LAWS1114 SEMESTER 2 2008 FINAL EXAMINATION

QUESTION 3

James, a businessman, purchased real estate in June 2007 from a developer, Property Developments Ltd. The ground floor comprised a substantial, open-plan area, with the upper floor consisting of a residential apartment. James runs a sportswear business from the ground floor and lives in the apartment, above.

The flooring in the property was originally laid by Subco, a firm of subcontractors engaged by Property Developments. Subco agreed to do the work for Property Developments at short notice on the understanding that its liability for any defects in workmanship would be excluded. The flooring was poorly laid and, in January 2008, serious cracks appeared in its surface. It will cost $100,000 to replace.

James is not insured and did not have a specialist survey done prior to purchasing the premises on the basis that the cost of such a survey was extortionate. He assumed the floors would be fine because the building was new. Instead of obtaining his own survey, he rang the local council to ask about an inspection which he knew the council had done when the floor was first completed. The council at first refused to provide any information, but the third time James rang, an exasperated supervisor in the inspections department finally relented and told him that the inspection had given the floor a clean bill of health. In fact, the council had noted several potential problems with the floor.

Advise James as to any action he may have in negligence against (a) Subco and (b) The Council.

EXAMPLE ANSWER ONE

Action Against Subco

Issue: Is Subco liable in negligence for the pure economic loss caused by the defective building work ?

In *Bryan v Moloney* it was recognised that a builder could be liable for economic loss caused by defective building work. The court recognised the duty as being the result of a "proximate" relationship of general reliance by the purchaser combined with an assumption of responsibility by the builder. This case involved a domestic building but the court did not draw a hard and fast distinction between domestic and commercial buildings or preclude recovery in the case of commercial buildings.

In *Woolcock* the High Court did not have to follow *Bryan v Moloney* as proximity had by this stage fallen out of favour with the court as a determinant of duty. The court distinguished *Bryan v Moloney* on the basis that there had been no general reliance by the first owner due to him refusing to follow advice and himself retaining control over the relevant aspect of the building work. There was therefore also no assumption of responsibility by the builder that could be extended to subsequent owners. The court also emphasised the plaintiff's lack of vulnerability as it was a commercial purchaser who might be expected to protect itself by obtaining warranties from the person from whom it had purchased the building; or possibly by getting its own building inspection done. The lack of an assumption of responsibility seems to have been the decisive point.

Although these cases were brought against builders, recovery against subcontractors is not precluded (UK flooring case).

This case is likely to follow *Woolcock* in that the absence of vulnerability on the part of the purchaser precludes recovery. James, as a businessman, most likely had the resources to be able to guard himself against the harm but refused to do so. He would have also been able to contract with the seller for a warranty.

The courts would also be worried about the conflict with the original contract between Property Developments and Subco. Unlike in *Bryan v Moloney*, where the court extended the relationship of general reliance and assumption of responsibility to the plaintiff, the courts would not be able to do this on these facts. The building contract precluded both any general reliance by building owners and any assumption of responsibility by Subco.

Due to the lack of vulnerability on the part of James and the possibility of conflict with the original contract, it is highly unlikely that James will be able to recover against Subco.

Action against The Council

Issues: Is the council liable for negligently omitting to prevent the defective building work through the exercise of their statutory powers?
Is the council liable for negligent misstatement?

Issue 1: Is the council liable for having failed to enforce building regulations?

Sutherland Shire Council v Heyman recognised there was no duty on the part of the council to ensure relevant inspections were done to a house so as to prevent pure economic loss being suffered, at least where there was no prior contact between the parties giving rise to "specific reliance" by a

property owner (Mason J also referred to the concept of general reliance but this idea has subsequently been disapproved by the High Court).

The principles set out in the more recent HCA authority of *Crimmins* identify a number of factors to take into account in deciding when it is appropriate to impose a duty on a public body. These are:

The foreseeability of harm
Vulnerability of the plaintiff
Whether liability would undermine core policy making
Knowledge
Power to protect a specific class and control
Other Policy reasons

S35 of the CLA 2003 (Qld) also dictates factors to take into account in deciding when it is appropriate to impose a duty on councils:

a) financial and other resources are limited
b) the general allocation of resources is not open to question
c) the broad range of their activities is to be taken into account
d) the council can provide evidence of general compliance with procedures

Ignoring the phone call (treated as negligent misstatement next) it is highly unlikely the council will owe a duty to James.

Under *Crimmins* although it was foreseeable that James would rely, it would not impinge on core policy making, they had knowledge that he would rely and the power was designed to protect him from the harm suffered, it is not clear whether he was actually vulnerable (he could have had a specialist survey done or contracted for a warranty). *Crimmins* also specifically mentions economic loss as another policy reason for denying a duty and Crimmins itself involved personal injury, not pure economic loss.

Under the CLA, the council could argue they did not have the resources to enforce building regulations and if so, they would most likely be absolved of liability. Due to the lack of information one cannot say for sure whether S35 will be used validly, but it could be.

Due to the *Sutherland Shire Council v Heyman* rule, the economic loss policy reason from *Crimmins* and S35 of the CLA it is unlikely that James will recover from the council for their omission of statutory power.

Issue2: Is the council negligent in negligent misstatement?

Mutual Life & Citizens v Evatt dictates when a duty will be owed in respect of negligent misstatements in a straightforward two-party case: The following elements are necessary to make up the required "special relationship" according to Barwick CJ, whose judgement in that case has subsequently been approved in *Tepko*.

-A Relationship of Trust between the parties
-Knowledge that P is relying on the D regarding important/business matters
-Reasonable reliance.

In relation to the last of these elements, the following factors are relevant: any intention on the part of the defendant's to induce reliance; any invitation to a plaintiff to rely; the subject matter of the

advice; its context; the relative knowledge of the parties; the capability/vulnerability of the parties; and whether the defendant has a financial interest in the transaction in question.

Although *Evatt* was a case involving an advisor, the principle is not restricted to only advisors (*Shaddock v Parramatta*).

In *Shaddock v Parramatta* the court held that while it was reasonable for the purchaser to rely on the certificate, it was not reasonable for them to rely on the oral telephone call.

In *Tepko v Waterboard* the High Court held that it was not reasonable in the circumstances for the purchaser to rely on the estimate provided by the council as they had hassled it out of them and the council did not know the seriousness of it.

Applying these principles, James was clearly trusting the council to give the information. It would be obvious to the council that James would be relying on it for a serious matter. As to whether it was reasonable to rely; the council had no intention to induce reliance, in fact the opposite was shown by their reluctance to provide the advice. For the same reason, there was no invitation by them to James to rely. The subject matter was serious, but the context was a casual telephone conversation to an unidentified council worker who had been harassed. Although the council had the monopoly of knowledge, James was not vulnerable and had the capacity to obtain his own information and the council had no financial interest in James' transaction. Overall, therefore it was not reasonable for him to rely and there can be no action for negligent misstatement.

The findings under these *Evatt* principles would be consistent with *Tepko* where the facts are similar as involving continual asking and eventual giving in. They are also consistent with *Shaddock v Parramatta,* where it was found reliance on the phone call was not reasonable.

The council is not liable to James under negligent misstatement.

James has no action against the council either for omission or statutory power of negligent misstatement.

GRADE AWARDED: 7

EXAMPLE ANSWER TWO

a) Claim against Subco

Because James did not own the property when the negligence occurred, this is not a case of property damage – his loss is purely economic. This is a relatively novel area of Australian negligence law (although there is an almost factually identical case (*Junior Books*) in the UK), and the correct test to apply in a novel economic loss case is that of McHugh J in *Perre v Apand*. Elements of this approach are reinforced and emphasised in the case of *Woolcock*. According to the approach, five questions must be answered:

1. "Was it reasonably foreseeable that by an act or omission on the part of the defendant, a plaintiff would have suffered harm as a result? It is clear that if Subco botched the flooring, economic harm would be suffered. Therefore the harm is reasonably foreseeable.

2. "Would imposing a duty on the defendant subject him/her to indeterminate liability?" There are four possible "cures for indeterminacy" that must be considered to answer this question, that might be considered by the court:

   - Was the plaintiff a first- line victim, i.e. was the plaintiff's loss a result of the defendant's act or was it consequential upon someone else's economic loss? (*Fortuna Seafoods*). It is clear that the plaintiff's loss was immediately caused by the defendant's acts, not the result of someone else suffering economic loss. James is a first-line victim.
   - Does the defendant know or have knowledge or means of knowledge of a specific and ascertainable class that will be affected? It is clear that any act of negligence will result in economic harm to a subsequent purchaser. The defendant ought to have known of the John as a member of this specific, limited class of future purchasers.
   - Joint venture – this approach does not apply on the facts (*Fortuna Seafoods*)
   - Transferred loss – this cure also does not apply on the facts (*McMullin v ICI*)

   Therefore, upon considering these factors (in particular the first two), it can be seen that imposing a duty on the defendant would not subject him/her to indeterminate liability.

3. "Would imposing a duty on the defendant restrict his/her commercial autonomy?" This question pertains to whether doing a dodgy flooring job would be a furtherance of the defendant's business interest. Clearly it is not, therefore imposing a duty would not restrict the autonomy of the defendant.

4. "Is the plaintiff vulnerable?" This question is key, and one which requires much consideration.

   In *Perre*, McHugh explains that vulnerability in this sense means "did the plaintiff have a reasonable alternate means of protection?". This could have been done in two ways: protection via the contract of sale, or by getting the relevant inspections done (*Woolcock*). He could also have obtained insurance, although the High Court is less clear whether this is relevant (*Perre*).

   In regards to the contractual protections, James may have been able to protect himself by insisting on a clause in the contract of sale which stated that property developments were liable for any defect in construction. This is not reasonable, however, as James does not have very great bargaining power. If he had not signed the contract, due to the demand for property, someone else would have.

In regards to the inspections, James did not have a specialist survey done because of its cost. However, he did ring the council, who said that the floor was fine. It can be argued that if James could not afford the inspection, it was not a reasonable alternate protection. Depending on the James' finances at the time, the court would probably look upon this argument favourably.

James could not have insured himself because premiums on this type of insurance would be unreasonably high, due to the speculative nature of property purchase. Therefore, James had no other reasonable means of protection, as he had already exhausted his only means of protection.

5. "Did the defendant know or ought he to have known that conduct of this type may cause harm to a plaintiff?" It is obvious that badly laid flooring would cause harm to the plaintiff, and as such, the defendant ought to have known about it.

One final consideration is whether imposing a tort duty on the defendant would conflict with any other duties the defendant has. There is a major concern here.

Subco undertook the flooring work "on the understanding" that liability would be excluded for the flooring. If this was a contractual disclaimer (i.e. outlined in the contract for Subco to do the floors), then imposing a tort duty would impose liability on the defendant that they had already disclaimed in their contract with Property Developments. Even a conversation may constitute a contract (provided there was an offer, acceptance and an intention to create legal relations – consideration can be seen). Therefore imposing a tort duty on Subco would conflict with their contractual duties with PD.

Therefore, James' action in relation to Subco turns on two main points: vulnerability and conflict. The vulnerability argument is relatively strong, and so he has a reasonable chance of succeeding. However, due to the conflict argument, James has a very low chance of recovering from Subco.

b) Claim against The Council

This is a case of negligent misstatement within a two-party relationship. As a result, Barwick J's test from *MLA v Evatt* applies. Three stages in this test are phrased as questions:

1. "Did the defendant know, or ought to have known, that he or she was being trusted?"
   James knew that the council had done surveys. These council surveys would have been done by professional council inspectors. Because James asked the council about the surveys, and asked repeatedly, it can be inferred that the defendant ought to have known that he/she was being trusted.

2. "Did the defendant know, or ought to have known, that the information was to be relied upon for a matter of business or serious consequence?"
   Building surveys are not normally requested for any other purpose than to judge the state of the building so that a purchase can be made.

   In the case of *Tepko v Water Board*, it was held that even though the plaintiff had begged the Water Board to supply information and it hadn't (but eventually did), that the defendant did not know that the plaintiff would rely on the information because they had hidden their dealings with the bank from the defendant.

   If James had told the council why he needed the plans, it could be argued that the defendant ought to have known that the plaintiff would rely on the information.

3. "Was it reasonable for the plaintiff to rely on the information?"

In *Tepko* it was held that it was not reasonable for the plaintiff to rely on the information because it was an estimate (not relevant) and because the P had squeezed the information out of the defendant. Therefore, it was not reasonable for James to rely on the information because he pestered “bullied” the information out.

It would be very unlikely that James could claim from the council because it was not reasonable to rely on the information from the council.

GRADE AWARDED: 7

EXAMINERS' FEEDBACK AND MARKING GUIDE

3 most common methodological errors:

- Spending too much time discussing issues (such as reasonable foreseeability etc), which were simply not at issue or difficult.
- Structure of argument- Too many stated blunt conclusions first, then the relevant principles, and then mentioning the relevant cases only at the end. This is the wrong way round. Work from relevant factors in the cases to your conclusions
- Insufficient planning before writing. This was evidenced by numerous post-scripts, footnotes, and meandering lines to other text. Planning and structure is vital in all problem questions. Don't be tempted to start writing before you have thought things through.

3 most common substantive errors:

- Students simply assumed that there is a 'rule' that a builder does not owe a duty of care for economic loss resulting from defective construction of a commercial building. Not so.
- Students failed to analyse the contract between Subco and PD within the framework of conflicting duties and/or assumed responsibility; instead they treated it as either 'clearly' excluding liability (because that is what it purports to do) or as 'clearly' being irrelevant because James was not a party of the understanding. Not enough thinking through!
- Students all too often tried to analyse the council's liability through a negligent omission/construction defect framework, rather than through the framework of negligent misrepresentation.

Outline of Main Issues:

James v Subco:

James' loss was purely economic. The main issue here was whether Subco owed James a duty of care, since breach, causation and remoteness were relatively unproblematic. There might be an issue as to whether James was contributorily negligent in failing to obtain a survey, but this was not the central point. Students should not have talked about statutory protections for purchasers as the question was clearly about common law negligence.

Students had to know the criteria for duty set out i*n Bryan v Moloney* and *Woolcock* (based on McHugh J in *Perre v Apand*) in detail and understand them in their historical context. The application of those authorities to the current facts was not wholly straightforward and careful reasoning was needed. Simply saying that *Woolcock* applied without more was not really good enough. The following were issues that had to be addressed before any such conclusion was reached:

- whether economic harm was reasonably foreseeable
- whether the premises were "domestic" or "commercial" and whether this was material to the outcome (*Woolcock*)
- whether James was vulnerable (and the definition of vulnerability), taking into account - the (potentially expensive) opportunity for property inspection; any (scant?) opportunity for insurance; any opportunity to negotiate protection in the contract of sale (*Perre v Apand*; *Woolcock*; *Johnson Tiles v Esso*); the (remote) possibility of obtaining access to council inspection information

- whether Subco had "assumed responsibility" for the work (and whether this mattered) (*Bryan v Maloney*, *Woolcock*)
- whether liability would "conflict" with an express contractual risk-allocation in Subco's contract with Property Developments (and whether this mattered) (*Perre v Apand*; *Johnson Tiles v Esso*)

James v The Council:

The central duty was again whether the Council owed James a duty of care in respect of his pure economic loss. There is no reason to assume that the council was negligent in the way in which the inspection itself was carried out under Statutory Powers, merely that the supervisor was careless in the information he/she gave to James about its results. It might have been argued and was in one or two cases that the council had been negligent in failing to enforce building standards, having picked up the problems in its report. Students needed to demonstrate knowledge of the possible (exceptional) duty criteria referred to *Heyman* (*obiter*) (specific reliance/actions inducing specific reliance); also of the Barwick criteria in *Evatt* which are generally accepted to apply in cases in which information is directly given by one party to another at the latter's request (see *Tepko*). Reference to the later (similar) approaches of the majority of the HCA in *Esanda* should probably also have been made (albeit that *Esanda* was a 3-party case, so that arguably, this was not necessary). In assessing whether the Barwick criteria were satisfied on the facts, key issues were –

- Whether there was a relationship of trust/reliance between James and the Council
- Whether the council knew or ought to have known that James would rely
- Whether James actually did rely on the assurance
- Whether his reliance upon an oral assurance provided over the telephone would be deemed reasonable (*Shaddock, Woolahra*)
- Whether his reliance upon information provided reluctantly under pressure would be deemed reasonable *(Tepko v the Water Board*)

It was not enough I respect of these matters simply to reach conclusions without reasoning.
Analogies needed to be drawn with the decided caselaw in order to demonstrate how courts would be likely to answer these questions.

KB 2008.