

JUDGEMENT : His Honour Judge Bowsher Q.C. TCC. 30th October 2000

Introduction

1. From 1995 onwards, the claimants jointly occupied an industrial unit in an industrial park at Bredbury, Stockport, Greater Manchester. One company was tenant and the other, an associated company, was a licensee of the other. The first claimants manufacture security systems and the second claimants distribute those systems. For the purpose of this action they are treated as one entity.
2. The building had been developed by Berisford Property Investments Limited. That company employed the defendants, Sheard Walshaw Partnership, as architects. Though there have been other defendants to this action, they are now the sole remaining defendants, and I shall refer to them simply as "the defendants". The defendants acted as architects from 1989 to December, 1992 pursuant to a written agreement made on 16 February, 1990. On 25 March, 1991 the defendants certified practical completion; on 28 June, 1991 they issued a certificate of making good defects; and on 3 December, 1992 they gave the final certificate.
3. On 29 May, 1995 and 4 September, 1995, there were floods through the roof of the building causing damage to the property of the claimants. The floods occurred due to the inability of the drainage system to cope with heavy falls of rain on those days.
4. Initially, the claimants joined as defendants to this action in addition to the architects, the engineers employed on the project, the building contractor, and two specialist sub-contractors. By the beginning of the trial, all defendants other than the architects had dropped out of the action.
5. There being no contract between the claimants and the defendants, this action is brought in tort.
6. Damages are agreed, subject to liability, in the sum of £128,170.43 for the first flood and £612,153.02 for the second flood, totalling £740,323.45. The damages claimed do not include the cost of remedial works to the building. All the damages claimed are in respect of property other than the building itself. There is no claim for economic loss.

The Building and Drainage

7. Unit 1, with which this action is concerned, is one of several buildings in the development built on a speculative basis for light industrial usage. It was not intended that the building should be occupied by the employers of the defendants. The building has a concrete floor and the walls and roof are supported by a steel frame. The walls have brick facing to about mid-height and have metal cladding above. The roof also has metal cladding. The roof is designed with twin pitches running lengthwise, the two pitches being separated at the inner eaves by a valley gutter. The building as a whole was described by one witness as being in effect a large shed, with a small space for an office for the occupants along one side, away from the valley gutter.
8. The intention was that storm water should drain from the roof partly into perimeter gutters and partly into the valley gutter. The floods in question went into the building from the valley gutter. This action has been concerned with the capacity of the valley gutter and possible obstructions to it. As with most houses in this country, any overflow from the perimeter gutters was directed outside the building, and provided overflows did not occur too often those overflows would be of little importance.
9. The valley gutter is made of metal with a flat base (laid to falls) and vertical sides. It was not practical to make a seal between the lip of the gutter and the underside of the metal roof cladding so that if the gutter over-filled, water would pour over the lip of the gutter into the building below. The valley gutter was made in sections, secured at the joins by metal bolts. In the base of the gutter were outlets leading to drain pipes to take the water away.
10. The expert witnesses are agreed that the valley gutter had a fundamental defect. It ought to have had, but did not have, overflows. If the drain outlets became blocked, or if a storm occurred that was heavier than any storm for which the drainage was designed, the overflows, if adequately designed, should take excess water away without damage to the building. One form of overflow would have been by wedge shaped cuts at the top of the ends of the gutter, known as weir overflows. In this building, weir overflows were impractical because the ends of the gutter were set against girders forming part of the steel frame. Another form of overflow would have been to have upstanding pipes at intervals along the gutter leading through the base of the gutter to overflow drains leading to the outside of the building. Overflows of this latter type would be on the same principle as the overflow commonly in place in domestic lavatory cisterns.
11. It being accepted that the valley gutter had that fundamental defect, it has been debated whether the architect was responsible for that defect, whether the architect owed a duty in that regard to later occupiers other than the client of the architect, and what causative effect the absence of overflows had on the floods. For the defendants, it is suggested that the floods were caused by blockage of the system due to poor maintenance by the claimants. It is also alleged that the defect ought reasonably to have been discovered by the claimants and that on that account the duty of the defendants to the claimants was negated.
12. A further criticism is that the drainage was not designed with sufficient capacity for the rainfall to be expected in the area.
13. The defendants were criticised for having failed to perform their contractual duty to their clients to collect manufacturers' and suppliers' maintenance manuals and supply them to their clients. However, it was not shown that even if such manuals had been supplied they would have been passed to the claimants, nor was it

demonstrated how possession of such manuals would have resulted in the claimants doing any maintenance other than the maintenance in fact undertaken. One of the features of the siphonic system is that so far as the pipes themselves are concerned, it should be self-cleaning and hence no rodding points were provided. I shall say no more about that criticism.

14. Other criticisms were advanced but were no longer live by the end of the trial and I shall say no more about them.

The responsibility of the defendants

15. The defendants were employed by Berisford on the RIBA conditions. They prepared drawings, a specification and employer's requirements, each of which referred to the question of roof drainage. However, the detailed design of the roof drainage was to be carried out by a specialist sub-contractor to be employed by the successful tenderer as main contractor.
16. In the event, Birse became the main contractor and they employed FK Roofing Limited to provide the detailed design of the roof drainage and to construct it. FK Roofing were joined as defendants to this action but they have never taken any part in the proceedings and they are in liquidation. Judgment was obtained against them in default. The defendant architects are criticised for failing to specify drainage of sufficient capacity or failing to notice that FK Roofing had failed to specify drainage of sufficient capacity and failing to notice the absence of an overflow on any inspection whether for the giving of certificates or otherwise. Roof drainage was within their general responsibility, though detailed design of the roof drainage was to be done by others.
17. It is common ground between the parties that the contract between the defendants and their employers is relevant only to determine the scope of the defendants' duties, not to determine the standard of care owed to the claimants.

The system of roof drainage

18. Originally, the drainage was to be by conventional gravity drainage with water falling from the pitched roofs into the valley and perimeter gutters and then falling by gravity down vertical pipes into underground drainage. In January, 1990, concern was expressed to the main contractor about methane underground, and as a result FK Roofing provided a design for siphonic drainage.
19. In 1990, siphonic drainage was little known in England, though more common on the continent of Europe. The experts who gave evidence before me did not claim any great knowledge of the detailed design of such systems. Such systems are so designed that the run off of water produces a siphonic effect sucking water from the gutters and drains. For that purpose, it is necessary to ensure that the pipes fill with water excluding the ingress of air.

Performance of the architects' duties

20. Mr. Walshaw gave evidence. At the time he was a partner and is now a consultant of the defendants. He said that although he was responsible for the concept, he left the execution of the architects' function to a Mr. Kevin Slater under his supervision. Mr. Slater was not a qualified architect. He worked as an architectural technical assistant. In the building recession he went out to Hong Kong and then returned to England. He was last heard of running a public house in Cumbria.
21. Mr. Walshaw was able to give very little evidence of what was actually done on behalf of his practice. Much of the work was done by Mr. Slater. The documents show that the defendants' specification made express provision for weir overflows in the valley gutter, and there is a drawing made by the defendants showing a weir overflow in the valley gutter. Those requirements for overflows were made before the change to siphonic drainage, but the manufacturer's literature for siphonic drainage make it plain that "large capacity overflows are essential". The defendants failed to ensure that the finished building included the overflows that they had specified.
22. There is no evidence, written or oral, that the defendants ever considered what was the rainfall intensity for which the drainage system should be designed. It appears that the decision as to the design rainfall intensity was made by FK Roofing and not dissented from by the defendants. FK Roofing selected a rainfall intensity of 75 mm per hour.

Rainfall intensity

23. Rainfall intensity is expressed in terms of millimetres per hour. There is a British Standard for Drainage of Roofs and Paved Areas, BS6367:1983. It is common ground that architects ought to be familiar with that BS.
24. The BS in paragraph 5.2 advises:
*"It is not possible to ensure complete safety from flooding or overflow.
For the design of paved areas ... a design rate of rainfall of 50 mm/h is recommended. A design rate of rainfall of 75 mm/h (category 2 in Appendix A) is generally satisfactory for roof gutters where overflow is not likely to occur inside a building and for other gutters where some risk to the contents of the building might be acceptable.
For other cases, design rates of rainfall corresponding approximately to a chosen return period should be used. The method to be used in the selection of these rates is described in Appendix A."*
25. Appendix A includes maps of the United Kingdom marked to show differing return periods in years for rainfalls of differing intensity in various parts of the country. The return period of an event is the approximate chance that the event will recur or be exceeded in any given year. Appendix A includes the following:
"Five categories of design rate are proposed as follows:

a. Category 1: A design rate of rainfall of 50 mm/h should be used for paved areas on which ponding can be tolerated during a heavy storm and for a few minutes after the storm has ceased.

b. Category 2: A design rate of rainfall of 75 mm/h should be used for sloping surfaces where ponding cannot occur and for flat surfaces where ponding cannot normally be tolerated. Return periods of this rate are given in Figure 17.

Note: In some cases (i.e. some valley gutters) the risks associated with categories 1 and 2 will be considered too great and higher design rates of rainfall should be used (categories 3 to 5)."

Category 3 gives a method of computation "in cases where the building or its contents require an additional measure of protection".

Category 4 provides a method "that should be used if a higher degree of security than that provided by category 3 is desirable".

Category 5 is for cases where "the highest possible degree of security is required".

Floods and leaks

26. There were some comparatively small leaks from the roof of the building both before and after the claimants went into occupation. Those leaks were in the main from the joins in the base of the valley gutter or from defective seals around the bolts securing those joins. The leaks may have been caused by bad workmanship or by movement caused by workmen on the roof doing maintenance. Those leaks were wholly different in type and causation from the floods the subject of this action and no damages are claimed in respect of them. The floods the subject of this action have been referred to as "the first flood" and "the second flood", but there is evidence that there was also some flooding before the claimants went into occupation.

History

27. In 1989, the defendants were appointed architects for the development by Berisford on RIBA terms. The appointment required that the defendants should appoint the following individuals to carry out the architects services, Mr. Walshaw, partner, Mr. Slater, Project architect, Mr. Merridith, Site supervisor. I have heard no evidence of the activities of Mr. Merridith.
28. In October, 1989, Berisford's quantity surveyors asked FK Roofing (amongst others) to tender for the design and supply of the roof and rainwater goods. A copy of that request was sent to the defendants. The request included a specification that referred to gutters. The specification included the following:
*"Gutters are to be laid so as to avoid standing water. The gutters are to be tested by flooding as soon as they have been levelled so as to demonstrate to the architect that no standing water will occur – and further test may be called for at Practical Completion if it is thought necessary.
Allow for weir overflows as indicated on drawings at a level slightly lower than the gutter sides. ..."*
No design requirement for the rate of rainfall intensity was included in that specification.
29. On 7 December, 1989, FK Roofing wrote to Birse stating that they wanted to change the overflow from a side exit to an overflow upstand pipe in the sole of the gutter in accordance with an enclosed drawing indicating the restriction at the end of the valley gutter caused by a steel joist. It is clear that this proposal came to the attention of the defendants.
30. On 13 December, 1989, the defendants issued an Architects Instruction confirming that FK Roofing were to be domestic sub-contractors.
31. In December, 1989 and January, 1990, FK Roofing issued drawings and explanatory notes indicating that a design rainfall rate of 75 mm per hour had been used. The notes stated that the calculations were in accordance with BS 6367:1983. In evidence, Mr. Walshaw said that the defendants had not approved that design rate but they had not disapproved it. The sub-contractor's design rate certainly came to their attention. The evidence of the claimant's expert, which I accept, is that the defendants ought to have set the design rainfall rate in the tender specification and not left it to the sub-contractor. The tendency of a sub-contractor when tendering, if not limited by the specification, would be to choose a low and inadequate design rate so as to be able to put in a low tender and get the job. The defendants in the ordinary course received copies of FK Roofings drawings and design and during 1990 were involved in details of the change from gravity to siphonic drainage. That change did not affect the design rate.
32. A letter of 5 January, 1990 indicates that on 20 December, 1989, there were discussions between Birse and Mr. Slater about FK Roofing's gutter drawings, and that Birse were happy with them provided the overflow pipes had open mesh caps on the ends. It is that letter which makes it clear that the defendants knew that the overflows were to take the form of upstands. Mr. Walshaw said that he did not discuss overflows with Mr. Slater, so it is quite possible that he personally did not know of the change. That is not a relevant factor in this litigation.
33. In January and February, 1990 there were conversations and correspondence between Mr. Slater and Birse and Berisford about the valley gutter. On 20 February, 1990 Birse wrote to Mr. Slater asking for a detail showing his requirements for an overflow for the valley gutter.
34. On 23 April, 1990 Mr. Slater on behalf of the defendants wrote to Birse enclosing a copy of Fullflow's drawing of the siphonic drainage with comments which did not include any adverse comment about design rate or overflow.

35. Before the claimants went into occupation or signed any tenancy agreement, they instructed Lambert Smith Hampton, surveyors, to inspect the building. They also instructed Mr. Meiklejohn of Castle Computer Suites Limited, environmental engineers, to advise on fitting out. Mr. Meiklejohn has a degree in building management and technology.
36. On 30 July, 1993, Mr. Meiklejohn wrote to the claimant's finance director in the following terms:
*"I spoke with your Surveyor employed to inspect the above on your behalf earlier this week.
I voiced my concern regarding the state of the roof to the premises, in that the previous week whilst I was escorting prospective contractors around the site, I noted that the Warehouse floor was flooded in many places with rainwater
Your surveyor explained that he had been upon the roof and noted that the valley guttering was blocked with debris which could be the source of the problem.
I pointed out that the flooding noted was in areas other than those beneath the valleys of the roof. From the ground I had been unable to see any defect in the roof sheeting other than some stains on the roof light translucent sheeting - suggesting water ingress between.
My concern is that the matter is entirely settled before we commence any works on site, particularly those which entail the suspension of services from the roof structures.
Otherwise it will appear reasonable to suggest later that any roof leakage problems are related to the services installation works, rather than a latent defect.
My advice would be that you do not take on any commitments regarding the premises until this matter is resolved. To do otherwise could leave us in dispute as to who is going to pay for a new roof."*
37. In oral evidence, Mr. Meiklejohn explained that although he referred in his letter to staining by floods in areas other than under the valley guttering he also saw stains under the valley guttering. It is clear that before the claimants went into occupation, there had been floods into the building, as opposed to small leaks, and the claimants were aware of that.
38. In August, 1993, Lambert Smith Hampton, the surveyors referred to by Mr. Meiklejohn, reported in writing to the claimants. Their report included the following:
*"Rainwater disposal from the main roof comprises a galvanised steel box gutter with bolted sections around the perimeter of the building and a similar central valley gutter. There is a large amount of debris and silt in the central valley gutter and this requires cleaning as soon as possible since as we discuss later, there appears to have been problems of rainwater penetration through the gutter system.
Weir outlets are provided in the event of blockage to the system."*
39. So not only did Lambert Smith Hampton fail to notice the absence of overflows, they positively misled their clients by saying that weir outlets existed when, as we know, they did not. However, even on the false assumption that there were overflows, even a layman could have asked the question, "Why did not the overflows prevent a flood when the primary drains were blocked?" Mr. Lynch, called as an expert witness on behalf of the defendants said that although the architects should have seen that there were no overflows, it was reasonable for Lambert Smith Hampton to have missed their absence, though I cannot see how that can be. Still less can I see why the surveyors should have said that there were overflows when there were not. Mr. Lynch said that when he himself inspected, he found difficulty in seeing the ends of the valley gutters, so he went back with a torch and could then see. Why could not anyone else who was looking have done the same?
40. The Lambert Smith Hampton report continued,
*"As previously mentioned, the gutter is particularly silted with debris and the rainwater outlets are partly blocked. We suspect that there has been a serious failure of the drainage system in the past causing extensive flooding internally as evidenced by the water staining to the floor. Such a system with small bore outlets is particularly vulnerable in the event of blockage and it is extremely important that the gutter is kept clear. We suggest, however, that the Landlords investigate the source of the problems and undertake any remedial action that is required.
The small bore outlets and single large diameter rainwater pipe system is a relatively new concept in rainwater disposal and involves careful calculation of the anticipated rain fall and flow levels. The system also relies on deep section gutters discharging to the small bore outlets and it is therefore particularly important that the outlets do not become blocked."*
41. The conclusions of the Lambert Smith Hampton report included the following: *"Firstly, it is evident that there have been problems of rainwater penetration through the roof construction. Our initial views are that this is a result of blocked and leaking gutters particularly to the central valley gutters and these areas require further investigation and remedial works. The damp staining affecting the floor suggests that there has been a major flood of water into the building at some time in the past and we are proposing to investigate the circumstances surrounding this with the Developers. There is also a separate roof leak isolated away from the gutter areas which requires further investigation since there are no obvious signs of failure of the roof covering in this area. The siphonic rainwater disposal system and the central valley gutter are always likely to be a cause of water penetration without regular and routine maintenance."*
42. No witness was called from Lambert Smith Hampton to give evidence and there is no evidence of what further investigations, if any, were made by Lambert Smith Hampton or by anyone else. In fairness to Lambert Smith Hampton I should make it plain that because no one from that firm has been called as a witness, they have not

had any opportunity to deal with any of the criticisms made by me or others about their conduct. On the evidence I have heard, without any evidence from Lambert Smith Hampton, the absence of overflows ought reasonably to have been discovered by Lambert Smith Hampton. It was not alleged on behalf of the defendants that the under design of the drainage system ought reasonably to have been discovered by Lambert Smith Hampton or by the claimants.

43. On 5 August, 1993, Lambert Smith Hampton wrote to the claimants enclosing a Schedule of Defects which the writer said, "I feel should be resolved by Landlords. I gather that you have agreed to an Agreement to Lease subject to these items being dealt with... In addition to dealing with the items contained in the Schedule, I suggest that agreement is reached that the Landlord will remain responsible for repairs for the first 12 months..." A handwritten note on the document suggests that Landlord will not agree to remain responsible for repairs for the first 12 months. The defects list sent with that letter was the same as the list appended to the Lambert Smith Hampton report and included:
- 1.1 Clean out gutters of debris.
 - 3.1 Investigate and repair water penetration along line of valley gutters.
 - 3.2 Investigate and repair penetration between grid lines 6-7/P-Q.
44. On 6 August, 1993, Mr. Meiklejohn wrote to the claimants:
- "With regard to your Surveyor's report. My only comment is that I know that the roof has been leaking extensively. I had discussed this matter with the Surveyor after his first visit and then we were unable to decide what the precise fault might be.*
- I am not sure how we might resolve this matter, but am concerned that it is highlighted as a latent defect that remains the Landlord's responsibility until remedied."*
45. On 17 August, 1993, Chestertons wrote to Lambert Smith Hampton saying that items 3.1 and 3.2 of the schedule of defects "will be remedied as a result of the works undertaken to the main roof gutters". In reply on 18 August, 1993, Lambert Smith Hampton simply said in relation to that statement, "Noted". There is no evidence what works were undertaken or to be undertaken to the roof gutters.
46. On 13 September, 1993, the claimants wrote to Mr. Meiklejohn enclosing "a list of works to be performed by ourselves as ingoing tenants and the landlord". A list was enclosed similar to the previous list made by Lambert Smith Hampton but without any reference to items 3.1 or 3.2. Mr. Meiklejohn wrote on that list,
- "What about ...*
- (ii) roof guttering ...*
 - (v) roof leaks".*
47. In his oral evidence, Mr. Meiklejohn said that on 29 September, 1993, the claimants knew about the problems to the roof and there was no reason why they should not have put it right. The problem was flooding inside the building. It is clear from his evidence that he responded to that letter either orally on the telephone or in writing. He wrote on 29 September, 1993 and he thinks that he would have responded earlier than that orally. In his letter of 29 September, he did not mention the valley gutter expressly.
48. Meanwhile, on 16 September, 1993, the claimants had entered into an agreement for a lease with Berisford. That agreement identified works to be carried out by Berisford. Those works did not include any works to the valley gutter other than "Clean out gutters of debris" and "Repaint gutters with bitumen paint".
49. There is no evidence that anything more was done by the claimants to solve the known problem of flooding (as opposed to leaks) from the roof before the first flood the subject of this action except that there was intermittent cleaning of the valley gutter.
50. On 11 November, 1993, Lambert Smith Hampton wrote to the claimants saying that there were still two leaks to the valley gutter which required attention.
51. On 12 November, 1993, Powell Williams Partnership, Surveyors, wrote to Lambert Smith Hampton saying that they were dealing with two leaks in the valley gutter, but on 1 December Lambert Smith Hampton complained that there was still one leak which on 2 December, Powell Williams Partnership claimed to have rectified. On 14 January, 1994, Lambert Smith Hampton wrote to the claimants: *"As far as I am aware [the outstanding works] have now been carried out. There were only three items outstanding from my last inspection, namely a leak to the valley gutterAlthough I have had written confirmation that these have been done, I have not had the opportunity of checking them on site, mainly because I wanted to see how the gutter performed over a period of time, since this should establish whether there are any leaks. I understand you have an understanding with Landlords to rectify any defects in works that they have completed and therefore if there are any leaks then I am sure you can get Landlord's Contractor back to deal with them."*
- It is clear from that letter that Lambert Smith Hampton had not recently done anything even to check the leaks from the valley gutter and had certainly not made any close enquiries to find out the cause of the floods and the attitude was that if anything went wrong the landlords would deal with it.
52. On 18 January, 1994, the claimants and Berisford entered into a Lease and a Latent Defects deed. By the latter instrument, Berisford undertook to be responsible over a period from 14 September, 1995 up to and excluding 14 September, 2002 for latent defects subject to certain qualifications.

53. In January, 1994 Mr. Meiklejohn was not satisfied that anything had been done about roof leaks, and in a letter to the claimants dated 20 January, 1994 he reminded them of the need to attend to roof leaks.
54. Through 1994 and into 1995, Mr. Meiklejohn remained dissatisfied about roof leaks. He had recommended monthly cleaning of the roof and there is some evidence that some cleaning was done but there was no contract for regular maintenance until 21 December, 1994. On 23 August, 1994, Hayes Building Services did some cleaning and also laid some roofing mastic. Hayes told Mr. Meiklejohn that the problem was from seagulls roosting on the roof. Mr. Meiklejohn wrote accordingly on 14 September, 1994 to the newly appointed Finance Director of Baxalls to try to get him to provide the funds to pay for regular maintenance. The letter, referred to as the "Seagulls letter" was in the following terms:
- "Re: Seagulls*
Yes Seagulls.
They have adopted the roof of your premises and roost in the gutter which runs the whole length of the building. Their feathers, food and droppings accumulate quickly and block the drain outlets. This only becomes evident, of course, when it rains. The gutter then fills up and overflows. As it is in the centre of the roof it overflows into the building, mainly in the Norbain half. A local builder has been employed by Norbain to clear the blockage on a couple of occasions and has reported the build up occurring over a period of just two weeks. I have discussed the problem with Dermot, who quite rightly suggested that it was a Landlord's problem, ie. Baxall's. If the problem was one of Herons or Pigeons I could suggest mounting a replica of another bird on the roof. Seagulls, however, seem to fear nothing - other than Killer Whales - which might prove difficult to fit and would require Planning Permission, (Someone suggested Ron Philips). I suggest that the solution might be to take out a maintenance contract with the local builder to regularly inspect and clean the gutters as and when necessary. His details are: Hayes Building Services ..."
55. There followed many more visits from a builder on a reactive basis to clear gutters after a leak, but there was no maintenance contract entered into before the first flood. Mr. Meiklejohn said that 90% of those leaks were minor. He qualified his previous statement that there was no reason why the claimants should not have put the roof right by saying that the claimants had no reason to believe that they were at risk of a flood. I do not accept Mr. Meiklejohn's evidence that the claimants had no reason to believe that they were at risk of a flood. They had been told of previous flooding and they had not ascertained that the cause of the previous flooding had been removed. He said that he himself never saw any evidence of seagulls when he went onto the roof. When he wrote the seagulls letter he had not been on the roof.
56. The gutters were cleaned by Hayes on 31 January and 28 February, 1995.

The first flood

57. The first flood the subject of this action was on 29 May, 1995.
58. There is little first hand evidence of the first flood. Mr. Alan Heath, Operations manager for Norbain was there but can remember little about the first flood, though he could recall the second flood. Mr. David Beech, Technical Director of Norbain gave a statement which was submitted as agreed evidence, but he did not see the warehouse until a few days after each flood.
59. On the basis of expert meteorological evidence, it is agreed that the first flood was due to rainfall of an intensity even for periods of less than 2 minutes of less than the design rate adopted by the sub-contractors, that is, less than 75 mm per hour. Evidence was given by Mr. David Crabbe, Senior Forensic Meteorologist of the Meteorological Office that it was very unlikely but not impossible that the rain exceeded 75 mm. per hour over 2 minutes. It is agreed that for a flood to be caused it would be necessary for the rainfall to exceed the design rate for over 2 minutes. Mr. Crabbe also said that the return rate for a 75 mm per hour rainstorm for two minutes in the Manchester area was about once per year.
60. The day after the flood, on 30 May, 1995, two men spent a total of 5 hours cleaning the gutter outlets and removed a considerable quantity of material.
61. There was clearly a flood rather than merely leaks. On the fairly sparse evidence, it seems clear enough that the first flood was not due to the low design rate for the valley gutter. The first flood was caused by a combination of obstructions in the gutter and the absence of any overflow to deal with excess water not taken away by obstructed drains.
62. Thereafter, the gutters were cleaned on 26 June, 31 July, and 1 September, 1995.
63. Mr. Heath said that he consulted Mr. Meiklejohn after the first flood, though there is no written evidence that he did so. I prefer Mr. Meiklejohn's evidence that he was not consulted after the first flood. The furthest Mr. Meiklejohn would go was that he might have been asked about it in the canteen and would, if asked, have advised systematic maintenance of the roof.

The Second Flood

64. On 4 September, 1995 there was another flood from the valley gutter. Mr. Heath has a clear recollection of some facts about that flood. He was driving home from the warehouse at about 6 p.m. when someone from the warehouse telephoned him on his mobile telephone to tell him that water was pouring through the roof and the warehouse was flooding. He turned his car round and drove back to the warehouse arriving there at about 6.45 p.m. On the return journey, his windscreen wipers could hardly cope with the volume of rainfall. However, the rainfall was not so heavy as to cause him to pull over and stop the car. Mr. Crabbe said that that would describe rainfall of an intensity of between about 75 and 150 mm. per hour. Mr. Crabbe said that it was possible though unlikely that the rainfall in the area of the premises would have exceeded 150 mm. per hour even for a very short period. Probably the rainfall there was in excess of 75 mm per hour but less than 150 mm. per hour. Mr. Crabbe had limited relevant data but I accept his evidence. When Mr. Heath arrived back at the warehouse he saw "a scene of total devastation". The whole warehouse was flooded and water was still pouring through the roof. 4.00 p.m. to 8 p.m. is the busiest time in the warehouse as that is when the bulk of orders are processed and as a result a large amount of stock was exposed awaiting packaging or processing. As a result much damage was caused to stock, most of it electrical goods.
65. The day after the flood, Mr. Meiklejohn gave an order to Hayes Building (with a copy to the claimants):
*"Please cut out and form an outflow from either end of the valley gutter to the above.
The purpose of this is to ensure that the rainwater level within the gutter is limited to two thirds of its depth and so unable to overflow into the premises along its length.
Please carry out a full endoscopic survey of all the pipes involved in the high level siphonic drainage system ..."*
66. I find that the cause of the second flood was the underdesign of the gutter and the absence of overflows. Since the gutter was cleaned only four days before the flood, lack of maintenance was not a cause of the second flood. There has been some suggestion that there may have been a blockage in the pipework of the drain as opposed to the gutter itself. I will consider that suggestion in more detail when I turn to the expert evidence, but I say at once that I have no hesitation in rejecting that suggestion.

The expert evidence

67. Expert evidence was given by Mr. Andrew Lynch on behalf of the defendants and by Mr. Barry Woodward on behalf of the claimants.
68. Mr. Woodward is a partner of the Mason Richards Partnership, a multi-disciplinary practice of architects. He has a BSc (Building) from Aston University and is a member of the British Institute of Architectural Technologists. Although not a member of the RIBA, no objection was made to his qualifications, which are considerable. He has frequently investigated and reported on matters involving allegations of professional negligence and is experienced in giving expert evidence.
69. Mr. Lynch is an Associate Member of the Royal Institute of British Architects. He qualified in 1958 and is now in practice on his own account. He has been a Senior Associate at the Mason Richards Partnership and has investigated and reported on many cases involving arbitration and legal proceedings.
70. Those experts provided a most helpful written statement of matters agreed and not agreed.
71. The statement of matters agreed included the following:
*"The valley gutter ought to have incorporated weir overflows in accordance with BS6367:1983.
Based upon calculations provided by F.K. Roofing Ltd. the adopted design criteria for the gravity rainwater system incorporated a rainfall intensity of 75mm per hour.
The building, as now occupied, ought to incorporate a rainwater disposal system designed for a rainfall intensity of 150mm per hour.
The valley gutter incorporated seven outlets but would have required ten outlets to discharge a rainfall intensity of 150 mm. per hour."*
72. The words, "as now occupied" in the sentence, "The building, as now occupied, ought to incorporate a rainwater disposal system designed for a rainfall intensity of 150mm per hour" are important because of a difference between the experts about what ought to have been foreseen as the likely occupation of the premises.
73. The statement of differences of opinion as to causation of the floods reveals a considerable measure of agreement.
74. Mr. Woodward said:
*"In my opinion the most likely causes of the floods were:-
The rainfall exceeded the design capacity of the system and/or
Gutter outlet or outlets became partially blocked and no weir overflows were available thus preventing the rainwater from being discharged clear of the building and/or
The different levels of outlet connections into the system allowed induced syphonage to break the siphon in the sole discharge pipe diminishing the rate of discharge."*
75. Mr. Lynch said:
"In my opinion the most likely causes of the floods were:-

the outlets and/or pipework of the syphonic system were unable to act at full capacity or at all as a consequence of blockages

the rainfall exceeded the capacity of the syphonic system and/or the capacity of the below-ground drainage system lack of adequate maintenance, which is the responsibility of the building owner or tenant, as the case may be."

76. The reference by Mr. Woodward to the different levels of outlet into the system is a matter no longer pursued.
77. Those views were given when the experts were unaware of what would be said about the rate of rainfall on the days in question. They also did not know what would be said about the regularity of maintenance.
78. Mr. Lynch agreed with Mr. Woodward that the rainfall exceeded the capacity of the drainage system. In his oral evidence, though not in his written report, Mr. Lynch said that overflows were an obvious requirement.
79. Mr. Lynch and Mr. Woodward disagreed about the required design capacity of the system. Their disagreement comes down to a matter to be decided by the court, namely, what was the use of the premises that ought to have been reasonably anticipated by the architects.
80. Mr. Woodward gave unchallenged evidence that the defendants took on the normal responsibility for providing detail design, specification information, inspection of the works and advice on maintenance.
81. Mr. Woodward also said, and I accept, that there was a fundamental deficiency in the design information given by the defendants. To enable the potential tenderers for the roof drainage to carry out their technical design, they ought to have been given information of the design requirement for the rate of rainfall. That requirement was not given. The tenderers provided their own design requirement and left to their own devices, would have been tempted to put in the lowest and cheapest requirement. Mr. Woodward gave it as his opinion, with which I agree, that any shortfall in the capacity of the gutters to dispose of short duration rainfall appropriate to the location of the building would be as a direct result of the failure of the architect to incorporate the necessary information within the specification requirement.
82. Mr. Woodward said that the design rate of intensity of 75 mm per hour that was in fact adopted by the roofing specialists was inadequate. In accordance with the BS, it ought to have been 150 mm per hour. An ordinarily experienced architect ought to have consulted the BS 6367: 1983. Mr. Lynch on the other hand said that the rainfall intensity criterion of 75 mm per hour was an acceptable basis for the design since the building was of a speculative nature at an economical cost and since no more precise knowledge of the degree of protection which might be required by a future occupant was ascertainable. But Mr. Lynch accepted that the building was built with planning permission for light industrial/warehouse use. He further accepted that the customer of almost any light industrial supplier would be supplied with goods wrapped in cardboard or plastic and would expect the goods to be dry. Mr. Lynch accepted that the design criteria in fact adopted would be likely to result in the area in question of flooding on a return period of once per year, but maintained nonetheless that that would be satisfactory. The only usage he could think of for which such a return period of flooding would be acceptable was the storage of bricks. I regard that part of Mr. Lynch's evidence as a mistaken attempt at advocacy on behalf of his client and I reject it without hesitation. I find that the architects ought not to have allowed the specialists to choose their own rate and having done so, the architects should have disapproved that rate and required a rate of 150 mm per hour. In those respects, they were in my view negligent.
83. The BS also required overflows. The architect did specify weir overflows, later changed to upstand overflows for reasons of practicality that I have mentioned. Having specified overflows, an ordinarily experienced architect ought to have ensured by inspection that such overflows were installed. They were extremely important. Mr. Lynch agreed that there was no argument about the need for overflows. The architect should certainly not have given any of the certificates to which I have referred until he had satisfied himself that the overflows were there. If for any reason he could not see overflows, he should withhold a certificate until it had been demonstrated that there were overflows as specified.
84. Mr. Woodward said that roof outlets, valleys, gutters and overflows need to be inspected and cleaned twice each year, once in the autumn and once in the spring. Siphonic systems are claimed to be self cleansing, but the efficiency of the self cleansing mechanism depends on the frequency and velocity of rainfall.
85. Mr. Woodward stated the causes of the floods to be that the rainfall exceeded the design capacity of the system and that in the case of the first flood the valley gutter outlets or some of them became blocked and no overflow mechanisms were available.
86. In keeping with Mr. Woodward's evidence, I find that the architects were negligent in failing to specify a design requirement for the drains for rainfall intensity of 150 mm per hour and in failing to ensure that the overflows that they did specify were installed.
87. As regards the first flood, I do not accept Mr. Woodward's conclusion that the flood was partly caused by the under design of the system. That view was expressed by him before he had heard the meteorological evidence. The system was certainly under designed, but the rainfall preceding the first flood was probably of an intensity that fell within the design limits that were actually selected by the sub-contractors. The first flood, in my view was caused partly by blockage of the outlets to the valley gutter and the absence of overflows. If there had been overflows, it is unlikely that they themselves would have been blocked. If it had been possible to have weir overflows, they would have been at the top lip of the gutter. In the alternative to weir overflows, the upstand

pipes would be about 75 mm high and it is most unlikely that any blockage would have extended to that height. Whether the overflow would deal with the excess water would depend on the capacity of the overflow.

88. As to the second flood, I agree with Mr. Woodward's view that it is extremely unlikely that the outlets or siphonic pipework were blocked at that time. The gutters had been cleaned only four days beforehand and there is no evidence that the pipework of the siphonic system was ever blocked. Mr. Lynch tried to suggest that they might have been blocked and then cleared by the storm, and I suppose that that might have happened, but there is absolutely no evidence that any such thing did happen. Almost immediately after the second flood, an endoscopic survey was conducted of the pipework and there were no signs of any blockage nor even of any residual material that might have formed part of a blockage. I accept the meteorological evidence that the rainfall leading to the second flood was in excess of the design criteria adopted but was probably not in excess of the design criteria that ought to have been adopted. I find that the second flood was caused by a combination of under design of the drainage system and the absence of overflows.

The defendants' duty of care

89. For the claimants it is submitted that in certain circumstances, an architect owes a duty in tort to an occupier of premises that the architect has designed and whose construction he has supervised even though the architect had no contract with that subsequent occupier. In argument, I asked whether an architect might be liable to such subsequent occupier even though he had by contract settled all continuing liability with his client, and it was submitted that he might be so liable.
90. The liability alleged is said to spring from the decision in *Donoghue v. Stevenson* [1932] AC 562. That decision is so well known that it is usually cited without any quotation from the speeches. But in the present case it may be helpful to remind oneself of the speeches of their Lordships. *Donoghue v. Stevenson* was a case of the supply of consumer goods, in that case, a drink. In a dissenting speech, one of the members of the appellate court protested that if such a duty were held to exist, he could not see any reason why it should not apply to the building of a house, which he plainly regarded as an impossible proposition. But in *Murphy v. Brentwood District Council* [1991] AC 398 such a duty was found by the House of Lords to exist. The claimants in this action say that if it applies to a builder it also ought to apply to an architect, though the question whether it does apply should be subjected to the test of "fair just and reasonable" as advanced by the House of Lords in *Marc Rich v. Bishop Rock Marine* [1996] AC 211. At the beginning of this case, it was thought by counsel that there was no direct authority for imposing such liability on an architect, but during the trial the researches of counsel unearthed the report of a decision of His Honour Judge Eyr *Lewis in Tesco Stores v. The Norman Hitchcox Partnership* and *Clark Care Group v. The Norman Hitchcox Partnership* [1997] CILL 1301 and [1998] 56 ConLR 42. Judge Eyr Lewis was, of course, the judge who tried *Murphy v. Brentwood District Council* at first instance. However, it seems to me that I ought to consider the matter afresh.
91. In *Donoghue v. Stevenson*, at page 580 Lord Atkin famously described the "Neighbour principle". It is worth reading a fuller citation than is usually given. That wider citation is valuable both for a fuller understanding of the concept of the neighbour principle and for a statement of its limit to latent defects:

*"At present I content myself with pointing out that in English law there must be, and is, some general conception of relations giving rise to a duty of care, of which the particular cases found in the books are but instances. The liability for negligence, whether you style it such or treat it as in other systems as a species of "culpa," is no doubt based upon a general public sentiment of moral wrongdoing for which the offender must pay. But acts or omissions which any moral code would censure cannot in a practical world be treated so as to give a right to every person injured by them to demand relief. In this way rules of law arise which limit the range of complainants and the extent of their remedy. The rule that you are to love your neighbour becomes in law, you must not injure your neighbour; and the lawyer's question, Who is my neighbour? receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be - persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question. This appears to me to be the doctrine of *Heaven v. Pender* 11 QBD 503, as laid down by Lord Esher (then Brett M.R.) when it is limited by the notion of proximity introduced by Lord Esher himself and A. L. Smith L.J. in *Le Lievre v. Gould* [1893] 1 QB 491 at 497 Lord Esher says: "that case established that, under certain circumstances, one man may owe a duty to another, even though there is no contract between them. If one man is near to another, or is near to the property of another, a duty lies upon him not to do that which may cause a personal injury to that other, or may injure his property." So A. L. Smith L.J.: "The decision of *Heaven v. Pender* was founded upon the principle, that a duty to take due care did arise when the person or property of one was in such proximity to the person or property of another that, if due care was not taken, damage might be done by the one to the other." I think that this sufficiently states the truth if proximity be not confined to mere physical proximity, but be used, as I think it was intended, to extend to such close and direct relations that the act complained of directly affects a person whom the person alleged to be bound to take care would know would be directly affected by his careless act. That this is the sense in which nearness of "proximity" was intended by Lord Esher is obvious from his own illustration in *Heaven v. Pender* (3) of the application of his doctrine to the sale of goods. "This" (i.e., the rule he has just formulated) "includes the case of goods, etc., supplied to be used immediately by a particular person or persons, or one of a class of persons, where it would be obvious to the person supplying, if he thought, that the goods would in all probability be used at once by such persons before a reasonable opportunity for discovering any defect which might exist, and where the thing supplied would be of such a nature that a neglect of ordinary care or skill as to its condition or the*

manner of supplying it would probably cause danger to the person or property of the person for whose use it was supplied, and who was about to use it. It would exclude a case in which the goods are supplied under circumstances in which it would be a chance by whom they would be used or whether they would be used or not, or whether they would be used before there would probably be means of observing any defect, or where the goods would be of such a nature that a want of care or skill as to their condition or the manner of supplying them would not probably produce danger of injury to person or property." I draw particular attention to the fact that Lord Esher emphasizes the necessity of goods having to be "used immediately" and "used at once before a reasonable opportunity of inspection." This is obviously to exclude the possibility of goods having their condition altered by lapse of time, and to call attention to the proximate relationship, which may be too remote where inspection even of the person using, certainly of an intermediate person, may reasonably be interposed. With this necessary qualification of proximate relationship as explained in *Le Lievre v. Gould* (1), I think the judgment of Lord Esher expresses the law of England; without the qualification, I think the majority of the Court in *Heaven v. Pender* (2) were justified in thinking the principle was expressed in too general terms. There will no doubt arise cases where it will be difficult to determine whether the contemplated relationship is so close that the duty arises. But in the class of case now before the Court I cannot conceive any difficulty to arise. A manufacturer puts up an article of food in a container which he knows will be opened by the actual consumer. There can be no inspection by any purchaser and no reasonable preliminary inspection by the consumer."

92. It is to be noted that Lord Atkin, following earlier authority, spoke of "no reasonable preliminary inspection by the consumer" and did not enter into questions of duty to inspect or whether there was in fact inspection – the question was simply whether there was a reasonable possibility of inspection.
93. Lord Atkin cautioned against stating propositions of law in terms wider than necessary for the facts (page 584), but he must have been a party to discussions of the wider implications of the decision in that case, as shown in the dissenting speech of Lord Buckmaster (with which Lord Tomlin agreed) at page 577:
"The principle contended for must be this: that the manufacturer, or indeed the repairer, of any article, apart entirely from contract, owes a duty to any person by whom the article is lawfully used to see that it has been carefully constructed. All rights in contract must be excluded from consideration of this principle; such contractual rights as may exist in successive steps from the original manufacturer down to the ultimate purchaser are ex hypothesi immaterial. Nor can the doctrine be confined to cases where inspection is difficult or impossible to introduce. This conception is simply to misapply to tort doctrine applicable to sale and purchase.
*The principle of tort lies completely outside the region where such considerations apply, and the duty, if it exists, must extend to every person who, in lawful circumstances, uses the article made. There can be no special duty attaching to the manufacture of food apart from that implied by contract or imposed by statute. If such a duty exists, it seems to me it must cover the construction of every article, and I cannot see any reason why it should not apply to the construction of a house. If one step, why not fifty? Yet if a house be, as it sometimes is, negligently built, and in consequence of that negligence the ceiling falls and injures the occupier or any one else, no action against the builder exists according to the English law, although I believe such a right did exist according to the laws of Babylon. Were such a principle known and recognized, it seems to me impossible, having regard to the numerous cases that must have arisen to persons injured by its disregard, that, with the exception of *George v. Skivington* LR 5 Ex 1, no case directly involving the principle has ever succeeded in the Courts, and, were it well known and accepted, much of the discussion of the earlier cases would have been waste of time, and the distinction as to articles dangerous in themselves or known to be dangerous to the vendor would be known to be meaningless."*
94. It is an open question whether Lord Buckmaster would have been surprised to learn that 50 years later in *Murphy v. Brentwood D.C.* the House of Lords would adopt principles closer to the laws of Babylon though without the pains and penalties imposed by those laws.
95. The extent to which Lord Buckmaster and Lord Tomlin were engaged in a hopeless argument against the tide of legal development in favour of a compensation culture was shown by a passage from Lord Tomlin's speech at page 600:
"The declaration averred (inter alia) that the defendant 'so improperly and negligently conducted himself' that the accident complained of happened.
The plaintiff's counsel said 'Here the declaration alleges the accident to have happened through the defendant's negligence and want of care.'
The alarming consequences of accepting the validity of this proposition were pointed out by the defendant's counsel, who said: 'For example, every one of the sufferers by such an accident as that which recently happened on the Versailles Railway might have his action against the manufacturer of the defective axle.'"
96. In *Murphy v. Brentwood D.C.*, the House of Lords took the 50th step feared by Lord Buckmaster and declared that a duty rested on builders towards subsequent occupiers with whom they had no contract. Should I take the 51st step and find that architects owe a duty in similar circumstances?
97. The decision of the House of Lords in *Murphy v. Brentwood D.C.* did not directly result in a builder paying damages to compensate for injuries suffered as a result of the building of an unsafe building. Rather, the decision of the appeal itself was to deny liability on the part of a local authority in a case where the application of a previous decision of the House of Lords in *Anns v. Merton L.B.C* [1978] AC 728 had persuaded the judge at first instance to award damages against the local authority. But the reasoning of the House of Lords in *Murphy v. Brentwood D.C.* made it clear that in certain circumstances a builder would be liable to a subsequent owner of a building.

98. In *Murphy v. Brentwood D.C.*, at page 487, Lord Oliver of Aylmerton said: "There can, of course, be no doubt that it can reasonably be foreseen that if an inherently defective house is built or an inherently defective chattel is manufactured some future owner will be likely to sustain loss when the defect comes to light, if only because it is less valuable than it was thought to be when he bought and paid for it. A series of decisions in this House and in the Privy Council since *Anns*, however, have now made it clear beyond argument that in cases other than cases of direct physical injury the reasonable foreseeability of damage is not of itself sufficient and that there has to be sought in addition in the relationship between the parties that elusive element comprehended in the expression "proximity": see *Governors of the Peabody Donation Fund v. Sir Lindsay Parkinson & Co. Ltd.* [1985] A.C. 210; *Yuen Kun Yeu v. Attorney-General of Hong Kong* [1988] A.C. 175; *Hill v. Chief Constable of West Yorkshire* [1989] A.C. 53. It is an expression which persistently defies definition but my difficulty in rationalising the basis of *Dutton* and *Anns* is and has always been not so much in defining it as in discerning the circumstances from which it could have been derived. For reasons which I have endeavoured to explain, the starting point in seeking to rationalise these decisions must, as it seems to me, be to establish the basis of the liability of the person who is the direct and immediate cause of the plaintiff's loss. Anyone, whether he be a professional builder or a do-it-yourself enthusiast, who builds or alters a semi-permanent structure must be taken to contemplate that at some time in the future it will, whether by purchase, gift or inheritance, come to be occupied by another person and that if it is defectively built or altered it may fall down and injure that person or his property or may put him in a position in which, if he wishes to occupy it safely or comfortably, he will have to expend money on rectifying the defect. The case of physical injury to the owner or his licensees or his or their property presents no difficulty. He who was responsible for the defect - and it will be convenient to refer to him compendiously as "the builder" - is, by the reasonable foreseeability of that injury, in a proximate "neighbour" relationship with the injured person on ordinary *Donoghue v. Stevenson* principles. But when no such injury has occurred and when the defect has been discovered and is therefore no longer latent, whence arises that relationship of proximity required to fix him with responsibility for putting right the defect? Foresight alone is not enough but from what else can the relationship be derived?"

Lord Oliver then went on to discuss problems relating to economic loss which do not arise in the present case.

99. Lord Keith in the same case, at page 460 cited words from the speech of Lord Wilberforce in *Anns*: "Through the trilogy of cases in this House - *Donoghue v. Stevenson* [1932] A.C. 562, *Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd.* [1964] A.C. 465, and *Dorset Yacht Co. Ltd. v. Home Office* [1970] A.C. 1004, the position has now been reached that in order to establish that a duty of care arises in a particular situation, it is not necessary to bring the facts of that situation within those of previous situations in which a duty of care has been held to exist. Rather the question has to be approached in two stages. First one has to ask whether, as between the alleged wrongdoer and the person who has suffered damage there is a sufficient relationship of proximity or neighbourhood such that, in the reasonable contemplation of the former, carelessness on his part may be likely to cause damage to the latter - in which case a prima facie duty of care arises. Secondly, if the first question is answered affirmatively, it is necessary to consider whether there are any considerations which ought to negative, or to reduce or limit the scope of the duty or the class of person to whom it is owed or the damages to which a breach of it may give rise: see [the] *Dorset Yacht* case [1970] A.C. 1004, per Lord Reid, at p. 1027. Examples of this are *Hedley Byrne's* case [1964] A.C. 465 where the class of potential plaintiffs was reduced to those shown to have relied upon the correctness of statements made, and *Weller & Co. v. Foot and Mouth Disease Research Institute* [1966] 1 Q.B. 569; and (I cite these merely as illustrations, without discussion) cases about "economic loss" where, a duty having been held to exist, the nature of the recoverable damages was limited: see *S.C.M. (United Kingdom) Ltd. v. W. J. Whittall & Son Ltd.* [1971] 1 Q.B. 337 and *Spartan Steel & Alloys Ltd. v. Martin & Co. (Contractors) Ltd.* [1973] Q.B. 27."

After further consideration of authority, Lord Keith said: "Lord Wilberforce went on, at pp. 758-759, to consider the position of the builder, upon the view that it would be unreasonable to impose liability in respect of defective foundations upon the council if the builder, whose primary fault it was, should be immune from liability. This consideration was, I think, a necessary part of the reasoning which led to his conclusion about the liability of the local authority. The *Dorset Yacht* case, upon which Lord Wilberforce was proceeding, was concerned with the liability of prison officers for failing to take reasonable care to prevent the Borstal boys in their charge from acting tortiously towards the owners of yachts moored in the vicinity of their encampment. If the conduct of the boys had not been tortious there would have been no liability on the prison officers. So, likewise, if the builder of defective foundations had been under no liability in tort, the local authority could have been under no liability for not taking reasonable care to see that he did not construct defective foundations. Lord Wilberforce took the view that the principle of *Donoghue v. Stevenson* [1932] A.C. 562 applied to the builder of defective premises, there being no sound reason why that principle should be limited to defective chattels.

I see no reason to doubt that the principle of *Donoghue v. Stevenson* does indeed apply so as to place the builder of premises under a duty to take reasonable care to avoid injury through defects in the premises to the person or property of those whom he should have in contemplation as likely to suffer such injury if care is not taken. But it is against injury through latent defects that the duty exists to guard. I shall consider this aspect more fully later."

At page 465, Lord Keith returned to the subject: "However an essential feature of the species of liability in 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: see per Lord Atkin, at p. 599; also *Grant v. Australian Knitting Mills Ltd.* [1936] A.C. 85, 103-105, per Lord Wright. It is the latency of the defect which constitutes the mischief. There may be room for dispute as to whether the likelihood of intermediate examination and consequent actual discovery of the defect has the effect of

negating a duty of care or of breaking the chain of causation (compare *Farr v. Butters Brothers & Co.* [1932] 2 K.B. 606 with *Denny v. Supplies & Transport Co. Ltd.* [1950] 2 K.B. 374). 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 defect results in physical injury to anyone, whether owner, occupier, visitor or passer-by, or to the property of any such person. But that principle is not apt to bring home liability towards an occupier who knows the full extent of the defect yet continues to occupy the building."

100. The last sentence was qualified by the Court of Appeal in *Targett v. Torfaen B.C.* [1992] 3 All ER 27 (following *Rimmer v. Liverpool City Council* [1984] 1 All ER 930) where it was pointed out that in some cases, (for example a person of limited means in residential property) an occupier of premises may become aware of a defect and be unable in effect either to move from the property or remedy the defect and in those circumstances that person is not deprived of a remedy. That consideration does not apply in the present case.
101. Counsel have cited to me other decisions, including *D & F Estates v. Church Commissioners for England* [1989] AC 177 and *Department of the Environment v. Bates* [1991] AC 499, both decisions forming part of the line of ground breaking decisions in cases started before the Official Referees. Those two decisions are mainly concerned with considerations of "pure economic loss" which do not concern me.
102. By the decision in *Marc Rich v. Bishop Rock Marine* [1996] AC 211 the House of Lords made plain that in addition to foreseeability and proximity, there were other requirements before a duty of care was imposed on a defendant. At page 235 Lord Steyn said: "...since the decision in *Dorset Yacht Co. Ltd. v. Home Office* [1970] A.C. 1004 it has been settled law that the elements of foreseeability and proximity as well as considerations of fairness, justice and reasonableness are relevant to all cases whatever the nature of the harm sustained by the plaintiff. Saville L.J. explained, at p. 1077:
'whatever the nature of the harm sustained by the plaintiff, it is necessary to consider the matter not only by inquiring about foreseeability 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 a 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 for 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.'
That seems to me a correct summary of the law as it now stands."
103. So, in the present case, have the claimants shown foreseeability of harm and proximity on the part of the defendants, and that it is fair just and reasonable that the defendants should be found to owe a duty to the claimants?
104. I have no difficulty in finding that it was reasonably, indeed easily, foreseeable by the defendants that a future occupier of the premises falling within a class of persons likely to occupy the premises would suffer damage to his goods as a result of the defects that the defendants caused or allowed to exist in the premises.
105. The requirements of proximity and "fair just and reasonable" are difficult to define and they overlap. They are also closely linked in this case with the consideration in *Donoghue v. Stevenson* of "reasonable opportunity of inspection". In *Donoghue v. Stevenson*, Lord Atkin propounded the relationship between reasonable opportunity of inspection and proximity: "I draw particular attention to the fact that Lord Esher emphasizes the necessity of goods having to be 'used immediately' and 'used at once before a reasonable opportunity of inspection.' This is obviously to exclude the possibility of goods having their condition altered by lapse of time, and to call attention to the proximate relationship, which may be too remote where inspection even of the person using, certainly of an intermediate person, may reasonably be interposed."
106. In *Murphy v. Brentwood D.C.*, in the passage that I have already cited, Lord Oliver said that he found difficulty in defining "proximity". Later he said, "The case of physical injury to the owner or his licensees or his or their property presents no difficulty. He who was responsible for the defect - and it will be convenient to refer to him compendiously as "the builder" - is, by the reasonable foreseeability of that injury, in a proximate "neighbour" relationship with the injured person on ordinary *Donoghue v. Stevenson* principles. But when no such injury has occurred and when the defect has been discovered and is therefore no longer latent, whence arises that relationship of proximity required to fix him with responsibility for putting right the defect? Foresight alone is not enough but from what else can the relationship be derived?"
107. One must now accept, following *Murphy*, that a builder owes a duty to a subsequent occupier in appropriate circumstances. I think it must follow that I must take the 51st step and hold that an architect also may owe a duty and be liable in appropriate circumstances.
108. In the present case, the precise defects had not been discovered before the floods, but there had been at least one previous flood evidenced by markings on the floor of the building. In my opinion, the duty of the defendants

to the claimants must depend on the question, "Was there a reasonable opportunity of inspection of the drainage system and discovering the defects before the floods?" If the claimants had a reasonable opportunity of inspecting the drainage system and discovering the defects before they suffered damage, it would not be fair just or reasonable to hold the defendants liable for that damage nor would it be right to say that there was a proximate relationship between the claimants and the defendants.

109. There was a reasonable opportunity of inspecting the building before the claimants took a lease. It would be normal procedure for any incoming tenant to have the building inspected by a surveyor, and that is what they did. Although the claimants received warnings from both the surveyors and from Mr. Meiklejohn of a danger, they were not told what was the precise problem. The surveyors could, and in my view should, have told the claimants that there were no overflows and that overflows should be provided. The cost of overflows was very small and if the claimants had been advised to install them I cannot think that they would have failed to do so.
110. If Lambert Smith Hampton had been more assiduous in the performance of their duties, the claimants would have been expressly warned of the absence of overflows and the floods would not have occurred. To what extent is the claimants' claim affected by the acts of their professional advisers? Are they entitled to say, as they might in response to a defence of contributory negligence, that they took skilled advice and are entitled to rely on that advice? I do not think that is the right approach. I do not think that it is fair just or reasonable that the extent of the liability of the defendants should depend on the assiduity of the surveyors instructed by the claimants. The claimants had the opportunity to discover the absence of overflows by reasonable inspection by professional advisers who might reasonably be expected to be instructed: whether that reasonable opportunity in fact revealed the defect is irrelevant. Because there was a reasonable opportunity to inspect, the defendants were not in a proximate relationship to the claimants so far as concerns defects which could have been discovered by that inspection, namely, the absence of overflows. But I repeat my previous finding that neither the claimants nor their surveyors could reasonably be expected to have discovered the under design of the drainage system.

Conclusion

111. I find that:

- a. The defendants owed a duty of care to the claimants in respect of latent defects in the building occupied by them in respect of which there was no reasonable possibility of inspection.
- b. In considering the question whether there was a reasonable possibility of inspection, it is not open to the claimants to say that they reasonably relied on competent advisers and on that account the duty is not negated.
- c. There was a reasonable possibility of inspection by the claimants or their professional advisers which would have discovered the absence of overflows but not the under design of the system.
- d. The first flood was caused by a combination of blockages of the drains for which the defendants were not responsible and the absence of overflows. The under design of the system was not a contributing cause of the first flood. Since the claimants could reasonably have discovered the absence of overflows, the defendants no longer owed them a duty in that regard and therefore the claimants can prove no breach of duty in relation to the first flood.
- e. The second flood was caused by a combination of the under design of the system and the absence of overflows. Blockages of the system were not a contributory cause of the second flood. While there was a reasonable opportunity to inspect which should reasonably have revealed the absence of overflows, it cannot be said that the opportunity to inspect should reasonably have revealed the under design of the system. The defendants are therefore responsible for one primary cause of the second flood though not for the other. On ordinary principles of liability in tort, the defendants are therefore liable for the whole of the loss arising from the second flood. Blockage of the system not being a contributory cause of the second flood, the question of contributory negligence does not arise.
- f. The claimants are entitled to no compensation in respect of the first flood but they are entitled to damages and interest on those damages in respect of the second flood. In respect of the second flood, the claimants were not guilty of contributory negligence. The damages are agreed at £612,153.02. The interest will be calculated up to the date of this judgment.

Alexander Nissen for the claimants (Kennedys, Solicitors)
Louise Randall for the defendants (Fishburn Morgan Cole, Solicitors)