Brookfield Multiplex Ltd v Owners Corporation Strata Plan 61288

[2014] HCA 36

High Court of Australia

(This case comes after *Woolcock Street Investments Pty Ltd v CDG Pty Ltd* on p 312)

Courts are reluctant to recognize duties of care in tort where the parties have freely chosen to purchase property on certain contractual terms because it is assumed that the parties could have protected themselves against incurring economic loss and are thus not "vulnerable". Should it make a difference if the defects which caused the economic loss are dangerous defects? What is the continuing authority of the High Court's decision in Bryan v Maloney? Can the courts' approach in building construction cases be easily reconciled with the approach in other categories of pure economic loss?

[Some footnotes omitted]

FRENCH CJ.

Introduction

1. The Court of Appeal of New South Wales held that the builder of strata-titled serviced apartments on land at Chatswood owed a duty of care to the owners corporation to avoid causing it to suffer loss resulting from latent defects in the common property which were structural or constituted a danger to persons or property in the vicinity or made the apartments uninhabitable. An owners corporation is created by statute whenever a strata plan is registered. The common property is vested in it as manager of the strata scheme and as "agent" for the owners of the apartments. In this case, the owners corporation ("the Corporation") is the first respondent. The serviced apartments were incorporated in levels one to nine of a 22 storey development. The apartments had been built under a design and construct contract made in November 1997 between the appellant, Brookfield Multiplex Ltd ("Brookfield"), and the registered proprietor of the land and property developer, Chelsea Apartments Pty Ltd ("Chelsea"). All of the apartments were subject to leases given by Chelsea to Park Hotel Management Pty Ltd ("Park Hotel"), a subsidiary of the Stockland Trust Group ("Stockland"), which was to operate them collectively as a serviced apartment hotel under the "Holiday Inn" brand.
2. The principal question raised on this appeal from the decision of the Court of Appeal is whether Brookfield owed the Corporation a duty to exercise reasonable care in the

construction of the building to avoid causing the Corporation to suffer pure economic loss resulting from latent defects in the common property. …

3. The contractual arrangements between Brookfield, Chelsea and Stockland had as their purpose the creation of a commercial venture which comprised serviced apartments to be operated collectively as a serviced apartment hotel. The Corporation, a creature of statute, came into existence as the statutory agent of Chelsea, albeit controlled pursuant to the lease arrangements by the hotel operator. The purchasers of individual apartments from Chelsea were effectively investors in the hotel venture. The nature and content of the contractual arrangements, including detailed provisions for dealing with and limiting defects liability, the sophistication of the parties and the relationship of Chelsea to the Corporation all militate against the existence of the asserted duty of care to either Chelsea or the Corporation. The appeal should be allowed. …

[French CJ then gave detailed reasons for his decision.]

CRENNAN, BELL and KEANE JJ … 107. It is to be noted that Basten JA [in the New South Wales Court of Appeal] confined the appellant's duty so that the appellant was bound only to avoid causing economic loss in relation to those defects which were "dangerous" in the sense that, if left unrepaired, they could cause personal injury or damage to property or made the premises uninhabitable.

The common law and economic loss

121. Economic interests are protected by the law of contract and by those torts that are usually described as the economic torts, such as deceit, duress, intimidation, conspiracy, and inducing breach of contract**[145]**. Generally speaking, the common law protects the interest of a party in having its contractual expectations met by the law of contract**[146]**. The law of negligence developed as part of the common law in this context. As Blackmun J said in delivering the opinion of the Supreme Court of the United States in *East River Steamship Corp v Transamerica Delaval Inc***[147]**, "the failure of the purchaser to receive the benefit of its bargain [is] traditionally the core concern of contract law."

122. The causes of action known as the economic torts were established in the common law before the decision of the House of Lords in *Donoghue v Stevenson***[148]**. In *Allen v Flood***[149]** in 1897, the House of Lords held that a person may deliberately cause economic harm to another without liability in tort provided that the defendant was not part of a conspiracy and that the means employed to inflict the harm were not themselves unlawful. Unintentionally inflicted economic loss was held to be compensable by an action for negligence only after the decision in *Hedley Byrne &*

*Co Ltd v Heller & Partners Ltd***[150]**. Until then, the common law of tort passed the burden of economic loss from plaintiff to defendant only where the defendant intentionally inflicted harm on the plaintiff by conduct which was unlawful for reasons other than that it was likely to, and did, cause economic loss**[151]**. And even then, the expanded liability for economic loss established by *Hedley Byrne & Co Ltd v Heller & Partners Ltd* depended upon proof of the fact of assumption of responsibility by a person giving advice to another, and that other having relied upon the advice.

123. The respondent sought to rely upon the decision of this Court in *Voli v Inglewood Shire Council***[152]**. That case establishes that the appellant may have been liable in damages for physical injuries to third parties resulting from defective work performed in the course of its contract with the developer. But the respondent's argument fails to observe the crucial distinction between physical injury and economic loss. Under the common law, "[t]he former is protected by the law even when, in similar circumstances, the latter is not."**[153]**

124. A cause of action in negligence does not arise unless and until the plaintiff suffers damage**[154]**. Damage is the gist of the cause of action in negligence**[155]**. As Brennan J said in *John Pfeiffer Pty Ltd v Canny***[156]**, a "duty of care is a thing written on the wind unless damage is caused by the breach of that duty." It is of critical importance to appreciate that the loss for which the respondent seeks damages is the expense which it is obliged to incur as a result of the emergence of latent defects after its acquisition of the common property. It was common ground that this expense is properly understood as a species of economic loss as distinct from damage to its property. The gist of the respondent's cause of action is that the interest in the common property it acquired from the developer was not as valuable as it should have been if the purchasers had got value for their money.

125. Quite apart from "the traditional common law approach" reflected in the maxim "caveat emptor" **[157]**, the loss incurred by a purchaser of a building who, it turns out, has paid more for the building than it should have, is significantly different from a liability in the owner to third parties who have suffered personal injuries or damage to their property as a result of a defect in the building. An owner who is, or should presumably be, aware of a defect in a building may incur liability to third parties injured by the defect because the owner decided not to incur the expense of repairing the defect in the building. The decision which attracts that liability will usually not be one to which the negligent builder has contributed**[158]**.

126. These considerations were reflected in the observations of McPherson JA in *Fangrove Pty Ltd v Tod Group Holdings Pty Ltd***[159]** that the common law maintains the distinction between the protection afforded to personal or property interests and economic interests because the common law "values the physical integrity of a person at a level well above the interests of commerce", and

because of "the capacity of those who engage in commerce to protect themselves against the kind of loss that the plaintiff sustained here." These observations accord with this Court's decision in *Woolcock Street Investments*. ...

***Winnipeg Condominium* and dangerous defects**

157. Basten JA derived support … from the decision of the Supreme Court of Canada in *Winnipeg Condominium Corporation No 36 v Bird Construction Co* ([1995] 1 SCR 85). In that case the Supreme Court of Canada held that a builder owes a duty of care in tort to a subsequent purchaser of the building if it can be shown that it is foreseeable that a failure to take reasonable care in constructing the building would create defects that pose a substantial danger to the health and safety of occupants. Where such defects become manifest before any damage to persons or property occurs, a subsequent purchaser may recover the reasonable cost of making good the defects in order to put the building into a non-dangerous state.

158. The respondent argued that the Court of Appeal erred in limiting the duty said to be owed by the appellant to the respondent to cases where the repair of defects in construction was necessary to obviate a situation of danger to person or property. Nevertheless, counsel for the respondent sought to rely upon the decision of the Supreme Court of Canada in *Winnipeg Condominium* as a last resort to support the Court of Appeal's answer to the separate question.

159. It may be noted that in *Winnipeg Condominium* the Supreme Court of Canada chose not to follow the approach of the House of Lords in *D & F Estates Ltd v Church Commissioners for England* ([1989] AC 177) and *Murphy v Brentwood District Council* ([1991] 1 AC 398).

160. The approach in *Winnipeg Condominium* was noted, but not followed, by this Court in *Bryan v Maloney* ((1995) 182 CLR 609) and in *Woolcock Street Investments* ((2004) 216 CLR 515). In *Fangrove Pty Ltd v Tod Group Holdings Pty Ltd* ([1999] 2 Qd R 236 at 239-240 [12]), de Jersey CJ, in the Court of Appeal of Queensland, noted that no Australian authority had adopted this approach. In terms of Australian authority, the position has not improved for the respondent in this regard in the years since that case was decided.

161. The approach in *Winnipeg Condominium* is attended by the practical difficulty that "the existence of the duty will not be known until after the defects have occurred and they can be confidently categorised as dangerous." (*Fangrove Pty Ltd v Tod Group Holdings Pty Ltd* at 248 [46]). More importantly, in point of principle the approach in *Winnipeg Condominium* is driven by the assumption that the cost of repair or diminution in market value of a building is a reflex of the liability for physical damage to person or property which may occur if the defect is not repaired. Quite apart from the haphazard nature of this notion of equivalence of damage, this approach is

flawed in that it detaches the duty not to inflict harm from the harm which is the gist of the cause of action.

162. As Lord Oliver of Aylmerton said in *Murphy v Brentwood District Council* (at 488-489):
"If one assumes the … case of one who has come into possession of a defective chattel … which may be a danger if it is used without being repaired, it is impossible to see upon what principle such a person, simply because the chattel has become dangerous, could recover the cost of repair from the original manufacturer.
The suggested distinction between mere defect and dangerous defect … is, I believe, fallacious. … [O]nce the danger ceases to be latent … [t]he plaintiff's expenditure is not expenditure incurred in minimising the damage or in preventing the injury from occurring. The injury will not now ever occur unless the plaintiff causes it to do so by courting a danger of which he is aware and his expenditure is incurred not in preventing an otherwise inevitable injury but in order to enable him to continue to use the property or the chattel. … "

GAGELER J.

169. A duty of care at common law is a duty of a specified person, or a person within a specified class, to exercise reasonable care within a specified area of responsibility to avoid specified loss to another specified person, or to a person within another specified class. Whether or not a particular duty of care should be recognised in a novel category of case is determined on the understanding that "[t]here are policies at work in the law which can be identified and applied to novel problems, but the law of tort develops by reference to principles, which must be capable of general application" (*Sullivan v Moody* (2001) 207 CLR 562 at 579 [49]).

170. The question in this appeal from the Court of Appeal of the Supreme Court of New South Wales is whether the builder of a strata development should be recognised to have a duty to exercise reasonable care, in executing the building work undertaken pursuant to a contract with the developer, to avoid specified loss to the owners corporation, which is the body corporate brought into existence on registration of the strata plan, as the legal owner of the common property, with an ongoing statutory responsibility for keeping the common property in a good state of repair.

171. The specified loss, on the widest formulation of the putative duty, would extend to the cost of repairing all defects in common property not apparent at the time of registration of the strata plan. A narrower formulation of the duty, which the Court of Appeal accepted, would limit the specified loss to the cost of repairing only those defects in common property not apparent at the time of registration of the strata plan which are structural, are dangerous to persons or other property, or make an apartment in the building uninhabitable.

172. Neither the existence nor the scope of the putative duty of care can turn on the peculiar feature of an owners corporation that the corporation has no option but to be brought into existence as the legal owner of common property and to shoulder the ongoing responsibility for keeping that common property in a good state of repair. It is not the function of the common law to fashion a principle of tortious liability which would confer a right to compensation exclusively on the unique statutory creation of a particular statutory scheme.
173. If the builder of a strata development is to be recognised as having the putative duty of care, it is because the owners corporation stands in relation to the builder as proxy for the owners from time to time of the registered lots corresponding to apartments in the building. In them the beneficial interest in the common property is vested as tenants in common. For them the corporation is constituted agent. To them the corporation can ultimately look to cover the cost of repair if that cost cannot be recouped elsewhere. It is they who bear the economic burden of the loss.
174. Whether or not the putative duty of care should be recognised therefore falls to be determined by applying principles which must be capable of general application to determine the existence and scope of such duty as a builder may have to exercise reasonable care, in the execution of building work, to avoid a subsequent owner incurring the cost of repairing latent defects in the building.
175. It has long been accepted that a common law duty of care can coexist with a duty in contract and that a duty of care can be to avoid economic loss. That being so, legal taxonomy alone cannot assign such common law liability as a builder may have to a subsequent owner of a building to the province of contract to the exclusion of the province of tort. Nor is recognition of a duty on the part of a builder to avoid a subsequent owner incurring the cost of remedying a latent defect in the building open to criticisms of indeterminacy which often count against recognising a common law duty of care to avoid economic loss.
176. Markedly divergent approaches to whether a builder should be recognised to have such a duty of care to a subsequent owner have now prevailed for more than two decades in other common law jurisdictions. In the United Kingdom, a duty of care has been rejected (*Murphy v Brentwood District Council* [1991] 1 AC 398; *Department of the Environment v Thomas Bates and Son Ltd* [1991] 1 AC 499). In Canada, a duty of care has been recognised, limited to the cost of remedying dangerous defects in the building (*Winnipeg Condominium Corporation No 36 v Bird Construction Co* [1995] 1 SCR 85). In New Zealand, a duty of care has been recognised, extending to the cost of remedying all latent defects (*Invercargill City Council v Hamlin* [1996] AC 624 [Privy Council]). There is no reason to consider any one of those approaches to result in a greater net cost to society than any other. Provided the principle of tortious liability is known, builders can be expected to accommodate it in the contractual terms on which they are prepared to build and subsequent

owners can be expected to accommodate it in the contractual terms on which they are prepared to purchase.

177. There is a net cost to society which arises from uncertainty as to the principle to be applied. McHugh J made that point in the context of discussing tortious liability for economic loss more generally when he referred to costs to parties and to the public of principles or rules whose application cannot confidently be predicted, and stated that "[i]f negligence law is to serve its principal purpose as an instrument of corrective justice, the principles and rules which govern claims in negligence must be as clear and as easy of application as is possible" (*Perre v Apand Pty Ltd* (1999) 198 CLR 180 at 216 [91]). Concern to minimise the cost of legal uncertainty was identified as a factor in overruling, rather than attempting to distinguish, prior authority so as to arrive at the position in respect of the liability of a builder to a subsequent owner which has prevailed in the United Kingdom (*Murphy v Brentwood District Council* [1991] 1 AC 398 at 471-472).

178. Part of the difficulty encountered by the Court of Appeal in the present case was in discerning the principle for which *Bryan v Maloney* remains authority after *Woolcock Street Investments Pty Ltd v CDG Pty Ltd*.

179. The question addressed in *Bryan v Maloney* was identified by the plurality in that case (Mason CJ, Deane and Gaudron JJ) as "whether, under the law of negligence, a professional builder who constructs a house for the then owner of the land owes a prima facie duty to a subsequent owner of the house to exercise reasonable care to avoid … foreseeable damage" specified as "the diminution in value of the house when a latent and previously unknown defect in its footings … becomes manifest" ((1995) 182 CLR 609 at 617) equating to "the amount which would necessarily be expended in remedying the inadequate footing[s] and their consequences" (at 616). Their Honours gave a positive answer to that question. They said that the contrary approach which had then recently come to prevail in the United Kingdom rested on "a narrower view of the scope of the modern law of negligence and a more rigid compartmentalization of contract and tort than is acceptable under the law of this country" (at 629).

180. The plurality in *Bryan v Maloney* referred to the relationship between the builder and the subsequent owner of a house as one characterised "by assumption of responsibility on the part of the builder and likely reliance on the part of the owner" (at 627), and emphasised that the decision in that case turned, "to no small extent, on the particular kind of economic loss involved" and, in particular, on the building having been "erected to be used as a permanent dwelling house" (at 630). The other member of the majority, Toohey J, similarly emphasised that the decision related to "the building of a house that is a non-commercial building" (at 665). Subsequent decisions of

intermediate courts of appeal treated its holding as confined to buildings of that description (*Woollahra Municipal Council v Sved* (1996) 40 NSWLR 101; *Zumpano v Montagnese* [1997] 2 VR 525; *Fangrove Pty Ltd v Tod Group Holdings Pty Ltd* [1999] 2 Qd R 236). The plurality in *Woolcock Street Investments* (Gleeson CJ, Gummow, Hayne and Heydon JJ) nevertheless expressed doubt that *Bryan v Maloney* should be "understood as depending upon drawing a bright line between cases concerning the construction of dwellings and cases concerning the construction of other buildings" and pointed to difficulties of maintaining such a distinction ((2004) 216 CLR 515 at 528 [17]).

181. The question addressed in *Woolcock Street Investments* was whether an engineering company owed a duty to exercise reasonable care, in designing the foundations of a warehouse and office complex, to avoid a subsequent purchaser of the building sustaining economic loss when it became apparent after purchase that the building was suffering substantial structural distress. The plurality noted that the engineering company designed the foundations in circumstances where "the original owner asserted control over the investigations which the engineer undertook for the purposes of performing its work" (at 531-532 [25]). Their Honours did not, however, treat the alleged defect in the design of the foundations as outside the scope of the work undertaken. Their stated ground for concluding that the engineering company did not owe the putative duty was that the subsequent purchaser did not allege that it "could not have protected itself against the economic loss" (at 533 [31]). They mentioned as a possible means of achieving that protection that the subsequent purchaser might have contracted on terms which would have cast on the engineering company the "economic consequences" of any negligence (at 533 [31]).

182. The ground so stated by the plurality for denying the putative duty accorded with the observation of McHugh J, who also formed part of the majority in *Woolcock Street Investments*, that "the capacity of a person to protect him or herself from damage by means of contractual obligations is merely one – although often a decisive – reason for rejecting the existence of a duty of care in tort in cases of pure economic loss" (at 552 [94]). In *Woolcock Street Investments*, it was the decisive factor.

183. McHugh J referred in *Woolcock Street Investments* to a variety of ways in which a subsequent purchaser might take steps to protect against the risk of latent defects by adjusting the terms on which the subsequent purchaser is prepared to contract with the vendor (at 550 [85], 558-559 [111]). He also referred to the possibility of commissioning expert investigation of the building prior to purchase (at 559 [111]). He pointed to disadvantages of imposing tortious liability on a builder which included the practical difficulties in determining whether there has been a breach of an appropriate standard of care and the incentive to create artificial business structures to avoid a long tail of claims (at 557-558 [107]- [109]**)**. He continued (at 559 [112]):

> "Of course … contractual protections and expert investigations may turn out to be inadequate. In that event, a remedy in tort – particularly a remedy against secondary parties such as architects, engineers and sub-contractors – would be desirable. But cases where contractual protection will be found deficient are likely to be the exception rather than the rule. Whether exceptional or not, the ultimate question is whether the residual advantages that an action in tort would give are great enough to overcome the disadvantages to which I have referred. This involves a value judgment, and the data that might permit that judgment to be made, if the data exists at all, is not before us. Because that is so, the better view is that this Court should not take the step of extending the principle of *Bryan v Maloney* to commercial premises. That is, this Court should hold that, in the absence of a contract between the owner of commercial premises and a person involved in the design or construction of those premises, the latter does not owe a duty to the current owner to prevent pure economic loss."

184. Turning specifically to the continuing authority of *Bryan v Maloney*, McHugh J said (at 560 [116]): "Nothing in this judgment is intended to suggest that *Bryan v Maloney* would now be decided differently. Whether a different decision would now be reached under current doctrine almost certainly depends on whether evidence would reveal that the purchasers of dwelling houses are as vulnerable as the Court assumed in that case."

185. Absent any application that *Bryan v Maloney* should be overruled, and absent data which might permit the making of a value judgment different from that made in *Woolcock Street Investments*, the view expressed by McHugh J in *Woolcock Street Investments* should in my opinion be accepted. The continuing authority of *Bryan v Maloney* should be confined to a category of case in which the building is a dwelling house and in which the subsequent owner can be shown by evidence to fall within a class of persons incapable of protecting themselves from the consequences of the builder's want of reasonable care. Outside that category of case, it should now be acknowledged that a builder has no duty in tort to exercise reasonable care, in the execution of building work, to avoid a subsequent owner incurring the cost of repairing latent defects in the building. That is because, by virtue of the freedom they have to choose the price and non-price terms on which they are prepared to contract to purchase, there is no reason to consider that subsequent owners cannot ordinarily be expected to be able to protect themselves against incurring economic loss of that nature.

186. The plurality in *Woolcock Street Investments* noted that the actual decision in *Bryan v Maloney* had by then been "overtaken, at least to a significant extent, by various statutory forms of protection for those who buy dwelling houses which turn out to be defective" (at 560 [116]). The Court of Appeal

in the present case referred in detail to the current statutory regime in New South Wales. If legal protection is now to be extended, it is best done by legislative extension of those statutory forms of protection. Neither version of the putative duty of care should be recognised.

187. I agree with the orders proposed by the Chief Justice.

[In separate joint judgments, Hayne and Kiefel JJ, and Crennan, Bell and Keane JJ agreed that the appeal should be allowed.]

Appeal allowed