

## CASE NOTE

### WOOLCOCK STREET INVESTMENTS PTY LTD v CDG PTY LTD\*

#### BEYOND *BRYAN*: BUILDERS' LIABILITY AND PURE ECONOMIC LOSS

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*[In Bryan v Maloney, the High Court extended a builder's duty of care to encompass a liability in negligence for the pure economic loss sustained by a subsequent purchaser of a residential dwelling as a result of latent defects in the building's construction. Recently, in Woolcock Street Investments Pty Ltd v CDG Pty Ltd, the Court refused to extend this liability to defects in commercial premises. The decision therefore provides an opportunity to re-examine the rationale and policy behind current jurisprudence governing builders' liability for pure economic loss. In doing so, this article considers the principles relevant to the determination of a duty of care generally and whether the differences between purchasers of residential and commercial properties are as great as the case law suggests.]*

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\* (2004) 216 CLR 515 (*Woolcock*).

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## I INTRODUCTION

In the context of builders' liability, damage to persons or property may occur as a result of negligent construction or design. However, the damage claimed generally relates to situations where the claimant's premises are, and always have been, inherently defective as a result of the defendant's negligence. Such loss was classified by the majority in *Bryan v Maloney*<sup>1</sup> as purely economic, represented by the amount expended to remedy the defect. As the premises were not 'injured' by some external cause but were always defective, the harm to its fabric was not treated as ordinary physical damage to property;<sup>2</sup> nor, therefore, was the monetary expenditure considered a loss consequential upon physical damage. The majority judgment in *Bryan* acknowledged that this distinction from physical damage was a 'technical one'.<sup>3</sup> Nevertheless, it is one that has been maintained.<sup>4</sup>

Physical damage, such as damage to a claimant's person or property, together with the economic loss suffered as a consequence or direct result of that harm,<sup>5</sup> is generally recoverable on the basis of reasonable foreseeability according to the standard application of *Donoghue v Stevenson*.<sup>6</sup> This type of financial harm is readily compensated, as the loss is necessarily limited to that which flows from injury to a specific individual. This is considered sufficient to keep liability within reasonable bounds. However, the care that the law requires for another's person or property is not matched by a corresponding requirement to have regard to their financial interests.<sup>7</sup> In Australia, it was not until *Caltex* that it was held

<sup>1</sup> (1995) 182 CLR 609, 616–17, 623 (Mason CJ, Deane and Gaudron JJ) ('*Bryan*').

<sup>2</sup> John Fleming, 'Property Damage or Economic Loss?' (1996) 4 *Tort Law Review* 177, 178; *Murphy v Brentwood District Council* [1991] 1 AC 398, 479 (Lord Bridge).

<sup>3</sup> (1995) 182 CLR 609, 623, 626 (Mason CJ, Deane and Gaudron JJ). However, Brennan J characterised the loss as being consequential upon physical damage: at 631, 643, 646–7. Toohey J, whilst doubting whether the damage claimed was pure economic loss, did not resolve the issue, the Court being asked to dispose of the appeal on the basis that it was pure economic loss: at 657–8. See also *Woollahra Municipal Council v Sved* (1996) 40 NSWLR 101, 131 (Clarke JA) ('*Woollahra*') where, although arguably property damage, both trial and appeal were conducted on the basis that the claim was purely economic and the loss was treated as such. See further *Woolcock* (2004) 216 CLR 515, 570–1 where Kirby J questioned the classification of loss as purely economic, as physical damage to the building's foundations could be proved.

<sup>4</sup> See *Woolcock* (2004) 216 CLR 515, 529 (Gleeson CJ, Gummow, Hayne and Heydon JJ).

<sup>5</sup> *Caltex Oil (Australia) Pty Ltd v The Dredge 'Willemstad'* (1976) 136 CLR 529, 544–5 (Gibbs J) ('*Caltex*').

<sup>6</sup> [1932] AC 562. In the building context, see *Bryan* (1995) 182 CLR 609, 617–18, 622–4 (Mason CJ, Deane and Gaudron JJ), 632–4 (Brennan J); *Voli v Inglewood Shire Council* (1963) 110 CLR 74.

<sup>7</sup> *Tame v New South Wales* (2002) 211 CLR 317, 329 (Gleeson CJ) ('*Tame*').

that, although as a general rule damages for pure economic loss are not recoverable outside negligent misstatement, a duty of care might be owed in ‘exceptional cases’.<sup>8</sup> In addition, due to the inherent capacity for pure economic loss (as opposed to physical damage) to manifest itself at several removes from the direct detriment caused by a defendant’s carelessness, foreseeability of harm is considered an inadequate control mechanism for establishing a duty of care in this type of case.<sup>9</sup> This is particularly so when liability is sought to be imposed for the commercial loss suffered by someone with whom the defendant has had no prior relationship. For example, in claims concerning a builder’s liability to subsequent purchasers of premises, the claimant is always at least one step removed from those who actually engaged the builder’s services.

Thus, the courts’ traditional reluctance to impose a duty to protect against causing financial harm to another rests primarily upon two policy considerations:<sup>10</sup>

- 1 A concern to avoid the imposition of liability indeterminate in amount, time or class;<sup>11</sup> and
- 2 A fear that the imposition of a duty would be inconsistent with community standards regarding what is legitimate in the pursuit of personal advantage.

The notion that the imposition of a duty of care should be consistent with other legal principles, statutes, or bodies of law has also become increasingly relevant,<sup>12</sup> with particular concern attaching to preventing tortious liability’s intrusion upon contractual allocation of risk.

Therefore, the central concern in pure economic loss cases is to construct duty requirements that operate to restrain excessively wide liability in such a way as to make liability determinate.<sup>13</sup> Previously, this was achieved by the use of ‘proximity’ as the conceptual test of what was needed, in addition to foreseeability, to give rise to a duty of care.<sup>14</sup> However, proximity is no longer regarded as

<sup>8</sup> (1976) 136 CLR 529, 555 (Gibbs J). Such cases were termed ‘special’ in *Bryan* (1995) 182 CLR 609, 619 (Mason CJ, Deane and Gaudron JJ).

<sup>9</sup> *Caltex* (1976) 136 CLR 529, 550, 555 (Gibbs J), 573–4 (Stephen J), 590 (Mason J); *Bryan* (1995) 182 CLR 609, 617–18 (Mason CJ, Deane and Gaudron JJ), 632–4, 652–3 (Brennan J).

<sup>10</sup> See, eg, *Caltex* (1976) 136 CLR 529, 552 (Gibbs J), 568 (Stephen J); *Bryan* (1995) 182 CLR 609, 618–19, 623, 626–8 (Mason CJ, Deane and Gaudron JJ), 632 (Brennan J), 658–60, 663–5 (Toohey J); *Hill v Van Erp* (1997) 188 CLR 159, 180 (Dawson J), 192–3 (Gaudron J) (*‘Hill’*); *Perre v Apand Pty Ltd* (1999) 198 CLR 180, 192–3 (Gleeson CJ), 199–200 (Gaudron J), 204 (McHugh J), 241–2 (Gummow J), 289–91 (Kirby J), 299–300 (Hayne J), 322 (Callinan J) (*‘Perre’*); *Tame* (2002) 211 CLR 317, 329 (Gleeson CJ); *Woolcock* (2004) 216 CLR 515, 529–30 (Gleeson CJ, Gummow, Hayne and Heydon JJ), 536–8 (McHugh J), 571 (Kirby J).

<sup>11</sup> *Ultramares Corporation v Touche, Niven & Co*, 174 NE 441, 444 (NY, 1931) (Cardozo CJ) (*‘Ultramares’*).

<sup>12</sup> *Hill* (1997) 188 CLR 159, 179–83 (Dawson J), 223–4, 231–4 (Gummow J); *Sullivan v Moody* (2001) 207 CLR 562, 580–2 (Gleeson CJ, Gaudron, McHugh, Hayne and Callinan JJ) (*‘Sullivan’*); *Woolcock* (2004) 216 CLR 515, 555 (McHugh J).

<sup>13</sup> See *Caltex* (1976) 136 CLR 529, 572 (Stephen J); Jane Stapleton, ‘Comparative Economic Loss: Lessons from Case-Law-Focused “Middle Theory”’ (2002) 50 *UCLA Law Review* 531, 539, 544, 547–51; Jane Stapleton, ‘The Golden Thread at the Heart of Tort Law: Protection of the Vulnerable’ (2003) 24 *Australian Bar Review* 135, 142.

<sup>14</sup> *Jaensch v Coffey* (1984) 155 CLR 549, 584–5 (Deane J); *Gala v Preston* (1990) 172 CLR 243, 252–3 (Mason CJ, Deane, Gaudron and McHugh JJ).

the test for liability,<sup>15</sup> having been considered only to express the result of a process of reasoning, rather than afford any practical guidance as to the circumstances in which a duty of care is owed. Courts now adopt an incremental or ‘salient features’ approach to determining a duty of care: they proceed by analogy, deduction and induction from previously decided cases to identify the factors giving rise to liability for similar kinds of conduct, or in regards to similar kinds of relationships between the parties.<sup>16</sup> Recently, in this manner, a claimant’s ‘vulnerability’ has emerged as an important requirement for determining the existence of a duty of care to avoid pure economic loss.<sup>17</sup> Whilst the term’s utility remains to be seen — for, like proximity, it runs the danger of being open-ended — its current importance as a unifying rationale was confirmed by the High Court in *Woolcock*.<sup>18</sup>

In this context, and following the successful recovery of pure economic loss in a commercial setting on the basis of vulnerability in *Perre*,<sup>19</sup> the High Court in *Woolcock* was required to consider whether builders’ liability for latent defects in construction extended to subsequent purchasers of commercial, as opposed to residential, premises. However, as this required the abolition, incremental expansion, or strictly narrow application, of the principles previously formulated in *Bryan*,<sup>20</sup> it is first necessary to reconsider the basis of that decision.

## II *BRYAN V MALONEY*

Whilst the original owner of defective premises generally has remedies in contract or tort in relation to a building professional’s negligent design or construction, traditionally — in the absence of some physical damage to person or other property — subsequent owners were not afforded similar protection.<sup>21</sup> Whilst some jurisdictions modified this position, at least in relation to subse-

<sup>15</sup> *Sullivan* (2001) 207 CLR 562, 578–9 (Gleeson CJ, Gaudron, McHugh, Hayne and Callinan JJ); *Woolcock* (2004) 216 CLR 515, 528–9 (Gleeson CJ, Gummow, Hayne and Heydon JJ), 546–7 (McHugh J), 568 (Kirby J). See also *Bryan* (1995) 182 CLR 609, 652–5 (Brennan J); *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520, 543 (Mason CJ, Deane, Dawson, Toohey and Gaudron JJ).

<sup>16</sup> *Perre* (1999) 198 CLR 180, 216–17 (McHugh J), 253 (Gummow J), 264, 272 (Kirby J); *Sullivan* (2001) 207 CLR 562, 580–2 (Gleeson CJ, Gaudron, McHugh, Hayne and Callinan JJ); *Woolcock Street Investments Pty Ltd v CDG Pty Ltd* [2002] Aust Torts Reports ¶81-660, 68 795 (Thomas JA); *Woolcock* (2004) 216 CLR 515, 546–7 (McHugh J), 562, 574, 579 (Kirby J), 589 (Callinan J).

<sup>17</sup> Stapleton, ‘Comparative Economic Loss’, above n 13, 554–61; Stapleton, ‘The Golden Thread at the Heart of Tort Law’, above n 13, 140–3; *Syred v BGC (Australia) Pty Ltd* [2004] WASC 87 (Unreported, Pullin J, 13 May 2004) [27].

<sup>18</sup> (2004) 216 CLR 515.

<sup>19</sup> (1999) 198 CLR 180, 195 (Gaudron J), 207, 225–30, 236 (McHugh J), 289 (Kirby J). For an argument that the decision created a more favourable climate for recovery, see *Woolcock Street Investments Pty Ltd v CDG Pty Ltd* [2002] Aust Torts Reports ¶81-660, 68 795 (Thomas JA); *Woolcock* (2004) 216 CLR 515, 534 (Gleeson CJ, Gummow, Hayne and Heydon JJ), 566–7 (Kirby J).

<sup>20</sup> *Woolcock* (2004) 216 CLR 515, 568–70 (Kirby J).

<sup>21</sup> *Bryan* (1995) 182 CLR 609, 619 (Mason CJ, Deane and Gaudron JJ), 658 (Toohey J). However, a builder’s duty of care to subsequent purchasers was previously acknowledged in *Miell v Hatjopoulos* (1987) 4 BCL 226; *Opat v National Mutual Life Association of Australasia Ltd* [1992] 1 VR 283 (residential); *National Mutual Life Association of Australasia Ltd v Coffey & Partners Pty Ltd* [1991] 2 Qd R 401 (commercial).

quent purchasers of residential premises, by legislation imposing various warranties of quality passing to successors in title,<sup>22</sup> it was not until *Bryan* that modification occurred at common law. Although confined on its facts to builders, liability in this area was subsequently extended to other construction professionals.<sup>23</sup>

The defendant, Bryan, was a professional builder who built a dwelling under a contract with its first owner in 1979. Seven years later, the house was sold to its third owner, the plaintiff, Maloney. The plaintiff inspected the house three times before purchasing it and, noticing no cracks or other defects, believed the house to be solid and properly built. Six months after the purchase, cracks began to appear in the walls of the house due to Bryan's negligence in building upon footings inadequate to withstand seasonal changes in the clay soil. Brennan J, dissenting, considered the loss consequential upon physical damage with such defects in quality being for the law of contract, not negligence, unless they posed a substantial risk of damage to person or property.<sup>24</sup> However, a High Court majority held that the relationship between a builder and a subsequent purchaser of residential property was sufficient to attract a duty on the part of the builder to take reasonable care to avoid reasonably foreseeable economic loss.<sup>25</sup> The loss was defined as the diminution in the value of the dwelling occurring<sup>26</sup> when a latent, and previously unknown, structural defect<sup>27</sup> first became manifest. Bryan had breached this duty on the facts,<sup>28</sup> and was therefore liable to Maloney for damages equal to the value of remedying the inadequate footings and their consequences.

In finding sufficient proximity to warrant the imposition of a duty of care, the principles and policy factors discussed below were considered.<sup>29</sup>

<sup>22</sup> See, eg, *Building Act 2004* (ACT) s 88; *Home Building Act 1989* (NSW) ss 18B, 18D; *Domestic Building Contracts Act 2000* (Qld) ss 41–50; *Building Work Contractors Act 1995* (SA) s 32; *Housing Indemnity Act 1992* (Tas) ss 7–8; *Domestic Building Contracts Act 1995* (Vic) ss 8–9.

<sup>23</sup> All such professionals are referred to by the term 'builder' or similar in this article. An engineer's liability was considered in *Fangrove Pty Ltd v Tod Group Holdings Pty Ltd* [1999] 2 Qd R 236 ('*Fangrove*') (no duty in a commercial building context), and *Proprietors Units Plan No 95/38 v Jiniess Pty Ltd* [2000] NTSC 89 (Unreported, Riley J, 31 October 2000) ('*Jiniess*') (duty of care owed concerning a mixed-use commercial and residential building). For the liability of a private building surveyor, see *Moorabool Shire Council v Taitapanui* [2004] VSC 239 (Unreported, Smith J, 1 July 2004) ('*Taitapanui*').

<sup>24</sup> *Bryan* (1995) 182 CLR 609, 643–5, 648, 655.

<sup>25</sup> Toohey J delivered a separate judgment, which according to the High Court in *Woolcock*, although differently expressed, did not depend upon the application of different principles: *Woolcock* (2004) 216 CLR 515, 526 (Gleeson CJ, Gummow, Hayne and Heydon JJ).

<sup>26</sup> *Sutherland Shire Council v Heyman* (1985) 157 CLR 424, 505 (Deane J).

<sup>27</sup> *Zumpano v Montagnese* [1997] 2 VR 525, 542 (Brooking JA) ('*Zumpano*'); *Goulding v Kirby* [2002] NSWCA 393 (Unreported, Heydon, Hodgson and Santow JJA, 9 December 2002) [27]–[33] (Santow JA).

<sup>28</sup> *Bryan* (1995) 182 CLR 609, 617, 625–8 (Mason CJ, Deane and Gaudron JJ), 665 (Toohey J).

<sup>29</sup> *Ibid* 618, 626–8 (Mason CJ, Deane and Gaudron JJ), 660, 663–5 (Toohey J) referring with approval to various policy considerations identified in *Lempke v Dagenais*, 547 A 2d 290, 295 (NH, 1988) (Thayer J).

*A Reliance and Assumption of Responsibility*

Concurrent liability in tort and contract being accepted,<sup>30</sup> the majority held that the existence of a contract between a builder and the original owner gave rise to a relationship of proximity between them that extended to cover the type of loss suffered.<sup>31</sup> An analogy could therefore be drawn between this relationship and the relationship between a builder and a subsequent purchaser. This relationship was similarly characterised by an assumption of responsibility and reliance, which was considered to flow from the fact that ‘ordinarily’:<sup>32</sup>

- the builder of a house undertakes the responsibility of erecting a structure on the basis that its footings are adequate to support it for the period during which it is likely that there will be one or more subsequent owners; and
- a subsequent owner will:
  - have no greater — and will often have less — opportunity to inspect and test the house than the first owner;
  - be unskilled in building matters and inexperienced in the niceties of real property investment; and
  - be likely, if the inadequacy has not become manifest, to assume that the house has been competently built, rather than obtain a professional structural survey, which was not discussed as a consideration relevant to the existence of a duty of care.

Arguably the most important criterion, this reliance — described as ‘fictitious’,<sup>33</sup> ‘presumed’, or ‘general’<sup>34</sup> — was imputed to Maloney on the facts even though she neither knew nor enquired about the identity of the builder and there was no actual reliance pleaded.<sup>35</sup> Therefore, these conclusions, founded upon a notion of what ‘ordinarily occurs’, were based not on evidence,<sup>36</sup> but on a number of presumptions. For example, it may be presumed that a homeowner does not ordinarily have the resources or experience to have the premises extensively examined, and will rely on the experience and expertise of building professionals in assuming that the premises have not been negligently built. This is especially true in relation to latent defects, which are generally not easily discoverable, and are certainly not discoverable by visual examination. In effect,

<sup>30</sup> *Bryan* (1995) 182 CLR 609, 619–22 (Mason CJ, Deane and Gaudron JJ).

<sup>31</sup> *Ibid* 622–4 (Mason CJ, Deane and Gaudron JJ), 662–3 (Toohey J). See also *Zumpano* [1997] 2 VR 525, 539, 545 (Brooking JA) in which it was held that a duty of care does not exist where a building is erected otherwise than under a contract (builder’s own home); *Woolcock* (2004) 216 CLR 515, 535 (McHugh J). However, the existence of a contract was not considered to be essential in *Jiniess* [2000] NTSC 89 (Unreported, Riley J, 31 October 2000) [120].

<sup>32</sup> *Bryan* (1995) 182 CLR 609, 627–8 (Mason CJ, Gaudron and Deane JJ), 663 (Toohey J).

<sup>33</sup> John Fleming, *The Law of Torts* (9<sup>th</sup> ed, 1998) 201.

<sup>34</sup> *Woollahra* (1996) 40 NSWLR 101, 129, 138–9 (Clarke JA), 150–1 (Cole JA); *Fangrove* [1999] 2 Qd R 236, 244 (Chesterman J).

<sup>35</sup> *Bryan* (1995) 182 CLR 609, 615 (Mason CJ, Deane and Gaudron JJ). See also Patrick 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, 26; *Woollahra* (1996) 40 NSWLR 101, 137–8 (Clarke JA).

<sup>36</sup> See *Woolcock* (2004) 216 CLR 515, 526–7 (Gleeson CJ, Gummow, Hayne and Heydon JJ), 590 (Callinan J).

this amounts to the creation of an implied representation or corresponding assumption of responsibility by the builder that the premises have been built with reasonable care, based upon the usual practice that there is no reasonable opportunity for subsequent purchasers to guard against the loss. Therefore, the builder would or should have known that a subsequent owner would be likely to assume that the house had been competently built unless its inadequacy had become manifest.

This is consistent with decisions in other jurisdictions involving the alleged negligence of building professionals who undertake to perform a service. For example, *Smith v Eric S Bush*<sup>37</sup> considered whether a duty of care was owed or whether a disclaimer, concerning a negligent land valuation funded by a mortgagor but procured by and on behalf of a prospective mortgagee, was fair and reasonable as required by ss 2 and 11(3) of the *Unfair Contract Terms Act 1977* (UK) c 50. The House of Lords held that the disclaimer was ineffective and that a duty of care was owed based upon an assumption of responsibility in circumstances where the defendant, a firm of surveyors and valuers, knew that the mortgagor, according to the general pattern of house purchases, typically could not afford a second valuation. Further, the defendant knew that the mortgagor would rely upon their valuation and the granting of the mortgage alone, without an independent survey, to reveal any serious defect in the property purchased. Lord Templeman claimed that ‘it is the purchaser who is vulnerable. If the valuation is worthless the building society can still insist that the purchaser shall repay the advance’,<sup>38</sup> whilst Lord Griffiths stated:

Mrs Smith did not obtain a structural survey of the property. She relied upon the valuer’s report to reveal any obvious serious defects in the house she was purchasing. It is common ground that she was behaving in the same way as the vast majority of purchasers of modest houses. ... [This decision] will obviously be of general application in broadly similar circumstances. But I expressly reserve my position in respect of valuations of quite different types of property.<sup>39</sup>

Chesterman J in *Fangrove* affirmed that the imputation of such assumptions of responsibility and reliance was founded upon policy considerations, claiming further that:

It cannot be supposed that all builders are wealthier and more worldly wise than all persons who might subsequently buy a house constructed by the builder. Nor is it realistic to assume that every house built and then sold will be comparatively modest and/or will represent the only substantial investment made in the purchaser’s lifetime. The imputation is made universal because both assumptions hold true for a large number of home purchasers in this country.<sup>40</sup>

These considerations are drawn out in Sections B and C below.

<sup>37</sup> [1990] 1 AC 831 (*‘Smith’*).

<sup>38</sup> *Ibid* 851.

<sup>39</sup> *Ibid* 855, 859.

<sup>40</sup> [1999] 2 Qd R 236, 244.

### B *Indeterminate Liability and the Pursuit of Personal Advantage*

The two policy considerations underlying the courts' traditional reluctance to recognise a duty of care in cases of mere financial loss were inapplicable in *Bryan*. As the builder owed the dwelling's first owner a duty to take reasonable care in constructing the building so as to avoid pure economic loss, there could be no inconsistency between the extension of that duty to subsequent purchasers and the builder's legitimate pursuit of their own financial interests.<sup>41</sup> Rather, Toohey J opined that restricting recovery to the first purchaser might lead to 'sham' first sales with the purpose of insulating builders from liability.<sup>42</sup>

Nor would the imposition of a duty of care give rise to liability of indeterminate amount or class. A cause of action could only be sustained by whoever owned the home when the defect first became manifest, in the sense of being actually discovered or discoverable by reasonable enquiry. Liability would be limited to the amount paid to rectify that defect.<sup>43</sup> Additionally, any difference in the duration of liability between the first and subsequent homeowners would do no more than reflect 'the chance element of whether and when the first owner dispose[d] of the house.'<sup>44</sup>

### C *Other Factors*

The following additional conclusions, concerning the relationship between a builder and subsequent purchaser, were also relevant to finding a duty of care with respect to the kind of economic loss sustained in *Bryan*.

#### 1 *Permanence and Significance of Investment*

Unlike a defective chattel, liability for which was specifically excluded from the decision's ambit,<sup>45</sup> a house is a permanent structure, intended to be used indefinitely, and which represents a significant investment.<sup>46</sup> This would be recognised and understood by any builder and was a factor arguing in favour of liability, given that issues of 'defectiveness' cannot be divorced from a building's contract price or purpose.

<sup>41</sup> *Bryan* (1995) 182 CLR 609, 626–7 (Mason CJ, Deane and Gaudron JJ).

<sup>42</sup> *Ibid* 663.

<sup>43</sup> *Ibid* 616–17, 623, 626–7 (Mason CJ, Deane and Gaudron JJ), 665 (Toohey J). See also *Hawkins v Clayton* (1988) 164 CLR 539, 588 (Deane J); Sharon Erbacher, 'Builder's Liability for Latent Defects: Recent Developments in the Torts–Contract Demarcation Dispute' (1996) 15 *University of Tasmania Law Review* 105, 113.

<sup>44</sup> *Bryan* (1995) 182 CLR 609, 626 (Mason CJ, Deane and Gaudron JJ), 663–4 (Toohey J); *Woolcock* (2004) 216 CLR 515, 575 (Kirby J).

<sup>45</sup> *Bryan* (1995) 182 CLR 609, 630 (Mason CJ, Deane and Gaudron JJ), 665 (Toohey J). Cf *Natcraft Pty Ltd v Det Norske Veritas* [2002] QCA 284 (Unreported, McPherson JA, White and Wilson JJ, 9 August 2002) [18] where McPherson JA would have applied the principles relating to defective buildings to a negligence claim pertaining to the construction of a vessel.

<sup>46</sup> *Bryan* (1995) 182 CLR 609, 625, 630 (Mason CJ, Deane and Gaudron JJ), 663 (Toohey J); *Woolcock* (2004) 216 CLR 515, 527 (Gleeson CJ, Gummow, Hayne and Heydon JJ).

## 2 Foreseeability

It was foreseeable to a builder that the negligent construction of a house would be likely to cause economic loss to whoever owned the building at the time.<sup>47</sup>

## 3 Duty to Avoid Physical Damage

The denial of a duty of care for economic loss equivalent to the cost of remedying the defect would foster an anomaly in that, if defects in construction were to cause physical damage to Maloney or her property, Bryan (as builder) would be liable.<sup>48</sup> However, Bryan would not be liable for work necessary to remedy the defect and avoid the occurrence of such damage in the future.<sup>49</sup>

## 4 Nature of Loss and Latency of Defect

‘Latent’ structural defects are incapable of discovery by visual inspection<sup>50</sup> and by their nature may not have manifested themselves for some time, often after the property’s sale. The Court therefore considered that ‘by virtue of superior knowledge, skill and experience in the construction of houses, it is likely that a builder will be better qualified and positioned to avoid, evaluate and guard against the financial risk’.<sup>51</sup>

The particular ‘kind’ of economic loss involved, being essentially very close to physical damage, was also important for making the test of recovery less onerous<sup>52</sup> and the loss more reasonably foreseeable.<sup>53</sup>

## 5 Contract and Intervening Acts

Although in some circumstances the contents of the contract between a builder and original owner may operate to exclude the existence of a duty of care,<sup>54</sup> Bryan’s contract contained no exclusion or limitation of liability. Nor was there any intervening negligence or other causative event contributing to Maloney’s

<sup>47</sup> *Bryan* (1995) 182 CLR 609, 625, 627 (Mason CJ, Deane and Gaudron JJ). Toohey J stated that ‘in a mobile society a builder must expect that the house will be sold within a relatively short time’: at 663. See also *Woolcock* (2004) 216 CLR 515, 527 (Gleeson CJ, Gummow, Hayne and Heydon JJ).

<sup>48</sup> See above n 6 and accompanying text. There is no distinction between commercial and residential properties in relation to this type of loss.

<sup>49</sup> *Bryan* (1995) 182 CLR 609, 628 (Mason CJ, Deane and Gaudron JJ); *Woolcock* (2004) 216 CLR 515, 563–4 (Kirby J).

<sup>50</sup> In denying a duty of care, Clarke JA in *Woollahra* (1996) 40 NSWLR 101, 134, 139 held that many of the defects were discoverable by ‘reasonably comprehensive inspection’. Priestley JA referred to ‘hidden departures from proper building standards’: at 118, and Cole JA to ‘undiscoverable defects in construction’: at 149. See also *Zumpano* [1997] 2 VR 525, 530–1 (Brooking JA); *Fangrove* [1999] 2 Qd R 236, 245 (Chesterman J); *Jiniess* [2000] NTSC 89 (Unreported, Riley J, 31 October 2000) [70]–[74].

<sup>51</sup> *Bryan* (1995) 182 CLR 609, 628 (Mason CJ, Deane and Gaudron JJ).

<sup>52</sup> Mead, above n 35, 25.

<sup>53</sup> Compared to the occurrence of physical damage to person or property (other than Maloney’s dwelling), a decrease in a premises’ value due to a latent defect was considered more readily foreseeable: *Bryan* (1995) 182 CLR 609, 626 (Mason CJ, Deane and Gaudron JJ).

<sup>54</sup> *Bryan* considered it uncertain how far this extends to subsequent purchasers who are third parties to any contract with the building professional, such issue being unnecessary to resolve that case: *ibid* 616–17, 619–22, 624–5 (Mason CJ, Deane and Gaudron JJ), 662, 665 (Brennan J). See also *Woolcock* (2004) 216 CLR 515, 531–3 (Gleeson CJ, Gummow, Hayne and Heydon JJ), 564 (Kirby J), 592 (Callinan J).

loss, which may have otherwise adversely affected the finding of sufficient causal proximity between Bryan's negligence and the damage sustained.<sup>55</sup>

#### D Effect

The High Court in *Bryan* therefore concluded that the similarities in a builder's relationship with the premises' first owner on the one hand, and with a subsequent owner on the other, were of greater significance than the differences such as to warrant extending a builder's field of liability for economic loss. Examples of such differences are, in the case of a subsequent purchaser, the absence of any direct contract or dealing; and the potentially longer period during which liability might arise.<sup>56</sup> However, the necessary relationship was based upon assumptions of responsibility and reliance that were presumed rather than actual. Thus, it would seem that the inference of a sufficient relationship in this manner is likely to depend upon the 'class of persons' under consideration. This has proved true in relation to purchasers of commercial buildings.

### III EXTENSION TO COMMERCIAL PREMISES

The application of *Bryan* to commercial premises has been considered on numerous occasions by several intermediate courts.<sup>57</sup> These decisions indicate a restrictive approach to the question of a builder's liability to subsequent purchasers for latent defects in construction. These courts have generally preferred to construe the High Court's decision strictly as a determination more reflective of its particular facts (in relation to residential dwellings), rather than as one applicable to a broad category of cases. Certainly this was the view adopted by Clarke JA in *Woollahra*, who stated that the 'authority of the decision does not extend to, for instance, the construction of a commercial building' and was restricted to

the liability for economic loss of a builder, who built a permanent residence pursuant to a construction contract which contained no terms limiting or excluding its liability, to a subsequent owner arising from the existence of latent defects discovered after that owner purchased the residence in circumstances where there was no intervening negligence.<sup>58</sup>

Past reluctance to extend liability to the commercial sector has been based upon the presumed capacity for those engaged in commerce to protect themselves against pure economic loss by means such as the employment of experts,

<sup>55</sup> *Bryan* (1995) 182 CLR 609, 627 (Mason CJ, Deane and Gaudron JJ); *Woolcock* (2004) 216 CLR 515, 527 (Gleeson CJ, Gummow, Hayne and Heydon JJ). In *Woollahra*, the council's negligence in stating that a certificate of building compliance would be issued had intervened between the builder's negligence and the purchaser's discovery of the damage: (1996) 40 NSWLR 101, 134, 139 (Clarke JA).

<sup>56</sup> *Bryan* (1995) 182 CLR 609, 627 (Mason CJ, Deane and Gaudron JJ); *Woolcock* (2004) 216 CLR 515, 527 (Gleeson CJ, Gummow, Hayne and Heydon JJ).

<sup>57</sup> *Woollahra* (1996) 40 NSWLR 101; *Zumpano* [1997] 2 VR 525; *Fangrove* [1999] 2 Qd R 236; *Jiniess* [2000] NTSC 89 (Unreported, Riley J, 31 October 2000); *Woolcock Street Investments Pty Ltd v CDG Pty Ltd* [2002] Aust Torts Reports ¶81-660.

<sup>58</sup> (1996) 40 NSWLR 101, 133. See also *Fangrove* [1999] 2 Qd R 236, 242 (McPherson JA).

the negotiation of warranties and contractual terms, and a greater degree of skill and self-reliance.<sup>59</sup> Therefore, a builder's assumption of responsibility based upon knowledge of a purchaser's likely reliance is not as readily presumed with commercial premises, or so the argument goes. For example, in *Fangrove* the Supreme Court of Queensland refused a claim for the cost of remedial work and lost rent brought by the subsequent owner of commercial premises against the structural engineer of a parapet, which collapsed 10 years after construction due to its inadequate design.<sup>60</sup> Chesterman J stated that the case

call[ed] into question the very basis for the imputation of assumption of responsibility and reliance ... The purchaser of a substantial commercial building acquired for profit does not fit the description of a purchaser of a modest suburban house who 'is likely to be unskilled in building matters and inexperienced in the niceties of real property investment'.<sup>61</sup>

However, in *Jiniess*, the Supreme Court of the Northern Territory upheld the pure economic loss claims made by subsequent purchasers of a mixed-use commercial and residential building against the complex's builders and engineers. The claims arose from defective design and construction causing water penetration and subsidence. Although the purchasers included corporations whose directors occupied the units as their place of residence, as well as individuals or corporations purchasing for the purpose of investment, Riley J stated that:

The purchasers of the residential units and of the commercial units ... are likely to be people of the same characteristics as Mrs Maloney. As with Mrs Maloney the plaintiffs 'will ordinarily have no greater, and will often have less, opportunity to inspect and test the footings of the house than the first owner'. The subsequent owner is just as 'likely to be unskilled in building matters and inexperienced in the niceties of real property investment' ... to assume that the [building] has been competently built ... The engineers will obviously have 'superior knowledge, skill and experience in the construction of [buildings]' and are clearly better qualified and positioned to 'avoid, evaluate and guard against the financial risk posed ...'.<sup>62</sup>

However, this was a shallow victory, as the Court did not award damages in favour of the owner of the commercial unit. The Court considered that once the unit was repaired there would be no diminution in its market value, as commercial purchasers were more influenced by the premises' return.<sup>63</sup> Whilst the residential unit owners recovered the cost of remedying the defects (together

<sup>59</sup> *Fangrove* [1999] 2 Qd R 236, 242 (McPherson JA); *Woolcock Street Investments Pty Ltd v CDG Pty Ltd* [2002] Aust Torts Reports ¶81-660, 68 795, 68 797 (Thomas JA).

<sup>60</sup> [1999] 2 Qd R 236.

<sup>61</sup> *Ibid* 245 (citations omitted). De Jersey CJ referred to an absence of evidence of reliance and assumption of responsibility: at 238. See also *Smith* [1990] 1 AC 831, 872 (Lord Jauncey).

<sup>62</sup> *Jiniess* [2000] NTSC 89 (Unreported, Riley J, 31 October 2000) [52] (citations omitted). See also at [55]–[56].

<sup>63</sup> See *Proprietors Units Plan No 95/38 v Jiniess Pty Ltd* [2001] NTSC 65 (Unreported, Riley J, 8 August 2001) [44]. See also *Jiniess* [2000] NTSC 89 (Unreported, Riley J, 31 October 2000) [19]–[20].

with consequential damages for relocation costs and loss of amenity) as well as loss of unit value subsequent to remedy, the commercial unit owner did not make these additional claims.

The basis of *Bryan*'s generally narrow interpretation in relation to commercial buildings can, in part, be sourced from the parameters of the decision imposed by the majority of the High Court. Toohey J limited the relevant duty of care to 'a house that is a non-commercial building',<sup>64</sup> whilst Mason CJ, Deane and Gaudron JJ confined their reasoning to 'the nature of the property involved, namely a building which was erected to be used as a permanent dwelling house'.<sup>65</sup> However, whilst their Honours' restrictive language was interpreted by some to preclude extension to commercial premises,<sup>66</sup> the judges themselves did not expressly indicate that this was impossible. For example, in *Zumpano*, Brooking JA recognised that, in view of its ultimate effect, *Bryan* was capable of both a wide application — imposing on builders who erect or alter any kind of building at least a prima facie duty of care — and narrow interpretation — confining the decision to the facts with which the High Court was concerned. However, his Honour suggested that the later construction would be difficult, because the joint judgment 'left open the position of buildings other than permanent dwelling houses'.<sup>67</sup> Therefore, whilst the law on this area was unsettled, it was universally accepted,<sup>68</sup> at least outside the Northern Territory, that any future extension of *Bryan* to subsequent owners of commercial buildings could not be undertaken without some legislative warrant or authority of the High Court. The appeal in *Woolcock* provided this opportunity.

#### IV *WOOLCOCK STREET INVESTMENTS PTY LTD V CDG PTY LTD*

A consideration of whether the distinction between purchasers of commercial and residential premises should be maintained in determining a builder's duty of care for pure economic loss required the High Court in *Woolcock* to ascertain whether there was good reason, in terms of principle or policy, to confine the decision in *Bryan*. In 1987, the trustee of a property trust engaged CDG Pty Ltd (the first respondent) to design the foundations of a commercial warehouse and office complex. The second respondent was a civil engineer employed by the first respondent and was its project manager in relation to the complex's design and construction. Seven years after completion, and following the building's

<sup>64</sup> *Bryan* (1995) 182 CLR 609, 665.

<sup>65</sup> *Ibid* 630.

<sup>66</sup> See, eg, *Woolcock Street Investments Pty Ltd v CDG Pty Ltd* [2002] Aust Torts Reports ¶81-660, 68 794 (McMurdo P); *Woolcock* (2004) 216 CLR 515, 586 (Callinan J); Gordon Smith, 'The Application of *Bryan v Maloney* to Commercial Buildings' (1999) 15 *Building and Construction Law* 221, 224.

<sup>67</sup> [1997] 2 VR 525, 529. See also at 528, 530 (Brooking JA); *Woolcock* (2004) 216 CLR 515, 528 (Gleeson CJ, Gummow, Hayne and Heydon JJ), 566–70 (Kirby J).

<sup>68</sup> *Fangrove* [1999] 2 Qd R 236, 241 (de Jersey CJ), 242 (McPherson JA), 245 (Chesterman J); *Woolcock Street Investments Pty Ltd v CDG Pty Ltd* [2002] Aust Torts Reports ¶81-660, 68 794 (McMurdo P), 68 798–9 (Thomas JA); Jennifer McVeigh, 'Liability to Purchasers of Commercial Premises Resolved?' (1999) 13 *Australian Property Law Bulletin* 63; Elsa Van Wijk, '*Bryan v Maloney* Limited to Domestic Dwellings' (1999) 11 *Australian Construction Law Bulletin* 1, 1–2.

subsequent purchase in 1992 by Woolcock Street Investments Pty Ltd (the appellant ‘Woolcock’), substantial structural defects became manifest due to the settlement of the foundations, or the materials below them, or both. This had allegedly occurred as a result of the respondents’ negligent design of the footings or supervision of their construction, in coastal soil conditions liable to subsidence. The appellant sought to claim the pure economic loss suffered as a result, being damages for the cost of demolishing and reconstructing part of the complex, together with consequential loss of rent.<sup>69</sup>

Proceedings commenced in the Supreme Court of Queensland, which referred the matter to the Court of Appeal as a case stated,<sup>70</sup> requiring the determination of whether the statement of claim (or pleadings) disclosed a cause of action in negligence. Notwithstanding, the matter was treated as requiring an answer to a substantial question of law; namely, whether the respondents owed the appellant a duty of care.<sup>71</sup> In answering this question in the negative, the Court of Appeal considered, for the reasons discussed earlier, that the vulnerability of those who acquired commercial premises was considerably less than that of residential purchasers.<sup>72</sup> The manner in which the case came before the High Court is significant and, as will be shown, affected their Honours’ judgments by limiting their point of reference to the agreed facts in the case stated, reasonable inferences drawn from those facts, and the appellant’s statement of claim.<sup>73</sup>

A 6:1 majority of the High Court confirmed that no duty of care was owed,<sup>74</sup> and that ‘[n]either the principles applied in *Bryan v Maloney*, nor those principles as developed in subsequent cases’<sup>75</sup> supported Woolcock’s claim. Whilst Kirby J provided a lone dissent, Gleeson CJ, Gummow, Hayne and Heydon JJ, in finding for the respondents, provided a joint judgment of a slightly different focus to McHugh and Callinan JJ’s individual findings.

Their Honours’ reasoning can again be divided amongst several broad themes.

#### A *Reliance and Assumption of Responsibility*

The joint judgment confirmed that in *Bryan* the duty of care to avoid economic loss owed to the subsequent purchaser depended upon the anterior step of concluding that the builder owed the first owner a duty of care to avoid loss of that kind.<sup>76</sup> Therefore, the case required an equation of the builder’s

<sup>69</sup> *Woolcock Street Investments Pty Ltd v CDG Pty Ltd* [2002] Aust Torts Reports ¶81-660, 68 794 (Thomas JA).

<sup>70</sup> Under the *Uniform Civil Procedure Rules 1999* (Qld) r 483(2).

<sup>71</sup> *Woolcock* (2004) 216 CLR 515, 524 (Gleeson CJ, Gummow, Hayne and Heydon JJ).

<sup>72</sup> *Woolcock Street Investments Pty Ltd v CDG Pty Ltd* [2002] Aust Torts Reports ¶81-660, 68 793–4 (McMurdo P), 68 795–9 (Thomas JA), 68 799 (Douglas J) preferring instead to follow the Court’s prior decision in *Fangrove* [1999] 2 Qd R 236.

<sup>73</sup> *Woolcock* (2004) 216 CLR 515, 524 (Gleeson CJ, Gummow, Hayne and Heydon JJ).

<sup>74</sup> *Ibid* 531, 534 (Gleeson CJ, Gummow, Hayne and Heydon JJ), 535, 559–60 (McHugh J), 586–7, 593–4 (Callinan J), 564–5, 577, 582 (Kirby J, in dissent).

<sup>75</sup> *Ibid* 534 (Gleeson CJ, Gummow, Hayne and Heydon JJ).

<sup>76</sup> *Ibid* 526–7 (Gleeson CJ, Gummow, Hayne and Heydon JJ).

responsibilities to the first owner with those owed to the subsequent owner, where assumption of responsibility and reliance were characteristics of the ‘ordinary’ relationship with both parties.<sup>77</sup>

On *Woolcock*’s facts, however, there was no reliance by the premises’ original owner on the respondents and no corresponding assumption of responsibility.<sup>78</sup> The trustee company undertaking the development for the original owner had asserted control over the investigations performed for the purpose of constructing the foundations.<sup>79</sup> Despite the first respondent obtaining a quotation for the necessary geotechnical investigations, the original owner, through its manager, had refused to pay for them and had instead directed the adoption of particular footing sizes. Consequently, construction proceeded without testing the subsoil’s suitability for the building constructed. Therefore, unlike *Bryan*, this was not a case where the owner had entrusted the premises’ construction to the building professional. As there was no duty of care owed by the respondents to the original owner, there could not be a corresponding duty of care owed to the appellant as subsequent owner.

McHugh J concluded that there is no duty upon those involved in the design or construction of commercial premises to take reasonable care to prevent pure economic loss, unless there is a contract between the building professional and the relevant claimant, be they a first or subsequent purchaser.<sup>80</sup> However, where a contract exists, his Honour opined that notions of assumption of responsibility and reliance might suffice to create a duty of care in tort as well as obligations in contract.<sup>81</sup> *Woolcock*, however, had no contractual relationship with the respondents.

Like McHugh J in *Perre*,<sup>82</sup> who considered reliance and assumption of responsibility to be indicators of a claimant’s vulnerability, Kirby J held that ‘assumption of risk, known reliance and commercial pressures’ were relevant to establishing vulnerability.<sup>83</sup> However, contrary to the joint judgment, his Honour found persuasive the appellant’s argument that the respondents not only owed a duty of care to the first owner, but to those who, within a comparatively short time and within the respondents’ reasonable contemplation, acquired the premises in reliance upon the professional’s skill and without investigation. Kirby J was persuaded by this argument, as the latent defect arose from the respondents’ conduct in continuing to act as engineers after an obviously important test was refused.<sup>84</sup> If the original owner could veto construction in this manner, it was claimed that the practical effect of employing a professional at all would be rendered nugatory.

<sup>77</sup> *Ibid.* See also *Bryan* (1995) 182 CLR 609, 624–7 (Mason CJ, Deane and Gaudron JJ).

<sup>78</sup> *Woolcock* (2004) 216 CLR 515, 532 (Gleeson CJ, Gummow, Hayne and Heydon JJ).

<sup>79</sup> *Ibid.* 523, 531–2 (Gleeson CJ, Gummow, Hayne and Heydon JJ), 535–6 (McHugh J), 563–4 (Kirby J).

<sup>80</sup> *Woolcock* (2004) 216 CLR 515, 535, 559.

<sup>81</sup> *Ibid.* His Honour’s preference that claims should be regulated by contract, not tort, is similar to Brennan J’s dissenting judgment in *Bryan* (1995) 182 CLR 609, 630–55.

<sup>82</sup> (1999) 198 CLR 180, 228.

<sup>83</sup> *Woolcock* (2004) 216 CLR 515, 576.

<sup>84</sup> *Ibid.* 563–4. Cf at 592–3 (Callinan J).

B *Vulnerability*

All members of the Court recognised the importance of ‘vulnerability’ to the finding of a duty of care to avoid economic loss since *Caltex* and *Perre*. However, as in *Bryan*, the various judgments in *Woolcock* also emphasised the importance of policy considerations in the determination of a duty of care relating to defective premises.<sup>85</sup> McHugh J confirmed that in particular cases, policies and principles might guide and even determine the outcome, and require a value judgement as to whether a duty of care should be owed.<sup>86</sup> Therefore, even if vulnerability can be shown in the context of a pure economic loss case, it may not be determinative.

1 *The Joint Judgment*

Defining vulnerability as a claimant’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’,<sup>87</sup> Gleeson CJ, Gummow, Hayne and Heydon JJ held that the information before them did not show that Woolcock was in this way vulnerable to the economic consequences of the respondents’ negligence.<sup>88</sup> There was no evidence that Woolcock could not have protected itself, only that nothing had been done on the facts. For example, there was simply evidence that Woolcock had not:<sup>89</sup>

- 1 obtained a warranty from the vendor that the complex was free from structural defect; or
- 2 sought an assignment of the vendor’s rights against the respondents or others in respect of any defects; or
- 3 obtained a pre-purchase inspection.

There was nothing to show, in the first and second instances, whether these precautions were in fact possible to obtain in a commercial contract of sale and therefore, consistently with tort’s expansion harmoniously with the law of contract,<sup>90</sup> what ‘could have been done to cast on the respondents the burden of the economic consequences of any negligence.’<sup>91</sup> Similarly, regarding the third instance, it was not alleged that the defects could not have been discovered by any other investigation, for example by retaining an expert to inspect the

<sup>85</sup> (2004) 216 CLR 515, 529–30 (Gleeson CJ, Gummow, Hayne and Heydon JJ), 547, 550–7 (McHugh J), 564–6, 573–4, 577–80 (Kirby J), 592–3 (Callinan J). For example, such considerations include individual autonomy, indeterminate/disproportionate liability, the lack of a measurable standard of care and ensuring consistency with contract law and the policy of limitation legislation.

<sup>86</sup> *Ibid* 547, 559.

<sup>87</sup> *Ibid* 530 (Gleeson CJ, Gummow, Hayne and Heydon JJ) citing Stapleton, ‘Comparative Economic Loss’, above n 13, 558–9.

<sup>88</sup> (2004) 216 CLR 515, 533.

<sup>89</sup> *Ibid* 523, 533 (Gleeson CJ, Gummow, Hayne and Heydon JJ).

<sup>90</sup> See above n 12 and accompanying text.

<sup>91</sup> *Woolcock* (2004) 216 CLR 515, 533 (Gleeson CJ, Gummow, Hayne and Heydon JJ). See also 549–53 (McHugh J), 576–7 (Kirby J). A vendor liable under a contractual warranty would be likely to attempt to join the negligent professional liable for the defect (the respondent), either directly or by enforcing a warranty given by another preceding vendor.

building or enquiring of the building's tenants or agents. The material available to the Court only showed that the defects were, perhaps understandably, 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 is ... in a structural condition prejudicial to inhabitants or property'.<sup>92</sup> In addition, the pleadings were also silent as to whether the building's purchase was a significant investment for the appellant.<sup>93</sup>

## 2 *McHugh and Callinan JJ*

In considering whether those involved in the construction of commercial premises owed a duty of care to a subsequent purchaser, McHugh J applied the five factors previously advocated by his Honour in *Perre* as relevant to the determination of a duty in all pure economic loss claims, namely: reasonable foreseeability of loss; avoidance of indeterminate liability; protection of individual autonomy; vulnerability to risk of harm; and a defendant's knowledge of the risk and its magnitude.<sup>94</sup> Kirby and Callinan JJ also generally endorsed this test.<sup>95</sup> However, the critical issue was again a claimant's 'vulnerability'.<sup>96</sup>

Similarly to the joint judgment, McHugh J defined the term as meaning not merely that a claimant would be exposed to risk if reasonable care were not taken, but rather that 'by reason of ignorance or social, political or economic constraints, the plaintiff was not able to protect' itself.<sup>97</sup> However, notwithstanding observations that no evidence of common practice was presented, and that contractual warranties and expert building inspections may not necessarily protect a claimant against the economic loss caused by latent defects in construction,<sup>98</sup> McHugh J opined that cases where contractual protection is deficient are likely to be the 'exception rather than the rule'.<sup>99</sup> In this context, and consistently with the joint judgment, his Honour recognised that one's capacity to protect oneself from damage by means of contractual obligation is often a strong policy reason for rejecting the existence of a duty of care for economic loss.<sup>100</sup> Finding it 'surprising' if the first or subsequent owner of commercial premises could not do so, McHugh J therefore concluded that Woolcock was not vulnerable based upon an assumption that 'ordinarily'<sup>101</sup>

<sup>92</sup> Pursuant to the *Building Act 1975* (Qld) s 53(2), repealed by *Building and Integrated Planning Amendment Act 1998* (Qld) s 15. Now see *Building Act 1975* (Qld) s 22.

<sup>93</sup> *Woolcock* (2004) 216 CLR 515, 533 (Gleeson CJ, Gummow, Hayne and Heydon JJ). See above nn 45–6 and accompanying text for a discussion of this factor's importance in *Bryan*.

<sup>94</sup> (1999) 198 CLR 180, 220; *Woolcock* (2004) 216 CLR 515, 547 (McHugh J).

<sup>95</sup> *Woolcock* (2004) 216 CLR 515, 574 (Kirby J), 585–6, 592–3 (Callinan J). However, the additional factors enumerated by Callinan J in *Perre* (1999) 198 CLR 180, 326–9 such as a special relationship and a defendant's control, were also indirectly referred to by his Honour.

<sup>96</sup> *Ibid* 548–50 (McHugh J).

<sup>97</sup> *Ibid* 549.

<sup>98</sup> For example, a builder or vendor may become insolvent, and an examination may not reveal the presence of latent defects and might only occur at considerable expense.

<sup>99</sup> *Ibid* 559.

<sup>100</sup> *Ibid* 552–3, 558–60. See also earlier statements by McHugh J in *Perre* (1999) 198 CLR 180, 226–7.

<sup>101</sup> *Woolcock* (2004) 216 CLR 515, 552–3, 558.

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 that a subsequent purchaser is able to bargain for contractual warranties from the vendor ...<sup>102</sup>

Therefore, according to his Honour, a claimant's failure to take reasonable steps open to them was not grounds for holding that a defendant owes a duty of care.<sup>103</sup> Rather, given that commercial buildings are usually purchased for profit, no prudent purchaser should contemplate buying premises without determining its capacity for existing or potential defects, such knowledge being essential to an evaluation of its worth as an investment. A prudent purchaser would instead factor risk into the price, obtain contractual protection, or walk away from negotiations.

However, Callinan J, whilst confirming that vulnerability alone will not give rise to a duty of care,<sup>104</sup> cautioned against the use of such assumptions in determining novel cases without reference to common practice, stating that:

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 ... 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.<sup>105</sup>

Applying the policy behind the defence of caveat emptor strictly, his Honour therefore concluded that it would be wrong to assert that any purchaser of any premises, dwelling or otherwise (including the appellant) is vulnerable — in the absence of any conduct by the defendant inducing them not to take steps of self-protection.<sup>106</sup> Instead, in line with Brennan J's reasoning in *Bryan*,<sup>107</sup> Callinan J preferred to leave the social question of whether building costs should be inflated to cover the 'transmissible warranty of quality' imposed upon professionals if a duty were owed to Parliament.<sup>108</sup> However, this conclusion was expressly criticised by Kirby J, who considered the defence only applicable as between vendors and purchasers and advocated an approach to determining novel duties of care that includes and legitimises a court's transparent consideration of policy issues.<sup>109</sup>

<sup>102</sup> Ibid 553.

<sup>103</sup> Ibid 559–60.

<sup>104</sup> Ibid 592.

<sup>105</sup> Ibid 590 (citations omitted).

<sup>106</sup> Ibid 587–9, 592–3.

<sup>107</sup> (1995) 182 CLR 609, 644.

<sup>108</sup> *Woolcock* (2004) 216 CLR 515, 587, 593.

<sup>109</sup> Ibid 572–3, 577–8. However, Kirby J acknowledged that the Court has abandoned the test in *Caparo Industries plc v Dickman* [1990] 2 AC 605 'for the time being': at 572–4.

### 3 *Kirby J's Dissent*

It was on the element of vulnerability from McHugh J's five factor test that Kirby J diverged from the majority of the Court. Holding that Woolcock's claim that a duty of care was owed was viable, and that the matter should proceed to a full trial,<sup>110</sup> Kirby J criticised McHugh J's definition of 'vulnerability', considering that the notion was 'not confined to cases of poverty, disability, social disadvantage or relative economic power.'<sup>111</sup> That is to say, the element required a consideration not solely of the characteristics of a particular claimant, but rather of all the circumstances of the case, including presumably the relationship between the parties. His Honour therefore considered that no barrier to recovery existed merely because the appellant was a corporation or because its purchase was an investment.<sup>112</sup> In addition, courts should be reluctant to assume that a plaintiff lacks vulnerability, either in hindsight, or merely due to their commercial character. In this way, the majority's findings or assumptions as to Woolcock's lack of vulnerability on the case stated were further criticised:

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.<sup>113</sup>

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. 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 trial. ... 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.<sup>114</sup>

Furthermore, whilst accepting that in a commercial context an entity's capacity to protect itself is an important factor in determining vulnerability, Kirby J opined that 'assumption of risk, known reliance and commercial pressures',<sup>115</sup> are also relevant.

His Honour, therefore, found the appellant vulnerable, as it had no reasonable opportunity of discovering and protecting itself against the latent defect — it being under the ground and beneath a building which was relatively new, of significant value, and supposedly erected under professional supervision.<sup>116</sup> Consequently, the appellant had no reason to suspect that the premises were otherwise than properly built, or that the appellant should have taken steps to protect itself. In these circumstances, why should the appellant reasonably have

<sup>110</sup> *Woolcock* (2004) 216 CLR 515, 564–5, 577, 582.

<sup>111</sup> *Ibid* 575. Kirby J has made similar comments in *Northern Sandblasting Pty Ltd v Harris* (1997) 188 CLR 313, 401.

<sup>112</sup> *Woolcock* (2004) 216 CLR 515, 577–80. See also *Jiniess* [2000] NTSC 89 (Unreported, Riley J, 31 October 2000) [63]–[67], [75]–[76].

<sup>113</sup> *Woolcock* (2004) 216 CLR 515, 578 (citations omitted).

<sup>114</sup> *Ibid* 566 (citations omitted).

<sup>115</sup> *Ibid* 576.

<sup>116</sup> *Ibid* 575–7.

anticipated a need to obtain a warranty, and why would a vendor, especially one that was itself a later purchaser, be conceivably willing to give such a warranty?

### C Other Factors

In applying the remaining factors from *Perre*<sup>117</sup> to the circumstances in *Woolcock*, McHugh, Callinan and Kirby JJ made the following observations.

#### 1 Reasonable Foreseeability of Loss and Knowledge of Risk

It was foreseeable that if a building's foundations were defective, the owner at the time of subsidence would be put to expense in effecting repairs.<sup>118</sup> The respondents were also aware of the relevant risk and its magnitude, such risk being the reason for their employment as professionals.<sup>119</sup> In addition, the respondents had suggested that ground tests be conducted to determine whether there was a risk of subsidence. McHugh J opined that '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.'<sup>120</sup>

#### 2 Indeterminate Liability and Individual Autonomy

McHugh and Kirby JJ considered indeterminacy issues insufficient to defeat claims for the pure economic loss suffered by first or subsequent purchasers of commercial buildings.<sup>121</sup> In particular, Kirby J, similarly to the majority in *Bryan*, held that as liability was ordinarily confined to the owner when the defect became manifest, the class of potential claimants was ascertained and the maximum duration of liability restricted to that specified by the applicable limitations statute.<sup>122</sup> However, McHugh J was concerned that as tortious liability did not occur until the defect manifested itself, as compared to the law of contract where the cause of action arose upon breach, if liability for defective construction were allowed, defendants would be required to defend themselves many years after the offending task's completion.<sup>123</sup> This would create a paradox, in that a defendant may be sued in tort years after time had expired on the contract giving rise to liability, and would affront the limitations statutes' policy of fixing definite times for the prosecution of civil claims in order to circumvent the effects of delay upon the quality of justice. It would also be undesirable to commercial enterprise if those involved in construction, and their insurers, were required to wait years to gauge the extent of their potential liability. Again, similar to *Bryan*, McHugh and Kirby JJ confirmed that being already under a

<sup>117</sup> (1999) 198 CLR 180, 220 (McHugh J).

<sup>118</sup> *Woolcock* (2004) 216 CLR 515, 547–8 (McHugh J), 574–5 (Kirby J), 592 (Callinan J).

<sup>119</sup> *Ibid* 550 (McHugh J), 577 (Kirby J).

<sup>120</sup> *Ibid* 550.

<sup>121</sup> *Ibid* 548, 553 (McHugh J), 575 (Kirby J).

<sup>122</sup> *Ibid* 575.

<sup>123</sup> *Ibid* 555–8.

duty to the initial owner, it would not otherwise interfere with the respondents' commercial freedom to impose a duty of care in relation to subsequent purchasers.<sup>124</sup>

Callinan J, in commenting that the appellant's submissions selectively referred to determinacy of class only, inferred that there might have been problems satisfying the remaining two elements of Cardozo CJ's test:<sup>125</sup> indeterminacy of time and amount.<sup>126</sup> His Honour also considered that commercial freedom might be impeded through the imposition of liability, in *Woolcock's* circumstances, disrupting parties' contractual allocation of risk.<sup>127</sup> The contract between the first owner and the respondents was clearly one under which the owner chose to accept the risks flowing from not conducting a geotechnical investigation. Parties to a contract should therefore be '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 the other of them.'<sup>128</sup>

However, with respect to McHugh and Callinan JJ's comments, it is difficult to see why issues regarding indeterminacy should play a particular role in denying a duty of care to guard against economic loss arising from commercial construction, given that *Bryan* deemed such issues insufficient to deny liability in a residential context.<sup>129</sup> Surely considerations of delay can instead be adequately addressed when determining the appropriate standard of care or breach,<sup>130</sup> for the greater the period subsequent to construction, the higher the likelihood of the defect arising due to fair wear and tear — in circumstances where at the time of construction the work was conducted to a reasonable standard.

#### D *Bryan v Maloney: What Now?*

*Bryan*, whilst based upon a now-abandoned notion of proximity, was not overruled in *Woolcock*. Rather, the decision appeared to be accepted, and its reasoning, although in result confined to its facts, was generally approved and compared to the case at hand.<sup>131</sup> Kirby J considered that although not providing a solution in itself, proximity (and presumably the factors or indicia constituting it), as a synonym for legal 'neighbour', remains relevant to determining the existence of a duty relationship.<sup>132</sup> However, in confining *Bryan's* ratio decidendi strictly, McHugh J considered that the factors it identified as relevant to liability, being based on proximity, could not therefore be used even by way of analogy in considering the extension of a building professional's duty of care to

<sup>124</sup> Ibid 548 (McHugh J), 575 (Kirby J).

<sup>125</sup> *Ultramares*, 174 NE 441, 444 (NY, 1931).

<sup>126</sup> *Woolcock* (2004) 216 CLR 515, 591–2.

<sup>127</sup> Ibid 592.

<sup>128</sup> Ibid.

<sup>129</sup> See above nn 43–4 and accompanying text.

<sup>130</sup> See, eg, *Bryan* (1995) 182 CLR 609, 665 (Toohey J); *Woolcock* (2004) 216 CLR 515, 578–9 (Kirby J).

<sup>131</sup> See, eg, *Woolcock* (2004) 216 CLR 515, 526–9, 531–3 (Gleeson CJ, Gummow, Hayne and Heydon JJ).

<sup>132</sup> Ibid 568–9. However, unlike the joint judgment, his Honour did not expressly apply the factors held relevant in *Bryan* to *Woolcock*.

the construction of commercial premises.<sup>133</sup> Whilst concluding that this did not suggest that *Bryan* would be decided differently today, his Honour did suggest that whether a different decision would be reached under current doctrine would depend upon ‘whether evidence would reveal that the purchasers of dwelling houses are as vulnerable as the court assumed’.<sup>134</sup>

Callinan J, whilst not expressing a final opinion on the matter, was therefore the only judge to strongly criticise *Bryan*’s correctness, as both being decided at a time when the Court was more heavily influenced by proximity and as concerning incorrect assumptions as to the vulnerability of purchasers.<sup>135</sup> The assumptions upon which the law is based should change in line with modern-day realities.<sup>136</sup> However, as *Smith*<sup>137</sup> indicates, Callinan J’s proposition that the vulnerability of residential purchasers might equally be denied on the basis that, as most sales are financed, a prudent lender will insist upon the premises’ professional survey, could overestimate a claimant’s capacity for self-protection in that context. More recently, in *Taitapanui*,<sup>138</sup> the Supreme Court of Victoria confirmed the vulnerability of subsequent purchasers of dwellings in a post-*Woolcock* environment. The case concerned an action against a builder, the builder’s insurer, a private building surveyor and the surveyor’s employer for pure economic loss equal to the demolition costs, arising from defective construction certified by the issuing of a building permit and a failure to properly perform statutory inspections. In finding that the surveyor owed a duty of care to the subsequent owners in possession when the defects became apparent, the Court considered that the claimant’s reliance, dependency and limited ability to secure practical or legal protection were relevant features of vulnerability, stating:

Many, if not most purchasers will rely upon a visual inspection and an assumption that the original work has been done properly. Such an assumption is reasonable (and to be expected) when there is, as here, a comprehensive system of building regulation ... It is unrealistic to expect purchasers of dwellings as a class generally to be able to obtain, let alone know about, contractual protections.<sup>139</sup>

Therefore, under the current rubric of ‘vulnerability’, it has not been conclusively determined that *Bryan* would be decided differently today.

### E *Effect*

At first glance, it might be tempting to conclude that the High Court’s decision in *Woolcock* limits the liability of building professionals by excluding a duty of care to subsequent purchasers of commercial properties, upon the basis that such claimants have a better capacity to protect themselves, being purchasers not as

<sup>133</sup> Ibid 546–7.

<sup>134</sup> Ibid 560.

<sup>135</sup> Ibid 587–90.

<sup>136</sup> See, eg, *De Sales v Ingrilli* (2002) 212 CLR 338, 393 (Kirby J).

<sup>137</sup> [1990] 1 AC 831. See above nn 37–9 and accompanying text.

<sup>138</sup> [2004] VSC 239 (Unreported, Smith J, 1 July 2004).

<sup>139</sup> Ibid [126] (Smith J).

influenced by need as those of residential dwellings. However, this would grossly underestimate the complexity of the issue.

On balance, the decision confirmed that the principles of *Bryan* did not depend upon any ‘bright line’ or ‘distinction between particular kinds of, or uses for, buildings’, only upon considerations of assumption of responsibility, reliance, and proximity.<sup>140</sup> In addition, the Court was significantly constrained by both the case stated procedure via which the appeal was heard and the consequently limited material, to the disadvantage of the party seeking recovery, upon which to base its conclusions.<sup>141</sup> The determination of a duty of care in novel, or developing, duty categories is heavily influenced by the facts of the particular case under consideration, and as discussed, by policy. This was acknowledged by Gleeson CJ, Gummow, Hayne and Heydon JJ, who therefore considered it ‘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’.<sup>142</sup> Their Honours’ conclusion as to the appellant’s lack of vulnerability — being merely based upon the agreed facts being such as not to show whether Woolcock could not have protected itself, only that no measures appeared to have been taken — is arguably evidence of this. Even McHugh J’s apparently more emphatic conclusion that purchasers of commercial properties were not vulnerable, having the means to contractually protect themselves, recognised that the question of whether a tortious action be allowed, involved a value judgement where the ‘data that might permit that judgement to be made, if the data exists at all’, was not before the Court.<sup>143</sup>

It would therefore seem that whilst unsuccessful on the facts of the individual case stated in *Woolcock*, the issue of whether liability may extend to commercial premises has not been conclusively decided. Consideration must therefore be given as to how this might be resolved in the future.

#### V LOOKING TOWARDS THE FUTURE

Their Honours did not consider it necessary to ‘articulate the breadth of any general proposition’ about the importance of the concept of ‘vulnerability’ in *Woolcock*.<sup>144</sup> However, it is without doubt that in any future consideration of whether building professionals owe a duty of care to guard against the economic loss caused when a latent defect in commercial premises first becomes manifest,

<sup>140</sup> (2004) 216 CLR 515, 527 (Gleeson CJ, Gummow, Hayne and Heydon JJ). Kirby J opined 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’: at 570. See also 567–8 (Kirby J).

<sup>141</sup> *Ibid* 523–5 (Gleeson CJ, Gummow, Hayne and Heydon JJ), 536 (McHugh J), 561–2, 565–6 (Kirby J), 582–4 (Callinan J).

<sup>142</sup> *Ibid* 525.

<sup>143</sup> *Ibid* 559.

<sup>144</sup> *Ibid* 531 (Gleeson CJ, Gummow, Hayne and Heydon JJ).

the purchaser's vulnerability in that context will be a key element to be pleaded and established. In the case of a subsequent purchaser, it will also need to be shown that a duty of care was owed to the building's original owner.<sup>145</sup>

In this way, an inability to protect oneself will be a factor adding to vulnerability, whilst an ability to do so may result in a duty being denied. This is in line with the current general focus in tort law reform upon a need for greater self-responsibility. It is also consistent with the High Court's concern not to override the law of contract by imposing tortious liability where contractual remedies are obtainable. Contract is usually preferred to regulate liability where indeterminate liability for economic or commercial loss is feared, as it encourages a more efficient allocation of risk and liability through voluntary exchange, rather than the defendant bearing sole responsibility.<sup>146</sup> However, the general consensus is that indeterminacy issues are absent in builders' liability cases, and that whilst contract law requires that parties be capable of bargaining to protect their interests, vulnerable claimants cannot meaningfully do this. Hence, the obligation is only likely to be one to take 'reasonable'<sup>147</sup> steps in self-protection. Building professionals may therefore be liable if defendants,<sup>148</sup> or market conditions,<sup>149</sup> prevent claimants from securing appropriate protection. A claimant's capacity to procure insurance would be an unlikely indicator of their vulnerability, given current judicial and academic sentiment as to the existence of insurance being irrelevant to the determination of a duty of care.<sup>150</sup>

A majority of the Court in *Woolcock* treated vulnerability as encompassing not only those situations where claimants are unable to protect themselves from the consequences of a defendant's want of reasonable care (either entirely or in a way which would cast the consequences of the loss on the defendant), but also situations where there is an assumption of responsibility and/or reliance.<sup>151</sup> Furthermore, whilst the way in which the differences in their Honours' approaches to the concept are reconciled — as between a 'circumstances of the case' or McHugh J's 'individual claimant focused' approach — remains to be seen, in light of past jurisprudence it would seem that a claimant's vulnerability requires consideration at two levels. Namely, it must be shown that:

<sup>145</sup> *Ibid* 526–7, 531–2 (Gleeson CJ, Gummow, Hayne and Heydon JJ); *Bryan* (1995) 182 CLR 609, 622–5, 627 (Mason CJ, Deane and Gaudron JJ).

<sup>146</sup> See, eg, *Perre* (1999) 198 CLR 180, 226 (McHugh J).

<sup>147</sup> *Woolcock* (2004) 216 CLR 515, 559–60 (McHugh J), 575–7 (Kirby J).

<sup>148</sup> *Ibid* 559 (McHugh J), 593 (Callinan J) referring to *Perre* (1999) 198 CLR 180, 225 (McHugh J).

<sup>149</sup> *Woolcock* (2004) 216 CLR 515, 576 (Kirby J) ('commercial pressures'), 550, 552–3 (McHugh J) (common building or conveyancing practice); Stapleton, 'Comparative Economic Loss', above n 13, 554; Peter Cane, 'The Blight of Economic Loss: Is There Life after *Perre v Apand*?' (2000) 8 *Torts Law Journal* 246, 259.

<sup>150</sup> *Caltex* (1976) 136 CLR 529, 581 (Stephen J); *Esanda Finance Corporation Ltd v Peat Marwick Hungerfords* (1997) 188 CLR 241, 282–3 (McHugh J); *Perre* (1999) 198 CLR 180, 230 (McHugh J); Jane Stapleton, 'Tort, Insurance and Ideology' (1995) 58 *Modern Law Review* 820, 829–32.

<sup>151</sup> (2004) 216 CLR 515, 531 (Gleeson CJ, Gummow, Hayne and Heydon JJ), 576 (Kirby J).

- 1 the claimant belongs to a class of persons (namely purchasers of commercial premises generally) who, as a whole, the court considers ‘ordinarily’ vulnerable;<sup>152</sup> and
- 2 the particular claimant, in the circumstances of the relationship between the parties, is in fact vulnerable.

#### *A Class Vulnerability*

Future consideration of the general vulnerability of subsequent purchasers of commercial premises might well conclude that the difference between commercial and residential purchasers is not as great as case law suggests.<sup>153</sup> Similar to residential dwellings, the purchase of commercial premises represents a significant capital outlay in respect of a permanent structure, which is generally intended to be used indefinitely, or if not, is certainly designed to have a particular useful life.<sup>154</sup> A serious defect in a commercial property can be proportionately just as expensive to rectify and just as likely to diminish the building’s overall value (whether measured in terms of its market value or its return as an investment). The assumption that commercial purchasers can withstand losses to a greater extent is also fallacious, given that such purchasers may not necessarily be large corporations. Certainly, Kirby J supports the view that entrepreneurs, purchasers for investment and corporations are not outside the protection of the law of negligence in this area.<sup>155</sup> In addition, similar to commercial sales, many purchasers of residential premises are likely to be professionally advised or assisted.

As the commercial premises constitute a connecting link between the subsequent purchaser and the building professional, it is foreseeable that the premises’ negligent construction would be likely to cause economic loss to the owner at the time its inadequacy becomes manifest. In contemporary Australia, one might ordinarily expect a commercial building to be carefully built and therefore structurally sound.<sup>156</sup> Further, one would expect that, by virtue of their superior knowledge, skill, experience and responsibility for construction, building professionals would, as opposed to any purchaser, be better qualified and positioned to evaluate and guard against the potential risk of latent defects.

<sup>152</sup> Ibid 526–7 (Gleeson CJ, Gummow, Hayne and Heydon JJ), 545–6, 558–9 (McHugh J), 586, 590 (Callinan J); *Bryan* (1995) 182 CLR 609, 624–5, 627 (Mason CJ, Deane and Gaudron JJ) (references to ‘ordinarily’ and ‘such as’); *Woolcock Street Investments Pty Ltd v CDG Pty Ltd* [2002] Aust Torts Reports ¶81-660, 68 794, 68 794 (Thomas JA); *Taitapanui* [2004] VSC 239 (Unreported, Smith J, 1 July 2004) [85], [120], [126] (Smith J).

<sup>153</sup> See above n 57 and accompanying text.

<sup>154</sup> *Woolcock* (2004) 216 CLR 515, 563 (Kirby J). In *Bryan* (1995) 182 CLR 609, 627, Mason CJ, Deane and Gaudron JJ mention ‘a period during which it is likely that there will be one or more subsequent owners.’

<sup>155</sup> *Woolcock* (2004) 216 CLR 515, 579–80. See also *Jiniess* [2000] NTSC 89 (Unreported, Riley J, 31 October 2000).

<sup>156</sup> *Woolcock* (2004) 216 CLR 515, 563 (Kirby J).

Builders therefore ought to be aware that, by the very nature of the services provided, defects can manifest themselves years later and, in a regulated industry, subsequent purchasers would likely assume that the premises were competently constructed.

In addition to their potential to point to a relationship of assumption of responsibility and reliance, subsequent purchasers of commercial premises may, in fact, be more vulnerable than residential purchasers due to their lack of legislative protection.<sup>157</sup> The actual ability of purchasers to secure the means of protection considered potentially available in *Woolcock*<sup>158</sup> also warrants consideration.

### 1 *Pre-Purchase Inspection*

The utility of the proposition that a commercial purchaser can protect against a defendant builder's want of reasonable care by engaging an expert to conduct a pre-purchase inspection is questionable. Many serious building defects remain latent for years, concealed from even the most diligent visual inspection. Further, once covered, a building's structure or foundations are incapable of inspection without intrusive and expensive investigation. According to McHugh J, vulnerability encompasses economic constraints.<sup>159</sup> In addition, even the most costly or comprehensive inspection may not reveal truly latent defects and, in this respect, a subsequent purchaser is in a potentially more vulnerable position than the building's original owner who commissioned its construction. Moreover, vendors may not consent to intrusive structural surveys on behalf of purchasers who have not already entered into a contract of sale.

### 2 *Vendor Warranties and Rights Assignment*

The effectiveness of vendor warranties as to structural soundness or the absence of latent defects as a means of protection, apart from hinging on issues such as the vendor's future solvency, depend on their ability to be contractually provided or negotiated in practice. For what incentive do vendors have to warrant against defects of which they have little, if any, prior chance of discovering or protecting against, unless they are also part of a chain of contractual warranties linking themselves to either prior vendors or builders? In addition, the utility of a vendor's assignment to a subsequent purchaser of any rights or warranties possessed in relation to the defective work of builders potentially depends upon whether:

- such an assignment can occur without the contractor's consent;<sup>160</sup>
- there are any rights to be assigned. An assignment of rights is only valid and enforceable to the extent that the vendor could have enforced those rights.

<sup>157</sup> See above n 22 and accompanying text.

<sup>158</sup> (2004) 216 CLR 515, 523, 533 (Gleeson CJ, Gummow, Hayne and Heydon JJ), 535, 558–9 (McHugh J), 576 (Kirby J), 582–3 (Callinan J).

<sup>159</sup> Ibid 549.

<sup>160</sup> See, eg, standard building contract *AS4902 Design and Construct General Conditions of Contract 2000* cl 9.1 which provides that 'neither party shall, without the other's prior written approval (including terms) assign the Contract or ... any other right, benefit or interest thereunder.'

Therefore, in *Woolcock*, the usefulness of any assignment would be conditional upon whether the original owner's instruction to the engineers not to proceed with the geotechnical investigation amounted to a negative variation of the owner's contractual rights in that regard;<sup>161</sup> and

- a subsequent purchaser's action is statute barred. Unlike tort, the limitation period for breach of contract runs from the time of the breach — that is, the time of the premises' construction, not the time the defect becomes apparent.

Evidence of common practice in relation to the purchase of commercial buildings is therefore likely to be an important consideration in establishing the presence or absence of vulnerability in the future.

### B Claimant Vulnerability

In pure economic loss claims concerning residential premises, it is possible for evidence of actual reliance (or lack thereof) to negate the general reliance on building professionals which *Bryan* imputed to subsequent purchasers.<sup>162</sup> This presumed reliance or assumption of responsibility may therefore be displaced by evidence to the contrary, such as in the case of a subsequent purchaser or original owner who:

- relied solely upon their own expertise;<sup>163</sup>
- exercised ultimate control over the content and quality of the builder's work;<sup>164</sup>
- could be shown to have relied *solely* upon a clause in a contract of sale which entitled them to rescind if a certificate that the building was free from defects was not issued;<sup>165</sup>
- built as an owner-builder;<sup>166</sup>
- purchased pursuant to a clause in a contract of sale which provided that the purchaser had satisfied themselves as to any defects in improvements;<sup>167</sup> and/or
- relied upon an inspection undertaken by their own expert, which placed them on notice as to the presence of serious structural problems.<sup>168</sup>

<sup>161</sup> See, eg. *Woolcock* (2004) 216 CLR 515, 592 (Callinan J).

<sup>162</sup> *Woollahra* (1996) 40 NSWLR 101, 139 (Clarke JA), 151–2 (Cole JA). See also *Fangrove* [1999] 2 Qd R 236, 244 (Chesterman J); *Zumpano* [1997] 2 VR 525, 533–4 (Brooking JA).

<sup>163</sup> *Woollahra* (1996) 40 NSWLR 101, 130 (Clarke JA) (obiter dictum of purchaser being an expert builder); *Goulding v Kirby* [2002] NSWCA 393 (Unreported, Heydon, Hodgson and Santow JJA, 9 December 2002) [27] (Santow JA) (purchaser being both architect and principal of a building firm).

<sup>164</sup> *Woollahra* (1996) 40 NSWLR 101, 133, 139 (Clarke JA).

<sup>165</sup> *Ibid* 133–4 (Clarke JA), 151–2 (Cole JA), 118 (Priestly JA, in dissent). The purchaser, being told that the certificate would be provided (although it had not been received at the time of settlement), was found not to have relied, in acquiring the property, on the builder or vendor concerning the dwelling's construction. Otherwise, the purchaser's explicit or implicit reliance upon enquiries made would not have negated the builder's duty of care.

<sup>166</sup> *Zumpano* [1997] 2 VR 525, 545 (Tadgell and Phillips JJA). This may operate to deny an assumption of responsibility, the home not being built for resale.

<sup>167</sup> *Jiniess* [2000] NTSC 89 (Unreported, Riley J, 31 October 2000) [82]–[86].

<sup>168</sup> *Ibid*.

It is assumed that these considerations will remain relevant if a duty of care is considered in relation to commercial premises in the future, and that similar evidence will therefore serve, under the new rubric, to displace a claimant's vulnerability.

There is, however, an unresolved issue concerning the extent to which a claimant's failure to act — in circumstances where steps might have been taken to secure protection against the economic consequences of the defendant's negligence — will be considered towards establishing the absence of vulnerability sufficient to deny a duty of care, as well as the extent to which a claim for contributory negligence should be made. It is also uncertain how a claimant's failure to act, in the context of vulnerability, fits with the principle that one who owes a duty of care must anticipate that persons to whom the duty is owed might fail to take proper care of their own safety.<sup>169</sup> Whilst no doubt a matter for future debate, the Supreme Court of Victoria in *Taitapanui* has commented, in obiter,<sup>170</sup> that to deny a duty of care on this basis would serve to reintroduce the 'last opportunity rule',<sup>171</sup> contrary to claimants' legislative right to pursue damages claims notwithstanding their own negligence.<sup>172</sup> The Court therefore opined that

[t]he defendant can always raise the issue by raising the defence of contributory negligence. In cases such as the present, a fair and just outcome can be achieved in that way — a duty is imposed ... [but the defendant] can seek a reduction in the damages awarded on the basis that the subsequent owner failed to take reasonable care.<sup>173</sup>

Consequently, whilst the fact of a purchase being for investment is unlikely to preclude a duty of care,<sup>174</sup> it may be that in such cases, the general expectation of a purchaser's individual behaviour (motivated by return) is higher, with prudence demanding that steps be taken to ascertain the building's structural soundness in order to avoid a contributory negligence finding.

## VI CONCLUSION

The High Court's decision in *Woolcock* emphasises the centrality of the concept of vulnerability as a test for determining the existence of a duty of care in pure economic loss cases. However, until the identity and relative importance of

<sup>169</sup> See, eg, *McLean v Tedman* (1984) 155 CLR 306, 311–12 (Mason, Brennan, Wilson and Dawson JJ); *March v E & M H Stramare Pty Ltd* (1991) 171 CLR 506, 520 (Deane J), 536–7 (McHugh J); *Nagle v Rottnest Island Authority* (1993) 177 CLR 423, 431 (Mason CJ, Deane, Dawson and Gaudron JJ).

<sup>170</sup> [2004] VSC 239 (Unreported, Smith J, 1 July 2004) [86].

<sup>171</sup> *Davie v Mann* (1842) 10 M & W 546; 152 ER 588. The rule denied a plaintiff's claim where, having the last opportunity to avoid an accident, they negligently failed to avail themselves of it.

<sup>172</sup> *Civil Law (Wrongs) Act 2002* (ACT) s 41(1)(a); *Law Reform (Miscellaneous Provisions) Act 1965* (NSW) s 9(1)(a); *Law Reform (Miscellaneous Provisions) Act 1956* (NT) s 16(1)(a); *Law Reform Act 1995* (Qld) s 10(1)(a); *Law Reform (Contributory Negligence and Apportionment of Liability) Act 2001* (SA) s 7(1); *Wrongs Act 1954* (Tas) s 4(1); *Wrongs Act 1958* (Vic) s 26(1)(a); *Law Reform (Contributory Negligence and Tortfeasors Contribution) Act 1947* (WA) s 4(1).

<sup>173</sup> [2004] VSC 239 (Unreported, Smith J, 1 July 2004) [129]. See also at [85]–[86].

<sup>174</sup> See above n 155 and accompanying text.

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the considerations relevant to the issue are more fully defined, care should be taken in its application lest it, like its predecessor 'proximity', deteriorate into little more than a catchphrase or value judgement, providing no real guidance as to whether a duty of care will be owed. Nevertheless, the above arguments and the High Court's decision do highlight the potential future liability in negligence of building professionals for commercial design defects.