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Legal developments in construction law

1. Defective building design (with no immediate physical damage) and the duty of care is?

Developers of a number of high-rise buildings, some of which were constructed in 2005, discovered what were said to be serious structural defects in some of the blocks in 2019. Although they no longer owned the buildings in 2019, the developers carried out remedial works and brought proceedings in tort against the designers, alleging negligent design, claiming that the designers owed the developers a duty of care in respect of their losses. The judge at first instance, dealing with preliminary issues on assumed facts, ruled that the designers did indeed owe the developers a duty of care but the designers appealed to the Court of Appeal, alleging, first, that they owed no duty of care in respect of the claimed losses because the risk of harm that their duty of care guarded the developers against was the risk of harm to their proprietary interests, and the risk of loss incurred to third parties. The delay in the discovery of the defects meant that the developers no longer had a proprietary interest in the developments at the relevant time, and that, by then, any claims by third parties were statute-barred.

Their second substantive ground of appeal was that the damages claimed were not recoverable because, at the time that the developers discovered the design defects, they had long since sold their proprietary interests in the developments and, by the time of discovery, claims by third parties would have been statute-barred. It was a critical element of this argument that any cause of action could only have accrued when the developers knew about the design defects in 2019 (by which time they had sold the buildings).

Duty of care on the designers?

Noting that the appeal had all the hallmarks of a three-day examination in construction law, the Court of Appeal dismissed the first ground of appeal. In doing so, the leading judgment dealt with a number of issues, in particular ruling that the designer's duty was a standard duty imposed on a design professional which was co-existent with that professional's contractual obligations. The risk of harm was that, in breach of the professional's duty, the design of the buildings would contain structural defects which would have to be subsequently remedied.

Recoverable damages?

The damages claimed were, the Court said, conventional damages claims, the cost of investigation, temporary works, evacuation of the residents and the carrying out of permanent remedial works, to protect occupants and were not, as claimed by the designers, reputational, primarily incurred (or primarily concerned) to protect the developers' reputation. The Court also noted that it has long been the case that a builder who goes back to rectify defective work can recover the relevant cost, even if they were under no obligation to carry out the remedial works, and that, in construction cases, diminution in value is measured by reference to the cost of the relevant remedial works.

The designers accepted that, at the time that the negligent design was perpetrated, they owed the full, conventional duty of care to the developers, who were the owners of the relevant buildings. Their argument, however, that the developers could not recover because they were under no obligation to third parties, was wrong on the facts because, at the time that the apartments and the developments were sold, it was common ground that the developers were liable to the purchasers for the defects, whether in contract, under the Defective Premises Act or tort, and therefore liable to them for the costs of any remedial works.

Does a potential limitation defence affect underlying liability?

The argument was also wrong in law. After sales of the buildings, at some point the developers might have been able, had they chosen to do so, to rely on a limitation defence, in answer to third-party claims but they were not obliged to do so. As the case law makes clear, the raising of a limitation defence is a procedural bar but it does not affect the underlying liability. On that basis, the developers' liability in law to third parties at the time that the defects were discovered remained as before, and it was a matter for them whether or not they chose to take the limitation point.

Was a proprietary interest in the buildings needed in order to claim?

The designers also argued that their duty of care to protect the developers against the risk of structural defects in their design could only arise if the developers had a proprietary interest in the buildings. Even if a proprietary interest was a necessary ingredient of the cause of action that did not help the designers because, when their duty began and was performed, the developers had such a proprietary interest, and, depending on the outcome of the second appeal ground, at the time that BDW suffered actionable damage (i.e. practical completion of the buildings) they also had the necessary proprietary interest. On either basis, the fact that BDW no longer owned the buildings when the structural issues were finally identified was irrelevant.

The Court also noted that the case of ***St Martin's Property Corporation Ltd v Robert McAlpine Ltd*** was the highest possible authority for the basic proposition that a claim for defects does not always require a proprietary interest in order for the cost of the remedial works to be recoverable.

URS Corporation Ltd v BDW Trading Ltd [2023] EWCA Civ 772

2. Cause of action for defective building design (with no immediate physical damage) begins when?

When does a cause of action in tort against designers of a defective building accrue, in circumstances where the defect caused no immediate physical damage? When the building was completed to the defective design, or when the developers discovered that the buildings were structurally defective? In ***URS Corporation Ltd v BDW Trading Ltd***, in dealing with the second substantive ground of appeal, the Court of Appeal had to provide the answer. Was the judge at first instance correct in concluding that the cause of action in the case accrued, with all of its necessary ingredients completed, not later than the date of practical completion of each of the blocks?

The Court of Appeal ruled that the judge was right to find that the cause of action accrued, at the latest, on practical completion, when the developments were owned by the developers, which gave them a completed cause of action in tort against the designers at that stage, when the defective and dangerous structural design had been irrevocably incorporated into the buildings as built. At that moment, the developers had suffered actionable damage because those buildings were structurally deficient.

In reaching that conclusion, the Court considered the case law and noted a number of relevant principles:

- there are only two kinds of loss recognised as actionable damage for the tort of negligence, physical damage and pure economic loss;
- the law of England and Wales is that, in a case where there is physical damage, the claimant's cause of action accrues when that physical damage occurs, regardless of the claimant's knowledge of the physical damage or its discoverability;
- if there was an inherent design defect which did not cause physical damage, the cause of action accrued on completion of the building (a conclusion entirely consistent with the Defective Premises Act);
- the essence of the non-construction case law considered is that, again, knowledge of the existence of a cause of action having accrued is irrelevant;

- the date of knowledge – the date when the claimant discovers the fact or facts that might cause them to make a claim – has never been the date in English law on which the cause of action in tort accrued;
- the case law strongly supports the view that accrual of the cause of action in a case like the present case occurs on practical completion;
- in a straightforward case, where a defective design causes physical damage to the building, the date on which the physical damage occurs will be the date that the cause of action in tort accrues. That is what ***Pirelli General Cable Works Limited v Oscar Faber & Partners*** decided;
- unlike ***Pirelli***, this was not a case of physical damage but a case of economic loss;.
- the law does not require that, where there is no physical damage, there still needs to be 'damaging consequences of the defect'. It is enough that there is actionable damage to found the cause of action;

URS Corporation Ltd v BDW Trading Ltd [2023] EWCA Civ 772

3. The Defective Premises Act duty is owed to?

In ***URS Corporation Ltd v BDW Trading Ltd***, the Court of Appeal had to deal with, and dismissed, an appeal in respect of the first instance judge's decision to allow certain amendments to the developers' claim in the proceedings.

One of the designers' objections to the amendments was that the developers were not owed a duty under the Defective Premises Act. Section 1(1) of the Act states:

> "**1 Duty to build dwellings properly.**
>
> (1) 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; and
>
> (b) without prejudice to paragraph (a) above, to every person who acquires an interest (whether legal or equitable) in the dwelling;"

In rejecting the designers' argument, the Court said it was clear, from the section wording, that the developers were owed a duty by the designers under s.1(1)(a) of the DPA. It was agreed that, as the engineer, the designers were "a person taking on work for or in connection with the provision of a dwelling". They owed a duty "if the dwelling is provided to the order of any person, to that person". The buildings in question were being provided "to the order of" the developers. They had a contract with the designers for the structural engineering design element of that work. As a matter of simple statutory interpretation, therefore, the designers owed a duty to the developers under s.1(1)(a). This was the straightforward grammatical meaning of the words in s.1(1)(a).

And there was nothing in the words of the DPA (whether in s.1(1)(a) or elsewhere) which somehow limited the recipient of the duty to individual purchasers, rather than companies or commercial organisations. On the contrary, since the duty to individual purchasers would plainly be caught by s.1(1)(b), the category of those to whom a duty is owed under s.1(1)(a) must be different, otherwise the sub-section would be otiose.

The designers also argued that the developers BDW had no claim under the DPA because they sold the buildings after completion and therefore suffered no loss. The Court noted that the sale of the buildings was irrelevant. The developers remained liable to the purchasers after sale (a liability expressly preserved by s.3) and so would suffer loss, which they could seek to recover by way of their own claims against the designers under the DPA. In addition, recoverability of damages under the DPA is not linked to, or limited by, property ownership.

URS Corporation Ltd v BDW Trading Ltd [2023] EWCA Civ 772

4. Ingredients of a claim for contribution?

In ***URS Corporation Ltd v BDW Trading Ltd***, the Court of Appeal also had to consider the necessary ingredients of a claim for contribution under the Civil Liability (Contribution) Act 1978. The leading judgment took, as an example, the situation where A (in this case, the individual purchasers) has a right to claim for a defective dwelling against B (in this case, the developers). B alleges that C (in this case, the designers) are liable for the same damage and

pleads a claim for contribution against C. In the ordinary case, where B and C are said to be liable to A in respect of the same damage, it will be usual for A to make a claim against B, and for B subsequently to claim a contribution against C but the question in this case was whether such a claim was, as a matter of law, required before B has the right to claim a contribution from C.

The Court ruled that the right to make a claim for contribution – the accrual of the cause of action – is established when the three ingredients in s.1(1)(a) of the CL(C) can be properly asserted and pleaded:

- Is B liable, or could be found liable, to A?
- Is C liable, or could be found liable, to A?
- Are their respective liabilities in respect of the same damage suffered by A?

If those three ingredients are capable of being pleaded, then there is a cause of action for a contribution. The making of a formal claim by A against B is not required by the 1978 Act and no decision of the Court of Appeal or Supreme Court was found that reached a different conclusion.

URS Corporation Ltd v BDW Trading Ltd [2023] EWCA Civ 772

5. JCT 2024 update

The JCT are anticipating that JCT 2024 will appear early in 2024. In addition to new Target Cost contracts, expected changes include:

- modernising and streamlining: gender-neutral language, provisions for electronic signatures and notices;
- fluctuations: a new fluctuations hub with guidance and online fluctuation provisions;
- extensions of time: new relevant events to cover epidemics and antiquities will additionally deal with UXB's, contamination and asbestos; reduction of the assessment period for interim extension of time applications from 12 to 8 weeks;
- loss and expense: optional additional grounds for loss and expense claims, including epidemics and the exercise of statutory powers; antiquities will be extended to deal with UXB's, contamination and asbestos;
- liquidated damages: amendments reflecting the Supreme Court's decision in ***Triple Point v PTT*** to restore the orthodox position that liquidated damages clauses do not apply after termination;
- dispute resolution: changes to the nominating body or appointer provisions and the notification and negotiation of disputes will no longer be optional (subject to a reference to adjudication);
- allocation of risk: new provision dealing with unexploded ordnance, contaminated materials and asbestos;
- legislative changes: updates to reflect recent legislation including the Building Safety Act and its secondary legislation and the two new insolvency grounds introduced by the Corporate Insolvency and Governance Act 2020;
- Construction Act: revisions to termination accounting provisions to reflect Construction Act requirements, including a due date for the final payment after termination;
- Future proofing: taken into account in the contract drafting were the Construction Playbook, sustainable development, collaborative working and environmental considerations.

See: JCT: The Next Evolution – The Joint Contracts Tribunal (jctltd.co.uk)

6. Second staircases to be required for 18m plus new residential buildings

The Secretary of State for Levelling Up, Housing and Communities, Michael Gove, has confirmed the intention to mandate second staircases in new residential buildings above 18m. The government has, however, made clear that this new regulation cannot jeopardise the supply of homes by disrupting schemes that have been planned for years and the Department for Levelling Up, Housing and Communities is to work "rapidly" with industry and regulators over the summer to design transitional arrangements, with the aim of securing the viability of projects which are already underway, avoiding delays where there are other more appropriate mitigations.

The Department for Levelling Up, Housing and Communities has since said, at the end of August, that it intends to be in a position to announce further detail "in the autumn"

See: https://www.gov.uk/government/news/long-term-plan-for-housing

7. Government looks to speed up NSIP consent process

The government has held a consultation on speeding up the consent process for Nationally Significant Infrastructure Projects, large-scale developments relating to energy, transport, water, or waste. The key operational changes proposed in the consultation fall broadly into three areas:

- operational reform to support a faster consenting process
- recognising the role of local communities and strengthening engagement
- system capability - building a more diverse and resilient resourcing model.

See: https://www.gov.uk/government/news/planning-changes-to-speed-up-delivery-of-vital-infrastructure

8. Responsible Actors' Scheme launched : Government guidance and documents

On 4 July 2023 the regulations to establish a Responsible Actors Scheme for residential developers under sections 126-129 of the Building Safety Act 2022 came into force and on 21 July 2023 the government launched the Responsible Actors Scheme.

The Scheme requires that any member of the Scheme must:

- identify residential buildings over 11 metres in height, in England, that they developed or refurbished over the 30 years ending on 4 April 2022, and any of those buildings known to have life-critical fire safety defects
- remediate and/or mitigate, or pay for the remediation/mitigation of, life-critical fire safety defects in those buildings; and
- reimburse government schemes for taxpayer-funded work to remediate and/or mitigate defects in those buildings.

See: Responsible Actors Scheme - GOV.UK (www.gov.uk)

9. 1 October start for new HRB building control regime

On 17 August 2023 the Regulations which provide the detail of the new building control regime for higher-risk buildings were issued. The Regulations set out the procedure that applies when a new higher-risk building is being designed and constructed or when building work is being carried out to an existing higher-risk building. The Building Safety Regulator will be the building control authority for all higher-risk buildings

The regulations come into force on 1 October 2023 but there are transitional provisions.

See: SI 2023/909 - The Building (Higher-Risk Buildings Procedures) (England) Regulations 2023

10. 1 October start for new dutyholder and competence requirements for all buildings

Also issued on 17 August, and to come into force on 1 October 2023, are Regulations which make amendments to the 2010 Building Regulations, including the addition of new dutyholder and competence requirements that will apply to all building work, including that undertaken on higher-risk buildings.

New Regulation 46A added to the 2010 Regulations – lapse of building control approval

The amendment regulations also adds a new Regulation 46A to the 2010 Regulations

Section 36 of the Building Safety Act 2022 amends the 1984 Building Act to provide for building control approval to automatically lapse three years after it is granted if work to each individual building is not commenced according to the new definition of commencement of work (previously only in guidance) set out in new Regulation 46A.

The regulations also contain transitional provisions.

See: The Building Regulations etc. (Amendment) (England) Regulations 2023 (legislation.gov.uk)

11. New HRB building control regime and competence requirements: HSE guidance

The HSE has issued guidance on the new building control regime for higher-risk buildings and the new dutyholder and competence requirements.

See: new guidance which can be found here.

12. BSI competence standards: frameworks, requirements and code of practice

BSI Built Environment competence standards **PAS 8671**, **8672** & **8673** and code of practice **PAS 8670 v3.0** can be found at, and downloaded from: https://www.bsigroup.com/en-GB/industries-and-sectors/construction-and-the-built-environment/built-environment-competence-standards/?utm_source=govdelivery&utm_medium=email&utm_campaign=bsr-hse&utm_term=bsi&utm_content=bsr-jul-22

PAS 8671:2022: Built environment – Framework for competence of individual Principal Designers – Specification

PAS 8671 addresses competence thresholds that individuals are expected to meet when managing the dutyholder functions of the Principal Designer role. It also specifies the minimum competence thresholds needed by Principal Designers and the additional requirements for working on higher-risk buildings (HRBs).

PAS 8672:2022: Built environment – Framework for competence of individual Principal Contractors – Specification

PAS 8672 specifies competence requirements for the role of Principal Contractor with regard to:

- Roles and responsibilities;
- Skills, knowledge and experience;
- Behaviours and ethics;
- Additional competences for higher-risk buildings (HRBs);
- Limits of competence.

It also describes specific competences common to all Principal Contractors and those which are additional for those undertaking the dutyholder role of Principal Contractor on HRBs.

PAS 8673:2022: Built environment – Competence requirements for the management of safety in residential buildings – Specification

PAS 8673 specifies competence requirements for managing safety in residential buildings and other developments incorporating residential accommodation. It also gives guidance on detailed competencies and the assessment of competence.

BSI Flex 8670: v3.0 2021-04: Built environment – Core criteria for building safety in competence frameworks – Code of practice

BSI Flex 8670 v3.0 sets out core building safety competence criteria, including fire safety, structural safety and public health, to be included in sector specific frameworks for individuals working in the built environment. It is applicable to buildings of all types and scales.

13. Transitional provisions for the new HRB building control regime

Transitional provisions for the new HRB building control regime, set out in Schedule 3 of the HRB regulations, can apply to HRB work or to work to an existing HRB for a particular building.

See, for the full details, Schedule 3 and the different scenarios set out in: The Building (Higher-Risk Buildings Procedures) (England) Regulations 2023 (legislation.gov.uk)

14. New in-occupation higher-risk building safety regime - more regulations issued, and more to come

The government has issued further regulations with provisions that the Building Safety Regulator, principal accountable persons and accountable persons, residents and others must follow under the new in-occupation higher-risk building safety regime.

See: The Higher-Risk Buildings (Management of Safety Risks etc) (England) Regulations 2023 (legislation.gov.uk)

Already in force are…

Already in force, from 6 April 2023, underpinning the framework and duties in Part 4 of the Building Safety Act 2022 are:

- The Higher-Risk Buildings (Descriptions and Supplementary Provisions) Regulations 2023 (legislation.gov.uk) (setting out the detailed specifications for 'higher-risk buildings');

- The Building Safety (Registration of Higher-Risk Buildings and Review of Decisions) (England) Regulations 2023 (legislation.gov.uk) (which include the requirements for applying for registration, the contents of the HRB register and how to keep registration information up-to-date).
- The Higher-Risk Buildings (Key Building Information etc.) (England) Regulations 2023 (legislation.gov.uk) (setting out the high-level information the principal accountable person for each HRB building must provide to the BSR within 28 days of a registration application and how to keep that information up-to-date. They also set out, where there are multiple accountable persons for the same higher-risk building, for which part[s] of the building an accountable person is responsible.)

The latest (Management of Safety Risks) regulations set out:

- procedures for building assessment certificates, engagement with residents and resident duties, and appeals;
- principles for identifying and managing building safety risks and mandatory occurrence reporting; and
- details for compliance notices given by the BSR to an accountable person under section 99 of the Building Safety Act;
- further details of the keeping, sharing and provision of information and documents.

Further regulations to come…

The latest (Management of Safety Risks) regulations are to come into force at the same time as a further set of regulations, the Higher-Risk Buildings (Keeping and Provision of Information etc.) (England) Regulations, are laid and debated in Parliament "in Autumn 2023". These further regulations are to:

- specify the information and documents that the accountable persons must keep as the golden thread information;
- identify to whom the accountable persons must provide information; and
- what information they must provide; and
- any exemptions to the requirements to provide information.

15. New measures on onshore wind projects to speed up planning process

On 5 September the government brought in changes to the planning rules on onshore wind projects. These new measures are to speed up the planning process where developments have community support.

See: https://www.gov.uk/government/news/local-areas-supported-to-progress-onshore-windfarms

If you have any questions or require specific advice on the matters covered in this Update, please contact your usual Mayer Brown contact.