Supreme Court
New South Wales

Medium Neutral Citation:	**Dix Gardner Pty Ltd v The Owners – Strata Plan 82053 [2017] NSWSC 940**
Hearing dates:	22 September 2016
Date of orders:	18 July 2017
Decision date:	18 July 2017
Jurisdiction:	Common Law
Before:	Harrison AsJ
Decision:	The Court orders that: (1) The appeal is upheld. (2) The decisions of her Honour Magistrate Milledge dated 16 April 2015 and 13 November 2015 are set aside. (3) The proceedings are remitted to the Local Court to be determined according to law. (4) Leave is granted to the parties to approach my associate in relation to costs within 14 days.
Catchwords:	LOCAL COURT APPEAL – jointly and severally liable - duty of care – duty of care to subsequent purchaser – vulnerability – assumption of reliance – appeal upheld
Legislation Cited:	Building Professionals Act 2005 (NSW) Civil Liability Act 2002 (NSW) ss 35, 41, 43 Civil Procedure Act 2005 (NSW) s 100 Employees Liability Act 1991 (NSW) s 3 Environmental Planning and Assessment Act 1979 (NSW) ss 109C, 109D,109E, 109H Local Court Act 2007 (NSW) ss 39, 40, 41
Cases Cited:	Beale v Government Insurance Office (NSW) (1997) 48 NSWLR 430 Brookfield Multiplex Ltd v Owners Corp Strata Plan 61288 (2014) 254 CLR 185; [2014] HCA 36 Chan v Acres [2015] NSWSC 1885 Moorabool Shire Council v Taitapanui (2006) 14 VR 55 Pollard v RRR Corporation Pty Limited [2009] NSWCA 110

Presland v Hunter Area Health Service [2003] NSWSC 754
Soulemezis v Dudley (Holdings) Pty Limited (1987) 10 NSWLR 247
Stoker v Adecco Gemvale Constructions Pty Ltd [2004] NSWCA 449
Swain v Waverley Municipal Council (2005) 220 CLR 517; [2005] HCA 4
Sydney Water v Asset Geotechnical Engineering [2013] NSWSC 1274
University of Wollongong v Metwally (No 2) (1985) 59 ALJR 481

Category: Principal judgment

Parties: Dix Gardner Pty Ltd (First Plaintiff)
Lyall Dix (Second Plaintiff)
The Owners – Strata Plan 82053 (Defendant)

Representation: Counsel:
R de Meyrick (Plaintiffs)
N Kulkarni (Defendant

Solicitors:
CBD Law (Plaintiffs)
Vardenega Roberts (Defendant)

File Number(s): 2015/361408

Publication restriction: Nil

Decision under appeal **Court or tribunal:** Local Court – Downing Centre

Jurisdiction: General

Citation: Nil

Date of Decision: 16 April 2015, 13 November 2015

Before: Milledge LCM

File Number(s): 2013/181004

JUDGMENT

1 **HER HONOUR:** These proceedings involve an appeal and cross appeal from two judgments of her Honour Magistrate Milledge. The plaintiff in the Local Court, The Owners – Strata Plan 82053 ("the Owners"), successfully claimed damages in the Local Court from the defendants, Dix Gardner Pty Ltd ("Dix Gardner") and Lyall Dix ("Dix"), arising from the alleged negligence of Dix Gardner and Dix in carrying out certification of the construction of a residential strata development of 28 or more dwellings over a basement car park at XX Waterloo Road, Marsfield ("the development"). The development is located next to the M2 Motorway, Marsfield. The Owners was the

subsequent purchaser of the development. The claim sought the costs of rectification of defects to the development that were alleged to have resulted from the alleged carelessness or incompetent performance of the certification.

Background facts

2 The background facts are not in dispute.

3 On 15 June 2004, development consent was obtained from Ryde Council in relation to the development. The development consent was given subject to specific conditions regarding noise. This included that an acoustical assessment report be prepared prior to the commencement of any work, and significantly, the following two conditions:

> "83 Construction requirements - AH acoustical treatments nominated in the acoustical assessment report and other project documentation must be implemented during construction.
>
> 84. Compliance report - A report from a qualified acoustical consultant demonstrating compliance with the above noise criteria must be submitted to the principal certifying authority (and Council, if Council is not the [Principal Certifying Authority] PCA) before the issue of the Occupation Certificate."

4 Applications to modify the proposed development (but they are not relevant here) were consented to by Ryde Council.

5 On 27 September 2007, Ferro Constructions Pty Ltd ("the builder") retained Dix Gardner to provide private certification services in relation to the development for a fee of $14,000 plus GST. Mr Dix was an accredited certifier under the *Building Professionals Act 2005* (NSW) and for the purposes of the *Environmental Planning and Assessment Act 1979* (NSW). On 31 October 2007, he was appointed as the principal certifying authority ("PCA") in respect of building work involved in the development pursuant to s 109E of the *Environmental Planning and Assessment Act*.

6 On 23 October 2007, an acoustical assessment report was prepared in relation to the development by Vipac Engineers & Scientists Ltd ("Vipac"). This set out the noise criteria and the acoustical treatments required to be implemented for compliance with the relevant building standards.

7 On 2 November 2007, Mr Dix issued a construction certificate for stage 1 of the development, following which building work commenced.

8 On 6 December 2007, Mr Dix issued a construction certificate for stage 2, which related to the slab and the basement works. On 28 May 2008, Mr Dix issued a construction certificate for all of the remaining building work.

9 On 7 August 2008, PKA Acoustics prepared an acoustic sound report setting out the requirements for the glazing of all windows and doors, to ensure acoustic sound compliance. On 6 March 2009, ASKA Aluminium Pty Ltd issued compliance certificates certifying that all glass supplied to aluminium windows met the relevant fire safety standards and acoustic sound standards.

10

On 16 March 2009, Vipac sent a report ("the Vipac report") with respect to acoustic sound compliance testing on the building. Further testing was also undertaken on 28 April 2009. On 3 April 2009, Mr Dix issued an interim occupation certificate in respect of the development. On 8 April 2009, Strata Plan 82053 was registered and legal title to the common property vested in the Owners and ownership of the townhouse complex was passed to the Owners.

11 On 30 April 2009, a report, bearing the date 1 May 2009, was prepared by Vipac recording non-compliance with noise criteria for five units in the development and recommending installation of acoustic seals for glazing and proper installation of windows and frames.

12 On 1 May 2009, Vipac provided a report setting out the requirements for acoustic compliance. The Vipac report made the following recommendations for all units in the development:

> "1. We have recommended acoustic seals such as Schlegel Q-LON [seals] for top and bottom and both ends of all windows and sliding doors. Moher seals are not considered acoustic seals and need to be replaced on all glazing.
>
> 2. Ensure that all windows/frames have been installed correctly, are airtight and gapfree."

On 1 May 2009, the same day as the Vipac report, Mr Dix issued the final occupation certificate. On 3 May 2010, an executive meeting of the strata owners convened to discuss the building defects. Other meetings were held over many months concerning the same issues.

13 On 16 November 2011, the Owners lodged a home warranty insurance claim with Wesfarmers Lumley Insurance ("Lumley"). Lumley commissioned an inspection report by Igentia Pty Ltd following the first claim on it. As a result of Lumley's determination of that claim, the Owners sought to recover damages from Dix Gardner and Dix in the Local Court. The hearing took place on 2 September 2014, 16 April 2015 and 13 November 2015 before her Honour Magistrate Milledge.

Pleadings in the Local Court

14 In summary, by statement of claim the Owners alleged that firstly, as a private certifier, Mr Dix owed a duty to the Owners to exercise reasonable care, skill and diligence in carrying out the certification; secondly, the occupation certificates for the development were not properly issued because the preconditions to their issue specified in the development consent had not been met and the building was not suitable for occupation; thirdly, a reasonably competent certifier would not have issued the occupation certificates until he or she was satisfied that the preconditions in the development consent had been met and the building was suitable for occupation; fourthly, Mr Dix breached his duty to the Owners by failing to exercise the degree of care, skill and diligence expected of a reasonably competent certifier in issuing the occupation certificate when he did; fifthly, the breach of duty of care by Mr Dix caused the Owners to suffer economic loss; and finally, quantum of damages.

15

Also in summary, the defences and primary arguments raised by Dix Gardner and Dix were firstly, Mr Dix did not owe a duty of care to the Owners; secondly, as a private certifier, Mr Dix was a "public or other authority" within the meaning of Part 5 of the *Civil Liability Act 2002* (NSW); thirdly, Mr Dix did not breach any duty of care owed to the Owners; fourthly, any loss suffered by the Owners was not caused by Mr Dix; and fifthly, pursuant to Part 4 of the *Civil Liability Act*, any liability of Mr Dix should be limited to an amount reflecting the extent of his responsibility for the Owners loss. It should be noted no mention was made as to whether Dix Gardner and Dix were separately liable or jointly and severally liable in the defence.

The hearing in the Local Court

16 On 16 April 2015, her Honour Magistrate Milledge gave ex tempore reasons in relation to liability. She requested that the parties provide written submissions in relation to quantum and costs. These submissions were provided. On 13 November 2015, her Honour gave extempore reasons in relation to quantum and costs.

17 At the hearing on liability, her Honour identified the issues in dispute as being whether Mr Dix, as principal certifying authority, owed a duty of care to the Owners to exercise reasonable care, skill and diligence in carrying out the certification, and whether the Owners suffered economic loss as a result of Mr Dix's conduct. Other issues raised at the hearing included: whether Mr Dix was a public or other authority within Part 5 of the *Civil Liability Act* (therefore limiting his liability); whether a certifier owed a duty of care to a subsequent owner; whether a private certifier was a public authority governed by the provisions of Part 5 of the *Civil Liability Act*; whether, if a duty of care did exist, what was the measure of the duty, particularly as limited under Part 5 of the *Civil Liability* Act; whether Mr Dix acted outside the usual standards of diligence expected of a reasonable, competent certifier; and finally; whether Mr Dix failed to undertake statutory inspections. (J2.42-50; J3.1-5 - 16/04/2015). A further issue raised at the hearing was whether the statement of claim was defective in its pleading as to the windows.

18 On 16 April 2015, her Honour Magistrate Milledge found Dix Gardner and Dix jointly and severally liable for some, but not all of the damages claimed by the Owners.

19 On 13 November 2015, her Honour Magistrate Milledge assessed the Owners' damages at $63,080 plus interest on and from 7 December 2012. A costs order was made in favour of the Owners.

The appeal and cross appeal

20 By amended summons filed 22 April 2016, Dix and Dix Gardner seek firstly, an order to the extent that leave is required, leave to appeal from the whole of both decisions below; secondly, an order that the verdict and judgment made on 16 April 2015 (the liability judgment) be set aside and in lieu thereof verdict and judgment be entered in

favour of Dix Gardner and Dix; and thirdly, an order that the verdict and judgment made on 13 November 2015 (the damages judgment) be set aside and in lieu thereof verdict and judgment be entered in favour of Dix Gardner and Dix.

21 By cross appeal filed 13 January 2016, the Owners seeks firstly, an order to the extent leave is required, leave to cross appeal from the part of the decision below in relation to quantum; secondly, that the cross appeal be allowed; thirdly, the judgment of the Court below be set aside; and fourthly, in lieu thereof, judgment for the Owners in the sum of $73,080 plus interest pursuant to s 100 of the *Civil Procedure Act 2005* (NSW) on and from 1 May 2009. I shall deal with the cross appeal after the appeal.

22 The parties relied upon the material contained in the Court Books (5 volumes) and a blue folder containing the submissions made in both the Local Court and this Court. I should add that on appeal the parties raised complex legal arguments, some of which were not raised before the Magistrate.

The appeal

23 Section 39(1) of the *Local Court Act 2007* (NSW) provides that a party to proceedings who is dissatisfied with a judgment or order of the Local Court may appeal to the Supreme Court, but only on a question of law.

24 Section 40(1) of the *Local Court Act* provides that a party to proceedings who is dissatisfied with a judgment or order of the Local Court on a ground that involves a question of mixed law and fact may appeal to the Supreme Court but only by leave of the Supreme Court.

25 Section 41 of the *Local Court Act* provides that this Court may determine an appeal made under ss 39(1) or 40(1) either (a) by varying the terms of the judgment or order, or (b) by setting aside the judgment or order, or (c) by setting aside the judgment or order and remitting the matter to the Local Court for determination in accordance with the Supreme Court's directions, or (d) by dismissing the appeal.

Should leave be granted?

26 In *Swain v Waverley Municipal Council* (2005) 220 CLR 517; [2005] HCA 4, Gleeson CJ at [2] reiterated that:

> "In the common law system of civil justice, the issues between the parties are determined by the trial process. The system does not regard the trial as merely the first round in a contest destined to work its way through the judicial hierarchy until the litigants have exhausted either their resources or their possibilities of further appeal…"

27 The parties have sought leave to appeal if necessary, but neither party identifies which grounds of appeal require leave. Leave to appeal is required if the appeal involves a question of mixed fact and law. Further, neither party provided any reasons as to why leave should be granted. No question of general public importance arises nor is there an injustice that is reasonably clear. The amount in dispute is $73,080 plus interest.

28

I would not have granted leave to appeal except the parties agree that the Magistrate did not address the issues of proportionality and apportionment, so the matter has to be remitted to the Local Court to be determined according to law. Hence, I will briefly address the issues raised by the parties on appeal.

Dix Gardner and Dix's grounds of appeal

29 Dix Gardner and Dix appeal from the whole of the decision of her Honour Magistrate Milledge dated 16 April 2015. The grounds of appeal are firstly, that the Magistrate erred in finding both Dix Gardner and Dix jointly and severally liable; secondly, the Magistrate erred in her decisions dated 16 April 2015 and 13 November 2015 by failing to give consideration to Part 4 of the *Civil Liability Act* and Dix Gardner's submissions as to apportionment; thirdly, the Magistrate erred in her decisions dated 16 April 2015 and 13 November 2015 by failing to give any reasons as to why Dix Gardner's apportionment arguments were unsuccessful; fourthly, the Magistrate erred at law in her decision dated 16 April 2015 by failing to give any, or adequate, reasons as to why Dix, an employee of Dix Gardner, was jointly and severally liable; fifthly, the Magistrate erred in law in her decision dated 13 November 2015 as her assessment of quantum had no evidentiary basis; sixthly, in the alternative, such error relates to a mixed question of fact and law; seventhly, the Magistrate should have found that Dix Gardner and Dix did not owe the Owners a duty of care, were not negligent nor otherwise liable in damages; eighthly, or in the alternative, the Magistrate should have found that the Owners failed to prove its case as to quantum; and ninthly, in the alternative, the Magistrate should have applied the proportionate liability provisions of Part 4 of the *Civil Liability Act* to hold that Dix Gardner and Dix's liability was nil, or some negligible percentage.

30 For convenience, I have not dealt with these grounds of appeal in chronological order but rather grounds 1 and 4 (joint and several liability), ground 7 (duty of care), grounds 2, 3 and 9 (apportionment and proportionality), and finally, grounds 5 and 8 (damages).

Appeal grounds 1 and 4 - Were Dix Gardner and Dix jointly and severally liable?

31 Ground 1 is that her Honour erred in her decision dated 16 April 2015 by finding both Dix Gardner and Dix jointly and severally liable. (J 6.22-24). Ground 4 is that her Honour failed to give any or adequate reasons as to why Mr Dix, an employee of Dix Gardner was jointly and severally liable.

32 Counsel for Dix Gardner and Dix submitted that her Honour's decision does not accord with the principles of vicarious liability and specifically s 3 of the *Employees Liability Act 1991* (NSW). This submission was not made to the Magistrate in the Local Court.

33 On appeal, counsel for the Owners drew this Court's attention to *University of Wollongong v Metwally (No 2)* (1985) 59 ALJR 481 ("*Metwally*"). *Metwally* established that a party is bound by the conduct of its case and, except in exceptional

circumstances, may not after the case has been decided adversely, raise a new argument which, whether deliberately or by inadvertence, was not put during the hearing when there was an opportunity to do so.

34 Dix Gardner and Dix submitted that the Owners did not avail themselves of the opportunity to make any such argument in their written submissions. The Owners say that the Local Court transcript does show that an argument as to whether Dix Gardner or Dix should not be liable was raised at the hearing. The Owners submitted that in those circumstances, there is some difficulty in contending that her Honour made an error of law in determining this issue where there was no argument put to her Honour.

35 I have read the opening addresses by the parties and their written submissions on liability. The Owners did mention the liability of Dix Gardner and Dix when they submitted that either Dix Gardner or Dix was retained as a private certifier to carry out the certification of the building of the development for the purposes of the *Environmental Planning and Assessment Act*.

36 In the absence of any submissions by Dix Gardner and Dix on this issue and taking into account the short opening submissions by the Owners, her Honour was entitled to make a finding that Dix Gardner and Dix were jointly and severally liable.

Failure to give reasons

37 The next issue is whether her Honour failed to give reasons. This issue arises here and in appeal grounds 2, 3, 4 and 9, in relation to different topics.

38 It is not in dispute that a Magistrate is obliged to provide adequate reasons and to not do so may constitute an error of law.

39 In *Stoker v Adecco Gemvale Constructions Pty Ltd* [2004] NSWCA 449 Santow JA at [41] said that:

> "[i]t is sufficient if the reasons adequately reveal the basis of the decision, expressing the specific findings that are critical to the determination of the proceedings."

40 However, in *Pollard v RRR Corporation Pty Limited* [2009] NSWCA 110, McColl JA (with whom Ipp JA and Bryson AJA agreed) stated at [58]:

> "The extent and the content of reasons will depend upon the particular case under consideration and the matters in issue:… While a judge is not obliged to spell out every detail of the process of reasoning to a finding…, it is essential to expose the reasons for resolving a point critical to the contest between the parties." (References omitted).

41 In *Beale v Government Insurance Office (NSW)* (1997) 48 NSWLR 430 ("*Beale*"), Meagher JA at 442 stated:

> "A failure to provide sufficient reasons can and often does lead to a real sense of grievance that a party does not know or understand why the decision was made: *Re Poyser and Mills Arbitration* [1964] 2 QB 467 at 478. This court has previously accepted the proposition that a judge is bound to expose his reasoning in sufficient detail to enable a losing party to understand why it lost". (References omitted).

42 In *Soulemezis v Dudley (Holdings) Pty Limited* (1987) 10 NSWLR 247, McHugh JA stated at 281:

> "In a case where a right of appeal is given only in respect of a question of law, different considerations apply from the case where there is a full appeal. An ultimate finding of fact, which is not subject to appeal and which is in no way dependent upon the application of a legal standard, can be treated less elaborately than an issue involving a question of law or mixed fact and law. If no right of appeal is given against findings of fact, a failure to state the basis of even a crucial finding of fact, if it involves no legal standard, will only constitute an error of law if the failure can be characterised as a breach of the principle that justice must be seen to be done. If, for example, the only issue before a court is whether the plaintiff sustained injury by falling over, a simple finding that he fell or sustained injury would be enough, if the decision turned simply on the plaintiff's credibility. But, if, in addition to the issue of credibility, other matters were relied on as going to the probability or improbability of the plaintiff's case, such a simple finding would not be enough."

43 Finally, in *Whalan v Kogarah Municipal Council* [2007] NSWCA 5, the Court of Appeal (Mason P, Ipp and Tobias JJA) stated at [1]:

> "The authorities that govern judges' duties to give reasons are, or should be, permanently engraved in the minds of all judicial officers. These duties are designed to ensure that a judge wrestles adequately with the issues in the case, to enable appellate accountability and to provide basic fairness to the losing party."

44 Once again, bearing in mind Dix Gardner and Dix did not make any submissions as to joint and several liability, I am of the view that her Honour provided adequate reasons as to why both Dix Gardner and Dix were jointly and severally liable when she stated:

> "Lyall Dix, the person, was always shown in documents as the principal certifying authority. His evidence is that a company cannot be authorised under the Act, it must be an individual. The company Dix Gardner Pty Ltd was always shown on the letterhead of all correspondence. The top right-hand corner of the stationery heralds the company as, "Building certifiers, strata plan certifiers building regulation consultants, fire safety consultants." The second defendant is a director of that company.
>
> Having said that, the challenge of the first defendant's position was only lightly touched on in the defendant's opening submission.
>
> DEFENDANTS 1 AND 2 ARE JOINTLY AND SEVERALLY LIABLE FOR THE LOSS TO THE PLAINTIFFS, THEREFORE THERE IS JUDGMENT FOR THE PLAINTIFF." (J6.30-43-16/04/2015).

45 Her Honour based her finding on relevant indicia such as the fact that the *Environment Planning and Assessment Act* required an individual to be named as principal certifying authority and the fact that Mr Dix was a director of Dix Gardner and issued all correspondence using the Dix Gardner Pty Ltd letterhead. In the context of limited submissions on the part of Dix Gardner and Dix on this issue, it was open to her Honour to make the finding that Dix and Dix Gardner and Dix were jointly and severally liable. Both these grounds of appeal fail.

Appeal ground 7 – Do Dix Gardner and Dix owe a duty of care to the Owners?

46 This is the most difficult issue raised on appeal. Appeal ground 7 is whether her Honour should have found that Dix Gardner and Dix did not owe the Owners a duty of care, were not negligent or otherwise liable in damages.

47 The Owners at paragraphs [18] to [20] of the Statement of Claim set out a detailed pleading in relation to duty of care. It refers to reliance and vulnerability. These paragraphs read:

"18. It was an implied term of the Certifier's Retainer that the First Defendant or alternatively the Second Defendant would carry out the Certifier's services with reasonable care, skill and diligence to the standard of a reasonably competent Certifier in issuing the Interim Occupation Certificate and/or the Final Occupation Certificate so as to ensure that the various elements of the Building Work were complete and suitable for occupation or use in accordance with the appropriate classification of the building under the BCA.

Particulars

a. The term is implied as a matter of legal principle.

19. At all material times, the First Defendant or alternatively the Second Defendant knew or ought reasonably to have known that the Developer was vulnerable to the acts or omissions of the First Defendant or alternatively the Second Defendant by reason of the following facts and matters:

a. The Developer relied on it to carry out the Certifier's Services with the exercise of due care, skill and expertise;

b. The Developer would not be able to detect or become aware of any negligence in the performance by the First Defendant or alternatively the Second Defendant of the Certifier's Services until the results of such negligent performance became manifest in the Building Work;

c. The Developer would not be able to detect or require the rectification of any such defective Building Work resulting from performance of the Certifier's Services that was concealed and otherwise not manifest or which by its nature would not become manifest until the effluxion of time;

d. By operation of the *Home Building Act 1989* (NSW) the Developer would become liable to the Plaintiff for any defects in the Building Work following registration of the Strata Plan;

e. Failure by the First Defendant or alternatively the Second Defendant to carry out the Certifier's Services with the exercise of due care, skill and expertise would or would be likely to cause loss and damage to the Developer and to its successors in title, including the Plaintiff.

20. In the premises and further as a result of its status as a professional engaged by or on behalf of the Developer, at all material times the First Defendant or alternatively the Second Defendant owed the Developer a duty to carry out the Certifier's Services with reasonable care, skill and diligence to the standard of a reasonably competent Certifier in issuing the Interim Occupation Certificate and/or the Final Occupation Certificate so as to ensure [that] various elements of the Building Work were complete and suitable for occupation and use in accordance with the appropriate classification of the building under the BCA.

…

Particulars of Breach of Duty of Care - Acoustic Seals to Windows

g. The acoustic seals to the windows were not suitable for occupation or use in accordance with the applicable standards and in accordance with the appropriate classification of the building under the BCA;

h. It was a condition of the Development Consent No. 909/2003 at Condition 84 that a report from a qualified acoustic consultant demonstrating compliance with the noise criteria must be submitted to the First Defendant or alternatively the Second Defendant before the issue of the Interim Occupation Certificate and/or the Final Occupation Certificate. The First Defendant and/or the Second Defendant failed to identify and/or failed to action the recommendations of Vipac Engineers & Scientists Ltd ACN 005 453 627 contained within the Acoustic Compliance Test Report dated 1 May 2009 that the acoustic seals needed to be replaced on all glazing and to ensure that window/frames had been installed correctly, are airtight and gap free and in failing to do so, issued an Interim Occupation Certificate and/or Final Occupation Certificate in circumstances where one should not have been issued."

48

The Owners submitted that when both parties were given the opportunity to lodge written submissions after the hearing in the Local Court, Dix Gardner and Dix chose to only submit one relevant paragraph stating that they "do not concede that a duty of care exists." According to Dix Gardner, the Owners made no submissions about the "correct criteria", did not provide an "examination of the relationship of the parties" and made no submissions in relation to whether the Owners were vulnerable. The Owners submitted that in the circumstances it is not surprising that the Magistrate did not provide detailed reasons on the issue of duty of care. Once again, the Owners submitted that it is not now open to Dix Gardner and Dix to raise on appeal arguments which they failed to advance before the Magistrate, or contend that the Magistrate made errors of law in those terms.

(i) Does the *Civil Liability Act* apply?

49 The first issue that arises is whether Part 5 of the *Civil Liability Act* applies. On appeal Dix Gardner and Dix argued that ss 41 and 43 of the *Civil Liability Act* applied and that Mr Dix was performing a public function as a principal certifying officer.

50 The Magistrate referred to Part 5, ss 41 and 43 of the *Civil Liability Act*. Section 41 of the *Civil Liability Act* relates to definitions and s 43 relates to breach of statutory duty in proceedings against public or other authorities. They read:

> "**41 Definitions**
>
> In this Part:
>
> "**exercise**" a function includes perform a duty.
>
> "**function**" includes a power, authority or duty.
>
> "**public or other authority**" means:
>
> (a) …
>
> (b) …
>
> (c) …
>
> (d) a local council, or
>
> (e) any public or local authority constituted by or under an Act, or
>
> (e1) any person having public official functions or acting in a public official capacity (whether or not employed as a public official), but only in relation to the exercise of the person's public official functions, or
>
> (f) a person or body prescribed (or of a class prescribed) by the regulations as an authority to which this Part applies (in respect of all or specified functions), or
>
> (g) any person or body in respect of the exercise of public or other functions of a class prescribed by the regulations for the purposes of this Part.
>
> **43 Proceedings against public or other authorities based on breach of statutory duty**
>
> (1) This section applies to proceedings for civil liability to which this Part applies to the extent that the liability is based on a breach of a statutory duty by a public or other authority in connection with the exercise of or a failure to exercise a function of the authority.
>
> (2) For the purposes of any such proceedings, an act or omission of the authority does not constitute a breach of statutory duty unless the act or omission was in the circumstances so unreasonable that no authority having the functions of the authority in

question could properly consider the act or omission to be a reasonable exercise of its functions.

(3) In the case of a function of a public or other authority to prohibit or regulate an activity, this section applies in addition to section 44."

51 On this topic, her Honour stated:

> "Does the *Civil Liability Act* apply? The defendant stated that Mr Lyall Dix, as the principal certifying authority, was performing a public function and is a public authority. I do not accept this claim. Mr Lyall Dix was paid a retainer at the beginning of his tenure with the builder and/or developer. He provides a paid service to those who engaged him. The *Environmental Planning and Assessment Act* also distinguishes at s 109D a consent authority, council, or accredited certifier.
>
> He did not have a public official function to perform, nor did he act in a public official capacity. He was not exercising a public official function. When considering the s 41 definition of function, he had no public power, no public authority and was not performing a public duty. His role is not prescribed for that purpose by the regulations. Therefore the *Civil Liability Act* does not apply. This claim is to be considered under the *Environmental Planning and Assessment Act 1979* and condition 84 of the compliance provision of the development consent." (J4.25-40 – 16/04/2015)

52 Whether Part 5 of the *Civil Liability Act* is applicable depends upon on consideration of the relevant sections of the *Environmental Planning and Assessment Act*. I will examine these latter provisions prior to making such a determination.

Relevant provisions of *Environmental Planning and Assessment Act*

53 The relevant provisions of the *Environmental Planning and Assessment Act* are ss 109C, 109D, 109 E and 109 H.

54 They relevantly read:

> "**109C Part 4A certificates**
>
> (1) The following certificates (known collectively as "**Part 4A certificates**") may be issued for the purposes of this Part:
>
> …
>
> (c) an "**occupation certificate**", being a certificate that authorises:
>
> (i) the occupations and use of a new building, or
>
> (ii) a change of building use for an existing building,
>
> …
>
> (2) An occupation certificate:
>
> (a) may be an interim certificate or a final certificate, and
>
> (b) may be issued for the whole or any part of a building.
>
> …
>
> **109D Certifying authorities**
>
> (1) Subject to subsections (2) and (3), the following kinds of Part 4A certificate may be issued by the following kinds of persons:
>
> …
>
> (c) an occupation certificate may be issued by a consent authority, the council or an accredited certifier,
>
> …

(2) An occupation certificate must not be issued to authorise a person to commence occupation or use of a new building except by the principal certifying authority appointed for the erection of the building.

…

109E Principal certifying authorities

(1) The person having the benefit of a development consent or complying development certificate for development:

> (a) is to appoint a principal certifying authority in respect of building work involved in the development and a principal certifying authority in respect of subdivision work involved in the development, and
>
> (b) may appoint only the consent authority, the council or an accredited certifier as the principal certifying authority for the building work or subdivision work, and
>
> (c) may appoint the same principal certifying authority for both types of work or different certifying authorities.

…

(3) A principal certifying authority for building work or subdivision work to be carried out on a site is required to be satisfied:

> …
>
> (e) that any preconditions required by a development consent or complying development certificate to be met for the work before the issue of an occupation certificate or subdivision certificate have been met, before the principal certifying authority issues the occupation certificate or subdivision certificate."

109H Restrictions on issue of occupation certificates

(1) There are two kinds of occupation certificates, as follows:

> (a) an "**interim occupation certificate**" that authorises a person to commence occupation or use of a partially completed new building, or to commence a new use of part of a building resulting from a change of building use for an existing building,
>
> (b) a "**final occupation certificate**" that authorises a person to commence occupation or use of a new building, or to commence a new use of a building resulting from a change of building use for an existing building.

It is not necessary for an interim occupation certificate to be issued before a final occupation certificate is issued with respect to the same building.

(2) An occupation certificate must not be issued unless any preconditions to the issue of the certificate that are specified in a development consent or complying development certificate, or any requirements of a planning agreement referred to in section 93F that, by its terms, are required to be complied with before such a certificate is issued, have been met.

…

(6) A final occupation certificate must not be issued to authorise a person to commence a new use of a building resulting from a change of a building use for an existing building unless:

> (a) a development consent or complying development certificate is in force with respect to the change of building use, and
>
> (b) the building is suitable for occupation or use in accordance with its classification under the *Building Code of Australia,* and
>
> (c) such other matters are required by the regulations to be complied with before such a certificate may be issued have been complied with.

…"

55 Also, Condition 84 of the development consent concerning noise criteria states:

> "A report from a qualified acoustical consultant demonstrating compliance with the above noise criteria must be submitted to the principal certifying authority and the council if the council is not the principal certifying authority."

56 Counsel for Dix and Dix Gardner submitted that the activities that they carried out under Part 4A of the *Environmental Planning and Assessment Act* meant that they were "public or other authorities" under Part 5 of the *Civil Liability Act* (s 41(e1)). Council for the Owners submitted that, while there is not yet authority for whether or not a privately employed principal certifying authority under part 4A of the *Environment Planning and Assessment Act* is a "public or other authority", under part 5 of the *Civil Liability Act*, the circumstances of the introduction of s 41(e1) suggests that the legislature did not have activities such as those carried out by Mr Dix in mind.

57 Section 41(e1) was introduced in 2003, in response to the decision of Adams J in *Presland v Hunter Area Health Service* [2003] NSWSC 754. In *Presland* a psychiatrist conferred with the power to detain mentally ill persons under the *Mental Health Act 1990* (NSW) was held liable in damages to a patient who was discharged from hospital by the psychiatrist and six hours later after discharge, killed his brother's fiancé.

58 Counsel for the Owners sought to distinguish between "very difficult decisions [in which] doctors as well as other decision-makers must be able to use their statutory discretion without the fear of litigation hanging over them" (see Hansard, Legislative Assembly, 13 November 2003, p 4992) and the present factual situation. The Owners submitted that "certification services for reward, although performing statutory functions, is not required to exercise any type of discretion that involves consideration of factors of a public nature. He or she simply determines whether or not certain proposed building work will comply with the law and whether or not certain matters have been satisfied in respect of that building work."

59 It is correct to say that Mr Dix's role under the *Environmental Planning and Assessment Act* did not involve the exercise of a finely balanced discretion with public policy implications. His primary duty was to ensure that prior to the issue of the final occupation certificate, certain mandatory and easily ascertainable prerequisites were met. In relation to the acoustic certification, there was no discretion to be exercised by him. He undertook to discharge a duty and then failed to do so. In these circumstances, it is not necessary to decide whether Mr Dix is a "public or other authority" under the *Civil Liability Act*.

60 It is my view that the Magistrate determined this issue under the correct legislation, namely, Part 4 of the *Environmental Planning and Assessment Act* together with Condition 84 of the compliance provision of the development consent. It is worth noting that this legislation was also applied in *Chan v Acres* [2015] NSWSC 1885 ("*Chan*") which involved a certifying officer and is discussed under the next heading.

Duty of care to a subsequent purchaser

61

The next issue is whether a principal certifying officer owes a duty of care to a subsequent purchaser. In the Local Court, her Honour was asked to consider *Moorabool Shire Council v Taitapanui* (2006) 14 VR 55 ("*Moorabool"*) by the Owners and *Sydney Water v Asset Geotechnical Engineering* [2013] NSWSC 1274 ("*Sydney Water"*) by Dix Gardner and Dix. On appeal, more recent cases including *Brookfield Multiplex Ltd v Owners Corp Strata Plan 61288* [2014] HCA 36 ("*Brookfield"*) and *Chan,* which have been provided to me, were not provided to the Magistrate in the Local Court.

62 The Magistrate's reasons as to whether a principal certifying officer owes a duty of care to a subsequent purchaser, are as follows:

> "Is a duty of care owed to a subsequent purchaser? It is clear there was no contract between the strata owners of plan 82053 and the principal certifying authority, Mr Lyall Dix, or Dix Gardner Pty Ltd. These townhouses were built to on sell. It was to be expected that the strata plan would be registered and ownership of the units would pass to others. I accept the plaintiff's claim that in considering the Court of Appeal in *Moorabool*, in reaching the conclusion that a duty was owed, placed importance on the fact that the building surveyor in that instance was acting in a private capacity and performed the functions for remuneration and financial advantage, as did the defendants.
>
> I am not persuaded by the defendant's reliance on *Sydney Water v Asset Geotechnical Engineering & Others* because it deals with a duty of care relating to councils. In *Moorabool* we are concerned with a private principal certifying authority. I am satisfied, even though the authorities are scant, given the decision in the Victorian Court of Appeal in *Moorabool Shire Council v Taitapanui* that owners of Strata Plan 82053 were always vulnerable when purchasing the development. The units builder and developer are no longer in business.
>
> At the time of purchase the building was not suitable for occupation as the occupation certificates were not properly issued. The plaintiff was purchasing a flawed investment. Two expert witnesses express different opinions as to the extent the PCA should undertake inspection or inquiries to ensure compliance. It is accepted by this Court, and in fact it is provided for in the Act, that the PCA can rely on certificates from other experts. The Court accepts that PCAs are usually generalists and cannot be expected to have expert knowledge on all aspects of building.
>
> The Court accepts that some items will be difficult to inspect, such as wiring, where certificates will be supplied to satisfy the compliance requirements. This case is different and whilst the Court expresses its gratitude to have heard from the expert it was a simple requirement of condition 84 that was abandoned and has subsequently caused the plaintiff substantial problems.
>
> A PCA exercising reasonable care, skill, and diligence, would have ensured the acoustic compliance certificate was submitted to the council, and indeed seen by him prior to issuing the final occupational certificate." (J4.42-50; J5.1-30 - 16/04/2015).

63 Thus, her Honour was satisfied that the Owners were "always vulnerable when purchasing the development". She accepted that some items would be difficult to inspect, such as where a certificate would be supplied to satisfy the compliance requirements. Her Honour decided that a principal certifying officer exercising reasonable care, skill and diligence, would have ensured the acoustic compliance certificate was submitted to the Council and was seen by him prior to issuing the final occupational certificate. In essence, the Magistrate analysed vulnerability as set out in *Moorabool* and applied it to the Owners factual situation.

Submissions on Magistrate's findings

64 *Moorabool* was an appeal to the Victorian Court of Appeal by a subsequent purchaser in relation to the incorrect issuing of a building permit by a certifier privately employed by the relevant council. The appeal in *Moorabool* raised issues of pure economic loss and consequential economic loss following the partial collapse of a dwelling due to structural flaws. *Moorabool* analysed the duty of care imposed by the Victorian statutory scheme. The majority in *Moorabool* per Maxwell P, Ormiston and Ashley JJA decided that the private certifier employed by the council did owe a duty to the subsequent purchaser.

65 On appeal, Dix Gardner and Dix submitted that her Honour erred in relying on *Moorabool* and arriving at the decision that Dix Gardner and Dix owed the Owners a duty of care. They contended that the decision in *Moorabool* was decided largely based on reasons specific to the Victorian legislative scheme and this meant it was not relevant to the present case.

66 The Owners submitted that it was open to her Honour to apply *Moorabool* because it answered the relevant question of whether an independent person who inspects and certifies building work pursuant to a statutory scheme but privately for reward, owes a duty to avoid pure economic loss to a subsequent owner. The Owners accept that in *Moorabool* the particular statutory scheme in operation was found to be a critical salient feature. They submitted that the relevant New South Wales statutory scheme is similar so as to support an argument for the decision in *Moorabool* being followed in the present case.

67 The Owners' argument does not accord with the view of McDougall J in *Chan* where his Honour stated at [129] and [132]:

> "129 …in my view, the ultimate decision in that case [*Moorabool*] depended very substantially on particular features of Victorian legislation which are not found in equivalent legislation in this State [NSW]. …
>
> …
>
> 132 …in my respectful view, the decision in *Moorabool* is of little assistance in this case."

68 In *Sydney Water,* the plaintiff successfully claimed damages for property damage suffered when a boat shed, built by one of the defendants and certified as safe in geotechnical terms by another of the defendants, caused a sewer main to burst. Campbell J held that Sydney Water was owed a duty in relation to damage to property rather than to pure economic loss. I agree with the Magistrate that this case does not assist the resolution of the issue of duty of care to a subsequent purchaser for damages of pure economic loss.

Brookfield

69 *Brookfield* involved serviced apartments, which were part of a commercial/residential development that were built under a design and construct contract and sold to investors. The contract between the builder and the developer contained significant protections such as indemnity clauses and requirements that the builder obtain

insurance. The contract between the developer and the subsequent owners also contained protective clauses including a clause relating to quality of materials and a clause providing for the rectification of defects.

70 The principal question was whether Brookfield, the builder, owed the Owners Corporation, as a subsequent purchaser, a duty of care to exercise reasonable care in the construction of the building to avoid causing the Owners Corporation to suffer pure economic loss. The High Court unanimously found that the builder was not liable to the subsequent owners for flaws in the building because:

> "The nature and content of the contractual arrangements, including detailed provisions for dealing with and limiting defects liability, the sophistication of the parties and the relationship of [the developer] to the Corporation all militate against the existence of the asserted duty of care to either [the developer] or the Corporation" (French CJ at [3]).

71 In *Brookfield*, Kiefel and Hayne JJ considered that both the developer and purchaser of the lot would be reliant on the builder to do the work properly but stated at [56] and [57]:

> "It may be assumed, without deciding, that the developer and the purchaser of a lot from the developer relied on the builder to do its work properly. The purchaser of a lot could not check the quality of the builder's work as it was being done. Perhaps the developer was in no different position. ….The Owners Corporation was in no better position to check the quality of the builder's work as it was being done than the original purchaser of a lot. Because these parties could not check the quality of what the builder was doing, it can easily be said that each relied on the builder to do its work properly.
>
> Reliance, in the sense just described, may be a necessary element in demonstrating vulnerability but it is not a sufficient element. As noted earlier, vulnerability is concerned with a plaintiff's inability to protect itself from the defendant's want of reasonable care, either entirely or at least in a way which would cast the consequences of loss on the defendant."

72 In determining whether a party was vulnerable, *Brookfield* considers known reliance and an assumption of responsibility. Crennan Bell and Keane JJ stated at [150]:

> "…There is no basis for a finding of fact that there was an assumption of responsibility by the appellant in favour of the respondent, or known reliance on the appellant on the part of the respondent, in relation to the quality of the common property of the serviced apartment complex. Further, an owners corporation acquires the common property in a strata scheme without any outlay on its part. Its assets are not diminished by the acquisition, at least if the common property is worth more than the cost of repairing latent defects (and there is no suggestion here that the common property is worth less than the cost of repair). Accordingly, if one considers the owners corporation independently of the individual lot owners, it is impossible to see that it has suffered any loss by reason of the quality of the common property vested in it."

73 In determining whether a party was vulnerable, the judgment of *Brookfield* considers known reliance and an assumption of responsibility. French CJ noted at [22] that "special cases would commonly, but not necessarily, involve an identified element of known reliance or dependence on the part of the plaintiff, or the assumption of responsibility by the defendant, or a combination of the two."

Chan

74 In *Chan,* the plaintiffs, Ms Chan and Mr Cox purchased a house in Wahroonga from the first defendant Mr Acres. The property was found to have been defectively renovated. The plaintiffs alleged that the Council breached a common law duty of care in its

capacity as principal certifying authority, in respect of inspections and certifications given by a council building surveyor and in respect of the occupation certificate issued by the Council. The facts in *Chan* are more analogous with the facts in this appeal.

75 In *Chan*, McDougall J discussed reliance. His Honour stated at [125], [145]-[148]:

> "[125] To my mind, the reasoning in *Brookfield* shows that, in determining whether to impose a common law duty of care to avoid pure economic loss, in facts for which there is no precise authority (that is, where the precise duty of care has not been recognised in decided cases), the Court must look at the relevant features of the relationship between the plaintiff and the defendant. An essential feature is that the plaintiff must be shown to have been "vulnerable" in the sense explained. Reliance on the defendant, and knowledge by the defendant of that reliance, will be at least an important, and perhaps a necessary, condition of vulnerability.
>
> [145] In *Perre v Apand Pty Ltd* [1999] HCA 36; (1999) 198 CLR 180, McHugh J considered "concepts of reliance and assumption of responsibility" at [124] and following. His Honour said at [124] that neither was either necessary or sufficient to justify the imposition of a duty of care to avoid economic loss. He referred to the plurality judgment in *Bryan at* 619, and to the judgment of Deane J in *Hawkins v Clayton* (1988) 164 CLR 539 at 576. McHugh J said (at [124] of *Perre*) that:
>
> > Like proximity, reliance and assumption of responsibility are neither necessary nor sufficient to found a duty of care.
>
> [146] McHugh J said at [125], [126] that reliance and assumption of responsibility were indicators of vulnerability, and that it was vulnerability rather than its evidentiary indicators which determined whether a duty of care exists. However, his Honour said (at [126]), in some circumstances "reasonable reliance" could show that the plaintiff was relevantly vulnerable. I set out those paragraphs:
>
> > [125] In my view, reliance and assumption of responsibility are merely indicators of the plaintiff's vulnerability to harm from the defendant's conduct, and it is the concept of vulnerability rather than these evidentiary indicators which is the relevant criterion for determining whether a duty of care exists. The most explicit recognition of vulnerability as a possible common theme in cases of pure economic loss is found in the judgment of Toohey and Gaudron JJ in *Esanda Finance Corporation Ltd v Peat Marwick Hungerfords.*
> >
> > [126] Reliance may therefore be seen – for the purposes of duty of care – as an indicator of vulnerability: the plaintiff is specially vulnerable to the words and/or conduct of the defendant because he or she relied on the defendant. Reliance may also, of course, be relevant to causation. In terms of duty of care, however, it is not reliance that is relevant, but its consequence, vulnerability. That is so, even though in certain situations "reasonable reliance" will be the appropriate test for determining whether the plaintiff was vulnerably exposed to harm from the defendant's acts or omissions.
>
> [147] To similar effect, Meagher JA (with whom Leeming JA agreed) said in *Dansar Pty Ltd v Byron Shire Council* (2014) 89 NSWLR 1 at [172] that known reliance may indicate vulnerability:
>
> > The presence of reliance is also an indication of "vulnerability" as that notion is understood: *Perre* at [10] (Gleeson CJ); *Woolcock* at [24] (Gleeson CJ, Gummow, Hayne and Heydon JJ). The vulnerability arises because of the recipient's known reliance on the defendant as the source of advice or information.
>
> [148] The decision of the High Court in *Caltex Oil (Australia) Pty Ltd v The Dredge "Willemstad"* [1976] HCA 65; (1976) 136 CLR 529 would seem to show also that neither reliance nor assumption of responsibility is a necessary condition for the imposition of a common law duty of care. The majority in that case (Gibbs, Stephen and Mason JJ, in separate reasons) concluded that the defendants did owe a duty of care to the plaintiff to avoid causing it economic loss. There was no question in that case of the defendants' having assumed responsibility to protect the plaintiff's interests. Nor was there any question of the plaintiff's having relied on the defendants to protect its economic interests."

76 In *Chan* McDougall J analysed the relationship between the Council, the principal certifying officer and the plaintiffs. His Honour concluded at [360], [361], [371] and [373].

> "[360] In the case of the Council…it is in my view clear that there was both the expectation of reliance (i.e. the Council, through the certifier, knew or understood that prospective purchasers would rely on the occupation certificate) and actual reliance…It is plain from the evidence of the certifier that the Council knew of the likelihood of that reliance. In those circumstances, it is easy to infer, and I do, that the Council, knowing that intending purchasers would rely on its work as summarised in occupation certificates, assumed the responsibility of certifying accurately…
>
> [361] When one considers in their totality the matters that I have canvassed above, it seems to me to be strongly arguable that the plaintiffs were relevantly vulnerable….
>
> [371] The *"Brookfield"* cases concerned a builder and a subsequent owner. *Woolcock Street* concerned an engineer and a subsequent owner. The salient features of the relationships exposed in those cases did not include any equivalent of the features of the relationship between the Council and the plaintiffs that I have referred to above. Specifically, they did not include the features of known reliance and assumption of responsibility…
>
> [373] I conclude that the Council, in its capacity as PCA, did owe to the plaintiffs a duty to use reasonable care in performing its critical stage inspections, and in issuing the final occupation certificate…."

77 This current case on appeal does not appear to fall into an established category. The salient features such as "vulnerability" will be relevant to the determination of a duty of care.

78 The Owners consist of persons who have purchased one or more of the (over) 28 apartments. On the facts pleaded, they are not commercial entities as was the case in *Brookfield* and *Woolcock Street*. Nor are they lone purchasers of domestic dwellings as was the case in *Chan*. Thus, the key question in a potentially novel case such as this is, did the Owners fall into a class of persons who "were not able to protect themselves" from the conduct of Dix and Dix Gardner? (*Brookfield* at [169]).

79 In the present case, the Magistrate considered whether the Owners were vulnerable. It is clear that in circumstances where the principal certifying authority signed a final compliance certificate, either knowing there were acoustic rectifications outstanding, or that the Vipac report was outstanding, he put the Owners in a position where they were vulnerable. Despite being an owner's corporation rather than an individual purchaser, each owner could not reasonably have been expected to look behind the occupation certificate at the time of purchase in order to determine whether it was properly issued. In my view, the Magistrate's reasons, while minimal, were sufficient as they adequately reveal the basis of her decision and expressed findings that are critical to the determination of the proceedings. Her Honour gave reasons that were sufficient to establish a duty of care and a breach of duty of care by Dix Gardner and Dix. Hence, this ground of appeal fails.

Appeal grounds 2, 3 and 9 – apportionment and proportionality

80

Grounds of appeal 2 and 3 are that the Magistrate erred in her decision by failing to give consideration and failing to give reasons as to why Dix Gardner and Dix's apportionment arguments were unsuccessful.

81 Section 35 of the *Civil Liability Act* reads:

> "**35 Proportionate liability for apportionable claims**
>
> (1) In any proceedings involving an apportionable claim:
>
> (a) the liability of a defendant who is a concurrent wrongdoer in relation to that claim is limited to an amount reflecting that proportion of the damage or loss claimed that the court considers just having regard to the extent of the defendant's responsibility for the damage or loss, and
>
> (b) the court may give judgment against the defendant for not more than that amount.
>
> (2) If the proceedings involve both an apportionable claim and a claim that is not an apportionable claim:
>
> (a) liability for the apportionable claim is to be determined in accordance with the provisions of this Part, and
>
> (b) liability for the other claim is to be determined in accordance with the legal rules, if any, that (apart from this Part) are relevant.
>
> (3) In apportioning responsibility between defendants in the proceedings:
>
> (a) the court is to exclude that proportion of the damage or loss in relation to which the plaintiff is contributorily negligent under any relevant law, and
>
> (b) the court may have regard to the comparative responsibility of any concurrent wrongdoer who is not a party to the proceedings.
>
> (4) This section applies in proceedings involving an apportionable claim whether or not all concurrent wrongdoers are parties to the proceedings.
>
> (5) A reference in this Part to a defendant in proceedings includes any person joined as a defendant or other party in the proceedings (except as a plaintiff) whether joined under this Part, under rules of court or otherwise."

82 In both the defence and amended defence at [9] Dix Gardner and Dix pleaded that "the claim made an apportionment claim pursuant to s 34 of the *Civil Liability Act* and the Defendants nominated Drumalbyn Apartments Pty Limited and Ferro Constructions Pty Limited as concurrent wrongdoers."

83 I accept that Dix Gardner and Dix raised the issue of apportionment under Part 4 of the *Civil liability Act* in both their defence dated 16 August 2013 and their amended defence dated 8 November 2013, in oral submissions at hearing on 2 September 2014, in their primary submissions dated 23 September 2014 at [50] to [60], their further submissions as to quantum dated 13 October 2015 at [17] to [21] and again in their oral submissions on 13 November 2015. Counsel for Dix Gardner and Dix submitted that the Owners made a brief submission in relation to the topic of apportionment and made lengthier submissions on the topic of proportionality and that the Magistrate said nothing as to apportionment and moved on to assessing quantum. Both Dix Gardner and Dix submitted that the Magistrate failed to give any consideration to their apportionment argument and failed to give any reasons as to why their arguments were unsuccessful.

84

Ground 9 is in relation to proportionality. Senior counsel for the Dix Gardner and Dix submitted that had if the Magistrate applied the proportionality provisions of Part 4 of the *Civil Liability Act,* her Honour would have held that, their liability was nil or some negligible percentage. Dix Gardner and Dix submitted that this is a matter where it is alleged that they were negligent for failing to ensure conditions as to acoustic requirements were complied with prior to issuing a final occupancy certificate.

85 Both parties addressed the issue of proportionality at some length in their written submissions in the Local Court. They agree, as do I, that the Magistrate did not address the issue of proportionality. Her Honour did not provide any reasons on this topic. This is an error of law. To determine this issue, factual findings may need to be made. In these circumstances, this issue of proportionate liability is remitted to the Local Court to be determined according to law. There may only be a negligible apportionment as the Owners argue factual findings need to be made.

Appeal Grounds 5 and 8 – Damages and quantum and Grounds 1 and 2 of cross appeal

86 The first ground of the cross appeal is whether the Magistrate erred in law in concluding that the statement of claim filed by the Owners did not claim damages for the costs of replacing windows that had glass of incorrect thickness with windows with glass of correct thickness.

87 Grounds 2 and 3 of the cross appeal are that her Honour should have concluded that the damages in respect of that cost were sufficiently stated in and claimed by the Owners statement of claim for replacing windows that had glass of incorrect thickness with windows having glass of correct thickness The cost referred to in Ground 2 is the cost of replacing the windows with glass of incorrect thickness with glass of correct thickness.

88 On appeal, the Owners argued that it was clear from the evidence that their case was related not only to damages arising from the acoustic seals but also from certain windows having glass of incorrect thickness.

89 At the hearing Dix Gardner and Dix asserted that the Owners' statement of claim did not claim for the replacement of windows with incorrect thickness. (LC T 15.10-18)

90 On this topic the Magistrate stated:

> "The defendant asserts the statement of claim fails to claim for windows, that is, that some windows that do not comply to the requirements will be needed to be replaced to ensure soundproofing. I agree with the defendants claim. The plaintiff relies on the Vipac report throughout the pleadings and particulars to prove breach of duty and scope of rectification.
>
> Nowhere in that report is the thickness of windows mentioned… Whilst windows replacement has been considered in the rectification process, I do not accept that it has been sufficiently pleaded in the statement of claim, however I do not accept the defendant's assertion that the rectification claim far exceeds what is required for acoustic compliance. Windows and doors must be removed to accommodate new seals and in accordance with the Vipac recommendations to ensure they are properly fitted, flashing would need to be replaced." (J5.47-50, J6.1-15 - 16/04/2015).

91

The Magistrate in her decision on liability dated 16 April 2015 agreed that the Owners failed to properly plead window thickness in its statement of claim. This portion of the claim relating to replacing windows which had been installed that were of a narrower thickness than the glass (10.38 mm thickness) that was meant to be installed affected five units. The Magistrate did not award damages which is consistent with her ruling that this part of the claim for damages was not properly pleaded. It should be noted the Owners could have sought to amend the statement of claim to include a claim for the incorrect thickness of the glass in the windows but it did not do so. In my view the Magistrate was entitled to make this finding. There is no error of law.

92 **Appeal ground 5 is that the Magistrate erred in law in her decision dated 13 November 2015 as her assessment of quantum had no evidentiary basis. Appeal ground 8 is whether her Honour should have found that the Owners failed to prove its case as to quantum.**

93 The damages claimed in the statement of claim are as follows:

> "26. As a result of the First Defendant and/or the Second Defendant's breach of duty of care, the Plaintiff has suffered loss and damage.
>
> **Particulars of Loss and Damage**
>
> a. Rectification costs, being the accepted tender of Biltbeta Constructions Pty Limited with respect to the acoustic seals to windows;
>
> b. Investigation and assessment costs; and
>
> c. Alternatively, loss of value of the Property."

94 Biltbeta Pty Ltd ("Biltbeta") was engaged by the Owner's insurance company to inspect the property and provide tender quotations. Biltbeta submitted a tender quotation for $73,080 for the relevant defects and scope of rectification works in respect of "Acoustic Rating and sound insulation."

95 The Owners submitted that where four independent builders provided quotes in respect of the rectification work for the acoustics in excess of $70,000 in circumstances where those quotes were not given under the shadow of or in contemplation of proceedings, that evidence as to cost should be accepted.

96 On appeal Dix Gardner and Dix submitted that firstly, the Owners failed to properly quantify their damages claiming that the only quantification of damages is that of Mr Goodwin's who puts the remedial work at $15,000; and secondly, that the Owners failed to give the Court a schedule to allow the Magistrate to make a deduction on an evidentiary basis and her Honour relied on a figure that was plucked from the air.

97 As the Magistrate did not allow damages for the incorrect thickness of the glass to be pleaded, the Owners claim of $73,080 needed to be reduced in order to take into account this deduction.

98 Dix Gardner and Dix have interpreted that the Magistrate's decision regarding the thickness of the windows to mean that the damages that should have been awarded were only for the cost of the seals. However, during the judgment regarding quantum,

her Honour clarified that for the seals to be properly replaced the windows still needed to be taken out. At T 3.31-44 on 13 November 2015, the following exchange took place:

> "FRANGOS: It was the defendant's interpretation of the judgment, and which may incorrect now, that given that window thickness was insufficiently, pleaded, that all the work that had to be done in relation to taking those windows out and replacing them had to be done despite the negligence of the defendant, and that the plaintiff is aiming to be put in a position not but for the negligence of the defendant so give that work had to be done in any event, in the defendant's view, due to that insufficiency of pleading, that it was only the seals that was the cost to be owned by the defendant.
>
> HER HONOUR: That was not the intent of the judgment. Those seals to be properly replaced, the windows have to be taken out. There are other issues regarding sealing and also repair work, so no, it's only to do with the cost of the glazing, so you can't throw any light on that either."

99 On the topic of damages, the Magistrate continued:

> "Having regard to the submissions by the plaintiff and the defendant that I have received during the interim period when the matter was adjourned, I had hoped that there would be some more certainty with regards to what the costs of the replacing the windows with the proper thickness of glass would be. In my finding I spoke of the duty of care the defendant owed the plaintiff, I also said that the plaintiff was in a very vulnerable position, having purchased the building the way that they had and the fact that the builder was no longer in a position where they were a viable option to seek damages against.
>
> I also have regard to the evidence of Mr Harriman and Mr O'Mara, and the different reports that were prepared in relation to the scope of works that needed to be done in relation to the rectification of the faults that clearly I found were the responsibility of the defendant. The defendant has not acquitted themselves with regard to the matter that they say should reduce the claim against them, nor has the plaintiff. The plaintiff has given a ball park figure of $5,000 to $10,000, not based on anything specific but they think that that is a reasonable amount and I accept that for the purpose of dealing with it and doing the best I can with what I have got. That would be based on some understanding of the industry and what would be required as far as Mr Frangos' defendant's position is concerned. I am just asked to consider the reports, they have given no breakdown, nothing else to go on.
>
> Doing the best I can, there are five units that are affected this way. I think the appropriate reduction is $10,000, that allows $2,000 per unit. We are looking at sliding glass doors, we are looking, we are looking at replacing windows, and the costs of removing the windows is to be borne by the defendant because the defendant has to replace acoustic seals. I believe $10,000 is a reasonable amount in this instance so I adjust the claim accordingly."
>
> (J 7.29-50, J 8. 1-6 – 13/11/2015).

100 The Magistrate awarded the plaintiff $63,080 in damages plus interest from 7 December 2012. There was scant evidence as to the cost of the five windows that needed to be replaced. The Magistrate was entitled to rely on the report of damages. She was obliged to do the best she could in these circumstances. She had to make a deduction to reflect the cost of the replacement of five windows. She made that assessment and deducted the sum of $10,000. In my view she was entitled to do so. The Magistrate's reasons for her decision on damages are sufficient. There is no error of law.

Cross appeal - Grounds 3 and 4

101

Grounds 3 and 4 of the cross appeal are the same as grounds 1 and 2 of the cross appeal but expressed in slightly different ways. I have already dealt with these issues. For the reasons already given under cross appeal grounds 1 and 2 there is no error of law. Grounds 3 and 4 of cross appeal fail.

Cross appeal - Ground 5 and 6 – interest

102 The date from which interest commences, be it either on the date of which the cause of action arose or from the date of judgment, are discretionary decisions and not ones that this Court would set aside on appeal. These grounds of cross appeal fail.

Conclusion

103 The result is that the appeal is upheld. The decisions of her Honour Magistrate Milledge dated 16 April 2015 and 13 November 2015 are set aside. The proceedings are remitted to the Local Court to be determined according to law.

104 Leave is granted to the parties to approach my associate in relation to costs within 14 days.

105 It should be drawn to the parties' attention that substantial legal costs have been incurred by both parties and a lot of Court time has been expended on what is after all a fairly modest claim. It would be prudent for the parties to attempt to settle the two related outstanding matters that have been remitted to the Local Court rather than incur even more costs in yet another Court hearing.

The Court orders that:

(1) The appeal is upheld.

(2) The decisions of her Honour Magistrate Milledge dated 16 April 2015 and 13 November 2015 are set aside.

(3) The proceedings are remitted to the Local Court to be determined according to law.

(4) Leave is granted to the parties to approach my associate in relation to costs within 14 days.

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Decision last updated: 19 July 2017