

Professional Liability for Defective Commercial Premises

Woolcock Street Investments Pty Ltd v CDG Pty Ltd

[2004] HCA 16

By Tracey Carver

In *Bryan v Maloney*¹ the High Court held that 'builders'² owe a duty of care in negligence to the subsequent purchaser of a dwelling (at the time the defects become manifest), to take reasonable care to avoid the reasonably foreseeable economic loss sustained due to latent defects caused by the house's defective construction. In *Woolcock Street Investments Pty Ltd v CDG Pty Ltd*, the High Court was required to consider the extension of this principle to purchasers of commercial premises.

FACTS

The appellant (*Woolcock*) as the subsequent owner of a commercial warehouse and offices sought to claim, against the engineer responsible for the building's design (and their employer),³ damages for the cost of demolishing and reconstructing part of the complex and consequential loss of rent.⁴ Seven years after the building's completion, defects in its construction became apparent due to the settlement of the foundations, or the materials below them, as a result of the respondents' negligent design of the footings or supervision of their construction.

The matter came before the High Court as an appeal on a case stated⁵ to determine whether the facts pleaded disclosed a cause of action in negligence. The Queensland Court of Appeal, in answering this question negatively, had previously indicated that any extension of the rule relating to liability for defects in construction was a matter for the High Court or the legislature.⁶

HIGH COURT DECISION

A 6:1 majority of the High Court confirmed that no duty of care was owed – 'neither the principles applied in *Bryan v Maloney*, nor those principles as developed in subsequent cases' supported *Woolcock's* claim.⁷ According to the joint judgment of Gleeson CJ, Gummow, Hayne and Heydon JJ, this was because there was, on the facts:

(a) No reliance by the original owner and no assumption of responsibility by the respondents⁸

There was no duty of care owed by the respondents to the premises' original owner, as that owner (through its manager) had controlled the engineer's work by refusing to pay for necessary geotechnical investigations and directing the adoption of particular footing sizes. Therefore no similar duty could be owed to a subsequent purchaser as the anterior step, considered necessary in *Bryan v Maloney*, of demonstrating that a duty of care was owed to the original owner, was not made out.

(b) An absence of any relevant 'vulnerability' by the appellant to the economic consequences of the foundations' negligent design⁹

The joint judgment recognised the importance of 'vulnerability' to finding a duty of care to avoid economic loss since *Caltex Oil*¹⁰ and *Perre v Apand*¹¹ – in the sense of a plaintiff's inability to protect itself against a defendant's want of reasonable care. However, in this instance, the agreed facts before the court did not show whether *Woolcock* was unable to protect itself, only that no warranty was obtained from the vendor that the complex was free from structural defect and no assignment of any vendor's rights against the engineer was sought. In addition, while a certificate under section 53 of the *Building Act 1975* (Qld) was obtained, no pre-purchase inspection had occurred.¹²

McHugh J applied the five principles for determining a duty of care for pure economic loss, proposed by his Honour in *Perre v Apand*¹³ to conclude that, in the absence of a contract, those involved in the design or construction of commercial premises do not owe a duty of care in tort.¹⁴ A plaintiff's vulnerability to risk was again considered critical.¹⁵ However McHugh J held that,¹⁶ given the lack of evidence, it must be assumed that subsequent purchasers of commercial premises are usually sophisticated, wealthy investors advised by competent professionals, who can bargain for contractual

remedies and other protection. Given that commercial buildings are usually bought to make money, no prudent purchaser would contemplate buying a premises without determining whether it had existing or potential defects - such knowledge being essential to an evaluation of its worth as an investment. His Honour's decision was also influenced by policy considerations.¹⁷

Callinan J, in holding that no duty of care was owed in relation to commercial structures, similarly emphasised Woolcock's lack of vulnerability in the circumstances of the case.¹⁸ The correctness of the court's decision in *Bryan v Maloney* was also questioned.¹⁹

CONCLUSION

Justice Kirby (dissenting) held that Woolcock's case, that a duty of care be owed, was viable.²⁰ His Honour thought the appellant vulnerable as it had no reasonable opportunity of discovering and protecting itself against the latent defect, and opined that courts should be reluctant to assume that a plaintiff lacks vulnerability merely due to their commercial character.²¹ The majority's findings on the case stated were also indirectly criticised:²²


'Where the law is uncertain and especially where it is in a state of development, it is inappropriate to put a plaintiff out of court if there is a real issue to be tried ... only in clear cases should answers be given and orders made that have the effect of denying a party its ordinary civil right to trial.'

In addition to the inherent limitations of the case stated approach, in determining a duty of care in a novel claim without a full trial of the facts,²³ the joint judgment also doubts that *Bryan v Maloney* 'should be understood as depending upon drawing a bright line between cases concerning construction of dwellings and cases concerning the construction of other buildings'.²⁴ It would therefore seem that while unsuccessful on the facts of the individual case stated in *Woolcock's Case*, the issue of whether liability may extend to commercial premises might not have been conclusively decided. ■

Notes: **1** (1995) 182 CLR 609. **2** Although confined on its facts to builders, liability in this area extends to other building professionals. **3** The second and first respondents respectively. **4** *Woolcock Street Investments Pty Ltd v CDG Pty Ltd & Anor* [2002] QCA 88, [16] (Thomas JA). **5** Above n1, [3], [6], [42-3], [121], [200]. **6** Above n4, [34] (Thomas JA). Also [9], [40-1], [43]. **7** Above n1, [35] (Gleeson CJ, Gummow, Hayne and Heydon JJ). **8** *Ibid* [14], [25-7]. **9** *Ibid* [23], [31-3]. **10** *Caltex Oil (Australia) Pty Ltd v The Dredge 'Willemstad'* (1976) 136 CLR 529. **11** *Perre v Apand Pty Ltd* (1999) 198 CLR 180. **12** See also McHugh J at [39]. **13** Above n1, [74-87]. This test was also applied by Kirby and

Callinan JJ. In addition, McHugh J opined that being based on the rejected doctrine of proximity, *Bryan v Maloney* did not govern the case: at [72-3]. **14** *Ibid* [37], [112], [114-5]. **15** *Ibid* [80-6]. **16** *Ibid* [96], [110-3]. **17** *Ibid* [88-113]. Such as the lack of a measurable standard of care, and ensuring consistency with other legal principles (eg, the policy of limitation legislation). **18** *Ibid* [212-3], [224], [228], [230]. **19** [211], [215-8]. His Honour adopted Brennan J's dissenting judgment in *Bryan's Case* in relation to commercial premises: at [209-10]. **20** *Ibid* [175]. **21** *Ibid* [169]. See generally [168-73]. **22** *Ibid* [138] (Kirby J). See also [183]. **23** *Ibid* [7] (Gleeson CJ, Gummow, Hayne and Heydon JJ). See also [112] (McHugh J); [123-4] (Kirby J). **24** *Ibid* [17] (Gleeson CJ, Gummow, Hayne and Heydon JJ).

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