practicability which are much better suited to resolution in the employment tribunal proceedings ... than in judicial review proceedings such as these'. Accordingly, the Supreme Court did not consider the effect of the European Convention on Human Rights on the construction issue to be decided.

Endnotes

1. [2014] UKSC 68 at [13].
2. [2014] UKSC 68 at [19].
3. Before the Lord Ordinary, Lady Smith.
4. Lord Mackay of Drumadoon, Lady Dorrian and Lord McEwan.
5. [2014] UKSC 68 at [20].
6. [2014] UKSC 68 at [21].
7. [2014] UKSC 68 at [29].
8. [2014] UKSC 68 at [29].
9. [2014] UKSC 68 at [31].
10. [2014] UKSC 68 at [32].
11. [2014] UKSC 68 at [33].
12. [1981] AC 800.
13. [2014] UKSC 68 at [28], [33].
14. [2014] UKSC 68 at [34].
15. [2014] UKSC 68 at [34].
16. [2014] UKSC 68 at [37].
17. [2014] UKSC 68 at [38].

Police duty of care

Daniel Klineberg reports on *Michael v Chief Constable of South Wales Police* [2015] UKSC 2

On 5 August 2009, Joanna Michael died. In the early hours of 5 August 2009, Ms Michael's ex-boyfriend turned up at her house, assaulted her physically and threatened to kill her. Following the assault, at 2.29am Ms Michael called the emergency 999 number and reported the assault and the threat to her life. Although Ms Michael lived in Cardiff which was in the area of South Wales Police, the emergency call was routed to Gwent Police. The call ended with Ms Michael being told that the information would be passed on to the police in Cardiff. The call was graded by Gwent Police as 'G1' meaning it required an immediate response from police officers. There was a police station no more than six minutes' drive away from Ms Michael's house.

The Gwent call handler immediately called South Wales Police and gave an abbreviated version of what Ms Michael had said. However, no mention was made of the threat to kill. South Wales Police graded the priority of the call as 'G2'. This meant that officers assigned to the case should respond to the call within 60 minutes.

At 2.43am Ms Michael again called 999. The call also was received by Gwent Police. Ms Michael was heard to scream and the line went dead. South Wales Police were immediately informed. Police officers arrived at Ms Michael's address at 2.51am. They found that she had been brutally attacked and was dead. Her attacker was soon found and arrested. He subsequently pleaded guilty to murder and was sentenced to life imprisonment.

Data held by South Wales Police recorded a history of abuse or suspected domestic abuse towards Ms Michael by the same man. On four occasions between September 2007 and April 2009, incidents had been reported to the police and entries had been made on a public protection referral for domestic abuse form, but in two instances the risk indications section of the form was not completed.

An investigation by the Independent Police Complaints Commission led to a lengthy report. It contained serious criticisms of both police forces for individual and organisational failures.

Procedural history

The claimants were the parents of Ms Michael and her two children. They sought damages for negligence at common law (as well as under certain legislation). They also sought damages under the *Human Rights Act 1998* for breach of the defendants' duties as public authorities to protect Ms Michael's right to life under article 2 of the European Convention on Human Rights. Originally, there was also a claim for misfeasance in public office. This note will consider only the issues arising out of the negligence claim.

The police applied for the claim to be struck out or for summary judgment to be entered in their favour. They were unsuccessful at first instance but, on appeal, the Court of Appeal held unanimously that there should be summary judgment in favour of the defendants on the negligence claim. The claimants

able to bargain for contractual warranties from the vendor of such premises.[12] Their Honours stated:[13]

> These passages accord with the primacy of the law of contract in the protection afforded by the common law against unintended harm to economic interests where the harm consists of disappointed expectations under a contract. The common law has not developed with a view to altering the allocation of economic risks between parties to a contract by supplementing or supplanting the terms of the contract by duties imposed by the law of tort.

In considering the obligations of Brookfield to the developer, their Honours found that the relevant provisions of the contract placed the risk of deficient work upon Brookfield, rather than the developer, and to supplement those with an obligation to take reasonable care would alter the allocation of risks effected by the contract.[14]

Their Honours found that a duty was not owed by Brookfield to the owners corporation independently of its obligations to the developer, and a contrary finding was not consistent with the court's finding in *Woolcock*.[15] The correct question was not whether the relevant legislative scheme excluded a duty of care in favour of the owners corporation, but whether the owners corporation itself suffered a loss in terms of the value of the common property vested in it when it came into existence, viewed separately from the individual owners. The fact that the owners corporation did not exist at the time that the defective work was carried out was held to point against, rather than in favour of, the duty of care propounded by the owners corporation.[16]

Their Honours noted that their conclusion accorded with the position in the United Kingdom and the preponderance of judicial authority in the United States, although it differed from the approach in Canada, which their Honours considered should not be followed in Australia.[17]

Gageler J

His Honour considered the position in other jurisdictions on the issue of whether a builder should be recognised to owe a duty of care to a subsequent owner, and observed that there was no reason to consider any one of those approaches to result in a greater net cost to society than any other. Rather, provided the principle of tortious liability is known, his Honour considered that builders can be expected to accommodate it in the contractual terms on which they are prepared to build, and subsequent owners can be expected to accommodate it in the contractual terms on which they are prepared to purchase. His Honour observed that there is a net cost to society which arises from uncertainty as to the principle to be applied.[18]

In considering the principle for which *Bryan v Maloney* remained authority after *Woolcock*, his Honour referred to the judgment of McHugh J in *Woolcock* and in particular to the finding that the ultimate question was whether the residual advantages that an action in tort would give were great enough to overcome the disadvantages, and in the absence of data to permit that judgment to be made, the better view was that the court should not take the step of extending the principle of *Bryan v Maloney* to commercial premises.[19]

Gageler J held that absent any application that *Bryan v Maloney* should be overruled, and absent data which might permit the making of a value judgment different from that made in *Woolcock*, the view expressed by McHugh J in the latter decision should be accepted. His Honour considered that the authority of *Bryan v Maloney* should be confined to cases concerning dwelling houses and where the subsequent purchasers could be shown by evidence to fall within a class of persons incapable of protecting themselves from the consequences of the builder's want of reasonable care, because, by virtue of the freedom they have to choose the price and non-price terms on which they are prepared to contract to purchase, there is no reason to consider that subsequent owners cannot ordinarily be expected to be able to protect themselves against incurring economic loss of that nature.[20]

Endnotes

1. *The Owners – Strata Plan No 61288 v Brookfield Australia Investments Ltd* (2013) 85 NSWLR 479.
2. (1995) 182 CLR 609.
3. (2004) 216 CLR 515.
4. At [22].
5. At [23].
6. At [29].
7. At [34].
8. At [34].
9. At [58].
10. At [59] – [60].
11. At [69].
12. At [130] – [131].
13. At [132].
14. At [142] – [144].
15. At [148].
16. At [149] – [150].
17. At [164].
18. At [176] – [177].
19. At [183].
20. At [185].