



JS MUELLER & CO
LAWYERS



AN INSIGHT INTO A DIFFERENT TYPE OF BUILDING DEFECTS CLAIM

Adrian Mueller
Partner | Senior Lawyer
B.Com LLB FACCAL
[Email](#) | [LinkedIn](#)

AN INSIGHT INTO A DIFFERENT TYPE OF BUILDING DEFECTS CLAIM

New Building Defects Laws

New building defects laws which commenced in June 2020 received considerable media attention. Those laws are contained in the *Design and Building Practitioners Act 2020* and impose on builders and others involved in the construction of apartment buildings a statutory duty of care to avoid loss caused by defects. The new laws give owners corporations greater powers to make defects claims against builders and others. However, a recent case which dealt with another statutory duty of care highlights some of the issues that will confront an owners corporation which makes a defects claim under the new laws. In this article we take a look at that case and explain what relevance it has to defects claims that will be brought by owners corporations under the *Design and Building Practitioners Act 2020*.

The Case

The case of *Shalhoub v Johnson* [2020] NSWSC 1321 concerned two neighbouring properties in Randwick, Sydney. Those properties are divided by a retaining wall on the lower property which provides support for the higher property. The owner of the higher property alleged that in 2012 the owner of the lower property carried out work around the retaining wall which caused the wall to fail resulting in the building on the higher property suffering damage. The owner of the higher property sued the neighbour for damages claiming that the neighbour breached the duty of care imposed by section 177 of the *Conveyancing Act 1919*.

Statutory Duty of Care

Section 177 creates a duty of care in relation to the right of support for land. It says that a person has a duty of care not to do anything on or in relation to land that removes the support provided by that land to any other land. The owner of the higher property alleged that the neighbour breached that duty of care when carrying out work around the retaining wall in 2012 by failing to ensure that the work did not remove the support which the retaining wall provided for the higher property and by excavating around the retaining wall without first providing adequate support for the higher property.

The Outcome

The claim by the owner of the higher property was unsuccessful. The Court did not accept that the neighbour had breached the duty of care created by section 177. The Court held that the duty imposed by section 177 is a duty to take *reasonable* care not to do anything on or in relation to land that removes the support provided by that land to other land. The Court said it is not enough that



something is done on or in relation land that in fact removes or reduces the support provided by that land to other land. The Court held that in order to establish that a person has breached the duty of care, it must be shown that the person has failed to take reasonable care in doing something on or in relation to land that removes or reduces the support provided by that land to other land.

Analysis

The Court concluded that the evidence did not show that the work done around the retaining wall in 2012 caused or contributed to movement of the retaining wall so as to remove or reduce the support it would have otherwise provided to the higher property. However, the Court went further. It said that even if the work done in 2012 had that effect, the owner of the higher property would still need to show that what was done on the neighbouring property to remove or reduce the support was done negligently, without the exercise of reasonable care. The Court observed that the owner of the higher property did not provide any expert evidence concerning standards and practices of builders in circumstances such as those faced by the builder who carried out the work in 2012 including as to any precautions that might be expected to be taken by a reasonably competent builder. The Court said the lack of that evidence made it difficult to conclude that the builder was negligent in failing to install shoring of some kind as a precaution against the risk of the retaining wall failing as a result of the work done in 2012. The Court also concluded that, based on the expert evidence, the work done in 2012 did not cause or contribute to the failure of the retaining wall and that the expert evidence showed that it would not have been reasonable, and indeed would have been unnecessary, for the builder to put some form of shoring in place for the retaining wall before commencing that work.

The Wash Up

The *Shalhoub* case gives a useful insight into the way in which the courts deal with a defect claim relating to a breach of a statutory duty of care. It shows that a statutory duty of care normally only imposes a duty to take *reasonable* care (not a duty to take every possible step) to avoid a defect. It also shows that a claimant will need to demonstrate, preferably through expert evidence, the precautions that might be expected to be taken by a reasonably competent builder or building practitioner to avoid a defect. In many cases, this will require the claimant to provide expert evidence concerning standards and practices of builders in the relevant circumstances. This is likely to increase the complexity and cost of defect claims that are based on a breach of a statutory duty of care such as the duty that arises under the *Design and Building Practitioners Act 2020*.

Adrian Mueller

Partner | B.Com LLB FACCAL
adrianmueller@muellers.com.au





About JS Mueller & Co Lawyers

JS Mueller & Co Lawyers has been servicing the strata industry across metropolitan and regional NSW for over 40 years. We are a specialist firm of strata lawyers with in depth and unmatched experience in, and comprehensive knowledge of all strata law inclusive of by-laws, building defects and levy collection.

02 9562 1266

enquiries@muellers.com.au

www.muellers.com.au



Disclaimer: The information contained in this newsletter is provided for your personal information only. It is not meant to be legal or professional advice nor should it be used as a substitute for such advice. You should seek legal advice for your specific circumstances before relying on any information herein. Contact JS Mueller & Co Lawyers for any required legal assistance.

