SUPREME COURT OF QUEENSLAND

CITATION:	*Tyrrell & Anor v McNab Constructions Pty Ltd & Ors* [2014] QCA 52
PARTIES:	**KELLIE TYRRELL** (first appellant) **MARK JOHN ROBERT** (second appellant) **v** **McNAB CONSTRUCTIONS PTY LTD** ACN 073 311 681 (first respondent) **MICHAEL JON McNAB** (second respondent) **LISA McNAB** (third respondent)
FILE NO/S:	Appeal No 7675 of 2013 DC No 30 of 2013
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	District Court at Toowoomba
DELIVERED ON:	21 March 2014
DELIVERED AT:	Brisbane
HEARING DATE:	6 March 2014
JUDGES:	Fraser and Gotterson JJA and Daubney J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. The appeal is dismissed.** **2. The cross-appeal is dismissed.**
CATCHWORDS:	TORTS – NEGLIGENCE – ESSENTIALS OF ACTION FOR NEGLIGENCE – DUTY OF CARE – RELATIONSHIP OF PROXIMITY – where the appellants were the subsequent purchasers of a house built by the first respondent and first purchased by the third respondent – where the appellants' statement of claim alleged the house was negligently constructed and the appellants suffered loss as a result – where the statement of claim was struck out however the appellants were allowed to re-plead their case – whether at law a builder of a dwelling house owes a duty of care to subsequent purchasers – identification of the prerequisites for imposing on a builder of a defectively constructed building a duty of care to subsequent purchasers

PROCEDURE – INFERIOR COURTS – QUEENSLAND – DISTRICT COURTS – CIVIL JURISDICTION – PROCEDURE BEFORE TRIAL – COMMENCEMENT OF ACTION AND PLEADINGS – where the appellants appealed the striking out of their statement of claim – whether the reasons given for the strike out were insufficient – whether the pleaded facts were incapable of giving rise to a duty of care and a cause of action – where the respondents cross-appealed the primary judge's order to not strike out the action and allow the appellants to re-plead – whether there was a sufficient basis for the primary judge to conclude that the appellants would be able to re-plead sufficient facts to justify that they were owed a duty of care

Uniform Civil Procedure Rules 1999 (Qld), r 171(1)(a), r 171(1)(b)

Bryan v Maloney (1995) 182 CLR 609; [1995] HCA 17, discussed
Cypressvale Pty Ltd v Retail Shop Lease Tribunal [1996] 2 Qd R 462; [1995] QCA 187, cited
Drew v Makita (Australia) Pty Ltd [2009] 2 Qd R 219; [2009] QCA 66, cited
Fangrove Pty Ltd v Tod Group Holdings Pty Ltd [1999] 2 Qd R 236; [1998] QCA 404, considered
In re the Will of F B Gilbert (dec'd) (1946) 46 SR (NSW) 318; [1946] NSWStRp 24, cited
Project Company No 2 Pty Ltd v Cushway Blackford & Associates Pty Ltd & Anor [2011] QCA 102, cited
Woolcock Street Investments Pty Ltd v CDG Pty Ltd (2004) 216 CLR 515; [2004] HCA 16, considered
Woollahra Municipal Council v Sved (1996) 40 NSWLR 101; [1996] NSWCA 522, considered

COUNSEL: M Foley for the appellants
T Matthews QC for the respondents

SOLICITORS: Clifford Gouldson for the appellants
Holding Redlich for the respondents

[1] **FRASER JA:** The appellants have appealed against an order striking out their amended statement of claim. The respondents have cross-appealed against orders refusing to strike out the appellants' action and giving the appellants 28 days to re-plead their case.

[2] The material allegations in the appellants' amended statement of claim may be summarised as follows:

(a) In 2002 the appellants purchased land from the third respondent which it had owned since 1997.

(b) Between 2007 and 2013 the appellants became aware that some of the building works for a dwelling house on the land had not been approved by the local authority ("Unapproved Works"), that latent defects were present in the building works ("the Latent Defect

Work"), and that some of those works did not comply with the Building Code of Australia ("the Non-Compliant Work").

(c) The first, second or third respondent carried out the building works between 1998 and 2001.

(d) The appellants "are the homeowners" of the property.

(e) As a consequence of the facts in (c) and (d), the first, second or third respondent, "owed the [appellants] a duty of care".

(f) In breach of that duty the first, second or third respondent "failed to take reasonable care in that building work for a dwelling house was carried out at the property which was…unapproved by [the local authority]", "contained latent defects", and "was non-compliant with the Building Code of Australia…".

(g) The first, second or third respondent "knew, or ought reasonably to have foreseen that" the carrying out of the Unapproved Works, the Latent Defect Work, and the Non-Compliant Work "would result in a subsequent purchaser of the Property, such as the [appellants], suffering loss and damage."

(h) As a result of the negligence of the first respondent, the second respondent, or the third respondent, the appellants suffered loss and damage. The particulars show rectification costs as the great bulk of the claimed loss, together with some consequential costs.

[3] The arguments before the primary judge centred upon the viability of the allegation in (e) that one of the respondents owed the appellants a duty of care. The appellants argued that such a duty of care might be held to exist upon the authority of *Bryan v Maloney*.[1] The respondents argued that the decision in that case had been undermined by the High Court's rejection in subsequent decisions of the doctrine of proximity as a determinative concept for a duty of care in novel cases. In the alternative, the respondents argued that the amended statement of claim was deficient even if judged against the decision in *Bryan v Maloney*.

[4] The primary judge: discussed *Bryan v Maloney* and subsequent decisions and held that "the preponderance of opinion is that the determining factor of "proximity" has lost favour and the factor of 'vulnerability' seems to be the touchstone"; referred to special conditions for the benefit of the appellants as purchasers in the contract of purchase with the third respondent (which the respondents had exhibited to an affidavit), the absence of evidence of any representation, the possibility that the warranties in the *Domestic Building Contracts Act* 2000 (Qld) might apply if there was a "regulated contract"; observed that there were factual matters to be considered when the pleadings were in order and this was not a case in which the action should be struck out; observed that there might be facts which could be pleaded by the appellants which would "give rise to a conclusion of 'vulnerability'"; gave as examples the possibility of representations made by the respondents, that the respondents might have had particular knowledge which was concealed, and that the appellants might have been particularly vulnerable; held that the amended statement of claim was defective because there were insufficient facts pleaded to conclude that a duty of care was owed; and held that, even if he was wrong in his conclusion about "vulnerability", the facts giving rise to "proximity" had not been sufficiently pleaded, there were insufficient particulars of the alleged latent defects,

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1 (1995) 182 CLR 609.

and there should be a pleading about how any particular defect was not discoverable.

The Appeal

[5] The first ground of the appeal contends that the primary judge's reasons are insufficient because they do not include a finding in terms of rules 171(1)(a) or (b) of the *Uniform Civil Procedure Rules* that the pleading "discloses no reasonable cause of action" or "has a tendency to prejudice or delay the fair trial of the proceeding". The appellants also argued that the primary judge's reliance upon deficiencies in the particulars was misplaced because this was not an application for further particulars.

[6] The appellants' claim was based only upon alleged negligence. An essential element of a claim in negligence is that the respondents owed the appellants a duty of care to protect the appellants against loss of the kind they sustained. In this case the allegation of a duty of a care was inevitably contentious. It was necessary for the appellants to plead material facts with reference to which it would be open at trial to find such a duty. The primary judge recited the respondents' submission "that the facts pleaded are incapable in law of establishing a duty of care", recorded that "the facts giving rise to 'proximity' [had] not been sufficiently pleaded", and similarly made clear his view that facts giving rise to "vulnerability" had also not been pleaded sufficiently. The primary judge's reference to the insufficiency of the particulars of the alleged latent defects was explained by his observations about the importance of allegations that a "particular defect" was not discoverable and how that was the case. Taken as a whole, the reasons clearly convey that the pleading did not disclose a reasonable cause of action because the pleaded facts were incapable of justifying a finding that the respondents owed the appellants the alleged duty of care. The reasons reveal "what was taken into account and in what manner"[2] and they explain the result in a way which made that clear to the public and in a way which enabled the appellants to frame meaningful grounds of appeal.[3] The reasons were not insufficient.

[7] The second ground of appeal contends that the primary judge erred in law in failing to find that the pleaded facts were capable of giving rise to a cause of action in negligence in accordance with *Bryan v Maloney*. This should be considered together with the third ground of appeal, which contends that the amended statement of claim should not have been struck out because the law was in a state of development. For that contention the appellants cited *Project Company No 2 Pty Ltd v Cushway Blackford & Associates Pty Ltd*.[4] The relevant law is in a state of development. I will proceed on the basis that this should have been taken into account.

[8] The appellants argued that *Bryan v Maloney* remained good law in relation to the duty of care pleaded in this case and that the pleaded allegations were sufficient to establish an arguable duty of care upon the basis of that decision. The respondents acknowledged that *Bryan v Maloney* had not been overruled "expressly" but cited authority for their proposition that the concept of proximity had been overtaken by the concept of "vulnerability" as "a key requirement" for a conclusion that a duty of

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2 *Cypressvale Pty Ltd v Retail Shop Lease Tribunal* [1996] 2 Qd R 462 at 476 – 477.

3 See *Drew v Makita (Australia) Pty Ltd* [2009] 2 Qd R 219 at [58] – [59].

4 [2011] QCA 102 at [27] – [29].

care existed. They argued that the primary judge was correct in holding that the amended statement of claim did not support a duty of care upon the basis of *Bryan v Maloney* or upon the basis that the appellants were "vulnerable".

[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.[5] 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.[6] The plaintiff relied upon the builder: her evidence was that she "thought it would be built properly… so I bought it".[7] 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."[8] 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".[9] 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]

[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;[11]

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5 (1995) 182 CLR 609 at 615 – 616.
6 (1995) 182 CLR 609 at 616 – 617.
7 (1995) 182 CLR 609 at 616.
8 (1995) 182 CLR 609 at 617.
9 (1995) 182 CLR 609 at 627.
10 (1995) 182 CLR 609 at 627.
11 (1995) 182 CLR 609 at 662.

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.[12]

[11] The High Court has since rejected the approach adopted by the majority in *Bryan v Maloney* of using the concept of proximity to determine in a novel case whether there is a duty of care,[13] but unless and until the High Court overrules *Bryan v Maloney* the decision in that case remains binding. In *Woolcock Street Investments Pty Ltd v CDG Pty Ltd* McHugh J described the *ratio decidendi* of *Bryan v Maloney* as being "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".[14] I do not accept the appellants' argument that this description is not consistent with the reasons of the majority in *Woolcock Street Investments Pty Ltd v CDG Pty Ltd*. Consistently with McHugh J's description, the majority observed that the principles in *Bryan v Maloney* "depended upon considerations of assumption of responsibility, reliance, and proximity" and also, upon "equating the responsibilities which the builder owed to the first owner with those owed to a subsequent owner".[15]

[12] Similarly, in *Fangrove Pty Ltd v Tod Group Holdings Pty Ltd*[16] the Chief Justice, with whose reasons McPherson JA and Chesterman J agreed, referred to "reliance or assumption of responsibility" as part of the approach which led to liability in *Bryan v Maloney*. Chesterman J, after observing that "the decision in *Bryan* should be confined to the particular circumstances which gave rise to liability in that case …",[17] added that in *Woollahra Municipal Council v Sved*[18] Clarke JA summarised the factors underlying the decision in *Bryan v Maloney* and which were prerequisites for liability to be imposed on a builder to pay damages to a subsequent owner as compensation for the diminution in value of a building by reason of its defective construction:

> "(i) builders ordinarily undertake the responsibility of erecting a structure on adequate foundations for periods in which the building will be owned by successive proprietors;
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> (ii) a subsequent owner will ordinarily have no realistic opportunity to discover the defects in the house prior to purchase and will rely on the builder to have built carefully;
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> (iii) the absence of any specific term in the contract bearing on the relationship of proximity such as limitations of liability or an obligation to build in accordance with the original owner's specifications; and
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> (iv) the absence of any intervening negligence."[19]

[13] It is not necessary here to expand upon this discussion of the authorities. The facts which the appellants' amended statement of claim alleged for the duty of care were,

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12 (1995) 182 CLR 609 at 663, referring to considerations identified by Thayer J in *Lempke v Dagenais* (1988) 547 A 2d 290 at 295.

13 *Woolcock Street Investments Pty Ltd v CDG Pty Ltd* (2004) 216 CLR 515 at [18] (Gleeson CJ, Gummow, Hayne and Heydon JJ), [72] – [73] (McHugh J), [145] (Kirby J), [211] (Callinan J).

14 (2004) 216 CLR 515 at [73].

15 (2004) 216 CLR 515 at [15].

16 [1999] 2 Qd R 236 at 238 [7].

17 [1999] 2 Qd R 236 at 245 [33].

18 (1996) 40 NSWLR 101 at 132 – 133.

19 [1999] 2 Qd R 236 at 244 [27].

in essence, (1) the appellants owned the property upon which one of the respondents had earlier built a dwelling house for one of the other respondents and (2) the building work included work which had not been approved by the local authority, "latent defects", and work which did not comply with a specified building code. No combination of the allegations in the amended statement of claim was arguably capable of supporting a finding that the appellants relied upon the skill of the builder, or that the builder assumed responsibility for the building work to a subsequent purchaser, or that the alleged deficiencies in construction were not discoverable by the appellants using reasonable diligence before they purchased the property, or even that loss of the kind allegedly suffered by the appellants was reasonably foreseeable by any of the respondents. (The appellants argued that the last mentioned omission was remedied by the allegation summarised in (g) in paragraph 2 of these reasons, but the amended statement of claim did not rely upon that allegation as supportive of the alleged duty of care.)

[14] Further, the allegation in (b) of paragraph 2 of these reasons was not amongst the allegations pleaded in support of the alleged duty of care and there was no express allegation that the appellants did not discover any of the alleged defects before they purchased the property. The appellants argued that this omission was remedied by allegations in further and better particulars that the appellants became aware of the defects at specified dates after the date of purchase. The delivery of particulars could not remedy the omission from the pleading of an allegation of a material fact which was essential for a cause of action. Nor is it sufficient for the appellants to point to the allegation that the construction work included "Latent Defect Work". The duty was alleged to arise with respect to a broader category of work – including "Unapproved Work" and "Non-Compliant Work" – and the particulars of the "Latent Defect Work" included at least some examples which were not self evidently concealed by the time the appellants purchased the property. The definition of "Latent Defect Work" as "latent defects … present in building works for a dwelling house carried out at the property between 1998 – 2001" was not an adequate substitute for an allegation of fact that the defects were not manifest or discoverable by a reasonable inspection when the appellants purchased the property.

[15] The facts alleged in the amended statement of claim to justify the alleged duty of care were incapable of making out a case that the appellants were "vulnerable" in a way which arguably might justify the imposition of a duty of care. The pleading also omitted allegations of facts which were treated in *Bryan v Maloney* as essential underpinnings of the then novel finding that the builder owed a duty to take reasonable care to protect the subsequent purchaser against diminution of the value of a house arising from defective construction. Even allowing for the potential for the continuing development of the law in this field, it was not reasonably arguable that the facts alleged in the amended statement of claim were capable of sustaining the alleged duty of care. The primary judge was right to strike out that pleading.

[16] To preclude any implication that my reasons amount to approval of aspects of the pleading which have so far not been discussed, it is appropriate here to mention three additional matters which were not the subject of argument, or at least were not emphasised in argument. First, the alleged duty is described simply as "a duty of care"; the content of the duty is not alleged. Secondly, the vast majority of the claimed loss consists of rectification costs. In *Bryan v Maloney* it was emphasised that the duty found to exist was to take reasonable care to avoid a particular kind of economic loss, namely "diminution in value of a house when the inadequacy of its footings first becomes manifest by reason of consequent damage to the fabric of the

house."[20] It is arguable that the appellants' claim instead resembles a claim for damages for breach of contractual promises by a builder that its work would be approved by the local authority, would not contain latent defects, and would comply with a specified building code. Thirdly, the pleading is open to the construction that, if one of the respondents built the house, all of the respondents owed the appellants the alleged duty of care. Because the amended statement of claim was correctly struck out on other grounds it is not necessary to extend these reasons by further discussion of those points.

Cross appeal

[17] The cross appeal relied upon three grounds, but the respondents' essential proposition was that there was no sufficient basis for the primary judge to conclude that the appellants might be able to plead sufficient facts to justify a conclusion that they were owed a relevant duty of care by the respondents. The respondents referred to special conditions in the contract under which the appellants purchased the land from the third respondent which permitted the appellants to terminate the contract without penalty if they were not satisfied with the results of inquiries whether necessary construction approvals had been obtained, whether any defects were present, and whether the construction complied with the relevant building code. The respondents also argued that the primary judge was wrong to consider the possibility of representations or concealed knowledge on behalf of the respondents in the absence of any factual basis for those assumptions.

[18] The primary judge was not necessarily required to treat the terms of the contract as conclusive evidence negating any potential application of *Bryan v Maloney* in a properly prepared further amended statement of claim. Nor was the primary judge obliged to insist, as a condition of granting leave to re-plead, that the appellants adduce evidence that they were able to plead additional facts. This aspect of the decision concerns an interlocutory order involving matters of practice and procedure and not determining any substantive right. Appellate courts are traditionally reluctant to intervene in such cases: see *Re Will of Gilbert*.[21] The order involves no particular injustice to the respondents and no error has been identified in the exercise of the discretion to grant the appellants leave to re-plead.

Proposed orders

[19] I would dismiss the appeal and the cross-appeal.

[20] If costs were ordered to follow the event, the appellants would be ordered to pay the respondents' costs of the appeal and the respondents would be ordered to pay the appellants' costs of the cross-appeal. The appeal sought merely to support a defective pleading whereas the cross appeal sought the markedly more extreme and manifestly inappropriate result that the appellants' claim be summarily terminated. With that in mind, it seems just that there be no order as to the costs of either proceeding, even though the respondents might be able to prove that their costs of opposing the appeal were greater than the appellants' costs of opposing the cross-appeal. I would make no order as to the costs of the appeal or the cross appeal.

[21] **GOTTERSON JA:** I agree with the orders proposed by Fraser JA and with the reasons given by his Honour.

[22] **DAUBNEY J:** I also agree with Fraser JA.

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20 (1995) 182 CLR 609 at 630.

21 (1946) 46 SR (NSW) 318 per Jordan CJ at 323.