New South Wales Court of Appeal

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BCS Strata Management Pty. Limited t/as Body Corporate Services v. Robinson & Anor. [2004] NSWCA 80 (23 March 2004)

Last Updated: 26 March 2004

NEW SOUTH WALES COURT OF APPEAL

CITATION: BCS Strata Management Pty. Limited t/as Body Corporate Services v. Robinson & Anor. [2004] NSWCA 80

FILE NUMBER(S):

CA 40802/2002

DC 9897/2000

HEARING DATE(S): 03/02/2004

JUDGMENT DATE: 23/03/2004

PARTIES:

BCS Strata Management Pty. Limited /t/as Body Corporate Services (Appellant/Second Respondent)

Jessie Margaret Robinson (First Respondent/ First Cross-Respondent)

Owners - Strata Plan 1175 (Second Respondent/Cross-Appellant))

Owners - Strata Plan 1175 (Cross-Claimant)

Jessie Margaret Robinson (First Cross-Opponent)

BCS Strata Management Pty. Limited t/as Body Corporate Services (Second Cross-Opponent)

JUDGMENT OF: Handley JA Beazley JA Palmer J

LOWER COURT JURISDICTION: District Court

LOWER COURT FILE NUMBER(S): DC 9895/2000

LOWER COURT JUDICIAL OFFICER: Gamble ADCJ

COUNSEL:

J. Maconachie QC/D Weinberger (Appellant/Second Cross-Respondent)

M.B. Williams SC/R.K. Stewart (First Respondent/First Cross-Responent)

I. Harrison SC/K. Poulos (Second Respondent/Cross-Appellant)

SOLICITORS:

Colin Biggers & Paisley (Appellant/Second Cross-Respondent)

G.H. Healy & Co - Sydney (First Respondent/First Cross Respondent)

A.R. Connolly & Company (Second Respondent/Cross Appellant)

CATCHWORDS:

NEGLIGENCE - No evidence to explain lift breakdown - Statutory claim pursuant to s.67 of the Construction Safety Regulation 1950 - Evidence of unforeseen, unexplained occurrence not sufficient.

INDEMNITY CLAUSES - Construction - Natural meaning of words used- Not available when party sued in respect of own conduct.

LEGISLATION CITED:

Construction Safety Regulation 1950

Strata Titles Act (NSW) 1973

DECISION:

1 Appeal allowed.

2. Cross-appeal, insofar as it relates to the plaintiff's claim, allowed.

3. Set aside the verdicts in favour of the plaintiff against the first and second defendants.

4. Set aside the consequential orders of apportionment.

5. Verdict for each defendant on the plaintiff's claim, judgments accordingly.

6. Cross-appeal otherwise dismissed.

7. Refuse leave to file Notice of Contention.

8. The first respondent is to pay the appellant's costs of the appeal and the trial.

9. The first respondent is to pay the second respondent's costs of and relating to the application for leave to file the Notice of Contention.

10. The first cross-respondent is to pay the cross-appellant's costs of the appeal and the cross-appeal insofar as it relates to the plaintiff's claim and is to pay the cross-appellant's costs of the trial.

11. The cross-appellant is to pay the second cross-respondent's costs of the cross-appeal.

12. The first respondent is to have a Certificate under the Suitors' Fund Act (NSW) 1951 in respect of the appeal and cross-appeal if so entitled.

JUDGMENT:

IN THE SUPREME COURT

OF NEW SOUTH WALES

COURT OF APPEAL

CA 40802/02

HANDLEY JA

BEAZLEY JA

PALMER J

23 March 2004

BCS STRATA MANAGEMENT PTY LIMITED t/as BODY CORPORATE SERVICES v. ROBINSON

Facts

The first respondent sustained a severe injury to her leg when she tripped and fell as she stepped into a lift in the home unit premises where she lived due to the floor of the lift not aligning with the floor of the foyer where she was standing.

The first respondent brought proceedings against the second respondent, the Owners of the Strata Plan and the appellant, the Strata Manager, in negligence. Res ipsa loquitur was also pleaded against both and breach of statutory duty under the *Construction Safety Regulation 1950* against the Owners of the Strata Plan. The appellant and second respondent cross-claimed against each other. In its cross-claim, the appellant sought indemnity for its legal costs in defending the proceedings.

Gamble ADCJ found against the appellant and the second respondent in negligence and under the res ipsa loquitur principle. She apportioned liability between them as to two-thirds against the second respondent and one third against the appellant. She did not decide the question of breach of statutory duty.

HELD per Beazley JA (Handley JA and Palmer J agreeing):

(i) As there was no breach of the appellant's Agency Agreement with the second respondent and no other action it should have taken as Managing Agent, there was no breach of duty by it.

(ii The first respondent failed to make out the statutory claim as there was no evidence as to the cause of the malfunctioning of the lift on the particular occasion or that the lift had malfunctioned on any other occasion. A single breakdown was not sufficient to establish a breach of Regulation 67: see *Austral Bronze Company Pty Limited v Ajaka* (1970) 44 ALJR 155 at 156.

(iii) The statutory claim was barely arguable and therefore leave to file a Notice of Contention out of time by the first respondent was refused.

(iv) The appellant's claim for indemnity under the Agency Agreement failed as the terms of the indemnity did not extend to the case where the appellant was sued in its own capacity for its own alleged negligence as Managing Agent.

ORDERS

1. Appeal allowed.

2. Cross-appeal, insofar as it relates to the plaintiff's claim, allowed.

3. Set aside the verdicts in favour of the plaintiff against the first and second defendants.

4. Set aside the consequential orders of apportionment.

5. Verdicts for each defendant on the plaintiff's claim, judgments accordingly.

6. Cross-appeal otherwise dismissed.

7. Refuse leave to file Notice of Contention.

8. The first respondent is to pay the appellant's costs of the appeal and the trial.

9. The first respondent is to pay the second respondent's costs of and relating to the application for leave to file the Notice of Contention.

10. The first cross-respondent is to pay the cross-appellant's costs of the appeal and the cross-appeal insofar as it relates to the plaintiff's claim and is to pay the cross-appellant's costs of the trial.

11. The cross-appellant is to pay the second cross-respondent's costs of the cross-appeal.

12. The first respondent is to have a Certificate under the *Suitors' Fund Act (NSW) 1951* if it is so entitled.

IN THE SUPREME COURT

OF NEW SOUTH WALES

COURT OF APPEAL

CA 40802/02

HANDLEY JA

BEAZLEY JA

PALMER J

23 March 2004

BCS STRATA MANAGEMENT PTY LIMITED t/as BODY CORPORATE SERVICES v. ROBINSON

Judgment

1 **HANDLEY JA:** I agree with Beazley JA.

2 **BEAZLEY JA:** Jessie Margaret Robinson was injured on 28 June 1999 when she tripped and fell on the floor of a lift in her home unit premises at 34 Wentworth Street, Glebe. Mrs. Robinson, who was 82 at the time of the accident, sustained a severe injury to her left leg. She described the accident as occurring in circumstances where, unnoticed by her, the floor of the lift was not in alignment with the floor of the foyer when the doors opened.

The Proceedings

3 Mrs. Robinson brought proceedings against the second respondent, the Owner of Strata Plan 1175 (the Owners of the Strata Plan), (the first defendant in the Court below) and the appellant, BCS Strata Management (the Managing Agent), (the second defendant in the Court below) in negligence. She also pleaded res ipsa loquitur against each defendant and breach of statutory duty under the *Construction Safety Regulations 1950* against the Owners of the Strata Plan. The last of these claims was the result of an amendment allowed by the trial judge at a very late stage of the hearing.

4 The Managing Agent cross-claimed against the Owners of the Strata Plan, claiming indemnity under its Strata Schemes Agency Agreement (the Agency Agreement) with the Owners of the Strata Plan. The Owners of the Strata Plan in turn cross-claimed against the Managing Agent (the second cross claim), alleging breach of the Agency Agreement and negligence.

5 The trial judge found against both defendants in negligence and under the res ipsa loquitur principle. She apportioned liability between them as to two-thirds against the Owners of the Strata Plan and one-third against the Managing Agent. Her Honour did not consider the statutory count against the Owners of the Strata Plan. She dismissed both cross-claims.

6 The Managing Agent has appealed against the verdict against it as well as against the dismissal of its cross-claim. The Owners of the Strata Plan have cross-appealed.

The Appeal

7 In my opinion, the Managing Agent' s appeal should be allowed. Its obligations relating to the home unit premises were governed by the Agency Agreement. Under the Agency Agreement, the Managing Agent was required to *"[a]rrange in the name of and as required by the Body Corporate normal day to*

day maintenance, repair and replacement of the common property ...": (Clause 4.1; Schedule 2 para 2).

8 At the time that the Agency Agreement was entered into, there was already in place an agreement between the Owners of the Strata Plan and an elevator contractor, Electra Lift Company Pty. Limited (Electra). That contract was still in place as at the date of the accident. That being so, there was no necessity for the Managing Agent to take any separate or other step to arrange for the maintenance and repair of the lifts in the building. It was not contended otherwise. Accordingly, there was no breach of the Agency Agreement. As there was no issue of the Managing Agent having failed to follow up a complaint or otherwise having ensured that Electra was properly servicing or repairing the lifts, the case against it must fail. No submissions were made to the Court on behalf of Mrs. Robinson against the appeal by the Managing Agent and I would propose in due course that it be allowed with costs.

The Cross-Appeal

9 It is next convenient to deal with the cross-appeal by the Owners of the Strata Plan. The lifts in question had been installed at the time of the original construction of the building in 1962. They were thus old but, it appears, they were not at the end of their working life. An examination of the maintenance records of Electra revealed that in the 12 months prior to the accident there had been 32 call-outs to the lifts. In addition, Mr. Kirkland, a lift mechanic employed by Electra, gave evidence that the lifts were serviced on a monthly basis. He denied however, that the frequency of the call-outs to these lifts indicated that "there was some problem" with them. They were, after all, old lifts and he said that "[t]here are many problems that could go wrong with a lift". He also pointed out that there were about 5000 moves of the lift in a week that caused wear and tear. Mr. Kirkland attended the premises immediately after the accident. However, at that time, he found that the lift was operating and in good working order. He said that he had never seen an occasion where a levelling problem with a lift fixed itself.

10 There is no evidence as to why the lift failed to come into alignment with the ground floor on this occasion. Nor was there any evidence of it having done so on any other occasion. There was no evidence that the repairs which had been carried out in the previous 12 months had been carried out in a negligent manner. Likewise there was no evidence that the lifts had not been maintained properly although her Honour drew an inference that the monthly maintenance was carried out during the break-down visits. Whilst I have some doubt as to the correctness of this inference, nothing in the appeal turns upon it as there was no evidence that Electra had failed to maintain the lifts or that any work carried out by Electra was performed improperly, inadequately or negligently. More relevantly, there was no evidence that the Owners of the Strata Plan were aware, or ought to have been aware, of any problem with the repairs to and maintenance of the lift. In those circumstances, Mrs. Robinson has failed to prove her case in negligence against the Owners of the Strata Plan.

11 Mr. Williams, senior counsel for Mrs. Robinson conceded that there was no case to be made under the doctrine of res ipsa loquitur and therefore did not seek to maintain her Honour' s finding to that effect.

12 My conclusions thus far would have disposed of the appeal on the basis of the issues raised in the Notice of Grounds of Appeal. However at the commencement of the hearing of the appeal, senior counsel for Mrs. Robinson sought leave to file in Court a Notice of Contention in which it was sought to uphold her Honour' s verdict against the Owners of the Strata Plan on the basis that it was in breach of it statutory duty under Regulation 67(1) and (2) of the *Construction Safety Regulation 1950*. The alleged breach of statutory duty was first raised by counsel for the plaintiff at the conclusion of the evidence when application was made to amend the Statement of Claim to include such a count. The application to amend was opposed by counsel for the appellant but was granted by the trial judge. As I have already

indicated her Honour then made no finding on the statutory count. When leave was sought to file the Notice of Contention, both parties were directed to file written submissions in respect of the issue raised in the Notice of Contention. The question whether leave should be granted to allow the contention was reserved, to be determined as part of the determination of the appeal.

13 In the statutory claim, Mrs. Robinson alleged that at the time of her injury on 28 June 1999, the Owners of the Strata Plan were in breach of their duty under Regulations 67(1) and 67(2) of the *Construction Safety Regulations 1950*, as a result of which she was injured.

14 Regulation 67(1) provides:

"Every lift ... and all parts thereof shall be maintained in conformity with these Regulations and in safe and proper working condition ..."

15 Regulation 67(2) provides:

"It shall be the duty of the owner of the lift ... to observe the provisions of this Regulation."

16 Senior counsel for Mrs. Robinson submitted that these regulations gave her a private right of action against the Owners of the Strata Plan. He relied upon *Puflett v. Proprietors of Strata Plan No. 121* (1987) 17 NSWLR 372 in support of this submission. In that case, a lessee of home unit premises had been injured when she stepped out of a lift which had stopped some 12 inches above floor level. Lee J held at p. 378 that the regulations provided a private right of action to the lessee.

17 It was submitted on behalf of Mrs. Robinson that since the floor of the lift was some 6 to 8 inches out of alignment with the foyer floor, it was open to the trial judge to infer that such malfunction would not have occurred had the lift been "maintained ... in safe and proper working condition": Reg. 67(1). In support of this submission, Mrs. Robinson relied upon the history of call-outs to the lift, being 53 call-outs in 16 months and, more specifically, 32 call-outs in the 12 months preceding the plaintiff' s acciden Mrs. Robinson submitted that the inference was also available from the evidence of herself and her daughters that the lifts "were always playing up" and upon the additional evidence that "the ... landing equipment required a comprehensive clean by Mr. Kirkland after he was called out" after Mrs. Robinson sustained her injury. It was submitted that this pointed to a breach of Regulation 67(1)(b) in that the machinery and equipment "was not kept clean and free from accumulation of dust and dirt".

18 The Owners of the Strata Plan did not seek to challenge the correctness of the decision in *Puflett* that the *Safety Construction Regulations* gave a private right of action in circumstances such as this case. Rather, its submissions were directed to meeting the claim by Mrs. Robinson that the lifts were not properly maintained. In particular, it submitted that there was no evidentiary link between the lift going out of alignment and any failure to maintain it. To the extent that there was evidence on the issue, it was to the contrary of the position asserted by Mrs. Robinson. Mr. Kirkland' s evidence was that lifts could break down unexpectedly, even if a thorough inspection and service was done on a monthly basis and that levelling problems with lifts can occur suddenly and unexpectedly. Her Honour, it appears, accepted this evidence: (Judgment p. 5). Her Honour had also found (Judgment p. 11) that there was no evidence of the types of break-downs that had occurred in the lifts in the previous 12 months. The call-out history contained in Exhibit K did not provide evidence of a link between this accident and any previous problems as Exhibit K was only admitted into evidence for the limited purpose of establishing the dates and times of calls made by Electra and not for the purpose of showing that any complaints or defects reported actually existed or had any foundation.

19 In my opinion, Mrs. Robinson has failed to make out the statutory count raised in the Notice of Contention (assuming that there is a statutory cause of action available to her). There was no evidence as to the cause of the malfunctioning of the lift on this occasion or that the lift had malfunctioned in this particular way (that is, being out of alignment by 6 to 8 inches) on any other occasion. There was no evidence either that there was a failure to maintain the lifts or that the lift had failed to "level" on this occasion due to a known or foreseeable malfunction. To the extent that there was evidence, it was that such an occurrence could occur for unexplained reasons. Mrs. Robinson relied upon the fact that Mr. Kirkland had thoroughly cleaned the landing equipment after the accident. However, Mr Kirkland' s evidence was that he did so merely as a precaution. No inferences could be drawn in respect of this issue from Exhibit K (the call-out records) because of the limited basis upon which this evidence was admitted.

20 In summary, therefore, there was no evidence that the occurrence was attributable to any lack of or inadequate maintenance. The evidence did not rise higher than that these were old lifts in need of constant maintenance and that there was a particular unforeseen occurrence on this occasion. That is not sufficient, for the purposes of establishing a breach of Regulation 67: see *Austral Bronze Company Pty. Limited v. Ajaka* (1970) 44 ALJR 155 at 156.

21 It follows that this part of Mrs. Robinson' s claim must also fail.

22 That leaves the question whether leave should be granted to file the Notice of Contention out of time. Notice of the intended reliance upon the Notice of Contention was not given to the Owners of the Strata Plan until the morning of the appeal. In fact, it appears that the statutory claim was an after-thought at each stage of the proceedings. Although the claim was brought forward by senior counsel for Mrs Robinson as part of his professional obligation to put the best case possible on her behalf, I consider the claim was barely arguable and accordingly I would not grant leave.

The Cross-Appeal

23 Finally, there is the Managing Agent' s cross-appeal relating to its claim for indemnity against the Owners of the Strata Plan. Clause 10 of the Managing Agent' s Agreement provided:

"The Body Corporate:

(a) indemnifies the Agent for all costs and expenses (including legal costs on a solicitor and client basis) properly incurred in carrying out work pursuant to this agreement or as instructed by the Body Corporate: and

(b) acknowledges that all such work will be carried out for the Body Corporate and not for the Agent directly." (Blue 84)

24 The Managing Agent submitted that, assuming this Court found that it had not breached its duty of care to Mrs. Robinson, then, on the natural and ordinary meaning of the words of cl. 10, it was entitled to an indemnity from the Owners of the Strata Plan for its costs in defending the proceedings. In support of its claim, the Managing Agent relied upon paras. 111-117 of my judgment in *Newcastle Entertainment Security Pty. Limited v. Simpson & Ors* (1999) Aust. Torts Reports 81-528. As is apparent from that case, the proper approach to the construction of an indemnity clause is not contentious. Such clauses are to be construed according to their natural meaning in the context in which they occur: see *Pendal Nominees Pty. Limited v. Lednez Industries (Australia) Limited* (1996) 40 NSWLR 282.

25 Clause 10 provides an indemnity, inter alia, for "*legal costs incurred in carrying out work pursuant to this agreement*". The duties of the Managing Agent under the Agency Agreement are specified in cl.3, Schedule 2 and Schedule 3 (an additional fee being payable for the duties under this Schedule and which are only to be carried out pursuant to a specific instruction). The duties cover a range of management and administration matters prescribed by law or which are necessary for the efficient and convenient running of a body corporate of a home unit complex. They include arranging insurances, maintaining the records of the Owners of the Strata Plan required by law, having the possession and care of the records and documents of the Owners of the Strata Plan, arranging and attending the annual general meeting and disbursing money in accordance with the *Strata Titles Act (NSW) 1973*. Schedule 3 duties include attending hearings conducted by a Strata Titles Board or Tribunal or Court. There is a specific power in Schedule 3, cl. 3 to "*instruct solicitors, attend conferences and generally supervise legal proceedings involving the Body Corporate*."

26 What has happened here is that the Managing Agent has been sued in its own capacity for its own alleged negligence. It has incurred expenses in defending the proceedings. Those expenses cannot, in my opinion, be categorised as having been incurred "*in carrying out work under [the Agency] Agreement or as instructed by the Body Corporate*", being the expenses for which indemnity is provided in cl.10. They are expenses incurred in respect of its own conduct.

27 It follows therefore, in my opinion that, on its proper construction, cl. 10 does not extend to cover the legal costs incurred by the Managing Agent in these proceedings. That part of its appeal should be dismissed with costs.

28 Accordingly, I propose the following Orders:

1 Appeal allowed.

2. Cross-appeal, insofar as it relates to the plaintiff' s claim, allowed.

3. Set aside the verdicts in favour of the plaintiff against the first and second defendants.

4. Set aside the consequential orders of apportionment.

5. Verdict for each defendant on the plaintiff' s claim, judgments accordingly.

6. Cross-appeal otherwise dismissed.

7. Refuse leave to file Notice of Contention.

8. The first respondent is to pay the appellant' s costs of the appeal and the trial.

9. The first respondent is to pay the second respondent' s costs of and relating to the application for leave to file the Notice of Contention.

10. The first cross-respondent is to pay the cross-appellant' s costs of the appeal and the cross-appeal insofar as it relates to the plaintiff' s claim and is to pay the cross-appellant' s costs of the trial.

11. The cross-appellant is to pay the second cross-respondent' s costs of the cross-appeal.

12. The first respondent is to have a Certificate under the Suitors' Fund Act (NSW) 1951 in respect of

the appeal and cross-appeal.

29 **Palmer J.** I agree with Beazley JA.

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LAST UPDATED: 24/03/2004