Blue Circle Industries plc v Ministry of Defence

COURT OF APPEAL, CIVIL DIVISION
SIMON BROWN, ALDOUS AND CHADWICK LJJ
12–15 MAY, 18 MAY, 10 JUNE 1998

Nuclear installation – Licensee – Liability to pay compensation – Plaintiff's land becoming contaminated with radioactive material – Plaintiff unable to sell land – Whether contamination causing 'damage' to property – Whether amount of compensation limited to damage to land or extending to diminution in value or saleability of land – Nuclear Installations Act 1965, ss 7, 12.

The plaintiff was the owner of an estate consisting of a large Victorian house surrounded by landscaped gardens and marshland, which adjoined land owned by the Atomic Weapons Establishment (AWE). In July 1989, following a storm which caused the ponds situated on the AWE's land to overflow, the marshland owned by the plaintiff became contaminated with radioactive material. The contamination was initially discovered 14 days later, but its extent and importance was not disclosed to the plaintiff at that time. In the meantime, the plaintiff had put the whole estate up for sale at an asking price of £34m. In 1992 S Ltd made an offer of £10m for the estate or £9·25m excluding the manor house and its surrounds, but the plaintiff rejected the offer. The offer was subsequently increased to £10·1m. However, in January 1993 the Ministry of Defence (MoD) disclosed the contamination and S Ltd broke off further negotiations. The plaintiff issued proceedings against the MoD, claiming damages for, inter alia, breach of statutory duty under the Nuclear Installations Act 1965. The judge held that there had been a breach of statutory duty imposed by s 7(1)(a)[a] of the 1965 Act not to damage property by an 'occurrence involving nuclear matter' and awarded the plaintiff damages in the sum of £6,045,617·65, which comprised mainly of the loss of a 75% chance of selling the estate and clean-up costs. The MoD appealed, contending, inter alia (i) that there was no breach of the duty imposed by s 7(1)(a) since there was no 'damage to property' which 'arose out of or resulted from radioactive properties', and (ii) that the loss in value of the estate was the economic result of the presence of radioactive material, not the result of damage to the estate from the radioactive material and, as such, compensation under s 12[b] of the 1965 Act should be limited to the cost of reinstatement of the marshland or the diminution in its value as at the date of damage, and not the loss of the sale to S Ltd.

Held – (1) Section 7(1)(a) of the 1965 Act imposed a duty to prevent physical damage to property from the radioactive properties of nuclear matter. Such damage was not limited to particular types of damage, but would occur provided that there was some alteration in the physical characteristics of the property caused by radioactive properties which rendered it less useful or less valuable. In the instant case, the intermingling of plutonium with the topsoil rendered the characteristics of the marshland different: it had become radioactive with the

a Section 7, so far as material, is set out at p 390 *d* to *f*, post
b Section 12, so far as material, is set out at p 390 *g* to *j*, post

result that it was 'radioactive waste' as defined in the Radioactive Substances Act 1960 and thus less useful and less valuable, as evidenced by the fact that the estate became unsaleable until the contaminated soil had been removed. Moreover, that damage was not mere economic damage; the land itself was physically damaged by the radioactive properties of the plutonium, even though its consequences were economic, in the sense that the property was worth less and required the owner to expend money to remove the topsoil (see p 393 *b* to *d g j* to p 394 *a*, p 405 *d e*, p 410 *d* and p 411 *j*, post); *Merlin v British Nuclear Fuels plc* [1990] 3 All ER 711 and *Murphy v Brentwood DC* [1990] 2 All ER 908 distinguished.

(2) In the instant case, the plaintiff was entitled to compensation under s 12 of the 1965 Act for damage to the land and all resulting losses, including diminution in the value and saleability of the land. Accordingly, the amount of compensation was best assessed on the basis of the loss of the chance of the sale to S Ltd. It followed that the appeal on liability and compensation would be dismissed (see p 394 *b j* to p 395 *b e f h j*, p 396 *j* to p 397 *a*, p 405 *f* to p 406 *e*, p 407 *j* and p 412 *b*, post); *Allied Maples Group Ltd v Simmons & Simmons (a firm)* [1995] 4 All ER 907 applied; dictum of Lord Hoffmann in *South Australia Asset Management Corp v York Montague Ltd, United Bank of Kuwait plc v Prudential Property Services Ltd, Nykredit Mortgage Bank plc v Edward Erdman Group Ltd* [1996] 3 All ER 365 at 369 considered.

Notes

For duties of nuclear site licensees and compensation for breach of duty, see 19(2) *Halsbury's Laws* (4th edn reissue) paras 1270, 1276.

For the Nuclear Installations Act 1965, ss 7, 12, see 47 *Halsbury's Statutes* (4th edn) (1998 reissue) 640, 643.

Cases referred to in judgments

Allied Maples Group Ltd v Simmons & Simmons (a firm) [1995] 4 All ER 907, [1995] 1 WLR 1602, CA.

Cambridge Water Co Ltd v Eastern Counties Leather plc [1994] 1 All ER 53, [1994] 2 AC 264, [1994] 2 WLR 53 HL.

Cockburn v Edwards (1881) 18 Ch D 449, CA.

Downs v Chappell [1996] 3 All ER 344, [1997] 1 WLR 426, CA.

Galoo Ltd v Bright Grahame Murray (a firm) [1995] 1 All ER 16, [1994] 1 WLR 1360, CA.

Hadley v Baxendale (1854) 9 Exch 341, [1843–60] All ER Rep 461, 156 ER 145.

Hartle v Laceys (a firm) [1997] CA Transcript 400.

Hooper v Rogers [1974] 3 All ER 417, [1975] Ch 43, [1974] 3 WLR 329, CA.

Hunter v Canary Wharf Ltd, Hunter v London Docklands Development Corp [1997] 2 All ER 426, [1997] AC 655, [1997] 2 WLR 684, HL; *rvsg* [1996] 1 All ER 482, [1997] AC 655, [1996] 2 WLR 348, CA.

Hussey v Eels [1990] 1 All ER 449, [1990] 2 QB 227, [1990] 2 WLR 234, CA.

I M Properties plc v Cape & Dalgleish (a firm) [1998] 3 All ER 203, CA.

Livingstone v Rawyards Coal Co (1880) 5 App Cas 25, HL.

Losinjska Plovidba v Transco Overseas Ltd, The Orjula [1995] 2 Lloyd's Rep 395.

Merlin v British Nuclear Fuels plc [1990] 3 All ER 711, [1990] 2 QB 557, [1990] 3 WLR 383.

Murphy v Brentwood DC [1990] 2 All ER 908, [1991] 1 AC 398, [1990] 3 WLR 414, HL.

President of India v La Pintada Cia Navegacion SA [1984] 2 All ER 773, [1985] AC 104, [1984] 3 WLR 10, HL.

Ross v Caunters [1979] 3 All ER 580, [1980] Ch 297, [1979] 3 WLR 605.

Rust v Victoria Graving Dock Co (1887) 36 Ch D 113, CA.

Ruxley Electronics and Construction Ltd v Forsyth, Laddingford Enclosures Ltd v Forsyth [1995] 3 All ER 268, [1996] AC 344, [1995] 3 WLR 118, HL.

Rylands v Fletcher (1868) LR 3 HL 330, [1861–73] All ER Rep 1.

Smith New Court Securities Ltd v Scrimgeour Vickers (Asset Management) Ltd [1996] 4 All ER 769, [1997] AC 254, [1996] 3 WLR 1051, HL.

South Australia Asset Management Corp v York Montague Ltd, United Bank of Kuwait plc v Prudential Property Services Ltd, Nykredit Mortgage Bank plc v Edward Erdman Group Ltd [1996] 3 All ER 365, [1997] AC 191, [1996] 3 WLR 87, HL; *rvsg* sub nom *Banque Bruxelles Lambert SA v Eagle Star Insurance Co Ltd* [1995] 2 All ER 769, [1995] QB 375, [1995] 2 WLR 607, CA.

Spartan Steel and Alloys Ltd v Martin & Co (Contractors) Ltd [1972] 3 All ER 557, [1973] QB 27, [1972] 3 WLR 502, CA.

Waddell v Blockley (1879) 4 QBD 678, CA.

West Leigh Colliery Co Ltd v Tunnicliffe & Hampson Ltd [1908] AC 27, [1904–7] All ER Rep 189, HL.

Cases also cited or referred to in skeleton arguments

Anns v Merton London Borough [1977] 2 All ER 492, [1978] AC 728, HL.

Batty v Metropolitan Property Realizations Ltd [1978] 2 All ER 445, [1978] QB 554, CA.

Chaplin v Hicks [1911] 2 KB 786, [1911–13] All ER Rep 224, CA.

County Personnel (Employment Agency) Ltd v Alan R Pulver & Co (a firm) [1987] 1 All ER 289, [1987] 1 WLR 916, CA.

Davies v Taylor [1972] 3 All ER 836, [1974] AC 207, HL.

Dept of the Environment v Thomas Bates & Son (New Towns Commission, third party) [1990] 2 All ER 943, [1991] 1 AC 499, HL.

Dodd Properties (Kent) Ltd v Canterbury City Council [1980] 1 All ER 928, [1980] 1 WLR 433, CA.

Gibson's Settlement Trusts, Re, Mellors v Gibson [1981] 1 All ER 233, [1981] Ch 179.

Gur v Bruton [1993] CA Transcript 981.

Hughes v Lord Advocate [1963] 1 All ER 705, [1963] AC 837, HL.

Invercargill City Council v Hamlin [1996] 1 All ER 756, [1996] AC 624, PC.

Kitchen v Royal Air Forces Association [1958] 2 All ER 241, [1958] 1 WLR 563, CA.

Louis v Sadiq [1997] 1 EGLR 136, CA.

McElroy Milne v Commercial Electronics Ltd [1993] 1 NZLR 39, NZ CA.

Metropolitan Asylum District Managers v Hill (1881) 6 App Cas 193, [1881–5] All ER Rep 536, HL.

Midland Bank plc v Bardgrove Property Services Ltd (1992) 65 P & CR 153, CA.

Payton v Brooks [1974] 1 Lloyd's Rep 241, CA.

Pirelli General Cable Works Ltd v Oscar Faber & Partners (a firm) [1983] 1 All ER 65, [1983] 2 AC 1, HL.

SCM (UK) Ltd v W J Whittall & Sons Ltd [1970] 3 All ER 245, [1971] 1 QB 337, CA.

Shuttleworth v Vancouver Gen'l Hospital [1927] 2 DLR 573, BC SC.

St Helen's Smelting Co v Tipping (1865) 11 HL Cas 642, 11 ER 1483.

Taylor (C R) (Wholesale) Ltd v Hepworths Ltd [1977] 2 All ER 784, [1977] 1 WLR 659.

Tito v Waddell (No 2), Tito v A-G [1977] 3 All ER 129, [1977] Ch 106.

Appeal and cross-appeal

The defendant, the Ministry of Defence (the MoD) appealed from the decision of Carnwath J on 26 November 1996 ([1997] Env LR 341) whereby he held that the MoD was in breach of its statutory duty under s 7 of the Nuclear Installations Act 1965 not to damage property by an 'occurrence involving nuclear matter' and awarded the plaintiff, Blue Circle Industries plc (BCL), damages of £6,045,617·65 inclusive of interest. BCL cross-appealed to vary the judgment in relation to the award of damages and interest. The facts are set out in the judgment of Aldous LJ.

Charles Flint QC and *Thomas Croxford* (instructed by the *Treasury Solicitor*) for the MoD.

Ronald Walker QC, Antony Edwards-Stuart QC and *Stephen Worthington* (instructed by *Reynolds Porter Chamberlain*) for BCL.

Cur adv vult

10 June 1998. The following judgments were delivered.

ALDOUS LJ (giving the first judgment at the invitation of Simon Brown LJ). On 6 July 1989 there was a storm. The rain caused ponds situated on the land of the Atomic Weapons Establishment (the AWE) at Aldermaston to overflow. That overflow passed down a stream through marshland into a lake on the Aldermaston Court Estate that was owned by Blue Circle Industries plc (BCL). The result was that the marshland became contaminated with radioactive material. That came to the knowledge of the AWE later that month and late in 1989 they informed HM Inspectorate of Pollution. However it was not until January 1993 that BCL were properly informed about the contamination. Remedial work which consisted of removing the contaminated top soil of the marsh started on 23 May 1994 and was completed by 19 December 1994.

By writ BCL claimed against the Ministry of Defence (the MoD) damages for breach of duty arising under the Nuclear Installations Act 1965, for nuisance and under the doctrine of *Rylands v Fletcher* (1868) LR 3 HL 330, [1861–73] All ER Rep 1. Those claims were resisted. Carnwath J in his judgment of 26 November 1996 held that there had been a breach of statutory duty and awarded damages of £6,045,617·65 inclusive of interest. Against that order the MoD appeal and BCL served a respondent's notice.

THE FACTS

The facts are fully and accurately set out in the appendices to the judgment of the judge to which recourse can be made. I therefore confine this part of my judgment to an outline of the facts as found by the judge.

BCL acquired the Aldermarston Court Estate in 1981. At that time it consisted essentially of a large Victorian house, the Manor House, surrounded by about 137 acres which included landscaped gardens, an ornamental lake, four lodges and the marsh that was subsequently contaminated. It adjoined land owned by the AWE. In 1983 BCL constructed a new office building beside the lake comprising about 80,000 sq ft, which they called Portland House. It was designed to be a showpiece and won an award for its design in 1986. Since 1988 the Manor House has been run as a hotel and conference centre under a

series of management agreements with BCL. It is able to seat 140 for weddings and conference dinners.

By January 1988, BCL had decided to move to smaller premises and therefore put the estate as a whole on the market. Initially the asking price was £34m. It did not sell despite the price being reduced to about half. The property market collapsed in the autumn of 1989 and a decision was taken to let parts of Portland House while at the same time trying to sell the estate as a whole. In April 1991 BCL moved back into Portland House.

In about May 1992 Sun Micro Systems Ltd (Sun) became interested in purchasing the estate and by September 1992 they had formed a view that it was suitable for their requirements. On 23 September 1992 they made an offer of £10m for the estate or £9·25m excluding the Manor House and its surrounds. The offer was rejected by BCL. On 27 December 1992 the offer was increased to £10·1m and the evidence was that they would have increased it again to £10·6m. On paper there was a wide gap between BCL and Sun, but BCL had a strong incentive to arrive at an agreement. On 5 and 6 January 1993 the MoD disclosed the contamination and Sun broke off further negotiations.

The judge held:

> 'An important issue in the case is whether Sun's offer would have materialised into a concluded contract in the absence of the contamination report, and if so at what price. In my view there is a strong probability that such a contract would have been concluded … I conclude that agreement would have been reached by the end of January at a price of close to £10·5m, leading to a concluded contract. That cannot of course be regarded as a certainty, but I would estimate the likelihood at 75%.'

Despite the fact that the contamination occurred on 6 July 1989 and it was initially discovered 14 days later, its extent and importance was not disclosed to BCL until 5 January 1993. That delay has to be considered in a context where the MoD knew by the end of 1991 that the levels of radioactivity in the marsh were in places above the threshold set by the Radioactive Substances Act 1960 and associated statutory instruments and they had by May 1992 realised that the contamination should be removed.

Upon being told of the contamination, BCL started their own investigations. The report of July 1993 that they commissioned confirmed the results of the MoD. In the meantime the MoD submitted an application for consent to dispose of the contaminated waste. It was granted. The remedial work consisting of removing the topsoil of the marsh with the trees and vegetation began on 23 May 1994 and was completed in December 1994 with the result that the site was returned to BCL on 19 December 1994.

THE JUDGMENT

The judge held that there had been a breach of the duty imposed by s 7(1)(a) of the Nuclear Installations Act 1965. He concluded that BCL had lost the chance of the sale to Sun and assessed it as a 75% chance. He held that the correct approach to quantify BCL's loss was to arrive at a figure reflecting the difference between the value of the estate as it would have been without contamination and as it in fact turned out, and then reduce the resulting figure by 25% to reflect the uncertainty of the sale to Sun. He concluded that in April 1993 BCL would have received £10·35m and in July 1996 the estate was worth £5m that being the date upon which the parties assumed the trial took place.

As the estate had been run at a loss during that period he added 75% of the running costs of £964,479 and special damages of £143,963 which he held were attributable to the costs of BCL in the clean-up operation. After judgment he ordered interest at a rate agreed between the parties.

LIABILITY

The claim under the Nuclear Installations Act 1965

The Nuclear Installations Act 1965 was enacted to consolidate the Nuclear Installations Act 1959 and its amending 1965 Act. Those Acts were passed to reflect the requirements of the Paris Convention on Third Party Liability in the Field of Nuclear Energy (Paris, 29 July 1960; Misc 17 (1960); Cmnd 1211) and the Vienna Convention on Civil Liability for Nuclear Damage and an Optional Protocol concerning the Compulsory Settlement of Disputes (Vienna, 21 May 1963; Misc 9 (1964); Cmnd 2333). The United Kingdom neither signed nor ratified the Vienna Convention. Those conventions are of historical interest, but in my view do not throw light upon the issue of construction raised by the MoD.

Section 7 of the 1965 Act imposes a duty upon the licensee of a licensed site, such as the AWE, in this way:

> '(1) Subject to subsection (4) below, where a nuclear site licence has been granted in respect of any site, it shall be the duty of the licensee to secure that—(a) no such occurrence involving nuclear matter as is mentioned in subsection (2) of this section causes injury to any person or damage to any property of any person other than the licensee, being injury or damage arising out of or resulting from the radioactive properties, or a combination of those and any toxic, explosive or other hazardous properties, of that nuclear matter; and (b) no ionising radiations emitted during the period of the licensee's responsibility—(i) from anything caused or suffered by the licensee to be on the site which is not nuclear matter; or (ii) from any waste discharged (in whatever form) on or from the site, cause injury to any person or damage to any property of any person other than the licensee.
>
> (2) The occurrences referred to in subsection (1)(a) of this section are—(a) any occurrence on the licensed site during the period of the licensee's responsibility, being an occurrence involving nuclear matter …'

The right to compensation for breach of the duty imposed in s 7 is provided for in s 12:

> '(1) Where any injury or damage has been caused in breach of a duty imposed by section 7, 8, 9 or 10 of this Act—(a) subject to sections 13(1), (3) and (4), 15 and 17(1) of this Act, compensation in respect of that injury or damage shall be payable in accordance with section 16 of this Act wherever the injury or damage was incurred; (b) subject to subsections (3) and (4) of this section and to section 21(2) of this Act, no other liability shall be incurred by any person in respect of that injury or damage.
>
> (2) Subject to subsection (3) of this section, any injury or damage which, though not caused in breach of such a duty as aforesaid, is not reasonably separable from injury or damage so caused shall be deemed for the purposes of subsection (1) of this section to have been so caused …'

Section 16 limits a licensee's exposure as follows:

> '(1) The liability of any person to pay compensation under this Act by virtue of a duty imposed on that person by section 7, 8 or 9 thereof shall

a not require him to make in respect of any one occurrence constituting a breach of that duty payments by way of such compensation exceeding in the aggregate, apart from payments in respect of interest or costs, £140 million or, in the case of the licensees of such sites as may be prescribed, £10 million …'

b Section 26 defines 'nuclear matter' and 'occurrence' as:

'… "nuclear matter" means, subject to any exceptions which may be prescribed—(a) any fissile material in the form of uranium metal, alloy or chemical compound (including natural uranium), or of plutonium metal, alloy or chemical compound, and any other fissile material which may be c prescribed; and (b) any radioactive material produced in, or made radioactive by exposure to the radiation incidental to, the process of producing or utilising any such fissile material as aforesaid … "occurrence" in sections 16(1) and (1A), 17(3) and 18 of this Act (a) in the case of a continuing occurrence, means the whole of that occurrence; and (b) in the case of an occurrence which is one of a succession of occurrences all d attributable to a particular happening on a particular relevant site or to the carrying out from time to time on a particular relevant site of a particular operation, means all those occurrences collectively…'

The judge concluded that the contamination of the marshland was an e 'occurrence involving nuclear matter' within s 7(1)(a) of the Act. He went on to hold that there had been damage to property by radioactive properties. His reasons were succinctly stated in this passage of his judgment:

'It is unnecessary in my view to go into any detailed scientific analysis, to conclude that the contamination caused a physical change to the area f affected, which rendered it less valuable. The physical change is evident from the fact that decontamination required a major engineering operation involving the removal of large quantities of earth from the site. That the contamination rendered the property less useful or less valuable is again to my mind self-evident. The matter can be looked at narrowly, g simply on the basis that from the time the contamination was made known until it had been dealt with by removing the earth, that part of the estate could not be used as frequently as it had been. Indeed, during the course of the works it could not be used at all. Nor on the evidence is there any dispute that, at least in the short term, while contamination was being evaluated and dealt with, it rendered the estate less saleable and therefore h less valuable. The extent of such damage is a much more difficult question and is at the heart of the case.'

The definition of 'occurrence' in s 26 does not apply to s 7; but Mr Flint QC, who appeared for the MoD, accepted that the contamination of the marshland j was an 'occurrence involving nuclear matter'. He submitted that before there could be a breach of the duty imposed by s 7(1)(a) there had to be 'damage to property' which 'arose out of or resulted from radioactive properties' namely the physical and chemical properties of radioactive substances. Thus there must be physical damage to BCL's property which arose out of or resulted from the physical or chemical properties of the radioactive material deposited in the marshland. That, he submitted, did not occur. To support that last submission

he relied on the evidence given by the expert witnesses and the findings of the judge as to the effect of the radioactive material upon the marshland.

The judge had before him expert evidence as to the nature of the contamination and its effect. He said that the contamination consisted of the intermingling of plutonium, amongst other chemicals, with the soil in the marsh with the result that there was no practical process, other than excavation, which would remove it. That was a feature of the chemical properties of plutonium which was unrelated to any radioactive property. It was not a function of ionising radiation. The judge considered in depth the evidence as to the levels of radioactivity and the risk that was involved to plants and humans in the area of the marshland. He concluded:

> 'The overall conclusion of the evidence is not in dispute. The 1989 incident resulted in levels of radioactivity well above the normal background levels and above the regulatory threshold. However, even before any remedial work, and applying pessimistic assumptions, they were well below levels which would have posed any risk to health.'

Mr Flint relied upon that conclusion to support his submission that the marshland had not been physically damaged by the radioactive properties of the plutonium. It physically was the same as before, albeit it had been mixed with a very small amount of plutonium. No doubt the plutonium emitted ionising radiations above the level set by the regulations, but the radioactivity was not such as to cause harm nor had it changed the properties of the soil. Removal of the soil was necessary because of the regulations, not because there was any damage to the marshland caused by radioactive properties. He asked—what was it that could have damaged the marshland? The answer was, he submitted, the emission of ionising radiations from the plutonium. But the radiations did not do any physical or chemical damage to the soil in the marsh nor did they pose any potential or actual risk to the vegetation or to humans. Thus there was no damage to the property arising out of or resulting from the radioactive properties of the plutonium. That result was, he submitted, consistent with the intention of the Act when subsections (1)(a) and (b)(ii) of s 7 were read together. Section 7(b)(ii) applied to damage to property from ionising radiations from waste discharged from a site. BCL did not suggest that such damage had occurred in this case. It would therefore be odd if s 7(i)(a) went wider and permitted recovery, not in respect of the physical effect, but in respect of the economic effect of the intermingling of the plutonium with the soil in the marsh.

To support his submission, Mr Flint referred us to the judgment of Gatehouse J in *Merlin v British Nuclear Fuels plc* [1990] 3 All ER 711, [1990] 2 QB 557. In that case the plaintiffs claimed that their house had been damaged by radioactive material that had been discharged into the Irish Sea from Sellafield which had subsequently become deposited in their house as dust. The judge concluded that the 1965 Act required them to establish that there had been damage to property, meaning tangible property. He went on to reject the plaintiffs' claim that the house included the air space within the walls, ceilings and floors and that it had been damaged by the presence of radioactive material which had resulted in the house being rendered less valuable. All that had happened was that the house had been contaminated and that did not amount to damage to property which was the type of damage for which the Act

provided compensation. The fact that the house was less valuable was the economic result of the presence of radioactive material, not the result of damage to the house from the radioactive properties of the material.

In my view the judge was right to reject Mr Flint's submissions. The physical damage to property contemplated in s 7(1)(a) is not limited to particular types of damage. Damage within the Act will occur provided there is some alteration in the physical characteristics of the property, in this case the marshland, caused by radioactive properties which render it less useful or less valuable: see *Hunter v Canary Wharf Ltd* [1996] 1 All ER 482 at 499, [1997] AC 655 at 676. I have no doubt that there was such an alteration in this case.

The plutonium intermingled with the soil in the marsh to such an extent that it could not be separated from the soil by any practical process. The marshland became radioactive with the result that it was 'radioactive waste' as defined in the Radioactive Substances Act 1960. The marshland was less valuable as was apparent from the valuation evidence given by the experts and the accepted fact that the estate was unsaleable until the contaminated soil had been removed. Further, the level of contamination was such that the topsoil of the marsh had to be excavated and removed from the site because the level of radioactivity exceeded that allowed by the regulations.

The educated reader of s 7(1)(a) of the 1965 Act would realise that it imposed a duty to prevent damage to property from the radioactive properties of nuclear material. He would have no difficulty in concluding that the marshland, admixed with radioactive material, was damaged as the level of contamination was such as to reduce its market value. He would also realise that such damage was the result of the radioactive properties of the plutonium soil admixture. He would be very surprised to be told that the MoD believed that there had been no damage to the property despite the fact that the level of contamination was such that the relevant regulations classified the topsoil of the marshland as 'radioactive waste' and required it to be excavated and removed.

I have no doubt that the addition of plutonium to the topsoil rendered the characteristics of the marshland different. Further, the result of the addition was that the marshland became less useful and less valuable. The facts in this case are different to those in *Merlin*'s case. In *Merlin*'s case the dust was in the house and the judge did not hold that the house and the radioactive material were so intermingled as to mean that the characteristics of the house had in any way altered. It was therefore possible on those facts for the judge to hold that the cause of the reduction in the value of the plaintiffs' house resulted from stigma, not from damage to the house itself. There is no need to decide whether *Merlin*'s case was rightly decided as this case is distinguishable on the facts.

The present case is more analogous to *Losinjska Plovidba v Transco Overseas Ltd, The Orjula* [1995] 2 Lloyd's Rep 395, where a vessel was held to be damaged because it had to be decontaminated and *Hunter v Canary Wharf Ltd*, where the Court of Appeal held that dust could in certain circumstances cause damage to property, e g where it was trampled into a carpet in such a way as to lessen the value of the fabric. The damage in the present case was not mere economic damage and therefore the reasoning in such cases as *Murphy v Brentwood DC* [1990] 2 All ER 908, [1991] 1 AC 398 does not apply. The land itself was physically damaged by the radioactive properties of the plutonium which had

been admixed with it. The consequence was economic, in the sense that the property was worth less and required the owner to expend money to remove the topsoil, but the damage was physical.

THE AMOUNT OF COMPENSATION

Section 12 of the 1965 Act requires compensation to be paid where there has been a breach of duty imposed by inter alia s 7(1)(a). The compensation is payable in respect of the damage, namely the physical damage to property resulting from radioactive properties. That, it was submitted, meant that the compensation was limited to the damage to the marshland which was the only property damaged. That approach was, it was submitted, supported by the speech of Lord Hoffmann in *South Australia Asset Management Corp v York Montague Ltd, United Bank of Kuwait plc v Prudential Property Services Ltd, Nykredit Mortgage Bank plc v Edward Erdman Group Ltd* [1996] 3 All ER 365 at 369, [1997] AC 191 at 211, which I will refer to as '*SAAM Co*'. There he said:

> 'Before one can consider the principle on which one should calculate the damages to which a plaintiff is entitled as compensation for loss, it is necessary to decide for what kind of loss he is entitled to compensation. A correct description of the loss for which the valuer is liable must precede any consideration of the measure of damages.'

It was submitted that in the present case the kind of loss for which compensation was to be paid was damage to the property due to radioactive properties. Thus the amount of damages was limited to the actual physical damage caused to the marshland, which was the property affected, and did not extend to any loss in value to the rest of the estate: that, it was said, was pure economic loss and therefore not recoverable.

BCL did not suggest that it was possible to recover compensation if no physical damage had been caused to their property nor if the only damage suffered was economic. It follows that there is no need to consider in depth such cases as *Rust v Victoria Graving Dock Co* (1887) 36 Ch D 113, where damages for prejudice because of the flooding that occurred were refused; *Hooper v Rogers* [1974] 3 All ER 417, [1975] Ch 43, a case where damages were held not to be recoverable in respect of probable or even certain future physical damage to land or buildings; *West Leigh Colliery Co Ltd v Tunnicliffe & Hampson Ltd* [1908] AC 27, [1904–7] All ER Rep 189, where damages were refused in respect of the influence on the market price of the property by the fear that more subsidence would occur in the future and also *Murphy v Brentwood DC*, in which it was held that a purchaser of a house could not recover against the council in respect of a defect, discovered before he had purchased the house, as his loss was purely economic.

Reading ss 7 and 12 of the 1965 Act together I do not discern any limitation which would prevent the normal rules of assessment of damages applying. I also do not believe that the principle, set out in the speech of Lord Hoffmann in *SAAM Co*, has any particular application in this case. The 1965 Act imposes a duty not to damage property by radioactive properties. Once it is established that such damage has occurred, then the person in breach of the duty must be liable for the foreseeable losses caused by the breach of statutory duty providing they are not too remote.

Having concluded that the marshland was damaged by radioactive properties, the only remaining question is—how much compensation should

be paid by virtue of s 12 of the 1965 Act? The answer must be: all losses of BCL caused by the damage which were reasonably foreseeable and not too remote. Such losses are not limited to the damage to the marshland. As was made clear by Lord Hoffmann in *Hunter v Canary Wharf Ltd*, a plaintiff, to recover, must have an interest in the land damaged. If he has that interest, he may recover, in addition to damages for injury to the land, damages for consequential loss. Such damages may be affected by the size, commodiousness and value of the property. In the same case Lord Hope said ([1997] 2 All ER 426 at 468, [1997] AC 655 at 724):

> 'The effect on that interest in land will also provide the measure of his damages, if reimbursement for the effects of the nuisance is what is being claimed, irrespective of whether the nuisance was by encroachment, direct physical injury or interference with the quiet enjoyment of the land. The cost of repairs or other remedial works is of course recoverable, if the plaintiff has been required to incur that expenditure. Diminution in the value of the plaintiff's interest, whether as owner or occupier, because the capital or letting value of the land has been affected is another relevant head of damages.'

In the present case BCL owned the whole of the Aldermarston Court Estate extending to some 137 acres. The principal features were Portland House, the Manor House and the lake with its surroundings. True the marshland was not a principal feature of the estate, but it was situated close to the lake and towards the middle of the property. Thus it must have been reasonably foreseeable that damage to the marshland, which was a breach of the duty imposed by s 7(1)(a) of the 1965 Act, would affect both the use and the value of more than the marshland. Every valuation witness agreed that the contamination of the marshland meant that the estate as a whole was worth less than it was before the contamination. That was not solely due to the risk of further leaks, but was due to the contamination. I reject Mr Flint's submission that the loss for which BCL should be compensated is limited to the cost of reinstatement of the marshland or the diminution in its value. That submission does not take into account the real facts. As the judge held:

> 'The disclosure of the contamination in January 1993 produced a situation in which BCL, in a period of falling property values, were unable to market the property until remedial works were complete. That was a foreseeable consequence of the contamination, and there is nothing unreasonable in holding AWE responsible for it.'

The claim was for damages for loss caused by damage to the marshland by the radioactive properties of the plutonium. Damage having been established, BCL were entitled to be compensated for losses caused to them by that damage which were foreseeable whether or not the land was part of a large or small estate. BCL were entitled to be compensated by an award of damages which would put them in the same position as they would have been in if they had not sustained the injury (see *Livingstone v Rawyards Coal Co* (1880) 5 App Cas 25 at 39). Such an award must have been caused by the injury, must have been reasonably foreseeable and not be too remote.

Mr Flint challenged the judge's assessment made upon the basis of the loss of the chance of a sale to Sun. He pointed to the fact that the property had, by July

1991, been on the market for four years and that the property market was in a state of collapse. Thus taking into account the small area of the estate that had been contaminated, it was not foreseeable that the sale of the whole estate would be affected, let alone that a sale, at an exceptional value, would be lost as was said to have occurred. In any case the loss of the Sun sale was too remote.

In my view the judge was right to conclude that it was a foreseeable consequence of the contamination that BCL would be unable to sell the estate until remedial work had been completed. Further it was reasonably foreseeable that a sale, such as the sale to Sun, would be lost. All the evidence pointed to that conclusion. The estate comprising Portland House, Manor House and the ornamental lake was a prestigious property which might well attract a single owner occupier, such as Sun, who would be prepared to pay substantially more than would an investor in property. The AWE were informed when the estate was first put on the market in 1988. They must have realised that it could be sold as a whole to an owner occupier such as Sun. Further the AWE knew in 1992 of Sun's interest and never expressed surprise that they were interested nor did the AWE give any evidence that they did not foresee that the estate could have been sold for about £10·5m in 1989.

The judge held that the contamination had on the balance of probability caused the loss of a sale to Sun at a price close to £10·5m. He had 'no doubt that the sale was aborted because of the 1989 incident and its aftermath'. He estimated that there had been a 75% chance of such a sale taking place and used that conclusion to compute the damages. That was a finding of fact which the judge was entitled to reach and this court should accept.

The MoD also submitted that the judge's assessment based upon a loss of the sale to Sun was wrong. They submitted that the measure of loss was the diminution in value assessed as at the date of the damage. They accepted that loss of a sale could provide evidence of diminution in value, but the measure of damages was the diminution, not the loss of the bargain. In the present case damages assessed upon the basis of a loss of a sale were inappropriate because they reflected the sensitivity of a particular purchaser, not the position of the market.

It is correct that the judge's assessment of the plaintiffs' loss depended upon the hypothetical action of a third party, but it is permissible to assess the damages upon that basis provided that causation is established. As Stuart-Smith LJ said in *Allied Maples Group Ltd v Simmons & Simmons (a firm)* [1995] 4 All ER 907 at 919, [1995] 1 WLR 1602 at 1614:

> '… in my judgment, the plaintiff must prove as a matter of causation that he has a real or substantial chance as opposed to a speculative one. If he succeeds in doing so, the valuation of the chance is part of the assessment of the quantum of damage, the range lying somewhere between something that just qualifies as real or substantial on the one hand and near certainty on the other. I do not think that it is helpful to seek to lay down in percentage terms what the lower and upper ends of the bracket should be.'

The judge found causation established and therefore had every reason to conclude that compensation by an award of damages which would place BCL

in a position in which it would have been, if the contamination had not occurred, was best assessed upon the basis of that loss of a chance.

CAUSATION

At the trial the parties' valuation evidence was directed to the value of the estate as of December 1994, being the date when the remedial work had been completed, and also July 1996 which was taken as the date of trial and therefore the last possible date when damages could be assessed. The judge held that the value of the estate in 1994, after cleanup, was £3·78m and in 1996 it was worth £5m. When calculating the damages he used the 1996 value. His reasoning is expressed in these paragraphs of his judgment:

> 'By analogy in this case, the disclosure of the contamination in January 1993 produced a situation in which BCL, in a period of falling property values, were unable to market the property until remedial works were complete. That was a foreseeable consequence of the contamination, and there is nothing unreasonable in holding AWE responsible for it. I agree with the plaintiffs that the chain of causation, leading from the contamination incident in 1989, ends at the completion of the remedial work—at which time they were free once again to exercise their own choice as to the use or the marketing of the estate. The resulting loss is properly within the scope of the duty of care. In principle therefore I accept that the award should take account of the fall in value while the property was rendered unsaleable.
>
> The defendants submit, however, that it would not be right for the award to reflect the fall in the market unless account is also taken of the evidence of increased values between 1994 and July 1996. I agree. In the words of Lord Hoffmann in *South Australia Asset Management Corp v York Montague Ltd* [1996] 3 All ER 365 at 376, [1997] AC 191 at 218: "If the market moves upwards, it reduces or eliminates the loss which the lender would otherwise have suffered."
>
> As I have found, the value of the estate increased from £3·75m to around £5m in this period. In so far as BCL's loss was reduced by their own decision to retain the property after December 1994, the award should reflect that. However, account must be taken not just of the increase in value, but also of the costs of running the estate in the meantime (giving credit, of course, for the actual rents during this period received from the new lettings in 1995 and 1996).'

The last paragraph of that extract from the judgment was criticised by Mr Walker QC, who appeared for BCL. He submitted that the sentence quoted from the speech of Lord Hoffmann's in *SAAM Co* did not apply to this case. It was directed to cases where compensation was caused by the negligent advice of valuers. The question of how much loss, if any, the lender would actually have sustained depended, in part, upon whether the value of the security rose or fell before the borrower defaulted and the plaintiffs were able to repossess and sell the property provided as security for the loan. That was a situation in which the plaintiff had no choice whether or not to realise the security. It was only when the borrower defaulted that the plaintiff could repossess and sell. Lord Hoffmann was not considering what should be the position where choice arose which could result in the chain of causation being broken. Thus upon the conclusion reached by the judge 'that the chain of causation, leading from the

contamination incident in 1989, ends at completion of the remedial work', he should have used the 1994 valuation to compute the damages.

I believe that Mr Walker's submission is correct. Lord Hoffmann's words were directed to a different situation to that which arose in the present case. In the present case the estate could not be sold until December 1994. It followed, applying the reasoning of Lord Hoffmann in *SAAM Co*, that the damages needed to reflect the movement in the market up to that date. But thereafter BCL could have sold the estate and whether or not the MoD would be liable for a further decrease in value or would have the benefit of an increase must depend on whether that further increase or decrease was caused by the contamination. The question for consideration in this case is one of causation. The judge held that the causative effect ended in 1994. That conclusion was supported by BCL and challenged by the MoD.

Mr Walker relied on three cases which he submitted showed that the judge had adopted the correct approach when he decided that the chain of causation ended in 1994. In *Waddell v Blockley* (1879) 4 QBD 678 the defendant sold paper upon the basis of false representations. After purchase, the price fell rapidly, but the plaintiff failed to sell for about four months. The Court of Appeal held that the retention of the paper was the plaintiff's own voluntary act which meant that he could not recover the full loss in value which resulted.

The plaintiffs in *Hussey v Eels* [1990] 1 All ER 449, [1990] 2 QB 227 bought a house in 1984 relying on a reply to a pre-contract inquiry which stated that the house had not been the subject of subsidence. That was false as the plaintiffs discovered. The remedial work would have cost them £17,000 which they could not afford to pay. In 1986 they applied for and obtained planning permission for the erection of two buildings and subsequently sold the property for £78,000. The judge dismissed their claim on the basis that the gain on resale had wiped out the initial loss. The Court of Appeal allowed the appeal. They held that damages of £17,000 were appropriate, because the gain in value had not been caused by the negligence. Mustill LJ reviewed the authorities. He said ([1990] 1 All ER 449 at 459, [1990] 2 QB 227 at 241):

> 'I have dealt with the authorities at some length, because it was said that in one direction or another they provided a direct solution to the present problem. For the reasons already stated, I do not see them in this light. Ultimately, as with so many disputes about damages, the issue is primarily one of fact. Did the negligence which caused the damage also cause the profit, if profit there was? I do not think so. It is true that in one sense there was a causal link between the inducement of the purchase by misrepresentation and the sale two and a half years later, for the sale represented a choice of one of the options with which the plaintiffs had been presented by the defendant's wrongful act. But only in that sense. To my mind the reality of the situation is that the plaintiffs bought the house to live in, and did live in it for a substantial period. It was only after two years that the possibility of selling the land and moving elsewhere was explored, and six months later still that this possibility came to fruition. It seems to me that when the plaintiffs unlocked the development value of their land they did so for their own benefit, and not as part of a continuous transaction of which the purchase of land and bungalow was the inception.'

In *Downs v Chappell* [1996] 3 All ER 344, [1997] 1 WLR 426 the plaintiffs purchased a bookshop in 1988 for £120,000 in reliance on inaccurate figures of turnover and profit. They suffered considerable loss. The value of the business at trial was estimated as £60,000, although they had refused offers of £76,000 in March 1990. The Court of Appeal held that the loss was the difference between the purchase price and the offered price of £76,000, not £60,000 as claimed. The reason was that the chain of causation was broken in March 1990, as Hobhouse LJ pointed out ([1996] 3 All ER 344 at 355, [1997] 1 WLR 426 at 437):

> 'It is not in dispute that it was possible for the plaintiffs to sell out in the first quarter of 1990. If necessary they would have had to abandon the business. Indeed, one or more of those expressing an interest in buying the shop and the flat in the early part of 1990 were not doing so for the purpose of running a bookshop. Since the business was unlikely to be capable of covering the cost of servicing its capital, it is not suggested that its goodwill had then a significant market value. It follows that any losses which the plaintiffs suffered after the spring of 1990 were not caused by the defendants' torts, but by the plaintiffs' decision not to sell out at that date for a figure of about £75,000 … Even accepting that they acted reasonably, the fact remains that it was their choice, freely made, and they cannot hold the defendants responsible if the choice has turned out to have been commercially unwise. They were no longer acting under the influence of the defendants' representations. The causative effect of the defendants' faults was exhausted; the plaintiffs' right to claim damages from them in respect of those faults had likewise crystallised. It is a matter of causation.'

Those cases turn on their facts, but the result depended on when the chain of causation ended. A defendant is only liable for the damages caused by injury. Thus when the causative effect ends, the liability to pay becomes crystallised. As Hobhouse LJ made clear, the test is not solely one depending upon the reasonableness of a plaintiff's actions.

Smith New Court Securities Ltd v Scrimgeour Vickers (Asset Management) Ltd [1996] 4 All ER 769, [1997] AC 254 was a case of deceit in which a dispute arose as to the date on which shares purchased as a result of fraud, should be valued so as to assess damages. Lord Browne-Wilkinson reviewed the authorities and concluded ([1996] 4 All ER 769 at 778, [1997] AC 254 at 266):

> 'In the light of these authorities the old nineteenth century cases can no longer be treated as laying down a strict and inflexible rule. In many cases, even in deceit, it will be appropriate to value the asset acquired as at the transaction date if that truly reflects the value of what the plaintiff has obtained. Thus, if the asset acquired is a readily marketable asset and there is no special feature (such as a continuing misrepresentation or the purchaser being locked into a business that he has acquired) the transaction date rule may well produce a fair result. The plaintiff has acquired the asset and what he does with it thereafter is entirely up to him, freed from any continuing adverse impact of the defendant's wrongful act. The transaction date rule has one manifest advantage, namely that it avoids any question of causation. One of the difficulties of either valuing the asset at a later date or treating the actual receipt on realisation as being the value obtained is that difficult questions of causation are bound to arise. In the period between the transaction date and the date of valuation or resale

other factors will have influenced the value or resale price of the asset. It was the desire to avoid these difficulties of causation which led to the adoption of the transaction date rule. But in cases where property has been acquired in reliance on a fraudulent misrepresentation there are likely to be many cases where the general rule has to be departed from in order to give adequate compensation for the wrong done to the plaintiff, in particular where the fraud continues to influence the conduct of the plaintiff after the transaction is complete or where the result of the transaction induced by fraud is to lock the plaintiff into continuing to hold the asset acquired.'

He came to apply the law to the facts ([1996] 4 All ER 769 at 779–780, [1997] AC 254 at 268):

'Can it then be said that the loss flowed not from Smith's acquisition but from Smith's decision to retain the shares? In my judgment it cannot. The judge found that the shares were acquired as a market making risk and at a price which Smith would only have paid for an acquisition as a market making risk. As such, Smith could not dispose of them on 21 July 1989 otherwise than at a loss. Smith were in a special sense locked into the shares having bought them for a purpose and at a price which precluded them from sensibly disposing of them. It was not alleged or found that Smith acted unreasonably in retaining the shares for as long as they did or in realising them in the manner in which they did. In the circumstances, it would not in my judgment compensate Smith for the actual loss they have suffered (ie the difference between the contract price and the resale price eventually realised) if Smith were required to give credit for the shares having a value of 78p on 21 July 1989. Having acquired the shares at $82\frac{1}{4}$p for stock Smith could not commercially have sold on that date at 78p. It is not realistic to treat Smith as having received shares worth 78p each when in fact, in real life, they could not commercially have sold or realised the shares at that price on that date. In my judgment, this is one of those cases where to give full reparation to Smith, the benefit which Smith ought to bring into account to be set against its loss for the total purchase price paid should be the actual resale price achieved by Smith when eventually the shares were sold.'

Smith New Court were locked into the shares and acted reasonably when they decided not to resell at the date of purchase. In the circumstances, the causative effect continued until the time that the shares were ultimately disposed of.

The parties agree that the contamination made the estate unmarketable until December 1994. It followed that BCL were 'locked in' up to that date. Thereafter it would have taken a few months to obtain a sale if that was possible, but it was not suggested that the valuation would have been any different say in March 1995 than the valuation given as of December 1994. Also it was not suggested that BCL had at any time acted unreasonably, but that cannot be decisive when deciding when the chain of causation was broken. For example it would have been reasonable for them to decide not to sell at any time, but that could not mean that the MoD would be responsible for losses caused by a downturn in the market or for the running costs which were incurred. The decision as to when the risk in movement in the market value

passed from the MoD to BCL must be taken in 'real time' and not with hindsight. The chain of causation will end at a particular date whether or not the value increased or decreased thereafter. In this case, it must have continued up to the end of 1994 as up to that time BCL could not sell the estate. But did the causative effect of the damage end at the time when the estate could have been sold, with the result that the risk of a downturn in the market passed to BCL as did the benefit of any increase in value if the market moved up?

For my part I believe that the chain of causation was broken in 1994. At that time BCL were able, if they wished, to sell the estate. The parties' experts put forward prices at which it could be sold and the judge accepted that evidence as establishing a market value. From then on BCL were not 'locked into' the situation produced by the contamination which was the injury caused by the MoD. It therefore would be wrong to require the MoD to pay for the losses incurred in running the estate after that date. After 1994 the risk of the market going down passed to BCL and consequently the advantage, if it went up.

The judge held that the chain of causation, leading from the contamination incident in 1989, ended at the completion of the remedial work. I believe he was right to so hold. The consequence is that, when assessing the damages, he should have used the 1994 value of £3·78m, not the 1996 value of £5m. It also follows that the losses incurred in respect of running costs should be reduced from £974,527 to £283,957 to reflect the shorter period.

The MoD also challenged the use by the judge, when computing the damages, of the value of the estate in 1996 after contamination. They submitted that the value was that which the estate would have fetched on the market and therefore it included an amount attributable to fear of recontamination in the future, and to the proximity of the estate to the AWE. Such an amount was not caused by the injury and therefore was not recoverable (see *West Leigh Colliery Co Ltd v Tunnicliffe & Hampson Ltd* [1908] AC 27, [1904–7] All ER Rep 189).

BCL submitted that the judge was entitled to award damages for consequential loss, but they accepted that if the award included an amount which reflected the risk of future damage then it was overstated. They submitted that it did not as the judge had correctly directed himself as to the law and had made a deduction, albeit a small one, from what he considered was the market value of the estate to reflect the fear of future damage. The MoD were prepared to accept that the judge had correctly directed himself, but submitted that he had failed to give effect to that direction. Thus the issue is—was the value of the estate in 1994, which was determined by the judge, depressed by a fear of a future loss and if so by how much?

In his judgment the judge said:

> 'The inquiry must, however, be directed to the effects of physical damage which has occurred—rather than fears of possible future damage (see *West Leigh Colliery Co Ltd v Tunnicliffe & Hampson Ltd* and *Hooper v Rogers* [1974] 3 All ER 417 at 419, [1975] Ch 43 at 47).'

The judge went on to consider the valuation evidence. He clearly had in mind the difference between stigma from the contamination which would be a consequence of the injury and the fear of possible future contamination. Having referred to the RICS guide on valuation after contamination he said:

'While I find this discussion of interest, it does not assist materially in reaching a conclusion on the facts of this case. What is apparent from such examples as can be found in the literature, and in practice, is that everything depends upon the facts of the particular case. In some cases, especially in a seller's market, stigma will be of minimal or no effect. Only two specific UK cases were mentioned in evidence in which radioactive contamination had been a potential issue (a retail park at Enfield, and a disused nuclear reactor site at Warrington), but in neither did the fact of previous contamination, following clean up to the satisfaction of the authorities, have any apparent effect on the purchaser's valuation. In other cases, however, where the purchaser has more choice of alternative sites, the stigma of previous contamination may be more relevant. In the present case, there is particular difficulty that the attraction of the estate to potential purchasers or tenants was already seriously affected by the proximity of AWE prior to 1993. That is evident from the history of marketing efforts from 1988 onwards. BCL have no claim in respect of the diminution in value attributable simply to proximity to AWE or to the scare stories which have appeared in the press from time to time, or to fears of future contamination, or indeed to the market's knowledge of the present litigation. They can only claim for loss which is attributable specifically to the contamination of their land following the 1989 incident.'

The judge valued Portland House and Manor House separately. He accepted the valuation suggested by Mr Rand, the MoD expert, of £2·03m for Portland House as at December 1994 'in the real world' and added to that £0·5m to take account of BCL's occupation. When coming to the value of Manor House, he adopted the approach of the experts which was to arrive at a value based upon the assumption that there had been no contamination and thereafter to make a reduction for the stigma of the contamination. One expert proposed a 25% reduction in 1993 and the other did not accept that there would be any deduction. In the end the judge made a deduction of about 10% for 1994.

Mr Walker submitted that when making the deduction of 10% the judge had taken into account the law as he had stated it. For myself I do not believe that was the case. The judge had before him a dispute between the expert witnesses as to what the estate was worth in the real world after contamination. Their evidence sought to arrive at a value upon the assumption that 'stigma' would be there. They did not differentiate between the effect of the contamination and the perceived risk of possible future contamination, neither did the judge when he arrived at his value of the estate. His valuation was on the same basis as the expert witnesses. It follows that if stigma, based on a fear of future contamination, was a significant factor, the valuation was understated.

In my view there would have been a general stigma and that general stigma contained an element which did not arise from the injury inflicted. Thus the judge's valuation was understated as the value to be used in the calculation of damages. By how much? That the judge did not decide and the evidence is not helpful. It follows that either this case must be remitted to enable further evidence to be called or the court must do the best it can upon the evidence before it. In my view the latter is appropriate in a case such as this where the valuation exercise is, by its nature, open to error, based as it is upon opinion as to value. Having regard to the probable nature of a potential purchaser of the

estate, the risk of future contamination would be a significant but small part in the overall consideration of the price to be paid. I estimate that at about 10% and would therefore increase the valuations to Portland House and Manor House by 10%. Thus the value after clean up would be, excluding the fear of future contamination and making no deduction in respect of BCL's occupation:

Portland House	£2·73m
Manor House	£0·99m
The Lodges	£0·35m
Total =	£4·07m

For the reasons given in the judgment of Simon Brown LJ there must also be added a figure to reflect the loss of the remaining 25% of the depreciation to the estate caused by stigma.

SPECIAL DAMAGES

The judge awarded as special damages £90,000 of the costs incurred by Denton Hall, who were at the time of the clean-up operation solicitors who acted for BCL. His reasons were:

> 'As one would expect (and as the allocation of staff suggests), Denton Hall had in mind the possibility of litigation from the outset, and well before the writ was issued in October 1993. A substantial amount of research and preparation work needed to be done in order to familiarise those involved with the relevant law and technical matters. This was required for the litigation as well as for general advice. It is also apparent that Denton Hall were instructed to oversee and co-ordinate all aspects of BCL's response to the contamination incident. Virtually every letter written by BCL was drafted or reviewed by them. Accordingly, much of Denton Hall's work was not so much legal advice or drafting, but of the nature of management work. While one can understand BCL wishing to entrust this to Denton Hall with the prospect of litigation in mind, it was not strictly necessary, and it was certainly a much more expensive way of doing it than use of in-house employees. I think it is right to distinguish between such general management costs, and those costs relating to matters where specific legal advice or input was required, such as advice on BCL's legal responsibilities, and on the preparation of the various applications needed in connection with the work. The latter were a direct and necessary consequence of the contamination incident. The former were not. Doing the best I can on the material available, I would hold that about 20% of the total legal fees charged by Denton Hall are reasonably attributable to the clean-up operation (say £90,000).'

The MoD submitted that the Denton Hall costs were part of the costs of the action and therefore should be claimed as costs and be subject to taxation like any other litigation costs. They referred to *Ross v Caunters* [1979] 3 All ER 580 at 601, [1980] Ch 297 at 324 when Megarry V-C refused to award solicitors' costs as damages. He said:

> 'It also seems to me that there is ample authority for saying that a successful plaintiff cannot obtain, in the guise of damages, any costs which, on a party and party taxation of costs, are disallowed by the taxing master. It is not enough for the plaintiff to claim that such costs were incurred by

him as a result of the defendants' negligence. I think that this is sufficiently established by *Cockburn v Edwards* (1881) 18 Ch D 449. I am saying nothing about damages which fall outside the particular form in which they are claimed in this case, namely, the legal expenses of investigating the plaintiff's claim up to the date of the issue of the writ. It seems to me that both on authority and on principle those legal expenses can be recovered by the plaintiff only as costs, and not in the form of damages. In so far as the plaintiff can persuade the taxing master that the items incurred should be allowed as costs on a party and party taxation, then the plaintiff can recover them; but so far as they are not allowed by the taxing master, then I think that they cannot be recovered in the shape of damages.'

BCL submitted that the costs allowed by the judge were not costs of or incidental to the action. They were administration costs incurred in investigating and putting right the contamination. Thus they were properly claimed as special damages.

In my view the judge was right to conclude that the Denton Hall costs he allowed were not properly termed costs of the action. It follows that he rightly allowed them to be claimed as special damages.

THE COMMON LAW CLAIMS

As BCL's claim succeeds on breach of statutory duty there is no need to consider these claims.

INTEREST

For the reasons given by Simon Brown LJ, the judge's ruling on interest must stand.

CHADWICK LJ. The Nuclear Installations Act 1965 was enacted to consolidate two earlier statutes, the Nuclear Installations (Licensing and Insurance) Act 1959 and the Nuclear Installations (Amendment) Act 1965. The purpose of the legislation, as the long titles to the two earlier statutes make clear, was to make provision, inter alia, for liability in respect of ionising radiations emitted from nuclear installations and to give effect to the Vienna Convention on Civil Liability for Nuclear Damage and an Optional Protocol concerning the Compulsory Settlement of Disputes (Vienna, 21 May 1963; Misc 9 (1964); Cmnd 2333). That purpose is reflected in the provisions contained in ss 7 and 12 of the consolidating Act. Section 7 imposes statutory duties on the licensee under a nuclear site licence. Section 12 provides a right to compensation where any injury or damage has been caused in breach of a duty imposed by s 7. The 1965 Act is, as it seems to me, a clear example of the legislation which Lord Goff had in mind when he said, in *Cambridge Water Co Ltd v Eastern Counties Leather plc* [1994] 1 All ER 53 at 76, [1994] 2 AC 264 at 305:

'… I incline to the opinion that, as a general rule, it is more appropriate for strict liability in respect of operations of high risk to be imposed by Parliament, than by the courts. If such liability is imposed by statute, the relevant activities can be identified, and those concerned can know where they stand. Furthermore, statute can where appropriate lay down precise criteria establishing the incidence and scope of such liability.'

The questions on the present appeal turn on the identification of the criteria which have been laid down by Parliament in the 1965 Act. Those criteria are to be ascertained by construing the Act itself.

Section 7(1) of the 1965 Act is in these terms, so far as material:

> 'Subject to subsection (4) below, where a nuclear site licence has been granted in respect of any site, it shall be the duty of the licensee to secure that—(a) no such occurrence involving nuclear matter as is mentioned in subsection (2) of this section causes injury to any person or damage to any property of any person other than the licensee, being injury or damage arising out of or resulting from the radioactive properties, or a combination of those and any toxic, explosive or other hazardous properties, of that nuclear matter …'

Subsection (2) of s 7 describes the occurrences relevant for the purposes of subsection (1)(a). Those include: '(a) any occurrence on the licensed site during the period of the licensee's responsibility, being an occurrence involving nuclear matter …' It was accepted on behalf of the defendant (i) that the flood was an occurrence on the licensed site, that is to say the defendant's atomic weapons establishment at Aldermaston, and (ii) that that occurrence involved nuclear matter. It is, in my view, self evident (in so far as it was not accepted) that that occurrence caused damage to property of the plaintiff—by contamination of the marshland. For the reasons explained by Aldous LJ it seems to me that the judge was plainly correct to hold that the further condition needed to support a finding of breach of duty under s 7(1)(a) of the 1965 Act—that that damage arose out of or resulted from the radioactive properties of that nuclear matter—was established on the evidence.

The finding of breach of statutory duty provides the foundation for a claim to compensation under s 12(1) of the 1965 Act. The subsection is in these terms, so far as material:

> 'Where any injury or damage has been caused in breach of a duty imposed by section 7 … of this Act—(a) … compensation in respect of that injury or damage shall be payable … wherever the injury or damage was incurred …'

The compensation payable is compensation in respect of *that* damage; that is to say in respect of the damage which has been caused *in breach of a duty imposed by s 7* of the 1965 Act. It is, I think, pertinent to note that the statute does not provide for compensation to be payable in respect of damage caused *by* a breach of the relevant duty. The answer to the question posed by Lord Hoffmann in *South Australia Asset Management Corp v York Montague Ltd, United Bank of Kuwait plc v Prudential Property Services Ltd, Nykredit Mortgage Bank plc v Edward Erdman Group Ltd* [1996] 3 All ER 365 at 369, [1997] AC 191 at 211—for what kind of loss is the claimant entitled to compensation—is provided by the statutory language. The damage for which the claimant is entitled to compensation is the damage which s 7 of the 1965 Act seeks to prevent. That is damage to the claimant's property; being damage arising out of the radioactive properties of the nuclear matter involved in the relevant occurrence which has given rise to the breach of duty. In the present case, that is the damage to the contaminated marshland. If and so far as the judge approached the question of compensation on the basis that the damage for which the respondent was to be compensated

was damage to the estate as a whole, I think that he was wrong. The 1965 Act provides for compensation to be payable in respect of the damage to the contaminated marshland.

But that conclusion does not lead, as the appellant contends, to the further conclusion that the compensation payable under the 1965 Act is limited to the costs of reinstating the marshland and any residual loss in the value of the marshland. The compensation payable is compensation *in respect of* the damage to the contaminated marshland. I can see no reason why, in assessing the amount of that compensation, the court should not apply the ordinary rule that—

> 'where any injury is to be compensated by damages, in settling the sum of money to be given for reparation of damages you should as nearly as possible get at that sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation.'

That well-known exposition of the general rule is taken from the speech of Lord Blackburn in *Livingstone v Rawyards Coal Co* (1880) 5 App Cas 25 at 39. The exercise which s 12 of the 1965 Act requires the court to carry out, as it seems to me, is to compare the position in which the claimant would have been if the relevant property had not been damaged by contamination with the position in which he is as a result of the damage which the relevant property has sustained. The difference is the measure of compensation payable under the Act.

For my part, I do not think that the exercise which s 12 of the 1965 Act requires gives rise to questions of forseeability. It is, in my view, plain that it is not necessary that the damage to the relevant property which has actually occurred should have been foreseeable. Further, I am not persuaded that it is relevant to ask whether the wrongdoer, or anyone else, did foresee or should have foreseen that the damage to the relevant property would have led to the result that the claimant has been put in the position in which he finds himself. If the damage to the relevant property need not be foreseeable, it seems to me illogical to impose a requirement that the consequences of that damage should themselves be foreseeable. I can find nothing in the statutory language which does impose that requirement. The question, in my view, is one of causation, not foreseeability: is the position in which the claimant now finds himself the result of the damage to the relevant property which has actually occurred?

In seeking to ascertain what sum of money will put the respondent, as nearly as possible, in the position in which it would have been if the marshland had not been contaminated, the starting point, as it seems to me, is to ask: what would have been the position of the respondent if the contamination had not occurred? On the facts found by the judge the answer to that question is that the respondent would have had the opportunity to sell the estate as a whole to Sun Micro Systems Ltd at a price 'of around £10m' at the beginning of 1993. The judge held that there was a probability (which he put at 75%) that that opportunity would have led to a concluded contract by the end of January 1993 at a price close to £10·5m; and that on completion of that contract in or about April 1993 the net proceeds of sale would have been £10·35m. If that sale had gone through, the claimant would have had the estate off its hands. If the sale had gone off, then the claimant would have continued to own an estate which

it would have been able to sell, in whole or in parts, free from any complication or stigma arising from the contaminated marshland at whatever price the market would pay from time to time. The judge found as a fact that the market would have paid £4·67m for the estate in December 1994, and a greater price, £5·8m, in July 1996. The judge made no finding whether, if the contamination had never occurred, the respondent would have sold the whole or any part of the estate in December 1994, in July 1996 or at any other time after January 1993. For so long as the respondent retained the estate it would have incurred costs greater than the value to be attributed to its own occupation of Portland House.

The position in which the respondent would have been if the contamination had never occurred must be compared with the position in which the respondent found itself in the events which did happen. The opportunity to sell the estate to Sun in January 1993 was lost. The judge found as a fact that 'the sale was aborted because of the 1989 incident and its aftermath'. The estate was unsaleable, whether as a whole or in parts, until the completion of the clean-up operation; that is to say until December 1994. But from that date the respondent was 'free once again to exercise their own choice as to the use or marketing of the estate'. The judge found that the estate could have been sold in December 1994 (in the state in which it then was following completion of the clean-up operation) at a price of £3·78m. That, I think, is a necessary inference from his finding that £3·78m was the market price at that date. The respondent did not sell the estate at that or any other price before trial. The judge found the market value of the estate in July 1996 (which was taken as the effective date of the commencement of the trial) in the state in which it then was to be £5·0m. The respondent incurred net costs in running the estate which it would not have incurred if the estate had been sold. The respondent also incurred certain costs and expenses in connection with the clean-up operation for which it had not been reimbursed.

On the facts as found by the judge it seems to me that the compensation payable falls to be assessed under two main heads: (i) compensation to reflect the fact that the respondent lost the opportunity to sell the estate in January 1993 and (ii) compensation to reflect the fact that, when the opportunity to sell revived in December 1994, the price at which the estate could be sold was less than it otherwise would have been. There is a third head, unrecovered costs incurred in connection with the clean-up operation, which has not been the subject of any sustained challenge in this court. I agree with Aldous LJ that the judge was right to allow as special damage that element of the solicitors' costs which were not properly to be regarded as costs of the action.

There is no doubt that the estate was unsaleable (either as a whole or in parts) between January 1993 (when the appellant disclosed that the contamination of the marshland had occurred) and December 1994. During that period the respondent was deprived of the opportunity to sell the land. The judge found, correctly as it seems to me, that that loss of opportunity was the direct result of the contamination. In my view, the respondent is entitled to compensation under the 1965 Act for the loss of the opportunity to sell. The question is: what sum of money will put the respondent, as nearly as possible, in the position in which he would have been if the opportunity had not been lost? Subject to one qualification, I think that the judge approached the matter correctly when he said:

> 'Thus one compares, on the one hand, a position in which, in April 1993, they would have got the estate off their hands, and would have received £10·35m; and, on the other, one in which they have been unable to market the estate for almost two years, have continued to incur running costs, and have been left in July 1996 with an asset worth only about £5m. The difference between these two should be reduced by 25% to reflect the risk that the sale would not have proceeded.'

The qualification to that approach which, as it seems to me, is required is that, when measuring compensation for the loss of the opportunity to sell, the relevant comparison is the difference between the price which could have been obtained when the opportunity was lost and the price which could have been obtained when the opportunity to sell revived. In my view, the correct measure under this head is 75% of the difference between (i) the aggregate of £10·35m (being the notional sale receipts in April 1993) and £305,301 (being the net running costs incurred in retaining the estate from April 1993 to December 1994) and (ii) £4·67m (being the price which could have been obtained by a willing seller in the market which would have existed in December 1994 if the contamination had never occurred) or, perhaps more accurately, the net proceeds that would be received on a sale at a price of £4·67m. The depreciation in the market attributable to the contamination is, in my view, properly taken into account under the next head. I should add that, although in principle the respondent would be entitled to compensation for loss of the use of the money which it would have received in April 1993 if the sale to Sun had gone through, this element would need to be claimed, and proved, as special damage. No special damage was claimed in respect of the loss of the use of the sale proceeds; and there is no basis on which the judge could have assessed compensation for that element of loss.

The second main head under which compensation falls to be assessed is to reflect the fact that, when the opportunity to sell revived in December 1994, the price at which the property could be sold by a willing seller was then (and so remained up to the date of trial) less than it would have been if the contamination had never taken place. Two questions of some difficulty arise. First, is the difference to be measured at December 1994 or at some later date—which, in the events which happened, would have to be the notional date taken as the date of the commencement of the trial, July 1996. Secondly, for the purpose of measuring the difference at whichever is the relevant date, should some adjustment be made to the price at which, as the judge found, the property would actually have sold in the market, that is to say in the condition in which it actually was, to reflect the fact that, in discounting the price from what it would have been if contamination had never taken place, the market would take into account the fear of possible future contamination.

At first sight, the first of those questions, at what date should the difference be measured, is linked to the question: should the respondent be entitled to recover the running costs of the estate between December 1994 and July 1996? I have no doubt that the answer to that latter question is No. The decision to sell or to retain the estate after December 1994 was a decision which, as the judge found, the respondent was free to take in its own interests. The chain of causation which linked the contamination of the marshland to the inability to sell had been broken. There is no reason why the respondent should be able to recover compensation for loss suffered as a result, not of the contamination,

but of its own choice to retain the estate. I would have given the same answer to the question: should the respondent be able to recover for any diminution in the value of the estate between December 1994 and July 1996. The risk of diminution had been assumed by the respondent as a matter of choice; and that is where it would lie. There is an obvious logical symmetry in applying the same principle to the question: should the appellant or the respondent have the benefit of any diminution in the amount of the difference between the notional price (absent any contamination) and the actual price (in the market as it was) which took place between December 1994 and July 1996? The symmetry has attracted the other members of this court. The amount involved, on the figures found by the judge, is small in the context of the overall award of damages: (£4·67m – £3·78m) – (£5·8m – £5·0m) = £0·09m. On the figures as adjusted by Aldous LJ the amount is even smaller. In those circumstances, I do not think it right to pursue my own doubts on the matter, which are based on a reluctance to compensate the respondent for loss which it has not actually suffered, to the point of dissent.

On the second question, whether there should be some adjustment to the price at which, as the judge found, the estate would actually have sold in the market, I agree with the analysis set out in the judgment of Aldous LJ; and with the adjustment which he has proposed.

I would allow compensation under the second head in the full amount. That has the effect of bringing in to the overall award the additional 25% in respect of this element to which, for the reasons to be given by Simon Brown LJ, the respondent is plainly entitled.

I agree, also, that the judge's ruling as to interest must be upheld, on the ground that there is no jurisdiction to award interest on the basis for which the respondent contends in its notice under RSC Ord 59, r 6. I am content that the amount of interest should be computed on the basis to be set out in the judgment of Simon Brown LJ.

SIMON BROWN LJ. With regard to the main issues on this appeal, the facts, the law and the arguments are fully summarised in Aldous LJ's judgment and for the most part I do not repeat them. It is convenient, however, for the purposes of my own judgment to tabulate at the outset the judge's central conclusions of fact.

(1) On 6 July 1989 the marshland on BCL's Aldermaston Court Estate was physically damaged by radioactive matter including plutonium which overflowed from the Ministry of Defence's (the MoD) adjacent Atomic Weapons Establishment (the AWE).

(2) On 6 January 1993 the MoD made full disclosure of the contamination whereupon Sun, prospective purchasers of the estate, immediately broke off negotiations.

(3) But for the damage and its disclosure, there was a 75% chance that Sun would have completed their proposed purchase of the estate on 1 April 1993 for £10·35m (net of sale expenses).

(4) The level of contamination was such that under regulatory legislation, the Radioactive Substances Act 1960, substantial quantities of soil had to be removed from the marshland area. This remedial work (undertaken by the MoD at their own expense of some £350,000) was completed in December

1994. BCL themselves incurred various costs totalling £143,963 in connection with the works.

(5) Although the remedial work was completed to the satisfaction of the experts for both parties and the regulatory authority, the market value of the land was affected by the residual stigma from the incident. The stigmatised value of the estate was £3·78m (£4·67m unstigmatised) in December 1994, £5m (£5·8m unstigmatised) in July 1996 (the notional date of trial).

(6) The estate was being run at a loss (even giving credit for BCL's own occupation of part). These losses totalled £283,957 from April 1993 to December 1994; £974,527 from April 1993 to July 1996.

On the basis of those findings the judge found the MoD liable to BCL under the Nuclear Installations Act 1965 and awarded them damages under two heads: (1) loss of the chance of sale to Sun, namely 75% of £10·35m plus the running costs from April 1993 to July 1996 (£974,527) less the stigmatised value of the estate at July 1996 (£5m): £4,743,396; (2) BCL's clean-up costs: £143,963.

The judge also awarded BCL interest on the damages totalling £1,158,259.

On this appeal the MoD seek to challenge the judge's conclusions both on liability and quantum. BCL for their part contend for higher awards both of damages and of interest.

On liability I wish to add nothing to what Aldous LJ has already said.

On quantum, however, and on the related issues of scope of duty and causation I wish to express a few brief thoughts of my own. I propose to deal also with BCL's cross appeal.

MOD's APPEAL

Underlying a great many of Mr Flint QC's submissions throughout this appeal were three related themes. (1) Even assuming physical damage to land was done, it was done only to a tiny and insignificant part of BCL's estate. (2) In terms of the estate as a whole, the real damage was not physical but rather by way of stigma. (3) Stigma represents the fear of future harm for which damages are not recoverable. (Something of the same approach informs the MoD's argument on liability also. The radioactive material in the marshland, they submit, was in fact doing no harm and, but for the ill-chance that it fell just the wrong side of the regulatory threshold, could perfectly well have stayed where it was. The regulatory controls are needlessly strict; unlike the Nuclear Installations Act 1965, the 1960 Act is not concerned with the scientific effect of the radioactive material; in scientific terms there was none.)

It is not fair, runs the subtext to their argument, that the escape of essentially harmless material onto a small and insignificant part of a large estate should enable BCL to recover huge financial losses realistically attributable rather to stigma than to physical damage. Having removed the contaminated soil at their own, very considerable, expense, the MoD ought not to be condemned further in damages.

There are, of course, a number of legal principles available for restricting or avoiding awards of damages where the court thinks this appropriate on grounds of fairness or for other reasons of policy. These principles (controls, techniques, mechanisms, call them what one will) are many and various. Sometimes it is said that the defendants' duty is to guard only against a certain kind of loss and that other types of damage suffered are accordingly irrecoverable—see particularly *South Australia Asset Management Corp v York Montague Ltd, United Bank of Kuwait plc v Prudential Property Services Ltd, Nykredit*

Mortgage Bank plc v Edward Erdman Group Ltd [1996] 3 All ER 365, [1997] AC 191. Sometimes it is said that the plaintiff has failed to prove causation in respect of a particular type of loss—see eg *Galoo Ltd v Bright Grahame Murray (a firm)* [1995] 1 All ER 16, [1994] 1 WLR 1360. Sometimes, as an aspect of causation, certain heads of damage are disallowed as parasitic—see *Spartan Steel and Alloys Ltd v Martin & Co (Contractors) Ltd* [1972] 3 All ER 557, [1973] QB 27. Sometimes, even after physical damage is suffered, a particular head of loss is characterised as purely economic (and thus irrecoverable) rather than as a natural consequence of the damage (and thus compensatable). Sometimes it is said that the damages must be reasonable as between the parties—see *Ruxley Electronics and Construction Ltd v Forsyth, Laddingford Enclosures Ltd v Forsyth* [1995] 3 All ER 268, [1996] AC 344. Sometimes it is said that given heads of damage are not reasonably forseeable; or that they are too remote.

Each and every one of these principles has been invoked by the MoD here in their attempt to avoid the large award of damages made by the judge below. For my part, however, I see nothing in the least unfair or inappropriate in the MoD being found liable to pay the sums awarded. Given that the 1965 Act imposes upon them strict liability for this kind of damage to land, and given that BCL were, as a direct and forseeable result of this damage, financially worse off (on the judge's findings of primary fact) to the extent of the award, why should they not be compensated in full? True it is that, had BCL owned only the physically damaged marshland area, their damages entitlement would have been very modest indeed. True too, had BCL owned substantially the same estate but in fact excluding the marshland area, they would have recovered nothing even though perhaps suffering much the same losses. But that is because the MoD owe no duty not to cause solely economic loss; physical damage is, all agree, the precondition of any liability. True further, had this damage been revealed not at a moment when the sale of the estate to an owner occupier seemed imminent, but instead when there appeared to be no prospect of sale save only on the substantially cheaper investment market, the damages would have been very considerably lower. True, finally, had BCL in fact achieved a sale before the fact of physical damage was discovered, they would have suffered no loss whatever and there would have been no right in the purchaser to claim damages for what to him would have been merely economic loss. These, however, are mere ifs and buts. In a sense, no doubt, it was fortuitous (adventitious and accidental were other words used in argument) that the physically damaged marshland formed part of a large estate which at the time was being sold as a single unit. Given, however, the wealth of evidence that the contamination stigmatised the whole of the estate and that no case has ever been advanced against BCL that they failed to mitigate their loss by seeking thereafter to dispose of the estate in pieces, I cannot see why this so-called accident of ownership should enable the MoD to escape liability for BCL's undoubted actual loss. The MoD may, indeed, reflect that had they made full disclosure of the extent of contamination in, say, 1990 (as they contemplated doing and as surely they should have done), the damages could well have been greater having regard to the substantially higher value of the estate at that time.

Put shortly, I agree with all that Aldous LJ has said on the various damages issues. This is not a case of pure economic loss; not a case of parasitic damage; not a case where BCL's losses were not reasonably foreseeable; not a case

where the losses are too remote; not a case where as between the parties it is unfair that BCL should recover their losses; not a case where the plaintiffs have failed to mitigate their loss; not a case (save to the limited extent suggested by Aldous LJ with whose view I agree) where on the judge's award BCL have impermissibly recovered in respect of prospective future loss. In the result I, like Aldous and Chadwick LJJ, would dismiss the MoD's appeal save as to the figure to be credited for the post clean-up value of the estate: namely £4·07m rather than £3·78m in December 1994.

BCL's CROSS-APPEAL

Three issues arise under the cross-appeal. (1) Should the damages for loss of the chance of the Sun sale be increased by requiring BCL to give credit, not for the value of the estate as at July 1996 (£5m) but only for its value as at December 1994 (£3·78m, increased by us to £4·07m) when theoretically it could have been sold following completion of the remedial work? (2) Should the damages be increased to include the 25% of the diminution in land value due to residual stigma discounted when calculating the damage due to loss of a chance? (3) Should the interest be increased? With regard to the damages for loss of the chance, interest was awarded from April 1993 to the date of trial on 75% of £10·35m less £5m (interest on the running costs being dealt with separately). BCL contend for interest on 75% of the whole £10·35m until December 1994 or July 1996 as the case may be.

(1) *December 1994 or July 1996?*

In deciding on the July 1996 date, Carnwath J said:

> '… the disclosure of the contamination in January 1993 produced a situation in which BCL, in a period of falling property values, were unable to market the property until remedial works were complete. That was a foreseeable consequence of the contamination, and there is nothing unreasonable in holding AWE responsible for it. I agree with the plaintiffs that the chain of causation, leading from the contamination incident in 1989, ends at the completion of the remedial work—at which time they were free once again to exercise their own choice as to the use or marketing of the estate. The resulting loss is properly within the scope of the duty of care. In principle therefore I accept that the award should take account of the fall in the value while the property was rendered unsaleable. The defendants submit, however, that it would not be right for the award to reflect this fall in the market, unless account is also taken of the evidence of increased values between 1994 and July 1996. I agree. In the words of Lord Hoffmann (*South Australian Asset Management Corp v York Montague Ltd* [1996] 3 All ER 365 at 376, [1997] AC 191 at 218): "If the market moves upwards, it reduces or eliminates the loss which the lender would otherwise have suffered." As I have found, the value of the estate increased from [£3·78m] to around £5m over this period. In so far as BCL's loss was reduced by their own decision to retain the property after December 1994, the award should reflect that. However account must be taken not just of the increase in value, but also the costs of running the estate in the meantime …'

Contesting the correctness of that approach here, Mr Walker submits that the judge erred in applying Lord Hoffmann's reasoning in the *South Australia*

Asset Management case. Those cases, he points out, were concerned with the liability of valuers to lenders who had made advances on the basis of negligently overvalued securities. The question of how much loss, if any, the lenders would actually sustain depended in part upon whether the value of their security rose or fell before the borrower defaulted and they were able to repossess and sell. If the value of the security rose, they might suffer no loss. In those cases, unlike the present case, the lenders had no choice whether or not to realise the security.

Mr Walker submits here that once the judge had held (correctly) that the chain of causation leading from the contamination in 1989 had ended at the completion of the remedial work in December 1994, he should have regarded that as the date when the plaintiffs' loss crystallised.

For my part I find Mr Walker's argument persuasive. Given that in December 1994 BCL became free to sell or retain their estate as they chose, why should the risk not then be regarded as switching back to them? Had they sold, no one doubts that that sale would have crystallised their loss and thus ended their risk. Why should it be otherwise merely because they chose instead to retain the property? True, as the judge observed when later giving judgment on the question of interest, BCL 'were not unreasonable in holding [the property] until July 1996.' Had the market, therefore, fallen and BCL claimed, as no doubt they would have done, for the additional loss, it could not have been said against them that they should have mitigated their loss by selling in December 1994. But would they in fact have been entitled to claim the additional loss? That to my mind merely restates the present question: Must they give credit for the rise in market value after December 1994? Both questions must be answered the same way, whichever way it is.

What, then, decides whether in these circumstances the risk passes? Does the risk (of benefit or disbenefit) remain where it is until trial (or earlier sale) provided only that the defendants act reasonably in retaining the land? This is the effect of the judge's decision. Or does the risk pass to the defendants once they are free to sell or retain the land and they exercise that choice? I prefer BCL's argument in favour of this latter approach. Mustill LJ's judgment in *Hussey v Eels* [1990] 1 All ER 449, [1990] 2 QB 227 seems to me helpfully in point. The defendants there negligently misrepresented that the bungalow they were selling to the plaintiffs for £53,250 had not been subject to subsidence. Because repairs would have cost £17,000 which was beyond the plaintiffs' means, they instead demolished the bungalow and applied for planning permission to erect two others in its place. Two and a half years later they sold the property with the benefit of that planning permission to a developer for £78,500. The Court of Appeal, allowing their appeal and awarding them £17,000 damages, rejected the defendants' argument that their loss had been eliminated by the sale to the developer. Having reviewed a great number of authorities, Mustill LJ concluded ([1990] 1 All ER 449 at 459, [1990] 2 QB 227 at 241):

> 'Ultimately, as with so many disputes about damages, the issue is primarily one of fact. Did the negligence which caused the damage also cause the profit, if profit there was? I do not think so. It is true that in one sense there was a causal link between the inducement of the purchase by misrepresentation and the sale two and a half years later, for the sale represented a choice of one of the options with which the plaintiffs had been presented by the defendants' wrongful act. But only in that sense. To

> my mind the reality of the situation is that the plaintiffs bought the house to live in, and did live in it for a substantial period. It was only after two years that the possibility of selling the land and moving elsewhere was explored, and six months later still that this possibility came to fruition. It seems to me that when the plaintiffs unlocked the development value of their land they did so for their own benefit, and not as part of a continuous transaction of which the purchase of land and bungalow was the inception.'

By the same token, as it seems to me, the plaintiffs' decision here to retain their estate after December 1994 should not properly be regarded 'as part of a continuous transaction' of which the damage to the land was the inception. The loss caused by that breach of statutory duty ended once the land was reinstated and again became available to be retained or sold as BCL chose. Any further loss would have been caused by BCL's decision to retain the land; likewise any gain. The speculation from that point was on their own account.

(2) *25% of the residual stigma depreciation*

This ground of appeal, having been suggested by the court itself, was added at a late stage of the hearing. It arises as follows. As at December 1994 (the date which I have already proposed should be taken for the calculation of BCL's loss) the estate was worth (on Aldous LJ's revised valuation) £600,000 less than otherwise it would have been as a result of having been contaminated (even though cleaned up). Three-quarters of this depreciation in value has, of course, already been brought into account in valuing the loss of the chance of the sale to Sun: but for this factor the figure to be credited against £10·35m would (in December 1994) have been £4·67m, not £4·07m. But why should BCL not be compensated for the whole of this element of the depreciation in the value of their land, ie a further £150,000? As it seems to me, they should be. This plainly was a loss suffered in addition to the loss of the chance of the Sun sale. Assume that that chance had never existed. And assume (in favour of the MoD as I shall demonstrate) that BCL would in that event have retained the estate until December 1994 even had this incident not made that inevitable. BCL would then at the very least have been entitled to damages to compensate them for the whole of the depreciation in the value of the land as a result of residual stigma, ie £600,000. And by the same token that there was a 75% chance of a sale to Sun, there was a 25% chance of not selling to Sun with this consequential entitlement.

I say that BCL's entitlement, had there been no sale to Sun, would have been 'at the very least' £600,000. The fact is that, by not selling the estate to Sun in April 1993, BCL were by December 1994 worse off not only to the extent of the residual stigma depreciation of £600,000, but also (a) such additional depreciation as resulted from falling land values over the period 1993 to 1994, a figure not specifically found by the judge, but on the evidence something in excess of £2m, and (b) the running costs of the estate over those two years (£283,957). The only reason why BCL are not entitled to 25% of all three of these amounts is the want of evidence to suggest that, had the sale to Sun not gone ahead, they would have been able to sell the estate at a price they would have been prepared to accept. On the contrary, the evidence was that Sun was the only prospective owner occupier in the market, and that the value of the estate on the investor market was only some £7m, a price at which BCL would

not have been prepared to sell. Given, however, that the alternative of sale to Sun was BCL's retention of the land (manifestly at their own risk as to general market movement), they would, without the contamination, have had in December 1994 an estate worth £600,000 more than it was. I would accordingly hold them entitled to the remaining 25% of this loss for which they have not elsewhere been given credit, together with interest thereon from December 1994.

(3) *Interest*

Interest was awarded on the damages for BCL's loss of a chance to sell to Sun at the agreed rate on 75% of £5·35m from April 1993 to the date of trial. BCL's essential argument is that the judge erred in requiring them to give credit for the later value of the estate against a loss which in fact occurred in April 1993. It is an issue of some considerable financial consequence.

The argument is an entirely straightforward one. But for the MoD's breach of duty, submits Mr Walker, BCL had a 75% chance of receiving £10·35m in April 1993 and have been deprived of the use of that money ever since. That deprivation was not diminished until the notional realisation of the value of the property (whether in December 1994 or July 1996). The object of an award of interest is to compensate the plaintiff for having been kept out of the use of his money. This, accordingly, is the basis upon which interest should have been awarded.

In his separate judgment on interest given on 6 December 1996 the judge said:

> 'I have not found it easy to reach a conclusion, and there does not appear to be any guidance in the cases, but on balance I think that the defendants' view is the right one. I think that when one is dealing with interest, one is looking at the matter slightly differently than damages. Ultimately it is a matter for the court's discretion, and I think that what I have done is to arrive at a figure representing the chance which was lost in April 1993, and I think it is right to regard that as the base on which interest should run.'

The defendants' argument below appears to have been put in very general terms. So too in their skeleton argument before us:

> 'The plaintiffs' calculation assumes that the property was of no value at all from April 1993 but then suddenly acquired a value of £5m in July 1996. The property had a residual value at all times, which can only be reflected by treating the award as that for a loss of chance, i e the net sum.'

For my part, I would have rejected this argument. The property was indeed of no value from April 1993 at least until December 1994 when its reinstatement was completed. During that period, as the judge found, it was unsaleable. It was, moreover, being run at a loss.

Mr Flint's oral argument before us, however, took a different turn. He now submits that there is simply no jurisdiction in the court to award interest on the basis contended for by BCL. It is time to set out the relevant statutory power, s 35A of the Supreme Court Act 1981. So far as material this provides:

> '(1) … in proceedings … before the High Court for the recovery of a debt or damages there may be included in any sum for which judgment is given simple interest, at such rate as the court thinks fit … on all or any part of

> the debt or damages in respect of which judgment is given … for all or any part of the period between the date when the cause of action arose and … (b) … the date of the judgment …'

(The section also provides for interest in respect of sums paid before judgment but that is not material for present purposes).

Mr Flint's simple point is that judgment has not been given here for (75% of) £10·35m so that there is no power to give interest on that sum for any period at all. The relevant 'damages in respect of which judgment is given' here are 75% of £5·35m or £6·57m (depending whether one takes the 1994 or 1996 figure). The credit to be given for the later valuation of the estate in the loss of the chance calculation manifestly does not represent a 'sum paid before judgment'.

This argument seems to me plainly correct. In truth what BCL are claiming here is not interest on damages but rather a special damage award. Just such a claim was made and upheld in the Court of Appeal in *Hartle v Laceys* (*a firm*) [1997] CA Transcript 400. That was a solicitors' negligence case in which the court awarded the plaintiff property developer damages for loss of a chance of selling property more favourably than eventually was possible. The damages were calculated at 60% of the difference between the price at which the plaintiff would probably have sold but for the negligence and that at which later he did sell (in two tranches). In addition the plaintiff recovered as special damages interest upon (60% of) the larger sum for the periods prior to, as well as after, the respective dates when credit had to be given for the two sums eventually realised. Ward LJ in the leading judgment put it thus:

> 'The statement of claim pleads the claim for interest as special damages. It alleges the defendants' awareness of the extent of the plaintiff's indebtedness to the Bank and of the fact that the plaintiff intended to repay or reduce his indebtedness out of the proceeds of the sale. In my judgment this was a correctly pleaded claim for interest as special damages under the second part of the rule [in *Hadley v Baxendale* (1854) 9 Exch 341, [1843–60] All ER Rep 461].'

There is no such pleaded claim for special damage here and, indeed, it is far from clear that such a claim would have succeeded. There was certainly no suggestion that BCL would have applied the proceeds of the prospective Sun sale to reducing bank indebtedness. On the contrary, the likelihood is that they would have purchased another property for their own occupation. In a time of falling market values, the use of the money in that way could well have proved expensive rather than profitable.

It follows from all this that I would uphold the judge's ruling on interest but upon the different ground that there is no jurisdiction in the court to award interest on the basis contended for by BCL. There will, of course, have to be a recalculation of interest upon the damages for loss of the chance of the sale to Sun given that (a) the credit to be allowed for the value of the estate is £4·07m rather than £5m and (b) the running costs for December 1994 to July 1996 are to be excluded.

(After writing this judgment, I received from Mr Walker a letter conceding, following consideration of *I M Properties plc v Cape & Dalgleish* (*a firm*) [1998] 3 All ER 203 and *President of India v La Pintada Cia Navegacion SA* [1984] 2 All ER 773, [1985] AC 104, that his argument is unsustainable and that the court has no

jurisdiction to make the order sought. I am comforted by this but see no reason to alter my own judgment on the point.)

As a final comment I wish to add this. Carnwath J's judgment, besides being as I conclude correct in almost every detail, is to be commended as a model judgment for a case of this kind. It consists of a central 31-page section in which the judge succinctly sets out the basic facts and law, lucidly analyses the arguments and authorities, and skilfully summarises his conclusions on all points; together with three appendices each of some 20 pages (making a total judgment of 90 pages) which cover respectively (A) the detailed factual background to the case, (B) the contamination, its treatment and effects, and (C) the valuation evidence. In a case as complicated as this one was, we could have had no more helpful a foundation for our consideration of the many issues raised on appeal.

Appeal dismissed to extent indicated. Cross-appeal allowed in part. Leave to appeal to the House of Lords refused.

Lawrence Nesbitt Esq Barrister.