SUPREME COURT OF QUEENSLAND

CITATION:	*Melisavon Pty Ltd v Springfield Land Development Corporation Pty Limited* [2014] QCA 233
PARTIES:	**MELISAVON PTY LTD** ACN 010 635 837 (appellant) **v** **SPRINGFIELD LAND DEVELOPMENT CORPORATION PTY LIMITED ACN 055 714 531 AS TRUSTEE FOR SPRINGFIELD DEVELOPMENT TRUST** (respondent)
FILE NO/S:	Appeal No 9105 of 2013 SC No 5108 of 2011
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	16 September 2014
DELIVERED AT:	Brisbane
HEARING DATE:	3 April 2014
JUDGES:	Margaret McMurdo P and Holmes JA and Ann Lyons J Separate reasons for judgment of each member of the Court, Margaret McMurdo P and Ann Lyons J agreeing as to the order made, Holmes JA dissenting
ORDER:	**The appeal is dismissed with costs.**
CATCHWORDS:	PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – PROCEDURE UNDER UNIFORM CIVIL PROCEDURE RULES AND PREDECESSORS – SUMMARY JUDGMENT– where the appellant appealed the decision of the learned primary judge dismissing an application for summary judgment – where the appellant made an application for summary judgment pursuant to r 293 of the *Uniform Civil Procedure Rules* 1999 (Qld) – where the respondent made a claim for damages for negligence – where by operation of s 10 of the *Limitation of Actions Act* 1974 (Qld) the claim will be statute barred if the cause of action arose prior to 16 June 2005 – where the respondent argued that there were real issues of fact to be tried in the proceeding – whether the appeal ought to be allowed LIMITATION OF ACTIONS – LIMITATION OF PARTICULAR ACTIONS – SIMPLE CONTRACTS,

QUASI-CONTRACTS AND TORTS – ACCRUAL OF CAUSE OF ACTION AND WHEN TIME BEGINS TO RUN – TORTS – ACTIONS AGAINST ARCHITECTS, ENGINEERS, BUILDERS AND RELATED PROFESSIONALS – where the cause of action is founded on tort – where the latent defect at the centre of the claim was the appellant's negligently engineered design of the clubhouse – when does time accrue – whether the learned primary judge erred in finding that the limitation period did not commence until the respondent "first became aware, or ought to have become aware, that it had sustained loss because of the alleged defective design" – whether the respondent's claim in this proceeding is statute barred

Limitation of Actions Act 1974 (Qld), s 10
Uniform Civil Procedure Rules 1999 (Qld), r 293

Bryan v Maloney (1995) 182 CLR 609; [1995] HCA 17, cited
Cartledge v E Jopling & Sons Ltd [1963] AC 758, cited
Central Trust Co v Rafuse [1986] 2 SCR 147, cited
City of Kamloops v Nielsen [1984] 2 SCR 2, cited
Council of the Shire of Noosa v Farr & Ors [2001] QSC 60, cited
Cyril Smith & Associates Pty Ltd v The Owners – Strata Plan No 64970 [2011] NSWCA 181, cited
Di Sante v Camando Nominees Pty Ltd [2000] VSC 211, cited
Hawkins v Clayton (1988) 164 CLR 539; [1988] HCA 15, followed
House v The King (1936) 55 CLR 499; [1936] HCA 40, applied
Pirelli General Cable Works Ltd v Oscar Faber & Partners [1983] 2 AC 1, cited
Pullen v Gutteridge Haskins & Davey Pty Ltd [1993] 1 VR 27; [1993] VicRp 4, considered
Sheldon v McBeath (1993) Aust Torts Reports 81-209, cited
Sherson & Associates Pty Ltd v Bailey (2001) Aust Torts Reports 81-591; [2000] NSWCA 275, cited
Sparham-Souter v Town and Country Developments (Essex) Ltd [1976] QB 858, cited
Sutherland Shire Council v Heyman (1985) 157 CLR 424; [1985] HCA 41, followed
Theseus Exploration NL v Foyster (1972) 126 CLR 507; [1972] HCA 41, cited
Wardley Australia Ltd v Western Australia (1992) 175 CLR 514; [1992] HCA 55, cited
Winnote Pty Ltd (in liq) v Page (2006) 68 NSWLR 531; [2006] NSWCA 287, cited

COUNSEL: D Kelly QC, with M Hodge, for the appellant
P Freeburn QC, with C Jennings, for the respondent

SOLICITORS: Thynne & Macartney for the appellant
McBride Legal for the respondent

[1] **MARGARET McMURDO P:** The respondent, Springfield Land Development Corporation as trustee for the Springfield Development Trust, leased land on which it developed a residential golf course community. In about January 2000, the respondent contracted with the appellant, Melisavon Pty Ltd,[1] civil and structural engineering consultants, to design a clubhouse and surrounds. The appellant completed the design in mid-2003 and the respondent alleged the work was completed in accordance with that design. On 16 June 2011 the respondent filed a claim and statement of claim alleging that the appellant negligently caused the respondent economic loss of $866,258 flowing from a latent defect, namely the appellant's negligent engineering design. The appellant contended the respondent's cause of action was statute-barred under s 10 *Limitation of Actions Act* 1974 (Qld) as more than six years had passed since it arose. It applied for summary judgment to dismiss the respondent's claim with costs. The appellant has appealed from the primary judge's order dismissing its application with costs.

[2] Although the notice of appeal contains five grounds, the essential question is whether the primary judge erred in law in not granting summary judgment. The appellant contends that the issue is whether the primary judge erred in finding that the limitation period did not commence until the respondent "first became aware, or ought to have become aware, that it had sustained loss because of the alleged defective design".[2]

The primary judge's reasons

[3] Before discussing the appellant's contentions more fully, it is helpful to review the primary judge's reasons in which most of the relevant facts and issues are set out. The following passage from the judgment is uncontentious for the purposes of this appeal:

> "[3] The [respondent's] claim, as pleaded in the amended statement of claim … ('the ASOC'), can be summarised as follows:
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> …
>
> (e) In 2000, the [respondent] … engaged the [appellant] 'to design a premier, two-storey golf clubhouse ('the Clubhouse') and surrounding pavements, to be constructed on the Clubhouse Site ('the Design Contract').'
>
> (f) The Design Contract had express or implied terms that:
>
> (i) the [appellant] would perform its obligations under the Design Contract to the standard of a reasonably competent civil and/or structural engineer exercising reasonable care and skill;
>
> (ii) the design of the Clubhouse would be fit for the purpose of operating a premier golf club;
>
> (iii) the [appellant] would design the Clubhouse in accordance with good and sound engineering practices and principles.
>
> (g) In 2000, the [appellant] commissioned, and subsequently received, a geotechnical report which

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1 Until June 2005 the appellant was known as Karamisheff Nagel Pty Ltd.

2 *Springfield Land Development Corporation v Melisavon Pty Ltd* [2013] QSC 228, [2], [62].

informed the [appellant], *inter alia*, that the soil beneath the proposed building area for the Clubhouse was susceptible to high to extreme amounts of 'ground heave' due to varying moisture conditions, that the estimated movement of soil in the area due to seasonal moisture variation was between 15 millimetres and 120 millimetres, that it was essential for the design of the Clubhouse that the slab on ground be supported by high level strip footings which could tolerate potential movement of up to 85 millimetres, and that the design should include drainage measures to ensure the sub-grade and pavement surrounding the Clubhouse did not become saturated.

(h) The [appellant] completed its design of the Clubhouse in mid-2003.

(i) The Clubhouse was constructed materially in accordance with the [appellant's] design.

(j) In breach of the duty of care owed by the [appellant] to the [respondent], the design failed to specify, *inter alia*, a design for the lower slab that could tolerate 'ground heave' beneath the Clubhouse exceeding about 40 millimetres. (Numerous other allegations of negligence in connection with the design are particularised in the ASOC, but it is sufficient to refer only to this one for present purposes.)

…

[4] The loss and damage said to have been suffered by reason of the [appellant's] breach of duty is then relevantly pleaded in the ASOC as follows:

'17. Since the construction of the Clubhouse, the reactive soil beneath the Clubhouse has expanded by up to 80mm ('**the Ground Heave**').

18. In 2009 and 2010, the lower level slab, adjoining non-structural walls and services of the Clubhouse, and surrounding pavements were damaged or failed, and continue to be damaged or fail, as a consequence of the Ground Heave, the further particulars whereof are as follows:

…

(k) the lower level slab shows various areas of heaving, particularly through the buggy parking bays and the spike bar, and at points parallel and midway between the strip footings (where cracking is evident); (**Collectively 'the Defects'**)

19. The defendant's negligence:

(a) caused the lower level slab of the Clubhouse, adjoining non-structural walls and services of the Clubhouse, and surrounding pavement to be susceptible to damage or failure by:

(i) ground heave exceeding 40mm;

(ii) the Ground Heave; and

(b) in the premises of the allegations contained in this paragraph, caused the Defects.

20. As a consequence of the allegations contained in paragraphs 1, 3, 4 and 16 of this pleading, the [respondent] will be required to, and will, rectify the Defects.'

[5] It is then alleged that 'the [respondent] has suffered, or will suffer, loss and damage rectifying the Defects in a sum not less than $866,258'.

[6] The limitation point is expressly raised in para 18(b) of the Amended Defence, which contends that 'the damage first occurred in late 2003/early 2004 and as such the claim is out of time more than six years having passed since the cause of action arose'. (See also para 23 of the Amended Defence.)

[7] In its Reply, the [respondent] joined issue with this limitation defence, contending (para 16(b)) that:

(a) The Defects did not become manifest until 2009 and 2010;

(b) The [respondent] did not, and did not reasonably, discover the Defects until 2009 and 2010."

[4] The judge then reviewed the competing evidence before him. The appellant relied on affidavit evidence from Mr Gary Nagel to the following effect. He was a civil engineer and, between 1 July 1986 and 30 June 2005, a director of the appellant.[3] He was responsible for and had a direct role in the design contract with the respondent. The appellant provided the respondent with a copy of a geotechnical report and all parties were aware of the problematic soil conditions on site and the potential for ground heave. Mr Nagel deposed that by November 2003 cracking was identified on the ground floor slab in the buggy storage area. It was apparent to Mr Nagel and to the appellant's Andrew Boyce[4] at a joint site inspection that there was cracking in the slab. The consensus of the parties was that the ground had heaved causing the basement slab to crack. The cause of cracking was identified as ground heave because of slab levels confirming an upward movement in the area of the cracking.[5]

[5] Mr Nagel referred to an email from the architects' Mr Bray to Mr Boyce on 10 November 2003[6] in which Mr Bray asked Mr Boyce to phone him to discuss a long crack down the middle of the lower floor of the golf cart store. Mr Bray stated that the builders "believed that once the carpark/Porte Cochere [sic] is sealed the land will dry out and maybe even shrink. However, we need your expertise, as we need to seal the Lower Floor slab and need to know what to use to allow for any anticipated shrinkage/cracking." The minutes of the November 2003 site meetings expressly referred to the lower floor slab "heaving", to "shrinkage" and to "a large crack through the lower floor cart store" which had been inspected by Mr Boyce and which was "most probably heave related – remediation plan to be resolved".[7]

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3 Above, [11], [12].

4 The appellant's engineer and associate director.

5 *Springfield Land Development Corporation v Melisavon Pty Ltd* [2013] QSC 228, [17].

6 Although not mentioned by the judge, this email was also sent to Mr Nagel: AB 269.

7 *Springfield Land Development Corporation v Melisavon Pty Ltd* [2013] QSC 228, [18].

[6] On 24 November 2003 Mr Bray emailed Mr Nagel and Mr Boyce asking for a report on the likely cause of this. Mr Nagel did not think he provided a report because the issue was addressed at site inspections and meetings.[8] Minutes of the 24 November 2003 site meeting[9] again referred to the large crack through the lower floor cart store and proposed a remedial light grey concrete seal to disguise the crack when the wet season was finished.[10] Minutes of the 1 December 2003 site meeting also referred to that large crack, that it appeared to be stable and referred to the concrete seal re-application.[11] The architects issued a certificate of practical completion for the work on 19 December 2003. The architects' list of preliminary defects to the builders referred to "cracking to the walls at the corner of the bag store and to the fact that the sealing of the crack to the floor in the cart park was to be reviewed."[12]

[7] Mr Nagel deposed that at the 28 June 2004 site meeting the respondent's project manager, the builder and other project consultants confirmed the following:

> "(a) uplift in the ground below the Clubhouse had occurred causing extensive cracking in the basement slab in the golf cart storage area;
>
> (b) the cracking occurred generally in the midspan of the slab between the columns and generally along the east - west axis;
>
> (c) uplift in the external lower terrace members area at the north east corner of the Clubhouse had occurred causing:-
>
> (i) extensive uplift and cracking in the external exposed aggregate concrete slab; and
>
> (ii) internal cracking in the stairwell to the left of the front entry and club room near the porte-cochere [sic] area;
>
> (d) uplift in the external slabs within the porte-cochere [sic] had occurred causing:-
>
> (i) surface cracking and significant level difference near the loading bay; and
>
> (ii) diagonal cracking to the servery off the kitchen wall."[13]

[8] Mr Nagel added that he stated at that site meeting:

> "... all of the cracking appears to be a result of the ground heaving underneath the slabs as it is saturated and has swelled. It looks like this is due to the extensive irrigation as all of the gardens adjacent to these areas are saturated. The irrigation is obviously excessive and the subsoil drainage is not allowing the water to get away. The subsoil drainage needs to be checked for damage and to make sure they all have free outlets to drainage structures. It is possible that the drainage paths to the subsoil drainage have been blocked when the landscaping was carried out at the end of the Project as it is essential that the drainage material is carried up to near the surface so that the water can drain away and not blocked by the landscaping works. This is all similar to the garden bed along the northern face outside

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8 Above, [19].
9 AB 119.
10 *Springfield Land Development Corporation v Melisavon Pty Ltd* [2013] QSC 228, [20].
11 Above, [21].
12 Above, [22].
13 Above, [23].

> the buggy storage area where the garden was totally saturated and ponding water because the subsoil drains had not been completed properly which led to the build-up of water under the ground slab as I identified in my civil defects inspection."[14]

[9] Mr Nagel further recommended at that site meeting:

> "that all of the subsoil drainage needs to be checked to ensure it is working and hasn't been affected by the landscaping works or the final works prior to the opening. Until these have been checked, I think it is essential that the irrigation be turned off to most of these areas until the drainage is checked, the gardens certainly don't need any more water at this time."[15]

[10] After the 24 November 2004 site meeting with the respondent's project manager, Mr Jayasekera and the appellant's Mr Boyce, Mr Boyce wrote to the respondent stating:

> "- We believe that the crack has resulted from swelling in the expansive soils under the slab due to an excessive wetness from the adjacent landscaping area.
>
> - Subsoil drainage to these landscaping areas has been in place for approximately six months. In this period the width of the crack has not changed significantly suggesting that the soil has reached an equilibrium moisture content."[16]

[11] Following an inspection towards the end of the defect liability period in December 2004, the architects issued a defects liability period expiration inspection notice to the builders which included confirmation of cracking in the slab, cracking in the entry/porte-cochère area and cracking in the block external wall. As to the buggy parking area, it included: "Crack between rows of columns has heaved (crack width appears to have remained similar during 2004) – to be buffed and resealed."[17]

[12] On 21 June 2005 the builders advised Mr Nagel that they did not accept responsibility for the ground heave which was "a design and maintenance issue". Mr Nagel responded that in his view:

> "The ground heave is due to penetration of water from irrigation and/or leaking watermains or services. This also indicates that the subsoil drainage is not working or has been affected by the landscape. Accordingly, we have recommended investigation by [the geotechnical expert] to advise on the matter."[18]

[13] The respondent's Mr Whitson advised Mr Nagel on 24 May 2006:

> "- that he had signed off on the Clubhouse construction and that the [respondent] had adopted the view that the ground heave was far greater than anybody had anticipated;
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> - that the [respondent] had released the bond to [the builders] and would be treating any further issues as maintenance issues and would not be worrying about minor cracking."[19]

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14 Above.
15 Above.
16 Above, [24].
17 Above, [26].
18 Above, [29].
19 Above, [31].

[14] Mr Nagel deposed that to his knowledge the ground heave under the clubhouse occurred during or immediately following construction in 2003-2004 and caused the lower level slab to uplift which in turn caused it to crack; this was first identified in November 2003.[20]

[15] As to the allegation in the ASOC para 18(k),[21] Mr Nagel stated:

> "This damage was first observed by the [respondent], Builder, Architect and the [appellant] in November 2003 and identified as having been caused by greater than anticipated ground heave. Repairs were carried out and no further damage has occurred.
>
> The cracking to the buggy storage area was attributed at that time to the large landscaped area along the northern face which was saturated with no provision for subsoil drainage. Subsoil drainage was installed by [the builders] and the cracking was sealed and the area noted for ongoing monitoring by the [respondent].
>
> My inspections of the lower level slab in October 2010 and June 2011 indicate that no further ground heave movement has occurred since 2003 / 2004."[22]

[16] Mr Bray, an architect in the employ of the architects retained by the respondent, also gave affidavit evidence on behalf of the appellant. At the 10 November 2003 site meeting he observed "a very large crack", "massive", in the lower floor golf cart store. It was about 10 millimetres wide and at the end of it the slab had lifted about 20 millimetres from the level. He had "never seen a crack that large" and all parties "were immediately very concerned. It was considered a major issue" which was discussed and monitored at every site meeting thereafter. After the slab cracked, there was zigzag cracking through the block work in the golf cart buggy wash area and over the next three to four months cracking and opening of joints occurred around the clubhouse.[23]

[17] The respondent's Mr Whitson, who is no longer employed by the respondent but was its project director during clubhouse construction, gave the evidence by affidavit on behalf of the respondent to the following effect. He knew from the beginning of the project that the site would be subject to ground heave. The design was intended to provide sufficient separation between the slab and the underlying ground so that the inevitable movements in ground level, due to the reactive nature of the soil would not impact upon the slab.[24] On project completion, the quality of the building was reasonable and he did not recall any major issues. The first defect issues were cracks in the buggy parking area and movement in the driveway joins but these did not cause him concern. They arose in late 2003 or early 2004 and appeared to be normal minor settlement and shrinkage issues.[25] He expected the building to be handed over with minor defects and for these to continue to arise for the first few months of the new building's life. He described the process for rectification of these minor defects.[26] Mr Whitson deposed that contrary to Mr Nagel's assertion, the respondent was unaware of underlying defects to the building from 2003 to

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20 Above, [32].
21 Set out in [3] of these reasons or see AB 43.
22 *Springfield Land Development Corporation v Melisavon Pty Ltd* [2013] QSC 228, [33].
23 Above, [34]-[37].
24 Above, [40].
25 Above, [41].
26 Above, [42].

2004. The defects which arose on completion and at the end of the defects period were of the expected kind and did not alarm him. There was the occasional mention of heave related to the lower floor slab but initially nobody was clear on this. Mr Nagel blamed it on constructional and operational issues, did not suggest there was an underlying problem with structural design, and blamed the contractors. The respondent followed Mr Nagel's advice as to investigating subsoil drainage issues with the builders who proved they had completed works in accordance with drawings and specifications. Only then did the respondent release the builders' bond.[27]

[18] Mr Whitson emphasised that he did not then regard any of the cracking as resulting from design issues. The respondent considered them to be contractor issues related to drainage or overwatering.[28] As to the allegation in the ASOC para 18(k), Mr Whitson said that the respondent had the appellant investigate the cracks. The appellant considered them minor and, after monitoring, stable and not an ongoing issue. The appellant advised the respondent that the cracking was likely to have been caused by defects other than inadequate design. After the builders rejected responsibility for the cracks on 31 March 2005, the respondent undertook a remedial investigation which continued until at least October 2005.[29] Mr Whitson denied that Mr Nagel told him "that the ground had heaved far more than anybody had anticipated; that nobody would be held responsible for that heave issue; and that future issues regarding drainage would be dealt with as maintenance issues".[30]

[19] The respondent's Mr Sharpless deposed that Mr Whitson did not raise with him any concerns about underlying structural issues prior to 2010. He understood there was minor cosmetic cracking in the concrete but no-one suggested that this was an underlying defect or an ongoing issue.[31]

[20] His Honour distinguished Handley JA's observations in *Sheldon v McBeath*[32] upon which the respondent had placed emphasis and discussed *Pullen v Gutteridge Haskins & Davey Pty Ltd*[33] and *Cyril Smith & Associates Pty Ltd v The Owners – Strata Plan No 64970*.[34] Relying on observations in *Cyril Smith*,[35] the judge concluded that there was a need for a factual investigation as to when the respondent "first became aware, or ought to have become aware, that it had sustained loss because of the alleged defective design of the clubhouse and surrounds". This was not something to be undertaken on a summary judgment application, especially as there was conflicting evidence as to what and when the parties knew as to the nature and cause of the cracking in the clubhouse.[36] For those reasons, his Honour dismissed the summary judgment application.[37]

The appellant's contentions

[21] The appellant submitted in ground (a) that the cause of action arose when the cracking caused by ground heave (the defect pleaded in the ASOC para 18(k))[38] first

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27 Above, [43], [44].
28 Above, [45].
29 Above, [46].
30 Above, [47].
31 Above, [48]-[49].
32 (1993) Aust Torts Reports 81-209.
33 [1993] 1 VR 27.
34 [2011] NSWCA 181.
35 Above, [19].
36 *Springfield Land Development Corporation v Melisavon Pty Ltd* [2013] QSC 228, [62].
37 Above, [64].
38 Set out in [3] of these reasons or see AB 43.

appeared. It was uncontentious on the evidence before the primary judge that this cracking first occurred at least before 16 June 2005 when the limitation period expired. Mr Nagel's unchallenged evidence was that this damage did not worsen after 2003-2004. Once there was any visible damage caused by the alleged negligence then the respondent suffered loss as an independent purchaser would not pay as much for the clubhouse as they would if there was no cracking. The time period for limitation purposes began to run when the cracks appeared and the cause of action based on the alleged negligence was complete at that point. The primary judge erred in not finding the respondent's cause of action in negligence arose more than six years before the commencement of the claim so that the proceeding was statute-barred under s 10 *Limitation of Actions Act* 1974 (Qld).

[22] The judge, the appellant contended in ground (b), also erred in finding that the limitation period did not commence until the respondent first became aware or ought to have become aware that it had sustained loss because of the alleged defective design of the clubhouse and surrounds. This is not the law in Australia. It was common ground that the respondent was aware that there was cracking in the clubhouse caused by ground heave in 2003 to 2004 so that any cause of action the respondent might have was complete at that time and was statute-barred.

[23] The appellant in ground (c) contended that the judge erred in regarding *Pullen* as authority for the proposition that the limitation period did not commence until the respondent first became, or ought to have become aware, that it had sustained loss because of the alleged defective design.

[24] If *Pullen* was authority for that proposition, the appellant contended in ground (d) that the judge erred in not finding that *Pullen* was clearly wrong in this respect. His Honour should not have followed *Pullen* and *Cyril Smith* which were both wrongly decided.

[25] Alternatively, the appellant contended in ground (e) that the judge erred in not finding that the limitation period commenced more than six years before the respondent commenced its claim because the respondent knew that the cracking of the clubhouse was caused by ground heave. As noted in *Cyril Smith*,[39] it was the physical defect which must be known or manifest, not the cause of the defect. It did not matter that the respondent was unaware of the alleged defective design of the clubhouse and surrounds.

The relevant law

[26] The decision to grant or refuse summary judgment is a discretionary exercise so that this Court will set aside the decision only where there is error in the sense discussed in *House v The King*.[40] A judge should order summary judgment for a defendant against a plaintiff when satisfied the plaintiff has no real prospect of succeeding on the claim and there is no need for a trial of it: *Uniform Civil Procedure Rules* 1999 (Qld), r 293. Summary judgment based on a statute of limitation defence, should be granted only where sufficient is known of the alleged damage sustained by the plaintiff and the circumstances in which it was sustained to determine the issue ahead of a full hearing of the action: *Wardley Australia Ltd v Western Australia*.[41]

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39 [2011] NSWCA 181, [24].

40 (1936) 55 CLR 499.

41 (1992) 175 CLR 514, Mason CJ, Dawson, Gaudron and McHugh JJ, 333.

The determination of whether a statute of limitation defence is made out is a technical application of the relevant legal principles to the facts.[42] The defendant has the onus of establishing that the plaintiff's claim is statute-barred.

[27] Section 10 *Limitation of Action Act* relevantly provides:

> "**10. Actions of contract and tort and certain other actions**
>
> (1) The following actions shall not be brought after the expiration of six years from the date on which the cause of action arose:
>
> (a) … an action founded on … tort where the damages claimed by the plaintiff do not consist of or include damages in respect of personal injury to any person;
>
> … ."

[28] It follows that the appellant's contention that the respondent's claim was statute-barred turns on when the respondent's cause of action against the appellant first arose. It is well-established that, ordinarily, a cause of action in tortious negligence arises when a plaintiff first suffers material damage or relevant loss, providing the damage is more than negligible[43] and the loss measurable.[44] The cause of action is complete even if the plaintiff is unaware of the damage. See *Hawkins v Clayton & Ors.*[45]

[29] In 1985 in *Sutherland Shire Council v Heyman*[46] Deane J modified that rule in some cases of tortious negligence involving pure economic loss. The plaintiffs in that case purchased a house in 1975 which had been built in about 1968. The Council approved the plans, issued a building permit and its officers inspected the house whilst under construction. In 1976 the plaintiffs noticed structural defects apparently caused by the subsidence of inadequate footings. They claimed the Council owed them a duty of care and was liable for damages for the structural defects resulting from the Council's negligent inspection. They were successful at first instance and on appeal to the New South Wales Court of Appeal. The High Court, however, allowed the appeal and gave judgment for the Council. Of particular relevance to the present case are the following observations of Deane J who noted that the plaintiffs' claim was:

> "for the loss or damage represented by the actual inadequacy of the foundations, that is to say, it is for the cost of remedying a structural defect in their property which already existed at the time when they acquired it. … Whatever may be the position with respect to consequential damage to the fabric of the building or to other property caused by subsequent collapse or subsidence, the loss or injury involved in the actual inadequacy of the foundations cannot, in the case of a person who purchased or leased the property after the inadequacy existed but before it was known or manifest, properly be seen as ordinary physical or material damage. The only property which could be said to have been damaged in such a case is the building. The building itself could not be said to have been subjected to

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42 *Hawkins v Clayton* (1988) 164 CLR 539, Brennan J, 561.

43 *Cartledge v E Jopling & Sons Ltd* [1963] AC 758.

44 *Wardley Australia Ltd v State of Western Australia* (1992) 175 CLR 514, Mason CJ, Gaudron, Dawson and McHugh JJ, 531; *Winnote Pty Ltd (in liq) v Page* (2006) NSWLR 531, [40]-[41] and [66].

45 (1988) 164 CLR 539, 587-588.

46 (1985) 157 CLR 424.

> 'material, physical damage' by reason merely of the inadequacy of its foundations since the building never existed otherwise than with its foundations in that state. Moreover, even if the inadequacy of the foundations could be seen as material, physical damage to the building, it would be damage to property in which a future purchaser or tenant had no interest at all at the time when it occurred. Loss or injury could only be sustained by such a purchaser or tenant on or after the acquisition of the freehold or leasehold estate without knowledge of the faulty foundations. It is arguable that any such loss or injury should be seen as being sustained at the time of acquisition when, because of ignorance of the inadequacy of the foundations, a higher price is paid (or a higher rent is agreed to be paid) than is warranted by the intrinsic worth of the freehold or leasehold estate that is being acquired. … [A]ny loss or injury involved in the actual inadequacy of the foundations is sustained only at the time when that inadequacy is first known or manifest. It is only then that the actual diminution in the market value of the premises occurs."[47]

[30] The following year the Supreme Court of Canada in *Central Trust Co v Rafuse*[48] considered when the plaintiff's cause of action in negligence against its solicitors arose. The plaintiff brought its action after a court had declared void as contrary to the Nova Scotia's *Company Act* the plaintiff's mortgage over property. It claimed the solicitors had negligently prepared the mortgage. The court rejected the approach of the House of Lords in *Pirelli General Cable Works Ltd v Oscar Faber & Partners*.[49] In *Pirelli* their Lordships held that the date of accrual of a cause of action in tort for damage caused by the negligent design or construction of a building was the date when the damage came into existence, not the date when the damage was discovered or should have been discovered by the exercise of reasonable diligence. But the Canadian Supreme Court followed the approach taken by the majority of the Canadian Supreme Court in *City of Kamloops v Nielsen*.[50] Their Honours in *Rafuse* concluded that in Canada there was "a general rule that a cause of action arises for purposes of a limitation period when the material facts on which it is based have been, or ought reasonably to have been discovered".[51] As the plaintiff did not discover and could not have reasonably discovered the solicitors' negligence until the validity of the mortgage was challenged in the action for foreclosure, the cause of action did not arise until that date and was not statute-barred.

[31] The next Australian development came with the 1988 case of *Hawkins v Clayton*.[52] Deane J, with whom Mason CJ and Wilson J agreed on this issue,[53] rejected the Canadian approach in *Kamloops* and *Rafuse*, preferring his approach in *Heyman*.[54] His Honour noted that in cases involving economic loss sustained as a consequence of a latent defect in a building:

> "Commonly… the building never existed and was never owned without the defect and (in the absence of consequential collapse or

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47 Above, 503-505.
48 [1986] 2 SCR 147.
49 [1983] 2 AC 1.
50 [1984] 2 SCR 2.
51 [1986] 2 SCR 147, 224.
52 (1988) 164 CLR 539.
53 Above, 543.
54 (1985) 157 CLR 424, 503-505.

> physical damage or injury) the only loss which could have been sustained by the owner was the economic loss which would be involved if and when the defect was actually discovered or became manifest, in the sense of being discoverable by reasonable diligence, with a consequence that the damage was then sustained by the then owner: (cf *Sutherland Shire Council v Heyman*). The position is different in cases where all or some of the damage, be it in the form of physical injury to person or property or present economic loss, is directly sustained in the sense that it does not merely reflect diminution in value or other consequential damage which occurs or is sustained only when a latent defect which has existed at all relevant times becomes manifest. In those cases, damage is sustained when it is inflicted or first suffered and the cause of action accrues at that time."[55]

[32] In 1992 the High Court in *Wardley Australia Ltd v Western Australia*[56]considered a cause of action for damages as a result of misleading or deceptive conduct under the *Trade Practices Act* 1974 (Cth). Deane J referred to the majority's rejection in *Hawkins v Clayton* of the general overriding qualification that time does not commence to run in a cause of action for negligence for damages for economic loss until the plaintiff knows or reasonably ought to know that the relevant conduct has caused loss. But his Honour affirmed that:

> "in some of the cases where an action lies in negligence for pure economic loss, no relevant loss is actually sustained or suffered and no cause of action for damages accrues unless and until some actual adverse consequence of the negligence is known or becomes manifest."

His Honour emphasised that there was no

> "general answer to the question whether the mere incurring of a contingent liability to make a future payment of itself constitutes loss or damage for the purpose of determining when a cause of action of which loss or damage is a necessary ingredient, accrues or arises."[57]

His Honour also considered it was not possible or desirable to provide an unqualified answer to that abstract question, noting:

> "the answer may vary according to the facts of the particular case, including the nature and implications of the contingent liability and whether the circumstances were such that, even without the benefit of hindsight, the distinction between contingent and certain loss or damage was illusory rather than real."[58]

[33] The primary judge understandably placed some emphasis on the 1993 Victorian case of *Pullen v Gutteridge Haskins & Davey Pty Ltd*[59] as the pertinent facts are not dissimilar to the present case. There the plaintiffs engaged the defendant engineer to design specifications for the reconstruction of a swimming pool complex. The work was subsequently undertaken. Problems emerged soon after the complex was commissioned and increased over the years. The defendant investigated each series of problems and reported to the plaintiffs that the majority of the faults were caused

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55 (1988) 164 CLR 539, 587-588.
56 (1992) 175 CLR 514, 541.
57 Above, 540.
58 Above, 541.
59 [1993] 1 VR 27.

by differential settlement of various sections of the structure, but all within the predicted range. The plaintiffs eventually engaged an independent firm of engineers to investigate the faults and finally sued the defendant for damages for professional negligence. The defendant claimed the action was statute-barred. The trial judge found the defendant owed the plaintiffs a duty of care but had not breached that duty and in any case the claim was statute-barred. The plaintiffs appealed.

The Court of Appeal[60] concluded that the defendant was negligent in its design[61] and that the claim was not statute-barred. Their Honours rejected the contention that the plaintiffs suffered damage as soon as physical damage was done to the structure. The court discussed the Canadian approach in *Kamloops* and *Rafuse* and the English approach in *Pirelli* but followed Deane J's approach in *Heyman* and *Hawkins v Clayton*, noting that the defendant was wrong to suggest:

> "… that Deane J was confining what he said about the time at which a cause of action accrued to cases in which there is no damage to the fabric of the building consequential upon the latent defect. It was [the defendant's] submission that where such consequential damage occurs the case is not to be treated as one of economic loss. But frequently that which causes the inadequacy of footings to become either known or manifest will be damage to the fabric of the house caused by collapse or subsidence as a result of the inadequate footings."[62]

Their Honours concluded that in *Pullen* time began to run for limitation purposes when the latent defect, (the inadequacy or unsuitability of the footings) first became known or manifest.[63] Their Honours further observed that, in determining the plaintiffs' knowledge, regard must be had to the defendant's conduct:

> "It was the expert and its conduct as regards the [plaintiffs] as soon as problems emerged with the centre tended to suggest to the [plaintiffs] that the problems being experienced were not the result of inadequate footings.
>
> Another important matter to be borne in mind, whether one is considering knowledge or manifestation, is that what must be known or made manifest is the inadequacy of the footings, and that on the facts of this case settlement in general and differential settlement in particular does not necessarily bespeak inadequacy of the footings."[64]

The Court concluded that the evidence at trial was insufficient to establish that the inadequacy of the footings was made known or manifest before the expiry of the limitation period.[65]

[34] There was no application in *Pullen* for special leave to appeal to the High Court of Australia.

[35] The same year *Pullen* was decided, the New South Wales Court of Appeal gave judgment in *Sheldon v McBeath*.[66] The plaintiff there engaged an architect in the

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60 Brooking, Tadgell and Hayne JJ.
61 Above, 48.
62 Above, 69-70.
63 Above, 71.
64 Above, 78-79.
65 Above, 79-83.
66 (1993) Aust Torts Reports 81-209.

design and construction of a house which was subsequently built. The architect certified practical completion in September 1983. Shortly afterwards cracks appeared in the house and the plaintiff sued the architect and the builder. The trial judge found that the cracks were caused by negligently constructed footings. The architect was negligent in not ensuring the footings were constructed in accordance with engineering drawings and owed that duty at least until practical completion. The action, therefore, was not statute-barred and both builder and architect were liable.

On appeal, Mahoney and Priestley JJA upheld the trial judge's finding that the architect's contractual duty to supervise extended to inspecting the construction of the footings. Handley JA dissented in the result, but in considering the tort question he followed *Heyman*, *Hawkins v Clayton* and *Pullen* and concluded that these cases establish:

> "that where latent building defects later cause consequential damage to the structure economic loss does not accrue until the defects are discovered or visible consequential damage occurs. Until then the owner can honestly sell the house for its market value, and if he did would suffer no loss. …
>
> Where a building has been properly constructed in accordance with a faulty design the owner will not suffer economic loss until the faults are discovered or visible consequential damage occurs. … However there was no claim here of negligent design."[67]

[36] In the seminal 1995 case, *Bryan v Maloney*,[68] a land owner engaged a professional builder to construct a house. The builder sold it to a purchaser who on-sold it to the plaintiff who inspected the house but did not notice any cracks or defects before the sale was completed.[69] Cracks subsequently appeared in the walls caused by inadequate footings and the resulting damage was extensive. The plaintiff sued the builder for damages in negligence. Mason CJ, Deane and Gaudron JJ referred to Deane J's statements in *Heyman* in articulating the duty of care owed by a professional builder who constructs a house for the then owner of the property to a subsequent owner. Their Honours described the duty as being to exercise reasonable care to avoid the kind of foreseeable damage which the plaintiff sustained, that is to say, the diminution in value of the house when a latent and previously unknown defect in its footings or structure first became manifest.[70] Later their Honours described the economic loss suffered as the diminution in value of the house when the inadequacy of its footings first became manifest by consequent damage to its fabric.[71]

[37] The principles discussed in *Heyman*, *Hawkins v Clayton* and *Pullen* which I have set out have been followed in a number of cases: see for example *Di Sante v Camando Nominees Pty Ltd*[72] and *Council of the Shire of Noosa v Farr & Ors*.[73]

[38] In the latter case, upon which the appellant placed some emphasis, the Council plaintiff sued consulting engineers for damages alleged to arise from the negligent design of waterworks infrastructure. The Council argued it did not suffer loss until

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67 Above, 62-081.
68 (1995) 182 CLR 609.
69 Above, 615.
70 Above, 617.
71 Above, 623.
72 [2000] VSC 211 [28]-[30].
73 [2001] QSC 60.

it fully appreciated that the water intake design by one defendant was completely faulty. His Honour rejected the arguments, noting:

> "They are based upon a misunderstanding of what the Full Supreme Court of Victoria held in *Pullen v Gutteridge Haskins & Davey Pty Ltd* [1993] 1 VR 27. In that case Pullen suffered economic loss when the consulting engineer he retained to design a public swimming pool on a site known to offer poor foundational material did not provide adequate support for the structure. When filled with water the pool settled differentially and cracked. The problem manifested itself over several years without the cause becoming apparent until an independent engineer investigated and discovered the design error. The court held (p 67) that in cases of pure economic loss due to a latent defect in design time begins to run when the latent defect first becomes known or was discoverable by reasonable diligence, applying the judgment of Deane J in *Hawkins v Clayton* (1987-1988) 164 CLR 539 at 588 and his Honour's judgment in *Sutherland Shire Council v Heyman* (1984-1985) 157 CLR 424 at 503-5. The latent defect was the inadequacy of the footings and what had to be known or reasonably discoverable was that inadequacy. On the facts of that case, the defective design was known or was reasonably discoverable only upon receipt of the second engineer's report.
>
> Likewise, in this case, it is said that the [Council] did not know and could not reasonably have discovered the inadequacy of the design until [it] saw the Burdekin intake operating. The argument overlooks the point made in *Pullen* (at 67) that
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> > 'The position is different in cases where all or some of the damage be it in the form of physical injury to person or property or present economic loss, is directly sustained in the sense that it does not merely reflect diminution in value or other consequential damage which occurs or is sustained only when a latent defect which has existed … becomes manifest. In those cases, damage is sustained when it is inflicted or first suffered then the cause of action accrues at that time.'"[74]

Chesterman J noted that the Council claimed it suffered loss when it paid to have the river dredged because the water intake screens were covered with sand preventing any intake. It was unorthodox to regard as recoverable damage, items of expenditure that occurred prior to the existence of a cause of action yet this was the corollary of the Council's submission that it can recover the cost of dredging although it had no cause of action until 18 months after it had spent that money. His Honour concluded that the Council knew the intake design was defective well prior to instituting proceedings so that the cause of action was statute-barred.[75]

[39] The New South Wales Court of Appeal also considered these questions in 2001 in *Sherson & Associates Pty Ltd v Bailey*[76] which has more factual similarities to the present case than *Farr*. The plaintiffs engaged an architect in mid-1989 to design seven industrial units. The building was to be constructed in two stages, the first

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74 This is a quotation from *Pullen* which is itself a quotation from Deane J's statement in *Hawkins v Clayton* (1988) 164 CLR 539, 587-588 set out in [31] of reasons.

75 Above, [71]-[72].

76 (2001) Aust Torts Reports 81-591; [2000] NSWCA 275.

comprising three units with the western wall functioning as an external wall until the second stage was built. In January 1990 the architect engaged an engineer to design the structural components and received the engineer's plans later that month. The builder constructed the first stage in late 1991. The second stage was never constructed. Towards the end of 1991 one plaintiff became concerned as to the adequacy of the roof engineering. On enquiring of the firm that manufactured the metal roof components, the plaintiffs were told that additional bolts were required at the lap and the lack of fly bracing may be problematic. This was communicated to the engineer who gave the assurance that the roof as engineered was satisfactory.

Early in 1992 one plaintiff sued the builder over a discrete dispute. On 9 May 1992 the plaintiffs obtained a report for the purpose of that dispute which stated that the roof may not withstand future wind forces; it required extra bracing and stiffening; a full report/investigation by a structural engineer should be obtained; and the western wall should be checked for stability by an engineer. The plaintiffs were aware of that report prior to 21 May 1992, the date when the defendants claimed the cause of action became statute-barred. In July 1992 the plaintiffs obtained a report from another structural engineer which stated that the western wall and roof structure were inadequate for potential wind loads and recommended that remedial work be undertaken. The plaintiffs received calculations, drawings and a quote in August 1992 and further engineering reports in late 1992 and early 1993. The dispute with the builder was compromised in early 1993. The plaintiffs did not have the remedial work carried out and the building collapsed in extraordinarily windy conditions on 6 November 1994.

On 21 May 1998 the plaintiffs sued the architect and the original engineer. The trial judge held that the building collapsed because of its negligent design and awarded damages against both the architect and engineer. On appeal, one issue was whether the trial judge should have allowed the engineer to amend its defence to plead that the action was statute-barred.

Fitzgerald JA noted that it was common ground that the plaintiffs' cause of action for negligence was complete when they first became, or with reasonable diligence would have become aware that they had sustained loss because of the defective design of the building,[77] citing Deane J's statements in *Hawkins v Clayton*[78] as applied in other cases including *Sheldon v McBeath*[79] and *Pullen*.[80] The trial judge rightly concluded that the plaintiffs' knowledge concerning defects in the roof and wall structure was confined to the 9 May report.[81] There was no evidence that the cost of the additional work to remedy the defects would have been greater than the additional cost of constructing the building without the defects. There was no evidence as to the additional cost of constructing the building if it had been satisfactorily designed and no evidence that the defects identified in the 9 May report reduced the property's market value. The defendant engineer did not prove that the plaintiffs had suffered damage prior to the expiry of the limitation period so that the plaintiffs' claim was not statute-barred. It follows that the trial judge's refusal to allow the engineer to rely on the *Limitation Act* was of no significance.[82]

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77 Above, at [24](f).

78 (1988) 164 CLR 539, 587-588.

79 (1993) Aust Torts Reports 81-208, 62-081.

80 [1993] 1 VR 27, 76-71.

81 (2001) Aust Torts Reports 81-591; [2000] NSWCA 275 [25].

82 Above, [32]-[35].

Heydon JA, as his Honour then was, noted that it was common ground that the relevant test was that in *Hawkins v Clayton*[83] as applied in *Pullen* so that the plaintiffs' claim:

> "would be statute-barred if it demonstrated that before 21 May 1992 the plaintiffs knew or could with reasonable diligence have discovered the fact that damage had been sustained in the sense that there was a latent defect in the building."[84]

Heydon JA rejected the defendant's argument that the plaintiffs' receipt of the 9 May 1992 report notified them of the defects and that the subsequent collapse of the building was the result of one or other or both these defects so that the cause of action was complete before 21 May 1992.[85] The trial judge was entitled to find on the evidence that the 9 May report did not cause the plaintiffs to discover the defect; it merely raised matters which required further reasonable enquiry of a structural engineer. The plaintiffs did this by obtaining a later report which revealed the defect making the cause of action complete.[86] The judge was entitled to conclude that it would have reasonably taken at least a month to obtain such a report.

Priestly JA agreed with both Fitzgerald JA and Heydon JA.[87]

[40] *Pullen* was most recently discussed at appellate level in *Cyril Smith and Associates Pty Ltd v The Owners – Strata Plan No 64970*.[88] Soon after construction of an eight storey unit block in 2001, problems emerged, including water penetration in some units. This caused damage, particularly rusting of the steel structure supporting the roof. In 2005 the plaintiff owners corporation sued the builder who in 2008 joined the architects. At trial the plaintiff was awarded damages against both the architect and the builder who also obtained judgment for partial contribution against the architect. The architect was successful in overturning that judgment on appeal. One issue was whether the limitation period had expired before proceedings were commenced. The Court[89] identified that the relevant defect in the building was not the design, installation or inspection of the windows but the windows themselves. The physical consequence of the defect, the ingress of water, was not itself the defect. The established legal principles did not deal specifically with the problem of a structural defect revealing itself over time progressively, with initial minor cracking leading to superficial repair when the underlying problem was far more serious and required far greater expenditure to correct, if capable of correction at all. The superficial cracking should have put the plaintiff on notice of enquiry as to its cause. If reasonable enquiry would have revealed the cause, the underlying defect had become manifest even though it was not in fact known to the owner at that time.[90] What Deane J described in *Heyman* as "consequential damage"[91] meant, in that context, consequential upon the inadequacy of the footings. The question is, whether appreciated at the time or not, was the damage a physical manifestation as later proved of the structural defect? There were ambiguities in Deane J's reasoning: damage by way of economic loss could occur before a latent defect became

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83 (1988) 164 CLR 539, 587-8.
84 [2000] NSWCA 275, [83].
85 Above, [84].
86 Above, [84]-[98].
87 Above, [1]-[14].
88 [2011] NSWCA 181.
89 Bathurst CJ and Basten and Young JJA with the judgment delivered by Basten JA.
90 Above, [15].
91 (1985) 157 CLR 424, 504 set out at [29] of these reasons.

manifest; and physical damage may accrue but not be known to be a manifestation of a latent defect.[92]

Their Honours noted that one difficulty with the reasoning of the Victorian Court of Appeal in *Pullen*[93] was that it appeared to treat the diminution in value and the consequential damage as occurring or being sustained only when the latent defect became manifest. The Court doubted whether that was the effect of Deane J's observations in *Hawkins* and made the following comment with which the present appellant takes issue:

> "17. …However, *Pullen* is authority for the proposition that even where actual damage caused by the latent defect in the building has been suffered more than six years before the commencement of the litigation, the cause of action does not accrue until the link between the physical manifestation and the underlying defect is known or ought to be known. Such a principle would constitute an exception to the rule that a cause of action in negligence accrues when material damage is first suffered.
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> 18. The potential consequences of the exception require consideration. For example, it is quite possible that damage to the fabric of a building might be repaired by the builder, at its cost, because the cause (inadequate design) was not then identified, and was not reasonably capable of identification. In such circumstances, the builder would not have joined the architect or engineer responsible for the design. When, more than six years later, the real problem becomes manifest and the architect or engineer is sued by the owner, would the builder be allowed in to recover from the architect the cost of the earlier repairs, even though that cost did not constitute damage for which the owner later sued?
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> 19. Despite considerations of this kind, it is necessary for this Court to follow the decision of the Appeal Division in *Pullen*, unless satisfied that it was clearly wrong. Not only was it not clearly wrong, but it is not necessarily wrong in any sense: all that can be said is that it appears to involve a development of the general law which may not find unequivocal support in the authorities upon which it relied."[94]

Conclusion

[41] The respondent alleged the appellant was negligent in that it breached its duty of care to the respondent by negligently designing the clubhouse and failing to adequately engineer the lower level slab, footings, intersections between the pavement and upper level slab and drainage.[95] The respondent claimed that in 2010 the lower level slab, adjoining walls and surrounding pavements were damaged and continued to be damaged as a consequence of ground heave, particularised as differential vertical movement between adjacent sections of pavement and kerbing

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92 [2011] NSWCA 181, [16].
93 Above, [17], [18].
94 Above, [19]-[21].
95 ASOC para 15, AB 441.

at the entrance to the pro-shop, south side driveway entry, lower floor;[96] widening of joints between the pavement at the entrance roadway and north of the clubhouse;[97] cracking of the pavement at the entry driveway of the clubhouse;[98] damage to sandstone facing around steel columns supporting the upper level slab at points adjacent to the pavement;[99] cracking to the block work partition wall of the bag store room on the lower level of the clubhouse;[100] seepage into the storage area adjacent to a sewerage pipe;[101] fracturing of internal sewerage pipe at lower slab level at the western end of the cart storage area;[102] cracking of tiles in the basement and toilet area;[103] popping or fracturing of the floor waste plumbing fixtures in the male changing rooms on the lower level;[104] buckling of metal louvers in the golf cart storage area on the lower level;[105] and heaving of the lower level slab, particularly through the buggy parking bays and the spike bar, at points parallel and midway between the strip footings (where cracking is evident).[106] It was the last item of this particularised damage set out in the ASOC para 18(k) upon which the appellant relied to establish its limitation defence. It is noteworthy, however, that the respondent relied on many other items of particularised damage. The respondent alleged that the appellant's negligence caused the lower level slab of the clubhouse, adjoining walls and services and surrounding pavement to be susceptible to damage or failure by ground heave and that the appellant caused the particularised damage.[107] The respondent pleaded that as a consequence it suffered damage of $866,258.

[42] The appellant pleaded the cause of action was statute-barred because the cracking pleaded in the ASOC para 18(k) occurred in 2003 so that the cause of action was complete at that time, more than six years before the respondent brought its claim.

[43] Although the ASOC could have been more carefully crafted and may need refinement, it makes clear enough that the latent defect at the centre of the claim was the appellant's negligently engineered design of the clubhouse. The preceding discussion of the relevant cases shows that for the purposes of s 10(1)(a) *Limitations Act*, the respondent's cause of action, which is at least arguably solely for economic loss, arose when it suffered economic loss, that is, when the latent defect, the alleged negligently engineered design of the clubhouse, first became known or manifest in the sense of being discoverable by reasonable diligence. That is because it was only then that the respondent suffered an actual diminution in the market value of the clubhouse.[108]

[44] It is true, as the appellant emphasises, that the High Court rejected the Canadian approach which provides that a cause of action for negligence for limitation period

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96 ASOC para 18(a), AB 42-43.
97 ASOC para 18(b), AB 43.
98 ASOC para 19(c), AB 43.
99 ASOC para 18(d), AB 43.
100 ASOC para 18(e), AB 43.
101 ASOC para 18(f), AB 43.
102 ASOC para 18(g), AB 43.
103 ASOC para 18(h), AB 43.
104 ASOC para 18(i), AB 43.
105 ASOC para 18(j), AB 43.
106 ASOC para 18(k), AB 43.
107 ASOC para 19; AB 43-44.
108 *Sutherland Shire Council v Heyman* (1985) 157 CLR 424, 503-505; *Hawkins v Clayton* (1988) 164 CLR 539, 587-588; *Bryan v Maloney* (1995) 182 CLR 609, 623; *Pullen v Gutteridge Haskins & Davey* [1993] 1 VR 27, 71; *Sheldon v McBeath* (1993) Aust Torts Reports 81-209, 62-081; *Sherson & Associates Pty Ltd v Bailey* (2001) Aust Torts Reports 81-591, [2000] NSWCA 275, [24(f)];[83].

purposes arises in cases of latent defects causing economic loss when the material facts on which the cause of action is based have been discovered or ought to have been discovered by reasonable diligence.[109] It is also true, as the appellant emphasises, that the application of the Canadian test to the present case would have resulted in the summary judgment application being refused, as it was here. But that is irrelevant. The duty of Australian judges is to apply the law in Australia to the established facts. This is an area of Australian law which is developing incrementally as courts apply the principles established in *Heyman* and *Hawkins v Clayton* to the infinitely variable factual circumstances arising in individual cases.

[45] It is true that *Wardley*,[110] *Bryan v Maloney*[111] and *Sheldon v McBeath*[112] stated that damage was sustained when a latent defect first became known or manifest without repeating Deane J's qualifying words in *Hawkins v Clayton*[113] "in the sense of being discoverable by reasonable diligence".[114] But those cases, unlike *Pullen*,[115] *Sherson*[116] and the present, did not concern an alleged latent defect of faulty building design where damage appeared incrementally, worsened over time and the defendant, upon whose advice the plaintiff could be expected to rely, advised the damage was caused by matters other than the defendant's faulty design. The application of the established principles in such cases is particularly difficult. The principles to be applied are those stated by Deane J in *Hawkins v Clayton*,[117] with which Mason CJ and Wilson J agreed:[118] damage by way of pure economic loss is suffered when the latent "defect was actually discovered or became manifest, in the sense of being discoverable by reasonable diligence".[119]

[46] It is true, as the appellant emphasises, that it produced affidavit evidence to the effect that the respondent was aware of substantial cracking in the buggy parking area as early as 2003 and that for limitation period purposes the critical date is 16 June 2005. Indeed, the architects' Mr Bray described "a very large crack", "massive", 10 millimetres wide with the slab lifting 20 millimetres from the level and that this damage was associated with ground heave. Mr Bray's defects liability period expiration inspection notice identified the cracking in December 2004. The respondent paid the builder an additional $25,000 to rectify the cracks and other associated matters.[120] But the appellant's Mr Nagel, who was the engineering expert engaged by the respondent at the time, agreed that he recommended as a solution limiting the watering of plants and checking the drainage. Neither he, Mr Boyce nor Mr Bray advised the respondent that this damage may be a manifestation of faulty engineering design.

[47] By contrast, the respondent's Mr Whitson, who left his position with the respondent in about 2008, described the 2003 cracking as "minor". He said he accepted Mr Nagel's advice that it was caused by overwatering, drainage problems and unanticipated ground heave, not the appellant's faulty design. He deposed that the builder carried out the repairs recommended by Mr Nagel and no further damage to

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109 *Kamloops v Nielsen* (1984) SCR 2; *Central Trust Co v Rafuse* (1986) 2 SCR 147.
110 (1992) 175 CLR 514; Deane J, 540.
111 (1995) 182 CLR 609; Mason CJ, Deane and Gaudron JJ, 617.
112 (1993) Aust Torts Reports 81-209, 62081 Handley JA.
113 (1988) 164 CLR 539.
114 Above, Deane J, 588.
115 [1993] 1 VR 27, 78-79.
116 (2001) Aust Torts Reports 81-591; [2000] NSWCA 275, [32]-[35] and [84]-[98].
117 Above, 587-588.
118 Above, 543.
119 Above, 588.
120 AB 225.

that area emerged. Further, the respondent's Mr Sharpless deposed that aspects of damage to the clubhouse steadily worsened after 2006 and only then did it become clear they may not be "simple maintenance issues" or "minor cosmetic matters". This caused the respondent to conduct further investigations which ultimately revealed the alleged faulty engineering design, well within the limitation period.

[48] There was therefore evidence that the respondent considered, on the appellant's advice, that the cracking referred to in the ASOC para 18(k) was the result of overwatering and minor drainage issues of the kind expected when constructing a new building, not the appellant's faulty design. If that evidence was accepted, the 2003 cracking was not a manifestation of the faulty design as long as the faulty design was not then discoverable by reasonable diligence.[121] At that time the respondent honestly could have informed any notional purchaser that the respondent's engineer had advised that the cracking was minor, would soon settle and was neither structural nor related to faulty design. If the notional purchaser accepted that advice the respondent could have sold the clubhouse then for its market value and would not have suffered any loss.[122] It may be that ultimately a trial judge will find that the respondent acting reasonably should have made further enquiries in 2003 or that a prudent notional purchaser observing the cracking in 2003 would have obtained independent engineering advice and discovered the faulty design. In that case, the faulty design would have become manifest in 2003 and the respondent would have suffered either direct physical damage or resultant economic loss or both so that its action would be statute-barred.

[49] On the other hand, if these findings were resolved in favour of the respondent, economic loss did not arise until the respondent actually discovered the faulty design or, using reasonable diligence, discovered that the faulty design had become manifest. Its economic loss would be the loss in value of the clubhouse arising from the faulty design.

[50] Contrary to the appellant's submissions, I consider *Pullen* was an orthodox application of the principles established in *Heyman* and *Hawkins v Clayton*, albeit an incremental development of those principles to the facts in that case, a development of the kind envisaged by Deane J in *Wardley.*[123] *Pullen* has been cited since with approval by intermediate appellate courts in cases including *Sherson*, *Farr* and *Cyril Smith*.

[51] The plaintiff was unsuccessful in *Farr*, but *Farr* can be distinguished from *Pullen*, *Sherson* and the present case. Chesterman J found that it was not an instance of pure economic loss; it concerned directly sustained physical injury. Further, his Honour found that the plaintiff knew at an early point in time that the water intake screens did not work and why they did not work so that the limitation period had expired when it brought its cause of action. His Honour's observations about the unorthodoxy of recovering economic loss for damage suffered before the cause of action was complete[124] must be read in that context and do not assist the appellant.

[52] The New South Wales Court of Appeal observed in *Cyril Smith* that the application of *Hawkins v Clayton* to circumstances pertaining in *Pullen* meant that the cause of action there did not accrue until the link between the manifest damage and the

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121 *Hawkins v Clayton*, 587-588.

122 Cf *Sheldon v McBeath* (1993) Aust Torts Reports 81-209, 62-081.

123 (1992) 175 CLR 514, 540-541.

124 [2001] QSC 60, [71].

underlying defect is known or ought to be known by the plaintiff. That may be the effect of the application of the principles in *Hawkins v Clayton* to the facts in *Pullen.* But in my view, despite the obiter remarks emphasised by the appellant in *Cyril Smith*, the test which trial judges should apply is that set out in *Hawkins v Clayton* and, where the facts require it, as developed in *Pullen*.

[53] Ordinarily, a cause of action for tortious negligence is complete when there is any manifestation of damage which is ultimately found to be connected to the alleged negligence. But it is at least arguable that this is a case of pure economic loss where in Australia that principle has been modified. The incremental development in *Pullen* of the legal principles established in *Hawkins v Clayton* has been followed in a number of jurisdictions. Until the High Court says otherwise, the cause of action in the present case was complete when the respondent suffered economic loss, that is, when the respondent had actual knowledge of the appellant's faulty engineering design or when the faulty design itself became manifest or could be discovered by reasonable diligence.

[54] The application of those principles in this case will require many and various factual findings to be made at trial as to the disputed issues between the parties. This case demonstrates why courts are reluctant to grant summary judgment based on a limitation defence where the facts are disputed. The relevant factual disputes here include the nature and extent of the damage; when it arose; whether it is a case of pure economic loss or direct physical injury to the fabric of the building; what was required of the respondent by way of reasonable diligence; and at what point the manifest damage caused the respondent economic loss. As the appellant's submissions demonstrate, the respondent's case is not without difficulties. Whether it is ultimately successful will turn on the resolution of many keenly disputed factual matters at trial. It was for the appellant to establish the limitation defence was so clear that it should be granted summary judgment. It did not demonstrate unequivocally that the respondent had suffered economic loss arising from the alleged faulty design when it became aware in 2003 of the cracking particularised in the ASOC para 18(k). The primary judge correctly concluded that the appellant's application for summary judgment should be dismissed.

[55] I would dismiss this appeal with costs.

[56] **HOLMES JA:** I have had the benefit of reading the President's comprehensive outline of the factual and pleading background to this case as well as her helpful summary of the authorities. However, I have reached a different conclusion as to their effect and, consequently, as to what should be the outcome in this case.

[57] The resolution of the appeal, it seems to me, depends on whether, when there is physical damage emanating from a latent building defect, the cause of action in a claim for economic loss arising from the defect accrues on the appearance of the damage or only once the damage is traceable to its source by the application of reasonable diligence.

[58] In *Sutherland Shire Council v Heyman*, the first of the decisions in which Deane J addressed the subject of economic loss consequent on a latent building defect, he described as his preferred approach that loss or injury was sustained only when the defect (inadequacy of footings in that case) was "first known or manifest".[125] The question about whether a defect is manifest once physical signs of it emerge, or only

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125 (1985) 157 CLR 424 at 505.

once those signs are recognised (or should be) as related to the defect, arises from Deane J's use of a puzzling turn of phrase in *Hawkins v Clayton*[126],

> "Commonly in such cases, the building never existed and was never owned without the defect and (in the absence of consequential collapse or physical damage or injury) the only loss which could have been sustained by the owner was the economic loss which would be involved if and when the defect was actually discovered or became *manifest, in the sense of being discoverable by reasonable diligence*, with the consequence that the damage was then sustained…"[127] (emphasis added)

[59] It is difficult to see in what sense something which is manifest can be merely discoverable, but an understanding of the context of that passage is necessary. Deane J had rejected the proposition, endorsed in the Canadian case of *Central Trust Co v Rafuse*,[128] that time began to run only when the plaintiff discovered, or could on reasonable inquiry discover, that he had sustained damage. He went on to doubt the correctness of a submission that an earlier Canadian case, *Kamloops v Nielsen*,[129] also stood for that proposition. It, like an earlier English decision, *Sparham-Souter v Town and Country Developments (Essex) Ltd*,[130] concerned economic loss consequent on a latent building defect in the form of inadequate foundations.

[60] It was in reference to cases of that kind that Deane J made the remark set out above. Consequently, it is important to note that in neither of those cases had the defect manifested itself in any overt damage to the buildings in question within the six years before the action was commenced (the relevant limitation period in each case being six years). In *Kamloops*, the inadequacy of the foundations could not have been observed unless the owner crawled under the building to inspect them, and in *Sparham-Souter*, there was nothing to alert the purchasers to the defect until cracks began to appear in the buildings three or four years before the writ was issued. That fact explains Deane J's exclusion, in that part of the passage in parenthesis, of cases where there was "consequential collapse or physical damage or injury". What follows is that in speaking of a defect which was discovered or discoverable, Deane J was speaking of knowledge, actual or constructive, of a defect the existence of which was not evidenced by consequential physical damage to the building in question.

[61] Notably, Deane J did not repeat the extended meaning he had given the word "manifest" in *Hawkins v Clayton* when he returned to the subject of economic loss on later occasions. In *Wardley Australia Ltd v Western Australia*,[131] he said that it was when

> "some actual adverse consequence of the negligence is known or becomes manifest"[132]

that the action in negligence for pure economic loss accrued. In *Bryan v Maloney*[133] Mason CJ and Deane and Gaudron JJ in a joint judgment referred to economic loss sustained when the inadequacy of the dwelling's footings

> "first becomes manifest by consequent damage to its fabric"[134].

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126 (1988) 164 CLR 539.
127 Above, 587-588.
128 (1986) 31 DLR (4th) 481.
129 [1984] 2 SCR 2.
130 [1976] QB 858.
131 (1992) 175 CLR 514.
132 Above, 540.
133 (1995) 182 CLR 609.
134 Above, 623.

Both of those forms of expression would suggest that upon evidence of an underlying defect emerging in the form of physical damage, such as cracks, any resulting economic loss is then sustained, whether or not that damage is then capable of being attributed to the defect.

[62] Notwithstanding the dicta of the New South Wales Court of Appeal in *Cyril Smith & Associates Pty Ltd v The Owners-Strata Plan No 64970*,[135] I do not read *Pullen v Gutteridge Haskins & Deavey Pty Ltd*[136] as saying anything different. The Appeal Division of the Victorian Supreme Court in *Pullen* accepted Deane J's view as representing the law, articulating it as follows:

> "Time began to run in the present case when the latent defect first became known or manifest. The latent defect was the inadequacy or unsuitability of the footings..."[137]

[63] In *Pullen*, the court had to deal with two questions: whether the defects in the swimming complex were known (actually or constructively) to the appellants and whether they were manifest. It was in the context of what was known that the court referred to the respondent's expert advice to the appellant suggesting that the problems with the pools were not the product of inadequate footings. The court made the point that so far as both knowledge and manifestation were concerned, some degree of settlement of the structures did not necessarily point to inadequacy of the footings. That was because the design, quite properly, allowed for some degree of settlement. Accordingly, minor settlement did not indicate either to the appellants or objectively that the footings were inadequate.[138]

[64] The court in *Pullen* reviewed the various features of the evidence which were said to show that the inadequacy of the footings had become manifest. It was not satisfied that some of the evidence of observations of damage in fact related to the period before the critical date (that is, six years before the writ was filed). Nor was it satisfied that other forms of damage were in fact a manifestation of the inadequacy of the footings. Having dealt with the absence of any actual manifestation of the latent defect, the court went on to say that the respondent had also failed to show that the inadequacy of the footings was known to the appellant before the critical date; in that regard the statements made by the respondent about the causes of the observable damage were relevant.

[65] It does not seem to me, then, that *Pullen* can be regarded, as was suggested in *Cyril Smith*, as

> "authority for the proposition that even where actual damage caused by the latent defect in the building has been suffered more than six years before the commencement of the litigation, the cause of action does not accrue until the link between the physical manifestation and the underlying defect is known or ought to be known."[139]

Rather, *Pullen* takes the conventional approach that the cause of action accrues where actual damage caused by a latent defect is manifested or the existence of the underlying defect is known or ought to be known.

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135 [2011] NSWCA 181.
136 [1993] 1 VR 27.
137 Above, 71.
138 Above, 79.
139 At [17].

[66] In the present case, in my view, the latent defect – the slab which was faulty in design, being unable to tolerate ground heave – became manifest, on the respondent's own pleadings and evidence, when the cracking in the buggy parking area occurred in 2003. It is not to the point that the respondent was misled as to the cause of the cracking. It was the product of the defect and was plainly not so minimal as not to produce economic loss: the quote for repair was $25,000. That was the point at which the cause of action accrued. In my view the appellant is right to contend that the action was brought outside the limitation period and they were entitled to summary judgment.

[67] I would allow the appeal, set aside the orders made at first instance and give judgment for the appellant.

[68] **ANN LYONS J:** The President, in her very detailed judgment, has very comprehensively outlined the factual background in this case as well as a summary of the leading cases and the essential issues which are in contention between the parties. I shall not repeat that analysis.

[69] It is uncontroversial that an application for summary judgment should only succeed in cases where it is clear that the plaintiff has no real prospects of success and there is no need for a trial. I agree with the President that when an application for summary judgment is based on a statute of limitations defence then it should only succeed if the evidence about the nature of the alleged damage which has been sustained is such that a trial is not required to settle any controversy in relation to the facts. It would seem to me that in this regard a high degree of certainty is required and it is only in the clearest of cases that an application for summary judgment should succeed.

[70] I do not consider that this is such a case. This is a case involving a latent building defect causing economic loss and the question to be answered is: "when did the respondent's cause of action against the appellant first arise?" I do not consider that the determination of that question in the circumstances of this case is a simple exercise. There is no doubt that the relevant legal principles were established in *Hawkins v Clayton*.[140] I agree however with the President's conclusion that whilst it is the duty of Australian judges to apply the law in Australia to established facts this is an area of Australian law which is indeed developing incrementally as courts apply the principles established in *Heyman*[141] and *Hawkins v Clayton* to the various factual circumstances which inevitably arise.

[71] I agree, in particular, with the President's view that the application of the established legal principles is difficult in cases of latent defects such as *Pullen* and the present case where the initial damage of a cracked slab appeared and was categorised by both parties in 2003 in a particular factual way. Subsequently however conflicting evidence arises about the cause and the extent of the damage. I consider there is still a factual controversy between the parties and that this is a case which requires a number of factual findings to be made. Those findings will need to be made at trial.

[72] I also note the clear statement by Barwick CJ, Gibbs and Stephen JJ held in *Theseus Exploration NL v Foyster*[142] that even if the facts are settled it was still open to

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140 (1988) 164 CLR 539.
141 (1985) 157 CLR 424.
142 (1972) 126 CLR 507.

a judge in a summary judgment application to take the view that a hearing was required given the extent and complexity of the legal issues in relation to those settled facts. In that case Gibbs J held:[143]

> "No doubt the remarks in these cases were not intended to preclude the exercise of some discretion by a judge to whom application for summary judgment is made in deciding whether the question of law raised is so difficult that it ought not be decided summarily, and no doubt also sometimes some explanation or reference to authorities will be necessary to enable a judge to decide whether a question is really unarguable. However in the present case the questions were serious and disputable and, assuming that the learned primary judge had a discretion, it was entirely proper for him to decline to dispose of them in chambers."

[73] I consider that not only were factual controversies raised before the primary judge but that questions were also raised which were both serious and disputable. In this case as the primary judge noted it was not a case where it could be said that "the plaintiff has no real prospect of succeeding on all or part of its claim because its claim is statute barred".

[74] I consider that the primary judge was correct in dismissing the application for summary judgment.

[75] I would dismiss the appeal with costs.

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143 Above, 515.