CA on appeal from Deputy District Judge Childs, Exeter County Court before Mummery LJ; Tuckey LJ; Clarke LJ. 2nd March 2005.

JUDGMENT : LORD JUSTICE TUCKEY

1. In ***Pirelli General Cable Works Ltd. v Oscar Faber & Partners*** [1983] 2 AC 1 the House of Lords decided that a building owner's cause of action against his consulting engineer for negligent design accrued for limitation purposes when physical damage to the building first occurred. The question on this appeal is whether *Pirelli* is still good law. It arises on appeal (transferred to this court under CPR 52.14) from a decision of Deputy District Judge Childs in the Exeter County Court who applied *Pirelli* to the facts of this case which are indistinguishable from those in *Pirelli.*

2. The appellant engineers say that the later decision of the House in ***Murphy v Brentwood D.C*** [1991] AC 398 is inconsistent with *Pirelli* which should no longer be followed. They submit that ***Murphy*** decides that the cause of action accrues when the building owner suffers economic loss. This occurs when work to the negligent design has been completed leaving the owner with a defective building in need of remedial work.

The Facts

3. The judge tried the limitation point as a preliminary issue on agreed facts. The claimants were the owners of a hotel in Torquay. In May 1995 they retained the defendant consulting structural and civil engineers to design the work necessary to remedy structural defects in a large bay window of the hotel. The contract to do this work was made orally and contained the usual implied term that it would be carried out with reasonable care and skill. Remedial work to the engineers' design was completed by a local builder in March 1997. In late 1999 the claimants first noticed that the lintel over the window had moved and cracked the surrounding structure. The agreed statement of facts upon which the preliminary issue was tried said that: *… the works did not prevent the lintel over the bay window …. from deflecting further and causing more damage. As a result the claimants were in possession of a property which was flawed and defective.*

   Further remedial works costing approximately £20,000 had to be carried out.

4. The claim against the engineers, put both in contract and tort, was not issued until 15 September 2003. The particulars of claim simply alleged that the breach of contract/duty had caused the defects which appeared in 1999 and claimed the cost of remedying them and consequential losses.

5. It was common ground that the contract claim was time barred. The concurrent claim in tort was time barred if it accrued more than six years before the issue of the claim: (s. 2 Limitation Act 1980), but of course it did not accrue until damage had occurred. S. 14A of the 1980 Act extended the primary limitation period for a further three years from the claimants' "date of knowledge" but as this was late 1999 and the claim was not issued until 2003 this extension of time did not help them. If, as the engineers contended, the cause of action accrued when the work was completed in March 1997 the claim was time barred; if it accrued when physical damage to the building first occurred it was probably not time barred. The claimants contended that such damage occurred when or shortly before they first noticed cracking in 1999. The judge did not make any finding about this but simply made a declaration that "if cracks first appeared within six years of the issue of proceedings [the claim] is not statute barred".

Respondents Notice

6. Before considering the main point on this appeal it is necessary to dispose of a preliminary objection to our hearing the appeal raised by the claimants in their respondents notice. What they say is that before the claim was issued the engineers admitted liability. Therefore, before proceeding with their defence, the engineers needed to withdraw this admission under CPR 14.1 (5) and as they did not do so their defence is an abuse of process and should be struck out. This point was apparently raised in the court below but there was no time to deal with it.

7. There are probably a number of answers to this point but the short answer is that the two letters relied on by the claimants do not contain any admission of liability. They emanate from loss adjusters instructed on behalf of the engineers' insurers and simply say that insurers will insist on proper proof

of any losses attributable to the inadequate design alleged. That is not an admission of liability; it is the sort of letter insurers and loss adjusters write in order to evaluate the claims they face.

The Cases

8. As I have said the facts in *Pirelli* are on all fours with the facts in the present case. Engineers had negligently designed a chimney for the plaintiff's factory which was built by July 1969. Not later than April 1970 cracks developed at the top of the chimney which were not discovered until November 1977. Extensive remedial work had to be carried out and in October 1978 proceedings were issued which included a claim for negligence. The defendants suggested three possible dates for the accrual of the cause of action: when the plaintiffs relied on the negligent advice, when building of the chimney was completed and when cracks first occurred. The plaintiff argued for the date when the damage was or ought with reasonable diligence to have been discovered.

9. Lord Fraser gave the leading judgment, with which Lords Scarman, Bridge, Brandon and Templeman agreed. Much of the judgment was devoted to consideration and disapproval of an earlier decision of this court to the effect that in cases involving latent defects in buildings the cause of action did not accrue until the date of discoverability. At p. 16 Lord Fraser pointed out that a latent defect in the foundations of a building might never lead to any damage to the building. He said that in such a case a plaintiff's cause of action would not accrue until damage occurred which would commonly consist of cracks coming into existence as a result of the defect, even though the cracks or the defect might be undiscovered and undiscoverable. At p. 17 he recorded the submission that the case of a negligent engineer was analogous to that of a solicitor who gives negligent advice where, following the ***Forster v Outred*** [1982] 1 WLR 86 line of authority, the cause of action accrues when the client acts on the advice. He continued: *"It is not necessary for the present purpose to decide whether that submission is well founded, but as at present advised, I do not think it is. It seems to me that, except perhaps where the advice of an architect or consulting engineer leads to the erection of a building which is so defective as to be doomed from the start, the cause of action accrues only when physical damage occurs to the building."*

and a little later he said: *"I would hold that the cause of action accrued in Spring 1970 when damage in the form of cracks near the top of the chimney must have come into existence."*

This meant that the plaintiff's claim was time barred – a result which was acknowledged to be unjust and led to the passing of what became S.14A of the 1980 Act.

10. Lord Fraser's possible exception of a building which was so defective as to be doomed from the start was one of the issues considered by the House in ***Ketteman v Hansel Properties*** *[1987] AC 189.* That was a case in which purchasers of houses built on defective foundations sued the builders and later the architects who designed them. It was argued on behalf of the defendants that the houses were doomed from the start so the cause of action accrued, not when the physical damage to the houses occurred, but when the plaintiffs became the owners of the houses with defective foundations, at which time they suffered economic loss because the houses were less valuable than they would have been if the foundations had been sound. In rejecting this argument Lord Keith said (p.205):

The proposition that a cause of action in tort accrued out of negligence resulting in pure economic loss was thought to be vouched by reference to ***Junior Books Ltd. v Veitchi Co. Ltd.*** 1983 1 AC 520. That case was cited in *Pirelli* in support of the argument that, since in that case there was economic loss when the chimney was built, the cause of action arose then. The argument was clearly rejected in the speech of Lord Fraser concurred in by all the others of their Lordships who participated in the decision. At p.16, he expressed the opinion that a latent defect in the building does not give rise to a cause of action until damage occurs. In the present case there can be no doubt that the defects in the houses were latent. No-one knew of their existence until damage occurred … this branch of the argument for the architects is in my opinion inconsistent with the decision in *Pirelli* and must be rejected.

Of the doomed from the start argument he said: *"Whatever Lord Fraser may have had in mind in uttering the dicta in question, it cannot, in my opinion have been a building with a latent defect which must inevitably result in damage at some stage. That is precisely the kind of building that Pirelli was concerned with, and in*

relation to which it was held that the cause of action accrued when the damage occurred. This case is indistinguishable from ***Pirelli*** *and must be decided similarly. "*

11. Lords Templeman, Griffiths and Goff agreed with Lord Keith on this issue. Lord Brandon dealt with it as follows (p.208): *"The argument of counsel, as I understand it, proceeded as follows. Where a house was built on defective foundations, a buyer of it might suffer two kinds of damage. The first kind of damage was physical in the form of consequential structural failure or damage. The second kind of damage was economic loss, in the form of diminution in market value. In the case of the first kind of damage, the buyer's cause of action against any party for negligence in respect of the defective foundations accrued when the consequential structural failure or damage occurred. But in the case of the second kind of damage, the diminution in market value was present from the time of the original construction, and it was at that earlier time that the buyers cause of action in respect of such diminution accrued. The plaintiffs in the present case had sued for the second kind of damage, namely diminution of market value. The causes of action had therefore accrued at the date when the houses were built.*

In my opinion this contention cannot be supported. I do not know what special cases Lord Fraser had in mind when he referred in his speech in ***Pirelli*** *to buildings "doomed from the start". It may be that he was only keeping open the possibility of the existence of such special cases out of major caution. Be that as it may, however I am quite sure that he was not seeking to differentiate between causes of action in respect of making good defects or damage on the one hand and the causes of action in respect of diminution in market value on the other…*

In my view there is nothing in the facts of the present case which would take it out of the general principle laid down in ***Pirelli…"***

12. ***Murphy*** is the case where a seven judge constitution of the House overruled its earlier decision in ***Anns v Merton London Borough*** [1978] AC 728 about the liability of local authorities for approving the defective design or construction of buildings. The plaintiff, whose house had been built on defective foundations and suffered structural damage, sued the council for the diminution in the market value of his house. The unanimous decision of the House is summarised in the first part of the head-note as follows: *"… while the principle in* ***Donoghue v Stevenson*** *[1932] AC 562 applied to impose the duty on the builder of a house to take reasonable care to avoid injury or damage, through defects in its construction, to the persons or property of those whom he ought to have in contemplation as likely to suffer such injury or damage, that principle as stated extended only to latent defects; that, where a defect was discovered before any injury to personal health or damage to property other than the defective house itself had been done, the expense incurred by a subsequent purchaser of the house in putting the defect right was pure economic loss; and that to hold that a local authority, in supervising compliance with the building regulations or bye-laws, was under a common law duty to take reasonable care to avoid putting the purchaser of a house in a position in which he would be obliged to incur such economic loss was an extension of principle which should not, as a matter of policy, be affirmed."*

13. The analysis that the building owners loss in such a case is purely economic was put by Lord Bridge as follows at p. 475: *"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, … in the absence of the special relationship of proximity they are not recoverable in tort."*

It follows that in a case where there is no personal injury or damage to property or special relationship between the builder or designer and the claimant there is no liability in tort (see ***Bellefield Computer Services Ltd. v E. Turner & Sons*** [2000] BLR 97). In the present case, however, it is common ground that there was a special relationship.

14. In ***Murphy*** Lord Keith recognised that the nature of the loss suffered in such a case was closely tied up with the question of when the cause of action accrued. After referring to the facts of ***Pirelli*** he said (p. 466): *"If the plaintiffs had happened to discover the defect before any damage had occurred there would seem to be no good reason for holding that they would not have had a cause of action at that stage, without having to wait until some damage had occurred. They would have suffered economic loss through having a defective*

chimney upon which they required to expend money for the purpose of removing the defect. It would seem that in a case such as Pirelli, where the tortious liability arose out of a contractual relationship with professional people, the duty extended to take reasonable care not to cause economic loss to the client by the advice given. The plaintiffs built the chimney as they did in reliance on that advice. The case would accordingly fall within the principle of Hedley Byrne …."

15. All the other members of the House agreed with the speech of Lord Keith although no-one else referred to the decision in ***Pirelli.*** The passage I have cited from Lord Keith's judgment does not obviously overrule ***Pirelli***. I have already cited from his judgment in ***Ketteman*** where he applied it with apparent approval. All he appears to be saying in ***Murphy*** is that if the claimant discovers the defect before damage occurs he has a claim for economic loss if there is a special relationship. As to the case where the claimant does not discover the defect before damage occurs Lord Keith had earlier said (p. 464): *"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 … or to the property of any such person."*

In such a case Lord Keith appears to accept that the cause of action accrues at the date of physical damage.

16. The last case I need refer to is ***Invercargill City Council v Hamlin*** [1996] AC 624, a Privy Council appeal from New Zealand. This was another claim against a local authority for negligent inspection of foundations. *Murphy* had not been followed in New Zealand and the Privy Council accepted that this was justified. The *Pirelli* date of physical damage had also been discarded in favour of the date of discoverability. In the course of giving the judgment of the committee Lord Lloyd described the decision in *Pirelli* as unfortunate and noted that it had been the subject of judicial and academic criticism. After referring to *Murphy* he said (p.648): *"Once it is appreciated that the loss in respect of which the plaintiff in the present case is suing is loss to his pocket, and not for physical damage to the house or foundations, then most, if not all the difficulties surrounding the limitation question fall away. The plaintiff's loss occurs when the market value of the house is depreciated by reason of the defective foundations, and not before. If he resells the house at full value before the defect is discovered he suffers no loss. Thus in the common case the occurrence of the loss and the discovery of the loss will coincide.*

But the plaintiff cannot postpone the start of the limitation period by shutting his eyes to the obvious …

In other words the cause of action accrues when the cracks become so bad and all the defects so obvious, that any reasonable home-owner would call in an expert. Since the defects would then be obvious to a potential buyer or his expert, that marks the moment when the market value of the building is depreciated and therefore the moment when economic loss occurs. Their Lordships do not think it is possible to define the moment more accurately. The measure of the loss will then be the cost of repairs if it is reasonable to repair, or the depreciation in the market value if it is not…

This approach avoids almost all the practical and theoretical difficulties to which the academic commentators have drawn attention and which led to the rejection of Pirelli by the Supreme Court of Canada … The approach is consistent with the underlying principle that a cause of action accrues when, but not before, all the elements necessary to support the plaintiff's claim are in existence. For in the case of a latent defect in a building the element of loss or damage which is necessary to support a claim for economic loss in tort does not exist so long as the market value of the house is unaffected. Whether or not it is right to describe an undiscoverable crack as damage, it clearly cannot affect the value of the building on the market. The existence of such a crack is thus irrelevant to the cause of action..."

Whether ***Pirelli*** should still be regarded as good law in England is not for their Lordships to say. What is clear is that it is not good law in New Zealand.

Discussion

17. So what is the present state of the law of England? With three House of Lords' cases to guide us it ought to be possible to give a clear answer to this question, but I regret that I feel unable to do so with any confidence. ***Murphy*** establishes that, absent a special relationship a claimant may only sue in tort for personal injury or damage to property caused by a latent defect in a building. But it is not clear whether this extends to damage to the building itself before the defect is discovered. And what is the

position where there is a special relationship? It is clear that the duty in such a case extends to taking care not to cause economic loss. But when does such loss occur in a case such as the present and does the duty not to cause physical damage to property constitute a separate cause of action for limitation purposes?

18. Mr Holwill for the engineers submits that in a case like the present a claimant will only suffer economic loss. In this case that loss occurred at the time when the defectively designed work to the bay window was completed, at which point the claimants suffered economic loss because their building was defective. Mr Holwill further submits that the claimants' cause of action for negligent design was *"single and indivisible"* and accrued when damage (economic loss) was first suffered. The fact that the claimants had chosen to claim the cost of carrying out work to remedy the physical damage to their building was not relevant and could not be used to get round the fact that their true claim was time barred.

19. I think the simple answer to these submissions is that we are bound by the decisions in ***Pirelli*** and ***Ketteman*** to uphold the decision of the District Judge. The facts in ***Pirelli*** are indistinguishable from those in the present case. ***Pirelli*** was approved in ***Ketteman*** and was cited without disapproval in ***Murphy*** by the House which included two members (Lords Bridge and Brandon) who were party to the decision in ***Pirelli.*** It has not been expressly over-ruled and I am not persuaded that this has been done impliedly. Lord Lloyd left open the question as to whether ***Pirelli*** was still the law in England. It seems to me that only the House of Lords can decide whether it is or not.

20. If, contrary to what I have said, we are not bound by ***Pirelli*** and the claimants' cause of action accrued at the time they suffered economic loss, I do not accept Mr Holwill's submission that this occurred in March 1997. The defective design had not caused any loss at that time. It would only do so when it manifested itself in some way which would affect the value of the building, measured either by the cost of repairs or depreciation in market value. In other words I accept Lord Lloyd's analysis in ***Invercargill*** which, as he says, avoids almost all the practical and theoretical difficulties which cases of this kind have caused. The present case is, I think, the common case where the occurrence of the loss and its discovery coincide. On this view the cause of action in the present case accrued in 1999 so the claim was not time barred.

21. These conclusions make it unnecessary to grapple with the problem as to whether in a case such as this there is more than one cause of action for limitation purposes. This is a difficult point upon which I suspect there is much more to be said than the limited argument we were able to hear in the time available.

Conclusion

22. For the reasons I have given I would dismiss this appeal.

Lord Justice Clarke: I agree

Lord Justice Mummery: I also agree.

ORDER: Appeal dismissed; minute of order agreed; leave to appeal to be decided on paper. (Order does not form part of approved Judgment)

Derek HOLWILL (instructed by Messrs. Bond Pearce) for the Appellant
Ian PENNOCK (instructed by Messrs. Richmond & Co.) for the Respondent