DEFECTS IN CONSTRUCTION: RECENT DEVELOPMENTS IN THE LAW RELATING TO LIMITATION OF ACTIONS

This article considers how the law of limitation of actions has developed through judicial interpretation of statutory provisions. The main perspective is that of the construction industry and, in particular, it addresses the problems created by latent defects in buildings which materialise after the completion of the construction process. The attempts by the courts to operate the '*Pirelli* principle' are discussed and the potential problems created by the so-called 'doomed-from-the-start exception' are explored. The article concludes with a consideration of the legislative response to the difficulties created by hidden defects, namely the Latent Damage Act 1986, and suggests that legislation may also be necessary in jurisdictions such as that of Singapore where similar difficulties are to be anticipated.

I. INTRODUCTION

IN the case of *United Indo-Singapura Corporation Pte Ltd* v. *Foo See Juan*[1], Wee Chong Jin C.J. had to consider whether an action in the tort of negligence against a firm of solicitors was statute barred. In the course of his judgement, the learned Chief Justice made the following statement, which is central to this article and is potentially of great importance in property and construction in Singapore and Malaysia and for litigation in those sectors. He said "It is common ground that in an action in tort, time will not begin to run until the damage occurs. It is also common ground that the critical question I have to decide is, when did the damage occur."[2] The significance of these words is that less than two years previously, the question and the premise upon which it was based, would almost certainly have been far from common ground. Singapore's Limitation Act[3], like most of the statutes modelled upon the Limitation Act 1939[4], contains the basic provision[5] that "actions founded on a contract or on tort" (subject to subsequent exceptions and qualifications) "shall not be brought after the expiration of six years from the date on which the cause of action accrued."[6]

In the law of contract, this presented relatively little difficulty, since breach of the contract was an identifiable starting point at which the limitation period could begin to run. In tort, however, the position has for some time been less settled. It is the purpose of this article to consider recent developments in the limitation period for tort actions, particularly with reference to latent damage and structural failures of buildings.

1 [1985] M.L.J. 11.

2 *Ibid*., at p. 12. The actual time of the occurrence of the damage in this case is not of great interest for the purposes of this article; it is the fact that the Chief Justice regarded that as the test to use which is important.

3 Cap. 163. 1985 (Rev. Ed.).

4 2 & 3 Geo. VI, c. 21; now consolidated by the Limitation Act 1980, c. 58.

5 At s. 6(1).

6 One of the major exceptions is the three-year period for personal injury actions.

II. THE TRADITIONAL POSITION

For many years, it was generally assumed that the limitation period in tort would begin at an analagous point to that of contract, namely the breach of the duty of care which gave rise to the plaintiff's loss or damage. Diplock L. J. was certainly of this opinion when he decided the case of *Bagot* v. *Stevens Scanlan and Co,*[7] sitting as an additional judge in the High Court. The defendant architects contended that the limitation period should start to run from the time when they had breached their duty of care by negligent supervision of the construction of a drainage system, and not from any later date Diplock L.J. said,[8] "[I]t seems to me that, having regard to the nature of the duty which is alleged to have been breached in this case, namely in effect to see that the drains were properly designed and built, the damage from any breach of that duty must have occurred at the time when the drains were improperly built, because the plaintiff at that time was landed with property which had bad drains when he ought to have been provided with property which had good drains, and the damage, accordingly, occurred on that date." He explicity rejected the suggestion that the occurrence of damage was the correct starting point. "What happened later, in 1961, when the settlement took place was merely a consequence of the damage resulting from the original breach which occurred when bad drains were installed on the plaintiffs property."[9]

This view found support from the Court of Appeal in *Dutton* v. *Bognor Regis Urban District Council.*[10] Lord Denning M.R. only had to consider the question of limitation *obiter* in adverting to what he saw to be a misconceived argument by counsel for the defendants. This was that the authorities responsible for inspections of building works would be subjected to almost endless liability, since he assumed that the limitation period would not even begin until the damage occurred, which might be many years after the inspection was carried out. The Master of Rolls dismissed this suggestion[11]: "I do not think that is right. The damage was done when the foundations were badly constructed. The period of limitation (six years) then began to run," and quoted *Bagot* v. *Stevens Scanlan* with apparent approval.

III. THE TURNING OF THE TIDE

Untypically, however, Lord Denning did not proceed with the line of authority which he had helped to establish. In *Sparham-Souter* v. *Town and Country Developments (Essex) Ltd*[12] the application of the principle propounded by Diplock L.J. and approved by Lord Denning would have had the result that the local authority would be protected from liability, since the writ had not been issued until more than six years after the approval of plans and inspections which it was alleged were responsible for the damage to the plaintiffs' houses. The Master of the Rolls was confronted with a dilemma which was partly of his own creation. In *Dutton* v. *Bognor Regis* he had been quite candid about the policy reasons influencing his decision. Examples of this are legion. "Nowadays we direct ourselves to considerations of policy .... we look at the relationship of the parties; and then say, as a matter of policy,

7 [1966] 1 Q.B. 197.
8 *Ibid*., at p. 203.
9 *Ibid.*
10 [1972] 1 Q.B. 373.
11 *Ibid*., at p. 3%.
12 [1976] 2 W.L.R. 493.

on whom the loss should fall."[13] Later on in his judgement,[14] Lord Denning referred to the plight of the plaintiff: "Mrs Dutton has suffered a grievous loss. The house fell down without any fault of hers. She is in no position herself to bear the loss. Who ought in justice to bear it? I should think those who were responsible." In particular, he thought that the building authority should, as a matter of policy, bear the burden because "They were entrusted by parliament with the task of seeing that houses were properly built. They received public funds for the purpose" and because "Their shoulders are broad enough to bear the loss."[15]

The purpose of rehearsing these policy arguments advanced by Lord Denning is to show that he had, figuratively speaking, 'painted himself into a corner'. He had established to his own satisfaction[16] that policy considerations required that the Council should bear responsibility for the damage, but he had also assured them, so to speak, that their liability would not be opened up so as to extend to claims arising more than six years after they had performed their functions. In *Sparham Souter's* case, he could not have it both ways. Accordingly and unsurprisingly, he abandoned his dictum on the beginning of the limitation period, justifying this manoeuvre by reference again to policy[17]: "It may seem hard on the builder or the council surveyor that he may find himself sued many years after he left the work: but it would be harder on the householder that he should be without remedy" concluding his reasoning with the attractive but uninformative assertion that "it is only fair that the plaintiff should have a remedy."

Lord Denning and the other members of the Court of Appeal proposed to abandon the time when the negligence occurred as the starting-point for the limitation period in favour of a subsequent date, left somewhat imprecise, but relating to the occurrence of damage. Lord Denning[18] described himself as "having thought it over time and again — and been converted by my brethren." The conversion was to the view that "when building work is badly done — and covered up — the cause of action does not accrue, and time does not begin to run, until such time as the plaintiff discovers that it has done damage, or ought, with reasonable diligence, to have discovered it."

This 'recantation', as the Master of the Rolls described it, was not without inconvenience. Between *Dutton* and *Sparham-Souter,* the case of *Higgins* v. *Arfon Borough Council*[19] had been decided. Mars-Jones J. had cited both *Bagot* and *Dutton* in his judgement and had held that the plaintiff house-owners' action against the negligent building authority was statute-barred under the Limitation Act,[20] because the action was brought more

13 *Ibid*., at p. 397.
14 *Ibid*., at pp. 397-398.
15 The caveat should be entered here that in Singapore, the building authority cannot be sued for negligent approval of plans or inspection: see Regulation 46, Building Control (Administration) Regulations 1979 (S. 169/1979) and Regulation 91, Building Control (Construction) Regulations 1979 (S. 242/1979).
16 His colleagues in the Court of Appeal, Sachs and Stamp L. JJ. based their judgements exclusively upon legal principle.
17 *Ibid*., at p. 499.
18 *Ibid.*
19 [1975] 1 W.L.R. 524.
20 Limitation Act 1939 s. 2(1). The only difference between this provision and s. 6(1) of the Limitation Act, Singapore, is that the latter makes no reference to 'simple' contracts, which is irrelevant for the purposes of this article, although contracts under seal may be involved if a contractor is concerned in the case.

than six years after the inspection. Lord Denning offered his apologies in *Sparham-Souter* for this unfortunate result, which was a direct consequence of Dutton's case.

Another case had also been decided at first instance prior to *Sparham-Souter.* This was the unreported decision of *Anns* v. *Walcroft Property Co Ltd*[21] in which the Official Referee, Judge Edgar Fay also followed the *Bagot/Dutton* path taken by Mars-Jones J. The subsequent history of this case was, of course, of considerable interest to the construction world as well as to lawyers, because of the exposition in the House of Lords of a building authority's duty of care to subsequent purchasers of a building constructed within its jurisdiction. Its relevance to this article, however, consists in the apparent decisions by the Court of Appeal[22] and the House of Lords[23] in *Anns* v. *London Borough of Merton* to follow the line of thought set out in *Sparham-Souter's* case. Lord Wilberforce expressed the opinion of the Law Lords when he commented[24] that "the Court of Appeal was right when, in *Sparham-Souter* v. *Town and Country Developments (Essex) Ltd* it abjured the view that the cause of action arose immediately on delivery ... of the defective house." Lord Salmon, too, noted[25] that Lord Denning in *Sparham-Souter* "reconsidered and handsomely withdrew his *obiter dictum* in *Dutton's* case to the effect that the period of limitation began to run from that date when the foundations were badly constructed."

Unfortunately for clarity of interpretation, the two Law Lords expressed themselves in different ways as to the then existing principle, which they proposed to apply. Lord Wilberforce said[26] that the cause of action "can only arise when the state of the building is such that there is present or imminent danger to the health or safety of persons occupying it." This did not properly address the question of whether the defect had to be discovered or discoverable and clearly did not apply to cases where persons did not occupy the building, as with, for example, an industrial installation.

Lord Salmon thought[27] that "the true view was that the cause of action in negligence accrued at the time when damage was sustained as a result of negligence." His explanation of this did more to obscure his meaning because he added the rider "i.e. when the building began to sink and the cracks appeared." The implication is that this is one date, whereas in many cases, including possibly *Anns,* there may be a difference between the date when the damage occurs and when its occurence becomes apparent.[28]

It need hardly be stated that the construction industry and the related professions of engineering, architecture and surveying viewed these developments with great alarm. The effect appeared to be that the limitation period would not begin to run until the plaintiff discovered the defect in the building, (or rather the damage resulting from it), or ought with reasonable diligence to have discovered it. After this point was reached, the potential liability of the defendant would then have a further six years to run.

21 24 October 1975.
22 [1976] 1 Q.B 882.
23 [1978] A.C. 728.
24 *Ibid*., at p. 760.
25 *Ibid*., at p. 770.
26 *Ibid*., at p. 760.
27 *Ibid*., at p. 770.
28 It was not necessary to decide this and the report provides no illumination of the point.

IV. *PIRELLI* – THE REVERSAL REVERSED

In *Pirelli General Cable Works Ltd* v. *Oscar Faber and Partners*[29] the House of Lords was required to identify with greater accuracy than in *Anns,* the point at which the limitation period began to run. The defendant consulting engineers had advised the plaintiff owners on the design and erection of an industrial chimney in March 1969. In November 1977, the owners discovered cracking due to a design defect and issued a writ in October 1978. Both the judge of first instance and the Court of Appeal, holding themselves to be bound by *Sparham-Souter* v. *Town and Country Developments (Essex) Ltd* found that the plaintiffs were within the limitation period which had only begun to run in 1977.

However, the House of Lords now provided a new twist to this already tortuous history. The evidence was that the damage, in the form of cracks at the top of the chimney, must have occurred no later than April 1970. The Law Lords held that it was the date when damage occurred which was decisive. As Lord Fraser of Tullybelton put it in the only substantial speech in the House,[30] "The plaintiffs cause of action will not accrue until *damage*[31] occurs, which will commonly consist of cracks coming into existence as a result of the defect even though the cracks or the defect may be undiscovered and undiscoverable."

This seemed to leave the difficulties of *Sparham-Souter* and *Anns,* much more formidable obstacles than the *dicta* from *Bagot* and *Dutton* which Lord Denning had swept away in *Sparham-Souter.* Lord Fraser resolved the matter by placing a new interpretation upon *Anns.* The House of Lords in *Anns* had not, after all, followed *Sparham-Souter,* except insofar as the latter had rejected the point of delivery of defective workmanship as the time of accrual of action. Nowhere in the speeches in *Anns* did Lord Fraser find anything which compelled him to follow the 'discoverability' line. This would not, of course, resolve the problem of *Sparham-Souter.* There was nothing equivocal in Lord Denning's statement[32] that "the cause of action does not accrue, and time does not begin to run, until such time as the plaintiff discovers that it has done damage, or ought, with reasonable diligence, to have discovered it" and that was the decision which confronted Lord Fraser in *Pirelli.* His Lordship overcame this by demonstrating certain inconsistencies between the reasoning in *Sparham-Souter* and the House of Lords decision of *Cartledge* v. *E. Jopling and Sons Ltd.,*[33] a personal injury case in which limitation was reviewed. In particular, Lord Fraser placed great importance on the words of Lord Reid in that case[34]: "a cause of action accrues as soon as a wrongful act has caused personal injury beyond what can be regarded as negligible, even when that injury is unknown to and cannot be discovered by the sufferer." This was replaced as a principle of general application by statute,[35] but only insofar as personal injury cases were concerned.

The Court of Appeal in *Sparham-Souter* had sought to distinguish defective building cases from the principle enunciated by Lord Reid, but Lord

29 [1983] 2 W.L.R. 6.
30 *Ibid*., at p. 12.
31 The emphasis is Lord Fraser's.
32 *Supra.*
33 [1963] A.C. 758.
34 *Ibid*., at pp. 771-772.
35 Limitation Act 1963, c. 47

Fraser was unconvinced. He drew support from an *obiter* observation by Templeman L.J. in *Dennis* v. *Charnwood Borough Council*[36] that the distinction was "delicate and surprising."

In the result there can be no doubt that the head-note of *Pirelli* is correct in stating that *Sparham-Souter* v. *Town and Country Development (Essex) Ltd* was overruled. The decision of the Law Lords in holding that *Pirelli's* action was time-barred was wholly inconsistent with Lord Denning's view in *Sparham-Souter,* and Lord Fraser expressly disapproved most of the Court of Appeal's reasoning in that case, even though he did not formally announce that he was overruling it.

V. THE POSITION SINCE *PIRELLI*

This article began by noting that Singapore's Court of Appeal seems to regard *Pirelli* as good law. In these circumstances, it is desirable to consider what has happened since 1983, particularly in relation to construction and property damage cases, which are especially vulnerable to latent defects. First, it must be noted that in the United Kingdom, Parliament passed the Latent Damage Act 1986 in July of that year.[37] This legislation followed the 24th Report of the Law Reform Committee on Latent Damage which was presented to Parliament in November 1984. The Law Lords in *Pirelli* had recognised the need for legislative change. Lord Fraser in his closing remarks[38] expressed "the hope that Parliament will soon take action to remedy the unsatisfactory state of the law on this subject", while Lord Scarman[39] saw that "The true way forward is not by departure from precedent but by amending legislation."

The Latent Damage Act 1986 has substantially enacted the recommendations of the Law Reform Committee. Those recommendations which bear upon the subject of this article are summarised in the Report as follows:[40] "We believe that the existing law (as laid down in *Pirelli*) under which the period of limitation begins with the date of damage should remain and should be of general application. But we think an extension of the period of limitation must be made available in cases of latent damage."

The irony, which will not be lost upon contractors and professionals engaged in the construction process, is that the statutory clarification which was so urgently needed has resulted in an advantage to the plaintiff.

Under s.l(4) of the 1986 Act,[41] actions in respect of latent damage not involving personal injuries, where facts relevant to the cause of action are not known at the date of accrual are subject to the later of the following two periods:

"(a) six years from the date on which the cause of action accrued; or

(b) three years from the starting date as defined by subsection(5)" namely

"the earliest date on which the plaintiff or any person in whom the cause of action was vested before him first had both the knowledge required

36 [1983] 3 W.L.R. 1064.

37 It received the Royal Assent on 18th July and came into force on 18th September 1986, c. 37. See s. 5(3).

38 *Ibid*., n. 29 at p. 15.

39 *Ibid.*

40 Paragraph 3.15.

41 Which is to be inserted as s. 14A(4) in the Limitation Act 1980.

for bringing an action for damages in respect of the relevant damage and a right to bring such an action."

The effect of this provision can be described as '*Pirelli-plus*'. The cause of action accrues when the damage occurs, but if it is not discovered (and it should be noted that this is not discoverability but actual discovery) until after the limitation period, a further three year limitation period applies, running from the point of discovery. This would actually be worse than *Anns* v. *Merton,* were it not for the "overriding time limit" or "long-stop"[42] provided for under the new s.14B(l). No action may be brought in negligence not involving personal injury under this provision after the expiration of fifteen years from the act or omission which either was alleged to constitute negligence or caused the damage suffered (whichever is the later).

'*Pirelli-plus*', as described above, now constitutes the English law on the subject of limitation. Its effects will be felt most keenly, although not exclusively, in the areas of activity already identified, namely property and construction. This was tacitly recognised by the Law Reform Committee who made numerous references to defects in building and frequently took builders as examples of defendants. It is significant that, of the 73 case references which appear in the Report, 54 are to construction and property related cases, while 19 are to other types of case.

There is as yet no indication as to whether Singapore's legislature will choose to adopt measures similar to the provisions of the Latent Damage Act 1986 and at present it is of academic interest only.

However, given that the *Pirelli* test has been held by Singapore's Court of Appeal to apply to the limitation of actions here too, it is informative to look at its effect upon construction litigation in Britain as a pointer to some of the hazards which it has created there and may create here. Issue must be taken at this point with those commentators who have deduced that because *Pirelli* may be, in their opinion, inconvenient for the plaintiff in certain circumstances; it must therefore be welcomed as a benefit by the construction industry. The Law Reform Committee noted that[43] "many would argue that the balance in certain cases has been shifted too far in favour of defendants" and many of the academic commentaries have a similar theme, Gerald Robertson,[44] for example, was concerned at "The possibility that *Pirelli* has deprived the subsequent purchaser of all rights in tort" while David Allen has said[45] that "the harshness is now on the side of the plaintiff, a reference to Lord Scarman's description[46] of the decision which he was helping to reach in *Pirelli* as "harsh and absurd."

It is the intention in the remaining part of this article to show that *Pirelli* is hardly to be regarded as beneficial in terms of the burden of risk exposure which is places upon those engaged in construction. This is done by pointing out the practical difficulties and problems of interpretation created by the case and the resultant uncertainty of liability and of the outcome of litigation.

42 The cricketing term was adopted by the Law Reform Committee.
43 *Op. cit.,* paragraph 2.8
44 G. Robertson "Defective Premises and Subsequent Purchasers" (1983) 99 L.Q.R. 559.
45 Allen "Limitation and Latent Damage" (1985) March/April Professional Negligence 54.
46 At p. 15.

1. *Ascertaining the point of damage*

One of the most obvious problems is the practical difficulty of ascertaining the point at which damage resulting from a latent defect occurred. In the case of *London Borough of Bromley* v. *Rush and Tompkins Ltd*[47] Sir William Stabb Q.C., the Official Referee had to contend with this very difficulty. A reinforced concrete building was completed in 1967. Cracks were observed in 1975 and following monitoring, investigations and remedial work, a writ was issued in 1980. The damage was unquestionably caused, from the evidence, by the poor quality of the concrete, but when did that damage actually occur for the purposes of limitation under the *Pirelli* test? The judge was confronted with at least four possible points, representing stages in the progressive deterioration of the structure:

i) Depassivation and the commencement of corrosion of the steel reinforcement.

ii) The appearance of hairline cracks in the exterior of the building, consequent upon such corrosion.

iii) The appearance of enlarged cracks in the exterior of the building consequent upon the corrosion of the steel reinforcement.

iv) The spalling of concrete resulting from such corrosion.

The judge rejected (i) as being "the stage before the onset of damage" and (iv) because "damage to the building existed before concrete was expected to spall." His preference was for (ii) which he called "the first manifestation of the existence of relevant and significant damage in the building." This is arguable, since hair-line cracking, especially in new buildings, is a phenomenon often encountered which is not a manifestation of the existence of relevant and significant damage. Individual preference is, of course, irrelevant. What is apparent is the scope for disagreement between expert witnesses in the fixing of a notional point, perhaps ten years previously, at which an undetected and undetectable process of deterioration could be said to have commenced. The judge's task, an unenviable one, is to try to determine, as did Judge Stabb, which point on a continuum is the relevant one, differing qualitatively from its predecessors and quantitatively from its successors.

2. *The meaning of 'doomed from the start'*

The *Pirelli* test brings with it problems beyond those of a purely practical nature. Lord Fraser chose to express *obiter* the opinion that in certain cases the point of damage would be coincident with the time of completion because "the defect is so gross that it is doomed from the start."[48] These words 'doomed from the start' have haunted litigation concerning structural defects since *Pirelli* was decided, and the interpretation of them has been attempted several times without arriving at a satisfactory formula. The consequence is that their effect must remain uncertain. It may have been believed by some optimists that the words implied that in many cases the limitation period would be treated as starting to run from the time of defective construction and it may have been this belief which prompted Allen to suggest[49] that "recent developments can be seen as beneficial (for the

47 [1985] 4 Con. L.R. 44.
48 At p. 14.
49 David Allen, "Surveyors' Liability: Recent Developments" (1984) Est. Gaz. 276.

surveyor) and *Pirelli* should cause (surveyors and their insurers) some relief." A study of some of the cases applying *Pirelli* where these words have been considered should be sufficient to dispel this idea. One of the first cases to be decided after *Pirelli* was *Dove* v. *Banhams Patent Locks.*[50] *Primafacie,* it was a prime candidate for applying the 'doomed from the start' exception. A security gate was negligently fixed to a wooden batten instead of to the door itself in 1967. The evidence was that it was thus immediately vulnerable to an attempt at forced entry. This did not materialise until 1979 when the premises were burgled. Hodgson J held that the damage accrued in 1979 when the damage "first manifested itself." The learned judge gave every sign of being dissatisfied with the 'doomed from the start' argument;[51] certainly it did not prevail in *Dove's* case.

Tozer Kemsley and Millboum Holdings Ltd v. *J. Jarvis and Sons Ltd*[52] afforded some support to the optimists who believed that *Pirelli* would lead to a return to the days of *Dutton,* but this has proved a chimera. The action was held to be time-barred because an air-conditioning plant had never worked. Speaight and Stone[53] are surely wrong to assume that this case "suggests that in future courts may debar claims as out of time much earlier than has hitherto been the case." With respect, it does not. The better view is surely Allen's[54], that "where an air-conditioning plant has never worked, it (rather than the building which houses it) may on this basis be said to be doomed from the start, and time will run accordingly from the date of installation." In other words, the decision is practically confined to its own facts and offers little of the hope envisaged by Speaight and Stone.

That this is so may be seen from more typical structural failure cases where the 'doomed from the start' argument has availed nothing. In *London Congregational Church Inc.* v. *Harriss and Harriss*[55] Judge Newey Q.C., hearing Official Referee's business, had to deal with an action for negligence against architects in respect of the design of a church and church hall. His view of the 'doomed from the start' principle which would have taken the action outside the limitation period was that it was strictly limited: "Certainly I think that by 'doomed from the start' Lord Fraser meant what might be described as a '*Batty* situation'[56]: one in which there was never any hope for the building or the part of it the subject of the action; nothing practicable could be done to save it." He also added the illuminating and somewhat ominous dictum that "I doubt whether today *Bagot* would be regarded as a 'doomed from the start' case." At all events, he did not regard the case before him as suitable to use the principle.

Similarly, in *Kensington and Chelsea and Westminster Area Health Authority* v. *Wettern Composites*[57], the 'doomed from the start' principle proved useless to the defendant architects and engineers. Again, as in *Dove* v. *Banhams Patent Locks,*[58] the evidence was superficially promising. Cracking had occurred in an extension of the Westminster Hospital

50 [1983] 1 W.L.R. 1436.
51 *Ibid*., at p. 1444 he said, "I confess that I do not understand the qualification as to a building being 'doomed from the start'.
52 [1984-85] 1 Con.L.R. 79.
53 A. Speaight and G. Stone, "Limiting Liability" (1984) 21 Mar. Architects Journal 75.
54 David Allen, "Doomed From The Start" (1984) May/June Professional Negligence 90.
55 [1985] 1 All E.R. 335.
56 *Batty* v. *Metropolitan Property Realisations Ltd* [1978] Q.B. 554.
57 [1985] 1 All E.R. 346.
58 *Supra,* n. 50.

built in 1964 because of inadequate fixing of artificial store mullions. Under cross-examination by Michael Ogden Q.C. for the architects, the plaintiffs expert witness, Mr Coffin, a consulting engineer, was compelled to admit that "if the defects of fixing had been known at the time of construction then it would have been obvious that at some time in the future what had to be done would have had to be done." The engineers' expert agreed; his advice "would be that the mullions would have to come down in due course" if they were discovered to be defective shortly after completion. When asked whether this meant that the building was doomed, he replied that "all the circumstances were there, and eventually replacement would have had to be done."

Even these clear statements by expert witnesses, however, failed to persuade Judge David Smout Q.C. that this was a proper case for applying the 'doomed from the start' principle from *Pirelli.* The judge explained thus[59] "I keep on stubbing my toe against this same obstacle: the cracks in the *Pirelli* chimney were the product of faulty materials and developed within a year of construction, yet the chimney was not regarded by the House of Lords as 'doomed from the start' ...I have to say that if the *Pirelli* chimney was not so doomed, nor was the Westminister Hospital extension."

Michael Ogden Q.C. appeared again to advance the 'doomed from the start' argument in *Ketteman* v. *Hansel Properties Ltd*[60] in the Court of Appeal. Again he was unsuccessful and on this occasion Lawton L.J. gave a strong endorsement[61] of the line taken by Judge Smout in the *Kensington* case; that the case "must be decided in the same way as the *Pirelli* case was, namely that the plaintiffs' causes of action accrued when the physical damage to their houses occurred." He continued with the most emphatic interpretations to date of the exceptional nature of those buildings which can be described as 'doomed from the start' contrasting them with *Pirelli—type* failures which "are not exceptional: if anything all too common."

Lawton LJ referred also[62] to what, in this author's opinion, are some of the most significant words in Lord Fraser's speech in *Pirelli,* and which are the main reasons why *Pirelli* and its 'doomed from the start' exception hold little cause for optimism in the construction industry. "In the two passages in which he (Lord Fraser) referred to buildings which were doomed from the start, he used the word 'perhaps' in relation to their existence. He said: 'Such cases, if they exist, would be exceptional'."

VI. CONCLUSION

The attitude taken by the respective courts in the *Harriss*, *Kensington* and *Ketteman* cases, is, it is submitted, the correct view of *Pirelli.* The vast majority of structural failure and negligent construction cases will fall within the principle that the limitation period begins to run when damage occurs. Only exceptionally will defendants be able to bring a case within the 'doomed from the start' exception, although it is to be expected that many will try.

Given the similarity between Singapore's Limitation Act and the Limitation Act 1980, it was probably inevitable that Singapore's Court of Ap-

59 *Ibid*., n. 57 at p. 351.
60 [1985] 1 All E. R. 352.
61 *Ibid*., at p. 362.
62 *Ibid*., at p. 363.

peal should hold in *United Indo-Singapura Corporation* v. *Foo See Juan* that *Pirelli* would be followed.

However, the implications of the importation of the *Pirelli* principle to Singapore must be understood by seeing their effects upon the English law and those affected by it. Ever since the overthrow of the *Bagot* and *Dutton dicta* in *Sparham-Souter's* case there has been a feeling of justifiable grievance in the construction and property-related professions, best understood by the emotive title of Vivian Ramsey's recent article[63] "Limitations: Law without Limit." The fear is, and it is not without foundation, that liability or the fear of liability lasts for an indefinite period beyond the completion of a job, so that either expensive indemnity insurance must be maintained into retirement, or the potential defendant can never fell secure[64]. The gloss placed upon *Anns* by *Pirelli,* does not, however, satisfy plaintiffs either, because there is a possibility that their right of action might disappear before they become aware of it.

In the United Kingdom, Parliament, while endorsing the principle of *Pirelli,* has tried to ameliorate this dissatisfaction by passing the Latent Damage Act 1986. The additional three-year limitation period in latent defect cases means that the builder or architect may be liable for a period which was described as *'Pirelli*-plus', although the fifteen year "overriding time limit" will protect against very stale claims.

Singapore has got *Pirelli,* but no Latent Damage Act. In the industries most affected, namely development and construction of buildings, it will be received with little enthusiasm.

Nor is there reason for rejoicing in the legal world. The practical problems of determining at what time damage took place and specifically at what point on the continuum of deterioration it changed from preliminary to manifest damage should not be underestimated. If the *Bromley* case is an indication, any litigation involving failure of concrete is likely to be abnormally expensive and uncertain in its outcome, where a limitation question is involved.

The judiciary will have to contend in particular with attempts, such as have been seen in the United Kingdom to make use of the somewhat ill-defined exception in *Pirelli,* the 'doomed from the start' exception. Since Lord Fraser's wording was unfortunately wide (and *obiter*) and one High Court judge[65] has already said that he does not understand it, the prospects for easy application are not encouraging.

The Latent Damage Act may not be a panacea but the signs are that the legislature of any country which tries to operate the *Pirelli* principle will soon be called into action to improve upon it. It is questioned whether such legislative intervention can be avoided in Singapore.

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63 V. Ramsey "Limitations: Law Without Limit", (July 1985) Building Technology and Management, 2.

64 The wide meaning given to concealment by fraud under the Limitation Acts (s. 29 of Singapore's Act) in cases such as *King* v. *Victor Parsons and Co.* [1973] 1 W.L.R. 29 is a further source of contention.

65 Hodgson J. in *Dove* v. *Banhams Patent Locks (supra).*

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