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INSPECTING BUILDINGS AND EXCLUSION CLAUSES: PROCEED WITH CAUTION

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Building inspector and insurer liable to child plaintiff for brain injuries and to mother for nervous shock following balcony collapse.

IN ISSUE

- Negligence of building inspector
- Construction of exclusion clause in insurance policy

THE BACKGROUND

The plaintiff in the first proceedings was Cate Doosey (the plaintiff), a practising barrister and mother of/tutor for the plaintiff in the second proceedings, Eadie Doosey (the plaintiff's daughter). In December 2011, the plaintiff's daughter, age 7, fell from a balcony onto the concrete pavement 2.57m below. She fell when a baluster on the balcony released at its bottom fixation and fell out from behind her weight. The plaintiff found her daughter unconscious and unresponsive at the time. The plaintiff's daughter's injuries included a brain injury. They subsequently brought negligence claims against Mr Nigel Walsh (the defendant), the building inspector, who had not reported any major defects in the balcony in his pre-purchase report. The plaintiff and her daughter sought damages for mental harm and personal injury respectively. The defendant, in turn, brought a cross-claim against Pacific International Insurance Pty Ltd (the cross-defendant) for their failure to indemnify and pay the claims.

THE DECISION

In the primary proceedings, the defendant conceded that he owed a duty of care to the plaintiff, as the purchaser of the property, however he denied owing a duty to the plaintiff's daughter. On this question, the court referred to *Voli v Inglewood Shire Council* [1963] HCA 15 at [9], affirming that the duty of care owed by building professionals extends even to those whose only relationship with them may be that they went into a building designed by and built under the supervision of the building professional. On this basis, the court applied the statutory framework for negligence outlined in ss 5B and 5C CLA (NSW) and concluded that a reasonable building inspector in the defendant's position would have discovered the hazard during the course of his inspection. Expert evidence established that the screws in the balustrade were so rusty that they could be moved and pulled apart with minimal force when touched. The court found that the defendant either failed to discover the hazard or, at the very least, failed to report it and was therefore in breach of his duty of care.

In respect of the cross-claim, the defendant sought indemnity for costs incurred as a result of his negligence under the insurance policy he held with the cross-defendant. The relevant insuring clause provided that the cross-defendant would pay for "all sums which You become legally liable to pay for Claims…for Personal Injury or Property Damage occurring in connection with the Business Activities" which are defined in the

policy schedule to include "Residential Building Inspections – AS4349.1-2007". The pre-purchase inspection conducted by the defendant at the plaintiff's property was a residential building inspection of this type.

However, the cross-defendant refused to indemnify the defendant on the basis of Clause 6.19, an exclusion clause contained in the Professional Indemnity and General Public Liability wording. The clause in question excluded costs that arise out of "advice, design or specification given by You for a fee or otherwise in carrying out any Business Activities".

In interpreting these contractual provisions, the court reiterated the correct approach to construing exclusion clauses, as articulated in *Darlington Futures Limited v Delco Australia Pty Ltd* (1986) 161 CLR 500 at [510], which involves identifying the clause's natural and ordinary meaning within the context of the contract so as to not inappropriately circumscribe the object of the contract. On this basis, the court concluded that the cross-defendant's overly onerous interpretation of the exclusion clauses would inappropriately limit the insurance cover to the point of virtually defeating it. Instead, the court preferred to interpret Clause 6.19 as prescribing the field of cover so as to cover all Business Activities but to exclude cover for any professional advice and services provided beyond Business Activities. Given that the pre-purchase inspection report provided by the defendant clearly fell within the scope of Business Activities as defined in the policy wording itself, the court found the cross-defendant liable to indemnify the defendant.

IMPLICATIONS FOR YOU

This case serves as a reminder to building professionals and insurers alike of the court's approach to assessing the former's duty of care owed to clients and users of the buildings for which they may be responsible and the scope of cover provided in the latter's professional indemnity policies. Insurers need to be particularly cautious in drafting insuring clauses and exclusion clauses, so as to afford themselves adequate protection in circumstances of ambiguity.

Cate Doosey v Nigel Walsh & Complete Building Inspection Services Pty. Ltd.; Evangeline Doosey-Shaw by her next friend Cate Doosey v Nigel Walsh & Complete Building Inspection Services Pty.Ltd. [2017] NSWDC 8

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