House of Lords before Lords Keith; Brandon ; Templeman; Jauncey. 20th April 1989

LORD KEITH OF KINKEL : My Lords,

1. My Lords, I have had the opportunity of considering in draft the speeches to be delivered by my noble and learned friends Lord Templeman, Lord Griffiths and Lord Jauncey of Tullichettle. I agree with them, and for the reasons they give would allow the appeal in ***Harris v Wyre Forest District Council*** and dismiss that in ***Smith v Eric S. Bush.***

LORD BRANDON OF OAKBROOK : My Lords,

2. For the reasons set out in the speeches to be delivered by my noble and learned friends, Lord Templeman, Lord Griffiths and Lord Jauncey of Tullichettle, I would allow the appeal in ***Harris v. Wyre Forest District Council*** and dismiss the appeal in ***Smith v. Eric. S. Bush (a firm).***

LORD TEMPLEMAN : My Lords,

3. These appeals involve consideration of three questions. The first question is whether a valuer instructed by a building society or other mortgagee to value a house, knowing that his valuation will probably be relied upon by the prospective purchaser and mortgagor of the house, owes to the purchaser in tort a duty to exercise reasonable skill and care in carrying out the valuation unless the valuer disclaims liability. If so, the second question is whether a disclaimer of liability by or on behalf of the valuer is a notice which purports to exclude liability for negligence within the Unfair Contract Terms Act 1977 and is therefore ineffective unless it satisfies the requirement of reasonableness. If so, the third question is whether, in the absence of special circumstances, it is fair and reasonable for the valuer to rely on the notice excluding liability.

4. In ***Harris v. Wyre Forest District Council,*** [1988] Q.B. 835 the first appeal now under consideration, Mr. and Mrs. Harris wished to purchase 74, George Street, Kidderminster, and needed a mortgage. They applied to the council. By section 43 of the Housing (Financial Provisions) Act 1958 (as amended by section 37 of the Local Government Act 1974), the council were authorised to advance money to any persons for the purpose of acquiring a house, provided that:

> *"(2) . . . the local authority . . . shall satisfy themselves that the house ... to be acquired is ... or will be made in all respects fit for human habitation. . . 3(e) The advance shall not be made except after a valuation duly made on behalf of the local authority ..."*

5. Mr. and Mrs. Harris signed the application form supplied by the council and that form contained the following declaration and notice:

> *"I/We enclose herewith valuation fee and administration fee £22. I/We understand that this fee is not returnable even if the council do not eventually make an advance and that the valuation is confidential and is intended soley for the benefit of Wyre Forest District Council in determining what advance, if any, may be made on the security and that no responsibility whatsoever is implied or accepted by the council for the value or condition of the property by reason of such inspection and report. (You are advised for your own protection to instruct your own surveyor/architect to inspect the property). I/We agree that the valuation report is the property of the council and that I/we cannot require its production."*

6. The council decided to carry out their own valuation and for that purpose instructed their employee, the second respondent, Mr. Lee. After receiving Mr. Lee's valuation, the council made a written offer to advance £8,505 to Mr. and Mrs. Harris to be secured on a mortgage of the house and subject to their undertaking to carry out within 12 months the works detailed in the schedule to the offer. The schedule was in these terms:

> *"Essential repairs*
>
> *"1. Obtain report for district council from Midlands Electricity Board regarding electrics and carry out any recommendations. 2. Make good mortar fillets to extension."*

7. Mr. and Mrs. Harris assumed from the council's offer that, as was the case, the house had been valued at £8,505 at the least, and that the valuer had not found serious defects and they therefore accepted the offer and entered into a contract to purchase the house for £9,000. Three years later, Mr. and Mrs. Harris discovered that the house was defective; one builder quoted £13,000 to carry out work to make the house safe. Another builder refused to tender for the work which he regarded as impractical and unsafe. The damages suffered by Mr. and Mrs. Smith, including interest up to the date of trial, were agreed at £12,000. The trial judge was satisfied that Mr. Lee did not exercise reasonable skill and care and that the council, as his employer, were vicariously liable for Mr. Lee's failure and he therefore ordered the council to pay £12,000. The Court of Appeal allowed the appeal of the council on the grounds that by the notice contained in the application form signed by Mr. and Mrs. Harris the council had avoided incurring liability. Mr. and Mrs. Harris now appeal.

8. In ***Smith v. Eric S. Bush (a firm)*** [1988] Q.B. 743, the second appeal now under consideration, Mrs. Smith wished to purchase 242, Silver Road, Norwich, and needed a mortgage. She applied to the Abbey National Building Society. By section 25 of the Building Societies Act 1962, now section 13 of the Building Societies Act 1986, the Abbey National was bound to obtain "a written report prepared and signed by a competent and prudent person who is experienced in the matters relevant to the determination of the value" of the house, dealing with the value of the house and with any matter likely to affect the value of the house. Mrs. Smith paid to the Abbey National an inspection fee of £36.89 and signed the application form which contained the following declaration and notice:

"I accept that the society will provide me with a copy of the report and mortgage valuation which the society will obtain in relation to this application. I understand that the society is not the agent of the surveyor or firm of surveyors and that I am making no agreement with the surveyor or firm of surveyors. I understand that neither the society nor the surveyor or the firm of surveyors will warrant, represent or give any assurance to me that the statements, conclusions and opinions expressed or implied in the report and mortgage evaluation will be accurate or valid and the surveyor's report will be supplied without any acceptance of responsibility on their part to me."

9. The Abbey National instructed the appellant firm, Eric S. Bush, to carry out the valuation. The appellants valued the house at £16,500 and the report contained the following paragraph:

"11. Repairs recommended as a condition of mortgage: No essential repairs are required. We noted a number of items of disrepair in the building which we have taken into account in our valuation, but which are not considered to be essential for mortgage purposes."

10. A copy of the report was supplied to Mrs. Smith by the Abbey National.

11. In reliance on the report, Mrs. Smith accepted an advance of £3,500 from the Abbey National and entered into a contract to purchase the house for £18,000. Eighteen months later, bricks from the chimneys collapsed and fell through the roof into the loft and the main bedroom and ceilings on the first floor. The collapse was due to the fact that two chimney breasts had been removed from the first floor, leaving the chimney breasts in the loft and the chimneys unsupported. Mr. Cannell, who carried out the inspection for the appellants and was a chartered surveyor had observed the removal of the first floor chimney breasts but had not checked to see that the chimneys above were adequately supported.

12. The trial judge was satisfied that Mr. Cannell had not exercised reasonable skill and care, that the appellants were liable for his negligence to Mrs. Smith and awarded her £4,379.97 damages including interest. The judge ignored the notice contained in the application and signed by Mrs. Smith whereby the Abbey National disclaimed liability on the part of the appellant firm. The Court of Appeal (Dillon and Glidewell L.JJ. and Sir Edward Eveleigh) held that the disclaimer was not fair and reasonable and was ineffective under the Unfair Contract Terms Act 1977; they accordingly affirmed the award of damages made by the judge. The appellants now appeal.

13. As I have indicated therefore, the three questions involved in these appeals are, firstly, whether the council's valuer was liable to Mr. and Mrs. Harris in negligence and whether the appellants were liable to Mrs. Smith in negligence; secondly, whether, if negligence applies, the notices excluding liability fall within the ambit of the Unfair Contract Terms Act 1977, and, thirdly, whether it is fair and reasonable for the valuers to rely on the notices.

14. Section 1(1) of the Act of 1977 defines "negligence" as the breach:

"(a) of any obligation, arising from the express or implied terms of a contract, to take reasonable care or exercise reasonable skill in the performance of the contract;

"(b) of any common law duty to take reasonable care or exercise reasonable skill ..."

15. Section 2 of the Act provides that:

"(1) A person cannot by reference to any contract term or to a notice . . . exclude or restrict his liability for death or personal injury resulting from negligence.

"(2) In the case of other loss or damage, a person cannot so exclude or restrict his liability for negligence except in so far as the term or notice satisfies the requirement of reasonableness."

16. The common law imposes on a person who contracts to carry out an operation an obligation to exercise reasonable skill and care. A plumber who mends a burst pipe is liable for his incompetence or negligence whether or not he has been expressly required to be careful. The law implies a term in the contract which requires the plumber to exercise reasonable skill and care in his calling. The common law also imposes on a person who carries out an operation an obligation to exercise reasonable skill and care where there is no contract. Where the relationship between the operator and a person who suffers injury or damage is sufficiently proximate and where the operator should have foreseen that carelessness on his part might cause harm to the injured person, the operator is liable in the tort of negligence.

17. Manufacturers and providers of services and others seek to protect themselves against liability for negligence by imposing terms in contracts or by giving notice that they will not accept liability in contract in tort. Consumers who have need of manufactured articles and services are not in a position to bargain. The Unfair Contract Terms Act 1977 prohibits any person excluding or restricting liability for death or personal injury resulting from negligence. The Act also contains a prohibition against the exclusion or restriction of liability for negligence which results in loss or damage unless the terms of exclusion or the notice of exclusion satisfies the requirements of reasonableness.

18. These two appeals are based on allegations of negligence in circumstances which are akin to contract. Mr. and Mrs. Harris paid £22 to the council for a valuation. The council employed, and therefore paid, Mr. Lee, for whose services as a valuer the council are vicariously liable. Mrs. Smith paid £36.89 to the Abbey National for a report and valuation and the Abbey National paid the appellants for the report and valuation. In each case the valuer knew or ought to have known that the purchaser would only contract to purchase the house if the valuation was satisfactory and that the purchaser might suffer injury or damage or both if the valuer did not exercise

reasonable skill and care. In these circumstances I would expect the law to impose on the valuer a duty owed to the purchaser to exercise reasonable skill and care in carrying out the valuation.

19. In ***Cann v. Willson*** (1888) 39 Ch.D. 39, approved by this House in ***Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd.*** [1964] A.C. 465, a valuer instructed by a mortgagor sent his report to the mortgagee who made an advance in reliance on the valuation. The valuer was held liable in the tort of negligence to the mortgagee for failing to carry out the valuation with reasonable care and skill.

20. A valuer who values property as a security for a mortgage is liable either in contract or in tort to the mortgagee for any failure on the part of the valuer to exercise reasonable skill and care in the valuation. The valuer is liable in contract if he receives instructions from and is paid by the mortgagee. The valuer is liable in tort if he receives instructions from and is paid by the mortgagor but knows that the valuation is for the purpose of a mortgage and will be relied upon by the mortgagee.

21. In ***Odder v. Westbourne Park Building Society*** (1955) 165 E.G. 261, a purchaser paid a survey fee to a building society, the survey was carried out by the chairman of the building society and in the result the purchaser purchased the house for £4,000 with the help of an advance of £3,000. There were serious defects and the house was unsaleable. There was a disclaimer of liability for negligence for the survey in the mortgage offer but Harman J. held that the disclaimer:

"did no more than to state what the legal position would be even if it were not there but it did emphasise the matter and took much of the sting out of the plaintiff's allegation, which was to the effect that once the building society had had a survey made and were willing to lend money, everything was all right and that she would not have entered on the transaction if they had not kept silent about the defects or been negligent in not discovering them. In view of the warning in the proposal form that grievance, if it were one, lost any of its justification."

22. Since 1955 a good deal of water has passed under the negligence bridge.

23. In ***Candler v. Crane, Christmas & Co.*** [1951] 2 K.B. 164, the accountants of a company showed their draft accounts to and discussed them with an investor who, in reliance on the accounts, subscribed for shares in the company. Denning L.J., whose dissenting judgment was subsequently approved in the ***Hedley Byrne*** case [1964] A.C. 465, found that the accountants owed a duty to the investor to exercise reasonable skill and care in preparing the draft accounts. Denning L.J. said, at p. 176:

"If the matter were free from authority, I should have said that they clearly did owe a duty of care to him. They were professional accountants who prepared and put before him these accounts, knowing that he was going to be guided by them in making an investment in the company. On the face of those accounts he did make the investment, whereas if the accounts had been carefully prepared, he would not have made the investment at all. The result is that he has lost his money."

24. Denning L.J., at p. 178-179 rejected the argument that:

"a duty to take care can only arise where the result of a failure to take care will cause physical damage to persons or property. ... I can understand that in some cases of financial loss there may not be a sufficiently proximate relationship to give rise to a duty of care; but, if once the duty exists, I cannot think that liability depends on the nature of the damage."

25. The duty of professional men *"is not merely a duty to use care in their reports. They have also a duty to use care in their work which results in their reports."* (p. 179). The duty of an accountant is owed *"to any third person to whom they themselves show the accounts, or to whom they know their employer is going to show the accounts, so as to induce him to invest money or take some other action on them. But I do not think the duty can be extended still further so as to include strangers of whom they have heard nothing and to whom their employer, without their knowledge, may choose to show their accounts."* (pp. 180-181). "The test of proximity in these cases is: did the accountants know that the accounts were required for submission to the plaintiff and use by him?" (p. 181).

26. Subject to the effect of any disclaimer of liability, these considerations appear to apply to the valuers in the present appeals.

27. In the ***Hedley Byrne*** case [1964] A.C. 465, a bank which supplied a reference for a customer was held to owe a duty of care to a stranger who relied on the reference but the bank escaped liability because in the reference the bank expressly disclaimed liability. Lord Reid said, at p. 486: *"A reasonable man, knowing that he was being trusted or that his skill and judgment were being relied on, would, I think, have three courses open to him. He could keep silent or decline to give the information or advice sought; or he could give an answer with a clear qualification that he accepted no responsibility for it or that it was given without that reflection or inquiry which a careful answer would require; or he could simply answer without any such qualification. If he chooses to adopt the last course he must, I think, be held to have accepted some responsibility for his answer being given carefully, or to have accepted a relationship with the inquirer which requires him to exercise such care as the circumstances require."*

28. Lord Devlin, at p. 515 rejected the argument that the maker of a careless statement is only under a duty to be careful if the duty, which is contractual or fiduciary or, arises from the relationship of proximity, causes physical damage to the person or property of the plaintiff. Lord Devlin also said, at pp. 528-529 that: *"the categories of special relationships which may give rise to a duty to take care in word as well as in deed are not limited to contractual relationships or to relationships of fiduciary duty, but include also relationships which . . . are 'equivalent*

to contract,' that is, where there is an assumption of responsibility in circumstances in which, but for the absence of consideration, there would be a contract."

29. In the present appeals, the relationship between the valuer and the purchaser is *"akin to contract."* The valuer knows that the consideration which he receives derives from the purchaser and is passed on by the mortgagee, and the valuer also knows that the valuation will determine whether or not the purchaser buys the house.

30. In ***Ministry of Housing and Local Government v. Sharp*** *[*1970] 2 Q.B. 223, the local authority was held liable to the Ministry because of the failure of an employee of the authority to exercise reasonable skill and care in searching for entries in the local land charges register. The search certificate prepared by the clerk negligently failed to record a charge of £1828 11s.5d. in favour of the Ministry. Lord Denning M.R., at p. 268 rejected the argument: *"that a duty to use due care (where there was no contract) only arose when there was a voluntary assumption of responsibility . . . Lord Reid in* ***Hedley Byrne's*** *case [1964] A.C. 465, 487 and ... Lord Devlin, at p. 529 ... used those words because of the special circumstances of that case (where the bank disclaimed responsibility). But they did not in any way mean to limit the general principle. In my opinion the duty to use due care in a statement arises, not from any voluntary assumption of responsibility, but from the fact that the person making it knows, or ought to know, that others, being his neighbours in this regard, would act on the face of the statement being accurate."*

31. Salmon L.J. said, at p. 279: *"I do not accept that, in all cases, the obligation to take reasonable care necessarily depends on the voluntary assumption of responsibility. Even if it did, I am far from satisfied that the council did not voluntarily assume responsibility in the present case. On the contrary, it seems to me that they certainly chose to undertake the duty of searching the register and preparing the certificate. There was nothing to compel them to discharge this duty through their servant."*

32. In the present proceedings by Mr. and Mrs. Harris, the council accepted the application form and the valuation fee and chose to conduct their duty of valuing the house through Mr. Lee. In the case of Mrs. Smith the appellant first accepted the valuation fee derived from Mrs. Smith and undertook the duty of preparing a report which they knew would be shown to and relied upon by Mrs. Smith.

33. Mr. Ashworth on behalf of the council relied on the decision of the Court of Appeal of Northern Ireland in ***Curran v. Northern Ireland Co-ownership Housing Association Ltd.)*** (1986) 8 N.I.J.B. 1. On a preliminary issue the court held that a mortgagee of a house owed no duty of care to the purchaser in respect of a valuation. The purchaser's action against the valuer remains to be determined. Gibson L.J., at p. 14, said that in the ***Hedley Byrne*** type of case: *"there must be an assumption of responsibility in circumstances in which, but for the absence of consideration, there would be a contract. Responsibility can only attach if the defendant's actions implied a voluntary undertaking to assume responsibility."*

34. I agree that by obtaining and disclosing a valuation, a mortgagee does not assume responsibility to the purchaser for that valuation.

35. But in my opinion the valuer assumes responsibility to both mortgagee and purchaser by agreeing to carry out a valuation for mortgage purposes knowing that the valuation fee has been paid by the purchaser and knowing that the valuation will probably be relied upon by the purchaser in order to decide whether or not to enter into a contract to purchase the house. The valuer can escape the responsibility to exercise reasonable skill and care by an express exclusion clause, provided the exclusion clause does not fall foul of the Unfair Contract Terms Act 1977. The Court of Appeal also decided in ***Curran's*** case that a local authority which provides a house-owner with a grant to carry out works of extension to his house might owe a duty of care to a subsequent purchaser of the house to ensure that the works of extension are carried in a manner free from defect; this House reversed the Court of Appeal on this point [1987] 1 A.C. 718 but the speech of my noble and learned friend, Lord Bridge of Harwich, dealt with the ambit of ***Anns v. Merton London Borough Council*** [1978] A.C. 728, and not with the duty of care which arises when the proximity between tortfeasor and victim is akin to contract.

36. It was submitted by Mr. Ashworth, on behalf of the council, that the valuation was prepared in fulfilment of the statutory duty imposed on the council by section 43 of the Housing (Financial Provisions) Act 1958. Similarly the valuation obtained by the Abbey National was essential to enable them to fulfil their statutory duty imposed by the Building Societies Act 1962. But in ***Candler v. Crane, Christmas & Co.*** [1951] 2 K.B. 164, the draft accounts were prepared for the company which was compelled by statute to produce accounts.

37. In the present appeals, the statutory duty of the council to value the house did not in my opinion prevent the council coming under a contractual or tortious duty to Mr. and Mrs. Harris who were cognisant of the valuation and relied on the valuation. The contractual duty of a valuer to value a house for the Abbey National did not prevent the valuer coming under a tortious duty to Mrs. Smith who was furnished with a report of the valuer and relied on the report.

38. In general I am of the opinion that in the absence of a disclaimer of liability the valuer who values a house for the purpose of a mortgage, knowing that the mortgagee will rely and the mortgagor will probably rely on the valuation, knowing that the purchaser mortgagor has in effect paid for the valuation, is under a duty to exercise reasonable skill and care and that duty is owed to both parties to the mortgage for which the valuation is made. Indeed, in both the appeals now under consideration the existence of such a dual duty is tacitly accepted and acknowledged because notices excluding liability for breach of the duty owed to the purchaser were drafted by the mortgagee and imposed on the purchaser. In these circumstances it is necessary to consider the second

question which arises in these appeals, namely, whether the disclaimers of liability are notices which fall within the Unfair Contract Terms Act 1977.

39. In ***Harris v. Wyre Forest District Council*** [1988] Q.B. 835, the Court of Appeal (Kerr and Nourse L.JJ. and Caufield J.) accepted an argument that the Act of 1977 did not apply because the council by their express disclaimer refused to obtain a valuation save on terms that the valuer would not be under any obligation to Mr. and Mrs. Harris to take reasonable care or exercise reasonable skill. The council did not exclude liability for negligence but excluded negligence so that the valuer and the council never came under a duty of care to Mr. and Mrs. Harris and could not be guilty of negligence. This construction would not give effect to the manifest intention of the Act but would emasculate the Act. The construction would provide no control over standard form exclusion clauses which individual members of the public are obliged to accept. A party to a contract or a tortfeasor could opt out of the Act of 1977 by declining in the words of Nourse L.J., at p. 845, to recognise *"their own answerability to the plaintiff."* Caulfield J. said, at p. 850, that the Act *"can only be relevant where there is on the facts a potential liability."* But no one intends to commit a tort and therefore any notice which excludes liability is a notice which excludes a potential liability. Kerr L.J., at p. 853, sought to confine the Act to "situations where the existence of a duty of care is not open to doubt" or where there is "an inescapable duty of care." I can find nothing in the Act of 1977 or in the general law to identify or support this distinction. In the result the Court of Appeal held that the Act does not apply to *"negligent misstatements where a disclaimer has prevented a duty of care from coming into existence;"* per Nourse L.J., at p. 848. My Lords this confuses the valuer's report with the work which the valuer carries out in order to make his report. The valuer owed a duty to exercise reasonable skill and care in his inspection and valuation. If he had been careful in his work, he would not have made a "negligent misstatement" in his report.

40. Section 11(3) of the Act of 1977 provides that in considering whether it is fair and reasonable to allow reliance on a notice which excludes liability in tort, account must be taken of: *"all the circumstances obtaining when the liability arose or (but for the notice) would have arisen."*

41. Section 13(1) of the Act prevents the exclusion of any right or remedy and (to that extent) section 2 also prevents the exclusion of liability: *"by reference to ... notices which exclude . . . the relevant obligation or duty."*

42. Nourse L.J. dismissed section 11(3) as "peripheral" and made no comment on section 13(1). In my opinion both these provisions support the view that the Act of 1977 requires that all exclusion notices which would in common law provide a defence to an action for negligence must satisfy the requirement of reasonableness.

43. The answer to the second question involved in these appeals is that the disclaimer of liability made by the council on its own behalf in the ***Harris*** case and by the Abbey National on behalf of the appellants in the ***Smith*** case, constitute notices which fall within the Unfair Contract Terms Act 1977 and must satisfy the requirement of reasonableness.

44. The third question is whether in relation to each exclusion clause it is, in the words of section 11(3) of the Act of 1977: "*fair and reasonable to allow reliance on it, having regard to all the circumstances obtaining when the liability arose or (but for the notice) would have arisen.*"

45. The liability of the council for the breach by Mr. Lee of his duty of care to Mr. and Mrs. Harris arose as soon as Mr. and Mrs. Harris, in reliance on the valuation of £8,505, bought the house for £9,000. The liability of the appellants for the breach of their duty of care to Mrs. Smith in their valuation arose as soon as Mrs. Smith, on reliance of the valuation of £16,500, bought the house for £18,000. The damages will include the difference between the market value of the house on the day when it was purchased and the purchase price which was in fact paid by the purchaser in reliance on the valuation.

46. Both the present appeals involve typical house purchases. In considering whether the exclusion clause may be relied upon in each case, the general pattern of house purchases and the extent of the work and liability accepted by the valuer must be borne in mind.

47. Each year one million houses may be bought and sold. Apart from exceptional cases the procedure is always the same. The vendor and the purchaser agree a price but the purchaser cannot enter into a contract unless and until a mortgagee, typically a building society, offers to advance the whole or part of the purchase price. A mortgage of 80 per cent, or more of the purchase price is not unusual. Thus, if the vendor and the purchaser agree a price of £50,000 and the purchaser can find £10,000, the purchaser then applies to a building society for a loan of £40,000. The purchaser pays the building society a valuation fee and the building society instructs a valuer who is paid by the building society. If the valuer reports to the building society that the house is good security for £40,000, the building society offers to advance £40,000 and the purchaser contracts to purchase the house for £50,000. The purchaser, who is offered £40,000 on the security of the house, rightly assumes that a qualified valuer has valued the house at not less than £40,000.

48. At the date when the purchaser pays the valuation fee, the date when the valuation is made and at the date when the purchaser is offered an advance, the sale may never take, place. The amount offered by way of advance may not be enough, the purchaser may change his mind, or the vendor may increase his price and sell elsewhere. For many reasons a sale may go off, and in that case, the purchaser has paid his valuation fee without result and must pay a second valuation fee when he finds another house and goes through the same procedure. The building society which is anxious to attract borrowers and the purchaser who has no money to waste on valuation fees, do not encourage or pay for detailed surveys. Moreover, the vendor may not be willing

to suffer the inconvenience of a detailed survey on behalf of a purchaser who has not contracted to purchase and may exploit minor items of disrepair disclosed by a detailed survey in order to obtain a reduction in the price.

49. The valuer is and, in my opinion, must be a professional person, typically a chartered surveyor in general practice, who, by training and experience and exercising reasonable skill and care, will recognise defects and be able to assess value. The valuer will value the house after taking into consideration major defects which are, or ought to be obvious to him, in the course of a visual inspection of so much of the exterior and interior of the house as may be accessible to him without undue difficulty. This appears to be the position as agreed between experts in the decided cases which have been discussed in the course of the present appeal. In ***Roberts v. J. Hampson & Co.*** [1988] 2 E.G.L.R. 181, Ian Kennedy J., after hearing expert evidence, came to the following conclusions concerning a valuation commissioned by the Halifax Building Society. I have no doubt the case is of general application. The judge, referring to the Halifax Building Society valuation, as described in the literature and as described by expert evidence, said, at p. 185:

"It is a valuation and not a survey, but any valuation is necessarily governed by condition. The inspection is, of necessity, a limited one. Both the expert surveyors who gave evidence before me agreed that with a house of this size they would allow about half-an-hour for their inspection on site. That time does not admit of moving furniture, or of lifting carpets, especially where they are nailed down. In my judgment, it must be accepted that where a surveyor undertakes a scheme valuation it is understood that he is making a limited appraisal only. It is, however, an appraisal by a skilled professional man. It is inherent in any standard fee work that some cases will colloquially be 'winners' and others 'losers,' from the professional man's point of view. The fact that in an individual case he may need to spend two or three times as long as he would have expected, or as the fee structure would have contemplated, is something which he must accept. His duty to take reasonable care in providing a valuation remains the root of his obligation. In an extreme case ... a surveyor might refuse to value on the agreed fee basis, though any surveyor who too often refused to take the rough with the smooth would not improve his reputation. If, in a particular case, the proper valuation of a £19,000 house needs two hours' work, that is what the surveyor must devote to it. The second aspect of the problem concerns moving furniture and lifting carpets. Here again, as it seems to me, the position that the law adopts is simple. If a surveyor misses a defect because its signs are hidden, that is a risk that his client must accept. But if there is specific ground for suspicion and the trail of suspicion leads behind furniture or under carpets, the surveyor must take reasonable steps to follow the trail until he has all the information which it is reasonable for him to have before making his valuation."

50. In his reference to "a scheme valuation" the judge was alluding to the practice of charging scale fees to purchasers and paying scale fees to valuers.

51. The valuer will not be liable merely because his valuation may prove to be in excess of the amount which the purchaser might realise on a sale of the house. The valuer will only be liable if other qualified valuers, who cannot be expected to be harsh on their fellow professionals, consider that, taking into consideration the nature of the work for which the valuer is paid and the object of that work, nevertheless he has been guilty of an error which an average valuer, in the same circumstances, would not have made and as a result of that error, the house was worth materially less than the amount of the valuation upon which the mortgagee and the purchaser both relied. The valuer accepts the liability to the building society which can insist on the valuer accepting liability. The building society seeks to exclude the liability of the valuer to the purchaser who is not in a position to insist on anything. The duty of care which the valuer owes to the building society is exactly the same as the duty of care which he owes to the purchaser. The valuer is more willing to accept the liability to the building society than to the purchaser because it is the purchaser who is vulnerable. If the valuation is worthless the building society can still insist that the purchaser shall repay the advance and interest. So, in practice, the damages which the valuer may be called upon to pay to the building society and the chances of the valuer being expected to pay, are less than the corresponding liability to the purchaser. But this does not make it more reasonable for the valuer to be able to rely on an exclusion clause which is an example of a standard form exemption clause operating in favour of the supplier of services and against the individual consumer.

52. Mr. Hague, who has great experience in this field, urged on behalf of the valuers in this appeal and on behalf of valuers generally, that it is fair and reasonable for a valuer to rely on an exclusion clause, particularly an exclusion clause which is set forth so plainly in building society literature. The principal reasons urged by Mr. Hague are as follows:

(1) The exclusion clause is clear and understandable and reiterated and is forcefully drawn to the attention of the purchaser.

- The purchaser's solicitors should reinforce the warning and should urge the purchaser to appreciate that he cannot rely on a mortgage valuation and should obtain and pay for his own survey.
- If valuers cannot disclaim liability they will be faced by more claims from purchasers some of which will be unmeritorious but difficult and expensive to resist.
- A valuer will become more cautious, take more time and produce more gloomy reports which will make house transactions more difficult.
- If a duty of care cannot be disclaimed the cost of negligence insurance for valuers and therefore the cost of valuation fees to the public will be increased.

53. Mr. Hague also submitted that there was no contract between a valuer and a purchaser and that, so far as the purchaser was concerned, the valuation was "gratuitous," and the valuer should not be forced to accept a liability

he was unwilling to undertake. My Lords, all these submissions are, in my view, inconsistent with the ambit and thrust of the Act of 1977. The valuer is a professional man who offers his services for reward. He is paid for those services. The valuer knows that 90 percent of purchasers in fact rely on a mortgage valuation and do not commission their own survey. There is great pressure on a purchaser to rely on the mortgage valuation. Many purchasers cannot afford a second valuation. If a purchaser obtains a second valuation the sale may go off and then both valuation fees will be wasted. Moreover, he knows that mortgagees, such as building societies and the council, in the present case, are trustworthy and that they appoint careful and competent valuers and he trusts the professional man so appointed. Finally, the valuer knows full well that failure on his part to exercise reasonable skill and care may be disastrous to the purchaser. If, in reliance on a valuation, the purchaser contracts to buy for £50,000 a house valued and mortgaged for £40,000 but, in fact worth nothing and needing thousands more to be spent on it, the purchaser stands to lose his home and to remain in debt to the building society for up to £40,000.

54. In ***Yianni v. Edwin Evans & Sons*** [1982] 1 Q.B. 438, Mr. and Mrs. Yianni decided that if the Halifax Building Society would agree to advance £12,000, they would buy a house for £15,000, otherwise they would let the house go as they had no money apart from £3,000. The house was valued by a valuer on behalf of the Halifax at £12,000, an advance of this amount was offered and accepted and the house was bought and mortgaged. Mr. and Mrs. Yianni then discovered that the house needed repairs amounting to £18,000. Park J., at p. 445, found on evidence largely derived from the chief surveyor to the Abbey National, that the proportion of purchasers who have an independent survey is less than 15 per cent.; that purchasers rely on the building society valuation; purchasers trust the building societies; each purchaser knows that he has paid a fee for someone on behalf of the society to look at the house. *"the intending mortgagor feels that the building society, whom he trusts, must employ for the valuation and survey competent qualified surveyors; and, if the building society acts upon its surveyor's report, then there can be no good reason why he should not also himself act upon it. The consequence is that if, after inspection by the building society's surveyor, an offer to make an advance is made, the applicant assumes that the building society has satisfied itself that the house is valuable enough to provide suitable security for a loan and decides to proceed by accepting the society's offer. So, if Mr. Yianni had had an independent survey, he would have been exceptional in the experience of the building societies and of those employed to carry out surveys and valuations for them."*

55. Park J., following the ***Hedley Byrne*** case [1964] A.C. 465, concluded at pp. 454-455, that a duty of care by the valuers to Mr. and Mrs. Yianni would arise if the valuers knew that their valuation: *"in so far as it stated that the property provided adequate security for an advance of £12,000, would be passed on to the plaintiffs, who, notwithstanding the building society's literature and the service of the notice under section 30 of the Building Societies Act 1962, in the defendants' reasonable contemplation would place reliance upon its correctness in making their decision to buy the house and mortgage it to the building society. . . . These defendants are surveyors and valuers. It is their profession and occupation to survey and make valuations of houses and other property. They make reports about the condition of property they have surveyed. Their duty is not merely to use care in their reports, they have also a duty to use care in their work which results in their reports .... Accordingly, the building society's offer of £12,000, when passed on to the plaintiffs, confirmed to them that 1, Seymour Road was sufficiently valuable to cause the building society to advance on its security 80 per cent, of the purchase price. Since that was also the building society's view the plaintiffs' belief was not unreasonable."*

56. In ***Yianni's*** case [1982] Q.B. 438, there was no exclusion of liability on behalf of the valuer. The evidence and the findings of Park J., which I have set out, support the view that it is unfair and unreasonable for a valuer to rely on an exclusion clause directed against a purchaser in the circumstances of the present appeals.

57. Mr. Hague referred to a new Abbey National proposal resulting from a consideration of ***Yianni's*** case. The purchaser is offered the choice between a valuation without liability on the valuer and a report which, as Mr. Hague agreed, did not involve any more work for the valuer but accepted that the valuer was under a duty to exercise reasonable skill and care. The fee charged for the report as compared with the fee charged for the valuation represents an increase of £100 for a house worth £20,000, and £150 for a house worth £100,000, and £200 for a house worth £200,000. On a million houses, this would represent increases of income to be divided between valuers, insurers and building societies, of about £150m. It is hardly surprising that few purchasers have chosen the report instead of the valuation. Any increase in fees, alleged to be justified by the decision of this House in these appeals, will no doubt be monitored by the appropriate authorities.

58. It is open to Parliament to provide that members of ail professions or members of one profession providing services in the normal course of the exercise of their profession for reward shall be entitled to exclude or limit their liability for failure to exercise reasonable skill and care. In the absence of any such provision valuers are not, in my opinion, entitled to rely on a general exclusion of the common law duty of care owed to purchasers of houses by valuers to exercise reasonable skill and care in valuing houses for mortgage purposes.

59. In the Green Paper "Conveyancing by Authorised Practitioners" see Cmnd. 572, the Government propose to allow building societies, banks and other authorised practitioners to provide conveyancing services to the public by employed professional lawyers. The Green Paper includes the following relevant passages:

"3.10 There will inevitably be claims of financial loss arising out of the provision of conveyancing services. A bad mistake can result in a purchaser acquiring a property which is worth considerably less than he paid for it - because, for example, the conveyancer overlooked a restriction on use or the planning of a new motorway.

The practitioner will be required to have adequate professional indemnity insurance or other appropriate arrangements to meet such claims."

Annex paragraph 12:

"An authorised practitioner must not contractually limit its liability for damage suffered by the client as a result of negligence on its part."

60. The Government thus recognises the need to preserve the duty of a professional lawyer to exercise reasonable skill and care so that the purchaser of a house may not be disastrously affected by a defect of title or an encumbrance. In the same way, it seems to me there is need to preserve the duty of a professional valuer to exercise reasonable skill and care so that a purchaser of a house may not be disastrously affected by a defect in the structure of the house.

61. The public are exhorted to purchase their homes and cannot find houses to rent. A typical London suburban house, constructed in the 1930s for less than £1,000 is now bought for more than £150,000 with money largely borrowed at high rates of interest and repayable over a period of a quarter of a century. In these circumstances it is not fair and reasonable for building societies and valuers to agree together to impose on purchasers the risk of loss arising as a result of incompetence or carelessness on the part of valuers. I agree with the speech of my noble and learned friend, Lord Griffiths, and with his warning that different considerations may apply where homes are not concerned.

62. In the instant case of ***Harris v. Wyre Forest District Council,*** I would allow the appeal of Mrs. and Mrs. Harris, restore the order of the trial judge and order the costs of Mr. and Mrs. Harris to be borne by the council. In the case of ***Smith v. Eric S. Bush,*** I would dismiss the appeal with costs.

LORD GRIFFITHS : My Lords,

63. These appeals were heard together because they both raise the same two problems. The first is whether the law places a duty of care upon a professional valuer of real property which he owes to the purchaser of the property although he has been instructed to value the property by a prospective mortgagee and not by the purchaser. The second problem concerns the construction and application of the Unfair Contract Terms Act 1977.

Smith v. Eric S. Bush (a firm)

64. I shall deal with this appeal first because its facts are similar to hundreds of thousands of house purchases that take place every year. It concerns the purchase of a house at the lower end of the market with the assistance of finance provided by a building society. The purchaser applies for finance to the building society. The building society is required by statute to obtain a valuation of the property before it advances any money (see section 13 of the Building Societies Act 1986). This requirement is to protect the depositors who entrust their savings to the building society. The building society therefore requires the purchaser to pay a valuation fee to cover or, at least, to defray the cost of obtaining a valuation. This is a modest sum and certainly much less than the cost of a full structural survey, in the present case it was £36.89. If the purchaser pays the valuation fee, the building society instructs a valuer who inspects the property and prepares a report for the building society giving his valuation of the property. The inspection carried out is a visual one designed to reveal any obvious defects in the property which must be taken into account when comparing the value of the property with other similar properties in the neighbourhood. If the valuation shows that the property provides adequate security for the loan, the building society will lend the. money necessary for the purchaser to go ahead, but prior to its repeal by the Building Societies Act 1986 would send to the purchaser a statutory notice pursuant to section 30 of the Building Societies Act 1962 to make clear that by making the loan it did not warrant that the purchase price of the property was reasonable.

65. The building society may either instruct an independent firm of surveyors to make the valuation or use one of its own employees. In the present case, the building society instructed the appellants, an independent firm of surveyors. I will consider whether it makes any difference if an "in-house" valuer is instructed when I come to deal with the other appeal. The building society may or may not send a copy of the valuer's report to the purchaser. In this case the building society was the Abbey National and they did send a copy of the report to the purchaser, Mrs. Smith. I understand that this is now common practice among building societies. The report, however, contained in red lettering and in the clearest terms a disclaimer of liability for the accuracy of the report covering both the building society and the valuer. Again, I understand that it is common practice for other building societies to incorporate such a disclaimer of liability.

66. Mrs. Smith did not obtain a structural survey of the property. She relied upon the valuer's report to reveal any obvious serious defects in the house she was purchasing. It is common ground that she was behaving in the same way as the vast majority of purchasers of modest houses. They do not go to the expense of obtaining their own structural survey, they rely on the valuation to reveal any obvious serious defects and take a chance that there are no hidden defects that might be revealed by a more detailed structural survey.

67. The valuer's report said "the property has been modernized to a fair standard ... no essential repairs are required" and it valued the property at £16,500. If reasonable skill and care had been employed when the inspection took place, it would have revealed that as a result of removing the chimney breasts in the rooms the chimneys had been left dangerously unsupported. Unaware of this defect and relying on the valuer's report, Mrs, Smith bought the house for £18,000 with the assistance of a loan of £3,500 from the building society.

68. After she had been living in the house for about 18 months, one of the chimney flues collapsed and crashed through the bedroom ceiling and floor causing damage for which Mrs. Smith was awarded £4,379.97 against the surveyors who had carried out the valuation.

69. Mr. Hague, on behalf of the surveyors, conceded that on the facts of this case the surveyors owed a duty of care to Mrs. Smith unless they were protected by the disclaimer of liability. He made this concession, he said, because the surveyors knew that their report was going to be shown to Mrs. Smith and that Mrs. Smith would, in all probability, rely upon it, which two factors would create the necessary proximity to found the duty of care. He submitted, however, that if the surveyor did not know that his report would be shown to the purchaser, no duty of care would arise and that the decision in ***Yianni v. Edwin Evans & Sons [***1982] Q.B. 438 was wrongly decided. I shall defer consideration of this question to the second appeal for it does not arise on the facts of the present case. Suffice it to say, for the moment, that on the facts of the present case it is my view that the concession made by Mr. Hague is correct.

70. At common law, whether the duty to exercise reasonable care and skill is founded in contract or tort, a party is as a general rule free, by the use of appropriate wording, to exclude liability for negligence in discharge of the duty. The disclaimer of liability in the present case is prominent and clearly worded and on the authority of ***Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd.*** [1964] A.C. 465, in so far as the common law is concerned effective to exclude the surveyors' liability for negligence. The question then is whether the Unfair Contract Terms Act 1977 bites upon such a disclaimer. In my view it does.

71. The Court of Appeal, however, accepted an argument based upon the definition of negligence contained in section 1(1) of the Act of 1977 which provides: *"For the purposes of this part of this Act, 'negligence' means the breach - (a) of any obligation, arising from the express or implied terms of a contract, to take reasonable care or exercise reasonable skill in the performance of the contract; (b) of any common law duty to take reasonable care or exercise reasonable skill (but not any stricter duty); (c) of the common duty of care imposed by the Occupiers' Liability Act 1957 or the Occupiers' Liability Act (Northern Ireland) 1957."*

72. They held that, as the disclaimer of liability would at common law have prevented any duty to take reasonable care arising between the parties, the Act had no application. In my view this construction fails to give due weight to the provisions of two further sections of the Act. Section 11(3) provides: *"In relation to a notice (not being a notice having contractual effect), the requirement of reasonableness under this Act is that it should be fair and reasonable to allow reliance on it, having regard to all the circumstances obtaining when the liability arose or (but for the notice) would have arisen."*

73. And section 13(1): *"To the extent that this part of this Act prevents the exclusion or restriction of any liability it also prevents - (a) making the liability or its enforcement subject to restrictive or onerous conditions; (b) excluding or restricting any right or remedy in respect of the liability, or subjecting a person to any prejudice in consequence of his purusing any such right or remedy; (c) excluding or restricting rules of evidence or procedure; and (to that extent) sections 2 and 5 to 7 also prevent excluding or restricting liability by reference to terms and notices which exclude or restrict the relevant obligation or duty."*

74. I read these provisions as introducing a "but for" test in relation to the notice excluding liability. They indicate that the existence of the common law duty to take reasonable care, referred to in section 1(1)(b), is to be judged by considering whether it would exist "but for" the notice excluding liability. The result of taking the notice into account when assessing the existence of a duty of care would result in removing all liability for negligent misstatements from the protection of the Act. It is permissible to have regard to the second report of the Law Commission on Exemption Clauses (Law. Com. No. 69) which is the genesis of the Unfair Contract Terms Act 1977 as an aid to the construction of the Act. Paragraph 127 of that report reads: *"Our recommendations in this part of the report are intended to apply to exclusions of liability for negligence where the liability is incurred in the course of a person's business. We consider that they should apply even in cases where the person seeking to rely on the exemption clause was under no legal obligation (such as a contractual obligation) to carry out the activities. This means that, for example, conditions attached to a licence to enter on to land, and disclaimers of liability made where information or advice is given, should be subject to control . . . . "*

75. I have no reason to think that Parliament did not intend to follow this advice and the wording of the Act is, in my opinion, apt to give effect to that intention. This view of the construction of the Act is also supported by the judgment of Slade L.J. in ***Phillips Products Ltd. v. Hyland (Note)*** [1987] 1 W.L.R. 659, when he rejected a similar argument in relation to the construction of a contractual term excluding negligence.

76. Finally, the question is whether the exclusion of liability contained in the disclaimer satisfies the requirement of reasonableness provided by section 2(2) of the Act of 1977. The meaning of reasonableness and the burden of proof are both dealt with in section 11(3) which provides: "*In relation to a notice (not being a notice having contractual effect), the requirement of reasonableness under this Act is that it should be fair and reasonable to allow reliance on it, having regard to all the circumstances obtaining when the liability arose or (but for the notice) would have arisen."*

77. It is clear, then, that the burden is upon the surveyor to establish that in all the circumstances it is fair and reasonable that he should be allowed to rely upon his disclaimer of liability.

78. I believe that it is impossible to draw up an exhaustive list of the factors that must be taken into account when a judge is faced with this very difficult decision. Nevertheless, the following matters should, in my view, always be considered.

1 Were the parties of equal bargaining power. If the court is dealing with a one-off situation between parties of equal bargaining power the requirement of reasonableness would be more easily discharged than in a case such as the present where the disclaimer is imposed upon the purchaser who has no effective power to object.

2 In the case of advice would it have been reasonably practicable to obtain the advice from an alternative source taking into account considerations of costs and time. In the present case it is urged on behalf of the surveyor that it would have been easy for the purchaser to have obtained his own report on the condition of the house, to which the purchaser replies, that he would then be required to pay twice for the same advice and that people buying at the bottom end of the market, many of whom will be young first-time buyers, are likely to be under considerable financial pressure without the money to go paying twice for the same service.

3 How difficult is the task being undertaken for which liability is being excluded. When a very difficult or dangerous undertaking is involved there may be a high risk of failure which would certainly be a pointer towards the reasonableness of excluding liability as a condition of doing the work. A valuation, on the other hand, should present no difficulty if the work is undertaken with reasonable skill and care. It is only defects which are observable by a careful visual examination that have to be taken into account and I cannot see that it places any unreasonable burden on the valuer to require him to accept responsibility for the fairly elementary degree of skill and care involved in observing, following-up and reporting on such defects. Surely it is work at the lower end of the surveyor's field of professional expertise.

4 What are the practical consequences of the decision on the question of reasonableness. This must involve the sums of money potentially at stake and the ability of the parties to bear the loss involved, which, in its turn, raises the question of insurance. There was once a time when it was considered improper even to mention the possible existence of insurance cover in a lawsuit. But those days are long past. Everyone knows that all prudent, professional men carry insurance, and the availability and cost of insurance must be a relevant factor when considering which of two parties should be required to bear the risk of a loss. We are dealing in this case with a loss which will be limited to the value of a modest house and against which it can be expected that the surveyor will be insured. Bearing the loss will be unlikely to cause significant hardship if it has to be borne by the surveyor but it is, on the other hand, quite possible that it will be a financial catastrophe for the purchaser who may be left with a valueless house and no money to buy another. If the law in these circumstances denies the surveyor the right to exclude his liability, it may result in a few more claims but I do not think so poorly of the surveyor's profession as to believe that the floodgates will be opened. There may be some increase in surveyors' insurance premiums which will be passed on to the public, but I cannot think that it will be anything approaching the figures involved in the difference between the Abbey National's offer of a valuation without liability and a valuation with liability discussed in the speech of my noble and learned friend, Lord Templeman. The result of denying a surveyor, in the circumstances of this case, the right to exclude liability, will result in distributing the risk of his negligence among all house purchasers through an increase in his fees to cover insurance, rather than allowing the whole of the risk to fall upon the one unfortunate purchaser.

79. I would not, however, wish it to be thought that I would consider it unreasonable for professional men in all circumstances to seek to exclude or limit their liability for negligence. Sometimes breathtaking sums of money may turn on professional advice against which it would be impossible for the adviser to obtain adequate insurance cover and which would ruin him if he were to be held personally liable. In these circumstances it may indeed be reasonable to give the advice upon a basis of no liability or possibly of liability limited to the extent of the adviser's insurance cover.

80. In addition to the foregoing four factors, which will always have to be considered, there is in this case the additional feature that the surveyor is only employed in the first place because the purchaser wishes to buy the house and the purchaser in fact provides or contributes to the surveyor's fees. No one has argued that if the purchaser had employed and paid the surveyor himself, it would have been reasonable for the surveyor to exclude liability for negligence, and the present situation is not far removed from that of a direct contract between the surveyor and the purchaser. The evaluation of the foregoing matters leads me to the clear conclusion that it would not be fair and reasonable for the surveyor to be permitted to exclude liability in the circumstances of this case. I would therefore dismiss this appeal.

81. It must, however, be remembered that this is a decision in respect of a dwelling house of modest value in which it is widely recognised by surveyors that purchasers are in fact relying on their care and skill. It will obviously be of general application in broadly similar circumstances. But I expressly reserve my position in respect of valuations of quite different types of property for mortgage purposes, such as industrial property, large blocks of flats or very expensive houses. In such cases it may well be that the general expectation of the behaviour of the purchaser is quite different. With very large sums of money at stake prudence would seem to demand that the purchaser obtain his own structural survey to guide him in his purchase and, in such circumstances with very much larger sums of money at stake, it may be reasonable for the surveyors valuing on behalf of those who are providing the finance either to exclude or limit their liability to the purchaser.

Harris and Another v. Wyre Forest District Council and Another

82. The Housing (Financial Provisions) Act 1958 (as amended by the Local Government Act 1974) gave power to local authorities to lend money for house purchase. Section 43 of the Act of 1958 provided, inter alia, that before making the loan the local authority had to satisfy themselves that the house was, or would after repair, be fit for human habitation. The local authority were also required to secure the loan by way of a mortgage on the property and only to make the loan after they had obtained a valuation of the property made on their behalf.

83. The appellants, Mr. and Mrs. Harris, two young first-time buyers, applied to the first respondents, Wyre Forest District Council, for a loan to enable them to purchase a small old house in Kidderminster. The asking price of the house was £9,450. Mr. and Mrs. Harris completed an application form to the council seeking a loan of £8,950. The application form contained the following paragraphs:

"To be read carefully and signed personally by all applicants

"I/we enclose herewith valuation fee & administration fee £22.00. I/we understand that this fee is not returnable even if the council do not eventually make an advance and that the valuation is confidential and is intended solely for the information of Wyre Forest District Council in determining what advance, if any, may be made on the security and that no responsibility whatsoever is implied or accepted by the council for the value or condition of the property by reason of such inspection and report. (You are advised for your own protection to instruct your own surveyor/architect to inspect the property). "I/we agree that the valuation report is the property of the council and that I/we cannot require its production."

84. When the council had received their application and their cheque for £22, they instructed the second respondent, Mr. Lee, a valuation surveyor in the council's employment, to inspect and value the house. Mr. Lee inspected the house and prepared a report in which he valued the property at the asking price of £9,450 and under the head *"Essential Repairs"* he entered "*Obtain report for district council from M.E.B. [Midland Electricity Board] regarding electrics and carry out any recommendations"* and *"Make good mortar fillets to extension.*" We were told that the entry in respect of the electrical installation is one that is standard in all councils' reports and it would seem the only other essential repair was a minor matter relating to mortar fillets in the extension. No other defects of any sort were noted on the report.

85. This report was not shown to Mr. and Mrs. Harris, but having received the report, the council made them an offer of a loan of £8,505 secured by a mortgage on the property on condition that they undertook to carry out the electrical work and the repair of the mortar fillets in the extension as recommended by the valuer to the satisfaction of the council. The Harrises accepted the offer and bought the house for £9,000.

86. Unfortunately, Mr. Lee had failed to report that the house had suffered from serious settlement which required inspection by a structural engineer. When the Harrises tried to sell the house three years later, the prospective purchaser also applied to the council for a loan and Mr. Lee was again sent to inspect the house. On this occasion he reported the settlement and recommended that a structural engineer's report should be obtained before any loan was made. In due course, a structural engineer's report revealed that the house was in a dangerous and unstable condition and that the cost of repairs would be many thousands of pounds. In fact, damages, subject to liability, were agreed at £12,000. Obviously, had Mr. Lee reported in his first report in the same terms as he did in his second report, the Harrises would never have bought the house. The judge held that Mr. Lee was negligent in the making of his first report and there is no appeal from that finding of fact.

87. For the reasons that I have already given, the disclaimer of liability must be disregarded when considering whether the council or Mr. Lee owed any duty of care to Mr. and Mrs. Harris. Mr. Ashworth has submitted that they did not because there was no voluntary assumption of responsibility on their part in respect of Mr. Lee's inspection and report. He submits that ***Yianni v. Edwin Evans & Sons*** [1982] Q.B. 438 was wrongly decided. That case was the first of a number of decisions, at first instance, in which surveyors instructed by mortgagees have been held liable to purchasers for negligent valuations. The facts were that the plaintiffs, who wished to buy a house at a price of £15,000, applied to a building society for a mortgage. The building society engaged a firm of valuers to value the property for which the plaintiffs had to pay. There was no disclaimer of liability although the mortgage application form advised the plaintiffs to obtain an independent survey. They did not do so because of the cost involved. The surveyors valued the property at £15,000 and assessed it as suitable for maximum lending. The building society offered the plaintiffs a maximum loan of £12,000 with which they purchased the property. There was serious damage to the house caused by subsidence which should have been discovered by the surveyors at the time of their inspection and it was admitted that the surveyors had been negligent.

88. In that case there was no disclaimer of liability and the valuer's report was not shown to the purchaser. Ignoring the disclaimer of liability, the facts are virtually indistinguishable from the present case unless it can be said that the fact that Mr. Lee was an in-house valuer can make a difference when considering the existence of his duty of care to the purchaser. Park J. said, at p. 454: *"... I conclude that, in this case, the duty of care would arise if, on the evidence, I am satisfied that the defendants knew that their valuation of 1, Seymour Road, in so far as it stated that the property provided adequate security for an advance of £12,000, would be passed on to the plaintiffs, who ... in the defendants' reasonable contemplation would place reliance upon its correctness in making their decision to buy the house and mortgage it to the building society."*

89. Finding both these conditions satisfied, Park J. held the surveyors to be liable.

90. Mr. Ashworth drew attention to the doubts expressed about the correctness of this decision by Kerr L.J., in the course of his judgment in the Court of Appeal, and submitted, on the authority of ***Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd. [***1964] A.C. 465 that it was essential to found liability for a negligent misstatement that there had been "a voluntary assumption of responsibility" on the part of the person giving the advice. I do not accept this submission and I do not think that voluntary assumption of responsibility is a helpful or realistic test for liability. It is true that reference is made in a number of the speeches in ***Hedley Byrne*** to the assumption of responsibility as a test of liability but it must be remembered that those speeches were made in the context of a case in which the central issue was whether a duty of care could arise when there had been an express disclaimer of responsibility for the accuracy of the advice. Obviously, if an adviser expressly assumes responsibility for his advice, a duty of care will arise, but such is extremely unlikely in the ordinary course of events. The House of Lords approved a duty of care being imposed on the facts in ***Cann v. Willson*** (1888) 39 Ch.D. 39 and in ***Candler v. Crane, Christmas & Co.*** [1951] 2 K.B. 164. But if the surveyor in ***Cann v. Willson*** or the accountant in ***Candler v. Crane, Christmas & Co.*** had actually been asked if he was voluntarily assuming responsibility for his advice to the mortgagee or the purchaser of the shares, I have little doubt he would have replied, *"Certainly not. My responsibility is limited to the person who employs me."* The phrase "*assumption of responsibility*" can only have any real meaning if it is understood as referring to the circumstances in which the law will deem the maker of the statement to have assumed responsibility to the person who acts upon the advice.

91. In ***Ministry of Housing and Local Government v. Sharp*** [1970] 2 Q.B. 223, both Lord Denning M.R. and Salmon L.J. rejected the argument that a voluntary assumption of responsibility was the sole criterion for imposing a duty of care for the negligent preparation of a search certificate in the local land charges register.

92. The essential distinction between the present case and the situation being considered in ***Hedley Byrne*** [1964] A.C. 465 and in the two earlier cases, is that in those cases the advice was being given with the intention of persuading the recipient to act upon it. In the present case, the purpose of providing the report is to advise the mortgagee but it is given in circumstances in which it is highly probable that the purchaser will in fact act on its contents, although that was not the primary purpose of the report. I have had considerable doubts whether it is wise to increase the scope of the duty for negligent advice beyond the person directly intended by the giver of the advice to act upon it to those whom he knows may do so. Certainly in the field of the law of mortgagor and mortgagee there is authority that points in the other direction. In ***Odder v. Westbourne Park Building Society*** (1955) 165 E.G. 261, Harman J. held that a building society owed no duty of care to purchasers in respect of the valuation report for mortgage purposes prepared by the chairman of the society. From the tenor of the short report it appears that Harman J. regarded it as unthinkable that a mortgagee could owe a duty of care to the mortgagor in respect of any action taken by the mortgagee for the purpose of appraising the value of the property. In ***Curran v. Northern Ireland Co-ownership Housing Association Ltd.*** (1986) 8 N.I.J.B. 1, the Court of Appeal in Northern Ireland held that the Northern Ireland Housing Executive, which had lent money on mortgage pursuant to powers contained in the Housing Act (Northern Ireland) 1971, owed no duty of care to their mortgagor in respect of the valuation of the property. The claim against the executive had been struck out by the judge on the ground that the pleadings disclosed no cause of action. For the purpose of the appeal, the following facts were assumed, that (1) the executive had instructed an independent valuer to prepare a valuation of the property; (2) the valuation had been negligently prepared; (3) the executive had negligently instructed an incompetent valuer; (4) the valuer's report would not be shown to the purchaser; (5) the purchaser knew that the executive would not lend money without a valuation to justify the loan; (6) the executive knew that the purchaser would assume that the valuation showed that the property was worth at least as much as the figure which the executive was willing to advance on mortgage, and that the purchaser would rely on the valuation to that extent. Gibson L.J. based his judgment on the absence of any acceptance of responsibility on the part of the executive. In the course of his judgment he said, at p. 14: *"Responsibility can only attach if the defendant's act implied a voluntary undertaking to assume responsibility. Were it otherwise a person who offered to an expert any object for sale, making it clear that he was unaware of its value and that he was relying on the other to pay a proper price, could sue the other should he later discover that he had not received the full value even though the purchaser had made no representation that he was doing any more than look after his own interests. Nor can any class of persons who to the knowledge of another habitually fail to take precautions for their own protection in a business relationship cast upon another without his consent an obligation to exercise care for their protection in such transaction so as to protect them from their own lack of ordinary business prudence. Generally, a mortgage contract in itself imports no obligation on the part of a mortgagee to use care in protecting the interests of a mortgagor. . . .*

93. Gibson L.J. said, at p. 21: *"But in so far as the facts of this case are clearly within the area of contemplation in the* ***Hedley Byrne*** *case, I have no doubt that the condition precedent to liability is that the executive should have indicated to the plaintiffs, or so acted as to mislead them into believing, that the executive was accepting responsibility for its opinion."*

94. Commenting on ***Yianni v. Edwin Evans & Sons*** [1982] Q.B. 438, Kerr L.J. in his judgment in the Court of Appeal in the present case [1988] Q.B. 835, 851-852, said: *"But its inherent jurisprudential weakness in any ordinary situation is clear. Suppose that A approaches B with a request for a loan to be secured on a property or chattel - such as a painting - which A is proposing to acquire. A knows that for the purpose of considering whether or not to make the requested loan, and of its amount, B is bound to make some assessment of the value of the security which is offered, possibly on the basis of some expert inspection and formal valuation. Then assume that B knows that in all probability A will not have had any independent advice or valuation and is also unlikely to commission anything of the kind as a*

check on B's valuation. B also knows, of course, that any figure which he may then put forward to A by way of a proposed loan on the basis of the offered security will necessarily be seen to reflect B's estimate of the minimum value of the offered security. Suppose that A then accepts B's offer and acquires the property or chattel with the assistance of B's loan and in reliance - at least in part – on B's willingness to advance the amount of the loan as an indication of the value of the property or chattel. Given those facts and no more, I do not think that B can properly be regarded as having assumed, or as being subjected to, any duty of care towards A in his valuation of the security. Even in the absence of any disclaimer of responsibility I do not think that the principles stated in ***Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd.*** *[1964] A.C. 465 support the contrary conclusion. B has not been asked for advice or information but merely for a loan. His valuation was carried out for his own commercial purposes. If it was done carelessly, with the result that the valuation and loan were excessive, I do not think that A can have any ground for complaint. And if B made a small service charge for investigating A's request for a loan, I doubt whether the position would be different; certainly not if he were also to add a disclaimer of responsibility and a warning that A should carry out his own valuation."*

95. Kerr L.J., however, added: *"It may be, but I agree that we should not decide this general question on the present appeal, that the particular circumstances of purchasers of houses with the assistance of loans from building societies or local authorities are capable of leading to a different analysis and conclusion."*

96. I have come to the conclusion that ***Yianni*** [1982] Q.B. 438 was correctly decided. I have already given my view that the voluntary assumption of responsibility is unlikely to be a helpful or realistic test in most cases. I therefore return to the question in what circumstances should the law deem those who give advice to have assumed responsibility to the person who acts upon the advice or, in other words, in what circumstances should a duty of care be owed by the adviser to those who act upon his advice? I would answer - only if it is foreseeable that if the advice is negligent the recipient is likely to suffer damage, that there is a sufficiently proximate relationship between the parties and that it is just and reasonable to impose the liability. In the case of a surveyor valuing a small house for a building society or local authority, the application of these three criteria leads to the conclusion that he owes a duty of care to the purchaser. If the valuation is negligent and is relied upon damage in the form of economic loss to the purchaser is obviously foreseeable. The necessary proximity arises from the surveyor's knowledge that the overwhelming probability is that the purchaser will rely upon his valuation, the evidence was that surveyors knew that approximately 90 per cent. of purchasers did so, and the fact that the surveyor only obtains the work because the purchaser is willing to pay his fee. It is just and reasonable that the duty should be imposed for the advice is given in a professional as opposed to a social context and liability for breach of the duty will be limited both as to its extent and amount. The extent of the liability is limited to the purchaser of the house - I would not extend it to subsequent purchasers. The amount of the liability cannot be very great because it relates to a modest house. There is no question here of creating a liability of indeterminate amount to an indeterminate class. I would certainly wish to stress that in cases where the advice has not been given for the specific purpose of the recipient acting upon it, it should only be in cases when the adviser knows that there is a high degree of probability that some other identifiable person will act upon the advice that a duty of care should be imposed. It would impose an intolerable burden upon those who give advice in a professional or commercial context if they were to owe a duty not only to those to whom they give the advice but to any other person who might choose to act upon it.

97. I accept that the mere fact of a contract between mortgagor and mortgagee will not of itself in all cases be sufficent to found a duty of care. But I do not accept the view of the Court of Appeal in ***Curran v. Northern Ireland Co-ownership Housing Association Ltd.*** (1986) 8 N.I.J.B. 1 that a mortgagee who accepts a fee to obtain a valuation of a small house owes no duty of care to the mortgagor in the selection of the valuer to whom he entrusts the work. In my opinion, the mortgagee in such a case, knowing that the mortgagor will rely upon the valuation, owes a duty to the mortgagor to take reasonable care to employ a reasonably competent valuer. Provided he does this the mortgagee will not be held liable for the negligence of the independent valuer who acts as an independent contractor.

98. I have already pointed out that the only real distinction between the present case and the case of ***Yianni*** [1982] Q.B. 438, is that the valuation was carried out by an in-house valuer. In my opinion this can make no difference. The valuer is discharging the duties of a professional man whether he is employed by the mortgagee or acting on his own account or is employed by 'a firm of independent surveyors. The essence of the case against him is that he as a professional man realised that the purchaser was relying upon him to exercise proper skill and judgment in his profession and that it was reasonable and fair that the purchaser should do so. Mr. Lee was in breach of his duty of care to the Harrises and the local authority, as his employers, are vicariously liable for that negligence.

99. For reasons that are essentially the same as those I considered in the other appeal, I would hold that it is not reasonable to allow the local authority or Mr. Lee to rely upon the exclusion of liability. Accordingly, I would allow this appeal.

LORD JAUNCEY OF TULLICHETTLE : My Lords,

100. These two appeals raise the important issue of the extent to which a valuer instructed by a mortgagee owes a duty of care to a potential mortgagor whom he knows will be shown in some shape or form the results of his valuation prior to purchasing the property in question.

Smith v. Eric S. Bush (a firm)

101. (1) Mrs. Smith applied to the Abbey National Building Society for a mortgage to enable her to purchase a house. The building society in pursuance of its statutory duty under section 25 of the Building Societies Act 1962 (now section 13 of the Building Societies Act 1986) instructed the appellants, a firm of surveyors and valuers to prepare a written report as to the value of the house. Mrs. Smith paid to the building society a fee in respect of this report. Mrs. Smith's application to the building society contained a disclaimer of liability by them on behalf of the appellants, which disclaimer she acknowledged. Thereafter the building society sent to Mrs. Smith a copy of the report and informed her that her application had been accepted. Both the copy report and the letter drew attention to the fact that the report was not to be taken as a structural survey. The report stated that the surveyor had made the report without any acceptance of responsibility to Mrs. Smith and the letter advised her to obtain independent professional advice. Thereafter, without obtaining an independent valuation, Mrs. Smith purchased the house which later proved to be structurally defective to a material extent. The surveyor, who was a member of the appellant firm, was found to be negligent in failing to discover and report upon the defect. He was at all material times aware that his report would be shown to Mrs. Smith, that she would be likely to place reliance upon it in deciding whether to buy the house and that his fee derived from a payment by her to the building society.

102. Three questions arise, namely:-
1 Whether in the absence of the disclaimers of liability the appellants owed a duty to Mrs. Smith;
2 If so, whether the disclaimers fell within the ambit of the Unfair Contract Terms Act 1977; and
3 If they did, whether they satisfied the requirements of reasonableness.

103. Since ***Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd. [***1964] A.C. 465, it has been beyond doubt that in certain circumstances A may be liable to B in tort in respect of a negligent statement causing economic loss to B. In considering whether such circumstances exist in the present case I propose, before looking at ***Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd.*** to look at two earlier cases. In ***Cann v. Willson*** (1888) 39 Ch. D. 39 an intending mortgagor, at the request of the solicitor of an intending mortgagee, applied to a firm of valuers for a valuation of the property in question. The valuers sent the valuation, which subsequently turned out to be wholly inept, to the mortgagee's solicitors knowing that it was required for the purpose of an advance. When the mortgagor defaulted the property was found to be worth far less than the valuation whereby the mortgagee suffered loss. In an action by the mortgagees against the valuer Chitty J. said, at p. 42:- *"In this case the document called a valuation was sent by the defendants direct to the agents of the plaintiff for the purpose of inducing the plaintiff and his co-trustee to lay out the trust money on mortgage. It seems to me that the defendants knowingly placed themselves in that position, and in point of law incurred a duty towards him to use reasonable care in the preparation of the document called a valuation."*

104. In ***Candler v. Crane, Christmas & Co.*** [1951] 2 K.B. 164 accountants were in the course of preparing the accounts of a company. They were instructed to press on and complete them so that they might be shown to the plaintiff who, they were informed, was a potential investor. A clerk of the accountants prepared the accounts and at the request of the company discussed these with the plaintiff who, relying thereon, invested money in the company. In the event the accounts gave a wholly misleading picture of the state of the company and the plaintiff sustained loss. In a dissenting judgment which was subsequently approved in ***Hedley Byrne & Co. Ltd v. Heller & Partners Ltd. [***1964] A.C. 465, Denning L.J., after suggesting that professional persons such as accountants, surveyors and valuers, might in certain circumstances owe a duty apart from contract to use care in their reports and in the work from which they resulted said, at pp. 180- 181: *"Secondly, to whom do these professional people owe this duty? I will take accountants, but the same reasoning applies to the others. They owe the duty, of course, to their employer or client; and also I think to any third person to whom they themselves show the accounts, or to whom they know their employer is going to show the accounts, so as to induce him to invest money or take some other action on them. But I do not think the duty can be extended still further so as to include strangers of whom they have heard nothing and to whom their employer without their knowledge may choose to show their accounts. Once the accountants have handed their accounts to their employer they are not, as a rule, responsible for what he does with them without their knowledge or consent. . . The test of proximity in these cases is: did the accountants know that the accounts were required for submission to the plaintiff and use by him? That appears from the case of* ***Langridge v. Levy*** *[(1837) 2 M. & W. 519] as extended by Cleasby, B. in* ***George v. Skivington;*** *[(1869) L.R. 5 Ex. 1, 5] and from the decision of that good judge, Chitty, J., in* ***Cann v. Willson,*** *[(1888) 39 Ch. D. 39] which is directly in point."*

105. Denning L. J. said, at p. 183: *"It will be noticed that I have confined the duty to cases where the accountant prepares his accounts and makes his report for the guidance of the very person in the very transaction in question. That is sufficient for the decision of this case. I can well understand that it would be going too far to make an accountant liable to any person in the land who chooses to rely on the accounts in matters of business, for that would expose him to 'liability in an indeterminate amount for an indeterminate time to an indeterminate class': see* ***Ultramares Corporation v. Touche*** *[(1951) 255 N.Y. Rep. 170] per Cardozo, C.J."*

106. In ***Hedley Byrne & Co. Ltd v. Heller & Partners Ltd.*** [1964] A.C. 465, bankers who were asked about the financial stability of one of their customers gave favourable references but stipulated that these were "*without responsibility.*" The plaintiffs on whose behalf the information had been sought relied on the references and thereby suffered loss. They sued the bank. Lord Reid said, at p. 486: *"A reasonable man, knowing that he was being trusted or that his skill and judgment were being relied on, would, I think, have three courses open to him. He could keep silent or decline to give the information or advice sought: or he could give an answer with a clear qualification that he accepted no responsibility for it or that it was given without that reflection or inquiry which a*

careful answer would require: or he could simply answer without any such qualification. If he chooses to adopt the last course he must, I think, be held to have accepted some responsibility for his answer being given carefully, or to have accepted a relationship with the inquirer which requires him to exercise such care as the circumstances require."

107. Lord Reid said, at p. 487 with reference to ***Candler v. Crane, Christmas & Co*** [1951] 2 K.B. 164: *"This seems to me to be a typical case of agreeing to assume responsibility."* Lord Morris of Borth-y-Gest said, at pp. 494-495:*"My Lords, it seems to me that if A assumes a responsibility to B to tender him deliberate advice, there could be a liability if the advice is negligently given. I say 'could be' because the ordinary courtesies and exchanges of life would become impossible if it were sought to attach legal obligation to every kindly and friendly act .... Quite apart, however, from employment or contract there may be circumstances in which a duty to exercise care will arise if a service is voluntarily undertaken."*

108. He further stated, at p. 497: *"Leaving aside cases where there is some contractual or fudiciary relationship, there may be many situations in which one person voluntarily or gratuitously undertakes to do something for another person and becomes under a duty to exercise reasonable care. I have given illustrations. But apart from cases where there is some direct dealing there may be cases where one person issues a document which should be the result of an exercise of the skill and judgment required by him in his calling and where he knows and intends that its accuracy will be relied upon by another."*

109. He further stated at pp. 502-503: "*My Lords, I consider that it follows and that it should now be regarded as settled that if someone possessed of a special skill undertakes, quite irrespective of contract, to apply that skill for the assistance of another person who relies upon such skill, a duty of care will arise. The fact that the service is to be given by means of or by the instrumentality of words can make no difference. Furthermore, if in a sphere in which a person is so placed that others could reasonably rely upon his judgment or his skill or upon his ability to make careful inquiry, a person takes it upon himself to give information or advice to, or allows his information or advice to be passed on to, another person who, as he knows or should know, will place reliance upon it, then a duty of care will arise."*

110. Lord Devlin, after posing the question, at p. 525 *"is the relationship between the parties in this case such that it can be brought within a category giving rise to a special duty?"* referred to a number of cases and continued at pp. 528-529: *"I think, therefore, that there is ample authority to justify your Lordships in saying now that the categories of special relationships which may give rise to a duty to take care in word as well as in deed are not limited to contractual relationships or to relationships of fiduciary duty, but include also relationships which in the words of Lord Shaw in* ***Nocton v. Lord Ashburton*** *[(1914) A.C. 932, 972] are 'equivalent to contract,' that is, where there is an assumption of responsibility in circumstances which, but for the absence of consideration, there would be a contract. Where there is an express undertaking, an express warranty as distinct from mere representation, there can be little difficulty. The difficulty arises in discerning those cases in which the undertaking is to be implied. In this respect the absence of consideration is not irrelevant. Payment for information or advice is very good evidence that it is being relied upon and that the informer or adviser knows that it is. ... "I do not understand any of your Lordships to hold that it is a responsibility imposed by law upon certain types of persons or in certain sorts of situations. It is a responsibility that is voluntarily accepted or undertaken, either generally where a general relationship, such as that of solicitor and client or banker and customer, is created, or specifically in relation to a particular transaction. In the present case the appellants were not, as in* ***Woods v. Martins Bank Ltd*** *[[1959] 1 Q.B. 55] the customers or potential customers of the bank. Responsibility can attach only to the single act, that is, the giving of the reference, and only if the doing of that act implied a voluntary undertaking to assume responsibility."*

111. Lord Devlin summarised his conclusions at p. 530: *"I shall therefore content myself with the proposition that wherever there is a relationship equivalent to contract, there is a duty of care. Such a relationship may be either general or particular. Examples of a general relationship are those of solicitor and client and of banker and customer .... Where, as in the present case, what is relied on is a particular relationship created ad hoc, it will be necessary to examine the particular facts to see whether there is an express or implied undertaking of responsibility. I regard this proposition as an application of the general conception of proximity."*

112. There are a number of references in the speeches in ***Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd.*** to voluntary assumption of responsibility. Although in that case the respondent bankers gave the financial reference without payment, I do not understand that "voluntary" was intended to be equiparated with "gratuitous." Rather does it refer to a situation in which the individual concerned, albeit under no obligation in law to assume responsibility, elected so to do. This is, I think, made clear by Lord Devlin's reference to the responsibility voluntarily undertaken by a solicitor to his client.

113. Here the building society had a statutory duty under section 25 of the Building Societies Act 1962 to satisfy itself as to the adequacy of the security of any advance to be made and for that purpose to obtain "a written report prepared and signed by a competent and prudent person who is experienced in the matters relevant to the determination of the value". In pursuance of that duty the building society instructed the appellants who, by accepting these instructions, not only entered into contractual relations with the building society but also came under a duty in tort to it to exercise reasonable care in carrying out their survey and preparing their report. To that extent they were in no different position to that of any other professional person who has accepted instructions to act on behalf of a client. However there were certain other factors present which must be taken into account. In the first place, the appellants were aware that their report would be made available to Mrs. Smith. In the second place they were aware that she would probably rely upon the contents of the report in deciding

whether or not to proceed with the purchase of the house and that she would be unlikely to obtain an independent valuation. In the third place they knew that she had at the time of the mortgage application paid to the building society an inspection fee which would be used to defray their fee. In these circumstances would the appellants in the absence of disclaimers of responsibility have owed a duty of care to Mrs. Smith?

114. In each of the three cases to which I have referred there was direct contact between the negligent provider of information on the one hand and the plaintiff or his agent on the other. In ***Cann v. Willson*** (1888) 39 Ch. D. 39, the sole purpose of the valuation was to enable the intending mortgagor to obtain a mortgage over the property value. In ***Candler v. Crane, Chrismas & Co.*** [1951] 2 K.B. 164, although the accounts were prepared for the benefit of the company, the discussion between the accountants' clerk and the plaintiff was for the sole purpose of enabling the latter to decide whether or not to invest in the company. Chitty J. and Denning L.J. referred to the valuation being sent and the accounts being shown and discussed for the purpose of inducing the plaintiff to do something. In ***Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd.*** [1964] A.C. 465, the information was provided to satisfy the inquiry made on behalf of the plaintiff. In the present case there was no direct contact between the appellants and Mrs. Smith and their sole purpose in preparing their report was to enable the building society to fulfil its statutory obligation. There are thus points of important distinction between the facts of this case and those of the other three. However, that does not necessarily mean that a different result must follow. The question must always be whether the particular facts disclose that there is a sufficiently proximate relationship between the provider of information and the person who has acted on that information to his detriment, such that the former owes a duty of care to the latter.

115. It is tempting to say that in this case the relationship between Mrs. Smith and the appellants was, in the words of Lord Shaw of Dunfermline quoted by Lord Devlin in ***Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd.,*** "equivalent to contract" inasmuch as she paid for the appellants' report. However, I do not think that Lord Devlin, when he used those words, had in mind the sort of tripartite situation which obtained here, but rather was he considering a situation where the provider and receiver of information were in contact with one another either directly or through their agents, and where, but for the lack of payment, a contract would have existed between them. In the present case a contract existed between the building society and the appellants who carried out their inspection and produced their report in pursuance of that contract. There was accordingly no room for a contract between Mrs. Smith and the appellants. I prefer to approach the matter by asking whether the facts disclose that the appellants in inspecting and reporting must, but for the disclaimers, by reason of the proximate relationship between them, be deemed to have assumed responsibility towards Mrs. Smith as well as to the building society who instructed them.

116. There can be only an affirmative answer to this question. The four critical facts are that the appellants knew from the outset:
1 That the report would be shown to Mrs. Smith;
2 That Mrs. Smith would probably rely on the valuation contained therein in deciding whether to buy the house without obtaining an independent valuation;
3 That if, in these circumstances, the valuation was, having regard to the actual condition of the house, excessive Mrs. Smith would be likely to suffer loss; and
4 That she had paid to the building society a sum to defray the appellants' fee.

117. In the light of this knowledge the appellants could have declined to act for the building society, but they chose to proceed. In these circumstances they must be taken not only to have assumed contractual obligations towards the building society but delictual obligations towards Mrs. Smith, whereby they became under a duty towards her to carry out their work with reasonable care and skill. It is critical to this conclusion that the appellants knew that Mrs. Smith would be likely to rely on the valuation without obtaining independent advice. In both ***Candler v. Crane, Christmas & Co.*** [1951] 2 K.B. 164 and ***Hedley Byrne & Co Ltd. v. Heller & Partners Ltd.*** [1964] A.C. 465 the provider of the information was the obvious and most easily available, if not the only available, source of that information. It would not be difficult therefore to conclude that the person who sought such information was likely to rely upon it. In the case of an intending mortgagor the position is very different since, financial considerations apart, there is likely to be available to him a wide choice of sources of information, to wit, independent valuers to whom he can resort, in addition to the valuer acting for the mortgagee. I would not therefore conclude that the mere fact that a mortgagee's valuer knows that his valuation will be shown to an intending mortgagor of itself imposes upon him a duty of care to the mortgagor. Knowledge, actual or implied, of the mortgagor's likely reliance upon the valuation must be brought home to him. Such knowledge may be fairly readily implied in relation to a potential mortgagor seeking to enter the lower end of the housing market but non constat that such ready implication would arise in the case of a purchase of an expensive property whether residential or commercial. Mr. Hague for the appellants conceded that if there had been no disclaimer they must fail. For the reasons which I have just given I consider that this concession was rightly made.

118. I would only add three further matters in relation to this part of the case. In the first place the duty of care owed by the appellants to Mrs. Smith resulted from the proximate relationship between them arising in the circumstances hereinbefore described. Such duty of care was accordingly limited to Mrs. Smith and would not extend to "strangers" (to use the words of Denning L.J. in ***Candler v. Crane Christmas & Co.*** [1951] 2 K.B. 164, 180) who might subsequently derive a real interest in the house from her. In the second place the fact that A is prepared to lend money to B on the security of property owned by or to be acquired by him cannot per se impose upon A any duty of care to B. Much more is required. Were it otherwise a loan by A to B on the security

of property, real or personal, would ipso facto amount to a warranty by A that the property was worth at least the sum lent. In the third place the sum sought by Mrs. Smith as a mortgage was relatively small and represented only a small proportion of the purchase price. The house with all its defects was worth substantially more than that sum, and had the report merely stated that the house was adequate security for that sum, Mrs. Smith would have had no complaint. However, the report contained a "mortgage valuation" of the house, which valuation wholly failed to reflect the structural defect. It is that valuation of which Mrs. Smith is entitled to complain.

119. (2) The next question is whether the disclaimers by and on behalf of the appellants fall within the ambit of the Unfair Contracts Act 1977. In ***Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd.*** [1964] A.C. 465, it was held that the disclaimer of responsibility made by the defendant bankers when giving the reference negatived any assumption by them of a duty of care towards the plaintiff. If the circumstances of this case had arisen before 1977 there can be no doubt that the disclaimers would have been effective to negative such an assumption of responsibility. Has the Act of 1977 altered the position? The relevant statutory provisions are sections 2(2), 11(3) and 13(1):

"2(2). In the case of other loss or damage, a person cannot so exclude or restrict his liability for negligence except in so far as the term or notice satisfies the requirement of reasonableness. . . .

"11(3) In relation to a notice (not being a notice having contractual effect), the requirement of reasonableness under this Act is that it should be fair and reasonable to allow reliance on it, having regard to all the circumstances obtaining when the liability arose or (but for the notice) would have arisen ....

"13(1) To the extent that this Part of this Act prevents the exclusion or restriction of any liability it also prevents - (a) making the liability or its enforcement subject to restrictive or onerous conditions; (b) excluding or restricting any right or remedy in respect of the liability, or subjecting a person to any prejudice in consequence of his pursuing any such right or remedy; (c) excluding or restricting rules of evidence or procedure; and (to that extent) sections 2 and 5 to 7 also prevent excluding or restricting liability by reference to terms and notices which exclude or restrict the relevant obligation or duty."

120. In the other appeal, ***Harris v. Wyre Forest District Council*** [1988] Q.B. 835, the Court of Appeal held that the Act of 1977 did not apply. Nourse L.J. at p. 848, accepted the defendant's argument that a notice which prevented a duty of care from coming into existence was not one upon which section 2(2) bit. Kerr L.J., said at p. *"For these reasons I agree with the judgments of Nourse L.J. and Caulfield J. that the effect of the Unfair Contract Terms Act 1977 on the disclaimer of responsibility and warning is of no relevance to the present case. One never reaches that issue, since it arises only if the existence of a duty of care and a breach of it have first been established."*

121. Mr. Ashworth in the **Harris** appeal supported the reasoning of the Court of Appeal and argued that the Act only applied to a disclaimer which operated after a breach of duty had occurred. Mr. Hague in this appeal adopted Mr. Ashworth's argument.

122. My Lords, with all respect to the judges of the Court of Appeal, I think that they have overlooked the importance of section 13(1). The words *"liability for negligence"* in section 2(2) must be read together with section 13(1) which states that the former section prevents the exclusion of liability by notices "*which exclude or restrict the relevant obligation or duty.*" These words are unambiguous and are entirely appropriate to cover a disclaimer which prevents a duty coming into existence. It follows that the disclaimers here given are subject to the provisions of the Act and will therefore only be effective if they satisfy the requirement of reasonableness.

123. I have had the advantage of reading in draft the speech of my noble and learned friend Lord Griffiths, and I gratefully adopt his reasons for concluding that the disclaimers did not satisfy the statutory requirement of reasonableness. I cannot usefully add anything to what he has said upon this matter.

124. For the foregoing reasons I would dismiss this appeal.

Harris v. Wyre Forest District Council and Another

125. Mr. and Mrs. Harris, two young people who were at the time contemplating matrimony, applied to the council for a mortgage over a house which they wished to buy. At the time, local authorities were empowered by section 43 (as amended) of the Housing (Financial Provisions) Act 1958 (as amended by section 37 of the Local Government Act 1974), to advance money up to a sum not exceeding the value of the security for house purchase. Before making an advance the local authority was required to satisfy itself that the house was or would be made in all respects fit for human habitation and have a valuation made.

126. The Harrises submitted their application form together with a "valuation fee and administration fee" of £22. The form contained an acknowledgment that the council accepted no responsibility for the value or condition of the house by reason of the inspection report. The council instructed the second respondent, Mr. Lee, a valuer in their employment, to inspect the house and report. Mr. Lee valued the house at the asking price of £9,450, recommended that the maximum loan should be 90 per cent, of the value and under the heading of "Essential Repairs" stated "Obtain report for district council from M.E.B. [Midland Electricity Board] regarding electrics and carry out any recommendations. Make good mortar fillets to extension." Mr. Lee's report was not shown to the Harrises but they were subsequently offered, by the council, an advance of £8,505 on condition, inter alia, that they carried out the essential repairs above referred to. Relying on this offer and without obtaining other advice as to value, the Harrises bought the house. Unfortunately there were present serious structural defects in the house

which Mr. Lee had not referred to and which materially reduced its value. As a result of the defects the Harrises suffered loss.

127. The foregoing is a summary of the relevant facts and I turn to examine in more detail those facts which determine whether or not Mr. Lee owed a duty of care to the Harrises. He knew that the report would not be sent to the Harrises but that they would be told the amount of any advance and would be told of any repairs which he considered to be essential. He also knew that the Harrises were likely to be first-time buyers of modest means. There is no finding by the judge that he was aware that the Harrises were likely to rely on his valuation in buying the house and that they were unlikely to obtain independent advice. However, after referring to the position of a valuer acting for a building society, Schiemann J. in [1987] 1 E.G.L.R. 231, 236 said:

"Such a valuer has been held to be liable to the mortgagor in the ***Yianni*** case and I see nothing on the grounds of policy or in the subsequent case law which should prevent me from following that decision."

128. In ***Yianni v. Edwin Evans & Sons*** [1982] 1 Q.B. 438, the plaintiffs applied to a building society for a mortgage and paid a fee for the statutory valuation. The building society instructed the defendant surveyors to value the property and on receipt of their valuation offered to the plaintiffs a loan of 80 per cent. Of the asking price of the house. The defendants' report was not made available to the plaintiffs. The application form advised the plaintiffs to obtain an independent survey and with the offer of the loan the plaintiffs received a notice under section 30 of the Building Societies Act 1962 indicating that an advance by the building society did not imply that the purchase price was reasonable. Consequent upon the offer, the plaintiffs bought the house without obtaining an independent valuation. Some time later, structural defects were discovered which the defendants admitted that they should have found on their inspection. The plaintiffs successfully sued the defendants for negligence. However, the facts in that case differed in one material aspect from those in the present in that there was there unchallenged evidence from the chief surveyor of a very large building society that no more than 15 per cent. of persons applying to a building society for a mortgage instructed independent surveys. Park J. concluded that the defendant surveyors, who had regularly carried out valuations for the building society, were aware that their figure of valuation would be passed on to the plaintiffs and were aware that the plaintiffs would rely upon it when they decided to accept the offer of the building society. In the absence of such a specific finding of awareness in the present case I do not think that it can necessarily be assumed that the experience of a local authority valuation surveyor must be the same as that of an independent surveyor regularly acting on behalf of a large building society. The only other relevant piece of evidence in the extracts from the transcript is the following question by the judge to Mr. Lee and the answer thereto:

"Q. You did know that if the list of essential repairs was passed on to the mortgagor he would take the view that these were, in your eyes, the essential repairs?

"A. That is right . . . . "

129. My Lords, I have found this case very much more difficult than that of ***Smith v. Eric S. Bush*** [1988] Q.B. 743. I do not find it easy to infer from such findings as were made by Schiemann J. and from the question and answer above quoted that Mr. Lee was aware that the Harrises would be likely to buy on reliance on his valuation without obtaining further advice. However, I understand that your Lordships do not share this difficulty and in these circumstances I do not feel disposed to dissent from the majority view. I therefore conclude, albeit with hesitation, that Mr. Lee would, but for the terms of the disclaimer in the application form, have owed a duty of care to the Harrises. In that situation the second and third question which I posed in the ***Smith v. Eric S. Bush*** appeal would arise and would fall to be answered in the same way as in that appeal. It therefore follows that this appeal should be allowed.