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DEVELOPMENT OF THE COMMON LAW”

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**Introduction**

When I came to the Bar in 1968, construction law was regarded as a rather dull, specialist subject, in some respects hardly worthy of being considered as proper law at all. It was all about boring Scott Schedules and claims for damages for defects and disruption and delay claims, otherwise known in the trade as “buggeration claims”. It was thought of as being all fact and no law. The judges who tried these cases were not even called judges. They bore the strange title of “Official Referees”. Although the cases often involved very large sums of money (well in excess of the county court jurisdiction), these judges were not High Court Judges. After the 1971 reforms, they were senior circuit judges. Before that I believe that they were *sui generis*. They were addressed as “your honour”, not “my lord”. It is true that the courts in which they sat were in the Royal Courts of Justice. But Official Referees’ cases appeared right at the bottom of the Daily Cause List almost as if they were an afterthought. And you needed an experienced orienteer to find the courts. You took a rickety lift up to the top floor of the West Block of the RCJ and then walked down a long corridor until you arrived at the courts. Hence the name “the Official Referees’ Corridor”.

The first edition of Hudson Building and Engineering Contracts was published as long ago as in 1891. But I do not think that it was perceived as a serious specialist area of the law by many people until after WWII. The first edition of Keating's Building Contracts was not published until 1955. I was in chambers with Donald from 1969 until 1986. He led me many times. His contribution to the development of Construction Law is well known. I regret that I never asked him why he became interested in the subject. Like me, he started at the Bar doing a bit of this and a bit of that

The integration of construction law into the mainstream has taken place gradually during my professional life. First, the Official Referees emerged from their lair in the Corridor and moved to St Dunstan's House, Fetter Lane. This was not a wonderful building, but it was important that it was also occupied by the Commercial Court. I should record, however, that the ORs (as they were called) were housed right at the top of the building. Next, the name of the court was changed in 1998 to the Technology and Construction Court and Official Referees were given the accolade of the title of "judge" and were now to be addressed as "my Lord". The growing recognition of the court culminated in their inclusion (with the judges of the Commercial Court and the Chancery Division) in the judges who moved to the Rolls Building. The TCC judges in the Rolls Building were now exclusively High Court Judges.

Following the changes in 1998, His Honour Judge Bowsher QC, appointed as an Official Referee in 1987 and a distinguished member of the court, commented:<sup>1</sup>

*The official referees no longer cry in the wilderness: they have been anointed if not priests at least deacons of the established church as judges of the Technology and Construction Court ...*

It may have been apt in 2000 to describe the TCC judges as deacons of the established church. I do not think it is apt to so describe them today. They are fully fledged priests, taking their stand alongside the judges of the Commercial Court and the

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<sup>1</sup> HHJ Bowsher QC, 'The Technology and Construction Court before and after the Woolf civil procedure reforms' [2000] *International Arbitration Law Review* 3(1), 19.

Chancery Division. Construction law has come in from the cold. TCC judges decide important issues of law which are of general application. These include difficult questions of contract, tort, limitation, restitution and damages – indeed the whole gamut of law.

I shall seek to dispel the idea that construction cases are somehow different and apart from the general law and that they only concern Scott Schedules, lists of defects and delay claims. On the contrary, I hope to demonstrate the wide range of issues that arise in construction cases as in any other area of the law and mention a few of the many important cases in the construction field that have found their way into the general law reports.

### **Formation of contract**

Like Julie Andrews in the Sound of Music, I shall start at the very beginning: formation of contract. It should not be overlooked that, in its essentials, a construction contract is no different from any other contract. It should, therefore, come as no surprise that the principles which determine whether a construction contract has been created are no different from those that govern the formation of any other type of contract.

An issue that commonly arises in construction cases, as in contract cases more generally, is the question of whether a contract was formed at all. Construction contracts more than many tend to be complex and detailed. Negotiations can drag on interminably. Work often starts before all the details have been sorted out. This may be done pursuant to a letter of intent which states that there is an intention to enter into contractual negotiations; or pursuant to an agreement which is said to be “subject to contract”. Sometimes, work starts pursuant to authority for work to be carried out up to a specified limit. Difficult issues may arise as to whether and, if so, on what terms a contract has been created where the project proceeds without formal documentation being drawn up and a dispute arises mid-way through performance.

In 1974 I appeared before Lord Denning MR, Lord Diplock and Lord Justice Lawton in *Courtney and Fairbairn v Tolani Brothers (Hotels) Ltd* [1975] 1 WLR 297.

Developers had approached my client, a contractor, seeking an introduction to a financier to fund a project in Hertfordshire. The contractor wrote to the developer stating it was prepared to make such an introduction but asked whether, if the introduction led to a financial arrangement, the developer would negotiate fair and reasonable sums with the contractor for the construction works based on agreed estimates of net cost and overheads with a margin for profit of 5%. The developer wrote agreeing to the contractor's proposal, the contractor introduced the developer to the financier and the developer obtained the financial backing it needed for the development. However, after failing to agree on the cost of the construction works, the developer engaged other contractors. The contractor claimed that its letter and the developer's response gave rise to a binding and enforceable contract.

Overtaking the trial judge's conclusion that a contract had been formed by the letters, Lord Denning MR, who gave the lead judgment, pointed to a lack of agreement on the price or any method by which the price was to be calculated<sup>2</sup>. He said that an agreement to "negotiate" fair and reasonable contract sums based on estimates that were yet to be agreed could not be enforced by the court.

In a statement that is of universal application to the general law of contract, Lord Denning MR commented that the price:<sup>3</sup>

*...is so essential a term that there is no contract unless a price is agreed or there is an agreed method of ascertaining it, not dependent on the negotiations of the two parties themselves...*

On a question on which there was scant authority at the time, Lord Denning dismissed the suggestion, and the tentative opinion by Lord Wright some 40 years earlier in *Hillas & Co Ltd v Arcos Ltd* (1932) 147 LT 503, 515, that a basis on which the claim could succeed was that there was an enforceable contract to negotiate. He stated:

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<sup>2</sup> At p300H.

<sup>3</sup> At p301B-C.

*If the law does not recognise a contract to enter into a contract ... it seems to me it cannot recognise a contract to negotiate. The reason is because it is too uncertain to have any binding force. No court could estimate the damages because no one can tell whether the negotiations would be successful or would fall through: or, if successful, what the result would be.*

Lord Diplock said “*the dictum of Lord Wright...for it is no more...although an attractive theory, should in my view be regarded as bad law*”. I recall this case well after 40 years. The combination of Lord Denning and Lord Diplock was fairly terrifying for a young barrister. They dispatched my appeal in a couple of hours in ex tempore judgments. Lord Diplock’s was particularly withering. And I lost a case which Donald Keating had won at first instance.

The fact that this was a construction case was irrelevant. The important point is that it was undoubtedly a case of general significance for the general law of contract. The holding that an agreement to negotiate cannot constitute a legally enforceable contract was subsequently applied in a number of first instance decisions. It was ultimately approved by the House of Lords <sup>4</sup> in *Walford v Miles* [1992] 2 AC 128. Whilst *Walford v Miles* is undoubtedly the better-known case on the topic, the reasoning expressed in a construction dispute had been influential in shaping this area of the law.

A question which often arises in commercial disputes where parties have started to perform before a formal contract has been executed is whether they have entered into contractual relations at all. Quite often A starts work pursuant to a letter of intent from B. It is by no means uncommon, for example, if things go awry for A to walk away. In that situation (where allegations of repudiation tend to abound) it is crucial to determine whether the parties made a contract and if so on what terms. This problem often occurs in the world of building and engineering disputes. The inherently complex nature of building and engineering projects is such that the problem is particularly likely occur in relation to them.

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<sup>4</sup> *Albion Sugar Co Ltd v Williams Tankers Ltd* [1977] 2 Lloyd's Rep 457; *Scandinavian Trading Tanker Co AB v Flota Petrolera Ecuatoriana* [1981] 2 Lloyd's Rep 425; *Trees Ltd v Cripps* (1983) 267 EG 596; *Nile Co for the Export of Agricultural Crops v H & J M Bennett (Commodities) Ltd* [1986] 1 Lloyd's Rep 555; *Voest Alpine Intertrading GmbH v Chevron International Oil Co Ltd* [1987] 2 Lloyd's Rep 547; and *Star Steamship Society v Beogradska Plovidba* [1988] 2 Lloyd's Rep 583.

The applicable principles are now well known. They have been stated in a number of leading cases, many of which have been construction cases. A now fairly elderly authority is the construction case of *Atomic Power Construction v Trollope and Colls* [1963] 1 WLR 333. Megaw J said that the defendant had to establish “not only that the parties were ad idem on all terms which they then regarded as being requisite for a contract, but also that they had not omitted to agree any term which was, in law, essential to be agreed in order to make the contract commercially workable”. I think today’s judges could strive a little harder to emulate this commendably succinct statement of the relevant principles. These were also helpfully summarised by Lloyd LJ in the Court of Appeal in *Pagnan SPA v Feed Products Ltd* [1987] 2 Lloyd’s Rep 601 at p 619, which was cited with approval by the Supreme Court in the construction case of *RTS Flexible Systems Ltd v Molkerei Alois Muller GmbH & Co KG* [2010] 1 WLR 753.

RTS is a typical case of its kind. The claimant negotiated with the Defendant, a dairy product supplier, to design and install two production lines in one of the Defendant’s factories. The Defendant sent the Claimant a letter of intent setting out a draft contract providing the price, completion date and standard terms. It was common ground that by the letter of intent the parties formed a limited contract to enable work to commence, but agreement was subject to a formal contract being concluded and would come to an end after four weeks. The parties did not sign or execute the contract, yet they proceeded with the project. They later re-negotiated the proposed terms, but never executed a formal contract. Following completion of the work, and after the Claimant had received 70% of the price stated in the letter of intent, a dispute arose as to whether the equipment supplied by the Claimant complied with the agreed specification. The claimant sought the remaining sums from the Defendant. It was in these circumstances that the court was asked to consider, as a preliminary issue, whether and if so on what basis a contract had arisen and on what terms.

As Lord Clarke noted, the relevant principles for determining whether a contract has been formed in such circumstances apply to all contracts, including construction contracts.<sup>5</sup>

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<sup>5</sup> At [48].

Inevitably, the application of those principles is highly fact specific. Here, like in *Courtney & Fairbairn*, whether the parties had reached agreement on the price was highly influential in determining whether a contract had been concluded at all. Lord Clarke adopted the price as a form of yardstick commenting:<sup>6</sup>

*We agree with the judge that it is unrealistic to suppose that the parties did not intend to create legal relations. This can be tested by asking whether the price of £1,682,000 was agreed. Both parties accept that it was. If it was, as we see it, it must have formed part of a contract between the parties. Moreover, once it is accepted (as both parties now accept) that the LOI contract expired and was not revived, the contract containing the price must be contained in some agreement other than the LOI contract. If the price is to be a term binding on the parties, it cannot, at any rate on conventional principles, be a case of no contract...*

I agree that, if the parties have not agreed the price (or a mechanism for determining the price), it is difficult to see how there can be a binding contract between them. But of course the corollary does not follow. There may be other essential terms without whose agreement there is no contract. The important point for present purposes, however, is that construction law cases have made a significant contribution to the development of this area of contract law.

### **Implied terms**

Construction cases have also made a considerable contribution to the law of implied terms. I wish to briefly mention two: *Young & Marten v McManus Childs* [1969] 1 AC 454 and *Trollope & Colls Ltd v North West Metropolitan Regional Hospital Board* [1973] 1 WLR 601.

The facts in *Young & Marten* were that a contractor required sub-contractors to use specified roofing tiles that could only be obtained from one manufacturer. Owing to faulty manufacture, the tiles had a latent defect that made them liable to break in frosty weather. The owners of a number of houses successfully sued the builders for the cost of reroofing; and the builders (McManus Childs) claimed an indemnity by way of

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<sup>6</sup> At [58].

damages from the roofing subcontractors (Young & Marten). The claim was heard by an experienced Official Referee, HH Norman Richards QC. The case eventually went to the House of Lords.

Lord Reid said that there was not very much authority on the matter, so that it might be well first to consider it from first principles. He started by saying that no warranty ought to be implied in a contract unless it is in all the circumstances reasonable. Here we see straightway at work the hand of one of the masters of the common law of the 20<sup>th</sup> century. He said that there were good reasons for implying a warranty against latent defects unless it was excluded by the terms of the contract. These were that, if the contractor's employer suffers loss by reason of the emergence of a latent defect, he will generally have no redress if he cannot recover damages from the contractor. But if he can recover damages, the contractor will generally not have to bear the loss: he will have bought the defective material from a seller who will be liable under the law of sale of goods because the material was not of merchantable quality.

So far so good. But the particular problem in this case was that the tiles that had been specified were only made by one manufacturer. The contractor had to buy them from the manufacturer or from someone who bought from him. Did that make any difference? The House held that, whilst the sub-contractors did not warrant that the tiles were fit for purpose, the fact that the tiles had been specified by the contractor did not exclude the ordinary implied warranty of quality on the part of the sub-contractors. This was on the basis that the sub-contractor could claim against the manufacturer of the tiles creating a "*chain of liability from the employer who suffers the damage back to the author of the defect*".<sup>7</sup>

Of wider application, Lord Reid reasoned that where both the contractor and sub-contractor knew at the time when the contract was made that the sole manufacturer of the materials would only sell on terms excluding the warranty of quality, it would be unreasonable to make the sub-contractor liable for latent defects and such a term would not be implied.<sup>8</sup> One can see that this decision was driven by policy considerations based on their Lordships' assessment of what was reasonable.

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<sup>7</sup> Per Lord Reid at 466E.

<sup>8</sup> Per Lord Reid at 467B-C.



The reasoning in *Young & Marten* has been applied further afield. For example, in *Rutherford v Seymour* [2010] IRLR 606 Coulson J rejected an employer's contention that it was not obliged to pay a bonus to an employee for the quarter before it dismissed him on the basis that it was an implied term that he still had to be employed on the date of payment. In addition to the need for a term to be necessary or obvious before it would be implied, Coulson J held, relying on *Young & Marten*:<sup>9</sup>

*Although these authorities and many others demonstrate that the emphasis must be on the necessity of the term, and not merely reasonableness, a term will not be implied unless it is equitable and reasonable.*

On the facts, in addition to the term being neither necessary nor obvious, Coulson J held that such a term was “*manifestly unreasonable*” and so ought not to be implied.<sup>10</sup>

Whilst the idea that the concept of reasonableness is relevant to whether a term will be implied was well established,<sup>11</sup> it is perhaps no surprise that Coulson J, a former member of Keating Chambers, drew on the reasoning in a construction case to support his conclusion.

The second case I wish to mention, *Trollope & Colls Ltd*,<sup>2</sup> is one in which two other well-known former members of Keating Chambers appeared, Donald Keating and Sir Anthony May. This is another important case in the development of the law on implied terms. It concerned whether a term could be implied into a building contract that the completion date for a third phase of a project should be read as amended by the addition of a particular extension of time to the first phase. If the terms of the contract were to be construed literally and no such term were to be implied, the period in which the third phase had to be completed would have been reduced from 30 to 16 weeks. Unusually, the contractors wanted the period to be reduced as the employer was unable to nominate any sub-contractor that was prepared to assume an obligation to complete in 16 weeks, with the result that a new contract would have to

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<sup>9</sup> At [17].

<sup>10</sup> At [22].

<sup>11</sup> See the authorities summarised in *Exxonmobil Sales and Supply Group v Texaco* [2003] EWHC 1964 Comm.

be made at prevailing rates that were considerably higher than at the time of the original contract.

Having set out what he found to be a conflict of judicial opinion, Lord Pearson said this:<sup>12</sup>

*...the court does not make a contract for the parties. The court will not even improve the contract which the parties have made for themselves, however desirable the improvement might be. The court's function is to interpret and apply the contract which the parties have made for themselves. If the express terms are perfectly clear and free from ambiguity, there is no choice to be made between different possible meanings: the clear terms must be applied even if the court thinks some other terms would have been more suitable. An unexpressed term can be implied if and only if the court finds that the parties must have intended the term to form part of their contract: it is not enough for the court to find that such a term would have been adopted by the parties as reasonable men if it had been suggested to them: it must have been a term that went without stating, a term necessary to give business efficacy to the contract, a term which, though tacit, formed part of the contract which the parties made for themselves.*

It was this reasoning on which Lord Hoffmann relied in the later case of *AG of Belize v Belize Telecom* [2009] 1WLR 1988 at para 19. After citing *Trollope & Colls*, Lord Hoffmann said this:<sup>13</sup>

*The proposition that the implication of a term is an exercise in the construction of the instrument as a whole is not only a matter of logic (since a court has no power to alter what the instrument means) but also well supported by authority...*

Drawing on *Trollope & Colls*, Lord Hoffmann concluded (in a passage that is commonly relied on by counsel):<sup>14</sup>

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<sup>12</sup> At 609.

<sup>13</sup> At [19].

<sup>14</sup> At [20].

*It follows that in every case in which it is said that some provision ought to be implied in an instrument, the question for the court is whether such a provision would spell out in express words what the instrument, read against the relevant background would reasonably be understood to mean.*

I do not wish to suggest that *Trollope & Colls* caused a marked shift in the law of implied terms. But it did resolve a conflict of judicial opinion that had emerged on the question of whether, in deciding whether a term should be implied, the court decides according to what is fair and reasonable or according to what the parties must be taken to have agreed. It resolved it in favour of the latter approach. This is the approach that Lord Hoffmann supported emphatically. It is not surprising that he drew on *Trollope & Colls* in reaching his conclusion in the later case.

### **Contractual interpretation**

In this whistle-stop tour, I move to the hugely important topic of contractual interpretation. Contracts are the cornerstone of commercial life. In principle, construction contracts are no different from any other commercial contracts. It is extraordinary how many cases are still being reported in the law reports in the 21<sup>st</sup> century on how to interpret a contract. I cannot help thinking that the great Lord Mansfield, who was perhaps the founding father of modern commercial law, would have been disappointed and probably astounded too.

I shall single out for mention two important decisions, one of the House of Lords and the other of the Supreme Court. Both involved construction contracts. They are both well known, although not for the fact that they were construction cases. *Chartbrook Ltd v Persimmon Homes* [2009] 1 AC 1101 concerned a dispute about the proper interpretation of a pricing formula in a contract for the development of a mixed commercial and residential development. After a comprehensive review of the law Lord Hoffmann said:<sup>15</sup>

*What is clear from these cases is that there is not, so to speak, a limit to the amount of red ink or verbal rearrangement or correction which the court is allowed. All that is required is that it should be clear that something has gone wrong with the language and it*

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<sup>15</sup> At [25].

*should be clear what a reasonable person would have understood the parties to have meant.*

This decision reflects the important trend that rectification and interpretation are simply different aspects of the single task of interpreting a contract in its context,<sup>16</sup> rather than discrete principles. The House of Lords was also invited to overrule the long-standing rule that pre-contract negotiations are inadmissible as an aid to the proper interpretation of a contract. The House held that there was no clearly established case for departing from this exclusionary rule despite the superficially attractive argument in favour of doing so. This is an important decision, because a head of steam had been building to get rid of the rule.

The second case is *Rainy Sky SA v Kookmin Bank* [2011] 1 WLR 2900. It may be said that this was not a construction case at all. In fact it was a shipbuilding contract and the case was heard at first instance in the Commercial Court. In essence a shipbuilding contract is a construction contract. It is a contract for the supply of materials and carrying out of construction work. Construction disputes do not always relate to the physical construction of a building, bridge, railway, ship or oil rig. They often arise from the financial and insurance arrangements that make the projects possible.

*Rainy Sky* was one such case. It concerned the interpretation of six bonds issued by the defendant bank under six shipbuilding contracts. Each contract required the builder to refund the buyer with the full amount of all advance payments made in the event of the builder's insolvency. The Supreme Court was asked to consider whether this obligation was covered by the bonds, and in particular to decide the proper interpretation of the obligation to pay "*all such sums due to you under the contract*". The buyers contended that "*such sums*" referred back to "*pre-delivery instalments*" mentioned in the first line of the paragraph, meaning that the builder's insolvency was covered. In contrast, the bank claimed "*such sums*" referred back to the sums mentioned in the previous paragraph, which did not include sums paid prior to insolvency of the builder. The issue for the Supreme Court was the role to be played by business common sense in determining what the parties meant.

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<sup>16</sup> See Lord Hoffman at [23].

Lord Clarke stated:<sup>17</sup>

*If there are two possible constructions, the court is entitled to prefer the construction which is consistent with business common sense and reject the other.*

He held that, since both constructions were arguable,<sup>18</sup> and although the buyers did not advance a good reason for the inclusion of the previous paragraph of the bonds,<sup>19</sup> the buyers' construction was to be preferred because it was consistent with the commercial purpose of the bonds.<sup>20</sup>

This provides confirmation of the general shift away from “black letter law” to a more purposive approach to interpretation of contracts. It also provides a helpful steer for the court in circumstances where the arguments for both sides are very finely balanced.

### **Damages**

Finally on contract law, I shall mention briefly two decisions in construction cases which contain important statements about damages.

Many of you will be familiar with the case of *Sempra Metals Limited v Inland Revenue Commissioners* [2008] 1 AC 561 which established, amongst other things, that interest can be awarded at common law as damages for losses caused by late payment of a debt and that such losses were subject to the principles governing all claims for damages for breach of contract. This was not a construction case. But perhaps you might be surprised to learn that the same principles had been considered and distilled some time earlier in the construction case of *FG Minter Ltd v Welsh Health Technical Services Organisation* (1980) 13 BLR 1. Here a dispute arose as to the amount of direct loss and expense to which a contractor was entitled under a term of a construction contract due to delays for which the employer was responsible.

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<sup>17</sup> At [21] and [23].

<sup>18</sup> See [31].

<sup>19</sup> See [34].

<sup>20</sup> At [45].

The Court of Appeal considered whether interest and finance charges fell within the proper interpretation of “direct loss and expense”. In doing so it was necessary to grapple with the long-standing hostility of the common law to awards of interest.

Both Lord Justice Stephenson and Lord Justice Ackner concluded that, in the context of building contracts, interest and finance charges were properly characterised as falling within the first limb of *Hadley v Baxendale* (1854) 9 Ex 341 and therefore were “direct”.<sup>21</sup> Lord Justice Ackner said<sup>22</sup>

*Building Contractors in the ordinary course of things, when they require capital to finance an operation, either have to pay charges for borrowing their capital, or if they use their own capital, lose the interest which it otherwise have earned. Accordingly, where a variation requires the expenditure of capital, not only is the primary expense – the money actually expended by reason of the variation – the direct loss or expense but so also is the secondary expenditure, the amount paid for or lost by the obtaining or the use of such capital.*

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*what the appellants here are seeking to claim, is not interest on a debt, but a debt which has as one of its constituent parts interest charges...*

In *Sempre Metals*, Lord Hope drew on the case of *FG Minter*, concluding that the House of Lords:<sup>23</sup>

*...should hold that at common law, subject to the ordinary rules of remoteness which apply to all claims of damages, the loss suffered as a result of the late payment of money is recoverable. This is already the law where the claim is for a debt incurred by a building contractor to raise the necessary capital which has interest charges as one of its constituents: see F G Minter Ltd v Welsh Health Technical Services Organisation (1980) 13 BLR 1, 23, per Ackner LJ ...*

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<sup>21</sup> At p15 – 16 per Stephenson LJ; at p23 per Ackner LJ.

<sup>22</sup> At p23.

<sup>23</sup> At [16].

I would not, however, wish to overstate the importance of the *Minter* case. The House of Lords were in a mood to sweep away the old common law rule anyway. As Lord Nicholls put it, “legal rules which are not soundly based resemble proverbial bad pennies: they turn up again and again”. The unsound rule for consideration concerned the negative attitude of English law to awards of compound interest on claims for debts paid late. Nevertheless, the *Minter* decision did point the way.

The second damages case is *Ruxley Electronics v Forsyth* [1995] 3 WLR 118, known to many as “the swimming pool case”. The plaintiffs contracted to build a swimming pool for the defendant. The contract specified that there should be a diving area 7 feet 6 inches deep. On completion the pool was suitable for diving, but the diving area was only 6 feet deep. The estimated cost of rebuilding the pool to the specified depth was £21,500. The Court of Appeal held that the measure of damages for the breach of the contract was the cost of rebuilding the pool. The House of Lords held that, where the expenditure was out of all proportion to the benefit to be obtained, the appropriate measure of damages was not the cost of rebuilding, but the diminution in value of the work occasioned by the breach. Rebuilding would have been unreasonable as it was out of all proportion to the benefit that would result. The House therefore concluded that the appropriate measure of damages was the difference between the value of the pool as built and the value of the pool as it ought to have been built. Lord Jauncey said:<sup>24</sup>

*Damages are designed to compensate for an established loss and not to provide a gratuitous benefit to the aggrieved party from which it follows that the reasonableness of an award of damages is to be linked directly to the loss sustained. If it is unreasonable in a particular case to award the cost of reinstatement it must be because the loss sustained does not extend to the need to reinstate.*

This decision may now seem to be not only reasonable, but obviously right. But that is not how it appeared to everyone at the time. At all events, the principle that a claimant is not entitled to the cost of doing whatever is necessary to place him in the position he would have been in if the contract had not been broken where it would be unreasonable to do so has since been applied in many decisions spanning all areas of

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<sup>24</sup> At p357E.

commercial law. For example, in the shipping cases of *The Maersk Colombo* [2001] 2 Lloyd's Rep 275 and *The Baltic Surveyor and the Timbuktu* [2002] 1 Lloyd's Rep 623 and in the solicitor's negligence case of *Fulham Leisure Holdings Ltd v Nicholson Graham & Jones* [2006] 4 All ER 1397 (Note).<sup>25</sup> *Ruxley* therefore made a considerable contribution to the general law.

[Asbestos case]

### **Duties of care**

The last topic to which I wish to refer is the issue of when a common law duty of care will arise. This is an area of the common law which has been the subject of much development in the last few decades and in which there has been a significant number of important construction cases. Cases such as *Anns v Merton LBC* [1978] AC 728 and *Junior Books v Veitchi* [1983] 1 AC 520 come to mind, but there are several others. I want to focus on *Governors of the Peabody Donation Fund v Sir Lindsay Parkinson & Co Ltd & Ors* [1985] AC 210, partly because I was in this case. I am afraid that it was another of my failures.

The case concerned the construction of drainage for a housing development owned by my client. Plans had been submitted by the owners' architects to the local authority and approved. Subsequently, the architects instructed the contractors to depart from the approved design. The local authority drainage inspector became aware of this departure from the approved plans during installation but he took no action. It later became apparent that the drains were unsatisfactory and had to be re-constructed causing the development to be delayed and the owners to incur losses. The House of Lords considered whether my client could recover its losses from the local authority on the basis it breached a duty of care owed to the owners.

We had succeeded at first instance before Judge Oddie, sitting as an official referee. He had held that the local authority owed a duty of care to the owner because there was proximity and it was reasonably foreseeable that, if the drainage inspector permitted the contractors to depart from the approved plans, the drainage would be

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<sup>25</sup> This decision was reversed in part by the Court of Appeal [2008] EWCA Civ 84 but on other grounds.



defective and the owner would suffer damage as a result. This all seemed pretty straightforward to me. The Court of Appeal did not like the decision and allowed the appeal. The lack of merit in our case did not appeal to them. Nor did it appeal to the House of Lords. I battled away valiantly, but to no avail. Lord Keith gave the only substantive speech. He referred to a passage in the speech of Lord Morris in *Dorset Yacht v Home Office* [1970] AC 1004, 1039, a passage to which no reference had been made during the argument. Lord Morris said: “...it would not only be fair and reasonable that a duty of care should exist but that it would be contrary to the fitness of things were it not so....the court is called upon to make a decision as to policy. Policy need not be invoked where reason and good sense will at once point the way. If the test as to whether in some particular situation a duty of care arises may in some cases have to be whether it is fair and reasonable that it should so arise, the court must not shrink from being the arbiter.”

So it was that Lord Keith said:<sup>26</sup>

*in determining whether or not a duty of care of particular scope was incumbent upon a defendant it is material to take into consideration whether it is just and reasonable that it should be so.*

I am not sure that the significance of this passage was appreciated at the time. I do, however, recall thinking when I read the speech with that awful sinking feeling that this was a really important turning point. Recourse to what is fair and reasonable was not commonplace in those days, perhaps because it was uncertain and difficult to control. This approach to the question of whether a duty of care arises in a particular situation is now orthodox. It has been firmly cemented into our law since the House of Lords decision in *Caparo v Dickman* [1990] 2 AC 605.

On the facts Lord Keith concluded that it would not be just or reasonable to impose a duty on the council given that my client, the owner, had a statutory duty to ensure that the drainage scheme conformed to the design approved by the local authority; the owner's loss resulted from reliance on the advice of its own architects, engineers and contractors.<sup>27</sup>

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<sup>26</sup> At p241C.

<sup>27</sup> At p241E – F.

Lord Keith expanded on his expression of when a duty of care arises in the later construction case of *Murphy v Brentwood District Council*; a case with which you are all no doubt familiar and the last on which I wish to comment.

In this case the House of Lords considered whether a local authority exercising building control powers conferred on them by statute for the purpose of securing compliance with building regulations owed a duty of care to purchasers of houses to safeguard them against purely economic loss in remedying a dangerous defect in the building.

In holding that *Anns v Merton* was wrongly decided, a decision which Lord Keith described as “*a remarkable example of judicial legislation*”<sup>28</sup> the House of Lords held that in such a situation the loss suffered was economic and the council were not liable for the negligent application of the building regulations where the resulting defects had not caused physical injury.

At one level, the case may be considered to be only about the duty local councils owe to building owners. But at a higher level, the case is an authority of general importance for the law more generally not only for the law of negligence, but also as indicating the court’s views as to the proper limits of its powers.

### **Conclusion**

I am delighted to have been asked to give this lecture. As I have said, I was led by Donald Keating many times and occasionally appeared against him. He was a formidably good lawyer. He would have been so proud to have his chambers named after him and this lecture too. I am also delighted that members of his family are here tonight. I have no doubt that they are proud too.

He was a perfectionist. He demanded much of his juniors and himself.

The book that he wrote (now in its ninth edition) is testament to that. The early editions (written entirely by him) contained a masterly analysis of the basic principles

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<sup>28</sup> At p471G.

of law as they affect construction disputes. As good an introduction to the general law of contract as you could wish to find. Succinct and not a word wasted. If only we could say that about the judgments that many of us write today. I cannot resist the observation that the latest edition of the book has a number of editors and a huge array of contributors.

He would have been thrilled to see how those who practise construction law have come down the rickety lift from the Official Referees' Corridor to occupy a central position in our justice system in the modern, well equipped Rolls Building and to see how construction law too has come to assume an important position, contributing significantly to the development of our general law.

I would like to thank Jennie Wild for the assistance she has given me in preparing this lecture.

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