A

WOOLLAHRA MUNICIPAL COUNCIL v SVED AND OTHERS *

Court of Appeal: Priestley JA, Clarke JA and Cole JA

21 November 1995; 26 July 1996

Negligence — Pure economic loss — By negligent act — Defective house — Liability of builders — To subsequent owner — Where no reliance or assumption of responsibility — Defects not latent — Intervening negligence — No duty of care owed by builders to subsequent owner — Problems of liability in economic loss by negligent act — Problem of "general reliance" by subsequent owner or builder.

B

Negligence — Pure economic loss — By negligent act — Defective house — Liability of vendor to purchaser — Where construction supervised by vendor — Whether reliance on vendor as builder — Reliance negated by terms of contract of sale — No duty of care owed to purchaser by vendor as builder.

C

Negligence — Economic loss — By negligent statement — Local councils — Statements by telephone — Whether duty of care to inquirer — Sale of defective house — Settlement conditional on certificate of compliance — Purchaser advised by telephone that certificate to issue — Advice not confirmed — Purchaser and council officer identified in conversation — Significance of information known to officer — Purchaser entitled to rely on statement.

D

Local Government — Torts — Negligence — Statements by telephone — Whether duty of care to inquirer — Sale of defective house — Settlement conditional on certificate of compliance — Purchaser advised by telephone certificate to issue — Advice not confirmed — Purchaser and council officer identified in conversation — Significance of information known to officer — Purchaser entitled to rely on statement.

E

Professions and Trades — Builders — Negligence — Defectively built house — Liability to subsequent owner — For pure economic loss — Where no reliance or assumption of responsibility — Defects not latent — Intervening negligence — No duty of care owed by builders to subsequent owner — Problem of "general reliance" by subsequent owner on builder.

F

The purchasers of a defectively built house sued the builders, the vendor and the local Council. The vendor had supervised the builders in the construction of the house and had made decisions resulting in inadequate work. The Council, on the basis of inadequate inspections, had issued a certificate of compliance pursuant to s 317A of the *Local Government Act* 1919. The contract for the sale of the property relevantly provided:

G

"28. Subject to warranties that are required to be given by the Vendor by law, the Purchasers acknowledge that they have satisfied themselves as to:

* [EDITORIAL NOTE: An application for special leave to appeal to the High Court has been filed.]

(a) (deleted)

(b) Any defects of such improvements or their state of repair and as to the position and condition of all fences and shall not make any objection, requisition or claim for compensation in relation thereto.

29. The Vendor will prior to completion proceed with all due despatch to obtain from Woollahra Council a Certificate of Compliance. In the event that such Certificate is not to hand within the time limited herein the Purchasers shall be at liberty to rescind this contract whereupon the provisions of Clause 19 hereof shall apply."

(In fact the s 317A certificate was issued after completion, but the purchasers were advised by telephone prior to completion that it would issue.)

At first instance the Council was found solely liable. On appeal,

Held: (Dismissing the appeal) (1) (Priestley JA dissenting) The builders owed no duty of care to the subsequent owners.

(By Clarke JA) The vendor (the first owner) had ultimate control over the construction; the purchasers did not rely on the builders, but on cl 29 of the contract of sale; the builders did not assume responsibility to subsequent owners; the defects were not latent; and there was intervening negligence by the Council.

(By Cole JA) While normally there would be general reliance on the builder of a house by the subsequent purchaser and at the same time specific reliance on a vendor or council, in this case there was no reliance at all on the builders, and thus no proximity. (133C-134C, 139C-G, 150F-152E)

Bryan v Maloney (1995) 182 CLR 609, discussed and distinguished.

Observations (by Clarke JA) on problems concerning the basis of liability in cases of mere economic loss resulting from negligent acts or omissions, and particularly the notion of general reliance on a builder by a subsequent owner. (134D-138G)

(2) (Priestley JA dissenting) The vendor, despite having overseen the defective construction, owed no duty of care to the purchasers.

(By Clarke JA) The terms of a contract may militate against a relationship of proximity, and the purchasers by cl 28(b) of the contract of sale assumed the risk of defects. (141C-E)

Bryan v Maloney (1995) 182 CLR 609 at 621, followed.

(By Cole JA) The vendors placed total and sole reliance on the s 317A certificate, and thus the element of causation was not satisfied. (153A-C)

Medlin v State Government Insurance Commission (1995) 182 CLR 1 at 6-7, followed.

(3) The purchaser was entitled to rely on the Council's unconfirmed statement in a telephone conversation that a s 317A certificate would issue, and the Council owed a duty of care in making the statement, because inquirer and Council officer were identified to each other and the officer knew that settlement was conditional on the issue of the certificate. (110D-111B, 126G-127F, 145C-146F)

L Shaddock & Associates Pty Ltd v Parramatta City Council (No 1) (1981) 150 CLR 225, distinguished.

Decision of Giles CJ Comm D in *Sved v Woollahra Municipal Council* (1995) 86 LGERA 222, affirmed.

Note:

A Digest (3rd ed) — TORTS [50-52]; LOCAL GOVERNMENT [40], [109]; PROFESSIONS AND TRADES [46]

CASES CITED

The following cases are cited in the judgments:

Bryan v Maloney (Supreme Court of Tasmania, Full Court, 6 October 1993, unreported)

A *Bryan v Maloney* (1995) 182 CLR 609
Burnie Port Authority v General Jones Pty Ltd (1994) 179 CLR 520
CAI Fences Pty Ltd v A Ravi (Builder) Pty Ltd (Supreme Court of Western Australia, Malcolm CJ, 27 December 1990, unreported)
Caltex Oil (Australia) Pty Ltd v The Dredge "Willemstad" (1976) 136 CLR 529
Candlewood Navigation Corporation Ltd v Mitsui OSK Lines Ltd [1986] AC 1
Central & Eastern Trust Co v Rafuse (1986) 2 SCR 147
D & F Estates Pty Ltd v Church Commissioners for England [1989] AC 177
B *Devries v Australian National Railways Commission* (1993) 177 CLR 472
Diecut Pty Ltd, Re; Ex parte North Sydney Municipal Council (1963) 8 LGRA 343
Gala v Preston (1991) 172 CLR 243
Gibson v Richardson & Wrench Ltd (1977) 1 BPR 9539
Hedley Byrne & Co Ltd v Heller & Partners Ltd [1964] AC 465
Henderson v Merrett Syndicates Ltd [1995] 2 AC 145
Invercargill City Council v Hamlin [1996] 1 All ER 756
C *Jaensch v Coffey* (1984) 155 CLR 549
King v Stewart (1994) 85 LGERA 384
Krakowski v Eurolynx Properties Ltd (1995) 69 ALJR 629
Kyogle Shire Council v Francis (1988) 13 NSWLR 396
L Shaddock & Associates Pty Ltd v Parramatta City Council (No 1) (1981) 150 CLR 225
Leigh and Sullivan Ltd v Aliakmon Shipping Co Ltd [1986] AC 785
Lempke v Dagenais (1988) 547 A 2d 290
D *Medlin v State Government Insurance Commission* (1995) 182 CLR 1
Miell v Hatjopoulos (1985) 2 BCL 258
Murphy v Brentwood District Council [1991] 1 AC 398
National Mutual Life Association of Australasia Ltd v Coffey & Partners Pty Ltd [1991] 2 Qd R 401
Northern Territory v Deutscher Klub (Darwin) Inc (1994) 4 NTLR 25; 84 LGERA 87
Opat v National Mutual Life Association of Australasia Ltd [1992] 1 VR 283
E *Parramatta City Council v Lutz* (1988) 12 NSWLR 293
Pisano v Fairfield City Council (1991) 73 LGRA 184
San Sebastian Pty Ltd v Minister Administering the Environmental Planning and Assessment Act 1979 (NSW) (1986) 162 CLR 340
Seeto Constructions Pty Ltd v Snowy River Shire Council (1982) 47 LGERA 199
South Australia v Callipari (Court of Appeal, 16 October 1992, unreported)
March v E & M H Stramare Pty Ltd (1991) 171 CLR 506
F *Sutherland Shire Council v Heyman* (1985) 157 CLR 424
Sved v Woollahra Municipal Council (1995) 86 LGERA 222
Ultramares Corporation v Touche 174 NE 441 (1931)
Warren v Coombes (1979) 142 CLR 531
White v Jones [1995] 2 AC 207

The following additional cases were cited in argument and submissions:
Bright v Sampson & Duncan Enterprises Pty Ltd (1985) 1 NSWLR 346
G *Curran v Greater Taree City Council* [1992] Aust Torts Reports 61,157
Eaglesfield v The Marquis of Londonderry (1876) 4 Ch D 708
Fletcher v Manton (1940) 64 CLR 37
Godfrey Constructions Pty Ltd v Kanagra Park Pty Ltd (1972) 128 CLR 529
L Shaddock & Associates Pty Ltd v Parramatta City Council (Waddell J, 20 March 1978, unreported)
Wollongong City Council v Fregnan [1982] 1 NSWLR 244

APPEAL AND CROSS-APPEALS

These proceedings arose from findings of Giles CJ Comm D concerning the liability of the various defendants in a trial in the Construction List.

P D McClellan QC and *S D Kalfas*, for the appellant.

S J Motbey, for the first respondent.

D H Murr, for the second and third respondents.

G K Burton, for the fourth respondent.

Cur adv vult

26 July 1996

PRIESTLEY JA.

The background:

These appeals against judgments and orders of Giles J raise the question of who is to bear the loss caused by major structural defects in the building of a house in Vaucluse, a suburb of Sydney.

The house was built, in greater part, in 1986. Mr and Mrs Goddard had bought the land in late 1985. They moved into the house in late November 1986, although it was not then completely finished. Before Giles J there was an issue whether the construction of the building and its later sale were part of a business venture by the Goddards or whether the house had been built as their home. Giles J held that it was the latter and that the decision to sell the house soon after the Goddards had gone to live there was the result of growing matrimonial differences which later led to divorce.

Mr Goddard took overall charge of the building of the house. He made some important building decisions at various stages. Mr L Di Blasio and Mr G Di Blasio oversaw and, through employees and sub-contractors, did much of the construction work. Officers of the Council of the Municipality of Woollahra (the Council) from time to time inspected the building to see that its construction complied with plans and specifications approved by the Council. A final inspection in August 1987 revealed that certain matters were still outstanding and were required to be completed. A further final inspection in October found the outstanding matters "satisfactory".

Mr and Mrs Goddard put the house on the market in May 1987. On 19 August 1987, they offered it for sale at auction. Mr and Mrs Sved became the purchasers, for a price of $1,820,000. Contracts were exchanged on that day. The form of contract available before the auction had contained a special condition, cl 28, as follows:

> "28. Subject to warranties that are required to be given by the Vendor by law, the Purchasers acknowledge that they have satisfied themselves as to:
>
> (a) The compliance or otherwise by any improvements erected on the property with the provisions of the Local Government Act, 1919 and all ordinances thereunder and whether or not a Certificate under s 317A of the Local Government Act is available from the local Council.
>
> (b) Any defects of such improvements or their state of repair and as

A to the position and condition of all fences and shall not make any objections, requisition or claim for compensation in relation thereto."

Immediately before the auction Mr Sved, who was in company with his wife and their solicitor, Mr Ratner, told the agent that he and his wife would not bid unless certain changes were made to the contract, because they had not yet seen the s 317A certificate. As a result par (a) was struck out from cl 28 and a cl 29 B was added, as follows:

"29. The Vendor will prior to completion proceed with all due despatch to obtain from Woollahra Council a Certificate of Compliance. In the event that such certificate is not to hand within the time limited herein the Purchasers shall be at liberty to rescind this contract whereupon the provisions of Clause 19 hereof shall apply."

The purchase of the property was to be completed on 14 October 1987.

C Mr Ratner wrote to Mr Miceli, the solicitor for Mr and Mrs Goddard, a letter dated 20 August 1987 which began: "We submit the following Requisitions on Title." Requisition 8 was:

"8. Have the provisions of the Local Government Act, 1919 as amended and the ordinances thereunder relating to subdivisions and buildings been observed and complied with in respect of the subject property?"

D By letter dated 31 August 1987 Mr Miceli replied. The answer to requisition 8 was: "As far as the vendors are aware, yes."

By the agreed completion date of 14 October 1987 no s 317A certificate had been issued by the Council. Giles J accepted evidence given by Mrs Sved that shortly before completion on 14 October she spoke to Mr James, an officer of the Council, who said that the certificate would issue. Giles J also accepted that in reliance on that statement Mr and Mrs Sved completed the purchase on 14 October. They moved into the house on 22 October 1987. On the same day the E Council issued the s 317A certificate. It certified:

"… that in the opinion of the Council, the two storey dwelling at the above premises, complies with the *Local Government Act* 1919, the Ordinances in force under that Act, the *Environmental Planning & Assessment Act* 1979 and the Woollahra Planning Scheme Ordinance and the plans and specifications approved by the Council in relation to the said premises."

F Beneath the signature of the Council officer to the certificate the following appeared:

"NOTE: This certificate is not an unequivocable [sic] affirmation of proper building standards."

Very soon after Mr and Mrs Sved moved in heavy rain fell. Water came into the house. The rumpus room flooded. This kept happening. As time passed even light rain resulted, among other things, in water staining and rotting of woodwork. Ceilings and cornices cracked. Slab edges cracked and became G stained. The render on walls cracked or crazed. The floor at the entrance and in the rumpus room dropped. As Giles J tersely remarked (*Sved v Woollahra Municipal Council* (1995) 86 LGERA 222 at 224): "… there is no doubt that there had been departures from the approved plans and specifications and defective workmanship in the construction of the building."

Numerous investigations were made into the causes of the defects. In the

course of these, it became clear that there had been a great many departures from the plans and specifications approved by the Council. A schedule of the departures from the approved plans and specifications was in evidence before Giles J. It listed about seventy-two instances upon which the experts of the parties were agreed. Notes to the schedule recorded the experts' joint opinion in respect of each departure as to whether it had serious consequences, was of moderate consequence, was of little consequence or was of no consequence. Giles J observed that before him the parties concentrated on the defects which gave rise to water entry and flooding with less or no evidence or submissions directed to liability in respect of the other defects.

One of the principal matters connected with the flooding was the incorrect installation of a sump and associated pumps. The facts relating to these were explored in considerable detail, carefully sifted by Giles J in a way that enables this Court to state the material facts more shortly than he was obliged to do.

In an inspection on or about 20 August 1986, Mr James discovered that the stormwater drainage was being constructed without approval. He spoke to Mr L Di Blasio and Mr Goddard and told them to stop the work. As a result Mr Goddard engaged a hydraulic engineer. This engineer prepared a plan providing for a sump to receive stormwater drainage and for pumps to take the water uphill to Hopetoun Avenue. This plan was approved by the Council in November 1986.

The sump, drains and pumps were not built and installed in accordance with the plan. The non-conformity with the plan was a principal reason for subsequent flooding. The clearest explanation of why this was so appeared in exhibit Q which consisted of two reports from a consulting engineer. In the second of these reports five main differences were listed between what was required by the approved plan of the hydraulic engineer and what was actually done. The design requirement for the hydraulic engineer's plan had been a system to cope with a one in twenty year storm event. The second report in exhibit Q, after listing the five main differences, said that their combined effect was a system which could not cope with a one in one year storm event.

It is apparent that Giles J accepted in full the conclusions of exhibit Q. In making his findings on this part of the case he repeated the statement in the exhibit that the system as installed could cope only with a one in one year storm rather than a one in twenty year storm. He then continued (at 228):

> "As constructed, the drainage departed from the Council's approvals inter alia in that —
>
> (a) the downpipe collection pipes were 80 mm diameter instead of 100 mm as specified;
>
> (b) the drainage pipes to the sump were 100 mm diameter instead of the 150 mm diameter specified;
>
> (c) the storage capacity of the sump was effectively reduced to about 20 per cent of its design capacity because the invert of the inlet pipe from the rear of the building was close to the bottom of the sump; and
>
> (d) the two pumps in the sump were smaller than as shown on the hydraulic engineer's plan, providing less than 35 per cent of the design discharge capacity."

The four departures listed by Giles J are identical with four of the five listed in the second report in exhibit Q, the exception being that the first of the exhibit

Q list is omitted, it being of comparatively lesser significance in the flooding of the house. After listing what he considered the four main departures, Giles J added (at 228): "More generally, the levels of the pipes were such that when the sump became full water backed up an inlet pipe and flooded the rumpus room."

Giles J found that both Mr Goddard and Mr L Di Blasio were told about the undersized drainage pipes to the sump at a time when they could have been replaced and that they did nothing to replace them with larger pipes. He also found that they were told that the sump was not deep enough for the draining pipe coming from the rear of the building. He also found that Mr Goddard asked how much it would cost to replace the two undersized pumps with the proper sized ones, and, when given a price, said they were too dear and asked whether something smaller could be put in which would pump the water out; pumps were then obtained on advice from a pump supplier that they would have adequate capacity, although less than that specified, and those pumps were installed.

There had been conflicting evidence about the matters in the preceding paragraph. Giles J was quite critical of the reliability of evidence given by Mr L and Mr G Di Blasio and Mr Goddard. He resolved the conflicts of fact in the way just mentioned generally adversely to those three defendants. Such conclusions are of a kind which an appellate court will not ordinarily disturb. No reason for disturbing them has appeared in the present case.

Giles J also found that the levels were incorrect because the pipes were installed before the question of a sump arose and no action was taken to alter the pipes or accommodate the depth of the sump to them. Giles J further found that the Council had undertaken the inspection of the drainage arrangements, had carried out inspections and had failed to make them adequately in that, inter alia, the Council did not notice, what Giles J held was plain to see, the non-conforming size of the pipes and the incorrect position of the inlet pipe. Nor did any Council inspection discover the inadequate capacity of the pumps installed.

The other principal matter relating to the flooding was the failure to use either of the two accepted methods for protection of the concrete slabs used as the basis of the decks above the rumpus room and garage against water penetration. Mr L Di Blasio advised Mr Goddard to use one of the recognised methods (a waterproofing membrane). The plans and specifications did not stipulate a waterproofing membrane. Giles J found that because of this, Mr Goddard decided not to use one and directed Mr Di Blasio accordingly. Mr Di Blasio complied. Giles J was also satisfied that Mr Goddard knew that proper practice required a waterproofing membrane in the circumstances.

Mr and Mrs Sved seek redress:

Mr and Mrs Sved brought Supreme Court proceedings claiming damages from the Council (first defendant), Mrs Goddard (second defendant), Mr L Di Blasio (third defendant), Mr G Di Blasio (fourth defendant) and Mr Goddard (fifth defendant).

The hearing:

At the hearing before Giles J it was agreed that the trial would be divided into two parts: first the judge would decide questions of liability, and secondly, if it became necessary, questions of damages.

The findings against the Council:

Giles J found that in the construction of the drainage of the house there had been departures from the plans approved by the Council, that such departures were readily ascertainable and should have been ascertained by inspection by the Council, that had they been ascertained a s 317A certificate would not have issued, that the Council's telling Mrs Sved that the certificate would issue was in breach of its duty of care to Mr and Mrs Sved, that Mr and Mrs Sved would not have completed the purchase if they had been told of the departures from the approved plans in relation to drainage, that on the probabilities Mr and Mrs Sved would have exercised their right to rescind the contract if the departures in relation to the drainage had caused the Council to refuse the s 317A certificate (as should have happened), and that accordingly, Mr and Mrs Sved, having suffered loss because of the Council's breach of duty, were entitled to recover from the Council the loss caused by their purchase of the property.

Giles J then stated the basis on which damages should be assessed when they later fell for assessment.

The claim against Mr and Mrs Goddard:

The plaintiffs' claim against Mr and Mrs Goddard was based first on an assertion that Mr and Mrs Goddard had given false answers to requisitions and that this was misleading and deceptive conduct within the meaning of s 42 of the *Fair Trading Act* 1987; secondly that the plaintiffs were entitled to damages for breach of the contractual warranty arising upon the giving of the answers to the requisitions; and thirdly that Mr and Mrs Goddard were in breach of a duty of care owed to the plaintiffs, as subsequent purchasers of the property.

As to the misleading and deceptive conduct claim Giles J held that s 42 did not apply because what was done by Mr and Mrs Goddard was not in trade or commerce. He also held that in view of the state of Mr and Mrs Goddard's knowledge, as the evidence before him was left he was not satisfied that the claim of misleading and deceptive conduct had been made out.

In regard to the contractual warranty claim Giles J held first that it had not been established that the answers to requisitions brought into existence any contractual warranty or collateral contract and secondly that in any event there was no breach of warranty because it had not been shown that the answers to requisitions relied on were false.

As to the claim for damages for breach of duty of care, Giles J held that special condition 28(b) of the contract of purchase had the effect that the risk of defects as between the vendors and the purchasers fell on the purchasers; the insertion of special condition 29 had the effect that the purchasers looked to the s 317A certificate “as their assurance of the state of the building” (at 242). Giles J concluded that this agreed allocation of risk was destructive of proximity. For that reason and also for a further reason he explained when dealing with the claim against the Messrs Di Blasio, he decided that the plaintiffs failed against Mr and Mrs Goddard.

The claim against the Messrs Di Blasio:

As regards the Messrs Di Blasio, Giles J held there was a substantial basis for a relationship of proximity between them and the plaintiffs. He then considered the part played by reliance in the present class of case and reached the conclusion that actual reliance by a plaintiff was a factor in its own right in

deciding whether a sufficient relationship of proximity existed, at least to the extent that if the plaintiff did not rely positively on the defendants' acts or omissions, that told against a relationship of proximity. Giles J thought that in the present case there had been no reliance on the part of the plaintiffs and that in the circumstances that negated any duty of care to the plaintiffs. What the plaintiffs had relied on was the s 317A certificate, and as a result they "… were not subsequent purchasers to whom was owed the duty of care which might otherwise have been owed" (at 245).

Alternatively, Giles J said, (at 245) if there was a duty of care, the breach did not relevantly cause the plaintiffs' loss: "… the commonsense cause of their loss was their purchase of the property in overwhelming reliance on what they were told about the issue of the s 317A certificate."

The cross-claims:

The Council had cross-claimed against all the other defendants, saying that if the Council were liable then each of the other defendants was also liable to the plaintiff in respect of the same damage so that the Council was entitled either to indemnity or contribution from those other defendants. Since, on Giles J's findings, the other defendants were not liable to the plaintiffs, the Council's cross-claim necessarily failed.

The other defendants all cross-claimed against one another, but in view of Giles J's conclusion that none of them, except the Council, was liable to the plaintiffs, those other cross-claims did not arise.

The appeals:

The Council's appeal:

The Council's first ground of appeal was that the trial judge's finding of fact that the plaintiffs relied on what the Council officer told Mrs Sved shortly before settlement of the purchase concerning the s 317A certificate should be changed. Direct evidence of this conversation had been given by Mrs Sved. The Council officer to whom she said she had spoken was Mr James. Mr James had no recollection of the conversation. He gave evidence, based on his practice in regard to such conversations, that he would not have said what Mrs Sved said he had said. This evidence of his practice was linked with contemporary Council documents which, it was submitted, both before Giles J and in this Court, strongly supported his denial that he would have said what was alleged and showed that Mrs Sved's account was unlikely. It was also submitted that further doubt was cast on Mrs Sved's evidence because the version accepted by Giles J only emerged late in the proceedings. It was submitted that the Court should reverse Giles J's factual finding and approach the case on the footing that Mr James had not said what Mrs Sved claimed and that any conversation with him must have been along the lines that he had asserted in his evidence.

A very long line of decisions stands in the way of this Court's acceptance of the Council's first ground of appeal, the latest of which is, *Devries v Australian National Railways Commission* (1993) 177 CLR 472. The effect of the decisions is that this Court will not disagree with a trial judge's findings on contested factual issues involving the acceptability of witnesses seen by the trial judge unless it is plain that there has been some misuse by the trial judge of the position of advantage that judge has by reason of seeing and hearing the

witness give evidence or there has been some palpable mistake in the judge's understanding of the evidence in the case. A

I can see no such mistake on the part of Giles J in the present case. Simply looking at the evidence as it appears in the appeal books, I do not think the Council's submission can get any more favourable answer than that Giles J could have decided the issue of fact in question in favour of the Council. Equally, however, it was open to him to find as he did. He was the person who saw the witnesses and the decision on the question of fact was for him to make. In my opinion, there is no acceptable reason for this Court to interfere with the challenged finding of fact. B

The Council's next submission was that, accepting the fact of the conversation as found by Giles J, the Council could not be liable to Mr and Mrs Sved because of it. Giles J had described what the understanding of Mr and Mrs Sved was of the significance of a s 317A certificate. It was submitted that Giles J was in error in doing this. It was submitted that Mr James and Mr and Mrs Sved may well have had different understandings of what the certificate would contain. It was submitted that his Honour had not taken account of this. C

Counsel supported this approach by what he called the *Shaddock* submission. This submission was to the effect that, in *L Shaddock & Associates Pty Ltd v Parramatta City Council (No 1)* (1981) 150 CLR 225, the High Court had made it clear that for a party to be able to rely upon a statement made by a council officer by telephone the party would have to show there had also been some confirmation of the statement. For example Gibbs CJ said (at 236): D

> "It would not, however, have been reasonable for the appellants to have relied on an unconfirmed answer given by an unidentified person in response to an inquiry made over the telephone. The Council therefore owed no duty of care in making response to such an inquiry."

Stephen J similarly said (at 238):

> "The appellants through their solicitor, Mr Carroll, made two inquiries of the Council. The first, by telephone, should not, in my view, be regarded as giving rise to any consequence in law. It was marked by informality: the person in the Council office to whom Mr Carroll spoke remained unidentified and the advice which that person then and there gave over the telephone remained unconfirmed by any writing. It must be but rarely that information conveyed by unidentified voices answering a telephone at the offices of municipal councils will render those councils liable in damages for negligence if the information should prove to be incorrect. In my view neither a council nor an inquirer would, in the absence of quite special circumstances, regard the response to such an inquiry as carrying with it liability in damages if incorrect: this must especially be the case when there exists a customary and more formal means of obtaining from a council the information which is sought." E F

I do not think that statements of the kind relied on by the Council in the present case establish that as a matter of law there must be some confirmation of information given by telephone by a Council officer before the party dealing with the Council can rely on the statement. Whether or not it will be appropriate for a court to treat such a statement as capable of giving rise to legal consequences will depend upon the circumstances. The circumstances of the present case are very different from those in *Shaddock*. G

A In the present case Giles J found that Mrs Sved spoke to a known and responsible officer of the Council — the very man concerned with Council inspections of the ongoing building — in circumstances where the inference is quite clear that the officer must have known that Mrs Sved was making a serious inquiry of him for an immediately pressing purpose.

I therefore do not think that either the argument founded on the possibly different understanding of Mrs Sved and Mr James of the significance of the B s 317A certificate to be issued or the *Shaddock* argument avails the Council in its appeal. Giles J found that Mr and Mrs Sved were relying upon the issue of a satisfactory certificate to complete the purchase of the house. He also found that Mr James was generally aware that purchasers relied on s 317A certificates. Mr James represented that a satisfactory certificate would issue. It was not contended that Mr James had no authority to make that representation. That representation was negligently made by the Council's officer on the Council's C behalf in that the Council should have known (and only did not know because of its inadequate inspections) that it was not in a position to issue the certificate. These bare facts, in my opinion, were the basis for Giles J's finding of liability, and in my opinion rightly so.

Further arguments were addressed to the Court contending that Mr and Mrs Sved had relied not on the obtaining of the s 317A certificate but on the advice of their solicitor, Mr Ratner in completing the purchase.

D The facts concerning Mrs Sved's ringing up Mr James, what she said to him and what she thereafter did all seem to me to make this submission untenable. The submission appears to involve the idea that when persons in the position of Mr and Mrs Sved in the present case decide to take a significant legal step and have available to them various sources of advice and information, they must be taken to have made their decision in reliance upon one source of advice or information only. It seems to me that Mr and Mrs Sved may well have relied on a number of factors in forming their decision to complete their purchase. E Amongst these, I think Giles J was quite right in acting on the footing that an important matter in Mrs Sved's eyes in deciding to settle the purchase was the assurance she received from Mr James. If there were other important matters also operating on the decision of her and her husband to complete the transaction, that does not undermine the proposition that they placed significant reliance upon what Mr James said.

Another way of making the same point is to observe that reliance on the F assurance that the s 317A certificate would be issued, and reliance on Mr Ratner, are not mutually exclusive states of affairs; it would be quite an everyday thing for Mr Ratner's advice to be affected by knowledge of Mr James' assurance about the certificate and for Mr and Mrs Sved to rely on that assurance both because of their direct knowledge of it and because of Mr Ratner's view, influenced by the same assurance, as well as placing some less obvious reliance on other matters.

G Related to the last submission was a further submission that no evidence was given by Mr and Mrs Sved as to what they would have done if the Council had refused to issue a s 317A certificate for the reason only of the departures in relation to the drainage. The submission pointed out that Mrs Sved had conceded that what she would have done if no s 317A certificate had issued by 14 October 1987 (and by implication if she had not obtained the assurance from Mr James) would have depended upon why the certificate was being delayed.

As to this and the preceding submission Giles J had, inter alia, said (*Sved* at 234-235):

> "According to both Mr and Mrs Sved, had they known that the building had the defects later ascertained they would not have bought it but would have terminated the contract, and Mrs Sved said that she would not have completed the purchase if Mr James had not said what he did. Although the evidence did not specifically address knowledge of the departures in relation to the drainage as distinct from the wider range of defects, I am satisfied that Mr and Mrs Sved would not have completed the purchase of the property if they had been told of those departures. It may well be that that would have led to knowledge of other defects, but almost certainly it would have led to an understanding of the possibility of the flooding that in fact occurred. Without intending to cause offence, Mrs Sved in particular demanded high standards and would not have been easy to satisfy once a defect of that significance was known. There had been insistence at the time of contract on a s 317A certificate, and I consider that on the probabilities Mr and Mrs Sved would have exercised their right to rescind the contract if, as should have been the case, the departures in relation to the drainage had caused the Council to refuse a s 317A certificate. I do not accept the Council's submission that Mr and Mrs Sved relied on their own inspection of the property and the advice of Mr Ratner in deciding to settle the purchase when they did: apart from being contrary to the evidence of Mr and Mrs Sved, that is not consistent with the insistence on a s 317A certificate at the time of contract and the enquiries made of Mr James."

The reasoning in this passage seems to me to deal very adequately with the submissions for the Council which referred to the matters the passage discussed. What Giles J says in the passage seems to me to be both persuasive and correct and I do not think I need do more in not accepting the Council's relevant submissions than say that I agree with what Giles J said in it.

Mr and Mrs Sved's cross-appeal: in regard to Mr and Mrs Goddard:

Mr and Mrs Sved claimed that the trial judge should have found that in addition to the Council's liability to them, Mr and Mrs Goddard were, or alternatively Mr Goddard was, also liable.

These submissions must be considered in light of the facts of the connection of Mr and Mrs Goddard, particularly Mr Goddard, with the building of the house and its sale. There was some conflict in the evidence concerning these facts. I mentioned earlier that the trial judge was not impressed with the reliability of either Mr L or Mr G Di Blasio or Mr Goddard. He took his doubts concerning their reliability into account in saying he was satisfied the arrangements for the construction of the building were as follows (*Sved* (at 225-226)):

> "The architect was not involved after the design and approval stage. Mr Goddard approached Mr Luigi Di Blasio and asked him for help in the building work, and it was agreed that Mr Di Blasio would be paid $200 per day for his part therein. Mr Di Blasio obtained quotes from subcontractors and, where appropriate, some suppliers of materials, submitted them to Mr Goddard, and Mr Goddard selected or approved the quotes; for PC items and some other materials Mr Goddard arranged their

supply direct. Mr Di Blasio co-ordinated and supervised the building work and provided his own labour and the labour of some employees of Di Blasio Bros & Co. Periodically he invoiced Mr Goddard, on a letterhead of Di Blasio Bros & Co, for amounts due to subcontractors and materials suppliers, for the Di Blasio Bros & Co labour at an hourly rate, and for the $200 per day. Mr Giuseppe Di Blasio was on the site at least once and knew that the building work was going on with Mr Luigi Di Blasio playing the part just mentioned, but did not directly participate in the work. The building work was carried out under the name of Di Blasio Bros & Co, with the firm's notice displayed at the site, and the income went to the partnership.

Whether Mr Goddard paid the subcontractors and materials suppliers direct or through Di Blasio Bros & Co was not entirely clear, but in the main probably the latter. Mr Goddard was himself frequently on the site, making decisions and giving instructions about matters such as PC items, kitchen layout, and details necessary because the plans and specification were rather general. As will appear, he also decided matters such as whether a waterproofing membrane should be used and how drainage requirements should be fulfilled. I accept as a reflection of Mr Goddard's standing a statement which Mr Giuseppe Di Blasio attributed to him, although Mr Di Blasio later sought to add a gloss which I do not accept: '*I'm the commander, I pay the money, I do what I like*.' Except on matters such as choosing finishes, Mrs Goddard left it all to Mr Goddard.

It is material to look to what occurred later. After Mr and Mrs Sved purchased the property their complaints of water entry led to inspections by officers of the Building Services Corporation in the company of Messrs Luigi and Giuseppe Di Blasio. On another occasion Mr Goddard attended with Mr Luigi Di Blasio otherwise than at the request of the Sveds, and after inspecting the building told Mrs Sved: '*There will be no problem rectifying everything*.' Thereafter Mr Luigi Di Blasio and workmen carried out work including replacing all the roof tiles, repainting ceilings, apparent waterproofing of and other attention to concrete decks, and making a hole in the drainage sump to allow excess water to run into the yard. Even after this there was further water entry and flooding, and in particular the attention to the decks was inadequate and there was still water entry."

In this Court the same three grounds were relied upon as had been put to Giles J, as earlier set out (at 108C-109D).

Each of the first two depended on the making of a finding concerning the knowledge and/or deliberate mis-statement by Mr and Mrs Goddard about certain matters. Giles J was not prepared to make such findings. In argument the Court was taken to various materials, particularly concerning Mr Goddard and some damaging answers he had made on the topics in question. It was submitted in regard to Mr Goddard that when these answers were taken into account together with the trial judge's clearly stated adverse views about his reliability, the Court should make the necessary findings of deliberate mis-statement. I have considerable sympathy with this submission, but on reflection do not think that it should be accepted. The claims made against Mr Goddard were of serious dishonesty and the trial judge evidently recognising that there was a distinction between not accepting a party's evidence and taking the further step of making positive findings of deliberate misrepresentation against

that party, made it quite clear that although he was severely critical of Mr Goddard's reliability and did not accept his version of a number of matters, he did not consider that there had been sufficient positive matter before him to justify him in making the further findings of fact sought by Mr and Mrs Sved. A

This seems to me to be an aspect of the case in which the trial judge's conclusion carries particular weight. Although, simply on the transcript, I think it would be possible to come to a different conclusion from that of the trial judge on these aspects, there is nothing decisively against the trial judge's conclusion in the materials and I feel unable to say that if I had been in his place at the trial and had available the input the trial judge had, over and above what appears in the transcript, that I would have come to a different conclusion. B

I therefore do not think that the first two heads of the claims of Mr and Mrs Sved against Mr and Mrs Goddard should succeed.

The third seems to me to be a more difficult matter. It involves questions of law in which this Court has the assistance and is bound by the authority of the decision of the High Court in *Bryan v Maloney* (1995) 182 CLR 609, handed down after Giles J decided the present case. C

Giles J held that Mr Goddard owed no duty of care to Mr and Mrs Sved because of the protection given by special condition 28(b) of the Contract of Purchase. He also held (at 244), after discussing the place of "reliance" in cases falling in the category of a subsequent owner of a house claiming damages from its builder for negligence in its construction, that "absence of reliance on the part of the particular subsequent purchaser may negate his invocation of a duty of care". His opinion was that the present case was an example of this. He set out (at 244-245) evidence from Mr and Mrs Sved on this point. Mrs Sved had been asked why the s 317A certificate had been so important to her, and then: D

> "Q. Because that meant that regardless of whether the builder was good or bad, someone else was inspecting the work and certifying that it was properly done? A. Yes. E
>
> Q. And that was what was important to you when you entered into the contract and when you decided to complete the contract? A. Because I didn't have a building inspection, yes."

Mr Sved's evidence of his state of mind after Mrs Sved had told him about the conversation with Mr James was:

> "Q. You acted in reliance upon that information you received from Mrs Sved in deciding to go ahead and settle on the 14th; is that correct? A. Yes. F
>
> Q. And there was nothing else that you relied upon in deciding to settle on the 14th other than the receipt of that information? A. That's right."

Giles J summarised his conclusions as follows (at 245):

> "It seems to me that the firm reliance on the s 317A certificate is significant, and that Mr and Mrs Sved were not subsequent purchasers to whom was owed the duty of care which might otherwise have been owed. G
>
> An alternative approach might be that, if there was a duty of care, the breach did not relevantly cause Mr and Mrs Sved's loss. I prefer the former way of looking at it, but in any event where Mr and Mrs Sved relied on the certificate, or what Mr James said about it, to the exclusion of even general reliance on the proper performance by the builder of the

A construction of the building, they cannot say that they suffered loss because of the builder's failure to exercise reasonable care and skill."

The argument on this aspect of the cross-appeal turned to a great extent on whether Giles J's conclusions were affected by the way in which the High Court, in *Bryan v Maloney* dealt with the builder purchaser category of negligence cases.

The facts of *Bryan v Maloney* were somewhat different from those in the B present case but general propositions of some importance were stated by the High Court which, at least arguably, apply to the present case.

In *Bryan v Maloney*, Mr Bryan built a house in 1979 for its first owner. That owner sold to a second owner. In 1986 the second owner sold the house to Mrs Maloney. About six months after she bought it it began to show cracks which she had not seen when inspecting the house before purchase. Her evidence of reliance was that when she had been looking at the house before C buying she "thought it would be built properly …". The reason for the cracking and subsequent damage was that Mr Bryan had built the house on footings inadequate to withstand the seasonal changes in the clay soil.

In the High Court the judges who heard the case were Mason CJ, Brennan, Deane, Toohey and Gaudron JJ. All except Brennan J were of the view that Mrs Maloney was entitled to damages from Mr Bryan. Mason CJ and Deane J and Gaudron J wrote a joint opinion. Toohey J's separate reasons took a slightly different approach in some respects from those of the other three judges D in the majority. I assume therefore that what is binding on this Court is the ratio decidendi of Mason CJ and Deane J and Gaudron J and I will confine myself to what appears in their reasons. They took the view that, in light of the facts of the case as they had emerged from the lower courts and the way it was argued before the High Court (at 617), they were presented with the abstract question:

> "… namely, whether under the law of negligence, a professional builder who constructs a house for the then owner of the land owes a prima facie E 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."

They treated that loss as "mere economic loss". In such cases the notion of proximity was of vital importance (at 618). They then discussed policy F considerations which courts must take into account in dealing with such cases. They said it was established that the law recognises the existence of concurrent duties in contract and tort. They approved of the statement of the contract/tort position by Le Dain J in a unanimous judgment of the Supreme Court of Canada in *Central & Eastern Trust Co v Rafuse* (1986) 2 SCR 147 at 204-205. They reproduced in their reasons (at 621-622) three numbered paragraphs from the Canadian decision, from which I set out the following presently relevant parts:

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> "1. The common law duty of care that is created by a relationship of sufficient proximity … is not confined to relationships that arise apart from contract ….
>
> 2. What is undertaken by the contract will indicate the nature of the relationship that gives rise to the common law duty of care, but the nature and scope of the duty of care that is asserted as the foundation

of the tortious liability must not depend on specific obligations or duties created by the express terms of the contract ….

3. A concurrent or alternative liability in tort will not be admitted if its effect would be to permit the plaintiff to circumvent or escape a contractual exclusion or limitation of liability for the act or omission that would constitute the tort. …"

A

They then went on to say there were no policy considerations precluding the finding of a relative relationship of proximity between Mr Bryan and the first owner. Indeed, they said (at 624) the ordinary relationship between the builder and first owner:

B

"… is characterised 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 the consequent duty of care exists in respect of pure economic loss."

C

They then indicated that the relationship between Mr Bryan and the first owner was a case where there had been such an assumption of responsibility and such reliance. From that, after noting that there was nothing of a contractual kind between Mr Bryan and the first owner to disturb that position of proximity they went on to say (at 628) that subsequent owners were in the same position:

"… In all the circumstances, the relationship between builder and subsequent owner as regards the particular kind of economic loss should be accepted as possessing a comparable degree of proximity to that possessed by the relationship between builder and first owner and as giving rise to a duty to take reasonable care on the part of the builder to avoid such loss.

D

The conclusion that a relationship of proximity existed between Mr Bryan, as the builder, and Mrs Maloney, as subsequent owner, with respect to the particular kind of economic loss is also supported by analogy with the relationship which would have existed between Mr Bryan, as the builder, and any person who suffered physical injury to person or property in the event that the house or part of the house had collapsed at the time when the inadequacy of the foundation first became manifest. It is difficult to see why, as a matter of principle, policy or common sense, a negligent builder should be liable for ordinary physical injury caused to any person or to other property by reason of the collapse of a building by reason of the inadequacy of the foundations but be not liable to the owner of the building for the cost of remedial work necessary to remedy that inadequacy and to avert such damage. Indeed, there is obvious force in the view expressed by Lord Denning MR in *Dutton v Bognor Regis Urban District Council* [1972] 1 QB 373 at 396."

E

F

Although, so far as Mr Goddard is concerned, the case is more like that of the sale by the builder to the first owner than a subsequent one, I have extracted as relevant from *Bryan v Maloney* references to the position concerning the subsequent purchaser for a number of reasons. One is that when I come to the claims of Mr and Mrs Sved against the Messrs Di Blasio those claims are by them as subsequent purchasers, the other is because of the way in which the joint reasons dealt with the matter of reliance. In the course of reaching the conclusion that Mrs Maloney was for relevant purposes owed the same duty as

G

had been owed to the first purchaser it was said (at 627) that they were in equivalent positions concerning reliance:

> "Upon analysis, the relationship between builder and subsequent owner with respect to the particular kind of economic loss is, like that between the builder and first owner, 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. In ordinary circumstances, 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. Such a subsequent owner will ordinarily have no greater, and will often have less, opportunity to inspect and test the footings of the house than the first owner. Such a subsequent owner is likely to be unskilled in building matters and inexperienced in the niceties of real property investment. *Any builder should be aware that such a 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*." (Emphasis added.)

It seems to me that Mason CJ and Deane J and Gaudron J are there saying that in the ordinary case a builder is to be taken as being aware that when a house appears to be sound a subsequent owner when purchasing will assume it was competently built. The whole tenor of their reasons shows that this proposition is just as much applicable to the first owner as to subsequent owners. The way the reasoning runs is that it is taken for granted that the first owner will make such an assumption and that there is no reason "in the absence of competing or intervening negligence or other causative event" (at 627) why the builder should not be taken as being aware of the same assumption being made by subsequent owners.

This is the same concept (indeed, perhaps slightly enlarged) as that explained by Mason J in some detail in *Sutherland Shire Council v Heyman* (1985) 157 CLR 424 at 462-464. In *Sutherland Shire Council v Heyman*, it was not clear whether the broad concept of general reliance as explained by Mason J had obtained the concurrence of a majority of the court. Nevertheless it was adopted by Kearney J in *Northern Territory v Deutscher Klub (Darwin) Inc* (1994) 4 NTLR 25 at 28-29; (1994) 84 LGERA 87 at 88-89, a decision of the Court of Appeal of the Northern Territory. One important feature of *Bryan v Maloney* is that it appears to have made the concept of general reliance part of its ratio decidendi.

On the basis of Giles J's statement of the facts of Mr Goddard's part in the building, my opinion is that although not a professional builder he falls into the class of persons to be regarded as builders for the purposes of the category which the High Court was considering in *Bryan v Maloney*. On the facts found by Giles J it was by his authority that the negligent acts were carried out in regard to the installation of the sump and its pipes and pumps and the negligent decision was made not to use the waterproofing membrane. I do not think that the fact that the house was originally intended to be a home for Mrs Goddard and himself detracts from his characterisation, for present purposes, as a builder. He had twice before been concerned with the purchase, improvement and sale of premises he and his wife had used as homes. Before this house was

finished in 1987 he had turned sixty-six. On and from 5 January 1987 he and his wife agreed that their marriage was at an end and acted on that footing although they continued to live separately in the house until it was sold. An amicable agreement for division of property had been reached some time before the end of March 1987. In view of Mr Goddard's age it seems to me that it must be taken as having been in his contemplation that the house would inevitably be sold at some time in the future and, bearing in mind that agreements to separate rarely come out of a blue sky, that there was a distinct possibility that that would happen in the next few years.

The next matter is whether the finding made by Giles J of actual reliance by Mr and Mrs Sved upon the obtaining of the s 317A certificate precludes this Court, in light of *Bryan v Maloney*, and its explanation of the role of general reliance in cases in the category dealt with by that decision, from finding that general reliance was concurrently operative. I do not think it does. Indeed, far from the actual conscious reliance on the s 317A certificate precluding general reliance on the builder, it seems to me to demonstrate it. Mr and Mrs Sved were inspecting prior to the auction a house that had only been finally completed earlier in the year. Descriptions of the house in the evidence indicate, as also its price at auction would suggest, that it was large, expensively appointed, and in most respects built to a high standard. The assumption must have been, whether or not consciously stated in these terms, that such a house would have been properly built without hidden departures from proper building standards likely to cause severe damage. It seems to me perfectly sensible in such circumstances that prospective purchasers contemplating laying out $1.8 million would want confirmation of what they were expecting of such a building. The obtaining from Mr James of the assurance about the s 317A certificate would confirm their assumption, based on the newness, appearance and likely price of the house, that it was properly built. In my view the realistic construction to put on Mr and Mrs Sved's actions is that they were not seeking assurances from the Council so that they could sue the Council if there was something wrong with the house; they were seeking reassurance that the house was what they already were assuming, that it was thoroughly soundly built and would give them no problems.

It seems to me that the conditions by reference to which Mason CJ and Deane J and Gaudron J said what they did about reliance in *Bryan v Maloney* were all obvious in the present case.

This leaves for consideration the contractual position between Mr and Mrs Sved and Mr and Mrs Goddard. It seems useful here to set out the relevant clauses as they appeared in the contract, free of the distraction of how cl 28 looked in its pre-amendment, pre-exchange form. What the parties actually agreed was:

> "28. Subject to warranties that are required to be given by the Vendor by law, the Purchasers acknowledge that they have satisfied themselves as to:
>
> (b) Any defects of such improvements or their state of repair and as to the position and condition of all fences and shall not make any objections, requisition or claim for compensation in relation thereto.
>
> 29. The Vendor will prior to completion proceed with all due despatch to obtain from Woollahra Council a Certificate of Compliance. In the

A event that such certificate is not to hand within the time limited herein the Purchasers shall be at liberty to rescind this contract whereupon the provisions of Clause 19 hereof shall apply."

These clauses must be read together.

Clause 29 was dealing with what would be covered by a certificate of compliance from the Council. At the relevant time, that meant in law, a certificate that in the opinion of the Council the building in all respects
B complied with inter alia the plans and specifications approved by the Council (s 317A(1)).

In cl 28 the purchasers were agreeing they would not make any claim for compensation for "defects of such improvements or their state of repair". I do not understand there to have been any suggestion in the case that the two main matters complained of by Mr and Mrs Sved, the stormwater drainage system connected with the sump, and the non-installation of the waterproofing
C membrane above the rumpus room went to their state of repair. It was the inadequacy of what was installed or built rather than its state of repair when built which was the basis of Mr and Mrs Sved's claims. In regard to the sump and stormwater drainage additionally the system installed did not comply with the plan approved by Council. This matter appears to have been the most significant factor in the flooding which caused the greatest damage to the house.

D In my view the words "defects of such improvements" should be taken to refer to those not within the scope of the Council's certificate of compliance or readily noticeable upon a reasonable inspection of the premises. When the clauses actually agreed are read together it seems to me it would be unduly restricting the obvious purpose of cl 29 to give cl 28 any wider reading.

The sump/stormwater drainage system would thus not be a relevant defect for the purposes of cl 28 because it did not comply with the Council-approved
E plan. Neither would the non-installation of the waterproof membrane, because its absence would not be detectable on reasonable inspection.

Thus, reverting to the words of Le Dain J earlier set out (at 115G) I do not think that cl 28 creates a contractual exclusion or limitation of liability for the actions of Mr Goddard constituting a tort. In my opinion he, along with the Council, is liable in negligence to Mr and Mrs Sved.

In interpreting the way cl 28 and cl 29 should be read together I have
F referred to what the certificate of compliance mentioned in cl 29 meant, at the time of exchange of contracts, in accordance with s 317A(1). This seems to me to be not only permissible, but necessary, when the fact that this conveyancing transaction was carried out on both sides through the agency of solicitors is taken into account. The questions of construction which arise in regard to the clauses are quite different questions from those sought to be raised by the Council in arguing against its liability about the understanding of Mrs Sved and Mr James of the effect of a s 317A certificate at the time of their conversation
G shortly before settlement of the contract. The argument the Council sought to raise on this point is dealt with (at 110D and following) above. For the reasons there given I did not think the argument availed the Council, but I wish to make it clear that in my view the argument raised or sought to raise questions quite distinct from those involved in the construction of cl 28 and cl 29 of the contract in their context.

Mr and Mrs Sved's cross-appeal: in regard to the Messrs Di Blasio: A

Although I have formed the opinion that Mr Goddard should be treated as a builder for the purposes of the category relevant in this case, I do not think it follows from that that the Messrs Di Blasio are necessarily saved from falling into the same description. I have earlier set out the factual findings of Giles J concerning the part they played in the building of the house. They seem to me to give ample justification for treating the Messrs Di Blasio also as builders. They were in partnership and either one or both of them took part in the B implementation of the decisions made by Mr Goddard which led to all the trouble. Even if they did not agree with his decisions concerning either or both the installation of the sump/stormwater drainage system and the absence of the waterproofing membrane, they were professional builders and, adapting the words of *Bryan v Maloney* (at 627) (see at 117A above) should have been aware that a subsequent owner was likely to assume that the house had been competently built and that the stormwater drainage system and waterproofing C arrangements above the rumpus room were in fact adequate. The fact that the Messrs Di Blasio regarded Mr Goddard as someone whose directions they were bound to carry out may be a factor in working out questions of contribution between the various tortfeasors, but they provide no answer to their liability to Mr and Mrs Sved for the same reasons generally as I have given in regard to Mr Goddard's liability in negligence. In some respects the negligence case against the Messrs Di Blasio is simpler than that against Mr Goddard because there was no contractual relation between them and Mr and Mrs Sved. D

Other cross-claims and cross-appeals:

From what I have already said, the conclusion follows that the Council, Mr Goddard and the Messrs Di Blasio are all liable to Mr and Mrs Sved and that their various cross-claims for contribution or indemnity will have to be decided. The Council and Mr Goddard had filed appeal documents appropriate to raising these questions if the appeal should be decided in accordance with an E opinion such as I have arrived at. Neither of the Messrs Di Blasio had filed any such documents before the hearing of the appeal began, but then sought leave to do so. The court then said that in the event of such a result as that which would follow from the opinion I have formed, they would be protected. As part of the orders I propose I would therefore include an order permitting them to put the record in appropriate order.

Damages: F

In the course of argument there was some reference to observations made by Giles J concerning the way in which damages would be assessed against the Council. As I understood it, all counsel eventually agreed that this Court should confine itself to questions of liability, leaving questions of the proper approach to damages in the circumstances of the case to be dealt with at subsequent stages of this case. I have therefore not said anything about damages in these reasons. G

Conclusion:

In my opinion the Council's appeal against the judgment against it should be dismissed. Its appeal against the judgments in favour of Mr Goddard and the Messrs Di Blasio should be upheld and those judgments should be set aside and in their place interlocutory judgment against Mr Goddard and each of the

Messrs Di Blasio substituted. There should be a similar result in regard to the various cross-appeals against the judgments in favour of Mr Goddard and the Messrs Di Blasio. As already mentioned, it seems that at the further hearing of this case it will be necessary for questions of contribution or indemnity between the various tortfeasors to be decided in conjunction with whatever assessments of damages are necessary.

In order to ensure that the various orders it would be necessary to make in conformity with my reasons be properly formulated, I would suggest the following directions: short minutes of orders be filed within fourteen days from the publication of the Court's decision; these to include orders to regularise the record in regard to the Messrs Di Blasio, and concerning costs; if short minutes were not agreed and there were to be any arguments about the form of the orders or the appropriate costs orders, then the parties should file their competing versions of the short minutes, together, if there were to be argument about costs, with a brief written submission in support of the costs orders proposed. If further directions were then necessary, notice would be given to the parties.

CLARKE JA. This appeal and the cross-appeals are from a decision of his Honour Justice Giles, sitting in the Commercial Division of the Supreme Court, relating to a defectively constructed house in Hopetoun Avenue, Vaucluse, which is owned by the respondents/cross-appellants (the Sveds). In the court below, the Sveds made claims against the Council of the Municipality of Woollahra (the Council) who inspected the property and issued a certificate in respect of its condition, against the former owners and vendors of the property (the Goddards), as well as against the builders of the house (the Di Blasios).

The property in question was purchased by the Goddards in 1985. They applied for approval for the construction of a two-storey split level home. The purchase of the property was completed in March 1986 and approval of the plans and specification for the building was given in July 1986. They then proceeded to demolish the existing improvements and construct the house, with the building work being carried out substantially by Mr Luigi Di Blasio and his brother Mr Giuseppe Di Blasio. The Goddards moved into the property in late 1986.

In May 1987 the Goddards put the property on the market. Mr George Sved and Mrs Barbara Sved attended the auction on 19 August 1987 and the property was knocked down to them for $1,820,000. Contracts were exchanged on the same day. At the auction, prior to the commencement of the bidding, the Sveds negotiated the amendment of the contract for the sale of land by deleting cl 28(a) and including cl 29. The contract then read as follows:

> "28. Subject to warranties that are required to be given by the Vendor by law, the Purchasers acknowledge that they have satisfied themselves as to:
>
> (a) ~~The compliance or otherwise by any improvements erected on the property with the provisions of the Local Government Act, 1919 and all Ordinances thereunder and whether or not a Certificate under Section 317A of the Local Government Act is~~ available from the local Council.
>
> (b) Any defects of such improvements or their state of repair and as to the position and condition of all fences and shall not make

any objection, requisition or claim for compensation in relation thereto.

29. The vendor will prior to completion proceed with all due dispatch to obtain from Woollahra Council a Certificate of Compliance. In the event that such Certificate is not to hand within the time limited herein the Purchasers shall be at liberty to rescind this contract whereupon the provisions of Clause 19 hereof shall apply."

It was common ground that the certificate of compliance to which cl 29 referred was a certificate under s 317A of the *Local Government Act* 1919. The purchase of the property was completed on 14 October 1987, at which time the s 317A certificate was not available (it not being issued until 22 October). Although the contract empowered the Sveds to rescind the contract of sale if the vendors had not acquired the certificate of compliance from Woollahra Council by the settlement date, the Sveds chose to proceed to completion in the absence of the certificate. They explained this by saying that the Council had informed Mrs Sved in a telephone conversation before completion that the certificate was "in the pipeline" and that they would receive it shortly.

The Sveds moved into the property on 22 October 1987. It soon became evident that the house was defective. During heavy rainfall in early November 1987, significant amounts of water entered through the roof above the front door, through the ceiling in the rumpus room (which was beneath a concrete deck) and into the garage (also beneath a concrete deck), as well as other places. There was also flooding in the rumpus room when water backed up from a drainage sump. Subsequently there were similar incidents during heavy rainfall. During light rainfall, there was some water entry which resulted in water staining, efflorescence between floor tiles and rotting of woodwork. In addition, over time, ceilings and cornices cracked, slab edges cracked and spalled with consequent staining, the render on walls cracked and the floor dropped at the entrance and in the rumpus room. Giles J found there was no doubt that there had been departures from the approved plans and specifications and defective workmanship in the construction of the building.

The Sveds sued Woollahra Council, the Goddards and the Di Blasios. They claimed damages measured by the difference in value between the property with the building as constructed and the property as the building should have been constructed, or alternatively, by the cost of rectifying the defects. The Council cross-claimed against each of the other defendants for contribution as joint tortfeasors. The Goddards similarly cross-claimed against each of the other defendants, as well as cross-claiming against the Council for damages amounting to an indemnity against the claims made against them. The Di Blasios cross-claimed against the Council and Mr Goddard for contribution as joint tortfeasors.

The trial judge, Giles J, found for the Sveds against the Council but dismissed all other claims and cross-claims. The Council has now appealed against that decision, and the Sveds have cross-appealed with respect to the dismissal of the claims against the Goddards and the builders. For convenience, I will divide the consideration of the various grounds of appeal and cross-appeal into those affecting the liability of the Council, those involving the Goddards, and those affecting the liability of the builders, the Di Blasios.

The liability of the Council:

The claim made by the Sveds against the Council was a claim for damages for breach of a duty of care, and was put in two ways; first, as a claim for breach of a duty of care in inspecting the building in the course of construction, and secondly, as a claim for breach of a duty of care in representing, by saying that a s 317A certificate would issue, that the building was free of defects. As Giles J acknowledged, the two grounds overlapped in that default in inspection of a building will commonly underlie the issue of an erroneous s 317A certificate. The issues on appeal related predominantly to the latter element of the claim.

Giles J proceeded on the basis that if the facts established the Council was negligent in issuing a s 317A certificate, it would follow as a matter of course that they were also negligent in representing to the Sveds that such a certificate would issue. The submissions on appeal did not focus directly on whether the Council owed a duty of care in the issue of the certificate. Rather they concentrated on whether that duty extended to require the Council to take reasonable care in representing that a certificate in respect of the good condition of the building would issue. The determination of this question was necessary because at the time the Sveds completed the purchase of the property, they did not rely on the s 317A certificate (it not being then available), but merely relied on the representation that one would issue.

On the question whether the Council owed a duty of care in issuing a s 317A certificate, his Honour adopted (*Sved v Woollahra Municipal Council* (1995) 86 LGERA 222 at 233) the statement of Kirby P in *Pisano v Fairfield City Council* (1991) 73 LGRA 184. According to his Honour (at 233-234):

> "In *Pisano v Fairfield City Council* it was held, following the principles in *L Shaddock & Associates Pty Ltd v Parramatta City Council (No 1)* (1981) 150 CLR 225, that the defendant council owed to the plaintiff purchasers a duty of care in exercising its statutory function of issuing a s 317A certificate. The court said that the council had to be taken to have been aware that a number of persons, not just the applicant for the certificate but also purchasers of the property to which it related, would rely upon the certificate, and declined to limit the council's duty of care to the applicant for the certificate. The '*elements of an assumption of responsibility and reliance*' (*Hawkins v Clayton* (1988) 164 CLR 539 at 579), the object of s 317A that the certificate would be received by and protect purchasers, and the particular feature that the council knew that the relevant land had been filled, with implications for the foundations of the building, gave rise to the necessary relationship of proximity whereby a duty of care was owed to the purchasers in the issue of the certificate. …
>
> In the present case the Council ought to have been alive to the particular importance of the certificate, when an expensive building had been constructed from the ground up without architectural supervision, with the notable irregularity of unauthorised commencement of drainage work and unlawful installation to a rubble drain, and with a further known irregularity (not so far mentioned) of unauthorised footings for retaining walls. In my opinion the Council owed to Mr and Mrs Sved a duty to take care in issuing the s 317A certificate, and equally owed a duty of care to them in informing them over the telephone that a certificate would be issued."

My understanding of the way this appeal has been argued is that the Council does not seriously dispute the fact that they owed a duty of care to purchasers of a property in issuing a s 317A certificate. What they do dispute is that that duty extended to the answering of queries in relation to the certificate over the telephone.

Giles J accepted that the mere fact there were defects not referred to in the s 317A certificate did not establish breach, as the Council was not guaranteeing total compliance with the plans and specifications and the use of proper materials and workmanship: *King v Stewart* (1994) 85 LGERA 384. Rather, in his Honour's view, it was necessary to show that the Council failed properly to detect defects which were ascertainable on reasonable inspection. On this basis, Giles J was not satisfied the Council had failed in its duty with respect to many of the defects, but was satisfied that there were departures from the Council's approvals involving the drainage system which were readily ascertainable. He therefore decided that, in telling Mrs Sved that the certificate would issue, the Council breached its duty.

The liability of the Council rested to a large extent on findings of fact made by the trial judge with respect to alleged telephone conversations between Mrs Sved and Mr James, an officer of the Council, after the exchange of contracts but before settlement. The Council has challenged these findings of fact and has asked this Court, in accordance with the principles in *Warren v Coombes* (1979) 142 CLR 531, to substitute its own finding to the effect that any conversations between Mr James and Mrs Sved did not contain the vital elements upon which the trial judge relied.

The crucial evidence, given by Mrs Sved, which the trial judge accepted, was as follows:

> "I said: 'My name is Barbara Sved. I'm about to settle on the purchase of 34 Hopetoun Avenue, Vaucluse. I bought the property at auction in August, subject to a s 317A certificate being issued. The certificate is still not issued. Is there a problem? Could you tell me if anything is wrong?'
>
> Mr James said: 'I'll have to get the file.'
>
> I cannot remember whether he put me on hold or called me back that day, but I do recall that he said to me a short while later words to the effect:
>
> > 'The only thing holding up the 317A certificate now is the door on the pool pump room. When that is on and painted you will get the Section 317A Certificate.'
>
> I said: 'Thank you very much.'
>
> The conversation then ended.
>
> The conversation with Mr James which took place shortly before 14 October 1987 was also by telephone. I telephoned Woollahra Council and asked to be put through to Mr James. Mr James identified himself and the conversation continued in words to the effect:
>
> I said: 'It's Barbara Sved calling. I'm ringing about the 317A certificate for Hopetoun Avenue. I need to know that the certificate is being issued, otherwise I'm not going to settle. Settlement is on October the 14th.'
>
> Mr James said: 'Everything has been done. The paper work is in the pipeline and you will get it any day'."

Mr James could not recall any conversations with Mrs Sved but advanced a number of reasons why he did not believe that he would have conducted a

A conversation in the terms as alleged by her. Giles J found Mr James to be a careful and honest witness, but came to the conclusion that the conversations occurred as alleged by Mrs Sved.

In my opinion, it was open to Giles J to prefer Mrs Sved's version of the telephone calls to that of Mr James. These findings do not involve the drawing of inferences from facts which are undisputed or which, having been disputed, are established by the findings of the trial judge, and hence the authority of B *Warren v Coombes* (1979) 142 CLR 531 does not provide any assistance to the appellant. Where findings of fact based on the demeanour of witnesses are disputed, as is the case here, an appellate court is not entitled to set aside the findings of the trial judge unless it can be shown that the trial judge has failed to use, or has palpably misused, his or her advantage, or has acted on evidence which was inconsistent with facts incontrovertibly established by the evidence or which was glaringly improbable: *Devries v Australian National Railways* C *Commission* (1993) 177 CLR 472 at 479. The appellant Council has not, in my opinion, established that any of these situations occurred.

The next ground of appeal relied on by the Council was that, even on the terms of the conversation between Mrs Sved and Mr James as found, his Honour erred in having regard to the Sveds' understanding of its effect, rather than having regard to the ordinary meaning of the words used by the two speakers. It submitted that Mr James did no more than represent to Mrs Sved that a s 317A certificate would issue in respect of the property, and that the D Council should not be held responsible for any reliance which the Sveds placed on that statement as a result of their own misunderstanding of the significance of the certificate. That misapprehension, according to Giles J, was that the Sveds were under the impression that a s 317A certificate would signify that the house was soundly constructed and free of any defects.

Section 317A of the *Local Government Act* 1919 states:

> E "(1) Any person may at any time apply for a certificate to the effect that in the opinion of the council a building in all respects complies with the Act, the ordinances, and the plans and specifications, if any, approved by the council or if there has been any contravention of the Act or ordinances or any departure from the approved plans and specifications that such contravention or departure is not such as need be rectified.
>
> …
>
> F (3) The council shall, upon payment of the prescribed fee, as soon as practicable furnish such certificate to the applicant, if the building in its opinion complies with the Act, the ordinances, and the plans and specifications, if any, approved by the council, or if, in its opinion, any contravention of the provisions of the Act or ordinances or any departure from the approved plans and specifications is not such as need be rectified.
>
> (4) The production of the certificate shall for all purposes be deemed conclusive evidence in favour of a bona fide purchaser for value that at the G date thereof the building complied with the requirements of the Act and ordinances."

The s 317A certificate issued by Woollahra Council was in standard form and said that, in the opinion of the Council, the house at 34 Hopetoun Avenue, Vaucluse conformed with the *Local Government Act* 1919, the *Environmental Planning and Assessment Act* 1979, the relevant Ordinances and the requisite

plans and specifications, and concluded with the words that "it (the certificate) was not an unequivocable (sic) affirmation of proper building standards". A

It was argued before this Court that a council which issued a certificate under s 317A should be taken to be saying that the relevant building had been erected in a proper and workmanlike manner, in accordance with the plans and specifications and all relevant ordinances. This argument is based on the terms of s 317A but is contrary to the dictum of Kirby P in *King v Stewart* (1994) 85 LGERA 384 at 394, the dictum of Waddell J in *Gibson v Richardson & Wrench Ltd* (1977) 1 BPR 9539, and the expression of opinion by H W Tebbutt in "Certificates of Compliance and the Purchaser's Solicitor in New South Wales" (1974) 47 ALJ 617 at 618. B

Similar submissions were put to and rejected by Giles J, who went on to say (*Sved* (at 233-234)):

> "They [the Sveds] were in the happy position of never having read s 317A and their understanding was that a s 317A certificate would say or meant that the building was built according to the plans and specification and (in the words of Mrs Sved) 'that it was sound, it was good, that there were no major problems with the house' or (in the words of Mr Sved) 'that the house was properly constructed and that it was free of any defects'. In Mrs Sved's understanding — and she seemed to have been the dominant partner in the purchase of the property — the Council would inspect the building work from time to time to ensure that the work was being carried out properly, with proper materials and good standards of workmanship and in accordance with the plans; Mr Sved's understanding was similar. C D
>
> …
>
> A favourable certificate did not really have the meaning understood by Mr and Mrs Sved, but Mr James must have appreciated that to them it had significance in relation to the integrity of the building work and, more to the point, that the mere fact of a certificate governed completion of the purchase. If a s 317A certificate was negligently issued, or it was negligently said that one would issue, there would be a breach of the duty of care owed to Mr and Mrs Sved even if they had an excessive view of what the certificate meant." E

In these circumstances it is unnecessary, in my opinion, to determine whether the obligations undertaken by a council which issues a s 317A certificate in respect of a building is greater than has hitherto been believed. What is important is that, whether or not Mrs Sved had a correct understanding of the effect of the issue of a s 317A certificate, she did know that once the Council issued a certificate the contract became, relevantly, unconditional and the issue of the statement was, in the event, negligent. In those circumstances, she should never have been told that one would issue. F

The next ground of appeal raised by the Council was that the terms of the alleged conversations found by Giles J did not justify a finding that a relationship of proximity existed between the Council and the Sveds such that the Council owed a duty of care in relation to the information provided in the course of the telephone conversations. The appellants argued that the conversations did not give rise to a duty of care because they did not meet the required elements for a duty of care with respect to inquiries of this nature as stipulated by the High Court in *L Shaddock & Associates Pty Ltd v Parramatta* G

A *City Council (No 1)* (1981) 150 CLR 225 and reliance was placed on the oft quoted statement of Gibbs CJ (at 231):

> "… It would appear to accord with general principle that a person should be under no duty to take reasonable care that advice or information which he gives to another is correct, unless he knows, or ought to know, that the other relies on him to take such reasonable care and may act in reliance on the advice or information which he is given, and unless it would be reasonable for that other person so to rely and act."

B In *Shaddock*, the court held that the Council was under a duty to purchasers to take reasonable care that information given in a s 342AS certificate was correct, and that the failure to mention certain road-widening proposals amounted to a breach of that duty. However, the court distinguished information furnished to purchasers in response to a telephone inquiry when the information was given by an unidentified person and was not confirmed: see Gibbs CJ (at 236), Stephen J (at 238), Mason J (at 253) and Murphy J (at 256).

C Despite what would appear to result from such statements, I do not believe Giles J erred in concluding that a relationship of proximity existed in the present case. The passages referred to above related to the particular facts of the case then under consideration and, in my opinion, should not be taken as stipulating factors which must be established before a duty of care will be found in any case involving oral inquiries.

D In the present case, although Mrs Sved could not remember how she obtained Mr James' name, the evidence as accepted by Giles J makes clear this was not a telephone conversation between an unidentified Council officer and an unidentified caller. Furthermore, the Council officer knew why the inquiry was being made and was aware that it related to a matter of great importance to Mrs Sved. Mr James knew reliance was being placed on his response because Mrs Sved informed him they would not proceed to settlement if a s 317A certificate was not forthcoming. Finally, the suggestion that, where a statutory E procedure for the issue of a certificate existed, it could never be reasonable for the plaintiff to rely on an oral communication as to the prospective status of a response, cannot be accepted without qualification. Here, it was the Goddards who were responsible, under the contract for the sale of the property, for obtaining the certificate. When a certificate had not been forthcoming, it was perfectly reasonable for Mrs Sved to make oral inquiries as to the status of the certificate and then to rely on the response to those inquiries. To my mind, the F circumstances do establish reasonable reliance and, on the facts of the case as found, it was open to his Honour to find that the Council owed a duty of care in answering Mrs Sved's inquiry.

The Council also argued that his Honour erred in attributing to the Council any statement which he found Mr James to have made to Mrs Sved, when in the circumstances any such statement could only have been in relation to Mr James' own knowledge or expectation as to the probability of a s 317A certificate issuing. They further argued that, in any case, Mr James was not G negligent in making the statement because, on the information available to him at the time, there was no basis for him to have known of the defects in relation to the drainage.

Whether or not Mr James was negligent in making the statement, given the information available to him, is not the crucial point in this case. Mason J, in *Shaddock*, makes clear that there will be situations in which an employer is

liable in negligence for the dissemination of incorrect information, even though no employee is liable, because the employee is ignorant of the use to which the information is to be put. The liability of the employer is not a vicarious liability, but is separate and independent, resulting from the attribution to the employer of the conduct of the employee (at 251). To my mind, it matters not whether Mr James was directly responsible for the negligent inspections, or the failure to record information adequately in council records, or for not checking the council records personally before making the statement to the Sveds. The simple issue is that incorrect information was conveyed to the Sveds in circumstances which the trial judge found to involve negligence. This conduct is attributable to the Council regardless of which particular employee was responsible for, or knew of, the various errors which culminated in the s 317A certificate being negligently issued.

The Council further appealed on the basis that Giles J erred in finding that the Sveds would have exercised their right to rescind the contract and thus not complete the purchase of the property, if they had only had knowledge of the departures in relation to the drainage as distinct from the wider range of defects. Although there was no direct evidence as to what course the Sveds would have followed if they had been told of the drainage problems, his Honour considered that on the probabilities Mr and Mrs Sved would have exercised their right to rescind the contract if, as should have been the case, the departures in relation to the drainage had caused the Council to refuse a s 317A certificate.

In my opinion, there was evidence upon which his Honour could come to this conclusion. Despite the fact that the departures in relation to the drainage were discrete from the other defects, commonsense suggests that the Sveds would not have completed the purchase of the house had they been aware that, because of the defects, the house would flood during heavy rain. In fact, Mrs Sved gave direct evidence that she would not have proceeded to completion if she had been advised by the Council that the building "had the sort of defects it in fact has".

The final grounds of appeal relied on by the Council relate to the issue of causation. In short, the Council submitted that his Honour erred in finding that the assurance by Mr James that a s 317A certificate would issue caused the Sveds to purchase the property. Rather, the Council argued, the Sveds relied on their own inspection of the property and the advice of their solicitor, Mr Ratner, in deciding to settle when they did. The Council made this submission despite the fact that it required this Court to adopt a finding of fact which was expressly rejected by his Honour below, namely, that the Sveds relied on their own inspection and on Mr Ratner's advice. Giles J was of the opinion that such a finding was inconsistent with the Sveds' insistence on a s 317A certificate and the inquiries made of Mr James prior to completion. There is no basis upon which this conclusion can be set aside.

The liability of the builders:

The claim against the builders, Messrs Luigi and Giuseppe Di Blasio, was pleaded in the court below on the basis that the builders owed a duty of care to Mr and Mrs Sved as subsequent purchasers of the property. In the course of his judgment, Giles J noted that in a number of cases it has been held that there may be a relationship of proximity between a builder and subsequent

purchasers such that the builder owed a duty of care to the particular purchaser: *Miell v Hatjopoulos* (1985) 2 BCL 258; *National Mutual Life Association of Australasia Ltd v Coffey & Partners Pty Ltd* [1991] 2 Qd R 401 (a case involving an engineer rather than builder); *CAI Fences Pty Ltd v A Ravi (Builders) Pty Ltd* (Supreme Court of Western Australia, Malcolm CJ, 27 December 1990, unreported); *Opat v National Mutual Life Association of Australasia Ltd* [1992] 1 VR 283; *Bryan v Maloney* (Supreme Court of Tasmania Full Court, 6 October 1993, unreported).

His Honour referred to the fact that some of these cases were based on the reasoning that a relationship of proximity can exist in the absence of specific reliance by the purchaser on a known and identified builder, and that general reliance by the purchaser on whoever had constructed the building may suffice: *Coffey*; *Opat*; *Bryan v Maloney*. Alternatively, his Honour said, the cases stand for the principle that reliance of any kind is not necessary and that proximity may be found in considerations of space and time, the nature of the relationship, and the causal connection between the builder's conduct and the purchaser's loss.

Giles J found that in the present case there was a substantial basis for a relationship of proximity between Messrs Luigi and Giuseppe Di Blasio and the Sveds in relation to the construction of the building. The Di Blasios had the building expertise to see to the proper construction of the building, and they would have known that in the absence of the exercise of reasonable care and skill on their part the building could be defective, and that such defects would impact on the owners of the property. Further, they would have known subsequent purchasers would be likely to place general reliance on the builder of the building. He found that there was a spatial connection in that the building was built by the Di Blasios and bought and lived in by the Sveds, and a temporal connection in that the Sveds purchased the property within a short time after the construction of the building.

However, Giles J was not satisfied that the Sveds had established either specific or general reliance. His Honour referred to *San Sebastian Pty Ltd v Minister Administering the Environmental Planning and Assessment Act 1979 (NSW)* (1986) 162 CLR 340, where it was said (at 355):

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

Giles J was of the opinion that where the question is whether a builder owed a duty of care to subsequent purchasers, reliance may be a factor in that the builder can be taken to have expected that subsequent purchasers would rely on non-negligent performance of the building work. His Honour then proceeded (*Sved* (at 244)) to analyse the place of actual, or subjective, reliance as a factor in deciding whether a sufficient relationship of proximity exists. Due to the significance of the result of this inquiry, it is instructive to set out that portion of his Honour's judgment in full:

"Both in principle and on authority, actual reliance by a plaintiff is a factor in its own right in deciding whether a sufficient relationship of proximity exists, at least in that it tells against the relationship if the plaintiff positively did not rely on the defendant's acts or omissions: by that I mean he relied on some other person or thing to the exclusion of reliance on the defendant's acts or omissions. It would be incongruous to say that a defendant owed a duty to take care in the interests of a person who positively did not rely on the defendant's acts or omissions, and descriptions of proximity include reference to actual reliance: see for example *Sutherland Shire Council v Heyman* (at 498; 172-173) ('reliance by one party upon such care being taken by the other in circumstances where the other party knew or ought to have known of that reliance': absence of reliance was taken up as a factor (at 511; 182)); and *Hawkins v Clayton* (at 576) (known reliance (or dependence)).

Moreover, because the requisite relationship of proximity must exist with respect to the allegedly negligent class of act and the particular kind of damage which the plaintiff has actually sustained (*Hawkins v Clayton* (at 576); see also *Murphy v Brentwood District Council* [1991] AC 398 at 485-486), account should be taken of the position of the particular plaintiff. It must be asked whether there was a relationship of proximity with the particular plaintiff, with knowledge of the damage suffered by the particular plaintiff, and so general reliance by a purchaser on whoever constructed a building has been seen as a relevant factor. In concept any duty of care is owed at the time the building is constructed, but it is not enough to consider a relationship with a class of subsequent purchasers and what must be considered is a relationship with a subsequent purchaser in the position of the particular plaintiff.

It would not be satisfactory, for example, to hold that a builder owed a duty of care to someone who was himself an expert builder, investigated the work exhaustively, and in fact relied on his own expertise and did not rely in any way on the performance of the builder, simply because that person was a subsequent purchaser.

In this manner, although reliance (even general reliance) may not be essential for a duty of care, absence of reliance on the part of the particular subsequent purchaser may negate his invocation of a duty of care. In my opinion, that is the case here."

His Honour therefore decided that the reliance by the Sveds on the issue of a s 317A certificate was inconsistent with the imposition of a duty on the Di Blasios. He concluded that the Sveds were not subsequent purchasers to whom was owed the duty of care which might otherwise have been owed. The Council in their appeal and the Sveds in their cross-appeal submit that Giles J was wrong in reaching this decision. Both parties support their submissions by reference to the High Court decision in *Bryan v Maloney* (1995) 182 CLR 609 published after the judgment in this case. *Bryan* may be regarded as a landmark. It was the first time that the High Court had held the builders of a house liable to a subsequent owner of that house. Because of its direct bearing on this case it is important to spend some time with it.

Bryan built a house for Mrs Manion in Launceston on a "cost plus profit" basis. There were no terms of the building contract which bore on the issue of negligence. Mrs Manion sold the house to a purchaser who sold it to

Mrs Maloney. About six months after purchase by Mrs Maloney, cracks appeared in the house. These were found to result from inadequate footings, the existence of which did not become apparent until the cracks were investigated. Mrs Maloney sued Bryan in negligence claiming the cost of rectification of the footings. This loss was characterised as economic loss being the depreciation in value of the house as a result of the unsound footings.

The issue before the High Court was whether Bryan owed Mrs Maloney a duty of care. The question which, in the circumstances, the majority (Mason CJ, Deane J and Gaudron J) posed (at 617) was:

> "… 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."

Although the question was a comprehensive one, in the sense that the answer could be seen to apply whenever a claim was made which satisfied its broad parameters, the answer which was given by the court was, in my view, heavily qualified.

The majority approached the question by accepting that the claim was for economic loss so that the answer to the question depended upon whether a relationship of proximity existed. The majority then adverted to the two policy considerations which, in their view, arose in this area of the law:

(1) the avoidance of the imposition of liability "in an indeterminate amount for an indeterminate time to an indeterminate class" (*Ultramares Corporation v Touche* 174 NE 441 (1931) at 444, per Cardozo J); and

(2) the need to recognise the right of persons in a competitive world to organise their affairs to suit their own business interests;

and went on to say:

> "The combined effect of those two distinct policy considerations is that the categories of case in which the requisite relationship of proximity with respect to mere economic loss is to be found are properly seen as special. Commonly, *but not necessarily*, they will involve an identified element of known reliance (or dependence) or the assumption of responsibility or a combination of the two." (My emphasis.)

The majority, as I have said, accepted that the damage suffered by Mrs Maloney was mere economic loss in the sense that it was distinct from, and not consequent upon, ordinary physical injury to person or property. Although there may be grounds for an argument in the present case that the Sveds suffered property damage, the trial and appeal were conducted on the basis that the Sveds' claim was purely for economic loss. In those circumstances there is no point in further considering this not uncomplicated aspect of the claim.

The majority first examined the relationship between Bryan and Mrs Manion. The judges recognised that Bryan had built the house pursuant to a contract but said that, as the law had recognised the existence of concurrent duties in contract and tort, that was no bar to the claim. That did not mean the contract was irrelevant for, as the majority said (at 621):

> "in some circumstances, the existence of a contract will provide the

> occasion for, and constitute a factor favouring the recognition of, a relationship of proximity either between the parties to the contract or between one or both of those parties and a third person. In other circumstances, the contents of a contract may militate against recognition of a relationship of proximity under the ordinary law of negligence or confine, or even exclude the existence of, a relevant duty of care."

A

This passage was explained further in the judgment by the adoption of three propositions expressed by Le Dain J in *Central Eastern Trust Co v Rafuse* (1986) 2 SCR 147 at 204-205. The court then expressed its view that a relationship of proximity existed between Bryan and Mrs Manion both as to physical damage and mere economic loss. They went on to hold that the distinction between the two was essentially technical in the present circumstances. Although this was an undoubted consideration the majority was strongly influenced in their conclusion by their opinion that there was an assumption of responsibility on the part of the builder and known reliance on the part of the client building owner.

B

C

The majority then turned to examine whether there was a relationship of proximity between the builder and subsequent owner in the context of the conclusion they had already expressed. Immediately two factors were identified which pointed in the direction of allowing the claim. First, the connecting link of the home itself and second the causal proximity which in the absence of any intervening negligence or causative event, existed between the loss and the builder's negligence.

D

Because the majority could find no significant factor telling against a finding in Mrs Maloney's favour they concluded that the requisite proximity existed. What, as it seems to me, were regarded as critical were two factors, assumption of responsibility and known reliance. The critical passage in the judgment (at 627) was as follows:

> "Upon analysis, the relationship between builder and subsequent owner with respect to the particular kind of economic loss is, like that between the builder and first owner, 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. In ordinary circumstances, 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. Such a subsequent owner will ordinarily have no greater, and will often have less, opportunity to inspect and test the footings of the house than the first owner. Such a subsequent owner is likely to be unskilled in building matters and inexperienced in the niceties of real property investment. Any builder should be aware that such a 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."

E

F

G

The majority was, however, at pains to point out that the particular kind of loss and the nature of the property were most important factors in their conclusion so that "… the decision is not directly decisive of the question whether a relationship of proximity exists in other categories of case as regards other damage" (at 630). Although the majority specifically identified those two elements which narrowed the ambit of the decision there were, at least, two

A other influential considerations. They were the absence of any specific term in the contract bearing on the relationship of proximity and the fact that there was no intervening negligence.

Upon that basis the category of case directly falling within the scope of the decision is limited to the liability for economic loss of a builder, who built a permanent residence pursuant to a construction contract which contained no terms limiting or excluding its liability, to a subsequent owner arising from the
B existence of latent defects discovered after that owner purchased the residence in circumstances where there was no intervening negligence or other causative event.

So understood the authority of the decision does not extend to, for instance, the construction of a commercial building, nor, presumably, a case in which other acts of negligence have intervened between the builders' negligence and the discovery of damage, such as occurs when a local council has been
C negligent, whether in the issue of a certificate or otherwise. Nor does it extend to the case of damage which, although discoverable on a reasonable inspection, was not in fact discovered until after the plaintiff had purchased the property.

The present case contains a number of features which distinguish it from *Bryan*. First, and foremost, it would not be accurate to describe the Di Blasios as the builders of the home. It is sufficient for present purposes to quote a finding of the trial judge. His Honour said (*Sved* (at 241)):

> D "Mr Goddard was not just an owner who contracted with a builder for the construction of a building. He retained Mr Luigi Di Blasio as a kind of clerk of works, and exercised ultimate control over the engagement of sub-contractors and acquisition of materials. While Mr Di Blasio had the day to day supervision of the building work, Mr Goddard exercised ultimate control over the content and quality of some of the work, in his decision not to worry about a water proofing membrane for the decks although he was told that a membrane was necessary and his acceptance of drainage
> E work although he was told that it departed from the approved plans and specifications. But in many other areas where the work was defective it has not been shown that he exercised the same control over the content and quality of the work, and while he had qualifications in automotive engineering Mr Goddard did not have or purport to have the expertise of a builder."

The details of the relationship between the Goddards and the Di Blasios are
F complex but the picture which emerged from the evidence was that the latter were very much under the overall control of the former. In particular, the absence of a waterproof membrane should be regarded as Mr Goddard's responsibility, as should the defective drainage having regard to his acceptance of drainage work he knew to be defective.

Secondly, there is no evidence that the Sveds relied upon the Di Blasios. Indeed the evidence is to the contrary. The Sveds were aware that they could
G protect themselves against the risk that they would suffer financial loss if the building had been constructed defectively. They knew that they could arrange for an inspection of the premises by a building contractor or they could seek to protect themselves by the inclusion of a term in the contract of purchase. They deliberately elected not to have an independent inspection and decided that they would protect themselves by making completion of the contract dependent upon the issue of a s 317A certificate. This may not have been entirely wise but

that is presently of little moment. What matters is that the Sveds knew of the availability of steps which would protect them from the risk of financial loss and they took one of them. They relied on cl 29 of the contract of purchase which entitled them to rescind if a s 317A certificate did not issue.

Thirdly, *Bryan* deals with a latent defect, a fact which appeared to be of significance in the reasoning of the majority. In this case, in contrast, many of the defects would have been discoverable upon a reasonably comprehensive inspection.

Finally, there was a particular mention in *Bryan* of the absence of intervening negligence. The context was, as I understand the judgment, the issue of causal proximity, it being considered that where there was no intervening negligence or causal event, causal proximity existed between the negligence and the ultimate loss. Although I have some difficulty with the notion that the question whether negligence which is causative of loss (in accordance with the accepted test of causation) is actionable or not may depend on whether someone else was also guilty of causative negligence, the majority in *Bryan* undoubtedly perceived that intervening negligence was significant on the issue. In this case there was intervening negligence — of the party on which the Sveds relied — and this is an indication that the necessary proximity was not present in this case.

In the light of these differences *Bryan* does not govern the present case. Indeed I am bound to say that the narrow ambit of the proximity relationship found in *Bryan* seems to me, with respect, to be more reflective of a determination based upon the particular facts rather than one applicable to a broad category of cases. In *Jaensch v Coffey* (1984) 155 CLR 549, Deane J pointed out (at 584-585) that the use of proximity as a limitation on the test of reasonable foreseeability did not mean that there was scope for decision in a particular case by reference to "individual predilections ungoverned by authority" and went on to say that "the requirement of a 'relationship of proximity' is a touchstone and a control of the *categories* of case in which the common law will admit of the existence of a duty of care …": see also *Gala v Preston* (1991) 172 CLR 243 at 252-253; *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520 at 543.

These cases express the accepted approach in the development of the law of negligence in novel areas but where the identified category is significantly fenced in with limitations and exceptions it seems to me, with respect, that the criticisms of the doctrine expressed by Brennan CJ in a series of cases, including *Bryan* (at 396), derive particular force. His Honour observed (at 653) that he had earlier expressed the opinion "that to treat proximity as a criterion of liability without a priori definition of the elements it contains is to create a judicial discretion", and went on to say (at 654-655):

> "If proximity in the broader sense be invoked as a criterion of liability in particular cases without a priori definition of its content, the certainty which analysis of the different elements of tortious liability in different categories of case can produce will be lost …, and the definition of elements which might constitute and distinguish a new category of case will give way to a mere evaluation of the circumstances favouring or not favouring recovery. Such a notion of proximity would be a juristic black hole into which particular criteria and rules would collapse and from which no illumination of principle would emerge."

A His Honour found support for this proposition in a statement (to which he referred in a footnote) by Underwood J in the Full Supreme Court of Tasmania in the same case that "the content of, or test for ascertaining, the requisite proximity is unclear". This is not the only expression of the difficulty judges have in identifying those features of a relationship which should in a novel case lead to a conclusion that a duty of care exists. Underwood J returned to the point in *Bryan* saying that, as the law now is, "the concept of proximity is B difficult to grasp" and his Honour referred to a statement by McHugh J in "Neighbourhood, Proximity and Reliance" in Finn, *Essays on Tort* (at 39) that the concept "seems to record the result of a finding of duty rather than a criterion for determining duty".

Again in *Opat v National Mutual Life Association of Australasia Ltd* [1992] 1 VR 283 at 294, Southwell J said that he had the greatest difficulty in precisely identifying the path which should be indicated by the legal reasoning, C induction and deduction referred to by Deane J in, among other cases, *Sutherland Shire Council v Heyman* (1985) 157 CLR 424. I share their Honours' difficulty. The problem, as I see it, lies in ascertaining what factors, apart from known reliance or the assumption of responsibility, will govern the existence of the requisite relationship.

Pausing there, it should be observed that, although the House of Lords has firmly rejected the notion that a builder could be liable in negligence for D economic loss suffered by a subsequent owner (*D & F Estates Pty Ltd v Church Commissioners For England* [1989] AC 177 at 210, 216-217 and *Murphy v Brentwood District Council* [1991] 1 AC 398, at 480, 488-489, 494-498) it has subsequently decided that there may exist concurrent duties in contract and in tort: *Henderson v Merrett Syndicates Ltd* [1995] 2 AC 145. In the same case the House held that the existence of a duty of care in a claim for economic loss depends upon reliance and assumption of responsibility as discussed in *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465: E see also *White v Jones* [1995] 2 AC 207 at 273-274.

A principle which bases liability on the elements of known reliance and the assumption of responsibility is, subject to one matter, one which I apprehend courts could readily apply. If, for instance, the majority had identified those two elements as the determining factors there would be no difficulty in trial courts identifying and applying the principle. But in *Bryan* the majority reiterated the statement in *San Sebastian* (at 355) that where the economic loss flows from F negligent acts or omissions those two elements may not be determinative.

That approach is explicable in the light of *Caltex Oil (Australia) Pty Ltd v The Dredge "Willemstad"* (1976) 136 CLR 529, a case in which there was neither known reliance nor an assumption of responsibility. This decision has been criticised on a number of grounds including the absence of a ratio decidendi: *Candlewood Navigation Corporation Ltd v Mitsui OSK Lines Ltd* [1986] AC 1; *Leigh and Sullivan Ltd v Aliakmon Shipping Co Ltd* [1986] AC G 785. But whatever view one holds of the decision in the *Dredge* case it stands in a completely different category to *Bryan*. In the *Dredge* case the problem involved a claim for economic loss suffered by a party as a consequence of physical damage to the property of another. The problems were whether or not the courts should depart from the principle pursuant to which such claims were not recognised by the law and, if so, to define the characteristics of the claims

which would be recognised. In this area of the law the famous words of Cardozo CJ in *Ultramares* were particularly relevant. A

Bryan was quite different. It concerned a claim against a builder for damage only "technically different" from physical property damage. There was no problem of indeterminacy, except, perhaps, as to time, and the considerations which operated on the question whether a right to recover should be allowed bore little, if any, relationship to those which troubled the court in the *Dredge* case. Nonetheless, the approach of the courts seems to have been to regard B economic loss cases as a distinct group except in so far as there is a perceived difference between claims arising from negligent mis-statements, on the one hand, and those arising from negligent acts or omissions on the other. Thus, as was said in *San Sebastian*, claims in the latter class may require consideration of other factors instead of, or as well as, reliance and assumption of responsibility.

I have a difficulty with this approach in that it is not self-evident to me that it C is consistent with the coherent development of the law that a single unifying principle should be sought which would apply to, and govern, a wide range of cases, many of which would have very different characteristics. As it seems to me, adherence to clearly defined principles, which identify the elements which establish a cause of action in a given category of case, in determining whether a duty of care arises from proven facts would lead to much greater certainty in the law than is presently the case. Where, however, the search is for some overall unifying principle designed to cover all claims in negligence for D economic loss flowing from acts or omissions, the very breadth of a principle wide enough to cover all sub-categories is likely to lead to an uncertain rule pursuant to which judges are required to determine novel cases without any more specific guidance than that there must be proximity: see as to the confusing influence of the grouping of categories, B P Feldhausen, *Economic Negligence: The Recovery of Pure Economic Loss* (1984), especially at 15 et seq. E

Having said that I am bound, as was Giles J, to decide this case by determining whether the requisite relationship of proximity existed between the Di Blasios and the Sveds. In undertaking that task I turn first to the discussion of proximity in Deane J's judgment in *Heyman* (at 497-498):

> "The requirement of proximity is directed to the relationship between the parties in so far as it is relevant to the allegedly negligent act or omission of the defendant and the loss or injury sustained by the plaintiff. It F involves the notion of nearness or closeness and embraces physical proximity (in the sense of space and time) between the person or property of the plaintiff and the person or property of the defendant, circumstantial proximity such as an overriding relationship of employer and employee or of a professional man and his client and what may (perhaps loosely) be referred to as causal proximity in the sense of the closeness or directness of the causal connection or relationship between the particular act or G course of conduct and the loss or injury sustained. It may reflect an assumption by one party of a responsibility to take care to avoid or prevent injury, loss or damage to the person or property of another or reliance by one party upon such care being taken by the other in circumstances where the other party knew or ought to have known of that reliance. Both the identity and the relative importance of the factors which are determinative

A of an issue of proximity are likely to vary in different categories of case. That does not mean that there is scope for decision by reference to idiosyncratic notions of justice or morality or that it is a proper approach to treat the requirement of proximity as a question of fact to be resolved merely by reference to the relationship between the plaintiff and the defendant in the particular circumstances. The requirement of a relationship of proximity serves as a touchstone and control of the
B *categories* of case in which the common law will adjudge that a duty of care is owed. Given the general circumstances of a case in a new or developing area of the law of negligence, the question what (if any) combination or combinations of factors will satisfy the requirement of proximity is a question of law to be resolved by the processes of legal reasoning, induction and deduction. On the other hand, the identification of the content of that requirement in such an area should not be either ostensibly or actually divorced from notions of what is 'fair and
C reasonable' (cf per Lord Morris of Borth-y-Gest, *Dorset Yacht Co v Home Office* [1970] AC at 1038-1039, and per Lord Keith of Kinkel, *Peabody Fund v Parkinson* [1985] AC at 240-241), or from the considerations of public policy which underlie and enlighten the existence and content of the requirement."

Accordingly, I am bound to consider the relative degrees of physical, circumstantial and causal proximity, as those expressions were explained, in
D deciding whether a duty should be found to exist. What combination of factors should be regarded as sufficient to give rise to a duty must be resolved by the identified legal processes. Because *Bryan* concerned a claim bearing general characteristics similar to the one now under consideration, it is to that authority which I should turn for guidance.

I have already set out the critical passage in *Bryan* (at 382). While the majority does not expressly base liability solely on reliance and assumption of
E responsibility they undoubtedly accorded those factors fundamental importance. In essence they adopted the premise that a builder should be taken to know that a subsequent owner will assume that the house has been competently built, in the absence of clear evidence of defects, and therefore assumes a responsibility to that subsequent owner. For his or her part, the subsequent owner should be taken to have relied on the builder to construct the building properly.

These conclusions involve, as I later explain, a significant development of
F the concepts of known reliance and assumption of responsibility. Further, they were not based upon evidence but on a number of perceptions. One, at least, of these perceptions troubles me. When their Honours said that "such a subsequent owner is likely to be unskilled in building matters and inexperienced in the niceties of real property investment" they were clearly not adverting to evidence in the case. Nonetheless, they regarded these factors as important considerations. I do not know whether the perceptions there expressed are correct or not. Frankly, I doubt that they are. Most purchasers in
G New South Wales have, until recently, retained solicitors. Now some may use conveyancers. Both would, I venture to suggest, advise their clients about the desirability of an independent inspection of the home to be purchased. Legal advisers also know that there are a number of builders specialising in the inspection of houses on behalf of potential purchasers. It may be that I am overstating the position but what I would seek to emphasise is that no

assumption should be made as to the knowledge of, or the incidence of, the use of solicitors or building inspectors by potential home purchasers in the absence of evidence. A

Later, when discussing issues of policy, the majority referred to the perceptions of Thayer J in *Lempke v Dagenais* 547 A 2d 290 (1988) at 294-295 with apparent approval. Thayer J observed that, inter alia, it is likely that a builder will be better qualified and positioned to avoid, evaluate and guard against the "financial risk imposed by latent defects in the structure of a house". His Honour may be correct but having regard to the potential passage of time between the completion of a building and the actual claim and the practices of insurers, particularly since the advent of asbestos and pollution claims, I wonder whether he is. How does a builder protect itself from an ancient claim? Surely, with respect, if that is a relevant consideration it should be proved. And, if it is to be taken into account, should it not be balanced against the ability of a purchaser to protect himself or herself by appropriate conditions in the contract of purchase or by insurance cover. It may be that a vendor would not be prepared to indemnify a purchaser against loss from a latent defect and it may also be that insurance cover may not be available but in the absence of evidence it is not open, in my respectful view, to express any opinion on the point. B C

Further, nowhere in *Bryan* does the majority take account of the ability of an owner to protect himself or herself in the balancing process. That, as it seems to me, follows from the perceptions to which I have referred. In my respectful opinion, there is a danger in courts assuming, without evidence, that something does, or may, exist or not exist particularly when the subject matter of the assumption is not strictly within judicial knowledge. That danger is magnified where the judicial perception guides a court to a decision laying down a principle to be applied generally or even in a restricted category of case. D

It is to be observed that neither express, known reliance nor assumption of responsibility were proved in *Bryan*. It is true that Mrs Maloney assumed that the home had been properly constructed but that is a concept quite different from the known reliance spoken of in *Hedley Byrne*. Again the assumption of responsibility by the builder Bryan bears little relationship to the assumption of responsibility discussed in the context of claims in tort against professional advisers. What the majority say could, for convenience sake, be characterised as presumed assumption of responsibility and "general (as opposed to specific) reliance". These are concepts which appear to be relatively well understood in New Zealand (see *Invercargill City Council v Hamlin* [1996] 1 All ER 756) where the court said (at 766-767) that "… community standards and expectations demand the imposition of a duty of care on local authorities and builders alike to ensure compliance with local bylaws". They have not, to my knowledge, received the same attention in Australia. It is true that, in the context of claims for economic loss, the importance of reliance and the assumption of responsibility (usually by a course of conduct) by public authorities was discussed at length by Mason J in *Heyman* (at 459-464). But what was said by the majority on the two subjects in *Bryan* represents a significant advance on that discussion. E F G

Although, as will have appeared from my earlier remarks on the perceptions expressed by the majority, I have found it difficult to understand by reference to what evidence the court was able to reason to its conclusions on reliance and

A assumption of responsibility, these two elements seem to be at the heart of the decision of the majority. It follows that I must recognise, for the purposes of deciding this case, that in circumstances such as arose in *Bryan* a builder will be taken to have assumed responsibility to a subsequent purchaser who, for his or her part, will be taken to have relied on the builder. So much is straightforward. What is not so simple is whether the presumption of reliance and assumption of responsibility may be displaced and, if so, to determine what
B facts should lead a court to conclude that there was neither the relevant reliance nor assumption of responsibility.

I apprehend that almost every purchaser of a house would, in the absence of a visible contrary indication, assume that the house was well built, but that assumption would seem to me not to provide a sound foundation for a conclusion that a purchaser, who said, for instance, that he or she relied on a building inspection or a clause in the contract of purchase, placed some reliance
C on the builder. Further, what is the position of a builder whose work had been performed in accordance with the specific requirements of an owner who has accepted that work? Should it be taken to assume a responsibility to subsequent purchasers in respect of patent defects notwithstanding that acceptance?

The facts in the present case highlight the significance of these questions. The Sveds did not rely upon the Di Blasios or even the Goddards. Giles J found that the Sveds did not rely on the builders and in the light of that finding there
D is no room for the conclusion that, in some way, the Sveds generally relied on the Di Blasios as the builders. Nor do I think it could properly be held that the Di Blasios assumed responsibility to future owners of the building for the quality of the workmanship. In the particular circumstances of this case, in my opinion, they bound themselves contractually to carry out the work that they were asked to do in a proper and workmanlike manner. They could not be considered to have assumed responsibility to other persons for works performed
E in accordance with the owners' instructions or for works which, while defective, were acceptable to the owner. Indeed, one of the difficulties thrown up by *Bryan* concerns this very point. I reiterate, should a builder be liable to a subsequent purchaser where a known defect is accepted by the contracting owner? In the circumstances I can see no basis upon which it could properly be said that the Di Blasios were accepting some wider responsibility by undertaking to perform the building work for the Goddards. In my opinion
F these conclusions defeat the Sveds' claim against the Di Blasios. There are, however, two other factors, which tell against it.

First, this is not a case of a latent defect but one in which the relevant defects would, upon his Honour's findings, have been discoverable upon a reasonably comprehensive inspection. Secondly, there was present in this case intervening negligence and, upon the reasoning of the majority in *Bryan*, the absence of causal proximity.

G I have, I think, said enough to indicate that while I must apply *Bryan*, the important factors in that case leading to a finding of proximity are absent in this case. For my part, there was no relevant assumption of responsibility, no special or general reliance, and no considerations of justice pointing towards a relationship of proximity. I would dismiss the appeal and cross-appeal against the Di Blasios.

The liability of the Goddards:

In the court below, the claim by the Sveds against the Goddards was made on three grounds: first as compensation for damage suffered as a result of the Goddards giving false answers to requisitions in contravention of the prohibition against misleading and deceptive conduct in the *Fair Trading Act* 1987; secondly, as damages for breach of a contractual warranty arising upon the giving of answers to requisitions; and thirdly, as damages for breach of a duty of care owed to Mr and Mrs Sved as subsequent purchasers of the property.

The first two claims were based upon the Goddards answers to two requisitions which were described as "requisitions on title". During the hearing of the appeal, counsel limited their challenge to the Goddards, answer to requisition 8, which was in the following terms:

> "8. Have the provisions of the Local Government Act 1919 as amended and the ordinances thereunder relating to subdivisions and buildings been observed and complied with in respect of the subject property?"

The Goddards responded to the requisition in the following manner: "As far as the vendors are aware, yes."

In respect of the first claim relating to misleading and deceptive conduct, Giles J found that the Goddards had not constructed the house as part of a commercial or profit-driven exercise. As the construction and sale of the property could not be described as a business venture and therefore in "trade or commerce", Giles J dismissed the claim under the *Fair Trading Act* 1987. During the hearing of the appeal, counsel for the Sveds accepted that this finding was not open to challenge, and they abandoned the ground of appeal.

His Honour dealt with this part of the claim on the basis that it was pleaded under s 42 of the *Fair Trading Act* 1987. He commented in his judgment that "if other conditions are met, the vendor may incur liability for a false answer in deceit or for negligence", but said that here the Sveds did not so base their claim. The Sveds have argued on appeal that Giles J erred in not dealing with and acting upon the Sveds' submissions that the answers to the requisitions were fraudulently made and actionable as deceit. In response, counsel for the Goddards submitted that the relevant paragraph in the Sveds' further amended summons was neither properly pleaded nor particularised so as to carry such allegations. In my opinion, Giles J was correct to characterise the claim as he did. The further amended summons represented the third chance the Sveds had to particularise their claim in deceit, and having not done so, they cannot now raise it on appeal.

The second basis of the claim made by the Sveds against the Goddards was that the Goddards' answers to the requisitions constituted a breach of contractual warranty. Giles J acknowledged that it has been said that a vendor warrants answers to requisitions and is liable in damages for breach of warranty if he gives a false answer, at least where the requisition is as to title, eg L Voumard, *The Sale of Land in Victoria*, 4th ed (1986), at 414-415; and R M Stonham, *The Law of Vendor and Purchaser* (1964) at 525), but found that the answers to the requisitions in this case were not warranties. His Honour noted that authority on the issue was scanty, and said that in most cases there would not either be consideration for the vendor's promise or the contractual intention necessary for a collateral contract.

Furthermore, Giles J found that even if the answers to the requisitions had

A constituted warranties, there was no breach of warranty because it had not been shown that the answers were false. His Honour found that although the Goddards were certainly aware of some of the defects of the building, it could not be established, expressly or by appropriate inference, that Mr and Mrs Goddard were aware that in relation to the defects known to them, or otherwise, the building did not comply with the *Local Government Act* 1919 or Ordinances. Because neither of the Goddards had been asked about their B knowledge of the requirements of the Act or Ordinances, his Honour was not prepared to infer they were so aware. I see no reason to disagree with his Honour's conclusions. Accordingly, the grounds of appeal based on an alleged breach of contractual warranty must fail.

The final aspect of the Sveds' claim against the Goddards was based on the duty of care allegedly owed by the Goddards as the persons responsible for the construction of the defective building. Giles J referred to *Hawkins v Clayton* C (at 576) where Deane J said that the requisite relationship of proximity must exist with respect to the allegedly negligent class of act and the particular kind of damage which the plaintiff has actually sustained, and decided that in the present case, there simply was not a sufficiently proximate relationship between the Goddards and subsequent purchasers of the property in relation to the kind of damage suffered.

His Honour emphasised the fact that the Goddards and the Sveds were in a D contractual relationship. As part of that relationship, the Sveds had agreed by cl 28(b) of the contract that they had satisfied themselves as to any defects in the building and that they would not make any objection, requisition or claim in relation thereto. In *Bryan*, the majority discussed the relevance of the existence of a contract between the parties in terms which indicated approval of the three propositions set out by Le Dain J in *Central & Eastern Trust Co v Rafuse* which are cited in the judgment. One of those directed attention to the relevance of a contractual exclusion or limitation and, of course, the majority E themselves recognised that the terms of the contract may militate against the recognition of a relationship of proximity. This is such a case. The Sveds, by cl 28(b), took the risk of defects in the building upon themselves. In these circumstances there is no proper basis, in my opinion, for a positive finding that the Goddards owed them a duty of care in tort in relation to those defects.

Conclusion:

F There is an incongruity in the conclusion in this case for the persons who were responsible for the shoddy workmanship, the Di Blasios and the Goddards, escape liability, while the Council whose negligence may be thought to be of a much lesser order, is found liable. This results, in my view, from the application of the law to the facts in the case and reflects the importance that the law (primarily in the form of the now repealed s 317A of the *Local Government Act* 1919) at the relevant time placed on the due performance by G public authorities of their responsibilities and the right of members of the public to rely on that due performance.

The result of the foregoing reasons is that, in my opinion, the appeals and cross-appeals should be dismissed with costs.

COLE JA. The circumstances giving rise to the litigation and the appeal are set forth in the judgment of Priestley JA.

Grounds 1-3:

These grounds seek to have this appellate court reverse factual findings made by Giles CJ Comm D in circumstances where authority makes clear that is not a permissible course: *Devries v Australian National Railways Commission* (1993) 177 CLR 472 at 478-479. These grounds do not raise any question of the drawing of inferences from undisputed primary facts (*Warren v Coombes* (1979) 142 CLR 531), rather they seek to have the appellate court reverse the trial judge's acceptance of the version of one witness regarding disputed facts.

These grounds fail.

Ground 4:

His Honour erred in having regard to what Mr and Mrs Sved's understanding of the effect of Mrs Sved's conversation with Mr James was rather than having regard to the ordinary meaning of the terms of that conversation as found.

Giles CJ Comm D held (*Sved v Woollahra Municipal Council* (1995) 86 LGERA 222 at 233) that Mr and Mrs Sved understood that a s 317A certificate:

> "… would say or mean that the building was built according to the plans and specifications and … 'that it was sound, it was good, that there were no major problems with the house' or … 'that the house was properly constructed and that it was free of any defects'. In Mrs Sved's understanding … the Council would inspect the building work from time to time to ensure that the work was being carried out properly, with proper materials and good standards of workmanship and in accordance with the plans."

Section 317A of the *Local Government Act* 1919, at the relevant time, was in the following form:

> "(1) Any person may at any time apply for a certificate to the effect that in the opinion of the council a building in all respects complies with the Act, the ordinances, and the plans and specifications, if any, approved by the Council or if there has been any contravention of the Act or ordinances or any departure from the approved plans and specifications that such contravention or departure is not such as need be rectified.
>
> …
>
> (3) The Council shall, upon payment of the prescribed fee, as soon as practicable furnish such certificate to the applicant, if the building in its opinion complies with the Act, the ordinances, and the plans and specifications, if any, approved by the council, or if, in its opinion, any contravention of the provisions of the Act or ordinances or any departure from the approved plans and specifications is not such as need be rectified."

Ordinance 70, cl 10.1 provided: "Every part of a building shall be erected in a good and workmanlike manner."

Clause 1.05 of the specification approved by Council provided: "The whole of the work is to be faithfully executed in a most tradesmanlike and substantial manner."

The certificate when ultimately issued on 22 October 1987 certified:

> "That in the opinion of the Council, the two storey dwelling at the above premises, complies with the *Local Government Act* 1919, the Ordinances in force under that Act, the *Environmental Planning and Assessment Act*

A 1979, the Woollahra Planning Scheme Ordinance and the plans and specifications approved by the Council in relation to the said premises.

…

Note. This certificate is not an unequivocable [sic] affirmation of proper building standards."

The expression of the opinion of council may not be an "unequivocable affirmation of proper building standards". Nonetheless, it was the expression of
B the opinion of Council that the works complied with Ordinance 70, cl 10.1 and cl 1.05 of the specification. The works obviously did not.

Subject to the point that the certificate expressed the opinion of Council regarding compliance, as distinct from an absolute statement of compliance, in my opinion the understanding which Giles CJ Comm D found Mr and Mrs Sved had was a correct understanding of the effect of a s 317A certificate in present circumstances where the specification was approved by Council. It is
C clear from Giles CJ Comm D's judgment that, had proper inspections been made by Council, it could not, other than negligently, have issued the certificate. In saying to Mrs Sved that, first: "The only thing holding up the 317A certificate now is the door on the pool pump room. When that is on and painted you will get the s 317 certificate" and later: "Everything has been done. The paperwork is in the pipeline and you will get it any day."

Mr James was stating that all work necessary to permit the issue of a clear s 317A certificate had been performed and that only the administrative act of
D issuing the certificate remained. It is clear all work necessary to permit the issue of such a clear certificate had not been done. Council could not, other than negligently, have held the opinion required under s 317A had it property inspected the building.

It may well be that the initial purpose of s 317A and surrounding sections was to protect an owner or purchaser of the building from the risk of demolition: *Re Diecut: Ex Parte North Sydney Municipal Council* (1963) 8
E LGRA 343 at 348. Nonetheless, as Waddell J said in *Gibson v Richardson & Wrench Ltd* (1977) 1 BPR 9539 at 9548:

> "If literal effect is given to subs (1), as I think it should be, the certificate should specify all the contraventions and departures there have been. In issuing such a certificate a council must, I think, accept that it has a duty under the section to bind itself to a precise statement of all the contraventions and departures there have been. Unless it does so the
F statutory purpose of the certificate will be defeated."

See *Seeto Constructions Pty Ltd v Snowy River Shire Council* (1982) 47 LGRA 199 at 207.

Whatever may be the statutory purpose behind a s 317A certificate, in my opinion it is clear that by giving a clean certificate, a council represents that there are no departures from the Act, Ordinances, plans or specifications which reasonable inspection ought to detect: see *Sutherland Shire Council v Heyman* (1985) 157 CLR 424 at 434-435.

G The Council relied upon a passage in the judgment of Kirby P in *King v Stewart* (1994) 85 LGERA 384 at 394. The learned President there said:

> "… The appellant faces the difficulty that the s 317A certificate merely warrants that there have not been any departures from the plans and specifications or that any departures need not be rectified. It is silent on whether building practices were adhered to in the construction."

His Honour's attention could not have been drawn to Ordinance 70, cl 10.1, or to the common provisions in specifications such as that in cl 1.05 to which I have referred. In my respectful opinion the last sentence I have quoted is not correct. There is no similar statement in the judgment of Sheller JA in *King* with which Priestley JA agreed.

As the understanding which Mr and Mrs Sved had of the meaning of a s 317A certificate was correct, the Council officer's representation that all had been done to permit the issue of a certificate, meaning a clean certificate, constituted a representation that the works had been constructed in accordance with the Act, Ordinances, plans and specifications. It was, in truth, a representation that the house was constructed in a good and workmanlike manner, whereas it was not.

This ground of appeal fails.

Ground 5:

His Honour erred, given the circumstances of the telephone conversation between Mrs Sved and Mr James, in finding that there was a relationship of proximity between the Council and the Sveds arising from those conversations such that the Council owed a duty of care to Mr and Mrs Sved in relation to the information provided in the course of such telephone conversations.

The Council contended that as Mrs Sved did not know who Mr James was, or his position within Council, as her inquiry was oral and as she did not seek written confirmation of the matters conveyed to her by Mr James, no duty was owed to her by the Council in circumstances where the conversations alleged were by telephone. This was said to be because of special rules established by *L Shaddock & Associates Pty Ltd v Parramatta City Council (No 1)* (1981) 150 CLR 225 at 236, 238, 253, 256. It was contended that the High Court was careful to confine the circumstances in which an oral communication with Council could ground a duty of care. For a duty to arise there must be reasonable reliance upon Council and, in the case of oral inquiries, such reliance is not reasonable absent written confirmation. This was necessary in the case of oral communications to avoid doubt regarding what was communicated. Further, where there exists a statutory procedure for the issue of a certificate it could never be reasonable for a plaintiff to rely upon an oral communication regarding the prospective status of a response to the request for a certificate.

In my opinion it is wrong to read the passages relied upon in *Shaddock* as a code. It is true that Gibbs CJ said (at 236):

> "It would not, however, have been reasonable for the appellants to have relied on an unconfirmed answer given by an unidentified person in response to an enquiry made over the telephone. The Council therefore owed no duty of care in making response to such an enquiry."

And Stephen J said (at 238):

> "… It must be but rarely that information conveyed by unidentified voices answering a telephone at the offices of municipal councils will render those councils liable in damages for negligence if the information should prove to be incorrect. In my view neither a council nor an inquirer would, in absence of quite special circumstances, regard the response to such an enquiry as carrying with it liability in damages if incorrect: this must especially be the case where there exists a customary and more

formal means of obtaining from a council the information which is sought."

To similar effect was the passage in the judgment of Mason J (at 253):

> "… I doubt whether the oral enquiry made by Mr Carol brought the respondent under such a duty. The enquiry was oral and informal. Mr Carol did not identify the officer to whom he spoke. Nor did he follow up his oral request by confirming the conversation in writing. There is some room for doubt whether the officer realised, or ought to have realised, that Mr Carol or his clients were relying on the information supplied or that they were intending to act upon it."

In *Shaddock*, their Honours were applying to the circumstances of that case concepts enunciated by Mason J in *Sutherland Shire Council v Heyman* (at 463). There his Honour said:

> "The American experience therefore furnishes support for the view that a public authority is liable for negligent failure to perform a function when it foresees or ought to foresee that: (a) the plaintiff reasonably relies on the defendant performing the function and taking care in doing so, and (b) the plaintiff will suffer damage if the defendant does not take care. Several interrelated questions arise in connection with the concept of reliance as a sufficient basis for the existence of duty of care in the class of case with which we are concerned: (1) whether it is an essential element in the concept (a) that there should be conduct on the part of the defendant contributing to the plaintiff's reliance, and (b) that the plaintiff should act to his detriment; and (2) whether the concept extends to general reliance or dependence by those in the position of the plaintiff, as distinct from specific reliance by the plaintiff. The last question is largely a reflection of the earlier questions. It is positive conduct on the part of the defendant or the plaintiff acting to his detriment which gives rise to specific, as distinct from general, reliance or dependence. Contributing conduct on the part of the defendant is an element in the vast majority of cases simply because without it the plaintiff would fail to establish reasonable reliance. Insistence on conduct contributing to the plaintiff's reliance would conform to a general notion that it is positive conduct on the part of an authority which attracts a duty of care calling for exercise of a statutory power."

In *Shaddock*, in the passages quoted, the court was addressing whether in an informal unconfirmed telephone conversation with unknown council officers then being considered it could truly be said that the element of "reasonable reliance" was established. They held it could not. It thus remains to consider in each case as it arises, whether the circumstances do establish "reasonable reliance". The passages quoted make clear that save in special circumstances, telephone conversations with unknown council officers unconfirmed in writing where the seriousness of answers or information conveyed by the unknown officer to the inquirer is not made clear to Council, there will not be established reasonable reliance.

This interpretation of *Sutherland Shire Council* and *Shaddock* accords with the decisions of this Court in *Kyogle Shire Council v Francis* (1988) 13 NSWLR 396 at 400-401, per Kirby P, *Parramatta City Council v Lutz* (1988) 12 NSWLR 293 at 324, per McHugh JA and *South Australia v Callipari* (Court

of Appeal, 16 October 1992 unreported), at 18-19, per Kirby P. As Kirby P said in *Callipari*:

> "What is essential is that the plaintiff should be able to prove, from the circumstances of the particular enquiry, the seriousness of the matter in hand, the trust being given to the official involved, the intention to rely upon the information provided, the fact of reliance and the detriment which flows as a result."

Giles CJ Comm D found that Mrs Sved in late September 1987 telephoned the Council and spoke to Mr James whose name she had obtained in a manner she could not recall. She informed Mr James who she was and then said:

> "I am about to settle on the purchase of 34 Hopetoun Avenue, Vaucluse. I bought the property at auction in August, subject to a 317A certificate being issued. The certificate is still not issued. Is there a problem? Could you tell me if anything is wrong."

His Honour accepted that Mr James said he would have to get the file and after doing so, in that conversation or on ringing her back, said: "The only thing holding up the 317A certificate is the door on the pool pump room. When that is on and painted you will get the s 317A certificate."

His Honour further found that shortly before settlement Mrs Sved again telephoned the Council and asked to speak to Mr James. She again identified herself to him and again said she was ringing about the s 317A certificate for the property and stated: "I need to know that the certificate is being issued, otherwise I am not going to settle. Settlement is on October the 14th."

It was found that Mr James replied: "Everything has been done. The paperwork is in the pipeline and you will get it any day."

This was thus not a telephone conversation between an unidentified inquirer and an unidentified Council officer. The Council officer knew the reason the inquiry was being made, and that it was a matter of great importance to the inquirer. He knew that reliance was being placed upon his responses because he was told that settlement would not occur unless the certificate was to issue. He made inquiries from Council records and gave a serious and considered, as distinct from a casual, response. In fact the certificate did issue some days later confirming his statement.

In those circumstances in my opinion the element of "reasonable reliance" discussed by Mason J has been established.

This ground of appeal fails.

Ground 6:

His Honour erred in attributing to Council any statements which he found Mr James to have made to Mrs Sved when in the circumstances any such statement could only have been in relation to Mr James' own knowledge or expectation as to the possibility of a s 317A certificate issuing.

Ground 7:

His Honour erred in finding that, in telling Mrs Sved that the certificate would issue, Mr James was negligent, when, on the face of the information available to Mr James at the time of the alleged conversations, the evidence was that there was no basis for Mr James to have known of the departures in relation to the drainage.

The trial judge found (*Sved* (at 228-229)):

> "The size of the pipe and the position of the inlet pipe from the rear of the

A building were obvious on inspection of the sump; although there was no specific evidence, the capacity of the pumps installed would no doubt have been readily enough ascertainable. That the drainage departed from the Council's approvals was not ascertained by the Council. As I have indicated, Mr James inspected the sump on 24 November 1986 and recorded that the steel for the base and sides was in order and the size was in accordance with the plan, and that the concrete could be poured. There must have been a further inspection in the course of the works, since Mr James recorded, as something told to him after 24 November 1986 by Ms Tracey Pershouse of the Engineering Department, 'S water pumps & pipe sizes as approved'. Ms Pershouse did not give evidence and her whereabouts were not known. According to Mr James, it was for the Engineering Department to make the further inspection, but there was no other record of an inspection of the drainage in the Council's files. It can only be said that whoever made the inspection failed to make it adequately. Neither the pipe sizes nor the pumps were as approved, and the sump did not conform to the approved plan in a manner which, to anyone conscious of how it was designed to operate, significantly affected its capacity and its proper function."

That was a clear finding of negligence by the Council which is liable for the negligence of each of its officers. If Mr James elected to respond to the inquiry from Mrs Sved, as he did, he was obliged to respond accurately in the circumstance of this inquiry. If the information available to him from Council records failed, because of the negligence of other officers, to note the deficiencies in consequence of the inadequate inspection found by Giles CJ Comm D, the incorrect information implicitly conveyed by Mr James as a Council officer is attributable to Council. Council confirmed the conveying of wrong information by issuing a clean certificate which made no reference to the departures from the plans and specifications. These grounds fail.

Ground 8:

His Honour erred in finding that Mr James should have observed or detected the departures in the drainage system when he made his inspection for the purposes of the s 31 certificate.

This is an unappellable finding of fact. This ground fails.

Ground 9, 10 and 11:

His Honour erred in finding that although the evidence did not specifically address what steps the Sveds would have taken if they only had knowledge of the departures in relation to the drainage as distinct from the wider range of defects, the Sveds would not have completed the purchase of the property if they had been told of the drainage defects above.

His Honour erred in inferring that the knowledge of the departures in relation to the drainage would have led to knowledge of other defects and to an understanding of a possibility of the flooding that in fact occurred

His Honour erred in finding that if the departures in relation to the drainage had caused the Council to refuse to issue a s 317A, the Sveds would have exercised their right to rescind the contract in the absence of any evidence as to what the Sveds, and/or the Goddards would have done in that circumstance.

The trial judge's finding (*Sved* (at 234-235)) was:

"According to both Mr and Mrs Sved, had they known that the building

had the defects later ascertained they would not have bought it but would have terminated the contract, and Mrs Sved said that she would not have completed the purchase if Mr James had not said what he did. Although the evidence did not specifically address knowledge of the departures in relation to the drainage as distinct from the wider range of defects, I am satisfied that Mr and Mrs Sved would not have completed the purchase of the property if they had been told of those departures. It may well be that that would have led to knowledge of other defects, but almost certainly it would have led to an understanding of the possibility of the flooding that in fact occurred. Without intending to cause offence, Mrs Sved in particular demanded high standards and would not have been easy to satisfy once a defect of that significance was known, there had been insistence at the time of contract on a s 317A certificate, and I consider that on the probabilities Mr and Mrs Sved would have exercised their right to rescind the contract if, as should have been the case, the departures in relation to the drainage had caused the Council to refuse a s 317A certificate. I do not accept the Council's submission that Mr and Mrs Sved relied on their own inspection of the property and the advice of Mr Ratner in deciding to settle the purchase when they did: apart from being contrary to the evidence of Mr and Mrs Sved, that is not consistent with the insistence on a s 317A certificate at the time of contract and the enquiries made of Mr James."

The findings made by his Honour were available to him. Commonsense suggests that the Sveds would not have completed the purchase if they had been told that, because of drainage deficiencies, the house would be subjected to flooding in times of heavy rainfall. Further, Mrs Sved gave direct evidence that she would not have proceeded to completion if she had been advised by the Council, or from any other source, that the building "had the sort of defects it in fact has".

These grounds fail.

Grounds 12, 13, 14, 15 and 16:

These grounds, which raise the issue of causation, were as follows:

12. His Honour erred in finding that the cause of the Sveds' purchase of the property was the conversation with Mr James when the evidence of both Mr and Mrs Sved was to the effect that they relied on their solicitor and would not have settled without his advice to do so in the circumstances.

13. His Honour erred in finding that the cause of the Sveds' purchasing the property, the subject of these proceedings, was what his Honour found Mr James to have said to Mrs Sved in relation to the likelihood of s 317A certificate issuing in the future.

14. His Honour erred in finding that what he found Mr James told Mrs Sved about the likelihood that a s 317A certificate would issue was the sole cause of the Sveds purchasing the said property.

15. His Honour erred in finding that the Sveds didn't rely on their own inspection of the property in deciding whether to purchase it.

16. His Honour erred in finding that the Sveds didn't rely on the advice of the solicitor acting for them on the purchase in deciding whether or not to purchase the property.

The trial judge's findings were (*Sved* (at 235)):

A

> "I do not accept the Council's submission that Mr and Mrs Sved relied on their own inspection of the property and the advice of Mr Ratner in deciding to settle the purchase when they did: apart from being contrary to the evidence of Mr and Mrs Sved, that is not consistent with the insistence on a s 317A certificate at the time of contract and the enquiries made of Mr James."

On any view of the evidence, a cause of the loss which flowed from
B completing the contract and thus purchasing a house with gross deficiencies, was the statement by Mr James that "all had been done" necessary for the issue of a s 317A certificate. That is sufficient to establish the necessary causation: *March v E & M H Stramare Pty Ltd* (1991) 171 CLR 506. Mrs Sved gave evidence that she would not have completed but for Mr James' statement. The finding by the trial judge was thus open to him. The error in the grounds of appeal is to suggest that it is necessary to find a single cause rather than one of a number of causes of damage.

C These grounds fail.

Grounds 17, 18, 19, 20 and 21:

17. His Honour erred in finding that other than in relation to the particular defects in the building erected on the property relating to waterproofing membrane and the sump drainage system, there was not a sufficiently proximate relationship between the fourth Respodence (sic) and subsequent
D *purchasers of the property so as to give rise to a duty of care.*

18. His Honour erred in finding that the existence of special condition 28(b) in the contract for the purchase of the property between the Goddards and the Sveds, was destructive of a sufficient relationship of proximity between the fourth respodence (sic) and the Sveds.

19. His Honour erred in finding that reliance by the Sveds on the statement which he found Mr James to have made as to the likelihood of the s 317A certificate issuing precluded reliance by the Sveds on the builders' non-
E *negligent performance of the building work.*

20. His Honour erred in finding that there was not a sufficient relationship of proximity between the second and third respondents and the Sveds in the circumstances to give rise to a duty of care owed by those respondents to the Sveds.

21. His Honour erred in finding that it was necessary in the circumstances to find actual reliance by the Sveds on the second and third respondents having
F *performed the building work in a non-negligent manner in order to establish a duty of care owed by those respondents to the Sveds.*

It is convenient to deal with these grounds when addressing the cross-claim.

The liability of the builder:

The majority judgment in *Bryan v Maloney* (1995) 182 CLR 609 establishes that a duty of care, in respect of pure economic loss arising in consequence of undiscoverable defects in construction arising from defective workmanship by a
G professional builder, exists between that builder and a subsequent purchaser of a dwelling. The duty of care exists because there is a relationship of proximity between the builder and subsequent purchaser. The relationship of proximity, in cases of pure economic loss, "commonly but not necessarily" (at 619) exists because it can be said there exists a known reliance by the purchaser on the builder, and the builder must be taken to have assumed a responsibility to build

with due care so as to avoid reasonably foreseeable loss to a purchaser. Those relationships of reliance or assumption of responsibility may, absent specific excluding contractual provisions, be taken to exist between the builder and the person for whom he built the dwelling (the first purchaser). As a matter of policy it has been held there is no reason to restrict the duty arising from those relationships either because of the fortuitous event of the time of transfer to a subsequent purchaser, the circumstance that the loss was purely economic loss, or the legitimacy of persons pursuing their own economic interest.

Proximity between the builder and both a first purchaser and a subsequent purchaser was held to flow from the permanent nature of a dwelling, and its intended long-term permanent use by a purchaser, whether first or subsequent, and from its obvious importance as an investment to a purchaser (at 625). These circumstances are deemed to be understood by a professional builder.

Thus Mason CJ, Deane J and Gaudron J wrote (at 627):

> "Upon analysis, the relationship between builder and subsequent owner with respect to the particular kind of economic loss is, like that between the builder and first owner, 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. In ordinary circumstances, 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. Such a subsequent owner will ordinarily have no greater, and will often have less, opportunity to inspect and test the footings of the house than the first owner. Such a subsequent owner is likely to be unskilled in building matters and inexperienced in the niceties of real property investment. Any builder should be aware that such a 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."

See also *Invercargill City Council v Hamlin* [1996] 1 All ER 756.

The reliance by a subsequent purchaser on a professional builder can be categorised as "general reliance". In some instances, such as a subsequent purchaser inquiring of the actual builder, the reliance may be specific. However, following *Bryan v Maloney*, it is now clear that general reliance is sufficient to give rise to a proximity giving rise to a duty of care.

Just as one can have more than one cause of a loss, so, in my opinion, can one have more than one reliance in the purchase of a dwelling. One can have general reliance by a subsequent purchaser upon a professional builder as discussed in *Bryan v Maloney*, as well as specific reliance on others concerning the quality of the building. That specific reliance may be upon, for instance, a council, or a vendor. There is not necessarily any inconsistency between a general reliance upon a professional builder, and a more specific reliance upon others. A person, not being a purchaser, injured by a falling dwelling would have an action for damages against the professional builder. There is no reason of policy why a subsequent purchaser of that dwelling should not have a similar action for personal injuries simply because, for instance, inquiry had been made of council regarding compliance with the Act, ordinances and approved specification by a request for a s 317A certificate. In my opinion it is consistent with the approach adopted by the majority in *Bryan v Maloney* that there can

co-exist both a general reliance and a specific reliance upon a different person or entity.

A subsequent purchaser may suffer loss from two causes. The first may be the deficient building by the professional builder. The second may be, for instance, the issue by a council of a certificate stating that the building had been constructed in accordance with the Act, ordinances, plans and specification, where it had not. Each may be a cause of loss: *March v E & M H Stramare Pty Ltd* (1991) 171 CLR 506. Each circumstance gives rise to that proximity creating a duty of care. Thus each may have some responsibility for the loss suffered by the subsequent purchaser. In my opinion it would be wrong in principle to hold that, because a subsequent purchaser made inquiry either of a vendor to him or of a third party such as a council concerning the quality status of the property being purchased, such inquiry, because of explicit or implicit reliance upon those inquiries, negated either the existence of the proximity to the professional builder recognised in *Bryan v Maloney*, or the failure by that builder properly to perform his work, as a cause of loss.

Normally one would expect there to be a general reliance by a subsequent purchaser upon a professional builder, coupled with a specific reliance by that purchaser on either or both of the vendor or a council concerning the quality of the property being purchased. In those circumstances, if all were sued, a question of apportionment would arise. In a singular case, however, it is possible that the evidence may be such as to negate entirely the general reliance on the professional builder, or the specific reliance upon either the council or the vendor. This case, it seems to me, is such a case. having regard to the findings made by Giles J. His Honour found (*Sved* (at 244-245)) as follows:

> "In this manner, although reliance (even general reliance) may not be essential for a duty of care, absence of reliance on the part of the particular subsequent purchaser may negate his invocation of a duty of care. In my opinion, that is the case here. On a number of occasions Mr or Mrs Sved stated under cross-examination that he or she relied only on the s 317A certificate, or on what Mrs Sved was told about the issue of the certificate, in completing the purchase of the property. Mrs Sved agreed that the information received from Mr James was '*the only document or information on which you relied when you went ahead with the settlement on 14 October 1987*', said that she depended on the s 317A certificate and was happy to go ahead if she received it, and (after agreeing that she knew nothing of the Di Blasios at the time):
>
> 'Q. You know, of course, that building work is an area which is typically fraught with hidden defects and things of that kind? A. Yes.
>
> Q. And that, there are some builders who are very good, some who are not so good and some who are bad? A. Yes.
>
> Q. And you know there are builders who are good on some jobs and not so good on other jobs? A. If it is a good builder, it is a good builder. If it is not a good builder, it is not a good builder.
>
> Q. The fact of the matter is in the building trade, as in any other trade, the full range of human experience is found between good, indifferent and bad, isn't it? A. Yes.
>
> Q. For all you knew the people who built this house could have been good, indifferent or bad? A. True.

Q. And again I suggest to you that that was an additional reason why the s 317A certificate was important to you? A. Absolutely.

Q. Because that meant that regardless of whether the builder was good or bad, someone else was inspecting the work and certifying that it was properly done? A. Yes.

Q. And that was what was important to you when you entered into the contract and when you decided to complete the contract? A. Because I didn't have a building inspection, yes'.

Mr Sved said, after reference to what Mrs Sved told him about her second conversation with Mr James:

'Q. You acted in reliance upon that information you received from Mrs Sved in deciding to go ahead and settle on the 14th; is that correct? A. Yes.

Q. And there was nothing else that you relied upon in deciding to settle on the 14th other than the receipt of that information? A. That's right.'

No qualification to this was brought out.

It seems to me that the firm reliance on the s 317A certificate is significant, and that Mr and Mrs Sved were not subsequent purchasers to whom was owed the duty of care which might otherwise have been owed."

Those findings of fact, unchallengeable in this Court, result in my opinion that there was no reliance at all, not even general reliance, by Mr and Mr Sved upon the builders. Having negated such reliance, I do not think that Mr and Mrs Sved can base a claim against the builders upon the presumed assumption of responsibility by the builder arising from the construction of a dwelling-house. The relationship identified by the majority in *Bryan v Maloney* in the case of a professional builder and a first purchaser, which their Honours equated to the relationship between the professional builder and a subsequent purchaser, involved not one element but two. It was expressed as follows (at 624): "… Both relationships are characterised, to a comparable extent, by assumption of responsibility on the part of the builder and likely reliance on the part of the owner"(emphasis added).

To sustain the proximity, and thus the duty, in my opinion both elements are necessary. Giles CJ Comm D having found positively absence of any reliance, even general reliance, the claim by Mr and Mrs Sved against the builder fails.

In those circumstances it becomes unnecessary to consider whether a sufficient proximity gives rise to a duty of care by a professional builder to a subsequent purchaser in circumstances where, as here, the otherwise latent defects became apparent, or the consequences of them became apparent, during ownership of a prior purchaser, here the first purchaser: see the emphasis on first appearance of defects in *Bryan v Maloney* (at 616) ("First"), ("previously unknown"), (at 626, 627) ("At the time when the inadequacy of the footings became manifest"); see also the discussion in *Invercargill City Council v Hamlin* [1996] 1 All ER 756 at 768-773 in particular (at 772) in the speech of Lord Lloyd.

It follows that grounds of appeal numbers 19, 20 and 21 fail.

Claims against the vendors:

Three bases of claim against the vendors, Mr and Mrs Goddard, were mounted:

A 1. A claim pleaded in pars 16-20 of the further amended summons which was said to be an action in deceit.

2. An action for breach of warranty based upon false answers to requisitions.

3. A claim in negligence as builder.

Giles CJ Comm D dismissed each claim. Various ground of cross-appeal challenge those dismissals.

Regarding the third basis, it is sufficient to refer to the finding of Giles CJ B Comm D set out above holding that total and sole reliance was placed on the s 317A certificate, and Council officers' statements regarding it. His Honour's finding of fact is not open to challenge. Causation having been found against the appellants (*Medlin v State Government Insurance Commission* (1995) 182 CLR 1 at 6-7), this ground fails.

The claim in deceit was grounded upon the answers to requisitions which were submitted by the appellant's solicitors as "requisitions on title". Reliance C on requisition 40(b) and answer was abandoned during the appeal. There remained the following:

> "8. Have the provisions of the *Local Government Act*, 1919 as amended and the Ordinances thereunder relating to the subdivisions and buildings been observed and complied with in respect of the subject property? A. As far as the vendors are aware, yes."

Giles CJ Comm D found that the Goddards' solicitor, Mr Miceli, had forwarded that reply to the purchasers' solicitors. He did so after forwarding a D copy of the requisitions and draft replies to Mr and Mrs Goddard with a request that they sign the draft if it was correct. His Honour found that there was no evidence that Mr and Mrs Goddard did sign the reply as requested but that the "probability is that Mr Goddard verbally approved the suggested replies before they were sent to Mr Ratner". His Honour found that the replies were forwarded by Mr Miceli with apparent authority.

Giles CJ Comm D treated the claim not as being in deceit but as being a E claim under s 42 of the *Fair Trading Act*. Thus the claim was dismissed because the transaction was not "in trade or commerce". I agree with his Honour's characterisation of the pleading. Being a further amended statement of claim, it was the appellant's third endeavour to plead its cause of action. If it intended to plead a claim in deceit, having regard to the character of such an allegation, such cause of action must be pleaded with clarity and particularity: *Krakowski v Eurolynx Properties Ltd* (1995) 69 ALJR 629 at 633. Counsel for F the vendors contended that neither by the pleading nor at the trial was the claim in deceit put. In my opinion Giles CJ Comm D was correct to categorise the pleading in the manner he did and dismiss the claim. A claim in deceit, as distinct from a claim under the *Fair Trading Act* 1987, should not be permitted to be raised for the first time on appeal.

There is a further basis upon which the appeal against this finding fails. Giles CJ Comm D found that Mr and Mrs Goddard were aware of continued water entry inconsistent with satisfactory construction of the dwelling, and that G Mr Goddard knew that no membrane had been laid over the deck of the garage and rumpus room, and knew that the drainage was not in conformity with the approved plans. However his Honour found that that knowledge did not establish misleading or deceptive conduct "unless it is also established, expressly or by appropriate inference, that Mr and Mrs Goddard were aware that in relation to the defects known to them, or otherwise, the building did not

comply with the *Local Government Act* 1919 or Ordinances … Awareness of what the *Local Government Act* 1919 and or Ordinances required and of departure therefrom was necessary. Neither Mr Goddard nor Mrs Goddard was asked about his or her knowledge of the requirements of the *Local Government Act* or Ordinances or of his or her awareness that defects in the building connoted non-compliance with their provisions". His Honour was not prepared to draw the inference that they were so aware when, as they could have been, they were not asked questions regarding these matters.

It was contended on appeal that his Honour should have drawn the inference required. Further it was contended that the trial was conducted upon the basis that the only issue was knowledge of defective building works not such defective works breaching, to the knowledge of Mr and Mrs Goddard, the Act or Ordinances. That was said to be, at trial, an assumed substratum.

In my opinion where a claim in deceit, or false or misleading conduct is asserted, all ingredients of such a serious allegation must be clearly established: *Krakowski v Eurolynx Properties Ltd* (at 633), per Brennan J, Deane, Gaudron and McHugh JJ. Inferences of knowledge to complete a cause of action in deceit should not readily be drawn.

This challenge to the trial judge's findings fail.

There remains the question of the claim for damages for breach of warranty.

Giles CJ Comm D rejected this claim upon the basis:

(a) the answer to the requisition did not constitute a warranty;

(b) even if it did, it was not breached because it was not shown that the answer to the requisition was false.

For the reasons given by Giles CJ Comm D, I agree with his Honour that this claim fails on each of the bases identified by his Honour.

Grounds 17 and 18 fail.

Conclusion:

In my opinion the appeal and the various cross-appeals should be dismissed. The appellant Council should pay the costs of all parties of the appeal. Mr and Mrs Sved should pay the costs of all parties to their cross-appeal.

Appeal dismissed. (By majority)
Cross-appeals dismissed.

Solicitors for the appellant: *Phillips Fox*.

Solicitors for the first respondent: *Jenkins & Associates*.

Solicitors for the second and third respondents: *Michael Miceli*.

Solicitors for the fourth respondent: *Dennis & Co*.

Solicitors for the fourth cross-respondent: *E Berman & Co*.

C SAKKAS,
Solicitor.