IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[1995] SGCA 79

CA 185/1994, 188/1994

Between

RSP Architects Planners & Engineers

… *Appellant*

And

Ocean Front Pte Ltd and another appeal

… *Respondent*

GROUNDS OF DECISION

Land — Strata titles — Common property; Land — Strata titles — Management corporation; Land — Strata titles — Management corporation; Tort — Negligence

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RSP Architects Planners & Engineers v Ocean Front Pte Ltd and another appeal

[1995] SGCA 79

CA 185/1994, 188/1994
Goh Joon Seng J; Karthigesu JA; L P Thean JA
01 November 1995

1 Cur Adv Vult

2 (delivering the judgment of the court): ***The facts***

3 These two appeals arose from a determination by the High Court of preliminary issues of law pursuant to O 33 r 2 of the Rules of the Supreme Court 1990. The relevant facts that led to the determination and subsequently the appeals are briefly these. The Management Corp Strata Title Plan No 1272 (the management corporation) is the management corporation of a condominium known as `Bayshore Park Condominium` situate at Bayshore Park Road which was developed and built by Ocean Front Pte Ltd (the developers); RSP Architects Planners & Engineers (the architects) were the architects involved in the development of the condominium. The management corporation was constituted in November 1987 or thereabouts, and as from 15 November 1987 it took over the management and administration of the condominium. In May 1989 complaints were made by it to the developers about the spalling of concrete in the ceilings of the car parks of the various blocks, namely, Aquamarine, Jade, Pearl, Diamond, Emerald and Sapphire Towers. Arising

from the complaints, repairs were attempted by the developers in 1989, but these did not resolve the problem. Consultants were appointed by the management corporation in 1990 to investigate the spalling of the concrete. The consultants reported, inter alia, that though repairs had been attempted, the spalling had recurred, and new areas were affected. The consultants were of the opinion that the spalling was caused by insufficient concrete protection of the steel rebars. Subsequently, a second opinion was sought from another firm of consultants, and the same conclusion was reached. There was also insufficient drainage of some common areas which was alleged to have been caused by the lack of a sufficient gradient, leading to the collection of water in areas surrounding several lift lobbies in the buildings.

4 On 28 June 1991 the management corporation took out a writ against the developers claiming damages on the basis of alleged faulty construction of certain areas of the common property. It was alleged that faulty construction of the ceiling of certain basement car parks had resulted in the spalling of concrete and that the faulty construction of certain common areas and corridors around the lift lobbies had resulted in water ponding in those areas, and that the developers had committed a breach of duty in failing to take reasonable care in the construction of these common areas. The developers after filing their defence took out third party notices against Ssangyong Engineering & Construction Co Ltd as the building contractor, the architects and Lau Downie & Partners as the engineers and they were joined in the action as third parties.

5 Subsequently, at the hearing of the summons for direction, the developers applied for a determination of certain preliminary issues, which were phrased as follows:

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> *(i) whether the developers owe a duty to the [management corporation] in its own capacity in law and/or in contract based on paras 11 and 21 of the statement of claim and the [management corporation`s] further and better particulars filed on 17 March 1993.*
>
> (ii) whether the subsidiary proprietors in whose capacity the [management corporation] is claiming in the alternative under paras 13 and 23 of the statement of claim are `jointly entitled to take proceedings` with respect to the alleged losses arising from the alleged breach of the sale and purchase agreements within the meaning of s 116(1) of the Land Titles (Strata) Act as alleged; and
>
> (iii) whether by virtue of the general meetings of 31 March 1991 and 29 March 1992, the subsidiary proprietors may be deemed to have so authorized and/or consented to and/or ratified the [management corporation`s] action to sue the developers for the alleged breach of the said sale and purchase agreements.

6 The preliminary issues came before Warren LH Khoo J. At the commencement of the hearing the third parties, including the architects, appeared. The management corporation objected to their participation, but the learned judge held that the third parties could be heard if they undertook to be bound by the decision. That undertaking was given on their behalf by their counsel, and full arguments from all the parties were heard. The learned judge characterized the issues as follows:

> (i) whether it is competent for the management corporation to sue in its own name for the alleged defects in the construction of those parts of the common property; and
>
> (ii) whether the management corporation is barred from claiming pure economic loss in the form of the cost of repair of the said defects.

7 In a reserved judgment (reported in [1995] 1 SLR 751) the learned judge held that the management corporation was competent to institute and maintain the action against the developers and was entitled to recover the cost

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of putting right the alleged defects in the common property. Against his decision both the developers and the architects have now appealed.

8 **The appeal**

9 At the commencement of the hearing before us, a procedural point was again raised as to the architects` locus standi. Counsel for the management corporation objected to the involvement of the architects in these appeals. We disallowed the objection, which, in our opinion, has absolutely no basis. The architects had participated at the hearing before the learned judge and agreed to be bound by his decision. They have an undoubted right to appeal against his decision. In any event, the architects are, strictly speaking, involved in a separate appeal as against the developers in which the management corporation is not a party, and are clearly entitled to be heard in their appeal. As a matter of convenience we heard both the appeals together, as both are appeals against the same decision and on substantially the same grounds.

10 We now turn to the substantive issues before us, which basically were the same before the learned judge, namely:

> (i) whether the management corporation is competent to institute and maintain the action against the developers claiming damages in negligence in the construction of the various parts of the common property; and
>
> (ii) whether the management corporation has a claim against the developers, whether in contract or in tort, for pure economic loss in the form of cost of repair or making good those defects complained of.

11 **Section 33**

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12 The first issue involves the legal capacity of the management corporation to bring the action and really turns on the construction of s 33 of the Land Titles (Strata) Act (Cap 158, 1988 Ed) (the Strata Act). Section 33 reads as follows:

> *(1) The subsidiary proprietors from time to time of the lots in a subdivided building, comprised in a strata title plan shall, by virtue of this Act, upon registration of the strata title plan -*
>
> (a) constitute a body corporate capable of suing and being sued and having perpetual succession and a common seal; and
>
> (b) ...
>
> *(2) The management corporation may -*
>
> (a) sue and be sued on any contract made by it;
>
> (b) sue and be sued in respect of any matter affecting the common property;
>
> (c) sue in respect of any loss or damage suffered by a management corporation arising out of a contract or otherwise; and
>
> (d) be sued in respect of any matter connected with the parcel for which the subsidiary proprietors are jointly liable.

13 It was argued on behalf of the management corporation that s 33(2) specified the causes of action, and reliance was placed in particular on para (c) which states that a management corporation `may sue in respect of any loss or damage suffered by a management corporation arising out of a contract or otherwise`. The developers and the architects on the other hand maintained that the entire s 33(2) does no more than clarify the capacity of the management corporation. Both sides referred to the legislative history of s 33 to support their respective arguments. It is therefore necessary to delve briefly into the legislative history of this section.

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14 The Strata Act was first enacted in 1967 and ss 18(1) and (2) of the 1967 Act provided as follows:

> *(1) The subsidiary proprietor or subsidiary proprietors shall, by virtue of this Act, upon registration of the strata title plan be a body corporate with perpetual succession and a common seal and shall be called `the management corporation`.*
>
> (2) The management corporation may -
>
> (a) sue and be sued on any contract made by it;
>
> (b) sue and be sued in respect of any matter affecting the common property;
>
> (c) be sued in respect of any matter connected with the parcel for which the subsidiary proprietors are jointly liable.

15 The Act subsequently underwent series of amendments, and the Act which amended s 18 was the Land Titles (Strata) Amendment Act of 1987. The Bill for this Act was introduced in Parliament as Bill No 10 of 1986 and was referred to a Select Committee. The Bill proposed a renumbered s 28 which was to replace the old s 18 of the 1967 Act. Principally, the proposed s 28 sought to introduce two changes to the old s 18. First, it introduced a new para 1(a) which read `constitute a body corporate capable of suing and being sued ...`, and second, it sought to repeal s 18(2)(a). No legislative material was available to explain the draftsmen`s intention for the proposed changes set out in the Bill. The Select Committee received various representations and also heard oral evidence. In particular, there was a paper submitted by Mr Suresh Gupta, an advocate and solicitor, in which he suggested, inter alia, that the management corporation should be given the power to sue a developer of the building for any defects in the common property caused by bad workmanship or negligence in the construction of the building or in using substandard materials for the purpose. Mr Gupta also appeared before the Committee and there was an exchange of views between him and Mr Barker, the Minister for Law, in relation

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to the issue of the management corporation`s right to sue the developer on defects occurring in the common property. Subsequently amendments were made to the proposed s 28 by inserting: (i) para (a) which provided that the management corporation may `sue and be sued on any contract made by it` and (ii) para (c) which provided that the management corporation may `sue in respect of any loss or damage suffered by a management corporation arising out of a contract or otherwise`. In introducing these amendments to the Bill in Parliament, Professor Jayakumar, the Second Minister for Law, said that they were to clarify specifically that the management corporation may sue or be sued on any contract made by it and may sue in respect of any loss or damage suffered by it arising out of a contract or otherwise. From a perusal of these Parliamentary records it does not appear to us that the intention for the amendments made to s 28, which are now reflected in s 33(2), was to confer on a management corporation any cause of action as contended on behalf of the management corporation.

16 In our opinion, s 33(1) of the Strata Act constitutes the management corporation a body corporate with a perpetual succession and confers on it the legal capacity to sue and be sued, and s 33(2) specifies the subject matters in respect of which the management corporation may sue and/or be sued (as the case may be). It specifically gives the management corporation the legal capacity to sue and be sued in respect of the matters set out in paras (a) and (b); to sue in respect of matters in para (c); and to be sued in respect of matter in para (d). It is certainly going too far to say that that subsection confers on the management corporation the various causes of action. In our judgment, the management corporation must turn to the general law to found its cause of action in any action instituted by it in respect of any of those matters listed in paras (a) to (c) of s 33(2).

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17 We now turn to the subject matter of the action. It is true that the management corporation has no proprietary interest in the common property. Under s 13(2) of the Strata Act the common property is held by the subsidiary proprietors of the lots as tenants in common proportional to their respective share values and for the same terms and tenure as their respective lots are held by them. But the management corporation has certain rights and obligations with reference to the common property. Under the provisions of the Strata Act it has the control, management and administration of the common property. In particular, under s 33(3) in respect of any subdivided building comprised in a strata plan the management corporation has the powers, duties and functions conferred or imposed by the Act and has `the control, management and administration of the common property`. Further, s 48 prescribes a list of powers and duties of the management corporation and for our purpose the relevant ones are as follows:

> *(1) A management corporation shall, for the purposes of the subdivided building concerned -*
>
> (a) control, manage and administer the common property for the benefit of all the subsidiary proprietors;
>
> (b) properly maintain and keep it in a state of good and serviceable repair -
>
> (i) the common property; and
>
> (ii) any property vested in the management corporation
>
> (c) where necessary, renew or replace any fixtures or fittings comprised in the common property and any property vested in the management corporation;
>
> (d) …
>
> (e) …
>
> (f) comply with any notice or order made by any competent, public or statutory authority requiring the abatement of any nuisance on the common property or ordering repairs or other

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> work to be done in respect of the common property or any building or other improvement on the parcel.

18 In addition, the Strata Act by s 120 also provides a sanction against the management corporation for breaching or failing to perform any of the duties imposed by the Act. The management corporation therefore has powers and duties under the Act in relation to the common property. What it has is something akin to possession of the common property.

19 The claim of the management corporation is against the developers for damages representing the costs and expenses incurred or which would be incurred in rectifying the defects to the common property occasioned by the alleged negligence of the developers. It is empowered by s 33(2) of the Strata Act to bring and maintain this action and the claims fall within para (b) as well as para (c) of s 33(2). In our judgment, the management corporation is competent to bring the action under s 33(2) of the Strata Act.

20 Alternatively, the management corporation is entitled to bring the action on behalf of the subsidiary proprietors under s 116 of the Strata Act. Section 116 provides as follows:

> *(1) Where all or some of the subsidiary proprietors of the lots in a subdivided building are jointly entitled to take proceedings against any person or are liable to have proceedings taken against them jointly (any such proceedings being proceedings for or with respect to common property), the proceedings may be taken by or against the management corporation as if it were the subsidiary proprietors of the lots concerned and any judgment or order made in favour of or against the management corporation in any such proceedings shall have the effect as if it were a judgment or order given or made in favour of or against the subsidiary proprietors.*
>
> (2) Where a subsidiary proprietor is liable to make a contribution to another subsidiary proprietor in respect of a judgment debt arising under a judgment referred to in

> subsection (1), the amount of that contribution shall bear to the judgment debt the same proportion as the share value of the lot of the first-mentioned proprietor bears to the aggregate share value.

21 This section was taken, with some amendments, from s 147 of the New South Wales Strata Titles Act 1973. However, under the New South Wales Act the body corporate (which is the equivalent of our management corporation) is the owner of the common property as agent for the subsidiary proprietors of the lots and it seems to us that the purpose of s 147 is to give to the body corporate the capacity to sue and be sued with respect to the common property. However, our Strata Act by s 13(2) vests the common property in the subsidiary proprietors of the lots as tenants in common proportional to their respective share values and for the same terms and tenure as their respective lots are held by them. To that extent the purpose of our s 116 may well be different from that of s 147 of the New South Wales Act. Notwithstanding this difference, the purpose of our s 116 is clear: it is to enable the management corporation to bring an action on behalf of all or some of the subsidiary proprietors, as the case may be, and also to enable a third party to bring an action against the management corporation as representing all or some of the subsidiary proprietors. As between, on the one hand, all or some of the subsidiary proprietors, as the case may be, and, on the other hand, a third party, the management corporation is interposed so that as a matter of convenience it would not be necessary for all or some of the subsidiary proprietors concerned to be joined in suing a third party, and, conversely, it would not be necessary for the third party to sue and name all the subsidiary proprietors concerned. As the learned judge held, and we agree, the management corporation represents the subsidiary proprietors, and it is the subsidiary proprietors who are the substantive party, although the proceedings are instituted by or against the management corporation. The

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purpose of this section is to simplify the procedural aspect of the proceedings so as to avoid naming all the subsidiary proprietors or some of them who are concerned in the proceedings as plaintiffs or defendants, as the case may be.

22 In ***Management Corp Strata Title Plan No 1279 v Khong Guan Realty Pte Ltd*** [1995] 1 SLR 593 , the management corporation brought an action against a housing developer of a condominium on behalf of persons interested who were described as purchasers, including their successors in title and assigns, claiming that the defects in certain parts of the common property were caused by poor workmanship and unsuitable materials provided by the developers. It was held that the management corporation could properly bring the action on behalf of the subsidiary proprietors. GP Selvam J said, at p 596:

> *The action, however, is properly brought for the subsidiary proprietors and their successors or assigns for it comes squarely under s 116(1) of the Land Titles (Strata) Act. On the assumption that the claim relates only to common property, the plain words of s 116(1) entitle a management corporation to represent the subsidiary proprietors where the subsidiary proprietors have a cause of action whether it be an action in tort or contract. It is an action in a representative capacity authorized by statute.*

23 This section may be invoked where there is some thing or matter in relation to the common property which is common to or affects all or specifically only some of the subsidiary proprietors concerned. In particular, this section may be invoked where the thing or matter in question affects only some of the subsidiary proprietors of the lots comprised in a condominium, for example, the subsidiary proprietors of the lots comprised in a particular block or subdivided building of a condominium. The words, `jointly entitled` and `are liable to have proceedings taken against them jointly` refer to the procedural aspect of the proceedings and not to substantive rights of the subsidiary proprietors in the subject matter of the proceedings. As the learned judge said,

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and we agree, the operation of this section does not depend on whether the subsidiary proprietors concerned have a joint interest in the common property, the subject matter of these proceedings. Nor does it matter that their interest in the common property is that of tenants in common.

24 **Cause of action - contract**

25 We now turn to the cause of action which the management corporation has against the developers. It was submitted by counsel for the management corporation that it has a cause of action in contract and he relied on the provisions of cll 8 and 9 of the sale and purchase agreements made between the developers and the individual purchasers, some of whom may or may not be the present subsidiary proprietors of the lots. Clauses 8 and 9 (in so far as relevant) provide as follows:

> *Clause (8)(1)*
>
> *The housing unit and the building project together with all the common property thereto shall be constructed in a good and workmanlike manner in accordance with the specifications described in the Second Schedule hereto and in accordance with the plans approved by the assistant director, or other competent authority, which specifications and plans have been accepted and approved by the purchaser as the purchaser hereby acknowledges.*
>
> *Clause 9*
>
> *The vendor shall at its own cost and expense cause to be constructed the roads, driveways, car parks, drains, culverts, sewerage mains, water works, sewerage plant, serving the housing unit and the building project in accordance with the requirements and standards of the local authority. The vendor shall at its own costs and expense cause to be laid all necessary water, electricity and sewerage mains to serve the housing unit and the building project and cause the internal mains and the sanitary installations of the housing unit to be connected to the water, electricity and sewerage mains of the local authority or the sewerage plant for the building project.*

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26 Counsel further relied on s 57(2) of the Conveyancing and Law of Property Act (Cap 61, 1994 Ed), which provides:

> *A covenant relating to leasehold land shall be deemed to be made with the covenantee, his executors, administrators and assigns, and shall have effect as if executors, administrators and assigns were expressed.*

27 It was submitted that the subdivided lots in the condominium are leasehold lands and cll 8 and 9 are `covenants relating to leasehold lands` and therefore by reason of s 57(2) they are deemed to be made with the present subsidiary proprietors. We are unable to accept this argument. On a plain reading of s 57(2) it is clear to us that it is concerned with the passing of the benefit of any covenant or undertaking in a lease to the assigns or successors in title of the lessee where such covenant or undertaking has been made between the lessor and lessee. Clauses 8 and 9 are terms of the sale and purchase agreements made between the developers and the purchasers, and 57(2) is wholly inapplicable to the terms of such agreements.

28 It was further submitted that cll 8 and 9 are covenants which touch and concern the land and therefore the benefits thereunder have passed to the assigns or successors in title of the purchasers, namely, the present subsidiary proprietors. At common law the benefit of a covenant passes to the assigns or successors in title of the covenantee provided that the covenant is one which touches and concerns the land. A covenant which touches and concerns the land is one which must `affect the land as regards mode of occupation, or it must be such as per se, and not merely from a collateral circumstances, affects the value of the land`: per Bayley J in ***Congleton Corp v Pattison***

29 (1808) 10 East 130, 135. It must also be shown that it is the intention of the parties that the benefit should run with the land. In ***Rogers v Hosegood***

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[1900] 2 Ch 388 at p 395, Farwell J adopted this definition of Bayley J, and said:

> *Covenants which run with the land must have the following characteristics: (1) They must be made with a covenantee who has an interest in the land to which they refer. (2) They must concern or touch the land. It is not contended that the covenants in question in this case have not the first characteristic, but it is said that they fail in the second. I am of opinion that they possess both. Adopting the definition of Bayley J in* ***Congleton Corp v Pattison****, the covenant must either affect the land as regards mode of occupation, or it must be such as per se, and not merely from collateral circumstances, affects the value of the land.*

30 The learned judge later said, at p 396:

> *... But a covenant may have the two characteristics above mentioned and yet not run with the land; it is in each case a question of intention to be determined by the court on the construction of the particular document, and with due regard to the nature of the covenant and the surrounding circumstances. No covenant can run with the land which has not the two characteristics above mentioned, but every covenant which has those two characteristics does not necessarily run with the land.*

31 Hence the intention of the parties is a relevant consideration. In our opinion, it would really be straining the language of the sale and purchase agreements to say that it was the intention of the developers and the purchasers that cll 8 and 9 of their sale and purchase agreements would run with the land. Such agreements are intended to govern the relations only between the developers and their purchasers, and clearly the developers did not intend to extend the benefit of these provisions to others down the line. In our judgment, the management corporation has no cause of action in contract against the developers.

32 Counsel also relied on the case of ***Williams v Unit Construction Co Ltd*** (1951) 19 Conv (NS) 262. In that case, an agreement was made between (i) the

lessors, (ii) a construction company (the defendant) and (iii) the lessee, whereby the company covenanted with the lessee to make up the roads and footpaths abutting on and co-extensive with the demised premises and to maintain the same until adopted by the local authority. One of the houses built on the demised premises was sublet to the plaintiff who later sustained personal injury as a result of the footpath adjoining the house being in a state of disrepair owing to a breach of the covenant by the defendant. It was held that the covenant ran with the land. That case is clearly different in that the road and footpath provided the access to the property and that access related to the occupation of the property, and the court construed the words of the covenant as designed to confer the benefit thereof on all occupiers of the house.

33 **Tort**

34 We now turn to the issue whether the management corporation has a cause of action against the developers in negligence. On this issue two questions were raised on behalf of the developers and the architects: first, whether the developers owe a duty of care to the management corporation in respect of the damage caused to the common property before the management corporation was constituted, and, second, whether the management corporation can recover in tort the costs of making good the defects caused by the alleged improper construction of the common property, such costs being pure economic loss. It seems to us that both questions basically can be resolved into one, namely, whether the developers in the construction of the condominium and in particular the common property owe to the management corporation a duty to exercise reasonable care so as to avoid causing to the management corporation the kind of damage the latter sustained, namely, the costs and expenses incurred or which would be incurred in making good the common property, ie pure economic loss.

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By the term `economic loss` we mean only mere economic loss not consequent on any injury to person or damage to property. On this issue there is a plethora of authorities - all of them highly persuasive - but unfortunately there is a divergence of judicial opinions. For our purpose, it is necessary to examine some of them in detail.

35 The convenient starting point is the English Court of Appeal decision in ***Dutton v Bognor Regis Urban District Council*** [1972] 1 QB 373. In that case, the plaintiff was the second purchaser of a house and soon after she had moved in serious defects developed in the internal structure of the house. An investigation revealed that these defects were due to inadequate foundations because they were built on the site of a rubbish tip. At an early stage of the building works, an inspector of the local council inspected the excavation for the foundations and approved the works. However, he was negligent and failed to detect that the foundations were to be constructed on the remains of an old rubbish tip, as a result of which the foundations did not have additional reinforcements. The plaintiff sued both the builder and the council for the cost of repair and diminution in the value of the house. Subsequently the case against the builder was settled but continued against the council. The trial judge awarded the plaintiff damages in an amount representing the estimated costs of repairing the house and surveyor`s fees. The council appealed, and one of the issues raised in the appeal was whether the council was liable to the plaintiff for pure economic loss. It was argued on behalf of the council that it was liable only for personal injury and its liability did not extend to making good the economic loss sustained by the plaintiff. In rejecting this submission, Lord Denning MR said, at p 396:

> *Mr Tapp submitted that the liability of the council would, in any case, be limited to those who suffered bodily harm: and did not*

> *extend to those who only suffered economic loss. He suggested, therefore, that although the council might be liable if the ceiling fell down and injured a visitor, they would not be liable simply because the house was diminished in value. He referred to the recent case of* ***SCM (United Kingdom) Ltd v WJ Whittall & Son Ltd****[1971] 1 QB 337.*

36 I cannot accept this submission. The damage done here was not solely economic loss. It was physical damage to the house. If Mr Tapp`s submission were right, it would mean that if the inspector negligently passes the house as properly built and it collapses and injures a person, the council are liable: but if the owner discovers the defects in time to repair it - and he does repair it - the council are not liable. That is an impossible distinction. They are liable in either case.

37 This was clearly a case of recovery of economic loss which was not consequent on any injury to person or damage to property. ***Dutton*** was subsequently approved by the House of Lords in ***Anns & Ors v London Borough Council of Merton*** [1978] AC 728. The facts in the latter were somewhat similar to those in ***Dutton*** . There, the plaintiffs were long lessees of maisonettes in a block of flats which had been constructed by a certain building company. Some years later, cracks appeared in the wall and part of the floor started to slope and the doors could not close. The cause of these defects was that the block had been erected on inadequate foundations. The plaintiffs sued the builder and the local council for the cost of remedying the defects. The builder did not put in a defence and did not take part in the proceedings. As against the council the plaintiffs claimed damages for negligence occasioned by their servants or agents in allowing the builder to construct the block of building on inadequate foundations or in failing to carry out the necessary inspection sufficiently carefully or at all in approving the foundations. The council resisted the claim. A preliminary issue whether the plaintiffs` claim was barred by

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limitation was tried. The Court of Appeal held that the cause of action accrued when the damage was discovered or ought to have been discovered and the claim was not time barred. On appeal, one of the questions argued before the House of Lords was whether the council owed a duty of care to the plaintiffs on the assumption that the council was negligent in failing to inspect the foundations sufficiently. The House of Lords held, inter alia, that the council owed a common law duty of care to the plaintiffs. That decision is relevant for our purpose in two important respects. First, in finding that the council was under a duty of care, Lord Wilberforce formulated a general two stage test in determining whether a duty of care would arise in a particular circumstance. He said, at pp 751-752:

> *Through the trilogy of cases in this House - **Donoghue v Stevenson** [1932] AC 562, **Hedley Byrne & Co Ltd v Heller & Partners Ltd** [1964] AC 465 and **Home Office v Dorset Yacht Co Ltd** [1970] AC 104 - the position has now been reached that in order to establish that a duty of care arises in a particular situation, it is not necessary to bring the facts of that situation within those of previous situations in which a duty of care has been held to exist. Rather the question has to be approached in two stages. First one has to ask whether, as between the alleged wrongdoer and the person who has suffered damage there is a sufficient relationship of proximity or neighbourhood such that, in the reasonable contemplation of the former, carelessness on his part may be likely to cause damage to the latter in which case a prima facie duty of care arises. Secondly, if the first question is answered affirmatively, it is necessary to consider whether there are any considerations which ought to negative or reduce or limit the scope of the duty or the class of person to whom it is owed or the damages to which a breach of it may give rise. See the **Dorset Yacht** case [1970] AC 104 per Lord Reid at p 1027. Examples of this are **Hedley Byrne & Co Ltd v Heller & Partners Ltd** [1964] AC 465 where the class of potential plaintiffs was reduced to those shown to have relied upon the correctness of statements made, and **Weller & Co v Foot and Mouth Disease Research Institute** [1966] 1 QB 569 and (I cite these merely as illustrations, without discussion) cases about `economic loss` where, a duty having been held to exist, the nature of the recoverable damages was limited: see **SCM (United Kingdom) Ltd v WJ Whitall & Son Ltd** [1971] 1 QB*

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> *337,* ***Spartan Steel and Alloys Ltd v Martin & Co (Contractors) Ltd*** *[1973] QB 27.*

38 The other aspect of the decision which is relevant in this appeal was the observations of Lord Wilberforce on the liability of the builder and the damages recoverable. Having held that the council was liable for failing to inspect and detect the defective foundations, Lord Wilberforce found it necessary to make certain observations on the liability of a builder and the damages recoverable. He held that a builder of defective premises would be liable in negligence to a person who subsequently acquired the house and who sustained injury (at pp 758-759) and expressed his agreement with the conclusions of Lord Denning MR in ***Dutton*** (at pp 392-394) with respect to the liability of a builder. Lord Wilberforce then dealt with the nature of damages recoverable from the council, and his observations there are equally applicable to the builder who is liable. He said, at p 759:

> *The damages recoverable include all those which foreseeably arise from the breach of the duty of care which, as regards the council, I have held to be a duty to take reasonable care to secure compliance with the byelaws. Subject always to adequate proof of causation, these damages may include damages for personal injury and damage to property. In my opinion they may also include damage to the dwelling house itself; for the whole purpose of the byelaws in requiring foundations to be of a certain standard is to prevent damage arising from weakness of the foundations which is certain to endanger the health or safety of occupants.*

39 To allow recovery for such damage to the house follows, in my opinion, from normal principle. If classification is required, the relevant damage is in my opinion material, physical damage, and what is recoverable is the amount of expenditure necessary to restore the dwelling to a condition in which it is no longer a danger to the health or safety of persons occupying and possibly

(depending on the circumstances) expenses arising from necessary displacement.

40 Like ***Dutton, Anns*** was a decision on the extent and scope of duty of a local authority and not that of a builder. Hence, Lord Wilberforce`s pronouncements on the builder`s liability and the nature of damages recoverable from the builder were purely obiter.

41 The case which dealt directly with the builder`s liability to the owner of a building with whom the builder has no contractual relationship is ***Junior Books Ltd v Veitchi Co Ltd*** [1983] 1 AC 520, also a decision of the House of Lords but on an appeal from the Court of Sessions in Scotland. There, the plaintiffs entered into a contract with a building contractor for the construction of a factory. The contractor entered into a subcontract with the defendants to lay the flooring of certain parts of the factory. The defendants were a company specialized in laying floors. Sometime after completion of the work the floors showed defects allegedly due to bad workmanship and/or bad material. The plaintiffs brought an action against the defendants claiming the cost of replacing the floor which they said was necessary to avoid continual maintenance that would be more expensive in the long run. The issue was whether the defendants having negligently laid the floor which was defective but which had not caused any danger to health or safety of any person or risk of damage to any other properties belonging to the owner were liable for the costs of making good the defective floors. The House of Lords, by a majority, held that they were liable. They held that there was a requisite degree of proximity between the defendants and the plaintiffs by virtue of a number of factors including the defendants` knowledge of the plaintiffs` requirements, the plaintiffs` reliance on the defendants` expertise, the defendants` knowledge that the plaintiffs relied on

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their skills and experience and the relationship between the parties was as close as it could be short of actual privity of contract and held that in those circumstances a duty of care existed. Lord Roskill who delivered the main speech of the majority first posed the question in the following terms, at p 545:

> *My Lords, to my mind, in the instant case there is no physical damage to the flooring in the sense in which that phrase was used in* ***Dutton****,* ***Batty*** *and* ***Bowen*** *and some of the other cases. As my noble and learned friend, Lord Russell of Killowen, said during the argument, the question which your Lordships` House now has to decide is whether the relevant Scots and English law today extends the duty of care beyond a duty to prevent harm being done by faulty work to a duty to avoid such faults being present in the work itself. It was powerfully urged on behalf of the appellants that were your Lordships so to extend the law, a pursuer in the position of the pursuer in* ***Donoghue v Stevenson*** *[1932] AC 562 could, in addition to recovering for any personal injury suffered, have also recovered for the diminished value of the offending bottle of ginger beer.*

42 His Lordship then referred to the two stage tests in ***Anns*** , and with regard to the first test he said, at p 546:

> *Turning back to the present appeal I therefore ask first whether there was the requisite degree of proximity so as to give rise to the relevant duty of care relied on by the respondents. I regard the following facts as of crucial importance in requiring an affirmative answer to that question. (1) The appellants were nominated subcontractors. (2) The appellants were specialists in flooring. (3) The appellants knew what products were required by the respondents and their main contractors and specialised in the production of those products. (4) The appellants alone were responsible for the composition and construction of the flooring. (5) The respondents relied upon the appellants` skill and experience. (6) The appellants as nominated subcontractors must have known that the respondents relied upon their skill and experience. (7) The relationship between the parties was as close as it could be short of actual privity of contract. (8) The appellants must be taken to have known that if they did the work negligently (as it must be assumed that they did) the resulting defects would at some time require remedying by the respondents expending money upon the remedial measures as a consequence of which the respondents would suffer financial or economic loss.*

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43 On the second test in ***Anns*** his Lordship saw nothing to restrict the duty of care arising from the proximity he had discussed. He referred to a suggestion that the law did not allow recovery of economic loss for breach of the duty of care and said, at pp 546-547:

> *But in the present case the only suggested reason for limiting the damage (ex hypothesi economic or financial only) recoverable for the breach of the duty of care just enunciated is that hitherto the law has not allowed such recovery and therefore ought not in the future to do so. My Lords, with all respect to those who find this a sufficient answer, I do not. I think this is the next logical step forward in the development of this branch of the law. I see no reason why what was called during the argument `damage to the pocket` simpliciter should be disallowed when `damage to the pocket` coupled with physical damage has hitherto always been allowed. I do not think that this development, if development it be, will lead to untoward consequences. The concept of proximity must always involve, at least in most cases, some degree of reliance - I have already mentioned the words `skill` and `judgment` in the speech of Lord Morris of Borthy-Gest in* ***Hedley Byrne*** *[1964] AC 465, at p 503.*

44 Lord Brandon of Oakbrook dissented. In his view, the only foundation for the existence of the duty of care owed by the defendant to the plaintiff was the principle laid down in ***Donoghue v Stevenson*** [1932] AC 562 which was based on a much wider principle that when a person foresees or ought reasonably to foresee that his careless act or omission might cause physical injury to other persons or their property, he owed a duty to all such persons to exercise reasonable care to avoid such careless acts or omission. Fundamentally, that was premised on the existence of a danger of physical injury to person or damage to property. Applying the ***Donoghue v Stevenson*** principle in that case, he held that the defendants only owed a duty of care to the plaintiff to exercise reasonable care to ensure that the flooring when completed would not constitute a danger of physical damage to persons or their property other than the flooring itself. He referred to Lord Wilberforce`s two-stage test in ***Anns***

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and accepted that there was sufficient degree of proximity between the parties so as to give rise to a duty of care. Applying the second test in ***Anns*** he held that there are two considerations which ought to limit the scope of duty. He said, at p 551:

> *The first consideration is that, in* ***Donoghue v Stevenson*** *itself and in all the numerous cases in which the principle of that decision has been applied to different but analogous factual situations, it has always been either stated expressly, or taken for granted, that an essential ingredient in the cause of action relied on was the existence of danger, or the threat of danger, of physical damage to persons or their property, excluding for this purpose the very piece of property from the defective condition of which such danger, or threat or danger, arises. To dispense with that essential ingredient in a cause of action of the kind concerned in the present case would, in my view, involve a radical departure from long-established authority.*

45 The second consideration is that there is no sound policy reason for substituting the wider scope of the duty of care put forward for the respondents for the more restricted scope of such duty put forward by the appellants. The effect of accepting the respondents` contention with regard to the scope of the duty of care involved would be, in substance, to create, as between two persons who are not in any contractual relationship with each other, obligations of one of those two persons to the other which are only really appropriate as between persons who do have such a relationship between them.

46 A few years later, in ***D & F Estates Ltd & Ors v Church Commissioners for England & Ors*** [1989] AC 177, which was a decision directly on the scope of a builder`s duty of care to a subsequent owner, the House of Lords appeared to retreat from the broad view they took in ***Junior Books Ltd*** . In that case, the defendants were the main contractors for the construction of a block of flats and they employed a subcontractor to carry out the plastering works. The subcontractor carried out the works negligently and

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the plaintiffs, who were the then lessees occupying the flats, brought an action against the defendants for the cost of necessary remedial works. The trial judge found that the plaster was defective because it had been incorrectly applied and the builder was negligent in not providing adequate supervision while the plastering work was in progress. Accordingly, he held that the contractors were liable and awarded damages. The Court of Appeal allowed the appeal. The appeal to the House of Lords was dismissed. Lord Bridge of Harwich, who delivered one of the main speeches, stated that the liability of a builder of a permanent structure, which was dangerously defective, arose only if the defects remained and caused personal injury or damage to property other than the structure itself. If the defects were discovered before any such injury or damage was caused, the loss of the owner of the structure in repairing or rectifying defects would be purely economic and was not recoverable. His Lordship in arriving at this conclusion drew his conclusion from the analogy of a defective chattel, the defect of which was discovered and which had not caused any personal injury or damage to property. He said at p 206:

> *If the same principle applies in the field of real property to the liability of the builder of a permanent structure which is dangerously defective, that liability can only arise if the defect remains hidden until the defective structure causes personal injury or damage to property other than the structure itself. If the defect is discovered before any damage is done, the loss sustained by the owner of the structure, who has to repair or demolish it to avoid a potential source of danger to third parties, would seem to be purely economic. Thus, if I acquire a property with a dangerously defective garden wall which is attributable to the bad workmanship of the original builder, it is difficult to see any basis in principle on which I can sustain an action in tort against the builder for the cost of either repairing or demolishing the wall. No physical damage has been caused. All that has happened is that the defect in the wall has been discovered in time to prevent damage occurring.*

47 With reference to the facts of the case his Lordship said, at p 207:

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> *It seems to me clear that the cost of replacing the defective plaster itself, either as carried out in 1980 or as intended to be carried out in future, was not an item of damage for which the builder of Chelwood House could possibly be made liable in negligence under the principle of* ***Donoghue v Stevenson*** *or any legitimate development of that principle. To make him so liable would be to impose upon him for the benefit of those with whom he had no contractual relationship the obligation of one who warranted the quality of the plaster as regards materials, workmanship and fitness for purpose.*

48 Lord Oliver of Aylmerton, who delivered the other main speech of the House, having referred to the observations made by Lord Wilberforce obiter in ***Anns*** on the liability of a builder, said at pp 213-214:

> *My Lords, so far as they concern such liability in respect of damage which has actually been caused by the defective structure other than by direct physical damage to persons or to other property, I am bound to say that, with the greatest respect to their source, I find them difficult to reconcile with any conventional analysis of the underlying basis of liability in tort for negligence. A cause of action in negligence at common law which arises only when the sole damage is the mere existence of the defect giving rise to the possibility of damage in the future, which crystallizes only when that damage is imminent, and the damages for which are measured, not by the full amount of the loss attributable to the defect but by the cost of remedying it only to the extent necessary to avert a risk of physical injury, is a novel concept. ... For my part, therefore, I think the correct analysis, in principle, to be simply that, in a case where no question of breach of statutory duty arises, the builder of a house or other structure is liable at common law for negligence only where actual damage, either to person or to property, results from carelessness on his part in the course of construction.*

49 A word should be said of their Lordships` treatment of ***Junior Books*** . Lord Bridge of Harwich did not analyse the majority decision of ***Junior Books*** , and he considered that the decision depended on `the unique` relationship between the plaintiff and the defendant which gave rise to `the unique scope of the duty of care` owed by the defendant to the plaintiff and that that decision could not be regarded as laying down any principle of general application in the

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law of tort. On the other hand, his Lordship quoted liberally lengthy passages from the dissenting speech of Lord Brandon of Oakbrook and said that the principles enunciated there were applicable to determine the scope of the duty of care. Lord Oliver of Aylmerton referred very briefly to ***Junior Books Ltd*** and agreed with Lord Bridge of Harwich that that case depended upon the close and unique relationship between the plaintiff and the defendant and was really of no use as an authority on the general duty of care and in any event it rested on the doctrine of reliance in ***Hedley Byrne & Co Ltd v Heller & Partners Ltd*** [1964] AC 465. With regard to the general limits of general duty of care in negligence, his Lordship also adopted what Lord Brandon of Oakbrook said in his dissenting speech. ***Junior Books*** has not really been expressly overruled in ***D & F Estates*** or in subsequent cases coming before the House of Lords, although its status in England is in some doubt. It appears to us, however, that it remains a good authority in Scotland. It was discussed at great length and was considered as an authority in ***Scott Lithgow Ltd v GEC Electrical Projects Ltd*** 1989 SC 412 and ***Parkhead Housing Association Ltd v Phoenix Preservation Ltd*** 1990 SLT 812.

50 Although the views expressed by the House of Lords in ***D & F Estates*** did not strictly accord with those in ***Anns*** , the House did not expressly depart from ***Anns*** , as the issues in ***D & F Estates*** were not the same as those in ***Anns*** . The issues, same as those in ***Anns*** , came up for reconsideration in ***Murphy v Brentwood District Council*** [1990] 2 All ER 908 and in that case the House of Lords expressly departed from ***Anns*** . There, the defendant council approved the design of the foundations of a house which was later purchased by the plaintiff. The foundations were subsequently discovered to be defective and the plaintiff sold the house for less than its market value. He then brought an action against the defendant claiming that it had been negligent in

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approving the design of the house. The House of Lords unanimously held that the defendant council owed no duty of care to the plaintiff in respect of the damage of the kind sustained. Lord Keith of Kinkel said, at pp 920-921:

> *It being recognized that the nature of the loss held to be recoverable in* ***Anns*** *was pure economic loss, the next point for examination is whether the avoidance of loss of that nature fell within the scope of any duty of care owed to the plaintiffs by the local authority. On the basis of the law as it stood at the time of the decision the answer to that question must be in the negative. The right to recover for pure economic loss, not flowing from physical injury, did not then extend beyond the situation where the loss had been sustained through reliance on negligent misstatements, as in* ***Hedley Byrne****. … On analysis, the nature of the duty held by* ***Anns*** *to be incumbent on the local authority went very much further than a duty to take reasonable care to prevent injury to safety or health. The duty held to exist may be formulated as one to take reasonable care to avoid putting a future inhabitant owner of a house in a position in which he is threatened, by reason of a defect in the house, with avoidable physical injury to person or health and is obliged, in order to continue to occupy the house without suffering such injury, to expend money for the purpose of rectifying the defect.*

51 Although on the facts, ***Murphy*** concerned the rights and obligations of a local council, the pronouncements made by their Lordships pertained also to the question of duty of care owed by a builder to subsequent occupiers in respect of pure economic loss arising from negligence in construction. His Lordship said, at p 921:

> *The existence of a duty of that nature should not, in my opinion, be affirmed without a careful examination of the implications of such affirmation. To start with, if such a duty [of care] is incumbent on the local authority, a similar duty must necessarily be incumbent also on the builder of the house. If the builder of the house is to be so subject, there can be no grounds in logic or in principle for not extending liability on like grounds to the manufacturer of a chattel. That would open on an exceedingly wide field of claims, involving the introduction of something in the nature of a transmissible warranty of quality. The purchaser of an article who discovered that it suffered from a dangerous defect before that defect had caused any damage would be*

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> *entitled to recover from the manufacturer the cost of rectifying the defect, and, presumably, if the article was not capable of economic repair, the amount of loss sustained through discarding it. Then it would be open to question whether there should not also be a right to recovery where the defect renders the article not dangerous but merely useless. The economic loss in either case would be the same. There would also be a problem where the defect causes the destruction of the article itself, without causing any personal injury or damage to other property. A similar problem could arise, if the* ***Anns*** *principle is to be treated as confined to real property, where a building collapses when unoccupied.*

52 Lord Bridge of Harwich further said, at page 926:

> *If a builder erects a structure containing a latent defect which renders it dangerous to persons or property, he will be liable in tort for injury to persons or damage to property resulting from that dangerous defect. But, if the defect becomes apparent before any injury or damage has been caused, the loss sustained by the building owner is purely economic. If the defect can be repaired at economic cost, that is the measure of the loss. If the building cannot be repaired, it may have to be abandoned as unfit for occupation and therefore valueless. These economic losses are recoverable if they flow from breach of a relevant contractual duty, but, here again, in the absence of a special relationship of proximity they are not recoverable in tort.*

53 His Lordship concluded thus at pp 929-930:

> *All these considerations lead inevitably to the conclusion that a building owner can only recover the cost of repairing a defective building on the ground of the authority`s negligence in performing its statutory function of approving plans or inspecting buildings in the course of construction if the scope of the authority`s duty of care is wide enough to embrace purely economic loss. The House has already held in* ***D & F Estates*** *that a builder, in the absence of any contractual duty or of a special relationship of proximity introducing the* ***Hedley Byrne*** *principle of reliance, owes no duty of care in tort in respect of the quality of his work. As I pointed out in* ***D & F Estates****, to hold that the builder owed such a duty of care to any person acquiring an interest in the product of the builder`s work would be to impose on him the obligations of an indefinitely transmissible warranty of quality.*

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54 Lord Oliver of Aylmerton also expressed similar views. In the course of his speech he said (at p 933) that the critical question was not the nature of the damage in itself, whether physical or pecuniary, but whether the scope of the duty of care in the circumstances of the case was such as to embrace damage of the kind which the plaintiff claimed to have sustained. He said, at pp 933-934:

> *The essential question which has to be asked in every case, given that damage which is the essential ingredient of the action has occurred, is whether the relationship between the plaintiff and the defendant is such, or, to use the favoured expression, whether it is of sufficient `proximity`, that it imposes on the latter a duty to take care to avoid or prevent that loss which has in fact been sustained. That the requisite degree of proximity may be established in circumstances in which the plaintiff`s injury results from his reliance on a statement or advice on which he was entitled to rely and on which it was contemplated that he would be likely to rely is clear from* ***Hedley Byrne*** *and subsequent cases, but* ***Anns*** *was not such a case and neither is the instant case.*

55 His Lordship later said, at p 936:

> *... I have found it impossible to reconcile the liability of the builder propounded in* ***Anns*** *with any previously accepted principles of the tort of negligence and I am able to see no circumstances from which there can be deduced a relationship of proximity such as to render the builder liable in tort for pure pecuniary damage sustained by a derivative owner with whom he has no contractual or other relationship.*

56 It seems to us that in the instant case on the basis of these two highly persuasive authorities, the developers do not owe to the management corporation a duty of care to safeguard the latter against the particular kind of damage which it has sustained, i e pure economic loss. However, to the contrary are the authorities emanating from other common law jurisdictions.

57 We turn first to the Australian cases. In ***Sutherland Shire Council v Heyman & Anor*** (1984-1985) 157 CLR 424, the plaintiffs having bought a

house and entered into occupation became aware of the damage to the house which subsequently appeared and on investigation was found to have been caused by inadequate footings. They incurred expenses in remedying the damage and strengthening the foundations. Thereafter they brought an action against the local council claiming that the council was negligent in approving the plans which showed inadequate footings. The trial judge found that the council was not negligent in approving the plans but that the council had failed to exercise reasonable care in conducting the inspection and was therefore in breach of a duty of care to the plaintiffs. His decision was upheld by the Court of Appeal of the Supreme Court of New South Wales. However, on further appeal, the High Court of Australia reversed the decision holding that the council was not guilty of any breach of duty. In coming to this decision, the court declined to follow the two-stage test of duty of care as laid down by Lord Wilberforce in ***Anns*** . Mason J in his judgment made the following observation obiter on the recovery of economic loss, at pp 465-466:

> *The proposition that in general damages are not recoverable for economic loss unless it is consequential upon injury to the plaintiff`s personal property is by no means absolute or inflexible; it is a reflection of the law`s concern about endless indeterminate liability. In the absence of any such concern in a particular class of case there is no necessity to give effect to the proposition. The dissenting judgment of Laskin J in* ***Rivtow Marine Ltd v Washington Iron Works*** *(1973) 40 DLR (3d) 530, cited with approval by Lord Wilberforce in* ***Anns*** *[1978] AC at p 760 and by Lord Roskill in* ***Junior Books*** *[1983] AC at p 544, acknowledged that there can be liability in negligence for economic loss resulting directly from avoidance of threatened physical harm to property of the plaintiff:* ***Rivtow****.*

58 We now come to the case of ***Bryan v Maloney*** (1995) 128 ALR 163, which undoubtedly is a landmark decision in Australia. There, Mr Bryan, a professional builder, built a house for one Mrs Manion who subsequently sold it to a couple, Mr and Mrs Quittenden, who later in turn sold it to Mrs Maloney.

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Prior to the purchase Mrs Maloney had inspected the house and found no cracks or other defects. However, about six months after the purchase, cracks began to appear in the walls of the house and the damage to the fabric of the house became apparent and was extensive. It was found that the reasons for the cracks and other damage was that the house had been built on footings which were inadequate to withstand seasonal changes in the clay soil. Mrs Maloney sued Mr Bryan in negligence and the Supreme Court of Tasmania awarded her damages in an amount which would necessarily be expended in remedying the inadequate footings and damage to the fabric of the house. On appeal, the Full Court of the Supreme Court dismissed the appeal. On further appeal, the High Court, by a majority, dismissed the appeal. In a joint judgment, Mason CJ, Dean and Gaudron JJ held that there was a relationship of proximity between Mr Bryan the builder, and Mrs Maloney the owner of the house giving rise to a duty of care owed by Mr Bryan to Mrs Maloney with regard to the kind of damage suffered by her. As this authority is of considerable importance on the question in issue before us, we shall refer to this judgment in extenso. Their Honours proceeded as follows. First, they were of the opinion that as between Mr Bryan, the builder, and Mrs Manion, the first owner, there was a relationship of proximity giving rise to a duty on the part of Mr Bryan to exercise reasonable care in relation to the construction of the building to avoid (i) physical injury to Mrs Manion or damage to her property, and also (ii) mere economic loss of the kind sustained by Mrs Maloney, ie diminution in the value of the house when the inadequacy of the footings first became manifest. Next, they further held that there was also a relationship of proximity between Mr Bryan as the builder and Mrs Maloney as the subsequent owner giving rise to a duty of care on the part of Mr Bryan to avoid physical injury to her person or damage to her property. In the context of these relationships they proceeded to determine

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whether there was a requisite degree of proximity in the relationship between Mr Bryan and Mrs Maloney. Their Honours said, at p 171:

> *[T]he relationship between them is marked by proximity in a number of important respects. The connecting link of the house is itself a substantial one. It is a permanent structure to be used indefinitely and, in this country, is likely to represent one of the most significant, and possibly* ***the*** *most significant, investment which the subsequent owner will make during his or her lifetime. It is obviously foreseeable by such a builder that the negligent construction of the house with inadequate footings is likely to cause economic loss, of the kind sustained by Mrs Maloney, to the owner of the house at the time when the inadequacy of the footings first becomes manifest.*

59 Their Honours turned to consider the factors present which could or might preclude the existence of the duty of care and said, at pp 171:

> *The only factor which arguably precludes the recognition of a relevant relationship of proximity between builder and subsequent owner for the purposes of the present case is the kind of damage involved, namely, mere economic loss. As has been seen, a relevant relationship of proximity would have existed between the builder and Mrs Maloney with respect to ordinary physical injury to her person or other property caused by a partial collapse of the house due to its inadequate footings even if she had not been the owner. Here again, it is important to bear in mind the particular kind of economic loss involved. As has been said, the distinction between that kind of economic loss and ordinary physical damage to property is an essentially technical one. Indeed, the economic loss sustained by the owner of a house by reason of diminution in value when the inadequacy of the footings first becomes manifest by consequent damage to the fabric of the house is, at least arguably, less remote and more readily foreseeable than ordinary physical damage to other property of the owner which might be caused by an actual collapse of part of the house as a result of the inadequacy of those footings.*

60 On policy considerations their Honours said, at pp 171-172:

> *Again, the policy considerations underlying the reluctance of the courts to recognize a relationship of proximity and a consequential duty of care in cases of mere economic loss are largely inapplicable to the relationship between builder and*

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> *subsequent owner as regards that particular kind of economic loss. There can be no question of inconsistency with the builder`s legitimate pursuit of his or her own financial interests since, as has been seen, the builder owed a duty of care to the first owner with respect to such loss. In circumstances where the particular kind of economic loss is that sustained by an owner of the house on the occasion when the inadequacy of the footings first becomes manifest, there is no basis for thinking that recognition of a relevant relationship of proximity between builder and that owner would be more likely to give rise to liability `in an indeterminate amount ... to an indeterminate class` than does recognition of such an element of proximity in the relationship between builder and first owner. It is true that, in so far as `an indeterminate time` is concerned, the time span in which liability to a subsequent owner might arise could be greater than if liability were restricted to the first owner. None the less, the extent of that time span would be limited by the element of reasonableness both in the requirement that damage be foreseeable and in the content of the duty of care. In any event, it would prima facie correspond with that applicable to the relationship of proximity which clearly exists as regards physical injury to person or other property. Moreover, any difference in duration between liability to the first owner and liability to a subsequent owner is likely to do no more than reflect the chance element of whether and when the first owner disposes of the house.*

61 Their Honours also found that in the relationship between Mr Bryan, the builder, and Mrs Maloney, the subsequent owner, there were elements of assumption of responsibility by Mr Bryan and reliance by Mrs Maloney. They said, at p 172:

> *Upon analysis, the relationship between builder and subsequent owner with respect to the particular kind of economic loss is, like that between the builder and first owner, marked by the kind of assumption of responsibility and known reliance which is commonly present in the categories of case in which a relationship of proximity exists with respect to pure economic loss. In ordinary circumstances, the builder of a house undertakes the responsibility of erecting a structure on the basis that its footings are adequate to support it for a period during which it is likely that there will be one or more subsequent owners. Such a subsequent owner will ordinarily have no greater, and will often have less, opportunity to inspect and test the footings of the house than the first owner. Such a subsequent*

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> *owner is likely to be unskilled in building matters and inexperienced in the niceties of real property investment. Any builder should be aware that such a subsequent owner will be likely, if inadequacy of the footings has not become manifest, to assume that the house has been competently built and that the footings are in fact adequate.*

62 Their Honours were also of the opinion that there were significant similarities between the relationship between the builder and the first owner and the relationship between the builder and the subsequent owner. They said, at p 172:

> *Ultimately, it seems to us that, from the point of view of proximity, the similarities between the relationship between builder and first owner and the relationship between builder and subsequent owner as regards the particular kind of economic loss are of much greater significance than the differences to which attention has been drawn, namely, the absence of direct contact or dealing and the possibly extended time in which liability might arise. Both relationships are characterized, to a comparable extent, by assumption of responsibility on the part of the builder and likely reliance on the part of the owner. No distinction can be drawn between the two relationships in so far as the foreseeability of the particular kind of economic loss is concerned: it is obviously foreseeable that that loss will be sustained by whichever of the first or subsequent owners happens to be the owner at the time when the inadequacy of the footings becomes manifest.*

63 And their Honours finally concluded thus, at p 173:

> *The conclusion that a relationship of proximity existed between Mr Bryan, as the builder, and Mrs Maloney, as subsequent owner, with respect to the particular kind of economic loss is also supported by analogy with the relationship which would have existed between Mr Bryan, as the builder, and any person who suffered physical injury to person or property in the event that the house or part of the house had collapsed at the time when the inadequacy of the foundations first became manifest. It is difficult to see why, as a matter of principle, policy or common sense, a negligent builder should be liable for ordinary physical injury caused to any person or to other property by reason of the collapse of a building by reason of the inadequacy of the foundations but be not liable to the owner of the building for the cost of remedial work necessary to remedy that inadequacy and*

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> *to avert such damage. Indeed, there is obvious force in the view expressed by Lord Denning MR in* ***Dutton v Bognor Regis Urban District Council*** *that, as a rational basis for differentiating between circumstances of liability and circumstances of no liability, such a distinction is an `impossible` one.*

64 There is thus clear authority emanating from no less than the High Court of Australia that a builder of defective premises is liable to a subsequent owner, with whom he has no contractual relationship, for mere economic loss caused by the negligence of the builder. The High Court has expressly declined to follow ***D & F Estates*** and ***Murphy*** .

65 The position in New Zealand is that a builder is liable in negligence to a subsequent owner of a house or building for damage sustained, even if such damage is pure economic loss. In ***Bowen & Anor v Paramount Builders (Hamilton) Ltd & Anor*** [1977] 1 NZLR 394, the Court of Appeal of New Zealand held a builder liable in negligence to a subsequent purchaser for damage which occurred in the building by reason of his carelessness in construction. The court regarded the plaintiff`s loss as physical damage, and not as pure economic loss. However, it is clear from the judgment of Cooke J that the court would have reached the same conclusion, even if it had characterized the damage as purely economic.

66 That case was decided before the House of Lord`s decision in ***Anns*** . Since the decision in ***Anns*** both the High Court and the Court of Appeal of New Zealand have consistently applied the two-stage test of duty of care propounded by Lord Wilberforce in ***Anns*** and followed the English Court of Appeal`s decision in ***Dutton*** . ***Bowen*** was followed and applied in ***Lester v White*** [1992] 2 NZLR 483, a decision of the High Court of New Zealand. There, the plaintiffs were owners of adjoining flats, having acquired them from

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the original owners. The first defendants were the builders of the flats, the second defendant was the foundation engineering specialist and the third defendant was the local authority which approved the foundation plan. After the purchase of the buildings, there was a settlement of the building resulting in severe damage to various parts of the building. The plaintiffs sued the defendants in negligence. It was found by the trial judge that the settlement was due to inadequate foundation. The learned judge held that it was the duty of the builders to ensure that the design and construction of a foundation system which would support the floor and the rest of the building; that it was the local authority`s responsibility to ensure that there were no obvious errors or inadequacies in the design and plan of the building and foundation; and that it was the specialist`s responsibility to construct and install the piles for the foundation in a proper manner. It was held that each of the defendants had a duty to use reasonable care to prevent damage to the plaintiffs, and the High Court declined to follow ***Murphy*** . Greig J having been invited by counsel to follow, inter alia, ***Murphy*** , said, at p 492:

> *But there can be no doubt that in the High Court, at first instance, the law to be applied must be that which has been declared by the Court of Appeal in New Zealand in this particular area until that is changed by a change of view of the Court of Appeal or by a pronouncement of the Privy Council. The law here, so far as it is applicable to the duty of builders and of a borough council to derivative owners of land, has been well and long established and has been reaffirmed. Reference needs only to be made to* ***Bowen v Paramount Builders (Hamilton) Ltd*** *[1977] 1 NZLR 394,* ***Mount Albert Borough Council v Johnson*** *[1979] 2 NZLR 234,* ***Brown v Heathcote County Council*** *[1986] 1 NZLR 76 and* ***Stieller v Porirua City Council*** *[1986] 1 NZLR 84 to show that this is a reasoned maintained approach. It has been applied in a number of cases and no doubt has governed the approach of local authorities, builders and others who have been involved in claims which have been settled and in conduct which has anticipated and perhaps prevented the damage which this kind of case examples.*

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67 The same question came for consideration before the Court of Appeal two years later. In ***Invercargill City Council v Hamlin*** [1994] 3 NZLR 513, the owner of a house sued the local council for negligence in approving the plans for the foundations of the house which caused the damage which was subsequently made good by the owner. The Court of Appeal referred, inter alia, to ***D & F Estates*** and ***Murphy*** but declined to follow them. The court held that the local council was liable to the owner for the loss sustained. Cooke P said, at p 522:

> *... Since* ***Bowen*** *in 1976, it has been accepted that a duty of reasonable care actionable in tort falls on house builders and controlling local authorities, and in that case one member of the court ventured to question the value in this field of an attempted distinction between pure economic loss and damage to the building, at pp 422-423.* ***Bowen*** *has been followed in many High Court cases without as far as is known any sense that it does other than justice. Similarly, in* ***Johnson*** *in 1979 the view was expressed that a cause of action arises when the defect becomes apparent or manifest, at pp 239-240. The defect under consideration in* ***Johnson*** *was likewise in the foundations; the discovery of minor damage earlier was seen as relevant only to the issues of possible successive actions, causation and intermediate examination. And similarly what was said in* ***Johnson*** *has been followed in the High Court.* ***D & F Estates*** *and* ***Murphy*** *also have not been followed in Canada. In* ***Winnipeg Condominium Corp No 36 v Bird Construction Co*** *(1995) 121 DLR (4th) 193, the Supreme Court of Canada adopted the two stage test in* ***Anns*** *and held that the economic loss sustained in circumstances somewhat similar to those in* ***D & F Estates*** *and* ***Bryan v Maloney*** *was recoverable. There, a developer entered into a building contract with the defendant for the construction of a 15-storey apartment building. The defendant in turn entered into subcontract with masonry subcontractors. The building was built and was used as an apartment block, but was later converted into a condominium and the plaintiff, the condominium corporation, became the registered owner of the land. A few years later, the state of the exterior claddings gave rise to grave concerns; the mortar had broken away and cracks were developing in the stonework. Some remedial work was carried out but was not effective. Subsequently a large section of the cladding fell. In consequence, the plaintiff after taking advice from the consultants had the entire cladding removed and replaced at a cost in excess of*

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> *$1.5m. It then commenced proceeding against the contractor, masonry subcontractors and the architects. It was conceded that the plaintiff was a subsequent owner and not the alter ego of the original owner. Two of the defendants applied to strike out the claim as disclosing no cause of action and the application was dismissed. On appeal, the Court of Appeal of the State of Manitoba allowed the appeal and struck out the claim. The plaintiffs appealed to the Supreme Court of Canada. The Supreme Court held that if there was negligence in the planning or construction of a building causing the building to be dangerous the plaintiff could recover the costs of making the building safe. In coming to this conclusion the Court declined to follow* ***D & F Estates***

68 and ***Murphy***

69 . La Forest J delivering the judgment of the court said, at p 203:

> *... In my view, where a contractor (or any other person) is negligent in planning or constructing a building, and where that building is found to contain defects resulting from that negligence which pose a real and substantial danger to the occupants of the building, the reasonable cost of repairing the defects and putting the building back into a non-dangerous state are recoverable in tort by the occupants. The underlying rationale for this conclusion is that a person who participates in the construction of a large and permanent structure which, if negligently constructed, has the capacity to cause serious damage to other persons and property in the community, should be held to a reasonable standard of care.*

70 Later, he said, at pp 212-213:

> *... If a contractor can be held liable in tort where he or she constructs a building negligently and, as a result of that negligence, the building causes damage to persons or property, it follows that the contractor should also be held liable in cases where the dangerous defect is discovered and the owner of the building wishes to mitigate the danger by fixing the defect and putting the building back into a non-dangerous state. In both cases, the duty in tort serves to protect the bodily integrity and property interests of the inhabitants of the building: see* ***Dutton****, supra, at p 396, per Lord Denning MR.*

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71 The learned judge then dealt with the policy consideration for imposing such a duty of care. He said, at pp 213-214:

> *Apart from the logical force of holding contractors liable for the cost of repair of dangerous defects, there is also a strong underlying policy justification for imposing liability in these cases. Under the law as developed in* ***D & F Estates*** *and* ***Murphy****, the plaintiff who moves quickly and responsibly to fix a defect before it causes injury to persons or damage to property must do so at his or her own expense. By contrast, the plaintiff who, either intentionally or through neglect, allows a defect to develop into an accident may benefit at law from the costly and potentially tragic consequences. In my view, this legal doctrine is difficult to justify because it serves to encourage, rather than discourage, reckless and hazardous behaviour. Maintaining a bar against recoverability for the cost of repair of dangerous defects provides no incentive for plaintiffs to mitigate potential losses and tends to encourage economically inefficient behaviour. ... Allowing recovery against contractors in tort for the cost of repair of dangerous defects thus serves an important preventive function by encouraging socially responsible behaviour.*

72 This conclusion is borne out by the facts of the present case, which fall squarely within the category of what I would define as a `real and substantial danger`. It is clear from the available facts that the masonry work on the Condominium Corp`s building was in a sufficiently poor state to constitute a real and substantial danger to inhabitants of the building and to passers-by. The piece of cladding that fell from the building was a storey high, was made of 4-inch-thick Tyndal stone, and dropped nine storeys. Had this cladding landed on a person or on other property, it would unquestionably have caused serious injury or damage. Indeed, it was only by chance that the cladding fell in the middle of the night and caused no harm. In this light, I believe that the Condominium Corp behaved responsibly, and as a reasonable homeowner should, in having the building inspected and repaired immediately. Bird should not be insulated from liability simply because the current owners of the building

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acted quickly to alleviate the danger that Bird itself may well have helped to create.

73 From our examination of all these authorities, it seems to us that there is no single rule or set of rules for determining, first, whether a duty of care arise in a particular circumstance and, second, the scope of that duty. In ***Governors of the Peabody Donation Fund v Sir Lindsay Parkinson & Co Ltd*** [1985] AC 210, at p 240, Lord Keith of Kinkel said:

> *The true question in each case is whether the particular defendant owed to the particular plaintiff a duty of care having the scope which is contended for, and whether he was in breach of that duty with consequent loss to the plaintiff. A relationship of proximity in Lord Atkin`s sense must exist before any duty of care can arise, but the scope of the duty must depend on all the circumstances of the case. ... So in determining whether or not a duty of care of particular scope was incumbent upon a defendant it is material to take into consideration whether it was just and reasonable that it should be so.*

74 This view was endorsed by Gibbs CJ in ***Sutherland Shire Council*** , where after quoting the above passage he said, at p 441:

> *In deciding whether the necessary relationship exists, and the scope of the duty which it creates, it is necessary for the court to examine closely all the circumstances that throw light on the nature of the relationship between the parties. The judgment of Lord Roskill in* ***Junior Books Ltd v Veitchi Ltd*** *[1983] AC 520, at p 546, provides an example of the process. If a relationship of neighbourhood or proximity is found to exist, then it will be necessary to proceed to the second stage of the inquiry. None of this process will be necessary if the facts fall into a category which has already been recognized by the authorities as attracting a duty of care, the scope of which is settled ....*

75 In determining the existence of a duty of care and scope of such duty in different categories of cases, different judges have used different expressions: some say they are doing so as a matter of policy; some justify their approach by

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common sense, pragmatism, justice and reasonableness. In ***Caparo Industries plc v Dickman & Ors*** [1990] 2 AC 605, at p 628, Lord Roskill said:

> *Phrases such as `foreseeability`, `proximity`, `just and reasonable`, `fairness`, or `voluntary assumption of responsibility` will be found from time to time in the different cases. But as your Lordships have said, such phrases are not precise definitions. At best they are but labels descriptive of the very different factual situations which can exist in particular cases and which must be carefully examined in each case before it can be pragmatically determined whether a duty of care exists and, if so, what is the scope and extent of that duty.*

76 Lord Bridge of Harwich expressed similar sentiments when he said at p 618:

> *[T]he concepts of proximity and fairness embodied in these additional ingredients are not susceptible of any such precise definition as would be necessary to give them utility as practical tests, but amount in effect to little more than convenient labels to attach to the features of different specific situations which, on a detailed examination of all the circumstances, the law recognizes pragmatically as giving rise to a duty of care of a given scope.*

77 Lord Oliver of Aylmerton expressed similar view but in a more detailed manner at p 633:

> *The postulate of a simple duty to avoid any harm that is, with hindsight, reasonably capable of being foreseen, becomes untenable without the imposition of some intelligible limits to keep the law of negligence within the bounds of common sense and practicality. Those limits have been found by the requirement of a `relationship of proximity` between plaintiff and defendant, and by the imposition of a further requirement, that the attachment of liability for harm which has occurred must be `just and reasonable`. Although the cases in which the courts have imposed or withheld liability are capable of an approximate categorisation, one looks in vain for some common denominator by which the existence of the essential relationship can be tested. Indeed, it is difficult to resist a conclusion that, what have been treated as three separate requirements are, at least in most cases, in fact merely facets of the same thing; for, in some cases the degree of foreseeability is such that it is from that alone, that the requisite proximity can be deduced, whilst in others, the*

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> *absence of that essential relationship can most rationally be attributable simply to the court`s view that it would not be fair and reasonable to hold the defendant responsible. `Proximity` is, no doubt, a convenient expression, so long as it is realised that it is no more than a label which embraces not a definable concept, but merely a description of circumstances, from which, pragmatically, the courts conclude that a duty of care exists.*

78 Whatever language is used the court is basically involved in a delicate balancing exercise in which consideration is given to all the conflicting claims of the plaintiffs and the defendants as viewed in a wider context of society. As Cooke P said in ***South Pacific Manufacturing Co Ltd v New Zealand Security Consultants & Investigations Ltd*** [1992] 2 NZLR 282 at p 294:

> *... Ultimately the exercise can only be a balancing one and the important object is that all relevant factors be weighed. There is no escape from the truth that, whatever formula be used, the outcome in a grey area case has to be determined by judicial judgment. Formulae can help to organize thinking but they cannot provide answers.*

79 But the approach of the court has been to examine a particular circumstance to determine whether there exists that degree of proximity between the plaintiff and the defendant as would give rise to a duty of care by the latter to the former with respect to the damage sustained by the former. Such proximity is the `determinant` of the duty of care and also the scope of such duty. In ***Burnie Port Authority v General Jones Pty Ltd*** (1994) 179 CLR 520, at pp 542-543, in a joint judgment, Mason CJ, Deane, Dawson, Tookey and Gaudron JJ said:

> *The `general conception` of a relationship of proximity was identified (**Donoghue v Stevenson** [1932] AC 580) by Lord Atkin as the `element common to the cases where [liability in negligence] is found to exist` and as the basis of the duty of care which is common to all such cases. It has been stressed and developed in judgements in recent cases in the court. As Deane J pointed out in **Stevens v Brodribb Sawmilling Co Pty Ltd** (1986) 160 CLR, at p 53: that common element of a relationship*

> *of proximity `remains the general conceptual determinant and the unifying theme of the categories of case in which the common law of negligence recognises the existence of a duty to take reasonable care to avoid a reasonably foreseeable risk of injury to another`. Without it, the tort of negligence would be reduced to a miscellany of disparate categories among which reasoning by the legal processes of induction and deduction would rest on questionable foundations since the validity of such reasoning essentially depends upon the assumption of underlying unity or consistency.*

80 We now return to the case at hand and consider whether in the circumstances there is sufficient proximity in the relationship between the developers and the management corporation which gives rise to a duty on the part of the developers to the management corporation to exercise reasonable care in the construction of the common property so as to guard against the management corporation sustaining the kind of damage complained of. The developers were the party who conceived and developed the entire condominium comprising the several multistorey subdivided buildings and the common property. The decision whether each of the lots in the subdivided building was to have a separate subsidiary strata certificate of title rested entirely with them. They were also the party who, having decided that each lot was to have a separate subsidiary title, caused and procured surveys of the lots to be carried out and strata title plan for each lot to be prepared and approved by the relevant authority and subsequently registered with the Registry of Land Titles. Under s 9(3) of the Strata Act, upon registration of a strata title plan a subsidiary proprietor shall be deemed to be the proprietor of his lot and his share in the common property, subject to the encumbrances, if any, registered or notified in the subsidiary strata land-register and on the strata plan. As the developers were the original owner of the entire parcel or parcels of land on which was built the entire condominium comprising, inter alia, the lots in subdivided buildings in respect of which the strata title plans were registered,

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they were the first proprietor of each of the lot and also of the common property, all comprised in the condominium. Under s 33(1) of the Strata Act the subsidiary proprietors from time to time of the lots in a subdivided building comprised in a strata plan constitute the body corporate, the management corporation. Hence, the management corporation at the time of its creation was, in fact, the developers themselves who alone constituted the management corporation. At that stage, the management corporation was the developers` alter ego. It is only at a later stage as and when the developers completed the sales of the various lots to purchasers that the constitution of the management corporation changed and subsidiary proprietors other than the developers then constituted the management corporation. Even at that stage, the subsidiary proprietors who formed the management corporation were parties with each of whom the developers had a contractual relationship. As the learned judge said, the management corporation was in fact the creation of the developers. Historically there existed a very close proximity in the relationship between the developers and the management corporation. It was therefore clearly foreseeable by the developers that if in the construction of the common property they failed to exercise reasonable care and skill, the burden of making good any defects arising from their failure would inevitably redound on their successor, the management corporation.

81 In terms of responsibilities the developers undertook with their purchasers to construct in a good and workmanlike manner, among other things, the common property in accordance with the agreed specifications and in accordance with the approved plans: see cll 8 and 9 of their sale and purchase agreements which we have set out earlier. These obligations are, of course, merely contractual. But such contractual obligations do not preclude the

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existence of their liability in tort under the ordinary law of negligence to their purchasers or other parties not privy to the agreements.

82 After the condominium had been completed and before the management corporation was established, the developers had certain statutory obligations with regard to the common property. At that stage, the Building and Common Property (Maintenance and Management) Act (Cap 30) applied to them. The developers were solely responsible for the upkeep and maintenance of the common property. Under s 4 of that Act if the common property had not been kept or maintained in a good state of repair, the Commissioner had the power by notice to require the developers to take such steps or carry out such repairs and maintenance and if the developers failed to comply with the notice the Commissioner further had the power to authorize any person to carry out the requirements at the costs of the developers. Next, under s 9 of the Act the developers were required as from a certain stage onwards to set up a maintenance fund to pay for various expenses for the upkeep and maintenance of the common property.

83 After the management corporation had been constituted, it took over from the developers the control, management and administration of the common property. The surplus in the maintenance fund established by the developer was transferred to the management corporation. Effectively, it was a successor to the developers. The management corporation in turn has statutory obligations. We have discussed earlier in some detail the statutory obligations of the management corporation and the sanction applicable in the event of any default on its part. It is clear from the provisions of the Strata Act that the management corporation has obligations in respect of the common property, the most relevant of which is the duty to maintain that property in a state of good repair,

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which means not only maintaining it in a state which it was originally in, but also the state that it was supposed to be in: ***Proprietors of Strata Plan No 6522 v Furney & Anor*** [1976] 1 NSWLR 412. Its obligations are, therefore, very much dependent on the developers having exercised reasonable care and applied good workmanship in the construction of the common property.

84 Bearing all these considerations in mind, if we may respectfully adopt the methodology and the words used by Lord Roskill in ***Junior Books*** (supra at p 546), we regard the following facts of crucial importance in determining that there is sufficient proximity between the developers and the management corporation which gives rise to the duty of care: (i) the management corporation was an entity conceived and created by the developers; (ii) the developers were the party who built and developed the condominium including the common property and undertook the obligations to construct it in a good and workmanlike manner and were alone responsible for such construction; (iii) after completion of the condominium the developers were the party solely responsible for the maintenance and upkeep of the common property; (iv) the management corporation as the successor of the developers took over the control, management and administration of the common property and has the obligations of upkeeping and maintaining the common property; (v) the performance of these obligations is very much dependent on the developers having exercised reasonable care in the construction of the common property; (vi) the developers obviously knew or ought to have known that if they were negligent in their construction of the common property the resulting defects would have to be made good by the management corporation. The relationship between the developers and management corporation is as close it could be short of actual privity of contract. In our judgment, there is a duty on the part of the

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developers in the construction of the common property a duty to take reasonable care to avoid the kind of damage sustained by the management corporation.

85 We now turn to consider whether there is any policy consideration in negativing such duty of care. First, there is the question whether this would result in imposing liability `in an indeterminate amount for an indeterminate time to an indeterminate class`. The amount recoverable is the cost of repair and making good the defects in the common property and in no way can it be said to be indeterminate. The class of persons is finite and definable. As for the duration, the time span is also not indeterminate, as the maximum period of time in which the developers can possibly be exposed to liability is limited by the Limitation Act (Cap 163): see s 24B. Secondly, there is also a related objection that recovery for economic loss would result in an indefinitely transmissible warranty. The common property has been and will continue to remain in the control and under the management of the management corporation. There is no question of any transmissible warranty to any other party.

86 In the result, we dismiss both the appeals.

87 We now come to the question of costs. Although there are two appeals and the parties in the two appeals are different, they were argued on the basis of one appeal, as both the appeals were against the same decision and on the same grounds. Effectively in these appeals, the developers and the architects are the appellants and the management corporation is the respondent. Having regard to all these matters, we now make the following order as to costs. First, we order that the costs of the appeals be paid by the developers and the architects to the management corporation and only one set of costs be allowed. Their obligations to pay are joint and several but, as between them, they each bear the costs

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equally. Secondly, the appeals warrant the issue to the management corporation of a certificate for two solicitors under O 59 r 19(1) of the Rules of Supreme Court 1990, and we accordingly so order. Lastly, the deposits in court as security for costs in the two appeals are to be paid to the management corporation or its solicitors to account of costs.

88 Appeals dismissed.

Goh Joon Seng J
Karthigesu JA
L P Thean JA

Mohan R Pillay and Lawrence Tan (Wong Partnership) for the appellants in CA 185/94
JG Advani and Chee Wei-Lin (PK Wong & Advani) for the respondents in CA 185/94 and the appellants in CA 188/94
Jimmy Yim and Lau Kok Keng (Drew & Napier) for the respondents in CA 188/94

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