MONAHAN + ROWELL
LAWYERS

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Scope of Services:

Professional indemnity
Directors' + officers' cover
Public + products liability
Trade + transport + aviation
General insurance
Self insurance
Construction risk
Medical defence
Contractual + commercial litigation
Employment contracts
Policy drafting + interpretation
Employment law
Equal opportunity
Discrimination law
OH+S

Editor's Note

In this Edition of the Reporter, we discuss three decisions on the law of negligence. The two High Court decisions favoured the Defendant, in one case an Estate Agent, in the other a home owner. The third decision from the Victorian Court of Appeal will prove a headache for building surveyors involved in domestic building work.

Mark Attard - Editor

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M+R News In Brief

Justin Griffin joined M+R as a partner in May 2006. Justin joins fellow partners Philip Rowell and Bruce Butler, practising in the areas of insurance litigation, products liability, professional indemnity claims and employment law. Justin brings 18 years of experience in South Australia and Victoria to the practice and we welcome him on board.

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ESTATE AGENT NOT LIABLE

<u>Butcher -v- Lachlan Elder Realty Pty Ltd</u>

High Court of Australia

December 2004

The High Court has found a Real Estate Agent did not engage in misleading and deceptive conduct after an incorrect surveyor's diagram was reproduced in one of their advertising brochures. The brochure that was provided to the purchasers by the agent included two disclaimer statements. The purchasers sued the Real Estate Agent for misleading and deceptive conduct as their brochure misrepresented the location of the boundary.

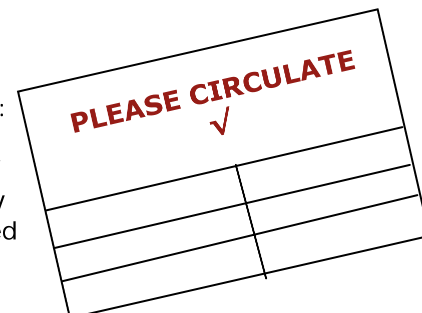
Misleading and Deceptive Conduct

The majority (*Gleeson CJ, Hayne and Heydon JJ*) considered the ambit of s.52 (misleading and deceptive conduct) of the *Trade Practices Act*. The Court recognised that the mere provision to the purchasers of a brochure containing misleading information was not enough to establish misleading and deceptive conduct.

It held that it was necessary to undertake a detailed analysis of the Agent's conduct as a whole.

In analysing the conduct of the Agent, the majority noted:

1. That the purchasers were intelligent, shrewd and self reliant people who were involved in complex property and financial dealings and therefore could be expected to make their own enquiries.



2. The Agent operated out of a suburban real estate agency and had no expertise in surveyor's diagrams.

3. The disclaimer clauses on the brochure were on both sides of the document. These clauses made it clear that the information contained in the brochure was not the Agent's own and recommended that interested persons rely on their own enquiries. It would have been plain to a reasonable purchaser that the Agent was not the source of the information which was said to be misleading.

4. The Agent did not purport to do anything more than pass on information supplied by others. It both expressly and implicitly disclaimed any belief in the truth or falsity of that information. It did nothing more than state a belief in the reliability of the sources.

"the conduit defence received considerable support ..."

The majority concluded that this conduct did not amount to misleading and deceptive conduct prohibited by the Act.

The "*conduit*" defence received considerable support from the majority. The defence applies where a party merely passes on information and does not make a representation about the objective truth of the information. The Court outlined that there could be cases where the presentation by an agent of a principal's document to a Plaintiff, does involve the Agent making a representation about the objective truth of the document's contents. However, these occasions will be identified on their facts and in this case, no such representation had been made.

In Dissent

Both McHugh and Kirby JJ provided strong dissenting judgments resulting in only a narrow victory for the Agent. Both dissenting judgments supported a more purposive approach to s.52 of the Act.

Conclusion

Although the disclaimer assisted the Agent, this outcome was heavily reliant on the particular facts of the case and reliance on disclaimers in situations where incorrect information is provided could well be dangerous.

The decision is consistent with the decision of the full Federal Court in *Tovegold Pty Ltd -v- Lawson High Estate Pty Ltd* [2005] FCAFC 169 (August 2005). The case dealt with misleading statements made prior to the sale of a vineyard.

By Andrew Brennan
Articled Clerk

GARAGE SALE TAKES NASTY TURN

<u>Neindorf -v- Junkovic</u>

High Court of Australia

December 2005

Facts

In February 2000, Martha Junkovic attended a garage sale at the home of Sandra Neindorf. Neindorf's driveway was not level and there was a difference in levels of approximately 10—12mm.

It was a clear and sunny day. Junkovic was 53 years of age and was wearing slip-on shoes. Unfortunately, her right foot rolled as she tripped and fell in the driveway. She was later diagnosed with a fractured right foot.

At first instance, the Magistrates' Court of South Australia found for Junkovic and awarded her $24,464.00.

The decision was overturned by the Supreme Court of South Australia. The Court held that the uneven surface was a situation that was so common place and visible and it was not

unreasonable for Neindorf not to have levelled her driveway.

This decision was overturned on Appeal by the Full Court of the Supreme Court of South Australia. Neindorf appealed to the High Court.

The Decision

The Appeal was upheld. The High Court was required to consider the relevant provisions of the *Wrongs Act* (SA). The Act provided that the liability of an occupier in respect to loss or injury arising from the state or condition of premises was to be determined in accordance with the principles of negligence. Under the Act, the Court was to take into account such things as the nature and extent of the premises and the danger, the circumstances of the accident, the age of the claimant, the awareness of the occupier of the danger, any step taken to reduce or eliminate the risk or warn against the danger and the reasonableness of taking such precautions.

The majority decision is best captured in Hayne J's judgment. He held that there may be instances where doing nothing to eliminate, reduce or warn against a danger is consistent with exercising reasonable care. This case did not raise any point of principle but turned on what would have been reasonable and practicable for the occupier to do. This does not involve a hindsight assessment.

"there may be instances where doing nothing to eliminate a danger is consistent with exercising reasonable care"

He said:-

> *"... Any suburban house presents many features that can lead to injury. In that sense, any suburban house presents many dangers. The Appellant, as occupier, was not required to reduce or eliminate the danger presented by an unevenness in the driveway that was no larger than, and no different from, unevennesses found in any but the most recently installed suburban concrete driveway......That the Appellant had invited the public to attend a garage...requires no different conclusion."*

Dissent

Kirby J. followed the approach of the Full Court and held that an important factor in his determination was Neindorf's invitation to the public to attend her premises and that her failure to *"attend to a known or knowable danger establishes breach of the Appellant's duty......"*.

He expressed concern about the over-reliance on the *"obviousness of risk"* defence to excuse dangerous situations.

Overview

The case does turn on its facts but it is yet another example of the Courts giving consideration to real and practical considerations to defeat a claim.

By Lisa Lee
Lawyer

BUILDING SURVEYORS BEWARE
<u>Moorabool Shire Council & Anor -v- Taitapanui & Anor</u>
Victorian Court of Appeal
24 February 2006

On 24 February 2006, the Victorian Court of Appeal handed down a landmark decision in *Moorabool Shire Council & Anor -v- Taitapanui & Anor* [2006] VSCA 30.

Facts

In August 1996, Steven Watson applied to Mellis for a Building Permit to construct a two storey dwelling. Mellis issued a Building Permit and conducted mandatory statutory inspections during construction.

Mellis was a building surveyor, employed by the Moorabool Shire Council. He used Moorabool paperwork and Moorabool, as his employer, was vicariously liable for his negligence.

In July 1997, the Watsons sold the property to Kathleen and Joseph Pozman.

In 1999, the Pozmans sold the property to the Taitapanuis.

The Taitapanuis issued proceedings at VCAT in respect to certain building defects. VCAT held that Mellis failed in his function under the statutory regime *"to the extent of gross carelessness and incompetence".* An Appeal to the Supreme Court by Moorabool was dismissed. It then appealed to the Court of Appeal.

Decision

The Court of Appeal dismissed the Appeal and held that Mellis and Moorabool owed the Taitapanuis, as subsequent purchasers, a duty of care in respect to building defects (pure economic loss).

Their Honours came to the same conclusion for different reasons.

Maxwell JA

In Maxwell JA's view, the present circumstances fell within the principles set out in *Bryan -v- Maloney [1995] 182 CLR* 609 and as recently discussed in *Woolcock Street Investments Pty Ltd v CDG Pty Ltd (2003) 216 CLR 515.*

The duty of care owed to the original owner and subsequent purchasers, results from the building surveyor's obligation to ensure that building work is undertaken in accordance with all applicable legislation. In His Honour's view, the building surveyor's complete control over the statutory function in assessing and granting Building Permits coupled with the owners (original or subsequent) being *"completely powerless to influence that process"* created the necessary relationship where a duty of care to avoid pure economic loss could be imposed.

Ormiston & Ashley JJ.A

In a joint judgment, Ormiston & Ashley JJ.A focused on the legislative intent and requirements under the Act and the *Sale of Land Act 1962* ("*the Land Act*") in reaching their decision.

In their Honours' view, the obligations and duties placed on Mellis by the statutory regime in Victoria was of *"central significance"* in determining whether Mellis owed a duty of care. In analysing the provisions of the Act, the Regulations and the Land Act, their Honours emphasised the importance of the Building Permit and the critical role of the building surveyor in this process.

In their Honours' opinion, it was *"of critical importance"* that Mellis voluntarily and for reward, agreed to perform an important statutory function which, if not undertaken competently, would not only impact on the original owners but also the Taitapanuis as subsequent purchasers of the property.

Overview

In June 2006, the High Court refused Moorabool leave to Appeal.

This case dealt with defective building work in a domestic residence. It is likely that commercial building work will give rise to different considerations. The decision is likely to turn attention to other building professionals involved with domestic building work, such as architects and engineers. While these professionals do not have statutory obligations, the subsequent home owners are also vulnerable to their negligence.

By Adrian Sella
Senior Associate

Interesting Fact

At the summit of Mt. Everest, the available oxygen is barely greater than the lowest rate of oxygen consumption required to sustain life. In all probability, if Mt. Everest was 20-50 metres higher, no human would reach it without supplemental oxygen. Nature must have a sense of the dramatic as Mt. Everest is almost the exact height that enables humans to reach it without additional oxygen.

"Lore of Running" – 4th Edition – Dr Tim Noakes

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