The Contractor's building defects liability in England and Wales

We discuss in this paper in what circumstances can a contractor be found liable for defects discovered by the building occupier several years after project completion, whether by reason of contractual commitments or by reason of tortious duties arising under statute and common law.

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1) Introduction

Circumstances where a contractor would hold a defects liability towards an occupier, for defects discovered many years post completion, raise several legal issues which we would develop and analyse under English law. We would here address latent defects, i.e. defects which were not patent at the time of completion since they would have otherwise been discovered. By doing so, we would consider an "occupier" as a human occupier of a building, as per the Building Act 1984, and concentrate on matters related to the construction of a building.

A first issue is whether the occupier is the current owner of the building, or a successive owner to another who may have been the initial construction employer. And whether he is the landlord, or only a tenant, hence does he hold sufficient legal or equitable interest in the building for holding a cause of action against the contractor? For the sake of this paper, we shall consider that the occupier is so enabled, in the sense of the *Linklaters Business Services v Sir Robert McAlpine Ltd*[1] case.

We would analyse the contractor's liabilities first in contract, then in tort and finally under the Defective Premises (DPA) Act 1972. We would also see how the contractor's liabilities might be depending on whether defects stem from design, workmanship or materials wrongdoings, and also on what damage they are causing – to others or solely to the building hence only reducing its economic value. We would also look at how the timing of an occupier's action, several years after completion, might affect the contractor's liabilities.

[1] [2010] EWHC 2931 (TCC) [114]

2) Liability in contract

a. The occupier was the contracting party

A first question is what was the contractor contracted for? Building work in the sense of the Building Regulations 2010, hence under a "normal" construction contract as per Keating[2] with design done by others, or acting as a design-build contractor? What was the performance standard along which he was contracted, or meant by statute, to perform? Reasonable care and skill, or a higher one such as fitness for habitation, or for purpose?

For residential occupiers, where a written contract might be inexistent or drafted in light and simple terms, a contractor is nevertheless under the obligation to perform work with adequate and proper materials, and in a workmanlike manner as per section 7 of the Building Regulations 2010, and with reasonable care and skill as per section 13 of the Supply of Goods and Services Act (SGSA) 1982. The contractor might have used his own standard terms of contract, but the residential occupier would be protected from an unreasonable exclusion of contractor's liability by virtue of the Unfair Contract Terms Act (UCTA) 1977. The contractor will furthermore be subject to the provisions of the DPA, and building be taken as dwelling under the Act, but we would expand on this matter in a further section below.

For business occupiers, a written contract will generally reflect the aforementioned legal obligations, together with a large range of expressed or implied (for example that materials are to be of satisfactory quality as per section 14 of the Sales of Goods Act 1979) others, such as compliance with specifications, drawings, and possibly higher standards than those minimum imposed by statute, such as fitness for purpose in design build contracts.

In both cases, the Contractor would end up being liable for defects if it is proved that he breached his contractual obligations related to construction (design, materials or workmanship), against the standard he had to comply with, and that such breach led to a defect which caused damage of whatever nature, i.e. physical damage to other property, physical damage to the property itself, being then pure economic loss, or personal injury to others. However the contractor's liability would be subject to section 5 of the Limitation Act 1980, and the occupier would have to bring a claim less than 6 years after the cause of action accrued, or 12 years under section 8 if the contract was signed as a deed. Cause of action accrual is the occurrence of breach or, latest, the completion

[2] The Hon Sir Vivian Ramsay; Stephen Furst QC, *Keating on Construction Contracts* (9th edition, Sweet & Maxwell, revised 2012) [7-018]

of the works. A contractual cause of action is the most straightforward remedy for the occupier, and will bring him back to the situation where he would have been had the contractor not breached an obligation. Accordingly, this is the most severe situation, money-wise, for the contractor as he will end up being liable for defects rectification costs plus possible other occupier's losses. Rarely would the contractor end up being liable for carrying out rectification work through an equitable remedy such as specific performance.[3]

We would also highlight cases where a contractor is contractually liable to deliver works which are fit for purpose when completed. This does impose a strict liability on the contractor, as the occupier will not have the burden to prove any fault from the contractor but only that the building is not fit for purpose. This does however require that the purpose is properly defined in the contract. This is a highly growing trend internationally with design-build[4] and EPC contracts, and is regularly applied in many civil law countries which impose decennial strict liabilities on the construction team[5]. Though growing, this is still limited[6] in England, mainly because of the contractors' difficulties to find the right insurance cover for their designs services in such contracts[7].

b. The occupier was not the contracting party

This is for instance the case when the construction employer is a developer and sold the building to others, or when an occupier bought the building from another occupier. The doctrine of the privity of contract would prevent him from benefiting from / enforcing a contractual term in between the initial contract parties, i.e. the contractor and the construction employer. And the *caveat emptor* rule would render him to have accepted at law the building as it is, i.e. with its latent defects, which, if they had been patent at the time of transfer/sale, would have led to a reduction in the economic value of the building hence its price.

The English law has however provided over the years a growing number of possibilities to overcome these issues. A successive occupier can then benefit by assignment from the right to sue the contractor under the initial contract, or there could have been a novation of contract with the occupier. There might also have been a collateral warranty given by the contractor to the occupier, creating a side contract to the main contract, as sometimes foreseen under standard forms of contract such as JCT. The occupier could also be in the position to benefit from the privileges

[3] (n 2) [12-017]
[4] FIDIC Plant & Design Build Conditions of Contract for instance
[5] France for instance, through Article 1792 of the Civil Code
[6] See latest editions of JCT and NEC3 (see Option X15) forms of contract
[7] John Barber, *the Roles of the Architect, Engineer, and Quantity Surveyor* (King's College, 2014/2015), Chapter 4.3

conferred by the Contracts (Rights of Third Parties) Act (TPA) 1999, which enables him to use any contract term as if he was a contract party. The powerful rights provided by TPA seem however still not widely used in the English construction industry yet[8], and some contracts even clearly exclude those.

3) Liability in tort

Tortious liabilities of a contractor would rather fall in the category of negligence. Establishing a negligent tortious liability would require that the contractor holds a duty of care, which he breached by acting below the requisite standard, and that this caused the damage[9]. Proving the existence of a duty of care would require a *Donoghue v Stevenson*[10] 3-stage test of proximity (whether the occupier is the contractor's neighbour at law, and that the contractor ought to have him in contemplation when performing the act or omission which caused the damage), foreseeability of the harm and whether it is just and reasonable to impose such duty.

Following the House of Lord decision in *Murphy v Brentwood District Council*[11], and as commented by LJ Jackson[12]:

> The law of tort imposes a different and more limited duty upon the manufacturer or builder. That more limited duty is to take reasonable care to protect the client against suffering personal injury or damage to other property. The law of tort imposes this duty, not only towards the first person to acquire the chattel or the building, but also towards others who foreseeably own or use it.

the contractor's liabilities at tort appear to be restricted to personal injury, or physical damage caused by a culpable defect to other property than the building itself. Physical damage caused by the latent defects to the building itself, amounting to pure economic loss for the owner/occupier, would then normally not be recoverable by tort but only by contract. Furthermore, even if a structural latent defect is spotted, and assessed to be a threat to nearby other property or persons, it might be considered that as long as the defects does not actually cause such damage to others, this would be pure economic loss and the reparation costs would not be recoverable by tort from the contractor[13]. An exception could however be for building on boundaries, where the defect is seen as immediate danger to others.[14]

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[8] McKendrick, *Contract law* (10th edition, Palgrave MacMillan 2013) [140]
[9] (n 2) [7-002]
[10] [1932] A.C. 562 (HL)
[11] [1991] 1 A.C. 398 (HL)
[12] *Robinson v PE Jones (Contractors) Ltd* [2011] EWCA Civ 9 [68]
[13] (n 11) , p. 475 [F]
[14] (n 11), p. 475 [G]

In addition, the contractor's tortious liabilities would not exceed those under contract[15]. His tortious liabilities might also be excluded by express contract terms, which would be upheld if they meet the reasonableness test under the UCTA, although this would be more difficult to achieve in case of a residential occupier, who is a consumer under UCTA hence more protected.

It would be construed from the above that the contractor's liability exposure is then narrower in scope in tort than in contract. This does stem from principles such as freedom of contract, and the general position at tort law, as there is no reasons for the latter to impose duties which are identical to the obligations negotiated by the parties[16].

However it might be argued that a design-build contractor acts, for his design services, as a professional designer/architect. The responsibility the latter voluntarily assumes for his acts or omissions towards the occupier (by giving advices, preparing plans and drawings which the occupier would rely upon for his building) plays a crucial role in determining the existence of his duty of care for pure economic loss[17]. It could be found logical that a design build contractor, encompassing the role of both a designer and a builder, would then hold co-extensive tortious and contractual liabilities at common law for pure economic loss caused by defects. This approach seems to have attracted conflicting authorities over the last twenty years[18], although recent cases could lead to conclude that it might now well be the case[19].

Despite the restrictions under tort law, this would appear to be, beside DPA, the only possible remedy for a successive occupier, not being the initial contracting party with the contractor, or not benefiting from the contractual protections seen above (collateral warranty, etc.), to find a remedy against the contractor for latent defects spotted many years after completion.

Furthermore this narrower scope of tortious liabilities might be outweighed by the beneficial effects of the Limitation Act 1980. Under section 2 of the Act, the contractor's liability is longer than in contract. It is six years from the date on which the cause of action accrued, which is when the damage materialized, and not from when completion was reached. It however raises the question of how being able to ascertain that a latent damage materialized. It may affect parts of the building which cannot be reasonably inspected, such as for instance cracks in foundations where only excavations around the building could assist in ascertaining such defects. The issue was addressed

[15] (n 12) [84]
[16] (n 12) [79]
[17] *Henderson v Merrett Syndicates* [1995] 2 A.C. 145 page 194 [D]
[18] (n 12) [54]
[19] (n 2) [7-018]

by the Latent Damage Act 1986 which, in effect, give the occupier a three-year limitation period to bring an action from when the defect is considered to be reasonably ascertainable or observable by the claimant.

Accordingly, remedies in tort run longer than in contract. This is however all subject to a fifteen-years long-stop period under the Limitation Act 1980.

4) Liability under Defective Premises Act (DPA) 1972

A claim under the DPA is seen as not in contract, but not clearly in tort either[20].

It imposes a strict liability to any person taking on work for a dwelling to see that it is fit for habitation. Fitness for habitation is assessed by judges along the system defined in the Housing Act 2004, classifying hazards (in relation to natural lighting, water supply and drainage, weatherproofing, etc.) affecting residential premises into 2 categories. DPA appears as a strong shield and sword for a resident occupier against any one from the construction team for defects occurring on the dwelling, and is furthermore a transmissible warranty meaning that the initial owner and successive owners and occupiers can benefit from its provisions within the limit of 6 years from the completion of the dwelling, or from rectification work.

5) Conclusion

Whether by statute or at common law, the contractor's defects liability towards an occupier appears strongly dependent upon the time when an action is brought by the occupier. If it is within 6 years from completion of the building work, the occupier would be able to rely on express or implied terms in the construction contract to find remedies for damages of whatever nature caused by defects. Reliance would either stem from the occupier being party to the contract, or benefiting from the TPA, a collateral warranty or an assignment or novation. Liability would require proving that the contractor failed to comply with the relevant performance standards.

When it comes to a dwelling and a residential occupier, his liability would however be strict within these 6 years, by means of the DPA.

Beyond 6 years, and before 15 years after completion, the contractor's liability would almost only be tortious – the only exception being when a contract is signed as a deed and liability runs up to 12 years after completion - and limited to personal injury to others and to physical damage to other property caused by the contractor's culpable defects. Liability for pure economic loss would

[20] Philip Britton, *Rights of action for construction defects: notes on the diagram* (King's College, 2015), page 6

generally not apply, although recent trends at common law could bring an exception to this rule, through design-build contracts.

Contractor's contractual and tortious defects liability then remains within set though fluctuating boundaries, and an occupier ought to bear in mind that there will not always be a remedy for each situation. As per the words of caution of HHJ Lloyd QC[21]:

> A building owner is not entitled to expect perfection and has to accept work that does not comply with the contract where such work does not materially detract from the intended use and occupation of the building. An owner has to expect and accept unwanted "presents" from the builder, provided that they are not visible and not deleterious. What the eye does not see the heart should not grieve.

[21] *Birse Construction Ltd v Eastern Telegraph Co Ltd* [2004] EWHC 2512 (TCC) [130]

Table of Cases

Birse Construction Ltd v Eastern Telegraph Co Ltd [2004] EWHC 2512 (TCC)

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Linklaters Business Services v Sir Robert McAlpine Ltd [2010] EWHC 2931 (TCC)

Murphy v Brentwood District Council [1991] 1 A.C. 398 (HL)

Table of Statutes

Building Act 1984

Building Regulations 2010

Contracts (Rights of Third Parties) Act 1999

Defective Premises Act 1972

Housing Act 2004

Latent Damage Act 1986

Limitation Act 1980

Sales of Goods Act 1979

Supply of Goods and Services Act 1982

Unfair Contract Terms Act 1977

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