

AN EXAMINATION OF THE LIABILITY OF A CONSTRUCTION CONTRACT CERTIFIER WHO GETS IT WRONG

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Construction contracts often provide that decisions under the contract will be made by a certifier. This paper reviews the liability issues when a certifier makes a mistake. We do that in light of recent pronouncements by the High Court of Australia and the New South Wales Court of Appeal on negligence. We look at this question in the context of traditional construction contract arrangements and also consider the implications for Public Private Partnerships and the typical contract arrangements entered into to facilitate these transactions.

I INTRODUCTION

Certifiers play an important role in relation to the administration of many construction contracts. They commonly include architects and engineers within their number who carry out functions related to both technical and commercial issues that arise under the building contract. This might include approving the contractor's design of the work, assessment of delay events and quality of work, and the determination of payments to be made to the contractor. Depending on the terms of the contract, these decisions may or may not be reviewable. If a decision is final and binding and cannot be reviewed but is in fact wrong, either the owner,¹ proponent in a public private partnership or the contractor may incur significant losses and may be interested in pursuing the certifier to cover those losses.² Even if the decision is not final and binding and can be challenged but one of the parties to the building contract is no longer solvent, it may be that the only opportunity to recover a loss incurred is to pursue the certifier.³

This paper considers the liability of the certifier to the owner or the contractor where the certifier makes a mistake. Consideration is given to the circumstances where the certifier is appointed by the owner and has no direct contractual relationship with the contractor and also considers those situations where the

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¹ In this paper the word "owner" is used to refer to both the owner and/or the proponent in a Public Private Partnership.

² For a discussion of the role of the certifier and final and binding decisions see Michelle Backstrom, 'An examination of the independent certification processes of a construction contract' (2013) 29(5) *Building and Construction Law Journal* 406.

³ For example, this was the situation in *Sutcliffe v Thackrah* [1974] AC 727 where the architect was sued by his employer, the building owner in circumstances where the architect had negligently certified work. Also see, *Pacific Associates Inc and another v Baxter and others* [1990] 1 QB 993 and *John Holland Construction and Engineering Pty Ltd v Majorca Projects Pty Ltd* (1996) 13 BCL 235; BC 9603676.

certifier enters into a deed with both the owner and contractor and this deed regulates the relationship of the parties. We consider existing case law and reflect on the impact of recent statements of the High Court of Australia and the New South Wales Court of Appeal in relation to negligence in order to assess whether the liability of a certifier is likely to be considered in a different way as future cases come before the court.

If a certifier makes a mistake, the owner and/or contractor will want to consider their options and ascertain whether a claim may be made in relation to that mistake. A claim might in an appropriate case be based in contract, in tort, or pursuant to the Australian Consumer Law (ACL). Firstly we will consider the position under a traditional contract structure and then consider implications for less traditional arrangements exemplified by public private partnerships.

II THE LIABILITY OF THE CERTIFIER TO THE BUILDING OWNER UNDER A TRADITIONAL CONTRACT STRUCTURE

In a traditional construction contract, the superintendent appointed by the owner to administer the contract will often undertake the role of certifier. In the contract of engagement between the owner and superintendent, the superintendent will agree to be bound by the obligations placed upon it under the building contract entered into by the owner and building contractor. In this scenario, there is no contractual relationship between the certifier and the contractor. In relation to its certification role, the obligation of the certifier has been described as an obligation 'to act fairly and justly and with skill to both parties to the contract'⁴ but the role of the certifier will of course be governed by the contract he or she enters into with the owner. Standard form contracts describe the obligation of the certifier in different ways. For example, in clause 23 of Australian Standard, General Conditions of Contract, AS 2124 – 1992, the Principal's obligations include ensuring that the superintendent acts 'honestly and fairly' and arrives at a 'reasonable measure or value of work, quantities, or time.' The certifier who fails to fulfil his or her obligations may breach its contract with the owner and may be liable in damages for loss suffered by the owner.⁵

Liability to the owner will extend to tortious liability for negligence in issuing certificates.⁶ If there is a relationship of professional and client, there will be an established duty of care, but there may be an argument about the scope of that duty of care.⁷ The content of the duty of care must be determined before the issue of breach can be addressed. The High Court has warned of the danger of considering breach before determining the scope of the duty of care, as:

to begin the inquiry by focusing only upon questions of breach of duty invite error. It invites error because the assumption that is made about the content of the duty of care may fail to take fundamental aspects of the relationship between the parties

⁴ *Perini Corp v Commonwealth of Australia* [1969] 2 NSW 530, 536. Also see, Stephen Furst and Vivian Ramsey, *Keating on Construction Contracts* (Sweet and Maxwell, 2006) [13-010]

⁵ *Harmer v Cornelius* (1885) 5 CB (NS) 236 at 246; *Jones v Manchester Corp* [1952] 852, 876 (Court of Appeal).

⁶ *Sutcliffe v Thackrah* [1974] AC 727.

⁷ *Kuhl v Zurich Financial Services Australia Ltd* (2011) 243 CLR 361, [22].

into account.⁸

The ‘appropriate level of specificity when formulating the scope and content of the duty’⁹ will depend on the circumstances of the particular case.

III THE LIABILITY OF THE CERTIFIER TO THE CONTRACTOR UNDER A TRADITIONAL CONTRACT STRUCTURE

A *Liability in contract and privity*

When it is the contractor who wishes to claim for losses suffered as a result of a mistake by the certifier, it seems the issue is further complicated. As the certifier is usually appointed by the owner, there is no privity of contract between the certifier and the contractor and to obtain a remedy against the certifier, the contractor may need to circumvent the privity rule. While the privity doctrine operates to ensure that third parties are unable to acquire rights or benefits under a contract,¹⁰ the doctrine can be circumvented in some cases by the operation of other areas of the law. We will now consider some of the arguments that might be raised.

The contract between the owner and certifier may include warranties in relation to the manner of performance of the certifier’s duty. Could it then be argued that the building owner is the trustee of any promises made by the certifier and that the contractor is the beneficiary of such promises much in the same way as was considered by Mason CJ, Wilson J and Deane J in *Trident General Insurance Co Ltd v McNiece Bros Pty Ltd*?¹¹ The difficulty with this argument is the uncertainty that surrounds the circumstances when the requisite intention to create a trust is found. There is unlikely to be an express statement of intention but highly probable that it will be necessary to infer the existence of the trust because of the circumstances of the contract.¹²

In an appropriate case it might be also considered whether a claim based on estoppel could be raised by a contractor against the certifier. If a promise is made or expectation raised by the certifier, for example that an extension of time will be granted, and the certifier subsequently reneges on the promise, a remedy may be available to the contractor who has performed work.¹³ The remedy in such a case

⁸ *Koehler v Cerebos (Australia) Ltd* (2005) 222 CLR 44, 53.

⁹ *Kuhl v Zurich Financial Services Australia Ltd* (2011) 243 CLR 361, [22].

¹⁰ *Wilson v Darling Island Stevedoring Co* (1955) 95 CLR 43.

¹¹ (1988) 165 CLR 107. Also see for example, *West Merchant Bank Ltd v Rural & Agricultural Management Ltd* (1996) 14 ACLC 719 (NSWCA); cf *Burleigh Forest Estate Management Pty Ltd v Cigna Insurance Australia Ltd* [1992] 2 Qd R 54 (FC).

¹² A list of the cases where intention has and has not been found is outlined in N Seddon and M Ellinghaus, *Cheshire and Fifoot’s Law of Contract* (LexisNexis Butterworths, 9th ed, 2007) 327-8.

¹³ In *Trident General Insurance Co Ltd v McNiece Bros Pty Ltd* (1988) 165 CLR 107, Brennan J and Deane J considered estoppel a possibility if there is unconscionable conduct on the part of the promisor. For the elements of estoppel, see *Waltons Stores (Interstate) Limited v Maher* (1988) 164 CLR 387.

would be the detriment suffered by the contractor who relies on the promise or expectation.¹⁴

In Western Australia, Queensland and the Northern Territory there has been statutory abrogation of the privity rule and if certain conditions are satisfied, a third party beneficiary of a promise may enforce the contract in his or her own name.¹⁵ In this case, the argument would be that the contractor is the third party beneficiary of the promises made by the certifier to the owner in the contract of engagement they enter into. This is likely to be a very difficult argument to make based on the current law because at this time the legislation will not assist an incidental beneficiary of a promise.¹⁶

B The approach of Australian courts to the certifier's liability in tort

Tortious liability of the certifier has been considered by the courts. Given that in the traditional contract structure the contractor is a third party suffering pure economic loss, a novel duty of care would need to be argued.¹⁷ In England, the certifier's liability in tort was discussed in *Pacific Associates Inc and another v Baxter and others*¹⁸ which involved a claim by dredging contractors against the owner's engineer for negligence in rejecting its claim for payment under the building contract. The contract between the owner and contractor included provision for arbitration and also included a provision excluding the liability of the engineer. The court relied on the contractual background and found that there was no duty of care owed by the engineer to the contractor.¹⁹ In this case the certificates were not final and binding and the contractor was entitled to pursue arbitration if aggrieved by a decision of the engineer. In the circumstances, the engineer had not assumed any responsibility to the contractor.

In Australia the question arose in *John Holland Construction and Engineering Pty Ltd v Majorca Projects Pty Ltd*.²⁰ When considering the liability of the certifier to the contractor, the court considered the terms of the building contract between the owner and contractor and asked the question 'have the Architect and Builder deliberately distanced themselves from each other so that no relationship of proximity was contemplated?'²¹ Byrne J in the Supreme Court of Victoria found

¹⁴ *Waltons Stores (Interstate) Limited v Maher* (1988) 164 CLR 387; *Commonwealth of Australia v Verwayen* (1990) 170 CLR 394; *Giumelli v Giumelli* (1995) 196 CLR 101.

¹⁵ See *Property Law Act 1969 (WA) s11*; *Property Law Act 1974 (Qld) s55*; *Law of Property Act (NT) s56*.

¹⁶ For example, see *Westralian Farmers' Co-operative Ltd v Southern Meat Packers Ltd* [1981] WAR 241; *Re Burns Philp Trustees*, Unreported, Qld SC, Macrossan J, 17 December 1986; cf *Gaudron J and Kirby J in Northern Sandblasting Pty Limited v Harris* (1997) 188 CLR 313.

¹⁷ *Bryan v Maloney* (1995) 182 CLR 609.

¹⁸ [1990] 1 QB 993.

¹⁹ But see *Lubenham v South Pembrokeshire DC* (1986) 33 BLR 36, 74 (Court of Appeal) and *John Mowlen v Eagle Star Insurance* (1992) 62 BLR 126 in relation to liability for the tort of procuring a breach of contract. Also, see *Pacific Associates Inc and another v Baxter and others* [1990] 1 QB 993, 1024, CA in relation to the position of the contractor where there is no arbitration clause discussed in *Stephen Furst and Vivian Ramsey* above n 4, [13-080].

²⁰ (1996) 13 BCL 235; BC 9603676.

²¹ *Ibid*, 29.

'it was not appropriate to seek to engraft upon the contractual background a tortious obligation of the kind contended by the builder.'²²

C A new approach to negligence and the question of a duty of care

The High Court of Australia has held that where there is a contract for professional services, there is an implied promise to exercise reasonable care and skill in the performance of those services therefore liability is concurrent in contract and tort.²³ When a party is not a party to the contract for services, and suffers loss as a result of the negligent performance of the contract, they need to argue that they are owed a novel duty of care.²⁴ This will be the position of the contractor under most traditional construction contracts as the certifier is appointed by the building owner and no contract exists between the certifier and contractor.

*John Holland Construction and Engineering Pty Ltd v Majorca Projects Pty Ltd*²⁵ was decided in the mid 1990s when the court (in determining whether a duty of care existed) used the proximity test to determine whether a novel duty of care was owed.²⁶ After the initial threshold requirement of reasonable foreseeability of the harm was satisfied, the proximity approach focussed on the degree of closeness in the relationship between the plaintiff and the defendant, that is, physical, circumstantial and causal. There was then an evaluation of the legal consequences.

In Australia the current approach to determining whether a duty of care is owed involves a judicial evaluation of the relevant factors.²⁷ These factors include reasonable foreseeability, nature of the harm, control of the defendant, vulnerability of the plaintiff, the relationship between the parties, coherency of the law and the issue of indeterminacy. The courts have traditionally been reluctant to find a duty of care for cases where the harm suffered is pure economic loss.²⁸ However there have been some cases involving pure economic loss where a duty of care has been found.²⁹ The court must consider:

1. Whether the defendant should have had the plaintiff's interests in contemplation,
2. How vulnerable the plaintiff is (including whether there was some way the plaintiff could have protected themselves),
3. Whether the defendant was in overall control of the situation,
4. The defendant's knowledge of the plaintiff's vulnerability,

²² Ibid, 30.

²³ *Astley v Austrust Ltd* (1999) 197 CLR 1, 20.

²⁴ *Penberthy v Barclay* [2012] HCA 40, [171].

²⁵ (1996) 13 BCL 235; BC 9603676.

²⁶ *Jaensch v Coffey* (1984) 155 CLR 549.

²⁷ *Sullivan v Moody; Thompson v Cannon* (2001) 207 CLR 269.

²⁸ *Caltex Oil (Australia) Pty Ltd v The Dredge 'Willemstad'* (1976) 136 CLR 529.

²⁹ See for example *Bryan v Maloney* (1995) 182 CLR 609; *Hill v Van Erp* (1997) 188 CLR 159; *Perre v Apand Pty Ltd* (1999) 198 CLR 180.

5. The extent of physical or commercial closeness and
6. Whether liability would impose an undue burden on the defendant.

This approach was recently confirmed by the High Court in *Penberthy v Barclay*³⁰ when it found, by majority, that a duty of care was owed by the defendant for pure economic loss, taking into consideration the reliance by the plaintiff on the defendant as well as the vulnerability of the plaintiff.

Where the parties to the litigation are parties to a contract, if it appears that the reasonable expectations of the parties may be frustrated by the doctrine of privity of contract, courts seem more willing to overcome what is essentially a technical issue, by finding a duty of care.³¹ But if the parties are fully aware of the doctrine of privity, then it would subvert their intention to superimpose a duty of care. This is particularly the case when commercial interests are involved.³² In a recent example of a certifier being sued in negligence, the ACT Supreme Court found there was no duty of care owed to the plaintiff, a government owned corporation responsible for the sewerage network in the ACT.³³ In that case Gray J considered that taking into consideration the factors of vulnerability of the plaintiff, reliance by the plaintiff, as well as assumption of responsibility by the defendant, it was not appropriate to find the defendant owed a duty of care in the circumstances. The public utility was not able to establish vulnerability nor was it able to show it relied on any responsibility assumed by the building certifier. Despite the result, the case is helpful as it demonstrates the approach to use if a duty of care is to be established.

In order for a plaintiff contractor to successfully establish that a duty of care was owed to it by the defendant certifier, they would have to focus on reasonable foreseeability, knowledge and vulnerability as well as any other relevant factors. The contractor would need to show that it was reasonably foreseeable that as a result of the certifier's acts or omissions, the contractor would suffer loss. Evidence needs to be provided that demonstrates the knowledge that the certifier had of the contractor. They would also need to show how they were particularly vulnerable in the circumstances, that is, what could they have done to protect themselves. The contractor would need to argue that their situation was analogous to *Bryan v Maloney*³⁴ where the plaintiff successfully argued for a duty of care, rather than *Woolcock Street Investments*³⁵ where no duty of care was found. *Woolcock Street Investments* confirmed the principles in *Bryan v Maloney* and rejected 'a bright line between cases concerning the construction of dwellings and cases concerning the construction of other buildings.'³⁶

A recent New South Wales Court of Appeal decision demonstrates that the factor of vulnerability is a vital consideration for the court in determining whether a duty of care is owed when the loss suffered by the plaintiff is pure economic loss from

³⁰ [2012] HCA 40.

³¹ *Hill v Van Erp* (1997) 188 CLR 159.

³² *Woolcock Street Investments Pty Ltd v CDG Pty Ltd* (2004) 216 CLR 515.

³³ *ACTEW Corporation Ltd v Mihaljevic* [2011] ACTSC 23.

³⁴ *Bryan v Maloney* (1995) 182 CLR 609.

³⁵ *Woolcock Street Investments Pty Ltd v CDG Pty Ltd* (2004) 216 CLR 515.

³⁶ *Ibid* [17].

a commercial transaction and is a 'key mechanism for maintaining control over a potentially expansive area of legal liability.'³⁷ The Court considered that vulnerability has a number of aspects, being the inability to:

- a) control or influence the physical events which gave rise to the loss;
- b) negotiate a contractual arrangement imposing liability on the defendant; or
- c) obtain insurance against the economic loss suffered.³⁸

The Court found that the plaintiff was owed a duty of care and the 'fact that the vulnerability arose with respect to its commercial interests rather than any personal interests of individuals, was not suggested to be a relevant consideration.'³⁹

Arbitration clauses are commonly found in commercial contracts. Such clauses do not necessarily mean that an action in negligence is precluded. It is reasonably foreseeable that negligent decisions made by certifiers may cause loss and this 'foreseeability is not removed by a right to review the decision by arbitration' and the certifier should exercise their responsibilities 'with due care and without partiality or unfairness.'⁴⁰ The Court will look at the contractual framework and consider whether the parties have 'deliberately distanced themselves from each other so that no relationship of proximity was contemplated.'⁴¹ Applying the current approach in Australia to determining whether a duty of care is owed, the court would consider the relevant factors, in particular, the vulnerability of the plaintiff in light of the contractual framework.

D Other potential liability of the certifier

Where there is pure economic loss, there is the potential for liability if a representation has been made negligently by the certifier to the contractor and the contractor has relied on that representation.⁴² The other potential liability is where there has been fraud on the part of the certifier and there is an action in fraudulent misrepresentation.⁴³

Section 18 of the ACL may also be relevant if it could be established the certifier, while acting in trade or commerce, has engaged in misleading or deceptive conduct or conduct likely to mislead or deceive. An example might be a representation that the certifier has the skill and competence to fulfil the duties of a certifier under the construction contract⁴⁴ or perhaps the conduct of the certifier surrounding a failure to certify because the certifier has taken the view that work is defective and remedial work is required (and completed) to the detriment of the

³⁷ *The Owners-Strata Plan No 61288 v Brookfield Australia Investments Ltd* [2013] NSWCA 317, [19].

³⁸ *Ibid* [35].

³⁹ *Ibid* [120].

⁴⁰ *John Holland Construction and Engineering Pty Ltd v Majorca Projects Pty Ltd* (1996) VicSC 334, 28.

⁴¹ *FW Neilson v PDC Constructions (ACT) Pty Ltd* (1987) 71 ACTR 1, 8.

⁴² *Mutual Life & Citizens Assurance Co Ltd v Evatt* (1968) 122 CLR 556.

⁴³ *Krakowski v Eurolynx Properties Ltd* (1995) 183 CLR 563.

⁴⁴ *Comalco Aluminium Ltd v Mogul Freight Services Pty Ltd* (1993) 113 ALR 677.

contractor.⁴⁵ Engaging in conduct is widely defined in ACL s2(2) and includes doing or refusing to do any act (otherwise than inadvertently).⁴⁶

Where the certifier is an engineer or architect engaged to provide services for reward, it may be possible to establish their conduct is in trade or commerce.⁴⁷ It is not usually necessary to show intention to mislead or deceive, just that the plaintiff, on an objective analysis, was led into error.⁴⁸ Nor does the transaction need to be a consumer transaction. If it can be established that there is a contravention of ACL s18, a contractor suffering loss or damage because of the misleading conduct, may recover against the person engaging in the misleading conduct or against a person involved in a contravention.⁴⁹ This accessorial liability may be helpful if the conduct alleged to be misleading is the conduct of the owner and it is possible to show the certifier is ‘involved’ in a contravention.

IV THE BUILDING OWNER’S LIABILITY FOR THE CERTIFIER’S MISTAKES

As we have noted, in many transactions the certifier is appointed by the owner. While a contract exists between the owner and the certifier and between the owner and the contractor, no contract exists between the certifier and the contractor. There will be contractual liability to the contractor for any breach of contract by the owner or a statutory claim if there is misleading or deceptive conduct by the owner.

We will now consider whether the owner would be liable to the contractor in tort for any loss suffered by the contractor as a result of the certifier’s negligence. There would only be liability by the owner for a personal duty of care to the contractor, if the certifier did not possess the appropriate qualifications or there was a known history adverse to the certifier that would make the appointment unreasonable in the circumstances.⁵⁰ If there was nothing negligent in the appointment of the certifier with regards qualifications and reputation, the only other avenues for liability in negligence would be through vicarious liability and non-delegable duty.

A Vicarious liability

If it can be established that the certifier has been negligent then it may be worthwhile to consider whether liability for that tort can be sheeted home to the

⁴⁵ For a discussion of the potential for these claims see Patrick Mead, ‘Liability of the superintendent for wrongfully certifying’ (1999) *Building and Construction Law Journal* 81, 101-104.

⁴⁶ Failure to disclose may be misleading. See *Demagogue Pty Ltd v Ramensky* (1992) 110 ALR 608.

⁴⁷ *Bond Corporation Pty Ltd v Thiess Contractors Pty Ltd* (1987)14 FCR 215. The possibility of this is enhanced under the ACL as the definition of ‘trade or commerce’ in s2(1) now includes ‘any business or professional activity (whether or not carried on for profit).’

⁴⁸ *Campbell v Backoffice Investments Pty Ltd* (2009) CLR 304,[25].

⁴⁹ ACL s236 and s237. The word “involved” is defined in ACL s2(1) and would include relevant officers and directors of a corporation and agents of an individual: *Collins Marrickville Pty Ltd v Henjo Investments Pty Ltd* (1987) 72 ALR 601. In this case, knowledge is relevant when determining whether a person is “involved” in a contravention.

⁵⁰ *Torette House Pty Ltd v Berkman* (1940) 62 CLR 637, 645.

owner. The question of vicarious liability may arise in those situations where the certifier is an employee or agent of the owner. For a party to be found vicariously liable for a tort there would need to be a relationship of employer/employee or principal/agent and the tort must be committed during the course of their employment. The appropriate test for determining the nature of the relationship is the multi-facet test.⁵¹ The court will consider a range of factors and not every factor is relevant in every case.⁵² Factors include degree of control, mode of remuneration, provision for holidays, deduction of income tax and provision and maintenance of equipment.⁵³ Whether a tort is committed in the course of employment is a question of fact.⁵⁴ Where there is no intention to cause harm, the court will consider whether the employee has deviated sufficiently from what they were supposed to be doing for it to amount to a frolic.⁵⁵ However where the act is intentional, the court will consider whether there was a sufficient connection between what they were employed to do and the particular misconduct.⁵⁶

B Non-delegable duty of care

The establishment of a non-delegable duty of care to the contractor would make the owner liable for the certifier's negligence. However, as this would not fit within an established category of non-delegable duty of care, this would not be an easy argument. The High Court has held that the categories are not closed.⁵⁷ The contractor would need to argue by analogy with an existing category⁵⁸ and demonstrate a special relationship taking into consideration special vulnerability and assumption of responsibility for a substantial risk.⁵⁹ However 'the general trend of contemporary tort law [is] to limit exceptional categories, and to reject new ones except on the basis of a clear analogy to a recognised class and then only for compelling reasons of legal principle and policy.'⁶⁰ There is an established category of non-delegable duty of care owed by an employer to an employee but it has been held by the High Court not to extend to independent contractors.⁶¹ If the certifier is held to be an independent contractor, the argument is likely to fail.

V PUBLIC PRIVATE PARTNERSHIPS AND LIABILITY ISSUES

In large infrastructure projects conducted in partnership between the public sector and the private sector ('public private partnerships')⁶² the certifier is usually

⁵¹ *Hollis v Vabu Pty Ltd* (2001) 207 CLR 21.

⁵² *Sweeney v Boylan Nominees Pty Ltd* (2006) 226 CLR 161.

⁵³ *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16.

⁵⁴ *Bugge v Brown* (1919) 26 CLR 110.

⁵⁵ *Storey v Ashton* (1869) LR 4 QB 476.

⁵⁶ *State of New South Wales v Lepore; Rich v State of Queensland* (2003) 212 CLR 511.

⁵⁷ *Leichhardt Municipal Council v Montgomery* (2007) 230 CLR 22, 62.

⁵⁸ The established categories are employers to employees; hospitals to patients; schools to students; occupiers to contractual entrant where extra-hazardous activities. See *Leichhardt Municipal Council v Montgomery* (2007) 230 CLR 22, 62.

⁵⁹ See *Leichhardt Municipal Council v Montgomery* (2007) 230 CLR 22, 64.

⁶⁰ *Leichhardt Municipal Council v Montgomery* (2007) 230 CLR 22, 60.

⁶¹ *Leighton Contractors Pty Ltd v Fox; Calliden Insurance Limited v Fox* (2009) 240 CLR 1.

⁶² For a discussion of the Public Private Partnership model in Australia see Professor Doug Jones, 'Evaluating what is new in the PPP pipeline' (2003) 19 *Building and Construction Law Journal* 250.

engaged by both the owner and contractor and enters into a deed with them both. This deed regulates the relationship of the certifier with the parties to the main construction project contract (the proponent and contractor). Does this altered contractual structure impact on the rights and liability of the contractor or owner against each other and/or the certifier?

The independent certifier deed entered into between the owner, contractor and certifier overcomes the privity difficulties usually facing a contractor under the traditional construction contract structure and the certifier is liable to the contractor for breach of contract where there is a failure to comply with its terms. Of course, it would not be uncommon for the independent certifier deed to contain a limitation of liability provision and this may be below the value of any issue in dispute.

It may be that there is a tortious liability which can be relied on by the contractor. The difficulties outlined in *Pacific Associates Inc and another v Baxter and others*⁶³ and *John Holland Construction and Engineering Pty Ltd v Marjorca Projects Pty Ltd*⁶⁴ are likely to be overcome by the changed circumstances. There is now no distance between the parties.⁶⁵ Under the changed contractual structure, certifiers are more at risk than under a traditional construction contract with potential liability for breach of contract and negligence.⁶⁶

In determining whether a duty of care is owed, the courts have referred to factors including the character of the relationship, nature of the damage,⁶⁷ known reliance, assumption of responsibility and vulnerability.⁶⁸ The factor of vulnerability can be particularly more difficult to show in commercial transactions⁶⁹ especially considering the size of these public private partnerships on major infrastructure projects. However even though it can be difficult to demonstrate vulnerability in a commercial transaction, it is still a relevant factor. Vulnerability is not about what the plaintiff actually did but what it could have done to protect itself. The courts seek 'to strike a balance between the traditional touchstone of foreseeability and commercial realities.'⁷⁰ In seeking to answer the question of whether a duty of care is owed, the 'starting point must be its relevant contractual obligations and expectations.'⁷¹ In determining the salient features:

the contractual regime is of significance, as well as the professional relationships which existed in fact between those parties. If the area of expertise brought to the project by a suggested negligent party is such as to be outside the ordinary experience of the others, it is less difficult to conclude that there was known reliance and, incidentally, a vulnerability on the part of the party suffering loss.⁷²

⁶³ *Pacific Associates Inc and another v Baxter and others* [1990] 1 QB 993.

⁶⁴ (1999) 15 Const. L.J. 432; BC 9603676.

⁶⁵ *Legal and General Life of Australia v A Hudson Pty Ltd* (1985) 1 NSWLR 314.

⁶⁶ But an exemption from liability may impact on liability.

⁶⁷ *Aquatec-Maxcon Pty Ltd v Barwon Region Water Authority (No 2)* [2006] VSC 117, [273].

⁶⁸ *Bryan v Maloney* (1995) 182 CLR 609, [26]; *Perre v Apand* (1999) 198 CLR 180, 227.

⁶⁹ *Woolcock Street Investments Pty Ltd v CDG Pty Ltd* (2004) 216 CLR 515, 530.

⁷⁰ *Aquatec-Maxcon Pty Ltd v Barwon Region Water Authority (No 2)* [2006] VSC 117, [267].

⁷¹ *Ibid* [294].

⁷² *Ibid* [276].

In *Aquatec-Maxcon Pty Ltd v Barwon Region Water Authority (No 2)*⁷³ the Supreme Court of Victoria found that one of the defendants did owe a duty of care to the plaintiff and that was ‘a duty of care to make its inspections, evaluations and recommendations with due care.’⁷⁴

If the negligent certifier is an employee of a public authority this would be a relevant factor to take into account when embarking on a claim. In this case in deciding whether a duty of care was owed by the certifier in a negligence action, the nature of the public private partnership would be examined as it would be considered that one of the relevant factors to be taken into account would be that one of the parties is a public authority.⁷⁵ Originally, public authorities were not liable for private wrongs, however over time public authorities have been found liable to a greater extent.⁷⁶ Today if action is to be taken against a public authority, reference should be made to civil liability legislation which has been introduced by most Australian jurisdictions. This legislation includes sections which deal with the elements of duty of care and breach when public authorities are being sued in negligence actions. The legislation takes into account considerations such as the limitation and general allocation of finite resources.⁷⁷

VI IF LIABLE FOR WRONG CERTIFICATION, WHAT WOULD A CERTIFIER BE LIABLE FOR?

Liability of the certifier would be dependent on which action was successful: compensatory⁷⁸ damages for negligence and consequential loss if not too remote⁷⁹ or compensatory⁸⁰, aggravated⁸¹ or exemplary⁸² damages for deceit. If it is possible to establish a contravention of s18 of the ACL then compensation would be payable for loss or damage suffered because of the misleading conduct. While the court has suggested that a definitive analogy should not be used, the court is likely, in these circumstances, to apply a tortious measure when making an assessment.⁸³

If the contractor has a claim against the certifier, the possible claims might be the contractor’s real entitlement under the construction contract with the owner or alternatively, a claim for the legal costs of the dispute incurred against the owner to have the certification revisited and the true entitlement established. A claim for the money foregone because of the certifier’s negligence might arise in circumstances where a certificate is final and binding and not subject to review

⁷³ Ibid.

⁷⁴ Ibid [302].

⁷⁵ *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 211 CLR 540, 553.

⁷⁶ *Brodie v Singleton Shire Council; Ghantous v Hawkesbury Shire Council* (2001) 206 CLR 512.

⁷⁷ *Civil Law (Wrongs) Act 2002* (ACT) s 110; *Civil Liability Act 2002* (NSW) s 42; *Civil Liability Act 2003* (Qld) s 35; *Civil Liability Act 2002* (Tas) s 38; *Wrongs Act 1958* (Vic) s 83; *Civil Liability Act 2002* (WA) s 5W.

⁷⁸ *Shaddock & Associates Pty Ltd v Parramatta City Council* (1981) 150 CLR 225.

⁷⁹ *Gates v City Mutual Life Assurance Society Ltd* (1986) 160 CLR 1, 13.

⁸⁰ *Gould v Vaggelas* (1985) 157 CLR 215.

⁸¹ *Archer v Brown* [1985] 1 QB 401, 423.

⁸² *Musca v Astle Corporation Pty Ltd* (1988) 80 ALR 251.

⁸³ *Gates v City Mutual Life Assurance Society* (1986) 160 CLR 1; *Murphy v Overton Investments Pty Ltd* (2004) 216 CLR 388.

(for example, the certificate issued upon the completion of the project and the setting of the date for the commercial operation of the project), or where losses are no longer recoverable from the owner, perhaps because of the owner's subsequent insolvency. Even if the decision of the certifier is subject to review the contractor can (and because of its obligation to mitigate, should) seek review but may incur costs in doing so. A hurdle to overcome though will be the issue of causation. The certifier is likely to argue that where there is a wrong certification, the cause of the loss is the owner's reliance on the certificate not the reliance of the contractor on the certificate. Mead suggests,⁸⁴ and we agree, that whether this argument is successful will depend on the terms of the contract. It will also depend on the nature of the particular complaint made against the certifier.

VII THE IMPACT OF AN EXCLUSION OF LIABILITY PROVISION

Even if there is a contractual relationship between the owner or proponent, contractor and certifier (as is commonly the case in projects conducted as a partnership between the public and private sectors), it may still be impossible to recover the losses flowing from a wrong decision because of the existence of an exclusion clause inserted for the benefit of the certifier. The owner or proponent and/or contractor may be in the position where they cannot have a wrong decision set aside and cannot obtain substantial damages in contract or tort from the expert whose mistake has caused them loss. Certainly in the case of the contractor negotiating the terms of its contract, market forces may mean agreement to an exclusion clause is difficult to evade. This is less of a problem in the case of liability for a contravention of the ACL s18, the operation of which is more difficult to exclude.⁸⁵

VIII CONCLUSION

The law of negligence continues to develop particularly in light of recent decisions.⁸⁶ More recent determinations of the Australian High Court as well as the New South Wales Court of Appeal highlight the modern approach to determining a duty of care where the plaintiff has suffered pure economic loss. They also provide guidance on the approach to be taken in cases which involve commercial transactions and on the importance of the factor of vulnerability. A building certifier appointed by the building owner, may have no contractual relationship with the contractor. For the certifier to be liable in negligence for mistakes made which impact adversely on the contractor, a novel duty of care would need to be found. Whether or not a duty of care is found would depend upon the circumstances of the case and the relevant factors taken into consideration by the court. The court would not find a duty of care if to do so would be inconsistent with other law, for example, contract law. If the privity doctrine cannot be avoided and it is not possible to establish a duty of care, it would seem a certifier may only be liable for pure economic loss where there has been misleading conduct or fraud.

⁸⁴ Patrick Mead, above n 45, 103.

⁸⁵ It will be more difficult to contract out of liability for a contravention of the ACL s18 than liability in contract and tort: see for example, the discussion of the court in *Campbell v Backoffice Investments Pty Ltd* (2009) 238 CLR 304.

⁸⁶ *The Owners-Strata Plan No 61288 v Brookfield Australia Investments Ltd* [2013] NSWCA 317.