Invercargill City Council v Hamlin

Judicial Committee
27 November 1995; 12 February 1996
Lord Keith of Kinkel, Lord Browne-Wilkinson, Lord Mustill, Lord Lloyd of Berwick and Sir Michael Hardie Boys

Tort – Negligence – Duty of care – Breach of duty – Council building inspector negligently approving foundations of house – Whether council liable for negligence of building inspector.

Practice and procedure – Limitation of proceedings – Foundations of home inadequately constructed – Proceedings issued against council 18 years after completion following advice of builder and engineer – Whether proceedings barred by Limitation Act 1950 – Whether time running from date of damage or when reasonably discovered – Limitation Act 1950, s 4.

H's house had had minor defects, such as doors jamming and cracks in walls, since its construction in 1972. In 1989, when the back door stuck badly, H commissioned an engineer's report which stated that the foundations should be replaced as they had not been built to an acceptable standard. In 1990 H commenced proceedings alleging inter alia that in 1972 the council's building inspector had negligently approved the foundations. The Judge found negligence and awarded damages to H, the greater part for repairs. The Judge also held that the cause of action was not time-barred since it arose when the damage could be reasonably discovered, in this case after expert advice in 1989. In dismissing the council's appeal, the Court of Appeal held (a) (declining to follow *Murphy v Brentwood District Council* [1991] 1 AC 398; [1990] 2 All ER 908) that there was sufficient proximity for a house owner and subsequent purchaser to claim economic loss in negligence from a local authority since house owners relied on local authorities to ensure compliance with building codes, and the authorities fully recognised that reliance; and (b) (declining to follow *Pirelli General Cable Works Ltd v Oscar Faber & Partners (A Firm)* [1983] 2 AC 1; [1983] 1 All ER 65) the cause of action was not time-barred since it arose when the defective foundations were reasonably discovered in 1989. The council argued on appeal to the Privy Council inter alia that the Board should state correctly the settled principles of English law that the Court of Appeal had purported to apply.

Held: 1 Although inheriting English common law, it did not follow that New Zealand common law would develop identically. The Court of Appeal should not be deflected from developing New Zealand common law merely because the House of Lords had not regarded an identical development as appropriate in England. The issue of a local authority's liability for a building inspector's negligence was especially unsuited to a single solution since the decision was based in part on policy considerations which New Zealand Judges were in a better position to decide than the Board and common law jurisdictions had a marked divergence of views. Further, Parliament had not changed the common law in enacting the Building Act 1991, which by ss 90 and 91 clearly envisaged such claims against local authorities.

Accordingly, the Court of Appeal was entitled consciously to depart from English case law on the ground that conditions in New Zealand were different (see p 519 line 53, p 520 line 17, p 521 line 31, p 521 line 40, p 522 line 9, p 522 line 44).

Murphy v Brentwood District Council [1991] 1 AC 398; [1990] 2 All ER 908 and *D & F Estates Ltd v Church Commissioners for England* [1989] AC 177; [1988] 2 All ER 992 not followed.

Mount Albert Borough Council v Johnson [1979] 2 NZLR 234 (CA), *Brown v Heathcote County Council* [1986] 1 NZLR 76 (CA), [1987] 1 NZLR 720 (PC) and *Williams v Mount Eden Borough Council* (1986) 1 NZBLC 102,544 adopted.

City of Kamloops v Nielsen [1984] 2 SCR 2; (1984) 10 DLR (4th) 641, *Canadian National Railway Co v Norsk Pacific Steamship Co* [1992] 1 SCR 1021; (1992) 91 DLR (4th) 289 and *Bryan v Maloney* (1995) 128 ALR 163; 69 ALJR 375 referred to.

2 In an action alleging a latent building defect negligently approved by a local authority, the loss was not physical damage to the house or foundations but economic loss, namely the diminution in the market value of the house. It followed that no loss occurred and (since it was a necessary element of the claim) no cause of action arose until the defect was discovered or was so obvious that any reasonable house owner would have called in an expert to make investigations that, properly carried out, would have revealed the local authority's breach of duty. Accordingly, the claim was not time-barred and the appeal would be dismissed (see p 526 line 18 – p 526 line 56).

Mount Albert Borough Council v Johnson [1979] 2 NZLR 234 (CA) and *Askin v Knox* [1989] 1 NZLR 248 (CA) approved.

Council of the Shire of Sutherland v Heyman (1985) 157 CLR 424; 60 ALR 1 adopted.

Pirelli General Cable Works Ltd v Oscar Faber & Partners (A Firm) [1983] 2 AC 1; [1983] 1 All ER 65 not followed.

Appeal dismissed.

Other cases mentioned in judgment

Anns v Merton London Borough Council [1978] AC 728; [1977] 2 All ER 492.
Australian Consolidated Press Ltd v Uren [1969] 1 AC 590; [1967] 3 All ER 523 (PC).
Bagot v Stevens Scanlon & Co Ltd [1966] 1 QB 197; [1964] 3 All ER 577.
Batty v Metropolitan Property Realizations Ltd [1978] QB 554; [1978] 2 All ER 445 (CA).
Bowen v Paramount Builders (Hamilton) Ltd [1975] 2 NZLR 546 (SC), [1977] 1 NZLR 394 (CA).
Cartledge v E Jopling & Sons Ltd [1963] AC 758; [1963] 1 All ER 341.
Cassell & Co Ltd v Broome [1972] AC 1027; [1972] 1 All ER 801.
Chase v de Groot [1994] 1 NZLR 613.
Craig v East Coast Bays City Council [1986] 1 NZLR 99 (CA).
Dennis v Charnwood Borough Council [1983] QB 409; [1982] 3 All ER 486 (CA).
Donoghue v Stevenson [1932] AC 562.
Dutton v Bognor Regis Urban District Council [1972] 1 QB 373; [1972] 1 All ER 462.
Hart v O'Connor [1985] AC 1000; [1985] 2 All ER 880 (PC).
Hedley Byrne & Co Ltd v Heller & Partners Ltd [1964] AC 465; [1963] 2 All ER 575.
Henderson v Merrett Syndicates Ltd [1995] 2 AC 145; [1994] 3 WLR 761.
Hope v Manukau City Council (Supreme Court, Auckland, A 1553/73, 2 August 1976, Chilwell J).
Ketteman v Hansel Properties Ltd [1987] AC 189; [1988] 1 All ER 38.
Mount Albert City Council v New Zealand Municipalities Co-operative Insurance Co Ltd [1983] NZLR 190 (CA).

Peabody Donation Fund (Governors of the) v Sir Lindsay Parkinson & Co Ltd [1985] AC 210; [1984] 3 All ER 529.
Ruxley Electronics and Constructions Ltd v Forsyth [1995] 3 WLR 118; [1995] 3 All ER 268.
South Pacific Manufacturing Co Ltd v New Zealand Security Consultants & Investigations Ltd [1992] 2 NZLR 282 (CA).
Sparham-Souter v Town and Country Developments (Essex) Ltd [1976] QB 858; [1976] 2 All ER 65 (CA).
Stieller v Porirua City Council [1986] 1 NZLR 84 (CA).
Tai Hing Cotton Mill Ltd v Liu Chong Hing Bank Ltd [1986] AC 80; [1985] 2 All ER 947 (PC).
White v Jones [1995] 2 AC 207; [1995] 1 All ER 691.
Winnipeg Condominium Corp No 36 v Bird Construction Co (1995) 121 DLR (4th) 193 (Man:CA).

Appeal

This was an appeal by the Invercargill City Council from a judgment of the Court of Appeal (reported at [1994] 3 NZLR 513) dismissing an appeal from the judgment of Williamson J (reported at [1993] 1 NZLR 374) awarding damages to the plaintiff in his action alleging negligence by the council's building inspector in approving the foundations of the plaintiff's house some 18 years before commencement of the proceedings.

Denese Bates and *Susan Bambury* for the appellant (Invercargill City Council).
Christine French for the respondent (N G Hamlin).

Cur adv vult

The judgment of Their Lordships was delivered by

LORD LLOYD OF BERWICK. In May 1972, the plaintiff, Mr Noel Gordon Hamlin, entered into an agreement with a firm of builders whereby they sold him some land at 67 Edinburgh Crescent, Invercargill, and agreed to build him a house. A building inspector employed by the Invercargill City Council carried out a number of inspections in the course of construction, as required by the city bylaws. On 1 June 1972 the inspector approved the foundations. Seventeen years later the plaintiff called in another builder, who told him the foundations were defective. In November 1990 the plaintiff commenced proceedings against the city council as well as the builders claiming $64,250 as the cost of repairs.

The case came before Williamson J on 8 June 1992. He held that the builders were in breach of contract, since the foundations were not laid in accordance with the specification. But, as so often happens, the builders were no longer in business. So the plaintiff's prospect of recovering damages depended on his claim in tort against the city council. The Judge held that the building inspector had been negligent in carrying out his inspection. In his report the inspector had noted "clay 15 inches siting approved". But along the eastern wall the foundations were only 7-8 inches deep. According to the expert evidence which the Judge accepted the inspector could have discovered without difficulty that the foundations had not been carried down to firm clay.

A number of cracks, and other minor defects, had appeared over the years. But the Judge found that a reasonably prudent homeowner would not have suspected the foundations, or discovered the cause of the trouble until 1989, when the plaintiff called in the second builder. It followed that, as New Zealand law then stood, his claim against the council was in time. Since it was admitted, for the purposes of the hearing before the Judge, that the council was under a duty of care towards the plaintiff, the Judge upheld the plaintiff's claim. He assessed the damages at $53,550.

The council appealed. There were two main issues for determination. Since

the concession made in the Court below was not binding in the Court of Appeal, the first question was whether the appellants owed any duty of care to the plaintiff at all. The appellants argued that the Court of Appeal ought to follow the decisions of the House of Lords in *D & F Estates Ltd v Church Commissioners for England* [1989] AC 177 and *Murphy v Brentwood District Council* [1991] 1 AC 398.

The second question was whether the plaintiff's claim was time-barred. The appellants argued that the Court of Appeal ought to follow the decision of the House of Lords in *Pirelli General Cable Works Ltd v Oscar Faber & Partners (A Firm)* [1983] 2 AC 1, in other words, that the cause of action accrued when the damage to the house came into existence, and not when it could with reasonable diligence have been discovered. On that view the plaintiff issued his writ too late.

The appeal came before a Full Court of five Judges [see [1994] 3 NZLR 513]. They answered the first question unanimously in favour of the plaintiff. They answered the second question by a majority in favour of the plaintiff with McKay J dissenting. Their Lordships would wish to pay tribute to the very high quality of all five judgments.

Duty of care

There can be no doubt that the decision of the Court of Appeal is in accordance with the law as it has been developed by New Zealand Courts over the last 20 years. A convenient starting point is *Bowen v Paramount Builders (Hamilton) Ltd* [1975] 2 NZLR 546, since it was also a case concerning inadequate foundations. The sole defendant in that case was the builder, and the plaintiff was a purchaser from the original owner. The case was decided shortly after the English decision in *Dutton v Bognor Regis Urban District Council* [1972] 1 QB 373. In *Dutton's* case the local authority was held liable for the negligence of the building inspector on facts very similar to the present case. Speight J, at first instance, declined to follow *Dutton's* case. But his decision was reversed in the Court of Appeal [1977] 1 NZLR 394. The leading judgment was given by Richmond P, who, as it happens, dissented on the facts. But there was no disagreement as to the principle. The case was treated as one involving physical damage to the premises. The Court did not find it necessary to deal with the question of "pure" economic loss, that is to say, economic loss unassociated with physical harm to the structure itself. The point was left open for the future.

In *Mount Albert Borough Council v Johnson* [1979] 2 NZLR 234 the plaintiff, a subsequent purchaser, brought proceedings against the council for failing to ensure that the foundations were adequate. The council brought in the builders as third party. By the time the case reached the Court of Appeal, the House of Lords had decided *Anns v Merton London Borough Council* [1978] AC 728. Lord Wilberforce said in that case at p 758 that it was the duty of the council "to take reasonable care, no more, no less, to secure that the builder does not cover in foundations which do not comply with the bylaw requirements".

The leading judgment in *Mount Albert Borough Council v Johnson* was given by Cooke J. It was, he said, current law in New Zealand that a purchaser in the plaintiff's position can recover in tort for economic loss caused by negligence, "at least when the loss is associated with physical damage".

In a subsequent and related case brought by the council against their insurers, Cooke J described the line of authority following on *Dutton's* case as depending on control; see *Mount Albert City Council v New Zealand Municipalities Co-operative Insurance Co Ltd* [1983] NZLR 190 at p 196:

> "The local authority's control of building in its district has been held to carry a duty to take reasonable care in performing statutory functions."

Next there came a group of cases all decided in 1986: *Brown v Heathcote County Council* [1986] 1 NZLR 76, *Stieller v Porirua City Council* [1986] 1 NZLR

84, *Craig v East Coast Bays City Council* [1986] 1 NZLR 99 and *Williams v Mount Eden Borough Council* (1986) 1 NZBLC 102,544. These cases applied the principles stated in *Bowen v Paramount Builders* and *Mount Albert Borough Council v Johnson* to building defects other than faulty foundations. They are important because they extended the principle to cases where there was no physical damage as such, nor any certainty that there would be. It was enough that the value of the premises had been reduced. Whether it is right to describe such cases as instances of "pure" economic loss may not matter very much. They do not depend on pure economic loss in the sense of *White v Jones* [1995] 2 AC 207 or *Henderson v Merrett Syndicates Ltd* [1995] 2 AC 145. For in the building cases the economic loss is suffered by reason of a defect in a physical object.

Secondly the cases are important because they recognise the element of reliance in establishing a duty of care in economic loss cases. Thus in *Williams v Mount Eden Borough Council* Casey J said at p 102,551:

> "Having had these powers in relation to the construction of buildings conferred on it, the reasonable local authority would no doubt have accepted that they were intended to be exercised for the protection of those members of the public concerned with those buildings, whether as owners, occupiers or users. No doubt it would also have appeared to such an authority that many of them would have no opportunity or expectation of checking or controlling hidden details in its construction to ensure that appropriate standards have been complied with, relating to its physical soundness, its ability to withstand earthquake shocks, and the safety and health of its occupants. Conversely, those members of the public would have been aware that local bodies exercised this kind of control over buildings constructed in their districts; this has been a known fact of at least New Zealand urban life for several generations.
>
> The statement by Mrs Williams that her knowledge of the Mount Eden Borough Council as 'the toughest' and her assumption that everything would be all right reflects what I am sure all these plaintiffs and most of the community at large would have felt. Work essential to the structural integrity of a building and its earthquake resistance is almost invariably covered in, and in the usual house buying situation, purchasers have to rely on the Council doing its job properly under the building controls conferred on it. I am also satisfied that the latter and its officers would have been well aware that such reliance was placed upon it by the community at large, especially in this case where they must have realised the builder was likely to sell the units; and that there was no feasible way any purchaser could have discovered hidden structural defects."

Lastly these cases are important because they mark the point at which Cooke P felt able to say in *Brown v Heathcote County Council* at p 79:

> "The lineaments of the contemporary New Zealand law of negligence in this and related fields are now, I think, reasonably firmly established by a series of cases; but in the main it is law of comparatively recent growth, largely though by no means exclusively evolved since the appeal in *Bowen* was allowed in this court."

The facts of *Brown v Heathcote County Council* were that the plaintiffs built a house on a site which, unknown to them, was subject to flooding. They incurred expenditure of $32,000 in raising the level of the floor. They brought an action against the council and the drainage board for negligence. They succeeded against the drainage board before Hardie Boys J and the Court of Appeal, on the ground that the drainage board should have warned them of the danger of flooding. In the course of his judgment Cooke P pointed out that the facts bore some resemblance to those in *Dennis v Charnwood Borough Council* [1983] QB 409; a decision which had survived *Governors of the Peabody Donation Fund v Sir Lindsay Parkinson & Co Ltd* [1985] AC 210, at pp 243-245. But reconciling the results in particular

cases in this field was not, he thought, of the highest priority. He clearly foresaw the time when New Zealand law might "go its own way" having regard to the special circumstances prevailing in that country.

The drainage board appealed to the Privy Council: see [1987] 1 NZLR 720. The appeal was dismissed. Their Lordships did not find it necessary in that case to consider the many authorities discussed in the Courts below. For the appeal turned on a straightforward question whether a sufficient degree of proximity existed between the drainage board and the plaintiffs. Their Lordships answered that question in favour of the plaintiffs. Although the drainage board had not been asked by the council to check the flood levels, they habitually did so. Accordingly they assumed a duty of care under the principle stated in *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465, not only towards the council, but also towards the plaintiffs.

Two years later the position which had by then been reached in New Zealand was recognised by the House of Lords in *D & F Estates Ltd v Church Commissioners for England.* After referring to *Batty v Metropolitan Property Realizations Ltd* [1978] QB 554, a case which Lord Oliver of Aylmerton analysed as one of pure economic loss, he continued at p 216:

> "As in *Anns*, the cause of action was related not to damage actually caused by the negligent act but to the creation of the danger of damage, and the case is therefore direct authority for the recovery of damages in negligence for pure economic loss – a proposition now firmly established in New Zealand: see *Mount Albert Borough Council v Johnson* [1979] 2 NZLR at 234."

Lord Bridge of Harwich said at p 207:

> "I should wish to hear fuller argument before reaching any conclusion as to how far the decision of the New Zealand Court of Appeal in *Bowen v Paramount Builders (Hamilton) Ltd* should be followed as a matter of English law. I do not regard *Anns v Merton London Borough Council* as resolving that issue."

Their Lordships can turn now to the decision of the Court of Appeal in the instant case, while noting on the way that in *Chase v de Groot* [1994] 1 NZLR 613, yet another foundations case, Tipping J followed the many previous decisions of the New Zealand Court of Appeal, in preference to the intervening decision of the House of Lords in *Murphy v Brentwood District Council*; and in *South Pacific Manufacturing Co Ltd v New Zealand Security Consultants & Investigations Ltd* [1992] 2 NZLR 282 Cooke P concluded in agreement with the four other members of the Court that the decision in *Murphy* should not lead to any change in the approach to negligence cases in New Zealand.

In the present case, Cooke P observed that "the linked concepts of reliance and control" had underlain the New Zealand case law from *Bowen* onwards; he also regarded the decision of the Privy Council in *Brown v Heathcote County Council* (to which Their Lordships have just referred) as an important authority in favour of the plaintiff's claim in the present case.

Their Lordships need not analyse the other four judgments. They are all founded on what the Court regarded as a consistent line of authority starting with *Bowen's* case in 1975, and thus stretching back over a period of nearly 20 years.

Miss Bates, for the appellants, attacks the decision on a number of grounds. Quite apart from the about turn which the House of Lords executed in *Murphy*, she submits that the decision represents a departure from the previous line of authority in New Zealand. The previous cases (so it was argued) were all based on a straightforward application of the principle in *Donoghue v Stevenson* [1932] AC 562. In the present case the Court seems for the first time to have imposed a duty of care on the basis of *Hedley Byrne v Heller & Partners*. But there was no evidence that the appellants ever assumed responsibility for economic loss caused by the builders' failure to comply with the building bylaws; nor was there any evidence of any reliance by the plaintiff. Indeed reliance was not even pleaded.

Their Lordships are unable to accept this argument. *Hedley Byrne v Heller & Partners* was scarcely mentioned in the Court below. Moreover general reliance (as distinct from specific reliance established on the facts of a particular case) has been a feature of this branch of New Zealand law for many years. As early as 1976 Chilwell J said in *Hope v Manukau City Council* (Supreme Court, Auckland, A 1553/73, 2 August 1976) at pp 30-31:

> "There is no direct evidence that the plaintiff relied upon the flat having been built in accordance with the bylaws and regulations. She did not say that she did. But she did say that she saw the plans and specification before she agreed to purchase the flat.
>
> . . .
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> I would be prepared to draw the inference as a matter of common sense that the average prudent purchaser of a new residential flat expects that the bylaws and regulations will have been complied with. I would classify this plaintiff as an average purchaser. In our cities there would be few citizens who would be unaware of the necessity for buildings to comply with the bylaws and health regulations and unaware of the control which city councils exercise over building works."

The same point was made by Casey J ten years later in *Williams v Mount Eden Borough Council*, in a passage which has already been quoted, and by Cooke P in the *South Pacific Manufacturing Co* case at p 297. So there was nothing new in the concept of reliance by house buyers generally as an element in the imposition of a duty of care. Cooke P drew attention in that connection to the "Report of the Commission of Inquiry into Housing in New Zealand", (1971) 4 AJHR H-51, over which he presided. He made the following comment at p 519:

> ". . . whatever may be the position in the United Kingdom, home-owners in New Zealand do traditionally rely on local authorities to exercise reasonable care not to allow unstable houses to be built in breach of the bylaws."

But even if (which Their Lordships doubt) it were possible to detect in the present case an increased emphasis on reliance when compared with previous cases that is just the sort of change of emphasis which is to be expected in a developing branch of the common law. Were it not for the intervening decision of the House of Lords in *D & F Estates Ltd v Church Commissioners for England* and *Murphy v Brentwood District Council*, it is unlikely that the present case would ever have reached the Board at all, at any rate on the duty of care point. It is to consider the impact of those decisions on New Zealand law that Their Lordships now turn.

Miss Bates's argument can be stated in very simple terms. The decision in *Bowen's* case was explicitly based on the English decision in *Dutton v Bognor Regis Urban District Council*. The authority of the line of cases which followed *Bowen's* case was reinforced by the decision of the House of Lords in *Anns v Merton London Borough Council*. Both those English cases are now known to have been wrongly decided. If English law had not taken a wrong turning in 1972, New Zealand law would never have followed. The present appeal affords an opportunity for the Board, as the final appellate Court for New Zealand, to put New Zealand law back on the correct path.

Where the New Zealand Court of Appeal is purporting to apply settled principles of English common law, then it is the function of the Board to ensure that those principles are applied correctly. *Hart v O'Connor* [1985] AC 1000 was such a case, and Lord Scarman's observations in *Tai Hing Cotton Mill Ltd v Liu Chong Hing Bank Ltd* [1986] AC 80 are to be understood in that light.

But in the present case the Judges in the New Zealand Court of Appeal were consciously departing from English case law on the ground that conditions in New Zealand are different. Were they entitled to do so? The answer must surely be Yes. The ability of the common law to adapt itself to the differing circumstances of the

countries in which it has taken root, is not a weakness, but one of its great strengths. Were it not so, the common law would not have flourished as it has, with all the common law countries learning from each other. The point was put by Lord Diplock in a very different context in *Cassell & Co Ltd v Broome* [1972] AC 1027 at p 1127:

> "Other supreme appellate tribunals exercise a similar function in other countries which have inherited the English common law at various times in the past. Despite the unifying effect of that inheritance upon the concept of man's legal duty to his neighbour, it does not follow that the development of the social norms in each of the inheritor countries has been identical or will become so. I do not think that Your Lordships should be deflected from your function of developing the common law of England and discarding judge-made rules which have outlived their purpose and are contrary to contemporary concepts of penal justice in England, by the consideration that other courts in other countries do not yet regard an identical development as appropriate to the particular society in which they perform a corresponding function."

By the same token, the Court of Appeal of New Zealand should not be deflected from developing the common law of New Zealand (nor the Board from affirming their decisions) by the consideration that the House of Lords in *D & F Estates Ltd v Church Commissioners for England* and *Murphy v Brentwood District Council* have not regarded an identical development as appropriate in the English setting.

The particular branch of the law of negligence with which the present appeal is concerned is especially unsuited for the imposition of a single monolithic solution. There are a number of reasons why this is so. The first and most obvious reason is that there is already a marked divergence of view among other common law jurisdictions.

In Canada it is well established that a municipality may be liable for economic loss caused by the negligence of a building inspector. Thus in *City of Kamloops v Nielsen* (1984) 10 DLR (4th) 641, the facts of which were very similar to the present case, the plaintiff, a subsequent purchaser, sued the municipality for failing to prevent his house being built with defective foundations in breach of a local bylaw. He also sued the builder. He succeeded against both defendants. *Kamloops* was decided before *Murphy*. But in a subsequent case, a majority of the Supreme Court followed *Kamloops*, and declined to follow *Murphy*: see *Canadian National Railway Co v Norsk Pacific Steamship Co* (1992) 91 DLR (4th) 289. McLachlin J said at p 365:

> "The fact is that situations arise, other than those falling within the old exclusionary rule, where it is manifestly fair and just that recovery of economic loss be permitted. Faced with these situations, courts will strain to allow recovery, provided they are satisfied that the case will not open the door to a plethora of undeserving claims. They will refuse to accept injustice merely for the sake of the doctrinal tidiness which is the motivating spirit of *Murphy*. This is in the best tradition of the law of negligence, the history of which exhibits a sturdy refusal to be confined by arbitrary forms and rules where justice indicates otherwise. It is the tradition to which this court has adhered in suggesting in *Kamloops* that the search should not be for a universal rule but for the elaboration of categories where recovery of economic loss is justifiable on a case-by-case basis."

A little later she said at p 371:

> "I conclude that, from a doctrinal point of view, this court should continue on the course chartered in *Kamloops* rather than reverting to the narrow exclusionary rule as the House of Lords did in *Murphy*."

The same approach was reaffirmed unanimously in a recent decision of the Supreme Court, see *Winnipeg Condominium Corp No 36 v Bird Construction Co* (1995) 121 DLR (4th) 193.

In Australia, the High Court at first declined to hold local authorities liable for economic loss suffered by reason of houses being built with defective foundations: see *Council of the Shire of Sutherland v Heyman* (1985) 157 CLR 424. A lengthy passage from Brennan J's judgment in that case was quoted with approval by Lord Keith of Kinkel in *Murphy's* case. But ten years later Brennan J found himself in a minority of one when the High Court changed tack. In *Bryan v Maloney* (1995) 69 ALJR 375 it was held that a negligent builder was liable for economic loss suffered by a subsequent purchaser. Mason CJ referred to *D & F Estates Ltd v Church Commissioners for England* and *Murphy v Brentwood District Council* at p 383 and continued:

> "It is, however, apparent that in each case, their Lordships considered that a negligent builder's liability under the law of negligence did not extend to compensating either the first or a subsequent owner for economic loss sustained when the inadequacy of the footings of a building first becomes manifest by reason of consequent damage to the fabric of the building. Their Lordships' view in that regard seems to us, however, to have rested upon a narrower view of the scope of the modern law of negligence and a more rigid compartmentalisation of contract and tort than is acceptable under the law of this country."

Their Lordships cite these judgments in other common law jurisdictions not to cast any doubt on *Murphy's* case, but rather to illustrate the point that in this branch of the law more than one view is possible: there is no single correct answer. In *Bryan v Maloney* the majority decision was based on the twin concepts of assumption of responsibility and reliance by the subsequent purchaser. If that be a possible and indeed respectable view, it cannot be said that the decision of the Court of Appeal in the present case, based as it was on the same or very similar twin concepts, was reached by a process of faulty reasoning, or that the decision was based on some misconception: see *Australian Consolidated Press Ltd v Uren* [1969] 1 AC 590.

In truth, the explanation for divergent views in different common law jurisdictions (or within different jurisdictions of the United States of America) is not far to seek. The decision whether to hold a local authority liable for the negligence of a building inspector is bound to be based at least in part on policy considerations. As Mason CJ said in *Bryan v Maloney* at p 377:

> "Inevitably, the policy considerations which are legitimately taken into account in determining whether sufficient proximity exists in a novel category will be influenced by the court's assessment of community standards and demands."

In a succession of cases in New Zealand over the last 20 years it has been decided that community standards and expectations demand the imposition of a duty of care on local authorities and builders alike to ensure compliance with local bylaws. New Zealand Judges are in a much better position to decide on such matters than the Board. Whether circumstances are in fact so very different in England and New Zealand may not matter greatly. What matters is the perception. Both Richardson J and McKay J in their judgment in the Court below stress that to change New Zealand law so as to make it comply with *Murphy's* case would have "significant community implications" and would require a "major attitudinal shift". It would be rash for the Board to ignore those views.

In one important respect circumstances prevailing in England at the time of *Murphy* and those prevailing in New Zealand are indeed very different. Their Lordships have in mind the statutory background. In *Murphy* the House of Lords attached great weight to the passing of the Defective Premises Act 1972 (UK). Thus Lord Mackay of Clashfern LC said at p 457:

> "Faced with the choice I am of the opinion that it is relevant to take into account that Parliament has made provisions in the Defective Premises Act

1972 imposing on builders and others undertaking work in the provision of dwellings obligations relating to the quality of their work and the fitness for habitation of the dwelling. For this House in its judicial capacity to create a large new area of responsibility on local authorities in respect of defective buildings would in my opinion not be a proper exercise of judicial power."

See also per Lord Keith of Kinkel at p 472, per Lord Oliver of Aylmerton at p 490 and Lord Jauncey of Tullichettle at p 498.

By contrast there is no legislation corresponding to the Defective Premises Act in New Zealand. Instead there was an extended period of research starting with the Commission of Inquiry into Housing in 1971, and including the Review of Building Controls published in 1983, which resulted eventually in the Building Act 1991. That Act was passed a year and a half after the decision in *Murphy*. There is nothing in the Act to abrogate or amend the existing common law, as developed by New Zealand Judges, so as to bring it into line with *Murphy's* case. On the contrary, a number of provisions in the Act clearly envisage that private law claims for damages against local authorities will continue to be made as before. Thus s 90 provides:

> **90. Civil proceedings against building certifiers** – Civil proceedings against a building certifier in respect of the exercise by the building certifier of the building certifier's statutory function in issuing a building certificate or a code compliance certificate are to be brought in tort and not in contract.

Similarly s 91 provides:

> **91. Limitation defences** – (1) Except to the extent provided in subsection (2) of this section, the provisions of the Limitation Act 1950 apply to proceedings against any person where those proceedings arise from –
>
> (a) The construction, alteration, demolition, or removal of any building; or
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> (b) The exercise of any function under this Act or any previous enactment relating to the construction, alteration, demolition, or removal of that building.
>
> (2) Civil proceedings may not be brought against any person 10 years or more after the date of the act or omission on which the proceedings are based.
>
> (3) For the purposes of subsection (2) of this section if –
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> (a) Civil proceedings are brought against a territorial authority, a building certifier, or the Authority; and
>
> (b) The proceedings arise out of the issue of a building consent, a building certificate, a code compliance certificate, or an Authority determination –
>
> the date of the act or omission is the date of issue of the consent or certificate or determination.

It is neither here nor there that the Building Act 1991 was not in force at the time of the inspection of the foundations in the present case. The question is whether New Zealand law should now be changed so as to bring it into line with *Murphy's* case. If the New Zealand Parliament has not chosen to do so, as a matter of policy, it would hardly be appropriate for Their Lordships to do so by judicial decision.

It follows that on the first question Their Lordships are content to adopt the reasoning of the unanimous judgments of the Court of Appeal.

Limitation

The negligent act or omission of the building inspector in approving the foundations occurred on 1 June 1972. The first cracks in the masonry veneer, and in the north wall of the kitchen, appeared in 1974. By 1979 a crack in the eastern

wall had developed to such an extent that a brick was loose. In the early 1980's the plaintiff noticed some cracks in the foundation wall. Yet proceedings were not issued until November 1990.

The facts as found by the Judge thus raise in an acute form the question when the plaintiff's cause of action accrued. If the cause of action arose at the time of the negligent act or omission, or when the first cracks appeared, then it is obvious that the plaintiff's claim in tort against the council would be time-barred. But if the cause of action did not accrue until the plaintiff was advised in 1989 that the foundations were defective, and if, as the Judge found, a reasonably prudent homeowner would not have discovered the cause of the cracks any earlier, then the proceedings were in time. Which view is correct?

This is an important question of principle which has been much debated in recent years in different common law jurisdictions, in a number of different contexts. Their Lordships propose to confine their advice to the particular context of the latent defects in buildings.

In New Zealand the law has been relatively clear and straightforward since at least the decision of the Court of Appeal in *Mount Albert Borough Council v Johnson*. That was the case in which, as already mentioned, Cooke J said that by the current law of New Zealand a plaintiff could recover in tort for economic loss "at least when that loss is associated with physical damage". Cooke J continued at p 239:

> "Such a cause of action must arise, we think, either when the damage occurs or when the defect becomes apparent or manifest. The latter appears to be the more reasonable solution. It is powerfully supported by what Lord Reid said about the common law in *Cartledge v E Jopling & Sons Ltd* [1963] AC 758, 772...".

Ten years later, in *Askin v Knox* [1989] 1 NZLR 248 the plaintiff brought an action against a builder and the local authority, alleging negligence in laying and inspecting the foundations. He failed to prove negligence on the facts. But Cooke P, giving the judgment of a five Judge Court, said that, with regard to limitation, Judges in New Zealand should continue to follow the guidance given by the Court of Appeal in *Mount Albert Borough Council v Johnson*. He foresaw the time when the matter might have to be reconsidered in the light of the intervening decision of the House of Lords in *Pirelli General Cable Works Ltd v Oscar Faber & Partners*. He commented at p 255:

> "... it does not follow that the reasoning in *Pirelli* will be irresistible. It might still be possible to maintain the approach that a cause of action arises when the defect becomes apparent or ought to have been discovered, that being the time when the effect of the negligence (whether classified as physical or economic) is suffered or experienced by the owner of the building."

He went on to urge Parliament to consider introducing a "longstop" limitation period such as the absolute limit of 15 years from the date of the negligent act or omission contained in the English Latent Damage Act 1986. Parliament acted swiftly on this suggestion: see the Building Act 1991, s 91(2), already cited.

The foreseen opportunity for reviewing *Pirelli* arose in the present case. Williamson J correctly regarded himself as bound by *Mount Albert Borough Council v Johnson* and *Askin v Knox*. In the Court of Appeal Cooke P, Casey J and Gault J reaffirmed the New Zealand approach on limitation, and pointed out some of the disadvantages of following *Pirelli*. Not only does that decision mean that a cause of action may become time-barred before any defect has become apparent (it was this obvious injustice which led the Supreme Court of Canada to reject *Pirelli* in the *Kamloops* case), but the reasoning in *Pirelli* was also suspect, in so far as it was based on certain observations in the earlier decision of the House of Lords in *Cartledge v E Jopling & Sons Ltd* [1963] AC 758.

In *Cartledge v Jopling* (which concerned an action for personal injuries) Lord Reid had been minded to hold that a cause of action for personal injuries ought not to accrue until the injured person has discovered or could reasonably have discovered the injury. "The common law" he said "ought never to produce a wholly unreasonable result". But Lord Reid felt constrained by s 26 of the Limitation Act 1939 (UK) (corresponding to s 28 of the New Zealand Limitation Act 1950) to reach just such an unreasonable result. By providing in s 26 for the postponement of the limitation period in the particular cases of fraud, mistake and concealment, Parliament must have intended that knowledge of the injury or damage should be irrelevant in all other cases.

The majority in the Court below considered that this did not follow. The inclusion of three specific instances did not necessarily exclude the general law. As for the injustice inherent in the *Pirelli* approach, this was swiftly cured, so far as English law was concerned, by the Latent Damage Act 1986. Cooke P concluded at p 523:

> ". . . the view that in building negligence cases any cause of action must accrue on the occurrence of damage to the building itself has been either wholly or largely abandoned in England by judicial decision, quite apart from the limitation changes made by the Latent Damage Act 1986 (UK). To introduce now the outmoded English position into New Zealand law would seem a paradoxical and peculiarly unsatisfactory step."

Richardson J agreed with the majority on the limitation point.

McKay J, while acknowledging that Lord Reid's speech in *Cartledge v E Jopling & Sons Ltd* contains a non-sequitur, nevertheless regarded the reasoning in that case and in *Pirelli* as compelling. A cause of action has always, he said, been taken to accrue when all the facts necessary to establish the cause of action are in existence. In the case of defective foundations that must mean when the damage occurs whether or not the damage could reasonably have been discovered. On the facts, McKay J regarded the cracks in the walls and in the foundation as more than minimal damage. Accordingly the claim was in his view time-barred.

Compared with New Zealand the course of English authority has run less smooth. In *Cartledge v E Jopling & Sons Ltd* the plaintiffs were workmen who had contracted pneumoconiosis at work. It was held by the House of Lords that their causes of action were already time-barred before they could have known that they had suffered any personal injury. The House called for urgent remedial legislation. But the Limitation Act 1963 (UK), passed later the same year, was confined to actions for personal injuries. It did not apply to property damage. Accordingly when the Court of Appeal decided *Dutton v Bognor Regis Urban District Council* in 1972, Lord Denning, relying on a dictum of Diplock LJ in *Bagot v Stevens Scanlon & Co Ltd* [1966] 1 QB 197 (a case concerning defective drains), said at p 396 that "the damage was done when the foundations were badly constructed".

But four years later in *Sparham-Souter v Town and Country Developments (Essex) Ltd* [1976] QB 858 Lord Denning recanted. The Court of Appeal held that where a house is built with defective foundations the cause of action does not accrue until the defect becomes apparent or ought reasonably to have become apparent. Geoffrey Lane LJ distinguished *Cartledge v E Jopling & Sons Ltd* in the following passage at p 880:

> "There is no proper analogy between this situation [ie the situation in *Sparham-Souter*] and the type of situation exemplified in *Cartledge v E Jopling & Sons Ltd* [1963] AC 758 where a plaintiff due to the negligence of the defendants suffers physical bodily injury which at the outset and for many years thereafter may be clinically unobservable. In those circumstances clearly damage is done to the plaintiff and the cause of action accrues from the moment of the first

injury albeit undetected and undetectable. That is not so where the negligence has caused unobservable damage not to the plaintiff's body but to his house. He can get rid of his house before any damage is suffered. Not so with his body."

For the seven years following *Sparham-Souter*, English law and New Zealand law went hand-in-hand (on the limitation point). Unfortunately *Sparham-Souter* was then overruled by the House of Lords in *Pirelli*, thereby, presumably, restoring the view expressed by Lord Denning in *Dutton v Bognor Regis Urban District Council*, until that decision too was overruled on the duty of care point in *Murphy*.

Their Lordships refer to *Pirelli* as an unfortunate decision not only because that is how the House itself regarded the decision – Lord Fraser of Tullybelton described the result as unreasonable and contrary to principle – but also because it has been subjected to a barrage of judicial and academic criticism ever since; see, by way of example, Michael A Jones, "Defective Premises and Subsequent Purchases – A Comment" (1984) 100 LQR 413; I N Duncan Wallace, "Negligence and Defective Buildings: Confusion Confounded?" (1989) 105 LQR 46; and Todd, Burrows, Chambers, Mulgan, Vennell, *The Law of Torts in New Zealand* (1991) p 912. Their Lordships do not find it necessary to review these criticisms in any detail, or to enter into the question what Lord Fraser of Tullybelton may have had in mind when he referred to buildings which are "doomed from the start": see *Ketteman v Hansel Properties Ltd* [1987] AC 189 per Lord Brandon of Oakbrook at p 207. Instead they will quote a passage from an article written by Stephen Todd shortly after *Pirelli* but before *Murphy*, since it leads on directly to the ground on which the limitation point must now be decided: see "Latent Defects in Property and the Limitation Act: A Defence of the 'Discoverability' Test" (1982-83) 10 NZULR 311 at p 316:

> "There is undoubtedly a superficial attraction in the argument which found favour with all five Lords of Appeal in *Pirelli's* case. If the nature of the damage suffered is regarded as a physical loss, it does indeed look as if the principle in *Cartledge v E Jopling and Sons Ltd* should apply, on the basis that the damage is there but is unknown and, it may be unknowable. *But if the damage is recognised as economic the whole picture changes.* It is thought that a failure to appreciate this point undermines the whole thrust of the argument in *Pirelli's* case." (Emphasis added.)

This passage is a remarkable anticipation of the reasoning of the House of Lords in *Murphy*.

In *Murphy* Lord Keith of Kinkel said at p 466:

> "In my opinion it must now be recognised that, although the damage in *Anns* was characterised as physical damage by Lord Wilberforce, it was purely economic loss."

Lord Keith of Kinkel went on to quote with approval a lengthy passage from the judgment of Dean J in *Council of the Shire of Sutherland v Heyman* as follows at pp 503-504:

> "Nor is the respondents' claim in the present case for ordinary physical damage to themselves or their property. Their claim, as now crystallized, is not in respect of damage to the fabric of the house or to other property caused by collapse or subsidence of the house as a result of the inadequate foundations. It is for the loss or damage represented by the actual inadequacy of the foundations, that is to say, it is for the cost of remedying a structural defect in their property which already existed at the time when they acquired it."

A little later Deane J said at pp 504-505:

> "It is arguable that any such loss or injury should be seen as being sustained at the time of acquisition when, because of ignorance of the inadequacy of the foundations, a higher price is paid (or a higher rent is agreed to be paid) than is warranted by the intrinsic worth of the freehold or leasehold estate that is being acquired. Militating against that approach is the consideration that, for so long as the inadequacy of the foundations is neither known nor manifest, no identifiable loss has come home: if the purchaser or tenant sells the freehold or leasehold estate within that time, he or she will sustain no loss by reason of the inadequacy of the foundations. The alternative, and in my view preferable, approach is that any loss or injury involved in the actual inadequacy of the foundations is sustained only at the time when that inadequacy is first known or manifest. It is only then that the actual diminution in the market value of the premises occurs. On either approach, however, any loss involved in the actual inadequacy of the foundations by a person who acquires an interest in the premises after the building has been completed is merely economic in its nature."

Once it is appreciated that the loss in respect of which the plaintiff in the present case is suing is loss to his pocket, and not for physical damage to the house or foundations, then most, if not all the difficulties surrounding the limitation question fall away. The plaintiff's loss occurs when the market value of the house is depreciated by reason of the defective foundations, and not before. If he resells the house at full value before the defect is discovered, he has suffered no loss. Thus in the common case the occurrence of the loss and the discovery of the loss will coincide.

But the plaintiff cannot postpone the start of the limitation period by shutting his eyes to the obvious. In *Dennis v Charnwood Borough Council*, a case decided in the Court of Appeal before *Pirelli* reached the House of Lords, Templeman LJ said at p 420 that time would begin to run in favour of a local authority:

> ". . . if the building suffers damage or an event occurs which reveals the breach of duty by the local authority or which would cause a prudent owner-occupier to make investigations which, if properly carried out, would reveal the breach of duty by that local authority."

In other words, the cause of action accrues when the cracks become so bad, or the defects so obvious, that any reasonable homeowner would call in an expert. Since the defects would then be obvious to a potential buyer, or his expert, that marks the moment when the market value of the building is depreciated, and therefore the moment when the economic loss occurs. Their Lordships do not think it is possible to define the moment more accurately. The measure of the loss will then be the cost of repairs, if it is reasonable to repair, or the depreciation in the market value if it is not: see *Ruxley Electronics and Constructions Ltd v Forsyth* [1995] 3 WLR 118.

This approach avoids almost all the practical and theoretical difficulties to which the academic commentators have drawn attention, and which led to the rejection of *Pirelli* by the Supreme Court of Canada in *Kamloops*. The approach is consistent with the underlying principle that a cause of action accrues when, but not before, all the elements necessary to support the plaintiff's claim are in existence. For in the case of a latent defect in a building the element of loss or damage which is necessary to support a claim for economic loss in tort does not exist so long as the market value of the house is unaffected. Whether or not it is right to describe an undiscoverable crack as damage, it clearly cannot affect the value of the building on the market. The existence of such a crack is thus irrelevant to the cause of action. It follows that the Judge applied the right test in law.

Their Lordships repeat that their advice on the limitation point is confined to the problem created by latent defects in buildings. They abstain, as did Cooke P,

from considering whether the "reasonable discoverability" test should be of more general application in the law of tort.

It is regrettable that there should be any divergence between English and New Zealand law on a point of fundamental principle. Whether *Pirelli* should still be regarded as good law in England is not for Their Lordships to say. What is clear is that it is not good law in New Zealand.

There is no ground for disturbing the Judge's conclusions on the facts, as to which there are in any event concurrent findings.

Finally Their Lordships would wish to pay tribute to the excellence of all three arguments at the Bar and are particularly grateful for the learned and comprehensive written submissions furnished by Miss French, to which they are much indebted.

Their Lordships will humbly advise Her Majesty that the appeal should be dismissed. By agreement, there will be no order as to costs.

Appeal dismissed.

Solicitors for the appellant: *Heaney Jones* (Auckland).
Solicitors for the respondent: *French Burt Partners* (Invercargill).

Reported by: Stewart Benson, *Barrister*