IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[1994] SGHC 275

Suit 1353/1991

Between

Management Corp Strata Title Plan No 1272

… Plaintiff

And

Ocean Front Pte Ltd

… Defendant

And

Ssangyong Engineering and Construction Co Ltd

… Third Party

GROUNDS OF DECISION

Civil Procedure — Parties; Land — Strata titles — Management corporation; Tort — Negligence — Damages; Words and Phrases; Words and Phrases

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Management Corp Strata Title Plan No 1272 v Ocean Front Pte Ltd (Ssangyong Engineering and Construction Co Ltd and Others, Third Parties)

[1994] SGHC 275

Suit 1353/1991
Warren Khoo L H J
04 November 1994

1 Cur Adv Vult

2 The plaintiffs are the management corporation of a condominium known as Bayshore Park. In the development of this condominium, the defendants were the developers, the first third party were the building contractors, the second third party were the architects and the third third party were the structural engineers.

3 The plaintiffs claim damages arising from alleged faulty construction of certain areas of the common property. It is alleged that the faulty construction of the ceiling of certain basement car parks has resulted in the spalling of concrete. It is also alleged that the faulty construction of certain common areas and corridors around the lift lobbies has resulted in a problem of water ponding in those areas.

4 The defendants obtained an order for certain points of law to be determined as preliminary issues under O 33 r 2 of the Rules of the Supreme

Court 1990. The questions as framed were in rather elaborate terms, but they can, I believe, be reduced to two basic questions. Firstly, is it competent for the management corporation to sue in its own name for the alleged defects in construction of these parts of the common property? Secondly, since the damages recoverable would be damages for a pure economic loss in the form of the cost of repair, is the management corporation barred from making such a claim on that ground?

5 At the hearing, plaintiffs` counsel objected to the participation of counsel for the third parties on the ground that the proceedings concerned only the plaintiffs and the defendants. On the counsel of the third parties undertaking that their respective clients would be bound by the decision of the court on the questions submitted for determination, counsel for all the third parties were allowed to take part in the proceedings.

6 **Relevant provisions of the Act**

7 The ownership, control, management and administration of condominiums are regulated by the Land Titles (Strata) Act (Cap 158, 1988 Ed). The word `condominium` is nowhere used in the Act, but it is a popular and convenient term and I shall use it in this judgment. The concept is based on the subdivision of a building or buildings containing units for which separate certificates of title are intended to be issued. Physically, a condominium basically consists of two parts, the units owned by the individual owners and the shared facilities outside the individually-owned units referred to collectively as the common property. The individually-owned units are referred to in the Act as `lots`, and the building or buildings containing the units is, or are collectively, referred to as the `subdivided building`. The owners of the individual lots are

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referred to as `subsidiary proprietors`. The whole of the land comprised in the condominium is referred to as the `parcel`.

8 The developer of a condominium has to submit to the Commissioner of Buildings for his approval a schedule of share values allotted to the lots in the condominium. The share value attached to a lot is of importance in at least three ways. Firstly, it determines the voting rights of a subsidiary proprietor in meetings of the subsidiary proprietors or of the management corporation. Secondly, it determines his share of the amount of contribution to be made to the management fund of the management corporation. Thirdly, and of relevance to the matter at hand, it determines the subsidiary proprietor`s share in the ownership of the common property, for it is provided by s 13(1) of the Act that the common property is owned by the subsidiary proprietors as tenants in common in proportion to the share values attached to their respective lots.

9 The developer of a condominium is required to apply to the Registrar of Titles for registration of a strata title plan approved by the Chief Surveyor. The strata title plan is required to show, among other things, the share values of the lots comprised in the subdivided building, the boundaries of the lots and a legend of all the common property. Section 33(1) of the Act provides that upon the registration of the strata title plan by the Registrar, the subsidiary proprietors of the lots in the subdivided building shall constitute the management corporation.

10 **Common property: developers` contractual duty as to construction**

11 Developers of condominiums are more likely than not controlled by the Housing Developers (Control and Licensing) Act (Cap 130), and the sale and

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purchase agreements which they enter into with purchasers of the units in the condominium are in the standard form prescribed by the Controller of Housing. That is the position in the instant case. Of the provisions of the sale and purchase agreements entered into between the defendants and the purchasers, cll 8(1) and 9 are of special relevance. Clause 8(1) provides as follows:

> *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.*

12 Clause 9 provides as follows:

> *(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.*

13 **Maintenance of common property prior to taking over by management corporation**

14 The initial responsibility for keeping the common property of a condominium under development, or immediately after completion of development, rests with the developer himself, and there are statutory provisions to ensure that he carries out this responsibility. Thus, under s 4 of the Buildings and Common Property (Maintenance and Management) Act (Cap 30), where any building or common property has not been kept or maintained

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in a state of good and serviceable repair or in a proper and clean condition, the Commissioner of Buildings may by notice require the owner to carry out such repairs or maintenance as he thinks fit. An owner who fails to comply with the notice is guilty of a offence. If the notice is not complied with to his satisfaction, the Commissioner or any person authorized by him may carry out the works required. The Commissioner may require the owner of the building or common property to deposit an amount necessary in his opinion for the purpose of carrying out the works required, and he may deduct from the deposit any cost incurred in carrying out the works required.

15 Under s 9 of the same Act, if the developer has sold units in the development to more than two purchasers, then, as soon as a temporary occupation licence has been issued in respect of any flat in the development, he has to set up a maintenance fund to be used for the maintenance of the common property. He has to pay into this fund all the maintenance charges which he is authorized by the Commissioner of Buildings to collect from the purchasers. He has himself also to contribute and pay into the management fund maintenance charges in respect of units which have not been sold. Upon the formation of the management corporation, any balance of the management fund must be transferred to the management corporation.

16 Section 16 requires the developer of a condominium to deposit with the Commissioner a sum determined in accordance with rules made under the Act, and the Commissioner is authorized to use the deposit for the purpose of carrying out any work which is necessary to rectify any defects in the common property of the development.

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17 In summary, it can be seen that the developer of a condominium has a responsibility, both under statute and under his contracts with the purchasers, to see to the proper construction, management and maintenance of the common property in a condominium. The management and maintenance of the common property passes to the management corporation when the latter comes into being. There are transitional provisions concerning the common property before the holding of the first annual general meeting of the management corporation which, however, I do not need to refer to in any detail.

18 **Management corporation: Responsibilities and powers**

19 The management corporation is charged by s 48 of the Land Titles (Strata) Act (Cap 158, 1988 Ed)) with the duties of controlling managing and administering the common property for the benefit of all subsidiary proprietors. It is required to properly maintain the common property and keep it in a state of good and serviceable repair, renewing and replacing any fixtures and fittings when necessary.

20 To enable the management corporation to carry out its duties under the Act, the Act empowers the management corporation in general meeting to determine the amount of contributions to the management fund (by reference to the share value of each lot) to be levied on the subsidiary proprietors .

21 There is provision in s 120 of the Act imposing a criminal liability for breach by the management corporation of its duties under Pt IV of the Act (containing inter alia provisions regarding the management corporation`s duties in relation to the common property). In the event of a breach of the duty to keep and maintain common property in good and serviceable repair, s 4 of the

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Buildings and Common Property (Maintenance and Management) Act, mentioned above, is also wide enough to enable the Commissioner to issue the necessary notice to compel the management corporation to carry out or pay for the carrying out of works required to keep it in good and serviceable repair; the word `owner` is defined in that Act to include a management corporation.

22 Section 120 of the Land Titles (Strata) Act also provides that any person for whose benefit a requirement or duty is imposed on a management corporation by Pt IV of the Act may apply to court to compel the management corporation to carry out the requirement or to perform the duty. Presumably, a subsidiary proprietor may resort to court if the management corporation fails to carry out its duties in relation to the common property.

23 Against all this legislative background, I turn to the questions at hand. The plaintiffs base their right to sue on ss 33 and 119 of the Act. I consider each of these sections in turn.

24 **Section 33 of the Act**

25 The relevant provisions of s 33 are 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
>
> …
>
> *(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;

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> (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.

26 The plaintiffs rely on sub-s (2) as giving them the right to sue. The defendants argue that that subsection only gives the management corporation the capacity to sue and does not deal with the causes of action for which the management corporation can sue. I respectfully disagree with the defence submission. It is clear that sub-s (1) already deals with the capacity question, in the sense that the management corporation can sue in its own name. The function of sub-s (2) is to list the matters in respect of which the management corporation can sue or be sued. These include, in (b), all matters affecting the common property and, in (c), any loss or damage arising out of contract or otherwise.

27 As stated above, the management corporation is under a duty to maintain the common property and to keep it in good repair. It follows, in my view, that where there is a defect in the common property capable of being made good by repair, it is the duty of the management corporation to carry out the repair. It is surely part of any good management of common property to effect necessary repairs to the common property, whether the necessity has arisen from ordinary wear and tear or from defects in the original construction of the common property. It cannot sensibly be argued that the management corporation`s duty is confined to the former and that it only needs to keep the latter from getting worse.

28 I find apposite the following dictum of Lord Patrick in at p 677:

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> *It is true that the primary meaning of the word `repair` is to restore to sound condition that which has previously been sound, but the word is also properly used in the sense of to make good. Moreover, the word is commonly used to describe the operation of making an article good or sound, irrespective of whether the article has been good or sound before.*

29 Needham J in had to consider the effect of s 68(1) of the New South Wales Act, which is in similar (but not exactly the same) terms to s 48(1)(a) and (b) of our Act. Referring to the above dictum of Lord Patrick, Needham J said:

> *I think that that interpretation should be applied to the word `repair` in s 68, firstly, because it is the ordinary meaning of the word but, secondly, because, if the power to make good that which was not good before does not vest in the body corporate under the legislation, there is a gap in the legislation which would mean that nobody had power to perform that duty, no matter how necessary it might be in any particular case.*

30 I wholly and respectfully agree with these pronouncements.

31 The cost of repair incurred is defrayed from the maintenance fund made up of contributions from the subsidiary proprietors. It is the management corporation that thus sustains the loss in having to defray such cost, although it is the subsidiary proprietors on whom the contributions to the management fund are levied in the first place. If the defect has been due to the negligence in the design or construction of the building by the developer, then, prima facie, and subject to the economic loss argument below, the management corporation is entitled to sue the developer for the loss resulting from the defect.

32 **Common property: subsidiary proprietors` ownership**

33 Defendants` counsel argues that because the ownership of the common property is by s 13(1) of the Act vested in the subsidiary proprietors as tenants in common and not in the management corporation, it is the subsidiary

proprietors, rather than the management corporation, who have the right to sue the developer for any defects in the common property that might be attributable to the developer.

34 I respectfully disagree. In the first place, if counsel`s argument is correct, there would have been no necessity to enact s 33(2) giving the management corporation the power to sue in respect of any matter affecting the common property. The subsection contains no limitation as to the type of matters concerning the common property in respect of which the management corporation can sue or be sued or as to the circumstances in which such suits may be brought by or against the management corporation. Secondly, the common property is under the control, management and administration of the management corporation, and it is also the management corporation, rather than the individual subsidiary proprietors, who have the duty to keep it in good and serviceable repair. Thirdly, it is obviously more convenient for the management corporation, operating under well-defined decision-making procedures prescribed by the Act and bye-laws, to take proceedings in respect of any matter concerning the common property, rather than for the subsidiary proprietors as individual subsidiary proprietors to do so. There is no reason for any particular subsidiary proprietors whose property is not specially affected by defects in the common property, to take the initiative of suing. This is of special relevance in a large condominium with many subsidiary proprietors, some of whom might be more affected by the defects than others.

35 I am therefore of the view that it is consistent with the purpose and objective of the Act that, in regard to common property in general, it is the management corporation, rather than the subsidiary proprietors, which should

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normally be the party to sue and to be sued. Such proceedings are for the account of the management corporation as management corporation.

36 The fact that legal ownership of the common property by the Act vests in the subsidiary proprietors has very little practical significance in the ordinary functioning of a condominium. In ordinary circumstances, a subsidiary proprietor`s liability and obligation vis-a-vis the common property is merely to contribute to the management fund in the amount determined by the management corporation in general meeting. Unlike owners of property not subject to the Act, the individual subsidiary proprietors as subsidiary proprietors do not have any responsibility vis-a-vis the maintenance and repair of the common property. They also do not have to account to each other in respect of moneys expended on the maintenance and repair of the common property. It thus seems to me that in ordinary circumstances the subsidiary proprietors` ownership of the common property as tenants-in-common carries with it no incidents of ownership in any practical sense. It probably assumes a significance if and when the strata subdivision scheme is terminated in accordance with Pt V of the Act and the subsidiary proprietors` interest in the parcel is to be accounted for. See s 78, particularly sub-s (6).

37 **Building defects occurring before formation of management corporation**

38 A question was also raised whether the management corporation is barred from suing the defendants on the ground that the defective construction alleged had taken place before the management corporation came into existence. No evidence was produced to me as to when the strata title plan was registered, that being the moment the management corporation came into being, as stated

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above. But I do not think that it matters. I would deal with the question on broader considerations.

39 The developer of a condominium knows from the moment he conceives of his plan to develop it that a management corporation will come into being as a matter of course on the implementation of the plan. The management corporation in fact is his own creation, although it does not come into existence by law until the strata title plan has been registered by the Registrar of Titles. The duty to construct the common property in a good workmanlike manner, if not implied as a matter of common law or common sense, is expressly provided in the standard terms of contract which he is required to use in selling the units to purchasers. The developer also knows, or should know, that if the common property is not properly constructed, the management corporation, which will surely come into being, will be exposed to liability for repair and to incurring cost in doing so. It seems to me that in these circumstances there is a clear duty on the part of the developer to the management corporation to see that the construction is properly carried out. If there is such a duty, it seems to me to be artificial and unreal in the extreme to seek to draw a distinction on the basis of whether the defects occurred before or after the formation of the management corporation, that is to say, before or after the moment the strata title plan is registered.

40 It is my view, therefore, that, again subject to the pure economic loss argument below, the management corporation can sue in respect of defects due to any improper construction of the common property, whether such defective construction took place before or after the management corporation was established. The only limitation is that provided by the Limitation Act (Cap 163).

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41 **Section 116 of the Act**

42 I now turn to s 116 of the Act. The section reads:

> *(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 given or made in favour of or against the management corporation in any such proceedings shall have 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 proprietary 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 subsidiary proprietor bears to the aggregate share value.

43 I do not find it easy to interpret this section. Given that there are already provisions in s 33 enabling the management corporation to sue in respect of any matter concerning the common property, it is difficult to see that there should be any need for this section. I assume, however, that the legislature does not enact anything in vain. I should assume that s 116 is intended to serve a purpose different from that served by s 33.

44 The section has its parallel in s 147 of the Strata Tiles Act 1973 of New South Wales, but there are significant differences in wording. Instead of a reference to all subsidiary proprietors jointly in s 147, the reference in s 116 is to `all or some` subsidiary proprietors. There is scant authority on s 147. Furthermore, there does not appear to be any provision in the New South Wales legislation equivalent to s 33(2) of our Act (concerning the matters in respect of

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which the management corporation may sue or be sued), or at least my attention has not been drawn to any. So I have to attempt to determine the respective spheres of application of ss 33(2) and 116(1) quite unaided. I do not have all the answers, but the terms in which s 116(1) is cast leads me to think that it is probably intended to cover cases where individual lots affect specially, or are affected specially by, the common property. Note the words `as if [the management corporation] were the subsidiary proprietors of the lots concerned`, particularly the words `the lots concerned`. These words seem to be apt to cover situations where something exists in some or all of the individual lots which specially and adversely affects the common property, or where something exists in the common property which specially and adversely affects some or all the lots in the condominium. An example would be where a common roof has been so poorly constructed that water leaks through it and adversely affects all or some of the units in the condominium. The subsidiary proprietors of the lots affected could take action under their sale and purchase agreements against the developer. Instead of those affected taking individual actions against the developer or joining in one action with numerous plaintiffs, the management corporation may, under this section, take action in its own name but substantively on behalf of the subsidiary proprietors concerned. The proceedings would be for the account of the subsidiary proprietors.

45 This impression of the effect of s 116(1) is reinforced by the words at the end of the subsection referring to a judgment or order obtained in such proceedings as having effect as if it was a judgment or order given or made in favour of or against the subsidiary proprietors concerned. If the proceedings were about aspects of the common property which do not specially affect particular lots or which are not specially affected by something in the particular lots, then on my view of the matter as I have expressed it when discussing s 33

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above, there is hardly any need for such a provision. The judgment would simply be for or against the management corporation as management corporation.

46 This impression of the effect of s 116(1) is also reinforced by the provision of sub-s (2) of that section, which speaks of a subsidiary proprietor making a contribution to another subsidiary proprietor in respect of a judgment debt arising under a judgment referred to sub-s (1).

47 The following section, s 117, provides that where the condition of a lot affects the support or shelter provided by that lot for the common property and the subsidiary proprietor of that lot neglects to take proceedings to get that condition rectified, the management corporation may take such proceedings as the agent of the subsidiary proprietor but at its own cost. It seems to me that this is an extension of the principle of s 116 to the situation where only one particular lot is specially concerned, an extension of `all or same` in s 116(1) to a single lot.

48 If my view is correct, then s 116 would have no application to situations where no particular lots are specially affected by, or specially affect, the common property. Take the case of a dust bin centre or a visitors` car park, or a swimming pool, not constructed properly. The defect affects no lots in particular but it does affect the general body of owners in their enjoyment of the common facilities and amenities of the condominium. In these situations, it would be unrealistic to expect individual subsidiary proprietors, as subsidiary proprietors, to take proceedings. The management corporation is the suitable party to sue. It sues in its own name, on its own behalf and for its own account, and it sues under s 33(2), not s 116(1).

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49 In the recent case of , it was alleged that the water system serving a condominium had been constructed in breach of cll 8 and 9 of the standard sale and purchase agreement in similar terms to those of the clauses in the agreements in the instant case. It was further alleged that as a result of the breach the purchasers had to expend money to repair the pipe bursts. The suit was taken out by the management corporation on behalf of the purchasers. The defendants, who were the developers of the project, took a preliminary objection as to the management corporation`s title to sue. GP Selvam J held that s 116(1) of the Act enabled the management corporation to sue, provided the subject matter of the suit was limited to the common property. He held that the suit was not in the nature of a representative action under O 15 r 12(1) of the Rules of the Supreme Court 1990. He then 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.*

50 The learned judge`s view and mine are one in that, in a proceeding under s 116, the management corporation represents the subsidiary proprietors. It is the subsidiary proprietors who are the substantive party, although the proceeding is in the name of the management corporation. GP Selvam J in that case appears not to have been called upon to express a view on the question which is before me, ie the respective spheres of application of ss 33(2) and 116(1).

51 My views on s 116 being what they are, it is not necessary for me to deal with the other points which have been raised in argument about s 116. However,

in deference to the arguments of counsel, I would make observations on two points. Firstly, the defendants rely on the words `jointly entitled` and they submit that the subsidiary proprietors as purchasers from the defendants, under separate sale and purchase agreements, have, if at all, only several rights to sue, as opposed to a joint right to sue. They say the section does not allow the management corporation to take action in these circumstances.

52 It seems to me that the purpose of the section is to simplify the procedural, as opposed to the substantive, aspect of proceedings so as to avoid the need to name a large number of plaintiffs. I do not think that the operation of the section depends on whether the subsidiary proprietors concerned have a joint substantive right to sue. Neither is it affected by the fact that the subsidiary proprietors` ownership of the common property in a condominium is as tenants-in-common, rather than as joint tenants. I am of the view that the section could be given sensible application if the words `jointly entitled` are construed to refer to the procedural aspect of the proceedings sought to be taken rather than the substantive cause of action. Order 15 r 4 of the Rules of Supreme Court 1990, and the corresponding provisions in the Subordinate Courts Rules provide as follows:

> *4(1) Subject to Rule 5(1), two or more persons may be joined together in one action as plaintiffs or as defendants with the leave of the Court or where -*
>
> (a) if separate actions were brought by or against each of them, as the case may be, some common question of law or fact would arise in all the actions; and
>
> (b) all rights to relief claimed in the action (whether they are joint, several or alternative) are in respect of or arise out of the same transaction or series of transactions.

53 It is clear that under these procedural rules, joinder of parties as plaintiffs or defendants is dependent on whether common questions of law or fact would

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arise and whether the same transaction or series of transactions have given rise to the rights to the relief claimed. It does not depend on the rights to relief being joint. In fact para (b) of the rule specifically states that the rights to relief could be joint, several, or in the alternative.

54 My reading of s 116, therefore, is that if the subsidiary proprietors of the lots concerned may be joined as plaintiffs in proceedings in accordance with these procedural rules, then, instead of suing in their individual names in relation to anything to do with the common property, the management corporation may take proceedings on their behalf.

55 Secondly, again in response to a point raised in argument, it is my view that the subsidiary proprietors who wish to sue through the management corporation under s 116 need not be the original purchasers of the lots concerned, contrary to what has been suggested. There is nothing in the section that supports such a narrow reading. Seeing that sub-sales of units in a condominium, indeed of any real property, is a common occurrence, a reading like that suggested would drastically reduce the usefulness of the provision. The subsidiary proprietors referred to in the section must therefore be read to mean the subsidiary proprietors from time to time of the lots comprised in the subdivided building. This in fact is clearly provided in the definition of `subsidiary proprietor`, where the words `for the time being` are to be found.

56 Note that the prescribed sale and purchase agreement defines the vendor and purchaser as including their respective successors-in-title and assigns. In the case, GP Selvam J held that either direct purchasers or derivative title holders are the persons for whose benefit an action under s 116(1) may be brought.

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57 There was also some argument as to whether cll 8 and 9 of the sale and purchase agreements contain covenants running with the land, and whether subsequent purchasers can rely on these covenants. What I have just said about s 116 makes it unnecessary to make any comment about this argument.

58 **Pure economic loss argument**

59 The defendants contend that the loss which the plaintiffs seek to recover is in the nature of a pure economic loss in that it is a loss which has not resulted from injury to a person or damage to property. They rely on the House of Lords decision in . I do not intend to enter into a philosophical discourse on the general question whether a pure economic loss is recoverable in tort. I prefer to take the pragmatic route by simply asking myself whether the management corporation in this case should be allowed to recover the cost of putting right the alleged defects in the common property caused allegedly by the negligence of the defendants, such cost being admittedly in the nature of a pure economic loss as just defined.

60 In , the plaintiff bought a newly built house. Eleven years later, he noticed serious cracks in the internal walls and discovered that the raft foundation was defective. The plaintiff was unable to carry out the necessary repairs to the foundation. He sold the house subject to the defects for Â£35,000 less than what it would have fetched if it had been in a sound condition. He brought an action against the local authority claiming that it was liable for the consulting engineers` negligence in recommending approval of the plans and alleging that he and his family had suffered an imminent risk to health and safety because gas and soil pipes had broken and there was a risk of further breaks.

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61 Although the case concerned a claim against a local authority, the liability of the builder came in for detailed consideration. Their lordships, overruling their earlier decision in , were unanimous in their view that, the loss being an economic loss, it was not recoverable in an action in tort against the local authority. Lord Bridge proceeded on the basis that the House had already held in that a builder in the absence of any contractual duty or of a special relationship of proximity introducing the ***Hedley Byrne*** [7] principle of reliance, owed no duty of care in tort in respect of the quality of his work. 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 obligation of an indefinitely transmissible warranty of quality.`

62 Lord Keith agreed, saying:

> *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 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.*

63 Notwithstanding these opinions, both Lord Bridge and Lord Keith recognized that where there is a relationship of proximity such losses would be recoverable. Lord Bridge put it thus:

> *There may, of course, be situations where, even in the absence of contract, there is a special relation of proximity between builder and building owner which is sufficiently akin to contract to introduce the element of reliance so that the scope of the duty of care owed by the builder to the owner is wide enough to embrace purely economic loss.*

64 In the Australian case of , Mason J said at p 32:

> *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.*

65 Deane J in the same case at p 63 said:

> *In any general formulation of the ingredients of a cause of action in negligence which is intended to encompass cases involving mere omission or mere economic loss, `proximity` of relationship in this broader sense should be seen as a distinct general requirement which must be satisfied before any duty of care to avoid reasonably foreseeable injury will arise. ... In such case, as Mason J demonstrates in his judgment in this appeal, it is likely that the existence of the requisite element of proximity will reflect, among other things, reliance by the plaintiff upon care being taken by the defendant to avoid or prevent injury, loss or damage to the plaintiff or his property in circumstances where the defendant had induced or encouraged such reliance or (depending upon the particular combination of factors) was or should have been aware of it.*

66 These learned pronouncements in the two cases referred to are aptly applicable to the case at hand and I respectfully adopt them. It seems to me that the test of proximity is more than amply satisfied in the instant case. Short of actual privity, the relationship between the management corporation and the developer was as akin to contract as any relationship could possibly be. As pointed out earlier, the developer of a condominium knows that the management corporation will come into existence from the moment he conceives of a plan to develop it. He also knows that the management corporation will take over the control, management, and maintenance of the common property, and that if the common property is not properly constructed and is handed over to the management corporation in that state, the management corporation will have to

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incur cost to rectify the defects. Thus, the entity to which the duty is owed as well as the nature and extent of loss that is likely to be sustained by that entity are well known to the developer. In such circumstances, to hold that the developer has a duty towards the management corporation to construct the common property properly and is liable to the management corporation for a defective construction of the common property would not open a floodgate to unlimited claims by an unlimited class of persons. It would not carry any risk of introducing a transmissible warranty or quality, in the words of their Lordships in the case.4 I am therefore of the view that there is nothing in the case4 which stands in the way of the plaintiffs` claim in this case.

67 I hold, therefore, that the management corporation is entitled, subject to proof, to recover the cost of putting right the alleged defects in the common property caused by the alleged negligence of the defendants.

68 ***Order accordingly.***

Warren Khoo L H J

Jimmy Yim and Lau Kok Keng (Drew & Napier) for the plaintiffs
JG Advani and Chee Wei Lin (PK Wong & Advani) for the defendants
Mariam Ng (Lee Chang & Pnrs) for the first third party
Ong Boon Leng (Lee Brothers) for the second third party
Thio Ying Ying (Chor Pee & Co) for the third third party

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