Civ. Pleadings — Amendment of defence — Refusal of judge to allow amendment to defence — whether discretion judicially exercised — whether any legal basis for appeal to be entertained — Appeal dismissed — Cases referred to (listed at page 24 at back)

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 2/88

BEFORE: THE HON. MR. JUSTICE ROWE, P.
THE HON. MR. JUSTICE CAMPBELL, J.A.
THE HON. MR. JUSTICE WRIGHT, J.A.

BETWEEN	DR. STEVE LAUFER	2ND DEFENDANT/APPELLANT
A N D	F.S.I. FINANCIAL SERVICES U.S. INC.	3RD DEFENDANT/APPELLANT
A N D	INTERNATIONAL MARBELLA CLUB S.A.	PLAINTIFF/RESPONDENT

Emil George, Q.C. and Charles Piper for Appellants

D. Muirhead, Q.C., H. Small, Q.C. and Mrs. Angella-Hudson Phillips, Q.C. instructed by Myers, Fletcher and Gordon, Manton and Hart for the Respondent

May 16, 17, 18, 19 and November 14, 1988

WRIGHT, J.A.:

On May 19, 1988 we dismissed this appeal with costs to the respondent and promised to put our reasons for so doing in writing. This we now do.

This appeal arose out of the refusal by Harrison J, on the fiftieth day of the trial of this case, to allow an amendment to their defence sought by the appellants to enable them to pursue against the plaintiff a defence which up to then had been pleaded only by the first defendant S.S.I. (Cayman) Limited which has since ceased to be a party to the case. The application was made at that point in time because of action initiated to terminate the 1st defendant's involvement in the case, a course which the appellants perceived as prejudicial to their cause because as regards that specific defence they had, in a manner of speaking, been riding piggy-back on the 1st defendant's case. However,

if the 1st defendant were no longer a party to the action, the appellants would need to stand on their own feet. This is what was sought to be achieved by the amendment. In order to set the application in its true perspective, it will be necessary to relate the background to the proceedings which may be briefly set out as follows:

Dr. Steve Laufer, the owner of the Third Defendant/Appellant (F.S.I.) of which the First Defendant/Appellant (S.S.I.) is a wholly owned subsidiary, wished to acquire ownership of the Dragon Bay Hotel in Port Antonio with the assistance of a loan from the Plaintiff/ Respondent (I.M.C.) to be secured by a mortgage of the Dragon Bay property and guarantees by Dr. Laufer and S.S.I. To effectuate this purpose, a loan agreement was signed on 30/3/83 for US$3,200,000 plus interest and other additional amounts. The loan was in fact made to F.S.I. at the request of Dr. Laufer and S.S.I. with agreement that it be loaned to S.S.I. so as to enable S.S.I. 'to acquire and develop the property and operate the hotel and to sell units in the Condominium Project planned as part of the said development'. On the same date, there was also executed a Management Agreement between S.S.I. and I.M.C. whereby the latter undertook to manage the hotel for a period of 10 years exclusively on behalf of S.S.I. with a proviso that I.M.C. may assign or sub-contract the rights and obligations under the agreement on condition that I.M.C. would guarantee the due performance by such subsidiary of the terms of the agreement. It was provided that the principal means of re-payment of the loan would be from the sale of villas in the Condominium Project planned as part of the said development. The loan was secured by a Mortgage Debenture bearing date 30/3/83.

The venture failed. The hotel did not attract sufficient clients and the expected sale of villas did not materialize. Consequently, I.M.C. called in the loan on 16/2/85, appointed a Receiver for S.S.I. on 6/3/85 and issued a Writ claiming approximately US$5.9 million in damages against S.S.I., Dr. Laufer and F.S.I.

Very lengthy pleadings are involved in the case and up to the point where this appeal arose there had been several amendments. At the core of this appeal is paragraph 21(i) of the Amended Defence and Counter-Claim of the three defendants dated 22/4/86, who were then jointly represented by Messrs Clinton Hart and Company. This particular paragraph in its present form represents an amendment of an earlier pleading to meet the plaintiff's claim. It reads:-

> "The Defendants say that the Plaintiff as Operator and Manager of the said Hotel and as agent of the First Defendant stood in a special relationship to the First Defendant as owner of the Dragon Bay Hotel, as a result of which relationship the Plaintiff owed a duty of care to the said Defendant. The Plaintiff was in breach of the said duty."

Mr. Emil George, Q.C., Counsel for the appellants entertained no doubt as to the adequacy of this pleading to carry the claim of negligence then being pursued on behalf of the 1st defendant (S.S.I.). However, that tranquility of mind was to be rudely disturbed by an event not contemplated. The Receiver for S.S.I. and the directors of S.S.I. were divided on the wisdom of S.S.I. remaining in the action. The Receiver contended that defending the action would create a drain on the already insufficient assets of S.S.I. whereas the directors maintained that there was the possibility of an appreciation of those assets should the defendants' Counter-Claim succeed. The issue was resolved by the Receiver seeking and obtaining the leave of the Court to withdraw S.S.I. from the action unless the directors gave an indemnity for the costs of S.S.I. Harrison J. ordered that the Receiver could withdraw S.S.I. from the case unless the directors gave indemnity set at US$2.8 million by way of a bond to be given by 14/1/88. However, on appeal the amount was reduced to JA$1,000,000. The directors failed to post the requisite bond. Consequently, the Receiver had his wish and S.S.I. ceased to be a party to the action. The immediate and inevitable consequence of this eventuality was that the claim in negligence made in paragraph 21(i) (supra) did not enure for the benefit of the remaining defendants.

But from the time when the continued participation of S.S.I. seemed threatened, Mr. George sought by means of an amendment to preserve the benefit of the plea in paragraph 21(i) for the 2nd and 3rd defendants. He would have the paragraph amended to read:-

> "The Defendants say that the Plaintiff as Operator and Manager of the said Hotel and as agent of the First Defendant stood in a special relationship to the First Defendant as owner of the Dragon Bay Hotel to the Third Defendant as owner of the First Defendant and to the Second Defendant as the beneficial owner of the Third Defendant and as Guarantor of the obligation of the Third Defendant under the Loan Agreement, and as principal in all negotiations on behalf of all three (3) Defendants with the Plaintiff, as a result of which relationship the Plaintiff owed a duty of care to the said defendants. The Plaintiff was in breach of the said duty."

Now, it is patent that the relationship which gave rise to the original paragraph 21(i) arose out of contract because the plaintiff and the 1st defendant were the parties to the Management Agreement which did not by its terms include the 2nd and 3rd defendants. And so, quite predictably, the application ran into very stiff opposition at the end of which Harrison J. refused the application ruling as follows:-

> "In this application for amendment the Second and Third Defendants are alleging that the Plaintiff as operator and manager of the said hotel stood in a special relationship with the First Defendant as owner of Dragon Bay Hotel, and the Third Defendant as owner of the First Defendant and the Second Defendant as beneficial owner of the Third Defendant and as guarantor of the obligations of the Third Defendant under the Loan Agreement and as principal in all negotiations on behalf of all three Defendants, as a result of which relationship, the Plaintiff owed a duty of care to the said Defendants.
>
> Now IMC was sued for breach of contract and that suit seems to have arisen under the Management Agreement. There was a contract between the First Defendant and IMC. There is therefore a direct relationship between both parties, that is, the First Defendant and IMC.

"The Second Defendant and Third Defendant therefore are alleging in the application for amendment that by an operation of law - because they are not alleging of contract - the Third Defendant is also owner of the First Defendant, and they are also alleging by an operation of law, the Second Defendant as beneficial owner of the Third Defendant and as guarantor and principal, both were owed a duty of care by the Plaintiff, that is, a duty to take care in the management of the hotel.

It seems to me that a duty of care may arise either by contract or in the circumstances of this case, by law. There is no contract alleged between the Plaintiff and the Third Defendant in respect of the duty to take care in respect of the management of the hotel. Now if this duty of care is alleged to have arisen out of that duty imposed by law there seems to be an oblique way in which the Second Defendant is in fact linking with the First Defendant, the Second Defendant being beneficial owner of the Third Defendant. The Third Defendant is also linked by ownership being the beneficial owner of the First Defendant. It seems to me that the Second and Third Defendants are in fact distinct and different entities to the First Defendant and therefore contractual rights and liabilities do not arise as a consequence of such link.

Now there was no prior allegation of negligence arising on the part of the Plaintiff as it affected the Second and Third Defendants, that is, there is a duty of care on the part of the Plaintiff to the Second and Third Defendants and there was a breach of that duty. I can find no legal basis nor is there any allegation for saying that the duty of care exists as a result of the relationship as the guarantor as it affects the Second Defendant nor as borrower as it affects the Third Defendant. It is not late in the day as such for an application of this nature. We are still dealing with the first witness for the Plaintiff but on the state of the Pleadings and in the circumstances of the reasons as I have given, I will not allow the application for amendment."

Against this refusal, both defendants appealed on the ground that -

> "The learned Judge erred in law and/or wrongly exercised his discretion in refusing the Second and Third Defendants' application to amend their Defence as aforesaid."

It is well established that to successfully appeal against the exercise of a discretion, it must be shown that that discretion was not judicially exercised. The ruling that it was not too late to make the application for an amendment of this nature disposed of one of the two grounds of objection to the application; the other being that the management of the hotel had been assigned in keeping with the provisions of paragraph 13(a) of the Management Agreement to I.M.C. International Marbella Services Limited of Grand Cayman. But it is obvious that the application was not refused because of this second ground of objection but rather on the lack of a legal basis to sustain the application. Harrison J. pointed out quite correctly that -

> "there was no prior allegation of negligence arising on the part of the Plaintiff as it affected the Second and Third Defendants, that is, there is a duty of care on the part of the Plaintiff to the Second and Third Defendants and there was a breach of that duty."

Nor could he find such a duty of care resulting from the relationship between I.M.C. and Dr. Laufer as guarantor on the one hand and I.M.C. and F.S.I. as borrower on the other hand. It is in this area therefore, that the learned trial judge's ruling must be faulted if the appeal were to succeed.

The difficulty confronting the appellants therefore, is the identification of the legal basis to sustain the economic loss which they claim against the Plaintiff (I.M.C.). That there was a contractual relationship between I.M.C. and the 1st defendant (S.S.I.) there can be no question. The Management Agreement is there for all to see. The two parties to the Agreement are clearly stated and no agency relationship can be culled from its terms. The claim is obviously not based on contract. Rather it is postured on the negligent performance of a contractual obligation palpably owed to S.S.I. which is now sought to

embrace Dr. Laufer and F.S.I., strangers to the contract.

Mr. George's approach to the issue was this. He contended that it is no longer the law that there can be no recovery of damages for purely economic loss. Further, he submitted that Dr. Laufer being the only human being common to the three defendants, then by virtue of the agreements which were all entered into on the same day the plaintiff knew that if they were negligent in managing the hotel, the appellants would suffer economic loss. The difficulty about that submission is that the relevant agreements do not incorporate one another nor is there any physical damage pleaded. However, Mr. George submitted that on the question of privity there was thus created a relationship as close as could be just short of privity of contract.

In his proposition that there is a legal basis to ground the appellants' claim, Mr. George referred to several cases in which he contended that there were awards for purely economic loss unrelated to any physical damage to the plaintiff or his property. However, when those cases are examined, and it is not necessary to refer to all since they merely exemplify the application of the governing principle, it is observed that the damages were in fact awarded in respect of the negligence of the defendants resulting in physical damage, though not to the plaintiff's property, such damages not being too remote. Examples are cases in which through negligence, damage was caused to the electricity supply which resulted in loss of electricity to the plaintiff's business which as a result suffered economic loss. See British Celanese Ltd vs A.H. Hunt (Capacitors) Ltd.(1969) 2 All ER 1252; SCM (United Kingdom) Ltd. vs W.J. Whittal & Son Ltd (1970) 2 All ER 417.

But the principle is wider than these examples demonstrate. Spartan Steel & Alloys Ltd vs Martin & Co.(1972) 3 All ER 557 was a similar case to British Celanese (supra) in which damages were awarded for economic loss due to damage to the electricity supply. In dealing with the basis for the recovery of economic loss, Lord Denning, MR put the matter thus at p.561j-562f:-

"At bottom I think the question of recovering economic loss is one of policy. Whenever the courts draw a line to mark out the bounds of duty, they do it as a matter of policy so as to limit the responsibility of the defendant. Whenever the courts set bounds to the damages recoverable- saying that they are, or are not, too remote- they do it as a matter of policy so as to limit the liability of the defendant.

In many of the cases where economic loss has been held not to be recoverable, it has been put on the ground that the defendant was under no duty to the plaintiff. Thus where a person is injured in a road accident by the negligence of another, the negligent driver owes a duty to the injured man himself, but he owes no duty to the servant of the injured man: see Best v Samuel Fox & Co Ltd (1952) 2 All ER 394 at 398, (1952) AC 716 at 731; nor to the master of the injured man: Inland Revenue Comrs v Hambrook (1956) 3 All ER 338 at 339, 340, (1956) 2 QB 656 at 660; nor to anyone else who suffers loss because he had a contract with the injured man: see Simpson & Co v Thomson (1877) 3 App Cas 279 at 289; nor indeed to anyone who only suffers economic loss on account of the accident: see Kirkham v Boughey (1957) 3 All ER 153 at 155, (1958) 2 QB 338 at 341. Likewise, when property is damaged by the negligence of another, the negligent tortfeasor owes a duty to the owner or possessor of the chattel, but not to one who suffers loss only because he had a contract entitling him to use the chattel or giving him a right to receive it at some later date: see Elliott Steam Tug Co v Shipping Controller (1922) 1 KB 127 at 139 and Margarine Union GmbH v Cambay Prince Steamship Co Ltd (1967) 3 All ER 775 at 794, (1969) 1 QB 219 at 251, 252.

In other cases, however, the defendant seems clearly to have been under a duty to the plaintiff, but the economic loss has not been recovered because it is too remote. Take the illustration given by Blackburn J in Cattle v Stockton Waterworks Co (1875) LR 10 QB 453 at 457, (1874-80) All ER Rep 220 at 223: when water escapes from a reservoir and floods a coalmine where many men are working; those who had their tools or clothes destroyed could recover, but those who only lost their wages could not. Similarly, when the defendants' ship negligently sank a ship which was being towed by a tug, the owner of the tug lost his remuneration, but he could not recover it from the negligent ship although the same duty (of navigation with reasonable

> "care) was owed to both tug and tow: see Société Remorquage a Hélice v Bennetts (1911) 1 KB 243 at 248. In such cases if the plaintiff or his property had been physically injured, he would have recovered; but, as he only suffered economic loss, he is held not entitled to recover. This is, I should think, because the loss is regarded by the law as too remote: see King v Phillips (1953) 1 All ER 617 at 622, (1953) 1 QB 429 at 439, 440. On the other hand, in the cases where economic loss by itself has been held to be recoverable, it is plain that there was a duty to the plaintiff and the loss was not too remote. Such as when one ship negligently runs down another ship, and damages it, with the result that the cargo has to be discharged and reloaded. The negligent ship was already under a duty to the cargo-owners; and they can recover the cost of discharging and reloading it, as it is not too remote: see Morrison Steamship Co Ltd v Steamship Greystoke Castle (Owners of Cargo lately laden on) (1946) 2 All ER 696, (1947) AC 265. Likewise, when a banker negligently gives a reference to one who acts on it, the duty is plain and the damage is not too remote: see Hedley Byrne & Co Ltd v Heller & Partners Ltd (1963) 2 All ER 575, (1964) AC 465."

But Lord Denning was obviously uncomfortable operating within such confines which, to say the least, are illogical and expressed himself as follows at p. 562g. -

> "The more I think about these cases, the more difficult I find it to put each into its proper pigeon-hole. Sometimes I say: 'There was no duty.' In others I say: 'The damage was too remote.' So much so that I think the time has come to discard those tests which have proved so elusive. It seems to me better to consider the particular relationship in hand, and see whether or not, as a matter of policy, economic loss should be recoverable."

But his attempt to break away from the old test did not receive the support of the Court. Lawton, LJ recognized the difficulty inherent in the impugned tests but counselled caution as he said at p. 573b -

> "The differences which undoubtedly exist between what damage can be recovered in one type of case and what in another cannot be reconciled on any logical basis. I agree with Lord Denning MR that such differences have arisen because of the policy of the law. Maybe there should be one policy for all cases; the enunciation of such a policy is not, in my judgment, a task for this court."

In the result their Lordships (Edmund-Davies, LJ dissenting) concurred in denying any remedy for economic loss unconnected with physical damage.

This case amply demonstrates the difficulty encountered in drawing the line in determining the amount of liability. Spartan Steel is a case in which there was disruption of the electricity supply as a result of the negligence of the defendants' employees who, while working on a road near the plaintiff's factory, damaged a cable supplying electricity to the plaintiffs' factory. The plaintiffs who were manufacturers of steel alloy claimed damages consisting of the profit lost on the "melt" in the furnace at the time of the disruption as well as profit lost on four other melts which, but for the disruption and its effects, they would have been able to put in the furnace. Unanimously, the plaintiffs were awarded the loss on the melt which was actually in the furnace but by a majority (Edmund-Davies, LJ dissenting) the loss on the other melts was held as being too remote. Edmund-Davies disagreeing said at p. 570 -

> "I should perhaps again stress that we are here dealing with economic loss which was both reasonably foreseeable and a direct consequence of the defendants' negligent act."

And so it seemed, indeed, but ten years later when the House of Lords had the opportunity to consider Spartan Steel in Junior Books Ltd v Veitchi Ltd (1983) 520 it was not disturbed. We will refer to this case later in this judgment.

Two other aspects of Mr. George's submissions were that at the time of making the application for the amendment, a party should not be obliged to go into, nor should the Court be so concerned about, profound details. He also placed reliance on the provisions governing the grant of leave to amend set out in Order 20 & 5-8 of the 1979 White Book. But liberal as these provisions may appear to be they do not sanction the grant of an amendment if there is nothing to be gained by such a course. This view regarding leave to amend was expressed by Vaughn Williams, LJ in Jones v Hughes (1905) 1 Ch. 180 at p. 187 where he said:-

> "Mr. Low says that we ought to give leave to amend. One good reason for our not doing so is that, looking at the case that he tells us he would wish to present, that case, if presented by amendment, would, in my judgment, also fail; so that there is nothing to be gained by amendment."

Harrison, J. after 50 days dealing with the case was in even a better position than was Vaughn Williams, LJ in determining the prospects of the success of the case sought to be presented by the amendment. See also McIntosh v McIntosh (1963) 5 W.I.R. 398 per Lewis, J.A. Thus:-

> "As the claim was pleaded, the plaintiff was unable to sustain his case on the evidence, and even if this court were to allow an amendment it would not be helpful to the plaintiff.....That being so, this court will not allow the amendment which would serve no useful purpose."

From Mr. Muirhead's submissions it is clear that Harrison, J. had had the benefit of very full arguments and that the learned judge's ruling was directed specifically to the arguments presented in support of the application and in this regard, Mr. Muirhead submitted that the materials formulated in the amendment were not new. They were the factors in the case.

Mr. Muirhead contended that the issue at hand is a banking transaction and raised the question whether a claim in tort can be introduced in circumstances where the defences open to the plaintiff against the contractual party may not be available to it in an action founded in tort by persons not parties to the contract from which the pecuniary obligations arise? He cited in support of a negative answer the case of Tai Hing Cotton Mill Ltd v Liu Chong Hing Bank Ltd and others (1985) 2 All ER 947 - a case dealing with the obligations between a bank and its customers. The customer had sued for breach of contract contending that the bank had wrongfully debited his accounts. The case raised the question of general principle as to the nature and extent of the duty of care owed by a customer to his bank in the operation of a current account. It should be stated that the bank had raised against the customer inter alia, a breach of a duty of care, arising in contract and in tort, in the conduct of his business, in such a manner as to prevent forged cheques from being presented for payment. At page 957 of the judgment of the Privy Council, Lord Scarman dealt with the question thus:-

> "Their Lordships do not believe that there is anything to the advantage of the law's development in searching for a liability in tort where the parties are in a contractual relationship. This is particularly so in a commercial relationship. Though it is possible as a matter of legal semantics to conduct an analysis of the rights and duties inherent in some contractual relationships including that of banker and customer either as a matter of contract law when the question will be what, if any, terms are to be implied or as a matter of tort law when the task will be to identify a duty arising from the proximity and character of the relationship between the parties, their Lordships believe it to be correct in principle and necessary for the avoidance of confusion in the law to adhere to the contractual analysis: on principle because it is a relationship in which the parties

"have, subject to a few exceptions, the right to determine their obligations to each other, and for the avoidance of confusion because different consequences do follow according to whether liability arises from contract or tort, e.g. in the limitation of action. Their Lordships respectfully agree with some wise words of Lord Radcliffe in his dissenting speech in Lister v Romford Ice and Cold Storage Co Ltd (1957) 1 All ER 125 at 139, (1957) AC 555 at 587. After indicating that there are cases in which a duty arising out of the relationship between employer and employee could be analysed as contractual or tortious Lord Radcliffe said:

> 'Since, in any event, the duty in question is one which exists by imputation or implication of law and not by virtue of any express negotiation between the parties, I should be inclined to say that there is not real distinction between the two possible sources of obligation. But it is certainly, I think, as much contractual as tortious. Since, in modern times, the relationship between master and servant, between employer and employed, is inherently one of contract, it seems to me entirely correct to attribute the duties which arise from that relationship to implied contract.'

Their Lordships do not, therefore, embark on an investigation whether in the relationship of banker and customer it is possible to identify tort as well as contract as a source of the obligations owed by the one to the other. Their Lordships do not, however, accept that the parties' mutual obligations in tort can be any greater than those to be found expressly or by necessary implication in their contract. If, therefore, as their Lordships have concluded, no duty wider than that recognised in Macmilan and Greenwood can be implied into the banking contract in the absence of express terms to that effect, the respondent banks

> "cannot rely on the law of tort to provide them with greater protection than that for which they have contracted."

The position therefore is that since a party to the contract cannot rely on the law of tort to provide greater protection than that for which he had contracted much less can a stranger to the contract rely on a breach of that contract to sustain a claim in tort. But according to Mr. Muirhead that is exactly what Mr. George had told Harrison, J. that he was entitled to do, that is, "to rely on the breach of contract as the only evidence of the alleged negligence".

Before dealing with the Junior Books case on which the appellant places great reliance, it is appropriate to mention the case of Hedley Byrne & Co v Heller & Partners Ltd (1953) 1 All ER 617; (1953) QB 429 to which reference was made in Spartan Steel (supra) and which was raised in argument before us. This case represented a departure from the general principle on which damages are awarded, that is, physical damage to the plaintiff or his property. The facts in Hedley Byrne bear no resemblance to the instant case but as a principle of liability is therein stated, it will suffice merely to state the principle to demonstrate its non-applicability and then pass on. That case decided that -

> "If, in the ordinary course of business or professional affairs, a person seeks information or advice from another, who is not under contractual or fiduciary obligation to give the information or advice, in circumstances in which a reasonable man so asked would know that he was being trusted, or that his skill or judgment was being relied on, and the person asked chooses to give the information or advice without clearly so qualifying his answer as to show that he does not accept responsibility, then the person replying accepts a legal duty to exercise such care as the circumstances require in making his reply; and for a failure to exercise that care an action for negligence will lie if damage results."

This is the principle of voluntary assumption of responsibility which, clearly, has no application to this case and this is so despite Mr. George's valiant efforts to distil from the evidence a proximity of relationship and reliance upon I.M.C. as would impose a duty of care upon I.M.C. in favour of the appellants. But even so, that is not the full picture. This insistence by Mr. George ignores a question of fundamental importance, namely, the law which was chosen by the parties to govern their relationship. In a composite contractual scheme in which all the parties entered into a series of integrated, interconnected and interdependent agreements, all executed on 30/3/83, the parties delimited their relationship by contract and chose the governing law to be the law of the District of Columbia. Be it noted that Dr. Laufer who was common to all the contracts and was the only human party in these contracts had ample opportunity to define the rights and obligations of the parties and he took that opportunity. The cause of action in tort now sought to be introduced by the amendment would be a matter to be determined by the laws of Jamaica. This would obviously be alien to the intention of the parties and would be an un-warranted imposition. Nor can Mr. Georges' appeal to the flexibility of the common law alter that fact. But he contends that Junior Books is authority for his stand. Although it is not difficult to recognize that Junior Books has introduced a novelty into the law regarding economic loss, we are far from agreeing with Mr. George that any such change as that for which he contends can find support from this case.

We turn now to Junior Books, which be it observed, was determined on a preliminary point which assumed the correctness of the Pleadings.

Veitchi Ltd who were specialists in the laying of flooring were nominated sub-contractors under a main building contract concluded between Junior Books Ltd and some main contractors. There was no privity of contract between Veitchi Ltd and Junior Books. Veitchi Ltd laid flooring in the production area of a factory which was being built for Junior Books at Grangemouth in 1969 and 1970. In 1972 Junior Books averred that the flooring showed defects due to bad workmanships or bad materials or both. At the time the pleadings were prepared no repair work had been carried out but it was averred that the costs of repairs would be about £50,000 to which were added certain figures in respect of economic or financial loss. The total sum claimed was over £200,000. Among peculiarities of the case are the fact that

(a) The main contractors were not made parties to the action;

(b) None of the three Courts viz., The Lord Ordinary, The Second Division of the Court of Session or The House of Lords (Sc) adjudicating on the case ever saw the main contract;

(c) There was no allegation of danger or damage to persons or to any other property of Junior Books.

Before the Lord Ordinary the claim was attacked as not disclosing a good cause of action and his dismissal of this claim was appealed to the Second Division of the Court of Session. The appeal was dismissed. Next there was an appeal to the House of Lords (Sc) where it was held, dismissing the appeal, (Lord Brandon of Oakbrook dissenting)

> that where the relationships between the parties was sufficiently close, the scope of the duty of care in delict or tort owed by a person doing work was not limited to a duty to avoid causing forseeable harm to persons or to property other than the subject-matter of the work by negligent acts or omissions but extended to a

> duty to avoid causing pure economic loss consequential on defects in the work and (per Lord Fraser of Tullybelton, Lord Russell of Killowen and Lord Roskill) to avoid defects in the work itself; and that, on the assumption that the averments of Junior Books were correct, they disclosed a sufficient degree of proximity to give rise to a duty of care and (per Lord Fraser of Tullybelton, Lord Russell of Killowen and Lord Roskill) disclosed nothing to restrict that duty, so that Junior Books were entitled to recover their financial loss for repairing the floor but (per Lord Keith of Kinkel) they could only recover for the less profitable operation of their business due to the heavy cost of maintenance of the floor and if they re-laid the floor in order to mitigate their loss, the cost of doing so would be the measure of Veitchi's liability.

The novelty of the claim was attested to by the fact that although some thirty-one cases featured in the appeal, not a single authority was found which was in point. Accordingly, Lord Fraser of Tullybelton while agreeing with the main speech delivered by Lord Roskill cautioned that "I would decide this appeal strictly on its own facts" - a view which was later echoed in Simaan General Contracting Company v Pilkington Glass Ltd 17/2/88 C.A. (unreported). The minority opinion of Lord Brandon of Oakbrook endorsed the appropriateness of the admission by Veitchi that it owed some duty of care arising from the proximity of the parties and identified the dispute as the scope of that duty of care. Relating the duty of care to the principle laid down in Donoghue v Stevenson (1932) AC 562 Lord Brandon identified the difficulty which accounted for his dissenting opinion. At page 549 he stated it thus:-

> "It is however of fundamental importance to observe that the duty of care laid down in Donoghue v Stevenson (1932) AC 562 was based on the existence of a danger of physical injury to persons or their property. That this is so is clear from the observations made by Lord Atkin at pp. 581-582 with regard to the statements of law of Brett MR in Heaven v Pender (1883) 11 QBD. 503, 509. It has further, until the present case, never been doubted so far as I know that the relevant property for the purpose of the wider principle on which the decision in Donoghue v Stevenson was based, was property other than the very property which gave rise to the danger of physical damage concerned."
>
> (Emphasis supplied)

This statement brief though it is, provided an over-view of the problem to be resolved with emphasis on the prevailing view regarding the award of damages of the nature claimed - the principle had operated on the basis of "property other than the very property which gave rise to the danger of physical damage concerned". Implicit in Lord Brandon's statement is an appreciation that inherent in Junior Books' claim there is the element of damage to property but not property such as had previously been recognised as essential to found a claim. Indeed, the several cases cited by Lord Denning, MR in Spartan Steel stood on the basis contended for by Lord Brandon. Since that was the recognised basis for sustaining a claim for economic loss, the question arises as to how the majority of the Court based its conclusion.

Per Lord Fraser of Tullybelton at p. 533 -

> "The present case seems to me to fall well within limits already recognised in principle for this type of claim, and I would decide this appeal strictly on it own facts."

Lord Russell of Killowen in stating his agreement with Lord Fraser of Tullybelton and Lord Roskill said at p. 534 -

> "I agree with them and with their conclusion that this appeal fails. In my respectful opinion the view of my noble and learned friend, Lord Brandon of Oakbrook, unnecessarily confines the relevant principles of delict to exclude cases of such immediate proximity as the present."

Lord Keith of Kinkel after stating that there existed between the parties such proximity of relationship within the Donoghue v Stevenson principle put the position thus at p. 535 -

> "So in the present case I am of opinion that the appellants in the laying of the floor owed to the respondents a duty to take reasonable care to avoid acts or omissions which they ought to have known would be likely to cause the respondents, not only physical damage to person or property, but also pure economic loss. Economic loss would be caused to the respondents if the condition of the floor, in the course of its normal life, came to be such as to prevent the respondents from carrying out ordinary production processes on it, or, short of that, to cause the production process to be more costly than it would otherwise have been. In that situation the respondents would have been entitled to recover from the appellants expenditure incurred in relaying the floor so as to avert or mitigate their loss. The real question in the appeal, as I see it, is whether the respondents' averments reveal such a state of affairs as, under the principles I have outlined, gives them a complete right of action. I am of opinion that they have relevantly averred a duty of care owed to them by the appellants, though I think their averments in this respect might have been more precise and better related to the true legal position."

Acknowledging, however, that his conclusion was based on a "somewhat narrow ground" he declined any temptation "to advance the frontiers of the law of negligence upon the broad lines favoured by certain of your Lordships". Then he stated bluntly much akin to Lord Brandon's view:-

> ".....I am unable to regard the deterioration of the flooring which is alleged in this case as being damage to the respondents' property such as to give rise to a liability falling directly within the principle of Donoghue v Stevenson (1932) AC 562. The flooring had an inherent defect in it from the start. The appellants did not, in any sense consistent with the ordinary use of language or contemplated by the majority in Donoghue v Stevenson, damage the respondents' property."

Peculiarly, therefore, although he concurred in the dismissal of the appeal because the averments were relevant, he did not agree on the question of the relevant damage to property.

Lord Roskill's is the more ample of the speeches and earned the endorsement of Lords Fraser of Tullybelton and Russell of Killowen. Indicating the course he proposed to adopt he had this to say fairly early in his speech at p. 539D:-

> "My Lords, although it cannot be denied that policy considerations have from time to time been allowed to play their part in the tort of negligence since it first developed as it were in its own right in the course of the last century, yet today I think its scope is best determined by considerations of principle rather than of policy."

Certain features of Lord Roskill's speech would indicate that he intended to proceed beyond recognised frontiers:-

(a) At page 537F -

> The appeal raises a question of fundamental importance in the law of delict as well as of negligence;

(b) At page 537H -

> There was no authority which showed conclusively the route to be taken;

(c) At page 539E

> ...."yet today I think its scope (referring to the tort of negligence) is best determined by considerations

of principle rather than of policy".

(d) At page 545B

> There is no physical damage to the flooring in the sense that that phrase was used in Dutton, Batty, Bowen and some of the other cases.

Then having identified the eight features on which he said a "sufficient relationship of proximity" rested and finding nothing to restrict the duty of care as intimated by Lord Wilberforce in Anns v Merton London Borough Council (1978) AC 728 he concluded:-

> "I see no reason why what was called during the argument "damage to pocket" simpliciter should be disallowed when "damage to the pocket" coupled with physical damage has hitherto always been allowed. I do not think that this development, if development it be, will lead to untoward consequences."

If this reasoning was meant to point the way into uncharted territory it has so far failed of its purpose. The judicial reluctance to respond to Lord Roskill's stimulus was pointed out by Bingham, LJ in Simaan v Pilkington Glass (supra) when at p.7 he said concerning Junior Books:-

> "Plainly this decision contained within it the seeds of a major development of the law of negligence ..... It remained to be seen whether those seeds would be encouraged or permitted to germinate. The clear trend of authority since Junior Books has indicated, that for the time being at most, they will not."

It would seem therefore that the defect in the flooring has been interpreted as sufficient damage, novel though that be, to attract the application of time-honoured authority, though it is doubtful whether such an interpretation accorded with the intention of Lord Roskill.

Reference to a few cases decided since Junior Books will suffice to demonstrate whether that case has been regarded as having the effect contended for by the appellants in the instant appeal.

In Candlewood Navigation Corp Ltd v Mitsui OSK Lines Ltd, The Mineral Transporter, the Ibaraki Maru (1985) 2 All ER 935; (1986) AC 1; (1985) 3 WLR 381, the question was the entitlement of the plaintiff to sue for damage to cargo which occurred at a time when it did not have possessory title to the goods. Junior Books was considered and this is what Lord Fraser of Tulleybelton who was a member of the Court in Junior Books had to say of the case at p. 945:-

> "That case may be regarded as having extended the scope of duty somewhat, but any extension was not in the direction of recognising a title to sue in a party who suffered economic loss because his contract with the victim of the wrong was rendered less profitable or unprofitable."

This is certainly not a view in favour of the recovery of economic loss simpliciter. Referring to the Candlewood case in Muirhead v Industrial Tank Specialities Ltd and others (1985) 3 All ER 705, a case dealing with liability for physical damage resulting in economic loss, Robert Goff, LJ said, at p. 715 referring to Junior Books:-

> "Faced with these difficulties it is, I think, safest for this Court to treat Junior Books as a case in which on its particular facts, there was considered to be such a very close relationship between the parties that the defenders could, if the facts pleaded were proved, be held liable to the pursuers."
>
> (Emphasis supplied)

And then referring to Lord Fraser's treatment of Junior Books in Candlewood he said - p. 715:-

> "Lord Fraser, who delivered the advice, appears to have treated Junior Books as a decision of limited application."

Again, no break-away from the hold of authorities is accorded Junior Books. Of even greater interest is Lord Brandon's encounter with Junior Books in Leigh & Sallivan Ltd v Aliakmon Shipping Co Ltd (1986) 2 All ER 145 where what was in issue was the entitlement to sue for damage to goods at a time when the plaintiff was not in possession of title to the goods. Of the case he said at p. 155:-

> "That was a case in which it was held by a majority of your Lordships' House that, when a nominated sub-contractor was employed by a head contractor under the standard form of RIBA building contract, the sub-contractor was not only under a contractual obligation to the head contractor, under the sub-contract between them, not to lay a defective factory floor, but also owed a duty of care in tort to the building owner not to do so and thereby cause economic loss. The decision is of no direct help to the buyers in the present case for the plaintiffs who were held to have a good cause in negligence in respect of a defective floor were the legal owners of it."

There appears to be a tacit acceptance here of a finding by the majority that there was damage, though in the manner peculiar to the case, to the floor at a time when the plaintiffs owned the floor.

Finally, in Greater Nottingham Co-operative Society Ltd v Cementation Piling & Foundations Ltd and others (Times Law Report 28.3.88) C.A. (Purchas, Woolf and Mann LJJ) it was held that -

> "it would not be in accordance with present policy to extend Junior Books rather than to restrict it."

We say, therefore, that since the parties had delimited their obligations in contract to the extent of choosing the governing law, i.e. the law of the District of Columbia, it is impermissible that one such party who has so limited his rights and obligations should now be able to extend the obligations of the other party by suing in tort. Further, it is our considered opinion, consonant with the weight of the

authorities, that where there is no allegation of physical damage to property or person an allegation which sounds only in economic loss cannot support a cause of action in tort.

For these reasons, it would be futile to permit an amendment to the Defence in the instant case where the allegation is of economic loss simpliciter.

ROWE, P:-

I agree.

CAMPBELL, J.A.:-

I agree.

(1) British Columbia Ltd v. A. H. Hunt (Capacitors) Ltd (1969) 2 ALLER 1252
(2) SCM (United Kingdom) Ltd v. W. J. Whittal & Son Ltd (1970) 2 ALLER 417
(3) Spartan Steel & alloys Ltd v. Martin & Co (1972) 3 ALLER 557.
(4) Junior Books Ltd v. Veitchi Ltd (1983) ? 520 (Canada?)
(5) Jonas v. Hughes (1905) 1 Ch 180
(6) McIntosh v. McIntosh (1963) 5 W.I.R. 398
(7) Tai Hung Cotton Mill Ltd v. Liu Chong Hung Bank Ltd and others (1985) 2 ALLER 947.
(8) Hedley Byrne & Co v. Heller & Partners Ltd (1953) 1 ALLER 617; (1953) QB 429
(9) Simaan General Contracting Co v. Pilkington Glass Ltd 17/2/88 CA unreported
(10) Donoghue v. Stevenson (1932) AC 562
(11) Anns v. Merton London Borough Council (1978) AC 728
(12) Caltex Oil (Australia) Pty Ltd v. The Dredge Willemstad; Caltex Oil (Australia) Pty Ltd v. The Dredge Willemstad; Caltex Oil (Australia) Pty Ltd v. The Dredge Willemstad (1976) 136 CLR 529; (1976) 11 ALR 227; (1976) 51 ALJR 133
(13) Muirhead v. Industrial Tank Specialities Ltd and others (1985) 3 ALLER 705
(14) Leigh & Sullivan Ltd v. Aliakmon Shipping Co Ltd (1986) 2 ALLER 145
(15) Greater Nottingham Co-operative Society Ltd v. Cementation Piling & ——>