Case No: A1/2013/1345

Neutral Citation Number: [2014] EWCA Civ 714
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE QUEEN'S BENCH DIVISION
TECHNOLOGY AND CONSTRUCTION COURT
MR JUSTICE AKENHEAD
[2013] EWHC 681 (TCC)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 31/07/2014

Before:

LORD JUSTICE MAURICE KAY
Vice President of the Court of Appeal, Civil Division
LORD JUSTICE TOMLINSON
and
LORD JUSTICE CHRISTOPHER CLARKE

- -

Between :

(1) Jonathan Paul Hunt **(2) Alan Bedwell** **(3) Toshi Sahi** **(4) Penny Sahi** **(5) Nicola Ransome** **(6) Diana Wyatt** **(7) Michael Peace** **(8) Mary Peace**	**Respondents /Claimants**
- and -	
(1) Optima (Cambridge) Limited **(2) Strutt & Parker (a Firm)** **(3) Mr S. Egford** **(4) Strutt & Parker LLP**	**Appellants/ Defendants**

- -
- -

Ben Patten QC and Katie Powell (instructed by **Simmons & Simmons LLP**) for the **Appellants**
William Webb (instructed by **Birketts LLP**) for the **Respondents**

Hearing dates: 13th February 2014

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Judgment

LORD JUSTICE CHRISTOPHER CLARKE:

1. Optima (Cambridge) Ltd ("Optima") built 2 blocks of flats in a T shape at Jubilee Mansions, Thorpe Road, Peterborough. They engaged Strutt & Parker ("S & P") to carry out inspections of the building in the course of development and to produce "Architects Certificates" in respect of the flats for the benefit of the purchasers and their lenders. Before contract the purchasers were told that they would be receiving Certificates on completion. The buildings were constructed between 1 September 2002 and 10 December 2003 and S & P carried out some ten inspections of the works, producing to Optima Certificates as to the stage of construction of the flats.

2. S & P also provided Certificates for the purchasers attesting to the satisfactory construction of the flats. In the event the building works were carried out badly and the inspections were carried out negligently. Eight of the purchasers sued Optima and S & P. Akenhead J held that all of them, save the 7th and 8th claimants, were entitled to recover damages from Optima, which is now in administration, for breach of contract and all of them were entitled to damages from S & P on account of the erroneous content of the Certificates provided to them.

3. In the case of two of the claimants – Mr and Mrs Sahi, who were claimants 3 and 4 – the Certificate signed by Mr Egford of Strutt & Parker was executed before the date of the sale agreement between them and Optima. S & P does not seek to appeal the judgment against it in their favour. In respect of claimants 1, 2, 5 and 6 - 8 (hereafter "the claimants"), the Certificate signed by Mr Egford was not provided to the relevant claimant until after, sometimes long after, the exchange of contracts and the execution of the lease of the flat concerned. The claimants were all represented by solicitors. The course of events in respect of the claimants other than claimants 7 and 8 – Mr & Mrs Peace - was for S & P to send the Certificates (in draft or as completed) to Optima's solicitors – Irena Spence & Co ("Irena Spence") – and by them to the individual firms of solicitors of the claimants.

4. The judge held that the fact that the Certificates had been received by the claimants after contract and completion was no obstacle to the recovery by them of damages from S & P. S & P, the now appellants, contend that in this respect he was in error.

5. Mr and Mrs Peace, unlike the other claimants, were not the original purchasers from Optima. The original purchaser of their flat - flat 17 – was Ms Chantal Smith whose lease was dated 19 December 2003; and she sold the lease to them in February 2006.

6. In respect of Ms Wyatt, the sixth claimant, a limitation point arises. Her claim was issued on 23 March 2010 which is more than six years after the date of the Certificate (22 January 2004), the exchange of contracts (15 October 2003) and the lease (17 October 2003). S & P contends that in those circumstances the claim is barred. The judge held that, in respect of the majority of the defects in the building, limitation was no bar because of the provisions of the Limitation Act 1980.

7. The Table below identifies (a) the individual claimants; (b) the number of their flat; (c) the date of their sale agreement; (d) the date of their lease; (c) the date of S & P's signed Certificates and the date the claimants or their solicitors received them; and (e)

the date when a draft Certificate was sent by Irena Spence to the purchaser's solicitors.

Claimant	Flat	Date of Sale Agreement	Date of Lease	Date on S&P Certificate & Date of receipt	Date first draft sent to Claimant's solicitors by Optima's solicitors
1st: Mr Hunt	Penthouse 1	15 April 2004	15 April 2004	15 June 2004 **Received by the claimant on 1 December 2008**	3 October 2003
2nd: Mr Bedwell	14	19 October 2004	20 October 2004	20 October 2004 **Received by the claimant on 5 October 2005**	26 July 2004
3rd/4th: Mr/Mrs Sahi	*15A*	*19 December 2007*	*19 December 2007*	*23 April 2004*	*Not appellants*
5th: Ms Ransome	1	19 September 2003	19 September 2003	23 April 2004 **Received by the claimant on 28 January 2009**	31 July 2003
6th: Ms Wyatt	5	15 October 2003	17 October 2003	22 January 2004 **9 February 2004 (date sent to Ms Wyatt's solicitors by Irena Spence)**	1 August 2003
7th/8th Mr/Mrs Peace	17	10 February 2006 Completion 17 February 2006	19 December 2003	23 April 2004 **Posted to C7 & B by their solicitors on 1 December 2008.** **Copy received by Mr Peace in October 2009.**	Not sent

Claimant 5: Ms Ransome - Flat 1

8. The typical course of events can be illustrated by the case of Ms Ransome, the 5th claimant, who was, of all the claimants, the earliest purchaser in time. When she

agreed to purchase flat 1 she was told by Optima that it would come with an Architect's Certificate which Optima said was similar to an NHBC Certificate.

9. On 23 July 2003 Mr Egford sent to Irena Spence at Optima's request a draft architect's Certificate for her reference. The Certificate was in the following form (which I shall call "the first draft"):

> "*I certify that:*
>
> 1. *I have visited the site at appropriate periods from the commencement of the construction to the current stage to check:*
>
> a. *progress*
>
> b. *use of materials, and*
>
> c. *conformity with structural drawings and building regulations*
>
> 2. *At the time of my last inspection on 15.07.2003, Phase I of the property had reached the state of completion.*
>
> 3. *So far as could be determined by each periodic visual inspection, the property has been constructed:*
>
> a. *to a satisfactory standard, and*
>
> b. *in general compliance with the approved structural drawings and/or building regulations.*
>
> 4. *I was originally retained by Optima Cambridge Ltd who are the developers in this case.*
>
> 5. *I am aware this Certificate is being relied upon by the first purchaser……..*
>
> *I confirm that I have appropriate experience in the design and/or monitoring of the construction of residential buildings.*
>
> *Name of Professional Consultant: Mr S Egford (Strutt & Parker)*
> *….*
> *Professional Indemnity Insurer Aon Ltd*
>
> *Date of Cover 1 May 2003*
>
> *Amount of Cover £ 5,000,000.*"

10. On 31 July 2003 Irena Spence sent to MyHomeMoveConveyancing ("MHM Solicitors"), Ms Ransome's solicitors, a set of documentation which included as one of the enclosed items a "*Draft Architect's Certificate*" in the form of the first draft. The letter included the following paragraphs:

"*The Sellers still await the Building Regulation final inspection Certificate together with a final architect's Certificate and these will be forwarded to you as soon as they are available.*

Please note that exchange of contracts is required within 28 days of submission of draft documentation or within seven days of the building regulations and architect's Certificate being available, whichever is the later."

Hereafter I refer to a letter in these terms as "the standard form letter".

At some stage MHM Solicitors received a Reply to their General Enquiries before Contract. Question 12.3 (a) asked:

"*Are there any agreements, Certificates, guarantees, warranties or insurance policies relating to the construction of the Property or any installations, repairs, improvements or treatment?*"

to which the response was:

"*An architect's Certificate will be provided on completion in relation to the construction of the building*"

I refer to this exchange as "the Reply".

11. On 11 August 2003 Mr Egford replied to a letter from Irena Spence of 8 August 2003, which was not before the judge or us, to confirm that the Certificate he had sent was a draft, that no Certificate currently existed, and that he was not in a position to issue one at this stage as he was awaiting information from various parties. He also said that he had amended the Certificate "*as noted in your letter*".

12. On 9 September 2003 Mr Egford sent a fax ("the 9 September fax") to Irena Spence saying:

"*SUBJECT: Jubilee Mansions – Optima Cambridge Ltd*

I am now in a position to issue certificates for apartments 1-9 at the above.

The certificate needs to be completed with the purchasers name and name of their lenders – if any.

I would be grateful to receive these details at your earliest convenience."

A copy of this reached MHM Solicitors' file.

13. On 10 September 2003 Mrs Spence wrote to Mr Egford in response to his fax. Mrs Spence says that she would advise him of the names of the purchasers and their mortgages "*as Contracts are exchanged in connection with each of these properties*". She also referred to the fact that she had written to him over the issue of the wording of the Certificate and enclosed a fresh copy of the Certificate annexed to the then current version of the Council of Mortgage Lenders (CML) Handbook. She asked him whether he was able to provide a Certificate in those terms because they were the

ones that were required by mortgage lenders. She asked for an urgent response because she needed to forward it to the solicitors on flat 4, which was then thought the most likely flat to proceed to exchange.

14. The copy CML Handbook Certificate which Mrs Spence enclosed was in the following form:

PROFESSIONAL
CONSULTANT'S CERTIFICATE

Return to:
Name of Applicant(s)
Full address of property

I certify that:

1. I have visited the site at appropriate periods from the commencement of
construction to the current stage to check generally:
(a) progress, and
(b) conformity with drawings, approved under the building regulations, and
(c) conformity with drawings/instructions properly issued under the building contract.

2. At the stage of my last inspection on _____, the property had reached the stage of
_____
_____
_____
_____

3. So far as could be determined by each periodic visual inspection, the property has been generally constructed:
(a) to a satisfactory standard, and
(b) in general compliance with the drawings approved under the building regulations.

4. I was originally retained by
_____
_____
who is the applicant/builder/developer in this case (delete as appropriate).

5. I am aware this certificate is being relied upon by the first purchaser
_____
_____ of the property and also by
_____ (name of lender) when making a mortgage advance to that purchaser secured on this property.

6. I confirm that I will remain liable for a period of 6 years from the date of this certificate. Such liability shall be to the first purchasers and their lenders and upon each sale of the property the remaining period shall be transferred to the subsequent purchasers and their lenders.

7. I confirm that I have appropriate experience in the design and/or monitoring of the construction or conversion of residential buildings.

_____
Name of Professional Consultant
_____
Qualifications _____
Address
_____
_____
_____
_____
_____

Telephone No. _____
Fax No. _____

Professional Indemnity Insurer
_____

8. The box below shows the minimum amount of professional indemnity insurance the consultant will keep in force to cover his liabilities under this certificate ☐ for any one claim or series of claims arising out of one event.

Signature _____

Date _____
_____

1 October 2002

15. On 12 September 2003 ("the 12 September confirmation") Mr Egford replied to Mrs Spence to "*confirm that our Certificate will accord with the example you have sent*

and I will action this upon receipt of the names of the purchasers". That confirmation also reached MHM Solicitors.

16. On 15 September 2003 Irena Spence wrote to the solicitors for Ms Wyatt, the sixth claimant and purchaser of flat 5, enclosing a copy of the letter "*from the architect indicating that they are in a position to provide the final Certificate which we intend to provide after exchange of contracts*". She added:

> "*Clearly there is little point in the architect issuing certificates until contracts have been exchanged*".

This was an astonishing statement. It obviously never crossed Mrs Spence's mind that there might be some problem in purchasers saying that in agreeing to purchase they had relied on a Certificate if they did not receive it until after the purchase had been made. The letter involved a reversal of the sequence contemplated in the standard form letter.

17. At some stage MHM Solicitors received the 9 September fax and the 12 September confirmation, both of which were on their file.

18. Also on 15 September Mrs Spence wrote to MHM Solicitors (i) to ask for their clients' full names so that they could engross the documents in readiness for completion (at that stage it was thought that there were to be two purchasers); (ii) to say that a clause had been added to the Contract to the effect that "*The Sellers will on completion provide the Buyers with an Architect's Certificate in the form annexed addressed to the Buyers and their mortgagees*" (in fact this clause was not added to the contract); and (iii) to ask for details of the mortgagees so that this could be added to the Architect's Certificate which, they said, would be in the form annexed to the CML handbook.

19. On 16 September 2003 MHM Solicitors wrote to Irena Spence to confirm that they held a signed contract and had requested funds for completion on 19 September. They asked for replies to three additional enquiries, one of which was:

> "3. *Please confirm that the sellers are offering an unqualified NHBC buildmark/Architects 10 year guarantee and that an offer of cover is held ready to hand over to is on exchange of documents*"

20. On 17 September 2003 the reply was:

> "*As we have indicated there is an Architect's Certificate which will be issued to your client on completion. Bearing in mind the shortness of time we will not be able to provide this between exchange and completion*"

21. On the same day Irena Spence wrote to MHM Solicitors a letter which stated:

> "*Can you please advise us of your client's mortgage lender's details so that we can arrange for these to be inserted into the Architect's Certificate? As we have indicated to you there is no NHBC Agreement in connection with this development*"

22. Also on the same day Irena Spence told Mr Egford that the Flat was due to complete on 19 September; that she did not have details of the mortgage lender; but that the purchaser's name was Nicola Ransome. She said she would forward the mortgage lender's details as soon as she had them and asked for the Certificate to be issued as soon as possible.

23. Exchange and Completion took place on 19 September 2003. Ms Ransome was advised by her own solicitors that she would receive a Certificate on completion. They said it was normal practice to have a draft copy on the file and the original sent after completion. Her understanding from talking with her solicitors was that the Certificate was to act as a guarantee if there were any issues in relation to the property and was similar to an NHBC Certificate.

24. There are, in fact, marked differences between the Certificate and an NHBC guarantee. The latter contains promises as to the quality of the building and undertakings to repair in the event of defects. The Certificate in the form proposed is, as its name implies, a statement as to the matters contained in it. It does not contain any promise to carry out remedial work, and whether it amounts to a warranty is in dispute.

25. No Certificate was in fact produced on Exchange/Completion. Ms Ransome's evidence was that she thought from what her solicitor had said that the Certificate had already been issued by then. If she was told that she was misinformed. There was - much later - correspondence between MHM Solicitors and S & P, who in November 2008 said that once they had received an Electrical Completion Certificate they could issue the Completion Certificate.

26. Ms Ransome received the Certificate from her solicitors on 28 January 2009, some 5 years and 4 months after completion. The Certificate was dated 23 April 2004. This date also appears on the Certificates for the 3rd/4th and 7th/8th claimants. The Certificate refers to Optima as the first purchaser and does not refer to any lender. It was in the form attached to the CML Handbook save that paragraph 6 read "*I confirm that Strutt & Parker will…*".

Claimant 6: Ms Wyatt - Flat 5

27. A similar pattern applies to Ms Wyatt. Her solicitors – Ivor Morison & Co ("Ivor Morison") – received the Reply; and may have received the standard form letter dated 29 July 2003. A copy of the letter is in the appeal documents but the letter is not listed by Ms Wyatt in her witness statement as being one on the files of Ivor Morison which she received in March 2012.

28. Ivor Morison also received a document entitled "*Additional Enquiries*" dated 1 August 2003 in which question 15 asked:

> "*Will a guarantee or warranty be offered by the seller on terms similar to the NHBC?*"

to which the response was:

> "*There will be an Architect's Certificate, a draft of which is enclosed*".

The draft enclosed was the first draft of the Certificate. It is not clear whether it was also enclosed with the standard letter referred to in the previous paragraph.

29. Ivor Morison also received (a) the 9 September fax; (b) the 12 September confirmation from S & P to Irena Spence & Co; (c) the Reply with the response to question 12.3 (a); and (d) the letter of 15 September 2003 ("*Clearly there is little point…*") set out in paragraph 16 above. It does not appear to have occurred to them that there might be some point in having the Certificate before exchange or completion.

30. Ms Wyatt also received from her solicitors before exchange a Report, written by them, in connection with the proposed purchase. This included the following passages

> "***Clause 6.5.*** *The property does not have the benefit of an NHBC Certificate but it has been constructed under the supervision of an Architect and his Certificate will be available after completion*
> *…*
>
> ***9. Architect's Certificate***
>
> *This confirms that the property has been inspected from time to time and that he is satisfied with the construction. This replaces the NHBC Certificate. It does mean that you lack the NHBC 10 year guarantee. However, the provision of an Architect's Certificate is an acceptable way of showing that the property has been built to a reasonable standard*"

31. Exchange and completion took place on 15 and 17 October 2003 respectively. The signed Certificate was dated 22 January 2004. It was sent to Ivor Morison on 9 February 2004. Ms Wyatt did not recall seeing it or receiving a copy. The form of this Certificate is marginally different to the form attached to the CML Handbook. Thus, the word "*generally*" is omitted from paragraph 1; in the first sentence of paragraph 6 "*I confirm that I will*" has become "*I confirm that we will*"; in the second sentence of paragraph 6 "*shall*" has become "*will*"; and instead of paragraph 8 the words "*Amount of Cover £ 5,000,000 to be kept in force to cover liabilities under this Certificate)*" are added to the list of matters in paragraph 7.

32. As is apparent, the only S & P documents which the solicitors for Ms Ransome and Mrs Wyatt received before purchase were the 9 September fax and the 12 September confirmation. The only drafts of Certificates which they received were in the form of the first draft.

Claimant 1: Mr Hunt - Penthouse 1

33. Mr Hunt's solicitors were Messrs Carters of Peterborough. They received the 12 September confirmation and the Reply. On 3 October 2003 Mrs Spence sent them the standard form letter, still including the reference to exchange of contracts taking place within 28 days of submission of draft documentation or within seven days of the Building Regulations and Architect's Certificates being available whichever was the later. This included the first draft Certificate. Exchange and Completion took place on 15 April 2004. On that day Irena Spence sent Mr Egford the full name of the purchaser and the identity of the mortgage lender (Coventry Building Society). On 26

April 2004 Mr Egford told Mrs Spence that he was awaiting some information from Optima before he could release the Certificate for the Penthouse Apartment. On 11 June 2004 he told Mrs Spence that he was not in a position to issue any further Certificate for Jubilee Mansions until Optima had forwarded to him four Certificates in relation to Electrical Installation, Gas Installation, Building Regulations Completion and Lift Testing.

34. The Certificate issued is dated 15 June 2004 and names Mr Hunt and the Coventry Building Society. It appears from Mr Egford's statement that it was only released by him on 13 May 2005. It was received by Carters from Irena Spence on 16 May 2005. Mr Hunt first received a copy on 1 December 2008. The Certificate is in the same from as that provided to the 6th claimant: see paragraph 31 above.

35. Mr Hunt's evidence was that prior to exchange of contracts his solicitors gave him to understand that the Architect had signed off on the property (he had not), on the basis that it was structurally sound and complied with the building regulations. He also understood that the Certificate would be a guarantee for any structural problems. As a result he committed himself to the purchase knowing that the property would have the benefit of an Architect's Certificate.

Claimant 2: Mr Bedwell - Flat 14

36. Mr Bedwell's solicitors were Rowlinsons. Their file includes a copy of the 12 September confirmation and the Reply. On 26 July 2004 they received the standard form letter. On this occasion the documentation enclosed included "*Draft Architects Certificate – Original will be handed over at completion*". The Certificate enclosed was in the form of the first draft. On 3 August 2004 Rowlinsons asked to be supplied with a copy of the Architect's Certificate together with the Professional Indemnity Insurance Certificate. On 18 August 2004 Mrs Spence replied to the relevant numbered paragraph saying "*Enclosed*". It is not clear what exactly was enclosed. Something must have been because on 8 October 2004 Rowlinsons wrote to Northern Rock telling them that the property was being built with the benefit of an Architect's Certificate and enclosing a copy for their approval.

37. On 6 October 2004 Rowlinsons produced a Report which apparently enclosed a "*Copy Professional Consultant's Certificate*". It is not clear which form that was. Under the heading "*Guarantees*" it said:

> "*The property has been built with the benefit of an Architect's Certificate instead of an NHBC Agreement, which will be provided before completion. If there are any structural problems with the property within the first ten years then you will be covered by Mr S Egford of Strutt & Parker.*"

This was inaccurate in two respects. The Certificate was not provided before completion. Even if it had been it would not have covered Mr Bedwell for any structural problems within the first ten years.

38. On 18 October 2004 Irena Spence asked Rowlinsons for confirmation of Mr Bedwell's mortgage lender so that she could obtain the Architect's Certificate. Exchange took place on 19 October 2004 and completion on 20 October 2004. On 18 February 2005 Irena Spence told Rowlinsons that she was contacting the architect

about the Certificate "*again*". On the same day she asked Mr Egford for the Certificate, giving him details of the full name of the purchaser and his mortgage company (Northern Rock plc). On 28 July 2005 Mr Egford sent Mrs Spence his Certificate for No 14. It was backdated to 20 October 2004 and was in the same form as the Certificates for the 6th and 1st claimants. Irena Spence sent it to Rawlinsons on 3 October 2005 and it was received by Mr Bedwell on 5 October 2005.

39. Mr Bedwell's evidence was that he understood from his solicitors that the Certificate would be a guarantee for any structural problems within the property and therefore committed himself to the long lease.

Claimants 7 & 8: Mr and Mrs Peace - Flat 17

40. Mr and Ms Peace bought from Chantal Smith, the original purchaser from Optima. Their solicitors were Barnetts of Southport. Exchange took place on 10 February and completion on 17 February 2006. No Certificate was in issue by either date. The Certificate eventually issued appears to have been created in December 2008, bearing the date 23 April 2004.

41. On 12 December 2005 Barnetts had written to Ms Smith's solicitors, saying:

> "*Please provide copies of the NHBC, Planning Permission and Building Regulations Consent relating to the construction of the property*"

On 20 December 2005 Ms Smith's solicitors replied: "*We are enquiring*".

42. Barnetts also received a document entitled Sellers Property Information Form which contained the following:

> "*Are there any guarantees or insurance policies of the following types: NHBC Foundation 15 or Newbuild?*"

to which the seller's response was "*Yes*". This was inaccurate.

43. In October 2008 the Peaces realised that they had no signed Certificate. Mr Peace's evidence was that he made several calls to Barnetts between 31 October and 1 December 2008 to try and obtain one. On 13 October 2009 he wrote to them to say that he had still had not received a signed Certificate. Barnetts replied by e-mail the next day to say that their records revealed that they had posted a copy to him on 1st December 2008. They attached a copy. It was in the same form as the Certificate given in respect of flat 1.

44. Thus the purchasers of Flats 1 and 17 received Certificates in the form attached to the Handbook; and the other claimants received Certificates in a similar but not identical form. All the claimants save Mr and Mrs Peace received copies of the first drafts of the Certificate.

The claims

45. The judge identified the claim against S & P as put in three ways. First it was said that the Certificates contained enforceable warranties. Second the Certificates were said to amount to negligent misstatements which gave the claimants a cause of action in tort.

Thirdly it was said that Mr Egford on behalf of S & P owed the claimants a duty of care to carry out the professional services referred to in the Certificates with reasonable skill and care for the purpose of the subsequent production of the Certificates.

Negligent misstatement

46. The judge made extensive citation from the speeches in the House of Lords in *Hedley Byrne & Co Ltd v Heller & Co Ltd* [1964] AC 465 and referred to the development of the tort of negligent misstatement and the concepts of special relationships and assumption of responsibility in later cases such as *Henderson v Merrett Syndicates Ltd* [1995] 2 AC 145, *Barclays Bank Plc v Fairclough Building Ltd* (1995) 76 BLR 1, *Smith v Bush* [1990] 1 AC 831 and *Williams v Natural Life Health Foods Ltd* [1998] 1 WLR 830.

47. He drew from those and other cases the following propositions:

> "*(a) Where there is a relationship akin to contract between the maker of the statement or the provider of services, there will (at least usually) be a duty of care owed by the maker or provider to the person for whose benefit the statement is given or the services are provided.*
>
> *(b) In any case in which the product of the tortious relationship is a statement (be it for example a valuation, a report or a reference), the duty is not only a duty to exercise care but also covers the exercise of care in the work which results in the statement (see Lord Templeman in Smith v Bush at page 845A-D).*
>
> *(c) There must be some reliance by the recipient of the statement on the statement that is being made. What is sufficient reliance in any given case will be a matter of fact. Logic suggests that, if the statement, its contents or existence are never communicated to the recipient, it will be unlikely that the recipient can be considered ever to have relied upon it.*
>
> *(d) Again, as a matter of logic, although this will be fact sensitive, there can be reliance if the person to whom the statement is directed knows of its existence and at least broadly what its contents are. Thus, in a negligent valuation case, a purchaser may not see the mortgage valuation report but is told by his or her solicitor or other adviser that the value was £X and that no significant defects were noticed; that purchaser may as a matter of fact have relied upon the fact that there was* ***or was to be*** *such a valuation and that can be sufficient to establish reliance. The absence of reliance does not mean that there is no duty of care or that there is no breach of their duty; it simply means that there can be no causative damage, which is the third element in the tort of negligence.* (Bold added in this and other citations)
>
> *(e) It does not necessarily matter that the maker of the statement does not know the name of or have any direct links with the person who is going to rely upon the statement provided that that person is within the class or group of people with whom the maker has a special relationship. However, there must be a sufficiently proximate relationship between the maker of the statement*

and the recipient such that it can be reasonably properly said that a duty of care is owed."

48. I accept the broad accuracy of these propositions, subject to three qualifications.

49. First, it is debatable whether, if a report or Certificate is given there are two independent and free standing duties (a) to take care in the work leading to the report and (b) to write the report carefully; or whether the duty is a duty to the recipient of a report, who thereafter relies on it, to take care in making the statements contained in the report, of which duty the writer of a report will be in breach, if the report is not the product of both competent groundwork and drafting.

50. Second, the proposition that the purchaser may as a matter of fact have relied upon the fact that "*there was to be a valuation*" is ambiguous. A person can, in appropriate circumstances, be said to rely on a report that is in existence, and of whose contents he is aware, but which he has not seen and which is to be provided to him later. The position may be otherwise if he is not told that it is in existence (because it is not) but that the report is to be provided by another.

51. Third, it is necessary to analyse with some precision what is the particular representation that is relied on.

Reliance

52. The judge found that the 1st to 6th claimants had relied upon the Certificates. He did so on the following basis:

> "*128 …In relation to the First to Sixth Claimants, their evidence, which I accept, is that they did rely on the Certificates* ***or at the very least on the fact that the Certificates would be coming sooner or later.*** *That is borne out by the fact that in relation to Ms Wyatt, Mr and Mrs Sahi, Mr Hunt and Mr Bedwell the Certificates specifically identify their lenders by name and that in relation to the other two Claimants (without a name) that lenders are referred to; to enable them to purchase or at least to facilitate the purchase, they were all borrowing and they and their lenders had to rely on the Certificate to secure the requisite loans. The Certificates on their face accept that they are being relied upon…*
>
> *129 The fact that the First, Second, Fifth and Sixth Claimants only received their Certificates after sale and completion is immaterial in the circumstances. They were all told prior to completion that they would be receiving an Architect's Certificate. Mr Egford provided draft Certificates to Optima's solicitors knowing, as turned out to be the case, that those solicitors would pass them on to purchasers in general and to specific purchasers in draft. The primary purposes of Mr Egford's involvement was to inspect and then to issue Certificates in relation to each flat; he obviously must be taken to have known that they could and were intended to be relied upon by purchasers. Apart from Mr and Mrs Sahi who did obtain their Certificate before they purchased, the signed Certificates were all eventually provided. They knew or believed that they were entitled to receive and would be receiving the Certificates sooner or later and they had the assurance therefore*

that the flats which they were purchasing and the Building (insofar as it impacted on the individual flats) had been properly inspected by an experienced and qualified architect and that his careful inspections revealed that the property had been constructed satisfactorily. That is more than enough to establish reliance in a case such as this.

130 The fact that Mr Egford could, theoretically have withheld Certificates or possibly have issued qualified Certificates if he had not been satisfied with the quality and completeness of the work ***is, in the result, immaterial because he in fact issued Certificates for the six flats*** *which are the subject matter of these proceedings…*"

53. I can well understand why the judge was not disposed to accept the unattractive point that the claim in negligent misstatement failed because the Certificates post-dated exchange and completion. However, it seems to me that his analysis takes inadequate account of certain key principles.

54. In order to recover in the tort of negligent misstatement the claimant must show that he relied on the statement in question*: James McNaughton Paper Group Ld v Hicks Anderson & Co* [1991] 2 QB 113,126. It must operate upon his mind in such a way that he suffers loss on account of his reliance e.g. by buying at too high, or selling at too low, a price, or making an agreement or doing something which he would not otherwise have made or done: *Chitty* 31st Ed 6-035; *Smith v Chadwick* [1884] 9 App Cas 187,195/6.

55. In the present case the negligent statements relied on were the statements contained in the signed Certificate eventually provided to the relevant claimant. But the claimants cannot have relied on such statements in committing themselves to the agreements to purchase because those statements were not then in existence. At best they could be said to have relied on an understanding either (i) that there was a Certificate *already* in place; or (ii) that they would receive a Certificate on or after completion.

56. Any understanding of the former type was erroneous and is not shown to have resulted from anything said by or on behalf of S & P. Any understanding that they would receive a Certificate on or after completion emanated from what the claimants (other than the 7th and 8th claimants) were told by their solicitors, who had received the standard form letter and the Reply from Irena Spence. Those solicitors also received the 12 September confirmation letter to Irena Spence from which they learnt that S & P's certificate would be "*in accord with the example you* (i.e. Irena Spence) *have sent*". If, as seems likely, the example Irena Spence had sent S & P was in the form of the Certificates ultimately issued, it was not the draft form that the purchasers' solicitors had themselves received. Further, the 12 September confirmation was not a promise by S & P that Certificates would be issued to each of the claimants but a statement as to the form that any Certificate issued by S & P would take.

57. The claimants might have advanced a claim in negligent misstatement relying on something other than the Certificates themselves. It may be that liability could be established on the footing:

a) that S & P knew or intended, or should have known:

i) that the 9 September fax or the 12 September confirmation together with the draft referred to in it (or the information contained in those documents) would be made available to the claimants or their solicitors before contract; and

ii) that the claimants would rely on either or both of these documents as the basis for entering into the contracts; and

b) that in those circumstances S & P must be taken to have assumed a responsibility to purchasers for the accuracy of the statements in the *draft* Certificate as at the date of contract or completion.

58. No such case was pleaded or ventilated with Mr Egford. Nor was it pleaded that Mr Egford told any of the claimants before purchases that he would be giving the flats a clean certificate. What was effectively submitted was that the chain of causation between the Certificates eventually signed and the claimants' loss was established by the fact that the claimants had been led to believe by Optima's solicitors that they would receive an Architect's Certificate. Reliance on the fact that there was to be a certificate (as in the event there was) was said to be enough.

59. I do not regard this as a wholly technical point. The extent to which Mr Egford contemplated that his preparedness to sign Certificates in the required form would (i) be communicated to the purchasers and (ii) be relied on by them is not clear. The judge found that he knew that the draft Certificates would be passed on by Optima's solicitors to purchasers in general and specific purchasers in draft. (In fact Optima sent the draft Certificates to the purchaser's solicitors). The only passage in his evidence to which we were directed where the question was canvassed with him is a passage (20 February, page 155) where he was asked whether he understood that there was a risk that if he said the sort of thing that he said in the 9 September fax it would get passed on to purchasers. His response was that it was up to the solicitor (i.e. Irena Spence) what she told her purchasers and what she advised them about the nature of the certificates and what they covered and that he could not object to their passing such information on because they could do what they like.

60. It was, in my judgment, open to the judge to find that Mr Egford knew that Irena Spence was likely to send a draft of the Certificate to the purchaser's solicitors at some stage before contract. The Certificate was intended for the benefit of the purchasers and their lenders; in the nature of things the seller's solicitors would need to inform the purchasers what certificate the sellers would be providing (although before contract they appear actually to have provided only the first draft). Irena Spence's letter of 10 September 2003 told Mr Egford in terms that she needed to forward his confirmation that he was able to provide a Certificate in the CML Handbook form in order to furnish it to the solicitors for the purchase of Apartment 4, which was the most likely property to exchange at that time.

61. The same letter indicated to Mr Egford that purchasers were going to purchase when there was no signed Certificate in existence ("*I will advise you of the names of the purchasers and their mortgages as Contracts are exchanged*"). It does not, however, follow that Mr Egford must, on behalf of S & P, be taken to have assumed, a responsibility to purchasers, with whom he had no direct contact, as to the accuracy of statements made in a draft Certificate, which was as yet unsigned and unissued, and

which was, therefore, capable of being amended or, possibly, not issued at all. In circumstances where he acknowledged that the purchasers would place reliance on the Certificate which he did sign, there is little room for an assumption of responsibility for one which he did not. Further the 9 September fax indicated that S & P was in a position to issue Certificates for flats 1 – 9, whose purchasers include the 5th and 6th, but no other, claimants. Thus only those two had any form of indication that S & P was in a position to sign a Certificate, as opposed to an indication of what would be the form of any Certificate once signed. An indication of the form that a statement will take when issued is a far cry from a representation that it can be relied on before it is.

62. These considerations apply with even greater force to Mr and Mrs Peace, the 7th and 8th claimants. They were not told prior to their purchase that an Architect's Certificate had been or would be issued nor were they provided with any draft. They received a Certificate nearly 3 years after they completed their purchase. This was the first time they knew anything of Mr Egford and the work he had carried out. The judge held that they could not rely on any collateral warranty. All that they received before contract and completion was the inaccurate affirmative answer by the seller to the question whether there were any guarantees or insurance policies of three specified types.

63. The question of S & P's responsibility was canvassed in the cross examination of Mr Egford as follows:

> "*Q. And you did not have any problem with issuing Certificates after the property had already been sold to the first owner?*
> *A. (no reply)*
> *Q. So far as you were concerned, it made no difference?*
> *A. If they were issued after or at the time? Well, I think it raises the question – I think the purchaser is saying that they were relying on it but they didn't have it at the time of purchase but I issued them afterwards.*
> *Q. So, why are you filling in these people's names as beneficiaries of the Certificates if you are saying that they get nothing out of it?*
> *A. Who's saying they get nothing out of it?*
> *Q. Well, if you are saying that you can see a reason why they might not be able to claim on it, why are you so keen to get their names and details to put on the ---*
> *A. I didn't actually say that. You've said that, but I'm just saying – I'm just recording the fact, really.*"

Mr Webb submits that Mr Egford was reluctant to say that the legal effect of his Certificates was non-existent but the passage does not provide any real insight into what exactly he thought was the effect of signing the Certificates, let alone any draft documentation.

64. An added complication is that, in relation to all of the claimants whose solicitors received draft Certificates, the draft Certificate received was in the form of the first draft.

65. It may be that these considerations would provide no insuperable obstacle to a claim formulated in a different way. I am, however, satisfied that a claim on these lines is a

different case to that made before the judge and would require to be distinctly pleaded so that the issues it raised were ventilated in evidence.

66. Mr Webb submitted that the law needs to provide a remedy for the situation where a vendor indicates that a Certificate is in existence (when it is not) or that it will be forthcoming after completion and, in either event, the Certificate does come forward. If the vendor says that there is a Certificate and there is one, there may be no difficulty in the purchaser suing even though he has not seen the Certificate: see *Yianni v Edwin Evans & Sons* [1982] QB 438 where the surveyors knew that that part of their report to the building society which indicated that the property was adequate security for the advance would be passed on to the buyers (who did not see the report) by reasons of the fact that the society offered an advance. If the vendor (unless fraudulent) says that there is a Certificate in existence when there is not, or says that one will be forthcoming, then, he submits, the purchaser ought not to be denied a remedy if in fact the Certificate is later signed. If that happens there is a sufficient causal connection between the representation in the Certificate and the reliance which the purchaser places on the Certificate when purchasing. If the purchaser would never have gone ahead if he had been told that no Certificate was ever to be issued, the necessary causal link is established between the representation in the Certificate and his loss.

67. Attractively though this submission was presented, it appears to me to founder on the fact that reliance must follow representation and cannot be retrospective. If the representation is the signed Certificate it cannot be relied on before it comes into existence. A cause cannot postdate its consequence.

Collateral Warranty

68. A way out of this dilemma, at least for the claimants other than Mr and Mrs Peace, would be afforded by construing the Certificate, as the judge did, as a form of warranty, which would require an intention to create contractual relations. Those of the claimants' solicitors who told their clients that the Certificate was like a guarantee could be regarded as adopting (perhaps subconsciously) this line of reasoning.

69. I do not, however, regard the Certificate as constituting any form of warranty. The document is one whose terms are the product of negotiation between professionals in the field who should know of the distinction between a warranty and a representation. The Certificate is described as such; not as a promise, warranty or guarantee. It contains no reference to any consideration. Although it is to be relied upon by subsequent purchasers, and the lenders to them, there is no reference to any possible assignment of obligations. The document certifies that various things have happened and states various conclusions as to the state of completion of the property and the standard of its construction. Clause 5 uses the language ("*I am aware that this Certificate is being relied upon*...") to be expected of a document which its maker intends to be relied on so as to give rise to a potential liability in negligent misstatement. These words are unnecessary if there is contractual liability anyway. So also is the confirmation in clause 7 that the certifier has appropriate experience. I do not agree with the judge's description of the Certificate as written in a way which was akin to contract or that, as he held, "*on its face*" it is a warranty.

70. Mr Webb submitted that the Certificate, which was to be given to and relied upon by ordinary lay people, ignorant in all probability of the distinction between warranty and representation and of the significance, if any, of reliance, assisted by solicitors acting on a cost effective basis (by which I understood him to mean cheaply), should not be construed as if it was an agreement between commercial parties that was the product of legal craftsmanship on both sides. I agree.

71. I do not, however, accept that the Certificate should be looked at solely from the perspective of a lay person. (If it was to be so construed, lay ignorance of the distinction would not provide much assistance in deciding whether the Certificate was a representation or a warranty or both). It is relevant to consider how it would be viewed by a reasonable person with such knowledge as he could be expected to have. Since most purchasers of land have legal assistance, as all the claimants did, it is material to consider how the document would appear to someone alive to the distinction.

72. Mr Webb also submits that the confirmation in clause 6 that S & P will remain liable for six years from the date of the Certificate is more consistent with it constituting a warranty.

73. In this respect he seems to me to be on firmer ground. On one view clause 6 is a purported confirmation of the legal position under the Limitation Acts. Insofar as the confirmation relates to a Certificate handed over at exchange or completion and bearing that date the 6 year period under the Limitation Acts is likely to be the same in contract as in tort, so far as a first time purchaser is concerned, since his cause of action in tort will arise on the date when he purchases the property negligently certified as having been soundly constructed, or completes the sale (since without the Certificate he could have refused to complete). If the Certificate pre-dates the contract the 6 year limitation period in contract is likely to begin, not at the date of the Certificate, but at the later date when the warranty becomes contractual i.e. on exchange or completion, which is also likely to be the commencement date for any claim in tort. If the Certificate postdates the contract and completion the 6 year period for an action in contract is likely to begin from the date of the Certificate. If, as I hold, there is no cause of action for negligent misstatement unless the purchaser bought in reliance on the Certificate, there will be no action in tort for negligent misstatements in the Certificate if it is issued after both.

74. In relation to subsequent purchasers and lenders the position is different. Insofar as they have a claim in tort it cannot arise until they purchase or lend. This could occur more than 6 years after the original purchase. If they purchased 4 years after the original purchase, they would, prima facie have 6 years, and not 2, in which to sue in tort.

75. Parties to a contract can agree a limitation period of their own. The fact that the liability period confirmed is, in some respects inaccurate, could, therefore, be said to support a conclusion that the function of the clause is to give a contractual promise in respect of which, in relation to purchasers and lenders, whether original or subsequent, liability will, regardless of the Limitation Acts, cease after 6 years from the date of the Certificate, presumably meaning that any action must be brought within that period if it is to be maintainable.

76. However the clause does not purport to reduce any applicable limitation period. Stronger wording would be required to reduce the limitation period in tort for an original purchaser if it arose later than 6 years after the date of the Certificate; or to deprive a secondary purchaser, buying the property 6 ½ years after the original purchase, on the strength of the Certificate, of any cause of action in tort at all; or to compel a purchaser buying after 5 ½ years to bring his action within six months. Even if the wording was there the secondary purchaser would not become bound by any restriction on suing in tort in the absence of a novation.

77. A final possibility is that the Certificate is to be regarded as giving rise to liability in both contract and tort and that clause 6 applies only to the former.

78. I cannot regard this poorly drafted clause as showing that the Certificate is intended to create a collateral warranty, particularly when it, like all the other clauses, contains no words of promise but only of confirmation and when what it is confirming is a period of liability the nature of which is derived from the preceding clauses.

79. In short, in my judgement the phraseology of the Certificate, taken as a whole, does not amount to a warranty. If that had been intended it would have been very easy to say so. I note that clause 6.6.5.2 of the 2002 edition of the CML Lender's handbook (which provides rules for solicitors acting for borrower and lenders and of which the Certificate in the form set out in paragraph 15 above is an Appendix) states:

> "*If we require a collateral warranty from any professional adviser this will be stated specifically in the mortgage instruction*"

Consideration

80. S & P contends that, even if there was an apparent collateral warranty it was not supported by any consideration. The Certificates were all provided after both contract and completion so that any consideration arising from the fact that the purchasers had agreed to buy their properties and had done so was past.

81. I do not regard this point as valid. *If* the Certificate amounted to a contractual promise the nature of the bargain was that, in consideration of the purchasers agreeing to purchase and purchasing the flat (the price of which would enable Optima to pay S & P) and thereby becoming a person who was entitled to receive or could expect to receive a Certificate (a) Optima sold the flat to the purchaser and (b) S & P gave the warranty in the Certificate. S & P were well aware that it was their function to provide the Certificates to Optima for delivery to the purchasers (in whose favour, on this hypothesis, the warranty was given) as part of the benefits to be received by them from the sale. The claimants expected to receive a Certificate in return for purchasing; and S & P expected to deliver Certificates to any purchasers who completed. The fact that S & P was dilatory in doing so does not alter the character of the basic arrangement which was that in return for the price the purchaser would get the Property and the Certificate. The price and the Certificate may properly be regarded as part and parcel of a single transaction; *Classic Maritime Inc v Lion Diversified Holdings Berhad* [2010] I Lloyd's Rep 59 at [45-6]. The fact that consideration from the purchaser did not move towards S & P is immaterial. Consideration must move from the promisee, but not necessarily to the promisor.

82. The position is different in relation to Mr and Mrs Peace. In purchasing from Ms Smith they gave no consideration for the production of a Certificate that had been issued nearly two years before.

Dual Duty

83. The Claimants submit, and the judge found, that S & P owed two separate duties. The first was to take care in carrying out the work of inspection that led to the Certificates and the second was to take care in compiling the Certificates. The duty was owed to future purchasers and lenders to whom a Certificate was issued or to whom it passed. S & P were in breach of the former duty as well as the latter. They attended at the site and failed to spot the defects in construction which the judge found. Had they not been in breach they would have discovered the defects, and, it is submitted, spoken up about them. Optima would have been required to remedy them and would have done so.

84. The Claimants rely on the observations of Lord Denning in his dissenting judgement in *Candler v Crane Christmas* [1951] 2 KB 164. That decision would, in the light of *Hedley Byrne,* now be decided the other way and, it is submitted, is, therefore a guide to the ambit of liability in the post *Hedley Byrne* era. In that case Lord Denning said:

> "*Let me now be constructive and suggest the circumstances in which I say that* ***a duty to use care in statement*** *does exist apart from a contract in that behalf. First, what persons are under* ***such a duty****? My answer is those persons such as accountants, surveyors, valuers and analysts, whose profession and occupation it is to examine books, accounts, and other things, and to make reports on which other people – other than their clients – rely in the ordinary course of business.* ***Their duty is not merely a duty to use care in the reports. They have also a duty to use care in their work which results in their reports. Herein lies the difference between these professional men and other*** *persons who have been held to be under no duty to use care in their statements, such as promoters who issue a prospectus: Derry v. Peek (now altered by statute), and trustees who answer enquiries about the trust funds: Low v. Bouverie . Those persons do not bring, and are not expected to bring, any professional knowledge or skill into the preparation of their statements: they can only be made responsible by the law affecting persons generally, such as contract, estoppel, innocent misrepresentation or fraud. But it is very different with persons who engage in a calling which requires special knowledge and skill. From very early times it has been held that they owe a duty of care to those who are closely and directly affected by their work, apart altogether from any contract or undertaking in that behalf. …*
>
> *The same reasoning has been applied to medical men who make reports on the sanity of others: Everett v. Griffiths. It is, I think, also applicable to professional accountants. They are not liable, of course, for casual remarks made in the course of conversation, nor for other statements made outside their work, or not made in their capacity as accountants: compare Fish v. Kelly (78); but they are; in my opinion, in proper cases, apart from any contract in the matter, under a duty to use reasonable care in the preparation of their accounts and in the making of their reports.*"
>
> [Bold added]

85. In that passage Lord Denning was explaining why, in his then controversial view, there was a duty cast on some people to use care in making statements. It was because they belonged to a class of persons whose profession was to examine things and make reports on which people other than their clients would rely. That explained why persons in that category were "*under such duty*" i.e. a duty to use care in statements. S & P contend that Lord Denning was not there expounding the existence of some duty separate from that of the duty to use care in making statements. Failure to take care in the work that led to the making of the statement may mean that the statement has been negligently given. The maker cannot then excuse himself on the basis that the statement was an impeccable representation of the result of incompetently carried out work. But the duty undertaken to the recipient of the statement is a duty to take care that the statements made are true. Thus, if the certificate states that the construction was sound, and it was, there would be no cause of action in misstatement even if the work of inspection was incompetently done

86. In *Smith v Bush* [1990] 1 AC 831, 845D Lord Templeman cited Lord Denning's dictum about the duty of professional men extending to the use of care in the preparation of their reports. At page 867E Lord Jauncey referred to Lord Denning's suggestion that professional persons might owe a duty apart from contract to use care in their reports and in the work from which they resulted. Neither of these citations, S & P submits, can be taken to have been intended to apply Lord Denning's dictum for any wider purpose than that intended by Lord Denning himself. Both cases were dealing with reliance upon a report.

87. A separate duty arising by reason of the Certificates in respect of the work of inspection would be of an extraordinary character. Mr Webb accepted that the duty would not arise unless the Certificate was in fact issued. On that footing, the architect, in a case such as the present, would be under no liability under this heading if, having incompetently failed to spot the defects in the building before the relevant claimant agreed to buy, he eventually woke up to the fact that it had been badly built and refused to issue any Certificate at all. If, however, he did issue a Certificate - possibly, as in this case, many years later and after contract - he would, *ipso facto*, acquire responsibility for the negligent inspections that he had carried out before. Contractual obligations may be retrospective, since parties may give promises to each other as to what they have done in the past. But tortious liability for things done or omitted to be done ought not to depend on whether the putative tortfeasor certifies that he has acted competently after the event.

88. I was originally attracted by the idea that this was too restrictive a view. It is apparent from the signed Certificates that the work which S & P was commissioned to undertake was not simply that of reporting an opinion as to the satisfactory construction of the Building once completed. S & P were engaged to visit the property at appropriate periods in order to check each of the three matters set out in clause 1 (a) – (c) of the Certificate, and to determine by each periodic visual inspection whether the property had been generally constructed to the standards specified in clause 3 (a) and (b). They were instructed by Optima, the developers and vendors. They knew that any Certificate they signed would be delivered to purchasers and lenders both original and subsequent. They also knew that any recipient would rely on the Certificate in the sense that they would take it to signify that the inspections had been properly carried

out and that they could rely on that as being so. This would be the case regardless of whether the Certificate was received before or after contract and completion.

89. In those circumstances it could be said that S & P must be taken to have assumed a duty to carry out the work of inspection competently, that duty being owed to a class of persons consisting of those to whom they issued Certificates, their lenders and subsequent purchasers and lenders. These were the very persons for whose benefit the work was being carried out in the first place. Such a class was one whose members would foreseeably suffer loss if the work of inspection was carried out incompetently and S & P should have had them in contemplation when they did the work. Such a conclusion would avoid the injustice that could be said to arise if S & P can escape all liability by reason of the fact that the Certificates which they gave post dated contract and completion, as S & P knew was the case. In such circumstances their confirmation of a liability subsisting for 6 years would be a confirmation of what was untrue.

90. I have, however, had the great advantage of reading in draft the judgment of my Lord, Lord Justice Tomlinson. For the reasons contained in his judgment, I have reluctantly come to the conclusion that an analysis on the lines set out in the preceding paragraph is ill founded. The genesis of any liability in respect of inspection to purchasers who received Certificates after their purchase would be the Certificate, which contains a series of statements. Any liability arising from the Certificate should be governed by the law relating to negligent statements. The Certificate was designed to operate as a statement upon which purchasers would rely in entering into their contracts and mortgagees when they made advances and which would, accordingly, give rise to liability when they did so. In the present case that is not what happened. But that is not apt to create a tortious duty of inspection independent of any reliance on the Certificate for the purpose of entry into any transaction.

91. S & P owed Optima a contractual duty in respect of inspection but that does not necessarily mean that they owed future Certificate holders a similar duty in tort. To hold that S & P were under such a duty to persons who become recipients of Certificates after purchase would involve imposing on them a duty to inspect arising out of statements which, at the time when the duty arose, they had not made. The duty would require them to report to Optima defects which they should, on inspection, have spotted. Whilst they had such an obligation to Optima in contract I am persuaded that they should not be regarded as having assumed a comparable duty to future recipients of Certificates. Any claim to damages for breach of any such duty would depend on how Optima would have acted in response to the report that should have been made - on which the judge has made no finding – which would itself beg the question, uncertain of answer, as to when exactly the duty (owed to subsequent recipients of Certificates) to report (to Optima) would arise. An additional problem would arise if the Certificate contained a qualification. In that case it would be necessary to decide whether, despite the qualification, S & P was liable because it should have notified Optima of the defect at some earlier stage.

92. It is these considerations which have caused me to agree with my Lord that S & P cannot be taken to have assumed a responsibility of inspection to subsequent Certificate holders who did not purchase on the faith of the Certificates.

93. Lord Justice Jackson refused S & P permission to appeal the judge's finding that Mrs Wyatt's claim was in any event not barred by limitation. For reasons which will become apparent, I am satisfied that we should give permission.

94. Section 14 A of the *Limitation Act 1980* provides a special limitation period for actions in negligence where an action is brought within 3 years from "*the starting date*": 14 A (4) (b). That date is the earliest date on which the plaintiff first had both the knowledge required for bringing an action for damages in respect of the relevant damage and a right to bring such an action: 14A (5). The knowledge required for bringing an action for damages in respect of the relevant damage means knowledge both (a) of the material facts about the damage in respect of which damages are claimed and (b) of certain other facts: 14 A (6). The material facts about the damage are such facts about the damage as would lead a reasonable person who had suffered such damage to consider it sufficiently serious to justify instituting proceedings for damages against a defendant who did not dispute liability and was able to satisfy a judgment: 14 A (7). The other facts referred to are, so far as presently relevant, that the damage was attributable in whole or in part to the act or omission which is alleged to constitute negligence and the identity of the defendant: 14 A (a) and (b).

95. The claim in the action was in respect of various different categories of defect with consequential losses: (a) unpleasant smells; (b) excessive sound transmission; (c) disrepair to the roof and plumbing leaks; and (d) deflection in the floors of the apartments: see Particulars of Claim paragraphs 20.2 and 20.3. Details of the defects were set out in a Scott Schedule. Ms Wyatt was said to have been affected by the leaks as a result of which she had carried out replacement of floors at a cost of about £ 10,000. The Limitation Act was relied on in the defence and Section 14 A was relied on in reply. But no date of relevant knowledge was pleaded. In her witness statement Ms Wyatt said that she had been aware of leaks in the plumbing and issues with the boiler. She said that, because there were long periods when she was absent from her flat, she being an air stewardess, she had become aware only lately of the problems with the roof, the vibration of the floors (and that was due to structural problems), fire stopping, smells (and the fact that they were due to defective internal and external drainage); and the drainage problem in the car park.

96. The judge identified the remedial work necessary in respect of which a claim was pursued against S & P by claimants including Ms Wyatt as falling within the following categories: (i) the roof (apart from the pitched roof); (ii) rainwater guttering; (iii) deflecting floors; (iv) acoustic problems; (v) riser ducts not being fire rated ; (vi) socket outlets; (vii) water leaks and bad plumbing

97. In his judgment the judge recorded that S & P's breaches of duty had occurred by 22 January 2004 (more than 6 years before the claim) and that she had, albeit unknowingly, suffered loss by buying her property at a greater price than it was worth by reason of the defects which had been carelessly overlooked by S & P: paragraph 231. However, he held that, whilst she had experienced a number of problems such as leaks and noise from an early stage, there were a number of defects of which she was not aware because for the most part she let out her flat. He held that in respect of five categories of defect namely (a) items (i) and (ii) above; (b) item (iii); (c) items (v) and (vi); and (d) all the drainage problems, all of which it was S & P's responsibility to

pick up, she did not have the knowledge required in respect of the relevant damage until well after the 3 year period. In respect of those defects she had the protection of section 14 A.

98. Mr Patten submits that in adopting this approach the judge was in error. As the judge recognised in paragraph 231 there was but one cause of action namely that arising from purchasing, on the faith of a Certificate, a property the value of which was diminished on account of the fact that defects in the building had been overlooked so that the Certificate was negligently made. The amounts which the claimants, including Ms Wyatt, were entitled to receive were the capital diminution in value as at the date of purchase attributable to the negligence of S & P: see paragraph 246 of the judgment.

99. In order, therefore, for Ms Wyatt to be able to take advantage of section 14 A it would be necessary for the judge to decide (which he did not) that the damage which Ms Wyatt did know about more than 3 years before the claim was issued was not such damage as would lead a reasonable person who had suffered it to consider sufficiently serious to justify proceedings against a solvent defendant who did not dispute liability.

100. The position, it is said, is no different than that which applied in *Hamlin v Edwin Evans* [1997] 80 BLR 85. In that case the defendant surveyors supplied the plaintiffs with a Report and Valuation which described the property as restored to reasonable standards with little likelihood of further movement. The Plaintiff made a claim against the surveyors for having failed to spot the dry rot. That claim was compromised in 1989 by a payment of £ 750 in full and final settlement. In 1992 the plaintiffs became aware of much more serious damage in the form of a fracture in one of the walls. Proceedings were issued in 1994 claiming the difference between the price paid and the actual value of the property. The defendants claimed that the claim was time barred and that it had been compromised by the acceptance of the £ 750. This court upheld the judgment of my Lord, Maurice Kay J, as he then was, on a preliminary issue, holding that the plaintiffs possessed only one cause of action in negligence in the making of the report notwithstanding that there were two heads of damage, namely the cost of eradicating the dry rot and the fracture.

101. Lord Justice Waite, giving the judgment of the court, said:

> "*... The present case is to be contrasted with cases involving claims against those with responsibility for defective building work, where there may well be different causes of action against different contractors and in respect of different categories of damage to the same building (as in Steamship Mutual Underwriting Association Ltd v Trollope & Colls (City) Ltd (1986) 33 BLR 77). Here there is but one single and indivisible cause of action arising out of one negligent act, the making of a single report. Section 14A is expressed to apply (subs (1)) to cases where the (knowledge related) starting date introduced by the section occurs at a date subsequent to that on which* "*the cause of action accrued* ". *There was only one such cause of action, namely the negligent making of the report; and it accrued when damage (great or small) was suffered for the first time. The reference in s14A(5) to* "*relevant damage* " *can only sensibly be construed as referring to damage relevant to that same cause of action.*"

102. The court rejected the argument that section 14A was intended to apply a separate starting date for the particular heads of injury of which the plaintiff for the time being complained. The Claimants do not appear to have suggested that separate failures (to discover the dry rot or the fracture) gave rise to separate causes of action for the different damage resulting therefrom, as opposed to different limitation periods in relation to different heads of damage.

103. Mr Webb draws attention to the reference to cases involving "*claims against those with responsibility for defective building work*" where there may well be different causes of action in respect of different categories of damage. He suggests that this is just such a case. The Certificate was from an architect, who inspected the construction as it went along, not a surveyor who looked at it at the end.

104. Insofar as the claim is one based on negligent misrepresentation I do not regard this case as distinguishable from *Hamlin*. The 6th claimant's claim under that heading arose when she purchased her flat on the faith of a negligently prepared certificate. In the absence of a finding that the damage of which she was aware (leaks and noise) during the early period was not such as would cause a reasonable person to institute proceedings against a solvent defendant who did not dispute liability, the limitation defence succeeds. The judge made such a finding in respect of the noise (see paragraph 232 (b)); but not in respect of the leaks, in respect of which the 6th claimant's evidence was that she was invoiced and paid £ 10,000 for replacing the floors in her kitchen, bathroom and shower room (para 245 (c)). The judge rejected that claim against Optima on the basis that, although the work had been carried out, it had not been proved that her work had been done to put right any problem for which Optima was responsible. Her evidence, however, was that she was invoiced and paid £ 600 for remedial work arising from leaks and was subsequently invoiced for further leaks.

105. In respect of the other claim in negligence, the position is, as it seems to me, different. Negligence in the work of inspection is, as *Hamlin* recognises, apt to give rise to more than one cause of action in respect of different categories of damage. In the light of the judge's findings that there were, indeed, distinct categories of damage, and his findings that Ms Wyatt lacked the necessary knowledge in respect of those categories, it seems to me that the defence of limitation was not made out in relation to those categories of damage in respect of which she did not have the requisite knowledge within 3 years of the commencement of the action.

Conclusion

106. For these reasons I would hold that the judge was wrong to find that the Claimants were entitled to succeed on the ground of negligent misstatement or collateral warranty. I would also reject the third head of claim. Finally, I would hold that the judge was wrong to find that the sixth claimant's claim was not time barred. Accordingly I would allow the appeal and dismiss the claim.

LORD JUSTICE TOMLINSON

107. I am grateful to Christopher Clarke LJ for his full exposition of the facts. I agree entirely with the reasoning which leads him to the conclusion that the claims by all of the Claimants except Mr and Mrs Sahi in respect of breach of warranty and negligent

misstatement must fail and that the appeal must accordingly, in that respect, be allowed. I add a few words of my own on the question whether Strutt & Parker must be taken to have assumed an independent duty to carry out the work of inspection competently, and whether if they did that duty was owed to a class of persons consisting of those to whom they issued Certificates, their lenders and subsequent purchasers and lenders. By an "independent duty" I mean of course a duty independent of that owed contractually to Optima. In my view no such independent duty was owed.

108. My Lord has set the scene for the debate at paragraph 49 above. I prefer the second formulation there proffered, viz, that the duty owed by Strutt & Parker was a duty to the recipient of a Certificate, who thereafter relies on it, to take care in making the statements contained in the Certificate, of which duty Strutt & Parker will be in breach if the Certificate is not the product of both competent groundwork and drafting.

109. I note that Denning LJ's conclusion in *Candler v Crane Christmas & Co* [1951] 2 KB 164 at 184 was that "a duty to use care in statement is recognized by English law". The discussion in that case was of the extent to which the accountants could potentially be liable in negligent misrepresentation to persons other than those to whom they owed a duty in contract.

110. The touchstone of the liability recognised by Denning LJ in his dissenting judgment was either the showing of the report to a third party by the accountants themselves, or knowledge of the accountants when they prepared their report that their employer (or client) intended to show the report to a third party with a view to inducing that third party to invest money, or to take some other action, in reliance on the report – see at pages 180-181. In each case crucial to the formulation for the test for liability is an intention or a realisation that the report is reasonably to be relied upon as a statement made by a person with particular expertise in evaluating the matters to which the report relates, those being matters requiring expertise for their evaluation.

111. *Smith v Eric S Bush* [1990] 1 AC 831 is I consider a straightforward application of the principle enunciated by Denning LJ, adopted as representing the common law as it had been in the interim by the House of Lords in *Hedley Byrne v Heller & Partners* [1964] AC 465.

112. In my view none of Denning LJ, Lord Templeman and Lord Jauncey can be taken to have been formulating the existence of two independent duties, not least because in neither case was it necessary so to do. These were straightforward cases of intended reliance upon a statement or statements set out in a report. I am inclined to think that Denning LJ expressed himself in the way that he did primarily in order to demonstrate that it will not be all makers of negligent statements who are potentially liable in the event that identified third parties rely upon them. The accountants attract liability because they appreciate that they have an expertise upon which it is reasonable for third parties to rely. Even then, in order to avoid the spectre of liability to an indeterminate class, the class to whom the duty is owed is circumscribed in the manner described.

113. It is in the nature of the matters upon which "experts" express opinions in their reports that liability will only usually attach where the work that led to the making of the

report, or the statement within the report, was itself carried out without proper care. So in order to show that a misstatement has been made negligently it will usually be necessary to demonstrate a failure to take proper care in the work that led to the making of the statement. Put the other way round, it may often be necessary for a representor who has made a demonstrably false statement to show that the work which underlies the representation was properly and carefully done if he wishes to escape liability for negligent misrepresentation.

114. However the cause of action with which this learning is concerned is that for negligent misrepresentation or misstatement. Looked at in the light of the formulations in the *Hedley Byrne* case itself, I do not think that there is any warrant for imposing, or ordinarily any necessity to impose, upon a representor a free-standing independent duty of care owed at a stage before he has made a representation. It is the circumstances in which the representation is made or enshrined in a form which can be communicated to a third party which generates the duty, or as I prefer, gives rise to the assumption of responsibility. As pointed out by Lord Devlin in *Hedley Byrne* at page 529, "responsibility can attach only to the single act, that is, the giving of the reference, and only if the doing of that act implied a voluntary undertaking to assume responsibility". As Lord Devlin said in the immediately preceding passage in his speech:-

> "*I have had the advantage of reading all the opinions prepared by your Lordships and of studying the terms which your Lordships have framed by way of definition of the sort of relationship which gives rise to a responsibility towards those who act upon information or advice and so creates a duty of care towards them. I do not understand any of your Lordships to hold that it is a responsibility imposed by law upon certain types of persons or in certain sorts of situations. It is a responsibility that is voluntarily accepted or undertaken, either generally where a general relationship, such as that of solicitor and client or banker and customer, is created, or specifically in relation to a particular transaction.*"

Thus assumption of responsibility for the statement is the touchstone of liability.

115. Naturally I accept that Strutt & Parker owed a contractual duty to carry out the work of inspection competently. I cannot however accept that it is appropriate to regard Strutt & Parker as at that stage assuming a like responsibility to those to whom Certificates might one day be issued. It seems to me that the stage at which Strutt & Parker should be taken as assuming a responsibility to third parties is the stage at which they had to decide whether to issue a Certificate, and if so in what form. After all, it might subsequent to an inspection or the inspections have become apparent to Strutt & Parker that an inspection or the inspections had <u>not</u> been properly conducted, in consequence of which they might, and should, have decided either not to issue a Certificate or to issue a Certificate only in an appropriately qualified form. It would I think be anomalous if notwithstanding that responsible decision Strutt & Parker nonetheless attracted a liability to third parties in respect of the failure properly to conduct the inspections. It would render the issue of the Certificate a superfluous step in the process whereby they attracted liability, which I find odd in relation to a cause

of action which is described as a duty to take care in carrying out the work of inspection which led to the Certificates.

116. It would of course be sufficient for the Claimants' purposes that the suggested duty is owed only to those to whom Certificates are in fact issued, together with their lenders and subsequent purchasers from them and their lenders. But I do not see why it is necessary to impose such a duty, as those to whom Certificates are negligently issued will have a cause of action if they rely upon them. The rationale for imputing an assumption of responsibility for the statements contained in the Certificate is the realisation by the architect that his expertise in making the evaluation contained in his statement will be relied upon by third parties. I see no reason artificially to devise a further duty which will enure to the benefit of those who do not rely upon his Certificate. As my Lord points out at paragraphs 57 and 58 above, a claim might have been advanced by reference to an assumption of responsibility for the accuracy of the statements in the draft Certificate, but it was not, and nor was it suggested that either Strutt & Parker or Mr Egford told any of the Claimants before they committed themselves to the purchase that a clean Certificate would in due course be forthcoming.

117. In order to be of any use to the Claimants the suggested duty would of course have to involve an obligation on Strutt and Parker to point out any defects which would prevent the issue of a certificate or of a clean certificate. If additionally it could be shown that Optima would have responded by carrying out the necessary repairs, then there would be the necessary ingredients of a cause of action. However the pleaded allegation does not go so far: paragraph 26 of the Amended Particulars of Claim reads:-

> "*The matters stated in the Certificates amounted to warranties given to the Claimants and/or representations made to the Claimants and the Third Defendant owed them a duty of care at common law to ensure that the Certificates were accurate. Further, D3 owed a duty to the Claimants to carry out the professional services stated on the face of the Certificates with reasonable skill and care for the purpose of the subsequent production of the Certificates*."

I do not read this as involving a duty to point out any defect which would prevent the issue of a Certificate or of a clean Certificate. If such a duty were to be imposed, one would need to consider at what point in time it attached and to whom it was incumbent upon Mr Egford to point out defects. I see grave difficulties in formulating this duty in an acceptable manner.

118. One major difficulty is that the suggested independent tortious duty to take care in the inspection of the property could not in my view have generated in Strutt & Parker a duty to point out at any given time the existence of defects which would, or would if unrectified, prevent the issue of a clean Certificate. It may be that Strutt & Parker undertook contractually with Optima to adhere to a programme of inspections, but it seems to me that to posit additionally a tortious duty periodically to draw attention to defects in construction is simply too great an accretion to graft onto what is at bottom an assumption of responsibility to take care in making statements upon which persons will place reliance..

119. All this reinforces my conclusion that Strutt & Parker assumed a responsibility when speaking to speak carefully, not a responsibility to speak.

120. In my judgment the judge was wrong, at paragraph 120 of his judgment, insofar as he envisaged the existence of two independent duties of care owed by Strutt & Parker through Mr Egford to the Claimants. I would therefore allow the appeal on all three heads of claim. In my judgment Strutt & Parker and Mr Egford have no liability to the Claimants other than Mr and Mrs Sahi, the judgment in whose favour they do not seek to appeal.

LORD JUSTICE MAURICE KAY

121. I agree with both judgments.