

Building & Construction Law Update

Winter 2009

Proportionate Liability – can you avoid it?

by Andrew Barclay and Dianna Gu

What is Proportionate Liability?

Proportionate liability is where more than one person has caused the loss suffered by another. The people causing the loss are called “concurrent wrongdoers”. If there are concurrent wrongdoers and proportionate liability applies, the person who has suffered the loss can only recover from each wrongdoer that part of the loss which is a fair reflection of that wrongdoer’s share of responsibility for the whole loss. In contrast, if proportionate liability does not apply the “victim” can recover all the loss from any one wrongdoer, who must then seek “contribution” from the others.

When does Proportionate Liability apply?

Proportionate liability was introduced to the building and construction industry in Victoria through section 131 of the *Building Act 1993* and in New South Wales by section 109ZJ of the *Environmental Planning and Assessment Act 1979*. Those provisions were replaced with new proportionate liability laws with much wider application. There are now proportionate liability schemes in all States and Territories and the Commonwealth.

The new laws apply to many (but not all) claims for damages arising from a failure to take reasonable care including building and construction disputes.

Is there anything wrong with Proportionate Liability?

Although the previous proportionate liability schemes have been replaced, the new laws have not removed their tendency to complicate litigation. In the Victorian Supreme Court building case of *Gunston –v– Lawley & Ors* the judge said:

“The owners’ fairly straightforward claims were transformed into a complex and doubtless expensive suite of proceedings, a phenomenon which is regrettably a not uncommon product of the proportionate liability regime now in force.”

This complexity means that there will be many arguments about how court cases ought to be run when the proportionate liability legislation is invoked. It will be some time before the proportionate liability laws are fully “bedded down”. This process has been made longer and more difficult because of variations from one proportionate liability scheme to another. The proportionate liability laws are different in every jurisdiction around Australia! For example, Victorian legislation prohibits courts from ordering apportionment of damages against any concurrent wrongdoer who is not made a party to the case. Elsewhere, the courts may apportion liability by having regard to the degree of responsibility of a person who is not a party. These differences mean that principles and practices developed in one Australian jurisdiction may not apply in any other.

Can you avoid Proportionate Liability?

Due to this uncertainty and for other reasons, parties may wish to avoid proportionate liability applying to their dispute. Defendants are unlikely to want this because proportionate liability reduces their liability for damages. However, a plaintiff probably has the opposite view.

In some circumstances the plaintiff may be a person who has been able to exclude proportionate liability by the terms of contracts made with one or more of the parties who have

become defendants. However, such “contracting out” is only permitted in some jurisdictions and even where it is allowed, you may not be able to get the other party to a contract to take on the risk of greater liability which would be the result of an agreement to opt out of proportionate liability.

Carefully crafted pleadings

Another possible way to limit the application of proportionate liability is by careful attention to the way in which a claim is made. This is because proportionate liability does not apply to claims that do not arise from a failure to take reasonable care. A claim for breach of a contractual warranty may fall into this category. In an article printed in the Building Disputes Practitioners’ Society Newsletter of September 2006, David Byrne (the judge in *Gunston –v– Lawley & Ors*) said that, when preparing a case, a lawyer who does not want proportionate liability to apply “would do well to plead the claim so as to avoid any suggestion that it is for monetary compensation for work done without reasonable care.” (*continued on page 4*)

In this issue

- Proportionate Liability – can you avoid it?
- Decisions of interest – security for payment
- Sustainability – the various rating systems
- Engaging in building contracts with tenants
- Industry Alerts

Decisions of interest – security for payment

by Tony Mylne, Partner

The Supreme Court of Queensland in this case (*Nebmas Pty Ltd –v– Subdivide Pty Ltd*, 1 May 2009), examined whether certain provisions of Sections 21(2) and 21(3) of the *Building and Construction Industry Payments Act (2004)*(Qld), which relate to the role/decision of an adjudicator of a dispute, are mandatory or “an essential precondition” for the existence of an adjudicator’s determination. Those experienced in the area will know that the phrase “an essential precondition” is particularly important when dealing with matters where it is alleged that the adjudicator has acted without jurisdiction. Acting without jurisdiction is one of the few occasions when an adjudicator’s decision will be voided.

In this instance an adjudication was made in favour of the subcontractor in circumstances where, on any interpretation, the subcontractor had failed to provide a notice required under Section 21(2) which provides:

“An adjudication application to which Section 1(b) applies [which is where the respondent failed to both serve a payment schedule and pay amounts owing] cannot be made unless:

- (a) The claimant gives the respondent notice within 20 business days immediately following the due date for payment, of the claimant’s intention to apply for adjudication of the payment claim; and*
- (b) The notice states that the respondent may serve a payment schedule on the claimant within 5 business days after receiving the claimant’s notice.”*

Under Section 21(3) an adjudication application **must** be made within 10 business days after the end of the 5 day period referred to in Section 2(b) as mentioned above.

The terminology used, i.e. “cannot be made” (Section 21(2)) and “must” (Section 21(3)) suggests these steps are essential preconditions for a valid determination by an adjudicator.

The Court made the observation that these particular stipulations had never before been identified as part of basic and essential requirements “for a valid determination”. In the test referred to in the case of *Brodyn Pty Ltd –v– Davenport* (NSW case) the judge, Hodgson JA, refers to the following:

“... it is preferable to ask whether the requirement being considered was intended by the legislature to be an essential precondition for the existence of an adjudicator’s determination.”

The applicant in the proceedings, *Nebmas*, cited the decision of *Kell and Rigby Pty Ltd –v– Guardian International Properties Pty Ltd* which suggested that the equivalent provision in the New South Wales legislation was a “mandatory condition”.

The Court approved comments made by the New South Wales Court of Appeal in *Co-ordinator Construction Co Pty Ltd –v– Climatech (Canberra) Pty Ltd* in which it was stated on review of another section as to whether it was an essential precondition (section 13(2) –

this provision in the NSW Act relates to what a payment claim must set out) that there were three points in favour of an argument that that section 13(2) was not a mandatory condition:

- Identification of matters for the purposes of a claim is within the special experience of an adjudicator and he is intended by the legislation to bring to that task some evaluative judgment;
- It relates to a procedural step in the claim process rather than some external criterion (unlike say, for instance, a payment schedule having been served within 12 months of the work being performed);
- “The Act reflects in its objects and procedures provisions for a speedy and effective means of ensuring progress payments are made during the construction contract without **undue formality or resort to the law.**”

In accordance with these principles and the fact that in *Brodyn* the Court did not mention the equivalent of section 21(2) was an essential precondition, the Court found that the non-compliance with 21(2) did not result in the adjudicator’s decision being void.

Comment

It is difficult to be convinced by the Court’s reasoning. The decision narrows further the circumstances in which adjudications can be declared void. The Queensland decision of *Nebmas –v– Subdivide* is in apparent direct conflict with *Kell and Rigby Pty Ltd –v– Guardian International Properties Pty Ltd* a decision on the equivalent New South Wales provision. The apparent inconsistencies and uncertainties associated with timing of notices and the effect on adjudications are likely to continue and be an area for conflict.



Sustainability – the various rating systems

by Robin Lonergan, Partner

Many organisations are requiring energy efficient buildings and tenants and government departments are demanding energy efficient buildings. This demand has led to tenants driving the market towards energy efficient buildings.

One of the objective measures used in the property industry to determine the environmental impact of a development is the sustainability rating systems.

The firms within the Hunt & Hunt Legal Group are committed to sustainability and have implemented various protocols within the firms to benefit our business, our clients and the future.

A number of our construction clients have also accepted the challenge to create a sustainable business. One of our clients, St Hilliers Group recently published its Sustainability Report to review the impact of St Hilliers on the community and the vision of St Hilliers to be a leader in sustainable development in the Australian property and construction industry.

In developing a framework to pursue a sustainable working environment and business practice an appreciation of the various rating systems is often the starting point.

NABERS

The NABERS Green Ratings (National Australian Built Environment Rating System) or NABERS provides for disclosure on the energy efficiency of a building both on how it is designed and its subsequent operation. NABERS is administered nationally by the NSW Department of Environment and Climate Change. It rates existing commercial office buildings and hotels in respect of energy and water efficiency with a higher rating being awarded to a more efficient building.

Under the NABERS system, the building is rated after 12 months of operating using data on the actual amount of energy and water consumed during

the year. As the rating reflects actual usage, it rewards both the efficient management of energy and water as well as efficient design of the building.

Green Star

The Green Building Council of Australia operates another system – the Green Star Rating Scheme. The Green Star Scheme evaluates the environmental design of buildings at a conceptual stage, during construction and 'as built' stages. It assesses a building's potential to reduce its environmental impact but not the building's operation.

Green Star measures environmental management, indoor environment quality, energy use, transport access, water use, use of materials, land use, ecology and emissions. The Green Star Ratings can be applied to the life cycle of a building (design, construction and use) and for different types of buildings. There are rating tools available for various types of buildings including commercial offices, retail centres and education facilities and there are pilot rating tools available for other buildings including health care, multi-unit residential and others.

As the Green Star Rating applies to different phases of a building's life, during the design phase, the rating can be granted once the design process is a minimum of 60% complete, if there is sufficient detail to allow the assessment to take place. The 'as built' rating would then be assessed when the building is completed, but it is not necessary for the building to be operational.

The Green Star Rating for residential accommodation had a pilot stage and the pilot rating tool for multi-unit residential has now been released as a Green Star Multi-Unit Residential Version 1 rating tool as from 2 July 2009. This tool enables building owners and developers to:

- Minimise the environmental impact of the development.
- Reduce greenhouse gas emissions.
- Capitalise on the environmental benefits of the initiative.
- Receive recognition for more environmentally sustainable design.
- Deliver health benefits and financial savings for building occupants.

The Green Star – Health Care Version 1 tool was released on 16 June 2009, the Green Star – Retail Centre Version 1 tool was released on 1 July 2009, the Green Star – Education Version 1 was released on 6 July 2009 and the Green Star – Office Version 3 was issued on 24 June 2009.

Government Commitment

The Federal Government has published a strategy for "Energy Efficiency in Government Operations Policy 2006", which considers targets for the 2011-2012 financial year. This policy refers to minimum energy performance standards for buildings and new premises over 2000 sq.m. if owned or leased by the Australian Government. The policy refers to a NABERS star rating.

The State Governments have also introduced various strategies. The Queensland Government introduced the Strategic Energy Efficiency Policy for government buildings in December 2007 requiring a 5% saving by 2010 and a 20% saving by 2015. The Queensland Department of Public Works published the Sustainable Office Rating Policy which identifies both the Green Star and NABERS systems as the preferred environmental rating systems for design and management in use of all office building portfolios. It sets out minimum target ratings for government office buildings, for new buildings (including fitout) of 5 star Green Star or 4.5 star NABERS and for leases, fitouts and refurbishments in excess of 2000 sq.m. of 4 star Green Star or 4.5 star NABERS.

In addition, the department seeks to achieve a minimum of 4 star NABERS water rating, 3 star NABERS waste rating and 5 star NABERS indoor environment rating within all government office buildings.

Representations

As with all representations, developers and owners need to be careful about the representations made about the energy rating of a particular building. Where a Green Star rating has been awarded for a particular phase of the life of the building, that rating should not be attributed to a different phase, ie if a 4 star rating is granted for design, that rating does not automatically apply to the ongoing use of the building and no representation should be made in that regard.

Green Star Ratings are dynamic and care needs to be made when representing exactly what tool has been used in achieving a particular rating.

Summary

The use of Green Star and NABERS rating systems are important tools for the sale and leasing of commercial, retail and residential buildings. In addition to the lower operation costs, tenants including government tenants are putting in place policies that require buildings to meet minimum energy efficiencies.

Proportionate Liability – can you avoid it? (cont)

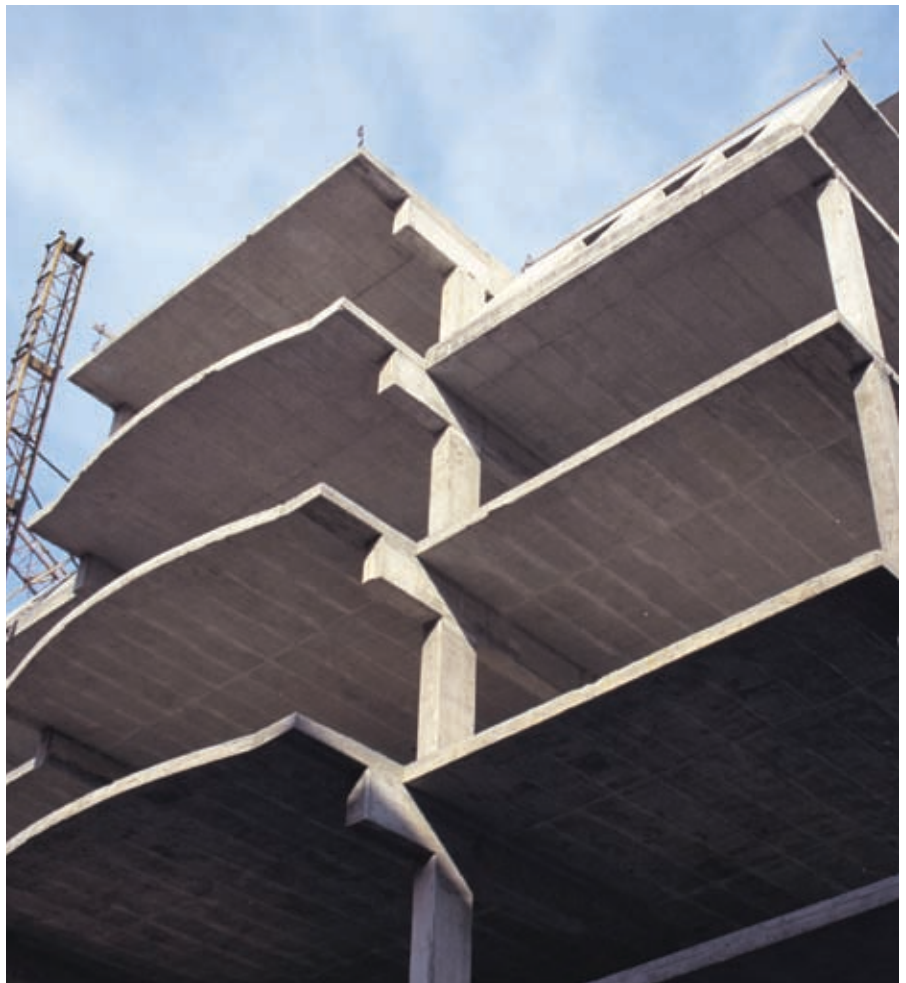
(continued from page 1)

But will such an approach work? The decisions in two recent cases suggest not. In the 2009 Victorian Supreme Court case of *Solak –v– Bank of Western Australia Ltd* the judge said that the purpose of proportionate liability was to make sure that each wrongdoer should only pay their fair share of the loss. The judge said “that task ought not to be frustrated by arid disputes about pleadings”. The judge’s suggestion that the pleadings are not important in this context, is supported by the earlier (2007) case of *Dartberg Pty Ltd –v– Wealthcare Financial Planning Pty Ltd* where another judge said:

Even though the claims in this proceeding themselves do not rely upon any plea of negligence or

a failure to take reasonable care in a strict sense, a failure to take reasonable care may form part of the allegations or the evidence that is tendered in the proceedings. At the end of the trial after hearing all the evidence, it may be found that [the system of proportionate liability] applies.

Going by these cases it seems that at least in Victoria even carefully crafted pleadings may not help avoid the impact of proportionate liability on building cases. But because the proportionate liability law in each Australian jurisdiction is different, these Victorian cases may not apply elsewhere. In each case, a check of the relevant law will be required.



Engaging in building contracts with tenants

by Garth O'Rafferty, Lawyer

This case has potential consequences for builders with respect to receiving payment for works undertaken on behalf of tenants of commercial buildings.

In 1997 Bowen Investments, owner of a unique commercial building in Melbourne, discovered that its corporate tenant Tabcorp had engaged its own architect, internal designer and contractors to renovate the premises. The contractors jack-hammered and filled with debris the building's foyer. The original foyer featured San Francisco Green Granite and Sequence and Matched Crown Coat American Cherry.

Tabcorp had agreed in the lease not to make any substantial alteration or addition to the premises without the prior consent of Bowen Investments. Tabcorp had also agreed in the lease to make good any damage incurred to the premises. Bowen Investments had not given prior consent to the alterations to the foyer, and Tabcorp refused to make good the damage it caused. The estimated cost of restoring the premises was \$1.38 million.

In January 2009, all 5 judges of the High Court of Australia determined that the actions of Tabcorp showed "contumelious disregard" for the rights of Bowen Investments as landlord.

At the first hearing of this case, the Federal Court of Australia awarded damages to the landlord of only \$38,820.00 (the difference between the value of the premises with the original foyer and the value of the premises with Tabcorp's newly constructed foyer). As a result, Bowen Investments felt that the law essentially allowed tenants complete liberty to breach their leases provided they paid adequate damages to compensate the landlord ("the doctrine of efficient breach").

Bowen Investments appealed the decision to the Full Federal Court of Australia, which awarded Bowen

Investments damages of \$1.38 million to restore the foyer to its original condition.

Tabcorp appealed to the High Court of Australia which, in January 2009, upheld the previous decision to award Bowen Investments \$1.38 million in damages, and noted that the "ruling principle" in relation to damages for breach of contract is that the innocent party is to be placed, so far as money can do it, in the same situation as if the contract had been properly performed. The Court found that the landlord's loss was the cost of restoring the premises to the condition it would have been in had the lease not been breached by the tenant. The Court said restoration was necessary to produce conformity with the condition of the foyer as it was at the start of the lease. The Court did not find that Bowen Investments' requirement to restore the foyer was unnecessary or unreasonable.

Tabcorp neglected to request a discount in the damages awarded against it to account for the fact that if Bowen Investments used the damages to restore the foyer after the expiry of the lease, it would be 'better off' with a brand new foyer it wouldn't ordinarily have had. As a result, the High Court did not allow for that discount.

The lessons from *Tabcorp Holdings Ltd –v– Bowen Investments Pty Ltd* are that:

- Tenants can no longer impose a form of economic rationalism on an unwilling landlord by making substantial alterations or additions to premises without prior consent, as it will likely result in restoration of the premises at great cost to the tenant.
- Builders engaged by tenants should ensure that the prior approval of the landlord has been given to any building alterations. Builders should at least obtain appropriate indemnities from the tenant, as (although it didn't occur in this case) tenants may find themselves financially overburdened by builders' claims for progress payments in addition to landlords' claims for substantial damages, which will in turn affect the ability of the tenant to pay the builder on time or perhaps at all. Building contracts AS 4000 – 1997 (cl 15.2) and AS 2124 – 1992 (cl 17.2), for example, provide that a principal must indemnify the contractor in respect of claims challenging the right of the principal to carry out the work under the contract.



Industry Alerts

Commonwealth

30/6/09

Federal Parliamentary Secretary for Regional Development, Maxine McKew, announced that agreements had been reached with State and local governments to form the consultative body Regional Development Australia (RDA). The charter for the RDA is to ensure that all three spheres of government deliver on regional projects that are responsive to community needs.

16/07/09

The Australian Competition and Consumer Commission proposes to allow the continuation of the levy on bricks and concrete masonry products. The levy funds a national program of training and supports apprenticeship opportunities.

(source Thomson Reuters)

South Australia

16/7/09

The South Australian parliament began debate in relation to the Building and Construction Industry Security for Payment Bill 2009 (Sth Aust).

(source Thomson Reuters)

New South Wales

15/07/09

The NSW Premier, Nathan Rees, launched an Expression of Interest process for opportunities in projects worth between \$50-100 million being developed in accordance with the Federal Government's National Building Economic Stimulus Plan. The Premier called for 'medium to large' building firms to respond for projects in the Greater Sydney region.

(source Premier NSW Newsroom)

On 23 June NSW Fair Trading Department announced the first suspension of a New South Wales contractor in accordance with the new regulations under the *Home Building Act 1989* (NSW). The Act empowers the Office of Fair Trading Home Building Service to suspend the licences of firms with outstanding money orders. The Office suspended the licence of GAJAC Pty Ltd.

(source Thomson Reuters)

Victoria

On 12 June the Victorian government announced two new Rebuilding Advisory Centres will be built in Marysville and

Kinglake – one-stop-shops where people will be able access all of the information needed for the rebuilding process.

(source Thomson Reuters)

Queensland

16/07/09

The Minister for Infrastructure and Planning, Stirling Hinchliffe, announced that the \$124billion infrastructure program for South East Queensland will result in 32 projects in this financial year with new projects rolling out each year until 2026. The program is underpinned by funding from all levels of government and the private sector.

(source Thomson Reuters)

Western Australia

03/07/09

The West Australian and Federal Governments announced the National Partnership Agreement for the East Kimberley Development Package. The package demonstrates an investment of \$195 million to be distributed across health infrastructure, education and training, social housing, transport and community infrastructure.

(source Thomson Reuters)

Contacts

If you would like to discuss any of the issues raised in this update or require further information, please contact:

Sydney (City)

Ned Boyce, Partner
+61 2 9391 3001
eboyce@hunthunt.com.au

Sydney (North West)

Ian Miller, Partner
+61 2 9804 5704
imiller@hunthunt.com.au

Melbourne

Andrew Barclay, Special Counsel
+61 3 8602 9219
abarclay@hunthunt.com.au

Brisbane

Tony Mylne, Partner
Macrossans Lawyers
+61 7 3292 9715
amylne@macrossans.com.au

Adelaide

Rick Harley, Partner
+61 8 8414 3373
rharley@hunthunt.com.au

Perth

Marcus Easthope, Lawyer
Marks and Sands Lawyers
+61 8 9488 1300
Marcus.Easthope@marksandsands.com.au

Hobart

Guy Abel, Partner
+61 3 6210 6221
gabel@hunttas.com.au

Darwin

Christine Osborne, Partner
+61 8 8924 2600
cosborne@huntnt.com.au

Newcastle

Susan Moran, Partner
+61 2 4925 5500
smoran@hunthunt.com.au

Disclaimer: The information contained in this newsletter is not advice and should not be relied upon as legal advice. Hunt & Hunt recommend that if you have a matter that is legal, or has legal implications, that you consult with your legal adviser. If you no longer wish to receive this Update or any other publication from Hunt & Hunt, please email us at unsubscribe@hunthunt.com.au.

This publication is printed on an FSC certified paper using 100% vegetable based inks. The printing method does not involve the use of isopropyl alcohol and meets the international environment standard ISO 14001.