COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Centurion Apartment Properties Limited Partnership v. Sorenson Trilogy Engineering Ltd.,* 2024 BCCA 25

Date: 20240124
Docket: CA48819; CA48832

Docket: CA48819

Between:

Centurion Apartment Properties Limited Partnership and Centurion Apartment Properties (Danbrook One) Inc.

Appellants/
Respondents on Cross Appeal
(Plaintiffs)

And

Sorenson Trilogy Engineering Ltd., Brian McClure, Theodore Tracy Sorenson and Brian Douglas Lange

Respondents/
Appellants on Cross Appeal
(Defendants and Third Parties)

And

Loco Investments Inc., DB Services of Victoria Inc., Margaret McKay, The City of Langford, and Jack (John) Patrick James, dba Jack James Architect

Respondents/
Respondents on Cross Appeal
(Defendants and Third Parties)

- and -

Docket: CA48832

Between:

Loco Investments Inc., DB Services of Victoria Inc., and Margaret McKay

Appellants/
Respondents on Cross Appeal
(Defendants and Third Parties)

And

Centurion Apartment Properties Limited Partnership and Centurion Apartment Properties (Danbrook One) Inc.

Respondents/
Respondents on Cross Appeal
(Plaintiffs)

And

Sorensen Trilogy Engineering Ltd., Brian McClure, and Brian Douglas Lange

Respondents/
Appellants on Cross Appeal
(Defendants and Third Parties)

And

Theodore ("Ted") Tracy Sorensen, The City of Langford, and Jack (John) Patrick James, dba Jack James Architect

Respondents/
Respondents on Cross Appeal
(Defendants and Third Parties)

Before: The Honourable Chief Justice Marchand
The Honourable Madam Justice Bennett
The Honourable Mr. Justice Grauer

On appeal from: An order of the Supreme Court of British Columbia, dated December 30, 2022 (*Centurion Apartment Properties Limited Partnership v. Loco Investments Inc.*, 2022 BCSC 2273, Vancouver Docket S2010013).

Counsel for Centurion Apartment Properties Limited Partnership, Centurion Apartment Properties (Danbrook One) Inc.:	M.L. Burris S. Stumpf, Articled Student
Counsel for Sorenson Trilogy Engineering Ltd., Brian McClure, Theodore ("Ted") Tracy Sorenson, Brian Douglas Lange:	C.A. Wallace
Counsel for Loco Investments Inc., and Margaret McKay:	D. Redman M.J. Adam
Place and Date of Hearing:	Vancouver, British Columbia October 3–4, 2023
Place and Date of Judgment:	Vancouver, British Columbia January 24, 2024

Written Reasons by:
The Honourable Mr. Justice Grauer

Concurred in by:
The Honourable Chief Justice Marchand
The Honourable Madam Justice Bennett

Summary:

These appeals and cross appeals concern an apartment building in Langford BC that was built with serious structural deficiencies. The plaintiffs in the underlying action include the subsequent purchaser of the building. The plaintiffs only became aware of the structural deficiencies after the purchase was completed. The defendants and third parties include the builders, structural engineers, the City of Langford, and the architects.

The chambers judge granted the engineers' application for summary dismissal and summary trial determination. The judge dismissed the plaintiffs' claims in negligence against the engineers on the basis that they were not in a relationship of proximity that would give rise to a duty of care; found that one of the plaintiffs who held only a beneficial interest in the building lacked standing to bring an action for damage to the trust property; and held that the enforceability of a contractual provision limiting the engineers' liability to the builder to the amount of their fees was suitable for summary determination. The judge found the provision enforceable. All of these orders are under appeal.

The engineers cross-appealed, seeking an order dismissing the plaintiffs' remaining failure to warn claim, as well as the builder's claim for contribution and indemnity to the claims of the plaintiffs.

Held: Appeals allowed in part; cross appeal dismissed. The chambers judge erred in finding that the engineers and the owner were not in a sufficiently close and direct relationship so as to establish proximity. That relationship is made out by reference to an analogous category of proximate relationship and is further supported by a full proximity analysis. This issue was appropriate for summary determination and this Court need not decide whether the judge erred in failing to dismiss claims of contribution and indemnity against the engineers.

The chambers judge correctly applied the principle that a beneficiary of a trust has no standing to bring a claim for damages in relation to trust property. The plaintiff beneficiary failed to identify special circumstances that would justify a departure from this general rule. The chambers judge also did not err in refusing to dismiss the plaintiffs' failure to warn claim. The full merits of that claim can be addressed at trial.

Finally, the issue of whether the engineers' liability to the builders should be limited to the amount of their fees was not suited to determination by way of summary trial. The issue is not moot, or in any event should be considered. The judge failed to turn his mind to the engineers' conduct at the point of contract formation which may implicate policy considerations that affect enforceability.

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Reasons for Judgment of the Honourable Mr. Justice Grauer:

1. INTRODUCTION

[1] The issues arising on these appeals concern claims relating to the design and construction of an 11-storey residential apartment building in Langford, BC, that was sold after construction was completed. The owner-developer retained DB Services of Victoria Inc ("DB Services") as designer-builder. DB Services retained Sorensen Trilogy Engineering Ltd ("Sorensen Trilogy") to act as structural engineers. Unfortunately, Sorensen Trilogy was not competent to provide structural engineering services for an 11-storey building. None of its members had the necessary expertise, but they undertook the retainer nevertheless.

[2] After the building was completed and occupied, it was discovered that it had been built with serious structural deficiencies. Langford revoked the occupancy permit it had issued, and the building had to be evacuated. By then, the building had been sold in a transaction that saw the transfer of the beneficial interest and ownership of the entity holding the legal interest. I describe the details of this transaction below.

[3] The primary issue that arises from this is whether there was a sufficiently proximate relationship between Sorensen Trilogy and its principals on the one hand, and the current building owner(s) on the other, to give rise to a *prima facie* duty of care. In short, can the owners claim against Sorensen Trilogy in negligence?

[4] In reasons indexed at 2022 BCSC 2273, the Chambers judge concluded that the relationship between Sorensen Trilogy and the new owners was not sufficiently proximate to found a duty of care. He came to this conclusion not because of any lack of 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 …" (*Anns v Merton London Borough Council*, [1978 AC 728 at 751 (HL)). Rather, the judge concluded on the basis of *1688782 Ontario Inc v Maple Leaf Foods Inc*, 2020 SCC 35 and *Tri-County Regional School Board v*

3021386 Nova Scotia Ltd, 2021 NSCA 4, that "any relationship of proximity … was negated by virtue of the multipartite contractual arrangement between and among [the relevant parties]" (at para 75).

[5] The judge was not asked, and did not need, to consider other elements relevant to the existence of a duty of care, such as external policy considerations.

[6] Important secondary issues concern the enforceability of a clause in Sorensen Trilogy's contract with DB Services that purports to limit its liability, if any, to the amount of its fees. The judge considered the question to be suited to determination by summary trial, and found the clause enforceable.

[7] Other issues arise which I will identify below.

2. BACKGROUND

2.1 The parties

[8] The plaintiffs, appellants in the first appeal, are Centurion Apartment Properties (Danbrook One) Inc ("Centurion Danbrook") and its parent, Centurion Apartment Properties Limited Partnership ("Centurion LP") (collectively, "Centurion").

[9] Centurion Danbrook holds legal title to the building in trust for Centurion LP, which acquired the beneficial interest. I describe below the transaction by which this occurred.

[10] Centurion claims damages from the defendants, alleging two causes of action: negligence in the design and construction of the building, and breach of duty to warn. These defendants are Loco Investments Inc, transferor of the beneficial interest, DB Services, Margaret McKay, Sorensen Trilogy, Sorensen Trilogy's principals, Brian McClure and Theodore Sorensen, and the City of Langford.

[11] As against Loco, the Centurion plaintiffs also allege a third cause of action: misrepresentation.

[12] Ms. McKay was the controlling mind of both Loco and DB Services.

[13] The defendants Loco, DB Services and Ms. McKay are the appellants in the second appeal. After these appeals were commenced, however, DB Services made an assignment into bankruptcy. By operation of section 69(1) of the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 [*BIA*], all claims against DB Services are stayed. As a result, DB Services did not participate in the hearing of this appeal, but Loco and Ms. McKay did.

[14] Loco, DB Services and Ms. McKay issued third-party proceedings claiming contribution and indemnity, aimed primarily at Sorensen Trilogy and its principals, Mr. Sorensen, Mr. McClure and Brian Douglas Lange. These claims for contribution and indemnity relate to the primary claims of Centurion. As a result of the bankruptcy of DB Services, its third party claims (but not those of Loco and Ms. McKay) are effectively stayed. Third-party claims have also been advanced against the architect, Jack (John) Patrick James dba Jack James Architect, and Langford, but these parties did not participate in the appeal.

[15] The defendants/third parties Sorensen Trilogy and its principals (collectively, the “Sorensen defendants”) are the appellants in the cross-appeal.

2.2 The transaction

[16] Through DB Services, Ms. McKay and her directors were in the business of developing rental apartment buildings. This project was an 11-storey building comprising 90 units, and was the first one they had done of that size. Their previous projects were five or six-storey developments of 25 or 30 units. They created 1113407 BC Ltd (“111”) for the purpose of holding legal title to the lands and building, once it was built, and created Loco to hold the beneficial interest. 111 and Loco entered into a bare trust agreement.

[17] DB Services entered into a contract with Sorensen Trilogy to provide the structural engineering design. DB Services had worked with Sorensen Trilogy before, but not on a building of this size. DB Services then proceeded to construct

the building using the structural design prepared by Mr. McClure and Mr. Sorensen of Sorensen Trilogy.

[18] DB Services issued a Certificate of Completion on January 1, 2019. Langford issued an occupancy permit on February 28, 2019, and the building was duly occupied.

[19] On April 25, 2019, Centurion LP agreed to purchase the building. By its general partner, it entered into an agreement of purchase and sale (the "APS") with Loco, as vendor, and 111 as "nominee". By the APS, Centurion LP agreed to purchase the full legal and beneficial interest in the lands and building.

[20] There were two ways to do this: through the transfer of Loco's beneficial interest directly plus the transfer of 111's legal interest by direction of Loco; alternatively, Centurion LP could, upon closing, acquire the shares of 111 from Loco at no additional cost. Centurion LP elected to acquire the shares of 111, which then became Centurion Danbrook on closing. The transaction closed on August 26, 2019.

[21] In the result, as we have seen, Centurion Danbrook holds legal title in trust for Centurion LP as beneficial owner. I emphasize that although its name is different and its shareholder has changed, Centurion Danbrook is the same entity that, as holder of legal title under the name 111, contracted with DB Services for the design and construction of the building.

2.3 The problem

[22] On December 17, 2019, Langford advised Centurion as owner of the building that it had been formally notified by Engineers & Geoscientists British Columbia ("EGBC") of concerns regarding the building's structural condition. Langford further advised that it was conducting an independent investigation which had given rise to significant concerns, including "elements of the gravity system design … which could fail suddenly or with little warning". In these circumstances, Langford noted that it:

> …has an obligation … to disclose to the public without delay information about a significant risk of harm to the health or safety to the public or group of

> people. The relevant group in this case is the residents of [the building]. The City intends to give notice to the tenants of this situation as early as tomorrow.
>
> [Emphasis added.]

This was the first the Centurion plaintiffs had heard of the problem or of any investigation by the EGBC.

[23] On December 20, 2019, Langford advised the residents of the building that it had revoked the occupancy permit, stating: “The City strongly advises you to prepare now for immediate relocation to a hotel”. It set up a command centre to facilitate this evacuation.

[24] The EGBC’s own formal investigation began on December 12, 2019. It had been triggered by a complaint from a qualified and experienced structural engineer in Victoria (the “complainant”) with whom concerns had been raised by persons peripherally involved in the project. The complainant followed this up with a review of the architectural drawings and communications with partners of Sorensen Trilogy, with one of whom he had a “frank discussion” on December 12, 2018. His concerns were not satisfied.

[25] The complainant discussed his concerns with the EGBC in January 2019, and made his formal complaint on April 3, 2019. The EGBC proceeded to obtain copies of the structural engineering drawings, and the complainant followed up with further correspondence.

[26] On May 27, 2019, the EGBC wrote to Mr. McClure by email advising him of the complaint concerning the structural engineering services he had provided for the building, and requesting his written response. This occurred three months before the APS was signed and the transaction closed.

[27] The process continued, and on December 10, 2021, EGBC issued a citation to Mr. McClure, which was resolved by way of a consent order dated May 9, 2022. By that order, Mr. McClure admitted that he had demonstrated unprofessional

conduct as his structural design for the building was deficient. Particulars of the deficiencies included a number of defects the existence of which "demonstrates incompetence on Mr. McClure's part". In addition, he admitted that he had demonstrated unprofessional conduct by improperly relying on the design of the building's core performed by Mr. Sorensen and by failing to ensure that an independent review of the structural design was completed and properly documented prior to construction. The particulars continued for several pages.

[28] A citation was also issued against Mr. Sorensen alleging unprofessional conduct and incompetence, largely relating to his design of the building's core and the seismic elements. It was resolved by consent order dated January 6, 2023, after the hearing in the court below. Counsel for Loco and Ms. McKay seek to have it admitted as fresh evidence. They rely in particular upon the following admission:

> 4. Mr. Sorensen demonstrated unprofessional conduct when he agreed with Mr. McClure that their engineering firm would take on the structural design for the Building with Mr. McClure acting as engineer of record, despite knowing that Mr. McClure lacked the training and ability required to competently complete the structural design for the Building.

[29] Following Langford's withdrawal of its occupancy permit in late 2019, and the consequent evacuation of the building, Centurion undertook immediate measures to install temporary shoring to address the risk of the building collapsing. This was considered a short-term fix while a comprehensive assessment of the building's structural defects was performed, and a remediation plan was developed.

[30] Centurion successfully completed the remediation of the building in April 2022, and Langford issued a new occupancy permit on April 28, 2022.

3. THE PROCEEDINGS BELOW

3.1 The Sorensen Trilogy application

[31] In these circumstances, it should surprise no one that Centurion sought to claim damages not only from DB Services, but also from Sorensen Trilogy and its principals for the economic loss it had suffered as a result of these problems. There

was, of course, no contract between Centurion and Sorensen Trilogy and so they framed their claim against the Sorensen defendants in tort, alleging negligence and failure to warn. Were they entitled in law to do so, given the surrounding contractual arrangements?

[32] The Sorensen defendants thought not. They argued that they were not subject, in law, to a duty of care because the relationship between them and Centurion was not sufficiently close and direct to establish proximity. They also maintained that any of the third-party claims against them for contribution and indemnity with respect to claims brought by the Centurion plaintiffs should be dismissed due to that same lack of proximity, and any third-party claims against them for contribution and indemnity with respect to the claims of DB Services should be limited by the limitation of liability clause in their contract with DB Services.

[33] Accordingly, the Sorensen Trilogy defendants applied before the Chambers judge for the following:

1) summary judgment (Rules 9-5 and 9-6 of the *Supreme Court Civil Rules*) dismissing the claim of the Centurion plaintiffs on the basis that no proximity existed between them, so that Sorensen Trilogy owed no duty of care to the Centurion plaintiffs;

2) summary judgment dismissing the third-party claims of Langford, Loco, Ms. McKay and Mr. James for contribution and indemnity in relation to claims brought by the Centurion plaintiffs on the basis that no duty of care was owed to the Centurion plaintiffs; and

3) judgment by way of summary trial (Rule 9-7 of the *Supreme Court Civil Rules*) declaring that any liability they may have to DB Services, or to any party seeking contribution and indemnity in relation to claims brought by DB Services, is limited by the limitation of liability clause in the contract between Sorensen Trilogy and DB Services.

3.2 The judge's order

[34] In his order pronounced December 30, 2022, the judge:

1) dismissed the claims of Centurion Danbrook against Sorensen Trilogy, Mr. McClure and Mr. Sorensen pursuant to Rule 9-6. As noted above, he did so on the basis that the multipartite contractual arrangements between and among Centurion Danbrook, DB Services and Sorensen Trilogy negated any relationship of proximity, so there could be no duty of care (at para 75);

2) dismissed the claims of Centurion LP in *negligence* against Sorensen Trilogy, Mr. McClure and Mr. Sorensen pursuant to Rule 9-6. While stating that the same proximity analysis would have applied, he based the dismissal on lack of standing. The judge noted that Centurion LP's claims for negligent design were for loss in relation to trust property, so that any loss suffered by Centurion LP as beneficial owner was entirely derivative of the losses claimed by Centurion Danbrook as legal owner/trustee, and only the trustee of trust property has standing to bring a claim in respect of it (at paras 48–49);

3) concluded, however, that Centurion LP did have standing to maintain its claims for misrepresentation and *failure to warn*, which claims did not relate to the trust property itself, but rather to damages suffered by Centurion LP in completing the APS (at para 51). I note parenthetically that the Centurion plaintiffs did not claim against the Sorensen Trilogy defendants in misrepresentation, but only in negligence and failure to warn. The misrepresentation claim was made against Loco only and is not relevant to the position of the Sorensen defendants;

4) dismissed the application of the Sorensen Trilogy defendants for an order dismissing the third-party proceedings against them, noting that he was not persuaded that the claims for contribution and indemnity

could not succeed in the absence of a duty of care owed to Centurion Danbrook (at para 83); and

5) declared that any liability on the part of the Sorensen Trilogy and its principals to DB Services or others for contribution and indemnity in relation to the claims of DB Services is limited to the amount of the fees paid to Sorensen Trilogy (at para 98).

4. ISSUES ON APPEAL

[35] In these three appeals, the parties have raised seven issues, which can be grouped into the following two categories:

Centurion/Sorensen issues: proximity and standing

1) Did the judge err in dismissing Centurion Danbrook's claims against the Sorensen defendants on the basis that the Sorensen defendants were not in a relationship of sufficient proximity to Centurion Danbrook to give rise to a duty of care?

2) Did the judge err in holding that the issue of duty of care was suitable for summary judgment (Rule 9-6)?

3) Did the judge err in failing to dismiss third-party claims against the Sorensen defendants for contribution and indemnity in relation to the claims of Centurion, given his finding of a lack of proximity?

4) Did the judge err in holding that Centurion LP lacked standing to bring a claim in negligence against the Sorensen defendants?

5) Did the judge err in failing to dismiss Centurion LP's claim against the Sorensen defendants for breach of duty to warn?

Loco/DB Services/McKay/Sorensen issues: limitation of liability

6) Did the judge err in determining that the issue of the enforceability of Sorensen Trilogy's contractual limitation of liability was suitable for determination by summary trial (Rule 9-7) without a full record?

7) Did the judge err in determining that there are no overriding public policy concerns that would justify refusing to enforce the limitation of liability clause?

[36] I now turn to discuss these issues.

5. ISSUES 1, 2 AND 3: (IN)SUFFICIENT PROXIMITY AND DUTY OF CARE

5.1 Standard of review

[37] Whether a duty of care arises is a question of law for which the standard of review is correctness: *Maple Leaf Foods* at para 24. As the judge recognized, the majority in *Maple Leaf Foods* set out the steps that the law requires us to take in determining whether a relationship of proximity exists in any given circumstances. Those steps are described in detail below, but I propose first to review their genesis briefly.

5.2 Overview—assessing proximity

5.2.1 *The Anns/Cooper test*

[38] As I suggested above in para 4, there can be little doubt that the relationship between the Sorensen defendants and the Centurion plaintiffs met, on its face, the first step of the *Anns* test for whether a duty of care arose as traditionally applied before the decision of the Supreme Court of Canada in *Cooper v Hobart*, 2001 SCC 79: they were surely neighbours in the sense that, in the reasonable contemplation of the Sorensen defendants, carelessness on their part in preparing the structural design of the building would be likely to cause damage to the owner of the building, 111/Centurion Danbrook (see *Anns* at p 751). I describe this as proximity in the "neighbourhood/foreseeability" sense.

[39] In the past, that would lead us to the second step of the *Anns* test—the policy component: "whether there are any considerations which ought to negative, or to reduce or limit the scope of the duty or the class of persons to whom it is owed …". (*Anns* at p 752).

[40] *Cooper* was something of a watershed: see, for instance, L. Klar, "Maple Leaf Foods: A Step Beyond Livent" (2021), 51 Advoc Q 441 at p 461. In *Cooper*, the Supreme Court revisited the *Anns* test, noting at para 26 that while the House of Lords had expressly recognized the policy component in determining the extension of the negligence principle, it left doubt on the precise content of the first and second branches of its new test: "Was the first branch concerned with foreseeability only or foreseeability and proximity? If the latter, was there duplication between policy considerations relevant to proximity at the first stage and the second stage of the test?"

[41] In this regard, the Court observed that the fundamental underlying question is "whether a duty of care should be imposed, taking into account all relevant factors disclosed by the circumstances" (at para 27). It went on to express the following view:

> [30] In brief compass, we suggest that at this stage in the evolution of the law, both in Canada and abroad, the *Anns* analysis is best understood as follows. 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. At the second stage of the *Anns* test, the question still remains whether there are residual policy considerations outside the relationship of the parties that may negative the imposition of a duty of care. It may be, as the Privy Council suggests in *Yuen Kun Yeu*, that such considerations will not often prevail. However, we think it useful expressly to ask, before imposing a new duty of care, whether despite foreseeability and proximity of relationship, there are other policy reasons why the duty should not be imposed.
>
> [31] On the first branch of the *Anns* test, reasonable foreseeability of the harm must be supplemented by proximity. The question is what is meant by

> proximity. Two things may be said. The first is that "proximity" is generally used in the authorities to characterize the type of relationship in which a duty of care may arise. The second is that sufficiently proximate relationships are identified through the use of categories. The categories are not closed and new categories of negligence may be introduced. But generally, proximity is established by reference to these categories. This provides certainty to the law of negligence, while still permitting it to evolve to meet the needs of new circumstances.
>
> [Emphasis added.]

[42] The focus, then, was on the type of relationship between the parties—which, the Court observed, "may involve looking at expectations, representations, reliance, and the property or other interests involved" (at para 34). The Court went on to say this:

> 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.

[43] This approach imported questions of policy into the first stage of the *Anns* test to determine whether, notwithstanding the apparent proximity in the neighbourhood/foreseeability sense, there were factors arising from the relationship between the parties that provided reasons for not recognizing tort liability in the circumstances. If not, the second stage requires consideration of residual policy considerations outside the relationship of the parties that may yet negative the imposition of a duty of care.

[44] Questions remained, the most relevant for our purposes being: 'Yes, but what is meant by "proximity", and how do you assess it?' As Professor Klar discussed in his article "Duty of Care for Negligent Misrepresentation – and Beyond?" (2018), 48 Advoc Q 235 ("*Klar 48*"), cited with approval by Justices Brown and Martin for the majority in *Maple Leaf Foods* at para 60, the majority of the Supreme Court clarified this and other ambiguities arising from *Cooper* in *Deloitte & Touche v Livent Inc*, 2017 SCC 63 ("*Livent*") a case involving a claim for negligent misrepresentation. Nevertheless, the professor observed (*Klar 48* at p 242):

> Describing what proximity entails has always been and still remains an elusive task. The best that judges have been able to do is to recite a series of words, in themselves vague, to explain it. … Since the particular relationship and circumstances of the parties are critical to proximity, and no two cases can ever share the identical facts, even relying on past judgments is not very helpful. Proximity exists when the courts consider it to be "just and fair" to recognize it. Like art, judges know it when they see it.
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> [Emphasis added.]

5.2.2 *Maple Leaf Foods*

[45] Professor Klar expressed the view that the majority's clarification in *Livent* was important for all of negligence law, not just negligent misrepresentation (*Klar 48* at p 238). In *Maple Leaf Foods* at para 62, the majority agreed. It explained the process this way, focusing on the nature of the relationship between the parties, and asking first whether proximity can be made out by reference to an analogous category of proximate relationship determined in a previous case:

> [63] Assessing proximity requires asking whether, in light of the nature of the relationship at issue (*Livent*, at para. 25), the parties are in such a "close and direct" relationship that it would be "just and fair having regard to that relationship to impose a duty of care in law" (*Livent*, at para. 25, citing *Cooper*, at paras. 32 and 34). This assessment proceeds in two steps.
>
> [64] First, the court must ask whether proximity can be made out by reference to an established or analogous category of proximate relationship (*Livent*, at paras. 26-28). This question comes first because "[i]f a relationship falls within a previously established category, or is analogous to one, then the requisite close and direct relationship is shown" (*Livent*, at para. 26). Analogous categories of proximity step into a prior and continuing stream of legal development. They are, in other words, just that: *analogous*, in the sense of being *like* an established category, although different in scope. Applying an established category of proximity so as to recognize another is simply an instance of the inductive reasoning whereby the common law is developed and a duty recognized in one set of cases is applied to a similar set of cases.
>
> [65] In determining whether proximity can be established on the basis of an existing or analogous category, "a court should be attentive to the particular factors which justified recognizing that prior category in order to determine whether the relationship at issue is, in fact, truly the same as or analogous to that which was previously recognized" (*Livent*, at para. 28). This is because, as between parties to a relationship, some acts or omissions might amount to a breach of duty, while other acts or omissions within that same relationship will not. Merely because particular factors will support a finding of proximity and recognition of a duty within one aspect of a relationship and for one purpose to compensate for one kind of loss does not

> mean a duty will apply to all aspects of that relationship and for all purposes and to compensate for all forms of loss. While, therefore, proximity may inhere between two parties at large, it may inhere only for particular purposes or for particular actions; whether it is one or the other, and (if the other) for which purposes and which actions, will depend, as we have already recounted, upon the nature of the particular relationship at issue (*Livent*, at para. 27) or the type of pure economic loss alleged. Ultimately, then, to ground an analogous duty, the case authorities relied upon by the appellant must be shown to arise from an analogous relationship and analogous circumstances (*ibid.*).

[46] Both in this Court and in the court below, much of the argument concerned whether the relationship between Centurion and the Sorensen defendants, and the relevant circumstances, were the same or analogous to the relationship and circumstances recognized by the Supreme Court as giving rise to a duty of care in *Winnipeg Condominium Corporation No. 36 v Bird Construction Co,* [1995] 1 SCR 85, thereby establishing proximity in accordance with this first step. The judge concluded that it was not (at paras 67–68). He therefore proceeded to the second step, being a "full proximity analysis". In *Maple Leaf Foods*, the majority explained that step:

> [66] Secondly, if the court determines that proximity cannot be based on an established or analogous category of proximate relationship, then it must conduct a full proximity analysis (*Livent*, at para. 29). In making this assessment, courts must examine all relevant factors present in the relationship between the plaintiff and the defendant — which, while "diverse and depend[ent] on the circumstances of each case" (*Livent*, at para. 29), include "expectations, representations, reliance, and the property or other interests involved" (*Cooper*, at para. 34).

[47] Of particular interest to the present case, given its contractual matrix, the majority went on to discuss the situation where the claim arises in a contractual relationship, or where the parties are linked by way of contracts each has with a middle party. That was the situation in *Maple Leaf Foods*, and is at least superficially similar to the situation in this case, where there was no contract between Centurion Danbrook, as owner, and Sorensen Trilogy, as structural designer, but each had a contract with DB Services.

> [67] In a case of negligent supply of shoddy goods or structures, the claim may arise in circumstances in which the parties could have protected their

> interests under contract. Even without being in privity of contract, the parties may nonetheless be "linked by way of contracts with a middle party", as Maple Leaf Foods and the Mr. Sub franchisees are linked by way of contracts with Mr. Sub (Stapleton, at p. 287). This is particularly the case in commercial transactions (as opposed to consumer purchases: *Arora v. Whirlpool Canada LP*, 2013 ONCA 657, 118 O.R. (3d) 113, at para. 106). Taken together, those contracts may reflect a "clear tripartite understanding of where the risk is to lie" (Stapleton, at p. 287). We see this consideration as crucial here when considering the "expectations [and] other interests involved" that must be accounted for in analysing the nature of the relationship (*Cooper*, at para. 34).
>
> [68] Given the possibility of an existing allocation of risk by contract, a proximity analysis must account for two concerns. First, the reasonable availability of adequate contractual protection within a commercial relationship, even a multipartite relationship, from the risk of loss is an "eminently sensible anti-circumvention argument" that militates strongly against the recognition of a duty of care (Stapleton, at p. 287; see also p. 286). As La Forest J., dissenting, recognized in *Norsk*, at p. 1116, "the plaintiff's ability to foresee and provide for the particular damage in question is a key factor in the proximity analysis". For example, a plaintiff may have been able to anticipate risk and remove, confine, minimize or otherwise address it by way of a contractual term (Linden et al., at §9.87). We agree with Professor Stapleton that the boundaries of tort liability should respect that "the principal alternative paths of protection which are theoretically available . . . are by way of contracts made directly with th[e] responsible party or indirectly with a middle party" (p. 271 (emphasis added)).

[48] In a passage on which the judge placed considerable reliance in finding that proximity had not been established, and on which Sorensen Trilogy relies before us, the majority summed up its discussion as follows:

> [73] In sum, under the *Anns/Cooper* framework and its rigorous proximity analysis, the determination of whether a claim of negligent supply of shoddy goods or structures is supported by a duty of care between the plaintiff and the defendant requires consideration of "expectations, representations, reliance, and the property or other interests involved", as well as any other considerations going to whether it would be "just and fair", having regard to the relationship between the parties, to impose a duty of care. In particular, where the parties are linked by way of contracts with a middle party that, taken together, reflect a multipartite allocation of risk, courts must be cautious about allowing parties to circumvent that allocation by way of tort claims. Courts must ask: is a party using tort law so as to circumvent the strictures of a contractual arrangement? *Could* the parties have addressed risk through a contractual term? And, *did* they? In our view, and as we will explain, these considerations loom large here.
>
> [Emphasis added.]

[49] Because of the importance of the contractual matrix in this case, I turn now to review the relevant terms of the contracts. The position of the Sorensen defendants, in a nutshell, is that the Centurion plaintiffs are indeed using tort law in an attempt to circumvent the strictures of the applicable contractual arrangements; the parties, they say, *did* address risk through contractual terms, and Centurion LP could have addressed risk further in the APS but did not. Accordingly, the Sorensen defendants submit, the judge was right in not allowing Centurion to circumvent the contractual allocations by way of tort claims, correctly concluding that proximity had not been established in the circumstances.

5.3 The contracts

5.3.1 *Between DB Services and Sorensen Trilogy (the "Trilogy Contract")*

[50] This contract was for the provision of structural engineering services in the construction of the building. It limits Sorensen Trilogy's liability for negligent acts or omissions "whether in contract or tort" to the amount of fees paid by DB Services in relation to the project ($86,300). The enforceability and effect of the limitation of liability clauses is in issue on this appeal. They provide as follows:

> **Liability**
>
> In the event of a claim, Sorensen Trilogy Engineering Ltd liability ["STEL"] will be as per Schedule B attached.
>
> **Terms and Conditions** **Schedule B**
>
> **…**
>
> **Liability**
>
> STEL is only liable for loss and damage that is directly attributable to its negligent acts or omissions (the "Recoverable Loss and Damage") and in the event of a claim for Recoverable Loss and Damage, the parties agree that the maximum liability of STEL, whether in contract or tort, is limited to the amount of fees paid by the Client to STEL on account of Services (or Additional Services) in relation to the Project as of the date the claim is made.
>
> In no event will STEL be liable for any indirect, incidental, special consequential or punitive damages as a consequence of any breach by STEL or the failure of STEL to satisfy and/or perform, any term or provision of this Agreement and without limiting the generality of the foregoing, STEL shall not, under any circumstances, be liable for loss or damage resulting from delays in the completion of the Project, or loss of earnings or loss of profits howsoever caused.

[Underlined emphasis added.]

[51] A limitation to similar effect, though not identical, was contained in the contract between DB Services and the architect, though that is not in issue on these appeals.

5.3.2 *Between the owner (111/Centurion Danbrook) and DB Services (the "DB Services contract")*

[52] This contract is in the form of a Design-Build Stipulated Price Contract prepared by the Canadian Construction Documents Committee as "CCDC 14 – 2013". It was executed by Ms. McKay on behalf of both parties.

[53] The term "consultant" as used in the contract is defined in a manner that includes Sorensen Trilogy as the provider of structural engineering services, but the contract provides that it creates no contractual relationship between the owner (111/Centurion Danbrook) and the consultant (Sorensen Trilogy). It also provides that the obligations, rights and remedies arising under the contract are in addition to any obligations, rights and remedies otherwise available by law. In essence, it makes DB Services responsible to the owner for any acts or omissions of the consultant, and limits DB Services' liability to the amount of applicable insurance ($1 million) where claims are covered by that insurance.

[54] The relevant terms are these:

> GC 1.1.2 Nothing contained in the *Contract Documents* shall create any contractual relationship between the *Owner* and the *Consultant*, an *Other Consultant*, a *Subcontractor*, a *Supplier*, or their agent, employee, or any other person performing any portion of the *Design Services* or the *Work*.
>
> GC 1.3.1 Except as expressly provided in the *Contract Documents*, the duties and obligations imposed by the *Contract Documents* and the rights and remedies available hereunder shall be in addition to and not a limitation of any duties, obligations, rights and remedies otherwise imposed or available by law.
>
> GC 3.4 OTHER CONSULTANTS, SUBCONTRACTORS AND SUPPLIERS
>
> 3.4.1 The *Design-Builder* shall preserve and protect the rights of the parties under the *Contract* with respect to work to be performed under subcontract,

and shall:

…

4. be as fully responsible to the *Owner* for acts and omissions of *Other Consultants, Subcontractors, Suppliers* and of persons directly or indirectly employed by them as for acts and omissions of persons directly employed by the *Design-Builder*.

GC 11.1 INSURANCE

11.1.1 Without restricting the generality of GC 12.2 – INDEMNIFICATION, the *Design-Builder* shall provide, maintain and pay for the following insurance coverages, the minimum requirements of which are specified in CCDC 41 – CCDC INSURANCE REQUIREMENTS in effect at the time of proposal closing or bid closing except as hereinafter provided:

…

.9 In addition to the insurance requirements specified in CCDC41 – CCDC INSURANCE REQUIREMENTS, the *Design-Builder* shall carry professional liability insurance with limits of not less than $1,000,000 per claim and with an aggregate limit of not less than $2,000,000 within any policy year, unless specified otherwise in the *Contract Documents*. The policy shall be maintained continuously from the commencement of the *Contract* until 2 years after *Substantial Performance of the Work*.

…

11.1.4 If the *Design-Builder* fails to provide or maintain insurance as required by the *Contract Documents*, then the *Owner* shall have the right to provide and maintain such insurance and give evidence of same to the *Design-Builder* and the *Consultant*. The *Design-Builder* shall pay the cost thereof to the *Owner* on demand or the *Owner* may deduct the cost from any amount which is due or may become due to the *Design-Builder*.

…

GC 12.2 INDEMNIFICATION

12.2.1 Without restricting the parties' obligations to indemnify one another as described in paragraph 12.2.4 and the Owner's obligation to indemnify as described in paragraph 12.2.5, the *Owner* and the *Design-Builder* shall each indemnify and hold harmless the other from and against all claims, whether in respect to losses suffered by them or in respect to claims by third parties that arise out of, or are attributable in any respect to their involvement as parties to this *Contract*, provided such claims are:

.1 caused by

(1) Errors, omissions, or negligence of the party from whom indemnification is sought or anyone for whom that party is responsible, or

…

> GC 12.3 LIMITATION OF LIABILITY FOR DESIGN SERVICES
>
> 12.3.1 Notwithstanding any other provisions of this *Contract*, the *Design-Builder*'s liability for claims which the *Owner* may have against the *Design-Builder*, including the *Design-Builder's* officers, directors, employees and representative that arise out of, or are related to, the *Design Services*, shall be limited:
>
> .1 to claims arising from errors, omissions, or negligent performance of the *Design Services* by the *Consultants* or *Other Consultant* and
>
> .2 where claims are covered by insurance the *Design-Builder* is obliged to carry pursuant to GC 11.1 – INSURANCE, to the amount of such insurance.

I note parenthetically that neither 111 nor DB Services obtained the stipulated insurance, so there was no coverage. According to Ms. McKay, who was the controlling mind on both sides of the contract, the parties never intended that either party should in fact be obliged to obtain such insurance. They used the standard form contract because the bank required it.

5.3.3 *Between Loco and Centurion LP (the APS)*

[55] As we have seen, this agreement transferred the beneficial interest in the building and property from Loco to Centurion LP, and effected Centurion LP's acquisition of 111, holder of the legal interest — 111 thereupon becoming Centurion Danbrook.

[56] The APS did not specifically allocate risk in relation to losses arising from acts or omissions in the construction of the building. Loco represented that there were no repairs, replacements, improvements or other work to the property which not been completed prior to closing, and Loco and 111 represented that they had no knowledge of any material defects in the construction of the building. In their amended notice of civil claim, the Centurion plaintiffs rely on these two representations, and further on an implied warranty that the building will be safe, habitable and ready for occupancy, and would comply with the basic safety standards, including those relating to seismic safety, and the requirements of applicable building codes and bylaws.

5.4 Assessing proximity

[57] Fundamentally, proximity exists "in all cases where, in view of the relationship between the parties, it would be just and fair to impose a duty of care on the defendant for the protection of the plaintiff" (*Klar 48* at pp 245–246; see also *Cooper* at para 34, *Livent* at para 25 and *Maple Leaf Foods* at para 73). Is this such a case? As I will explain, I think it is. I turn to the two-step analysis articulated in *Livent* and approved in *Maple Leaf Foods*.

5.4.1 *Step 1: an analogous relationship in analogous circumstances?*

5.4.1.1 Winnipeg Condominium and Maple Leaf Foods

[58] As noted above at para 46, the question here is whether the *Winnipeg Condominium* case, upon which Centurion relies, arises from an analogous relationship and analogous circumstances.

[59] In *Winnipeg Condominium*, a land developer (in the position of 111/Centurion Danbrook) contracted with the defendant/respondent builder (in the position of DB Services) to build an apartment building. The defendant builder subcontracted for the masonry portion of the work (the defendant subcontractor being in the position of Sorensen Trilogy).

[60] After the building was completed, it was acquired by the plaintiff/appellant and converted into a condominium. Problems arose with the masonry work on the exterior cladding of the building. Ultimately, inspection revealed structural defects in the masonry work that required the entire cladding to be replaced at the plaintiff owner's expense. The plaintiff commenced an action in negligence against the builder and the subcontractor (as well as against an architectural firm that had inspected the building without finding the structural defect) The plaintiff was, of course, a subsequent owner of the building and had no contractual relationship with the builder or subcontractor it sued.

[61] For present purposes, the procedural history can be summarized this way: the defendant builder and subcontractor filed motions to strike the claim against

them, which applications were dismissed. The defendant builder appealed to the Court of Appeal for Manitoba, but the defendant subcontractor did not. The Court of Appeal allowed the appeal, striking out the statement of claim against the builder.

[62] The issue thus raised for the Supreme Court of Canada was whether a general contractor (the builder) responsible for the construction of a building may be held tortiously liable for negligence to a subsequent purchaser of the building, who is not in contractual privity with the contractor, for the cost of repairing defects in the building arising out of negligence in its construction (at para 1). The Court concluded that the builder could be held tortiously liable to the subsequent owner in the circumstances, and allowed the appeal.

[63] There is much about this case that is like the present case. Centurion argues that, as between it and Sorensen Trilogy, their claim is analogous to the claim of the subsequent owner against the responsible builder. It is necessary, however, to be cautious. The issue before the Supreme Court of Canada was framed differently, and the analysis proceeded differently, as the majority pointed out in *Maple Leaf Foods*.

[64] In the Supreme Court, the issue was framed not as a question of proximity, but rather as one of the recoverability of economic loss under the law of tort based on principles of foreseeability. In the present case, foreseeability of harm seems incontestable. Sorensen Trilogy could not possibly have failed to contemplate that carelessness on its part may be likely to cause damage to 111/Centurion Danbrook as owner of the building contracting with DB Services for its construction. As Professor Klar has observed (*Klar 48* at p. 242):

> … with considerations of policy being openly recognized as a key element of duty in *Anns*, reasonable foreseeability increasingly became an irrelevant consideration.
>
> [Emphasis added.]

[65] It is the policy issues discussed in *Winnipeg Condominium* that, in my view, mirror the sort of considerations relevant to the proximity analysis undertaken in

Maple Leaf Foods. This is because the policy issues focus on factors that arise from the relationship between the parties—the owner/landlord of an apartment building, and the engineer responsible for the design of the building—which factors also arise in the present case.

[66] As Justice La Forest stated for the Court in *Winnipeg Condominium*:

> [12] This case gives this Court the opportunity once again to address the question of recoverability in tort for economic loss. In [*Canadian National Railway Co. v. Norsk Pacific Steamship Co.*, [1992] 1 S.C.R. 1021] at p. 1049, I made reference to an article by Professor Feldthusen in which he outlined five different categories of cases where the question of recoverability in tort for economic loss has arisen ("Economic Loss in the Supreme Court of Canada: Yesterday and Tomorrow" (1990-91), 17 *Can. Bus. L.J.* 356, at pp. 357-58), namely:
>
> 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:
>
> I stressed in *Norsk* that the question of recoverability for economic loss must be approached with reference to the unique and distinct policy issues raised in each of these categories. That is because ultimately the issues concerning recovery for economic loss are concerned with determining the proper ambit of the law of tort, an exercise that must take account of the various situations where that question may arise. This case raises issues different from that in *Norsk*, which fell within the fifth category. The present case, which involves the alleged negligent construction of a building, falls partially within the fourth category, although subject to an important *caveat*. The negligently supplied structure in this case was not merely shoddy; it was dangerous. In my view, this is important because the degree of danger to persons and other property created by the negligent construction of a building is a cornerstone of the policy analysis that must take place in determining whether the cost of repair of the building is recoverable in tort. As I will attempt to show, a distinction can be drawn on a policy level between "dangerous" defects in buildings and merely "shoddy" construction in buildings and that, at least with respect to dangerous defects, compelling policy reasons exist for the imposition upon contractors of tortious liability for the cost of repair of these defects.
>
> [Emphasis added]

[67] Should this liability extend to subsequent owners? Justice La Forest explained why it should:

> [36] In my view, the reasonable likelihood that a defect in a building will cause injury to its inhabitants is also sufficient to ground a contractor's duty in tort to subsequent purchasers of the building for the cost of repairing the defect if that defect is discovered prior to any injury and if it poses a real and substantial danger to the inhabitants of the building. … If a contractor can be held liable in tort where he or she constructs a building negligently and, as a result of that negligence, the building causes damage to persons or property, it follows that the contractor should also be held liable in cases where the dangerous defect is discovered and the owner of the building wishes to mitigate the danger by fixing the defect and putting the building back into a non-dangerous state. In both cases, the duty in tort serves to protect the bodily integrity and property interests of the inhabitants of the building.

[68] Justice La Forest went on to observe that it made no sense to permit recovery by a plaintiff who, either intentionally or through neglect, allows the defect to develop into an accident, but not to a plaintiff who moves quickly and responsibly to fix a defect before it causes injury to persons or damage to property. As he summed it up at para 37:

> Allowing recovery against contractors in tort for the cost of repair of dangerous defects thus serves an important preventative function by encouraging socially responsible behaviour.

[69] In *Maple Leaf Foods*, the majority found that the *Winnipeg Condominium* case did not establish an analogous relationship and analogous circumstances. The primary point of distinction was that, unlike the situation in *Winnipeg Condominium*, the negligence at issue in *Maple Leaf Foods* created no real and substantial danger:

> [47] The appellant urges us to extend the liability rule in *Winnipeg Condominium* so as to recognize what La Forest J. refrained from recognizing (para. 41), which is a duty owed to subsequent purchasers for the cost of repairing *non-dangerous* defects in building structures and products. But merely shoddy products, as opposed to *dangerous* products, raise different questions pertaining to issues such as implied conditions and warranties as to quality and fitness for purpose, and not of real and substantial threats to person or property …. In our view, those claims are better channelled through the law of contract, which is the typical vehicle for allocating risks where the only complaint is of defective quality (*Hasegawa & Co. v. Pepsi Bottling Group (Canada) Co*., 2002 BCCA 324, 169 B.C.A.C. 261, at paras. 57-61). Further, and even more fundamentally, such concerns do not implicate a right protected under tort law. As Laskin J.A. explained in *Hughes v. Sunbeam Corp. (Canada) Ltd*. (2002), 61 O.R. (3 d) 433 (C.A), at para 26 in identifying the limits of the duty, "compensation to repair a defective but not dangerous product will improve the product's quality but not

> its safety." Again, we observe that, absent a contractual or statutory entitlement, there is no right to the quality of a bargain.
>
> [Emphasis original.]

[70] The majority explained at para 49 that the point is not to preserve the plaintiff's continued use, whether of a building or of a product; "rather, recovery is for the cost of averting a real and substantial danger of 'personal injury or damage to other property' [emphasis original]", citing *Winnipeg Condominium* at para 35. Where one is considering defects in a building structure or a good, "it is the feasibility of discarding the thing as the means of averting the danger which will determine whether the plaintiff's loss is recoverable" (at para 51). In this regard, the majority agreed that "few homeowners or owners of other kinds of building structures can reasonably remove the real and substantial danger posed by a defect by walking away from the building structure" (*loc. cit*.). That is true of the present case.

[71] It was not, however, true of the situation in *Maple Leaf Foods,* where the claimant Mr. Sub franchisees were affected by the decision of Maple Leaf Foods to recall meat products that had been processed in one of its factories where a listeria outbreak had occurred. The franchisees sought to claim against Maple Leaf Foods, but did not have a contract with Maple Leaf. Both those parties had a contract with the franchisor, Mr. Sub. These arrangements required the franchisees to purchase meats produced exclusively by Maple Leaf.

[72] As a result of the recall, the franchisees experienced a shortage of product for 6 to 8 weeks and were further affected by adverse publicity. There was, however, no real danger to the franchisees' customers or to the franchisees. The franchisees were simply deprived of the use of the products, and lost custom. Any potential danger to consumers at the time of manufacture evaporated when the products were recalled and destroyed.

[73] The majority further noted that in *Winnipeg Condominium*, the duty of care analysis was undertaken in accordance with the law as it stood before *Cooper* and *Livent* were decided. Accordingly, "La Forest J. concluded that a *prima facie* duty of

care existed on the basis of foreseeability of 'personal injury or damage to other property', without inquiring into whether the parties were in a relationship of proximity" (at para 59). Nevertheless, the majority concluded at para 60:

> While, therefore, *Winnipeg Condominium* remains binding authority governing the duty of care in respect of shoddy goods or structures, the framework by which that duty is imposed must now distinguish more clearly between foreseeability and *proximity*.
>
> [Emphasis original.]

[74] The majority did not suggest that the relationship between the parties in *Winnipeg Condominium* was one that ought not have been found proximate.

5.4.1.2 The judge's distinction and alleged errors

[75] As we have seen, the judge concluded that the existence of a duty of care on the part of the Sorensen defendants could not be established on the basis of an existing or analogous category because the relationship was not the same as, or analogous to, that in *Winnipeg Condominium*. The distinction he relied upon in examining the nature of the respective relationships was that the three parties, 111/Centurion Danbrook, DB Services and Sorensen Trilogy, had ordered their relationships by way of contracts in which they considered and allocated the very risk at issue in the proceeding. There was, he noted at para 68, "no such contractual allocation of risk in *Winnipeg Condominium*."

[76] Centurion argues that the judge erred in two ways: first, by requiring there to be an "imminent risk" of danger to person and/or property for the case to be analogous to *Winnipeg Condominium*, and second, by finding a lack of analogous relationship because of the specifics of the contractual matrix, which, in Centurion's submission, properly falls for consideration as part of a full proximity analysis if no analogous category is found.

5.4.1.3 Imminent risk

[77] The Sorensen defendants point out that the question of risk of danger, imminent or otherwise, played no part in the judge's proximity analysis and was not

raised by the judge as a point of distinction from *Winnipeg Condominium*. I agree. It was neither raised as a point of distinction by the judge nor, in my view, could it properly have been so raised.

[78] The phrase "imminent risk" appears at para 45 of the majority's reasons in *Maple Leaf Foods*, and must be read in context. The discussion was not part of an analysis of the risks arising in *Winnipeg Condominium*. Rather, it concerned whether liability could be imposed in respect of danger to the plaintiff's rights, as opposed to damage that had occurred to the plaintiff's rights:

> [44] At first glance, the liability rule in *Winnipeg Condominium* may appear curious, since it appears as though liability is imposed *not* in respect of damage that *has* occurred to the plaintiff's rights, but in respect of a real and substantial *danger* thereto. As a general principle, there is no liability for negligence "in the air", for "[t]here is no right to be free from the *prospect* of damage" but "only a right not to *suffer* damage that results from exposure to unreasonable risk" (*Atlantic Lottery Corp. Inc. v. Babstock*, 2020 SCC 19, [2020] 2 S.C.R. 420, at para. 33 (emphasis in original); *Clements v. Clements*, 2012 SCC 32, [2012] 2 S.C.R. 181, at para. 16; *Ratych v. Bloomer*, [1990] 1 S.C.R. 940, at p. 964).
>
> [45] We maintain, however, that, properly understood, the liability rule in *Winnipeg Condominium* is consonant with that principle. In that case, the Court was clear about the source of the right to which the duty of care corresponds: ***the plaintiff's rights in person or property*** (paras. 21, 36 and 42).[3] Where a design or construction defect poses a real and substantial danger ☐ that is, what Fraser C.J.A. and Côté J.A. described in *Blacklaws v. 470433 Alberta Ltd.*, 2000 ABCA 175, 261 A.R. 28, at para. 62, as "imminent risk" of "physical harm to the plaintiffs or their chattels" or property ☐ *and* the danger "would unquestionably have caused serious injury or damage" if realized, given the "reasonable likelihood that a defect . . . will cause injury to its inhabitants", it makes little difference whether the plaintiff recovers for an injury actually suffered or for expenditures incurred in preventing the injury from occurring (*Winnipeg Condominium*, at paras. 36 and 38; see also *Morrison Steamship Co. v. Greystoke Castle (Cargo Owners)*, [1947] A.C. 265 (H.L.), at p. 280; *Murphy v. Brentwood District Council*, [1991] 1 A.C. 398 (H.L.), at p. 488, per Lord Oliver of Aylmerton). Thus, the economic loss incurred to avert the danger "is analogized to physical injury to the plaintiff's person or property" (P. Benson, "The Basis for Excluding Liability for Economic Loss in Tort Law", in D. G. Owen, ed., *Philosophical Foundations of Tort Law* (1995), 427, at p. 429). The point is that the law views the plaintiff as having sustained actual injury to its right in person or property because of the necessity of taking measures to put itself or its other property "outside the ambit of perceived danger" (*ibid.*, at p. 440; see also *Aktieselskabet Cuzco v. The Sucarseco*, 294 U.S. 394 (1935), at p. 404).
>
> [Italicized emphasis original; underlined emphasis added.]

[79] As I read it, the use of the phrase “imminent risk” in para 45, which the majority equated to “real and substantial danger”, was simply a means of emphasizing the fundamental distinction discussed in para 47, quoted above at para 69, between non-dangerous defects in building structures, and dangerous defects. It signified, as the passage demonstrates, a reasonable likelihood that the defect would cause damage to the building’s inhabitants if not repaired, and was not intended to impose a requirement that the danger be imminent in the sense of bound to happen immediately. What mattered was that it was a presently existing risk. As this Court said in *Nissan Canada Inc v Mueller*, 2022 BCCA 338 at para 67, the mere fact that it may take a period of time for a part to fail does not make the danger of unexpected and immediate failure non-imminent. If the danger is indeed real and substantial, it is sufficient that it could happen at any time so that steps need to be taken promptly in order to ensure safety. The precise timing of the danger’s likely manifestation is in that sense irrelevant: see, for instance, *Vargo v Hughes*, 2013 ABCA 96 at para 32.

[80] In this case, the presence of significant structural concerns, including that of sudden failure of the gravity system design, and the “significant risk of harm” to the health and safety of residents of the building as noted by Langford, requiring the prompt evacuation of the building, constitute, in my view, at least as real and substantial a danger as existed in *Winnipeg Condominium*. I do not think *Winnipeg Condominium* can be distinguished on this basis.

5.4.1.4 The interests being protected

[81] The Sorensen defendants distinguish *Winnipeg Condominium* on the basis of what Justice LaForest said in para 36 of that case, quoted above but repeated here for ease of reference:

> If a contractor can be held liable in tort where he or she constructs a building negligently and, as a result of that negligence, the building causes damage to persons or property, it follows that the contractor should also be held liable in cases where the dangerous defect is discovered and the owner of the building wishes to mitigate the danger by fixing the defect and putting the building back into a non-dangerous state. In both cases, the duty in tort

> serves to protect the bodily integrity and property interests of the inhabitants of the building.
>
> [Emphasis added.]

[82] The Sorensen defendants argue that this passage makes it clear that the interests being protected are those of the inhabitants of the building, not those of the plaintiffs as commercial landlords. I disagree. In both *Winnipeg Condominium* and this case, the claims were advanced by the owners of the buildings, not by individual inhabitants. It is the fixing of the building by the owner/landlord that protects the bodily integrity and property interests of the inhabitants; hence the reference to "cases where the dangerous defect is discovered and the owner of the building wishes to mitigate the danger by fixing the defect"—for the costs of which, the Court held, policy dictates that the builder should be liable in tort. I see no distinction between the cases on this basis.

5.4.1.5 The contractual chain

[83] Finally, the Sorensen defendants contend, it was correct and indeed necessary for the judge to consider the specific contractual matrix, as that was what defined the relationships between the relevant parties. They maintain that the contractual chain by which the sophisticated parties in this case allocated risk is missing from *Winnipeg Condominium*.

[84] Centurion argues that the contractual analysis is relevant to the second step of the proximity analysis, not to this step. That second step is taken only where a previous, analogous proximate relationship has not been found to exist. In that event, as we have seen, proximity will be established only where a "novel" proximate relationship is found after a full proximity analysis: *Maple Leaf Foods* at para 66; *Livent* at paras 27–29.

[85] As I see it, it is not correct to say, as the Sorensen defendants would have it, that there was no contractual allocation of risk in *Winnipeg Condominium*. The reality is that we do not know what the relevant contracts provided. It seems logical that there would have been clauses in the applicable contracts in *Winnipeg*

Condominium that considered the allocation of risk, but they were not part of the analysis.

[86] The analysis undertaken by the majority in *Maple Leaf Foods* that emphasized the chain of contracts and the allocation of risk was part of the second step, the full proximity analysis. It was not part of the first step, where the ground of distinction was the absence in *Maple Leaf Foods* of the real and substantial danger that existed in *Winnipeg Condominium*. A comparison of contractual provisions did not play a part in the Court's consideration of whether *Winnipeg Condominium* constituted an analogous category of proximity to that asserted by the claimants in *Maple Leaf Foods*. It does not necessarily follow, however, that the contractual matrix is irrelevant to assessing whether there is an analogous category.

[87] In *Livent*, the majority said this about the two stages of analysis:

> [27] This Court has on occasion defined previously established categories of proximity in broad terms. In *Hill*, for example, the Court listed "[t]he duty of care of the motorist to other users of the highway; the duty of care of the doctor to his patient; the duty of care of the solicitor to her client" (para. 25). Proximate relationships will not always, however, be identified so generally. In particular, whether proximity exists between two parties at large, or whether it inheres only for particular purposes or in relation to particular actions, will depend upon the nature of the particular relationship at issue (*ibid.*, at para. 27; *Haig*, at p. 479). Indeed, and as we explain below, factors which support recognizing "novel" proximate relationships do so based upon the characteristics of the parties' relationship and the circumstances of each particular case (*Cooper*, at paras. 34-35).
>
> [28] It follows that, where a party seeks to base a finding of proximity upon a previously established or analogous category, a court should be attentive to the particular factors which justified recognizing that prior category in order to determine whether the relationship at issue is, in fact, truly the same as or analogous to that which was previously recognized. And, by corollary, courts should avoid identifying established categories in an overly broad manner because, again, residual policy considerations are not considered where proximity is found on the basis of an established category (*Cooper*, at para. 39). Analytically, this makes sense. For a court to have previously recognized a proximate relationship, second-stage residual policy considerations must already have been taken into account. When, therefore, a court relies on an established category of proximity, it follows "that there are no overriding policy considerations that would [negate] the duty of care" (*ibid.*). A consequence of this approach, however, is that a finding of proximity based upon a previously established or analogous category must be grounded not merely upon the identity of the parties, but upon examination of

> the particular relationship at issue in each case. Otherwise, courts risk recognizing *prima facie* duties of care without any examination of pertinent second-stage residual policy considerations.
>
> [29] Where an established proximate relationship cannot be found, courts must undertake a full proximity analysis. To determine whether the "'close and direct' relationship which is the hallmark of the common law duty of care" exists (*Saadati v. Moorhead*, 2017 SCC 28, [2017] 1 S.C.R. 543, at para. 24, citing *Cooper*, at para. 32, and *Donoghue v. Stevenson*, [1932] A.C. 562 (H.L.), at pp. 580-81), courts must examine all relevant "factors arising from the *relationship* between the plaintiff and the defendant" (*Cooper*, at para. 30 (emphasis in original); *Edwards*, at para. 9; *Childs*, at para. 24; *Odhavji*, at para. 50; *Hill*, at para. 24; *Fullowka*, at para. 26; *Saadati*, at para. 24). While these factors are diverse and depend on the circumstances of each case (*Cooper*, at para. 35), this Court has maintained that they include "expectations, representations, reliance, and the property or other interests involved" (*ibid.*, at para. 34; *Odhavji*, at para. 50; *Fullowka*, at para. 26) as well as any statutory obligations (*Cooper*, at para. 38; *Edwards*, at paras. 9 and 13; *Odhavji*, at para. 56).
>
> [Emphasis added.]

[88] In my view, the particular factors that justified the finding of a duty of care in *Winnipeg Condominium* arise also in this case notwithstanding any difference in the contractual matrix:

- Both cases concerned the same problem: the alleged negligent construction of a building that rendered it dangerously defective.
- Although there was a chain of contractual relationships, the claimant in each case did not have a contract with the alleged tortfeasor.
- The alleged duty of care in question was the same: to take reasonable care in constructing the building at issue, and "to ensure that the building does not contain defects that pose foreseeable and substantial danger to the health and safety of the occupants" (*Winnipeg Condominium* at para 54).
- In both cases, the buildings were, on the evidence, built with defects that did raise a real and substantial danger to the occupants, necessitating extensive remediation. It does not appear that the

condominium building in *Winnipeg Condominium* had to be evacuated, but the building in this case certainly did.

- In both cases, the claimants and the alleged tortfeasor were in a relationship of neighbourhood such that, in the reasonable contemplation of the alleged tortfeasor, carelessness on its part may be likely to cause damage to the claimant.

- Analogous policy considerations apply, arising from identical factors existing in each relationship. In both cases, injury to the claimant who was not in privity of contract with the alleged tortfeasor was not only foreseeable, but concerned buildings, which are permanent structures where negligent construction creates a foreseeable danger that will threaten the original owner, subsequent owners, and every inhabitant during the useful life of the building (see *Winnipeg Condominium* at para 35).

- In both cases, the duty to construct a building according to reasonable standards and without dangerous defects arises independently of any contractual stipulation because it arises from a duty to create the building safely and not merely according to contractual standards of quality: see *Winnipeg Condominium* at para 47.

- In both cases, there is a strong underlying policy justification for imposing liability, being “to encourage the repair of dangerous defects and thereby to protect the bodily integrity of inhabitants of buildings” (*Winnipeg Condominium* at para 42). In the present case, the importance to the public of designing and constructing buildings that are safe for occupation is demonstrated by, among other things, the applicable building codes, the steps taken by Langford, and the rules and standards of the EGBC.

- It follows, in my opinion, that in both cases there is a strong underlying policy justification for not protecting the tortfeasor from liability in tort on the basis of contractual defences where there is no contract between the tortfeasor and the claimant.

[89] In these circumstances, I conclude that proximity is made out by reference to the analogous category of proximate relationship found in *Winnipeg Condominium*. Both the relationships and circumstances support this conclusion. That the Court in *Winnipeg Condominium* did not undertake an analysis that fully distinguished between foreseeability and proximity does not, in my view, detract from the capacity of the case to provide an analogous category of proximate relationship. As the Court stated in *Maple Leaf Foods* at para 60, *Winnipeg Condominium* "remains binding authority governing the duty of care in respect of shoddy … structures". And a shoddy structure—shoddy to the point of being dangerously defective—is what we have.

5.4.2 *Step 2: a full proximity analysis*

[90] Given my finding on the first step of the proximity analysis, it is not necessary for me to proceed to a full proximity analysis (the second step). Nevertheless, I observe, my conclusion that the contractual chain in this case is not sufficient to overcome the points of identity between this case and *Winnipeg Condominium* would also support a finding of proximity based on a full proximity analysis.

[91] In *Maple Leaf Foods,* the Court concluded that a full proximity analysis failed to establish sufficient proximity to found a duty of care. As we have seen (para 48 above), in the majority's analysis, how the contracts among the parties allocated risk "loom[ed] large" in that case. The majority asked three questions: Is a party using tort law so as to circumvent the strictures of a contractual arrangement? *Could* the parties have addressed risk through a contractual term? And, *did* they? But I consider it wrong to treat these three questions as a proximity template, as the Sorensen defendants would have us do, and as the judge below seems to have done.

[92] As the full analysis undertaken by the majority indicates, consistent with what the court stated in *Cooper*, context is everything, and one must consider the "expectations, representations, reliance, and the property or other interests involved" as well as any other relevant considerations: *Maple Leaf Foods* at para 73. The mere fact that there are contracts that allocate risk does not, by itself, answer the fundamental question: *whether it would be just and fair, having regard to the relationship between the parties, to impose a duty of care*. More must be considered.

[93] It is important to understand that *Maple Leaf Foods* dealt with a set of contracts that governed ongoing commercial relationships among the relevant parties. That was not our case, where, like *Winnipeg Condominium*, we are dealing with a single project.

[94] More importantly, the problem in *Maple Leaf Foods* was that, because of the alleged negligence of Maple Leaf, the franchisees were deprived of product for a period of time and suffered reputational damage. There was economic loss, but no real and substantial danger either to them or to the consumers due to Maple Leaf's recall of the product. That is precisely the sort of situation where allocation of risk is best handled by contracts: between Maple Leaf and the franchisor, and between the franchisor and the franchisees. That, in my view, is what the Supreme Court had in mind when, in *Winnipeg Condominium*, it distinguished cases where there was shoddy workmanship from cases where the workmanship was dangerously defective:

> [42] … I note that the present case is distinguishable on a policy level from cases where the workmanship is merely shoddy or substandard but not dangerously defective. In the latter class of cases, tort law serves to encourage the repair of dangerous defects and thereby to protect the bodily integrity of inhabitants of buildings. By contrast, the former class of cases bring into play the questions of quality of workmanship and fitness for purpose. These questions do not arise here.
>
> [Emphasis added.]

[95] Thus, as the Court pointed out at para 25, the builder's duty in tort to take reasonable care arises independently of any duty in contract:

> … The duty in contract with respect to materials and workmanship flows from the terms of the contract between the contractor and home owner. By contrast, the duty in tort with respect to materials and workmanship flows from the contractor's duty to ensure that the building meets a reasonable and safe standard of construction. For my part, I have little difficulty in accepting a distinction between these duties. The duty in tort extends only to reasonable standards of safe construction and the bounds of that duty are not defined by reference to the original contract.

[96] It is this distinction that, in my opinion, led the majority in *Maple Leaf Foods* to rely on the absence of real and substantial danger as the distinguishing feature between the case before them and *Winnipeg Condominium*. I repeat what the majority stated in para 47 of *Maple Leaf Foods*:

> But merely shoddy products, as opposed to *dangerous* products, raise different questions pertaining to issues such as implied conditions and warranties as to quality and fitness for purpose, and not of real and substantial threats to person or property …. In our view, those claims are better channelled through the law of contract, which is the typical vehicle for allocating risks where the only complaint is of defective quality….

[97] The Sorensen defendants argue that the contracts in this case established a "tower of liability" to which the parties agreed, and which Centurion ought not to be allowed to circumvent through a claim in tort. In this regard, they rely on the passages from *Maple Leaf Foods* quoted above at paras 47 and 48, including the three questions just discussed in para 91.

[98] That "tower", they submit, began with Sorensen Trilogy's contract with DB Services, which limited Sorensen Trilogy's liability to DB Services to the amount of its fees. I note that this limit was said to apply to Sorensen Trilogy's liability "whether in contract or tort". It thus recognized that Sorensen Trilogy might have liability in tort, which, of course, could be contractually limited only vis-à-vis DB Services.

[99] The next stage in the tower was DB Services' contract with 111/Centurion, which limited DB Services' liability to 111/Centurion to the $1 million limit of any applicable liability insurance as stipulated in their contract. This contract recognized that its rights and remedies were to be "in addition to and not a limitation of any duties, obligations, rights and remedies otherwise imposed or available by law".

[100] Thus, the Sorensen defendants assert, Sorensen Trilogy accepted the risk of loss up to the amount of its fees of approximately $85,000, DB Services accepted the risk of loss between that amount and $1 million, with 111/Centurion accepting the risk of loss over $1 million (despite having no contractual recourse against Sorensen Trilogy). But as the DB Services contract indicated, this was subject to what other rights or remedies might be available.

[101] This argument based on contractual allocation of risk might well succeed in cases of negligence in the course of business relationships or transactions where no real and substantial danger arises. That was the situation in *Tri-County Regional School Board,* a decision upon which both the Sorensen defendants and the judge placed considerable reliance. There, the claim was for soil remediation costs incurred in relation to the development of property after the discovery of hydrocarbon contaminants from oil tanks. No present risk of physical injury arose. There were as yet no inhabitants to worry about.

[102] The argument does not, however, answer the concern expressed by the Supreme Court in *Winnipeg Condominium* when it distinguished cases where the workmanship is merely shoddy or substandard from those where it is dangerously defective. Here, we have workmanship that was so dangerously defective as to threaten the structural stability of the building to the extent that its occupants were obliged to evacuate it for their own safety. Given the parties' expectations, the foreseeable reliance of 111/Danbrook on the professional competence of Sorensen Trilogy, and the property interests and public policy concerns involved, I do not accept that the contractual linkage should eliminate a duty of care in tort.

[103] I conclude, with respect, that as to both steps in the proximity analysis, the judge erred in his finding that no proximity arises between 111/Centurion and the Sorensen defendants. In finding that *Winnipeg Condominium* was not an analogous case because of the contractual allocation of risk, the judge incorrectly relied upon the parties' contractual matrix without considering the true nature of the risk (a factor that was central to the Supreme Court's analysis in both *Winnipeg Condominium*

and *Maple Leaf Foods*) and the other factors arising from the relationship in question. Similarly, the judge erred in his full proximity analysis by finding the parties had anticipated the very risk that occurred without properly characterizing the nature of that risk, thereby limiting his consideration of policy to contractual concerns, ignoring the significant safety concerns. He thereby limited the factors relevant to the parties' relationship that he took into account, and effectively treated this like a case of shoddy (substandard) workmanship instead of a case of dangerously defective design. The very fact of how the risk was allocated suggests that the parties did not contemplate the risk of real and substantial danger to inhabitants of the building due to Sorensen Trilogy lacking the competence to carry out what it undertook to do in its contract. To reiterate what the Supreme Court said in *Winnipeg Condominium* at para 25, the "duty in tort extends only to reasonable standards of safe construction and the bounds of that duty are not defined by reference to the original contract."

[104] In sum, I consider that a full "novel" proximity analysis, while unnecessary, would inevitably lead to the same conclusion.

5.5 Suitability for summary judgment

[105] The appellants Loco, DB Services and Ms. McKay joined with Centurion in arguing that, as I have found, the judge erred in law in failing to find that there was a relationship of sufficient proximity between Centurion and the Sorensen defendants to give rise to a duty of care.

[106] In the alternative, these appellants argue that the judge erred in finding that the question was suitable for summary judgment by failing to identify and apply the correct legal test for suitability under Rule 9-6 of the *Supreme Court Civil Rules.* In particular, they contend that the judge's decision turned in large part on his interpretation of the contractual matrix, which involved questions of mixed fact and law and was therefore unsuitable for summary judgment.

[107] These arguments disappear in view of the conclusion that I have reached on the proximity issue. I agree with the Sorensen defendants that the judge did not err

in exercising his discretion to determine the proximity issue summarily, whether under Rule 9-6(5)(c), upon which the judge relied, or Rule 9-7, upon which the Sorensen defendants relied in addition to the summary judgment rule.

[108] Here, the question of whether a duty of care is owed is undoubtedly a question of law, and although it involves some factual aspects, those relevant to this issue were not seriously contested. For instance, the Sorensen defendants led no evidence to counter the ample evidence of the real and substantial danger that arose as a result of their structural design, and did not seek to distinguish this case from *Winnipeg Condominium* on that basis. This is so even though the amended notice of civil claim specifically alleged the existence of "Dangerous Defects" arising from the structural engineering design. In addition, the evidence of Ms. McKay about the parties' intentions with respect to their contracts was either inadmissible as parol evidence, or irrelevant for the reasons discussed above.

5.6 Conclusion

[109] To answer the "fundamental question" concerning proximity, then, I consider that this is a case in which it would be just and fair, having regard to the relationship between 111/Centurion and the Sorensen defendants, to impose a duty of care. I find that the requisite close and direct relationship is made out by reference to the analogous category of proximate relationship established in *Winnipeg Condominium* (the first step). It follows, in my opinion, that the judge erred in dismissing the claims of Centurion Danbrook against the Sorensen defendants,

[110] This, of course, covers only the first part of the *Anns/Cooper* test as modified. What about the second part of the test, which asks whether there are residual policy considerations outside the relationship of the parties that may negative or limit the imposition of a duty of care? The authorities suggest that where proximity is found by reference to an analogous category of proximate relationship previously established, the second part of the *Anns/Cooper* test has no application, or, at least, will "seldom" have application: see *Cooper* at para 39; *Livent* at paras 26 and 28.

The question of its applicability in the circumstances of this case, however, was not argued before us, and so I would leave it open.

[111] In view of this conclusion, I need not consider the third issue: whether, given the judge's finding of a lack of proximity between Centurion Danbrook and the Sorensen defendants, he erred in failing to dismiss the third party claims against those defendants for contribution and indemnity in relation to Centurion Danbrook's claims.

6. ISSUES 4 AND 5: CENTURION LP'S STANDING TO SUE

6.1 Overview and standard of review

[112] Two issues arise here: the first relates to Centurion LP's standing to claim against the Sorensen defendants in negligence, while the second relates to Centurion LP's standing to claim against the Sorensen defendants for failure to warn.

[113] As to the first, the judge found that Centurion LP lacked standing to claim in negligence because it was the beneficiary under a bare trust and its claim related to trust property. Accordingly, the judge concluded, only Centurion Danbrook as trustee of the trust property had standing to bring the negligence claim.

[114] As to the second, the judge found that Centurion LP did have standing to claim for failure to warn because that claim did not relate to the trust property itself, but rather to damages sustained by Centurion LP by entering into the APS to purchase the beneficial interest.

[115] Whether a beneficiary should be allowed to sue the third-party debtor of a trust raises a question of mixed fact and law and is thus a decision reviewable on the deferential standard of palpable and overriding error, absent an extricable error of law: *Price Security Holdings Inc v Klompas & Rothwell*, 2023 BCCA 453 ("*Price Security No. 2*") at para 14.

[116] The judge's reasons were succinct:

> [48] As counsel for the Defendant Applicants points out, the legal owner of the Lands and Building never changed. It has always been 111 (now Danbrook Inc.). Only the beneficial ownership of the trust property changed—from Loco to Centurion LP upon completion of the April 25, 2019 purchase and sale transaction. The claims in negligent design are for loss in relation to trust property. Any loss suffered by Centurion LP is entirely derivative of Danbrook Inc.'s losses.
>
> [49] It is trite law that only the trustee of trust property has standing to bring a claim in respect of it, the beneficiary of the trust property does not: *0956375 B.C. Ltd. v. Regional District of Okanagan-Similkameen*, 2020 BCSC 743 [*RDOS*] at paras. 65–103. Accordingly, Centurion LP has no standing to bring its claims in negligence against the Defendant Applicants.
>
> [50] Throughout, the parties, all of whom are sophisticated, voluntarily chose to use various corporate and other vehicles to transact their affairs, including the use of a trust to hold the property. Having taken the benefits of that structure, they must also face its burdens: *RDOS*, at para. 103.
>
> [51] However, Centurion LP does have standing to maintain its claims against the Defendant Applicants in misrepresentation and failure to warn. [That claim does] not relate to the trust property itself, but rather to damages suffered by Centurion LP in completing the APS as it did.
>
> [52] I find that it is plain and obvious that the claims as pleaded (or as could reasonably be amended) by Centurion LP against the Defendant Applicants regarding the deficient design and construction of the Building disclose no reasonable cause of action. Those claims are dismissed.

[117] Centurion complains that the judge did not explain why, if Centurion LP could maintain a claim against the Sorensen defendants for breach of a duty to warn, Centurion Danbrook could not (its claims against the Sorensen defendants having been dismissed in their entirety due to a lack of proximity). In view of my conclusion that the judge erred in dismissing the claims of Centurion Danbrook on the basis of a lack of proximity, I need consider this problem no further.

6.2 The claim in negligence

[118] Centurion seeks to distinguish the authorities upon which the judge relied on the basis that they involved multiple beneficiaries—so only the trustee could act representing all of them—or they did not involve bare trustees. Here, they say, we have a true bare trust with but one beneficiary. Moreover, the trustee, Centurion Danbrook, is already a plaintiff, and because the trustee is not refusing to act, Centurion LP cannot sue Centurion Danbrook. They argue that the evidence will

show that it was Centurion LP who actually suffered the loss, not the holding company (Centurion Danbrook) that held the title. Both, they maintain, must therefore be plaintiffs, and they should not be hamstrung at this stage by a procedural issue. The questions of standing and who suffered the loss, they argue, should be left to be determined at trial.

[119] I am unable to agree with these arguments. In my view, the judge's reasons are entitled to deference. The fact that Centurion Danbrook is a bare trustee does not distinguish this case from those relied on by the judge. The same was true in *0956375 BC Ltd v Regional District of Okanagan-Similkameen*, 2020 BCSC 743 ("*RDOS*"). Nor does it distinguish this situation from the well-established principle of law that only a trustee can sue for damage to the trust property: see the authorities reviewed extensively by this Court in *Price Security Holdings Inc. v Klompas & Rothwell*, 2019 BCCA 36 ("*Price Security No. 1*").

[120] In *Price Security No. 2* this Court considered further the question of "special circumstances" as reviewed extensively in *Price Security No. 1*. What constitutes special circumstances that would justify a departure from the general rule that only a trustee can sue for damage to the trust property will depend on the particular case. They may include matters such as fraud or collusion between the trustee and the third person, conflict of interest, or where the trustee has failed in its duty to protect the trust estate or the interests of the beneficiary: see *Price Security No. 2* at paras 18–22.

[121] In my view, none of the factors upon which Centurion relies would constitute special circumstances justifying a departure from the general rule, even assuming that the beneficiary is not first required to pursue an action against the trustee before initiating a claim against a third party.

[122] That the negligence claim seeks compensation for damage to trust property, being the building, as opposed to an outstanding debt, does not distinguish the nature of the claim. It still relates to a loss suffered in relation to trust property: see, for instance, *RDOS* at para 98, and D.W.M. Waters, M.R. Gillien and L.D. Smith,

Waters' Law of Trusts in Canada 5th ed (Toronto: Thomson Reuters Canada, 2021 at 24.II).

[123] That it may not be clear which entity suffered the loss should make no difference. The loss is claimable by Centurion Danbrook in any event, either directly as its own loss, or as trustee on behalf of the beneficiary if it is Centurion LP's loss. The point is that the claimable economic loss will be the same in either case, however it may be distributed between the Centurion parties. It follows that the judge was right to find the claim of Centurion LP derivative of the claim of Centurion Danbrook.

[124] As to the argument that the relationship was one of agency, rather than trust, Centurion has not demonstrated any palpable and overriding error in the judge's conclusion, and I would not disturb it.

[125] I would not accede to this ground of appeal.

6.3 The claim for breach of a duty to warn

[126] As noted above, although the judge held at para 51 that Centurion LP did have standing to maintain its claims against the Sorensen defendants in "misrepresentation and failure to warn", in fact Centurion LP advanced no claim against the Sorensen defendants for misrepresentation. That claim was brought only against Loco. Accordingly, I need only consider here the claim for damages for failure to warn.

[127] The Sorensen defendants argue that Centurion LP's claim for breach of a duty to warn must fail because there is nothing to support a relationship of proximity between Centurion LP and the Sorensen defendants, particularly as the contract between Centurion LP and Loco (the APS) allocated the risks between the parties as discussed in *Maple Leaf Foods*.

[128] I accept that a claim for breach of a duty to warn must depend upon the existence of a duty of care. But the duty of care analysis in the present context differs from that applicable to Centurion Danbrook's claim in negligence.

[129] Centurion LP's claim is that the Sorensen defendants had a duty to warn the Centurion plaintiffs "or any subsequent purchasers of the Building of known dangers or deficiencies in the Building, including the Dangerous Defects …". This duty is founded on not only the alleged negligence of the Sorensen defendants in carrying out their professional duties, but also their failure to act once they later became aware of the potential consequences of their alleged negligence given the enquiries, the complaint and the investigation. Centurion LP did not enter into the APS until after this alleged failure, and so, it claims, was denied the opportunity to withdraw from the arrangement altogether. It follows that proximity would not be negated by any actual or potential allocation of risk in the APS. It further follows, as the judge held, that the principles relating to standing to bring a claim in respect of trust property do not apply to the same effect because it was not the trustee that entered into the APS; rather it was Centurion LP directly.

[130] The Sorensen defendants further argue that no proximity arises because they did not know about Centurion LP, and so could not be expected to warn that entity. This resembles the foreseeability argument rejected in *Winnipeg Condominium*. As in that case, the duty of the contractor to subsequent purchasers (including, in the present context, Centurion LP) was grounded in the reasonable likelihood that the contractor's breach of duty would cause injury to the building's inhabitants. Here, the alleged duty to warn would be framed similarly: to protect the safety of inhabitants, the negligent structural engineer should warn those obviously in a position to do something about it. It may (subject to the evidence at trial) prove to be the case that Sorensen Trilogy knew or ought to have known that the building would be sold after completion, and that warning those with whom it was directly dealing would have the desired effect. Those parties included the then-current owners (111/Centurion Danbrook and Loco), DB Services, who acted for the owners, Langford, and the

EGBC. Instead, there is evidence that would, if accepted at trial, support the proposition that Sorensen Trilogy tried to cover the problem up.

[131] In these circumstances, I consider that it was open to the judge to conclude, as he did, that Centurion LP had standing to maintain its claim against the Sorensen defendants for failure to warn. I would dismiss this aspect of the cross appeal.

[132] I turn next to consider the question of the enforceability of Sorensen Trilogy's contractual limitation of liability.

7. ISSUES 6 AND 7: THE ENFORCEABILITY OF SORENSEN TRILOGY'S CONTRACTUAL LIMITATION OF LIABILITY

7.1 Overview

[133] As we have seen (para 50 above), Sorensen Trilogy's contract with DB Services to provide structural engineering services in the construction of the building limited Sorensen Trilogy's liability as follows:

> [Sorensen Trilogy] is only liable for loss and damage that is directly attributable to its negligent acts or omissions (the "Recoverable Loss and Damage") and in the event of a claim for Recoverable Loss and Damage, the parties agree that the maximum liability of [Sorensen Trilogy], whether in contract or tort, is a limited to the amount of fees paid by [DB Services] to [Sorensen Trilogy] on account of Services … in relation to the Project as of the date the claim is made.
>
> In no event will STEL be liable for any indirect, incidental, special consequential or punitive damages as a consequence of any breach by STEL or the failure of STEL to satisfy and/or perform, any term or provision of this Agreement and without limited the generality of the foregoing, STEL shall not, under any circumstances, be liable for loss or damage resulting from delays in the completion of the Project, or loss of earnings or loss of profits howsoever caused.

[134] This limitation, of course, is not binding on the Centurion plaintiffs who were not parties to this contract—hence the position of the Sorensen defendants that the Centurion plaintiffs could not claim against them in tort because of the lack of sufficient proximity to found a duty of care. As the Centurion plaintiffs acknowledged, the enforceability of this limitation clause becomes much less important to them if

they succeed on the proximity question. It remains, however, of significance to Loco and Ms. McKay, who challenge the judge's declaration as set out in his final order:

> THIS COURT DECLARES that:
>
> Any liability that Sorensen Trilogy Engineering Ltd., Brian McClure, Ted Sorensen or Brian Lange may have to DB Services of Victoria Inc., or to others for contribution and indemnity for the claims of DB Services of Victoria Inc., is limited in the aggregate to the amount of $88,775, being the fees paid to Sorensen Trilogy Engineering Ltd.

[135] As noted, the challenge is brought primarily on two fronts. First, Loco and Ms. McKay maintain that the judge erred in determining this issue by way of summary trial, instead of leaving it to be decided at trial on a full record. Second, they assert that if it was open to the judge to proceed by way of summary trial, the judge erred in his determination that there were no overriding public policy concerns that would justify the court refusing to enforce the limitation clause. They rely on the decision of the Supreme Court in *Tercon Contractors Ltd v British Columbia (Transportation and Highways)*, 2010 SCC 4, where the Court said this:

> [121] The present state of the law, in summary, requires a series of enquiries to be addressed when a plaintiff seeks to escape the effect of an exclusion clause or other contractual terms to which it had previously agreed.
>
> [122] The first issue, of course, is whether as a matter of interpretation the exclusion clause even *applies* to the circumstances established in evidence. This will depend on the Court's assessment of the intention of the parties as expressed in the contract. If the exclusion clause does not apply, there is obviously no need to proceed further with this analysis. If the exclusion clause applies, the second issue is whether the exclusion clause was unconscionable at the time the contract was made, "as might arise from situations of unequal bargaining power between the parties" (*Hunter*, at p. 462). This second issue has to do with contract formation, not breach.
>
> [123] If the exclusion clause is held to be valid and applicable, the Court may undertake a third enquiry, namely whether the Court should nevertheless refuse to enforce the valid exclusion clause because of the existence of an overriding public policy, proof of which lies on the party seeking to avoid enforcement of the clause, that outweighs the very strong public interest in the enforcement of contracts.

7.2 Fresh evidence and mootness

[136] In relation to both these issues, Loco and Ms. McKay seek to introduce fresh evidence in the form of Mr. Sorensen's admission as set out in the January 6, 2023

order of the EGBC, quoted in para 28 above. The admission was that Mr. Sorensen had:

> … demonstrated unprofessional conduct when he agreed with Mr. McClure that their engineering firm would take on the structural design for the Building with Mr. McClure acting as engineer of record, despite knowing that Mr. McClure lacked the training and ability required to competently complete the structural design for the Building.

[137] They argue that this evidence indicates that, at the time Sorensen Trilogy entered into its contract with DB Services, it was known to its principal that the member of the firm who would act as engineer of record under the contract was not competent to fulfil the task because he did not have the training and ability to do so. I deal below with the question of whether we should admit this evidence.

[138] The Sorensen defendants also rely on events that took place after the judgment in this matter, being DB Services' assignment into bankruptcy and the resulting stay imposed by section 69 of the *BIA*. They point out that DB Services and Sorensen Trilogy were the only two parties to the contract containing the limitation clause at issue. In these circumstances, they maintain that the issue of its interpretation and enforceability is moot. DB Services is no longer in a position to advance any claims for contribution and indemnity against the Sorensen defendants.

[139] Loco and Ms. McKay submit that the issue is not moot, pointing out that while section 69 of the *BIA* has stayed the claims against DB Services, it has not effected their dismissal, extinguishment, or final determination. I agree. On the evidence before us, it is not clear at this stage of the proceedings that a decision of this Court on the issue will have no practical effect on the rights of the parties—see *Borowski v Canada (Attorney General)*, [1989] 1 SCR 342 at p 353.

[140] But even if I were satisfied that the question is moot, I would exercise the court's discretion to consider the issue in any event. In my view, the circumstances warrant it. The issue arises in an adversarial context and has been fully argued by able and experienced counsel. Its determination at this stage of the litigation may well have collateral consequences as matters proceed and are finally determined.

Given the context in which the issue arises, its consideration does not strain judicial resources, and, in my opinion, represents an appropriate exercise of this Court's adjudicative function. See *Borowski* at pp 353 and 359–360. I note in this regard that, for the reasons I explain below, resolution of this question turns largely on procedural issues of potential importance to litigation practice and case management.

7.3 Standard of review

[141] It is well known that a Chambers judge's decision to proceed by way of summary trial is discretionary. As this Court said in *Nickel v Phoenix Construction Systems Ltd,* 2021 BCCA 268:

> [30] The applicable standard of review is uncontroversial. A judge's decision on the suitability of proceeding by summary trial involves the exercise of discretion. Accordingly, it is entitled to appellate deference: (a) in the absence of a clear conclusion that the discretion was wrongly exercised, in that no weight or insufficient weight was given to relevant considerations; or (b) unless it appears that the decision is clearly wrong and may result in an injustice: *Gichuru v. Pallai*, 2013 BCCA 60 at para. 34.

[142] Similarly, absent an extricable issue of law or error in principle, the interpretation of a contractual provision is a question of mixed law and fact, reviewable on a standard of palpable and overriding error: *Sattva Capital Corp v Creston Moly Corp*, 2014 SCC 53 at paras 50–53.

7.4 The judge's reasons

[143] In finding that Sorensen Trilogy's limitation clause was enforceable against DB Services and those claiming contribution and indemnity from Sorensen Trilogy with respect to claims by DB Services, the judge said this:

> [86] The DB Services Defendants and Trilogy utilized standard form contracts that were well-known to them. Those contracts allocated the responsibility for risk and insurance. They were entitled to do so: *Howe Sound School District No. 48 v. Killick Metz Bowen Rose Architects and Planners Inc.*, 2008 BCCA 195 at para. 13 [*Howe Sound*]. The limitation of liability provision in the Trilogy Contract stipulates that Trilogy's maximum liability "whether in contract or tort" is limited to the amount of fees paid to it.

> [87] Clauses limiting liability must be given their ordinary and grammatical meaning, considered in harmony with the rest of the contract and in light of their purpose and commercial context: *Corner Brook (City) v. Bailey*, 2021 SCC 29 at paras. 20, 27–28. Interpretation of standard form contracts is generally a question of law: *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)*, 2010 SCC 4 at paras. 64–65; *Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co.*, 2016 SCC 37 at para. 34.
>
> [88] There is nothing inherently unreasonable or sinister about an exclusion clause in a freely negotiated contract, particularly in circumstances where the parties are sophisticated and capable of organizing their commercial affairs by allocating risk in a manner different from that which would otherwise be provided by law: *Dow Chemical Canada ULC v. NOVA Chemicals Corporation*, 2020 ABCA 320 at para. 49. There is nothing unreasonable about limiting liability for professional errors and omissions on the part of an engineering sub-consultant, particularly in the context of a design-build contractor (DB Services) agreeing to assume responsibility for obtaining professional liability insurance. The decision not to insure against potential risks was made by the DB Services Defendants consciously. It remains to be seen as to whether their decision was financially prudent.
>
> [89] This is not a case of an imbalance of power between or among the parties. There is no unfairness or unconscionability alleged in the various relationships. The design and construction of the Building was a sizeable commercial enterprise. The subsequent sale of the Building was a sizable commercial transaction. All of the parties were sophisticated. As was observed by this Court in *The Board of School Trustees of School District No. 72 (Campbell River) v. IBI Group Consultants Ltd.*, 2007 BCSC 280 at para. 55, there is nothing about the circumstances of these events that would "constitute an affront to public policy or outweigh the intent of the parties".
>
> [90] Summary trial is an appropriate procedure for determining the applicability of limitations of liability clauses: *Howe Sound* at paras. 2, 4, 19. In this case, I find that I am able to find the facts necessary to the decide the issue of law relating to whether Trilogy's limitation of liability is effective. I also find that it would be just, in the circumstances of this case, to decide the issue by way of summary trial. Indeed, an early determination of the issue will foster the object of the *Rules*, namely the just, speedy and inexpensive determination of every proceeding on its merits.
>
> [Emphasis added.]

7.5 Discussion

[144] It is my respectful view that the judge erred in exercising his discretion to determine this issue by way of summary trial, though I understand his desire to foster the object of the Rules of achieving the just, speedy and inexpensive determination of every proceeding on its merits (at para 90). It seems to me,

however, that in the particular circumstances of this case, he gave no or insufficient weight to relevant considerations, leading to a decision that may result in an injustice.

[145] With respect to interpretation, the judge was clearly alive to the proper principles governing the construction of clauses limiting liability. What he does not seem to have considered, however, is whether the limitation clause as a whole, construed in its proper context, should be interpreted as not extending beyond claims of professional negligence to the claims framed by DB Services in misrepresentation and failure to warn.

[146] The judge also seems not to have considered the effect of the conduct of the Sorensen defendants on either the formation of the contract or its enforceability, but rather focused on the same contractual matrix on which he relied heavily in his proximity analysis.

[147] On the question of contract formation, the question is whether the conduct complained of rose to a level that would render the limitation clause unconscionable at the time the contract was made: *Tercon Contractors* at para 122.

[148] As to enforcement, assuming that the limitation clause is otherwise valid and applicable, the judge did not appear to undertake the third inquiry discussed in *Tercon Contractors* at para 123: “whether the court should nevertheless refuse to enforce the valid exclusion clause because of the existence of an overriding public policy”. Instead, the judge concentrated on the contractual matrix, stating at para 88:

> There is nothing unreasonable about limiting liability for professional errors and omissions on the part of an engineering sub-consultant, particularly in the context of a design-build contractor (DB Services) agreeing to assume responsibility for obtaining professional liability insurance.

[149] The conduct of the Sorensen defendants does not seem to have entered into the analysis. In my respectful view, it should have, and had it done so, the judge would have recognized the propriety of leaving these questions to be determined at trial on a full record after cross-examination.

[150] Some of the relevant evidence before the judge included the following:

- Mr. McClure admitted incompetence and unprofessional conduct in the proceedings before the EGBC and its orders, including an admission that he had failed to take adequate steps to address serious concerns about the building's design that were brought to his attention by Skyline Engineering in November 2017 while the building was under construction.

- Investigation by the EGBC and Langford revealed the existence of structural defects that gave rise to real and substantial danger to the occupants of the building.

- DB Services hired Mr. McClure and Sorensen Trilogy after inquiring of Mr. McClure about their qualifications and experience to build a concrete tower of the size of the building — the first such project DB Services had undertaken. It was assured that engineers in the office had done lots of these buildings, and checked each other's work. According to the results of the EGBC investigation and the admissions, this was at least arguably untrue.

- Mr. McClure knew that he was not qualified to take on the project on his own.

- Mr. McClure was not "fully aware" (as he put it) of Ted Sorensen's qualifications beyond experience with concrete structures of 4–6 storeys.

- Mr. McClure knew that there had been no third-party review of the structural design when Mr. Lange represented otherwise to the EGBC complainant. He had discussed Mr. Lange's response beforehand with Mr. Lange and did not correct it. When asked on discovery if he knew that

the representation was inaccurate, Mr. McClure answered: “It might’ve been an exaggeration, yes.”

- Mr. McClure indicated to the EGBC that Sorensen Trilogy had asked Skyline Engineering to perform an independent review but Skyline had declined. In fact, it was Skyline that came to Sorensen Trilogy with concerns about the building’s structural design.

- On July 26, 2019, Stantec delivered a report to Sorensen Trilogy, prepared at Sorensen Trilogy’s request. Stantec recommended that three steps should be taken to reduce the deficiencies it had found, which it described as follows:

  > … the sheer capacity of the core walls may be deficient under seismic load cases. A cursory review of the existing structural drawings suggests that the structural detailing for some of the major seismic resisting elements may not be compliant with BCBC 2012 and CSA A23.3-04 provisions.

- That same day, Mr. McClure advised DB Services that he was confident that no remediation would be required, and that Stantec’s seismic specialist reviewed the building and agreed with Sorensen Trilogy’s assessment.

[151] The Sorensen defendants argue that the admissions to the EGBC ought not to be relied upon as they were made for expediency reasons, and in hindsight. But that, surely, is properly a matter for a trial judge to determine after weighing all of the evidence. Only then could it be decided whether and what representations were made, whether they were misrepresentations, and whether they were made fraudulently, recklessly or negligently.

[152] In my view, the later admission of Mr. Sorensen to the effect that, at the time his firm undertook to provide the structural design with Mr. McClure as engineer of record, he knew that Mr. McClure lacked the training and ability required to competently complete the structural design, is similarly relevant and should be

admitted. It meets the *Palmer* criteria (*Palmer v The Queen,* [1980] 1 S.C.R. 759) in that the admission and its context were not available at the time of the hearing, it is relevant and credible, and, if believed, could reasonably, when weighed with other evidence adduced, be expected to have affected the result—which, in this case, was that it was appropriate to decide this issue by way of summary trial.

[153] The Sorensen defendants argue that it fails to meet the first *Palmer* criterion in that Mr. Sorensen could have been examined for discovery before the hearing, and his evidence was always available. I consider, however, that the particular form of the evidence and its context, being an admission in the course of disciplinary proceedings by Mr. Sorensen's professional governing body, the EGBC, bring it within that first criterion.

[154] Arguably, if Mr. Sorensen and Mr. McClure knew at the time that the contract was entered into that neither they nor their firm were competent to undertake the structural design, and yet they recklessly or knowingly misrepresented their capability, it would be unconscionable to permit them to limit their liability to the amount of their fees. Otherwise, the result would be to transfer far more risk than DB Services and Ms. McKay would reasonably have contemplated. See, for instance, *Plas-Tex Canada Ltd v Dow Chemical of Canada, Limited*, 2004 ABCA 309 at para 52.

[155] It follows that the weighing of all of this factual matrix would assist in determining whether the inclusion of the limitation clause at the time the contract was formed was unconscionable, or whether enforcing the clause would be contrary to public policy, particularly given the important public safety policy issues discussed in *Winnipeg Condominium*. But this would require, first, a full hearing and weighing all of the evidence.

[156] Consequently, in my respectful opinion, where both Centurion and the DB Services defendants have alleged fraud and misrepresentation on the part of the Sorensen defendants, the question of the impact of the Sorensen defendants' conduct on the validity and enforceability of the limitation clause could not justly be

decided by way of summary trial. The question does not, however, appear to have played a part in the judge's analysis. Although he mentions unconscionability, he does so in the context of there being no power imbalance, and the parties being professionals involved in a substantial commercial enterprise.

[157] In that context, the judge was, of course, right to say, as he did at para 88, that:

> There is nothing inherently unreasonable or sinister about an exclusion clause in a freely negotiated contract, particularly in circumstances where the parties are sophisticated and capable of organizing their commercial affairs by allocating risk in a manner different from that which would otherwise be provided by law.

[158] The question, however, was not about inherent unreasonableness, but whether particular misconduct changed the balance. That needed to be addressed at trial. If, as the Sorensen defendants maintain, the issue is truly moot, then the parties need not pursue it. But it should not have been predetermined.

[159] I would therefore set aside the judge's declaration.

8. DISPOSITION

[160] For these reasons, I would allow the appeals in part by

1) setting aside the judge's order dismissing the claims of Centurion Danbrook against the Sorensen defendants, a *prima facie* duty of care having been established;

2) dismissing the application of the Sorensen defendants for an order dismissing the claims of Centurion Danbrook against them;

3) setting aside the judge's declaration limiting the liability of the Sorensen defendants to DB Services, or to others for contribution and indemnity for the claims of DB Services, to the amount of $88,775; and

4) dismissing the application of the Sorensen defendants for a declaration limiting the liability of the Sorensen defendants to DB Services, or to others for contribution and indemnity for the claims of DB Services, to the amount of $88,775.

[161] I would dismiss the cross appeal.

"The Honourable Mr. Justice Grauer"

I AGREE:

"The Honourable Chief Justice Marchand"

I AGREE:

"The Honourable Madam Justice Bennett"