

### EXTENSION OF DUTY OF CARE

*Proprietors Units Plan No 95/98 & Ors v Jiniess Pty Ltd & Ors*

Northern Territory Supreme Court

Riley J

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### INTRODUCTION

The High Court decision of *Bryan v Maloney* (1995) 182 CLR 609; caused considerable comment when it was handed down in 1995. Builders saw it as an erosion of their rights and an extension of their liability, while the decision was welcomed by home owners and consumer groups. *Bryan v Maloney* decided, that a builder owed the subsequent owner of a domestic house a duty to take reasonable care in the construction of the house and was liable to compensate the subsequent owner for any damages suffered, as a result of negligent or defective construction. In that case, Mrs Maloney was the second owner of a house which had been built by Mr Bryan in 1979. In 1986 she purchased the house and 6 months later noticed that cracks started to appear in the walls of the house as a result of inadequate footings. Mr Bryan was liable to pay Mrs Maloney damages sufficient to rectify the house.

The decision was controversial because it extended, the builder's duty of care from not only the original owner of a house but also to a subsequent owner. Further, the duty of care also was for any monetary or economic loss which the owner might suffer.

Traditionally, the courts have been more willing to find a duty of care for any personal injury suffered arising from negligence, but less so for any economic loss.

The cases which followed treated the decision with some caution. The following year, the Victorian Supreme Court looked at whether the same principal would apply to a house which had been purchased from a builder where the original owner was the builder. In that case, *Zumpano v Montagnese* (1997) 2 VR 525, 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 did not have to specifically consider the application of *Bryan v Maloney*.

However, those decisions applied to domestic houses and 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 Pty Ltd v Tod Group Holdings Pty Ltd* (1991) 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 this particular factual circumstance holding that it was a matter for the High Court to do so. The Court 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 therefore there was less reliance on the builder by the commercial owner than the domestic owner.

The decision of the Supreme Court of The Northern Territory in *Proprietors Unit Plan 95/98 & Ors v Jiniess Pty Ltd & Ors* (unreported SCINT) Riley J, 31 October 2000) looked at another scenario, namely whether both a builder and an engineer owed a

duty of care to the subsequent owners of a mixed use residential and commercial building.

## THE JINIESS' CASE

### The Facts

The building consisted of a two and three storey development with an attached single storey car park. There were five residential units at the upper levels which were constructed on an elevated slab over five ground level commercial units. The building was completed in 1995. In 1996 water penetration, structural defects and excessive differential settlement became apparent. Concerns were raised with the builder but nothing was done until the following year when the firm of engineers who undertook the initial design were appointed to develop a method of repair. Some work of an interim nature was done by the original builder. In the end a new firm of engineers was engaged and rectification work was undertaken.

A number of claims were brought. Some of those claims, including claims by the Body Corporate were settled prior to trial. At trial nine owners brought proceedings against the builder and the engineers. All owners were subsequent owners and one owner owned a commercial unit.

### Claims Against the Engineers

These claims were for pure economic loss. To succeed, the Court said that the owners had to show that there was a special relationship with the engineers in order to satisfy the need for a sufficient degree of proximity to give rise to a duty to take reasonable care on the part of the engineers to avoid such loss. The owners claimed that the engineers assumed responsibility for the structural design and that they had relied upon the engineers in that regard. Not surprisingly, the engineers denied that they owed any duty.

The Court carefully considered *Bryan v Maloney* and the cases that followed as well as *Fangrove Pty Ltd v Tod Group Holdings Pty Ltd* and found that the engineers did, as a general proposition, owe a duty of care to the owners.

The Court held:

*As with the situation in Bryan v Maloney the relationship between the engineers and the plaintiff unit owners is characterised by an assumption of responsibility on the part of the engineers for the professional design and supervision, and likely reliance upon the part of the owner. The loss arising from negligence in those areas is foreseeable as is the fact that the loss will be sustained by whichever of the first or subsequent owners happens to be the owner at the time when the inadequacy of the design becomes manifest.*

The Court found that there were similarities between the present (subsequent) owners and Mrs Maloney. These owners had no greater, and will often have less of an opportunity to inspect and test the premises than the first owner. Similarly the engineers should be aware that subsequent owners will be likely to assume that the building has been competently built 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.

In finding that *Bryan v Maloney* should apply to compensate the residential unit owners, The Court then had to consider whether it would apply to the commercial unit owners. The Court found that as the commercial units were in the same building and as they were affected by the same failures of design, supervision and construction, there was no reason why it should not apply. There were no different characteristics

between the commercial owners and the residential owners so as to make any distinction.

The engineers were therefore 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. His Honour then looked at the individual circumstances of each plaintiff.

In relation to the claim against the engineers for the negligent remedial works, His Honour found that the plaintiffs had failed to establish that they had suffered any damage and therefore the claims failed. However, it was found that the engineers would owe the owners a duty of care with respect to these works.

### Claims Against the Builder

The Court found that the builder must have known that the owners would rely upon him to construct the building in a proper and workmanlike manner.

The builder sought to rely on *Bryan v Maloney* as applying to purely residential premises. Given the Court's findings with respect to the engineers that was unsuccessful.

The builder then sought to distinguish *Bryan v Maloney* by submitting that a duty of care for pure economic loss cannot arise in circumstances where there has been no contract of any kind entered into by the builder. This submission was based on the dicta of Brooking JA in *Zumpano v Montagnese* where his Honour said:

*[A] builder who erects a house otherwise than under a contract does not come under the duty of care recognised in Bryan v Maloney.*

This case whittles away the previous distinction between residential and commercial buildings. It is likely that this distinction will be done away with altogether in the future and that all builders and design professionals will owe a duty of care to both the original and subsequent owners of buildings for any economic loss incurred as a result of their action.

The Court rejected this submission and held that while the existence of a contractual relationship between the owner and builder may serve to assist in determining the obligations undertaken by the builder and hence the nature of the relationship between the builder and subsequent purchasers, it is not essential. All of the circumstances need to be taken into account and a contract is just one factor.

The Court therefore found that the builder owed a duty of care to the subsequent owners and was liable for the economic loss which they had suffered. The Court then went through the individual defects and determined whether they were a design or construction problem and hence whether they were the problem of the engineers or the builder respectively.

#### **Other Claims**

Claims for misleading and deceptive conduct pursuant to the *Trace Practices Act* were also brought against the builders and the engineers. These claims arose from representations which had been made in certifying that the building had been constructed in accordance with *Building Act* requirements.

The Court found that there was misleading and deceptive conduct and allowed the owners to recover on this basis. The Court also allowed a claim by the owners against the director of the building company as being a person who was involved in the contravention of the Act.

## **CONCLUSION**

The case is important for a number of reasons:

1. The Court found that a duty of care was owed by an engineer to the subsequent owner of a residential building thereby extending the principles of *Bryan v Maloney* which only applied to builders, and
2. The Court found that a duty of care was owed by both a builder and an engineer to the subsequent owner of commercial premises where those premises were in the same building as residential premises.

The law of who owes a duty of care for economic loss is one of constant change and its scope is continually widening. This case whittles away the previous distinction between residential and commercial buildings. It is likely that this distinction will be done away with altogether in the future and that all builders and design professionals will owe a duty of care to both the original and subsequent owners of buildings for any economic loss incurred as a result of their action.

This development accords with recent extensions of the duty of care by the House of Lords. Recently, in *Baxall Securities Limited, Norbain SDC Limited v Sheard Walshaw Partnership (a Firm)* [2000] CILL 1689, His Honour Judge Bowsher QC held that the duty of care to subsequent owners/occupiers be extended to architects.