DEVELOPMENTS IN THE LAW OF NEGLIGENCE CAUSING PURE ECONOMIC LOSS

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INTRODUCTION

The scope of the law of negligence for pure economic loss began expanding in the mid-1990s. Before 1995, the general rule at common law was that damages were not recoverable for economic loss which was not consequential upon physical injury to person or property except in exceptional circumstances. Judicial opinions as to what constituted 'exceptional circumstances' varied, although 'exceptional circumstances' were often demonstrated if a contractual relationship existed between the parties.

In 1995, the High Court decision of *Bryan v Maloney* (1995) 182 CLR 609 extended a builder's duty of care, finding that the builder also owed a duty to a subsequent owner of a house despite there only being a contract between the builder and the original owner of the house.

Despite its application being limited to domestic construction work, this decision caused a huge uproar within the construction industry. Builders saw this decision as a controversial erosion of their rights and an extension of their liability. Obviously, the decision was welcomed by home owners and consumer groups. Courts found themselves faced with the dilemma of whether or not this area of law should be expanded to apply to commercial or other premises as well as residential premises, and to engineers and architects as well as builders.

TO EXPAND OR NOT TO EXPAND?

Courts treated the decision in *Bryan v Maloney* with some caution, and cases that followed in the next 5 years sought to confine the boundaries of this decision.

In 1997, the Victorian Supreme Court in *Zumpano v Montagnese* [1997] 2 VR 525 looked at whether the principle in *Bryan v Maloney* would apply to a house which had been purchased from a builder where the original owner was the builder. In that case, Brooking JA went to great lengths to distinguish *Bryan v Maloney* and stated in obiter that it would only apply to houses built by a builder pursuant to a contract and not for example to a 'spec home'. In the end, the Court found that there had not been any negligence and therefore it did not have to specifically consider the application of *Bryan v Maloney.*

Similarly, in *Woollahra Municipal Council v Sved* (1996) *Aust Torts Reports* 81-398, the New South Wales Supreme Court held that the narrow ambit of proximity found in *Bryan v Maloney* reflected the particular facts of that case. They found that in *Bryan v Maloney*, the reasoning of the majority of the High Court was influenced by the fact that the defect was latent. In this case, the defects would have been discoverable if the property had been properly inspected.

THE DEVELOPMENT OF QUEENSLAND LAW: *FANGROVE PTY LTD v TOD GROUP HOLDINGS PTY LTD*

However, those decisions applied to domestic houses. The law was still unsettled on whether the same principles applied to commercial premises or other buildings and also whether it applied to other construction professionals such as engineers. This question was dealt with by the Queensland Court of Appeal in *Fangrove Pry Ltd v Tod Group Holdings Pry Ltd* [1999] 2 QdR 236. In that case, an engineer was sued as a result of a collapse of a parapet on a commercial building in 1995. The building had been designed and erected in 1985 and the plaintiff had purchased it in 1989.

The Court in that case was not prepared to extend the *Bryan v Maloney* principle to the particular factual circumstances, stating that extending these principles involved

the intrusion of policy considerations and hence any extension should be conducted only at the highest judicial level. The Court held that the extension of the principles enunciated in *Bryan v Maloney* was a matter only for the High Court. The Queensland Court of Appeal found distinguishing factors between the owners of commercial buildings and the owners of domestic houses. The former were likely to be more skilled and therefore able to take steps to protect their position more so than the ordinary residential purchaser and there would therefore be less reliance on the builder by a commercial owner than a domestic owner.

A NEW DEVELOPMENT: *PROPRIETORS UNIT PLAN 95/98 & ORS v JINIESS PTY LTD & ORS*

In 2000, the Supreme Court of the Northern Territory[1] extended the duty of care owed by both a builder and an engineer to the subsequent owners of a mixed use residential and commercial building.

The Court carefully considered *Bryan v Maloney* and the cases that followed, as well as the Queensland Court of Appeal's decision of *Fangrove Pty Ltd v Tod Group Holdings Pty Ltd.* As a general proposition, the Court found that the engineers did in fact owe a duty of care to the owners, and that the elements of an action in negligence could be made out.

The Court held that the subsequent owners in the *Jiniess* case were likely to be people of the same characteristics as Mrs Maloney, with no greater and often less of an opportunity to inspect and test the premises than the first owner. Subsequent owners will be likely to assume that the building has been competently built. The Court held that engineers will have superior knowledge, skill and experience over subsequent owners in the construction of buildings and are in a better position to avoid, evaluate and guard against the financial risk posed by latent defects in the structure of the building.

Justice Riley found that the engineers were liable to the subsequent owners of the residential units. He was then required to determine whether this liability would also extend to the subsequent owners of the commercial units. His Honour saw no reason why this would not be the case. The commercial units were in the same building as the residential units, and consequently were affected by the same failures of design, supervision and construction. The characteristics of the owners, in terms of their knowledge of construction and ability to identify structural defects, had not been demonstrated to be any different. The only real, difference was that the commercial units were to be used as commercial outlets, His Honour thus did not draw a distinction between the two.

The Court therefore held that the engineers owed the subsequent purchasers a duty to take reasonable care in the design and construction of the building. It was held that the engineers may be found liable for damages of an amount equal to the decrease in the value of the interest of the building held by the plaintiff arising from the inadequacy of the design and its consequences, loss of amenity and disruption and relocation during the remedial works.

REFUSING TO EXPAND: *WOOLCOCK STREET INVESTMENTS PTY LTD v CDG PTY LTD*

Although *Jiniess* seemed to be a turning point for the expansion of the law of negligence causing pure economic loss, the Queensland Court of Appeal handed down a decision last month which severely

In Queensland at least, the scope of the duty of care owed by builders to subsequent owners of the building has once again been limited to factual circumstances resembling those in *Bryan v Maloney.*

limits the application of this law. The case of *Woolcock Street Investments Pty Ltd v CDG Pty Ltd & Anor* [2002] QCA 88, was consistent with the court's ruling in *Fangrove,* with the court refusing to follow cases such as *Jiniess* in allowing the scope of the duty of care owed by builders and engineers to subsequent purchasers of residential or commercial properties to be widened. In *Woolcock*, the court unanimously found that there was no cause of action in negligence against the defendant engineers. In Queensland at least, the scope of the duty of care owed by builders to subsequent owners of the building has once again been limited to factual circumstances resembling those in *Bryan v Maloney.*

The Facts

Woolcock concerned a case stated for the opinion of the Court of Appeal on the question of whether the statement of claim disclosed a cause of action in negligence against the defendants. The answer to that question depended upon whether, on the agreed facts:

1. a subsequent owner of a commercial complex could maintain a claim for pure economic loss against the engineer responsible for designing the complex; and

2. whether such an, engineer owed a duty of care to the subsequent owner of the complex.

The building in question was a warehouse and office complex in Townsville. In 1987, the owner of the premises engaged the defendants to provide structural design, and documentation for the foundations of the complex and act as Project Manager respectively.

The complex was completed in late 1987, but in October 1990, the owner of the complex identified the possibility of movement in the foundations of the complex.

In September 1992, the plaintiff purchased the complex, without engaging an engineer or building expert to provide any pre-purchase inspection report, or obtaining any warranty that the complex was free of structural defects.

Substantial structural distress to the complex due to the settlement of foundations or of material below the foundations became manifest in 1994. The plaintiff alleged in its statement of claim that it had suffered and would suffer loss and damage including the cost of demolishing and reconstructing the affected sections of the complex, and loss of rent during demolition and reconstruction. In other words, the plaintiff claimed for pure economic loss suffered as a result of the alleged negligence of the defendants.

Decision of the Court

The Court of Appeal was unanimous in its decision that there was no cause of action in negligence against the defendant engineers. The court here held, that there was no good reason, in terms of principle or policy, to extend the decision in *Bryan v Maloney* to cases involving other than residential dwellings.

Thomas JA, with whom the other two Justices concurred, stated that the law had not changed since the case of *Fangrove* was decided in any way such as to herald the extension of a further category of liability beyond that recognised in *Bryan v Maloney.* There was, accordingly, no good reason why the Court should decide the present case differently from the way it was decided in *Fangrove.*

With respect to *Bryan v Maloney,* His Honour stated that a quite restricted view has been taken by the courts of Australia. It therefore remained to be seen whether *Bryan v Maloney* would be recognised as a high watermark case or as a gateway to further claims whenever

a person acquires ownership of a building that is found to have a defect in it. He stated that *Bryan v Maloney* rested quite heavily on the vulnerability of members of the public in acquiring homes. Such reasoning did not necessarily translate to commercial dealings where parties have better means of protecting themselves.

He considered that the distinction between purchasers of commercial buildings and purchasers of dwelling houses, as brought about by *Bryan v Maloney*, was one which could properly be maintained. Further, this distinction between the two groups of potential defendants was sufficient to raise good reason against recognising liability of builders and designers to a further indeterminate commercial class of persons over a potentially unlimited period. His Honour stated that:

Whilst the avoidance of an unduly litigious and inefficient society is perhaps too broad a perception to sway a decision of this kind, the prospect of opening up an extra category of liability against an indeterminate class of consecutive purchasers for an indeterminate period is not one that should be lightly entertained.

His Honour stated that there were many unanswered problems concerning the scope and application of *Bryan v Maloney*, and that, when further examined, the case might not necessarily be found to afford, a sound building block for further extensions. However, he stated that it was not the function of his court to question the wisdom of *Bryan v Maloney*. It was enough to say, as in *Fancourt*, that if there is to be an extension of this body of law, it should be made by the High Court or by the legislature.

In making a case for the legislature to intervene, His Honour stated that, in this area of law, which involved policy considerations, legislation might be thought to enjoy some potential advantage over the common law method of case by case extension. His Honour stated that the court has insufficient information of the commercial workings of society, or of the economic consequences of such an extension, to determine that as a matter of policy such an extension of the law is desirable. However, he also stated that so far, no Australian legislature has seen fit to create general liability of this kind within the commercial or industrial area.

CONCLUSION

The extension of the *Bryan v Maloney* principle to commercial building projects would greatly increase the number of potential plaintiffs for actions in negligence. This would have a negative effect on the building industry as a whole, with construction and engineering companies potentially being liable to many future owners of the building, for many years to come.

With the decision of the Queensland Court of Appeal in *Woolcock*, however, the law in Queensland in respect of negligence causing pure economic loss bas been limited to cases concerning residential dwellings. The Court in this case expressed their extreme reluctance to allow the law relating to pure economic loss to be expanded without some intervention from a body higher than themselves.

It seems highly unlikely, with two concurring Court of Appeal decisions, that any further developments in this area of law in Queensland will occur without intervention from, either the High Court of Australia or the legislature itself. It remains to be seen whether the other Australian states will follow this latest decision of the Queensland Court of Appeal in limiting the scope of liability for pure economic loss caused by negligence.

REFERENCE

1. *Proprietors Unit Plan 95/98 & Ors v Jiniess Pty Ltd & Ors* (unreported, Supreme Court of the Northern Territory, Riley J, 31 October 2000).