A BRIDGE TOO FAR:
A BUILDER'S LIABILITY FOR ECONOMIC LOSS IN TORT

"What the decision in Thomas v Taylor Wimpey does highlight is the difficulty in articulating a principled basis for exceptions or qualifications in this area."

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Introduction

As every law student knows, following the double volte-face which took place in our higher courts in the 20 years preceding the decision in Murphy v Brentwood[1] in 1991, a builder is liable in tort only for damage caused to persons or property by defects in its work but not for the purely economic loss of remedying the defect. However, in Murphy, having set out those general principles, Lord Bridge suggested a possible exception to them in the following terms:

> *"The only qualification I would make to this is that, if a building stands so close to the boundary of the building owner's land that after discovery of the dangerous defect it remains a potential source of injury to persons or property on neighbouring land or on the highway, the building owner ought, in principle, to be entitled to recover in tort from the negligent builder the cost of obviating the danger, whether by repair or by demolition, so far as that cost is necessarily incurred in order to protect himself from potential liability to third parties."*

That suggested exception is not infrequently relied upon by parties and is the subject of conflicting first instance decisions. However, in Thomas v Taylor Wimpey[2], HHJ Keyser QC ('the Judge') has decided that Lord Bridge's dictum does not represent the law.

Thomas v Taylor Wimpey

The issue arose on the trial of a series of preliminary issues arising in proceedings between the claimants, who were owners of two adjacent properties, in which they claimed damages from the homebuilder ('the Builder') in respect of what were said to be defective log retaining walls at the rear of the back gardens of the properties. Any cause of action in contract having become statute-barred, the claim was advanced *inter alia* as a claim in the tort of negligence.

In response to the Builder's contention that the claim was one for pure economic loss, the claimants averred that the defects in the walls amounted to a potential source of injury to persons or property on neighbouring land. In other words, they sought to rely on Lord Bridge's exception as founding a claim where there would not otherwise have been one. The Court ordered various preliminary issues to be determined, including an issue as to whether, on the assumption that the facts pleaded by the claimants were true, the Builder owed the claimants a duty of care not to cause them the loss and damage claimed.

The Previous First Instance Authorities

The Judge reviewed the previous authorities at first instance in which the exception suggested by Lord Bridge had been considered.

In Morse v Barratt[3], a case from 1993 in which a wall adjacent to a highway had to be rebuilt after it was found to represent a danger to the public, HHJ O'Donoghue had taken Lord Bridge's suggested exception and applied it as correctly stating the law. However, as the Judge observed, the reasoning in Morse was somewhat unsatisfactory: no legal basis for the exception was identified and the suggestion of one member of the Appellate Committee, on a point that did not arise for decision by the House of Lords in that case, was simply applied as representing the law.

The only other previous decision in which the point had arisen was George Fischer Holding Ltd v Multi Design Consultants Ltd[4], in which Morse had not been followed. In that case, HHJ Hicks QC had concluded (albeit obiter) that Lord Bridge's dictum was properly to be regarded as a minority obiter dictum which was contrary to the ratio of the decision of the House in Murphy. In HHJ Hicks' view, the decision in Murphy was premised on the rejection of the reasoning in the older cases (Dutton v Bognor Regis[5] and Anns v Merton[6]) that it was anomalous to award damages for a realised injury but not for the cost of averting it. In his view, it was difficult to see why the exception suggested by Lord Bridge should *"linger on where the danger averted is that of liability to a neighbour or passer-by rather than of injury to the plaintiff himself"*.

The Judge's Reasoning in Thomas v Taylor Wimpey

The Judge decided that Lord Bridge's suggested exception to the rule that loss suffered as a result of the need to remedy a defect was irrecoverable in tort did not represent the law. Interestingly, although his ultimate conclusion was the same as that of HHJ Hicks QC in George Fischer Holding, his reasoning was rather different.

The Judge disagreed with the suggestion that Lord Bridge's qualification was itself inconsistent with the ratio of the House of Lord's decision in Murphy. As the Judge observed, it would be *"surprising indeed"* if Lord Bridge had said something inconsistent with the *ratio* of a decision in which he had himself expressed his full agreement with the leading speech of Lord Keith, a speech with which a majority of the Committee also agreed. In the Judge's view, the point was simply not one that had arisen to be decided in Murphy.

The Judge also differed from Judge Hicks in suggesting that there was a real distinction between the possibility of causing injury to those on neighbouring land, on the one hand, and the possibility of causing injury to a claimant or his visitors on his own land. If the condition of a property amounts to a danger to those on it, the owner of that property is in a position to obviate that danger by taking necessary precautions, including, ultimately vacating it altogether. By contrast, the Judge reasoned, the owner of the defective property has no right to control the use of the adjacent land and thereby obviate the risk to those upon it; all he can do is remedy the defect.

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Having conducted a careful review of the authorities and the academic discussion of the point, the Judge summarised his own reasoning for concluding that Lord Bridge's exception did not represent the law in a series of six propositions as follows:

- First, it was propounded in a single obiter dictum in Murphy.
- Second, it was unsupported by authority, other than Morse in which there was no persuasive analysis.
- Third, it is not supported by the *ratio* or reasoning in Murphy; indeed, it is not supported by any specific reasoning on the part of Lord Bridge.
- Fourth, it is contrary to the analysis of the Court of Appeal in Robinson v PE Jones, which concluded that the only basis for tortious liability for economic loss was on grounds of assumption of responsibility.
- Fifth, were the exception correct, it would suggest, logically, that a claimant ought to be able to recover the cost of moving out of his own home if forced to do so because of a dangerous defect, whereas such recovery was not permitted on the current state of the law.
- Sixth, builders have a potential liability by virtue of the Defective Premises Act 1972 and in respect of injury to persons or property under the common law. In those circumstances, there was no compelling policy justification for recognising the existence of Lord Bridge's qualification.

Conclusion

It might be said, albeit perhaps uncharitably, that this is not the first time that Lord Bridge has been found culpable of mooting possible exceptions or explanations in the field of tortious liability for pure economic loss which have not withstood subsequent analysis: see Exhibit A – the 'complex structure theory'. What the decision in Thomas v Taylor Wimpey does highlight is the difficulty in articulating a principled basis for exceptions or qualifications in this area, just as the contortions which were introduced into the law following the decision in Anns v Merton over 40 years ago.

For practical purposes, however, the key point is that it is now going to be very difficult for claimants to seek to recover in tort on the basis of Lord Bridge's exception. Whilst definitive resolution of the point perhaps awaits a decision of the Court of Appeal or the Supreme Court, there is no doubt where the weight of first instance decisions now lies.

1 Murphy v Brentwood [1991] 1 AC 398
2 Thomas v Taylor Wimpey [2019] EWHC 1134 (TCC)
3 Morse v Barratt [1993] 9 Const LJ 158
4 George Fischer Holding Ltd v Multi Design Consultants Ltd [1998] 61 Con LR 85
5 Dutton v Bognor Regis [1978] 1 QB 373
6 Anns v Merton [1978] AC 728