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CA-2023-000120/
HT-2020-000084

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
TECHNOLOGY AND CONSTRUCTION COURT (KBD)
[2021] EWHC 2796 (TCC) (Mr Justice Fraser)
[2022] EWHC 2966 (TCC) (Mr Adrian Williamson KC)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 03/07/2023

Before:

LADY JUSTICE KING
LADY JUSTICE ASPLIN
and
LORD JUSTICE COULSON

- -

Between:

URS CORPORATION LIMITED	**Appellant**
- and -	
BDW TRADING LIMITED	**Respondent**

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- -

Fiona Parkin KC, Ronan Hanna & Christopher Reid (instructed by **CMS Cameron McKenna Nabarro Olswang LLP)** for the **Appellant**
Simon Hargreaves KC & David Sheard (instructed by **Osborne Clarke LLP**) for the **Respondent**

Hearing dates: 25, 26 and 27 April 2023

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Approved Judgment

This judgment was handed down remotely at 10.30am on 5 July 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives

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LORD JUSTICE COULSON:

1. INTRODUCTION

1. With 11 files of authorities, ranging from the well-known (*Pirelli*, *Murphy)* to the obscure (*Tozer Kemsley*), and disputes concerning scope of duty, accrual of the cause of action in tort, contribution and the Defective Premises Act 1972 ("DPA"), this appeal had all the hallmarks of a three-day examination in construction law. However, with the assistance of leading counsel on both sides, and the teams that they led, the issues were swiftly identified and then efficiently debated. Perhaps the most important concerned the date of the accrual of a cause of action in tort against designers of a defective building, in circumstances where the defect caused no immediate physical damage. Did the cause of action accrue when the building was completed to the defective design, or when the developers discovered that the buildings were structurally defective?

2. There are two related appeals. The first is an appeal against the order of Fraser J ("the judge") dated 22 October 2021 in which he answered various Preliminary Issues in favour of the respondent, BDW Trading Limited ("BDW"). I granted the appellant URS Corporation Limited ("URS") permission to appeal against that order on 20 January 2022. I shall refer to that as "the substantive appeal".

3. The judge's order was based on his detailed judgment of 22 October 2021 at [2021] EWHC 2796 (TCC). One of the Assumed Facts against which the Preliminary Issues were decided was that, by the time that the defects were discovered, any action brought by third parties against BDW to enforce any obligation they may have had to rectify the defects "would be time-barred".[1] Subsequent to the judgment, in June 2022, the Building Safety Act ("BSA") came into force. Amongst other things, s.135 of the BSA increased the applicable limitation periods for claims under the DPA. So, in consequence, BDW sought permission to amend their pleadings. Those amendments sought to take advantage of the longer limitation periods identified in the BSA and also sought to add claims under the DPA and the Civil Liability (Contribution) Act 1978 ("CL(C)").[2]

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[1] Assumed Fact 9 was in the following terms:

"At the time that BDW first became aware of the Defects and/or first incurred the costs pleaded at paragraph 48.1-48.13 ("the Costs")

(a) BDW no longer had any proprietary interest in the Developments; and

(b) BDW did not have an obligation in law to rectify the Defects. BDW's case is that (i) it owed obligations to third parties in relation to the Defects but (ii) any action brought by third parties against BDW to enforce those obligations would be time-barred."

[2] Although claims under the DPA had originally been made in the Claim Form, they were not set out in the original Particulars of Claim and are therefore treated as abandoned: see *Chandra v Brooke North* [2013] EWCA Civ 1559 at [92]. The amended contribution claim deleted what appeared to be a contingent future claim ("intends to claim") and replaced it with a claim for a contribution that had already arisen.

4. URS objected to those proposed amendments for a variety of reasons. In two short judgments dated 8 November and 14 December 2022, Adrian Williamson KC (sitting as a Deputy Judge of the High Court) ("the deputy judge") gave permission to BDW to make the amendments. On 6 March 2023, I granted URS permission to appeal against those decisions, primarily on the basis of the connection between the substantive appeal and the proposed amendments and the wider importance of the points raised. That second aspect of this appeal I shall call "the amendment appeal".

2. THE BACKGROUND FACTS

5. BDW are developers. They include brand-name developers such as Barratt Homes and David Wilson Homes. In the last 20 plus years they have been responsible for the construction of numerous blocks of flats across the UK. Many of those were designed by the consulting engineering firms who were consolidated as part of URS which itself became part of the AECOM group in 2014.

6. We were shown one of the relevant contracts between BDW and URS. They were in standard form. The relevant warranty, which was at clause 3.3 of the contract, was in the following terms:

> "3.3. The Consultant warrants that it has exercised and will continue to exercise in the performance of its duties under this Agreement such reasonable skill care and diligence as is to be expected of a properly qualified and competent member of the relevant profession experienced in carrying out work such as its duties under this Agreement in relation to projects of a similar size scope nature and complexity to the Development and that in the performance of its duties it will act with all such reasonable skill care and diligence to enable programmes and timetables to be met and all work to be completed as soon as practically possible."

7. It was envisaged that, following completion of the developments, the individual flats would be sold. Accordingly, clause 3.10 of the contract required URS to enter into collateral warranties in favour of the first tenant and the first purchaser. The form of collateral warranty was attached to the contract.

8. These proceedings are concerned with two developments: Capital East, on the Isle of Dogs in London, and Freemens Meadow, in Leicester.[3] The Capital East development consisted of 5 separate tower blocks ranging from 10 to 18 stories in height and containing a total of about 350 apartments. Practical Completion of the development occurred in or around March 2007 to February 2008.[4] The apartments were sold by BDW by way of individual contracts of sale. Although BDW had a 200 year head lease, their interest in that head lease was transferred in December 2008.

9. The Freemens Meadow development comprised 7 towers, each of 6 stories, and each containing 32 separate apartments. Practical Completion of these blocks occurred between February 2005 and October 2012. The individual apartments were sold to

[3] It was the contract in relation to Freemans Meadow that the court was shown. Neither party can find the contract in respect of Capital East.

[4] BDW has been unable to locate practical completion certificates in relation to Capital East: consequently the completion date has been estimated based on the earliest lease for each of the five blocks.

purchasers on long leases and BDW's freehold interests were transferred on various dates, the last being in May 2015.

10. Following the Grenfell Tower disaster in June 2017, developers like BDW undertook widespread investigations of their developments. In late 2019, BDW discovered cracking in the structural slab of a building known as "Citiscape", which they had developed, and which had been designed by one of the firms that are now part of URS. It was discovered that the structural integrity of the slab was seriously deficient, and the building was at risk of impending structural failure. The block had to be evacuated and extensive remedial works carried out.

11. As a result of this discovery, BDW undertook a wholesale review of the structural design of their developments which had been designed by URS. On the Assumed Facts, the review showed that, for some developments, including Capital East and Freemans Meadow, the structural design had been negligently performed. As a result, the existing structures were dangerous.

12. The discovery of the structural defects at Capital East and Freemens Meadow led to the commencement of these proceedings on 6 March 2020. The claims particularised in the Particulars of Claim were limited to claims in negligence. BDW made no claim against URS for breach of contract (presumably because such claims were, on any view, statute-barred). The judge noted at [20] that "the existence of the contract is what leads to a conventional duty of care on the part of the designer, which was in express terms. That is a duty of care co-existent with the designer's contractual duties. This is entirely conventional". As previously noted, this claim in tort is now the subject of the disputed amendments, alongside other amendments which add claims under the DPA and the CL(C)

13. Although the blocks at Capital East and Freemens Meadow did not exhibit cracking of the type which had been identified in the investigation into Citiscape, the investigation showed they had been built to dangerously inadequate structural designs. Indeed in one of the Capital East blocks, residents were evacuated. That is therefore the first particular feature of this case: although the buildings are defective, they have not suffered any physical damage.

14. The second particular feature of this case is that, by the time the defects came to light in 2019, BDW no longer owned or had any proprietary interest in the relevant buildings. BDW's position is that, as a responsible developer, they could not ignore the problem once it had come to light. As a result they have incurred significant costs, running to many millions of pounds, in order to carry out investigations, temporary works, evacuation of the relevant block and permanent remedial works. URS maintain that BDW never suffered any actionable damage, either because they sold the buildings for full value before the problems came to light and/or BDW were not liable to carry out any remedial works and had a complete limitation defence to any claim brought against them by the purchasers, so their losses were outside the scope of URS' duty of care.

15. Those two particular features of this case – the lack of physical damage and BDW's sale of the buildings for value before the defects were discovered - gave rise to the Preliminary Issues in this case. As the judge noted at [5], those Preliminary Issues do not expressly address the issue of limitation at all: it is the ghost at the feast. Furthermore, contrary to the usual sides taken in this sort of limitation debate, it is a

curious feature of this case that BDW say that its cause of action accrued on the earliest possible date (namely practical completion of the buildings) whilst URS, the negligent designer, argue for the latest possible date: they say that, if there was a cause of action in tort, it would not have accrued until the defects were discovered in 2019. This, of course, then allows them to argue that, as BDW had sold the buildings by that date, they had suffered no actionable damage.[5]

16. This may also be said to reflect the underlying merits of the claim, and the policy questions to which the issues undoubtedly give rise. Regardless of limitation, URS' position is that, when BDW were owed what might be called the full professional duty of care by URS, they suffered no loss (because the defects were unknown); and that when they did incur the costs of remedial works, they no longer owned the building and so were not entitled to recover their expenditure. It is a kind of legal 'black hole' argument. It has some similarities with the defendant's argument in *St Martin's Property Corporation Ltd v Robert McAlpine Ltd*, the second case decided with *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd* [1994] 1 A.C. 85; [1993] 3 W.L.R 408 ("*St Martin's*"). In particular, the point was made there that the original employer, Corporation, had parted with its interest on its disposal to a separate company, Investments, for full value even before any breach of contract by McAlpine. The consequential argument, that Corporation could claim for breach of contract but it was Investments who had actually suffered the loss, was described by Lord Browne-Wilkinson as "a formidable, if unmeritorious, argument" (at page 111C) and was ultimately rejected by the House of Lords.

3. THE JUDGMENTS BELOW

3.1 The Judgment of Fraser J

17. Having set out an introduction between [1] and [11], Fraser J dealt with the factual background between [12] and [23]. He then started his analysis at [24]-[34] by identifying two matters which, although only tangential to the resolution of the Preliminary Issues, were none the less important. The first was the observation that a limitation defence does not extinguish the underlying cause of action, but is a procedural bar to the recovery of damages. The second general point made by the judge was that a majority of the heads of loss, pleaded at paragraph 48.1 - 48.6 of the Particulars of Claim, were conventional heads of loss (costs of investigation, remedial works etc). The judge rejected URS's case that those were properly classified as reputational losses. However, the judge did say that the claim at paragraph 48.7 was a claim for reputational damage and was not recoverable. There is no appeal against that decision, and that paragraph has subsequently been deleted in the amendments allowed by the deputy judge.

18. Between [35] and [74] the judge dealt with the first Preliminary Issue, namely whether the scope of URS's duty extended to the claimed losses. Other than the claim for reputational damage at paragraph 48.7, the judge concluded that they did. This involved, amongst other things, a consideration of the decisions of the Supreme Court in the linked cases of *Manchester Building Society v Grant Thornton UK LLP* [2021]

[5] As the judge pointed out at [6], whilst this reversal of the typical positions adopted by parties in this kind of dispute did not affect the legal analysis of accrual of the cause of action and scope of duty, it is "unusual nonetheless".

UKSC 20 and *Meadows v Khan* [2021] UKSC 21 ("*Manchester BS").* This in turn gives rise to Ground 1 of the substantive appeal.

19. The judge dealt with the second and third Preliminary Issues at [75]-[124]. Although these were framed as Preliminary Issues concerned with the recoverability of BDW's losses, it became apparent to the judge that, on analysis, this issue was inextricably bound up with the date on which actionable damage occurred and the claim in tort accrued: see [77]-[79]. The judge dealt specifically with the date when damage occurred in his analysis from [80]-[118]. These passages contain a detailed analysis of the law which I do not set out here, because I shall attempt my own such analysis in Section 6 below.

20. In these paragraphs, the judge concluded, on the authorities, that BDW's cause of action in tort against URS accrued no later than the date of practical completion of the blocks. He rejected URS' contention that cause of action accrued when the defects were discovered in 2019 (which was, of course, a critical part of their argument that, since BDW had sold the buildings by then, they had in fact suffered no actionable damage at all). Although it is rather unfair to single out just two paragraphs in this analysis, because that does not do justice to the careful exercise the judge undertook, I consider that the following two paragraphs from his judgment neatly summarise his conclusions:

> "104. That measurable loss, in the case of a negligently designed structure that has been constructed, for example, is the cost of making it structurally safe. That occurs when the structure is constructed in accordance with the negligent design. It cannot be right to say that the developer of a building has no such loss unless and until he discovers that the building he has had constructed is structurally unsafe. That proposition is not in accordance with fundamental principles in terms of accrual of causes of action in negligence. It also introduces a concept that is not accepted generally in English law, which is that a cause of action accrues upon date of knowledge […]
>
> 108. I therefore conclude that the cause of action accrued, with all of its necessary ingredients completed, not later than the date of practical completion of each of the blocks. This conclusion has the following benefits. It is consistent with, and continues, the approach of English law that knowledge is not required to complete a cause of action. It is therefore consistent with orthodoxy. It is also consistent with the other first instance decisions relied upon in argument, in particular *New Islington* and *Co-op v Birse*. It is also consistent with the concept of BDW being worse off, or having acted to its detriment, as explained by Hobhouse LJ in the Court of Appeal in *Knapp v Ecclesiastical Insurance Group plc* [1998] P.N.L.R. 172."

21. Having dealt with various other matters, with the exception of the claim at paragraph 48.7 of the Particulars of Claim, the judge also rejected URS' application to strike out the points of claim at [125]-[130].

3.2 The Judgments of the Deputy Judge

22. The applications by BDW to amend their pleadings were the subject of two separate judgments in November and December 2022. The deputy judge dealt first with the proposed amendments to the reply. These broadly sought to take advantage of the

longer limitation periods suggested by the BSA. These were opposed by URS on the grounds that a) they ran counter to Assumed Fact 9 (footnote 1 above); b) the claims under the DPA and for a contribution were unsustainable in law and so should not be permitted.

23. In his first judgment, dealing with the amendments to the Reply, the deputy judge concluded that the amendments were of comparatively modest scope and did not amount to a collateral attack on the judgment of the judge. He said that it was neither necessary nor appropriate for him to deal with the separate arguments raised by URS about s.135 of the BSA.

24. In his second judgment, the deputy judge dealt with the amendments which sought to add claims under the CL(C) and the DPA. Those claims might be said to have been prompted by the BSA because, certainly in the case of the DPA, such claims are expressly referred to in the BSA and longer limitation periods there identified for such claims. The deputy judge said that the test was whether he was satisfied that the new claims were not fanciful and were reasonably arguable. He identified URS' principal objections to those amendments as being that: a) there could be no claim for contribution because there had been no actual claims by third parties against BDW; and b) there could be no claim under the DPA because URS did not owe a statutory duty to BDW. The deputy judge said that it was reasonably arguable that BDW could make these claims but, beyond that, these were not short or easy points amenable to summary determination. Accordingly, he allowed the amendments to be made.

4. THE ISSUES ON APPEAL

25. The substantive appeal mounted by URS consists of three Grounds although, on analysis, Ground 3 is parasitic on Grounds 1 and 2. Ground 1 is to the effect that the judge was wrong to say that the losses claimed by BDW were within the scope of URS' duty of care. The principal point taken was that the risk of harm that URS' duty of care guarded BDW against was the risk of harm to BDW's proprietary interests, and the risk of loss incurred to third parties. The delay in the discovery of the defects meant that BDW no longer had a proprietary interest in the developments at the relevant time, and that by then any claims by third parties were statute-barred. So it was said that the judge erred in failing to conclude that any harm suffered by BDW was not that encompassed by the duty owed to them by URS.

26. Ground 2 is to the effect that the damages claimed by BDW were not recoverable, and that the judge should have so found. URS said that the judge should have reached this conclusion because, at the time that BDW discovered the design defects, it had long since sold its proprietary interests in the developments and, by the time of discovery, claims by third parties would have been statute-barred. It was a critical element of URS' argument on this point, as reflected in Ground 2, that any cause of action could only have accrued when BDW knew about the design defects in 2019 (which could not avail them on the facts of this case because they had sold the buildings by then).

27. Ground 3 is that the judge erred in not striking out the claim. Of course, this Ground does not arise for consideration unless URS are successful on Grounds 1 and 2. But it is important because, if they are, Ms Parkin KC argued that the claim should have been struck out by Fraser J in October 2021, and that therefore this action must be deemed to have been finally determined at that date. In those circumstances, she said, it was not

open to BDW to make any amendments at all, let alone to seek to take advantage of the potentially longer limitation periods offered by the BSA. That was because s.135(6) of the BSA provided that it did not apply to actions which had been "finally determined by a court" by the date it came into force. Her argument was that, if the judge had not erred in respect of Grounds 1 and 2, this action would have been struck out – so finally determined - before the BSA came into force.

28. Even if the substantial appeal fails, URS still maintain that the deputy judge was wrong to allow the amendments. Those objections give rise to the amendment appeal. URS submit that the deputy judge applied the wrong test; he should have "grasped the nettle" and dealt with the points of law they raised in respect of both the DPA and the claim for contribution. URS had a raft of reasons as to why those claims were bound to fail. Amongst others, these included the propositions that:

a) BDW was a developer who itself owed duties to the purchasers of the flats under the DPA, but was not owed similar statutory duties by URS;

b) The longer limitation periods for claims under the DPA provided for by the BSA could not apply in this case because, although the BSA was intended to be retrospective, it could not change the accrued rights of those involved in ongoing litigation;

c) No claim for contribution was open to BDW because they themselves had not received a claim from any third party, and that such third-party claims or intimation of a claim, were a necessary element (effectively a condition precedent) of any cause of action for a contribution.

29. I propose to deal with the issues in broadly that sequence. In so doing, I inevitably address many (but by no means all) of the numerous authorities to which we were referred. I have been keen to avoid the 'anxious parade of knowledge' which judgments of this kind can sometimes exhibit, so I have tried hard to minimise both the citations of and quotations from those authorities wherever possible.

5. THE SCOPE OF URS' DUTY (GROUND 1 OF THE SUBSTANTIVE APPEAL)

5.1 The Simple Question and The Simple Answer

30. On behalf of URS, Ms Parkin argued that the judge was wrong to find that the scope of the duty encompassed the loss suffered by BDW. She argued that, pursuant to *Manchester BS*, it was necessary to identify precisely the risk of harm which URS were obliged to protect BDW against, in order to see if URS' duty of care guarded against that particular risk. She said that the risk of harm that URS were obliged to guard against was the harm caused to BDW's proprietary interest in the buildings and/or the risk of BDW being exposed to claims brought by those to whom it had sold those proprietary interests (namely, the individual purchasers). She said that neither risk came to fruition here because, by the time the defects were discovered, BDW no longer had a proprietary interest in the developments and any claims by third party purchasers were statute-barred.

31. On behalf of BDW, Mr Hargreaves KC said that the judge had been right. He maintained that, on the facts of this case, there was no need for such a convoluted delineation of the scope of the duty and the risk of harm. He said that the duty owed by

URS was co-existent with the duty it owed under the contract, to the effect that the structural design would be produced using reasonable skill and care. He said that the risk which URS had to guard against was the risk that their negligent structural design would lead to structural defects and an unsound building. No other analysis was necessary or required.

32. On this issue, at [49], the judge gave an unequivocal answer:

> "I consider that the answer to this question is the risks of harm to BDW, the employer, against which the law imposed upon URS, the structural designer, a duty to take care was the risk of economic loss that would be caused by a construction of a structure using a negligent design such that it was built containing structural deficiencies or defects."

33. In my view, the judge's answer was entirely conventional and correct. This was a standard duty imposed on a design professional which was co-existent with that professional's contractual obligations. The risk of harm was that, in breach of the professional's duty, the design of the buildings would contain structural defects which would have to be subsequently remedied. For the purposes of the Preliminary Issues, it was assumed that the design was not only defective but dangerous, requiring multi-million pound remedial works and, in one block, the evacuation of the residents. In such circumstances, it is impossible to conclude that the losses were somehow outside the scope of URS' duty.

34. That is, therefore, the simple answer to Ground 1 of the substantive appeal. The additional complications that URS adds, particularly in relation to the need for a proprietary interest (in order that they can subsequently argue that BDW did not have such a relevant interest at what was said to be the relevant time when the cause of action accrued) simply do not arise. However, there are a number of other reasons why I consider that URS' submissions underlying Ground 1 were incorrect.

5.2 The Manchester BS Checklist

35. I am not persuaded that *Manchester BS* has any direct application to a case of this sort. The decision of the majority in *Manchester BS*, which at [6] sets out the six-stage checklist, is designed to provide a useful way of analysing whether an alleged duty of care properly correlated to the harm claimed. It was, I think, primarily designed to analyse duties of care alleged to arise in novel situations which had not previously been considered by the courts, or where the type of loss claimed was unusual or stretched the usual boundaries imposed by the law. The checklist was not primarily intended to be applied by rote to the well-known and much-reported standard duties of care, such as those owed by doctors to their patients, or structural engineers to their employers, where the damage claimed is, respectively, the personal injury caused by a botched operation or the consequences of the errors in the structural design. As Mr Hargreaves submitted, this was not a claim that fell into any sort of grey area: it was, as he put it, "right bang in the middle".

36. That said, I accept that the judgment of Lord Hodge and Lord Sales in *Manchester BS* sets out a useful checklist which does, even in a conventional case like this, act as something of a 'sanity check'. If that checklist is applied here, it can be seen that the

judge properly worked his way through the relevant questions and arrived at incontrovertible answers.

37. Question 1 of the checklist is whether the claim for the cost of the remedial works was actionable in negligence where a duty of care was owed which extended to economic loss. The judge considered that at [41]-[47] and concluded that (with the exception of the head of loss at paragraph 48.7 of the Particulars of Claim) it was actionable. Indeed, he noted at [42] that URS apparently accepted that the loss and damage included in the remaining paragraphs of the Particulars of Claim (namely the cost of investigation, remedial works and so on) was in principle actionable in negligence.

38. In arriving at his conclusions, the judge rejected the suggestion that the losses claimed were "reputational". This was a point which Ms Parkin raised again at the hearing of the appeal. For the avoidance of doubt, I should say that, in my view, the judge was right. I explain why in more detail in paragraphs [44-53] below.

39. Returning to the checklist in *Manchester BS*, the judge dealt with Question 2, the scope of duty, at [48]-[49]. I have already noted at paragraph [33] above that I agree with his categorisation of the risk of harm; that it was the risk of economic loss caused by structural deficiencies or defects. It is impossible to see what other conclusion the judge could have reached.

40. Questions 3 and 4 from *Manchester BS*, being concerned with breach and causation, did not arise for consideration under the Preliminary Issues.

41. Question 5 of *Manchester BS* is concerned with the duty nexus question. In my view, this has already been dealt with under Question 2. Although URS seek to argue that BDW had no legal liability for the cost of repair at the time that the repairs were carried out, this was really the reputational loss argument in another guise. I already said that, in my view, this argument was rightly rejected by the judge, who found the necessary nexus at [54]-[62].

42. Finally there is Question 6 in *Manchester BS*, often called the legal responsibility question, which the judge answered at [63]-[71]. As the judge made plain at [66] this again involved a consideration of the 'reputational damages' argument. The judge said:

> "I do not accept that characterisation. Remedial works costs of a structurally inadequate building cannot, in my judgment, be properly characterised as not being in the contemplation of the employer and structural engineer at the time they contract, nor are they too remote."

The judge also rejected other related arguments such as BDW's alleged failure to avoid loss and failure to mitigate, which are not the subject of any appeal.

43. For these reasons, to the extent that the judge was obliged to work his way through the checklist identified by the majority in *Manchester BS*, he did so and arrived at answers which, in my view, were entirely correct.

5.3 Reputational Damage(s)

44. There are two reasons why I consider that Ms Parkin was wrong to describe the claims made at paragraphs 48.1 – 48.6 of the Particulars of Claim as claims for "reputational damage". The first arises from how the claims are pleaded and the detailed findings about those claims made by the judge; the second is based on the law.

45. As to the first, it is clear from the Particulars of Claim that the claims that are made are conventional damages claims, common in cases of this sort: they comprise the cost of investigation, temporary works, evacuation of the residents and the carrying out of permanent remedial works. That was the point the judge made at [66] (see paragraph [42] above). They were not therefore primarily incurred (or said to have been primarily concerned) to protect BDW's reputation; on the contrary, Assumed Fact 11 stated expressly that BDW had incurred those costs "to protect occupants against the danger presented by those defects".

46. In addition, BDW expressly plead (in their response to request 6 for further information, dated 18 June 2020) that, at the time that they sold the apartments to the purchasers, they were liable to them under the DPA. On that basis, I consider that Mr Hargreaves was right to say that it was a matter for BDW whether or not, when the defects subsequently became known, they acted on that liability and sought to meet the obligations it imposed. I develop that point further below.

47. In the circumstances, this case is a long way from a "meddling" employer who gratuitously incurred costs on works which were unnecessary or unjustified. As the judge correctly noted at [28], "this is not a voluntary assumption of responsibility case". On the contrary, I consider that the pleaded case, and the judge's findings about that case, demonstrate that this was a conventional claim for damages, and not a claim for what Ms Parkin called "reputational damage".

48. Secondly, as to the law, it has long been the case that a builder who goes back to rectify defective work can recover the relevant cost, even if he was under no obligation to carry out such remedial works: see *Newton Abbott v Stockman* (1931) 47 T.L.R. 616, cited with approval by this court in *G.W. Atkins Ltd v Scott* (1991) 7 Const. L.J. 215. In *St Martin's, Newton Abbott* created a difficulty for McAlpine, who were arguing that there was no claim because the party with the right to claim had sold the building. McAlpine attempted unsuccessfully to distinguish *Newton Abbott* on the sole ground that, there, the sale had happened before the breach (which is of course not the case here). Lord Browne-Wilkinson dealt with *Newton Abbott* in detail at page 110H-111C, and neither he nor leading counsel for McAlpine suggested that it was wrongly decided.

49. Further support for this approach can be found in the Australian case of *Director of War Service Homes v Harris* [1968] Qd.R. 275, where it was said that "if the owner subsequently sold the building, or gave it away to a third person, that would not affect his accrued right against the builder to damages…". This reasoning was followed in the Australian case of *Orlit Proprietary Ltd v J.F.& P. Consulting Engineers Ltd and Others* [1993] QCA 277 at pages 14-15. In the case of *Globalnet Management Solutions Inc and Others v Cornerstone CBS Building Solutions Ltd and Another* 2018 BCCA 303; [2018] B.L.R. 633, a case from British Columbia, the principle of allowing an employer to recover the cost of remedial works despite the absence of an obligation to carry out such work was summarised in this way: "the court should and would decide

the case on the basis of the principle that wrongdoers should be held responsible for their conduct and persons in the position of Globalnet should be compensated for the costs they incurred in remedying such (mis)conduct" [63].

50. I accept Ms Parkin's point that, with the exception of *Globalnet*, these cases were concerned with contractual rather than tortious claims, but I do not consider that that makes any difference to the underlying principle. Had it done so, I would have expected that distinction to have been expressly made in the cases. Moreover, the reality is that the common law generally seeks to encourage a builder or developer to act in accordance with its underlying obligations, and would if possible seek to avoid penalising them for acting responsibly. If it was impossible for such a developer to recover the costs from the party actually in default, however the claim against that party might arise, the law would have taken a mis-step.

51. In addition, I should add that, in this sort of case, motive seems to me to be irrelevant. If the type of damage is recoverable in principle (as it is here, being the cost of investigations, remedial work etc), then BDW's precise motivation for carrying out those works is immaterial.

52. Finally on this topic, I note that, at paragraph 18(a) and footnote 28 of her skeleton argument, Ms Parkin suggested that, on the facts, BDW suffered no diminution in the value of its proprietary interest in the buildings, and she cited *Broster v Galliard Docklands Limited* [2011] P.N.L.R. 34 at [20]-[22]. In my view, this point was misconceived. The context of *Broster* was a claim by the residents (who had paid for the remedial works) pursuant to s.3 of the Latent Damage Act, in which they had to show that the developers had suffered loss in order to 'inherit' that cause of action. They failed because the developers had suffered no diminution in value, because they had sold the building for full value, and had not carried out any remedial works to rectify the defects. For obvious reasons, that is not this case. Moreover, it is trite law that, in construction cases, diminution in value is measured by reference to the cost of the relevant remedial works: see *East Ham Corp v Bernard Sunley & Sons* [1966] A.C. 406 at 434F.

53. For these reasons, therefore, I consider that these were not (and were not presented as) claims for reputational damage, but as conventional claims for damages measured by reference to the cost of remedial works and the like, and the judge was right to so find. As a matter of law, the possible absence in 2019 of an obligation on the part of BDW to carry out such works is irrelevant to BDW's ability to recover those costs as damages.

5.4 The Timing and Limitation Issues

54. As Ms Parkin accepted during the hearing, the submission underlying Ground 1 of the substantive appeal is really no more than a timing point. Even on URS' case, it is accepted that, at the time that the negligent design was perpetrated, they owed the full, conventional duty of care to BDW and that BDW were the owners of the relevant buildings. There could be no argument about the scope of that original duty. At various times, Ms Parkin's argument seemed to suggest that in some way there was a change in that legal position when the buildings were sold.

55. But what could be the nature of any such change? It could hardly be said that the duty that was owed before the sale itself changed. Why should it? How could it in law? Was

it said that, at the point of sale, the duty to BDW was discharged, and replaced with a duty to the individual purchasers? Again, what would the mechanics of that be? What authority is there for the proposition that, as a matter of common law, an existing duty owed suddenly disappears in this way? In essence, as my Lady, Lady Justice Asplin, pointed out during these exchanges, URS had to say that, as a result of the sales, BDW were no longer under a liability to carry out the remedial works and therefore could not seek to recover those costs from URS. But that is not an argument about duty: it is an argument that BDW should not have acted as they did. That is the reputational loss argument in another guise and, as I have already said, the judge correctly rejected that.

56. Furthermore, to the extent that URS argued that BDW could not recover because they were under no obligation to third parties, I consider that to be wrong on the facts and wrong in law. It is wrong on the facts because, at the time that the apartments and the developments were sold, it is common ground that BDW were liable to the purchasers for the defects, whether in contract, the DPA or tort, and therefore liable to them for the costs of any remedial works.

57. It is also wrong in law. After the sales, the time may have come subsequently when, in answer to such third-party claims, BDW might have been able, had they chosen to do so, to rely on a limitation defence. But they were not obliged to do so. As the authorities make crystal clear, the raising of a limitation defence is a procedural bar but it does not affect the underlying liability: see *Kajima Construction Ltd v Children's Ark Partnership Ltd* [2023] EWCA Civ 292 at [116]-[117]. On that basis, BDW's liability in law to third parties at the time that the defects were discovered remained as before, and it was a matter for them whether or not they chose to take the limitation point.

58. At other times, Ms Parkin's answer to this issue was to say that the duty did not change when the buildings were sold, but the circumstances triggering a cause of action could not arise, because BDW suffered no actionable damage thereafter, having sold for full value. That is a different kind of timing point that gives rise to Ground 2 of the appeal, and is dealt with in Section 6 below.

5.5 The Terms of the Appointment

59. URS' argument that, in some way, the duty owed by URS changed or was modified on the sale to the individual purchasers was also put by reference to the contractual terms of URS' appointment. Before the judge, those terms were not regarded as relevant: the judge noted that at [20]. At the appeal hearing, Ms Parkin went through the terms in some detail, emphasising that URS had agreed to provide collateral warranties to the individual purchasers which would last for 12 years. At one point, the suggestion appeared to be that, since the individual purchasers had acquired direct claims against URS, BDW's rights – whether in contract, or tort, or under the DPA - fell away.

60. To the extent that this argument was advanced under Ground 1 (or even Ground 2), I reject it. The contract of appointment between BDW and URS contained no provision that the collateral warranty in favour of the individual purchasers replaced or in any way affected the duties owed to BDW; on the contrary, the draft collateral warranty at clause 7.2 provided that the individual purchaser would not be affected by any subsequent variation of the contract of appointment. Moreover, the mere fact that an individual purchaser had the right to make a direct claim against URS cannot affect the duties URS owed to, and the loss recoverable by, BDW.

61. I should add that, in my view, there are many practical reasons why the existence of a claim on behalf of the individual purchasers by a major corporate entity like BDW, which would cover the whole building and not just individual parts, is an important benefit to those purchasers, regardless of the terms of any individual warranties in their favour. The difficulties that defendants can place in the way of individual claimants in large residential blocks can be seen in *Manchikalapati v Zurich* [2019] EWCA Civ 2163; [2020] B.L.R. 1.

5.6 A Proprietary Interest

62. Finally, I must address Ms Parkin's insistence that URS' duty of care to protect BDW against the risk of structural defects in their design could only arise if BDW had a proprietary interest in the buildings. Let us assume – without deciding – that such a proprietary interest was a necessary ingredient of the cause of action. It still does not assist URS. That is because, first, at the time that URS' duty was incepted and performed, BDW had such a proprietary interest; second, depending on the outcome of Ground 2 of this appeal, at the time that BDW suffered actionable damage (i.e. practical completion of the buildings) they also had the necessary proprietary interest. On either basis, the fact that BDW no longer owned the buildings when the structural issues were finally identified is nothing to the point.

63. At the hearing, Ms Parkin relied on *Co-Operative Group Ltd v Birse Developments Ltd* [2014] EWHC 530 (TCC); [2014] P.N.L.R. 21. There was some irony in this, given that it was Ms Parkin's unequivocal submission under Ground 2 of the substantive appeal that *Co-Op v Birse* was wrongly decided. In any event, I do not consider that *Co-Op v Birse* is authority for any proposition concerned with the importance or otherwise of a proprietary interest. The case was concerned with a main contractor's liability to the employer and the nature of its own tortious claim against its sub-contractors, so questions of a proprietary interest did not directly arise at all. When at [26] Stuart-Smith J (as he then was) sought to identify the risk that the sub-contractor should have in mind when undertaking design and inspection services for a main contractor constructing a building for an employer, he said:

> "…Even if the sub-contractors had not known the terms of the main contract, they knew that part of Birse's obligations under the main contract had been subcontracted to them and that Birse's reasonable expectation was that they would provide design or inspection services that were appropriate to the proper discharge of those obligations as required by the terms of their sub-contracts. Equally, if their design was defective, the risk was that Birse would build in accordance with it, which would have two consequences: first, the building as built would be defective in Birse's hands and would consequently be less valuable because of the need to remedy it in order to bring it to an acceptable standard; and, second, if the building was handed over to the employer in its defective condition, Birse was likely to be placed in breach of contract, whether or not it appreciated it or accepted it at the time."

64. Stuart-Smith J went on at [27] to say:

> "…However, where what is being contemplated is a failure to design or inspect a building under construction, the likelihood is that negligent failures by the sub-contractor will cause the main contractor to incur liabilities that are

> financially measurable and significant. The consequences of a negligent failure to inspect are predictably similar. I conclude that, in a case where the development is being constructed for someone other than the main contractor, the primary risk that should be in the contemplation of the parties will be that the main contractor will build and hand over a defective building to the employer and thereby incur liability. His liability will usually be measured by the cost to the main contractor of undertaking repairs or the sums necessary to compensate the main contractor for the defects."

In my view, Stuart-Smith J's analysis of the scope of duty in that case does not depend – indeed these passages make no mention of – any proprietary interest or the need to protect against damage to it. On the contrary, what is being described is directly analogous to the present case: in *Co-Op v Birse*, the risk was defined as the construction and handing over of a defective building; precisely the same is true here.

65. The only reference that Stuart-Smith J makes to "possessory interests" comes at [45], when he is analysing Birse's claim under what is sometimes called "the damaged asset rule" (explained below). He was simply making the point that, up until practical completion, "Birse had at least a possessory interest in the development as well as accrued rights under the contract". So they did; and so, of course, did BDW.

66. I should add that, in my view, the absence of a proprietary interest much later in time should not affect the validity of a claim of this type.[6] In *St Martin's*, the claimant employer had parted with its proprietary interest before the breach occurred, let alone the occurrence of the damage. The House of Lords did not consider that to be a bar to recovery.[7] There is, therefore, the highest possible authority for the basic proposition that a claim for defects does not always require a proprietary interest in order for the cost of the remedial works to be recoverable.

5.7 Summary on Ground 1

67. For all those reasons, I would dismiss Ground 1 of the substantive appeal.

6. THE ACCRUAL OF THE CAUSE OF ACTION IN TORT (GROUND 2 OF THE SUBSTANTIVE APPEAL)

6.1 The Law

(a) The Starting Point

68. In *Rothwell v Chemical & Insulating Co. Limited* [2007] UKHL 39; [2008] 1 A.C. 281 at [7], Lord Hoffmann said:

[6] This is a claim for economic loss. If it had been a claim for physical damage, the position might be different: see *Leigh & Sillivan Ltd v Aliakmon Shipping Co Ltd (The Aliakmon)* [1986] A.C. 785, and Clerk and Lindsell On Tort, 23rd Edition, paragraph 1-41.

[7] Again it is accepted that *St Martin's* was a claim in contract; again that does not seem to me to make a difference in principle.

> "[…] a claim in tort based on negligence is incomplete without proof of damage. Damage in this sense is an abstract concept of being worse off, physically or economically, so that compensation is an appropriate remedy".

As Stuart-Smith J reiterated in *Co-Op v Birse* at [17], there are only two kinds of loss which are recognised as actionable damage for the tort of negligence, namely physical damage and pure economic loss.

(b) Defective Buildings Where There Is Physical Damage

69. In *Pirelli General Cable Works Limited v Oscar Faber & Partners* [1983] 2 A.C. 1 ("*Pirelli*"), the chimney at the heart of the case had been completed in July 1969. Because it had been negligently designed by the defendant engineers, cracks began to develop on the inside of the chimney not later than April 1970. The claimant employers did not know about the damage until November 1977. It was found that they could not with reasonable diligence have discovered the damage before October 1972. They commenced proceedings in October 1978.

70. The case before the House of Lords was a straight fight between two diametrically opposed cases as to the accrual of the cause of action. The defendant said that the cause of action accrued either on completion, or when physical damage occurred in April 1970, and that therefore the claim was statute barred. They relied on the decision of the House of Lords in *Cartledge v E. Jopling & Sons Limited* [1963] A.C. 758. The employers argued that the cause of action did not accrue until the damage was discovered or ought with reasonable diligence to have been discovered, and they relied on the Court of Appeal decision in *Sparham-Souter v Town and Country Developments (Essex) Limited* [1976] QB 858.

71. The House of Lords unequivocally decided that *Cartledge v Jopling* was right and *Sparham-Souter* was wrong. Lord Fraser said at page 16F:

> "I think, with all respect to Geoffrey Lane L.J. [in *Sparham-Souter*], that there is an element of confusion between *damage* to the plaintiff's body and latent *defect* in the foundations of a building. Unless the defect is very gross, it may never lead to any damage at all to the building. It would be analogous to a predisposition or natural weakness in the human body which may never develop into disease or injury. The plaintiff's cause of action will not accrue until *damage* occurs, which will commonly consist of cracks coming into existence as a result of the defect even though the cracks or the defect may be undiscovered and undiscoverable. There may perhaps be cases where the defect is so gross that the building is doomed from the start, and where the owner's cause of action will accrue as soon as it is built, but it seems unlikely that such a defect would not be discovered within the limitation period. Such cases, if they exist, would be exceptional."

> At page 18G Lord Fraser continued:

> "Counsel for the appellants submitted that the fault of his clients in advising on the design of the chimney was analogous to that of a solicitor who gives negligent advice on law, which results in the client G suffering damage and a right of action accruing when the client acts on the advice: see *Howell* v. *Young*

> (1826) 5 B. & C. 259 and *Forster* v. *Outred & Co.* [1982] 1 W.L.R. 86. It is not necessary for the present purpose to decide whether that submission is well founded, but as at present advised, I do not think it is. It seems to me that, except perhaps where the advice of an architect or consulting engineer leads to the erection of a building which is so defective as to be 'doomed from the start', the cause of action accrues only when physical damage occurs to the building. In the present case that was April 1970 when, as found by the judge, cracks must have occurred at the top of the chimney, even though that was before the date of discoverability. I am respectfully in agreement with Lord Reid's view expressed in *Cartledge* v. *E. Jopling & Sons Ltd.* [1963] A.C. 758, that such a result appears to be unreasonable and contrary to principle, but I think the law is now so firmly established that only Parliament can alter it."

72. As to that last point, in consequence of *Pirelli*, Parliament did not change the law in relation to the accrual of a cause of action in tort, but they did ameliorate what was seen to be the adverse consequences of *Pirelli* by way of the Latent Damage Act 1986. This added provisions, by way of s.14A of the Limitation Act 1980, that the cause of action accrued either 6 years from the date on which the cause of action accrued, or 3 years from the earliest date on which the claimant had both the knowledge required for bringing an action for damages in respect of the relevant damage and a right to bring such an action. In addition, in respect of any claim other than actions involving personal injuries, there was a 15-year longstop.

73. In *Ketteman v Hansel Properties Limited* [1987] A.C.189; [1987] 2 W.L.R. 312, the House of Lords were principally concerned with procedural matters and amendments. But they addressed *Pirelli* because of a reference to the 'doomed from the start' argument. Lord Keith said at page 205G:

> "In the second branch of the argument it was maintained that a distinction fell to be drawn between the case where the defect in a building was such that damage must inevitably eventuate at some time and the case of a defect such that damage might or might not eventuate. The former case was that of a building "doomed from the start" such as was in the contemplation of Lord Fraser of Tullybelton when he made reference to that concept in his dicta in the *Pirelli* case, at p. 16. In the present case the houses were doomed from the start because the event showed that damage was bound to occur eventually. My Lords, whatever Lord Fraser may have had in mind in uttering the dicta in question, it cannot, in my opinion, have been a building with a latent defect which must inevitably result in damage at some stage. That is precisely the kind of building that the *Pirelli* case was concerned with, and in relation to which it was held that the cause of action accrued when the damage occurred. This case is indistinguishable from the *Pirelli* case and must be decided similarly. The second branch of the architects' argument fails. I understand that all your Lordships agree."

Ketteman was a case about faulty foundations which caused cracks in the walls of the houses. Save for the 'doomed from the start' argument, which the House of Lords rejected, it was not disputed that the cause of action accrued when the cracking began.

74. The 'doomed from the start' argument also arose in *London Congregational Union Inc v Harriss & Harriss* [1988] 1 All E.R. 15, the last of these cases decided before *Murphy*.

In that case the church hall was completed in January 1970. The drains apparently functioned without obvious problems for 20 months but, from August 1971 onwards, floods occurred due to defects in the drainage design. Proceedings were issued on 18 February 1977, namely within 6 years of the flooding but more than 6 years since the drainage had been completed. The defendant architects raised a limitation defence, arguing that the building was doomed from the start because of the inherent deficiency of the drains. The claimants said that the cause of action accrued when the damage, namely the flooding caused by the defective drainage, first occurred.

75. Ralph Gibson LJ at page 23H rejected the proposition that the defect in design was or should be treated as physical damage to the building. He went on:

> "The drains, in the physical condition resulting from the defect in design, were not such as to produce at once their damaging effects. They were capable of functioning properly as drains and they did so for some twenty months. When they failed effectively to function as drains because of heavy rainfall in the area they did not merely function unsatisfactorily, e.g. by making noises or emitting smells, but were the cause of physical damage to other parts of the building, The defect in design in this case was, in my judgment, as latent, and as distinct from subsequent physical damage caused by it, as was the negligent incorporation of unsuitable material in Pirelli's chimney."

He also rejected the 'doomed from the start' argument. He said that it overlapped with the point made by the defendants that the defect in design constituted the physical damage, an argument he had already rejected.

76. Sir Denys Buckley dissented. He said at page 32B:

> "From the moment when the property was handed over to the plaintiffs by the builders the drainage system suffered from an existing and physical defect: it was incapable of dealing with foreseeable volumes of water which were to be expected to occur from time to time. No change occurred in the system between that time and the event of the first flood. The effect of the flood was to demonstrate the existence of the physical defect: it did not occasion it."

In those circumstances, he concluded that the cause of action accrued on completion because "when the building was handed over the plaintiffs acquired a building which incorporated an existing physical defect: they did not get what the defendants were under a duty to ensure that they would get" (page 33E). As we shall see, it might be said that this analysis has been confirmed as a result of *Murphy*.

77. So far, these cases were all decided under the misapprehension that physical damage was needed in order to complete the cause of action in tort. This misapprehension was corrected in *Murphy v Brentwood District Council* [1991] 1 A.C. 398, a seminal decision by a 7-man House of Lords in which they overruled *Anns v Merton*. That was the main thrust of all of the judgments in the case. It was again a case about defective foundations which caused extensive physical damage to the walls and pipes of the house in question.

78. The speech of Lord Keith touched on *Pirelli*. He dealt with it primarily to note that a claimant who discovered a defect before it caused physical damage did not have to wait

until physical damage occurred before the cause of action crystalised. In respect of *Pirelli*, he said at page 466E-F:

> "If the plaintiffs had happened to discover the defect before any damage had occurred there would seem to be no good reason for holding that they would not have had a cause of action in tort at that stage, without having to wait until some damage had occurred. They would have suffered economic loss through having a defective chimney upon which they required to expend money for the purpose of removing the defect. It would seem that in a case such as *Pirelli*, where the tortious liability arose out of a contractual relationship with professional people, the duty extended to take reasonable care not to cause economic loss to the client by the advice given."

Having made this observation, Lord Keith then went back to his principal theme which was that, although the damage in *Anns* had been characterised as physical damage by Lord Wilberforce, it was in fact, economic loss.

79. During the latter part of his speech in *Murphy*, Lord Keith referred to the Australian case of *Council of the Shire of Sutherland v Heyman* (1985) 157 C.L.R. 424, a case about a purchaser of a property who discovered after the purchase that the foundations were inadequate and pursued the local authority for negligent inspection. In that case, Deane J had said that it was arguable that loss was sustained at the time that the purchaser acquired the property because, not knowing about the defective foundations, he paid too much for it. The judge said that the alternative and, in his view, "preferable" approach, was that loss was only sustained "when that inadequacy is first known or manifest" (at 14-38).

80. Similar views were expressed by Lord Lloyd in the Privy Council in *Invercargill City Council v Hamlin* [1996] A.C. 624, another case, this time from New Zealand, of actual physical damage caused by negligent inspection. In New Zealand, the courts have not followed *Murphy* or *Pirelli*, and the cause of action accrues at the date of discoverability of the defects. In *Bank of East Asia Ltd v Tsien Wui Marble Factory Ltd and Others* [2000] 1 HKLRD 268, in the Hong Kong Court of Final Appeal, in a very short judgment, Lord Nicholls felt able to regard *Pirelli* as simply over-ruled by *Murphy* without explaining how or why.

81. Finally in this category of case is *Abbott v Will Gannon and Smith Limited* [2005] EWCA Civ 198; [2005] P.N.L.R.30. That was a case where the work was completed in March 1997; cracking occurred and was first noted in late 1999. Proceedings were not issued until September 2003. The judge found that the cause of action arose when the actual cracking occurred in 1999 and the defendant engineer's appeal was dismissed. Tuckey LJ found that the facts in *Pirelli* were on all fours with the facts in *Abbott*, and that that dictated the outcome. Tuckey LJ noted that Lord Keith's judgment in *Murphy* did not obviously overrule *Pirelli*: as he said, all Lord Keith appeared to be saying in *Murphy* was that "if the claimant discovers the defect before damage occurs he has a claim for economic loss if there is a special relationship" [15].

82. Tuckey LJ went on to say, however that, if he was not bound by *Pirelli* and the claimants' cause of action accrued at the time they suffered economic loss, that was only when the defect manifested itself in some way which would affect the value of the

building, measured either by the cost of repairs or depreciation in market value. But, as he made clear at [20], these *obiter* remarks were made in a case where the occurrence of loss and its discovery coincided.

83. In summary, therefore, the law of England and Wales is that, in a case where there is physical damage, the claimant's cause of action accrues when that physical damage occurs. That is regardless of the claimant's knowledge of the physical damage or its discoverability.

(c) Defective Buildings Where There Is No Physical Damage

84. There are a number of cases in which there was a defective design but no physical damage in consequence. The first in time is *Tozer Kemsley & Milbourn (Holdings) Limited v J Jarvis & Sons Limited & Ors.* (1983) 4 Con. L.R. 24. There, the heating and air conditioning plant was defective. His Honour Judge Stabb QC considered *Pirelli*, and the argument as to whether or not damage was physical or economic. He said at page 31:

> "I think that a defect in the construction of the building, be it as a result of a faulty design or construction of part of that building or its services, means and can only mean that a building in that defective state is a damaged building. It is a damaged article in the sense that it is not a sound one. As Mr Vallance pointed out, rightly in my view, a building is a manufactured thing, and if it is unsuitable or defective when it is handed over it seems to me that the cause of action arises when the person acquires it in its defective state. It may well be that to quantify the economic loss that flows or will flow from the defective state will be impossible at that time, but in my judgment that is the time when the cause of action arises.
>
> Accordingly, I look to see what evidence there is that the defect existed before 17 January 1973, the writ having been issued on 17 January 1979. It seems to me to be very clear from all that subsequently transpired that if this air-conditioning plant was defective, as it is alleged to have been, it was defective in design and construction from the time that it was installed, and that was in 1972, over six years before the writ was issued. It does not seem to me to matter how the details of the defects manifested themselves with ever-increasing severity over the years. Complaints of its defective operation were made in 1972 and as the years went by details of the defective design came to light which seem to support the view that, if the allegations are right, it very clearly was a defectively designed and constructed plant from the very beginning. It has never been suggested that the plant was satisfactory at the start but only developed defects as time went by. Accordingly I would, as an alternative if necessary, strike out the statement of claim on the ground that it was very clearly statute-barred."

85. In *Chelmsford District Council v TJ Evers & Ors* (1983) 25 B.L.R. 99, the claim was again about defective design, principally concerned with a lack of stability in the roofs. The case was concerned again with amendments, and it was held that the engineers should remain a party to the action because the claim against them might not be statue barred. The judge followed *Tozer Kemsley* but he also found that, on the material he had seen, "it would seem that the flats, or at least their roofs, were "doomed from the

start"" (at page 107). On that basis he found that the flats had been 'damaged' from the date of hand over. He found that the cause of action accrued on practical completion.

86. In *New Islington and Hackney Housing Association Ltd v Pollard Thomas & Edwards Ltd* [2001] P.N.L.R. 20, the issue concerned the inadequate noise insulation due to the defective specification of the internal walls. Dyson J (as he then was) dismissed the claim on the basis that, in a case without physical damage, the cause of action in tort accrued at the latest at the time of practical completion of the building. He addressed *Pirelli*, *Tozer Kemsley*, and *London Congregational Union,* as well as one or two of the other non-construction authorities to which I refer below. He went on to *Murphy* and said this:

> "38. The fact remains, however, that the House in *Murphy* did not say that *Pirelli* was wrongly decided. Accordingly, it remains an authority that is binding on me. In *Knapp,* the Court of Appeal stated that it was bound by *Pirelli,* although it appears that *Murphy* was not cited to it.
>
> 39. Since I am bound by *Pirelli*, it is clear that the Association's cause of action in the present case did not accrue when they first knew or ought reasonably to have known of the defect. It is true that in the *Sutherland* case, Deane J. said that the date of knowledge of the defect in the building was his "preferable" approach, and that Lord Keith found the reasoning of Deane J. to be "incontrovertible". But the fact remains that the knowledge test has not been applied in English law as marking the date on which damage is first suffered for the purpose of completing a cause of action in negligence. This test was disavowed in *Pirelli* itself; and it has not been applied in the line of cases exemplified by *Forster* either. It is because a claimant can suffer loss without being aware of it that the Latent Damage Act 1986 was passed."

87. At [40], Dyson J said that if, as per *Murphy*, the case was to be viewed as one of economic loss, then the claimants suffered damage at the latest when the buildings were handed over with their defective sound insulation. So he found at [41] that the cause of action in negligence accrued at the latest at the date of practical completion. However, he went on to say that, even if he had not been bound by *Pirelli,* he would have come to the same conclusion. Dyson J said at [43]:

> "If I had been free to do so, I would have reached the same conclusion by a different route, but that would have involved the proposition that *Pirelli* was wrongly decided. It seems to me that, if it is now to be understood as a case on economic loss, then *Pirelli* cannot stand. That is because it makes no sense to say that the plaintiffs in that case first suffered economic loss when, unknown to them, cracks first occurred in the chimney. There are arguments in favour of saying that the plaintiffs suffered economic loss when the chimney was constructed to the defective design, or alternatively (Deane J.'s preferred approach) when the defect was first discovered or discoverable. On the facts of *Pirelli,* the first approach would have led to the cause of action accruing in June or July 1969; the second approach would have led to the cause of action accruing in 1977. One advantage of abandoning the *Pirelli* approach would be to bring the defective building cases into line with the other cases involving latent defects resulting from negligent advice. On the face of it, there is no good reason why building cases should be the subject of special rules. Another

> advantage would be to avoid the kind of contortions that are exemplified by decisions such as *Dove* [*Dove v Banhams Patent Locks Ltd* [1983] 1 W.L.R. 1436] and *Harriss*. I see the great force of the reasoning of Deane J. Similar reasoning was expressed by the Privy Council in the New Zealand case of *Invercargill City Council v. Hamlin* [1996] A.C. 624, 646H–649A. But, as Hobhouse L.J. pointed out in *Knapp* (at page 397), New Zealand, and indeed Australia, have adopted different solutions to the potential injustices which arise from a strict application of the primary limitation period. In those countries judicial solutions have been found. In England the approach has been different:
>
> 'Additional statutory provisions have been introduced designed to achieve similar results. These provisions are premised upon the prima facie application of the primary limitation period and introduced in a defined way certain relaxations of it to avoid injustice.'"

88. These authorities establish that, if there was an inherent design defect which did not cause physical damage, the cause of action accrued on completion of the building. Although the authorities do not mention it, that conclusion is entirely consistent with the DPA. That Act, which is dealt with in greater detail below, is concerned with defects in dwellings which make them uninhabitable and gives the occupier certain rights to claim against those responsible. S.1(5) of the DPA states in terms that states in terms that:

> "(5) Any cause of action in respect of the 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…"

(d) The Non-Construction Authorities

89. Leading Counsel for both parties referred to other, non-construction cases in support of their respective submissions. They were right to do so: as Dyson J observed in *New Islington* at [43], "there is no good reason why building cases should be the subject of special rules". I refer to a number of them below.

90. In *Forster v Outred* [1982] 1 W.L.R. 86, the claimant executed a mortgage on her freehold property as security for a loan made by a company to her son. He went bankrupt, the mortgage was called in and the claimant lost her property. She subsequently claimed damages for negligence against her solicitors in connection with the mortgage. This court concluded that the claimant had suffered actual damage through the defendant's negligence by executing the mortgage deed, so that her cause of action in tort accrued on execution, notwithstanding the fact that she did not actually become liable for the repayment of the loan until the demand was made. Dunn LJ said at page 99F that "in cases of financial or economic loss the damage crystalises and the cause of action is complete at the day when the plaintiff, on reliance of negligent advice, acts to his detriment."

91. I am of course aware that, in *Pirelli*, Lord Fraser said of *Forster v Outred* that, whilst it was unnecessary to decide whether the submission based on the proposition that the cause of action accrued when the client relied on the negligent advice, "as at present

advised" he did not think it was well-founded. But it seems plain to me that that was because, at the time of *Pirelli*, it was wrongly thought that physical damage was required to complete the cause of action. In my view, following *Murphy*, that doubt about *Forster v Outred* falls away. As Dyson J put it in *New Islington* at [40], "if, as appears from *Murphy*, the case is to be viewed as one of economic loss, then [the claimant] suffered damage at the latest when the buildings were handed over with their defective sound insulation".

92. In similar vein, in both *Alex Baker v Ollard & Bentley* [1982] C.L.Y 1845 and *DW Moore v Ferrier* [1988] 1 W.L.R. 267, this court rejected the argument that the cause of action did not accrue until the third party decided to enforce its claim or take other steps which might lead to loss. In the latter case this court said that "the imponderables which future behaviour presented relate to the quantification of damages and not to the existence of a cause of action" (at page 277B). A similar result obtained in *Bell v Peter Browne & Co.* [1990] 2 Q.B. 495.

93. In *Knapp v Ecclesiastical Insurance Group Plc* [1998] P.N.L.R. 172, this court held that a claimant who had paid a premium for a fire and insurance policy, which was voidable because his insurance broker had failed to disclose material facts, had suffered immediate damage when he entered into the policy. Hobhouse LJ summarised the authorities noted above, and said that they showed that the cause of action in tort accrued when the claimant acted upon the relevant advice to his detriment, and failed to get that to which he was entitled.[8] He was less well off than he would have been if the defendant had not been negligent. He paid his renewal premium without getting in return a binding contract of indemnity from the insurance company, so he had acted to his detriment at that point. The fact that the nature and scope of the consequences of that negligence were dependent upon subsequent events and contingencies made no difference.

94. In contrast to these authorities, if the liability that the claimant incurs as a result of the negligence is properly described as contingent, the cause of action may accrue at a later date. Thus in *Law Society v Sephton & Co* [2006] UKHL 22; [2006] 2 A.C. 543, it was found that the claimant Law Society's cause of action against a solicitor who had misappropriated large sums of money from his client account was not statute-barred. Compensation had been paid out by the Law Society to clients who had been defrauded by the solicitor, but only when those clients had made claims in the prescribed form to the Solicitor's Compensation Fund. It was held that, by virtue of the terms of the Fund and its Rules, the solicitor's misappropriations gave rise only to the possibility of a liability on the Fund to pay out, contingent upon the misappropriation not being otherwise made good, and a claim being made in the proper form. The Rules said in terms that grants were wholly at the discretion of the council and that "no person has a right to a grant enforceable at law". Such a liability was contingent and was therefore not in itself actionable damage until the contingency occurred.

95. In *Axa Insurance Limited v Akther & Derby & Ors* [2009] EWCA Civ 1166; [2010] 1 W.L.R. 1662, the claims by the ATE insurer against the negligent solicitors were of two kinds: a failure properly to vet claims to ensure that the prospects of success were at least 51%, and a failure to conduct cases with reasonable care so as to notify the insurer

[8] In coming to this conclusion, Hobhouse LJ explained how and why the Australia and New Zealand cases to which I have referred above were of no applicability in English law, see page 192D.

when the success rate fell below 51%. This court concluded that it was not a *Sephton* case: the damage occurred long before the claims in question had failed. In respect of the vetting breaches, the insurer's book of business carried liabilities as soon as the policies had been underwritten, so as to incur liabilities in excess of those which would have been incurred if the vetting breaches had not occurred. In respect of the conduct breaches, this court found that damage occurred at the time that the breaches had taken place, in so far as the insurer was thereby exposed to larger liabilities then it would have been but for the failure to notify.

96. In her analysis, Arden LJ identified two potential rules. The first was "the damaged asset rule", where damage occurs (for the purposes of the commencement of the cause of action) at the time when the transaction is entered into and the asset – in that case the book of business – was reduced in value. The second was where there was a bilateral transaction under which the claimant should have received certain benefits, but owing to the negligence of his professional adviser, did not do so. That she called "the package of rights rule". These are useful categories, and have been used in subsequent cases, although they are not determinative of the underlying principle.

97. In *Linklaters Business Service Ltd v Sir Robert McAlpine Ltd (No. 2)* [2010] EWHC 2931 (TCC), Akenhead J was considering a claim made under collateral warranties against the main contractor (McAlpine) and the sub-contractor (How). How issued proceedings in tort against the relevant sub-sub-contractor, Southern. On the facts, the judge found that Southern had not been negligent and that, even if they had been, they would not have been liable to Linklaters, the employer, because the insulation with which they were concerned was simply a component of the chilled water pipework.

98. In those circumstances, all that Akenhead J said about the accrual of the cause of action in tort was *obiter*, a point he himself made at [109]. He considered the earliest at which the relevant loss can be said to have incurred was the time when the claim was first intimated [113]. He went on to say that, if Southern had been in material breach of a tortious duty, the claim was not barred by limitation. He said that this was because the duty of care was to guard How against the financial loss directly flowing from the breach of duty in question, and the reality was How would not in practice or in fact have incurred that loss prior to the time that the claim was intimated. He considered that this conclusion was consistent with *Sephton*. It does not appear that, in arriving at this conclusion, the judge was referred to or relied on the decision of the Court of Appeal in *Axa*.

99. Finally in this review of the principal authorities, there is the decision in *Co-Op v Birse,* to which I have already referred above. Stuart-Smith J held that Birse's cause of action in tort against its sub-contractors accrued when they suffered a genuine, as against a conditional or contingent, loss within the scope of the duty owed. He found that it could not be said that Birse suffered no loss until the owners either recovered judgment or there was a settlement. Birse's underlying liability to the owners was itself capable of amounting to loss, even if not yet admitted or established in litigation. He found that Birse had suffered a loss at the time it handed over the defectively built site because its accrued rights under the construction contract were less valuable than they seemed because of the potential liability. It was therefore a "damaged asset" in accordance with the first test articulated in *Axa.* Alternatively, if the sub-contractors had been liable in tort the result was that the benefits obtained by Birse in performance of those sub-

contracts would have been less valuable then they ought to have been and therefore they could be regarded as a devalued "package of rights".

100. I have set out Stuart-Smith J's summary at paragraph [63] above. His analysis of the "damaged asset rule" and the "package of rights" rule is at [43]-[55] of that judgment. I do not set out that analysis there, save to note three things.

101. First, at [46], Stuart-Smith J distinguished *Sephton* on the basis that in that case there was nothing more than a pure contingent liability and there was no other financially measurable detriment to the claimant's interest until the misappropriation had not been made good and the claim had been made in proper form against the fund. Secondly, in the same paragraph, Stuart-Smith J said that, in *Co-Op v Birse*, "there was a present liability which arose at the latest on practical completion". Ms Parkin submitted that, in consequence of *Pirelli*, that assertion was incorrect. Indeed that was part of her wider submission that *Co-Op v Birse* was wrongly decided. I do not agree. It is plain from the assumed facts and the judgment that everyone treated *Co-Op v Birse* as a case about economic loss, where questions of physical damage were entirely irrelevant. *Pirelli* was not even cited. Thirdly, at [57] Stuart-Smith J, having distinguished *Sephton* on the grounds that it was a case where notification was a prerequisite to actual, as opposed to purely contingent, liability, he respectfully questioned the correctness of the *obiter* observations of Akenhead J in *Linklaters* at [113]. For the reasons that he had given, he was not persuaded to follow them.

102. In my view, the essence of the non-construction authorities to which we were taken was that, again, knowledge of the existence of a cause of action having accrued was irrelevant. The cause of action accrued when the claimant did something irrevocable as a result of and in reliance upon the negligent advice, such as entering into the mortgage (*Forster v Outred)* or the contract of insurance (*Knapp*), or advancing monies in respect of inadequately vetted litigation (*Axa*). The only case where the cause of action accrues later was where the liability was truly contingent (*Sephton*). *Co-Op v Birse* is a good recent example of this line of authority and, what is more, it arose in a building context.

6.2 The Parties' Submissions

103. URS submitted that the judge ought to have found that BDW had not suffered actionable damage, so that they did not have a cause of action in tort against URS. They said that, in circumstances where there had been no physical damage but the defect was discovered subsequently, the cause of action accrued at the point at which the claimant "comes to know of the defect". They said that the fact that a building had suffered from a latent defect was not enough to constitute actionable damage in law. By the time BDW had discovered the defects in design, they no longer had a proprietary interest in the developments, having sold for full value. There was therefore no actionable damage to complete a cause of action in tort.

104. BDW submitted on the wider issue to which Ground 2 relates that it was an unlikely proposition that the damages claimed were not recoverable in law, since the claim was for the cost of remedying URS' negligent design. As to the narrow point on accrual, BDW argued that the actionable damage occurred when the negligent design was incorporated into the as-built development (i.e. on practical completion). They submitted that neither party could suggest that there was no cause of action at all in respect of the relevant defects, and that, since the date of discovery was irrelevant in

law, the accrual of the cause of action must have occurred at practical completion. BDW said that this was the result of the application of *New Islington*, amongst others, but it was also the answer suggested by first principles.

6.3 Analysis

105. In my view, 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. It was a damaged asset, as per *Axa* and *Co-Op v Birse*. Their cause of action in tort was complete. There are a number of reasons for that conclusion.

a) The Irrelevance of Knowledge

106. The date of knowledge – the date when the claimant discovers the fact or facts that might cause him to make a claim – has never been the date in English law on which the cause of action in tort accrued. As Dyson J put it in *New Islington*, "the knowledge test has not been applied in English law as marking the date on which damage is first suffered for the purpose of completing a cause of action in negligence" [39]. That succinct summary of the law remains good today. It demonstrates the irrelevance of the claimant's knowledge to the accrual of the cause of action.

107. That was what *Pirelli* was all about. *Pirelli* was, if you like, the showdown between actionable damage occurring when a claimant did not know about it, and actionable damage only occurring when the claimant did know about it. The House of Lords overwhelmingly rejected the latter submission, and made plain that it was the former which was the applicable test in English law. Despite the opportunities, both in *Murphy* and other cases, for the House of Lords/Supreme Court to overrule *Pirelli*, they have not done so. Moreover, on this point, with the exception of the *obiter* remarks in *Abbott* (where the loss and knowledge conveniently coincided), I am unaware of any other suggestion that the knowledge test should somehow be promoted as having been the right answer all along.

108. Of course, it was rightly recognised that, in some circumstances, the result in *Pirelli* might have unfair consequences for claimants who might have had no reasonable way of discovering the damage caused by the defect. It was for that reason that Parliament passed the Latent Damage Act. In this way, the Latent Damage Act did not reverse the decision in *Pirelli* as to when the cause of action accrued; instead, the Act was based on the correctness of the decision in law, but sought to ameliorate its effect by extending the limitation period in certain circumstances.

109. If Ms Parkin was right, and the cause of action only accrued on the claimant's knowledge of the problem, limitation in this area could become more complicated than it is already and lead to the significantly later accrual of the cause of action. That would not only run counter to the purpose of the Latent Damage Act (which added a test of facts which "he might reasonably have been expected to acquire" in certain situations, because knowledge was otherwise irrelevant), but it could make it unworkable in practice. As Dyson J noted in *New Islington* at [44], it would (at the very least)

undermine the 15 year longstop period and the operation of sections 14A and 14B of the Limitation Act.

110. For all these reasons, I consider that the Latent Damage Act cannot be made consistent with the cause of action in tort accruing at the date of knowledge. That is because the Latent Damage Act was passed on the understanding that that was *not* the date when the cause of action accrued.

111. Ms Parkin placed considerable reliance on what Lord Keith said in *Murphy* at page 466 (paragraph [78] above) where he said that, if the claimants had discovered the defect before any damage had occurred "there would seem to be no good reason for holding that they would not have had a cause of action in tort at that stage without having to wait until some damage had occurred." She suggested that this passage should be read as Lord Keith saying that the cause of action accrued when the defect was discovered. I profoundly disagree. Lord Keith made no reference whatsoever in this passage to the accrual of a cause of action. All he was saying was that a claimant who had been provided with a defective design had a cause of action before there was any physical damage: in other words, the defective nature of the design might provide the necessary actionable damage. To that extent, therefore, the passage in *Murphy* supported Mr Hargreaves' position, not Ms Parkin's.

112. That leaves the Commonwealth and Hong Kong cases concerned with subsequent purchases of houses that are found out to have defective foundations: *Council of the Shire of Sutherland v Heyman, Invercargill* and *Bank of East Asia*. However, those cases are on different facts (they involved physical damage); they came from jurisdictions where different and in some respects wider duties in tort have been imposed; and the courts are not bound by (and have not followed) either *Pirelli* or *Murphy*. As Dyson J noted at [39] of *New Islington*, Deane J in *Sutherland* may have thought that the date of knowledge of the defect was a "preferable" approach in such cases, but that was not the English law.

113. For all those reasons, therefore, I reject Ms Parkin's submission that BDW's cause of action in tort against URS did not accrue until they discovered the defects in the structural design in 2019. There is no authority in English law that supports such a proposition.

b) The Potential Relevance of Physical Damage

114. Unlike the date of knowledge, which is irrelevant as a matter of law to the accrual of a cause of action in tort, the date when physical damage occurs in a defective building is a relevant date for that purpose. So in a straightforward case, where a defective design causes physical damage to the building, the date on which the physical damage occurs will be the date that the cause of action in tort accrues. That is what *Pirelli* decides.

115. It is fair to say that there are some difficulties with *Pirelli*. It was decided at a time when it was thought that, in the circumstances, physical damage was needed to complete the cause of action in tort against a professional, rather than the occurrence of economic loss. That misapprehension was corrected in *Murphy*. But another, more prosaic difficulty with *Pirelli* is that it seems to have been assumed that a defective design will inevitably give rise to physical damage. Save for the reference to buildings that may be 'doomed from the start', one looks in vain in the judgment of Lord Fraser to find any

sort of justification for that assumption. It does not seem to me to be a sound one. Take, for example, the design/specification defects which led to the tragedy at Grenfell Tower. One would not necessarily expect to see physical damage caused by the non-compliance of the cladding panels with the Building Regulations, but that did not mean that no cause of action had accrued to the owners of the building prior to the fire.

116. For these reasons, even in cases where there is physical damage, *Pirelli* needs careful consideration. But that need not trouble us in the present case because, as both parties agree, this is not a case of physical damage in any event. *Pirelli*, and all the other cases of physical damage, therefore have no application. This is, on any view, a case of economic loss.

c) The Application of the Approach in *New Islington*

117. So if the date of knowledge is irrelevant in law, and there is no physical damage, when did actionable damage occur and the cause of action for economic loss accrue? In my view, the answer is provided by the inherent defect cases, as analysed in the judgment of Dyson J in *New Islington.*

118. In *Tozer Kemsley*, decided at a time when physical damage was still thought to be required, Judge Stabb QC said that a building that had been defectively designed was a damaged building; a building was a manufactured thing and if it was unsuitable and defective when it was handed over the cause of action arose when the person acquired it in its defective state. In *London Congregational Union*, the result is explicable because it was decided before *Murphy*, so it was still thought physical damage was a necessary ingredient of the tortious claim. Furthermore, I consider that Sir Denys Buckley's dissenting judgment in *London Congregational Union* is much closer to the modern approach to such claims. He concluded that the cause of action accrued on practical completion.

119. In *New Islington* itself, Dyson J held that because, following *Murphy*, the case was to be viewed as one of economic loss, the claimants suffered damage at the latest when the buildings were handed over with their defective sound insulation specification. He concluded that a finding that the cause of action in negligence accrued at the latest at the date of practical completion followed from an application of *Pirelli* as it was interpreted in the *London Congregational Union* case and was analogous to *Tozer Kemsley*. In neither of those cases was it necessary to identify a date when the occupant actually suffered from the defect. He said "it is the building that suffers from the defect and that is what is required to enable the owner to complete his cause of action in negligence" (at [41]).

120. *Tozer Kemsley* and *New Islington*, as well as *London Congregational Union*, were all cases in which there was some debate as to whether "the damaging consequences of the defect" were immediately effective. Ms Parkin relied on that to suggest that none of these cases was applicable here because, although the design was defective and rendered the building dangerous, there were no damaging consequences of the dangerous design. I do not accept that submission for three reasons.

121. First, I am not persuaded that the law requires the additional complication of a requirement that where there is no physical damage, there still needs to be 'damaging consequences of the defect'. It is enough that there is actionable damage in order to

found the cause of action; any gloss is to be avoided. Secondly, I consider that this is again a throw-back to the time when it was thought that physical damage was necessary to complete the cause of action in tort, and we now know that that is not the case. But thirdly and in any event, the judge found that there were 'damaging consequences' of the deficient design which had an immediate effect, namely that the buildings were rendered dangerous and unsafe: see [13] and [21]. I agree. There was an existing risk to the health and safety of the residents. Again, the fact that this situation was not known did not prevent the accrual of the cause of action for economic loss.

122. The application of the judgment in *New Islington* to the present case does not end there. At [43]-[45], Dyson J set out what he would have found if he was not bound by *Pirelli*. He considered the different approaches, including discoverability, and explained how and why – regardless of *Pirelli* - he rejected knowledge as the operative test. He went on to conclude instead that the claimants had suffered economic loss when the chimney was constructed to the defective design. He said that one advantage of that would be to bring the defective building cases into line with other cases involving latent defects resulting from negligent advice. So, of the two approaches adumbrated by Deane J in *Shire of Sutherland*, Dyson J would have adopted the first of the two approaches (time of acquisition of the property), not the second (date of knowledge). I respectfully agree with, and cannot improve upon, that analysis.

123. In her written submissions, Ms Parkin suggested that the judge had wrongly elided latent defects with latent damage, which was contrary to *Pirelli* and *Ketteman*. Not only is that wrong on the judge's analysis, but it ignores *Murphy* altogether, and takes no account of the judgment and approach in *New Islington*. It is trite law that a defect in a building is actionable without physical damage: you do not need to wait for the building to collapse to have a cause of action in tort.

124. Accordingly, I consider that, whichever approach is taken, the analysis of Dyson J in *New Islington* is of direct application to the present case. It explains, by reference to the authorities, how and why BDW's cause of action in tort in this case accrued when the building was practically completed in accordance with the negligent design.

d) "Doomed From The Start"

125. It is appropriate, perhaps, to say something about Lord Fraser's concept of a defect that was so gross that the building was doomed from the start. This was not a concept which either counsel had raised before the judge, for the very good reason that, following *Ketteman*,[9] it is not a concept that has received any judicial traction at all. But I am not aware of any case in which, following the adjustment of the law in *Murphy*, the idea has been reconsidered. It was for that reason that I raised it with counsel in the present appeal.

126. As I have said, the problem with *Pirelli* was that it was decided at a time when it was thought to be fundamental to categorise the damage as physical damage. It is plain that Lord Fraser was aware of the limitations of that; that there may be cases in which, regardless of the manifestation of physical damage, the defect rendered the building

[9] With respect to Lord Keith, he dismisses the "doomed from the start" argument with precious little analysis. I also note that *Chelmsford District Council v TJ Evers*, referred to in paragraph [85] above, was not apparently cited to the House of Lords.

doomed from the start (so that, by implication, the cause of action accrued from the start, namely at practical completion). His observation was at least a recognition that, even in a world where physical damage was regarded as a critical component of a cause of action, there may be exceptions.

127. I therefore wonder whether, in the post-*Murphy* world, where physical damage is not required and it is quite appropriate in this sort of case to advance a claim for economic loss, what Lord Fraser said in *Pirelli* about buildings being "doomed from the start" might have some resonance. Take the present case. On the assumed facts, the structural design was so defective that the buildings were rendered dangerous and indeed required the evacuation of some of the tenants before extensive remedial works were carried out. As a matter of ordinary English, it seems to me that that suggests a building that is "doomed from the start".

128. I make plain that this is not a significant part of my decision, nor is it one of the principal reasons why I consider the approach in *New Islington* to be correct. But it may be said to provide a modicum of support for that approach.

e) Would Such a Result be in Accordance with General Principles?

129. It is sensible now to pause and to see if the conclusion that I have reached is in accordance with general principle. I consider that it is. In *Nykredit v Edward Erdman (No.2)* [1997] 1 W.L.R. 1627 at page 1633D, Lord Nicholls said:

> "Within the bounds of sense and reasonableness the policy of the law should be to advance, rather than retard, the accrual of a cause of action. This is especially so if the law provides parallel causes of action in contract and in tort in respect of the same conduct. The disparity between the time and these parallel causes of action should be smaller, rather than greater."

130. In my view, the conclusion that the cause of action in tort against a design professional (in a case where there is no physical damage) accrued on practical completion of the building achieves both of these objectives. Accrual at practical completion is the most advanced possible date: accrual on discovery could be so retarded that it might regularly trigger the 15 year longstop date in sections 14A and 14B of the Limitation Act. Furthermore, the cause of action in contract would have occurred on breach and, in construction cases, this is generally taken to be on practical completion at the latest, when any design defect became irremediable: see *Pearson Education Ltd v The Charter Partnership Ltd* [2007] EWCA Civ 130; [2007] B.L.R. 324 at [55]; *Swansea Stadium Management Co Ltd v Swansea City and County Council* [2018] EWHC 2192 (TCC), [2019] P.N.L.R. 4.[10] Not only would my conclusion make the accrual of the cause of action the same in this sort of claim in negligence as for a claim in contract, it would also make the accrual of the cause of action in tort the same as that expressly identified in Section 1(5) of the DPA (see paragraph [88] above).

f) Would Such a Result be in Accordance with the Non-Construction Cases?

[10] In *Cameron Taylor Consulting Ltd v BDW Trading Ltd* [2022] EWCA Civ 31; [2022] P.N.L.R 11 the cause of action was found to have accrued earlier than practical completion, when the drawings containing the defective design were issued to the contractor for construction purposes.

131. As I have said, I am not persuaded that the accrual of a cause of action in tort against a professional in a case involving a building should be the subject of special or particular rules. The reason for treating them differently advanced by Ms Parkin, which derived some support from Lord Nicholls in *Bank of East Asia*, was that a building was a physical thing. But, with respect, so what? It seems to me that the same principles should apply to an engineer giving advice and designing a building, to a solicitor drawing up a will and a trust deed, and a broker advising on investments. Dyson J was of the same view: see [43] of *New Islington*.

132. I consider that the non-construction authorities strongly support the view that accrual of the cause of action in a case like this occurs on practical completion. The non-construction cases make plain that the relevant cause of action accrued at the outset, when the fateful step in reliance upon negligent professional advice was irrevocably taken, and not on the date that the error was discovered, or the losses crystallised into hard reality: see the analysis at paragraphs [88]-[101] above and in particular the cases of *Forster v Outred*, *Knapp* and *Axa*.

133. Finally, in *Co-Op v Birse* it was held that Birse suffered a loss at the time it handed over the defectively built site to the employer. That was because it accrued rights under the construction contract with the employer, which was an important asset in its business, were less valuable than they seemed because of the potential liability. Accordingly the cause of action against the sub-contractors accrued on completion. Stuart-Smith J applied both the "damaged asset rule" and the "package of rights" rule. I consider that Mr Hargreaves was right to say that what Stuart-Smith J said at [26] (paragraph [63] above) was directly applicable to this case.

134. Ms Parkin's response was to say that *Co-Op v Birse* was wrongly decided. I disagree. It seems to me an application of basic principles to the liabilities in tort of a main contractor and a sub-contractor. I have already addressed and rejected her arguments about the alleged discrepancy between *Co-Op v Birse* and *Pirelli* (see paragraph [101] above).

135. Ms Parkin also relied on *Sephton* and what Akenhead J said about it in *Linklaters*. She said that those cases provided support for the proposition that the cause of action accrued when the third party made claims, and not earlier. In my view, *Sephton* was a very different situation. On the facts of that case, it was found that the cause of action did not accrue until claims were made by former clients under the Solicitors' Compensation fund. But that was unsurprising, given that the rules of the fund said in terms that "no person has a right to a grant enforceable at law". Thus the payments out were entirely at the discretion of the Law Society and no liability could arise until they paid out. That was properly a contingent liability and no actionable damage could have arisen before there was a claim under the Fund.

136. It is unnecessary to deal in detail with *Linklaters*. What the judge said there was expressly *obiter dicta*. Furthermore, neither Stuart-Smith J nor subsequent judges[11] have followed what Akenhead J said in that case: Stuart-Smith J's reasons for departing from it in *Co-Op v Birse* at [57] are clear and I respectfully agree with them. To be fair

[11] See, by way of example, *Interface Europe Ltd v Premier Hank Dyers Ltd* [2014] EWHC 2610 (QB) at [108] where the judge said that *Linklaters* could not be reconciled with *Co-op v Birse* and that he preferred the reasoning in the latter.

to Akenhead J, it does not appear that *Axa*, and a number of the other cases which I have cited above, were cited to him.

137. In those circumstances, therefore, I conclude that the non-construction cases confirm and support the view that I have reached as to the accrual of BDW's cause of action in tort. Of the two cases in particular relied on by Ms Parkin, *Sephton* is readily distinguishable and the relevant passage in *Linklaters* is *obiter* and, in my view, incorrect.

138. For all those reasons, therefore, I accept BDW'S primary case as to the accrual of its cause of action in tort. I would therefore dismiss Ground 2 of the substantive appeal.

6.4 BDW's Alternative Cases

139. In the circumstances it is strictly unnecessary to deal with the other alternatives. I therefore confine myself to some very brief observations.

140. BDW's secondary case is that the cause of action accrued when the apartments and/or buildings that made up the development were transferred to the purchasers or the new long lease holders, and liabilities were incurred as a result. I can see that, on one view, that might be said to be consistent with *Co-Op v Birse*. But it would not be in accordance with the authorities identified in paragraphs [84]-[88] above. It would be inconsistent with the accrual of the cause of action in contract. It would be inconsistent with the accrual of the cause of action under the DPA. And it would also be messy and impractical, because it would mean that, in a block of a hundred apartments, the cause of action would only accrue on sale, and those might be on very different dates. They might be random, wholly outside the parties' control. There is no authority for the proposition that a claim against a construction professional accrues when the relevant building was sold.[12]

141. BDW's tertiary case is that the cause of action accrued when it was discovered. That was essentially what Ms Parkin argued, with the twist that she said that, at that point, because they no longer owned the building, BDW did not have a cause of action. For the reasons I have explained, I reject BDW's tertiary case. That depends on knowledge which has never been the test in English law for the accrual of a cause of action.

6.5 Summary on Ground 2

142. For the reasons set out above, I would dismiss Ground 2 of the substantive appeal. The judge was right to find that the cause of action accrued, at the latest, on practical completion. That was at a time when the developments were owned by BDW, and so there is no reason in law not to conclude that they had a completed cause of action in tort against URS at that stage.

7. URS' APPLICATION TO STRIKE OUT (GROUND 3 OF THE SUBSTANTIVE APPEAL)

143. Ground 3 of the substantive appeal only arises if URS had been successful on Grounds 1 and 2. Since, if my Ladies agree, both those Grounds fail, it is unnecessary to consider

[12] That might be the date that the loss crystallises, and if there is no diminution in value and no remedial work, there could be 'no loss' arguments, but that is another point and does not arise here (see paragraph [52] above).

further the possible striking out of BDW's claim. In consequence, it is also unnecessary to deal with Ms Parkin's argument that, pursuant to s.135(6) of the BSA 2022, all of the amendments failed *in limine* because the action should be taken to have been struck out in October 2021. It follows from what I have already said that, in my view, the judge was right not to strike out the action. That therefore brings us to the amendment appeal.

8. THE AMENDMENTS GENERALLY

8.1 The Nature of the Amendments

144. As noted above, after permission to make the substantive appeal had been granted, BDW sought permission to amend their Particulars of Claim and their Reply. Permission was granted by the deputy judge and that permission is now the subject of the amendment appeal.

145. The amendments to the Particulars of Claim included a certain amount of tidying-up and the deletion of the claim at paragraph 48.7 which the judge said was irrecoverable. The controversial amendments to the Particulars of Claim include, in particular:

(a) Paragraph 12A, which makes a claim pursuant to s.1(1) of the DPA;

(b) Paragraph 46A, which alleges a breach of the duty owed under s.1(1) of the DPA;

(c) Wholesale amendments to paragraph 49 and the addition of paragraphs 49A and 49B, which set out a claim pursuant to s.1 of the CL(C). This new claim for a contribution alleges that both BDW and URS were liable to those with an interest in the dwellings (principally the purchasers) which comprised the two developments and were liable for the damage suffered by them as a result.

146. The amendments to the Reply add in references to the claims under the DPA and contribution and make express reference to the extended limitation periods for claims arising as a result of s.135 of the BSA.

8.2 URS' Threshold Objections

147. Ms Parkin advanced what can properly be described as two threshold objections to the amendments. The first is that the judge applied the wrong test (or, if he had the right test in mind, he misapplied it) in allowing the amendments and saying that the points of law were to be determined at trial. She said that the judge should have, as she put it, "grasped the nettle" and decided the points of law then and there. In her oral submissions in reply, in answer to a question from me, Ms Parkin said that, where amendments give rise to potential limitation disputes, it was always necessary for the court to determine when the cause of action accrued.

148. Ms Parkin's second threshold objection was that the new claim under the DPA was not only inherently bad, but could not rely on the extended limitation periods in the BSA because that Act did not apply to parties involved in ongoing court proceedings. She did not make the same point in the same way about the new claim for a contribution under the CL(C); there her primary argument was that, because there had been no claim by a third party against BDW, no claim for a contribution had arisen. However, I

address the particular arguments as to the limitation position in respect of the contribution claim in Section 11 below.

149. It is convenient to take these two threshold points first.

8.3 Did the Deputy Judge Apply the Wrong Test?

150. If an objection to an amendment raises a short point of law, then it should be determined at the time of the amendment application: see *Easyair Ltd v Opal Telecom Ltd* [2009] EWHC 339 (Ch), *Elite Property Holdings Ltd & Anr v Barclays Bank PLC* [2019] EWCA Civ 204 and *Kawasaki Kisen Kaisha Ltd v James Kemball Ltd* [2021] EWCA Civ 33; [2021] 3 All E.R. 978. In addition, if there is an application for an amendment and/or the substitution of parties following the possible expiry of a relevant limitation period, there is a slightly different balance to be struck: if *the party opposing the amendment* can show that it was reasonably arguable that the new claim introduced by the amendment was statute-barred, it will not be permitted: see *Cameron Taylor Consulting Ltd v BDW Trading Ltd* [2022] EWCA Civ 31 at [38].

151. I deal with that second point first. I do not accept Ms Parkin's submission in reply that the test applicable to amendments which are potentially outside the limitation period has any relevance to the amendment appeal in this case. It is not said that the claim for contribution is statute-barred: on the contrary, it is said not yet to have arisen. Neither is it said that the claim under the DPA is statute-barred; this time, the argument is that the longer limitation periods permitted by the BSA do not apply because URS are a party to ongoing litigation. If URS are wrong about that, the BSA will apply to this case, subject to arguments about the breach of URS' Convention Rights (preserved by s.135(5)), which Ms Parkin accepts must await the trial.

152. That leaves the application to amend and the test to be applied. In my view, the deputy judge correctly described the test as one of reasonable arguability: did the amendments have some prospects of success? He concluded that, in general terms, they did, and he declined to decide the specific points of law raised by Ms Parkin on the basis they were not suitable for summary determination.

153. In my view, the deputy judge's approach cannot be criticised. The points of law raised by URS could not be described as short points of law of the type identified in *Easyair* and the other authorities referred to above. The deputy judge had to form a view about that and exercise his discretion as to whether to decide the points or leave them to trial. He chose the latter. That was a classic case management decision of the sort that civil judges make every day. The deputy judge had to exercise his discretion and, having concluded that the new claims had a reasonable prospect of success, he declined to go further into the various issues of law. Having spent a not insignificant part of this three-day appeal listening to those same arguments of law, I have considerable sympathy with that approach. On any view, it was an approach that was open to him.

154. On one view, that is the end of the amendment appeal. The judge adopted the correct test and was entitled to reach the view that he did. However, in deference to leading counsel, who deployed all of the relevant points before us, I consider that it would be wrong not to go on and address the substantive points. Accordingly, I go on in Sections 9 and 10 below to deal in detail with the substantive objections raised by URS, in respect of both the claim under the DPA and the claim for a contribution. However, the

analysis under the DPA is only relevant if Ms Parkin is wrong to say that the new limitation periods introduced by the BSA, which have prompted the new claims under the DPA, are not available to BDW. I deal with that second threshold point under the next heading of 'Retrospectivity'.

8.4 Retrospectivity

155. Section 135 of the BSA provides as follows:

> "**135 Limitation periods**
>
> (1) After section 4A of the Limitation Act 1980 insert—
>
> "**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."
> (2) In section 1(5) of the Defective Premises Act 1972, for "the Limitation Act 1939, the Law Reform (Limitation of Actions, &c.) Act 1954 and the Limitation Act 1963" substitute "the Limitation Act 1980".
> (3) The amendment made by subsection (1) in relation to an action by virtue of section 1 of the Defective Premises Act 1972 is to be treated as always having been in force.
> (4) In a case where—
> (a) by virtue of section 1 of the Defective Premises Act 1972 a person became entitled, before the day on which this section came into force, to bring an action against any other person, and
> (b) the period of 30 years from the date on which the right of action accrued expires in the initial period, section 4B of the Limitation Act 1980 (inserted by subsection (1)) has effect as if it provided that the action may not be brought after the end of the initial period.
> (5) Where an action is brought that, but for subsection (3), would have been barred by the Limitation Act 1980, a court hearing the action must dismiss it in relation to any defendant if satisfied that it is necessary to do so to avoid a breach of that defendant's Convention rights.
> (6) Nothing in this section applies in relation to a claim which, before this section came into force, was settled by agreement between the parties or finally

> determined by a court or arbitration (whether on the basis of limitation or otherwise).
> (7) In this section—
> "Convention rights" has the same meaning as in the Human Rights Act 1998;
> "the initial period" means the period of one year beginning with the day on which this section comes into force."

156. Ms Parkin accepted that s.135(3) was retrospective in its effect. Accordingly, the point she raised was a narrow one, although by no means unimportant: did the retrospectivity provided for by s.135(3) exclude the rights of parties who were involved in ongoing litigation? Were they exempt from the otherwise widely worded retrospectivity provision?

157. Ms Parkin's argument was that it would be wrong, as a matter of statutory interpretation, for such parties to find that, as she put it, "the rules of the game had changed". In answer to a question from my Lady, Lady Justice Asplin, Ms Parkin accepted that, if a party had not commenced proceedings for breach of the DPA before 28 June 2022 (when s.135 came into force), it would have 30 years to bring its claim, but if that party had already started its DPA proceedings by that day (even if they had only started the action the day or week before), it would only have the 6 years for breach of statutory duty provided for by s.9 of the Limitation Act.

158. Ms Parkin made a number of submissions in support of what seems, certainly at first blush, a rather odd result. She relied on what the House of Lords said in *Wilson v First County Trust Limited (No 2)* [2003] UKHL 40; [2004] 1 A.C. 816 about the need to construe any statute in a way that was compatible with Convention Rights. She referred to Lord Hope's speech at [98] and Lord Rodger's speech at [198], to the effect that there was a general presumption that legislation was not intended to operate retrospectively, such that accrued rights and the legal effect of past action should not be altered by subsequent legislation. Ms Parkin said that it could not have been Parliament's intention that the BSA changed the existing rights of the parties before the court. In addition, she argued that s.135 of the BSA "impliedly repealed" s.9 of the Limitation Act in so far as it affected claims under the DPA and that, in consequence, pursuant to s.16 of the Interpretation Act, where an Act repeals an enactment, the repeal does not, unless the contrary intention appears, "affect any right, privilege, obligation or liability acquired, accrued or incurred under that enactment."

159. In response, Mr Hargreaves argued that the words of s.135(3) of the BSA were clear. They mean what they say: that the new, longer limitation periods have always been in force. There was no carve-out or exception in relation to current proceedings. If that had been the intention, he submitted that various parts of s.135 would have had to have been rewritten. He said that all the authorities, including *Wilson*¸ recognised that Parliament might enact retrospective legislation, and he referred to the decision in *Secretary of State for the Home Department v R (Khadir)* [2003] EWCA Civ 475, in which similar words of a new statute (the new provision must be "treated as always having had effect") were applied retrospectively without qualification. In that case, for other reasons, the House of Lords declined to approve the Court of Appeal's decision in *Khadir* because they found that both Court of Appeal and the judge at first instance had been wrong to address the new legislation at all, and that the same position was provided by the old legislation.

160. In my view, Mr Hargreaves' interpretation of s.135 of the BSA was correct. The section was retrospective in effect and, although there was an exception to that addressing claims which had been finally determined or settled (s.135(6)), there was no exception relating to the rights of parties involved in ongoing litigation. There are a number of reasons for my conclusion.

161. The starting point – and, in some ways, the end point – must be the ordinary linguistic meaning of the words used in s.135(3): see Bennion, Bailey and Norbury on *Statutory Interpretation,* 8th Edition, at paragraph 10.4 and *R (Jackson) v Attorney General* [2005] UKHL 56; [2006] 1 A.C. 262 at [29]. The amendment which, by way of s.135 of the BSA, adds the extension to the relevant limitation position "is to be treated as always having been in force".

162. 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. Ms Parkin accepted that the provision plainly had retrospective effect. Thus the remarks of Lord Hope and Lord Rodger in *Wilson* are inapplicable, because this is a situation where Parliament plainly intended that the extended limitation periods would have retrospective effect.[13]

163. In those circumstances, I am not persuaded that *Khadir* adds very much to the argument. But it is not irrelevant that the Court of Appeal reached the same view in *Khadir,* where the wording was very similar ("the section shall be treated as always having had effect"). On one view, it might be said that the words of the BSA are even clearer.

164. Further, there is already an express carve-out. Although the longer periods are to be treated as if they had always been in force, that does not apply to a party who made a claim under the DPA which had been finally determined or settled before the BSA came into effect. Such a party cannot rely on the new limitation periods. In this way, Parliament turned its attention to whether the wide words of s.135(3) were to be the subject of any exceptions. It decided that there would be that single exception, but there was no reference to any other exception, or any reference to parties in ongoing proceedings. The absence of any such reference, in circumstances where there is an exception for those in a different category, is also fatal to Mr Parkin's submission.

165. In her written skeleton argument, Ms Parkin relied, amongst others, on the decision of the Privy Council in *Yew Bon Tew v Kenderaan Bass Mara* [1983] 1 A.C. 553. There, the Judicial Committee concluded that, where a defendant had acquired an entitlement to plead a time-bar, that entitlement constituted an accrued right and that the later legislation which provided for a longer limitation period was not to be construed retrospectively. The case was decided on the basis that where a statute was repealed, the repeal would not affect 'any right, privilege, obligation or liability' acquired under it. Ms Parkin said that this was authority for the proposition that an accrued right could not be taken away following the repeal of a statute.

166. I disagree. It depends on what the statute says. *Yew Bon Tew,* and the other authorities on which Ms Parkin relied, was an entirely different sort of case, because the statute

[13] This makes it unnecessary to review in any detail the other authorities referred to by URS at paragraph 39(a) of their skeleton argument; they all arise under different statutory provisions with different effects.

under consideration did not contain any retrospectivity provision. Those cases are of no application here, where there is a clear and widely drawn provision plainly designed to achieve retrospectivity.

167. Ms Parkin's argument on this point sought to rely on paragraphs 7.14 and 7.15 of Bennion: that a repeal of a statute cannot affect accrued rights. She said that the BSA involved the implied repeal of s.9 of the Limitation Act in respect of claims under the DPA, and that therefore URS' accrued right under that Act was preserved. But there has been no express repeal of s.9 and it is not for this court to suggest any sort of 'implied repeal' (whatever that might precisely mean). In any event, even if an implied repeal is assumed, the position would then be that s.135(3) applies to the present proceedings, because it is to be treated as "always having been in force". Thus, as a matter of statutory interpretation, the accrued right is no longer operative; indeed, on this analysis, the right had never even accrued, because the longer limitation periods have always been in force.

168. If Parliament had intended a carve-out to protect the position of parties in ongoing litigation, not only would they have said so, but such a provision would have been relatively easy to provide: the words "save for ongoing proceedings" might have been used in s.135(3). Other amendments would then have been necessary to s.135(4), (5) and (6). In each case, it would have been necessary to distinguish between claims commenced before this section came into force and subsequent claims. But no such provisions were included. In my view, therefore, the wide wording of s.135 and the narrowness of the express exception leave no room for the sort of implied exception URS seek to rely upon.

169. I should add that a carve-out for parties in current litigation, whose rights have not been finally determined or settled, would, in my view, have been unusual: we were not taken to any other legislation which had the same or a similar exception. It is also difficult to justify on policy grounds: Why, one might ask rhetorically, should a party who started an action promptly, before the BSA came into force, be disadvantaged, whilst a party who had sat on its hands could take advantage of the far longer limitation periods introduced by the BSA?

170. Contrary to Ms Parkin's submission, there is no clash with Article 6. URS' Convention Rights are preserved: see s.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 s.135(5). But that possibility has no effect on the clear intention of Parliament to make the BSA retrospective, without any qualification relating to ongoing proceedings.

171. In all the circumstances, therefore, I reject the retrospectivity challenge raised by URS. The claim under the DPA (subject to the points considered in Section 10 below) is open to BDW. I address the inter-relationship between the new claim for contribution, and the limitation position, in Section 10 below.

172. Having dealt with and rejected the two threshold arguments, I now turn to the particular amendments in respect of the DPA and the claim for contribution. This is on the assumption that, contrary to my primary view, the deputy judge was wrong not to

decide the points of law raised by Ms Parkin on behalf of URS, and that it now falls to this court to decide them.

9. THE PARTICULAR AMENDMENTS IN RESPECT OF THE DPA

173. Ms Parkin advanced two principal objections to these amendments. Her first was that a developer such as BDW was not a person to whom a duty was owed under the DPA. Her second was that BDW had not suffered any relevant loss, because they did not own the building by the time the defects were discovered and rectified.

174. Mr Hargreaves said that, as a matter of construction of the DPA, BDW were plainly owed a duty under s.1(1)(a). As to the loss point, he said that recoverability was not limited to those who owned the defective buildings at the time the remedial works were carried out.

175. The relevant part of the DPA is section 1. That provided as follows:

> "**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, as the case may be, 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.
> (4) A person who—
> (a) in the course of a business which consists of or includes providing or arranging for the provision of dwellings or installations in dwellings; or (b) in the exercise of a power of making such provision or arrangements conferred by or by virtue of any enactment; arranges for another to take on work for or in connection with the provision of a dwelling shall be treated for the purposes of this section as included among the persons who have taken on the work.
> (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, but if after that time a person who has done work for or in connection with the provision of the dwelling does further work to rectify the work he has already done, any such

> cause of action in respect of that further work shall be deemed for those purposes to have accrued at the time when the further work was finished."

176. Ms Parkin's primary objection that, as a developer, BDW were not owed any duty under the DPA by URS, came in two parts. The first was a submission that as a matter of interpretation, and by reference to the Law Commission Report which gave rise to the DPA, it was plain that s.1(1) of the DPA was intended to protect what she called lay purchasers of defective properties, and not commercial developers. The second objection was that, since BDW as a developer, plainly owed duties themselves to the subsequent purchasers under s.1(4) of the DPA, they could not also be owed a similar duty by URS.

177. For the reasons set out below, I do not accept that either objection is well-founded. I take the s.1(1) arguments first.

178. First, it seems to me to be clear from the words of the section that BDW were owed a duty by URS under s.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 s.1(1)(a). That is the straightforward grammatical meaning of the words used in s.1(1)(a).[14]

179. Secondly, there is nothing in the words of the DPA (whether in s.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 s.1(1)(b), the category of those to whom a duty is owed under s.1(1)(a) must be different, otherwise the sub-section would be otiose. Further, the purported distinction relied on by URS would be very unusual, and would be impossible to police in practice. There is no basis for introducing such a significant qualification into the interpretation of s.1(1) of the DPA when there are no words within the statute to justify it, and much to indicate that it is untenable.

180. Thirdly, there was a suggestion in Ms Parkin's written skeleton that URS did not owe a duty to BDW under s.1(1)(a) of the DPA because they were not providing individual dwellings, but an entire development (which contained a number of dwellings, common parts etc). I consider that argument to be unsustainable as a matter of common sense. It would be an unduly restrictive interpretation of the DPA. I also note that, in *Rendlesham Estate Plc & Ors v Barr Ltd* [2014] EWHC 3968 (TCC); [2015] 1 W.L.R. 3663, Edwards-Stuart J rejected a similar argument at [47]-[54]. There the argument was that the structure and common parts of both the blocks of flats in question was not work "in connection with the provision of a dwelling". He rejected that submission and found that even the common parts of one block was work done in connection with the provision of the dwellings in the other block.

181. Fourthly, Ms Parkin sought to rely on *Herons Court v Heronslea Limited & Ors* [2019] EWCA Civ 1423; [2019] 1 W.L.R. 5849, where Hamblen LJ (as he then was) observed that the absence of any previous claims against statutory inspectors under s.1 of the

[14] Again, therefore, the passage in Bennion cited at paragraph [161] above is of direct application.

DPA showed that such a claim was inherently unlikely. She argued that that reasoning applied by analogy to the absence of previous claims by developers against professionals under the same section. I do not consider that the analogy is apt, given that (i) the DPA has been significantly under-used in its lifetime so far; and (ii) unlike claims against inspectors (which cannot usually be made in contract, or tort following *Murphy*), claims by developers against professionals would be largely brought in contract or in tort. Since a claim under the DPA has a higher threshold anyway (see paragraph [187] below), the lack of such claims historically is unsurprising.

182. I consider that, on analysis, the decision in *Herons Court* supports BDW's position. Hamblen LJ said that s.1(1) applied to those who did work which positively contributed to the creation of the dwelling, including those, such as engineers and architects, who prescribed how the dwelling was to be created. That would therefore catch URS. At [40-41] he contrasted s.1(1) with s.1(4) which extended its ambit to developers. As he said, "they arrange for others to take on work but do not take on that work themselves. Special provision is therefore needed to ensure that s.1(1) applies to them". In my view, that confirms that URS owed the duty under s.1(1), amongst others, to BDW, whilst BDW themselves owed duties to the individual purchasers under s.1(4).

183. Fifthly, Ms Parkin relied on the Law Commission Report, because that made a number of references to individual purchasers. It was not clear how or why the Report was even admissible, given that the words of the DPA itself were free from ambiguity. But in my view, the Report did not assist her. Whilst purchasers were the primary category of people whom the Law Commission concluded required protection, their Report did not limit the proposed protection to that individual category of persons. On the contrary, as Mr Hargreaves demonstrated, there were plenty of references in the Report to commercial organisations, including developers.

184. Also in support of this submission, Ms Parkin argued that the DPA was an element of consumer protection and should therefore be focused on consumers rather than commercial organisations like BDW. That is superficially attractive but not justified on analysis. Of course, the DPA is conferring a particular consumer benefit (as noted by Hamblen LJ in *Herons Court*). But it is not conferring that benefit solely on what Ms Parkin called lay purchasers. Moreover, since most lay purchasers will, in the first instance be buying from a developer, it would be contrary to consumer protection principles to conclude that the developer was not owed the relevant duty by one of the key professionals responsible for the design and construction of the building, so could not play a part in any claims for redress. That would hinder consumer protection rather that enhance it.

185. Sixthly, Ms Parkin argued that s.6(3) may cut across its contractual rights and obligations to BDW, which suggested that no duty to BDW under s.1(1) of the DPA could arise. S.6(3) is the provision which renders void any terms of an agreement which purported to exclude or restrict the operation or provisions of the DPA. So Ms Parkin submitted that, if a professional owed a duty under the DPA to the developer, then any provisions in the contract by which the professional may have sought to limit or qualify his liability, or the loss recoverable, would be excluded. She said that this strongly suggested that the developer was not therefore owed the relevant duty under s.1(1).

186. I do not think that s.6(3) has the draconian effect for which Ms Parkin argued. In any event, the point was again irrelevant to the existence of URS' duty under s.1(1)(a). As

Mr Hargreaves pointed out, URS would probably be liable under the DPA to the subsequent purchasers in any event, and they could not rely on any such limitations or qualifications to defend themselves from those claims. It would therefore be consistent with that to find that they could not rely on such provisions against the developer. Ms Parkin suggested in reply that any such qualifications and limitations may still be relevant to the assessment of contribution, but if that was right, that only served to confirm that the duty owed to BDW under the DPA would not necessarily cut across URS' contractual obligations, because it would all be taken into account in the final assessment.

187. In any event, the test for liability under the DPA is fitness for habitation, which is a higher hurdle than is required for an ordinary claim for defects. It might be thought to be consistent with that higher threshold that, if it was crossed, the professional could not then hide behind contractual limitations and qualifications. Ms Parkin was dismissive of that argument, pointing out that, in *Rendlesham*, fitness for habitation was deemed to include defective shower trays. But as my Lady, Lady Justice King pointed out, if the absence of proper shower trays meant that the purchasers of a particular flat could not keep themselves clean, then that would properly be regarded as rendering the property unfit for habitation. That higher bar must therefore ameliorate the effect of s.6(3).

188. Finally, as I have indicated, the other limb of this element of URS' argument was that, as a developer, BDW were not themselves caught by s.1(1) but were plainly caught by s.1(4) – being a party who owed a duty to the purchasers – and therefore could not themselves be owed a duty under s.1(1) of the DPA. I do not accept that submission.

189. Assuming that BDW were liable to the purchasers under s.1(4), why would that mean that URS did not owe BDW a duty under s.1(1)? Just as in a contractual chain, where a main contractor owes duties to his employer, and is himself owed duties by his sub-contractors, it seems to me perfectly sensible for a developer to be owed duties under the DPA by those providing the services, but in turn to owe a statutory duty to those who buy the properties from him. There is nothing to say that the application of the DPA is in some way binary, such that if you owe a duty to X, you cannot yourself be owed a duty by Y.

190. Ms Parkin relied on the decision of Latham J (as he then was) in *Mirza v Bhandal* (unreported, 27 April 1999) in which the judge said that "a distinction is to be made between those who 'order the provision of a dwelling and those who take on work in connection with the provision of a dwelling'". But that was in the context of a dispute about whether the defendant was a developer or not. More importantly, whilst a distinction is inherent in the different sections of the DPA in any event, neither the DPA nor the judge in *Mirza* was suggesting that a developer could not owe a duty under s.1(4) and itself be owed a duty under s.1(1). The point did not arise in *Mirza*.

191. That leaves Ms Parkin's second objection, that BDW had no claim under the DPA because they sold the buildings after completion and therefore suffered no loss. In one sense, that is answered by my conclusions on the previous submission: since, as developers, BDW were both owed and themselves owed duties under the DPA, the sale of the buildings was irrelevant. They remained liable to the purchasers after sale (a liability expressly preserved by s.3) and so would suffer loss, which they could seek to recover by way of their own claims against URS under the DPA.

192. The submission is also wrong in law: recoverability of damages under the DPA is not linked to or limited by property ownership. In *Bayoumi v Protim Services Limited* [1997] P.N.L.R. 189, this court emphasised that the claimant was entitled to recover "such damage as he may prove he suffered by reason of the wording of section 1" (at page 192E). They emphasised that the short title of the DPA was to impose duties and amend the law "as to liability for injury or damage caused to persons through defects in the state of premises". There was no reference to a requirement of ownership. Similarity, in *Harrison v Shepherd Homes Limited* [2011] EWHC 1811 (TCC); (2011) 27 Const.L.J. 709, Ramsey J held at [208]-[212] that there is an equivalence between the measure of loss for breach of contract and the applicable measure under the DPA, namely damages to put the claimant in the position he or she would have been in if the breach had not occurred. I therefore consider that Mr Hargreaves was right to say at paragraph 98 of his skeleton argument that, in consequence, the consequence of the breach was that the buildings were unfit for habitation, that such damage was not too remote, and that it was reasonably foreseeable that the remedial works would be carried out.

193. For all these reasons, therefore, I have concluded that BDW have, as a matter of law, a valid claim against URS under s.1(1)(a) of the DPA. That claim is subject to the longer limitation periods provided by the BSA. Of course, whether or not that claim can be made out on the facts will be a matter for the trial.

10. THE PARTICULAR AMENDMENTS IN RESPECT OF THE CL(C)

10.1 The Parties' Submissions

194. Ms Parkin's principal objection to the amendments which added the claim for contribution under the CL(C) was that no claim had been made or intimated by any third parties (in effect, the individual purchasers) against BDW. She said that, in the absence of such claims, BDW had no legal right to make a claim for contribution against URS. Thus, in contrast to her other arguments that touched on limitation, in this instance Ms Parkin was suggesting that the claim for contribution was premature because the cause of action in respect of a contribution had not arisen (although she had other arguments that, if it had, it was flawed because it was based on claims that were statute-barred).

195. In response, Mr Hargreaves said that there was nothing in the CL(C) that suggested that the receipt of a claim from a third party was in some way a condition precedent to the making of a claim under the CL(C). Moreover, he argued that such a stipulation would lead to a very curious result, where a pro-active party who undertook the necessary remedial works to avoid receiving claims from the purchasers would not have a cause of action, whilst a developer who sat on his hands until such claims had been received would have a claim.

10.2 The Civil Liability (Contribution) Act 1978: Interpretation and Analysis

196. It is necessary to start with the terms of the CL(C). The Act is short, although the problems to which it has given rise are legion. Section 1 provides as follows:

> "**1 Entitlement to contribution.**

> (1) Subject to the following provisions of this section, any person liable in respect of any damage suffered by another person may recover contribution from any other person liable in respect of the same damage (whether jointly with him or otherwise).
> (2) A person shall be entitled to recover contribution by virtue of subsection (1) above notwithstanding that he has ceased to be liable in respect of the damage in question since the time when the damage occurred, provided that he was so liable immediately before he made or was ordered or agreed to make the payment in respect of which the contribution is sought.
> (3) A person shall be liable to make contribution by virtue of subsection (1) above notwithstanding that he has ceased to be liable in respect of the damage in question since the time when the damage occurred, unless he ceased to be liable by virtue of the expiry of a period of limitation or prescription which extinguished the right on which the claim against him in respect of the damage was based.
> (4) A person who has made or agreed to make any payment in bona fide settlement or compromise of any claim made against him in respect of any damage (including a payment into court which has been accepted) shall be entitled to recover contribution in accordance with this section without regard to whether or not he himself is or ever was liable in respect of the damage, provided, however, that he would have been liable assuming that the factual basis of the claim against him could be established.
> (5) A judgment given in any action brought in any part of the United Kingdom by or on behalf of the person who suffered the damage in question against any person from whom contribution is sought under this section shall be conclusive in the proceedings for contribution as to any issue determined by that judgment in favour of the person from whom the contribution is sought.
> (6) References in this section to a person's liability in respect of any damage are references to any such liability which has been or could be established in an action brought against him in England and Wales by or on behalf of the person who suffered the damage; but it is immaterial whether any issue arising in any such action was or would be determined (in accordance with the rules of private international law) by reference to the law of a country outside England and Wales."

197. In *Baker & Davies PLC v Leslie Wilks Associates (A firm)* [2005] EWHC 1179 (TCC); [2006] P.N.L.R. 3, at [15] Judge Havery QC summarised those provisions in this way:

> "15…The primary provision giving rise to the right to claim contribution is section 1(1) of the 1978 Act. There is no suggestion there of any limit or restriction on the right of a person to claim contribution from another person liable in respect of the same damage. Subsections (2) to (4) of section 1 are designed not to restrict the right, but to remove restrictions or defences that might otherwise be raised. Section 10 of the Limitation Act 1980, albeit that it arises out of an enactment of the 1978 Act, is directed to time limitation and not to narrowing the nature of the right to contribution."

I respectfully agree with and adopt that analysis. The right to contribution is provided by s.1(1) and the later sub-sections are all addressing potential defences (see also the

fuller analysis of Sir Colin Rimer in *IMI PLC v Delta Ltd* [2016] EWCA Civ 773; [2017] Ch. 27 at [48]-[53]).

198. The example I will use for the remainder of this judgment is the situation where A (in this case, the individual purchasers) has a right to claim for a defective dwelling against B (in this case, BDW). B alleges that C (in this case, URS) is liable for the same damage and pleads a claim for contribution against C. 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?

199. In my view, it is not. There is nothing in s.1(1) which provides that B's right to claim contribution from C does not arise until there is a claim against B by A. Although Ms Parkin suggested that such a third-party claim was, in effect, a condition precedent for such liability to arise, the requirement for such a claim is not identified or even referred to in s.1(1).

200. Additional support for this interpretation can be found in other parts of s.1. First, s.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 s.1(1). That shows that it could easily have been included, had that been Parliament's intention.

201. Secondly, I note that s.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. The liability arises if it could be established: in other words, it is at least potentially notional or theoretical, in the sense that it need never actually be established by A. As Rix LJ put it in *Aer Lingus PLC v Gildacroft* [2006] EWCA Civ 4; [2006] 1 W.L.R. 1173, at [10], "the 1978 Act, which creates the right to contribution, is written in terms of the mere occurrence (or concurrence) of liability in respect of the same damage. There is no apparent need for that liability to have been established". B's right to claim a contribution can therefore anticipate the making of a claim by A against B and, in circumstances where B's liability has already been discharged, a notional liability is all that is required for B to seek a contribution from C. In this way, I consider that s.1(6) is directly contrary to Ms Parkin's interpretation of the CL(C).

202. 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 s.1(1)(a) 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).

203. I am also confirmed in that view by wider considerations. I have already referred at paragraph [197] above to the decision of Judge Havery in *Baker & Davies*. In

addressing s.10(3) and (4) of the Limitation Act 1980, which concern when the 2 year limitation period for contribution claims starts to run,[15] 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 [30] – [32]).

204. 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. On that basis, I consider that this case is on all fours with *Baker & Davies*, with the one difference being that, in that case, there was a formal settlement agreement between A and B in respect of the remedial works. Can it really be suggested that the absence of a formal settlement agreement, means that the result in *Baker & Davies* should not be the same in the present case? In my view, the answer is No. Furthermore, on one view, the fact that the purchasers agreed to be decanted from their apartments; allowed extensive remedial works to be carried out in and around the apartments; and then moved back, all at the expense of BDW, could be construed as an implied agreement for those works to be carried out at BDW's expense, even if the entirety of the purchasers' claims had not yet been formally settled. The absence of a piece of paper is, or should be, of no account.

205. No policy reasons were put forward that could justify why it is sensible to make B wait for a formal claim from A before having the legal right to claim a contribution from C, and as I have explained, there seem to me to be good policy reasons why that would be a regressive approach.

206. For these reasons, therefore, I conclude that, as a matter of statutory interpretation, and as a matter of policy, there is no requirement or obligation for A to serve some sort of formal claim on B before C's liability to make a contribution to B arises. The question then becomes whether there is any binding authority which requires a contrary conclusion.

207. Neither party was able to identify any binding authority (that is to say, a decision of this court or the Supreme Court) which sets out any such requirement. Ms Parkin referred to the predecessor legislation, Law Reform (Married Women and Tortfeasors) Act 1935 and the cases interpreting that Act, such as *George Wimpey & Co Ltd. v British Overseas Airways Corp*. [1953] 2 Q.B. 501; [1953] 3 W.L.R. 553, in which liability was a much stricter concept: you needed judgment, or settlement or an admission. But one of the main purposes of the CL(C) was to do away with those requirements: hence sub-sections 1(2) and following. So that line of authorities was of no assistance.

208. During the hearing, although it was not identified in her skeleton argument, Ms Parkin referred to and sought to rely on the decision of Leggatt J (as he then was) in *Kazakhstan Kagzy PLC & Others v Zhunus & Others* [2016] EWHC 1048 (Comm); [2018] 4 W.L.R. 86 ("*Kazakhstan*").

209. *Kazakhstan* was a case where a group of companies sued the chairman of the board, the chief executive officer and the finance director, alleging that they had dishonestly

[15] I deal with the arguments about those provisions at paragraphs [213-219] below.

caused the claimant companies to enter into transactions in which large sums of money were paid to entities owned or controlled by the defendants and which had caused the claimants to incur substantial financial losses. The first defendant, the chairman of the board, settled the claims against him, but the other two defendants sought permission to bring a claim under the CL(C) against him for contribution. The second defendant also sought a worldwide freezing order against the first defendant.

210. The applications were refused. The principal reason for that was the absence of a properly pleaded case in the contribution notice: see [38]. When, in the course of his *obiter* remarks, Leggatt J discussed when a cause of action accrued for contribution, he rejected the suggestion that s.10 of the Limitation Act 1980 (the 2 year period) was necessarily relevant. He said that was concerned solely with when a right to recover contribution was triggered for the purposes of limitation and, whilst that date might turn out to coincide with the date when a cause of action accrues, he could see no reason in principle why the date should necessarily be the same (at [64]). Thereafter, he focused on when a cause of action accrued for the purposes of a claim for a freezing injunction, in circumstances where all relevant parties were before the court.

211. Ms Parkin referred to [66] of Leggatt J's judgment, in which he said that, on the facts of that case, D1's entitlement to commence proceedings to claim contribution arose pursuant to CPR 20.6(1), which permits a defendant who has filed an acknowledgement of service or a defence to make an additional claim for a contribution against a person who is already a party to the proceedings. She therefore said that, by analogy, the cause of action for a contribution did not accrue until B was in the equivalent position of a defendant and thus had a right to bring a Part 20 claim against C. That therefore meant that there had to be a pre-existing claim by A against B for that entitlement to arise.

212. In my view, Leggatt J's *obiter* remarks were concerned with the particular facts of that case and the right to claim contribution as between already-named defendants.[16] He cannot have been intending to refer to the accrual of a cause of action for contribution generally because, as Mr Hargreaves correctly submitted, that must be the sole function of s.1(1) of the CL(C), not the CPR. Accordingly, I do not consider that there is anything in the decision in *Kazakhstan* which supported Ms Parkin's proposition that, as a matter of principle, a claim or intimation of a claim by A against B is a condition precedent for the accrual of B's cause of action against C for a contribution. For the reasons I have explained, I do not accept that there is any such principle.

10.3 The Limitation Act 1980 and The Building Safety Act 2022

213. A number of references were made in the submissions to s.10 of the Limitation Act 1980. That is designed to provide a cut-off date for limitation purposes in contribution claims: s.10 provides that a party seeking contribution must make the claim within 2 years of the date of judgment or arbitral award, and if there are no such proceedings, the 2 year period starts to run from the date of the final settlement of the underlying claim (as explained by Judge Havery in *Baker & Davies*, referred to above).That is not addressing when the cause of action for contribution might accrue in the first place. I have referred above to what Leggatt J said about these provisions of the Limitation Act in *Kazakhstan*. I respectfully agree with him: the Limitation Act is dealing with when

[16] I note that the decision was overturned by the Court of Appeal in any event (see [2016] EWCA Civ 1036; [2017] 1 W.L.R. 1360) although these passages were not criticised.

a contribution claim must be brought for the purposes of limitation; it is not addressing the accrual of the cause of action for a contribution. The provisions do not therefore indicate when the right to claim a contribution first arises.

214. That leaves one final, but not unimportant, issue concerned with the inter-relationship between the claim for contribution and the relevant limitation arguments. Ms Parkin submitted that any liability on the part of BDW to the individual purchasers would have to be assessed as at 2020, when the payments in kind were made (i.e. the carrying out of the remedial works). At that time, she submitted, not only had no claims been made by the individual purchasers, but even if they had been made, they would have been statute-barred. In support of that submission, she relied on s.1(2) of the CL(C) to say that there could be no claim for contribution here, because BDW had ceased to be liable to the individual purchasers by 2020, when the payments in kind were made.

215. This argument gains some additional support from the unusual nature of s.1(2) which suggests that the cessation of liability could occur as a result of a limitation defence. In other words, the ordinary position in respect of limitation - that it is a procedural bar but does not affect liability - is reversed by s.1(2) and it becomes a negator of liability: see also *IMI* at [40].

216. However, I have concluded that, on analysis, this submission is not well-founded. It is necessary to take the points in stages.

217. First, the law is that the liability under s.1(1) of B to A in a contribution claim is assessed when the contribution is sought, which would in practical terms be at the time of the trial: see *Co-Operative Retail Services Ltd v Taylor Young Partnership Ltd* [2002] UKHL 17; [2002] 1 W.L.R. 1419 at [58]. In the present case, when BDW's liability to the individual purchasers is assessed at the trial in, say, 2024, it will be at a time when the BSA is in force, the relevant limitation period is 30 years, and the individual purchasers' claims against BDW would not be statute barred.

218. It seems to me that, however you analyse it, s.1(2) of the CL(C) is not engaged. That is either because, when liability is assessed at the trial, the relevant statute for limitation purposes is the BSA, so there would be no question of the claim being statue-barred. But if that is wrong, then it seems to me that BDW are entitled to rely on the retrospectivity provision at s.135(3) of the BSA to achieve the same result.

219. In some ways, therefore, Ms Parkin's argument, when analysed out, is a re-run of her argument about the retrospectivity of s.135(3) and her submission that it excluded the accrued rights of parties to ongoing litigation. For the reasons that I have set out in Section 9 above, I have rejected that submission. It seems to me that precisely the same points apply in relation to the argument that there was a time when, on her case, the claims against BDW by the individual purchasers were time-barred, so that no liability on the part of BDW arose under the CL(C). The BSA was intended to be retrospective; the position of the parties in the ongoing litigation is not an exception to that; and so the longer limitation periods have always been in force. So on that analysis too, s.1(2) is not engaged, and there was never a time when BDW ceased to be liable to the third parties. Nothing in Assumed Fact 9(b) can change that: it is an inevitable consequence of the BSA.

10.4 Summary

220. Accordingly, I consider that, provided that the three necessary ingredients of a contribution claim (paragraph [202] above) can be pleaded, B is entitled to make a claim for contribution against C, regardless of whether or not A has intimated any sort of claim against B. All those ingredients were in place here. BDW's claim for contribution was therefore properly added by way of amendment.

11. DISPOSAL

221. For the reasons that I have given, doubtless at much too great a length, I would dismiss the substantive appeal in respect of the judge's order on the Preliminary Issues, and I would also dismiss the amendments appeal against the orders made by the deputy judge in relation to the amendments.

LADY JUSTICE ASPLIN

222. I agree with my Lord, Lord Justice Coulson. I would dismiss the substantive appeal and the amendments appeal for the reasons he has given.

223. At the risk of lengthening this decision even further, I will add a few additional comments. First, I agree that Ms Parkin was wrong to describe the claims made at paragraphs 48.1 – 48.6 of the Particulars of Claim as claims for "reputational damage". They were conventional damages claims. Assumed Fact 11 stated that BDW had incurred those costs "to protect occupants against the danger presented by those defects". Furthermore, as the judge pointed out, this was not a voluntary assumption of responsibility case. It seems to me that to seek to characterise the damages as "reputational" is to seek to confuse their nature with what may have been one of BDW's motives in carrying out the works. As my Lord, Lord Justice Coulson points out, if the type of damage is recoverable in principle, BDW's motivation for doing the works is immaterial. To adopt such a characterisation in relation to damages of this type would be dangerous in the extreme. It would be contrary to public policy because it might dissuade a builder from rectifying defective work.

224. Secondly, I endorse my Lord, Lord Justice Coulson's conclusion at [105] that BDW's cause of action arose, at the latest, when the individual buildings were practically completed. That conclusion is in line with the non-construction cases such as *Forster v Outred* in which it was held that damage was suffered when Mrs Forster entered into the mortgage charging her farm, as a result of negligent advice. It seems to me that in just the same way, BDW suffered actionable loss as soon as practical completion occurred in relation to buildings which were structurally deficient. Such an approach is also consistent with the approach in *Co-Op v Birse*.

225. Thirdly, in relation to the amendment appeal and section 135(3) BSA, in particular, I agree that the natural and ordinary meaning of the words is quite clear. They mean what they say. The new, longer limitation periods have always been in force. Section 135(6) contains an express exception. Had an exception for the rights of those involved in ongoing proceedings been intended, it could have been included but it was not. Furthermore, as Mr Hargreaves submitted, if that had been the intention, other parts of section 135 would have had to have been rewritten.

226. Lastly, in relation to the DPA, I agree that there is nothing which limits the recipient of the duty to individual purchasers. Furthermore, as the duty to individual purchasers falls

naturally within section 1(1)(b), those to whom the duty is owed under section 1(1)(a) must be different.

LADY JUSTICE KING

227. I agree with both judgments