JUDGMENT : H Judge Thornton QC: TCC. 10th October 2005.

1. **Introduction**

1. In these proceedings, the claimant ("PEL") claims damages from the defendant ("CPL") in respect of losses suffered by PEL when a warehouse premises, known as Unit 7000, Magna Park Industrial Estate, Lutterworth, Leicestershire flooded during a severe rain storm that occurred during the early evening of 30 July 2002. The warehouse was being used to store educational books published and distributed by PEL and the stock was severely damaged with the result that in excess of 2 million books were damaged or destroyed and over 1.7 million copies of books had to be reprinted at a cost in excess of £1.3 million. CPL was the firm of architects who designed the warehouse when it was constructed in 1989 – 1990. The cause of the flooding was the inadequate capacity of the drainage system to drain away rainwater gathering on the roof of the building so that excess water was discharged out of the valley gutters so that it poured through adjacent openings in the roof into the warehouse and its stock below.

2. CPL had overall responsibility for the design of the rainwater system and it carried out its design work in the period 1988 – 1989. PEL's complaint against CPL is that CPL designed a rainwater system which had a capacity to drain rainwater away that was less than the minimum capacity that the system should reasonably have had. PEL contends that had the system had that minimum capacity, the flood would not have occurred since the storm rainwater could have been drained away. PEL is the fourth lessee of the building and has no contractual relationship with CPL. It is, therefore, claiming damages from CPL in negligence, on the basis of an alleged ***Donaghue v Stevenson***-type liability. It alleges that it was owed a duty of care by PEL when PEL carried out its design of the rainwater system. That design work was allegedly carried out without reasonable skill and care with the result that a faulty rainwater drainage system was installed. This faulty design is alleged to have been the direct cause of the flood and the resulting physical damage of its property.

3. The damages that are claimed are the cost of removing and replacing the damaged stock and the loss of profit on books that were destroyed but were not reprinted. Other heads of damage that are claimed include the cost of removing debris, dehumidifying the building and replacing computers. CPL alleges that some of the property damaged was owned by third parties and that the damages that are claimed for some of the heads of damage and for damage to third party property are irrecoverable even if liability is otherwise established for the physical damage to PEL's books.

4. CPL denies that it owed PEL any relevant duty of care but admits that it failed to perform its design services with reasonable skill and care. Thus, if CPL is found to have owed PEL a duty of care, CPL admits that it was in breach of that duty. It also admits that the agreed damages are recoverable but contends that any claim is barred by limitation.

5. The parties have agreed that the damages that are recoverable, if liability is established, are £2.1 million exclusive of interest. This is a global agreement covering all heads of claim. The agreement is to be welcomed. It does, however, obviate the need to determine which if any of the claimed heads of loss are irrecoverable in this type of case.

6. The issues that I must resolve, therefore, are whether CPL owed PEL a duty of care in relation to the agreed loss and damage that occurred, whether CPL caused that loss and whether, if it did, the resulting claim in the agreed sum is barred by limitation.

2. **Background to Issues**

2.1. Unit 7000, Magna Park

7. The premises comprised a large distribution warehouse located on an industrial estate in Leicestershire. The premises were steel framed and the internal floor dimensions measure approximately 135 metres by 140 metres. The roof comprised 4 double pitched roofs located behind perimeter parapets. The external height of the building to the top of the parapets was 20 metres and the internal height was 15 metres. Internally, the building was divided into two sections by a full height block work wall and there was a mezzanine level located along the north eastern wall. The main parts of the building were filled with extensive storage racking and distribution machinery.

8. This design means that the roof contains three valleys. A flat 113-metre length full length valley gutter was located along the bottom of each valley. The roof also contained two gutters enclosed by the boundary walls. Each pitch of the roof was made up by profiled or corrugated steel sheeting coated with a plastic-type material called Plastisol. This sheeting was laid over the steel frame members and the lower end of each sheet abutted one of the two gutter lips at an angle. If the gutter overflowed, water could pass out of the gutter, across the gutter lip and into the building through the inverted U-shaped spaces formed by the abutment of the underside of the corrugated sheeting. If water entered the building in this way, it would cascade down onto the stock, racks and floor spaces below. This type of roof opening, located close to the lip of a valley gutter, was a common and acceptable construction detail for this type of building.

2.2. Siphonic Rainwater Drainage Systems

9. The large three-pitched roof of Unit 7000 with its three valley and two parapet wall gutters required a sophisticated rainwater drainage system to take away rainwater falling onto its various pitched surfaces and then draining into its gutters. It is not difficult to drain the single pitched roofs of relatively small buildings since the rainwater can run down each of the two pitched roof surfaces into gutters located at the perimeter of the

building. The gutters can then be drained by gravity action using conventional gravity drained rainwater down pipes that run down the outside faces of the building into an underground drainage system below ground level.

10. With multi-pitched roofs, with one or more valley gutters, rainwater running into the valley gutters can be drained by gravity action using rainwater down pipes located at each end of the gutter which can drain the accumulated rainwater to below ground level. However, this external method of gravity drainage is only possible where the valley gutter lengths are relatively short since otherwise the hydraulic gradient will be too high to enable all the rainwater accumulating during prolonged rainfall to drain into the rainwater down pipes. As a result, the valley gutters will overflow with the consequent risk of a discharge of this surplus water into the building.

11. For this reason, drainage of longer roof valleys traditionally involved placing rainwater down pipes at intervals along the gutter. These would run vertically downwards into and through the building to a drainage system installed underneath the floor slab. This method of drainage has two disadvantages. Firstly, it reduces the usable and lettable space within the building and, secondly, the cost of installation is substantial given the need to install an internal underground drainage system. Indeed, it is almost impossible to drain some very large industrial premises given both the considerable intrusion into the internal useable parts of a building and the lengthy internal gutter runs on the roof that would be required.

12. The difficulties caused in draining long valley gutters led to the development of siphonic rainwater drainage systems in the early 1980s. These systems enabled accumulated water to be drained from valley gutters in a way that does not reduce or affect the internal working space within the building. This is achieved because a siphonic system eliminates internal vertical rainwater pipes passing through the building from ceiling to floor level. Instead one down pipe or several down pipes are located at one end of the building into which all the gutter outlets drain at high level. These down pipes can be fixed unobtrusively to the inside end wall of the building. Rainwater outlets are positioned within each gutter and these outlets lead into a horizontal collector pipe strapped internally to the steel frame of the roof of the building. These collector pipes run parallel with the internal gutter and then lead down at a gradient into the vertical down pipes set against the end wall.

13. This siphonic method of drainage was installed to drain the gutters of Unit 7000. The siphonic method relies on siphonic action, so-called because the system works in the same way as a siphon. Thus, air is gradually eliminated from the system as it becomes charged. This elimination occurs because specially designed siphonic gutter outlets are set into the gutters which restrict air from entering the top of the pipe work system. Furthermore, the vertical pipes are made of a much smaller bore than is used for conventional rainwater pipes. The restricted outlets and smaller bore pipe work system cause air to be eliminated from the system when the gutter starts to fill with water. This causes the system rapidly to fill with water which in turn purges it of air. During the early stages of the filling cycle, the system operates as a conventional gravity system but, as the system reaches about 50% of its capacity, water will start to drop more and more rapidly down the vertical pipes, creating a vacuum within them and causing the formation of negative pressure at the top of the pipe work. This negative pressure will then suck water with great rapidity from the gutters, along the horizontal collector pipes and down the vertical pipes into the external drainage. Given the rapidity of water movement away from the gutters when the system is under negative pressure, only one or two down pipes at each end of the collector pipe will be needed combined with relatively few outlets set into the gutter.

14. At the bottom of the vertical pipes, the water is literally sucked out of the system and is again mixed with air from the external drainage system. This air mixture is necessary so as to break the vacuum within the system. Otherwise, the internal negative pressure will exceed the pressures that the small bore pipes have been designed to withstand. At Unit 7000, this pressure break was caused by use of a so-called open drainage system where the diameter of the bottom section of the drainage pipe below ground level was enlarged. This allowed air to be drawn into the siphonic system from the underground system at that point.

15. A siphonic system, to operate effectively, must use correctly sized small bore rainwater pipes and an appropriate number of outlets fitted with siphonic gutter outlets in combination. Only then will the system progressively purge itself of air as the gutters become charged with rainwater. The system requires greater maintenance than a conventional gravity rainwater system since it is more susceptible to blockage by leaves or debris given the design of the outlets and the much smaller internal bore of the down pipes.

16. Siphonic and gravity systems alike will lead to an overflow of water out of their respective gutters if the system is blocked or if there is a sudden intense storm which creates a water flow rate greater than the system has been designed to accommodate. Overflow conditions occur because the system no longer has the capacity to accommodate all the water accumulating in the gutter. In a storm of any intensity greater than the capacity of the system to cope with it, the surplus can rapidly overflow over the top of the gutter and discharge into the building through any available water passage, particularly if, as in this building, there are gaps located in the corrugated roof sheeting abutting the lips of the gutters.

2.3. Unit 7000's Siphonic Drainage System

17. A Geberit siphonic system was installed at Unit 7000. Geberit was one of the specialist manufacturers of siphonic drainage systems and it obtained a test certificate for its system on 30 September 1988. The five gutters to be drained by this system ran east-west and were formed of galvanised pressed metal between 2 and 3mm thick. The valley gutters were about 650mm wide and 200mm high with sloping sides set at an angle of about 70° to the horizontal. They were laid flat, as is normal on large industrial buildings. Each gutter was fitted with a number of

variable spaced siphonic rainwater outlets comprising a leaf guard, pressed metal inner sump, baffle and integral down pipe. Each outlet was located off-centre towards the edge of the gutter. All but three of the outlets in the central valley had an internal diameter of 56mm. The other three outlets had had a 35mm internal diameter.

18. At both ends of each gutter, a small spigot overflow penetrated through the parapet. The spigot was 40mm in diameter with its bottom edge located 100mm up from the sole of the gutter. These overflows provided limited secondary or overflow capacity. The capacity of each outlet was 5.8 litres per second whereas that of each overflow was 0.5 litres per second.

19. The outlets were connected internally into plastic pipe work which decreased in size down the drainage run but was generally about 63mm in diameter. The vertical down pipes were 200mm at the top, reducing down to 160mm at mid height. The main horizontal connector pipe work was suspended from straps hung from a pressed metal channel above them. The connector was laid to a slight fall towards the vertical down pipe. The channel itself was hung from the structural steelwork. The secondary pipe work was also hung from the structural steelwork and its junctions were set with 45° connections.

20. The down pipes in a siphonic system must be supported since they will be subjected to both lateral and longitudinal thrust as siphonic action cuts in and out. This can cause the pipes to vibrate and to both expand and contract with consequent axial movement. In extreme conditions or if the pipe work is not securely attached to the supporting structure, the pipes will shake and emit considerable noise. The Unit 7000 down pipes were supported by Geberit anchor brackets which both clamped the pipe to the solid support provided by the steelwork and accommodated the effects of expansion and contraction by means of a slip membrane inserted between the bracket and the pipe. Geberit's technical requirements recommended maximum spacings of either 2.0m or 2.4m between anchor brackets given the pipe size and the location of the brackets in this particular system. These recommended spacings were exceeded for the majority of the brackets when installed. Moreover, some of the brackets were not fitted with the tape needed to permit them to slide freely in harmony with the pipe being supported. These deficiencies led to the down pipes being distorted by the extreme conditions resulting from the storm but it is agreed they were not causative of the flooding of the building and are not relied on as part of PEL's claim.

21. The drainage system was arranged into three sections. The central section drained the central valley gutter and each external section drained both one of the external valley gutters and the parapet gutter located nearest to it. There were, therefore, three vertical down pipes. These stacks then connected into the underground drainage system below ground level using sealed connections.

2.4. PEL's Engagement

22. Magna Park was developed in the late 1980s as a distribution centre comprising numerous industrial units of which Unit 7000 was one. The developers were McLagan Investments Ltd ("McLagan") trading under the name of Gazeley Properties Ltd ("Gazeley") and was stated by Mr Brown to have been part of the ASDA Group. It would appear that Gazeley was a separate company, probably a wholly owned subsidiary of McLagan, set up to manage the Magna Park development. CPL was appointed as the architect for Unit 7000. The formal written appointment was entered into with McLagan and was dated June 1991 but it was stated to be retrospective with effect from 1 June 1988.

23. CPL's appointment embraced the performance of architectural services pursuant to the conditions of appointment, both as described in the May 1988 revision of the January 1982 RIBA conditions. The appointment also included the following term defining the services to be performed: *"to complete a detailed design and specification (including as necessary co-ordinating and incorporating any design work done by any other consultants and specialists, named, nominated and/or domestic sub-contractors and suppliers) relating to the buildings, external works, services, rainwater goods for [Plot 7000 Magna Park] including applying for building regulations and other approvals for the development as required under works stage E of the architect's appointment.*"

    There was no direct evidence as to the brief given to CPL for Unit 7000 but it is clear that this brief must have included a general requirement that the building was to be designed for general warehousing purposes to include a building for storage purposes for all forms of distribution. CPL was not informed that one such use might be higher value goods such as books and other paper-based goods of the kind stored in the building by PEL that would be particularly susceptible to water damage. However, given the location of Unit 7000 within a large industrial park specialising in distribution centres, such a use was reasonably within the scope of the brief that CPL must have been given.

24. CPL also entered into an architect's duty of care deed dated 27 April 1990 with the Church Commissioners who had acquired the freehold of Unit 7000 on the same day. This deed provided a warranty to the Church Commissioners that it had exercised all reasonable skill and care in conformity with the normal standards of the Architect's profession in respect of all matters within its professional responsibility. CPL's liability to the Church Commissioners under the deed did not extend to any economic and consequential losses nor for any longer period than it had a continuing liability to McLagan.

25. The main contractors for the construction of Unit 7000 were Norwest Holst Construction Ltd who entered into a traditional main contract for the construction work. The nominated subcontractors for the design, supply and installation of the roof and associated items were Sharkey Dowd and they entered into a sub-subcontract with Fullflow Systems Ltd ("Fullflow") for the design, supply and installation of the siphonic above ground surface water roof drainage system.

26. CPL itself undertook the overall design scheme for the building. The design work was carried out by a team of five designers and the relevant design work was carried out in CPL's Bedford office. The design team comprised a project director, Mr Stephen Brown who was a director of CPL and an associate architect, Mr James Clark. The other three members of the team, Mr Mark Platt, Mr Paul Ainge and Mr Asil Purcell, were technicians. CPL was directly responsible for the overall design of the building and for co-ordinating the detailed drainage design work carried out by the drainage sub-subcontractor. This co-ordination role included the responsibility for ensuring that the drainage system co-ordinated with the design of the building as a whole.

2.5. Design of Rainwater Drainage System

2.5.1. Design Principles

27. The first and most important decision that the designer of a surface rainwater drainage system had to make was what drainage capacity the system was to have. The more intense a rain storm might be, the greater would be the volume of water passing off the roof surface over a given period of time. For this reason, the designer had first to decide on the capacity of the system being designed, expressed as a volume of water per hour, that it can remove from the gutters into which the rainwater collecting on the roof surface will drain. The intention was to provide a system which would constantly drain away the water collecting in the gutter before the gutter filled up and overflowed since any overflow would run the risk of water cascading into the building or its fabric and causing significant damage.

28. The designer's decision as to the appropriate design capacity of the system would clearly be a difficult one since the building would be intended to have a lengthy working life and the intensity of the heaviest storms that the building would be subject to in that period would be difficult to predict. For this purpose, the designer would have to undertake a risk assessment using historical meteorological data collected over many decades for the locality in which the building was situated. This data would then be used to assess what capacity should be provided for in the light of the predicted storm level of the heaviest storms that the building might encounter during its working life. The nature of the risk assessment was clearly explained in the Code of Practice for Drainage of Roofs and Paved Areas, BS 6367:1983 as follows:

5 Meteorological aspects of design.

5.1 General

When designing drainage systems for roofs and paved areas, it is normally impracticable to guard against very infrequent extremely heavy rainfall events. The designer should aim to achieve a balance between the cost of the rainwater run-off system and the frequency and consequences of flooding.

The capacity of roofs and paved area drainage systems should be adequate to dispose of intense summer rains that usually occur in thunderstorms. Allowance should be made, where necessary, for the effect on the drainage capacity of wind concurrent with rain.

29. In choosing an appropriate design capacity for the system, the designer had to take account of the nature of the building being designed and its intended use. In particular, he had to avoid a design which would result in water collecting in the gutters and not rapidly running-off through the drainage system. Thus, long gutter runs had to be avoided since a hydraulic gradient would build up along these gutters, preventing water from draining from them.

30. Most buildings would not have to be protected from every possible heavy storm however small the risk of it occurring might be. For some industrial buildings, however, the designer could design on the basis that they could be subject to water ingress on a regular basis since they may be intended to store materials which would not be susceptible to water damage. Such a building can accommodate a relatively high risk of water passing into them from overflowing gutters. Other buildings, however, must be designed in a way that eliminates the risk of water ingress, particularly if they are susceptible to being flooded because they have ventilation or other gaps in the roof through which overflowing gutter water can readily pass.

31. Thus, the balancing exercise referred to by the code of practice always has to be carefully undertaken whenever a drainage system is being designed and an informed decision has to be made in the light of that assessment about the appropriate design capacity for the rainwater system for that building. That decision has to take into account the design and type of building in question and its intended design life, use and location.

32. In 1988 -1989, when the relevant design work was undertaken, the designer of a storm water drainage system was provided with much assistance and guidance as to how to undertake the necessary initial drainage risk assessment and the consequent selection of an appropriate design capacity by Section H of the Building Regulations 1985 and BS 6367. Indeed, the drainage designer had a statutory duty to design a roof drainage system so that it complied with the provisions of the Building Regulations and his detailed drainage design had to be approved by the relevant local authority before construction of the drainage system started.

33. The Building Regulations were applicable to all forms of rainwater drainage systems but had been drafted and enacted before siphonic drainage systems were used with any regularity in Great Britain. The principal provision of Section H stated that: *"Any system which carries rainwater from the roof of the building to a rainwater outfall shall be adequate.*"

This provision was mandatory and governed the remaining provisions which provided guidance as to how this requirement was to be achieved. Any ambiguity or uncertainty in the remaining provisions had to be resolved by adopting an appropriate interpretation of those provisions which best gave effect to the overriding requirement that the system should be adequate for roof rainwater drainage.

34. Section H provided guidance to the designer as to the choice of design capacity under the heading:

Acceptable level of performance

The relevant guidance stated:

To reduce the risks to health and safety of persons in buildings the rainwater drainage system should:

(a) carry the flow of rainwater to an outfall, and

(b) minimise the risk of blockage or leakage, and

(c) be accessible for clearing of blockages."

Section H then carried a part entitled: **Provisions for meeting the performance** which stated:

CAPACITY OF DRAINAGE

02 The capacity of the drainage system should be large enough to carry the expected flow at any point in the system.

03 The flow depends on the area to be drained and the intensity of the rainfall which should be assumed to be 75mm an hour.

35. Section H then set out guidance as to how the design capacity of the system was to be ascertained. The Building Regulations 1985 were drafted at a time when siphonic drainage systems were not in use in Great Britain and its detailed provisions were drafted with gravity systems but not siphonic systems in mind. Section H nonetheless applied to siphonic systems as much as to gravity or any other storm water surface drainage systems.

36. Two methods of ascertaining the design capacity of the system were prescribed by Section H. The first method, which was only appropriate when a conventional gravity drainage system was to be used, provided for an assumed maximum intensity of 75mm per hour and also set out prescribed gutter sizes and flow capacities. This assumption was based on the fact that a conventional gravity system has sufficient surplus capacity within it to enable it to drain the water that will accumulate on the roofs of conventionally sized buildings for all but the most severe and unexpected storms. It is, therefore, an acceptable rough and ready method of selection of the system's design capacity where the building will have relatively small roof areas, will not be readily susceptible to water ingress and whose use does not require special measures to be taken to reduce or eliminate the risk of water penetration from overflowing gutters. The designer had to consider in every case whether it was appropriate to make this statutory assumption for the building in question before adopting it and then had to make a conscious decision that that assumption could and should be adopted.

37. The second method, which was to be used in every case where there was any doubt as to the appropriateness of making the statutory assumption, stated:

Alternative approach

1.8. The performance can also be met by following the relevant recommendations of BS 6367: 1983 Code of practice for drainage of roofs and paved areas. The relevant clauses are in Section one, Section two, Section three (except clause 9), Section four, Section five (except clause 18) and Appendices. The Code contains additional detailed information about design and construction.

38. The code of practice was, like Section H3, drafted without specific reference to siphonic drainage systems but the critical sections dealing with the design parameters of a drainage system were clearly applicable to all types of drainage including siphonic systems. The code of practice set out the principles to be adopted in this design decision clearly as follows:

5.2 Design rates of rainfall

It is not possible to ensure complete safety from flooding or overflow.

For the design of paved areas, except when overflow from them will present undue risk to persons or property (as, for example, in adjacent basements), a design rate of rainfall of 50mm/h (category 1 in appendix A) is recommended. A design rate of 75mm/h (category 2 in Appendix A) is generally satisfactory for roof gutters where overflow is not likely to occur inside a building and for other gutters where some risk to the contents of the building may be acceptable.

For other cases, design rates of rainfall corresponding approximately to a chosen rate of return period should be used. The method to be used in the selection of these rates is described in appendix A.

The other cases referred to were Category 3 which was defined as: *"where the building or its contents require an additional measure of protection."*

Category 4: "*where a higher degree of security than that provided by category 3 is desirable."*

and Category 5: *"where the highest possible security is required.*"

39. In this case, the experts agreed that the category that CPL should have selected was Category 3, given that the design intended to adopt a siphonic system and that the system was to drain the very large roofs of a distribution warehouse into very long gutters which would, if they overflowed, immediately cascade water into the warehouse and damage anything stored within it. Indeed, PEL's expert architect considered that the appropriate category to have been chosen was Category 4 but the reduced capacity resulting from a Category 3 design would still have prevented the flooding that occurred.

40. Section H3 of the Building Regulations 1983 did not expressly state that a designer should not adopt the assumption of a maximum design capacity of 75 mm per hour as the basis of his storm water drainage design in situations where that capacity was inadequate for the intended drainage system in the light of the intended size, type, use or

location of the building being designed. Equally, there was no express statement in Section H3 of how its provisions should be applied to ascertain the design flow capacity of a siphonic storm water drainage system.

41. The two architect experts agreed, however, that the intention of the Building Regulations was that the code of practice should be used as the basis of the drainage design for siphonic rainwater drainage systems used where water ingress into the building could easily occur. Thus, CPL should not have made or relied on the assumption of a rainwater flow rate of 75 mm per hour. In consequence, the experts agreed that CPL should have undertaken the initial design work for the drainage system for Unit 7000 by determing which of the code of practice categories was appropriate and should then have concluded that Unit 7000 was a Category 3 case. In consequence, CPL should have concluded that Unit 7000's design capacity should be 150 mm per hour.

42. The architects' joint statement reads:

1.2 … the functional requirement of the Building Regulations 1985, Part H3, relevant at the time of the design and construction of the building was that:- 'any system which carries rainwater from the roof of the building to a rainwater outfall shall be adequate'.

1.3 The Approved Document H, 1985, which gave guidance on meeting the functional requirement referred at paragraph 0.3 to an assumption of 75 mm an hour rainfall intensity and at paragraph 1.8 to an alternative approach of following the relevant recommendations of BS 6367:1983.

1.4 It is agreed that although not specifically stated in the Approved Document, the reference to 75 mm an hour would only be relevant to a building with external gutters or where overflow could safely occur. For this building the appropriate design standard was BS 6367:1983.

Their earlier joint statement, which the two engineer expert witnesses also agreed to and signed, had stated:

4.7 It was agreed that the standard design basis for rainwater disposal relevant at the time of the original construction of this building was BS 6367:1983 "British Standard Code of Practice for drainage of roofs and paved areas".

4.9 It is agreed that this Code of Practice does not mention siphonic drainage. …

4.11 It was agreed that for this warehouse in this location, with no special design requirements, a design rainwater intensity of 150 mm an hour would be reasonable.

43. Once the appropriate design category had been selected, the code of practice enabled the designer to ascertain the maximum amount of rainfall per hour that the system should be designed to accommodate. This rate is expressed in millimetres per hour. The recommended method was easy to apply and allowed the appropriate drainage capacity to be readily determined.

44. Once the architect had decided on the appropriate design capacity, the details and dimensions of the system had to be designed. This involved designing the precise size, layout and location of all the materials to be used in making up the drainage system. The detailed design of a siphonic system and the preparation of its design calculations required considerable expertise and a familiarity with working with such systems. The work involved the designer in calculating the resistance to water flow of the internal pipe surfaces, the appropriate bore of all the vertical down pipes and the water flow rates through the system at full flow conditions. Finally, once the system had been designed, calculations had to be prepared which would demonstrate to the satisfaction of the local authority that had to approve the drainage design for building regulations purposes that the designed system was adequate.

45. The principal complaint made against CPL is that it chose, or allowed to be chosen, a Category 2 rather than a Category 3 design with the result that the storm water drainage system was designed to have too low a maximum flow rate. In consequence, it was unable to cope with a storm whose intensity a Category 3 drainage system could have accommodated.. The flow rate of a Category 3 design was 150mm per hour but the designed flow rate was only a Category 2 rate of 75 mm per hour. No additional complaint is made about Fullflow's detailed design calculations.

2.5.2. Design Work

46. Mr Stephen Brown of CPL submitted a witness statement which was not challenged and he was not required to attend the trial to be cross-examined. His witness statement gave evidence about the design process which was supplemented by such relevant documents as were still available. Mr Brown was employed as an architect by CPL in 1984 and became a director in 1989. Until he was appointed a director, he was a member of CPL's project team and, on appointment as a director in April 1989, he ceased to be project leader and became project director. He was immediately succeeded as project leader by Mr James Clarke, at a time when construction work had started. Mr Clarke was an associate architect and he was based on site.

47. The storm water drainage was achieved using three drainage systems laid out in sequence. The initial system drained the rainwater from the gutters through the building and into the storm water on site underground drainage system. This second system then ran to the plot boundary where it connected with overall site drainage system. CPL designed the underground site drainage system and also the first of the three design stages of the surface drainage. This first stage was a general indicative stage. It was followed by the design undertaken at tender stage and the detailed design undertaken once the sub-subcontract had been entered into. These last two stages were carried out by the sub-subcontractor Fullflow. Following the completion of the design of the surface storm water drainage system, the completed design was then subject to two further stages in the design process. Firstly, it had to be co-ordinated with and into the overall design. Secondly, it had to be checked and forwarded

to the Local Authority for its approval under the Building Regulations. These last two stages were the responsibility of CPL. The services engineer, Jackson Stokoe Associates, does not appear to have had any involvement in the design or construction of the surface storm water drainage system.

48. CPL started the design process by producing indicative drawings which included indications of where the valley and parapet gutters were to be located and how many down pipes were to be used. This first design provided for gravity surface water drainage with the down pipes passing through the working part of the building. According to Mr Brown, CPL decided on the appropriate flow rate capacity and did calculations to determine the size of the rainwater pipes. Since Mr Platt carried out the drainage calculations undertaken by CPL, it is likely that this decision was taken by him sometime in November 1988. The indicative drawing as annotated was no longer available and was not adduced in evidence at the trial but it would seem from the calculations subsequently produced by Mr Platt that the flow rate he chose was 75 mm per hour, a figure probably chosen by his applying the first method of ascertaining this rate provided for by Section H3, being the method that merely adopted an assumed capacity of 75 mm per hour. This flow rate and the necessary gravity rainwater pipe size needed to give effect to this decision, were identified on the relevant indicative drawing and these drawings were then sent out to obtain tenders for the work to Sharkey Dowd Ltd in November 1988.

49. Sharkey Dowd Ltd, who was a proposed nominated roofing subcontractor, prepared a quotation dated 30 November 1988 based on a bill of quantities that it had drawn up, having taken the necessary quantities off CPL's annotated indicative drawing. That bill included an item: "*150 diameter PVC rainwater pipes – 1,018 linear metres*". This confirmed that CPL had depicted conventional 150mm gravity rainwater pipes and that the system would have a conventional assumed capacity of 75mm per hour.

50. On 1 December 1988, a Design Team Meeting was held, attended by representatives of ASDA, Gazeley and the consultants. CPL was represented by Mr Platt. At that meeting, the Gazeley representative, who was an experienced developer, explained that Unit 7000 was to be a high bay distribution building with goods stored at a very high level and would be a national non-food building. He also explained that it was an absolute requirement for the design that the building be constructed so that there was clear space under the roof structure to maximise the storage space available so that horizontally located rainwater pipes running through the useable space would not be acceptable. He went on to suggest that the design team consider siphonic drainage which he had had previous experience of because that system could be constructed so as to avoid pipe work intrusion into the warehouse useable airspace.

51. CPL had never previously had any experience of siphonic drainage systems but it did not make any enquiries or ascertain what kind of system it was or whether it had any special features, such as a different maximum flow capacity, from its gravity counterpart. Instead, it merely sent to Sapaflow, who was a supplier of siphonic drainage systems and whose name had been given to CPL by either Gazeley or the Quantity Surveyors, WH Stephens, the same indicative drawing showing the proposed gravity rainwater system as had been supplied previously to Sharkey Dowd. The drawing containing the stipulated design capacity for the system of 75mm per hour was sent to Sapaflow on about 13 December 1988.

52. CPL did not accept in its evidence that it had supplied Sapaflow, or subsequently Fullflow, with a stipulated design capacity of 75mm per hour. It did accept that it had used this design capacity in designing the underground drainage and in preparing the initial indicative drawing incorporating a gravity drainage system. However, after the first flood in 1994, Gazeley wrote to CPL and asked it to provide details of the design criteria that CPL had chosen for the sizing of the gutters and the siphonic rainwater discharge system. No reply was adduced in evidence but Mr Brown stated that he would have replied. I am not satisfied that he did reply or that any other representative of CPL replied since, if there had been a reply, it would have been located on Gazeley and CPL's files where other contemporary correspondence was still located when discovery in this action was carried out.

53. However, Mr Brown accepted that the reply, had it been provided, would have stated that: *"… the underground drainage system was designed to a capacity of 75 mm per hour and the above ground system was designed and installed by Fullflow.*"

    This statement is consistent with his earlier statement that the decision regarding the flow rate of the above ground gravity system was reached by CPL, being the same flow rate that was used by Fullflow to design the siphonic system. According to Mr Brown, he did not think that CPL supplied the siphonic drainage tenderers with a suggested flow rate but: *"… if they did, it would have been based upon the original design of the gravity system arrived at in 1988."*

    Since the siphonic drainage contractors would have needed instructions from the architect as to the design capacity or flow rate of the system to which they were to design their siphonic systems, either they were supplied this information by CPL on its indicative drawings or they would have asked for it later and been supplied it by CPL.

54. It follows that CPL designed or specified the capacity of the siphonic system as being 75 mm per hour and instructed Fullflow to prepare its designs of the system itself using that as the capacity to which the system should be designed.

55. Sapaflow provided a first quotation on 13 December 1988 which was not acceptable to Gazeley and a second quotation was obtained as well as a quotation from a second specialist, being Fullflow. CPL sent Fullflow a copy of the same indicative drawing as had been sent to Sapaflow in late January 1989. Fullflow's quotation, as revised on

27 February 1989, was significantly lower than Sapaflow's revised final quotation and was acceptable to and accepted by CPL whose intention was that the siphonic drainage work would be carried out by the specialist siphonic drainage contractor as a sub-subcontractor to Sharkey Dowd. Thus, when Sharkey Dowd came to be nominated, its sub-contract with Norwest Holst would contain an item for the siphonic drainage system to be installed by Fullflow at the figure provided by its revised quotation dated 27 February 1989. Fullflow was to be, in effect, a nominated sub-subcontractor within the nominated subcontract package involving Sharkey Dowd.

56. Fullflow did not undertake any risk assessment or consideration of the appropriate drainage capacity for the system it was quoting for. It merely adopted CPL's figure of 75 mm per hour set out on or indicated by the indicative drawing it was provided with to enable it to provide a quotation. Equally, CPL, and in particular Mr Platt, did not give any further or fresh consideration to the question of what the appropriate design capacity for the siphonic system should be. Mr Platt must have considered that there was no relevant difference between a gravity and a siphonic system so that he did not need to revisit the risk assessment or design capacity decision taken in relation to the now discarded gravity system or else he gave no further thought to the question of the design capacity of the drainage system although the system was being changed from a gravity to a siphonic system.

57. CPL issued Norwest Holst Construction Ltd, the main contractor, with a nomination instruction on 10 May 1989 whose effect was to require Norwest Holst to enter into a nominated subcontract with Sharkey Dowd on terms incorporating a further instruction that Sharkey Dowd enter into a nominated sub-subcontract with Fullflow which incorporated Fullflow's tender which in turn incorporated CPL's stipulation provided by its indicative drawing that the design capacity of the system should be 75 mm per hour.

58. Meanwhile, CPL had submitted a detailed application to the local authority, Harborough District Council, dated 6 February 1989 which stated that the flow calculations for the storm water drainage and the method of disposal beyond the immediate site would be submitted at a later stage. Once Fullflow had supplied the details of its drainage design to CPL, Mr Platt prepared the necessary flow calculations using the designs prepared by Fullflow, the original design capacity figure of 75mm per hour that CPL had originally supplied to Fullflow and the method of calculating these figures recommended in a publication published by the Clay Pipe Development Association, a well-known source for information and advice as to how to produce flow calculations. Mr Platt worked on these figures in the period between 27 February and 8 March 1989 and the finished calculations were copied and sent to Harborough District Council on 8 March 1989. The accompanying letter described the calculations as being for a "*Full flow system*".

59. The relevant set of calculations was prepared by hand by Mr Platt and is in his handwriting. They are entitled: "*Underground drainage – Surface water: - Roof drainage system*." The calculations are introduced with these words:

Calculations based on the following:-

Design rainwater intensity of 75mm/hr.

The local authority approved these calculations and the design of the drainage system on 25 April 2005.

2.6. Initial History - Interest of McLagan Investments Ltd

60. The Magna Park Site was acquired freehold by the developer, McLagan, not long before it started to develop the site in the mid-1980s. McLagan employed CPL and the main contractor.

61. It was clear from the Land Registry Entries Register adduced in evidence that the Church Commissioners acquired the freehold interest in Magna Park by a transfer of land dated 27 April 1990 and the Church Commissioners were, until a date before 1998, the freehold owners of Unit 7000 and the long lessors of the head leasehold in that premises. Thereafter, the freehold owners have been the British Steel Pension Fund. The head lessees were, successively, Asda Storage Ltd ("Asda Storage"), International Book Distributors Ltd ("IBD(1)"), IBD's assignee that was also called International Book Distributors Ltd having acquired this name after IBD(1) changed its name ("IBD(2)") and PEL. At the time of that acquisition, the design process was complete and construction work had been completed since practical completion had occurred on 13 April 1990. The acquisition does not appear to have been preceded by any form of review of the designs nor, once work was completed, by a structural or any survey of Unit 7000 or of its drainage system by or on behalf of the Church Commissioners.

2.7. Completion of Construction and Lease to Asda

62. The developer McLagan appointed a clerk of works called Tupper Associates. Their duties would have extended to undertaking regular inspections of the construction work as this proceeded but not to any consideration or checking of the design capacity of the siphonic drainage system. CPL also had inspection duties of the work during and after construction associated with its duty to issue certificates under the building contract. As already stated, practical completion of the building contract for Unit 7000 was certified as having been achieved on 13 April 1990.

63. Asda Storage, as the first tenants of the warehouse, entered into a 25-year lease dated 27 April 1990 with the Church Commissioners. There was no evidence to show what if any relationship there was between McLagan, as the developer, and Asda Storage and I conclude that Asda Storage, as the first lessee of Unit 7000, being a separate company from McLagan, had no knowledge of the siphonic drainage system or its potential shortcomings save for the knowledge it had acquired from its own appointed surveyor's pre-contract structural survey.

64. At practical completion, no overflow had been provided for the valley gutters, apparently because CPL did not consider it necessary to provide an overflow facility. This was contrary to the recommendations of BS 6367 which were that weir overflows should have been provided for each gutter. Asda Storage does not appear to have

obtained a structural survey of the newly completed building's siphonic drainage system before it entered into a lease with the freehold owners who also appear to have acquired the building from the developers on an earlier occasion without obtaining a structural survey of the siphonic drainage system themselves.

65. The lease contained a schedule which contained a specification of the building including one for the roof gutters and rainwater system. This provided that all gutters were to have weir overflows and that the rainwater pipes were to be fixed internally but made no specific reference to the system being a siphonic one.

66. In February and March 1991, a prospective assignee of the lease obtained a surveyor's structural survey report on Unit 7000. It seemed from the documents adduced in evidence that this report had been commissioned by IBD(1) and that the surveyor was called Simon Schuster Surveyors who would appear to have been connected with the Simon Schuster Group which IBD(1) was a part of. A copy of the survey report was given to Gazeley in its capacity of managing agent for the developer, who sent it to CPL. The report made reference to a number of features of the drainage system. It drew particular attention to the fact that the drainage system was a siphonic system and so had small bore pipes so that particular attention was needed to keep the pipes clear of debris. The report referred, in this context, to the absence of an overflow facility since, without one, if the system became blocked, water would penetrate into the building. It also highlighted the need to provide additional bracket supports for the vertical rainwater pipe work to avoid cracking of that pipe work.

67. There was no advice in the report to the effect that someone should check that the capacity of the siphonic system was sufficient and could cope with all anticipated rainfall without the gutters overflowing and discharging rainwater into the building, notwithstanding the fact that the prospective assignee was to use the warehouse for storing books and it would therefore need to be kept dry at all times.

68. CPL was asked to comment on the suggestion in the structural survey that the bracketing supporting the siphonic pipes was inadequate. It obtained the comments of Sharkey Dowd who replied in a letter dated 18 March 1991 that: *"Fullflow systems carried out the siphonic drainage system and the whole of the system is designed and installed in accordance with their recommendations. They do offer guarantees which would be applicable to this project, however, it would be prudent to have regular maintenance carried out on the gutters to pre-empt possible blockages due to debris*."

69. After some delay, Gazeley finally instructed CPL in May 1992 to arrange for an overflow facility to be provided. CPL finally complied with these instructions in November 1992 by instructing the main contractors to instruct Sharkey Dowd to carry out this work. The overflow was provided by means of small spigot overflows placed at each end of each gutter so as to penetrate through the parapet by Sharkey Dowd in December 1992.[1]

2.8. Assignment to IBD(1) in 1991

70. On 17 July 1991, Asda Storage's leasehold interest was assigned to IBD(1). This company was controlled by Viacom Inc which in turn was controlled by Simon & Schuster Inc. Both companies were American companies involved in publishing and neither was then, nor has since become, part of the Pearson Group. IBD(1) in turn sub-let two parts of Unit 7000 back to Asda Storage. Part of the warehouse, being the part that IBD(1) had not sub-let to Asda Storage, was from that time used for storing and distributing books and other similar products by IBD(1).

71. In February 1992, the building was subject to a final inspection of all outstanding defects in the building. The inspection was carried out at the behest of the new lessees who took up with the developers the defects it referred to. One item of the resulting list stated that no overflows had been provided to the canopies. This was taken up with CPL who reported to Gazeley that the siphonic drainage system was so designed as not to require overflows. No reason was then given or has subsequently been provided by CPL to explain or justify that advice. Instead, Gazeley insisted that overflows should be provided and it was these that CPL arranged to be installed. Mr Brown in his witness statement described these overflow pipes as being tell-tales only whose use was to warn the occupants of blockages or other problems with the siphonic drainage system.

72. Although the need for additional brackets that had been commented upon in March 1991 was subsequently referred to during an inspection of the warehouse carried out in March 1992 by a representative of IBD(1), who had by then become the assignee of the lease, and Gazeley on behalf of the developer to discuss outstanding matters that McLean needed to attend to, nothing was subsequently done to provide additional brackets for the internal small bore rainwater pipes.

2.9. Flood in July 1994

73. During the evening of 24 July 1994, a Sunday, the warehouse was flooded. A storm event occurred during which the maximum intensity of rainwater was 109 mm per hour. This would have been a 'noteworthy' storm with a return period of 12 years but was more remarkable because of the length of time that that intensity was maintained. The intensity exceeded 100 mm per hour for a period of 15 minutes and remained above 60 mm per hour for 40 minutes. Contemporary records and newspaper articles show that this rainstorm was very unusually intense, being described as a one in one hundred years storm. About ¾ of an inch of rain fell in a 40-minute period and many premises in the area, including three adjacent units on the Magna Park Estate, were damaged by flooding caused by the storm. The damage to the Magna Park units was caused by flooding from the roofs that had resulted from under-capacity siphonic drainage systems.

[1] This overflow piping is described in paragraph 18 above.

74. The result of the flooding at Unit 7000 was flooding internally within the warehouse, with water cascading onto the books stored below, particularly underneath the guttering. Moreover, part of the roof cladding collapsed. At the time of the flood, IBD(1) was of the belief that the flooding had been caused by a rainstorm of exceptionally unusual intensity. This belief arose as a result of what Mr Alan Martin, IBD(1)'s then managing director, was told by those investigating the flood at the time, namely that the design of the rainwater system complied with the building regulations and even so was unable to cope with the rainstorm. He was also informed that even systems designed to the building regulations couldn't have coped with the rainfall due to its freakish nature. This evidence was not challenged. Mr Martin did not state who these informants were but I conclude that they would have been one or more of those investigating the flood in it immediate aftermath including fire officers, representatives of the loss adjusters appointed by IBD(1)'s contents insurers, the landlords and their insurers and Gazeley who acted for the developers.

75. Either the landlord or its agents or the developer's agent Gazeley arranged for all the remedial work to be carried out to the gutters, roof cladding and rainwater pipes, some of whose connections had broken away. Several other warehouses adjacent to Unit 7000 were also flooded and Mr Martin's recollection may also have been based on what he was informed by those connected with one or more of these other floods. Mr Jeremy Moss, who was a director of IBD(1), also provided a witness statement which stated that he recalled being informed just after the flood that it had been caused by a freak storm over the weekend.

76. The result was that much of the stock, consisting of books, was destroyed. These had to be replaced and IBD(1)'s parent company, Simon and Schuster which was an American company, made an insurance claim on the Independent Insurers who, it appeared, had provided a block policy for Simon and Schuster's premises in the United Kingdom. The claim was for about $3m. The insurers instructed loss adjusters, McLarens to adjust the claim and the claim was settled promptly. The loss adjusters then, in May 1995, instructed Pick Everard, a firm of consulting engineers, architects and surveyors, to carry out an investigation to determine whether the guttering system was inadequate for its intended purpose. These instructions were not given until 16 May 1995, nearly one year after the flood and some months after the remedial work had been finished and IBD(1)'s insurance claim had been settled.

77. On 24 February 1995, Asda Storage surrendered its two sub-leases of parts of Unit 7000 back to IBD(1). There is no evidence of how its contents claims resulting from the flood were dealt with.

78. Pick Everard reported back to McLarens on 19 June 1995 with a full report dated 22 August 1995. The report concluded that the design of the roof drainage was inadequate because it could only cope with a one in five years storm whereas it should have been designed in accordance with BS 6367 with a capacity to cope with a one in one hundred and eighty year storm. Thus, the flooding was caused by an inadequately designed drainage system in that too low an intensity was used for the design of the roof and the overflow system was inadequate.

79. The report also drew attention to the totally inadequate overflow system provided for the gutters. Instead of the small emergency weir overflow that had been provided, the report suggested that a weir which was, in size, at least the full width of the gutter should have been provided and the gutter should have been at least twice its present depth. It is clear from the report that had such an overflow system been provided instead of the overflow system actually installed, the first flood would still have occurred since the intensity of the storm was such that only a system with at least a 150 mm per hour capacity could have coped with it without the gutters overflowing onto the roof and into the warehouse.

80. The drainage system was not altered following the flood and such repair work as was carried out had been completed long before this report was completed and submitted to the contents insurers' loss adjusters. Pick Everard also prepared similar reports for at least three other warehouses that had been constructed on the Magna Park estate and, in each case, it concluded that the drainage system had been designed with an inadequate capacity of 75 mm per hour and an actual capacity of about 78 mm per hour.

81. On 10 October 1995, Mr Bowler of Pick Everard, who had carried out the investigations and prepared the report, telephoned Mr Tozer of McLarens and made a note of his conversation which showed that he asked Mr Tozer whether his report and conclusions would be made available to IBD(1) since he believed that IBD(1) should be made aware of the problem. He reported Mr Tozer as replying that IBD(1) would be made aware of the report's contents "*at some stage*".

82. However, there was no evidence that McLarens or the insurers subsequently ever made any contact with IBD(1) or Simon and Schuster. Certainly, no copies of any communication or information about the inadequate design of the system were subsequently provided by IBD(1) to IBD(2) or PEL when the lease was assigned and Viacom's educational business subsequently sold in 1998. Furthermore, Mr Martin and Mr Moss, the only IBD(1) witnesses to give evidence, had no recollection of any such information being received by them or IBD(1) from either the insurers or the insurers' loss adjusters and no evidence was adduced from McLarens to the effect that IBD(1) had in fact been informed about the real cause of the flood or of Pick Everard's advice. I conclude, and find, that no-one in IBD(1) was ever informed of the content of Pick Everard's advice nor that the drainage system was inadequate nor that the cause of the flood was anything other than a freak rainstorm which caused the flooding despite being designed in accordance with the building regulations.

83. There were two further indications that IBD(1) never learnt of the existence or nature of the design defect in the siphonic drainage system, being its under design in breach of the Building Regulations that had resulted in a Category 2 rather than a Category 3 system. Firstly, Gazeley, on behalf of the developer, wrote to CPL on 7

September 1994 asking, with a request for a response by return, what design criteria CPL had chosen for the sizing of the gutters and the rainwater discharge system. As I have already found, no written response was given to that enquiry. Gazeley never appeared to have discovered what the design capacity of the system was despite enquiring from CPL. If the developer/employer of the architect was unable to ascertain this information, it is understandable that a subsequent lessee had also been left in the dark.

84. The second indication arises from the terms of the lease. The lease included a repairing covenant whereby the tenant, IBD(1), was to keep the premises in good and substantial repair and to remedy any defects of design, construction, workmanship or materials with the exception of damage by any of the insured risks. These risks were defined as including destruction or damage by storm, tempest, flooding or overflowing of water tanks, apparatus and pipes. The landlord covenanted to procure adequate insurance to cover these risks and the tenant was prohibited from taking out its own insurance to cover them. As a result, IBD(1) left to the landlord the entire role of discovering what work was required to remedy the damage resulting from the flood

85. There were in force, therefore, two separate policies of insurance, one covering damage to the structure caused by flood and the other covering IBD(1)'s stock.

86. The first policy, taken out by the landlord, was with unknown insurers. This cover insured the structure of the property against loss or damage caused by the insured risks and had been effected pursuant to the landlords' insurance obligations contained in clause 5.2 of the lease. IBD(1) had no responsibility for the repair of, or insurance relating to, the damage to the building including the drainage system since these were covered by the landlord's obligations in relation to damage caused by flood. These repairs were arranged by the landlord or its agents, initially in initiating the repairs to the roof and the drainage system after the flood and then in making a claim on the landlord's insurer in relation to the remedial work necessitated by the storm.

87. The second policy, taken out by the tenant's American holding company, was with the Independent whose loss adjusters were McLarens. This insurance covered all IBD(1)'s stock in its various business premises in the United Kingdom. IBD(1) claimed under this policy through its American holding company and the claim was adjusted by McLarens and then appears to have been met promptly and in full. After IBD(1)'s claim had been settled, and somewhat belatedly in May 1995, the insurers, the Independent, instructed McLarens to ascertain the cause of the flooding. McLarens instructed Pick Everard to undertake the necessary investigations and the letter instructing Pick Everard, dated 16 May 1995, stated that McLarens was endeavouring to progress enquiries as to the identity of the designers of the drainage system. This shows that McLarens had not been in contact with the landlord or its agents or the developer or its agent Gazeley and were carrying out their investigations independently to any investigations being carried out by Gazeley. McLarens' instructions led to the Pick Everard report in August 1995, over one year after the flood. The report was provided to the insurers' loss adjusters but, as I have already found, there is no evidence that its contents were passed on to IBD(1) as the insured or to the landlord or the developer's agents.

88. I conclude that IBD(1)never learnt of the true cause of the flood, being the inadequately designed capacity of the siphonic rainwater system. This was because IBD's contents insurance claim was settled promptly and in full before any investigations were initiated by IBD(1)'s contents insurer's loss adjusters and the contents of the subsequent investigation report were never communicated to IBD(1). The report as to the cause of the flood was obtained by the insurer's agents who were not acting for or on behalf of IBD(1) and the insurer, on whose behalf the report was obtained, were similarly not acting as agents of, nor under any reporting obligation to, IBD(1).

89. Moreover, given the terms of its lease, IBD(1) as tenants had no role in any claim arising out of the design defect in the rainwater system nor any involvement in the work needed to repair the storm and flood damage to the building.

90. In consequence, IBD(1)'s officers and employees had no reason to be involved in any investigations, repairs or insurance claims and never learnt of the existence of the design defects inherent in CPL's rainwater system design.

2.10. Transfer of Freehold Before 1998

91. Sometime before 1998 but after the flood in July 1994, the Church Commissioners sold its freehold interest in Unit 7000 to the British Steel Pension Fund at arm's length for consideration. At the same time, the British Steel Pension Fund became lessors by assignment from the Church Commissioners of the head lease and became IBD(1)'s landlords. The parties adduced no evidence about this transaction and it was not established what if any survey was undertaken by or on behalf of British Steel Pension Fund before it acquired the freehold and long leasehold interest as lessors. Equally, no evidence was adduced as to whether this acquisition was of a kind which would ordinarily involve a pre-acquisition survey or, of so, of the kind of survey that would have been reasonably anticipated.

2.11. Assignment to IBD(2) in 1998

92. In November 1998, Pearson Inc, PEL's ultimate parent company, bought the entire educational, reference, business and professional publishing divisions of Simon & Schuster Inc for a total cost of $4.6 billion. These divisions were held by Viacom and Viacom was the parent of IBD(1). This global acquisition included, amongst many other assets, the educational publishing business part of IBD(1)'s wider business, including the property and stocks of books associated with that part of its business. The acquisition was the subject of lengthy previous negotiations and an inter-Group reorganisation of educational assets within the vendor Group so as to facilitate the sale and transfer of this huge part of an even larger overall business operation. These activities included the transfer of Viacom's educational assets, including the lease of Unit 7000, from IBD(1) to a holding company or vehicle company also owned by Viacom. IBD(1) changed its name to Simon & Schuster (UK) Ltd. Meanwhile, the intended

assignee of IBD(1)'s educational assets was incorporated in the name of Hackremco Ltd on 3 April 1998 to act as a holding vehicle for all of Viacom's educational assets. Hackremco changed its name to Book Distributors Ltd on 27 April 1998 who in turn changed its name to IBD(2) on 28 May 1998. IBD(1), in its new name of Simon & Schuster (UK) Ltd, then assigned the lease of Unit 7000 to IBD(2) on 9 September 1998.

93. Thus, the assignment of the lease of from IBD(1) to IBD(2) was an inter-Group assignment from one subsidiary of Viacom to another as part of a massive re-organisation of the Viacom Group's educational assets. There would be no reason for that assignment to have been preceded by a survey of any kind of the building and none was in fact obtained.

94. The acquisition of Viacom's educational assets by the Pearson Group was undertaken by Pearson Plc acquiring all the issued shares in IBD(2) in November 1998. The Pearson Group is an US Group with an UK subsidiary, Pearson Plc. Following that acquisition, Mr Alan Martin was "head hunted" by IBD(2). He ceased to be a director of IBD(1) within the Viacom Group and became a director of IBD(2) within the Pearson Group.

95. As part of the acquisition of the Viacom educational business, the Pearson Group arranged for due diligence enquiries to be undertaken of that business prior to the execution of the sale of the business to Pearson. Such enquiries are normal as a prelude to a takeover or business acquisition. It is common knowledge that such enquiries are in the nature of an extended audit of all parts of the business being acquired and of all risks and liabilities associated with that business, and of all warranties, disclosures and undertakings being given by the vendor. They are carried out by accountants, financial advisors and lawyers and do not ordinarily involve surveyors. There was no evidence to suggest that the due diligence enquiries preceding the Viacom acquisition by Pearson, which were carried out in the Pearson Group's US-based offices, were any different from normal due diligence enquiries or that any thought was given by Pearson to commission a survey of the buildings leased by IBD(2) which were, at the time of the due diligence enquiries, neither owned nor occupied by any member of the Pearson Group. Furthermore, there was no evidence at the trial that it would normally be expected that a survey of Unit 7000 would be commissioned by the Pearson Group as part of the due diligence enquiry process it was undertaking. It is clear that no such survey was in fact undertaken in the period leading up to Pearson's acquisition of IBD(2)'s issued shares.

2.12. Assignment to PEL in 2000

96. Between November 1998 and July 1999, the educational assets of the Pearson Group were spread amongst a number of different companies within the Pearson Group including IBD(2). It was decided to reorganise and rationalise these assets and PEL was formed as a new subsidiary company of Pearson Plc. As part of the transfer of educational assets to PEL, IBD(2)'s assets were acquired by PEL on 5 July 1999 and IBD(1)(2) ceased to trade. One of those assets was IBD(2)'s leasehold interest in Unit 7000.

97. This acquisition was, like the previous assignment of the lease from IBD(1) to IBD(2), an inter-Group technical re-organisation of assets and was not preceded by any survey of the premises. Unit 7000 was only one of a number of property interests held by IBD(2) which were transferred to PEL at this time.

98. Although IBD(2) ceased to trade, the formal assignment of the lease did not take place until 16 June 2000. Thus, between July 1999 and July 2000, IBD(2) held the lease in trust for, and as the nominee of, PEL. This assignment was, of course, a pure formality and was not preceded by any survey of Unit 7000.

2.13. Flood in July 2002

99. A further unusually heavy storm occurred in the early evening of 30 July 2002 which caused the gutters to overflow and water to cascade into the warehouse and destroying or damaging most of the books stored there. The event and its consequences was almost a carbon copy of the earlier storm in July 1994, eight years earlier nearly to the day.

100. The meteorological experts examined the relevant weather station and radar reports and agreed on their analysis of the storm. Their joint report concluded that the storm lasted for nearly an hour between 17.15 and 18.10 and the rain between 17.00 and 19.25. In that time, about 70 mm of rain fell. During the intense period of the storm, the intensity of rainfall was between 80 and 100 mm per hour with one or two exceptional bursts of activity when the rainfall exceeded 150 mm per hour for at least 2 minutes.

101. The result of this storm was to cause about 140 cubic metres of water to overflow into the warehouse from the overflowing gutters. It was agreed by the two engineering experts that had the capacity of the system been designed with a capacity of 150 mm per hour, the gutters would not have flooded. The overflow actually installed had no appreciable effect in preventing or reducing the flood that occurred, largely because of the effect of the hydraulic gradient in the gutters. The CPL drawings had shown a small rectangular weir as being required for each gutter which had not been installed and the overflow pipe was a late substitute for these weirs. However, these weirs, had they been installed instead, would also have made no appreciable difference to the extent of the flooding.

102. The experts also agreed that the distortion that occurred to the siphonic pipes was caused by two factors. Firstly, the capacity of the underground drainage was exceeded and this prevented air from entering the siphonic system resulting in an increased negative pressure which caused the pipe work to distort. Secondly, the reduced bracket support, originally noted in 1992, would have caused the pipes to vibrate and distort. The experts also agreed that these two features of the system amounted to defects but the resulting distortion of the pipes did not amount to a contributory cause of the flooding or damage that occurred.

103. Following the flood and the clearing up operation, the distorted pipes were replaced, additional brackets were installed and a new secondary siphonic system was installed. This work was undertaken by PEL. This new secondary system, with outlets raised above the existing outlets, drains separately down to ground level. Since the underground system only has a capacity of 75 mm per hour, the secondary system does not drain into it but drains externally into the surface water drainage system. No additional overflows were provided. The overall drainage system, taking the combined primary and secondary system as a whole, now has a capacity of 150 mm per hour.

104. PEL's stock was insured under a block policy covering damage to all PEL's stock and premises in the United Kingdom and a claim was made under that policy which did not, however, extend to covering the cost of repairing structural damage caused to Unit 7000 by flooding. The new supplementary drainage system that was installed after the flood in 2002 to increase the capacity of the system overall is a siphonic system which was installed by Fullflow. This work was arranged and paid for by PEL.

2.14. Management of Site and Unit 7000

105. The Magna Park site is managed by a management company which is funded by management charges payable by every lessee or occupier on the site. This company is only concerned with the management of the common areas and parts such as the communal drainage, roads and general security. I was informed in closing submissions that that company employed a maintenance company, Chapco, to undertake maintenance work on the site as necessary. The freehold owners of Unit 7000 have maintenance obligations and need to collect the rent and arrange the insurance. There was no evidence as to who was responsible for these tasks but it is possible that Gazeley, or even Chapco, were retained by, and performed some or all of the management tasks for, the freehold owners up to 2002. The original owner of Unit 7000 and the site developer, who may well have retained an interest in other parts of Magna Park, was McLagan with Gazeley as their managing agents. There was no evidence as to whether Gazeley continued to retain an interest and involvement in the site after 1995 but they were sufficiently interested in the flooding at Unit 7000 to seek from CPL in September 1994 details of CPL's design criteria for the siphonic rainwater system. There was no evidence of what, if any, further interest in the site Gazeley had in the years following that enquiry but it is possible that it retained some management functions on behalf of McLagan. Finally, PEL had a Facilities Department which had some management functions for all the property and premises held by PEL including arranging a group insurance policy to cover any property and contents held by PEL but not covering, I presume, such repair, maintenance and insurance obligations retained by the landlords in premises where PEL was a tenant..

3. Basis of CPL's Alleged Liability

3.1. General Discussion

106. PEL's claim against CPL is based on CPL's alleged breach of its duty of care owed to PEL. PEL must therefore show that CPL owed it a duty of care, that that duty was broken, that that breach caused it damage and that it is fair and reasonable for it to be held liable. Further, insofar as CPL show that PEL negligently contributed to its loss, any reduction in damages that PEL might otherwise have recovered to reflect that contributory negligence must be determined.

107. PEL's claim essentially relies on three cases: ***Donoghue v Stevenson***, ***Murphy v Brentwood District Council*** and ***Baxall Securities Ltd v Sheard Walshaw Partnership***.[2] The basis of PEL's claim is that CPL owed PEL, as one of the potentially large class of people who occupied and owned property that might be stored at any time within Unit 7000, a duty to take reasonable skill and care to design or supervise the construction of that building so that it was free from latent defects which might cause physical damage to any such property. This duty related particularly, although not exclusively, to latent defects in the building that might cause damage by water ingress.

108. PEL accepted that, in relation to any particular member of this class of people to whom this duty was owed, the duty ceased once that member discovered the existence of the latent defect or could reasonably have discovered it by a survey or inspection of the building that he should reasonably have carried out or commissioned prior to the damage occurring. However, in such a case, the duty nonetheless survived for any other member of the class until that particular person separately became aware, or should have become aware, of the existence of the latent defect.

109. It is to be noted that, on PEL's case, the duty is not confined to those who have an interest in the building as owner or lessee at the time damage occurs. Moreover, the duty continues to be owed to anyone who is not made aware of the existence of the latent defect once it has been discovered, save where the owner of the damaged goods ought to have known or have been informed of the existence of the latent defect. PEL accepts that the duty does not extend to any damage to the building itself although it does extend to adjacent buildings in separate ownership damaged by, say, an escape of water resulting from the latent defect.

110. CPL accepted that it owed a limited duty to the owner for the time being of the building in relation to that owner's property stored within but contended that the duty was no more extensive than that. It was not clear whether CPL would allow for an extension of this duty to a long or even a short lessee or sub-lessee but such an extension is to be presumed. Thus, the duty of care in relation to damage caused by latent defects was only owed to a person who was both the owner of the damaged property and of a substantial interest in the building at the time the damage occurred. Furthermore, once anyone discovered the defect, or ought reasonably to have discovered it, any duty of care arising from the design of the defect ceased. As an alternative, CPL contended for the modified refinement that

[2] Respectively [1932] AC 562, HL (Sc); [1991] 1 AC 398, HL and [2002] BLR 100, CA.

the duty of care ceases for any damaged property owned by anyone who subsequently also acquires an interest in the building even if that succeeding building owner had not been made aware of the defect and ought not reasonably to have commissioned a survey of the building before acquiring that interest.

111. My determination of which of these two approaches is correct could be critical to the determination of this case for two reasons.

112. Firstly, the latent defect in question, being the inadequate capacity of the siphonic drainage system, had actually been discovered in 1995 following the first flood by the investigations into the cause of that flood by the surveyor commissioned by the loss adjuster acting for the then contents insurers. The surveyor who carried out these investigations diagnosed the cause of the flood as being the inadequate capacity of the siphonic drainage system. If CPL's formulation of the duty is correct, it would prevent PEL from recovering damages even if it succeeds in showing that it was never informed of the result of these investigations and had no reason to ascertain this information.

113. Secondly, CPL submitted that PEL was both the owner of the building and of the property damaged. On CPL's case, the chain of causation between negligent architect and damaged property will always be broken once any owner of the building becomes aware of the latent defect. The chain of causation is broken even if that knowledge is not passed on to a succeeding building owner.

114. CPL therefore, contended that the chain of causation was broken on two occasions. It was initially broken when the first flood was discovered to have been caused by CPL's latent design defect and was secondly broken when IBD(2), PEL's predecessor lessee, commissioned due diligence enquiries in 1998 which either revealed or should have revealed the latent defect in question. In consequence, the chain of causation linking PEL's breach of duty and the damage to PEL's property was broken both when the first flood occurred and when IBD(2) acquired its leasehold interest in the building even if PEL did not itself know of the latent defect.

115. CPL also contends that PEL, prior to the second flood, knew of the existence of the latent defect or is to be taken to have had that knowledge or, finally, should have commissioned a survey in 2000 before it took an assignment of the lease which would have revealed the existence of this defect. If any of these contentions are made good, PEL's claim will fail, even if it was owed the much wider duty that it contends for.

3.2. The Authorities including *Baxall Securities Ltd v Sheard Walshaw Parternership*

116. The starting point of any consideration of this area of negligence law is ***Donoghue v Stevenson***. The question asked and the answer provided by the majority in that case were stated by Lord Atkin in these terms:

"The question is whether the manufacturer of an article of drink sold by him to a distributor, in circumstances which prevent the distributor or ultimate purchaser or consumer from discovering by inspection by any defect, is under any legal duty to the ultimate purchaser or consumer to take reasonable care that the article is free from defect likely to cause injury to health."

"... a duty to take due care did arise when the person or property of one was in such proximity to the person or property of another that, if due care was not taken, damage might be done by the one to the other. ... proximity ... extend[s] to such close and direct relations that the act complained of directly affects the person whom the person alleged to be bound to take care would know would be directly affected by his careless act. ... 'This [rule] included the case of goods, etc., supplied to be used immediately by a particular person or persons, or one of a class of persons, where it would be obvious to the person supplying, if he thought, that the goods would in all probability be used at once by such persons before a reasonable opportunity for discovering any defect which might exist, and where the thing supplied would be of such a nature that a neglect of ordinary care or skill as to its conditions or manner of supplying it would probably cause danger to the person or property of the person for whose use it was supplied, and who was about to use it. It would exclude a case in which the goods are supplied under circumstances in which it would be a chance by whom they would be used or whether they would be used or not, or whether they would be used before there would probably be means of observing any defect, or where the goods would be of such a nature that a want of care or skill as to their condition or the manner of supplying them would not probably produce danger of injury to person or property.' This is obviously ... to call attention to the proximate relationship, which may be too remote where inspection even of the person using, certainly of an intermediate person, may reasonably be interposed. With this necessary qualification of proximate relationship ... I think the judgment of Lord Esher expresses the Law of England. "[3]

117. The likelihood of there being an intermediate examination so as to negative the duty was expressed by Lord Atkin as being one which was possible. As explained in **Clerk & Lindsell on Torts**,[4] this test has since been changed so as to require an intermediate examination to be probable before the duty is excluded. The relevant passage quotes from Goddard L.J. in ***Paine v Colne Valley Electricity Supply Co. Ltd***:[5] *"Perhaps, therefore, without disrespect, the word **'probability'** may be substituted for **'possibility.'** If there be such probability the relationships between the manufacturer and ultimate user or consumer will not be proximate."*

118. This development of the law of negligence, in relation to buildings, was taken forward by ***Murphy v Brentwood D.C.***. Lord Keith of Kinkel stated: *"... an essential feature of the species of negligence established by **Donoghue v Stevenson** was that the carelessly manufactured product should be intended to reach the injured consumer in the same state as that in which it was put up with no reasonable prospect of intermediate examination ... It is the latency of the*

[3] ibid. at pages 578 – 579 and 581 – 582.
[4] Eighteenth Edition, paragraph 9-30
[5] [1938] 4 All ER 803 at 808 – 809, CA.

defect which constitutes the mischief. There may be room for disputation as to whether the likelihood of intermediate examination and consequent actual discovery of the defect has the effect of negativing a duty of care or breaking the chain of causation … but there can be no doubt that, whatever the rationale, a person who is injured through consuming or using a product of the defective nature of which he is well aware has no remedy against the manufacturer. In the case of a building, it is right to accept that a careless builder is liable, on the principle of ***Donoghue v Stevenson****, where a latent defect results in physical injury to anyone, whether owner, occupier, visitor or passer-by, or to the property of any such person. But that principle is not apt to bring home liability towards an occupier who knows the full extent of the defect yet continues to occupy the building."* [6]

119. The most recent decision in this line of authorities is ***Baxall v Sheard Walshaw Partnership***.[7] In that case, Steel J[8] stated:

"52. In my judgment, the decision in ***Murphy v Brentwood*** *was dealing with matters of broad principle and does not detract from the proposition that a defect is not latent if it is discoverable by the exercise of due diligence whether or not due diligence was in fact exercised. Awareness of the danger (i.e. the propensity to flood) is not of itself only consistent with a flaw. The relevance of such awareness is to the ability to discover the actual defect by the exercise of due diligence.*

53. In summary, I would put the matter in this way. Where, in the normal course of events, a surveyor would be engaged in a survey of a building for a purchaser, and, with the exercise of due diligence, that surveyor would have discovered a defect, that defect is patent whether or not a surveyor is in fact engaged and, if engaged, whether or not the surveyor performs his task competently. … In my judgment, the judge[9] was right to conclude as follows: '… I do not think it fair just or reasonable that the extent of the liability of the defendants should depend on the assiduity of the surveyors instructed by the claimants. … Because there was a reasonable opportunity to inspect, the defendants were not in a proximate relationship to the claimants so far as concerns defects which could have been discovered by that inspection, namely the absence of overflows'.

54. … Actual knowledge of the defect, or alternatively a reasonable opportunity for inspection that would unearth the defect, will usually negative the duty of care or at least break the chain of causation unless (and it is not suggested in the present case) it is reasonable for the claimant not to remove the danger posed by the defect and to run the risk of injury …."

3.3. Summary of Legal Issues

120. I conclude that PEL must establish the following in order to recover damages from CPL:

(1) A failure by CPL to exercise reasonable skill and care in its design work;

(2) A consequent design defect occurred;

(3) The defect was latent;

(4) The existence of a duty of care that CPL owed to PEL;

(5) PEL had neither discovered nor learnt about nor should have discovered the latent defect before the damage occurred and is not barred by someone else discovering the defect;

(6) The relevant defect caused damage to PEL's property;

(7) PEL was not contributorily negligent;

(8) Damage resulted;

(9) It is fair and reasonable for CPL to be held liable to PEL; and

(10) The claim is not barred by limitation.

In order to answer the two issues left for me to resolve, I must answer each of these issues, albeit that some no longer arise for decision.

4. Findings

4.1. Failure to Exercise Reasonable Skill and Care

121. CPL admits that it failed to exercise reasonable skill and care. The admission is to this effect:

"The siphonic roof drainage system at Unit 7000 was negligently designed with a design capacity of 75 mm per hour when it should have had a design capacity of not less than 150 mm per hour.

CPL fell below the standard of the normally competent architect in failing to ensure that the system installed had a capacity of 150 mm per hour in accordance with BS 6367 and/or could cope with such a rainfall intensity."

4.2. Defect

122. In the context of an architectural design, a defect is a flaw. It is to be contrasted with the danger created by the flaw, whether of an explosion, flood or other eruption from the building or of damage to other property caused by that eruption. A design defect is, therefore, a shortcoming, error or imperfection in the design. Steel J put it this way in ***Baxall & Morbain v Sheard***:

"46. The concept of a latent defect is not a difficult one. It means a concealed flaw. What is a flaw? It is the actual defect in the workmanship or design, not the danger presented by the defect. (A good example of the distinction is contained in ***Nitrigin Eireann Teoranta v Inco Alloys Ltd***.[10])

6 ibid. at page 464 D – G.
7 [2002] B.L.R. 100, CA
8 Sitting as an additional judge of the Court of Appeal.
9 Judge Bowsher QC, the judge at first instance sitting in the TCC
10 [1992] 1 WLR 498, QBD.

123. In ***Nitrigin***, defectively manufactured pipe work forming part of an industrial plant cracked and explosive gaseous material escaped. The resulting explosion caused by that escaping gas damaged the surrounding plant. The defect in question was a defect of quality of the pipe work that could lead to its cracking, to an escape of an explosive mixture and to damage to the surrounding plant.

124. In this case, the defect was the under capacity of the drainage. Since it is acceptable to design drainage systems so as to have a maximum capacity which might not drain way all possible severe storms, however intense, a defectively designed drainage system is one which has a reduced capacity to the capacity provided for by appropriate applicable drainage design principles. Thus, the Unit 7000 drainage system was defective in having a shortfall in drainage capacity of 75 mm per hour, or in having a drainage capacity of 75 mm per hour rather than 150 mm per hour. Had the capacity been 150 mm per hour, the system would not have been designed defectively, even if a totally unexpected rain storm of greater intensity than 150 mm per hour measured over a 2 minute period occurred and caused overflow damage.

4.3. Latent

125. In the context of a design defect in the structure of a building, the defect is latent if it has not been discovered and could not reasonably have been discovered before the damage has occurred. The only way in which a defect can readily be discovered is if it is visible to the user of the building or it can be ascertained or discovered by an inspection, survey or examination undertaken by a competent professional. It is ordinarily to be expected that any building will at some stages in its life be surveyed or inspected by the owner or lessee but not necessarily when it was first completed. Thus, a latent design defect to the drainage system is one that CPL, as the architectural designer, might reasonably anticipate would not be discovered at or immediately following the completion of the construction of Unit 7000. That defect remains latent until the time when it was, or could have been, discovered by an inspection, survey or examination of that part of the building that was undertaken or could reasonably have been expected to have been undertaken.

126. An under capacity siphonic rainwater drainage system looks to the naked eye as being one which is normal even though its vertical down pipes are smaller than those installed into a gravity system. All siphonic systems use smaller pipes than conventional systems use. The system will lack sufficient capacity if the size of its pipe work and the outlets leading rainwater from the gutters into that pipe work or the gutters are incorrectly sized or if there are inadequate overflow arrangements from the gutters. The sizing will depend on the nature of the system, particularly whether it is a gravity or a siphonic system and on the geometry of the pipe work. A purely visual inspection of the building will not reveal that the system is defective in being under capacity since that question requires the appropriate capacity and the actual installed capacity to be ascertained. Only an engineer or a surveyor with particular expertise can usually ascertain these matters, particularly if the system is a siphonic one. If, however, the system lacks any overflow arrangement installed in conjunction with the primary system, any surveyor undertaking a survey of the roof and surface rainwater drainage system should conclude that the system is under-designed but particular expertise, coupled with the taking of measurements and the undertaking of appropriate calculations is required to ascertain that the system is under-designed in any other respect.

127. This was the position in ***Baxall*** because the relevant pre-acquisition survey of a warehouse building failed to note that the gutters lacked any overflow arrangement. The surface rain water drainage system in that case was also a siphonic one and the valley gutters should have had overflows installed at intervals to accommodate overflow at times of intense rain storms. The system was also generally designed with an insufficient capacity since, as in this case, it was designed as a Category 2 rather than a Category 3 system. The judge, and on appeal the Court of Appeal, held that the defect arising from the absence of any overflows could and should have been discovered by the surveyor undertaking the pre-acquisition survey. However, the additional design defect arising from the installation of a primary system with insufficient capacity could not reasonably have been expected to be discovered during such an inspection. The architect was, however, held not to have been liable because the discovery of the absence of overflows would have given rise, on the facts of that case, to a situation where overflows could and should then have been fitted and, if fitted, the flooding would have been avoided.

128. In this case, an overflow system, albeit an inadequate one, was installed. Thus, it is agreed by the parties' experts that the relevant test to apply to this case was whether there should have been a survey or inspection at any time prior to the second flood which would have revealed the existence of the under-capacity of the drainage pipes or, in other words, ascertained that the capacity was 75 mm per hour and not 150 mm per hour in a situation where that larger capacity was required.

4.4. The Existence of a Duty of Care Owed by CPL to PEL

129. The duty of care can arise in relation to the owner, occupier, visitor or passer-by of a building or to the property of any such person. This is a potentially wide class of potential claimants. The overall duty of care can give rise to liability for up to fifteen years after the breach of duty occurs. For industrial premises, there can be a large number of interests held, including the owner, lessor, a series of lessees and underlessees, mortgagees, licensees, bailees of goods and visitors. Moreover, since leasehold interests can be assigned and ownership can change hands several times within a fifteen year period, the totality of potential claimants is considerable.

130. One of the questions that arises in this case is what happens to the potential duty of care owed to other members of the class of potential claimants if the latent defect is either discovered or discoverable by one member of the class. If, of course, another member of the class learns of the existence of the defect from the person who has discovered it, that second member of the class also ceases to have a cause of action against the negligent

architect because, for that second potential claimant, the defect ceased to be latent on his discovery of its existence. But if any other member of the class does not learn of the defect, particularly if the class member who discovers its existence should have passed on his knowledge in a way that the defect's existence should have become known to that other class member, is the duty of care lost for that second class member?

131. It is clear from the authorities that other members of the class of potential claimants do not automatically lose their potential causes of action in such circumstances. In some cases, another member of the potential class may lose his cause of action if he is so closely connected to the individual who discovers the existence of the defect that he is taken to have been affected sufficiently by that knowledge that, for him, the defect is no longer latent. An example of such a case is provided by ***Hayes v Leo Scaffolding Ltd & Another***.[11] There a scaffolding board was manufactured in a defective condition. The board both could and should have been inspected by the plaintiff's employer but was not. The board was used and the plaintiff was injured when working on the scaffold. He sued both his employer, who submitted to judgment, and the manufacturer but lost. The Court of Appeal held that since the manufacturer could reasonably have assumed that the board would have been inspected before it was used, the plaintiff had no cause of action against the manufacturer even though it was his employer and not himself who should have inspected the board.

132. However, in many cases where a third party is injured or his property damaged by a latent defect which was, or could have been, discovered by the owner of that property, the third party's cause of action against the manufacturer or designer survives and may still be pursued. Two examples of this are provided by ***Lambert v Lewis***[12] and **Clay v A. J. Crump & Sons**.[13] In ***Lambert*** at first instance, the judge found that the negligent design by the manufacturer of a coupling used as a towing device gave rise to liability to the plaintiffs, two of whom had been killed and two injured in a car accident which had been caused by a trailer being separated from the vehicle it was being towed by and to which it was coupled by the coupling in question. The cause of the accident was the coupling linking the trailer to the towing vehicle which suddenly broke in transit as a result of its negligently designed locking mechanism. The owner of the vehicle should have discovered that this mechanism was defective, although the defect was latent, because the coupling had been in an obviously damaged condition resulting from this defect for some months before the accident. The owner should have discovered this damage during one of the periodic inspections of the coupling that reasonable prudence suggested that he should have made. Instead, the owner had not inspected this part of the towing device and negligently continued to use it in that condition. The plaintiffs recovered from the owner as a result of that negligent failure to inspect his coupling. However, they als recovered from manufacturer because the judge held that it had put into circulation a coupling whose design was defective which was dangerous in use. The negligent failure of the owner to inspect the coupling did not break the chain of causation linking the plaintiffs to the manufacturer. This finding was not appealed and the case on appeal was concerned with third and fourth party proceedings which did not affect or upset this finding.

133. In ***Clay's*** case, an architect and demolition contractors carelessly left a wall standing in a dangerous condition on a site which was being cleared. Subsequently, building contractors working on the site negligently failed to notice the danger. When the wall collapsed on the plaintiff, all three parties were held jointly liable to the plaintiff although the architect's and the demolition contactors' negligent failure to inspect had occurred prior to the building contractors' negligent failure. The architect was not relieved of liability based on his having allowed a dangerously defective wall to remain standing whose defect he could and should have discovered by an inspection he could reasonably have been expected to carry out. In so doing, he *"put the defective wall into circulation*" but could reasonably have expected the defect to have been discovered by a reasonable inspection before it caused damage. A reasonable opportunity to discover the defect arose when the building contractors' director subsequently inspected the defect but negligently failed to notice that defect. The architect's liability arose notwithstanding that subsequent negligent failure of the building contractors' managing director.

134. However, in many cases where a party up the chain or earlier in time has failed to discover or to pass on the knowledge of a latent defect, the party who has been injured or whose property has been damaged by the same defect will fail in an action against the manufacturer or designer of the latently defective object. There are three ways that this result may be achieved. Firstly, the court might determine that the damage was caused not by the latent defect but by the subsequent failure of the party who discovers it to pass on that knowledge. In other words, it might determine that the chain of causation between breach of duty and damage was broken by the subsequent failure to discover or pass on knowledge of the latent defect. Secondly, the court might determine that the injured party contributed to his loss by himself failing to inspect the latently damaged object. Damages can then be reduced, or in an extreme case eliminated, by application of the Law Reform (Married Women and Tortfeasors) Act 1935. Thirdly, the court might determine that it is not just and reasonable that the claimant caused loss or damage by the latently defective building or article should recover from the manufacturer or designer in circumstances where the latent defect has become known to another related party. Such a finding is particularly appropriate where the third party should have taken steps which would have led to its discovering the defect for itself.

135. It follows that a potential duty of care owed to one member of the class of potential owners of an interest in property damaged by a latently defective designs is not automatically lost when another member of the class of

[11] Unreported, 3 December 1996, [1996] EWCA Civ 1091, CA.
[12] [1982] AC 225, HL and CA, [1978] I Lloyd's Law Reports 610, QBD
[13] [1964] 1 QB 533, CA

potential claimants discovers, or ought to have discovered, the latent defect. The claim of each member of the class of potential claimants must be examined individually in the light of the facts specific to that member and that claim. Where, for one member of the class of potential claimants, the defect ceased to be latent, the resulting consequence for another member of the class who seeks to make a claim against the negligent manufacturer or designer will depend on the facts. The potential cause of action of that second member of the class will, depending on the circumstances, either survive unaffected, or it will be lost altogether because there is no longer a duty of care owed to him because the defect is no longer latent, or it will be defeated because the chain of causation was broken by the earlier discovery, failure to discover or failure to pass on knowledge of the discovery or it will result in reduced damages by virtue of the operation of the contributory negligence doctrine or, finally, it will be defeated because it is no longer fair, just or reasonable to allow recovery.

4.5. Potential Inspections and Surveys of Unit 7000's Latently Defective Drainage System

136. It is clear from the lengthy history of Unit 7000 in the first 12 years of its life from 1990 until 2002, that there were several interested parties in the building at any one time and also a series of successive lessees. Throughout, the building was owned first by the Church Commissioners then by the British Steel Pension Fund. Under the terms of the 25-year lease granted to Asda, the building owner retained the obligation to repair damage caused by flooding.

137. The developer and its managing agent, respectively McLagan and Gazeley, retained an interest in the drainage system since McLagan had an on-going duty to the owner and its lessees, by virtue of the terms of the conveyance to the owner and the terms of the lease, in relation to latent design defects in the siphonic rainwater drainage system.

138. Each successive owner, being the Church Commissioners and the British Steel Pension Fund, and each successive lessee, being Asda, IBD(1), IBD(2) and PEL, had an interest capable of being damaged in that each would be storing valuable goods which would be damaged by any overflow of the latently defective drainage system. At the time of the first flood in 1994, Asda was no longer the lessee but it had a similar interest to IBD(1) by virtue of its sub-leases of parts of the warehouse.

139. Finally, there were at any one time, at least two different insurance policies covering flood damage resulting from the latently defective rainwater system. One policy covered the structure and was taken out by the owner for the time being and at least one other policy covered the contents of the warehouse and was taken out by the lessee. covering damage caused by the latently defective design of the rainwater system. Each insurer, by virtue of its rights of subrogation, had separate interests in the latently defective rainwater system from their insured following any settlement of a claim resulting from damage caused by that latent design defect since it could bring proceedings in the name of the insured to recover from the negligent designer its own loss in meeting its insurance obligations following damage caused by the overflowing drainage system.

140. The nature of the inspection will be determined by the context and purpose of that inspection. Whether it ought reasonably to have discovered the particular latent defect in question will depend on these factors since they will shape the nature of the inspection and what it ought reasonably to throw up. There are, for example, at least eight different types of inspection of commercial and industrial properties that are provided for in the 1998 edition of the Guidance Notes for Surveyors produced by the RICS that is entitled *"Building Surveys and Inspections of Commercial and Industrial Property"*. These include surveys in connection with an acquisition; a schedule of conditions or dilapidations; the production of a maintenance programme; a feasibility study; specialist investigations; insurance related matters; regulations and workmanship.

141. Thus, the survey might arise in connection with an intended purchase of the freehold or leasehold, it might follow a flood or overflowing of the rainwater system it might arise in connection with the construction of the building or in post-construction inspections made in connection with on-going design or construction defects that require attention from the contractor or it might arise in one of several other ways. Furthermore, the nature of the inspection or survey might vary depending on whether it was being made for the owner, for the lessee, particularly if the lease provided for the lessee only to undertake limited repair or reinstatement obligations, or for an insurer.

142. In ***Baxall,*** the Steel J stated:

> *"53. Where, in the normal course of events, a surveyor would be engaged in a survey of a building for a purchaser, and, with the exercise of due diligence, that surveyor would have discovered a defect, that defect is patent whether or not a surveyor is in fact engaged and, if engaged, whether or not the surveyor performs his task competently."*

In that case, a structural survey was in fact commissioned for a system which lacked any overflow arrangements and the survey was poorly performed since it did not reveal or report on this absence of overflow arrangements although it should have done. Had the absence of any overflow arrangements been noted, this would have led to the insertion of overflows which would have avoided the flooding that occurred. This case did not decide that, before every acquisition of an interest in a building, the party acquiring that interest is to be expected to commission a survey of a kind which would reveal latent surface water drainage defects, particularly if these do not include the absence of any overflow arrangements.

143. A further complication is that it would not necessarily be accepted, standard or reasonable practice for a freehold owner or lessee to obtain a survey before acquiring its interest in the building. Circumstances vary, so that, in the case of Unit 7000, two separate ownerships and five successive long lessee interests were involved. The first leasehold interest occurred with the grant of the head lease to Asda, being a connected party to the developer, and no acquisition or other survey was carried out. This grant was followed by a first transfer of the head lessee's interest

to IBD(1). This was accompanied by a structural survey which, notably, did not identify the siphonic drainage system's latent design defect. CPL did not contend that that inspection should have revealed the latent defect or that the surveyor's failure to discover that defect resulted in a break in the chain of causation linking CPL's negligence to PEL's damage. There was then a transfer of the ownership which may or may not have been accompanied by a structural survey. The first transfer of the lease was followed, in turn, by a second transfer to IBD(2). This was a Simon & Schuster inter-Group transfer undertaken as part of a technical re-arrangement of that Group's assets. No survey accompanied this transfer. This second transfer was followed by a sale of IBD(2)'s shares to the Pearson Group, a transaction which did not involve any assignment or transfer of the lease. This sale of IBD(2)'s shares formed a small part of a huge sale by one Group of its educational business to another Group. The overall sale involved due diligence enquiries but did not involve any structural or other survey of individual properties included in the sale. Finally, there was a third equitable transfer of the lease arising from the transfer of IBD(2)'s assets including the Unit 7000 lease to PEL followed by a fourth transfer which occurred when the legal assignment of the lease to PEL was executed some months later. This transfer to PEL therefore occurred in two stages as part of a technical inter-Group transfer of Pearson assets and no survey accompanied either stage.

144. What if any survey or inspection would reasonably be anticipated in relation to each of these different types of transaction varies from transaction to transaction and evidence is needed to establish whether a survey would reasonably be expected at all in connection with that particular transaction and, if one would be expected, what kind of survey it would be and what kind of latent defect it might be anticipated to reveal. CPL did not lead any evidence as to whether it was reasonable to expect that the British Steel Pension Fund, IBD(2) or PEL should have commissioned a survey at any particular stage in the chain of events following the putting into circulation of the latent defective design, nor as to what kind of survey could reasonably be expected in connection with any of the four particular types of transaction that resulted in PEL's acquisition of an interest in Unit 7000 from IBD(2). In particular, no evidence was adduced to explain what is normally involved in a due diligence enquiry and whether such an enquiry would ordinarily include surveys of buildings included in a sale of the business that was subject to such an enquiry.

4.6. Did PEL Know of the Existence of the Latent Design Defect?

145. I have already found that neither IBD(1) nor Simon & Schuster was ever informed about the contents of the Pick Everard Report of August 1995 because neither McLarens nor the Independent passed on this information. Equally, Mr Alan Martin was never informed of the cause of the flood other than to have been told at the time of the flood that it was caused by a freak storm and that the design and capacity of the surface rainwater drainage system complied with the building regulations.

146. It is also clear that McLarens were acting exclusively as loss adjustors for the Independent and that neither McLarens nor the Independent had any obligation to pass over information either had received from Pick Everard to IBD(1) about the drainage system or about the cause of the flooding. Neither was acting as IBD(1)'s agent in receiving this information. It was the case that the surveyor who undertook the survey leading to the Pick Everard Report subsequently suggested to McLarens that IBD(1) should, as a matter of courtesy and decent commercial practice, be informed of the under-design of the siphonic system but, in failing to implement that advice, neither McLarens nor the Independent was in breach of any legal duty to disclose information to IBD(1).

147. There was no evidence to explain why neither the Independent nor McLarens appear to have passed on this information to IBD(1), why the Independent, or some other contents insurer, appear to have renewed IBD(1)'s insurance policy covering the contents of Unit 7000 without requiring any additional work to increase the capacity of the rainwater system or why the landlords or their insurers or Gazeley do not appear to have investigated the rainwater system or to have required further work to increase its capacity. These questions are within PEL's knowledge to answer and the parties chose to conduct the case without obtaining evidence in relation to them.

148. CPL submitted that Mr Martin was aware that the 1994 flood was caused by the fact that the capacity of the above ground drainage system was insufficient to accommodate the amount of rainwater that fell on 24 July 1994 and that, therefore, he discovered the existence of the latent defect in that system. However, that submission confuses the actual design defect in the system with a supposed defect in the system notwithstanding its apparent compliance with good design practice. I have already found that it is not every shortfall in the system's design capacity that constitutes a latent defect, merely the shortfall of 75 mm per hour resulting from the capacity being 75 mm per hour rather than 150 mm per hour. It is clear from the evidence that Mr Martin was not informed of the numerical capacity of the system but was merely informed that the system, although designed satisfactorily to conform to the building regulations, was still of insufficient capacity to cope with a freak storm. That is tantamount to being informed that the system, although having a capacity of 150 mm per hour, was still incapable of coping with the storm that occurred. This information does not, therefore, amount to a statement that the system has a latent defect in it or of the nature or extent of that defect.

149. It was suggested by CPL that PEL should have become aware of the 1994 flood and have been put on enquiry by answers it should have received in any enquiries before contract it should have addressed to IBD(1) or IBD(2) during the conveyancing transactions in 1998 and 2000. However, the manner in which the leasehold interest in Unit 7000 was transferred from IBD(1) to PEL precluded any such enquiries before contract. The transfer was from IBD(1) to IBD(2) by way of an internal Group transfer within the Simon & Schuster Group and, subsequently, a similar internal Group transfer occurred from IBD(2) to PEL within the Pearson Group after it had acquired the entire shareholding of IBD(2). No conventional conveyancing transaction would have occurred. As a final point,

there was in any case no evidence as to what enquiries would ordinarily be addressed during a commercial conveyancing transaction and whether such a transaction could reasonably have been expected to pass onto PEL, on the facts of this case, knowledge of the 1994 flood.

150. Thus, IBD(1) had no knowledge of the latent defect and cannot be faulted for not having that knowledge or have that knowledge attributed to it on the basis of McLarens or the Independent acquiring it. There was, therefore, nothing which was or should have been passed onto IBD(2) and PEL about the flood or its causes or of the existence or nature of the latent defect in the siphonic drainage system.

4.7. Should the Latent Design Defect have been Discovered after the 1994 Flood?

151. It is clear that IBD(1)'s insurers, through its loss adjuster, learnt of the existence of the design latent defect. Moreover, it is to be expected that that knowledge would be sought and obtained by anyone financially responsible for the damage caused by flooding resulting from the gutters overflowing. Indeed, that knowledge was ascertained by McLarens. It was explained in evidence that a structural engineer with drainage experience could ascertain that the system was under designed by ascertaining from visual inspection and measurements, the capacity of each gutter, the roof area being drained and the capacity and spacing of each outlet. Using this information, appropriate calculations could be carried out to identify the capacity of the system.

152. Equally, a surveyor could have deduced that the flooding was caused by under design by first ruling out blockage or a freak rainstorm had occurred. The first could have been ruled out by visual inspection and the second by ascertaining from meteorological records the intensity of the rain storm in question. Having ruled out both possibilities, by process of elimination of the only other viable potential causes of the flood, the surveyor could have concluded that the cause was under capacity.

153. However, the fact that the insurers of IBD(1)'s stock or the owner of the building may have, or should have, ascertained what the cause of the flooding was does not lead to the conclusion that IBD(1) or any successor in title of IBD(1) has no surviving claim arising out of the second flood. Firstly, IBD(1) had no particular interest in ascertaining the cause of the flood given that it was not responsible for damage caused to the building by the flooding nor for pursuing the insurer's rights of subrogation against CPL. Thus, IBD(1) should not necessarily have itself ascertained the cause of the flood.

154. Secondly, any failure to pass on the fact that the rainwater system was under-designed to successor lessees, even if IBD(1) had itself acquired this knowledge, did not turn the defect from being latent to being patent so far as those successors were concerned. Equally, there was no break in the chain of causation between CPL's negligence and the damage caused by the second flood in 2002, the effective cause of that damage was CPL's negligent drainage design and not any failure to pass on along the chain of lessees' knowledge about the existence or extent of the rainwater drainage system's under-design. Furthermore, there is no question of contributory negligence by PEL nor that it would be unjust or unfair to allow PEL a remedy against CPL merely because PEL was unaware of the existence of the latent defect that IBD(1) knew of or ought to have known of.

155. It follows that there is no reason to deprive IBD(1) of is title to sue CPL or to recover damages from it by virtue of the 1994 flood and the inspections that were, or ought to have been, carried out in its immediate aftermath.

156. CPL also suggested that IBD(1) should reasonably have been expected to commission an engineer's report from a drainage expert so as to ascertain the cause of the flood and to report on the rainwater drainage system. This was a wholly unrealistic suggestion. IBD(1) had no obligation to repair flood damage or to insure the building against flood damage. It had fully insured the contents of the warehouse and, following the flood and the consequent flood damage, its claim, made on a block policy by IBD(1)'s American insurers, was met promptly and in full for the lost and damaged stock. IBD(1)'s employees and representatives were informed on site that the cause of the damage was an act of God in the form of a storm of unprecedented severity which the rainwater drainage system, although built to conform to the Building Regulations, could not cope with. The landlords repaired the structural damage promptly and without any suggestion to IBD(1) that there was, or might be a problem with the capacity of the siphonic rainwater drainage system. So far as is known, the buildings and the separate contents insurance on Unit 7000 was renewed regularly and without question with insurers in the years following the flood. The only possible glimmer of information that came to IBD(1)'s attention that the drainage system might be questionable was when Mr Bowler of Pick Everard, who carried out the on-site investigations of the system for Pick Everard when working on its report for McLarens, made arrangements with IBD(1) to enable him to visit and inspect the premises. He may well have explained why he was carrying out this inspection. However, unless and until IBD(1) was subsequently informed of what was discovered by being sent a copy of the report or by some other means, IBD(1) would have no basis for making its own enquiries. It would reasonably have concluded that its insurers were satisfied with the results of the investigations and, indeed, appear to have accepted a renewal of the insurance policy in the two years following the flood prior to assigning its interest to IBD(2).

157. It follows that not only did IBD(1) not get to hear of the contents of the Pick Everard report, it acted reasonably in not itself commissioning any further enquiries or inspections of the siphonic rainwater system.

4.8. Did Pick Everard's Survey Affect PEL's Cause of Action?

158. CPL contended that the fact that the latent design defect was discovered by Pick Everard, even if that discovery was not brought to IBD(1) or PEL's attention, nonetheless caused CPL to be relieved of its duty of care otherwise owed to PEL or constituted a break in the chain of causation between CPL's breach and PEL's damage.

159. I cannot accept that contention. Firstly, it assumes that the latent quality of the defect is inherent in the defect so that, if one person discovers the defect, that defect thereafter ceases to be latent to any other person. However, the latent quality of the defect survives for everyone else unless and until the defect becomes obvious to all without the need for a particular or specialised inspection or survey. That is clear from the line of cases that I have already referred to. Moreover, where, as here, neither IBD(1) or any of its successors as lessees knew or ought to have known of the existence of the latent defect because this knowledge was not communicated to any of them and none of them ought reasonably to have ascertained that fact, it cannot be said that the chain of causation was broken by Pick Everard's survey. Although it may seem as a matter of first impression that IBD(1) knew or ought to have known of the existence of the siphonic drainage system's latent design defect, a careful review of the facts shows that IBD(1) neither did, nor could reasonably have been expected to, find out about that latent defect.

9. Should A Survey Have Been Commissioned in 1998 or 2000?

160. CPL contends that a survey should have been commissioned by IBD(2) before it acquired its interest as a lessee of Unit 7000, by Pearson Plc before it acquired IBD(2)'s shares and by PEL before it acquired its interest as a lessee from IBD(2). It further contends that the due diligence enquiries made by Pearson Plc in 1998 before acquiring Viacom's educational business amounted to, or included, a survey of Unit 7000.

161. I do not accept CPL's contentions. It is to be noted that the leasehold interest did not pass directly from one party to an unrelated party when PEL acquired that interest. It passed in four separate stages. Initially, IBD(1)'s interest was assigned without consideration from one company to another related company, IBD(2) within the Simon & Schuster Group of companies as part of a technical re-organisation of Group assets. Secondly, Pearson Plc acquired the shares of IBD(2) which remained the lessee of Unit 7000. Thirdly, IBD(2) transferred its assets to PEL, being another related company within the Pearson Group and, fourthly, having ceased trading, assigned its leasehold interest to PEL. Both transactions involving PEL were for no consideration and amounted to a technical re-organisation of Group assets.

162. I cannot find, without evidence, that any survey ought ordinarily to have been anticipated prior to any of these four transactions. These types of transaction are very common in commercial restructuring and in the sale of whole businesses and they are clearly not always preceded by what was referred to in this case as a pre-acquisition survey. Furthermore, the due diligence enquiries that Pearson Plc undertook, which would have been ones involving accountants, financial experts and lawyers, would not ordinarily involve surveys of buildings or the intervention or participation of surveyors or engineers although, no doubt, in some situations due diligence enquiries might involve such assistance. I cannot, in the absence of evidence, reach any conclusions as to the nature of any enquiries made during Pearson's 1998 due diligence enquiries or whether they ought to have revealed the latent design defect in existence at Unit 7000, a mere grain of sand in the beach of Viacom's educational business which was the subject of those due diligence enquiries.

163. I conclude that a survey or inspection of the siphonic drainage system at Unit 7000 was not to have been reasonably expected in 1998 or 2000 at any of the four stages of the transfer of IBD(1)'s interest to PEL and, in any case, there was no evidence that there was such an expectation without which no such finding can be made. I also conclude that the due diligence enquiries that were made had nothing to do with inspecting the drainage system at Unit 7000.

4.10. What Would an Inspection or Survey in 1998 or 2000 have revealed?

164. Since much time was spent in considering with the two surveyor experts whether a survey of Unit 7000 in either 1998 or 2000 would have thrown up the existence of the under-design of the drainage system, I will consider that question although, on the basis of the findings that I have already made, that question does not arise.

165. There is an initial difficulty in seeking from the surveyors an answer to this hypothetical question. That is that the context of the hypothetical inspection must first be defined. In particular, it must be determined whether the survey was to be regarded as an acquisition survey by PEL who, at the time of the survey, was at arm's length from, and with no interest in, the owner or long lessee of Unit 7000. The nature of the acquisition and the instructions as to that particular acquisition that would have been given to then surveyor must also be determined. In that context, it must also be determined whether the hypothetical surveyor in 1998 or 2000 would have been aware, before he started the survey, that there had been a flood in Unit 7000 in 1994.

166. The hypothetical exercise that is envisaged makes no sense unless it is to be regarded as being undertaken on the same basis that it would have been undertaken had IBD(2), Pearson Plc or PEL actually instructed such a survey at that time. None of those parties was aware of the fact of the 1994 flood. Moreover, had the surveyor been informed of the fact of that flood when he was first commissioned, he would not have been carrying out a survey which might potentially have discovered a latent design defect since he would have already been put on enquiry that such a defect might exist.

167. For all these reasons, I find that the appropriate hypothetical survey to consider in the context of ascertaining whether a survey in 1998 or 2000 would have unearthed the existence of the latent design defect in the drainage system is one where the surveyor instructed to carry it out was instructed to undertake an acquisition survey and would have embarked on his survey work without prior knowledge of the 1994 flood. This is certainly the type of survey that CPL, had it given any thought to the question of what reasonable examination it might

anticipate might be conducted of Unit 7000, would have considered as being the type of inspection that would take place in the future if any was to occur at all.

168. It was clear that both surveyors who gave evidence on this question accepted that a surveyor, particularly if conducting an acquisition survey, would be expected to follow the guidelines set out in the RICS Guidance Notes, the relevant version of which had, by coincidence, been published in February 1998. These Guidance Notes did not, of course, have the force of law but they clearly set out what should be considered to be best practice for surveyors conducting any kind of survey or inspection of commercial and industrial property.

169. For an acquisition survey, the Guidance Notes provided:

2.1.1 Acquisition

The surveyor needs to determine the interest being acquired. In the case of a leasehold interest copies of the relevant leases, etc. should be obtained prior to inspection. A schedule of condition may be suitable.

The Guidance Notes stressed the importance of ascertaining the client's needs. As a minimum, the surveyor should ascertain what the client needs to know, why he requires that information, when he requires it, the appropriate shape, size and age of the building, whether it is occupied and relevant lease information. The intended use of the building and any special needs should also be ascertained.

The Guidance Notes confirmed that enquiries of the occupiers can often additionally be made on such matters as recent structural alterations and major repair works. Particularly relevant to this case would be the next item:

The relevance of flooding

The surveyor should have sight of any existing lease documents before beginning his inspection including the repairing covenants and their effects, any attached schedule of condition, the need to obtain the landlord's consent to alterations and the provision for reinstatement in the event of an insurable loss.

The degree of inspection will depend on the purpose of the survey and the intent of the report. For roofs and rainwater goods, the Guidance Notes stated:

Externally, the roof areas should be inspected as closely as practicable using the available equipment and vantage points. Similar attention should be paid to the insides of gutters, the conditions of rainwater pipes and other elements affecting the collection and disposal of roof water. …

It is useful and sometimes important to record … the size and design of the roof structure …

In relation to Services, a number of detailed recommendations were made. Of relevance were those relating to the use of specialists. The surveyor should advise, if possible before the inspection, on the engagement of specialists for particular aspects of the survey and should co-ordinate the specialist tests where these are required. The surveyor's role in relation to services was stated to be:

Under normal circumstances the surveyor would not be expected to carry out a visual examination of the services as most of these would require a specialist trained in that particular field. The surveyor's role, however, should be to carry out a visual inspection of the services and co-ordinate specialist tests as necessary. Once the specialists have submitted their reports he should be responsible for co-ordinating them for presentation to the client. It is not necessary to appoint specialist consultants on behalf of a client as a matter of course, but where the surveyor is aware of the client's requirements he must use his judgment and take his client's instructions.

Under Drains and Other Specialist Services, the Guidance Notes provided:

Drains

Surface water drains should be checked using water in order to identify severely blocked gullies etc., and outlets should be confirmed wherever possible, or a note to the effect that gullies were not checked included in the report.

Other Specialist Services

Other specialist services may need inspection and report by the surveyor in conjunction with any specialist may include inter alia:

. window cleaning equipment
. fire alarms
. burglar alarms
. entry systems
. escalators and lifts

170. PEL's surveyor was Mr Ian Ford and CPL's was Mr Richard Cook. The two issues on which they were specifically asked to advise were whether a reasonably competent Building Surveyor would have recognised a symphonic drainage system in 1998 or 2000 and whether he would have recommended an inspection of the roof drainage system by a specialist. They took opposing views on both questions.

171. Mr Ford considered that the majority of surveyors would have been aware of the existence of siphonic drainage systems and would have recognised the Unit 7000 system to be such a system but many surveyors would not have known of these systems. Moreover, very few building surveyors would have known of the design faults relating to siphonic drainage which is a specialist engineering area.

172. Mr Cook considered that any surveyor could and should have recognised the system to have been a siphonic one and could had should have been aware of the problems of such systems. Thus, the surveyor should have specifically recommended further expert advice be obtained.

173. The surveyors agreed that a building surveyor would not have sufficient expertise to be able to ascertain that a siphonic system was under-designed or was of insufficient capacity, save possibly to note, if it be the case, that there were no visible overflow arrangements in place. Any blockages or obvious deterioration should be noted and the need for particular care in inspecting for, and dealing with, blockages from leaves and similar material would be expected. Thus, the dividing line between them was the narrow but significant question of whether a prudent surveyor in the context of an acquisition survey on this building in 1998 or 2000 would have recommended that he commission, for the purposes of the survey, an inspection and report from a specialist drainage engineer with an expertise in siphonic drainage systems in a situation in which there was no prior knowledge that the system had ever flooded in the 8 – 10 years of its life to date and no visible signs of blockage, deterioration or under-capacity.

174. Mr Cook was employed by Pick Everard, the firm that had conducted the investigations of the system for McLarens in 1995 after the 1994 flood. He had not been involved in that investigation but was aware of the siphonic drainage failures both at Unit 7000 and at other Units on the Magna Park Estate as a result of his firm's involvement in the investigations of those failures. He had been employed by Pick Everard for 35 years and had always worked in the Leicester office of that firm. He clearly had acquired an interest in siphonic drainage systems as a result and had undertaken a detailed document search of such systems as part of the investigations he made when preparing his report for this case in the months before trial.

175. As a consequence of the particular knowledge that he had acquired of siphonic drainage systems in general and of those at Magna Park in particular and given his knowledge of the freak storm that had occurred in that area in 1994 from having worked and practised in that area, Mr Cook started his consideration of what a competent surveyor would have advised about the rainwater system as part of an acquisition survey in 1998 or 2000 from a special or privileged starting point. He was clearly influenced in forming his opinion by his previous experience and knowledge of Unit 7000 and of the siphonic drainage problems encountered on the Magna Park Estate.

176. His views can be summarised as follows. A competent surveyor would start from the assumption that since there had been a number of under-design failures with siphonic drainage systems in the early 1990s, any siphonic system was to be regarded as suspect. Thus, enquiries should be made of those working in the building or connected with it as to whether there had been any overflow problems or flooding in the preceding years. If such enquiries had been made, given the surveyor's starting point that the system was potentially "guilty until proved innocent", the surveyor would have discovered that there had been a flood previously or would have remained concerned about the system's propensity to overflow and, in either event, would have firmly recommended that a siphonic drainage specialist should examine the system.

177. Mr Cook was unable to point to any RICS publication or advice to surveyors prior to 2000 which highlighted any particular problems associated with siphonic drainage systems. As an historical fact, as both this case and the ***Baxall*** case demonstrate, the early use of siphonic systems in the 1980s was, on occasion, coupled with a misapplication of the BS 6367 guidelines and recommended Categories in designing for the capacity of such systems and a number of failures undoubtedly occurred. However, progress with regard to the widespread dissemination of information about such systems was slow. A trade association for siphonic drainage systems, The Siphonic Roof Drainage Association, was not formed until 2004. Work to produce a revised and updated BS 6367 containing pointers on design parameters applicable to siphonic drainage has only recently, in 2004, been started and by 2005 this updated British Standard has still not been published. The other literature Mr Cook referred to did not refer specifically to the design problems and failures that had occurred during the early use of siphonic systems and was, in any case, very recent in origin and would not have been available to surveyors in 1998 or 2000.

178. In the end, the real difference between the two surveyors boiled down to Mr Cook's conviction that a surveyor would have been bound to ascertain that there had previously been a flood and, armed with the knowledge of siphonic drainage failures of the kind that he had from his own practising experience, would have firmly recommended that an investigation be undertaken of this system by a siphonic drainage specialist. However, if for some reason, the surveyor remained in ignorance of the previous flood, he would not have been in error in not recommending such an investigation. Mr Ford agreed that had the surveyor known or discovered that a previous flood had occurred, he might have recommended that an investigation be undertaken. He did not believe, however, that a surveyor would have discovered that a previous flood had occurred.

179. I find that it is unlikely that a surveyor would have discovered the existence of the previous flood or, if he did, would have regarded that as significant on the facts of this case so as to firmly recommend that a specialist's advice be obtained. The only relevant knowledge of the flood potentially available to the surveyor in 1998 or 2000 was that of Mr Martin, based on his experience when working for IBD(1). He was, however, based at Hemel Hempstead and it is extremely unlikely that his knowledge would have been passed onto the surveyor. Had it been, it would have been that there had been a one-off storm which exceeded the capacity of the system which had been designed satisfactorily but the storm had been of such intensity that the system had been unable to cope with it despite it having been designed correctly. The surveyor would have noted that the lease imposed onto the landlord the obligation to repair any consequence of flooding and would have learnt that the landlord did undertake repair work. Moreover, he would have learnt that insurance claims had been made and dealt with without any comeback that the system was defective. The Estate's managing agents might have provided information but they were only concerned with the common parts of the Estate and it is unlikely that anyone with

knowledge of all the flood problems encountered in 1994 on the Estate would have been passed on to the surveyor carrying by out this acquisition survey if he had been able to address enquiries to a representative of the managing agents.

180. Thus, there was a slim chance that the hypothetical surveyor undertaking an hypothetical survey in 1998 of 2000 at Unit 7000 would have ascertained that a flood had occurred some four to six years earlier. Even so, there was only a possibility that he would then have recommended that a specialist be retained to advise on the system. Even if that surveyor became aware of the flood, it would not necessarily have been bad practice for him to have refrained from advising on retaining a specialist drainage engineer to investigate. Finally, had the flood been ascertained and commented upon, and a recommendation made that a further specialist investigation be carried out, it is unlikely that PEL would have followed that advice and, in the circumstances of its actually acquiring either an equitable or a legal title to Unit 7000, it would not have been unreasonably for it to decline to follow such advice.

181. The facts of this case are highly unusual and would have appeared to the surveyor at the time of his hypothetical survey to be that the damage had been dealt with without any apparent complaint about the design of the system by the landlord who had the obligation under the lease to repair flood damage and to insure against the consequences to the building of such damage. The building had, at the time of the earlier flood, been used for book storage, which was the same use that it still had and was intended to have after the acquisition. Thus, it would have been reasonable to assume that the drainage system, certainly after any post-flood repairs, had been checked to ensure that it complied with the particular requirements of that sensitive use of the building. Finally, the contents insurers' claim had been dealt with without any apparent complaint by the insurers who had settled the resulting claim immediately and without any apparent comeback. The insurers, after all, appear to have kept to themselves the knowledge acquired by their 1995 investigations and that knowledge only surfaced when the 2002 flood was being investigated by those concerned with this litigation. Thus, the conclusion might well have been, and certainly could reasonably have been, that the 1994 storm and resulting flood was an accident of nature and had exceeded the capacity of any well designed system and that any design problem had subsequently been cured. The surveyor would, therefore, even if he had learnt of the flood, have reported it without a recommendation that a further specialised investigation should be carried out of the siphonic system or, if unusually he had the same partis pris of Mr Cook, would have recommended an investigation.

182. I reach my conclusion as to what a reasonable competent surveyor should have advised following an acquisition survey by reference to the RICS Guidance Notes. If the advice they contain was correctly followed, the surveyor would first have acquired a copy of the lease and noted the limited repairing obligations for flooding from the gutters and drainage system. He would also have ascertained that the purpose of the survey was limited. If IBD(1) or PEL was commissioning it, the purpose was merely for accounting purposes in relation to an inter-Group rearrangement of assets. If IBD(2) or Pearson was commissioning it, the purpose would have been for due diligence enquiry purposes and would, again, have been for the limited purpose of ascertaining that the building existed and did not obviously have a significantly reduced value or give rise to a significant risk to the overall running of the business.

183. The surveyor would have noted the condition of the gutters and rainwater pipes and that the system was a siphonic one requiring particular attention to avoid blockages and would have found nothing untoward about any of these features. He would have made such enquiries of the occupants and of others readily available and would have been unlikely to have learnt of the earlier flood. He would then have considered whether the siphonic system, being a specialist services feature which he had no knowledge about, should be inspected by a specialist. This decision, in accordance with the Guidance Notes practice, would have involved him in making an informed decision based on the circumstances of the case. That decision would have involved him in considering the risk of flooding at Unit 7000 and the likelihood of its siphonic system overflowing. In making that decision, involving as it did a risk assessment, he would have had no reason to suppose that the system had been designed so as not to conform to the building regulations, indeed he would have reasonably concluded that the system was so designed.

184. In those circumstances, and given the limited nature of the survey he was undertaking, he would not, if he followed the practise of the surveying profession applicable to the period 1998 – 2000, have concluded that a specialist's opinion of the siphonic system should be obtained. Had he learnt of the flood by chance during his inspection or from the limited enquiries he would have made on site, he would still not have advised on a specialist. He would have taken into account that the landlord and the insurers apparently took no action to enhance the capacity of the system and would have taken at face value the knowledge he would have obtained as to the apparent freak nature of the storm. He would, of course, have reported on the storm and, at best, would have noted that, if required, the client could commission a separate expert drainage report if the client had a particular requirement that meant that it needed confirmation that the system was safe notwithstanding that it was, apparently satisfactory. Had, such advice been given to, say, PEL, I have no doubt that it would not have led to PEL commissioning such an investigation since such would have seemed both unnecessary and an unnecessary expense and, in reaching that conclusion, PEL would have been acting reasonably. It was, after all, only involved in an inter-Group technical transaction.

185. Overall, I conclude that it was not to be expected that any survey should have been commissioned of Unit 7000 in 1998 or 2000 at the time of any of the four relevant transactions involving IBD(1), Pearson Plc, IBD(2) or PEL. Thus, neither PEL nor IBD(2) acted unreasonably in not obtaining an acquisition survey of Unit 7000. However, had they been unreasonable in not obtaining one, I also conclude that that survey would not have led to the discovery

of the existence of the earlier flood or of the latent design defect of the siphonic system. Moreover, it was to be expected, and would be neither negligent nor a departure from accepted surveying practice, that that hypothetical surveyor would not advise on the need to obtain a specialist inspection report, even if he became aware of the existence of the earlier flood, given the unusual circumstances of this case. Finally, in the unlikely event of the surveyor recommending a specialist investigation, the terms of the advice, and the circumstances in which it would have been given, would have been such that PEL, or the earlier companies in the chain, would reasonably have declined to follow that advice so that no investigation would in fact have resulted.

186. I am fortified in reaching this conclusion by considering what happened when IBD(1) acquired its leasehold interest. It commissioned a structural survey which reported on the siphonic drainage system in the way recommended by the Guidance Notes. However, apart from commenting on the fact that the system was siphonic and required additional support brackets and regular preventative maintenance to ensure it never became blocked and then noting the then absence of overflow arrangements, there was no separate recommendation that the capacity of the system should be checked by a drainage expert. There is no reason to suppose that the state of the art, so far as acquisition surveys concerned in relation to siphonic drainage systems, changed between 1991 and 1998 or 2000. Certainly, the 1998 Guidance Notes makes no reference to siphonic systems as being one of the services which should be considered as requiring specialist investigation, which they would have done had it been standard practice by 1998 for a surveyor to recommend that any siphonic system found on a building being surveyed should be subject to a specialist investigation.

187. Thus, since the 1991 survey, which was not criticised by anyone at the trial, was carried out reasonably and in accordance with RICS recommended practice and it made no reference to the need for a specialist investigation of the siphonic system, equally a survey carried out in 1998 or 2000 would not have been unreasonably prepared if it too included no such reference. Furthermore, if any transaction involving a substantial interest in land is to be assumed to be one which should be accompanied by a structural survey that would reveal the latent design defect such that the duty of care is no longer owed or the chain of causation is broken for subsequent owners or lessees, even if they had no knowledge of the latent defect or the circumstances of the earlier acquisitions, PEL's cause of action would have been defeated by virtue of the transfer of ownership from the Church Commissioners to the British Steel Pension Fund in or before 1998. However, neither party regarded this transfer as relevant or of significance and it was not contended to have had any effect on PEL's potential cause of action.

188. Overall, I conclude that CPL still owed PEL a duty of care notwithstanding the 1994 flood and the conveyancing transactions and absence of any surveys in 1998 and 2000. None of those matters broke the chain of causation between CPL's breach of duty and PEL's loss and damage. Furthermore, PEL was not contributorily negligent and nothing has been shown which would make it unfair, unjust or unreasonable for PEL to recover damages from CPL in the circumstances of this case.

4.11. Limitation

189. The claim form was issued on 7 January 2004 and the damage occurred on 30 July 2002. Thus, prior to the amendment of the Limitation Act 1980, the claim would have clearly been issued within the limitation period since, for tort actions framed in negligence, is six years from the cause of action accruing, being when damage occurred (section 2 of the Limitation Act 1980). However, the amendment imposed a long stop of fifteen years from the act of negligence on actions being brought in negligence. Thus, the fifteen-year period imposes a deadline on actions being brought, whether or not the ordinary tort six-year period, or any other applicable period, would otherwise expire after the completion of that period. Even in such circumstances, the action is barred.

190. Section 14B provides that:

> *"(1) An action for damages for negligence, … shall not be brought after the expiration of 15 fifteen years from the date (or, if more than one, from the last of the dates) on which there occurred any act or omission*
>
> *(a) which is alleged to constitute negligence; and*
>
> *(b) to which the damage in respect of which damages are claimed is alleged to be attributable (in whole or in part)."*

191. It follows that CPL's last act or omission constituting the act of negligence and to which the flood damage is attributable must be shown to have occurred on or after 7 January 1989. In considering what CPL's duties were and what act or omission occurred with regard to the capacity of the siphonic drainage system, due regard must be made to the contractual duties CPL was engaged upon. Clearly, CPL's common law duty of care is shaped by, although not necessarily conclusively determined by is contractual duties but it would be an unusual case where a professional's contractual duty of care was more extensive than the common law duty of care owed to a third party. I should, therefore, consider what CPL's contractual duties were and when these were broken in relation to the siphonic drainage system and then consider whether that breach also constituted a breach of CPL's common law duty of care owed to PEL.

192. As I have already noted, CPL accepts that it was in breach of duty in designing the siphonic system with a design capacity of 75 mm per hour and in not designing the system by correctly applying the design guidance provided by BS 6367. CPL should have adopted a design capacity appropriate to a Category 3 system. Instead, it adopted the much smaller design capacity appropriate to a Category 2 system. It is also agreed that it was that breach which caused the flood damage and to which that damage is attributable. PEL contended that the relevant act or omission occurred after 7 January 1989 and that, in any case, it owed a continuing duty to check

the design up to practical completion of the work by virtue of its duties imposed by the RIBA conditions applicable to its engagement. CPL contended that the breach of duty was confined to one omission occurring in November 1988 when it settled on the gravity system when producing its initial indicative drawings.

193. As a matter of fact, CPL first addressed the question of the appropriate capacity of the rainwater system in November 1988 when adopting a gravity system with a design capacity of 75 mm per hour as part of its work in preparing its indicative drawings. However, it then addressed, or should have addressed the question of the appropriate capacity of the surface rainwater drainage system on at least three subsequent occasions. Firstly, following instructions from the client that the system should be a siphonic rather than a gravity system, CPL should have undertaken a fresh risk assessment to determine the appropriate Category and capacity that that alternative system should be assigned. This re-appraisal should have occurred before drawings were authorised to be sent to Sapaflow on 13 December 1988 to enable the first of the two siphonic drainage suppliers to provide a quotation for the installation work of a siphonic drainage system.

194. Secondly, CPL had an obligation to prepare the necessary supporting details and calculations to apply for and obtain approval of the rainwater drainage system as part of the need to obtain Building Regulations approval for Unit 7000. By law, construction work could not start without that approval and it was the responsibility of CPL, pursuant to its contractual obligations owed to McLagan, to design the rainwater system and obtain Building Regulations approval for that system. The necessary calculations were performed by Mr Platt of CPL between 27 February 1989 and 8 March 1989 and the submission of those calculations occurred on 8 March 1989. The calculations were prepared in Mr Platt's own handwriting and the essential first step in the calculations, which were intended to prove that the capacity of the system was sufficient and complied with the minimum requirements of the Building Regulations, was the adoption by Mr Platt of a design rainwater intensity of 75 mm per hour.

195. Thirdly, CPL should have checked that the intended system to be installed has a sufficient capacity at the time it approved the documentation associated with its nomination of the roofing and drainage subcontractor in which was included its nomination of the drainage sub-subcontractor. This nomination occurred on 10 May 1989.

196. The need to check that the overall capacity of the system being nominated was appropriate was three-fold. Firstly, the design of the system was to be prepared by, and would be the responsibility of, Fullflow as the nominated symphonic drainage sub-subcontractor. That design would be dependent upon the required overall capacity of the system and this had first to be determined and established by the architect. Clearly, therefore, the architect had to check that the sub-subcontract with Fullflow would contain the appropriate design parameters which would govern Fullflow's design work and those parameters were set out in the nomination documentation.

197. Secondly, CPL had a duty to co-ordinate the design work of specialists so as to ensure that that design work was compatible with the overall design of the building. The overall design of the building included a multi-pitched roof with internal valley gutters with openings through which overflowing rainwater from the gutters could flow. That required a siphonic rainwater system which co-ordinated with those design details and that in turn required a Category 3 system to be designed by the drainage designer. CPL's co-ordination duties required it to check that the siphonic system as designed was a Category 3 system.

198. Thirdly, CPL had an overriding duty to design the rainwater system as provided for in its contract. Clearly, that duty required it to look at the overall designed system once the various component design inputs had been completed and ensure that the whole system, as provided for by the sum of its design parts, was satisfactory and appropriate. That required a final check of the whole system before it was committed to both Building Regulation approval and to being constructed.

199. CPL contended that the only relevant selection of design criteria was that made by CPL when it first adopted 75 mm per hour for the discarded gravity drainage system. That selection, for the gravity system, was an appropriate selection since a gravity system has so much surplus capacity within it. Had that been an appropriate selection for the then intended gravity system, as the evidence suggests it was, it is hard to see what breach of duty CPL had committed if it was only required to exercise reasonable skill and care at that time. On this basis, the subsequent decision to change to a completely different system requiring a different and larger capacity did not carry with it an obligation to re-appraise the design parameters of that system. Such a contention only has to be stated to be seen to be erroneous.

200. CPL also contended that if it did have an obligation to re-appraise the design once the decision had been taken to adopt a siphonic system, that re-appraisal could and should have occurred in December 1988 prior to the submission of tender documents to Sapolite and that no further or later error or omission occurred. In making this submission, CPL attempted to downplay its work in preparing calculations to accompany its building regulations submission or in checking the designs of Fullflow at any stage before or after it had been nominated.

201. CPL had to somewhat contort the design process associated with both stages of its design work in its attempt to make good this submission. In relation to the building regulation submission and approval-seeking process it stated in counsel's closing submissions: *"The submission of design calculations to the Local Authority was at the Local Authority's request and simply confirmed the design criterion which had already been established. There was no reason for the architects to change the design criterion for the purposes of those calculations, which anyway ostensibly complied with the building regulations although the building regulations were clearly designed for domestic rather than commercial buildings*"

202. This submission cannot be accepted for a series of reasons. These are that the building regulations require anyone undertaking a new building construction, whether domestic or commercial, to submit plans and calculations which show that the rainwater system is adequate for the building in question. Unless proving calculations are provided, approval will not be given and construction work cannot start. The Local Authority did request these calculations but the courteous manner in which it expressed the wish to see them should not lead to the conclusion that it was requiring their submission in circumstances in which the original approval submission did not include them. There was, moreover, every reason for the design criteria to be changed before the submission was made. The design work was still being finalised and there was still time enough for Fullflow to finalise its designs of the system even if the overall capacity of the system was changed form 75 mm per hour to 150 mm per hour in March 1988. The nomination of Fullflow only occurred in May 1988. CPL had a statutory duty and a common law duty to ensure, at this stage, that the basis on which its proving calculations were being prepared was correct and, if it was not, to change it to a correct basis. Finally, the calculations did not ostensibly comply with the regulations since they clearly adopted the Category 2 capacity and not a Category 3 capacity. Moreover, the building regulations are as applicable to commercial as to domestic premises.

203. CPL's contention that it did not err in relation to its co-ordinating function is equally untenable. This was contention was that CPL only had a function in adopting the design criteria. As it stands, that contention is correct. However, CPL then asserted that this adoption did not require it to ensure that the system designed by Fullflow had not been based on appropriately adopted design criteria. Since CPL had to select those criteria, it clearly had to check that the completed designs were based on the appropriate criteria and therefore it had to reconfirm in the designer's mind that the system had been correctly designated a category 3 system once Fullflow's initial designs were to hand and prior to the nomination process.

204. It follows that CPL clearly omitted to check and adopt an appropriate capacity for the system on at least two occasions after 7 January 1988. It submitted details of a rainwater drainage system whose design capacity that it had produced breached the building regulations. It also approved the nomination of a system whose design was based on an inadequate capacity at a time when it could easily have changed that design capacity. Since that omission is accepted to be the one that amounted to the alleged negligence to which the relevant damage and damages is attributed, PEL's action was brought, albeit only just brought, within the period allowed for by section 14A of the Limitation Act 1980 and is not barred by statute.

205. This analysis shows that CPL's breach of duty was not only one linked to its contractual duties but was also one linked to its common law duty that required the exercise of skill and care in carrying out its designs. It also shows that it is not necessary to consider whether or not CPL was additionally in breach of a common law continuing duty to check its designs during the construction process and after the design process has been completed.

5. Overall Conclusion

206. PEL has established that CPL was in breach of duty, that CPL owed PEL a duty of care, that the damage and damages claimed by PEL were caused by that breach of duty by CPL and that the resulting claim is not barred by limitation. It is, therefore entitled to judgment in the agreed sum of £2.1 million with interest to be assessed.

Mr Mark Pelling QC (instructed by Barlow Lyde & Gilbert, Beaufort House, 15 St Botolph Street, London, EC3A 7NJ, DX: 155 London CDE, Ref: 7550-36/TR/DJJ/3.05) for the Claimant

Mr Nicholas Dennys QC and Mr Mark Chennells (instructed by Mills & Reeve, 1 Court, Whitefriars, St James, Norwich, NR3 1RU, DX: 5210 Norwich, Ref: