QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

CITATION:	*Grant v Russell* [2022] QCAT 68
PARTIES:	**JASON GRANT** (applicant) **v** **JAMES TERENCE RUSSELL** (respondent)
APPLICATION NO/S:	BDL008-21
MATTER TYPE:	Building matters
DELIVERED ON:	3 March 2022
HEARING DATE:	On the papers
HEARD AT:	Brisbane
DECISION OF:	Senior Member Brown
ORDERS:	**1. The application for miscellaneous matters filed 27 July 2021 is refused.**
CATCHWORDS:	ADMINISTRATIVE LAW – ADMINISTRATIVE TRIBUNALS – QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL – where an application to dismiss the proceeding is made, the power under s 47 of the *Queensland Civil and Administrative Tribunal Act* 2009 (Qld) (QCAT Act) should only be exercised if it is clear beyond doubt that the claim is lacking in substance and is not arguable – where the applicant has an arguable case in negligence, the power to dismiss the proceedings should not be exercised. CONTRACTS – BUILDING, ENGINEERING AND RELATED CONTRACTS – OTHER MATTERS – where an action for breach of contract was brought in 2021 – where the Tribunal finds that the breach occurred in 2010 and the cause of action accrued in 2010, the action is time barred – section 10(1)(a) of the *Limitation of Actions Act* 1974 (Qld) applies. TORTS – NEGLIGENCE – DUTY OF CARE: EXISTENCE – GENERALLY AT COMMON LAW – whether a concurrent duty of care in tort is owed by a building contractor to a building owner where the parties are in a contractual relationship relating to the performance of domestic building work.

Civil Liability Act 2003 (Qld) s 11(1)
Domestic Building Contracts Act 2000 (Qld)
Limitation of Actions Act 1974 (Qld) s 10(1)(a), s 38(1)
Queensland Civil and Administrative Tribunal Act 2009 (Qld) s 47, s 48
Victorian Civil and Administrative Tribunal Act 1998 (Vic) s 75

Atkinson & Anor v Van Uden [2020] QCAT 259
Brookfield Multiplex Ltd v Owners Corporation Strata Plan 61288 [2014] HCA 36
Brown v Havenfoot Pty Ltd t/as Ibis Pools and Anor [2019] QCAT 105
Bryan v Maloney (1995) 182 CLR 609
Canavan v Sutton [2020] QCAT 374
Howell v Young (1826) 5 B&C 259; 108 ER 97
Melisavon Pty Ltd v Springfield Land Development Corporation Pty Limited [2014] QCA 233
Norman v Australian Red Cross Society (1998) 14 VAR 243
Voli v Inglewood Shire Council (1963) 110 CLR 74
Woolcock Street Investments Pty Ltd v CDG Pty Ltd [2004] HCA 16

This matter was heard and determined on the papers pursuant to s 32 of the *Queensland Civil and Administrative Tribunal Act* 2009 (Qld)

REASONS FOR DECISION

[1] Mr Grant owns a house in Brisbane ('the property'). In 2009/2010 Mr Grant undertook building renovation works at the property ('the works'). Mr Russell was the building contractor engaged by Mr Grant to undertake the works. Mr Grant says that when Mr Russell performed the works he incorrectly connected the sewerage drain to the stormwater system which resulted in problems with the sewerage system. Mr Grant says that he was required to arrange for further building work to be undertaken to disconnect the sewerage drain from the stormwater system and connect the sewerage drain to the main Brisbane City Council sewerage line. Mr Grant says that the cost of the rectification works was $17,489.42.

[2] Mr Grant commenced proceedings in the tribunal in January 2021. He claims the cost of the rectification works.

[3] Mr Russell says that he did not undertake the plumbing work complained of by Mr Grant or otherwise supervise the conduct of the work, nor did he engage a sub-contractor to undertake the work. Mr Russell says that Brisbane City Council issued a final certificate upon completion of the works. In any event says Mr Russell, Mr Grant's claim against him is statute barred pursuant to s 10(1)(a) of the *Limitation of Actions Act* 1974 (Qld) (LAA).

[4] Mr Russell has applied to have the proceedings dismissed. The application for dismissal falls for determination.

What do the parties say?

[5] Mr Russell relies upon three principal grounds in support of his application to dismiss the proceedings: (a) Mr Grant's claim has no reasonable prospects of success as Mr Russell did not undertake the subject building work; (b) Mr Grant's claim in contract is statute barred; (c) Mr Grant has no claim in negligence against Mr Russell on the basis that the contract exclusively governed the relationship between the parties.

[6] Mr Russell says that he was engaged by Mr Grant to demolish an existing addition to the original worker's cottage on Mr Grant's property and construct new additions. Mr Russell says that the scope of works did not include the re-routing of the property's waste-water to the council combined sewerage drain. Mr Russell says that while plumbing work was within the scope of works of the renovation, such work was minor in nature and was completed by licensed plumbers. Mr Russell says that all drains in the existing additions were connected to a primary drain and that after the demolition of the existing additions the primary drain was capped and the drains constructed as part of the new additions were then plumbed into the primary drain. Mr Russell says that there was no information available to him at the time the renovation works were undertaken suggesting that the primary drain was not connected to the sewer main or was otherwise non-compliant. Mr Russell says that at the time the renovation works were carried out the property did not have storm water plumbing in place and that there was no suggestion that the primary drain was a storm water drain.

[7] Mr Russell says that the claim in contract by Mr Grant is statute barred. He says that the works were completed in 2010. Mr Russell says that even if he was responsible for the defective work, which he denies, Mr Grant's claim cannot be maintained as a consequence of the operation of the LAA.[1] Mr Russell says that the contractual claim must fail on the basis that, even if Mr Grant established a breach, the cause of action accrued at the time of the breach and as the building works were undertaken in 2010, more than 6 years has passed and the claim is statute barred by operation of s 10(1)(a) of the LAA.

[8] In response, Mr Grant says that his claim is not one solely based on breach of contract. Mr Grant says that he also has a claim against Mr Russell in negligence. Mr Grant says that Mr Russell was the architect and builder engaged to undertake major renovations to his family home. Mr Grant says that Mr Russell was responsible for the connection of the sewerage to the storm water. Mr Grant says that he was unaware that the sewerage had been connected to the storm water drain. He says that Mr Russell did not arrange for an initial under slab inspection leading to the absence of plumbing certification by Brisbane City Council.

[9] Mr Grant says that it was not until 2020 that the ceramic pipe carrying the sewerage to the storm water drain failed requiring extensive rectification works to be undertaken. It was at this time he says that he became aware of the issue regarding

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[1] The submission by Mr Russell refers to s 10AA of the LAA. Presumably the reference should be to s 10(1)(a),

the connection of the sewerage to the storm water drain. Relying upon the decision of the Court of Appel in *Melisavon Pty Ltd v Springfield Land Development Corporation Pty Limited*,[2] Mr Grant says that his cause of action in negligence did not accrue until the defective work was detected and that the proceeding has been commenced within time. Mr Grant also says that Mr Russell concealed the defective building work and that by operation of s 38(1) of the LAA the commencement of Mr Grant's cause of action against Mr Russell was postponed until the fraud was discovered by Mr Grant.

[10] In reply, Mr Russell says that the claim by Mr Grant for breach of contract cannot be maintained. Mr Russell says that Mr Grant has failed to file in the tribunal a copy of the building contract which, from an evidentiary perspective, is critical to Mr Grant's prospects of success in relation to both the claim in contract and the claim in tort.

[11] As to Mr Grant's claim in negligence, Mr Russell says that where the parties' obligations are regulated by contract there is no room for the imposition of a concurrent duty in tort. He says that Mr Grant's vulnerability as a building owner did not give rise to a duty of care on the part of Mr Russell.

[12] As to the assertion by Mr Grant that the defective works were fraudulently concealed, Mr Russell says that there is no evidence that he acted unconscionably or concealed the existence of allegedly defective works and that he was, in fact, unable to conceal something he was not aware of.

Consideration

[13] By s 47 of the *Queensland Civil and Administrative Tribunal Act* 2009 (Qld) the tribunal may, in circumstances where the tribunal considers a proceeding or part of a proceeding is frivolous, vexatious or misconceived, lacking in substance or otherwise an abuse of process, order that the proceeding or part thereof be dismissed or struck out.[3]

[14] The power conferred by s 47 is in the nature of a summary judgment power. There is no temporal constraint on when such an application may be brought. An application to dismiss pursuant to s 47 may be brought at an interlocutory stage of a proceeding or conceivably after the evidence of the applicant has been heard, in other words, a 'no case to answer'.

[15] The principles relevant to the exercise of the analogous power found in s 75 of the *Victorian Civil and Administrative Tribunal Act* 1998 (Vic) have been expressed as follows:

> VCAT should exercise caution before summarily terminating a proceeding. It should only do so if the proceeding is obviously hopeless, obviously unsustainable in fact or in law, or on no reasonable view can justify relief, or is bound to fail. This will include, but is not limited to, a case where a complaint can be said to disclose no reasonable cause of action, or where a

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2 [2014] QCA 233.

3 *Queensland Civil and Administrative Tribunal Act* 2009 (Qld), s 47(1), s 47(2).

> Respondent can show a good defence sufficient to warrant the summary termination of the proceeding.[4]

[16] A proceeding brought in the tribunal should only be dismissed before a full hearing if it is clear beyond doubt that the applicant's claim is lacking in substance and the applicant has no arguable case that should be resolved at a full hearing. The onus is upon the party bringing the application to establish that there exist grounds for the summary dismissal of a proceeding.

[17] A compulsory conference was conducted in August 2021. Prior to that, and in accordance with tribunal directions, the parties had filed their statements of evidence. It is appropriate to pause here to consider the evidence.

[18] Mr Grant relies upon two statements of evidence: a statement by himself and a statement by a plumbing contractor, Mr Sfettina.

[19] Mr Grant's evidence, as it is relevant for present purposes, may be summarised as follows:

(a) Mr Grant experienced sewerage problems at the property in or about September 2019;

(b) Mr Grant was advised by a Brisbane City Council building inspector that the sewerage drain had been connected to the existing storm water system;

(c) Mr Grant became aware that the combined sewerage drain had been connected incorrectly to the storm water drain on or about 8 January 2020;

(d) Mr Russell undertook the defective plumbing works;

(e) On or about 14 November 2019 Mr Grant became aware that Brisbane City Council had not certified or approved the plumbing works undertaken by Mr Russell;

(f) The defective plumbing works have been rectified and a final certificate has been issued in respect of the works.

[20] Mr Sfettina's evidence, as it is relevant to the present application, may be summarised as follows:

(a) In September 2019 he was engaged by Mr Grant to investigate blockages in the sewerage system at the property;

(b) Mr Sfettina was present when a representative of Brisbane City Council inspected the works on two occasions, on 4 November 2019 (the first inspection) and on 8 January 2020 (the second inspection);

(c) At the time of the first inspection, Mr Sfettina became aware that the plumbing works had not been the subject of a final inspection and approval;

(d) The second inspection revealed that the sewerage combined outlet had been connected to the storm water drain (referred to by Mr Sfettina as the Irvine ware pipe). The Irvine ware pipe had not been renewed and the existing and

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4 *Norman v Australian Red Cross Society* (1998) 14 VAR 243.

proposed fixtures had been connected to the combined sanitary house drain, downstream and external to the building alignment;

(e) The Brisbane City Council archives drainage plan shows the existing sewerage drain running down the middle of the rear yard of the property. During the renovation works undertaken in 2010, 'the home's sewerage was connected to Irvine ware pipe located in ground at eastern back corner of house to the old Irvine ware stormwater drain which runs along the eastern fence line';

(f) Rectification works were required to be undertaken to address the defective plumbing works which included the excavation of parts of the property, the installation of new piping and related hardware and cutting the fence footing to access the pvc combined drain for connection;

(g) The rectification works have been inspected and approved and a final certificate has been issued.

[21] Mr Russell's evidence is:

(a) Mr Russell entered into a contract with Mr Grant to undertake renovations works at the property;

(b) The scope of works under the contract included the demolition of an existing addition to a worker's cottage and the construction of an extension to the rear of the house;

(c) Mr Russell personally undertook carpentry and general construction works and sub-contracted, *inter alia*, concreters, plumbers and electricians;

(d) During the course of the works, Mr Grant consulted Mr Russell regarding stormwater management following the completion of the works. The property had no rainwater drainage system at the time with rainwater from the roof and gutters being deposited on the ground. Mr Russell advised Mr Grant to install rainwater tanks and a gravel pit. This work did not form part of the scope of works and was not undertaken by Mr Russell;

(e) Mr Russell has not retained records identifying the plumbing contractors he subcontracted the plumbing works to;

(f) When the existing addition was demolished the drain line servicing the waste water from the dwelling was capped – referred to by Mr Russell as the 'primary drain'. When the new extension was constructed the waste water services were plumbed into the primary drain;

(g) The scope of works did not include the re-routing of the waste water to the Council's combined sewerage drain at the rear fence of the property;

(h) Prior to Mr Grant making a complaint in 2020, Mr Russell was not aware of the following:

(i) The existing waste water was not connected to the combined sewerage drain;

(ii) The sewerage drain was located at the rear boundary of the property;

(iii) The existing waste water connections were in any way non-compliant;

(iv) The existing addition was connected to a storm water drain;

(i) Mr Russell had no reason to suspect, at the time the building works were being undertaken, that the primary drain was not compliant or connected to the main sewerage line;

(j) The re-routing or redirection of sewerage lines at the property was major plumbing work and not within the scope of works.

[22] In the absence of pleadings, the issues in tribunal proceedings are often, albeit not always, identified in the statements of evidence filed by the parties. In these proceedings, the originating application filed by Mr Grant does not set out clearly the cause or causes of action upon which he relies in respect of his claim against Mr Russell. It is however apparent from the originating application that Mr Grant asserts that the building work undertaken by Mr Russell was defective, the defective work being the connection of the combined sewerage drain to the existing stormwater system.

[23] In response to the present application, Mr Grant says that, in addition to his claim in contract, he is also claiming in negligence. I am satisfied that Mr Grant has sufficiently identified the causes of action upon which he relies in respect of his claim against Mr Russell.

The claim in contract

[24] By s 10(1)(a) of the LAA an action founded on simple contract cannot be brought after the expiration of 6 years from the date on which the cause of action arose. A cause of action in contract arises at the time of breach.[5] Exactly when breach occurs and a cause of action arises depends upon the construction of the contract. Although it appears to be common ground between the parties that a written contract was entered into by the parties, the contract is not in evidence. Both parties say that they cannot locate a copy of the contract. The exercise of construing the contract cannot therefore be undertaken.

[25] It may however be assumed for present purposes, noting that the building works were completed in 2010, that the cause of action for breach of contract, at least on Mr Grant's case, accrued when the allegedly defective work was undertaken by Mr Russell. Even if it is accepted that the connection of the combined sewerage drain to the stormwater system had been performed by someone other than Mr Russell prior to the renovation works being undertaken, and that the breach by Mr Russell was his failure to identify and remedy this defect, the cause of action must have accrued not later than the end of 2010.

[26] Mr Grant filed the originating application in January 2021, more than 6 years after the cause of action in contract arose. It follows that any claim in contract is statute barred by operation of s 10(1)(a) of the LAA and Mr Grant cannot pursue such a claim.

[27] Turning to Mr Grant's claim against Mr Russell in negligence, it must be said that the claim is somewhat lacking in particulars. Mr Russell says that the claim in negligence must fail on the basis that he did not owe a duty of care to Mr Grant. Mr Russell says that the contract set out the parties respective rights and obligations and

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5 *Howell v Young* (1826) 5 B&C 259; 108 ER 97.

that Mr Grant cannot demonstrate the necessary vulnerability which is a necessary element in any claim in negligence.

The claim in negligence

[28] Mr Russell says that he did not owe to Mr Grant a duty in tort additional to his contractual obligations.

[29] In *Bryan v Maloney*[6] a majority of the High Court held that the existence of a contractual relationship between the parties to a domestic building contract did not preclude the existence either of a relationship of proximity between them in relation to that work or of a consequent duty under the ordinary law of negligence.

[30] In *Bryan v Maloney*, Mr Bryan built a house for Mrs Manion. Mrs Maloney was a subsequent purchaser of the property. Mrs Maloney brought a claim against Mr Bryan for damages for defective building work. The majority of the High Court referred to the earlier decision of the High Court in *Voli v Inglewood Shire Council*[7] where it was held, in relation to the liabilities of an architect to his or her client:

> He is bound to exercise due care, skill and diligence. He is not required to have an extraordinary degree of skill or the highest professional attainments. But he must bring to the task he undertakes the competence and skill that is usual among architects practising their profession. And he must use due care. If he fails in these matters and the person who employed him thereby suffers damage, he is liable to that person. This liability can be said to arise either from a breach of his contract or in tort.[8]

[31] In *Bryan* it was held:

> On the other hand, there are strong reasons for acknowledging the existence of a relevant relationship of proximity between a builder such as Mr Bryan and a first owner such as Mrs Manion with respect to the kind of economic loss sustained by Mrs Maloney. *In particular, the ordinary relationship between a builder of a house and the first owner with respect to that kind of economic loss is characterized by the kind of assumption of responsibility on the one part (i.e. the builder) and known reliance on the other (i.e. the building owner) which commonly exists in the special categories of case in which a relationship of proximity and a consequent duty of care exists in respect of pure economic loss.* There is nothing to suggest that the relationship between Mr Bryan and Mrs Manion was not characterized by such an assumption of responsibility and such reliance.[9] (emphasis added)

[32] The majority observed that it was unnecessary, in the circumstances of the case, to consider whether the relationship of proximity or any consequent duty of care could be excluded or modified by the terms of the contract between the builder and the first owner and that it had not been suggested that there was any special feature of the contract or agreement between Mr Bryan and Mrs Manion (the original owner) that had that effect.[10]

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6 (1995) 182 CLR 609.
7 (1963) 110 CLR 74.
8 Ibid, at 84 (Windeyer J).
9 *Bryan v Maloney* (1995) 182 CLR 609, at 624 (Mason CJ, Deane and Gaudron JJ).
10 Ibid, at 625 (Mason CJ, Deane and Gaudron JJ).

[33] Whilst it may be observed that proximity is no longer the relevant test in determining the existence of a duty of care, *Bryan v Maloney* has not been expressly overruled although subsequent cases have tended to limit the effect of the decision to its particular facts, relating as it did to domestic building work.

[34] Mr Russell refers to the decisions of the High Court in *Woolcock Street Investments Pty Ltd v CDG Pty Ltd* [11] and in *Brookfield Multiplex Ltd v Owners Corporation Strata Plan 61288*[12], both of which post-date *Bryan v Maloney*, in support of his submission that he did not owe a duty of care to Mr Grant. Both *Woolcock* and *Brookfield Multiplex* involved liability to subsequent owners, and the buildings were commercial in nature, not domestic dwellings. In the case of *Woolcock*, the liability asserted was that of the engineer responsible for the design of the building's foundation. In *Brookfield Multiplex*, the liability asserted was that of the builder.

[35] In *Woolcock* the majority of the High Court observed that it was not alleged that the respondents breached any obligation owed to the original owner. The court held:

> [25] Unlike *Bryan v Maloney*, it cannot be said, in this case, that the respondents owed the original owner of the land a duty to take reasonable care to avoid economic loss of the kind of which the appellant now complains. It was agreed in the Case Stated that, despite the first respondent obtaining a quotation for geotechnical investigations, the original owner of the land, by its manager, refused to pay for such investigations. (The respondents go further in their pleadings and allege that the original owner directed the adoption of particular footing sizes.) The relationship between the respondents and the original owner of the land was, therefore, not one in which the owner entrusted the design of the building to a builder, or in this case the engineer, under a simple, "non-detailed" contract. It was a relationship in which the original owner asserted control over the investigations which the engineer undertook for the purposes of performing its work.
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> [26] In its pleading the appellant did not allege that the relationship between the respondents and the original owner was characterised by that assumption of responsibility by the respondents, and known reliance by the original owner on the respondents, which is referred to in the joint reasons in *Bryan v Maloney*. Such further facts as are agreed, far from supporting any inference that this was the nature of the relationship between the respondents and the original owner, point firmly in the opposite direction. There was not, therefore, what was referred to in *Bryan v Maloney* as "an identified element of known reliance (or dependence)" or "the assumption of responsibility".
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> [27] It follows that the appellant's contention that the respondents owed it a duty of care cannot be supported by the reasoning which was adopted in *Bryan v Maloney*. What we earlier referred to as the anterior step of demonstrating that the respondents owed a duty of care to the original owner is not made out. [13]

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11 [2004] HCA 16.

12 [2014] HCA 36.

13 *Woolcock Street Investments Pty Ltd v CDG Pty Ltd* [2004] HCA 16, at [25]-[27] (Gleeson CJ, Gummow, Hayne and Heydon JJ)

[36] The distinction between domestic and commercial buildings was also referred to in *Brookfield Multiplex* where Crennan, Bell and Keane JJ stated, referring to the judgment of McHugh J in *Woolcock*:

> [131] To similar effect McHugh J said:
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> > "The first owners and subsequent purchasers of commercial premises are usually sophisticated and often wealthy investors who are advised by competent solicitors, accountants, architects, engineers and valuers. In the absence of evidence, this Court must assume that the first owner of commercial premises is able to bargain for contractual remedies against the builder. It must also assume that a subsequent purchaser is able to bargain for contractual warranties from the vendor of such premises."
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> [132] These passages accord with the primacy of the law of contract in the protection afforded by the common law against unintended harm to economic interests where the particular harm consists of disappointed expectations under a contract. The common law has not developed with a view to altering the allocation of economic risks between parties to a contract by supplementing or supplanting the terms of the contract by duties imposed by the law of tort.
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> …
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> [136] The material distinctions between the present case and *Bryan v Maloney* lie, first, in the detailed prescriptions of the D&C contract between the appellant and the developer, in contrast to the simple obligation in *Bryan v Maloney* between the builder and the original owner to exercise reasonable skill and diligence in the construction of the dwelling; and, secondly, in the express promises in cll 32.6 and 32.7 of the sales contracts, in contrast to the situation in *Bryan v Maloney*, where there was no promise as to quality given to Mrs Maloney when she acquired the dwelling.
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> [137] As to the first of these grounds of distinction, in *Bryan v Maloney* the builder's obligations as to the quality of design and construction were not expressed in the specific and detailed provisions to be found in the D&C contract. That being so, it could also be said that the relationship between the builder and the original owner in *Bryan v Maloney* was:
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> > "characterized by the kind of assumption of responsibility on the one part (ie the builder) and known reliance on the other (ie the building owner) which commonly exists in the special categories of case in which a relationship of proximity and a consequent duty of care exists in respect of pure economic loss."
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> [138] A conclusion that the builder owed to the first owner obligations equivalent in content to the tortious duty asserted by the subsequent owner was apparently thought to lessen the force of the objection to imposing a more onerous obligation on a builder in favour of the subsequent owner than was owed by the builder to the person for whom it agreed to carry out the building work and by whom it was paid. In *Woolcock Street Investments*, the plurality noted that:
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> > "In *Bryan v Maloney*, it was found that there was no disconformity between the duty owed to the original owner and the duty owed to the subsequent owner. As Toohey J said, that

> case was 'uncomplicated by anything arising from the contract between the appellant and Mrs Manion' (the original owner)."[14]

[37] It follows from the above analysis of the decisions in *Bryan v Maloney*, *Woolcock* and *Brookfield Multiplex* that a builder may be liable in tort to a building owner for whom a domestic dwelling is constructed notwithstanding the existence of a contractual relationship between the parties. It follows that such liability may extend to other domestic building work including the renovation, alteration or improvement of a dwelling depending upon the circumstances of the particular case.

[38] The building contract is not in evidence. Notwithstanding this, it is not suggested by either party that the contract was other than a simple non-detailed contract as referred to by the majority in *Woolcock* or that the contract contained any special provisions as referred to by Crennan, Bell and Keane JJ in *Brookfield Multiplex.* Neither party submits that there was any special feature of the contract that had the effect of modifying or excluding the duty of care owed by Mr Russell to Mr Grant. Assuming for present purposes that the contract between the parties complied with the requirements of the *Domestic Building Contracts Act* 2000 (Qld) (DBCA)[15] and the contract was of effect, the warranties contained in the DBCA would be implied into the contract. The warranties might be categorised as including the 'simple obligation' referred to in *Bryan v Maloney* to exercise reasonable skill and diligence in the construction of the dwelling.

[39] There is nothing to suggest that, as between Mr Grant and Mr Russell, there did not exist the ordinary relationship between a builder of a house and the owner with respect to that kind of economic loss characterized by the kind of assumption of responsibility (by Mr Russell) and known reliance (by Mr Grant) which commonly exists in the special categories of case in which a duty of care exists in respect of pure economic loss.

[40] It follows from the foregoing that the existence of a contractual relationship between the parties does not preclude the existence of a duty of care owed by Mr Russell to Mr Grant in respect of the performance of the subject building works.

[41] Having concluded that a duty in tort, concurrent with any contractual duties, may have been owed by Mr Russell to Mr Grant it is necessary to turn to the provisions of the *Civil Liability Act* 2003 (Qld) (CLA). This tribunal has previously found that a claim in negligence by a building owner against a building contractor is subject to the provisions of the CLA.[16] There is no cause to doubt the correctness of those decisions.

[42] To succeed in a claim for breach of duty, Mr Grant must establish the following:

(a) That Mr Russell owed Mr Grant a duty to avoid a foreseeable and not insignificant risk of harm;

(b) That Mr Russell breached the duty;

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14 *Brookfield Multiplex Ltd v Owners Corporation Strata Plan 61288* [2014] HCA 36, at [131]-[132], [136]-[138] (Crennan, Bell and Keane JJ).

15 The DBCA is the applicable Act noting that the contract was entered into in 2009 or 2010.

16 See, for example, *Atkinson & Anor v Van Uden* [2020] QCAT 259; *Brown v Havenfoot Pty Ltd t/as Ibis Pools and Anor* [2019] QCAT 105; *Canavan v Sutton* [2020] QCAT 374.

(c) That Mr Grant suffered loss and damage as a consequence of the breach. In this regard the CLA refers to 'factual causation' and 'scope of liability'.[17]

[43] The CLA defines 'duty' as, inter alia, a duty of care in tort or a duty of care under contract that is concurrent and coextensive with a duty of care in tort. 'Duty of care' is defined as a duty to take reasonable care or to exercise reasonable skill (or both duties).[18]

[44] It should be noted that neither party has addressed the application of the CLA.

[45] In my view it is clearly arguable that Mr Russell owed Mr Grant a duty to take reasonable care and exercise reasonable skill in undertaking the works to avoid a foreseeable and not insignificant risk of harm. That duty extended to the connection of the household sewerage in accordance with Council approvals and accepted building practices. It is clearly arguable that if that duty was breached Mr Grant would suffer harm as manifested in the sewerage problems that developed in 2019 resulting in the remedial works which Mr Grant claims the cost of.

[46] It follows from the foregoing that I am satisfied Mr Grant has an arguable case in negligence against Mr Russell.

Factual disputes surrounding the performance of the works

[47] It seems reasonably clear on the present evidence that the sewerage combined outlet was, at some point in time, incorrectly connected to the storm water drain. In evidence is a letter from Brisbane City Council to a private certifier dated 20 October 2008 approving plumbing and drainage work at Mr Grant's property. The approval notes that the property was connected to the Council's sewer via a combined sanitary house drain. The approval also notes that the section of the combined sanitary house drain installed within the building alignment was to be renewed and the existing and proposed fixtures connected to the combined sanitary house drain, downstream and external to the building alignment. The approval states that the combined sanitary house drain was to remain in service at all times during construction.

[48] Mr Russell's evidence is that he has no recollection of the Council plumbing approval and that it pre-dates his involvement in the renovation works. Mr Russell's evidence is that he recalls a final certificate issuing upon completion of the renovation works. There is however evidence that on 10 May 2010 Brisbane City Council made a decision that the final plumbing inspection failed on the basis that 'conditions regarding combine not met'. Mr Russell says that the Council's decision was issued some time after the completion of the renovation works.

[49] Mr Grant says that Mr Russell should have arranged for the Council plumbing inspection prior to the pouring of the slab which would likely have identified the plumbing issue. As to the evidence of Mr Russell that the 2008 Council approval predated his involvement in the renovation, Mr Grant says that Mr Russell's involvement in the project in fact began in 2007. Mr Grant disputes Mr Russell's assertion that he was unaware of the development approval relating to the plumbing works.

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17 *Civil Liability Act* 2003 (Qld), s 11(1).

18 Ibid, schedule 2.

[50] It is clear that there are significant factual disputes regarding the scope of the works Mr Russell was contracted to undertake and what works were actually performed and by whom. There are also factual disputes about the extent to which Mr Russell had knowledge of the Council plumbing development approval and whether and to what extent he was required to ensure that the conditions of the development approval were met. There is also a factual dispute about when the house sewerage line was connected to the storm water drain, who connected the line, when the line failed and why the line failed.

[51] These are all matters that should be addressed at a contested hearing to enable the Tribunal to make appropriate findings of fact.

[52] In all the circumstances I am not persuaded that this is a matter in which the summary dismissal of the proceeding is appropriate.

[53] In light of my conclusions, it is unnecessary for me to address the submissions by the parties in relation to the application of s 38 of the LAA.

Failure to comply with Tribunal directions

[54] Mr Russell says that the proceeding should be dismissed on the basis of Mr Grant's failure to comply with the direction of the tribunal to file a copy of the building contract.

[55] On 9 March 2021 the tribunal directed Mr Grant to file and serve a copy of the building contract. Mr Russell says that Mr Grant is causing unnecessary disadvantage to him by failing to comply with the direction. By s 48 of the QCAT Act, the tribunal may dismiss a proceeding if an applicant, without reasonable excuse, fails to comply with tribunal directions and thereby unnecessarily disadvantages the respondent. Mr Grant says that he cannot locate a copy of the building contract and thus cannot comply with the direction of the tribunal to produce the document. As I have observed, Mr Russell cannot locate a copy of the contract. Mr Grant's explanation that he cannot find a copy of the contract is a reasonable explanation for his failure to comply with the tribunal directions. Section 48 of the QCAT Act is not engaged.

Conclusion

[56] The application for summary dismissal of the proceedings is refused.