In this judgment, handed down on 14 August 2019, the Court of Appeal upheld the decision of Waksman J at first instance that Approved Inspectors do not owe a duty under Section 1 of the Defective Premises Act 1972 in the exercise of their Building Control functions. It is a decision of immediate practical relevance not just to Approved Inspectors, but also to local authorities exercising Building Control functions and to property owners seeking recourse in respect of defects in their home.

The Background

Herons Court is a block of flats located in Radlett, Hertfordshire. The Respondent, an Approved Inspector under Part II of the Building Act 1984, certified that the flats materially complied with the Building Regulations on their completion in 2012. The Appellants, the lessees of the flats, alleged that the flats did not comply with the Building Regulations, and that as a result the Respondent was in a breach of a duty owed to them under s. 1 of the Defective Premises Act 1972. The Respondent applied to strike out the claim on the basis that no duty was owed under that provision.

The Arguments

Section 1 of the Defective Premises Act 1972 provides:

> *"(1) A person taking on work for or in connection with the provision of a dwelling (whether the dwelling is provided by the erection or by the conversion or enlargement of a building) owes a duty –*
>
> > *(a) if the dwelling is provided to the order of any person, to that person; and*
> > *(b) without prejudice to paragraph (a) above, to every person who acquires an interest (whether legal or equitable) in the dwelling;*
>
> *to see that the work which he takes on is done in a workmanlike or, as the case may be, professional manner, with proper materials and so that as regards that work the dwelling will be fit for habitation when completed."*

The Appellants submitted, at first instance and on appeal, that on its natural and ordinary meaning s. 1 of the Defective Premises Act 1972 extends to Approved Inspectors because they take on work "*in connection with*" the provision of dwellings. In particular, the Appellants argued that:

(1) The Respondent's responsibility being to secure that Herons Court was built in compliance with building regulations, its work was plainly done at least "*in connection with*" the provision of a dwelling.

(2) The position of an Approved Inspector, who voluntarily 'takes on' such work, is to be contrasted with the position of a local authority which provides its Building Control functions under statutory compulsion in the form of Part I of the Building Act 1984.

In response, the Respondent submitted that:

(1) The natural meaning of the words "*work in connection with the provision of a dwelling*" is work whose purpose it is to 'provide', i.e. bring into physical existence, a dwelling. The s. 1 duty is directed towards builders, architects and engineers involved in the substantive creation of dwellings.

(2) Conversely, those involved in the Building Control process do not 'provide' dwellings, but simply ensure, so far as can reasonably be achieved, that buildings are lawful in the sense of not contravening building regulations.

(3) The decision of the House of Lords in *Murphy v Brentwood DC* [1991] AC 398 is highly persuasive authority that local authorities do not owe duties under the 1972 Act. Approved Inspectors perform substantially the same functions and there could therefore be no rational basis for treating them differently.

The Judgment of the Court of Appeal

Upholding the decision of Waksman J, the Court of Appeal comprehensively rejected the submissions of the Appellant and accepted those of the Respondent. As regards the scope of s. 1, Hamblen LJ said:

> *"An AI…has no statutory power to influence the design or construction of a building in any way, save to stipulate that it must comply with the law. In certifying, or refusing to certify, plans and works, the AI is not engaged in the positive role of the provision or creation of the relevant building, but performs the essentially negative regulatory role of checking for compliance against prescribed criteria."*

It followed that Waksman J was correct to conclude that an Approved Inspector did not fall within the natural and ordinary meaning of the words in s. 1.

As regards the impact of *Murphy v Brentwood*, Hamblen LJ said:

> *"The result, the reasoning and a number of the speeches in Murphy mean that it is highly persuasive authority that a local authority does not owe a duty under s.1 DPA 1972 in the exercise of its building control functions."*

Noting the similarities between the statutory regimes governing the building control functions of local authorities and Approved Inspectors, the Court of Appeal accepted the Respondent's submission that it was "*difficult to see how these activities amount to "work for or in connection with the provision of a dwelling" when carried out by an AI, in circumstances where they do not when carried out by a local authority.*" Hamblen LJ rejected the Appellant's submission that the position of an Approved Inspector was different because, unlike a local authority, it voluntarily 'took on' work:

> *"Nor do I agree that this is reflected in the use of the wording of "taking on work". As the judge observed at [49], "the expression 'take on' connotes 'undertakes'. Both a local authority and an approved inspector undertake their statutory roles in respect of building regulation compliance, in relation to any particular building with which they are involved."*

The Court of Appeal ended by noting that the case represented the first time in the 35 years since the passing of the Building Act 1984 that Approved Inspectors had been alleged to owe a duty under s. 1 of the Defective Premises Act 1972:

> *"Whilst it is always possible that the true legal position has simply been missed or misunderstood, it is inherently unlikely that so many legal advisers, advocates and judges would have done so over such a sustained period of time."*

The appeal was therefore dismissed.

Samuel Townend and Harry Smith (Keating Chambers) were counsel for the successful Respondent, NHBC Building Control Services Limited.