Neutral Citation Number: [2019] EWCA Civ 1423

Case No: A1/2018/2751

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
TECHNOLOGY AND CONSTRUCTION COURT (QBD)
THE HONOURABLE MR JUSTICE WAKSMAN
[2018] EWHC 3309 (TCC)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 14/08/2019

Before :

LORD JUSTICE LEWISON
LORD JUSTICE FLOYD
and
LORD JUSTICE HAMBLEN

- -

Between :

THE LESSEES AND MANAGEMENT COMPANY OF HERONS COURT	**Appellants/ Claimants**
- and -	
(1) HERONSLEA LIMITED **(2) TNV CONSTRUCTION LIMITED** **(3) NATIONAL HOUSE BUILDING COUNCIL** **(4) NHBC BUILDING CONTROL SERVICES LIMITED**	**Respondent/ Fourth Defendant**

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- -

Paul Letman (instructed by **Fairweather Law Limited**) for the **Appellants/Claimants**
Samuel Townend and Harry Smith (instructed by **NHBC Legal Department**) for the **Respondent/Fourth Defendant**

Hearing date : 25 July 2019

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Approved Judgment

Lord Justice Hamblen:

Introduction

1. This appeal concerns whether approved inspectors ("AIs") owe a duty under s. 1 of the Defective Premises Act 1972 ("DPA 1972") in the performance of their statutory function under Part II of the Building Act 1984 ("the 1984 Act"), which involves inspection and certification in order to ensure compliance with building regulations.

2. The judge, Waksman J, held that no duty is owed and struck out the claim against the Respondent AI ("BCS") on that basis. The Appellants appeal against that decision.

Factual and procedural background

3. The Appellant Claimants are the lessees of flats at Herons Court, Shenley Hill, Radlett, Hertfordshire ("Herons Court"), either as original purchasers or assignees of the long leasehold interests, together with the lessees' management company.

4. The Appellants brought a claim for damages against the four Defendants arising out of the alleged defective construction of flats in 2012.

5. The First Defendant was the developer of Herons Court. The Second Defendant was the main contractor for the construction of Herons Court. The Third Defendant was the provider of the NHBC Buildmark insurance policy obtained by each of the purchasers of the flats at Herons Court.

6. The Fourth Defendant, BCS, is an AI for the purposes of the 1984 Act and under its contract with the developer provided building control services including inspection and certification in order to ensure compliance with building regulations at Herons Court.

7. Particulars of Claim were served on 24 April 2018, by which the Appellants made claims against the Defendants in respect of alleged breaches of building regulations and NHBC Technical Requirements and Performance Standards relating to Fire Prevention and Safety, as well as in relation to ventilation, sanitation, heating provision, insulation and other matters. By reason of the alleged defects the Appellants maintain that their flats were unfit for habitation on completion. The cost of the required remedial work is claimed in the sum of just under £3m. The claims are defended by the Defendants, each of whom has filed a defence, save for BCS.

8. By an application notice dated 27 July 2018 BCS applied to strike out the case against it pursuant to CPR rr.3.4(2)(a) and/or 3.4(2)(b) on the ground that no duty is owed in law by an AI under s.1(1) DPA 1972.

9. The Respondent's application was heard in the TCC by Waksman J on 16 October 2018. By an oral judgment given on Monday 29 October 2018 the application was granted and it was held that no duty was owed. Permission to appeal was granted by Coulson LJ on 15 January 2019.

The Statutory and Regulatory Framework

The DPA 1972

10. Section 1 DPA 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.
>
> …
>
> (4) A person who—
>
> (a) in the course of a business which consists of or includes providing or arranging for the provision of dwellings or installations in dwellings; or
>
> (b) in the exercise of a power of making such provision or arrangements conferred by or by virtue of any enactment;
>
> arranges for another to take on work for or in connection with the provision of a dwelling shall be treated for the purposes of this section as included among the persons who have taken on the work."

The Building Regulations at the time of the DPA 1972

11. The origins of the present system of building control are to be found in the Public Health Act 1875 ("the 1875 Act"). By s.157 of the 1875 Act, urban authorities were empowered to make byelaws regulating the construction of new buildings. By s. 158, it was provided:

> "Where a notice plan or description of any work is required by any byelaw made by an urban authority to be laid before that authority, the urban authority shall, within one month after the same has been delivered or sent to their surveyor or clerk, signify in writing their approval or disapproval of the intended work to the person proposing to execute the same; and if the work is commenced after such notice of disapproval, or before the expiration of such month without such approval, and is in any respect not in conformity with any byelaw of the urban authority,

> the urban authority may cause so much of the work as has been executed to be pulled down or removed."

12. The provisions of the 1875 Act were consolidated and developed in the Public Health Act 1936, which provided, by s. 64(1):

> "Where plans of any proposed work are, in accordance with building byelaws, deposited with a local authority, the local authority shall… pass the plans unless they either are defective, or show that the proposed work would contravene any of those byelaws, and, if the plans are defective or show that the proposed work would contravene any of those byelaws, they shall reject the plans."

13. The Public Health Act 1961 revoked, by s. 4(1), the power to make building byelaws, and provided for their replacement throughout England and Wales (save, initially, for Inner London) by building regulations. By s. 4(3), it was provided that: "It shall be the function of every local authority to enforce building regulations in their district." By s. 4(6), it was provided that a person contravening any provision contained in building regulations would be liable on conviction to a fine.

14. The first building regulations were the Building Regulations 1965. By regulation A10, the 1965 Regulations required a builder to give notice to the relevant local authority of proposed building operations in order to enable the inspection of the work by the authority to ascertain whether the requirements of the regulations were met. No provision was made for the carrying out of inspections on behalf of local authorities by third parties. Neither the 1961 Act nor the 1965 Regulations provided for civil liability arising from breach of building regulations.

Subsequent developments in the Building Regulations

15. The Health and Safety at Work etc. Act 1974, by s. 70(1), extended the scope of the power to make building regulations to include Inner London, and by s. 71, made provision as to civil liability arising from breach of building regulations. This latter provision was, however, only brought into force insofar as to enable regulations to be made: see the Health and Safety at Work etc. Act 1974 (Commencement No. 4) Order 1977, art. 4.

16. The 1984 Act, amongst other things, re-enacted and consolidated the existing statutory provisions empowering the Secretary of State to make building regulations (s. 1); imposed criminal liability for breaches of the regulations (s. 35); required local authorities to approve plans for work deposited with them unless "the plans are defective" or "they show that the proposed work would contravene any of the building regulations" (s. 16); made provision for practical guidance to be given with respect to the requirements of the building regulations by Approved Documents (ss. 6-7); imposed a duty on local authorities to pass plans deposited with them in accordance with building regulations unless "the plans are defective" or "they show that the proposed work would contravene any of the building regulations" (s. 16), and replaced s. 71(1) of the 1974 Act with s. 38 of the 1984 Act, a section in substantially the same terms as its predecessor. As with s. 71(1) of the 1974 Act, s. 38 of the 1984 Act has been brought

into force only insofar as it enables regulations to be made (see s. 134(2) of the 1984 Act).

17. The 1984 Act also made provision for the introduction of the AI regime via a system of certificates, and for its development by way of further regulations (Part II).

18. The Building Regulations 1985, replacing the 1965 Regulations, and the Building (Approved Inspectors etc.) Regulations 1985, were made the following year.

19. By regulation 9 of the Building (Approved Inspectors etc.) Regulations 1985, under the heading "Independence of approved inspectors", it was provided that an approved inspector was to have "no professional or financial interest in the work he supervises" unless it was "minor work" as defined. By regulation 10, it was provided that an approved inspector by whom an initial notice had been given owed a duty whilst the notice remained in force to "take such steps as are reasonable to enable him to be satisfied within the limits of professional skill and care" that the requirements of the building regulations were met. These were designated as provisions to which criminal liability would not attach under s. 35 of the 1984 Act in the event of breach (regulation 29).

20. The Building Regulations 1985 were repealed and replaced by the Building Regulations 1991, which were in turn repealed and replaced by the Building Regulations 2000. The present version in force is the Building Regulations 2010. Each successive version of the building regulations has been subject to a large number of amendments whilst in force.

21. The Building (Approved Inspectors etc.) Regulations 1985 were variously amended and then repealed and replaced by the Building (Approved Inspectors etc.) Regulations 2000. Those regulations were themselves variously amended and then repealed and replaced by the Building (Approved Inspectors etc.) Regulations 2010, which, subject to amendments in 2012, 2013, 2014, 2016 and 2018, remain in force. The duty imposed by regulation 10 of the Building (Approved Inspectors etc.) Regulations 1985 was retained in regulation 11 of the Building (Approved Inspectors etc.) Regulations 2000, and is still retained in regulation 8 of the Building (Approved Inspectors etc.) Regulations 2010.

The 1984 Act and the Building Regulations

22. For the purpose of the appeal the most relevant provisions of the 1984 Act and the applicable building regulations are set out below. They will be addressed under the headings: Local Authorities, Approved Inspectors and Enforcement.

Local authorities

23. Part I of the Building Act 1984, and the Building Regulations 2010, together make provision for, amongst other things, the operation of the building control process by local authorities. In particular:

    (1) By regulation 4(1) of the Building Regulations 2010, it is provided that building work shall be carried out in accordance with the substantive requirements set out in Schedule 1 thereto. Those requirements are divided into Parts A to R inclusive

and relate to different aspects of the design and construction of buildings. By regulation 7(1), it is provided that building work shall be carried out with adequate and proper materials, and in a workmanlike manner.

(2) By Part 3 of the Building Regulations 2010, it is provided that a person who intends to carry out building work shall give notice and deposit specified plans of the work with the local authority (regulations 11-16).

(3) By s. 16(1) of the 1984 Act, it is provided that a local authority shall pass plans so deposited with it unless "they are defective" or "they show that the proposed work would contravene any of the building regulations", in which case the authority may (by s. 16(2)) either reject the plans or pass them subject to conditions. By s. 16(3), those conditions include that "such modifications as the local authority may specify shall be made in the deposited plans."

(4) By ss. 15 and 24 of the 1984 Act, and regulation 15 of the Building Regulations 2010, local authorities are required in certain circumstances to consult with the fire and rescue authority, and the sewage undertaker.

(5) By regulation 17(1) of the Building Regulations 2010, it is provided that a local authority shall give a completion certificate "where they are satisfied, after taking all reasonable steps, that, following completion of building work carried out on it, a building complies with the relevant provisions." By regulation 17(2) such a certificate is evidence (but not conclusive evidence) that the requirements specified in the certificate have been complied with.

Approved inspectors

24. Part II of the 1984 Act and the Building (Approved Inspectors etc.) Regulations 2010 set out a mechanism for the exercise by AIs of the statutory functions of local authorities outlined above. In particular:

(1) An "approved inspector" is defined by s. 49 of the 1984 Act as "a person who, in accordance with building regulations, is approved" for the purposes of Part II of the Act by the Secretary of State or a designated body. S.49 further provides:

> "(7) An approved inspector may make such charges in respect of the carrying out of the functions referred to in section 47(1) above as may in any particular case be agreed between him and the person who intends to carry out the work in question or, as the case may be, by whom that work is being or has been carried out.
>
> (8) Nothing in this Part of this Act prevents an approved inspector from arranging for plans or work to be inspected on his behalf by another person; but such a delegation—
>
> (a) shall not extend to the giving of a certificate under section 50 or 51 below, and
>
> (b) shall not affect any liability, whether civil or criminal, of the approved inspector which arises out of functions

> conferred on him by this Part of this Act or by building regulations,
>
> and, without prejudice to the generality of paragraph (b) above, an approved inspector is liable for negligence on the part of a person carrying out an inspection on his behalf in like manner as if it were negligence by a servant of his acting in the course of his employment."

(2) By s. 47(1) of the 1984 Act, it is provided that any person intending to carry out work together with an AI may jointly give an "initial notice" in a prescribed form together with specified plans, and that thereafter:

> "so long as the notice continues in force, the approved inspector by whom the notice was given shall undertake such functions as may be prescribed with respect to the inspection of plans of the work to which the notice relates, the supervision of that work and the giving and receiving of certificates and other notices."

(3) By s. 47(2), when a local authority receives such an initial notice, it may impose such requirements as a condition of passing the plans as would have been available to it had the plans been deposited with the local authority. The AI has no equivalent power to impose conditions on or make modifications to the works.

(4) By regulation 19 of the Building Regulations 2010, it is provided that *inter alia* regulations 12, 16 and 17 (relating to the giving of notices to, and issuing of certificates by, local authorities) do not apply where an initial notice given under s. 47 of the 1984 Act is in force. Instead, ss. 50-51 of the 1984 Act have effect, such that:

(i) By s. 50(1), the AI is required, if requested, to issue a "plans certificate" when he has inspected them and *inter alia* is "satisfied that the plans neither are defective nor show that work carried out in accordance with them would contravene any provision of building regulations".

(ii) By s. 51(1):

> "Where an approved inspector is satisfied that any work to which an initial notice given by him relates has been completed, he shall give to the local authority by whom the initial notice was accepted such certificate with respect to the completion of the work and the discharge of his functions as may be prescribed (called a "final certificate")."

(5) Regulations 12 and 13 provide for AIs to consult with the fire and rescue authority and the sewage authority in certain circumstances.

(6) By the Building (Approved Inspectors etc.) Regulations 2010, regulation 8(1), it is provided:

> "…an approved inspector by whom an initial notice has been given shall, so long as the notice continues in force, take such steps (which may include the making of tests of building work and the taking of samples of material) as are reasonable to enable the approved inspector to be satisfied within the limits of professional skill and care that…[the requirements of multiple specified Building Regulations] are complied with".

(7) By regulation 18 of the Building (Approved Inspectors etc.) Regulations 2010, AIs are empowered to give notice that work being carried out under an initial notice does not comply with the building regulations. The only significant difference between this provision and a local authority's equivalent power to reject plans under s. 16 of the 1984 Act is that (similarly to s. 47, above) whilst the local authority has the power to require to the person carrying out the work to make prescribed modifications as a condition of approval, an AI has no such power. Regulation 18 is in the following terms:

> "Cancellation of initial notice
>
> (1) An approved inspector who is of the opinion that any of the work described in an initial notice which has been carried out contravenes any provision of building regulations may give notice in writing to the person carrying out the work specifying—
>
> (a) the requirement of building regulations which in the approved inspector's opinion has not been complied with, and
>
> (b) the location of the work which contravenes that requirement.
>
> (2) A notice of contravention given in accordance with paragraph (1) shall inform the person carrying out the work that if within the prescribed period that person has neither pulled down nor removed the work nor effected such alterations in it as may be necessary to make it comply with building regulations, the approved inspector will cancel the initial notice."

Enforcement

25. The enforcement options available to local authorities where building regulations are not complied with include:

(1) Prosecution pursuant to s. 35 of the 1984 Act, by which a person who contravenes any provision contained in building regulations is liable on conviction to a fine.

(2) Service of an enforcement notice pursuant to s. 36 of the 1984 Act, by which the local authority may require the owner of the relevant building to pull down, remove or alter work which contravenes the requirements of building regulations.

(3) An application for injunction for the removal or alteration of work (the availability of which is expressly preserved, subject to conditions, by s. 36(6) of the 1984 Act).

26. By s. 38(1) of the 1984 Act, provision is made for breach of a duty imposed by building regulations to be actionable so far as it causes damage. However, s. 38 has been brought into force only insofar as necessary to enable regulations to be made thereunder: see s. 134(1)(a) of the 1984 Act.

27. By s. 57(1) of the 1984 Act, it is an offence for any person to issue a notice or certificate containing a statement which he knows to be false or misleading, or to recklessly issue a notice or statement containing a false or misleading statement. The offence may be committed both by persons acting directly for local authorities and by AIs.

The judgment

28. The judge noted that the claim against BCS did not rely on any particular facts or special role. It was a case based on the functions being performed by the AI under the building regulations. As he stated at [21]:

> "It will be noted at the outset that no particulars of the breach of Section 1(1), in terms of how the approved inspectors work was not done in a professional manner in relation to each of the defects alleged, were provided. It is also clear, as noted above, that no special role relying on particular facts, was alleged against BCS. Finally, it is clear that no freestanding duty of care is alleged against BCS. Either it fell within Section 1(1) of The 1972 Act. If it did not, that is the end of the claim."

29. The judge held that s.1(1) DPA 1972 did not apply to building control inspectors. He drew a distinction between those who make a positive contribution to the design or construction of a building and those whose role was to ensure that the design or construction of the building was lawful. As he stated at [31]:

> "….those who could fall within clause 1, other than builders, would be architects, designers, and those supervising the construction of the works on behalf of one of the building or designing parties. That is quite different from an inspector, whose essential function is not to contribute in any meaningful way to the design or construction of the building, but rather to certify simply whether that design or construction is lawful in a building sense, and that is the extent of the role."

30. The judge considered that this distinction was supported by the Law Commission Report dated 15 December 1970 which led to the passing of DPA 1972. Although that Report recognised that liability should extend beyond builders to others who "take on work" in connection with a dwelling, such as architects, surveyors or engineers, there

was no suggestion that it should extend to building control inspectors or local authorities exercising building control functions.

31. The judge also considered that it was supported by the fact that s.38 of the 1984 Act contemplated a "separate freestanding regime for any civil liability" for building control inspectors, which militated against the idea that they were already under such liability under a prior statute.

32. The judge also found "major" support for his conclusion in the House of Lords decision in *Murphy v Brentwood District Council* [1991] 1 AC 398 which held that local authorities owed no duty of care in relation to the passing of plans for a house with defective foundations. The judge considered that a number of the speeches in that case assumed that there was no liability on local authorities under the DPA 1972.

33. Finally, the judge rejected any suggestion that for these purposes a meaningful distinction could be drawn between local authority inspectors and AIs. As the judge observed at [48]:

> "It would be very odd if their roles were different, given that the approved inspector regime is effectively a privatised version of the local authority regime."

The grounds of appeal

34. As developed at the hearing of the appeal, Mr Letman for the Appellants advanced two main grounds of appeal:

(1) On its natural and ordinary meaning s.1(1) DPA 1972 extends to AIs.

(2) None of the other matters relied upon by the judge support a contrary conclusion.

(1) Whether, on its natural and ordinary meaning, s.1(1) DPA 1972 extends to AIs.

35. Mr Letman submits, in particular, that:

(1) The words "in connection with" are "words of the widest import" – per Balcombe LJ in *Ashville Investments Ltd v Elmer* [1989] QB 488 at p503D. It denotes "any link at all" – per Coulson J in *Amec Group v Thames Water Utilities Ltd* [2010] EWHC 419 (TCC) at [29].

(2) BCS's responsibility was to secure that the development in question, Herons Court, and each dwelling within it were built in compliance with building regulations. There is no sense in which their work was not done for or, at least, "in connection with" the provision of a dwelling.

(3) That is consistent with the mischief which s.1 DPA 1972 was designed to meet, namely to ensure that dwellings are fit for habitation. Compliance with building regulations serves to meet that mischief.

36. Mr Townend for BCS submits, in particular, that:

(1) The natural meaning of the words "work for or in connection with the provision of a dwelling" is work whose purpose it is to 'provide', i.e. bring into physical existence, a dwelling. This reading is confirmed by the bracketed words in the first part of s. 1(1): "whether the dwelling is provided by the erection or by conversion or enlargement of a building".

(2) The s.1 duty is directed towards parties such as builders, architects and engineers who are involved in the physical creation of dwellings either by literally constructing them or by creating designs and plans in whose image the dwelling is ultimately built.

(3) It is no part of the function of the building control process to provide dwellings. The function of the building control process – whether operated by a local authority or an AI – is to ensure, as far as can reasonably be achieved, that buildings do not contravene the building regulations. The substantive creation of buildings is carried out by others. As the judge held, the work of the AI allows the provision of the dwelling to be lawful, but does not affect the provision of the dwelling itself at all.

37. In my judgment little assistance is to be derived from other cases in which the words "in connection with" have been interpreted. As Mr Letman accepts, they are words that necessarily take their colour from the context in which they are used. Sometimes that will mean they are words of "the widest import", but on other occasions it will not.

38. In the present case the context includes the whole of section 1(1), not just the words: "A person taking on work for or in connection with the provision of a dwelling". This includes that the duty relates to how "the work which he takes on is done" and that it is done "with proper materials". The focus is therefore very much on the doing of work.

39. That work also has to relate to the "provision of a dwelling". This suggests the bringing of that dwelling into physical existence or its creation. This is consistent with how these words have been interpreted in other cases. For example, *Jacobs v Morton & Partners* (1994) 72 BLR 92 at 105: "In my judgment, this phrase connotes the creation of a new dwelling" per Mr Recorder Jackson QC; *Saigol v Cranley Mansions Ltd* (1995) unrep., [1996] CA Transcript No 658: "Mr. Ticciati was in my view correct in submitting the "provision" was a word which prima facie involved the creation of something new", per Hutchison LJ.

40. The emphasis is therefore on those who do work which positively contributes to the creation of the dwelling. That may include architects and engineers who prescribe how the dwelling is to be created, not just those who physically create it. It does not, however, include those whose role is the essentially negative one of seeing that no work is done which contravenes building regulations. Building control ensures that the dwelling is legal and properly certified, but it does not positively contribute to the provision or creation of that dwelling.

41. That s.1(1) is focusing on those involved in the doing of the work involved in the provision of the dwelling is borne out by s.1(4) which extends its ambit to developers. They arrange for others to take on work but do not take on that work themselves. Special provision is therefore needed to ensure that s.1(1) applies to them.

42. That an AI's function is far removed from the work of the provision or creation of the dwelling is borne out by the fact that an AI has no statutory power to order changes to be made to plans for works, or to building work which is ongoing or completed. The powers of the AI are confined to refusing to issue a plans certificate or final certificate in the face of non-compliant work. Moreover, unlike the local authority, the AI has no power to impose conditions or prescribe modifications to the works and the relevant enforcement powers are left entirely with the local authority.

43. An AI therefore 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.

44. For all these reasons, and those given by Mr Townend and the judge, I consider that the judge was correct to conclude that an AI performing statutory functions does not fall within s.1(1) DPA 1972 on its natural and ordinary meaning.

(2) Whether the other matters relied upon by the judge support his conclusion.

45. In the light of my conclusion on the natural and ordinary meaning of s.1(1) DPA 1972 this further issue does not arise. I agree, however, with the judge that powerful support for his conclusion is provided by the House of Lords decision in *Murphy v Brentwood District Council* [1991] 1 AC 398. In particular, I agree with the judge that that decision strongly suggests that a local authority inspector owes no duty under s.1(1) DPA 1972, and that no distinction can properly be drawn between the position of a local authority inspector and an AI.

46. In *Murphy* the House of Lords rejected a homeowner's claim that the local authority was liable at common law for its negligent approval of the plans for a building's foundations, overruling *Anns v Merton London Borough Council* [1977] AC 728.

47. Although a local authority's liability under s.1 DPA 1972 was not in issue, if any of the Law Lords had considered that s.1 DPA 1972 applied to local authorities, one would expect that to have been a significant factor in their analysis of whether those local authorities were also subject to a duty at common law. None of them did, however, reason in this way and, moreover, a number of the judgments state or assume that local authorities owed no such duty.

48. This is clearest in the judgment of Lord Oliver who stated as follows at p491-2:

> "It may be said that to hold local authorities liable in damages for failure effectively to perform their regulatory functions serves a useful social purpose, by providing an insurance fund from those who are unfortunate enough to have acquired defective premises can recover at least part of the expense to which they have been put… One cannot but have sympathy with such a view although I am not sure that I see why the burden should fall on the community at large rather than be left to be covered by private insurance. But, in any event, like my noble and learned friends, I think that the achievement of beneficial

> social purposes by the creation of entirely new liabilities is a matter which properly falls within the province of the legislature and within that province alone. At the date when *Anns* was decided the Defective Premises Act 1972, enacted after a most careful consideration by the Law Commission, had shown clearly the limits within which Parliament had thought it right to superimpose additional liabilities upon those previously existing at common law and it is one of the curious features of the case that no mention even of the existence of this important measure, let alone of its provisions — and in particular the provision regarding the accrual of the cause of action —appears in any of the speeches or in the summary in the Law Reports of the argument of counsel..
>
> There may be sound social and political reason for imposing upon local authorities the burden of acting, in effect, as insurers that buildings erected in their areas have been properly constructed in accordance with the relevant building regulations. Statute may so provide. It has not done so and I do not, for my part, think that it is right for the courts not simply to expand existing principles but to create at large new principles in order to fulfil a social need in an area of consumer protection which has already been perceived by the legislature but for which, presumably advisedly, it has not thought it necessary to provide."(emphasis added)

49. These observations reflect an understanding that a local authority's responsibility to ensure that buildings are constructed in accordance with building regulations is not covered by DPA 1972, and indeed Lord Oliver so states.

50. In his speech Lord Mackay considered that the choice facing the House was between removing the qualifications for the cause of action which *Anns* held to exist or going back to the position as it was, before *Anns*, which would also involve overruling *Dutton v Bognor Regis Urban District Council* [1972] 1 QB 373. In this context he said at p457:

> "Faced with the choice I am of the opinion that it is relevant to take into account that Parliament has made provisions in the Defective Premises Act 1972 imposing on builders and others undertaking work in the provision of dwellings obligations relating to the quality of their work and the fitness for habitation of the dwelling. For this House in its judicial capacity to create a large new area of responsibility on local authorities in respect of defective buildings would in my opinion not be a proper exercise of judicial power….While of course I accept that duties at common law may arise in respect of the exercise of statutory powers or the discharge of statutory duties I find difficulty in reconciling a common law duty to take reasonable care that plans should conform with byelaws or regulations with the statute which has imposed on the local authority the duty not to pass

> plans unless they comply with the byelaws or regulations and to pass them if they do."

51. As the judge observed at [40], "it is plain that he thought that the 1972 Act had nothing to do with local authority inspectors, which is why the recognition of a new duty of care owed by them would be such an extension of their liability."

52. Other speeches included concluding remarks which reflect an apparent assumption that local authorities were not liable under DPA 1972, as reflected in observations that the imposition of a liability on them would be a matter for Parliament. For example:

(1) Lord Keith at p472:

> "It is also material that Anns has the effect of imposing upon builders generally a liability going far beyond that which Parliament thought fit to impose upon house builders alone by the Defective Premises Act 1972, a statute very material to the policy of the decision but not adverted to in it. There is much to be said for the view that in what is essentially a consumer protection field, as was observed by Lord Bridge of Harwich in D. & F. Estates, at p. 207, the precise extent and limits of the liabilities which in the public interest should be imposed upon builders and local authorities are best left to the legislature."

(2) Lord Bridge at p482:

> "These may be cogent reasons of social policy for imposing liability on the authority. But the shoulders of a public authority are only "broad enough to bear the loss" because they are financed by the public at large. It is pre-eminently for the legislature to decide whether these policy reasons should be accepted as sufficient for imposing on the public the burden of providing compensation for private financial losses. If they do so decide, it is not difficult for them to say so."

(3) Lord Jauncey at p498:

> "Parliament imposed a liability on builders by the Defective Premises Act 1972 - a liability which falls far short of that which would be imposed upon them by Anns. There can therefore be no policy reason for imposing a higher common law duty on builders, from which it follows that there is equally no policy reason for imposing such a high duty on local authorities. Parliament is far better equipped than the courts to take policy decisions in the field of consumer protection."

53. An important reason for the House of Lords' conclusion that the extension of tort liability found in *Anns* could not rationally be supported was that the scope of that proposed liability on local authorities exceeded any statutory liability created Parliament via the DPA 1972. The conclusion that the DPA 1972 did not impose duties on local authorities was therefore a significant element of the reasoning of the House.

54. 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. Indeed, Mr Letman does not positively contend for such a duty. His essential point is that this is not an issue that needs to be addressed as the position of an AI is materially different to that of local authority inspector. I do not agree. As Mr Townend points out, the statutory regimes governing the building control functions of local authorities, and the role and responsibilities of AIs, directly parallel one another, and insofar as the regimes diverge, it is to give the local authority more expansive powers than those available to its AI counterpart. In particular:

(1) Both regimes require the responsible party to pass plans for the proposed work in the event that the plans are not defective nor show that work carried out in accordance with them would contravene building regulations (ss. 16(1) and 50(1) of the 1984 Act, respectively).

(2) Both regimes require the responsible party to issue a completion certificate where they are satisfied, having taken reasonable steps, that the work carried out complies with the requirements of the building regulations (regulation 17(1) of the Building Regulations 2010 in the case of a local authority, and s. 51(1) of the 1984 Act together with regulation 8 of the Building (Approved Inspectors etc.) Regulations 2010 in the case of an AI).

(3) Both regimes require the responsible party to reject work which does not comply with the building regulations. The local authority has the power to impose conditions and modifications on the work (s. 16 of the 1984 Act), whereas the AIs' power is limited to pointing out the fact of the non-compliance (regulation 18 of the Building (Approved Inspectors etc.) Regulations 2010.

(4) Both regimes require the responsible party to consult with the fire and sewage authorities in certain circumstances: see the 1984 Act, ss. 15 and 24; the Building Regulations 2010, regulation 15; and the Building (Approved Inspectors etc.) Regulations 2010, regulations 12-13.

(5) A completion certificate issued by a local authority constitutes evidence (but not conclusive evidence) that the requirements specified in the certificate are met (regulation 17(4) of the Building Regulations 2010). A final certificate issued by an approved inspector has the same effect (regulation 16(3) of the Building (Approved Inspectors etc.) Regulations 2010).

(6) The enforcement powers available to a local authority for breach of building regulations are identical irrespective of whether the building control process is undertaken by the local authority or an AI. Those powers are exercisable exclusively by the local authority.

(7) Both AIs and local authorities are permitted to charge for their services: in the case of AIs by s. 49(7) of the 1984 Act; and in the case of local authorities by Sch. 1, paragraph 9 of the 1984 Act.

55. As Mr Townend submits, it is 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.

56. These similarities are far more significant than the main point of distinction relied upon by Mr Letman, namely that local authorities have the duty to secure compliance with building regulations imposed upon them, whilst AIs freely undertake that role. 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".

57. If there is no material distinction between the position of a local authority inspector and an AI then it follows that *Murphy* is highly persuasive authority against the imposition of the alleged duty on AIs. It also means that, on the Appellants' case, local authorities have always owed a duty under s.1(1) DPA 1972, although this would appear to be the first time such a duty has been alleged in the 47 years since the Act was passed. On any view, it is the first time such duty on AIs has been alleged in the 35 years since the 1984 Act. 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.

58. All these considerations provide strong support for the conclusion which the judge reached. In these circumstances it is not necessary to address whether the other matters he relied upon also do so.

Conclusion

59. For the reasons outlined above, on its natural and ordinary meaning s.1(1) DPA 1972 does not extend to AIs and this conclusion is supported by the matters referred to above under Ground (2).

60. I would accordingly dismiss the appeal.

Lord Justice Floyd:

61. I agree.

Lord Justice Lewison:

62. I also agree.