Exams season – Court of Appeal answers wide ranging series of construction law questions

In *URS Corporation Ltd v BDW Trading Ltd* [2023] EWCA Civ 772 the Court of Appeal dismissed the First, Second and Third Appeals, leaving the way open for BDW to claim contribution from URS in respect of the cost of repair works required to tower block developments in London and Leicester.

Background

The respondent, BDW Trading Limited ("**BDW**") had engaged the appellant consulting engineers, URS Corporation Limited ("**URS**") to carry out structural design work in connection with a series of tower blocks including those constructed at the two developments (the "**Properties**"). Upon the discovery of alleged dangerous inadequacies in the structural design of the Properties, BDW commenced proceedings in negligence against URS on 6 March 2020.

URS raised certain Preliminary Issues, which were decided against it at first instance. The most important of these concerned the date of the accrual of a cause of action in tort against designers of a defective building, in circumstances where the defect caused no immediate physical damage (this gave rise to the "**Substantive Appeal**").

Following the coming into force of the Building Safety Act 2022 ("BSA"), BDW obtained permission to amend its statements of case to take advantage of the longer limitation periods identified in the BSA, and to add claims under the Defective Premises Act 1972 ("DPA") and Civil Liability (Contribution) Act 1978 ("CLCA") (this triggered the "**Amendment Appeal**").

URS was unhappy with both outcomes, and as reported in one of our earlier bulletins https://hklegal.co.uk/case_bulletin/urs-corporation-ltd-v-bdw-trading-ltd-2023/ sought and obtained permission to bring the two related Appeals.

The Substantive Appeal

Ground 1

URS sought to argue that the losses claimed by BDW (i.e. the cost of repair) were not within the scope of its duty of care. In particular, URS sought to rely on the fact that by the time the defects were discovered, BDW no longer had a proprietary interest in the buildings (as these had been sold on) such that any claims by third party purchasers were statute barred.

This ground of appeal was dismissed on the following basis: -

- URS were under a duty to guard against the risk of economic loss that would be caused by a construction of a structure using a negligent design such that it was built containing structural deficiencies or defects that would need to be remedied. This was a standard duty imposed on a design professional and co-existed with that professional's contractual obligations.

- The claimed losses were not reputational damages. Correctly categorised, the claimed losses were conventional damages comprising of investigation, temporary works, evacuation and remedial work costs.

- Where the type of damage claimed is recoverable in principle, (which in this case it was), a party's precise motivation for carrying out those works will be immaterial.

- URS was wrong to assert that BDW suffered no diminution in value of its proprietary interest because it had already sold the buildings for their full value before problems came to light. It is trite law that, in construction cases, diminution in value is measured by reference to the cost of the relevant remedial works (*East Ham Corp*).

- At the time the negligent design was carried out, URS owed a conventional duty of care to BDW. It did not follow that this was somehow discharged when BDW sold the buildings. Rather BDW incurred liability to purchasers upon sale for defects and was, therefore, liable to them (whether in contract, the DPA or tort) for the cost of any remedial works.

- The deed of appointment between the parties provided that an individual purchaser would not be affected by any subsequent variation of the appointment. Moreover, the mere fact that an individual purchaser has the right to make a direct claim against URS did not affect the duties URS owed to, and the loss recoverable by, BDW.

- A claim in economic loss for defects does not always require a proprietary interest for the cost of remedial works to be recoverable. In this case (and as established by the Court's findings in respect of Ground 2 – see below), BDW suffered actionable damage on practical completion of the buildings so they had the necessary proprietary interest anyway.

Ground 2

Unusually, URS had argued for the latest conceivable limitation date, arguing that this did not accrue until after the alleged defects were discovered in 2019. That then allowed them to argue that as BDW had sold the buildings by that date, they had suffered no actionable loss.

This ground of appeal was also dismissed. The Court found that the judge was right to find that BDW's cause of action in tort against URS accrued, at the latest, on practical completion of the buildings. The Court's reasoning included the following:

- The authorities established that where there is physical damage, the claimant's cause of action accrues when that physical damage occurs irrespective of that party's knowledge of the physical damage or its discoverability (*Pirelli*).

- More particularly, where, as in the present case, there was an inherent design defect which had not (yet) caused physical damage, the cause of action in negligence accrues on completion of the building (*New Islington, Co-Op v Birse* and other post-*Murphy* cases were considered). Knowledge of the existence of that cause of action having accrued was irrelevant.

- On practical completion (i.e. when the defective and dangerous structural design has been irrevocably incorporated into the buildings as built) BDW owned the buildings, so it was not necesssary to conclude that they had completed a cause of action in tort against URS at that stage.

- Contrary to URS' assertions, the presence of latent defects was enough to constitute actionable damage in law because on

practical completion, those buildings were structurally deficient. In other words, the buildings were a "*damaged asset*" and their case of action in tort was complete (*Axa* and *Co-Op v Birse* applied).

- The conclusion that the cause of action accrued at practical completion was consistent with both the DPA and the public policy aim that the date of accrual wherever possible should be advanced and not postponed.

As grounds 1 and 2 of the First Appeal were dismissed, it was not necesssary for the Court to consider ground 3 – the judge was right not to strike out the claim in negligence.

The Amendment Appeal

Section 135 of the BSA introduced a new section 4B into the Limitation Act 1980, the effect of which is to retrospectively extend limitation in respect of claims brought under section 1 of the DPA to 30 years.

As above, BDW had obtained permission from the first instance judge to amend its Particulars of Claim and their Reply to refer to the DPA and CLCA.

URS appealed on the following grounds:

Ground 1: the judge applied the wrong test in allowing the amendments and should have determined the points of law then and there, rather than merely decide they were arguable.

Appeal dismissed. The points of law raised by URS were not "*short points of law*" that could be determined by the judge at the time of the amendment application (*Easyair Ltd* distinguished). The judge had exercised its discretion correctly in managing the case and the correct test was applied.

Ground 2: the 'retrospectivity' of s135 of the BSA could not apply to proceedings ongoing at the point of enactment / coming into force.

Appeal dismissed. The Court held that the wording of the BSA was intended to have retrospective effect and "*is to be treated as always having been in force*". As a matter of statutory interpretation, the BSA did not exclude the rights of parties involved in *ongoing* litigation. Rather, the express carve-out contained in s135(6) only applied to claims that had already been finally determined or settled before the BSA came into effect. If Parliament had intended the BSA to exclude the rights of parties involved in *ongoing* litigation, this would have been expressly stated.

Ground 3: a developer such as BDW was not a person to whom a duty was owed under the DPA.

Appeal dismissed. There is nothing in the DPA which limits the receipt of the duty to individual purchasers, rather than companies or commercial organisations. To maintain otherwise would be unusual and impossible to police in practice. URS were contracted as structural engineer and were classed as "*a person taking on work for or in connection with the provision of a dwelling*" so owed a duty to BDW.

Ground 4: BDW had suffered no loss under the DPA because it no longer owned the properties when the defects were discovered.

Appeal dismissed. The Court pointed out that recoverability of damages under the DPA is not linked to or limited by property ownership. The threshold for liability under the DPA is fitness for habitation. BDW had, as a matter of law, a valid

claim against URS under s1(1)(a) of the DPA and that claim was subject to the longer limitation periods provided for by the BSA.

Ground 5: no claim could be made by BDW under the CLCA because no claim had been made, or intimated, by the owners.

There was nothing in the wording of s1(1) of the CLCA to suggest that the making or intimation of a claim by the owners was a condition precedent to the bringing of a claim in contribution by BDW. The Court pointed out that if this was the case, it would reward indolence.

The Court also reasoned that the 2-year period provided for in s10 of the Limitation Act 1980 did not speak to when a cause of action for contribution accrued. On a proper interpretation, BDW's liability to individual purchasers under s1(1) would be assessed from the date the contribution is sought (so at the time of trial) so these claims cannot be time-barred because the BSA "*is to be treated as always having been in force*". BDW would be able to rely on the retrospective effect of s135 of the BSA in any event to achieve the same result.

Analysis

This important decision provides welcome guidance not only in respect of issues which have long been debated in English law e.g. the date of accrual of a cause of action in tort, but also in relation to questions which have more recently emerged as to how the new limitation provisions of the BSA 2022 will impact ongoing and future claims concerning damaged and/or defective buildings.