Smith (Respondent)

v.

Eric S. Bush (a firm) (Appellants)

JUDGMENT

Die Jovis 20° Aprilis 1989

Upon Report from the Appellate Committee to whom was

referred the Cause Smith against Eric S. Bush (a firm), That

the Committee had heard Counsel on Monday the 6th, Tuesday the

7th, Wednesday the 8th, Thursday the 9th, Monday the 13th,

Tuesday the 14th, Wednesday the 15th and Thursday the 16th

days of February last, upon the Petition and Appeal of Eric S.

Bush (a firm) of 2A Upper King Street, Norwich, praying that

the matter of the Order set forth in the Schedule thereto,

namely an Order of Her Majesty's Court of Appeal of the 13th

day of March 1987, might be reviewed before Her Majesty the

Queen in Her Court of Parliament and that the said Order might

be reversed, varied or altered or that the Petitioners might

have such other relief in the premises as to Her Majesty the

Queen in Her Court of Parliament might seem meet; as upon the

case of Jean Patricia Smith lodged in answer to the said

Appeal; and due consideration had this day of what was offered

on either side in this Cause:

It is Ordered and Adjudged, by the Lords Spiritual and

Temporal in the Court of Parliament of Her Majesty the Queen

assembled, That the said Order of Her Majesty's Court of

Appeal (Civil Division) of the 13th day of March 1987

complained of in the said Appeal be, and the same is hereby,

Affirmed and that the said Petition and Appeal be, and the

same is hereby, dismissed this House: And it is further

Ordered, That the Appellants do pay or cause to be paid to the

said Respondent the Costs incurred by her in respect of the

said Appeal, the amount thereof to be certified by the Clerk

of the Parliaments if not agreed between the parties.

Cler: Parliamentor:

Judgment: 20.4.89

HOUSE OF LORDS

SMITH (A.P.)

(RESPONDENT)

v.

ERIC S. BUSH (A FIRM)

(APPELLANTS)

HARRIS (A.P.) AND ANOTHER (A.P.)

(APPELLANTS)

v.

WYRE FOREST DISTRICT COUNCIL AND ANOTHER

(RESPONDENTS)

Lord Keith of Kinkel

Lord Brandon of Oakbrook

Lord Templeman

Lord Griffiths

Lord Jauncey of Tullichettle

LORD KEITH OF KINKEL

My Lords,

My Lords, I have had the opportunity of considering in draft

the speeches to be delivered by my noble and learned friends Lord

Templeman, Lord Griffiths and Lord Jauncey of Tullichettle. I

agree with them, and for the reasons they give would allow the

appeal in Harris v. Wyre Forest District Council and dismiss that

in Smith v. Eric S. Bush.

LORD BRANDON OF OAKBROOK

My Lords,

For the reasons set out in the speeches to be delivered by

my noble and learned friends, Lord Templeman, Lord Griffiths and

Lord Jauncey of Tullichettle, I would allow the appeal in Harris v.

Wyre Forest District Council and dismiss the appeal in Smith v.

Eric. S. Bush (a firm).

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LORD TEMPLEMAN

My Lords,

These appeals involve consideration of three questions. The

first question is whether a valuer instructed by a building society

or other mortgagee to value a house, knowing that his valuation

will probably be relied upon by the prospective purchaser and

mortgagor of the house, owes to the purchaser in tort a duty to

exercise reasonable skill and care in carrying out the valuation

unless the valuer disclaims liability. If so, the second question is

whether a disclaimer of liability by or on behalf of the valuer is a

notice which purports to exclude liability for negligence within the

Unfair Contract Terms Act 1977 and is therefore ineffective unless

it satisfies the requirement of reasonableness. If so, the third

question is whether, in the absence of special circumstances, it is

fair and reasonable for the valuer to rely on the notice excluding

liability.

In Harris v. Wyre Forest District Council, [1988] Q.B. 835

the first appeal now under consideration, Mr. and Mrs. Harris

wished to purchase 74, George Street, Kidderminster, and needed a

mortgage. They applied to the council. By section 43 of the

Housing (Financial Provisions) Act 1958 (as amended by section 37

of the Local Government Act 1974), the council were authorised to

advance money to any persons for the purpose of acquiring a

house, provided that:

"(2) . . . the local authority . . . shall satisfy themselves

that the house ... to be acquired is ... or will be made

in all respects fit for human habitation. . . 3(e) The advance

shall not be made except after a valuation duly made on

behalf of the local authority ..."

Mr. and Mrs. Harris signed the application form supplied by

the council and that form contained the following declaration and

notice:

"I/We enclose herewith valuation fee and administration fee

£22. I/We understand that this fee is not returnable even if

the council do not eventually make an advance and that the

valuation is confidential and is intended soley for the

benefit of Wyre Forest District Council in determining what

advance, if any, may be made on the security and that no

responsibility whatsoever is implied or accepted by the

council for the value or condition of the property by reason

of such inspection and report. (You are advised for your

own protection to instruct your own surveyor/architect to

inspect the property). I/We agree that the valuation report

is the property of the council and that I/we cannot require

its production."

The council decided to carry out their own valuation and for that

purpose instructed their employee, the second respondent, Mr. Lee.

After receiving Mr. Lee's valuation, the council made a written

offer to advance £8,505 to Mr. and Mrs. Harris to be secured on a

mortgage of the house and subject to their undertaking to carry

out within 12 months the works detailed in the schedule to the

offer. The schedule was in these terms:

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"Essential repairs

"1. Obtain report for district council from Midlands

Electricity Board regarding electrics and carry out

any recommendations. 2. Make good mortar fillets to

extension."

Mr. and Mrs. Harris assumed from the council's offer that, as was

the case, the house had been valued at £8,505 at the least, and

that the valuer had not found serious defects and they therefore

accepted the offer and entered into a contract to purchase the

house for £9,000. Three years later, Mr. and Mrs. Harris

discovered that the house was defective; one builder quoted

£13,000 to carry out work to make the house safe. Another

builder refused to tender for the work which he regarded as

impractical and unsafe. The damages suffered by Mr. and Mrs.

Smith, including interest up to the date of trial, were agreed at

£12,000. The trial judge was satisfied that Mr. Lee did not

exercise reasonable skill and care and that the council, as his

employer, were vicariously liable for Mr. Lee's failure and he

therefore ordered the council to pay £12,000. The Court of

Appeal allowed the appeal of the council on the grounds that by

the notice contained in the application form signed by Mr. and

Mrs. Harris the council had avoided incurring liability. Mr. and

Mrs. Harris now appeal.

In Smith v. Eric S. Bush (a firm) [1988] Q.B. 743, the

second appeal now under consideration, Mrs. Smith wished to

purchase 242, Silver Road, Norwich, and needed a mortgage. She

applied to the Abbey National Building Society. By section 25 of

the Building Societies Act 1962, now section 13 of the Building

Societies Act 1986, the Abbey National was bound to obtain "a

written report prepared and signed by a competent and prudent

person who is experienced in the matters relevant to the

determination of the value" of the house, dealing with the value of

the house and with any matter likely to affect the value of the

house. Mrs. Smith paid to the Abbey National an inspection fee

of £36.89 and signed the application form which contained the

following declaration and notice:

"I accept that the society will provide me with a copy of

the report and mortgage valuation which the society will

obtain in relation to this application. I understand that the

society is not the agent of the surveyor or firm of

surveyors and that I am making no agreement with the

surveyor or firm of surveyors. I understand that neither the

society nor the surveyor or the firm of surveyors will

warrant, represent or give any assurance to me that the

statements, conclusions and opinions expressed or implied in

the report and mortgage evaluation will be accurate or valid

and the surveyor's report will be supplied without any

acceptance of responsibility on their part to me."

The Abbey National instructed the appellant firm, Eric S.

Bush, to carry out the valuation. The appellants valued the house

at £16,500 and the report contained the following paragraph:

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"11. Repairs recommended as a condition of mortgage: No

essential repairs are required. We noted a number of items

of disrepair in the building which we have taken into

account in our valuation, but which are not considered to be

essential for mortgage purposes."

'

A copy of the report was supplied to Mrs. Smith by the Abbey

National.

In reliance on the report, Mrs. Smith accepted an advance

of £3,500 from the Abbey National and entered into a contract to

purchase the house for £18,000. Eighteen months later, bricks

from the chimneys collapsed and fell through the roof into the loft

and the main bedroom and ceilings on the first floor. The

collapse was due to the fact that two chimney breasts had been

removed from the first floor, leaving the chimney breasts in the

loft and the chimneys unsupported. Mr. Cannell, who carried out

the inspection for the appellants and was a chartered surveyor

had observed the removal of the first floor chimney breasts but

had not checked to see that the chimneys above were adequately

supported.

The trial judge was satisfied that Mr. Cannell had not

exercised reasonable skill and care, that the appellants were

liable for his negligence to Mrs. Smith and awarded her £4,379.97

damages including interest. The judge ignored the notice contained

in the application and signed by Mrs. Smith whereby the Abbey

National disclaimed liability on the part of the appellant firm.

The Court of Appeal (Dillon and Glidewell L.JJ. and Sir Edward

Eveleigh) held that the disclaimer was not fair and reasonable and

was ineffective under the Unfair Contract Terms Act 1977; they

accordingly affirmed the award of damages made by the judge.

The appellants now appeal.

As I have indicated therefore, the three questions involved

in these appeals are, firstly, whether the council's valuer was

liable to Mr. and Mrs. Harris in negligence and whether the

appellants were liable to Mrs. Smith in negligence; secondly,

whether, if negligence applies, the notices excluding liability fall

within the ambit of the Unfair Contract Terms Act 1977, and,

thirdly, whether it is fair and reasonable for the valuers to rely on

the notices.

Section 1(1) of the Act of 1977 defines "negligence" as the

breach:

"(a) of any obligation, arising from the express or implied

terms of a contract, to take reasonable care or

exercise reasonable skill in the performance of the

contract;

"(b) of any common law duty to take reasonable care or

exercise reasonable skill ..."

Section 2 of the Act provides that:

"(1) A person cannot by reference to any contract term or

to a notice . . . exclude or restrict his liability for death or

personal injury resulting from negligence.

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"(2) In the case of other loss or damage, a person cannot so

exclude or restrict his liability for negligence except in so

far as the term or notice satisfies the requirement of

reasonableness."

The common law imposes on a person who contracts to

carry out an operation an obligation to exercise reasonable skill

and care. A plumber who mends a burst pipe is liable for his

incompetence or negligence whether or not he has been expressly

required to be careful. The law implies a term in the contract

which requires the plumber to exercise reasonable skill and care in

his calling. The common law also imposes on a person who carries

out an operation an obligation to exercise reasonable skill and care

where there is no contract. Where the relationship between the

operator and a person who suffers injury or damage is sufficiently

proximate and where the operator should have foreseen that

carelessness on his part might cause harm to the injured person,

the operator is liable in the tort of negligence.

Manufacturers and providers of services and others seek to

protect themselves against liability for negligence by imposing

terms in contracts or by giving notice that they will not accept

liability in contract in tort. Consumers who have need of

manufactured articles and services are not in a position to bargain.

The Unfair Contract Terms Act 1977 prohibits any person

excluding or restricting liability for death or personal injury

resulting from negligence. The Act also contains a prohibition

against the exclusion or restriction of liability for negligence which

results in loss or damage unless the terms of exclusion or the

notice of exclusion satisfies the requirements of reasonableness.

These two appeals are based on allegations of negligence in

circumstances which are akin to contract. Mr. and Mrs. Harris

paid £22 to the council for a valuation. The council employed,

and therefore paid, Mr. Lee, for whose services as a valuer the

council are vicariously liable. Mrs. Smith paid £36.89 to the

Abbey National for a report and valuation and the Abbey National

paid the appellants for the report and valuation. In each case the

valuer knew or ought to have known that the purchaser would only

contract to purchase the house if the valuation was satisfactory

and that the purchaser might suffer injury or damage or both if

the valuer did not exercise reasonable skill and care. In these

circumstances I would expect the law to impose on the valuer a

duty owed to the purchaser to exercise reasonable skill and care in

carrying out the valuation.

In Cann v. Willson (1888) 39 Ch.D. 39, approved by this

House in Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd. [1964]

A.C. 465, a valuer instructed by a mortgagor sent his report to

the mortgagee who made an advance in reliance on the valuation.

The valuer was held liable in the tort of negligence to the

mortgagee for failing to carry out the valuation with reasonable

care and skill.

A valuer who values property as a security for a mortgage

is liable either in contract or in tort to the mortgagee for any

failure on the part of the valuer to exercise reasonable skill and

care in the valuation. The valuer is liable in contract if he

receives instructions from and is paid by the mortgagee. The

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valuer is liable in tort if he receives instructions from and is paid

by the mortgagor but knows that the valuation is for the purpose

of a mortgage and will be relied upon by the mortgagee.

In Odder v. Westbourne Park Building Society (1955) 165

E.G. 261, a purchaser paid a survey fee to a building society, the

survey was carried out by the chairman of the building society and

in the result the purchaser purchased the house for £4,000 with

the help of an advance of £3,000. There were serious defects and

the house was unsaleable. There was a disclaimer of liability for

negligence for the survey in the mortgage offer but Harman J.

held that the disclaimer:

"did no more than to state what the legal position would be

even if it were not there but it did emphasise the matter

and took much of the sting out of the plaintiff's allegation,

which was to the effect that once the building society had

had a survey made and were willing to lend money,

everything was all right and that she would not have

entered on the transaction if they had not kept silent about

the defects or been negligent in not discovering them. In

view of the warning in the proposal form that grievance, if

it were one, lost any of its justification."

Since 1955 a good deal of water has passed under the

negligence bridge.

In Candler v. Crane, Christmas & Co. [1951] 2 K.B. 164, the

accountants of a company showed their draft accounts to and

discussed them with an investor who, in reliance on the accounts,

subscribed for shares in the company. Denning L.J., whose

dissenting judgment was subsequently approved in the Hedley Byrne

case [1964] AC 465, found that the accountants owed a duty to

the investor to exercise reasonable skill and care in preparing the

draft accounts. Denning L.J. said, at p. 176:

"If the matter were free from authority, I should have said

that they clearly did owe a duty of care to him. They

were professional accountants who prepared and put before

him these accounts, knowing that he was going to be guided

by them in making an investment in the company. On the

face of those accounts he did make the investment, whereas

if the accounts had been carefully prepared, he would not

have made the investment at all. The result is that he has

lost his money."

Denning L.J., at p. 178-179 rejected the argument that:

"a duty to take care can only arise where the result of a

failure to take care will cause physical damage to persons

or property. ... I can understand that in some cases of

financial loss there may not be a sufficiently proximate

relationship to give rise to a duty of care; but, if once the

duty exists, I cannot think that liability depends on the

nature of the damage."

The duty of professional men "is not merely a duty to use

care in their reports. They have also a duty to use care in their

work which results in their reports." (p. 179). The duty of an

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accountant is owed "to any third person to whom they themselves

show the accounts, or to whom they know their employer is going

to show the accounts, so as to induce him to invest money or take

some other action on them. But I do not think the duty can be

extended still further so as to include strangers of whom they

have heard nothing and to whom their employer, without their

knowledge, may choose to show their accounts." (pp. 180-181).

"The test of proximity in these cases is: did the accountants know

that the accounts were required for submission to the plaintiff and

use by him?" (p. 181).

Subject to the effect of any disclaimer of liability, these

considerations appear to apply to the valuers in the present

appeals.

In the Hedley Byrne case [1964] AC 465, a bank which

supplied a reference for a customer was held to owe a duty of

care to a stranger who relied on the reference but the bank

escaped liability because in the reference the bank expressly

disclaimed liability. Lord Reid said, at p. 486:

"A reasonable man, knowing that he was being trusted or

that his skill and judgment were being relied on, would, I

think, have three courses open to him. He could keep silent

or decline to give the information or advice sought; or he

could give an answer with a clear qualification that he

accepted no responsibility for it or that it was given

without that reflection or inquiry which a careful answer

would require; or he could simply answer without any such

qualification. If he chooses to adopt the last course he

must, I think, be held to have accepted some responsibility

for his answer being given carefully, or to have accepted a

relationship with the inquirer which requires him to exercise

such care as the circumstances require."

Lord Devlin, at p. 515 rejected the argument that the

maker of a careless statement is only under a duty to be careful

if the duty, which is contractual or fiduciary or, arises from the

relationship of proximity, causes physical damage to the person or

property of the plaintiff. Lord Devlin also said, at pp. 528-529

that:

"the categories of special relationships which may give rise

to a duty to take care in word as well as in deed are not

limited to contractual relationships or to relationships of

fiduciary duty, but include also relationships which . . . are

'equivalent to contract,' that is, where there is an

assumption of responsibility in circumstances in which, but

for the absence of consideration, there would be a

contract."

In the present appeals, the relationship between the valuer

and the purchaser is "akin to contract." The valuer knows that

the consideration which he receives derives from the purchaser and

is passed on by the mortgagee, and the valuer also knows that the

valuation will determine whether or not the purchaser buys the

house.

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In Ministry of Housing and Local Government v. Sharp [1970]

2 Q.B. 223, the local authority was held liable to the Ministry

because of the failure of an employee of the authority to exercise

reasonable skill and care in searching for entries in the local land

charges register. The search certificate prepared by the clerk

negligently failed to record a charge of £1828 11s.5d. in favour of

the Ministry. Lord Denning M.R., at p. 268 rejected the

argument:

"that a duty to use due care (where there was no contract)

only arose when there was a voluntary assumption of

responsibility . . . Lord Reid in Hedley Byrne's case [1964]

A.C. 465, 487 and ... Lord Devlin, at p. 529 ... used

those words because of the special circumstances of that

case (where the bank disclaimed responsibility). But they

did not in any way mean to limit the general principle. In

my opinion the duty to use due care in a statement arises,

not from any voluntary assumption of responsibility, but

from the fact that the person making it knows, or ought to

know, that others, being his neighbours in this regard, would

act on the face of the statement being accurate."

Salmon L.J. said, at p. 279:

"I do not accept that, in all cases, the obligation to take

reasonable care necessarily depends on the voluntary

assumption of responsibility. Even if it did, I am far from

satisfied that the council did not voluntarily assume

responsibility in the present case. On the contrary, it

seems to me that they certainly chose to undertake the

duty of searching the register and preparing the certificate.

There was nothing to compel them to discharge this duty

through their servant."

In the present proceedings by Mr. and Mrs. Harris, the

council accepted the application form and the valuation fee and

chose to conduct their duty of valuing the house through Mr. Lee.

In the case of Mrs. Smith the appellant first accepted the

valuation fee derived from Mrs. Smith and undertook the duty of

preparing a report which they knew would be shown to and relied

upon by Mrs. Smith.

Mr. Ashworth on behalf of the council relied on the decision

of the Court of Appeal of Northern Ireland in Curran v. Northern

Ireland Co-ownership Housing Association Ltd.) (1986) 8 N.I.J.B. 1.

On a preliminary issue the court held that a mortgagee of a house

owed no duty of care to the purchaser in respect of a valuation.

The purchaser's action against the valuer remains to be

determined. Gibson L.J., at p. 14, said that in the Hedley Byrne

type of case:

"there must be an assumption of responsibility in

circumstances in which, but for the absence of

consideration, there would be a contract. Responsibility can

only attach if the defendant's actions implied a voluntary

undertaking to assume responsibility."

I agree that by obtaining and disclosing a valuation, a mortgagee

does not assume responsibility to the purchaser for that valuation.

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But in my opinion the valuer assumes responsibility to both

mortgagee and purchaser by agreeing to carry out a valuation for

mortgage purposes knowing that the valuation fee has been paid by

the purchaser and knowing that the valuation will probably be

relied upon by the purchaser in order to decide whether or not to

enter into a contract to purchase the house. The valuer can

escape the responsibility to exercise reasonable skill and care by

an express exclusion clause, provided the exclusion clause does not

fall foul of the Unfair Contract Terms Act 1977. The Court of

Appeal also decided in Curran's case that a local authority which

provides a house-owner with a grant to carry out works of

extension to his house might owe a duty of care to a subsequent

purchaser of the house to ensure that the works of extension are

carried in a manner free from defect; this House reversed the

Court of Appeal on this point [1987] 1 A.C. 718 but the speech of

my noble and learned friend, Lord Bridge of Harwich, dealt with

the ambit of Anns v. Merton London Borough Council [1978] A.C.

728, and not with the duty of care which arises when the

proximity between tortfeasor and victim is akin to contract.

It was submitted by Mr. Ashworth, on behalf of the council,

that the valuation was prepared in fulfilment of the statutory duty

imposed on the council by section 43 of the Housing (Financial

Provisions) Act 1958. Similarly the valuation obtained by the

Abbey National was essential to enable them to fulfil their

statutory duty imposed by the Building Societies Act 1962. But in

Candler v. Crane, Christmas & Co. [1951] 2 K.B. 164, the draft

accounts were prepared for the company which was compelled by

statute to produce accounts.

In the present appeals, the statutory duty of the council to

value the house did not in my opinion prevent the council coming

under a contractual or tortious duty to Mr. and Mrs. Harris who

were cognisant of the valuation and relied on the valuation. The

contractual duty of a valuer to value a house for the Abbey

National did not prevent the valuer coming under a tortious duty

to Mrs. Smith who was furnished with a report of the valuer and

relied on the report.

In general I am of the opinion that in the absence of a

disclaimer of liability the valuer who values a house for the

purpose of a mortgage, knowing that the mortgagee will rely and

the mortgagor will probably rely on the valuation, knowing that

the purchaser mortgagor has in effect paid for the valuation, is

under a duty to exercise reasonable skill and care and that duty is

owed to both parties to the mortgage for which the valuation is

made. Indeed, in both the appeals now under consideration the

existence of such a dual duty is tacitly accepted and acknowledged

because notices excluding liability for breach of the duty owed to

the purchaser were drafted by the mortgagee and imposed on the

purchaser. In these circumstances it is necessary to consider the

second question which arises in these appeals, namely, whether the

disclaimers of liability are notices which fall within the Unfair

Contract Terms Act 1977.

In Harris v. Wyre Forest District Council [1988] Q.B. 835,

the Court of Appeal (Kerr and Nourse L.JJ. and Caufield J.)

accepted an argument that the Act of 1977 did not apply because

the council by their express disclaimer refused to obtain a

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valuation save on terms that the valuer would not be under any

obligation to Mr. and Mrs. Harris to take reasonable care or

exercise reasonable skill. The council did not exclude liability for

negligence but excluded negligence so that the valuer and the

council never came under a duty of care to Mr. and Mrs. Harris

and could not be guilty of negligence. This construction would not

give effect to the manifest intention of the Act but would

emasculate the Act. The construction would provide no control

over standard form exclusion clauses which individual members of

the public are obliged to accept. A party to a contract or a

tortfeasor could opt out of the Act of 1977 by declining in the

words of Nourse L.J., at p. 845, to recognise "their own

answerability to the plaintiff." Caulfield J. said, at p. 850, that

the Act "can only be relevant where there is on the facts a

potential liability." But no one intends to commit a tort and

therefore any notice which excludes liability is a notice which

excludes a potential liability. Kerr L.J., at p. 853, sought to

confine the Act to "situations where the existence of a duty of

care is not open to doubt" or where there is "an inescapable duty

of care." I can find nothing in the Act of 1977 or in the general

law to identify or support this distinction. In the result the Court

of Appeal held that the Act does not apply to "negligent

misstatements where a disclaimer has prevented a duty of care

from coming into existence;" per Nourse L.J., at p. 848. My

Lords this confuses the valuer's report with the work which the

valuer carries out in order to make his report. The valuer owed a

duty to exercise reasonable skill and care in his inspection and

valuation. If he had been careful in his work, he would not have

made a "negligent misstatement" in his report.

Section 11(3) of the Act of 1977 provides that in considering

whether it is fair and reasonable to allow reliance on a notice

which excludes liability in tort, account must be taken of:

"all the circumstances obtaining when the liability arose or

(but for the notice) would have arisen."

Section 13(1) of the Act prevents the exclusion of any right

or remedy and (to that extent) section 2 also prevents the

exclusion of liability:

"by reference to ... notices which exclude . . . the

relevant obligation or duty."

Nourse L.J. dismissed section 11(3) as "peripheral" and made no

comment on section 13(1). In my opinion both these provisions

support the view that the Act of 1977 requires that all exclusion

notices which would in common law provide a defence to an action

for negligence must satisfy the requirement of reasonableness.

The answer to the second question involved in these appeals

is that the disclaimer of liability made by the council on its own

behalf in the Harris case and by the Abbey National on behalf of

the appellants in the Smith case, constitute notices which fall

within the Unfair Contract Terms Act 1977 and must satisfy the

requirement of reasonableness.

The third question is whether in relation to each exclusion

clause it is, in the words of section 11(3) of the Act of 1977:

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"fair and reasonable to allow reliance on it, having regard

to all the circumstances obtaining when the liability arose

or (but for the notice) would have arisen."

The liability of the council for the breach by Mr. Lee of his

duty of care to Mr. and Mrs. Harris arose as soon as Mr. and Mrs.

Harris, in reliance on the valuation of £8,505, bought the house

for £9,000. The liability of the appellants for the breach of their

duty of care to Mrs. Smith in their valuation arose as soon as

Mrs. Smith, on reliance of the valuation of £16,500, bought the

house for £18,000. The damages will include the difference

between the market value of the house on the day when it was

purchased and the purchase price which was in fact paid by the

purchaser in reliance on the valuation.

Both the present appeals involve typical house purchases. In

considering whether the exclusion clause may be relied upon in

each case, the general pattern of house purchases and the extent

of the work and liability accepted by the valuer must be borne in

mind.

Each year one million houses may be bought and sold.

Apart from exceptional cases the procedure is always the same.

The vendor and the purchaser agree a price but the purchaser

cannot enter into a contract unless and until a mortgagee,

typically a building society, offers to advance the whole or part of

the purchase price. A mortgage of 80 per cent, or more of the

purchase price is not unusual. Thus, if the vendor and the

purchaser agree a price of £50,000 and the purchaser can find

£10,000, the purchaser then applies to a building society for a loan

of £40,000. The purchaser pays the building society a valuation

fee and the building society instructs a valuer who is paid by the

building society. If the valuer reports to the building society that

the house is good security for £40,000, the building society offers

to advance £40,000 and the purchaser contracts to purchase the

house for £50,000. The purchaser, who is offered £40,000 on the

security of the house, rightly assumes that a qualified valuer has

valued the house at not less than £40,000.

At the date when the purchaser pays the valuation fee, the

date when the valuation is made and at the date when the

purchaser is offered an advance, the sale may never take, place.

The amount offered by way of advance may not be enough, the

purchaser may change his mind, or the vendor may increase his

price and sell elsewhere. For many reasons a sale may go off,

and in that case, the purchaser has paid his valuation fee without

result and must pay a second valuation fee when he finds another

house and goes through the same procedure. The building society

which is anxious to attract borrowers and the purchaser who has

no money to waste on valuation fees, do not encourage or pay for

detailed surveys. Moreover, the vendor may not be willing to

suffer the inconvenience of a detailed survey on behalf of a

purchaser who has not contracted to purchase and may exploit

minor items of disrepair disclosed by a detailed survey in order to

obtain a reduction in the price.

The valuer is and, in my opinion, must be a professional

person, typically a chartered surveyor in general practice, who, by

training and experience and exercising reasonable skill and care,

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will recognise defects and be able to assess value. The valuer will

value the house after taking into consideration major defects which

are, or ought to be obvious to him, in the course of a visual

inspection of so much of the exterior and interior of the house as

may be accessible to him without undue difficulty. This appears

to be the position as agreed between experts in the decided cases

which have been discussed in the course of the present appeal. In

Roberts v. J. Hampson & Co. [1988] 2 E.G.L.R. 181, Ian Kennedy

J., after hearing expert evidence, came to the following

conclusions concerning a valuation commissioned by the Halifax

Building Society. I have no doubt the case is of general

application. The judge, referring to the Halifax Building Society

valuation, as described in the literature and as described by expert

evidence, said, at p. 185:

"It is a valuation and not a survey, but any valuation is

necessarily governed by condition. The inspection is, of

necessity, a limited one. Both the expert surveyors who

gave evidence before me agreed that with a house of this

size they would allow about half-an-hour for their inspection

on site. That time does not admit of moving furniture, or

of lifting carpets, especially where they are nailed down. In

my judgment, it must be accepted that where a surveyor

undertakes a scheme valuation it is understood that he is

making a limited appraisal only. It is, however, an appraisal

by a skilled professional man. It is inherent in any standard

fee work that some cases will colloquially be 'winners' and

others 'losers,' from the professional man's point of view.

The fact that in an individual case he may need to spend

two or three times as long as he would have expected, or

as the fee structure would have contemplated, is something

which he must accept. His duty to take reasonable care in

providing a valuation remains the root of his obligation. In

an extreme case ... a surveyor might refuse to value on

the agreed fee basis, though any surveyor who too often

refused to take the rough with the smooth would not

improve his reputation. If, in a particular case, the proper

valuation of a £19,000 house needs two hours' work, that is

what the surveyor must devote to it. The second aspect of

the problem concerns moving furniture and lifting carpets.

Here again, as it seems to me, the position that the law

adopts is simple. If a surveyor misses a defect because its

signs are hidden, that is a risk that his client must accept.

But if there is specific ground for suspicion and the trail of

suspicion leads behind furniture or under carpets, the

surveyor must take reasonable steps to follow the trail until

he has all the information which it is reasonable for him to

have before making his valuation."

In his reference to "a scheme valuation" the judge was alluding to

the practice of charging scale fees to purchasers and paying scale

fees to valuers.

The valuer will not be liable merely because his valuation

may prove to be in excess of the amount which the purchaser

might realise on a sale of the house. The valuer will only be

liable if other qualified valuers, who cannot be expected to be

harsh on their fellow professionals, consider that, taking into

consideration the nature of the work for which the valuer is paid

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and the object of that work, nevertheless he has been guilty of an

error which an average valuer, in the same circumstances, would

not have made and as a result of that error, the house was worth

materially less than the amount of the valuation upon which the

mortgagee and the purchaser both relied. The valuer accepts the

liability to the building society which can insist on the valuer

accepting liability. The building society seeks to exclude the

liability of the valuer to the purchaser who is not in a position to

insist on anything. The duty of care which the valuer owes to the

building society is exactly the same as the duty of care which he

owes to the purchaser. The valuer is more willing to accept the

liability to the building society than to the purchaser because it is

the purchaser who is vulnerable. If the valuation is worthless the

building society can still insist that the purchaser shall repay the

advance and interest. So, in practice, the damages which the

valuer may be called upon to pay to the building society and the

chances of the valuer being expected to pay, are less than the

corresponding liability to the purchaser. But this does not make it

more reasonable for the valuer to be able to rely on an exclusion

clause which is an example of a standard form exemption clause

operating in favour of the supplier of services and against the

individual consumer.

Mr. Hague, who has great experience in this field, urged on

behalf of the valuers in this appeal and on behalf of valuers

generally, that it is fair and reasonable for a valuer to rely on an

exclusion clause, particularly an exclusion clause which is set forth

so plainly in building society literature. The principal reasons

urged by Mr. Hague are as follows:

(1) The exclusion clause is clear and understandable

and reiterated and is forcefully drawn to the attention of

the purchaser.

The purchaser's solicitors should reinforce the

warning and should urge the purchaser to appreciate that he

cannot rely on a mortgage valuation and should obtain and

pay for his own survey.

If valuers cannot disclaim liability they will be

faced by more claims from purchasers some of which will

be unmeritorious but difficult and expensive to resist.

A valuer will become more cautious, take more

time and produce more gloomy reports which will make

house transactions more difficult.

If a duty of care cannot be disclaimed the cost of

negligence insurance for valuers and therefore the cost of

valuation fees to the public will be increased.

Mr. Hague also submitted that there was no contract

between a valuer and a purchaser and that, so far as the

purchaser was concerned, the valuation was "gratuitous," and the

valuer should not be forced to accept a liability he was unwilling

to undertake. My Lords, all these submissions are, in my view,

inconsistent with the ambit and thrust of the Act of 1977. The

valuer is a professional man who offers his services for reward.

He is paid for those services. The valuer knows that 90 per cent.

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of purchasers in fact rely on a mortgage valuation and do not

commission their own survey. There is great pressure on a

purchaser to rely on the mortgage valuation. Many purchasers

cannot afford a second valuation. If a purchaser obtains a second

valuation the sale may go off and then both valuation fees will be

wasted. Moreover, he knows that mortgagees, such as building

societies and the council, in the present case, are trustworthy and

that they appoint careful and competent valuers and he trusts the

professional man so appointed. Finally, the valuer knows full well

that failure on his part to exercise reasonable skill and care may

be disastrous to the purchaser. If, in reliance on a valuation, the

purchaser contracts to buy for £50,000 a house valued and

mortgaged for £40,000 but, in fact worth nothing and needing

thousands more to be spent on it, the purchaser stands to lose his

home and to remain in debt to the building society for up to

£40,000.

In Yianni v. Edwin Evans & Sons [1982] 1 Q.B. 438, Mr. and

Mrs. Yianni decided that if the Halifax Building Society would

agree to advance £12,000, they would buy a house for £15,000,

otherwise they would let the house go as they had no money apart

from £3,000. The house was valued by a valuer on behalf of the

Halifax at £12,000, an advance of this amount was offered and

accepted and the house was bought and mortgaged. Mr. and Mrs.

Yianni then discovered that the house needed repairs amounting to

£18,000. Park J., at p. 445, found on evidence largely derived

from the chief surveyor to the Abbey National, that the proportion

of purchasers who have an independent survey is less than 15 per

cent.; that purchasers rely on the building society valuation;

purchasers trust the building societies; each purchaser knows that

he has paid a fee for someone on behalf of the society to look at

the house.

"the intending mortgagor feels that the building society,

whom he trusts, must employ for the valuation and survey

competent qualified surveyors; and, if the building society

acts upon its surveyor's report, then there can be no good

reason why he should not also himself act upon it. The

consequence is that if, after inspection by the building

society's surveyor, an offer to make an advance is made,

the applicant assumes that the building society has satisfied

itself that the house is valuable enough to provide suitable

security for a loan and decides to proceed by accepting the

society's offer. So, if Mr. Yianni had had an independent

survey, he would have been exceptional in the experience of

the building societies and of those employed to carry out

surveys and valuations for them."

Park J., following the Hedley Byrne case [1964] AC 465,

concluded at pp. 454-455, that a duty of care by the valuers to

Mr. and Mrs. Yianni would arise if the valuers knew that their

valuation:

"in so far as it stated that the property provided adequate

security for an advance of £12,000, would be passed on to

the plaintiffs, who, notwithstanding the building society's

literature and the service of the notice under section 30 of

the Building Societies Act 1962, in the defendants'

reasonable contemplation would place reliance upon its

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correctness in making their decision to buy the house and

mortgage it to the building society. . . . These defendants

are surveyors and valuers. It is their profession and

occupation to survey and make valuations of houses and

other property. They make reports about the condition of

property they have surveyed. Their duty is not merely to

use care in their reports, they have also a duty to use care

in their work which results in their reports ....

Accordingly, the building society's offer of £12,000, when

passed on to the plaintiffs, confirmed to them that 1,

Seymour Road was sufficiently valuable to cause the building

society to advance on its security 80 per cent, of the

purchase price. Since that was also the building society's

view the plaintiffs' belief was not unreasonable."

In Yianni's case [1982] Q.B. 438, there was no exclusion of

liability on behalf of the valuer. The evidence and the findings of

Park J., which I have set out, support the view that it is unfair

and unreasonable for a valuer to rely on an exclusion clause

directed against a purchaser in the circumstances of the present

appeals.

Mr. Hague referred to a new Abbey National proposal

resulting from a consideration of Yianni's case. The purchaser is

offered the choice between a valuation without liability on the

valuer and a report which, as Mr. Hague agreed, did not involve

any more work for the valuer but accepted that the valuer was

under a duty to exercise reasonable skill and care. The fee

charged for the report as compared with the fee charged for the

valuation represents an increase of £100 for a house worth

£20,000, and £150 for a house worth £100,000, and £200 for a

house worth £200,000. On a million houses, this would represent

increases of income to be divided between valuers, insurers and

building societies, of about £150m. It is hardly surprising that few

purchasers have chosen the report instead of the valuation. Any

increase in fees, alleged to be justified by the decision of this

House in these appeals, will no doubt be monitored by the

appropriate authorities.

It is open to Parliament to provide that members of ail

professions or members of one profession providing services in the

normal course of the exercise of their profession for reward shall

be entitled to exclude or limit their liability for failure to

exercise reasonable skill and care. In the absence of any such

provision valuers are not, in my opinion, entitled to rely on a

general exclusion of the common law duty of care owed to

purchasers of houses by valuers to exercise reasonable skill and

care in valuing houses for mortgage purposes.

In the Green Paper "Conveyancing by Authorised

Practitioners" see Cmnd. 572, the Government propose to allow

building societies, banks and other authorised practitioners to

provide conveyancing services to the public by employed

professional lawyers. The Green Paper includes the following

relevant passages:

"3.10 There will inevitably be claims of financial loss

arising out of the provision of conveyancing services. A bad

mistake can result in a purchaser acquiring a property which

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is worth considerably less than he paid for it - because, for

example, the conveyancer overlooked a restriction on use or

the planning of a new motorway. The practitioner will be

required to have adequate professional indemnity insurance

or other appropriate arrangements to meet such claims."

Annex paragraph 12:

"An authorised practitioner must not contractually limit its

liability for damage suffered by the client as a result of

negligence on its part."

The Government thus recognises the need to preserve the

duty of a professional lawyer to exercise reasonable skill and care

so that the purchaser of a house may not be disastrously affected

by a defect of title or an encumbrance. In the same way, it

seems to me there is need to preserve the duty of a professional

valuer to exercise reasonable skill and care so that a purchaser of

a house may not be disastrously affected by a defect in the

structure of the house.

The public are exhorted to purchase their homes and cannot

find houses to rent. A typical London suburban house, constructed

in the 1930s for less than £1,000 is now bought for more than

£150,000 with money largely borrowed at high rates of interest

and repayable over a period of a quarter of a century. In these

circumstances it is not fair and reasonable for building societies

and valuers to agree together to impose on purchasers the risk of

loss arising as a result of incompetence or carelessness on the part

of valuers. I agree with the speech of my noble and learned

friend, Lord Griffiths, and with his warning that different

considerations may apply where homes are not concerned.

In the instant case of Harris v. Wyre Forest District

Council, I would allow the appeal of Mrs. and Mrs. Harris, restore

the order of the trial judge and order the costs of Mr. and Mrs.

Harris to be borne by the council. In the case of Smith v. Eric S.

Bush, I would dismiss the appeal with costs.

LORD GRIFFITHS

My Lords,

These appeals were heard together because they both raise

the same two problems. The first is whether the law places a

duty of care upon a professional valuer of real property which he

owes to the purchaser of the property although he has been

instructed to value the property by a prospective mortgagee and

not by the purchaser. The second problem concerns the

construction and application of the Unfair Contract Terms Act

1977.

Smith v. Eric S. Bush (a firm)

I shall deal with this appeal first because its facts are

similar to hundreds of thousands of house purchases that take

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place every year. It concerns the purchase of a house at the

lower end of the market with the assistance of finance provided

by a building society. The purchaser applies for finance to the

building society. The building society is required by statute to

obtain a valuation of the property before it advances any money

(see section 13 of the Building Societies Act 1986). This

requirement is to protect the depositors who entrust their savings

to the building society. The building society therefore requires the

purchaser to pay a valuation fee to cover or, at least, to defray

the cost of obtaining a valuation. This is a modest sum and

certainly much less than the cost of a full structural survey, in

the present case it was £36.89. If the purchaser pays the

valuation fee, the building society instructs a valuer who inspects

the property and prepares a report for the building society giving

his valuation of the property. The inspection carried out is a

visual one designed to reveal any obvious defects in the property

which must be taken into account when comparing the value of

the property with other similar properties in the neighbourhood. If

the valuation shows that the property provides adequate security

for the loan, the building society will lend the. money necessary

for the purchaser to go ahead, but prior to its repeal by the

Building Societies Act 1986 would send to the purchaser a

statutory notice pursuant to section 30 of the Building Societies

Act 1962 to make clear that by making the loan it did not

warrant that the purchase price of the property was reasonable.

The building society may either instruct an independent firm

of surveyors to make the valuation or use one of its own

employees. In the present case, the building society instructed the

appellants, an independent firm of surveyors. I will consider

whether it makes any difference if an "in-house" valuer is

instructed when I come to deal with the other appeal. The

building society may or may not send a copy of the valuer's report

to the purchaser. In this case the building society was the Abbey

National and they did send a copy of the report to the purchaser,

Mrs. Smith. I understand that this is now common practice among

building societies. The report, however, contained in red lettering

and in the clearest terms a disclaimer of liability for the accuracy

of the report covering both the building society and the valuer.

Again, I understand that it is common practice for other building

societies to incorporate such a disclaimer of liability.

Mrs. Smith did not obtain a structural survey of the

property. She relied upon the valuer's report to reveal any

obvious serious defects in the house she was purchasing. It is

common ground that she was behaving in the same way as the

vast majority of purchasers of modest houses. They do not go to

the expense of obtaining their own structural survey, they rely on

the valuation to reveal any obvious serious defects and take a

chance that there are no hidden defects that might be revealed by

a more detailed structural survey.

The valuer's report said "the property has been modernised

to a fair standard ... no essential repairs are required" and it

valued the property at £16,500. If reasonable skill and care had

been employed when the inspection took place, it would have

revealed that as a result of removing the chimney breasts in the

rooms the chimneys had been left dangerously unsupported.

Unaware of this defect and relying on the valuer's report, Mrs,

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Smith bought the house for £18,000 with the assistance of a loan

of £3,500 from the building society.

After she had been living in the house for about 18 months,

one of the chimney flues collapsed and crashed through the

bedroom ceiling and floor causing damage for which Mrs. Smith

was awarded £4,379.97 against the surveyors who had carried out

the valuation.

Mr. Hague, on behalf of the surveyors, conceded that on the

facts of this case the surveyors owed a duty of care to Mrs.

Smith unless they were protected by the disclaimer of liability.

He made this concession, he said, because the surveyors knew that

their report was going to be shown to Mrs. Smith and that Mrs.

Smith would, in all probability, rely upon it, which two factors

would create the necessary proximity to found the duty of care.

He submitted, however, that if the surveyor did not know that his

report would be shown to the purchaser, no duty of care would

arise and that the decision in Yianni v. Edwin Evans & Sons [1982]

Q.B. 438 was wrongly decided. I shall defer consideration of this

question to the second appeal for it does not arise on the facts of

the present case. Suffice it to say, for the moment, that on the

facts of the present case it is my view that the concession made

by Mr. Hague is correct.

At common law, whether the duty to exercise reasonable

care and skill is founded in contract or tort, a party is as a

general rule free, by the use of appropriate wording, to exclude

liability for negligence in discharge of the duty. The disclaimer of

liability in the present case is prominent and clearly worded and

on the authority of Hedley Byrne & Co. Ltd. v. Heller & Partners

Ltd. [1964] AC 465, in so far as the common law is concerned

effective to exclude the surveyors' liability for negligence. The

question then is whether the Unfair Contract Terms Act 1977 bites

upon such a disclaimer. In my view it does.

The Court of Appeal, however, accepted an argument based

upon the definition of negligence contained in section 1(1) of the

Act of 1977 which provides:

"For the purposes of this part of this Act, 'negligence'

means the breach - (a) of any obligation, arising from the

express or implied terms of a contract, to take reasonable

care or exercise reasonable skill in the performance of the

contract; (b) of any common law duty to take reasonable

care or exercise reasonable skill (but not any stricter duty);

(c) of the common duty of care imposed by the Occupiers'

Liability Act 1957 or the Occupiers' Liability Act (Northern

Ireland) 1957."

They held that, as the disclaimer of liability would at common law

have prevented any duty to take reasonable care arising between

the parties, the Act had no application. In my view this

construction fails to give due weight to the provisions of two

further sections of the Act. Section 11(3) provides:

"In relation to a notice (not being a notice having

contractual effect), the requirement of reasonableness under

this Act is that it should be fair and reasonable to allow

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reliance on it, having regard to all the circumstances

obtaining when the liability arose or (but for the notice)

would have arisen."

And section 13(1):

"To the extent that this part of this Act prevents the

exclusion or restriction of any liability it also prevents - (a)

making the liability or its enforcement subject to restrictive

or onerous conditions; (b) excluding or restricting any right

or remedy in respect of the liability, or subjecting a person

to any prejudice in consequence of his purusing any such

right or remedy; (c) excluding or restricting rules of

evidence or procedure; and (to that extent) sections 2 and 5

to 7 also prevent excluding or restricting liability by

reference to terms and notices which exclude or restrict the

relevant obligation or duty."

I read these provisions as introducing a "but for" test in relation

to the notice excluding liability. They indicate that the existence

of the common law duty to take reasonable care, referred to in

section 1(1)(b), is to be judged by considering whether it would

exist "but for" the notice excluding liability. The result of taking

the notice into account when assessing the existence of a duty of

care would result in removing all liability for negligent mis-

statements from the protection of the Act. It is permissible to

have regard to the second report of the Law Commission on

Exemption Clauses (Law. Com. No. 69) which is the genesis of the

Unfair Contract Terms Act 1977 as an aid to the construction of

the Act. Paragraph 127 of that report reads:

"Our recommendations in this part of the report are

intended to apply to exclusions of liability for negligence

where the liability is incurred in the course of a person's

business. We consider that they should apply even in cases

where the person seeking to rely on the exemption clause

was under no legal obligation (such as a contractual

obligation) to carry out the activities. This means that, for

example, conditions attached to a licence to enter on to

land, and disclaimers of liability made where information or

advice is given, should be subject to control . . . . "

I have no reason to think that Parliament did not intend to follow

this advice and the wording of the Act is, in my opinion, apt to

give effect to that intention. This view of the construction of the

Act is also supported by the judgment of Slade L.J. in Phillips

Products Ltd. v. Hyland (Note) [1987] 1 WLR 659, when he

rejected a similar argument in relation to the construction of a

contractual term excluding negligence.

Finally, the question is whether the exclusion of liability

contained in the disclaimer satisfies the requirement of

reasonableness provided by section 2(2) of the Act of 1977. The

meaning of reasonableness and the burden of proof are both dealt

with in section 11(3) which provides:

"In relation to a notice (not being a notice having

contractual effect), the requirement of reasonableness under

this Act is that it should be fair and reasonable to allow

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reliance on it, having regard to all the circumstances

obtaining when the liability arose or (but for the notice)

would have arisen."

It is clear, then, that the burden is upon the surveyor to establish

that in all the circumstances it is fair and reasonable that he

should be allowed to rely upon his disclaimer of liability.

I believe that it is impossible to draw up an exhaustive list

of the factors that must be taken into account when a judge is

faced with this very difficult decision. Nevertheless, the following

matters should, in my view, always be considered.

Were the parties of equal bargaining power. If the court

is dealing with a one-off situation between parties of equal

bargaining power the requirement of reasonableness would be more

easily discharged than in a case such as the present where the

disclaimer is imposed upon the purchaser who has no effective

power to object.

In the case of advice would it have been reasonably

practicable to obtain the advice from an alternative source taking

into account considerations of costs and time. In the present case

it is urged on behalf of the surveyor that it would have been easy

for the purchaser to have obtained his own report on the condition

of the house, to which the purchaser replies, that he would then

be required to pay twice for the same advice and that people

buying at the bottom end of the market, many of whom will be

young first-time buyers, are likely to be under considerable

financial pressure without the money to go paying twice for the

same service.

How difficult is the task being undertaken for which

liability is being excluded. When a very difficult or dangerous

undertaking is involved there may be a high risk of failure which

would certainly be a pointer towards the reasonableness of

excluding liability as a condition of doing the work. A valuation,

on the other hand, should present no difficulty if the work is

undertaken with reasonable skill and care. It is only defects which

are observable by a careful visual examination that have to be

taken into account and I cannot see that it places any

unreasonable burden on the valuer to require him to accept

responsibility for the fairly elementary degree of skill and care

involved in observing, following-up and reporting on such defects.

Surely it is work at the lower end of the surveyor's field of

professional expertise.

4. What are the practical consequences of the decision on

the question of reasonableness. This must involve the sums of

money potentially at stake and the ability of the parties to bear

the loss involved, which, in its turn, raises the question of

insurance. There was once a time when it was considered

improper even to mention the possible existence of insurance cover

in a lawsuit. But those days are long past. Everyone knows that

all prudent, professional men carry insurance, and the availability

and cost of insurance must be a relevant factor when considering

which of two parties should be required to bear the risk of a loss.

We are dealing in this case with a loss which will be limited to

the value of a modest house and against which it can be expected

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that the surveyor will be insured. Bearing the loss will be unlikely

to cause significant hardship if it has to be borne by the surveyor

but it is, on the other hand, quite possible that it will be a

financial catastrophe for the purchaser who may be left with a

valueless house and no money to buy another. If the law in these

circumstances denies the surveyor the right to exclude his liability,

it may result in a few more claims but I do not think so poorly of

the surveyor's profession as to believe that the floodgates will be

opened. There may be some increase in surveyors' insurance

premiums which will be passed on to the public, but I cannot think

that it will be anything approaching the figures involved in the

difference between the Abbey National's offer of a valuation

without liability and a valuation with liability discussed in the

speech of my noble and learned friend, Lord Templeman. The

result of denying a surveyor, in the circumstances of this case, the

right to exclude liability, will result in distributing the risk of his

negligence among all house purchasers through an increase in his

fees to cover insurance, rather than allowing the whole of the risk

to fall upon the one unfortunate purchaser.

I would not, however, wish it to be thought that I would

consider it unreasonable for professional men in all circumstances

to seek to exclude or limit their liability for negligence.

Sometimes breathtaking sums of money may turn on professional

advice against which it would be impossible for the adviser to

obtain adequate insurance cover and which would ruin him if he

were to be held personally liable. In these circumstances it may

indeed be reasonable to give the advice upon a basis of no liability

or possibly of liability limited to the extent of the adviser's

insurance cover.

In addition to the foregoing four factors, which will always

have to be considered, there is in this case the additional feature

that the surveyor is only employed in the first place because the

purchaser wishes to buy the house and the purchaser in fact

provides or contributes to the surveyor's fees. No one has argued

that if the purchaser had employed and paid the surveyor himself,

it would have been reasonable for the surveyor to exclude liability

for negligence, and the present situation is not far removed from

that of a direct contract between the surveyor and the purchaser.

The evaluation of the foregoing matters leads me to the clear

conclusion that it would not be fair and reasonable for the

surveyor to be permitted to exclude liability in the circumstances

of this case. I would therefore dismiss this appeal.

It must, however, be remembered that this is a decision in

respect of a dwelling house of modest value in which it is widely

recognised by surveyors that purchasers are in fact relying on their

care and skill. It will obviously be of general application in

broadly similar circumstances. But I expressly reserve my position

in respect of valuations of quite different types of property for

mortgage purposes, such as industrial property, large blocks of

flats or very expensive houses. In such cases it may well be that

the general expectation of the behaviour of the purchaser is quite

different. With very large sums of money at stake prudence would

seem to demand that the purchaser obtain his own structural

survey to guide him in his purchase and, in such circumstances

with very much larger sums of money at stake, it may be

reasonable for the surveyors valuing on behalf of those who are

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providing the finance either to exclude or limit their liability to

the purchaser.

Harris and Another v. Wyre Forest District Council and Another

The Housing (Financial Provisions) Act 1958 (as amended by

the Local Government Act 1974) gave power to local authorities to

lend money for house purchase. Section 43 of the Act of 1958

provided, inter alia, that before making the loan the local

authority had to satisfy themselves that the house was, or would

after repair, be fit for human habitation. The local authority

were also required to secure the loan by way of a mortgage on

the property and only to make the loan after they had obtained a

valuation of the property made on their behalf.

The appellants, Mr. and Mrs. Harris, two young first-time

buyers, applied to the first respondents, Wyre Forest District

Council, for a loan to enable them to purchase a small old house

in Kidderminster. The asking price of the house was £9,450. Mr.

and Mrs. Harris completed an application form to the council

seeking a loan of £8,950. The application form contained the

following paragraphs:

"To be read carefully and signed personally by all applicants

"I/we enclose herewith valuation fee & administration fee

£22.00. I/we understand that this fee is not returnable even

if the council do not eventually make an advance and that

the valuation is confidential and is intended solely for the

information of Wyre Forest District Council in determining

what advance, if any, may be made on the security and that

no responsibility whatsoever is implied or accepted by the

council for the value or condition of the property by reason

of such inspection and report. (You are advised for your

own protection to instruct your own surveyor/architect to

inspect the property). "I/we agree that the valuation report

is the property of the council and that I/we cannot require

its production."

When the council had received their application and their

cheque for £22, they instructed the second respondent, Mr. Lee, a

valuation surveyor in the council's employment, to inspect and

value the house. Mr. Lee inspected the house and prepared a

report in which he valued the property at the asking price of

£9,450 and under the head "Essential Repairs" he entered "Obtain

report for district council from M.E.B. [Midland Electricity Board]

regarding electrics and carry out any recommendations" and "Make

good mortar fillets to extension." We were told that the entry in

respect of the electrical installation is one that is standard in all

councils' reports and it would seem the only other essential repair

was a minor matter relating to mortar fillets in the extension.

No other defects of any sort were noted on the report.

This report was not shown to Mr. and Mrs. Harris, but

having received the report, the council made them an offer of a

loan of £8,505 secured by a mortgage on the property on condition

that they undertook to carry out the electrical work and the

repair of the mortar fillets in the extension as recommended by

the valuer to the satisfaction of the council. The Harrises

accepted the offer and bought the house for £9,000.

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Unfortunately, Mr. Lee had failed to report that the house

had suffered from serious settlement which required inspection by

a structural engineer. When the Harrises tried to sell the house

three years later, the prospective purchaser also applied to the

council for a loan and Mr. Lee was again sent to inspect the

house. On this occasion he reported the settlement and

recommended that a structural engineer's report should be obtained

before any loan was made. In due course, a structural engineer's

report revealed that the house was in a dangerous and unstable

condition and that the cost of repairs would be many thousands of

pounds. In fact, damages, subject to liability, were agreed at

£12,000. Obviously, had Mr. Lee reported in his first report in

the same terms as he did in his second report, the Harrises would

never have bought the house. The judge held that Mr. Lee was

negligent in the making of his first report and there is no appeal

from that finding of fact.

For the reasons that I have already given, the disclaimer of

liability must be disregarded when considering whether the council

or Mr. Lee owed any duty of care to Mr. and Mrs. Harris. Mr.

Ashworth has submitted that they did not because there was no

voluntary assumption of responsibility on their part in respect of

Mr. Lee's inspection and report. He submits that Yianni v. Edwin

Evans & Sons [1982] Q.B. 438 was wrongly decided. That case was

the first of a number of decisions, at first instance, in which

surveyors instructed by mortgagees have been held liable to

purchasers for negligent valuations. The facts were that the

plaintiffs, who wished to buy a house at a price of £15,000,

applied to a building society for a mortgage. The building society

engaged a firm of valuers to value the property for which the

plaintiffs had to pay. There was no disclaimer of liability

although the mortgage application form advised the plaintiffs to

obtain an independent survey. They did not do so because of the

cost involved. The surveyors valued the property at £15,000 and

assessed it as suitable for maximum lending. The building society

offered the plaintiffs a maximum loan of £12,000 with which they

purchased the property. There was serious damage to the house

caused by subsidence which should have been discovered by the

surveyors at the time of their inspection and it was admitted that

the surveyors had been negligent.

In that case there was no disclaimer of liability and the

valuer's report was not shown to the purchaser. Ignoring the

disclaimer of liability, the facts are virtually indistinguishable from

the present case unless it can be said that the fact that Mr. Lee

was an in-house valuer can make a difference when considering the

existence of his duty of care to the purchaser. Park J. said, at p.

454:

"... I conclude that, in this case, the duty of care would

arise if, on the evidence, I am satisfied that the defendants

knew that their valuation of 1, Seymour Road, in so far as

it stated that the property provided adequate security for an

advance of £12,000, would be passed on to the plaintiffs,

who ... in the defendants' reasonable contemplation would

place reliance upon its correctness in making their decision

to buy the house and mortgage it to the building society."

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Finding both these conditions satisfied, Park J. held the surveyors

to be liable.

Mr. Ashworth drew attention to the doubts expressed about

the correctness of this decision by Kerr L.J., in the course of his

judgment in the Court of Appeal, and submitted, on the authority

of Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd. [1964] A.C.

465 that it was essential to found liability for a negligent mis-

statement that there had been "a voluntary assumption of

responsibility" on the part of the person giving the advice. I do

not accept this submission and I do not think that voluntary

assumption of responsibility is a helpful or realistic test for

liability. It is true that reference is made in a number of the

speeches in Hedley Byrne to the assumption of responsibility as a

test of liability but it must be remembered that those speeches

were made in the context of a case in which the central issue was

whether a duty of care could arise when there had been an

express disclaimer of responsibility for the accuracy of the advice.

Obviously, if an adviser expressly assumes responsibility for his

advice, a duty of care will arise, but such is extremely unlikely in

the ordinary course of events. The House of Lords approved a

duty of care being imposed on the facts in Cann v. Willson (1888)

39 Ch.D. 39 and in Candler v. Crane, Christmas & Co. [1951] 2

K.B. 164. But if the surveyor in Cann v. Willson or the

accountant in Candler v. Crane, Christmas & Co. had actually

been asked if he was voluntarily assuming responsibility for his

advice to the mortgagee or the purchaser of the shares, I have

little doubt he would have replied, "Certainly not. My

responsibility is limited to the person who employs me." The

phrase "assumption of responsibility" can only have any real

meaning if it is understood as referring to the circumstances in

which the law will deem the maker of the statement to have

assumed responsibility to the person who acts upon the advice.

In Ministry of Housing and Local Government v. Sharp [1970]

2 Q.B. 223, both Lord Denning M.R. and Salmon L.J. rejected the

argument that a voluntary assumption of responsibility was the sole

criterion for imposing a duty of care for the negligent preparation

of a search certificate in the local land charges register.

The essential distinction between the present case and the

situation being considered in Hedley Byrne [1964] AC 465 and in

the two earlier cases, is that in those cases the advice was being

given with the intention of persuading the recipient to act upon it.

In the present case, the purpose of providing the report is to

advise the mortgagee but it is given in circumstances in which it

is highly probable that the purchaser will in fact act on its

contents, although that was not the primary purpose of the report.

I have had considerable doubts whether it is wise to increase the

scope of the duty for negligent advice beyond the person directly

intended by the giver of the advice to act upon it to those whom

he knows may do so. Certainly in the field of the law of

mortgagor and mortgagee there is authority that points in the

other direction. In Odder v. Westbourne Park Building Society

(1955) 165 E.G. 261, Harman J. held that a building society owed

no duty of care to purchasers in respect of the valuation report

for mortgage purposes prepared by the chairman of the society.

From the tenor of the short report it appears that Harman J.

regarded it as unthinkable that a mortgagee could owe a duty of

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care to the mortgagor in respect of any action taken by the

mortgagee for the purpose of appraising the value of the property.

In Curran v. Northern Ireland Co-ownership Housing Association

Ltd. (1986) 8 N.I.J.B. 1, the Court of Appeal in Northern Ireland

held that the Northern Ireland Housing Executive, which had lent

money on mortgage pursuant to powers contained in the Housing

Act (Northern Ireland) 1971, owed no duty of care to their

mortgagor in respect of the valuation of the property. The claim

against the executive had been struck out by the judge on the

ground that the pleadings disclosed no cause of action. For the

purpose of the appeal, the following facts were assumed, that (1)

the executive had instructed an independent valuer to prepare a

valuation of the property; (2) the valuation had been negligently

prepared; (3) the executive had negligently instructed an

incompetent valuer; (4) the valuer's report would not be shown to

the purchaser; (5) the purchaser knew that the executive would not

lend money without a valuation to justify the loan; (6) the

executive knew that the purchaser would assume that the valuation

showed that the property was worth at least as much as the figure

which the executive was willing to advance on mortgage, and that

the purchaser would rely on the valuation to that extent. Gibson

L.J. based his judgment on the absence of any acceptance of

responsibility on the part of the executive. In the course of his

judgment he said, at p. 14:

"Responsibility can only attach if the defendant's act

implied a voluntary undertaking to assume responsibility.

Were it otherwise a person who offered to an expert any

object for sale, making it clear that he was unaware of its

value and that he was relying on the other to pay a proper

price, could sue the other should he later discover that he

had not received the full value even though the purchaser

had made no representation that he was doing any more

than look after his own interests. Nor can any class of

persons who to the knowledge of another habitually fail to

take precautions for their own protection in a business

relationship cast upon another without his consent an

obligation to exercise care for their protection in such

transaction so as to protect them from their own lack of

ordinary business prudence. Generally, a mortgage contract

in itself imports no obligation on the part of a mortgagee

to use care in protecting the interests of a mortgagor. . . .

Gibson L.J. said, at p. 21:

"But in so far as the facts of this case are clearly within

the area of contemplation in the Hedley Byrne case, I have

no doubt that the condition precedent to liability is that the

executive should have indicated to the plaintiffs, or so acted

as to mislead them into believing, that the executive was

accepting responsibility for its opinion."

Commenting on Yianni v. Edwin Evans & Sons [1982] Q.B.

438, Kerr L.J. in his judgment in the Court of Appeal in the

present case [1988] Q.B. 835, 851-852, said:

"But its inherent jurisprudential weakness in any ordinary

situation is clear. Suppose that A approaches B with a

request for a loan to be secured on a property or chattel -

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such as a painting - which A is proposing to acquire. A

knows that for the purpose of considering whether or not to

make the requested loan, and of its amount, B is bound to

make some assessment of the value of the security which is

offered, possibly on the basis of some expert inspection and

formal valuation. Then assume that B knows that in all

probability A will not have had any independent advice or

valuation and is also unlikely to commission anything of the

kind as a check on B's valuation. B also knows, of course,

that any figure which he may then put forward to A by way

of a proposed loan on the basis of the offered security will

necessarily be seen to reflect B's estimate of the minimum

value of the offered security. Suppose that A then accepts

B's offer and acquires the property or chattel with the

assistance of B's loan and in reliance - at least in part - on

B's willingness to advance the amount of the loan as an

indication of the value of the property or chattel. Given

those facts and no more, I do not think that B can properly

be regarded as having assumed, or as being subjected to,

any duty of care towards A in his valuation of the security.

Even in the absence of any disclaimer of responsibility I do

not think that the principles stated in Hedley Byrne & Co.

Ltd. v. Heller & Partners Ltd. [1964] AC 465 support the

contrary conclusion. B has not been asked for advice or

information but merely for a loan. His valuation was

carried out for his own commercial purposes. If it was

done carelessly, with the result that the valuation and loan

were excessive, I do not think that A can have any ground

for complaint. And if B made a small service charge for

investigating A's request for a loan, I doubt whether the

position would be different; certainly not if he were also to

add a disclaimer of responsibility and a warning that A

should carry out his own valuation."

Kerr L.J., however, added:

"It may be, but I agree that we should not decide this

general question on the present appeal, that the particular

circumstances of purchasers of houses with the assistance of

loans from building societies or local authorities are capable

of leading to a different analysis and conclusion."

I have come to the conclusion that Yianni [1982] Q.B. 438

was correctly decided. I have already given my view that the

voluntary assumption of responsibility is unlikely to be a helpful or

realistic test in most cases. I therefore return to the question in

what circumstances should the law deem those who give advice to

have assumed responsibility to the person who acts upon the advice

or, in other words, in what circumstances should a duty of care be

owed by the adviser to those who act upon his advice? I would

answer - only if it is foreseeable that if the advice is negligent

the recipient is likely to suffer damage, that there is a

sufficiently proximate relationship between the parties and that it

is just and reasonable to impose the liability. In the case of a

surveyor valuing a small house for a building society or local

authority, the application of these three criteria leads to the

conclusion that he owes a duty of care to the purchaser. If the

valuation is negligent and is relied upon damage in the form of

economic loss to the purchaser is obviously foreseeable. The

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necessary proximity arises from the surveyor's knowledge that the

overwhelming probability is that the purchaser will rely upon his

valuation, the evidence was that surveyors knew that approximately

90 per cent. of purchasers did so, and the fact that the surveyor

only obtains the work because the purchaser is willing to pay his

fee. It is just and reasonable that the duty should be imposed for

the advice is given in a professional as opposed to a social context

and liability for breach of the duty will be limited both as to its

extent and amount. The extent of the liability is limited to the

purchaser of the house - I would not extend it to subsequent

purchasers. The amount of the liability cannot be very great

because it relates to a modest house. There is no question here

of creating a liability of indeterminate amount to an indeterminate

class. I would certainly wish to stress that in cases where the

advice has not been given for the specific purpose of the recipient

acting upon it, it should only be in cases when the adviser knows

that there is a high degree of probability that some other

identifiable person will act upon the advice that a duty of care

should be imposed. It would impose an intolerable burden upon

those who give advice in a professional or commercial context if

they were to owe a duty not only to those to whom they give the

advice but to any other person who might choose to act upon it.

I accept that the mere fact of a contract between

mortgagor and mortgagee will not of itself in all cases be

sufficent to found a duty of care. But I do not accept the view

of the Court of Appeal in Curran v. Northern Ireland Co-ownership

Housing Association Ltd. (1986) 8 N.I.J.B. 1 that a mortgagee who

accepts a fee to obtain a valuation of a small house owes no duty

of care to the mortgagor in the selection of the valuer to whom

he entrusts the work. In my opinion, the mortgagee in such a

case, knowing that the mortgagor will rely upon the valuation,

owes a duty to the mortgagor to take reasonable care to employ a

reasonably competent valuer. Provided he does this the mortgagee

will not be held liable for the negligence of the independent valuer

who acts as an independent contractor.

I have already pointed out that the only real distinction

between the present case and the case of Yianni [1982] Q.B. 438,

is that the valuation was carried out by an in-house valuer. In my

opinion this can make no difference. The valuer is discharging the

duties of a professional man whether he is employed by the

mortgagee or acting on his own account or is employed by 'a firm

of independent surveyors. The essence of the case against him is

that he as a professional man realised that the purchaser was

relying upon him to exercise proper skill and judgment in his

profession and that it was reasonable and fair that the purchaser

should do so. Mr. Lee was in breach of his duty of care to the

Harrises and the local authority, as his employers, are vicariously

liable for that negligence.

For reasons that are essentially the same as those I

considered in the other appeal, I would hold that it is not

reasonable to allow the local authority or Mr. Lee to rely upon

the exclusion of liability. Accordingly, I would allow this appeal.

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LORD JAUNCEY OF TULLICHETTLE

My Lords,

These two appeals raise the important issue of the extent to

which a valuer instructed by a mortgagee owes a duty of care to

a potential mortgagor whom he knows will be shown in some shape

or form the results of his valuation prior to purchasing the

property in question.

Smith v. Eric S. Bush (a firm)

(I) Mrs. Smith applied to the Abbey National Building Society

for a mortgage to enable her to purchase a house. The building

society in pursuance of its statutory duty under section 25 of the

Building Societies Act 1962 (now section 13 of the Building

Societies Act 1986) instructed the appellants, a firm of surveyors

and valuers to prepare a written report as to the value of the

house. Mrs. Smith paid to the building society a fee in respect of

this report. Mrs. Smith's application to the building society

contained a disclaimer of liability by them on behalf of the

appellants, which disclaimer she acknowledged. Thereafter the

building society sent to Mrs. Smith a copy of the report and

informed her that her application had been accepted. Both the

copy report and the letter drew attention to the fact that the

report was not to be taken as a structural survey. The report

stated that the surveyor had made the report without any

acceptance of responsibility to Mrs. Smith and the letter advised

her to obtain independent professional advice. Thereafter, without

obtaining an independent valuation, Mrs. Smith purchased the house

which later proved to be structurally defective to a material

extent. The surveyor, who was a member of the appellant firm,

was found to be negligent in failing to discover and report upon

the defect. He was at all material times aware that his report

would be shown to Mrs. Smith, that she would be likely to place

reliance upon it in deciding whether to buy the house and that his

fee derived from a payment by her to the building society.

Three questions arise, namely:-

Whether in the absence of the disclaimers of liability the

appellants owed a duty to Mrs. Smith;

If so, whether the disclaimers fell within the ambit of the

Unfair Contract Terms Act 1977; and

If they did, whether they satisfied the requirements of

reasonableness.

Since Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd.

[1964] AC 465, it has been beyond doubt that in certain

circumstances A may be liable to B in tort in respect of a

negligent statement causing economic loss to B. In considering

whether such circumstances exist in the present case I propose,

before looking at Hedley Byrne & Co. Ltd. v. Heller & Partners

Ltd. to look at two earlier cases. In Cann v. Willson (1888) 39

Ch. D. 39 an intending mortgagor, at the request of the solicitor

of an intending mortgagee, applied to a firm of valuers for a

valuation of the property in question. The valuers sent the

valuation, which subsequently turned out to be wholly inept, to the

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mortgagee's solicitors knowing that it was required for the purpose

of an advance. When the mortgagor defaulted the property was

found to be worth far less than the valuation whereby the

mortgagee suffered loss. In an action by the mortgagees against

the valuer Chitty J. said, at p. 42:-

"In this case the document called a valuation was

sent by the defendants direct to the agents of the

plaintiff for the purpose of inducing the plaintiff and

his co-trustee to lay out the trust money on

mortgage. It seems to me that the defendants

knowingly placed themselves in that position, and in

point of law incurred a duty towards him to use

reasonable care in the preparation of the document

called a valuation."

In Candler v. Crane, Christmas & Co. [1951] 2 K.B. 164

accountants were in the course of preparing the accounts of a

company. They were instructed to press on and complete them so

that they might be shown to the plaintiff who, they were

informed, was a potential investor. A clerk of the accountants

prepared the accounts and at the request of the company discussed

these with the plaintiff who, relying thereon, invested money in

the company. In the event the accounts gave a wholly misleading

picture of the state of the company and the plaintiff sustained

loss. In a dissenting judgment which was subsequently approved in

Medley Byrne & Co. Ltd v. Heller & Partners Ltd. [1964] A.C.

465, Denning L.J., after suggesting that professional persons such

as accountants, surveyors and valuers, might in certain

circumstances owe a duty apart from contract to use care in their

reports and in the work from which they resulted said, at pp. 180-

181:

"Secondly, to whom do these professional people owe

this duty? I will take accountants, but the same

reasoning applies to the others. They owe the duty,

of course, to their employer or client; and also I

think to any third person to whom they themselves

show the accounts, or to whom they know their

employer is going to show the accounts, so as to

induce him to invest money or take some other action

on them. But I do not think the duty can be

extended still further so as to include strangers of

whom they have heard nothing and to whom their

employer without their knowledge may choose to show

their accounts. Once the accountants have handed

their accounts to their employer they are not, as a

rule, responsible for what he does with them without

their knowledge or consent. . . The test of proximity

in these cases is: did the accountants know that the

accounts were required for submission to the plaintiff

and use by him? That appears from the case of

Langridge v. Levy [(1837) 2 M. & W. 519] as extended

by Cleasby, B. in George v. Skivington; [(1869) L.R. 5

Ex. 1, 5] and from the decision of that good judge,

Chitty, J., in Cann v. Willson, [(1888) 39 Ch. D. 39]

which is directly in point."

Denning L. J. said, at p. 183:

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"It will be noticed that I have confined the duty to

cases where the accountant prepares his accounts and

makes his report for the guidance of the very person

in the very transaction in question. That is sufficient

for the decision of this case. I can well understand

that it would be going too far to make an accountant

liable to any person in the land who chooses to rely

on the accounts in matters of business, for that would

expose him to 'liability in an indeterminate amount

for an indeterminate time to an indeterminate class':

see Ultramares Corporation v. Touche [(1951) 255

N.Y. Rep. 170] per Cardozo, C.J."

In Hedley Byrne & Co. Ltd v. Heller & Partners Ltd. [1964]

A.C. 465, bankers who were asked about the financial stability of

one of their customers gave favourable references but stipulated

that these were "without responsibility." The plaintiffs on whose

behalf the information had been sought relied on the references

and thereby suffered loss. They sued the bank. Lord Reid said,

at p. 486:

"A reasonable man, knowing that he was being trusted

or that his skill and judgment were being relied on,

would, I think, have three courses open to him. He

could keep silent or decline to give the information

or advice sought: or he could give an answer with a

clear qualification that he accepted no responsibility

for it or that it was given without that reflection or

inquiry which a careful answer would require: or he

could simply answer without any such qualification.

If he chooses to adopt the last course he must, I

think, be held to have accepted some responsibility

for his answer being given carefully, or to have

accepted a relationship with the inquirer which

requires him to exercise such care as the

circumstances require."

Lord Reid said, at p. 487 with reference to Candler v.

Crane, Christmas & Co [1951] 2 K.B. 164: "This seems to me to

be a typical case of agreeing to assume responsibility." Lord

Morris of Borth-y-Gest said, at pp. 494-495:

"My Lords, it seems to me that if A assumes a

responsibility to B to tender him deliberate advice, there

could be a liability if the advice is negligently given. I say

'could be' because the ordinary courtesies and exchanges of

life would become impossible if it were sought to attach

legal obligation to every kindly and friendly act .... Quite

apart, however, from employment or contract there may be

circumstances in which a duty to exercise care will arise if

a service is voluntarily undertaken."

He further stated, at p. 497:

"Leaving aside cases where there is some contractual or

fudiciary relationship, there may be many situations in which

one person voluntarily or gratuitously undertakes to do

something for another person and becomes under a duty to

exercise reasonable care. I have given illustrations. But

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apart from cases where there is some direct dealing there

may be cases where one person issues a document which

should be the result of an exercise of the skill and judgment

required by him in his calling and where he knows and

intends that its accuracy will be relied upon by another."

He further stated at pp. 502-503:

"My Lords, I consider that it follows and that it should now

be regarded as settled that if someone possessed of a

special skill undertakes, quite irrespective of contract, to

apply that skill for the assistance of another person who

relies upon such skill, a duty of care will arise. The fact

that the service is to be given by means of or by the

instrumentality of words can make no difference.

Furthermore, if in a sphere in which a person is so placed

that others could reasonably rely upon his judgment or his

skill or upon his ability to make careful inquiry, a person

takes it upon himself to give information or advice to, or

allows his information or advice to be passed on to, another

person who, as he knows or should know, will place reliance

upon it, then a duty of care will arise."

Lord Devlin, after posing the question, at p. 525 "is the

relationship between the parties in this case such that it can be

brought within a category giving rise to a special duty?" referred

to a number of cases and continued at pp. 528-529:

"I think, therefore, that there is ample authority to justify

your Lordships in saying now that the categories of special

relationships which may give rise to a duty to take care in

word as well as in deed are not limited to contractual

relationships or to relationships of fiduciary duty, but

include also relationships which in the words of Lord Shaw

in Nocton v. Lord Ashburton [(1914) A.C. 932, 972] are

'equivalent to contract,' that is, where there is an

assumption of responsibility in circumstances which, but for

the absence of consideration, there would be a contract.

Where there is an express undertaking, an express warranty

as distinct from mere representation, there can be little

difficulty. The difficulty arises in discerning those cases in

which the undertaking is to be implied. In this respect the

absence of consideration is not irrelevant. Payment for

information or advice is very good evidence that it is being

relied upon and that the informer or adviser knows that it

is. ... "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. In the

present case the appellants were not, as in Woods v. Martins

Bank Ltd [[1959] 1 Q.B. 55] the customers or potential

customers of the bank. 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."

Lord Devlin summarised his conclusions at p. 530:

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"I shall therefore content myself with the proposition that

wherever there is a relationship equivalent to contract,

there is a duty of care. Such a relationship may be either

general or particular. Examples of a general relationship

are those of solicitor and client and of banker and customer

.... Where, as in the present case, what is relied on is a

particular relationship created ad hoc, it will be necessary

to examine the particular facts to see whether there is an

express or implied undertaking of responsibility. I regard

this proposition as an application of the general conception

of proximity."

There are a number of references in the speeches in Hedley

Byrne & Co. Ltd. v. Heller & Partners Ltd. to voluntary

assumption of responsibility. Although in that case the respondent

bankers gave the financial reference without payment, I do not

understand that "voluntary" was intended to be equiparated with

"gratuitous." Rather does it refer to a situation in which the

individual concerned, albeit under no obligation in law to assume

responsibility, elected so to do. This is, I think, made clear by

Lord Devlin's reference to the responsibility voluntarily undertaken

by a solicitor to his client.

Here the building society had a statutory duty under section

25 of the Building Societies Act 1962 to satisfy itself as to the

adequacy of the security of any advance to be made and for that

purpose to obtain "a written report prepared and signed by a

competent and prudent person who is experienced in the matters

relevant to the determination of the value". In pursuance of that

duty the building society instructed the appellants who, by

accepting these instructions, not only entered into contractual

relations with the building society but also came under a duty in

tort to it to exercise reasonable care in carrying out their survey

and preparing their report. To that extent they were in no

different position to that of any other professional person who has

accepted instructions to act on behalf of a client. However there

were certain other factors present which must be taken into

account. In the first place, the appellants were aware that their

report would be made available to Mrs. Smith. In the second

place they were aware that she would probably rely upon the

contents of the report in deciding whether or not to proceed with

the purchase of the house and that she would be unlikely to obtain

an independent valuation. In the third place they knew that she

had at the time of the mortgage application paid to the building

society an inspection fee which would be used to defray their fee.

In these circumstances would the appellants in the absence of

disclaimers of responsibility have owed a duty of care to Mrs.

Smith?

In each of the three cases to which I have referred there

was direct contact between the negligent provider of information

on the one hand and the plaintiff or his agent on the other. In

Cann v. Willson (1888) 39 Ch. D. 39, the sole purpose of the

valuation was to enable the intending mortgagor to obtain a

mortgage over the property value. In Candler v. Crane, Chrismas

& Co. [1951] 2 K.B. 164, although the accounts were prepared for

the benefit of the company, the discussion between the

accountants' clerk and the plaintiff was for the sole purpose of

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enabling the latter to decide whether or not to invest in the

company. Chitty J. and Denning L.J. referred to the valuation

being sent and the accounts being shown and discussed for the

purpose of inducing the plaintiff to do something. In Hedley Byrne

& Co. Ltd. v. Heller & Partners Ltd. [1964] AC 465, the

information was provided to satisfy the inquiry made on behalf of

the plaintiff. In the present case there was no direct contact

between the appellants and Mrs. Smith and their sole purpose in

preparing their report was to enable the building society to fulfil

its statutory obligation. There are thus points of important

distinction between the facts of this case and those of the other

three. However, that does not necessarily mean that a different

result must follow. The question must always be whether the

particular facts disclose that there is a sufficiently proximate

relationship between the provider of information and the person

who has acted on that information to his detriment, such that the

former owes a duty of care to the latter.

It is tempting to say that in this case the relationship

between Mrs. Smith and the appellants was, in the words of Lord

Shaw of Dunfermline quoted by Lord Devlin in Hedley Byrne & Co.

Ltd. v. Heller & Partners Ltd., "equivalent to contract" inasmuch

as she paid for the appellants' report. However, I do not think

that Lord Devlin, when he used those words, had in mind the sort

of tripartite situation which obtained here, but rather was he

considering a situation where the provider and receiver of

information were in contact with one another either directly or

through their agents, and where, but for the lack of payment, a

contract would have existed between them. In the present case a

contract existed between the building society and the appellants

who carried out their inspection and produced their report in

pursuance of that contract. There was accordingly no room for a

contract between Mrs. Smith and the appellants. I prefer to

approach the matter by asking whether the facts disclose that the

appellants in inspecting and reporting must, but for the

disclaimers, by reason of the proximate relationship between them,

be deemed to have assumed responsibility towards Mrs. Smith as

well as to the building society who instructed them.

There can be only an affirmative answer to this question.

The four critical facts are that the appellants knew from the

outset:

That the report would be shown to Mrs. Smith;

That Mrs. Smith would probably rely on the valuation

contained therein in deciding whether to buy the house

without obtaining an independent valuation;

That if, in these circumstances, the valuation was, having

regard to the actual condition of the house, excessive Mrs.

Smith would be likely to suffer loss; and

(4) That she had paid to the building society a sum to

defray the appellants' fee.

In the light of this knowledge the appellants could have

declined to act for the building society, but they chose to proceed.

In these circumstances they must be taken not only to have

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assumed contractual obligations towards the building society but

delictual obligations towards Mrs. Smith, whereby they became

under a duty towards her to carry out their work with reasonable

care and skill. It is critical to this conclusion that the appellants

knew that Mrs. Smith would be likely to rely on the valuation

without obtaining independent advice. In both Candler v. Crane,

Christmas & Co. [1951] 2 K.B. 164 and Hedley Byrne & Co Ltd.

v. Heller & Partners Ltd. [1964] AC 465 the provider of the

information was the obvious and most easily available, if not the

only available, source of that information. It would not be

difficult therefore to conclude that the person who sought such

information was likely to rely upon it. In the case of an intending

mortgagor the position is very different since, financial

considerations apart, there is likely to be available to him a wide

choice of sources of information, to wit, independent valuers to

whom he can resort, in addition to the valuer acting for the

mortgagee. I would not therefore conclude that the mere fact

that a mortgagee's valuer knows that his valuation will be shown

to an intending mortgagor of itself imposes upon him a duty of

care to the mortgagor. Knowledge, actual or implied, of the

mortgagor's likely reliance upon the valuation must be brought

home to him. Such knowledge may be fairly readily implied in

relation to a potential mortgagor seeking to enter the lower end

of the housing market but non constat that such ready implication

would arise in the case of a purchase of an expensive property

whether residential or commercial. Mr. Hague for the appellants

conceded that if there had been no disclaimer they must fail. For

the reasons which I have just given I consider that this concession

was rightly made.

I would only add three further matters in relation to this

part of the case. In the first place the duty of care owed by the

appellants to Mrs. Smith resulted from the proximate relationship

between them arising in the circumstances hereinbefore described.

Such duty of care was accordingly limited to Mrs. Smith and would

not extend to "strangers" (to use the words of Denning L.J. in

Candler v. Crane Christmas & Co. [1951] 2 K.B. 164, 180) who

might subsequently derive a real interest in the house from her.

In the second place the fact that A is prepared to lend money to

B on the security of property owned by or to be acquired by him

cannot per se impose upon A any duty of care to B. Much more

is required. Were it otherwise a loan by A to B on the security

of property, real or personal, would ipso facto amount to a

warranty by A that the property was worth at least the sum lent.

In the third place the sum sought by Mrs. Smith as a mortgage

was relatively small and represented only a small proportion of the

purchase price. The house with all its defects was worth

substantially more than that sum, and had the report merely stated

that the house was adequate security for that sum, Mrs. Smith

would have had no complaint. However, the report contained a

"mortgage valuation" of the house, which valuation wholly failed to

reflect the structural defect. It is that valuation of which Mrs.

Smith is entitled to complain.

(II) The next question is whether the disclaimers by and on

behalf of the appellants fall within the ambit of the Unfair

Contracts Act 1977. In Hedley Byrne & Co. Ltd. v. Heller &

Partners Ltd. [1964] AC 465, it was held that the disclaimer of

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responsibility made by the defendant bankers when giving the

reference negatived any assumption by them of a duty of care

towards the plaintiff. If the circumstances of this case had arisen

before 1977 there can be no doubt that the disclaimers would have

been effective to negative such an assumption of responsibility.

Has the Act of 1977 altered the position? The relevant statutory

provisions are sections 2(2), 11(3) and 13(1):

"2(2). In the case of other loss or damage, a person cannot

so exclude or restrict his liability for negligence except in

so far as the term or notice satisfies the requirement of

reasonableness. . . .

"11(3) In relation to a notice (not being a notice having

contractual effect), the requirement of reasonableness under

this Act is that it should be fair and reasonable to allow

reliance on it, having regard to all the circumstances

obtaining when the liability arose or (but for the notice)

would have arisen ....

"13(1) To the extent that this Part of this Act prevents the

exclusion or restriction of any liability it also prevents - (a)

making the liability or its enforcement subject to restrictive

or onerous conditions; (b) excluding or restricting any right

or remedy in respect of the liability, or subjecting a person

to any prejudice in consequence of his pursuing any such

right or remedy; (e) excluding or restricting rules of

evidence or procedure; and (to that extent) sections 2 and 5

to 7 also prevent excluding or restricting liability by

reference to terms and notices which exclude or restrict the

relevant obligation or duty."

In the other appeal, Harris v. Wyre Forest District Council

[1988] Q.B. 835, the Court of Appeal held that the Act of 1977

did not apply. Nourse L.J. at p. 848, accepted the defendant's

argument that a notice which prevented a duty of care from

coming into existence was not one upon which section 2(2) bit.

Kerr L.J., said at p.

"For these reasons I agree with the judgments of Nourse

L.J. and Caulfield J. that the effect of the Unfair Contract

Terms Act 1977 on the disclaimer of responsibility and

warning is of no relevance to the present case. One never

reaches that issue, since it arises only if the existence of a

duty of care and a breach of it have first been established."

Mr. Ashworth in the Harris appeal supported the reasoning

of the Court of Appeal and argued that the Act only applied to a

disclaimer which operated after a breach of duty had occurred.

Mr. Hague in this appeal adopted Mr. Ashworth's argument.

My Lords, with all respect to the judges of the Court of

Appeal, I think that they have overlooked the importance of

section 13(1). The words "liability for negligence" in section 2(2)

must be read together with section 13(1) which states that the

former section prevents the exclusion of liability by notices "which

exclude or restrict the relevant obligation or duty." These words

are unambiguous and are entirely appropriate to cover a disclaimer

which prevents a duty coming into existence. It follows that the

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disclaimers here given are subject to the provisions of the Act and

will therefore only be effective if they satisfy the requirement of

reasonableness.

,(II) I have had the advantage of reading in draft the speech of

my noble and learned friend Lord Griffiths, and I gratefully adopt

his reasons for concluding that the disclaimers did not satisfy the

statutory requirement of reasonableness. I cannot usefully add

anything to what he has said upon this matter.

For the foregoing reasons I would dismiss this appeal.

Harris v. Wyre Forest District Council and Another

Mr. and Mrs. Harris, two young people who were at the

time contemplating matrimony, applied to the council for a

mortgage over a house which they wished to buy. At the time,

local authorities were empowered by section 43 (as amended) of

the Housing (Financial Provisions) Act 1958 (as amended by section

37 of the Local Government Act 1974), to advance money up to a

sum not exceeding the value of the security for house purchase.

Before making an advance the local authority was required to

satisfy itself that the house was or would be made in all respects

fit for human habitation and have a valuation made.

The Harrises submitted their application form together with

a "valuation fee and administration fee" of £22. The form

contained an acknowledgment that the council accepted no

responsibility for the value or condition of the house by reason of

the inspection report. The council instructed the second

respondent, Mr. Lee, a valuer in their employment, to inspect the

house and report. Mr. Lee valued the house at the asking price of

£9,450, recommended that the maximum loan should be 90 per

cent, of the value and under the heading of "Essential Repairs"

stated "Obtain report for district council from M.E.B. [Midland

Electricity Board] regarding electrics and carry out any

recommendations. Make good mortar fillets to extension." Mr.

Lee's report was not shown to the Harrises but they were

subsequently offered, by the council, an advance of £8,505 on

condition, inter alia, that they carried out the essential repairs

above referred to. Relying on this offer and without obtaining

other advice as to value, the Harrises bought the house.

Unfortunately there were present serious structural defects in the

house which Mr. Lee had not referred to and which materially

reduced its value. As a result of the defects the Harrises

suffered loss.

The foregoing is a summary of the relevant facts and I turn

to examine in more detail those facts which determine whether or

not Mr. Lee owed a duty of care to the Harrises. He knew that

the report would not be sent to the Harrises but that they would

be told the amount of any advance and would be told of any

repairs which he considered to be essential. He also knew that

the Harrises were likely to be first-time buyers of modest means.

There is no finding by the judge that he was aware that the

Harrises were likely to rely on his valuation in buying the house

and that they were unlikely to obtain independent advice.

However, after referring to the position of a valuer acting for a

building society, Schiemann J. in [1987] 1 E.G.L.R. 231, 236 said:

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"Such a valuer has been held to be liable to the mortgagor

in the Yianni case and I see nothing on the grounds of

policy or in the subsequent case law which should prevent

me from following that decision."

In Yianni v. Edwin Evans & Sons [1982] 1 Q.B. 438, the

plaintiffs applied to a building society for a mortgage and paid a

fee for the statutory valuation. The building society instructed

the defendant surveyors to value the property and on receipt of

their valuation offered to the plaintiffs a loan of 80 per cent. of

the asking price of the house. The defendants' report was not

made available to the plaintiffs. The application form advised the

plaintiffs to obtain an independent survey and with the offer of

the loan the plaintiffs received a notice under section 30 of the

Building Societies Act 1962 indicating that an advance by the

building society did not imply that the purchase price was

reasonable. Consequent upon the offer, the plaintiffs bought the

house without obtaining an independent valuation. Some time

later, structural defects were discovered which the defendants

admitted that they should have found on their inspection. The

plaintiffs successfully sued the defendants for negligence.

However, the facts in that case differed in one material aspect

from those in the present in that there was there unchallenged

evidence from the chief surveyor of a very large building society

that no more than 15 per cent. of persons applying to a building

society for a mortgage instructed independent surveys. Park J.

concluded that the defendant surveyors, who had regularly carried

out valuations for the building society, were aware that their

figure of valuation would be passed on to the plaintiffs and were

aware that the plaintiffs would rely upon it when they decided to

accept the offer of the building society. In the absence of such a

specific finding of awareness in the present case I do not think

that it can necessarily be assumed that the experience of a local

authority valuation surveyor must be the same as that of an

independent surveyor regularly acting on behalf of a large building

society. The only other relevant piece of evidence in the extracts

from the transcript is the following question by the judge to Mr.

Lee and the answer thereto:

"Q. You did know that if the list of essential repairs was

passed on to the mortgagor he would take the view that

these were, in your eyes, the essential repairs?

"A. That is right . . . . "

My Lords, I have found this case very much more difficult

than that of Smith v. Eric S. Bush [1988] Q.B. 743. I do not find

it easy to infer from such findings as were made by Schiemann J.

and from the question and answer above quoted that Mr. Lee was

aware that the Harrises would be likely to buy on reliance on his

valuation without obtaining further advice. However, I understand

that your Lordships do not share this difficulty and in these

circumstances I do not feel disposed to dissent from the majority

view. I therefore conclude, albeit with hesitation, that Mr. Lee

would, but for the terms of the disclaimer in the application form,

have owed a duty of care to the Harrises. In that situation the

second and third question which I posed in the Smith v. Eric S.

Bush appeal would arise and would fall to be answered in the same

way as in that appeal. It therefore follows that this appeal should

be allowed.