BUILDING LAW REPORTS

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VOLUME
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Theme

Liability and Limitation

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Liability and Limitation

The intention of dedicating this volume entirely to the theme of 'Design and other Liability' has been partly frustrated by the need to deal with the important changes in the law of limitation of liability introduced by the Court of Appeal's decision in the *Sparham-Souter* case (*post*).

That case was said expressly by Lord Justice Roskill to have no bearing on a builder's liability. 'We heard no detailed argument as to their position in this respect and [counsel for the plaintiffs] did not found his argument . . . upon any supposed liability or protection from liability of persons in the position of [the builders].' But before the year was out a puisne judge had professed to follow it by holding that the builder of a house was liable both in contract and tort to the immediate purchaser, but also in tort to any subsequent purchaser: *Sutherland v Maton* (*post*).

The Law Commission considered the *Civil Liability of Vendors and Lessors of Defective Premises* (Law Com No 40) as the result of which the Defective Premises Act 1972 was passed by Parliament.

Not content with that, the judges appear to have taken upon themselves to legislate also, and the evils of judicial legislation are apparent in every case.

To start with, there is the uncertainty created when law is seemingly changed by a judge's whims. In *Dutton v Bognor Regis,* Lord Denning expressed the opinion that time began to run in the case of actions in tort for defective foundations when the damage was done — that is when the foundation was laid. In that he followed Diplock LJ (as he then was) in *Bagot v Stevens Scanlan* (2 BLR 67). That was dutifully approved by other judges in successive cases: *Higgins v Arfon* (*post*) and *Anns & Ors v Merton BC.*

But less than four years later, Lord Denning has changed his mind. Time begins to run when some subsequent purchaser discovers defective foundations, his lordship holds — be it a century hence. And this is so even though the argument based appears to be based not only upon a manifest fallacy but in defiance of a principle laid down by the House of Lords.

In any tort, there are logically three distinct incidents:

1. The wrongful act.
2. The damage resulting from the wrongful act which may, like a punch on the nose, be contemporanious with the act or, like radiation, be long delayed.
3. The time when a potential plaintiff becomes aware of the damage. This, again, may be contemporaneous with the wrongful act itself — and with the damage — like the punch on the nose — or, as in the silicosis cases, be long delayed after the damage is done.

The House of Lords in *Cartledge v E. Jopling & Sons Ltd* decided that the period laid down by section 2(1) of the Limitation Act 1939 began to run when appreciable damage was sustained (event 2 above), and not when the plaintiff became aware of it (event 3 above).

As a result, Parliament passed, in respect of personal injuries only, the Limitation Act 1963, the Law Reform (Miscellaneous Provisions) Act 1971 and the Limitation Act 1975.

But the principle laid down by the House of Lords remained the law.

Lord Denning's argument in *Sparham-Souter* that there was an analogy

between that case and *Davie v New Merton Board Mills Ltd* is, in the Editor's view, specious.

In that case the manufacturer made a tool with a latent defect. That was the tortious act (incident 1). Seven years later, a piece broke off and flew into the eye of a fitter who was using it (incident 2). He was aware immediately that he had suffered damage (incident 3). In this particular case, the damage and the knowledge of it were contemporaneous. It is therefore in no way comparable to allegedly defective foundations that became apparent years later.

All this might be unimportant if the judges had not drained the word 'negligence' of all meaning. Once it could be understood as meaning, in Baron Alderson's famous words: 'Negligence is the omission to do something which a reasonable man . . . would do, or doing something which a prudent and reasonable man would not do': *Blyth v Birmingham Waterworks Co.*

The famous case of *Donoghue v Stevenson* only decided that there was a duty on a 'person who for gain engages in the business of manufacturing articles of food intended for consumption by members of the public in the form in which he issues them to avoid injury to them' by his negligence (*per* Lord MacMillan). The pursuer in that case was unable to prove that, in spite of the duty, there had been a breach of it, so that years later she settled her claim for its nuisance value. But since that date, judges have reduced the concept of negligence to a thin disguise for their own vlaue judgments. As John Munkman, author of *Employers' Liability*, wrote in *The Times*: 'Negligence does not mean blameworthiness. It means falling short of whatever standard a court fixes and this is often a counsel of perfection. Negligence is a wholly arbitrary and uncertain concept.'

In the case of a builder, if Mr Justice Cobb be correct, it means an absolute guarantee of the property for all time.

Absolute liability for all time for any damage caused by a chattel may well be a desirable goal and it is shortly to be thrust upon the United Kingdom by the EEC Commission. But that is not the same as absolute liability for all time for the chattel itself. Still less does it have any relevance to houses and realty, where a purchaser has traditionally by his contract been deemed to purchase with full knowledge of the actual state of the property and to take it as it is (see, for example, the National Conditions of Sale, clause 12(1)). By this contract, the purchaser takes on himself the responsibility of ensuring that the premises are what he requires.

But if Mr Justice Cobb be right, he can disregard his contractual obligations and sue in tort for any defect whether caused by the builder's real negligence or not.

Defective Premises Act 1972

Most cases reported in this volume relate to circumstances which occurred before the Defective Premises Act 1972 became operative on 1 January 1974.

Subsequent cases may rely upon the statute as an additional ground of liability. One cannot, however, anticipate what attitude the courts will adopt to the differing limitation periods.

The material sections of the act are set out below in full; other sections have been summarised in brief. The act:

(1) is limited to dwellings and not other buildings
(2) is expressely made 'in addition to any duty a person may owe apart' from the provision of this act
(3) does not apply to Scotland or Northern Ireland
(4) makes void any contractual or other provision to exclude or restrict liability under the act
(5) applies to builders and developers alike
(6) extends its benefits to every person who acquires an interest in the dwelling
(7) but excludes houses sold with National House-Building Council Guarantees
(8) provides a new period of limitation (see section 1(5)).

The Defective Premises Act 1972

1.—(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.

(2) a person who takes on any such work for another on terms that he is to do it in accordance with instructions given by or on behalf of that other shall, to the extent to which he does it properly in accordance with those instructions, be treated for the purposes of this section as discharging the duty imposed on him by subsection (1) above except where he owes a duty to that other to warn him of any defects in the instructions and fails to discharge that duty.

(3) A person shall not be treated for the purposes of subsection (2) above as having given instructions for the doing of work merely because he has agreed to the work being done in a specified manner, with specified materials or to a specified design.

(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.

(5) Any cause of action in respect of a breach of the duty imposed by this section shall be deemed for the purposes of the Limitation Act 1939, the Law Reform (Limitation of Actions, &c.) Act 1954 and the Limitation Act 1963, to have accrued at the time when the dwelling was completed, but if after that time a person who has done work for or in connection with the provision of the dwelling does further work to rectify the work he has already done, any such cause of action in respect of that further work shall be deemed for those purposes to have accrued at the time when the further work was finished.

2.—(1) Where—

(*a*) in connection with the provision of a dwelling or its first sale or letting for habitation any rights in respect of defects in the state of the dwelling are conferred by an approved scheme to which this section applies on a person having or acquiring an interest in the dwelling; and

(*b*) it is stated in a document of a type approved for the purposes of this section that the requirements as to design or construction imposed by or under the scheme have, or appear to have, been substantially complied with in relation to the dwelling;

no action shall be brought by any person having or acquiring an interest in the dwelling for breach of the duty imposed by section 1 above in relation to the dwelling.

(2) A scheme to which this section applies—

(*a*) may consist of any number of documents and any number of agreements or other transactions between any number of persons; but

(*b*) must confer, by virtue of agreements entered into with persons having or acquiring an interest in the dwellings to which the scheme applies, rights on such persons in respect of defects in the state of the dwellings.

(3) In this section "approved" means approved by the Secretary of State, and the power of the Secretary of State to approve a scheme or document for the purposes of this section shall be exercisable by order, except that any requirements as to construction or design imposed under a scheme to which this section applies may be approved by him without making any order or, if he thinks fit, by order.

(4) The Secretary of State—

(*a*) may approve a scheme or document for the purposes of this section with or without limiting the duration of his approval; and

(*b*) may by order revoke or vary a previous order under this section or, without such an order, revoke or vary a previous approval under this section given otherwise than by order.

(5) The production of a document purporting to be a copy of an approval given by the Secretary of State otherwise than by order and certified by an officer of the Secretary of State to be a true copy of the approval shall be conclusive evidence of the approval, and without proof of the handwriting or official position of the person purporting to sign the certificate.

(6) The power to make an order under this section shall be exercisable by statutory instrument which shall be subject to annulment in pursuance of a resolution by either House of Parliament.

An order was made under this section as SI 1973:No 1843 *Building and Buildings: The House Building Standard (Approved Scheme etc) Order.* This approves the National House-Building Council Scheme 1973.

The current order is SI 1975:No 1462 *Building and Buildings: The House-Building Standards (Approved Scheme etc) Order.* This approves the National House-Building Council Scheme 1975.

Section 2(7) deals with compulsory purchase.

Section 3 proves that the duty of care shall not be abated by disposal of the premises.

Section 4 deals with landlords' obligations and replaces in wider terms the repealed section 4 of the Occupiers Liability Act 1957.

Section 5 applies the act to the Crown.

Section 6(1) defines terms.

Section 6(2) states as follows:

(2) Any duty imposed by or enforceable by virtue of any provision of this Act is in addition to any duty a person may owe apart from that provision.

(3) any term of an agreement which purports to exclude or restrict, or has the effect of excluding or restricting, the operation of any of the provisions of this Act, or any liability arising by virtue of any such provision, shall be void.

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Applegate v Moss
Archer v Moss

Coram: *Court of Appeal, Civil Division*
Lord Denning MR, Edmund Davies LJ, Megaw LJ

Date of judgment: *11 December 1970*

Counsel: *T.G. Field-Fisher QC and S. Ibbotson for the defendant appellant*
H Brooke for the plaintiff respondents, also appellants by cross appeal

The defendant was an estate developer who employed a building company, Piper Ltd, to erect houses. By contracts with each of the plaintiffs, he undertook in 1957 to build for each a dwellinghouse for the sum of £1900, in accordance with plans and specifications approved by them.

The latter provided that the excavations and concreting for the foundations 'were to be carried out in accordance with the local authority's requirements, and approved by them'. There was a further undertaking that the 'developer will carry out the said works in a substantial and workmanlike manner'.

By an exemption clause, the purchaser was, on going into actual occupation, deemed to accept the house and to have no cause of action against the developer in respect of any breach of contract or variation from the plans and specifications.

When one of the purchasers came to try to sell his house in 1965, it was found that the footings were 2 ft 3 ins deep instead of 3 ft or 3 ft 6 ins, and the concrete used was a mixture of 15 aggregate to 1 cement instead of 8 : 1.

The plaintiffs brought actions against the developer for breach of contract. The trial judge found as a fact that the houses were fit only for demolition.

Reliance on the exemption clause was abandoned by the defendant in the course of that trial: but he relied upon the Limitation Act 1939, section 2(1):

> 'The following actions shall not be brought after the expiration of 6 years from the date on which the cause of action accrued, that is to say:-
> (a) actions founded on simple contract or on tort. . . six years.'

The trial judge (Paull J) held that the developer had been guilty of 'fraud' within the meaning of the Limitation Act 1939, section 26:

> 'Where, in the case of any action for which a period of limitation is prescribed by this Act, either:
> (a) the action is based upon the fraud of the defendant or his agent, or any person through whom he claims or his agent, or
> (b) the right of action is concealed by the fraud of any such person as aforesaid . . . . .
> the period of limitation shall not begin to run until the plaintiff has discovered the fraud . . . . . or could with reasonable dilligence have discovered it. . . .'

The trial judge therefore gave judgment for the plaintiffs for the sum of £1,900 plus interest from 1957, namely £3,700. The defendant appealed on liability and both the plaintiffs cross-appealed on the quantum of damage.

The court held:

1. The word 'fraud' in section 26(b) means neither common law deceit nor moral turpitude, but only conduct which it would be 'against conscience' for the defendant to rely upon.

2. The plaintiffs' right of action had been concealed by the action of the builder in covering up the foundations and this was 'fraud' for the purpose of 26(b).

3. The builder was the developer's agent for the purpose of that section; and (per Edmund Davies LJ) an independent contractor can be an agent for that purpose.

4. Damages should be assessed as at the date when the breach of contract was discovered i e, 1965, when the houses were then worth £2,900 if of satisfactory construction.

5. Interest should run from the date when the plaintiffs gave up possession until the date of judgment.

Commentary

The exemption clause in this case would probably have been effective to protect the developer had it not been for the doctrine of fundamental breach. In *Harbutt's Plasticine Ltd v Wayne Tank Co Ltd*, the defendants undertook to design and supply a system for keeping molten wax flowing through a factory. The contract contained a limitation of liability clause, whereby the maximum damages for breach of contract was to be the value of the contract, namely £2,300. The system the defendants designed and installed consisted of plastic pipes wrapped round with heating cable. When it was switched on, the factory was burned down at a total loss of £151,420. Because the breach of contract was so fundamental as to deprive the plaintiffs of substantially all the benefit they were entitled to expect from the contract, the defendants could not rely upon the limitation of liability clause.

In the present case, it may be thought that the defendant's advisers too readily abandoned the defence based on the exemption clause: both the plaintiffs got substantially what they had bargained for, namely a house without a guarantee and had voluntarily taken on themselves exclusively the responsibility for seeing that it complied with the contract, to the extent that they agreed that they should have 'no cause of action, claim or demand' in respect of any defective workmanship whatsoever. There therefore seems to be no reason in law or morality why they should not be held to their bargain. There was no doubt a difference in price between a house sold with an exclusion of liability clause and a house sold with a guarantee good for ten years or more, just as there is between a motor car sold on the buyer's inspection with no warranty and one sold with a guarantee. Moreover, it is difficult to see how it could be said that there was a fundamental breach since the plaintiffs had not been deprived substantially of *all* the benefit they were entitled to expect from the contract: both lived in their houses without complaint for nine years.

On the main point at issue, the meaning of 'fraud' in section 26 of the Limitation Act 1939, it may be doubted whether this was the meaning Parliament intended to be attached to this word.

'Fraud' has one meaning at common law. Qualified by the adjective 'equitable', it has a totally different meaning, namely 'unconscionable'. It is difficult to accept that the draftsman of the act did not know the difference between 'fraud' and 'equitable fraud'. The decision of the Court of Appeal implied that the word in section 26(b) means 'equitable fraud'. In the word of Lord Denning: 'It .... does not necessarily .... involve moral turpitude ....

The section applies whenever the conduct of the defendant or his agent has been such as to hide from the plaintiff the existence of his right of action.' To which, one should add perhaps, the necessary gloss 'even though the defendant knew nothing whatsoever about any such concealment'.

Moreover this definition of the word 'fraud' in 26(b) seems to place an entirely different meaning on the word, to the use of the same word in 26 (a).

The House of Lords decided in *Derry v Peek* (1) that an action for fraud would lie only 'when it is shown that a false representation has been made (i) knowingly or (ii) without belief in its truth or (iii) recklessly, careless whether it be true or false', to quote Lord Herschell. Therefore fraud always involves moral obliquity, such as would sustain the common law action of deceit. If that had not been the only 'action based upon fraud', there would have been no need for the Misrepresentation Act 1967.

No doubt these words 'action. . . .based upon the fraud of the defendant' are wider than a tort action for deceit. It might be 'based upon the fraud of the defendant' if it were an action to set aside a contract for fraudulent misrepresentation without a claim for damages for deceit. But what other action can be based 'upon the fraud of the defendant'? It is difficult to conceive any *'action* . . . . based on the fraud of the defendant' which does not involve moral turpitude on his part. An action in negligence or for any other tort, for example, would not be based on the fraud of the defendant.

An equally spurious interpretation was applied to the word 'agent'. The defendant had an independent company as his contractors to erect the houses. The term 'agent' normally imports somebody who is employed to act on another's behalf in such a way as to bind his principal: it therefore excludes automatically all independent contractors. 'The judge felt that Mr Moss must have indicated to Mr Piper at some stage before the foundations were laid that he did not mind what was the nature of the foundations, provided that the houses were saleable,' said Lord Denning, though he was quick to add, 'I do not myself think that the evidence warrants so harsh a finding against Mr Moss'. What he might have said better, was that there was not a shred of evidence to support this allegation against Mr Moss, and that normally a developer is entitled to rely not only on his contractor but also upon the local authority's building inspector to see that foundations comply with the building regulations. 'Nevertheless,' said Lord Denning, 'it is quite plain that Mr Piper, the builder, was "the agent" of Mr Moss.' Why? Nowhere in this case is that explained.

Megaw J's judgment, with respect, provides a more satisfactory basis than those of Lord Denning or Edmund Davies LJ. He held that since the trial judge had found as a fact that Mr Moss must have given instructions about foundations (albeit without any evidence to that effect) and the foundations were completed at the time of the contracts of sale, it amounted to a fraudulent misrepresentation to enter into a contract to the effect that the foundations would comply with the local authority's requirements. 'It is just as much fraud in making a contract containing that term, knowing that the term was false, as it would have been if there had been a fraudulent representation to that effect inducing the making of the contract.' That may well be a sustainable proposition of law. The only defect about it is that it was neither founded on evidence nor on a reasonable inference from the evidence.

The measure of damages for breach of contract is that required to put the plaintiff in a position as if the contract had been correctly performed. In this case, a plaintiff would then have had a satisfactory house, which he could have sold for £2,900 in 1967. But even if he had an unsatisfactory house he still owned the site, and it is submitted that both courts were in error in ignoring that fact. The true damages, it is submitted, were £2,900 less site value.

Applegate v Moss
Archer v Moss

Court of Appeal, Civil Division
Lord Denning MR, Edmund Davies LJ, Megaw LJ

LORD DENNING MR: In the spring of 1957 Mr Moss was about to develop a building site in Fanshawe Crescent, Hornchurch. There was room for two semi-detached houses to be built on it. He employed a builder, Mr Piper of Piper Ltd, to build the houses. Two men, Mr Archer and Mr Applegate, saw the plots and decided to take one each. Each signed a contract to buy the plot. Each signed a contract with Mr Moss, the developer, by which Mr Moss agreed to erect a house for each of them. I will take the one between Mr Applegate and Mr Moss. It was drawn up by a solicitor. The material clauses were:

> '1. The developer will for the consideration of £1,900 erect for the owner a dwellinghouse in accordance with the plans and the specification hereto annexed.'

The plan showed that the house was to be built on a foundation which was a concrete raft. The reason was that it was on sloping ground of wet clay. The specification provided that: 'The excavations and concreting to be carried out in accordance with the local authority's requirements and approved by them.' Those requirements required a specified mixture of aggregate and cement.

Clause 4 said that 'the developer will carry out the said works in a substantial and workmanlike manner'. Clause 8 was a very wide exemption clause:

> 'It is hereby expressly agreed that on going into actual occupation of the said dwellinghouse the owner shall be deemed to accept the same in all respects in its then present condition and he shall have no cause of action claim or demand against the developer whatsoever in respect of the said dwellinghouse or any works carried out by the developer under this agreement whether in respect of any default in the design or structure or the workmanship or the materials thereof and therein or variation from the plans and specification or otherwise howsoever.'

In due course in 1957 the houses were completed. Mr Applegate and Mr Archer went into occupation. For some years all seemed to be well. There were occasional cracks which looked like settlement cracks which did not worry them greatly. But then it turned out that in 1965 one of the purchasers had to move away. He proposed to sell his house. A surveyor looked at it on behalf of the proposed purchaser. He found serious cracks. He called in a local builder and afterwards some experts. They found, the judge said, 'a disgraceful condition of affairs'. There was no concrete raft. The foundation was on concrete footings. But the footings, instead of being 3ft or 3ft 6ins deep, were only 2ft 3ins deep. Worst of all, the concrete was not the proper

mixture at all. Instead of 8 to 1 aggregate and cement, as it ought to have been, it was 15 to 1; with the result that it was friable and liable to break and crumble. Wide cracks were opening beneath the houses. So much so that they were unsafe and unfit to live in. In January 1966 both houses had to be evacuated. It was quite impossible to repair them at any reasonable cost. They were only fit to be pulled down.

Each of these two men brought an action against the developer, Mr Moss, for breach of contract for not building the houses in accordance with the plans and specification. Mr Moss relied on two defences in law.

In the first instance Mr Moss prayed in aid the exemption clause. It was wide enough to cover the claim. But in the course of the hearing before the trial judge, Mr Moss and his advisers gave up that contention. It was a good instance of a fundamental breach. The case was covered by the rule that an exemption clause should not be construed as applying to a situation created by a fundamental breach of contract. We have had recent examples of this following *Harbutt's 'Plasticine' Ltd v Wayne Tank and Pump Co Ltd.*

In the next place Mr Moss prayed in aid the Statute of Limitations. The breach of contract, he said, was in 1957; the period of limitation was six years; more than six years had elapsed, and therefore the action was barred by lapse of time. To which Mr Applegate and Mr Archer replied that there was concealed fraud within section 26(b) of the Limitation Act 1939, which says that where the right of action is concealed by the fraud of the defendant or his agent 'the period of limitation shall not begin to run until the plaintiff has discovered the fraud . . . or could with reasonable diligence have discovered it'.

It has long been settled that 'fraud' in this context does not necessarily involve any moral turpitude: see *Beaman v A.R.T.S. Ltd.* It is sufficient if what was done was unconscionable: see *Kitchen v Royal Air Force Association*, a test which was applied in the case of a building contract in *Clark v Woor*. Those cases show that 'fraud' is not used in the common law sense. It is used in the equitable sense to denote conduct by the defendant or his agent such that it would be 'against conscience' for him to avail himself of the lapse of time. The section applies whenever the conduct of the defendant or his agent has been such as to hide from the plaintiff the existence of his right of action, in such circumstances that it would be inequitable to allow the defendant to rely on the lapse of time as a bar to the claim. Applied to a building contract, it means that if a builder does his work badly, so that it is likely to give rise to trouble thereafter, and then covers up his bad work so that it is not discovered for some years, then he cannot rely on the statute as a bar to the claim. The right of action is concealed by 'fraud' in the sense in which 'fraud' is used in this section.

It is plain that the right of action here was concealed by the fraud of someone. The builder put in rubbishy foundations and then covered them up. But was it the fraud of 'the defendant or his agent'?

Mr Moss says that it was not his fraud; and that the builder was not his 'agent' for the purpose. The judge found that it was both. So far as Mr Moss himself was concerned, the judge felt that Mr Moss must have indicated to Mr Piper at some stage before the foundations were laid that he did not mind what was the nature of the foundations, provided that the houses were saleable. That would have been a most disgraceful thing to do. I do not myself think that the evidence warrants so harsh a finding against Mr Moss.

But I do think that Mr Moss must have permitted Mr Piper to depart from the plan. Mr Piper said that he would not have omitted the concrete raft and put in footings unless he had had specific instructions from Mr Moss. If Mr Moss did give Mr Piper instructions to omit the concrete raft, knowing the work would be afterwards covered up, without a word to Mr Archer or Mr Applegate, that would be conduct which would amount to concealed fraud.

But even if there had been no such conduct by Mr Moss, nevertheless it is quite plain that Mr Piper, the builder, was the 'agent' of Mr Moss. Mr Moss employed Mr Piper to carry out the building work. Mr Piper did the work extremely badly. He was guilty of gross neglect in mixing the concrete. He covered up his disgraceful work. Even if Mr Moss knew nothing about it, nevertheless he must take responsibility for the conduct of Mr Piper.

I would hold, therefore, in agreement with the judge, that Mr Moss cannot rely on the Statute of Limitations.

The only remaining question is damages. The judge held that the cause of action arose in 1957. At that time the building was worth £1,900. He awarded £1,900 plus interest on that sum at 7¼ per cent from that time onwards. That interest comes to £1,800, making a total of £3,700. Mr Field-Fisher for Mr Moss argues that that measure is wrong, because Mr Archer and Mr Applegate were in occupation of the houses from 1957 to 1966. They should not recover both interest on the £1,900 and also the benefit of occupation; for that would be having it both ways. I think that criticism is to some extent justified. But the right method gives about the same total. It is this: if the defects had not been so serious, and the house could have been repaired at reasonable cost, the damages would be the cost of repair at the date when in 1965 the breach was discovered. That is clear from the decision in *East Ham Corporation v Bernard Sunley & Sons Ltd.* But in 1965 it was not an economical proposition to repair the house. It would have cost too much to underpin it. The only thing was to pull it down. In these circumstances it seems to me that we should apply the general principle that the party injured by the breach should be put into as good a position, as far as money can do it, as he would have been if there had been no breach. If this house had been properly built, it would have been worth £2,900 in 1965 when the breach was discovered. That is the proper figure of damage. As to interest on it, Mr Applegate and Mr Archer did not go out until January 1966. In these circumstances, interest should run at 7¼ per cent on £2,900 from January 1966. The total is some £200 more than the total awarded by the judge.

The appeal will be dismissed; the cross appeal allowed accordingly. Judgment for each plaintiff for £2,900 and interest at 7¼ per cent from January 1966 until judgment.

EDMUND DAVIES LJ: Having regard to the lapse of time since the undoubted breaches of contract occurred, it is clear that these two plaintiffs were statute-barred, unless they could bring themselves within subsection (b) of section 26 of the Limitation Act 1939. Accordingly the first question that arises is whether there was fraud by anyone. If there was, one then proceeds to consider whether that fraud was 'concealed' and, if so, by whom. It is a truism that not every breach of contract arising from a defect in the quality of materials or workmanship would justify a finding of fraud. But some breaches can be so fundamental that if deliberately and knowingly

committed, they properly give rise to an inference of fraud by the party in breach. Furthermore, the special relationship between the parties may facilitate such a finding. As Lord Evershed MR said in *Kitchen v Royal Air Force Association*, referring to what Lord Hardwicke had said a long time before in relation to equitable fraud:

> 'it is, I think, clear that the phrase covers conduct which, having regard to some special relationship between the two parties concerned, is an unconscionable thing for the one to do towards the other'.

If in the present case it be the truth that Mr Moss did suppress from the two purchasers of the houses the deplorable condition of their foundations, he having full knowledge about the matter, there can be no doubt that he was guilty of fraud within the meaning of the act. As Lawton J said in *Clark v Woor* and his words can be adopted and applied without qualification to the facts of the present case:

> 'The relationship between these parties was that of builder and building owner, and the circumstances were such that the builder knew perfectly well that the building owners were relying upon him to perform his contract and treat them in a decent, honest way. He also knew there was nobody supervising the work on their behalf and that they were dependent upon him for the honest performance of the contract.'

The soundness of the foundations of these houses was literally a matter of fundamental importance. In 1956 the plans submitted by Mr Moss to the local authority for approval related to the erection of two houses. Those plans were not approved, the council insisting that the proposed raft foundation should be reinforced with a steel network of the type known as the B.R.C. No 5. This defendant, with his experience as a surveyor, was thus alerted (if he ever required to be) to the importance the council attached to this matter. The contracts he thereafter entered into with each of the plaintiffs had a clause providing that: 'The excavations and concreting to be carried out in accordance with the local authority's requirements and approved by them.' One thing not in doubt in this case is that the foundations nevertheless departed materially from the local authority's requirements. First of all, they were not raft foundations at all. Secondly, they were not reinforced raft foundations. Instead, they were concrete footings, and the mix used was deplorably defective. Fraud was clearly committed by somebody. By whom? The judge saw and heard the witnesses. That the builder must have been party to the fraud is clear. Did that fact *ipso facto* render the defendant liable on the basis that Mr Piper, his builder, must be regarded as his agent? Mr Field-Fisher valiantly submits that that is not so, on the ground that the word 'agent' in section 26(b) has to be given the narrow definition of somebody acting *other than as an independent contractor*. He says that such was the role of Mr Piper, and accordingly his fraud ought not to lead to a finding prejudicial to the defendant. I respectfully reject that submission. I think the word 'agent' as here used embraces an independent contractor. The defendant contracted directly with the purchasers that *he* would, for the consideration of £1,900 erect 'a dwellinghouse in accordance with the plans and specification hereto