Neutral Citation Number: [2019] EWHC 1134 (TCC)

Case No: F50CF001

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN WALES
TECHNOLOGY AND CONSTRUCTION COURT (QBD)

Cardiff Civil Justice Centre
2 Park Street, Cardiff, CF10 1ET

Date: 9 May 2019

Before :

HIS HONOUR JUDGE KEYSER Q.C.
sitting as a Judge of the High Court

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Between :

(1) SIMON THOMAS
(2) SIAN THOMAS — **Claimants**

- and -

(1) TAYLOR WIMPEY DEVELOPMENTS LIMITED
(2) NATIONAL HOUSE BUILDING COUNCIL
(3) GORDON A. BATTRICK & CO. SOLICITORS — **Defendants**

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Charlie Newington-Bridges (instructed by **Darwin Gray LLP**) for the **Claimants**
Tom Coulson (instructed by **Gowling WLG (UK) LLP**) for the **First Defendant**
Samuel Townend (instructed by **National House Building Council in-house legal department**) for the **Second Defendant**

Hearing dates: 18 April 2019

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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HIS HONOUR JUDGE KEYSER Q.C.

JUDGE KEYSER QC:

Introduction

1. The claimants, Mr and Mrs Thomas, are the freehold owners of adjacent properties at 9 and 10 Church Bell Sound, Cefn Glas Road, Bridgend ("the Properties"; respectively, No. 9 and No. 10). They purchased the Properties as new-builds from the first defendant, Taylor Wimpey Developments Limited ("TW"), which had built the Properties. Contracts were exchanged on 8 February 2006 and each purchase was completed on 19 January 2007. Each Property came with the benefit of a 10-year Buildmark Warranty from the second defendant, National House Building Council ("NHBC"), which commenced on 19 January 2007. The third defendant, Gordon A. Battrick & Co ("GB"), was the solicitor who performed conveyancing services for Mr and Mrs Thomas in connection with the purchases. After purchasing the Properties, Mr and Mrs Thomas let them to tenants.

2. On 25 January 2018, Mr and Mrs Thomas commenced these proceedings, in which they claim damages from all the defendants in connection with the Properties. The claims arise from what is said to be the fact that log retaining walls at the rear of the back gardens of the Properties ("the Walls") were inadequately built and are defective; the particulars of claim say that remedial works will cost about £200,000. The case against TW is put on the basis of breach of a duty of care owed at common law and under the Defective Premises Act 1972 and also on the basis of misrepresentation. The claim against NHBC is put on the basis that the defect in the Walls is within the scope of the Buildmark Warranty and that NHBC has wrongfully refused cover for the cost of remedial works. The claim against GB is put on the basis of professional negligence in connection with the conveyancing.

3. This is my judgment upon the trial of five preliminary issues concerning the liability of TW and NHBC. Issues 1 and 2 arise between Mr and Mrs Thomas and TW. Issues 3, 4 and 5 arise between Mr and Mrs Thomas and NHBC. None of the preliminary issues concern GB.

4. In what follows, I shall first set out the relevant parts of the pleaded cases against TW and NHBC. Then I shall set out the terms of the preliminary issues and consider them in turn.

5. I am grateful to Mr Newington-Bridges, Mr Coulson and Mr Townend, counsel respectively for Mr and Mrs Thomas, TW and NHBC, for their submissions.

The cases against TW and NHBC

6. The particulars of claim state that earth at the Properties is retained by a "wooden pole retaining wall system" (that is, the Walls) that was also used by TW in the construction of other properties on the estate where the Properties are situated; that defects have become apparent in the Walls; that sections of the Walls have already failed; and that the Walls are not fit for their purpose and need to be replaced.

The claim against TW

7. The contracts for sale between Mr and Mrs Thomas and TW contained contractual warranties by TW that the Properties would be constructed in "a good and workmanlike manner in accordance with the terms of the relevant planning permission and building regulation consent and the relevant specification of the National House Building Council." Although the particulars of claim set out the warranty, they do not rely on breach of warranty as a cause of action. This is no doubt because the limitation period for any such claim would have expired long before proceedings were commenced.

8. Instead, as against TW the claimants rely on causes of action in tort. Paragraph 16 of the particulars of claim sets out a claim based on misrepresentation:

> "By way of correspondence in or about December 2005 / January 2006, TW's conveyancing solicitors, Cameron McKenna ('CMS'), represented to the claimants that the Properties (and in particular the Walls) had been properly constructed and were in any event covered by TW's own warranty and/or NHBC's warranty. Furthermore, TW failed to excavate properly the lower section of the garden at the Properties and replace with clean stone as they agreed to do and as documented in a letter to GB from CMS dated 16 January 2006. In reliance on and induced by these representations, the claimants purchased the Properties."

The falsity of the alleged representation that the Walls had been properly constructed is set out in detailed particulars of negligence in paragraph 21. The falsity of the alleged representations that the Walls were covered by TW's own warranty and by NHBC's warranty is set out, albeit rather indirectly, in paragraph 30.

9. Paragraphs 17 to 20 of the particulars of claim allege that TW owed to the claimants duties of care at common law and by statute:

> "17. As the party responsible for construction of the Properties, TW owed a duty of care to the claimants, arising both at common law and pursuant to the Defective Premises Act 1972 ('the 1972 Act').
>
> 18. TW's statutory duty, pursuant to section 1 of the 1972 Act, was to see that its work was done in a workmanlike and professional manner, with proper materials[,] so that the dwellings would be fit for habitation when completed.
>
> 19. TW's common law duty of care was to take all reasonable skill and care in the construction of the Properties and to ensure that the Properties, when constructed, were fit for purpose.
>
> 20. Further or alternatively, TW owed the claimants a duty of care to exercise all due skill and care in the performance of its services. As such it was the duty of TW at all material times to

> act with all due care, skill, competence and diligence to be expected of a builder/developer constructing a new build property."

Paragraph 21 alleges breach of those duties of care; eight particulars of defective construction are set out. Paragraph 23 alleges that it was reasonably foreseeable that a failure to construct the Walls properly would result in loss and damage to the claimants.

10. The plea of loss and damage is at paragraphs 30, 31 and 32:

> "30. In the premises and by reason of TW, its respective servants or agents acting in breach of the aforesaid duty or being negligent and/or misrepresenting that the Walls had been properly constructed and were covered by warranty or warranties, the claimants have suffered loss and damage.
>
> 31. The aim of damages will be to put the claimants in the position they would have occupied but for TW's negligence. The cost of remedying the Walls is estimated to be £200,000.
>
> 32. Alternatively, the appropriate measure of loss is the diminution in the value of the Properties. It is estimated that such diminution also equates to about £200,000."

The claim against NHBC

11. Paragraphs 34 and 35 of the particulars of claim state that the Properties had the benefit of a 10-year Buildmark Warranty and that the claimants intimated a claim under the Warranty in respect of the Walls within the 10-year period. There is no dispute between the parties on those points.

12. Paragraphs 36 to 43 allege that the defects in the Walls are within the scope of cover provided by sections 3 and 4 of the Warranty. Section 3 covered the cost of remedying physical damage caused by a defect in, among other things, "Retaining walls necessary for the structural stability of the house, … its garage or other permanent outbuilding." Section 4 covered the cost of repairs needed "where there is a present or imminent danger to the physical health and safety of the occupants of the Home because the Home does not comply with the requirements of the Building Regulations that applied to the work at the time of construction or conversion …" (I shall refer to the terms of the Warranty more fully below.) Paragraphs 44 to 46 allege that NHBC wrongfully refused cover.

13. For present purposes, the critical issue appears from paragraph 28 of NHBC's defence:

> "Paragraphs 43 to 46 are denied:
>
> (a) There is no entitlement under Section 3 of the Warranty because the alleged Defect is not in any parts of the house listed in part A of Section 3. The log retaining walls are

not necessary for the structural stability of the houses or the garages.

(b) There is no entitlement under Section 4 of the Warranty because there is no present or imminent danger to the physical health and safety of the occupants of the Home.

(c) No non-compliance with the requirements of the Building Regulations is alleged and the pleading of the claim under Section 4 of the Warranty is, therefore, incomplete and cannot succeed.

(d) Further, or in the alternative, there is no entitlement under Section 4 of the Warranty as there is no non-compliance with the requirements of the Building Regulations. The log retaining walls did not fall within the definition of 'building work' under Regulation 3(1) of the Building Regulations 2000 and, therefore, are not controlled under the Building Regulations."

The preliminary issues

14. On 11 February 2019 District Judge Vernon directed that the following issues be determined as preliminary issues:

Issue 1: On the assumption that the facts stated in the claimants' statements of case are true, did TW owe the claimants a duty of care in the tort of negligence not to cause the claimants the loss and damage asserted at paragraphs 30 to 32 of the particulars of claim?

Issue 2: On the assumption that the facts stated in the claimants' statements of case are true, are the claimants' pleaded claims against TW in misrepresentation and/or pursuant to the Defective Premises Act 1972 statute-barred by reason of the expiry of the relevant periods of limitation prior to the commencement of proceedings?

Issue 3: Are the log retaining walls necessary for the structural stability of the houses or garages?

Issue 4: Is any non-compliance with the requirements of the Building Regulations that applied to the work at the time of construction pleaded by the claimants?

Issue 5: Were the log retaining walls controlled under the Building Regulations that applied to the work at the time of construction?

Issue 1: did TW owe the pleaded duty of care?

15. Issue 1 arises in connection with the plea in paragraph 4 of TW's defence:

> "[T]he claim in negligence is a claim for pure economic loss in circumstances in which it is settled law that a party in TW's position does not owe any such duty to the purchaser of a property."

The claimants responded to that contention in paragraph 4 of their reply to TW's defence:

> "4. Paragraph 4 is denied:
>
> 4.1 It is denied that the claim is for pure economic loss.
>
> 4.2 Further or alternatively, if, which is denied, the claim is for pure economic loss, then in the circumstances of the case [TW] owes the duty claimed.
>
> 4.3 Further or alternatively, the defect to the Walls is such that it is a potential source of injury to persons or property on neighbouring land."

16. For the purposes of Issue 1, it is to be assumed that the facts pleaded by the claimants are correct, although those facts remain in issue for the other purposes of the litigation.

17. It is common ground that the loss suffered by a building owner from an ordinary building defect is the cost of rectifying the defect and is ordinarily irrecoverable in tort as being pure economic loss: *Department of the Environment v Thomas Bates and Son Ltd* [1991] 1 AC 499. It is also common ground that the loss suffered by a building owner in consequence of a dangerous building defect is also generally irrecoverable, as being pure economic loss, once the defect is detected: *D&F Estates Ltd v Church Commissioners for England* [1989] AC 177; *Murphy v Brentwood District Council* [1991] AC 398. The general rule was stated as follows by Lord Bridge of Harwich in *Murphy* at 475E-G:

> "If a builder erects a structure containing a latent defect which renders it dangerous to persons or property, he will be liable in tort for injury to persons or damage to property resulting from that dangerous defect. But if the defect becomes apparent before any injury or damage has been caused, the loss sustained by the building owner is purely economic. If the defect can be repaired at economic cost, that is the measure of the loss. If the building cannot be repaired, it may have to be abandoned as unfit for occupation and therefore valueless. These economic losses are recoverable if they flow from breach of a relevant contractual duty, but, there again, in the absence of a special relationship of proximity they are not recoverable in tort."

18. However, the claimants rely on what Lord Bridge said in a dictum at 475G-H, immediately following his statement of the general rule:

> "The only qualification I would make to this is that, if a building stands so close to the boundary of the building owner's land that after discovery of the dangerous defect it remains a potential source of injury to persons or property on neighbouring land or on the highway, the building owner ought, in principle, to be entitled to recover in tort from the negligent builder the cost of obviating the danger, whether by repair or by demolition, so far as that cost is necessarily incurred in order to protect himself from potential liability to third parties."

19. The present case raises two questions: first, whether there is any such qualification as proposed by Lord Bridge; second, if there is, whether the claimants' statements of case truly engage it.

20. I was referred to two cases in which Lord Bridge's qualification had been considered in the High Court: *Morse v Barratt (Leeds) Ltd* (1993) 9 Const LJ 158 (Chancery Division, HHJ O'Donoghue); and *George Fischer Holding Ltd v Multi Design Consultants Ltd* (1998) 61 Con LR 85 (Official Referees' Business, HHJ Hicks QC).

21. In the *Morse* case, the defendant had built a number of dwellings on a site along which ran a retaining wall adjacent to the highway. The defendant's construction activities rendered the wall unstable and a danger to the public. The plaintiff owners were required by the local authority to repair the wall, which put them to considerable expense. They claimed the cost of repair as damages from the defendant. The judge held that they were entitled to recover. He directly applied Lord Bridge's qualification as set out above. In doing so, he clearly recognised that the dictum at 475G-H did not represent the *ratio decidendi* of *Murphy*. But he implicitly accepted the submission that the dictum represented "the fruit of mature reflection" of Lord Bridge and that, unless it represented "a wholly erroneous view of the law and amounted to a mistake", he ought to follow it. He noted that in *Murphy* Lord Oliver of Aylmerton at 489 had expressly reserved his position on Lord Bridge's qualification and had expressed himself to be "not at the moment convinced" of the basis for making it; but that none of the other members of the Appellate Committee had cast doubt on the qualification. He concluded at 161:

> "… I cannot distinguish on fact or otherwise from the qualification of Lord Bridge. I cannot see any reason that qualification constitutes an erroneous view of the law or amounts to obvious mistake and in such circumstances it is proper for this Court to accept and adopt the qualification of Lord Bridge."

Morse thus represents the direct acceptance and application of Lord Bridge's qualification. With respect, however, I cannot say that I find the reasoning in *Morse* to be very satisfactory. Undue weight seems to have been attached to the dictum of only one member of the Appellate Committee of the House in *Murphy* on a point that did not arise for decision there. The lack of comment by other members of the Committee cannot be taken to amount to endorsement of the dictum. Judge O'Donoghue did not say anything at all about the legal basis of Lord Bridge's qualification or how it cohered with the general principle established in *Murphy*.

22. In the *George Fischer Holding* case, the defendant designed the plaintiff's building defectively, with the result that the roof leaked. The judge held that the defendant was liable to the plaintiff for breach of contract; however, in case he were wrong in having found the existence of a contract, he considered the alternative pleaded case based on a concurrent duty in tort. One of the plaintiff's fall-back positions, if all else failed, was that it ought to recover the cost of certain remedial works that would prevent parts of the roof being blown off and presenting a danger to users of a nearby motorway; reliance was placed on Lord Bridge's qualification. Having set out Lord Bridge's dictum, Judge Hicks QC continued:

> "89. The only other of the seven law lords who heard *Murphy* to comment on that point was Lord Oliver, who reserved his opinion, adding: 'although I am not at the moment convinced of the basis for making such a distinction' (page 489C). As Lord Bridge himself recognised this was a 'qualification' of the otherwise general principle which he was propounding. The other reasoned speeches all proceed on the basis of that general principle without qualification. That it is anomalous to award damages for a realised injury but not for the (usually lesser) cost of averting it was explicitly the ground of the decision in *Dutton v Bognor Regis Urban District Council* [1978] 1 QB 373, and in overruling *Dutton* the House of Lords in *Murphy* equally explicitly rejected the claim of that argument to prevail. It is difficult to see why it should linger on where the danger averted is that of liability to a neighbour or passer-by rather than of injury to the plaintiff himself, damage to his property or liability to his employees, customers or visitors. In my understanding the passage quoted is properly to be regarded as a minority obiter dictum, contrary to the ratio of the decision of the House. I therefore respectfully disagree with His Honour Judge O'Donoghue, who in *Morse v Barratt (Leeds) Ltd* (1992) 9 Const LJ 158 adopted and applied Lord Bridge's 'qualification' as a statement of the law."

Accordingly, Judge Hicks QC expressly considered the relationship between Lord Bridge's qualification and the *ratio decidendi* of *Murphy* and had due regard to the limited weight to be given to a single dictum in that earlier case. On the other hand, his own comments were *obiter dicta*, as he had allowed the claim on different grounds.

23. The facts of *Murphy* involved an allegation of danger to the occupiers of the property: 459C. Lord Mackay of Clashfern L.C. decided the case on the basis that a local authority (a builder is in the same position) owed no private law duty of care to avoid damage to property which caused present or imminent danger to the health and safety of owners or occupiers: 457F. Lord Keith of Kinkel was also concerned with the situation where the known defect presented a danger to an occupier, as appears from the concluding words of his dictum at 464F-G:

> "In the case of a building, it is right to accept that a careless builder is liable, on the principle of *Donoghue v Stevenson*, where a latent defect results in physical injury to anyone,

> whether owner, occupier, visitor or passer-by, or to the property of any such person. but that principle is not apt to bring home liability towards an occupier who knows the full extent of the defect yet continues to occupy the building."

(See also 465E-G.) The same point appears from 470H-471B:

> "Liability under the *Anns* decision is postulated upon the existence of a present or imminent danger to health or safety. But considering that the loss involved in incurring expenditure to avert the danger is pure economic loss, there would seem to be no logic in confining the remedy to cases where such danger exists. There is likewise no logic in confining it to cases where some damage (perhaps comparatively slight) has been caused to the building, but refusing it where the existence of the danger has come to light in some other way, for example through a structural survey which happens to have been carried out, or where the danger inherent in some particular component or material has been revealed through failure in some other building. Then there is the question whether the remedy is available where the defect is rectified, not in order to avert danger to an inhabitant occupier himself, but in order to enable an occupier, who may be a corporation, to continue to occupy the building through its employees without putting those employees at risk."

24. Lord Oliver of Aylmerton agreed with the reasons given by Lord Keith and Lord Bridge for allowing the appeal but also stated his reasons independently. In explaining why the loss in question was economic loss, he said at 484G:

> "The injury which the plaintiff suffers in such a case is that his consciousness of the possible injury to his own health or safety or that of others puts him in a position in which, in order to enable him either to go on living in the property or to exploit its financial potentiality without that risk, whether substantial or insubstantial, he has to expend money in making good the defects which have now become patent."

That Lord Oliver's focus was on the risk of injury to occupiers appears also at 487H-488B and from his remark at 489C, already mentioned, concerning Lord Bridge's qualification:

> "Whether, as suggested in the speech of my noble and learned friend, Lord Bridge of Harwich, [the builder] could be held responsible for the cost necessarily incurred by a building owner in protecting himself from potential liability to third parties is a question upon which I prefer to reserve my opinion until the case arises, although I am not at the moment convinced of the basis for making such a distinction."

25. Lord Jauncey of Tullichettle agreed with Lord Keith that *Anns v Merton London Borough Council* [1978] AC 728 had been wrongly decided and considered that the extension of liability to economic loss was justified neither by logic (497E-498B) nor, having regard to the existence of statutory liability under the Defective Premises Act 1972, by policy considerations (498E). Lord Brandon of Oakbrook agreed with the speech of Lord Keith of Kinkel. Lord Ackner agreed with the reasons given by Lord Keith, Lord Bridge, Lord Oliver and Lord Jauncey for allowing the appeal. Lord Bridge expressed full agreement with the speech of Lord Keith; so far as his own particular comments are concerned, I need refer only to the passages set out above. (Lord Mackay said that Lord Keith and Lord Bridge had "comprehensively analysed the issues" arising in the appeal; whether that amounts to agreement with their reasoning is unclear, at least to me, and it certainly does not commit Lord Mackay to agreement with everything in their speeches.)

26. I respectfully disagree with the opinion of Judge Hicks QC in the *George Fischer Holding* case that Lord Bridge's qualification is inconsistent with the *ratio decidendi* of *Murphy*. It would be surprising indeed if Lord Bridge, who expressed full agreement with the speech of Lord Keith (whose reasoning was expressly approved by more than half of the Appellate Committee) and whose own reasons for allowing the appeal met with the express agreement of Lord Ackner and Lord Oliver (both of whom agreed with Lord Keith's reasoning), had contradicted the *ratio* of the case. Lord Oliver clearly did not think that Lord Bridge's qualification contradicted the *ratio*: he thought that the point it addressed did not arise for consideration and doubted whether the qualification was justified. In my view the qualification does not contradict the *ratio decidendi* of *Murphy,* which related to the cost of obviating danger to the safety of those on the premises in question. What is true, however, is that Lord Bridge's qualification must rest on a basis that was not clearly articulated by Lord Bridge himself and was different from anything contained in the reasoning of the other members of the Appellate Committee. The *ratio* of *Murphy* does not itself justify Lord Bridge's qualification.

27. Judge Hicks QC found it "difficult to see why [the argument for recovery] should linger on where the danger averted is that of liability to a neighbour or passer-by rather than of injury to the plaintiff himself, damage to his property or liability to his employees, customers or visitors." However, there is a real distinction between the cases. If the condition of a property presents a danger to those on it, the owner of that property is in a position to obviate that danger by steps including, ultimately, vacating the property and excluding others from it. (That is a graphic indication of the potential extent of the owner's economic loss.) But if the condition of the property presents a risk of injury to those on adjacent land, the owner has no right to control the use of that adjacent land and thereby obviate the risk to those upon it. He can only remove the risk of injury to those on adjacent land by remedying the defect. For much this reason, both Professor Beever (*Rediscovering the Law of Negligence,* 2007, p. 259) and Professor Stevens (*Torts and Rights,* 2007, pp. 30-32) defend Lord Bridge's qualification, though on rather different grounds, neither of them appearing from *Murphy*: Professor Beever relies on the right of the building-owner "to rescue third parties from injuries to their rights"; Professor Stevens explains the qualification in terms of unjust enrichment. Professor Stevens concludes: "The distinction Lord Bridge intuitively grasped is correct, although the envisaged basis of the claim is not."

28. However, the correctness of Lord Bridge's qualification is not established merely by showing that it does not contradict the *ratio decidendi* of *Murphy* and that it rests on a real distinction between the risk of injury to those on the defective property and the risk of injury to those on adjacent property. Lord Bridge's qualification still involves allowing recovery for pure economic loss, although the circumstances in which such loss is recoverable are circumscribed and the qualification is not justified by the reasoning in *Murphy.*

29. For TW, Mr Coulson referred me to the decision of the Court of Appeal in *Robinson v P. E. Jones (Contractors) Ltd* [2012] QB 44. The claimant purchased a house from the defendant, which had built the house. The construction of the house proved to be defective; the cost of remedial works would be substantial. Any claim in contract being statute-barred, the issue was whether the builder owed to the claimant a duty of care in tort in respect of the cost of remedial works, concurrent with any contractual duty. No injury had been suffered, and the question of a risk to third parties not on the premises did not arise. Jackson LJ gave the first judgment, with which Stanley Burnton and Maurice Kay LJJ agreed. He reviewed the authorities and, under the heading "Tortious liability after *Murphy v Brentwood District Council*", continued:

> "67. Having reviewed the two streams of authority set out in Part 5 above, my conclusion is that the relationship between (a) the manufacturer of a product or the builder of a building and (b) the immediate client is primarily governed by the contract between those two parties. Long established principles of freedom of contract enable those parties to allocate risk between themselves as they see fit. In the case of consumer contracts, of course, those principles yield to the requirements of the 1977 Act. However, even in the case of a consumer, the contract (as modified by the 1977 Act) is the primary determinant of each party's obligations and remedies.
>
> 68. Absent any assumption of responsibility, there do not spring up between the parties duties of care co-extensive with their contractual obligations. The law of tort imposes a different and more limited duty upon the manufacturer or builder. That more limited duty is to take reasonable care to protect the client against suffering personal injury or damage to other property. The law of tort imposes this duty, not only towards the first person to acquire the chattel or the building, but also towards others who foreseeably own or use it."

30. Jackson LJ proceeded to consider the doctrine of assumption of responsibility and the question when and how a builder might acquire tortious liabilities under that doctrine. His general conclusion was set out at para 82:

> "82. If the matter were free from authority, I would incline to the view that the only tortious obligations imposed by law in the context of a building contract are those referred to in para 68 above. I accept, however, that such an approach is too restrictive. It is also necessary to look at the relationship and the dealings between the parties, in order to ascertain whether

> the contractor or subcontractor 'assumed responsibility' to its counter-parties, so as to give rise to *Hedley Byrne* duties."

31. Stanley Burnton LJ gave a short judgment of his own, in which he said:

> "92. In my judgment, it must now be regarded as settled law that the builder/vendor of a building does not by reason of his contract to construct or to complete the building assume any liability in the tort of negligence in relation to defects in the building giving rise to purely economic loss. The same applies to a builder who is not the vendor, and to the seller or manufacturer of a chattel. The decision of the House of Lords in *Anns v Merton London Borough Council* [1978] AC 728 , like its earlier decision in *Junior Books Ltd v Veitchi Co Ltd* [1983] 1 AC 520 , must now be regarded as aberrant, indeed as heretical. The law is as stated by Lord Bridge of Harwich in *D & F Estates Ltd v Church Comrs for England* [1989] AC 177 , 206:
>
>> 'If the hidden defect in the chattel is the cause of personal injury or of damage to property other than the chattel itself, the manufacturer is liable. But if the hidden defect is discovered before any such damage is caused, there is no longer any room for the application of the *Donoghue v Stevenson* principle. The chattel is now defective in quality, but is no longer dangerous. It may be valueless or it may be capable of economic repair … If the same principle applies in the field of real property to the liability of the builder of a permanent structure which is dangerously defective, that liability can only arise if the defect remains hidden until the defective structure causes personal injury or damage to property other than the structure itself. If the defect is discovered before any damage is done, the loss sustained by the owner of the structure, who has to repair or demolish it to avoid a potential source of danger to third parties, would seem to be purely economic."

32. Although *Robinson* was not concerned specifically with Lord Bridge's qualification, the reasoning of both Jackson LJ and Stanley Burnton LJ does not support the existence of such a qualification, absent special circumstances—beyond the mere existence of a contract between the parties—establishing that the builder has assumed a duty of care in respect of pure economic loss.

33. In my judgment, in ultimate agreement with Judge Hicks QC, Lord Bridge's qualification in *Murphy* does not represent the law.

    1) It was propounded in a single obiter dictum in *Murphy.*

2) It is unsupported by authority, other than the first-instance decision in *Morse,* where reliance on Lord Bridge's dictum was not supported by any persuasive analysis.

3) While not in direct contradiction to the *ratio decidendi* of *Murphy,* it is not supported by that *ratio* or by the reasoning of the other Law Lords. Indeed, it is not supported by any specific reasoning on the part of Lord Bridge.

4) Inasmuch as it would create a non-contractual common law basis for tortious liability for economic loss on grounds other than assumption of responsibility it is contrary to the analysis in *Robinson.*

5) The argument that recovery ought to be permitted because expenditure would be required to obviate the risk to third parties would, logically, imply that, where the risk of injury was only to persons on the premises, the owner ought to be able to recover the cost of moving from the premises. However, such recovery does not appear to be permitted on the current state of the law and in accordance with the analysis in *Murphy* and in *Robinson.*

6) Builders have potential liability under contract and by virtue of existing duties under the Defective Premises Act 1972 and the tort of negligence concerning injury to persons and property. In the absence of an articulated principle for liability, there is no compelling policy justification for recognising the existence of Lord Bridge's qualification (cf. the remarks of Lord Jauncey in *Murphy* at 498E).

7) Accordingly, I would decline to follow the decision in *Morse,* which of course predated the Court of Appeal's decision in *Robinson.*

34. Even if I were wrong as to the law, however, I would still answer the question in Issue 1 in the negative. The claimants rely on paragraph 4.3 of the reply, which invokes Lord Bridge's qualification by way of an assertion. Nothing in the evidence before me shows any reason to suppose that the assertion in paragraph 4.3 of the reply is true. Nevertheless, I proceed on the basis that it is true. The question, however, is whether TW's duty of care extended to the pleaded loss. That loss is set out in paragraphs 30 to 32 of the particulars of claim. The loss there alleged has no stated or indeed plausible relation to Lord Bridge's qualification. It is simply the cost of full remediation or the amount of diminution in value and does not purport to have any relation to the cost of obviating the risk of injury to persons on adjacent land. I do not see how the invocation in paragraph 4.3 of the reply can suffice to bring the particular losses alleged in the particulars of claim within the scope of the supposed duty of care. This by itself might be a matter capable of cure by amendment or further particulars, though frankly I am doubtful of that. But given my conclusion as to the law I do not have to concern myself with that possibility.

35. Accordingly, the answer to Issue 1 is "No".

Issue 2: limitation

36. Issue 2 arises in connection with the plea of limitation in paragraph 3 of TW's defence:

> "3. Each of the causes of action asserted by the claimants are (sic) statute barred under the Limitation Act 1980.
>
> 3.1 Any cause of action in negligence and any cause of action in misrepresentation had accrued by 8 February 2006 when the claimants entered into the contracts of sale by which they agreed to purchase the Properties.
>
> 3.2 Any cause of action under the 1972 Act had accrued by February 2006 when the relevant dwellings were completed."

The claimants' rather oblique response to the plea of limitation is contained in paragraph 3 of their reply to TW's defence:

> "In relation to paragraph 3, the claimants first became aware of the collapse of the wall at No. 9 Church Bell Sound when they were alerted to the fact by their then tenants of No. 10 Church Bell Sound … In the statement attached hereto at R1, [those tenants] state that they told the claimants of the collapse of the wall at No. 9 on … 27 January 2015."

The purpose of that response is to rely on the special time-limit for claims for damages for negligence provided by section 14A of the Limitation Act 1980.

37. Issue 2 concerns only the claims based on misrepresentation and under section 1 of the Defective Premises Act 1972; it does not concern the claim based on negligence at common law. For the purposes of Issue 2, it is to be assumed that the facts pleaded by the claimants are correct, although those facts remain in issue for the other purposes of the litigation.

38. Section 2 of the Limitation Act 1980 provides:

> "An action founded on tort shall not be brought after the expiration of six years from the date on which the cause of action accrued."

Section 9 of the Limitation Act 1980 provides:

> "An action to recover any sum recoverable by virtue of any enactment shall not be brought after the expiration of six years from the date on which the cause of action accrued."

39. The claim under section 1 of the Defective Premises Act 1972 is either a claim in tort or, perhaps, a claim to recover a sum recoverable by virtue of an enactment. In either case, the limitation period is six years from the accrual of the cause of action. By virtue of section 1(5) of the 1972 Act, the cause of action accrued at the time when the Properties were completed. That was more than six years before the date when proceedings were commenced. At the trial of the preliminary issues, Mr Newington-Bridges rightly conceded that the claim under section 1 was statute-barred.

40. So far as concerns the claim based on misrepresentation, the issue has resolved into a question as to the precise nature of the claim advanced by the claimants. The parties do not disagree as to the applicable law.

41. In itself, misrepresentation is not an actionable wrong. However, it is a component of a number of actionable wrongs, of which two are relevant. First, there are claims in tort for breach of a duty of care in making a negligent misstatement of the kind identified in *Hedley Byrne & Co Ltd v Heller & Partners* [1964] AC 465 ("negligent misrepresentation"). Second, there are claims for misrepresentation pursuant to section 2(1) of the Misrepresentation Act 1967 ("statutory misrepresentation"). Claims for damages for negligent misrepresentation are claims for damages for the tort of negligence and section 14A of the Limitation Act 1980 applies to them. However, claims for damages for statutory misrepresentation are not claims for damages for negligence, because it is not necessary for the claimant making such a claim to aver any negligent act or omission on the part of the defendant, and therefore section 14A of the Limitation Act 1980 does not apply to them: see *Laws v The Society of Lloyd's* [2003] EWCA Civ 1887 at [78]-[93], and especially at [86]-[87].

42. In my judgment, the claimants' statements of case advance only a claim for damages for statutory misrepresentation; they cannot be read as alleging negligent misrepresentation. The particulars of claim aver that TW made representations and that the claimants relied on them and were induced by them to purchase the Properties (paragraph 16), that the representations were false and that they have suffered loss and damage in consequence of them (paragraph 30). That is a sufficient plea of statutory misrepresentation. The particulars of claim do not, however, allege the existence of any duty of care in respect of the making of the representations. More importantly, they do not allege that TW made the representations negligently. By contrast, paragraphs 17, 19 and 20 allege that, as the party responsible for the construction of the Properties, TW owed a common law duty of care to the claimants to take all reasonable skill and care in the construction of the Properties and ensure that the Properties, when constructed, were fit for purpose, and to act with all the care, skill, competence and diligence to be expected of a builder constructing a new property; and paragraphs 21 and 22 allege breach of that duty of care in respects that all have to do with the faulty design or construction of the Walls. Mr Newington-Bridges submitted that paragraph 30 was a sufficient averment of negligence in the making of the representations:

> "In the premises and by reason of TW, its respective servants or agents acting in breach of the aforesaid duty or being negligent and/or misrepresenting that the Walls had been properly constructed and were covered by warranty or warranties, the claimants have suffered loss and damage."

However, when read according to its plain meaning and in the context of paragraphs 15 to 32 as a whole, paragraph 32 plainly does not allege that the misrepresentations were made negligently. It simply alleges that the loss and damage resulted from either or both of two things: first, TW's negligence or breach of duty; second, the misrepresentations. The only negligence alleged against TW in the particulars of claim concerns the construction of the Walls, not the making of the representations.

43. Accordingly, as it is common ground that the proceedings were commenced more than six years after the accrual of the causes of action, if any, under section 1 of the Defective Premises Act 1972 and section 2(1) of the Misrepresentation Act 1967, the answer to Issue 2 is "Yes".

Issue 3: are the retaining walls necessary for structural stability?

44. This issue arises from the claimants' averment that NHBC is liable under Section 3 of the Buildmark Warranty, which so far as material relates to "Retaining walls necessary for the structural stability of the house, … its garage or other permanent outbuilding". The question is whether, for the purposes of Section 3, the Walls are necessary for the structural stability of the respective houses or their respective garages (there are no other outbuildings). The answer to the question turns on the construction of Section 3 and on consideration of the function of the Walls.

45. The interpretation of the Buildmark Warranty is subject to the same principles as apply to the construction of other written contracts. Those principles were summarised shortly by Lord Bingham of Cornhill in *Dairy Containers Ltd v Tasman Orient CV* [2005] 1 WLR 215 at [12]:

> "The contract should be given the meaning it would convey to a reasonable person having all the background knowledge which is reasonably available to the person or class of persons to whom the document is addressed."

What this means has been discussed in detail in many subsequent cases. I refer in particular to *Rainy Sky S.A. v Kookmin Bank* [2011] UKSC 50, [2011] 1 WLR 2900; *Arnold v Britton* [2015] UKSC 36, [2015] AC 1619, esp. *per* Lord Neuberger PSC at [15]-[22]; and *Wood v Capita Insurance Services Limited* [2017] UKSC 24, [2017] AC 1173, where Lord Hodge said at [10]-[13]:

> "10. The court's task is to ascertain the objective meaning of the language which the parties have chosen to express their agreement. It has long been accepted that this is not a literalist exercise focused solely on a parsing of the wording of the particular clause but that the court must consider the contract as a whole and, depending on the nature, formality and quality of drafting of the contract, give more or less weight to elements of the wider context in reaching its view as to that objective meaning. In *Prenn v Simmonds* [1971] 1 WLR 1381 (1383H-1385D) and in *Reardon Smith Line Ltd v Yngvar Hansen-Tangen* [1976] 1 WLR 989 (997), Lord Wilberforce affirmed the potential relevance to the task of interpreting the parties' contract of the factual background known to the parties at or before the date of the contract, excluding evidence of the prior negotiations. …
>
> 11. Lord Clarke elegantly summarised the approach to construction in *Rainy Sky* at para 21f. In *Arnold* all of the

judgments confirmed the approach in *Rainy Sky* (Lord Neuberger paras 13-14; Lord Hodge para 76; and Lord Carnwath para 108). Interpretation is, as Lord Clarke stated in *Rainy Sky* (para 21), a unitary exercise; where there are rival meanings, the court can give weight to the implications of rival constructions by reaching a view as to which construction is more consistent with business common sense. But, in striking a balance between the indications given by the language and the implications of the competing constructions the court must consider the quality of drafting of the clause (*Rainy Sky* para 26, citing Mance LJ in *Gan Insurance Co Ltd v Tai Ping Insurance Co Ltd (No 2)* [2001] 2 All ER (Comm) 299 paras 13 and 16); and it must also be alive to the possibility that one side may have agreed to something which with hindsight did not serve his interest: *Arnold* (paras 20 and 77). Similarly, the court must not lose sight of the possibility that a provision may be a negotiated compromise or that the negotiators were not able to agree more precise terms.

12. This unitary exercise involves an iterative process by which each suggested interpretation is checked against the provisions of the contract and its commercial consequences are investigated: *Arnold* para 77 citing *In re Sigma Finance Corpn* [2010] 1 All ER 571, para 10 per Lord Mance. To my mind once one has read the language in dispute and the relevant parts of the contract that provide its context, it does not matter whether the more detailed analysis commences with the factual background and the implications of rival constructions or a close examination of the relevant language in the contract, so long as the court balances the indications given by each.

13. Textualism and contextualism are not conflicting paradigms in a battle for exclusive occupation of the field of contractual interpretation. Rather, the lawyer and the judge, when interpreting any contract, can use them as tools to ascertain the objective meaning of the language which the parties have chosen to express their agreement. The extent to which each tool will assist the court in its task will vary according to the circumstances of the particular agreement or agreements. Some agreements may be successfully interpreted principally by textual analysis, for example because of their sophistication and complexity and because they have been negotiated and prepared with the assistance of skilled professionals. The correct interpretation of other contracts may be achieved by a greater emphasis on the factual matrix, for example because of their informality, brevity or the absence of skilled professional assistance. But negotiators of complex formal contracts may often not achieve a logical and coherent text because of, for example, the conflicting aims of the parties, failures of communication, differing drafting practices, or

> deadlines which require the parties to compromise in order to reach agreement. There may often therefore be provisions in a detailed professionally drawn contract which lack clarity and the lawyer or judge in interpreting such provisions may be particularly helped by considering the factual matrix and the purpose of similar provisions in contracts of the same type. The iterative process, of which Lord Mance spoke in *Sigma Finance Corpn* (above), assists the lawyer or judge to ascertain the objective meaning of disputed provisions."

46. In the case of a standard contract used nationally in respect of "newly built or converted properties registered with NHBC from 1 April 2005" (as set out on the front of the Buildmark Warranty), primacy is necessarily afforded to textual analysis. This must involve consideration of the contract as a whole: words must be set in their textual, as well as in their factual, context. Accordingly, I was given a complete copy of the Buildmark Warranty. In the event, little reference was made to the text, other than to Section 3 itself and to various definitions.

47. Section 3 of the Buildmark Warranty sets out the extent of cover provided in years 3 to 10 of the 10-year duration of the policy. Under the heading, "What NHBC will pay for", there are three categories: A, B and C. I need only set out A; I place the directly relevant part of the text in bold type for ease of reference:

> "**The full Cost, if it is more than £1000 Indexed, of putting right any actual physical Damage caused by a Defect in any of the following parts of the house, bungalow, maisonette or flat and its garage** or other permanent outbuilding or its Common Parts:
>
> - Foundations
> - Load-bearing walls
> - Non load-bearing partition walls
> - Wet-applied wall plaster
> - External render and external vertical tile hanging
> - Load-bearing parts of the roof
> - Tile and slate coverings to pitched roofs
> - Ceilings
> - Load-bearing parts of the floors
> - Staircases and internal floor decking and screeds where these fail to support normal loads

- **Retaining walls necessary for the structural stability of the house, bungalow, flat or maisonette, its garage or other permanent outbuilding**
- Double or triple glazing panes to external windows and doors
- Below-ground drainage for which you are responsible".

"Damage" is defined as "Physical damage to the Home caused by a Defect." "Defect" is defined as "A breach of any mandatory NHBC Requirement by the Builder or anyone employed by him or acting for him." It is unnecessary for present purposes to set out further parts of the definitions.

48. The parties adduced expert evidence from chartered structural engineers on the question whether the Walls were necessary for the structural stability of the houses or the garages. The claimants relied on the evidence of Mr Christopher Hyatt, the principal of Chris Hyatt Partnership, whose report was dated 29 March 2019. NHBC relied on the evidence of Mr Arshad Masyood Varma of Varco Consultants Ltd, whose report was dated 4 April 2019. Both experts gave evidence at the trial. It was unfortunate that there had been no opportunity for the experts to meet and prepare a joint statement before trial.

49. The houses and garages at the Properties have been built on a plateau that was formed by cutting into a steep bank. Adjacent to the buildings to the rear is a level area of ground, which comprises the paths at the side of the buildings and the patio area at the back. The remains of the bank rise behind the level area and have been cut to form a terrace by means of banking and berm. The Walls are likely to have been introduced to stabilize the faces of the excavated bank and are situated at various levels up the bank, beginning from the bottom. The Walls are constructed from timber logs placed vertically in the ground; those further up the bank are 1800mm high and those adjacent to the level ground are 750mm high. There is a semi-permeable geotextile membrane behind the Walls. Parts of the Walls have collapsed. The collapse is due to deterioration of the timbers and pressure from the loose backfill placed behind the Walls when they were constructed. In general, the bank itself behind the Walls remains entirely in place, with stable faces; some photographs show some very localised landslip, but as I understand the evidence this does not represent collapse of the bank itself. The smallest gap between the buildings and the lower Walls is approximately 2.8m at No. 9 (the proximity to the house) and approximately 1m at No. 10 (the proximity to the garage).

50. The experts were in agreement that any retaining function of the Walls relates solely to the bank behind and above the plateau on which the buildings at the Properties were built. The Walls do not retain any of the plateau itself; they do not have any function in preventing the collapse of the buildings in the sense of the falling away of the buildings or the land on which they are situated. Mr Hyatt put the matter like this in section 4.01 of his report:

> "[T]he retaining walls are not an integral part of the structure of the individual houses or garages and hence are not necessary

> for the structural stability of the houses or garages directly if the houses and garages are located on flat and level sites."

On this point, Mr Varma's evidence was to substantially the same effect.

51. The issue between the experts related instead to the importance of the Walls in respect of preventing the bank behind the Properties from collapsing and thereby imposing the pressures of soil against the walls of the houses at both Properties and on the roof of the garage at No. 10. In section 4.01 of his report Mr Hyatt summarised his opinion as follows:

> "[T]he retaining walls are required to retain the embankment which forms the rear gardens of the houses. Failure of the retaining walls would allow mobilisation of the retained soils onto the roof of the garage of No. 10 and against the rear walls of the houses of Nos. 9 & 10. The soils would exert earth pressures and forces on the rear walls of the houses and the roof of the garage for which the house and garage structures were not designed and could probably not withstand. Hence the retaining walls are necessary for the structural stability of the houses and garages indirectly."

Mr Hyatt explained that the retained soil in the bank appeared to be firm dry clay, which in the time since construction had mobilised hardly at all and kept virtually its original shape. However, he considered it probable that in the course of time weathering of the soil, primarily on account of rainfall, would cause it to become more of a slurry of liquified clay with an angle of repose tending towards zero. In that event, the bank would be liable to collapse. Mr Hyatt had not calculated how much soil might collapse; he suggested that it was impossible to do so, because the movement of soil at other properties on the development could not be estimated. He was also unable to say what forces the side walls of the buildings could withstand; however, in re-examination he said that a normal cavity wall could probably withstand pressure from about 450mm of soil and that, depending on the extent of weathering of the soil, the amount of soil that might collapse against the rear walls of the buildings might be much greater. Mr Hyatt also said that it would take only a relatively small amount of soil on the roof of the garage at No. 10 to cause a collapse of the roof.

52. In accordance with Mr Hyatt's opinion, Mr Newington-Bridges submitted that the Walls at each Property (which, it is common ground, are "retaining walls") are "necessary for the structural stability of the house [or] its garage" within the meaning of Section 3 of the Buildmark Warranty, in that they prevent the structural stability of the buildings from being adversely affected by pressures from collapsing soil in the bank. He submitted that it was difficult to give any proper content to the relevant words in Section 3 if they did not relate to retaining walls that provided indirect support to the structures by protecting them from pressures from soil at higher levels; in this respect he relied on Mr Hyatt's evidence that he could not conceive of an engineer designing a retaining wall for the purpose of supporting the higher land on which a structure was to be erected.

53. Mr Townend submitted, to the contrary, that Mr Hyatt's opinion was immaterial: the Walls were not "necessary for the structural stability" of the buildings, because they are not part of the buildings and do not provide any support at all to the structures, being rather for the purpose of retaining the banks at the rear of the Properties. They do not contribute to "the resistance of [the houses or garages] to buckling, sliding, overturning or collapsing" (see the definition of "stability" in Scott, *The Penguin Dictionary of Civil Engineering*, 4th edition 1991); *a fortiori* they are not "necessary" to that end, because they are not indispensable or essential for that purpose (see *The Shorter Oxford English Dictionary*, 6th edition 2007) and could at most be merely useful or expedient.

54. In agreement with Mr Newington-Bridges, I consider that it is not possible to resolve this issue purely as a matter of the construction of Section 3 and without regard to the experts' opinions concerning indirect contribution to structural stability. A retaining wall will most obviously be necessary for the structural stability of a building if it holds up the land on which the building has been constructed, thereby preventing the land from falling away and, with it, the building. However, I see no reason to limit the scope of the relevant part of Section 3 to such a case. If the absence or failure of a retaining wall that supports land above a building would result in the collapse of that land and the demolition of the building, it would seem to me perfectly reasonable to say that the retaining wall was necessary to the structural stability of the building. Stability of the structure surely includes the power of the structure to remain erect and its "freedom from liability to fall or be overthrown" (cf. *The Shorter Oxford English Dictionary*). A building might be liable to total or partial collapse because it is built on insecure ground or inadequate foundations. It might also be liable to collapse because, without an external structure to protect it, it will be subjected to pressures from soil that will break the structure. The critical question, I think, concerns the test of necessity.

55. Interestingly, this conclusion as to the construction of Section 3 of the Buildmark Warranty accords with the approach of Mr Varma. Section 9 of his report did not dismiss the question posed by Issue 3 by saying that the Walls provided no support for the buildings; rather, he considered the significance of the Walls for the stability of the bank and, having opined that retaining walls were unnecessary, concluded:

> "Therefore, in response to the specific question posed in the letter of instruction, the log retaining walls are NOT considered structurally necessary for the stability of the house, bungalow, flat or maisonette, its garage or other permanent outbuilding in the strictest sense albeit garden access would have been severely restricted."

In his oral evidence, Mr Varma said that chemical weathering of the soil, whether by oxidation, carbonation or hydration or hydrolysis, (and it was the effects of water that, he agreed, were primarily in question here), would result at most in localised mobilisation of the soil, namely erosion, but not full mobilisation, namely a slip of the bank. He did not consider that it was plausible to suppose that rainfall would have the effect of turning the soil—which according to his observation was clay—to slurry. The critical angle of repose for such soil was between 40° and 50°, which could have been achieved without the use of any retaining structures, albeit with the loss of some garden access.

56. The expert evidence was prepared with a degree of haste that was all too obvious at trial. The experts had no geotechnical information other than from their own observations on site. They had no data concerning the structural properties or robustness of the buildings but relied on the inferences they drew from the appearance of the buildings and from their own experience. There was no topographical survey of the site. Mr Hyatt was unable to say how much soil was liable to collapse on the mechanism he posited or how much soil the structures could withstand; he expressed some views but had done no calculations and, as mentioned above, was unable to express informed views about the impact and relevance of land outside the curtilage of the Properties. Rather surprisingly, he accepted that when he produced his report he had not known that there was a masonry retaining wall at the north-east corner of the garage at No. 10. As for Mr Varma, he accepted that in the absence of a soil analysis he could not exclude with certainty the possibility that slippage of the bank would result in the banking of soils against the rear walls of the buildings. He also acknowledged that his report had not contained a consideration of the effects of weathering; this, however, is explicable on the basis of his opinion that weathering was of no material relevance. Perhaps more importantly, his use of diagrams to illustrate his opinions was selective: in particular, his Diagram B showed angles of repose in the context of the rear walls of the house of No. 10, but he produced no corresponding drawings relating to the house at No. 9 or the garage at No. 10, both of which are considerably closer to the nearest of the Walls.

57. Having considered the entirety of the written and oral expert evidence, I have concluded and find that the claimants have failed to prove that the Walls are necessary to the structural stability of the houses or the garages at the Properties. Indeed, I prefer the opinion of Mr Varma and the submission of Mr Townend that they are not so necessary. My reasons in brief are as follows.

1) The evidence is insufficiently rigorous to show that there is any significant likelihood of slippage of the bank, never mind of consequent damage threatening the structural stability of the buildings. For all his expression of opinion, Mr Hyatt was unable to back up his conclusions with the geotechnical, topographical or structural data that were necessary to establish them. Further, while Mr Hyatt's evidence was given intelligently and his experience commands respect, the level of analysis in his report was not overly impressive. I was especially perplexed by his lack of awareness of a retaining structure adjacent to one corner of the garage at No. 10.

2) There is no reason to overlook the inherent implausibility in supposing that, if the stability of the terraced bank were "necessary to the structural stability" of the houses or garages, it would be secured by means of the wooden pole retaining wall system. Such a system is fairly obviously intended to provide localised support for the terraces, not to ensure that the bank does not collapse and knock down the walls of the buildings. It seems to me that a heavy burden lies on a party seeking to establish that the wooden pole retaining system was necessary for a purpose for which it had clearly not been designed.

3) The claimants' case on this issue turns on the supposition that, over time, water from rainfall is likely to saturate the soil (probably clay, so far as the evidence goes) and turn it to what Mr Hyatt called "more of a slurry", causing it to collapse against or onto the buildings. There seem to me to be a number

of difficulties with this supposition. For one thing, there is no evidence that any such thing has happened either at the Properties or elsewhere on the larger development. The faces of the terraced bank at the Properties have not collapsed. Mr Hyatt insisted that these things take time. However, the bank is not a recent creation; the evidence gives no reason to believe that it has not existed since time immemorial. It is a mistake to think that the bank has only been subjected to rainfall and the effects of water since the development was carried out. It is true that the terraces were, presumably, cut only in the period around 2006. But none of the evidence has sought to explain why the cutting of terraces should cause clay to liquify (or at least become much more unstable by reason of the decrease of its angle of internal friction) that has remained firm at all previous times. One can, of course, see that the cutting might result in a risk of erosion at the faces. But that is the scenario rightly envisaged by Mr Varma; it is a far cry from the landslip envisaged by Mr Hyatt. I cannot see why it should be supposed that chemical weathering of the soil should be materially different in the future from how it has been in the past. In this connection, Mr Newington-Bridges suggested that the Walls contained inadequate provision for drainage, with the result that the bank was liable to become saturated. However, I accept Mr Varma's opinion that the wooden pole system operated in the same way as a masonry wall with weep-holes, and I reject the suggestion that the risk of landslip is increased by lack of drainage.

4) In connection with the foregoing observations, it is necessary to remember that Mr Hyatt's argument for the necessity of the Walls for the structural stability of the buildings rests on the notion that the bank is liable to a catastrophic collapse in the course of time. The simple slide of occasional amounts of soil from the erosion of the cut faces of the terraces cannot reasonably be thought to threaten the buildings, though it might be a nuisance to the amenity of the Properties.

58. Accordingly, the answer to Issue 3 is "No".

Issue 4: do the claimants plead non-compliance with the Building Regulations?

59. This is a pleading issue, arising from the claimants' averment that NHBC is liable under section 4 of the Buildmark Warranty. Section 4 provides in part that NHBC will pay for:

> "repairs needed where there is a present or imminent danger to the physical health and safety of the occupants of the Home because the Home does not comply with the requirements of the Building Regulations that applied to the work at the time of construction …"

The words "the Home" are defined to include retaining walls and the garden. Therefore, insofar as the claimants rely on section 4, they must plead and prove (among other things) that the construction of the Walls did not comply with the

requirements of the Building Regulations that applied to the work of construction of the Walls at the time when they were constructed.

60. In fact, the particulars of claim do not make any express reference to the Building Regulations. Paragraph 21 alleges that the Walls were not built in accordance with "NHBC technical specifications" and were not "British Standards compliant", but there is no mention of the Building Regulations generally, let alone any specific breach of the Building Regulations.

61. In paragraph 24(c) of its defence, NHBC observed that the claimants had not alleged any non-compliance with the requirements of the Building Regulations and averred that therefore the pleaded claim under section 4 of the Warranty was incomplete and could not succeed. The claimants responded to this in paragraph 7 of their reply to NHBC's defence; the relevant parts are the following:

> "7.3 There are three main Codes of Practice / NHBC Standards to which the Walls should conform:
>
> …
>
> 7.3.3 NHBC Standards – Standard 1.1 …
>
> …
>
> 7.6.1 Standard 1.1 – R3 states that the structure of a home should have a life of at least 60 years. R5 states that the structural design shall be carried out by suitably qualified persons and take account of durability."

62. Mr Newington-Bridges relied on the first requirement in NHBC's Standard 1.1, namely R1, which states:

> "*Statutory requirements*
>
> *Work shall comply with all relevant Building Regulations and other statutory requirements relating to the completed construction work.*"

However, neither the particulars of claim nor the reply makes any reference to R1; the only requirements referred to are R3 and R5. Further, the claimants' statements of case do not identify any requirement of the Building Regulations with which there is said to be non-compliance; obviously, therefore, they do not allege that any such non-compliance was causative of the defects complained of in the Walls or of loss and damage to the claimants.

63. Mr Newington-Bridges drew my attention to various dicta that make the point that the purpose of statements of case is simply to enable the parties to know sufficiently what case is being advanced against them; they are neither an end in themselves nor a game to be played. The observation is salutary. Nevertheless, it is a basic requirement that the statements of case set out the matters said to establish the right to the remedy claimed. If the claimants contend that NHBC is liable under section 4 of the Warranty, they have to establish (i) that there is a present or imminent danger to the

physical health and safety of the occupants of the Properties, (ii) that the Properties do not comply with the requirements of the Building Regulations and (iii) that the present or imminent danger to the physical health and safety of the occupants has been caused by the non-compliance with the requirements of the Building Regulations. Issue 4 is concerned only with the second of these matters. The claimants' statements of case plainly do not allege non-compliance with the requirements of the Building Regulations. To describe this, as Mr Newington-Bridges described it in his skeleton argument, as "an unattractive pleading point" is nothing if not bold.

64. I should record that in the course of his submissions Mr Newington-Bridges did not once identify any requirement of the Building Regulations with which there was alleged to be non-compliance. Therefore, even if the Building Regulations did apply to the Walls, the claimants would not have come any nearer to showing that the deficiency in their statements of case could be remedied.

65. Accordingly, the answer to Issue 4 is "No".

Issue 5: did the Building Regulations apply to the log retaining walls?

66. The Building Regulations in force at the time of the construction of the Walls were the Building Regulations 2000 as amended to 2005. I shall refer to these simply as "the Regulations".

67. It was common ground between the parties that the answer to Issue 5 turned on the question whether the construction or erection of the Walls was "building work" as defined by regulation 3(1) of the Regulations. It was also common ground that the only relevant part of the definition of "building work" was the first part: "the erection or extension of a building". For the purposes of the Regulations, "building" is defined in regulation 2(1) as "any permanent or temporary building but not any other kind of structure or erection"; and any reference to a building includes a reference to part of a building. Therefore, in respect of each Property, the question comes down to whether the Walls were either a building or a part of a building.

68. Mr Newington-Bridges advanced alternative submissions on this point. He submitted, first, that at each Property the Walls were part of a building, because they were constructed at the same time as the house development and were integral to it, forming part of a larger whole. Alternatively, second, he submitted that the Walls themselves were properly to be considered to be a building in their own right. He sought to bolster that alternative submission by reference to section 121(2) of the Building Act 1984, which provides that for the purposes of that Act "structure or erection" "includes a vehicle, vessel, hovercraft, aircraft or other moveable object of any kind in such circumstances as may be prescribed …": as the Walls were not moveable objects or akin to any of the things mentioned in section 121(2), they could not be considered to be a "structure or erection" of any kind other than a building.

69. Those submissions were, with respect, quite hopeless. The log retaining walls in the gardens of the Properties may well have been integral to the whole development of each plot. That does not make them part of the buildings on the plot. The Walls were

not part of the houses and they were not part of the garages. They were separate structures. Log retaining walls are obviously not buildings. They are therefore structures of another kind. Therefore their erection or construction did not constitute building work and the Regulations did not apply. Section 121(2) of the Building Act 1984 has no bearing on the matter and Mr Newington-Bridges' submission in respect of it was incoherent.

70. Accordingly, the answer to Issue 5 is "No".

Conclusion

71. In summary, the answers to the questions posed by the preliminary issues are as follows:

1) No.

2) Yes.

3) No.

4) No.

5) No.

72. Since receiving this judgment in draft, the parties have reached agreement on the appropriate terms of order. I shall make an order accordingly.