Pure economic loss in Qld – new case, same news

Do subsequent owners of a commercial building in Queensland have the right to sue the original builder for defects that cause economic loss? Senior Associate Renwyck Niemann and Lawyer Krista Bowie review a recent case which rules that they can’t.

Recently Queensland courts have been clear on whether a subsequent owner of a commercial complex is owed a duty of care by the engineer responsible for its design and whether the subsequent owner can make a claim for pure economic loss against the engineer. In Woodcock Street Investments v GDG Pty Limited and John Cameron Johnson1 the Queensland Court of Appeal recently reiterated that approach of dismissing such a claim.

Background to the case

In 1987, the owner of the commercial premises engaged the first defendant to provide structural design and documentation for the foundations of the complex. The second defendant became the Project Manager in respect of design and construction of the complex. The building was completed in 1987 and in September 1992 it was sold to the plaintiff. In 1994, substantial structural distress became manifest due to the settlement of foundations, or of material below the foundations. The plaintiff (the subsequent owner) alleged that he had suffered, and will suffer, pure economic loss and damage as a result of the negligence of the defendants, including the cost of demolishing and reconstructing the affected sections of the complex, loss of rent during demolition and reconstruction, and diminution in the value of the property.

Outcome

In concluding that there was no duty of care owed by either of the defendants to the plaintiff, the Queensland Court of Appeal held that:

- The principle (from the High Court decision of Bryan v Maloney2) that a subsequent purchaser of a dwelling house can recover pure economic loss from the negligent builder of the house, is restricted to residential dwellings and will not be extended, at
least in Queensland, to commercial premises.

- The approach adopted in Queensland, in this and other recent decisions, is not inconsistent with the general principles for the recovery of pure economic loss enunciated in recent High Court cases. As in the earlier case of Fangrove Pty Ltd v Tod Group Holdings Pty Limited where the Court held that the designer of a commercial building was not subject to a duty of care to a subsequent owner to design them so as to avoid potentially dangerous defects), the Court stated that any extension of the present boundaries of liability beyond that recognised in Bryan v Maloney was a matter for the High Court or the legislature rather than the Court of Appeal.

- The recent High Court case of Perre v Apand, which examined the general principles governing the recovery of pure economic loss, did not change the law since Fangrove Pty Ltd in such a way as to promote the extension of a further category of liability beyond that recognised in Bryan v Maloney.

The Court, in discussing the factor of vulnerability, being one of the factors recognised in Perre v Apand as relevant in determining whether a category of claim for pure economic loss should be recognised, noted that those engaged in commerce have some capacity to protect themselves against this kind of pure economic loss - through employing expert assistance to ascertain the condition of the premises, seeking appropriate warranties and bargaining with the benefit of legal and other expert advice. This was compared with the position of an ordinary home buyer, where only some, or possibly none, of these options may be available to protect its interests. As a result, legislation has intervened and provided some protection to, at least, Queensland home buyers under acts such as the Queensland Building Services Authority and the Domestic Building Contracts Act.

The Court of Appeal stated that Bryan v Maloney rested quite heavily on the vulnerability of members of the public in acquiring homes. It concluded that the distinction between purchasers of commercial buildings and purchasers of dwelling homes could be properly maintained, and was sufficient to raise good reason against recognising liability of builders and designers to a further indeterminate commercial class of persons over a potentially unlimited period.

Commercial reality

The Queensland Court of Appeal has taken a clear position on the issue of recoverability of pure economic loss, by not permitting subsequent owners of commercial premises to have a right in negligence to recover such loss from those who originally built or designed the commercial premises. It is the view of the Court of Appeal that this issue should be resolved by either the High Court or through legislation. Until this happens, it would seem that contractors, engineers and architects can, at least in Queensland, be at ease about their potential long-term exposure to liability to subsequent owners for the construction of commercial buildings.

On the other hand, subsequent purchasers of commercial premises should take note of this decision and take whatever steps are available, such as detailed property inspections, appropriate warranties in the sale contracts and appropriate insurances, to protect what rights they might have to recover pure economic loss resulting from defects in the premises.

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1 See Woolcock Street Investments Pty Limited v CDG Pty Limited and John Cameron Johnson [2002] QCA 88 (unreported 21 March 2002)
2 See Bryan v Maloney [1995] 182 CLR 609
3 See Fangrove Pty Limited v Tod Group Holdings Pty Limited [1999] 2 QdR 236

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