Building Safety Act in the Court of Appeal: *URS Corporation Ltd v BDW Trading Ltd* [2023] EWCA Civ 772

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A INTRODUCTION

Developers, principal contractors, and building owners have come under pressure from a number of different sources to remediate buildings with fire safety defects. Whether they have remediated buildings voluntarily, such as pursuant to the developer remediation contract, or if they are likely to assume the cost of the same through claims under the Defective Premises Act 1972, building liability orders, or remediation contribution orders, they will now be looking for avenues to claw back some of these costs from participants in the construction supply chain, including the professional consultancy teams who were involved in the design of unsafe buildings.

The recent Court of Appeal decision in *URS Corporation Ltd v BDW Trading Ltd* provides clarification for parties who are considering and responding to such claims. Its facts are especially pertinent because they concern a developer who had sold its proprietary interest in the buildings in question some time before the defects were identified. This developer attempted to bring a claim in negligence against the structural engineer allegedly responsible for the defective design, a scenario that the Building Safety Act 2022 has made far more common and which promises to be fertile ground for many more such claims.

B THE KEY FACTS

The Respondent, BDW Trading Ltd ("**BDW**"), a developer, instructed the Appellant, URS Corporation Ltd ("**URS**"), an engineering firm, to undertake the structural design of two tower block developments: Capital East, on the Isle of Dogs in London, and Freemens Meadow, in Leicester.

The Capital East development consisted of 5 separate tower blocks ranging from 10 to 18 stories in height and containing a total of about 350 apartments. Practical Completion of the development occurred in or around March 2007 to February 2008. The apartments were sold by BDW by way of individual contracts of sale. Although BDW had a 200 year lease, their interest in that head lease was transferred in December 2008.

The Freemens Meadow development comprised 7 towers, each of 6 stories, and each containing 32 separate apartments. Practical Completion of these blocks occurred between February 2005 and October 2012. The individual apartments were sold to purchasers on long leases and BDW's freehold interests were transferred on various dates, the last being in May 2015.

Following the Grenfell Tower disaster in 2017, BDW undertook investigations of its developments. In 2019, it discovered significant defects in the structural design of the two tower blocks, although no physical damage had occurred. On 6 March 2020, BDW commenced negligence proceedings against URS, being out of time to bring claims under the contracts between the parties.

There are two particular features to note in this case:

1. Although the buildings are defective, they have not suffered any physical damage; and

2. By the time the defects came to light in 2019, BDW no longer owned or had any proprietary interest in the relevant buildings.

C THE APPEALS

The Court of Appeal heard two related appeals.

C.1 The Preliminary Issues Hearing and Substantive Appeal

At the preliminary issues hearing, Fraser J held that URS's duty of care related to the risk of economic loss that would be caused by a construction of the buildings using a negligent design. Further, the cause of action accrued no later than the date of practical completion of the blocks. URS was granted permission to appeal on three grounds:

1. The judge was wrong to say that the losses claimed by BDW were within the scope of URS' duty of care. URS argued that the risk harm that its duty of care guarded BDW against was the risk of harm to BDW's proprietary interests and the delay in the discovery of the defects meant that BDW no longer had a proprietary interest in the developments at the time the defects were discovered and claims by third parties were statute-barred.

2. The damages claimed by BDW were not recoverable. URS argued that at the time BDW discovered the design defects, it had sold its proprietary interests in the developments and claims by third parties would have been statute-barred.

3. The judge erred in not striking out the claim.

C.2 The Amendments and the Amendment Appeal

After the preliminary issues judgment, the Building Safety Act 2022 ("**BSA**") came into force. BDW obtained permission to amend its pleadings to take advantage of the increased limitation periods under s 135 of the BSA and to add claims under the Defective Premises Act 1972 ("**DPA**") and the Civil Liability (Contribution) Act 1978 ("**CLCA**"). Broadly, URS was granted permission to appeal on the following grounds:

1. BDW was a developer who itself owed duties to the purchaser of the flats under the DPA, but was not owed similar statutory duties by URS;

2. No claim for contribution was open to BDW because they themselves had not received a claim from any third party, and that such third-party claims or intimation of a claim, were a necessary element of any cause of action for a contribution.

3. The longer limitation periods for claims under the DPA provided for by the BSA could not apply in this case because, although the BSA was intended to be retrospective, it could not change the accrued rights of those involved in ongoing litigation.

Both the Substantive Appeal and the Amendment Appeal were dismissed.

D THE SUBSTANTIVE APPEAL

D.1 The Scope of URS' Duty of Care

The principal argument raised by URS was that the scope of its duty of care did not include the losses claimed by BDW. By the time of the claim, BDW had sold its proprietary interest in the properties. At the time of that sale, there was no physical damage to the tower blocks. URS submitted that it owed a duty to BDW to guard against the risk of harm to BDW's proprietary interests and the risk of loss to third parties. On the case advanced by URS, the losses now claimed fell outside the scope of that duty of care.

BDW's response was that this analysis of the scope of the duty of care by URS was overly convoluted. The duty owed by URS was co-existent with the duty it owed under the contract between the parties, that is, that the structural design would be produced using reasonable skill and care. The risk that URS had to guard against was that their negligent structural design would lead to structural defects and an unsound building.

The Court of Appeal upheld Fraser J's decision that the law imposed on URS a duty to take care against the risk of economic loss that would be caused by the construction of a structure with a negligent design that, when it was built, would contain structural

deficiencies or defects. Coulson LJ described this answer as "*entirely conventional and correct"*: it was a standard duty imposed a design professional which was co-existent with that professional's contractual obligations.

Coulson LJ then went on to analyse a number of URS' supporting submissions, which contain lessons for those advancing and defending similar claims.

- The six-fold checklist set out in *Manchester Building Society v Grant Thornton UK LLP* [2021] UKSC 20, [2021] 4 All ER 1 at [6] for analysing an alleged duty of care was primarily designed for novel situations which had not previously been considered by the courts; it was not intended to be applied by rote to a well-known duty of care such as that owed by structural engineers to their employers.
- The claims made were for damages which are conventional in cases of this sort, such as for the cost of investigation, evacuation of the residents, and the carrying out of remedial works. They were not primarily incurred to protect BDW's reputation and could not be characterised as 'reputational damages'. A builder who goes back to rectify defective work can recover the relevant cost, even if he was not under an obligation to carry out such remedial works: *G. W. Atkins Ltd v Scott* (1991) 7 Const. L.J. 215.
- At the heart of URS' case was a submission that, when BDW sold its proprietary interest in the buildings, the scope of the duty of care owed by URS changed. This submission was robustly rejected as being unsupported in any authority and wrong in law.
- Both at the time that URS' duty was incepted and performed, and when BDW suffered actionable damage (that is, as discussed in Ground 2, at the time of practical completion), they had a proprietary interest. There was therefore nothing in URS' submission that BDW could not demonstrate such an interest. In any case, the absence of a proprietary interest does not affect the validity of a claim of this type.

D.2 The Accrual of Cause of Action in Tort

Coulson LJ observed that there are now two kinds of loss which are recognised as actionable damage for the tort of negligence, namely physical damage and pure economic loss. The leading case on the accrual of the cause of action in defective buildings, *Pirelli General Cable Works Limited v Oscar Faber & Partners* [1983] 2 AC 1, concerned physical damage to a building that arose from a negligent design. Lord Scott in *Pirelli* held that a claimant's cause of action did not accrue until damage occurred. Lord Scott also observed that there might be some cases, however, where the defect was so gross that the building is 'doomed from the start'.

The Latent Damages Act 1986 (which inserted section 14A into the Limitation Act 1980) ameliorated the adverse consequences of *Pirelli* by allowing an action to be

brought within three years of the date of knowledge by the claimant, but did not change the law in relation to the accrual of a cause of action in tort. Coulson LJ acknowledged that it is the law of England and Wales that, in a case where there is physical damage, the cause of action accrues when that physical damage occurs, regardless of the claimant's knowledge of it or its discoverability.

Coulson LJ noted that *Pirelli* and the cases that followed it were decided at a time when the English common law considered that physical damage was needed in order to complete the cause of action in tort. This misapprehension was corrected in *Murphy v Brentwood District Council* [1991] 1 AC 398. In that case, Lord Keith noted that if the claimants in *Pirelli* had discovered the defect before it caused physical damage, they would not have to wait until this physical damage eventuated before the cause of action crystalised.

In a line of other construction cases decided after *Pirelli*, it was held that if there is an inherent design defect which did not cause physical damage, the cause of action accrues on completion of the building. This accords with the position under section 1(5) of the Defective Premises Act 1972, which states this position in the same terms.

URS submitted that the cause of action accrued when the claimant 'came to know' of the defect. It was their submission that, by the time BDW had discovered the defects in design, they no longer had a proprietary interest in the developments, which had been sold for full value; there was therefore no actionable damage to complete a cause of action in tort. This argument was rejected by the Court of Appeal. It held that BDW's cause of action against URS arose, at the latest, when the individual buildings achieved practical completion, as at that point the defective structural design had been irrevocably incorporated into the buildings as a whole. Coulson LJ set out a number of reasons for this conclusion.

- The date when the claimant discovers the fact or facts that might cause him to bring a claim (that is, the date of knowledge) has never been the date in English law on which the cause of action accrues. This was the decision in *Pirelli*, which has never been overruled.

- The Latent Damages Act 1986 did not reverse *Pirelli*, but was based on the correctness of the decision in law.

- Lord Keith's statement in *Murphy* supported BDW's position, not URS'; the defective nature of the design provided the necessary actionable damage.

Coulson LJ acknowledged that there are difficulties with *Pirelli*, decided as it was when it was thought that physical damage was required to complete the cause of action in tort against a professional, rather than the occurrence of economic loss. *Pirelli* appears to have been decided on the assumption that a defective design will inevitably lead to

physical damage, but as the cladding cases have shown, one would not expect to see physical damage caused by non-compliance with the Building Regulations. This does not mean that no cause of action has accrued to the owners of the building before any fire breaks out. To this extent, therefore, Coulson LJ considered that *Pirelli* (not being a physical damage case) has no application.

E THE AMENDMENT APPEAL

E.1 Claims under the Defective Premises Act

Section 1(1)(a) of the DPA provides:

> *"A person taking on work for or in connection with the provision of a dwelling (whether the dwelling is provided by the erection or by the conversion or enlargement of a building) owes a duty—*
>
> *(a) if the dwelling is provided to the order of any person, to that person*
>
> […]
>
> *to see that the work which he takes on is done in a workmanlike or, as the case may be, professional manner, with proper materials and so that as regards that work the dwelling will be fit for habitation when completed."*

URS argued it did not owe BDW a duty under s 1(1)(a) of the DPA, because:

- as a matter of statutory interpretation, s 1(1) of the DPA was intended to protect lay purchasers of defective properties, not commercial developers; and
- BDW itself owed duties to subsequent purchasers of the flats under s 1(4) of the DPA.

URS developed a number of threads in support of this argument, which were all rejected:

- URS relied, in part, for its statutory interpretation argument, on the Law Commission report which gave rise to the DPA. However, the court queried whether the report was even admissible "*given that the words of the DPA itself were free from ambiguity*" (para 183). The "*straightforward grammatical meaning of the words*" in s 1(1)(a) meant that URS owed a duty to BDW: the buildings were being provided to the order of BDW since it had a contract with URS for the structural engineering design element of that work (para 178); and there is

nothing in the words of the DPA which somehow limited the recipient of the duty to individual purchasers, rather than companies or commercial organisations (para 179).

- The suggestion that URS did not owe a duty to BDW under s 1(1)(a) because it was not providing individual dwellings, but an entire development was "*unsustainable as a matter of common sense*". At para 180, Coulson LJ also referred approvingly to the judgment of Edwards-Stuart J in *Rendlesham Estates plc & Ors v Barr Ltd* [2014] EWHC 3968; [2015] 1 WLR 3663, which rejected a similar argument.

- Finally, there was no reason why the fact that BDW owed duties to individual purchasers under s 1(4) meant that it could not also be owed a duty under s 1(1). Coulson LJ drew an analogy with the contractual chain in which a main contractor owes duties to its employer and is in turn owed duties by its subcontractors, and so on (paras 188–190).

URS's other objection to BDW being permitted to bring a claim under s 1(1) was its contention that BDW had no claim because it sold the buildings after completion and therefore suffered no loss. That was answered, in one sense, by the reasons for rejecting URS's first objection. BDW was owed a duty by URS and owed duties to individual purchasers. It remained liable to the purchasers after sale. Since it would suffer loss, it could seek to recover that loss from URS by claims under the DPA. Further, as a matter of law, recoverability of damages under the DPA is not linked to or limited by property ownership, as the Court of Appeal had previously held in *Bayoumi v Protim Services Limited* [1997] PNLR 189.

Coulson LJ commented at para 181 that "*the DPA has been significantly under-used in its lifetime so far*". It may be that this judgment goes some way to changing that situation.

E.2 Claims under the Contribution Act

The issue on appeal regarding the Civil Liability (Contribution) Act 1978 ("the CL(C)") was whether the judge had erred in allowing amendments to the claim to add the claim for a contribution when no claim had been made or intimated against the developer by the individual purchasers. It was contended that, in these circumstances, the claim was premature. In his analysis Coulson LJ described the individual purchasers as "A"; BDW (the developer) as "B"; and URS (the designer) as "C".

Coulson LJ confirmed that s 1(1) of the CLCA provided no limit or restriction on the right of a person to claim a contribution from another person liable in respect of the same damage. Coulson LJ adopted the analysis of Judge Havery QC in *Baker & Davies plc v Leslie Wilks Associates (a firm)* [2005] EWHC 1179 (TCC); [2005] 3 All ER 603

that ss 1(2)–(4) were designed to remove restrictions or defences that might otherwise be raised and that s 10 of the Limitation Act 1980 was directed to time limitation and not to narrowing the right to contribution.

Rejecting the argument by the designer that a third-party claim was a condition precedent for liability under the CLCA Coulson LJ held that this requirement was not identified nor referred to in s 1(1) and so the issue could be determined as a simple matter of statutory construction. The accrual of a cause of action under CLCA occurred when the three ingredients in s 1(1)(a) of the CLCA were satisfied:

1. Is B liable or could be found liable to A?

2. Is C liable or could be found liable to A?

3. Are their respective liabilities in respect of the same damage suffered by A?

This analysis based on statutory construction was reinforced by additional factors

- the absence, in s 1(1) of language present in s 1(4) "*any claim made against him*" which could have been included had that been Parliament's intention.

- the reference in s 1(6) to "*any liability which has been or could be established*" strongly suggested that liability to any third party did not have to be established in fact prior to the contribution but was "*at least potentially notional or theoretical*." A notional liability was all that was required.

Wider considerations also supported the view of Coulson LJ:

- there was no reason why B should have to wait for a formal claim from A prior to commencing remedial works in order to then be able to claim a contribution against C as that "*would reward indolence*";

- there was no reason why the case should be different from *Baker & Davies* purely because there was no formal settlement agreement.

Further, the consent of the purchasers to be decanted, allowing extensive remedial works and then moved back all at the expense of BDW could be construed as an implied agreement for the works even if the entirety of their claims were not formalised.

No policy reasons were advanced why B should await a formal claim for A prior to having a legal right to claim a contribution from C and as a matter of policy that would be regressive.

Accordingly, both as a matter of statutory interpretation and of policy there was no requirement for A to serve a formal claim on B before C's liability to make a contribution to B. Neither party had identified any binding authority to the contrary requiring any contrary conclusion.

Further, s 10 of the Limitation Act 1980 provided a cut-off date for limitation purposes such that a claim for a contribution must be made within 2 years of the date of judgment or arbitral award and if there are no such proceeding it runs from the date of the final settlement of the claim. Section 10 of the Limitation Act 1980 did not address when the cause of action for a contribution arose.

The court also rejected an argument that BDW had ceased to be liable to the third parties because of s 1(2) of the CLCA; it was not engaged because it was the BSA which was the relevant statute for limitation purposes and so there was no question of the claim being statute barred. In any event BDW could rely on the retrospectivity provision at s 135(3) of the BSA to achieve the same result. The BSA was intended to be retrospective and so BDW never ceased to be liable to the third parties.

E.3 Retrospectivity – section 135 of the Building Safety Act

Section 135 of the BSA inserted a new s 4B into the Limitation Act 1980 providing for a special time limit for certain actions in respect of building defects. In essence:

- if a claimant seeks to bring a claim under s 1 of the DPA for the provision of a new dwelling then they will now be able to bring a claim for works that were completed in the 30-year period prior to 28 June 2022 (when the BSA came into force); and

- for s 1 DPA claims where works were completed after 28 June 2022, the limitation period has been extended to 15 years from the date on which the right of action accrued.

The previous limitation period was six years and therefore this extension of the limitation period is significant and far-reaching.

Further, s 135(6) of the BSA provides that "*Nothing in this section applies in relation to a claim which, before this section came into force, was settled by agreement between the parties or finally determined by a court or arbitration (whether on the basis of limitation or otherwise).*"

The key issue in this case was whether the retrospectivity provided by s 135 of the BSA excluded the rights of parties who were involved in ongoing litigation? Were they exempt from the otherwise widely worded retrospectivity provision?

The Court of Appeal held that s 135 of the BSA was retrospective in effect and although there was an exception to that, addressing claims which had been finally determined or settled (provided for by s 135(6)), there was no exception relating to the rights of parties involved in ongoing litigation for two key reasons:

1. First, the ordinary linguistic meaning of the words used in s 135(3). The amendment which, by way of s 135 of the BSA, adds the extension to the relevant limitation position "*is to be treated as always having been in force*".

2. Second, the fact there was an express carve-out for parties whose claims under the DPA had been finally determined or settled suggested that Parliament had turned its attention to the wide words of s 135(3) and decided that there would only be one exception. If Parliament had intended a carve-out to protect the position of parties in ongoing litigation, not only would they have said so, but such a provision would have been relatively easy to provide. Further, a carve-out for parties in current litigation, whose rights have not been finally determined or settled, would be unusual. The Court of Appeal were not taken to any other legislation which had the same or a similar exception and it would be difficult to justify on policy grounds.

F CONCLUSIONS

The conclusions reached by the Court of Appeal reflect many of the assumptions held by English construction and property lawyers about the scope of a designer's duty of care in tort and the possibility of claims by developers under section 1(4) of the Defective Premises Act 1972. The precise scenario in which these particular claims arose, however, parallels many claims that are likely to be brought as a consequence of a number of the provisions of the Building Safety Act 2022 and the related building safety measures taken by the English government. The decision therefore offers very important clarification and validation of our understanding of the Defective Premises Act 1972, claims in negligence against professionals, and limitation.