SUPREME COURT OF QUEENSLAND

CITATION:	*Raymond v Lewis* [2024] QCA 43
PARTIES:	**RAMY RAYMOND** (appellant) **v** **BELINDA SARAH LEWIS** (respondent)
FILE NO/S:	Appeal No 4420 of 2023 DC No 3425 of 2018
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	District Court at Brisbane – Unreported, 16 March 2023 (Rinaudo DCJ)
DELIVERED ON:	26 March 2024
DELIVERED AT:	Brisbane
HEARING DATE:	29 August 2023
JUDGES:	Mullins P, Morrison JA and North J
ORDERS:	**1. Appeal allowed with costs.** **2. Judgment for the respondent dated 16 March 2023 is set aside.** **3. In lieu, judgment entered for the appellant and the respondent must pay the appellant's costs of the proceeding in the District Court.**
CATCHWORDS:	APPEAL AND NEW TRIAL – APPEAL – GENERAL PRINCIPLES – RIGHT OF APPEAL – WHEN APPEAL LIES – ERROR OF LAW – PARTICULAR CASES INVOLVING ERROR OF LAW – FAILURE TO GIVE REASONS FOR DECISION – ADEQUACY OF REASONS – where the appellant was the builder of a dwelling house that was bought by the respondent as a subsequent purchaser from the intervening owner – where the dwelling had defects in the subfloor and the props and joists that support the driveway and garage floor – where the trial judge found that *Bryan v Maloney* (1995) 182 CLR 609 applied and the appellant owed the respondent a duty of care in respect of the construction of the dwelling house – where the trial judge adopted the submissions of the respondent in relation to whether the appellant owed a duty of care – whether the trial judge gave insufficient reasons TORTS – NEGLIGENCE – PURE ECONOMIC LOSS: NEGLIGENT ACTS, OMISSIONS OR

MISREPRESENTATIONS – PARTICULAR CASES OF ECONOMIC LOSS – DEFECTIVE BUILDINGS – where the appellant was the builder of a dwelling house that was bought by the respondent as a subsequent purchaser from the intervening owner – where the respondent prior to the purchase of the dwelling house was given building and pest inspection reports obtained by the vendor – where the building report outlined defects that were described as minor – where the vendor's inspection reports noted that the inspections did not include 'inaccessible areas' of the dwelling house – where the respondent obtained expert building and engineering reports after the purchase of the dwelling house – where these reports disclosed defects in the subfloor and the props and joists that support the driveway and garage floor – where the trial judge found *Bryan v Maloney* (1995) 182 CLR 609 applied and the appellant owed the respondent a duty of care in respect of the construction of the dwelling house – where the trial judge found that the respondent was vulnerable at the time of purchase and reliant on the appellant – whether the trial judge erred in finding that *Bryan v Maloney* applied

Brookfield Multiplex Ltd v Owners Corporation Strata Plan 61288 (2014) 254 CLR 185; [2014] HCA 36, cited
Bryan v Maloney (1995) 182 CLR 609; [1995] HCA 17, considered
Tyrrell v McNab Constructions Pty Ltd [2014] QCA 52, cited
Woolcock Street Investments Pty Ltd v CDG Pty Ltd (2004) 216 CLR 515; [2004] HCA 16, cited

COUNSEL: G D Beacham KC, with S J Hogg, for the appellant
D P de Jersey KC, with F Y Lubett, for the respondent

SOLICITORS: Queensland Construction Legal for the appellant
Stephen Rudz & Associates for the respondent

[1] **MULLINS P:** The respondent Ms Lewis was successful in the District Court in her claim against the appellant Mr Raymond for damages for negligence. Mr Raymond was ordered to pay Ms Lewis damages in the sum of $229,100 together with interest in the sum of $67,466.45 to the date of judgment of 16 March 2023 and costs of the proceeding to be assessed on the indemnity basis. Written reasons were delivered to the parties on the date of judgment (the reasons).

[2] By contract dated 14 March 2017 entered into after being the successful bidder at an auction, Ms Lewis purchased from one Mr King a residential property at Charteris Street, Paddington for $1.6 million. The dwelling house was constructed on the property during 2005 and 2006 when the property was owned by Tycoon Developments Pty Ltd of which Mr Raymond was a director and shareholder. Mr Raymond was a registered builder at the time of the construction. Tycoon subsequently sold the property to Mr King.

[3] The subject property is on the southern side of Charteris Street. The property slopes steeply down from the front which is the northern boundary of the property to the

rear which is the southern boundary. The allotment has been partially terraced. The dwelling house is multi-storey and split level. The uppermost floor is the entry and garage which are level with the road. The landing area inside the front door has a few steps that gives access to the living and dining areas and the kitchen. The next level down is the bedroom level with the bathroom. The swimming pool is located on the lowest terrace below the bedroom level. There are three areas underneath the three levels of the house. There is a hatch at the eastern side of the residence that provides access to the upper subfloor area and a hatch on the western side of the residence that provides access to the lower subfloor area. It was possible to stand under the floor of the middle level of the residence. There was a retaining wall around six feet in height that separated the space under the middle level from the upper level space.

[4] After Ms Lewis and her family moved into the property, she ascertained there were defects with the construction of the house. The trial was conducted on the basis that the claim was in respect of two types of building defects:

(a) those associated with the subfloor timber members, supports and fittings which were referred to throughout the trial and on the hearing of the appeal as "the subfloor defects"; and

(b) those associated with the props and joists used to support the driveway and garage floor (which was the upper level at the front of the property) as a result of termite entry and rot at the end of the timber joists which were referred to as "the driveway and garage floor defects".

[5] The learned trial judge found (at [83]-[85] of the reasons) that Mr Raymond as the builder owed Ms Lewis as a subsequent purchaser a duty of care as expressed in *Bryan v Maloney* (1995) 182 CLR 609 on the basis of her "vulnerability and reliance which was proved by her evidence" and that part 5 of the *Queensland Building and Construction Commission Act 1991* (Qld) (QBCC Act) had not replaced the duty of care expressed in *Bryan v Maloney*.

[6] The grounds of appeal are:

1. The trial judge erred in finding that Ms Lewis was relevantly vulnerable in that the finding was unsupported by reasoning or findings of primary fact and unsupported by the evidence.

2. The trial judge erred in finding that there was reliance by Ms Lewis on Mr Raymond in that the finding was unsupported by reasoning or findings of primary fact, and unsupported by the evidence.

3. The trial judge erred in holding that Ms Lewis was vulnerable, and that a duty was owed, despite the existence of the statutory insurance scheme under the QBCC Act.

4. The trial judge erred in finding that Mr Raymond owed Ms Lewis a duty of care.

[7] There is some overlapping in the grounds of appeal. On the hearing of the appeal, the appellant's submissions were made by reference to four issues raised by the grounds of appeal: insufficient reasons, the discoverability of the defects, lack of reliance, and the effect of the statutory insurance scheme. The latter three issues

were directed at whether Ms Lewis' claim was within the principles of *Bryan v Maloney* on the facts proved at the trial.

The reasons

[8] There is no challenge on the appeal to the trial judge's finding (at [75] of the reasons) that Mr Raymond was the builder of the dwelling house. There is also no challenge to the trial judge's finding (at [80] of the reasons) that the defects in the building identified in Ms Lewis' claim were defects that occurred during the construction of the dwelling and the finding (at [82] of the reasons) that the defects were not caused by a lack of maintenance by subsequent purchasers.

[9] The trial judge dealt with the issue of the duty of care at [83]-[88] of the reasons:

> "[83] The real issue in this case is whether the builder owes a duty of care to a subsequent purchaser and whether the authority for this proposition namely *Bryan v Maloney* still applies. Or whether, as submitted by Mr Raymond, the existence of a duty of care has been supplanted by the statutory warranty scheme. I am satisfied that Mr Raymond does owe Mrs [Lewis] a duty of care as expressed in that case. (see paragraph 27 and 28 above).
>
> [84] I accept the submission of the plaintiff that Pt 5 of the *Queensland Building and Construction Commission Act 1991* has not replaced the duty of care expressed by the High Court in *Bryan v Maloney*.
>
> [85] In this case, I accept that a duty was owing [due] to Mrs Lewis' vulnerability and reliance which was proved by her evidence.
>
> [86] It would in my view, be wrong to limit the duty owed for, what are in this case, significant building defects to a period of six years. The insurance scheme must, in my view, apply to defects which are discovered within the statutory period. Defects such as leaks or cracks. substandard construction, as in this case, which is not immediately discoverable, but which has the potential over a lengthy period of time to be significant, could not have been in the contemplation of the legislation. In other words, this presupposes that the original construction was by all accounts in accordance with the standards applicable.
>
> [87] In my view it would be wrong to suggest that the legislation excuses a builder in the circumstances of this case. I am fortified in this view having regard to Henry J in *Wright V The State Coroner (See paragraph 29 above)*
>
> [88] In those circumstances, it seems to me that a duty was owed by Mr Raymond to Mrs Lewis and accordingly Mrs Lewis is entitled to damages."

Summary of the evidence relevant to the issues on the appeal

[10] Ms Lewis' evidence included the following. This was the first house purchased by her husband Dr Lewis and her. They were interested in the property because it had sufficient bedrooms for their family. They had two small children and Ms Lewis was pregnant with their third child. They had inspected the subject property on two occasions before bidding at the auction. The first inspection was during the day about one month prior to the auction and the second inspection was during the evening about two weeks later. After the second inspection, Ms Lewis received the building report (exhibit 3) and pest inspection report (exhibit 4) procured by the vendor. These reports were undertaken by One Stop Building & Timber Pest Inspections based on inspections on 1 February 2017.

[11] On the second inspection Ms Lewis noted a hatch about half a metre high and about 40 centimetres wide in the undercroft area. She opened the hatch. There was no light and it was pitch black. All she could see was a step down and that it was dirt. Neither she nor her husband entered that area. Neither of them had building qualifications.

[12] Before bidding at the auction, Ms Lewis read the building and pest inspection reports. In the section of the building report dealing with the subfloor space (3.3), there was a photograph to illustrate the rusting box section of several steel house columns, mainly at the base, that were characterised in the report as minor defects. The report recommended that the bases of existing columns should be "spaded away" to the top of footings, rust should be cleaned with a wire brush, followed by an application of "Rust Converter" and then coated with a zinc rich paint in addition to a bitumen based brushable waterproofer. The report then recommended that "ducting tape should be wrapped around the prepared base of the column with mortar then used to form a mound around the base to divert any surface water away and prevent the column from soil exposure". Ms Lewis was not concerned about that defect because it was categorised as a minor defect and the report disclosed the method for fixing the problem and explained that minor defects were "generally of an ongoing maintenance nature" and "not in most cases affecting the overall functionality of the residence".

[13] The pest report noted no visible and accessible borer indicators, dampwood termites, wood decay fungi or termite indicators but that did not mean there were no termite indicators or damage as the level of inspection was visual and non-invasive and had many limitations. Ms Lewis was not concerned that the pest report recorded that there were "some inaccessible areas" in the under house of the property with "varying available crawl spaces and some inaccessible areas" as the report did not state there were a lot of inaccessible areas.

[14] Ms Lewis did not obtain her own building and pest inspections reports before purchasing the property. She did not think she needed to, as the vendor's reports suggested that there were not any problems.

[15] After she had purchased the property, Ms Lewis engaged a person to do the pest treatment of the house. After he entered the under house, he refused to treat the property. (Ms Lewis clarified in cross-examination that the pest treatment person had told her that there were major problems underneath the house and that he could not treat it because he could not access areas of it.) About a week later, Ms Lewis engaged a building inspector Mr Waddell to do a report. Morgan Consulting Engineers Pty Ltd (Morgan) was engaged to do a structural inspection report. (That

was undertaken by Mr Bowman and Mr Ketheeswaran on the first inspection and by Mr Bowman and two other Morgan employees on the second inspection. The Morgan report dated 23 April 2018 was exhibit 7 at the trial and the supplementary report dated 21 December 2020 was exhibit 9.) Ms Lewis stated that if she had been aware of Mr Bowman's opinions at the time of the auction, she would not have purchased the house.

[16] Ms Lewis' evidence in cross-examination included the following. Apart from the subject property, Ms Lewis had inspected the property next door (the adjoining property) for which she was also given building and pest reports. She bid unsuccessfully at the auction of the adjoining property and also inspected two other properties around the same time. Ms Lewis was asked whether she understood that it would be prudent, when buying a house to obtain her own independent building and pest inspection report. Ms Lewis stated:

> "So for me, personally, the fact that there were no major issues in either [the adjoining property] or [the subject property] said to me that I don't need to do further investigation because, if there was a major issue, it would show up in this report."

[17] Ms Lewis confirmed that she "basically trusted that the report that was provided to [her] by the real estate agent was … done properly … and that it picked up any defects".

[18] She received the building and pest inspections report for the subject property on 6 February 2017. She had done both inspections of the subject property prior to receiving the reports. Her second inspection was on 5 February 2017. She did not take an independent building inspector with her to do the inspections. The auction was at the end of February 2017. The settlement date was 18 April 2017. The following exchange took place in cross-examination relevant to the fact that Ms Lewis did not obtain her own building and inspection reports:

> "And you didn't obtain your own building and pest inspection - - -?---No, I didn't.
>
> - - - at any time, did you?---No, I didn't.
>
> No. Did it occur to you that it might be a possibility there could be defects in the house?---No.
>
> It didn't occur to you at all?---No, because I had a building and pest inspection that said to me that there were no major defects.
>
> So, really, you relied on that building and pest inspection to form - - - ?---Yes, I did.
>
> - - - your own opinion. Right. And – so when you were – when you decided to pay this 1.6 million for the property at auction - - -?--- Yes.
>
> - - - that was the price that you thought was the right price for you in a house with no defects?---Yes."

[19] Although Ms Lewis suggested in her cross-examination that she engaged the pest inspector in July or August 2017, that is inconsistent with evidence of the

engagement of Mr Bowman who was engaged after the pest inspector and whose reports noted that his initial inspection of the property was on 30 May 2017. Around the same time that Ms Lewis had engaged the pest inspector, she had brought in Mr Reece as the contractor to do the repairs identified in the building report (exhibit 3) which Ms Lewis considered were maintenance issues. He had already commenced doing the repairs to the posts under the laundry area, when the pest inspector attended the property.

[20] Mr Waddell's evidence included the following. He did a number of inspections throughout 2017 and his initial inspections commencing "earlier" in 2017, when he took a series of 45 photographs (exhibit 6). He is 172 cm tall. Towards the front of the house, he was on his stomach for most of the area to take the photographs as the crawl space was about half a metre. In other parts, such as the area towards the rear of the house, it was approximately a metre.

[21] It is not necessary for the purpose of the issues on this appeal to set out the detail of Mr Waddell's observations and what is shown in each photograph. The photographs confirm the defects were of a type that were in existence and observable prior to Ms Lewis' purchase of the subject property. Photograph number 5 showed the packing between the bearer and one of the columns that was a different example of packing to the photograph of packing in exhibit 3. The crawl space was approximately 400 mm in the vicinity of that column and the crawl space diminished as the columns progressed. There were many photographs of rusting on the steel columns, such as was identified in exhibit 3. Photograph number 12 was taken almost to the rear of the property and the first bearer in the photograph was less than 300 mm above the ground, the next one was less than 200 mm and the space got progressively less to about 100-150 mm above the ground. Photographs numbered 32, 33 and 34 were taken below the lower northeast deck and showed pieces of wood that would have been temporary supports during construction and should have been removed, as there should have been columns supporting the bearer.

[22] The vendor's building and pest inspection reports of the subject property (exhibits 3 and 4) were noted as being based on visual and non-invasive residential inspection to "accessible areas" where reasonable access was available. The building report defined "minor defects" as "generally of an ongoing maintenance nature" and not affecting the overall functionality of the residence. Apart from the rusting box section at the base of the steel house columns in the subfloor space dealt with in item 3.3 of the report, that item also identified and illustrated in a photograph that packing had been placed on top of some of the columns which had not been placed "truly level" and that at least one column had been incorrectly placed with an added bearer bolted onto the existing bearer to compensate. The report noted that ventilation in the subfloor space was adequate. The definition section of the report explained that inaccessible areas would include subfloor or underhouse areas where safe and unobstructed access as determined by the consultant was not provided.

[23] Item 2 of the pest report in dealing with the underhouse and subfloor noted that the underhouse "consists of exposed ground on 2-3 levels, with varying available crawl spaces and some inaccessible areas". In item 2.1.4 "antcapping" was noted as "[i]nadequate in some areas with timber in close ground contact without apparent protection". Item 6 of the report gave examples of areas not visible, accessible or inspected and included subfloor timbers for decking due to closeness to the ground

and underfloor areas where insufficient safe crawl space was available. In the recommendations in item 9, it was noted the underfloor is on several levels with some regions difficult and/or impossible to access physically.

[24] Other than in general terms in defining inaccessible areas, neither exhibit 3 nor exhibit 4 indicated the extent of the inaccessible areas in the subfloor space and under the driveway and garage that was not inspected.

[25] Mr Bowman's evidence included the following. He inspected the residence on two occasions, namely 30 May 2017 and 12 September 2017. The report noted:

> "In our opinion, the Building Inspection Report [exhibit 3] does not accurately represent the condition of the residence. While no single major defect was identified during our investigation, it is our opinion that the frequency of minor defects is uncommonly high. These defects relate to poor or inappropriate construction and poor repair works. Furthermore, many of these defects may impact the structural condition and maintenance of the structure in the future."

[26] The report also noted that the Building Code of Australia (BCA) that was in effect during the construction of the residence (BCA 2005 Volume 2) indicates that for timber members beneath a residence there must a vertical gap of no less than 400 mm between the exposed ground surface and the underside of the timber above (with an exception along one external side of the residence of no more than 150 mm that within two metres of the ground level slopes away until the 400 mm is achieved). The report then noted:

> "In this case the majority of the lower sub-floor area does not comply with the BCA at the time of construction. Inadequate ventilation can lead to issues regarding excess moisture in the subfloor area including increased risk of termite attack, increased risk of rotting of timber members and increased risk of mould issues inside the residence. Contrary to this [exhibit 3] advises that there is adequate sub-floor ventilation, however it is noted that access is restricted due to low clearance."

[27] The report noted that exhibit 3 failed to report on the evidence of termite activity that was identified during Mr Bowman's inspection, some of which was visible below the western boundary hatch. The photographs that accompanied exhibit 7 showed many of the defects identified in the photographs taken by Mr Waddell. Further photographs were taken on the visit on 12 September 2017 that showed the termite damage.

The authority of *Bryan v Maloney*

[28] The parties were agreed on this appeal that *Bryan v Maloney* remains authoritative for determining whether a duty of care is owed by the original builder in circumstances such as this case where there are defects in a dwelling house purchased by Ms Lewis as a subsequent purchaser with no contractual relationship with the original builder.

[29] Where the parties differ is whether the trial judge erred in finding that the circumstances of Ms Lewis' purchase brought her within the category of subsequent

purchaser of a dwelling house who is owed a duty of care by the original builder in the construction of the dwelling house.

[30] In *Tyrrell v McNab Constructions Pty Ltd* [2014] QCA 52 which concerned the viability of an allegation in the statement of claim by a subsequent purchaser of a house property that a duty of care was owed by the builder for latent defects, Fraser JA summarised the judgments of the members of the majority in *Bryan v Maloney* at [9]-[10]:

> "[9] In *Bryan v Maloney* damage to a plaintiff's house was caused by inadequacy in the house's footings. That damage was of its nature not discoverable by reasonable inspection when the plaintiff inspected the house before purchasing it. It was not in fact discovered by the plaintiff at that time - the cracks and other defects which subsequently became apparent did not then exist. The contract between the builder and the first owner of the house contained no relevant exclusion or limitation of liability and there was no competing or intervening negligence by the architect, local council, or any other person. The plaintiff relied upon the builder: her evidence was that she 'thought it would be built properly… so I bought it'. Mason CJ, Deane and Gaudron JJ took those facts into account when they framed the question for decision 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 Mrs Maloney sustained in the present case, that is to say, the diminution in value of the house when a latent and previously unknown defect in its footings or structure first becomes manifest.' In holding that the builder owed a duty to the subsequent purchaser, their Honours observed that the relationship with respect to the particular kind of economic loss was 'marked by the kind of assumption of responsibility and known reliance which is commonly present in the categories of case in which a relationship of proximity exists with respect to pure economic loss', that ordinarily the builder of a house 'undertakes the responsibility of erecting a structure on the basis that its footings are adequate to support it for a period during which it is likely that there will be one or more subsequent owners', that a subsequent owner would 'ordinarily have no greater, and will often have less, opportunity to inspect and test the footings of the house than the first owner', that such a subsequent owner was likely to be unskilled in building matters, and that a builder should be aware that the subsequent owner 'will be likely, if inadequacy of the footings has not become manifest, to assume that the house has been competently built and that the footings are in fact adequate'. Like the relationship between the builder and the first owner, the relationship between the builder and a subsequent owner in relation to the particular kind of economic loss in question was characterised 'by assumption of

responsibility on the part of the builder and likely reliance on the part of the owner'.

[10] The other member of the majority, Toohey J, referred to the similar considerations that: the house was built for the first owner under an ordinary commercial transaction; the builder was to build in accordance with standard building practice and to conform to the standard of a reasonably competent builder, and in particular to build a house with footings which were adequate; inadequacy in the footings might not manifest itself for some years; the builder was responsible for a structure, the defects in which might not readily be ascertained by a subsequent purchaser; a subsequent purchaser had little opportunity to inspect and little experience and knowledge of a construction; and the builder already owed a duty to the first owner to build in a workmanlike manner." (*footnotes omitted*)

[31] As Fraser JA then observed in *Tyrrell* at [11], even though the High Court subsequently rejected the approach adopted by the majority in *Bryan v Maloney* of using the concept of proximity to determine in a novel case that there is a duty of care, "unless and until the High Court overrules *Bryan v Maloney* the decision in that case remains binding".

[32] The extent to which *Bryan v Maloney* remains authoritative was considered in *Woolcock Street Investments Pty Ltd v CDG Pty Ltd* (2004) 216 CLR 515 and *Brookfield Multiplex Ltd v Owners Corporation Strata Plan 61288* (2014) 254 CLR 185. *Woolcock* concerned whether the statement of claim by a subsequent purchaser of a warehouse and office complex disclosed a cause of action in negligence against the engineers who designed the foundations when it was discovered by the purchaser that the building suffered substantial structural distress due to settlement of the foundations. It was held by the majority in the High Court that the engineers did not owe to the subsequent purchaser a duty to take reasonable care on the facts alleged in the statement of claim and agreed in the case stated. The joint judgment in *Woolcock* of Gleeson CJ and Gummow, Hayne and Heydon JJ explained *Bryan v Maloney* at [14]-[15]:

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

[15] Both this anterior step, and the conclusion drawn from it, were considered in the context of the facts of the particular case — in which the building in question was a dwelling house. The propositions about assumption of responsibility by the builder and known reliance by the building owner were said to be characteristics of 'the *ordinary* relationship between a builder of a house and the first owner' (emphasis added). At least in terms, however, the principles that were said to be engaged in

> *Bryan v Maloney* did not depend for their operation upon any distinction between particular kinds of, or uses for, buildings. They depended upon considerations of assumption of responsibility, reliance, and proximity. Most importantly, they depended upon equating the responsibilities which the builder owed to the first owner with those owed to a subsequent owner." (*footnote omitted*)

[33] The concept of vulnerability was explained in this joint judgment at [23]:

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

[34] *Bryan v Maloney* was referred to in the joint judgment at [24] as an example of a case of pure economic loss where reference was made to "notions of assumption of responsibility and known reliance" as relevant to the notion of vulnerability. The joint judgment concluded (at [24]) that it was not necessary in *Woolcock* "to attempt to identify or articulate the breadth of any general proposition about the importance of vulnerability", as that case could be decided without doing so. The joint judgment also noted (at [35]) that *Woolcock* arose in a different factual context from that considered in *Bryan v Maloney* and could be decided without determining whether doubt should be cast upon the result in *Bryan v Maloney*. The following observations were then made:

> "The actual decision in *Bryan v Maloney* has now been overtaken, at least to a significant extent, by various statutory forms of protection for those who buy dwelling houses which turn out to be defective… No doubt, as recognised earlier in these reasons, the principles applicable in cases of negligently inflicted pure economic loss have evolved since *Bryan v Maloney* was decided."

[35] McHugh J (who in a separate judgment in *Woolcock* agreed with the conclusion of the joint judgment) stated at [73]:

> "Since the doctrine of proximity was rejected in *Sullivan*, the only ratio decidendi that can be extracted from *Bryan v Maloney* is one based on its principal facts and assumptions. Its ratio is that the builder of a dwelling house owes a duty to a subsequent purchaser who relies on the skill of the builder to protect that person from reasonably foreseeable decreases in value resulting from latent defects in the house."

[36] *Woolcock* was applied by the High Court in *Brookfield* where there was found to be no duty of care owed by the appellant builder to the respondent which was the body corporate that held the common property of the subject building as agent for the owners of the individual lots as tenants in common in shares proportional to the unit entitlements of the respective lots. The appellant had constructed a 22 storey building under a design and construct contract with an owner/developer for a contract price of more than $57 million. There was provision in the contract for a defects liability period of 52 weeks which commenced upon practical completion with an exception after the final certificate was issued for defects that were not apparent. A strata scheme was registered in respect of levels 1 to 9 which comprised serviced apartments. The developer onsold the strata-titled apartments to purchasers who were investors under a standard form contract annexed to the design and construct contract and those purchases were subject to a lease of the apartments granted by the developer to an operator to be operated collectively as a serviced apartment hotel. The respondent sued the appellant for the cost of rectifying latent defects in the common property. The Court of Appeal had allowed an appeal by the respondent, holding that the appellant owed it a duty of care to avoid loss resulting from latent defects that were structural, which constituted a danger to persons or property in, or in the vicinity of, that part of the building constructed by the appellant that was used as serviced apartments, or which made them uninhabitable: *Owners – Strata Plan No 61288 v Brookfield Australia Investments Ltd* (2013) 85 NSWLR 479. All members of the High Court joined in allowing the appeal by the appellant from the Court of Appeal's decision.

[37] French CJ explained in *Brookfield* (at [22]) how *Bryan v Maloney* remained authoritative when it was the concept of vulnerability that was relevant in determining the existence of a duty of care for pure economic loss:

> "Abstracting the reference to proximity in *Bryan v Maloney*, the decision adverted to factors adverse to the recognition of a duty of care for pure economic loss other than in special cases. The special cases would commonly, but not necessarily, involve an identified element of known reliance or dependence on the part of the plaintiff, or the assumption of responsibility by the defendant, or a combination of the two. The contract between the prior owner and the builder in that case was 'non-detailed and contained no exclusion or limitation of liability'. The subsequent owner would ordinarily be unskilled in building matters and inexperienced in the niceties of real property investment. Any builder should be aware that such a subsequent owner would be likely to assume that the building had been competently built and that the footings were adequate. Those considerations may be seen as elements of the notion of 'vulnerability', which has become an important consideration in determining the existence of a duty of care for pure economic loss. In

> this context, it refers to the plaintiff's incapacity or limited capacity to take steps to protect itself from economic loss arising out of the defendant's conduct." (*footnotes omitted*)

[38] French CJ concluded (at [35]) that the relationship between the appellant and the respondent was not analogous to the relationship in *Bryan v Maloney* "between the builder of a dwelling house and the downstream, arms-length purchaser of the house, who suffered economic loss by reason of latent defects in the construction".

[39] The joint judgment of Hayne and Kiefel JJ in *Brookfield* assumed at [56], without deciding, that the developer and the purchaser of a lot from the developer relied on the builder to do its work properly and the respondent was in no better position than them, because these parties could not check the quality of what the appellant was doing, and stated at [57]-[58]:

> "[57] Reliance, in the sense just described, may be a necessary element in demonstrating vulnerability, but it is not a sufficient element. As noted earlier, vulnerability is concerned with a plaintiff's inability to protect itself from the defendant's want of reasonable care, either entirely or at least in a way which would cast the consequences of loss on the defendant.
>
> [58] It is neither necessary nor profitable to attempt to define what would or would not constitute vulnerability. It is enough to observe that both the developer and the original purchasers made contracts, including the standard contracts, which gave rights to have remedied defects in the common property vested in the Owners Corporation. The making of contracts which expressly provided for what quality of work was promised demonstrates the ability of the parties to protect against, and denies their vulnerability to, any lack of care by the builder in performance of its contractual obligations. It was not suggested that the parties could not protect their own interests. The builder did not owe the Owners Corporation a duty of care." (*footnote omitted*)

[40] The joint judgment of Crennan, Bell and Keane JJ in *Brookfield* (at [67]) characterised the respondent's claim as "based on the failure of the purchasers of the apartments to get value for money from the developer rather than on the appellant's causing damage to the respondent's property". They stated at [69]:

> "This Court's decision in *Bryan v Maloney* does not sustain the proposition that a builder that breaches its contractual obligations to the first owner of a building is to be held responsible for the consequences of what is really a bad bargain made by subsequent purchasers of the building. To impose upon a defendant builder a greater liability to a disappointed purchaser than to the party for whom the building was made and by whom the defendant was paid for its work would reduce the common law to incoherence. Moreover, to hold that a subsequent purchaser of a building is vulnerable to the builder so far as the risk of making an unfavourable bargain for its acquisition is concerned would involve a departure

> from what was held by this Court in *Woolcock Street Investments.*" (*footnotes omitted*)

[41] Gageler J in *Brookfield* (at [185]) confined the authority of *Bryan v Maloney* in these terms:

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

[42] As the trial judge concluded (at [83] of the reasons), *Bryan v Maloney* remains authoritative. Its application, however, must be considered with regard to *Woolcock* and *Brookfield* which have somewhat clarified the circumstances in which a duty of care by a builder who constructs a building is owed to a subsequent purchaser of the building who suffers pure economic loss arising from defects in the construction. The preponderance of views in *Woolcock* (at [23]) and *Brookfield* (at [22], [57] and [185]) confines the authority of *Bryan v Maloney* so that the duty of care will not be owed by the builder to a subsequent purchaser of the building unless there is relevant vulnerability on the part of the purchaser at the time of the purchase of the building. That vulnerability will exist when the subsequent purchaser is incapable of protecting himself or herself from pure economic loss sustained as a result of defects in the building at the time of purchase. The nature and discoverability of the defects in the construction at the time of purchase are relevant to whether there is such incapacity on the part of the purchaser.

Insufficient reasons

[43] The appellant relies on a distinct ground of appeal of insufficient reasons separate from his main contentions that the evidence in the case did not justify a finding that a duty of care was owed by Mr Raymond to Ms Lewis. This ground must be considered in the context of how the issues were addressed at the trial by both parties. Ms Lewis' case was conducted on the basis that it was a *Bryan v Maloney* case. The defence focused on whether the builder was Mr Raymond or Tycoon and, if Mr Raymond was the builder, whether the statutory insurance scheme had removed the essential element of vulnerability in subsequent owners and set a limit on the extent of the duty of care owed by the builder to them. There is no appeal against the first of the defence issues and the second issue is a discrete aspect of

whether *Bryan v Maloney* applied to Ms Lewis' purchase. Mr Hogg of counsel who also appeared for Mr Raymond at the trial appropriately acknowledged on Mr Raymond's behalf in the written submissions provided to the trial judge at the conclusion of the trial in relation to the second issue:

> "Mr Raymond accepts that he cannot succeed on this argument in the District Court as it would be contrary to the decision in *Bryan v Maloney* (1995) 182 CLR 609. He includes reference to this argument as a placeholder in case he needs to take the decision further."

[44] In essence, on the initial issue of whether Mr Raymond owed a duty of care to Ms Lewis as a subsequent purchaser in accordance with *Bryan v Maloney* the trial judge (at [83]-[88] of the reasons) adopted the submissions on behalf of Ms Lewis set out at [27]-[28] of the reasons as follows:

> "[27] It was submitted that the pleaded duty of care is based on the decision of *Bryan v Maloney*. It was noted that in that case, a subsequent purchaser of a residential dwelling successfully sued the builder in respect of latent defects in the footings of the building which had become apparent to the plaintiff, after the plaintiff purchased the dwelling. The contract between the builder and the first owner contained no relevant exclusion or limitation on liability of the builder. In this case, Mr Raymond did not tender any building contract, let alone one containing any relevant exclusions of liability or limitation on the duty of care he owed as builder. It was noted that the plaintiff's evidence in *Bryan v Maloney*, was that she relied on the builder. She said, 'she thought it would be built properly, so I bought it'. Mason CJ, Deane and Gaudron JJ took those matters into account and framed the issue as:
>
> > 'whether, under the law of negligence, a professional builder who constructs a house for the then owner of the land owes a prima facie duty to a subsequent owner of the house to exercise reasonable care to avoid the kind of foreseeable damage which Mrs Maloney sustained in the present case, that is to say, the diminution in value of the house when a latent and previously unknown defect in its footings or structure first becomes manifest.'
>
> [28] It was submitted that Mrs Lewis in all respects was in the same position as the plaintiff in *Bryan v Maloney*. It was further submitted that Mrs Lewis also trusted that the house which she purchased was built properly, so she bought it. It was submitted that Mason CJ, Deane and Gaudron JJ said that there was a duty of care because the relationship was:
>
> > 'marked by the kind of assumption of responsibility and known reliance which is commonly present in the categories of case in which a relationship of proximity exists with respect to pure economic loss.'
>
> and that ordinarily the builder of the house:

> 'undertakes the responsibility of erecting a structure on the basis that its footings are adequate to support it for a period during which it is likely that there will be one or more subsequent owners. [that a subsequent owner would] ordinarily have no greater, and will often have less, opportunity to inspect and test the footings of the house than the first owner, [that such a subsequent owner was likely to be unskilled in building matters, and that a builder should be aware that the subsequent owner] will be likely, if inadequacy of the footings has not become manifest, to assume that the house has been competently built and that the footings are in fact adequate.'" (*footnotes omitted*)

[45] The cross reference in [83] of the reasons to [27]-[28] of the reasons was a shorthand way of the trial judge exposing his reasoning process based on Ms Lewis' submissions at the trial that cannot be characterised as insufficient reasons. The trial judge (at [83]-[87] of the reasons) disposed of the main argument advanced by Mr Raymond at trial based on the statutory insurance scheme and accepted (at [85]) that Ms Lewis' vulnerability and reliance was proved by her evidence and that she was therefore owed the duty of care as expressed in *Bryan v Maloney*.

Discoverability of the defects

[46] It was in issue on the pleadings whether the defects were discoverable by Ms Lewis before the auction. It was alleged in the statement of claim that the subfloor defects were not discoverable by Ms Lewis during inspection of the property before the auction because the subfloor area was inaccessible and she therefore could not, and did not, inspect the subfloor area. Similarly, it was alleged that the driveway and garage defects were not discoverable by Ms Lewis because the subfloor beneath the driveway and garage was inaccessible and she therefore could not, and did not, inspect the area beneath the driveway and garage. In relation to both the subfloor defects and the driveway and garage defects, it was also alleged in the statement of claim that they first became known or manifest in the sense of being discoverable by reasonable diligence upon receipt by Ms Lewis of a report produced by Morgan on or about 10 October 2017. The appellant in his defence denied those allegations and alleged that the subfloor area was accessible via a doorway to a crawl space and the defects would have been discoverable by reasonable diligence before Ms Lewis entered into the contract and that the subfloor beneath the driveway and garage would also have been discoverable by reasonable diligence before Ms Lewis entered into the contract.

[47] The discoverability of the defects was raised in the parties' written submissions to the trial judge. It was submitted on behalf of Ms Lewis that the evidence from her, Mr Bowman and Mr Waddell showed that it was impossible for Ms Lewis and her husband to have noticed the defects prior to bidding at the auction. The reply submissions on behalf of Mr Raymond submitted that it did not follow that because Mr Waddell had to get down on his stomach to access the upper and lower terrace areas, the defects in the house were not reasonably discoverable.

[48] In considering whether Ms Lewis had the requisite vulnerability for the imposition of a duty of care on the appellant based on *Bryan v Maloney*, it is not merely Ms

Lewis' personal characteristics that are determinative of that vulnerability. She may have been pregnant, without building qualifications and neither able nor desirous of entering into the crawl spaces, but she was contemplating expending somewhere in the vicinity of $1.6m to purchase a house property at auction. The inference is open that she was therefore capable of procuring others to do any inspections of the property that were prudent for the expenditure she proposed to undertake.

[49] No doubt the vendor was endeavouring to facilitate the sale of the property by providing prospective purchasers with exhibits 3 and 4 prior to the auction. Exhibits 3 and 4 did not disclose complete investigations of the subject property which was apparent from their terms, as they did not investigate inaccessible areas. The extent of the inaccessible areas that were not investigated by the consultants who prepared those reports was not identified in the reports. Ms Lewis assumed there were not a lot of inaccessible areas, because the reports did not state there were a lot of inaccessible areas. There was no basis for that assumption in the terms of the reports. Ms Lewis' assumption reflects the risk that she assumed before the auction by being satisfied to proceed after reading exhibits 3 and 4 rather than procuring further investigations of the areas that were inaccessible to those who prepared exhibits 3 and 4, such as having a building inspector like Mr Waddell inspect the subfloor areas.

[50] For the purpose of the arguments on the appeal, the date of the engagement of the pest inspector by Ms Lewis after settlement of her purchase has some relevance. It was not a matter that was the focus of submissions before the trial judge. As noted above, Mr Bowman's report stated his initial inspection of the property was on 30 May 2017. That is also consistent with Mr Waddell's evidence as to the timing of his initial inspections. Even though there was no further clarification of Ms Lewis' evidence that she engaged the pest inspector in July or August 2017, the date of Mr Bowman's first inspection is incontrovertible.

[51] Both before the trial judge and on appeal, the submissions on behalf of Ms Lewis proceeded on the basis that the defects that were the subject of her claim were latent defects or, in other words, that the defects were not manifest or able to be seen when the property was inspected prior to purchase. That was an inapt description. The trial judge used (at [86] of the reasons) the expression "not immediately discoverable" to describe the defects.

[52] The trial judge found (at [80] of the reasons) that the defects occurred when the building was built. The relative speed and ease with which the subfloor defects and the driveway and garage floor defects were identified so soon after the settlement of Ms Lewis' purchase indicates that the defects were, in fact, discoverable before the auction, if Ms Lewis had procured others to do the inspections of the property that she herself was physically incapable and unqualified to undertake but managed to procure others to do relatively shortly after the settlement of her purchase.

[53] The evidence adduced at the trial therefore did not support the trial judge's finding of vulnerability on the part of Ms Lewis at the time of her purchase, as she had the capacity to procure an appropriately qualified or experienced person before the auction to do the inspection that would have revealed the existing defects in the residence.

Lack of reliance

[54] The trial judge found (at [85] of the reasons) that Ms Lewis' reliance on the builder was proved by her evidence by accepting the submission made on her behalf (and recorded at [28] of the reasons) that Ms Lewis, like the purchaser in *Bryan v Maloney* "trusted that the house which she purchased was built properly" and so she bought it. The trial judge therefore has inferred reliance on Ms Lewis' part, even though Ms Lewis did not give evidence of any actual reliance on the construction of the house by the original builder being without defects. Mr Raymond's challenge on this issue on the appeal is directed at whether the trial judge erred in inferring that reliance in the circumstances of Ms Lewis' purchase.

[55] As a preliminary matter, Ms Lewis submits that Mr Raymond should not be permitted to advance the argument on the appeal that the evidence did not support a finding that relied upon Mr Raymond's proper construction of the house, as that argument was not advanced before the trial judge. As *Bryan v Maloney*, *Woolcock* and *Brookfield* show, there must be something about the circumstances of the purchase of the building by the subsequent purchaser (such as the purchaser's vulnerability and/or reliance on the builder) that supports the existence of a duty of care by the builder to the subsequent purchaser for pure economic loss arising from defects in the construction. The facts of *Bryan v Maloney* exemplify how the issue of reliance can be related to the discoverability of the defects, as there were no cracks or other defects observed (or observable) by the purchaser when she inspected the house before purchase and it was not until six months after the purchase that the otherwise latent defects became apparent when cracks began to appear in the walls of the house. The footings of the house in *Bryan v Maloney* were inadequate to withstand the seasonal changes in the soil.

[56] It was apparent that at the trial neither Ms Lewis nor Mr Raymond paid much attention to the issue of reliance, as the approach on behalf of Ms Lewis in submissions was to draw an analogy between the facts of her purchase and that of the purchaser in *Bryan v Maloney* to advance the submission that Ms Lewis was "in all relevant respects in the same position as the plaintiff in *Bryan v Maloney*". The trial judge did make a finding, however, (at [85] of the reasons) of reliance on Ms Lewis' part in respect of the builder's construction of the dwelling house. The acceptance by Mr Raymond before the trial judge that he could not challenge the authority of *Bryan v Maloney* that a builder owes a duty of care to a subsequent purchaser generally at common law did not dispense with the requirement for Ms Lewis to prove, on the basis of the evidence adduced at the trial, that *Bryan v Maloney* was applicable to the circumstances of her purchase. Mr Raymond is not precluded from challenging the trial judge's inference from Ms Lewis' evidence that there was reliance by Ms Lewis on the builder when she purchased the property.

[57] The reliance that was found in *Bryan v Maloney* was to some extent based on the facts that inadequate footings did not become manifest until after the purchase when cracks began to appear in the walls. Ms Lewis was satisfied to proceed with her purchase on the basis of exhibits 3 and 4 (despite the qualifications in those reports) and chose not to obtain the assistance of an independent building inspector prior to the purchase which would have revealed the existence of the subfloor defects and the driveway and garage floor defects. The evidence at trial therefore did not support the inference that Ms Lewis relied on the builder of the subject property to have built the property free from such defects.

[58] As Mr Raymond has succeeded in showing error in the trial judge's findings of vulnerability on the part of Ms Lewis at the time of the purchase and that she relied on the builder when she purchased the property, it follows that the trial judge's conclusion that a duty of care as expressed in *Bryan v Maloney* was owed by Mr Raymond to Ms Lewis in respect of the construction of the property was in error. Mr Raymond therefore succeeds on his appeal.

The statutory insurance scheme

[59] It is common ground that the statutory insurance scheme that was in place at the time of the construction of the property covered the owner of the property for the time being against defective construction for a period of six years and six months from the date of payment of the insurance premium or commencement of the construction. Mr Raymond urges that the existence of the statutory insurance scheme was relevant to whether a builder owes a duty of care to as subsequent purchaser in accordance with *Bryan v Maloney* as the Legislature has made the policy decision to limit the liability of a builder for construction defects to the period of the insurance cover and that was also relevant to assessing the vulnerability of the subsequent purchaser in determining whether the builder owed such a duty of care to the subsequent purchaser. The argument was based on the observation of Bond JA (with whose reasons Morrison JA and Williams J agreed) in *Mallonland Pty Ltd v Advanta Seeds Pty Ltd* [2023] QCA 24 at [301] in another context where it was suggested that there was a policy question as to whether the common law of the tort of negligence should extend the legal protection available to end users of manufactured goods, notwithstanding the limitations imposed under the *Australian Consumer Law*.

[60] The essence of Mr Raymond's argument is that vulnerability of the purchaser in *Bryan v Maloney* was found in circumstances where there was no statutory insurance scheme such as that which has applied in Queensland since the enactment of the *Queensland Building Services Authority Act 1991* (Qld) (as the QBCC Act was called when it was enacted) and that a purchaser should not be found to be vulnerable in circumstances analogous to *Bryan v Maloney* when the statutory insurance scheme does not apply to the purchaser. In other words, to apply *Bryan v Maloney* to benefit Ms Lewis when she purchased the property more than six years and six months after construction would involve the Court extending tortious protection to the purchaser of a dwelling beyond the period that is applicable under the statutory insurance scheme that was chosen by the Legislature in its endeavour "to achieve a reasonable balance between the interests of building contractors and consumers": see s 3(a) of the QBCC Act.

[61] As set out above, the High Court in *Woolcock* and *Brookfield* has successively explained and confined the authority of *Bryan v Maloney* for a claim for damages for pure economic loss by a subsequent purchaser of a dwelling against the builder in relation to defects that were not discoverable at the time of purchase. In view of the conclusion otherwise reached that the circumstances of Ms Lewis' purchase did not fall within *Bryan v Maloney*, it is not necessary to consider Mr Raymond's argument based on the existence of the statutory insurance scheme to further confine the application of *Bryan v Maloney*.

Orders

[62] Both parties in their submissions on the appeal sought costs if they were successful. As Mr Raymond has succeeded on his appeal, costs should follow the event.

[63] It follows the orders which should be made are:

1. Appeal allowed with costs.

2. Judgment for the respondent dated 16 March 2023 is set aside.

3. In lieu, judgment entered for the appellant and the respondent must pay the appellant's costs of the proceeding in the District Court.

[64] **MORRISON JA:** I agree with the reasons of Mullins P and the orders her Honour proposes.

[65] **NORTH J:** I agree with the reasons of Mullins P and the orders proposed by her Honour.