Section 1 of the Defective Premises Act 1972: An update

The defective construction of large, often high-rise developments, is an issue that has become increasingly prevalent in the press over the past few years. The use of defective cladding is particularly significant. For obvious reasons, such issues create significant worry and concern for residents. There are also likely to be financial implications, with individuals owning such properties struggling to sell or facing large bills for necessary remedial works. With the High Court recently discussing a number of issues in bringing such claims, now seems the opportune moment to reconsider the duty imposed by section 1 of the Defective Premises Act (DPA) 1972.

Section 1 of the Defective Premises Act 1972

Section 1(1) of the DPA 1972 imposes a duty that work "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". A prospective claimant must show that either inadequate work has been completed, or inadequate materials have been used, such that the dwelling is rendered not fit for human habitation. It should be noted that the mere failure to carry out works in a workmanlike manner, or with proper materials is insufficient to give rise to a cause of action; it must cause the property to be unfit for human habitation.

The duty under section 1 of the DPA 1972 is owed by "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)". This duty is owed to a relatively wide class of persons. It is owed not only to the person who ordered the construction of the dwelling (DPA 1972, section 1(1)(a)), but also any person who acquires an interest in the dwelling whether legal or equitable (DPA 1972, section 1(1)(b)).

It should be noted that the DPA 1972 also creates a number of statutory defences to the duty imposed by section 1(1). Section 1(2) creates a defence where an individual acts in accordance with the instructions given by, or on behalf of, another. In such a scenario, the remedy lies with the individual who is responsible the instructions. The defence under section 1(2) does not, however, come to the aid of an individual who had a duty to warn of the defects following instruction, but failed to do so. It should be noted that the DPA 1972 does not create a duty to warn and so such a duty must have an alternative source. There is also an additional qualification of the defence at section 1(2) that is given by section 1(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"

A further defence is provided for at section 1(5) of the DPA 1972. This is a limitation defence and any claims under the DPA 1972 must be brought within six years. This section is clear that:

"Any cause of action in respect of a breach of the duty imposed by this section shall be deemed … to have accrued at the time when the dwelling was completed"

It should be noted that there is a qualification to this:

"… 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 when the further work was finished."

As will be seen in the case law update below, this limitation defence can have significant implications. Should construction have occurred more than six years ago, a claim will be statute-barred. However, if remedial works have occurred, the limitation period in relation to this separate cause of action will be different.

Section 6 of the DPA 1972 provides some useful information as to the extent and limitations of an individual's rights under the Act. Section 6(2) makes it clear that any duty the DPA 1972 is in addition to any duties (whether contractual or tortious) owed to one of the parties from alternative sources. As a consequence of section 6(3), the effect of the DPA 1972 cannot be excluded or restricted by agreement between the parties.

Sportcity 4 Management Ltd and others v Countryside Properties (UK) Ltd [2020] EWHC 1591 (TCC)

The High Court, in the case of Sportcity 4 Management Ltd and others v Countryside Properties (UK) Ltd [2020], provides useful guidance on a number of issues that are likely to arise in a claim under section 1 of the DPA 1972. The case concerns claims that were brought by the management companies of a high-

rise apartment development in Manchester. The claims were brought against the Defendant developer for a number of defects that were allegedly present. There was some dispute as to whether the development was completed in 2007 or 2010, but this was largely immaterial for the reasons set out below. In late 2013, the managing agents of the Claimants raised that there were problems with the cladding that had been used in the construction of the development. The Defendant denied that the cladding was defective, but had attended to carry out works in 2014 and 2017 (Paragraph 5).

The claim was pursued under three separate causes of action: a claim under the leases, a claim under the Defective Premises Act 1972 and a common law tort claim on the basis that the Defendant owed a duty of care to construct the development with reasonable care and skill. All three causes of action were advanced on the basis that there were "life-threatening defects in the design and/or construction of the cavity barriers and fire-stopping measures in the property" (Paragraph 7). Significant damages were sought: in excess of £15 million for the estimated cost of recladding all of the properties, along with circa £840,000 in respect of cavity barrier and fire stopping measures.

The developer applied for summary judgment and/or for the claims to be struck out. In determining the application, HHJ Eyre QC addressed each of the pleaded causes of action in turn.

Firstly, although the developer was a party to the leases, the covenants relating to quiet enjoyment, and how the construction works were completed, were made by the landlord. Any claim in which references to the landlord would encompass the developer was described as "simply untenable and has no real prospects of success" (Paragraph 13). An alternative submission was made that the Defendant was liable as "a party to the Leases and/or the Landlord's agent and was responsible for carrying out the work and responsible for performing itself" (Paragraph 23). The Court quickly rejected this:

"*The question is not whether the Defendant was a party to the Leases but whether under the terms of the Leases it made the covenants in question. The mere fact that a person is a party to an instrument or agreement does not give rise to particular liabilities unless those liabilities are imposed on that person by the provisions of the instrument or agreement".*

Secondly, the Court considered the six-year limitation period for a claim under the Defective Premises Act 1972. The building works had been completed in 2010 and so any claim was barred under section 1 (5) of the Defective Premises Act 1972. The Judgment reiterated some important points in relation to the limitation period. It was highlighted that although the developer conducted visits to the development in 2014 and 2017, a failure to act on those occasions did not restart the clock in relation to any alleged defects in the original construction. Those visits only restarted the clock in relation to any defective remedial works that were conducted (or should have been conducted) at the time of those visits (Alderson v Beetham Organisation Ltd [2003] EWCA Civ 408). HHJ Eyre QC quoted from the judgment of Judge LJ in Alderson v Beetham Organisation Ltd [2003] EWCA Civ 408, 2:

"The limitation provisions provided by section 1(5) of the Defective Premises Act 1972 arise at distinct stages, in relation to specific causes of action. The person subject to the obligations created by s1(1) of the Act is required to see that the work for which he is responsible is done in a workmanlike or professional manner, with proper materials, and so that when completed, the dwelling is fit for habitation. If thereafter he carries out additional work to rectify the work already done, although s1(5) does not say so expressly, the statutory obligation relating to the standard and quality of workmanship and materials applies equally to the remedial work as it did so to the original work. Hence my view that there are two separate causes of action, the first relating to the quality of the original building work, and the second to the quality of the remedial work. For the purposes of the first cause of action, time starts to run when the dwelling is completed, and, for the second, when the remedial work is finished."

The Judge raised that there may be claims under the Defective Premises Act 1972 in relation to any acts or omissions that occurred in 2014 and 2017, but that these are separate causes of action (Paragraph 35). The Particulars of Claim solely pleaded the claim on the basis of alleged defects in the original construction (Paragraph 28). Although the Reply to Defence made reference to the Defendant's attendance in the development in 2014 and 2017, a new non-statute-barred cause of action cannot be raised in the Reply to Defence in order to protect a cause of action in the Particulars of Claim that is statue-barred (Civil Procedure Rule 16.4(1)(a)).

Thirdly, a common law tort claim had also been brought by the management companies. The cost of remedying any defects to the development was a pure economic loss and therefore irrecoverable, in accordance with Murphy v Brentwood [1991] 1 AC 398. Any tortious claim was therefore sure to fail (Paragraph 38).

As such, the developer was entitled to summary judgment on claims under leases and the Defective Premises Act 1972. The common law tort claim was struck out.

Analysis

The case of Sportcity 4 Management Ltd and others v Countryside Properties (UK) Ltd [2020] raises a number of pertinent points, most significantly in relation to the pleading of claims under the Defective Premises Act 1972. The defective construction of buildings, particularly in relation to cladding, is a significant and serious problem. The construction of such buildings may not have been recent, and so successfully navigating statutory limitation issues is of particular importance. The need to plead all of the available causes of action should be noted. Although a significant period of time may have passed since the original construction, more recent acts or omissions may create alternative causes of action. However, such causes of action cannot be simply be raised at a later date when it becomes apparent that the claim will be defended on the basis that it is statutory-barred.

The judgment also highlights a number of the potential pitfalls in bringing claims for a defective property on an alternative basis to that under the Defective Premises Act 1972. Should a potential claimant's losses be purely economic, a common law tort claim is likely to fail. The terms of any lease may provide a potential cause of action, but the terms of such should be read carefully to ensure that any potential claim is applicable to the prospective defendant.

Conclusions

The significance of section 1 of the DPA 1972 is likely to be highly dependent on the facts of individual cases. For developments constructed relatively recently, the duty that it imposes may provide a useful cause of action. In other cases, the effect of statutory limitation may be significant. The case of Sportcity 4

Management Ltd and others v Countryside Properties (UK) Ltd [2020] provides a useful reminder as to the significance of ensuring such claims are properly pleaded.

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ST IVES CHAMBERS

Law is correct as at 13 July 2020

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