degree of accuracy. Architects, engineers, design and construct companies, project managers and others faced with the daunting task of preparing estimates on which the client will base decisions should consider: whether they are best placed to carry out the estimate or whether it is feasible to have the client engage others to do so; ensuring that the client understands the limitations of estimates and the potential for cost blow outs through problems encountered; and that it might be advisable to limit or exclude liability for the estimate and for damages incurred as a result of reliance upon it.

It must also be understood that the Bond Corporation case also clearly indicates the potential for the Trade Practices Act to be used as an alternative to an action in tort in relation to negligent advice generally, not just in relation to estimates of cost.

Finally, there would also seem to be the potential for State Fair Trading Acts to be used, as an alternative to the Trade Practices Act in relation to negligent advice. Such legislation currently exists in Victoria, New South Wales and South Australia, is proposed for Queensland and Tasmania and is currently in Bill form in Western Australia.

16. LATENT DEFECTS AND LIMITATION PERIODS - HIGH COURT DEVELOPMENT

Pirelli General Cable Works Limited ("Pirelli") was a building owner, which decided to build a 50 metre high chimney in England. The chimney was completed in mid-1969. Cracks must have appeared in the top of the chimney by April 1970. Even with reasonable diligence, the cracking of the chimney could not have been discovered by October 1972. In fact Pirelli discovered it in November, 1977.

In October, 1978 Pirelli instituted proceedings against the engineers responsible for the design of the chimney, claiming the cracks had occurred because the chimney had been designed by the engineers in a negligent manner.

Judgment was entered against the engineers, who appealed to the Court of Appeal. The appeal was rejected. That decision was appealed and so the case came before five Law Lords, sitting as the House of Lords, the final appellate court in England.

The House of Lords unanimously found in favour of the engineers. Judgment was accordingly entered against the owner, who recovered nothing in the end and no doubt incurred very substantial legal fees in the process.

While the judgment in Pirelli is to be applauded from the point of view of contractor, sub-contractor, architect, engineer, insurer or the like, from an owner's point of view it is obviously a disaster.

The Limitation Period

The engineers were successful because they raised a Limitation Act (UK) defence. That Act limits the period in which the various forms of action (proceedings) can be instituted. As a general rule, it provides that actions will not, as a matter of law, be permitted to succeed if not commenced within the relevant period.

In Pirelli, the action was brought in tort. More particularly the action was an action for negligence.

At the time Pirelli was heard, the Limitation Act (UK) provided that, as a general rule, such actions must be commenced within six years of the date upon which the right to sue arose. Similar provisions exist throughout Australia.

The House of Lords Judgment

The Law Lords held that the right to sue in tort arose when damage came into existence and not when it was discovered or should with reasonable diligence have been discovered.

They indicated there may be an exception to that rule. That was where "the defect is so gross that the building is doomed from the start". In such cases they held the owner's right to sue in tort might arise as soon as the building was built and before any damage had come into existence.

In Pirelli, they merely had to apply the general rule. It was not necessary to consider the application of the exception. In doing so, they found that the six year period commenced when the cracks first appeared. Therefore, the owner had not commenced the action within the six year period. Accordingly, they upheld the engineer's defence that the owner's action, as a matter of law, should not be permitted to succeed.

The Law Lords acknowledged that the application of that rule may lead to injustice. However, they stated that it was for the Parliament and not judges to correct any such injustice. It has since done so by enacting the Latent Damage Act 1986.

Australia: Post Pirelli To April 1988

The issue raised in Pirelli was not the subject of a judgment by the High Court of Australia, directly on the point, until Hawkins v Clayton, a judgement handed down on 8 April, 1988, (1988) 62 ALJR 240.

Pending that judgment, all courts in Australia were bound either not to disregard Pirelli lightly or possibly even to follow it, unless they could find something in a judgment of the High Court of Australia which permitted them to reach the conclusion that the High Court had rejected the line of reasoning adopted in Pirelli.

Prior to the High Court's judgment in Hawkins v Clayton, as far as the writer is aware only a small number of Australian decisions after Pirelli involved consideration of the issues raised by Pirelli. Of those, the two leading decisions are judgments of the Court of Appeal of New South Wales.

In San Sebastian's case, of the three members of the Court only two Justices (Hutley and Glass JJA) addressed the Pirelli issue. Both noted that they were obliged to follow Pirelli. Both did so with approval.

The second judgment was in Hawkins v Clayton. There two of the three judges (Justices Kirby and Glass) followed Pirelli with approval. The third, Mr Justice McHugh, held that Pirelli was not relevant to the case before him. He also stated that on the basis of two of the judgments of members of the High Court in Sutherland Shire Council v Heyman (1985), it was by no means probable that the High Court would follow the approach in Pirelli.

As to the remaining Australian cases, each involved a judge sitting at first instance. In each case, the judge followed Pirelli either with approval or without protest. The judgments were of judges in New South Wales, Queensland and South Australia. For example, in the New South Wales Supreme Court decision in Burgchard v Holroyd Municipal Council (1984) 5 BCLRS 360, which involved cracking and damage to a building, Roden J. noted that, according to the decision in Pirelli, the date of the accrual of the cause of action was the date that the damage came into existence and not the date when the damage was discovered, or ought with reasonable diligence to have been discovered, as was previously regarded to be the position. In deciding Burgchard, Roden J. followed and applied the decision in Pirelli.

The High Court of Australia: Hawkins v Clayton

The Judgment of the Court of Appeal of New South Wales in Hawkins v Clayton was the subject of an appeal to the High Court of Australia. The High Court upheld the appeal. In doing so it declined to follow, as predicted by the dissenting Justice in the Court of Appeal, the approach adopted in Pirelli.

In essence the facts in Hawkins v Clayton concerned a claim in negligence by an executor of a deceased's estate against a firm

of solicitors for damages sustained by the estate by reason of the firm's delay for more than 6 years in notifying him of his appointment as executor.

Although the facts of the case did not involve latent defects (i.e. defects not discovered and not discoverable by reasonable diligence) in a building, a majority of the Justices in their judgments dealt with that problem.

The leading Judgment in that regard was given by Deane J., with whom Mason C.J. and Wilson J. agreed in substance. Gaudron and Brennan JJ. gave separate judgments on the point.

Deane J. proceeded on the basis that an action in tort for negligence for damages in respect of latent defect is ("in the absence of consequential collapse or physical damage") an action for economic loss sustained at the time the existence of the latent defect was detected or ought with reasonable diligence to have been detected. On that basis an owner would have a right to commence such an action at any time within six years of the date upon which such loss was sustained.

Gaudron J. proceeded on a basis that did not necessarily agree with Deane J. Gaudron J. considered that it was arguable that the relevant test for limitation purposes was the interest infringed. If the interest infringed was the value of the property, Her Honour would agree with Deane J.'s conclusion. If, however, the interest infringed was the physical integrity of the property, Her Honour acknowledged the logic of the Pirelli approach. Her Honour's judgment therefore leaves the issue open.

Brennan J.'s judgment also leaves the issue open although arguably it is capable of a construction which favours the Pirelli approach.

As Mason C.J. and Deane and Wilson JJ. constituted a majority of the High Court, the law in Australia with respect to the limitation period for an action in tort in respect of a latent defect is therefore as stated in the judgment of Deane J.

That law will apply to both the original owner and subsequent owners of the building.

It follows that in Australia although there is a limit on the period of time which can elapse without the right to sue for damages for economic loss arising from a latent defect being lost, the method of calculation of that period is such that provided an owner and his legal advisors are reasonably diligent, the owner should not lose such a right of action by reason of the provisions of a Limitation Act.

Deeds

From an owner's point of view, further protection against limitation problems may lie in the use of a deed to record the contract between the parties. The reasons are as follows. Proceedings for negligence causing physical damage must be commenced within six years of the period specified by Deane J. However, proceedings for the same wrong but in breach of a term of a deed need only be commenced in New South Wales within twelve years of the date of breach. Similar extended periods exist in other States.

The date of breach will occur upon completion of the work or the building. The twelve year (or similar) period may mean that the original owner's right to commence proceedings for breach of the deed will exist after his right to commence proceedings for negligence causing physical damage will have been lost.

The extra time could mean the difference between recovering or not recovering the cost of rectifying a defective building. The writer is aware of a case in Sydney involving a multi-million dollar claim by an owner where this arose.

Every owner should therefore insist that contracts between it and any of the following in respect of the construction or refurbishment of a building are in the form of a deed:

- Consultants (architects, engineers, project managers, etc)
- Head contractor
- Suppliers.

The deed must not, however, provide for the issue of a conclusive final certificate or similar document at the expiration of the work. Such a certificate, if issued, could well deprive the owner of the right to sue for breach of the deed.

Obstacles to a Limitations Defence

Even if a limitation defence appears to be available, an owner may still be able to escape it. For example:

- The onus of proving the right to sue has been lost rests on the defendant. If it fails, the defence will fail.
- The defendant may be "estopped" (that is prevented as a matter of law) from successfully raising the defence.
- There may be statutory provisions available which grant the Court a discretion to extend the limitation period. Such provisions exist in South Australia, the Australian Capital Territory and the Northern Territory.

- Adrian Batterby (Partner), Westgarth Baldick, Solicitors.

17. THE LESSON OF SAN SEBASTIAN

The lesson to be learned from the recent decision of the High Court of Australia in San Sebastian Pty Limited & Anors v the Minister Administering the Environmental Planning and Assessment Act 1979 & Anor (1986) 6 BCLRS 327 is any reliance placed on a public planning proposal is at one's own risk.

In that case, the State Planning Authority (NSW) ("the Authority") and the Council of the City of Sydney ("the Council") were found to have no liability to a developer ("the Developer") in respect of the preparation and publication of a redevelopment plan, subsequently abandoned after several years, for the Woolloomooloo area of Sydney.

Prior to that abandonment, the Developer on the basis of the plan had, via certain companies ("his companies"), acquired land in the area and incurred other expenditure in pursuit of a redevelopment proposal he intended to implement in accordance with that plan. At the time of abandonment of the plan, he had not obtained the development consent necessary to implement his proposal.

The abandonment of the plan accordingly caused him and his companies very substantial losses which he sought by the proceedings to recover from the Authority and the Council.

To appreciate the basis of the decision, the following factual background is relevant.

The Facts

In February, 1968 a meeting was convened between the Council and the Authority at which it was resolved to arrange for the preparation of a detailed plan of development for the Woolloomooloo area. A committee, comprising representatives of both, and a planning team were established.

In July, 1968 the Authority submitted its report on the completed plan to the Council. In August, 1969 it was adopted by the Council. One week later it was placed on public exhibition at Sydney Town Hall. The plan was exhibited as the following three documents ("the Study documents"), copies of which were made available to members of the public attending the exhibition:

- Woolloomooloo Redevelopment Study.
- Development Control Proposals.
- A publicity brochure.

The Developer visited the exhibition and obtained a copy of the Study documents. He examined them. Believing them to have