DEKA
CHAMBERS

Civil Liabilities Under the Building Safety Act 2022

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Overview

- Remediation Orders
- Remediation Contribution Orders
- Building Liability Orders (and Information Orders)

Remediation Orders (BSA 2022 s123)

"**123 Remediation orders**
(1) The Secretary of State may by regulations make provision for and in connection with remediation orders.
(2) A "remediation order" is an order, made by the First-tier Tribunal on the application of an interested person, requiring a relevant landlord to do one or both of the following by a specified time—.
(a) remedy specified relevant defects in a specified relevant building;
(b) take specified relevant steps in relation to a specified relevant defect in a specified relevant building.
(3) In this section "relevant landlord" , in relation to a relevant defect in a relevant building, means a landlord under a lease of the building or any part of it who is required, under the lease or by virtue of an enactment, to repair or maintain anything relating to the relevant defect.
(4) In subsection (3) the reference to a landlord under a lease includes any person who is party to the lease otherwise than as landlord or tenant.
(5) In this section "interested person" , in relation to a relevant building, means—
(a) the regulator (as defined by section 2);
(b) a local authority (as defined by section 30) for the area in which the relevant building is situated,
(c) a fire and rescue authority (as defined by section 30) for the area in which the relevant building is situated,
(d) a person with a legal or equitable interest in the relevant building or any part of it, or
(e) any other person prescribed by the regulations.
(6) In this section—
"relevant building" : see section 117;
"relevant defect" : see section 120;
"relevant steps" : see section 120;
"specified" means specified in the order.
(7) A decision of the First-tier Tribunal or Upper Tribunal made under or in connection with this section (other than one ordering the payment of a sum) is enforceable with the permission of the county court in the same way as an order of that court.
(8) In proceedings for a remediation order, a direction given by the First-tier Tribunal requiring a relevant landlord to provide or produce an expert report is to be regarded as a decision for the purposes of subsection (7).
(9) In subsection (8), "expert report" means an expert report or survey relating to—
(a) relevant defects, or potential relevant defects, in a relevant building;
(b) relevant steps taken or that might be taken in relation to a relevant defect in a relevant building."

Remediation Orders “Relevant Building”

“117 Meaning of “relevant building”

(1)This section applies for the purposes of sections 119 to124 and Schedule 8.

(2) “Relevant building” means a self-contained building, or self-contained part of a building, in England that contains at least two dwellings and—

(a)is at least 11 metres high, or

(b)has at least 5 storeys.

This is subject to subsection (3).”

Remediation Orders: “Relevant Defect”

“120 Meaning of “relevant defect” and “relevant steps”

(1) This section applies for the purposes of sections 122 to 124 and Schedule 8.

(2) “Relevant defect”, in relation to a building, means a defect as regards the building that:

(a) arises as a result of anything done (or not done), or anything used (or not used), in connection with the relevant works, and

(b) causes a building safety risk

(5) For the purposes of this section –

“Building safety risk”, in relation to a building, means a risk to the safety of people in or about the building arising from –

(a) the spread of fire, or

(b) the collapse of the building or any part of it”

Waite v Kedai (2023)

- First case in which the FtT made a Remediation Order.
- Involved a group of 5 leaseholders who sought an order for the landlord to replace defective cladding.
- Decision outlined the FtT's ability to broadly define the required works in the order.
- FtT disagreed with the Respondent that the Applicants were required to set out a detailed schedule of works.

Secretary of State for Levelling Up, Housing and Communities v Grey GR Limited Partnership [2024] 4 WLUK 558

- The parties had agreed a specification of relevant defects.
- FtT determined it had a discretion as to whether to issue a Remediation Order (noting the use of the word “may” in regulation 2(2) of the Building Safety (Leaseholder Protections (Information etc.) Regulations 2022).
- FtT granted the application as a backstop (where the Respondent had already commenced remedial works)

Remediation Contribution Orders (s124)

“124 Remediation contribution orders
(1) The First-tier Tribunal may, on the application of an interested person, make a remediation contribution order in relation to a relevant building if it considers it just and equitable to do so.
(2) ”Remediation contribution order” , in relation to a relevant building, means an order requiring a specified body corporate or partnership to make payments to a specified person, for the purpose of meeting costs incurred or to be incurred in remedying, or otherwise in connection with, relevant defects (or specified relevant defects) relating to the relevant building .
(2A) The following descriptions of costs, among others, fall within subsection (2)—
(a) costs incurred or to be incurred in taking relevant steps in relation to a relevant defect in the relevant building;
(b) costs incurred or to be incurred in obtaining an expert report relating to the relevant building;
(c) temporary accommodation costs incurred or to be incurred in connection with a decant from the relevant building (or from part of it) that took place or is to take place—
(i) to avoid an imminent threat to life or of personal injury arising from a relevant defect in the building,
(ii) (in the case of a decant from a dwelling) because works relating to the building created or are expected to create circumstances in which those occupying the dwelling cannot reasonably be expected to live, or
(iii) for any other reason connected with relevant defects in the building, or works relating to the building, that is prescribed by regulations made by the Secretary of State
2B) The Secretary of State may make regulations for the purposes of this section specifying descriptions of costs which are, or are not, to be regarded as falling within subsection (2)

Cont. (1): RCOs

(4) An order may—
(a) require the making of payments of a specified amount [ ]
(aa) if it does not require the making of payments of a specified amount, determine that a specified body corporate or partnership is liable for the reasonable costs of specified things done or to be done;

Cont. (2): RCOs

124(5) In this section—

”interested person” , in relation to a relevant building, means—
(a) the Secretary of State,
(b) the regulator (as defined by section 2),
(c) a local authority (as defined by section 30) for the area in which the relevant building is situated,
(d) a fire and rescue authority (as defined by section 30) for the area in which the relevant building is situated,
(e) a person with a legal or equitable interest in the relevant building or any part of it, or
(f) any other person prescribed by regulations made by the Secretary of State;

Cont. (3): RCOs

(3) A body corporate or partnership may be specified as a person required to make payments only if it is—

(a) a landlord under a lease of the relevant building or any part of it,
(b) a person who was such a landlord at the qualifying time,
(c) a developer in relation to the relevant building, or

(d) a person associated with a person within any of paragraphs (a) to (c).

Cont. (4): RCOs

“124 Remediation contribution orders

(1) The First-tier Tribunal may, on the application of an interested person, make a remediation contribution order in relation to a relevant building if it considers it **just and equitable to do so.**

Batish v Inspired Sutton Ltd (2023)

- First case in which an RCO was made pursuant to s124 BSA 2022.
- Matter concerned an application to recover service charge already paid towards the remediation of defects under 15 separate leases.
- Costs of remedial works to cladding were covered by a grant, but costs of remedial works to balconies were not covered and were sought to be covered by way of service charge.

Triathlon Homes LLP v Stratford Village Development Partnership and others [2024] UKFTT 26

- Matter concerned East Village in Stratford.
- Serious defects were discovered in 2020 (pre-BSA 2022).
- Remediation works had already begun by the time of the FtT hearing.
- Central issue was the exercise of discretion and the “just and equitable” test.
- FtT ordered an RCO to provide a backstop and reassurance to leaseholders.

Building Liability Orders (ss130-132)

130 Building liability orders

(1) The High Court may make a building liability order if it considers it just and equitable to do so.

(2) A “building liability order” is an order providing that any relevant liability (or any relevant liability of a specified description) of a body corporate (“the original body”) relating to a specified building is also—

(a) a liability of a specified body corporate, or

(b) a joint and several liability of two or more specified bodies corporate.

(3) In this section “relevant liability” means a liability (whether arising before or after commencement) that is incurred—

(a) under the Defective Premises Act 1972 or section 38 of the Building Act 1984, or

(b)as a result of a building safety risk.

(4) A body corporate may be specified only if it is, or has at any time in the relevant period been, associated with the original body.

Cont. (1): Building Liability Orders

131Building liability orders: associates

(1)For the purposes of section 130, a body corporate (A) is associated with another body corporate (B) if—

(a)one of them controls the other, or

(b)a third body corporate controls both of them.

Subsections (2) to (4) set out the cases in which a body corporate is regarded as controlling another body corporate.

Information Orders (s312 BSA)

132Order for information in connection with building liability order

(1)A person of a prescribed description may apply to the High Court for an information order.

(2)An “information order” is an order requiring a specified body corporate to give, by a specified time, specified information or documents relating to persons who are, or have at any time in a specified period been, associated with the body corporate.

(3)An information order may be made only if it appears to the court—

(a)that the body corporate is subject to a relevant liability (within the meaning of section 130), and

(b)that it is appropriate to require the information or documents to be provided for the purpose of enabling the applicant (or the applicant and others) to make, or consider whether to make, an application for a building liability order.

Cont. (2): Building Liability Orders

- The High Court may make a building liability order if it considers it **just and equitable to do so**

- Factors which may be considered are:
  - The nature of the defects.
  - Whether a fair trial can take place.
  - Whether the Applicant has alternative means of recourse (such as insurance).
  - The extent of damages sought.
  - Interference with Convention Rights.

Wilmott Dixon Construction Ltd v Prater and others [2024] EWHC 1990 (TCC)

- Matter involved an application by 4 of the Defendants to stay the BLO claim.
- The Court refused the application for a stay, commenting that it would be “sensible and efficient” for the potential associated companies to be a party to the main litigation and for both claims to be dealt with at the same time.

Defective Premises Act 1972

S.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;

to see that the work which he takes on is done in a **workmanlike** or […] **professional manner**, with **proper materials** and so that as regards that work the dwelling will be **fit for habitation** when completed.

(2)A person who takes on any such work for another on terms that he is to do it in accordance with instructions given by or on behalf of that other shall, to the extent to which he does it properly in accordance with those instructions, be treated for the purposes of this section as discharging the duty imposed on him by subsection (1) above except where he owes a duty to that other to warn him of any defects in the instructions and fails to discharge that duty.

(3)A person shall not be treated for the purposes of subsection (2) above as having given instructions for the doing of work merely because he has agreed to the work being done in a specified manner, with specified materials or to a specified design.

[…]

(5)Any cause of action in respect of a breach of the duty imposed by this section shall be deemed, for the purposes of the Limitation Act 1980, to have accrued at the time when the dwelling was completed […]

Defective Premises Act 1972

2A - Duties relating to work to dwellings etc

(3) [A person who, in the course of a business, takes on work in relation to any part of a relevant building containing one or more dwellings] owes a duty to—

- (a)the person for whom the work is done, and
- (b)each person who holds or acquires an interest (whether legal or equitable) in a dwelling in the building,

to see that the work is done in a **workmanlike** or […] **professional manner**, with **proper materials** and so that as regards the work the dwelling is **fit for habitation** when the work is completed.

[…]

(5) A person (A) who takes on any work to which this section applies for another (B) on terms that A is to do it in accordance with instructions given by or on behalf of B is, to the extent to which A does it properly in accordance with those instructions, to be treated for the purposes of this section as discharging the duty imposed on A by this section except where A owes a duty to B to warn B of any defects in the instructions and fails to discharge that duty.

(6)A person is not treated for the purposes of subsection (5) as having given instructions for the doing of work merely because the person has agreed to the work being done in a specified manner, with specified materials or to a specified design.

(7)A person who, in the course of a business which consists of or includes carrying out or arranging for the carrying out of work of a kind mentioned in subsection (1), arranges for another to take on work of that kind is treated for the purposes of this section as included among the persons who have taken on the work.

(8)For the purposes of the Limitation Act 1980, a cause of action in respect of a breach of a duty imposed by this section is treated as accruing at the time the work is completed; but if after that time a person does further work to rectify the work the person has already done, any such cause of action in respect of that further work is treated as accruing at the time when the further work is finished.

Defective Premises Act 1972

- *Rendlesham Estates plc and others v Barr Ltd* [2014] EWHC 3968 (TCC), para 68 (re s.1(1)): A dwelling is fit for habitation if capable of occupation for a reasonable time without risk to the health or safety of occupants, and undue inconvenience or discomfort to them.
- *Harrison v Shepherd Homes Ltd* [2011] EWHC 1811 (TCC). Claimants were freeholders of homes built by defendant developer in 2002-2004. Homes had been built on landfill, which had moved and caused cracks in the properties. The Claimants sued the developer for breach of s.1(1) DPA 1972 on the basis that the properties had not been built with good workmanship and materials such that the properties were not fit for habitation when complete, as well as for breach of the sale contract.

Defective Premises Act 1972

Ramsey J held that he was bound by a Court of Appeal authority, *Alexander v Mercouris* [1979] 1 W.L.R. 1270 in which Buckley LJ had held:

"It seems to me clear upon the language of section 1(1) that the duty is intended to arise when a person takes on the work. The word "owes" is used in the present tense, and ***the duty is not to ensure that the work has been done in a workmanlike manner with proper materials so that the dwelling is fit for habitation when completed, but to see that the work is done in a workmanlike manner with proper materials, so that the dwelling will be fit for habitation when completed****. The duty is one to be performed during the carrying on of the work.* ***The reference to the dwelling being fit for habitation indicates the intended consequence of the proper performance of the duty and provides a measure of the standard of the requisite work and materials. It is not, I think, part of the duty itself****. If, at an early stage in the provision of the dwelling -- for instance, the putting in of the foundations -- someone who had taken on that part of the work failed to do it in a workmanlike manner, then in my judgment, assuming that the section applied, an immediate cause of action would arise. It would not be necessary to await the completion of the dwelling to claim relief on the basis of a breach of statutory duty.*

The argument that the duty is a single duty which continues in operation until completion of the dwelling but in respect of which no relief can be obtained until the dwelling is completed, is in my view inconsistent with, or at least accords very ill with, section 1 (5), which is in these terms:…'

Defective Premises Act 1972

- Goff LJ agreed, and said:

"Mr. Browne argued that "taking on work" in section 1 (1) of the Defective Premises Act 1972 is equivalent to "doing," that there is only one duty imposed by the section, namely, to provide a dwelling fit for habitation when completed, and that, therefore, a breach of the statutory duty occurs when the building is finished and not earlier, so that the Act applies if it comes into force before that happens, even if but very little remains to be done.

This argument could not be sustained without some qualification, because the statutory duty must, in my judgment, be broken as soon as bad workmanship, or the use of faulty materials, takes place. ***Indeed, as Buckley L.J. has pointed out, and I agree, the concluding words of the section do not state the duty but the measure of the duty imposed by the earlier words, that is to say, to do the work in a workmanlike or, as the case may be, professional manner and to do it with proper materials, so that the result may be produced that the dwelling will be fit for habitation when completed****.'*

Defective Premises Act 1972

Having reviewed *Alexander*, Ramsey J said:

Not without some initial reluctance, I have come to the conclusion that the decision of the Court of Appeal in Alexander v Mercouris is […] binding on me at first instance.

I come to that conclusion that I am bound by Alexander v Mercouris with reluctance because I would otherwise have come to a different conclusion on the basis of the matters put before me but not put before either the Court of Appeal in Alexander v Mercouris […].

First, I was referred to Law Commission Report No.40 which […] attached a draft bill in which s.1(1) was in the same terms as what became the 1972 Act. The report stated at paras 33 and 34 as follows:

"33. As regards the content of the proposed obligation, we have considered the terms of the obligation implied in building contracts by the common law (in the absence of terms to the contrary effect); and, in particular, whether it is necessary to provide both that the work should be done efficiently, and with proper materials, and that the house should be fit for habitation.

In Hancock v B.W. Brazier (Anerley) Ltd, Diplock L.J. described the requirement of fitness for habitation as being merely an alternative way of formulating the requirement for good work and proper materials. ***It is not, however, the view normally taken, and the implied obligation is generally thought to have threefold application covering: (a) good workmanship, and (b) proper materials, and (c) fitness for habitation, all three of which must be met. We think that there are good reasons for the latter view.***

Defective Premises Act 1972

*34. **It may be that proper work with good materials will usually produce a house which is fit for habitation, but it is possible to imagine cases in which, however skilful the work and however good the material, there is some defect of design or lay-out which makes the resulting dwelling unsuitable for its purpose. We propose, therefore that the statutory obligation should follow the form last outlined and should contain each of those three requirements.**'*

*In addition, in the **explanatory notes** to s.1(1) it stated as follows:*

- *"This clause will impose a **threefold statutory duty** upon:-*
- *(a) any person who takes on work for or in connection with the provision of a new dwelling; and*
- *(b) any person who, in the course of a business or in the exercise of statutory powers of providing or arranging for the provision of new dwellings, arranges for others to take on such work.*
- *Where building contractors undertake the provision of dwellings, the common law implies a term into their contracts which has the same content as the threefold statutory duty, unless all the circumstances are such as to exclude its implication….*

Defective Premises Act 1972

Secondly, as stated by Diplock L.J. in Hancock v Brazier at 1327A, based on the judgment of Macnaghten J. in Miller v Cannon Hill Estates Ltd [1931] 2 K.B. 113:

"[I]t can hardly be doubted that the obligation of the builder was an obligation to build properly, to build with proper materials, and in a proper manner, and to provide a house fit for the purposes for which, to the knowledge of both parties, the house was required-namely for the habitation of the plaintiff and his wife.'

Diplock L.J. then said at 1327C to D:

"That formulation of the implied warranty is sometimes varied by the use of the words "a house fit for human habitation", but I think it is very clear from the judgments of the Court of Appeal in Perry v Sharon Development Co Ltd, which I have already cited, that there is no substantial or significant difference between the formulation of the warranty that the house should be built of materials suitable and fit and proper for the purpose and the work should be carried out in a proper, efficient and workmanlike manner, and the alternative way of stating it, that the house is habitable and fit for humans to live in.

Defective Premises Act 1972

*Thirdly, in **D&F Estates v The Church Commissioners** Lord Bridge considered the 1972 Act and cited from Law Commission Report number 40. At pp.193 to 194 he cited para.26 of that report which stated that the law should be amended so that a builder should be placed under a duty, similar to his common law obligations.*

*Fourthly, in **Murphy v Brentwood District Council** at 480 Lord Bridge stated:*

*"By section 1 of the Defective Premises Act 1972 Parliament has in fact imposed on builders and others undertaking work in the provision of dwellings **the obligations of a transmissible warranty of the quality of their work and of the fitness for habitation of the completed dwelling**.'*

*Fifthly, in **Batty v Metropolitan Realisations Ltd** [1978] 1 Q.B. 554 the question which arose for decision was the meaning of an express warranty in the following terms:*

"The vendor hereby warrants that the dwelling has been built or agrees that it will be built: (i) in an efficient and workmanlike manner and of proper materials and so as to be fit for habitation….'

*In giving a judgment, with which the other members of the Court of Appeal agreed, **Megaw L.J.** said this at 563H to 564B:*

*"**For the first defendants it is said that the obligation imposed by the warranty "and so as to be fit for habitation," though expressed as a separate warranty, co-ordinate with the two warranties which precede it in the clause, ought to be read as though it were expressed as "and so as to be fit for habitation so far as compliance with the two preceding warranties can achieve that result." I am afraid that I cannot accept that construction.'***

Defective Premises Act 1972

On the basis of the Law Commission Report and the decisions which have been put before me, if not bound to decide otherwise, ***I would have found that s.1(1) of the 1972 Act was intended to give rise to a threefold duty on builders similar to the implied terms set out by Diplock L.J. in Hancock v Brazier, and not a single duty****. In the event I hold that s.1(1) of the 1972 Act gives rise to a single duty on builders, so that the obligation to do the work "in a workmanlike or, as the case may be, professional manner, with proper materials' is a duty which has to be read subject to the requirement "as regards that work the dwelling will be fit for habitation when completed'* ***so that there is no breach unless the dwelling is not fit for habitation****.*

Defective Premises Act 1972

New amendment to the Limitation Act 1980 for claims under the DPA 1972, as follows:

4B – Special time limit for certain actions in respect of damage or defects in relation to buildings

(1)Where by virtue of a relevant provision a person becomes entitled to bring an action against any other person, no action may be brought after the expiration of 15 years from the date on which the right of action accrued.

(2)An action referred to in subsection (1) is one to which—

(a)sections 1, 28, 32, 35, 37 and 38 apply;

(b)the other provisions of this Act do not apply.

(3)In this section “relevant provision” means—

(a)section 1 or 2A of the Defective Premises Act 1972;

(b)section 38 of the Building Act 1984.

(4)Where by virtue of section 1 of the Defective Premises Act 1972 a person became entitled, before the commencement date, to bring an action against any other person, this section applies in relation to the action as if the reference in subsection (1) to 15 years were a reference to 30 years.

(5)In subsection (4) “the commencement date” means the day on which section 135 of the Building Safety Act 2022 came into force.**]**

Defective Premises Act 1972

- Who owes the duty?
  - "A person taking on work for or in connection with the provision of a dwelling".
  - Extremely wide, and will include architects, engineers, project managers, etc.
- Content of the duty?
  - to see that the work which he takes on is done in a **workmanlike** or […] **professional manner**, with **proper materials** and so that as regards that work the dwelling will be **fit for habitation** when completed.

- How does it contrast with the duty in negligence?
  - Will depend on the terms of the contract or basis on which work was undertaken.
  - ***Investors in Industry Commercial Properties Ltd v South Bedfordshire DC*** [1986] 1 All ER 787, per Slade LJ at 807: "where a particular part of the work involved in a building contract **involves specialist knowledge or skill beyond that which an architect of ordinary competence may reasonably be expected to possess, the architect is at liberty to recommend to his client that a reputable independent consultant**, who appears to have the relevant specialist knowledge or skill, shall be appointed by the client to perform this task. If following such a recommendation a consultant with these qualifications is appointed, **the architect will normally carry no legal responsibility** for the work to be done by the expert which is beyond the capability of an architect of ordinary competence"
  - Contrast with *Moresk v Hicks* [1966] 2 Lloyd's Rep. 338 where Sir Walter Carter QC rejected an architect's contention that there was an implied term allowing him to delegate specialist tasks: *"if a building owner entrusts the task of designing a building to an architect he is entitled to look to that architect to see that the building is properly designed. The architect has no power whatever to delegate his duty to anybody else, certainly not to a contractor who would in fact have in interest which was entirely opposed to that of the building owner"*

Defective Premises Act 1972 compared with negligence

Scope of duty in negligence? Helpful summary by Ramsey J in *Co-operative Group v John Allen Associates* [2010] EWHC 2300 at para. 180:

(1) That construction professionals do not by the mere act of obtaining advice or a design from another party thereby divest themselves of their duties in respect of that advice or design […]

(2) That construction professionals can discharge their duty to take reasonable care by relying on the advice or design of a specialist provided that they act reasonably in doing so.

In London Borough of Merton v Lowe the ***architect's decision to use Pyrok was reasonable****. In commenting on the decision in Moresk v Hicks , Waller LJ distinguished that case on the basis that the architect has virtually handed over to another the whole task of design and "the architect could not escape responsibility for the work which he was supposed to do by handing it over to another."*

In Sealand of the Pacific v McHaffie the ***decision to use the specialist concrete had been based solely on representations and guarantees from the sales representative and a pamphlet which dealt with the use of the product in a different manner and for different purposes. Any other enquiries would have disclosed that the use of the product was not sound engineering procedure****. The architect appreciated that the use of the material was somewhat experimental. It was held that further enquiries should have been made. In my judgment that is a case where the court held that the architects had not acted reasonably in relying on the sales representative and the pamphlet given the circumstances of the case. If the architect had made the further enquiries and those further enquiries had supported the use of the concrete it seems that the court would not have held the architects liable. That would be the case even if the enquiries led to advice which, unbeknownst to the architects, was negligent.*

In Surrey v Church the architect knew of the instability in the soils and that placed a duty to have appropriate investigations made by an expert. He selected somebody not qualified as a soils expert and despite the fact that he knew that he could engage whatever competent specialists he needed and that there were firms specialising in soil testing he did not select such a specialist. The basis of contractual liability appears to have been fitness for purpose but it was also found that the architect was negligent. Again it seems that the basis upon which the architect was negligent was that, knowing there were problems with the soils, he should have had appropriate investigations carried out. However, instead of going to specialist soil testing engineers he went to ones who were not so qualified, even though he knew that the client would authorise him to engage those who were competent. In those circumstances it is evident that the architect did not act reasonably.

Defective Premises Act 1972 compared with negligence

Scope of duty in negligence? Helpful summary by Ramsey J in Co-operative Group v John Allen Associates [2010] EWHC 2300 at para. 180:

(3) That in determining whether construction professionals act reasonably in seeking the assistance of specialists to discharge their duty to the client, the court has to consider all the circumstances which include

(a) Whether the assistance is taken from an appropriate specialist;

(b) Whether it was reasonable to seek assistance from other professionals, research or other associations or other sources;

(c) Whether there was information which should have led the professional to give a warning;

(d) Whether and to what extent the client might have a remedy in respect of the advice from the other specialist;

(e) Whether the construction professional should have advised the client to seek advice elsewhere or should themselves have taken professional advice under a separate retainer.

Defective Premises Act 1972 compared with negligence

- Duty to warn? *Pride Valley Foods Ltd v Hall* (2000) 16 Const. L.J. 424:

Project managers were found to be negligent because they failed to advise their clients that the expanded polystyrene sandwich panels used int the construction of a bread factory were highly combustible and offered no resistance to the spread of fire.

- Choice of materials? *JD Williams & Co v Michael Hyde* [2001] P.N.L.R.

Architects held to be negligent for failing to investigate whether a heating system would cause discoloration of fabrics, negligent for accepting assurances provided by British Gas where British Gas had refused to withdraw a disclaimer that it was not liable or its assurances, and negligent for failing to make further enquiries.

Defective Premises Act 1972 compared with negligence

- *Martlet Homes Ltd v Mulalley* [2022] EWHC 1813 (TCC)

There was, from 2003, a report (BRE 135 (2003)) which had been commissioned as a result of a fire in a multi-storey housing block in Scotland in Summer 1999. That highlighted what the authors considered to be unacceptable risks involved with the use of cladding in high rise buildings above 18 metres. It did not state that prohibition of the cladding was mandatory unless and until regulators intervened, but it did imply that it would be a decision for individual specifiers on individual projects whether or not to use cladding, and exhorted them not do to so on high rise buildings.

HHJ Stephen Davies held the defendant had breached their obligation to use reasonable skill and care in their design: *"I am satisfied that any reasonably competent designer specifier could not have failed to be aware at the time that BRE 135 (2003) - as the most up to date and authoritative report on the topic - contained a clear recommendation and advice to avoid specifying a product such as the StoTherm Classic system "*

Defective Premises Act 1972 compared with negligence

- *Martlet Homes Ltd v Mulalley* [2022] EWHC 1813 (TCC)

In response to the defendant's submission that *"the typical designer specifier would regularly specify the StoTherm Classic system even for high-rise residential buildings on the simple basis of its being a well-known system which had a valid BBA certificate hose use was not expressly prohibited at the time"*, the judge held that *"for the Bolam principle to operate to exonerate a defendant, there must be "evidence of a responsible body of opinion that has identified and considered the relevant risks or events and which can demonstrate a logical and rational basis for the course of conduct or advice that is under scrutiny". "A defendant is not exonerated simply by proving that others ... [were] ... just as negligent"*

Defective Premises Act 1972

S.4B of the LA 1980 was considered by the Court of Appeal in ***BDW Trading Ltd v URS Corporation Ltd*** [2023] EWCA Civ 772, where a claim had been issued prior to the coming into force of the Building Safety Act 2022, and where the claimants had applied to amend their claim to plead s.1 of the DPA 1972 after the Act came into force.

Coulson LJ held:

"[Section 135 of the BSA] was retrospective in effect and, although there was an exception to that addressing claims which had been finally determined or settled (section 135(6)), there was There are a number of reasons for my conclusion. ***no exception relating to the rights of parties involved in ongoing litigation.***

*The starting point, and, in some ways, the end point, must be the ordinary linguistic meaning of the words used in section 135(3) […] The amendment which, by way of section 135 of the BSA, adds the extension to the relevant limitation position "****is to be treated as always having been in force****".*

In my view, that could not be any clearer: the amendments to the DPA, and therefore the longer limitation periods, are to be treated as always having been in force. To put the point another way, since 1972, there was never a time when those extended periods did not apply […] this is a situation where Parliament plainly intended that the extended limitation periods would have retrospective effect."

[…] Contrary to Ms Parkins submission, there is no clash with article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms. ***URSs Convention rights are preserved: see section 135(5). So if, for example, URS could show that, in 2016, they had destroyed some critical documents which might have provided a defence to the claim under the DPA, because they assumed that under the existing law any relevant claims were statute-barred, then they may be able to deploy that fact at trial*** *pursuant to section 135(5).*

Defective Premises Act 1972

To whom is the DPA 1972 s.1 duty owed? Coulson LJ held it was owed to developers as well as to ultimate purchasers of dwellings:

*First, it seems to me to be clear from the words of the section that BDW were owed a duty by URS under section 1(1)(a) of the DPA. It is agreed that, as the engineer, URS was "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**" BDW. They had a contract with URS for the structural engineering design element of that work. **As a matter of simple statutory interpretation, therefore, URS owed a duty to BDW under section 1(1)(a**). That is the straightforward grammatical meaning of the words used in section 1(1)(a).*

*Secondly, there is **nothing in the words of the DPA (whether in section 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 section 1(1)(b), the category of those to whom a duty is owed under section 1(1)(a) must be different, otherwise the subsection would be otiose. Further, the purported distinction relied on by URS would be very unusual, and **would be impossible to police in practice**.*

Defective Premises Act 1972

- Re Contribution claims, Coulson LJ held:

I accept that, 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. The question here is: is such a claim required as a matter of law before B has the right to claim a contribution from C?

In my view, it is not. **There is nothing in section 1(1)** which provides that Bs right to claim contribution from C does not arise until there is a claim against B by A.

Additional support for this interpretation can be found in other parts of section 1. First, section 1(4), which is designed to broaden the circumstances in which B can claim contribution against C, expressly envisages A making a claim against B: it expressly refers to any claim made against him. But those same words, and that same provision, is absent from the right to claim contribution set out in section 1(1). That shows that it could easily have been included, had that been Parliament's intention.

Secondly, I note that section 1(6) refers to liability as being any such liability which has been or could be established. That strongly suggests that the potential liability which B may have to A does not need to be established in fact (whether by the making of a claim or howsoever) before B's right to claim a contribution against C arises.

Defective Premises Act 1972

So, as a matter of simple statutory interpretation, I consider that the right to make a claim for contribution, the accrual of the cause of action is established when the three ingredients in section 1(1) of the CL(C) can be properly asserted and pleaded. Is B liable, or could be found liable, to A? Check. Is C liable, or could be found liable, to A? Check. Are their respective liabilities in respect of the same damage suffered by A? Check. 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 CL(C).

I am also confirmed in that view by **wider considerations**. I have already referred at para 197 above to the decision of Judge Havery in Baker & Davies [2005] 3 All ER 603. **In addressing section 10(3) and (4) of the Limitation Act 1980, which concern when the two year limitation period for contribution claims starts to run, Judge Havery concluded that the reference to payment in those sections was not limited to the simple payment of money and could encompass the situation, as occurred in that case, where remedial works were carried out instead. That was, he said, a payment in kind and triggered the right to contribution**. The start of the applicable limitation period (a different question) was triggered when the underlying claim was settled (see paras 30—32).

There is no rational reason why a party in the position of B should wait for a formal claim from A before commencing remedial works, in order then to be able to claim contribution against C. That would reward indolence.

Insurance considerations

- Construction Professional Indemnity insurance
    - Claim's made basis, as opposed to underlying loss or damage.
    - Notification of claim is key. Where the requirement is deemed to be a condition precedent, it will provide the insurer with a complete defence.
- What is covered?
    - Will depend on terms of policy.
    - CPII policies generally exclude cover for loss arising from a contractual undertaking that a design will be reasonably fit for purpose, as opposed to produced exercising reasonable care and skill, which may be significant in cladding claims.
    - Commonly encountered terms cover "breach of duty"; "negligence"; "default"; "omission"; "error".
    - Some insurance clauses, e.g. RICS Approved Minimum Wording 2021 cover *"civil liability"* arising out of the professional business of the insured, rather than by reference to the cause of action.
    - Design & Build Contractors tend to be subject to terms requiring that the materials used be of good quality, reasonably fit for purpose, and that the completed building will be reasonably fit for the intended purposes. Insurers are often not willing to cover such strict liabilities not contingent on professional skill or judgment.
    - CPII is not intended as a guarantee for intended outcomes of construction professional's services, because the professional is in the best position to know if they've done the work competently, and there needs to be an incentive to do it competently.

Insurance considerations

- Construction of the policy

Lord Bingham in *Bank of Credit and Commerce International SA v Ali [2001] UKHL 8*:

"to ascertain the intention of the parties the court reads the terms of the contract as a whole, giving the words used their natural and ordinary meaning in the context of the agreement, the parties' relationship and ***all the relevant facts surrounding the transaction so far as known to the parties****. To ascertain the parties' intentions the court does not of course inquire into the parties' subjective states of mind but makes an objective judgment based on the materials already identified".*

Insurance considerations

- Construction of the policy

Hansard – House of Commons – 20th April 2022, column 188

Sir Mike Penning

I welcome the Minister to his position on this very interesting Bill that is going back and forth. ***The one group of people who took the money right at the start for the developers and builders was the insurance companies. The developers could not have built those properties without having the legal protection of insurance****. Sadly, the Minister has not mentioned the insurance companies once in this situation, but that is where the burden should fall, instead of on the leaseholders. Does he agree?*

Stuart Andrew (Minister of State for Housing)

Actually, the responsibility lies with those who built the building defectively in the first place. They are the ones we are chasing*.*

Insolvency considerations

- Construction contracts will generally contain provisions designed to protect the employer against the insolvency of the contractor. Will either be a performance bond or insurance against liabilities to the employer. It will generally be the contract administrator who is responsible for exercising due care and skill in seeing that these protections are in place and that their employer is protected (*Pozzolani Lytag v Bryan Hobson Associates* 1999 B.L.R. 267: project managers were also under a duty to assess the adequacy of insurance cover).

Insolvency considerations

Third Parties (Rights Against Insurers) Act 2010 updated the 1930 Act.

- Came into force on 1st August 2016, and applies to any case where either:
    - The third party's claim accrued after 1st August 2016; or
    - The insured's insolvency occurred after that date.
- Key changes are:
    - It applies to individual voluntary arrangements;
    - Now no need to bring a claim in two stages (where previously the third party had to bring an action against the insured and then an action to enforce that judgment/arbitral award against the insurer)
    - Third party can obtain information from the insured, insurer, and any third parties from the outset.
    - Court has express power to grant declaratory relief on both policy coverage (even where they have not yet established and quantified the insured's liability – see *Dogs for the Blind Assoc v Box* [2020] EWHC 1948 (Ch)) and liability (so the third party will not need to issue proceedings to resurrect a struck off company in order to attempt to establish and quantify its liability).

Insolvency considerations

Third Parties (Rights Against Insurers) Act 2010

- Conditions of transfer:
    - A deed of arrangement is registered;
    - An administration order is made;
    - An enforcement restriction order is made;
    - A debt relief order is made;
    - A voluntary arrangement is approved;
    - A bankruptcy order is made;
    - A liquidator is appointed
    - Etc.
- Third party must establish and quantify their loss, by obtaining a judgment or arbitration award, or obtaining a declaration under s.2 of the 2010 Act.

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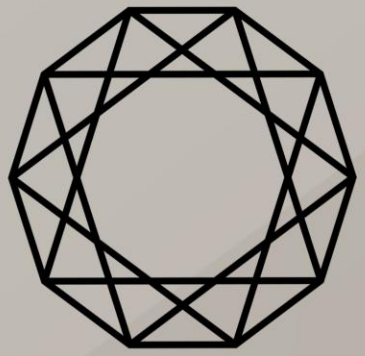
Thank you for your attention.

Questions?



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