**HOUSE OF LORDS** : Lord Clyde Lord Goff of Chieveley Lord Jauncey of Tullichettle Lord Browne-Wilkinson Lord Millett . 27th July 2000.

**LORD CLYDE :** My Lords,

1. Panatown employed McAlpine to build a building on land owned by UIPL. The work was defective. Panatown has sought to terminate the contract on the ground of McAlpine's failure in performance. Panatown has suffered no loss. UIPL owns a defective building, which requires a significant expenditure for its repair, and has been unable for a considerable period to put the building to a profitable use. Panatown now seeks to recover, by way of an arbitration, from McAlpine the loss which UIPL has suffered. The appeal thus concerns the circumstances in which the employer in a contract of services may claim from the contractor on the ground of breach of contract damages in respect of a loss which has been suffered by a third party.

2. I find no reason to question the general principle that a plaintiff may only recover damages for a loss which he has himself suffered. But there are exceptions to that principle. One is where the one party expressly enters a contract as agent or trustee for another. The existence of this category of case was recognised in ***Woodar Investment Development Ltd. v. Wimpey Construction U.K. Ltd.*** [1980] 1 W.L.R. 277. In such a case the contracting party may be entitled to recover damages for all the loss which his principal has suffered. But a solution along the lines of a formal agency is not available in the present case. Although the Duty of Care Deed expressly records that Panatown was acting on behalf of the building owner, that is UIPL, any relationship of agency was disowned by the respondents. The precise analysis of the relationships which may have existed between the companies associated with the employer remains obscure. The issue in the case has required to be resolved against the unsatisfactory background of that obscurity.

3. The exception which is invoked by the respondents, Panatown, is the one which was identified in ***The Albazero*** [1977] A.C. 774. It arose in the context of the carriage of goods by sea but has more recently been developed in the context of building contracts. It may be useful first to consider its antecedents. The decision in ***The Albazero*** was plainly heavily influenced by what was seen as the doctrine, or the rule, in ***Dunlop v. Lambert*** (1839) 6 Cl. & F. 600. But the use of the word "***rule***" in such a context may lead to confusion. If anything, ***Dunlop v. Lambert*** provides an exception to the general rule, rather then constituting a rule in itself. The trouble may lie in the ambiguity of the word "***rule,***" which may serve both to refer to a principle of general application and to a ruling, or decision, which may truly not be prescribing any general principle. It appears that the case has come to be seen as authority for the proposition that a consignor may recover substantial damages from the carrier where there was privity of contract between the consignor and the carrier, even although the goods were neither his property nor at his risk. Consideration of ***Dunlop v. Lambert*** gives rise to a real question whether it propounded any new principle at all.

4. ***Dunlop v. Lambert*** concerned the loss of a cargo consisting of a puncheon of whisky while in course of carriage by sea between Leith and Newcastle. The pursuers, William Dunlop and Co., wine and spirit merchants in Edinburgh, shipped the puncheon on board a vessel owned by the defenders. The bill of lading bore that the puncheon was to be delivered to "***Robson or his assigns***" and that the freight had been paid by the pursuers. The pursuers sent the bill of lading to Robson. They also sent to him an invoice informing him that they had drawn on him by bill at three months, which Robson accepted. The invoice included the cost of the freight and the cost of insurance. After the loss of the puncheon the pursuers shipped to Robson another puncheon, the price of which together with the freight was slightly higher than the cost of the first puncheon, with its freight and insurance. *Dunlop* advised Robson that if he wished to insure the second puncheon he should do that in Newcastle. Robson stated in a deposition that the first puncheon was to be delivered safely on the quay at Newcastle before he could consider it as his property, that the second puncheon was expressly sent to replace the first, that the bill drawn for the first was renewed on account of the second and that he, Robson, had lost nothing. The pursuers claimed damages against the shipowners on the ground that they were liable to the pursuers in damages for wrongfully failing to deliver the puncheon to Robson. The pursuers stated in their pleadings that they *"undertook by their agreement, and were answerable to the said Matthew Robson, for the safe delivery of the said puncheon."*

5. The case went eventually before a jury. There was a question whether the loss occurred through improper stowage or through a peril of the sea, but the jury held that as it had been placed on the deck and not stowed in the hold the defenders were liable for its loss. However, the jury were also asked to decide whether the defenders were liable to the pursuers for the loss. The presiding judge, Lord President Hope, instructed the jury that after the puncheon had been shipped and the bill of lading transmitted to Robson, the puncheon was Robson's property and at his risk. Robson had been charged with the cost of insurance, and that could only proceed on the basis of its being his property at his risk. So the pursuers had no right to recover the value of the puncheon. The jury decided that the defenders had wrongfully failed to deliver the puncheon to Robson, but that the defenders were not liable to the pursuers because they were not at the time of the loss the owners of the goods, the invoice showing that their right in the whisky ceased at the time of shipment. The report of the trial is at First Division (1837) 15 S 884

6. The pursuers took exception to the direction of the trial judge and the matter came before the First Division (1837) 15 S 1232. The majority of the four judges considered that the direction of the trial judge was correct. Lord Mackenzie and Lord Gillies founded particularly upon the fact the insurance for the first puncheon had been effected at the direction of Robson and to his account. The Lord President stated that it was proved by written contract that the pursuers were free of all risk or liability after shipping the puncheon, the property and the risk being then Robson's. Lord Corehouse dissented. He considered that since the insurance only covered perils of the sea and did not cover the fault or negligence of the mariners, which the pursuer alleged was the cause of the loss, the insurance was not incompatible with the understanding of both parties that the pursuers were to be responsible for the safe delivery. He also considered that the sending of the second puncheon was real evidence of their understanding. The bargain relating to the second puncheon superseded the first bargain and necessarily inferred that Robson had given up all claim for the price of the first.

7. *Dunlop* then appealed to this House. The report is in (1839) 6 Cl. & F. 600, and (1839) 3 Maclean & R. 663. The Lord Chancellor first rejected an argument that the liability of the defenders to the pursuers had not been put in issue in the case. The point of that argument was that the question whether the pursuers were the right people to sue should not have been raised as a question for the jury to consider. That question had been raised at an earlier stage of the case as a preliminary point. As appears from the report in *Maclean and Robinson* at p. 666 the point had been argued at an early stage of the litigation before the Lord Ordinary, Lord Fullerton, and he had held that the pursuer's pleadings were relevant to support their title and interest to sue. The pursuers had accordingly good reason to argue that that issue at least as a matter of law had been disposed of and should not have been re-opened before the jury. However, the Lord Chancellor was satisfied that point was within the scope of the formal issues which had been put to the jury.

8. The Lord Chancellor then formulated what he saw as the question in the case. His formulation at p. 674 of the report in *Maclean and Robinson* was whether under the law of Scotland - the law of Scotland being in this respect the same as the law of England: *"in a question between a carrier and the person to whom the carrier is responsible in the event of the property being lost, whether it be true in law, that the sending of an invoice to the consignee, by which it appeared that the property had been insured and the freight paid by the consignor, and the amount charged by the consignor to the consignee, deprived the consignor of the power of suing, and of an interest or right to recover the value of the property."*

9. He observed that while in general delivery to the carrier was delivery to the consignee and the risk then passed at p. 675, to the consignee, that position could be varied: *"If a particular contract be proved between the consignor and the consignee, - and it does not follow that the circumstance of the freight and the insurance being paid by the one or the other is to be considered a conclusive evidence of ownership, - as notwithstanding the ordinary rule, of course there may be special contracts; - where the party undertaking to consign undertakes to deliver at a particular place, and if he undertakes to deliver at a particular place, the property, till it reaches that place, and is delivered according to the contract, is at the risk of the party consigning; so although the consignor may follow the directions of the consignee, and deliver the property to be conveyed, either by a particular carrier or in the ordinary course of business, still the consignor may make such a contract with the carrier as will make the carrier liable to him . . ."*

10. The trial judge had erred in directing that because the consignee was charged with freight and insurance the jury were not entitled to consider what was the particular transaction between the parties. The Lord

Chancellor pointed out that the cost of the freight and insurance had to be met by the consignee, whether embodied in the price charged by the consignor or paid directly by the consignee. He then referred to the special contract with the carrier by which he agreed to deliver at Newcastle and also the fact that as between the consignor and the consignee the consignors were under an undertaking to deliver the spirits at Newcastle. If that latter contract existed it ought to have been admitted to proof and not withdrawn from the jury. He then referred to several cases to show that notwithstanding the general rule that the consignee can sue the carrier, the right of action and the liability *"may be varied by special contract entered into between the consignor and the consignee, and that the payment of insurance by the one or the other is not conclusive."* Having reviewed the cases he stated at p. 683: *"that although, generally speaking, where there is a delivery to a carrier to deliver to a consignee, the consignee is the proper person to bring the action against the carrier if they should be lost; yet the consignor may have a right to sue if he made a special contract with the carrier, and the carrier has agreed to take the goods from the consignor and to deliver them to any particular person at a particular place, which special contract supersedes the necessity of showing ownership in the goods; and by authority of the case of* ***Davis v. James*** *(5 Burr. 2680), and the latest case of* ***Joseph v. Knox*** *(3 Camp. 320) that the consignor is able to maintain an action, though the goods may be the goods of the consignee."*

*11.* He continued with the observation that *"the authorities seem to me to establish that the consignor is entitled to maintain the action where there is a contract to deliver at a particular place, provided the risk appears in fact to be still on him."*

*12.* The paying of the freight or the insurance was not conclusive of the right to sue. He identified two objections to the way in which the Lord President had left the case to the jury: *"he withdrew from their consideration that which ought to have been submitted to their consideration, - I mean the fact whether the goods had been delivered to the carrier on the risk of the consignor or the consignee; and the question whether there was a special contract between the consignors and the consignee, which in its circumstances would have been sufficient to enable the pursuers to recover in the action."*

13. It is to be noticed that in the first passage which I have quoted passage the Lord Chancellor first refers to a contract between the consignor and the consignee, and then refers to a contract between the consignor and the carrier. In the later passages he again refers to the possibility of a "special contract" but again identifies the parties as either the consignor and the carrier, or the consignor and the consignee. In the final passage in the context of the particular facts of the case the possible contract in question was described as a special contract between the consignors and the consignee. In my view Professor Emeritus Brian Coote ("***Dunlop v. Lambert: the Search for a Rationale***" [1998] J.C.L. 91) is correct in concluding that the Lord Chancellor had two kinds of special contracts in mind. Either of them may have the effect of leaving a sufficient interest in the consignor to entitle him to sue the carrier. The two kinds of special contract were identified by Lord Diplock in ***The Albazero*** [1977] A.C. 774, 842. Thus the general rule that the risk passes to the consignee on delivery to the carrier can be varied by a particular contractual arrangement between the consignor and the carrier or between the consignor and the consignee. *Dunlop's* argument was that the contractual arrangements it had made with the consignee left the risk with him until delivery at Newcastle. What the Lord Chancellor was saying was that evidence of that agreement should have been allowed to be put before the jury. In that connection I agree with my noble and learned friend Lord Jauncey of Tullichettle that it would be difficult to understand how the Lord Chancellor could have been referring to the evidence of Robson's opinion of the effect of the written contract, evidence which had been properly excluded by the Lord President. But the Lord Chancellor may have been requiring that the jury should have been allowed to consider the whole terms of the contract properly before them namely not only the provisions regarding responsibility for payment of the freight and insurance, which was not necessarily conclusive, but also the obligation to deliver at Newcastle which could be a factor pointing to the existence of a special contract.

14. Whether Dunlop was entitled to claim damages depended upon matters of fact which the jury should have been entitled to consider. The case thus does not decide that Dunlop did have title to claim, but only that it might be able to do so. But if Dunlop was entitled to claim, that would be because, under the particular contractual arrangements made between the parties, the risk of loss of the cargo had remained with Dunlop. The case did not decide that a consignor can sue for damages for loss of a cargo even although he

has suffered no loss, nor is it authority for the view that a consignor may recover on behalf of the consignee damages for a loss which has fallen upon a consignee. The House proceeded upon the express understanding that the laws of Scotland and England on the correctness or otherwise of the trial judge's direction were the same. That understanding would not have been correct if the case had been seen as involving broader principles of contract law or consideration of the particularly English doctrine of privity of contract. Nor would the understanding have been correct if there was an issue about the passing of the risk and the passing of the ownership at common law, since in Scotland the risk of loss might pass before delivery, but the ownership would not pass until delivery was made (***Seath & Co. v. Moore*** (1886) 13 R. (H.L.) 57). The question in the case, as formulated by the Lord Chancellor in the terms which I have already quoted, was concerned purely with carriage of goods and the special feature was the identification of contractual relationships between consignor and carrier and between consignor and consignee. Whether the general rule regarding the entitlement to sue in the event of the loss of goods during a sea voyage could be affected by some particular agreement between the interested parties was a matter where the laws of Scotland and England would coincide. However, as can be seen from Lord Diplock's speech in ***The Albazero*** [1977] A.C. 774, 844, the understanding of the case in England was developed in terms which recognised the doctrine of privity.

*15.* The decision of the House in ***Dunlop v. Lambert*** 6 Cl. & F. 600 came before the First Division of the Court of Session a few years later in ***Campbell v. Tyson*** (1840) 2 D. 1215. The majority of the First Division did not find difficulty with the decision in *Dunlop*, although the Lord President dissented, making some critical observations upon the speech of the Lord Chancellor. The question was raised in argument whether the earlier cases to which the Lord Chancellor had referred established that the mere contracting for the safe carriage, if made by the consignor, entitled him to sue the carrier for damages, if the carrier failed to perform the duty undertaken by him under that contract. In that connection Lord Mackenzie observed at p. 1222: *"I do not trust to these decisions as going as far as that. The Lord Chancellor does not go so far in his opinion; and even, as it seems to me, implies in his opinion the reverse of that general abstract doctrine. And there would be great difficulty in reconciling such a doctrine to the ordinary principles of the law of Scotland."*

*16.* Lord Fullerton, the same judge who had ruled on the preliminary dispute on title to sue in *Dunlop's* case, observed at p. 1223 of the decision in ***Dunlop*** that *"It went no further than this, that although in the general case the consignee was the proper party to sue, there might be circumstances in the transaction which reserved in the person of the consignor such an interest in the contract of carriage as to protect his title to pursue."*

*17.* He also observed at p. 1224: *". . . the consignor, who by contract undertakes the risk of the goods, substantially contracts with the consignee for their safe delivery; and consequently the contract with the actual carrier for their carriage remains a separate contract between the consignor and the carrier, for the breach of which the consignor has the legal interest to maintain action."*

*18.* He also observed at p. 1224 in relation to the older English cases: *"The only question in the case of* ***Dunlop & Co. v. Lambert,*** *etc, and the other cases referred to, was, whether the consignor could recover. It never was doubted that the consignee could; on the contrary, in all those disputed cases it is assumed on all sides that the consignee was, in the general case, the proper party to sue."*

*19.* In the standard work on the law of contract in Scotland, Professor *Gloag on Contract,* 2nd ed. (1929), p. 350 refers to ***Dunlop*** and other Scottish cases as supporting the proposition that *"an agreement whereby the seller undertakes the risk may be inferred from the terms of the contract, although the property in the goods may have passed to the buyer."*

20. A corresponding view of the decision appears to have been taken in England in the years subsequent to it. It appears to have been absorbed by textbook writers as vouching the proposition that where there is a special contract with the consignor, the consignor can have a right to sue for damage to the goods during carriage, even if he was not the owner of the goods. Where such a special contract was made with the consignor on his own behalf the ownership of the goods was immaterial (*Maude and Pollock,* ***A Compendium of the Law of Merchant Shipping,*** 1st ed. (1853), p. 150, 2nd ed. (1861), p. 235 and carried into later editions). *Abbott,* ***Treatise of the Law relating to Merchant Ships and Seamen Shipping*** 7th ed. (1844) and carried into later editions) makes the point that where there is a special contract the consignor may sue upon it: the ownership may have passed to the consignee but there is still a sufficient interest in the goods

or their carriage remaining with the consignor to enable him to sue. Chitty, in the first edition of his ***Practical Treatise on the Law of Contracts*** (1850) at p. 422, in listing cases where the consignor may sue the carrier for the loss notes ***Dunlop v. Lambert*** as authority for the case "*where the carrier is employed by the consignor and the goods are at his risk,"* recognising the separation of the risk and the property. The separate contract between consignor and carrier may co-exist with the contract between the carrier and the consignee (***The Proprietors of the Cork Distilleries Co. v. The Directors of the Great Southern and Western Railway Co. (Ireland)*** (1874) L.R. 7 H.L. 269) and the question generally is one of construction of the particular contract in each case (***Great Western Railway Co. v. Bagge & Co.*** (1885) 15 Q.B.D. 625). But on the approach discussed so far the consignor is suing the carrier in his own right and for his own loss.

21. It is evident from the careful review of the early cases in the English courts which was made particularly by Brandon J. in ***The Albazero*** that the right of the consignor to sue the carrier was recognised even where the risk as well as the ownership had passed to the consignee. For such a condition to hold there was required to be some special contract between the consignor and the carrier, the special contract distinguishing the case from that of a common carrier where no detailed agreement was concluded with the carrier. But the seeds of what grew into ***The Albazero*** exception may more truly be found in such earlier English cases as ***Davis and Jordan v. James*** (1770) 5 Burr. 2680, and more particularly ***Joseph v. Knox*** (1813) 3 Camp. 320, on which the Lord Chancellor particularly relied in ***Dunlop.*** In the latter case Lord Ellenborough took the view that the consignors were entitled to recover the value of the lost goods *"and they will hold the sum recovered as trustees for the real owner."* Here the consignor is to be seen as suing for the loss suffered by another.

*22.* The proposition which I refer to as **The Albazero** exception, as described by Lord Diplock (at p. 844), was: *"that the consignor may recover substantial damages against the shipowner if there is privity of contract between him and the carrier for the carriage of goods; although, if the goods are not his property or at his risk, he will be accountable to the true owner for the proceeds of his judgment."*

23. If by a special contract the goods were the property or at the risk of the consignor then the loss would be his. That indeed was recognised in ***Dunlop.*** The second part of the passage which I have quoted however advances beyond such a position. What is there propounded is, as was noticed by my noble and learned friend Lord Goff of Chieveley in ***White v. Jones*** [1995] 2 A.C. 207, 267, a case of transferred loss. This is not a situation where the loss is that of the promissee. It is a loss suffered by the third party but transferred to the promissee who is then accountable to the third party. Thus the loss becomes that of the employer instead of and in place of the third party, a point emphasised by Hannes Unberath in his recent article in (1999) 115 L.Q.R 535. The promissee is deemed to have suffered the loss so that it is he and not the third party who is able to pursue the remedy in damages.

*24.* The justification for the exception to the general rule that one can only sue for damages for a loss which he has himself suffered was explained by Lord Diplock in ***The Albazero*** [1977] A.C. 774, 847. His Lordship noted that the scope and utility of what he referred to as the rule in ***Dunlop v. Lambert*** 6 Cl. & F. 600 in its application to carriage by sea under a bill of lading had been much reduced by the passing of the Bills of Lading Act 1855 and the subsequent development of the law, but that the rule extended to all forms of carriage, including carriage by sea where there was no bill of lading: *"and there may still be occasional cases in which the rule would provide a remedy where no other would be available to a person sustaining loss which under a rational legal system ought to be compensated by the person who has caused it."*

25. The justification for *The Albazero* exception is thus the necessity of avoiding the disappearance of a substantial claim into what was described by Lord Stewart in ***J. Dykes Ltd. v. Littlewoods Mail Order Stores Ltd.*** 1982 S.C. (H.L.) 157, 166 as a legal black hole, an expression subsequently taken up by Lord Keith of Kinkel in this House at p. 177.

*26.* In **The Albazero** Lord Diplock, at p. 847, sought to "rationalise the rule in **Dunlop v. Lambert**" so that it might fit into the pattern of English law. He did so by treating it: *"as an application of the principle, accepted also in relation to policies of insurance upon goods, that in a commercial contract concerning goods where it is in the contemplation of the parties that the proprietary interests in the goods may be transferred from one owner to another after the contract has been entered into and before the breach which causes loss or damage to the goods, an original party to the contract, if such be the intention of them both, is to be treated in law as having entered into the contract for*

*the benefit of all persons who have or may acquire an interest in the goods before they are lost or damaged, and is entitled to recover by way of damages for breach of contract the actual loss sustained by those for whose benefit the contract is entered into."*

27. It is particularly this passage in Lord Diplock's speech which has given rise to a question discussed in the present appeal whether ***The Albazero*** exception is a rule of law or is based upon the intention of the parties. The issue was identified by my noble and learned friend Lord Goff of Chievely in his speech in ***White v. Jones*** [1995] 2 A.C. 207, 267. The problem arises from two phrases in the speech of Lord Diplock the mutual relationship between which may not be immediately obvious. The two phrases, in the reverse order than that in which they appear, are *"is to be treated in law as having entered into the contract" and "if such be the intention of the parties."* In my view it is preferable to regard it as a solution imposed by the law and not as arising from the supposed intention of the parties, who may in reality not have applied their minds to the point. On the other hand if they deliberately provided for a remedy for a third party it can readily be concluded that they have intended to exclude the operation of the solution which would otherwise have been imposed by law. The terms and provisions of the contract will then require to be studied to see if the parties have excluded the operation of the exception.

*28.* That appears to have been the conclusion adopted in ***St. Martins Property Corporation Ltd. v. Sir Robert McAlpine*** [1994] 1 A.C. 85, where my noble and learned friend Lord Browne-Wilkinson observed at p. 115: *"In such a case, it seems to me proper, as in the case of the carriage of goods by land, to treat the parties as having entered into the contract on the footing that Corporation would be entitled to enforce contractual rights for the benefit of those who suffered from defective performance but who, under the terms of the contract, could not acquire any right to hold McAlpine liable for breach."*

29. In that case the point was made that the contractor and the employer were both aware that the property was going to be occupied and possibly purchased by third parties so that it could be foreseen that a breach of the contract might cause loss to others than the employer. But such foresight may be an unnecessary factor in the applicability of the exception. So also an intention of the parties to benefit a third person may be unnecessary. Foreseeablility may be relevant to the question of damages under the rule in ***Hadley v. Baxendale*** (1854) 9 Exch. 341, but in the context of liability it is a concept which is more at home in the law of tort than in the law of contract. If the exception is founded primarily upon a principle of law, and not upon the particular knowledge of the parties to the contract, then it is not easy to see why the necessity for the contemplation of the parties that there will be potential losses by third parties is essential. It appears that in the *St. Martins* case [1994] 1 A.C. 85 the damages claimed were in respect of the cost of remedial work which had been carried out. I see no reason why consequential losses should not also be recoverable under this exception where such loss occurs and the third party should have a right to recover for himself all the damages won by the original party on his behalf.

*30.* ***The Albazero*** exception will plainly not apply where the parties contemplate that the carrier will enter into separate contracts of carriage with the later owners of the goods, identical to the contract with the consignor. Even more clearly, as Lord Diplock explained at p. 848, will the exception be excluded if other contracts of carriage are made in terms different from those in the original contract. In ***The Albazero*** the separate contracts which were mentioned were contracts of carriage. That is understandable in the context of carriage by sea involving a charterparty and bills of lading, but the counterpart in a building contract to a right of suit under a bill of lading should be the provision of a direct entitlement in a third party to sue the contractor in the event of a failure in the contractor's performance. In the context of a building contract one does not require to look for a second building contract to exclude the exception. It would be sufficient to find the provision of a right to sue. Thus as my noble and learned friend Lord Browne-Wilkinson observed in the ***St. Martins*** case [1994] 1 A.C. 85, 115: *"If, pursuant to the terms of the original building contract, the contractors have undertaken liability to the ultimate purchasers to remedy defects appearing after they acquired the property, it is manifest the case will not fall within the rationale of* ***Dunlop v Lambert*** *6 Cl. & F. 600. If the ultimate purchaser is given a direct cause of action against the contractor (as is the consignee or endorsee under a bill of lading) the case falls outside the rationale of the rule."*

31. In the ***St. Martins*** case the employer started off as the owner of the property and subsequently conveyed it to another company. In the present case the employer never was the owner. But that has not featured as a

critical consideration in the present appeal and I do not see that that factor affects the application of the exception. In the *St. Martins* case there was a contractual bar on the assignment of rights of action without the consent of the contractor. In the present case the extra qualification was added that the consent should not be unreasonably withheld. But again I do not see that difference as of significance. It does not follow that the presence of a provision enabling assignment without the consent of the contractor excludes the exception. As was held in ***Darlington Borough Council v. Wiltshier Northern Ltd.*** [1995] 1 W.L.R. 68 where there is a right to have an assignment of any cause of action accruing to the employer against the contractor, the exception may still apply so as to enable the assignee to recover substantial damages. It may be that the exception could be excluded through some contractual arrangement between the employer and the third party who sustained the actual loss, but the law would probably be slow to find such an intention established where it would leave the black hole. At least an express provision for assignment of the employer's rights will not suffice.

32. I have no difficulty in holding in the present case that the exception cannot apply. As part of the contractual arrangements entered into between Panatown and McAlpine there was a clear contemplation that separate contracts would be entered into by McAlpine, the contracts of the deed of duty of care and the collateral warranties. The duty of care deed and the collateral warranties were of course not in themselves building contracts. But they did form an integral part of the package of arrangements which the employer and the contractor agreed upon and in that respect should be viewed as reflecting the intentions of all the parties engaged in the arrangements that the third party should have a direct cause of action to the exclusion of any substantial claim by the employer, and accordingly that the exception should not apply. There was some dispute upon the difference in substance between the remedies available under the contract and those available under the duty of care deed. Even if it is accepted that in the circumstances of the present case where the eventual issue may relate particularly to matters of reasonable skill and care, the remedies do not absolutely coincide, the express provision of the direct remedy for the third party is fatal to the application of ***The Albazero*** exception. On a more general approach the difference between a strict contractual basis of claim and a basis of reasonable care makes the express remedy more clearly a substitution for the operation of the exception. Panatown cannot then in the light of these deeds be treated as having contracted with McAlpine for the benefit of the owner or later owners of the land and the exception is plainly excluded.

33. I turn accordingly to what was referred to in the argument as the broader ground. But the label requires more careful definition. The approach under ***The Albazero*** exception has been one of recognising an entitlement to sue by the innocent party to a contract which has been breached, where the innocent party is treated as suing on behalf of or for the benefit of some other person or persons, not parties to the contract, who have sustained loss as a result of the breach. In such a case the innocent party to the contract is bound to account to the person suffering the loss for the damages which the former has recovered for the benefit of the latter. But the so-called broader ground involves a significantly different approach. What it proposes is that the innocent party to the contract should recover damages for himself as a compensation for what is seen to be his own loss. In this context no question of accounting to anyone else arises. This approach however seems to me to have been developed into two formulations.

*34.* The first formulation, and the seeds of the second, are found in the speech of Lord Griffiths in ***St. Martins Property Corporation Ltd. v. Sir Robert McAlpine Ltd.*** [1994] 1 A.C. 85, 96. At the outset his Lordship expressed the opinion that Corporation, faced with a breach by McAlpine of their contractual duty to perform the contract with sound materials and with all reasonable skill and care, would be entitled to recover from McAlpine the cost of remedying the defect in the work as the normal measure of damages. He then dealt with two possible objections. First, it should not matter that the work was not being done on property owned by Corporation. Where a husband instructs repairs to the roof of the matrimonial home it cannot be said that he has not suffered damage because he did not own the property. He suffers the damage measured by the cost of a proper completion of the repair: *"In cases such as the present the person who places the contract has suffered financial loss because he has to spend money to give him the benefit of the bargain which the defendant had promised but failed to deliver."*

*35.* The second objection, that Corporation had in fact been reimbursed for the cost of the repairs was answered by the consideration that the person who actually pays for the repairs is of no concern to the party who broke the contract. But Lord Griffiths added at p. 97: *"The court will of course wish to be satisfied that the repairs have been or are likely to be carried out but if they are carried out the cost of doing them must fall upon the defendant who broke his contract."*

36. In the first formulation this approach can be seen as identifying a loss upon the innocent party who requires to instruct the remedial work. That loss is, or may be measured by, the cost of the repair. The essential for this formulation appears to be that the repair work is to be, or at least is likely to be, carried out. This consideration does not appear to be simply relevant to the reasonableness of allowing the damages to be measured by the cost of repair. It is an essential condition for the application of the approach, so as to establish a loss on the part of the plaintiff. Thus far the approach appears to be consistent with principle, and in particular with the principle of privity. It can cover the case where A contracts with B to pay a sum of money to C and B fails to do so. The loss to A is in the necessity to find other funds to pay to C and provided that he is going to pay C, or indeed has done so, he should be able to recover the sum by way of damages for breach of contract from B. If it was evident that A had no intention to pay C, having perhaps changed his mind, then he would not be able to recover the amount from B because he would have sustained no loss, and his damages would at best be nominal.

*37.* But there can also be found in Lord Griffiths' speech the idea that the loss is not just constituted by the failure in performance but indeed consists in that failure. This is the "second formulation." In relation to the suggestion that the husband who instructs repair work to the roof of his wife's house and has to pay for another builder to make good the faulty repair work has sustained no damage Lord Griffiths observed at p. 97: *"Such a result would in my view be absurd and the answer is that the husband has suffered loss because he did not receive the bargain for which he had contracted with the first builder and the measure of damages is the cost of securing the performance of that bargain by completing the roof repairs properly by the second builder."*

38. That is to say that the fact that the innocent party did not receive the bargain for which he contracted is itself a loss. As Steyn L.J. put it in ***Darlington Borough Council v. Wiltshier Northern Ltd.*** [1995] 1 W.L.R. 68, 80, *"he suffers a loss of bargain or of expectation interest."* In this more radical formulation it does not matter whether the repairs are or are not carried out, and indeed in the *Darlington* case that qualification is seen as unnecessary. In that respect the disposal of the damages is treated as res inter alios acta. Nevertheless on this approach the intention to repair may cast light on the reasonableness of the measure of damages adopted. In order to follow through this aspect of the second formulation in Lord Griffiths' speech it would be necessary to understand his references to the carrying out of the repairs to be relevant only to that consideration.

39. I find some difficulty in adopting the second formulation as a sound way forward. First, if the loss is the disappointment at there not being provided what was contracted for, it seems to me difficult to measure that loss by consideration of the cost of repair. A more apt assessment of the compensation for the loss of what was expected should rather be the difference in value between what was contracted for and what was supplied. Secondly, the loss constituted by the supposed disappointment may well not include all the loss which the breach of contract has caused. It may not be able to embrace consequential losses, or losses falling within the second head of ***Hadley v. Baxendale*** (1854) 9 Exch. 341 . The inability of the wife to let one of the rooms in the house caused by the inadequacy of the repair, does not seem readily to be something for which the husband could claim as his loss. Thirdly, there is no obligation on the successful plaintiff to account to anyone who may have sustained actual loss as a result of the faulty performance. Some further mechanism would then be required for the court to achieve the proper disposal of the monies awarded to avoid a double jeopardy. Alternatively, in order to achieve an effective solution, it would seem to be necessary to add an obligation to account on the part of the person recovering the damages. But once that step is taken the approach begins to approximate to ***The Albacruz*** exception. Fourthly, the *"**loss**"* constituted by a breach of contract has usually been recognised as calling for an award of nominal damages, not substantial damages.

*40.* The loss of an expectation which is here referred to seems to me to be coming very close to a way of describing a breach of contract. A breach of contract may cause a loss, but is not in itself a loss in any

meaningful sense. When one refers to a loss in the context of a breach of contract, one is in my view referring to the incidence of some personal or patrimonial damage. A loss of expectation might be a loss in the proper sense if damages were awarded for the distress or inconvenience caused by the disappointment. Professor Coote ("Contract Damages, Ruxley, and the Performance Interest" (1997) C.L.J. 537) draws a distinction between benefits in law, that is bargained-for contractual rights, and benefits in fact, that is the enjoyment of the fruits of performance. Certainly the former may constitute an asset with a commercial value. But while frustration may destroy the rights altogether so that the contract is no longer enforceable, a failure in the obligation to perform does not destroy the asset. On the contrary it remains as the necessary legal basis for a remedy. A failure in performance of a contractual obligation does not entail a loss of the bargained-for contractual rights. Those rights remain so as to enable performance of the contract to be enforced, as by an order for specific performance. If one party to a contract repudiates it and that repudiation is accepted, then, to quote Lord Porter in ***Heyman v. Darwins Ltd.*** [1942] A.C. 356, 399, *"By that acceptance he is discharged from further performance and may bring an action for damages, but the contract itself is not rescinded."*

41. The primary obligations under the contract may come to an end, but secondary obligations then arise, among them being the obligation to compensate the innocent party. The original rights may not then be enforced. But a consequential right arises in the innocent party to obtain a remedy from the party who repudiated the contract for his failure in performance.

42. Both of these two formulations seek to remedy the problem of the legal black hole. At the heart of the problem is the doctrine of privity of contract which excludes the ready development of a solution along the lines of a jus quaesitum tertio. It might well be thought that such a solution would be more direct and simple. In the context of the domestic and familial situations, such as the husband instructing the repairs to the roof of his wife's house, or the holiday which results in disappointment to all the members of the family, the jus quaesitum tertio may provide a satisfactory means of redress, enabling compensation to be paid to the people who have suffered the loss. Such an approach is available in Germany see W. Lorrenz "***Contract Beneficiaries in German Law***" in The Gradual Convergence: Foreign Ideas, Foreign Influences, and English Law on the Eve of the 21st Century ed. Markesinis (1994), pp. 65, 78, 79. It may also be available in Scotland (***Carmichael v. Carmichael's Executrix*** 1920 S.C. (H.L.) 195). But we were not asked to adopt it in the present case and so radical a step cannot easily be achieved without legislative action. Since Parliament has recently made some inroad into the principle of privity but has stopped short of admitting a solution to a situation such as the present, it would plainly be inappropriate to enlarge the statutory provision by judicial innovation. The alternative has to be the adoption of what Lord Diplock in ***Swain v. The Law Society*** [1983] 1 A.C. 598, 611 described as a juristic subterfuge *"to mitigate the effect of the lacuna resulting from the non-recognition of a jus quaesitum tertio."* The solution, achieved by the operation of law, may carry with it some element of artificiality and may not be supportable on any clear or single principle. If the entitlement to sue is not to be permitted to the party who has suffered the loss, the law has to treat the person who is entitles to sue as doing so on behalf of the third party. As Lord Wilberforce observed in ***Woodar Investment Development Ltd. v. Wimpey Construction U.K. Ltd.*** [1980] 1 W.L.R. 277, 283, "there are many situations of daily life which do not fit neatly into conceptual analysis, but which require some flexibility in the law of contract."

43. It seems to me that a more realistic and practical solution is to permit the contracting party to recover damages for the loss which he and a third party has suffered, being duly accountable to them in respect of their actual loss, than to construct a theoretical loss in law on the part of the contracting party, for which he may be under no duty to account to anyone since it is to be seen as his own loss. The solution is required where the law will not tolerate a loss caused by a breach of contract to go uncompensated through an absence of privity between the party suffering the loss and the party causing it. In such a case, to avoid the legal black hole, the law will deem the innocent party to be claiming on behalf of himself and any others who have suffered loss. It does not matter that he is not the owner of the property affected, nor that he has not himself suffered any economic loss. He sues for all the loss which has been sustained and is accountable to the others to the extent of their particular losses. While it may be that there is no necessary right in the third party to compel the innocent employer to sue the contractor, in the many cases of the domestic or familial situation that consideration should not be a realistic problem. In the commercial field,

in relation to the interests of such persons as remoter future proprietors who are not related to the original employer, it may be that a solution by way of collateral warranty would still be required. If there is an anxiety lest the exception would permit an employer to receive excessive damages, that should be set at rest by the recognition of the basic requirement for reasonableness which underlies the quantification of an award of damages.

44. The problem which has arisen in the present case is one which is most likely to arise in the context of the domestic affairs of a family group or the commercial affairs of a group of companies. How the members of such a group choose to arrange their own affairs among themselves should not be a matter of necessary concern to a third party who has undertaken to one of their number to perform services in which they all have some interest. It should not be a ground of escaping liability that the party who instructed the work should not be the one who sustained the loss or all of the loss which in whole or part has fallen on another member or members of the group. But the resolution of the problem in any particular case has to be reached in light of its own circumstances. In the present case the decision that Panatown should be the employer under the building contract although another company in the group owned the land was made in order to minimise charges of VAT. No doubt thought was given as to the mechanics to be adopted for the building project in order to achieve the course most advantageous to the group. Where for its own purposes a group of companies decides which of its members is to be the contracting party in a project which is of concern and interest to the whole group I should be reluctant to refuse an entitlement to sue on the contract on the ground simply that the member who entered the contract was not the party who suffered the loss on a breach of the contract. But whether such an entitlement is to be admitted must depend upon the arrangements which the group and its members have decided to make both among themselves and with the other party to the contract. In the present case there was a plain and deliberate course adopted whereby the company with the potential risk of loss was given a distinct entitlement directly to sue the contractor and the professional advisers. In the light of such a clear and deliberate course I do not consider that an exception can be admitted to the general rule that substantial damages can only be claimed by a party who has suffered substantial loss.

45. I agree that the appeal should be allowed.

**LORD GOFF OF CHIEVELEY** My Lords,

46. The appellant company, Alfred McAlpine Construction Ltd. ("McAlpine"), is a building contractor. The respondent company, Panatown Ltd., is one of the Unex group of companies, of which the parent company is Unex Corporation Ltd. ("UCL") and which also includes Unex Investment Properties Ltd. ("UIPL"). On 2 November 1989 Panatown as employer entered into a building contract ("the building contract") with McAlpine as contractor, for the design and construction of an office building and car park on a site at 126-130 Hills Road, Cambridge. The contract was in a modified J.C.T. Standard Form of Building Contract with Contractor's Design (1981edition), the contract sum being a little under £10.5m.

47. It is of crucial importance in the present litigation that, although Panatown was the member of the Unex group which entered into the building contract as employer, the site at 126-130 Hills Road has at all material times been the property of another member of the group, UIPL. Another matter upon which McAlpine has placed much reliance is that, in addition to the building contract, McAlpine entered into a Duty of Care Deed ("the DCD") with UIPL. Under the DCD UIPL, as building owner, acquired a direct remedy against McAlpine in respect of any failure by McAlpine to exercise reasonable skill, care and attention in respect of any matter within the scope of McAlpine's responsibilities under the building contract. The DCD was expressly assignable by UIPL to its successors in title (with McAlpine's consent, such consent not to be unreasonably withheld). I should mention that, in the DCD, it is stated that Panatown entered into the building contract "on behalf of the building owner," viz. UIPL. It is however common ground between the parties that Panatown entered into the building contract as principal and not as agent (see para. 2.9 of the Agreed Statement of Facts and Issues). In these circumstances, especially as in the building contract itself "the employer" is identified simply as "Panatown," I shall proceed on the basis, accepted on both sides, that Panatown did not in fact contract as agent for UIPL. The true position, as I understand it, was that Panatown was authorised by UIPL to enter onto UIPL's land and to cause the development to be constructed there for the benefit of UIPL, Panatown having been put in funds for that

purpose from within the Unex group of which both UIPL and Panatown were members. I should add that similar DCDs were entered into with UIPL by the architects, the structural engineers and the M. and E. engineers.

48. Another matter on which McAlpine placed reliance was that the reason why it was decided within the Unex group that Panatown, rather than UIPL, should be the employer under the building contract was to avoid the incidence of VAT, which was not imposed on contracts for new buildings until September 1989. UIPL was treated as being within the group ("the Unex VAT group") for VAT purposes, but Panatown was not. On 23 March 1989 arrangements were made within the Unex group for an advance payment of £7.5m. to be paid to Panatown from within the Unex VAT group. This payment, which did not attract VAT, was intended to finance the development. Between January 1990 and January 1992 Panatown paid to McAlpine about £7.4 million under the building contract.

49. The building contract contained an arbitration clause. On 8 July 1992 Panatown served notice of arbitration on McAlpine, claiming (inter alia) damages for alleged breaches by McAlpine of the building contract by reason of allegedly defective work and delay. The dispute was referred to Mr. John Sims as arbitrator. In the proceedings McAlpine has denied Panatown's allegations of breach of contract, and no determination has yet been made in respect of any of these allegations. Even so, McAlpine and the Unex group have together investigated the extent of defects in the office and car park buildings. These investigations led to an open letter from McAlpine to UCL, dated 4 July 1994, acknowledging the existence of significant defects in the foundations and steel frame of the office building and, where the defects arise from a breach of the building contract, acknowledging McAlpine's responsibility for the necessary remedial works. The present appeal has proceeded on the assumption, in Panatown's favour, that McAlpine is in breach of the building contract by reason of defective design and construction and delay. The defects in the building alleged by Panatown are very serious; indeed it appears that the building may have to be demolished and rebuilt. The total damages claimed by Panatown run to many millions of pounds.

50. In the proceedings, McAlpine has raised a contention that Panatown is not entitled to recover substantial damages under the building contract on the ground that Panatown, having no proprietary interest in the site, has suffered no loss. McAlpine sought an award to that effect. The arbitrator directed that this be heard as a preliminary issue. By an interim award dated 12 August 1994 the arbitrator, who for the hearing of the issue had sat with Mr. Brian Knight Q.C. as a legal assessor, answered the question in the issue in Panatown's favour.

*51.* McAlpine appealed to the High Court against the interim award. The proceedings were transferred to Official Referee's business. Judge Thornton Q.C. held that the matter should be remitted to the arbitrator, but in so doing he answered questions of law arising on the issue adversely to Panatown. However on appeal by Panatown, the Court of Appeal on 13 March 1998 ordered that the answer in the interim award of the arbitrator be confirmed, and that each of the relevant answers in the judgment of Judge Thornton Q.C. be set aside. It is from that decision that McAlpine now appeals to your Lordships' House, by leave of the Court of Appeal. The issue in the appeal was summarised in the judgment of the Court of Appeal as follows: *"Is Panatown debarred from recovering substantial as opposed to nominal damages, by reason of the fact that it is not, and was not, owner of the land?"*

52. This appeal is therefore concerned with a case in which there is an assumed breach by B of his contractual obligations with A but, because the contract relates to services rendered by B in respect of the property of a third party, C, a question has been raised by B whether in such circumstances A can recover substantial damages from him. The principal type of case in which such a point has arisen has related to contracts for the carriage of goods where, at the time of loss of or damage to the goods in transit, the property in the goods has passed to C; but more recently the point has been taken in the context of a building contract under which the work contracted for was to be performed on land or buildings which, at the time of performance, belonged to C.

53. It is widely supposed that there is a general rule that a party is only entitled to recover substantial damages for breach of contract in respect of his own loss, and not therefore in respect of loss suffered by a third party. The clearest statement of this supposed rule is to be found in the opinion of Lord Diplock in ***The Albazero*** [1977] A.C. 774, 845, where he referred to "the general rule of English law that a party to a

contract apart from nominal damages, can only recover for its breach such actual loss as he himself has sustained." In support of the proposition, reliance is frequently placed on statements of principle by two distinguished judges, Parke B. in ***Robinson v. Harman*** (1848) 1 Exch. 850, 855, and Lord Blackburn in ***Livingstone v. Rawyards Coal Co.*** (1880) 5 App. Cas. 25, 39; yet in both cases the judges were addressing only the measure of damages suffered by the plaintiff in an ordinary two-party situation. Neither was concerned with the situation in which a party contracts for a benefit to be conferred on a third party, and so neither statement can properly be read as ruling out the possibility that the contracting party can recover substantial damages for a breach of such a contract. So far as Lord Diplock's statement of law is concerned, the function of his proposition, for which he cited no authority, was simply to provide a peg on which to hang a truly exceptional case (to which I will turn in a moment).

54. It would be an extraordinary defect in our law if, where (for example) A enters into a contract with B that B should carry out work for the benefit of a third party, C, A should have no remedy in damages against B if B should perform his contract in a defective manner. Contracts in this form are a commonplace of everyday life, very often in the context of the family; but, as the present case shows, they may also occur in a commercial context. It is not surprising therefore to discover that the authority for the supposed rule which excludes such a right to damages is very thin, and that its existence has been doubted by distinguished writers - I refer in particular to articles by Professor G.H. Treitel in (1998) 114 L.Q.R. 527, and by Mr. Duncan Wallace Q.C. in (1999) 115 L.Q.R. 394.

*55.* At all events, however, the problem surfaced first in the context of carriage of goods by sea, though the case in question, ***Dunlop v. Lambert*** (1839) 6 Cl. & F. 600, must be regarded as most unsatisfactory. That case was considered by your Lordships' House in ***The Albazero*** [1977] A.C. 774, in which the leading opinion was given by Lord Diplock who at (p. 843) described the reasoning in the speech of Lord Cottenham L.C. in *Dunlop v. Lambert* as "***baffling,***" and the value of that case as an authority has been further undermined by the trenchant critique of my noble and learned friend Lord Clyde in his opinion in the present case (which I have had the opportunity of reading in draft). At all events, in ***The Albazero*** [1977] A.C. 774, 844, Lord Diplock concluded that the relevant passage in the speech of Lord Cottenham L.C. has been: *"uniformly treated ever since by textbook writers of the highest authority . . . as authority for the broad proposition that the consignor may recover substantial damages against the shipowner if there is privity of contract between him and the carrier for the carriage of goods; although, if the goods are not his property or at his risk, he will be accountable to the true owner for the proceeds of his judgment."*

*56.* Later in his opinion at p. 847, Lord Diplock rationalised the "rule in **Dunlop v. Lambert**" as follows: *"The only way in which I find it possible to rationalise the rule in Dunlop v. Lambert so that it may fit into the pattern of the English law is to treat it as an application of the principle, accepted also in relation to policies of insurance upon goods, that in a commercial contract concerning goods where it is in the contemplation of the parties that the proprietary interests in the goods may be transferred from one owner to another after the contract has been entered into and before the breach which causes loss or damage to the goods, an original party to the contract, if such be the intention of them both, is to be treated as having entered into the contract for the benefit of all persons who have or may acquire an interest in the goods before they are lost or damaged, and is entitled to recover by way of damages for breach of contract the actual loss sustained by those for whose benefit the contract is entered into."*

*57.* Lord Diplock however identified an important exception to the rule, holding that it could not apply to contracts for the carriage of goods which contemplate that the carrier will also enter into separate contracts of carriage with whoever may become the owner of the goods in question. This was because, Lord Diplock said at p. 848 of the *"complications, anomalies and injustices that might arise from the co-existence of different parties of rights of suit to recover, under separate contracts of carriage which impose different obligations upon the parties to them, a loss which a party to one of those contracts alone has sustained . . ."*

58. The rule in ***Dunlop v. Lambert*** was therefore treated by Lord Diplock as an aspect of a special rule applicable in the case of commercial contracts concerning goods. It was moreover designed to solve a practical problem which may arise in the context of such contracts, viz., that the property in the goods may pass from one party to another after the contract was made, and that loss of or damage to or loss of the goods may occur at a time when the property in the goods has passed from the consignor to another party. In such circumstances it is obviously convenient that the consignor of the goods should, if such be the

intention of the parties, be treated as having contracted for the benefit of all those who have acquired, or may acquire, an interest in the goods before they are lost or damaged, and as such be able to recover damages for their benefit. The rule, as so understood, is founded on commercial convenience, though its usefulness has since been much reduced as a result of later legislation, notably the Bills of Lading Act 1855 and now the Carriage of Goods by Sea Act 1992.

*59.* However the rule in ***Dunlop v. Lambert*** 6 Cl. & F. 60 was recently invoked and applied by your Lordships' House in a very different context, viz., a case concerned with a building contract, ***Linden Gardens Trust Ltd. v. Lenesta Sludge Disposals Ltd.; St. Martin's Property Corporation Ltd. v. Sir Robert McAlpine Ltd***. [1994] 1 A.C. 85. In 1968 St. Martin's Property Corporation Ltd. ("Corporation") began to develop a site in Hammersmith. In the same year Corporation entered into an agreement with the local authority under which, on completion of the development, Corporation would become entitled to a 150 year lease of the site. In 1974 Corporation entered into a building contract with contractors, Sir Robert McAlpine Ltd. ("McAlpine") for the construction of the proposed buildings on the site. In the mid-1970s all the property interests of Corporation including its interest in the property under the agreement with the local authority of 1968, were assigned to another company in the same group, St. Martin's Property Investments Ltd. ("Investments"). Corporation also purported to assign to Investments the benefit of the contracts and engagements entered into by it for the construction of the development. This assignment was however held to fall foul of a prohibition against assignment contained in the building contract with McAlpine, which had the effect of precluding any claim by Investments as assignee against McAlpine under the building contract. The question then arose whether Corporation could recover substantial damages from McAlpine for breach of the building contract, notwithstanding that the interest of Corporation in the site had been transferred to another party. It was submitted by McAlpine that Corporation, having before the date of any breach of contract disposed of its interest in the property on which the building works were carried out, had suffered no loss in respect of which damages could be recovered by it, and for this proposition McAlpine cited *The Albazero*. The majority of their Lordships then invoked against McAlpine the exceptions to that general rule, referred to by Lord Diplock in ***The Albazero*** and exemplified by the so-called rule in ***Dunlop v. Lambert*** as rationalised by Lord Diplock in the same case. In his leading opinion, with which three other members of the Appellate Committee agreed, Lord Browne-Wilkinson said [1994] 1 A.C. 85, at pp. 114-115: *"In my judgment the present case falls within the rationale of the exceptions to the general rule that a plaintiff can only recover damages for his own loss. The contract was for a large development of property which, to the knowledge of both Corporation and McAlpine, was going to be occupied, and possibly purchased, by a third party and not by Corporation itself. Therefore it could be foreseen that damage caused by a breach would cause loss to a later owner and not merely to the original contracting party, Corporation. As in contracts for the carriage of goods by land, there would be no automatic vesting in the occupier or owners of the property for the time being who sustained the loss of any right of suit against McAlpine. On the contrary, McAlpine had specifically contracted that the rights of action under the building contract could not without McAlpine's consent be transferred to third parties who became owners or occupiers and might suffer loss. In such a case, it seems to me proper, as in the case of carriage of goods by land, to treat the parties as having entered into the contract on the footing that Corporation would be entitled to enforce contractual rights for the benefit of those who suffered from defective performance but who, under the terms of the contract, could not acquire any right to hold McAlpine liable for breach. It is truly a case in which the rule provides 'a remedy where no other would be available to a person sustaining loss which under a rational legal system ought to be compensated by the person who caused it.'"*

*60.* Lord Griffiths also reached the conclusion that Corporation was entitled to recover substantial damages from McAlpine, but he did so on what he called a broader ground, viz. that Corporation had suffered loss because it did not receive from McAlpine the performance of the bargain which it had contracted for. He said at pp. 96-97: *"I cannot accept that in a contract of this nature, namely for work, labour and the supply of materials, the recovery of more than nominal damages for breach of contract is dependent upon the plaintiff having a proprietary interest in the subject matter of the contract at the date of breach. In everyday life contracts for work and labour are constantly being placed by those who have no proprietary interest in the subject matter of the contract. To take a common example, the matrimonial home is owned by the wife and the couple's remaining assets are owned by the husband and he is the sole earner. The house requires a new roof and the husband places a contract with a builder to carry out the work. The husband is not acting as agent for his wife, he makes the contract as principal because only*

*he can pay for it. The builder fails to replace the roof properly and the husband has to call in and pay another builder to complete the work. Is it to be said that the husband has suffered no damage because he does not own the property? Such a result would in my view be absurd and the answer is that the husband has suffered loss because he did not receive the bargain for which he had contracted with the first builder and the measure of damages is the cost of securing the performance of that bargain by completing the roof repairs properly by the second builder . . . "*

61. Lord Griffiths' broader ground was found attractive by three other members of the Appellate Committee, including my noble and learned friend Lord Browne-Wilkinson; but they hesitated to follow Lord Griffiths down that road, partly because the point had not been fully argued, and partly because they felt that *"exposure to academic consideration"* was desirable before the point was decided by the House: see p. 112 *per* Lord Browne-Wilkinson.

62. The next decision in this line of authority, following on the *St. Martin's* case, was the decision of the Court of Appeal in ***Darlington Borough Council v. Wiltshier Northern Ltd***. [1995] 1 W.L.R. 68, another building contract case in which the same point was taken. There the council was the owner of land on which it had been decided to build a recreational centre. For reasons connected with local government finance, contracts were entered into for construction of the centre not by the council but by a finance company, the building contractors being the respondents Wiltshier Northern Ltd. The finance company subsequently assigned to the council its rights under the building contracts, and the council claimed damages from the builders for breach of the contracts. The builders took the point that the council, as assignee, had no greater rights under the contracts than the finance company had and that, as the finance company did not own the site, it had suffered no loss. The point was again rejected - by all three members of the Court (Dillon, Waite and Steyn L.JJ.) on the narrower ground in the opinion of my noble and learned friend Lord Browne-Wilkinson in the ***St. Martin's* case** [1994] 1 A.C. 85, but by Steyn L.J. (as he then was) also on Lord Griffiths' broader ground.

*63.* The point next arose before the Court of Appeal in the present case. As I have already recorded, the submission of McAlpine was unanimously rejected by the court. The judgment of the court was delivered by Evans L.J. He proceeded essentially in accordance with the narrower ground set out in my noble and learned friend Lord Browne-Wilkinson's opinion in the ***St. Martin's*** case, based upon the rationale of ***Dunlop v. Lambert*** 6 Cl. & F. 600 which Evans L.J. described as "***contract-based***," The broader approach was not, in the opinion of the Court of Appeal, a possible alternative route to the same conclusion; rather *"it was the underlying principle on which the Dunlop v. Lambert and St. Martin's decisions based."* The court went on to consider whether the existence of a direct contractual obligation by McAlpine to UIPL under the DCD precluded recovery of substantial damages by Panatown from McAlpine on the narrower ground, having regard to the exception to the rule in *Dunlop v. Lambert* identified by Lord Diplock in *The Albazero* [1977] A.C. 774. They regarded the point as one of construction, and concluded that *"the DCD was not intended to preclude the employer's right to receive substantial damages under the building contract in the present case."* Evans L.J. continued: *"The parties to that contract [the building contract] cannot have intended or even contemplated that the elaborate provisions of the standard form of contract, which they amended in many respects so as to have a tailor-made version for the particular project, could be replaced by a claim for damages, on a different basis, before a court rather than in arbitration under the building contract (there is no arbitration clause in the DCD). We would hold that, on the true construction of their contract, the parties did not intend or contemplate that the DCD should deprive the employers of the right to claim substantial damages for the contractor's breach."*

64. It was for these reasons that the Court of Appeal upheld the conclusion of the arbitrator on the issue before him in the present case. It is from the decision of the Court of Appeal, for the reasons I have set out, that McAlpine now appeals to your Lordships' House.

65. There are, as I understand the case, essentially two questions which your Lordships have to consider: (1) whether Panatown is entitled to recover substantial damages from McAlpine in respect of the assumed breaches by McAlpine of the building contract, notwithstanding that at all material times Panatown had no proprietary interest in the site of the development; and (2) if so, whether the existence of the direct right of action by the owners of the site, UIPL, against McAlpine under the DCD precluded Panatown from recovering substantial damages from McAlpine.

66. I turn therefore to the first question. Here Panatown presented its case primarily on the basis of Lord Griffiths' broader ground in the **St. Martin's case** [1994] 1 A.C. 85; though in the alternative it was prepared, if necessary, to fall back on the rule in **Dunlop v. Lambert**, 6 Cl. & F. 600 as adopted by the majority of the Appellate Committee in the *St. Martin's* case. It was, however, submitted on behalf of McAlpine that it was not open to Panatown to invoke the broader ground. Its submission was that the prospect of imminent legislative reform of the privity rule, in the form of the Contract (Rights of Third Parties) Bill already before Parliament, both removed the need for, and rendered illegitimate, any further judicial activism in the field which was subject of the appeal; and that the present case therefore fell to be decided solely on the basis of the exception to the "*privity/loss rules*" as laid down in the ***The Albazero*** [1977] A.C. 774, and explained and applied by Lord Browne-Wilkinson in the *St. Martin's* case. There is, I believe,. little doubt that the choice by the parties of their respective grounds was largely dictated by the possible impact of the DCD upon Panatown's claim to substantial damages under the building contract. On McAlpine's approach, it was open to it to argue that, by reason of the exception identified by Lord Diplock in ***The Albazero***, the existence of the DCD precluded any claim by Panatown to substantial damages for breach of the building contract; whereas, by invoking Lord Griffiths' broader ground, Panatown could at least avoid that trap, though a claim on the broader ground presented its own difficulties.

67. Two questions therefore arise at the threshold of the argument in this case: (1) Which is the preferable approach to the appeal? And (2) What is the impact, if any, of the imminence of statutory reform of the old privity rule? I shall now consider the first of these two questions, which is a fundamental question which lies at the heart of the case. The second question I shall postpone to a later stage.

68. Which, then, is the preferable approach - is it the narrow ground derived from the rule in ***Dunlop v. Lambert,*** 6 Cl. & F. 600 or is it Lord Griffiths' broader ground? To consider this question it is, I feel, desirable to stand back from the case now before the House, and to identify the nature of the problem with which we are concerned. For that purpose it is, I believe, essential to segregate in our minds two different problems. The first, is a problem which arises from the old common law doctrine of privity of contract. The second, is a problem concerned with damages. Let me explain.

    (A) As we all know, from an early time the common law adopted a rule of privity of contract, by virtue of which only a party to the contract could enforce the contract. The rule, seen in the abstract, is rational and very understandable in a law of contract which includes the doctrine of consideration; but it has given rise to great problems in practice - because, both in commerce and in the domestic context, parties do enter into contracts which are intended to confer enforceable rights on third parties, and a rule of law which precludes a right of enforcement by a third party can therefore fail to give effect to the intention of the contracting parties and to the reasonable expectations of the third party. The existence of these problems led first of all to the recognition of a number of exceptions to the rule and ultimately, only last year, to its abolition by the Contracts (Rights of Third Parties) Act 1999.

    (B) "*There is, or is widely thought to be, a general rule that, where A commits a commits a breach of his contract with B, then B can recover damages only in respect of his own loss and not in respect of loss suffered by a third party, C.*" I adopt the words of Professor Treitel in (1998) 114 L.Q.R. 527, because, as I have already indicated, I share his scepticism about the existence of this "rule." Plainly it is right that a contracting party should not use the remedy of damages to recover what has been described by Oliver J. (as he then was) in a notable judgment (in ***Radford v. De Froberville*** [1977] 1 W.L.R. 1262, 1270 as "*an uncovenanted profit*," or indeed to impose on the other contracting party an uncovenanted burden. But if the supposed rule exists, it could deprive a contracting party of any effective remedy in the case of a contract which is intended to confer a benefit on a third party but not to confer on the third party an enforceable right. It is not surprising therefore to discover increasing concern on the part of scholars specialising in the law of contract that the supposed rule, if rigidly applied, can have the effect of depriving parties of the fulfilment of their reasonable contractual expectations, and to read of doubts on their part whether any such rule exists.

69. It is, I believe, important to keep these two problems distinct in our minds when addressing the basic question which arises in the present case. With this distinction in mind, let us look first of all at the rule in

***Dunlop v. Lambert*** 6 Cl. & F. 600. As Lord Diplock himself explained, this rule should be seen in context of commercial contracts concerning goods, and in particular of contracts for the carriage of goods by sea. It is a commonplace of such contracts that the goods may be shipped pursuant to a contract of sale, under which the property in the goods may pass to the consignee while the goods are in transit. However, the rule of privity of contract requires that, if the contract of carriage is (as it usually is) made between the consignor and the carrier, it can be enforced only by the consignor and not by the consignee. This creates manifest problems where the goods are lost or damaged in transit after the property in them has passed to the consignee. The rule in ***Dunlop v. Lambert*** provided a practical solution to these problems by giving the consignor the right to recover damages for such loss or damage for the benefit of the consignee, to whom he was accountable. The shortcoming of this rule must, I imagine, have been that it left the initiative with the seller, rather than with the consignee who was the person who had suffered the loss of or damage to the goods. It is not surprising, therefore, that Parliament intervened only fifteen years later, in 1855, to pass the Bills of Lading Act of that year, under section 1 of which a person to whom the property in the goods had passed upon or by reason of the consignment to him of the goods or the indorsement to him of the bill of lading acquired a direct right of action against the shipowner on the terms of the bill of lading. (The Act of 1855 has recently been repealed and replaced by the Carriage of Goods by Sea Act 1992.) The more effective remedy given by statute must have meant that the useful life of the rule in *Dunlop v. Lambert* was relatively short. For present purposes, however, the important point is that the function of the rule was to escape the undesirable consequences of the privity rule in a particular context, though it had the incidental effect that, if there is a rule that a party can only recover damages for breach of contract in respect of his own loss, then the rule in *Dunlop v. Lambert* constitutes an exception to that rule.

70. Let me turn next to consider in this context Lord Griffiths' broad ground in the *St. Martin's* case. It is at once plain that Lord Griffiths was not concerned with a problem of privity of contract; on the contrary, he was concerned that a contracting party who contracts for a benefit to be conferred on a third party should himself have an effective remedy. He was moreover addressing not a special problem which arises in a particular context, such as carriage of goods by sea, but a general problem which arises in many different contexts in ordinary life, notably in the domestic context where parties may frequently contract for benefits to be conferred on others, though it may well arise in other contexts, such as charitable giving or even, as the present case shows, a commercial transaction. His problem was not, therefore, privity of contract; it was the rule, or supposed rule, that a party can only recover damages in respect of his own loss.

71. The purpose of this analysis is to demonstrate that, in my opinion, the invocation of the rule in ***Dunlop v. Lambert*** 6 Cl. & F. 600 in the present context is, I believe, inapposite. This is because we are not here addressing a problem of privity of contract. The problem is not that UIPL had no enforceable rights against McAlpine arising under the building contract: it was the evident intention that UIPL should not have such rights, its rights against McAlpine being restricted to different rights under a separate contract, the DCD. That the rule in ***Dunlop v. Lambert*** is inapposite in the present context is illustrated in particular by the irrelevance, in this context, of any contemplation that the property of the contracting party should be transferred to a third party - a feature which was regarded by Lord Diplock as a prerequisite of the application of the rule in ***Dunlop v. Lambert,*** and was fortuitously present in the ***St. Martin's*** case [1994] 1 A.C. 85. An indication that any such prerequisite is irrelevant in the present context may be derived from the fact that, in the next case in which the ***St. Martin's*** case was applied, ***Darlington Borough Council v. Wiltshier Northern Limited*** [1995] 1 W.L.R. 68, there was no such feature and yet its absence was ignored by the Court of Appeal, no doubt because they felt that it did not matter. The same applies to the judgment of the Court of Appeal in the present case. In truth, what we are concerned with here is the effectiveness of the rights conferred on Panatown under the building contract itself.

72. In expressing this opinion I wish to stress that I fully understand, and indeed sympathise with, the hesitation of the majority in the ***St. Martin's*** case to follow Lord Griffiths down the route which he preferred. But, with the passage of time and the benefit of much useful academic writing, I feel more hesitant about adopting the rule in ***Dunlop v. Lambert*** in what I consider to be an inappropriate context than I do about adopting Lord Griffiths' approach. That the latter approach itself involves certain difficulties, I freely recognise; but I regard my appropriate course in the present case as being not to reject Lord Griffiths' approach, but to identify and confront these difficulties in order to reach a solution which is

in accordance with principle and also does practical justice between the parties, without leaving too great a legacy of problems for the future. To that task I now address myself.

73. I start with the proposition that the interest of a contracting party (A) in the performance by the other party (B) of his contractual obligations to A has long been recognised, and is protected as such by a remedy by A against B in damages. The protection of this "performance interest" or "expectation interest" is today placed at the forefront of their treatment of damages by both Professor Treitel (see *Treitel on Contract,*10th ed., (1999) pp. 973 et seq.) and Professor Beatson (see *Anson on Contract,* 27th ed., (1998) pp. 364 et seq.). The question raised by McAlpine's argument in the present case is said to arise in circumstances in which the plaintiff attempts to enforce his right to damages where the "loss" has been suffered by a third party: see, e.g., *Anson on Contract,* 27th ed., pp. 412 et seq.

74. The argument advanced by McAlpine in the present case appears more compelling in cases where the plaintiff is claiming damages in respect of loss of, or damage to a third party's property, than in cases such as the present, where the plaintiff is claiming damages in respect of failure by the defendant to carry out, or to carry out properly, work of improvement (or repair) on the land (or chattel) of a third party. It is in the former case that it can more readily be said that the third party has suffered loss, and indeed that the loss has fallen on the third party rather than on the plaintiff. It is in such cases that we have seen the development of the specific exception identified by Lord Diplock in ***The Albazero*** [1977] A.C. 774. In the latter case, however, it is difficult to see why the fact that the land (or chattel) is owned by a third party should of itself prevent the plaintiff from recovering damages in respect of the failure by the other contracting party to fulfil his side of the bargain with the plaintiff (for which the plaintiff has ex hypothesi furnished consideration). Indeed, if the law should in such circumstances deny the plaintiff a remedy in damages, it can be said with force that his performance or expectation interest is insufficiently protected in law. Historically this may have been the position; but, if so, it appears that this defect in the law has, in recent years, been addressed and remedied in cases which the point has arisen for decision and furthermore that those decisions have been generally welcomed by the academic legal community.

75. I add that, if Lord Griffiths' approach was to be rejected, it would follow that, for example, the employer under a building contract for work on another's property would have no remedy in damages if the builder was to repudiate the contract or to fail altogether to perform the contractual work. In other words, the builder could repudiate with impunity. It is no answer, or an insufficient answer, to this point that money paid in advance by the employer may be recoverable on the ground of failure of consideration, any more than it is an answer to other cases that there may be an abatement of the price.

76. In the light of this preamble I wish to state that I find persuasive the reasoning and conclusion expressed by Lord Griffiths in his opinion in the ***St. Martin's*** case [1994] 1 A.C. 85, that the employer under a building contract may in principle recover substantial damages from the building contractor, because he has not received the performance which he was entitled to receive from the contractor under the contract, notwithstanding that the property in the building site was vested in a third party. The example given by Lord Griffiths of a husband contracting for repairs to the matrimonial home which is owned by his wife is most telling. It is not difficult to imagine other examples, not only within the family, but also, for example, where work is done for charitable purposes - as where a wealthy man who lives in a village decides to carry out at his own expense major repairs to, or renovation or even reconstruction of, the village hall, and himself enters into a contract with a local builder to carry out the work to the existing building which belongs to another, for example to trustees, or to the parish council. Nobody in such circumstances would imagine that there could be any legal obstacle in the way of the charitable donor enforcing the contract against the builder by recovering damages from him if he failed to perform his obligations under the building contract, for example because his work failed to comply with the contract specification.

77. At this stage I find it necessary to return to the opinion of Lord Griffiths in the ***St. Martin's*** case. In the passage from his opinion, [1994] 1 A.C. 85, 96-97, which I have already quoted, he gave the example of a husband placing a contract with a builder for the replacement of the roof of the matrimonial home which belonged to his wife. The work proved to be defective. Lord Griffiths expressed the opinion that, in such a case, it would be absurd to say that the husband has suffered no damage because he does not own the property. I wish now to draw attention to the fact that, in his statement of the facts of his example, Lord

Griffiths included the fact that the husband had to call in and pay another builder to complete the work. It might perhaps be thought that Lord Griffiths regarded that fact as critical to the husband's cause of action against the builder, on the basis that the husband only has such a cause of action in respect of defective work on another person's property if he himself has actually sustained financial loss, in this example by having paid the second builder. In my opinion, however, such a conclusion is not justified on a fair reading of Lord Griffiths' opinion. This is because he stated the answer to be that "*the husband has suffered loss because he did not receive the bargain for which he had contracted with the first builder and the measure of damages is the cost of securing the performance of that bargain by completing the roof repairs properly by the second builder*." It is plain, therefore, that the payment to the second builder was not regarded by Lord Griffiths as essential to the husband's cause of action.

78. The point can perhaps be made more clearly by taking a different example, of the wealthy philanthropist who contracts for work to be done to the village hall. The work is defective; and the trustees who own the hall suggest that he should recover damages from the builder and hand the damages over to them, and they will then instruct another builder, well known to them, who, they are confident, will do the work well. The philanthropist agrees, and starts an action against the first builder. Is it really to be suggested that his action will fail, because he does not own the hall, and because he has not incurred the expense of himself employing another builder to do the remedial work? Echoing the words of Lord Griffiths, I regard such a conclusion as absurd. The philanthropist's cause of action does not depend on his having actually incurred financial expense; as Lord Griffiths said of the husband in his example, he "has suffered loss because he did not receive the bargain for which he had contracted with the first builder."

79. There has been a substantial amount of academic discussion about the difference of opinion in the Appellate Committee in the *St. Martin's* case and in particular about the merits of Lord Griffiths' opinion in that case. The Appellate Committee in the present case was supplied with copies of a number of relevant articles, which I have studied with interest and respect. I have not detected any substantial criticism of Lord Griffiths' broader ground, whereas there has been some criticism of the narrower ground adopted by the majority of the Appellate Committee in the ***St. Martin's*** case [1985] 1 A.C. 85 - see in particular the articles by Professor Treitel in (1998) 114 L.Q.R. 527, and by Mr. Duncan Wallace Q.C. (the editor of Hudson on Building Contracts) in (1994) 110 L.Q.R. 42 and (1999) 115 L.Q.R. 394 (in which the writer supports Lord Griffiths' broader ground). I have found nothing in the academic material with which we were supplied which should deter those who are attracted to the broader ground from giving effect to it in an appropriate case. In this connection, I wish to draw attention in particular to articles by Professor Brian Coote in (1997) 56 Camb. L.J. 557 and in (1998) 13 J.C.L. 91; to the articles by Mr. Duncan Wallace Q.C. to which I have already referred; and to a Paper presented by Janet O'Sullivan (the Director of Studies in Law at Selwyn College, Cambridge) at a conference held in Cambridge in 1999 on Comparative Unjustified Enrichment (the Papers for which will , I understand, shortly be published) in which she considered the whole question of damages awarded to protect contractual expectations with special reference to "*restitutionary damages*," and in particular to the judgment of the Court of Appeal in ***Attorney-General v. Blake*** [1998] Ch. 439. In so doing, she reviewed a number of cases in which damages were, or might usefully have been, awarded to protect contractual expectations, and in particular regarded Lord Griffiths' opinion in ***St. Martin's***, together with the recent decision of your Lordships' House in ***Ruxley Electronics and Construction Ltd. v. Forsyth*** [1996] A.C. 344, as providing examples of steps recently taken to recognise and attack a deficiency in the remedial regime for breach of contract, arising from the *"perceived failure of the English law of contract to recognise that the plaintiff's interest lies in the performance of the contract."* Her review provides the context within which Lord Griffiths' opinion can usefully be set, and in this way provides further justification for Lord Griffiths' broader ground.

*80.* Turning to the authorities, I think it right to start with the decision of your Lordships' House in East **Ham Corporation v. Bernard Sunley & Sons Ltd**. [1966] A.C. 406, which is regarded as the leading authority for the proposition that, in cases in which the plaintiff is seeking damages for the defective performance of a building contract (which is a contract for labour and materials), the normal measure of his damages is the cost of carrying out remedial work. On the issue of damages in that case, there appears to have been no difference of opinion among the members of the Appellate Committee. Lord Upjohn accepted at p. 445 that the normal measure of damages is the cost of reinstatement, as both Lord Guest and Lord Pearson appear

to have done at pp. 440 and 451 respectively. Lord Cohen was however careful to qualify this proposition by reference to a principle of reasonableness which he drew from Hudson on Building and Engineering Contracts, 8th ed. (1859). The statement of the law (which he drew from that book) was as follows at p. 434: *"There is no doubt that wherever it is reasonable for the employer to insist upon reinstatement the courts will treat the cost of reinstatement as the measure of damage."*

81. I turn next to the authoritative judgment of Oliver J. in ***Radford v. De Froberville*** [1977] 1 W.L.R. 1262, for which I wish to express my respectful admiration. The case was concerned with a contract for the sale of a plot of land adjoining a house belonging to the plaintiff (the vendor) but occupied by his tenants, under which the defendant (the purchaser) undertook to build a house on the plot and also to erect a wall to a certain specification on the plot so as to separate it from the plaintiff's land. The plaintiff obtained judgment against the defendant for damages for breach of contract by reason of her failure to erect the dividing wall, but an issue arose as to the measure of the damages. The defendant having failed to build the dividing wall on the land purchased from the plaintiff, the plaintiff proposed to build a dividing wall on his own land, and claimed the cost of doing so from the defendant; whereas the defendant maintained that the appropriate measure of damages was the consequent diminution in the value of the plaintiff's property, which was nil. Oliver J. rejected the defendant's contention. He held that the plaintiff had a genuine and serious intention of building the wall on his own land, and that this was a reasonable course of action for him to take. With regard to an argument by the defendant that, since the plaintiff did not himself occupy the property, he could not be said to have himself suffered damage by reason of the defendant's failure to build the wall, because he was not there to enjoy it, and that his only loss, therefore, was the diminution of the value of his reversion, Oliver J. gave the following answer at [1977] 1 W.L.R. 1262, 1285: *"Whilst I see the force of this, I do not think that it really meets the point that, whatever his status, the plaintiff has a contractual right to have the work done and does in fact want to do it . . . . As it seems to me, the fact that his motive may be to confer what he conceives to be a benefit on persons who have no contractual rights to demand it cannot alter the genuineness of his intentions."* Oliver J. here referred to ***Jackson v. Horizon Holidays Ltd.*** [1975] 1 W.L.R. 1468.

82. The reference in this passage to the persons who would benefit by the building of the wall was a reference to the plaintiff's tenants.

83. Oliver J.'s reliance on the simple fact that the plaintiff had a contractual right to have the wall built constitutes a plain assertion of the plaintiff's right to recover damages on the basis of damage to his performance interest, and is surely inconsistent with the submission of McAlpine, in the present case, that the mere fact that the buildings were to be constructed on the land of UIPL, rather than on the land of Panatown, debars Panatown from recovering substantial damages for the defective performance of McAlpine in the construction of the buildings. Indeed the decision of Oliver J. that the plaintiff in the case before him was entitled to substantial damages is of itself inconsistent with McAlpine's submission, since the damages were awarded in respect of a failure by the defendant to build on land which was not the property of the plaintiff.

*84.* In the course of his judgment Oliver J., relying on a passage from the judgment of Megarry V.-C. in ***Tito v. Waddell (No. 2)*** [1977] Ch. 106, 331-334, concluded, at p. 1283, that there were three questions which he had to answer: *"First, am I satisfied on the evidence that the plaintiff has a genuine and serious intention of doing the work? Secondly, is the carrying out of the work on his own land a reasonable thing for the plaintiff to do? Thirdly, does it make any difference that the plaintiff is not personally in occupation of the land but desires to do the work for the benefit of his tenants?"*

85. The first two questions he answered in the affirmative; the third he answered in the negative. I think it right however to record that the issue of reasonableness which arose in the second question was not the same issue as that raised in Lord Cohen's statement of principle in ***East Ham Corporation v. Bernard Sunley & Sons;*** [1996] A.C. 406 it arose because Oliver J. had to consider whether, although the defendant's breach of contract related to a failure to build the wall on her land which she had purchased from the plaintiff, the plaintiff was entitled to claim the cost of building a similar wall on his own land. It followed that the second question was, as Oliver J. said (see [1977] 1 W.L.R. 1284E-F) *"really one of mitigation,"* and that it was in that context that he had to consider whether the proposed action of the plaintiff was a reasonable step for him to take.

*86.* In ***Ruxley Electronics and Construction Ltd. v. Forsyth*** [1996] A.C. 344, the defendants contracted to construct a swimming pool on the plaintiff's land. The contract specification required that the deep end of the pool should be 7 feet 6 inches deep. The pool was constructed, but the deep end was only 6 feet deep. The plaintiff claimed damages in the sum required to reconstruct the pool to the specified depth, viz. £21,560. The trial judge rejected that claim, but awarded the plaintiff damages in the sum of £2,500 for loss of amenity. The Court of Appeal allowed the plaintiff's appeal from that decision, and awarded him the full sum claimed by him. The House of Lords allowed the defendants' appeal from the decision of the Court of Appeal, on the ground that the expenditure required to reconstruct the pool to the specified depth was out of all proportion to the benefit to be obtained, and restored the judgment of the trial judge. The plaintiff invoked the decision of Oliver J. in ***Radford v. De Froberville*** as showing that he was entitled to damages for failure to comply with the contract to provide a swimming pool to his specification, notwithstanding that the extra depth was of no objective value; but on the facts of the case your Lordships' House held that the award of damages which the plaintiff sought was unreasonable and so could not be upheld. In support of this conclusion, the House was able to invoke not only English authority, notably the speech of Lord Cohen in ***East Ham Corporation v. Bernard Sunley & Sons***, but also authoritative statements of principle from the High Court of Australia (viz. ***Bellgrove v. Eldridge*** (1954) 90 C.L.R. 613, 617-618) and the United States (viz. ***Jacob & Youngs v. Kent*** 129 N.E. 889, 891-2, *per* Cardozo J.). It is however plain from the opinions of the Appellate Committee that they regarded Oliver J.'s judgment in ***Radford v. De Froberville*** [1977] 1 W.L.R. 1262 as an authoritative and useful statement of legal principle: see, e.g., [1996] 1 A.C. at p. 360, *per* Lord Mustill. And, as Oliver J. said in ***Radford v. De Froberville*** [1977] 1 W.L.R. 1262, 1270: *"If [the plaintiff] contracts for the supply of that which he thinks serves his interests - be they commercial, aesthetic or merely eccentric - then if that which is contracted for is not supplied by the other contracting party I do not see why, in principle, he should not be compensated by being provided with the cost of supplying it through someone else or in a different way, subject to the proviso, of course, that he is seeking compensation for a genuine loss and not merely using a technical breach to secure an uncovenanted profit."*

87. I respectfully agree with this proposition, the last few words of which can be regarded as concerned with the issue of reasonableness which arose in the ***Ruxley Electronics*** case [1996] A.C. 344. It cannot be said that, in the present case, the breach of contract alleged by Panatown is *"technical"*, or that Panatown is seeking an "uncovenanted" profit. Moreover Oliver J.'s proposition, and indeed his decision, are, as I have already indicated, inconsistent with the argument now advanced on behalf of McAlpine that the employer under a building contract is unable to recover substantial damages for breach of the contract if the work in question is to be performed on land or buildings which are not his property. Oliver J.'s proposition is, in my opinion, equally applicable where the work contracted for is to be performed on another person's property for family reasons, or (as in the present case) for the benefit of a group of companies of which the plaintiff is a member, or for purely charitable reasons, or for any other reason for which the plaintiff thinks it appropriate to enter into such a contract --as for example in the case of a contract by the defendant to build a wall on her own land, as in ***Radford v. De Froberville*** [1977] 1 W.L.R. 1262 itself.

88. It follows, in my opinion, that the principal argument advanced on behalf of McAlpine is inconsistent with authority and established principle. This conclusion may involve a fuller recognition of the importance of the protection of a contracting party's interest in the performance of his contract than has occurred in the past. But not only is it justified by authority, but the principle on which it is based is supported by a number of distinguished writers, notably Professor Brian Coote and Mr. Duncan Wallace Q.C.

89. However, as I have already recorded, it was the submission of McAlpine that your Lordships should regard any such development in the law as a matter for legislation, presumably after a reference to the Law Commission. This submission was made on the basis that the Lord Chancellor had introduced into Parliament a Bill - the Contract (Rights of Third Parties) Bill, based on a Report by the Law Commission, designed to bring about a radical reform of the privity rule, and that the prospect of this imminent legislation rendered illegitimate any further judicial activism in the field which was the subject of the present appeal. That Bill is now on the statute book: see the Contracts (Rights of Third Parties) Act 1999.

90. I am unable to accept this submission. As I have previously explained, this case is not concerned with privity of contract. There is no question of a third party here seeking to enforce a jus quaesitus tertio - i.e., of

UIPL enforcing a right arising under the contract between McAlpine and Panatown. On the contrary, the reason why Panatown contracted as employer under the building contract with McAlpine was so that UIPL, although the owner of the site, should not do so. Even if the new Act had been in force at the material time, it would not have given UIPL any right to enforce the building contract, or any provision of it, against McAlpine. Section 1 of the Act, which is concerned with the right of a third party to enforce a contractual term, provides as follows:

*1.(1) Subject to the provisions of this Act, a person who is not a party to a contract (a "third party") may in his own right enforce a term of the contract if*
*(a) the contract expressly provides that he may, or*
*(b) subject to subsection (2), the term purports to confer a benefit on him.*
*(2) Subsection (1) (b) does not apply if on a proper construction of the contract it appears that the parties did not intend the term to be enforceable by the third party.*

91. It is plain that the building contract in the present case did not expressly provide that UIPL might in its own right enforce a term of the contract; and, in so far as the contract, or any term of it, purported to confer a benefit on UIPL, it is plain that the parties did not intend any such term to be enforceable by UIPL, the rights of the latter against McAlpine being limited to those which arose under a separate contract, the DCD.

92. In truth, no question of a jus quaesitum tertio arises in this case at all. Lord Griffiths' broader ground is not concerned with privity of contract as such. It is concerned with the damages recoverable by one party to a contract (the employer) against another (the contractor) for breach of a contract for labour and materials, viz. a building contract. It does not seek to establish an exception to the old privity rule, though it may provide a principled basis for the recovery of damages (by a contracting party, not by a third party) in some cases, such as ***Jackson v. Horizon Holidays Limited*** [1975] 1 W.L.R. 1468, in which the privity rule has been seen as a barrier to recovery (not by a contracting party but by a third party).

93. Furthermore, as Professor Hugh Beale stated some years ago (see (1995) 9 J.C.L. 103 at p. 108). "Even if the basic doctrine of privity were to be reformed along the lines suggested by the Law Commission, I think it is vital that the promisee should have adequate remedies to take care of those cases in which the third party does not acquire rights."

94. I would however go further. I do not regard Lord Griffiths' broader ground as a departure from existing authority, but as a reaffirmation of existing legal principle. Indeed, I know of no authority which stands in its way. On the contrary, there have been statements in the cases which provide support for his view. Thus in ***Darlington Borough Council v. Wiltshier Northern Ltd.*** [1995] 1 W.L.R. 68, 80, Steyn L.J. (as he then was) described Lord Griffiths' broader ground as based on classic contractual theory, a statement with which I respectfully agree. Moreover, Lord Griffiths' reasoning was foreshadowed in the opinions of members of the Appellate Committee in ***Woodar Investment Development Ltd. v. Wimpey Construction U.K. Ltd.*** [1980] 1. W.L.R. 277; see especially the opinion of Lord Keith of Kinkel (at pp. 297-8), and in addition the more tentative statements of Lord Salmon (at p. 291) and Lord Scarman (at pp. 300-1). Furthermore, as I have just indicated, full recognition of the importance of the performance interest will open the way to principled solution of other well-known problems in the law of contract, notably those relating to package holidays which are booked by one person for the benefit not only of himself but of others, normally members of his family (as to which see ***Jackson v. Horizon Holidays Ltd.*** [1975] 1 W.L.R. 1468), and other cases of a similar kind referred to by Lord Wilberforce in his opinion in the ***Woodar Investment*** case at p. 283 - cases of an everyday kind which are calling out for a sensible solution on a principled basis. Even if it is not thought, as I think, that the solution which I prefer is in accordance with existing principle, nevertheless it is surely within the scope of the type of development of the common law which, especially in the law of obligations, is habitually undertaken by appellate judges as part of their ordinary judicial function. That such developments in the law may be better left to the judges, rather than be the subject of legislation, is now recognised by the Law Commission itself, because legislation within a developing part of the common law can lead to ossification and a rigid segregation of legal principle which disfigures the law and impedes future development of legal principle on a coherent basis. It comes as no surprise therefore that, in its Report on "Privity of Contract: Contracts for the Benefit of Third Parties, (1996) (Law

Com. No. 242) para. 5.15, the Law Commission declined to make specific recommendations in relation to the promisee's remedies in a contract for the benefit of a third party (here referring to ***The Albazero*** [1977] A.C. 774 and ***Linden Gardens Trust Ltd. v. Lenesta Sludge Disposals Ltd.*** (the **St. Martin's** case) [1994] 1 A.C. 85 as cases in which "the courts have gone a considerable way towards developing rules which in many appropriate cases do allow the promisee to recover damages on behalf of the third party"), and stated that the Commission "*certainly . . . would not wish to forestall further judicial development of this area of the law of damages.*" This certainly does not sound like a warning to judicial trespassers to keep out of forbidden territory; see also para. 11. 22, concerned with the problem of double liability - which I shall have to consider at a later stage.

95. The present case provides, in my opinion, a classic example of a case which falls properly within the judicial province. I, for my part, have therefore no doubt that it is desirable, indeed essential, that the problem in the present case should be the subject of judicial solution by providing proper recognition of the plaintiff's interest in the performance of the contractual obligations which are owed to him. I cannot see why the proposed statutory reform of the old doctrine of privity of contract should inhibit the ordinary judicial function, and so prevent your Lordships' House from doing justice between the parties in the present case. As I have said, the principal function of this submission of McAlpine appears to have been to restrict the argument of Panatown to the narrower ground in ***Dunlop v. Lambert*** 6 Cl. & F. 600 and by so doing to enable McAlpine to argue that, on that basis, the cause of action by Panatown under the building contract was excluded by the separate contractual right afforded to the building owner, UIPL, under the DCD. That is a matter which I will have to address when I come to consider the second issue in the case.

96. There are however four specific matters to which I should refer before I leave the main issue in this appeal.

(1) The first relates to damages for delay. Here we are concerned, first, with the question of principle, viz. whether an employer under a building contract who does not own the building site can recover damages for delay. However the building contract in the present case, like most building contracts, contains a liquidated damages clause (condition 24). The question therefore arises whether that clause is enforceable by an employer who does not own the site. I should add that the sum specified in the contract (by Appendix 1) as payable by way of liquidation damages for delay is £35,000 per week. In the present case, the delay for which liquidated damages are claimed is potentially very great, and so the sum claimed on this basis must be very substantial.

97. The Court of Appeal held that the fact that Panatown was not the building owner did not preclude it from recovering damages for delay, either liquidated or unliquidated. In so holding, the Court of Appeal must have rejected the conclusion of both the arbitrator and Judge Thornton Q.C. that the liquidated damages clause in the contract was unenforceable because it was a penalty. In this connection, however, it must be borne in mind that the Court of Appeal decided the case on the basis of the narrower ground, based on the rule in ***Dunlop v. Lambert***, 6 Cl. & F. 600.

98. I myself prefer to proceed on the basis of the broader ground in Lord Griffiths' opinion in the ***St Martin's*** case [1994] 1 A.C. 85. On that basis, I can see no reason in principle why my conclusion should not apply to damages for delay, as well as to damages for defective work. The employer has, after all, contracted not only for the work to be performed by the contractor as specified, but also for it to be performed within a specified time, and has given consideration for the contractor's promise to perform his obligations. He has therefore a contractual right to the performance by the contractor of his obligation as to time, as much as he has to his performance of the work to the contractual specification.

99. But, in the case of delay, there appears at first sight to be a problem of quantification. In the case of defective work, the employer who does not own the building site can have recourse to an objective standard for the quantification of the damage, viz. the reasonable cost of remedying the defects. At first sight, however, this approach is not so easily applicable in the case of delay, where the damages fall to be assessed by reference to the loss of the opportunity to take advantage of the completed building, either by disposing of it through a sale or long lease, or by putting it to profitable use. It appears to be suggested that loss of such an opportunity will inevitably fall on the owner of the building, and not on the employer who does not own it; and it appears to have been on this basis that condition 24 of the present building contract was held to be unenforceable as a penalty both by the arbitrator and by Judge Thornton Q.C.

100. I am however unable to accept the reasoning on which that conclusion appears to have been based. In the case of a commercial development such as the present, the impact of delay on the completion of the development can be measured objectively in financial terms with reference to the anticipated profitability of the development; and this can provide an appropriate yardstick for measuring the estimated damages for delay in the performance for which the employer has contracted, even where the development was to be carried out on a site belonging to another person. There is no reason to imagine that the figure included in condition 24 Appendix 1 was not calculated in some such way. It should not be forgotten that, in the present case, the contractual documents included assignable DCDs granted to UIPL, obviously as the owner of the site; and it must have been plain to all concerned that Panatown was not the owner of the site. For my part, I cannot see why the liquidated damages clause in the building contract should not be regarded as a genuine pre-estimate of the damage suffered by Panatown by reason of the delay in receiving the benefit of the building work to be performed by McAlpine under the building contract.

101. Even so let me, like Lord Griffiths, take an example from the context of the family. Suppose that a married woman divorces her husband, and as a result of her unhappy experiences suffers what used to be called a nervous breakdown with the effect that she is incapable of managing her own affairs. The matrimonial home always belonged to her, and remained her property after the divorce settlement; but it is decided among her family that, because of her illness, she should live with her parents, and that her house should be sold to provide her with an income from the capital sum so raised. The house needs to be put in order before it is put on the market. Her father decides to do this at his own expense, as a present to his daughter. He places a contract with a builder, which contains a liquidated damages clause. Is it to be said that, if the building work is delayed, the father cannot enforce the liquidated damages clause on the ground that it is not, and cannot be, a genuine pre-estimate of his loss? I do not think so. The sum specified in the clause for liquidated damages is intended to reflect the economic circumstances prevailing at the time, and to be related to the enhancement in the value of the house when the work is done. It may perhaps have been proposed by the builder as a rate which was, on that basis, acceptable to him and have been accepted by the father as such. The whole purpose of the father in placing the contract at his own expense is to ensure that his daughter is in a position to reap the benefit of that enhancement; and I do not see why the sum so specified should not constitute a genuine pre-estimate of the damage suffered by him by reason of delay in receiving the benefit of the building work. Indeed, he will then be in a position to make good the gift which he intended to make to his daughter, by handing the damages over to her; and he will, if necessary, have no difficulty in satisfying a court of his intention to do so. If that is not right, it is difficult to see how there could be an effective liquidated damages clause in such a contract, although such clauses are a manifest convenience to both parties in building contracts.

102. At all events, the foregoing reasoning is in my opinion applicable in the present case, if damages are awarded on the basis of Lord Griffiths' broader ground; though the same conclusion would be reached if damages were awarded on the basis of the rule in ***Dunlop v. Lambert*** 6 Cl. & F. 600, where the damages are recoverable on behalf of the owner. I would therefore decline to interfere with the conclusion of the Court of Appeal on this point, and I would uphold Panatown's claim to liquidated damages under condition 24 of the building contract at the rate specified in Appendix 1. I should add that, even if there had been no liquidated damages clause in the contract, in my opinion Panatown would have been entitled to recover substantial damages from McAlpine for delay, on the basis that McAlpine's assumed breach of contract had pro tanto defeated Panatown's contractual expectations. I wish to add that I understand my approach to this issue to be consistent with the views expressed by Professor Brian Coote in his article, "***Contract Damages, Ruxley and the Performance Interest***" in [1997] C.L.J. 537, 552, to which I wish to express my indebtedness.

(2) The second relates to the relevance of the plaintiff's intention. It is plain that Oliver J. regarded the plaintiff's intention as material to the issue before him. He therefore asked himself (see ***Radford v. De Froberville*** [1977] 1 W.L.R. 1262, 1283E) whether the plaintiff had "***a genuine and serious intention of doing the work***," thereby satisfying himself that the plaintiff was "***seeking compensation for a genuine loss and not merely using a technical breach to secure an uncovenanted profit***" (see p. 1270E). In the ***St. Martin's*** case [1994] 1 A.C. 85, 97G, Lord Griffiths took a similar view when he expressed the opinion that, in awarding damages to the plaintiff on his broader ground, the court "will of course wish to be satisfied that

the repairs have been or are likely to be carried out". It has however been suggested that to have regard in these cases to the intention of the plaintiff as to the use to which he intends to put his damages is contrary to the general principle that the court is not concerned with what the plaintiff does with his damages: see ***Darlington Borough Council. v. Wiltshier Northern Ltd.*** [1995] 1 W.L.R. 68. 80, *per* Steyn L.J. For my part, however, I cannot see why it should not be appropriate to have regard to such a matter when the reasonableness of the plaintiffs claim to damages is under consideration. This was the view expressed by Lord Lloyd of Berwick in ***Ruxley Electronics and Construction v. Forsyth*** [1996] 1 A.C. 344, 372C-D when he said: *"I fully accept that the courts are not normally concerned with what a plaintiff does with his damages. But it does not follow that intention is not relevant to reasonableness, at least in those cases where the plaintiff does not intend to reinstate. Suppose in the present case Mr. Forsyth had died, and the action had been continued by his executors. Is it to be supposed that they would be able to recover the cost of reinstatement, even though they intended to put the property on the market without delay?"*

103. I respectfully agree.

(3) I have yet to consider the impact on the main issue of the fact that the decision within the Unex Group that the contract for the development of the site owned by UIPL should be placed by Panatown rather than by UIPL was made with the purpose of avoiding the incidence of VAT. Mr. Pollock for McAlpine, submitted that your Lordships should be unwilling to assist Panatown to escape from the predicament created by this arrangement, when its cause was so unmeritorious; and in this he had a distinguished supporter in the person of Professor Treitel (see "Damages in Respect of a Third Party's Loss" (1998) 114 L.Q.R. 527, 534). I am however unable to accept this submission. It seems to me that, in modern business, where the incidence of tax can be of great importance to the viability of any enterprise such as the present, companies such as those in the Unex Group are fully entitled to take lawful measures open to them to minimise the incidence of tax. Indeed, their shareholders might well have reason to complain if they did not have this purpose in mind when they arranged their affairs. I for my part cannot see that the tax reasons underlying the arrangements in the present case have any impact upon the question whether Panatown is entitled to recover substantial damages from McAlpine. In any event, I do not conceive my function in the present appeal as being to assist Panatown to escape from their predicament. I regard it as being to ascertain the relevant principles of law, and to apply them to the facts of the case. If a consequence of this exercise is that the companies in the Unex Group have successfully avoided the incidence of VAT by a legitimate tax avoidance scheme, then so be it.

(4) Your Lordships were assisted by a presentation by Mr. Jeremy Nicholson, junior counsel for Panatown, on the applicable German law, for which I was grateful. This was founded upon advice received from Dr. Hannes Unberath, recently a graduate student at Worcester College, Oxford, and the author of an interesting case note on the present case in the Law Quarterly Review: see (1999) 115 L.Q.R. 535. His thesis is that, in Germany, the present case would be decided in favour of Panatown on the basis of a principle called Drittschadenliquidation, which has been loosely translated into English as "transferred loss" - an expression which I have myself adopted from time to time, though not I fear with any great accuracy. Indeed the concept is not an easy one for a common lawyer to grasp; and, with all respect to Dr. Unberath, I do not feel sufficiently secure to adopt it as part of my reasoning in this opinion. Even so, I find it comforting (though not surprising) to be told that in German law the same conclusion would be reached as I have myself reached on the facts of the present case. I have however also been struck by the provisions of paras. 633 and 635 of the BGB, falling within the Seventh Title entitled *Contract for Work.* I note (from Ian Forrester's translation of 1975) that the remedies under these two paragraphs (for defective work and for non-fulfilment) are vested in "the customer," and that there is no indication that the situation might be different if the property on which the work is to be done is vested in a person other than the customer.

***Conclusion on the first issue.***

104. For the reasons I have given, I would decide the first issue in favour of Panatown. I therefore find myself to be in agreement with the conclusion of the Court of Appeal on that issue, though not with their reasoning, since they proceeded (as I believe they were bound to do) on the basis of the narrower ground in the ***St Martin's* case** [1994] 1 A.C. 85, and I, as I am free to do, have preferred Lord Griffiths' broader ground. I wish to add in parenthesis that I have difficulty with the suggestion of the Court of Appeal that the broader

ground is not a possible alternative route to the same conclusion as that reached by them on the narrower ground, but is *"rather the underlying principle on which the* ***Dunlop v. Lambert*** *6 Cl. & F. 600 and* ***St. Martin's*** *decisions are based."* I myself regard the two grounds as different routes to a similar conclusion.

***The DCD.***

105. I now turn to the second issue in the case, which relates to the possible impact of the DCD on Panatown's remedy against McAlpine in damages.

106. It was the submission of McAlpine that the existence of the building owner's remedy under the DCD had the effect of precluding Panatown from recovering damages from McAlpine under the building contract. I have to say that this is, on its face, a remarkable submission; it is a strange conclusion indeed that the effect of providing a subsidiary remedy for the owner of the land (UIPL), on a restricted basis (breach of a duty of care), is that the building employer, who has furnished the consideration for the building, is excluded from pursing his remedy in damages under the main contract, which makes elaborate provision, under a standard form specially adapted for this particular development, for the terms upon which the contractor has agreed to design and construct the buildings in question.

107. As I have previously indicated, however, this argument was advanced by McAlpine on the basis that Panatown could only recover damages in respect of defects in a building to be constructed on land which was the property of another by invoking the narrow ground under the rule in ***Dunlop v. Lambert*** as formulated by Lord Diplock in ***The Albazero*** [1977] A.C. 774. By so confining the argument, McAlpine was able to invoke the exception identified by Lord Diplock in ***The Albazero*** at pp. 847-848, that *"the rationale of the rule [in* ***Dunlop v. Lambert****] is in my view also incapable of justifying its extension to contracts for carriage of goods which contemplate that the carrier will also enter into separate contracts of carriage with whoever may become the owner of goods carried pursuant to the original contract."*

108. The conclusion flowed from *"The complications, anomalies and injustices that might arise from the co-existence in different parties of rights of suit to recover, under separate contracts of carriage which impose different obligations upon the parties to them, a loss which a party to one of those contracts alone has sustained . . ."*

109. In other words the rule in ***Dunlop v. Lambert***, 6 Cl. & F. 600 which is a rule of law, will not apply to recognise a right of action in the original party to recover damages for the loss of, or damage, to goods, for the benefit of another person who has acquired an interest in the goods, where it is contemplated that such a person will or may enter into a separate contract of carriage with the carrier on different terms. The possibility of confusion if the rule in ***Dunlop v. Lambert*** were to apply in such circumstances is obvious.

110. This reasoning has, however, no application to Lord Griffiths' broader ground, under which the employer is seeking to recover damages for his own account in respect of his own loss, i.e. the damage to his interest in the performance of the building contract to which he, as employer, is party and under which he has contracted to pay for the building. The mere fact that the building contractor, McAlpine, has entered into a separate contract in different terms with another party with regard to possible defects in the building which is the subject of the building contract cannot of itself detract from its obligations to the employer under the building contract itself. In other words, it is plain that the exception identified by Lord Diplock in ***The Albazero*** [1997] A.C. 774 is confined to the circumstances of the special rule in ***Dunlop v. Lambert*** as formulated by him. There is no basis for extending it to the circumstances of the present case. It was, I imagine, for this reason that McAlpine was concerned to confine Panatown, if possible, to advancing its case on the narrower ground based on the rule in *Dunlop v. Lambert*, rather than on Lord Griffiths' broader ground. However I have already explained why, in my opinion, Panatown's argument should not be restricted in this way.

111. For this reason alone, therefore, I am of the opinion that McAlpine's submission founded on the DCD, as advanced by it, must fail. But I wish to add that, in any event, I can see no likelihood of double recovery from McAlpine in respect of the same damage, by Panatown under the building contract and by UIPL under the DCD, and that for that reason there is no inconsistency between the two remedies.

112. In this connection I have been impressed by the suggestion of Mr. David Lewis (in (1997) 115 L.Q.R. at p.402) that the real purpose of the DCD was to provide a contractual remedy in negligence (comparable to that formerly available in tort under ***Anns v. London Merton Borough Council*** [1978] A.C. 728 before that

case was departed from by your Lordships' House in ***Murphy v. Brentwood District Council*** [1991] 2 A.C. 398) against McAlpine by subsequent owners of the building. For that purpose, the remedy was made available in the first instance to UIPL so that it could assign the benefit of the DCD to subsequent purchasers of the development, to whom clause 3 of the DCD expressly contemplated and authorised assignment, as and when they became identified. The purpose must, primarily at least, have been to enable such assignees to enforce their rights under the DCD in respect of defects which came to light after the property in the building passed to them; any defects which had previously come to light would have been remedied by McAlpine under the building contract or, if not, would have been the subject of a claim by Panatown for damages which, if recovered, would (for reasons which will appear) have been available and used directly or indirectly to make good the defects.

113. But what about the rights of UIPL under the DCD? It is arguable that, having regard to the evident purpose of the DCD, it was not intended that UIPL should itself enforce its rights under the DCD against McAlpine. After all, it was only sensible that UIPL should leave it to Panatown, as a member of the same group of companies, to enforce its more valuable rights under the building contract. The fact remains, however, that those rights of action under the DCD must in law have been vested in UIPL, for otherwise UIPL would have been in no position to assign them to subsequent purchasers.

114. I approach the matter as follows. First of all, it seems to me that where one party (A) is permitted by the owner of land (B) to procure the carrying out of building work on B's property, A, if he procures a builder to do the work and the work is commenced, must be under some obligation with regard to its completion. Let me take an example. Suppose that a wealthy philanthropist who lives in a village undertakes as an act of charity to renovate the village hall at his own expense. The trustees who own the hall gladly agree that he should do so. A contract is placed by the philanthropist with a builder, and the work is commenced. Unfortunately the work is defective. The builder fails or refuses to rectify the defects; the philanthropist therefore claims damages from him under the building contract, and recovers substantial damages. I cannot believe that, in those circumstances, the philanthropist can simply put the damages in his pocket and leave the building in its defective state. In my opinion, it must be implicit in the licence under which he was permitted to renovate the hall and for that purpose to contract with a builder for the work of renovation that, if the work was begun, he should at least take reasonable steps to procure its satisfactory completion. Accordingly, if he recovers damages from the builder for defective work, he should procure the rectification of the defects by another builder, the damages recovered by him being available to finance that work; though he might, by agreement with the trustees, hand the money over to them to enable them to instruct another builder of their own choice to carry out the necessary remedial work. In the present case, although it was held by Judge Thornton Q.C. that there was no contractual obligation on Panatown (vis a vis UCL or UIPL) to carry out and complete the development satisfactorily, nevertheless there was a contractual obligation on Panatown to procure a building contract. By parity of reasoning with the example I have given, it must have been implicit in that contractual obligation that, if the builder's work was defective and the defects were not rectified by him, and Panatown should in consequence recover damages from the builder for breach of contract, Panatown should instruct another builder to rectify the defects, using the damages recovered by it to finance the remedial work. (I add in parenthesis that, in the present case, the point will be reinforced if, as my noble and learned friend Lord Millett has persuasively suggested, Panatown, having received the finance for the development through the Unex Group, must hold any damages recovered from McAlpine on the same trusts as it held the money originally advanced to it.) The materiality of this point in the present case is that any damages recovered by Panatown from McAlpine by reason of the defective state of the building will be available for making good the defects in the structure, and will no doubt be used, directly or indirectly, for that purpose.

115. It is against this background that the materiality of UIPL's rights under the DCD must be judged. It is, of course, plain that the DCD provides a limited remedy which is subsidiary to that which arises under the main contract, i.e. the building contract itself, in the sense that, if defects come to light before completion of the work under the contract, the prime remedy lies under the building contract where the right of recovery does not depend on proof of negligence and the making good of defects is specially legislated for (in condition 16 of the Conditions of Contract). Moreover, the principal function of the DCD is to enable UIPL to assign its limited rights under it to subsequent purchasers of the development. In ordinary

circumstances, therefore, there will be no need for UIPL itself to enforce its rights against McAlpine under the DCD. This is because any defects which come to light before completion of the work under the building contract should be remedied by McAlpine under the contract in the ordinary way or, if not so remedied, will be the subject of a claim for damages by Panatown; and in the latter event the damages so received by Panatown will be available, and no doubt used, directly or indirectly, to finance the necessary remedial work. In such circumstances, UIPL will naturally leave it to Panatown, as the employer, to enforce its more valuable rights under the building contract, rather than have recourse to its more uncertain remedy under the DCD under which it has to prove negligence on the part of McAlpine. Moreover, if Panatown is successful in its claim, the benefit will, as I have indicated, enure to UIPL which, in consequence, will suffer no damage.

116. It is conceivable that UIPL, as owner of the land, may suffer some damage distinct from that covered by Panatown's claim. In theory this could, I imagine, occur if a defect came to light after the completion of the works under the building contract, in which event a claim by Panatown against McAlpine in respect of such defect would be excluded by the terms of condition 16 of the Conditions of the Contract (concerned with practical completion and defects liability period) but would appear to be preserved for UIPL by clause 4 of the DCD which provides that "Notwithstanding the completion of the current development or any part thereof the provisions of this agreement shall continue to have effect." But a successful claim by UIPL against McAlpine in respect of such damage could not give rise to any double recovery. In any event, no such claim is relevant in the present case where, as appears from Panatown's statement of case in the arbitration, the defects complained of were identified by Panatown during the currency of contract and indeed led to the purported determination by Panatown of McAlpine's employment though McAlpine denies that Panatown were entitled to determine its employment.

117. For these reasons, in my opinion, there can in practice be no possibility of double recovery from McAlpine in respect of the defects which are the subject matter of Panatown's present claim against McAlpine. If any such possibility should exist, it can be disposed of in the manner indicated by my noble and learned friend Lord Millett in his opinion, by joinder of the relevant party or parties to the proceedings.

118. It follows that, on the second issue, I have reached the same conclusion as that reached by the Court of Appeal, viz., that the existence of the DCD does not stand in the way of the enforcement by Panatown of its right to recover substantial damages from McAlpine under the building contract.

***Conclusion***

119. For the reasons I have given, I would dismiss McAlpine's appeal from the decision of the Court of Appeal, and I would order that McAlpine pay the costs of the appeal to your Lordships' House.

**LORD JAUNCEY OF TULLICHETTLE** My Lords,

120. This inordinately protracted arbitration/litigation has already been running in one form or another for more than 7 years and appears to have many more years of life ahead of it, howsoever this appeal is decided. My noble and learned friend Lord Goff of Chieveley in his speech has set out in detail the circumstances of the dispute between the parties which account I gratefully adopt and I can therefore refer to them very briefly. Panatown, the appellants, entered into a contract ("the building contract") with McAlpine, the respondents, whereby the latter were to design and construct an office block in Cambridge on land owned by UIPL, a company in the same group. Panatown were put in funds from within the group to meet their financial obligations under the contract, and were chosen as the contracting party for VAT reasons. On the same date McAlpine in pursuance of the building contract executed a duty of care deed (DCD) in favour of UIPL who were therein referred to as the building owners whereby they undertook inter alia that they had exercised and would continue to exercise all reasonable care, skill and attention in respect of all matters which lay within the scope of their responsibilities under the building contract and that they would owe a duty of care to UIPL in respect thereof. The situation is unusual in that no contractual obligation by Panatown to UIPL in relation to the performance of the building contract has been shown to exist.

121. This appeal arises from a question of law raised in an arbitrator's interim award. That question was broadly whether Panatown was entitled to recover substantial, as opposed to nominal, damages when

they were not the owners of the land on which the building was constructed and had suffered no financial loss as a result of the breach. The Court of Appeal answered the question in favour of Panatown.

122. Three issues were canvassed in this House namely:-

(1) Whether there is a general rule of English law that a person cannot recover substantial damages for breach of contract where he himself has suffered no loss by reason of the alleged breach;

(2) Whether if such a rule exists, the exception to it said to be established in ***Dunlop v. Lambert*** (1839) 6 Cl. & F.600 and upheld in ***The Albazero*** [1977] A.C. 774 and in ***St. Martin's Property Corporation Ltd. v. Sir Robert McAlpine Ltd.*** [1994] 1 A.C. 85 applied ("***the narrow ground***"); and

(3) Whether Panatown were entitled to recover substantial damages on the ground that they had not received the bargain for which they had contracted, irrespective of the fact that they had no proprietary interest in the building at the date of the breach and had no suffered no financial loss ***("the broader ground").***

***The General Rule***

*123.* That damages for breach of contract are compensatory has long been established in English Law. Mr. Friedman for Panatown did not seek to challenge this general principle but argued that there was no need to limit the compensatory principle by reference to the promisee's loss. He referred to the following well known dictum of Parke B. in ***Robinson v. Harman*** (1848) 1 Exch. 850 (154 E.R. 363) 855: *"The rule of the common law is, that where a party sustains a loss by reason of a breach of contract, he is, so far as money can do it to be placed in the same situation, with regard to damages as if the contract had been performed."* and also to ***Livingstone v. Rawyards Coal*** **Co. (**1880) 5 App. Cas. 25, 39, where Lord Blackburn referred to the general rule that compensatory damages should as nearly as possible: *"put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong. . . "*

124. These dicta, Mr. Friedman submitted, did not exclude a case where a third party and not the plaintiff had suffered the loss. Furthermore although it had been assumed in previous cases that the compensatory principle was restricted to loss suffered by the plaintiff no authority for this proposition had been cited.

125. My Lords, there are in my view two answers to this submission. In the first place while it is true that neither of the above quoted dicta specifically excluded claims by a promisee for loss suffered by a third party, it is equally true that in neither case was the position of a third party under consideration. Thus, when Parke B. and Lord Blackburn referred to a or the "***party***" it is quite obvious that they were referring to the plaintiff and pursuer in the actions and to no one else. In the second place in the ***The Albazero*** [1977] A.C. 774 there were clear statements both in the Court of Appeal (Cairns L.J. at p. 803C Ormerod L.J. at p. 823C) and in your Lordships' House that in an action of damages for breach of contract the plaintiff can only recover such damages as he has actually suffered. Lord Diplock, at p. 846G, referred to: "*the general rule of English Law that apart from nominal damages a plaintiff can only recover in an action for breach of contract the actual loss he has himself sustained."* (see also 845G).

126. The existence of this general rule was again referred to by my noble and learned friend Lord Browne-Wilkinson in ***St. Martin's Property Corporation v. Sir Robert McAlpine Ltd.*** [1994] 1 A.C. 85, 114G. Mr. Friedman could cite no positive authority to support his submission and to give effect to it would mean departing not only from Lord Diplock's authoritative statement of the law but also from that of Lord Browne-Wilkinson. I see no justification for so doing and am content to proceed upon the basis that the law is as stated by Lord Diplock and Lord Browne-Wilkinson.

***The Narrow Ground***

127. The starting point is the Scots case of ***Dunlop v. Lambert*** 6 Cl. & F. 600, 3 Maclean & R. 663 which has been treated ever since by authoritative English text book writers: *"as authority for the broad proposition that the consignor may recover substantial damages against the ship owner if there is privity of contract between him and the carrier for the carriage of goods; although, if the goods are not his property or at his risk, he will be accountable to the true owner for the proceeds of his judgment.": **The Albazero** [1977] A.C. 774, 884D, per Lord Diplock.*

128. Scottish text book writers have been less enthusiastic. My noble and learned friend Lord Clyde in his powerful and detailed analysis of the case has already referred to Professor Gloag's comment. In the 10th ed. (1899) of *Bell's Principles* para. 88 ***Dunlop v. Lambert***, among other cases, is cited as vouching the

proposition that the risk is continued in the seller *"where there is an express or implied undertaking of the risk by the seller, as to deliver at a certain place."*

129. Lord Diplock at p. 847E rationalised the rule in ***Dunlop v. Lambert*** 6 Cl. & F. 600 as an application of the principle: *"that in a commercial contract concerning goods where it is in the contemplation of the parties that the proprietary interests in the goods may be transferred from one owner to another after the contract has been entered into and before the breach which causes loss or damage to the goods, an original party to the contract, if such be the intention of them both, is to be treated in law as having entered into the contract for the benefit of all persons who have or may acquire an interest in the goods before they are lost or damaged, and is entitled to recover by way of damages for breach of contract the actual loss sustained by those for whose benefit the contract is entered into."*

130. Although the rule in ***Dunlop v. Lambert***, as Lord Diplock described it, was held not to be applicable to the circumstances of ***The Albazero*** where the breach of a charterparty resulted in a total loss of cargo he refused to accept counsel's invitation to jettison it (847B).

131. In view of my noble and learned friend's analysis it is unnecessary for me to go over all the same ground but I consider that in order to understand what was decided by this House in ***Dunlop v. Lambert*** 6 Cl. & F. 600 it is necessary first to look at the proceedings in the Court of Session. During the course of the jury trial counsel for the pursuers sought to introduce parole evidence as to what the consignee understood to be the contractual position between him and the pursuers (the consignors) as to the risk of the puncheon during the voyage. The Lord President ruled the question incompetent on the ground that the understanding of one of the parties could not effect the real nature of the agreement which was in writing (1837) 15S at 886). The direction to which the exception was taken was in these terms: *"that as it appeared that the pursuers, at the time of furnishing the puncheon of spirits in question, had sent an invoice thereof to Matthew Robson the purchaser bearing that the same had been insured, and that the freight thereof and insurance were charged against the said Matthew Robson in the said invoice, the pursuers were not entitled in law or interest to recover the value of the said puncheon from the defenders."*

132. In the Inner House (1837) (15S 1232) the judges referred to the averment in the summons that the pursuers *"undertook by this agreement, and were answerable to the said Matthew Robson for the safe delivery of the puncheon."*

133. The majority held that these averments had not been proved but that in terms of the written agreement between the pursuers and Robson the former were, after shipping the puncheon, free of all risk or liability on account thereof. In construing the written agreement the majority were clearly impressed with the fact that Robson had instructed and paid for the insurance. The Lord President pointed out that it would be quite wrong to qualify the terms of the written agreement by the parole evidence of Robson as to what he thought he had agreed to (1237). Pausing here it is clear that the Lord President was doing no more than construing a written agreement and propounding the long established rule of law that it is impermissible to vary the terms of a written agreement by parole evidence as to what one of the parties thought it meant. So far as the direction is concerned there being no competent evidence to support the averment (supra) as to the pursuers' liability I should have thought that it was unexceptionable.

134. In this House the Lord Chancellor took a different view and held the Lord President to be in error. After referring at 6 Cl. & F. 600, 621, Maclean & R. (1839) 663, 676 to the "*general rule that delivery by the consignor to the carrier is a delivery to the consignee, and that the risk is after such delivery the risk of the consignee*" he went on to explain the rule can be varied by circumstances. He proceeded: *" and now The Lord President laid down the rule to the jury as if there could be no exception to the operation of it. And that seems to me to be the first error in the direction. The Lord President stated it as a rule without an exception, that the cost of freight and insurance were paid by the consignor, who charged the consignee with their amount, the risk was therefore necessarily with the consignee - that there was consequently no right to enquire what was the particular transaction between the parties - but that the course of that circumstance alone the consignor could not recover."*

135. If the Lord Chancellor was referring only to the direction to which exception had been taken I am at a loss to understand how he justified the words *"stated as a rule without an exception."* To my mind the direction did no more than tell the jury what was the proper construction of the written agreement. Neither in the direction nor in his judgment in the Inner House did The Lord President suggest that he was doing

anything more than construing the written agreement and applying the normal rules of evidence. However, the Lord Chancellor later referred to the averment (supra) and stated that if such a contract existed, it ought to have been admitted to proof (6 Cl. & F. 600, 622-3, Maclean & R. 663, 677-678). This statement appears entirely to overlook the fact that there was no competent evidence of such an agreement which the jury could consider.

136. My Lords I am driven to the conclusion that the Lord Chancellor who does not appear to have had the benefit of Scottish Counsel before him proceeded upon a misapprehension of the true effect of the proceedings in the Court of Session. Nevertheless the so called rule as Lord Diplock pointed out in *The **Albazero*** has become firmly established in English Law notwithstanding its exceedingly dubious parentage and I must proceed accordingly. I should, however, emphasise that throughout the proceedings in *Dunlop **v. Lambert*** there was never any suggestion that the carrier could escape liability for any breach of contract resulting in the loss. The Inner House of the Court of Session concluded that at the time of the loss the puncheon was the property of and at the risk of the consignee who could have sued in terms of the contract. This House simply concluded that it should have been left to the jury to determine whether there was a special contract which modified the terms of the written contract so that the consignors rather than the consignee could sue. I would only add that I agree with my noble and learned friend Lord Clyde that rather more relevant to what has become the ***Albazero*** exception than ***Dunlop v. Lambert*** was ***Joseph v. Knox*** [1813] 3 Camp 320 in which Lord Ellenborough held that the plaintiffs who had shipped the goods and paid the freight were entitled to recover the value of the lost cargo which they would *"hold as trustees for the real owner."*

137. The rule in ***Dunlop v. Lambert***, as expounded by Lord Diplock, was applied *in* ***St. Martins Property Corporation Ltd. v. Sir Robert McAlpine Ltd.*** [1994] 1 A.C. 85 to a case arising out of breach of a building contract whereby St. Martins had contracted with McAlpine for the multi-purpose development of a site in Hammersmith. The contract contained a clause prohibiting the assignment of the contract by St. Martins without the consent of McAlpine. Some 17 months after the contract date St. Martins assigned to another company in the group for full value their whole interest in the property without attempting to obtain the consent of McAlpine. After the practical completion of the works a serious defect was discovered which was remedied at a substantial cost paid for initially by St. Martins who were later reimbursed by the assignee company. The defect was alleged to have resulted from a breach of contract occurring after the assignment. St. Martins sued McAlpine who maintained that since St. Martins had suffered no loss they were only entitled to nominal damages. In a speech with whose reasoning Lord Keith of Kinkel, Lord Bridge of Harwich and Lord Ackner agreed, Lord Browne-Wilkinson concluded that St. Martins were entitled to recover substantial damages. At p. 114G-115C he stated: *"In my judgment the present case falls within the rationale of the exceptions to the general rule that a plaintiff can only recover damages for his own loss. The contract was for a large development of property which, to the knowledge of both Corporation and McAlpine, was going to be occupied, and possibly purchased, by third parties and not by Corporation itself. Therefore it could be foreseen that damage caused by a breach would cause loss to a later owner and not merely to the original contracting party, Corporation. As in contracts for the carriage of goods by land, there would be no automatic vesting in the occupier or owners of the property for the time being who sustained the loss of any right of suit against McAlpine. On the contrary, McAlpine had specifically contracted that the rights of action under the building contract could not without McAlpine's consent be transferred to third parties who became owners or occupiers and might suffer loss. In such a case, it seems to me proper, as in the case of the carriage of goods by land, to treat the parties as having entered into the contract on the footing that Corporation would be entitled to enforce contractual rights for the benefit of those who suffered from defective performance but who, under the terms of the contract, could not acquire any right to hold McAlpine liable for breach. It is truly a case in which the rule provides 'a remedy where no other would be available to a person sustaining loss which under a rational legal system ought to be compensated by the person who has caused it.'"*

138. The reasoning of Lord Browne-Wilkinson (supra), was applied by the Court of Appeal in ***Darlington Borough Council v. Wiltshier Northern Ltd.*** [1995] 1 W.L.R. 68, another building contract case in which a third party and not the employer under the contract who had no interest in the site had suffered the physical loss flowing from the breach.

139. The circumstances in the instant case differ from those in the *St. Martins* case in as much as in the latter case the employer had an interest in the site at the date of the contract whereas Panatown had no such interest at that date or thereafter. I very much doubt whether this distinction is sufficient to remove the case from the ambit of Lord Browne-Wilkinson's reasoning. There are, however, certain other considerations to be examined.

*140.* In **The Albazero** [1997] A.C. 774 Lord Diplock pointed out that the rationale of the rule in **Dunlop v. Lambert** did not extend to cases where there existed a separate contract of carriage between the person who actually suffered the loss and the carrier. He referred to the Bills of Lading Act 1855 having rendered the rationale of the rule in cases to which the Act applied inapplicable since the property in the goods and the right of suit against the ship owner would have passed from consignor to consignee. Thus having stated, at pp. 847H to 848A, that there was no justification for extending the rule*: "to contracts for the carriage of goods which contemplate that the carrier will also enter into separate contracts of carriage with whoever may become the owner of goods carried pursuant to the original contract."* he went on at p. 848C to state*: "A fortiori there can be no sensible business reason for extending the rule to cases where the contractual rights of the charterer under the charterparty are not identical with those of the bill of lading holder whose goods are lost or damaged; and this must always be the case as respects holders for valuable consideration because of the statutory estoppel to which I have referred."*

*141.* He subsequently stated: *"The complications, anomalies and injustices that might arise from the co-existence in different parties of rights of suit to recover, under separate contracts of carriage which impose different obligations upon the parties to them, a loss which a party to one of those contracts alone has sustained, supply compelling reasons why the rule in* ***Dunlop v. Lambert****, 6 Cl. & F. 600 should not be extended to cases where there are two contracts with the carrier covering the same carriage and under one of them there is privity of contract between the person who actually sustains the loss and the carrier by whose breach of that contract it was caused."*

142. Lord Diplock's reasoning for these statements can be traced to his earlier reference to the fact that notwithstanding the effect of the Bills of Lading Act 1855 there might still be occasional cases in which the rule would provide a remedy where no other would be available to a person sustaining loss (847B). It was this lack of other remedy which justified the rule. In *St. Martins* Lord Browne-Wilkinson similarly pointed out that the rationale of ***Dunlop v. Lambert*** did not extend to a case where C had a contractual right of action against B. At p. 115E-G he stated: *"If, pursuant to the terms of the original building contract, the contractors have undertaken liability to the ultimate purchasers to remedy defects appearing after they acquired the property, it is manifest the case will not fall within the rationale of* ***Dunlop v. Lambert****, 6 Cl. & F. 600. If the ultimate purchaser is given a direct cause of action against the contractor (as is the consignee or endorsee under a bill of lading) the case falls outside the rationale of the rule. The original building owner will not be entitled to recover damages for loss suffered by others who can themselves sue for such loss."*

143. The DCD in favour of UIPL was executed by McAlpine in pursuance of an obligation contained in the building contract. In these circumstances Mr. Pollock for McAlpine argued that the ***Dunlop v. Lambert*** rule had no application and the general rule that a plaintiff can only recover damages (other than nominal) for his own loss applied. Mr. Friedman countered this by pointing out that the remedies available to UIPL under the DCD were different from and less effective than those available under the building contract. He referred to the arbitration clause in the building contract which was absent in the DCD, and to the facts that McAlpine's duty of compliance with the contractual provisions of the building contract under the DCD were merely to exercise reasonable care and skill whereas the duty under the building contract was absolute and that the provision for liquidated damages for delay in the building contract was absent in the DCD. He also referred to an article by Mr. I N Duncan Wallace Q.C. in [1999] 15 Const. L.J. 245 in support of the proposition that the DCD could not properly be treated as the equivalent of the *"****separate contract of carriage****"* referred to by Lord Diplock in ***The Albazero*** as an exception to the ***Dunlop v. Lambert*** rule. Mr. Friedman also urged upon your Lordships that the DCD was granted, not for the benefit of UIPL, but to enable that company to assign the benefit thereof to a future purchaser. Be that as it may there can be no doubt that UIPL were, and indeed are, entitled to sue McAlpine under the DCD and this cannot be ignored.

144. My Lords it is of course correct that the DCD is not co-terminous with the building contract but does that necessarily mean that the exception to the ***Dunlop v. Lambert*** rule above referred to has no application? That rule provides a remedy where no other would be available for breach of a contract in circumstances where it is within the contemplation of contracting parties that breach by one is likely to cause loss to an identified or identifiable stranger to the contract, rather than to the other contracting party. It prevents the claim to damages falling into what Lord Keith of Kinkel in ***G.U.S. Property Management Ltd. v. Littlewoods Mail*** **Stores** 1982 S.L.T. 533, 538 so graphically described as "***some legal black hole***." It must however, be remembered that the ***Dunlop v. Lambert*** rule is an exception to the general rule that a party who has suffered no loss cannot recover substantial damages for breach. Neither in the speeches of Lord Diplock nor of Lord Browne-Wilkinson, to which I have referred, is it suggested that the ***Dunlop v. Lambert*** rule will only be displaced by rights vested in a third party which are identical to those of the innocent contracting party, indeed Lord Diplock, ***The*** **Albazero** [1977] A.C. 774, 848C, considered that there were even stronger grounds for not applying the rule to cases where the two sets of contractual rights were different. What is important, as I see it, is that the third party should as a result of the main contract have the right to recover substantial damages for breach under his contract even if those damages may not be identical to those which would have been recovered under the main contract in the same circumstances. In such a situation the need for an exception to the general rule ceases to apply. I therefore conclude that in this case the general rule is not displaced by the rule in ***Dunlop v. Lambert*** and that Mr. Pollock's submissions are correct. I find support for this conclusion in an article by Professor Treitel *"**Damages in Respect of a Third Party's Loss**"* (1998) 114 L.Q.R 527, 533-4.

***The Broader Ground***

145. For the purposes of his argument Mr. Friedman limited the application of the broader ground to contracts for the supply of services and defined it as recovery on the basis that the promisee suffers a loss if there is a breach of a contract to confer a benefit on a third party. The promisee suffers that loss because he has not received the benefit of the bargain for which he contracted. Since Panatown had not received what they had contracted for, namely the construction of a building conform to contract, it followed that they had suffered loss, which was the cost of achieving that objective.

146. The basis for the foregoing proposition was the speech of Lord Griffiths in ***St. Martins Property Corporation Ltd. v. Sir Robert McAlpine Ltd.*** [1994] 1 A.C. 85, which it is necessary to look at in some detail. After referring to two defences advanced by McAlpine to the effect (1) that St. Martins had no proprietary interest in the property when the breach occurred and (2) that they had been reimbursed from within the group for the cost of repairs Lord Griffiths, continued at, p. 96F, in relation to the first defence: *"I cannot accept that in a contract of this nature, namely for work, labour and the supply of materials, the recovery of more than nominal damages for breach of contract is dependent upon the plaintiff having a proprietary interest in the subject matter of the contract at the date of breach."*

147. Lord Griffiths instanced the case of a husband who was the sole earner contracting for the repair of the matrimonial home owned by his wife and having to pay a second builder to remedy the defects created by the first. He continued, at 96H: *"Is it to be said that the husband has suffered no damage because he does not own the property? Such a result would in my view be absurd and the answer is that the husband has suffered loss because he did not receive the bargain for which he had contracted with the first builder and the measure of damages is the cost of securing the performance of that bargain by completing the roof repairs properly by the second builder."*

148. Lord Griffiths then gave a further similar example where the husband after contracting with the builder, on advice, transferred his house to his wife and defects appeared. In response to the argument that neither husband nor wife could recover damages he remarked that that would be so unjust a result that the law could not tolerate it. This comment was made with reference to a hypothetical situation in which if the husband had no right of action no one else had and the claim to damages would fall into Lord Keith's black hole.

*149.* Lord Griffiths considered McAlpine's argument that ***The Albazero*** [1977] A.C. 774 supported their argument that a contracting party suffered no loss if they did not have a proprietary interest in the property at the date of the breach and continued, at 97D: *"**The Albazero** was not concerned with money being paid to enable the bargain, i.e. the contract of carriage, to be fulfilled. The damages sought in **The Albazero** were*

*claimed for the loss of the cargo, and as at the date of the breach the property in the cargo was vested in another with a right to sue it is readily understandable that the law should deny to the original party to the contract a right to recover damages for a loss of the cargo which had caused him no financial loss. In cases such as the present the person who places the contract has suffered financial loss because he has to spend money to give him the benefit of the bargain which the defendant had promised but failed to deliver. I therefore cannot accept that it is a condition of recovery in such cases that the plaintiff has a proprietary right in the subject matter of the contract at the date of breach."*

*150.* Two matters emerge from that passage namely (1) that Lord Griffiths was contrasting a situation where the promisee (the consignor in ***The Albazero***) had suffered no financial loss by the breach of contract and the case before him where St. Martins had paid for the necessary repairs, and (2) that he clearly considered it to be of importance that a third party who had actually sustained the financial loss had a right to sue. I summarise Lord Griffith's position on the first defence as follows: Where A employs B to perform work on Whiteacre, which B performs defectively the fact that Whiteacre is owned by C who has no contractual rights against B is no bar to an action for damages by A provided that he has paid or intends to pay for the necessary remedial treatment. In relation to the second defence Lord Griffiths expressed the view that: *"who actually pays for the repairs is no concern of the defendant who broke the contract. The court will of course wish to be satisfied that the repairs have been or are likely to be carried out . . . "*

151. I do not find it entirely easy to reconcile Lord Griffith's last observation with his reference to the promisee, St. Martins, having suffered financial loss because they had to spend money. It is true that they did initially pay for the remedial work but they were reimbursed in full and cannot therefore be said to have suffered financial loss in the end of the day. Can it matter that they were reimbursed afterwards rather than being put in funds before they made payment? Lord Griffiths vouched his remarks about the second defence by reference to ***Jones v. Stroud District Council*** [1986] 1 W.L.R. 1141, in which the plaintiffs were unable to prove that they had paid for repair carried out to their building and rendered necessary by the defendants' negligence. In the ***Jones*** case Neill L.J., at p. 1150H, after referring to the general principle that a plaintiff who seeks to recover damages must prove that he has suffered loss continued:— *'but if property belonging to him has been damaged to an extent which is proved and the court is satisfied that the property has been or will be repaired I do not consider that the court is further concerned with the question whether the owner has had to pay for repairs out of his own pocket or whether the funds have come from some other source.'* Such a case must be distinguished from that where the defect is in the property of a third party and the cost is met by that party or someone other than the plaintiff. In the latter case it is the third party rather than the plaintiff who has suffered financial loss. Given the detailed reasoning of Lord Griffiths in relation to McAlpine's first defence which proceeded upon the footing that the plaintiff although not the proprietor of the subjects had incurred or would have to incur expenditure to remedy the defect I do not think that he can have intended his remarks on the second defence to be taken as authority for the proposition that a plaintiff who had neither incurred expenditure on a third party's property nor had any interest in so doing was nevertheless entitled to recover substantial damages for breach of contract by the contractor. Indeed his comments on ***The Albazero*** would suggest that a plaintiff should not recover substantial damages for breach of contract when he had suffered no financial loss and when the third party had an independent right of action against the promissor. This would appear to be how Lord Keith of Kinkel understood Lord Griffith's position because having expressed sympathy with the view that a building contractor in breach of his contract should not be relieved of liability to pay substantial damages merely by reason that the other contracting party had no proprietary interest in the works at the time of the breach continued at 95F: *"There is much force in the analysis that the party who contracted for the works to be done has suffered loss because he did not receive the performance he had bargained for and in order to remedy that has been required to pay for the defects to be put right by another builder."*

152. It was not mere lack of performance but lack of performance plus the requirement to incur expenditure by the promisee which impressed Lord Keith. In my view Mr. Friedman's definition of the broader ground goes far beyond what Lord Griffiths said in *St. Martins* and consequently is not supported by his speech in that case.

153. In ***Darlington Borough Council. v. Wiltshier Northern Ltd.*** [1995] 1 W.L.R. 68, where A entered into a contract with B for an erection of a building on C's land the Court of Appeal applied the narrow ground in

***St. Martins***. However, Steyn L.J. (as he then was) at p. 80E expressed his agreement with Lord Griffith's wider principle which he defined as where a builder fails to render the contractual service the employer suffers a loss of bargain or expectation of interest which loss can be recovered on the basis of what it would cost to remedy the defect. Steyn L.J. went on to express the view that "*in the field of building contracts, like sale of goods, it is no concern of the law what the plaintiff proposes to do with his damages,*" thereby rejecting Lord Griffiths qualification that the court would wish to be satisfied that the repairs have been or are likely to be carried out. ***Darlington Borough Council v. Wiltshier Northern Ltd***. was a case in which the employer suffered no financial loss by reason of the contractors' breach and the third party, for whose benefit the works were to be carried out, had no independent right of action. On the reasoning of Steyn L.J. it would appear that the employer in such a case could recover the cost of effecting the necessary repairs and then put the money in his own pocket. This would be a particularly unattractive result and certainly not one which Lord Griffiths would have advocated. Indeed it would seem to raise very sharply the question of whether the employer had suffered any financial loss at all.

154. Mr. Friedman sought further support for the broader ground in the authoritative judgment of Oliver J., (as he then was) in ***Radford v. De Froberville*** [1977] 1 W.L.R. 1262. The plaintiff owned a large house and garden in Holland Park. The house was divided into six flats all of which were let and the tenants had the right to use the garden so far as not used for building. The plaintiffs sold part of the garden as a building plot for a consideration which included a convenant by the purchaser to build a dividing wall on the plot sold. The purchaser failed to build the wall and sold the plot. In an action for breach of contract Oliver J., being satisfied that the plaintiff intended to build a wall on his own side of the boundary, awarded him damages measured by the cost of carrying out this work. In response to the argument that the only loss which the plaintiff had sustained as a result of the breach was the diminution in value of the property, which was little or nothing, Oliver J. pointed out that the plaintiff had a contractual right to have the work done and did in fact want to do it and continued, at p. 1285D: *"As it seems to me, the fact that his motive may be to confer what he conceives to be a benefit on persons who have no contractual rights to demand it cannot alter the genuineness of his intentions."*

155. The facts in ***Radford*** were far removed from those in ***St. Martins*** or in the present case. The plaintiff conveying the plot to the purchaser in consideration inter alia of the covenant had effectively paid for the works. These works were for the benefit of his property and the tenants therein and he proposed to carry out substitute works on his own property at his own expense. Oliver J.'s dictum that the plaintiff had a contractual right to have the work done was thus made in circumstances different from those addressed by Lord Griffiths. The plaintiffs' loss was not merely one of bargain or expectation of interest - it was the loss of the covenanted and paid for works with their aforementioned benefits. I do not therefore consider that it supports the broader ground as advanced by Mr. Friedman.

156. It is interesting that in ***The Albazero*** there was no suggestion in Lord Diplock's speech that a plaintiff had a right to recover on the broader ground, which would in that case have rendered unnecessary application of the rule in ***Dunlop v. Lambert***. Indeed, in refusing to jettison the rule Lord Diplock, at p. 847B said: *"there may still be occasional cases in which the rule would provide a remedy where no other would be available to a person sustaining loss which under a rational legal system ought to be compensated by the person who has caused it."*

157. Had Lord Diplock thought that recovery under the broader ground was generally available there would have been little or no content for these observations. I accept, of course, that Mr. Friedman in his submissions restricted the application of the broader ground to supply contracts but if the broader ground is to be accepted as a principle there seems little reason for restricting its application to one type of contract.

158. In ***Woodar Investment Development Ltd. v. Wimpey Construction U.K. Ltd***. [1977] 1 W.L.R. 277 *Wimpey* agreed to buy land from *Woodar* for a sum of £850,000 of which £150,000 was to be paid to Transworld. A month later *Wimpey* sent a letter purporting to rescind the contract and *Woodar* sued for damages including the £150,000 payable to Transworld. This House, in allowing the appeal, held that *Wimpey* had not repudiated the contract but in view of the Court of Appeal's decision that *Wimpey* were liable in damages for the £150,000 made certain observations thereon. At p. 284A-D Lord Wilberforce referred to the proposition: *"that if Woodar made a contract for a sum of money to be paid to Transworld, Woodar can, without*

*showing that it has itself suffered loss or that Woodar was agent or trustee for Transworld, sue for damages for non payment of that sum. That would certainly not be an established rule of law. . . "*

*159.* Lord Wilberforce later said, at p. 284C: *"Whether in a situation such as the present - viz. where it is not shown that Woodar was agent or trustee for Transworld, or that Woodar itself sustained any loss, Woodar can recover any damages at all, or any but nominal damages, against Wimpey, and on what principle, is, in my opinion, a question of great doubt and difficulty - no doubt open in this House - but one on which I prefer to reserve my opinion."*

*160.* Lord Salmon considered that the law in relation to damages of the kind under consideration was most unsatisfactory (at p. 291C). Lord Russell of Killowen would have concluded that in the absence of evidence to suggest that Woodar would suffer any damage from a failure by Wimpey to pay the £150,000 Woodar had established no more than nominal damages (at p. 293F). Lord Keith of Kinkel agreed with Lord Scarman, at p. 300G, that it was open to the House to declare that: *"in the absence of evidence to show that he has suffered no loss, A, who has contracted for a payment to be made to C, may rely on the fact that he required the payment to be made as prima facie evidence that the promise for which he contracted was a benefit to him and that the measure of his loss in the event of non-payment is the benefit which he intended for C but which has not been received."*

Lord Scarman pointed out that this was clearly a difficult question.

161. It is clear from the speeches in the Woodar case that none of their Lordships were aware of an existing principle such as the broader ground contended for by Mr. Friedman. Lord Wilberforce and Lord Russell of Killowen were, to say the least, extremely doubtful whether such a principle could exist and certainly did not consider that mere loss of bargain or expectation per se with no resultant financial loss would justify substantial damages. Mr. Friedman has not persuaded me otherwise.

162. My Lords there is a fundamental distinction between the narrow and broader grounds whether as examined by Lord Griffiths or as expounded by Mr. Friedman. In the former the promisee seeks to recover the loss suffered by and for the benefit of the third party, and is accountable therefor to that party (***Joseph v. Knox, The Albazero*** 845-846). In the latter the promisee seeks to recover the loss which he personally has suffered. Given that the law is not generally concerned with what a plaintiff proposes to do with his damages one must ask what principle of law would require the promisee to hand over his damages to the third party. It was suggested that in applying the broader ground the court would only award substantial damages to the promisee if satisfied that he was likely to pass them on to the third party. John Cartwright in ***"Damages, Third Parties and Common Sense"*** (1996) 10 J.C.L. 244, 256 recognising the difficulty suggests that the court might require the promisee to give an appropriate undertaking on condition of allowing recovery. These suggestions, however, throw no light on the principle which dictates that thereafter the promisee should hand over the damages. Furthermore consequential loss resulting to the third party due to delay and resultant loss of profits would appear to be irrecoverable. Lord Griffiths in the ***St. Martins*** case [1994] 1 A.C. 85, 97A referred to the husband's loss as being the cost of securing performance of the bargain with the first builder, namely the proper completion of the roof repairs. He did not require to consider consequential loss.

163. The ***St. Martins*** case and ***Darlington Borough Council v. Wiltshier Northern Ltd.*** [1995] 1 W.L.R. 68 were both what I may describe as "***black hole***" cases, that is to say if the employer under the building contract could not recover from the contractor the owner of the building would receive nothing and the contractor would effectively be relieved of liability for his breach. The greater part of Lord Griffith's reasoning was directed to reject the proposition that entitlement to more than nominal damages was dependent upon the plaintiff having a proprietary interest in the subject matter. His examples predicated that the husband/employer required to pay for repairs rendered necessary by the breach. He did not require to address the situation where, as here, Panatown has neither spent money in entering into the contract nor intends to do so in remedying the breach and has therefore suffered no loss thereby. Had he had to do so I very much doubt whether he would have expressed the same views in relation thereto.

164. Since writing this speech, I have had the advantage of reading in draft the speech of my noble and learned friend Lord Goff of Chieveley. I respectfully agree with his rejection of the proposition that the employer under a building contract is unable to recover substantial damages for breach of the contract if the work in

question is to be performed on land or buildings which are not his property. In such a case the employer's right to substantial damages will, in my view, depend upon whether he has made good or intends to make good the effects of the breach. This appears to be implicit in the speech of Lord Griffiths at p. 97E and of Lord Keith of Kinkel at p. 95F to which I have already referred and to the two passages in the judgment of Oliver, J. in ***Radford v. De Froberville*** [1997] 1 WLR 1262 at 1283 and 1285 to which my noble and learned friend has referred. This produces a sensible result and avoids the recovery of an ***"uncovenanted"*** profit by an employer who does not intend to take steps to remedy the breach.

*165.* However, there is a further matter to be considered in this case namely the DCD in favour of UIPL. This, in my view, is equally relevant to the broader as to the narrow ground. The former as does the latter seeks to find a rational way of avoiding the "***black hole***." What is the justification for allowing A to recover from B as his own a loss which is truly that of C when C has his own remedy against B? I would submit none. The complications and anomalies to which Lord Diplock referred in **The Albazero** [1977] A.C. 774, 848F as arising from two contracts of carriage for the same goods could arise equally if not more sharply were Panatown entitled to claim substantial damages on the broader ground. If Panatown have a claim for loss of expectation of interest measured by the cost of achieving what they contracted for and UIPL have a separate claim in relation to the same defects McAlpines' cannot be mulcted twice over in damages. Panatown's claim for loss of expectation of interest can have only nominal value when UIPL has an enforceable claim and Panatown has no intention of taking steps to remedy the breach. Were it otherwise the great practical difficulties referred to by my noble and learned friend Lord Browne-Wilkinson at the end of his speech would arise. Lord Griffiths in a passage to which I have already referred ([1994] 1 A.C. 85, 97E) accepted that A should not have a remedy for loss of cargo which had caused him no financial loss when C had a direct right of action. It would be surprising if he had taken a different view of the position of Panatown and UIPL. I therefore consider that Panatown is not entitled to recover under Mr. Friedman's broader ground not only because they have suffered no financial loss but also because UIPL have a direct right of action against McAlpine under the DCD. As I have come to the conclusion that neither the narrow nor the broader ground is applicable to the facts of this case I would allow the appeal.

**LORD BROWNE-WILKINSON** My Lords,

166. This appeal raises again the question which was considered by the House in ***St. Martin's Property Corporation v. Sir Robert McAlpine Ltd.*** (heard with ***Linden Gardens Trust Ltd. v. Lenesta Sludge Disposals Ltd.)*** [1994] 1 A.C. 85, viz., where A enters into a contract with B for the erection by B of a building on land belonging to C and the building so erected is defective, have either A or C a remedy against B? The general rule is that A can only recover compensation for damage that A has suffered; it is argued that, since neither the building nor the land belonged to A, no compensatable damage has been suffered by A. C as owner of the land and building has suffered damage but, not being a party to the contract, it is said that C has no claim against B. The legal position in cases such as these is now fundamentally affected by the Contract (Rights of Third Parties) Act 1999. However the Act does not apply to the present case where all the events took place before that Act came into force.

167. In the ***St. Martin's*** case, one company in the group (A) contracted with McAlpines (B) for the erection of a building on land which at the date of contract belonged to A but which, before the date of breach, had been transferred to another company in the group (C). The building was defective. The contract contained no provision enabling C to sue B for the defect in the building. B argued that no damages were recoverable by A: the wrong done had fallen into a black hole where no one had a claim. Your Lordships rejected that submission on what was called in argument "the narrower ground."

168. The narrower ground starts by accepting the basic proposition that A, not owning the land at the date of breach, can show no compensatable loss and therefore no substantial damage suffered by A. However, the majority of the members of the Committee extended the reasoning in ***The Albazero*** [1977] A.C. 774, to cover the case so as to hold that where A enters into a contract with B relating to property and it is envisaged by the parties that ownership of that property may be transferred to a third party, C, so that the consequences of any breach of contract will be suffered by C, A has a cause of action to recover from B the loss suffered by C. However, two points are clearly established by the decision in both ***The Albazero*** and the ***St. Martin's*** case. First, A is accountable to C for any damages recovered by A from B as compensation

for C's loss: *The Albazero* at p. 888D. Second, the exceptional principle does not apply (because it is not needed) where C has a direct remedy against B: see the ***The Albazero*** at p. 848 and the decision itself which, whilst recognising the exception, held that it did not apply to that case since the consignee of the goods had a direct claim; *St. Martin's* case, at p. 115E-F.

169. Lord Griffiths decided the ***St. Martin's*** case on what has been called "***the broader ground.***" In the present case it is argued that the broader ground represents the right approach in law and that it applies even in cases where the third party has a cause of action directly against the defaulting promisor. Before considering it in greater detail I will shortly summarise the relevant facts of the present case, which are fully stated in the speech of my noble and learned friend Lord Goff of Chieveley.

170. The respondent, Panatown, entered into a building contract with Alfred McAlpine Construction Ltd. under which McAlpine undertook to design and construct an office building on a site. Panatown did not own that site. However, Panatown was part of the Unex Group of which Unex Corporation Ltd. is the parent. Another member of the group was U.I.P.L. which did own the land. Defects have appeared in the building erected by McAlpine and Panatown has launched arbitration proceedings claiming substantial damages. If these were all the relevant facts, the case would be covered by the decision in the *St. Martin's* case: Panatown would be entitled on the narrower ground to recover the loss suffered by U.I.P.L. through the failure to construct a sound building on U.I.P.L.'s land.

171. But, critically, there is in the present case an additional factor which was absent in the *St. Martin's* case. In negotiating and agreeing the contractual arrangements, the Unex Group negotiated for, and obtained, a direct contractual obligation between McAlpine and U.I.P.L. the owner of the site. Under a duty of care deed ("the D.C.D.") McAlpine undertook to U.I.P.L. as follows:

> *"**1. Warranties** The contractor undertakes with the building owner that in respect of all matters that lie within the scope of his responsibilities under the building contract (a) he has exercised and will continue to exercise all reasonable skill, care and attention; (b) he shall owe a duty of care to the building owner in respect of such matters; (c) the building owner shall be entitled to rely upon the contractor's professional skill and judgment in respect of such matters as defined in the terms of the building contract; (d) he will use his reasonable endeavours to maintain and enforce professional indemnity insurance without any material excesses or unusual exclusions taken out with reputable insurers carrying on business in the United Kingdom sufficient to cover any liabilities of the contractor which may arise out of the work carried out pursuant to the building contract up to a limit in respect of each and every claim of not less than £3m. and will use his reasonable endeavours to maintain the same until 12 years after the completion of his services under the building contract and will produce such evidence as the building owner may require to satisfy itself that the terms of this clause have been complied with."*

172. By clause 3 it was expressly provided that U.I.P.L. could assign the D.C.D. to its successors in title or to any other party with the consent of the contractor such consent not to be unreasonably withheld.

173. Therefore the whole contractual matrix relating to this development envisaged that McAlpine's obligations under the building contract were to be enforceable against McAlpine not only by Panatown but also to a very substantial extent by U.I.P.L. and its successors in title under the D.C.D. It was suggested in argument that the purpose of the D.C.D. was to give purchasers of the site from the Unex Group undoubted causes of action for breach of a tortious duty of care. Even if that is so, it does not alter the fact that under the D.C.D., U.I.P.L. itself has the right to claim substantial damages for any negligent performance of the building contract, a right which will cover most of the claims arising under the building contract.

174. In my judgment the direct cause of action which U.I.P.L. has under the D.C.D. is fatal to any claim to substantial damages made by Panatown against McAlpine based on the narrower ground. First, the principle in ***The Albazero*** [1977] A.C. 774 as applied to building contracts by the ***St. Martin's*** case [1994] 1 A.C. 85 is based on the fact that it provides a remedy to the third party *"where no other would be available to a person sustaining loss which under a rational legal system ought to be compensated by the person who has caused it.":* see ***The Albazero***, at p. 847B and the *St. Martin's* case, at p. 114G. If the contractual arrangements between the parties in fact provide the third party with a direct remedy against the wrongdoer the whole rationale of the rule disappears. Moreover, as I have said, both the decision in ***The Albazero*** case itself and dicta in

the *St. Martin's* case at p. 115F state that where the third party (C) has a direct claim against the builder (B) the promisee under the building contract (A) cannot claim for the third party's damage.

175. I turn now to the broader ground on which Lord Griffiths decided the *St. Martin's* case. He held that the building contractor (B) was liable to the promisee (A) for more than nominal damages even though A did not own the land at the date of breach. He held in effect that by reason of the breach A had himself suffered damage, being the loss of the value to him of the performance of the contract. On this view even though A might not be legally liable to C to provide him with the benefit which the performance of the contract by B would have provided, A has lost his ***"performance interest***" and will therefore be entitled to substantial damages being, in Lord Griffiths' view, the cost to A of providing C with the benefit. In the *St. Martin's* case Lord Keith of Kinkel, Lord Bridge of Harwich and I all expressed sympathy with Lord Griffiths' broader view. However, I declined to adopt the broader ground until the possible consequences of so doing had been examined by academic writers. That has now happened and no serious difficulties have been disclosed. However, there is a division of opinion as to whether the contracting party, A, is accountable to the third party, C, for the damages recovered or is bound to expend the damages on providing for C the benefit which B was supposed to provide. Lord Griffiths in the ***St. Martin's*** case (at p. 97G) took that view. But as I understand them Lord Goff of Chieveley and Lord Millett in the present case (in agreement with Lord Steyn in ***Darlington Borough Council v. Wiltshier Northern Ltd.*** [1995] 1 W.L.R. 68, 80H) would hold that, in the absence of the specific circumstances of the present case A, is not accountable to C for any damages recovered by A from B.

176. I will assume that the broader ground is sound in law and that in the ordinary case where the third party (C) has no direct cause of action against the building contractor (B) A can recover damages from B on the broader ground. Even on that assumption, in my judgment Panatown has no right to substantial damages in this case because U.I.P.L. (the owner of the land) has a direct cause of action under the D.C.D.

177. The essential feature of the broader ground is that the contracting party A, although not himself suffering the physical or pecuniary damage sustained by the third party C, has suffered his own damage being the loss of his performance interest, i.e. the failure to provide C with the benefit that B had contracted for C to receive. In my judgment it follows that the critical factor is to determine what interest A had in the provision of the service for the third party C. If, as in the present case, the whole contractual scheme was designed, inter alia, to give U.P.I.L. and its successors a legal remedy against McAlpine for failure to perform the building contract with due care, I cannot see that Panatown has suffered any damage to its performance interests: subject to any defence based on limitation of actions, the physical and pecuniary damage suffered by U.P.I.L. can be redressed by U.P.I.L. exercising its own cause of action against McAlpine. It is not clear to me why this has not occurred in the present case: but, subject to questions of limitation which were not explored, there is no reason even now why U.P.I.L. should not be bringing the proceedings against McAlpine. The fact that the D.C.D. may have been primarily directed to ensuring that U.P.I.L.'s successors in title should enjoy a remedy in tort against McAlpine is nothing to the point: the contractual provisions were directed to ensuring that U.P.I.L. and its successors in title did have the legal right to sue McAlpine direct. So long as U.P.I.L. enjoys this right Panatown has suffered no failure to satisfy its performance interest.

178. The theoretical objection to giving the contracting party A substantial damages for breach of the contract by B for failing to provide C with a benefit which C itself can enforce against B is further demonstrated by great practical difficulties which such a view would entail. Let me illustrate this by postulating a case where, before the breach occurred, U.P.I.L. had with consent assigned the benefit of the D.C.D. to a purchaser of the site, X. What if Panatown itself was entitled to, and did, sue for and recover damages from McAlpine? Presumably McAlpine could not in addition be liable to X for breach of the D.C.D.: yet Panatown would not be liable to account to X for the damages it had recovered from McAlpine. The result would therefore be another piece of legal nonsense: the party who had suffered real, tangible damage, X, could recover nothing but Panatown which had suffered no real loss could recover damages. Again, suppose that X agrees with McAlpine certain variations of McAlpine's liability under the building contract. What rights would Panatown then have against McAlpine? The Law Commission in its Report ***"Privity of Contract: Contracts for the Benefit of Third Parties*** (1996) (Law Com. No. 242) considered at length

questions like these (see in particular paragraphs 11.14, 11.21 and 11.22) and many other problems such as set off and counter-claims. The Law Commission recommended that in certain defined circumstances third parties should be entitled to enforce the contract. But in the draft Bill annexed to the Report and in the Act of Parliament which enacted the recommendations, the Contract (Rights of Third Parties) Act 1999, specific statutory provisions were included to deal with the difficulties arising. Although both the Law Commission's Report (paragraphs 5.10 and 5.11) and sections 4 and 6(1) of the Act make it clear that the Act is not intended to discourage the courts from developing the rights of third parties when it is appropriate to do so, in my judgment there is little inducement in a case such as the present where a third party has himself the right to enforce the contract against the contract breaker, to extend the law so as to give both the promisee and the third party concurrent rights of enforcement.

179. For these reasons I would allow the appeal .

**LORD MILLETT** My Lords,

180. In 1989 the Unex Group of companies decided to develop a piece of land at Hills Road, Cambridge by constructing an office building and car park on the site. Financing for the project was obtained by the Group, probably by the parent company Unex Corporation Ltd., and provided to one of its wholly owned subsidiaries Panatown Ltd. ("Panatown"). Panatown duly entered into a building contract as employer with Alfred McAlpine Construction Ltd. ("McAlpine"). At all material times the site was owned by another member of the Group, Unex Investment Properties Ltd. ("U.I.P.L."). Ordinarily of course it is the company which owns the land which enters into the building contract as employer. The choice of Panatown rather than U.I.P.L. was entirely tax-driven. The principal question in this appeal is whether the fact, known to McAlpine, that the site was owned by another member of the Group and not by the building employer should affect the employer's remedies under the building contract.

181. The building contract was a modified standard form of contract. Like all such contracts, it was lengthy and extremely elaborate. It contained an arbitration clause. The contract sum was in excess of £10 million. The contractual documentation, which was voluminous, included a Duty of Care Deed ("the D.C.D.") entered into directly between McAlpine and U.I.P.L. This gave UIPL as building owner a direct remedy against McAlpine in the event of any failure by McAlpine to exercise reasonable skill, care and attention in respect of any matter within the scope of its responsibilities under the building contract. The D.C.D. was expressly made assignable by U.I.P.L. to its successors in title with McAlpine's consent, such consent not to be unreasonably withheld. It was a short form of contract and contained no arbitration clause. The structural and M.& E. engineers entered into similar Duty of Care Deeds in favour of U.I.P.L. McAlpine also undertook to enter into an unqualified warranty with any future lessee of the site that it had complied with its obligations under the building contract. The facts that U.I.P.L. was a party to the D.C.D. and that it gave McAlpine permission to enter on its land and carry out the works there (which it had no contractual obligation to do) show that it knew and approved of the proposed works.

182. In 1992 Panatown served notice of arbitration on McAlpine under the building contract claiming damages for defective work and delay. Although breach is disputed the existence of defects in the building is not. McAlpine has acknowledged that there are significant defects in the steel frame and foundations of the building and has accepted that insofar as those defects arise out of a breach of the building contract it is responsible for any necessary remedial works. Panatown alleges that the defects are so serious that the existing building may have to be demolished and entirely rebuilt. It estimates the total costs of rebuilding and the losses due to consequential delay at some £40 million.

183. In the ordinary way this dispute would be decided by arbitration and result, if Panatown were successful, in an award of substantial damages. McAlpine, however, contends that Panatown is not entitled to substantial damages; it is entitled to nominal damages only because it is not the owner of the site and has accordingly suffered no loss. The loss, McAlpine claims, has been suffered by U.I.P.L., which must sue under the D.C.D.

184. In the Court of Appeal Panatown successfully countered this argument by relying on what has variously been described as *"the rule in* ***Dunlop v. Lambert*** *(1839) 6 Cl. & F. 600"* or "*the narrow ground"* in ***St. Martins Property Corporation Ltd. v. Sir Robert McAlpine Ltd.*** [1994] 1 A.C. 85. This acknowledges that the loss was suffered by U.I.P.L. but allows Panatown to recover damages in respect of such loss on the footing that

it will account for them to U.I.P.L. Before your Lordships Panatown, while maintaining this as a fall-back position, has primarily contended for "*the broad ground*" suggested by Lord Griffiths in the ***St. Martins*** case. This way of putting the case treats the loss occasioned by McAlpine's breach of the building contract as a loss sustained by Panatown itself. This would entitle Panatown to retain the damages for its own benefit, though since it is a member of the same Group as U.IP.L., and must be under the same equitable obligation in relation to the damages as it was in relation to the building finance in the first place, the difference between the two approaches would appear to have no commercial significance. There is certainly no reason to suppose that U.P.I.L. has any objection to the result for which Panatown contends.

185. Before your Lordships Panatown has advanced an even more far-reaching argument by challenging the existence of the supposed rule of English law that a plaintiff cannot recover damages for breach of contract in respect of a loss suffered by a third party. It is convenient to deal with this submission first.

***The general rule.***

186. There is no direct authority for the rule which, so Panatown submits, has been criticised so often and has been subjected to so many exceptions that we should take this opportunity to lay it to rest.

187. Discussion of the rule almost invariably begins with the well-known passages to which your Lordships have referred in the judgments of Parke B. in ***Robinson v. Harman*** (1848) 1 Exch. 850 and Lord Blackburn in ***Livingstone v. Rawyards Coal Company*** (1880) 5 App. Cas. 25. Yet neither passage is concerned with the supposed rule, or even with the still more general rule that only compensatory damages may be awarded for breach of contract. As their opening words make clear, they are concerned with the measure of compensatory damages in respect of loss sustained by the plaintiff. The general rule is that damages for breach of contract are compensatory, and both Parke B. and Lord Blackburn were speaking of the ordinary case where the plaintiff seeks to recover compensation for his own loss. Neither of them was concerned with the question whether there were exceptions to the general rule. Neither of them had in mind the possibility of a claim for restitutionary damages in a proper case or the award of compensatory damages to a party other than the party who has suffered the loss. A more relevant statement of the rule in relation to compensatory damages can be found in the reference by Lord Diplock in ***The Albazero*** [1977] A.C. 774, 845G to: *". . . the general rule of English law that a party to a contract apart from nominal damages, can only recover for its breach such actual loss as he himself has sustained . . ."*

188. The necessity of such a rule in relation to compensatory damages is, in my opinion, self-evident. Compensation is compensation for loss; its object is to make good a loss. It is inherent in the concept of compensation that only the person who has suffered the loss is entitled to have it made good by compensation. Compensation for a third party's loss is a contradiction in terms. It is impossible on any logical basis to justify the recovery of compensatory damages by a person who has not suffered the loss in respect of which they are awarded unless he is accountable for them to the person who has. As my noble and learned friend Lord Goff of Chieveley observes, allowing the contracting party to recover damages for the benefit of a third party is not an exception to the rule regarding compensatory damages but a means of circumventing the privity rule.

189. Although there is no direct authority for the rule, it has been stated or assumed so often, and has been the basis upon which so many cases have been decided, that it is far too late for it to be challenged now. It is far from clear that the rule is subject to numerous exceptions; the rule in ***Dunlop v. Lambert*** 6 Cl. & F. 600 is probably the only true exception. If the failure of English law to award substantial damages in proper cases defeats the parties' expectations and leads to injustice, the fault does not lie in the general rule but in the unduly narrow way in which the Courts have approached the concept of loss.

***The narrow ground.***

190. There are several apparent but well-established exceptions to the general rule of English law that in an action for breach of contract a plaintiff can only recover substantial damages for the loss which he has himself sustained. I say "apparent exceptions," for I regard most of them as explicable in a manner consistent with the rule. The first is the right of a trustee to recover damages for breach of contract in respect of the loss sustained by the beneficiaries. But an action for damages for breach of contract is an action at common law, and in the eyes of the common law it is the trustee who sustains the loss. The fact

that a Court of Equity will compel him to hold the benefit of the contract and any damages recovered for its breach in trust for the beneficiaries is neither here nor there.

191. A second apparent exception arises where the action is brought by an agent to recover in respect of the loss sustained by an undisclosed principal. In such a case the agent can both sue and be sued on the contract. But the agent is treated as suing in respect of his own loss, not his principal's, and it is no defence to the party in breach that by reason of the agent's dealings with a third party the actual incidence of the loss may fall elsewhere: see *Bowstead on Agency* 15th ed. (1985), p. 431 and ***Bovis International Inc. v. The Circle Ltd. Partnership*** (1995) 49 Con. L.R. 12). A third is the right of a bailee in possession to recover for loss or damage to his bailor's goods even though he would have had a good defence to an action by the bailor: ***The Winkfield*** [1902] P. 42 (and see sections 7 and 8 of the Torts (Interference with Goods) Act 1977). The principle here is that as between bailee and stranger possession gives a complete title and entitles the bailee to damages for the loss or injury to the property itself, whereas as between bailee and bailor the real interests of each must be ascertained. As the bailee must account to the bailor for the thing bailed, so he must account for its proceeds. What he receives above his own interest he receives to the use of the bailor; the wrongdoer, having paid damages in full to the bailee, has a good defence to any action by the bailor. This is not a true exception to the rule; so far as the wrongdoer is concerned, the bailee has full ownership and recovers damages for his own loss. There is an analogy with the case of the trustee, though the analogy is incomplete, for the bailor can bring his own proceedings and cannot compel his bailee to sue. But in both cases the fact that the contracting party is not the full owner of the property which has been lost or damaged is disregarded in ascertaining the extent of the wrongdoer's liability.

192. A further exception is the right of a person who has insured goods in appropriate terms to recover under the policy the full value of the goods even though the loss or part of it has been sustained by another party. The underlying rationale of this rule is uncertain. It has been explained as resting on agency, but this is doubtful. But the plaintiff must have an insurable interest in the goods, and this generally means that he is either a part-owner or bailee (see ***Waters v. The Monarch Fire & Life Assurance Co***. (1856) 5 El. & Bl. 870), in which case the rule may be an extrapolation from the exception last-mentioned and so not a true exception at all.

193. In all these cases the common law, following the law merchant, has been able to reconcile the practical needs of commercial men with principle by attributing the loss to the contracting party. The remaining, and probably only true, exception is the so-called rule in *Dunlop v. Lambert* as rationalised by Lord Diplock in ***The Albazero*** [1977] A.C. 774. This allows a consignor of goods to recover from the carrier in full in respect of loss or damage to the goods in transit even though he has parted with all property in the goods before they are lost or damaged and thus suffers no loss. The rule may be excluded by the contract of carriage, and is excluded where the consignee has his own action. Where the rule applies, the consignor must account to the consignee for the damages recovered on his behalf.

194. My noble and learned friend Lord Clyde has convincingly demonstrated that the rule is in fact based on a misunderstanding of the actual decision in *Dunlop v. Lambert*. But Lord Diplock's rationalisation of the rule has been recently considered and applied in a different context by your Lordships House, and where applicable it must be taken to represent the law today. It is encapsulated in the following passage of Lord Diplock's speech at p. 847: *"The only way in which I find it possible to rationalise the rule in* ***Dunlop v. Lambert*** *so that it may fit into the pattern of the English law is to treat it as an application of the principle, accepted also in relation to policies of insurance upon goods, that in a commercial contract concerning goods where it is in the contemplation of the parties that the proprietary interests in the goods may be transferred from one owner to another after the contract has been entered into and before the breach which causes loss or damage to the goods, an original party to the contract, if such be the intention of them both, is to be treated in law as having entered into the contract for the benefit of all persons who have or may acquire an interest in the goods before they are lost or damaged, and is entitled to recover by way of damages for breach of contract the actual loss sustained by those for whose benefit the contract is entered into."*

195. I do not with respect accept the Court of Appeal's analysis of this doctrine as "***contract-based***," leading to the conclusion that the general rule that a plaintiff cannot recover damages for the loss of a third party can be excluded or modified by agreement. Lord Diplock's language *("is to be treated in law*") shows that it is a

rule of law. My noble and learned friend Lord Goff of Chieveley so described it in ***White v. Jones*** [1995] 2 A.C. 207, 267. It does not depend on the proper construction of the contract. The parties cannot by contract create an exception to the general rule; any attempt to do so is likely to be struck down as a penalty. Still less can they contract out of the privity rule. But they may by their contract exclude the application of the doctrine, for it applies only *"if such be the intention of them both."* Lord Diplock used the language of imputed intention, and to this extent the doctrine can be said to be contractual; but imputed intention is merely a legal construct employed to justify a legal consequence which the law attaches to a particular factual situation.

196. The scope of the rule as enunciated by Lord Diplock is relatively narrow. It is not confined to contracts of carriage, but it appears to be limited in two respects. First, Lord Diplock confined it to cases where the breach of contract leads to property in the possession of the defendant being lost or damaged, so there is some affinity with the bailment cases. Indeed, Lord Diplock considered whether the law of bailment might provide an explanation for the rule, though in the end he did not think it did. Secondly, it must have been in the contemplation of the parties that the ownership of the property would or might in the ordinary course of business be transferred by the contracting party to a successor in title during the currency of the contract. In such a case the identity of the person who suffers loss if the property is lost or damaged depends on whether the breach of contract occurs before or after the ownership of the property has been transferred. It would be contrary to the expectation of commercial men if this were to affect the extent of the wrongdoer's liability. Accordingly, in the absence of a contrary indication, Lord Diplock's rationalisation of the rule allows the contracting party to sue on the contract and recover substantial damages in respect of breaches whether occurring before or after the ownership of the property has been transferred. Where they have occurred after the transfer the contracting party recovers damages for the benefit of his successor in title and must account to him for the proceeds.

197. In ***The Albazero*** itself the rule in ***Dunlop v. Lambert*** was not applied, because the goods were shipped under a bill of lading which gave the consignee his own cause of action against the carrier. As my noble and learned friend Lord Goff observes, this is because the function of the rule was to escape the undesirable consequences of the privity rule, and it does not apply where it is not needed. Curiously, while the scope and utility of the rule have been much reduced in its original context of the carriage of goods by sea, it has in recent years gained a new lease of life in an entirely different context. In the ***St. Martins*** case [1994] 1 A.C. 85 it was applied to a building contract where the building employer was the owner of the site at the date of the contract but it was in the contemplation of both parties that the site might be sold or transferred to a third party before the completion of the works. My noble and learned friend Lord Browne-Wilkinson explained at p. 114: *"In my judgment the present case falls within the rationale of the exceptions to the general rule that a plaintiff can only recover damages for his own loss. The contract was for a large development of property which, to the knowledge of both Corporation and McAlpine, was going to be occupied, and possibly purchased, by third parties and not by Corporation itself. Therefore it could be foreseen that damage caused by a breach would cause loss to a later owner and not merely to the original contracting party, Corporation. As in contracts for the carriage of goods by land, there would be no automatic vesting in the occupier or owners of the property for the time being who sustained the loss of any right of suit against McAlpine. On the contrary, McAlpine had specifically contracted that the rights of action under the building contract could not without McAlpine's consent be transferred to third parties who became owners or occupiers and might suffer loss. In such a case, it seems to me proper, as in the case of the carriage of goods by land, to treat the parties as having entered into the contract on the footing that Corporation would be entitled to enforce contractual rights for the benefit of those who suffered from defective performance but who, under the terms of the contract, could not acquire any right to hold McAlpine liable for breach. It is truly a case in which the rule provides 'a remedy where no other would be available to a person sustaining loss which under a rational legal system ought to be compensated by the person who has caused it."*

198. Lord Browne-Wilkinson made it clear that if the ultimate purchaser is given a direct cause of action against the contractor, as is the consignee under a bill of lading, the case falls outside the rationale of the rule. The original contracting party will not be entitled to recover damages for loss suffered by others who can themselves sue for such loss.

199. The ***St. Martins*** case did not merely apply the rule in ***Dunlop v. Lambert*** 6 Cl. & F. 600 in a new factual context. It extended it from contracts for the carriage of goods to contracts for the supply of services, and in particular to building contracts. By doing so it applied the rule in a different legal context, where the problem is not caused by the privity rule but by the unduly narrow approach which the courts have adopted towards the concept of loss. In the case of a contract of carriage where the breach of contract causes loss or damage to property, the loss is suffered by the party who owns the property at the date of breach. In the case of a contract for the supply of services, however, the loss arising from defective or incomplete performance is normally suffered by the party who ordered the services. A building contract would seem to occupy the middle ground. It is a contract for the supply of services in relation to land. It is to my mind far from axiomatic that the loss arising from defective or incomplete performance is suffered exclusively by the building owner and not, or not also, by the building employer who ordered and promised to pay for the works to be carried out.

200. Both ***The Albazero*** and ***St. Martins*** were concerned with a contract in relation to property where it was within the contemplation of both parties that the ownership of the property might be transferred to a third party before the completion of the contract. In ***Darlington B.C. v. Wiltshier Northern Ltd.*** [1995] 1 W.L.R.. 68, however, the principle was extended still further to a case like the present where the building employer did not own the property either at the date of the contract and or at the date of the breach and where no transfer of ownership had taken place.

201. The Court of Appeal treated this as an a fortiori case, or at best only a small extension of the principle. I do not think it was either. It not only applied the rule in ***Dunlop v. Lambert*** in a different legal context where damages were not being claimed for loss or damage to property, following the ***St. Martins*** **case** [1994] 1 A.C. 85 in this respect; but applied it in a situation where the rationale of the rule was wanting. It is one thing to treat the consignor of goods as contracting with the carrier for the safety of the goods on behalf of his successors in title the owners of the goods from time to time while they are in transit. It is another to treat the building owner as contracting for works to be done on land on behalf of his successors in title the owners of the land from time to time before the completion of the works. But it is quite another to treat a building employer with no title to the land as contracting on behalf of the owner of the land who, unlike the succeeding owners in the other cases, is identifiable and perfectly capable of contracting on his own behalf. This last step uncouples the rule from the need to deal with potential successors in title and eliminate the effect of the fortuitous distinction between breaches which occur before and those which occur after the ownership of the property has been transferred, and causes a beneficent rule to lose all contact with the grounds which originally sustained it.

202. I think that this further extension is very difficult to justify. It extends the benefit of the rule in ***Dunlop v. Lambert,*** itself an exception to the general rule applicable to compensatory damages, beyond successors in title of the original contracting party to everyone with an interest in the property. This is too extensive for an exception, particularly where damages are not claimed for loss or damage to property; it comes near to repealing the general rule. But I am far from saying that ***Darlington Borough Council v Wiltshier Northern Ltd.*** [1995] 1 W.L.R. 68 was wrongly decided. It was obvious to the contractor throughout that the building employer was not the building owner and that the works were to be carried out for the benefit of the owner. It would have been unjust to allow the contractor to escape liability because, to its knowledge, the works were to be carried out on land not owned by the building employer. On the other hand, I find it difficult to understand why a contractor's liability should depend upon his knowledge of the building employer's lack of title. He would, no doubt, normally assume that the land belonged to the building employer, and that he would be liable to substantial damages for incomplete or defective performance of his contract. He might be mildly interested to learn that in fact the land belonged to a third party, but I doubt that it would occur to anyone but a lawyer - and evidently not to every lawyer - that this would exonerate him from liability to substantial damages for breach of contract. These considerations indicate to my mind that cases like the *Darlington Borough Council* case and the present ought to be accommodated, if at all, within some wider principle independently of the rule in ***Dunlop v. Lambert***.

***The broad ground.***

203. In the ***St. Martins*** case [1994] 1 A.C. 85, 96-98 Lord Griffiths refused to accept the proposition that in the case of a contract for work, labour and the supply of materials the recovery of more than nominal damages should depend on the plaintiff having a proprietary interest in the subject matter of the contract at the date of breach. He observed that in every day life contracts for work and labour are constantly placed by persons who have no proprietary interest in the subject matter of the contract. He instanced the common case where the matrimonial home is owned by the wife, the couple's other assets belong to the husband and he is the sole earner. The house requires a new roof and the husband places a contract with a local builder to carry out the work. The husband contracts as principal and not as agent for his wife because only he can pay for the work. The builder fails to repair the roof properly and the husband has to call in and pay another builder to complete the work. Lord Griffiths considered that it would be absurd to say that the husband has suffered no loss because he does not own the property. He suggested that the husband has suffered loss because he did not receive the bargain for which he contracted with the first builder and the measure of damages is the cost of securing performance of that bargain by having the repairs done properly by the second builder.

204. Lord Griffiths did not consider that the case was covered by the rule in ***Dunlop v. Lambert*** 6 Cl. & F. 600. He distinguished that case and *The Albazero* [1977] A.C. 774 on the ground that they were claims for damages for the loss of cargo, not with a claim to damages to enable the bargain (in that case the contract of carriage) to be fulfilled.

205. Lord Browne-Wilkinson had considerable sympathy with this approach. He recognised that a contract for the supply of goods or of work, labour and materials is not the same as a contract for the carriage of goods. Breach of a supply contract involves a failure to provide the very goods or services which the defendant has contracted to supply and for which the plaintiff has paid or agreed to pay. If the breach is discovered before the payment of the contract price, the price is abated by the cost of making good the defects. The right to abatement does not depend upon ownership by the plaintiff of the property, whether goods or land, on which the work was to be carried out; and it would be very odd if the plaintiff's rights varied according to whether the breach was discovered before or after the payment of the price.

206. In the present case McAlpine insists that there is nevertheless a critical distinction between abatement of the price and damages in that damages may exceed the contract price. The building employer, it concedes, may obtain abatement of the price, because he is the paying party; but only the building owner may recover damages for breach of contract, because only he has suffered any loss. I see the distinction, of course, but I think that it is less than it appears. Abatement of the purchase price is a species of damages; it is not a form of restitution, since ex hypothesi the plaintiff has not made payment. The distinction between being charged for more than one has received and having to pay a third party to supply what one ought to have but has not received is, in economic terms at least, a distinction without a difference. The argument does, however, throw up a real issue; who in contemplation of law is the recipient of the services contracted for? Is it the building employer who ordered them? Or is it the building owner who owns the land on which the works were to be carried out? Or can it be both? In ***Customs and Excise Commissioners v. Redrow Group Plc***. [1999] 1 WLR 408, where the taxpayer instructed estate agents to value and act in the sale of a customer's house, your Lordships' House held that the right to have goods or services supplied to a third party was itself a right to a supply of services. The case was concerned with VAT, not with the contractual measure of damages; but it is a useful illustration of a case where, on the facts, the party who ordered services to be supplied to a third party had a strong commercial interest in having the services properly performed.

207. In the ***St. Martin*** case Lord Browne-Wilkinson considered that there was much to be said for drawing a distinction between cases where the ownership of property is relevant to prove that the breach of contract has caused the plaintiff loss and contracts for the supply of goods or services where the contract requires the very goods or services to be supplied. But understandably he was unwilling to express a concluded view on the point, which might have profound effects on commercial contracts which had not been fully explored in argument and which he considered merited academic exposure before it was decided by the House. He found it unnecessary to do so because, unlike Lord Griffiths, he was satisfied that the case could be brought within the rule in ***Dunlop v. Lambert***. Two of the other members of the House (Lord Keith of

Kinkel and Lord Bridge of Harwich) expressed themselves as attracted by the broad principle favoured by Lord Griffiths, but for similar reasons were content to dispose of the appeal on the narrow ground.

208. My Lords, Lord Griffiths was not proposing to depart from the general rule that a plaintiff can only recover compensatory damages for breach of contract in respect of a loss which he has himself sustained. He was insisting that, in certain kinds of contract at least, the right to performance has a value which is capable of being measured by the cost of obtaining it from a third party. In ***Darlington v. Wiltshier*** [1995] 1 W.L.R. 68 Steyn L.J. expressed himself as being in agreement with Lord Griffith's broad principle, which he considered to be based on classic contractual theory. Indeed, he adopted it as part of his reasoning. But he held that the case was also covered by the rule in *Dunlop v. Lambert*, and I have a difficulty with this. I do not think that it can be both. The rule in ***Dunlop v. Lambert*** is an (incidental) exception to the general rule that a plaintiff can only recover damages for his own loss. Lord Griffiths' broader principle treats the plaintiff as recovering for his own loss, and is thus is an application of the general rule and not an exception to it. For the same reason I cannot accept the Court of Appeal's attempt in the present case to unify the narrow and broad grounds by treating the broad ground as "***the underlying principle***" of the narrow. If the House had felt itself free to adopt the broad ground in the ***St. Martin*** case, then logic would have required it to adopt it in place of and not in addition to the narrow ground.

209. If in the ***St. Martin*** case Lord Browne-Wilkinson was wise to await academic consideration of Lord Griffiths' broad principle, as I respectfully think he was, it has now been received in some abundance, particularly since the decision of the Court of Appeal in the present case. Commentators have given it their support, as might be expected with varying degrees of enthusiasm. None has rejected it outright or suggested that it is heterodox. There has for some time been a growing consensus among academic writers that English law adopts an unduly narrow approach to the concept of loss, and that it ought to recognise that the performance of a contractual obligation may have an economic value of its own which is capable of sounding in damages. Such damages may be measured by the cost of obtaining alternative performance, but they may also take account of loss from delay and other consequential loss. I would instance in particular: Brian Coote: 13 Journal of Contract Law 91; Professor Treitel "***Damages in Respect of a Third Party's Loss***" (1998) L.Q.R. 527 (a muted dubitante); I.N. Duncan-Wallace Q.C.: "***Third Party Damage: No Legal Black Hole" (***1999) 115 L.Q.R. 394 and (1999) 15 Const. L.J. 245; Gerard McMeel (1999) R.L.R. 20. I have also had the advantage of reading a paper given by Janet O'Sullivan in 1999 which is shortly to be published. Her paper was prompted by the decision of the Court of Appeal in ***Attorney-General v. Blake*** [1998] Ch. 439, which opened the door to the possibility of restitutionary damages for breach of contract. Her preferred solution was the recognition of the performance interest as a basis for compensatory damages. I think that there is room for both approaches. In some cases one approach may be more appropriate, in others the other. They will often produce the same measure of damages, though they may not always do so. But there has always been some flexibility in the measure of damages, and this is not undesirable.

210. To my mind the most significant feature of the academic literature is that no one has suggested that the adoption of the broad ground would have any adverse consequences on commercial arrangements. Nor, despite every incentive to do so, has McAlpine been able to suggest a situation in which it would cause difficulties or defeat the commercial expectations of the parties. In my view it would help to rationalise the law and provide a sound basis for decisions like ***Ruxley Electronics and Construction Ltd. v. Forsyth*** [1996] A.C. 344 and ***Jackson v. Horizon Holidays Ltd.*** [1975] 1 W.L.R. 1468. If it is adopted, it will be for future consideration whether it would provide the better solution in cases such as ***St. Martin*** also.

211. In the ***Ruxley*** case your Lordships' House refused to allow the full costs of reinstatement on the well-recognised ground that reinstatement would be an unreasonable course to take. But it was not constrained to withhold substantial damages on the ground that the value of the property was unaffected by the breach. It expressly rejected the view that these were the only two possible measures of damage in a building case. It awarded an intermediate sum for "loss of amenity." The evidence, however, showed that, viewed objectively, there was no loss of amenity either. The amenity in question was entirely subjective to the plaintiff; and its loss could equally well, and perhaps more accurately, be described as defeated expectation.

212. In ***Woodar Investment Development Ltd. v. Wimpey Construction Ltd***. [1980] 1 W.L.R. 277 Lord Wilberforce was prepared to support the ***Jackson*** case [1975] 1 W.L.R. 1468 either as a broad decision on the measure of damages or as an example of a type of contract calling for special treatment. Other examples which he instanced were persons contracting for family holidays, ordering meals in restaurants for a party, or hiring a taxi for a group. He observed that there are many situations of daily life which do not fit neatly into conceptual analysis but which require some flexibility in the law of contract.

213. It must be wrong to adopt a Procrustean approach which leaves parties without a remedy for breach of contract because their arrangements do not fit neatly into some pre-cast contractual formula. When such arrangements have been freely entered into and are of an everyday character or are commercially advantageous to the parties, it is surely time to re-examine the position.

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

215. The idea that a contracting party is entitled to damages measured by the value of his own defeated interest in having the contract performed was not new in 1994. A strong case for its adoption in the case of consumer contracts was made in an important article *"**The Consumer Surplus**"* [1979] 95 L.Q.R. 581, in which the authors explained that this would make a significant difference only in a minority of cases. As I shall show, the language of defeated expectation has been employed in the context of building contracts, at least in ordinary two-party cases like ***Ruxley,*** since the 19th century. As for three-party cases like the present, Lord Keith adverted to it as a possible solution in the ***Woodar*** case [1980] 1 W.L.R. 277, and in the same case both Lord Salmon and Lord Scarman expressed the view that the question required consideration by the House. Lord Scarman said at. pp.300-301: *"Likewise, I believe it open to the House to declare that, in the absence of evidence to show that he has suffered no loss, A, who has contracted for a payment to be made to C, may rely on the fact that he required the payment to be made as prima facie evidence that the promise for which he contracted was a benefit to him and that the measure of his loss in the event of non-payment is the benefit which he intended for C but which has not been received. Whatever the reason, he must have desired the payment to be made to C and he must have been relying on B to make it. If B fails to make the payment, A must find the money from other funds if he is to confer the benefit which he sought by his contract to confer upon C. Without expressing a final opinion on a question which is clearly difficult, I think the point is one which does require consideration by your Lordships' House."*

216. Whether the law should take account of the performance interest when considering the measure of damages for breach of contract arose clearly in the seminal case of ***Radford v. De Froberville*** [1977] 1 W.L.R. 1262. The landlord of premises let to tenants had obtained a covenant from the owner of neighbouring land to build a garden wall on the neighbour's side of the boundary. The wall was not built. The landlord sued on the covenant for damages, claiming the cost of building a similar wall on his own side of the boundary. Oliver J. found that the absence of the wall caused no reduction in value to the landlord's reversionary interest, and that the landlord (as opposed to his tenants) would derive no amenity or other advantage from having the wall built. The defendant contended that, since the landlord had suffered no loss, he was entitled to nominal damages only. The judge found that the landlord intended to apply the damages in building the wall in order to provide his tenants with the amenity which the promised wall would have done, and that this was a reasonable course for him to take. On these findings Oliver J. awarded the landlord the cost of building the wall. He said at p. 1270: *"Now, it may be that, viewed objectively, it is not to the plaintiff's financial advantage to be supplied with the article or service which he has stipulated. It may be that another person might say that what the plaintiff has stipulated for will not serve his*

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

217. This is the language of Lord Griffiths' broad ground. Moreover, Oliver J. raised the question of the tenants' interest, recalling the defendant's argument that the landlord was merely a landlord with an investment property and that he was not entitled to damages for a loss suffered by his tenants who were strangers to the contract. He dealt with the point, at. p. 1285: *"Whilst I see the force of this, I do not think that it really meets the point that, whatever his status, the plaintiff had a contractual right to have the work done and does in fact want to do it. I refrain from expressing any view about what the position would be if his motives were merely capricious, for there is no suggestion of anything of that sort. As it seems to me, the fact that his motive may be to confer what he conceives to be a benefit on persons who have no contractual rights to demand it cannot alter the genuineness of his intentions. The recent case of* ***Jackson v. Horizon Holidays Ltd****. [1975] 1 W. L.R. 1468 demonstrates that the plaintiff may obtain damages for breach of a contract entered into for the benefit of himself and other persons not parties to the contract."*

This is the language of defeated expectation with substantial damages being awarded for the loss of the performance interest.

218. My Lords, Oliver J.'s judgment has been very influential. His test of reasonableness was approved and applied by your Lordships' House in ***Ruxley Electronics and Construction v. Forsyth*** [1996] A.C. 344. I believe that it provides the key to the present case. The similarity of the two cases is striking. Both are concerned with building contracts in circumstances where performance would benefit a third party to the contract but not the promisee. I would draw particular attention to the fact that in ***Radford v. De Froberville*** [1977] 1 W.L.R. 1262 the proper measure of damages was taken to be the cost of doing the promised work (i.e. fulfilling the landlord's contractual expectation) and not the tenants' loss of amenity. No independent attempt was made to evaluate this.

219. The seed was planted more than 20 years ago. It has been long in germination, but it has been watered and nurtured by favourable judicial and academic commentators in the meantime. I think the time has come to give it the imprimatur of your Lordships' House. I am not impressed by the argument that such a radical change, with the attendant risk of opening the floodgates to capricious and complex claims to damages in unforeseen situations of every kind, should be left to Parliament. In the first place, I do not think that it is a radical change. I respectfully agree with Steyn L.J. in ***Darlington Borough Council v. Wiltshier Northern Ltd.*** [1995] 1 W.L.R. 68 that it is based on orthodox contractual principles. And in the second place, the development of the remedial response to civil wrongs and the appropriate measure of damages are matters which have traditionally been the province of the judiciary. For the present I would restrict the broad ground to building contracts and other contracts for the supply of work and materials where the claim is in respect of defective or incomplete work or delay in completing it. I would not exclude the claim for damages for delay, since the performance interest extends to having the work done timeously as well as properly. There is no difficulty in quantifying the loss due to delay, at least in the family or group context. In the case of building contracts the broad ground is in line with the principle that the prima facie measure of damages is the cost of repair rather than the reduction in the market value of the property or any loss of amenity, even where the cost of repair is substantially greater, subject only to the qualification that the carrying out of the repairs must be a reasonable course to adopt: see ***Bellgrove v. Eldridge*** (1954) 90 C.L.R. 613: ***East Ham Corporation v. Bernard Sunley & Sons Ltd***. [1996] A.C. 406.

*220.* The rationale which underlies this measure of damages is instructive. It is best summed up in a passage in the judgment of Wetmore J. in an old Canadian case (***Allen v. Pierce*** **(**1895) 3 Terr.L.R. at p. 323) cited with approval in *Hudson's Building and Engineering Contracts* 11th ed., (1995) Vol. 1, p. 1047: *"It is not a mere matter of difference between the value of the material supplied and that contracted for, or of the work done and that which ought to have been done, or of the house as it stands and that which ought to have been built under the contract. If these were the standards of damages, there would be no point in a man contracting for the best materials. The owner*

*of the building is, therefore, entitled to recover such damages as will put him in a position to have the building he contracted for."*

221. Again this is the language of defeated expectation. Of course, as the last sentence cited shows, Wetmore J. was speaking of the ordinary two-party case where the building employer is also the building owner. But his reasoning applies equally, and perhaps with even greater force, to the case where the building employer is not the building owner. If it did not, there would be no point in the building employer entering into the contract at all. It would be strange logic to allow the building employer to recover the cost of achieving his contractual expectations even where these do not affect the value of his land, and insist at the same time that he must own the land in question if he is to recover more than nominal damages. In my opinion, it is not a departure from orthodoxy to say, adapting Wetmore J.'s words, that the building employer, whether or not he is also the owner of the building, is entitled to recover such damages as will put him in a position to have the building he contracted for.

222. Moreover, the question must be considered from a wider perspective than merely defective work. As my noble and learned friend Lord Goff observes, unless the law recognises the performance interest it can provide no remedy to the building employer if the contractor repudiates the contract before he has done any work at all, and the building employer has to engage another contractor to do the work at a higher price. This would be manifestly unjust, and to defend it by saying that the loss is suffered by the building owner (who in fact has suffered none) and not by the building employer is nothing short of absurd.

223. The broad ground may be more readily applicable where the contracting party had a legitimate interest, though not necessarily a commercial one, in placing the order for the services to be supplied to the third party. Where there is a family or commercial relationship between them, as in the present case, any such requirement is easily satisfied, though it would not be right to limit the application of the principle to cases where such a relationship exists. The charitable donor has a legitimate interest in the object of his charity. But I do not think that the existence of such an interest should be seen as a separate or necessary requirement. It is rather an aspect of the test adopted by Oliver J., that is to say, reasonableness. There is much to be said for the view expressed by Lord Scarman in ***Woodar v. Wimpey*** that the fact that a contracting party has required services to be supplied at his own cost to a third party is at least prima facie evidence of the value of those services to the party who placed the order.

***Must the building employer intend to carry out the work?***

224. Where the broad ground applies, the plaintiff recovers damages for his own loss, and accordingly in my opinion there can be no question of requiring him to account for them to the third party. In the *St. Martin* case Lord Griffiths drew attention to the fact that the person who places the contract suffers loss because he has to spend money to obtain the benefit of the bargain which the defendant had promised but failed to deliver. He added that the Court would wish to be satisfied that the repairs had been or would be carried out. Professor Treitel has argued that Lord Griffiths was merely saying that the plaintiff could recover damages in respect of his own loss in making alternative arrangements. I do not think that this can be right. If the making of such arrangements were a precondition of recovery, it would follow that in their absence no such damages would be recoverable. But a plaintiff is bound to mitigate his loss. He cannot increase it by entering into other arrangements. I respectfully agree with Steyn L.J. in the *Darlington Borough Council* case [1995] 1 W.L.R. 68 that what the plaintiff proposes to do with his damages is of no more concern to the party in breach in a three-party case than it is in a two-party case. In my opinion, it may be evidence of the reasonableness or otherwise of the plaintiff's claim to damages, but it cannot be conclusive.

225. In the present case, the development of the site was a group project financed by group money. Panatown was chosen to be the building employer, but it did not use its own money to fund the cost. This was provided to it from within the group, almost certainly (if implicitly) on terms that it should be applied in paying for the works and for no other purpose. U.I.P.L. was the building owner, and must be taken to have known and approved of the works and allowed Panatown to grant McAlpine permission to enter the land and carry out the works, presumably on the basis that they would be carried out properly and in accordance with the building contract. It would be inconsistent with these arrangements if Panatown were simply to retain the damages for its own benefit. They will almost certainly be held on trust to apply them at the direction of the group company which provided the building finance.

226. It may sometimes be implicit in the arrangements between the building owner and the building employer by which the building owner agrees to allow the contractor onto its land to carry out the proposed works that such works will be completed properly and in accordance with the building contract. I do not think that it is necessary or desirable to explore this question further in the present case, particularly as it may be precluded by the findings of fact below. It is sufficient that the necessary remedial work will obviously have to be carried out, and that it will have to be carried out at the expense of the group. Whether it is carried out directly or indirectly by or at the expense of Panatown itself or of another member of the group is not material. What matters is that the work will be done and that doing it will enable Panatown to obtain whatever benefit it sought to obtain as a member of the Unex Group by entering into the building contract. It will not, to use the language of Oliver J., obtain an uncovenanted benefit.

***Does the existence of the D.C.D. bar recovery?***

227. I am unable to accept McAlpine's submission that the parties were well aware of the problem caused by the fact that Panatown was not the owner of the site, and that the D.C.D. was intended to cater for this. It is much more likely that the parties, being businessmen and more sensible than lawyers, assumed that it made no difference which company in the group owned the land. If the present problem had been foreseen, Panatown would surely have insisted on taking the benefit of an unqualified warranty such as was proposed to be given to a future tenant. It would make no commercial sense for a future tenant to have a more effective remedy than either the building employer or the building owner.

228. I agree with the Court of Appeal that the D.C.D. was primarily designed to cater for subsequent purchasers. This is also the view expressed by Mr. Duncan Wallace Q.C. in ***"Third Party Damages: No Legal Black Hole?*** (1999) 115 L.Q.R. 394 and is confirmed by an article by Mr. David Lewis in (1997) 13 Const. L.J. 305. .He notes that the widespread use of collateral warranties, as they are usually called, derives from the change in the law of tort which occurred in 1990 when the House decided ***Murphy v. Brentwood District Council*** [1991] 1 A.C. 398 and departed from ***Anns v. Merton London Borough Council*** [1978] A.C. 728. Collateral warranties were commonly given by consultants and other professionals before this, but more rarely by the contractor and subcontractors. After ***Murphy***'s case strangers to the building contract, such as successors in title of the building owner, could no longer recover damages in tort for economic loss caused by the contractor's negligence. Building employers employed collateral warranties in order to provide their successors in title with a contractual cause of action for defective work discovered after they had sold the land. Contractors did not give unqualified warranties; they only warranted the exercise of due care. They were normally unwilling to undertake strict liability in advance to an unknown entity. But they were prepared to warrant due care and attention, since this only replicated their former liability in tort. Since the intended beneficiary was as yet unidentified, one solution was to enter into the warranty with the building owner and make it assignable to his successors in title. It cannot, however, have been contemplated that the building owner would rely on it himself; he had a better cause of action under the building contract.

229. The need for collateral warranties for successors in title was removed by the decision in the *St. Martins* case, [1994] 1 A.C. 85 which was given in July 1993. The building contract in the present case was entered into in 1989, that is to say after ***Murphy's*** case [1991] 1 A.C. 398 and before **St. Martins**. Of course, the parties and their lawyers knew that U.I.P.L. was the building owner. That is why the D.C.D. was entered into with U.I.P.L. and its successors in title rather than with Panatown and its successors in title. But I think that it was intended to serve the purpose normally served by such a document: to provide the building owner's successors in title with a cause of action, not to provide U.I.P.L. with one. Pending the disposal of the site, it must have been assumed that Panatown would enforce the building contract in the usual way. It was the paying party, and would certainly be the party to claim any abatement of the contract price. It is unlikely to have entered anyone's head that Panatown could claim abatement but not damages and U.I.P.L. damages but not abatement. As it happens, McAlpine was willing to offer an unqualified warranty to an unidentified future lessee, and there is no reason to suppose that it would have been unwilling to have entered into such a warranty with a future purchaser from U.I.P.L. But this merely shows that the D.C.D. was included in the contractual documentation as a matter of course in accordance with contemporary practice rather than to meet a special and unusual situation.

230. Accordingly I agree with the Court of Appeal that the existence of the D.C.D. does not demonstrate an intention that any damages caused by defective or incomplete performance of McAlpine's obligations under the building contract should be recoverable by U.I.P.L. under the D.C.D. and not by Panatown under the building contract. I do not, however, agree with their formulation of the question: whether the parties contemplated that the D.C.D. would "**replace**" the more detailed provisions of the building contract. It is not correct to ask whether Panatown would have had a claim under the building contract if there had been no D.C.D. and then ask whether the parties intended to replace that claim by a claim by U.I.P.L. under the D.C.D. If it be relevant to impute intention to the parties, the correct approach is to examine the whole complex of contracts and ask whether they contemplated that the building contract could be enforced by Panatown.

231. But the broad ground does not rest on imputed intention. The narrow ground does, for it is a response to the privity rule which incidentally allows the claimant to recover damages for a third party's loss. The claimant is granted this exceptional remedy on two conditions: that he is accountable for the damages to the third party who suffered the loss, and that the remedy is withheld if the third party has his own cause of action. But the broad ground is based on ordinary contractual principles. It has nothing to do with the privity rule. The plaintiff is a contracting party who recovers for his own loss, not that of a third party. Whatever arrangements the third party may have entered into, these do not concern the plaintiff and cannot deprive him of his contractual rights. He is not accountable for the damages to anyone else, and he cannot be denied a remedy because "*it is not needed*." I respectfully agree with my noble and learned friend Lord Goff of Chieveley that the exception identified by Lord Diplock in ***The Albazero*** [1997] A.C. 774 is confined to the narrow ground and that it is inappropriate to apply it to the broad ground.

232. The real significance of the D.C.D. is different. By giving the third party a cause of action, it raises the spectre of double recovery. Even though the plaintiff recovers for his own loss, this obviously reflects the loss sustained by the third party. The case is, therefore, an example, not unknown in other contexts, where breach of a single obligation creates a liability to two different parties. Since performance of the primary obligation to do the work would have discharged the liability to both parties, so must performance of the secondary obligation to pay damages. Payment of damages to either must pro tanto discharge the liability to both. The problem, in my view, is not one of double recovery, but of ensuring that the damages are paid to the right party.

233. There can be no complaint by the building employer if the damages are recovered by the building owner, since he was the intended beneficiary of the arrangements in the first place. The building employer's performance interest will be satisfied by carrying out the remedial work or by providing the building owner with the means to pay for it to be done. This provides the key to the proper approach in the converse case like the present where the action is brought by the building employer despite the existence of a cause of action in the building owner. Since the building employer's expectation loss reflects and cannot exceed the loss suffered by the building owner, and would be satisfied by any award of damages to the latter, his claim should normally be subordinated any claim made by the building owner. While, therefore, I do not accept that Panatown's claim to substantial damages is excluded by the existence of the D.C.D., I think that an action like the present should normally be stayed in order to allow the building owner to bring his own proceedings. The court will need to be satisfied that the building owner is not proposing to make his own claim and is content to allow his claim to be discharged by payment to the building employer before allowing the building employer's action to proceed.

234. My noble and learned friend Lord Browne-Wilkinson has postulated the case where the breach does not occur (or the defects are not discovered) until after completion of the work and sale of the building to a purchaser who has taken an assignment of a collateral warranty.

235. I do not share his concern that such a case will cause difficulty in practice. The position will be the same as in the ordinary case where the building owner and the building employer are one and the same. In such a case, the building employer/owner suffers no financial loss if he disposes of the building before the breach occurs or the defects are discovered. It cannot make any difference that the building owner and the building employer are different. The purchaser will have a cause of action under the collateral warranty. Whether this bars the remedy of the building employer depends on whether the ***St. Martin*** case is properly

regarded as covered by the narrow ground or, now that it is available, the broad ground. If the former, it is an exception to the privity rule, and the building owner's action is barred (because it is not needed) by the existence of the purchaser's cause of action. If the latter, then the building owner is in theory entitled to bring proceedings in respect of own his own defeated expectation interest, but they are likely to be stayed since in practice the purchaser will normally prefer to bring his own.

236. All the supposed difficulties disappear once it is grasped that the building employer's performance interest merely reflects the interest of the building owner and that his loss cannot exceed that of the building owner.

***Conclusion***

237. In the present case U.I.P.L. is fully aware of the present proceedings and supports Panatown's claim to substantial damages. It has no wish to be forced to invoke its own subsidiary and inferior remedy under the D.C.D. There is no need to join it in the proceedings or require it to enter into a formal waiver of its claim under the D.C.D. Any claim it may have under the D.C.D. will be satisfied by the payment of damages to Panatown.

238. I would dismiss the appeal.