

Building Defects - Duty of Care: Reliance and Proximity

Sved v Municipality of Woollahra, unreported, NSW Supreme Court, Giles J, 2 March 1995.

The decision of *Sved v Municipality of Woollahra* is an interesting one. The facts are similar to those in the High Court decision of *Bryan v Moloney*. However, this decision of Justice Giles was delivered three weeks before the *Bryan v Moloney* decision.

One of the issues raised in this case was whether a builder owes a duty of care to a purchaser of a house who buys a property after the original owner. Justice Giles discussed the two issues of reliance and the relationship of proximity with a particular purchaser - in this case the Sveds.

Background

Mr and Mrs Goddard exchanged contracts for the purchase of a property in November 1985. In February 1986, their architect applied to Woollahra Council for building approval. The purchase of the property was completed in March 1986 and the plans and specifications for building were approved in July.

By December 1986, the existing property was demolished, a new building was constructed by Messrs L and G Di Blasio, and Mr and Mrs Goddard had moved into the new property.

In August 1987, the property was auctioned and sold to Mr and Mrs Sved, completion being subject to Mr and Mrs Goddard obtaining a section 317A certificate. The purchase was completed on 14 October 1987. The section 317A certificate was not available before completion, but Mr and Mrs Sved were informed by the Council that the certificate would be issued and they proceeded to completion in reliance on that information. The Council issued the certificate on 22 October 1987.

Mr and Mrs Sved moved into the property in October 1987 and within a short time numerous defects in the building became apparent. Among numerous claims, Mr and Mrs Sved claimed in damages against the builder, pleading breach of a duty of care owed to them as subsequent purchasers of the property.

Justice Giles noted numerous cases that have held that there may be a relationship of "closeness" or proximity between a builder and subsequent purchasers whereby a builder will owe a duty of care to a subsequent purchaser. Such cases have held that there can be such a relationship even if there is no specific reliance by the purchaser on a known and identified builder.

A purchaser's general reliance on whoever constructed the building may be enough and reliance of a specific kind is not essential. Further, considerations of space and time,

the nature of the relationship and the causal connection between the builder's conduct and the purchaser's loss may establish a necessary relationship. (Justice Giles also referred to the case of *Bryan v Moloney*, which at the time had not been delivered by the High Court.)

Proximity

In this case, Justice Giles felt that there was a substantial basis for a relationship of proximity between the builder and the purchasers as:

- the builder would have known that subsequent purchasers would be likely to place general reliance on the builder of the building;
- there was a "spatial connection" between the parties in that the building was built by the builder and bought and lived in by the purchasers;
- there was a "temporal connection" between the parties in that the purchasers purchased the property within a short time of the construction of the building;
- the defective work was likely to have a direct impact on at least those who became owners within a short time of construction.

Reliance

However, Justice Giles went on to state that a relationship of proximity would not exist if the Sveds positively did not rely on the builder's acts and relied on some other person or thing. In this particular situation, Justice Giles considered that the Sveds, when deciding to purchase the house, had not specifically relied on the builder's acts but rather on the section 317A certificate issued by the Council.

Justice Giles held that the firm reliance on the section 317A certificate was significant and that the Sveds were not subsequent purchasers to whom a duty of care was owed.

Conclusion

Justice Giles may well have come to a different conclusion had another purchaser of the house indicated that they relied on the actions of the builder to construct a house free of defects.

He may also have reached a different conclusion with the benefit of the High Court's decision in *Bryan v Moloney*.

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