced in the *Leigh & Sillivan Ltd v Aliakmon Shipping Co Ltd* [1986] AC 785 (HL). In that case, the House of Lords denied a consignee a tort remedy against a negligent carrier where the risk but not the property in the goods had passed at the relevant time. Brandon LJ "offered the buyers the cold comfort that they should have either contracted with the sellers to exercise the right to sue the carrier, or assigned such a right to them".[10] According to Fleming:[11]

> Brandon LJ's suggestion has struck a responsive chord in later cases. It has, for example, played a role in the construction area in denying tort recovery to a building owner against a subcontractor, or to a contractor against the owner's supervising engineer, on the reasoning that the claimant could have contracted with the defendant for additional protection …

13 Fleming suggests that this argument also works the other way, that is, "the plaintiff's inability to plan against the contingency of loss favours recognition of a duty of care by the defendant."[12] This has some of the hallmarks of what would later emerge as the notion of "vulnerability".

14 At the time of Fleming's writing, the proposition that a failure to take "self-protective" measures precluded a duty of care was by no means universally accepted.

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10 Fleming, n3 above, at p671

11 Ibid

12 Fleming, n3 above, at p671, citing *White v Jones*, [1995] 2 AC 207 (HL) and *Smith v Bush* [1990] 1 AC 831 (HL)

In the Canadian case of *Norsk Pacific Steamship Co v CNR* [1992] 1 SCR 1021, for example, a barge operator negligently collided with a bridge owned and operated by a public authority. The plaintiffs were the principal users of the bridge under a licence from the authority. They sued the barge operator for loss caused by the interruption to their use of the bridge. A majority of the Supreme Court of Canada allowed the tort claim notwithstanding the availability to the plaintiffs of contractual protection against the risk. As La Forest J pointed out (in dissent), the plaintiffs were in a much better position to assess their risk of loss from damage to the bridge than were the defendants, and could easily have shifted it to the bridge owner under their contract. Accordingly to the majority, their failure to do so did not preclude recovery.

15 Similarly, in *Henderson v Merrett Syndicates* [1995] 2 AC 145 (HL), the plaintiffs brought an action for negligence not only against their own "member's agent" (with whom they had contracted), but also against managing agents of Lloyd's syndicates with which risks were placed. Lord Goff (with whom the other Law Lords agreed) held that the managing agents were liable notwithstanding that the plaintiffs already had a contractual remedy against their own agent.

16 However, a series of decisions in Australia since 1995 has established that a plaintiff's failure to take steps to protect itself contractually can be fatal to a successful claim in negligence. Those decisions sprang from the wider development under Australian law of principles governing the recovery of damages for pure economic loss. It is appropriate to consider that wider development next.

Recovery for pure economic loss in Australia

17 The seminal case that established an entitlement to damages for pure economic loss in Australia is *Caltex Oil (Australia) Pty Ltd v The Dredge "Willemstad"* (1976) 136 CLR 529. Each of the members of the High Court gave separate reasons for upholding the appeal. Stephen J focused on the "salient features"[13] of the factual

[13] (1976) 136 CLR 529 at 576.

background: the respondent's knowledge that the pipelines on the seabed were property of a kind inherently likely, when damaged, to produce consequential economic loss to those who relied directly upon them, its knowledge or means of knowledge that the pipelines extended across Botany Bay to the plaintiff's terminal, the infliction of damage to the property owned by the third party that owned the pipelines and the nature of the plaintiff's loss. Stephen J also observed that there was a requirement for "some control mechanism"[14] to avoid the risk of indeterminate liability.[15]

18 An examination of the "salient features" of the relationship between the parties has since become a compulsory step in determining whether a duty of care should be imposed to avoid pure economic loss.[16] Subsequent courts have similarly sought to impose some limit on the damages recoverable for pure economic loss.

19 In *Bryan v Maloney* (1995) 182 CLR 609, a professional builder constructed a house using inadequate footings. The defect did not manifest until the owner had sold the house to the plaintiff. The original building contract did not include any exclusion or limitation of the builder's liability to the owner and it was held that the builder was under an implied duty to perform the work with due care and skill. A majority of the High Court (Brennan J dissenting) held that the builder owed the subsequent purchaser a duty in tort to take reasonable care in the construction of the house. The builder was liable to that purchaser in damages for the decrease in the property's value attributable to the inadequate footings.

20 When *Bryan* was decided, the concept of "proximity" was the touchstone of negligence. Again apparently with an eye on the risk of "indeterminacy" associated

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14 (1976) 136 CLR 529 at 575.

15 Chief Judge Cardozo famously sought to avoid the imposition of liability "in an indeterminate amount for an indeterminate time to an indeterminate class": *Ultramares Corporation v Touche* (1931) 174 NE 441, 444.

16 See eg *Chan v Acres* at [2015] NSWSC 1885 at [96].

with compensating for pure economic loss, Mason CJ, Deane and Gaudron JJ made the following comment as to the precedent value of their decision in that case:[17]

> In particular, the nature of the property involved, namely a building which was erected to be used as a permanent dwelling house, constitutes an important consideration supporting the conclusion that a relevant relationship of proximity existed between Mr Bryan, as the builder, and Mrs Maloney as a subsequent owner. That being so, the decision in this case is not directly decisive of the question whether a relevant relationship of proximity exists in other categories of case or as regards other kinds of damage.

21 The appellants in *Perre v Apand Pty Ltd* (1999) 198 CLR 180 grew potatoes. Their farm was in an area affected by an importation ban following the negligent introduction by the respondent of a disease onto another farm in the region. No property belonging to the appellants suffered any physical harm.

22 The High Court held that the respondent owed the appellants a duty of care not to cause economic loss by introducing the disease. The judges of the High Court differed in their view as to the appropriate test for negligence liability for pure economic loss. The notion of "vulnerability" emerged as a common theme. McHugh J stated five principles that he considered were "relevant in determining whether a duty exists in all cases of liability for pure economic loss".[18] They were: foreseeability of loss; indeterminacy of liability; autonomy of the individual; vulnerability to risk; and knowledge of the risk and its magnitude. His Honour added that, in particular cases, other policies and principles may be relevant but, in his view, these five principles must always be considered.

23 His Honour observed in relation to "vulnerability to risk":[19]

> In many cases, there will be no sound reason for imposing any duty on the defendant to protect the plaintiff from economic loss where it was reasonably open to the plaintiff to take steps to protect itself. The vulnerability of the plaintiff to harm from the defendant's

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17 (1995) 182 CLR 609 at 630.
18 (1999) 198 CLR 180 at 220 [105].
19 Ibid at 225 [118].

> conduct is therefore ordinarily a pre-requisite to imposing a duty. It means that where the plaintiff has taken, *or could have taken* steps to protect itself from the defendant's conduct and was not induced by the defendant's conduct from taking such steps, there is no reason why the law should step in and impose a duty on the defendant to protect the plaintiff from the risk of pure economic loss. [Emphasis added]

24 Justice McHugh went on to point out that one way in which a plaintiff could protect itself is by "obtaining contractual warranties".[20]

Recent cases and the increasing importance of "self-protection"

25 In *Woolcock Street Investments Pty Ltd v CDG Pty Ltd* (2004) 216 CLR 515, the appellant purchased a commercial building some years after it was built. After it took possession, it discovered that the building had latent defects that were attributable to the design engineer's negligent design of the footings or negligent supervision of the construction work. The appellant sued the engineer in tort, there being no contractual relationship on which it could rely. It apparently had not negotiated any warranties from the vendor as to the condition of the building nor any right to sue the engineer as assignee.

26 The claim failed. According to Gleeson CJ, Gummow, Hayne and Heydon JJ, the facts did not show:[21]

> that the appellant could not have protected itself against the economic loss it alleges it has suffered. It is agreed that no warranty of freedom from defect was included in the contract by which the appellant bought the land, and that there was no assignment to the appellant of any rights which the vendor may have had against third parties in respect of any claims for defects in the building.

27 Gleeson CJ, Gummow, Hayne and Heydon JJ expressed the view that since *Caltex* and most notably *Perre*, the "vulnerability" of the plaintiff had emerged "as an important requirement in cases where a duty of care to avoid economic loss has been

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20 Ibid at 226 [120].
21 *Woolcock* at 533 [31].

held to have been owed".[22] They defined vulnerability as "a reference to the plaintiff's inability to protect itself from the consequences of a defendant's want of reasonable care, either entirely or at least in a way that would cast the consequences of loss on the defendant".[23]

28 McHugh J said:

> The better view in all cases – not merely building cases – is that 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 a duty of care in tort in cases of pure economic loss.[24]

29 *Barclay v Penberthy* (2012) 246 CLR 258 was not a building case although it was relevantly a claim for pure economic loss. The case is important because in its judgment the High Court touched on "self-protection" via contract but treated the point somewhat differently to the approach taken in cases such as *Woolcock Street Investments*.

30 An air crash resulted in the death of the plaintiff's employees, who were passengers on the chartered aeroplane. The plaintiff alleged that the pilot owed it a duty of care to avoid the pure economic loss flowing from loss of the services of its employees. The trial judge held that the pilot knew that the purpose of the flight was a commercial purpose.

31 French CJ, Gummow, Hayne, Crennan and Bell JJ referred to the question of whether the plaintiff could have protected itself from pure economic loss by appropriate terms in its contract with the charter company. Their Honours commented:

> An express term [in the contract] presumably would have gone further than an implied term … that Fugro [the charter company] would exercise reasonable care and skill in the performance of the charter contract, and would have required Fugro to accept liability to

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22 *Woolcock* at 530 [23].
23 *Woolcock* at 530-531 [23]-[24]
24 *Woolcock* at 552 [94].

> [the plaintiff] for pure economic loss suffered by [the plaintiff] from injury to its employees.[25]

32 In an apparent contradiction of what was said in cases such as *Woolcock Street Investments*, the plurality rejected the contention that the plaintiff's failure to protect itself via contract was fatal to its claim in tort. Their Honours said:

> it was not incumbent upon [the plaintiff] to establish that it could not have bargained with [the charter company] for a particular contractual provision. *The presence or absence of a claim in contract would not be determinative of a claim in tort*.[26] [Emphasis added]

33 This last sentence was supported by a footnote reference to *Astley v Austrust* and to a discussion in *Fleming's Law of Torts* (10th ed, 2011) of concurrent duties in contract and tort. On its face, the sentence appears to ignore the considerable jurisprudence discussed above to the effect that the availability of a claim in contract *may well* be determinative of a claim in tort. As we have seen, that can occur if parties specifically provide in their contract (or at least the contractual matrix generally) for a contractual remedy for a failure to take care, such that they can be taken to have included adequate protection for that loss and therefore to have negated vulnerability.

34 In a separate judgment, Kiefel J held that it was not open to conclude on the facts that the charter company would have agreed to an express term that it accept liability for loss due to negligence. On that basis the Court below's finding that the plaintiff was not vulnerable was, according to her Honour, in error. "In any event", according to Kiefel J, the plaintiff "had the protection of the implied term to take reasonable care …"[27]

35 Again, this is at odds with the authorities that suggest that it is the *opportunity* to negotiate express terms that is relevant in determining the existence of a duty of care.

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25 *Barclay* at 284-285 [46].
26 *Barclay* at 285 [47].
27 *Barclay* at 321 [177].

36 The approaches of the majority and of Keifel J are perhaps explicable on the grounds that the plaintiff in *Barclay* (unlike the plaintiffs in *Woolcock* and *Perre*) was in a direct contractual relationship with the defendant. We will return to this point below.

37 The next case to consider is *Brookfield Multiplex Ltd v Owners Corporation Strata Plan 61288* (2014) 254 CLR 185. The building contract in that case was between the builder and a developer called Chelsea. Chelsea was the owner of the land, and remained the owner until the strata plan was registered. Upon that that registration, the Owners Corporation came into existence and became the legal owner of the common property. The Owners Corporation had no contractual relationship with Brookfield or with Chelsea. It held the common property as agent for Chelsea within the meaning of the strata legislation.[28]

38 The Owners Corporation was empowered under the standard-formal contract of sale of each of the lots to serve written notice of defects in the common property on Chelsea. That would enliven Chelsea's contractual obligation to the lot owners to repair such defects.

39 The responsibility assumed by Brookfield, as the builder, with respect to Chelsea, as the initial owner of the lots, was defined in detail by the building contract.[29] On that basis, French CJ held that "Chelsea cannot be taken to have relied upon any responsibility on the part of Brookfield, and Brookfield assumed none, in relation to pure economic loss flowing from latent defects extending beyond the limits of the responsibility imposed on it by the contract".[30] This has since been seen by later courts as an important aspect of the decision in *Brookfield*, and will be discussed further below.

40 French CJ rejected the suggestion that the Owners Corporation was vulnerable on the basis that:

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28 *Brookfield* per French CJ at 204 [31].
29 Ibid at 204 [33].
30 Ibid

> The purchasers of lots from Chelsea were effectively investors in a hotel venture under standard form contracts which were an integral part of the overall contractual arrangements. The standard form contract contained specific provisions relating to the construction of the building and Chelsea's obligations to undertake 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. Nor, therefore, could the [Owners] Corporation as their statutory "agent". The position of the subsequent owners and the interaction of the contractual and statutory frameworks are antithetical to the proposition that Brookfield owed the Corporation a duty of care …[31]

41 Hayne and Kiefel JJ considered it was not necessary to closely consider the terms of the building contract or the contracts for the sale of the lots. According to their Honours:

> It is enough to notice that the relevant parties made contracts for the construction of the building and for subsequent sale of parts of the building which were contracted (and did) make provisions regulating the quality of what was to be received in return for payment of the price. The making of those contracts denies vulnerability.[32]

42 For their Honours, mere reliance (which they said was "made out on the facts") was not sufficient to establish a duty of care. Vulnerability, they held, was required in the circumstances. It was concerned with a plaintiff's "inability to protect itself from the defendant's want of a reasonable care, either entirely or at least in a way which would cast the consequences of loss on the defendant".[33]

43 According to their Honours, the making of contracts demonstrated the ability of the parties to protect against any lack of care by the builder in the performance of its contractual obligations. It was not suggested that the parties "could not protect their own interests". On that basis, their Honours held that no duty of care from the builder arose in favour of the Owners Corporation.[34]

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31 Ibid at 204-205 [34].
32 *Brookfield* per Hayne and Kiefel JJ at 210 [55].
33 Ibid at 210 [57].
34 Ibid at 210-211 [58].

44 Crennan, Bell and Keane JJ went on to say that the respondent's claim in *Brookfield* was "based on the failure of the purchasers of the apartments to get value for money from the developer rather than on the appellant's causing damage to the respondent's property."[35] According to their Honours, the proposition that a builder that breaches its contractual obligations to the first owner of a building is responsible for the consequences of what is really a "bad bargain made by subsequent purchasers of the building" was not supported by previous decisions such as *Bryan v Maloney*. In their view, "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".[36] This (it seems) is the point made by French CJ above regarding consistency in the scope of the duty. We will return to it in the context of a discussion of the recent case of *Chan v Acres* below.

45 Crennan, Bell and Keane JJ accepted the appellant's submission that its obligations to the developer were so comprehensively stated in the building contract that there was no room for the imposition of a concurrent duty of care owed to the developer in tort. The liability of the appellant to the developer was the subject of detailed provisions relating to the risk of latent defects in the appellant's work. They cast onto the appellant the risk of expenditure to make good any defect. Those detailed provisions secured performance of a clause which required completion in accordance with detailed specifications. According to their Honours, those provisions:[37]

> set out the extent of the appellant's obligations to ensure that the developer should 'get what it paid for'. To supplement them with an obligation to take reasonable care to avoid a reasonably foreseeable economic loss to the developer and having to make good the consequences of latent defects … would be to alter the allocation of risks effected by the parties' contract.

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35 *Brookfield* per Crennan, Bell and Keane JJ at 213 [67].

36 *Brookfield* per Crennan, Bell and Keane JJ at 214 [69], citing *Woolcock* at 532 [28] and *Woollahra Municipal Council v Sved* (1996) 40 NSWLR 101 at 120.

37 *Brookfield* per Crennan, Bell and Keane JJ at 233] [144].

46 On that basis, their Honours rejected the Owners Corporation's submission that concurrent liability ought to apply. Their Honours noted that in each of *Barclay v Penberthy* and *Astley v Austrust* the content of the duty was the same in contract and tort and that was not the case in the dispute before them.[38]

47 That is a critical aspect of the decision in *Brookfield.* It suggests that, according to Crennan, Bell and Keane JJ, the province of concurrent liability may be limited to circumstances in which the content of the duty is the same in contract and in tort. On that analysis, as soon as the parties turn their minds to specific contractual provisions that alter the scope or content of the duty of care, the duty in tort no longer arises.

48 That approach is consistent with the view that the parties ought to be free to choose the terms on which they arrange their relationship. It reflects the notion that it would be unjust for the parties to be subject to a different duty to that which they have, by their agreement, put in place. It is also consistent with the idea that as soon as parties have an opportunity to bargain, they are no longer vulnerable to one another. It is easier to conclude that the home owner in *Bryan v Maloney* could enjoy the benefit of an orthodox duty of care (that is, a duty that is not the subject of any special detailed provisions in a contract) because that owner, like the original owner, can be taken to have proceeded on the basis that such a duty applied when the work was originally performed.

49 For Gageler J, the critical question as to whether a duty of care arises should be answered by whether the plaintiff was within a class of persons "incapable of protecting themselves from the consequences of the builder's want of reasonable care…" 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

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38 *Brookfield* per Crennan, Bell and Keane JJ at 233 [143].

> cannot ordinarily be expected to be able to protect themselves against incurring economic loss [in repairing latent defects].[39]

Chan v Acres

50 *Chan v Acres* [2015] NSWSC 1885 concerned a claim by a purchaser of a dwelling that was affected by defects, including structural defects. The plaintiffs argued that the local Council owed a tortious duty of care to a future owner when discharging its functions as principal certifying authority (or "PCA"). They also argued that a structural engineer who had prepared the designs for the work and periodically inspected it was also liable in negligence for the defects.

51 Mr Acres, the original owner who carried out the extensions to the house, was an owner-builder. He engaged the Council as the PCA in respect of the work. In that capacity, it issued a construction certificate and an occupation certificate. The engineer was engaged by Mr Acres to prepare structural drawings and carry out inspections from time to time when called upon to do so by him.

52 After the work had been performed, Mr Acres sold the dwelling to Ms Chan and her partner, the plaintiffs. They arranged a pre-settlement building report. Later, it transpired that the house had significant structural and other defects. Several of those defects, it was held, should have been apparent to the Council at the time it issued the occupation certificate to Mr Acres and should have prevented such a certificate being issued.

53 Justice McDougall found that the Council owed the plaintiffs a duty of care in tort but the engineer did not. According to McDougall J, there was an assumption of responsibility on the part of the Council by reason of the underlying statutory scheme under which it provided certifying services. A second critical ingredient was that there was actual reliance by the plaintiff on the Council properly performing its duties. In contrast, the plaintiffs did not rely on the engineering advice, not having

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39 *Brookfield* per Gageler J at 245 [185].

turned their mind to whether Mr Acres had engaged an engineer in relation to the work.

54 As the PCA, the Council owed statutory duties pursuant to ss109E and 109H of the *Environmental Planning & Assessment Act* 1979 (NSW). In particular,

(a) sub-section 109E(3)(d) required the Council to carry out a series of mandatory inspections, plus any other inspections called up in either the development consent or construction certificate conditions, and subsection (e) obliged the Council to ensure that any preconditions under the development consent were met before issuing any occupation certificate; and

(b) sub-sections 109H(5)(b)&(c) operated such that Council was obliged to ensure that any construction certificate that issued was with specific reference to the plans and specification to be followed, and further required that it not issue any final occupation certificate unless the building was suitable for occupation in accordance with its classification under the Building Code of Australia.

55 Council entered into a PCA Agreement with Mr Acres. By that contract, Council expressly agreed to undertake inspections at 'critical phases of the building process'.

56 McDougall J held:

> It was reasonable for purchasers (including the plaintiffs) to rely on the Council properly to discharge its functions. There are at least three reasons why:
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> (1) the independence of the Council,
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> (2) because of the statutory scheme pursuant to which it acted;
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> (3) and because it was not reasonably practicable for the purchasers to undertake the kind of testing that would be necessary to uncover the defects that the Council should have picked up, but did not.

57 Justice McDougall then turned his attention to the question of vulnerability. The known reliance referred to above was critical to his vulnerability finding (at [360]ff):

> [I]t is easy to infer, and I do, that the Council, knowing that intending purchasers would rely on its work as summarised in occupation certificates, assumed the responsibility of certifying accurately. One might well ask, accordingly, why should it not also bear the consequences of certifying inaccurately?
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> …[I]t seems to me to be strongly arguable that the plaintiffs were relevantly vulnerable. There is the unchallenged evidence of known and expected reliance, and of inferred assumption of responsibility. There is the feature of the Council's functions as PCA. There is the feature that the work inspected was "critical" because, in many cases at least, it was important structural work. And there is the feature that, in many cases at least (in fact, probably all), the opportunity to reinspect that work was lost once the Council had done so and certified it as compliant, because the work was then covered up.
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> Further, where (as here) the work is the construction of a dwelling house (or extensions to a dwelling house) intended for use as a family home, there is the consideration that it is unlikely in the extreme that invasive or destructing examination would be undertaken, to "second-guess" the state of affairs certified by the final occupation certificate. Indeed, purchasers would be entitled to think (as did the plaintiffs) that there was no need to revisit matters apparently settled by the issue of that certificate.

58 The existence of the warranties under ss 18B and 18C of the *Home Building Act* did not preclude the tortious duty. At first blush, this is surprising, given his Honour's reference to that statutory scheme in other judgments as displacing a duty of care.[40] The distinction appears to be that in the present case, the existence of the scheme did not overcome the plain reliance by the plaintiffs on the Council and the Council's assumption of responsibility toward them (or at least toward the members of their class). His Honour dealt with the issue as follows:

> Further, Mr Bambagiotti referred to the statutory scheme for protection of buyers of residential homes set out in ss 18B and 18C of the HB Act. He submitted, he said consistently with what I had said in *Brookfield* at first instance …, that the legislature had chosen to enact the indemnity scheme set out in those provisions of the HB Act, and that it was not for the Court to go further. (I said the same in *Owners Corporation Strata Plan*

[40] See eg *Owners Corporation Strata Plan 72535 v Brookfield* [2012] NSWSC 712

> *72535 v Brookfield* [2012] NSWSC 712 - a case that did not go on appeal.) It might be thought that the joint judgment in *Woolcock Street* at [35], and the judgment of Gageler J *Brookfield* at [186], support that proposition.
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> The *"Brookfield"* cases concerned a builder and a subsequent owner. *Woolcock Street* concerned an engineer and a subsequent owner. The salient features of the relationships exposed in those cases did not include any equivalent of the features of the relationship between the Council and the plaintiffs that I have referred to ... Specifically, they did not include the features of known reliance and assumption of responsibility. Whilst I accept (as I did in my earlier decisions) that the Court should be very slow to tread where the legislature has not, in a field where the legislature has chosen to intervene to some extent, I do not think that this consideration is sufficient to outweigh what I see as being the logical and principled development, by analogy, of what has been said in the High Court cases to which I have referred all too extensively.

59 In relation to the engineer, the outcome was quite different. His Honour found that no duty of care arose. His Honour's reasoning was as follows.

(a) The starting point was that the engineer could not owe a duty to the plaintiff owner that was any wider or more onerous than the duty that it owed to the original owner pursuant to their direct contractual relationship. According to his Honour (who cited the judgement of Crennan, Bell and Keane JJ in *Brookfield* at [69] referred to above), to so find would "reduce the common law to incoherence".[41]

(b) That said, following *Astley v Austrust*, there was no reason why the engineer's duty to the owner in tort could not have been coextensive with its duty in contract.

(c) The engineer knew or ought reasonably to have known that:

(i) if its design was inadequate, or it performed inspections negligently, there was a risk of loss;

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41 *Chan v Acres* at [202]

(ii) if structural shortcomings resulted, the defects would probably only be discovered by inference (if cracking had appeared) or by destructive testing; and

(iii) the risk of loss would rest not only on the original owner with whom the engineer had a contract, but also any subsequent purchaser of the house.

60 On these bases, according to his Honour, the engineer must have realised that future purchasers who were practically dependent on it appropriately performing its works, would or may suffer loss if the engineer performed its work negligently. Reasonable foreseeability of economic loss (an essential, but not of itself sufficient criterion for the imposition of a duty of care) was thus made out.

61 However, the limited evidence called by the plaintiffs revealed that they knew there were some defects in the property (from inspections undertaken on their behalf by qualified building inspectors), knew that the sale contract acknowledged the possibility that there may be defects in the dwelling and called on them to make their own inquiries, knew of and took comfort in the existence of the *Home Building Act* statutory insurance scheme, failed to take any steps to avail themselves of the plans and specifications used by the original owner or any certificates or guarantees that he may have obtained, and, importantly, did not even turn their mind to whether the original owner had retained an engineer, let alone consider what work such an engineer may have done.

62 In short, and unlike the factual position in *Bryan v Maloney*, the facts did not establish that the engineers assumed responsibility to subsequent purchasers or that the plaintiffs relied on the engineer's work in deciding whether to buy the house.

Conclusion

63 Categorical statements cannot be made about the state of the law in relation to precisely when damages for pure economic loss can be recovered in tort. Although it

is settled that in a novel case the court will look to the "salient features" of the relationship between the parties in order to determine whether a duty of care arises, the features that are "salient" and their effect one way or the other is not fixed. "Vulnerability" has been identified repeatedly as an important criterion, but it has also been said that "there is no binding authority that vulnerability is a necessary condition of a duty to avoid pure economic loss".[42] Vulnerability's precise role has not yet been articulated.

64 In those circumstances, it is possible to offer tentative conclusions only about the role of the contractual matrix in determining liability in tort for defects in construction and design.

65 This article has examined two aspects of the impact of the contractual matrix:

(a) first, the principle that a failure to negotiate protective contractual terms may prevent a duty of care from arising at all. Given what was said in *Barclay v Penberthy*, there is a question-mark over whether this principle applies where the plaintiff is in a direct contractual relationship with the defendant. It is also liable to be displaced where there is an assumption of responsibility by the defendant and clear, known reliance by the plaintiff (see *Chan v Acres* in relation to the liability of the Council); and

(b) secondly, the principle that the duty of care imposed pursuant to an initial contractual retainer will not be permitted to grow wider when relied upon by subsequent claimants. This principle has now been restated on a number of occasions and appears reasonably well settled.

66 These principles have the potential to generate problematic outcomes from the perspective of plaintiffs.

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42 *Apache Energy Ltd v Alcoa of Australia Ltd (No 2)* (2013) 45 WAR 379 at 386 [20] per McLure P (with whom Newnes JA agreed);

67 Parties who contracted before decisions such as *Woolcock Street Investments* can be assumed to have done so on the understanding that concurrent liability would permit the implication of a tortious duty alongside a contractual one. Is it just that such a party may discover that a duty of care will not now be implied, precisely because the contracting parties had an opportunity to negotiate contractual protection and did not do so? It may be, following *Barclay v Penberthy*, that a concurrent duty of care will generally survive where the plaintiff contracted directly with the defendant and the parties chose not to disturb the usual implied term of due care and skill. But the position is not clear.

68 Similarly, is it appropriate that a duty of care owed to a subsequent owner of a building that is affected by latent defects should be limited by the terms of a contract to which that owner was not a party? There is a respectable argument that the existence and scope of such a duty ought not to depend on the terms on which design or construction work on the building was carried out for a former owner. To hold otherwise is, in effect, to compel purchasers to conduct a costly and potentially unreliable "due diligence" exercise to search for such prior contracts.

69 It remains to be seen how future courts develop the principles identified in this article and whether in doing so they seek to address the problematic issues identified above.