Winnipeg Condominium Corporation No. 36 *v.* Bird Construction Co., [1995] 1 S.C.R. 85

Winnipeg Condominium Corporation No. 36 *Appellant*

v.

Bird Construction Co. Ltd. *Respondent*

and

Smith Carter Partners *Intervener*

Indexed as: Winnipeg Condominium Corporation No. 36 *v.* Bird Construction Co.

File No.: 23624.

1994: October 12; 1995: January 26.

Present: La Forest, L'Heureux-Dubé, Sopinka, Cory, McLachlin, Iacobucci and Major JJ.

on appeal from the court of appeal for manitoba

Torts -- Negligence -- Economic loss -- Building sold by developer after construction -- Dangerous defect in building -- Defect repaired to prevent serious

damage or accident -- Liability for cost of repair -- Whether or not contractor liable in tort for economic loss to subsequent purchaser.

A land developer contracted with respondent to build an apartment building in accordance with plans and specifications prepared by the intervener (an architectural firm). Respondent subcontracted the masonry portion of the work. The building was converted into a condominium in October, 1978, when appellant became the registered subsequent owner of the land and building. In 1982, the appellant's directors became concerned about the masonry work on the exterior cladding of the building. They retained the architects (the intervener) and a firm of consulting engineers to inspect the building. The architects and engineers offered the opinion that the building was structurally sound. In 1989, a storey-high section of the cladding fell from the ninth storey level of the building. The appellant had further inspections undertaken which revealed structural defects in the masonry work. Following these inspections, the entire cladding was replaced at the appellant's expense.

Appellant commenced an action in negligence against the respondent, the intervener and the subcontractor. The statement of claim detailed alleged inadequacies in design and workmanship, without assigning specific blame to one defendant or another. Respondent and the subcontractor filed notices of motion for summary judgment and notices of motion to strike the claim as disclosing no reasonable cause of action with the Manitoba Court of Queen's Bench. Both motions were dismissed. Respondent appealed to the Court of Appeal but the subcontractor did not. The appeal was dismissed with respect to the motion for summary judgment but allowed with respect to the motion to strike, and the

statement of claim was struck out as against respondent. At issue in this appeal is whether a general contractor responsible for the construction of a building may be held tortiously liable for negligence to a subsequent purchaser of the building, who is not in contractual privity with the contractor, for the cost of repairing defects in the building arising out of negligence in its construction.

Held: The appeal should be allowed.

The Court of Appeal erred in deciding that the costs of repair claimed by appellant are not recoverable economic loss under the law of tort in Canada. The law has now progressed to the point where contractors (as well as subcontractors, architects and engineers) who take part in the design and construction of a building will owe a duty in tort to subsequent purchasers of the building if it can be shown that it was foreseeable that a failure to take reasonable care in constructing the building would create defects that pose a substantial danger to the health and safety of the occupants. Where negligence is established and such defects manifest themselves before any damage to persons or property occurs, they can be held liable for the reasonable cost of repairing the defects and putting the building back into a non-dangerous state.

In coming to its conclusion that the losses claimed by the appellant were not recoverable in tort, the Court of Appeal followed the reasoning of the House of Lords in *D & F Estates Ltd. v. Church Commissioners for England*. That decision should no longer be seen as having strong persuasive authority in Canadian tort law. First, it is inconsistent with recent Canadian decisions recognizing the possibility of concurrent contractual and tortious duties. Second,

it is inconsistent with the continued application in Canada of the principles with respect to the recoverability of economic loss in tort established in *Anns v. Merton London Borough Council* and adopted by this Court in *City of Kamloops v. Nielsen*.

The losses claimed by appellant satisfy the two-part test for recoverability of economic loss established in *Anns* and *Kamloops*. First, it is reasonably foreseeable to contractors that, if they design or construct a building negligently and if that building contains latent defects as a result of that negligence, subsequent purchasers of the building may suffer personal injury or damage to other property when those defects manifest themselves. The reasonable likelihood that a defect in a building will cause injury to its inhabitants is also sufficient to ground a contractor's duty in tort to subsequent purchasers of the building for the cost of repairing the defect if that defect is discovered prior to any injury and if it poses a real and substantial danger to the inhabitants of the building. In coming to this conclusion, this Court adopts the reasoning of Laskin J. in *Rivtow Marine Ltd. v. Washington Iron Works*. 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.

Apart from the logical force of holding contractors liable for the cost of repair of dangerous defects, a strong underlying policy justification also exists for imposing liability in these cases. 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 preventative function by encouraging socially responsible behaviour.

The present case is distinguishable on a policy level from cases where the workmanship is merely shoddy or substandard but not dangerously defective. Tort law serves to encourage the repair of dangerous defects and thereby to protect the bodily integrity of inhabitants of buildings. By contrast, cases of shoddy or substandard workmanship bring into play the questions of quality of workmanship and fitness for purpose. These questions did not arise here. Accordingly, if respondent is found negligent at trial, appellant would be entitled to recover the reasonable cost of putting the building into a non-dangerous state but not the cost of any repairs that would serve merely to improve the quality, and not the safety, of the building.

Second, there are no policy considerations which are sufficiently compelling to negate the duty. There is no risk of liability to an indeterminate class because the potential class of claimants is limited to the very persons for whom the building is constructed: the inhabitants of the building. There is no risk of liability in an indeterminate amount because the amount of liability will always be limited by the reasonable cost of repairing the dangerous defect in the building

and restoring that building to a non-dangerous state. There is little risk of liability for an indeterminate time because the contractor will only be liable for the cost of repair of dangerous defects during the useful life of the building. Practically speaking, the period in which the contractor may be exposed to liability for negligence will be much shorter than the full useful life of the building. With the passage of time, it will become increasingly difficult for owners of a building to prove at trial that any deterioration in the building is attributable to the initial negligence of the contractor and not simply to the inevitable wear and tear suffered by every building. Finally, given the fact that a subsequent purchaser is not the best placed to bear the risk of the emergence of latent defects, the doctrine of *caveat emptor* should not serve to negate a contractor's duty in tort to subsequent purchasers.

Cases Cited

Considered: *Anns v. Merton London Borough Council*, [1978] A.C. 728; *Canadian National Railway Co. v. Norsk Pacific Steamship Co.*, [1992] 1 S.C.R. 1021; *Central Trust Co. v. Rafuse*, [1986] 2 S.C.R. 147; *Edgeworth Construction Ltd. v. N. D. Lea & Associates Ltd.*, [1993] 3 S.C.R. 206; *City of Kamloops v. Nielsen*, [1984] 2 S.C.R. 2; **not followed**: *D & F Estates Ltd. v. Church Commissioners for England*, [1988] 2 All E.R. 992; *Murphy v. Brentwood District Council*, [1990] 2 All E.R. 908; **referred to**: *Rivtow Marine Ltd. v. Washington Iron Works*, [1974] S.C.R. 1189; *Dutton v. Bognor Regis Urban District Council*, [1972] 1 Q.B. 373; *Donoghue v. Stevenson*, [1932] A.C. 562; *Hedley Byrne & Co. v. Heller & Partners Ltd.*, [1964] A.C. 465; *Houle v. Canadian National Bank*, [1990] 3 S.C.R. 122; *Rothfield v. Manolakos*, [1989] 2 S.C.R. 1259; *Attorney General for Ontario v. Fatehi*, [1984] 2

S.C.R. 536; *Terlinde v. Neely*, 271 S.E.2d 768 (1980); *Drexel Properties, Inc. v. Bay Colony Club Condominium, Inc.*, 406 So.2d 515 (1981); *Bowen v. Paramount Builders (Hamilton) Ltd.*, [1977] 1 N.Z.L.R. 394; *Bryan v. Moloney*, Sup. Ct. Tasmania, No. A77/1993, October 6, 1993; *Lempke v. Dagenais*, 547 A.2d 290 (1988); *Richards v. Powercraft Homes, Inc.*, 678 P.2d 427 (1984); *Fraser-Reid v. Droumtsekas*, [1980] 1 S.C.R. 720; *Ultramares Corp. v. Touche*, 174 N.E. 441 (1931); *Aronsohn v. Mandara*, 484 A.2d 675 (1984); *Podkriznik v. Schwede*, [1990] 4 W.W.R. 220; *Vaughan v. Warner Communications Inc.* (1986), 56 O.R. (2d) 242.

Statutes and Regulations Cited

Civil Code of Quebec, S.Q. 1991, c. 64, arts. 1442, 2118-2120.

Court of Queen's Bench Rules, Man. Reg. 553/88, Rules 20.01, 25.11.

Authors Cited

Barrett, Sidney R., Jr. "Recovery of Economic Loss in Tort for Construction Defects: A Critical Analysis" (1989), 40 *S.C. L. Rev.* 891.

Cooke, Sir Robin. "An Impossible Distinction" (1991), 107 *L.Q. Rev.* 46.

Feldthusen, Bruce. "Economic Loss in the Supreme Court of Canada: Yesterday and Tomorrow" (1990-91), 17 *Can. Bus. L.J.* 356.

Jobin, Pierre-Gabriel. *La vente dans le Code civil du Québec*. Cowansville: Yvon Blais, 1993.

Osborne, Philip H. "A Review of Tort Decisions in Manitoba 1990-1993", [1993] *Man. L.J.* 191.

APPEAL from a judgment of the Manitoba Court of Appeal (1993), 85 Man. R. (2d) 81, 41 W.A.C. 81, 101 D.L.R. (4th) 699, 15 C.C.L.T. (2d) 1, 6 C.L.R.

(2d) 1, [1993] 5 W.W.R. 673, striking out a statement of claim on allowing an appeal from a judgment of Galanchuk J. (1992), 84 Man. R. (2d) 23, dismissing an application to strike out or alternatively for summary judgment. Appeal allowed.

Kevin T. Williams and *Paul Forsyth*, for the appellant.

Sidney Green, Q.C., and *Murdoch MacKay, Q.C.*, for the respondent.

David I. Marr and *Roger B. King, Q.C.*, for the intervener Smith Carter Partners.

The judgment of the Court was delivered by

1 LA FOREST J. -- May a general contractor responsible for the construction of a building be held tortiously liable for negligence to a subsequent purchaser of the building, who is not in contractual privity with the contractor, for the cost of repairing defects in the building arising out of negligence in its construction? That is the issue that was posed by a motion for summary judgment and a motion to strike out a claim as disclosing no reasonable cause of action argued before Galanchuk J. of the Manitoba Court of Queen's Bench pursuant to Rules 20.01 and 25.11 of the Manitoba *Court of Queen's Bench Rules*, Man. Reg. 553/88. Galanchuk J. dismissed the motions, but the Court of Appeal of Manitoba allowed an appeal from this decision and struck out the claim against the contractor on the grounds that the damages sought were for economic loss, which were not recoverable in the

circumstances, and hence that the claim did not disclose a reasonable cause of action.

2 For reasons that will appear, I do not, with respect, share the views of the Court of Appeal; I agree with Galanchuk J. that the action should proceed to trial. The facts as set out before Galanchuk J. are contained in the appellant's amended statement of claim, the respondent's statement of defence and notice of motion. These facts are as follows.

Facts

3 On April 19, 1972, a Winnipeg land developer, Tuxedo Properties Co. Ltd. ("Tuxedo"), entered into a contract ("the General Contract") with a general contractor, Bird Construction Co. Ltd. ("Bird"), for the construction of a 15-storey, 94-unit apartment building. In the General Contract, Bird undertook to construct the building in accordance with plans and specifications prepared by the architectural firm of Smith Carter Partners ("Smith Carter"), with whom Tuxedo also had a contract. On June 5, 1972, Bird entered into a subcontract with a masonry subcontractor, Kornovski & Keller Masonry Ltd. ("Kornovski & Keller"), under which the latter undertook to perform the masonry portion of the work specified under the General Contract. The work called for by the General Contract commenced in April, 1972 and the building was substantially completed by December, 1974.

4 The building was initially built and used as an apartment block, but was converted into a condominium in October, 1978, when Winnipeg Condominium Corporation

No. 36 ("the Condominium Corporation") became the registered owner of the land and building. The facts surrounding the conversion were a subject of dispute between the parties, but during oral argument the appellant conceded for the purposes of this appeal that the Condominium Corporation was a subsequent owner of the building and was not the alter ego of the original owner. I shall accordingly deal with the appeal on the assumption that this was indeed the case.

5 In 1982, the Board of Directors of the Condominium Corporation became concerned about the state of the exterior cladding of the building (consisting of 4-inch thick slabs of stone), which had been installed by the subcontractor, Kornovski & Keller. The directors observed that some of the mortar had broken away and that cracks were developing in the stone work. As a result of these concerns, the Condominium Corporation retained a firm of structural engineers and the original architects, Smith Carter, to inspect the building. The engineers and Smith Carter recommended some minor remedial work but offered the opinion that the stonework on the building was structurally sound. The remedial work, costing $8,100, was undertaken at the Condominium Corporation's expense in 1982.

6 On May 8, 1989, a storey-high section of the cladding, approximately twenty feet in length, fell from the ninth storey level of the building to the ground below. The Condominium Corporation retained engineering consultants who conducted further inspections. Following these inspections, the Condominium Corporation had the entire cladding removed and replaced at a cost in excess of $1.5 million.

7 An action was commenced in negligence by the Condominium Corporation against Bird, Smith Carter and Kornovski & Keller. The Condominium Corporation, in

its statement of claim, detailed alleged inadequacies in design and workmanship, without assigning specific blame to one defendant or another. Bird responded by filing a notice of motion for summary judgment and a motion to strike the Condominium Corporation's claim as disclosing no reasonable cause of action with the Manitoba Court of Queen's Bench. Galanchuk J. heard the motions, along with a similar one by the subcontractor. Smith Carter did not bring a motion of its own, but appeared and was allowed to support the motions of its co-defendants. Both motions were dismissed. Bird appealed to the Court of Appeal but the subcontractor did not. The appeal was dismissed with respect to the motion for summary judgment but allowed with respect to the motion to strike and the statement of claim was struck out as against Bird.

Judgments Below

Court of Queen's Bench for Manitoba (1992), 84 Man. R. (2d) 23 (Galanchuk J.)

8 Galanchuk J. dismissed Bird's motion for summary judgment and its motion to strike the Condominium Corporation's claim as disclosing no reasonable cause of action on the grounds that the Condominium Corporation's claim disclosed a reasonable cause of action and that the issues raised before him were genuine. He observed that the parties had raised real issues of credibility and had introduced conflicting evidence of sufficient complexity to warrant a trial. With respect to

Bird's argument that the Condominium Corporation's loss was pure economic loss and therefore not recoverable against Bird, he held that that issue had to be dealt with by a trial judge and that the following question (at p. 28) would have to be answered at trial:

> Is there a sufficient degree of foreseeability of harm and proximity of the parties to impose liability in all of the circumstances of this case to warrant the plaintiff's claim for recovery?

Court of Appeal (1993), 85 Man. R. (2d) 81 (Huband J.A., Scott C.J. and Philp J.A. concurring)

9 The Court of Appeal, we saw, allowed the appeal and struck out the Condominium Corporation's claim as against Bird. Huband J.A., writing for a unanimous court, decided that the expenses incurred by the Condominium Corporation in repairing the building were pure economic loss and not recoverable against Bird in tort. In reaching this decision, he found the decision by the House of Lords in *D & F Estates Ltd. v. Church Commissioners for England*, [1988] 2 All E.R. 992, to be directly on point. In that case, the House of Lords ruled that, in the absence of a contractual relationship, the cost of repairing a defective structure, where the defect is discovered before it causes personal injury or physical damage to other property, is not recoverable in negligence by a remote buyer of real property against the original contractor or builder. Applying this reasoning, Huband J.A. observed that, even if Bird's employees, rather than the subcontractor Kornovski & Keller, had affixed the exterior cladding, the Condominium Corporation would not have had a claim in negligence because the damages claimed for the cost of repairing the cladding would still have been purely economic in nature. In support

of this conclusion, he quoted with approval the following passage from the reasons of Lord Bridge in *D & F Estates*, at p. 1006:

> . . . 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.

10 Huband J.A. found that the law as stated in *D & F Estates* was consistent with Canadian law. He expressed some concern about the fact that Lord Bridge and Lord Oliver in *D & F Estates* had expressly criticized the earlier decision of the House of Lords in *Anns v. Merton London Borough Council*, [1978] A.C. 728, in which Lord Wilberforce had set down a two-stage negligence test and had suggested, in an *obiter* passage, that liability might fall upon a contractor in similar circumstances to the case at bar. Huband J.A. observed that the application of the reasoning in *D & F Estates* by Canadian courts may be problematic because *D & F Estates* paved the way for the full repudiation of *Anns* by the Law Lords in *Murphy v. Brentwood District Council*, [1990] 2 All E.R. 908 (H.L.). By contrast, he noted, this Court explicitly declined, in *Canadian National Railway Co. v. Norsk Pacific Steamship Co.*, [1992] 1 S.C.R. 1021, to abandon *Anns*.

11 However, Huband J.A. resolved the problem by deciding that the result in this case would be the same under either the *Anns* or the *Murphy* approach. First, Huband

J.A., at p. 90, found that the concept of *caveat emptor* negated any relationship of proximity as defined under the first stage of Lord Wilberforce's two-stage *Anns* approach:

> The maxim, caveat emptor, operates as between purchaser and vendor. But the very existence of the principle instructs the potential purchaser to rely upon his own investigations, inspections and inquiries, and not to rely upon the fact that the vendor had retained Smith Carter Partners as architects, Bird as general contractor, and that Kornovski & Keller was one of the subcontractors, and since they are reputable firms, the integrity of the building can be safely assumed. The concept of "buyer beware" tells the potential purchaser that if it seeks greater protection than its own investigations, inspections and inquiries provide, it should seek appropriate warranties from the vendor or, if that cannot be bargained, to seek out an insurer to cover anticipated future risks.

Second, Huband J.A., at p. 86, found that the House of Lords in *D & F Estates* had set forth sufficiently compelling policy concerns to justify precluding recovery under the second branch of the *Anns* test:

> The great debate as to whether the *Anns* case was correctly decided and should be followed, or whether the reasoning in *Murphy* should be preferred will rage on. But in certain cases, I do not think that the difference in approach will yield a difference in result. In the *D & F Estates* case, the House of Lords did in fact consider whether there were factors which should negative, reduce or limit the scope of a duty of care owed by a building contractor to the subsequent lessee of the building, or a limitation on the damages to which a breach of that duty may give rise. The court found that considerations did exist which should limit the remedy. Lord Bridge observed that with respect to defective chattels, economic loss is recoverable in contract by a buyer or hirer of the chattel entitled to the benefit of a relevant warranty of quality, but economic loss is "not recoverable in tort by a remote buyer or hirer of the chattel". Lord Bridge concluded that the same law should apply in the field of real property and this need for consistency should indeed limit the breadth of a remedy for a breach of a duty of care.

Analysis

12 This case gives this Court the opportunity once again to address the question of recoverability in tort for economic loss. In *Norsk, supra,* at p. 1049, I made reference to an article by Professor Feldthusen in which he outlined five different categories of cases where the question of recoverability in tort for economic loss has arisen ("Economic Loss in the Supreme Court of Canada: Yesterday and Tomorrow" (1990-91), 17 *Can. Bus. L.J.* 356, at pp. 357-58), namely:

> 1. The Independent Liability of Statutory Public Authorities;
> 2. Negligent Misrepresentation;
> 3. Negligent Performance of a Service;
> 4. Negligent Supply of Shoddy Goods or Structures;
> 5. Relational Economic Loss.

I stressed in *Norsk* that the question of recoverability for economic loss must be approached with reference to the unique and distinct policy issues raised in each of these categories. That is because ultimately the issues concerning recovery for economic loss are concerned with determining the proper ambit of the law of tort, an exercise that must take account of the various situations where that question may arise. This case raises issues different from that in *Norsk*, which fell within the fifth category. The present case, which involves the alleged negligent construction of a building, falls partially within the fourth category, although subject to an important *caveat*. The negligently supplied structure in this case was not merely shoddy; it was dangerous. In my view, this is important because the degree of danger to persons and other property created by the negligent construction of a building is a cornerstone of the policy analysis that must take place in determining whether the cost of repair of the building is recoverable in tort. As I will attempt to show, a distinction can be drawn on a policy level between "dangerous" defects in buildings and merely "shoddy" construction in

buildings and that, at least with respect to dangerous defects, compelling policy reasons exist for the imposition upon contractors of tortious liability for the cost of repair of these defects.

13 Traditionally, the courts have characterized the costs incurred by a plaintiff in repairing a defective chattel or building as "economic loss" on the grounds that costs of those repairs do not arise from injury to persons or damage to property apart from the defective chattel or building itself; see *Rivtow Marine Ltd. v. Washington Iron Works*, [1974] S.C.R. 1189, at p. 1207. For my part, I would find it more congenial to deal directly with the policy considerations underlying that classification as was done in an analogous situation in *Dutton v. Bognor Regis Urban District Council*, [1972] 1 Q.B. 373 (C.A.), *per* Denning M.R. (aux pp. 396-98), and Sachs L.J. (aux pp. 403-4). However, I am content to deal with the issues in the terms in which the arguments were formulated. Adopting this traditional characterization as a convenient starting point for my analysis, I observe that the losses claimed by the Condominium Corporation in the present case fall quite clearly under the category of economic loss. In their statement of claim, the Condominium Corporation claim damages in excess of $1.5 million from the respondent Bird, the subcontractor Kornovski & Keller and the architects Smith Carter, representing the cost of repairing the building subsequent to the collapse of the exterior cladding on May 8, 1989. The Condominium Corporation is not claiming that anyone was injured by the collapsing exterior cladding or that the collapsing cladding damaged any of its other property. Rather, its claim is simply for the cost of repairing the allegedly defective masonry and putting the exterior of the building back into safe working condition.

14 Although most of the Condominium Corporation's submissions before this Court were directed toward establishing that the costs of repair were recoverable economic loss, counsel for the Condominium Corporation made a subsidiary claim that the losses in question could, in fact, be characterized as damage to property as opposed to pure economic loss. In *D & F Estates*, *supra*, at pp. 1006-7, Lord Bridge observed, in *obiter*, that:

> . . . it may well be arguable that in the case of complex structures, . . . one element of the structure should be regarded for the purpose of the application of the principles under discussion as distinct from another element, so that damage to one part of the structure caused by a hidden defect in another part may qualify to be treated as damage to `other property'. . . .

Counsel for the Condominium Corporation argued that the collapse of the cladding may have been attributable to the negligent installation of certain metal ties. Following the logic suggested by Lord Bridge, counsel argued that the loss suffered was not, in fact, economic loss but, rather, damage to "other property" and thus recoverable under the principles established in *Donoghue v. Stevenson*, [1932] A.C. 562 (H.L.). In other words, he sought to localize the defect in one part of the structure and to claim that the damage to the rest of the structure was "caused" in some manner by the defect.

15 I note at the outset that I do not find the Condominium Corporation's argument on this subsidiary point persuasive. In *Murphy*, *supra*, at pp. 926-28, Lord Bridge reconsidered and rejected the "complex structure" theory he had suggested in *D & F Estates*, criticizing the theory on the following basis (at p. 928):

> The reality is that the structural elements in any building form a single indivisible unit of which the different parts are essentially interdependent. To the extent that there is any defect in one part of the structure it must to a greater or lesser degree necessarily affect all other parts of the structure. Therefore any defect in the structure is a defect in the quality of the whole and it is quite artificial, in order to impose a legal liability which the law would not otherwise impose, to treat a defect in an integral structure, so far as it weakens the structure, as a dangerous defect liable to cause damage to `other property'.
>
> A critical distinction must be drawn here between some part of a complex structure which is said to be a `danger' only because it does not perform its proper function in sustaining the other parts and some distinct item incorporated in the structure which positively malfunctions so as to inflict positive damage on the structure in which it is incorporated. Thus, if a defective central heating boiler explodes and damages a house or a defective electrical installation malfunctions and sets the house on fire, I see no reason to doubt that the owner of the house, if he can prove that the damage was due to the negligence of the boiler manufacturer in the one case or the electrical contractor in the other, can recover damages in tort on *Donoghue v. Stevenson* principles.

I am in full agreement with Lord Bridge's criticisms of the "complex structure" theory. In cases involving the recoverability of economic loss in tort, it is preferable for the courts to weigh the relevant policy issues openly. Since the use of this theory serves mainly to circumvent and obscure the underlying policy questions, I reject the use of the "complex structure" theory in cases involving the liability of contractors for the cost of repairing defective buildings.

16 Proceeding on the assumption, then, that the losses claimed in this case are purely economic, the sole issue before this Court is whether the losses claimed by the Condominium Corporation are the type of economic losses that should be recoverable in tort. In coming to its conclusion that the losses claimed by the Condominium Corporation are not recoverable in tort, the Manitoba Court of Appeal, we saw, followed the reasoning of the House of Lords in *D & F Estates*. In that case, the House of Lords found that the cost of repairing a defect in a

building is not recoverable in negligence by a successor in title against the original contractor in the absence of a contractual relationship or a special relationship of reliance. I should say that the Court of Appeal might well have come to the same conclusion on the basis of the majority opinion in *Rivtow*, *supra*, an issue I will take up later. Here I shall dispose of the arguments relating to *D & F Estates*.

17 The facts in *D & F Estates* were as follows. The defendants were the main contractors hired by the owner of a piece of land to construct a block of flats between 1963 and 1965. The contractors hired a sub-contractor to carry out plastering work on the building which, it was later discovered, was performed negligently. In 1965, after the block was completed, the plaintiffs took a 98 year lease on a flat from the owner of the block. In 1980, the plaintiffs discovered that the plaster on the ceilings and on one wall was loose and that some of the plaster had fallen down. The plaintiffs had the remaining plaster hacked off and the areas affected were replastered and redecorated at the plaintiff's expense. The plaintiff sued the original contractor in tort for the cost of the repairs and the estimated cost of future remedial work. At trial, the judge awarded damages against the contractors in respect of cost of the remedial work on the grounds that the contractors had been negligent in supervising the plastering work. The Court of Appeal reversed the trial judge's decision, and the plaintiff appealed to the House of Lords.

18 The House of Lords dismissed the appeal on two principal grounds. First, they decided that any duty owed by a contractor to a home owner with respect to the quality of construction in a building must arise in contract, and not in tort. They based this conclusion upon a concern that allowing recoverability for the cost of

repairing defects in buildings would have the effect of creating a non-contractual warranty of fitness; see *D & F Estates*, at p. 1007.

19 Second, they decided that a contractor can only be held liable in tort to subsequent purchasers of a building when the contractor's negligence causes physical injury to the purchasers, damage to their other property, or where a special relationship of reliance has developed between the contractor and the purchasers along the lines suggested in *Hedley Byrne & Co. v. Heller & Partners Ltd.*, [1964] A.C. 465. See *D & F Estates*, at p. 1014.

20 There was no contract between the plaintiff and the defendants in *D & F Estates*, and the Law Lords found no special relationship of reliance on the facts of the case. Accordingly, they reasoned that the cost of repairing defective plaster fell under the category of "pure economic loss". Since the negligence in that case did not result in damage to persons or property, they concluded that the plaintiff could not claim that expense against the contractor. Lord Bridge expressed the conclusion as follows, at p. 1006:

> . . . 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.

Lord Oliver came to a similar conclusion, at p. 1014:

> . . . such loss is not in principle recoverable in tort unless the case can be brought within the principle of reliance established by *Hedley Byrne*. In the instant case the defective plaster caused no damage to the

> remainder of the building and in so far as it presented a risk of damage to other property or to the person of any occupant that was remediable simply by the process of removal.

21 Huband J.A. found the reasoning in *D & F Estates* to be compelling and of strong persuasive authority and, on that basis, came to the conclusion that the cost of repair of the defects in the building were not recoverable in tort by the Condominium Corporation against Bird. With respect, I come to a different conclusion. 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. Sir Robin Cooke expressed the rationale for this conclusion as follows ("An Impossible Distinction" (1991), 107 *L.Q. Rev.* 46, at p. 70):

> The point is simply that, prima facie, he who puts into the community an apparently sound and durable structure, intended for use in all probability by a succession of persons, should be expected to take reasonable care that it is reasonably fit for that use and does not mislead. He is not merely exercising his freedom as a citizen to pursue his own ends. He is constructing, exploiting or sanctioning something for the use of others. Unless compelling grounds to the contrary can be made out, and subject to reasonable limitations as to time or otherwise, the natural consequences of failure to take due care should be accepted.

22 My conclusion that the type of economic loss claimed by the Condominium Corporation is recoverable in tort is therefore based in large part upon what seem to me to be compelling policy considerations. I shall elaborate in more detail upon these later in my reasons. However, before doing so, I think it important to clarify why the *D & F Estates* case should not, in my view, be seen as having strong persuasive authority in Canadian tort law as that law is currently developing. My reasons for coming to this conclusion are twofold: first, to the extent that the decision of the House of Lords in *D & F Estates* rests upon the assumption that liability in tort for the cost of repair of defective houses represents an unjustifiable intrusion of tort into the contractual sphere, it is inconsistent with recent Canadian decisions recognizing the possibility of concurrent contractual and tortious duties; second, to the extent that the *D & F Estates* decision formed part of a line of English cases leading ultimately to the rejection of *Anns*, it is inconsistent with this Court's continued application of the principles established in *Anns*.

23 Turning to the first of these reasons, I observe that it is now well-established in Canada that a duty of care in tort may arise coextensively with a contractual duty. In *Central Trust Co. v. Rafuse*, [1986] 2 S.C.R. 147, Le Dain J. explained the relationship between tort and contractual duties as follows, at pp. 204-5:

> 1. The common law duty of care that is created by a relationship of sufficient proximity, in accordance with the general principle affirmed by Lord Wilberforce in *Anns v. Merton London Borough Council*, is not confined to relationships that arise apart from contract. Although the relationships in *Donoghue v. Stevenson*, *Hedley Byrne* and *Anns* were all of a non-contractual nature and there was necessarily reference in the judgments to a duty of care that exists apart from or independently of contract, I find nothing in the statements of general principle in those cases to suggest that the principle was intended to be confined to relationships that arise apart from contract. . . . [T]he question is whether there is a relationship of sufficient proximity, not how it arose.

> The principle of tortious liability is for reasons of public policy a general one.

This is not say, of course, that a duty in tort arises out of a duty in contract. In *Rafuse,* Le Dain J. made it clear that, although duties in tort and contract may arise concurrently, the duty in tort must arise independently of the contractual duty. He stated, at p. 205:

> 2. What is undertaken by the contract will indicate the nature of the relationship that gives rise to the common law duty of care, but the nature and scope of the duty of care that is asserted as the foundation of the tortious liability must not depend on specific obligations or duties created by the express terms of the contract. It is in that sense that the common law duty of care must be independent of the contract.

For the similar situation under Quebec law, see *Houle v. Canadian National Bank,* [1990] 3 S.C.R. 122, *per* L'Heureux-Dubé J., at pp. 165-67.

24 I emphasize the fact that contractual and tortious duties can arise concurrently in Canadian law because, in my view, the decision in *D & F Estates* was based at least in part upon the assumption that a duty on the part of contractors to take reasonable care in the construction of buildings can only arise in contract. In deciding that the contractor in that case could not be held liable in tort for the cost of repairing the defective plaster, Lord Bridge expressed a concern that the imposition of a tort duty upon a contractor to third parties would be to impose, in effect, a contractual duty in tort. He stated, at p. 1007:

> To make [the contractor] so liable would be to impose on 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. I am glad to reach the conclusion that this is not the law.

25 However, in light of this Court's decision in *Rafuse*, I do not believe that Lord Bridge's concern should preclude conceptualizing Bird's duty in tortious terms. In my view, a contractor's duty to take reasonable care arises independently of any duty in contract between the contractor and the original property owner. The duty in contract with respect to materials and workmanship flows from the terms of the contract between the contractor and home owner. By contrast, the duty in tort with respect to materials and workmanship flows from the contractor's duty to ensure that the building meets a reasonable and safe standard of construction. For my part, I have little difficulty in accepting a distinction between these duties. The duty in tort extends only to reasonable standards of safe construction and the bounds of that duty are not defined by reference to the original contract. Certainly, for example, a contractor who enters into a contract with the original home owner for the use of high-grade materials or special ornamental features in the construction of the building will not be held liable to subsequent purchasers if the building does not meet these special contractual standards. However, such a contract cannot absolve the contractor from the duty in tort to subsequent owners to construct the building according to reasonable standards. This is important because, in my view, the unfortunate result of the reasoning in *D & F Estates* is that it leaves subsequent purchasers with no remedy against a contractor who constructs a building with substandard materials or substandard workmanship, and thereby puts subsequent purchasers at considerable risk.

26 Thus, the fact that Bird negotiated a contract with Tuxedo, the original owner of the building, does not insulate Bird from a separate duty to the current owners of

the building. This duty arises out of the danger created by the work and not the specifications contained in the contract. An analogy can be drawn, in this respect, with this Court's decision in *Edgeworth Construction Ltd. v. N. D. Lea & Associates Ltd.*, [1993] 3 S.C.R. 206. In that case, an engineering firm had contracted with the province of British Columbia for the drawing up of specifications for a road building project. There were errors in the specifications and a construction company, which had entered into a contract with the province for the building of the road, sued the engineering firm in tort, alleging negligent misrepresentation. This Court decided that the engineering firm could be held liable to the construction company in the absence of a contract. In so ruling, McLachlin J., at pp. 217-18, had the following to say about the effect of a duty in contract upon any duty owed to third persons in tort:

> Another way of putting the argument that the contract terminates the duty of care between the contractor and the engineers, is to say that once the contractor enters into a contract with the province which deals with the matter of design, the contract ousts all tort duties. Where the parties to the contract have themselves defined their obligations by contract, it may be argued that the contract must prevail over a different duty which tort law might impose, on the principle that people are free to determine their own civil rights and responsibilities. Subject to this limitation, however, the presence of a contract does not bar the right to sue in tort: *BG Checo International Ltd. v. British Columbia Hydro and Power Authority*, [1993] 1 S.C.R. 12. In this case, the contract is not between the plaintiff and the defendant. Moreover, for the reasons given above, it does not purport to limit the tort duty which is owed by the defendant engineering firm to the contractor. Accordingly, the argument that the parties have defined their obligations by the contract, thereby ousting tort obligations, cannot succeed.

27 The second reason that the *D & F Estates* decision should not be regarded as strong persuasive authority in the Canadian context is that the approaches taken by English and Canadian courts with respect to the recoverability of economic loss have, in recent years, diverged significantly. The decision by the House of Lords

in *D & F Estates* was the penultimate step in a path of reasoning followed by the Law Lords culminating in *Murphy*, where they overruled their earlier decision in *Anns* and re-established a broad bar against recovery for pure economic loss in tort. This is a path this Court has chosen not to follow.

28 The divergence in approach between this Court and the House of Lords relates in large part to the question whether courts should impose what, in *Norsk*, I called a "broad exclusionary rule" against recovery for economic loss in tort. In *Norsk*, I discussed the development of the rule against recovery for economic loss in tort at common law and observed that, in its broad formulation, that rule was said to exclude all claims in negligence for pure economic loss in the absence of property loss or personal injury loss (at pp. 1054-61). I then made the following observation, at pp. 1060-61:

> A new stage in the development of the law on economic loss opened with the great case of *Hedley Byrne v. Heller*, *supra*. The speeches of the Law Lords were principally concerned with the problem of liability for negligent words, rather than with the issue of economic loss itself. . . .
>
> Only two of the Lords in *Hedley Byrne*, Lord Hodson and Lord Devlin, dealt specifically with the issue of economic loss. Both rejected the broad exclusionary rule. It was clear that henceforth economic loss was recoverable at least in some circumstances. With *Hedley Byrne* to guide the way, the broad rule came increasingly under attack in a variety of situations during this third phase.

The divergent attacks upon the broad rule after *Hedley Byrne* were synthesized in Lord Wilberforce's well-known and influential decision in *Anns*, *supra*, where the House of Lords found a local council liable in negligence to a successor in title for a failure to inspect the negligently constructed foundations of a building to ensure that it complied with local by-laws. In his reasons, at pp. 751-52, Lord

Wilberforce rejected the traditional broad exclusionary rule and instead proposed the following general approach to cases involving economic loss in tort:

> . . . 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 to 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. . . .

29 Applying this test, Lord Wilberforce came to the conclusion in *Anns*, at pp. 759-60, that the cost of repairing a dangerous defect in a building and putting the building back into a non-dangerous state could, in principle, be characterized as recoverable economic loss in tort. In coming to this conclusion, Lord Wilberforce was influenced by the dissenting opinion of Laskin J. (as he then was) in *Rivtow*, *supra*. In *Rivtow,* a barge charterer who had purchased several defective barge cranes through a distributor brought a claim in negligence against the manufacturer for the cost of repair of two defective cranes installed on one of its barges. The charterer had decided to repair the cranes after one of the cranes on another barge collapsed owing to a failure in the rear legs, killing the crane operator. As a result, the barge had to be taken out of service for repairs in the busiest part of the logging season. The majority in *Rivtow* found that the plaintiff had a valid claim because the manufacturer, having knowledge of the defects in the cranes, had failed to warn the plaintiff about the defects prior to the accident. Accordingly, the majority found the manufacturer liable in tort for the loss of extra profit caused by the

manufacturer's failure to warn promptly in a slack period, but explicitly rejected the plaintiff's claim for the cost of repairing the damage to the defective cranes themselves. However, Laskin J., in dissent, took a different approach. While agreeing with the majority that there had been a breach of a duty to warn, Laskin J. observed that he would also have found the manufacturer liable for the cost of repairing the defective article. He noted that, if the defective crane had caused personal injury or damage to property, then, under the traditional *Donoghue* analysis, the manufacturer would have been liable. He then made the following argument, at p. 1217:

> Should it then be any less liable for the direct economic loss to the appellant resulting from the faulty crane merely because the likelihood of physical harm, either by way of personal injury to a third person or property damage to the appellant, was averted by the withdrawal of the crane from service so that it could be repaired?

Lord Wilberforce in *Anns* found Laskin J.'s reasoning persuasive in coming to his own conclusions that the cost of repair for a dangerous defect in a building could be recoverable in tort. He stated, at pp. 759-60:

> 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. On the question of damages generally I have derived much assistance from the judgment (dissenting on this point, but of strong persuasive force) of Laskin J. in the Canadian Supreme Court case of *Rivtow Marine Ltd. v. Washington Iron Works*.

30 It appears, however, that the decision in *Anns* was the high water mark for recovery of economic loss in tort in England. Subsequently, the Law Lords have retreated

from the broad approach to recoverability in tort for economic loss suggested by Lord Wilberforce. It is clear that the *D & F Estates* decision played an important part in this retreat. In *D & F Estates*, Lord Oliver, at pp. 1011-12, made the following criticism of the approach adopted by Lord Wilberforce in *Anns*:

> . . . it is, I think now entirely clear that the vendor of a defective building who is also the builder enjoys no immunity from the ordinary consequences of his negligence in the course of constructing the building, but beyond this and so far as the case was concerned with the extent of or limitations on his liability for common law negligence divorced from statutory duty, Lord Wilberforce's observations were, I think, strictly obiter. 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 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 crystallises 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. Regarded as a cause of action arising not from common law negligence but from breach of a statutory duty, there is a logic in so limiting it as to conform with the purpose for which the statutory duty was imposed, that is to say the protection of the public from injury to health or safety. But there is, on that footing, no logic in extending liability for a breach of statutory duty to cases where the risk of injury is a risk of injury to property only, nor, as it seems to me, is there any logic in importing into a pure common law claim in negligence against a builder the limitations which are directly related only to breach of a particular statutory duty. 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.

In *D & F Estates*, Lord Bridge also expressed doubts about the *Anns* decision and explicitly rejected Laskin J.'s dissenting reasoning in *Rivtow* in favour of the majority reasoning (at p. 1006).

31 The reasons given by Lord Oliver and Lord Bridge in *D & F Estates* were a signal that the days of the *Anns* test in England were numbered. This became apparent in *Murphy*, *supra*, where the Law Lords explicitly rejected the two-part test suggested by Lord Wilberforce in *Anns* and restored the traditional broad exclusionary rule against recovery, in the absence of a special relationship of reliance, for pure economic loss in tort. In their reasons in *Murphy*, Lord Keith and Lord Bridge both made it clear that the reasoning in the 1988 *D & F Estates* decision played an influential role in their Lordships' decision to overrule *Anns*. In *Murphy*, Lord Bridge noted, at p. 925, that "the reasoning of the speeches in *D & F Estates* . . . has gone far to question the principles on which the [*Anns*] doctrine rests". Similarly, Lord Keith stated, at p. 923:

> In my opinion there can be no doubt that *Anns* has for long been widely regarded as an unsatisfactory decision. In relation to the scope of the duty owed by a local authority it proceeded on what must, with due respect to its source, be regarded as a somewhat superficial examination of principle and there has been extreme difficulty, highlighted most recently by the speeches in the *D & F Estates* case, in ascertaining on exactly what basis of principle it did proceed.

32 By contrast, in respect of both the appropriate test with regard to the recoverability of economic loss and the recoverability of the cost for repairing dangerous defects, this Court has chosen not to take the path followed by the House of Lords in *D & F Estates* and *Murphy*. In the first place, this Court has not followed the House of Lords in repudiating the two-part test established by Lord Wilberforce in *Anns*. The approach proposed by Lord Wilberforce in *Anns* was adopted by this Court in *City of Kamloops v. Nielsen*, [1984] 2 S.C.R. 2, where Wilson J., at pp. 10-11, suggested the following slightly modified version of the *Anns* test:

> (1) is there a sufficiently close relationship between the parties . . . so that, in the reasonable contemplation of [one person], carelessness on its part might cause damage to [the other] person? If so,
>
> (2) are there any considerations which ought to negative or limit (a) the scope of the duty and (b) the class of persons to whom it is owed or (c) the damages to which a breach of it may give rise?

Subsequently, the *Anns* approach was employed by this Court in *Rothfield v. Manolakos*, [1989] 2 S.C.R. 1259, at pp. 1266, 1285 and, most recently, in *Norsk, supra*, where this Court chose not to follow the Law Lords in retreating from the approach adopted in *Anns* and *Kamloops*. I made this clear in *Norsk*, at p. 1054:

> . . . I fully support this Court's rejection of the broad bar on recovery of pure economic loss in *Rivtow* and *Kamloops*. I would stress again the need to take into account the specific characteristics of each case.

Similarly, McLachlin J., at p. 1155, stated the following in *Norsk*:

> I conclude that, from a doctrinal point of view, this Court should continue on the course charted in *Kamloops* rather than reverting to the narrow exclusionary rule as the House of Lords did in *Murphy*.

33 Secondly, in recent years, members of this Court have, in *dicta*, expressed considerable sympathy for Laskin J.'s reasoning in *Rivtow*. In *Kamloops*, Wilson J. observed that the reasoning in *Anns* was more compatible with the reasoning in Laskin J.'s dissent in *Rivtow* than with the majority reasoning. At page 33, she stated:

> In any event, the majority judgment of this Court in *Rivtow* stands until such time as it may be reconsidered by a full panel of the Court.

Shortly thereafter, in *Attorney General for Ontario v. Fatehi*, [1984] 2 S.C.R. 536, at pp. 544-45, the Court observed that the law as stated in *Rivtow* was "uncertain" and that "*Rivtow* has been variously applied or rejected by the courts of this country". Finally, in *Norsk*, I had occasion to comment upon Laskin J.'s dissent and stated, at pp. 1067-1068, that "Laskin J.'s concern with safety and the prevention of further damage is justified", and at p. 1065, that:

> In Laskin J.'s view, the courts must be careful to avoid giving redress in tort for "safe but shoddy" products. Where the products are unsafe, however, tort may have a role: prevention of threatened harm resulting directly in economic loss should not be treated differently from post-injury treatment.

McLachlin J. made a similar observation, at p. 1161:

> One might fasten on the fact that damaging the bridge raised the danger of physical injury to CN's property. CN's property -- its trains -- were frequently on the bridge and stood to be damaged by an accident involving the bridge. Whether they were in fact damaged is immaterial to the question of proximity. What is important is that this danger indicates a measure of closeness which has traditionally been held to establish the proximity necessary to found liability in tort for pure economic loss. However, to found the decision on this criterion would be to affirm the minority position of Laskin and Hall JJ. in *Rivtow* that danger of physical loss is sufficient to found liability. I note that the majority's restriction of recovery of economic loss to the duty to warn has been doubted. Wilson J. in *Kamloops* noted that the problem of concurrent liability in contract and tort may have played a major role in the majority decision in *Rivtow*, and (at p. 34) that "as in the case of *Hedley Byrne*, we will have to await the outcome of a developing jurisprudence around that decision also". MacGuigan J.A. below stated at p. 166: "In my observation, courts will always find sufficient proximity where there is physical danger to the plaintiff's property". However it is not necessary to address that issue in this case since other factors clearly indicate the necessary proximity.

34 I conclude, therefore, that the *D & F Estates* decision is not of strong persuasive authority in the Canadian context. Accordingly, the question arising in this appeal

must be resolved with reference to the test developed in *Anns* and *Kamloops*. I will now proceed, applying this test, to discuss whether the costs of repair claimed by the Condominium Corporation are the type of economic loss that should be recoverable in tort.

Was There a Sufficiently Close Relationship Between the Parties so that, in the Reasonable Contemplation of Bird, Carelessness on its Part Might Cause Damage to a Subsequent Purchaser of the Building such as the Condominium Corporation?

35 In my view, it is reasonably foreseeable to contractors that, if they design or construct a building negligently and if that building contains latent defects as a result of that negligence, subsequent purchasers of the building may suffer personal injury or damage to other property when those defects manifest themselves. A lack of contractual privity between the contractor and the inhabitants at the time the defect becomes manifest does not make the potential for injury any less foreseeable. Buildings are permanent structures that are commonly inhabited by many different persons over their useful life. By constructing the building negligently, contractors (or any other person responsible for the design and construction of a building) create a foreseeable danger that will threaten not only the original owner, but every inhabitant during the useful life of the building. As noted by the Supreme Court of South Carolina, in *Terlinde v. Neely*, 271 S.E.2d 768 (1980), at p. 770:

> The key inquiry is foreseeability, not privity. In our mobile society, it is clearly foreseeable that more than the original purchaser will seek to enjoy the fruits of the builder's efforts. The plaintiffs, being a member of the class for which the home was constructed, are entitled to a duty of care in construction commensurate with industry standards. In the light of the fact that the home was constructed as speculative, the home builder cannot reasonably argue he envisioned anything but a class of purchasers. By placing this product into the stream of commerce, the

> builder owes a duty of care to those who will use his product, so as to render him accountable for negligent workmanship.

36 In my view, the reasonable likelihood that a defect in a building will cause injury to its inhabitants is also sufficient to ground a contractor's duty in tort to subsequent purchasers of the building for the cost of repairing the defect if that defect is discovered prior to any injury and if it poses a real and substantial danger to the inhabitants of the building. In coming to this conclusion, I adopt the reasoning of Laskin J. in *Rivtow*, which I find highly persuasive. 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 M.R.

37 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. The Fourth District Court of Appeal for Florida in *Drexel Properties, Inc. v. Bay Colony Club Condominium, Inc.*, 406 So.2d 515 (1981), at p. 519, explained the problem in the following manner:

> Why should a buyer have to wait for a personal tragedy to occur in order to recover damages to remedy or repair defects? In the final analysis, the cost to the developer for a resulting tragedy could be far greater than the cost of remedying the condition.

Woodhouse J. in *Bowen v. Paramount Builders (Hamilton) Ltd.*, [1977] 1 N.Z.L.R. 394, at p. 417, described the problem in similar terms:

> It would seem only common sense to take steps to avoid a serious loss by repairing a defect before it will cause physical damage; and rather extraordinary if the greater loss when the building fall down could be recovered from the careless builder but the cost of timely repairs could not.

Allowing recovery against contractors in tort for the cost of repair of dangerous defects thus serves an important preventative function by encouraging socially responsible behaviour.

38 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 Corporation'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" thick Tyndall 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 Corporation behaved responsibly, and as a reasonable home owner should, in having the building inspected and repaired immediately. Bird should not be insulated from liability simply because the current owner of the building acted quickly to alleviate the danger that Bird itself may well have helped to create.

39 Counsel for Bird submitted that, although the Condominium Corporation behaved reasonably in fixing the defects in the masonry, Bird should not be held liable for the cost of repairs the Corporation incurred in fixing the defective masonry. In support of this submission, counsel for Bird relied upon Lord Keith's argument in *Murphy*, *supra*, that the decision to repair a dangerous defect in a building is analogous to a decision to discard a defective article. In either case, Lord Keith noted, at p. 918, the cost of repair cannot be characterized as a recoverable loss because the owner of the defective article may simply discard it and thereby remove the danger:

> It is difficult to draw a distinction in principle between an article which is useless or valueless and one which suffers from a defect which would render it dangerous in use but which is discovered by the purchaser in time to avert any possibility of injury. The purchaser may incur expense in putting right the defect, or, more probably, discard the article. In either case the loss is purely economic.

40 While Lord Keith's argument has some appeal on the basis of abstract logic, I do not believe it is sufficient to preclude imposing liability on contractors for the cost

of repairing dangerous defects. The weakness of the argument is that it is based upon an unrealistic view of the choice faced by home owners in deciding whether to repair a dangerous defect in their home. In fact, a choice to "discard" a home instead of repairing the dangerous defect is no choice at all: most home owners buy a home as a long term investment and few home owners, upon discovering a dangerous defect in the home, will choose to abandon or sell the building rather than to repair the defect. Indeed, in most cases, the cost of fixing a defect in a house or building, within the reasonable life of that house or building, will be far outweighed by the cost of replacing the house or buying a new one. This was certainly demonstrated in this case by the fact that the Condominium Corporation incurred costs of over $1.5 million in repairing the building rather than choosing to abandon or sell the building. I conclude therefore that contractors ought reasonably to foresee that subsequent purchasers of the building will incur expenses to repair dangerous defects created by their negligence during the useful life of the building.

41 Given the clear presence of a real and substantial danger in this case, I do not find it necessary to consider whether contractors should also in principle be held to owe a duty to subsequent purchasers for the cost of repairing non-dangerous defects in buildings. It was not raised by the parties. I note that appellate courts in New Zealand (in *Bowen, supra*), Australia (*Bryan v. Moloney*, Sup. Ct. Tasmania, No. A77/1993, October 6, 1993) and in numerous American states (e.g., *Lempke v. Dagenais*, 547 A.2d 290 (N.H. Sup. Ct. 1988); *Richards v. Powercraft Homes, Inc.*, 678 P.2d 427 (Ariz. Sup. Ct. 1984) (*en banc*); *Terlinde*, *supra*) have all recognized some form of general duty of builders and contractors to subsequent purchasers with regard to the reasonable fitness and habitability of a building. In Quebec, it

is also now well-established that contractors, subcontractors, engineers and architects owe a duty to successors in title in immovable property for economic loss suffered as a result of faulty construction, design and workmanship (see arts. 1442, 2118-2120 of the *Civil Code of Quebec*, S.Q. 1991, c. 64; Pierre-Gabriel Jobin, *La vente dans le Code civil du Québec* (1993), at pp. 79 and 142). However, it is right to note that from the tone of Dickson J.'s reasons in *Fraser-Reid v. Droumtsekas*, [1980] 1 S.C.R. 720, at pp. 729-31, he would appear to be cool to the idea, though he found it unnecessary to canvass the point. For my part, I would require argument more squarely focused on the issue before entertaining this possibility.

42 Without entering into this question, I note that the present case is distinguishable on a policy level from cases where the workmanship is merely shoddy or substandard but not dangerously defective. In the latter class of cases, tort law serves to encourage the repair of dangerous defects and thereby to protect the bodily integrity of inhabitants of buildings. By contrast, the former class of cases bring into play the questions of quality of workmanship and fitness for purpose. These questions do not arise here. Accordingly, it is sufficient for present purposes to say that, if Bird is found negligent at trial, the Condominium Corporation would be entitled on this reasoning to recover the reasonable cost of putting the building into a non-dangerous state, but not the cost of any repairs that would serve merely to improve the quality, and not the safety, of the building.

43 I conclude that the law in Canada has now progressed to the point where it can be said that contractors (as well as subcontractors, architects and engineers) who take part in the design and construction of a building will owe a duty in tort to

subsequent purchasers of the building if it can be shown that it was foreseeable that a failure to take reasonable care in constructing the building would create defects that pose a substantial danger to the health and safety of the occupants. Where negligence is established and such defects manifest themselves before any damage to persons or property occurs, they should, in my view, be liable for the reasonable cost of repairing the defects and putting the building back into a non-dangerous state.

Are There Any Considerations that Ought to Negate (a) the Scope of the Duty and (b) the Class of Persons to Whom it is Owed or (c) the Damages to which a Breach of it May Give Rise?

44 There are two primary and interrelated concerns raised by the recognition of a contractor's duty in tort to subsequent purchasers of buildings for the cost of repairing dangerous defects. The first is that warranties respecting quality of construction are primarily contractual in nature and cannot be easily defined or limited in tort. Sidney Barrett, in "Recovery of Economic Loss in Tort for Construction Defects: A Critical Analysis" (1989), 40 *S.C. L. Rev.* 891, at p. 941, makes this argument in the following terms:

> Perhaps more than any other industry, the construction industry is "vitally enmeshed in our economy and dependent on settled expectations". The parties involved in a construction project rely on intricate, highly sophisticated contracts to define the relative rights and responsibilities of the many persons whose efforts are required -- owner, architect, engineer, general contractor, subcontractor, materials supplier -- and to allocate among them the risk of problems, delays, extra costs, unforeseen site conditions, and defects. Imposition of tort duties that cut across those contractual lines disrupts and frustrates the parties' contractual allocation of risk and permits the circumvention of a carefully negotiated contractual balance among owner, builder, and design professional.

45 The second concern is that the recognition of such a duty interferes with the doctrine of *caveat emptor* which, as this Court affirmed in *Fraser-Reid, supra*, at p. 723, "has lost little of its pristine force in the sale of land". The doctrine of *caveat emptor* dictates that, in the absence of an express warranty, there is no implied warranty of fitness for human habitation upon the purchase of a house already completed at the time of sale. Huband J.A. of the Manitoba Court of Appeal relied on this doctrine in concluding that no duty in tort could be owed to subsequent purchasers of a building. He presented the argument, at p. 90, as follows:

> The maxim, caveat emptor, operates as between purchaser and vendor. But the very existence of the principle instructs the potential purchaser to rely upon his own investigations, inspections and inquiries . . . . The concept of "buyer beware" tells the potential purchaser that if it seeks greater protection than its own investigations, inspections and inquiries provide, it should seek appropriate warranties from the vendor or, if that cannot be bargained, to seek out an insurer to cover anticipated future risks.

46 In my view, these concerns are both merely versions of the more general and traditional concern that allowing recovery for economic loss in tort will subject a defendant to what Cardozo C.J. in *Ultramares Corp. v. Touche*, 174 N.E. 441 (N.Y.C.A. 1931), at p. 444, called "liability in an indeterminate amount for an indeterminate time to an indeterminate class." In light of the fact that most buildings have a relatively long useful life, the concern is that a contractor will be subject potentially to an indeterminate amount of liability to an indeterminate number of successive owners over an indeterminate time period. The doctrines of privity of contract and *caveat emptor* provide courts with a useful mechanism for limiting liability in tort. But the problem, as I will now attempt to demonstrate, is that it is difficult to justify the employment of these doctrines in the tort context

in any principled manner apart from their utility as mechanisms for limiting liability.

The Concern with Overlap Between Tort and Contract Duties

47 Turning to the first concern, a duty on the part of contractors to take reasonable care in the construction of buildings can, in my view, be conceptualized in the absence of contract and will not result in indeterminate liability to the contractor. As I mentioned earlier, this Court has recognized that a tort duty can arise concurrently with a contractual duty, so long as that tort duty arises independently of the contractual duty; see *Rafuse, supra*; *Edgeworth, supra*. As I see it, the duty to construct a building according to reasonable standards and without dangerous defects arises independently of the contractual stipulations between the original owner and the contractor because it arises from a duty to create the building safely and not merely according to contractual standards of quality. It must be remembered that we are speaking here of a duty to construct the building according to reasonable standards of safety in such a manner that it does not contain dangerous defects. As this duty arises independently of any contract, there is no logical reason for allowing the contractor to rely upon a contract made with the original owner to shield him or her from liability to subsequent purchasers arising from a dangerously constructed building. This point was forcefully made by Richmond P. in *Bowen, supra*, at p. 407:

> It is clear that a builder or architect cannot defend a claim in negligence made against him by a third person by saying that he was working under a contract for the owner of the land. He cannot say that the only duty which he owed was his contractual duty to the owner. Likewise he cannot say that the nature of his contractual duties to the owner sets a limit to the duty of care which he owes to third parties. As

> regards this latter point it is, for example, obvious that a builder who agreed to build a house in a manner which he knows or ought to know will prove a source of danger to third parties cannot say, in answer to a claim by third parties, that he did all that the owner of the land required him to do.

In the same case, Woodhouse J., at p. 419, made a similar point in the following terms:

> . . . I do not consider the courts need be astute to protect those prepared to undertake jerry-building or shoddy work against the reasonable claims of innocent third parties merely because their bad work was done to a deliberate pattern or by arrangement. The recognition of a duty situation does not depend upon overcoming some initial bias in favour of excluding it. Instead, the principle described by Lord Atkin ". . . ought to apply unless there is some justification or valid explanation for its exclusion": *Dorset Yacht Co Ltd v Home Office* [1970] AC 1004, 1027. . . . I do not regard a private contractual arrangement for an inefficient design or for an unworkmanlike or inadequate type of construction as any sort of "justification or valid explanation" for releasing the builder from his duty to those who otherwise could look to him for relief.

48 The tort duty to construct a building safely is thus a circumscribed duty that is not parasitic upon any contractual duties between the contractor and the original owner. Seen in this way, no serious risk of indeterminate liability arises with respect to this tort duty. In the first place, there is no risk of liability to an indeterminate class because the potential class of claimants is limited to the very persons for whom the building is constructed: the inhabitants of the building. The fact that the class of claimants may include successors in title who have no contractual relationship with the contractors does not, in my view, render the class of potential claimants indeterminate. As noted by the New Jersey Supreme Court in *Aronsohn v. Mandara*, 484 A.2d 675 (1984), at p. 680, "[t]he contractor should

not be relieved of liability for unworkmanlike construction simply because of the fortuity that the property on which he did the construction has changed hands".

49 Secondly, there is no risk of liability in an indeterminate amount because the amount of liability will always be limited by the reasonable cost of repairing the dangerous defect in the building and restoring that building to a non-dangerous state. Counsel for Bird advanced the argument that the cost of repairs claimed for averting a danger caused by a defect in construction could, in some cases, be disproportionate to the actual damage to persons or property that might be caused if that defect were not repaired. For example, he expressed concern that a given plaintiff could claim thousands of dollars in damage for a defect which, if left unrepaired, would cause only a few dollars damage to that plaintiff's other property. However, in my view, any danger of indeterminacy in damages is averted by the requirement that the defect for which the costs of repair are claimed must constitute a real and substantial danger to the inhabitants of the building, and the fact that the inhabitants of the building can only claim the reasonable cost of repairing the defect and mitigating the danger. The burden of proof will always fall on the plaintiff to demonstrate that there is a serious risk to safety, that the risk was caused by the contractor's negligence, and that the repairs are required to alleviate the risk.

50 Finally, there is little risk of liability for an indeterminate time because the contractor will only be liable for the cost of repair of dangerous defects during the useful life of the building. Practically speaking, I believe that the period in which the contractor may be exposed to liability for negligence will be much shorter than the full useful life of the building. With the passage of time, it will become

increasingly difficult for owners of a building to prove at trial that any deterioration in the building is attributable to the initial negligence of the contractor and not simply to the inevitable wear and tear suffered by every building; for a similar view, see Sachs L.J. in *Dutton*, *supra*, at p. 405.

The Caveat Emptor Concern

51 Turning to the second concern, *caveat emptor* cannot, in my view, serve as a complete shield to tort liability for the contractors of a building. In *Fraser-Reid, supra,* this Court relied on the doctrine of *caveat emptor* in rejecting a claim by a buyer of a house for the recognition of an implied warranty of fitness for human habitation. However, the Court explicitly declined to address the question of whether *caveat emptor* serves to negate a duty in tort (pp. 726-27). Accordingly, the question remains at large in Canadian law and must be resolved on the level of principle.

52 In *Fraser-Reid,* Dickson J. (as he then was) observed that the doctrine of *caveat emptor* stems from the *laissez-faire* attitudes of the eighteenth and nineteenth centuries and the notion that purchasers must fend for themselves in seeking protection by express warranty or by independent examination of the premises (at p. 723). The assumption underlying the doctrine is that the purchaser of a building is better placed than the seller or builder to inspect the building and to bear the risk that latent defects will emerge necessitating repair costs. However, in my view, this is an assumption which (if ever valid) is simply not responsive to the realities of the modern housing market. In *Lempke*, *supra,* at p. 295, the Supreme Court of New Hampshire made reference to a number of policy factors that strongly militate

against the rigid application of the doctrine of *caveat emptor* with regard to tort claims for construction defects:

> First, "(c)ommon experience teaches that latent defects in a house will not manifest themselves for a considerable period of time . . . after the original purchaser has sold the property to a subsequent unsuspecting buyer." . . .
>
> Second, our society is rapidly changing.
>
> "We are an increasingly mobile people; a builder-vendor should know that a house he builds might be resold within a relatively short period of time and should not expect that the warranty will be limited by the number of days that the original owner holds onto the property."
>
> . . . Furthermore, "the character of society has changed such that the original buyer is not in a position to discover hidden defects. . . ."
>
> Third, like an initial buyer, the subsequent purchaser has little opportunity to inspect and little experience and knowledge about construction. "Consumer protection demands that those who buy homes are entitled to rely on the skill of a builder and that the house is constructed so as to be reasonably fit for its intended use." . . .
>
> Fourth, the builder/contractor will not be unduly taken unaware by the extension of the warranty to a subsequent purchaser. "The builder already owes a duty to construct the home in a workmanlike manner. . . ." . . . And extension to a subsequent purchaser, within a reasonable time, will not change this basic obligation.
>
> Fifth, arbitrarily interposing a first purchaser as a bar to recovery "might encourage sham first sales to insulate builders from liability."

Philip H. Osborne makes the further point in "A Review of Tort Decisions in Manitoba 1990-1993", [1993] *Man. L.J.* 191, at p. 196, that contractors and builders, because of their knowledge, skill and expertise, are in the best position to ensure the reasonable structural integrity of buildings and their freedom from latent defect. In this respect, the imposition of liability on builders provides an important incentive for care in the construction of buildings and a deterrent against poor workmanship.

53 My conclusion that a subsequent purchaser is not the best placed to bear the risk of the emergence of latent defects is borne out by the facts of this case. It is significant that, when cracking first appeared in the mortar of the building in 1982, the Condominium Corporation actually hired Smith Carter, the original architect of the building, along with a firm of structural engineers, to assess the condition of the mortar work and exterior cladding. These experts failed to detect the latent defects that appear to have caused the cladding to fall in 1989. Thus, although it is clear that the Condominium Corporation acted with diligence in seeking to detect hidden defects in the building, they were nonetheless unable to detect the defects or to foresee the collapse of the cladding in 1989. This, in my view, illustrates the unreality of the assumption that the purchaser is better placed to detect and bear the risk of hidden defects. For this Court to apply the doctrine of *caveat emptor* to negate Bird's duty in tort would be to apply a rule that has become completely divorced, in this context at least, from its underlying rationale.

Conclusion

54 I conclude, then, that no adequate policy considerations exist to negate a contractor's duty in tort to subsequent purchasers of a building to take reasonable care in constructing the building, and to ensure that the building does not contain defects that pose foreseeable and substantial danger to the health and safety of the occupants. In my view, the Manitoba Court of Appeal erred in deciding that Bird could not, in principle, be held liable in tort to the Condominium Corporation for the reasonable cost of repairing the defects and putting the building back into a non-dangerous state. These costs are recoverable economic loss under the law of tort in Canada.

55 The Manitoba Court of Appeal affirmed the trial judge's dismissal of the motion for summary judgment but allowed the appeal from the trial judge's decision with respect to the motion to strike on the grounds that Bird's claim did not disclose a reasonable cause of action. As I have decided that Bird's claim discloses a reasonable cause of action, I would accordingly order the case to proceed to trial. I am also in agreement with both the trial judge and the Court of Appeal that this matter should not be resolved on a motion for summary judgment. In *Podkriznik v. Schwede*, [1990] 4 W.W.R. 220 (Man. C.A.), Twaddle J.A. made it clear, at p. 224, that a court considering a motion for summary judgment under Rule 20 of the Manitoba Queen's Bench Rules must take a "hard look at the merits of an action" (quoting from *Vaughan v. Warner Communications Inc.* (1986), 56 O.R. (2d) 242 (H.C.), at p. 247) and determine whether there is a "real chance" that the action will be successful. In my view, Galanchuk J. was correct in concluding that there are genuine issues for trial in this case. In particular, there are conflicting allegations regarding Bird's participation in the construction and planning of the building, which disposes of the principal argument made on behalf of the respondent at the hearing. Issues such as whether the work on the building was negligently performed, or whether Bird was negligent in the hiring of suitable subcontractors, or whether the danger was substantial and foreseeable can be considered at trial. This Court is not in a position to resolve these questions at this stage in the proceedings. Nor, despite the respondent's argument, is it necessary to reconsider the well-established principles regarding the vicarious liability of contractors for the work of sub-contractors. The appellant at no time raised this issue in this Court. The issue it raised was whether the Court of Appeal erred in its conclusion that the appellant's action in tort failed because the damages sought were not recoverable economic loss.

56 I would allow the appeal, reverse the decision of the Court of Appeal and make the following orders: that the losses alleged in the statement of claim, to the extent that they may be found to constitute pure economic loss flowing from the negligence of the respondent, be recoverable from the respondent, and that the order of the learned motions judge, that the within action proceed to trial against the respondent Bird Construction Co. Ltd. with respect to the remaining issues raised in the statement of claim, be reinstated. The appellant is entitled to its costs throughout.

Appeal allowed.

Solicitors for the appellant: Taylor, McCaffrey, Winnipeg.

Solicitors for the respondent: Inkster, Christie, Hughes, MacKay, Winnipeg.

Solicitors for the intervener: Campbell, Marr, Winnipeg.