DEFECTIVE BUILDINGS AND DEFECTIVE LAW: THE DUTY OF CARE IN NEGLIGENCE

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Under Hong Kong law, an owner of property with defects caused by the builder or architect's negligence has no legal remedy. This position has come about as a result of the reception of pre-handover English authorities characterizing such property damage as economic loss, and therefore outside of the law's protection. It is here argued that this position runs counter to common sense notions of fairness and the expectations of ordinary people, is not supported by social and economic policy considerations, nor defensible legal principle, and should be judicially repealed at the first opportunity.

Introduction

Few areas of negligence law confront basic notions of fairness and justice as that concerning the right of a purchaser of a structurally defective building to sue a careless builder or architect. The law has been developed by the English House of Lords in such a way that very few purchasers of defective flats or buildings will find themselves with a viable legal remedy. Put simply, negligence law as currently configured effectively confers immunity from suit on the parties responsible for creating the defective structure.

Not surprisingly, given this legal environment, substandard workmanship on Hong Kong's building sites remains a serious problem, for which the consumer ultimately pays. Even in the slow property market that has afflicted Hong Kong since 1997, violations of building standards are prevalent. Unscrupulous builders persist in cutting corners to save costs and balance books in the current competitive business environment, secure in the knowledge that their substandard work will be covered in and not easily discovered, at least not before project completion and the sale of units to unsuspecting buyers. The alarming extent to which this attitude prevails in Hong Kong was demonstrated by the spate of piling scandals on public and private housing developments earlier this year,[1] in one case culminating in a government-ordered demolition of two 34-storey residential tower blocks.[2]

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1 Defective piling was discovered on a number of sites, as reported in the South China Morning Post: see 22 March 2000, p 6 (Tin Shui Wai); 15 March 2000, p 3 (Waterfront Project); 9 January 2000, p 4 (Sha Tin); 12 October 1999, p 6 (Lam Tin); and October 5, 1999, p 3 (Tung Chung).

2 'Blocks in Scandal May Come Down', South China Morning Post, January 22, 2000, p 1.

Courts in England have had ample opportunity to decide cases and develop the law in this area, and in the result have tipped the scales heavily in favour of the builder over the property owner. This state of the law became incorporated into Hong Kong's law under the pre-handover statutory mechanism for the automatic reception of the English common law.[3] However, it was and is a matter of some anticipation and legitimate expectation whether, in the wake of the 1997 formal break with the UK, Hong Kong should take a pro-active approach in developing its own law, or would continue its reverence for English authorities, even in areas of the law that have been developed along problematic, and in the case of building defects, decidedly non-consumerist lines.[4]

Property purchasers in Hong Kong had cause for some optimism, for at least three reasons: the law as developed in the UK was not well-received, had been the subject of widespread academic criticism,[5] was rejected as the appropriate law of Canada and Australia by the highest courts in those jurisdictions,[6] and seemed ripe for reform, or at least a re-visiting by the House of Lords; Hong Kong's Legislative Council indicated some interest in protecting the property owner's position, having amended the Limitation Ordinance[7] in 1991 to preserve and extend the right of action of owners of defective buildings beyond the traditional limitation period;[8] and in 1996, the Privy Council, in a case on appeal from New Zealand, deviated from the orthodox UK legal position and confirmed the lower courts' decisions to confer the right to sue on a purchaser of defective property, and expressed the view that the law in this area was capable of different approaches within the commonwealth.[9]

The question of entitlement to sue in negligence, in legal jargon, *duty of care*, is obviously central to the position of an owner of defective property seeking redress for his damage. This article will consider that issue as configured in the law of Hong Kong, taking into account the Court of Final Appeal's[10] recent decision in *Bank of East Asia v Tsien Wui Marble Factory Ltd & Others*.[11] The opportunity will be taken to assess this notoriously unsatisfactory aspect of the law of negligence against developments elsewhere, and make a plea for judicial reform of the law at the first opportunity.

3 Section 3 (1) of the Application of English Law Ordinance (Cap 88) (repealed in 1997).

4 Although still applicable in Hong Kong, after 30 June 1997 the English common law is now open to reconsideration, at least by the highest courts. See notes 41 and 42 below, and accompanying text.

5 See note 52 below, and accompanying text.

6 See notes 36-39 below, and accompanying text.

7 Cap 347, Laws of Hong Kong.

8 New section 31of the Limitation Ordinance delays the running of the limitation period in cases of latent damage to the date when the owner acquires knowledge of the damage, and other facts required to sue. The plaintiff is not bound by the usual six-year limitation period applicable to tort law in section 2. The action can be brought within three years of the date of acquisition of such knowledge. This reform parallels that intended by the Latent Damage Act 1986 (now s 14A and 14 B of the Limitation Act 1980, (1980 c 58)).

9 *Invercargill City Council v Hamlin* [1996] AC 624.

10 The Court of Final Appeal replaced the Privy Council as Hong Kong's final appeal court on 1 July 1997.

11 [2000] 1 HKLRD 268.

Building defects and the duty of care

A purchaser of a defective building or flat fortunate enough to have discovered the defect at an early stage may have an action in contract against the builder and architects, if he is in privity with them.[12] However, more often than not, the plaintiff will not be in privity with the builder or architects, having purchased from an intermediary. Most certainly he will not be in privity with any governmental authority responsible for the inspection and certification of buildings under construction. In all such cases, the remedy, if any, whether against the builder, the architect, or any certifying authority would have to be in the tort of negligence.

Liability for negligence can arise only if the defendant owes a duty of care to the plaintiff. This is saying nothing more than that the nature and circumstances of the damage or injury to the plaintiff must be such that the law imposes an obligation on the defendant to take reasonable care in relation to the plaintiff. This aspect of the law of negligence is far from coherent but has reached the point where certain generalizations can safely be made. Where the damage is physical and is the direct result of the defendant's negligence, the plaintiff need only prove that the damage was a reasonably foreseeable consequence of the defendant's negligence.[13] Where the damage is purely economic, reasonable foreseeability of the loss is not sufficient for the imposition of a duty of care. The law requires a closer relationship, based on assumption of responsibility and reliance.[14] This principle was adopted in respect of defective buildings by the House of Lords in *Murphy v Brentwood*.[15] This more stringent test for duty of care regarding claims for purely economic damage is routinely justified on the basis of a judicial fear of indeterminate liability. Negligently caused financial loss is a commonplace event, and if it were to give rise to liability, would open the much-feared 'floodgates of litigation'.[16]

On a common sense view of the facts, one that would accord with the understanding of the non-lawyer, a building with defects caused by negligent design or construction, for instance one collapsing into itself due to defective foundations, seems an obvious case of physical damage. If that were so, the position of property owners would be secured. A duty of care would arise as a

[12] By s 4 (1) of the Limitation Ordinance (note 7 above), the relevant limitation period for an action in contract is six years from the date of the accrual of the cause of action.

[13] As stated by Lord Oliver in *Murphy v Brentwood* [1991] 1 AC 398 at 486-7, 'in the straightforward case of the direct infliction of physical injury by the act of [the defendant] there is 'no need to look beyond the foreseeability by the defendant of the result in order to establish that he is in a "proximate" relationship with the plaintiff.' This formulation is just a restatement of Lord Atkin's 'neighbour principle' in *Donoghue v Stevenson* [1932] AC 562.

[14] *Henderson v Merrett Syndicates Ltd* [1995] 2 AC 145, adopting in more general terms the principle first enunciated in *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465 (hereafter referred to as *Hedley Byrne*).

[15] Note 13 above at 480 (per Lord Bridge) and 486 (per Lord Oliver).

[16] For a fuller justification in the context of lost business profits, see Lord Denning in *Spartan Steel & Alloys Ltd v Martin & Co (Contractors) Ltd* [1972] 3 WLR 502 at 509-10.

matter of course on the basis of reasonable foreseeability of physical damage, an issue not normally difficult of proof. Much turns then on the judicial characterization of such damage.

For some time, defects in buildings had been characterized as physical damage, for the purposes of the duty of care determination. In *Dutton v Bognor Regis Urban District Council*,[17] a local authority had wrongly approved foundations as complying with the applicable building byelaws, resulting in damage to the building itself. The English Court of Appeal found a duty of care owed on the basis that the damage to the building was physical. The majority rejected the notion that physical damage requires injury to persons or damage to property other than the defective structure. This reasoning permitted a finding of duty of care on the basis of reasonable foreseeability of damage to the structure. The property owner was thus able to recover damages in the amount necessary to repair the structure and remedy the defect. Subsequent cases proceeded on the same footing.[18]

A more ambivalent approach can be detected in *Anns v Merton London Borough Council*,[19] a case like *Dutton v Bognor Regis* concerned with inadequate building foundations. The plaintiff alleged that the local authority had wrongly approved plans that, in the event, resulted in inadequate foundations and cracks in the walls. The court held that the owners had suffered physical damage, and were accordingly owed a duty of care on the basis of reasonable foreseeability of that damage, but confined the decision to circumstances where, as in that case, the defects posed a threat of imminent risk of injury to occupants or to other property. In such circumstances, the damage was the cost necessary to remedy the defects and avoid the imminent danger to occupants or other property.[20] By implication, defects that did not give rise to such an imminent threat, being mere defects in quality, would not be classified as physical damage.

A few years later, in *Pirelli General Cable Works Ltd v Faber (Oscar) & Partners*,[21] a case concerning engineers' negligent chimney design resulting in cracks to the chimney, the House of Lords proceeded on the basis that the damage was physical, without reference to the question of imminent danger to persons or other property. Although the plaintiff's action was defeated by the limitations defence, the House of Lords seemed prepared to find a duty of care on the basis of reasonable foreseeability of damage to the chimney itself.[22]

17 [1972] 1 QB 373.

18 See eg *Higgins v Arfon Borough Council* [1975] 1 WLR 524; see also *Sparham-Souter v Town and Country Developments (Essex) Ltd* [1976] QB 858.

19 [1978] AC 728 (hereafter referred to as *Anns v Merton*).

20 See *Dennis v Charnwood Borough Council* [1983] QB 409, applying the same principle.

21 [1983] 2 AC 1.

22 But see *Junior Books Ltd v Veitchi Co Ltd* [1983] AC 520, decided about the same time, where the House of Lords characterized defective flooring installed by a subcontractor as pure economic loss. However, this finding did not prevent the court from imposing a duty of care, so the consumerist position was preserved.

In this state of the law, purchasers of property that proved to be defective could look forward to a realistic chance of recovering damages against the negligent creator of the defect, normally the builder or architect, or in appropriate cases, the building authority, at least in the amount required to correct the defect and restore the building to a non-dangerous state.

Building defects as pure economic loss

By the late 1980's the view that structural defects in an acquired property constituted physical damage came to be questioned. The seeds of doubt were sown in the decision of the High Court of Australia in *Sutherland Shire Council v Heyman & Another*.[23] In that case, involving a homeowner's action against a negligent building authority, the court characterized inadequate foundations that caused subsidence to the house as pure economic loss. This conclusion was explained on the basis that the plaintiff had not suffered damage to any property other than the house itself. He had merely acquired a property of diminished value. In the words of Deane J, '[t]he building itself could not be said to have been subjected to 'material physical damage' by reason merely of the inadequacy of its foundations since the building never existed otherwise than with its foundations in that state'.[24] Therefore, the plaintiff's loss was purely economic and, in the obvious absence of a *Hedley Byrne* relationship, no duty of care was owed.

The House of Lords was persuaded to the same view a few years later in *D & F Estates Ltd v Church Commissioners*,[25] a case brought against a builder for substandard ceiling plastering that required replacement. The majority of the House of Lords held that the defective plaster constituted pure economic loss. Any recoverable physical damage would be confined to injury to persons or damage to property other than the defectively constructed building itself.[26] The plaintiff's loss was in having purchased a property less valuable than expected. This was pure economic loss, and not recoverable.[27]

Then, in 1990, in *Murphy v Brentwood District Council*,[28] the matter was laid to rest. The case again concerned a local authority's approval of foundations that, in the event, proved to be of inappropriate design, resulting in cracks in the walls and subsidence of the structure. The House of Lords reviewed the

23 (1985) 157 CLR 424.
24 Ibid, p 504.
25 [1989] AC 177 (hereafter referred to as *D & F Estates*).
26 Damage to the carpet was recoverable.
27 The 'complex structure theory', whereby damage to a part of the house caused by a defect in another part could be treated as physical damage for duty purposes, was posited by Lords Bridge and Oliver as a possible explanation for the result in *Anns v Merton*, and as a way through for future property owners (note 25 above, pp 206-7, and 212 respectively). Lords Bridge and Oliver later recanted this view in *Murphy v Brentwood District Council* (note 13 above, at 478-9 and 484 respectively).
28 Note 13 above (hereafter referred to as *Murphy v Brentwood*).

decisions in *Dutton v Bognor Regis Urban District Council*[29] and *Anns v Merton*[30] and the cases that followed them. The House of Lords confirmed that if the only complaint was with respect to the physical integrity of the acquired structure, and not to damage to other property, the property owner's loss is properly characterized as purely economic. The loss is the diminution in the value of the building. This is so even where, as in *Anns v Merton*, there is an imminent risk of injury to persons or damage to other property. Lord Wilberforce's attempt in *Anns v Merton* to characterize such damage as physical was expressly overruled. The Law Lords reasoned that once the danger is detected, the risk of further damage is removed, and the loss is truly economic.[31] If such losses were to be treated as physical damage, a duty of care would arise as a matter of course on the basis of reasonable foreseeability alone, and as stated by Lord Bridge in *D & F Estates*, the overall effect would be tantamount to implying into the law of tort a transmissible warranty of quality, in circumstances where no payment was made for the warranty. To do so would be too great an extension of the duty of care, and an unjustifiable incursion into the domain of contract law.[32]

Therefore, after *Murphy v Brentwood*, a plaintiff who acquired a defective property, whether posing an imminent danger or not, would be treated as having incurred a pure economic loss, in the amount of the diminution in the value of the property. In the absence of a contract, such a plaintiff must suffer this loss quietly—unless of course he can establish the exceptional circumstances required for a duty of care for pure economic loss laid down in *Hedley Byrne*.[33] Most would not be able to establish the close proximity required in the *Hedley Byrne* relationship, because most property owners will have purchased from an intermediary, normally a previous purchaser. This state of the law left purchasers of defective property effectively without a remedy. From the perspective of consumer protection, *Murphy v Brentwood* had an impact on the law on a scale no less grand than that in *Donoghue v Stevenson*, but sadly, the effect was to emasculate rather than invigorate, the law.

A duty of care nonetheless

The decision of the Privy Council in *Invercargill City Council v Hamlin*[34] signaled a major breakthrough for property owners in New Zealand. The case concerned a building authority's negligent certification of faulty building

[29] Note 17 above.
[30] Note 19 above.
[31] An exception left open by the House of Lords is where the defect poses a risk to persons or property on immediately adjacent land or the highway. In such circumstances damages may be recoverable according to the duty principles applicable to physical damage (note 13 above at 475).
[32] Note 25 above at 206.
[33] Note 14 above. See dicta of Lords Bridge and Oliver in *Murphy v Brentwood*, note 15 above, and accompanying text.
[34] Note 9 above (hereafter referred to as *Invercargill*).

foundations that resulted in cracks in the walls and other defects. The building authority presented two main arguments in its defence of the negligence action brought by the property owner: that no duty of care was owed in the absence of a *Hedley Byrne*-style relationship, the loss being purely economic; and limitations, the action having been brought more than six years after certification.

Lord Lloyd, giving the judgment of the court, accepted the position from *Murphy v Brentwood* that the plaintiff/owner's loss was purely economic. However, in his view, this did not prevent the imposition of a duty of care, even in the absence of a strict *Hedley Byrne* relationship. That is because, viewing the matter in context, in New Zealand, local authorities performing building inspection duties were under a duty of reasonable care to prospective owners, on the basis of the general reliance of owners on inspecting authorities, and on the basis of the control exercised by such authorities over building sites. Lord Lloyd described New Zealand as a social and legal culture where 'community standards and expectations demand the imposition of a duty of care on local authorities and builders alike to ensure compliance with local byelaws'.[35]

Parallel developments were taking place in Canada and Australia. In *Winnipeg Condominium Corporation No 36 v Bird Construction Co*[36] the Supreme Court of Canada imposed a duty of care on architects and contractors in respect of the economic loss incurred by the owner to repair dangerous cladding that posed a risk of personal injury to occupants and visitors. The court found a duty of care on the basis of the reasonable foreseeability of personal injury arising from negligent installation of the cladding, and a range of policy factors supporting the imposition of a duty of care.[37]

In *Bryan v Maloney*[38] the High Court of Australia imposed a duty of care on a builder in respect of the property owner's economic loss, being the diminution in the value of the house resulting from inadequate foundations that caused cracks and other defects to the house. The court found that there was sufficient proximity, despite the fact that the plaintiff, a subsequent purchaser, had no direct dealings with the defendant builder. The court could see little distinction between the position of a first owner and that of a subsequent owner such as the plaintiff, when considering the question of proximity with the builder.[39]

None of the courts in *Invercargill*, *Winnipeg Condominium* and *Bryan v Maloney* challenged the fundamental holding in *Murphy v Brentwood* to the effect that building defects are pure economic loss. Such a challenge was not necessary, since those courts took the view that sufficient proximity could be

35 Ibid, p 642. Moreover, the action was not time-barred. The six-year limitation period did not begin to run, in Lord Lloyd's view, until such time as the damage, economic in this case, would have become apparent to a reasonable homeowner (at 648).

36 (1995) 121 DLR (4th) 193 (hereafter referred to as *Winnipeg Condominium*).

37 Ibid pp 212-17. The policy factors are discussed below (see notes 66-69, 72-73, and accompanying text).

38 (1995) 182 CLR 609.

39 Ibid, pp 624-7.

established in circumstances falling short of the traditional criteria required in *Hedley Byrne*. However, in the UK and Hong Kong the position in the decided cases was otherwise. Any prospects for improvement of the legal position of owners of defective buildings in the UK or Hong Kong would have to await an appropriate case coming before the courts.

Bank of East Asia Ltd v Tsien Wui Marble Factory Ltd & Others

Bank of East Asia v Tsien Wui Marble Factory Ltd & Others[40] presented Hong Kong's Court of Final Appeal with its first opportunity to address the contradictions arising from the House of Lords decisions ranging from *Anns v Merton* through to *Murphy v Brentwood*. Although the central issue in the case was the time limitation imposed on the property owner in bringing the action, the question of duty of care and entitlement to sue for this kind of loss was a necessary incident of the decision. Unfortunately, because of the court's view of the legal issues necessary to the determination of the case, the court passed on the opportunity to address those contradictions. Nonetheless, much of the court's thinking on this issue is implicit in the reasoning of the various members of the court.

Hong Kong courts have generally followed the lead of the House of Lords in determining the content of negligence law. Indeed, there can be little doubt that prior to July 1, 1997, they were obliged to do so, except in so far as such law was shown to be inapplicable to local circumstances.[41] The practice has been to accept on its terms the negligence law as developed in the UK, and so it is that there has never been a serious judicial pronouncement in Hong Kong that has deviated from the official position in the UK. With the 1997 change of sovereignty, the way was clear for Hong Kong to develop the law without strict adherence to English precedents, in a way that was conducive to local needs and the expectations of Hong Kong's citizens.[42]

In the *Bank of East Asia* case, the plaintiff was the owner of a newly constructed 23-storey tower block, built to accommodate its new headquarters. The building was completed in 1983. Some years after completion, the

[40] Note 11 above (hereafter referred to as *Bank of East Asia*).

[41] See 3 (1) of the Application of English Law Ordinance (note 3 above). Hong Kong courts adopted a strict approach to this provision. English common law would be rejected only if its application would cause injustice or oppression: P Wesley-Smith, *An Introduction to the Hong Kong Legal System* (Hong Kong: Hong Kong University Press, 3rd ed, 1998), p 43.

[42] Although Article 8 of the Basic Law, Hong Kong's mini constitution, continues the common law, Article 84 expressly authorizes the court to 'refer to precedents of other common law jurisdictions.' Certainly, the Court of Final Appeal, as the court of final adjudication, is no longer bound by House of Lords decisions in developing the common law of Hong Kong: see eg *Tang Siu Man v HKSAR (No 2)* [1998] 1 HKLRD 350 at 368, where the Court of Final Appeal rejected the relevant House of Lords authority as applying to Hong Kong; and see the dicta of Nazareth NPJ in *Bank of East Asia* (note 11 above at 361). However, not all members of the Court are so adventurous: 'Nor is it for this Court to impose what it considers to be the best solution or a solution better than that laid down by the House of Lords...' (per Ching PJ, note 11 above at 325).

plaintiff discovered that the exterior granite cladding was defective, and was at risk of falling off. The plaintiff arranged for its replacement, at a cost of $38,502,951.85, and sought to recover that amount from the defendant architects who had been directly engaged by the plaintiff and who had approved the cladding, and from its nominated subcontractor responsible for the design and installation of the cladding. Proceedings were not instituted against the subcontractor until 1994, and against the architects until 1996, so by any measure, the contractual remedy against the architects and the action on a collateral warranty against the subcontractors were time-barred.

The plaintiff's main contention was that the defendants were liable in the tort of negligence. Rather generously, the architects admitted at trial that a duty of care was owed and breached, but argued that the action was time-barred, having been brought more than six years after the accrual of the cause of action. The subcontractor contested its tort liability, arguing that it had effectively delegated its responsibility for the design of the cladding to its sub-subcontractor, a specialist architect. The subcontractor also relied on the limitations defence.

At trial, the plaintiff succeeded against the architects. The court proceeded on the footing that the plaintiff's loss was properly characterized as purely economic, and following the Privy Council decision in *Invercargill*,[43] found that the cause of action accrued and the limitation period had begun to run only in the latter half of 1993, when (on the court's view of the facts), the damage was reasonably discoverable. As for the cladding subcontractor, the court held that it had effectively delegated responsibility to the specialist sub-subcontractor, and was therefore not liable for any damage.

In the Court of Appeal,[44] all three judges held that the actions against the architects and the subcontractor were time-barred. They accepted that the damage was purely economic, but held that the damage occurred, and that the cause of action accrued, either when the building was completed in 1983 (per Mayo JA)[45] or when the plaintiff acquired and paid for the building, also in 1983 (Rogers JA).[46] In the event, the Court of Appeal's inability to reach agreement regarding the subcontractor's argument that it had effectively delegated its tort responsibility to the sub-subcontractor, was of no practical import.[47]

In the Court of Final Appeal, the majority, consisting of Litton and Ching PJJ[48] and Nazareth NPJ,[49] agreed that both the actions against the architects

[43] See note 35 above.
[44] [1998] 2 HKLRD 373.
[45] Ibid, p 397.
[46] Ibid p 422.
[47] Mayo JA held that the subcontractor was liable in tort, Rogers JA held that it was not, and Leong JA, cryptically, agreed with both.
[48] Permanent Judges of the Court of Final Appeal.
[49] Non-Permanent Judge of the CFA.

and the cladding subcontractor were time-barred. The minority, consisting of Bokhary PJ and Lord Nicholls NPJ, would have followed *Invercargill* and started the running of the limitation period when economic damage was reasonably discoverable, in the latter half of 1993, thereby saving the plaintiff's actions. The Court of Final Appeal held that the subcontractor could not delegate its tort responsibility to the sub-subcontractor, but again, this holding was of no practical import, in view of the majority's finding on the limitations issue. Although the Court did not address the issue of duty of care directly, presumably because of its view of the limitations issue, the assumptions implicit in the reasoning of the majority judges provide strong hints about their views on the more general issue of the property owner's entitlement to sue for building defects.

The dubious doctrine of *Murphy v Brentwood*

As observed by Litton PJ in *Bank of East Asia*, the judicial resolution of the case in the Court of Appeal and Court of Final Appeal was constrained by the architects' admissions made at trial to the effect that a duty of care in negligence was owed and breached. According to Litton PJ, this resulted in a less than thorough exploration at trial of the facts necessary to a proper resolution of the limitations issue as he conceived it.[50] However, it had another effect. It shifted the analysis away from the bigger legal and policy issues underlying the question whether negligence liability properly arises in such circumstances. If the architects had not admitted negligence liability, the court would have been required to consider the circumstances in which a duty of care in negligence is owed for building defects, and this would in turn have required a consideration of the *Murphy v Brentwood* doctrine. However, the occasion never arose. Nonetheless, it is clear from the approach to the issues that were taken up by the Court of Final Appeal that all of the judges implicitly accepted as applying to Hong Kong the major tenet of *Murphy v Brentwood* to the effect that building defects do not normally attract a duty of care on the part of the builder, because they are pure economic loss.[51] They accepted *Murphy v Brentwood* as stating the law on this point, despite the barrage of academic criticism directed at that case in the ensuing years,[52] and without considering the far-reaching practical implications of that decision from the consumer's perspective.

50 Note 11 above at 275.

51 In fact, Ching PJ expressly accepted *Murphy v Brentwood* and its restrictions on the duty of care—see note 11 above at 339. As for Litton PJ, he was, somewhat quixotically, prepared to characterize the loss as both economic and physical, in determining the accrual date of the cause of action. However, in doing so he did not suggest that a duty of care would be owed in circumstances falling short of *Hedley Byrne* proximity – see note 11 above at 293-4, and 308.

52 See eg Fleming, 'Requiem for *Anns*', (1990) 106 LQR 525; Sir Robin Cooke, 'An Impossible Distinction', (1991) 107 LQR 46, 51-2; Wallace, '*Anns* Beyond Repair', (1991) 107 LQR 228, 237; Stapleton, 'Duty of Care and Economic Loss—a Wider Agenda', (1991) 107 LQR 249; and Howarth, 'Negligence After *Murphy*: Time to Re-think', [1991] 50 CLJ 58.

In fact, duty of care was actually a live issue in *Bank of East Asia*, however much the Court of Final Appeal did not see it that way. The cladding subcontractor did not join the architects in admitting a duty of care. Hence, for the subcontractor at least, the duty of care question was relevant and should have been addressed. The Court of Final Appeal, mesmerized perhaps by the limitations issue, did not analyse the circumstances in which a duty of care might be owed by the subcontractor. The Court of Final Appeal seems to have assumed that a duty of care was owed,[53] and in the event, ignored the opportunity to express its views on the imposition of a duty of care in circumstances of defective buildings, the policy questions related thereto, and the continued application in Hong Kong of *Murphy v Brentwood*.

Although the focus in *Bank of East Asia* was properly on the limitations defence, and the identification of the date of accrual of the cause of action, the court's implicit acceptance of a state of the law in which purchasers of defective property go unprotected cannot pass without comment. Put another way, and echoing the words of Lord Lloyd in *Invercargill City Council v Hamlin*, is *Murphy v Brentwood* appropriate to Hong Kong's circumstances?[54] Lord Lloyd in *Invercargill* noted that New Zealand was a society that had come to have expectations of reasonable care from building authorities and, perhaps more so, from builders.[55] Is not Hong Kong a society with similar needs and expectations? And if not, why not? A family that cobbles together its financial resources to purchase a flat can hardly be thought of as different in this respect from its New Zealand counterpart. Or is Hong Kong still to be associated with England, where, inexplicably, no such expectations exist (or so we are to believe)? In fact, the inference arising from Lord Lloyd's judgment to the effect that the *Murphy v Brentwood* doctrine conforms to the needs and expectations of English society would probably come as a surprise and insult to most members of that society. In fairness to Lord Lloyd in *Invercargill*, he seemed inclined to leave open the question whether conditions and expectations in England and New Zealand were really different, but '[w]hat matters is the perception.'[56] He did say, earlier, that this branch of the law '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.'[57] He went on to analyse and take support from case law

[53] Ching PJ expressly stated that even in the absence of an admission he would have found a duty of care owed by both defendants (note 11 above at 314).

[54] Note 9 above at 640.

[55] Ibid, p 639. The New Zealand Court of Appeal and the Privy Council relied heavily in their reasoning on an earlier decision of the New Zealand Court of Appeal in *Bowen v Paramount Builders (Hamilton) Ltd* [1977] 1 NZLR 394, a building defects case in which a duty of care was imposed on the builder.

[56] Note 9 above at 642.

[57] Ibid, pp 640-1.

developments in Canada and Australia, where in similar circumstances, the highest courts had imposed a duty of care.[58]

What is it then, about *Murphy v Brentwood* that would make it appropriate to Hong Kong's circumstances? Certainly, it is not a decision that was taken with Hong Kong's legislative backdrop in mind. Reviewing the judgments in *Murphy v Brentwood*, it is clear that some of the Law Lords were influenced by the existence of remedial legislation in the form of the Defective Premises Act 1972.[59] They were concerned that the effect of the decision in *Anns v Merton* went beyond the protection afforded by that Act, which imposes a duty of care on builders, albeit a restricted duty, that is limited to dwellings, expires after six years, and is exempted in cases of approved schemes. The Law Lords did not think that the common law should afford a greater remedy than that provided by statute. But whatever may be the merits of such reasoning in England, Hong Kong has no comparable legislation. Any argument that circumstances are similar would have to find support in some other line of reasoning.[60]

Still on the subject of legislation, at the time when *Murphy v Brentwood* was being decided, the Hong Kong Legislature was passing into law important amendments to the Limitation Ordinance intended to preserve the right of action of owners of property with latent defects. The amendments attempted to prevent the extinguishing of the cause of action in circumstances where the property owner was unaware of the damage and his right to sue because of the latency of the damage.[61] Implicit in the legislative initiative was the assumption that a property owner had the right to sue. The effect of the decision in *Murphy v Brentwood* was to emasculate that legislative reform.[62] The cause of action that it was meant to preserve was by the time of its enactment non-existent.[63] *Murphy v Brentwood* can hardly be said to be consonant with Hong Kong's legislative circumstances.

However, the real objections to the assertion that the law as stated in *Murphy v Brentwood* is appropriate to Hong Kong rely not on such subtle arguments, but question the policy and reasoning underlying the decision. In this sense, the objections are applicable in England no less than in Hong Kong.

With a stroke of the pen in *Murphy v Brentwood*, with its characterization of building defects as pure economic loss, in itself more a matter of semantics

58 *Winnipeg Condominium Corporation No 36 v Bird Construction Co* (note 36 above) (hereafter referred to as *Winnipeg Condominium*); and *Bryan v Maloney* (note 38 above) reversing its own position on this point in *Sutherland Shire Council v Heyman & Another* (note 23 above).

59 See Lord Bridge, note 13 above, at 480, Lord Oliver at 491, and Lord Jauncey at 498.

60 The same point was made by Lord Lloyd in *Invercargill*. The absence in New Zealand of any legislation comparable to the Defective Premises Act 1972, weakened the argument that the law as stated in *Murphy v Brentwood* was appropriate to New Zealand (note 9 above at 642-3).

61 See notes 7 and 8 above, and accompanying text.

62 For a more complete analysis of how this came about, see R Glofcheski, 'Limitations', (1991) 21 HKLJ 353; and N J Mullany, 'Limitation of Actions—Where are We Now?' [1993] LMCLQ 34.

63 Except in those rare cases where *Hedley Byrne* proximity can be established: see notes 14 and 15 above and accompanying text.

than anything else, the reality on the ground for purchasers was transformed dramatically. Pure economic loss has historically not been protected by negligence law, largely because of a judicial fear of indeterminate liability.[64] In the context of defective buildings, where the number of potential plaintiffs is limited by the circumstances of property purchase and ownership, the relevance of such a consideration, dubious and self-serving at the best of times, is open to question. It is not a radical suggestion that property owners should be protected and that a duty of care should be owed at least to the extent of the amount required to render a defective building safe for its occupants, and other persons. Moreover, the attempted justification to the effect that the imposition of a duty of care would be akin to the extension of a contractual warranty for which no consideration was paid may have superficial attraction, but the argument proceeds more by way of assertion than reason. Whatever overlapping with contract law may result, the House of Lords never explained why the overlapping is objectionable. The notion that the law can exist only in airtight categories is not convincing, and has since been revised by no less than the House of Lords itself.[65] In the result, defects in buildings were removed from the law's protection, with scant or no regard for the underlying social and economic issues. Such issues were not the subject of serious consideration by the House of Lords in *Murphy v Brentwood*, and were not addressed by the Court of Final Appeal in *Bank of East Asia*.

Reverting to conventional duty of care argumentation, the relationship between builders and architects, and property owners can be shown to comprise the necessary proximity to give rise to a duty of care. In the view of La Forest J, giving the unanimous judgment of the court in *Winnipeg Condominium*,[66] a case factually similar to *Bank of East Asia* involving contractors' negligent installation of cladding that created a risk of injury to persons, 'the potential class of claimants is limited to the very persons for whom the building is constructed'.[67] Moreover, 'the amount of liability will always be limited by the amount of the reasonable cost of repairing the defect and restoring the building to a non-dangerous state'.[68] And finally, there is no risk of liability for an indeterminate time because 'the contractor will only be liable for the cost of repair for dangerous defects during the useful life of the building'.[69] At any rate, in Hong Kong such claims will now be contained by the fifteen-year longstop provisions introduced in the Limitation Ordinance in 1991,[70] thereby further reducing the force of claims about indeterminacy. Any concern about indeterminate liability is therefore comprehensively answered.

64 See note 16 above and accompanying text.
65 *Henderson v Merrett*, note 14 above.
66 Note 36 above.
67 Ibid, p 218.
68 Ibid, pp 218-9.
69 Ibid, p 219.
70 Note 7 above, s 32.

Again, with reference to conventional duty of care language, from the perspective of policy considerations and notions of justice and reasonableness, a duty of care is supported. Sir Robin Cooke (as he then was) put it simply that

> he who puts into the community an apparently sound and durable structure, intended for use in all probability by a succession of persons—should be expected to take reasonable care that it is reasonably fit for that use and does not mislead. He is not merely exercising his freedom as a citizen to pursue his own ends. He is constructing, exploiting or sanctioning something for the use of others. Unless compelling grounds to the contrary can be made out, and subject to reasonable limitations as to time and otherwise, the natural consequences of failure to take due care should be accepted.[71]

Moreover, the finding of no duty of care in *Murphy v Brentwood* leaves a huge contradiction in the law that, in the ensuing years, the House of Lords has never resolved. Since it is accepted that builders, architects and local authorities are under a duty to take reasonable care in the design, construction and approval of buildings to avoid injury to persons and other property, how is it that the duty effectively ceases at the moment when the defective work, posing a risk of injury to others, is discovered? If someone is injured, liability will attach for that injury. If the defect is discovered just in time to avoid the injury, no liability attaches. It is then for the plaintiff to put right the defect at his own expense. This is a purely fortuitous circumstance from which the defendant undeservedly benefits, and one that is not consistent with any of tort law's goals.

A finding of no duty of care is certainly not consistent with the principle of deterrence and economic goals generally, in that the parties with control over the building site will be secure in the knowledge that most defects will be discovered before any harm occurs. As stated by La Forest J in *Winnipeg Condominium*,

> [m]aintaining a bar against recoverability for the cost of repair of dangerous defects provides no incentive for plaintiffs to mitigate potential losses and tends to encourage economically inefficient behaviour. Allowing recovery against contractors in tort for the cost of repair of dangerous defects thus serves an important preventative function by encouraging socially responsible behavior.[72]

In Hong Kong one might have thought that the case was strong for the courts to intervene and impose a duty of care in an area where, regrettable as

[71] 'An Impossible Distinction' (note 52 above) at 70.
[72] Note 36 above at 213.

it is to say, the standards of builders and building inspectors routinely fall below acceptable levels and have proved insufficient to protect property owners. The imposition of a duty of care could provide the missing incentive for builders to do their work carefully, in adherence to appropriate industry standards and those imposed by law.

From the point of view of corrective justice, the position in *Murphy v Brentwood* is equally unsound. Negligent builders, architects and building authorities effectively avoid responsibility for their wrongdoing. At most a purchaser can protect himself by arranging for a survey, but in the case of many latent defects, they will not be picked up.[73]

And finally, it is unsound from the point of view of distributive justice. Builders are better positioned to insure against their own faulty work. Rarely do purchasers think about the possibility of significant defects in a newly acquired property, or of injuries resulting therefrom, let alone insure against them. Moreover, the regulatory regime, which might otherwise be expected to ensure that builders meet proper standards, and therefore might argue against the need for a duty of care, has proved woefully inadequate, as recent events have shown.[74] It is very difficult to see what values or policy the law is pursuing in withholding a duty of care. The fear of indeterminate liability is simply not convincing in itself to justify such a position.[75]

The court should not permit the critical policy question whether or not to afford protection to property owners to become obscured by the categorization of the loss as physical or economic. Pure economic loss it may be, according to the court's latest formulation, but to permit this technical classification to dictate the outcome of the case is a far too mechanical approach to the resolution of an important social and economic issue.[76] The duty of care can justifiably be extended to defective buildings even as between builders and subsequent purchasers because, as stated by Mason CJ, Deane and Gaudron JJ in *Bryan v Maloney*, 'it is important to bear in mind the particular kind of

[73] In the view of La Forest J in *Winnipeg Condominium*, the notion that the purchaser is better placed to inspect the building and bear the risk of latent defects involves 'an assumption which (if ever valid) is simply not responsive to the realities of the modern housing market' (ibid, at 220).

[74] See notes 1 and 2 above.

[75] The concepts of corrective and distributive justice have elsewhere been embraced by the House of Lords: see for instance *McFarlane v Tayside Health Board* [1999] 4 All ER 961, in particular the judgments of Lords Steyn and Hope. See also *White v Chief Constable of the South Yorkshire Police* [1999] 1 All ER 1.

[76] As stated by La Forest J in *Winnipeg Condominium*, '[i]n cases involving the recoverability of economic loss in tort, it is preferable for the courts to weigh the relevant policy issues openly' (note 36 above, at 201). Sir Robin Cooke (as he then was) put it even more succinctly: 'if a house subsides and parts crack because of defective foundations, is there much profit in arguing whether this should be classified as physical damage or purely economic loss?' ('An Impossible Distinction' (note 52 above) at 50)). More recently, in *McFarlane v Tayside Health Board* (note 75 above), Lord Millett decried an approach that would allow determination of the outcome of a claim for the cost of rearing a child from an unwanted pregnancy to turn on the characterization of the loss as physical or purely economic. He described such an approach on the facts of that case as 'technical and artificial if not actually suspect' (p 1001).

economic loss involved'.[77] Any distinction with ordinary physical damage is technical. Moreover, building defects are 'arguably, less remote and more readily foreseeable than ordinary physical damage to other property of the owner that might be caused by an actual collapse of part of the house...'.[78]

To all of these arguments can be added the reminder, if indeed one is necessary, that the imposition of a duty of care does not in itself lead to a finding of liability in negligence on the part of the builder. Duty of care is only part of the puzzle to be solved by the plaintiff. Breach of duty (the builder's failure to meet the reasonable standard of care), causation and remoteness of damage are issues that can be complex and difficult of proof, and must all be established by the plaintiff before liability will attach. They are obstacles standing in the way of the property owner, and provide ample opportunity for the builder to demonstrate why he should not be held liable for the building defects. The re-introduction of a duty of care, as argued for here, would amount to nothing more than the lifting of the ban on negligence actions for defective buildings.

As matters stand, the negligence law of defective buildings as currently formulated is unacceptable, especially when one considers that the purchase of a flat represents for most people the biggest and single-most important financial commitment of their lives, and that its primary purpose is to provide safety and shelter for the owner and his family. The courts must activate the law of negligence in a way that responds to community needs, rather than permitting it to develop in isolation, driven by its own dynamics, in virtual ignorance of the community it is meant to serve.

Although the *Bank of East Asia* case, with its focus on the limitations issue, may not have presented the Court of Final Appeal with the ideal opportunity for a comprehensive review of the law as embodied in *Murphy v Brentwood*, the absence of any comment on these issues, in judgments that run to 100 or more pages, suggests an implicit acceptance of that state of the law. If that is so, the prospects for Hong Kong property owners are grim indeed.

Conclusion

The law concerning the rights of owners of defective property has been developed by the House of Lords in a decidedly non-consumerist fashion. Only those owners of defective property who can establish a relationship of close proximity with the builder or architect of the sort outlined in *Hedley Byrne v Heller*[79] will be within the protection of the tort of negligence as now configured in *Murphy v Brentwood*. This will constitute only a tiny minority of purchasers of defective property. This law has been cogently criticized by courts

[77] Note 38 above at 626.
[78] Ibid.
[79] Note 14 above.

elsewhere,[80] and has been abandoned in those jurisdictions as inadequate to meet the needs of society having regard to modern social and economic conditions. Those arguments apply with equal force in Hong Kong, and clearly signpost the way forward for Hong Kong courts. The House of Lords' characterization of building defects as pure economic loss neither explains nor justifies the exclusion of the claims of property owners from the law's protection.

The decision in *Bank of East Asia* does little to calm the worries of property owners in Hong Kong. It implicitly accepts as valid the position adopted by the House of Lords in *Murphy v Brentwood*, despite the removal of legal constraints on the Court of Final Appeal's freedom to deviate from House of Lords' decisions. It does nothing to encourage builders to adhere to safe standards of construction in an environment in which poor workmanship is rife. It implicitly affirms a state of the law that leaves owners of defective buildings without a common law, or indeed any remedy,[81] because they are not owed a duty of reasonable care. The maxim *caveat emptor*[82] is alive and well, and applies to the purchaser not only in respect of the vendor, but in respect of the negligent builder as well.

The issue of the property owner's entitlement to sue is a vital question, one that must be resolved in favour of the property owner if the legal system is to play a role in providing the protection that is so obviously needed, given the realities on the Hong Kong building site today. For this reason, the law of duty of care in the context of defective buildings must be reviewed at the first opportunity.

80 See notes 36-39 above, and accompanying text.

81 There is no statutory remedy. Hong Kong does not have an equivalent of the Defective Premises Act 1972 (see notes 59 and 60 above, and accompanying text).

82 'Buyer beware'.