Gilchrist Connell

Limelight

Issue No. 75

- ***Libra Collaroy Pty Ltd v Bhide* [2017] NSWCA 196**
- **Balcony collapse**
- **Whether delegation to managing agent a defence to alleged breach of duty**
- **Apportionment between an real estate agent, tenant and owners of residential real estate**
- **Entitlement to contractual indemnity reduced by the owners' contributory negligence**

Introduction

On 11 September 2017, the NSW Court of Appeal entered final orders allowing the appeal of a District Court judgment that had found against a managing agent of a residential property, in favour of its owners and tenant, as to liability to various people injured when the property's balcony collapsed.

The decision confirms that:

- appointing a managing agent to manage residential rental premises will not necessarily be a defence to a claim for personal injury damages;
- an entitlement to a contractual indemnity may be reduced by reason of that party's contributory negligence;
- a tenant who is on notice of a risk of harm may be found liable to lawful entrants if there are measures the tenant could have taken to remove the risk; and
- section 5B(1) of the *Civil Liability Act 2002* (NSW) requires accurate identification of the actual risk of harm faced by a plaintiff.

Background

Deepak Bhide and Alka Bhide (**the owners**) owned residential property at Collaroy, NSW (**the property**). In 2005, they appointed Libra Collaroy Pty Ltd (**the agent**) to manage that property pursuant to an Exclusive Management Agency Agreement (Residential) (**MAA**). There was a long history of complaints regarding the state and structural integrity of the balcony from the tenant of the property, Joanne Gillies (**the tenant**), who also happened to be an architect.

On 15 June 2012, a group of school friends were gathered on the balcony at the property. The balcony collapsed.

Four of the people injured in the collapse commenced proceedings in the District Court of NSW against the owners and the agent. The tenant was the mother of one of the victims. She was not home when the balcony collapsed, but she also sued the owners and the agent for nervous shock.

The agent and owners issued cross claims against each other seeking an indemnity from the other, firstly, as joint tortfeasors pursuant to section 5(1)(c) of the *Law Reform (Miscellaneous Provisions) Act 1965* (NSW) and, secondly, pursuant to a contractual indemnity clause in the MAA.

The owners and the agent also issued cross claims on the tenant for her failure to lock access to the balcony in circumstances where she was fully aware of the potential risk of harm, as she had made multiple complaints to the agent that the balcony was not structurally sound.

First Instance decision

On 29 September 2015, a liability trial took place before Judge Curtis of the District Court. On the last day of trial, his Honour delivered an *ex tempore* judgment, finding that:

- the agent was 100% liable to the plaintiffs;
- the owners discharged their duty of care as owner to the plaintiffs by delegating the management of the property to the agent; and
- the tenant did not breach any duty of care she owed to any of the plaintiffs.

His Honour found that the cause of the balcony collapse was, in essence, a deterioration of steel bolts caused by weather and poor maintenance. The agent had obtained and passed on various quotes for repairs to the balcony to the owners, who had rejected them. His Honour found that the agent should have gone further than simply passing on the quotes and should have instead specifically recommended that the owners obtain expert advice to assess the structural integrity of the balcony.

His Honour also found that the owners were not liable to the plaintiffs in tort because they had discharged their duty owed to the plaintiffs by appointing a managing agent to manage the property.

His Honour further found that the tenant had discharged her obligations owed to the plaintiffs by complaining to the agent about that the balcony was not structurally sound.

The agent appealed.

Appeal

On appeal, the agent did not challenge the finding that it was liable, but instead challenged the findings that the owners and the tenant were not liable to the plaintiffs.

The agent also challenged the decision on the ground that Judge Curtis had failed to consider and apply section 5B of the *Civil Liability Act*, in not identifying the precise foreseeable risk of harm, which, in this case, was the risk of injury to people due to the failure to properly investigate and maintain the structural integrity of the balcony.

The Court of Appeal found that:

- Judge Curtis had erred in failing identify the relevant risk of harm and whether the owners and/or the tenant knew, or ought to have known, of the risk as required by section 5B of the *Civil Liability Act*. Accurate identification of the risk is necessary to determine what constitutes a reasonable response to the risk;
- a reasonable person in the position of the owners should have formed the view that the agent had not properly discharged its duty and that they should have expressly instructed the agent to engage an expert to investigate the structural integrity of the balcony. The owners could not rely on their delegation to the agent in answer to their alleged breach of duty;
- the owners succeeded in their claim for a contractual indemnity from the agent, but the entitlement to a contractual indemnity should be reduced by 30% by reason of their contributory negligence pursuant to section 9 of the *Law Reform (Miscellaneous Provisions) Act* in failing to expressly instruct the agent to engage a suitable expert to investigate the structural integrity of the balcony;
- the tenant was liable to contribute 20% to the agent's liability to the plaintiffs by reason of her failure to lock access to the balcony in circumstances where she knew about potential structural issues; and
- apportionment of liability between the agent, owners and tenant should be 50%, 30% and 20%, respectively.

Final Orders

On 11 September 2017 the Court of Appeal made orders giving effect to its reasons, which, in addition to setting aside various orders made by Judge Curtis, were essentially:

- Judgment for the plaintiffs against the owners.
- Judgment for the owners against the agent.
- Any damages recovered by the owners from the agent to be reduced by 30%.
- Judgment for the agent against the tenant.
- The tenant is to contribute 20% to the agent's liability to each of the plaintiffs.
- The owners and the tenant to pay the agent's appeal costs.
- The agent and the owners to each bear their own costs of their cross claims in the District Court.
- The tenant to pay the agent's cross claim costs in the District Court.
- The agent, owners and tenant are to respectively pay 50%, 30% and 20% of the plaintiffs' costs.

Implications

If a party is entitled to be indemnified pursuant to a contractual indemnity clause, the amount of indemnity can be reduced by operation of section 9 of the *Law Reform (Miscellaneous Provisions) Act.*

In claims against real estate agents and property owners by injured plaintiffs, a tenant may bear some responsibility if they did not act as a reasonable tenant to avoid a risk of injury, if measures were available to them to prevent the risk of harm. Presumably, a tenant will always know about the risk; they will usually be the source of the complaint. Whether they can take steps to prevent the harm occurring will depend on what is required. In this case, the Court found the tenant could have simply locked the door, blocking access to the balcony.

Gilchrist Connell acted for the successful agent.

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Contact Details

This publication constitutes a summary of the information of the subject matter covered. This information is not intended to be nor should it be relied upon as legal or any other type of professional advice.

For further information in relation to this subject, please contact:

Paul Kozub – Principal (Sydney)

T: +61 2 8240 8002
E: **pkozub@gclegal.com.au**

Catherine Hing– Special Counsel (Sydney)

T: +61 2 8240 8010
E: **ching@gclegal.com.au**