Defective Structures and the Construction Financier's Remedy in Tort

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INTRODUCTION

Construction financiers may find themselves in a situation where a developer has gone into receivership or liquidation and they move to exercise their rights under their security documentation. But what if, after entering into possession of the property and attempting to realise the value of the securities, problems are uncovered with the works undertaken on the project which arise as a result of the negligence of the contractor or professional consultants engaged in the design and/or supervision of the works. Absent an appropriately drafted tripartite agreement, will the loss suffered by the financier by reason of this negligence be recoverable by it?

The answer to this question is not to be found in the ratio of any decided case in this country and at present would represent an extension of the current law.

This article will examine the circumstances in which the courts may find that the financier can recover and the difficulties it will have to overcome in order to succeed in such a claim. The article will conclude that, while there may be circumstances in which recovery will be allowed, the law in this area is in such a state of uncertainty that it is impossible to arrive at any general principle governing recovery. Indeed, the courts themselves may be unlikely to do so, preferring instead to consider each matter in view of its own particular facts.

Bryan v Maloney

In *Bryan v Maloney*[1] the High Court was faced with a question which it stated in the abstract as being whether, under the law of negligence, a professional builder who constructs a house for the then owner of the land owes a prima facie duty to a subsequent owner of the house to exercise reasonable care to avoid the kind of foreseeable damage which the plaintiff sustained in that case, that is to say, the diminution in the value of the house when a latent and previously unknown defect in its footings or structure first becomes manifest[2].

This judgment has been extensively noted since its publication[3] and it is not proposed to recite its findings or reasonings in any great detail here. Suffice it to say,with respect, that while the Court held that in the particular facts of that case a duty of care was owed, the decision seemed to owe more to the Court's desire to see the interests of justice served (e.g. Tasmania having no equivalent of the *Queensland Building Services Authority Act 1991* and its compulsory insurance scheme) rather than providing any sound basis upon which to assess the likely success of analogous cases[4].

Nonetheless, the case is instructive in seeking an answer to the present question, firstly because it illustrates the process by which the High Court **may** arrive at the answer to the present question, and secondly because, taken at face value, dicta from that decision also suggests circumstances in which the court may be prepared to allow recovery.

The Process

Faced with a question of this nature for which there is no decision of the High Court, the High Court indicated that its resolution will require the articulation of both the factual components of the relevant category of relationship and the identification of any applicable policy considerations[5]. Consistent with its recent approach the High Court confirmed that ultimately the question will be resolved by the ordinary processes of legal reasoning in the context of the existence or absence of the requisite element of proximity in comparable relationships or with respect to comparable acts and/or damage[6].

Other elements relevant to the recovery of damages in negligence (e.g. causation, remoteness of damage etc) were not considered by the High Court in *Bryan v Maloney*[7]. Nor were questions peculiar to the present situation such as the issue of double recovery.

Accordingly, this paper will be divided into two parts. The first will consider the issue which the writer considers will be determinative of the question - that is whether a construction financier will be sufficiently proximate to the negligent party so that a duty of care will be owed to it. The second part will look at the issues peculiar to the present question including some of the arguments against recovery

and will touch upon some other possible remedies.

As an aside, it should be mentioned that there is now a clear divergence of approach to the recovery of pure economic loss between the Australian and English courts[8], such that there is little assistance to now be gained by examining the English authorities in this area. Reference will, however, be made to these decisions where relevant[9].

PART I - PROXIMITY

It has already been stated that the nature of the loss sought to be recovered by a construction financier is purely economic. This means no more than that the damages sought to be recovered do not flow from physical damage to the plaintiff's person or property[10]. Traditionally the right to recover damages of this nature was not recognised in the absence of a contractual or fiduciary relationship. This was because of the so called "exclusory rule", the theoretical justification for which was the fear of liability *"in an indeterminate amount for an indeterminate time to an indeterminate class"*[11].

The early exceptions to the proposition that pure economic loss was not recoverable were cases of negligent misstatement, in which the court drew upon Lord Atkin's principle of proximity in formulating the circumstances in which the law would imply a duty of care to avoid purely economic loss[12]. Assumption of responsibility by the maker of the statement and reasonable reliance upon it by the recipient were the determinative factors in recognising the existence of such a duty[13].

There has been a great deal of development in the law in this area in recent years such that it is now recognised that in particular circumstances recovery of economic loss unaccompanied by and not directly consequential upon physical damage will be allowed in tort[14].

In the case of negligence leading to a defective building structure, it now appears settled that even where the only loss relates to the rectification of the defective work itself, such loss will still be regarded as being purely economic[15]. The English courts after a period of uncertainty, have now arrived at the same conclusion[16].

In *Caltex Oil (Australia) Pty Limited v The Dredge "Willemstad" & Ors*[17] Stephen J emphasised that the inherent capacity of economic loss to manifest itself at several removes from the direct detriment inflicted by the defendant's carelessness made reasonable foreseeability an inadequate control mechanism of the existence of the duty of care.[18] The decision also indicates that policy considerations will play an important role in identifying the categories of cases where the courts will find sufficient proximity to give rise to such a duty[19].

In *Jaensch v Coffey*[20] Deane J saw the requirement of proximity as a touch stone in the control of the categories of cases in which the common law would admit the existence of a duty of care.

At page 584 his Honour put it thus:

> *"It involves the notion of nearness or closeness and embraces physical proximity (in the sense of space and time) between the person or property of the plaintiff and the person or property of the defendant, circumstantial proximity such as an overriding relationship of employer and employee or of a professional man and his client and causal proximity in the sense of the closeness or directness of the relationship between the particular act or cause of action and the injuries sustained".*

The identity and relative importance of the factors which are determinative of the existence of a relevant relationship of proximity vary in different categories of cases[21].

In *San Sebastian Pty Limited & Anor v Minister Administering the Environmental Planning and Assessment Act 1979 & Anor*[22] Gibbs CJ, Mason, Wilson and Dawson JJ said:

> *"... When the economic loss results from negligent misstatement, the element of reliance plays a prominent part in the ascertainment of a relationship of proximity between the plaintiff and the defendant, and therefore in the ascertainment of a duty of care. But when the economic loss results from a negligent act or omission outside the realm of negligent misstatement, the element of reliance may not be present. It is in this sphere that the absence of reliance as a factor creates an additional difficulty in deciding whether a sufficient relationship of proximity exists to enable a plaintiff to recover economic loss."*[23]

In a different factual context *Hawkins v Clayton*[24] was concerned with this type of problem. Deane J emphasised that the relationship of proximity must exist with respect to the allegedly negligent class of act and the particular kind of damage which the plaintiff has actually sustained. At page 576 his Honour said:

> *"... where the plaintiff's claim is for pure economic loss ... the categories of case in which the requisite relationship of proximity is to be found are properly to be seen as special in that they will be categorised by some additional element or elements which will commonly (but not necessarily) consist of known reliance (or dependence) or the assumption of responsibility or a combination of the two."*

Aside from the cases referred to above, the High Court has canvassed at length the application of the notion of proximity in decisions such as *Sutherland Shire Council v Heyman*[25], *Gala & Ors v Preston*[26], *Stevens v Brodribb Sawmilling Co Pty Ltd*[27], and, most recently (prior to the decision in *Bryan v Maloney*[28]) in *Burnie Port Authority v General Jones Pty Ltd*[29], where the court confirmed that its practical utility lay in identifying the categories of cases in which a duty of care will be held to arise.

Similarly, at State and Appellate level there have recently been a multitude of cases concerned with the recovery of economic loss arising from a claim in relation to a defectively built structure both by subsequent purchasers of property[30] and by principals/owners against subcontractors/professional advisers[31].

While decisions concerning the issue of concurrent

liability in contract and tort, may not, at first instance, appear particularly relevant to the present case where there is the absence of a contractual relationship, it would seem difficult to argue that a financier might be in a better position than the developer in respect of defects in the project works caused by the contractor's or design/ supervising professional's negligence, particularly where there may be relevant exclusions contained in the contractual documentation[32].

In the final analysis the answer to the question of whether proximity will exist in the present case must be decided by reference to the leading High Court cases previously referred to and the other notable Australian decisions cited above.

Application

From these cases it would appear that in order to establish a relationship of proximity the following factors will be relevant:

- knowledge by the negligent party of a project financier either specifically or as a class of person likely to suffer loss or damage;[33]
- known reliance or dependence on the part of the financier and a concomitant assumption of responsibility to the financier by the construction or design/supervising professional;[34]
- some other element or elements which make the category of case "special" in the sense indicated by Deane J[35]. This process will invariably involve an analysis of the relationship between the financier and the negligent party[36], the closeness or directness of the relationship between the particular act or cause of action and the injuries sustained[37] and the nearness or closeness between the person or property of the financier and the person or property of the negligent party.[38]

The decision of the High Court in *Bryan v Maloney*[39] also indicates that policy factors are now unquestionably a major consideration when determining when a duty of care will be found to exist in negligence.

Knowledge

Although in the writer's view the reasoning (if not result) in *Caltex*[40] may be different were it decided today (placing, as it does, undue emphasis on the element of knowledge[41]), recent cases have indicated that knowledge may be important in the sense of both knowledge of the identity of the building owner and knowledge of the use to which the defective works were to be put[42].

That the negligent party need not know the precise identity of the plaintiff was made clear by Deane J. in *Hawkins v Clayton*[43] where his Honour specifically identified cases involving damage by reason of the existence of a latent defect as being illustrative of a situation where a relationship of proximity may exist and a duty of care may be owed "to a class of persons who are identified by some future characteristic or capability which they do not yet have"[44].

Similarly, in *Opat v National Mutual Life Association of Australasia*[45], a case concerning liability of a builder to a plaintiff who had purchased units from a developer and earlier purchaser, it was argued before Southwell J. that knowledge of the identity of the possible victim was a crucial element of the requisite degree of proximity. His Honour rejected that argument and held that it mattered not that particular names were not attached to particular units as the class of unit purchase was "confined and readily defined"[46].

Accordingly, insofar as "knowledge" is a necessary element of a relationship of proximity, this would be made out in the present case if it could be shown that the negligent party was aware or ought to have been aware that the principal would be borrowing funds to pay for the project from a financier whose interests could be affected by the value of the proposed works as security for the advance. These circumstances would identify financiers as a relevant class so that the class of a prospective plaintiff could not be said to be indeterminate.

In reality, the "indeterminateness" or otherwise of the financier will not be dependant on the knowledge of the tortfeasor, illustrating the problem with the court's treatment of this element in *Caltex*[47].

Known reliance and assumption of responsibility

In *Opat*[48] Southwell J considered that the circumstances in which the Court would impose on the parties a duty to avoid economic loss were properly to be seen as "special" and that in the absence of pleaded reliance the required degree of proximity was lacking. Accordingly his Honour struck out the statement of claim.

In *National Mutual Life Association of Australasia Ltd v Coffey and Partners Pty Ltd*[49], the issue was whether a statement of claim by the original owner's assignor should be struck out as disclosing no cause of action against a firm of civil engineers who had negligently advised, designed and supervised the foundations of a building which subsequently showed signs of damage.

In concluding that the statement of claim should not be struck out, Connolly J, with whom Macrossan CJ and Kelly SPJ concurred, reviewed recent High Court authorities, including *Sutherland Shire Council v Heyman*[50] and concluded:

> *"The reliance which a prospective purchaser of a building, which is seen to be standing in apparent good order, on the exercise of due care by the doubtless unknown designers and builders is at least as real as the reliance placed by the public on the due performance of public duties."*[51]

On the other hand, cases such as *RW Miller & Co. v Krupp*[52], *CBD Developments v Ace Ceramics Pty Ltd*[53], *John Goss Projects Pty Ltd v Thiess Watkins White Constructions (In Liquidation)*[54] and *NRMA Insurance Ltd v AW Edwards Pty Ltd & Ors*[55] suggest that where the parties have quite deliberately chosen to regulate their relationship by a detailed contractual structure, the courts will be reluctant to infer reliance or an assumption of

responsibility for an additional tortious duty of care not envisaged by those contracts.

Accordingly, evidence of the involvement of the financier in the preliminary stages of the project may disclose that its rights and remedies are just as much detailed by the structure of the project, particularly where there is equity participation in the nature of a joint venture arrangement. In circumstances where, for example, the issue of tripartite deeds was canvassed but rejected, the courts may be loath to interfere with the risk allocation process evidently engaged in by the parties at the negotiation stage.

In other circumstances, reliance by the financier on a particular engineer or contractor, to the knowledge of the engineer or contractor, may assist in establishing proximity[56].

However, *Bryan v Maloney*[57] suggests that a more general kind of reliance on the professionals performing their task in a professional and workmanlike manner may be sufficient[58].

Moreover, in circumstances where the facility in question is the common construction kind with payments of progressive draw-downs, it might reasonably be said that a lender under such a facility relies on the "value" of the works assessed prior to making individual draw-downs with a view to their value as security.

Assuming the contractor and engineer were aware of this, then they ought also to be aware that the lender might have considered the value of the work done as important to the exposure of the financier to the developer for risk associated with the lending transaction. The financier's scrutiny of progress claims, far from indicating a lack of reliance, is illustrative of the proximity, its continuation of finance being dependent upon it being satisfied that the value of its security is being enhanced by the building work. Given the willingness of the High Court in *Bryan v Maloney*[59] to infer an assumption of responsibility, the requisite elements would appear to be satisfied in this scenario.

Other elements

In circumstances where the financier is involved in a project at the time the works are performed, there is a high degree of physical proximity in the sense of space and time.

These same facts may also demonstrate the existence of circumstantial proximity. The nearness or closeness of the financier in these circumstances is, if anything stronger than that of the assignee or subsequent purchaser considered in *National Mutual Life Association of Australasia Ltd v Coffey*[60] and *Bryan v Maloney*[61].

Similarly, causal proximity may be demonstrated in the sense that poor workmanship on the part of the defendants will be the cause of the mortgagee's loss in circumstances where the mortgagee goes to exercise its powers under its security instruments. The causal connection between act and injury would appear to be particularly strong where the nature of the injury sustained is the cost of the rectification works.[62]

However, there is a caveat to this. In *Bryan v Maloney*[63] it was said:

> *"In the absence of competing or intervening negligence or other causative events,* [author's emphasis] *the causal proximity between negligence on the part of the builder in constructing the footings and consequent economic loss on the part of the owner when the inadequacy of the footings becomes manifest is the same regardless of whether the owner in question is the first owner or a subsequent owner".*[64]

Unless it can be argued that the financier has suffered damage in the sense of a loss of its rights to have recourse to an adequate security in the event of default[65], the financier will only suffer its "injury" in the form of economic loss, firstly if there is a default under the securities and even then only if there is a shortfall in the security.[66] It is arguable that this additional requirement amounts to a "causative event" which may negate the existence of causal proximity in the sense of the closeness or directness of the causal connection or relationship between the particular act or cause of conduct and the loss or injury sustained[67].

Reasonable Foreseeability and Nature of damage

It will be necessary for any mortgagee seeking to bring such an action to establish that there was **reasonable foreseeability** of a real risk that injury of the kind sustained by it would be sustained by it either as an identified individual or as a member of a class[68].

In this regard the nature of the damages claimed by the mortgagee may be important. It will be necessary for the mortgagee to show that in designing and supervising the construction of the works the contractor/professional must have foreseen that a failure to take reasonable care might result in rectification costs being incurred by those having an interest in the land. In circumstances where the financier has a right to enter into possession of the property and exercise its power of sale, this should not be difficult.

Bryan v Maloney[69] also emphasised that a duty of care will only arise where there exists a relationship of proximity between the parties with respect to both the relevant **class of act or omission** and the relevant **kind of damage.**

In *Sutherland Shire Council v Heyman,*[70] Brennan and Deane JJ. noted that the nature of the damage may be relevant to the existence and scope of a duty of care[71]. This was confirmed by the court in *Bryan v Maloney*[72] where, for the first time, the court sought to differentiate between different "kinds" of economic loss which may arise in a relevant category of case[73]. The court said that the distinction between physical damage and economic loss in the form of diminution in the value of the house was essentially a "technical one" and held that no distinction could be drawn between the relationship of builder and original owner and builder and subsequent owner, insofar as the foreseeability of the particular kind of economic loss was concerned[74].

Accordingly, where the loss equates to the cost of remedying the defective work itself (in order to enhance

the value of the security property) or the diminution in the value of the security property (i.e. a direct detriment claim)[75] this is likely to make reasonable foreseeability easier to demonstrate than if, for example, it was a loss arising because of a commercial collateral arrangement.

Policy considerations

In *Bryan v Maloney*[76] the High Court identified two "policy considerations" which in the past had militated against the finding of proximity. These were the concerns to avoid the imposition of liability *"in an indeterminate amount for an indeterminate time to an indeterminate class"*[77], and the reluctance of the courts to interfere with the so-called pursuit of *"personal advantage"*[78]. As was the case in *Bryan v Maloney*[79], neither of these are likely to have particular relevance to the present situation. There will be no risk of an indeterminate liability for an indeterminate issue to an indeterminate class. Nor is the imposition of such a duty likely to offend against the principle of "personal advantage" (a peculiar concept to say the least!) as the contractor has overriding professional and contractual duties in any effect.

Conversely, the High Court identified a number of policy reasons favouring the recognition of a duty[80].

While most of these are specific to the factual scenario in *Bryan v Maloney*[81], the High Court did consider relevant the fact that a builder already owes a duty to construct the home in a workmanlike manner and the extension of this duty (in the present case to the financier) would not change this basic obligation[82].

PART II - OTHER FACTORS

Causation and Remoteness

One would assume it would be difficult for the defendant to argue that it was only reasonably foreseeable that damage could be suffered by the proprietor i.e. that the damage suffered by the financier was too remote. Depending on the nature and size of the project it would be reasonably foreseeable that a financier will be involved and will suffer loss and damage if the project works are performed negligently, particularly given the possibility (well known to most parties in the construction industry) that the developer may become insolvent, making it impossible for the financier to otherwise recover its loss.

The financier may also be met with the argument that its loss was not **caused** by the negligence of the defendants but by the shortfall in the security. The High Court has held that the "but for" test will no longer always be determinant of this issue[83]. In any event, the act complained of does not have to be the sole cause of the claimant's loss and it will be sufficient if it contributes to it.

As the financier would not have suffered that part of its loss attributable to the defect "but for" the negligence in the construction of the works, it is likely to be able to satisfy this requirement.

Who owes the duty?

In any given project, there is likely to be any number of design professionals, surveyors, engineers, architects etc. together with parties (many of whom will consist of highly skilled professionals) which operate under titles such as "construction managers", "project managers", "superintendent" etc., as well as head contractors and various subcontractors.

It is beyond the scope of this paper to attempt to examine the potential liability of these parties separately. Suffice it to say (subject to the caveat below) that the further down the contractual chain these parties find themselves, the less likely they will find themselves exposed to an action from a developer or financier in tort (generally because there is less likely to be reliance). *Bryan v Maloney*[84] considered the liability of the builder (or head contractor) and made no mention of the various other trades or professionals which may have been involved in the construction of the house.

However, it seems clear that the courts will more readily infer a duty of care with respect to professionals. This willingness to so extend the duty owed by professionals is illustrated by the High Court's reference to the position of the architect in *Voli v Inglewood Shire Council*[85] in *Bryan v Maloney*[86] and recently in a different context, in the Queensland Court of Appeal decision in *Van Erp v Hill*[87].

The English courts, with their pre-occupation with liability founded upon the principles in *Hedley Byrne & Co v Heller & Partners Ltd*[88] would seem similarly disposed, prompting one commentator to conclude that architects and consulting engineers who give bad advice leading to the construction of shoddy buildings may be liable to their owners, but that the builder whose negligence produces the same result will not[89].

Who suffers the loss?

The argument that the loss suffered is not that of the financier, but of the developer has not been considered in this country in the context of the tort of negligence. However, the High Court in *Gould v Vaggela*[90] considered whether a lender to a company could recover damages for **deceit** when the lender advanced money to a company to enable that company to purchase property as a result of a fraudulent inducement. This case suggests that both the developer and lender may still have a claim based on the same negligence for loss suffered as a result of the defective works[91].

The difficulty occasioned by allowing the lender to recover directly against the contractor or engineer is that recovery of that loss will not extinguish the liability of the defendant to parties further up the contractual chain to whom it still owes a duty and may be a bar to recovery[92].

Possible solutions to this problem are to be found in *Gould*[93] where it was suggested that the difficulty could be overcome by constructing a right of subrogation in the defendant to the rights of the lender against the borrower[94]. Alternatively, it was thought that the damages payable to the lender may be decreased by the sum recoverable at the suit of the contracting party from the defendant for the same loss[95].

Whether or not the courts adopt one of the approaches suggested in Gould or simply treat recovery as a credit to the borrower's account with the financier such that the borrower's loss against the defendant is proportionally reduced to the extent of that credit, one would be fairly confident that the courts would be able to see their way around this problem, particularly in light of Brennan J's statement in *Heyman*[96] that "*... the wrong doer is liable to be sued by each plaintiff whose interest are adversely affected by the physical damage done*"[97].

Residential v Commercial

In view of the High Court's decision in *Bryan v Maloney*[98] one might be tempted to suggest that the financier would have greater prospects of recovery where the subject matter of the claim is a domestic dwelling house[99] however this would be unsound. Unlike "Mrs Maloney", the financier, be it a residential or commercial lender, is in the business of financing such projects. In fact, if one were to attach any real significance to the dicta which suggests that the duty owed by the builder in that case, arose in part because the investment was "one of the most significant"[100] a person could make, a duty to the financier may more readily be inferred in a commercial context where the more significant investment decisions will occur.

This highlights the danger of treating *Bryan v Maloney*[101] as anything more than a policy decision made in the particular facts of that case. It is difficult to see that the nature of the subject matter will be a significant factor in determining whether or not a duty of care will be owed to the financier.

Subsequent mortgagee

Whilst it is unclear whether a construction financier, involved in a project from its inception, will be afforded a right to recovery, it is even less so in respect of a mortgagee who takes its interest subsequent to the completion of a project.

In this situation, the parties involved are unlikely to have specific knowledge of the financier who presumably will not have had the opportunity to have nominated specific subcontractors etc. Indeed, it is likely that the subsequent mortgagee will have carried out its own independent investigations prior to committing itself to the project[102]. As such, the element of reliance is unlikely to be present.

Similarly, circumstantial proximity in the sense of space and time will also be diminished.

Although in *National Mutual Life Association of Australasia Ltd v Coffey*[103], Conolly J considered that there were strong reasons for believing that a professional designer owed a duty of care to successors to the ownership of the professional design[104], the now Chief Justice, Brennan CJ (in the minority in *Bryan v Maloney)*[105] was of the view that *"only those with an interest in the property at the beginning, when the initial damage is done, can recover"*[106].

On balance, it seems unlikely that a subsequent mortgagee will be sufficiently proximate in these circumstances to be owed a duty of care, although the possibility cannot be entirely discounted.

Linden Gardens and Assignability of Developer's Contractual Rights

The decision in *Linden Gardens*[107] suggests of the possibility that a financier may avoid the hurdles to recovery in tort by assigning to itself the developer's contractual rights.

Of course, a financier may be reluctant to take such an assignment for fear of exposing itself to the burden of the contract (usually itself incapable of assignment without the prior consent of the other parties of the contract)[108] particularly where the developer has "gone under" and parties participating in the construction may have unpaid progress claims.

Where a developer has become insolvent, and a financier expends funds in remedying defects in the works so as to better realise the value of its security, the situation is analogous to that considered in *Linden Gardens*[109] (where there had been a failed, though genuine attempt to assign all rights which related to the construction contract) in that the party with the cause of action in contract will have suffered no loss (if the financier expends the money necessary to effect the repairs), and the party who suffers the loss (the financier) may have no remedy, with the risk that the claim would disappear into a "legal black hole" so that the wrong doer escapes Scott-free[110].

Whilst the view of the House of Lords in that case was that the assignor was permitted to recover "for the benefit" of those who subsequently suffered loss as a result of the breach of contract[111] it seems likely that *Linden Gardens*[112] will be confined to the particular facts of its case. Already, it has been distinguished in Australia in *Alucraft Pty Ltd (In liquidation) v Grocon*[113] and while raising a possible further avenue of recovery for the financier, it is unlikely to be of significant application in this country, being based as it was on policy considerations and necessitated by the refusal of the House of Lords to allow the recovery of economic loss in the absence of the *Hedley Byrne*[114] criteria.

Trade Practices Act 1974 (Cth)

It should be briefly mentioned that in addition to any tortious remedies which may be available, there may be circumstances where a financier will also have a right to bring an action pursuant to Section 52 of the *Trade Practices Act* (the prohibition against engaging in misleading or deceptive conduct) for damages pursuant to Section 82 of that Act[115].

The decision in *Bond Corporation Pty Ltd v Thiess Contractors Pty Ltd*[116] confirmed that the provision of services by a member of a profession was capable of being characterised as conduct in trade or commerce for the purposes of Section 52[117].

Although there is no requirement to establish a relationship of proximity between the relevant parties, cases in the area stress the necessity to establish a causal

nexus or relationship between the conduct complained of and the damage suffered[118]. The plaintiff must also establish reliance upon the conduct complained of to supply that sufficient causal connection[119].

It would seem that a financier's greatest prospects of recovery under the TPA will probably arise in two specific situations.

The first is where, as in the case of *Coleman v Gordon M Jenkins & Associates Pty Ltd*[120] an architect, in breach of its professional duties, incorrectly estimated the cost of a project with a resulting loss to the principal.

Presumably a financier who is involved from the project's inception and who relies upon a professional's estimate in making its decision whether or not to advance funds for the project, would have reasonable prospects of recovery in these circumstances.

Similarly, a financier who in approving draw-downs relies upon the exercise of due care and skill by a professional superintendent certifying the value of the works, may also be afforded a remedy against that party.

As is the case with the recovery by a financier in tort, there is a dearth of authority relating to the financier's ability to recover in these circumstances pursuant to the *Trade Practices Act*, so once again one can only hazard a guess at the direction which the courts are likely to take.

CONCLUSION

It should be evident that this is a confusing and evolving area of the law and it is difficult to predict with any great certainty the likely outcome of the present question.

The methodology by which the High Court reached it decision in *Bryan v Maloney*[121] is with respect inconsistent with the way in which the Court has traditionally approached the question, and it is difficult to understand why, where proximity should be determined by the closeness of the relationship between the plaintiff and defendant, it is necessary to focus to the degree the Court did on the nature of the relationship between the original contracting parties.

In the writer's opinion the better view is that the courts should look directly at the relationship between the financier and the allegedly negligent party and make a determination based upon the closeness of that relationship, including the knowledge of the parties, the degree of reliance, assumption of responsibility and the other factors drawn out of the various judgments referred to above.

If it were to do this, then there is no reason why, in the appropriate circumstances, a financier may not be owed a duty of care in respect of damages suffered by it from the negligence of a contractor or other construction professional.

In light of recent decisions in the area, there seems a strong likelihood that each case will turn on its own special facts and circumstances. The one thing that is certain is that at the end of the day, policy is likely to be the crucial factor in the court's willingness to allow recovery. While there are a few "negatives" which would militate against a finding of proximity, the compelling (to the High Court at least) policy reasons for allowing recovery in B*ryan v Maloney* will not be present. The most compelling reason for extending a duty to the financier in these circumstances is that a builder or other professional already owes a duty to construct the premises in a professional and workmanlike manner. Whether this will be enough will no doubt be determined in the fullness of time. ❑

FOOTNOTES

1. (1995) 128 ALR 163.
2. ibid at 165.
3. For example see: G Miller QC and D Miller, *"Bryan v Maloney* - Builders' Liability in Negligence to a Subsequent Purchaser: the High Court Re-opens the Duty of Care Debate" (1995) #41 ACLN p43; McDonald and Swanton, "Builders' Liability for Negligence Towards Subsequent Owners of the Property" (1995) 69 ALJ 687; Lonergan, *"Bryan v Maloney"* (1995) 25 QLSJ 381.
4. *Bryan v Maloney* has since been considered in *Zumpano v Montagnese* (unreported, Vic Sup Ct, Mandie J, 3 May 1995) and also *Meadow Gem Pty Ltd v ANZ Executor & Trustee Co Ltd* (unreported, Vic Sup Ct, Hensen J., 25 July 1995).
5. *Bryan v Maloney* (1995) 128 ALR 163 at 166.
6. ibid at 166.
7. (1995) 128 ALR 163.
8. For example: *D & F Estates Ltd v Church Commissioners for England* [1989] AC 177 and *Murphy v Brentwood District Council* [1991] 1 AC 398. Recognised by the High Court in *Bryan v Maloney* (1995) 128 ALR 163 at 173.
9. See also decisions of the Canadian Courts: *Rivtow Marine Ltd v Washington Iron Works* (1973) 40 DLR (3d) 530; *Winnipeg Condominium Corp No 36 v Bird Construction Co Ltd and Smith Carter Partners* (unreported, Canadian Supreme Court, La Forest J, 26 January 1995); *City of Kamloops v Nielsen* (1984) 10 DLR (4th) 641; *Canadian National Railway Co v Norsk Pacific Steamship Co Ltd* (1992) 91 DLR (4th) 289; and New Zealand Courts: e.g. *Bowen v Paramount Builders (Hamilton) Ltd* [1977] lNZLR394; *Allied Finance & Investments Ltd v Haddow & Co* [1983] NZLR 22; *South Pacific Manufacturing Co Ltd v New Zealand Security Consultants and Investigations Ltd* [1992] 2 NZLR 282; where it appears that pure economic loss will be recoverable in certain circumstances.
10. See *Sutherland Shire Council v Heyman* (1985) 157 CLR 424 at 503-5; *D & F Estates Ltd v Church Commissioners for England* [1989] AC 177 at 206, 213, 216; *Murphy v Brentwood District Council* [1991] 1 AC 398 at 466-8, 475, 484-5, 492-3; *Department of Environment v Thomas Bates & Son Ltd* [1991] 1 AC 499 at 519 and *Bryan v Maloney* (1995) 128 ALR 163 at 165.
11. *Ultramares Corporation v Touche* (1931) 174 NE 441, per Cardozo CJ at 444.
12. *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465; *Mutual Life & Citizens Assurance Co Ltd v Evatt* (1971) AC 793.
13. *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465 at 486, 502, 514.

14. See for example: *Caltex Oil (Australia) Pty Ltd v The Dredge "Willemstad"* (1976) 136 CLR 529; *Bryan v Maloney (1995)* 128 ALR 163.
15. *Sutherland Shire Council v Heyman* (1985) 157 CLR 424; *Hawkins v Clayton* (1988) 164 CLR 539; *Bryan v Maloney (1995)* 128 ALR 163 though contra the view of Brennan J in *Sutherland Shire Council v Heyman* (1985) 157 CLR 424 at 490-1 and *Bryan v Maloney (1995)* 128 ALR 163 at 184.
16. *D & F Estates Ltd v Church Commissioners for England* [1989] AC 177; *Murphy v Brentwood District Council* [1991] 1 AC 398; *Department of the Environment v Thomas Bates & Son Ltd* [1991] 1 AC 499.
17. (1976) 136 CLR 529.
18. ibid at 573-574.
19. ibid at 568, 591.
20. (1984) 155 CLR 549.
21. *Jaensch v Coffey* (1984) 155 CLR 549 at 585; *Sutherland Shire Council v Heyman* (1985) 157 CLR 424 at 497.
22. (1986) 162 CLR 340.
23. ibid at 355.
24. (1988) 164 CLR 539.
25. (1985) 157 CLR 424.
26. (1981) 172 CLR 243.
27. (1986) 160 CLR 16.
28. (1995) 128 ALR 163.
29. (1994) 179 CLR 520 at 543.
30. *C.A.I. Fences Pty Ltd v A Ravi (Builder) Pty Ltd* (unreported, WA Sup Ct, Malcolm CJ, 27 December 1990); Op*at & Ors v National Mutual Life Association of Australasia Ltd* [1992] 1 VR 283; *National Mutual Life Association of Australasia Ltd v Coffey & Partners Pty Ltd* [1991] 2 QdR 401; *Brumby v Pearton* (1991) 10 BCL 291; *Salama v Pisarek* (unreported, NSW Sup Ct, Cole J, 10 September 1992); *Zumpano v Montagnese* (unreported, Vic Sup Ct, Mandie J, 3 May 1995).
31. *CBD Investments Pty Ltd v Ace Ceramics Pty Ltd* (1994) 10 BCL 437; *National Mutual Life Nominees Ltd v Marble Tile Co Ltd* (unreported, NSW Sup Ct, Rolfe J, 28 July 1992); *R W Miller & Co v Krupp (Australia) Pty Ltd (1995)* 11 BCL 74; *John Goss Projects Pty Ltd v Thiess Watkins White Constructions Limited (In liquidation)* (unreported, Qld Sup Ct, de Jersey J, 2 October 1992); P. & *E. Phontos Pty Ltd v McConnel Smith & Johnson Pty Ltd* (1993) 9 BCL 259; *Frederick Nielsen (Canberra) Pty Ltd v PDC Constructions (ACT) Pty Ltd* (1987) 3 BCL 387; *NRMA v F R Coyle Pty Ltd* (unreported, NSW Sup Ct, Cole J, 10 May 1994); *William Hill Organisation Ltd v Bernard Sunley & Sons Ltd* (1982) 22 BLR 1; *Doug Rea Enterprises Pty Ltd v Hymix Australia Pty Ltd* [1987] 2 QdR 495; *Craig Nathan & Co Pty Ltd v Schwagger Brookes & Partners* (unreported, NSW Sup Ct, Cole J, 4 December 1992); *NRMA Insurance Ltd v A W Edwards Pty Ltd* (1995) 11 BCL 200.
32. The House of Lords has recently re-opened the debate in relation to concurrent liability, casting doubt upon dicta of the Privy Council in *Tai HinB Cotton Mill Limited v Liu Chong Hing Bank* [1986] 1 AC 80; see *Henderson v Merret Syndicates Ltd* [1994] 3 All ER 506; considered in *NRMA Insurance v AW Edwards Pty Ltd (1995)* 11 BCL 200.
33. *Caltex Oil (Australia) Pty Ltd v The Dredge "Willemstad"* (1976) 136 CLR 529; *CBD Investments Pty Ltd v Ace Ceramics Pty Ltd* (1992) 8 BCL 437; *National Mutual Life Nominees Ltd v Marble Tile Co Ltd* (unreported, NSW Sup Court, Rolfe J, 28 July 1992); C.*A.I. Fences Pty Ltd v A. Ravi (Builder) Pty Ltd* (unreported, WA Sup Ct, Malcolm CJ, 27 December 1990); *Opat v National Mutual Life Association of Australasia Ltd* [1992] 1 VR 283; *Hawkins v Clayton* (1988) 164 CLR 539.
34. *Sutherland Shire Council v Heyman* (1985) 157 CLR 424; *San Sebastian Pty Ltd v Minister Administering the Environmental Planning & Assessment Act 1979* (1986) 162 CLR 341; *R W Miller & Co v Krupp (Australia) Pty Ltd (1995)* 11 BCL 74; *CBD Investments Pty Ltd v Ace Ceramics Pty Ltd* (1992) 8 BCL 437; *John Goss Projects Pty Ltd v Thiess Watkins White Constructions Ltd* (In Liquidation) (unreported, Qld Sup Ct, de Jersey J, 2 October 1992); P. & *E. Phontos Pty Ltd v McConnel Smith & Johnson Pty Ltd* (1993) 9 BCL 259; *Opat v National Mutual Life Association of Australasia Ltd* [1992] 1 VR 283; *National Mutual Life Association of Australasia Ltd v Coffey & Partners Pty Ltd* [1991] 2 QdR 401; *Brumby v Pearton* (1991) 10 BCL 291; *Frederick W Nielsen (Canberra) Pty Ltd v PDC Constructions (ACT) Pty Ltd* (1987) 3 BCL 387; *NRMA v F R Coyle Pty Ltd; NRMA v A W Edwards (1995)* 11 BCL 200.
35. *Hawkins v Clayton* (1988) 164 CLR 539 at 576; see also *Opat v National Mutual Life Association of Australasia Ltd* [1992] 1 VR 283.
36. Circumstantial proximity from *Jaensch* (supra) at 585.
37. Causal proximity from *Jaensch* (supra) at 585.
38. Physical proximity from *Jaensch* (supra) at 585.
39. (1995) 128 ALR 163 at 166.
40. (1976) 136 CLR 529.
41. Which in the writer's view goes more to the issue of reasonable foreseeability.
42. *CBD Investments Pty Ltd v Ace Ceramics Pty Ltd* (1992) 8 BCL 437; *National Mutual Life Nominees Ltd v Marble Tile Co Ltd* (unreported, NSW Sup Ct, Rolfe J, 28 July 1992); *C.A.I. Fences Pty Ltd v A . Ravi (Builder) Pty Ltd* (unreported, WA Sup Ct, Malcolm CJ, 27 December 1990); *Opat v National Mutual Life Association of Australasia Ltd* [1992] 1 VR 283.
43. (1988) 164 CLR 539.
44. ibid at 578.
45. [1992] 1 VR 283.
46. ibid at 294.
47. *Caltex Oil (Australia) Pty Ltd v The Dredge "Willemstad"* (1976) 136 CLR 529.
48. *Opat v National Mutual Life Association of Australasia* [1992] 1 VR 283.
49. [1991] 2 QdR 401.
50. (1985) 157 CLR 424.

51. [1991] 2 QdR 401 at 406.
52. (1993) 9 BCL 259.
53. (1992) 8 BCL 437.
54. (unreported, Qld Sup Ct, de Jersey J, 2 October 1992).
55. (1995) 11 BCL 200.
56. See for example: *Junior Books v Vietchi Co Ltd* [1983] 1 AC 520; *Muirhead v Industrial Tanker Specialties* [1986] QB 507 at 527.
57. (1995) 128 ALR 163.
58. See also *National Mutual Life Association of Australia v Coffey and Partners Pty Ltd* [1991] 2 Qd R 401 at 406.
59. ibid.
60. [1991] 2 QdR 401.
61. (1985) 128 ALR 163.
62. *Jaensch v Coffey* (1984) 155 CLR 549 at 584-5.
63. (1985) 128 ALR 163.
64. ibid at 172.
65. See for e.g.: *Forster v Outred & Co* [1982] 1 WLR 86; *Islander Trucking Ltd (In Liq) v Hogg Robinson & Gardner Mountain Marine Ltd* [1990] 1 AIER at 831; *SWF Hoists and Industrial Equipment Pty Ltd v State Government Insurance Commission* [1990] ATPR 41-845 and *Zoneff v Elcom Credit Union Ltd* [1990] ATPR 41-058. Contra *Wardley Australia Ltd v State of Western Australia* (1992) 109 ALR 247.
66. See for example *Hawkins v Clayton* (1988) 164 CLR 539 at 600-601. Confirmed in *Wardley Australia Ltd* (supra).
67. *Sutherland Shire Council v Heyman* (1985) 157 CLR 424 at 497-498.
68. *Jaensch v Coffey* (1984) 155 CLR 549 at 586; *Caltex Oil (Australia) Pty Ltd v The Dredge "Willemstad"* (1976) 136 CLR 529 at 555.
69. (l995) 128 ALR 163.
70. (1985) 157 CLR 424.
71. ibid at 490-3, 504-5.
72. (1995) 128 ALR 163.
73. ibid at 171.
74. ibid at 171.
75. See *Caltex Oil (Australia) Pty Ltd v The Dredge "Willemstad"* (1976) 136 CLR 529 at 579.
76. (1995) 128 ALR 163.
77. ibid at 166, 171.
78. ibid at 166,171.
79. (1995) 128 ALR 163.
80. ibid at 172-173.
81. (1995) 128 ALR 163.
82. ibid at 169-170.
83. *March v B & MH Stramare Pty Ltd* (1991) 171 CLR 506.
84. (1995) 128 ALR 163. See also *Sheldon v McBeath* [1993] ATR 81-209.
85. (1963) 110 CLR 74.
86. (1995) 128 ALR 163. For the English position see for example *District of Surrey v Carrol Hatch & Associates* (1979) 101 DLR (3d) 218.
87. (unreported, Qld Court of Appeal, Pincus and Davies JA and Fitzgerald P, 13 February 1995).
88. [1964] AC 465.
89. Makesinis and Deakin, "The random element of their lordships' infallible judgment: an economic and comparative analysis of the tort of negligence from Anns to Murphy," (1992) 55 (5) MOD.L.R. 619.
90. (1985) 157 CLR 215, at 226, 232, 246, 259 and 269.
91. See also *Junior Books v Vietchi* [1983] 1 AC 520 where presumably the building owner would also have had a claim against the main contractor who in normal circumstances would have had a right of recovery against the subcontractor.
92. *Clarke v Bruce Lance & Co* [1988] 1 WLR 881.
93. *Gould v Vaggelas* (1985) 157 CLR 215.
94. ibid at 259.
95. ibid at 246.
96. (1985) 157 CLR 424.
97. ibid at 490.
98. (1995) 128 ALR 163.
99. Although see *National Mutual Life Association v Coffey & Partners* [1991] 2 QdR 401, where the Court left open the possibility of recovery in a commercial setting.
100. *Bryan v Maloney* (1995) 128 ALR 163 at 171.
101. (1995) 128 ALR 163.
102. But see *National Mutual Life Association of Australasia Ltd v Coffey & Partners Pty Ltd [1991]* 2 QdR 401, where the opportunity of inspection was not of itself considered to be fatal to the claim.
103. [1991] 2 QdR 401.
104. ibid at 406.
105. (1995) 128 ALR 163.
106. *Sutherland Shire Council v Heyman* (1985) 157 CLR 424 at 493.
107. *Linden Gardens Trust Ltd & Lenesta Sludge Disposals Ltd & Ors v Sir Robert McAlpine Ltd* [1994] 1 AC 85.
108. The JCT standard form is substantially similar to AS2124-1986.
109. [1993] 3 WLR 408.
110. ibid at 109 - citing the words of Lord Keith of Kinkel in G. *U.S. Property Management Pty Ltd v Littlewoods Mail Order Stores Ltd* [1982] SLT 533, 538.
111. ibid at 105.
112. [1994] 1 AC 85.
113. (1995) 11 BCL 20.
114. *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465.
115. See also Section 53 and 75(b) of that *Act* and in respect of individuals' claims the equivalent provisions of the relevant Fair Trading legislation.
116 [1987] ATPR 40-771.
117. ibid at 48, 385 - 48, 386.
118. *Western Mail Securities Pty Ltd v Forest Plaza Developments Pty Ltd* (1987) 3 BCL 360; *Kaze Constructions Pty Ltd* and *Kaze & Zecevich Pty Ltd v Housing Indemnity Australia Pty Ltd and Neil Francis McPeake* (1994) 10 BCL 63.
119. *Jiawan Holdings Pty Ltd v Design Collaborative Pty Ltd* (1994) BCL 214.
120. [1989] ATPR 40-974.
121. (1995) 128 ALR 163. ❑