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Insights

COURT OF APPEAL JUDGMENT IN URS CORPORATION LTD V BDW TRADING LTD

COURT OF APPEAL CLARIFIES WHEN A CAUSE OF ACTION IN TORT ACCRUES AND PROVIDES GUIDANCE ON DEFECTIVE PREMISES ACT AND CONTRIBUTION CLAIMS AND EXTENDED LIMITATION PERIODS UNDER THE BUILDING SAFETY ACT 2022

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In the recent case of *URS Corporation Ltd v BDW Trading Ltd* [2023] EWCA Civ 772, the Court of Appeal provided helpful guidance on some issues that will be of core relevance to the increasing volume of building safety claims:

- When the six-step checklist in the Supreme Court case of Meadows v Khan [2021] UKSC 21 on the scope of duties of care in tort is applicable.
- Whether having a proprietary interest is necessary in tortious claims for economic loss.
- When the cause of action in tort accrues in relation to defective buildings that have manifested physical damage, and those that have not, and the position in relation to contingent liabilities.
- The effect of the Building Safety Act 2022 (BSA 2022), and more specifically section 135, on ongoing proceedings.
- Claims brought by developers under the Defective Premises Act 1972 (DPA 1972) and the Civil Liability (Contribution) Act 1978 (Contribution Act 1978).

This article summarises some key features of this significant judgment.

THE DISPUTE

The proceedings concerned two residential developments: the Capital East development on the Isle of Dogs (Capital East), and the Freemans Meadow development in Leicester (Freemans Meadow).

The appellant, URS Corporation Ltd (URS), was engaged as structural engineer by the respondent owner and developer, BDW Trading Ltd (BDW) in connection with both projects. The contracts

between BDW and URS contained express duties on the part of URS to exercise reasonable skill and care in the provision of its services.

Both Capital East and Freemans Meadow comprise a set of residential tower blocks, practical completion of which occurred at different times between February 2005 and October 2012. Following completion, BDW sold the apartments in both developments, transferring its proprietary interests to various third parties.

In 2019, at a point when BDW no longer had a proprietary interest in either development, it came to light that the structural design services at both developments appeared to have been performed negligently, creating a health and safety risk to residents. However, the residential buildings in question had not manifested any physical damage.

Following discovery of the defects, and despite the fact that it no longer had any proprietary interest, BDW incurred costs in carrying out investigations, undertaking temporary works and permanent remedial works, and arranging evacuations. It then brought a tortious claim against URS claiming compensation in respect of these losses, and additional reputational losses.

At the time that BDW brought the claim, and as at the date of the first instance and Court of Appeal decisions addressed below, no third party claims in respect of the structural defects had been brought against BDW.

In a first instance judgment on preliminary issues, Fraser J held that the scope of URS' duties in tort encompassed all of the claimed losses, except for certain alleged reputational losses.

After that judgment, the BSA 2022 came into force. Section 135, which retrospectively increased the relevant limitation periods for DPA 1972 claims, had the potential to affect the parties' positions at trial. In particular, it had the potential to obviate URS' ability to argue that actions brought by third parties against BDW to enforce any obligation they may have had to rectify the defect would be time-barred. BDW therefore sought permission to amend its pleadings to take advantage of the longer limitation periods introduced by the BSA 2022, and to add claims under the DPA 1972 and the Contribution Act 1978.

In *BDW Trading Ltd v URS Corporation Ltd [2022] 12 WLUK 248*, Adrian Williamson KC, sitting as a deputy High Court judge, permitted these amendments.

URS appealed against both the preliminary issues judgment (Substantive Appeal), and the judgment permitting the amendments (Amendments Appeal). Coulson LJ granted permission to appeal on 23 February 2023 (with both appeals to be heard together).

COURT OF APPEAL DECISION

Coulson LJ handed down the leading judgment.

EXISTENCE OF A DUTY OF CARE IN TORT WHERE THERE ARE EXPRESS CONTRACTUAL DUTIES

The Court of Appeal affirmed Fraser J's decision that it is entirely "conventional" for a tortious duty of care to arise as a result of an express duty of care existing under contract, and for it to be co-existent with that contractual duty (*paragraph 12, judgment*).

THE SCOPE OF URS' DUTY OF CARE - KHAN V MEADOWS GUIDANCE IS CHIEFLY APPLICABLE TO NOVEL OR UNUSUAL CASES

The principle that damage claimed must be within the scope of the duty imposed on a tortfeasor was first expounded by Lord Hoffmann in *South Australia Asset Management Corporation Respondents v York Montague Ltd [1997] A.C. 191*, where he held (at paragraph 211):

> "A plaintiff who sues for breach of a duty imposed by the law (whether in contract or tort or under statute) must do more than prove that the defendant has failed to comply. He must show that the duty was owed to him and that it was a duty in respect of the kind of loss which he has suffered."

Building on Lord Hoffmann's judgment, in the linked cases of *Manchester Building Society v Grant Thornton [2021] UKSC 20* and *Khan v Meadows [2021] UKSC 21*, the Supreme Court (*Khan v Meadows, Lords Hodge and Sales at paragraph 28)* set out a six-question test in respect of this scope of duty principle:

> "(1) Is the harm (loss, injury and damage) which is the subject matter of the claim actionable in negligence? (the actionability question)
>
> (2) What are the risks of harm to the claimant against which the law imposes on the defendant a duty to take care? (the scope of duty question)
>
> (3) Did the defendant breach his or her duty by his or her act or omission? (the breach question)
>
> (4) Is the loss for which the claimant seeks damages the consequence of the defendant's act or omission? (the factual causation question)
>
> (5) Is there a sufficient nexus between a particular element of the harm for which the claimant seeks damages and the subject matter of the defendant's duty of care as analysed at stage 2 above? (the duty nexus question)
>
> (6) Is a particular element of the harm for which the claimant seeks damages irrecoverable because it is too remote, or because there is a different effective cause (including novus actus interveniens) in relation to it or because the claimant has mitigated his or her loss or has

failed to avoid loss which he or she could reasonably have been expected to avoid? (the legal responsibility question)."

At first instance, Fraser J had considered and applied each of these sequential questions in detail in coming to his conclusion as to the scope of URS' duty of care.

However, in the Court of Appeal, while agreeing with Fraser J's overall conclusion that URS' duty of care covered the type of losses claimed, Coulson LJ opined that the questions in *Khan v Meadows* were:

> "… primarily designed to analyse duties of care alleged to arise in novel situations which had not previously been considered, or where the type of loss claimed was unusual…[and were] not primarily intended to be applied by rote to… standard duties of care, such as those owed by… structural engineers to their employers."
>
> (*Paragraph 35, judgment.*)

It had therefore not been necessary to apply the guidance in *Khan v Meadows* in this "conventional" case, although it was still valuable as a "sanity check" (*paragraph 36, judgment*).

BDW'S MOTIVATION FOR CARRYING OUT INVESTIGATIONS AND REMEDIAL WORKS WAS IRRELEVANT

As BDW had incurred costs investigating and carrying out remedial works without having a proprietary interest in either Capital East or Freemans Meadow, one of URS' arguments was that BDW had no obligation to incur these costs, and that, in reality, they were incurred in order to "mitigate an altogether different type of damage: Reputational Loss" (*BDW Trading Ltd v URS Corporation Ltd and another [2021] EWHC 2796 (TCC), Fraser J at paragraph 18*), which URS argued undermined BDW's ability to claim these costs against URS. In addition, URS argued that BDW did not have any obligations or liabilities to third parties, because BDW would have a limitation defence against those third parties.

The Court of Appeal agreed with the first instance court in dismissing both of these arguments, holding that:

- The submission that BDW could not recover because it was under no obligation to third parties was wrong in fact and in law, because liabilities to third parties did in fact crystallise when BDW sold the apartments to third parties. In addition, because a limitation defence is a "procedural bar" that does not affect the underlying liability, it would have been a matter for BDW whether or not it chose to take a point on limitation (*paragraphs 56 and 57, judgment*).
- The "precise motivation" for carrying out remedial works was "immaterial". The only relevant question was whether the type of damage is recoverable in principle (*paragraph 51, judgment*).

PROPRIETARY INTEREST NOT NECESSARY IN CLAIMS FOR ECONOMIC LOSS, BUT MAY BE NECESSARY IN TORTIOUS CLAIMS INVOLVING PHYSICAL DAMAGE

URS argued that a duty of care on its part to BDW could only arise if BDW had a proprietary interest in the buildings, and that because BDW did not have a proprietary interest when the defects were discovered, its claim against URS must fail.

The Court of Appeal rejected this argument on the factual basis that BDW still had a proprietary interest both when URS' duty of care first arose, and - parasitic on the court's other finding on when the cause of action accrues - when BDW suffered actionable damage on practical completion of the buildings.

Obiter, the Court of Appeal held that, in any event, "a claim for defects does not always require a proprietary interest in order for the cost of… remedial works to be recoverable" (*paragraph 66, judgment*), at least in cases involving claims for economic loss (such as BDW's claim), rather than claims for physical damage.

Accrual of cause of action in tort against designers of a defective building where there is no immediate physical damage

When the cause of action in tort accrued was a central battleground between the parties.

In an interesting reversal of the usual position where an alleged tortfeasor seeks to argue that the cause of action accrued as early as possible in order to raise a limitation defence, and a claimant argues for a later date of accrual, the parties took the following positions:

- As BDW had transferred its proprietary interest to third parties by the time the defects were discovered in 2019, URS argued that the cause of action only accrued on that discovery.
- BDW, on the other hand, argued that the cause of action accrued as early as practical completion, or, alternatively, at the moment when the apartments were transferred to the relevant third parties.

After confirming the established position that physical damage and pure economic loss are the only kinds of actionable loss in the tort of negligence (*paragraph 68, judgment*), the Court of Appeal embarked on a detailed analysis of existing case law on this issue. It noted the following:

- There is a distinction to be drawn between cases involving defective buildings where there is physical damage, and those involving defective buildings where damage has not (yet) manifested.
- Physical damage is not needed in order to complete a cause of action in tort, and some older cases, such as *Pirelli v Oscar Faber [1983] 2 AC 1*, were decided based on the misapprehension that it was (*paragraph 77, judgment*).

- In a case where physical damage has manifested, such as in the *Pirelli* case, which is still good law but needs to be considered carefully (*paragraph 116*), the cause of action accrues when that physical damage occurs (regardless of the claimant's knowledge of the physical damage or its discoverability) (*paragraphs 83 and 114, judgment*).
- In cases where there is defective design, but no physical damage in consequence of that design has manifested, the cause of action accrues, at the latest, on practical completion of the building (*paragraph 142, judgment*).
- There is no authority for the proposition that a claim against a construction professional accrues on sale (*paragraph 140, judgment).*

The claim before the Court of Appeal involved no physical damage and was therefore a pure economic loss claim.

In light of its conclusions on the case law, the Court of Appeal held that the cause of action arose, at the latest, on practical completion:

> "… BDW's cause of action against URS arose, at the latest, when the individual buildings that comprised Capital East and Freemens Meadow respectively, were practically completed. At that point, the defective and dangerous structural design had been irrevocably incorporated into the buildings as built. At that moment, BDW had suffered actionable damage because those buildings were structurally deficient."
>
> *(Paragraph 105, judgment.)*

The Court of Appeal also distinguished cases such as *Law Society v Sephton & Co [2006] UKHL 22*, on the basis that it involved a "properly… contingent liability" (*paragraph 135, judgment*) with "no other financially measurable detriment" (*paragraph 101, judgment*). That was not the case with BDW, as its financially measurable detriment arose as at practical completion, and, following the decision of *Co-operative Group Ltd v Birse Developments Ltd [2014] EWHC 530 (TCC)*, the absence of crystallised claims against BDW from third parties did not affect BDW's claim against URS.

AMENDMENTS APPEAL

Before Adrian Williamson KC, sitting as a deputy High Court judge, BDW had received permission to amend its claim:

- To include a claim that URS had breached section 1(1) of the DPA 1972.
- To rely on the new section 135 of the BSA 2022.
- To include a claim under section 1 of the Contribution Act 1978, alleging that both BDW and URS were liable to transferees of BDW's proprietary interests in the two projects.

The judge reached this conclusion on the basis that he considered the amendments to be reasonably arguable, but declined to decide various specific points of law because they were not suitable for summary determination.

URS appealed against this decision, and argued as part of its appeal that the judge should have "grasped the nettle", particularly because the amendments gave rise to potential limitation issues.

The Court of Appeal upheld the deputy judge's decision, holding that he had applied the correct test, and that it had been within his discretion to leave the points in question for trial.

The Court of Appeal could have left it at that. However, that would have missed an opportunity to provide much needed appellate guidance on section 135 of the BSA 2022 and claims under the DPA 1972 and the Contribution Act 1978.

The Court of Appeal held that section 135 of the BSA 2022 is to be taken as always having been in force, that there is no statutory exception for ongoing proceedings and that it was therefore open to BDW to add a DPA 1972 claim.

As to the substance of the DPA 1972 claim, the Court of Appeal clarified the following principles:

- Developers can be owed duties under the DPA 1972, on a straightforward grammatical reading of section 1(1)(a) of the DPA 1972, and can simultaneously owe duties to purchasers (*paragraphs 189-190, judgment*).
- There is nothing in the DPA 1972 which limits the beneficiaries of the section 1 duty to individual purchasers rather than companies or commercial organisations (*paragraph 179, judgment*).
- Duties can be owed under the DPA 1972 even if the party in question is not providing individual dwellings, but an entire development including common parts, and work to those common parts can be work done "in connection with the provision of a dwelling" (section 1(1)), following *Rendlesham Estates v Barr Ltd [2014] EWHC 3968 (TCC)* (*paragraph 180, judgment*).
- Recoverability of damages under the DPA 1972 is not linked to or limited by property ownership at (*paragraph 192, judgment*).

In relation to the added Contribution Act 1978 claim, the Court of Appeal clarified that, as a matter of statutory interpretation of section 1 of the Contribution Act 1978, a crystallised claim from a third party A is not required as a matter of law before a party B has the right to claim a contribution from a party C. What is required is that a liability to A is "at least potentially notional or theoretical, [and] it need never actually be established" by A (*paragraph 201, judgment*).

COMMENTARY

The Court of Appeal's decision in this case resolves some longstanding uncertainties around tort claims in the construction industry. The clarification, put in more certain terms than in *Murphy v Brentwood [1991] 1 AC 398*, that physical damage is not needed in order to complete a cause of action, is a welcome one, as is the clarification that the cause of action in cases not involving manifested physical damage accrues on practical completion. Not only does this bring tort in line with the position in contract claims, where the cause of action for defects will ordinarily accrue on practical completion (leaving aside issues of temporary disconformity), but it also obviates the need to rely on some wider meaning of "damage", or to argue that a building that had not quite manifested physical damage was somehow "doomed from the start", as was historically necessary in some reported cases, in order to allow the cause of action to accrue at practical completion.

The Court of Appeal's judgment is policy-driven. The findings that BDW's motive for carrying out remedial works was irrelevant (*paragraph 51, judgment*), that crystallised claims from third party purchasers were not necessary for the cause of action to arise (*paragraphs 92 and 204, judgment*), and that it was a matter for BDW whether or not they chose to take the limitation point opposite third parties (*paragraph 52, judgment*), were all undergirded by policy motivations to "avoid penalizing" builders and developers for "acting responsibly" (*paragraph 50, judgment*), and to avoid "reward[ing] indolence" (*paragraph 204, judgment*). In a post-Grenfell world, appellate pronouncements of this nature should help to further engender an attitude of making buildings safe first, and arguing later.

It remains to be seen if this case will proceed all the way to trial for final determination on the substantive issues.

In the meantime, the court's decision about the possibility of developer claims under the DPA 1972, the fact that recoverability is not limited by property ownership, and that DPA 1972 claims can be brought in respect of developments including common parts, should have a substantial impact on the number of DPA 1972 claims that are brought by commercial entities going forward and how these types of claims are pleaded. Further, it may cause parties to request amendments to claims that are already afoot.

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