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DEFECTS IN PROPERTY CAUSING PURE ECONOMIC LOSS: THE RESURRECTION OF *JUNIOR BOOKS* AND *ANNS*

RSP Architects Planners & Engineers v *Ocean Front Pte Ltd and another appeal*[1–]

I. INTRODUCTION

IN *Management Corp Strata Title Plan No 1272* v *Ocean Front Pte Ltd*,[2] Warren Khoo J allowed the management corporation of Bayshore Park condominium to recover from the developers of the condominium the pure economic losses arising from the faulty construction of certain parts of the common property. In allowing the management corporation's claim, the court had departed[3] from the current English position which is that a builder does not owe a duty of care in tort to purchasers of the property for any defects causing purely economic loss.[4]

The developers and the architects (who had joined the developers as third parties) appealed against the decision of the High Court. In *RSP Architects Planners & Engineers* v *Ocean Front Pte Ltd and another appeal*,[5] hereafter referred to as *Ocean Front (Appeal)*, the appeal was heard and dismissed. The Court of Appeal reached the same result as the High Court but its judgment with respect to the tort action is explicit in its departure from the latest English position established in *Murphy* v *Brentwood District Council*[6] and *D & F Estates Ltd and Others* v *Church Commissioners of England and others.*[7]

1 [1996] 1 SLR 113.

2 – [1995] 1 SLR 751.

3 Warren Khoo J did not say that he was departing from the English position stated in *Murphy* v *Brentwood District Council* [1990] 2 All ER 908. On the contrary, he appeared to have accepted *Murphy* as an authority but distinguished it on the facts. A more detailed analysis of the learned judge's decision can be found in [1995] SJLS 256.

4 See *Murphy* v *Brentwood District Council*, *supra*, note 3 and *D & F Estates Ltd* and *Others* v *Church Commissioners of England and others* [1988] All ER 992.

5 *Supra*, note 1.

6 *Supra*, note 3.

7 *Supra*, note 4.

II. Facts and Decision of Ocean Front (Appeal)

The Appellants were the developers, Ocean Front Pte Ltd, and the architects, RSP Architects Planners and Engineers of Bayshore Park Condominium. In 1991 the management corporation of the condominium sued the developers for the alleged faulty construction of the ceilings of certain carparks which resulted in the spalling of concrete and the faulty construction of certain corridors resulting in water ponding. The building contractor and the architects were joined as third parties. The developers raised two preliminary issues which were: whether the management corporation were competent to sue and whether the pure economic losses were recoverable. Warren Khoo J decided in the affirmative for both issues. At the present appeal, the Court of Appeal upheld the holdings of Warren Khoo J.

The Court of Appeal held that section 33 of the Land Titles (Strata) Act[8]– enabled the management corporation to bring the action. However it had to turn to general law to found its cause of action in respect of the matters listed in the statute. The Court held that the management corporation had no cause of action in contract against the developers because the sale and purchase agreements were made between the developer and the original purchasers only. The developers clearly did not intend to benefit the subsequent purchasers down the line. Despite this, the management corporation could still recover its losses because it had a cause of action in tort. This discussion focuses on the decision on the tort action.

The Court of Appeal noted that on the basis of current English case law, there was no duty of care owed by the developers to the management corporation. However, LP Thean JA, who delivered the judgment of the Court referred to the Australian case of *Bryan* v *Maloney*[9] and noted that the High Court of Australia in Bryan had expressly declined to follow *D & F Estates* and *Murphy*. The Court also drew support from the New Zealand cases of *Lester* v *White*,[10] *Invercargill City Council* v *Hamlin*[11] and the Canadian case of *Winnipeg* v *Condominium Corp No 36*[12] which had all declined to follow *Murphy*.

The Court adopted the "methodology" used in *Junior Books* v *Veitchi*–[13] and found that there was sufficient proximity in the relationship between the management corporation and the developers which gave rise to a duty of care.

8 Cap 158 (1988 Ed).
9 (1995) 128 ALR 163.
10 [1992] 2 NZLR 483.
11 [1994] 3 NZLR 513.
12 (1995) 121 DLR (4th) 193.
13 [1983] AC 520.

The Court then considered whether there were any policy considerations negativing such duty of care. Since the amount recoverable was the cost of repair and making good the defects in the common property, there would not be indeterminate liability. Further, as the common property would remain in the control of the management corporation, there would not be any transmissible warranty arising. As such, the Court decided that the duty of care was not negated and dismissed the appeals.

III. Analysis and Comments

It has been argued elsewhere[14] that there is a legal gap in the law if *Murphy* is applied in Singapore. Faced with conflicting case authorities from the various jurisdictions, the Court of Appeal chose to plug the legal gap by declining to follow *Murphy*, adopting instead the cases in other jurisdictions which have allowed recovery.

A. *Scope of Recovery*

The Court rightly understood the law in England to deny recovery to parties who have suffered pure economic loss due to defects in property and who are not in any contractual relationship with the builder of the property:

> It seems to us that in the instant case on the basis of these two highly persuasive authorities (*Murphy* and *D & F Estates*), 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, *ie*, pure economic loss. However, to the contrary are the authorities emanating from other common law jurisdictions.[15]

The Court of Appeal referred to two Australian cases. LP Thean JA drew support from the judgment of Mason J in *Sutherland Shire Council* v *Heyman & Anor*,[16] where the judge points out that the proposition that in general damages are not recoverable for pure economic loss is not an inflexible or absolute rule; liability can arise from the avoidance of threatened physical harm. Lest it appears that *Heyman* supports recovery for pure economic loss, it must be clarified that in *Heyman*, the High Court of Australia held that the council was not liable to the owners of the house which had inadequate footings. The Australian Court recognized that the facts involved pure

[14] Defects in Property Causing Pure Economic Loss: *Management Corp Strata Title Plan No 1272* v *Ocean Front Pte Ltd* [1995] SJLS 256.

[15] *Supra*, note 1, at 132B.

[16] (1984-85) 157 CLR 424.

economic loss and not physical damage. This probably led to its conclusion that there was insufficient proximity between a housing authority and a subsequent owner to establish a duty of care. The judgments of Deane and Brennan JJ in *Heyman* were adopted by *Murphy*. Thus on closer analysis, far from lending support to the decision in *Ocean Front (Appeal)*, *Heyman* supplies strength to the position in *Murphy*.

LP Thean JA found the strongest support in *Bryan*, which was a case on the liability of a private builder. In *Bryan*, the High Court of Australia held that as between the builder and the first owner, there was a relationship of proximity giving rise to a duty of care on the part of the builder to exercise reasonable care in the construction of the building to avoid causing the owner physical harm and economic loss resulting from defects in the property. It was further held that there was also a similar relationship of proximity between the builder and the subsequent owner; the relationships between the builder and first owner and builder and subsequent owner are characterized by the assumption of responsibility on the part of the builder and likely reliance on the part of the owner.

The learned judge then discussed the New Zealand and Canadian authorities on the issue. In the New Zealand case of *Invercargill*, a local council was held liable to the owner of a house for negligently approving plans for the foundations of the house. Although *Invercargill* permitted recovery for pure economic loss, the case may be of limited use as the Court appeared to have distinguished *Murphy* by holding that the circumstances in New Zealand were different from those in England:

> The circumstances of home buyers in New Zealand include factors well beyond those described (in *Murphy*) and support a conclusion of reliance on the local bodies inspectors doing the job properly.[17]

In *Winnipeg*, the Supreme Court of Canada allowed the plaintiff, a subsequent owner of a condominium block, to recover pure economic losses from the defendant builders. La Forest J, who delivered the judgment of the Canadian Court, made a convincing point in favour of recovery:

> Under the law as developed by *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 expense.... Maintaining a bar against recoverability for the cost of repair of dangerous defects provides no incentive for plaintiffs

[17] *Supra*, note 11, *per* Casey J at 530.

> to mitigate potential losses and tends to encourage economically inefficient behaviour.[18]

It could be argued that the ratio of *Ocean Front (Appeal)* is that there is sufficient proximity between the *management corporation* and the developers of a condominium which gives rise to a duty of care. The Court found proximity based on, *inter alia*, the following facts:

> (i) that management corporation was an entity conceived and created by the developers...(iv) the management corporation as the successor of the developers took over the control, management and administration 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.[19]

These facts were peculiar to the present claimant which was a management corporation. The position of a *subsequent purchaser* attempting to recover from the developer or builder the pure economic losses arising from the cost of remedying defects caused by the latter's negligent construction is less clear. It is possible to argue that the Court's departure from *Murphy*'s position and its adoption of *Bryan* and other authorities support recovery in such cases.

But given the care taken by the Court in spelling out how special the relationship of the present parties is, how liability is not indeterminate and why there will not be any indefinite transmissible warranty arising on present facts, it still remains to be seen whether a future court will extend liability to a subsequent owner. After all, actual damage has always been the essential focus in negligence claims and permitting recovery for qualitative defects and the prevention of threatened damage is a departure from the traditional basis of recovery on actual physical damage. *Bryan*'s decision was premised on the existence of voluntary assumption of risk by the builder and likely reliance by the home-owner. These factors are the same bases for which recovery is permitted in the *Hedley Byrne*[20] type of cases. In the cases of negligent misstatements, *Hedley Byrne* liability is limited by active reliance, *ie*, actually acting on the misstatement and suffering losses resulting from such reliance. But outside the area of misstatements, in cases such as the

[18] *Supra*, note 12, at 213. It is noted that *Winnipeg* concerned a defect posing danger to safety; in *Ocean Front (Appeal)* and *Bryan*, the defects were qualitative defects rather than dangerous defects.

[19] *Supra*, note 1, at 141-142.

[20] *Hedley Byrne & Co Ltd* v *Heller & Partners Ltd* [1963] 2 All ER 575.

present, reliance is usually passive. Where there is only general or implied reliance on others not to be negligent, the courts should be cautious in imposing liability. The danger of indeterminate liability is real: liability will no longer be limited to parties who actually relied, to their detriment, on the defendant not being negligent. This line of cases also opens up the question of whether liability for the cost of qualitative or preventive repairs should be extended to defective chattels or at least, non-residential premises. Another problem is the uncertainty of the definition of "quality" that a plaintiff is entitled to. If the requirement is that there must be imminent danger to the occupant, there will at least be some control on the scope of liability. But *Bryan* and *Ocean Front (Appeal)* concern cases with quality defects which do not pose such danger. The question is, what are the defects which cause the builder's workmanship to fall below the standard of "reasonable quality"? Suppose a first purchaser contractually agrees to a lower quality than that which a reasonable subsequent purchaser would have been satisfied with, does the contractual standard apply to all subsequent purchasers?

The Court of Appeal in *Ocean Front (Appeal)* could have relied on *Bryan* and *Winnipeg*, the most applicable authorities on the facts, and decline to follow the latest English cases on this particular issue. However, it appeared to do more than that. First, the Court revived the outdated English case of *Junior Books*. Second, it is arguable that it applied the universal two-stage test in *Anns and Others* v *Merton London Borough Council.*[21]

B. *Junior Books Resurrected*

LP Thean JA said

> *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.[22]

[21] "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..." [1978] AC 728 at 751-752.

[22] *Supra*, note 1, at 130B.

His honour also appeared slightly critical of the treatment of *Junior Books* by the judges in *D & F Estates*. He noted that Lord Bridge of Harwich in *D & F Estates* did not analyse the majority decision in *Junior Books* but quoted liberally from the dissenting judgment of Lord Brandon of Oakbrook. It is a little surprising that the learned judge chose to read the cases in this manner. The fact is that Lord Bridge and Lord Oliver adopted what was said in the dissenting speech in *Junior Books*. In fact one might have expected that having taken that position, *Junior Books* ought to have been overruled in *D & F Estates*.

Although not expressly overruled, *Junior Books* has not been applied in subsequent cases. In fact, it has constantly been distinguished in later cases on facts which could be argued to be analogously similar to *Junior Books*.[23] In *Simaan General Contracting Co* v *Pilkington Glass Ltd (No 2)*[24] Dillon LJ said

> I find it difficult to see that future citation from *Junior Books* can ever serve any useful purpose.[25]

In *D & F Estates, Junior Books* came close to being overruled, as discussed earlier. *Murphy* followed the approach taken by the cases subsequent to *Junior Books*, which confined the case to its special facts. Despite these developments in the law, Thean JA still felt that *Junior Books* deserved consideration.

C. *Test of Duty of Care*

LP Thean JA observed from the cases 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.[26]

[23] See *Muirhead* v *Industrial Tank Specialities Ltd* [1985] 3 All ER 705 and *Tate and Lyle Industries Ltd* v *Greater London Council* [1983] 2 AC 509.
[24] [1988] 1 All ER 791.
[25] *Supra*, note 23, at 805.
[26] *Supra*, note 1, at 138C.

After some reference to the cases of *Governors of the Peabody Donation Fund* v *Sir Lindsay Parkinson & Co Ltd*[27] and *Caparo Industries plc* v *Dickman*,[28] LP Thean JA concluded that

> 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....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 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.[29]

Examining these statements, it may be surmised that the learned judge interpreted the test of duty in *Caparo* to be predominently "proximity" and that "proximity" is the same as policy considerations. His honour appears to have read *Caparo* as adopting a test of "proximity" which allows judges to take into account policy considerations.

The Court of appeal then decided that there was a sufficiently proximate relationship of proximity between the developers and the management corporation which gives rise to a duty of care. Theirs was a relationship "as close (as) it could be short of actual privity of contract".[30] The Court went on to consider "whether there is any policy consideration in negativing such duty of care" and held that there were none.

It is arguable on the face of the judgment that the Court of Appeal was using the universal test of duty formulated by Lord Wilberforce in *Anns*. If this is the case, then the Court has applied an outdated test which is invalid today in England in the light of *Caparo*. Lord Bridge of Harwich in *Caparo* referred to the "single general principle" attempted as the test of duty in *Anns* and said:

> Whilst recognising, of course, the importance of the underlying general principles common to the whole field of negligence, I think the law has now moved in the direction of attaching greater significance to the more traditional categorisation of distinct and recognisable

[27] [1985] AC 210.
[28] [1990] 1 All ER 568.
[29] *Supra*, note 1, at 139E-G.
[30] *Supra*, note 1, at 142A.

> situations as guides to the existence, the scope and the limits of the varied duties of care which the law imposes.[31]

The test of duty described in *Caparo*, which is "foreseeability", "proximity" and "justice and reasonableness":

> 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.[32]

The judgments in *Caparo* have endorsed the movement of the law towards the "traditional categorisation of distinct and recognisable situations", which effectively returns the law to the early days when the law developed incrementally by analogy to previous cases: liability arose only if there had been liability established in a previous case with similar facts. This "incremental approach" to the determination of duty has therefore superceded the method in *Anns* which had its emphasis, not on precedents, but on the general principle of forseeability qualified by policy considerations.

Recent cases in Singapore have adopted and applied the incremental approach in *Caparo*.[33] It is unclear from the decision whether the approach to determining duty in *Caparo* or the universal test in *Anns* or both were applied to the present facts. If the Court had decided that there was sufficient proximity on the basis that the facts are analogous to those in *Junior Books*, then it may be said that the incremental approach in *Caparo* was used. It is possible that the Court took this approach. The learned judge adopted the "methodology and words" used in *Junior Books* in arriving at the conclusion that there was proximity. However, by considering policy subsequently, the Court had added a further qualification to the test in *Caparo*. The use of the phrase "justice and reasonableness" in *Caparo* could be superficially taken to support the use of policy in determining liability and it is possible that LP Thean JA thought that the second stage of the test in *Anns* was consistent with this part of *Caparo*'s test. It is difficult, however, to read *Caparo* in this manner. The Court in *Caparo* did not advocate the use of policy; the test merely involved analogizing with previous decisions. "Justice and reasonableness", like "proximity", are only labels descriptive of different fact situations. The test in *Anns* and the test in *Caparo*

[31] *Supra*, note 28, at 574.

[32] *Per* Lord Bridge of Harwich, *supra*, note 28, at 574.

[33] See *Standard Chartered Bank & Another* v *Coopers & Lybrand* [1993] 3 SLR 712. See also: *Active Timber Agencies Pte Ltd* v *Allen & Gledhill* [1996] 1 SLR 401 and *Pang Koi Fa* v *Lim Djoe Phing* [1993] 3 SLR 317.

to ascertain the existence of a duty of care involve totally different approaches; the former is a general test while the latter requires an incremental approach.

On the other hand, if proximity had been found on the present facts with little reference to factually-similar case precedents, then it may be said that the Court was applying the pure two-stage test in *Anns*. It is submitted that the judgment of LP Thean JA strongly supports such a reading. The learned judge examined the facts to find a proximity which is understood to be the closeness of relationship in a common-sensical way.[34] There was little comparison with the facts of *Junior Books.* The implication of this on current tort law is that in Singapore, *Anns*' two-stage test is still good law.

IV. Conclusion

What is significant about *Ocean Front (Appeal)* lies not only in its departure from current English law on quality defects causing pure economic loss, but in the revival of outdated English law. The resurrection of *Junior Books* may have been unnecessary though not particularly significant since the Court had already declined to follow *Murphy* and chosen to adopt the position in other jurisdictions. However the application of the test of duty in *Anns* raises the question of how duty of care in negligence is to be determined in Singapore in the future.

Debbie Ong Siew Ling*

[34] See pages 140 to 142 of the judgment, *supra*, note 1.

* LLB (NUS); LLM (Cantab); Advocate & Solicitor (Singapore); Lecturer, Faculty of Law, National University of Singapore. I am grateful to Associate Professor Tan Keng Feng for his encouragement and helpful comments on the earlier draft of this article. The writer remains exclusively responsible for all views and errors.