CA on appeal from QBD (Mr Justice Bell) before Schiemann LJ; Tuckey LJ; Mr Justice Wall. 28th January 2000

LORD JUSTICE SCHIEMANN:

1. This appeal by the fourth claimant from Bell, J. is in respect of his ruling on preliminary issues of law on assumed facts set out in the papers. All the other claimants had already abandoned their claims before the hearing in front of Bell, J. The significant assumed facts are these. Between 1981 and 1983 the Defendant Building Contractors *("the builders")*, pursuant to a contract with one of the other claimants (*"the original owners"*) constructed a steel portal frame building which was intended to be used as a dairy including a processing and bottling factory, offices, laboratories and a storage area. In 1989 the original owners of the dairy sold it to the appellants *("the subsequent owners")*. In 1995 a fire broke out in the storage area. It spread from the storage area to the rest of the dairy and caused much damage. The Builders, had they followed good building practice and the requirements of the Building Regulations, would have constructed, between the storage area and the rest of the building, a compartment wall which would have prevented the spread of the fire from the storage area to the rest of the building. Although a wall was constructed in the right place, along what one of the plans to which the builders were supposed to be working described as Gridline 2, the fire passed over the top of the wall. This it would not have done had the wall been constructed in accordance with good building practice.

2. The subsequent owners sued the builders in negligence alleging that they had suffered damage under 6 heads
   (A) Repairs and cleaning to buildings (other than the area in which the fire started); provision of temporary car-park and access ; professional fees;
   (B) Machinery and plant-damage (other than in the area in which the fire started);
   (C) Damage to the laboratory materials and equipment;
   (D) Damage to office equipment and general contents;
   (E) Damage to stocks and removal costs;
   (F) Loss of profit and increased costs of working caused by the fire damage.

3. The builders were not responsible for starting the fire and the subsequent owners did not seek to be compensated for the damage caused at the site of the fire or indeed to the wall.

4. The preliminary questions of law to be decided were formulated as follows:
   (a) On the assumed facts, did the defendant owe any duty of care to the claimant, and if so, what was the nature of that duty?, and
   (b) if the defendant owed a duty of care to the claimant on the assumed facts, and if the defendant had no other defence to the claim, would the claimant be entitled to recover damages in respect of damage caused by the fire to the structure of the Dairy on the side of the wall along gridline 2, which was remote from the seat of the fire or is such damage to be regarded as pure economic loss, for which no duty would be owed?

5. The Judge answered these questions as follows:. (a) O*n the assumed facts the defendant did owe a duty of care to the claimant. It was a duty to take reasonable care to safeguard him against damage to property other than the Dairy building itself, namely the damage set out in categories B, C, D, and E.... insofar as the items mentioned therein had not merged with or become part of the structure of the Dairy, and in respect of loss of profit and increased costs of working caused by fire damage to such property. The defendant did not owe a duty of care to the claimant in respect of damage to the Dairy itself, that is loss in category A, or in respect of loss of profit and increased costs of working caused by the fire damage to the Dairy itself*.

6. He answered question (b) as follows: "*The claimant is not entitled to recover damages in respect of damage caused by the fire to the structure of the Dairy on the side of the wall along gridline 2, which was remote from the seat of the fire. Such damage is to be regarded as pure economic loss in respect of which no duty is owed in the absence of a contractual or other special relationship of proximity.*"

7. From that ruling the claimants appeal submitting that the judge erred in excluding damage to the structure of the dairy from the compensatable damage. For their part, the builders also appeal submitting that the judge erred in holding that they owed any duty at all to the claimants.

8. From the foregoing it will be clear that the judge and this court have been required once more to visit an area regularly considered by the House of Lords in recent years, most notably in ***Anns v Merton L.B.C.*** [1978] A.C.728 and ***Murphy v Brentwood D.C.*** [1991] 1 A.C.398. The courts are frequently faced with a situation where a claimant has suffered damage as a result of careless acts or omissions by a defendant in circumstances where the defendant should have foreseen that his carelessness might well cause damage to the claimant. Although damages have been recoverable for injuries caused in traffic accidents or accidents at work for centuries, at one time the courts were reluctant as a matter of policy to give a remedy in cases where the defendant sold products which harmed the ultimate consumer unless the claimant and defendant were contractually linked. Then it became clear that the mere fact that, as part of the history so to speak, a contract was involved, did not necessarily prevent the situation being looked at in the same way as it would have been looked at had there been no contract. The position of the negligent manufacturer could be seen as similar to that of the negligent driver. So could that of those who negligently put words into circulation reliance on which caused damage to parties not contractually bound to the speaker or writer. However this extension of liability has brought with it a feeling that one must stop somewhere. The courts' perception of policy requirements has been such that various control devices have been adopted to limit the potential exposure of defendants to claims of this nature. Where, on policy

grounds, it has been regarded as undesirable to expose defendants in a particular situation to liability in relation to the acts or omissions under consideration, the courts have expressed that conclusion sometimes by holding that the defendant owed no duty of care to the claimant, sometimes by holding that the particular damage suffered by the claimant is not one of a type in respect of which he is entitled compensation. In such cases the relevant damage is described as pure economic loss. It is this fact which explains the formulation of the two preliminary issues. One can note in passing that these are not the only control devices for excluding or limiting liability - sometimes that has been achieved by a finding that the act or omission in question was too remote from the ultimate damage for it to be appropriate to impose liability on the defendant; sometimes by finding that the defendant belonged to a class of persons upon whom it was inappropriate to impose liability, and so on. There are various periods of limitation which have been added to and amended from time to time which also serve as control devices. We have thus arrived at a situation where fault, causation and damage are necessary but not sufficient conditions for the establishment of liability.

9. The judge held that the case law, as it at present stands, indicates that a subsequent owner of the building can recover from a builder with whom he is not in any contractual relationship in respect of damage to his possessions in the building but not in respect of damage to the building itself. This conclusion, which seems odd, has been arrived at as a result of the application by the judge to the facts of this case of control devices formulated in general terms. The builders submit that the judge erred in not also applying to the facts of this case a control device which excuses from liability negligent omissions as opposed to negligent commissions. The claimants submit that the judge erred in applying to the facts of this case a different control device, namely, classing damage to the building itself as something in respect of which there could be no recovery.

The Appeal by the Builders : Omission only

10. Mr Stow Q.C., who appears on behalf of the builders accepts for present purposes that had the wall been properly constructed the fire would not have spread. He submits however that in substance the complaint against his clients is that they omitted to build the wall high enough and that therefore no liability attaches to them, even if liability would otherwise have attached. He relied on ***Stovin v Wise*** [1996] A.C.923 in which the House of Lords refused to hold the highway authority liable for injuries to a person injured in a traffic accident. It had been submitted that the authority had been negligent in failing to use its statutory powers to insist on the removal of an earth bank which obstructed sight lines. He relies in particular on the following passage in the speech of Lord Hoffman at page 943: *"Omissions, like economic loss, are notoriously a category of conduct in which Lord Atkin's generalisation in* ***Donaghue v Stevenson*** *[1932] A.C. 562 offers limited help....... There are sound reasons why omissions require different treatment from positive conduct. It is one thing for the law to say that a person who undertakes some activity shall take reasonable care not to cause damage to others, it is another thing for the law to require that a person who is doing nothing in particular shall take steps to prevent another from suffering harm from the acts of third parties (like Mrs. Wise) or natural causes. One can put the matter in political, moral or economic terms. In political terms it is less of an invasion of an individual's freedom for the law to require him to consider the safety of others in his actions than to impose upon him a duty to rescue or protect. A moral version of this point may be called the "why pick on me?" argument. A duty to prevent harm to others or to render assistance to a person in danger or distress may apply to a large and indeterminate class of people who happen to be able to do something. Why should one be held liable rather than another? In economic terms, the efficient allocation of resources usually requires an activity should bear its own costs. If it benefits from being able to impose some of its costs on other people (what economists call "externalities"), the market is distorted because the activity appears cheaper than it really is. So liability to pay compensation for loss caused by negligent conduct acts as a deterrent against increasing the cost of the activity to the community and reduces externalities. But there is no similar justification for requiring a person who is not doing anything to spend money on behalf of someone else...... Of course it is true that the conditions necessary to bring about an event always consists of a combination of acts and omissions. Mr. Stovin's accident was caused by the fact that Mrs. Wise drove out into Station Road and omitted to keep a proper look out. But this does not mean that the distinction between acts and omissions is meaningless or illogical. One must have regard to the purpose of the distinction as it is used in the law of negligence, which is to distinguish between regulating the way in which an activity may be conducted and imposing a duty to act upon a person who is not carrying on any relevant activity. To hold the defendant liable for an act, rather than an omission, it is therefore necessary to be able to say, according to common-sense principles of causation, that the damage was caused by something which the defendant did..... Mr. Stovin's injuries were not caused by negotiations between the Council and British Rail or anything else which the Council did. So far as the Council was held responsible, it was because it had done nothing to improve the visibility at the junction.*

11. There are, as Lord Hoffman recognised inherent problems in using the distinction between mis-feasance and non-feasance as a device to control liability exposure. A helpful discussion of the issues can be found in Peter Cane's 6th edition of Atiyah's Accidents, Compensation and the Law. He writes at page 60 *"..... there are many situations in which it is impossible to draw any logical line between misfeasance and nonfeasance. A solicitor instructed to make a will allows it to be wrongly witnessed so that it is invalid: this may be seen as misfeasance in making the will or as a failure to ensure that it was properly witnessed. A person digs a hole on their land and visitor falls into it: this may be seen as affirmative conduct in digging the hole or as nonfeasance in failing to fence the hole or give a warning. A person turns right across a line of traffic without signalling: this is either positive bad driving or a negative failing to signal. More generally, whether failure to act is viewed as nonfeasance or misfeasance depends largely on whether we view the failure in isolation or as part of a larger activity."*

12. There is no doubt that in various fields the law has refused to impose liability where all that is complained of is a failure to act. A classic example is ***Stovin v Wise*** itself where the Highway Authority had a statutory power but no statutory duty to act and where the House of Lords held that in those circumstances there was no common law duty to act unless the circumstances were such that it was irrational not to exercise the power. Another example is a case where a potential rescuer stands by and watches someone drown.

13. In ***Stovin v Wise*** the distinction between omission and commission was of importance in the context of the liability of a public authority who was only on the scene as it were by reason of its public law powers and duties. Clearly the principles underlying the decision in that case have no direct application to the facts of the present case where no public law element is present. Nor is there in the present case someone fortuitously on the scene who failed to act. These builders had a contractual duty to build this wall so as to act as a firebreak. They were obliged to comply with the building regulations. If the builders had never built the dairy of course the claimants could not have complained. But the builders did build the dairy and did build the relevant wall albeit not sufficiently high.

14. At times during his submissions Mr Stow emphasised that the builders did not cause the fire itself. This is common ground. He elided this with a submission that they did not cause the damage on the side of the wall away from the fire. However as Atiyah points out at page 64 of his work *"There is, however, a basic objection to this causal argument. At first sight, to say that the defendant's nonfeasance did not cause the plaintiff's loss seems to provide a sort of objective criterion for not imposing liability. But the way we view the causation issue depends on whether we think that the defendant ought morally to have done something, and whether we think that this moral duty ought to be translated into a legal duty. This is a matter of legal policy and does not depend on any objective distinction between misfeasance and nonfeasance. In other words, the language of causation in this context simply provides a way of expressing a judgement about the proper limits of liability for negligent failure to act."*

15. There are arguments against imposing liability on reluctant rescuers. There are arguments against holding public authorities liable for not doing something which they are under no statutory duty to do. But in the present case, absent any possible exclusion clause in the liability of the builders to their contractual partners, the imposition of liability on the builders to subsequent owners only has the effect of substituting a different beneficiary for the original beneficiary of the builders' potential liability. In those circumstances, to hold that, although they would have been liable if the wall had been built of combustible materials, they are not liable because the wall was not built high enough, would have been quite unjustifiable on any policy ground and the judge was right not to do so. I would dismiss the Builders appeal.

The Appeal by the Dairy Owners : Damage to the Building itself

16. Although the judge held that the builders owed a duty to the subsequent owners to take reasonable care to safeguard them from damage to the **content** of the dairy he held that they did not owe them any duty to take reasonable care to safeguard them from damage to the dairy itself. I confess that my instinctive reaction to that finding was one of unease and a desire to discover what policy considerations could lead to such a result. It seemed odd to exempt a builder for damage to the building which he had seen but fix him with liability for damage for the contents which he had not seen.

17. In substance the judge applied a control device so as to achieve the result that the builders were not liable to subsequent owners for damage to the building itself. There being no evidence of any contractual exclusion clause which sought to exclude liability in tort, the case has proceeded on the basis that, had there been no change in ownership, the builders would have been liable to the original owners both in contract and in tort.[1] Contract is irrelevant for present purposes but it is significant that the builders are assumed liable to the original owners in tort for damage to the building. The result of the judge's holding is that, although the builders were under a duty owed to the original owners to build the wall in such a way that it contained any fire for a certain period and although they broke that duty, the original owners can not sue because they have suffered no damage and the subsequent owners can not sue because the duty owed to them only extends to chattels in the building and not to the building itself. Whatever the justification is for coming to that result it can not be either a desire not to increase the degree of care which the builders would need to exercise when building the wall or a desire not to increase the exposure of the builders to damages greater than those to which they would have been exposed had there been no change in ownership. As I have already indicated, had there been no change of ownership the builders would have been liable in tort for the damage to the building. Mr Stow was not in a position to indicate any considerations of policy which argued in favour of the judge's conclusion but submitted that that conclusion was one to which the judge rightly recognised that he was compelled to come by reason of the speeches in **Murphy v Brentwood.**

Murphy v Brentwood

18. There the claimant appellant was a houseowner. He had bought the house from its builders. Those builders had employed civil engineers to design the foundations. Their design was negligent. They had submitted the plans to the defendant council for approval under the building bye-laws. The Council approved them. The Council was negligent in so doing. The inadequacy of the foundations meant that they did not prevent differential settlement which badly affected the claimant's house. The cost of repair was £45,000. He did not repair but instead sold it for £35,000 less than he would have obtained for it had the foundations been designed properly. He sued the council in respect of this damage. It was held that to hold that a local authority, in supervising compliance with the building regulations or bye-laws, was under a common law duty of care to avoid putting a purchaser of a house

[1] ***Henderson v Merrett Syndicates Ltd*** [1995] 2 A.C. 145

in a position in which he would be obliged to incur such economic loss was an extension of principle that should not, as a matter of policy, be affirmed.

19. The following points should be noted about that case.

1. The defendant was not the negligent builder or engineer but a body created by statute with statutory powers and duties; however, their Lordships proceeded on the basis of examining the duties of the builder and stated that the duties of the council could be no higher. In consequence, although policy arguments might be available to an authority which would not be available to a builder [2] the decision in the case does not rely on any such policy arguments and it can thus be regarded as an ordinary negligent builders case.
2. Their Lordships left open the question whether the council would have been liable in respect of injury to the person caused by the defective foundations - 457H, 463H.
3. Their Lordships rejected the reasoning in the following passage in the judgment of Lord Denning MR in ***Dutton v Bognor Regis U.D.C.*** [1972] 1 Q.B. 396 at page 396 *"If Mr Tapp's submissions were right, it would mean that if the inspector negligently passes the house as properly built and it collapses and injures a person, the council are liable : but if the owner discovers the defect in time to repair it - and he does repair it - the council are not liable. That is an impossible distinction. They are liable in either case".*

   The reason for their rejection was that, in cases where the defect becomes apparent before injury to a third person, the injury should never occur unless the plaintiff causes it to do so by courting a danger of which he is aware and his expenditure is incurred not in preventing an otherwise inevitable injury but in order to enable him to continue to use the property or the chattel. -per Lord Oliver at p.488H [3]
4. *"The decision is clear authority for the proposition that ... the law imposes upon the person primarily responsible for placing on the market a defective building no liability to a remote purchaser for expenditure incurred in making good defects* ***which, ex hypothesis, have injured nobody****..."* - per Lord Oliver at p.489D
5. The decision could have been reached merely on the basis of the reasoning contained in the following passages

   "An essential feature of the species of negligence established by ***Donoghue v Stevenson*** *was that the carelessly manufactured product should be intended to reach the injured consumer in the same state as that in which it was put up with no reasonable prospect of intermediate examination ....It is the latency of the defect which constitutes the mischief. There may be room for disputation as to whether the likelihood of intermediate examination and consequent actual discovery of the defect has the effect of negativing a duty of care or of breaking the chain of causation ..... But there can be no doubt that, whatever the rationale, a person who is injured through consuming or using a product of the defective nature of which he is well aware has no remedy against the manufacturer. 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 physical defect results in physical injury to anyone or to the property of any such person. But the principle is not apt to bring home liability toward an occupier who knows the full extent of the defect and continues to occupy the building".* - per Lord Keith 464D

   "The duty held to exist [4] may be formulated as one to take reasonable care to avoid putting a future inhabitant of a house in a position in which he is ***threatened****, by reason of a defect in the house,* ***with avoidable physical injury*** *to person or health and is obliged, in order to continue to occupy the house without suffering such injury, to expend money for the purpose of rectifying the defect. The existence of a duty should not ... be affirmed without a careful examination of the implications of such affirmation. .... If the builder of a house is to be so subject, there can be no grounds in logic or principle for not extending liability upon like grounds to the manufacturer of a chattel. That would open up an exceedingly wide field of claims, involving the introduction of something in the nature of a transmissible warranty of quality. The purchaser of an article who discovered that it suffered from a dangerous defect* ***before that defect had caused any damage*** *would be entitled to recover from the manufacturer the cost of remedying the defect, and presumably, if the article was not capable of economic repair, the amount of loss sustained through discarding it. Then it would be open to question whether there should not also be a right to recovery where the defect renders the article* ***not dangerous but merely useless"****.* - per Lord Keith at p.469

   "If a dangerous defect in a chattel is discovered ***before it causes any personal injury or damage to property****, because the danger is now known and the chattel can not safely be used until the defect is repaired, the defect becomes merely a defect in quality. The chattel is either capable of repair at economic cost or it is worthless and must be scrapped. In either case the loss sustained by the owner or hirer of the chattel is purely economic. . it is recoverable against any party who owes the loser a relevant contractual duty. But it is not recoverable in tort in the absence of a special relationship of proximity imposing upon the tortfeasor a duty of care to safeguard the plaintiff from economic loss. There is no such relationship between the manufacturer of a chattel and a remote owner or hirer. I believe that these principles are equally applicable to buildings.* ***If a builder erects a structure containing latent defects which renders it dangerous to persons or property, he will be liable in tort for injury to persons or damage to property resulting from the dangerous defect. But if the defect become apparent before any injury or damage has been caused, the loss sustained by the building owner is purely economic"****.* - per Lord Bridge at p.475 E

[2] see Lord Bridge at p.479E

[3] see also Lord Keith at p.464F and Lord Bridge At p.477D

[4] in ***Anns***

I have reproduced some of those passages in bold type because the emphasised parts indicate that much of that reasoning has no immediate application to the facts of the present case where the very physical damage against which the builder should have guarded - damage by fire - was caused to the subsequent owner. The last sentence cited from the speech of Lord Bridge which seems to reflect the views of at least the majority of their Lordships and from which, at any event, no-one expressed dissent, seems to indicate that damage which might be categorised as economic prior to injury or damage might cease to be so categorised once damage had occurred.

6. It is however an undoubted fact that the speeches contain passages which indicate that the law imposes no liability in circumstances where the damage for which compensation is claimed is damage to the very chattel or building which was negligently manufactured or constructed. I refer to the following passages.

   "The question is whether the appellant council owed the respondent a duty to take reasonable care to safeguard him against the particular kind of damage which he in fact suffered, which was not injury to person or health nor damage to anything other than the defective house itself" ... per Lord Keith at p.464

   "We realise that the damage may be qualitative, occurring through gradual deterioration or internal breakage. Or it may be calamitous.... But either way, since by definition no person or other property is damaged, the resulting loss is purely economic. Even when the harm to the product itself occurs through an abrupt, accident-like event, the resulting loss due to repair costs, decreased value, and lost profits is essentially the failure of the purchaser to receive the benefit of its bargain - traditionally the core concern of contract law". - per Lord Bridge at 476F quoting with apparent approval the unanimous opinion of the United States Supreme Court in ***East River Steamship Corporation v Transamerica Delaval*** [5] *".... damage to a house itself which is attributable to a defect in the structure of the house is not recoverable in tort on* ***Donoghue v Stevenson*** *principles but represents pure economic loss which is only recoverable in contract or tort by reason of some special relationship of proximity which imposes upon the tortfeasor a duty of care to protect against economic loss".* - per Lord Bridge at p479D

   "Two matters emerge clearly from Lord Atkin's speech in namely, (1) that damage to the offending article was ***Donoghue v Stevenson.,*** *not within the scope of the duty ....Application of the principle enunciated by Lord Atkin in* ***Donoghue v Stevenson*** *would therefore appear to negative rather than support the recovery of damages for damage to the house itself detected before the damage had caused resultant injury to persons or other property"* - per Lord Jauncey at p.495

7. The whole of the discussion in the speeches about complex structures is premised on the assumption that it matters in cases where actual damage has been caused whether that damage is to the very defective article or building or whether it is to something or someone else - see especially the speech of Lord Bridge between pages 476 and 479 and that of Lord Jauncey between pages 496B and 497D.

8. Their Lordships were clearly influenced by the fact that the duty imposed on builders by the Defective Premises Act 1972 was narrower than that imposed by ***Anns*** and thought it inappropriate to go beyond the statute.

9. The decision has not escaped both judicial and academic criticism - see for instance ***Norsk Pacific Steamship Co. Ltd v Canadian National Railway Co.*** (1992) 91 DLR (4th) 289 (Supreme Court of Canada) and Markesinis and Deakin Tort Law 4th edition, especially pages 104-109

20. Mr Stuart-Smith Q.C. in his elegantly advanced argument submitted that it would be wrong to apply the passages in ***Murphy*** extracted under the sixth head above too rigidly. He pointed out that the present case is not one of the gradual deterioration of a building and that it is not a case of a defect which existed at the time of construction working itself gradually out to create more and more damage. He pointed out that the wall was supposed to act as a barrier against the very danger which eventuated and submitted that therefore it would be appropriate to regard the far side of the wall from the fire as a different building. He pointed out that the mechanism of the damage in the present case was fire and that it was not the wall itself which had resulted in the damage there being no functional interdependence between the wall and the rooms on the other side of it, unlike the position of a building on top of defective foundations. He submitted that on the facts of this case the dairy should not be regarded as an indivisible building for the purposes of this branch of the law of tort. He submitted that to impose liability in a case such as the present would be to develop the law incrementally in precisely the manner that had been held to be proper in ***Murphy.***

21. Before considering these submissions, it is worth noting that any appellate court in an area such as this where there are conflicting policy considerations in play has to decide the case before it and the arguments tend to be framed in the light of the facts of that case. The judgments are of course influenced by the facts but they must be expressed at a certain level of abstraction otherwise they afford no guidance to subsequent courts and one of the aims of any legal system, namely to provide guidelines which will enable the result of any particular dispute in the future to be accurately predicted without recourse to the courts, will not be achieved. One may wonder whether if, for instance, the present case had preceded ***Murphy*** the principled parts of the speeches would have been expressed differently. However, the fact is that they were not. Whilst it would perhaps be possible, without disloyalty to the principle of *stare decisis,* to hold that on facts such as the present the claimants should have a remedy, I consider that the judge was right not to depart from the guidance given in ***Murphy*** and the cases cited in it to the effect that where the damage is to the very building itself there should be no liability. I do not say that I would necessarily have reached that conclusion absent authority but there is no denying that, after the fullest

[5] see also Lord Jauncey at p.496A

argument, the speeches clearly point to that conclusion. In those circumstances I do not think it would be right for us to depart from the guidance there given.

22. Can we, whilst being loyal to the guidance there given, come to the conclusion that the judge ought to have held that there was on the facts of the present case a liability on the builder for damage to the building itself? Mr Stuart-Smith rightly points out that the concept of one building is not hard edged. One building built at one time by one person for one purpose is at one extreme, but one can have buildings which are gradually added to over the centuries and used for different purposes, such as a modern shop added to the end of a Georgian residential terrace at the other extreme. He points out that in the present case, the purpose of the rooms on the far side of the wall from the fire was offices and laboratories whereas the purposes of the room in which the fire broke out were storage. That is true. However, in the present case the whole of the dairy was built at the same time by the builders, marketed as a unit, bought as a unit to be used as a unit and was used as a unit. I have no doubt that any holding either that (1) the rooms on one side of the wall should be treated for present purposes as constituting a different building from the rooms on the other side of the wall, or that (2) the wall should be treated as constituting a different building from the rooms on one side of it, would be a thoroughly undesirable approach to the issues before us.

23. I would therefore dismiss the claimants' appeal as well as the builders appeal and affirm the judgment below.

LORD JUSTICE TUCKEY:

24. For the reasons given in the judgments by Schiemann LJ and Wall J I agree that the appeal and the cross appeal should be dismissed.

25. As Schiemann LJ says the courts have limited liability in tort as a matter of policy in different ways. The approach following the House of Lords cases in the early 1990's was well summarised by Saville LJ (as he then was) in ***Marc Rich & Co. -V- Bishop Rock Ltd (*****1994) 1 WLR 1071 at p.1077** where he said: *"whatever the nature of the harm sustained by the plaintiff, it is necessary to consider the matter not only by enquiring about foreseeabilty but also by considering the nature of the relationship between the parties; and to be satisfied that in all the circumstances it is fair, just and reasonable to impose a duty of care. Of course...these three matters overlap with each other and are really facets of the same thing. For example, the relationship between the parties may be such that it is obvious that a lack of care will create a risk of harm and that as a matter of common-sense and justice the duty should be imposed ... Again in most cases of the direct infliction of physical loss or injury through carelessness, it is self evident that a civilised system of law should hold that a duty of care has been broken, whereas the infliction of financial harm may well pose a more difficult problem. Thus the three so called requirements of a duty of care are not to be treated as wholly separate and distinct requirements but rather as convenient and helpful approaches to the pragmatic question whether a duty should be imposed in any given case. In the end whether the law does impose a duty in any particular circumstances depends upon those circumstances...."*

In the House of Lords **(1996) 1 AC 211 at p.236** Lord Steyn with whose speech the majority agreed said that this seemed to him a correct summary of the law.

26. I agree that at first sight it is anomalous that in this case the builder is liable in tort for physical damage to other property but not to the property which he contracted to build. It is also perhaps anomalous to describe the damage flowing from the latter as pure pecuniary or economic loss when it is the fire which has caused the damage in both cases. To explain the policy reason behind the first anomaly and to get away from the second anomaly I think that Lord Brandon's dissenting (but subsequently much approved) speech in ***Junior Books -v- Veitchi*** **(1983) AC 520** is helpful. In that case the owner of a factory sought to make specialist sub-contractors liable in tort for defects in the factory floor which they had laid. Lord Brandon held that the sub-contractors had no liability because the scope of their duty was limited by two considerations.

Firstly, following ***Donoghue -v- Stevenson*** and the numerous cases in which the principle in that case had been applied the duty was to avoid damaging persons or their property *"other than to the very piece of property from the defective condition of which"* the danger arose.

Secondly the effect of accepting that the scope of the duty was wide

"would be in substance to create as between two persons who are not in any contractual relationship with each other, obligations of one of those persons to the other which are only really appropriate as between persons who do have such a relationship between them.

In the case of a manufacturer or distributor of goods the position would be that he warranted to the ultimate user or consumer of such goods that they were as well designed as merchantable and as fit for their contemplated purpose as the exercise of reasonable care could make them. In the case of sub-contractors such as those concerned in the present case, the position would be that they warrant to the building owner that the flooring, when laid, would be as well designed as free from defects of any kind and as fit for its contemplated purpose as the exercise of reasonable care would make it. In my view the imposition of warranties of this kind on one person in favour of another, when there is no contractual relationship between them, is contrary to any sound policy requirement.

It is I think just worthwhile to consider the difficulties which would arise if the wider scope of the duty of care put forward by the respondents were accepted. In any case where complaint was made by an ultimate consumer that a product made by some persons with whom he himself had no contract was defective, by what standard or standards of quality would the question of defectiveness fall to be decided? In the case of goods bought from a retailer, it could hardly be the standard prescribed by the contract between the retailer and the wholesaler, or between the wholesaler

and the distributor, or between the distributor and the manufacturer, for the terms of such contracts would not even be known to the ultimate buyer. In the case of sub-contractors such as the appellants in the present case, it could hardly be the standard prescribed by the contract between the sub-contractors and the main contractors, for, although the building owner would probably be aware of those terms, he could not, since he was not a party to such a contract, rely on any standard or standards prescribed in it. It follows that the question by what standard or standards alleged defects in a product complained of by its ultimate user or consumer are to be judged remains entirely at large and cannot be given any just or satisfactory answer."

27. It is these difficulties which I think justify the policy which prevents recovery in tort against the builder in this case for defects in the building which have caused damage to it. I do not think it is an answer to say that the original contracting party may be owed a concurrent duty in tort by the builder and so why should the same duty not be owed to his successor in title? This is still an undeveloped area of the law and in practice the builder may well be able to exclude such liability by his contract.

MR JUSTICE MAY:

28. I respectfully agree with the judgments of my Lords, which I have had the opportunity to read in draft, and that both the appeal and the cross-appeal in this case fall to be dismissed. I add a short judgment of my own out of deference to the helpful arguments addressed to us. I do not propose to rehearse the facts which are assumed for the purposes of the hearing before Mr. Justice Bell and this court.

29. In my judgment, there are three points which are critical to the determination of this appeal; one of fact and two of law. The factual point is whether or not the judge was correct in describing "The Dairy" identified in point 3 of the agreed statement of facts as a single building, and the fire stop wall as "as much an integral part of the whole structure as any dividing wall".

30. The two points of law are (a) whether or not a builder owes a duty of care within ***Donoghue v Stevenson*** [1932] AC 562 principles to a subsequent owner of the building in relation to damage caused to property other than the building itself as a consequence of any negligent act or omission in the course of the building's construction; and (b) - assuming a ***Donoghue v. Stevenson*** duty of care exists - whether damage caused by fire to the property itself as a consequence of the builder's negligence is properly described as economic loss, thus taking it outside the scope of the duty of care envisaged by that case.

31. On the factual point, the judge's view was that: - .... *the fire stop wall along grid line 2 and the structures on the side of it, remote from the seat of the fire, were integral parts of the same original building which was constructed by the Defendant, together with the part where the fire started, as one complete structure. The fire stop wall was a dividing wall, but designed also as a fire stop, and it was as much an integral part of the whole structure as any dividing wall. Neither the fire stop wall nor the structures on either side or it can sensibly be viewed as "other property" to the complete building, or to each other, in my view.*

32. I respectfully agree with this analysis. As paragraphs 3 and 5 of the Statement of Assumed Facts makes clear, the building was constructed for use as a Dairy, was formed of portal frames providing a high single storey structure, and was divided internally in certain areas to provide two floors. The fact of "compartmentalisation", and that different parts of the building were used for different purposes within its overall function as a Dairy does not mean, in my judgment, that the structure ceased to be a single building.

33. Mr Stuart-Smith QC sought to argue that if the purpose of a structure is to achieve separation of function it is incorrect to identify the entity as one piece of property simply because the word *"building"* can be loosely used to describe it. In my judgment, that argument does not bear analysis. Most buildings are divided up in one way or another to enable individual rooms or spaces to perform different functions without the structure losing its identity as a single building. In any event the question here seems to me a straightforward issue of fact, and the judge, in my judgment, was plainly right to find that the Dairy was one building in which the various functions of a dairy were combined under one roof.

The Cross-Appeal

34. It is convenient to deal with this first, since in my judgment it presents less difficulty.

35. The existence of what may generically be called a ***Donoghue v Stevenson*** type duty of care in a case such as the present seems to me to be conclusively established by the authorities, in particular by the speeches in the House of Lords in ***Murphy v Brentwood District Council*** [1991] 1 AC 398. The position is aptly summarised by the judge on page 13 of the judgment where he says: - "............ *the scope of the duty of care which a builder owes to the owner or lessee or occupier of the building which he has built, but with whom he has no contractual or other special relationship of proximity, for defects in the building as he has constructed it, extends only to protection from damage to persons or to property other than the building itself."*

36. The principal routes by which Mr. Stow QC sought to escape a ***Donoghue v. Stevenson*** liability deriving from the speeches in ***Murphy v Brentwood District Council*** were (a) that liability under ***Donoghue v Stevenson*** was limited to personal injuries and consequential loss arising therefrom; and (b) that the case against the Defendant involved pure omissions; it did not involve omissions during the course of positive acts which, together, gave rise to physical damage. Reliance was placed in this context on the speech of Lord Hoffman in ***Stovin v. Wise, Norfolk County Council (Third Party)*** [1996] AC 923.

37. I am impressed by neither argument. Dealing with the second argument first, I do not think that ***Stovin v Wise*** assists Mr. Stow on the facts of this case. The Defendant was under a duty to build the wall in question in accordance with the plans. It failed to do so. Like the judge, I find no intellectual or legal difficulty in taking the view that the Defendant's failure, like much tortious conduct, consisted of both positive acts and omissions.

38. Once the existence of a ***Donoghue v Stevenson*** type duty is acknowledged, it seems to me that it must apply both to personal injury and to damage to property, together with losses consequent upon either: - see, for example, the speech of Lord Bridge in ***Murphy v Brentwood District Council*** [1991] 1 AC 398 at 475E-F, and in particular his use of the phrase "injury to persons or damage to property". A distinction between recovering the cost of clothing damaged in the fire as part of a claim for personal injuries and the cost of personal equipment or chattels left behind in the fire seems to me to be both artificial and without any foundation in principle.

39. In my judgment, therefore, the judge was plainly right to hold that the Claimant could recover for items B,C,D and E under paragraph 16 of the Statement of Assumed Facts, and the cross-appeal must, accordingly fail.

The Appeal

40. Concepts of artificiality are, however, at the heart of Mr. Stuart-Smith's argument in relation to the appeal. In simple terms, the argument, as I understood it, was as follows. The fire caused damage. The same fire caused damage to the building itself (for this purpose, beyond the wall which should have contained the fire) and to items of property and equipment likewise beyond the wall. The central question thus becomes: in the absence of a contractual or ***Hedley Byrne & Co Ltd v. Heller & Partners Ltd*** [1964] AC 465 relationship between the parties, should catastrophic damage caused by fire to the building itself not be seen for what it is - physical damage to property - rather than being treated as pure economic loss and thus outside the ***Donoghue v Stevenson*** principles?

41. Like the judge, I have some sympathy for this view. However, Mr. Stuart-Smith put the question aptly, I thought, when he asked, rhetorically, during the course of argument: *"does **Murphy v Brentwood District Council** leave any room for manoeuvre?"* In my judgment the answer to this question has to be "no", at least as far as the judge and this Court are concerned. If the policy of the law is to be extended to enable liability under ***Donoghue v Stevenson*** principles to include damages for economic loss consequent upon damage caused to the thing itself (chattel or building); alternatively, if liability for damage such as that caused in the instant case to the Dairy itself is to be included within the duty of care owed under ***Donoghue v Stevenson***, it is, in my judgment, for the House of Lords to take those steps.

42. Both the judge in his judgment, and Mr. Stuart-Smith in his well crafted skeleton argument trace with care the developments in the law which led to the decision of the seven member appellate committee of the House of Lords in ***Murphy v Brentwood District Council***. In my judgment that decision establishes clearly that the duty of care owed under ***Donoghue v Stevenson*** principles excludes economic loss consequent upon damage to the chattel in question itself; and where the damage in question is damage to a building, that damage is to be treated as economic loss and irrecoverable in the absence of a contractual or other special relationship.

43. Consistent with that analysis, the judge held that the Defendant did owe the Claimant a duty of care under ***Donoghue v Stevenson*** principles, but that the duty was limited to personal injury or damage to property other than the fabric of the building itself, which was to be regarded as purely economic loss and for which the Claimant was unable to recover.

44. Mr. Stuart-Smith sought to argue that there was a conceptual difference between damage caused by fire to a building due to a deficient fire wall, and damage caused to a building consequent upon a defect in the underlying construction - such as faulty foundations. The judge did not accept that distinction.

45. The critical passage in the judgment of Bell J which Mr. Stuart-Smith realistically recognised he had to demonstrate was wrong was that which appears at page 15 of the transcript, namely: -

In my view, however, there is no conceptual or qualitative difference (and certainly none which I feel able to formulate) between the case of defective foundations which fail to cope with shrinkage or heave in the subsoil and to support the building, resulting in cracked walls and pipes, and the case of a defective roof which fails to cope with and to keep out water, and the case of the defective fire stop wall which fails to cope with and to contain fire which goes on to injure other parts of the same building.

If the resulting injury to the fabric of the building itself is to be seen as purely economic loss in the first two of those cases it must, in my view, be seen as economic loss in the third. The fabric of the Dairy on the side of the fire stop wall remote from the seat of the fire depended on the fire stop wall to protect it from the effects (great or small) of the spread of fire, just as the building on top of foundations depends on the foundations to protect it from the effects (great or small) of ground movement. In both cases the defective part of the structure has failed to keep other parts of the same building or property secure from the potentially dangerous agent as it was designed to do. In both cases the inherent defect is manifested by the effects (great or small) of the agent.

46. I respectfully adopt both the language and the reasoning of the judge in this passage. Mr. Stuart-Smith's attack on the judgment and on this passage in it was studied, moderate and extremely well-argued, but in my judgment it leaves both unscathed. The judge, it seems to me, correctly applied the law as it stands to the agreed assumed facts of the case.

47. As I have already stated, it seems to me that if the policy of the law is to be expanded in this area to impose the type of duty of care for which Mr. Stuart-Smith argues it is not open to this court, on the facts of this case, to do so.

48. For these reasons, in addition to those given by My Lords, I agree that both the appeal and the cross-appeal fall to be dismissed.

Order: Appeal dismissed with costs. Cross-appeal dismissed. Leave to appeal to their Lordships' House refused to both parties. (Order does not form part of approved judgment).

JEREMY STUART-SMITH Q.C. & DORE GREEN (instructed by Messrs Berrymans Lace Mawer for the Appellants)
TIMOTHY STOW Q.C. & FREYA NEWBERY (instructed by Messrs Kennedys for the Respondents)