THE HIGH COURT

[2012 No. 11486 P]

BETWEEN

KEVIN McGEE and GRIT McGEE

PLAINTIFFS

AND

MARK ALCORN and MICHAEL FRIEL TRADING AS MICHAEL FRIEL ARCHITECTURAL DESIGN AND SURVEYING

DEFENDANTS

JUDGMENT of Ms. Justice Iseult O'Malley delivered the 5th day of February 2016.

Introduction

1. The issue in this case is whether or not the plaintiffs are entitled to recover damages from the second named defendant for economic loss in relation to a negligently constructed dwelling-house. The claim is in respect of the cost of works done to date and further works proposed to be carried out, including the cost of alternative accommodation during the proposed works. There is also a claim for damages for emotional suffering and distress.

2. The primary basis for the claim against this defendant, who is an architectural technician, is that he issued certificates stating that he had inspected the construction, that the foundations of the house were satisfactory, and that the ground conditions for the foundations were suitable. It is common case that the foundations were in fact unusually defective and that they were laid in unsuitable ground.

3. The defendant has admitted negligence on his part. However, he says that he has no liability for any loss suffered by the plaintiffs. This is based, firstly, on the argument that the cause of action pleaded against him is negligence, and that damages for pure economic loss cannot be recovered in a negligence action.

4. Secondly, he contends that in any event his relationship was with the first named defendant (the builder) and that he had no duty of care to the purchasers of the house.

5. Thirdly, issue is taken with the extent of the damages claimed, on the basis that the proposed works (as opposed to works already carried out) are necessary only from an aesthetic point of view and will entail a cost that is disproportionate to the value of the house.

Background facts

6. The plaintiffs are a married couple with three young children. They lived abroad for some years and moved to County Donegal in 2008. The first named plaintiff is a self-employed mechanical engineer. His family are from the area and his parents owned a company which had initially engaged in construction but had come to specialise in monumental headstones. The plaintiffs took over as directors of this company at some stage after coming to live in the county. The second named plaintiff is a teacher.

7. The first named defendant is a builder. By contract dated the 8th July, 2008, the plaintiffs purchased a new house that he had built. (This defendant has left the jurisdiction and judgment in default has been marked against him.) The purchase price was €430,000.

8. The house is sizable, being some 16.3 metres in length. A conservatory on the western end brings the total length to 21 metres. It is clear that the plaintiffs have taken great care in its upkeep, and that both the house and garden are extremely well maintained.

9. Although impressive in appearance, the house was built upon a bizarrely defective foundation. For some reason, the first named defendant constructed the foundation in the shape of a rough V, tapering to a point at the bottom. Two bow windows at the front of the house were not supported at all and simply rested on the ground.

10. To compound the problem, the soil in which the foundations were laid was not suitable, being in part "made up" or "filled" ground.

11. The second named defendant is the holder of a technician's certificate in architecture. On the 9th April, 2008, he issued two certificates. One is headed "Certificate of Supervision". In this document he confirmed that he had been employed in the erection of the house during the various stages of construction, and that he had inspected the progress of the work at various stages including the opening and pouring of foundations. He certified that:

> *"… the foundations were satisfactory at the time of pouring and that the ground conditions were suitable for the laying of such foundations in respect of the property."*

12. He also certified that good building materials and workmanship had been used throughout and that the property was structurally sound and in accordance with good practice. He attached a copy of his professional insurance indemnity.

13. The second certificate is headed "Certificate of Compliance". In this document the second named defendant confirmed that he had been retained by the first named defendant to inspect the house. He stated that in his opinion the construction of the house complied substantially with all of the applicable Building Regulations.

14. Over the course of 2009 cracks began to appear in the house. These became more serious, and ultimately substantial works were carried out in 2012 (for a cost that is agreed at €129,000) to underpin the foundations. The house is now completely structurally sound and safe. However, it has been left with a permanent tilt. The plaintiffs wish to remedy this by further extensive works which will cost in the region of €277,000. They say that this is required to make the house "*right*", in terms of what they bought.

15. The case as pleaded against this defendant claims damages for negligence, breach of duty and breach of statutory duty. The statement of claim alleges in paragraph 2 that he was at all times the supervising architect in relation to the property, and that he provided both a certificate that the relevant works were carried out in accordance with the Building Regulations made pursuant to statute and a certificate that the foundations were satisfactory.

16. The particulars pleaded are as follows:

> *"(a) Failing to superintend the construction of the said works properly or at all.*

(b) Failing to take any or any adequate steps to ensure that the said building work would comply with Building Regulations and ensuring that the building was in compliance with the said regulations.

(c) Failing to adequately and/or appropriately inspect the building and the works as carried out.

(d) Failing to provide adequate and appropriate plans specific to the requirements of the construction of the said dwelling house.

(e) Failing to ascertain the remedy to the problems that had arisen in the said dwelling house.

(f) Failing to heed or observe the defects or faults hereinbefore referred to.

(g) Failing to instruct the first named defendant to remove or remedy the said defects or faults.

(h) Failing to give any or any adequate instruction for opening up for inspection any of the said works.

(i) Approving the said works, including the said defects and faults.

(j) Acting or omitting as aforesaid, issued the final certificate and when they knew or ought to have known of the said defects or faults.

(k) Failing adequately to detail or design the said works.

(l) Certifying the said works when not correct and in particular certifying that the foundations were satisfactory at the time of pouring and that the ground conditions were suitable for the laying of such foundations in respect of the property."

17. A notice for particulars from the solicitors for the second named defendant requested, *inter alia*, clarification as to whether the plaintiffs were claiming that they were owed a duty of care by that defendant with regard to the construction of the property; particularisation of the matters relied upon in support of the pleading that he owed them a duty of care; and clarification as to the basis upon which the plaintiffs were relying on the two certificates issued by him. The response to these queries was that, as this was a new build, the plaintiffs had relied upon the certificates as provided by the second named defendant.

18. In his defence, the second named defendant pleaded, *inter alia*, that the statement of claim disclosed no valid or sustainable cause of action against him; that he was a stranger to the contract of sale; that the plaintiffs were not entitled to rely upon his certificates and that he had no liability to them in respect of the alleged defects. He denied that he owed them a duty of care, that he was guilty of the alleged negligence, and that he had caused the alleged damage.

19. Prior to the hearing of the case, however, the second named defendant admitted negligence on his part but otherwise placed the plaintiffs on proof of their claim and of their entitlement to recover damages as against him for the economic loss suffered by them.

20. The defendant has not given evidence as to the extent of his supervision or other involvement in the construction of the house. The only evidence on this issue, therefore, is the fact that he issued the certificates.

21. The necessity for the underpinning works that have been carried out is not in dispute and the defendant has agreed the figures for the cost of that work (without prejudice to his denial of liability). However he disputes the necessity for the proposed works. He asserts that the tilt could have been corrected at the same time as the underpinning works, at only marginally greater expense. He also argues that the tilt is merely a cosmetic defect, and insignificant even in that context. It is contended that the proposed expenditure is out of all proportion to the value of the house.

The damage to the house

22. Cracks began to appear in the walls of the house in the course of 2009. Gaps also began to appear in the floor. The plaintiffs contacted the first named defendant but ultimately no help was forthcoming from that quarter. Eventually they engaged Mr. Francis Harvey, who is a qualified engineer with his own practice and a member of the Association of Consulting Engineers. With his assistance it was eventually established that the problem was caused by the foundations of the house.

23. Mr. Harvey carried out a full inspection of the house on the 27th April, 2011. He observed a large crack between the floor of the main kitchen/dining area and the floor of the conservatory, which he measured with callipers. There was also a large crack extending diagonally and vertically above the back door. He fitted a "tell-tale" on this.

24. On a follow-up inspection on the 14th September, 2011, it was noted that the crack in the floor had widened by 4mm and the crack over the door had opened up a further 1mm.

25. On the 16th September, 2011, levels were taken of the floors throughout the ground floor level. It was noted that there was a cross fall of 90mm from the right hand side of the house to the left hand gable.

26. Trial holes were dug around the outside of the house in February, 2012. It was found that the ground along the left hand side of the house was "made up" or "filled" ground. It was evident that the site had been levelled out many years before the work in relation to the foundations had begun. Filling had been placed on top of the sod, under which there was a peat layer and a layer of blue till. Mr. Harvey said that it was never good practice to build on filled or made up ground.

27. Mr. Harvey described the foundations as tapering to a point at the bottom. He said that this was "*most unusual*", and something that he had never come across before. One would only put a point on something if one wanted it to drive it into the ground, whereas the purpose of foundations is to spread a load. The thickness of the foundations varied, and the outer face was extremely curved.

28. It was discovered that the blockwork for the two bay windows at the front of the house had simply been built on hardcore with no foundations at all.

29. Asked whether the house would have collapsed in the absence of remedial works, Mr. Harvey said that he did not know if it would have collapsed but there was evidence of movement and it would certainly have continued to tilt to "*an intolerable degree*".

30. Mr. Harvey said that he had considered other options to arrest the movement, apart from underpinning. Piling would not have worked because it requires a vertical, rather than curved, face on the foundation, in order to insert tie bars to fasten the foundations to the piles. It was also uncertain whether there was any reinforcing in the foundations, such that one could risk piling. His view was that it was an "*incredibly poor*" foundation and that the standard of workmanship was "*pathetically bad"*.

31. He says that he also considered jacking the house. However, this technique requires a solid foundation, or, as he described it, "*a decent solid plate*" to push against so that the house would lift as a unit. In this case, the foundations were sitting on top of made-up ground, which was on top of sod, which was on top of peat. There was no consistency in the foundation and part of the blockwork (under the bay windows) had been built on grass. If one were to attempt to jack up one corner it was most likely that that corner would lift and break off. He therefore did not ask the contractors who did the underpinning to consider jacking.

The remedial works
32. The works have been dealt with in evidence and in submissions under the headings "Phase 1", "Phase 2" and Phase 3".

Phase 1

33. These works have already been carried out and, as noted, the cost has been agreed at €129,000.

34. In April, 2012 Mr. Harvey and the plaintiffs met with Sub-Tech Contracts, a company based in London which specialises in underpinning. It was agreed that having regard to the findings from the trial holes, piling would not be a suitable solution, and that underpinning down to a hard stratum would be necessary. The works began in early July.

35. There was groundwater running from the right hand side and rear of the house, under the foundation, and it was necessary to dig drainage trenches around the house and to install gabion baskets prior to the underpinning. Apart from the excavations, the garden was used throughout the period of the works for the deposit of excavated soil and hardcore. The kerbs were damaged by the heavy vehicles and machinery required for the works.

36. The underpinning necessitated excavations of vertical shafts down the outside of the foundation, to varying depths, until a hard base was found. These shafts had to be supported and cased in timber. At a depth of about 5 metres horizontal tunnels of about a metre in length were dug in under the house and then vertical filled concrete columns were put in and packed tight under the existing foundation.

37. In order to underpin the two internal walls it was necessary to excavate a tunnel from the front to the back of the house for the insertion of pillars.

38. Mr. Harvey said that the underpinning was highly skilled and very good quality work. It is his opinion that the house is now "*very well stabilised*" and it will not move any more. However, he says that he was at all times aware of the cross fall in the house, and that the underpinning would not rectify this.

39. It is relevant to note that in early August, 2012 the site was attended by Mr. Rory McLaughlin, a consulting engineer retained by the second named defendant's insurance company. At his request a trial hole was excavated at the left hand side of the house to a depth of 5 metres. Mr. McLaughlin thus had an opportunity to observe the soil conditions and the nature of the foundations. He does not appear to have made any suggestion that the works were not necessary, or should be done differently.

40. According to the plaintiffs, they were refused a bank loan to pay for the work and used all of their own savings and their children's savings accounts, along with assistance from family and friends, to pay for it. Health insurance was cancelled. They used the resources of the family business where possible.

41. While the family did not move out during the works, it is clear that their lives were very much disrupted during the relevant period. The work was obviously intensive, noisy and messy. The large holes created a risk in relation to the plaintiffs' small children.

Phase 2

42. The figures for this phase are not agreed. It relates to redecorating the house and reinstating the garden after the Phase 1 works were completed. According to the plaintiffs every room had at least hairline cracks by the end of Phase 1. Cracks were plastered over, but the walls were not fully replastered. Electrical and plumbing works were completed.

43. The outdoor work was done in 2014. It involved the re-concreting of the rear area, removal and replacement of old kerbs and steps broken by lorries and machinery during the course of the works, and the levelling and re-sowing of the lawn. Much of this work was carried out by the family business with the assistance of sub-contractors. Photographs taken during Phase 1 and after Phase 2 demonstrate that a complete mess has been transformed into an impressive area.

44. The plaintiffs' claim in respect of Phase 2 is for €38,525 including VAT. The first named plaintiff has said in evidence that the rates charged by the family company were much less than standard commercial rates, and that he was able to obtain materials directly from manufacturers at a cost lower than retail prices. Invoices have been furnished.

45. The second named defendant argues for a figure in the region of €26,000 for these works.

Phase 3 – the tilt and the chimneys

46. The proposed works involve the removal of the roof, windows and doors; the insertion of new windowsills and lintels; the raising of the floors, necessitating the removal of the pipes underneath; the stripping out of the kitchen and utility units; the taking down of the chimneys to ground level; the replacement of all plasterwork and the installation of new plumbing and electrics.

47. The defendant says that this in effect amounts to the demolition of a "*perfectly fine*", structurally sound house and the building of a new one.

48. Mr. Harvey was asked to inspect the house again in January, 2015 in relation to the tilt. He had previously, as noted above, found a cross fall of 90mm (just under four inches) across the length of the house. On this occasion he engaged a firm to make digital measurements, which confirmed his view that there was a cross fall through the house.

49. Mr. Harvey says that as a result of the floor not being horizontal, the walls are not vertical and the roof is tilted. The windows and doors are also affected. The plaintiffs say that there is a problem with all of the internal doors. They have rehung them and adjusted the hinges but when partly open they will all drift open to the left. The plaintiffs have to use door-stops and they find that annoying.

50. Mr. Harvey said that, as an engineer who carries out structural surveys for potential house purchasers, the tilt would cause him to want to know what work had been done to arrest the movement of the house. An engineer who had not observed the work done, as he had, might not be as convinced as he was about the success of the work.

51. Asked about the cost of the proposed works, Mr. Harvey said that a lot of it was caused by the "*knock on*" effect of doing particular work. To create a uniform, level floor throughout the house would require the removal of the heating pipes and other services underneath the screed. To reconnect them would require new plumbing. Straightening the walls, similarly, would mean moving the sockets. This would affect the wiring and the existing wiring would probably not reach the new sockets.

52. While there is no necessity to have ceilings at the same level in each room, Mr. Harvey considers that a sloping ceiling in a room is noticeable.

53. The proposed solution for the leaning gable walls – to build tapering walls tight up against them – was, in Mr. Harvey's view, much less drastic than demolishing and rebuilding them.

54. Mr. Harvey is at pains to stress that the necessity for the proposed works is "*very much from an aesthetic point of view"*, and to make the house "*right"* from a human point of view. There is nothing structurally wrong with the house.

55. The plaintiff's quantity surveyor, Mr. Clarke, has costed the proposed works at €277,060.99 including VAT. He says that it would cost considerably more to demolish and rebuild. The estimates are based on re-using, as far as possible, existing timbers and roof-slates.

56. The defendant's engineer, Mr. Ian Duckenfield, is a structural engineer with a particular interest in building failure. He inspected the premises in April, 2015 and found it to be "*a perfectly serviceable, fine house*". He agreed with Mr. Harvey that there was nothing structurally wrong with the house as it currently stands.

57. He said that he had gone to the house expecting to see serious problems but that with one possible exception there was nothing visible. The exception was that, looking at the house with the garage in the background, one could see that by comparison with the garage, the house wall was out of plumb.

58. Based on the dimensions of the house, he calculated the average cross fall as being 4mm per metre, or 0.4%. He said that this was "*sensibly undetectable*". However, he said, this was an average. The west (right hand) part of the house was essentially flat, while the worst area was the hallway. In this area, by getting down on his hands and knees, he could certainly see a cross fall. In contrast, the cross fall in the kitchen and dining area was only 10mm.

59. The eastern (or left-hand) gable wall was described by Mr. Duckenfield as "*a bit of a contradiction*", in that parts of it were definitely out of plumb, parts were "*spot on*" plumb and parts were very slightly out of plumb. There are allowable tolerances for masonry to be out of plumb and a wall of this sort could have 15 mm and still be regarded as perfectly adequate. He would argue that 70 mm in a wall buttressed by other external and internal walls and chimneys was not a structural issue. There was, he said, no such thing as a perfectly vertical wall.

60. Mr. Duckenfield said that the slope in the roof was not discernible without a spirit level.

61. Mr. Duckenfield characterised the issues with the house as cosmetic, and very minor, rather than structural. They did not justify the proposed expenditure.

62. Mr. Duckenfield is of the view that jacking works could have been carried out while the underpinning was being done. He describes this procedure as being not common, but recognised. In this context, it would have involved stopping the underpinning concrete pillars short of the existing foundation and then the insertion of a hydraulic jack between the pillars and the foundation. The problem identified by Mr. Harvey, that there was nothing to "*jack against*", did not arise since the pillars were built on good ground. Next, holes would be drilled in the floor slab and a geopolymer injected under pressure. This would expand, and as it expanded it would raise the floor. Jacks would also be used to raise the walls. A number of jacks would be needed, at about two metres apart, operated by a specialist crew of about half a dozen.

63. Mr. Duckenfield accepted that the process he described required that both the underside of the foundation and the top of the underpinning concrete be sound and level.

64. Asked what additional cost this might have involved, Mr. Duckenfield said that costs were not his area of expertise but he believed that it would have been in the order of €15,000.

65. It was put to him that Mr. Harvey had to make a judgement call in 2012, and that it was not unreasonable for the plaintiffs to follow the course of action he proposed. He agreed, saying that Mr. Harvey had found that the house was continuing to settle and had arrested that movement and also the possibility of structural instability.

Phase 3 – the chimneys

66. The plaintiffs' evidence is that there is an issue with the chimney in the conservatory. Sand is falling down into the fireplace, indicating that there is cracking in the flue-liner.

67. Mr. Harvey said that it is not possible to put in new flue-liners without opening up the chimney breast. The best way of doing that, in his view, is to take it down and reconstruct it.

68. Mr. Clarke included €9,240 for the chimneys in his overall estimate for Phase 3. He said that doing them on their own, without the other works, would cost €2,000 to €5,000 more.

69. Mr. Duckenfield says that it is not necessary to take the chimney down in order to replace the flues.

Diminution in value
70. The plaintiffs' valuer says that this house, in this location, could have been expected to fetch in the order of €285,000 if it did not have the history that it has. He says that, however, the appearance of the repaired plaster work may give the impression that structural problems are being covered up. In addition, most people in the area would know that there was a history with the house and he believed that there was a stigma attached to it. It was, otherwise, a fine house and a professional survey would demonstrate that it was structurally sound.

71. He refers to what he describes as "*niggly*" things, like doors closing over or the shower door sliding closed on its own.

72. Because of the problems that the house has had, he estimates that its value has fallen by 35 to 50%. Asked if he meant by that a figure between €155,000 and €185,000, he agreed.

73. The defendant's valuer agrees with the figure of €285,000 in the "*no problem*" scenario, and accepts that there may be some diminution of value. However he considers this to be a fine, substantial house. He considers that a discount in the region of 10 to 15% would be reasonably acceptable.

74. It should be noted that the plaintiffs are very happy with the location of their home and have no wish to move.

Submissions
75. Mr. Connolly SC submits that the works that have already been carried out were necessary for health and safety reasons. The proposed works are intended to put the plaintiffs in the position of having a house without defects, as they should have had from the start.

76. It is submitted that the Irish case-law on the issue of pure economic loss arising from negligently constructed buildings is clear, and is governed by *Ward v. McMaster & Ors*. [1985] 1 I.R. 29 (High Court) and [1988] I.R. 337 (Supreme Court). According to the judgment of Costello J. in the High Court, damages for a defective building are recoverable for all aspects of loss including the cost of making good structural defects. It is submitted that the Supreme Court decision in that case left in place the High Court ruling on this issue.

77. It is accepted that in *Glencar Explorations p.l.c v. Mayo County Council* (No.2) [2002] 1 I.R. 84 and in *Beatty v. The Rent Tribunal* [2006] 2 I.R. 191 some doubts were expressed about the correctness of *Ward v. McMaster*, but Mr. Connolly argues that the observations in those cases were obiter and that *Ward v. McMaster* has not been overturned.

78. It is submitted that in the instant case there was undoubted proximity, given that the certificate supplied by the defendant was supplied to the plaintiffs in the knowledge that it was to be relied upon. The ensuing damage was foreseeable. It is just and reasonable that the plaintiffs should be compensated for the loss arising from defects that should have been uncovered by the defendant.

79. Reference is made to *Leahy v. Rawson* [2004] 3 I.R. 1 where damages were awarded against a surveyor in respect of all works, not simply those that could be described as structural. Similarly, in *McShane Wholesale Fruit & Vegetables Limited v. Johnston Haulage Company Limited & anor*. [1997] 1 I.L.R.M. 86, damages were recovered under all headings. In that case Flood J. expressly declined to follow the ruling in *Colgan v. Connolly Construction Co (Ireland) Ltd*. [1980] I.L.R.M. 33 to the effect that loss was recoverable only in respect of structural works necessary to avoid personal injury.

80. As an alternative, it is submitted that the Court should approach the case, not on the basis that pure economic loss is recoverable for some torts but not others, but seeing the test as being proximity. It is argued that this is the predominant theme in the English authorities and is not inconsistent with either *Glencar* or *Ward*. Keane J. had accepted in *Glencar* that pure economic loss was recoverable in cases of negligent misstatement. That, it is argued, is a sub-set of negligence. Although the plaintiffs' case is pleaded in negligence, it is based upon a negligent examination and an untrue representation of the facts in the completed certificate. The representation was intended to be relied upon by the first time purchasers of the house, giving rise to a close proximity and a duty of care. The damage suffered by the plaintiffs was foreseeable, and there are no public policy considerations which could be relied upon to exempt the defendant from liability for the full extent of the losses incurred.

81. On behalf of the defendant, Mr. Marray BL submits that the nature of the loss in respect of which the plaintiffs seek to recover is pure economic loss, in that the case is about a purely qualitative defect rather than a defect causing personal injury or damage to other property. He argues that the law on the issue has been clear since Glencar – such damages are not recoverable in a negligence action. It is submitted that the analysis of Keane C.J. in that case was not *obiter*, that Geoghegan J. was incorrect in so describing it in *Beatty*, and that in *Wildgust v. Bank of Ireland* [2006] 1 I.R. 570 Kearns J. appears to refer to it as being the law. Irish law thus, it is contended, makes a distinction between a claim for damages for pure economic loss in negligence, which must fail, and a claim in negligent misstatement, which may succeed if the criteria are met.

82. It is submitted that the plaintiffs have not made a claim for negligent misstatement, and that in any event there is not the required degree of proximity between the parties to form the basis for such a claim. The defendant had no contract of any kind with the plaintiffs. The certificate was supplied to the vendor, not to the purchasers. The purchasers could rely upon it as against the vendor, but not as against the person giving the certificate unless the criteria for negligent misstatement were fulfilled. In the instant case there was no contract between the parties, no advice given by the defendant to the plaintiffs and no representation made by him to them. A negligent misstatement cannot be made to the world – there must be a duty of care.

83. Turning to the specifics of the works done or proposed to be done, Mr. Marray has agreed the figures for Phase 1 but not Phase 2. The proposed works in Phase 3 would, he says, involve undoing nearly all of the previous work, are essentially aesthetic rather than structurally necessary and would involve a cost that is disproportionate to the value of the house. An award of damages must be reasonable and must have regard to the principle of mitigation of loss. The evidence establishes that the house could be sold in its current condition.

The authorities

Ward v. McMaster & Ors. [1985] 1 I.R. 29 (HC) [1988] I.R. 337 (SC)

84. The first named defendant was a builder who built a house for his own occupation. Some years later it was purchased by the plaintiffs. In order to make the purchase they applied for a loan to the second named defendant, the local authority, pursuant to the provisions of the Housing Act 1966. That body was obliged by statute to satisfy itself as to the value of the house and for that

purpose it retained the third named defendant, who was an auctioneer. The person who inspected the house was therefore a valuer, rather than a person with any qualification in construction. He found no defects and reported that it was in good repair.

85. Problems soon arose and an engineer engaged by the plaintiffs reported that the house was structurally unsound, a source of danger and a risk to health.

86. In the High Court, Costello J. described the issues as being:

- Whether the builder owed the plaintiffs a duty of care as builder and vendor;
- Whether the local authority owed a duty of care in exercising its statutory functions in granting the loan; and
- Whether the auctioneers owed a duty of care in carrying out the valuation.

87. Costello J. noted that the abolition in England of the longstanding principle that builders were not liable in tort in relation to defective buildings had been "*copperfastened*" by the House of Lords in *Anns v Merton London Borough* [1978] A.C. 728. That decision had rejected the proposition that *Donoghue v Stevenson* [1932] A.C. 562 did not apply to realty. He cited the judgment of Lord Wilberforce in Anns, and in particular the following passage:

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

88. Costello J. also referred to *Siney v. Dublin Corporation* [1980] I.R. 400 as having significantly developed the law in this jurisdiction in applying *Donoghue v Stevenson* to the exercise by a local authority of powers of inspection of properties provided, although not built, by it. He considered that although *Siney* was concerned with a duty of care relating to an inspection carried out under statutory powers, rather than a common law duty of care of a builder, it provided very strong support for the then current English approach. He was satisfied, both in principle and on authority, that a builder owed a duty of care to the person to whom he might subsequently sell the house, based on the neighbour principle in *Donoghue v. Stevenson.*

89. In considering the scope of that duty, Costello J. referred to *Junior Books v. Veitchi* [1982] 3 W.L.R. 477, where a sub-contractor had been held liable for economic loss in respect of a negligently constructed factory floor. The majority of the House of Lords had seen this as a natural result of the reformulation of the *Donoghue v. Stevenson* principle in *Anns v. Merton London Borough*.

90. In *Junior Books* the House of Lords rejected the proposition that the subcontractors' duty was limited to a duty to avoid causing foreseeable harm to persons or property (other than the subject matter of the work). Applying the *Anns* principles, it was held that the subcontractors must be taken to have known that if they did the work negligently the resulting defects would at some time require the owners of the property to expend money on remedial measures.

91. Costello J. said that he found the reasoning in *Junior Books* to be persuasive and that he had 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). It also seems to me that the defendant should have foreseen that if he caused the bungalow to be so badly constructed as to force the plaintiffs to leave it that this would cause them both inconvenience and discomfort, and so he owed a duty to the plaintiffs not to cause hidden defects which would result in such inconvenience."*

92. Costello J. then went on to consider the liability of the local authority. He held that there was a sufficient relationship of proximity or neighbourhood between the parties such that in the reasonable contemplation of the Council, carelessness on their part in valuing the bungalow might be likely to cause the plaintiff damage. Given his lack of means, and his knowledge that they were going to value it, they should have been aware that it was unlikely that he would himself employ a professional person to examine it. That gave rise to a *prima facie* duty of care and there was nothing in the dealings between the parties to restrict or limit that duty. Having regard to the purpose of the statutory powers being exercised, it was consistent with those powers that they should be accompanied by a private law duty of care. It was also just and reasonable to hold that a duty of care arose. The plaintiff was relying on the Council's valuation and they should have been aware that he was doing so.

93. The scope of the Council's duty was, he considered, governed by foreseeability and reasonableness. The duty was to ensure that the person carrying out the valuation was competent to discover reasonably ascertainable defects which would materially affect its market value.

94. The claim as against the third named defendant was dismissed. He had been employed in his capacity as an auctioneer, and the standard of care required of him was that of an ordinary skilled auctioneer. The plaintiffs had failed to establish that, in that capacity, he should have discovered the hidden defects.

95. Only the local authority appealed. It appears from the report of the Supreme Court decision that the grounds of appeal were limited to the existence of a duty of care, the issue of foreseeability and the argument that a decision not to engage engineers for the purpose of inspection was a policy matter within the discretion of the Council. The issue of damages was left over, and was subsequently settled without a hearing.

96. Henchy J. found it unnecessary to analyse the "*different and not always reconcilable approaches*" adopted in the authorities cited to the Court, considering that it was possible to decide the case on "*well-established*" principles. The fact that the Council was in breach of its statutory duty to ensure that the house was a good security for the loan would not in itself be sufficient to give a cause of action to the plaintiff, but the statutory duty in respect of the provision of housing in its area created a special relationship between the parties. The plaintiff could only qualify for the loan by showing that he would otherwise, by reason of financial need, have to be rehoused by the Council. He could not, therefore, be expected to be able to afford to engage a surveyor. Henchy J. therefore found that the Council should, in the circumstances, have foreseen that the plaintiff would rely on the inspection by its valuer and that it owed him a duty to ensure by a proper valuation that the house would be a good security for the loan.

> *"It would be unconscionable and unfair if they were to be allowed to escape liability in negligence on the ground that the plaintiff himself should have taken the necessary steps to ascertain that the house was sound. In the light of the statutory rights and duties of the Council it must, in my view, be held that they owed a duty to the plaintiff to observe due care in the valuation of the house and that they failed to carry out that duty."*

97. McCarthy J. accepted that *Anns* was the "*high water mark*" of the application of *Donoghue v. Stevenson* but said that he would not seek to dilute the passage quoted by Costello J. He did not find the criticisms voiced in *Sutherland Shire Council v. Heyman* (1985) 59 A.L.J.R. 564 or *Yuen Kun Yeu v. A.G. of Hong Kong* [1987] 3 W.L.R. 776 to be convincing. At p. 349 he said:

> *"Whilst Costello J. essentially rested his conclusion on the "fair and reasonable" test, 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 upon 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 an injured party his right to redress at the expense of the person or body that injured him."*

98. McCarthy J. found the existence of a duty of care arising from the proximity of the parties as intended mortgagors and mortgagees.

> *"It is a simple application of the principle in Donoghue v. Stevenson [1932] A.C. 562 confirmed in Anns v. Merton London Borough [1978] A.C. 728 and implicit in Siney v. Corporation of Dublin [1980] I.R. 400 that the relationship between the first plaintiff and the County Council created a duty to take reasonable care arising from the public duty of the County Council under the statute. The statute did not create a private duty but such arose from the relationship between the parties."*

99. He also found that it was foreseeable that the plaintiff would rely on the Council's inspection.

100. These two considerations were both involved in the first leg of the *Anns* principle, and it had not been argued that there were considerations which ought to negative, reduce or limit either the scope of the duty, the class of persons to whom it was owed or the damages to which a breach might give rise, within the second leg.

101. Finlay C.J. and Griffin J. agreed with both judgments. Walsh J. expressed agreement with the judgment of McCarthy J. only.

Glencar Explorations p.l.c. v. Mayo County Council [2002] 1 I.R. 84

102. The decision in *Glencar* was concerned with a claim for damages in respect of a mining ban incorporated by the respondent local authority into its development plan. The ban was quashed in judicial review proceedings, having been found by the High Court to have been *ultra vires*. In pursuing the damages aspect the applicants claimed that its adoption entailed negligence, amongst other legal wrongs. In the High Court Kelly J. accepted that the Council had acted negligently, in that it had acted as no reasonable local authority would have acted, but held that there had been no duty of care extant between the parties.

103. On appeal, the Supreme Court agreed that the respondent did not owe a duty of care. The basis for this was the fact that, in adopting the development plan, it was exercising powers for the benefit of the community as a whole and not for the benefit of a defined category of persons to which the applicants belonged. There was therefore no relationship of proximity between the applicants and the respondent that would render it just to impose liability.

104. The applicants had relied upon *Donoghue v. Stevenson, Anns, Siney* and *Ward v. McMaster* in relation to the negligence issue, and Keane C.J. gave detailed consideration to those judgments in determining the question of the existence of the duty of care.

105. He began by observing that in the introductory part of the passage in *Donoghue v Stevenson* dealing with the "neighbour principle", Lord Atkin envisaged that while the law of negligence involved some general conception of relations giving rise to a duty of care, it necessarily embodied rules of law which limit the range of complainants and the extent of their remedy. He had then gone on to clarify that "*proximity*" did not mean only "*mere physical proximity*" but extended

> *"to such close and direct relations that the act complained of directly affects a person whom the person alleged to be bound to take care would know would be directly affected by his careless act."*

106. This was described by Keane C.J. as an "*essential*" clarification given that what was under consideration was the duty of manufacturers to the ultimate purchaser, with whom they had no contractual relationship.

107. He also noted that Lord Atkin had cited with approval a passage from *Le Lievre v. Gould* [1893] 1 Q.B. 491, where the duty had been said to be:

> *"not to do that which may cause a personal injury to that other, or may injure his property."*

108. It had been, therefore, a feature of the law of negligence that it did not afford redress to those who had suffered "economic loss" *simpliciter.* However, a major qualification of that principle had been established in *Hedley Byrne & Co. Ltd. v. Heller and Panners Ltd* [1964] A.C. 465, which involved pecuniary loss caused by a negligent misstatement.

109. Having referred to *Anns,* Keane C.J. referred to subsequent expressions of doubt as to the two stage formulation adopted by Lord Wilberforce (in *Peabody Donation Fund (Governors of) v. Sir Lindsay Parkinson & Co. Ltd* [1985] A.C. 210, *Yuen Kun Yeu v. A.G. of Hong Kong and Sutherland Shire Council v. Heyman)* and to the ultimate change in approach in *Caparo v Dickman* [1990] 2 A. C. 605, where Lord Bridge said:

> *"What emerges is that, in addition to the foreseeability of damage, necessary ingredients in any situation giving rise to a duty of care are that there should exist between the party owing the duty and the party to whom it is owed a relationship characterised by the law as one of 'proximity' or 'neighbourhood' and that the situation should be one in which the court considers it fair, just and reasonable that the law should impose a duty of a given scope upon the one party for the benefit of the other.."*

110. Keane C.J. then turned to *Ward v. McMaster*. At p. 138 he said:

> *"While the decision in Ward v. McMaster [1988] I.R. 337 has been treated by some as an unqualified endorsement by this court of the two stage test adopted by Lord Wilberforce in Anns v. Merton London Borough [1978] A.C. 728, it is by no means clear that this is so. As already noted, Henchy J. was satisfied that the case could be decided by reference to "well established principles" and made no reference in his judgment to the two stage test in Anns v. Merton London Borough. Since Finlay C.J. and Griffin J. expressed their agreement with both the judgments of Henchy J. and McCarthy J., it is not clear that the observations of the latter in relation to the two stage test in Anns necessarily formed part of the ratio of the decision. Given the far reaching implications of adopting in this jurisdiction a principle of liability in negligence from which there has been such powerful dissent in other common law jurisdictions, I would not be prepared to hold that further consideration of the underlying principles is foreclosed by the dicta of McCarthy J. in Ward v. McMaster."*

111. He continued at p. 139:

> *"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 …"*
>
> *I observe, in this context, that it has been suggested in England that the difference in approach between Anns v. Merton London Borough [1978] A.C. 728 and Caparo plc. v. Dickman [1990] 2 A.C. 605 may ultimately be of no great significance, since the considerations which, in a particular case, may negative the existence of a duty of care under the Anns formulation are consistent with an assessment as to whether it is just, fair and reasonable to impose such a duty in the particular circumstances: (see the comments of Lord Hoffman in Stovin v. Wise [1996] A.C. 923 at p. 949)."*

112. Discussing the question of damages for economic loss, Keane C.J. noted that such damages were normally not recoverable in tort. He continued at p. 142:

> *"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."*

113. The other members of the Court agreed with this judgment.

Leahy v. Rawson [2004] 3 I.R. 1

114. This case, as noted above, is relied upon by the plaintiffs in the instant case. It concerned a negligently constructed extension to a cottage, where the work was so badly done that the plaintiff ended up having to convert the garage into living quarters pending resolution of the matter. O'Sullivan J. found that a duty of care arose in a context where the engineers (who denied having supervisory responsibility) had at the request of the plaintiff inspected the work while it was in progress and had assured her that all was well.

115. In reaching this conclusion, O'Sullivan J. specifically followed the *Glencar* analysis rather than applying the *Anns* test endorsed by McCarthy J. in *Ward v. McMaster.*

Beatty v. The Rent Tribunal [2006] 2 I.R. 191

116. In this case, the owners of a rented dwelling succeeded in quashing a decision made in a rent review, on the basis of lack of fair procedures. They also claimed damages in negligence, in respect of loss of rental income. The respondent argued, *inter alia,* that it owed no duty in private law to the applicants and that pure economic loss was not recoverable in negligence.

117. The case turned largely upon the status in law of a body such as the Rent Tribunal and the legal nature of its decision-making process. However, the issue of negligence was also dealt with in the judgments.

118. Geoghegan J. found for the Tribunal on the basis of judicial immunity. He concluded by saying:

> *"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 C.J. in Glencar Explorations p.l.c. v. Mayo County Council. It is unnecessary too express any views on that question in this appeal…"*

119. Fennelly J. described the underlying principles of negligence as being:

> *"1. That there is a relationship of such proximity between the parties such as to call for the exercise of care by one party towards the other;*
>
> *2. That it is reasonably foreseeable that breach of the duty of care will occasion loss to the party to whom the duty is owed; and*
>
> *3. That it is just and reasonable that the duty should be imposed."*

120. Fennelly J. observed that in *Sunderland v. Louth County Council* [1990] I.L.R.M. 658 the plaintiff had attempted to rely upon *Siney* and *Ward v. McMaster* to claim damages for loss alleged to have resulted from a grant of planning permission. The Supreme Court had held unanimously that those cases dealt with "*provision in a social context for those who are unable to provide for themselves*" and did not apply where a planning authority was acting in a "*watchdog"* role.

121. On the facts of the case, he found that the conditions of proximity and foreseeability had been established. However, it would not be just and reasonable to impose a duty of care. Firstly, he considered that it was not the sort of case where reliance on the behaviour of the other party, such as in *Siney* and *Ward v. McMaster*, would justify departure from the normal principle in respect of pure economic loss. Secondly, the availability of such a remedy might tend to compromise the independence of the Tribunal.

122. McCracken J. agreed that the "fair and reasonable" test was not satisfied.

Wildgust v. Bank of Ireland [2006] 1 I.R. 570

123. The issue in this appeal was the liability of an insurance company for an incorrect answer from the plaintiffs' banker to an inquiry as to whether a premium for loan insurance had been paid. Informed that it had been paid, the bank did not feel it necessary to contact the plaintiffs. This occurred in a context where, apparently, it would have been normal for the bank to pay the premium itself rather than let the policy lapse. It later transpired that, as a result of an error, a payment made by the plaintiffs had not been correctly processed and the policy did lapse.

124. The plaintiffs' case for damages for negligent misstatement was dismissed in the High Court on the basis that there had been no actual reliance by the plaintiffs on the incorrect statement, since they were unaware of it. However, it should be noted that in applying the test for the existence of a duty of care, Morris P. had ruled that the formulation set out by McCarthy J. in *Ward v. McMaster* was not, in the light of *Glencar,* to be seen as the full test, and that the Court must in addition ask itself whether it was just and reasonable that the law should impose a duty of a given scope on the defendant for the benefit of the plaintiff.

125. In allowing the appeal, the Supreme Court held that the proximity test applicable to negligent misstatement covered the facts of the case.

126. In considering whether actual reliance was an essential ingredient of the tort, Geoghegan J. referred to the practical reasons for the distinction that had developed, since *Donoghue v. Stevenson*, between negligence in act and negligence in statement.

> *"Pragmatically, some kind of control mechanism was necessary in relation to liability for negligent misstatement as otherwise an action might lie at the suit of large numbers of people influenced and reasonably foreseen to be influenced by the erroneous statement. By contrast, a negligent act will, for the most part, foreseeably damage only a small category of people."*

127. He noted that the more recent English caselaw (in particular, *Caparo Industries plc v. Dickman*) had introduced a third element into liability for negligence. In addition to reasonable foreseeability and proximity, there was now the question of reasonableness in the imposition of a duty of care. Geoghegan J. observed, without further discussion, that this principle had been endorsed, "*albeit obiter*", by Keane C.J. in *Glencar*.

128. Having considered *Hedley Byrne v. Heller & Partners* and the subsequent authorities, in particular *White v. Jones* [1995] 2 A.C. 207, Geoghegan J. concluded that the defendant ought to have known that the information would be relied upon at least by the bank. If the statement made by it was incorrect, the policy could lapse to the detriment of both the bank and the plaintiffs, who had a beneficial interest in the form of an equity of redemption in the policy. There was, therefore, a special relationship between the plaintiffs and the defendant.

> *"Put shortly, the first plaintiff was a "neighbour" for the purposes of the law of negligence and a specially close one at that. There is no question here of the second defendant being liable to large numbers of perhaps unknown persons."*

129. Kearns J. noted that liability for negligence under the principles of *Donoghue v Stevenson* was confined to personal injury to, or damage to the property of, the plaintiff. *Hedley Byrne* had extended liability to include pecuniary loss caused by a negligent misstatement on a "*very specific basis*" – namely,

> *"[t]hat the law would imply a duty of care when a party seeking information from a party possessed of a special skill trusts him to exercise due care, and that party knew or ought to have known that reliance was being placed on his skill and judgment."*

130. Kearns J. then analysed the subsequent leading English authorities, including *Caparo Industries p.l.c. v. Dickman.* In that case, the House of Lords held that liability for economic loss due to negligent misstatement was confined to cases where the statement or advice had been given to a known recipient for a specific purpose of which the maker was aware and upon which the recipient had relied and acted to his detriment. Kearns J. noted the emphasis placed by Lord Bridge on the distinction between a duty to avoid causing injury to the person or to property, and the duty to avoid causing others to suffer purely economic loss.

131. The question whether the parameters of the duty had been extended significantly in this jurisdiction by *Ward v. McMaster*, having regard to the later decision in *Glencar*, was then considered. Having quoted the passages from pp. 138 and 139 of the judgment of Keane C.J. referred to above, Kearns J. said:

> *"56 This most authoritative recent statement of the law in relation to the general duty of care in negligence is in itself a powerful reason for holding that the test in Caparo Industries plc. v. Dickman [1990] 2 A.C. 605, if applicable, must apply with even greater force to cases of negligent misstatement and that Lord Bridge's caveat at p. 621 that an essential ingredient of the "proximity" between the plaintiff and the defendant in such circumstances must at the very least involve proof 'that the defendant knew that his statement would be communicated to the plaintiff, either as an individual or as a member of an identifiable class, specifically in connection with a particular transaction or transactions of a particular kind and that the plaintiff would be very likely to rely on it for the purposes of deciding whether or not to enter upon that transaction or upon a transaction of that kind'.*
>
> *57 This strikes me as a particularly appropriate restriction to apply to any duty of care arising in respect of negligent misstatement for all the reasons identified in the cases already considered and bearing in mind always the crucial distinction between words and statements on the one hand and deeds and conduct on the other. It seems obvious that this distinction is one which should not be elided. The question however is whether the principles in Caparo Industries plc. v. Dickman [1990] 2 A.C. 605, itself a case in negligent misstatement, should apply to cases of negligent misstatement in this jurisdiction, as distinct from cases of the general duty of care in negligence where application of those principles has been established by Glencar Explorations p.l.c. v. Mayo County Council (No.2) [2002] 1 I.R. 84."*

132. Kearns J. held that on the facts of the case, both the plaintiffs and their bank were "*neighbours*" of the defendant in the legal sense, to whom a legal duty was owed. He favoured an interpretation, "*or adaptation if needs be*" of the *Hedley Byrne* principles to include more than just the person to whom the negligent misstatement was addressed.

> *"The "proximity" test in respect of a negligent misstatement must go further than that and include persons in a limited and identifiable class when the maker of the statement can reasonably expect, in the context of a particular inquiry, that reliance will be placed thereon by such person or persons to act or not act in a particular manner in relation to that transaction."*

Discussion and conclusions

133. At the risk of over-simplifying complex issues, the situation appears to be as follows:

> (i) In Ward v McMaster, Costello J. followed Siney and applied the two stage Anns test to find that a duty of care existed. He also applied Junior Books in finding a liability for economic loss caused by a breach of the duty. In the Supreme Court, McCarthy J. (with the agreement of Finlay C.J. and Walsh and Griffin JJ.) approved the *Anns* test, with the added observation that it would require "*powerful*" considerations based on public policy to deny an injured party his right to redress at the expense of the person or body that injured him.
>
> Because of the procedural manner in which the appeal had been run, the Court did not consider the question of liability for economic loss.
>
> (ii) In *Glencar*, the Supreme Court expressed disapproval of the *Anns* test and preferred an approach whereby, in considering the existence of a duty of care, the Court should ask whether it was "*fair, just and reasonable*" to impose such a duty rather than asking whether there were powerful considerations against imposing it.
>
> > The Court considered that it was possible that the judgment of Henchy J. in *Ward v. McMaster*, which was based on "*well-established"* principles, was the binding decision of the Court in that case, rather than the judgment of McCarthy J.
> >
> > The Court also reiterated that the general principle was that damages could be awarded only in respect of personal injuries or damage to property (not being the property, the subject of the litigation). The Court acknowledged that negligent misstatement was an exception to this principle. It expressly reserved its position as to whether damages for economic loss were recoverable "*other than actions for negligent misstatement and those falling within the categories identified in Siney v. Dublin Corporation and Ward v. McMaster"*.
>
> (iii) In *Leahy v. Rawson* O'Sullivan J. applied the *Glencar* analysis in finding that an engineer who assured the plaintiff that all was well with the building was under a duty of care.

134. Whether the analysis of Keane C.J. was, on the facts of the case in *Glencar*, simply obiter as Geoghegan J. said, or a "*most authoritative*" statement of the law, as Kearns J. described it, it is certainly incumbent on this Court to accord it full respect as a considered expression of the unanimous view of the Supreme Court. 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. or Keane C.J.

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.

139. The question then arises as to the recoverability of damages. The defendant says none can be recovered, because the claim was made in negligence rather than negligent misstatement.

140. I note that in *Glencar* one issue dealt with in the judgment arose because the respondent had not specifically denied that it had a duty of care. The issue is discussed by Keane C.J. at pp.131 to 132, where he noted that the defence denied negligence and breach of duty. He stated that it was clearly implicit that the respondent was contending that it was under no duty of care, or that if it was, then it was not in breach. He continued:

> *"Apart from that consideration, whether a duty of care existed in the particular circumstances of this case was a matter of law and, on the orthodox view of the function of pleadings, the absence of a duty of care did not have to be expressly pleaded by the respondent. There is, of course, no question of the applicants having been taken in any way by surprise either in this court or in the High Court, having regard to the detailed written submissions furnished in both courts…"*

141. I also note that at an earlier stage of the proceedings in *Wildgust* the plaintiffs had been directed by the High Court, and, on appeal, by the Supreme Court, to amend the statement of claim to include a specific plea of negligent misstatement – see *Wildgust v. Bank of Ireland* [2001] 1 I.L.R.M. 24. This issue arose when it became clear in the course of the High Court hearing that negligent misstatement was, in fact, the basis of the plaintiff's case. The plaintiff argued that it was already sufficiently clear from the statement of claim, which set out details of the communications in question, the particulars, the defence (which denied having made the representation) and from counsel's opening statement (which referred to "negligence in the misstatement"). The defendant contended that the plaintiff was obliged to plead that a statement had been made to the plaintiff by the defendant, that the defendant intended the plaintiff to rely upon it and that the plaintiff did rely upon it and acted to his detriment. The defendant claimed to have been prejudiced in its defence.

142. Giving the judgment of the Court, McGuinness J. held that the plaintiff had failed to set out the normal elements of a claim of negligent misstatement, and that the defendant was justified in arguing that parts of the pleadings relied upon appeared, rather, to concern an allegation of *mala fides* on the part of the defendant.

143. In the instant case, the plaintiffs plead in their statement of claim that the second named defendant was guilty of negligence and breach of duty. The particulars at (i), (j) and (l) assert that he approved the works, including the defects; that he issued the final certificate when he knew or ought to have known of the defects; and that he certified the works "*when not correct*", in particular that the foundations were satisfactory and that the ground conditions were suitable. The notice for particulars asked for the basis of the claim that there was a duty of care, to which the response was that the plaintiffs had relied upon the certificates.

144. The second named defendant has admitted negligence, without prejudice to his denial of liability to the plaintiffs. That concession appears to have been made orally, and indeed was the cause of some confusion initially in that the plaintiffs' representatives thought that there had been an admission of liability. According to the defendant's written submissions,

> *"The second named defendant without prejudice to the Defence delivered in the proceedings admitted negligence on his part but otherwise placed the plaintiffs on proof of their claim and their entitlement to recover damages against the second named defendant for the economic loss suffered by the plaintiffs."*

145. The Court is not otherwise aware of the exact terms of the admission, and with hindsight it would have been preferable to have clarified it at the hearing. There is some difficulty in understanding how the admission could have been "*without prejudice to the defence*", since the defence denied negligence. I think that the intention was that the admission should not prejudice the argument that this defendant was under no duty of care towards the plaintiffs, and was in any event not liable for economic loss suffered by them.

146. In the absence of any express limitation or exclusion the admission must, in my view, be held to relate to the claims of negligence made in the pleadings including the claims relating to the certificates. It is presumably on foot of the admission that the plaintiffs have not called expert evidence as to the standard of care expected of a professional providing certificates of this nature, but it has not been suggested by the defendant that the plaintiffs have not proved that the representation as to the adequacy of the foundations was made negligently. Further, it has not been suggested that the defendant has been taken by surprise by the plaintiffs' submissions, or that he would have addressed the case differently had the term "negligent misstatement" been expressly employed in the pleadings.

147. That being so, it appears to me that in the circumstances, the combination of the statement of claim, the notice for particulars and replies thereto are adequate for the purpose of making a case of negligent misstatement. On the facts of the case, there can be little doubt as to whether the criteria for liability for negligent misstatement, as discussed in the authorities and most recently in *Wildgust*, have been met. Damages for economic loss are therefore recoverable.

148. Also, 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.

149. The next issue, then, is the extent of the damages recoverable.

150. The cost of the remedial works undertaken in Phase 1 presents little difficulty. These works had to be done if the house was not to continue moving. In my view it was a directly foreseeable result of the inadequate construction of the foundations that extensive and expensive works would have to be carried out. I bear in mind that an engineer nominated by the defendant's insurance company attended at the site, inspected it and did not express any disagreement with what was being done. I therefore award the €129,000 claimed under this heading.

151. Phase 2 relates to some redecoration of the house and reinstatement of the garden after Phase 1 had been completed. Having regard to the photographs taken during Phase 1, I consider that Phase 2 was a necessary consequence. The costs have been properly vouched and I see no reason not to allow the sum of €38,525 as claimed by the plaintiffs.

152. The major issue in relation to the damages concerns Phase 3.

153. The leading Irish authority on damages in this area is the decision of the Supreme Court in *Munnelly v. Calcon Limited* [1978] I.R. 387. In that case, part of one of the walls of a house belonging to the plaintiff had collapsed as the result of the negligence of the defendants, who were engaged in construction work on the adjoining site. The damage was irreparable and the house had to be demolished. The High Court awarded a sum in general damages to cover the cost of building a new house on the site.

154. In allowing the defendant's appeal, the Supreme Court held that the appropriate measure of damages was the diminution in the value of the property rather than the cost of reinstatement.

155. Henchy J. cited the following passage from *McGregor on Damages* (13th ed., 1972):

> *"The difficulty in deciding between diminution in value and cost of reinstatement arises from the fact that the plaintiff may want his property in the same state as before the commission of the tort but the amount required to effect this may be substantially greater than the amount by which the value of the property has been diminished. The test which appears to be the appropriate one is the reasonableness of the plaintiff's desire to reinstate the property; this will be judged in part by the advantages to him of reinstatement in relation to the extra cost to the defendant to the defendant in having to pay damages for reinstatement rather than damages calculated by the diminution in the value of the land."*

156. Henchy J. also accepted that two principles were basic to the law of damages. Firstly, damages should be such as to put the plaintiff, so far as money can, in the same position as he would have been had the tort not occurred. Secondly, the damages must be reasonable as between the plaintiff and the defendant. In the case before the Court, the cost of reinstatement would have given unjustifiable profit to the plaintiff excessively and unfairly penalised the defendants. Measuring damages at the diminished value, on the other hand, would enable the plaintiff to get premises no less suitable for his needs.

157. In similar vein, Kenny J. said:

> *"The principle of restitutio in integrum does not absolve the subsidiary rule that in every case where property is destroyed or demolished, the owner is entitled to recover the cost of restoration as damages…There may be some cases in which damages equal to the cost of restoration are the only way to put the plaintiff back into the same position as he was before the accident, but they are special cases and the onus lies on the plaintiff to establish that his is one of them."*

158. Parke J. agreed, saying that the cost of reinstatement would impose a wholly unreasonable burden on the defendants.

159. *Leahy v. Rawson*, referred to above, is an example of one such exceptional case in that O'Sullivan J., having had regard to *Munnelly,* did award the cost of demolition and rebuilding. However, that was a case where a) the house was positively dangerous and could not be occupied, and b) the cost of repair works would actually have been greater.

160. In my view the claim in the instant case for damages to cover very extensive works in order to correct the tilt is excessive and unreasonable. It would mean that the total spent on repairs to the house would be close to the price paid for it in 2008, and would be greatly in excess of any estimate of its current value. It must be remembered that the plaintiff's own witness has described the necessity for these works as purely aesthetic. I do not consider that it is justifiable in a context where the tilt is barely perceptible, has no structural implications and appears to have caused, at most, the annoyance of having to use doorstops. In these circumstances, diminution in value is the appropriate measure in this case. I do accept the evidence that the house has probably acquired something of a reputation, despite its now-undoubted structural soundness, and that an astute purchaser would probably look for the cross fall and demand a discount. I do not see, however, that it could be as much as 50% of the value. I therefore award the sum of €75,000 under this heading to reflect a diminution in value of approximately 25%.

161. In these circumstances, there is no requirement to consider the cost of alternative accommodation.

162. The chimneys, however, are in a different category in that there are real safety concerns associated with them. A figure to cover the cost of rectifying them as stand-alone works should therefore be awarded. Given that the quantity surveyor was somewhat vague on this, I will award €11,000.

163. Finally, there is the issue of distress and inconvenience. There is no doubt but that the plaintiffs had to put up with very intrusive, noisy and messy works for the period of the Phase 1 works. The situation was particularly difficult having regard to the fact that there were three young children in the house. I consider that €25,000 is an appropriate award in these circumstances.