URS v BDW: Supreme Court answers key building safety questions

The Supreme Court has delivered a landmark judgment, with implications for all future claims relating to historical defects within residential developments. Guidance is provided on statutory duties under the Defective Premises Act 1972 and how the Building Safety Act 2022 applies retrospectively. The Court's ruling sheds light on the legal rights and responsibilities of developers when historic building safety defects are uncovered including when they may recover remedial costs through a contribution claim.

Background

The respondent, BDW Trading Limited ("**BDW**") engaged the appellant consulting engineers, URS Corporation Limited ("**URS**") to carry out structural design works in connection with a series of tower blocks. In 2019, BDW discovered design defects within two sets of multiple high-rise residential building developments ("the **Developments**") for which URS had provided structural designs.

Despite it no longer having any proprietary interest in the Developments, BDW performed remedial works on the Developments from 2020 to 2021. No claim had been made against BDW by the owners or occupiers and such a claim would – or so it was thought at that stage - have been time-barred. In March 2021, BDW brought a claim against URS for the costs incurred in carrying out the remedial works.

The Rulings of the Lower Courts

At first instance, Fraser J held that:

1. The losses claimed by BDW fell within the scope of URS' duty and were all recoverable in principle (save for the claim for reputational damages);
2. The losses were in contemplation of the parties at the time of entering into the appointments and were not too remote; and
3. Issues of legal causation and mitigation should be determined at trial and BDW's claim should not be struck out.

Following the first instance decision, but before the Court of Appeal's judgment – see below - s.135 of the Building Safety Act 2022 ("**BSA**") came into force, retrospectively extending limitation under s.1 of the Defective Premises Act 1972 ("**DPA**") from 6 to 30 years. Consequently, BDW successfully applied to amend its claim against URS to incorporate the newly in force s.1 DPA together with a claim under the Civil Liability (Contribution) Act 1978 ("the Contribution Act").

The Court of Appeal dismissed URS' appeals against these preliminary determinations as reported in one of our previous bulletins (https://hklegal.co.uk/wp-content/uploads/2023/07/Bulletin-10.7.23.pdf).

URS nevertheless obtained permission to appeal to the Supreme Court on four grounds, detailed further below.

Held

The Justices of the Supreme Court were unanimous in agreeing that each of URS' grounds of appeal should be dismissed. Lord Hamblen and Lord Burrows provided the leading judgment on grounds 1 to 3 and Lord Leggatt gave the leading judgment on ground 4.

Ground 1: Did BDW suffer actionable and recoverable damage? If not, did BDW have an accrued cause of action when they sold the Developments?

BDW's claim in negligence concerned pure economic loss. To establish a cause of action for such loss, the claimant must show the building has a lower value than it would otherwise have had and/or requires repairs due to the alleged negligence, per *Murphey v Brentwood District Council* [1991] 1 AC 398. Here, the Court ruled that there was an assumption of responsibility from URS to use reasonable skill and care in providing structural designs to BDW. It was uncontentious that URS was in breach of this duty to BDW.

URS nevertheless sought to argue that as BDW had no proprietary interest in the Developments and/or no legal obligation to carry out remedial works (given that all the claims from owners and occupiers were then time barred) BDW had essentially volunteered to carry out the works. URS contended the loss incurred by BDW was therefore too remote.

The Court was satisfied URS had a duty to guard BDW against the loss incurred – the repair costs to the Developments. Therefore, the loss was within the scope of URS' duty. Further, regarding remoteness, the Court held that the type of loss suffered must have been reasonably contemplated by URS as a serious possibility at the time it assumed responsibility for its work.

The Court dismissed URS' arguments that by 'voluntarily' carrying out the repair works in circumstances where it was not under any immediate legal compulsion to do so, BDW had broken the chain of causation or made the repair costs too remote to claim from URS.

Indeed, the Court considered it was strongly arguable did not act 'voluntarily' in any event. BDW could have been legally liable to occupiers under the DPA or in contract for personal injury or death, given the extended limitation periods which might have been applicable to such claims.

As URS failed on ground 1, the Supreme Court noted the issue of when BDW's cause of action accrued fell away. The Court declined to overturn *Pirelli v Oscar Faber* [1983] 2 AC 1 and so for the time being, there is no change to the existing position as to when the cause of action is accrued in cases of latent defects to buildings.

Despite this, the Court made comments on the status of *Pirelli.* First, it noted that *Pirelli* was decided on the false premise that cracks in a building constituted physical damage, when really, it should have been classified as pure economic loss for the purposes of the tort of negligence.

However, this did not mean *Pirelli* was incorrect that the cause of action in negligence accrued from the date the damage occurred, rather than on the date the damage was reasonably discoverable.

The Court noted there had been strong arguments of principle that in the context of pure economic loss, a cause of action should accrue only once actual loss has been discovered or could reasonably be discovered (e.g. Lord Nicholls dissenting in *Bank of East Asia v Tsien Wui Marble Factory* [2000] 1 HKLRD 268). However, it was highlighted that this would contradict the Latent Damages Act 1986, which gave a limitation period of 3 years from the date of discoverability. If the Supreme Court were to overturn *Pirelli* and change the cause of action to the date of discoverability, this would have the effect of giving

claimants 6 years, instead of 3 years as envisioned by Parliament under the Latent Damages Act 1986.

While *Pirelli* was not overturned because the issue had fallen away, there were therefore strong hints from the Supreme Court that *Pirelli* would have limited application in the future.

Ground 2: Did s.135 of the BSA apply?

S.135 BSA amends the Limitation Act 1980 to provide for a 30-year retrospective limitation period for claims accrued under s.1 DPA before 28 June 2022.

The issue in this case was whether the retrospectivity of s.135 BSA applied to other claims dependant on s.1 DPA. In the present case, BDW's downstream claims of negligence and contribution against URS relied on duties owed retrospectively pursuant to s.1 DPA. The Court held that the retrospectivity under s.135 BSA did apply to these onward claims.

Examining the statutory wording of s.135(3) BSA, the Court noted that Act refers to "*an action by virtue of*" s.1 DPA. The Supreme Court held this wording did not limit nor restrict s.135 BSA to actions *under* the DPA.

Further, the purpose of the BSA was to ensure accountability for parties responsible for historic building safety defects. Restricting the retrospectivity of s.135 BSA could defeat attempts by developers to make downstream contractors and consultants directly responsible for defects and allow them to fund their obligations to homeowners.

Ground 3: Did URS owe a s.1(1)(a) DPA duty to BDW and, if so, were BDW's losses recoverable?

The duty under s.1(1)(a) DPA is owed to those who "order" a dwelling.

URS' position, that the DPA precluded a person who owes a duty under the DPA from also being owed a duty, was rejected. The Court clarified a developer can both owe and be owed a duty, especially where the developer is the first owner of the dwelling.

The Court held the purpose of s.1 DPA was to protect the interests of those who acquire an interest in the dwelling and those who have an interest in the dwelling other than by purchasing it (e.g. being a first owner).

The Court ruled when considering the words used within s.1(1)(a) DPA, "*they should be interpreted as applying to any person, including a developer, to whose "order" a dwelling is being built*". Here, URS carried out work to the order of BDW and therefore owed BDW a duty under s.1 DPA.

Ground 4: Was BDW entitled to bring a contribution claim against URS?

The Contribution Act addresses a situation where two (or more) people ("D1" and "D2") are liable for damage suffered by another person. The law allows that third party ("C") to choose which of D1 and D2 it wishes to pursue for compensation. While C might choose to sue both, it does not have to, and in practice often does not do so.

The law nevertheless recognises the potential unfairness that would result if C for whatever reason elected to pursue and recovered full compensation from D1 alone, whilst D2 did not have to pay anything. Therefore, a statutory right exists under the Contribution Act enabling D1 to claim a contribution from D2, where D2 would notionally have been liable to C for the same damage.

In this case, BDW paid for the repair works and subsequently claimed contribution from URS under the Contribution Act. Both BDW and URS were liable to the homeowners for damage resulting from the defects i.e. the repair costs.

URS' position was that BDW's claim was premature, as it alleged the right to contribution would only arise where BDW's liability to the homeowners had been established, by way of judgment or a settlement with the homeowners.

The Court disagreed and clarified that the right to a contribution claim arises on D1 paying (or being ordered to pay) damages to C. At this point, and not before, D1 is entitled to recover contribution from D2. Payment might include the carrying out of rectification works, being a payment in kind. Applying this interpretation, BDW was entitled to bring its contribution claim against URS.

Analysis

This landmark decision provides important guidance on the retrospectivity of s.135 of the BSA and when s.1(1)(a) duties will arise under the DPA. Further, the test for when a party is able to commence a contribution claim has been clarified.

It is also significant that the Supreme Court declined to overturn *Pirelli.* The long-debated issue over whether reform is needed to finally resolve when the cause of action accrues in negligence claims will continue. Despite this, the Supreme Court has strongly hinted that *Pirelli's* influence over the Courts will reduce and its application will be restricted.

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