No Duty Owed by Certifying Council

The New South Wales Court of Appeal recently handed down a long awaited reserved decision in the case of *Ku-ring-gai Council v Chan*.

That case was an appeal from the decision of McDougall J in the NSW Supreme court decision known as *Chan v Acres*, where the court found that the certifying council had a duty to a subsequent home owner to ensure that the certification of the subject premises was not undertaken negligently.

Mr Acres was an owner-builder who renovated his Wahroonga property and then obtained an occupation certificate from the Ku-ring-gai council ("The Council").

Mr Acres then sold the property to Ms Chan and Mr Cox who were not aware that the renovations undertaken by Acres contained structural defects.

The Supreme Court had decided that the claim against the engineer should be dismissed because the engineer did not owe a subsequent purchaser any duty of care.

In that decision the judge found that the subsequent purchasers were relevantly "vulnerable" because it must have been reasonably foreseeable to the council certifier that any purchaser would suffer a loss if the defects were not at least identified and then rectified before the new purchasers bought.

In the appeal the Court of Appeal held unanimously that the purchasers must be able to establish that they were owed a duty of care.

Although it was not determinative the Court of Appeal decided that as the purchasers were able to protect themselves by negotiating terms in their contracts of sale with Acres and because they had the benefit of the statutory warranties for defective building works which ran with the property they were not entitled to any further duty.

The Court of Appeal looked in particular at the role of the certifier and the issue of the occupation certificate. In particular in this case the purchaser's barrister in their opening remarks stated that their case against the council was "not one of actual reliance" on any certificate provided but one of reliance in a general sense.

The Court found that as we are all aware the suitability of a building for occupation and use, does not require that all of the building work which is the subject of the development consent has been carried out in accordance with the approved plans and specifications, and in a proper and workmanlike manner. In other words as we so often say to owners, the fact that an occupation certificate was issued does not mean that there has not been any breach of the builder's statutory warranties. In fact the Court of Appeal went on to find that the occupation certificate does not

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actually certify that the building does not contain any defective building works or even that the building complies with the plans and specifications.

Whilst there still may possibly be cases where we can bring a claim against a certifier for misleading and deceptive conduct, it will be necessary to establish what the certifier actually did, and that the claimant actually relied specifically upon the certificate in question when making the decision to purchase.

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20 November 2017

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