Defective premises ruling likely to lead to increase in claims

By Sheena Sood and Michael O'Brien | 1 September 2023

Whether developers are owed duties under the Defective Premises Act – a point long uncertain in the courts – has been clarified

A recent appeal court decision in the case of URS Corporation Ltd vs BDW Trading Ltd has shed some light on the vexed question of whether developers are owed duties under the Defective Premises Act 1972 (the DPA).

Developer BDW appointed engineering firm URS to provide structural design services in relation to two residential developments. Practical completion occurred between March 2007 and February 2008, and BDW then sold the individual apartments.

In 2019 BDW discovered that there were structural defects in the developments, but by this time it no longer owned or had a proprietary interest in them. Nevertheless, it considered it had liability to the occupiers under the DPA pursuant to the individual contracts of sale. BDW therefore incurred costs of investigating and carrying out remedial works.

In March 2020 BDW commenced proceedings against URS for the alleged negligent structural design, seeking to recover its losses.

The claim against URS ultimately gave rise to several issues, which were ultimately considered by the Court of Appeal.

At a preliminary issue hearing, the High Court determined that, with some exceptions, the scope of URS's duty of care extended to the alleged losses suffered by BDW, and that those losses were in principle recoverable.

The court also considered BDW's cause of action accrued no later than the date of practical completion (so its claim against URS was not time-barred).

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The Court of Appeal then went on to find that:

- The losses claimed were within the scope of URS's duty of care, which protected BDW against the risk of economic loss caused by construction of a structure using a negligent design. Further, a builder that no longer had a proprietary interest in a development could claim its costs of going back to carry out repairs.
- BDW's claim in negligence was for economic loss. There was no requirement for there to be physical damage. Where there is no physical damage, its cause of action accrued at the latest at practical completion. By contrast, where there is physical damage, a cause of action accrues at the date of damage.

URS's second and third appeals arose from a separate High Court decision in which that court granted BDW permission to amend its claim.

Again, the Court of Appeal dismissed URS's appeal, stating that:

- It was clear from section 1(1)(a) of the DPA that URS was "a person taking on work for or in connection with the provision of a dwelling", and the dwellings in this case were "provided to the order of" BDW (as the developer). URS had argued that duties were owed only to lay purchasers, not commercial organisations, but this was rejected as it was not what section 1(1) said and was impossible to police in practice. URS also argued that what was "provided" to BDW were not dwellings, but an entire development. The court found that this argument had been rejected in earlier case law. Consequently, BDW was owed the duty under section 1(1) of the DPA.
- Section 135 the Building Safety Act 2022 (imposing a retrospective longer limitation period of 30 years for DPA claims) was intended to have retrospective effect, with no carve-out for ongoing proceedings. Therefore it applied here and there was no barrier to BDW's DPA claim.
- There was nothing in the wording of section 1(1) of the Civil Liability (Contribution) Act 1978 to suggest the making (or intimation) of a claim was a condition precedent to pursuing contribution from a third party. BDW's right to seek contribution arose when the three elements in section 1(1) were established, irrespective of whether or not another entity (in this case the occupiers of the developments) intimated a claim against BDW.

This appeal started off dealing with issues of duties of care and limitation, and whether there is a requirement for physical damage in negligence claims. While those issues are important, the most interesting point arising from the Court of Appeal's judgment concerns the Defective Premises Act.

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The comments indicating developers are owed the duty under section 1(1) of the DPA is significant. There had been a line of authority stretching back over 30 years indicating that developers could not claim against subcontractors or consultants under the DPA. That position appears to have now changed – at least in respect of residential properties (which is the gateway into the DPA duty). Whether restrictions continue to apply in respect of non-residential properties is an open question.

Given the large number of ongoing building safety claims, this decision will be one closely scrutinised by construction professionals and lawyers. It is likely to result in new claims being made or existing claims being amended to plead in relation to the DPA.

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