Man B&W Diesel S E Asia Pte and Another v PT Bumi International Tankers and Another Appeal
[2004] SGCA 8

Case Number	: CA 75/2003, 79/2003
Decision Date	: 09 March 2004
Tribunal/Court	: Court of Appeal
Coram	: Chao Hick Tin JA; Tan Lee Meng J; Yong Pung How CJ
Counsel Name(s)	: N Sreenivasan, Collin Choo (Straits Law Practice LLC) and Charles Lin Ming Khin (Donaldson and Burkinshaw) for appellants in CA 75/2003 and respondents in CA 79/2003; Philip Tay Twan Lip (Rajah and Tann) for respondent in CA 75/2003 and appellant in CA 79/2003
Parties	: Man B&W Diesel S E Asia Pte; Mirrlees Blackstone Ltd — PT Bumi International Tankers

Contract – Breach – Main contract between ship owner and shipbuilder -Subcontractors contracted with shipbuilder – No contract between ship owner and subcontractors – Whether ship owner could seek redress from subcontractors for defects – Whether subcontractors assumed duty of care to ship owner

Contract – Contractual terms – Exclusion clauses – Warranties – Whether ship owner should have altered limited warranty and limitation clauses to cover economic losses – Whether court should assist ship owner when contract already in place

Damages – Pure economic loss – Whether pure economic loss recoverable – Two-stage test – Whether recovery for economic loss in tort extended to chattels

Tort – Negligence – Duty of care – Whether pure economic loss recoverable – Two-stage test – Whether recovery for economic loss in tort extended to chattels

9 March
2004
Judgment reserved.

Chao Hick Tin JA (delivering the judgment of the court):

1 There are two appeals before us and they arose out of the same decision of the High Court (reported at [2003] 3 SLR 239). The first appeal raises a point of considerable importance, namely, whether the owners of a specially-built vessel are entitled to sue the sub-contractors, the engine manufacturers, for economic losses under the tort of negligence when there were express clauses in the main contract between the owners and the vessel builder limiting the remedies available to the owners for any defect. The second appeal relates to the quantum of damages which the owners are entitled to, following the judge's disallowance of certain items of claim of the owners.

The background

2 By way of a contract made in October 1991 ("main contract") the Malaysian Shipyard and Engineering Sdn Bhd ("MSE") agreed to build an oil tanker for PT Bumi International Tankers ("Bumi"), the respondent in Civil Appeal No 75 of 2003 ("CA 75/2003"). The tanker, upon completion, was named *Bumi Anugerah*. The vessel was required by Bumi to fulfil the needs of a long-term charter which it had entered into with the Indonesian oil company, Pertamina. The main contract set out the specifications of the engine. It was clearly contemplated in the main contract that MSE would be sourcing the engine from a third party. Thus, MSE in turn obtained the engine from the first appellant

in CA 75/2003, Man B&W Diesel S E Asia Pte Ltd ("MBS"), a Singapore company, which sold and serviced engines manufactured by its UK parent company, Mirrlees Blackstone Ltd ("MBUK"), the second appellant in CA 75/2003. There was no direct contractual relationship between Bumi and MBS or MBUK.

3 In March 1994, the engine was delivered to MSE. In December 1994, the completed vessel was delivered by MSE to Bumi. From the evidence tendered in court, the engine gave trouble within a few weeks of the delivery of the vessel and the problems persisted. In February 1996, major repairs of the engine took place, which included the replacement of the turbocharger and fuel injection pumps. Finally, the engine broke down completely in September 1997.

4 Bumi commenced the present action in tort against MBS and MBUK on the ground that both MBS and MBUK had breached their duty of care which they owed to Bumi. Bumi claimed for its losses, including the cost of the engine and the loss of rental income which it would have earned from the charter.

The decision below

5 The judge below listed the issues which she had to decide under the following three heads:

> (1) did MBS and/or MBUK owe Bumi a duty of care to provide an engine that would be suitably manufactured and free from defect, built for the safe and proper operation of the vessel so that Bumi could have avoided the type of losses that [it] sustained;
>
> (2) if such a duty of care was owed, was there a breach of the duty in that the engine was defectively and/or negligently designed; and
>
> (3) if there was breach, what damages did Bumi suffer and [is it] entitled to recover all such damages?

6 Relying on two decisions of this court, namely, *RSP Architects Planners & Engineers v Ocean Front Pte Ltd* [1996] 1 SLR 113 ("*Ocean Front*") and *RSP Architects Planners & Engineers (Raglan Squire & Partners FE) v Management Corporation Strata Title Plan No 1075* [1999] 2 SLR 449 ("*Raglan Squire*"), the judge held (at [22]) that in Singapore "there can in certain circumstances be a tortious duty imposed on one party to avoid negligently causing another party to sustain pure economic loss". The judge then went on to state (at [28]) that:

> The principles laid down by the Court of Appeal as to when one party owes a duty of care to another to avoid causing economic loss to that other are capable of application in a wide variety of circumstances. They are not confined to the types of factual situations that were seen in the *Ocean Front* and [*Raglan Squire*] cases. There are substantial differences between the facts of the present case and those of the cases cited. That in itself is not decisive of the issue. The differences must be examined in the context of an investigation into whether the application of the principles to the existing facts provides a sound basis for the imposition of a tortious duty on the defendants. One cannot simply brush aside any suggestion of the existence of a duty by saying airily "the facts are different".

7 The judge noted that as MBUK was a specialist designer and manufacturer of engines for marine use and had knowledge that the vessel was custom-built to meet Bumi's specific requirements, there was sufficient proximity between Bumi and MBUK to give rise to a duty of care on the part of MBUK to exercise due diligence in the design and manufacture of the engine so that the engine would,

upon delivery, be fit for the operation of the vessel.

8 While the judge recognised that the position *vis-à-vis* MBS was more difficult, as MBS was neither the designer nor the maker of the engine, she nevertheless held that there was sufficient proximity between Bumi and MBS because the latter had, by asserting that the engine was reliable and by actively marketing it at various meetings with MSE and Bumi, assumed responsibility for the delivery of an engine which would meet Bumi's requirements.

9 The judge then went on to consider whether there was any reason why the duty should not be imposed. On this, she considered whether it would result in "imposing liability in an indeterminate amount for an indeterminate time to an indeterminate class" or result "in an indefinitely transmissible warranty". To both these points, she answered in the negative.

10 The judge next examined the relevant clauses (cll 14, 17 and 22) in the main contract which limited the liability of MSE to Bumi but she did not think Bumi should thereby be barred from making a claim against MBS and MBUK for Bumi's economic losses.

11 Finally, the judge embarked on a very careful and detailed examination of the alleged faults of the engine and came to the conclusion that the engine supplied did not meet the standards prescribed in the specifications. While the expert witness could not pinpoint the exact cause, he felt it must have arisen from some defect in the design.

The development in the law

12 In order to better appreciate the scope of the decision in *Ocean Front*, we will briefly re-traverse some of the cases which were examined in *Ocean Front* to understand the development of the law in this area. A useful starting point is the case of *Dutton v Bognor Regis Urban District Council* [1972] 1 QB 373 ("*Dutton*") where a sub-purchaser of a house in an estate developed by one Mr Holroyd sued Mr Holroyd and the local authority for the cost of repair to the house or its diminution of value due to poor foundation. The judge found that the inspector of Bognor Regis UDC was negligent in approving the foundation. The sub-purchaser settled his claim with Mr Holroyd but pursued the claim against Bognor Regis UDC. This was the first case where a house owner sought to impute liability to a local authority for failing to discharge its functions diligently. The English Court of Appeal recognised that the principle in *Donoghue v Stevenson* [1932] AC 562 ("*Donoghue*") was broad enough to cover the case and also came to the conclusion that there should not be any policy consideration which militated against the local authority, Bognor Regis UDC, being held liable. The approach which Lord Denning MR took was as follows (at 397):

> In *Rondel v Worsley* [1969] 1 AC 191, we thought that if advocates were liable to be sued for negligence they would be hampered in carrying out their duties. In *Dorset Yacht Co Ltd v Home Office* [1970] AC 1004, we thought that the Home Office ought to pay for damage done by escaping Borstal boys, if the staff was negligent, but we confined it to damage done in the immediate vicinity. In *SCM (United Kingdom) Ltd v W J Whittall & Son Ltd* [1971] 1 QB 337, some of us thought that economic loss ought not to be put on one pair of shoulders, but spread among all the sufferers. In *Launchbury v Morgans* [1971] 2 QB 245, we thought that as the owner of the family car was insured she should bear the loss. In short, we look at the relationship of the parties: and then say, as a matter of policy, on whom the loss should fall.

13 The decision in *Dutton* came under review in *Anns v Merton London Borough Council* [1978] AC 728 ("*Anns*") where the issue before the court was whether a local authority was under any duty of care towards lessees for defects in dwellings. The plaintiffs were long-term lessees of

certain flats. The owners of the block were the owners as well as the builders. Cracks appeared in the walls and floors due to inadequate foundation. The owners/builders were cited as the first defendants and the claim was based on, *inter alia*, breach of contract. The Merton London Borough Council was sued as the second defendant for negligence on the part of their servants or agents in approving the foundation when the latter was not erected up to a sufficient depth. The matter came before the House of Lords on certain preliminary points of law. In this case, Lord Wilberforce, who delivered the leading judgment, and with which three other Law Lords concurred, set out a two-step test to determine whether a duty of care arose in a particular situation (at 751–752):

> 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: see *Dorset Yacht case* [1970] AC 1004, *per* Lord Reid at p 1027.

14 Lord Wilberforce, after examining the statutory scheme governing the functions, powers or discretion of the local authority and noting that the primary responsibility for construction in accordance with the byelaws was with the builder and that the inspector's function was supervisory, nevertheless remarked at 755 that the duty of the local authority was a serious one as "once the inspector has passed the foundations they will be covered up, with no subsequent opportunity for inspection". The fact that the duty was statutorily imposed did not exclude liability at common law for negligence in the performance of such statutory duties.

15 Next is the case of *Junior Books Ltd v Veitchi Ltd* [1983] 1 AC 520 ("*Junior Books*"), where contractors were engaged to construct a factory. As special flooring was required, the contractors delegated that task to the defendants, who were flooring specialists. It would be noted that the facts in this case are quite similar to those in our present case. The flooring laid by the defendants was defective and had cracked. Rectification works had to be carried out by the owners, who claimed for the cost of re-laying the floor tiles and also for loss of profits while the works were being carried out. The owners did not sue the main contractors and instead sued the sub-contractors in tort. The matter came before the House of Lords on a preliminary point of law, based on the facts as set out in the pleadings. The House, by a four to one majority, held that the owners were entitled to recover those losses.

16 Lord Roskill, applying the two-stage test propounded by Lord Wilberforce in *Anns*, said (at 546) that the sub-contractors owed a duty of care to the owners because, *inter alia*:

> (7) The relationship between the parties was as close as it could be short of actual privity of contract. (8) The appellants must be taken to have known that if they did the work negligently (as it must be assumed that they did) the resulting defects would at some time require remedying by the respondents expending money upon the remedial measures as a consequence of which the respondents would suffer financial or economic loss.

He also found that there was nothing to restrict the duty of care arising from the proximity he had discussed.

17 Lord Keith of Kinkel held (at 535) that:

> There undoubtedly existed between [the defendants] and [the owners] such proximity of relationship, within the well known principle of *Donoghue v Stevenson* [1932] AC 562, as to give rise to a duty of care owed by the former to the latter.

18 Lord Fraser of Tullybelton expressed the view (at 533) that the proximity between the parties was "extremely close, falling only just short of a direct contractual relationship". Because of such proximity, the sub-contractors owed to the owners a duty to take reasonable care to avoid acts or omissions which they ought to have known would be likely to cause the owners not only physical damage to person or property, but also pure economic losses.

19 However, Lord Brandon, who dissented, while recognising that *prima facie*, as between the parties there was a sufficient degree of proximity so as to give rise to a duty of care, said that it was in relation to the second-stage inquiry that a duty of care ought not to be imposed. He felt that, first, the principle in *Donoghue* is clear – there should be injury to person or property. Second, in relation to the case, such a duty should only arise in the context of a contract between the parties.

20 We ought to add that the decision in *Junior Books* was subject to considerable analysis and controversy so much so that Dillon LJ in *Simaan General Contracting Co v Pilkington Glass Ltd (No 2)* [1988] QB 758 at 784 said:

> [T]he case cannot now be regarded as a useful pointer to any development of the law, whatever Lord Roskill may have had in mind when he delivered his speech. Indeed I find it difficult to see that future citation from the *Junior Books* case can ever serve any useful purpose.

21 Some six years later, the decision in *Junior Books* was not followed in the case of *D & F Estates Ltd v Church Commissioners for England* [1989] AC 177 ("*D & F Estates*") where a differently constituted House of Lords held that pure economic losses were not recoverable in tort. There the lessee of a property claimed against the builder, seeking to recover cost of remedial work, the cost of cleaning carpets and other possessions damaged by falling plaster and loss of rental during the period when repair works were being carried out. Lord Bridge of Harwich said (at 207):

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

22 Then came the very important case of *Murphy v Brentwood District Council* [1991] 1 AC 398 ("*Murphy*") where a specially constituted House of Lords, consisting of seven Law Lords, expressly overruled *Anns* and held that pure economic losses were not recoverable in tort. There, the subsequent owner of a house sued the District Council for losses suffered on account of faulty foundation and serious cracks appearing in the building, which defects were attributable to the District Council in approving the plans. Lord Keith of Kinkel said (at 468):

> The right to recover for pure economic loss, not flowing from physical injury, did not then extend beyond the situation where the loss had been sustained through reliance on negligent mis-statements, as in *Hedley Byrne*.

23 Similar views were expressed by Lord Bridge of Harwich when he said (at 475):

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

His Lordship went on to say (at 480):

> All these considerations lead inevitably to the conclusion that a building owner can only recover the cost of repairing a defective building on the ground of the authority's negligence in performing its statutory function of approving plans or inspecting buildings in the course of construction if the scope of the authority's duty of care is wide enough to embrace purely economic loss.

24 Next, we move to Australia, and here it would suffice if we merely cite the Australian High Court case of *Bryan v Maloney* (1995) 128 ALR 163 where the court refused to follow *Murphy*. There, a subsequent owner of a house sued the builder for economic losses she suffered on account of inadequate footings. The High Court, by a majority, declined to follow *D & F Estates* and *Murphy* and ruled that there was sufficient proximity between the builder and the subsequent owner of the house to give rise to a duty of care. Their Honours said (at 172 and 173):

> Ultimately, it seems to us that, from the point of view of proximity, the similarities between the relationship between builder and first owner and the relationship between builder and subsequent owner as regards the particular kind of economic loss are of much greater significance than the differences to which attention has been drawn, namely, the absence of direct contact or dealing and the possibly extended time in which liability might arise. Both relationships are characterised, to a comparable extent, by assumption of responsibility on the part of the builder and likely reliance on the part of the owner. No distinction can be drawn between the two relationships in so far as the foreseeability of the particular kind of economic loss is concerned: it is obviously foreseeable that that loss will be sustained by whichever of the first or subsequent owners happens to be the owner at the time when the inadequacy of the footings becomes manifest.
>
> ….
>
> It is difficult to see why, as a matter of principle, policy or common sense, a negligent builder should be liable for ordinary physical injury caused to any person or to other property by reason of the collapse of a building by reason of the inadequacy of the foundations but be not liable to the owner of the building for the cost of remedial work necessary to remedy that inadequacy and to avert such damage.

25 However, we must observe that the majority in *Bryan v Maloney* had placed emphasis on the fact that the building was a permanent residence, not a commercial building, and this distinction seems to be a critical ingredient of their reasoning. Subsequent cases declined to extend that decision to commercial buildings, *eg*, *Fangrove Pty Ltd v Tod Group Holdings Pty Ltd* [1999] 2 Qd R 236, a decision of the Queensland Court of Appeal and *Woollahra Municipal Council v Sved* (1996) 40 NSWLR 101, a New South Wales Court of Appeal decision.

26 Of course, we see that there will be difficulties in maintaining a clear distinction between purchasers according to the type of building they buy. The majority decision in *Bryan v Maloney* rests

very much on the vulnerability of members of the public in acquiring homes. We do not think it would be beneficial, nor necessary, to pursue this distinction to its logical conclusion for the purposes of determining its soundness.

27 Finally, we ought to mention that the New Zealand courts have also refused to follow *D & F Estates* and *Murphy*: see *Invercargill City Council v Hamlin* [1994] 3 NZLR 513 which held that the owner of a house was entitled to claim in negligence, for the expenses incurred by him to rectify damage to the house, against the local council for approving the plans of the house. In Canada, in the case of *Winnipeg Condominium Corporation No 36 v Bird Construction Co* (1995) 121 DLR (4th) 193 ("*Bird Construction*"), the Supreme Court of Canada seems to have taken a similar stance. La Forest J, delivering the judgment of the court said (at [21]):

> 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.

Later at [36], he said:

> 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* … at p 396, *per* Lord Denning MR.

28 It would be noted that the decision in *Bird Construction*, while it allowed a claim for economic loss, was of a narrow compass, *ie*, only in respect of the expenses of putting right defects in the building which posed a real and substantial danger.

Ocean Front

29 We now turn to consider the landmark decision of this court in *Ocean Front* which broke new ground, as far as Singapore law was concerned, when it held that the developer of a condominium was liable in tort for non-personal injury losses suffered by the management corporation of the development. In coming to its decision, the court reviewed the English and other cases on the issue, including those which we have discussed above. However, it preferred the approach taken by the House of Lords in *Anns* rather than in *Murphy* and also by the courts in Australia and Canada. It basically adopted the two-step test advanced by Lord Wilberforce in *Anns*. The first step was to determine whether, in the particular circumstances, there existed that degree of proximity between the plaintiff and the defendant as would give rise to a duty of care by the defendant to the plaintiff and to determine the scope of that duty. The second step was, having found such a degree of proximity, to consider whether there was any material factor or policy which precluded such a duty from arising. Under the second step, one of the considerations was whether this would result in imposing liability "in an indeterminate amount for an indeterminate time to an indeterminate class".

30 In holding that the developer was so liable to the management corporation with whom the developer had no contractual relation, the court examined the scheme of things under the Land Titles (Strata) Act (Cap 158, 1988 Rev Ed), ("the Strata Act"), the role of the management corporation in a development, and the duties of the developer under the Buildings and Common Property (Maintenance and Management) Act (Cap 30, 1985 Rev Ed), ("the Common Property Maintenance Act"), with regard to common property before the establishment of the management corporation. It held that the relationship between the developer and management corporation was "as close as it could be short of actual privity of contract" and based its decision on the following considerations (at 141, [74]):

> [W]e regard the following facts of crucial importance in determining that there is sufficient proximity between the developers and the management corporation which gives rise to the duty of care: (i) the management corporation was an entity conceived and created by the developers; (ii) the developers were the party who built and developed the condominium including the common property and undertook the obligations to construct it in a good and workmanlike manner and were alone responsible for such construction; (iii) after completion of the condominium the developers were the party solely responsible for the maintenance and upkeep of the common property; (iv) the management corporation as the successor of the developers took over the control, management and administration of the common property and has the obligations of upkeeping and maintaining the common property; (v) the performance of these obligations is very much dependent on the developers having exercised reasonable care in the construction of the common property; (vi) the developers obviously knew or ought to have known that if they were negligent in their construction of the common property the resulting defects would have to be made good by the management corporation.

31 The court also indicated that there was no single rule or set of rules for determining whether a duty of care arises in a particular circumstance, and the scope of that duty. It said that in determining whether a duty of care existed, and the scope of such duty, all the relevant circumstances would have to be examined. This approach was similar to that enunciated by Gibbs CJ in *The Council of the Shire of Sutherland v Heyman* (1984-1985) 157 CLR 424 at 441:

> In deciding whether the necessary relationship exists, and the scope of the duty which it creates, it is necessary for the court to examine closely all the circumstances that throw light on the nature of the relationship between the parties.

32 The decision in *Ocean Front* came up for review in the subsequent case of *Raglan Squire* where the architects of a condominium development were held liable to the management corporation for economic loss arising from poor design. There, the action was instituted by the management corporation against the developer, who, in turn, brought in the architects as a third party. Notwithstanding a challenge by counsel for the architects requesting the court to review its decision in *Ocean Front*, the court reiterated the correctness of its decision in *Ocean Front*.

The limits of *Ocean Front*

33 The next question to ask is whether this court intended in *Ocean Front* to lay down a general proposition that, applying the two-step test and whatever may be the subject matter, whenever economic losses are suffered by a party and those losses are attributable to a lack of care on the part of another party, the first party may claim the losses from the second party. It is important to bear in mind that the court was at pains in *Ocean Front* to explain the special position of the management corporation. The court examined the scheme of things under the Strata Act and the Common Property Maintenance Act and how the management corporation came into being. The court noted that "the management corporation was in fact the creation of the developers". It was in this

very special factual matrix that the court came to the view that a remedy in tort should be made available to the management corporation, who would otherwise be without a remedy.

34 It is true that the principle enunciated in *Donoghue* – namely, that when a person can or ought to appreciate that a careless act or omission on his part may result in physical injury to other persons or their property, he owes a duty to all such persons to exercise reasonable care to avoid such careless act or omission – has been extended to claims other than for such personal injuries or property damage: see *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465 and *Home Office v Dorset Yacht Co Ltd* [1970] AC 1004. We also acknowledge that the *Donoghue* principle is not a statutory definition. Its application has not remained static. It is evolving. It offers an avenue of redress for losses suffered by a person on account of the acts or omission of another, where such losses would otherwise be without a remedy. While we would not say that for every subsequent case to fall within the scope of the decision in *Ocean Front* the facts must be identical or the same, extreme caution must be exercised in extending the *Donoghue* principle, or the decision in *Ocean Front*, to new situations, particularly to a scenario which is essentially contractual.

Our analysis of the present case

35 It is indisputable that MBS and MBUK knew that the engine supplied under the sub-contract would be fitted onto the vessel which was being built by MSE for Bumi. The specifications for the engine were known to MBS. MBS knew that Bumi required the vessel for its business. MBS would also have realised that any defect in the engine would render the vessel inoperable. *Prima facie*, such circumstances could give rise to a duty of care.

36 However, those are not all the relevant circumstances as far as the present case is concerned. There are certain contractual arrangements which must be borne in mind. As stated before, the main contract covered both the hull as well as the engine. Under the contract, MSE would be sourcing the engine from a third party. Though MBS and MBUK supplied the engine, Bumi made MSE solely responsible for any defect that could arise in respect of the vessel, including the engine. The following terms in the main contract are germane to the present proceeding and they are cll 14.1, 14.4, 17.1, 21 and 22:

> 1 4 . 1 *The BUILDER [MSE] guarantees the replacement of all parts and equipment of the VESSEL thereof that are manufactured or furnished by the BUILDER under this CONTRACT against all defects which are of defective faulty design, constructional miscalculations and/or poor workmanship* including improper storage, fabrication or assembly, provided that such defects have not been caused by perils of the sea, rivers or navigations, or by normal wear and tear, overloading, improper loading or stowage, fire, accident, incompetence, mismanagement, negligence or wilful neglect or by alteration or addition by the OWNER not previously approved by the BUILDER *and are discovered within a period of twelve (12) months after the date of delivery of the VESSEL* and a notice thereof is duly given to the BUILDER as herein provided. The BUILDER will be responsible for all fabrications, forgings castings, machinery, equipment or parts of machinery and all constructions which are supplied by sub-contractors *and will guarantee the above mentioned for a period of twelve (12) months on* the basis as laid down in this CLAUSE, or for such longer period as the manufacturers thereof may give.
>
> 14.4(a) The BUILDER shall have no responsibility or liability for any other defects whatsoever in the VESSEL than the defects specified in sub-CLAUSE 14.1 of this CLAUSE. *Nor the BUILDER shall in any circumstances be responsible or liable for any consequential or special losses, damages or expense including, but not limited to loss of time, loss of profit or earning or detention of the VESSEL* …

14.4(c) The guarantee … hereinbefore … replaces and excludes any other liability, guarantee … imposed or implied by the law …

17.1 *BUILDER shall be fully responsible for* any part of work performed or to be performed by *his sub-contractors and for the acts and omissions of his sub-contractors* and persons either directly or indirectly employed by them to the same extent as he is for the acts and omissions of persons directly employed by him.

21. This CONTRACT embodies the entire contract between OWNER and BUILDER with respect to the VESSEL. …

22. BUILDER states that he and his sub-contractors are fully experienced and properly qualified to perform the class of construction of the VESSEL provided for herein … *BUILDER shall act as an independent builder in performing the construction of the VESSEL, maintaining complete control over its employees and all of its sub-contractors.* Nothing contained in this CONTRACT or any sub-contract awarded by BUILDER shall create any contractual relationship between any such sub-contractor and OWNER …

[emphasis added]

37 It would be seen that under the main contract, Bumi had bargained for a limited warranty, limited to defects discovered within 12 months of delivery, and the obligation of MSE was only to repair the defects. However, it was also provided that should MSE obtain a more favourable warranty from the manufacturers, MSE would pass the same onto Bumi. Consequential losses were expressly excluded.

38 It was Bumi's deliberate choice that there was no direct contractual relationship with MBS or MBUK. Bumi has in its case challenged the existence of any evidence to suggest that it deliberately arranged the transaction in this manner. We are unable to see how this challenge can be valid. Under the main contract, MSE had contracted with Bumi to build a complete vessel, together with the engine. Under its terms, MSE was to be responsible for all the machineries supplied by sub-contractors. Clearly, if Bumi had wanted to, it could have entered into a direct contractual arrangement with MBS and MBUK with regard to the engine. Bumi was the paymaster and it was entitled to call the tune. But for reasons of its own, it felt more comfortable in making MSE wholly responsible for the entire vessel. It is true that Bumi did discuss the quotation received from MBS with MBS and MBUK before instructing MSE to accept the quotation. But those contacts were not with a view to altering the contractual arrangement but to gauge MBUK's capacity and to ensure that MBS and MBUK understood Bumi's requirements and thus be able to produce an engine which would meet Bumi's needs. In any event, foreseeability of harm does not automatically lead to a duty of care: see *Simaan General Contracting Co v Pilkington Glass Ltd (No 2)* ([20] *supra*).

39 Pursuant to the main contract, MSE entered into a sub-contract with MBS for the supply of the engine. According to MBS, the sale was subject to its standard conditions of sale, one of which limited the rights of the purchaser as regards defects in the engine. However, as there were some doubts as to whether the standard terms did form a part of the transaction and as the judge had also held that they did not, we shall not pursue this aspect any further.

40 Now the question is, how far has the law on tortious liability in Singapore been extended in *Ocean Front*? As pointed out before, that case was concerned with real property, with peculiar features which are alluded to in [30] above. The other cases which arose in England, Australia, New Zealand and Canada, were also primarily concerned with economic losses suffered on account of

damage to homes. So should the principle of duty of care enunciated in *Donoghue* be further extended to cover economic losses arising from the supply of chattels?

41 A case which extensively discussed this question is *East River Steamship Corp v Transamerica Delaval* 476 US 858 (1986), a decision of the US Supreme Court. There, the charterers of supertankers claimed from turbine manufacturers damages resulting from alleged design and manufacturing defects which caused the supertankers to malfunction while on the high seas. The court disallowed such claims. Blackmun J, who delivered the judgment of the court discussed the issues as follows (at 868–871):

> The intriguing question whether injury to a product itself may be brought in tort has spawned a variety of answers. At one end of the spectrum, the case that created the majority land-based approach, *Seely v White Motor Co*, 63 Cal 2d 9, 403 P 2d 145 (1965) (defective truck), held that preserving a proper role for the law of warranty precludes imposing tort liability if a defective product causes purely monetary harm. See also *Jones & Laughlin Steel Corp v Johns-Manville Sales Corp*, 626 F 2d 280, 287 … (citing cases).
>
> At the other end of the spectrum is the minority land-based approach, whose progenitor, *Santor v A & M Karagheusian, Inc*, 44 NJ 52, 66-67; 207 A 2d 305, 312-313 (1965) (marred carpeting), held that a manufacturer's duty to make nondefective products encompassed injury to the product itself, whether or not the defect created an unreasonable risk of harm.
>
> …
>
> Between the two poles fall a number of cases that would permit a products-liability action under certain circumstances when a product injures only itself. These cases attempt to differentiate between "the disappointed users … and the endangered ones," *Russell v Ford Motor Co*, 281 Ore 587, 595; 575 P 2d 1383, 1387 (1978), and permit only the latter to sue in tort. The determination has been said to turn on the nature of the defect, the type of risk, and the manner in which the injury arose.
>
> …
>
> We find the intermediate and minority land-based positions unsatisfactory. The intermediate positions, which essentially turn on the degree of risk, are too indeterminate to enable manufacturers easily to structure their business behavior. Nor do we find persuasive a distinction that rests on the manner in which the product is injured. We realize that the damage may be qualitative, occurring through gradual deterioration or internal breakage. Or it may be calamitous. Compare *Morrow v New Moon Homes, Inc*, 548 P 2d 279 (Alaska 1976), with *Cloud v Kit Mfg Co*, 563 P 2d 248, 251 (Alaska 1977). But either way, since by definition no person or other property is damaged, the resulting loss is purely economic. *Even when the harm to the product itself occurs through an abrupt, accident-like event, the resulting loss due to repair costs, decreased value, and lost profits is essentially the failure of the purchaser to receive the benefit of its bargain – traditionally the core concern of contract law.* See *E Farnsworth, Contracts* §12.8, pp 839-840 (1982).
>
> We also decline to adopt the minority land-based view espoused by *Santor* and *Emerson*. Such cases raise legitimate questions about the theories behind restricting products liability, but we believe that the countervailing arguments are more powerful. The minority view fails to account for the need to keep products liability and contract law in separate spheres and to maintain a realistic limitation on damages.

[emphasis added]

42 In an earlier Canadian case, *Rivtow Marine Ltd v Washington Iron Works* (1972) 26 DLR (3d) 559, the British Columbia Court of Appeal held that the manufacturers were not liable in tort to the hirers of a crane for the cost of repair rendered necessary when the crane was found to be dangerously defective in use. This decision was affirmed by the Canadian Supreme Court (1973) 40 DLR (3rd) 530 by a majority of seven to two. One of the dissenting opinions was rendered by Laskin J who seemed to draw a distinction between mere defect and dangerous defect. This distinction was rejected by Lord Oliver of Aylmerton in *Murphy* ([22] *supra*) in these terms (at 488–489):

> The argument appears to be that because, if the defect had not been discovered and someone had been injured, the defendant would have been liable to pay damages for the resultant physical injury on the principle of *Donoghue v Stevenson* it is absurd to deny liability for the cost of preventing such injury from ever occurring. But once the danger ceases to be latent there never could be any liability. The plaintiff's expenditure is not expenditure incurred in minimising the damage or in preventing the injury from occurring. The injury will not now ever occur unless the plaintiff causes it to do so by courting a danger of which he is aware and his expenditure is incurred not in preventing an otherwise inevitable injury but in order to enable him to continue to use the property or the chattel.

43 In this connection, by analogy, we think the reasoning of Lord Bridge of Harwich in *D & F Estates* ([21] *supra* at 206), which was along a similar line, is not without merits:

> 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.

44 While in *Ocean Front* this court allowed a claim in economic loss in relation to real property, it must be reiterated that there the court was of the view that the relationship between the developer and the management corporation was as close to a contract as could reasonably be. It seems to us that *Ocean Front* should be treated as a special case in the context of the statutory scheme of things under the Strata Act or at least be confined to defects in buildings.

45 This is an extremely difficult area of the law as any extension of the *Donoghue* principle will have far-reaching consequences. Even the two-stage test in *Anns* has been qualified. In *Yuen Kun Yeu v Attorney-General of Hong Kong* [1988] AC 175 at 194, the Privy Council said:

> In view of the direction in which the law has since been developing, their Lordships consider that for the future it should be recognised that the two-stage test in *Anns* … is not to be regarded as in all circumstances a suitable guide to the existence of a duty of care.

46 In *Governors of the Peabody Donation Fund v Sir Lindsay Parkinson & Co Ltd* [1985] AC 210 at 241, Lord Keith of Kinkel emphasised the element of fairness:

> So in determining whether or not a duty of care of particular scope was incumbent upon a defendant it is material to take into consideration whether it is just and reasonable that it should be so.

47 However, for the present appeal, it is not necessary for us to indicate whether we completely agree with the views of Blackmun J that the *Donoghue* principle should not be extended at all to a claim for economic losses in respect of chattels. It is unnecessary for us to make such a general pronouncement because, in our opinion, in the light of the special circumstances here, MBS and MBUK could not have owed a duty of care to Bumi. The existence of a duty or otherwise must depend on the facts of each case. It would be unwise to generalise. As noted by Lord Roskill in *Caparo Industries Plc v Dickman* [1990] 2 AC 605 at 628:

> I agree with your Lordships that it has now to be accepted that there is no simple formula or touchstone to which recourse can be had in order to provide in every case a ready answer to the questions whether, given certain facts, the law will or will not impose liability for negligence or in cases where such liability can be shown to exist, determine the extent of that liability.

48 By entering into the main contract with MSE in the terms which we have set out, Bumi committed itself to looking to MSE for redress. While Bumi was anxious that the sub-contractors, MBS or MBUK, should produce an engine in accordance with the specifications, it did not intend to seek redress from MBS or MBUK. In so far as Bumi was concerned, it had relied on MSE and MSE alone. It held MSE responsible. Even in *Junior Books*, Lord Roskill accepted (at 547) that the concept of proximity must always involve, at least in most cases, some degree of reliance. In such circumstances, we do not see how Bumi could have averred that it was relying on the promise of MBS and MBUK to deliver a satisfactory engine. It was not. To infer such a duty would run counter to the specific arrangement which Bumi had chosen to make with MSE. While MBS and MBUK certainly owed a duty of care to MSE by virtue of the sub-contract, we do not think a similar duty was owed to Bumi. There was no such assumption of duty by MBS or MBUK *vis-à-vis* Bumi. Bumi could have, by altering the contractual structure, made MBS or MBUK assume that responsibility. But it did not. Instead, Bumi elected to distance itself from all the sub-contractors, including MBS and MBUK.

49 In this regard, we think the following passage, though *obiter*, of Lord Goff of Chieveley in *Henderson v Merrett Syndicates Ltd* [1994] 3 WLR 761 at 790, is germane:

> I wish however to add that I strongly suspect that the situation which arises in the present case is most unusual; and that in many cases in which a contractual chain comparable to that in the present case is constructed it may well prove to be inconsistent with an assumption of responsibility which has the effect of, so to speak, short circuiting the contractual structure so put in place by the parties. It cannot therefore be inferred from the present case that other sub-agents will be held directly liable to the agent's principal in tort. Let me take the analogy of the common case of an ordinary building contract, under which main contractors contract with the building owner for the construction of the relevant building, and the main contractor sub-contracts with sub-contractors or suppliers (often nominated by the building owner) for the performance of work or the supply of materials in accordance with standards and subject to terms established in the sub-contract. I put on one side cases in which the sub-contractor causes physical damage to property of the building owner, where the claim does not depend on an assumption of responsibility by the sub-contractor to the building owner; though the sub-contractor may be protected from liability by a contractual exemption clause authorised by the building owner. But if the sub-contracted work or materials do not in the result conform to the required standard, it will not ordinarily be open to the building owner to sue the sub-contractor or supplier direct under the *Hedley Byrne* principle, claiming damages from him on the basis that he has been negligent in relation to the performance of his functions. For there is generally no assumption of responsibility by the sub-contractor or supplier direct to the building owner, the parties having so structured their relationship that it is inconsistent with any such assumption of responsibility. This was the conclusion of the Court of Appeal in *Simaan General Contracting Co v*

Pilkington Glass Ltd (No 2) [1988] QB 758. As Bingham LJ put it, at p 781:

> I do not, however, see any basis on which [the nominated suppliers] could be said to have assumed a direct responsibility for the quality of the goods to [the building owners]: such a responsibility is, I think, inconsistent with the structure of the contract the parties have chosen to make.

50 We would moreover add that the ground for denying Bumi's claim for the economic losses becomes even stronger when we take into account the fact that in the main contract Bumi had agreed to limit their recourse should the vessel, including its engine, fail to meet the specifications. As this court observed in *Ocean Front* (at 139, [68]), what was involved in this regard was a delicate balancing exercise in which consideration should be given to all the conflicting claims of the plaintiffs and the defendants as viewed in a wider context of society. Should the court stretch the *Donoghue* principle and afford Bumi a remedy which would be wholly in conflict with Bumi's express contractual commitment? Is it fair, in such circumstances, that Bumi be accorded a separate remedy in tort? Should the court condone Bumi's breach of an agreement which it had solemnly entered into with MSE? Should the court help a party to better a bargain it has made? In this regard, it is vitally important to bear in mind the rationale behind the *Donoghue* principle (see [34] above).

51 At this juncture, we return to examine the manner in which the judge looked at the issue. She held that there was, in the circumstances, close proximity between Bumi and the manufacturer, MBUK. As regards MBS, while she realised that MBS was only the agent of MBUK, she held at [35] that:

> By asserting that the engine was reliable and actively marketing it through the various tenders that [MBS] sent MSE and the various meetings with Bumi and MSE, I think that MBS [was] assuming responsibility for the delivery of an engine that would meet Bumi's requirements.

52 As regards the point about the contractual structure which was adopted by Bumi, she said that this factor alone could not mean that in all circumstances "each party in the chain is limited to suing only the party with whom he is in privity of contract for any damages". Much would depend on the facts of each case. After considering the terms of the main contract which we have quoted above, and the arguments of MBS and MBUK that Bumi should not be allowed to escape from their contractual arrangement by a direct action against MBS and MBUK, she said (at [42]):

> There is no reason in law or in policy why Bumi, simply because they entered into a contract with MSE whereby they agreed that MSE would only be responsible for defects discovered and notified within 12 months and even then only for the cost of replacing those defects, should be barred from making a claim against the defendants, who actually supplied the defective equipment, for their full losses more than 12 months after delivery. Whilst MSE did assume responsibility for the work and the design of their sub-contractors, nowhere in the contract did they specifically require Bumi to give up any separate rights of claim that Bumi might have against such sub-contractors. Though cl 22 did operate to prevent the creation of any contractual relationship between Bumi and MSE's sub-contractors, it did not attempt to deprive Bumi of any claim in tort against the sub- contractors which the general law granted to them. In my view, cl 22 was not drafted as a "Himalaya" clause. In law, Bumi's agreement to limit their rights of recovery against MSE cannot constitute a bar to their fully exercising any rights of recovery against third parties that the law may allow them, notwithstanding that such third parties were MSE's sub-contractors.

53 With respect, and for the reasons which we have given above, we are unable to agree with

the approach of the judge. She seems to assume that under present law, Bumi had the right to claim against MBS and MBUK when she said "cl 22 … did not attempt to deprive Bumi of any claim in tort against the sub-contractors which the general law *granted* to them". But this is the very question which is confronting the court: should Bumi be granted such a right? To answer this question, the correct approach is not to ask whether there is any justification for depriving Bumi of the remedy or whether the clauses in the main contract had provided that Bumi had lost all rights to sue the sub-contractors, but whether there are any compelling reasons to extend the law and to afford such a separate remedy to Bumi. If it is justice that we are seeking to obtain, and that must be so, we do not see how affording the remedy to Bumi would promote justice. Indeed, it seems to us that the result would be just the reverse. If Bumi was concerned about the limitation of liability clauses in the main contract it should have, before execution, modified them. At the end of the day, it was all a matter of price. Even if MSE was not prepared to budge, Bumi's option would lie in either going to another builder or obtaining independent insurance coverage for such economic losses, which under the terms of the main contract MSE was not willing to shoulder. It is not for the court to help a party, after the event, to improve his commercial bargain. Bumi does not deserve any help. Bumi had made its bargain and must live with it. Taking the policy line advocated by Lord Denning MR in *Dutton*, it would not be just and reasonable in all the circumstances here to impose the duty on MBS or MBUK. There is every reason that the loss should fall on Bumi.

Judgment

54 In the result, we would allow the appeal of MBS and MBUK in CA 75/2003 and dismiss the appeal of Bumi in Civil Appeal No 79 of 2003 ("CA 79/2003"). MBS and MBUK shall have the costs of both appeals as well as the costs below. The security for costs furnished in CA 75/2003, together with any accrued interest, shall be returned to MBS and MBUK and that for CA 79/2003 shall be released to MBS and MBUK to account of their costs.

Appeal in CA 75/2003 allowed. Appeal in CA 79/2003 dismissed.

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