



GREENWAY CHAMBERS

Be careful what you wish for:
When and how to plead (and defend) a claim for breach of
statutory duty of care under the *Design and Building
Practitioner's Act 2020*

Presenter: Garth Campbell

Chair: Richard Cheney SC

Section 37

- (1) **A person who carries out construction work** has a duty to exercise reasonable care to avoid economic loss caused by defects—
- (a) in or related to a building for which the work is done,
 - and
 - (b) arising from the construction work.
- (2) The duty of care is owed to each owner of the land in relation to which the construction work is carried out and to each subsequent owner of the land.



Elements of claim in negligence

The three basic elements of a claim in negligence are:

1. the existence of a duty of care and its scope;
2. a breach of that duty by the defendant; and
3. the remoteness (or non-remoteness) of the damage claimed.



The existence of a duty of care - historical

1. At common law, there is no general test for determining the existence or non-existence of a duty of care in negligence.
2. Proximity and reasonable foreseeability have been used to determine whether or not a duty of care exists.
3. Duties of care were imposed *“upon those who followed a calling which required skill and competence to exercise in the calling such reasonable skill and competence as was appropriate”*.



Defective works

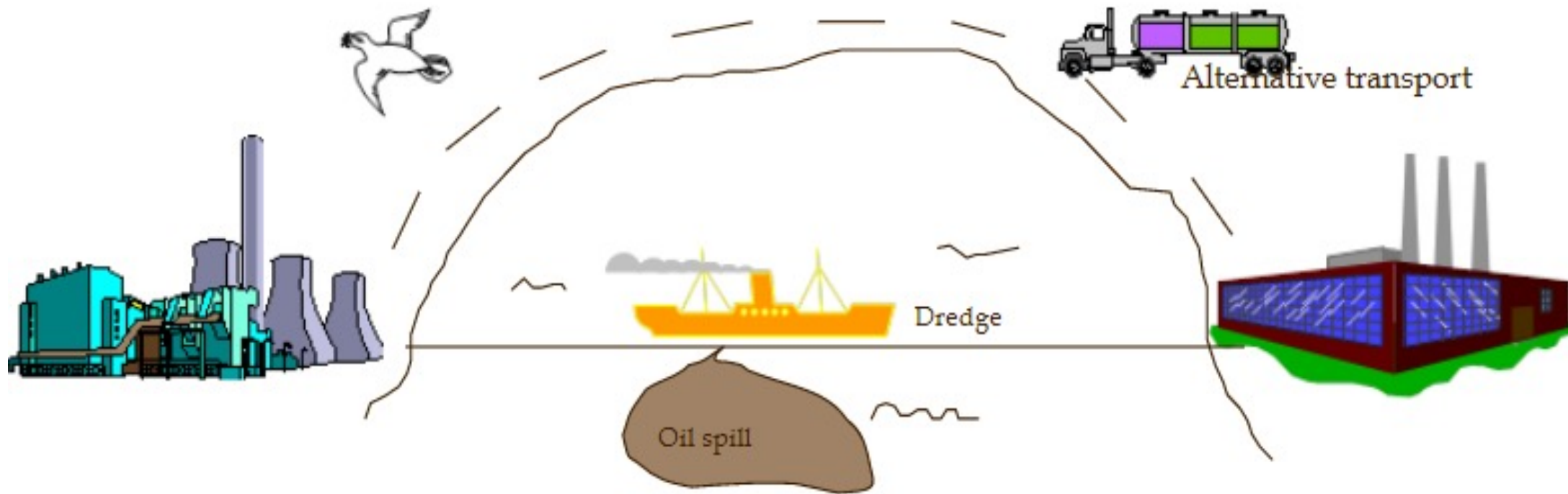
Pure economic loss - the old rule

1. Pure economic loss is defined to be economic loss which is not consequential upon injury to person or property.
2. Construction defects are characterised as pure economic loss, as is economic loss due to injury to *another* person or their property.
3. There was a general rule established in *Cattle v Stockton Waterworks* (1875) LR 10 QB 453 that damages for pure economic loss are not recoverable in negligence.



Development of negligence regarding pure economic loss

Caltex Oil (Australia) Pty. Limited v The Dredge Willemstad (1976) 136 CLR 529



Development of negligence regarding pure economic loss

Caltex Oil (Australia) Pty. Limited v The Dredge Willemstad (1976) 136 CLR 529

Gibbs J at 551:

If a person committing an act of negligence were liable for all economic loss foreseeably resulting therefrom, an act of careless inadvertence might expose the person guilty of it to claims unlimited in number and crippling in amount. For example, if, through the momentary inattention of an officer, a ship collided with a bridge, and as a result a large suburban area, which included shops and factories, was deprived of its main means of access to a city, great loss might be suffered by tens of thousands of persons, but to require the wrongdoer to compensate all those who had suffered pecuniary loss would impose upon him a burden out of all proportion to his wrong.



Development of negligence regarding pure economic loss

Bryan v Maloney (1995) 182 CLR 609

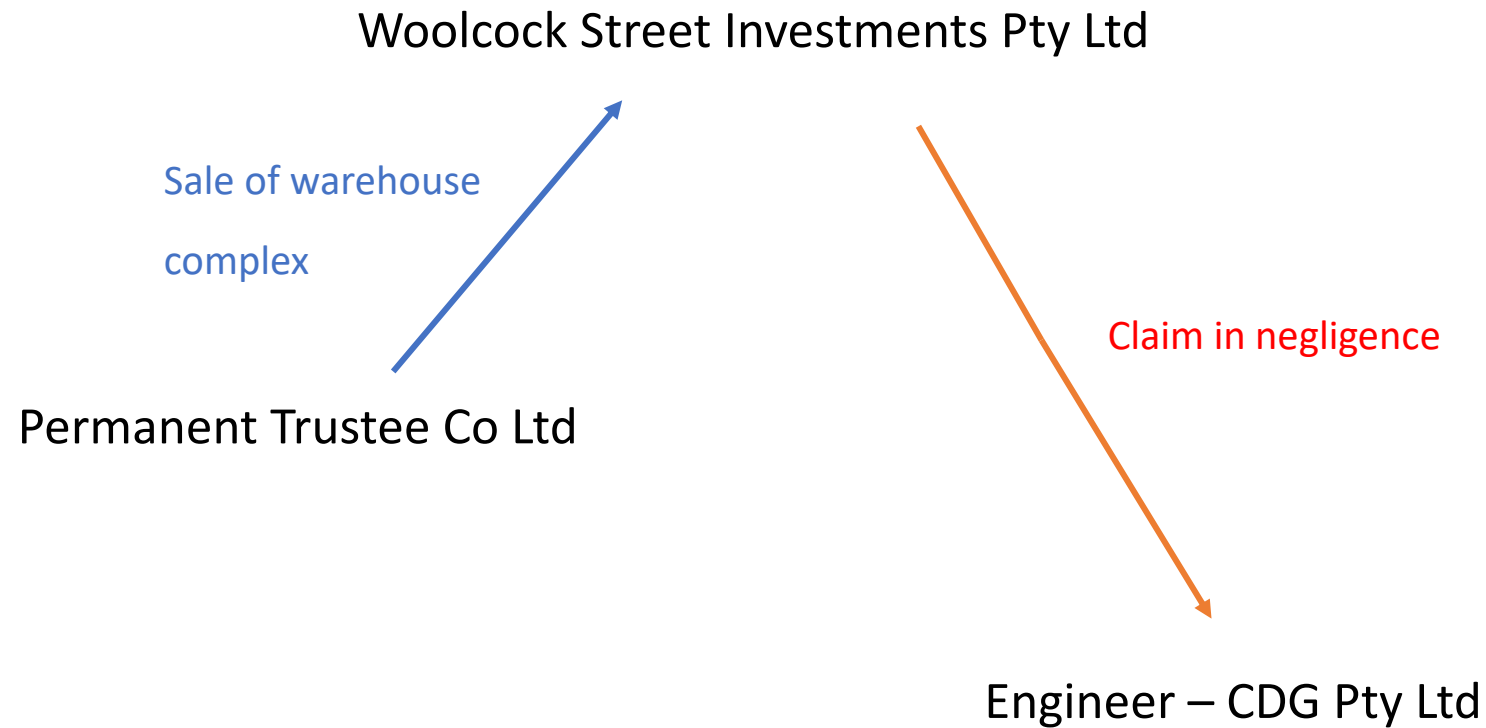
1. For the first time, the High Court held that a builder who constructs a house owes a duty of care to subsequent owners to exercise reasonable care to avoid pure economic loss.
2. The relationship was characterised by the assumption of responsibility on the part of the builder and the likely reliance on the part of the owner.
3. Relied on the concept of proximity between the builder and the subsequent owner.



Development of negligence regarding pure economic loss

Woolcock Street Investments v CDG Pty Ltd (2004) 216

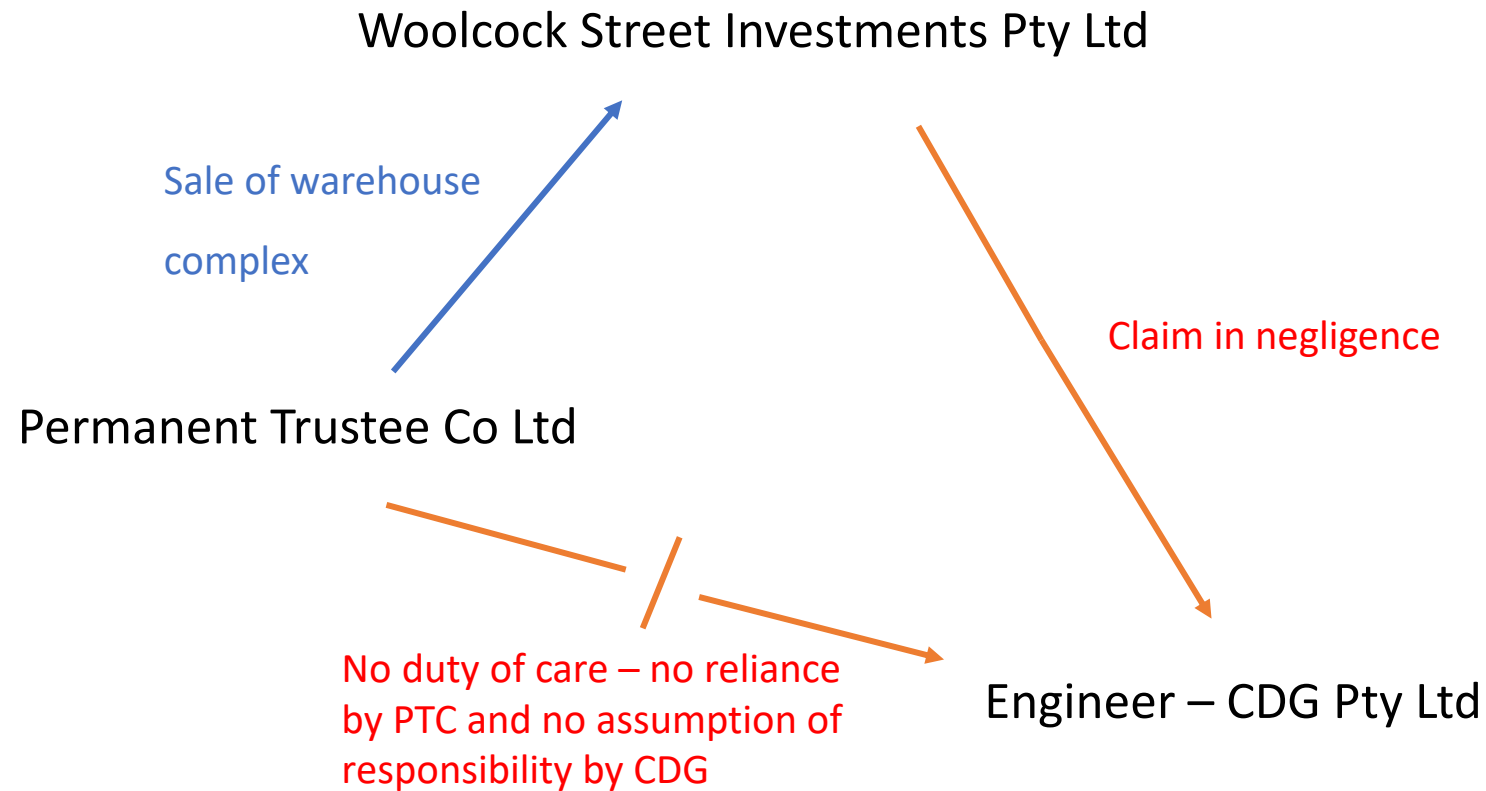
CLR 515



Development of negligence regarding pure economic loss

Woolcock Street Investments v CDG Pty Ltd (2004) 216

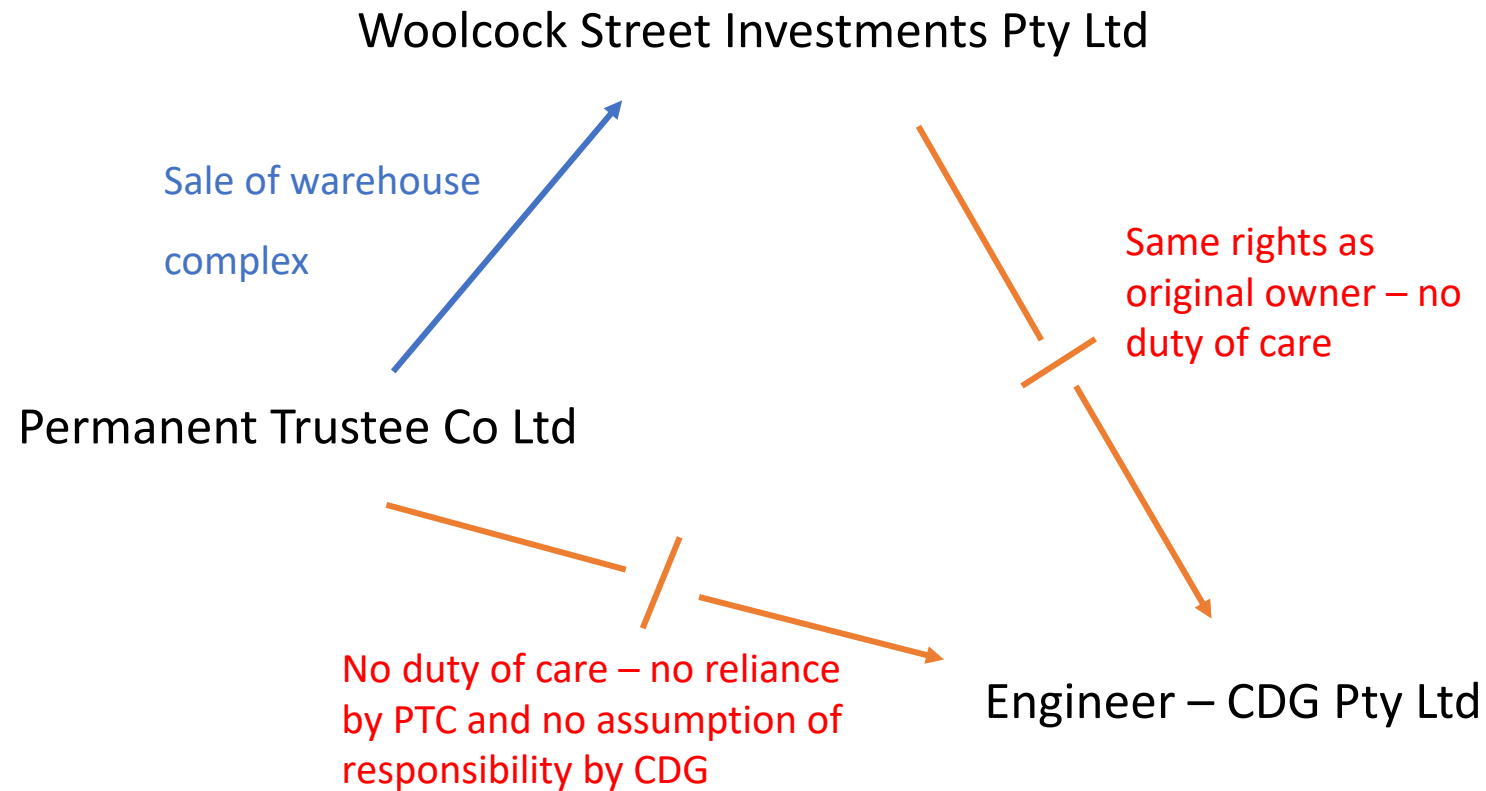
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Development of negligence regarding pure economic loss

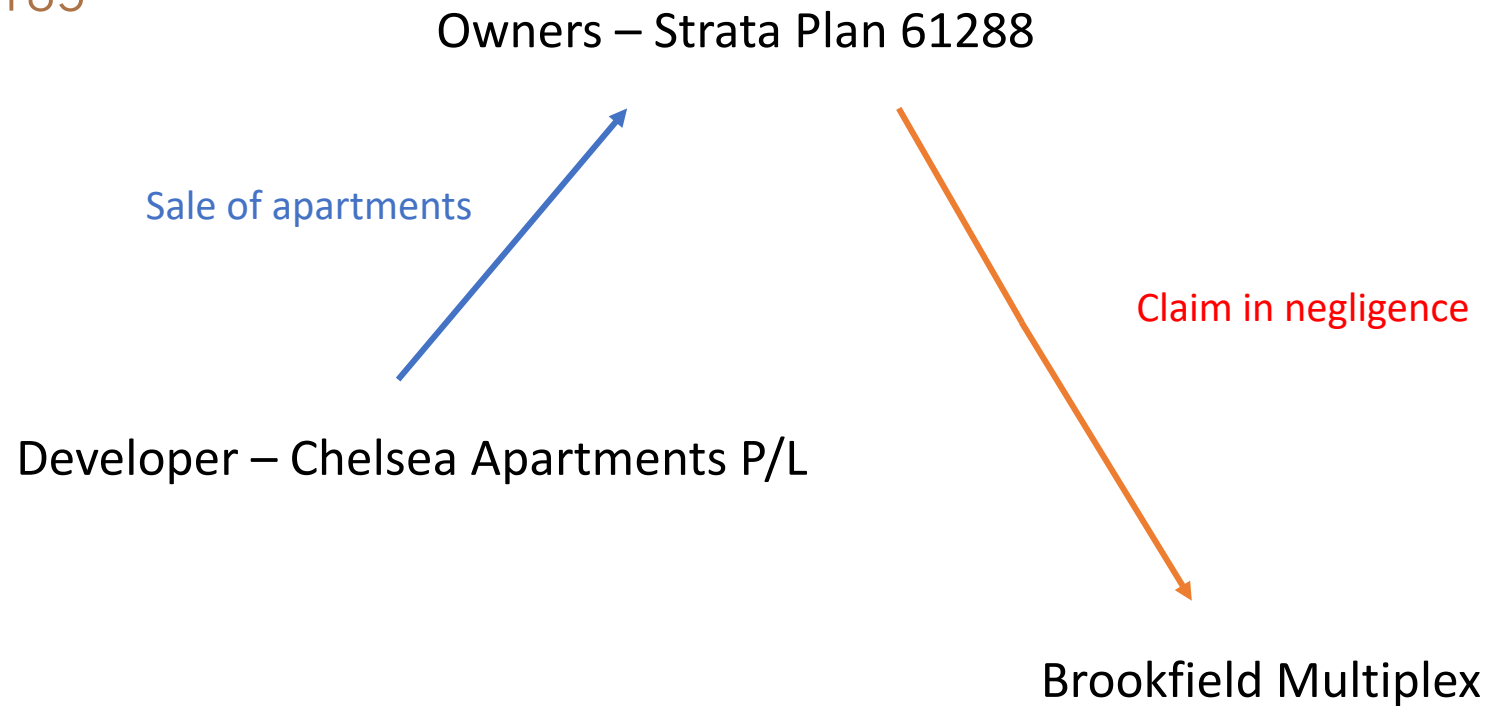
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CLR 515



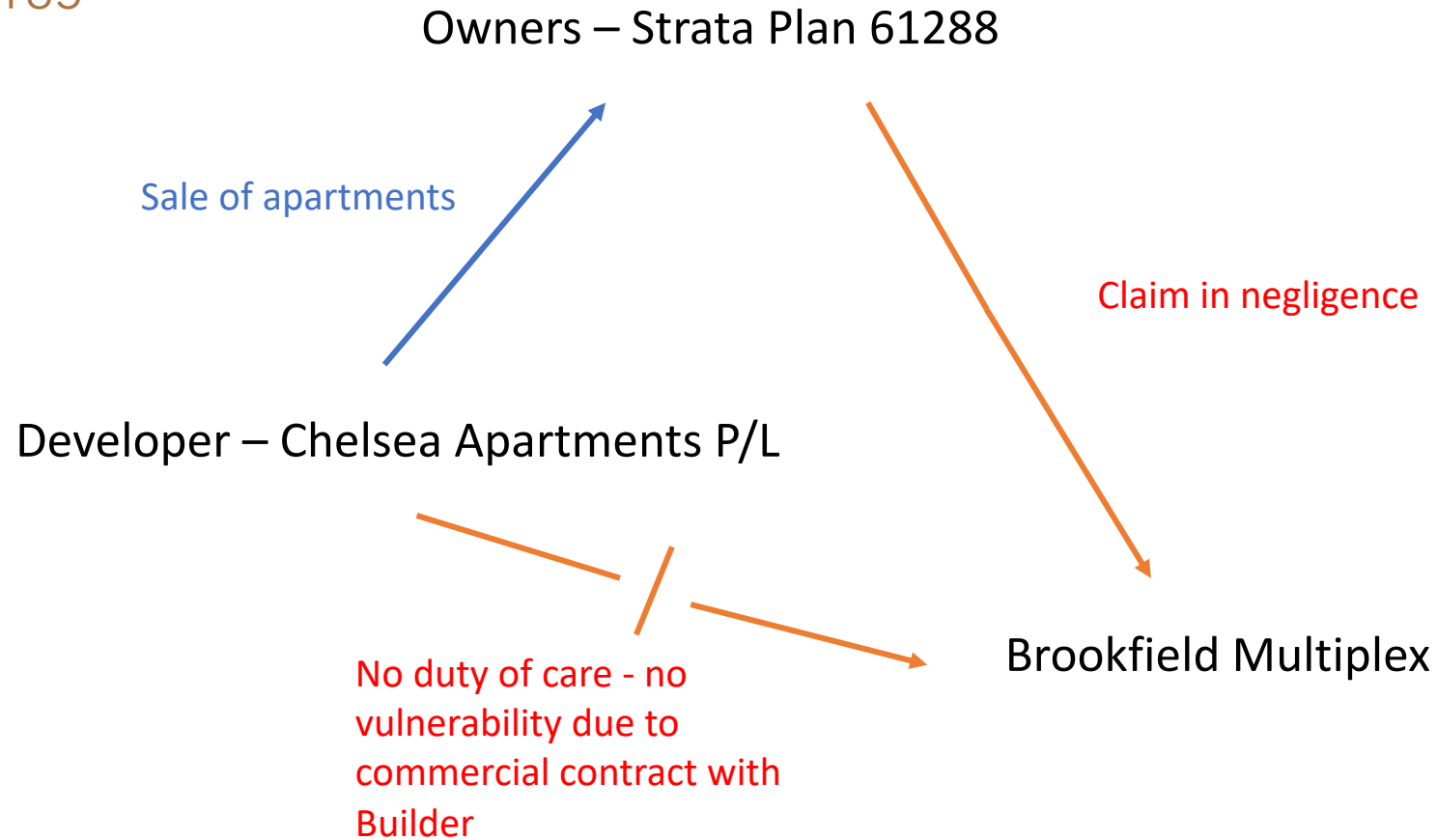
Development of negligence regarding pure economic loss

Brookfield Multiplex v Owners - Strata Plan 61288 (2014) 254 CLR 185



Development of negligence regarding pure economic loss

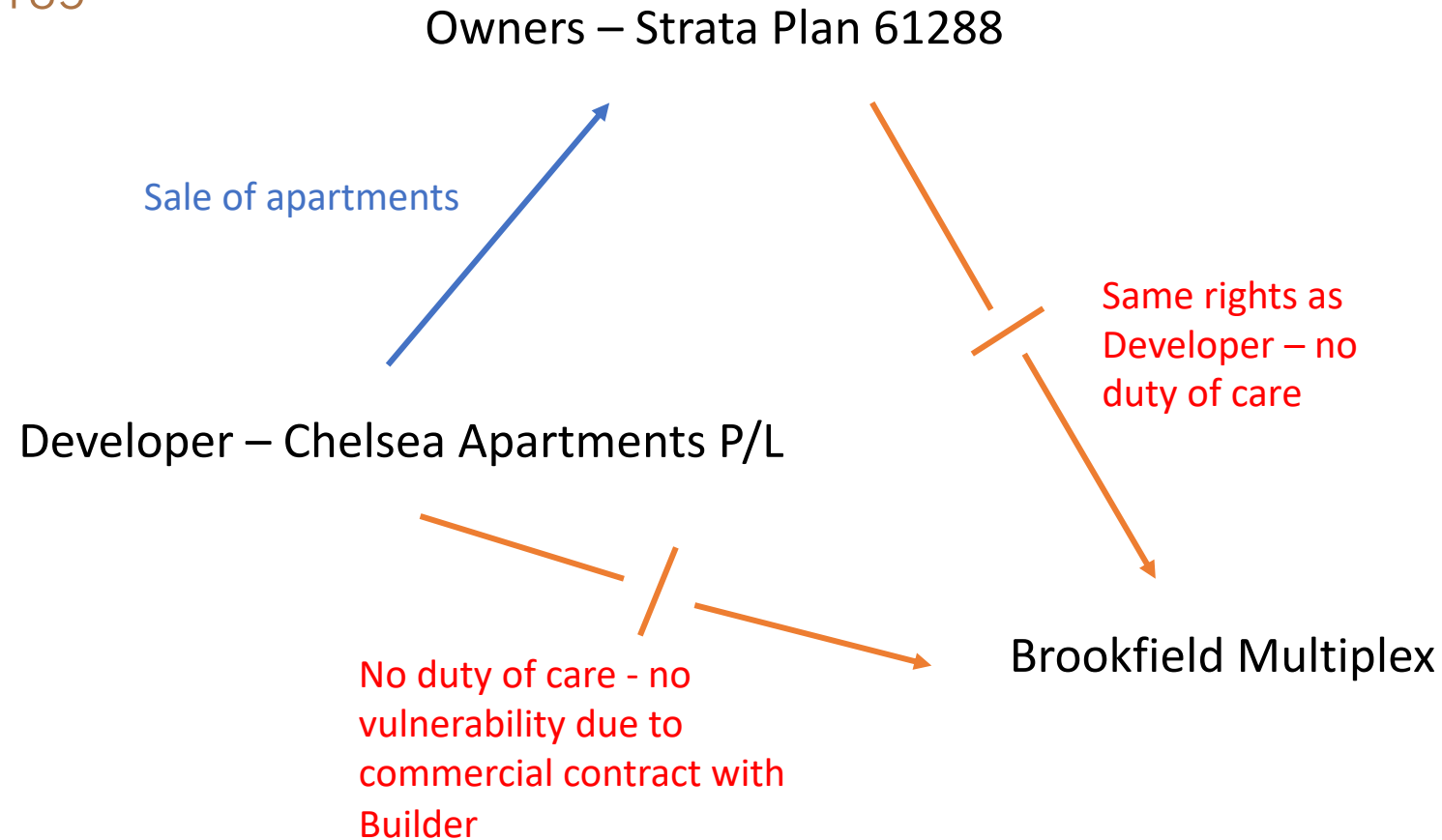
Brookfield Multiplex v Owners - Strata Plan 61288 (2014) 254 CLR 185



Development of negligence regarding pure economic loss

Brookfield Multiplex v Owners - Strata Plan 61288 (2014) 254 CLR

185



Building issues that led to the DBPA

1. High Court decision in *Brookefield Multiplex v Owners - Strata Plan 61288* (2014) 254 CLR 185
2. Lacrosse fire in Melbourne 2014
3. Victorian Building Authority ACP investigation 2015
4. Grenfell fire, London, June 2017
5. *Building Products Safety Act 2017 (NSW)*
6. National report February 2018 - *Building Confidence—Improving the effectiveness of compliance and enforcement systems for the building and construction industry across Australia.*



Section 37

- (1) **A person who carries out construction work** has a duty to exercise reasonable care to avoid economic loss caused by defects—
- (a) in or related to a building for which the work is done,
 - and
 - (b) arising from the construction work.
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“A person who carries out construction work”

Section 36

36. Definitions

building has the same meaning as it has in the *Environmental Planning and Assessment Act 1979*.

building work includes residential building work within the meaning of the *Home Building Act 1989*.

construction work means any of the following—

- (a) building work,
- (b) the preparation of regulated designs and other designs for building work,
- (c) the manufacture or supply of a building product used for building work,
- (d) supervising, coordinating, project managing or otherwise having substantive control over the carrying out of any work referred to in paragraph (a), (b) or (c).



“A person who carries out construction work”

Section 36

36. Definitions

- (4) In this Part, a reference to a person who carries out construction work includes a reference to a person who manufactures, or is a supplier (within the meaning of the *Building Products (Safety) Act 2017*) of, a building product used for building work.



“A person who carries out construction work”

Goodwin Street Developments Pty Ltd atf Jesmond Unit Trust v DSD Builders Pty Ltd (in liq) [2022]

NSWSC 624

Per Stevenson J at [98] – [127]

1. Found a broad interpretation of “Construction work”, which implies a broad interpretation of “a person who carries out construction work”.
2. Roberts was a “person who carried out construction work” because he in fact:
 - (a) project managed; and
 - (b) supervised, the construction work.



“A person who carries out construction work”

Section 36(1) – construction work definition part (d)

supervising, coordinating, project managing or otherwise having substantive control over the carrying out of any [building work, design work, or the manufacture or supply of a product used in building work].



“A person who carries out construction work”

The Owners – Strata Plan No 84674 v Pafburn Pty Ltd [2022] NSWSC 659

Per Stevenson J at [23] – [26]:

Section 37(1) of the DBP Act speaks of a person who “carries out construction work”: that is, actually “carries out” such work.

Thus, in relation to the first four words of the relevant definition of “construction work”, the question is whether the relevant person actually supervised, coordinated or project managed the work, ...

However, ... A person could have “substantive control over the carrying out of” work notwithstanding the fact, at any particular moment in time, the person was not actually doing anything to cause that control to be exercised; provided the person had the ability and the power to control how the work was carried out.

In those circumstances, in my opinion, it is sufficient to enliven the definition to establish that the person was in a position where it was able to so control how the work was carried out.

That would be a question of fact in each case. ...



“A person who carries out construction work”

The Owners – Strata Plan No 84674 v Pafburn Pty Ltd (No 2) [2022] NSWSC 1002

Per Stevenson J at [37] – [38]:

Mr Obeid could only be a nominated supervisor of the Builder if he, personally, held an “endorsed contractor licence” that enabled him to supervise the work “for which the contractor licence applied for ... is required”; that is, the work to be carried out by the Builder. Mr Obeid was thus the Builder’s nominated supervisor in his personal capacity as a licensed builder and not as a “functionary” of the Developer.

... Mr Obeid concurrently held the positions of sole director and thus “controlling mind” of the Developer and also the Builder’s nominated supervisor he, in his capacity as the sole director and “controlling mind” of the Developer, in fact “supervised, coordinated and project managed the carrying out of the building work”.



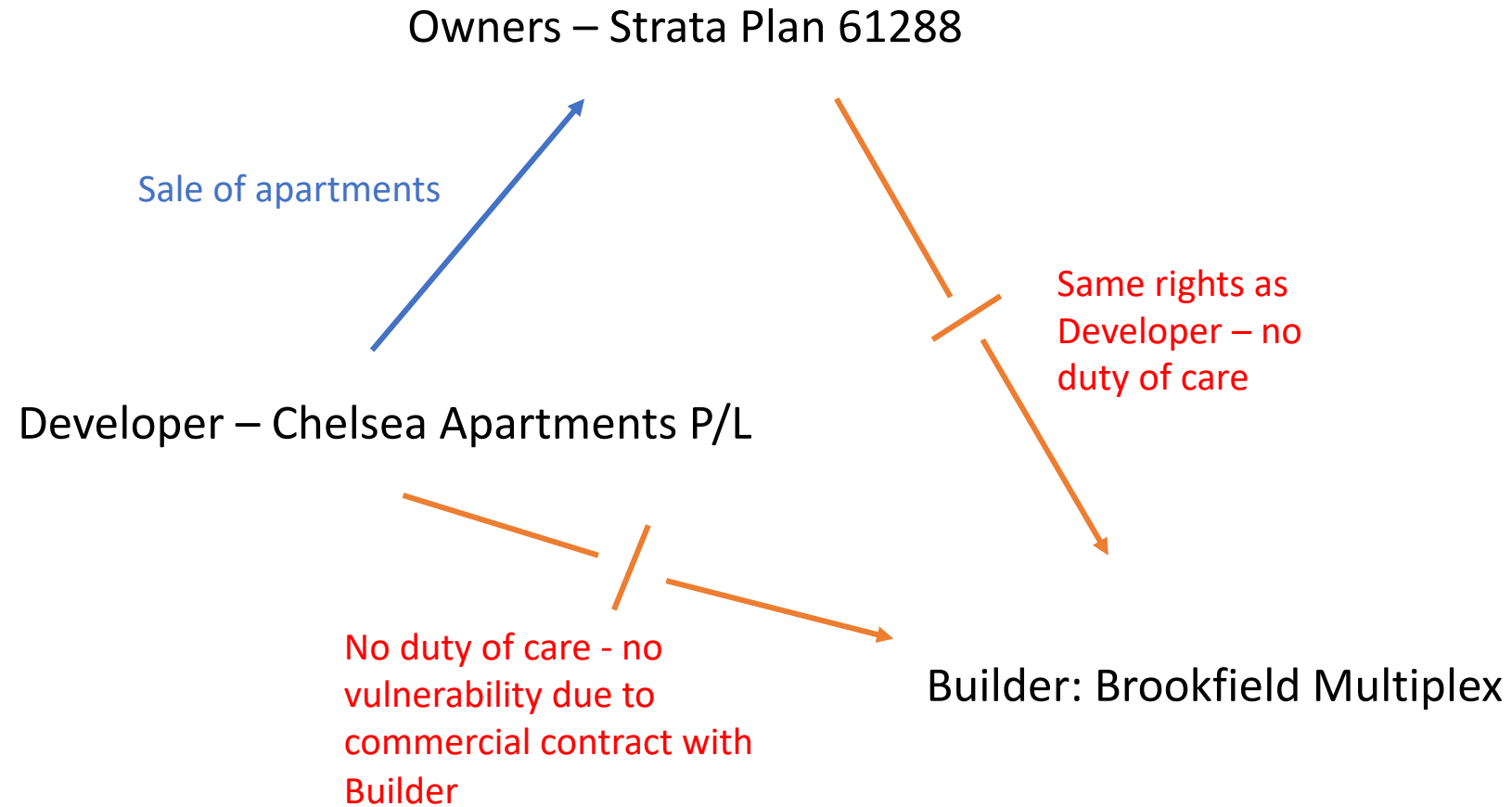
“A person who carries out construction work”

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Multiplex decision 2014 - claim in negligence



Statutory Duty of Care – facts of Multiplex case

Subsequent owner – Strata Plan 61288

Original owner – Chelsea Apartments P/L

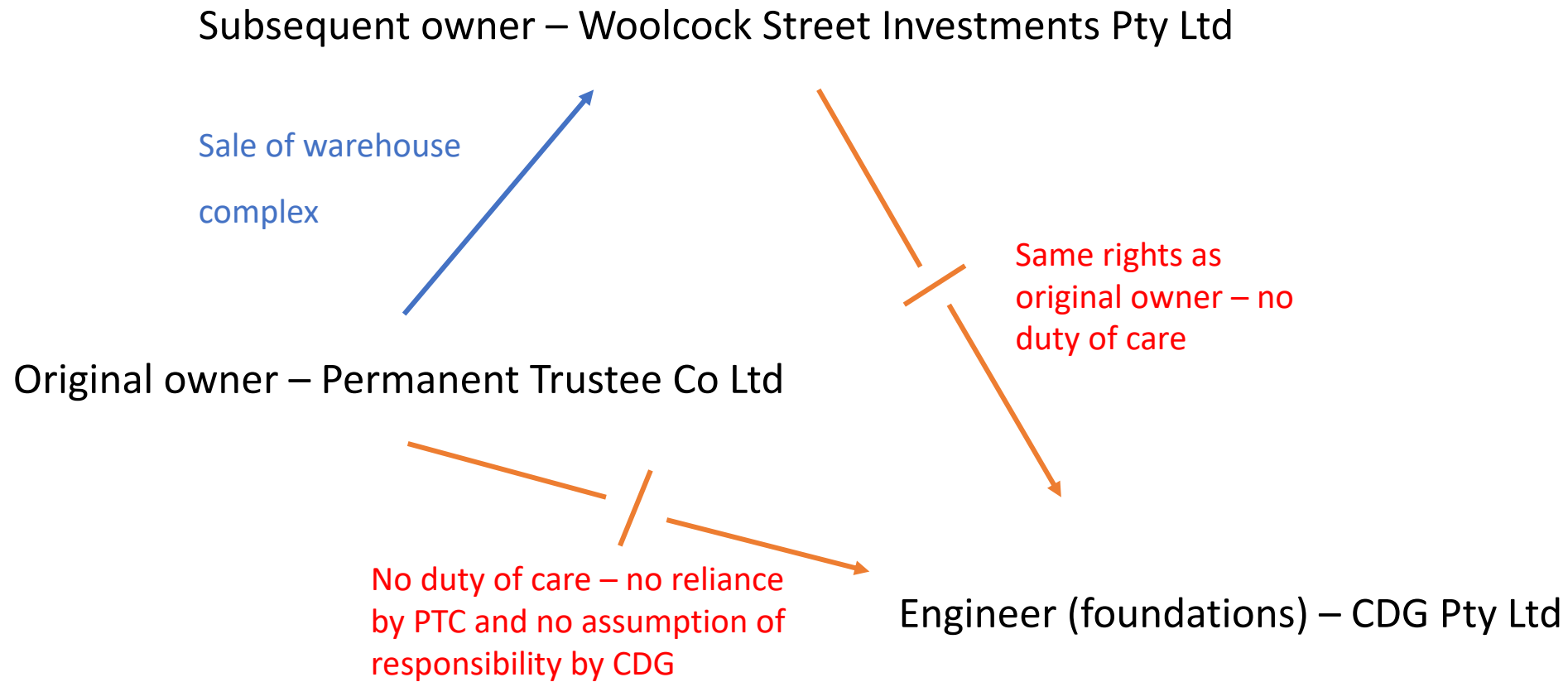
Section 37, DBPA
claim for breach of
duty of care

Section 37 DBPA
claim for breach of
duty of care

Person who carries out
construction work –
Brookfield Multiplex



Woolcock Street Investments 2004 – claim in negligence



Statutory Duty of Care – facts of Woolcock Street Investments case

Subsequent owner – Woolcock Street Investments Pty Ltd

Original owner – Permanent Trustee Co Ltd

Section 37, DBPA
claim for breach of
duty of care. Breach?

Section 37 DBPA
claim for breach of
duty of care. Breach?

Person who carries out
construction work – CDG Pty Ltd



“A person who carries out construction work”

Broad interpretation



No contracting out and *Civil Liability Act 2002*

Section 39:

A person who owes a duty of care under this Part is not entitled to delegate that duty.

Section 40(2):

No contract or agreement made or entered into, or amended, after the commencement of this Part operates to annul, vary or exclude a provision of this Part.

Section 41(3):

This Part is subject to the *Civil Liability Act 2002*.



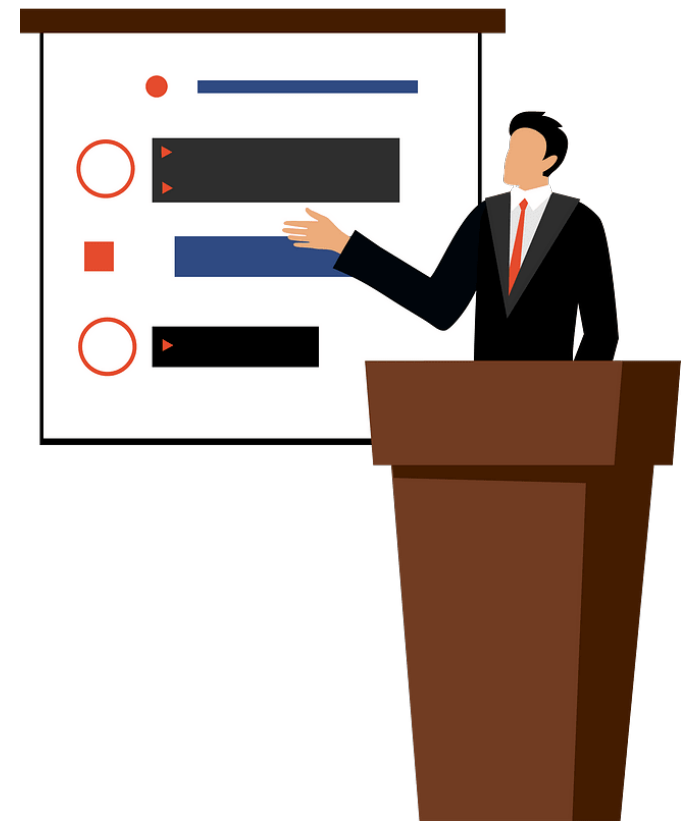
Second Reading Speech - DBPA

October 2019:

For the first time in NSW, clause 30 establishes a statutory duty of care that eradicates any uncertainty that may exist in the common law that a duty is owed to the end user and in respect to liability for defective building work. ...

This provision recognises that owners corporations and associations may not be in existence when the construction work is occurring and puts beyond doubt that these owners are considered beneficiaries of the duty. ...

This is important, as practitioners will need to accept individual and collective responsibility for their work. Clause 34 sets out the duty of care relationship with other duties of care and the law.



Legislative background

Greens amendments, passed

Hansard 2 June 2020 p 64:

All the amendments ... seek to establish what everyone thought was the common law position prior to the 2014 High Court's decision in Brookfield Multiplex Ltd v Owners Corporation Strata Plan 61288 & Anor. ...

Taken together, these amendments seek to re-establish what everybody thought was the common law prior to the High Court's decision.



“A person who carries out construction work”

Boulus Constructions Pty Ltd v Warrumbungle Shire Council [2022] NSWSC 1368

1. Held that “person” referred to any person, not just a person “acting in their own capacity”.
2. Considered the difference between the use of the word “person” and the availability of the defined term “practitioner”, which HH said would achieve the same thing as interpreting the word “person” as “person acting in their own capacity.”
3. Currently the subject of an appeal. Watch this space.



Pleading a claim for breach of statutory duty of care

Civil Liability Act 2002 (NSW)

Section 5B:

(1) A person is not negligent in failing to take precautions against a risk of harm unless—

- (a) the risk was foreseeable (that is, it is a risk of which the person knew or ought to have known), and
- (b) the risk was not insignificant, and
- (c) in the circumstances, a reasonable person in the person's position would have taken those precautions.



Pleading a claim for breach of statutory duty of care

The Owners - SP87060 v Loulach Developments Pty Ltd (No 2) [2021] NSWSC 1068

Stevenson J at [42] – [43]:

... a plaintiff alleging a breach of duty of care by a builder, ... must identify the specific risks that the builder was required to manage, and the precautions that should have been taken to manage those risks.

It is not sufficient simply to assert a defect and allege that the builder was required to take whatever precautions were needed to ensure that the defect not be present.



Pleading a claim for breach of statutory duty of care

Civil Liability Act 2002 (NSW)

Section 5D:

(1) A determination that negligence caused particular harm comprises the following elements—

- (a) that the negligence was a necessary condition of the occurrence of the harm (***factual causation***), and
- (b) that it is appropriate for the scope of the negligent person's liability to extend to the harm so caused (***scope of liability***).



Proportionate Liability

Section 34 *Civil Liability Act 2002*

(1) “**apportionable claim**” is a claim for economic loss or damage to property in an action for damages (whether in contract, tort or otherwise) arising from a failure to take reasonable care, but not including any claim arising out of personal injury. ...

(2) “**concurrent wrongdoer**”, in relation to a claim, is a person who is one of two or more persons whose acts or omissions ... caused, independently of each other or jointly, the damage or loss that is the subject of the claim. ...



Pleading a defence to a claim for breach of statutory duty of care

Ucak v Avante Developments Pty Ltd [2007]

NSWSC 367

Hammerschlag J at [35]:

... for a defendant to assert that there is a person who is a current wrongdoer the defendant must plead the necessary elements which result in the asserted conclusion. Those elements are:

- (a) the existence of a particular person;
- (b) the occurrence of an act or omission by that particular person; and
- (c) a causal connection between that occurrence and the loss that is the subject of the claim.

Relied on by the Court of Appeal in *Bingo Holdings Pty Ltd v GC Group Company Pty Ltd* [2021] NSWCA 184.



Pleading a defence to a claim for breach of statutory duty of care

HSD Co Pty Ltd v Masu Financial Management Pty Ltd [2008] NSWSC 1279

Rothman J at [18]:

It is essential, if these provisions are to operate appropriately, that any defendant be required to plead the proportionate liability defence in a manner that discloses the cause of action and damage in at least as detailed a manner as would be required of any initiating process for such a cause of action.

The information should include:

- (a) the identity of the concurrent wrongdoer;
- (b) the basis for the cause of action ... if it be tort, identifying the duty, its scope and the breach; and
- (c) the damage – the aspects of causation; the alleged extent and proportion of the damages, and the causal connection with the damage said to be suffered by the plaintiff in the substantive proceedings.



Pleading a defence to a claim for breach of statutory duty of care

The Owners - Strata Plan No 87265 v Saaib [2021]

NSWSC 150

Henry J at [514]:

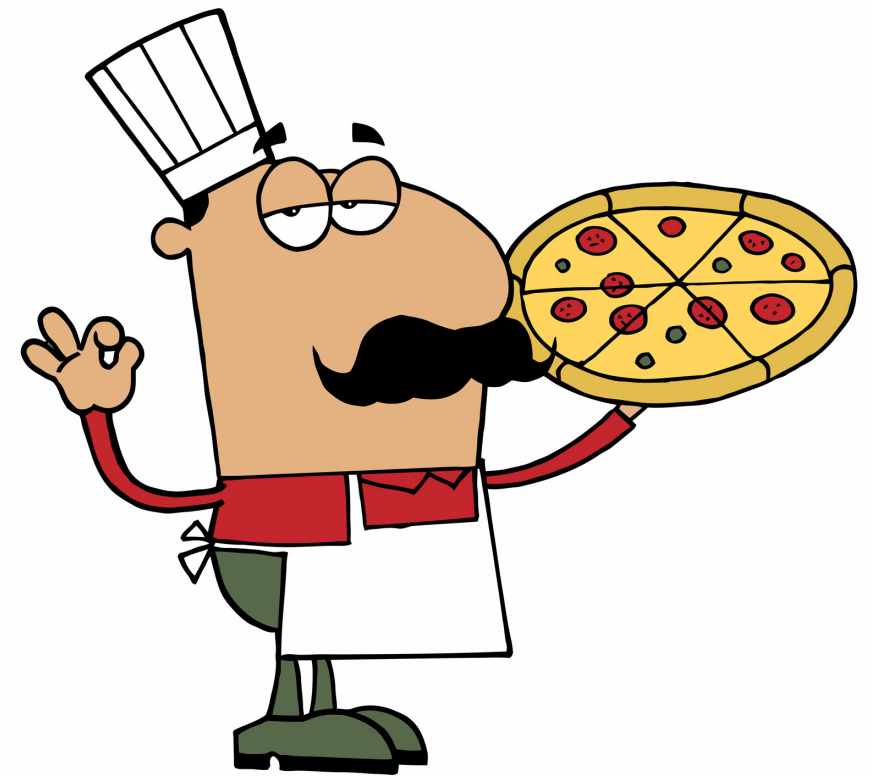
If the provisions are to operate appropriately, it is essential that any defendant be required to plead the proportionate liability defence in a manner that discloses the cause of action and damage in at least as detailed a manner as would be required for any initiating process for a cause of action.



Pleading a claim for breach of statutory duty of care

Key Takeaways

1. Is a DBPA claim worth the cost? If not, don't do it.
2. If it is, satisfy the requirements of ss 5B and 5D of the *Civil Liability Act 2002* and the authorities in pleading.
3. Defendants: identify any and all concurrent wrongdoers. Must be able to satisfy the requirements to plead as if you were a plaintiff.



Questions



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