

## DEFECTIVE CONSTRUCTION: CLAIMS AGAINST BUILDERS AND LOCAL AUTHORITIES

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Where a contract is for the sale of land and fixtures the general law on fitness and quality is well settled : *prima facie* the general law implies into that contract no terms as to the fitness of the subject property for any purpose nor any term as to its general quality. It is the purchaser's responsibility to discover defects in the physical quality of the property for himself.<sup>1</sup> A party who seeks to claim the benefit of some such term must establish either an express term in the contract or some term to be implied from the particular course of dealings between those specific parties.

There is much good sense in the common law position. Purchasers may very well buy properties in bad repair with their eyes open and for their own advantage. Furthermore, the common law rule does not apply in the case of a contract for the sale of land and a house to be constructed or in course of construction. Instead there are three implied warranties:

- (a) that the work will be done in a good and workmanlike manner;
- (b) that the materials will be good and proper for the work;
- (c) that the house will be fit for human habitation.<sup>2</sup>

These warranties arise under the initial contract. The purpose of this paper is to examine recent authorities which extend a tortious liability to builders and local authorities in respect of defective construction work. The writer will seek to establish the extent to which that liability runs in favour of both initial and later purchasers of defective premises.

The cases examined are a series of United Kingdom decisions:

*Dutton v. Bognor Regis Urban District Council*<sup>3</sup>

*Sparham-Souter v. Town and Country Developments (Essex) Ltd.*<sup>4</sup>

*Anns v. Merton London Borough Council*<sup>5</sup>

*Batty v. Metropolitan Property Realisations Ltd.*<sup>6</sup>

*Junior Books Ltd. v. Veitchi Co. Ltd.*<sup>7</sup>

*Pirelli General Cableworks Ltd. v. Oscar Faber & Partners*<sup>8</sup>

In light of the many current complaints of bad design and shoddy workmanship in building we can expect these cases to be closely scrutinised in the coming years. The writer anticipates that they will be of particular interest with respect to local authority liability and in so far as they may apply in the case of building units.

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1. But see E.L. Newsome, [1980] Conv.287 as to the modification of this principle.
2. *Hancock v. B. W. Brazier (Annerley) Ltd.* [1966] 1 W.L.R. 1317
3. [1972] 1 Q.B. 373.
4. [1976] Q.B. 858.
5. [1978] A.C. 728.
6. [1978] Q.B. 554.
7. [1983] 1 A.C. 520.
8. [1983] 2 A.C. 1.

*Dutton v. Bognor Regis U.D.C.*<sup>9</sup> is perhaps well enough known. A builder constructed a house on the site of an old rubbish tip. The house foundations were seriously inadequate but were passed by a council building inspector. The house was sold on completion and one year later the Duttons bought it from the original purchaser. Not long after, the house developed serious cracks and subsidence.

Believing that she could not succeed against the builder, Mrs. Dutton sued the Bognor Regis Council. The Court of Appeal held that, independently of any statutory duty, the local authority owed a general duty of care which could reach as far as both the first owner and later purchasers such as Mrs. Dutton. Further in the view of Lord Denning and Sachs L.J. the same duty of care would have extended to the builder.

So in 1972, Mrs. Dutton won her landmark case and was finally paid the 2115 pounds plus six percent interest which had been first awarded her almost ten years earlier. By then, as Mrs. Dutton told the *Sunday Times*, the actual cost of repairs had risen to 8500 pounds, far more than she could ever afford. Nonetheless, *Dutton* heralded a decade of rapid development in the law.

In *Sparham-Souter v. Town & Country Developments (Essex) Ltd.*<sup>10</sup> the Court of Appeal faced a similar factual problem but a principal difficulty was that the work was done and inspected in September 1965. The plaintiff purchased in 1966 and the defects became manifest in 1969. The writ issued in October, 1971, that is just outside the six year limitation period if one regarded the completion of building and inspection in September, 1965 as the relevant date.

Theoretically, there would seem to be three possible dates as the relevant choices:

- (a) the date when the work was completed or the inspection was conducted;
- (b) the date when the structural damage first occurred;
- (c) the date when the damage might first have been detected.

As the writer understands the judgments in *Sparham-Souter*, the Court of Appeal adopted a 'discoverability' test — time began to run only when the *then owner* of the premises could with reasonable diligence have discovered the damage. In so holding, Lord Denning expressly recanted on his own earlier view in *Dutton* that time began to run when the work was done.<sup>11</sup>

We may notice, though, that in *Sparham-Souter* the question of date of actual damage or date of discovery was inconsequential. The limitation problem only arose if the date of completion of work was the test.

However, we can also notice that as between date of damage and date of discovery tests, we have the germ of a serious difficulty. Who has the right of action if between the date of damage and date of its discovery, the property is sold? The writer will return to this question shortly.

In *Anns v. Merton London Borough Council*,<sup>11A</sup> Lord Wilberforce gave the principal judgment of the House of Lords.<sup>12</sup> The Law Lords endorsed the broad proposition that, in cases of this sort, the duty of care was owed by both local authority and builder — but then, who could bring the action? According to Lord Wilberforce: 'A right of action can only be conferred upon an owner or occupier who is such when the damage occurs.'<sup>13</sup>

Now this looks very like a preference for the date of actual damage test as opposed to the discoverability test favoured in the Court of Appeal. And, while not altogether clear on the

9. *Supra* n. 3.

10. *Supra* n. 4.

11. *Supra* n. 3 at 396 and n. 4 at 868.

11A. *Supra* n. 5.

12. Lord Diplock, Lord Sutton and Lord Russell of Killowen concurred fully. Lord Salmon agreed in part and delivered his own opinion on, inter alia, the 'limitation' question.

13. *Supra* n. 5 at 758.

point, a following passage in his judgment suggests the same preference: 'It [the cause of action] can only arise when the state of the building is such that there is present an imminent danger to the health or safety of persons occupying [the building].'<sup>14</sup> Presumably, the danger arises when the actual damage occurs, even though not detected.

In the view of Lord Salmon in *Anns* the answer to the cause of action question was this:

In *Sparham-Souter v. Town and Country Developments (Essex) Ltd.* [1976] Q.B.858, Lord Denning M.R. reconsidered and handsomely withdrew his obiter dictum in *Dutton's* case [1972] 1 Q.B. 373 to the effect that the period of limitation began to run from that date when the foundations were badly constructed. He acknowledged that the true view is that the cause of action in negligence accrued at the time when damage was sustained as a result of negligence, *i.e.*, when the building began to sink and the cracks appeared. He therefore concluded that in *Higgins v. Arfon Borough Council* [1975] 1 W.L.R. 524 and in the instant case, it had been wrongly decided that the action was statute-barred, and as I read their judgments Roskill and Geoffrey Lane L.JJ. agreed with that view; and I certainly do.<sup>15</sup>

Two points on this: one, Lord Salmon appears to suggest that the date of actual damage is the test and two, in saying that this was the view of Lord Denning in *Sparham-Souter*, Lord Salmon appears to misconstrue what Lord Denning said there:

And again: what about *Bagot v. Stevens Scanlan & Co. Ltd.* [1966] 1 Q.B. 197, 203, when Diplock L.J. expressed the view that the damage occurred "when the drains were improperly built": and I followed him in *Dutton v. Bognor Regis Urban District Council* [1972] 1 Q.B. 373, 396. This does make me pause. But now, having thought it over time and again — and been converted by my brethren — I have come to the conclusion that, when building work is badly done — and covered up — the cause of action does not accrue, and time does not begin to run, until such time as the plaintiff discovers that it has done damage, or ought, with reasonable diligence, to have discovered it.<sup>15A</sup>

The cited passage from Lord Denning surely endorses a discoverability test.

That same year in *Batty v. Metropolitan Property Realisations Ltd.* the Court of Appeal applied *Anns*, holding that a builder who constructed a house in a situation where there was evident danger of land slip was liable because of 'the imminent danger to the health or safety of occupants'.<sup>16</sup> In expressing the origin of the duty in this way in *Batty*, the Court of Appeal simply followed a lead given by Lord Wilberforce in *Anns*. He too saw the duty as arising from 'present or imminent danger to health or safety'.

In other words, it was not the economic loss resulting from the purchase of a defective building, but the risk of physical harm which justified an award of damages in tort for the costs of remedial work. The award is a preventative loss kind of remedy.

This brings us then to *Junior Books Ltd. v. Veitchi*.<sup>17</sup> Here, the House of Lords, by majority, has now held that where the proximity between a person who carried out defective work and the user of it was sufficiently close, the scope of the duty of care owed by the producer to the user was not limited to a duty to prevent physical harm being done by the defective work or article, but included a duty to avoid faulty construction of the work itself.

On this basis, despite a complete lack of any contractual privity, *Junior Books* who had commissioned building work, could in principle recover directly against a nominated sub-contractor, who had constructed a defective floor, both the cost of repairing the floor and consequential economic loss.

14. *Ibid.*

15. *Ibid.* at 770.

15A. *Supra* n. 4 at 868.

16. *Supra* n. 6 at 571, per Megaw L.J.

17. *Supra* n. 7.

The difference between *Junior Books* and the earlier cases is clear. In those cases emphasis is put upon the likelihood of physical harm resulting from the negligent work. In *Junior Books* no such further harm was known to be likely and yet recovery was allowed — allowed because of a ‘sufficient relationship of proximity’.<sup>18</sup>

This appears to be the explanation of the passage in Lord Roskill’s judgment in which he says:

In the instant case there is no physical damage to the flooring in the sense in which that phrase was used in *Dutton, Batty and Bowen* and some other cases . . . the question which your Lordship’s House has now to decide is whether the relevant Scots and English law today extends the duty of care beyond a duty to prevent harm being done by faulty work to a duty to avoid such faults being present in the work itself.<sup>19</sup>

In the result the House of Lords held that the latter duty could exist and could give rise to recovery. The question in our context then must be whether a later purchaser is in a sufficiently proximate relationship to the builder to recover for any defective work.

Certainly, the builder must foresee that his work may come into the hands of later purchasers, who will suffer economic loss if they are compelled to repair defective work. All the same, the writer inclines to doubt that there is the relevant ‘proximity’ here. In *Junior Books*, of the majority judges, Lords Fraser and Roskill (both of whom were supported by Lord Russell of Killowen) emphasized that the identity of the head party was known to the sub-contractor and the relationship was only just short of direct privity.<sup>20</sup> Further, according to Lord Roskill: ‘The concept of proximity must always involve, at least in most cases (sic), some degree of reliance.’<sup>21</sup> Since a later purchaser buys without a warranty of quality it is difficult to see how he can argue that he has nonetheless relied upon a builder when they are, to each other, complete strangers. The writer therefore doubts that *Junior Books* relevantly modifies the principles established in *Anns*’ case.

The most recent United Kingdom authority is *Pirelli General Cableworks Ltd. v. Oscar Faber & Partners*.<sup>22</sup> In this case the House of Lords firmly denied that the date when the damage was or might have been discovered was the relevant date for determining the accrual of a claim. Instead the House of Lords asserted that the relevant date is the date when, in consequence of the work, the physical damage actually occurs.

In that case, in March 1969, Pirelli engaged Oscar Faber to advise on and design a chimney. The design was defective. It was accepted that consequent structural damage would have occurred at the top of the chimney not later than April 1970. The plaintiff did not discover the damage until inspection in 1977. The writ issued in 1978. The House of Lords held that the occurrence of the damage in or before April 1970, was the relevant date at which any tort liability first arose. Pirelli’s claim was statute barred.

Now once a ‘discoverability’ test is clearly abandoned, this poses problems for a purchaser who buys a house or unit which has already suffered hidden structural damage of some sort, for example the cracked chimney in *Pirelli*. A purchaser buys and the damage then becomes reasonably obvious, all within the six year period. Has the purchaser got a claim?

The answer seems to the writer to be ‘No’, because, while there has been a clear difference between the Court of Appeal and the House of Lords in deciding *when* the tort occurs, there

18. *Ibid.* at 545, per Lord Roskill.

19. *Ibid.*

20. *Ibid.* at 533 and 546.

21. *Ibid.* at 546.

22. *Supra* n. 8.

is agreement between these courts that whenever it does occur, there is one tort and one tort only.<sup>23</sup>

In *Sparham-Souter*, Lord Denning suggested, however, that the right of action might be preserved in favour of a later purchaser by 'assignment'. With respect, this will not work because it encounters the same difficulty as confronted the purchaser in *Ziel Nominees Pty. Ltd. v. V.A.C.C. Insurance Co.*<sup>24</sup>

In *Ziel*, the purchaser-assignee of a fire policy could recover nothing on his vendor's fire policy because the vendor had suffered no loss when he was paid the full value of the property. Similarly, if the purchaser of a defective house pays a full price the vendor has suffered no loss.

In New Zealand, however, later purchasers have recovered where the court has been prepared to treat initial minor damage and later major structural harm as separate and distinct occurrences. The cases are *Bowen v. Paramount Builders (Hamilton) Pty. Ltd.*<sup>25</sup> and *Mount Albert Borough Council v. Johnson.*<sup>26</sup> The factual logic of such an approach might be criticised.<sup>27</sup>

Two writers have also argued, recently, that the subsequent purchaser should have a right of action in the case of hidden damage at the time of purchase. Todd argues in favour of the retention of the 'discoverability' test. He argues, if the writer represents him fairly, that once it is accepted, as in *Junior Books*, that there can be recovery for pure economic loss, then the true cause of the purchaser's complaint is the financial loss which flows from the purchase of defective property:

The plaintiff found his cause of action not on the mere existence of the cracks or other physical damage to the structure of the property; but on the fact that he has acquired property *not of the quality* reasonably to be expected in the circumstances.<sup>28</sup>  
(Emphasis added)

To the writer's mind, this argument is fundamentally unsound in that it relies upon an implied warranty as to quality — which must surely be a matter of contract. And again, if there is no such implication in the vendor's contract, how can there be such an implied term between parties who are not in privity at all? In that sense, the House of Lords in *Anns* did ask the proper question in a tort case (at least where the parties are not otherwise in 'proximity'), that is, whether there was foreseeable risk of physical damage, *not* whether the quality of the work attains the standard reasonably to be expected of a competent builder.

Robertson looks to a statement of Lord Fraser in *Pirelli* as suggesting some form of class action which might give rise to a right of action in a purchaser who buys after actual damage has occurred.<sup>29</sup> Lord Fraser said:

I think the true view is that the duty of the builder and of the local authority is owed to owners of the property as a class, and that if time runs against one owner, it also runs against all his successors in title. No owner in the chain can have a better claim than his predecessor in title.<sup>30</sup>

This statement is clearly dicta, for this point was not in issue in *Pirelli*. Moreover, it is an argument which Roskill L.J. (as he then was) roundly trounced in *Sparham-Souter*:

23. See *Sparham-Souter*, *supra* n. 4 at 868 and *Anns*, *supra* n. 5 at 758.

24. (1976) 50 A.L.J.R. 106.

25. [1977] 1 N.Z.L.R. 394.

26. [1979] 2 N.Z.L.R. 234.

27. Cf. Lord Halsbury in *Darley Main Colliery Co. v. Mitchell* (1886) 11 App. Cas. 127 at 132.

28. S. Todd, Latent Defects in Property and the Limitation Act: A Defence of the "Discoverability" Test (1983) 10 N.Z.U.L.R. 311 at 320.

29. G. Robertson: 'Defective Premises and Subsequent Purchasers' (1983) 99 L.Q.R. 559.

30. *Supra* n. 8 at 18.

Mr. Tackaberry, for the council, submitted that when the present plaintiffs acquired the property they acquired an existing cause of action against the local authority which, to quote his own words, "came with the property", by which I understood him to mean that there was some inchoate cause of action already existing against the defendants which in some manner, apparently akin to a covenant running with the land, enured to the benefit of the plaintiffs and crystallised in their favour upon their acquiring title, whether equitable or legal, to the defective property. This, with respect, is an impossible argument. There is no relevant estate contract here. There is no assignment of any pre-existing cause of action in tort in the plaintiffs' favour from their predecessors in title. Nor do I understand how, as this argument presupposed, there can be some inchoate or floating cause of action in tort existing in vacuo which can suddenly enure to the plaintiffs' benefit upon their acquisition of a legal or equitable title to the property in question. So to hold in my view would not only be contrary to principle but also to the judgment of Diplock L.J. in this court in *Letang v. Cooper* where he analysed the true nature of a cause of action. Furthermore the present plaintiffs have clearly not acquired such a benefit by contract or by statute, and I fail to see upon what principle they can be said to have acquired it by operation of law.<sup>31</sup>

It also runs counter to Lord Wilberforce in *Anns*:

A right of action can only be conferred upon an owner or occupier, who is such when the damage occurs. This disposes of the possible objection that an endless, indeterminate class of potential plaintiffs may be called into existence.<sup>32</sup>

One final point. In *Batty* the Court of Appeal held that in the circumstances of that case concurrent liabilities arose — one in contract and the other in tort. The establishment of such a tort liability has the implication that builders will be liable to original owner/purchasers for longer periods. Contract liability arises when the work is done badly but the tort liability arises when the consequences of that bad work take effect in the shape of damage to the premises although the measure of damages would seem to be the same. Hence, there is the possibility of the tort claim outdistancing the contract action.

In sum, the 'proximity' test in *Junior Books* at first sight suggests that the purchaser of a home defectively constructed has the prospect of recovery against builders and negligent local authorities at whatever point in the chain the purchase occurs. However, in the view of the writer, the form in which this 'proximity' was measured in that case presents no countervailing element to the insistence of the House of Lords and the Court of Appeal in earlier cases that there is one tort and one tort only. In England it is now settled that that tort arises on the occurrence of the physical damage. The proprietor — whether original owner or later purchaser — who gets the benefit of the tort claim is the one who is proprietor when that damage occurs.

31. *Supra* n. 4 at 873.

32. *Supra* n. 5 at 758.