The Building Safety Bill: A New Scope for Claims Under the Defective Premises Act 1972 & the Building Act 1984?

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Introduction

The Building Safety Bill ("the Bill") sets out the Government's strategy to make homes safer across the country. The Bill contains significant amendments that aim to extend redress provisions for the owners of both new and existing buildings and will impact significantly on claims by building owners and occupiers.

This article focuses on some of the key changes the Bill will have on the Defective Premises Act 1972 (the "DPA") and the Building Act 1984 (the "Building Act").

The Defective Premises Act 1972

The Current Regime

The DPA provides a statutory cause of action to owners of dwellings (including leaseholders and landlords) and anyone else who has a legal or equitable interest in a property to bring a claim for defective work, where the dwelling is "*unfit for habitation*".

Section 1 of the DPA establishes the specific duty owed by those involved in a construction project. This section provides that anyone seeking to claim under the DPA must show that those "*carrying out work in connection with the provision of a dwelling*" owe a duty to complete the work in a "*workmanlike or professional manner with proper materials*" so that the dwelling will be "*fit for habitation*" when completed. Therefore, it is important to note that the DPA does not cover all defects and all failures to carry out work properly, but only those that render the property unfit for habitation.

The DPA does not define the meaning of what is or is not fit for habitation, but this has been dealt with in case law. For example, in ***Rendlesham Estates plc v Barr Limited* (2014) *EWHC 3968 (TCC)***, it was held that the correct test applied by the courts is whether a dwelling is capable of occupation for a reasonable time without risk to the health or safety of and without undue inconvenience or discomfort to the occupants. For instance, the court has ruled that a dwelling is not fit for habitation where a dwelling was unsuitable for its purpose rendering the dwelling dangerous (***Bole v Huntsbuild Ltd and another* (2009) EWHC 483 (TCC)**) or where there was significant damp (***Andrews v Schooling* (1991) 1 WLR 783**). The judge also held in this case that if a building did not comply with building regulations at the time it was built and a local authority with knowledge of its condition would not have approved it as fit for occupation, then it was probably unfit for habitation.

The current limitation period in relation to claims under the DPA is six years from the date upon which the dwelling was completed. It was recently held in ***Sportcity 4 Management Ltd v Countryside Properties (UK) Ltd* (2020) EWHC 159** that the execution of further work undertaken after completion of the original project does not extend the limitation period under the DPA.

The Proposed Changes

The Bill will make significant changes to the DPA. Some of the most striking changes include:

1. Extending the scope of application of the DPA from new buildings to existing buildings; and

2. Extending the limitation period applicable to claims brought under the DPA with ***retrospective*** application.

Application to Work on Existing Buildings

The Bill proposes to amend the DPA by inserting a new section 2A which creates a new duty on those who do any work on a building which contains a dwelling (e.g. extension or refurbishment works to an existing property) to ensure the work does not render the dwelling unfit for habitation, provided the work was carried out during the course of business.

This means that the scope of who may become liable under the DPA will be extended so that it will not just include persons participating in building work on new dwellings, but also those who work on existing dwellings, such as renovation or remedial works.

However, this change will only apply prospectively i.e. in respect of new projects or works only.

Extension to the Limitation Period & Retrospective Application

The current limitation period for claims under section 1 of the DPA is 6 years from completion of the dwelling. The Bill proposes to extend the limitation period from 6 years to 15 years from completion of the dwelling (or completion of the remedial works).

In addition to extending the limitation period, the Bill proposes that such extension will apply both prospectively and ***retrospectively*** to claims under section 1 of the DPA.

This means that subject to some further comments below, claimants will have a significantly longer period in which to make claims. Evidently, this will provide building owners with a greater scope of protection as claimants have a longer period of time to bring a claim. The ability to bring a claim under the DPA is also not limited to a specific category of defect such as fire safety. This increases the risk for claims to be made against construction professionals in respect of historical projects and is something that professional indemnity insurers will want to be alert to.

However, the extension of the limitation period is unlikely to assist all building owners as a considerable number of developments requiring remedial works will have been completed more than 15 years ago. It may also be that after 15 years, a number of potential defendants may no longer be in business.

Furthermore, it is important to note that under section 128(5) of the Bill, a court must dismiss a claim against a defendant if it would have been time-barred by the current six year limitation period **and** allowing the claim to continue would be a breach of the defendant's rights under the Human Rights Act 1986.

Also, section 128(6) states that if a claim was settled or determined before the bill came into force, then a claimant cannot rely on this extended limitation period.

Section 38 of the Building Act 1984

The Building Act 1984 at section 38 contains a provision which essentially provides that where a building does not comply with building regulations the occupant will have a statutory cause of action for civil damages against the person responsible for the breach to the extent the breach has caused "*damage*". However, it has never been brought into force. That will change once the Building Safety Bill becomes law. It is important to note that once this comes into force it is only going to apply prospectively. That is to say, going forward. So, it will not apply to breaches that occurred prior to the provision coming into force.

The limitation period for a claim under section 38 of the Building Act will be 15 years.

Alongside this, there are going to be regulations which will impose duties on those who commission, design and undertake building work to which building regulations apply. These duty holders will be:

- Client
- Principal Designer
- Designers
- Principal Contractor
- Contractors

It will be interesting to see how the courts interpret the word "*damage*" in this context. In order to form a view on how the word "*damage*" in this provision will be interpreted by the courts, we can look to other areas of law.

For example, insofar as the tort of negligence is concerned generally a defect in design or construction itself will not constitute actionable "*damage*". So, for example, if a house was designed with defective foundations but there was no consequential damage as a result of the defect to the property there would have been no "*damage*". Whereas if the defective foundations caused say the walls of the property to crack this would be "*damage*" in respect of the crack to the walls.

So, if the word "*damage*" in section 38 is interpreted by the courts in the same way i.e. that a defect amounting to a breach of regulations is not damage itself then a claim under that section will be similar to one made in tort. However, that is save for two important distinctions being:

a. For a claim under the Building Act there will be no need for arguments about who owed the building owner / occupier a duty of care and the extent of that duty (which would be required in a tortious claim) because that duty will be imposed by statute.

b. For a claim under the Building Act there would be one limitation period of 15 years. In contrast for a claim in tort there is a primary limitation period of 6 years (section 2 of the Limitation Act) from actionable damage running alongside a 3 year limitation period starting from the "*date of knowledge*" (section 14A of the Limitation Act) with both being subject to a long stop of 15 years from the date of the alleged negligent act or omission (section 14B of the Limitation Act).

Conclusion

The Bill will give a substantial boost to building owners wishing to claim against designers, contractors, and developers in respect to building defects. However, the proposed changes to the DPA and the implementation of section 38 of the Building Act will be a cause for concern for those operating in the construction arena and their professional indemnity insurers. This may result in increased pressure on the pricing of construction work and the insurances to allow the work to continue.

Further Information

Given the generality of the note it should not be treated as specific advice in relation to a particular matter as other considerations may apply.

Therefore, no liability is accepted for reliance on this note.
If specific advice is required, please contact one of the Partners at Caytons who will be happy to help.

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