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RECOVERABILITY OF ECONOMIC LOSS IN CONSTRUCTION CASES

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Introduction

1. This paper examines the recoverability of so-called pure economic loss in construction disputes. The issue arises where a defendant, with whom the plaintiff does not have a contractual relationship, negligently constructs a defective building resulting in economic loss to the plaintiff independent of any physical injury or damage to other property. Economic loss is often calculated by measuring the difference between what the plaintiff paid for the property and the actual value of the property after the latent defects have become apparent or it can be the cost of putting the property right.
2. The recoverability of economic loss is analysed in terms of the existence of a duty of care. Duty of care analysis frequently asks the question duty to whom; however, in this context, the relevant question is duty for what. The proposition that a builder owes an ordinary duty of care founded upon *Donoghue v Stevenson* [1932] AC 562 principles with respect to negligent building work causing physical injury or damage to other property is uncontroversial and requires little elaboration. Whether a builder, or some other person (eg, an engineer or a materials supplier), who is responsible or accountable for a defect in a building owes a duty of care in negligence to the owner in respect of loss other than physical injury or damage to other property is altogether more disputed. The common law has traditionally been reluctant to recognise a duty to avoid causing non-physical or purely pecuniary loss, even when it was foreseeable. The breakthrough for plaintiffs came with the House of Lords decision in *Hedley*

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Byrne & Co Ltd v Heller & Partners Ltd [1964] AC 465 which held that a duty to take care could be owed by the maker of a statement to a person who suffered financial loss caused by reliance on that statement. This also opened the door to claims in negligence for financial loss arising in other ways.

3. There are a number of critical distinctions to be aware of when considering this issue. The first, clearly, is an assessment of the nature of the losses claimed for. Are they pure economic losses or do they fit into the categories of physical damage to property or personal injury? Assuming that they are pure economic losses, the second important distinction is by reference to the cause of action. If the claim is for breach of contract, the nature of loss dichotomy is not especially relevant. Economic losses are recoverable in contract law. It is only where there is no contractual relationship between the parties that the difficulties surrounding the existence of a tortious duty of care emerge. A further important distinction can be drawn between careless statements causing detrimental reliance and careless acts. This distinction can have a critical bearing on whether or not a duty of care is found to exist. A negligent representation as to the state of a building, for example, can give rise to a duty under *Hedley Byrne* principles but where negligent work erects a latently defective building, a duty of care in tort is not likely to exist.

The English Position

4. The Court of Appeal in *Dutton v Bognor Regis Urban District Council* [1972] 1 QB 373 and then the House of Lords in *Anns v Merton London Borough Council* [1978] AC 728 formerly permitted the recovery of damages for pure economic loss. In *Anns*, what was recoverable was the amount of expenditure necessary to restore a dwelling to a condition in which it no longer presented an imminent danger to the health or safety of persons occupying it. The *Anns* principle was subsequently extended by the House of Lords in *Junior Books Ltd v Veitchi* [1983] 1 AC 520, holding that subcontractors who built a defective floor in the plaintiff's factory were liable for the costs of repair notwithstanding the fact that the defect posed no risk to health.
5. In a significant reversal of jurisprudence, the House of Lords has roundly rejected the *Anns* line of authority acknowledging a duty of care in respect of pure economic loss. In *D & F Estates v Church Commissioners* [1989] AC 117 it was held that sub-contractors were not

liable to the lessees of a flat for the cost of repairing their negligent plaster work. The plasterers could not be liable to the plaintiffs with whom they had no contractual relationship simply for a defect in the quality of their workmanship. In *Murphy v Brentwood District Council* [1991] 1 AC 398, some 11 years after purchasing it as a new-build, the foundations of the plaintiff's house revealed themselves to be seriously defective which led to, amongst other issues, serious cracks in the internal walls and the fracturing of gas and waste pipes. The House of Lords rejected the claim. The cost of remedying the defects, which had been discovered before any injury to person or health had resulted or any damage to property other than the defective building itself had been caused, was irrecoverable pure economic loss.

6. The principle was applied in *Robinson v PE Jones (Contractors) Ltd* [2012] QB 44. The claimant and his wife had agreed to purchase from the defendant a property which was under construction. Subsequently a test identified faults with two fires and flues in the house. A preliminary issue arose as to whether the defendant owed the plaintiff a duty of care in tort. The Court of Appeal held that absent an assumption of responsibility a tortious duty of care co-extensive with contractual obligations did not arise and the only tortious duty owed by a manufacturer or builder to his client and others who would foreseeably own or use the product or building was to take reasonable care to prevent any defect in it causing a personal injury to them or damage to other property of theirs. In order to determine whether there had been an assumption of responsibility by one party to another so as to give rise to a tortious duty of care in respect of economic loss, it was necessary to consider the relationship and the dealings between the parties; since the parties had entered into a normal contract for the defendant to complete the construction of a house to an agreed specification and for the plaintiff to buy it at an agreed price and which set out warranties of quality and remedies for any breach, there was nothing to suggest that the defendant had assumed any responsibility to the plaintiff.
7. English law is thus relatively clear. Pure economic loss is not recoverable in tort. The limited exception to this is based on *Hedley Byrne* principles where there has been an assumption of responsibility by the defendant along with reliance by the plaintiff (see *Henderson v Merrett Syndicates Ltd* [1995] 2 AC 145, *per* Lord Goff). For example, in *Hamble Fisheries Ltd v L Gardner & Sons Ltd* [1999] 2 Lloyd's Rep 1 the Court of Appeal held that in order to establish a duty of care to avoid economic loss on the part of the manufacturer of engines for a ship, the plaintiffs had to show a special relationship of proximity which involved both an

assumption of responsibility by the manufacturer and reliance by them. Tuckey LJ held (at paras 26 and 27) that:

“[T]he general rule is that a manufacturer in the position of the respondents owes no duty of care to avoid economic loss. Exceptionally he may be under such a duty if he assumes responsibility to his customers in a situation which is akin to contract ... The test is an objective one so the focus of the inquiry must be on statements and conduct which cross the line between the parties.”

8. The Court of Appeal concluded that because the engines had been supplied via a chain of suppliers and the manufacturers had had no direct dealings with the plaintiffs at any time, there was no assumption of responsibility. Under English law, therefore, in the absence of direct dealings, it is very unlikely that there will be assumption of responsibility and consequent duty to avoid causing economic loss.

The Irish Position

9. The contemporary Irish approach to liability for negligently caused pure economic loss has been described as one of “fascinating uncertainty”.² Principles established with apparent clarity in *Ward v McMaster* [1985] IR 29 and [1988] IR 337 have been called into question by the judgment of Keane CJ in *Glencar Explorations plc v Mayo County Council (No 2)* [2002] 1 IR 84. In general terms, *Glencar* makes it considerably more difficult to establish a duty of care when novel situations present themselves. With specific reference to economic loss, Keane CJ was resistant to the recognition of a duty of care beyond what was covered by *Hedley Byrne*. It is not settled under Irish law whether pure economic loss is recoverable in tort claims other than for negligent misstatement.
10. In *Siney v Dublin Corporation* [1980] IR 400 the Corporation (a housing authority) had built a block of flats and let one of them to the plaintiff. The ventilation in the flat turned out to be defective and the plaintiff sued the Corporation in negligence for damage to furniture and clothing and for interference with comfort and convenience. The judgments do not make clear whether the claim for discomfort and inconvenience arose out of the physical damage to

² McMahon and Binchy, *Law of Torts* (4th ed, 2013), at [10.11].

the furniture and clothing or out of the damage to the building itself. Accordingly, it is not at all clear that the Supreme Court in *Siney* did in fact consider itself to be upholding an award for damages for pure economic loss. On one view, the decision might be construed simply as an award of damages arising out of physical damage to the plaintiff's property.

11. The Supreme Court found the Corporation to be liable for both heads of loss. In relation to the question of pure economic loss, Henchy J held (at p 421):

“Following on *Donoghue v. Stevenson* it has been established by a line of decisions (such as *Dutton v. Bognor Regis U.D.C.*; *Anns v. Merton London Borough* and *Batty v. Metropolitan Realisations Ltd.*) that where a person, including a builder or a local authority, carelessly provides a dwelling in which there is a concealed defect which the occupier could not have discovered by inspection, the person who provided the dwelling may be liable in negligence for personal injury or economic loss suffered as a result of the defect. The precise conditions or limitations of that liability need not now be considered, for I have no doubt that the principle of liability evolved in those cases is applicable to the circumstances of this case.”

12. In *Ward v McMaster* the plaintiffs received a loan from their local council to assist in the purchase of a house from the builder of the house. When they moved into the property they found it was riddled with defects, most of them concealed structural defects. The plaintiffs claimed against the vendor builder in negligence and succeeded at first instance. Costello J applied *Junior Books*, holding (at p 44):

“There is no doubt that this case has extended the liability of a builder for loss sustained by defective workmanship. I find its reasoning persuasive and I have no difficulty in applying it. It follows from it that the concept of reasonable foresight is one to be employed not only in deciding in a given case whether a duty of care *exists*, but also can be employed in determining its *scope*. Applying this concept to the present case it seems to me that the duty of care which the defendant owed to a purchaser of the bungalow which he built was one relating to hidden defects not discoverable by the kind of examination which he could reasonably expect his purchaser to make before occupying the house. But the duty was not limited to avoiding foreseeable harm to persons or property other than the bungalow itself (that

is a duty to avoid dangerous hidden defects in the bungalow) but extended to a duty to avoid causing the purchaser consequential financial loss arising from hidden defects in the bungalow itself, (that is a duty to avoid defects in the quality of the work).”

13. That part of the decision was not appealed by the vendor/builder.
14. The plaintiffs also brought a negligence claim against the local authority on the basis that it had the property valued by an auctioneer and not an appropriate surveyor. The first instance judge found that the local authority was also liable in negligence for pure economic loss. The local authority appealed and the Supreme Court upheld the decision. Henchy J (p 342) justified it on the basis that there were “special relations” between the plaintiffs and the local authority such that the authority “must be taken to have impliedly assured the plaintiff that the house would be good security for the loan.”
15. McCarthy J (with whom Walsh J agreed), however, found that a duty not to cause pure economic loss existed by applying the two stage test adopted by Lord Wilberforce in *Anns*, namely:

“[T]he position has now been reached that in order to establish that a duty of care arises in a particular situation, it is not necessary to bring the facts of that situation within those of previous situations where a duty of care has been held to exist. Rather the question has to be approached in two stages. First one has to ask whether, as between the alleged wrongdoer and the person who has suffered damage there is a sufficient relationship of proximity or neighbourhood such that, in the reasonable contemplation of the former, carelessness on his part may be likely to cause damage to the latter - in which case a prima facie duty of care arises. Secondly, if the first question is answered affirmatively, it is necessary to consider whether there are any considerations which ought to negative, or to reduce or limit the scope of the duty or the class of person to whom it is owed or the damages to which a breach of it may give rise ...”

16. In *McShane Wholesale Fruit and Vegetables Ltd v Johnston Haulage Company Ltd* [1997] 1 ILRM 86, Flood J (in a very short judgment) appears to have regarded claims based on pure economic loss as essentially non-controversial and non-distinctive:

“On the matter being opened in this Court, I was advised that the plaintiff and defendants had agreed that I should try a preliminary issue as to whether economic loss consequent on a negligent act is recoverable as damages, within this jurisdiction.

In Ireland since the Supreme Court decision in *Ward v. McMaster* [1988] IR 337; [1989] ILRM 400, the test for actionable negligence is:

- (a) A sufficient relationship of proximity between the alleged wrongdoer and the person who has suffered damage.
- (b) Such relationship that in the reasonable contemplation of the former carelessness on his part may be likely to cause damage to the latter — in which case a *prima facie* duty of care arises.
- (c) Subject always to any compelling exemption based on public policy.

McCarthy J stated the position as follows at pp. 349/409:

‘... I prefer to express the duty as arising from the proximity of the parties, the foreseeability of the damage and the absence of any compelling exemption based on public policy. I do not in any fashion seek to exclude the latter consideration although I confess that such a consideration must be a very powerful one if it is to be used to deny any injured party his right to redress at the expense of the person or body that injured him.’

The quality of the damage does not arise. It can be damage to property, to the person, financial or economic — see *Sweeney v. Duggan* [1991] 2 IR 274. The question as to whether the damage (of whatever type) is recoverable is dependent on proximity and foreseeability subject to the caveat of compelling exemption on public policy.

In short, the proximity of the parties giving rise to the duty of care must be such, as a matter of probability to be causal of the damage. If it is not, the damage is too remote and the action will fail. It will fail not because the damage is of a particular type but because the relationship between the wrongdoer and the person who suffers the

damage does not have the essential of sufficient relationship of proximity or neighbourhood.

It therefore follows that the fact that the damage is economic is not in itself a bar to recovery where the other elements above stated are present.

Whether the damage in this instance is or is not too remote is a question of fact to be determined on evidence.”

17. The Irish approach to the recognition of a duty of care, and therefore, very arguably, the recoverability of damages for pure economic loss, changed markedly in *Glencar*. Certainly the earlier authorities can no longer be accepted as setting out the Irish legal position on economic loss. Having considered *Siney* and *Ward*, Keane CJ concluded (pp 142-3) as follows:

“There remains the question of economic loss. The reason why damages for such loss - as distinct from compensation for injury to persons or damage to property - are normally not recoverable in tort is best illustrated by an example. If A sells B an article which turns out to be defective, B can normally sue A for damages for breach of contract. However, if the article comes into the possession of C, with whom A has no contract, C cannot in general sue A for the defects in the chattel, unless he has suffered personal injury or damage to property within the *Donoghue v. Stevenson* [1932] A.C. 562 principle. That would be so even where the defect was latent and did not come to light until the article came into C's possession. To hold otherwise would be to expose the original seller to actions from an infinite range of persons with whom he never had any relationship in contract or its equivalent.

That does not mean that economic loss is always irrecoverable in actions in tort. As already noted, economic loss is recoverable in actions for negligent misstatement. In *Siney v. Corporation of Dublin* [1980] I.R. 400, economic loss was held to be recoverable in a case where the damages represented the cost of remedying defects in a building let by the local authority under their statutory powers. Such damages were also held to be recoverable in *Ward v. McMaster* [1985] I.R. 29; [1988] I.R. 337, the loss being represented by the cost of remedying defects for which the builder and the

local authority were held to be responsible. In both cases, the loss was held to be recoverable following the approach adopted by the House of Lords in *Anns v. Merton London Borough* [1978] A.C. 728. While the same tribunal subsequently overruled its earlier conclusion to that effect in *Murphy v. Brentwood District Council* [1991] 1 A.C. 398, we were not invited in the present case to overrule our earlier decisions in *Siney v. Corporation of Dublin* and *Ward v. McMaster*. I would expressly reserve for another occasion the question as to whether economic loss is recoverable in actions for negligence other than actions for negligent misstatement and those falling within the categories identified in *Siney v. Dublin Corporation* and *Ward v. McMaster* and whether the decision of the House of Lords in *Junior Books Ltd. v. Veitchi Co. Ltd.* [1983] 1 A.C. 520 should be followed in this jurisdiction.”

18. It should be noted that Keane CJ’s comment in the above passage that “[i]n *Siney*, economic loss was held to be recoverable in a case where the damages represented the cost of remedying defects in a building” seems to be technically incorrect. It appears from the judgment of O’Higgins CJ in *Siney* that the damages were for physical damage to furniture and clothes and for physical discomfort and inconvenience (a kind of bodily injury) neither of which are obviously pure economic loss.
19. Keane CJ went on to consider (p 139) whether the *Anns* approach to establishing a duty of care or a more cautious approach, favoured in *Caparo plc v Dickman* [1990] 2 AC 605, should be followed:

“There is, in my view, no reason why courts determining whether a duty of care arises should consider themselves obliged to hold that it does in every case where injury or damage to property was reasonably foreseeable and the notoriously difficult and elusive test of ‘proximity’ or ‘neighbourhood’ can be said to have been met, unless very powerful public policy considerations dictate otherwise. It seems to me that no injustice will be done if they are required to take the further step of considering whether, in all the circumstances, it is just and reasonable that the law should impose a duty of a given scope on the defendant for the benefit of the plaintiff, as held by Costello J. at first instance in *Ward v. McMaster* [1985] I.R. 29, by Brennan J. in *Sutherland Shire Council v. Heyman* (1985) 157 C.L.R. 424 and by the House of Lords in *Caparo plc. v. Dickman* [1990] 2 A.C. 605. As Brennan J. pointed out, there

is a significant risk that any other approach will result in what he called a ‘massive extension of a *prima facie* duty of care restrained only by undefinable considerations ...’”

20. The uncertainty flowing from *Glencar* insofar as it concerned the recoverability of economic loss was commented upon by Geoghegan J in *Beatty v Rent Tribunal* [2006] 2 IR 191, 200:

“I do not want to express any views on the principles of Irish law relating to recovery of damages for economic loss in a negligence action. I am satisfied that the law on this question has not been finally determined in Ireland notwithstanding some relevant *obiter dicta* of Keane CJ in *Glencar*. It is unnecessary to express any views on that question in this appeal ...”

21. In *Bates v Minister for Agriculture* [2012] 1 IR 247, Laffoy J observed as follows (p 272):

“[I]t is important to note the caveat entered by Geoghegan J. at the end of his judgment, at p. 200 (with which Denham and Hardiman JJ. concurred) in *Beatty v. Rent Tribunal* [2005] IESC 66, [2006] 2 I.R. 191, that he was not expressing any views on the principles of Irish law ‘relating to recovery of damages for economic loss in a negligence action’, stating that the law had not been finally determined in Ireland.”

22. She further noted (p 276) the remarks in McMahon and Binchy, *Law of Torts* (3rd ed., 2000) at [10.141] that “*Ward v. McMaster* could well have been based on *Hedley Byrne* principles rather than proximity of relationship, having regard to the assumption of responsibility for obtaining an effective survey which Louth County Council was found to have undertaken.”

23. It follows that the basis or extent of a plaintiff’s entitlement under Irish law to recover damages for pure economic loss has still not been finally resolved. It is not clear whether the decision of the Supreme Court in *Ward v McMaster* represents an extension of the law or simply an application of *Hedley Byrne*. Even if it represents an extension of the law, the question then is whether it would be followed today having regard in particular to the comments of Keane CJ in *Glencar*. The tenor of his judgment was hostile to compensation for negligently caused pure economic loss. Keane CJ did not formally repudiate *Junior Books*

v Veitchi nor did he expressly exclude the imposition of liability for economic loss sustained in protecting people from the risk of physical injury caused by the defendant's negligence, which Costello P had recognised as appropriate in *Ward v McMaster*. Keane CJ did however cast a long shadow over their future survival prospects. This uncertainty can only be resolved by a further decision of the Supreme Court. However one would have to conclude that it is likely that the Irish Courts will ultimately heed Keane CJ's emphasis on the importance of the distinction between pure economic loss and physical damage or injury and that recovery for the former will be excluded or significantly limited.

24. However it must be recognised that the recent High Court decision in *McGee v Alcorn* [2016] IEHC 59 suggests some continuing support for the survival of *Ward v McMaster*. The defendant was an architectural technician who had issued certificates stating that he had inspected the construction and that the foundations of the house were satisfactory. It was common case that the foundations were in fact defective. The defendant contested liability on the grounds that he owed no duty of care to the plaintiff not to cause him economic loss. O'Malley J ultimately found for the plaintiff on the basis of liability for negligent misstatement (the defendant had contended that negligent misstatement had not been pleaded) meaning that damages for economic loss were recoverable. She added, however, at para 148, that "quite apart from negligent misstatement, the case in my view comes within the parameters of the *Ward v McMaster* category of case, and as such is not subject to the reservations expressed in *Glencar* in relation to economic loss." Earlier in her judgment, at para 134, O'Malley J had stated that "it is certainly incumbent on this court to accord [the decision of Keane CJ in *Glencar*] full respect as a considered expression of the unanimous view of the Supreme Court." O'Malley J continued:

"[134] ... However, I think it important to note in the context of this case that it does not appear, in my view, to be authority for the proposition that the outcome in either *Siney* or *Ward v McMaster* was incorrect.

[135] On the facts of the instant case, I have no difficulty in finding the existence of a duty of care on either the approach of McCarthy J [in *Ward v McMaster*] or Keane CJ [in *Glencar*].

[136] There was, in the first place, undoubtedly proximity between the plaintiffs and the second named defendant. In this respect I consider that the absence of a contractual relationship between the parties is immaterial. It is true to say that the certificates were supplied by the second named defendant to the builder, but the only conceivable purpose of them from the builder's point of view was for presentation to a prospective buyer. The second named defendant must have been aware of this, and there must have been implicit knowledge and indeed an assumption that such a person would rely upon the certificates – that is the purpose for which they were issued. This is particularly so in the case of the representation that the foundations were properly constructed. Having regard to the evidence in this case as to how the problem was identified – by the digging of large test holes around the house - this is not a matter that can readily be assessed by a potential buyer. By the same token, it was eminently foreseeable by a person in the second named defendant's position that if the foundations were in fact inadequate, there was likely to be loss occasioned to the buyer.

[137] The alternative questions: 'Is there any reason not to impose a duty of care in the circumstances?' and 'Is it fair, just and reasonable to impose a duty of care in the circumstances?' both lead me, on the facts of the case, in the same direction. No argument has been made by the second named defendant that there are any policy considerations that would make the court hesitate in finding that the duty exists. The class of persons to whom the duty is owed is easily defined – it is the purchaser to whom the certificate has been presented, since that is the person who will rely upon it. It is not necessary to go further in this case, and consider the possibility of open-ended liability to subsequent buyers years down the line.

[138] I further consider that it is fair, just and reasonable to impose a duty of care towards purchasers on persons such as engineers and architects who provide certificates of this nature to builders. Most people buying a modern house, and most of the lenders to whom they will go for mortgages, will require such certificates and will rely upon them. Self-certification by a builder does not seem a realistic alternative. It is simply untenable to suggest that the person who holds himself out as professionally qualified to assess, and in a position to certify, the quality of the house

and the workmanship of its construction, should not thereby be required to take care in giving such certification.”

25. It is important to consider the foregoing analysis in the context of the claim upon which the plaintiff ultimately succeeded: negligent misstatement. In light of this, the above *obiter* comments are perhaps not overly instructive on the question of the more general availability of damages for economic loss outside a *Hedley Byrne* claim. The discussion by O’Malley J of the policy factors which *Glencar* and, to a lesser degree of influence, *Ward v McMaster* take into account when considering the existence of a duty of care is heavily informed by the professional advisory role of the defendant, something which is clearly reflected in the standalone cause of action that is negligent misstatement. A similar point can be made in respect of O’Donnell J’s discussion of the duty of care in *Whelan v AIB* [2014] IESC 3 in the context of negligently caused pure economic loss. *Whelan* was concerned with the well-established rules regarding duty in solicitors’ professional negligence.

Alternative Avenues of Recovery

26. A couple of alternative avenues should be considered by a plaintiff who seeks recovery for pure economic loss; however, they are not straightforward options. First, there is an argument to be made that recovery is possible where the defect poses a danger to health, even if it has not yet resulted in physical injury. Second, it has been recognised that one element of a complex structure could be regarded as distinct from another element so that damage to one part caused by a defect in another part might qualify as damage to “other property”.

Dangerous Qualitative Defects

27. Lord Bridge in *Murphy* (p 475) resoundingly rejected a distinction between dangerous qualitative defects and non-dangerous qualitative defects for the purpose of establishing a duty of care to avoid economic losses:

“If a manufacturer negligently puts into circulation a chattel containing a latent defect which renders it dangerous to persons or property, the manufacturer, on the well known principles established by *Donoghue v. Stevenson* [1932] A.C. 562, will be liable in tort for injury to persons or damage to property which the chattel causes. But

if a manufacturer produces and sells a chattel which is merely defective in quality, even to the extent that it is valueless for the purpose for which it is intended, the manufacturer's liability at common law arises only under and by reference to the terms of any contract to which he is a party in relation to the chattel; the common law does not impose on him any liability in tort to persons to whom he owes no duty in contract but who, having acquired the chattel, suffer economic loss because the chattel is defective in quality. If a dangerous defect in a chattel is discovered before it causes any personal injury or damage to property, because the danger is now known and the chattel cannot safely be used unless the defect is repaired, the defect becomes merely a defect in quality. The chattel is either capable of repair at economic cost or it is worthless and must be scrapped. In either case the loss sustained by the owner or hirer of the chattel is purely economic. It is recoverable against any party who owes the loser a relevant contractual duty. But it is not recoverable in tort in the absence of a special relationship of proximity imposing on the tortfeasor a duty of care to safeguard the plaintiff from economic loss. There is no such special relationship between the manufacturer of a chattel and a remote owner or hirer.” (Emphasis added.)

28. The decision of the Canadian Supreme Court in *Winnipeg Condominium Corporation v Bird Construction Company* (1995) 1 ISCR 85 offers a different view. In that case a land developer had contracted with the respondent to build an apartment building. The building was converted into a condominium and the appellant became the registered subsequent owner of the building. The appellant subsequently became concerned about the condition of the building and had to incur considerable expense in repairing it. The appellant then commenced an action in negligence against the respondent builder. The Supreme Court of Canada held that the costs of repair claimed by the appellant were recoverable economic loss under the law of tort in Canada. It said that the law had now progressed to the point where contractors who take part in the design and construction of a building will owe a duty in tort to subsequent purchasers of the building if it can be shown that it was foreseeable that a failure to take reasonable care in constructing the building would create defects that posed substantial danger to the health and safety of the occupants. Where negligence is established and such defects manifest themselves before any damage to persons or property occurs, they can be held liable for the reasonable cost of repairing the defects and putting the building back into a non-dangerous state.

29. On the other hand Lord Keith in *Murphy v Brentwood* recognised the injustice of the outcome in that case but held it to be inevitable and a matter which Parliament would be obliged to address (p 472):

“[The decision in *Anns* (which *Murphy* overruled)] is capable of being regarded as affording a measure of justice, but as against that the impossibility of finding any coherent and logically based doctrine behind it is calculated to put the law of negligence into a state of confusion defying rational analysis. It is also material that *Anns* has the effect of imposing upon builders generally a liability going far beyond that which Parliament thought fit to impose upon house builders alone by the Defective Premises Act 1972, a statute very material to the policy of the decision but not adverted to in it. There is much to be said for the view that in what is essentially a consumer protection field, as was observed by Lord Bridge of Harwich in *D. & F. Estates* [1989] A.C. 177, 207, the precise extent and limits of the liabilities which in the public interest should be imposed upon builders and local authorities are best left to the legislature.”

30. Insofar as purchasers of defective commercial property are concerned, the absence of a tortious remedy against the original builder could be justified on the grounds that they are capable of looking after their own interests in the contractual matrix or through insurance.

Complex Structures

31. There is some English authority which suggests that it might be possible to regard the constituent parts of a building as separate items of property, instead of regarding the whole building as a distinct and indivisible entity. On that basis the House of Lords in *D&F Estates* thought it might be possible to say that the defective foundations in *Anns* were separate from the rest of the building and that they had caused damage to “other property”, namely the walls. Recovery for the cost of repairing the walls could follow. This view was rejected in *Murphy*; where inadequate foundations led to differential settlement and cracking the structure as a whole was seen to be defective and as it deteriorated would only damage itself. Lord Bridge commented thus (p 478):

“The reality is that the structural elements in any building form a single indivisible unit of which the different parts are essentially interdependent. To the extent that there is any defect in one part of the structure it must to a greater or lesser degree necessarily affect all other parts of the structure. Therefore any defect in the structure is a defect in the quality of the whole and it is quite artificial, in order to impose a legal liability which the law would not otherwise impose, to treat a defect in an integral structure, so far as it weakens the structure, as a dangerous defect liable to cause damage to ‘other property.’

A critical distinction must be drawn here between some part of a complex structure which is said to be a ‘danger’ only because it does not perform its proper function in sustaining the other parts and some distinct item incorporated in the structure which positively malfunctions so as to inflict positive damage on the structure in which it is incorporated. Thus, if a defective central heating boiler explodes and damages a house or a defective electrical installation malfunctions and sets the house on fire, I see no reason to doubt that the owner of the house, if he can prove that the damage was due to the negligence of the boiler manufacturer in the one case or the electrical contractor on the other, can recover damages in tort.”

32. The complex structure theory was however accepted in principle. Lord Jauncey stated (p 497) that “the only context for the complex structure theory in the case of a building would be where one integral component of the structure was built by a separate contractor and where a defect in such a component had caused damage to other parts of the structure, e.g. a steel frame erected by a specialist contractor which failed to give adequate support to floors and walls.” This leaves the door ajar for plaintiffs where the construction was undertaken by a number of different contractors and/or suppliers.
33. Consideration of a number of examples from different contexts offers guidance. In *M/S Aswan Engineering Establishment Co Ltd v Lupdine Ltd* [1987] 1 WLR 1, Lloyd LJ observed as follows (p 21):

“If I buy a defective tyre for my car and it bursts, I can sue the manufacturer of the tyre for damage to the car as well as injury to my person. But what if the tyre was part of the original equipment? Presumably the car is *other* property of the plaintiff, even

though the tyre was a component part of the car, and property in the tyre and property in the car passed simultaneously. Another example, perhaps even closer to the present case, would be if I buy a bottle of wine and find that the wine is undrinkable owing to a defect in the cork. Is the wine other property, so as to enable me to bring an action against the manufacturer of the cork in tort? ... I do not find these questions easy. There is curiously little authority on the point in England, compared with America, where the law as to product liability is more highly developed. My provisional view is that in all these cases there is damage to other property of the plaintiff.”

34. In *Messer UK v Thomas Hardy Packaging* [2002] EWCA Civ 549, Mance LJ held that the mixing of defective carbon dioxide with other ingredients did not cause damage to “other” property. The ingredients were never intended to retain their identity and the more natural description of events was that the mixing resulted in a defective product as opposed to damage to “other” property. He therefore concluded that the cost of recalling the defective products was pure economic loss, observing (at para 18):

“To recapitulate, carbon dioxide of separate manufacture was acquired by THP, which had in its possession concentrate and other items owned by Bacardi. THP mixed the concentrate with water of THP's supply (so as to create a mix which Bacardi owned), and at this stage (substantially) further mixed in carbon dioxide so as to create liquid Bacardi Breezer mix, owned by Bacardi. This was the product that THP then bottled and packaged, before delivering the whole finished product to Bacardi. Although there were ingredients owned by Bacardi which were separate from the defective carbon dioxide and water supplied by THP, THP's activity involved creating a new product by mixing all these elements. The new product was not damaged, but merely defective from the moment of its creation. The alternative and more persuasive way of justifying any tort claim on Bacardi's behalf seems to me to be to argue that damages can be claimed for the spoiling of the (without doubt valuable) concentrate that Bacardi supplied. But this concentrate did not survive, and was never intended to survive, as such. It was always going to be merged in the finished Breezer. The real complaint relates to the finished product.”

35. The point was considered again in *Linklaters Business Services v Sir Robert McAlpine Ltd* [2010] EWHC 1145. An insulation sub-sub-contractor applied for summary judgment in

respect of a claim in tort by the employer on the basis that corrosion damage to pipes to which it had fitted insulation was pure economic loss as the insulation and the pipes were all part of the structure. In dismissing the application Akenhead J said (para 27):

“What has not been explored and examined in any great detail is the extent of the duty of care owed by those in the position of sub-contractors, or as in this case sub-sub-contractors, and suppliers whose carelessness in and about providing the work, materials, services or equipment which are incorporated into a building or structure causes consequential damage to other elements of the building. The scope of this duty and where the dividing lines are remain to be explored jurisprudentially.”

36. When the matter reached trial ([2010] EWHC 2931), Akenhead J commented *obiter* that the above examples given in *Murphy* and *D&F Estates* did not satisfactorily deal with component parts of an offending installation such as the reinforcement within a tyre or a valve within a boiler causing damage only to the tyre or the boiler. He cited with approval the decision of the USA Supreme Court in *East River SS Corp v Transamerica Delaval* 476 US 858 (1986) which regarded each turbine within a ship to be “a single unit”, citing this passage from *Northern Power & Engineering Corp v Caterpillar Tractor Co* 623 P 2d 324, 330 (Alaska 1981):

“Since all but the very simplest of machines have component parts, [a contrary] holding would require a finding of ‘property damage’ in virtually every case where a product damages itself. Such a holding would eliminate the distinction between warranty and strict product liability.”

37. Akenhead J concluded (*obiter*, at para 119):

“I have formed the view that the insulated chilled water pipework was essentially one ‘thing’ for the purposes of tort. One would simply never have chilled water pipework without insulation because the chilled water would not remain chilled and it would corrode. The insulation is a key component but a component nonetheless. It would follow that no cause of action arises in tort as between [the sub-sub-contractor] and Linklaters. That is not at all unreasonable in any way because Linklaters or people in their position can protect themselves, as Linklaters did, with the securing of

contractual warranties from relevant parties such as the key contractors in any given development.”

38. The conclusion to be drawn from these authorities is that, while it will of course be necessary to obtain expert evidence as to the nature of the structure of the relevant premises and the role played in that structure by the defective component in issue, there is a good prospect of defendants successfully arguing in favour of the integrity of the overall structure of the premises (provided it has been constructed by a single contractor).

Conclusion

39. It is appropriate to conclude this discussion by reference to the recent *dicta* of Ryan P in *Newlyn Developments Limited v Murphy Concrete (Manufacturing) Limited* [2015] IECA 294, an appeal against a High Court refusal of security for costs, which articulate the prevailing uncertainty surrounding the recoverability for economic loss in this jurisdiction:

“[62] *Junior Books* was followed in Ireland in *Ward v. McMaster* [1988] I.R. 337, but the position has become uncertain since the decision of the Supreme Court in *Glencar Exploration plc v. Mayo County Council* [2002] 1 I.R. 84, in which the court refused to allow an action for pure economic loss. Although negligent misstatement continues to be a cause of action, the law generally on economic loss remains uncertain, as Geoghegan J, acknowledged in *Beatty v. The Rent Tribunal* [2006] 1 ILRM 164 at 173 ...

[66] The issue of law concerning economic loss ... features prominently and this area of important uncertain legal liability has implications far beyond the cases and the parties that are engaged in this litigation ... There is, therefore, in addition to the questions of fact that arise, an important and difficult area of acknowledgedly uncertain law.”

40. Despite the uncertainty the clear distinction between negligence claims for pure economic loss and claims for physical damage/injury must be recognised.