Chia Kok Leong and Another v Prosperland Pte Ltd
[2005] SGCA 12

Case Number : CA 76/2004

Decision Date : 16 March 2005

Tribunal/Court : Court of Appeal

Coram : Chao Hick Tin JA; Tan Lee Meng J; Yong Pung How CJ

Counsel Name(s) : Steven Chong SC and Sim Kwan Kiat (Rajah and Tann) for the appellants; Thio Shen Yi, Adrian Tan and Linnet Choo (TSMP Law Corporation) for the respondents

Parties : Chia Kok Leong; D. Exodus Architects and Planners Pte — Prosperland Pte Ltd

Civil Procedure – Limitation – Burden of proof in case where s 24A of Limitation Act applicable – Whether developer's claim against architects for damage to wall tiles time-barred – Section 24A Limitation Act (Cap 163, 1996 Rev Ed)

Contract – Breach of contract – Developer of condominium no longer owner of condominium – No actual loss suffered by developer in respect of defects in condominium – Whether developer can claim against architects for substantial damages in respect of defects

16 March 2005 *Judgment reserved.*

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

1 This is an appeal against certain rulings given by Judith Prakash J in *Prosperland Pte Ltd v Civic Construction Pte Ltd* [2004] 4 SLR 129, in relation to a number of preliminary points of law which arose from the action instituted by the respondent against the appellants and one other party.

2 The respondent ("Prosperland"), the plaintiff in the action below, was the developer of a condominium at 7 Claymore Road, Singapore ("the condominium"). The first defendant, Civic Construction Pte Ltd ("Civic"), was the main contractor for the construction of the condominium. The second and third defendants, Mr Chia Kok Leong ("Chia") and D Exodus Architects & Planners Pte ("Exodus"), the appellants herein, were the architects engaged in the design and supervision of the project, with Chia being the person in charge of the project.

3 The construction of the condominium was completed in August 1993. In May 1998, the Management Corporation Strata Title Plan No 2201 ("the MCST") was constituted, which, by virtue of the Land Titles (Strata) Act (Cap 158, 1988 Rev Ed), became the proprietor of the common property of the condominium.

4 On 2 May 2002, Prosperland commenced an action against Civic for defective works, *ie*, de-bonding of the tiles forming the external façade of the building and damage of the glass blocks installed in the lobbies and stairways. In the action, it also claimed against Chia and Exodus for breach of contract in failing to exercise due care in the design and supervision of the project which resulted in the defective works.

5 However, by the time the defects appeared and the action was instituted, Prosperland was no longer the owner of the condominium. The individual units in the condominium had been transferred to third parties. The common areas of the condominium had become vested in the MCST. Prosperland had not yet spent any money to effect the repairs. Neither had it been sued by the MCST in respect

of the defects. While Prosperland was placed under voluntary liquidation in December 2002, the MCST has not, to date, filed any proof of debt with the liquidators of Prosperland to date.

6 It should be noted that Civic and the supplier of the adhesives gave Prosperland a ten-year warranty by way of a deed guaranteeing the construction and the adhesive used in the construction of the external wall tile façade. The MCST was not a party to this deed of warranty.

7 In the light of these undisputed facts, Civic and the appellants asked the court to rule on two sets of preliminary issues. They were:

(a) whether the claims in respect of the external façade of the building and the glass blocks were time-barred; and

(b) whether Prosperland was the proper party to sue in respect of these claims.

8 On the first issue, the judge held that Prosperland's claim in respect of the glass blocks was time-barred but its claim in respect of the wall tiles was not. On the second issue, the judge held that Prosperland was the proper party to sue the defendants and could claim for substantial damages.

9 Civic did not appeal against the aforesaid rulings. Neither did Prosperland with regard to the ruling on the time bar in respect of the glass blocks. However, Chia and Exodus, being dissatisfied, have taken the matter on appeal before us. Thus, the issues which require the determination of this court are:

(a) whether Prosperland can claim against the appellants for substantial damages, even though Prosperland has suffered no loss and the MCST has, following two decisions of this court, a direct legal remedy in tort against the appellants; and

(b) whether Prosperland's claim against the appellants for the alleged damage to the wall tiles is time-barred.

Title to sue for substantial damages

10 The general rule in law is that a plaintiff is entitled to claim damages only for the actual loss suffered on account of a breach of contract. This is because damages are compensatory in nature. Damages are awarded to put the injured party, as far as possible, in the position he would have been in had there been no breach. When the innocent party suffers no actual loss on account of the breach, he would only be entitled to nominal damages. But there are exceptions which we will now examine.

11 One of the earliest cases which seems to have created an exception to this rule is *Dunlop v Lambert* (1839) 6 Cl & Fin 600; 7 ER 824, a case where goods shipped on board a vessel were lost due to a general average sacrifice. The case held that the consignor could recover substantial damages against the shipowner if there was privity of contract between him and the carrier for the carriage of goods. However, if by the time of the action the goods were not his property, or at his risk, he would be accountable to the true owner for the proceeds of judgment. This decision was made before the enactment of the Bills of Lading Act 1855 (c 111) ("B/L Act") which gave the indorsee of a bill of lading a direct right of action against the shipowner on the terms of the bill of lading.

12 The rule in *Dunlop v Lambert* came under scrutiny in the recent case of *The Albazero*

[1977] AC 774, where the preliminary question of law raised for the consideration of the court was whether the charterer of a bill of lading, having endorsed it over to a third party, was still entitled to claim for substantial damages upon the vessel and its cargo becoming a total loss in the course of the voyage. At the time of the loss, the plaintiff-charterer had already indorsed the bill of lading, but it was only received by the indorsee the day after the loss occurred. The plaintiff claimed that the measure of damages which it was entitled to recover was the arrived value of the goods lost notwithstanding that at the time the goods were lost, it no longer had any property in the goods and suffered no loss by reason of their non-delivery at the destination. Lord Diplock, who delivered the sole judgment of the House of Lords, thought that the exception created by *Dunlop v Lambert* should not be unnecessarily extended and he rationalised the decision in this manner (at 847):

> [I]n a commercial contract concerning goods where it is in the contemplation of the parties that the proprietary interests in the goods may be transferred from one owner to another after the contract has been entered into and before the breach which causes loss or damage to the goods, an original party to the contract, if such be the intention of them both, is to be treated in law as having entered into the contract for the benefit of all persons who have or may acquire an interest in the goods before they are lost or damaged, and is entitled to recover by way of damages for breach of contract the actual loss sustained by those for whose benefit the contract is entered into.

13 However, with the enactment of the B/L Act, the indorsee of a bill of lading would be entitled under the B/L Act to enforce the contract directly. There would then be no ground on which one could impute to the parties an intention that the consignor was entering into the contract for the benefit of others who would acquire the property in the goods but would acquire no right of action for breach of contract. Thus, Lord Diplock held that the plaintiff in *The Albazero* could not claim for substantial damages. We would respectfully say that this is in line with logic. The rule in *Dunlop v Lambert* was created to get around the undesirable consequences of the privity rule. There would be no such undersirable consequences if it is within contemplation that "the carrier will also enter into separate contracts of carriage with whoever may become the owner of goods carried pursuant to the original contract": *per* Lord Diplock in *The Albazero* at 847–848.

14 However, this does not mean that the rule in *Dunlop v Lambert* should be consigned to legal history. While the B/L Act would reduce the scope and utility of the rule in *Dunlop v Lambert* where goods are carried under a bill of lading, the rule can still apply to other contracts for the carriage of goods where such automatic assignment of the rights of action for breach does not take place. It is also important to note that while Lord Diplock recognised that since *Dunlop v Lambert* the law of negligence had developed, he felt that the latter did not "provide a complete substituted remedy for some types of loss caused by breach of a contract of carriage. Late delivery is the most obvious example of these": see *The Albazero* at 846–847.

15 The next case which must be considered is that of *St Martins Property Corporation Ltd v Sir Robert McAlpine Ltd* [1994] 1 AC 85 ("*St Martins*") where the court extended the application of the *Dunlop v Lambert* exception to a different setting, *ie*, a building contract. In *St Martins*, the first plaintiff ("Corporation"), who was the leasehold owner of the land, entered into a building contract with the defendant, McAlpine. One of the terms of the contract was that "[Corporation] shall not without the written consent of the [defendant] assign the contract". Later, Corporation, without the defendant's consent, assigned the land and the benefits under the contract to the second plaintiff. Subsequently, the building was found to be defective and the cost of remedial works would amount to about £800,000. The English Court of Appeal, affirming (by majority) the decision of the official referee, held that the assignment was ineffective. However, the court unanimously reversed the decision of the official referee and held that Corporation was entitled to substantial damages. The

House of Lords upheld the Court of Appeal's decision on both counts. Lord Browne-Wilkinson, delivering a judgment with which three other law lords concurred (namely, Lord Keith of Kinkel, Lord Bridge of Harwich and Lord Ackner), said that the case fell within the rationale of the *Dunlop v Lambert* exception to the general rule that a plaintiff could only recover damages for his own actual loss. He explained (at 114–115):

> The contract was for a large development of property which, to the knowledge of both Corporation and McAlpine, was going to be occupied, and possibly purchased, by third parties and not by Corporation itself. Therefore it could be foreseen that damage caused by a breach would cause loss to a later owner and not merely to the original contracting party, Corporation. As in contracts for the carriage of goods by land, there would be no automatic vesting in the occupier or owners of the property for the time being who sustained the loss of any right of suit against McAlpine. On the contrary, McAlpine had specifically contracted that the rights of action under the building contract *could* not without McAlpine's consent be transferred to third parties who became owners or occupiers and might suffer loss. In such a case, it seems to me proper, as in the case of the carriage of goods by land, to treat the parties as having entered into the contract on the footing that Corporation would be entitled to enforce contractual rights for the benefit of those who suffered from defective performance but who, under the terms of the contract, could not acquire any right to hold McAlpine liable for breach. It is truly a case in which the rule provides "a remedy where no other would be available to a person sustaining loss which under a rational legal system ought to be compensated by the person who has caused it."

16 In answer to the argument that this was an exceptional case and that if the court were to accord to the plaintiff a right to substantial damages in such a case it would produce chaos when applied to other cases where the contractors had entered into direct warranties with the ultimate purchasers of the individual parts of a development, Lord Browne-Wilkinson clarified (at 115):

> I am far from satisfied that this is a one off or exceptional case. We are concerned with standard forms of building contracts which prohibit the assignment of the benefit of building contracts to the ultimate purchasers. In the prolonged period of recession in the property market which this country has experienced many developments have had to be sold off before completion, thereby producing the risk that the ownership of the property may have become divided from the right to sue on the building contract at a date before any breach occurs. As to the warranties given by contractors to subsequent purchasers, they will not, in my judgment, give rise to difficulty. If, pursuant to the terms of the original building contract, the contractors have undertaken liability to the ultimate purchasers to remedy defects appearing after they acquired the property, it is manifest the case will not fall within the rationale of *Dunlop v. Lambert*, 6 Cl. & F. 600. If the ultimate purchaser is given a direct cause of action against the contractor (as is the consignee or endorsee under a bill of lading) the case falls outside the rationale of the rule. The original building owner will not be entitled to recover damages for loss suffered by others who can themselves sue for such loss.

17 The fifth member of the quorum, Lord Griffiths, while he came to the same conclusion as the other four law lords, felt that the plaintiffs should be entitled to claim for substantial damages on a much broader basis ("the broad ground") than that stated by Lord Browne-Wilkinson ("the narrow ground"). Lord Griffiths said (at 96–97):

> I cannot accept that in a contract of this nature, namely for work, labour and the supply of materials, the recovery of more than nominal damages for breach of contract is dependent upon the plaintiff having a proprietary interest in the subject matter of the contract at the date of breach. In everyday life contracts for work and labour are constantly being placed by those who

have no proprietary interest in the subject matter of the contract. To take a common example, the matrimonial home is owned by the wife and the couple's remaining assets are owned by the husband and he is the sole earner. The house requires a new roof and the husband places a contract with a builder to carry out the work. The husband is not acting as agent for his wife, he makes the contract as principal because only he can pay for it. The builder fails to replace the roof properly and the husband has to call in and pay another builder to complete the work. Is it to be said that the husband has suffered no damage because he does not own the property? Such a result would in my view be absurd and the answer is that the husband has suffered loss because he did not receive the bargain for which he had contracted with the first builder and the measure of damages is the cost of securing the performance of that bargain by completing the roof repairs properly by the second builder.

18 We should add that the broad ground advocated by Lord Griffiths was not opposed to by Lord Browne-Wilkinson who, in fact, found it attractive. However, Lord Browne-Wilkinson felt that, before he finally took that position, it would be prudent to expose this broad ground to academic consideration.

19 Lord Griffiths distinguished *The Albazero* on the basis that the case was not concerned with money being paid to enable the bargain, *ie*, the contract of carriage, to be fulfilled. There the claim was for the loss of the cargo. Moreover, in *The Albazero*, at the date of the breach of contract, the property in the cargo which was lost was vested in another person with a right to sue for the loss under the terms of the bill of lading. In Lord Griffiths' view, the basis for allowing the plaintiff-employer in *St Martins* to recover substantial damages was the loss of his "performance interest".

20 The broader approach to the issue advocated by Lord Griffiths in *St Martins* was the subject of consideration in the House of Lords in the subsequent case of *Alfred McAlpine Construction Ltd v Panatown Ltd* [2001] 1 AC 518 ("*Panatown*"). There, where the House was split by three to two, Panatown Ltd employed McAlpine to construct a building on land owned by a third party, UIPL, a company related to Panatown Ltd. The work was defective and considerable expenses would have to be incurred by UIPL to put things right. Panatown Ltd argued that it had the right to sue for substantial damages pursuant to *The Albazero* exception. The dispute went to arbitration. The preliminary question that arose for consideration was (as stated at 520):

> [Is Panatown Ltd] debarred from recovering substantial as opposed to nominal damages by reason of the fact that it is not and was not the owner of the land[?]

The arbitrator answered the question in the negative. The High Court overturned that ruling.

21 In the Court of Appeal, which followed the narrow ground enunciated by the majority in *St Martins*, Panatown Ltd was awarded substantial damages on the footing that it would account for them to UIPL. However, in the House of Lords, the majority restored the ruling of the High Court and held that Panatown Ltd was not entitled to claim for substantial damages notwithstanding the breach of the building contract on the part of McAlpine. This decision turned on one fact which was special to the case and which, in the opinion of the majority, was decisive. There, besides the building contract with Panatown Ltd, McAlpine also entered into a duty of care deed ("DCD") with UIPL, the owner of the site. Under the DCD, UIPL acquired a *direct remedy* against McAlpine in respect of any failure by McAlpine to exercise reasonable skill, care and attention in carrying out its obligations under the main building contract. Furthermore, under the DCD it was expressly provided that UIPL could assign the DCD to its successors-in-title or to any other party with the consent of McAlpine and such consent was not to be unreasonably withheld. On the majority ruling, the existence of the DCD made all the difference as it meant that there was no legal black hole whatsoever. Lord Clyde reasoned as

follows (at 531–532):

> The duty of care deed and the collateral warranties were of course not in themselves building contracts. But they did form an integral part of the package of arrangements which the employer and the contractor agreed upon and in that respect should be viewed as reflecting the intentions of all the parties engaged in the arrangements that the third party should have a direct cause of action to the exclusion of any substantial claim by the employer, and accordingly that the exception should not apply. There was some dispute upon the difference in substance between the remedies available under the contract and those available under the duty of care deed. Even if it is accepted that in the circumstances of the present case where the eventual issue may relate particularly to matters of reasonable skill and care, the remedies do not absolutely coincide, the express provision of the direct remedy for the third party is fatal to the application o f *The Albazero* exception. On a more general approach the difference between a strict contractual basis of claim and a basis of reasonable care makes the express remedy more clearly a substitution for the operation of the exception. Panatown [Ltd] cannot then in the light of these deeds be treated as having contracted with McAlpine for the benefit of the owner or later owners of the land and the exception is plainly excluded.

22 Lord Browne-Wilkinson, the second majority member in *Panatown*, also rejected the argument that the contractual relief afforded by the DCD was of a more limited kind than what Panatown Ltd could have obtained under the building contract and thus should not exclude the *Dunlop v Lambert* or *The Albazero* exception. He said (at 576–577):

> It was suggested in argument that the purpose of the DCD was to give purchasers of the site from the Unex Group undoubted causes of action for breach of a tortious duty of care. Even if that is so, it does not alter the fact that under the DCD, UIPL itself has the right to claim substantial damages for any negligent performance of the building contract, a right which will cover most of the claims arising under the building contract.
>
> In my judgment the direct cause of action which UIPL has under the DCD is fatal to any claim to substantial damages made by Panatown [Ltd] against McAlpine based on the narrower ground. … If the contractual arrangements between the parties in fact provide the third party with a direct remedy against the wrongdoer the whole rationale of the rule disappears.

23 It would be recalled that in *St Martins*, Lord Browne-Wilkinson, in commenting on the broader approach advocated by Lord Griffiths, thought it prudent to leave the question for further scrutiny by academic writers before the House should finally rule on it. While in *Panatown* Lord Browne-Wilkinson noted that the academic writings thus far did not show that there would be serious difficulties in adopting Lord Griffiths' broader approach, he did not take the occasion to embrace it. Instead, assuming that the broad ground was sound in law, he held that Panatown Ltd had no right to substantial damages because UIPL had a direct cause of action under the deed. In view of this, he did not think that Panatown Ltd had any more "performance interest" as explained by him as follows (at 577–578):

> If, as in the present case, the whole contractual scheme was designed, inter alia, to give [UIPL] and its successors a legal remedy against McAlpine for failure to perform the building contract with due care, I cannot see that Panatown [Ltd] has suffered any damage to its performance interests: subject to any defence based on limitation of actions, the physical and pecuniary damage suffered by [UIPL] can be redressed by [UIPL] exercising its own cause of action against McAlpine. It is not clear to me why this has not occurred in the present case: but, subject to questions of limitation which were not explored, there is no reason even now why [UIPL] should

not be bringing the proceedings against McAlpine. The fact that the DCD may have been primarily directed to ensuring that [UIPL's] successors in title should enjoy a remedy in tort against McAlpine is nothing to the point: the contractual provisions were directed to ensuring that [UIPL] and its successors in title did have the legal right to sue McAlpine direct. So long as [UIPL] enjoys this right Panatown [Ltd] has suffered no failure to satisfy its performance interest.

24 Lord Browne-Wilkinson then went on to illustrate why Panatown Ltd should not in the circumstances be accorded relief for substantial damages (at 578):

> Let me illustrate this by postulating a case where, before the breach occurred, [UIPL] had with consent assigned the benefit of the DCD to a purchaser of the site, X. What if Panatown [Ltd] itself was entitled to, and did, sue for and recover damages from McAlpine? Presumably McAlpine could not in addition be liable to X for breach of the DCD: yet Panatown [Ltd] would not be liable to account to X for the damages it had recovered from McAlpine. The result would therefore be another piece of legal nonsense: the party who had suffered real, tangible damage, X, could recover nothing but Panatown [Ltd] which had suffered no real loss could recover damages. Again, suppose that X agrees with McAlpine certain variations of McAlpine's liability under the building contract. What rights would Panatown then have against McAlpine?

25 We now turn to the minority view in *Panatown*. Lord Goff of Chieveley thought that the rule in *Dunlop v Lambert* was wholly inappropriate to the fact situation at hand. To him, to deny Panatown Ltd a claim to substantial damages would amount to its "performance or expectation interest" being "insufficiently protected in law" (as he noted at 546). Accordingly, Lord Goff preferred to adopt the broader approach advocated by Lord Griffiths in *St Martins*. Lord Goff was also of the opinion that the existence of the DCD did not detract from Panatown Ltd's right to sue for its performance interest. He explained (at 558):

> [I]t is a strange conclusion indeed that the effect of providing a subsidiary remedy for the owner of the land (UIPL), on a restricted basis (breach of a duty of care), is that the building employer, who has furnished the consideration for the building, is excluded from pursuing his remedy in damages under the main contract, which makes elaborate provision, under a standard form specially adapted for this particular development, for the terms upon which the contractor has agreed to design and construct the buildings in question.
>
> …
>
> The mere fact that the building contractor, McAlpine, has entered into a separate contract in different terms with another party with regard to possible defects in the building which is the subject of the building contract cannot of itself detract from its obligations to the employer under the building contract itself.

26 To Lord Goff, the DCD provided only a limited remedy which was subsidiary to that which arose under the main contract. Moreover, he did not think there was really any real risk of double recovery. He gave this example to substantiate his thinking (at 559–560):

> Let me take an example. Suppose that a wealthy philanthropist who lives in a village undertakes as an act of charity to renovate the village hall at his own expense. The trustees who own the hall gladly agree that he should do so. A contract is placed by the philanthropist with a builder, and the work is commenced. Unfortunately the work is defective. The builder fails or refuses to rectify the defects; the philanthropist therefore claims damages from him under the building contract, and recovers substantial damages. I cannot believe that, in those circumstances, the

philanthropist can simply put the damages in his pocket and leave the building in its defective state. In my opinion, it must be implicit in the licence under which he was permitted to renovate the hall and for that purpose to contract with a builder for the work of renovation that, if the work was begun, he should at least take reasonable steps to procure its satisfactory completion. Accordingly, if he recovers damages from the builder for defective work, he should procure the rectification of the defects by another builder, the damages recovered by him being available to finance that work; though he might, by agreement with the trustees, hand the money over to them to enable them to instruct another builder of their own choice to carry out the necessary remedial work.

27 The other minority law lord in *Panatown* was Lord Millett. He did not dispute that the general rule was that only compensatory damages could be awarded for breach of contract, namely, that only the person who has suffered the loss would be entitled to have it made good by compensation. While recognising that the majority of the House of Lords in *St Martins* had extended the rule in *Dunlop v Lambert* from contracts for the carriage of goods to contracts for the supply of services, and in particular to building contracts, Lord Millett was of the view that there was no justification to extend the *Dunlop v Lambert* exception and treat a building employer with no title to the land as contracting on behalf of the owner of the land who, unlike the succeeding owners in the other cases, was identifiable and capable of contracting on his own behalf. Thus, he thought that if the law were to grant substantial damages to such a building employer, it should be under some wider principle, independently of the rule in *Dunlop v Lambert*. He was therefore inclined to embrace the broad ground advocated by Lord Griffiths in *St Martins*, that the performance of a contractual obligation had an economic value of its own which was capable of sounding in damages. He cited, *inter alia*, this illustration to justify his preference for the broad ground (at 588–589):

> This is the product of the narrow accountants' balance sheet quantification of loss which measures the loss suffered by the promisee by the diminution in his overall financial position resulting from the breach. One of the consequences of this approach is to produce an artificial distinction between a contract for the supply of goods to a third party and a contract for the supply of services to a third party. A man who buys a car for his wife is entitled to substantial damages if an inferior car is supplied, on the assumption (not necessarily true) that the property in the car is intended to vest momentarily in him before being transferred to his wife, whereas a man who orders his wife's car to be repaired is entitled to nominal damages only if the work is imperfectly carried out. This is surely indefensible; the reality of the matter is that in both cases the man is willing to undertake a contractual liability in order to be able to provide a benefit to his wife.

28 Lord Millett also referred to the case of *Radford v De Froberville* [1977] 1 WLR 1262 ("*Radford*"), a decision of Oliver J, which he felt was really the seed germinating in the broad ground advanced by Lord Griffiths. In *Radford*, the landlord of tenanted premises had obtained a covenant from the owner of a neighbouring land to build a garden wall on the neighbour's side of the boundary. The wall was not built. The landlord sued on the covenant and claimed, as damages, the cost of building a similar wall on his side of the boundary. Oliver J, while finding that the absence of the wall had caused no reduction in the landlord's reversionary interest and that the landlord would derive no direct benefit in having the wall built, nevertheless awarded the landlord the cost of building the wall, as he also found that the landlord intended to apply the damages in building a wall on his side of the boundary in order to provide his tenants with the amenity which the promised wall on the neighbour's side would have done. In those circumstances, it was reasonable for the landlord to have insisted that the wall be built. Oliver J elaborated (at 1270):

> Now, it may be that, viewed objectively, it is not to the plaintiff's financial advantage to be

supplied with the article or service which he has stipulated. It may be that another person might say that what the plaintiff has stipulated for will not serve his commercial interests so well as some other scheme or course of action. And that may be quite right. But that, surely, must be for the plaintiff to judge. Pacta sunt servanda. If he contracts for the supply of that which he thinks serves his interests – be they commercial, aesthetic or merely eccentric – then if that which is contracted for is not supplied by the other contracting party I do not see why, in principle, he should not be compensated by being provided with the cost of supplying it through someone else or in a different way, subject to the proviso, of course, that he is seeking compensation for a genuine loss and not merely using a technical breach to secure an uncovenanted profit.

29 Reverting to the facts in *Panatown*, like Lord Goff, Lord Millett did not think that the fact that, under the DCD, McAlpine had undertaken a duty of care to UIPL, should deprive Panatown Ltd of its contractual rights. While appreciating that the wider approach would raise the spectre of double recovery, he did not think that such an eventuality, where a breach of a single obligation creates a liability to two different parties, was that exceptional. To overcome what appeared to be a problem, he offered these practical solutions (at 595):

> Since performance of the primary obligation to do the work would have discharged the liability to both parties, so must performance of the secondary obligation to pay damages. Payment of damages to either must pro tanto discharge the liability to both. The problem, in my view, is not one of double recovery, but of ensuring that the damages are paid to the right party.
>
> There can be no complaint by the building employer if the damages are recovered by the building owner, since he was the intended beneficiary of the arrangements in the first place. The building employer's performance interest will be satisfied by carrying out the remedial work or by providing the building owner with the means to pay for it to be done. This provides the key to the proper approach in the converse case like the present where the action is brought by the building employer despite the existence of a cause of action in the building owner. Since the building employer's expectation loss reflects and cannot exceed the loss suffered by the building owner, and would be satisfied by any award of damages to the latter, his claim should normally be subordinated to any claim made by the building owner. While, therefore, I do not accept that [Panatown Ltd's] claim to substantial damages is excluded by the existence of the DCD, I think that an action like the present should normally be stayed in order to allow the building owner to bring his own proceedings. The court will need to be satisfied that the building owner is not proposing to make his own claim and is content to allow his claim to be discharged by payment to the building employer before allowing the building employer's action to proceed.

30 The difference between the majority and the minority approaches in *Panatown* is of a doctrinal nature. The majority took the view that as the contractual arrangement between the building employer and the builder envisaged and provided for a direct contractual claim by the third party (by way of the DCD) against the builder, it must follow that where the loss was suffered by the third party, the latter should be the person to make the claim. To hold otherwise would run counter to the implicit contractual intention of the building employer and the builder. It is based on what was within the presumed intention of the parties. However, the minority did not think that just because the contractual arrangement envisaged the giving of a contractual right, though limited, to the third party, it must necessarily follow that the primary right of the building employer to obtain relief for breach of the building contract should thereby be curtailed. There was no justification to presume that the rights of the building employer were to be subsumed under or subordinate to those of the third party under the DCD. The building employer should be compensated for what he had paid for but did not receive and the grant of such relief to the building employer would have nothing to do with

the exception in *Dunlop v Lambert*.

31 The foregoing would appear to be the state of the law in England. Before this case, the Singapore courts had no occasion to address the issue as to whether the narrow ground or the broad ground is more correct in principle.

The appellants' argument

32 The appellants have argued, following the decisions of this court in *RSP Architects Planners & Engineers v Ocean Front Pte Ltd* [1996] 1 SLR 113 ("*Ocean Front*") and *RSP Architects Planners & Engineers (Raglan Squire & Partners FE) v MCST Plan No 1075* [1999] 2 SLR 449 ("*Eastern Lagoon*"), that the MCST in this case would have a direct cause of action in tort against the contractors and professional advisors, and that under neither the narrow ground nor the broad ground was Prosperland entitled to substantial damages. They argued that there was no legal black hole warranting the law granting to a party like Prosperland a cause of action to sue for substantial damages. If there was any breach of duty, the MCST, the real party to suffer the loss, should be the one to sue in tort for the loss.

The narrow ground

33 We will first examine the appellants' arguments under the narrow ground. Should it follow that, just because the decisions in *Ocean Front* and *Eastern Lagoon* permit the MCST to sue Civic and the appellants in tort, Prosperland should thereby be precluded from claiming substantial damages for the defective works? Prakash J did not think so. She pointed out that unlike a claim in contract, to succeed in a claim in tort, the claimant must establish negligence on the part of the alleged tortfeasor. Moreover, not all breaches of contract are evidence of negligence.

34 That, of course, is not all. A claim in tort can also be defeated by certain defences, such as, that the work was executed by an independent competent sub-contractor or that the articles were supplied by a reputable manufacturer and the latent defect could not reasonably be discovered by the contractor.

35 While a claim in tort could overlap with that of a claim in contract, it does not follow that they are the same. The difference, in relation to a contract of carriage, was noted by Lord Diplock in *The Albazero*, where he said at 846–847:

> The development of the law of negligence since 1839 does not provide a complete substituted remedy for some types of loss caused by breach of a contract of carriage. Late delivery is the most obvious example of these. … But the rule extends to all forms of carriage including carriage by sea itself where no bill of lading has been issued, and there may still be occasional cases in which the rule would provide a remedy where no other would be available to a person sustaining loss which under a rational legal system ought to be compensated by the person who has caused it.

36 We would respectfully agree with Lord Diplock that a claim in tort does not provide a complete substituted remedy in a contract of carriage. It does not wholly eliminate the "legal black hole". That is also the case with regard to a building contract. In tort, one cannot recover damages for delay. As mentioned before, a claim in tort can also be defeated by the defence of independent contractor. Thus, even though Singapore law, unlike English law, allows claims in tort by a management corporation under the Land Titles (Strata) Act for economic losses arising from damage to real property, a legal black hole may still exist.

37 The appellants sought to rely on a passage in *Rolls-Royce Power Engineering plc v Ricardo Consulting Engineers Ltd* [2004] 2 All ER (Comm) 129 ("*Rolls-Royce*") to contend that where the third party could sue in tort, there is no more room for the application of the *Dunlop v Lambert* exception. The passage at 172 reads:

> [T]he law does not readily contemplate a situation in which, as a result of a breach committed by A of a term of his contract with B, which term it was envisaged at the time the contract was made was intended, in whole or in part, to benefit C or an identified class of which C was a member, C has suffered a loss, C has no remedy. To avoid the injustice which depriving C of a remedy in that situation would cause the law strives to find a way of navigating round technical rules which would prevent C being compensated. The problem does not arise in tort because it can be avoided by the imposition of a duty of care owed by A to C in an appropriate case.

38 We would point out that this passage does not say that because C has a remedy in tort against A, B therefore cannot claim for substantial damages in contract on the basis of the *Dunlop v Lambert* exception. The "problem" referred to in the passage was really the question of privity which would, of course, not arise if the claim was in tort. The passage does in no way suggest that a claim in tort is as good a remedy as a claim in contract. At [33] and [34] above, we have referred to some of the differences between a claim in contract and that in tort. In addition, under a claim in tort, the claimant cannot ask for losses suffered as a result of any delay in the completion of the works; nor for liquidated damages which may have been provided in the building contract.

39 It is significant to note that Lord Diplock in *The Albazero*, while recognising that the *Dunlop v Lambert* exception should not be extended beyond what was justified by its rationale, said that the exception was necessary where "there was *no contact* between the carrier and the person who sustained the actual loss". It seems to us that by "no contact", Lord Diplock was referring to the necessity of the rule where there was no *contract* between the third party and the party in breach. This is reinforced by the fact that the other examples given by Lord Diplock as to when the exception would apply were confined to the situation where there was no *contract*: see *The Albazero* at 847–848.

40 Similar views were expressed by Lord Browne-Wilkinson in *St Martins* where he said (at 115):

> If, pursuant to the terms of the original building contract, the contractors *have undertaken liability to the ultimate purchasers to remedy defects* appearing after they acquired the property, it is manifest the case will not fall within the rationale of *Dunlop v Lambert* … [emphasis added]

41 In *Panatown*, Lord Clyde, in explaining what would preclude the building employer from suing the builder for substantial damages, said at 531:

> But the counterpart in a building contract to a right of suit under a bill of lading should be the provision of a *direct entitlement* in a third party to sue the contractor in the event of a failure in the contractor's performance. In the context of a building contract one does not require to look for a second building contract to exclude the exception. It would be sufficient to find *the provision* of a right to sue. [emphasis added]

42 In *Panatown*, Lord Jauncey of Tullichettle also seemed to think that only where a contractual right to sue was available to the third party would *The Albazero* exception be excluded. He said at 568:

Neither in the speeches of Lord Diplock nor of Lord Browne-Wilkinson, to which I have referred, is it suggested that the *Dunlop v Lambert* rule will only be displaced by rights vested in a third party which are identical to those of the innocent contracting party, indeed Lord Diplock, *The Albazero* [1977] AC 774, 848C, considered that there were even stronger grounds for not applying the rule to cases where the two sets of contractual rights were different. What is important, as I see it, is that the third party should as a result of the main contract have the right to recover substantial damages for breach under his contract even if those damages may not be identical to those which would have been recovered under the main contract in the same circumstances. In such a situation the need for an exception to the general rule ceases to apply.

43 However, the appellants relied on a statement of Lord Browne-Wilkinson in *St Martins* (at 115) where he said that the *Dunlop v Lambert* exception provided "a remedy where *no other* would be available to a person sustaining loss which under a rational legal system ought to be compensated by the person who has caused it", emphasising in particular the words "no other". But immediately before this sentence, Lord Browne-Wilkinson was referring to the building employer being entitled to *enforce contractual rights* for the benefit of those who suffered from defective performance but who "under the terms of the contract, could not acquire any right to hold [the contractor] liable for breach". It seems to us that Lord Browne-Wilkinson had in mind a contractual remedy. When the person who in fact suffers the loss should eventually sue for the loss in tort, he would not be enforcing contractual rights. It would be for the more limited purpose of obtaining damages due to negligence. We would add that the indorsee of a bill of lading, by virtue of the B/L Act, steps into the shoes of the consignor and is entitled to sue under the terms of the bill of lading.

44 In *Panatown*, the majority of the law lords did not think that Panatown Ltd should be permitted to claim for substantial damages because of the existence of the DCD. In the context there, they felt that there was no legal black hole. The parties had addressed the question of UIPL, and its successors, having a remedy against McAlpine, and had expressly provided for it by way of the DCD. As the DCD was an integral part of the contractual arrangement, there was really no room for the application of the *Dunlop v Lambert* or *The Albazero* exception.

45 In contrast, in our present case, there was no such deed emanating from Civic or the appellants in favour of any potential purchasers of the units in the condominium. The fact that under general law, following *Ocean Front* and *Eastern Lagoon*, the subsequent purchasers have a limited right to claim in tort against Civic and the appellants, cannot justify the taking away of the contractual rights of the building employer under *The Albazero* exception. Such a limited right does not remove the legal black hole completely. A claim in tort is not a "provision of a direct entitlement" and it is subject to establishing proximity and foreseeability and defences such as independent contractors. Thus, we agree with Prakash J that the present case falls within the narrow ground of the exception expounded by Lord Browne-Wilkinson in *St Martins* and affirmed by the majority of the House of Lords in *Panatown*. To deprive a building employer of *The Albazero* exception, there has to be an express contractual right in favour of a third party or something akin to it, as in the case of an indorsee of a bill of lading under the B/L Act.

46 Finally, we need to briefly address two further questions. The first is the question of double liability. This problem is more apparent than real. On the basis of what Lord Diplock said in *The Albazero* at 844 and what Lord Browne-Wilkinson stated in *Panatown* at 575, Prosperland would have to account to the MCST for the damages recovered by Prosperland from Civic and the appellants. While Prosperland is presently under members' voluntary liquidation, there was no suggestion that Prosperland did not have sufficient assets to discharge its obligations to its existing creditors as well as the MCST. Mr Ng Chee Kheng, the property manager of Prosperland and its main witness at the trial, had said in his affidavit of evidence-in-chief that "any [moneys] which the plaintiff may recover

from these proceedings would be used to rectify the defects".

47 The second question relates to the argument that as the appellants did not raise the defence of independent contractor in their pleadings, that defence is irrelevant to the action. The short answer is that in relation to the preliminary issue now under consideration, we are concerned with general principles, not with details of pleadings in the case. Moreover, if the MCST were to sue any party in tort, the defence of independent contractor could come into play, depending on the facts.

The broad ground

48 The foregoing should suffice to dispose of the first issue. Nevertheless, we will now turn to consider the issue under the broad ground. Prakash J preferred the broad ground both on principle and logic. She said at [64]:

> It is not, in my view, consistent with logic or principle that a contractor under a building contract, who is fully aware that his acts or defaults can have long-term consequences that only manifest themselves well after the employer has divested himself of his interest in the building project (as all anticipate he will), should be able to avoid his responsibility to fulfil the contractual specifications and to deliver to the employer the performance that the latter has paid for and that the contractor has assured the employer he will be able to undertake and deliver.

49 In *Panatown*, Lord Millett pointed out a number of absurdities if the broad ground were not to be accepted. He said at 586:

> Breach of a supply contract involves a failure to provide the very goods or services which the defendant has contracted to supply and for which the plaintiff has paid or agreed to pay. If the breach is discovered before the payment of the contract price, the price is abated by the cost of making good the defects. The right to abatement does not depend upon ownership by the plaintiff of the property, whether goods or land, on which the work was to be carried out; and it would be very odd if the plaintiff's rights varied according to whether the breach was discovered before or after the payment of the price.

Further down at 591–592, Lord Millett added:

> [U]nless the law recognises the performance interest[,] it can provide no remedy to the building employer if the contractor repudiates the contract before he has done any work at all, and the building employer has to engage another contractor to do the work at a higher price. This would be manifestly unjust, and to defend it by saying that the loss is suffered by the building owner (who in fact has suffered none) and not by the building employer is nothing short of absurd.

50 Lord Goff also made a similar comment (at 546), that if it were to be held that the building employer had no performance interest and if the builder were to repudiate the contract or fail to perform, the employer would have no remedy if he were not the owner of the property.

51 However, this is not to say that there will be no difficulties if the broad ground is to be adopted. At [24] above, we have quoted a passage from Lord Browne-Wilkinson's judgment in *Panatown* where he gave an illustration of the problems the broad ground could give rise to. It seems to us that most of the problems may not be intractable and may be overcome through the practical solutions suggested by Lord Millett quoted at [29] above.

52 In our view, the broad ground is probably more consistent with principle. There is no reason

why the employer's right to sue for his loss should be dependent on whether he is the owner of the property or otherwise. The only problem that could arise, which is more apparent than real, is that the builder could be exposed to double liability. We would reiterate the solutions proffered by Lord Millett. We think those solutions meet the "problem". The court ought not to deprive a party of his just contractual relief on account of a perceived difficulty which could be easily surmounted.

53 As we have discussed above, the basis on which a plaintiff is entitled to claim for substantial damages under the broad ground is that he did not receive what he had bargained and paid for. It has nothing to do with the ownership of the thing or property. As to the value of this performance interest, it seems to us that the observation of Lord Scarman in *Woodar Investment Development Ltd v Wimpey Construction UK Ltd* [1980] 1 WLR 277, that the fact that a contracting party has required services to be supplied at his own cost to a third party is at least *prima facie* evidence of the value of those services to the party who placed the order, is a useful pointer.

54 Neither should the claim be dependent upon whether a third party can sue the party in default in tort. Why should the existence of such a right in a third party to claim in tort affect the contractual rights of the plaintiff? The only thing which the court should guard against is to ensure that the builder is not required to compensate twice over for the same damage.

55 As mentioned in [32] above, the main ground upon which the appellants sought to argue that Prosperland could not claim for substantial damages was that, as the MCST was entitled to sue the appellants in tort, there was no legal black hole. It was also pointed out that if Prosperland were to be allowed to claim for substantial damages, it would expose the appellants to double liability. In our opinion, these arguments miss the fundamental premise upon which the broad ground is based. It has nothing to do with the "filling up" of a legal black hole. We can do no better than quote the following passage of Steyn LJ (as he then was) in *Darlington Borough Council v Wiltshier Northern Ltd* (1994) 69 BLR 1 at 24:

> The rationale of Lord Griffiths' wider principle is essentially that if a party engages a builder to perform specified work, and the builder fails to render the contractual service the employer suffers a loss. He suffers a loss of bargain or of expectation interest. And that loss can be recovered on the basis of what it would cost to put right the defects.

56 We have addressed the question of double liability in relation to the narrow ground. At [29] above, we have quoted what Lord Millett said could be the solution. Clearly, if the court, in a particular case, should think it expedient or just, it could always, pursuant to O 15 r 6 of the Rules of Court (Cap 322, R 5, 2004 Rev Ed), join a third party to the proceedings (see *Panatown* at 561 and 596 *per* Lord Goff and Lord Millett respectively).

57 A related matter raised is whether it must be shown by the building employer that he has already carried out the repairs or intends to do so before he is entitled to claim for substantial damages. On the basis of the broad ground that a plaintiff recovers substantial damages for the loss in not getting what he contracted for, that should not be a prerequisite before such damages may be claimed. If, for example, an owner of a house were to engage a contractor to erect a koi pond and it was so badly done that it was of no use and the owner decided to abandon the project, there is no reason why he must have proceeded with the repairs, or intended so to do, before he may claim for substantial damages. At the end of the day, the entire circumstances of the case must be considered to determine whether the claim made was reasonable or was made with a view to obtaining an uncovenanted benefit.

58 In any case, as mentioned earlier, there is evidence that the MCST intended to carry out the

repairs and it was also looking towards Prosperland (the developer) for relief. The MCST also expected Prosperland to carry out the rectifications. Moreover, there is evidence that Prosperland intended to use the damages recovered for that purpose. Prosperland and the present owners of the condominium are related.

59 In the premises, we hold that Prosperland is, in principle, entitled to claim for substantial damages pursuant to the broad ground.

Limitation

60 We now turn to consider the issue as to whether the claim relating to the de-bonding of the wall tiles of the building is time-barred. On this matter, the material facts are these. In August 1997, the building supervisor of the condominium, one Mr Law, noticed a wall tile on the fourth storey of the building becoming de-bonded and he duly reported the matter to Prosperland, which in turn notified Civic. Civic had the tile replaced. Thereafter, Mr Law did regular visual inspection of the external façade. Nothing unusual appeared to him. The trial judge found that such steps taken by Prosperland were an adequate response. The next event occurred two years later in August 1999, when Mr Law noticed that some tiles at the sixth and seventh storeys of the building had become de-bonded and he again reported the matter. In the next month, September 1999, two tiles fell from the 20th storey. A close range inspection was subsequently carried out and it revealed more de-bonded and uneven tiles.

61 As Civic denied liability, a surveyor was engaged to look into the problem. In his report issued in May 2000, the surveyor indicated that the de-bonding was due to poor workmanship and missing or incomplete movement joints. Prosperland instituted the present action in May 2002. The position taken by Prosperland was that the earliest date it could have had knowledge of the seriousness of the defects in the external façade was in September 1999, when the two tiles had fallen off. Prosperland also contended that, in fact, such knowledge should only be imputed to it when it received the surveyor's report in May 2000. For this purpose Prosperland relied on the following passage in *Nash v Eli Lilly & Co* [1993] 4 All ER 383 at 396:

> It is to be noted that a firm belief held by the plaintiff that his injury was attributable to the act or omission of the defendant, *but in respect of which he thought it necessary to obtain reassurance or confirmation from experts, medical or legal, or others, would not be regarded as knowledge until the result of his inquiries was known to him* or, if he delayed in obtaining that confirmation, until the time at which it was reasonable for him to have got it. [emphasis added]

62 Since the building was completed in May 1993, the normal limitation period for a claim in contract or tort of six years would have expired by May 1999. However, s 24A of the Limitation Act (Cap 163, 1996 Rev Ed) postpones the commencement of the limitation period, for actions in respect of latent injury or damage, to the date on which the injured party had knowledge of his rights to bring a claim for the injury or damage. The section also provides that a party's knowledge includes knowledge which he might reasonably have been expected to acquire "from facts observable or ascertainable by him". The injured party will be required to institute the action within three years of such commencement date.

63 The trial judge held that the de-bonding of the single tile in August 1997 would not constitute the requisite knowledge for the purposes of s 24A. She held that Prosperland had acted reasonably in bringing the matter to the attention of Civic, who duly rectified the defect. Accepting the evidence of the experts, she did not think that the fact that Prosperland had knowledge of the de-bonding of just one tile in August 1997 was a sufficient basis to hold that Prosperland had knowledge that there were

widespread defects in the bonding of the wall tiles.

64 The appellants have raised the question of law as to the burden of proof in a case where s 24A applies. It seems to us clear that as Prosperland did not bring the action within the period of six years from the completion of the project, the burden was on Prosperland to show that it acquired knowledge of the claim within three years of the date on which the action was, in fact, instituted. In *Nash v Eli Lilly & Co*, the judge said (at 396):

> Finally it is important to remember where the onus of proof lies. *If the writ is not issued within three years of the date when the cause of action arose … the onus is on the plaintiff to plead and prove a date within the three years* preceding the date of the issue of the writ … If the *defendant wishes to rely on a date prior to the three year period immediately preceding the issue of the writ, the onus is on the defendant* to prove that the plaintiff had or ought to have had knowledge by that date. [emphasis added]

65 On the facts of the present case, the central issue turned on the question as to the date on which it would be reasonable to hold that Prosperland had knowledge, or should have known, that there was a serious defect in the bonding of the wall tiles as a whole. The evidence of the experts called by the parties would appear to indicate that when more than one tile had become de-bonded, a reasonable person would have been very concerned and would have conducted a close inspection to determine the state of the bonding of the tiles surrounding the de-bonded tiles.

66 The evidence relating to the discovery of the de-bonded tiles, as well as that given by the experts called by the parties, was carefully considered and evaluated by the trial judge at [14] to [38] of her judgment and she concluded at [39] as follows:

> In my view, the first time that Prosperland had knowledge that the problem with the wall tiles was not an isolated one was in September 1999 when two tiles de-bonded and fell off. This has been established on the balance of probabilities and the defendants have not convinced me that Prosperland had the requisite knowledge of the defects before May 1999.

67 Contrary to the assertion by the appellants, the trial judge had not wrongly applied the burden of proof. It was for Prosperland to prove it acquired the relevant knowledge on or after May 1999. It would be for the appellants to show knowledge on the part of Prosperland on an earlier date. Prosperland could not be expected to prove a negative.

68 We have only one minor qualification to the conclusion reached by the trial judge. While we agree that she was amply justified to hold, in the light of the evidence of the experts, that the de-bonding of one tile in August 1997 was an isolated incident which would not have warranted the taking of further actions to examine at close range the entire façade of the building, other than stepping up periodic visual inspections of the façade (which were in fact carried out by Mr Law), the emergence of the de-bonding of more tiles at the sixth and seventh storeys of the building in August 1999 should have sounded the alarm and alerted Prosperland that there was something seriously amiss with regard to the wall tiles. The falling of two tiles in September 1999 would have provided the further confirmation that the problem was no longer an isolated one. Perhaps, the trial judge did not think that in reality it made any real difference as August 1999 was still within the period of three years before May 2002. Moreover, that was how the issue was framed for her to determine, namely, whether Prosperland had the requisite knowledge "within the period of three years prior to the date" of the action. However, strictly on the evidence, and particularly that of the experts, we would have thought that the date from which knowledge should be imputed to Prosperland was August 1999 rather than September 1999.

69 Lastly, there are two other aspects which we must touch on. First, on the evidence, it is clear that the de-bonding of a tile does not take place overnight. It is a slow process. However, this is not the material consideration. The critical question is, from which date would it be reasonable to hold that Prosperland knew or ought to have known that there was a widespread problem of de-bonding in relation to the wall tile of the façade of the building. Mr Law undertook regular visual inspection of the façade. The trial judge accepted that it was only in August 1999 that more de-bonded tiles were observed by Mr Law. The fact that the process of the de-bonding of a tile has commenced does not necessarily mean that it would be noted or observed from a distance with the human eye.

70 Second, the appellants placed much emphasis on a photograph which was tendered to court to show de-bonding of certain wall tiles between the sixth and seventh storeys. The photograph itself did not indicate a date. However, below the photograph were written the words "photograph taken on 24 June 1999". It was not absolutely clear who wrote those words though Mr Ng Chee Kheng said that it could be him. He added that he got the date from Law but Law denied giving it to him. It was also not known who took the photograph. Be that as it may, the trial judge did not take this photograph into account in determining when de-bonding of more wall tiles was noticed by Law, who was the person charged by Prosperland to periodically inspect the external façade to detect the de-bonding of wall tiles. As the finding of the judge, that the de-bonding of more tiles did not occur before May 1999, is a finding of fact based on the evidence of witnesses, we are unable to say that it is plainly wrong and warranting our overturning it.

Judgment

71 In the result, we would affirm the answers given by Prakash J to the two preliminary issues of law set out in [9] above. Accordingly, this appeal is dismissed with costs, with the usual consequential orders.