What does the Supreme Court ruling in the case between URS and BDW mean for architects?

Learn how the first ruling dealing with claims associated with liability extensions under the Building Safety Act 2022 impacts architects defending design defects.

A significant judgement from the Supreme Court in the case of developer BDW Trading Ltd (BDW) versus its structural engineer, URS Corporation Ltd (URS), has established a precedent that developers can pursue design consultants (and contractors) under the Defective Premises Act 1972 (DPA) on projects dating back 27 years.

The Building Safety Act 2022 (BSA) extended the DPA limitation period retrospectively to 30 years, but it was not clear until now whether the DPA would apply to recovery actions against designers and contractors. This ruling establishes that a recovery can be pursed against design consultants within the extended limitation period. The judgement was eagerly anticipated because it is the first of its kind relating to these issues under the DPA since the enactment of the BSA.

Joanna Lewis, Partner at international construction and insurance law specialists, Beale & Co, says the ruling also raises issues around the nature of liability under the DPA.

What was the case about?

BDW's claim relates to two residential apartment developments where URS acted as structural engineer. After practical completion BDW had sold its freehold interest, but following the Grenfell fire, decided to review its residential tower blocks to allay any building safety concerns. The developer found serious structural design flaws in two of the 12 tower blocks URS provided structural design services for and although it had received no claims, nor any threat of a claim, it carried out remedial works and was seeking to recover costs from URS.

BDW brought a claim in negligence against URS (a contractual claim under the DPA would have been time barred). The enactment of the Building Safety Act in 2022 then extended the time limit for bringing claims under the Defective Premises Act, and BDW was granted permission to amended its claim to include claims under the DPA and **The Civil Liability (Contribution) Act 1978 (the Contribution Act)**. URS's appeal against this was dismissed. Subsequently, the Supreme Court went on to dismiss all four of URS's grounds for appeal.

URS's first ground for appeal was that the developer's remedial costs had been "voluntarily incurred" as it had not suffered any actionable claims or damage. The Supreme Court rejected this on a number of grounds and went on to note that the law now favours incentivising a developer to carry out repairs in order to remove danger to occupants.

What is the significance of the court's ruling?

Lawyers suggest that the ruling will give building owners and developers confidence to undertake remedial works and recover costs from its supply chain even though they are not facing claims.

"The decision means that developers now have a direct statutory route to architects rather than relying on a claim in negligence or breach of contract," Joanna says. "It's not yet clear to what extent a defence of reasonable skill and care will be accepted by the court and we will need to await a decision looking specifically at this in due course, but it does create an additional avenue of exposure for architects."

She continues: "Ultimately, the full impact of the issues will be determined by the judgment delivered at trial, including important issues of how the designer's statutory duty will be assessed by the court, the use of expert evidence and the reasonable skill and care defence."

URS also argued that the BSA's extension of the DPA limitation period applied to developers, not the supply chain. But the Supreme Court ruled that it was central to the BSA that those directly responsible for building safety defects should be held to account and that any other interpretation would run counter to the spirit of the Act.

"The aim of the Building Safety Act was to hold those responsible for safety defects liable for them so that the burden does not rest with leaseholders. The decision shows that the courts will give the broadest interpretation of the legislation in order to make this possible," Joanna adds.

What architects need to know when it comes to insurance?

Joanna points out that there are potential issues for insurance around whether or not a breach of the DPA constitutes a professional negligence claim capable of cover, and while Beale & Co has started to see a softening of the professional indemnity market in relation to future projects around fire safety, this ruling allows that direct route to architects going back 30 years.

Even in the absence of a specific judgment or settlement payment by the developer to the homeowner, the right to contribution will arise even from a "payment in kind" by way of voluntarily carrying out remedial works as was the case here.

This could lead, Joanna suggests, to the market looking again at the cover it will provide, especially in light of the fact that the DPA is not restricted to fire safety/cladding claims only.

What significance does record keeping hold for architects?

The risk management issues mean that there is an even greater importance placed on project design work retention, as there is now a clear route to pursue architects for projects going back 27 years from the present time (the clock started on 28 June 2022) and going forward for 15 years.

However, it will be important for architects to ensure they are not agreeing to extend the limitation periods beyond those required under the Limitation Act. Similarly, Joanna recommends that they should avoid extending liability to all parties who may be able to rely on the DPA by way of collateral warranties or third-party rights.

She continues: “Compliance with statutory duties will be a standard wording in appointments and so may make it easier for claims to be brought within the normal six- or 12-year period without necessarily having to establish the breach of contract or negligence, but only establishing the breach of the statutory duty.”

“In practice we do consider that the claims will still need to show, as against architects, that they have breached their obligations, caused the loss and failed to act reasonably in what they did.”

For architects, having and retaining the documentation to stand behind what they did, particularly for such a lengthy period of time, will be important as these time periods of 30 and 15 years are likely to mean there is less reliable witness evidence available to defend claims, and so the importance of record keeping to demonstrate the design process, decisions and implementation will be key.

Thanks to Joanna Lewis, Partner, Beale & Co.

Text by Neal Morris. This is a professional feature edited by the RIBA Practice team.