SUPREME COURT OF QUEENSLAND

CITATION:	*Maybury v Brodie* [2026] QCA 175
PARTIES:	**HELEN LESLEY MAYBURY** (first appellant) **FREDERICK MAYBURY** (second appellant) **v** **GREGORY WILLIAM BRODIE** (first respondent) **GRIETHA LUKEA BRODIE** (second respondent)
FILE NO/S:	Appeal No 1619 of 2026 SC No 6803 of 2023
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane – Unreported, 20 March 2026 (Callaghan J)
DELIVERED ON:	15 September 2026
DELIVERED AT:	Brisbane
HEARING DATE:	8 September 2026
JUDGES:	Doyle JA, Thomson AJA, Copley J
ORDERS:	**1. Appeal is allowed.** **2. Orders 1, 2, 3 and 4 of the Order made 20 March 2026 are set aside.**
CATCHWORDS:	PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – ENDING PROCEEDINGS EARLY – SUMMARY DISPOSAL – SUMMARY JUDGMENT FOR PLAINTIFF OR APPLICANT – where the applicant sought summary judgment on the basis that the respondent negligence claim was statute-barred – where the limitation issue depended upon when the cause of action accrued – where other claims for breach of statutory duties and nuisance remained to be tried – whether the respondent had no real prospect of successfully defending the application – whether there was no need for a trial of the negligence claim *Body Corporate and Community Management Act 1997* (Qld), s 59, s 167, s 229 *Land Title Act 1994* (Qld), s 115Q *Limitation of Actions Act 1974* (Qld), s 10 *Uniform Civil Procedure Rules 1999* (Qld), r 293

Black v Gold Coast Pickleball Association Inc [2025] QCA 236, applied
Bolton Properties Pty Ltd v JK Investments (Australia) Pty Ltd [2009] 2 Qd R 202; [2009] QCA 135, cited
Bond v Nottingham Corporation [1940] 1 Ch 429, cited
Bryan v Maloney (1995) 182 CLR 609; [1995] HCA 17, cited
Byrne v Australian Airlines Ltd (1995) 183 CLR 410; [1995] HCA 24, considered
Carter v Cole [2006] EWCA Civ 398, cited
Council of the Shire of Noosa v Farr [2001] QSC 60, considered
Hare v Van Brugge (2013) 84 NSWLR 41; [2013] NSWCA 74, cited
Hawkins v Clayton (1988) 164 CLR 539; [1988] HCA 15, cited
HS South Brisbane Pty Ltd v United Voice (2019) 2 QR 556; [2019] QSC 274, cited
Hunt Leather Pty Ltd v Transport for NSW (2025) 100 ALJR 89; [2025] HCA 53, cited
Jones v Pritchard [1908] 1 Ch 630, cited
McQueen v Mount Isa Mines Ltd [2018] 3 Qd R 1; [2017] QCA 259, cited
Melisavon Pty Ltd v Springfield Land Development Corporation Pty Ltd [2015] 1 Qd R 476; [2014] QCA 233, cited
Montana Hotels Pty Ltd v Fasson Pty Ltd (1986) 61 ALJR 282; [1986] UKPC 55, cited
Pullen v Gutteridge, Haskins & Davey Pty Ltd [1993] 1 VR 27; [1993] VicRp 4, cited
Sheldon v McBeath (1993) Aust Torts Reports 81-209, cited
Sherson & Associates Pty Ltd v Bailey [2000] NSWCA 275, cited
Sutherland Shire Council v Heyman (1985) 157 CLR 424; [1985] HCA 41, applied
Wardley Australia Ltd v Western Australia (1992) 175 CLR 514; [1992] HCA 55, cited

COUNSEL:	F L Harrison KC, with P G Jeffery, for the appellants J W Peden KC, with K A Gothard, for the respondents
SOLICITORS:	Deakin Milani for the appellants Bradley Rees Hogan for the respondents

[1] **DOYLE JA:** This is an appeal from orders:

(a) dismissing the appellants' claims in negligence and for breach of statutory duties as against the respondents;

(b) striking out parts of the appellants' fifth further amended statement of claim (**the statement of claim**) against the respondents for nuisance.

[2] One of the appellants is the registered owner of, and the appellants occupy, unit 342 in the Contessa Condominiums. The primary judge did not differentiate between the

appellants (the first appellant alone being a registered owner of the unit) nor did the parties do so in their submissions below or on appeal. Accordingly in these reasons I shall refer to them collectively as if both were owners of unit 342.

[3] The first named defendant in the proceedings is the Body Corporate for that building, the respondents (the second and the third defendants) are the owners of unit 351 and unit 341, and the fourth defendant to the proceedings is a builder who did work on the building in 2024. The respondents were the applicants below and the other defendants are not parties to this appeal.

[4] Unit 351 is the unit above that owned and occupied by the appellants, while unit 341 is on the same level and adjoining unit 342. The respondents caused a staircase to be constructed connecting units 341 and 351. Unit 351 has a swimming pool as part of the unit.

[5] The appellants essentially contend that:

(a) as a result of the respondents undertaking alterations to the pool in their unit and in constructing a staircase between units 341 and 351, breaches were introduced in the membrane which is in the slab of level 35 with the result that water leaked from unit 351 into unit 342 via the breaches in the membrane by at least October 2012;

(b) further, had the respondents not refilled the pool in unit 351 after it was emptied during some remediation work, or not allowed water to be maintained in that pool, water would not have leaked from unit 351 into unit 342;

(c) the leaking of the water has created and is a nuisance and has caused damage to unit 342.

[6] The appellants were not the owners of unit 342 at all times. The first appellant contracted a purchase of that unit in October 2018 and settled that contract on 20 November 2018. In the course of their purchase, and before completion, the appellants allege that an officer of the Body Corporate informed them that there had been historical leaks into their unit but that those leaks had been fixed. They observed a drip tray in the walk-in wardrobe of the main bedroom but again were told that was a precautionary step only.

[7] In the first half of 2019 and again in May 2020, they also became aware of mould damage which in each case they were assured was old, that the leak had been fixed and that there was no need to do anything.

[8] All that changed in November 2020 when it is alleged, for the first time, they became aware of what is pleaded to be "an ongoing leak through the level 35 slab and pool undercroft into unit 342." The water ingress from unit 351 is pleaded to have been into unit 342 and to have caused "mould growth…including varieties of mould potentially hazardous to human health". They commenced proceedings in 2023 against the Body Corporate, the respondents and by later amendment, the builder.

[9] That claim against the respondents is advanced on three bases:

1. a claim for negligent breach of duty;
2. a claim for breach of various claimed statutory duties;
3. a claim for nuisance.

The Application Below

[10] The respondents applied for summary judgment in respect of the claims made against the respondents or alternatively that the statement of claim be struck out in whole or part.

[11] In argument at first instance (as clarified on appeal) the respondents sought:

(a) Summary judgment only in relation to the claim in negligence and on the basis of the claim being commenced outside the time permitted by s 10(1)(a) of the *Limitation of Actions Act*;

(b) That the statement of claim otherwise be struck out in respect of the claims for breach of the statutory duties and the claim in nuisance (but without any order seeking to prevent the appellants repleading the claims).

[12] As will be apparent, the orders in fact made by the primary judge went further than this.

Primary Judge's Reasons[1]

[13] The respondents contended that the claims for negligence or for breach of any statutory duty would be statute barred and accordingly have no prospects of success. In that respect the primary judge proceeded on the basis of the facts pleaded in the amended statement of claim. This involved an assumption (urged on his Honour by the respondents) that given this was the fifth version of the pleading the appellants' case "might reasonably be thought to be settled". As emerged on appeal, the respondents relied not only on the statement of claim but upon the various reports or documents referred to in it as if all aspects of those documents were to be accepted as established.

[14] As to the contention that the appellants' claim in negligence was statute barred his Honour stated:

> "This means that the cause of action accrued upon the emergence of the relevant physical defect in the building, which in this case means the emergence of apertures through which water transgressed into the plaintiffs' residence with consequential diminution in the value of the building. This was, as I have said, according to the pleadings, sometime in 2011 or 2012. A cause then arose which lay with the incumbent owner of the building, self-evidently not with the plaintiffs, but nevertheless, it arose at that time.
>
> I have not ignored the fact that in their Reply, the plaintiffs have pleaded that the effect of the defect "abated" as the result of remedial works undertaken in 2012 and that these were effective until 2018 or 2019. Nevertheless the plaintiffs plead that it was the action of the defendants that caused the apertures to open and that they did not ever fix them properly. It is also true that the damage which was later to emerge and which was seemingly the motivating force behind this litigation was of a very different kind from that which originally

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1 *Maybury v Body Corporate for Contessa Condominiums CTS 6203*, unreported, Callaghan J, SC No 6803 of 2023, 20 March 2026 (**Reasons or R**).

occurred and was ultimately to cause much greater diminution in the value of the building such that the plaintiffs' claim exceeds a million dollars.

It does not appear that anything as intrusive as mould was an issue prior to the plaintiffs' purchase of their residence. However, there must have already been an actual loss (albeit not to the plaintiffs themselves) with the result that the cause of action had accrued. Once that happens subsequent loss and damage caused by the same issue became attributable to the same cause. See *McQueen v Mount Isa Mines Ltd* [2018] 3 Qd R 1.

In the result, the conclusion must be reached that in respect of the action for negligence, the claim is not the plaintiffs' to make but belonged to the owner of their residence as at the time the defendants are said to have inflicted the damage which caused the loss, as at the manifestation of that loss. That claim for economic loss as a result of negligence accrued no later than, by reference to the events described in the claim, July 2012, when the parties were aware that the leak was as a result of cracks in the slab and a compromised waterproof membrane. Time began to run at that point, with the result that the claim for negligence is now statute-barred. The plaintiffs enjoy no prospect of success on that part of their claim, and so in that regard, summary judgment should be entered for the defendants."

[15] As to the statutory duty claims, the primary judge concluded that the *Body Corporate and Community Management Act 1997* (the **Body Corporate Act**) and its bylaws, did not create any civil claim actionable by the appellants for breach of any duty imposed by them. His Honour did not separately consider whether, in any event, any breach of such duty could itself be statute-barred under the *Limitation of Actions Act*.

[16] The other duty alleged to arise under a statute was the statutory easement of shelter under the *Land Title Act 1994*. His Honour said of that claim that:

"The only remedy available under the section identified is one that enables the plaintiffs to enter into another lot to 'maintain or replace' something. It follows that no remedy is available to the plaintiffs in the current circumstances pursuant to that statute."

[17] Finally, as to the claim to nuisance, his Honour recorded that that was in a different category. His Honour recorded that the respondents conceded that an action for nuisance may renew each time damage is caused and accordingly no application was made for summary judgment on the basis of the *Limitation of Actions Act*. Rather the respondents urged that it was an essential element of the claim that "fault is pleaded against" the respondents relying upon the Privy Council decision in *Montana Hotels Pty Ltd v Fasson Pty Ltd* (1986) 61 ALJR 282. His Honour agreed, finding that the element of "fault" of the respondents meant it needed to be pleaded that the respondents continued or adopted that nuisance or did not, without undue delay, remedy it when they became aware of it or with ordinary reasonable care should have become aware of it.

[18] On the basis that fault had not been pleaded, his Honour struck out various paragraphs of the statement of claim.

Test for Summary Judgment

[19] UCPR 293(2) provides:

> "(2) If the court is satisfied—
>
> (a) the plaintiff has no real prospect of succeeding on all or a part of the plaintiff's claim; and
>
> (b) there is no need for a trial of the claim or the part of the claim;
>
> the court may give judgment for the defendant against the plaintiff for all or the part of the plaintiff's claim and may make any other order the court considers appropriate."

[20] As to the first of these requirements, the approach to be adopted in relation to applications for, and the grant of, summary judgment was recently stated in *Black v Gold Coast Pickleball Association Inc* [2025] QCA 236, as follows (at [15]):

> "The Court may grant summary judgment where a party has no real prospect of succeeding – on its claim or its defence – and there is no need for a trial of the claim. Like other ways of ending proceedings early, summary judgment prevents parties wasting costs on a claim that has no prospect of succeeding and ensures the court's resources are used properly, for claims that require a trial. The question is not whether a claim is hopeless or bound to fail. It is whether there is a real as opposed to a fanciful prospect of success. If there is a real prospect of success, then the claim should go to a trial. The interests of justice usually require disputed facts and issues to be the subject of evidence and submissions at a trial. Summary judgment should not be given unless it is just to do so. It is given only in the clearest of cases."

[21] There are, however, two cumulative requirements before the court may give judgment or make other order: satisfaction that the plaintiff has 'no real prospects'; and satisfaction that there is no need for a trial on the claim or the part of the claim: *Bolton Properties Pty Ltd v JK Investments (Australia) Pty Ltd* [2009] 2 Qd R 202 per Holmes JA at [2]; per Daubney J at [73], [78]. Often, of course, once it is determined that the claim has no real prospects the conclusion is readily reached that there is no need for a trial. But in a case where the facts or many of the facts which are relevant to the claim said to be statute barred will in any event be relevant to and litigated for claims not said to be statute barred, it might readily be concluded that there is a need for a trial of the facts giving rise to the claim said to have no real prospects in any event so as to refuse summary judgment on that basis. This is especially so when the claim said to have no prospect would add little to the trial if judgment was not entered.

Caution in Summary Determination of Limitations Issues

[22] Section 10(1)(a) of the *Limitation of Actions Act 1974* (Qld) provides relevantly that an action founded on tort must not be brought more than six years after "the date on which the cause of action arose".

[23] Where a defendant seeks summary judgment under r 293 of the *UCPR* on the basis that a negligence claim is statute-barred under s 10(1)(a) of the *Limitation of Actions*

Act 1974, the defendant bears the onus of establishing that the cause of action accrued outside the limitation period and that the limitation issue can be determined without a trial. Courts are appropriately hesitant to determine limitation issues at an interlocutory stage (even as a separate issue) given the question is or at least usually is highly fact dependent.

[24] In *Wardley Australia Ltd v Western Australia* (1992) 175 CLR 514 Mason CJ, Dawson, Gaudron and McHugh JJ said at 527:

> "Economic loss may take a variety of forms and, as Gaudron J noted in *Hawkins v. Clayton*, the answer to the question when a cause of action for negligence causing economic loss accrues may require consideration of the precise interest infringed by the negligent act or omission. The kind of economic loss which is sustained and the time when it is first sustained depend upon the nature of the interest infringed and, perhaps, the nature of the interference to which it is subjected. With economic loss, as with other forms of damage, there has to be some actual damage. Prospective loss is not enough." (footnotes omitted)

[25] The majority went on to caution against deciding such limitation questions in an interlocutory manner, at 533:

> "We should, however, state in the plainest of terms that we regard it as undesirable that limitation questions of the kind under consideration should be decided in interlocutory proceedings in advance of the hearing of the action, except in the clearest of cases. Generally speaking, in such proceedings, insufficient is known of the damage sustained by the plaintiff and of the circumstances in which it was sustained to justify a confident answer to the question."

[26] The principle was applied directly to r 293 and s 10(1)(a) in *Melisavon Pty Ltd v Springfield Land Development Corporation Pty Ltd* [2015] 1 Qd R 476. The majority (McMurdo P, Lyons J; Holmes JA dissenting) upheld the refusal of summary judgment on a limitation defence concerning a latent building defect. McMurdo P said at [26]:

> "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*. The determination of whether a statute of limitation defence is made out is a technical application of the relevant legal principles to the facts. The defendant has the onus of establishing that the plaintiff's claim is statute barred." (footnotes omitted)

[27] Lyons J said at [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."

The Negligence Claim

[28] In the hearing below, the respondents submitted (and the primary judge accepted) that "if the [respondents'] argument cannot be made out on the pleadings it should not succeed": Reasons page 2. On appeal this was explained as also involving considering the various reports or other documents particularised in the statement of claim.

The Statement of Claim

[29] The statement of claim pleads that the respondents constructed the staircase which compromised certain concrete beams and support for level 35 (statement of claim [15]). It also pleads that alterations were made by the respondents to the pool and its surrounds (statement of claim [16]). Those two activities it is said caused breaches in the membrane in unit 351 leading to water (alleged to originate from the pool and the undercroft) leaking into unit 342 (statement of claim [17]).

[30] It is alleged that the respondents were aware of this by 2011: statement of claim [18]-[19]. It is understandably, however, not pleaded that the defects (the breaches of the membrane) were known to the owner of unit 342, nor in terms is it alleged that they were manifest (discoverable by reasonable diligence) given the pleaded facts as to the leakage of water. That said, the documents particularised include Building Manager Reports and Committee meetings which would suggest the then owner was aware of the leaks and complaining about them, or at least the membrane breaches were discoverable with reasonable diligence at the time.

[31] It is pleaded in paragraph 43A of the statement of claim that:

> "In the premises pleaded in paragraphs 38 to 43, the link between the physical manifestations of damage to unit 342 and the above leaks was not known or could not have been known until November 2020 or alternatively, at the earliest, December 2018."

[32] This should be understood (and I would read it) as referring to the knowledge or means of knowledge of the appellants as distinct from the prior owner of unit 342.

[33] It is evident that there was an attempt to ameliorate the effects on unit 342 of the water leaks in late 2012 (statement of claim [20]) but without the knowledge of the owner of unit 342 (statement of claim [21]). A further leak through grouting of tiles around the pool and another breach of the membrane were identified in 2013. These apparently led to leaking to unit 342 (statement of claim [22]).

[34] The statement of claim however also alleges:

(a) That the only way to stop the leaking permanently was to replace the membrane and "until that was done, the only way to stop the leaking was to drain the pool": [29(ca)];

(b) That the respondents owed the appellants a duty inter alia to "not maintain any or any substantial quantity of water in the pool, undercroft and spa while the level 35 slab remained compromised": [49(ba)];

(c) That the respondents breached that by failing to prevent water "originating from the pool, undercroft and spa leaking into unit 342, including by draining them and not refilling them.": [55(e)].

[35] These paragraphs (read with paragraph [17]) allow a case for the appellants that the water was coming from the pool, that in any event it was possible to stop the leaking by draining the pool and leaving it empty and that the respondents had a duty to do just that until the membrane was replaced.

[36] This is a contention which was not explicitly considered by the primary judge.

When Does Cause of Action Arise

[37] The respondents contend that the appellants' claim against them is one for economic loss. The appellants purchased the unit, it is said, with whatever latent (or arguably patent) defect it had as a result of the respondents' work in introducing the staircase and around the pool. As Deane J stated in *Sutherland Shire Council v Heyman* (1985) 157 CLR 424 at 503-4:

> "[the claim] is 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 '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."

[38] This approach has been adopted and followed in *Hawkins v Clayton* (1988) 164 CLR 539 at 587-588 (per Deane J with Mason CJ and Wilson J agreeing at 543); *Bryan v Maloney* (1995) 182 CLR 609 at 617; and *Melisavon Pty Ltd v Springfield Land Development Corporation Pty Ltd*, supra at [45].

[39] Assuming the claim is solely one for economic loss, the question must be whether the defect was known to or discoverable by someone in the position of the owner or prospective purchaser of unit 342 such that the market value of the unit would be affected: *Sherson & Associates Pty Ltd v Bailey* [2000] NSWCA 275, per Fitzgerald JA at [24f] (Priestley JA agreeing); *Sheldon v McBeath* (1993) Aust Torts Reports 81-209 per Handley JA at 62,081.

[40] There is some doubt, in a case such as this, as to whether the cause of action is complete when some external feature is identified (or with reasonable diligence

identifiable) which can later be shown to have been caused by the defect the subject of the pleaded cause of action, or whether the thing that, from those external features, must be manifest (or discoverable with reasonable diligence) is the defect the subject of the pleaded cause of action. The first of these approaches draws support from *Council of the Shire of Noosa v Farr* [2001] QSC 60 at [31] relying on a passage in *Pullen v Gutteridge, Haskins & Davey Pty Ltd* [1993] 1 VR 27 at 67.

[41] On the other hand, support for the second approach is found in three appellate decisions. The first is *Pullen* itself. After discussion, their Honours concluded at page 71 that:

> "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".

[42] The same approach is taken in *Sherson & Associates Pty Ltd v Bailey* [2000] NSWCA 275, at [84] per Heydon JA (with whom Priestely JA agreed); and by McMurdo P in *Melisavon Pty Ltd v Springfield Land Development Corporation Pty Ltd*.

[43] The respondents sought on appeal to demonstrate that the leaking was known or reasonably discoverable as due to membrane breaches (though perhaps the cause of the breaches was opaque) from 2011. There is considerable force in that submission.

[44] A Building Managers Report to Body Corporate Committee dated 26 May 2011 at item (9) states:

> "**Repairs to leak in Apt 342.**
>
> The owner has requested (in writing) that remedial works associated with a water leak emanating from the concrete ceiling over his bedroom and walk in areas be attended to as soon as possible so that he can use the apartment again. Whilst the insurance company will cover resultant water damage. The cracks in the slab and the original causes of the water ingress remain the responsibility of the Body Corporate. Extensive checks have been undertaken by Excel Waterproofing to find the causes of the problem. In our opinion, the small areas North and South of the underside of the penthouse spa should be tanked and the water drained away to gauge if that stops the water running into Apt 342. We recommend that Gerry Winter be retained by the committee to provide expert advice and assistance in this difficult matter."

[45] That same entry is repeated in the report dated 2 September 2011 but with the addition that "[c]urrently, a stainless steel drain tray has been fixed to the ceiling under the cracked section of concrete where the worst of the water is coming through. No work has been carried out above the bedroom door which also has a small leak. The insurance company has approved the plaster and timber replacement in the walk in robe area and the contractors have been advised to complete the work." The Report dated 25 November 2011 notes the apartment 342 water leaks as a completed item.

[46] Savills Project Management provided a report after an inspection on 18 July 2012 which sought to identify the source of the leak. That report ruled out the pool or spa as leaking. The leak was said to be from rainwater "permeating somewhere through

the tiles on the pool deck and tracking its way over the bondek [the slab]". A similar view is summarised in the minutes of the meeting of the Committee of the Body Corporate dated 2 September 2012, and in a further Savills Project Management report of 15 August 2013. A report by Facet Consulting Engineers dated November 2013 identified the fact of the leaks and recommended that "the origin of the leaks…. be investigated". It refers to the leaks sites as being "where the waterproof membrane has been breached at level 35".

[47] The respondents also relied on the Savills Project Management report as showing that the water in the pool is not the source of the water leaking into unit 342 and further that this is supported by a report by Infracorr prepared in November 2024 (but dated 14 March 2025) which identified the water ingress to unit 342 as "related to the alteration work around the original pool and spa area and pool terrace, where the wall section between the pool and spa was removed".

[48] But it is to be recalled the application was for summary judgment and on a foundation that the claim in negligence had no real prospects because the respondents could demonstrate it was statute barred. It may be the views expressed by Savills Project Management in its report and that of Infracorr that the water is not originating from the pool, are accepted at trial. But the statement of claim alleges to the contrary.

[49] More fundamentally, in this case, the statement of claim seeks to make out a case of a continuing breach by not emptying the pool and keeping it empty so as to stop the leaks. It has not been shown (clearly) that such a claim is statute barred which is the only basis upon which the respondents contended that the claim had no real prospects of success.

Need for Trial

[50] Quite apart from the discussion above as warranting the refusal of the application for summary judgment, in this case the primary judge did not go on to also consider whether there was a need for a trial of the claim. There are in my view good reasons for refusing the application also having regard to this second component of the test in r 293(2).

[51] The respondents accepted that the nuisance claim was one which the appellants could advance (if properly pleaded). The facts of that claim turn on the leakage of water into unit 342 from sources above (namely unit 351) and how to prevent that continuing will be an issue at trial.

[52] Similarly, the respondents (as outlined above) do not contend that the claims based on the statutory duties pleaded (subject to some clarification) are claims in respect of which summary judgment was to be given. This is significant for a number of reasons. First, the facts relied on for these claims (or some of them) will be the same as those the subject of the negligence claim. Second, it is seemingly not contended now that these causes of action can be shown plainly to be statute barred.

[53] In the circumstances, and in addition to my view that the negligence claim has not been demonstrated to be one which has no real prospects (by reason of it being statute barred) there is no utility in entering summary judgment on the claim in negligence where the facts or many of them will in any event need to be tried on the remaining claims.

Summary

[54] The primary judge was in error in concluding that a clear case had been made out that the negligence claim had no real prospects of success, by reason of the operation of s 10(1)(a) of the *Limitation of Actions Act.* Further, it has not been shown that a trial of the claim is not necessary.

[55] Accordingly this aspect of the appeal is made out and the summary judgment is to be set aside.

The Statutory Duties

[56] The appellants relied in their pleading upon three relevant statutory provisions as the source of a duty of care. They are:

(a) Section 167 of the *Body Corporate Act* which states:

> "(1) The occupier of a lot included in a community titles scheme must not use, or permit the use of, the lot or the common property in a way that—
>
> (a) causes a nuisance or hazard; or
>
> (b) interferes unreasonably with the use or enjoyment of another lot included in the scheme; or
>
> (c) interferes unreasonably with the use or enjoyment of the common property by a person who is lawfully on the common property."

(b) Clause 13.1 of the By-laws in Schedule C in the Community Management Statement;

(c) Section 115Q of the *Land Title Act 1994* (Qld) which provides:

> "(1) An easement entitling the owner of a lot to have the lot sheltered by parts of a building within scheme land necessary to supply shelter exists against the lots or parts of common property where the relevant parts of the building are situated.
>
> (2) The easement for shelter under subsection (1) entitles the owner of the lot to enter a lot or common property supplying shelter under the easement to maintain or replace the shelter."

[57] The duties are pleaded as follows:

> "**Second and third defendants' duties**
>
> 48 The second and third defendants each owed duties to the plaintiffs not to:
>
> (a) use units 341 and 351 in a way that caused a nuisance or hazard or interfered unreasonably with the use or enjoyment of another lot (pursuant to s 167 of the BCCM Act);[2]

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2 There is some doubt as to whether the appellants relied on this section at first instance: see T 1-13 Line 28. But on appeal it was made plain that they do. The primary judge's reasons deal with the argument based on this section and entered summary judgment in respect of it.

(b) allow water to flow from within their lot onto another lot (pursuant to clause 13.1 of the By-laws in Schedule C to the Community Management Statement); and

(c) infringe the first plaintiff's statutory easement of shelter (pursuant to s 115Q of the Land Title Act).”

[58] As to s 167 of the *Body Corporate Act*, it prohibits the occupier of unit 351 from using or permitting the use of that unit in a way that causes a nuisance, or unreasonably interferes with the use of unit 342. It is pleaded as requiring the conduct of rectification work and in particular requiring the respondents not to refill the pool until that work was done: statement of claim [55]. The appellants rely on the test expressed in *Byrne v Australian Airlines Ltd* (1995) 183 CLR 410 at 424 where Brennan CJ, Dawson and Toohey JJ stated:

> “A cause of action for damages for breach of statutory duty arises where a statute which imposes an obligation for the protection or benefit of a particular class of persons is, upon its proper construction, intended to provide a ground of civil liability when the breach of the obligation causes injury or damage of a kind against which the statute was designed to afford protection. The question is one of the construction of the statute, although as Dixon J pointed out in *O'Connor v* S *P Bray Ltd*, an examination of the statute ‘will rarely yield a necessary implication positively giving a civil remedy’. One generalisation that can be made is that where the persons upon whom the statutory obligation is imposed are under an existing common law duty of care towards the persons whom the statute is intended to benefit or protect, the statutory prescription of a higher or more specific standard of care may, in the absence of any indication of a contrary intention, properly be construed as creating a private right.” (footnotes omitted)

[59] The primary judge concluded the pleaded statutory duties did not arise on the proper construction of the provisions relied on. The primary judge did so on the assumption (which was reasonable having regard to the written submissions made for the respondents) that the case being advanced by the respondents was that the duties alleged had no real prospects of success as a matter of construction of those statutes.

[60] On appeal, the respondents submitted that the reference below in submissions made on their behalf to the application being for a ‘strikeout’[3] was to be understood as referring to the pleading as concerns all three of the statutory duties. Given that clarification, I will express only briefly my views on why in any event summary judgment should not have been entered in respect of the claims. But it is appropriate, in my view, for this court to proceed on the basis now urged by the respondents and accordingly set aside the summary judgment in respect of these claims.

[61] It may be accepted that s 167 is intended to protect other persons and while other unit holders will comprise a likely section of those to be protected, the protection will extend to occupiers and indeed others. By paragraph 48A of the statement of claim it is pleaded that the section imposed an obligation for the benefit of a class of persons of which the appellants were members. While there is no language used which

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3 T 1-12 line 9.

implies that a civil remedy in damages is intended to be available for contravention of the obligations in the section, the final sentence of the passage quoted above from *Byrne v Australian Airlines Ltd* provides some support for the appellants' pleaded statutory duty in this case. That is because the obligation in s 167 extends beyond not merely causing a nuisance (for which a common law right already exists) to other matters which seemingly need not meet that description.

[62] There are other provisions of the *Body Corporate Act* which provide for the resolution of disputes between unit holders and which are stated to be the exclusive remedy: see s 229. However, these matters of construction were not fully explored before this Court, and accordingly no concluded view can or ought to be expressed as to them. The proper construction of the *Body Corporate Act* and how it applies to the facts as found is something which should be decided at trial.

[63] The appeal record did not include clause 13.1 of the By-laws in schedule C of the Community Management Statement, but the facts as pleaded are to be taken as correct for present purposes. The Community Management Statement does not appear to have been in the material before the primary judge. A view should not have been taken as to it imposing or not imposing a statutory duty without being able to construe the clause in its proper context. Additionally, the provisions of the *Body Corporate Act* may themselves bear upon that issue. It is noted that s 59 of the *Body Corporate Act* provides the Community Management Statement binds the members and has effect as if it included mutual covenants to observe its provisions. Such an obligation (a promise) might be capable of being described as a duty to do or prevent something occurring. Without further argument, I would not conclude that some claim arising from the breach of clause 13.1 is unavailable to the appellants.

[64] Finally as to s 115Q of the *Land Title Act 1994* (Qld), it creates an easement entitling the owner of a lot to have the lot sheltered by such parts of the building as are capable of providing shelter. Section 115Q(2) confers a right to enter the burdened lot or common property for the purpose of maintaining or replacing the shelter.

[65] Section 115Q(2) reflects the position at common law that the grant of an easement carries such ancillary rights as are reasonably necessary to make the easement effective: *Jones v Pritchard* [1908] 1 Ch 630 at 638.

[66] That right is distinct from any positive obligation upon the servient owner to undertake the repairs. *Bond v Nottingham Corporation* [1940] 1 Ch 429 concerned an easement of support supplied by an adjoining building. Sir Wilfrid Greene MR said, at 438-439:

> "The owner of the servient tenement is under no obligation to repair that part of his building which provides support for his neighbour. He can let it fall into decay. If it does so, and support is removed, the owner of the dominant tenement has no cause for complaint. On the other hand, the owner of the dominant tenement is not bound to sit by and watch the gradual deterioration of the support constituted by his neighbour's building. He is entitled to enter and take the necessary steps to ensure that the support continues by effecting repairs, and so forth, to the part of the building which gives the support."

[67] The general principles were traversed by Longmore LJ in *Carter v Cole* [2006] EWCA Civ 398, at [8], and subsequently adopted by Barrett JA in *Hare v Van Brugge* (2013) 84 NSWLR 41, at 48 [28].

[68] Accordingly, I incline to the view that s 115Q is not to be construed as imposing upon the servient owner a positive duty to maintain or replace the shelter.

[69] But given that the respondents (now) do not contend that the claims have no real prospects of success, and as the facts as to each of these statutory duties are highly likely to overlap to some extent with the nuisance claim and the negligence claim, the proper course is to set aside the summary judgment which has been entered.

The Nuisance Claim

[70] The elements of the cause of action for nuisance have been recently stated in *Hunt Leather Pty Ltd v Transport for NSW* (2025) 100 ALJR 89. The primary judge was not referred to, and did not himself refer to this decision. From the reasons of Gordon and Edelman JJ (with whom Beech-Jones J agreed) the following principles emerge.

[71] *First*, the claimant in a claim for private nuisance must establish that the use of the respondent's land causes a substantial interference with the claimant's ordinary use of its land: [96]. The 'ordinary use of the land' means the "ordinary uses of land in the relevant locality, which involves consideration of both the purpose of the use and the means by which the purpose is achieved": [94]. At this point of the analysis consideration of whether the respondent's use is or is not ordinary or unreasonable does not arise.

[72] *Second*, the respondent may have a justification or excuse for causing that substantial interference if the respondent establishes that it was using its land "for a common and ordinary purpose, by means that involved it being 'conveniently done'…": [97]. The expression 'common and ordinary' refers to a use which is "reasonable according to the ordinary usages of mankind living in society, or more correctly in a particular society" [106]. Their Honours described as apt the description that this was an "expectation that people 'must conform to the habits of the community'": [104]. This is explained on the basis that both neighbours doing so will mean the conduct of one will create a reciprocal nuisance to the nuisance caused by the (like) conduct of the other which are both of comparatively trifling character: [104].

[73] The respondents submitted that nonetheless the appellants must also plead a 'fault' element in the sense suggested in *Montana Hotels Pty Ltd v Fasson Pty Ltd* (1986) 61 ALJR 282 and *HS South Brisbane Pty Ltd v United Voice* (2019) 2 QR 556 at [96]-[97]. In the first of these, the Privy Council cited, with approval at 284, the following:

> "The liability of nuisance is not, at least in modern law, a strict or absolute liability. If the defendant by himself or those for whom he is responsible, has created what constitutes a nuisance and if it causes damage, the difficulty now being considered does not arise. But he may have taken over the nuisance, ready made as it were, when he acquired the property, or the nuisance may be due to a latent defect or to the act of a trespasser or stranger. Then he is not liable unless he continued or adopted the nuisance, or, more accurately, did not without undue delay remedy it when he became aware of it, or with ordinary and reasonable care should have become aware of it."

[74] If 'fault' in the sense described is relevant, in my view the reasons in *Hunt* strongly suggest (at least as arguable, but in my view establish) that it is not something which a plaintiff has to plead as part of its cause of action. As stated by Gordon and Edelman JJ at [96] in *Hunt Leather Pty Ltd v Transport for NSW* (Beech-Jones J

agreeing): "the starting point has been that the action requires a substantial interference with the plaintiff's ordinary use of land. Once this has been proved, the focus shifts to whether the defendant has acted with 'any lawful ground of justification or excuse'." Their Honours continued at [97]:

> "If a defendant causes a substantial interference with a plaintiff's enjoyment of land for ordinary purposes, the defendant may have a lawful ground of justification or excuse in an action for private nuisance if they establish that they were using their land for a common and ordinary purpose, by means that involved it being 'conveniently done' in the sense of using means that reasonably minimised the extent of the interference."

[75] It may well be relevant to a defence by the defendant that the use causing the substantial interference with the plaintiff's enjoyment of its land had (up to a time) not been created by the defendant or had not been adopted and continued in any sense by it. However, in my view, it was in error for the primary judge to have struck out the nuisance claim in the statement of claim because the appellants did not include a plea of fault in their pleading.

[76] This makes it unnecessary to express a concluded view on the further argument advanced by the appellants, namely that the statement of claim had adequately pleaded the 'fault' requirement. There is however, it must be said, real force in that submission taking into account paragraphs [13], [16], [19], [29], [49 (ba)], [55 (e)] and [57] of the statement of claim.

[77] This aspect of the appeal is made out.

Conclusion

[78] For these reasons in my view:

(a) summary judgment ought not to have been entered against the appellants on the basis that their claims were commenced outside the time provided for in the *Limitation of Actions Act*.

(b) it was also in error to give summary judgment in respect of the appellants' claims for breach of statutory duties.

(c) the primary judge misapplied the test for nuisance in determining to strike out the relevant paragraphs of the statement of claim.

[79] Accordingly the appropriate orders are:

1. Appeal is allowed.
2. Orders 1, 2, 3 and 4 of the Order made 20 March 2026 are set aside.

[80] As to costs, in my view, costs should follow the event both in the appeal and below. I would propose that it is ordered that the respondents pay the appellants' costs of the application and the appeal. However, in accordance with the approach forecast on the hearing of the appeal the costs both of the appeal and of the application will be reserved to enable either party, by 4 pm on 22 September 2026 to make such submissions in writing (not to exceed 3 pages) as they may be advised for the court to make some different order as to costs. The costs will be determined by the court without further hearing on the expiry of that time.

[81] **THOMSON AJA:** I agree with the reasons and proposed orders of Doyle JA.

[82] **COPLEY J:** I have read and agree with the reasons for judgment of Doyle JA and with the orders proposed by his Honour.