provide photocopied authorities, rather than to use copies provided by the House, the particular passages should be indicated by highlighting."

Attendance in custody

Direction 35 (Directions as to Procedure applicable to Criminal Appeals). At end insert:

"Such an application should also be made in cases where the prisoner was on bail pending the hearing of the appeal, since surrender is required on the first day of the hearing."

M. A. J. WHEELER-BOOTH
Clerk of the Parliaments

17 May 1991

[COURT OF APPEAL]

*WATTS AND ANOTHER v. MORROW

[1987 W. No. 3314]

1991 July 3, 4, 8, 9; 30 — Sir Stephen Brown P., Ralph Gibson and Bingham L.JJ.

Damages—Measure of damages—Surveyor's report—Surveyor's report negligently failing to disclose defects—Property purchased in reliance on negligent report—Purchaser repairing defects–Whether cost of repairs recoverable—Whether damages measurable by difference in value as described and true value of defective property—Measure of damages for distress and inconvenience

The plaintiffs, who were husband and wife, purchased a property for £177,500 in reliance on a building surveyor's report made by the defendant in August 1986. The plaintiffs acquired the property as a second home and had required that it should be reasonably trouble free without any need for extensive repairs. The report indicated that the defects mentioned in it could be dealt with as part of ordinary maintenance. On entering into possession in 1987 the plaintiffs discovered defects beyond those disclosed in the defendant's report. The cost of the repairs amounted to £33,961. The plaintiffs commenced an action for damages for negligence and/or breach of contract. The judge gave judgment for the plaintiffs, awarding them the cost of the repairs, together with general damages of £4,000 for each plaintiff for "distress and inconvenience."

On appeal by the surveyor on quantum of damages:—

Held, allowing the appeal, (1) that, in the absence of any warranty that the condition of the property had been correctly

described by the defendant, there was no basis for awarding the cost of repairs; that the proper measure of damages was the sum needed to put the plaintiffs in as good a position as if the contract had been properly performed; and that, accordingly, the financial loss of the plaintiffs was limited to the difference between the value of the property as it was represented to be and its value in its true condition (post, pp. 1434G—1435E, 1444F–G, 1445D–E, 1446C–D).

Philips v. Ward [1956] 1 W.L.R. 471, C.A. applied.

Hipkins v. Jack Cotton Partnership [1989] 2 E.G.L.R. 157 and *Syrett v. Carr & Neave* [1990] 2 E.G.L.R. 161 disapproved.

(2) That in the case of the ordinary surveyor's contract general damages were recoverable only for distress and inconvenience caused by physical consequences of the breach of contract; that such damages should be a modest sum for the amount of physical discomfort endured; and that, on the facts, £750 was an appropriate sum for each plaintiff (post, pp. 1440B–C, 1442C–D, 1443G–H, 1445G–H, 1446D).

Perry v. Sidney Phillips & Son [1982] 1 W.L.R. 1297, C.A. and *Hayes v. James & Charles Dodd (a firm)* [1990] 2 All E.R. 815, C.A. considered.

Decision of Judge Bowsher Q.C., sitting on official referee's business, reversed.

The following cases are referred to in the judgments:

Addis v. Gramophone Co. Ltd. [1909] A.C. 488, H.L.(E.)
Admiralty Commissioners v. S.S. Chekiang [1926] A.C. 637, H.L.(E.)
Admiralty Commissioners v. S.S. Susquehanna [1926] A.C. 655, H.L.(E.)
Bailey v. Bullock [1950] 2 All E.R. 1167
Bigg v. Howard Son & Gooch [1990] 1 E.G.L.R. 173
Bliss v. South East Thames Regional Health Authority [1987] I.C.R. 700, C.A.
British Westinghouse Electric and Manufacturing Co. Ltd. v. Underground Electric Railways Co. of London Ltd. [1912] A.C. 673, H.L.(E.)
County Personnel (Employment Agency) Ltd. v. Alan R. Pulver & Co. [1987] 1 W.L.R. 916; [1987] 1 All E.R. 289, C.A.
Cross v. David Martin & Mortimer [1989] 1 E.G.L.R. 154, Phillips J.
Dodd Properties (Kent) Ltd. v. Canterbury City Council [1980] 1 W.L.R. 433; [1980] 1 All E.R. 928, C.A.
Groom v. Crocker [1939] 1 K.B. 194; [1938] 2 All E.R. 394
Hayes v. James & Charles Dodd (a firm) [1990] 2 All E.R. 815, C.A.
Heywood v. Wellers [1976] Q.B. 446; [1976] 2 W.L.R. 101; [1976] 1 All E.R. 399, C.A.
Hipkins v. Jack Cotton Partnership [1989] 2 E.G.L.R. 157, Scott Baker J.
Hobbs v. London and South Western Railway Co. (1875) L.R. 10 Q.B. 111, D.C.
Jackson v. Horizon Holidays Ltd. [1975] 1 W.L.R. 1468; [1975] 3 All E.R. 92, C.A.
Jarvis v. Swans Tours Ltd. [1973] Q.B. 233; [1972] 3 W.L.R. 954; [1973] 1 All E.R. 71, C.A.
Livingstone v. Rawyards Coal Co. (1880) 5 App.Cas. 25, H.L.(Sc.)
Perry v. Sidney Phillips & Son [1982] 1 W.L.R. 1297; [1982] 3 All E.R. 705, C.A.
Philips v. Ward [1956] 1 W.L.R. 471; [1956] 1 All E.R. 874, C.A.
Pinnock v. Wilkins & Sons (unreported), 23 January 1990; Court of Appeal (Civil Division) Transcript No. 26 of 1990, C.A.
Roberts v. J. Hampson and Co. [1990] 1 W.L.R. 94; [1989] 2 All E.R. 504
Steward v. Rapley [1989] 1 E.G.L.R. 159, C.A.
Syrett v. Carr & Neave [1990] 2 E.G.L.R. 161

The following additional cases were cited in argument:

Bacon v. Cooper (Metals) Ltd. [1982] 1 All E.R. 397

Esso Petroleum Co. Ltd. v. Mardon [1975] Q.B. 819; [1975] 2 W.L.R. 147; [1975] 1 All E.R. 203

Harbutt's "Plasticine" Ltd. v. Wayne Tank and Pump Co. Ltd. [1970] 1 Q.B. 447; [1970] 2 W.L.R. 198; [1970] 1 All E.R. 225, C.A.

Pilkington v. Wood [1953] Ch. 770; [1953] 3 W.L.R. 522; [1953] 2 All E.R. 810

Simple Simon Catering Ltd. v. Binstock Miller & Co. (1973) 228 E.G. 527, C.A.

APPEAL from Judge Bowsher Q.C. sitting on official referee's business.

In August 1986 the plaintiffs, Ian Roscoe Watts and Lesley Mary Samuel Watts, instructed the defendant, Ralph Morrow, a building surveyor, to survey and advise them on the structural and general condition of Nutford Farm House, Blandford, Dorset. On 26 August 1986 the surveyor sent his report to the plaintiffs, and the plaintiffs entered into a contract to buy the property for £177,500. On entering into possession, following completion in April 1987, the plaintiffs discovered defects beyond those disclosed by the defendant's report. Repairs were carried out by the plaintiffs in 1988 at a cost of £33,961. By a writ issued on 11 November 1987 the plaintiffs claimed damages against the defendant for negligence and/or breach of contract. On 6 November 1990 the judge gave judgment for the plaintiffs and awarded the plaintiffs damages of £33,961·35 for the cost of the repairs and general damages, for distress and inconvenience, of £4,000 for each plaintiff.

By an amended notice of appeal the defendant appealed against the quantum of damages on the grounds, inter alia, that (1) the judge was wrong in law in holding that the proper measure of damage was the cost of repairing the property, when the proper measure was any overpayment in the price paid for the property; (2) the judge was wrong in law in holding that the plaintiffs were entitled to recover general damages for distress and inconvenience; and (3) the award of £4,000 to each plaintiff for inconvenience and distress, was, in any event, excessive and not justified by the evidence.

The facts are stated in the judgment of Ralph Gibson L.J.

Rupert Jackson Q.C. and *Iain Hughes* for the defendant.

Philip Naughton Q.C. and *Jonathan Acton Davis* for the plaintiffs.

Cur. adv. vult.

30 July. The following judgments were handed down.

RALPH GIBSON L.J. This is an appeal by the defendant, Ralph Morrow F.R.I.C.S., a building surveyor, against the judgment obtained by the plaintiffs, Mr. and Mrs. Watts, on 9 November 1990, after trial of the action by Judge Bowsher Q.C. The action arose out of a negligent survey report by the defendant made in August 1986 on Nutford Farm House, Blandford, in Dorset, which the plaintiffs were proposing to buy and thereafter bought. The judgment awarded £33,961·35 for the cost of certain repairs to the house, with £12,839·87

for interest; and £8,000 (£4,000 for each plaintiff) for "distress and inconvenience" with interest of £477·81. At the trial liability was in issue, but the defendant's appeal is on damages only. He contends, first, that the judge was wrong in law to award damages based on the cost of repairs and that the award should have been, on the basis of diminution in value or excess purchase price paid, in the sum of £15,000; secondly, that any award for distress and inconvenience was wrong in law, alternatively, that the award of £8,000 was excessive; and, thirdly, that the award of interest was based on an excessive rate.

The case raises questions of general importance both for surveyors of houses and for those who buy houses in reliance upon survey reports. The defendant contends that the judge has disregarded the rule which, since 1956 at least, has been generally held to apply to such cases as this. The plaintiffs assert that there is no such rule or, if there is, that it is wrong to apply it in this case. It is necessary to set out the facts in some detail.

Summary of the facts

Mr. Watts is a stockbroker employed by Barclays de Zoete Wedd U.K. Equities Ltd. Mrs. Watts, a solicitor, is a director of Kleinwort Benson Ltd., merchant bankers. In 1986 they were married and living in a house in Cloudesly Road, Islington. They decided to look for a country house for use at weekends and holidays. Their case at trial was that they both wanted a house which would be, so far as possible, trouble free and into which they could move without the need for any substantial works of repair. It was to be a second home for use at weekends and holidays. Each had a substantial income but considered that, although they could buy a new house within a budget of £170,000, they could not afford to buy a house which required the carrying out of any expensive repairs. Further, they did not have the time or energy to get involved in doing up a house which required extensive repairs or improvements.

Mr. Watts found and "fell in love with" the house. It was a larger house than Mrs. Watts had expected to buy but, as she said, "it was very beautiful, a house with a heart and difficult to resist," built in the 18th and 19th centuries. The house is substantial with three quarters of an acre of garden and three acres of paddock. It is near the River Stour and the vendor was willing to let the purchaser have some fishing rights.

The asking price of the house was £175,000. There was another prospective purchaser. Mr. and Mrs. Watts decided to offer £177,500. That was acceptable to the vendor. Before entering into a contract to buy, Mr. and Mrs. Watts decided to get a full and detailed survey to ensure that there were going to be no unexpected costs.

Mr. Watts instructed the defendant in August 1986. The defendant was asked to provide a full structural survey of the house. Mr. Watts told Mrs. Morrow, who received the instructions, that he wanted to be sure that the £177,500 offered was the right price in the current market.

On 26 August 1986 the defendant sent to Mr. Watts his structural report on the property. The fee charged was £400 plus disbursements and VAT. The report was detailed and long. It mentioned many defects and made recommendations for repairs, but Mr. and Mrs. Watts found it reassuring. The general criticism made of the report, which the judge held to have been made out, was that, as a recurring theme, the defendant pointed out a defect in the house and then gave a reassurance

that the defect could be dealt with as a part of ordinary ongoing maintenance and repair. The "conclusion," which summarised the tone of the report, though not all its detail, was as follows:

> "Despite earlier minor settlement I found the overall dwelling house to be sound, stable and in good condition. Attention is particularly required to the sometime eradication of wood borer in roofing timbers, and to minor works of eradicating continued dampness in ground floor walls. Ideally some insulation would be introduced to upper ceiling areas, but in general, the defects referred to within this report can normally be identified as being associated with regular maintenance required with a building of this age and type. The foul drainage arrangements, while apparently adequate, are not ideal, and some further rationalisation and improvement of this may be required in the sometime future, but with attention given to the various aspects referred to within this report, which could well be attended to on an ongoing basis, I am satisfied that a comfortable and largely trouble-free dwelling of considerable charm can be attained."

Nothing was said in the report about the value of the house.

On receiving the report Mr. and Mrs. Watts read it with care and, as the judge held, reasonably concluded that there was nothing to suggest that any major repairs would be required in the foreseeable future and that nothing was required which could not wait until between them they had funds to spare for such work. Mr. Watts by telephone asked the defendant whether the price of £177,500 was fair and whether the repairs which the defendant had recommended would result in substantial expenditure. The defendant replied that the valuation was fair and that no repairs would be substantial in terms of cost. That reply was not relied upon as constituting a warranty, whether express or implied.

In reliance on the report Mr. and Mrs. Watts decided to buy the house. The contract was made on 15 October 1986 at the price of £177,500. It was agreed that completion would be deferred and it took place on 10 April 1987 with the assistance of a mortgage loan from Kleinwort Benson Ltd. on ordinary commercial terms.

Defects were discovered in the house beyond those of which warning was given in the defendant's report. After taking possession in 1987 Mr. Watts asked Mr. White, a builder, for a quotation for work which included the remedying of certain defects identified by the defendant, namely, the roof flashing and defective windows. On examining the house for those purposes, Mr. White informed Mr. Watts of other defects and Mr. Wadey F.R.I.C.S. was then instructed to carry out a full structural survey. His report, dated 3 August 1987, included the following: (a) the roof was due for renewal with felting, rebattening and retiling; (b) the chimneys and main walls required repointing in places; (c) lead flashings needed to be installed; (d) window casements and frames generally needed to be upgraded and replaced; (e) the first floor timbers needed specialist woodworm treatment and refixing of firring pieces with extensive renewal of floor boarding. He reported other defects as well which were not relied upon against the defendant at the trial.

If Mrs. Watts had known of the defects described in Mr. Wadey's report she would not have gone ahead with the purchase. If Mr. Watts had known of those defects he would either not have agreed to buy the

house or would have agreed to buy only if he had been able to negotiate a substantial reduction in the price based on quotations for the work recommended to roof, to floors and to windows.

Upon receipt of Mr. Wadey's report it was obvious to Mr. Watts that building repairs at a cost running into many thousands of pounds would have to be done urgently. He obtained advice as to his right to claim redress in law for the failure of the defendant to describe the condition of the roof accurately. A formal letter before action was sent. Liability was denied.

Mr. Watts then asked the builder to prepare an estimate for the repairs described in Mr. Wadey's report. In September and October Mr. White carried out the work to the roof and on 3 November 1987 he was paid £11,212·50 for that work.

On 11 November 1987 the writ was issued and in March 1988 the statement of claim was served. The main allegation was that the defendant had negligently failed to observe and advise Mr. and Mrs. Watts that the house was in a defective condition. The loss and damage alleged were, first, the difference between the price paid and the value of the house, and, in addition, the cost of repairs, of alternative accommodation, of furniture removal and storage, for loss of use of the property and for the cost in investigation of the defects. There was no allegation of negligent valuation.

Between April and October 1988, for a period of six months, the other works, in respect of which claims were made at the trial, were carried out. Because claims in the action were to be made in respect of the work, it was carried out under separate quotations. The times of doing the work and the amounts paid were: (a) replacing the first floor flooring £6,840·01: before 20 May 1988; (b) first floor windows £7,196·70: before 9 July 1988; (c) exterior brickwork £4,507·42: before 9 September 1988; (d) flooring £4,204·72: before 28 October 1988. Those sums, together with the cost of the roof repairs, make up the total of £33,961 awarded as special damages.

The cost of carrying out those repairs was met by Mr. and Mrs. Watts by borrowing money. It was their case that, when the defendant was instructed and made his negligent report, and when Mr. and Mrs. Watts entered into the contract to purchase in October 1986, although they were both high earners, they were "strapped for cash," and hence the importance to them of knowing what the likely financial burdens would be from buying the house. However, between 1986 and 1988 the earned income of both Mr. Watts and Mrs. Watts substantially increased. Mrs. Watts in 1986 received a salary of £41,000 and a bonus of £6,000 paid in January 1987. Her salary for 1987 was £70,000 and her bonus in January 1988 was £40,000. As to Mr. Watts, he earned "very substantially more during 1987 and subsequent years than . . . anticipated at the time of purchase." In consequence, Mr. and Mrs. Watts were able to finance the cost, not only of the repairs in respect of which the sums listed above were paid, but also other repairs, of which the defendant was not said negligently to have failed to inform Mr. and Mrs. Watts and, in addition, to "decorate and refurbish" the house to a high standard. Mr. Watts pointed out that "this process of refurbishment was considerably delayed by the need to undertake the repairs which had neither been foreseen nor budgeted for." The sum expended on all the repairs, decoration and refurbishment was in excess of £150,000.

A The circumstances which gave rise to the claim for damages for "distress, worry, vexation and inconvenience" were described by Mr. Watts as follows:

> "the quality of our life was very seriously affected. We had bought the house on the basis . . . that apart from regular maintenance, the property would not require attention. In the event, for eight months
B we spent almost every weekend staying in a building site. The conditions were quite deplorable. At various times there was scaffolding around the entirety of the house, the first floor boards and the first floor windows were removed in sequence. There was constant dirt and dust permeating the air. Moving our possessions from room to room in accordance with the builder's requirements was a recurrent nightmare and our possessions and furniture became
C dirty. From time to time there was no internal sanitation and we could not bath. [We] were forced to spend extended periods out of our first floor bedroom living and sleeping in the unheated, undecorated attic rooms. We were most reluctant to entertain our friends and were completely unable to entertain clients.
>
> "Throughout the period of building works [we] continued to
D spend weekends at the house. As there was no supervising architect or surveyor . . . the only supervision was that provided by me. I believed it to be essential that I spent as much time as possible with the builders to provide them with an incentive to get on with it, to ensure that the work was done to the requisite standard and to provide guidance with the numerous minor problems which arose. I met the builder at the property virtually every weekend.
>
E "Our summer holiday in 1988, which we had planned to spend in the house, was spent in a hotel in the Western Isles at an unplanned cost of £880. Both [of us] were employed in extremely stressful occupations in the City . . . Weekend relaxation was essential to us, both in terms of our physical wellbeing and our capacity to perform our jobs to the requisite standard. The denial
F of that relaxation by virtue of the building works caused us both great distress. I believe that it was, at the very least, a contributory cause to the unfortunate breakdown of our marriage, which culminated in our separation late in 1989."

Mr. and Mrs. Watts were divorced in April 1990 having separated early in 1989. Mr. Watts still owns and occupies the house. Mrs. Watts lives
G in the house in Islington.

As to the ground of liability, the judge held that Mr. and Mrs. Watts had reasonably concluded from the defendant's report of August 1986 that no major repairs would be required in the foreseeable future and that nothing was required which could not wait until between them Mr. and Mrs. Watts had the funds to spare for such work. There was, of course, no finding that the defendant had warranted the absence of any
H need for major repairs. No such warranty was alleged.

As to the difference in value, it was the unchallenged evidence of Mr. Wadey, who gave evidence for Mr. and Mrs. Watts at the trial, that in October 1986, the date of the contract to purchase, the value of the house in its true condition was £162,500. It has been common ground in this court that, in reliance on the defendant's advice, Mr. and Mrs. Watts paid for the property £15,000 more than the property was worth in its true condition.

The judge's grounds of decision

The judge accepted the evidence of Mr. and Mrs. Watts. As to the measure of damages for the consequences of the negligent advice, the judge accepted that the damages were to be assessed either on the cost of repairs or on the difference in value. He directed himself by reference to the principles stated by Bingham L.J. in *County Personnel (Employment Agency) Ltd. v. Alan R. Pulver & Co.* [1987] 1 W.L.R. 916, 925, namely, in brief summary, that the "diminution in value" rule is almost always appropriate where property is acquired following negligent advice by surveyors; but that that is not an invariable approach and should not be mechanistically applied in cases where it may appear inappropriate. He observed that the circumstances of the present case were remarkably similar to the facts in *Syrett v. Carr & Neave* [1990] 2 E.G.L.R. 161, a case also decided by him. The judge then, after reference to the receipt by Mr. and Mrs. Watts of Mr. Wadey's report on 3 August 1987, stated the ground of his decision in accordance with his reasoning in *Syrett's* case as follows:

> "If [Mr. and Mrs. Watts] had then sought to cut their losses by reselling, they would have incurred very considerable costs in reselling, in the shape of agents' and solicitors' fees and stamp duty, and in finding a new property if that had been their chosen course of action. In addition, they might have incurred a very substantial loss on the resale in very different market conditions and when they were selling what would have become a suspect house, and they would have had to devote much time to the sale of the house. In the very difficult position in which they found themselves, I find that they acted entirely reasonably in deciding to repair the premises rather than resell."

He therefore held that Mr. and Mrs. Watts were entitled to recover damages assessed as the cost of repair of the premises as to those items of which complaint had been made, namely £33,961·35. It is to be noted that there was nothing in the pleaded case as what costs they would have incurred on reselling. As to the claim for general damages for distress and inconvenience the judge rejected the submission for the defendant, based on *Hayes v. James & Charles Dodd* [1990] 2 All E.R. 815, that such damages are not recoverable in this class of case. That case, he held, did illustrate features for which damages of that sort should not be awarded. He noted the reference to the physical consequences of the breach of duty as justifying an award in the judgment of Kerr L.J. As a matter of policy, in his view, damages for mental distress in contract are limited to certain classes of case including "where the contract which has been broken was itself a contract to provide peace of mind or freedom from distress:" see *per* Dillon L.J. in *Bliss v. South East Thames Regional Health Authority* [1987] I.C.R. 700, 718. The judge held that, on the authorities cited, in appropriate circumstances a negligent surveyor of a residential property, which he has undertaken to survey for a prospective purchaser of the property who intends to live there, may be liable to his client in damages to compensate him or her for inconvenience and distress arising out of living in the property but not out of litigation about it. The judge commented that a prospective buyer of a house goes to a surveyor not just to be advised on the financial advisability of one of the most

important transactions of his life, but also to receive reassurance that when he buys the house he will have "peace of mind and freedom from distress."

As to the amount of damages, they should be on a scale which is not excessive but modest: see *per* Lord Denning M.R. in *Perry v. Sidney Phillips & Son* [1982] 1 W.L.R. 1297, 1302, 1303. The judge then set out the description of the distress and inconvenience which Mr. and Mrs. Watts suffered in the house, limited to weekends, in the terms set out in the proof of Mr. Watts quoted above. The judge declined to allow the £880, the cost of the holiday in 1988, as special damages, but held that it was to be taken into account in assessing general damages for distress and inconvenience. He rejected the contention that, since Mr. and Mrs. Watts had voluntarily undertaken works going far beyond the works the subject of the action, therefore their alleged distress and inconvenience should be discounted. The answer of Mr. Watts had been that, once it became necessary to do certain works, other works naturally followed: for example, once the floor had to come up it was only natural and sensible that the wiring and underfloor plumbing also should be dealt with, even though those matters would not normally have been considered for some years. The judge held that answer of Mr. Watts to be sensible and well founded. The judge also considered, though the point had not been argued, whether the breakdown of the Watts' marriage could be taken into account and held that, as a matter of policy, it could not be. The judge then held that the totality of the distress and inconvenience, assessed on a modest scale, should be set at £4,000 for each plaintiff.

As to interest, the judge was invited by counsel for Mr. and Mrs. Watts to allow interest at 15 per cent. on the award in respect of damages based on the cost of repairs. The contention for the defendant was that interest should be at the short-term interest account rates. Judge Bowsher, without giving any detailed reasons, held that the appropriate rate of interest was 15 per cent. on the £33,961·35 calculated from the dates of payment by Mr. and Mrs. Watts and 2 per cent. on general damages.

The contest on the main issue: diminution in value or cost of repairs?

Before describing the submissions which have been made on this appeal it is necessary to refer to the decisions of this court in *Philips v. Ward* [1956] 1 W.L.R. 471 and *Perry v. Sidney Phillips & Son* [1982] 1 W.L.R. 1297 to which detailed reference has been made in the submissions of counsel. In *Philips v. Ward* the plaintiff, in reliance upon a negligent report by a surveyor, purchased in June 1952 for £25,000 an Elizabethan manor house farm consisting of house, two cottages, and some land. The surveyor failed to report that the timbers of the house were badly affected by death watch bettle and worm so that the only course was to replace the roof by a new roof and to rebuild the timbers etc. The market value of the property in its actual condition was £21,000. After moving into the house with his family the plaintiff found that it would require an additional expenditure of £7,000 at 1952 prices to put the property into the condition in which it had been described in the report. The plaintiff claimed, among other heads of claim, the cost of repairs ruling at the date of trial. The official referee awarded £4,000, namely the difference between the value of the property as it should have been described and its value as described. This court (Denning,

Morris and Romer L.JJ.) held that the proper measure of damages was the difference in money between the value of the property in the condition described and its value as it should have been described, namely £4,000. It is necessary to set out some passages in the judgments. It has been common ground on this appeal that the diminution in value rule is more accurately to be expressed as the difference between the price paid and the value in its true description, at least where no point is taken, as in this case, that the plaintiff chose to pay above market value.

In *Philips v. Ward* [1956] 1 W.L.R. 471, 473, Denning L.J. said:

> "I take it to be clear law that the proper measure of damage is the amount of money which will put Mr. Philips into as good a position as if the surveying contract had been properly fulfilled: see *British Westinghouse Electric and Manufacturing Co. Ltd. v. Underground Electric Railways Co.* [1912] A.C. 673, 689, *per* Lord Haldane L.C. Now if [the surveyor] had carried out his contract, he would have reported the bad state of the timbers. On receiving that report, Mr. Philips would either have refused to have anything to do with the house—in which case he would have suffered no damage—or he would have bought it for a sum which represented its fair value in its bad condition—in which case he would pay so much less on that account. The proper measure of damages is therefore the difference between the value in its assumed good condition and the value in the bad condition which should have been reported to the client. We were referred to the cases where a house is damaged or destroyed by the fault of a tortfeasor. These cases are, I think, different. If the injured person reasonably goes to the expense of repairing the house, the tortfeasor may well be bound to pay the cost of repair, less an allowance because new work takes the place of old: see *Lukin v. Godsall* (1795) Peake Add.Cas. 15 and *Hide v. Thornborough* (1846) 2 Car. & Kir. 250. In other cases, the tortfeasor may only have to pay the value of the house: see *Moss v. Christchurch Rural District Council* [1925] 2 K.B. 750. It all depends on the circumstances of the case: see *Murphy v. Wexford County Council* [1921] 2 Ir.R. 230. The general rule is that the injured person is to be fairly compensated for the damage he has sustained, neither more nor less."

Later in his judgment Denning L.J. said, at p. 474:

> "So also in this action, if Mr. Philips were to recover from the surveyor the sum of £7,000, it would mean that Mr. Philips would get for £18,000 (£25,000 paid less £7,000 received) a house and land which were worth £21,000. That cannot be right. The proper amount for him to recover is £4,000."

Morris L.J. said, at pp. 475–476:

> "In my judgment, the damages to be assessed were such as could fairly and reasonably be considered as resulting naturally from the failure of the defendant to report as he should have done. . . . It is said . . . that [the official referee] was not warranted in proceeding on the basis . . . of the difference between the value of the property as it was described in the defendant's report and its value as it should have been described. In my view, however, that was the correct basis on the facts of this case."

Romer L.J., after giving the same reasons for holding that the diminution in value was the correct measure of damages, said, at p. 478:

> "It may well be that if, on learning of the real condition of the house, he had decided to leave and resell, he would have been entitled to recover from the defendant, in addition to the £4,000, his costs and expenses of moving in and moving out and of the resale. As, however, he elected to stay, after all the facts had become known to him this point does not arise."

In *Perry v. Sidney Phillips & Son* [1982] 1 W.L.R. 1297 the surveyor failed to observe serious defects, including a leaking roof and a septic tank with an offensive smell. The plaintiff could not afford major repairs and executed only minor repairs himself. At the date of the trial the plaintiff was still occupying the house as his home. The judge awarded damages assessed in respect of repairing the defects as at the date of trial in 1981. Between the date of the trial and the hearing of the appeal the plaintiff sold the property for £43,000. He had paid £27,000 in 1976 in reliance on the negligent report. It was acknowledged by the plaintiff that sale of the house without repairs having been executed made it difficult to support the award based upon the cost of repairs, and his contention was that damages should be assessed on the basis of the difference in market value of the property as between its value taking into account the defects for which the judge found liability established and its value in the condition the defendants reported it to be either on the basis of values at the date of the report or at the date of judgment. Lord Denning M.R., after reference to the measure of damages for breach of contract to build a house, or to do repairs to it, or in respect of damages done to it (*Dodd Properties (Kent) Ltd. v. Canterbury City Council* [1980] 1 W.L.R. 433), continued [1982] 1 W.L.R. 1297, 1301–1302:

> "where there is a contract by a prospective buyer with a surveyor under which the surveyor agrees to survey a house and make a report on it—and he makes it negligently—and the client buys the house on the faith of the report, then the damages are to be assessed at the time of the breach, according to the difference in price which the buyer would have given if the report had been carefully made from that which he in fact gave owing to the negligence of the surveyor. The surveyor gives no warranty that there are no defects other than those in his report. There is no question of specific performance. The contract has already been performed, albeit negligently. The buyer is not entitled to remedy the defects and charge the cost to the surveyor. He is only entitled to damages or the breach of contract or for negligence. It was so decided by this court in *Philips v. Ward* [1956] 1 W.L.R. 471, followed in *Simple Simon Catering Ltd. v. Binstock Miller & Co.* (1973) 117 S.J. 529."

Oliver L.J. said, at p. 1304:

> "The position as I see it is simply this, that the plaintiff has been misled by a negligent survey report into paying more for the property than that property was actually worth. The position, as I see it, is exactly the same as that which arose in *Philips v. Ward* . . . and in the subsequent case of *Ford v. White & Co.* [1964] 1 W.L.R. 885. . . . I see nothing . . . which justifies the proposition

> . . . that damages are to be assessed on the basis of some hypothetical value at the date of the trial because the plaintiff has chosen—as he did in this case—to retain the property and not to cut his loss by reselling it. . . . the right measure of damage is the measure suggested in both *Philips v. Ward* . . . and *Ford v. White & Co.* . . . which is simply the difference between what the plaintiff paid for the property and its value at the date when he obtained it."

Kerr L.J., at p. 1306, reserved his view as to whether in a case like this the approach by way of cost of repairs is necessarily right since the point had not been argued.

Mr. Jackson, in support of the contention that the judge was wrong in law in failing to apply the diminution in value rule, submitted that the present case on the facts cannot be validly distinguished from, and should therefore be decided in accordance with, the decision of this court in *Philips v. Ward* [1956] 1 W.L.R. 471 by awarding no more than the sum of £15,000, together with interest. *Philips* was, he submitted, a decision in which, on analysis of the ordinary relationship between the purchaser of a dwelling house and the surveyor advising him as to the condition of that house, this court was applying, and not failing to apply, what has been called the "overriding rule" of restitution in relation to damages, that is as stated by Lord Blackburn in *Livingstone v. Rawyards Coal Co.* (1880) 5 App.Cas. 25, or as stated by Lord Haldane L.C. in *British Westinghouse Electric and Manufacturing Co. Ltd. v. Underground Electric Railways Co. of London Ltd.* [1912] A.C. 673 to which Denning L.J. referred in his judgment in *Philips v. Ward* [1956] 1 W.L.R. 471. That was recognised by this court in *County Personnel (Employment Agency) Ltd. v. Alan R. Pulver & Co.* [1987] 1 W.L.R. 916 where, in a passage cited by Judge Bowsher Q.C. in his judgment in the present case, Bingham L.J. said, after reference to the overriding rule of restitution, at p. 925:

> "On the authorities as they stand the diminution in value rule appears almost always, if not always, to be appropriate where property is acquired following negligent advice by surveyors. Such cases as *Philips v. Ward* [1956] 1 W.L.R. 471; *Pilkington v. Wood* [1953] Ch. 770; *Ford v. White & Co.* [1964] 1 W.L.R. 885 and *Perry v. Sidney Phillips & Son* [1982] 1 W.L.R. 1297, lay down that rule . . ."

In commenting on the judge's findings of fact with reference to the decision of Mr. and Mrs. Watts not to resell but to carry out repairs. Mr. Jackson submitted that, since on the expert evidence the value of the house in its true condition in August 1987 was £185,000 (£7,500 more than the plaintiffs had paid in April 1987, the plaintiffs could have sold, have paid the sums wasted on fees etc., and have been in the same financial position in August 1987 as immediately before exchange of contracts. This point was made, as I understood the argument, not in order to justify application of the diminution in value rule (which was submitted to be correctly applied irrespective of the financial consequences on resale), nor to criticise the finding that it was reasonable for Mr. and Mrs. Watts not to resell—(it was conceded that it was reasonable if they wished so to act for their own purposes)—but to demonstrate the consequences of the application of the rule to either course of conduct which Mr. and Mrs. Watts might have chosen to follow.

A Mr. Jackson drew to the court's attention a large number of cases decided since *Philips v. Ward* [1956] 1 W.L.R. 471 in which the diminution in value rule had been applied. He submitted that in those cases where the diminution in value rule had not been applied, and where there was no justification on the facts for not applying it, the decisions were wrong, including, in his submission, *Hipkins v. Jack Cotton Partnership* [1989] 2 E.G.L.R. 157 (Scott Baker J.) and *Syrett v.* B *Carr & Neave* [1990] 2 E.G.L.R. 161 (Judge Bowsher Q.C.).

For Mr. and Mrs. Watts, Mr. Naughton submitted that the judge was right in his conclusion for the reasons given by him. The judge had correctly applied the overriding rule of restitution. This court, it was said, in *Philips v. Ward* [1956] 1 W.L.R. 471 had not laid down any particular rule which the judge was required to follow so as to prevent C application of that overriding rule: he referred to *The Chekiang* [1926] A.C. 637 and to *The Susquehanna* [1926] A.C. 655 for support for the proposition that a rule cannot be laid down which will apply to the measure of damages in cases of a particular category if application of the rule in a particular case in that category will result in departing from the rule of restitution.

The substance of Mr. Naughton's submission on the facts of this case D was that Mr. and Mrs. Watts had bought the house in reliance on the report of the defendant as to its condition; the house was not in the condition described; in consequence Mr. and Mrs. Watts spent £33,961 to put the house in the condition in which, on reading the defendant's report, they believed the house to be; and, therefore, if the damages are limited to £15,000, in accordance with the diminution in value rule, the E overriding rule of restitution is not satisfied.

Mr. Naughton was willing to concede that the principle in *Philips v. Ward* [1956] 1 W.L.R. 471 in so far as it can be regarded as a prima facie rule for the measure of damages in a claim against a negligent surveyor, is applicable in, but only in, a case where it is clear that the plaintiff would have bought the house any way, i.e. even if it had been accurately described by the surveyor. He referred to and relied on F *Hayes v. James & Charles Dodd* [1990] 2 All E.R. 815, a case of negligent advice by solicitors as to the existence of a necessary right of way for the use of land for a motor repair business by the clients who bought that land. Properly advised, the clients would not have bought the premises. Staughton L.J. referred to such a case as a "no transaction case" and contrasted it with a case where the claimant would still have G bought the property if he had been correctly advised as to its condition which he referred to as a "successful transaction" case. In that case, the plaintiffs recovered damages on the basis that it was a "no transaction" case and damages were awarded in the amount of the capital expenditure thrown away in the purchase of the business and the expenses incurred in extricating themselves from the purchase. He relied also on *Steward v. Rapley* [1989] 1 E.G.L.R. 159 where, he submitted, in a claim against H a negligent surveyor, Staughton L.J. again held that in a "no transaction" case the cost of repairs, as contrasted with the diminution in value, may be the appropriate measure of damage.

Mr. Naughton made detailed submissions designed to show that, if the present plaintiffs, on discovering the defects missed by the defendant, had decided to sell the house, the damages which they would have suffered, and which would have been recoverable from the defendant, would have been substantial and probably greater than the £33,961, the

cost of repairs. In outline, those damages, it was said, would have included at least £8,733 for agent's commission and solicitor's fees on resale; removal costs; solicitor's fees and stamp duty on a replacement purchase; the loss on resale which would have been £17,250; the costs of seeking an alternative property; the increase in cost of the replacement house in the sum of at least £25,800, being 15 per cent. on £172,000; and the wasted cost of borrowing the purchase price of the house which Mr. Naughton put at £1,000 per month from completion in April 1987 until resale at earliest some months after August 1987 when Mr. Wadey's report was received. The points made by reference to these potential losses on resale were, as I understood the argument, primarily intended to answer the submission made by Mr. Jackson; and, then, firstly to show that the award of the cost of repairs at £33,900 is thus shown to be moderate and not excessive; secondly, that the nature and extent of such damages upon resale had been left out of account in the reasons given by the members of this court in *Philips v. Ward* [1956] 1 W.L.R. 471; and, thirdly, by demonstrating the unreality of any suggestion that Mr. and Mrs. Watts could sensibly have chosen to sell the house instead of deciding to repair it, to make good the judge's ruling that Mr. and Mrs. Watts are entitled to recover the cost of repairs because, as in *Syrett v. Carr & Neave* [1990] 2 E.G.L.R. 161, they had had no real opportunity of cutting their losses by reselling.

I have given no more than a brief summary of Mr. Naughton's argument in which he referred to a number of cases and to the comments made in textbooks. The argument followed the reasoning in Judge Bowsher Q.C.'s judgment in *Syrett's* case and the suggestion made in *Dugdale & Stanton, Professional Negligence*, 2nd ed. (1989), para. 20.34, where it was submitted that if, being correctly advised, the plaintiff would have withdrawn, the natural measure of his loss is to indemnify him against the losses incurred as a result of acquiring the property; that the correct measure of damage, despite the decision in *Philips v. Ward*, is the cost of repair provided that it is "reasonable for him to retain the property and to incur the cost of repairs;" and that such an award does not "amount to a surveyor warranting the quality of the building, it merely reflects the losses which the plaintiff incurs and needs to be indemnified against."

The reasoning of Judge Bowsher Q.C. in *Syrett's* case [1990] 2 E.G.L.R. 161, and the argument based upon the alleged potential unfairness of the application of the diminution in value rule, particularly in cases of the purchase of dwelling houses by purchasers of limited means, makes it necessary to try to test the ruling in *Philips v. Ward* by reference to basic principles in a variety of possible situations. In the end, I have reached the conclusion that the defendant is right in his contentions on this issue and that, on the facts of this case, the financial loss of Mr. and Mrs. Watts is in law limited to the diminution in value of £15,000 with interest therein. My reasons are as follows.

The task of the court is to award to a plaintiff that sum of money which will, so far as possible, put the plaintiff into as good a position as if the contract for the survey had been properly fulfilled: see *per* Denning L.J. in *Philips v. Ward* [1956] 1 W.L.R. 471, 473. It is important to note that the contract in the present case, as in *Philips v. Ward*, was the usual contract for the survey of a house for occupation with no special terms beyond the undertaking of the surveyor to use proper care and skill in reporting on the condition of the house.

A The decision in *Philips v. Ward* was based upon that principle: in particular, if the contract had been properly performed the plaintiff either would not have bought, in which case he would have avoided any loss, or, after negotiation, he would have paid the reduced price. In the absence of evidence to show that any other or additional recoverable benefit would have been obtained as a result of proper performance, the price will be taken to have been reduced to the market price of the B house in its true condition because it cannot be assumed that the vendor would have taken less.

The cost of doing repairs to put right defects negligently not reported may be relevant to the proof of the market price of the house in its true condition (see *Steward v. Rapley* [1989] 1 E.G.L.R. 159); and the cost of doing repairs and the diminution in value may be shown to be the C same. If, however, the cost of repairs would exceed the diminution in value, then the ruling in *Philips v. Ward*, where it is applicable, prohibits recovery of the excess because it would give to the plaintiff more than his loss. It would put the plaintiff in the position of recovering damages for breach of a warranty that the condition of the house was correctly described by the surveyor and, in the ordinary case as here, no such warranty has been given.

D It is clear, and it was not argued to the contrary, that the ruling in *Philips v. Ward* may be applicable to the case where the buyer has, after purchase, extricated himself from the transaction by selling the property. In the absence of any point on mitigation, the buyer will recover the diminution in value together with costs and expenses thrown away in moving in and out and of resale: see *per* Romer L.J. in *Philips v. Ward* E [1956] 1 W.L.R. 471, 478. I will not here try to state the nature or extent of any additional recoverable items of damage.

The damages recoverable where the plaintiff extricates himself from the transaction by resale are not necessarily limited to the diminution in value plus expenses. The consequences of the negligent advice and of the plaintiff entering into the transaction into which he would not have entered if properly advised, may be such that the diminution in value F rule is not applicable. An example is *County Personnel (Employment Agency) Ltd. v. Alan R. Pulver & Co.* [1987] 1 W.L.R. 916, a case of solicitors' negligence, where the plaintiff recovered the capital losses caused by entering into the transaction.

It is also clear, and again there was no argument for Mr. and Mrs. Watts to the contrary, that, if the plaintiff would have bought the house G anyway, if correctly advised, the ruling in *Philips v. Ward* is applicable: the fact that after purchase he discovers that the unreported defects will cost more than the diminution in value does not entitle him to recover the excess. That is, again, because, if the contract had been performed properly, he would have negotiated and, absent proof of a different outcome, would have done no better than reduction to the market value in true condition.

H It was rightly acknowledged for Mr. and Mrs. Watts that proof that the plaintiff, properly advised, would not have bought the property does not by itself cause the diminution in value rule to be inapplicable. It was contended, however, that it becomes inapplicable if it is also proved that it is reasonable for the plaintiff to retain the property and to do the repairs. I cannot accept that submission for the following reasons. (1) The fact that it is reasonable for the plaintiff to retain the property and to do the repairs seems to me to be irrelevant to determination of

the question whether recovery of the cost of repairs is justified in order to put the plaintiff in the position in which he would have been if the contract, i.e. the promise to make a careful report, had been performed. The position is no different from that in *Philips v. Ward*: the plaintiff would either have refused to buy or he would have negotiated a reduced price. Recovery of the cost of repairs after having gone into possession: that is to say in effect the acquisition of the house at the price paid less the cost of repairs at the later date of doing those repairs, is not a position into which the plaintiff could have been put as a result of proper performance of the contract. Nor is that cost recoverable as damages for breach of any promise by the defendant because, as stated above, there was no promise that the plaintiff would not incur any such cost.

(2) In the context of the contract proved in this case, I have difficulty in seeing when or by reference to what principle it would not be reasonable for the purchaser of a house to retain it and to do the repairs. He is free to do as he pleases. He can owe no duty to the surveyor to take any cheaper course. The measure of damages should depend, and in my view does depend, upon proof of the sum needed to put the plaintiff in the position in which he would have been if the contract was properly performed, and a reasonable decision by him to remain in the house and to repair it, on discovery of the defects, cannot alter that primary sum which remains the amount by which he was caused to pay more than the value of the house in its condition.

(3) If the rule were as contended for by Mr. and Mrs. Watts, what limit, if any, could be put on the nature and extent of the repairs of which the plaintiff could recover the cost? Mr. Naughton asserted that the cost of repairs awarded in this case was no more than putting the house in the condition in which, on reading the report, they believed the house to be. That, however, contains no relevant standard of reasonableness, because, again, the defendant did not warrant that description to be true. To argue that to award damages on that basis is not to enforce a warranty never given but merely to "reflect the losses which the plaintiffs have incurred" seems to me to be a circular statement.

(4) I have considered whether the reasonableness of the amount which a plaintiff might recover towards the cost of repairing unreported defects in excess of the diminution in value might be determined by reference to the amount which the plaintiff could recover if he sold the property: i.e. the diminution in value plus any other recoverable losses and expenses. Such a limit was not contended for by Mr. Naughton. It has the apparent attraction of enabling a plaintiff who chooses to retain the property to recover as much as he would recover if he chose to sell it. It seems to me, however, to be impossible to hold that such is the law in the case of such a contract as was made in this case. The plaintiff must, I think, prove that the loss which he claims to have suffered was caused by the breach of duty proved and he cannot do that by proving what his loss would have been in circumstances which have not happened.

It is necessary to test the conclusion which I have reached as set out above by examining *Hipkins v. Jack Cotton Partnership* [1989] 2 E.G.L.R. 157 and *Syrett v. Carr & Neave* [1990] 2 E.G.L.R. 161 which Mr. Jackson submitted were wrongly decided.

In *Hipkins v. Jack Cotton Partnership* Scott Baker J. held that application of the diminution in value rule would manifestly not do justice in that particular case. On applying that rule the damages would have been £8,900 with interest from the summer of 1981. The cost of repairs which the plaintiff was held reasonably to have carried out in 1985, after advice in 1982 to "wait and see," was £14,211. I accept that, if I am right in the conclusion which I have described above, there is no valid ground of distinction reported in *Hipkins v. Jack Cotton Partnership* and that, therefore, the award on the facts found should have been £8,900 with interest.

Next, in *Syrett's* case the reasoning of Judge Bowsher Q.C. may be summarised, I think, as follows. He held that it was to be inferred that in *Philips v. Ward* [1956] 1 W.L.R. 471 the purchaser, on discovering the defect on moving in, had the choice between selling the property at its true value, making the loss which was less than the then cost of repairs, or of doing the repairs. To award in those circumstances the cost of doing the repairs would have been to give him a benefit to which he was not entitled in the absence of a warranty from the surveyor as to the state of the property. There was, however, no such giving of a benefit to which the plaintiff was not entitled on the facts in *Syrett's* case [1990] 2 E.G.L.R. 161, because instant resale would not, at that date, have left the purchaser with a loss less than the cost of repairs and, more importantly, the purchaser had no reason to make an instant sale of the property because she did not know of the defect until two years after moving in. Similarly in *Perry v. Sidney Phillips & Son* [1982] 1 W.L.R. 1297, the unreported defects were discovered soon after moving in and, in that case also, the plaintiff had a choice of either cutting his loss by reselling or of undertaking the necessary repairs. Since, however, the plaintiff in *Syrett's* case was unaware of the unreported defects until two years after the purchase, she was entitled to the cost of repairs because she had not had an opportunity of cutting her losses about the date of purchase and had acted reasonably throughout.

With respect to the judge, I do not find that reasoning to be convincing and, in my view, the decision in *Syrett v. Carr & Neave* [1990] 2 E.G.L.R. 161 was wrong. It is true that both in *Philips v. Ward* [1956] 1 W.L.R. 471 and in *Perry v. Sidney Phillips & Son* [1982] 1 W.L.R. 1297 the plaintiff, on discovering the unreported defects, had the choice of selling or undertaking the necessary repairs. This court held that, whichever choice was made, the primary sum for damages was the diminution in value together with any expenses etc. caused by the breach. There is, however, nothing to suggest that it was the existence of that choice or opportunity at any particular time which caused the proper measure of damages to be stated as the diminution in value. Since that statement was expressly explained by reference to putting the plaintiff in the position in which he would have been if the contract had been properly performed and since that concept is not affected by the subsequent date of discovery of breach, the fact that in *Syrett v. Carr & Neave* the claimant did not discover the breach until two years after purchase seems to me to be irrelevant to the measure of damages as based upon the diminution in value. I would, however, reserve with reference to this point the question as to the date at which the diminution in value is to be calculated. Upon discovering the breach the plaintiff can decide whether on that ground to sell. In *Philips v. Ward* [1956] 1 W.L.R. 471, 475, the measure of damages was stated by

Morris L.J. as the difference between the value of the property as it was described in the negligent report and its value as it should have been described in 1952. If the unreported defects had been discovered three years later, and if the value of the property in either state had increased by 25 per cent. as a result of inflation of house prices, it seems to me to be arguable that this measure of damage should be taken as the difference between the values so increased: i.e. £5,000, being £31,250 less £26,250. No such point was raised in this case.

Next, as to the grounds of decision in *Syrett v. Carr & Neave* [1990] 2 E.G.L.R. 161, if, in the case of the ordinary contract, an award of the cost of repairs to a plaintiff who discovers the defects on moving in is to give to him a benefit to which he is not entitled (and I agree that it is: see *Philips v. Ward*), it is no less the giving of a benefit to which the plaintiff is not entitled to award him the cost of repairs when he discovers the defects years after moving in: the principle that an award of the cost of repairs is a benefit to which the plaintiff is not entitled depends upon the terms of the contract between the plaintiff and the surveyor and not upon the time of discovery of the unreported defects.

Lastly, in *Syrett v. Carr & Neave*, the opportunity to "cut losses" at about the date of sale, which it was held was denied to the claimant in that case, is, as I understand it, the opportunity to decide to sell and to suffer the loss of the diminution in value which would be recoverable. If the plaintiff decided instead to do the repairs he would incur any additional cost over this diminution in value as a result of his own decision; but, if he did not discover the defects until two years later, having been deprived of that earlier opportunity, he becomes, it is said, entitled to the full cost of repairs and not, be it noted, only the amount by which the cost of repairs may be shown to have increased since the date of purchase. As I have said above, however, the opportunity to sell on discovery of the defects was not the reason for holding in *Philips v. Ward* [1956] 1 W.L.R. 471 that the measure of damages was the diminution in value: that holding resulted from the application of the basic principle of restitution to the terms of the contract between the claimant and the surveyor. Delay in discovery of the defects does not affect that application of that principle. A decision to remain and to carry out repairs after such delayed discovery cannot, in my judgment, alter the proper measure of damages.

One further matter must, I think, be examined. It is, I think, clear law that where a claimant is caused to enter into a transaction in consequence of negligent advice, as in the case of a surveyor employed under the ordinary contract, the claimant may be entitled to all the losses incurred as a result of entering into the transaction where he would not have entered into the transaction if properly advised and the losses are caused by entry into the transaction and by extrication from it. An example in the case of a solicitor's advice is *County Personnel (Employment Agency) Ltd. v. Alan R. Pulver & Co.* [1987] 1 W.L.R. 916. Can the claim of the present plaintiff to the cost of repairs properly be put on the same basis, i.e., as damages caused by entering into a transacton in reliance on the bad advice, and, if not, why not? On this part of the argument, Mr. Naughton referred to a number of matters and, in particular, to the fact that it is in many cases unrealistic to measure the damages of the purchaser by reference to the value of the property where it is not his intention to resell the house but to live in it and resale is impossible for reasons unconnected with value in the

market. If the buyer is caused to buy a house by a negligent report which does not warn him of the existence of defects, and which he must cause to be repaired in order to live in the house in the condition in which he expected it to be, why is not the cost of repairs a loss resulting from entering into the transaction just as much as the payments recovered in *County Personnel (Employment Agency) Ltd. v. Alan R. Pulver & Co.* [1987] 1 W.L.R. 916? Since such a buyer has no intention of selling—he is repairing his home not an article of commerce—any addition to the value of the house, it was said, will not be at once realised and he is not in truth thereby getting any advantage beyond what he reasonably thought he was getting when he relied on the surveyor's advice.

I recognise the force of these points so far as concerns the position of such an unfortunate claimant. From his point of view, it would, indeed, be better if the surveyor could be treated as having warranted that no repairs, beyond those described as indicated in the survey report, would be required within some period of time. No such warranty, however, was given in the present case, or was said to have been given, and, in the absence of such a warranty, there is no basis for awarding the cost of repairs.

I would, therefore, hold that the judgment for £33,961, the cost of repairs, must be set aside and that, in substitution therefore, judgment should be entered for financial loss in the sum of £15,000 with interest at 15 per cent. from the date of payment until judgment. I understand it to be common ground that payment is to be taken as having been made as to £1,500, from the date of payment of the deposit of £17,750 on the making of the contract, and as to the balance of £13,500 at the date of completion, based upon the proportion of the excess payment of £15,000 to the total sum agreed to be paid. If I am wrong in my understanding I would wish to hear counsel on that matter. I shall deal later in this judgment with my reasons for confirming the rate of interest at 15 per cent. as awarded by the judge.

General damages: the award for "distress and inconvenience"

For the defendant, Mr. Jackson submitted that, on the facts of this case, Mr. and Mrs. Watts were entitled to no award under this head, but that, if any sum was due, the award was plainly excessive and far greater than sums commonly awarded, in accordance with *Perry v. Sidney Phillips & Son* [1982] 1 W.L.R. 1297, as "modest" compensation. His contention was that, in a contract of this nature, general damages are not recoverable for mere mental distress; and are recoverable only for the enduring of physical discomfort and inconvenience in the measuring of which regard may properly be had to the mental reaction to such physical discomfort. He further criticised the judge's conclusion on this part of the case on the ground that the judge did not make any finding as to the nature or extent of any physical discomfort which had been caused by the defendant's breach of contract as contrasted with physical discomfort caused by Mr. and Mrs. Watts' decision to carry out substantial additional repairs and refurbishment.

Mr. Naughton submitted that it was decided by the decision of this court in *Perry's* case that damages for mental distress can be recovered against a negligent surveyor in the ordinary case and that such a contract is in the same category as contracts for the provision of holiday: see *Jarvis v. Swans Tours Ltd.* [1973] Q.B. 233 and *Jackson v. Horizon*

Holidays Ltd. [1975] 1 W.L.R. 1468. The misery and discomfort experienced by the claimants in the position of these plaintiffs is not, he said, linked to the cost of the works carried out or to the time taken to complete them. The hardship should be seen as subjective and that is best assessed by the judge who heard the evidence. The fact that this was the second home for hard working and stressed individuals should be seen as increasing the proper compensation and not as reducing it. Further, the fact that the house was expensive, and that the use of it for relaxation could be regarded as costing the interest on the price paid, would justify a larger award in comparison with an award in respect of a cheaper house.

As to the law, it is, in my judgment, clear that Mr. and Mrs. Watts were not entitled to recover general damages for mental distress not caused by physical discomfort or inconvenience resulting from the breach of contract. It is true that in *Perry v. Sidney Philips & Son* [1982] 1 W.L.R. 1297, Lord Denning M.R. justified the award of damages for anxiety, worry and distress, i.e. "modest compensation," by reference to the holiday cases of *Jarvis v. Swans Tours Ltd.* [1973] Q.B. 233 and *Jackson v. Horizon Holidays Ltd.* [1975] 1 W.L.R. 1468 and to *Heywood v. Wellers* [1976] Q.B. 446, a solicitor's case. I do not, however, accept that *Perry's* case is authority for that proposition. It is, I think, clear that, in that case, the award of damages, which was upheld, was for

> "vexation, that is the discomfort and so on suffered by the plaintiff as a result of having to live for a lengthy period in a defective house which for one reason or another was not repaired over the period between the acquisition by the plaintiff and the date of the trial:" see *per* Oliver L.J., at p. 1304H.

Further, in *Perry* Kerr L.J. said, at p. 1307:

> " it should be noted that the judge has awarded these [damages for vexation and inconvenience] not for the tension or frustration of a person who is involved in a legal dispute in which the other party refuses to meet its liabilities. If he had done so, it would have been wrong, because such aggravation is experienced by almost all litigants. He has awarded these damages because of the physical consequences of the breach which were all foreseeable at the time."

Mr. Jackson's submission is, I think, correct. In *Bailey v. Bullock* [1950] 2 All E.R. 1167 Barry J., in a case of solicitor's negligence, held that damages for inconvenience and discomfort could be recovered for the solicitor's failure to get possession of premises for his client but not damages for annoyance and mental distress. So holding, he relied on the judgment of Scott L.J. in *Groom v. Crocker* [1939] 1 K.B. 194, 224 where *Addis v. Gramophone Co. Ltd.* [1909] A.C. 488 was held to be a conclusive authority against general damages for injury to reputation or feelings. Barry J. contrasted that decision with that of *Hobbs v. London and South Western Railway Co.* (1875) L.R. 10 Q.B. 111 where damages for physical inconvenience were upheld for breach of a contract of carriage.

In *Jarvis v. Swans Tours Ltd.* [1973] Q.B. 233 it was held that the old authorities excluding damages for disappointment of mind were out of date and that damages for mental distress can be recovered in contract in a proper case. One such proper case was held there to be breach of a contract for a holiday or of a contract to provide

A entertainment and enjoyment. Breach of a contract of carriage, were vexation may be caused, was distinguished from breach of a contract for a holiday where the provision of pleasure is promised.

Again, in *Heywood v. Wellers* [1976] Q.B. 446 damages were awarded against a negligent solicitor for failure to obtain protection for his client against molestation, and in particular for the client's distress, because the solicitor was employed to protect the client from molestation B which was causing distress. In *Hayes v. James & Charles Dodd* [1990] 2 All E.R. 815 Purchas L.J., with reference to a claim to damages for mental distress in a claim against a surveyor, said, at p. 826:

> "I agree with the approach adopted by Staughton L.J. reflecting, as it does, the judgment of Dillon L.J. in *Bliss v. South East Thames Regional Health Authority* [1987] I.C.R. 700 at 718, namely that C damages of this kind are only recoverable when the subject matter of the contract or duty in tort is to provide peace of mind or freedom from distress."

If, then, the plaintiffs, for breach of a contract of this nature, are entitled only to damages in respect of physical discomfort or D inconvenience resulting from the breach, it is clear, as in *Perry v. Sidney Phillips & Son* [1982] 1 W.L.R. 1297, that such damages are recoverable where, as contemplated by the defendant, the plaintiff move into the property and live there in physical discomfort because of the existence of unreported defects such as an evil-smelling cesspit or a leaking roof. But what of physical discomfort caused not by the defects but by the E process of repairing them in a case where, as here, the surveyor has not warranted that there are no defects? Thus, in this case, there was no discomfort caused by any defect in the roof: it was replaced before it leaked or collapsed. Mr. Jackson, rightly, I think, did not contend that damages for physical discomfort are not recoverable where caused by the carrying out of repairs to negligently unreported defects even though the surveyor is not in law liable for the cost of these repairs. The F concession seems to be to be rightly made provided it is shown that the parties contemplated that, upon the plaintiff occupying the house as his home in reliance on the report, he would in fact have to live there while the repairs are done and it is reasonable for him to do so. We do not have to decide whether, if the plaintiff has to rent other accommodation during the carrying out of repairs, such costs will be recoverable in the G absence of any contractual warranty as to the existence of defects requiring repairs, and I would reserve my decision upon it.

In his judgment below, Judge Bowsher Q.C., after reference to *Hayes v. James & Charles Dodd* [1990] 2 All E.R. 815 and to *Perry v. Sidney Phillips & Son* [1982] 1 W.L.R. 1297, held that a negligent surveyor of a residential property, which he has undertaken to survey H for a prospective purchaser who intends to live there, may be liable to his client in damages to compensate him for "inconvenience and distress arising out of living in the property but not out of litigation about it." Judge Bowsher Q.C. continued that that seemed to him to be the case where the position be rationalised by reference to "special relationship" or "a contract to provide peace of mind or freedom from distress." A prospective buyer of a house goes to a surveyor, said Judge Bowsher, not just to be advised on the financial advisability of one of the most

important transactions of his life, but also to receive reassurance that, when he buys the house, he will have "peace of mind and freedom from distress."

It is clear, I think, that the judge was regarding the contract between Mr. and Mrs. Watts and the defendant as a contract in which the subject matter was to provide peace of mind or freedom distress within the meaning of Dillon L.J.'s phrase in *Bliss v. South East Thames Regional Health Authority* [1987] I.C.R. 700, 718 cited by Purchas L.J. in *Hayes v. James & Charles Dodd* [1990] 2 All E.R. 815, 826. That, with respect, seems to me to be an impossible view of the ordinary surveyor's contract. No doubt house buyers hope to enjoy peace of mind and freedom from distress as a consequence of the proper performance by a surveyor of his contractual obligation to provide a careful report, but there was no express promise for the provision of peace of mind or freedom from distress and no such implied promise was alleged. In my view, in the case of the ordinary surveyor's contract, damages are only recoverable for distress caused by physical consequences of the breach of contract. Since the judge did not attempt to assess the award on that basis this court must reconsider the award and determine what it should be.

For my part, I accept that the award was excessive even if the judge had directed himself correctly. It was very substantially more than the awards made in similar cases apart from the award by the same judge in *Syrett v. Carr & Neave* [1990] 2 E.G.L.R. 161. The other cases to which we were referred for this purpose included the following and I have listed the amount of the award together with the amount adjusted for inflation since the date of the award: *Roberts v. J. Hampson and Co.* [1990] 1 W.L.R. 94: £1,500 (£1,890); *Cross v. David Martin & Mortimer* [1989] 1 E.G.L.R. 154: £1,000 (£1,260); *Steward v. Rapley* [1989] 1 E.G.L.R. 159: £2,000 (£2,520); *Bigg v. Howard Son & Gooch* [1990] 1 E.G.L.R. 173: £1,600 (£1,744); *Hipkins v. Jack Cotton Partnership* [1989] 2 E.G.L.R. 157: £750 (£877). In the first three cases the award stated was to two plaintiffs. In each case the award was in respect of a period of inconvenience and discomfort in the claimants' home.

The judge accepted the evidence of Mr. and Mrs. Watts in full. The period of physical discomfort caused by the carrying out of work extended over eight months. It started in September 1987 when work to the roof began and was completed in October. The time taken in performing that work is not more exactly proved. Scaffolding was around the house. Work in respect of unreported defects began again in 1988 and was done under separate quotations before the several dates stated above ending in October 1988. The periods of physical discomfort were limited to visits to the house at weekends, most but not all weekends over the relevant time. Some of the matters complained of were clearly not caused by the breach of contract, for example, the interference with the use of bath and W.C. caused by work to the plumbing which Mr. and Mrs. Watts chose to carry out at the same time as repair to the flooring.

Further, as explained in the judgment, Mr. and Mrs. Watts, finding that they had sufficient money to do so, decided to carry out work going far beyond the works the subject of the action. The judge held that the distress and inconvenience alleged by Mr. and Mrs. Watts was not to be discounted at all because he accepted, as sensible and well founded, the explanation by Mr. Watts of his decision. For my part, while I have no

A doubt that it was a sensible and well founded decision for Mr. Watts to do all the other work which he had decided to do at the same time as the repairs in respect of unreported defects, it does not seem to me thereby to be demonstrated that the physical discomfort and inconvenience throughout the period of work was caused by the failure to report those defects. It is clear that by 1987 the earnings of Mr. and Mrs. Watts had risen and were rising. They decided that they would decorate B and refurbish the house to a high standard. The need to do the repairs to unreported defects was not the reason why all the work was done when it was done. Indeed the need to carry out the unreported defects was seen by Mr. Watts as delaying the process of refurbishment in the course of which the repairs of many other defects, of which there was no failure to give warning, were carried out.

C It is difficult, in my judgment, to be confident as a matter of probability that such physical discomfort as there was over the period of six months in 1988 was caused by the breach of contract of the defendant as contrasted with the decision of Mr. and Mrs. Watts to refurbish and redecorate the house. It is not clear to me that in any real sense Mr. and Mrs. Watts had to live in the house at weekends: their decision to D do so appears to have resulted largely from their view that it was necessary for them to supervise personally all the work which they were having done.

The judge, however, accepted their evidence and was not caused to doubt that all their complaints were caused by that breach of contract. It does not seem that the factual basis for the claims to general damages was examined in any close detail at the trial. The right course, in my E view, is for this court, accepting and applying the principle that damages for mental distress resulting from the physical consequence of such a breach of contract should be modest, to accept the judge's finding that, during the weekends over a period of eight months, there was discomfort from the physical circumstances of living in the house caused by the presence of Mr. and Mrs. Watts during the carrying out of repairs in F respect of unreported defects. I reject the suggestion that, in comparing the proper awards in other cases of discomfort in a plaintiff's only home, there should be allowed, in respect of discomfort at weekends in an expensive second home, a comparatively larger sum. The proper approach is to fix a modest sum for the amount of physical discomfort endured having regard to the period of time over which it was endured. I would not take into account, as did the judge, in fixing the general G damages, anything in respect of the expenditure on a holiday in Scotland. There was no claim to loss of use. Any vexation in respect of taking a holiday away from the second home is not associated with physical discomfort in that home.

I would award to each plaintiff, since it has not been suggested that there is any basis for distinguishing between them, general damages in H the sum of £750.

The award of interest

In my judgment there is no ground for interfering with the judge's decision that interest at the rate of 15 per cent. should be awarded on the damages for financial loss. Mr. Jackson's submission was that the rate customarily awarded is the short term investment account rate:

reference was made to *The Supreme Court Practice 1991*, vol. 1, para. 6/2/16 (4); and that the judge erred in awarding a flat rate of 15 per cent. which was the same as the Judgments Act 1838 rate.

The award of interest at 15 per cent. was, in my judgment, within the judge's discretion and it is not shown that he misdirected himself or went wrong in principle in taking that rate. The facts that that rate was the same as the judgment rate, and was higher than the short-term interest account rates over the relevant period, do not cause to be wrong the selection of that rate as the appropriate rate on the facts of this case: see the judgment of Nicholls L.J. in *Pinnock v. Wilkins & Sons* (unreported), 23 January 1990; Court of Appeal (Civil Division) Transcript No. 26 of 1990.

I would, accordingly, allow this appeal to the extent described above.

BINGHAM L.J. I am in complete agreement with the judgment of Ralph Gibson L.J. which I have read in draft. I would allow the appeal to the extent he indicates for the reasons he gives. Since we are in part differing from the trial judge, who considered the matter with great care, I shall briefly give my own reasons.

Diminution in value or cost of repairs?

The restitutory or compensatory principle which underlies the award of damages in contract is not open to question. Since it is ultimately a question of fact what sum of money is necessary to put a particular plaintiff in the position he would have been in if the particular defendant had properly performed the contract in question, I would accept Mr. Naughton's contention that the measure of damages cannot be governed by an inflexible rule of law to be applied in all cases irrespective of the particular facts and regardless of whether or not such measure gives effect to the underlying principle. But this does not mean that there may not be sound prima facie rules to be applied in the ordinary run of cases. Examples may be found in sections 51(3) and 53(3) of the Sale of Goods Act 1979: these are only prima facie rules, but they reflect the same underlying principle and they govern cases to which they are not shown to be inapplicable. In the present field, by which I mean the purchase of houses by private buyers in reliance on a negligent survey of structure or condition, *Philips v. Ward* [1956] 1 W.L.R. 471 has been generally thought to lay down and, in my view, did lay down a prima facie rule for measuring damages. The crucial question is whether that prima facie rule was, as the judge held, inapplicable to the facts of the present case.

I do not think so. In *Philips v. Ward*, as in the present case, the cost of repairs exceeded the diminution in value. The Court of Appeal there pointed out that if the plaintiff received the house, for which he had paid £25,000, and £7,000 (the cost of repairs) he would in effect have obtained the house for £18,000. But the value of the house in the defective state in which it had actually been was £21,000, and had the defendant properly performed his contract the plaintiff could not have bought at any lower price. An award of £7,000 would not therefore have put him in the same position as if the defendant had properly performed his contract. It would have improved his position to the extent of £3,000 and thus put him in an advantageous position he could never have enjoyed had the defendant properly performed.

A The same simple approach applies here. Mr. and Mrs. Watts paid £177,500, the value of the house as it was represented to be. The value of the house in its actual condition was £162,500, a difference of £15,000. The actual cost of repairs was (in rounded-up figures) £34,000. If Mr. and Mrs. Watts were to end up with the house and an award of £34,000 damages they would have obtained the house for £143,500. But even if the defendant had properly performed his contract that bargain B was never on offer. The effect of the judge's award is not to put Mr. and Mrs. Watts in the same position as if the defendant had properly performed but in a much better one.

I would be willing to accept, as Romer L.J. did in *Philips v. Ward* [1956] 1 W.L.R. 471, 478, that if, on learning of the true state of the house, Mr. and Mrs. Watts had at once moved out and sold, they might C well have been able to recover the costs thrown away in addition to the diminution in value. But Mr. and Mrs. Watts, no doubt for good reason, did not do that. They stayed and did the repairs. But the quantum of their claim would in theory be the same whether they had actually done and paid for the repairs or not, and if they had not the figures demonstrate a clear windfall profit. If, on learning of the defects which should have been but were not reported, a purchaser decides, for D whatever reason, to retain the house and not move out and sell, I would question whether any loss he thereafter suffers, at least in the ordinary case, can be laid at the door of the contract-breaker.

In the course of interesting and wide-ranging argument, a number of hypothetical situations were suggested in which the prima facie rule might be ousted or call for variation. I think it is wise to leave such E cases for decision until they arise. I can see nothing in the present case to take it outside the prima facie rule in *Philips v. Ward*, and that is enough to resolve this issue in the defendant's favour.

Damages for distress and inconvenience

A contract-breaker is not in general liable for any distress, frustration, F anxiety, displeasure, vexation, tension or aggravation which his breach of contract may cause to the innocent party. This rule is not, I think, founded on the assumption that such reactions are not foreseeable, which they surely are or may be, but on considerations of policy.

But the rule is not absolute. Where the very object of a contract is to provide pleasure, relaxation, peace of mind or freedom from G molestation, damages will be awarded if the fruit of the contract is not provided or if the contrary result is procured instead. If the law did not cater for this exceptional category of case it would be defective. A contract to survey the condition of a house for a prospective purchaser does not, however, fall within this exceptional category.

In cases not falling within this exceptional category, damages are in my view recoverable for physical inconvenience and discomfort caused H by the breach and mental suffering directly related to that inconvenience and discomfort. If those effects are foreseeably suffered during a period when defects are repaired I am prepared to accept that they sound in damages even though the cost of the repairs is not recoverable as such. But I also agree that awards should be restrained, and that the awards in this case far exceeded a reasonable award for the injury shown to have been suffered. I agree with the figures which Ralph Gibson L.J. proposes to substitute.

Interest

Since the award of interest on damages is intended to compensate a plaintiff for being kept out of money lawfully due to him, there is much to be said for applying a rate of interest which reflects the cost or value of money over the relevant period rather than a flat rate under the Judgments Act 1838 which has remained fixed over a number of years despite fluctuations in interest rates during that time. But the choice of an interest rate is discretionary and the judgment of Nicholls L.J. in *Pinnock v. Wilkins & Sons*, Court of Appeal (Civil Division) Transcript No. 26 of 1990 precludes the argument that choice of the Judgments Act 1838 rate of 15 per cent. is a challengeable exercise of discretion. On this point the judge's ruling cannot be disturbed.

SIR STEPHEN BROWN P. I have had the advantage of reading in draft the judments of Ralph Gibson and Bingham L.JJ. I am in complete agreement with their conclusions.

The measure of damages in this case is governed by the principle clearly stated in *Philips v. Ward* [1956] 1 W.L.R. 471 and re-affirmed in *Perry v. Sidney Phillips & Son* [1982] 1 W.L.R. 1297. I agree that the appeal should be allowed on this head as proposed by Ralph Gibson and Bingham L.JJ.

I further agree that the quantum of damage awarded for "distress and inconvenience" was greatly excessive and that the sums proposed by Ralph Gibson L.J. should be substituted. As to the appeal on the question of the rate of interest, I also agree that this was within the judge's discretion and should not be disturbed.

I therefore agree that the appeal should be allowed to the extent proposed by Ralph Gibson and Bingham L.JJ.

Appeal allowed with costs up to and including 21 June 1991.
Leave to appeal refused.

Solicitors: Pinsent & Co.; Goodman Derrick & Co.

M. B. D.