BROOKFIELD MULTIPLEX LTD v OWNERS CORPORATION STRATA PLAN 61288 & ANOR (S66/2014)

Court appealed from:	New South Wales Court of Appeal [2013] NSWCA 317
Date of judgment:	25 September 2013
Special leave granted:	14 March 2014

Pursuant to a contract ("the Contract") made in 1997, the Appellant ("Brookfield") constructed a high-rise apartment building on land owned by Chelsea Apartments Pty Ltd ("Chelsea"). Under a prior Master Agreement between Chelsea and certain companies in the Stockland Group, Chelsea would lease the apartments on certain floors ("the apartments") to Park Hotel Management Pty Ltd ("Park") for it to operate as serviced apartments. Chelsea gave various warranties under the Master Agreement as to the quality of construction. Brookfield in turn gave similar warranties to Chelsea in the Contract. The Contract did not specifically address potential latent defects in the building.

In 1999 the building was completed and Brookfield registered the strata plan for the apartments, creating the First Respondent ("the Owners Corporation"). Chelsea sold each of the apartments to investors, who obtained title subject to the leases to Park (which held all of the voting rights in the Owners Corporation).

In 2008 the Owners Corporation sued Brookfield (and another company) in negligence, for the cost of rectifying alleged defects in the building.

On 10 October 2012 Justice McDougall dismissed the Owners Corporation's application. His Honour held that it was not appropriate for a judge at trial level to impose the novel duty of care sought, namely "*to take reasonable care to avoid a reasonably foreseeable economic loss to [the Owners Corporation] in having to make good the consequences of latent defects caused by the building's defective design and/or construction.*"

On 25 September 2013 the Court of Appeal (Basten, Macfarlan & Leeming JJA) unanimously allowed the Owners Corporation's appeal. Their Honours found that Chelsea had been sufficiently vulnerable in respect of latent building defects that it was owed a duty of care by Brookfield. The Court of Appeal then held that Brookfield's duty of care extended to the Owners Corporation (as the statutory agent of the subsequent owners, the investors), which was in a more vulnerable position than that of Chelsea. That duty covered any loss resulting from latent defects which were structural, dangerous or made the serviced apartments uninhabitable.

The grounds of appeal include:

- The New South Wales Court of Appeal erred in finding that the Appellant owed the First Respondent a duty to exercise reasonable care in the construction of the building to avoid causing the First Respondent to suffer pure economic loss resulting from the latent defects in the common property.