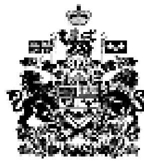

SUPREME COURT OF CANADA

CITATION: Design Services Ltd. *v.* Canada, [2008] 1 S.C.R. 737, 2008 SCC 22

DATE: 20080508
DOCKET: 31618

BETWEEN:

**Design Services Limited, G.J. Cahill & Company Limited,
Pyramid Construction Limited, PHB Group Inc.,
Canadian Process Services Inc. and Metal World Incorporated Inc.**
Appellants
and
Her Majesty The Queen
Respondent

CORAM: McLachlin C.J. and Binnie, Deschamps, Fish, Abella, Charron and Rothstein JJ.

REASONS FOR JUDGMENT: (paras. 1 to 67):	Rothstein J. (McLachlin C.J. and Binnie, Deschamps, Fish, Abella and Charron JJ. concurring)

Design Services Ltd. *v.* Canada, [2008] 1 S.C.R. 737, 2008 SCC 22

Design Services Limited, G.J. Cahill & Company Limited, Pyramid Construction Limited, PHB Group Inc., Canadian Process Services Inc. and Metal World Incorporated Inc. *Appellants*

v.

Her Majesty The Queen *Respondent*

Indexed as: Design Services Ltd. *v.* Canada

Neutral citation: 2008 SCC 22.

File No.: 31618.

2007: November 9; 2008: May 8.

Present: McLachlin C.J. and Binnie, Deschamps, Fish, Abella, Charron and Rothstein JJ.

on appeal from the federal court of appeal

Torts — Negligence — Duty of care — Tendering process — Recovery for pure economic loss — Owner awarding construction contract to non-compliant bidder following

“design-build” tendering process — Subcontractors to contractor which should have been awarded contract suing owner in tort for economic loss suffered — Whether owner owed duty of care to subcontractors — Whether claim fits within recognized duty of care category — Whether new duty of care between owner and subcontractors should be recognized.

Public Works (PW) launched a “design-build” tendering process for the construction of a building. The tendering documents indicated that proponents could bid on the contract alone or in conjunction with other entities as a joint venture. PW awarded the contract to a non-compliant bidder. O, the contractor which should have been awarded the contract, and the subcontractors associated with it, sued. No partnership or joint venture had been entered into between O and the subcontractors. O settled with PW, but the subcontractors continued with the litigation. The trial judge found that PW owed a duty in tort, but not in contract, to the subcontractors. The Court of Appeal set aside the decision, concluding that a new duty of care should not be recognized in these circumstances.

Held: The appeal should be dismissed.

The subcontractors’ claims do not fall within a preexisting category in respect of which a duty of care has been recognized. Since the subcontractors’ damages were solely financial in nature, they qualify as pure economic losses. Of the five pre-existing categories of pure economic loss, relational economic loss is the only one within which the subcontractors’ claims could possibly fall. Relational economic loss occurs in situations where the defendant negligently causes personal injury or property damage to a third party and the plaintiff suffers pure economic loss by virtue of

some relationship, usually contractual, it enjoys with the injured third party or the damaged property. Since O's property was not damaged here, the subcontractors do not fit within this category. Absent damage to O's property, even a finding of joint venture or situation analogous to a joint venture between O and the subcontractors would not bring them within the relational economic loss category. [30-31] [33-34] [42] [44]

The recognition of a new duty of care between an owner and subcontractors in the context of a tendering process is not justified. While there are certainly factors that indicate a close relationship between PW and the subcontractors, at the first stage of the *Anns* test a court must also examine whether there are any policy considerations specific to the parties such that tort liability should not be recognized. Here, the fact that the subcontractors had the opportunity to form a joint venture, and thereby be parties to the "Contract A" made between PW and O, which would have entitled them to claim in contract, is an overriding policy reason that tort liability should not be recognized in these circumstances. The obligations the subcontractors seek to enforce through tort exist only because of "Contract A". Allowing them to sidestep the circumstances they participated in creating and make a claim in tort would be to ignore and circumvent the contractual rights and obligations that were, and were not, intended by PW, O and the subcontractors. To conclude that an action in tort is appropriate when commercial parties have deliberately arranged their affairs in contract would be to allow for an unjustifiable encroachment of tort law into the realm of contract. Even if a *prima facie* duty of care had been found at the first stage of the *Anns* test, it would have been negated at the second stage because of indeterminate liability concerns. [3] [53] [56-57] [66]

Cases Cited

Referred to: *Martel Building Ltd. v. Canada*, [2000] 2 S.C.R. 860, 2000 SCC 60; *Kamloops (City of) v. Nielsen*, [1984] 2 S.C.R. 2; *Cooper v. Hobart*, [2001] 3 S.C.R. 537, 2001 SCC 79; *Edwards v. Law Society of Upper Canada*, [2001] 3 S.C.R. 562, 2001 SCC 80; *Odhavji Estate v. Woodhouse*, [2003] 3 S.C.R. 263, 2003 SCC 69; *Childs v. Desormeaux*, [2006] 1 S.C.R. 643, 2006 SCC 18; *Donoghue v. Stevenson*, [1932] A.C. 562; *Anns v. Merton London Borough Council*, [1978] A.C. 728; *The Queen in right of Ontario v. Ron Engineering & Construction (Eastern) Ltd.*, [1981] 1 S.C.R. 111; *M.J.B. Enterprises Ltd. v. Defence Construction (1951) Ltd.*, [1999] 1 S.C.R. 619; *D'Amato v. Badger*, [1996] 2 S.C.R. 1071; *Canadian National Railway Co. v. Norsk Pacific Steamship Co.*, [1992] 1 S.C.R. 1021; *Winnipeg Condominium Corporation No. 36 v. Bird Construction Co.*, [1995] 1 S.C.R. 85; *Caltex Oil (Aust.) Pty. Ltd. v. The Dredge "Willemstad"* (1976), 11 A.L.R. 227; *Morrison Steamship Co. v. Greystoke Castle (Cargo Owners)*, [1947] A.C. 265; *Ultramares Corp. v. Touche*, 174 N.E. 441 (1931).

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APPEAL from a judgment of the Federal Court of Appeal (Létourneau, Sexton and Malone JJ.A.) (2006), 272 D.L.R. (4th) 361, 352 N.R. 157, 42 C.C.L.T. (3d) 1, 58 C.L.R. (3d) 153, [2006] F.C.J. No. 1141 (QL), 2006 CarswellNat 2566, 2006 FCA 260, reversing a decision of Mosley J. (2005), 275 F.T.R. 183, 46 C.L.R. (3d) 171, [2005] F.C.J. No. 1108 (QL), 2005 CarswellNat 1807, 2005 FC 890. Appeal dismissed.

Geoffrey E. J. Brown, *Q.C.*, and *Gerry R. Fleming*, for the appellants.

Christopher Rupar, for the respondent.

The judgment of the Court was delivered by

ROTHSTEIN J. —

I. Introduction

[1] The issue in this appeal is whether an owner in a tendering process owes a duty of care in tort to subcontractors. The owner awarded a construction contract to a non-compliant bidder. The appellants were subcontractors to the contractor which should have been awarded the contract. The appellants do not have privity of contract with the owner and therefore, being unable to establish a claim for breach of contract, have asserted a claim in tort for the economic loss they have

suffered.

[2] There are two ways that such a claim can succeed. Either (1) the claim fits within a recognized duty of care category, or (2) a new duty of care is recognized.

[3] The claim in this appeal does not fall within a recognized category of duty of care, and the recognition of a new duty between an owner and subcontractors is not justified. Therefore, I would dismiss the appeal.

II. Facts

[4] Public Works and Government Services Canada ("PW") launched a tendering process in May 1998 for the construction of a naval reserve building in St. John's, Newfoundland, to be named HMCS Cabot.

[5] PW decided to use what is called a "design-build" tendering process. The key difference between a traditional tendering process and a design-build project is that in the latter, the bid proponent is responsible for both the design and the construction of the project. It is the proponent that must bring together the design and construction professionals in a collaborative effort to complete the bid. This type of tendering process is advantageous for the owner since instead of having an architect, a general contractor and other consultants, an owner will only deal with one entity usually called the design-builder. This single point of contact allows the owner to funnel all its concerns (e.g. design revisions, project feedback, budgeting, permits, construction issues) through

the design-builder. Also, as described by Mr. Carl Mallam, the president of Olympic Construction Ltd. ("Olympic"), the proponent/general contractor to which the appellants would have been subcontractors, a design-build project offers other advantages to the owner: "it usually took less time to complete and posed less risk that the project would go over budget as the bids offered a 'package' deal and lump sum price covering everything from the design to final inspection and 'turnkey' operation" (trial reasons (2005), 275 F.T.R. 183, 2005 FC 890, at para. 45).

[6] This was a two-stage tendering process. First, under a Request for Statement of Qualifications ("SOQ"), the bid proponents were asked to provide evidence of the capabilities, qualifications and experience of key individuals within their proposed design-build teams. From this information, PW would select proponents to continue to the next stage of the process known as the Request for Proposal ("RFP"). Once the proposals were submitted, PW would evaluate them and award the contract to the winning proponent.

[7] The tendering documents supplied by PW at the SOQ stage indicated that proponents could bid on the contract alone or in conjunction with other entities as a joint venture. In the present case, the joint venture option was not pursued. No partnership or joint venture was entered into between Olympic and the appellants.

[8] Olympic submitted its reply to the SOQ on June 24, 1998. Olympic's SOQ documents identified the appellants as part of Olympic's design-build team, with the exception of the mechanical subcontractor, Canadian Process Services Inc.

[9] Four proponents were chosen to proceed to the RFP stage, among them Olympic and Westeinde Construction Ltd.

[10] Olympic submitted its reply to the RFP on August 12, 1998. The bid indicated that Olympic was the sole proponent. Olympic also posted the bond and the evidence of financial capability.

[11] PW awarded the contract to the non-compliant bidder, Westeinde. As a result, Olympic and the appellants commenced litigation against PW. On November 17, 2004, Olympic reached a settlement with PW and discontinued its action. The appellants continued with the litigation.

[12] For the purpose of the present litigation, the Court is to assume that the contract was awarded to a non-compliant bidder and that the contract should have been awarded to Olympic. PW reserves the right to argue otherwise at a later date without prejudice.

III. Judgments Below

A. *Federal Court of Canada* (2005), 275 F.T.R. 183, 2005 FC 890

[13] The trial judge, Mosley J., determined that PW owed a duty in tort, but not in contract, to the appellants. He held that there was no contractual privity between the appellants and PW. The trial judge's contractual findings were upheld by the Court of Appeal and are not challenged in this Court.

[14] Turning to tort, Mosley J. stated that it was clear that the recognition of liability in tort by owners to subcontractors in the tendering process is, as yet, an undeveloped area of the law, and there is little support for the appellants' position in the jurisprudence. Accordingly, the question was whether a new duty of care ought to be recognized.

[15] Mosley J. accepted the appellants' argument that it was reasonably foreseeable in the circumstances of this case that PW's issuing the contract to a non-compliant bidder would result in financial losses to the appellants. With respect to proximity, Mosley J. stated that notwithstanding his finding that Olympic and its team members did not enter into a formal joint venture, the process adopted by Olympic and the appellants in this case was analogous to a joint venture. Therefore, he found that "[PW's] requirements in the pre-qualification and tendering process created a relationship between [PW] and the [appellants] that meets the proximity standard" (para. 115).

[16] Mosley J. did not accept PW's contention that liability would be indeterminate, because of the "unique" design-build approach adopted by PW in the tendering process. In his view, the class of appellants and the scope of the liability were readily ascertainable.

[17] Mosley J. added the following:

> I conclude, therefore, that this is a case that cries out for a remedy. By reason of its close management of the participation of the plaintiffs in the tendering process, the defendant owed the plaintiffs a duty of care in tort not to award the contract to a non-compliant bidder. Providing a remedy does not raise the risk of indeterminate liability because of the particular facts of this case. [para. 119]

B. *Federal Court of Appeal* (2006), 272 D.L.R. (4th) 361, 2006 FCA 260

[18] Sexton J.A., for the court, noted that the trial judge had made errors of mixed fact and law. Therefore, he could only interfere if those errors were palpable and overriding.

[19] Sexton J.A. stated that the trial judge had made a palpable and overriding error in concluding that PW had intended to create a form of "partnership" between itself and the successful design-build team. In Sexton J.A.'s view, the "partnering" session called for by the RFP "had nothing to do with [PW] partnering with design-build team members and everything to do with the efficient completion of the project" (para. 53). Sexton J.A. noted that there was a two-tier relationship: the first between PW and Olympic; the second between Olympic and the appellants. There was no direct relationship between the appellants and PW. Sexton J.A. accordingly concluded that the situation was not analogous to that of a joint venture.

[20] Turning to whether a new duty of care should be recognized in these circumstances, Sexton J.A. stated that several considerations went against a finding of proximity necessary to substantiate a new duty of care. First, given the two-tier relationship between the appellants and PW, the facts did not support a finding of proximity between the parties. Second, policy considerations negated imposing a duty of care, as the appellants were in an excellent position to protect themselves by forming a joint venture with Olympic or by submitting bids to other

proponents. Accordingly, Sexton J.A. concluded that the relationship between PW and the appellants was not such as to justify a finding of a *prima facie* duty of care on PW.

[21] The Court of Appeal also held that the trial judge had made a palpable and overriding error by overestimating the alleged "uniqueness" of this tendering process.

IV. Analysis

A. *The Framework for Determining Duty of Care*

[22] It is agreed between the parties that Canadian jurisprudence has as yet not recognized a duty of care between an owner and subcontractors. The issue is whether it should.

[23] In *Martel Building Ltd. v. Canada*, [2000] 2 S.C.R. 860, 2000 SCC 60, at para. 108, this Court left the door open to a duty of care arising between subcontractors and an owner:

> Finally, we note that Desjardins J.A. relied on two cases to support the view that a duty to treat all bidders fairly and equally has been recognized in the context of tort claims. However, we note that both cases have subsequently been reversed by appellate courts: *Twin City Mechanical v. Bradsil (1967) Ltd.* (1996), 31 C.L.R. (2d) 210 (Ont. Ct. (Gen. Div.)), rev'd (1999), 43 C.L.R. (2d) 275 (Ont. C.A.); *Ken Toby Ltd. v. British Columbia Buildings Corp.* (1997), 34 B.C.L.R. (3d) 263 (S.C.), rev'd (1999), 62 B.C.L.R. (3d) 308 (C.A.). In addition, reliance in tort was necessary because both cases involved situations where a subcontractor sought redress against the tender calling authority who had received bids from the general contractor. Since there was no privity of contract between the subcontractor and the owner, liability could only be founded in tort. In both cases, the appellate courts refrained from deciding whether or not a duty of care was owed in such situations, and preferred to limit their decisions to the fact that a breach could not be established. We believe that the issue of whether a duty of care can arise between a subcontractor and an owner must be left to a case in which it arises.

[Emphasis added; emphasis in original deleted.]

This is such a case.

[24] The general principles applicable when determining whether a duty of care exists have been analyzed by this Court in a series of decisions. See for example *Kamloops (City of) v. Nielsen*, [1984] 2 S.C.R. 2; *Cooper v. Hobart*, [2001] 3 S.C.R. 537, 2001 SCC 79; *Edwards v. Law Society of Upper Canada*, [2001] 3 S.C.R. 562, 2001 SCC 80; *Odhavji Estate v. Woodhouse*, [2003] 3 S.C.R. 263, 2003 SCC 69; *Childs v. Desormeaux*, [2006] 1 S.C.R. 643, 2006 SCC 18.

[25] As McLachlin C.J. wrote in *Childs*, at para. 9, the question to be wrestled with is how to define the persons to whom the duty is owed. As she explained in para. 10, with reference to *Donoghue v. Stevenson*, [1932] A.C. 562 (H.L.), proximity remains the foundation of the modern law of negligence. A legal duty extends to my "neighbour". And legal neighbourhood is "restricted" to "persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question" (*Donoghue*, at p. 580, *per* Lord Atkin).

[26] Proximity has generally been understood in the context of an overt act that directly causes physical loss to a plaintiff (A. M. Linden and B. Feldthusen, *Canadian Tort Law* (8th ed. 2006), at p. 304). However, the notion of proximity has been extended to cover certain limited circumstances in which a defendant, without causing a plaintiff to suffer personal injury or property damage, did cause financial loss to the plaintiff. Further, Canadian law recognizes that new

categories where a duty of care is recognized may be established by application of the analysis set out in *Anns v. Merton London Borough Council*, [1978] A.C. 728 (H.L.).

[27] However, as stated in *Childs*, at para. 15, before determining if a new duty of care should be recognized, it must first be determined whether the present situation fits within, or is analogous to, a relationship previously recognized as having a duty of care between the parties. If it does, a duty of care will be established. By first determining whether the situation fits within or is analogous to a previously recognized category, the analysis otherwise required by *Anns* is avoided.

B. *Does This Claim Fall Within a Recognized Duty of Care*

[28] *The Queen in right of Ontario v. Ron Engineering & Construction (Eastern) Ltd.*, [1981] 1 S.C.R. 111, first established the "Contract A/Contract B" analysis for tendering processes. Under this approach, "Contract A" is formed once the proponent submits its bid to the owner. "Contract B" comes into being once the owner awards the contract to the successful bidder. Here, the trial judge found, at para. 99, that there was clearly a "Contract A" between Olympic and PW. PW does not dispute this finding.

[29] As developed in *M.J.B. Enterprises Ltd. v. Defence Construction (1951) Ltd.*, [1999] 1 S.C.R. 619, and *Martel*, "Contract A" can impose certain implied terms on the owner such as the obligation to treat all bidders fairly and equally, as well as the obligation to only accept compliant bids. In this case, PW breached its "Contract A" with Olympic by awarding "Contract B" to a

non-compliant bidder. This breach affected the appellants since their opportunity to recoup the costs of preparing their bids and their opportunity for profit from participating in the construction project depended on Olympic being awarded "Contract B".

[30] The appellants' costs and lost opportunity for profit were solely financial in nature. They were not causally connected to physical injury to their persons or physical damage to their property. As such, they qualify as pure economic losses (*D'Amato v. Badger*, [1996] 2 S.C.R. 1071, at para. 13; *Martel*, at para. 34; Linden and Feldthusen, at pp. 441-43).

[31] In *Canadian National Railway Co. v. Norsk Pacific Steamship Co.*, [1992] 1 S.C.R. 1021, at p. 1049, La Forest J. recognized five different categories of negligence claims for which a duty of care has been found with respect to pure economic losses:

1. The Independent Liability of Statutory Public Authorities;
2. Negligent Misrepresentation;
3. Negligent Performance of a Service;
4. Negligent Supply of Shoddy Goods or Structures;
5. Relational Economic Loss.

See also B. Feldthusen, "Economic Loss in the Supreme Court of Canada: Yesterday and Tomorrow" (1990-91), 17 *Can. Bus. L.J.* 356, at pp. 357-58; *Winnipeg Condominium Corporation No. 36 v. Bird Construction Co.*, [1995] 1 S.C.R. 85, at para. 12; *D'Amato*, at para. 30; *Martel*, at para. 38. As explained in *Martel*, at para. 45: "The reason for the broader five categories is merely

to provide greater structure to a diverse range of factual situations by grouping together cases that raise similar policy concerns. These categories are merely analytical tools."

[32] The appellants' economic losses do not fall within the first four categories. This case obviously does not involve a negligent misrepresentation, a negligent performance of services or a negligent supply of shoddy goods or structures. Neither is this a case of independent liability of statutory public authorities, which deals with the government's "unique public power to convey certain discretionary benefits, such as the power to enforce by-laws, or to inspect homes or roadways" (Feldthusen, at p. 358). Here, the government is not inspecting, granting, issuing or enforcing something mandated by law. Instead, the present situation is akin to commercial dealings between private parties, not the exercise of unique government power.

[33] This leaves relational economic loss as the only preexisting duty of care category within which the appellants' claims could possibly fall. Linden and Feldthusen, at p. 477, define relational economic loss as a situation in which "the defendant negligently causes personal injury or property damage to a third party. The plaintiff suffers pure economic loss by virtue of some relationship, usually contractual, it enjoys with the injured third party or the damaged property."

[34] The appellants do not fit within the relational economic loss category because no property of Olympic was actually damaged in this case. From its origin, relational economic loss has always stemmed from injury or property damage to a third party.

[35] The reason appears to be that physical damage tends "to ensure a reassuringly proximate nexus between tortious act and recoverable damage" (*Caltex Oil (Aust.) Pty. Ltd. v. The Dredge "Willemstad"* (1976), 11 A.L.R. 227 (H.C.), at p. 255). This is not to say that in the development of new categories under the *Anns* test, physical injury or property damage would necessarily be a requirement to justify a finding of proximity. However, insofar as the existing category of relational economic loss is concerned, injury or property damage to a third party has been a requirement.

[36] In *Morrison Steamship Co. v. Greystoke Castle (Cargo Owners)*, [1947] A.C. 265 (H.L.), the Greystoke Castle, a ship, had to be put into dry dock for repairs after it collided with another ship, the Cheldale. The cargo owners of the Greystoke Castle were able to recover from the owners of the Cheldale some of the general average expenditures incurred from the discharging and reloading of their cargo while the Greystoke Castle was in dry dock.

[37] In *Caltex*, a dredge damaged an underwater pipeline that was providing petroleum from a refinery to an oil terminal across the bay. As a result, the pipeline was no longer able to carry petroleum to the terminal. Although the pipeline was owned by the refinery, the oil terminal was able to recover the cost of arranging alternative means of transportation of the petroleum from the owners of the dredge and from the company which had plotted the inaccurate navigation chart for the dredge.

[38] In *Norsk*, a barge damaged a railway bridge owned by Public Works Canada but primarily used by Canadian National Railway Company ("CN"). As a result, CN's trains had to be rerouted, incurring additional expenses. CN recovered these costs from the owners of the barge.

[39] In all of the above cases, damage to a third party's property led to the financial losses of the plaintiffs and these losses were recoverable in negligence. Here, we are dealing with the award of a bid to a non-compliant bidder, which constitutes a breach of "Contract A" between PW and a third party, Olympic. Granted, the breach of contract by PW resulted in the appellants' being unable to recoup the costs of preparing the bid and the loss of an opportunity to profit from participating in the construction project. But the breach of Olympic's contractual rights arising out of "Contract A" cannot be interpreted as damage to Olympic's property. As explained in *Anson's Law of Contract* (28th ed. 2002), at p. 24:

> The law of obligations must be distinguished from the law of property which governs the acquisition of the rights persons have in things, which may be land or moveables, and may be a tangible physical object or an intangible, such as a debt, shares in a company or a patent. Whereas a person's property right in a thing is generally valid against the whole world, the rights under the law of obligations, including contract, are personal and valid only against a specific person or persons.

Or explained another way by S. J. Hepburn in *Principles of Property Law* (2nd ed. 2001), at p. 21:

> In order to establish a proprietary interest it must be proven that the holder has an enforceable, *in rem* right to exclude the rest of the world; it is this right alone which distinguishes *in rem* rights from other enforceable legal rights. Contractual rights are not enforceable against the rest of the world; they are only enforceable against the parties to the contract and are therefore *in personam* in nature. Contracts which deal with land or personal property may confer similar rights of use and enjoyment; however, without the right to exclude, such rights will only be *in personam*.

[40] The rights arising out of "Contract A" between Olympic and PW are not *in rem* rights

meant to exclude the rest of the world. "Contract A" only imposed *in personam* obligations between PW and Olympic. Since "Contract A" is not property, no property was damaged. Because no property was damaged, the appellants' claims do not fall within the existing category of relational economic loss.

[41] At paras. 114-15, the trial judge concluded that there was sufficient proximity between PW and the appellants because the relationship between Olympic and the appellants was analogous to a joint venture. (The Court of Appeal appears to have thought that the trial judge contemplated a joint venture involving PW as well as Olympic and the appellants. On my reading of his reasons, I think the trial judge was only referring to a joint venture between Olympic and the appellants.) He based this finding on para. 36 of *Cooper*, which lists preexisting categories where proximity has already been recognized and which stipulates that "[w]hen a case falls within one of these situations or an analogous one and reasonable foreseeability is established, a *prima facie* duty of care may be posited."

[42] It seems that the trial judge believed that a joint venture or a relationship analogous to a joint venture was in and of itself a category where proximity had already been recognized. It is not. The only recognized category that involves joint venture is the relational economic loss category "where the relationship between the claimant and the property owner constitutes a joint venture" (*Cooper*, at para. 36). However, there must be damage to the property of the third party. Absent such damage, a finding of joint venture or situation analogous to a joint venture does not bring the claimant within the relational economic loss category.

[43] The trial judge should have first considered whether there was property damage suffered by Olympic. In not doing so, he erred in law. Had he done so, he would have found that the claim did not fit within the relational economic loss category because there was no property damage suffered by Olympic.

[44] I conclude that the appellants' claims do not fall within a preexisting category in which a duty of care has been recognized.

C. *Should a New Duty of Care Be Recognized?*

[45] Having found that the present situation does not fit within one of the five preexisting categories of pure economic loss, it is necessary to assess whether a new category of pure economic loss should nonetheless be established, specifically a new duty of care between an owner and subcontractors. This requires the analysis mandated in *Anns*.

[46] The *Anns* test was recently described by this Court in *Childs*, at para. 11:

> In *Anns v. Merton London Borough Council*, [1978] A.C. 728 (H.L.), Lord Wilberforce proposed a two-part test for determining whether a duty of care arises. The first stage focuses on the relationship between the plaintiff and the defendant, and asks whether it is close or "proximate" enough to give rise to a duty of care (p. 742). The second stage asks whether there are countervailing policy considerations that negative the duty of care. The two-stage approach of *Anns* was adopted by this Court in *Kamloops (City of) v. Nielsen*, [1984] 2 S.C.R. 2, at pp. 10-11, and recast as follows:
>
> (1) is there "a sufficiently close relationship between the parties" or "proximity" to justify imposition of a duty and, if so,
>
> (2) are there policy considerations which ought to negative or limit the scope of the duty, the class of persons to whom it is owed or the damages to which breach may

give rise?

[47] In essence, if a *prima facie* duty of care is found at the first stage of the *Anns* test and there are no residual policy concerns negating the creation of that duty at the second stage, then a new category of duty is recognized.

1. First Stage of the *Anns* Test

[48] The analytical process for the appellants to establish that there is a close and direct relationship between the parties and thus that there is a *prima facie* duty of care is explained by McLachlin C.J. and Major J. at para. 30 of *Cooper*:

> At the first stage of the *Anns* test, two questions arise: (1) was the harm that occurred the reasonably foreseeable consequence of the defendant's act? and (2) are there reasons, notwithstanding the proximity between the parties established in the first part of this test, that tort liability should not be recognized here? The proximity analysis involved at the first stage of the *Anns* test focuses on factors arising from the relationship between the plaintiff and the defendant. These factors include questions of policy, in the broad sense of that word. If foreseeability and proximity are established at the first stage, a *prima facie* duty of care arises. [Emphasis deleted.]

(a) *Reasonable Foreseeability*

[49] The usual indication of proximity is foreseeability. Here, the trial judge found that it was reasonably foreseeable that the award of the contract to a non-compliant bidder would result in financial losses for the appellants (para. 110). At the Court of Appeal, PW conceded reasonable foreseeability of harm (para. 48). In this Court, PW does not resile from that concession. However,

"[f]oreseeability does not of itself, and automatically, lead to the conclusion that there is a duty of care": G. H. L. Fridman, *The Law of Torts in Canada* (2nd ed. 2002), at p. 320.

(b) *Other Considerations Relevant to Proximity*

[50] At para. 34 of *Cooper*, McLachlin C.J. and Major J. considered several factors for evaluating the closeness of the relationship between the parties in order to determine whether it was just and fair to find a duty of care:

> Defining the relationship may involve looking at expectations, representations, reliance, and the property or other interests involved. Essentially, these are factors that allow us to evaluate the closeness of the relationship between the plaintiff and the defendant and to determine whether it is just and fair having regard to that relationship to impose a duty of care in law upon the defendant.

[51] From the perspective of the appellants, several factors seemed to have led them to believe that their relationship with PW was closer than in the usual owner/subcontractor situation. PW was not only selecting a design-builder but also a design-building team. Information on the respective roles and experience of the appellants had to be provided to PW at the SOQ stage. The selection process for choosing the four proponents to advance to the RFP stage was heavily reliant on the ability of the proponent's team. At least 70 of the 150 points for the SOQ evaluation were directed at the team members' ability to do the work individually and as a team. Also, the design-build team members and their key personnel could not be substituted without the express advance written consent of PW. In addition, the appellants had to attend a "partnering" session with PW's project manager.

[52] Further, the appellants expended considerable time and energy preparing their bids. In so doing, they relied on PW's documentation and representations which implied a fair methodology in the selection process of the bids. The appellants were reliant on PW respecting the "Contract A" between itself and Olympic. Any breach of "Contract A" directly affected the appellants since they were not to be compensated for their work in preparing the RFP unless Olympic was awarded the bid. Given that the tendering process required significant effort and that only the team selected would be rewarded, the appellants expected the selection process to be fair (trial reasons, at para. 62).

[53] Although the factors above are the type of factors that one would expect to find in a proximate relationship, as explained in *Cooper*, at the first stage of the *Anns* test the Court must also examine whether there are any policy considerations specific to the parties such that tort liability should not be recognized.

[54] Linden and Feldthusen, at p. 444, indicate that when assessing proximity in the context of a pure economic loss, "[i]t may also be relevant whether the plaintiff had an opportunity to protect itself by contract from the risk of economic loss and declined to do so." This reflects Justice La Forest's caution in *Norsk*, at p. 1116, that "the plaintiff's ability to foresee and provide for the particular damage in question is a key factor in the proximity analysis".

[55] Importantly, the SOQ documents provided an opportunity for a general contractor and its subcontractors to submit their bid as a "joint venture proponent". Section 3(1) of the SOQ reads:

> While there is no requirement for firms to participate in this procurement in joint venture, firms may elect to do so if they see fit.

Olympic and the appellants did not choose the joint venture option. Therefore, Olympic was the only one submitting the bid and thus the only one with which PW formed a "Contract A". (Before this Court, the appellants did not argue that they were parties to the "Contract A" between PW and Olympic.)

[56] The fact that the appellants had the opportunity to form a joint venture, and thereby be parties to the "Contract A" made between PW and Olympic, is an overriding policy reason that tort liability should not be recognized in these circumstances. Allowing the appellants to sidestep the circumstances they participated in creating and make a claim in tort would be to ignore and circumvent the contractual rights and obligations that were, and were not, intended by PW, Olympic and the appellants. In essence, the appellants are attempting, after the fact, to substitute a claim in tort law for their inability to claim under "Contract A". After all, the obligations the appellants seek to enforce through tort exist only because of "Contract A" to which the appellants are not parties. In my view, the observation of Professor Lewis N. Klar (*Tort Law* (3rd ed. 2003), at p. 201) — that the ordering of commercial relationships is usually in the bailiwick of the law of contract — is particularly apt in this type of case. To conclude that an action in tort is appropriate when commercial parties have deliberately arranged their affairs in contract would be to allow for an unjustifiable encroachment of tort law into the realm of contract.

(c) *Conclusion as to the First Stage of the Anns Test*

[57] There are certainly factors that indicate a close relationship between PW and the appellants, such as the appellants' expectation that PW was choosing a design-build team at the SOQ stage and the reliance of the appellants on a fair selection methodology in the tendering process. Nonetheless, the appellants' ability to foresee and protect themselves from the economic loss in question is an overriding policy reason why tort liability should not be recognized in these circumstances. The appellants had the opportunity to arrange their affairs in such a way as to be in privity of contract with PW relative to "Contract A", but they chose not to do so and they are now trying to claim through tort law for lack of a contractual relationship with PW. Tort law should not be used as an after-the-fact insurer.

[58] I conclude that the appellants have failed to satisfy the first stage of the *Anns* test justifying a finding of a *prima facie* duty of care.

2. Second Stage of the *Anns* Test

[59] Having found no *prima facie* duty of care at the first stage of the *Anns* test, it is unnecessary to continue with the second stage of examining residual policy concerns that could negate the creation of a new duty of care. However, it may be useful to comment on one residual policy concern — indeterminate liability.

[60] The recognition of a duty of care of an owner to subcontractors in a tendering process could lead to what Cardozo C.J. of the Court of Appeals of New York coined as "liability in an indeterminate amount for an indeterminate time to an indeterminate class" (*Ultramares Corp. v.*

Touche, 174 N.E. 441 (1931), at p. 444).

[61] The trial judge discounted the indeterminate liability concern. At para. 118, he stated:

> In this case, however, I do not accept that liability would be indeterminate because of the particular — and according to the evidence before me, unique — approach adopted by the defendant in the tendering process. The defendant defined the class of the members of the design build team whose qualifications would be examined, who had to provide terms of reference, review the plans and drawings, had to certify that they would perform the work and could not be substituted without approval by the defendant. Those obligations did not extend to the broad range of sub-subcontractors, suppliers and employees. The scope of the liability is also readily ascertainable by quantifying the plaintiffs' reasonable expectation of lost profits or fees.

[62] PW contends that when dealing with cases of pure economic loss, the principal concern is indeterminate liability, since unlike physical damage, it "can spread well beyond any confined physical area or group of victims and seep into an ever expanding circle of plaintiffs" (respondent's factum, at para. 82). This would lead to uncertainty in the marketplace. I agree that in the case of pure economic loss, there is a greater risk of indeterminate liability than in cases of physical injury or property damage. Therefore, in cases of pure economic loss, to paraphrase Cardozo C.J., care must be taken to find that a duty is recognized only in cases where the class of plaintiffs, the time and the amounts are determinate.

[63] In the present situation, the subcontractors were identified and vetted by PW at the SOQ stage of the tendering process. The subcontractors could not be substituted without the consent of PW. On its face, this seems to indicate that the class of plaintiffs was determinate. However, one of the appellants, Canadian Process Services Inc., was not named as part of the design-build team

at the SOQ stage. Only its parent company, G.J. Cahill & Co., was named. This suggests that the class of plaintiffs was not as well defined as found by the trial judge since a subsidiary of one of the design-build team members also made a claim. In my view, since the class of plaintiffs seems to seep into the lower levels of the corporate structure of the design-build team members, this case has indications of indeterminate liability.

[64] Moreover, contrary to the findings of the trial judge, the Court of Appeal concluded that the design-build tendering process was not unique. In the Court of Appeal, Sexton J.A. noted that Carl Mallam, the president of Olympic, testified that the design-build tendering process was used by both private and public entities throughout the country and that both the federal Crown and the Province of Newfoundland and Labrador used tendering processes with similar provisions (paras. 76-82). Given that this type of tendering process is not unique and that there are many types of arrangements that can arise between owners and contractors and in turn between contractors and subcontractors, a recognition of an owner's duty of care towards subcontractors could lead to a multiplicity of lawsuits in tort, an undesirable result.

[65] That the facts here suggest indeterminacy is, I think, symptomatic of a more general concern in the construction contract field. Even where subcontractors are named and known by an owner, those subcontractors will have employees and suppliers and perhaps their own subcontractors who also could suffer economic loss. And these suppliers and subcontractors will have their own employees and suppliers who might claim for economic loss due to the wrongful failure of the owner to award the contract to the general contractor upon which they were all dependant. The construction contract context is one in which the indeterminancy of the class of plaintiffs can readily

be seen.

[66] Even if a *prima facie* duty of care had been found at the first stage of the *Anns* test, in my view, it would have been negated at the second stage because of indeterminate liability concerns.

V. Conclusion

[67] The appellants' claims do not fit within one of the preexisting categories of duty of care for pure economic loss. Nor is a finding of a new duty of care justified between an owner and subcontractors in the context of a tendering process. I would dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitors for the appellants: Stewart McKelvey, St. John's.

Solicitor for the respondent: Deputy Attorney General of Canada, Ottawa.