THE COURT IS OUT

Andrew Shields
Associate

Stephen Pyman
Partner

Dibbs Barker Gosling
Lawyers, Brisbane

The decision of the High Court in *Woolcock St Investments (Woolcock)* is likely to be the most important decision since *Bryan v Maloney*. When the Full Court of the High Court finally hands down it's decision, expected in early 2004, the effect it will have on professional negligence cases against builders, architects, engineers, supervisors and other building professionals will, in the writer's opinion, be of great significance, as it will more than likely look at issues concerning not only the duty of care owed to subsequent purchasers but also negligence actions in general and economic loss not associated with physical injury or property damage.

The arguments put forward by counsel for the appellant are, in the writer's opinion, the most relevant as they attempt to widen and significantly develop the current law as it relates to the duty of care owed to subsequent purchasers. These arguments can be summarised (to the best of the writer's ability) based on the transcript as follows:

Appellant's Arguments

(1) that it is very difficult to draw a line between purchasers of domestic premises and commercial premises on the question of vulnerability of the particular purchaser;

(2) that as a result of this difficulty, each case must turn on its own facts and it is not correct to say, in every circumstance, that commercial purchasers are always in a stronger position than residential purchasers;

(3) that the duty of care between a builder or building professional to a purchaser arises once the damage to the building has been identified, with the nature of the damage being the cost of rectification;

(4) that an extension of the duty of care owed to subsequent purchasers does not leave an open–ended liability to unsuccessful purchasers and vendors because the damage only occurs at a particular time and point and it is at this time that the duty arises. That damage occurs when there is some fault in the structure of the building that is located or identified;

(5) that the likely reliance by a subsequent purchaser is a matter of some significance to be considered by the court when assessing whether a duty is owed and will vary from case to case. However, in relation to a purchaser of a building, whether it be a large residential building, a large city commercial building or an industrial building, will be the same and it is unlikely that the purchaser is going to dig up that building and inspect what is underneath (with respect to foundations of a building and the subsoil beneath them);

(6) that as far as each individual plaintiff is concerned, the fact of his/her reliance and any other opportunities available to that purchaser to diminish his/her own damage, would go to two things:

(a) whether there was in fact negligence; and

(b) whether it was appropriate in terms of contributory negligence for there to have been such a degree of reliance by the plaintiff (the appellant's barrister relied on Justice McHugh's reasons in *Perre v Apand* [1999] HCA 36, which referred to vulnerability);

(7) there is a clear relationship between the conduct that gives rise to liability to exactly the same person in the same circumstances where there is damage to property or personal injury. It is a case where one sees that the damage, although economic in one sense, is clearly closely related to physical damage to the building, and in those circumstances there is no reason for the policy of the law or for the law to say that the ability to recover

for damage to the building, as distinct from the damage to the person, by the falling brick, or damage to the car by the falling brick, could not be recovered;

(8) that the court in *Bryan v Maloney* was not looking at issues concerning whether it was a residential or an investment property but was really looking at the nature of the property rather than, in a sense, the nature of the purchaser. For instance (as suggested by Justice Gleeson CJ):

... a milk bar in a country town might be owned by a person in quite a small way of business.

In such a case, the commercial investment is small and the purchaser is vulnerable not because he/she is a commercial investor but because of his/her size;

(9) that the limiting of *Bryan v Maloney* by restricting it to only dwelling houses is not quite right and that in subsequent cases such as *Zumpano v Montagnese* [1997] 2 VC 525 and *Woollahra Council v Sved* (1996) 40 NSWLR 101, only some members of those courts took the view that *Bryan v Maloney* was limited to dwelling houses;

(10) that *Bryan and Maloney* was dealing with the simplest case, that being of one house and one allotment and does not deal with the circumstances of there being, for example, home units in a large block or how much of the owners available capital was expended in purchasing the home (per Justice Gleeson CJ). It is as a result of this distinction, which fails to distinguish between an individual's worth when purchasing residential property or a commercial property, that it is difficult to draw the line at that residential premises; and

(11) it is clear that negligent design resulting in personal injury can give rise to a cause of action against the designer (see *Voli v Inglewood Shire Council* (1963) 110 CLR 74). If one bears in mind that the same breach by the architect or engineer could give rise to personal injury or to damage to property in or outside the building, or to the building itself, so that one has to fix it before it falls over, there is, a very close relationship between that damage, on the one hand, and property damage on the other.

In wrapping up his submissions, the appellant's counsel submitted to the court that there were questions that needed to be answered in each specific factual circumstance and although the answers may vary from case to case, there was nothing new about the types of reasoning that was involved in answering those questions:

(1) What kinds of building fall within the decision (of *Bryan v Maloney*)?

A: All buildings.

(2) Is the decision in *Bryan v Maloney* confined to cases where the defendant builder erected the house under a contract?

A: No.

(3) Does the decision apply to all purchasers of dwellings, regardless of the occupation, intentions and conduct of the purchaser?

A: The attributes of a particular purchaser may perhaps be a salient feature in some cases and a relevant factor in determining whether there is contributory negligence.

(4) Is the duty owed not only to purchasers but also to mere occupiers?

A: A mere occupier would not ordinarily suffer damage in the *Bryan v Maloney* sense, that is, economic loss arising from damage to the structure itself.

(5) To which 'builders' does the decision in *Bryan v Maloney* apply?

A: This is a question of fact for each case and must depend on the particular circumstances of that case.

(6) (a) To what 'defects' does the decision of *Bryan v Maloney* apply?

A: It would apply to defects which are latent. If a defect was patent at the time of purchase, then ordinarily speaking the reasonable purchaser would have called in a professional. This might be a salient feature but some knowledge of a defect which had started to become patent may not defeat the claim.

(6) (b) Is the decision limited to 'major' or 'serious' defects?

A: There should be no such limitation, but in the ordinary course of events one would be talking about things which were likely to involve some significant economic consequences.

(7) How is one to determine whether there has been in fact negligence?

A: The same way one determines if, as a result of a building falling down, someone is injured by it.

Whether the submissions made by Mr Jackson QC persuade the High Court is completely another matter. If they do, the law in Australia relating to the duty of care owed to subsequent purchasers of residential and commercial premises will radically change from the current restrictions imposed by the lower courts' recent interpretations of *Bryan v Maloney*.

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