10/11; [2011] VSC 171

SUPREME COURT OF VICTORIA

VALE & ANOR v SHANKLYN INVESTMENTS PTY LTD

J Forrest J

13 April, 6 May 2011

CIVIL PROCEEDINGS – NEGLIGENCE – SHED IN KIT FORM ERECTED – INSTRUCTION MANUAL PROVIDED WITH KIT – WHEN PORTION OF SHED HAD BEEN ERECTED SHED COLLAPSED – DAMAGE OCCURRED – FINDING BY MAGISTRATE THAT PERSON ERECTING SHED DID NOT RELY ON INSTRUCTION MANUAL – FAILURE TO PROVIDE ADEQUATE INSTRUCTIONS WITH SHED IN KIT FORM – CAUSATION – HYPOTHETICAL CAUSATION – FINDING OF NO BREACH OF DUTY NOT CORRECT IN LAW – FINDING AS TO NO CAUSATION NOT CORRECT IN LAW – WHETHER MAGISTRATE ERRED IN APPLICATION OF LAW.

V. purchased a large shed in kit form with an instruction manual. When a portion of the frame had been erected, the shed collapsed causing damage. V. sued the shed's suppliers SIP/L asserting that the instructions in the manual were inadequate. V. asserted that the manual should have mentioned the necessity to brace the roof and the wall very early in the shed's construction. The Magistrate concluded that V. placed no reliance on the manual and therefore V.s claim failed. Upon appeal—

HELD: Appeal allowed. Remitted for further hearing by the Magistrate.
1. The central point to V's claim was the inadequacies of the manual and its relationship to the shed's collapse.

2. The first issue to be determined by the Magistrate was the existence and scope of the duty of care. The Magistrate was undoubtedly correct in concluding that a duty of care was owed by SIP/L to V. This was a product liability case – the duty of SIP/L to take reasonable care extended to the provision of instructions or warnings with the components of the shed.

3. The next task was to determine the question of breach. This was to be resolved by the application of the principles set out in Part X of the *Wrongs Act* s48 which reflect to a large extent, but not entirely, the principles set out in *Wyong Shire Council v Shirt* [1980] HCA 12; (1980) 146 CLR 40; (1980) 29 ALR 217; (1980) 54 ALJR 283; (1980) 60 LGRA 106; 47 Aust Torts Reports 80-278.

4. The issue of causation could not be properly resolved by looking at what approach V. had actually taken as that ignored the negligent omission which made out the breach. There had to be an analysis of what would have happened, hypothetically, if the manual had contained instructions concerning the early erection of the bracing. In determining the case on the basis of what happened in fact, not the hypothetical, the Magistrate fell into error. The question of breach was not dependent upon reliance.

5. All the evidence concerning the use of the manual had to be evaluated on this issue and then considered in the light of what the manual should have contained. On the balance of probabilities, would the roof bracing have been erected prior to the collapse? If so, the breach was a cause of the shed's demise. If not, V's case would have failed.

6. The case is remitted to the Magistrate to determine the questions of breach of duty and causation in accordance with this judgment.

J FORREST J:

Introduction

1. In February 2007, the appellants, Michael and Tricia Vale, purchased a very large shed in kit form manufactured by the respondent A G & S Building Systems Pty Ltd.[1] An instruction manual[2] accompanied the kit.

2. Mr Vale, a solicitor, with a friend, Mr Fraser Sleeth, a carpenter, set out to construct the shed at Enterprise Park Benalla.

3. After about three weeks work, when a portion of the frame had been erected, the shed collapsed in a heap. A picture tells a thousand words; I have annexed to these reasons two photographs of the shed in its before and after state.

4. The Vales then sued A G & S in the Magistrates' Court at Benalla, asserting that the manual was inadequate. It omitted a vital point – the necessity to brace the roof and the wall very early in the shed's construction.

5. The Magistrate accepted that the manual was deficient. However, he was not satisfied that there was any reliance upon the manual by Mr Vale and Mr Sleeth and, therefore, the Vales' claim failed.

6. The Vales now appeal to this Court and must establish an error of law on the part of the Magistrate. The primary ground of appeal advanced in the notice was that it was not open to the Magistrate to conclude that Mr Vale and Mr Sleeth had not relied upon the manual.

7. This, it seemed to me after reading the submissions made in both the Magistrates' Court and in this Court, did not properly address the real complaint of the Vales which, I thought, related to the Magistrate's analysis of breach of duty and any causal relationship it may have had to the demise of the shed. During the course of the hearing I permitted an amendment to reflect this contention. That ground of appeal now reads:

> The learned Magistrate failed to consider the effect of the failure of the defendant to specify in the instruction manual the need to brace the shed during the construction phase.

The Vales also argue that the Magistrate's reasons are inadequate.

8. I have now concluded that the Magistrate's approach to both breach of duty and causation was wrong in law. I think that he should reconsider those issues in the light of the following reasons.

The claim

9. The Vales sought over $50,000 in damages as a result of the damage to the shed. In their particulars of claim, the Vales alleged negligence and breach of the *Trade Practices Act* 1974 and the *Fair Trading Act* 1999. It was said that the shed was built in accordance with the manual and that the negligence of A G & S was as follows:-

> The construction manual should have ensured that the strap bracing was commenced at an earlier stage.

The hearing

10. When the case was opened by counsel for the Vales on the morning of 22 February 2010 solely as a claim for negligence, he said as follows:

> I will say on behalf of my clients that there has been a failure in the construction manual to set out the need for proper bracing, and Your Honour will hear about this from experts as opposed to me that if there had been proper bracing at the diagonal from the top... The problem was, there was no discussion of that in the manual, the manual was silent on that topic.[3]

11. A G & S argued that Mr Vale and Mr Sleeth had not followed the manual and that the manner in which they erected the shed did not conform with either of the methods it prescribed. In effect, the defence of A G & S was that it could hardly be blamed for the collapse of the shed when Mr Vale and Mr Sleeth failed to follow the manual's instructions.

12. The manual produced under the name of A G & S and entitled "Instruction Manual for MultiBuild All Steel Buildings 3 to 30 metre span" set out the method of construction of the shed.[4] It specified two methods of construction: the tilt up method and the frame first method. It also contained warnings as to construction. It referred to the need for bracing,[5] but it said nothing in clear language about the need to erect the bracing at an early point of time.

13. Three experts provided reports for the purpose of the case. On the day of the trial, a conclave of experts was held and his Honour recorded their findings as follows:[6]

> Both parties' experts also agreed following a "hot tubbing" session conducted on the day of the hearing, on the following:
> (1) The instruction manual is deficient in detail relating to propping of bracing.
>
> (2) At what stage roof and wall bracing was to be installed.
>
> (3) Joint between columns rafters and the apex will need to be temporarily braced before lifting into position – statement is ambiguous
>
> (4) Disagree - who is the targeted person the manual is written for.
>
> The experts also provided the following guidance with agreement reached on the following facts:
> (1) Erection procedure [adopted by the plaintiffs] did not conform with the erection procedure outlined in points 1, 2, 3 of the manual, however a similar assembly was achieved.
>
> (2) Departure from the procedure was not ratified or agreed by the manufacturers engineers.
>
> (3) With the departure from the manual regarding erection, installation of the roof bracing at that stage could have, prevented collapse of the frame (however this was not documented in the manual either).
>
> (4) There is agreement that the departure from the manual (new erection procedure) should have been satisfactory provided the roof bracing was installed.
>
> (5) Deviation from the documented procedure did not contribute (more or less) to the failure of the structure; however, the requirement for roof bracing would have been the same.

One of the experts, a Mr Whytlaw, gave evidence and was cross-examined by counsel for A G & S.

14. There was no issue, given the findings of the experts, that the roof would not have collapsed if roof bracing had been installed. Nor was the cause of the collapse in issue. It was also agreed that if roof bracing had been in place then the cause of the collapse was unrelated to the method actually adopted by Mr Vale and Mr Sleeth in their construction of the shed.

15. Mr Vale and Mr Sleeth also gave evidence for the Vales. A G & S called a former director, Mr Dennis McFadden.

16. I was told by counsel (both of whom had appeared at the hearing before the Magistrate) that the evidence concluded at about 5.00pm.

17. At the conclusion of the evidence the Magistrate asked the parties to file written submissions on the question of liability. In those submissions, in the penultimate and concluding paragraphs, counsel for the Vales put forward this proposition:

> The inadequacies of the instructions amount to a breach of Gliderol's duty of care to the plaintiff (paragraphs 22 and 24 of the decision).[7] In short, the case is similar to here where the instructions were capable of inducing error.

The Magistrate's reasons

18. The Magistrate delivered his reasons on 22 April. He dismissed the claim and entered judgment for A G & S.

19. In his reasons, the Magistrate set out the background to the claim, including the findings of the experts,[8] he noted the experts conclusion that the cause of the collapse "was a lack of roof cross bracing in plan of rafters and no propping detail to apex".[9]

20. He identified the arguments addressed by each side[10] and then set out the issues:[11]

> There can be no issue that the defendants owed the plaintiffs a duty of care as purchasers of their product. It was not pleaded that no duty arose where a purchase was made through an unauthorised distributor. It is in my view, immaterial whether the distributor was authorised or not, the issue is adequacy of the instructions contained in the manual and the extent of the reliance by the plaintiff on those instructions.

> To borrow from the analysis of the Court of Appeal in *Gliderol*, the question is whether there existed a causal nexus between the inadequacy of the instructions and the collapse of the structure.
>
> Therefore consistent with the approach taken by the High Court in *San Sebastian* and *Esanda*, does the evidence show on the balance of probabilities, that the plaintiffs relied on the contents of the IM and that such reliance induced them to act in a particular way by relying on it?

Next, his Honour turned to an analysis of the evidence and said as follows:[12]

> Neither Mr Vale nor his employee, Mr Sleeth were qualified builders. They had between them some experience in construction, but had not direct experience in the construction of a shed of this magnitude.
> Both men understood the need for bracing in roofs. Mr Vale gave evidence that the method he chose to erect the shed was safer than the FFM. The different method of construction involving the use of purlins affixed to the rafters was considered by Mr Vale and Sleeth to improve the stability of the structure.
>
> Mr Vale conceded that he had not "strictly" relied on the IM for the method of construction in his evidence. He also conceded that his method of construction was different from the FFM contained in the IM.
>
> It was never argued by the plaintiff that as a result of confusion or ambiguity arising from the agreed deficiencies identified by the experts in the IM, that they chose to adopt a different method of construction.

Finally, his Honour set out his determination:[13]

> I am satisfied that the defendant as a manufacturer and supplier of the shed owed a duty of care to members of the public who purchase their products.
>
> The duty of care owed is irrespective of the level of experience and qualifications of the purchaser. The sheds were marketed to the general public, and it is reasonable to expect that members of the public who are not licenced builders may purchase and attempt the erect the shed.
>
> The fact that the structure that the plaintiffs attempted to erect was substantial, and arguably beyond their experience, does not diminish the duty of care owed. Had the defendants intended for sheds of this magnitude to be constructed only by licenced builders that should have been clearly stated. It was not.
>
> There was a foreseeable risk that the supply of the shed with a generic instruction manual and ambiguous engineering drawings, may result in the structure being erected in an unsafe manner resulting in collapse.
>
> The instruction manual provided for two alternative methods of construction, the Tilt Up Method and the Frame First Method.
>
> I am satisfied on the evidence that neither Mr Vale or his employees relied to any significant degree on the contents of the IM. The method chosen by the plaintiff's [sic] was neither of the methods set out in the IM.
>
> I am satisfied that the plaintiff [sic] turned their minds to the need for bracing and support of the frame as it was erected, and determined their own construction method, which they believed was superior to the suggested methods in the IM. Such a deliberate and considered departure from the IM demonstrates that there had been little or no reliance on the contents of the IM by the plaintiffs. This was not a case where the plaintiff had misunderstood the instructions in the IM, or that the instructions were ambiguous such as was the case in *Gliderol*. The fact that the experts concluded that the instruction manual is deficient in detail relating to propping of bracing and at what stage roof and wall bracing is to be installed, becomes immaterial in the absence of reliance by the plaintiff on the IM.
>
> I find that notwithstanding that the defendants owed the plaintiffs a duty of care, that there has not been a breach of that duty of care. There has not been any breach of that duty of care because I am unable, on the evidence as I have found, to be satisfied on the balance of probabilities that there was any reliance by the plaintiff on the instruction manual.
>
> It follows that in the absence of demonstrated reliance on the contents of the IM, by the plaintiff that

> the loss they have suffered as a result of the collapse of the shed was not caused by the negligence of the defendants.

21. I should make a point here. This was not an easy case for the Magistrate to determine, particularly given the way in which the Vales' case was presented and the manner in which submissions, from both sides, were put to him. As part of their case, the Vales said that Mr Vale and Mr Sleeth had followed the manual in constructing the shed. His Honour concluded that they had not followed either of the two methods set out in the manual – rather, they had utilised their own method of constructing the shed. This, in itself, however, as I will explain, did not resolve the central point of the Vales' claim – the inadequacies of the manual and its relationship to the collapse. I shall return to these issues in a moment.

Adequacy of Reasons

22. I take the law to be as stated by the Court of Appeal in *Intertransport International Private Ltd v Donaldson*[14], in which Chernov JA (with whom Eames and Ashley JJA agreed) said as follows:

> It is well-settled that, ordinarily, a judicial officer is under an obligation to explain, however briefly, why he or she came to the conclusion that is sought to be challenged – the reasoning process by which the impugned conclusion was reached must be apparent... A principal justification for this requirement is obvious enough – the parties, particularly the losing parties, are entitled to know the basis on which the judge came to the impugned conclusion so that proper consideration can be given whether it might be properly challenged on appeal. Moreover, reasons for the decision should be set out so as to enable an appellate court to determine if there was relevant error. ...
>
> But reasons will be adequate notwithstanding that they are brief if they reveal the steps in the thinking process of the court by which it reached its decision: see *Kiama Constructions Pty Ltd v Davey*. It may be that the basis for the decision can be inferred from the whole of the reasons for judgment, having regard to the circumstances of the case. ...
>
> Whether a judgment sufficiently indicates the basis of the decision depends, as I have said, on the circumstances of the case, including how the case was conducted by the parties and, relevantly for present purposes, what were the principal issues in dispute between them [citations omitted].[15]

23. Last month, in *Transport Accident Commission v Kamel*,[16] Kyrou AJA said:

> This Court has repeatedly emphasised, including in appeals from decisions of the County Court under s93(4)(d) of the Act, that judicial reasons for decision must sufficiently explain the basis for any findings that are made in reaching that decision. It has been said that the reasons must disclose "the route that led to the answer", "how or why the conclusion was reached", "the process of reasoning" or "the path of reasoning".[17]

24. I am not persuaded that the Magistrate's reasons are inadequate. It is not to the point that the reasoning may result in an error of law – that may be cured on another basis. What is to the point is whether the reader (be it the parties or a court called upon to consider the decision) can follow the train of reasoning adopted by the Magistrate and the basis for his conclusion.

25. Factually, this was not a difficult case once the experts had reached agreement. Here the Magistrate set out the facts, the expert evidence and the issues as he perceived them. The Magistrate then analysed the case presented by each party and ultimately concluded that there was no breach of duty because of the absence of reliance.

26. I have no difficulty in understanding the Magistrate's reasoning. Whilst for reasons I will set out in a moment, I think that there was an error in that approach, that does not render the reasons susceptible to attack on this ground.

Was there an error of law?

27. I do not accept A G & S's contention that the case run at trial was not one of negligence caused by the inadequacies in the manual. It patently was just such a case. In part, what confused things was the insistence by the Vales that Mr Vale and Mr Sleeth had followed the manual. The Magistrate found they had not. But this did not resolve the case. Whether Mr Vale and Mr Sleeth in building the shed had relied, in fact, upon the manual was not relevant to findings of duty of care or breach.

28. The first issue to be determined by his Honour was the existence and scope of the duty of care. The Magistrate was undoubtedly correct in concluding that a duty of care was owed by A G & S to the Vales. This was a product liability case – the duty of A G & S to take reasonable care[18] extended to the provision of instructions or warnings with the components of the shed.[19]

29. The next task was to determine the question of breach. Here, this was to be resolved by the application of the principles set out in Part X of the *Wrongs Act* s48 which reflect to a large extent, but not entirely, the principles set out in *Wyong Shire Council v Shirt*.[20]

30. The Magistrate commenced this analysis by correctly addressing the issue of foreseeable risk: s48(1)(a). He held that there was a foreseeable risk that the supply of the shed with a generic instruction manual and ambiguous engineering directions, may result in the structure being erected in an unsafe manner resulting in collapse. I infer from his finding as to that risk, that his Honour accepted the agreed evidence of the experts to the effect that the manual was deficient in its detail concerning the propping of bracing and at what stage the roof bracing was to be installed. Clearly the risk was not insignificant. The next step was to identify the reasonable response to the perceived risk: s48(1)(c) and s48(2).

31. Pausing here, this is where confusion seems to have arisen, primarily because of the reliance by A G & S upon decisions such as *Esanda Finance Corporation v Peat Marwick Hungerfords*[21] and *San Sebastian Pty Ltd v Minister administering the Environmental Planning and Assessment Act* 1979.[22] These decisions were not to the point and deflected the Magistrate from the correct approach. Both those cases deal with the existence of duty of care where a negligent statement has arguably, induced a person to take certain steps which then result in economic loss.

32. For instance in *Esanda*, a company's auditor was said to have examined the books negligently. Esanda lent money to the company and argued that it relied upon the audited accounts. This was a case of pure economic loss and the High Court held that foreseeability alone was insufficient to establish a duty of care. Rather, in establishing the existence of a duty, it was necessary to point to other factors and in particular the likelihood that another party would rely upon that advice before a duty of care could arise. The central point in both *Esanda* and *San Sebastian* was determining the circumstances in which a duty of care would (or would not) arise, not when a breach of that duty was established, nor whether there was a causal link between breach and damage.

33. Here the Vales sustained property damage, not pure economic loss. This was a product liability case in which it was said that there was an omission or defect in the contents of the manual provided with the kit. The existence of the duty of care was not a real issue (it was of course resolved in the Vales' favour), and reference to these cases was not of assistance – indeed I perceive that it deflected the Magistrate from the correct analysis.

34. The question to be answered at this point was how a reasonable manufacturer would have responded to the identified risk.[23] I infer that the Magistrate concluded, based on the unassailed expert evidence, that the manual should have contained clear instructions as to the necessity of bracing at an early point of time.

35. At this stage – in determining whether a breach of duty occurred, questions of reliance, actual or hypothetical, were not relevant. However, the Magistrate, having found that there was no actual reliance upon the manual[24], then concluded that there was no breach of the duty of care. But as I have said, in this case reliance was irrelevant to breach; so I think there was an error of law probably generated by repeated references to two decisions of the High Court, not relevant to this issue.

36. What I have said means the appeal must be allowed. However, I should address the question of causation (s51 of the *Wrongs Act*), it being the nub of the case as I see it.

37. The Magistrate concluded that in the absence of demonstrated reliance on the contents of the manual, the Vales had failed to establish that the collapse of the shed had a causal link to the negligence of the defendants.[25]

38. Again, it seems to me that the Magistrate was not assisted by the submissions of A G & S as to the need for reliance in fact. That was not the point.

39. Rather, the issue of causation could not be properly resolved by looking at what approach Mr Vale and Mr Sleeth had actually taken as that ignores the negligent omission which makes out the breach. There had to be an analysis of what would have happened, hypothetically, if the manual had contained instructions concerning the early erection of the bracing.[26] In determining the case on the basis of what happened in fact, not the hypothetical, the Magistrate fell into error.

40. On this point, it is to be noted that both Mr Vale and Mr Sleeth were adamant that they had in fact consulted the manual, but had elected to erect the shed in a different way to that prescribed in the manual.

41. As McHugh J said in *Rosenberg v Percival*,[27] – a case about a failure to warn as to the risks of surgery –

> The Tribunal of fact must always make a finding of what this patient *would* have done.[28]

Recently, in *Peterson v Merck Sharpe and Dohme (Aust) Pty Ltd*,[29] Jessup J noted "a certain artificiality about the task",[30] but it is nevertheless a necessary exercise in determining whether a causal link is established.

42. All the evidence concerning the use of the manual had to be evaluated on this issue and then considered in the light of what the manual should have contained. On the balance of probabilities, would the roof bracing have been erected prior to the collapse? If so, the breach was a cause of the shed's demise. If not, the Vales' case would fail.

43. As a result of permitting the Vales to amend their Notice of Appeal, I gave leave to A G & S to file any supplementary submissions relating to the amended grounds of appeal. In these submissions, A G & S conceded that the Magistrate did not analyse the "hypothetical question of what the appellants would have done had the manual been adequate", but argued that on the evidence and the findings, no different result would have ensued.

44. It may be that ultimately the Magistrate is not persuaded that such a warning would have altered the manner in which Mr Vale and Mr Sleeth tackled the job. However, it is not to the point to argue on this application that such a conclusion is inevitable, given the findings made by the Magistrate. As I have said, the approach urged upon the Magistrate by A G & S was wrong in law. The analysis was conducted through the wrong prism. The question of breach and its relationship to the collapse of the shed now needs to be analysed again.

45. The actual failure by Mr Vale and Mr Sleeth to follow to the letter either of the methods set out in the manual does not necessarily mean they would not have followed an appropriately worded warning as to the use of roof bracing at an early point of time. That is a discrete issue that needs to be considered by the Magistrate.

46. Accordingly I am not persuaded that there is no utility in remitting the matter to the Magistrate for further determination. It is for the Magistrate, as the trier of fact, to resolve this case, having considered the evidence and submissions from both parties in the light of these reasons.

47. To sum up, I think the Vales have established two errors of law. First, in respect of the Magistrate's finding that there was no breach of duty based upon the lack of any reliance on the manual. The question of breach was not dependent upon reliance. Second, the question of causation could only be addressed by an analysis of the hypothetical, not what actually happened.

48. The appeal will be allowed.

What course should now be taken?

49. Neither side argued that in the event of remitter the case should not be sent back for further determination by his Honour. I propose to remit the matter to the Magistrate to determine the questions of breach of duty and causation in accordance with these reasons.

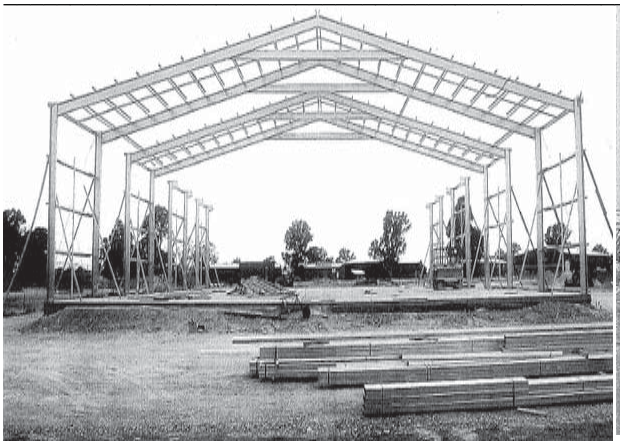
50. It is up to the Magistrate, it seems to me, to determine whether he wishes to hear further evidence on the issues I have identified or to decide the matter on the material adduced at trial.

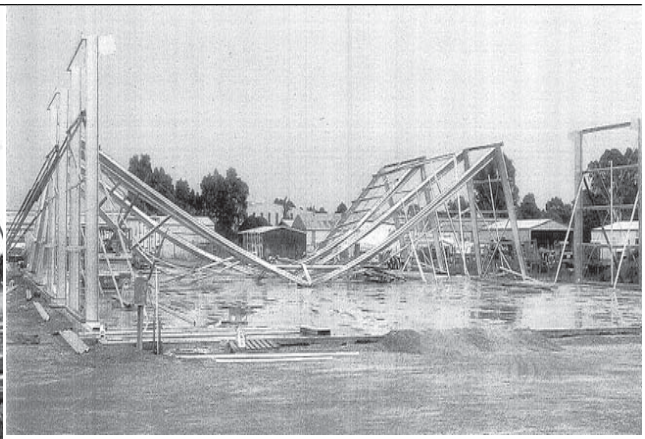
Orders

51. I will make the following orders:-

(a) Appeal allowed. (b) The complaint is remitted for further hearing before the Magistrate.

52. The parties may wish to make submissions as to costs.





[1] *A G & S.*
[2] *"The manual".*
[3] AB 38.
[4] The evidence as to how the manual came into the possession of the Vales was not entirely clear. But it was undisputed that the manual was applicable to the shed and was read by Mr Vale and Mr Sleeth.
[5] AB 378.
[6] [6] and [7] of the Reasons.
[7] This was a reference to a decision of *Gliderol International Pty Ltd v Skerbic* [2009] ACTCA 16.
[8] See [6] and [7] of the Reasons.
[9] [5] of Reasons.
[10] [7] – [35] of the Reasons.
[11] [36] – [38] of the Reasons.
[12] [39] – [42] of the Reasons.
[13] [43] – [52] of the Reasons.
[14] [2005] VSCA 303.
[15] Ibid [18]-[19].
[16] [2011] VSCA 110.
[17] Ibid, [70].
[18] *Graham Barclay Oysters Pty Ltd v Ryan* [2002] HCA 54; (2002) 211 CLR 540 [106]; (2002) 194 ALR 337; (2002) 23 Leg Rep 2; (2002) 77 ALJR 183; [2003] Aust Torts Reports 81-681; (2002) 125 LGERA 1 – *"Graham Barclay Oysters"*.
[19] *Thompson v Johnson & Johnson Pty Ltd* [1991] VicRp 84; [1991] 2 VR 449, 488-492; [1991] Aust Torts Reports 68-587.
[20] [1980] HCA 12; (1980) 146 CLR 40, 47-48; (1980) 29 ALR 217; (1980) 54 ALJR 283; (1980) 60 LGRA 106; 47 Aust Torts Reports 80-278. See also *New South Wales v Fahy* [2007] HCA 20; (2007) 232 CLR 486 [78]-[79]; (2007) 236 ALR 406; (2007) 81 ALJR 1021; [2007] Aust Torts Reports 81-889; (2007) 4 DDCR 459.
[21] [1997] HCA 8; (1997) 188 CLR 241; (1997) 142 ALR 750; (1997) 71 ALJR 448; (1997) 23 ACSR 71; [1997] Aust Torts Reports 81-420; (1997) 15 ACLC 483; [1997] 5 Leg Rep 2 .
[22] [1986] HCA 68; (1986) 162 CLR 340; (1986) 68 ALR 161; (1986) 61 ALJR 41; (1986) 60 LGRA 405; [1986] Aust Torts Reports 80-060.
[23] *Graham Barclay Oysters* [192]. *Amaca Pty Ltd v A B &P Constructions Pty Ltd* [2007] NSWCA 220; (2007) Aust Torts Reports 81-910, [67]-[74]; (2007) 5 DDCR 543 *"Amaca"*.
[24] See [20] above.
[25] See [20] above.
[26] See the analysis in *Amaca* [75] – [88].
[27] (2001) 205 CLR 434.
[28] Ibid [25]. See also *Chappell v Hart* [1998] HCA 55;(1998) 195 CLR 232, 246; 156 ALR 517; 72 ALJR 1344.
[29] [2010] FCA 180; (2010) 184 FCR 1; (2010) 266 ALR 1; (2010) 85 IPR 1; [2010] ATPR 42-313.
[30] Ibid [864].

APPEARANCES: For the appellants Vale: Mr W Gillies, counsel. Michael Vale & Associates, solicitors. For the respondent Shanklyn Investments Pty Ltd: Mr J Shaw, counsel. Nevin Lenne & Gross, solicitors.