HIGH COURT OF AUSTRALIA

GLEESON CJ,
McHUGH, GUMMOW, KIRBY, HAYNE, CALLINAN AND HEYDON JJ

WOOLCOCK STREET INVESTMENTS PTY LTD APPELLANT

AND

CDG PTY LTD (formerly Cardno & Davies Australia Pty Ltd) & ANOR RESPONDENTS

Woolcock Street Investments Pty Ltd v CDG Pty Ltd [2004] HCA 16
1 April 2004
B19/2003

ORDER

Appeal dismissed with costs.

On appeal from the Supreme Court of Queensland

Representation:

D F Jackson QC with A M Daubney SC and G D Beacham for the appellant (instructed by Gilshenan & Luton Lawyers)

P A Keane QC with P D T Applegarth SC and M A Hoch for the respondents (instructed by Thynne & Macartney)

CATCHWORDS

Woolcock Street Investments Pty Ltd v CDG Pty Ltd

Negligence – Duty of care – Where pure economic or financial loss – Whether engineer owed duty of care to subsequent owner of commercial premises – Salient features of relationship giving rise to duty – Vulnerability – Assumption of responsibility – Known reliance (or dependence) – Relevance of latent defects and structural defects.

Negligence – Duty of care – Where pure economic or financial loss – Whether engineer owed duty of care to subsequent owner of commercial premises – Construction of dwellings and construction of other buildings – Relevance of the contract with the original owner – Relevance of statutory protection.

Practice and procedure – Whether cause of action on agreed facts – Sufficiency of pleading – Limitations on determining separate questions.

Words and phrases – "salient features", "vulnerability", "assumption of responsibility", "known reliance (or dependence)", "construction of dwellings and construction of other buildings".

Home Building Act 1989 (NSW), ss 18A-18G, 90-99.
House Contracts Guarantee Act 1987 (Vic), ss 5-8.
Domestic Building Contracts Act 1995 (Vic), ss 8-10.
Building Work Contractors Act 1995 (SA), ss 32-35.
Building Act 1975 (Q), ss 52-53.
Queensland Building Services Authority Act 1991 (Q), ss 68-69, Sched 2.
Home Building Contracts Act 1991 (WA), ss 25A-25D.
Housing Indemnity Act 1992 (Tas), ss 7-9, 11-14.
Building Act 1972 (ACT), ss 62, 64-65.

GLEESON CJ, GUMMOW, HAYNE AND HEYDON JJ.

The issue

1 In 1987, the first respondent, a company carrying on the business of consulting engineers, designed foundations[1] for a warehouse and offices in Townsville. The land on which this building (referred to in the pleadings as "the Complex") was to be built was owned by the trustee of a property trust. Some years after the building was finished it was sold by the then trustee of the property trust to the appellant. The contract for the sale of the land did not include any warranty that the building was free from defect and there was no assignment by the vendor of any rights that the vendor may have had against others in respect of any such defects.

2 More than a year after the appellant bought the land, it became apparent that the building was suffering substantial structural distress. It is agreed that the distress was and is due to the settlement of the foundations of the building, or the material below the foundations, or both. The appellant alleges that the first respondent and its employee, the second respondent, each owed it a duty to take reasonable care in designing the foundations for the building. The respondents deny that they owed the appellant any duty of care; they deny that they acted in breach of any such duty; they say that despite advising the then owner of the land to allow them to obtain soil tests, the then owner instructed them to proceed without soil tests and to use structural footing sizes provided by the builder. Did the respondents owe the appellant a duty of care?

The procedural context

3 The appellant commenced proceedings in the Supreme Court of Queensland. After it had delivered a further amended statement of claim and each respondent had filed a defence to that pleading, the parties consented to an order stating a case for the opinion of the Court of Appeal. The question asked in the Case Stated was: "On the agreed facts, does the further amended statement of claim delivered on 11 April 2000 disclose a cause of action in negligence against the defendants?" The Case Stated set out some agreed facts, but those added little to the exiguous allegations of fact made in the pleadings.

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1 The Case Stated generally spoke of the structure on which the building stood as its "foundations" rather than "footings" and of the material on which those structures sat as material "below the foundations" rather than "foundations". We adopt the language of the Case Stated in these reasons.

4 The critical paragraphs of the appellant's statement of claim asserted that the respondents had owed it a duty of care but said very little about why that was so. It is as well to set out those paragraphs:

> "6(a) The Complex was, at all material times, to be a permanent structure to be used indefinitely.
>
> (b) It was, at all material times, foreseeable that:
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> (i) failure to design the structure of the Complex properly;
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> (ii) failure to design the foundations of the Complex properly;
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> (iii) failure to take any or any proper account of the sub-soil conditions under the Complex; and/or
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> (iv) failing to construct the foundations properly,
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> would result in an owner of the Complex suffering loss and damage of the kind pleaded in paragraphs 3, 4 and 5 herein.
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> 7 The said loss and damage to the Plaintiff has been caused by reason of the negligence of the First Defendant and/or the Second Defendant in discharge of their respective duties to the Plaintiff."

Particulars were given under par 7 of the respects in which it was alleged that there had been a failure to discharge the duties.

5 The appellant's statement of claim took a form that is common enough in claims for negligence. The allegation of duty was rolled up with the allegation of breach. The pleading did allege that the respondents had been engaged to perform engineering work in connection with the construction of the building, a "permanent" structure, and alleged that the adverse consequences of which the appellant complained were foreseeable but it alleged no other matter bearing upon the existence of the asserted duty of care.

6 The question reserved for the opinion of the Court of Appeal could have been understood as inviting attention only to the sufficiency of the appellant's pleading. In both the Court of Appeal and this Court, however, the Case Stated has been treated as requiring an answer to a substantive question of law. That is, argument proceeded on the basis that this Court, and the Court of Appeal, were to assume that whether either respondent owed the appellant a duty of care was a question which could be resolved having regard only: first, to the facts set out in

the Case Stated; secondly, to any inference that might reasonably be drawn from those facts; and thirdly, to the facts alleged in the appellant's statement of claim.

7 If a plaintiff is willing to have a point determined by reference only to the facts which that plaintiff chooses to put before the court, and the parties join in seeking determination of the issue, there may appear to be little reason to refuse to decide the point tendered by the parties. It is important, however, to recognise that there may be difficulty in using such procedures in cases in which it is necessary to consider developing, as distinct from applying, common law principles. The dangers of developing common law principle against an artificially constricted body of fact are self-evident. That is why, in some cases, even if the parties join in asking a court to determine a question separate from trial of the facts, it may be prudent for the court to decline to answer the question presented as being one which it is inappropriate to answer[2]. Indeed, as *Bass v Permanent Trustee Co Ltd* illustrates[3], in some circumstances to answer a question may be contrary to the judicial process. If the question is answered, it is important to identify any limitations which the procedure adopted may impose on the breadth of any principle that is to be identified as having been established or applied.

The Court of Appeal

8 The Court of Appeal answered the question reserved: "On the agreed facts, does the further amended statement of claim delivered on 11 April 2000 disclose a cause of action in negligence against the defendants?", "No"[4]. Both McMurdo P[5] and Thomas JA[6] (with whose reasons Douglas J[7] agreed) concluded that *Bryan v Maloney*[8] established that the builder of a *dwelling* may owe a duty

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2 *Bass v Permanent Trustee Co Ltd* (1999) 198 CLR 334 at 357-358 [51]-[53].

3 (1999) 198 CLR 334 at 359 [56]. See also *Malika Holdings Pty Ltd v Stretton* (2001) 204 CLR 290 at 308-309 [61].

4 *Woolcock St Investments Pty Ltd v CDG Pty Ltd* (2002) Aust Torts Reports ¶81-660.

5 (2002) Aust Torts Reports ¶81-660 at 68,793 [3].

6 (2002) Aust Torts Reports ¶81-660 at 68,795 [24].

7 (2002) Aust Torts Reports ¶81-660 at 68,799 [43].

8 (1995) 182 CLR 609.

of care to a remote purchaser. Their Honours concluded[9], however, that those who built or designed *commercial* buildings did not owe any duty of care to subsequent purchasers. As Thomas JA put the matter[10], "there is no good reason, in terms of principle or policy, to extend the decision in *Bryan v Maloney* to cases other than residential dwellings" (footnote omitted). McMurdo P was of the view that in *Fangrove Pty Ltd v Tod Group Holdings Pty Ltd*[11] the Court of Appeal had earlier considered and rejected what her Honour described[12] as "[t]he extension of the *Bryan v Maloney* principle to commercial buildings" and concluded that there was no reason to depart from that earlier decision[13].

9 What did *Bryan v Maloney* decide?

Bryan v Maloney

10 In *Bryan v Maloney*, the Court (Mason CJ, Deane, Toohey and Gaudron JJ, Brennan J dissenting) decided that the builder of a dwelling house owed a subsequent purchaser, Mrs Maloney, of the house a duty to take reasonable care to avoid the economic loss which the subsequent purchaser suffered as a result of the diminution in value of the house when the fabric of the building cracked because the footings were inadequate. Both Mason CJ, Deane and Gaudron JJ in their joint reasons[14], and Toohey J in his separate reasons[15], noted that there was no direct relationship between the builder and the subsequent purchaser, but concluded[16] that the necessary relationship of proximity existed to warrant finding that the builder had owed the subsequent purchaser a duty of care.

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9 (2002) Aust Torts Reports ¶81-660 at 68,794 [8] per McMurdo P, 68,799 [40] per Thomas JA.

10 (2002) Aust Torts Reports ¶81-660 at 68,799 [40].

11 [1999] 2 Qd R 236.

12 (2002) Aust Torts Reports ¶81-660 at 68,793 [5].

13 (2002) Aust Torts Reports ¶81-660 at 68,794 [8].

14 (1995) 182 CLR 609 at 617, 619.

15 (1995) 182 CLR 609 at 663.

16 (1995) 182 CLR 609 at 628 per Mason CJ, Deane and Gaudron JJ, 665 per Toohey J.

11 It is important to identify the reasoning that underpinned this conclusion. It is convenient to do that by reference to the joint reasons of Mason CJ, Deane and Gaudron JJ. The reasons of Toohey J, although differently expressed, did not depend upon the application of any principles different from those applied in the joint reasons.

12 The joint reasons began by examining the relationship between the appellant (the builder) and the first owner of the house (Mrs Manion). They, of course, were the parties to the contract in performance of which the builder had built the house. That contract was said[17] to be "non-detailed and [to contain] no exclusion or limitation of liability". Accordingly, the content of the contract was said not to preclude the existence of a duty of care owed by the builder to Mrs Manion, not only to take reasonable care to avoid injury to her person or property[18] but also to avoid "mere economic loss by Mrs Manion of the kind ultimately sustained by Mrs Maloney when the inadequacy of the footings became manifest"[19]. That was because

> "the ordinary relationship between a builder of a house and the first owner with respect to that kind of economic loss is characterized by the kind of assumption of responsibility on the one part (i.e. the builder) and known reliance on the other (i.e. the building owner) which commonly exists in the special categories of case in which a relationship of proximity and a consequent duty of care exists in respect of pure economic loss."[20]

There was said[21] to be nothing to suggest that the relationship between the builder and the first owner was not characterised by such an assumption of responsibility and reliance.

13 Four considerations were then identified as warranting the conclusion that a relationship of proximity also existed with the subsequent owner. First, the

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17 (1995) 182 CLR 609 at 622.

18 (1995) 182 CLR 609 at 622-623.

19 (1995) 182 CLR 609 at 623.

20 (1995) 182 CLR 609 at 624.

21 (1995) 182 CLR 609 at 624.

house was identified[22] as a "connecting link", it being a permanent structure and a significant investment for a subsequent owner like the respondent. Secondly, it was pointed out[23] that it was foreseeable that economic loss would likely result from negligent construction of the house. Thirdly, it was said[24] that there was no "intervening negligence or other causative event". Finally, the similarities with the relationship between the builder and the first owner as regards the particular kind of economic loss were said[25] to be "of much greater significance than the differences to which attention has been drawn, namely, the absence of direct contact or dealing and the possibly extended time in which liability might arise".

14 It is evident, then, that the conclusion that the builder owed a subsequent owner a duty to take reasonable care to avoid the economic loss which that subsequent owner had suffered depended upon conclusions that were reached about the relationship between the first owner and the builder. In particular, the decision in the case depended upon the anterior step of concluding that the builder owed the first owner a duty of care to avoid economic loss of that kind.

15 Both this anterior step, and the conclusion drawn from it, were considered in the context of the facts of the particular case – in which the building in question was a dwelling house. The propositions about assumption of responsibility by the builder and known reliance by the building owner were said[26] to be characteristics of "the *ordinary* relationship between a builder of a house and the first owner" (emphasis added). At least in terms, however, the principles that were said to be engaged in *Bryan v Maloney* did not depend for their operation upon any distinction between particular kinds of, or uses for, buildings. They depended upon considerations of assumption of responsibility, reliance, and proximity. Most importantly, they depended upon equating the responsibilities which the builder owed to the first owner with those owed to a subsequent owner.

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22 (1995) 182 CLR 609 at 625.

23 (1995) 182 CLR 609 at 625.

24 (1995) 182 CLR 609 at 625.

25 (1995) 182 CLR 609 at 627.

26 (1995) 182 CLR 609 at 624.

Criticisms of *Bryan v Maloney*

16 The decision in *Bryan v Maloney* has not escaped criticism[27]. Some of those criticisms found reflection in the series of questions posed by Brooking JA in *Zumpano v Montagnese*[28]. It is not necessary, in this case, to attempt to deal with all of those criticisms, or to attempt to answer all of the questions posed in *Zumpano*. Rather, two points should be made.

17 First, for the reasons given earlier, it may be doubted that the decision in *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. If it were to be understood as attempting to draw such a line, it would turn out to be far from bright, straight, clearly defined, or even clearly definable. As has been pointed out subsequently[29], some buildings are used for mixed purposes: shop and dwelling; dwelling and commercial art gallery; general practitioner's surgery and residence. Some high-rise apartment blocks are built in ways not very different from high-rise office towers. The original owner of a high-rise apartment block may be a large commercial enterprise. The list of difficulties in distinguishing between dwellings and other buildings could be extended.

18 Secondly, the decision in *Bryan v Maloney* depended upon the view[30] that "the overriding requirement of a relationship of proximity represents the conceptual determinant and the unifying theme of the categories of case in which the common law of negligence recognizes the existence of a duty to take reasonable care to avoid a reasonably foreseeable risk of injury to another". It

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27 See, for example, I N Duncan Wallace, "Murphy Rejected: The Bryan v Maloney Landmark", (1995) 3 *Tort Law Review* 231; Allsop, "*Bryan v Maloney* and Other Developments in Relation to the Duty of Care in Tort", (1996) 7 *Insurance Law Journal* 81; Mead, "The Recovery of Economic Loss Arising from Defective Structures – Policy, Principle and the Amorphous Notion of Proximity as a General Concept", (1996) 12 *Building and Construction Law* 9; Brooking, "Bryan v Maloney – Its Scope and Future", in Mullany and Linden (eds), *Torts Tomorrow – A Tribute to John Fleming*, (1998) 57.

28 [1997] 2 VR 525 at 528-536.

29 For example, *Zumpano v Montagnese* [1997] 2 VR 525 at 528-529 per Brooking JA.

30 (1995) 182 CLR 609 at 619.

was the application of this "conceptual determinant" of proximity that was seen as both permitting and requiring the equation of the duty owed to the first owner with the duty owed to the subsequent purchaser. Decisions of the Court after *Bryan v Maloney*[31] reveal that proximity is no longer seen as the "conceptual determinant" in this area.

Economic loss

19 The damage for which the appellant seeks a remedy in this case is the economic loss it alleges it has suffered as a result of buying a building which is defective. Circumstances can be imagined in which, had the defects not been discovered, some damage to person or property might have resulted from those defects. But that is not what has happened. The defects have been identified. Steps can be taken to prevent damage to person or property.

20 A view was adopted for a time in England[32] that, because there was *physical* damage to the building, a claim of the kind made by the appellant was not solely for economic loss. That view was questioned in *Sutherland Shire*

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31 *Hill v Van Erp* (1997) 188 CLR 159 at 176-179 per Dawson J, 189 per Toohey J, 210 per McHugh J, 237-239 per Gummow J; *Pyrenees Shire Council v Day* (1998) 192 CLR 330 at 360-361 [76] per Toohey J, 414 [238] per Kirby J; *Perre v Apand Pty Ltd* (1999) 198 CLR 180 at 209-210 [74]-[76] per McHugh J, 284 [281]-[282] per Kirby J, 302 [333] per Hayne J; *Crimmins v Stevedoring Industry Finance Committee* (1999) 200 CLR 1 at 13 [3] per Gleeson CJ, 32-33 [73], 33-34 [77] per McHugh J, 56 [149] per Gummow J, 80 [222] per Kirby J, 96-97 [270]-[274] per Hayne J; *Modbury Triangle Shopping Centre Pty Ltd v Anzil* (2000) 205 CLR 254 at 275 [61] per Kirby J; *Brodie v Singleton Shire Council* (2001) 206 CLR 512 at 630-631 [316] per Hayne J; *Sullivan v Moody* (2001) 207 CLR 562 at 578-579 [48] per Gleeson CJ, Gaudron, McHugh, Hayne and Callinan JJ; *Tame v New South Wales* (2002) 211 CLR 317 at 355-356 [104]-[107] per McHugh J, 409 [268] per Hayne J; *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 211 CLR 540 at 583 [99] per McHugh J, 624-625 [234]-[236] per Kirby J.

32 *Dutton v Bognor Regis Urban District Council* [1972] 1 QB 373 at 396 per Lord Denning MR; *Anns v Merton London Borough Council* [1978] AC 728 at 759 per Lord Wilberforce.

Council v Heyman[33] and rejected in *Bryan v Maloney*[34]. It was subsequently also rejected by the House of Lords in *Murphy v Brentwood District Council*[35]. There is no reason now to reopen that debate and neither side in the present matter sought to do so. The damage which the appellant alleges it has suffered is pure economic loss.

21 Claims for damages for pure economic loss present peculiar difficulty. Competition is the hallmark of most forms of commercial activity in Australia. As Brennan J said in *Bryan v Maloney*[36]:

> "If liability were to be imposed for the doing of anything which caused pure economic loss that was foreseeable, the tort of negligence would destroy commercial competition[37], sterilize many contracts and, in the well-known dictum of Chief Judge Cardozo[38], expose defendants to potential liability 'in an indeterminate amount for an indeterminate time to an indeterminate class'."

That is why damages for pure economic loss are not recoverable if all that is shown is that the defendant's negligence was a cause of the loss and the loss was reasonably foreseeable.

22 In *Caltex Oil (Australia) Pty Ltd v The Dredge "Willemstad"*[39], the Court held that there were circumstances in which damages for economic loss were recoverable. In *Caltex Oil*, cases for recovery of economic loss were seen as being exceptions to a general rule, said to have been established in *Cattle v*

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33 (1985) 157 CLR 424 at 446-447 per Gibbs CJ, 466 per Mason J, 471 per Wilson J, 490 per Brennan J, 504 per Deane J.

34 (1995) 182 CLR 609 at 617 per Mason CJ, Deane and Gaudron JJ, 657 per Toohey J; cf at 643 per Brennan J.

35 [1991] 1 AC 398.

36 (1995) 182 CLR 609 at 632.

37 See per Lord Reid in *Dorset Yacht Co v Home Office* [1970] AC 1004 at 1027.

38 *Ultramares Corporation v Touche* 255 NY 170 at 179 (1931) [174 NE 441 at 444].

39 (1976) 136 CLR 529.

Stockton Waterworks[40], that even if the loss was foreseeable, damages are not recoverable for economic loss which was not consequential upon injury to person or property. In *Caltex Oil*, Stephen J isolated a number of "salient features" which combined to constitute a sufficiently close relationship to give rise to a duty of care owed to Caltex for breach of which it might recover its purely economic loss[41]. Chief among those features was the defendant's knowledge that to damage the pipeline which was damaged was inherently likely to produce economic loss[42].

23 Since *Caltex Oil*, and most notably in *Perre v Apand Pty Ltd*[43], the vulnerability of the plaintiff has emerged as an important requirement in cases where a duty of care to avoid economic loss has been held to have been owed. "Vulnerability", in this context, is not to be understood as meaning only that the plaintiff was likely to suffer damage if reasonable care was not taken. Rather, "vulnerability" is to be understood as a reference to the plaintiff's inability to protect itself from the consequences of a defendant's want of reasonable care, either entirely or at least in a way which would cast the consequences of loss on the defendant[44]. So, in *Perre*, the plaintiffs could do nothing to protect themselves from the economic consequences to them of the defendant's negligence in sowing a crop which caused the quarantining of the plaintiffs' land. In *Hill v Van Erp*[45], the intended beneficiary depended entirely upon the solicitor performing the client's retainer properly and the beneficiary could do nothing to ensure that this was done. But in *Esanda Finance Corporation Ltd v Peat Marwick Hungerfords*[46], the financier could itself have made inquiries about the

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40 (1875) LR 10 QB 453.

41 *Caltex Oil (Australia) Pty Ltd v The Dredge "Willemstad"* (1976) 136 CLR 529 at 576-578. See also *Hill v Van Erp* (1997) 188 CLR 159 at 233-234; *Pyrenees Shire Council v Day* (1998) 192 CLR 330 at 389 [168]; *Perre v Apand Pty Ltd* (1999) 198 CLR 180 at 254 [201] per Gummow J.

42 (1976) 136 CLR 529 at 576.

43 (1999) 198 CLR 180.

44 Stapleton, "Comparative Economic Loss: Lessons from Case-Law-Focused 'Middle Theory'", (2002) 50 *UCLA Law Review* 531 at 558-559.

45 (1997) 188 CLR 159.

46 (1997) 188 CLR 241.

financial position of the company to which it was to lend money, rather than depend upon the auditor's certification of the accounts of the company.

24 In other cases of pure economic loss (*Bryan v Maloney* is an example) reference has been made to notions of assumption of responsibility and known reliance. The negligent misstatement cases like *Mutual Life & Citizens' Assurance Co Ltd v Evatt*[47] and *Shaddock & Associates Pty Ltd v Parramatta City Council [No 1]*[48] can be seen as cases in which a central plank in the plaintiff's allegation that the defendant owed it a duty of care is the contention that the defendant knew that the plaintiff would rely on the accuracy of the information the defendant provided. And it may be, as Professor Stapleton has suggested[49], that these cases, too, can be explained by reference to notions of vulnerability. (The reference in *Caltex Oil* to economic loss being "inherently likely" can also be seen as consistent with the importance of notions of vulnerability.) It is not necessary in this case, however, to attempt to identify or articulate the breadth of any general proposition about the importance of vulnerability. This case can be decided without doing so.

The appellant's claim

25 On the facts set out in the Case Stated and alleged in the pleadings neither respondent owed the appellant a duty to take reasonable care to avoid the appellant suffering the economic loss which it alleges it suffered. As counsel for the respondents submitted, it was not alleged that the respondents breached any obligation to the original owner. Unlike *Bryan v Maloney*, it cannot be said, in this case, that the respondents owed the original owner of the land a duty to take reasonable care to avoid economic loss of the kind of which the appellant now complains. It was agreed in the Case Stated that, despite the first respondent obtaining a quotation for geotechnical investigations, the original owner of the land, by its manager, refused to pay for such investigations. (The respondents go further in their pleadings and allege that the original owner directed the adoption of particular footing sizes.) The relationship between the respondents and the original owner of the land was, therefore, not one in which the owner entrusted the design of the building to a builder, or in this case the engineer, under a simple, "non-detailed" contract. It was a relationship in which the original owner

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47 (1968) 122 CLR 556; (1970) 122 CLR 628; [1971] AC 793.

48 (1981) 150 CLR 225.

49 (2002) 50 *UCLA Law Review* 531 at 558-559.

asserted control over the investigations which the engineer undertook for the purposes of performing its work.

26 In its pleading the appellant did not allege that the relationship between the respondents and the original owner was characterised by that assumption of responsibility by the respondents, and known reliance by the original owner on the respondents, which is referred to in the joint reasons in *Bryan v Maloney*[50]. Such further facts as are agreed, far from supporting any inference that this was the nature of the relationship between the respondents and the original owner, point firmly in the opposite direction. There was not, therefore, what was referred to in *Bryan v Maloney*[51] as "an identified element of known reliance (or dependence)" or "the assumption of responsibility".

27 It follows that the appellant's contention that the respondents owed it a duty of care cannot be supported by the reasoning which was adopted in *Bryan v Maloney*. What we earlier referred to as the anterior step of demonstrating that the respondents owed a duty of care to the original owner is not made out.

The relevance of the contract with the original owner

28 In this case, as in *Bryan v Maloney*[52], it is not necessary to decide whether disconformity between the obligations owed to the original owner under the contract to build or design a building and the duty of care allegedly owed to a subsequent owner will necessarily deny the existence of that duty of care. However, as Windeyer J said in *Voli v Inglewood Shire Council*[53], the terms of the contract between the original owner and the builder (or, in this case, the respondents) "is not an irrelevant circumstance" in considering what duty a builder or engineer owed others[54]. At the least, that contract defines the task which the builder or engineer undertook. There would be evident difficulty in holding that the respondents owed the appellant a duty of care to avoid economic loss to a subsequent owner if performance of that duty would have required the

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50 (1995) 182 CLR 609 at 624.

51 (1995) 182 CLR 609 at 619.

52 (1995) 182 CLR 609 at 624-625.

53 (1963) 110 CLR 74 at 85.

54 See also *Hill v Van Erp* (1997) 188 CLR 159 at 167 per Brennan CJ.

respondents to do more or different work than the contract with the original owner required or permitted[55].

29 In *Bryan v Maloney*, it was found that there was no disconformity between the duty owed to the original owner and the duty owed to the subsequent owner. As Toohey J said[56], that case was "uncomplicated by anything arising from the contract between the appellant and Mrs Manion" (the original owner).

30 This case can be determined without deciding whether disconformity of the kind we have mentioned would always deny the existence of a duty of care to a subsequent owner. There are other reasons for concluding that the respondents owed no duty of care to prevent the economic loss of which the appellant complains.

No vulnerability

31 Neither the facts alleged in the statement of claim nor those set out in the Case Stated show that the appellant was, in any relevant sense, vulnerable to the economic consequences of any negligence of the respondents in their design of the foundations for the building. Those facts do not show that the appellant could not have protected itself against the economic loss it alleges it has suffered. It is agreed that no warranty of freedom from defect was included in the contract by which the appellant bought the land, and that there was no assignment to the appellant of any rights which the vendor may have had against third parties in respect of any claim for defects in the building. Those facts describe what did happen. They say nothing about what could have been done to cast on the respondents the burden of the economic consequences of any negligence by the respondents. The appellant's pleading and the facts set out in the Case Stated are silent about whether the appellant could have sought and obtained the benefit of terms of that kind in the contract.

32 It may be accepted that the appellant bought the building not knowing that the foundations were inadequate. It is not alleged or agreed, however, that the defects of which complaint now is made could not have been discovered. The Case Stated records that, before completing its purchase, the appellant sought and obtained from the relevant local authority a certificate that the building complied

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55 cf *Woollahra Municipal Council v Sved* (1996) 40 NSWLR 101 at 120 per Priestley JA.

56 (1995) 182 CLR 609 at 665.

with the *Building Act* 1975 (Q) and some subordinate legislation. That the defects now alleged were not discovered by a local authority asked to certify whether the building was "a ruin or so far dilapidated as to be unfit for use or occupation or [was] ... in a structural condition prejudicial to the inhabitants of or to property in the neighbourhood"[57] says nothing about what other investigations might have been undertaken or might have revealed.

33 Finally, if it is relevant to know, as was assumed to be the case in *Bryan v Maloney*, whether buying the building represented a very significant investment for the appellant[58], there is nothing in the Case Stated or the appellant's pleading which bears on that question.

Overseas authorities

34 Similar questions to the one which is raised in this case have been considered by the courts of other jurisdictions. Some reference has already been made in these reasons to some decisions of the English courts. In addition, we were referred to Canadian[59], New Zealand[60], Malaysian[61] and Singaporean[62] authorities and, as well, to a number of decisions of United States State courts. Once it is recognised that foreseeability of negligently caused economic loss is a necessary but not sufficient condition for recovery of such loss, the critical question is: what more must be shown? The core of the appellant's contention in this Court was that because there is no difference in principle between a residential house and a purely commercial development like the one now in issue, the appellant was entitled to recover, just as the plaintiff in *Bryan v Maloney* had been held entitled to recover. The appellant did not contend that the Court should adopt any new or different principles for dealing with claims for negligently inflicted economic loss. In particular, it did not contend that

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57 *Building Act* 1975 (Q), s 53(2).

58 (1995) 182 CLR 609 at 625.

59 *Winnipeg Condominium Corporation No 36 v Bird Construction Co* [1995] 1 SCR 85; *Martel Building Ltd v Canada* [2000] 2 SCR 860; *Cooper v Hobart* [2001] 3 SCR 537.

60 *Invercargill City Council v Hamlin* [1996] AC 624.

61 *Arab-Malaysian Finance Bhd v Steven Phoa Cheng Loon* [2003] 1 MLJ 567.

62 *RSP Architects Planners & Engineers (Raglan Squire & Partners FE) v Management Corporation Strata Title Plan No 1075* [1999] 2 SLR 449.

principles of a kind which have found favour in other jurisdictions should now be adopted in Australia. It is, therefore, not necessary to discuss those decisions in these reasons.

Conclusion and orders

35 The present case arises in a different factual context from that considered in *Bryan v Maloney* and can be decided without determining whether doubt should now be cast upon the result at which the Court arrived in that case. The actual decision in *Bryan v Maloney* has now 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. Reference is made to those provisions in the reasons of Callinan J. No doubt, as recognised earlier in these reasons, the principles applicable in cases of negligently inflicted pure economic loss have evolved since *Bryan v Maloney* was decided. Neither the principles applied in *Bryan v Maloney*, nor those principles as developed in subsequent cases, support the appellant's contention that on the facts agreed in the Case Stated and alleged in its statement of claim the respondents owed it a duty of care to avoid the economic loss which it alleged it suffered.

36 The appeal should be dismissed with costs.

37 McHUGH J. The question in this appeal is whether it is a principle of the Australian law of torts that those involved in the design or construction of commercial premises owe a duty to subsequent purchasers of the premises to take reasonable care to ensure that the building is free from defects so as to prevent *pure* economic loss to those purchasers. In my opinion, the Australian law of torts imposes no such duty. Moreover, although the point does not arise directly for decision, it must follow that, in the absence of a contract, those involved in the design or construction of commercial premises do not owe such a duty in tort to the first owner of the premises. Where there is a contract between the first owner and those involved in the design or construction of the building, notions of assumption of responsibility and reliance may be sufficient to create a duty in tort as well as obligations in contract. Without re-introducing the discarded doctrine of proximity, no distinction can be drawn between the case of a first owner and the case of a subsequent purchaser in the absence of a contract with the defendant.

Statement of the case

38 Woolcock Street Investments Pty Ltd ("Woolcock") brings this appeal against an order of the Court of Appeal of Queensland. The effect of the order was that the respondents, in providing services concerning the construction of a building complex, did not owe Woolcock, as a subsequent purchaser of the building, a duty to take care to protect it from pure economic loss.

39 The building consists of warehouses and offices and has no dwellings. It was built for a company that was the trustee of a property trust and owned the land on which the building was erected. By late 1987, construction of the building was substantially completed. Woolcock purchased the building in September 1992 from a company that was the successor trustee of the property trust. The contract for sale of the building contained no warranty that it was free of defects. Nor did it assign to the purchaser any rights that the vendor might have against those involved in the design and construction of the building. Before entering into the contract for sale, Woolcock did not retain an expert to inspect the building and did not inquire of the tenants or their agents whether the premises had any structural defects.

40 Substantial structural distress to the building became apparent in 1994. The distress was caused by the settlement of the foundations or the material below the foundations. Woolcock claims that the damage that it suffered from the subsidence was caused by the negligence of the first and second respondents to the appeal. It claims that it is entitled to damages from the respondents under the principle propounded by this Court in *Bryan v Maloney*[63]. In *Bryan*, the

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63 (1995) 182 CLR 609.

Court held that the builder of a dwelling house owes a duty to a subsequent purchaser of the house to take reasonable care to avoid reasonably foreseeable decreases in its value resulting from latent defects in the house.

41 The first respondent to the appeal is a company that carries on business as a consulting engineer. It designed the building and provided supervision services in respect of its construction. The second respondent is a qualified civil engineer who was employed by the first respondent and acted as the project manager in respect of the design and construction of the building. In the performance of its services, the first respondent obtained a quotation from another company as to the cost of investigating the sub-soil conditions under the proposed building. Investigation would have required the digging of auger holes at locations on the site and the testing of samples of soil. However, the company undertaking the development of the site for the owner refused to pay for these investigations. Consequently, the construction proceeded without testing the suitability of the sub-soil for the building that was to be constructed.

42 After discovering the subsidence, Woolcock sued the respondents in the Supreme Court of Queensland for damages claiming that it had suffered economic loss as a result of the respondents' negligent design or negligent supervision during the construction of the building. Subsequently, Atkinson J stated a Case for the Court of Appeal of the Supreme Court of Queensland. The Case Stated asked a single question:

> "On the agreed facts, does the Further Amended Statement of Claim ... disclose a cause of action in negligence against the defendants?"

43 The Court of Appeal (McMurdo P, Thomas JA and Douglas J) held that that question should be answered "No". Their Honours held that the principle formulated in *Bryan v Maloney* did not extend and should not be extended to the purchasers of commercial premises. If change in the law is to be made, this Court or the legislature should make it.

44 Subsequently, this Court gave Woolcock special leave to appeal against the order of the Court of Appeal.

The action in tort for damages for pure economic loss

45 Since the decision of the House of Lords in *Hedley Byrne & Co Ltd v Heller & Partners Ltd*[64], confusion approaching chaos has reigned in the law of negligence. At all events, it has reigned in that branch of negligence law concerned with a plaintiff suffering economic loss that does not result from

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64 [1964] AC 465.

injury to the plaintiff's person or property. *Hedley Byrne* held that a banker might owe a duty to take care to a plaintiff who had requested a credit reference concerning a third party with whom the plaintiff was proposing to deal. On the facts of that case, the House of Lords held that the defendant owed no duty to the plaintiff. But the recognition that, in the absence of a contractual or fiduciary obligation, a person could owe a duty to take reasonable care to prevent pure economic loss to another person has had a dramatic effect on the development of the common law.

46 Until *Hedley Byrne*, the accepted rule of the common law was that, absent a contractual, fiduciary or statutory duty, persons such as a banker owed no duty to prevent a plaintiff from suffering economic loss not resulting from injury to their person or property[65]. This was known as the "exclusionary" rule. The principal reason for the common law's reluctance to impose a duty of care in such cases was the fear that imposing liability on the defendant would result in an indeterminate liability in an indeterminate amount to an indeterminate number of persons[66]. The common law was particularly fearful of the consequences that might flow from permitting actions to be brought in respect of negligent statements because they were likely to cause economic losses more often than they would cause physical injury. Haunting the corridors of the common law was the spectre of the cartographer being held liable to all the passengers and all the owners of a ship and its cargo that had been sunk by the cartographer's negligence in omitting to mark a reef on a map.

47 Not only might a defendant be liable to an indeterminate number of persons who directly suffered pure economic loss as the result of the defendant's negligence but in many cases that negligence might have indirect economic consequences for those involved with those directly injured. Were these secondary victims also to be compensated for losses that the defendant had caused and ought reasonably to have foreseen? Fear of this "ripple" effect[67] of the defendant's negligence played its part in inducing the common law to hold that, absent a contractual duty, a person owed no common law duty to prevent pure economic loss to others. In some cases, the common law and statute – *Lord Campbell's Act*, for example – allowed a person to recover "pure" economic loss in a derivative action based on a breach of a duty owed to a physically injured person. The action *per quod servitium amisit* was perhaps the best

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65 *Candlewood Navigation Corporation Ltd v Mitsui OSK Lines Ltd* [1986] AC 1 at 15-17.

66 *Ultramares Corporation v Touche* 174 NE 441 at 444 (1931).

67 *Perre v Apand Pty Ltd* (1999) 198 CLR 180 at 221 [106].

known example of such a common law cause of action[68]. But otherwise the common law set its face against a claim for pure economic loss that did not arise from a breach of contract or a fiduciary or statutory duty.

48 One can be sure that the Law Lords who decided *Hedley Byrne* did not foresee the consequences that their decision would have for the law of negligence. Although their Lordships' reasons differ, they appear to have believed that, in the case of negligent statements, a claim for economic loss would lie only where the defendant had or could be supposed to have assumed responsibility for the statement. But, once the Law Lords indicated that the so-called exclusionary rule concerning economic loss was no longer exclusionary, actions for "pure" economic loss could not be confined to claims of negligent statement. As a result, appellate courts in the United Kingdom, Canada, New Zealand and Australia have spent much time deciding whether or not defendants owed a duty of care to prevent pure economic loss to plaintiffs. It is not unfair to say that the results have been less than successful. Not only have the courts of different jurisdictions formulated different principles and rules for determining the issue of duty but ultimate appellate courts have reached conflicting decisions in cases where the material facts were similar, if not identical. Nowhere has the conflict in the ultimate appellate courts of various jurisdictions been more obvious than in the law of negligence concerning defective premises.

United Kingdom case law concerning defective premises

49 In England, judicial opinion has varied both as to the nature of the loss suffered by a purchaser of premises who subsequently discovers that they are defective and as to the circumstances that may or may not give rise to a cause of action in respect of the defects. In *Anns v Merton London Borough Council*[69], the House of Lords held that in some circumstances an action might be brought where the plaintiff has suffered financial loss as the result of purchasing a defective building. Lord Wilberforce, who gave the leading speech, formulated a two-stage test of duty that for a time proved influential and is still substantially followed in New Zealand and Canada. He said[70]:

> "First one has to ask whether, as between the alleged wrongdoer and the person who has suffered damage there is a sufficient relationship of proximity or neighbourhood such that, in the reasonable contemplation of the former, carelessness on his part may be likely to cause damage to the

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68 *Commissioner for Railways (NSW) v Scott* (1959) 102 CLR 392.

69 [1978] AC 728.

70 [1978] AC 728 at 751-752.

> latter – in which case a prima facie duty of care arises. Secondly, if the first question is answered affirmatively, it is necessary to consider whether there are any considerations which ought to negative, or to reduce or limit the scope of the duty or the class of person to whom it is owed or the damages to which a breach of it may give rise".

50 His Lordship went on to say that, in the case of buildings, the cause of action "can only arise when the state of the building is such that there is present or imminent danger to the health or safety of persons occupying it"[71]. Lord Wilberforce classified the defect in that case – cracks in the walls and sloping floors – as "material, physical damage"[72]. In *Pirelli General Cable Works Ltd v Oscar Faber & Partners*[73], the House of Lords confirmed the proposition that the damage in such cases was physical damage. On this classification of the damage, an action brought in respect of defective premises was a straightforward action for damages for injury to property. Accordingly, such a case fell under the principle formulated by the House of Lords in *Donoghue v Stevenson*[74]. Classifying the damage as physical, however, created problems for the purchasers of buildings. Such a claim suffered from the difficulty that the cause of action was complete when the damage occurred. If the defect was not discovered until many years after the plaintiff had acquired the premises, the plaintiff might be met with the defence that the action was statute barred.

51 In an earlier decision – *Junior Books Ltd v Veitchi Co Ltd*[75] – however, the House of Lords had classified a claim for the cost of replacing defective flooring as one of pure economic loss. This classification was approved in *D & F Estates Ltd v Church Commissioners for England*[76]. There, the House of Lords held that, where a claim is based upon the defective condition of the building, the claim is one of pure economic loss. The House held that such a case is distinguishable from an action where the claim is that the defective premises caused physical injury to the plaintiff or damaged other tangible property of the plaintiff. These latter claims fall under the *Donoghue v Stevenson* principle. In *Murphy v*

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71 [1978] AC 728 at 760.

72 [1978] AC 728 at 759.

73 [1983] 2 AC 1 at 16.

74 [1932] AC 562.

75 [1983] 1 AC 520.

76 [1989] AC 177.

Brentwood District Council[77], the House of Lords confirmed that a claim based on loss arising out of the discovery that premises were defective was a claim for pure economic loss. In *D & F Estates Ltd*, the House held that the cost of replacing the defective plaster work of a sub-contractor was not an item of damage for which a builder "could possibly be made liable in negligence under the principle of *Donoghue v Stevenson* or any legitimate development of that principle"[78]. In *Murphy*, the House held that neither a builder nor a council that had approved the building plans could be liable for the cost of repairing a defect in a building discovered by a subsequent purchaser before the defect had caused any injury to person or other property. Such a claim was one for pure economic loss.

Canadian case law concerning defective premises

52 Canadian courts have reached a diametrically opposed view to that prevailing in the United Kingdom since *Murphy*. In *City of Kamloops v Nielsen*[79], the Supreme Court of Canada held that an action by a subsequent purchaser of premises to recover the cost of repairing dangerously defective foundations was a claim for pure economic loss but could be maintained. Two years later in *Central Trust Co v Rafuse*[80], the Supreme Court of Canada held that *Kamloops* had formulated:

> "a general rule that a cause of action arises for purposes of a limitation period when the material facts on which it is based have been discovered or ought to have been discovered by the plaintiff by the exercise of reasonable diligence".

53 This principle was again confirmed by the Supreme Court of Canada in *Winnipeg Condominium Corporation No 36 v Bird Construction Co*[81]. In a unanimous judgment, the Supreme Court held that, if defective premises constitute a "real and substantial danger to the inhabitants of the building"[82], the

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77 [1991] 1 AC 398.

78 [1989] AC 177 at 207.

79 [1984] 2 SCR 2.

80 [1986] 2 SCR 147 at 224.

81 [1995] 1 SCR 85.

82 [1995] 1 SCR 85 at 116. Other suggested criteria were: "a substantial danger to the health and safety of the occupants" at 121 and "foreseeable and substantial danger to the health and safety of the occupants" at 129.

cost of repairing the building is recoverable in an action in negligence from those involved in its construction.

New Zealand case law concerning defective premises

54 New Zealand courts have been the most liberal of the courts in common law jurisdictions in permitting an action in negligence for economic loss caused by defective premises[83]. In *Bowen v Paramount Builders (Hamilton) Ltd*[84], three members of the Court of Appeal regarded the common law as recognising a cause of action on the part of a purchaser who later discovered a defect in premises. The Court treated the case as one of physical damage. Then in *Mount Albert Borough Council v Johnson*[85], Cooke and Somers JJ held that the purchaser of a defective building was entitled to sue "in tort for economic loss caused by negligence, at least when the loss is associated with physical damage"[86]. However, their Honours held that the right of action accrued only when the defect became apparent or manifest[87].

55 After a series of cases where plaintiffs successfully sued councils in negligence over the presence of defects in premises, the issue came before the New Zealand courts again in *Invercargill City Council v Hamlin*[88]. A majority of the Court of Appeal held that the plaintiff's cause of action arose when the plaintiff (the first owner) first discovered or ought reasonably to have discovered the defect[89] and that the plaintiff could recover against the Council, which had inspected the foundations but negligently failed to note that they were not in accordance with the plans. The Court of Appeal held that there was sufficient proximity between the Council and the first owner because the Council had assumed responsibility for the inspection and the plaintiff had relied on the Council. The Judicial Committee of the Privy Council upheld the majority's

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83 *Bowen v Paramount Builders (Hamilton) Ltd* [1977] 1 NZLR 394; *Mount Albert Borough Council v Johnson* [1979] 2 NZLR 234; *Stieller v Porirua City Council* [1983] NZLR 628; [1986] 1 NZLR 84; *Brown v Heathcote County Council* [1986] 1 NZLR 76; *Chase v de Groot* [1994] 1 NZLR 613; *Invercargill City Council v Hamlin* [1994] 3 NZLR 513.

84 [1977] 1 NZLR 394 at 410, 414, 417, 422-423.

85 [1979] 2 NZLR 234.

86 [1979] 2 NZLR 234 at 239.

87 [1979] 2 NZLR 234 at 239.

88 [1994] 3 NZLR 513.

89 [1994] 3 NZLR 513 at 522-524.

decision. So far as the nature of the damage was concerned, Lord Lloyd of Berwick said[90]:

> "In other words, the cause of action accrues when the cracks become so bad, or the defects so obvious, that any reasonable homeowner would call in an expert. Since the defects would then be obvious to a potential buyer, or his expert, that marks the moment when the market value of the building is depreciated, and therefore the moment when the economic loss occurs."

His Lordship thought that the Court of Appeal's perception of the prevailing circumstances in New Zealand justified it taking a different view of the law from that taken in *Murphy*[91]. The Judicial Committee held, therefore, that in New Zealand a subsequent purchaser could sue a council that had negligently approved a building that was not in accordance with the approved plans.

Australian case law concerning defective premises

56 Australian courts have long held that a person who suffers physical injury as the result of the defective design or execution of building work may sue in tort for the injury[92]. In *Sutherland Shire Council v Heyman*[93], however, this Court held that the Council owed no duty to the second owners of a house to take reasonable care to ensure that the house had been constructed in accordance with plans that it had approved so as to prevent them suffering economic loss from defects in the house. After buying the house, the owners were forced to expend money to repair cracking and other problems resulting from faulty foundations. No member of the Court was willing to apply the general principle formulated by Lord Wilberforce in *Anns v Merton London Borough Council*. Gibbs CJ and Wilson J held that the evidence did not establish that the Council had acted negligently in exercising its discretionary power to inspect the premises. Mason, Brennan and Deane JJ held that the Council owed no relevant duty of care to the plaintiffs because they had not relied on any inquiry of the Council concerning the foundations or inspection. Mason, Wilson and Brennan JJ made no finding as to whether the damage giving rise to the action was physical damage or pure economic loss. However, Gibbs CJ held[94] that the damage was physical damage.

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90 [1996] AC 624 at 648.

91 [1991] 1 AC 398.

92 *Voli v Inglewood Shire Council* (1963) 110 CLR 74; *Florida Hotels Pty Ltd v Mayo* (1965) 113 CLR 588.

93 (1985) 157 CLR 424.

94 (1985) 157 CLR 424 at 447.

Deane J held that it was economic, not physical, damage. He held[95] that, as a result of the defective foundations, the owners suffered pure economic loss upon the market value of the house falling when the defect was "first known or manifest". By "manifest", Deane J meant "discoverable by reasonable diligence"[96]. The view of Deane J as to the nature of the damage has prevailed[97]. It is economic loss, not physical damage.

57 In *Bryan v Maloney*[98], a majority of this Court reached the opposite conclusion from that reached by the House of Lords in *D & F Estates Ltd* and *Murphy v Brentwood District Council*. Expressly or inferentially, the Court approved the decisions – but not necessarily the reasoning – in the Canadian and New Zealand cases to which I have referred. The majority (Mason CJ, Deane, Toohey and Gaudron JJ) held that the builder of a house owed a duty to a subsequent purchaser to take reasonable care to avoid reasonably foreseeable decreases in its value arising from the consequences of latent defects caused by the house's defective construction. Brennan J dissented.

The *ratio decidendi* of *Bryan v Maloney*

58 The first issue in this appeal is whether the *ratio decidendi* of *Bryan v Maloney* covers the present case. If it does, Woolcock must succeed. If it does not, a further issue arises as to whether this Court should hold that those involved in the building of commercial premises owe a duty to subsequent purchasers that is similar to the duty owed by a builder to a subsequent purchaser of a dwelling house.

59 The common law distinguishes between the holding of a case, the rule of the case and its *ratio decidendi*. The holding of a case is the decision of the court on the precise point in issue – for the plaintiff or the defendant. The rule of the case is the principle for which the case stands – although sometimes judges describe the rule of the case as its holding. The *ratio decidendi* of the case is the general rule of law that the court propounded as its reason for the decision.

60 Under the common law system of adjudication, the *ratio decidendi* of the case binds courts that are lower in the judicial hierarchy than the court deciding the case. Moreover, even courts of co-ordinate authority or higher in the judicial

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95 (1985) 157 CLR 424 at 505.

96 *Hawkins v Clayton* (1988) 164 CLR 539 at 588.

97 *Bryan v Maloney* (1995) 182 CLR 609 at 617.

98 (1995) 182 CLR 609.

hierarchy will ordinarily refuse to apply the *ratio decidendi* of a case only when they are convinced that it is wrong.

61 Prima facie, the *ratio decidendi* and the rule of the case are identical. However, if later courts read down the rule of the case, they may treat the proclaimed *ratio decidendi* as too broad, too narrow or inapplicable[99]. Later courts may treat the material facts of the case as standing for a narrower or different rule from that formulated by the court that decided the case. Consequently, it may take a series of later cases before the rule of a particular case becomes settled. Thus for many years, courts and commentators debated whether the landmark case of *Donoghue v Stevenson*[100] was confined to manufacturers and consumers and whether the duty formulated in that case was dependent upon the defect being hidden with the lack of any reasonable possibility of intermediate examination[101]. If later courts take the view that the rule of a case was different from its stated *ratio decidendi*, they may dismiss the stated *ratio* as a mere *dictum* or qualify it to accord with the rule of the case as now perceived.

62 What then is the *ratio decidendi* of *Bryan v Maloney*? That question can be answered only by examining their Honours' reasoning, which I will summarise.

The reasoning in *Bryan v Maloney*

63 The starting point of the reasoning in the joint judgment[102] in *Bryan v Maloney* was that the builder, Mr Bryan, had constructed a house for a Mrs Manion on land that she owned. Later, she sold the land and the house to another couple who, seven years after the house was built, sold it to the plaintiff, Mrs Maloney[103]. The trial judge – who found in the plaintiff's favour – had awarded an amount of damages which "would necessarily be expended in remedying the inadequate footings and the consequential damage to the fabric of

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99 See generally Llewellyn, *The Case Law System in America*, (1989) at 14-15, based on lectures given by Karl Llewellyn in 1928-1929 at the Leipzig Faculty of Law while on leave from Columbia University.

100 [1932] AC 562.

101 cf *Grant v Australian Knitting Mills Ltd* (1935) 54 CLR 49 at 62-68.

102 Mason CJ, Deane and Gaudron JJ. (Toohey J in a separate judgment reached the same result.)

103 (1995) 182 CLR 609 at 615.

the house"[104]. Thus, the only damage sustained by the plaintiff "was mere economic loss in the sense that it was distinct from, and not consequent upon, ordinary physical injury to person or property"[105].

64 Their Honours said that two policy considerations could militate against recognition of a relationship of proximity in a case involving mere economic loss. First, the law was concerned to avoid the imposition of liability "in an indeterminate amount for an indeterminate time to an indeterminate class"[106]. Second, the common law feared that a duty to take care to avoid economic loss might be inconsistent with community standards in relation to what was ordinarily legitimate in the pursuit of personal advantage[107].

65 The builder and Mrs Manion were parties to a contract, but the existence of the contract did not preclude a relationship of proximity between them under the law of negligence[108]. That did not mean that the existence of a contractual relationship was irrelevant to the existence of proximity or the content of a duty of care under the ordinary law of negligence[109]. However, the contract between the builder and Mrs Manion "was non-detailed and contained no exclusion or limitation of liability"[110]. Accordingly, neither the existence nor the content of the contract precluded the liability of Mr Bryan to Mrs Manion or Mrs Maloney under the law of negligence[111].

66 Their Honours said that a relationship of proximity clearly existed between the builder and Mrs Manion with respect to ordinary physical injury to her person or property. Accordingly, the builder was under a duty to exercise reasonable care in relation to the building work to avoid any reasonably foreseeable risk of such injury. While the relationship between the builder and Mrs Manion concerning physical injury had to be distinguished from the

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104 (1995) 182 CLR 609 at 616.

105 (1995) 182 CLR 609 at 617.

106 (1995) 182 CLR 609 at 618 citing *Ultramares Corporation v Touche* 174 NE 441 at 444 (1931).

107 (1995) 182 CLR 609 at 618.

108 (1995) 182 CLR 609 at 619-620.

109 (1995) 182 CLR 609 at 621.

110 (1995) 182 CLR 609 at 622.

111 (1995) 182 CLR 609 at 622.

relationship between them concerning mere economic loss, the significance of the distinction varied according to the particular kind of economic loss. The distinction between physical damage to a house by external cause and mere economic loss in the form of diminution in its value when the inadequacy of its footings became manifest by consequent damage to its fabric was "an essentially technical one"[112].

67 "Moreover", said their Honours, "the policy considerations underlying the reluctance of the courts to recognize a relationship of proximity and a consequent duty of care in cases of mere economic loss are inapplicable to a relationship of the kind which existed between Mr Bryan and Mrs Manion as regards the kind of economic loss sustained by Mrs Maloney."[113] To the contrary, there were strong reasons for acknowledging the existence of a relevant relationship between the builder and the first owner with respect to that kind of economic loss[114]. Their Honours said[115]:

> "In particular, the ordinary relationship between a builder of a house and the first owner with respect to that kind of economic loss is characterized by the kind of assumption of responsibility on the one part (i.e. the builder) and known reliance on the other (i.e. the building owner) which commonly exists in the special categories of case in which a relationship of proximity and a consequent duty of care exists in respect of pure economic loss."

68 Prima facie, a relationship of proximity also existed between the builder and persons such as Mrs Maloney who might sustain physical injury to person or property as a consequence of inadequate footings of part of the house while they or their property were lawfully in the house or in its vicinity[116].

69 Whether the relationship that existed between the builder and a subsequent owner possessed the relevant degree of proximity to give rise to a duty to take reasonable care to avoid economic loss had to be considered in the context of the relationships of proximity to which their Honours referred[117]. Although the only

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112 (1995) 182 CLR 609 at 623.

113 (1995) 182 CLR 609 at 623.

114 (1995) 182 CLR 609 at 624.

115 (1995) 182 CLR 609 at 624.

116 (1995) 182 CLR 609 at 624.

117 (1995) 182 CLR 609 at 624-625.

connection between the builder and the subsequent owner was likely to be the house itself, their relationship was marked by proximity in a number of respects[118]:

- the house was a permanent structure which was to be used indefinitely and was likely to represent one of the most significant and possibly the most significant investment which the subsequent owner would ever make;

- it was foreseeable by the builder that the negligent construction of a house with inadequate footings was likely to cause economic loss when the inadequacy became manifest; and

- no intervening negligence or other causative event would occur between the construction and the sustaining of the economic loss.

70 Their Honours concluded[119]:

> "Upon analysis, the relationship between builder and subsequent owner with respect to the particular kind of economic loss is, like that between the builder and first owner, marked by the kind of assumption of responsibility and known reliance which is commonly present in the categories of case in which a relationship of proximity exists with respect to pure economic loss. In ordinary circumstances, the builder of a house undertakes the responsibility of erecting a structure on the basis that its footings are adequate to support it for a period during which it is likely that there will be one or more subsequent owners. Such a subsequent owner will ordinarily have no greater, and will often have less, opportunity to inspect and test the footings of the house than the first owner. Such a subsequent owner is likely to be unskilled in building matters and inexperienced in the niceties of real property investment. Any builder should be aware that such a subsequent owner will be likely, if inadequacy of the footings has not become manifest, to assume that the house has been competently built and that the footings are in fact adequate."

71 I do not think that the *ratio decidendi* of *Bryan v Maloney* applies to the case of commercial premises. The *ratio* can be put no higher than that the builder of a dwelling house owes a duty to a subsequent purchaser to take reasonable care to avoid reasonably foreseeable decreases in its value arising from the consequences of latent defects caused by the house's defective

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118 (1995) 182 CLR 609 at 625.

119 (1995) 182 CLR 609 at 627.

construction. Neither the stated reasons of the Court nor the material facts of the case justify any wider conclusion. Certainly, they do not justify the conclusion that the *ratio* of the case covers commercial premises. That is not to say that the reasoning in *Bryan v Maloney* – or by analogy its material facts – may not lead to the conclusion that the common law recognises an identical or similar duty in respect of the builder of commercial premises. That requires further analysis. But it does mean that the *ratio decidendi* of *Bryan v Maloney* does not automatically determine the result of this appeal.

72 Moreover, a conclusive reason for finding that the *ratio* of *Bryan v Maloney* does not cover this case is that the Court decided it when the doctrine of proximity governed the Australian law of negligence, and its reasoning is based on that doctrine. Thus, Mason CJ, Deane and Gaudron JJ said[120]:

> "The cases in this Court establish that a duty of care arises under the common law of negligence of this country only where there exists a relationship of proximity between the parties with respect to both the relevant class of act or omission and the relevant kind of damage."

73 It is unnecessary to determine whether the majority Justices would have reached the same result even if the doctrine of proximity was not regarded as binding. The decisive rejection of that doctrine by this Court in *Sullivan v Moody*[121] is sufficient reason for holding that the material facts of *Bryan v Maloney* cannot be used – even by way of analogy – as persuasive. Facts that are regarded as material for the purpose of one legal doctrine are not necessarily material for another doctrine. The materiality of facts depends on the principle or principles that is or are applied to them. Once the stated principle of a case is rejected or distinguished, the materiality of the particular facts of the case must depend on the new principle or doctrine that governs the case. Since the doctrine of proximity was rejected in *Sullivan*, the only *ratio decidendi* that can be extracted from *Bryan v Maloney* is one based on its principal facts and assumptions. Its *ratio* is that the builder of a dwelling house owes a duty to a subsequent purchaser who relies on the skill of the builder to protect that person from reasonably foreseeable decreases in value resulting from latent defects in the house. *Bryan v Maloney* does not govern this case.

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120 (1995) 182 CLR 609 at 617.

121 (2001) 207 CLR 562.

The indicia of a duty to prevent pure economic loss as the result of constructing commercial premises

74 In *Perre v Apand Pty Ltd*[122], I listed five principles that I thought were "relevant in determining whether a duty exists in all cases of liability for pure economic loss". They were principles concerned with:

- reasonable foreseeability of loss,
- indeterminacy of liability,
- autonomy of the individual,
- vulnerability to risk, and
- knowledge of the risk and its magnitude.

75 I went on to say that, in particular cases, other policies and principles may guide and even determine the outcome of the case, but the principles concerning these five categories must always be considered. Accordingly, I turn to consider them and other relevant matters in the context of this case.

Reasonable foreseeability

76 The loss that Woolcock suffered in the present case was clearly foreseeable by the respondents. Consulting engineers like the respondents would clearly have foreseen that, if the foundations for the complex were liable to subsidence, the current owner of the building would be put to expense in repairing the damage caused by the subsidence. Courts have long held that engineers engaged in connection with the design of a building have a duty to examine the site to see whether the nature of the sub-soil is adequate for the proposed building[123]. Reasonable foreseeability of damage, however, is a necessary but not sufficient condition of a cause of action in negligence[124].

Indeterminacy of liability

77 Indeterminacy of liability is a factor that will ordinarily defeat a claim that the defendant owed a duty of care to persons such as the plaintiff. But it is not likely to be a significant issue in cases concerned with economic loss suffered by the subsequent purchaser of a commercial building that is or becomes defective

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122 (1999) 198 CLR 180 at 220 [105].

123 *Moneypenny v Hartland* (1826) 2 Car & P 378 [172 ER 171]; *Columbus Company v Clowes* [1903] 1 KB 244; cf *Auburn Municipal Council v ARC Engineering Pty Ltd* [1973] 1 NSWLR 513 at 518, 519.

124 *Sullivan v Moody* (2001) 207 CLR 562 at 576 [42].

by reason of negligent design or construction. Liability will ordinarily be restricted to the owner of the building when damage manifests itself. Indeterminacy of liability may be a relevant factor where occupants of the building claim damages for economic loss arising out of the defective design or construction of the building. But when the first owner or a subsequent purchaser of a commercial building claims damages for pure economic loss, indeterminacy of liability is not an issue.

Autonomy of the individual

78 In *Hill v Van Erp*[125], I pointed out that "Anglo-Australian law has never accepted the proposition that a person owes a duty of care to another person merely because the first person knows that his or her careless act may cause economic loss to the latter person". Speaking generally, a person owes no duty to prevent economic loss to another person even though the first person intends to cause economic loss to that other person. This particular immunity from liability reflects the common law's concern with the autonomy of the individual and its desire to give effect to the choices of the individual by not burdening his or her freedom of action. Thus, as long as a person is legitimately protecting or pursuing his or her commercial interests, the common law does not require that person to be concerned with the effect of his or her conduct on the economic interests of other persons[126].

79 Questions concerning the autonomy of individuals do not seem relevant in the context of claims for damages for pure economic loss arising out of the defective design or construction of a building. Those involved in the building are already under a duty to the first owner to avoid physical injury to the owner's person and property. Consequently, imposing a duty to avoid economic loss to the first or a subsequent owner is not inconsistent with the pursuit of the legitimate interests of those who design or construct the building[127].

Vulnerability to risk

80 Whether or not the plaintiff was vulnerable to the risk of injury from the defendant's conduct is a key issue in determining whether the defendant owed a duty of care to the plaintiff. Indeed, the issue of the purchaser's vulnerability to economic loss is the critical issue in determining whether those involved in the construction of commercial premises owe a duty of care to the purchaser. In this

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125 (1997) 188 CLR 159 at 211.

126 *Perre v Apand Pty Ltd* (1999) 198 CLR 180 at 224 [115].

127 *Bryan v Maloney* (1995) 182 CLR 609 at 623-624.

context, vulnerability to risk means not that the plaintiff was exposed to risk but that by reason of ignorance or social, political or economic constraints, the plaintiff was not able to protect him or herself from the risk of injury.

81 Subject to the express terms of the contract, the first owner or purchaser has extensive contractual remedies open to him or her in respect of the negligent construction of the building. The ordinary building contract contains an implied term that the work will be done in accordance with the contractual stipulation, with proper materials[128], in a workmanlike manner and that the building will be reasonably fit for its purpose. Similar terms will be implied in the contracts made with other persons who are involved in the design or construction of the building. These contractual remedies will lie against those involved even in cases where sub-contractors have carried out the work or services. Such remedies usually provide sufficient protection against the problems that are likely to be encountered during the first few years of the building's life.

82 But extensive as contractual protection may be – it is unlikely to be narrower than in tort – it suffers from one shortcoming. A cause of action in contract arises upon breach. In the case of a defective building, the breach will frequently occur before the loss-causing defect manifests itself. Hence, the first owner of a commercial building may find that his or her claim in contract is outside the relevant limitation period and statute barred. Nevertheless, by insisting that the construction contract be made under seal, the first owner can ordinarily protect him or herself against most problems concerning a defective building that were reasonably foreseeable.

83 Still, even when the contract is under seal, the first owner may be left with a remedy that is unenforceable. When the defect does not manifest itself for some time, the first owner may find that the builder is insolvent[129] or in liquidation, or has gone out of business. If, as is often the case, the defect in the premises results from a sub-contractor's negligence, holding that there is no duty in tort to guard against economic loss arising from the negligent design or construction of a building deprives the first owner of a valuable remedy against the sub-contractor. No doubt it may be possible in some cases for the first owner to enter into contractual indemnities or warranties with the sub-contractor. In other cases, the first owner may be able to sue the sub-contractor on any warranty given by the sub-contractor to the builder.

84 The present case proceeded by way of Case Stated. There is no agreed fact as to whether it is a common practice for builders and their sub-contractors

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128 *Young & Marten Ltd v McManus Childs Ltd* [1969] 1 AC 454.

129 *Invercargill City Council v Hamlin* [1996] AC 624 at 634.

to agree to obligations concerning the condition of premises that might be enforced by the first owner of the premises. Leading writers on Australian construction law suggest a prudent principal should enter into a collateral contract with sub-contractors that contains appropriate warranties[130]. In Australia, professional institutions have endorsed particular contractual warranties whose purpose is to make the sub-contractor liable to the principal[131].

85 A subsequent purchaser of a commercial building also has means of protecting him or herself against economic loss arising from the condition of the building. That person can obtain warranties from the vendor. The subsequent purchaser can also have the building examined by relevant experts. But even expert examination may not reveal the presence of latent defects. Moreover, some areas of concern – such as the stability of the foundations of the building – may be examined and tested only at considerable expense.

86 Although the first and subsequent owners may take steps to protect themselves contractually, it is clear that in some cases contractual remedies may not be sufficient to protect an owner against pure economic loss. In these cases, the owner will be compensated for economic loss only if the law of torts provides a cause of action.

The defendant's knowledge of the risk and its magnitude

87 The case for imposing a duty is always strengthened if the defendant actually knew of the risk. It is strengthened further if the defendant knew the magnitude of the risk. The significance of the defendant's knowledge of the risk of loss and its magnitude will depend on the facts of each case. However, it would be a rare case where those involved in the construction of commercial premises would not be aware of the risks arising from particular defects and their potential magnitude. In the present case, the respondents were fully aware of the risk – they asked for the site to be tested for the purpose of determining whether there were risks of subsidence. And the inference is irresistible that, as consulting engineers, they were well aware of the magnitude of the damage that the owner of the building would suffer if the risk should eventuate.

Other policy factors

88 In addition to the factors that I referred to in *Perre v Apand Pty Ltd* as relevant, other factors are also relevant in determining whether a duty of care is

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130 Dorter and Sharkey, *Building and Construction Contracts in Australia: Law and Practice*, 2nd ed (looseleaf service) at [5.630].

131 Bailey, *Construction Law in Australia*, 2nd ed (1998) at 156.

owed in respect of the negligent design or construction of commercial premises. They include:

Responsibility to control third parties

89 The common law has always been reluctant to impose a duty to control others[132]. In the area of defective building work, the issue of controlling third parties usually arises in respect of sub-contractors. In *D & F Estates Ltd*[133], for example, it was on this ground that the House of Lords refused to hold a builder liable for the negligence of a plasterer who was a sub-contractor. But if, as is usually the case, there is a contract between the owner and builder, the builder will already be under a practical, if not legal, obligation to supervise the work of any employed sub-contractors. Clause 9.5 of the Australian Standard General Conditions of Contract AS 4000-1997 makes the contractor liable to the principal "for the acts, defaults and omissions of subcontractors" unless the contract otherwise provides. Despite the decision in *D & F Estates Ltd*, issues concerning the control of third parties do not seem significant in the present context in Australia.

Outflanking the law of contract

90 Until the decision of the House of Lords in *Hedley Byrne*[134], the received wisdom was that pure economic loss cases belonged to the law of contract, not tort. Even as late as 1986, the Judicial Committee of the Privy Council and the House of Lords appeared to assume that the contract and not tort was ordinarily the source of the remedy for the recovery of negligently caused economic loss[135]. Indeed, one reason that the House of Lords gave for denying the owner's claim in *D & F Estates Ltd*[136] was that it would outflank the operation of the law of contract. Lord Bridge of Harwich said[137] that to require the builder to owe a duty to a subsequent purchaser "would be to impose upon him for the benefit of those with whom he had no contractual relationship the obligation of one who

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132 *Smith v Leurs* (1945) 70 CLR 256 at 262; *Modbury Triangle Shopping Centre Pty Ltd v Anzil* (2000) 205 CLR 254 at 263-264 [18]-[21], 291-293 [108]-[113].

133 [1989] AC 177.

134 [1964] AC 465.

135 *Candlewood Navigation Corporation Ltd v Mitsui OSK Lines Ltd* [1986] AC 1 at 17; *Leigh and Sillavan Ltd v Aliakmon Shipping Co Ltd* [1986] AC 785 at 818-819.

136 [1989] AC 177.

137 [1989] AC 177 at 207.

warranted the quality of the plaster as regards materials, workmanship and fitness for purpose".

91 But since *Hedley Byrne*, the argument that economic loss falls within the domain of contract rather than tort cannot be sustained in Australia and probably cannot be sustained even in England. Nor since the decision of the House of Lords in *Donoghue v Stevenson*[138] is it possible to argue that the law of negligence should not be permitted to outflank fundamental contractual doctrines such as consideration and privity. Until the decision of the House of Lords in *White v Jones*[139] and the decision of this Court in *Hill v Van Erp*[140], it was possible to argue that the law of negligence should not be concerned with the loss of expectancies. But those decisions put an end to that argument. They held that a person could bring an action in tort against a solicitor in respect of the loss of an expectancy under a will. In *White v Jones*[141], Lord Goff of Chieveley said that he did not consider that "damages for loss of an expectation are excluded in cases of negligence".

92 The decisions in *Hedley Byrne*, *Donoghue*, *White* and *Hill*, therefore, make it difficult to argue that claims in negligence for pure economic loss should be excluded merely because such claims may outflank or undermine fundamental doctrines of the law of contract. In *Bryan v Maloney*[142], this Court rejected the notion that in Australia contract and tort were so neatly compartmentalised that it would be an error to give a remedy in tort for economic loss. So far as the builder and first owner were concerned, Mason CJ, Deane and Gaudron JJ said[143]:

> "as a matter of policy, the sanctity of contract or the compartmentalization of the law dictates that liability under the ordinary principles of negligence ... must be excluded as between parties in a contractual relationship notwithstanding the absence of any actual agreement between the parties to that effect".

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138 [1932] AC 562.

139 [1995] 2 AC 207.

140 (1997) 188 CLR 159.

141 [1995] 2 AC 207 at 269.

142 (1995) 182 CLR 609 at 624.

143 (1995) 182 CLR 609 at 624.

93 Once the courts rejected the traditional view that professional persons such as solicitors and architects could only be sued in contract[144], it became likely that, in building cases, tortious remedies would extend to third parties affected by the performance of the contract.

94 The better view in all cases – not merely building cases – is 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.

95 Whether the securing of an alternative remedy in contract was really open to a plaintiff who has suffered economic loss depends upon current market conditions and conveyancing practices. In *Henderson v Merrett Syndicates Ltd*[145], the House of Lords held that the existence of various contractual arrangements between the plaintiffs and certain managing agents and underwriters did not prevent the plaintiffs from suing in tort. The market conditions were such that the plaintiffs could not bargain for protection against the risks of the agents and others being careless. Similarly, in *Smith v Eric S Bush*[146], the House of Lords held that a purchaser of a house could sue a careless valuer in tort because, having regard to market conditions, the purchaser was not able to protect herself against the valuer's negligence. Likewise in *Bryan v Maloney*[147], the inability of an ordinary purchaser of a dwelling house to realistically protect him or herself against the builder's negligence influenced this Court to allow the purchaser to sue the builder in tort.

96 As I have pointed out, the Case Stated does not reveal the extent to which, if at all, it is open to the first owner or subsequent purchaser, as a matter of commerce or conveyancing practice, to protect him or herself by contractual remedies against those involved in the negligent design or construction of commercial premises. However, it would be surprising if they could not do so. The first owners and subsequent purchasers of commercial premises are usually sophisticated and often wealthy investors who are advised by competent solicitors, accountants, architects, engineers and valuers. In the absence of evidence, this Court must assume that the first owner of commercial premises is able to bargain for contractual remedies against the builder. It must also assume

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144 *Groom v Crocker* [1939] 1 KB 194; *Bagot v Stevens Scanlan & Co Ltd* [1966] 1 QB 197.

145 [1995] 2 AC 145.

146 [1990] 1 AC 831.

147 (1995) 182 CLR 609 at 627-628.

that a subsequent purchaser is able to bargain for contractual warranties from the vendor of such premises.

The floodgates argument

97 In determining whether the common law should recognise a duty of care, the possibility that its recognition might lead to a flood of claims is a ground for rejecting the existence of the duty[148]. However, New Zealand and Canada have long recognised tort claims for economic loss arising out of defective premises without apparently being flooded with litigation. Similarly, the decision of this Court in *Bryan v Maloney* does not appear to have caused the lists of Australian courts to be flooded with claims that could not have been brought but for that decision.

Disproportionate liability

98 In some cases concerned with pure economic loss, it may be necessary in determining whether a defendant should owe a duty of care to consider whether any potential liability of the defendant would be disproportionate to its fault. Claims against auditors by investors or creditors are examples of cases where disproportionate liability has played a role in rejecting plaintiffs' claims that the auditors owed them a duty of care[149].

99 However, it is difficult to see how issues of disproportionate liability can be a factor in defective building cases concerned with pure economic loss. First, the loss in value or the cost of repairs to the defective work is likely to bear a proportionate relationship to the contract price for doing or advising in respect of the building work. Second, if the defective building causes physical injury or injury to other property, those involved in the construction will be liable even though the damages payable far exceed the contract price.

Lack of a measurable standard of care

100 One objection to the law of torts creating a general duty of care to prevent pure economic loss in relation to "defective" premises is that the question of defectiveness cannot be divorced from the contract price payable for the building work. This problem is not confined to commercial premises but extends to the

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148 *Bowen v Paramount Builders (Hamilton) Ltd* [1977] 1 NZLR 394 at 419, 422; cf *Esanda Finance Corporation Ltd v Peat Marwick Hungerfords* (1997) 188 CLR 241 at 283-284.

149 *Esanda Finance Corporation Ltd v Peat Marwick Hungerfords* (1997) 188 CLR 241 at 286-287.

design and construction of all premises. The first owner or purchaser may have been influenced to build or buy by the low price of the building, but that price may reflect the use of inferior quality materials and workmanship[150]. In most cases, the purpose for which the building is to be used will also have a significant effect on both price and materials and the standard of workmanship. What is regarded as sufficient for a barn is unlikely to be sufficient for a dwelling house. And what is suitable for a horse barn may not be suitable for a barn that is used to store hay. Indeed, price and purpose can seldom be separated. As Brooking J pointed out in *Minchillo v Ford Motor Company of Australia Ltd*[151] in dealing with a claim of economic loss with respect to a truck:

> "One man's meat is another man's poison. The scribbling block bought for a few cents at the supermarket might serve very well for the correspondence of the artisan, but it would not have done for the Duke. Price is an important consideration: generally speaking, as the saying goes, you get what you pay for."

101 The problem of measuring what constitutes defective quality in building cases for the purpose of the law of tort is a real one. But it is not so great that it automatically requires the common law to hold that no tortious duty of care is ever owed in respect of "defective" premises. Courts have long had to deal with similar problems under the Sale of Goods Acts with respect to such terms as fitness for purpose, merchantable quality and so on. They should be able to formulate reasonable standards for determining whether, having regard to the price and purpose of the premises and relevant market and industry standards, the particular premises were or were not designed or constructed negligently.

Circumventing the policy of limitation legislation

102 Law is too complex for it to be a seamless web. But, so far as possible, courts should try to make its principles and policies coherent[152]. Accordingly, it is always relevant in determining whether to create, extend or formulate a duty in tort to consider whether it is consistent with other legal doctrines, principles and policies.

103 The now accepted doctrine is that, in the case of defective premises, damage does not occur until the defect manifests itself. No cause of action arises in tort until the plaintiff suffers damage. Consequently, those concerned with the design and construction of a building may be required to defend themselves

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150 cf *Junior Books Ltd v Veitchi Co Ltd* [1983] 1 AC 520 at 533.

151 [1995] 2 VR 594 at 598.

152 *Sullivan v Moody* (2001) 207 CLR 562 at 581 [55].

against an action in tort many years after completing the task that now gives rise to the claims against them. On the other hand, a cause of action in contract arises when the contract is breached[153]. Time runs from the breach, not the sustaining of damage. This creates the paradox that those involved in the design or construction of a building may be sued in tort years after the time has expired for suing on the contract that gave rise to the duty. Of course, since *Donoghue v Stevenson*[154], a similar anomaly arises in the case of goods and chattels. But in that area, the time lag between breach of contract and sustaining damage will ordinarily not be as long as in the case of defective buildings. Goods and chattels are usually consumed or used before the expiration of the contractual limitation period.

104 Moreover, imposing duties in respect of pure economic loss in building cases creates other problems. As I pointed out in *Brisbane South Regional Health Authority v Taylor*[155], the policy of the law for nearly 400 years has been to fix definite time limits (usually six but often three years) for prosecuting civil claims. These time limitations have been driven by the general perception that "[w]here there is delay the whole quality of justice deteriorates"[156]. In *Taylor*[157], I went on to say:

> "The effect of delay on the quality of justice is no doubt one of the most important influences motivating a legislature to enact limitation periods for commencing actions. But it is not the only one. Courts and commentators have perceived four broad rationales for the enactment of limitation periods. First, as time goes by, relevant evidence is likely to be lost[158]. Second, it is oppressive, even 'cruel', to a defendant to allow an action to be brought long after the circumstances which gave rise to it have passed[159]. Third, people should be able to arrange their affairs and utilise their resources on the basis that claims can no longer be made

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153 *Lynn v Bamber* [1930] 2 KB 72 at 74.

154 [1932] AC 562.

155 (1996) 186 CLR 541 at 551.

156 *R v Lawrence* [1982] AC 510 at 517.

157 (1996) 186 CLR 541 at 552-553.

158 *Jones v Bellgrove Properties Ltd* [1949] 2 KB 700 at 704.

159 *RB Policies at Lloyd's v Butler* [1950] 1 KB 76 at 81-82.

against them[160]. Insurers, public institutions and businesses, particularly limited liability companies, have a significant interest in knowing that they have no liabilities beyond a definite period[161]. As the New South Wales Law Reform Commission has pointed out[162]:

> 'The potential defendant is thus able to make the most productive use of his or her resources[163] and the disruptive effect of unsettled claims on commercial intercourse is thereby avoided[164]. To that extent the public interest is also served.'

Even where the cause of action relates to personal injuries[165], it will be often just as unfair to make the shareholders, ratepayers or taxpayers of

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160 New South Wales Law Reform Commission, *Limitation of Actions for Personal Injury Claims*, Report No 50, (1986) at 3; Law Reform Commission of Western Australia, *Limitation and Notice of Actions*, Discussion Paper, Project No 36, Pt II, (1992) at 11.

161 In *Limitation of Actions for Latent Personal Injuries*, Report No 69, (1992) at 10, the Law Reform Commissioner of Tasmania said: "The need for certainty can be justified in many cases. For example, manufacturers need to be able to 'close their books' and calculate the potential liability of their business enterprise with some degree of certainty before embarking on future development. Under modern circumstances, an award of damages compensation may be so large as to jeopardise the financial viability of a business. The threat of open-ended liability from unforeseen claims may be an unreasonable burden on a business. Limitation periods may allow for more accurate and certain assessment of potential liability."

162 New South Wales Law Reform Commission, *Limitation of Actions for Personal Injury Claims*, Report No 50, (1986) at 3.

163 Kelley, "The Discovery Rule for Personal Injury Statutes of Limitations: Reflections on the British Experience", (1978) 24 *Wayne Law Review* 1641 at 1644.

164 "Developments in the Law – Statutes of Limitations", (1950) 63 *Harvard Law Review* 1177 at 1185.

165 The vast majority of defendants in personal injury actions are insured. Consequently, the amount of the verdict will not be met by the defendant. Nevertheless, it is a charge on the revenue of the insurer for the relevant year and is ultimately met by the shareholders of the insurer or the individual proprietors of the insurance business if the insurer is not incorporated. Although the burden of the plaintiff's claim is spread in such cases, the consequences for the proprietors of the insurance business can be significant. When a large number of claims are allowed to be brought out of time, as has been the case in respect of some types of injuries

(Footnote continues on next page)

today ultimately liable for a wrong of the distant past, as it is to refuse a plaintiff the right to reinstate a spent action arising from that wrong. The final rationale for limitation periods is that the public interest requires that disputes be settled as quickly as possible[166].

In enacting limitation periods, legislatures have regard to all these rationales. A limitation period should not be seen therefore as an arbitrary cut off point unrelated to the demands of justice or the general welfare of society. It represents the legislature's judgment that the welfare of society is best served by causes of action being litigated within the limitation period, notwithstanding that the enactment of that period may often result in a good cause of action being defeated."

105 To allow an action in tort to be brought more than six or even twelve years after the negligent act has occurred when it could not have been brought in contract flies in the face of these rationales of the statutes of limitation.

The respondents owed no duty to Woolcock to protect it from pure economic loss

106 Whether and in what circumstances the law of torts ought to impose on the builder or other persons involved in designing or constructing commercial premises a duty of care to purchasers to prevent economic loss from defects in the premises are difficult questions. The varying reasons and conclusions of ultimate appellate courts throughout the common law world show that this is unequivocally so. Undoubtedly, the availability of a remedy in tort in respect of such losses strengthens claims by first owners and purchasers for compensation for losses arising from lack of care by those responsible for building defects. Hence, the availability of a remedy in tort would advance the cause of corrective justice, one of the rationales of the law of negligence. Moreover, for the reasons that I have given, the existence of a contractual remedy may not always be a sufficient protection for the first owners and purchasers of commercial premises who suffer economic loss as a result of defective premises. Consequently, the availability of a remedy in tort gives greater protection to the owners and purchasers of commercial premises.

107 But other factors point against a remedy in tort. Many defects will not manifest themselves for many years after the erection of the building. Given the

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or in some industries in recent years, the financial consequences for an insurer can be drastic.

166 New South Wales Law Reform Commission, *Limitation of Actions for Personal Injury Claims*, Report No 50, (1986) at 3; Law Reform Commission of Western Australia, *Limitation and Notice of Actions*, Discussion Paper, Project No 36, Pt II, (1992) at 11.

now accepted doctrine that damage does not occur until the defect manifests itself, those involved in the construction of the building may be required to defend themselves many years after the event. Claims that might have been defended if brought within the normal periods imposed by the statute of limitations may become indefensible in practice. Records may have been destroyed or disappeared; key workers may be untraceable; memories may have long faded. Hence, the capacity of the courts to do justice may be impaired, if not defeated, by the passage of the years. And the capacity of the courts to do justice is impaired rather than improved by the problems to which I have referred in determining an appropriate standard of care.

108 A further consequence of the doctrine that damage does not occur until the defect manifests itself is that those involved in the construction of a building and their insurers may have to wait many years before they can be sure that they are free of potential claims. As one of the rationales of statutes of limitation indicates, this is an undesirable and unsatisfactory result for any commercial enterprise. To overcome the problems caused by the potential delay in bringing actions, builders in particular may be forced or at all events induced to adopt inefficient commercial practices such as using a series of shell companies to make one-off building contracts for each construction project.

109 The likelihood that imposing a duty in respect of building premises will have unsatisfactory consequences for the administration of justice and the efficiency of commerce is a powerful reason for not recognising the duty which Woolcock propounds.

110 But the most powerful reason for rejecting the proposed duty is that the first owners and purchasers of commercial buildings are ordinarily in a position to protect themselves from most losses that are likely to occur from defects in the construction of such buildings. Occasionally, a commercial building may be built or bought for an emotional rather than an economic reason. But in the overwhelming number of cases, commercial buildings are constructed or bought to make money. A commercial building is constructed or bought because it is perceived to be a suitable vehicle for investment. The prudent first owner or purchaser of such a building will compare the likely return on the capital investment with the potential risks including falls in the value of the building that may result from various factors, economic, social and physical. And no prudent purchaser would contemplate buying a building without determining whether it has existing or potential construction defects. Knowledge of its defects, actual or potential, is central to any evaluation of its worth as an investment. In so far as risks are uncertain or unknown, the prudent purchaser will factor the risk into the price or obtain contractual protections or, if necessary, walk away from the negotiations.

111 There are many means of protection open to first owners and purchasers of commercial buildings to cover the risk that the building may have latent

defects. The first owner can enter into contractual arrangements with those involved in the construction. Those arrangements can include warranties concerning the fitness of the building for the purpose for which it was constructed. The first owner can supplement the contractual arrangements with those directly involved by obtaining similar warranties from directors and other persons connected with the construction of the building. The first owner can employ other professionals to check the work of those directly involved in the project. Subsequent purchasers can protect themselves by entering into similar arrangements with their vendor. They can take an assignment of the vendor's rights (if any) against the builders and others. They can minimise the risks of loss from physical defects by obtaining expert investigations of the building.

112 Of course, for the reasons that I have given, 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. Where a contract exists, however, the concepts of assumption of responsibility and reliance may create a duty of care in tort as well as obligations in contract.

113 In *Perre v Apand Pty Ltd*[167], I said:

> "If the plaintiff has taken, or could have taken steps to protect itself from the defendant's conduct and was not induced by the defendant's conduct from taking such steps, there is no reason why the law should step in and impose a duty on the defendant to protect the plaintiff from the risk of pure economic loss."

The respondents did not owe the duty pleaded

114 Various steps are open to the purchasers of commercial buildings such as Woolcock to protect themselves against pure economic loss that is consequent on

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167 (1999) 198 CLR 180 at 225 [118].

the discovery of defects in the construction of those buildings. It is true that Woolcock made no investigation or inquiries concerning defects or potential defects in the building that it bought and obtained no warranties in respect of them. But its failure to take reasonable steps that were open to it is not a ground for holding that the respondents owed it a duty to take care in respect of pure economic losses arising from the defects in the foundations of the building. No doubt if Woolcock had insisted on contractual protection from its vendor, it may have had to pay a higher price for the building. But that only shows that, in this area, contract rather than tort is a better, more just and probably more efficient way of dealing with the problem of pure economic losses arising from defective construction. The price of a commercial building almost invariably reflects the inherent and other risks – including the risk of latent defects – of buying the building.

115 In my opinion, the law of negligence is best served by leaving it to the market and the law of contract to determine who should bear the economic loss that arises as the result of a fall in the value of a commercial building consequent upon the discovery of latent defects in the building.

116 Nothing in this judgment is intended to suggest that *Bryan v Maloney*[168] 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.

Order

117 The appeal should be dismissed with costs.

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168 (1995) 182 CLR 609.

118 KIRBY J. In *Zumpano v Montagnese*[169], Brooking JA noted the opinion of a commentator[170] on this Court's decision in *Bryan v Maloney*[171]. The comment suggested that in *Bryan* the Court had "opened Pandora's Box, visiting on builders all the evils of the world".

119 Brooking JA remarked that such observations implied that "there is no more agreement about the limits of the decision than there is about what the lidded vase carried by Pandora really contained"[172]. According to one version of the mythological story, Pandora's box contained all the blessings of the gods which, on its opening, escaped and were lost. The only exception was hope, which was at the bottom[173]. Now, full of hope, the appellant comes to this Court seeking an extension of the principle in *Bryan*, to cover its case.

120 In *Zumpano*[174], Brooking JA went on to observe that:

> "On the widest view of its ultimate effect, *Bryan v Maloney* will impose upon builders who erect or alter any kind of building at least a 'prima facie' duty of care to all those who come to own or even only to use or occupy it and that duty will extend to all defects, whatever their nature and extent, and whether or not they result from the work of a subcontractor, provided only that they are 'latent'."

On the other hand, his Honour accepted[175] that *Bryan* "might be viewed as a determination based upon the particular facts rather than one applicable to a broad category of cases". He predicted that the problem presented in that case would return to this Court in order to resolve these doubts and difficulties[176]. So, by special leave in this appeal, it has.

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169 [1997] 2 VR 525 at 528.

170 Mead, "The Recovery of Economic Loss Arising from Defective Structures – Policy, Principle and the Amorphous Notion of Proximity as a General Concept", (1996) 12 *Building and Construction Law* 9.

171 (1995) 182 CLR 609.

172 [1997] 2 VR 525 at 528.

173 Grimal, *The Dictionary of Classical Mythology*, (1986) at 343.

174 [1997] 2 VR 525 at 528.

175 [1997] 2 VR 525 at 528 referring to the opinion of Clarke JA in *Woollahra Municipal Council v Sved* (1996) 40 NSWLR 101 at 134.

176 [1997] 2 VR 525 at 534.

The facts and course of the proceedings

121 *The facts and decisional history*: The relevant facts are set out in the reasons of the other members of this Court[177]. The reasons of Gleeson CJ, Gummow, Hayne and Heydon JJ ("the joint reasons") explain the somewhat unsatisfactory way in which an issue of legal importance is now presented in a stated case, supplemented by the parties' pleadings and inferences said to be available from this confined material[178].

122 The other reasons[179] also trace the decisional history of this case in the Supreme Court of Queensland, principally in the Court of Appeal[180]. Those reasons provide an explanation of what was decided by this Court in *Bryan*[181] and some of the criticisms that have been directed at its holding both in judicial opinions and in academic literature[182]. This material and the outline of the main arguments of the parties allow me to go directly to my analysis. I will not needlessly repeat the facts.

123 *An unsatisfactory procedure*: If this case was planned as a vehicle to expand, or confine, the principle in *Bryan*, it is a somewhat unsuitable one. I can understand the reasons, tactics and hoped-for cost savings that launched the parties upon a contest, effectively over the pleadings. However, the one lesson that has emerged from recent Australian cases about the law of negligence is that the facts and the evidence, taken as a whole, are critical for the resolution of the issues presented by the tort. It is out of the detail of the facts that the "salient features" and pertinent factors will emerge that help the decision-maker to decide whether a duty of care exists, whether it has been breached and, if so, whether that breach caused the plaintiff's damage.

124 In this appeal, this Court must do its best with the unelaborated facts upon the basis of which we were asked to decide the matter. I cannot but think that

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177 Reasons of Gleeson CJ, Gummow, Hayne and Heydon JJ ("joint reasons") at [1]-[2]; reasons of McHugh J at [39]-[41]; reasons of Callinan J at [194]-[199].

178 Joint reasons at [3]-[7].

179 Joint reasons at [8]; reasons of McHugh J at [42]-[43]; reasons of Callinan J at [200].

180 *Woolcock St Investments Pty Ltd v CDG Pty Ltd* (2002) Aust Torts Rep ¶81-660.

181 Joint reasons at [10]-[15]; reasons of McHugh J at [63]-[73].

182 Joint reasons at [16]-[18]; reasons of Callinan J at [209]-[211].

this course of events has disadvantaged the party seeking recovery. When the boundaries of liability in negligence are pushed forward it is often because detailed evidence, adduced at trial, appears in its totality to call out for a remedy[183] or to indicate that one is not appropriate[184].

The apparent reasonableness of the appellant's claim

125 *The nature of the claim*: The appellant's claim is for economic loss said to be recoverable by a subsequent purchaser of a commercial building for the design of that building by the respondents or their supervision of its construction.

126 The first respondent is a company of consulting engineers. The second respondent, a qualified civil engineer, was employed by the first respondent. The construction of the building took place between 1987 and 1988. It is at that time that the relevant acts and omissions of negligence were alleged to have occurred. The building contains warehouses and offices, with no residences. It is situated in the city of Townsville. That city abuts the Pacific coast of Queensland. It is a commonplace that buildings erected in the vicinity of water – including an oceanic coastline – are often liable to subsidence. It is elementary that such buildings often need special care in the design and placement of foundations. So it was to prove with the subject building.

127 The appellant did not acquire the title to the building until September 1992. The substantial structural "distress" did not manifest itself until 1994. A defence based on s 10(1) of the *Limitation of Actions Act* 1974 (Q) was pleaded by the respondents. However, that plea was raised in the alternative to the more fundamental denial by the respondents that any cause of action against them was available in the circumstances pleaded.

128 Putting aside any limitation period, and assuming that otherwise the appellant brought its proceedings in time after first becoming aware of the damage suffered by subsidence of the footings of the building, the notion that the respondents, as civil engineers, are liable in law for the ensuing loss to the appellant is not, on the face of things, surprising. At least it is not so in a legal system that provides remedies against those who are negligent and thereby cause damage to others in respect of whom they ought to have exhibited professional care.

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183 As in *Hill v Van Erp* (1997) 188 CLR 159; *Pyrenees Shire Council v Day* (1998) 192 CLR 330; *Perre v Apand Pty Ltd* (1999) 198 CLR 180; *Crimmins v Stevedoring Industry Finance Committee* (1999) 200 CLR 1.

184 As in *Romeo v Conservation Commission (NT)* (1998) 192 CLR 431.

129 A commercial building, such as that in issue, is a large financial investment. Ordinarily, in contemporary Australia, one would expect that it would be built carefully with special attention by supervising engineers to the security and stability of its foundations. Such a building is obviously designed to have a certain life. That life may be described as "permanent" or "indefinite"; but at the least it would usually be envisaged that the building would last for more than 10 years without serious or fundamental defects: earthquakes, tidal waves and other unexpected events of nature aside.

130 In the present case there was alleged to have been a latent defect, not readily discoverable by the appellant on reasonable inspection. This was alleged to have been caused by the negligent performance by the respondents of their professional duties. The latent character of the defect was a consequence of the very nature of foundations or footings in such a building. The appellant has no contractual relationship with the respondents. Accordingly, its only relevant legal entitlement against them lay in the law of tort – specifically the tort of negligence. The days are past when professional people could claim that their only duty to others was according to their contracts[185]. For duties to a larger range of persons, the other concurrent branch of the law of obligations, namely the law of tort, may be invoked. In this country, as in others, the law has increasingly moved away from accepting immunities from liability in negligence on the part of particular classes of professional people[186].

131 *The nature of the respondents' defaults*: The respondents proposed to the original developer that a site investigation by a competent expert should be undertaken. This would have involved the digging of auger holes at various locations of the site and the expert testing of soil samples, by inference, to ensure that the planned foundations were stable and carefully secured against subsidence. The original developer advised that it did not agree to pay for such geotechnical investigations. The respondents acquiesced in that decision. The building went ahead. Now the appellant, a subsequent purchaser, is confronted with evidence of subsidence. By inference, left unattended, this could in time cause direct injury to persons or property.

132 The common law undoubtedly provides that a person who suffers physical injury as the result of defective design or execution of building work may sue in tort[187]. It would be anomalous if someone seeking to prevent such physical

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185 See eg *Hill v Van Erp* (1997) 188 CLR 159 at 225-231 citing *White v Jones* [1995] 2 AC 207 at 223-224; *Astley v Austrust Ltd* (1999) 197 CLR 1 at 20 [44], 23 [48].

186 *Cattanach v Melchior* (2003) 77 ALJR 1312 at 1348 [179]; 199 ALR 131 at 180.

187 *Voli v Inglewood Shire Council* (1963) 110 CLR 74.

injury from happening could not recover the costs of doing so. Prevention is usually better than cure. In the words of the majority in *Bryan*[188]:

> "It is difficult to see why, as a matter of principle, policy or common sense, a negligent builder should be liable for ordinary physical injury caused to any person or to other property by reason of the collapse of a building by reason of the inadequacy of the foundations but be not liable to the owner of the building for the cost of remedial work necessary to remedy that inadequacy and to avert such damage."

The appellant must now effect repairs. It seeks to recover the costs of doing so from the respondents whose acts and omissions it alleges were negligent in the circumstances.

133 To the original developer's instruction not to proceed with soil tests, accepted by the respondents, the appellant has an answer. It says that this might be relevant to any claim in contract between the respondents and the developer or the builder who decided to proceed without the tests, although the respondents' professional experience had caused them to recommend such tests. But, as between the present parties, the appellant says that it is irrelevant to its claim in negligence. The respondents did not owe a duty of care only to the building supervisor, builder and immediate owner and initial occupiers of the building. They owed a duty to those, like the appellant, who within a comparatively short time, and within the reasonable contemplation of the respondents, acquired the building without knowledge of the latent defect. That defect arose from the conduct of the respondents in continuing to act as professional engineers, as they did, in respect of the building although an obviously important test, which they had recommended, had been refused. The acquisition of the building by a later purchaser, such as the appellant, was readily foreseeable. So was the reliance of such a purchaser upon the discharge by the respondents of a duty to observe professional care and skill in the design of the building and supervision of its construction.

134 If the developer could control, and effectively veto, the conduct of proper structural tests, the appellant, in effect, asked: why bother to have a professional engineer at all? If the law excused the engineer from liability, it would encourage fly-by-night builders and nominee owners. It would relieve professional engineers of the very responsibility for which they were engaged. That responsibility was to ensure the safety of the building and to protect those who might be expected to purchase and use the building during a reasonable period after construction without having to search for, and correct, latent defects for themselves.

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188 (1995) 182 CLR 609 at 628.

135 *Conclusion: an arguable claim*: Looked at in this light, the argument of the appellant in support of its claim for recovery against the respondents is not unpersuasive. If upheld, not only would it redress a wrong which arguably arose as a foreseeable consequence of the respondents' acquiescence in the erection of the building without the structural tests that the respondents had proposed. It would also instil proper standards of professional engineering conduct. It would sanction unsafe building practices. It would encourage better building design and supervision. It would protect life, property and investments from the kind of unsafe conduct that allegedly occurred in this case. If the tort of negligence is ultimately concerned with moral issues such as fault and blameworthiness and the protection of those vulnerable from harm done by others who, legally speaking, are their "neighbours"[189] – including in business contexts[190] – the provision of a legal remedy to the appellant in its proceedings against the respondents would not, without more, be inconsistent with the purposes of the tort.

136 Negligence law is a common law invention. Normally, it will offer solutions that will be considered fair and reasonable to the ordinary person. Courts such as this Court need constantly to remind themselves of this fact. Following the brief description of events set out in the case stated and pleadings, the appellant asked the ultimate question: would it not be fair and reasonable to hold the respondents liable to the appellant for their failure to foresee the likelihood of what so quickly ensued? Clearly, the legal obligation to persuade the Court of its entitlements rests upon the appellant. However, in the sequence of events described, it would not, in my view, be unreasonable to suggest that a forensic burden rests on the respondents to invoke a clear rule of law to exculpate themselves from liability for their apparent carelessness, with its readily foreseeable consequences. Most especially would this be so where the respondents seek summary relief in advance of a full trial of the issues.

The proper approach to a pleading issue

137 A particular consideration should be taken into account at the threshold. It is one that is enlivened by the way in which the issue comes before this Court. Because the appellant has not yet had a trial, at which all of its evidence might be adduced, and because the respondents assert an entitlement to an immediate

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189 Todd, "Negligence and Policy", in Rishworth (ed), *The struggle for simplicity in the law*, (1997) 105 at 107-108.

190 Stapleton, "Comparative Economic Loss: Lessons from Case-Law-Focused 'Middle Theory'", (2002) 50 *UCLA Law Review* 531 at 559.

termination of the action, the issue in the appeal should be approached in a settled and well established way.

138 If there is any reasonable prospect that the appellant might be able to make good a cause of action, it is not proper for a court, in effect, to terminate the appellant's action before trial[191]. 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[192]. The proper approach in such cases is one of restraint. Only in a clear case will answers be given, and orders made, that have the effect of denying a party its ordinary civil right to a trial. This is especially so where, as in many actions for negligence, the factual details may help to throw light on the existence of a legal cause of action – specifically a duty of care owed by the defendant to the plaintiff. The parties consented to the course adopted. However, this Court owes its duty to the law. Its decision in this case affects persons other than the parties.

The two foundations of the appellant's action

139 *Analogous reasoning: past authority*: It was common ground that no decision of this Court concludes the issue of whether a party in the position of the respondents owed a duty of care to a party in the position of the appellant. It follows that to discover and declare the law applicable to the case, this Court is, and the courts below were, obliged to reach a decision by reference to relevant legal authority and applicable considerations of legal principle and legal policy[193].

140 Neither party pretended in its submissions to this Court that authority alone resolved the appeal. In written and oral submissions, both parties, correctly, addressed the considerations of legal policy without which resolution of the appeal would be a barren and artificial exercise.

141 To sustain its action against the respondents as conforming to the Australian common law of negligence, the appellant drew particularly upon two

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191 *Dey v Victorian Railways Commissioners* (1949) 78 CLR 62 at 91.

192 See *E (A Minor) v Dorset County Council* [1995] 2 AC 633 at 694 per Sir Thomas Bingham MR; *X (Minors) v Bedfordshire County Council* [1995] 2 AC 633 at 740-741; *Barrett v Enfield London Borough Council* [2001] 2 AC 550 at 557 per Lord Browne-Wilkinson; cf *National Mutual Life Association of Australasia Ltd v Coffey & Partners Pty Ltd* [1991] 2 Qd R 401 at 407.

193 *Oceanic Sun Line Special Shipping Co Inc v Fay* (1988) 165 CLR 197 at 252; *Northern Territory v Mengel* (1995) 185 CLR 307 at 347.

lines of this Court's authority concerning the law of negligence and specifically the existence of a duty of care. These were (1) the decision in *Bryan*[194], which concerned the liability of a negligent builder to a subsequent purchaser of a domestic dwelling; and (2) the decision in *Perre v Apand Pty Ltd*[195], which concerned the liability of a neighbour for losses suffered by the growing of prohibited potato seeds on a nearby farm, resulting in economic loss.

142 *The principles in Bryan and Perre*: The appellant argued that the principle in *Bryan*, read in light of *Perre*, was not as narrow as Australian courts and commentators had sometimes stated. Alternatively, if it was originally so, the appellant argued that the principle should be reformulated in this appeal, in the light of *Perre*, so as to uphold the existence of a duty of care on the part of the professional engineers to a subsequent purchaser of the subject building, although that building was a non-residential, purely commercial one and although the appellant's loss at this stage was solely economic.

143 The appellant contested the proposition that an "extension" of the principle in *Bryan* was really necessary[196] or that the holding in that case was limited, in terms, to the liability to subsequent purchasers of builders of domestic dwellings (and by inference other related persons including civil engineers).

144 In *Bryan*, Toohey J expressly confined his conclusion to a case relating to "the building of a house that is a non-commercial building"[197]. Such a precise limitation of application was not stated in the joint reasons of Mason CJ, Deane and Gaudron JJ who, together with Toohey J, constituted the majority. Nevertheless, it is difficult to read the joint reasons in that case in any other way. Not only was that the only factual circumstance considered in *Bryan*. There are many references throughout the joint reasons that indicate that it was this feature of the building in question that weighed most heavily in overcoming the considerations against upholding a duty of care, which Brennan J collected in his dissent[198]. Thus the joint reasons referred to the particular relationship between the builder of a dwelling house and its subsequent owners[199]; the fact that "in this

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194 (1995) 182 CLR 609.

195 (1999) 198 CLR 180.

196 As suggested in the Court of Appeal: *Woolcock St Investments Pty Ltd v CDG Pty Ltd* (2002) Aust Torts Rep ¶81-660 at 68,794 [8] per McMurdo P, 68,799 [40] per Thomas JA.

197 (1995) 182 CLR 609 at 665.

198 (1995) 182 CLR 609 at 645-648.

199 (1995) 182 CLR 609 at 624.

country [such a house] is likely to represent one of the most significant, and possibly *the* most significant, investment which the subsequent owner will make during his or her lifetime"[200]; and that "the nature of the property involved, namely a building which was erected to be used as a permanent dwelling house, constitutes an important consideration supporting the conclusion that a relevant relationship … existed between … the builder … and …. a subsequent owner"[201].

145 On the face of things, therefore, the *ratio decidendi* in *Bryan* is concerned, and concerned only, with the duty of a builder (or like person) to subsequent purchasers of a dwelling house. *Bryan* establishes no wider principle; certainly none as a binding legal rule governing Australian courts; certainly not one binding until re-expressed by this Court or imposed by legislation.

The defects of *Bryan v Maloney* and their repair

146 *Defects of the decision in Bryan*: Certain features of the decision in *Bryan* are obviously unsatisfactory. The attempted expression of the holding in terms of a building of a particular kind is but the first of these. In *Zumpano*[202], Brooking JA collected a long series of problems and uncertainties which such a factual *discrimen* created for those deciding later cases involving allegedly defective building works of various kinds. As some of his Honour's reasoning is described elsewhere, I will not repeat it[203]. It is enough to say, if I can be pardoned the expression, that the suggested point of distinction in *Bryan* presents a very shaky and unstable foundation for a viable legal principle that will answer the many later cases that arise where judges are entitled to expect clear and principled guidance. Unfortunately, in this respect, those judges look in vain to *Bryan* to show the way.

147 That is not all. The decision in *Bryan* can also now be seen as resting on a defective doctrinal basis. The majority reasons are clearly anchored in the consideration of "proximity" as the propounded point of distinction between

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200 (1995) 182 CLR 609 at 625 (original emphasis).

201 (1995) 182 CLR 609 at 630.

202 [1997] 2 VR 525 at 528-536.

203 Joint reasons at [16]; reasons of Callinan J at [202]-[203]. The reasoning of Brooking JA cuts both ways. The respondents used it to urge the overruling or confinement of *Bryan* as a flawed decision. The appellant used it to show that *Bryan* was correctly decided but that it needed to be placed on a broader, and more convincing, legal basis.

cases where a duty of care was held to exist and cases where it was missing[204]. In this, I agree with what is written by the other members of this Court[205].

148 Proximity is not irrelevant as a factor in determining the existence of a duty relationship[206]. This is especially so if it is used as a synonym for the relationship of legal "neighbours". Indeed, this was the essential defect of the use of proximity as the conceptual determinant of the existence of a duty of care. It was question begging. It did little more than offer a legal fiction designed to state, in shorthand, Lord Atkin's neighbour relationship[207]. Proximity is not now accepted as a sole criterion for explaining when a duty of care exists at law[208], any more than other attempted short verbal formulae can do that job: whether "reasonable foreseeability", "reliance", "assumption of responsibility" or existence of a "special relationship".

149 *Responses to Bryan's defects*: The result of these defects of reasoning in *Bryan* led to various responses by the parties to this appeal concerning what the Court should do in relation to that decision. In summary, the parties severally submitted:

(1) That the Court should accept that *Bryan* constituted a wrong turning in the law of negligence, and should be overruled, and that the principle should be reinstated that there is no duty of care in negligence on the part of a builder or like professional for economic loss to any subsequent purchaser of a building, whether residential, commercial or otherwise[209];

(2) That the Court should allow *Bryan* to remain as authority but effectively confined to its own facts[210] or specifically treated as an

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204 (1995) 182 CLR 609 at 617, 624-625, 627, 628, 663-665.

205 Joint reasons at [12]-[13], [18]; reasons of McHugh J at [66]-[70], [72]; reasons of Callinan J at [211].

206 *Perre v Apand Pty Ltd* (1999) 198 CLR 180 at 210 [75], 284 [281], 300-301 [330].

207 *Donoghue v Stevenson* [1932] AC 562 at 580.

208 *Sullivan v Moody* (2001) 207 CLR 562 at 578-579 [48].

209 This appears to have been the view of Brooking JA in *Zumpano v Montagnese* [1997] 2 VR 525 at 528 although he was too polite to say so.

210 This was the view suggested by Clarke JA in *Woollahra Municipal Council v Sved* (1996) 40 NSWLR 101 at 134.

anomalous exception to the general rule of no liability to subsequent purchasers, absent an express contractual stipulation. This was the primary way in which the respondents eventually argued the appeal. Various contentions of policy were advanced to support this view of authority, including the special vulnerability of residential home owners to latent defects that reasonable care would have prevented or repaired and that allegedly have no equivalent relevance to the investment decisions of purchasers of commercial buildings; and

(3) That the Court should accept the principle stated in *Bryan* so far as it goes but re-express it in a broader way, more consonant with subsequent decisions of the Court in cases of economic loss, and specifically *Perre*. Upon this basis, the appellant argued that the "salient features" of the case warranted acceptance of the proposition that the respondents owed a duty of care to the appellant for breach of which they would be held liable in negligence.

150 *Conclusion: need for new principle*: *Bryan* has had its critics[211]. However, it has also had its defenders[212]. The latter have viewed *Bryan* as conformable with other developments of the law of negligence, as elaborated by this Court, including the protection of the vulnerable[213]. Indeed, the decision in *Bryan* is one of those described by Professor Stapleton as "fit[ting] well within the Atkinian mould of successful tort law-making [which is] the envy of tort commentators abroad". She has suggested that reversals of such decisions can be left to legislators on the basis of reports of inquiries rather than "judicial activism" instituting what she terms the "dramatic pro-defendant era in tort decisions" in this country in recent times[214].

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211 See joint reasons at [16]-[18].

212 eg Stapleton, "The golden thread at the heart of tort law: Protection of the vulnerable", (2003) 24 *Australian Bar Review* 135 at 142.

213 *Pilmer v Duke Group Ltd (In Liq)* (2001) 207 CLR 165 at 217-218 [136.2]; Finn, "The Courts and the Vulnerable", (1996) 162 *Law Society of the Australian Capital Territory Gazette* 61.

214 Stapleton, "The golden thread at the heart of tort law: Protection of the vulnerable", (2003) 24 *Australian Bar Review* 135 at 140 referring to Luntz, "Torts Turnaround Downunder", (2001) 1 *Oxford University Commonwealth Law Journal* 95.

151 *Bryan* has stood for nearly a decade. It does not need to be reconsidered and overruled to reach a decision in the present appeal. Its reasoning is available for criticism and confinement or extension as new cases require. I would reject, as unnecessary, the application to overrule it. But, clearly, it does not, in itself, provide a solution to the present case[215].

152 The most that can be said is that *Bryan* leaves the law in an unsatisfactory state if a later home owner can recover for a latent and undiscoverable defect but a subsequent buyer of a commercial building cannot. This intuitive conclusion stimulates attention to later decisions of this Court to discover whether they provide a more satisfactory conceptual basis for resolving the issues in the appeal. This takes me to the decisions on the recovery of damages for economic loss and particularly to the Court's pronouncements on that subject in *Perre* and in *Cattanach v Melchior*[216]. But first a question is posed, as it was in *Cattanach*, as to how the appellant's case is to be classified.

Is the present case one of "pure economic loss"?

153 *A contestable concession*: In its written submissions, the appellant conceded that its claim was for *pure* economic loss. That may have been an unnecessary and incorrect concession. There is no doubt that the complaint which the appellant makes involves the demonstration of actual physical damage to its property. This is inherent in the allegation of subsidence and structural "distress" to its building caused by the allegedly inadequate and faulty foundations that the respondents approved and instituted. By inference, there is a risk that, without action on the part of the appellant to repair the specified defects, there will ultimately be physical injury to persons in or near the building, including employees of the owners or tenants and members of the public. Certainly, it can be inferred that physical damage to the foundations of the building itself could be proved.

154 The "pragmatic"[217] basis for the common law's restriction on the recognition of duties of care to prevent pure economic loss to others was a concern that such loss was liable to be open-ended, indeterminate, very

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215 See reasons of McHugh J at [73].

216 (2003) 77 ALJR 1312; 199 ALR 131.

217 *Tame v New South Wales* (2002) 211 CLR 317 at 329 [6]; *Cattanach v Melchior* (2003) 77 ALJR 1312 at 1342 [148]; 199 ALR 131 at 171-172.

substantial and therefore prone to impose an undue burden on economic activity, to the great disadvantage of society[218].

155 *Physical damage and indeterminacy*: Where physical injury to a person or to property could be shown, much of the sting of indeterminacy is taken out of the common law's reluctance to permit recovery of economic loss. The case would not then be one of "pure" economic loss. This is one explanation of why the plaintiffs recovered economic loss in *Perre*. It is also an explanation of why the majority in *Cattanach*[219] (decided after the present appeal was argued) rejected a view, expressed by the minority in that case[220], that the claim there was unrecoverable as pure economic loss. The happening of the unplanned pregnancy in *Cattanach* dispelled the contention of indeterminacy. It made concrete the financial loss suffered by the parents who unexpectedly discovered that, despite the sterilisation operation and medical advice, the wife was again pregnant.

156 In a similar way in this case, the allegation of actual damage to the appellant's building arguably makes its claim one that escapes the common law's resistance to recovery of pure economic loss. Despite its written submissions, the oral arguments of the appellant did not, in the end, as I understood them, disclaim such a contention[221]. I do not accept that earlier decisions bind this Court to a different conclusion. At the least, it should be open to the appellant to argue its case in such a way. It should not be denied the opportunity to do so at trial. *Perre* and *Cattanach* give it support. By the authority of this Court, the respondents would have been liable for damage to persons or property caused by a total collapse of the building[222]. To say the least, the distinction between the

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218 The words of Cardozo CJ in *Ultramares Corporation v Touche* 174 NE 441 at 444 (1931) are normally cited, as they were by Brennan J in his dissent in *Bryan*. See also *Perre v Apand Pty Ltd* (1999) 198 CLR 180 at 267-268 [243]; cf joint reasons at [21]; reasons of McHugh J at [46]-[47]; reasons of Callinan J at [225].

219 (2003) 77 ALJR 1312 at 1327 [67]-[68], 1342 [148]-[149], 1371 [300]; 199 ALR 131 at 151, 171-172, 212.

220 (2003) 77 ALJR 1312 at 1316-1317 [19], 1319-1320 [30]; 199 ALR 131 at 136, 140-141.

221 *Woolcock Street Investments Pty Ltd v CDG Pty Ltd* transcript of proceedings, 23 June 2003 at 14.

222 See eg *Voli v Inglewood Shire Council* (1963) 110 CLR 74.

damages recoverable in such a case and the damages claimed by the appellant in the present case is not very persuasive[223].

The developing law on avoidance of economic harm

157 *Developing law on economic loss*: A review of recent decisions shows that the law in this country concerning the duty to avoid causing economic loss to others is in a state of development. The original endeavour to confine the tort of negligence to cases which result in "danger to life, danger to limb, or danger to health"[224] has given way in recent years to an increasing number of "exceptions" by which the existence of a duty of care and the acceptance of recovery have gradually been treated as separate from the different question of "the nature of the damage"[225]. The original rule wholly excluding recovery of pure economic loss has increasingly been recognised as capricious and unjust. Only this recognition explains such decisions as *Hedley Byrne & Co Ltd v Heller & Partners Ltd*[226] and *Caltex Oil (Australia) Pty Ltd v The Dredge "Willemstad"*[227].

158 Nevertheless, as I pointed out in *Perre*[228], crafting a different and convincing substitute rule that is viable and easy to apply has not proved easy. In *Perre*[229] I favoured, as I did in many other cases before and after, the application of the three-fold test expressed by the House of Lords in *Caparo Industries Plc v Dickman*[230] for deciding whether a duty of care existed in a particular factual situation, which the law of negligence would enforce. This approach requires consideration of reasonable foreseeability and proximity (in the sense of

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223 See *Bryan v Maloney* (1995) 182 CLR 609 at 623 where the joint reasons described it as "essentially technical"; see also at 657 per Toohey J.

224 *Old Gate Estates Ltd v Toplis* [1939] 3 All ER 209 at 217.

225 *Candler v Crane, Christmas & Co* [1951] 2 KB 164 at 179 per Denning LJ (diss).

226 [1964] AC 465.

227 (1976) 136 CLR 529 at 576.

228 (1999) 198 CLR 180 at 268-275 [246]-[258]. See eg *Pyrenees Shire Council v Day* (1998) 192 CLR 330 at 419-420 [243]-[244]. See also reasons of McHugh J at [45]-[48].

229 (1999) 198 CLR 180 at 275 [259].

230 [1990] 2 AC 605 at 617-618 per Lord Bridge of Harwich; cf *X (Minors) v Bedfordshire County Council* [1995] 2 AC 633 at 749; *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 211 CLR 540 at 626-627 [238].

"neighbourhood") without attributing to either of these factors the primacy accorded to them in the past and without turning either into a *sufficient* criterion for acceptance of a duty of care. *Caparo* also obliges a transparent consideration of the issues of legal policy that tend to favour, or reject, the imposition of a legal duty of care sounding in damages for a negligent breach. Since *Perre*[231], I have been obliged by the holdings of this Court[232] to abandon the *Caparo* approach for the time being. This is so although, in various guises, that approach continues to be applied in the final appellate courts of most Commonwealth countries.

159 I cannot forbear to mention two features of more recent developments that lead me to nurture the hope that this Court may, even yet, come in time to endorse the *Caparo* approach. The first is the fact that *Caparo* continues to be observed in the courts of our region and beyond. Thus, in *Pacoil Fiji Ltd v The Attorney General of Fiji*[233], decided since *Sullivan v Moody*[234], the Supreme Court of Fiji Islands preferred to follow the *Caparo* approach in deciding whether a cause of action in negligence existed rather than to resort to whatever guidance the decisions of this Court could offer on that point. Our guidance, to say the least, is less than clear. It has driven trial judges and intermediate courts in Australia back to the original Atkinian idea that a duty arises from a "close relationship"[235], opaque though that expression is. Alternatively, it has sent them searching for collections of "salient features" of the evidence or notions of "vulnerability", which are at best open-ended and somewhat confusing and at worst question begging.

160 *Relevant policy considerations*: I would also point out that, doubtless influenced by the arguments of the parties, the reasons of the other members of the Court in the present appeal expressly address questions of legal policy, much as *Caparo* mandates. Callinan J states that "social policy … is a matter for parliament rather than the courts to weigh"[236]. With respect, this fits ill with what

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231 In *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 211 CLR 540 at 624-627 [236]-[238].

232 Most especially in *Sullivan v Moody* (2001) 207 CLR 562 at 579 [49] a case in which I did not participate.

233 Unreported, Supreme Court of Fiji Islands, 11 July 2003 per Gault, Mason and French JJ.

234 (2001) 207 CLR 562.

235 *Avenhouse v Hornsby Shire Council* (1998) 44 NSWLR 1 at 8 noted in *Perre v Apand Pty Ltd* (1999) 198 CLR 180 at 253 [198].

236 Reasons of Callinan J at [229].

all members of the Court did, and said, in *Cattanach*[237]. There Callinan J, in particular, remarked[238]:

> "I cannot help observing that the repeated disavowal in the cases of recourse to public policy is not always convincing … [I]t would be more helpful for the resolution of the controversy if judges frankly acknowledged their debt to their own social values, and the way in which these have in fact moulded or influenced their judgments rather than the application of strict legal principle."

Respectfully, I support these earlier remarks. I regard them as sustaining the transparent approach that *Caparo* favours for the resolution of the duty of care question. Wherever possible, I favour transparency in the legal process[239]. If regard is paid to the reasons of the other members of this Court in the present case, most especially those of McHugh J[240], they come very close to the transparent weighing of policy considerations that *Caparo* required.

161 Nevertheless, until this Court reconsiders its stand, I accept the obligation imposed on me by the authority of *Sullivan* to approach the issue in the appeal more obliquely, as the other members of this Court favoured in *Perre*.

162 *The approach in Perre*: Two central considerations were identified in *Perre* as standing *against* the existence of a legal duty of care in negligence in cases involving economic loss. The first was that such a duty should not be accepted where it would impose liability for an indeterminate amount for an indeterminate time to an indeterminate class. Secondly, it was held that such a duty would not exist where, to impose it, would infringe the rights of others to protect, or pursue, their own legitimate social or business interests[241].

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237 (2003) 77 ALJR 1312; 199 ALR 131.

238 (2003) 77 ALJR 1312 at 1369 [291]; 199 ALR 131 at 209.

239 See eg *Osmond v Public Service Board of New South Wales* [1984] 3 NSWLR 447 at 462-464; *Soulemezis v Dudley (Holdings) Pty Ltd* (1987) 10 NSWLR 247 at 259-261; *Hartigan Nominees Pty Ltd v Rydge* (1992) 29 NSWLR 405 at 418-421; *Wong v The Queen* (2001) 207 CLR 584 at 621-622 [101]-[102]; *Johnson v The Queen* [2004] HCA 15 at [41].

240 See reasons of McHugh J at [88]-[105].

241 (1999) 198 CLR 180 at 192 [5] per Gleeson CJ, 199-200 [32]-[33] per Gaudron J, 204 [50] per McHugh J, 241 [168]-[169] per Gummow J, 289-290 [298]-[300] of my own reasons, 299-300 [329] per Hayne J, 322 [395], 324 [402] per Callinan J.

163 This Court in *Perre* adopted an "incremental approach" in coming to its conclusion that a duty of care was established for the avoidance of the economic loss claimed in that case[242]. It emphasised the importance of considering all of the facts concerning the relationship between the defendant and the several parties claiming a duty of care[243]. What does such an approach produce in the present appeal?

The principled application of the tests in *Perre v Apand Pty Ltd*

164 *Salient features*: Various features typical of evidence in cases such as the present were highlighted by different members of the Court in *Perre*. Thus Gummow J[244], in words reminiscent of those used by Stephen J in *Caltex Oil*[245], described certain recurring features and arguments as "the salient features of the matter [which] gave rise to a duty of care". In his reasons, McHugh J identified five factors applicable to cases of economic loss. According to McHugh J, these were the reasonable foreseeability of the loss; the avoidance of indeterminate liability; the protection of the autonomy of individuals; the vulnerability to risk; and the extent, if at all, to which the defendant knew of the risk and of its magnitude[246]. I do not take the other judges in *Perre* to have adopted an approach significantly different from these. In this case, McHugh J has knocked the "floodgates" argument on the head[247].

165 *Reasonable foreseeability*: If the considerations mentioned by McHugh J in *Perre* are applied to the present case[248], there can be no doubt that, at least arguably, the loss allegedly suffered by the appellant was reasonably foreseeable by the respondents. After all, the respondents had suggested expert ground tests, presumably for a purpose. That purpose was arguably to avoid the erection of a building with the problem of subsidence that is now alleged to have transpired. They agreed to, or acquiesced in, the decision of someone else (against which they may have their own legal remedies) not to proceed with the tests. If there is subsidence and instability in the building, it was not only reasonably foreseeable to the respondents. The risk was actually foreseen.

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242 See *Perre v Apand Pty Ltd* (1999) 198 CLR 180 at 217 [94].

243 cf *Mutual Life & Citizens' Assurance Co Ltd v Evatt* (1968) 122 CLR 556 at 569.

244 *Perre v Apand Pty Ltd* (1999) 198 CLR 180 at 253 [198].

245 (1976) 136 CLR 529 at 576.

246 *Perre v Apand Pty Ltd* (1999) 198 CLR 180 at 219-220 [102]-[105].

247 Reasons of McHugh J at [97].

248 cf reasons of McHugh J at [74]-[87].

166 *Indeterminate liability*: The liability of the respondents propounded in the case is not indeterminate. Nor are the members of the class affected unascertainable. They are members of the class of future owners and users of the building during the period that the building might reasonably be expected to survive who could be damaged by the respondents' failure to insist on the conduct of ground tests against the risk of subsidence evident within a reasonable time. Exposure to liability was not, on the appellant's proposition, open-ended in terms of time. The appellant disclaimed the assertion of a duty of unlimited or indefinite duration. It submitted that all such claims would, as a maximum, be subject to the applicable limitations statute. That statute would, on the face of things, ordinarily be enlivened by the appearance of a defect in the building "so obvious, that any reasonable homeowner would call in an expert"[249].

167 *Autonomy*: Nor would it unduly interfere in the commercial freedom of the respondents to uphold a duty of care. They were already under a clear duty of care to the original owner. The content of that duty in respect of the appellant would not be different. The only question is whether the duty is taken to have been terminated at the happening of a causally irrelevant event, namely the sale of the building to its first and subsequent purchasers. As such sale might have occurred within a very short time, or after a comparatively long interval (over which the respondents had no control, and which they could not foresee), the termination of their liability by reference to such an event is arbitrary, capricious and unreasonable. It does not, therefore, control the duration and scope of the respondents' professional liability according to the common law of negligence. Such liability depended on considerations more closely connected with the nature and foreseeable consequences of the professional conduct of the respondents as civil engineers.

168 *Vulnerability*: The vulnerability of the appellant arises from the circumstances of the case. Vulnerability is not confined to cases of poverty, disability, social disadvantage or relative economic power as the majority suggest[250]. It extends to those who, like the plaintiffs in *Perre*, might be carrying on a profitable economic enterprise but who are exposed to an insidious risk by the acts of others about which they were unaware and against which they could not reasonably protect themselves. That is also the case here.

169 I accept that the capacity of an entity to protect itself and its interests is an important factor in determining vulnerability. However, it is not the only one. In a commercial context there may be many more to be considered – assumption of

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249 *Invercargill City Council v Hamlin* [1996] AC 624 at 648 (PC).

250 cf *Hodgkinson v Simms* [1994] 3 SCR 377 at 412; reasons of McHugh J at [80].

risk, known reliance and commercial pressures, to name but a few. With the benefit of hindsight it is easy to suggest that an entity should have protected itself. However, courts should be reluctant to assume that a commercial entity lacked vulnerability simply because of its commercial character.

170 In the way the present case proceeded, there is no evidence as to the negotiations that took place in relation to the purchase of the property. Evidence at trial might disclose that pressure was placed upon the appellant or that some degree of urgency in the purchase made the appellant vulnerable to the undisclosed defect. There is no evidence that suggests that the appellant constituted a large commercial enterprise with large resources, skill or experience. In my view, it is a mistake to assume that the appellant possessed such characteristics.

171 No doubt the pre-purchase tests that the majority have suggested should have been carried out, would have involved great expense. McHugh J suggests that an entity might be vulnerable to risk as a result of "economic constraints"[251]. There is no evidence on that point one way or the other. There is no guarantee that tests would have disclosed *latent* defects in the building. The majority suggest that the appellant could, and should, have obtained contractual warranties from the vendor. Again, there is no evidence to suggest that the appellant had any reason to negotiate such warranties. It is dangerous to assume that, simply by virtue of the commercial character of the entity (or the premises), warranties should have been sought, still more that they would have been agreed to.

172 The very nature of building foundations is that, once put in place, they tend to be concealed by the superstructure of the building erected above them. That was so in the appellant's building. It was still a comparatively new structure. It was a very valuable asset in a regional city. It had been erected under the supervision of professional engineers. The appellant would normally have had no reason to suspect that it was otherwise than properly built upon stable and secure foundations as professionally advised. Its tendency to subside was latent.

173 In my view, the suggestion that the appellant or its solicitor should have obtained an express warranty involves a great deal of wisdom *after* the event. Such an answer could be proffered in virtually every instance of economic loss and many cases of physical and property damage as well. It cannot represent a general rule of liability exclusion. The negligence of the respondents, so it is said, involved wisdom *before* the event. The possibility of other remedies and other precautions involving other persons is ultimately irrelevant. The appellant was vulnerable because of the fact that it had no reasonable intermediate

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251 Reasons of McHugh J at [80].

opportunity of discovering, and protecting itself against, the *latent* defect of which it now complains[252]. That defect was under the ground and beneath the building. According to the pleadings, it only became known to the appellant when the "distress", which the defect caused to the building, first began to manifest itself in outward signs.

174 *Knowledge*: The respondents knew, or ought to have known, of the risk to the owner and the consequences of that risk's occurring[253]. That was the very reason why the respondents had been retained as civil engineers to provide their professional services for the erection of the building. The fact that they recommended special tests indicates that they appreciated that a risk of subsidence existed. That precise risk is now alleged to have manifested itself.

175 *Conclusion: a viable case*: The preconditions for the existence of a duty of care stated in *Perre* are therefore made good, certainly on the basis of the reasonable arguability of the appellant's pleaded cause of action. The appellant should have its opportunity at trial, by evidence and argument, to establish that a duty of care existed and was breached in the circumstances. In the state of the authorities of this Court, it cannot be said that the appellant is bound to fail. No insuperable barrier of legal authority exists because of the suggestion that the appellant's claim is, or is substantially, to be classified as one for economic loss. No principled barrier could exist because the appellant is a corporation or because its investment was in a commercial building.

Other considerations confirm the duty of care

176 *Consumer legislation is irrelevant*: In so far as it is relevant to consider issues of legal principle or policy raised in other reasons (as *Caparo* would certainly require), I will do so briefly for they confirm the conclusion that I have reached by applying the approach taken by this Court in *Perre*.

177 It is true that in some, but not all, Australian jurisdictions special legislation has been enacted to provide forms of protection for first purchasers of domestic dwellings but not for other, or later or different, purchasers[254]. It is natural that, as part of consumer protection, legislatures should enact popular laws of such a kind. However, such laws do not exclude the residual operation of the common law in other instances. Least of all do they do so in a case, such as

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252 cf *Kriegler v Eichler Homes Inc* 74 Cal Rptr 749 at 752-753 (1969).

253 *Esanda Finance Corporation Ltd v Peat Marwick Hungerfords* (1997) 188 CLR 241.

254 Joint reasons at [35]; reasons of Callinan J at [233].

the present, which is different from *Bryan* and upon which this Court has not previously pronounced. There is nothing in the legislation mentioned by the respondents that contradicts the application of established common law principles to the facts propounded by the appellant. It is entitled to have its claim decided in the same way as *Perre* was decided, on its legal merits by the application of the same general principle.

178 *Caveat emptor is irrelevant*: The "defence" of *caveat emptor* is, with respect, irrelevant[255]. It is, or may be, a defence to any claim that the appellant sought to assert against the vendor from which it purchased the building. However, it is no answer to the appellant's claim in tort against the respondents. The fact that the appellant might have sought a warranty from the vendor is also irrelevant. Why should the appellant reasonably have anticipated a need to obtain such a warranty in a building so recently erected under professional engineering supervision? Would a vendor, and especially a vendor which was itself a later purchaser, have conceivably been willing to give it? What is the usual commercial practice in the purchase of such commercial buildings? Especially where a party is being effectively deprived of its ordinary entitlement to trial of its claims, this Court errs in assuming that the provision of warranties to later purchasers of commercial buildings is either commonly sought or given. Yet substantially on the basis of that possibility, the appellant is put out of court[256]. The appellant's complaint in law is against the professional civil engineers. It is not against the previous owner or owners.

179 *Local authority tests are irrelevant*: The fact that the appellant's solicitors conducted routine enquiries of the local government authority[257] is also irrelevant. Those tests did not, by the terms of the applicable statutes, extend to – nor could they have been expected to include – tests for a latent defect in the foundations of the building. As I have said, the very complaint that the appellant makes against the respondents is that their conduct had the effect of concealing the resulting defect for a time, until objective signs elsewhere in the building began to disclose the subsidence, necessitating repairs.

180 *Applying limitations law*: It is suggested that allowing claims against building professionals for latent defects in buildings which they design, supervise or build will subvert any statute of limitations and the policy behind such statutes because the cause of action will not arise until the damage manifests itself,

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255 Reasons of Callinan J at [227].

256 cf *Winnipeg Condominium Corporation No 36 v Bird Construction Co* [1995] 1 SCR 85 at 126-128 per La Forest J.

257 Reasons of Callinan J at [212].

possibly many years later[258]. It is said that this would have a serious and unfair effect on the conduct of such building professionals. In my view, such considerations of delay can be adequately dealt with when a court decides the appropriate standard of care and whether there has been a breach of duty in the circumstances. It is not determinative of the question of whether a duty of care is imposed by the law. If the damage does not manifest itself for many years, this will often have a direct bearing on the standard of care of the builder, architect or engineer[259] and also on whether there has been a breach. It will often suggest that the work was carried out to the appropriate standard and thus that no liability arises.

181 In any case, if there is negligence it is unfortunately the nature of the services that such building professionals provide that defects can sometimes manifest themselves years later, with very serious economic and other consequences for those affected. If that is part of the risk of performing such professional building services, those who are neglectful of their duties should not escape ordinary liability which includes the operation of the normal statute of limitations. Otherwise, for a consequence that would ordinarily flow from proved negligence, the statute of limitations is elevated to a new and larger effect than its words provide in shaping the existence of the duty of care. This presses the statute to a protection beyond its language or proper purpose.

182 *Applying the incremental approach*: I accept that an "incremental approach" is required by authority. However, it is not enough to demand such an approach[260]. The holding that the professional engineers were liable to the appellant in the circumstances of this case is as incremental as was the decision of this Court in *Perre*. The criterion of incrementalism is, in any case, rather unhelpful. It simply means that a global approach, as suggested by *Caparo*, is not accepted. Instead, this Court has elected to proceed from instance to instance, in search of an ultimate principle that, at this time, we can only perceive imperfectly.

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258 Reasons of McHugh J at [102]-[105].

259 As to the standard of care of architects see *Voli v Inglewood Shire Council* (1963) 110 CLR 74 at 84 per Windeyer J. The same principle applies to engineers: *Greaves & Co (Contractors) Ltd v Baynham Meikle & Partners* [1975] 1 WLR 1095 at 1101 (CA); [1975] 3 All ER 99 at 104-105.

260 Reasons of Callinan J at [214]; cf *Sutherland Shire Council v Heyman* (1985) 157 CLR 424 at 481; *Caparo Industries Plc v Dickman* [1990] 2 AC 605 at 617-618.

183 *Proved negligence and investors' rights*: The fact that the appellant is an investor for economic reward is also irrelevant[261]. The appellant is entitled to equal justice and the neutral application to its case of applicable legal principles. Equality before the law is a postulate of the rule of law. There is now no absolute rule against the existence of a duty of care even in a case of pure economic loss – assuming this to be such a case. The appellant is an entrepreneur; but none the worse for that fact. It seeks a profit; but that is its legal duty to its shareholders. Corporations such as the appellant are not outside the protection of the tort of negligence. The appellant, like the plaintiffs in *Perre*, is entitled to invoke the courts for the ascertainment and enforcement of its legal rights. Particularly where the applicable law is in a state of development, this Court should not jump to a conclusion that the appellant's case would not be reasonably arguable once all the evidence is adduced at a trial.

Overseas authority favours a duty of care

184 *The trend in overseas courts*: To the extent that it is relevant in matters such as this to endeavour to uphold similar principles of negligence in Australian law to those observed in other common law countries, the decisions called to notice by the parties evidence the same divisions of judicial opinion as exist in this Court in this appeal.

185 In England, the House of Lords in *Murphy v Brentwood District Council*[262] adopted an approach supporting some of the propositions of the respondents, essentially for pragmatic reasons. However, as with all arbitrary rulings, the decision, reversing the earlier authority in *Anns v Merton London Borough Council*[263], has not been universally applauded. Recent decisions of the English courts have upheld the assertion of a duty of care to a subsequent purchaser of a building by a design architect, where the claim involved (as here) damage to the building itself rather than only damage to other property[264].

186 The decision in *Murphy* has not been followed in Canada where the courts have generally adhered to the approach adopted by the House of Lords in *Anns*[265]. That case was the progenitor of the *Caparo* approach. In *Winnipeg*

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261 Reasons of Callinan J at [206].

262 [1991] 1 AC 398.

263 [1978] AC 728.

264 *Bellefield Computer Services v E Turner & Sons Ltd* [2003] Lloyd's Rep PN 53; *Sahib Foods Ltd v Paskin Kyriakides Sands (a firm)* [2003] Lloyd's Rep PN 181.

265 [1978] AC 728. See *City of Kamloops v Nielsen* [1984] 2 SCR 2 noted in *Bryan v Maloney* (1995) 182 CLR 609 at 648-651.

Condominium Corporation No 36 v Bird Construction Co[266], the Supreme Court of Canada unanimously held that this approach resulted in a conclusion that a building professional owed a duty of care to a subsequent purchaser of the building for economic loss caused by the need to repair the building which contained defects posing a "substantial danger to the health and safety of the occupants".

187 In New Zealand, before the abolition of appeals to the Privy Council, the courts upheld the duty of care by builders to subsequent purchasers. The principle was recognised in *Bowen v Paramount Builders (Hamilton) Ltd*[267]. That was a case of a domestic dwelling. It was decided before this Court's decision in *Bryan*. After the decision of the House of Lords in *Murphy*, the New Zealand courts continued to apply the approach in *Anns*, modified in ways similar to the Canadian approach. This was a course of judicial independence in which the Privy Council acquiesced, as appropriate to the different direction that had been taken by the New Zealand common law[268].

188 In Malaysia, the courts have declined to follow the approach of the House of Lords in *Murphy*[269]. So has the Singapore Court of Appeal[270]. Within the courts of high authority in the Commonwealth of Nations, the decision of this Court in the present appeal will therefore appear as one that is out of step with majority judicial opinion.

189 As noted by Brennan J in *Bryan*[271] and Thomas JA in the Court of Appeal in this case[272], in the United States of America there have been many voices. No

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266 [1995] 1 SCR 85 at 121 [43].

267 [1977] 1 NZLR 394.

268 *Invercargill City Council v Hamlin* [1996] AC 624. See reasons of McHugh J at [55].

269 *Dr Abdul Hamid Abdul Rashid v Jurusan Malaysia Consultants* [1997] 3 MLJ 546 (High Court); see also *Arab-Malaysian Finance Bhd v Steven Phoa Cheng Loon* [2003] 1 MLJ 567 (CA) where reasonable foreseeability appears to have been adopted as the critical test.

270 *RSP Architects Planners & Engineers v Ocean Front Pte Ltd* [1996] 1 SLR 113; *RSP Architects Planners & Engineers v Management Corporation Strata Title Plan No 1075* [1999] 2 SLR 449.

271 (1995) 182 CLR 609 at 651-652.

272 *Woolcock St Investments Pty Ltd v CDG Pty Ltd* (2002) Aust Torts Rep ¶81-660 at 68,796 [25].

clear trend has emerged. For example, the divided opinion of the Supreme Court of California in *Aas v Superior Court*[273] shows how universal this legal problem is for all jurisdictions of the common law. At least in my opinion, the dissentients in *Aas*[274] had the better of the argument. George CJ described the conclusion of the majority as an "unfortunate misstep in the development of the law"[275]; a description I also adopt in relation to the views of the majority of this Court in this appeal.

190 *Regional and global consistencies*: Wherever precisely the cards fall in the present state of American decisional law, the trend of authority elsewhere, on the whole, lends support to the appellant. In the global and regional economy that is such a feature of the present age and in which Australian investors and civil engineers must now compete, it is undesirable that we should adopt a more restrictive right of recovery whilst our businesses elsewhere are subject to a larger legal duty. At the least, the trend of the case law reinforces the conclusion that the law on this subject remains in a state of active development. That affords further reinforcement for my view that the respondents should be denied what is effectively summary relief. The appellant should be allowed the ordinary facility of a trial of its claim on the basis of all of the relevant evidence that it can adduce.

Conclusion and orders

191 The appellant has established error on the part of the Court of Appeal whose orders have the effect of denying it a trial of its action against the respondents. As a matter of law, such a trial would not be futile.

192 The appeal should be allowed with costs. The orders of the Supreme Court of Queensland (Court of Appeal) should be set aside. In place thereof, the question set out in the case stated should be answered "yes". The proceedings should be returned for trial. The respondents should pay the appellant's costs in the Supreme Court of proceedings to date.

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273 12 P 3d 1125 (2000).

274 George CJ and Mosk J.

275 12 P 3d 1125 at 1156 (2000). This is an area of the law where "wrong turning[s]" are endemic, as Lord Bridge of Harwich acknowledged in *Caparo Industries Plc v Dickman* [1990] 2 AC 605 at 619 by reference to *Le Lievre v Gould* [1893] 1 QB 491. After that decision it took 70 years to be set once again on a "right path". This occurred in *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465, upholding Denning LJ's dissent in *Candler v Crane, Christmas & Co* [1951] 2 KB 164.

193 CALLINAN J. This is a case stated. The principal question that it raises is whether a professional engineer who negligently designed the structure of a building for use as offices and a warehouse is liable for economic loss to a subsequent purchaser of the building.

Facts

194 The building has no residential component. Its construction was undertaken by two joint venturers. The second respondent was an engineer employed by the first respondent. The first respondent undertook for payment the design and supervision of the complex. No geotechnical inspection of the site was undertaken before the construction began. This was so because one of the joint venturers was unwilling to meet the cost of it although by implication, at the very least, the respondents must have thought it desirable.

195 The case stated records that,

> "[t]he routine civil structural supervision by [the first respondent] included routine civil/structural supervision of the construction of the foundations of the Complex."

196 Construction started in the middle of 1987 and was completed by about the end of that year.

197 In September 1992, the appellant, Woolcock Street Investments Pty Ltd, bought the property on which the building stood, from Permanent Trustee Company Limited, a company which had replaced one of the joint venturers, under a contract which contained no warranty that the building was free of defects, and effected no assignment of such rights (if any) as the vendor might have had against third parties, including the respondents, in respect of any structural defects. Before buying, the appellant's solicitors requested the Townsville City Council to make a physical inspection of the building. The Council did so on 18 June 1992 and gave a report to the appellant on 7 July 1992. The Council qualified its report as follows.

> "Reference is made to your request dated 12 June 1992 for an inspection of this property. I have treated this request as relating to matters arising under the 'Building Act 1975' and the 'Standard Building Bylaws' and to such matters only. Should you wish the inspection to encompass other matters, it will be necessary for you to specify these matters and to pay the appropriate further inspection fees.
>
> However, matters of, for example, encroachments, or termite infestation are not covered by this inspection. You should consult a licensed surveyor in the case of encroachments, or an appropriately qualified person in the case of termite infestation.

The property has been inspected under the following headings:

1. Unauthorised structures, alterations or additions. (Section 52)

2. Unsafe or dilapidated buildings or structures. (Section 53)

3. Other matters arising under the Act or Bylaws."

198 The report referred to a number of unauthorized additions and changes to the complex. It did not identify any unsafe or dilapidated structures, or indeed hint at any matters of structural concern. An inspection and report by a plumber in relation to the roof similarly pointed to no serious defects in the building.

199 By 1994, however, structural distress by way of settlement began to manifest itself.

200 The appellant sued the respondents in the Supreme Court of Queensland in negligence. The primary judge, Atkinson J ordered that a case be stated. It was in the form that I have summarized, and came on for hearing before the Court of Appeal of Queensland (McMurdo P, Thomas JA and Douglas J) in early 2002. The case was treated, and correctly so, as a case of pure economic loss. There it was argued by the respondents that the principle stated in *Bryan v Maloney*[276] was confined in application to single dwellings. The argument was generally accepted by Thomas JA (who gave the leading judgment) on the basis that *Bryan v Maloney* rests heavily on notions of vulnerability, of a special vulnerability of members of the public who buy single dwelling houses. This was so, even though, as his Honour said, houses may on occasions be bought by commercial investors. His Honour was influenced by two other factors: that the remedy, if there were any, was available either under current legislation, or, if it were not, should only become available in accordance with specific legislative provision for it because of the underlying economic and social factors relating to an action of this kind and home ownership generally. The other matter which affected the reasoning of Thomas JA was that to enable the appellant to sue here would have the effect of granting to all purchasers in a line of purchases, a transmissible warranty of quality of indefinite duration. Douglas J agreed with Thomas JA as did in substance McMurdo P. It was accordingly held that the stated case should be answered adversely to the appellant, that is, no.

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276 (1995) 182 CLR 609.

The appeal to this Court

The appellant's arguments

201 The appellant first submitted that a subsequent purchaser of premises is not absolutely precluded from recovering damages in the nature of pure economic loss from a building professional who was negligent in the design or supervision of a building premises, merely because the design is adapted to a commercial application rather than a residential one: that the building may or may not be a permanent dwelling house, although undoubtedly a relevant matter, is not a conclusive one. In the case of a commercial building – to adapt the words of Mason CJ, Deane and Gaudron JJ in *Bryan v Maloney*[277] – it is plainly foreseeable by any engineer that the construction of a negligently designed building will be likely to cause economic loss to its owner at the time when the inadequacy of the design becomes manifest. There is current authority that would make the engineer liable for physical damage to any person or other property caused by the collapse of the building[278], whether it was a commercial building or not[279]. Any distinction between damages caused in those circumstances and those claimed in the present case is artificial and is not, it was submitted, justified[280].

202 The appellant's submissions continued, that to treat the potential for liability as limited to a "permanent dwelling house", and not applicable to other buildings gives rise to significant definitional issues. Many Australians do not reside in a simple, single dwelling house on one allotment. To highlight the anomalous state of the law on the basis of the holding of the Court of Appeal the appellant called in aid some observations of Brooking JA in *Zumpano v Montagnese*[281]:

> "(a) …
>
> (ii) Does *Bryan v Maloney* apply not only to dwelling houses in the narrow sense but also to other dwellings, for example,

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277 (1995) 182 CLR 609 at 625.

278 *Voli v Inglewood Shire Council* (1963) 110 CLR 74.

279 The hall in *Voli* was being hired out at the time.

280 In *Bryan v Maloney* (1995) 182 CLR 609 at 623 Mason CJ, Deane and Gaudron JJ described it as "essentially technical"; Toohey J at 657 regarded the classification of the loss as pure economic loss as "debatable".

281 [1997] 2 VR 525 at 528-529.

residential apartments in a multi-storey development, like the building in *Opat v National Mutual Life Association of Australasia Ltd*[282]? Does it apply to 'mixed' buildings, like a shop and dwelling or a building comprising a dwelling and commercial art gallery or a general practitioner's residence combined with surgery? In the case of a 'mixed' building, if the decision is applicable, then does it apply to the whole building, or only to the residential part of it, or does the answer to this question depend on some such notion as that of 'dominant use'?

(iii) Does the decision apply to dwellings which are not the principal residence of the purchaser, for example, an apartment in or near the city for occasional use, or a holiday home?

(iv) What if the value of the dwelling is only a small part of the total value of the house and land, as where a modest dwelling is bought which stands on a very large piece of land or on land which is, by reason of its location, exceptionally valuable? What of a house forming part of a large rural property stocked with cattle or used for viticulture? What of a rural property with two houses, one intended for occupation by a manager? Do the houses in the last two examples answer the description of Toohey J[283], 'a house that is a non-commercial building'?

(b) If the decision is not confined to houses, or to houses and other dwellings, then to what other buildings does it apply? The joint judgment[284] left open the position of buildings other than permanent dwelling houses, while Toohey J, as just mentioned, limited his decision to 'a house that is a non-commercial building'. In Western Australia, Malcolm CJ has accepted the existence of a duty of care to a subsequent occupier on the part of the builder of a commercial greenhouse[285]."

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282 [1992] 1 VR 283.

283 *Bryan v Maloney* (1995) 182 CLR 609 at 665.

284 *Bryan v Maloney* (1995) 182 CLR 609 at 630.

285 *CAI Fences Pty Ltd v A Ravi (Builder) Pty Ltd* unreported, Supreme Court of Western Australia, 27 December 1990.

203 The questions raised by Brooking JA do not, as will appear, exhaust the catalogue of questions and anomalies to which the decision in *Bryan v Maloney* gives rise.

204 The appellant also seeks to rely on some statements in the judgments of this Court in *Perre v Apand Pty Ltd*[286], in particular in the reasons of McHugh J. It urged that some language of his Honour there could readily be adapted to this case. Six propositions were advanced as relevant.

205 Conditions of the kind referred to in that case were present here. The losses suffered by the appellant were a reasonably foreseeable consequence of the respondents' failure to design appropriate foundations and supervise the construction of them. The appellant is a member of a class of subsequent owners of premises from time to time whose membership was readily ascertainable by the respondents. The appellant's business was vulnerably exposed to the respondents' conduct because the appellant was not in a position to protect itself against the effects of the respondents' negligence. The imposition of a relevant duty on the respondents does not expose them to "indeterminate" liability. Nor does it unreasonably interfere with their commercial freedom because they were already under a duty of care to the original owner to take reasonable care. And the respondents knew or ought to have known of the risk to the owner of the building from time to time, and the consequences of the realization of that risk.

206 The imposition of such a duty is unobjectionable in principle, or on grounds of policy. The approach of the Court of Appeal was based, at least in part, upon the assertion that the vulnerability of purchasers of commercial premises may be thought to be significantly less than that of purchasers of dwelling houses. That assumption is not justified. Commercial purchasers, in appropriate circumstances, may be just as vulnerable as residential purchasers. Why is a sole trader, the appellant asks, who purchases a building from which to operate a business, more vulnerable in purchasing a dwelling house than in purchasing commercial premises? The distinction between a purchaser of residential premises and of commercial premises is in reality no more than arbitrary.

207 A finding that a duty of care is owed is efficient and encourages responsible commercial and professional behaviour. As to the respondents' suggestion that the appropriate way for a buyer to protect itself is to obtain a contractual warranty, the appellant's answer is that a vendor who is liable would almost certainly join the negligent professional responsible for the defect: in consequence, the loss would ultimately be borne by the same party, but only after additional legal costs (incurred by the seller) are expended.

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286 (1999) 198 CLR 180.

Reasoning

208 I am unable to accept the appellant's submissions for several reasons. The joint judgment of Mason CJ, Deane and Gaudron JJ in *Bryan v Maloney* repeatedly emphasized that it was because the Court was concerned with a dwelling house and purchaser of it[287] that their Honours were drawn to the conclusion that they reached. Their Honours also made assumptions including that a purchaser, in buying a dwelling house in this country is probably making the most significant investment that he or she will make in a lifetime[288]. Others were that "a subsequent owner is likely to be unskilled in building matters and inexperienced in the niceties of real property investment."[289]

209 With respect, I think that what was said by Brennan J in *Bryan v Maloney* is more persuasive[290]:

> "It would be anomalous to have claims relating to the condition of the building by an original owner against the builder determined by the law of contract if the relief claimed by the remote purchaser against the builder would be determined by the law of tort. Such a situation would expose the builder to a liability for pure economic loss different from that which he undertook in constructing the building and would confer a corresponding right on the remote purchaser which the purchaser had not sought to acquire from the vendor[291]. It would be tantamount to the imposition on the builder of a transmissible warranty of quality. In some jurisdictions, Parliament has provided such a remedy by statute. The social question whether building costs should be inflated to cover the builder's obligation under such a transmissible warranty is an appropriate question for parliaments to consider but, in the absence of compelling legal principle or considerations of justice reflecting the enduring values

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287 (1995) 182 CLR 609 at 625-627.

288 (1995) 182 CLR 609 at 625.

289 (1995) 182 CLR 609 at 627.

290 (1995) 182 CLR 609 at 644.

291 See *Winnipeg Condominium Corp No 36 v Bird Construction Co* (1993) 101 DLR (4th) 699 at 711. The observation of Huband JA with reference to "caveat emptor" is apposite to a remote purchaser's rights in respect of mere defects in a building. The decision of the Manitoba Court of Appeal was reversed by the Supreme Court which considered the defects to be a substantial danger to the health and safety of the occupants: [1995] 1 SCR 85.

> of the community, the courts should not decide to extend remedies not hitherto available to remote purchasers of buildings without considering the cost to builders and the economic effect of such an extension. Those are questions which the courts are not suited to consider. The extension of remedies in that direction is properly a matter for Parliament."

210 I regard myself as free to adopt that passage in this, a case of a commercial structure, to which it has in my opinion, a particular relevance, even though his Honour's judgment was a dissenting judgment. This case is distinguishable from *Bryan v Maloney*, and, if the appellant's claim here were to be allowed, would represent a marked and unwarranted extension of it.

211 There is in my respectful opinion, in any event, reason to question the correctness of *Bryan v Maloney* itself. It was decided at a time when the jurisprudence of this Court in cases of tort was more heavily influenced by notions of proximity[292] than it currently is. But it is not for that reason only that I would question its correctness.

212 Neither the appellant here, nor indeed a purchaser of any premises, whether a dwelling or otherwise, is especially vulnerable, and unable to protect itself as the appellant contends. Here the appellant chose to seek an inspection and report by the local authority under s 53 of the *Building Act* 1975 (Q) which provided as follows:

> "**Building etc dangerous, neglected or unfit for use or occupation**
>
> 53 (1) If in the opinion of a local authority formed on reasonable grounds any building or other structure or any part of a building or other structure is dangerous, the local authority may, subject to section 54, by notice in writing, require the owner of the building or structure to do any 1 or more of the following:-
>
> (a) shore-up or otherwise secure such building or structure or part;
>
> (b) erect a proper hoarding or fence for the protection of persons using any road, path or way upon which the building or structure or part abuts;
>
> (c) demolish or take down the building or structure or part;
>
> (d) repair the building or structure or part;

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292 See for example (1995) 182 CLR 609 at 625 per Mason CJ, Deane and Gaudron JJ.

(e) remove the building or structure or part;

as the local authority directs within the time specified in the notice.

(2) If in the opinion of a local authority formed on reasonable grounds any building or other structure or any part of a building or other structure is a ruin or so far dilapidated as to be unfit for use or occupation or is, from neglect or other cause, in a structural condition prejudicial to the inhabitants of or to property in the neighbourhood, the local authority may, subject to section 54, by notice in writing, require the owner of the building or structure to do any 1 or more of the following:-

(a) demolish the building or structure or part;

(b) repair the building or structure or part;

(c) remove the building or structure or part;

(d) fence the land on which the building or structure or part stands;

(e) repair any fence that encloses or is on that land;

(f) secure the building or structure or part;

within the time specified in the notice.

(3) If in the opinion of a local authority formed on reasonable grounds any building or other structure or any part of a building or other structure is in a filthy or dilapidated condition, or is infected with disease, or is infested with lice, bugs, rats or other vermin, or is improperly constructed, or from any other cause is unfit to be used or occupied, the local authority may, subject to section 54, by notice in writing, require the owner of the building or structure to do any 1 or more of the following:-

(a) demolish the building or structure or part;

(b) cleanse, purify and disinfect the building or structure or part so as to make it fit to be used or occupied;

(c) repair the building or structure or part so as to make it fit to be used or occupied;

(d) alter the building or structure or part so as to make it fit to be used or occupied;

(e) remove the building or structure or part;

within the time specified in the notice.

(4) If an owner of a building or other structure to which a notice given to the owner under any provision of this section relates fails to comply with such notice, then:-

(a) the local authority may itself cause such steps to be taken and such things to be done as it has, by the notice, required the owner of the building or structure to take or do; and

(b) the owner commits an offence against this Act.

(5) A notice under this section must state that the person to whom it is given has a right of objection under section 57."

213 It may be, as counsel for the appellant accepts, that the failure of the Council here to discover the defective state of the foundations, could arguably give rise to a right of action against the local authority. The real point however is that a purchaser does have several means of protecting itself, one only of which may be by the obtaining of a report by a local authority. Insistence on a warranty, or condition of fitness or soundness, or the seeking of an inspection and report by an expert, who by making them, will become liable if negligent in not discovering and reporting relevant defects, are others.

214 It is true, as both Brooking JA in *Zumpano*[293] and Thomas JA in this case[294] pointed out, that some cases will involve buildings of mixed residential and commercial uses, that the purchase of a small commercial building with or without a dwelling attached, may itself be a major, indeed the most significant investment by a purchaser in his or her lifetime, and that therefore lines of demarcation of cases of liability may not be able tidily and without anomaly to be drawn. The law is not in other areas[295] without anomalies. The guarded, incremental approach of the courts to cases of economic loss will inevitably give rise to apparent and perhaps temporary anomalies as principle is developed.

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293 [1997] 2 VR 525 at 528-529.

294 (2002) Aust Torts Reports ¶81-660 at 68,797 [32].

295 For example, see Meagher, Heydon and Leeming, *Meagher, Gummow and Lehane's Equity: Doctrines and Remedies*, 4th ed (2002) at 417 which outlines that the equitable doctrine of marshalling may be invoked where one claimant has the right to satisfy a claim from two funds and another claimant has the right to resort to one only of the two funds. In such a situation equity may intervene so that the double claimant must exercise its security over the fund to which the single claimant has no claim.

215 The better view may however be that abstention from extending the operation of *Bryan v Maloney* to structures other than residences is not anomalous, but that it is the decision in *Bryan v Maloney* itself that is the anomaly. I mentioned that there were reasons to question its correctness in addition to those mentioned by Brooking JA in *Zumpano* and Brennan J in his dissenting judgment in *Bryan v Maloney*.

216 What degree of seriousness of defect must exist before liability can be established; a defect in paintwork[296], a departure from one or more of the Australian Standards, and which standards, the presence of ten, twelve, fifty or a hundred loose tiles on a roof, or a crumbling but repairable foundation in one corner only? This is another question to be added to those to which I elsewhere refer and to which *Bryan v Maloney* gives rise.

217 In *Bryan v Maloney* the majority made the assumption, it may or may not be correct – no evidence about it was given in the case – that for most people in Australia the purchase of a dwelling will be the most significant investment that a person will make in his or her lifetime. Reliance essentially on assumptions of this kind is fraught with risk. Quite apart from dangers of misapprehension by judges in the absence of evidence, of what is happening in the community, there is also a serious risk of incompleteness[297].

218 Another, in my view equally reasonable assumption may be that most purchasers will need to borrow to buy, and that any prudent lender will insist, before lending, for the lender's and the buyer's protection, upon a professional survey of the structure. And as to the assumption that all, indeed most buyers of houses are seeking merely to put a roof over their heads under circumstances of vulnerability, two matters should be noted. The first is that most sellers of residences will shortly become buyers, that therefore, they will at some time be as much in need of a relevant warranty or condition as the buyers to whom they have sold. The second matter is that the majority in *Bryan v Maloney* failed to have regard to the capital gains tax regime[298], which since 1985 has provided for exemptions from capital gains tax on a profitable sale of a principal place of residence, occupied for no fewer than twelve months by the seller, and which almost certainly encourages *de facto* business investment in houses. Another

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296 *Goulding v Kirby* [2002] NSWCA 393.

297 cf *Woods v Multi-Sport Holdings Pty Ltd* (2002) 208 CLR 460 at 512-513 [166] per Callinan J.

298 See now Pt 3-1, Div 118, sub-div 118-B of the *Income Tax Assessment Act* 1997 (Cth).

equally valid assumption in more recent times may be that house ownership for future investment purposes has increased because of cash grants made under the *First Home Owner Grant Act* 2000 (Q), an enactment forming part of a co-operative endeavour by State and federal governments. It is unnecessary to explore the validity and completeness of the assumptions made by the majority in *Bryan v Maloney* any further. Nor is there any need to express any final opinion as to the correctness or otherwise of that decision in order to resolve this case, of a purchase of commercial premises.

219 For the purposes of this appeal it is unnecessary to decide when any relevant period of limitation commenced and whether any limitations enactment could be invoked here. The best position for the purchaser would be that time would not begin to run until the defect manifested itself. If that be the correct position, there may still be problems of indeterminacy, indeterminacy of time, and if not actual indeterminacy of damages, at least uncertainty as to their correct measure. Take the case of a structure, even a dwelling house, theoretically built to last, say forty or fifty years. Assume a buyer acquires the property with the structure erected on it fifteen years into its lifetime. A serious structural defect manifests itself three years later[299]. I do not say that the law necessarily lacks the ingenuity to devise a means of assessing the loss or damage to the buyer, but any formula for doing so is bound to be complicated, and to involve a large number of imponderables themselves further complicated by such considerations as the need to take account of changes in value of the land in its unimproved state, the relative values of the land and the structure, whether the first eighteen years of life of a structure have an intrinsically greater value than the balance of its life during which the need to provide for natural wear and tear may be greater and more costly, other matters referred to by Brooking JA in *Zumpano* and the prospect that the structure, even if it had remained sound, would have been demolished or altered in response to changing fashions, diminishing utility or otherwise. All of these matters, and no doubt others that a purchaser's ingenuity may devise, could fall to be considered in litigation against the builder, brought many, many years after the events forming the basis of the action.

220 In *Bryan v Maloney*, in their Honours' joint judgment, Mason CJ, Deane and Gaudron JJ sought to explain their divergence from the decisions of the

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299 cf *D & F Estates Ltd v Church Commissioners for England* [1989] AC 177 where the defect manifested itself 17 years after the construction.

House of Lords in *D & F Estates Ltd v Church Commissioners for England*[300] and *Murphy v Brentwood District Council*[301] on the ground that[302]:

> "[t]heir Lordships' view … seems to us … to have rested upon 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."

221 Contrary to their Honours' view however, the subsequent case of *Astley v Austrust Ltd*[303] demonstrates that a clear compartmentalization remains a live, indeed a flourishing plant in Australian jurisprudence.

222 *Perre v Apand Pty Ltd* was referred to extensively in argument. The respondents' submission in relation to it is generally correct. The plaintiffs there were in a very exceptional and vulnerable position in which they had no opportunity of protecting themselves by a contractual term or condition. It was the combination of foresight of the likelihood of harm, knowledge of an ascertainable class of vulnerable persons, the latter's helplessness in the circumstances, the control exercised by the defendant, and the causal link between the control and the damage that proved decisive there. The appellant's attempt to rely on *Perre v Apand Pty Ltd* here was ill-founded in many respects. I will deal with each of the matters relied on by the appellant.

223 That damage might be suffered as a result of defective design was plainly foreseeable, but little in human affairs is not. Foreseeability, that is reasonable foreseeability, although a necessary element, is of itself not enough to establish liability. Purchasers of a building are members of an identifiable class, but not all of them would have the same use in mind of the building purchased, and over its lifetime the numbers of purchasers could vary greatly.

224 It is quite wrong however to assert that the appellant or indeed any purchaser is vulnerable. Means of protection are readily to hand as I have already indicated. Furthermore, vulnerability alone does not suffice to ground liability.

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300 [1989] AC 177.

301 [1991] 1 AC 398.

302 (1995) 182 CLR 609 at 629.

303 (1999) 197 CLR 1.

225 The appellant denies an indeterminacy of liability. "Indeterminacy" had three elements in its famous first formulation by Cardozo CJ[304]:

> "an indeterminate amount for an indeterminate time to an indeterminate class."

226 The appellant's submissions selectively focus on one only of these, of determinacy of class.

227 Commercial freedom may well be put at risk by the imposition of liability on the respondents here. The contract that was freely made between the first respondent and the first owner was one under which the latter chose to take such risks as flowed from its decision not to have a geotechnical investigation made. Parties to a contract between themselves are entitled to allocate risks, obligations and rights as they choose. They should not be obliged to do so in order to give some unknown person in the future rights against one or other of them. If commercial freedom is to be impaired in this way it is better done by statutory intervention. In the meantime the rule of *caveat emptor*, which is little more than a rule that people should act diligently, prudently and carefully in their own interests should apply. As Stonham in *The Law of Vendor and Purchaser* puts it[305]:

> "The rule of *caveat emptor* applies to contracts of sale of land. The purchaser takes that which he sees, or which, as a prudent and diligent purchaser, he ought to have seen, and is not entitled to have anything better."

228 Everyone knows that the durability of a building depends upon the soundness of its foundations. The fact that they are below ground does not mean that they cannot be professionally examined and tested. Their state is relevantly there to be seen and assessed.

229 The appellant resorted to social policy. This is a matter for parliament rather than the courts to weigh. In my view, the social considerations which the appellant invoked are probably outweighed in any event by the other matters to which I have referred. The same may be said of the appellant's claims of economic efficiency, an end which is likely to be just as well served by personal prudence by all purchasers as by obligations imposed after the event by the courts.

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304 *Ultramares Corporation v Touche* 174 NE 441 at 444 (1931).

305 Stonham, *The Law of Vendor and Purchaser*, (1964) at 228 [355].

230 In *Perre v Apand Pty Ltd*, McHugh J contrasted the position of the plaintiffs there with that of plaintiffs in other situations[306]:

> "If the plaintiff has taken, or could have taken steps to protect itself from the defendant's conduct and was not induced by the defendant's conduct from taking such steps, there is no reason why the law should step in and impose a duty on the defendant to protect the plaintiff from the risk of pure economic loss."

231 To put the matter another way, the appellant has failed to point to a sufficiency of the kind of factors which need to be present and which I thought most relevant in *Perre v Apand Pty Ltd*[307]. They need no repetition here. In this area of claims, for economic loss, an evolving area of the law, cases will in practice only be resolved by closely and carefully examining the facts to ascertain whether a sufficiency of factors of a sufficient degree of relevance and importance has been demonstrated. It is better I think to acknowledge and apply that reality than to attempt to state an inflexible principle which is bound, at this stage at least, to fail to meet the justice of the cases which are likely to arise in the future.

232 It is unnecessary to deal with cases in other jurisdictions in any detail. They are summarized in the judgment of Brennan J in *Bryan v Maloney*. That summary indicates that the question for decision here has been given different answers in different jurisdictions at different times.

233 What the debate in this appeal does show however is that this particular area is better regulated, as it has already in many respects and places been, by legislators[308].

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306 (1999) 198 CLR 180 at 225 [118].

307 (1999) 198 CLR 180 at 326-329 [406]-[422].

308 Statutory warranties that enure for the benefit of owners and successors in title are implied in contracts for residential building work in New South Wales (*Home Building Act* 1989 (NSW), ss 18A-18G), Victoria (*Domestic Building Contracts Act* 1995 (Vic), ss 8-10), South Australia (*Building Work Contractors Act* 1995 (SA), s 32), Tasmania (*Housing Indemnity Act* 1992 (Tas), ss 7-9) and the Australian Capital Territory (*Building Act* 1972 (ACT), s 62). Further, statutory insurance or guarantee schemes for residential building work enure for the benefit of owners and successors in title in all States and the Australian Capital Territory: see *Home Building Act* 1989 (NSW), ss 90-99; *House Contracts Guarantee Act* 1987 (Vic), ss 5-8; *Building Work Contractors Act* 1995 (SA), ss 33-35; *Queensland Building Services Authority Act* 1991 (Q), ss 68-69 and Sched 2; *Home*

(Footnote continues on next page)

234 The appeal should be dismissed with costs.

Building Contracts Act 1991 (WA), ss 25A-25D; *Housing Indemnity Act* 1992 (Tas), ss 11-14; *Building Act* 1972 (ACT), ss 64-65.