A balcony collapse: who is liable?

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Introduction

In September 2017, the NSW Court of Appeal allowed an appeal brought by Libra Collaroy Pty Ltd (**the property manager**) in which it was found solely liable for injuries sustained by four people (**the plaintiffs**) following a balcony collapse at a rental property at Collaroy, NSW.[1] The decision examines a number of significant issues, including the apportionment of liability between a property manager, the owner and tenant, as well as the implications of the contractual indemnity contained in the property management agreement.

Background

Mr and Mrs Bhide (**the owners**) purchased the property in 1999. The balcony had been constructed prior to their purchase, in around 1995, and the property manager had been appointed in 2005 pursuant to a property management agreement (**the agreement**). There had been a long history of complaints regarding the condition and manner of construction of the balcony by the tenant Ms Gillies (**the tenant**), who was an architect.

At first instance, the plaintiffs issued proceedings against the property manager and the owners seeking damages for personal injury. The tenant also issued proceedings against the same parties for a psychiatric injury as a result of seeing her daughter injured at the accident scene.

The property manager and the owners issued cross claims against each other seeking indemnity from each other as joint tortfeasors pursuant to section 5B(1) of the *Civil Liability Act 2002* (NSW) (**the CLA**) and the contractual indemnity provision contained in the property management agreement. Both parties also issued cross claims against the tenant for her failure to prevent access to the balcony in circumstances where she was aware of its poor condition.

The decision at first instance

At a liability only hearing in the District Court, Judge Curtis found that the cause of the balcony collapse was the deterioration of the bolts due to weather and poor maintenance. It was held that the property manager should have gone further than simply passing on quotes to repair the balcony to the owners and instead recommended that they retain an expert to assess the structural integrity of the balcony.

On that basis, it was held that the property manager was 100% liable to the plaintiffs in tort and also to the tenant. The property manager's submission that it was entitled to be indemnified by the owners pursuant to the contractual indemnity in the agreement was rejected.

The owners were held to be liable to the tenant only in respect to their contractual obligation to keep the property in a reasonable state of repair, but they were entitled to a contractual indemnity from the property manager pursuant to the agreement in that regard. Otherwise, the Court found that the owners had discharged their duty of care to the plaintiffs by delegating management of the property to the property manager. The Court also concluded that the tenant did not breach any duty of care she owed to the plaintiffs because she had discharged her obligations to them by making complaints about the balcony to the property manager.

The Appeal

The property manager appealed the decision to the NSW Court of Appeal. It did not deny that it had been negligent, nor the finding that it could not rely upon the contractual indemnity provision in the agreement. However, it submitted that the owners and the tenant should also be held liable in negligence to the plaintiffs and that the owners were not entitled to be indemnified by them in respect of their liability to the tenant.

The Court of Appeal needed to consider whether the owners and tenant had breached their respective duties of care to the plaintiffs. It was also asked to examine whether the judge at first instance had failed to consider and properly apply section 5B of the CLA and whether he had erred in finding that the owners were entitled to a contractual indemnity from the property manager with respect to their liability to the tenants and whether their entitlement should be reduced by their contributory negligence. The Court of Appeal was also tasked with deciding if the owners and tenant had breached their duties of care and to what extent they should be liable to contribute to any damages the property manager was required to pay to the plaintiffs.

The Court of Appeal found that the owners and the tenant had breached their duties of care to the plaintiffs. It also found that the trial judge had not applied the provisions of the CLA and failed to identify the foreseeable risk of harm to the tenant and the plaintiffs and what a reasonable response to that risk might be.

The Court of Appeal found that Judge Curtis did not err in finding that the owners were entitled to a contractual indemnity from the property manager with respect to their liability to the tenant, but that the trial judge should have also found that the indemnity in favour of the owners should have also extended to their liability to the plaintiffs. However, it went on the hold that the owners' entitlement to be indemnified by the property manager should be reduced by 30% to reflect their contributory negligence in failing to obtain an expert's report on the condition of the balcony and/or replacing the decking. The Court also held that the tenant was liable to contribute 20% to the property manager's liability on account of her failure to prevent access to the balcony in circumstances where she knew it was defective. The apportionment of liability between the property manager, the owners and the tenant was therefore held to be 50%, 30% and 20% respectively.

Although this matter occurred in New South Wales, section 9(1) of Queensland's *Civil Liability Act 2003* would carry the same ramifications as the New South Wales provisions, and there is no reason to suggest that a matter involving similar facts would be decided any differently if it had occurred in Queensland.

Conclusion

As this case demonstrates, real estate agents, owners and also tenants may all be exposed to claims for personal injuries by visitors to rental properties. The apportionment of liability between these parties will depend upon the particular circumstances of each case. Agents should ensure that they report all repair and maintenance issues to owners in a timely manner and proactively seek instructions to remedy the same. A thorough paper trail evidencing the agent's attempts at addressing any repair and maintenance issues will greatly assist in the defence of any such claims.

[1] *Libra Collaroy Pty Ltd v Bhide* [2017] NSWCA 196.