Reports from the courts

Our round up of the cases of most interest to construction from **Andrew Croft** and **Ben Spannuth** of **Beale & Company Solicitors LLP** who report on a decision that shows the importance of limitation periods; and an appeal court ruling that confirms the duties owed to developers under s1(1) of the *DPA*.

Vinci Construction UK Limited v (1) Eastwood and Partners (Consulting Engineers) Limited (2) Snowden Seamless Floors Limited v GHW Consulting Engineers Limited

[2023] EWHC 1899; O'Farrell J

Princes Limited (Princes) appointed Vinci Construction UK Limited (Vinci) as design and build contractor to undertake work at its warehouse/distribution facility in Bradford (the Project) pursuant to an amended NEC3 Engineering and Construction Contract 2005. Vinci engaged Snowden Seamless Floors Limited (Snowden) to design, supply, and install structural reinforced concrete slabs. Snowden in turn subcontracted the design of the in situ reinforced concrete internal floor slabs to GHW Consulting Engineers Limited (GHW) (the Subcontract). The Subcontract was a simple contract.

In early-July 2013, the overlay slab was installed to the warehouse. The works were completed by about August 2013. Vinci alleged that, in September 2013, cracks developed in the warehouse floor, which ultimately led to Princes removing/replacing the floor.

On 7 May 2021, Snowden and GHW entered into a Standstill Agreement.

On 8 February 2022, Vinci commenced proceedings against Snowden seeking c.£2.5m in respect of sums paid to Princes in prior adjudication proceedings. On 8 April 2022, Snowden served its Defence, together with its additional claim against GHW. On 6 March 2023, GHW applied for summary judgment, arguing that Snowden's claim was statute-barred.

Whilst it was common ground that contractual claims by Snowden against GHW were statute-barred by 7 May 2021, Snowden resisted the application arguing, inter alia, that the relevant damage for limitation purposes was its liability to Vinci caused by the cracking to the concrete slabs and therefore financial loss arising from physical damage to the slab. Snowden relied on the decision in ***Pirelli General Cable Works Limited v Oscar Faber & Partners [1983] 2 AC 1 (HL)*** in which the House of Lords decided that a building owner's cause of action against his consulting engineer for negligent design accrued when physical damage to the building first occurred. GHW's position was that the relevant damage was the economic loss arising from its exposure to a claim by Vinci in respect of the defects in the concrete slabs rather than physical damage to the concrete slabs themselves.

Decision

O'Farrell J concluded that Snowden's alleged claim was statute-barred, subject however to the question of attributability of knowledge under s14A of the Act, in respect of which it was not possible to reach a definitive view without "conducting a mini trial on the documents". GHW's application for summary judgment was therefore dismissed.

In relation to date of accrual of a cause of action in tort, O'Farrell J summarised the relevant legal principles as follows:

(i) there are two kinds of loss which are recognised as actionable damage for the tort of negligence, namely physical damage and economic loss;
(ii) 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;
(iii) where there is economic loss, the claimant's cause of action accrues when the claimant relies on negligent advice or services to its detriment, including incurring a liability (unless such liability is purely contingent, in which case it is not actionable damage until there is measurable loss);
(iv) where the claimant relies on negligent advice or services and, as a result, the structure contains an inherent design defect which does not immediately cause physical damage, the claimant's cause of action accrues at the latest

on completion of the structure, at which point the claimant has a defective asset and suffers economic loss, regardless of its knowledge of the latent damage; and

(v) ***Pirelli*** remains good law in cases concerning physical damage but requires careful consideration.

Comment

This judgment is a reminder that parties should consider both contractual and tortious limitation periods at the outset and take immediate steps to protect their position by entering into Standstill Agreements or issuing protective proceedings. It also reaffirms that summary judgment may not be appropriate where there are contested issues of fact between the parties.

URS Corporation Limited v BDW Trading Limited

[2023] EWCA Civ 772; Coulson LJ

BDW Trading Limited (BDW), a developer, appointed URS Corporation Limited (URS) to provide structural design services in relation to two residential developments (the Developments). Practical completion was achieved in March 2007-February 2008, following which BDW sold the individual apartments.

In 2019, when BDW no longer owned/had any proprietary interest in the Developments, it became aware of structural defects in the Developments. BDW considered it was liable to the purchasers under the *Defective Premises Act 1972* (the *DPA*) via the individual contracts of sale and remedied the defects.

In March 2020, BDW commenced proceedings against URS for its alleged negligent structural design. BDW's alleged claims were limited to claims in negligence on the basis that claims in contract were statute-barred. URS maintained that BDW never suffered actionable damage because it sold the buildings for full value before the problems came to light and/or was not liable to undertake remedial works and had a complete limitation defence to claims brought against it by the purchasers such that BDW's losses were outside the scope of URS' duty of care.

At a preliminary issue hearing, the High Court determined that the scope of URS' duty of care extended to BDW's alleged losses, which were in principle recoverable.

URS obtained permission to appeal on the following grounds: (i) BDW's alleged losses were outside the scope of URS' duty of care; (ii) the damages claimed were unrecoverable; and (iii) the High Court was incorrect for not striking out the negligence claim. URS separately argued that BDW was not owed duties under s1(1) of the *DPA* and that s135 of the *Building Safety Act 2022* (the *BSA*) (which imposes a retrospective longer limitation period of 30 years for claims under the *DPA*) could not apply to proceedings that were ongoing when that legislation came into force.

Decision:

The Court of Appeal dismissed URS's appeal, finding that:

1. The losses claimed were within the scope of URS' duty of care, which protected BDW against the risk of economic loss caused by construction of a structure using a negligent design which would need to be remedied. In addition, a builder who no longer had a proprietary interest in a development could claim his costs of undertaking repairs.
2. 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. In any event, there were damaging consequences of the defects – namely that the Developments were unsafe. By contrast, where there is physical damage, a cause of action accrues at the date of damage.

The Court of Appeal also confirmed: (i) BDW was owed a duty under s1(1) of the *DPA* as it was clear that URS was "a person taking on work for or in connection with the provision of a dwelling", and the dwelling(s) in this case were "provided 'to the order' of BDW" and there was nothing which limited the recipient of the duty to individual purchasers, rather than companies or commercial organisations; and (ii) s135 of the *BSA* was intended to have retrospective effect and there was no carve out for ongoing proceedings such that there was no barrier to BDW's claim.

Comment

This judgment confirms the duties owed to developers under s1(1) of the *DPA*. This judgment further confirms that the extended 30-year limitation period under the *BSA* applies to litigation commenced prior to its implementation. **CL**