HIGH COURT OF AUSTRALIA

FRENCH CJ,
HAYNE, CRENNAN, KIEFEL, BELL, GAGELER AND KEANE JJ

BROOKFIELD MULTIPLEX LTD APPELLANT

AND

OWNERS CORPORATION STRATA PLAN 61288
& ANOR RESPONDENTS

Brookfield Multiplex Ltd v Owners Corporation Strata Plan 61288
[2014] HCA 36
8 October 2014
S66/2014

ORDER

1. *Appeal allowed.*

2. *Set aside the order of the Court of Appeal of the Supreme Court of New South Wales made on 25 September 2013 and, in its place, order that the appeal to that Court be dismissed with costs.*

3. *Special leave to cross-appeal granted.*

4. *Cross-appeal treated as instituted and heard instanter and dismissed with costs.*

5. *First respondent to pay the appellant's costs of the appeal.*

On appeal from the Supreme Court of New South Wales

Representation

D F Jackson QC with T J Breakspear for the appellant (instructed by Gilbert + Tobin Lawyers)

F Corsaro SC with P J Bambagiotti for the first respondent (instructed by Grace Lawyers Pty Ltd)

Submitting appearance for the second respondent

CATCHWORDS

Brookfield Multiplex Ltd v Owners Corporation Strata Plan 61288

Negligence – Duty of care – Pure economic loss – Strata-titled apartment complex constructed pursuant to contract between builder and developer – Apartments sold pursuant to standard form contract of sale – Contracts conferred rights to have defects remedied – Latent defects in common property – Owners corporation for strata scheme claimed damages from builder for pure economic loss – Whether builder owed owners corporation a duty of care – Relevance of inquiry into whether builder owed anterior duty of care to developer.

Words and phrases – "assumption of responsibility", "common property", "disconformity of obligations", "proximity", "pure economic loss", "reliance", "vulnerability".

FRENCH CJ.

Introduction

1 The Court of Appeal of New South Wales held that the builder of strata-titled serviced apartments on land at Chatswood owed a duty of care to the owners corporation to avoid causing it to suffer loss resulting from latent defects in the common property which were structural or constituted a danger to persons or property in the vicinity or made the apartments uninhabitable[1]. An owners corporation is created by statute whenever a strata plan is registered. The common property is vested in it as manager of the strata scheme and as "agent" for the owners of the apartments. In this case, the owners corporation ("the Corporation") is the first respondent. The serviced apartments were incorporated in levels one to nine of a 22 storey development[2]. The apartments had been built under a design and construct contract made in November 1997 between the appellant, Brookfield Multiplex Ltd ("Brookfield"), and the registered proprietor of the land and property developer, Chelsea Apartments Pty Ltd ("Chelsea"). All of the apartments were subject to leases given by Chelsea to Park Hotel Management Pty Ltd ("Park Hotel"), a subsidiary of the Stockland Trust Group ("Stockland"), which was to operate them collectively as a serviced apartment hotel under the "Holiday Inn" brand.

2 The principal question raised on this appeal from the decision of the Court of Appeal is whether Brookfield owed the Corporation a duty to exercise reasonable care in the construction of the building to avoid causing the Corporation to suffer pure economic loss resulting from latent defects in the common property. The Corporation has filed a notice of contention asserting, contrary to the conclusion of the Court of Appeal, that the duty owed to it was not contingent upon the existence of a similar duty of care owed to Chelsea. The Corporation also seeks special leave to cross-appeal in relation to the limited ambit of the duty as defined by the Court of Appeal.

3 The contractual arrangements between Brookfield, Chelsea and Stockland had as their purpose the creation of a commercial venture which comprised serviced apartments to be operated collectively as a serviced apartment hotel. The Corporation, a creature of statute, came into existence as the statutory agent of Chelsea, albeit controlled pursuant to the lease arrangements by the hotel operator. The purchasers of individual apartments from Chelsea were effectively investors in the hotel venture. The nature and content of the contractual

---

1 *The Owners — Strata Plan No 61288 v Brookfield Australia Investments Ltd* (2013) 85 NSWLR 479.

2 The balance of the development comprised residential apartments which are the subject of a separate strata scheme and a different owners corporation.

arrangements, including detailed provisions for dealing with and limiting defects liability, the sophistication of the parties and the relationship of Chelsea to the Corporation all militate against the existence of the asserted duty of care to either Chelsea or the Corporation. The appeal should be allowed. Special leave to cross-appeal should be granted and the cross-appeal dismissed.

4 The text of relevant statutory and contractual provisions, the reasoning at first instance and the reasoning of the Court of Appeal are set out in the joint judgment of Crennan, Bell and Keane JJ. Reference to the salient features of the statutory framework and the contractual arrangements appears later in these reasons.

Procedural history

5 By summons issued out of the Supreme Court of New South Wales on 3 November 2008, the Corporation claimed from Brookfield the cost of rectifying alleged defects in the common property[3]. The claim was in negligence and depended upon the existence and breach of a relevant duty of care owed by Brookfield to the Corporation.

6 On 10 October 2012, McDougall J delivered judgment on the separate question of the existence of a duty of care[4]. The alleged duty of care, as propounded by the Corporation, was a duty "to take reasonable care to avoid a reasonably foreseeable economic loss to the [Corporation] in having to make good the consequences of latent defects caused by the building's defective design and/or construction"[5]. His Honour held that the Corporation had not established that Brookfield owed it the duty of care alleged[6]. He made orders directing entry of judgment for the defendants and ordered the Corporation to pay their costs. The Corporation appealed to the Court of Appeal.

---

3 There was one other defendant, the second respondent in this Court, whose involvement is not material for present purposes.

4 *Owners Corporation Strata Plan 61288 v Brookfield Multiplex* [2012] NSWSC 1219.

5 *Owners Corporation Strata Plan 61288 v Brookfield Multiplex* [2012] NSWSC 1219 at [18].

6 *Owners Corporation Strata Plan 61288 v Brookfield Multiplex* [2012] NSWSC 1219 at [109].

7 On 25 September 2013, the Court of Appeal allowed the appeal and set aside the orders made by McDougall J. Their Honours answered the separate question thus[7]:

> "[Brookfield] owed the [Corporation] a duty to exercise reasonable care in the construction of the building to avoid causing the [Corporation] to suffer loss resulting from latent defects in the common property vested in the [Corporation], which defects (a) were structural, or (b) constituted a danger to persons or property in, or in the vicinity of, the serviced apartments, or (c) made those apartments uninhabitable."

Brookfield appeals to this Court by special leave granted on 14 March 2014[8].

The questions

8 The appeal raises two questions:

1. Did Brookfield owe a duty of care to the Corporation independently of the existence of a duty of care owed to Chelsea, and, if so, what was its content?

2. Did Brookfield owe a duty of care to Chelsea and thereby a similar duty of care to the Corporation, and, if so, what was its content?

As appears from the reasons that follow, the interaction between the statutory scheme and the contractual matrix causes the two questions to converge. It requires a negative answer to both. An outline of the statutory and contractual arrangements follows.

The strata schemes statutes

9 Under strata schemes laws in New South Wales, a parcel of land, including any building or buildings which comprise part of it, can be subdivided into lots in accordance with a strata plan[9]. A strata plan for freehold lots is registered in the office of the Registrar-General pursuant to s 8 (read with s 5(1)) of the *Strata Schemes (Freehold Development) Act* 1973 (NSW) ("the Strata Freehold Act"). Common property is so much of a parcel as is not comprised in

---

7 *The Owners — Strata Plan No 61288 v Brookfield Australia Investments Ltd* (2013) 85 NSWLR 479 at 510 [132] per Basten JA, Macfarlan JA agreeing at 511 [133], Leeming JA agreeing at 512 [139].

8 [2014] HCATrans 052 (French CJ and Crennan J).

9 *Strata Schemes (Freehold Development) Act* 1973 (NSW), s 7.

any lot[10]. Under the *Strata Schemes Management Act* 1996 (NSW) ("the Strata Management Act"), the owners of the lots from time to time in a strata scheme constitute a body corporate designated "The Owners—Strata Plan No X", where "X" is the registered number of the strata plan to which that strata scheme relates[11]. The owners corporation comes into existence upon registration of the strata plan[12]. The Corporation came into existence on 11 November 1999. An owners corporation has the functions conferred upon it by the Strata Management Act or any other Act[13]. The common property is vested in it[14]. It holds its estate or interest as "agent" for the proprietor or proprietors of the lots[15]. If different persons are proprietors of each of two or more lots, it holds the common property as agent for the proprietors as tenants in common in shares proportional to the unit entitlements of the respective lots[16]. The content of the term "agent" is to be derived from the statutory functions conferred upon the owners corporation.

10 The interest of a lot owner in the common property has been characterised by the Supreme Court of New South Wales as an equitable interest as a tenant in common with other lot owners[17]. On that basis, the owners corporation has been described as holding the common property "as trustee for all the lot proprietors in proportion to their unit entitlements"[18]. Leeming JA in the Court of Appeal also referred to the relationship as "analogous to trustee and

---

10 Strata Freehold Act, s 5(1).

11 Strata Management Act, s 11(1). The body corporate constituted under s 11 is referred to as an owners corporation elsewhere in the Act: see s 8 and the Dictionary definition of "owners corporation" in the Strata Management Act.

12 Strata Management Act, s 8(1).

13 Strata Management Act, s 12.

14 Strata Freehold Act, s 18.

15 Strata Freehold Act, s 20.

16 Strata Freehold Act, s 20(b).

17 *Houghton v Immer (No 155) Pty Ltd* (1997) 44 NSWLR 46 at 56 per Handley JA, Mason P agreeing at 48, Beazley JA agreeing at 60; *Young v Owners — Strata Plan No 3529* (2001) 54 NSWLR 60 at 64 [14] per Santow J; *Lin v The Owners — Strata Plan No 50276* (2004) 11 BPR 21,463 at 21,464 [7] per Gzell J.

18 *Segal v Barel* (2013) 84 NSWLR 193 at 209 [81] per Barrett JA, McColl JA agreeing at 195 [1], Preston CJ of LEC agreeing at 218 [140].

beneficiary"[19]. That cautious description may avoid attachment to the functions of the Corporation of the full panoply of equitable and statutory incidents of the trust relationship. In any event, the characterisation of the Corporation as a trustee or an analogue of a trustee was not in dispute before the Court of Appeal or in this appeal[20].

11 The owners corporation has a statutory duty to properly maintain the common property and keep it in a state of good and serviceable repair[21]. It must renew or replace any fixtures or fittings comprised in the common property[22]. Those duties do not apply to a particular item of property if the owners corporation, by special resolution, determines that it is inappropriate to do any of those things[23], albeit that exemption does not apply if the safety of any building, structure or common property is affected or the appearance of any property in the strata scheme detracted from[24]. The duties of the owners corporation do not depend upon whether someone was to blame for the common property being other than in a state of good and serviceable repair. As the primary judge correctly observed[25]:

> "The duty to maintain and repair common property is not limited by reference to the source of the problem that gives rise to the need for maintenance or [repair]. The duty will extend, in an appropriate case, even to the rectification of defective work left unrectified by the builder."

Generally speaking, funding for repairs and maintenance of the common property must come from the lot proprietors by way of levies. The owners corporation must establish an administrative fund and a sinking fund and can, and in some circumstances must, impose a levy so that it can meet particular maintenance and

---

19 *The Owners — Strata Plan No 61288 v Brookfield Australia Investments Ltd* (2013) 85 NSWLR 479 at 512 [142].

20 *The Owners — Strata Plan No 61288 v Brookfield Australia Investments Ltd* (2013) 85 NSWLR 479 at 498 [74]–[76] per Basten JA.

21 Strata Management Act, s 62(1).

22 Strata Management Act, s 62(2).

23 Strata Management Act, s 62(3)(a).

24 Strata Management Act, s 62(3)(b).

25 *Owners Corporation Strata Plan 61288 v Brookfield Multiplex* [2012] NSWSC 1219 at [64].

repair obligations[26]. Insurance payments, damages awards and negotiated settlements with persons said to be liable for damages for defects in the common property comprise other obvious sources of funding.

12 The connection between the Corporation and Chelsea, created by the Strata Management Act and Strata Freehold Act, was said in argument to be relevant to the question whether the Corporation was "vulnerable" with respect to economic loss arising from latent defects in the common property caused by Brookfield's alleged lack of care. As appears from these reasons, the Corporation's statutory relationship to Chelsea and subsequent purchasers of the lots is a circumstance which, taken with the contractual arrangements described below, militates against a finding of vulnerability supportive of the existence of a duty of care.

The Deed of Master Agreement

13 The working of the statutory relationship between the Corporation on the one hand and Chelsea and the purchasers of the apartments on the other was affected by the provisions of a Deed of Master Agreement made between Chelsea and Stockland. Under the Master Agreement, the apartments were to be leased to Park Hotel and operated collectively as a serviced apartment hotel under the "Holiday Inn" brand[27]. Under the leases, Park Hotel was to acquire Chelsea's rights, in effect, to direct the operation of the Corporation. Individual purchasers of the apartments were to acquire their interests subject to the leases to the operator[28]. The leases required that the owners yield their voting rights in the Corporation to the operator by appointing it as their proxy[29]. In the Master Agreement, Chelsea provided detailed warranties to Stockland in relation to the quality of the building work[30].

---

26 Strata Management Act, ss 66–71, 75–76 and 78.

27 Master Agreement, cll 9.1, 10 and 25.4(a).

28 Standard form contract, cl 53.2. The leases were each for a term of 10 years commencing 10 November 1999, with options to renew for two further successive terms of five years each.

29 Lease agreement, cl 19; see also *Owners Corporation Strata Plan 61288 v Brookfield Multiplex* [2012] NSWSC 1219 at [36]–[37]. Stockland's interest in Park Hotel was subsequently sold to the Mantra Group and the apartments became known as the "Mantra Chatswood". Nothing turns on that for the purposes of this appeal.

30 Master Agreement, cll 5.2, 6.1 and 9.9.

The design and construct contract

14 The design and construct contract between Brookfield and Chelsea was made on 5 November 1997. The contract sum was $57,539,000. The contract contained detailed provisions relating to the quality of the services to be provided by Brookfield[31]. It imported the Australian Standard General conditions of contract for design and construct AS 4300-1995. It is not in dispute that Brookfield and Chelsea were experienced and sophisticated entities negotiating on an equal footing and at arms length. The contract contemplated the sale of the apartments to individual investors and annexed a standard form contract of sale to such investors. Brookfield was required to register the strata plan by 31 March 2000.

15 There was provision in the contract for a Defects Liability Period of 52 weeks, which commenced upon practical completion[32]. A Final Certificate would stand as evidence that the Works had been completed in accordance with the contract[33]. An exception was made in cl 42.6(b) for:

> "any defect (including omission) in the Works or any part thereof which was not apparent at the end of the Defects Liability Period, or which would not have been disclosed upon reasonable inspection at the time of the issue of the Final Certificate".

The contract also contained an express provision requiring Brookfield to maintain professional indemnity insurance with a run-off period of four years after issue of the Final Certificate[34].

The standard form contract of sale

16 The standard form contract of sale to purchasers of the apartments, annexed to the design and construct contract, required Chelsea to cause the property and "the Common Property" to be finished in accordance with the schedule of finishes and "in a proper and workmanlike manner" before completion[35]. Chelsea was obliged to repair defects or faults in the common property due to faulty materials or workmanship of which written notice was

---

31 Design and construct contract, cll 4.1 and 30.1.

32 Design and construct contract, cl 37 read with Annexure Pt A, item 44.

33 Design and construct contract, cl 42.6.

34 Design and construct contract, cl 21 read with Annexure Pt A, item 32.

35 Standard form contract, cl 32.1.

served on it by the Corporation within seven months after the date of registration of the strata plan[36]. Notice of Special Faults, which were structural or required urgent attention or might cause danger to persons in the property or made the property uninhabitable, could be served by a purchaser[37].

17 Basten JA said in his judgment in the Court of Appeal that there were no specific provisions in any of the contractual arrangements between Brookfield and Chelsea, and Chelsea and the purchasers of the lots, dealing with latent defects or limiting liability with respect to such defects[38]. There was, however, the qualification in cl 42.6(b) of the design and construct contract on the effect of the Final Certificate with respect to defects not apparent at the end of the Defects Liability Period.

The nature of the defects

18 It was conceded before the primary judge that it was reasonably foreseeable, at the time of construction, that if there were defects in the building, some of them might be latent at the time of registration of the strata plan[39]. His Honour observed that if the defects alleged by the Corporation existed, then many of them would properly be characterised as latent defects not readily detectable by any reasonable process of inspection[40]. So much can be assumed for present purposes. The question whether the defects existed and were latent and/or structural and/or dangerous would be a matter to be determined at trial if the appeal were to be dismissed.

---

36 Standard form contract, cl 32.7.

37 Standard form contract, cll 23.1, 32.5 and 32.6.

38 *The Owners — Strata Plan No 61288 v Brookfield Australia Investments Ltd* (2013) 85 NSWLR 479 at 496 [68].

39 *Owners Corporation Strata Plan 61288 v Brookfield Multiplex* [2012] NSWSC 1219 at [67].

40 *Owners Corporation Strata Plan 61288 v Brookfield Multiplex* [2012] NSWSC 1219 at [71]. The defects alleged related, inter alia, to the failure to hot-dip galvanised steel lintels, the failure to properly fabricate and coat sheet metal cowlings above certain windows to the exterior of the building and the defective installation of picture windows and a spa.

The duty of care

19 The existence of a relevant duty of care is a necessary condition of liability in negligence. As this Court said in *Sullivan v Moody*[41]:

> "A defendant will only be liable, in negligence, for failure to take reasonable care to prevent a certain kind of foreseeable harm to a plaintiff, in circumstances where the law imposes a duty to take such care."

20 Historically, duties of care were attached to particular categories of relationships. The search for "some larger proposition" covering differing sets of circumstances was foreshadowed by Brett MR in *Heaven v Pender*[42]. Later, as Lord Esher MR, in *Le Lievre v Gould*[43], he introduced what Lord Atkin characterised in *Donoghue v Stevenson* as a "notion of proximity" underpinning the existence of a duty of care. That "doctrine" was said by Lord Atkin to be reflected in his famous description of the "neighbour" in law to whom a duty of care is owed[44]. His generalisation, as refined in later decisions bearing with them the metaphor of "proximity", was restated in *Wyong Shire Council v Shirt*[45]:

> "prima facie a duty of care arises on the part of a defendant to a plaintiff when there exists between them a sufficient relationship of proximity, such that a reasonable man in the defendant's position would foresee that carelessness on his part may be likely to cause damage to the plaintiff".

21 An extended concept of proximity was adopted in this Court as a criterion of the existence of a duty of care in the 1980s and until the beginning of this century[46]. It was used to identify categories of cases in which a duty of care

---

41 (2001) 207 CLR 562 at 576 [42]; [2001] HCA 59.

42 (1883) 11 QBD 503 at 509.

43 [1893] 1 QB 491 at 497.

44 [1932] AC 562 at 580–581.

45 (1980) 146 CLR 40 at 44 per Mason J, Stephen J agreeing at 44, Aickin J agreeing at 50; [1980] HCA 12.

46 *Wyong Shire Council v Shirt* (1980) 146 CLR 40 at 44 per Mason J, Stephen J agreeing at 44, Aickin J agreeing at 50; *San Sebastian Pty Ltd v The Minister* (1986) 162 CLR 340 at 355 per Gibbs CJ, Mason, Wilson and Dawson JJ; [1986] HCA 68; *Cook v Cook* (1986) 162 CLR 376 at 381–382 per Mason, Wilson, Deane and Dawson JJ; [1986] HCA 73; *Gala v Preston* (1991) 172 CLR 243 at 252–253 per Mason CJ, Deane, Gaudron and McHugh JJ; [1991] HCA 18; *Burnie Port*

(Footnote continues on next page)

arose under the common law of negligence, rather than as a test for determining whether the circumstances of a particular case brought it within such a category[47]. It was invoked in 1995 in *Bryan v Maloney*[48], in which the Court held that the builder of a dwelling house owed a duty of care to a subsequent purchaser of the house, a breach of which, by careless construction giving rise to latent defects, would support an action in negligence for economic loss. Thereafter it became a metaphor under threat. McHugh J in *Perre v Apand Pty Ltd*[49] regarded it as already despatched[50]. In *Sullivan v Moody*, it was put to rest by the whole Court, which observed that despite its centrality for more than a century[51]:

> "it gives little practical guidance in determining whether a duty of care exists in cases that are not analogous to cases in which a duty has been established".

That was not to say, and the Court did not say, that its application in previous cases such as *Bryan v Maloney*, which was of a classificatory and conclusionary character, falsified the underlying judgments that the circumstances said to be indicative of "proximity" gave rise to a duty of care. As Basten JA observed in the Court of Appeal, "the factors which were apt to be included" in "the concept of 'proximity' as a touchstone of the existence of a duty of care ... remain relevant"[52].

22 Abstracting the reference to proximity in *Bryan v Maloney*, the decision adverted to factors adverse to the recognition of a duty of care for pure economic

---

Authority v General Jones Pty Ltd (1994) 179 CLR 520 at 542–543 per Mason CJ, Deane, Dawson, Toohey and Gaudron JJ; [1994] HCA 13.

47 *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520 at 543 per Mason CJ, Deane, Dawson, Toohey and Gaudron JJ.

48 (1995) 182 CLR 609; [1995] HCA 17.

49 (1999) 198 CLR 180; [1999] HCA 36.

50 (1999) 198 CLR 180 at 209–210 [74] referring to *Hill v Van Erp* (1997) 188 CLR 159 at 176–177 per Dawson J, 210 per McHugh J, 237–239 per Gummow J; [1997] HCA 9 and *Pyrenees Shire Council v Day* (1998) 192 CLR 330 at 414 per Kirby J; [1998] HCA 3.

51 (2001) 207 CLR 562 at 578 [48].

52 *The Owners — Strata Plan No 61288 v Brookfield Australia Investments Ltd* (2013) 85 NSWLR 479 at 486 [24].

loss other than in special cases. The special cases would commonly, but not necessarily, involve an identified element of known reliance or dependence on the part of the plaintiff, or the assumption of responsibility by the defendant, or a combination of the two[53]. The contract between the prior owner and the builder in that case was "non-detailed and contained no exclusion or limitation of liability"[54]. The subsequent owner would ordinarily be unskilled in building matters and inexperienced in the niceties of real property investment. Any builder should be aware that such a subsequent owner would be likely to assume that the building had been competently built and that the footings were adequate[55]. Those considerations may be seen as elements of the notion of "vulnerability", which has become an important consideration in determining the existence of a duty of care for pure economic loss. In this context, it refers to the plaintiff's incapacity or limited capacity to take steps to protect itself from economic loss arising out of the defendant's conduct[56].

23 It is in relation to vulnerability that there is a sharp distinction between *Bryan v Maloney* and the present case. That distinction is analogous to that made in the subsequent decision of this Court in *Woolcock Street Investments Pty Ltd v CDG Pty Ltd*[57], which is discussed below. Before turning to *Woolcock*, the point should be made that there are special features of the present case, generated by the contractual and statutory matrix in which the duty of care is asserted, that give it an element of novelty not overcome by a straightforward application of precedent.

24 This Court in *Sullivan v Moody* eschewed any attempt at formulating a general test for determining the existence or non-existence of a duty of care for the purposes of the law of negligence. As the Court said, different classes of case raise different problems, requiring "a judicial evaluation of the factors which tend for or against a conclusion, to be arrived at as a matter of principle"[58]. The

---

53 (1995) 182 CLR 609 at 619 per Mason CJ, Deane and Gaudron JJ.

54 (1995) 182 CLR 609 at 622 per Mason CJ, Deane and Gaudron JJ.

55 (1995) 182 CLR 609 at 627 per Mason CJ, Deane and Gaudron JJ.

56 *Perre v Apand Pty Ltd* (1999) 198 CLR 180 at 225 [118] per McHugh J; see also Stapleton, "Comparative Economic Loss: Lessons from Case-Law-Focused 'Middle Theory'", (2002) 50 *UCLA Law Review* 531 at 554–561.

57 (2004) 216 CLR 515; [2004] HCA 16.

58 (2001) 207 CLR 562 at 579–580 [50].

development of the law of negligence had revealed "the difficulty of identifying unifying principles that would allow ready solution of novel problems"[59].

25 Much legal reasoning in relation to novel cases can proceed by way of analogy, as McHugh J pointed out in *Crimmins v Stevedoring Industry Finance Committee*[60]. The advantage of the analogical approach appears from an observation by Professor Cass Sunstein quoted by McHugh J[61]:

> "[A]nalogical reasoning reduces the need for theory-building, and for generating law from the ground up, by creating a shared and relatively fixed background from which diverse judges can work. Thus judges who disagree on a great deal can work together far more easily if they think analogically and by reference to agreed-upon fixed points."

Reasoning by analogy should be conducive to coherence in the development of the law. Concerns about coherence may also inform the determination of the existence or non-existence of a duty of care in particular classes of case. As the Court said in *Sullivan v Moody*, the problems in determining the duty of care[62]:

> "may [sometimes] concern the need to preserve the coherence of other legal principles, or of a statutory scheme which governs certain conduct or relationships".

26 The reference to analogical reasoning directs attention to the decision in *Woolcock*. This Court held that an engineering company, which had designed inadequate foundations for a warehouse and office complex resulting in subsequent structural damage, did not owe a duty of care in respect of economic loss suffered by a subsequent purchaser of the complex. The case came to the Court on appeal from a decision of the Court of Appeal of the Supreme Court of Queensland, which had decided the matter on a case stated to that Court from a single judge[63]. It was decided on a restricted set of agreed and pleaded facts.

---

59 (2001) 207 CLR 562 at 580 [53].

60 (1999) 200 CLR 1 at 32 [73]; [1999] HCA 59.

61 (1999) 200 CLR 1 at 33 [74] citing Sunstein, *One Case at a Time: Judicial Minimalism on the Supreme Court*, (1999) at 42–43.

62 (2001) 207 CLR 562 at 579–580 [50].

63 *Woolcock Street Investments Pty Ltd v CDG Pty Ltd* (2002) Aust Torts Reports ¶81-660.

27 *Bryan v Maloney* was held not to support the plaintiff's claim. On the agreed and pleaded facts in *Woolcock*, the prior owner had exercised control over geotechnical investigations carried out by the engineering company[64]. There was no allegation of any assumption of responsibility by the engineering company or of known reliance by the prior owner[65]. There was no duty of care owed to the prior owner[66].

28 In *Bryan v Maloney*, the existence of an anterior duty of care to the prior owner was supportive of a duty of care to the subsequent purchaser. Its existence overcame a "policy" concern that liability to the subsequent purchaser would be inconsistent with the defendant's legitimate pursuit of its freedom to protect its own financial interests by limiting its liability to the prior owner[67]. The building contract had left the way open for concurrent tortious liability to the prior owner. There was no disconformity, therefore, between the duty owed by the builder to the first owner and the duty asserted by the subsequent purchaser[68]. This Court in *Woolcock* did not decide whether such a disconformity would always deny the existence of a duty of care to a subsequent purchaser[69]. There is no reason to regard the existence, or non-existence, of an anterior duty of care to a prior owner as more than an important factor relevant to the existence of a duty of care in respect of pure economic loss to a subsequent purchaser.

29 The question whether the plaintiff in *Woolcock* was vulnerable, so as to attract a duty of care, could not be answered definitively in that case. The agreed and pleaded facts were insufficient to demonstrate vulnerability. Specifically[70]:

- It was not shown that the plaintiff could not have protected itself against the economic loss which it suffered.

- No warranty of freedom from defect was included in the contract entered into by the plaintiff in purchasing the complex.

---

64 (2004) 216 CLR 515 at 531–532 [25] per Gleeson CJ, Gummow, Hayne and Heydon JJ.

65 (2004) 216 CLR 515 at 532 [26] per Gleeson CJ, Gummow, Hayne and Heydon JJ.

66 (2004) 216 CLR 515 at 532 [27] per Gleeson CJ, Gummow, Hayne and Heydon JJ.

67 (1995) 182 CLR 609 at 623–624 per Mason CJ, Deane and Gaudron JJ.

68 (1995) 182 CLR 609 at 665 per Toohey J.

69 (2004) 216 CLR 515 at 533 [30] per Gleeson CJ, Gummow, Hayne and Heydon JJ.

70 (2004) 216 CLR 515 at 533 [31] per Gleeson CJ, Gummow, Hayne and Heydon JJ.

- There was no assignment to the plaintiff by the prior owner of the prior owner's rights in respect of any claim for defects.

- There was nothing to demonstrate what could have been done to cast on to the engineering company the burden of the economic consequences of any negligence by it.

- There was nothing about whether the plaintiff could have obtained the benefit of terms of that kind in the contract.

In the end, *Woolcock* was not a "special" case in the sense in which that term was used in *Bryan v Maloney*.

30 The present appeal falls for decision against a background of prior decisions about classes of case in which a person performing a contract may have a concurrent duty of care to another contracting party, classes of case in which a party to a contract may owe a duty of care to a person who is not a party to the contract, classes of case involving pure economic loss, and classes of case in which the careless performance of a building contract has left latent defects in the building and thereby caused economic loss to a subsequent purchaser. Those decisions interact with each other but none is precisely applicable in this case. Consistently with the approach taken in *Woolcock* and, before that, in *Bryan v Maloney*, the determination of this appeal requires consideration of the salient features of the relationship between the Corporation and Brookfield, including whether Brookfield owed Chelsea a relevant duty of care and whether the Corporation was vulnerable in the sense discussed above.

Whether Brookfield owed a duty of care to the Corporation

31 When Brookfield entered into the design and construct contract with Chelsea, Chelsea was the owner of the parcel of land upon which the apartment block was to be constructed. It remained the registered proprietor of that parcel until it was subdivided into lots and common property when the strata plan was registered by Brookfield in November 1999. Upon that registration, the Corporation came into existence and became the legal owner of the common property. It had no contractual relationship with Brookfield or with Chelsea. Nevertheless, it held the common property as agent for Chelsea within the meaning of the Strata Freehold Act. It was effectively subject to Chelsea's control, albeit Chelsea's controlling rights and those of its successors in title to the strata lots were ceded to Park Hotel under the prior leasing arrangements.

32 The Corporation had a function under the standard form contract of sale whereby it could, within seven months of registration of the strata plan, serve written notice of defects or faults in the common property on Chelsea which would enliven Chelsea's contractual obligation to the lot owners to repair such defects and faults. No doubt control of the Corporation, which was effectively

conferred on Park Hotel by the leases from the lot owners, enabled Park Hotel to require the Corporation to issue such notices. Chelsea, as initial owner of all of the lots, was at the outset the directing mind of the Corporation, albeit it had delegated its powers of direction to Park Hotel. The Corporation was controlled by Chelsea and Park Hotel, who were party to and therefore can be taken to have been fully apprised of the contractual arrangements and in particular the extent and limits of Brookfield's obligations and liabilities in relation to defects in the common property.

33 The responsibility assumed by Brookfield with respect to Chelsea, as initial owner of the lots, was defined in detail by the design and construct contract. Chelsea cannot be taken to have relied upon any responsibility on the part of Brookfield, and Brookfield assumed none, in relation to pure economic loss flowing from latent defects extending beyond the limits of the responsibility imposed on it by the contract. The statutory relationship between the Corporation and Chelsea as first owner meant that there was no duty of care owed to the Corporation as a proxy for Chelsea. The question that follows is whether there was a duty of care owed to the Corporation by virtue of its relationship to subsequent purchasers from Chelsea.

34 The purchasers of lots from Chelsea were effectively investors in a hotel venture under standard form contracts which were an integral part of the overall contractual arrangements. The standard form contract contained specific provisions relating to the construction of the building and Chelsea's obligations to undertake repairs. Those provisions have already been mentioned. This is not a case in which, for the purposes of the subsistence of a duty of care, the subsequent owners could be regarded as vulnerable. Nor, therefore, could the Corporation as their statutory "agent". The position of the subsequent owners and the interaction of the contractual and statutory frameworks are antithetical to the proposition that Brookfield owed the Corporation the duty of care found to exist by the Court of Appeal.

35 Against that background, the relationship between Brookfield and the Corporation is not analogous to the relationship in *Bryan v Maloney* between the builder of a dwelling house and the downstream, arms-length purchaser of the house, who suffered economic loss by reason of latent defects in the construction. It is analogous, although not identical, to the position of the purchaser of the complex in *Woolcock*.

36 There was no duty of care in respect of pure economic loss flowing from latent defects owed by Brookfield to Chelsea. Nor was there a duty of care owed by Brookfield to the subsequent owners. There was therefore no duty of care owed to the Corporation. That conclusion means that the appeal must be allowed. It is fatal to the notice of contention and to the proposed cross-appeal. In so holding, I would also wish to associate myself with the observation by

Hayne and Kiefel JJ that that conclusion does not depend upon any *a priori* assumption about the proper provinces of contract and tort.

Conclusion

37 The following orders should be made:

1. Appeal allowed.

2. Set aside the order of the Court of Appeal of the Supreme Court of New South Wales made on 25 September 2013 and, in its place, order that the appeal to that Court be dismissed with costs.

3. Special leave to cross-appeal granted.

4. Cross-appeal treated as instituted and heard instanter and dismissed with costs.

5. First respondent to pay the appellant's costs of the appeal.

HAYNE AND KIEFEL JJ.

The issue

38 The first respondent ("the Owners Corporation") claimed damages from the appellant ("the builder"). The Owners Corporation alleged that the builder owed it a duty of care in carrying out certain building works on land at Chatswood, New South Wales. The Owners Corporation alleged that, because the builder had breached that duty of care, the building had various latent defects in common property vested in the Owners Corporation and that, as a result, the Owners Corporation had suffered loss and damage. The Owners Corporation particularised that loss and damage as the cost of rectifying the defects and "the diminished value to the Building and the loss of rents and income during the period of and due to the rectifying of the defects".

39 Did the builder owe the Owners Corporation the alleged duty of care?

The decisions below and the appeal to this Court

40 In the Supreme Court of New South Wales, McDougall J held[71] that the builder did not owe the alleged duty and entered judgment for the builder. On appeal, the Court of Appeal of the Supreme Court of New South Wales held[72] that the builder owed the Owners Corporation "a duty to exercise reasonable care in the construction of the building to avoid causing [the Owners Corporation] to suffer loss resulting from latent defects in the common property vested in [the Owners Corporation], which defects (a) were structural, or (b) constituted a danger to persons or property in, or in the vicinity of, the serviced apartments, or (c) made those apartments uninhabitable".

41 By special leave the builder appeals to this Court. The Owners Corporation applies for special leave to cross-appeal seeking orders providing for a larger duty of care than that found by the Court of Appeal. The builder's appeal should be allowed with costs. The orders of the Court of Appeal should be set aside and the appeal to that Court dismissed with costs. The Owners Corporation should have special leave to cross-appeal but the cross-appeal should be dismissed with costs.

---

71 *Owners Corporation Strata Plan 61288 v Brookfield Multiplex* [2012] NSWSC 1219.

72 *The Owners – Strata Plan No 61288 v Brookfield Australia Investments Ltd* (2013) 85 NSWLR 479 at 510 [132].

The essential facts

42 The building works were to construct "a mixed use retail, restaurant, residential and serviced apartments building" on the land. The builder undertook these works under a "design and construct" contract it made with a developer: Chelsea Apartments Pty Ltd ("the developer"). The contract obliged the builder to construct the building in general accordance with detailed plans and specifications for a contract price of more than $57 million. The contract incorporated detailed provisions regulating the performance and superintendence of the work. The contract provided for certain warranties by the builder about the work and for the builder to remedy defects or omissions in the work. It provided that the issue of a "final certificate" under the contract was evidence, subject to specified exceptions, that the works had been completed in accordance with the contract.

43 Before a final occupation certificate was granted by the relevant municipal council, a strata plan was registered in relation to that part of the building which was to be used for serviced apartments. Initially, the developer owned the lots in the strata scheme. The lots were later sold by the developer to different proprietors under standard sale contracts, the form of which was fixed by agreement between the developer and the builder. Those contracts obliged the developer, as vendor, to "cause the Building to be constructed in a proper and workmanlike manner" and made detailed provision about the repair of defects or faults (including defects or faults in the common property).

44 Upon registration of the strata plan, the Owners Corporation was created by operation of law[73]. The owners of the lots from time to time in the strata scheme constitute[74] a body corporate under the name of the Owners Corporation. The estate or interest of that body corporate in the common property is held[75] by the Owners Corporation as agent for the owner or owners of the lots the subject of the strata scheme. Initially, the Owners Corporation held the common property as agent for the developer as the owner of all of the lots. Now that the lots are owned by different proprietors, the Owners Corporation holds the common property as agent for those proprietors as tenants in common in shares proportional to their unit entitlements[76]. The Owners Corporation is bound[77] to

---

73 *Strata Schemes Management Act* 1996 (NSW), s 8(1).

74 *Strata Schemes Management Act* 1996 (NSW), s 11(1).

75 *Strata Schemes (Freehold Development) Act* 1973 (NSW), s 20.

76 *Strata Schemes (Freehold Development) Act* 1973 (NSW), s 20(b).

77 *Strata Schemes Management Act* 1996 (NSW), s 62.

properly maintain and keep in a state of good and serviceable repair the common property and any personal property vested in the Owners Corporation and to renew or replace any fixtures or fittings comprised in the common property and any personal property vested in the Owners Corporation.

The damage

45 There may be a real and lively debate about whether the Owners Corporation itself suffered any loss as a result of defects in the common property. The better view may be that any loss constituted or occasioned by defects in the common property was suffered by the owners of the lots for whom the Owners Corporation held the common property as "agent"[78]. It is not necessary, however, to pursue that question.

46 Nor is it necessary to explore what follows from observing that, at the time the builder is alleged not to have taken reasonable care in the execution of the building works, the Owners Corporation did not exist. It is convenient to assume, without deciding, that nothing turns on this observation. It is sufficient to instead focus on whether the builder owed a duty of care to a subsequent owner of part of the building.

47 The nature of the damage suffered is important to resolving the issue about duty of care. The defects which the Owners Corporation identifies in the common property are not alleged to have caused any damage to person or property. Steps can be taken, therefore, to prevent damage to person or property. If the Owners Corporation has suffered damage, that damage is pure economic loss.

Duty of care to avoid pure economic loss?

48 Determination of whether, under the common law of Australia, the builder owed a duty of care to a subsequent owner of part of the building (in this case, the Owners Corporation) depends on applying the principles which have been established by the decisions of this Court. Immediately, it requires close attention to what this Court decided in *Woolcock Street Investments Pty Ltd v CDG Pty Ltd*[79]. No doubt *Woolcock Street* must be read and understood in the

---

78 cf *Colonial Mutual Life Assurance Society Ltd v Producers and Citizens Co-operative Assurance Co of Australia Ltd* (1931) 46 CLR 41 at 50 per Dixon J; [1931] HCA 53, observing the difficulties created by the many senses in which the word "agent" is employed.

79 (2004) 216 CLR 515; [2004] HCA 16.

light of the Court's earlier decisions including, in particular, *Bryan v Maloney*[80]. No party suggested, however, that *Woolcock Street* should be reopened. Hence, that decision must be the starting point for considering the issue in this appeal.

Woolcock Street Investments Pty Ltd v CDG Pty Ltd

49 In *Woolcock Street*, six members of the Court held[81] that an engineering company which designed the foundations of a warehouse and office complex did not owe a subsequent purchaser of the building a common law duty of care to avoid economic loss. That decision was reached recognising[82] that similar questions had been considered by the courts of other jurisdictions and resolved by applying principles about recovery for negligently inflicted pure economic loss which differ from those which this Court has held are to be applied in Australia.

50 Four members of the Court observed[83] that the decision in *Bryan v Maloney* had depended upon an anterior demonstration that the builder owed a duty to take reasonable care to avoid economic loss to the original owner of the kind suffered by the subsequent purchaser. And the plurality further observed[84] that in *Woolcock Street* there had been neither reliance by the original owner on, nor an assumption of responsibility by, the engineering company. Hence, the plurality held[85] that the reasoning in *Bryan v Maloney* by which an original duty owed by the builder to the owner was extended to a subsequent purchaser did not apply.

51 The plurality founded[86] their conclusion that the engineering company did not owe the subsequent purchaser a duty of care on the proposition that the subsequent purchaser was not vulnerable to the economic consequences of the

---

80 (1995) 182 CLR 609; [1995] HCA 17.

81 (2004) 216 CLR 515 at 534 [35] per Gleeson CJ, Gummow, Hayne and Heydon JJ, 559-560 [114]-[116] per McHugh J, 586-587 [208]-[210] per Callinan J.

82 (2004) 216 CLR 515 at 534 [34] per Gleeson CJ, Gummow, Hayne and Heydon JJ, 538-541 [49]-[55] per McHugh J, 593 [232] per Callinan J.

83 (2004) 216 CLR 515 at 531 [25] per Gleeson CJ, Gummow, Hayne and Heydon JJ.

84 (2004) 216 CLR 515 at 532 [26].

85 (2004) 216 CLR 515 at 532 [27].

86 (2004) 216 CLR 515 at 533 [31].

engineering company's negligence in designing the foundations. In the context, vulnerability was said to refer[87] to a plaintiff's inability to protect itself from the defendant's want of reasonable care, either entirely or at least in a way which would cast the consequences of loss on the defendant. It is the question of vulnerability which, consistent with the decision in *Woolcock Street*, must determine the outcome of this appeal.

Matters that need not be considered

52 Before dealing with the issue of vulnerability, two other aspects of the matter, mentioned in argument, should be noted but then put aside from consideration.

53 First, it is not useful to examine particular decisions made in other jurisdictions about the tortious liability of a builder for economic loss occasioned by the negligent construction of a building without recognising that those decisions necessarily reflect the particular ways in which those jurisdictions have developed and applied principles about recovery for negligently caused pure economic loss. It was not submitted that this Court should revisit those principles as they have been developed by this Court.

54 Second, some argument was directed in this Court to the proper construction of the contract pursuant to which the builder built the building. In particular, there was debate about three aspects of that contract: the provisions which stated the builder's obligations; the provisions for superintendence of the work by a superintendent appointed by the developer; and the provisions about the defects liability period and the issuance of the final certificate. In addition, argument was directed to the proper construction of the standard form agreements for purchase of lots in the relevant strata scheme.

55 It will not be necessary to pursue the arguments about the proper construction of these provisions to their conclusion. It is enough to notice that the relevant parties made contracts for the construction of the building and for the subsequent sale of parts of the building which were contracts that could (and did) make provisions regulating the quality of what was to be received in return for payment of the price. The making of those contracts denies vulnerability. It is necessary to explain that conclusion.

Vulnerability?

56 It may be assumed, without deciding, that the developer and the purchaser of a lot from the developer relied on the builder to do its work properly. The

---

87 (2004) 216 CLR 515 at 530 [23] per Gleeson CJ, Gummow, Hayne and Heydon JJ.

purchaser of a lot could not check the quality of the builder's work as it was being done. Perhaps the developer was in no different position. (That would turn on what meaning is given to the superintendence provisions of the developer's contract with the builder.) The Owners Corporation was in no better position to check the quality of the builder's work as it was being done than the original purchaser of a lot. Because these parties could not check the quality of what the builder was doing, it can easily be said that each relied on the builder to do its work properly.

57 Reliance, in the sense just described, may be a necessary element in demonstrating vulnerability, but it is not a sufficient element. As noted earlier, vulnerability is concerned with a plaintiff's inability to protect itself from the defendant's want of reasonable care, either entirely or at least in a way which would cast the consequences of loss on the defendant.

58 It is neither necessary nor profitable to attempt to define what would or would not constitute vulnerability. It is enough to observe that both the developer and the original purchasers made contracts, including the standard contracts, which gave rights to have remedied defects in the common property vested in the Owners Corporation. The making of contracts which expressly provided for what quality of work was promised demonstrates the ability of the parties to protect against, and denies their vulnerability to, any lack of care by the builder in performance of its contractual obligations. It was not suggested that the parties could not protect their own interests[88]. The builder did not owe the Owners Corporation a duty of care.

Contract and tort

59 The conclusion just expressed denies the existence of a duty of care. The conclusion does not depend, however, upon making any a priori assumption about the proper provinces of the law of contract and the law of tort. As McHugh J pointed out[89] in *Woolcock Street*, "[t]he decisions in *Hedley Byrne* [*& Co Ltd v Heller & Partners Ltd*[90]], *Donoghue* [*v Stevenson*[91]], *White* [*v Jones*[92]]

---

88 cf *Smith v Eric S Bush* [1990] 1 AC 831; Stapleton, "Comparative Economic Loss: Lessons from Case-Law-Focused 'Middle Theory'", (2002) 50 *UCLA Law Review* 531 at 555-556.

89 (2004) 216 CLR 515 at 552 [92].

90 [1964] AC 465.

91 [1932] AC 562.

92 [1995] 2 AC 207.

and *Hill* [*v Van Erp*[93]] ... make it difficult to argue that claims in negligence for pure economic loss should be excluded merely because such claims may outflank or undermine fundamental doctrines of the law of contract". And as McHugh J also observed[94], this Court rejected in *Bryan v Maloney* "the notion that in Australia contract and tort were so neatly compartmentalised that it would be an error to give a remedy in tort for economic loss". That rejection manifests the necessary premise for earlier decisions of this Court about liability for pure economic loss, such as *Mutual Life & Citizens' Assurance Co Ltd v Evatt*[95], as well as later decisions like *Perre v Apand Pty Ltd*[96].

60 Nor does the conclusion about absence of vulnerability depend upon detailed analysis of the particular content of the contracts the parties made. As in *Woolcock Street*[97], it is not necessary to decide in this case whether disconformity[98] between the obligations owed to the original owner under the contract and the duty of care allegedly owed to the subsequent owner would necessarily deny the existence of that duty. It may again be observed, as it was in *Woolcock Street*[99], that in *Bryan v Maloney* there was the *absence* of disconformity of that kind. The absence of disconformity was an essential step in the reasoning in *Bryan v Maloney*. That step is not available in this case.

Conclusion

61 The appeal to this Court should be allowed. The first respondent should pay the appellant's costs. The orders of the Court of Appeal of the Supreme Court of New South Wales should be set aside and, in their place, there should be orders that the appeal to that Court is dismissed with costs. The Owners Corporation should have special leave to cross-appeal; the cross-appeal should be treated as instituted and heard instanter and dismissed with costs.

---

93 (1997) 188 CLR 159; [1997] HCA 9.

94 (2004) 216 CLR 515 at 552 [92].

95 (1968) 122 CLR 556; [1968] HCA 74. See, on appeal, *Mutual Life & Citizens' Assurance Co Ltd v Evatt* (1970) 122 CLR 628; [1971] AC 793.

96 (1999) 198 CLR 180; [1999] HCA 36.

97 (2004) 216 CLR 515 at 532 [28].

98 cf *Voli v Inglewood Shire Council* (1963) 110 CLR 74 at 85 per Windeyer J; [1963] HCA 15.

99 (2004) 216 CLR 515 at 532 [29].

62 CRENNAN, BELL AND KEANE JJ. The first respondent, which is conveniently referred to as "the respondent"[100], is the owners corporation in respect of the common property in a strata-titled serviced apartment complex in Chatswood, New South Wales. The appellant built the complex pursuant to a contract with a developer, who owned the land on which it was built.

63 The respondent brought proceedings against the appellant in the Supreme Court of New South Wales to recover damages for the cost of repairing what were said to be latent defects in the common property of the serviced apartment complex. The respondent contended that the appellant was liable in negligence for breach of a duty "to take reasonable care to avoid a reasonably foreseeable economic loss to the [respondent] in having to make good the consequences of latent defects caused by the building's defective design and/or construction."[101] The respondent's contention was rejected[102] at first instance, but was upheld[103] (albeit subject to limitations presently contested by the respondent) by the Court of Appeal of New South Wales.

64 The Court of Appeal proceeded to its conclusion on the basis that the duty of care propounded by the respondent matched an equivalent tortious duty of care owed by the appellant to the developer of the serviced apartment complex. The appellant contended that the Court of Appeal had erred in supplementing the appellant's obligations to the developer by adding a tortious duty equivalent to that propounded by the respondent: the appellant's obligations to the developer as to the quality of the work were comprehensively stated in the contract pursuant to which the complex was built. The respondent disputed the contention that it was not permissible to supplement the appellant's contractual obligations to the developer in this way, and argued that, in any event, imposing an equivalent tortious duty in favour of the developer was not an essential step on the path to holding the appellant liable in negligence to the respondent.

---

100 The second respondent played no part in the appeal beyond filing a submitting appearance.

101 *Owners Corporation Strata Plan 61288 v Brookfield Multiplex* [2012] NSWSC 1219 at [18].

102 *Owners Corporation Strata Plan 61288 v Brookfield Multiplex* [2012] NSWSC 1219 at [4], [110].

103 *The Owners – Strata Plan No 61288 v Brookfield Australia Investments Ltd* (2013) 85 NSWLR 479.

65 To the latter contention the appellant replied that dispensing with the need for an equivalent liability on its part to the developer, for whom it built the complex, would reduce the law to incoherence, in that, in relation to defects in the quality of construction, a builder of a building may find itself potentially liable in tort to every subsequent owner of the building and yet not be liable to the party for whom the building was originally constructed.

66 The appellant also contended that the contracts pursuant to which the owners of apartments acquired their rights in the common property afforded those owners, and the respondent as their agent, such protection against the risk of economic loss attributable to defects in construction that the owners and the respondent were not relevantly vulnerable to the appellant, for the purposes of the law of negligence, in respect of the risk of economic loss by reason of such defects.

67 The appellant's contentions should be accepted. It is of critical importance in this regard that, as was common ground between the parties, the loss for which the respondent claimed damages is truly characterised as economic loss. The respondent's claim is based on the failure of the purchasers of the apartments to get value for money from the developer rather than on the appellant's causing damage to the respondent's property. One difficulty with the respondent's claim is that the respondent itself paid nothing for the common property: it suffered no "loss" arising out of the acquisition of the common property. And to say that the common property, for which it paid nothing, is less valuable to it by the amount which it must expend to repair it, is distinctly not to show that any act or omission on the part of the appellant caused the respondent's assets to be diminished[104]. As Stanley Burnton LJ said in *Robinson v P E Jones (Contractors) Ltd*[105]:

> "the crucial distinction is between a person who supplies something which is defective and a person who supplies something (whether a building, goods or a service) which, because of its defects, causes loss or damage to something else. …
>
> I do not think that a client has a cause of action in tort against his negligent accountant or solicitor simply because the accountant's or solicitor's advice is incorrect (and therefore worth less than the fee paid by the client). The client does have a cause of action in tort if the advice is relied upon by the client with the result that his assets are diminished."

---

104 *Murphy v Brentwood District Council* [1991] 1 AC 398 at 477, 478, 479, 487-488.

105 [2012] QB 44 at 64-65 [93]-[94].

68 If that preliminary difficulty is put to one side on the basis that the respondent acquired the common property as a proxy for the purchasers of apartments who are disappointed with the bargains they made with the developer, a substantial difficulty remains. The circumstance that economic loss of this kind is a foreseeable consequence of a want of reasonable care by the appellant is not of itself sufficient to make the loss compensable in negligence, even where acceptance of the claim will not give rise to indeterminate liability[106].

69 The expansive view of the appellant's obligations to the respondent which was upheld by the Court of Appeal in this case is not supported by the decision in *Bryan v Maloney*[107]; and it does not accord with the decision of this Court in *Woolcock Street Investments Pty Ltd v CDG Pty Ltd*[108]. This Court's decision in *Bryan v Maloney* does not sustain the proposition that a builder that breaches its contractual obligations to the first owner of a building is to be held responsible for the consequences of what is really a bad bargain made by subsequent purchasers of the building. To impose upon a defendant builder a greater liability to a disappointed purchaser than to the party for whom the building was made and by whom the defendant was paid for its work would reduce the common law to incoherence[109]. Moreover, to hold that a subsequent purchaser of a building is vulnerable to the builder so far as the risk of making an unfavourable bargain for its acquisition is concerned would involve a departure from what was held by this Court in *Woolcock Street Investments*[110].

The commercial background

70 The serviced apartment complex was constructed by the appellant as part of a transaction between Chelsea Apartments Pty Ltd ("the developer") and

---

106 *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465; *Mutual Life & Citizens' Assurance Co Ltd v Evatt* (1970) 122 CLR 628 at 632-636; [1971] AC 793 at 801-804; *Caltex Oil (Australia) Pty Ltd v The Dredge "Willemstad"* (1976) 136 CLR 529 at 555, 572-574, 590-592; [1976] HCA 65; *Candlewood Navigation Corporation Ltd v Mitsui OSK Lines Ltd* [1986] AC 1; *Leigh and Sillavan Ltd v Aliakmon Shipping Co Ltd* [1986] AC 785.

107 (1995) 182 CLR 609; [1995] HCA 17.

108 (2004) 216 CLR 515; [2004] HCA 16.

109 *Woolcock Street Investments Pty Ltd v CDG Pty Ltd* (2004) 216 CLR 515 at 532 [28]. See also *Woollahra Municipal Council v Sved* (1996) 40 NSWLR 101 at 120.

110 (2004) 216 CLR 515 at 530 [23], 533 [31], 548-553 [80]-[96].

companies in the Stockland Group ("Stockland"). The development involved the construction of a 22-storey building, with two major components, the serviced apartment complex being floors one to nine, and residential apartments being floors 10 to 22.

71 The respondent is the owners corporation in respect of the serviced apartment lots on floors one to nine.

72 Pursuant to the terms of a Deed of Master Agreement dated 11 August 1997 ("the Master Agreement"), the developer, who was the registered proprietor of the land on which the building was to be constructed, agreed with Stockland to design and construct the building and then to lease apartments on certain floors to a Stockland subsidiary, Park Hotel Management Pty Ltd ("Park"), to be operated by Park as serviced apartments[111]. The apartments were to be sold to investors, subject to the leases granted to Park; and Park would operate a business of servicing those apartments under the "Holiday Inn" brand[112].

73 Under the Master Agreement, the developer warranted the quality of its building work to Stockland[113].

74 On 5 November 1997, the developer and the appellant entered into a design and construct subcontract ("the D&C contract") for the construction of the building for the sum of $57,539,000. It was common ground that the D&C contract was negotiated between sophisticated and experienced parties at arms' length and on an equal footing[114].

---

111 *Owners Corporation Strata Plan 61288 v Brookfield Multiplex* [2012] NSWSC 1219 at [34]; *The Owners – Strata Plan No 61288 v Brookfield Australia Investments Ltd* (2013) 85 NSWLR 479 at 496-497 [69]-[70].

112 *Owners Corporation Strata Plan 61288 v Brookfield Multiplex* [2012] NSWSC 1219 at [33].

113 *Owners Corporation Strata Plan 61288 v Brookfield Multiplex* [2012] NSWSC 1219 at [38].

114 *Owners Corporation Strata Plan 61288 v Brookfield Multiplex* [2012] NSWSC 1219 at [44]; *The Owners – Strata Plan No 61288 v Brookfield Australia Investments Ltd* (2013) 85 NSWLR 479 at 496 [67].

The D&C contract

75 The D&C contract contained detailed provisions with respect to the quality of the work to be performed by the appellant as "Contractor" for the developer as "Principal".

76 Clause 3.1 of the D&C contract provided that "[t]he Contractor shall execute and complete the work under the Contract in accordance with the requirements of the Contract."

77 Clause 4 of the D&C contract provided relevantly:

"**4.1 Contractor's Warranties**

Without limiting the generality of Clause 3.1, the Contractor warrants to the Principal that the Contractor—

(a) … shall exercise due skill, care and diligence in the execution and completion of the work under the Contract;

…

(e) shall execute and complete the work under the Contract in accordance with the Design Documents so that the Works, when completed, shall—

(i) be fit for their stated purpose; and

(ii) comply with all the requirements of the Contract and all Legislative Requirements."

78 Clause 30 of the D&C contract provided relevantly:

"**30.1 Quality of Material and Work**

The Contractor shall use the materials and standards of workmanship required by the Contract. In the absence of any requirement to the contrary, the Contractor shall use suitable new materials and proper and tradesmanlike workmanship.

...

30.3 Defective Material or Work

If the Superintendent discovers material or work provided by the Contractor which is not in accordance with the Contract, the Superintendent shall as soon as practicable notify the Contractor. The Superintendent may direct the Contractor—

…

(c) to … reconstruct, replace or correct the material or work; or

…

The Superintendent may direct the times within which the Contractor must commence and complete the … reconstruction, replacement or correction.

…

30.6 Generally

...

Nothing in Clause 30 shall prejudice any other right which the Principal may have against the Contractor arising out of the failure of the Contractor to provide material or work in accordance with the Contract."

79 Clause 55 of the D&C contract obliged the appellant to:

"(a) cause the Building to be constructed in general accordance with the Development Consent (including, without limitation, the plans and specifications in the Development Application);

(b) cause the Serviced Apartments Parcel to be constructed in general accordance with the Serviced Apartments Floor Plan;

(c) cause the Serviced Apartments Parcel to be finished in general accordance with the Serviced Apartments Finishes; and

(d) install in each of the Serviced Apartments the FF&E Package (as amended by the Trade Off List) relevant to the particular Serviced Apartments."

80 The D&C contract provided for a Defects Liability Period. In this regard, cl 37 provided that the appellant would be liable to rectify construction defects for a period of 52 weeks commencing from the date of practical completion[115].

81 Clause 31 of the D&C contract made provision for the Superintendent to test any material or work at any time before the expiry of the Defects Liability Period. To this end the Superintendent was authorised by cl 31.2 to direct that any part of the work under the contract shall not be "covered up or made inaccessible without the Superintendent's prior approval."

82 Clause 42.6 provided for the Superintendent, at the expiry of the Defects Liability Period, to issue to the developer a "Final Certificate" of "the amount which, in the Superintendent's opinion, is finally due from the Principal to the Contractor or from the Contractor to the Principal arising out of the Contract or any alleged breach thereof."

83 Clause 42.6 continued:

> "Unless either party, either before the Final Certificate has been issued or not later than 21 days after the issue thereof, serves a notice of dispute … the Final Certificate shall be evidence that the Works have been completed in accordance with the terms of the Contract … except in the case of—
>
> (a) fraud, dishonesty or fraudulent concealment relating to the work under the Contract or any part thereof or to any matter dealt with in the said Certificate;
>
> (b) any defect (including omission) in the Works or any part thereof which was not apparent at the end of the Defects Liability Period, or which would not have been disclosed upon reasonable inspection at the time of the issue of the Final Certificate".

84 The effect of cl 42.6(b) was that the developer had contractual protection against the appellant in respect of the expense of repairing latent defects in the building after the Defects Liability Period had expired.

85 The D&C contract also provided for the terms on which the developer would offer individual lots for sale to investors. Annexed to the D&C contract was a form of standard contract for sale, which conferred on each purchaser of a

---

115 *The Owners – Strata Plan No 61288 v Brookfield Australia Investments Ltd* (2013) 85 NSWLR 479 at 494 [58].

lot specific contractual rights in relation to defects in the property, including the common property[116].

The contracts for sale

86 By cl 26.1 of the standard form contract for sale the purchaser represented and warranted that it "did not rely on any representations or warranties about the subject matter of this contract … except those representations and warranties set out in this contract", and had "obtained appropriate independent advice on and is satisfied about … the purchaser's obligations and rights under this contract".

87 Clause 32.1 of the standard form contract set out the purchaser's rights in respect of the quality of construction. In particular, the developer was obliged "[b]efore completion … [to] cause the property and the Common Property to be finished as specified in the Schedule of Finishes … in a proper and workmanlike manner."

88 Clause 32.6 obliged the developer to:

> "repair in a proper and workmanlike manner, at the [developer's] expense, within a reasonable time after the applicable notice has been served by the purchaser, any defects or faults in the property due to faulty materials or workmanship (including Special Faults but excluding minor shrinkage and minor settlement cracks) of which notice is served by the purchaser within 6 months after completion. The purchaser may not serve notice of defects or faults other than Special Faults on more than 3 occasions."

89 Clause 32.7 obliged the developer to:

> "repair in a proper and workmanlike manner, at the [developer's] expense, within a reasonable time after the applicable written notice has been served on the [developer], any defects or faults in the Common Property due to faulty materials or workmanship … of which written notice is served on the [developer] by the Owners Corporation within 7 months after the date of registration of the Strata Plan."

---

116 *Owners Corporation Strata Plan 61288 v Brookfield Multiplex* [2012] NSWSC 1219 at [45]; *The Owners – Strata Plan No 61288 v Brookfield Australia Investments Ltd* (2013) 85 NSWLR 479 at 495-496 [63].

The strata scheme legislation and the owners corporation

90 After a construction period of approximately two years, the serviced apartments were completed. On 11 November 1999, the appellant registered the strata plan for the serviced apartments. By virtue of that registration, the respondent was brought into existence[117] and the common property in the serviced apartment complex was vested in it[118].

91 The developer, as the registered proprietor of the serviced apartment lots, sold them to investors subject to the leases which enabled them to be deployed by Park in its "Holiday Inn" business.

92 Section 20 of the *Strata Schemes (Freehold Development) Act* 1973 (NSW) ("the SSFD Act") provides:

> "The estate or interest of a body corporate in common property vested in it or acquired by it shall be held by the body corporate as agent:
>
> (a) where the same person or persons is or are the proprietor or proprietors of all of the lots the subject of the strata scheme concerned—for that proprietor or those proprietors, or
>
> (b) where different persons are proprietors of each of two or more of the lots the subject of the strata scheme concerned—for those proprietors as tenants in common in shares proportional to the unit entitlements of their respective lots."

93 Section 61(1)(a) of the *Strata Schemes Management Act* 1996 (NSW) ("the SSM Act") provides that "[a]n owners corporation has, for the benefit of the owners … the management and control of the use of the common property of the strata scheme".

94 Section 62(1) of the SSM Act provides that "[a]n owners corporation must properly maintain and keep in a state of good and serviceable repair the common property".

---

117 *Strata Schemes Management Act* 1996 (NSW), s 8(1).

118 *Strata Schemes (Freehold Development) Act* 1973 (NSW), s 18.

The proceedings

95 The respondent commenced an action against the appellant in 2008[119] to recover the cost of rectifying defects found in the construction of the common property of the serviced apartment complex. Initially, the respondent also claimed that the appellant was liable for breaching statutory warranties relating to the quality of workmanship under Pt 2C of the *Home Building Act* 1989 (NSW), but that claim was resolved before trial[120].

96 The respondent particularised the defects of which it complained[121]. The primary judge accepted that "if the defects alleged exist, then many of them are properly to be characterised as latent defects"[122]. For present purposes, it is necessary to note only that of the five categories of alleged defects, the complaint made by the respondent in relation to two categories, namely, the steel lintels and windows, was that the work does not comply with the specifications under the D&C contract. The complaint in respect of the third category was that "[t]he external render to the façade of the building is defective." The complaint in respect of the fourth category, namely, the sheet metal cowlings to the fire services shutters, is that they "were fabricated and coated with materials which were unsuitable for exterior exposure." The complaint in respect of the fifth category of defects, namely, the water leak from the spa, is that there were "defects to the waste connection and inadequate waterproofing to the enclosure below the spa."

97 Whether such defects as may be proved to exist are structural or likely to render the building dangerous to person or property or uninhabitable is an issue contested by the appellant. It has not yet been decided.

---

119 The respondent also commenced proceedings against the second respondent. The respondent's pleadings did not disclose a cause of action against the second respondent; and as noted above, the second respondent has no involvement in this appeal.

120 *Owners Corporation Strata Plan 61288 v Brookfield Multiplex* [2012] NSWSC 1219 at [8]-[9].

121 *Owners Corporation Strata Plan 61288 v Brookfield Multiplex* [2012] NSWSC 1219 at [65].

122 *Owners Corporation Strata Plan 61288 v Brookfield Multiplex* [2012] NSWSC 1219 at [71].

The decision of the primary judge

98 The parties asked the primary judge (McDougall J) to determine the question whether the appellant owed the respondent the duty propounded by the respondent separately from the other issues in the proceedings.

99 On 10 October 2012, the primary judge answered the separate question, holding[123] that the appellant did not owe the respondent the duty of care propounded by the respondent. In consequence, his Honour gave judgment for the appellant in the action.

100 His Honour held[124] that "[w]here the parties have negotiated in full their rights and obligations, there is no reason for the law to intervene by imposing some general law duty of care." His Honour concluded that the duty of care propounded by the respondent was not supported by this Court's decision in *Bryan v Maloney*[125]; and, given the difficulties of principle involved in imposing on the appellant what Brennan J in *Bryan v Maloney* referred to as a transmissible warranty of quality[126], any alteration to the position at common law should be undertaken by the legislature[127].

The decision of the Court of Appeal

101 The respondent appealed to the Court of Appeal of the Supreme Court of New South Wales. The Court of Appeal (Basten JA, Macfarlan and Leeming JJA agreeing) allowed[128] the appeal.

---

123 *Owners Corporation Strata Plan 61288 v Brookfield Multiplex* [2012] NSWSC 1219 at [4], [110].

124 *Owners Corporation Strata Plan 61288 v Brookfield Multiplex* [2012] NSWSC 1219 at [90].

125 (1995) 182 CLR 609.

126 (1995) 182 CLR 609 at 644.

127 *Owners Corporation Strata Plan 61288 v Brookfield Multiplex* [2012] NSWSC 1219 at [88]-[92].

128 *The Owners – Strata Plan No 61288 v Brookfield Australia Investments Ltd* (2013) 85 NSWLR 479.

102 Basten JA proceeded on the basis "that no general law duty of care can arise with respect to successive owners unless there [is] a general law duty owed to the original owner with whom the builder contracted to construct the building."[129] His Honour concluded[130] that the appellant owed the developer a duty under the law of tort to take reasonable care that it should not suffer economic loss concurrently with the contractual duties which arose under the D&C contract. In this regard, his Honour held[131] that the developer was "vulnerable" to the appellant in the sense that it was reliant on the appellant's "expertise, care and honesty ... in performing its obligations under the [D&C] contract."

103 Basten JA rejected the argument that the contractual arrangements between the appellant and the developer dealt comprehensively with their relationship so as to leave no room for the imposition of a duty of care in tort[132]. His Honour held that the D&C contract:

> "did not purport expressly, or by necessary implication, to exclude any liability for defects or omissions which might arise otherwise than during [the Defects Liability Period], whether under contract or under the general law."[133]

---

129 *The Owners – Strata Plan No 61288 v Brookfield Australia Investments Ltd* (2013) 85 NSWLR 479 at 503 [100].

130 *The Owners – Strata Plan No 61288 v Brookfield Australia Investments Ltd* (2013) 85 NSWLR 479 at 509 [127], 510 [129].

131 *The Owners – Strata Plan No 61288 v Brookfield Australia Investments Ltd* (2013) 85 NSWLR 479 at 508 [118]-[120].

132 *The Owners – Strata Plan No 61288 v Brookfield Australia Investments Ltd* (2013) 85 NSWLR 479 at 501-504 [91]-[100].

133 *The Owners – Strata Plan No 61288 v Brookfield Australia Investments Ltd* (2013) 85 NSWLR 479 at 503 [98].

104 It may also be noted here that Macfarlan JA, melding a number of lines of argument, including a reference to this Court's decision in *Astley v Austrust Ltd*[134], said[135]:

> "The existence of a contract between the developer and a builder for the latter to construct a building does not preclude the existence of a duty of care owed by the builder to the developer as similar contractual and tortious rights may exist concurrently[136]. Further, it was not suggested in *Astley* that proof of the existence of a tortious duty of care concurrent with contractual obligations was dependent upon proof by the party to whom it was owed that it could not have negotiated with the party subject to the duty for contractual protection against the loss that came to be suffered. This being the case, it is difficult to see why a successor in title, or a party otherwise related to that to whom the duty of care was owed, should have to show that it could not have negotiated contractual protection in order to establish that a duty of care was owed to it."

105 Basten JA went on to conclude[137] that the appellant owed the propounded duty to the respondent, as successor in title to the developer. His Honour reasoned that, as the respondent was at least as vulnerable as the developer to the risk of economic loss from latent defects, so the respondent was owed a duty in tort equivalent to that held to be owed by the appellant to the developer. Basten JA said[138]:

> "[the respondent] was vulnerable with respect to latent defects in the same way that the developer was. Indeed, its position was weaker than that of the developer, which may have had some opportunity to carry out inspections during the course of the construction and before the defective materials were no longer examinable."

---

134 (1999) 197 CLR 1; [1999] HCA 6.

135 *The Owners – Strata Plan No 61288 v Brookfield Australia Investments Ltd* (2013) 85 NSWLR 479 at 511 [136].

136 *Astley v Austrust Ltd* (1999) 197 CLR 1 at 20-23 [44]-[48]; see also *Bryan v Maloney* (1995) 182 CLR 609 at 619-620.

137 *The Owners – Strata Plan No 61288 v Brookfield Australia Investments Ltd* (2013) 85 NSWLR 479 at 510 [129].

138 *The Owners – Strata Plan No 61288 v Brookfield Australia Investments Ltd* (2013) 85 NSWLR 479 at 508-509 [122].

106 Basten JA summarised his conclusions[139]:

> "Accepting that the general law does not impose a general duty of care to avoid economic loss, and that the decision in *Bryan v Maloney* does not in terms dictate the outcome in the present case, there are significant features which militate in favour of the existence of a duty of care covering loss resulting from latent defects which (a) were structural, (b) constituted a danger to persons or property in, or in the vicinity of, the serviced apartments, or (c) made them uninhabitable. The existence of a duty expressed in those terms should be accepted."

107 It is to be noted that Basten JA confined[140] the appellant's duty so that the appellant was bound only to avoid causing economic loss in relation to those defects which were "dangerous" in the sense that, if left unrepaired, they could cause personal injury or damage to property or made the premises uninhabitable. The respondent had not argued for a duty of care confined in this way; and consequently, in this Court, the respondent contended that the duty owed to it by the appellant should not be qualified or limited as indicated by Basten JA.

108 Macfarlan and Leeming JJA made some additional observations upon which the respondent was disposed to rely in this Court in support of its argument that it was unnecessary that there be a duty owed by the appellant to the developer equivalent to the duty propounded by the respondent against the appellant. In this regard, Macfarlan JA said[141]:

> "[T]he [appellant] argued that the [respondent] did not show that it had been vulnerable, in the sense that it had been unable to protect itself from the consequences of the [appellant's] lack of care[142], because it did not show that it could not have bargained with the developer for contractual protection. One answer to this argument is that the [respondent] only came into existence on registration of the strata plan and was not a

---

139 *The Owners – Strata Plan No 61288 v Brookfield Australia Investments Ltd* (2013) 85 NSWLR 479 at 510 [129].

140 *The Owners – Strata Plan No 61288 v Brookfield Australia Investments Ltd* (2013) 85 NSWLR 479 at 509-510 [127]-[128], [132].

141 *The Owners – Strata Plan No 61288 v Brookfield Australia Investments Ltd* (2013) 85 NSWLR 479 at 511 [135].

142 *Woolcock Street Investments Pty Ltd v CDG Pty Ltd* (2004) 216 CLR 515 at 530-531 [23].

conventional successor in title which acquired the property in question under a contract with the previous owner (here the developer)."

109 Leeming JA referred to the SSM Act and to s 20 of the SSFD Act, adding[143]:

> "There is nothing antithetical in those provisions to a duty of care owed by the builder to that special creature of statute which is intended by builder and developer to come into existence following the performance of the builder's obligations. The legislative scheme is such that the owners' corporation is much more vulnerable than, say, a company which owns land on which is to be erected a company title building. To the contrary, what would be strange, to my mind, would be an imputed legislative intention to deny to that corporation the ordinary rights legal persons enjoy at common law."

110 In the upshot, the Court of Appeal set aside the orders made by the primary judge and answered[144] the separate question posed by the parties by holding that the appellant owed the respondent a duty:

> "to exercise reasonable care in the construction of the building to avoid causing the [respondent] to suffer loss resulting from latent defects in the common property vested in the [respondent], which defects (a) were structural, or (b) constituted a danger to persons or property in, or in the vicinity of, the serviced apartments, or (c) made those apartments uninhabitable."

The appeal to this Court

111 The appellant appealed to this Court pursuant to special leave granted on 14 March 2014.

112 The respondent filed a notice of contention to the effect that the Court of Appeal had erred in restricting the scope of the appellant's duty of care to latent defects that were "dangerous". The respondent also sought to cross-appeal on the basis that the appellant owed the respondent the duty propounded by it even if the appellant did not owe an equivalent duty to the developer.

---

143 *The Owners – Strata Plan No 61288 v Brookfield Australia Investments Ltd* (2013) 85 NSWLR 479 at 513 [144].

144 *The Owners – Strata Plan No 61288 v Brookfield Australia Investments Ltd* (2013) 85 NSWLR 479 at 510-511 [132].

The appellant's submissions

113 The appellant's first submission was that the appellant's obligations to the developer were so comprehensively stated in the D&C contract that there was no room for the imposition by the law of tort of a concurrent duty of care to the developer.

114 The appellant's second submission was that, whatever its obligations to the developer, it did not owe the respondent the duty of care propounded by it.

The respondent's submissions

115 The respondent submitted that the duty of care propounded by it does not depend on finding an equivalent duty of care owed by the appellant to the developer. The respondent argued that, in determining whether the appellant owed the respondent a duty of care, the correct approach was to focus on the salient features of the relationship between the appellant and the respondent separately from the relationship between the appellant and the developer. The salient features on which the respondent relied were the appellant's power of administration of the D&C contract (which gave the appellant control of the developer's rights and expectations), the expertise of the appellant in business matters, the commercial cost to the developer of monitoring the construction work, and, based on the foregoing, general notions of assumption of responsibility and reliance.

116 The respondent also embraced the point made by Macfarlan and Leeming JJA that, because the respondent did not come into existence until the registration of the strata plan, it was vulnerable to the risk of loss from latent defects because it had no opportunity to take steps to protect itself against the financial consequences of latent defects in the construction of the common property.

117 In this regard, the respondent emphasised that cl 65 of the D&C contract obliged the appellant to register the strata plan which brought the respondent into existence, so that from the moment of its coming into existence it was obliged by s 62(1) of the SSM Act to rectify defects in the common property as they became apparent. Because the respondent had no opportunity to accept or reject the vesting in it of the common property and to protect itself from the expense of having to make good any defects in the construction, it should be held, so it was said, that the respondent was relevantly vulnerable to a risk of loss in respect of which the appellant owed it the propounded duty. This was said to be so irrespective of whether the appellant owed an equivalent duty to the developer.

118 In the alternative, the respondent submitted that there was an assumption by the appellant of liability to the developer for latent defects, and reliance by the developer on the appellant, which gave rise to a duty in tort equivalent to the duty propounded by the respondent.

119 In addition, and contrary to the conclusion of the Court of Appeal, the respondent contended that, in establishing the nature and scope of the propounded duty, it is the significance of the loss in value of the building or the expenditure necessary to make good the defects that is germane, rather than the characterisation of the defects as "dangerous".

120 Before addressing these submissions directly, it is desirable to make some general observations in relation to the protection afforded to economic interests by the common law.

The common law and economic loss

121 Economic interests are protected by the law of contract and by those torts that are usually described as the economic torts, such as deceit, duress, intimidation, conspiracy, and inducing breach of contract[145]. Generally speaking, the common law protects the interest of a party in having its contractual expectations met by the law of contract[146]. The law of negligence developed as part of the common law in this context. As Blackmun J said in delivering the opinion of the Supreme Court of the United States in *East River Steamship Corp v Transamerica Delaval Inc*[147], "the failure of the purchaser to receive the benefit of its bargain [is] traditionally the core concern of contract law."

122 The causes of action known as the economic torts were established in the common law before the decision of the House of Lords in *Donoghue v Stevenson*[148]. In *Allen v Flood*[149] in 1897, the House of Lords held that a person may deliberately cause economic harm to another without liability in tort

---

145 See generally, Heydon, *Economic Torts*, 2nd ed (1978).

146 *Woolcock Street Investments Pty Ltd v CDG Pty Ltd* (2004) 216 CLR 515 at 534-535 [37]. See also *East River Steamship Corp v Transamerica Delaval Inc* 476 US 858 at 870 (1986).

147 476 US 858 at 870 (1986).

148 [1932] AC 562.

149 [1898] AC 1.

provided that the defendant was not part of a conspiracy and that the means employed to inflict the harm were not themselves unlawful. Unintentionally inflicted economic loss was held to be compensable by an action for negligence only after the decision in *Hedley Byrne & Co Ltd v Heller & Partners Ltd*[150]. Until then, the common law of tort passed the burden of economic loss from plaintiff to defendant only where the defendant intentionally inflicted harm on the plaintiff by conduct which was unlawful for reasons other than that it was likely to, and did, cause economic loss[151]. And even then, the expanded liability for economic loss established by *Hedley Byrne & Co Ltd v Heller & Partners Ltd* depended upon proof of the fact of assumption of responsibility by a person giving advice to another, and that other having relied upon the advice.

123 The respondent sought to rely upon the decision of this Court in *Voli v Inglewood Shire Council*[152]. That case establishes that the appellant may have been liable in damages for physical injuries to third parties resulting from defective work performed in the course of its contract with the developer. But the respondent's argument fails to observe the crucial distinction between physical injury and economic loss. Under the common law, "[t]he former is protected by the law even when, in similar circumstances, the latter is not."[153]

124 A cause of action in negligence does not arise unless and until the plaintiff suffers damage[154]. Damage is the gist of the cause of action in negligence[155]. As Brennan J said in *John Pfeiffer Pty Ltd v Canny*[156], a "duty of care is a thing written on the wind unless damage is caused by the breach of that duty." It is of critical importance to appreciate that the loss for which the respondent seeks damages is the expense which it is obliged to incur as a result of the emergence of latent defects after its acquisition of the common property. It was common

---

150 [1964] AC 465.

151 cf *D v East Berkshire Community Health NHS Trust* [2005] 2 AC 373 at 404-405 [76]-[78].

152 (1963) 110 CLR 74; [1963] HCA 15.

153 *Fangrove Pty Ltd v Tod Group Holdings Pty Ltd* [1999] 2 Qd R 236 at 242 [19].

154 *Overseas Tankship (UK) Ltd v Morts Dock & Engineering Co Ltd (The Wagon Mound)* [1961] AC 388 at 425.

155 *Tame v New South Wales* (2002) 211 CLR 317 at 388 [208]; [2002] HCA 35.

156 (1981) 148 CLR 218 at 241; [1981] HCA 52.

ground that this expense is properly understood as a species of economic loss as distinct from damage to its property. The gist of the respondent's cause of action is that the interest in the common property it acquired from the developer was not as valuable as it should have been if the purchasers had got value for their money.

125 Quite apart from "the traditional common law approach" reflected in the maxim "caveat emptor"[157], the loss incurred by a purchaser of a building who, it turns out, has paid more for the building than it should have, is significantly different from a liability in the owner to third parties who have suffered personal injuries or damage to their property as a result of a defect in the building. An owner who is, or should presumably be, aware of a defect in a building may incur liability to third parties injured by the defect because the owner decided not to incur the expense of repairing the defect in the building. The decision which attracts that liability will usually not be one to which the negligent builder has contributed[158].

126 These considerations were reflected in the observations of McPherson JA in *Fangrove Pty Ltd v Tod Group Holdings Pty Ltd*[159] that the common law maintains the distinction between the protection afforded to personal or property interests and economic interests because the common law "values the physical integrity of a person at a level well above the interests of commerce", and because of "the capacity of those who engage in commerce to protect themselves against the kind of loss that the plaintiff sustained here." These observations accord with this Court's decision in *Woolcock Street Investments*.

Woolcock Street Investments

127 In *Woolcock Street Investments*[160], Gleeson CJ, Gummow, Hayne and Heydon JJ accepted that the general rule of the common law is that damages for economic loss which is not consequential upon damage to person or property are not recoverable in negligence even if the loss is foreseeable. Their Honours said:

---

157 *Gatsios Holdings v Kritharas Holdings (In Liq)* (2002) ATPR ¶41-864 at 44,800 [29].

158 *Murphy v Brentwood District Council* [1991] 1 AC 398 at 479-480, 488.

159 [1999] 2 Qd R 236 at 242 [19]-[20]. See also *Perre v Apand Pty Ltd* (1999) 198 CLR 180 at 299 [328]; [1999] HCA 36.

160 (2004) 216 CLR 515 at 530 [22].

> "In *Caltex Oil (Australia) Pty Ltd v The Dredge 'Willemstad'*[161], the Court held that there were circumstances in which damages for economic loss were recoverable. In *Caltex Oil*, cases for recovery of economic loss were seen as being exceptions to a general rule, said to have been established in *Cattle v Stockton Waterworks*[162], that even if the loss was foreseeable, damages are not recoverable for economic loss which was not consequential upon injury to person or property."

128 In *Woolcock Street Investments*[163], the plurality noted that the exception to the general rule for negligent misstatement recognised in cases such as *Mutual Life & Citizens' Assurance Co Ltd v Evatt*[164] and *Shaddock & Associates Pty Ltd v Parramatta City Council [No 1]*[165] depends on proof of an assumption of responsibility by the defendant and known reliance on the defendant by the plaintiff.

129 In *Woolcock Street Investments*[166], *Bryan v Maloney* was explained as an example of a decision based on "notions of assumption of responsibility and known reliance." The plurality said[167] that *Bryan v Maloney*:

> "depended upon considerations of assumption of responsibility, reliance, and proximity. Most importantly, [the principles that were engaged] depended upon equating the responsibilities which the builder owed to the first owner with those owed to a subsequent owner."

---

161 (1976) 136 CLR 529.

162 (1875) LR 10 QB 453.

163 (2004) 216 CLR 515 at 531 [24].

164 (1968) 122 CLR 556; [1968] HCA 74; on appeal to the Privy Council (1970) 122 CLR 628; [1971] AC 793.

165 (1981) 150 CLR 225; [1981] HCA 59.

166 (2004) 216 CLR 515 at 531 [24].

167 *Woolcock Street Investments Pty Ltd v CDG Pty Ltd* (2004) 216 CLR 515 at 527 [15].

130 Further in this regard, the plurality in *Woolcock Street Investments*[168] noted that in decisions such as *Perre v Apand Pty Ltd*[169], *Hill v Van Erp*[170] and *Esanda Finance Corporation Ltd v Peat Marwick Hungerfords*[171], the concept of vulnerability could be invoked as the rationale explaining the exceptions to the general rule. Vulnerability, in this field of discourse, is concerned not only with the reasonable foreseeability of loss if reasonable care is not taken by the defendant, but also, and importantly, with the inability of the plaintiff to take steps to protect itself from the risk of the loss. Their Honours held[172] that the concept of vulnerability did not afford a basis for holding the defendant liable in that case because the facts of the case did:

> "not show that the appellant could not have protected itself against the economic loss it alleges it has suffered. It is agreed that no warranty of freedom from defect was included in the contract by which the appellant bought the land, and that there was no assignment to the appellant of any rights which the vendor may have had against third parties in respect of any claim for defects in the building. Those facts describe what did happen. They say nothing about what could have been done to cast on the respondents the burden of the economic consequences of any negligence by the respondents."

131 To similar effect McHugh J said[173]:

> "The first owners and subsequent purchasers of commercial premises are usually sophisticated and often wealthy investors who are advised by competent solicitors, accountants, architects, engineers and valuers. In the absence of evidence, this Court must assume that the first owner of commercial premises is able to bargain for contractual remedies against

---

168 (2004) 216 CLR 515 at 530-531 [23].

169 (1999) 198 CLR 180.

170 (1997) 188 CLR 159; [1997] HCA 9.

171 (1997) 188 CLR 241; [1997] HCA 8.

172 *Woolcock Street Investments Pty Ltd v CDG Pty Ltd* (2004) 216 CLR 515 at 533 [31].

173 *Woolcock Street Investments Pty Ltd v CDG Pty Ltd* (2004) 216 CLR 515 at 553 [96].

the builder. It must also assume that a subsequent purchaser is able to bargain for contractual warranties from the vendor of such premises."

132 These passages accord with the primacy of the law of contract in the protection afforded by the common law against unintended harm to economic interests where the particular harm consists of disappointed expectations under a contract. The common law has not developed with a view to altering the allocation of economic risks between parties to a contract by supplementing or supplanting the terms of the contract by duties imposed by the law of tort[174].

133 Statutory provisions may supplement the common law of contract by providing for special protection to identified classes of purchasers on the ground, for example, that they may not be expected to be sufficiently astute to protect their own economic interests. Part 2C of the *Home Building Act* 1989 (NSW) is an example of such a statutory regime.

134 By enacting the scheme of statutory warranties, the legislature adopted a policy of consumer protection for those who acquire buildings as dwellings. To observe that the *Home Building Act* does not cover claims by purchasers of serviced apartments is not to assert that the Act contains an implied denial of the duty propounded by the respondent. Rather, it is to recognise that the legislature has made a policy choice to differentiate between consumers and investors in favour of the former. That is not the kind of policy choice with which courts responsible for the incremental development of the common law are familiar[175]; and to the extent that deference to policy considerations of this kind might be seen to be the leitmotif of this Court's decision in *Bryan v Maloney*, the action taken by the New South Wales legislature served to relieve the pressure, in terms of policy, to expand the protection available to consumers.

Bryan v Maloney

135 It might be said that this Court's decision in *Bryan v Maloney* is distinguishable from the present case because it was concerned with the construction of a dwelling house rather than a commercial investment. But this distinction was not said to be material by either party in this Court. That is understandable, given that the distinction between purchases of buildings for

---

174 *Downsview Nominees Ltd v First City Corporation Ltd* [1993] AC 295 at 316; *Hill v Van Erp* (1997) 188 CLR 159 at 179, 223, 231-234.

175 Stevens, *Torts and Rights*, (2007) at 312; Arvind and Steele (eds), *Tort Law and the Legislature: Common Law, Statute and the Dynamics of Legal Change*, (2013) at 3, 469-470.

domestic and commercial purposes is an unstable one (at least in the absence of statutory definition), because its application means that liability is apt to come and go depending on the use intended for a building by its successive purchasers[176].

136 The material distinctions between the present case and *Bryan v Maloney* lie, first, in the detailed prescriptions of the D&C contract between the appellant and the developer, in contrast to the simple obligation in *Bryan v Maloney* between the builder and the original owner to exercise reasonable skill and diligence in the construction of the dwelling; and, secondly, in the express promises in cll 32.6 and 32.7 of the sales contracts, in contrast to the situation in *Bryan v Maloney*, where there was no promise as to quality given to Mrs Maloney when she acquired the dwelling.

137 As to the first of these grounds of distinction, in *Bryan v Maloney*[177] the builder's obligations as to the quality of design and construction were not expressed in the specific and detailed provisions to be found in the D&C contract. That being so, it could also be said that the relationship between the builder and the original owner in *Bryan v Maloney* was:

> "characterized by the kind of assumption of responsibility on the one part (ie the builder) and known reliance on the other (ie the building owner) which commonly exists in the special categories of case in which a relationship of proximity and a consequent duty of care exists in respect of pure economic loss."[178]

138 A conclusion that the builder owed to the first owner obligations equivalent in content to the tortious duty asserted by the subsequent owner was apparently thought to lessen the force of the objection to imposing a more onerous obligation on a builder in favour of the subsequent owner than was owed by the builder to the person for whom it agreed to carry out the building work and by whom it was paid[179]. In *Woolcock Street Investments*[180], the plurality noted that:

---

176 cf *Zumpano v Montagnese* [1997] 2 VR 525 at 528-534.

177 (1995) 182 CLR 609 at 623.

178 *Bryan v Maloney* (1995) 182 CLR 609 at 624.

179 *Woolcock Street Investments Pty Ltd v CDG Pty Ltd* (2004) 216 CLR 515 at 532 [28].

> "In *Bryan v Maloney*, it was found that there was no disconformity between the duty owed to the original owner and the duty owed to the subsequent owner. As Toohey J said[181], that case was 'uncomplicated by anything arising from the contract between the appellant and Mrs Manion' (the original owner)."

139 In this case, by contrast, there was no substantial equivalence between the obligations of the appellant to the developer and the duty propounded by the respondent. That may be seen by a consideration of the terms of the contract between the appellant and the developer to which reference will be made in the next section of these reasons.

140 As to the second ground of distinction noted above, in the present case each purchaser from the developer exercised its contractual wisdom to bargain for protection against the risk of defects in the work. Purchasers of units in the serviced apartment complex from the developer, and the respondent, were protected by reason of the developer's promises in cll 32.6 and 32.7 of the sales contracts against the risk of economic loss because of defects of quality. It is true that these provisions did not protect purchasers or the respondent against the possibilities that the developer would not be of sufficient substance to meet the liability or that any defect would not be discovered within time to make a claim under the warranty. But as to these possibilities, the appellant had nothing to do with the purchaser's decision to accept the value of the developer's warranty or with the decision by the purchaser not to investigate for defects. Had a purchaser not been satisfied that its investment was adequately protected in this way, it could have avoided the risk of loss by taking its capital and investing elsewhere. As McHugh J said in *Woolcock Street Investments*[182]:

> "A commercial building is constructed or bought because it is perceived to be a suitable vehicle for investment. … [N]o prudent purchaser would contemplate buying a building without determining whether it has existing or potential construction defects. Knowledge of its defects, actual or potential, is central to any evaluation of its worth as an investment. In so far as risks are uncertain or unknown, the prudent purchaser will factor the risk into the price or obtain contractual protections or, if necessary, walk away from the negotiations."

---

180 (2004) 216 CLR 515 at 532-533 [29].

181 *Bryan v Maloney* (1995) 182 CLR 609 at 665.

182 (2004) 216 CLR 515 at 558 [110].

The obligations of the appellant to the developer

141 Basten JA held that the developer was "vulnerable in the relevant sense" to the appellant. In this regard, his Honour said[183]:

> "The defects, so far as one can tell, do not involve complaints about the design stage of the project, but rather the execution of the building works. There was a superintendent appointed under the design and construct contract, but there can be no doubt that the developer relied upon the expertise, care and honesty of the builder in performing its obligations under the contract. Whatever may be possible in theory, there is no suggestion that in practical terms the contract was not administered in accordance with usual industry practices, which inevitably involve reliance by the developer on the exercise of responsibility by the builder. There is no reason in these circumstances to treat the developer as otherwise than vulnerable in the relevant sense."

142 This passage suggests that one may disregard the role of the Superintendent under the D&C contract as a mechanism apt to afford protection to the developer against loss of value due to latent defects. But, whatever the "usual industry practices" to which his Honour was referring, the provision made by cll 31 and 42 of the D&C contract for supervision and assessment of the appellant's performance by the Superintendent, linked as it was to payment of the appellant for its work, was a contractual mechanism which squarely placed the risk of deficient work upon the appellant.

143 The respondent referred to *Barclay v Penberthy*[184] to support its argument that the duty propounded by the respondent was owed by the appellant to the developer concurrently in contract and tort. In *Barclay*, the plaintiff succeeded in its claim for damages for economic loss suffered when the aircraft it had chartered crashed as a result of the pilot's negligence, killing the plaintiff's valued employees and thus depriving it of their services. The Court held that it was an implied term of the contract of charter that the charter would be carried out with reasonable skill and diligence. There was no express provision in the contract which dealt with the subject of this term. The obligation created by this implied term was sufficient to entitle the plaintiff to recover the loss suffered as a result of negligent performance of the contract between the plaintiff and the defendant. The content of the duty which arose from the defendant's assumption of

---

183 *The Owners – Strata Plan No 61288 v Brookfield Australia Investments Ltd* (2013) 85 NSWLR 479 at 508 [120].

184 (2012) 246 CLR 258 at 284-285 [42]-[48]; [2012] HCA 40.

responsibility under that contract was the same as that which arose under the implied term of the charter. That was also the case in *Astley v Austrust*[185], to which Macfarlan JA referred. In each of these cases, the content of the duty was the same in contract and tort. That is not the case here.

144 In the present case, the liability of the appellant to the developer was the subject of detailed provisions relating to the risk of latent defects in the appellant's work. The provisions in cll 4, 30, 31, 37 and 42 of the D&C contract expressly cast onto the appellant the risk of expense required to make good any defect in the work. These detailed provisions were apt to secure performance of cl 55 of the D&C contract, which required that the construction be completed in accordance with detailed specifications. They set out the extent of the appellant's obligations to ensure that the developer should "get what it paid for". To supplement them with an obligation to take reasonable care to avoid a reasonably foreseeable economic loss to the developer in having to make good the consequences of latent defects caused by the appellant's defective work would be to alter the allocation of risks effected by the parties' contract.

145 The provisions of the D&C contract regulated the appellant's obligations to the developer and the extent of the appellant's liability for failing to meet those obligations. To the extent that the respondent's complaints in relation to the steel lintels and windows are grounded in an alleged failure to comply with the contract's specifications, reliance on a duty in the terms propounded by the respondent would be unnecessary and indeed embarrassing. Either the work and materials of the appellant complied with the specifications, in which case the appellant had fulfilled its obligations to the developer, or they did not. In relation to the other categories of alleged defect, whether the respondent's claims of defective work could be established would necessarily depend upon the specifications and other documents referred to in cl 55 of the D&C contract, rather than upon the general duty propounded by the respondent.

<u>A duty owed by the appellant to the respondent independently of its obligations to the developer?</u>

146 Basten JA analysed the position of the respondent in terms of its vulnerability to the appellant. His Honour said[186]:

---

185 (1999) 197 CLR 1 at 22-23 [47]-[48].

186 *The Owners – Strata Plan No 61288 v Brookfield Australia Investments Ltd* (2013) 85 NSWLR 479 at 508-509 [122].

> "[T]he [respondent] is to be viewed as a true successor in title to the interests of the developer. However, it was vulnerable with respect to latent defects in the same way that the developer was. Indeed, its position was weaker than that of the developer, which may have had some opportunity to carry out inspections during the course of the construction and before the defective materials were no longer examinable."

147 In relation to the ability of purchasers of lots from the developer to protect themselves against the risk of economic loss, Basten JA said[187]:

> "The question of legal protection is more complicated. The standard sale contracts did not include such protection. They were agreed between the builder and the developer and the builder retained a contractual right to be informed of and to approve any change in their terms. It seems inconsistent with the concept of vulnerability, in relation to the existence of a liability on the part of the [appellant] in tort, to say that the purchasers were not vulnerable because they could have insisted upon a contractual right as against the builder or the developer."

148 That reasoning is not consistent with *Woolcock Street Investments*[188]. And, in any event, in this case the purchasers did insist upon "a contractual right as against ... the developer" in cl 32.6 of the sales contracts. It may also be noted that there was no factual basis for a conclusion that each purchaser was deprived by the appellant's conduct of the choice of bargaining with the developer for a more extensive warranty as to quality or of walking away from the negotiation and investing elsewhere if a satisfactory warranty at an acceptable price was not forthcoming. In this regard, there was no encouragement given by the appellant or suggestion that the appellant assumed responsibility to them for their decision.

149 As to the points made by Macfarlan and Leeming JJA in the Court of Appeal upon which the respondent relied in this Court, the question on which the liability asserted by the respondent depends is not whether the legislative scheme of the SSM Act and the SSFD Act excludes a duty of care in favour of the owners corporation. Rather, the question is whether the owners corporation itself suffered a loss in terms of the value of the common property vested in it when, viewed separately from the individual lot owners, it came into existence.

---

187 *The Owners – Strata Plan No 61288 v Brookfield Australia Investments Ltd* (2013) 85 NSWLR 479 at 509 [125].

188 (2004) 216 CLR 515 at 533 [31], 553 [96].

150 The circumstance that the respondent did not exist at the time that the defective work was carried out points against, rather than in favour of, the duty of care propounded by the respondent given that on this basis it could not have relied upon the appellant in any way. There is no basis for a finding of fact that there was an assumption of responsibility by the appellant in favour of the respondent, or known reliance on the appellant on the part of the respondent, in relation to the quality of the common property of the serviced apartment complex. Further, an owners corporation acquires the common property in a strata scheme without any outlay on its part. Its assets are not diminished by the acquisition, at least if the common property is worth more than the cost of repairing latent defects (and there is no suggestion here that the common property is worth less than the cost of repair). Accordingly, if one considers the owners corporation independently of the individual lot owners, it is impossible to see that it has suffered any loss by reason of the quality of the common property vested in it.

151 If the respondent is viewed as the alter ego of the purchasers from the developer, the respondent's position is not any stronger. Before explaining why that is so, it is desirable to acknowledge that it may be the better view of the position to regard the respondent for present purposes as the representative of the lot owners.

152 In *Owners – Strata Plan No 43551 v Walter Construction Group Ltd*[189], Spigelman CJ, with whom Ipp and McColl JJA agreed, said that the statutory description of an owners corporation in s 20 of the SSFD Act as agent for the proprietors of individual lots should not be understood "solely in terms of an agency at common law." The precise significance of the reference to agency in s 20 of the SSFD Act is debatable[190], but it is sufficient for present purposes to

---

189 (2004) 62 NSWLR 169 at 178-179 [43]-[45]. See also *Vero Insurance Ltd v The Owners – Strata Plan No 69352* (2011) 81 NSWLR 227 esp at 240-241 [60], 243 [73].

190 It may be of some significance in this regard that, in *Salomon v Salomon & Co* [1897] AC 22 at 31, the great case which established that a company formed under the *Companies Act* 1862 (UK) and its analogues is a legal person separate from its shareholders, Lord Halsbury LC expressly rejected the proposition that a limited liability company could be regarded as the "agent" of its shareholders; see also at 35, 54-55. The terms of s 20, in deploying the concept of agency, are at least apt to ensure that an owners corporation is not the owner of the common property as an entity distinct from the lot owners. Rather, it is a convenient statutory conduit for the funds necessary to maintain and conserve the beneficial interests of lot owners in the common property.

say that it tends to confirm, rather than to deny, that the detriment to the economic or financial interests of the owners corporation is, in substance, suffered by the owners of lots. There is nothing in the SSFD Act to suggest that the cost incurred by an owners corporation in meeting the need to keep the common property in good repair is not a loss truly borne by the individual lot owners, given that they are called upon to make proportionate contributions by way of levy under ss 75 and 76 of the SSM Act in order to meet that expense.

153 That view is supported by s 227(2) of the SSM Act, which provides in relation to common property that "[i]f the owners of the lots in a strata scheme are jointly entitled to take proceedings against any person … the proceedings may be taken by ... the owners corporation." Section 227(3) goes on to provide that "[a]ny judgment … given … in favour of or against the owners corporation in any such proceedings has effect as if it were a judgment … given … in favour of or against the owners." These provisions are consistent with the view that the legislation, while establishing the owners corporation as a convenient vehicle for the vindication of the interests of the individual lot owners, does not deny or diminish those interests.

154 On the basis that the respondent is to be regarded as making its claim as a proxy for the purchasers from the developer, counsel for the respondent argued that cl 32.7 of the standard form contracts was concerned not with the protection of the purchasers, but with the conferral on the developer of a right to repair defects and thereby to mitigate the damages which might otherwise be recovered from it by the purchasers if they incurred expense in repairing defects themselves. Counsel's argument was evidently intended to lessen the force of the appellant's argument that the tortious duty propounded by the respondent was more extensive than the contractual protection which purchasers had obtained from the developer. As an argument in favour of discounting the protection conferred on the purchasers it is not persuasive.

155 Clause 32.7 expressly obliged the developer to repair defects brought to its attention within a specified period. The purchasers had a contractual right against the developer which could have protected them against the risk of which the respondent now complains had those rights been pursued in accordance with their terms. It is true that the purchasers would have been required to be alert to the possibility of latent defects in order to exercise their rights under cl 32.7, but the very existence of the provision reflects an awareness of the relevant risk as well as a means of dealing with it.

156 Counsel for the respondent also said that, if individual lot owners might have brought claims against the developer under cl 32.7 in respect of their proportionate share of the loss incurred by reason of the defects in the common property which have emerged, this right might not now be valuable, for example,

because it might be unenforceable due to the lapse of time and associated expiration of the applicable limitation period for bringing an action in contract against the developer, or because of the financial inability of the developer to meet the claims. But these arguments serve only to make the point that the contractual rights of individual purchasers for which they bargained were cast in terms which expressly limited their scope and duration in a manner inconsistent with the open-ended liability now asserted by the respondent.

Winnipeg Condominium and dangerous defects

157 Basten JA derived support[191] for his answer to the separate question from the decision of the Supreme Court of Canada in *Winnipeg Condominium Corporation No 36 v Bird Construction Co*[192]. In that case the Supreme Court of Canada held that a builder owes a duty of care in tort to a subsequent purchaser of the building if it can be shown that it is 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 occupants. Where such defects become manifest before any damage to persons or property occurs, a subsequent purchaser may recover the reasonable cost of making good the defects in order to put the building into a non-dangerous state.

158 The respondent argued that the Court of Appeal erred in limiting the duty said to be owed by the appellant to the respondent to cases where the repair of defects in construction was necessary to obviate a situation of danger to person or property. Nevertheless, counsel for the respondent sought to rely upon the decision of the Supreme Court of Canada in *Winnipeg Condominium* as a last resort to support the Court of Appeal's answer to the separate question.

159 It may be noted that in *Winnipeg Condominium* the Supreme Court of Canada chose not to follow the approach of the House of Lords in *D & F Estates Ltd v Church Commissioners for England*[193] and *Murphy v Brentwood District Council*[194].

---

191 *The Owners – Strata Plan No 61288 v Brookfield Australia Investments Ltd* (2013) 85 NSWLR 479 at 509-510 [127]-[128].

192 [1995] 1 SCR 85.

193 [1989] AC 177.

194 [1991] 1 AC 398.

160 The approach in *Winnipeg Condominium* was noted, but not followed, by this Court in *Bryan v Maloney*[195] and in *Woolcock Street Investments*[196]. In *Fangrove Pty Ltd v Tod Group Holdings Pty Ltd*[197], de Jersey CJ, in the Court of Appeal of Queensland, noted that no Australian authority had adopted this approach. In terms of Australian authority, the position has not improved for the respondent in this regard in the years since that case was decided.

161 The approach in *Winnipeg Condominium* is attended by the practical difficulty that "the existence of the duty will not be known until after the defects have occurred and they can be confidently categorised as dangerous."[198] More importantly, in point of principle the approach in *Winnipeg Condominium* is driven by the assumption that the cost of repair or diminution in market value of a building is a reflex of the liability for physical damage to person or property which may occur if the defect is not repaired. Quite apart from the haphazard nature of this notion of equivalence of damage, this approach is flawed in that it detaches the duty not to inflict harm from the harm which is the gist of the cause of action.

162 As Lord Oliver of Aylmerton said in *Murphy v Brentwood District Council*[199]:

> "If one assumes the … case of one who has come into possession of a defective chattel … which may be a danger if it is used without being repaired, it is impossible to see upon what principle such a person, simply because the chattel has become dangerous, could recover the cost of repair from the original manufacturer.
>
> The suggested distinction between mere defect and dangerous defect … is, I believe, fallacious. … [O]nce the danger ceases to be latent … [t]he 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

---

195 (1995) 182 CLR 609 at 621 fn 66, 649-651.

196 (2004) 216 CLR 515 at 534 [34] fn 108.

197 [1999] 2 Qd R 236 at 239-240 [12].

198 *Fangrove Pty Ltd v Tod Group Holdings Pty Ltd* [1999] 2 Qd R 236 at 248 [46].

199 [1991] 1 AC 398 at 488-489.

otherwise inevitable injury but in order to enable him to continue to use the property or the chattel."

The position in other common law jurisdictions

163 The conclusion that the duty propounded by the respondent should not be accepted is in accord with the position in the United Kingdom[200]. In addition, the preponderance of judicial authority in the United States accords with the conclusion that the respondent's claim should fail[201].

164 That a different view prevails in Canada has already been noted. For the reasons set out above, that approach should not be followed in Australia. The respondent's preferred position is also supported by the decision of the Judicial Committee of the Privy Council on appeal from New Zealand in *Invercargill City Council v Hamlin*[202]. But in that decision it was acknowledged that it departed from the approach which has prevailed in the United Kingdom[203]. For the reasons set out above, the latter view better accords with the coherent development of the common law.

---

200 *D & F Estates Ltd v Church Commissioners for England* [1989] AC 177; *Murphy v Brentwood District Council* [1991] 1 AC 398; *Robinson v P E Jones (Contractors) Ltd* [2012] QB 44.

201 *East River Steamship Corp v Transamerica Delaval Inc* 476 US 858 at 870 (1986); *Redarowicz v Ohlendorf* 441 NE 2d 324 (Ill 1982); *Sensenbrenner v Rust, Orling & Neale, Architects Inc* 374 SE 2d 55 (Va 1988); *Casa Clara Condominium Association Inc v Charley Toppino and Sons Inc* 620 So 2d 1244 (Fla 1993); *Calloway v City of Reno* 993 P 2d 1259 (Nev 2000); *Moglia v McNeil Co Inc* 700 NW 2d 608 (Neb 2005); *Association of Apartment Owners of Newtown Meadows ex rel its Board of Directors v Venture 15 Inc* 167 P 3d 225 (Haw 2007); *Davencourt at Pilgrims Landing Homeowners Association v Davencourt at Pilgrims Landing LC* 221 P 3d 234 (Utah 2009). But see *Brown v Fowler* 279 NW 2d 907 (SD 1979); *Morris v Holt* 401 NE 2d 851 (Mass 1980); *Terlinde v Neely* 271 SE 2d 768 (SC 1980); *Cosmopolitan Homes Inc v Weller* 663 P 2d 1041 (Colo 1983); *Oates v Jag Inc* 333 SE 2d 222 (NC 1985).

202 [1996] AC 624. See also *Bowen v Paramount Builders (Hamilton) Ltd* [1977] 1 NZLR 394; *Mount Albert Borough Council v Johnson* [1979] 2 NZLR 234; *Chase v de Groot* [1994] 1 NZLR 613.

203 [1996] AC 624 at 648-649.

Conclusion and orders

165 The appeal should be allowed.

166 The orders of the Court of Appeal of New South Wales should be set aside, and in their place it should be ordered that the appeal to the Court of Appeal of New South Wales should be dismissed with costs.

167 The first respondent should be granted special leave to cross-appeal, but the cross-appeal should be dismissed with costs.

168 The first respondent must pay the appellant's costs of the appeal to this Court.

169 GAGELER J. A duty of care at common law is a duty of a specified person, or a person within a specified class, to exercise reasonable care within a specified area of responsibility to avoid specified loss to another specified person, or to a person within another specified class. Whether or not a particular duty of care should be recognised in a novel category of case is determined on the understanding that "[t]here are policies at work in the law which can be identified and applied to novel problems, but the law of tort develops by reference to principles, which must be capable of general application"[204].

170 The question in this appeal from the Court of Appeal of the Supreme Court of New South Wales is whether the builder of a strata development should be recognised to have a duty to exercise reasonable care, in executing the building work undertaken pursuant to a contract with the developer, to avoid specified loss to the owners corporation, which is the body corporate brought into existence on registration of the strata plan[205], as the legal owner of the common property[206], with an ongoing statutory responsibility for keeping the common property in a good state of repair[207].

171 The specified loss, on the widest formulation of the putative duty, would extend to the cost of repairing all defects in common property not apparent at the time of registration of the strata plan. A narrower formulation of the duty, which the Court of Appeal accepted, would limit the specified loss to the cost of repairing only those defects in common property not apparent at the time of registration of the strata plan which are structural, are dangerous to persons or other property, or make an apartment in the building uninhabitable.

172 Neither the existence nor the scope of the putative duty of care can turn on the peculiar feature of an owners corporation that the corporation has no option but to be brought into existence as the legal owner of common property and to shoulder the ongoing responsibility for keeping that common property in a good state of repair. It is not the function of the common law to fashion a principle of tortious liability which would confer a right to compensation exclusively on the unique statutory creation of a particular statutory scheme.

173 If the builder of a strata development is to be recognised as having the putative duty of care, it is because the owners corporation stands in relation to the builder as proxy for the owners from time to time of the registered lots

---

204 *Sullivan v Moody* (2001) 207 CLR 562 at 579 [49]; [2001] HCA 59.

205 Section 8 of the *Strata Schemes Management Act* 1996 (NSW).

206 Section 18 of the *Strata Schemes (Freehold Development) Act* 1973 (NSW).

207 Section 62 of the *Strata Schemes Management Act* 1996 (NSW).

corresponding to apartments in the building. In them the beneficial interest in the common property is vested as tenants in common[208]. For them the corporation is constituted agent[209]. To them the corporation can ultimately look to cover the cost of repair if that cost cannot be recouped elsewhere[210]. It is they who bear the economic burden of the loss.

174 Whether or not the putative duty of care should be recognised therefore falls to be determined by applying principles which must be capable of general application to determine the existence and scope of such duty as a builder may have to exercise reasonable care, in the execution of building work, to avoid a subsequent owner incurring the cost of repairing latent defects in the building.

175 It has long been accepted that a common law duty of care can coexist with a duty in contract and that a duty of care can be to avoid economic loss. That being so, legal taxonomy alone cannot assign such common law liability as a builder may have to a subsequent owner of a building to the province of contract to the exclusion of the province of tort. Nor is recognition of a duty on the part of a builder to avoid a subsequent owner incurring the cost of remedying a latent defect in the building open to criticisms of indeterminacy which often count against recognising a common law duty of care to avoid economic loss.

176 Markedly divergent approaches to whether a builder should be recognised to have such a duty of care to a subsequent owner have now prevailed for more than two decades in other common law jurisdictions. In the United Kingdom, a duty of care has been rejected[211]. In Canada, a duty of care has been recognised, limited to the cost of remedying dangerous defects in the building[212]. In New Zealand, a duty of care has been recognised, extending to the cost of remedying all latent defects[213]. There is no reason to consider any one of those approaches to result in a greater net cost to society than any other. Provided the principle of tortious liability is known, builders can be expected to accommodate it in the

---

208 Section 20 of the *Strata Schemes (Freehold Development) Act* 1973 (NSW).

209 Section 20 of the *Strata Schemes (Freehold Development) Act* 1973 (NSW).

210 Sections 69-71, 75(2)(e) and 76 of the *Strata Schemes Management Act* 1996 (NSW).

211 *Murphy v Brentwood District Council* [1991] 1 AC 398; *Department of the Environment v Thomas Bates and Son Ltd* [1991] 1 AC 499.

212 *Winnipeg Condominium Corporation No 36 v Bird Construction Co* [1995] 1 SCR 85.

213 *Invercargill City Council v Hamlin* [1996] AC 624.

contractual terms on which they are prepared to build and subsequent owners can be expected to accommodate it in the contractual terms on which they are prepared to purchase.

177 There is a net cost to society which arises from uncertainty as to the principle to be applied. McHugh J made that point in the context of discussing tortious liability for economic loss more generally when he referred to costs to parties and to the public of principles or rules whose application cannot confidently be predicted, and stated that "[i]f negligence law is to serve its principal purpose as an instrument of corrective justice, the principles and rules which govern claims in negligence must be as clear and as easy of application as is possible"[214]. Concern to minimise the cost of legal uncertainty was identified as a factor in overruling, rather than attempting to distinguish, prior authority so as to arrive at the position in respect of the liability of a builder to a subsequent owner which has prevailed in the United Kingdom[215].

178 Part of the difficulty encountered by the Court of Appeal in the present case was in discerning the principle for which *Bryan v Maloney*[216] remains authority after *Woolcock Street Investments Pty Ltd v CDG Pty Ltd*[217].

179 The question addressed in *Bryan v Maloney* was identified by the plurality in that case (Mason CJ, Deane and Gaudron JJ) as "whether, under the law of negligence, a professional builder who constructs a house for the then owner of the land owes a prima facie duty to a subsequent owner of the house to exercise reasonable care to avoid ... foreseeable damage" specified as "the diminution in value of the house when a latent and previously unknown defect in its footings … becomes manifest"[218] equating to "the amount which would necessarily be expended in remedying the inadequate footing[s] and their consequences"[219]. Their Honours gave a positive answer to that question. They said that the contrary approach which had then recently come to prevail in the United Kingdom rested on "a narrower view of the scope of the modern law of

---

214 *Perre v Apand Pty Ltd* (1999) 198 CLR 180 at 216 [91]; [1999] HCA 36.

215 *Murphy v Brentwood District Council* [1991] 1 AC 398 at 471-472.

216 (1995) 182 CLR 609; [1995] HCA 17.

217 (2004) 216 CLR 515; [2004] HCA 16.

218 (1995) 182 CLR 609 at 617.

219 (1995) 182 CLR 609 at 616.

negligence and a more rigid compartmentalization of contract and tort than is acceptable under the law of this country"[220].

180 The plurality in *Bryan v Maloney* referred to the relationship between the builder and the subsequent owner of a house as one characterised "by assumption of responsibility on the part of the builder and likely reliance on the part of the owner"[221], and emphasised that the decision in that case turned, "to no small extent, on the particular kind of economic loss involved" and, in particular, on the building having been "erected to be used as a permanent dwelling house"[222]. The other member of the majority, Toohey J, similarly emphasised that the decision related to "the building of a house that is a non-commercial building"[223]. Subsequent decisions of intermediate courts of appeal treated its holding as confined to buildings of that description[224]. The plurality in *Woolcock Street Investments* (Gleeson CJ, Gummow, Hayne and Heydon JJ) nevertheless expressed doubt that *Bryan v Maloney* should be "understood as depending upon drawing a bright line between cases concerning the construction of dwellings and cases concerning the construction of other buildings" and pointed to difficulties of maintaining such a distinction[225].

181 The question addressed in *Woolcock Street Investments* was whether an engineering company owed a duty to exercise reasonable care, in designing the foundations of a warehouse and office complex, to avoid a subsequent purchaser of the building sustaining economic loss when it became apparent after purchase that the building was suffering substantial structural distress. The plurality noted that the engineering company designed the foundations in circumstances where "the original owner asserted control over the investigations which the engineer undertook for the purposes of performing its work"[226]. Their Honours did not, however, treat the alleged defect in the design of the foundations as outside the scope of the work undertaken. Their stated ground for concluding that the

---

220 (1995) 182 CLR 609 at 629.

221 (1995) 182 CLR 609 at 627.

222 (1995) 182 CLR 609 at 630.

223 (1995) 182 CLR 609 at 665.

224 *Woollahra Municipal Council v Sved* (1996) 40 NSWLR 101; *Zumpano v Montagnese* [1997] 2 VR 525; *Fangrove Pty Ltd v Tod Group Holdings Pty Ltd* [1999] 2 Qd R 236.

225 (2004) 216 CLR 515 at 528 [17].

226 (2004) 216 CLR 515 at 531-532 [25].

engineering company did not owe the putative duty was that the subsequent purchaser did not allege that it "could not have protected itself against the economic loss"[227]. They mentioned as a possible means of achieving that protection that the subsequent purchaser might have contracted on terms which would have cast on the engineering company the "economic consequences" of any negligence[228].

182 The ground so stated by the plurality for denying the putative duty accorded with the observation of McHugh J, who also formed part of the majority in *Woolcock Street Investments*, that "the capacity of a person to protect him or herself from damage by means of contractual obligations is merely one – although often a decisive – reason for rejecting the existence of a duty of care in tort in cases of pure economic loss"[229]. In *Woolcock Street Investments*, it was the decisive factor.

183 McHugh J referred in *Woolcock Street Investments* to a variety of ways in which a subsequent purchaser might take steps to protect against the risk of latent defects by adjusting the terms on which the subsequent purchaser is prepared to contract with the vendor[230]. He also referred to the possibility of commissioning expert investigation of the building prior to purchase[231]. He pointed to disadvantages of imposing tortious liability on a builder which included the practical difficulties in determining whether there has been a breach of an appropriate standard of care and the incentive to create artificial business structures to avoid a long tail of claims[232]. He continued[233]:

> "Of course ... contractual protections and expert investigations may turn out to be inadequate. In that event, a remedy in tort – particularly a remedy against secondary parties such as architects, engineers and sub-contractors – would be desirable. But cases where contractual protection will be found deficient are likely to be the exception rather than the rule. Whether exceptional or not, the ultimate question is whether the residual

---

227 (2004) 216 CLR 515 at 533 [31].

228 (2004) 216 CLR 515 at 533 [31].

229 (2004) 216 CLR 515 at 552 [94].

230 (2004) 216 CLR 515 at 550 [85], 558-559 [111].

231 (2004) 216 CLR 515 at 559 [111].

232 (2004) 216 CLR 515 at 557-558 [107]-[109].

233 (2004) 216 CLR 515 at 559 [112].

> advantages that an action in tort would give are great enough to overcome the disadvantages to which I have referred. This involves a value judgment, and the data that might permit that judgment to be made, if the data exists at all, is not before us. Because that is so, the better view is that this Court should not take the step of extending the principle of *Bryan v Maloney* to commercial premises. That is, this Court should hold that, in the absence of a contract between the owner of commercial premises and a person involved in the design or construction of those premises, the latter does not owe a duty to the current owner to prevent pure economic loss."

184 Turning specifically to the continuing authority of *Bryan v Maloney*, McHugh J said[234]:

> "Nothing in this judgment is intended to suggest that *Bryan v Maloney* would now be decided differently. Whether a different decision would now be reached under current doctrine almost certainly depends on whether evidence would reveal that the purchasers of dwelling houses are as vulnerable as the Court assumed in that case."

185 Absent any application that *Bryan v Maloney* should be overruled, and absent data which might permit the making of a value judgment different from that made in *Woolcock Street Investments*, the view expressed by McHugh J in *Woolcock Street Investments* should in my opinion be accepted. The continuing authority of *Bryan v Maloney* should be confined to a category of case in which the building is a dwelling house and in which the subsequent owner can be shown by evidence to fall within a class of persons incapable of protecting themselves from the consequences of the builder's want of reasonable care. Outside that category of case, it should now be acknowledged that a builder has no duty in tort to exercise reasonable care, in the execution of building work, to avoid a subsequent owner incurring the cost of repairing latent defects in the building. That is because, by virtue of the freedom they have to choose the price and non-price terms on which they are prepared to contract to purchase, there is no reason to consider that subsequent owners cannot ordinarily be expected to be able to protect themselves against incurring economic loss of that nature.

186 The plurality in *Woolcock Street Investments* noted that the actual decision in *Bryan v Maloney* had by then been "overtaken, at least to a significant extent, by various statutory forms of protection for those who buy dwelling houses which turn out to be defective"[235]. The Court of Appeal in the present case

---

234 (2004) 216 CLR 515 at 560 [116] (footnote omitted).

235 (2004) 216 CLR 515 at 534 [35].

referred in detail to the current statutory regime in New South Wales[236]. If legal protection is now to be extended, it is best done by legislative extension of those statutory forms of protection. Neither version of the putative duty of care should be recognised.

187 I agree with the orders proposed by the Chief Justice.

---

236 Part 2C of the *Home Building Act* 1989 (NSW). See *The Owners – Strata Plan No 61288 v Brookfield Australia Investments Ltd* (2013) 85 NSWLR 479 at 498-500 [77]-[82].