ECONOMIC LOSS AFTER *ROBINSON v JONES*

A paper presented to the Society of Construction Law at a meeting in Oxford on 17th November 2011

Philip Harris

November 2011

D128

www.scl.org.uk

ECONOMIC LOSS AFTER *ROBINSON v JONES*

Philip Harris

The Court of Appeal's judgment in *Robinson v Jones* is likely to become a landmark ruling, not only on the subject of concurrent liability in contract and the tort of negligence but also on the wide issue of the liability of builders in negligence for building defects.[1]

Three issues arising from the first instance decision of His Honour Judge Davies[2] and the judgment of the Court of Appeal are considered in this paper. The issues are:

1. The differences and similarities between the role and function of the professional designer on the one hand and the designer builder on the other and consequently the differences and similarities between their respective duties in tort. At first instance, Judge Davies considered that this issue had historically been influenced by 'the now out-moded concept of status'.[3]

2. The significance and practicability of the complex structure theory and whether it still survives. This arises obliquely from Lord Justice's Jackson decision to pass over the complex structure theory as it was not obviously relevant to the Robinson case, 'and not discuss whether the complex structure theory still survives'.[4]

3. Tortious liability as a creature of judicial or social policy. This third issue of tortious liability as a creature of policy in turn poses sub-issues for consideration. These include:

    (i) Given that tortious duties are imposed by law (and are developed by the courts incrementally, as stated by the House of Lords in *Caparo v Dickman*[5]), why has there been a practice in the past of the lower courts waiting for policy to be set by the higher courts? Should it not be the case that, as each new potential stepping stone of tortious duty is offered up to the courts, it should be determined

1 *Robinson v P E Jones Contractors Ltd* [2011] EWCA Civ 9; also (2011) 27 Const LJ 145, 134 Con LR 26, [2011] BLR 206.

2 *Robinson v P E Jones Contractors Ltd* [2010] EWHC 102; also [2010] TCLR 3 (TCC).

3 *Robinson v Jones*, note 2, para 59 quoting Lord Goff in *Henderson v Merrett* (note 8).

4 *Robinson v Jones*, note 1, para 45.

5 *Caparo v Dickman* [1990] UKHL 2; also [1990] 2 AC 605, [1990] 1 All ER 568.

unhesitatingly by the lower courts and then reviewed by the higher courts on appeal, where appropriate?

(ii) Can it be said, in the context of building defects and liability for economic loss, that judicial policy making has meandered over the decades? If so, given the demands of certainty and immediacy made by modern citizens in the computer age, are the interests of society best served by the dual systems of codification on the one hand and judicial policy-writing by case law on the other?

Setting the scene: the first instance decision

The case concerned the design and construction of defective flues in a house built by PE Jones Contractors Ltd, the defendant, and sold to Robinson, the claimant. Proceedings were brought for breach of contract, misrepresentation and breach of a duty of care in tort, under the Latent Damage Act 1986, in reliance upon section 14A of the Limitation Act 1980.

The claims in contract and misrepresentation were not pursued as they were statute barred.

For present purposes, the relevant issues the judge had to decide were:

(i) Can a builder owe his client a concurrent duty of care in tort (as well as contract) in relation to economic loss?

(iii) If so, did the defandant owe a duty of care to the claimant?

On the first point, the judge concluded that in principle, in relation to economic loss, a builder can owe a duty in tort to his client, concurrent with his duty in contract.

On the second point, the judge concluded that the defendant had successfully excluded liability. (That part of the decision was upheld by the Court of Appeal but is not considered further in this paper.)

The defendant, relying upon *Murphy*,[6] had argued that a builder does not owe a tortious duty of care to owners of a building constructed by the builder where the defect was in the thing itself that was built and did not cause personal injury or physical damage to other property. Although, under the *Hedley Byrne* line of authority,[7] leading to the House of Lords decision in *Henderson v Merrett*,[8] it is possible for a party to have assumed liability so as to found a duty of care in tort not to cause economic loss, this requires more than the existence of a contractual relationship and there was

6 *Murphy v Brentwood District Council* [1991] UKHL 2; also [1991] 1 AC 398, [1990] 2 All ER 908.

7 *Hedley Byrne v Heller* [1963] UKHL 4; also [1964] AC 465, [1963] 2 All ER 575, [1963] 3 WLR 101, [1963] 1 Lloyd's Rep 485.

8 *Henderson v Merrett Syndicates* [1994] UKHL 5; also [1995] 2 AC 145, [1994] 3 All ER 506.

nothing more here. The defendant argued that *Tesco v* Costain,[9] in which the court held that the builder did owe a concurrent duty in tort to the employer arising from the contractual promise of reasonable skill and care, was wrongly decided.

The claimant had argued that *Murphy*[10] is not inconsistent with the proposition that a builder may have concurrent liability to his client in contract and in tort, where there is a *Hedley Byrne* type of special relationship. The claimant said the decision in *Henderson v Merrett*[11] was authority for the proposition that a special relationship may arise from the existence of a contract between the parties, without more.

The judge deliberated and determined as follows:

1. Nothing in Lord Bridge's speech in relation to economic loss in the House of Lords' judgment in *Murphy* excludes a duty of care in tort to guard against economic loss arising where there was a special relationship of proximity.
2. Lord Goff, in his judgment in *Henderson v Merrett* contemplated that the said duty may arise in the case of a contract for services other than the provision of information and advice and that in 'contract' or 'equivalent to contract' cases an objective test should be applied when asking whether responsibility should be held to have been assumed.
3. The existence of a concurrent duty of care is not limited to cases involving professional men. Judge Seymour had been correct to say, as he did in *Tesco v Costain*, that anyone who undertakes by contract to perform a service for another upon terms (express or implied) that the service will be performed with reasonable skill and care, owes a duty of care to like effect which extends to not causing economic loss. There is no exception in the case of the builder or designer of a building. This applies unless the existence of the duty is excluded or modified by the contract.
4. It would appear to follow from the speech of Lord Goff in *Henderson v Merrett* that the contractual relationship itself provides the 'something more' which Lord Oliver said in *Murphy* was necessary to justify holding a builder liable for economic loss, and that for all practical purposes there is no need to look for anything more than the contractual relationship.

The Court of Appeal judgment

In *Murphy v Brentwood* the House of Lords had returned to 'the orthodox and principled basis of tortious duty for negligently inflicted harm' in

9 *Tesco Stores Ltd v Costain Construction Ltd* 2003 EWHC 1487 (TCC).
10 *Murphy*: note 6.
11 *Henderson v Merrett*: note 8.

holding that if a building defect became apparent before injury or damage is caused, the loss sustained is purely economic and in the absence of a special relationship of proximity is not recoverable in tort.'[12]

Lord Justice Jackson, giving the leading judgment, said:

> '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 building, but also towards others who foreseeably own or use it.'[13]

He qualified this, saying:

> '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 [*the paragraph 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 sub-contractor "assumed responsibility to his counter-parties, so as to give rise to *Hedley Byrne* duties".'[14]

Earlier in his judgment, he said:

> 'In my view, the conceptual basis upon which the concurrent liability of professional persons in tort to their clients now rests is assumption of responsibility.'[15]

He went on:

> 'When one moves beyond the realm of professional retainers, it by no means follows that every contracting party assumes responsibilities (in the *Hedley Byrne* sense) to the other parties co-extensive with the contractual obligations. Such an analysis would be nonsensical. Contractual and tortious duties have different origins and different functions. Contractual obligations spring from the consent of the parties and the common law principle that contracts should be enforced. Tortious duties are imposed by law, as a matter of policy, in specific situations.'[16]

Concluding:

12 *Robinson v Jones*, note 1, para 44.
13 *Robinson v Jones*, note 1, para 68.
14 *Robinson v Jones*, note 1, para 82.
15 *Robinson v Jones*, note 1, para 74.
16 *Robinson v Jones*, note 1, para 76.

> 'There is no reason why the law of tort should impose duties which are identical to the obligations negotiated by the parties.'[17]

It followed that the existence of a contract did not, without more, necessarily create a tortious duty to prevent economic loss, because one has to look at the relationship between the parties to see if there has been an assumption of liability.

The roles, functions and duties of the professional designer and the design builder

Arguments at first instance

At first instance, the claimant's argument that a builder may come under a concurrent duty of care in tort to his client not to cause economic loss where there is a special relationship between them required consideration of *Batty v Metropolitan Property*.[18] Judge Davies considered that *Batty* 'is authority for the proposition that concurrent liability in tort under the *Hedley Byrne v Heller* principle is not limited to those conducting a common calling or to professional men'.[19]

Having concluded that Lord Goff's decision in *Henderson v Merrett*[20] was to the effect that a *Hedley Byrne* type duty may arise in the case of the provision of services other than information and advice, Judge Davies then looked at several judgments in the construction field following *Henderson.*

In *Barclays v Fairclough*, a Court of Appeal judgment in a case concerning industrial cleaning of asbestos roofs, Lord Justice Beldam said that:

> 'A skilled contractor undertaking maintenance work to a building assumes a responsibility which invites reliance no less than the financial or other professional advisor does in undertaking his work.'[21]

Judge Davies said that in his judgment that provided powerful support for the argument that a builder may owe a concurrent duty of care to an owner in relation to economic loss.

In *Storey v Charles Church* Judge Hicks held that a builder who contracted to build a house under which contract he undertook a design liability, owed a duty of care it tort to his client in respect of economic loss caused by the negligent design.[22] He rejected the submission that a distinction should be drawn between a designer who is an independent professional and a designer who also builds, as neither inherent in *Murphy*[23] (nor *D and F*

17 *Robinson v Jones*, note 1, para 79.
18 *Batty v Metropolitan Property Realisations* 1978 QB 554.
19 *Hedley Byrne v Heller*: note 7.
20 *Henderson v Merrett*: note 8.
21 *Barclays Bank plc v Fairclough Building Ltd (no 2)* 76 BLR 1, para 47; also 44 Con LR 35.
22 *Storey v Charles Church* 1997 13 ConLR 206 (TCC).
23 *Murphy*: note 6.

Estates[24]) nor justified. He accepted that a line had to be drawn somewhere to prevent builders from being under a concurrent duty in tort for all their contractual obligations, including workmanship and strict contractual warranties, although in that case it was not necessary for him to express any opinion as to where that line should be drawn.[25]

Judge Davies considered that Judge Hicks' judgment supports the argument that the existence of a concurrent duty is not limited to cases involving professional men.

In *Bellefield v Turner*, Lord Justice May spoke of 'a blurred borderline between architectural design and the construction details needed to put it into effect'.[26] He referred to the carpenter's choice of a particular nail or screw as a design choice which merges with workmanship obligations. He pointed out that the architect had responsibility to provide drawings and specifications which give full construction details, but responsibility for some details may rest with specialist contractors or subcontractors, not as a delegation of responsibility from the architect but rather because that element of design responsibility did not rest with the architect in the first place. This passage of Lord Justice May's judgment was, in Judge Davis' view, relevant to the question of whether there is any good policy reason for holding an architect concurrently liable in tort for his design but deciding the builder does not owe a duty in respect of either his design or building work.

In *Payne v Setchell*, Judge Humphrey Lloyd appeared to agree with Judge Hicks that there should be no distinction turning not on the context of the duty, but the trade or profession of the person undertaking it. However, he added,

> '... when one takes into account the policy considerations that led to *Murphy* and *Bates* such an approach points in the opposite direction to that endorsed by Judge Hicks.'[27]

In *Mirant-Asia Pacific v Ove Arup International*, Judge Toulmin had clearly distinguished between a designer providing professional services and a contractor, stating:

> '... in relation to the distinction between the builder and designer it is right to note that a builder warrants that its works will be fit for purpose … whereas a professional adviser warrants only that he will exercise reasonable care and skill.'[28]

---

24 *D and F Estates v Church Commissioners for England* [1988] UKHL 4; also [1989] AC 177.

25 *Storey*: note 22, para 29.

26 *Bellefield Computer Services v E Turner and Sons Ltd* [2002] EWCA Civ 1823, para 76.

27 *Payne v Setchell* [2001] EWHC 457 (TCC), para 29; also [2002] BLR 489, (2001) 3 TCLR 26, [2002] PNLR 7.

28 *Mirant-Asia Pacific Hong Kong (Construction) Ltd v Ove Arup & Partners International Ltd* [2004] EWHC 1750 (TCC), para 397.

Whilst noting the distinction drawn in this passage, Judge Davies felt that it did not justify distinguishing between the positions of a builder and a designer when considering whether a builder owes a duty of concurrent care in tort to his client to take reasonable skill and care to avoid causing economic loss, nor when considering whether or not any such duty extends only to errors of design or also to errors of workmanship.

Judge Davies then considered Judge Seymour's judgment in *Tesco v Costain* and cited the following passage:

> 'If the position now is, as I consider that it is, that anyone who undertakes by contract to perform a service for another upon terms, express or implied, that the service will be performed with reasonable skill and care, owes a duty of care to like effect to the other contracting party or parties, which extends to not causing economic loss, there seems to be no logical justification for making an exception in the case of a builder or a designer of a building. My reading of the authorities does not require or permit the making of such exception.'[29]

Judge Davies broadly agreed with Judge Seymour stating:

> 'In my judgment it is clear from the authorities to which I have referred that there is no authority binding on me which requires me to distinguish between the case of a professional designer and a non-professional builder.'[30]

It is in this paragraph that Judge Davies borrows Lord Goff's phrase from *Henderson v Merrett* the 'now out-moded concept of status'.

Lord Justice Jackson's view

Lord Justice Jackson, in his judgment in the Court of Appeal, dealt obliquely with the issue of whether or not to draw a distinction between the professional designer's tortious duties and those of the design builder. He cited Lord Bridges' judgment in *Murphy*[31] to the effect that if a builder erects a structure containing a defect and it becomes apparent before injury or damage is caused, the economic losses 'in the absence of a special relationship of proximity … are not recoverable in tort'.[32] Lord Justice Jackson did not stipulate how that special relationship may arise. He cited the first instance decisions in *Storey*, *Payne v Setchell*, *Tesco v Costain* and *Mirant-Asia Pacific*[33] and noted that on the question of the contractor's concurrent duties of care in tort to protect employers, the decisions were inconsistent.

Lord Justice Jackson observed, as stated above that,

---

29 *Robinson v Jones*, note 2, para 51.
30 *Robinson v Jones*, note 2, para 59.
31 *Murphy*: note 6.
32 *Robinson v Jones*, note 1, para 43.
33 *Storey*: note 22; *Payne v Setchell*: note 27; *Tesco v Costain*: note 9 and *Mirant-Asia Pacific*: note 28.

> 'When one moves beyond the realm of professional retainers it by no means follows that every contractual party assumes responsibility (in the *Hedley Byrne* sense) to the other parties.'[34]

To the objective observer, the strength of the language used by Lord Justice Jackson in the paragraph above indicates that the Court of Appeal was seeking to draw a clear distinction between the duties of the professional under his retainer on the one hand and the builder on the other. Professional retainers are distinguished from other contractual relationships. It 'by no means follows' that non-professional contracts carry a tortious assumption of liability co-extensive with contractual obligations. We are told that this would be 'nonsensical'.[35] We are reminded of the decision in *Caparo*[36] that the law imposes tortious duties 'in specific situations'. The roles of professional and builder are further distinguished. First, he states that it is necessary to look at the relationship and dealings between the parties in order to ascertain whether the contractor or subcontractor assumed responsibility.[37] He then concludes that there is nothing in the present case to suggest that the defendant assumed responsibility to the claimant:

> 'The parties were not in a professional relationship whereby, for example, the claimant was paying the defendant to give advice or to prepare reports or plans on which the claimant would act.'[38]

If one considers these passages together, it is reasonable to conclude that there remains a significant demarcation between professional negligence and the tortious duties of the builder. It is respectfully submitted that there is real merit in this distinction at a practical level. 'The concept of status' as applied to this distinction is a misnomer.

Firstly, one must compare and contrast the contractor's obligation to warrant and achieve what is often referred to as 'buildability' on the one hand, with the architect's or engineer's lack of responsibility for feasibility at common law on the other.

At common law an architect or engineer does not warrant that his design, contained within the specification or drawings on which the employer goes out to tender, is practicable or achievable. He makes no promise of feasibility.

Instead it is the contractor who accepts the technological or practical challenge within his tender. He promises that he can build what he tenders for. He must take himself to insolvency to achieve this objective as he has promised both to carry out and complete the works.

34 *Robinson v Jones*, note 1, para 76.
35 *Robinson v Jones*, note 1, para 76.
36 *Caparo v Dickman*: note 5.
37 *Robinson v Jones*, note 1, para 82.
38 *Robinson v Jones*, note 1, para 83.

Secondly, temporary works are the province of the contractor and not the architect or engineer. The architect or engineer must exercise reasonable skill and care to see that the permanent works are properly designed. However, he should not intermeddle in temporary works. The contractor has responsibility for the temporary works such as strutting, propping and scaffolding. This is within his specialisation as a builder. This is an additional responsibility not shared with the architect or engineer.

Thirdly, and in relation the builder's responsibility for the temporary works, there is a separation between the responsibilities of the architect or engineer and the contractor for the 'how' or method of construction. This responsibility falls to the contractor. Leaving aside a welter of regulations governing health and safety (such as the Construction Design and Management Regulations), at common law the architect or engineer has no substantial responsibility for the 'how' of the build process and could fold his arms and watch the builder doing something dangerous without any common law liability.[39] Nor could the contractor insist upon receiving an architect's or engineer's instruction if his building methods were faulty and created a site-based problem. So a builder, working alongside a canal, who caused the canal wall to collapse, flooding a building site, would not be able to insist upon an instruction from an architect or engineer to resolve the situation.

Fourthly, the architect or engineer does not, on behalf of his client, warrant the accuracy of the site and soils survey information. It is for the contractor to ascertain the condition of the soil and the other site conditions. The undertaking of responsibility for site and soils conditions is a tremendous burden of risk upon the contractor.

Fifthly, to echo Lord Justice Jackson's judgment in *Robinson v Jones*, construction professionals expect their client to act in reliance upon their work with financial and economic consequences.[40] A very large percentage of employers in the field of construction are ignorant of the building process. They must surround themselves with professional advisers such as architects, structural engineers, mechanical and electrical engineers. It is right that there is seen to be a special relationship between these professionals and their client. An assumption of liability is implicit in these circumstances.

Sixthly, professional designers impliedly licence their clients to use their designs to complete the building. The implication is that the professional person says to his client: 'You can make use of my design, the fruits of my skill and labour'. This licence is considered to be irrevocable (*NG v Clyde Securities*[41]). It is less clear that such an implied irrevocable licence arises under a building contract in respect of the builder's design where he

39 *Clayton v Woodman & Son (Builders) Ltd* [1962] 2QB 533 and *AMF (International) v Magnet Bowling Ltd* [1968] 1WLR 2018.

40 *Robinson v Jones*, note 1, para 75.

41 *NG v Clyde Securities* 1976 NSWLR 4 43.

remains unpaid. A statutory right to suspend work and services pending payment might suggest otherwise.

The JCT Design Build Contract 2005 provides, at clause 2.17.1, as follows:

> 'The Contractor shall in respect of any inadequacy in … design have the like liability to the Employer, under statute or otherwise, as would an Architect, or, as the case may be, other appropriate professional designer holding himself out as competent to take on work for such design …'

Insurers who are now actively involved in indemnifying builders for design responsibilities are keen to limit their liability to no more than the reasonable skill and care of the professional designer. It does not follow from this that builders become construction professionals when they undertake design and that they cease to be builders with their separate specialist role.

Given the heavy burden of responsibility for the practicalities of the construction process, including the 'how' of the process, buildability and the technological challenge that goes with it, the risk of site and soils conditions and the responsibility for temporary works, it is a step too far to say that contractors voluntarily assume any additional burden of responsibility to the employer. Contracting is a hard, tough business. Contractors are content to leave the 'noblesse oblige' of voluntarily assuming responsibility to the professionals. Logic might not favour this demarcation between professionals and builders. However the life of the law is not logic but experience.

The complex structure argument

Briefly, the complex structure theory contemplates the separateness of the component parts of a building or structure, and considers that different component parts have a separate entity as discreet distinct items of property. A defect in one such separate part causing damage to another can establish a foundation for tortious liability by the builder of the first part because the damage is not to the thing itself he built but to separate property.

The first issue to consider in relation to the complex structure theory is whether it poses the right questions for consideration. If it does not, then it is futile.

In *Murphy* Lord Oliver stated:

> 'The critical question, as was pointed out in the analysis of Brennan J in his judgment in *Council of the Shire of Sutherland v Heyman* [1985] 157 CLR 424, is not the nature of the damage in itself, whether physical or pecuniary, but whether the scope of the duty of

care in the circumstances of the case is such as to embrace damage of the kind which the Plaintiff claims to have sustained ...'[42]

If it is not the nature of the damage that matters, then arguments over the severability of the components of a building (to establish separate physical damage, in order to circumvent the policy that defective building work in itself creates only economic loss) is simply casuistry. One might as well argue over how many angels there are on the head of a pin. If it is merely casuistry, then this lends some force to the argument at the end of this paper that a progressive codification of this area of law should supplement the process of judicial argument and analysis. As, sometimes, such argument is convoluted.

Intellectual property law[43]

It is submitted, however, that the complex structure argument is more than casuistry. Indeed, the position that a building or other structure can be categorised as containing separate components, each capable of enjoying legal protection, has been recognised for some time in the field of intellectual property law, albeit for different reasons and purposes than those concerning the complex structure theory in the field of construction law.

Copyright protects original works, including literary and artistic works. Dual copyright may exist in a building. First, copyright would prevent the copying of an architect's plans for a building and even the construction of a building from the plans. Secondly, a work of architecture which is a building or a model for a building is also protected by copyright as a separate artistic work from the plans. In this context, a building is defined as including any fixed structure and a part of a building or fixed structure.[44] The copyright in a work of architecture would be infringed by the reproduction of the whole building, or at least a substantial or material part, by making a three-dimensional copy of the building in question.

It seems that copyright extends to not only whole buildings, as long as they are original in design, but also to individual, original features of a building. Examples from the case law include a façade or the layout of internal walls and rooms.[45] Similarly, the authors of *Copinger & Skone James On Copyright* consider that copyright would also potentially subsist in an original chimney piece.[46]

Even smaller components of a building will potentially attract a different form of intellectual property protection in the design or external look or appearance of such components. Rather confusingly, design protection

42 *Murphy*, note 6, page 30.

43 I am most grateful to my colleague, Iain Colville of Wright Hassell's Intellectual Property Department, for assistance with this section.

44 Copyright Designs and Patents Act 1988, section 4(2).

45 *Meikle v Maufe* [1941] 3 All ER 144.

46 *Copinger & Skone James On Copyright* (16th edition, Sweet & Maxwell 2010), page 111, para 3-63.

comes in a number of different forms, both registered and unregistered. However in each case original or new designs that are not commonplace will be capable of design protection. If so, the individual component will not lose such protection by virtue of being incorporated within or fixed upon a building.

So the design of an individual component, such as a chimney cowl or a window frame could be protected. In fact, even relatively basic building materials such as roofing tiles or bricks could be protected if sufficiently novel and to the extent that there is any design freedom beyond the need for such items to fit together or to match other components. At the other extreme, larger building components such as a conservatory, or a pre-fabricated garage,[47] or possibly a modular building component may also be protectable by registered designs.[48]

Away from buildings and parts of buildings, design law also recognises that some products consist of a multiplicity of individual components. For example, the overall shape and appearance of a motor vehicle is capable of design registration, as are many of the individual components. As mentioned above, design protection cannot subsist in components which are purely functional or those elements whose shape and configuration is governed by the requirement that one component must fit into another component or match other neighbouring components.[49] So the element of an exhaust pipe which must be connected to the exhaust manifold would not attract protection, but protection would be available to the extent that there is freedom for a designer to fashion the remainder of the exhaust pipe.

This foray into a parallel field of law, motivated by entirely different considerations, merely serves to show that more than one branch of English law wrestles with the separateness of component parts in relation to buildings and complex objects.

It is acknowledged that this recognition that individual component features of a building are capable of distinct legal protection may also reinforce the reality that they are no more than parts of a greater composite whole building. As we have seen, the Copyright Designs & Patents Act 1988 provides that copyright can attach to buildings or parts of buildings. So the distinctness of the component which lends it copyright protection does not make it any less a part of the whole.

This foray into a parallel field of law, motivated by entirely different considerations, merely serves to show that more than one branch of English law wrestles with the separateness of component parts in relation to complex objects.

47 *Portable Concrete Buildings Ltd v Bathcrete Ltd* [1962] RPC 49, although decided under the Registered Designs Act 1949 before more recent amendments.

48 An example of a registered design for a modular building is Registered Community Design 224365-0001 (see ttp://oami.europa.eu/RCDOnline/RequestManager).

49 For unregistered design rights, section 213(3) Copyright Designs and Patents Act 1988; for registered designs, section 1C Registered Designs Act 1949.

It is acknowledged that this recognition that individual component features of a building are capable of distinct legal protection may also reinforce the reality that they are no more than parts of a greater composite whole building. The Copyright Designs and Patents Act 1988 provides that copyright can attach to buildings or parts of buildings. So the distinctness of the component which lends it copyright protection does not make it any less a part of the whole.

Recent case law on complex structures

The case of *Linklaters v McAlpine* concerned, *inter alia*, the potential tortious liability of Southern Insulation (Medway) ('Southern'), the insulation sub-subcontractor, for corrosion to pipework at 1 Silk Street, London.[50] The matter came before Judge Aikenhead twice, in related proceedings. On the first occasion he dismissed an application for summary judgment by Southern on its defence made on the grounds that claims in negligence against it by How (a company in the contractual chain) and How's parent company, had no reasonable prospect of success. It is fair to say that Judge Aikenhead gave serious consideration and credence to the complex structure theory. He said:

> 'One would in logic have to say that the "thing itself" means not only the thing carelessly provided by the sub-sub-contractor but also the thing to which it is attached; whilst that may exclude from a duty of care pipework covered by insulation, one might think it necessary to include within a duty of care, say, negligently installed exterior cladding attached to the building which causes or permits serious physical rain penetration to those parts of the building to which it is attached or which it covers. Logic does not obviously support these types of distinction which revolve around merely the type of damage.'[51]

It is interesting to note that Judge Aikenhead considered that it could be 'necessary' to regard damage to another part of the same structure caused by a defective part of that structure as falling within a duty of care owed by the negligent sub-subcontractor. That strongly suggests that the complex structure theory still survives. In his subsequent judgment, having heard all the evidence, Judge Aikenhead concluded:

> 'Having now heard and understood the evidence, I have formed the view that the insulated, chilled water pipework was essentially one "thing" for the purposes of tort. One would simply never have chilled water pipework without insulation because the chilled water would not remain chilled and it would corrode. The insulation is a key component but a component nonetheless. It would follow that no cause of action arises in tort as between Southern and Linklaters. That is not at all unreasonable in any way because Linklaters or people in their position can protect themselves, as Linklaters did, with

50 *Linklaters Business Services v Sir Robert McAlpine Ltd* [2010] EWHC 1145 (TCC); also [2010] BLR 537, 130 Con LR 111.

51 *Linklaters v McAlpine*, note 50, para 30.

> the securing of contractual warranties from relevant parties such as the key contractors in any given development.'[52]

Judge Aikenhead noted that:

> 'Southern's Counsel have assiduously researched relatively recent authorities in the USA. The reason for doing so was the approving references in the *Murphy* case to the US Supreme Court's decision in *East River SS Corporation v Transamerica Delaval Inc* [1986] 476 US 858. That case involved claims in tort by the charterers of ships against the manufacturers of turbine engines within the ships said to have been defective. The Court regarded each turbine as 'a single unit' noting with approval the case of *Northern Power and Engineering Corporation v Caterpillar Tractor Co* [1981] 623 P 2d 324 [Alaska]: "Since all but the very simplest of machines have component parts, [a contrary] holding would require a finding of 'property damage' in virtually every case where a product damages itself. Such a holding would eliminate the distinction between warranty and strict product liability." This approach has been followed in a number of other American cases ...'[53]

He followed this American line of authority with approval stating: 'There does … seem to be logic as well as common sense in this line of authority'.[54]

If the trend in judicial perspective is to say that a building is a product (albeit constructed *in situ*) and all but the simplest products have components, so that to treat such components as separate property creates the prospect of an unlimited warranty by the component supplier/installer, then the complex structure theory, though still alive, might not survive much longer. At least that is the case if this line of American authority is comprehensively adopted by the English courts.

Tortious liability and judicial policy: 'Waiting for Godot'?

Lord Justice Jackson's statement in *Robinson v Jones*, that contractual obligations spring from the consent of the parties whereas tortious duties are imposed by law as a matter of policy in specific situations, is direct and uncompromising.[55] Tortious duty is entirely a matter of judicial policy. Judicial and social policy seem to be synonymous. This policy is developed incrementally to suit new situations as they arise (rather than by the application of single general principle) as stated by the House of Lords in *Caparo*. The headnote to that case states:

> 'In determining whether there was a relationship of proximity between the parties, the Court, guided by situations in which the

52 *Linklaters Business Services v Sir Robert McAlpine Ltd* [2010] EWHC 2931; also 133 ConLR 211 (TCC), para 119.
53 *Linklaters v McAlpine*, note 52, para 118.
54 *Linklaters v McAlpine*, note 52, para 118.
55 *Robinson v Jones*, note 1, para 76.

> existence, scope and limits of a duty of care had previously been held to exist rather than by a single general principle, would determine whether the particular damage suffered was the kind of damage which the Defandant was under a duty to prevent and whether there were circumstances from which the Court could pragmatically conclude that a duty of care existed.'[56]

Since this is judicial policy, there seems to be little or no reason for the lower courts to hold back and wait for policy to be determined by the higher courts. Tortious duty is in the hands of the judiciary. If a new situation arises to which judicial policy has yet to be applied, then each judge determines that policy on the material before him. Once that policy is set for such a situation, all advocates become apologists for that policy in all subsequent cases which fall within the scope of that situation (though of course, the judgment setting policy is susceptible to appeal).

This requirement for judges to set policy empirically, rather than waiting for a single principle to emerge from the higher courts, is not always evident in practice. A number of judgments of the lower courts have suggested a judicial trend of waiting for a clear principle to emerge from the higher courts. (One must sympathise with this to some extent and observe the 'chicken and egg' nature of the dilemma.)

In *Linklaters v McAlpine*, at the summary judgment hearing, Judge Aikenhead observed:

> 'It may well be the case that broad policy considerations, along the "flood gates" line, might have to be applied by the higher courts ...'[57]

In that judgment Judge Aikenhead was simply dealing with an application for summary judgment (a judgment which he declined to give). He was not required to give any policy ruling and was not awaiting guidance from the higher courts. Still, the passage does perhaps illustrate the general position of the lower courts having to await clarification and sometimes guidance from the higher courts. It is submitted that if that reflects the true relationship between the lower and the higher courts, it is unfortunate. In practice, the relationship should be reversed, with the higher courts awaiting appeals from the lower courts as an opportunity to confirm or amend policy.

Codification as a complement to case law

Imagine this scenario: in 2011, it is decreed that a capsule be buried containing a summary of our laws currently in force in England and Wales, comprising case law and statute law and current regulations. Thousands of years pass. A subsequent, highly developed society digs up the capsule. An expert in technology and construction law is tasked with deciphering the contents relevant to his field.

56 *Caparo v Dickman*, note 5, headnote.
57 *Linklaters v McAlpine*, note 50, para 30.

He finds, here, a system of case law within which one case is apparently inconsistent with another. He finds a piece of legislation governing terms which should go into construction contracts, concerning payment and adjudication. Elsewhere he finds a more general Act about unfair contract terms and then another Act, generally about the sale of goods and supply of services and another about misrepresentation. He detects broad tensions between the legislation governing construction on the one hand and that governing insolvency on the other.

He concludes, quickly, that what he has been presented with can be no more than fragments – torn scraps of a greater manuscript, broken shards of a greater tablet, all jumbled up. Later scholars disagree. They uncover, with bemusement, that this is all that existed by way of construction law in 2011. Society had simply not joined up all the pieces into a comprehensive code which offered clarity and certainty. Perhaps the pace of change was too fast, but surely if law makers had applied their minds, they would have put in place a system to deal with this?

What might that system be? Well, faced with a changing society, case law and judge-made law would certainly be important, in order to absorb change and give it a valid legal context and direction. Statute law would continue to be written and co-exist with case law and be interpreted by the judges as before. What would be beneficial and prudent would be to commence a creeping system of codification.

One would begin with a major task of writing the central core for the construction and engineering code of law. (This would be a task on a par with the King James' Bible or the Book of Common Prayer.) Every five years perhaps, the existing laws, both statutory and regulatory on the one hand and judge-made on the other, would be consolidated and added to the current codes. The process could not be comprehensively achieved in one attempt and by its very nature would have to be progressive but it would gradually bring increased certainty and stability. Few would dispute that it would be worth the effort.

It is human nature to learn from our experiences. Perhaps the turgid development of the law of negligence in relation to building defects and economic loss could be a major catalyst towards a form of codification in construction law that the English could embrace as their own.

Philip Harris is a solicitor at Wright Hassall LLP, Leamington Spa; he also acts as an arbitrator, adjudicator and mediator.

'The object of the Society
is to promote the study and understanding of
construction law amongst all those involved
in the construction industry'

MEMBERSHIP/ADMINISTRATION ENQUIRIES

Jill Ward
The Cottage, Bullfurlong Lane
Burbage, Leics LE10 2HQ
tel: 01455 233253
e-mail: admin@scl.org.uk

website: www.scl.org.uk