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Out of time and out of pocket: the Victoria Square apartments debacle and the (empty?) promise of the Defective Premises Act (Northern Ireland) 2024

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ABSTRACT

The residents of apartments housed within the Victoria Square residential complex in central Belfast were ousted from their homes in February and April 2019 due to concerns over the safety of the building structure. In March 2024, the residents launched a joint claim for compensation under the Defective Premises (Northern Ireland) Order 1975 which was struck out in the High Court by Mr Justice Huddleston applying the Limitation (Northern Ireland) Order 1989. The judgment became the subject of much media attention in Northern Ireland and ignited a swift call to action by Members of the Legislative Assembly to align the legal regime here to that in England and Wales. In September 2024, a very short statute in the form of the Defective Premises Act (Northern Ireland) 2024 came into force and claimants were permitted to appeal the High Court's ruling to the NI Court of Appeal considering the new legislation. Notwithstanding the revival of the claimants' case, this commentary demonstrates how the 2024 Act falls short in many aspects due to its rushed inception and scant provisions; it is not a silver bullet for these types of claims in Northern Ireland.

Keywords: defective premises; high-rise buildings; leasehold covenants; contractual liability; negligence; pure economic loss; statute of limitations.

INTRODUCTION

The judgment in the case of *Ulster Garden Villages Ltd & Maeve Nora McDonald and others*[1] was delivered on 13 March 2024 by Huddleston J sitting in the King's Bench Division of the Northern Ireland High Court.[2] Unfortunately for the apartment owners involved, their case was dismissed by the sitting judge as lacking sufficient merit to proceed to a full trial. The impact of the ruling has undoubtedly caused much 'personal trauma and worry'[3] to the individuals affected, as they were statute barred under the Limitation (NI) Order 1989 from proceeding to trial in their claim for compensation under the Defective Premises (NI) Order 1975 for defects in the building structure discovered in and around February 2019. Regrettably, the (vacant) apartment owners continue to be liable for incumbent property levies which now include property management charges, in some cases mortgage monies and, up until April 2024, domestic rates[4] and alternative living costs.[5]

Despite the immediate and obvious negative consequences of the ruling for the apartment owners in this case, it has precipitated a watershed moment in the legal consciousness around these types of claims in this jurisdiction in the form of the Defective Premises Act (NI) 2024. The former legislative mandate in Northern Ireland for such claims at the time of the hearing (the changes brought in under

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1 *Ulster Garden Villages Ltd & Maeve Nora McDonald and Others v Farrans (Construction) Ltd & Others* [2024] NIKB 15. Hereafter referred to as *Ulster Garden Villages Ltd*.

2 At the time of writing, the author has been informed by the Northern Ireland Courts and Tribunals Service that the parties settled an appeal to the Northern Ireland Court of Appeal on 12 December 2024 on the procedural point on whether the judgment of Huddleston J in the High Court can be reconsidered in light of the new Defective Premises Act (NI) 2024, or whether this judgment is in fact a settled matter prohibiting a re-opening of the case under s 2(5) of the 2024 Act. It is also important to note that this approach aligns with the English Court of Appeal's decision in *URS Corporation Ltd v BDW Trading Ltd* [2023] EWCA Civ 772 wherein it was held that the new 30-year limitation period prescribed under s 135 of the Building Safety Act 2022 was to be considered as always having been in force where proceedings began before the 2022 Act took effect, but were still ongoing. Thus, BDW Trading Ltd was allowed to amend its claim form to take advantage of the increased limitation periods promulgated under the new legislation.

3 *Ulster Garden Villages Ltd* (n 1 above) [140].

4 Note that apartment owners are no longer liable for domestic rates on their properties and have been refunded any rates paid by them since April 2019 by the Department of Finance: see Department of Finance, 'Rates resolution reached for Victoria Square apartment owners' (27 March 2024).

5 BBC News NI, 'Victoria Square apartments: "no assurances" on compensation' (*BBC News NI* 11 April 2019).

the 2024 legislation are discussed in greater detail below) can be found in article 3 of the Defective Premises (NI) Order 1975. Thus, claims for compensation for defective premises had to be brought six years after building works were completed in tandem with article 4(d) of the Limitation (NI) Order 1989. In relation to any further remedial works to the residential building carried out after the date of its completion, time accrued from the date those (remedial) works were deemed completed. In addition, article 11 of the 1989 Order prescribes that claims in negligence where facts relevant to the cause of action were not known at date of accrual may be brought within three years from the date of discovery of such facts. The plaintiffs in this instance were within the statutory timeframe under the mantle of article 11 of the 1989 Order, but ultimately lost on this ground for reasons related to damage suffered amounting to 'pure economic loss' (as opposed to personal injury or damage) which is discussed in more detail below.

Following the judgment, the spotlight was inevitably put on the relative futility of the Defective Premises (NI) Order 1975 in conjunction with the Limitation (NI) Order 1989 for historic structural defect compensation claims of this kind. The minimum standard petitioned for by the owners and their representatives at that time was that promulgated in England and Wales under the Building Safety Act 2022.[6] The position there was that apartment owners in the same circumstances as the NI litigants would be allowed to make a legal claim for compensation 30 years from the date in which a defect is, in law, deemed discoverable (ie the date of building completion)[7] or 15 years after the date from when remedial works to said premises took place.[8] Given the acute media attention on the case, it was unsurprising that the Minister for Communities, Gordon Lyons, set into motion the Defective Premises Bill 2024[9] which reached its final reading stage at the end of June 2024 and was passed into law in the form of the Defective Premises Act (NI) 2024 in September 2024. This very succinct piece of legislation (four clauses) mirrors the English provisions contained in sections 134–135 of the Building Safety Act 2022. However, caution is warranted over the first glance favourability of the new Northern Ireland legislation. Inevitably, where statutory provisions are expedited in acute situations such as the case of the Victoria Square apartment owners, significant margins for error potentiate. The 2024 Act as it applies in Northern Ireland will require a more extensive reconfiguration to ensure that effective

6 C Lynch, 'Victoria Square apartment owners have building defects case dismissed by High Court' *Belfast Telegraph* (Belfast 13 March 2024).

7 The Building Safety Act 2022, ss 134–135.

8 Ibid.

9 Defective Premises Bill (NIA Bill 03/22-27).

safeguards are put in place to mitigate the deleterious impact of the litigation-avoidant corporate restructuring and financial modelling discussed below.

THE VICTORIA SQUARE RESIDENTIAL APARTMENT OWNERS' CASE: A LEGAL WATERSHED?

The Victoria Square Complex situated in central Belfast is a mixed purpose, high-rise structure consisting of various retail and commercial premises, as well as residential apartments. It is the residential section of the complex to which the claimants' cause of action related.

The residential wing of the Victoria Square complex elevates over nine floors, housing 91 residential apartments, 54 of which are owned by Ulster Garden Villages Ltd (a registered charity,[10] and the principal claimant in this case). The apartments, described as 'luxury' apartments, were completed during the onset of the 2008 global financial crisis in March of that year.[11] The building development company, Multi-Residential Developments Ltd (Multi), engaged Farrans (Construction) Ltd and Gilbert Ash Ltd (collectively FGA) to carry out the necessary construction work and 'fit-out' of the residential tranche of the Victoria Square complex. Further, Building Design Partnership Ltd provided architectural and structural/civil engineering services in relation to the development; the latter two companies were the key defendants in the case.

Following the completion of the residential building construction in 2008, Multi became the lead tenant of the residential section of the complex in April 2009 under a 250-year term lease with CGI Ltd[12] (the owner of the commercial tranche of the complex and head landlord). Importantly, under the terms of the head lease, Multi covenanted with CGI Ltd to keep 'the premises structure in good and substantial repair' and CGI symbiotically covenanted with Multi to keep the centre and centre structure in 'good and substantial repair'. Following the grant of the head lease to Multi, it sold off the individual apartments by way of sublease (for a term just shy of the 250-year head lease). Following sale of all the apartment units by 2015, Multi then assigned

10 *Ulster Garden Villages Ltd* (n 1 above) [1]–[5]. Note also, Ulster Garden Villages is a charity which 'was established under the Industrial and Provident Societies Act (Northern Ireland) 1946 with the principal objective of providing good quality housing and associated amenities for the disadvantaged and aged'. See Ulster Garden Villages Ltd.

11 Ibid. The certificate of practical completion was issued on 5 March 2008.

12 The collective name given by the court for: CGI Victoria Square Partnership, CGI Victoria Square Ltd and CGI Victoria Square Nominees Ltd; see *Ulster Garden Villages Ltd* (n 1 above) [6].

its interest in the head lease to two property management companies: Victoria Square (Chichester Street) Residential Management Ltd and Victoria Square (William Street South) Residential Management Ltd (collectively VSRM Ltd). Importantly, VSRM Ltd held an interest in the retained parts of the residential development which included the premises structure. The apartment subleases further contained certain repairing covenants, one of which was the repairing obligation in relation to the premises structure which VSRM Ltd was bound by, subject to its right to demand and collect a service charge from the apartment owners.

In February 2019, sudden damage to a reinforced structural concrete column (Column E2) in the blockwork partition between two of the apartments (the premises structure) became apparent and the residents of same were evacuated immediately. Several weeks later, on 10 April 2019, residents in the remaining apartments were quickly advised to leave their homes due to safety concerns of further potential movement in the building due to the damaged structural column.[13] The residents have not been able to return since. The retail and commercial section of the Victoria Square Complex remains largely unaffected. The plaintiffs further alleged that certain remedial works were carried out after the evacuation date by various unidentified parties and that these repair works in fact made the column weaker. It was further submitted that spalling brickwork posed a serious risk of injury to passers-by in the Chichester Street and Montgomery Street elevations of the building.

Considering the cumulative impact of these events and the cessation of repair works to the building, the plaintiffs claimed that the building could not be repaired and so theirs was a total loss scenario.[14] In rebuttal of these allegations, the defendants proceeded by way of a strike-out application under order 18, rule 19 of the Rules of the Court of Judicature (NI) 1980 that the plaintiffs' claim either in whole or in part disclosed no reasonable cause of action.

CAUSE(S) OF ACTION AND STRIKE-OUT

The primary causes of action in this case centred on the building contractors', architects' and civil engineers' statutory liability under the Defective Premises (NI) Order 1975, the general law of negligence and, significantly, the effect of the Limitation (NI) Order 1989 on bringing claims of this nature.

It should be noted in preface to the discussion of these that the plaintiffs unsuccessfully argued that CGI Ltd (the head landlord) was

13 Ibid [7]–[8].
14 Ibid [2].

directly liable to the apartment owners under the repairing covenants contained in the head lease (noted above) as 'successors in title' to Multi. Huddleston J rightly asserted that the plaintiffs were somewhat misguided on the operation of privity of contract and privity of estate in the landlord and tenant relationship; there was no privity of contract or privity of estate between CGI Ltd and the apartment owners as sublessees of Multi (and now VSRM Ltd).[15] Thus, as the learned judge explained, the owners 'have recourse through their ability to seek enforcement of those obligations as assumed by their direct landlord (i.e. the present management companies) on assignment'.[16] Consequently, the action against CGI Ltd was discontinued; VRSM Ltd, however, remains liable under the covenants to repair, as laid out in the apartment sublease agreements.[17]

BREACH OF STATUTORY DUTY UNDER THE DEFECTIVE PREMISES (NI) ORDER 1975 AND THE LIMITATION (NI) ORDER 1989

The mainstay of the plaintiffs' case rested on article 3 of the Defective Premises (NI) Order 1975 which stipulates that where persons connected with 'the provision of a dwelling'[18] and/or in the course of a business engage others to take on work in connection to the provision of a dwelling,[19] *all* entities are obligated to ensure that the work is done in a 'workmanlike manner' so that the dwelling in question 'will be fit for human habitation when completed'.[20] Bearing in mind the defects in the structural column of the residential complex and the fact that the plaintiffs' apartments were deemed unsafe for habitation in 2019, these provisions were clearly breached. Unfortunately for the owners, this cause of action was statute barred under the six-year limitation rule prescribed under article 3(5) of the Defective Premises (NI) Order 1975 and article 4(d) of the Limitation (NI) Order 1989 given that the building works of the residential part of the Victoria Square complex were completed in 2008, 12 years before the plaintiffs writs were issued.[21]

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15 This part of the plaintiff's claim was ultimately discontinued.

16 *Ulster Garden Villages Ltd* (n 1 above) [135].

17 VRSM Ltd was not a party to the action and so the findings of the case in hand did not apply to it.

18 Defective Premises (NI) Order 1975, art 3(1).

19 Ibid art 3(4).

20 Ibid art 3(1).

21 Plaintiffs' writs were issued between April 2020 and March 2021. See *Ulster Garden Villages Ltd* (n 1 above) [6].

To circumvent the deadening effect of the limitation period, it was argued in the alternative that the discovery of (defective) remedial works undertaken in respect of the weakened structural column 'in or around February 2019'[22] restarted the clock running again to the point where 'time becomes at large until the completion of those works'.[23] Furthermore, the claimants tried to argue that there was an issue around concealment of the latent defect in the structural column which counteracted the statutory limitation period. Unsurprisingly, this approach was rejected by Huddleston J, mainly because the particulars of claim failed to specify the specific dates and individuals who had carried out the remedial work. At best, the latest point in time from which the limitation period could begin if the case was taken at its height, would have been before September 2011, when the plaintiff 'at the latest, took, possession on their acquisition of the premises',[24] as, after that point, they would have had knowledge of such remedial works. Significantly, the claimants failed to address the English High Court decision in *Sportcity 4 Management Ltd & v Countryside Properties (UK) Ltd*[25] which clarified that the performance of further remedial works on defective property does not revive a statute-barred cause of action.[26]

Further, in the factually resonant case of *Canada Square Operations Ltd v Potter*[27] the UK Supreme Court clarified the terms 'deliberately' and 'concealed' for the purposes of section 32(1)(b) of the Limitation Act 1980 as it applies in England and Wales.[28] Thus, for concealment to be actionable it must involve an intention to conceal a relevant fact or facts from the claimant by way of a positive act of concealment or by withholding information.[29] Once again, the plaintiffs' pleadings and affidavit evidence failed to meet this threshold and were struck out accordingly.

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22 Ibid [51].

23 Ibid [63]. Note that the completion of works appears to be an ongoing process as part of investigations into the sustainability of the residential part of the Victoria Square complex.

24 Ibid [64].

25 *Sportcity 4 Management Ltd & Others v Countryside Properties (UK) Ltd* [2020] EWHC 1591 (TCL).

26 *Ulster Garden Villages Ltd* (n 1 above) [69].

27 *Canada Square Operations Ltd v Potter* [2023] UKSC 41.

28 That is 'any fact relevant to the plaintiff's right of action has been deliberately concealed from him by the defendant'. Note the equivalent in Northern Ireland lies in art 70(1)(b) of the Limitation (NI) Order 1989.

29 *Ulster Garden Villages Ltd* (n 1 above) [75], citing the UK Supreme Court Judgment in *Potter* (n 27 above) [109].

NEGLIGENCE: PURE ECONOMIC LOSS AND 'COMPLEX STRUCTURE THEORY'

The plaintiffs' claim in negligence at first glance seemed to offer a better chance of surmounting the chokehold of the well-rehearsed statutory time-limits. Article 11(3)(b) and (4) of the Limitation (NI) Order 1989 state that a claim in tort may be brought three years from when the plaintiff knew or ought to have known about the issues giving rise to a claim. In the present case, 2019 was cited as the starting point when the structural damage first came to the knowledge of the apartment owners.[30] Therefore, the cause of action was within the statutory time limit.

Even though the loss sustained by the apartment owners in this instance has been financially oppressive and psychologically distressing, in the eyes of the law, it amounts to 'pure economic loss' which is unrecoverable in tort.[31] Pure economic loss in this context relates to the pecuniary losses generated by the defects in the residential building structure, namely the costs of repair and, where this is not possible, the cost incurred as a result of the building being unfit for human habitation and thus valueless.[32] The House of Lords decision in *Murphy v Brentwood*[33] set the bar for negligence claims vis-á-vis defective premises. Thus, in *Murphy*, the property in question had defective foundations rendering it structurally unsafe.[34] In the absence of physical injury linked to this defect or damage to property other than the building itself, it was held that the loss was financial (economic) only and so no duty of care was owed by the respective builders and local council in that case.[35]

In exasperated rebuff to the pure economic loss doctrine, the *obiter dictum* of Lord Bridge in the *Murphy* case around 'complex structure theory' was deployed in an effort to 'take cases of tortious loss outside

30 *Ulster Garden Villages Ltd* (n 1 above) [78].

31 Generally, 'pure economic loss' is defined as 'economic loss unrelated to injury of the person or property of the plaintiff': see P Benson, 'The problem with pure economic loss' (2008–2009) 60 South Carolina Legislative Review 823–879.

32 See, generally, K Horsey and E Rackley, *Tort Law* 7th edn (Oxford University Press 2021) 190–202.

33 *Murphy v Brentwood* [1991] 1 AC 398.

34 Ibid. The structural defect discovered in *Murphy* had also resulted in serious cracks in the wall of the house and a fractured gas pipeline and soil pipe.

35 Note that there is an exception to the pure economic loss doctrine as identified in *Hedley Byrne v Heller* [1964] AC 465. The House of Lords in this case held that where there exists a special relationship in which one party assumes responsibility for advice given, and in which the claimant places their trust and confidence, that damages may be recoverable for pure economic loss. Note that this principle was not relevant in the case of *Ulster Garden Villages* such that the *Hedley Byrne* line of case law is beyond the scope of this commentary.

of the strictures of being "pure economic loss"'.[36] Prior to the decision in *Murphy*, Lord Bridge had mooted the idea in *D & F Estates Ltd v Church Commissioners for England*[37] that:

> [I]t may well be arguable that in the case of complex structures, as indeed possibly in the case of complex chattels, one element of the structure should be regarded for the purpose of the application of the principles under discussion as distinct from another element, so that damage to one part of the structure caused by a hidden defect in another part may qualify to be treated as damage to 'other property,' and whether the argument should prevail may depend on the circumstances of the case.[38]

To that end, the plaintiffs contended that the defective E2 Column in the residential portion of the Victoria Square building ought to be conceptualised as a 'structure distinct from another and so capable of inflicting damage to the wider structure'.[39] However, as Huddleston J pointed out, Lord Bridge in *Murphy* appears to thwart his own hypothesis, stating 'I express no opinion as to the validity of this theory'[40] and crucially, his Lordship concluded that:

> [I]t is quite artificial, in order to impose a legal liability which the law would not otherwise impose, to treat a defect in an integral structure, so far as it weakens the structure, as a dangerous defect liable to cause damage to 'other property'.[41]

Furthermore, it was emphasised by the present defendants that the analysis of Lord Bridge in *Murphy* was simply *obiter dicta* and unsupported by other members of the appellate committee in that case. Huddleston J confirmed this approach, citing the more recent decision of *Thomas v Taylor Wimpey Developments Ltd*[42] so concluding that 'it is artificial to suggest that the facia/or Column E2 can be treated other than as an integral and fundamental part of the structure of the Residential Development'.[43] Further, on grounds of public policy and in line with the sentiments in *Murphy*, the limits on the liability of builders and affiliated construction businesses in cases such as these are 'best left to the legislature'.[44] Lastly, it was propounded by the plaintiffs

36 *Ulster Garden Villages Ltd* (n 1 above) [84].
37 *D & F Estates Ltd v Church Commissioners for England* [1989] AC 177.
38 Ibid [206] per Lord Bridge of Harwich.
39 *Ulster Garden Villages* (n 1 above) [89].
40 *Murphy* (n 33 above) [476].
41 Ibid [478].
42 *Thomas & Another v Taylor Wimpey Developments Ltd & Others* [2019] EWHC 1134.
43 *Ulster Garden Villages* (n 1 above) [108].
44 Ibid [90]. Huddleston J reciting the words of Lord Bridge in *Murphy* (n 33 above) at [474].

that spalling brickwork in the Chichester Street and Montgomery Street elevations of the building posed a significant risk of injuring a passer-by. Whilst a possibility, there was no evidence to suggest at the time of hearing that this type of injury had in fact occurred, and so this argument was of limited assistance in the interim. In any event this is not an obvious loss the plaintiffs had sustained. In the round, the desired remedy sought by the apartment owners that the building be demolished and rebuilt ultimately gives way to the strictures of the pure economic loss doctrine.[45]

It is interesting to note that the decision in Murphy has not taken root in most Commonwealth jurisdictions.[46] The High Court of Australia in *Brian v Maloney*[47] held that sufficient proximity existed between a builder and subsequent purchasers owing to the building itself being a permanent structure to be used indefinitely.[48] In Canada, the Supreme Court in *Winnipeg Condominium Corporation v Bird Construction*[49] deemed it reasonable to hold builders and/or architects liable where a building was deemed unsafe due to negligence, with liability limited to the cost of works needed to render such building safe.[50]

Undoubtedly in England, there has been a monumental shift in legal consciousness around the liability of the construction industry and affiliated persons/businesses in property design and development following the publication of Dame Judith Hackitt's damning report on the Grenfell Tower Tragedy which occurred on 14 June 2017.[51] The outpouring from this was the Building Safety Act which was passed in April 2022 and came into force in England and Wales on 28 June 2022. The Act has been heralded as making 'ground-breaking reforms to give residents and homeowners more rights, powers, and protections – so homes across the country are safer'.[52] A key measure incited under the 2022 Act is the extension of limitation periods for legal action vis-á-vis

45 *Ulster Garden Villages Ltd* (n 1 above) [106]–[110].

46 Horsey and Rackley (n 32 above) 147–148.

47 *Brian v Maloney* (1994) 128 ALR 163.

48 See Horsey and Rackley (n 32 above) 147. See also the similar approach in *New Zealand in InverCargill City Council v Hamlin* [1996] AC 624 (PC).

49 *Winnipeg Condominium Corporation v Bird Construction* (1995) 121 DLR (4th) 193.

50 Horsey and Rackley (n 32 above) 148, fn 4.

51 In the Grenfell Tower tragedy, a high-rise block of council flats in the Lancaster West Estate of North Kensington in West London went on fire resulting in 72 deaths. The tragedy revealed many shortcomings in the building regulations and health and safety management of high rise buildings; see J Hackitt, Building a Safer Future: Independent Review of Building Regulations and Fire Safety: Final Report, Cm 9607 (May 2018).

52 Department for Levelling up, Housing and Communities, 'Guidance: The Building Safety Act' (25 July 2022).

defective premises, such as in the case of the Victoria Square apartment owners, to which the discussion now turns.

MODELLING THE BUILDING SAFETY ACT 2022 IN NORTHERN IRELAND: ALL SPIRIT AND NO SUBSTANCE?

Following on from the decision in the High Court in Northern Ireland, the Defective Premises Bill 2024 quickly sailed through the legislative process in a short four-month period resulting in the Defective Premises Act (Northern Ireland) 2024 which came into effect as of 21 September 2024. The 2024 Act is a very short piece of legislation comprising only four provisions in comparison to the 288-page document that is the Building Safety Act 2022. Undoubtedly, the Act is a step in the right direction for the Victoria Square category of claimant, but it is far from a silver bullet and falls short of the English position in important respects. At the time of writing, the Victoria Square claimants are now awaiting a retrial in the NI High Court in which they will be able to operationalise the Defective Premises Act (NI) 2024.[53] Irrespective of the court's decision, this commentary demonstrates that under the current Northern Ireland model these types of claimants will face inevitable challenges to securing adequate redress, as the wider construction sector can employ human rights-centric defences and various corporate accounting structures to stymie long tail compensation claims.

RETROSPECTIVITY AND LONGER LIMITATION PERIODS: WHAT OF HUMAN RIGHTS AND BUSINESS ACCOUNTING MODELS?

The changes made by the recent Defective Premises Act (NI) 2024 essentially replicate the statutory limitation amendments brought in under section 135 of the Building Safety Act 2022 in England and Wales.[54] Hitherto, sections 1 and 2 of the 2024 Act amend the Defective Premises (NI) Order 1975 and the Limitation (NI) Order 1989 to increase the statutory limitation period under which actions can be brought against persons involved in the provision of dwellings, and those who carry out any work in relation to such buildings.[55] The

53 See n 2 (above).

54 S 135 amends s 1 of the Defective Premises Act 1972 which is now read in conjunction with s 4B of the Limitation Act 1980 as they both apply in England and Wales.

55 Art 4A of the Defective Premises (NI) Order 1975 as inserted by s 1 of the Defective Premises Act (NI) 2024.

limitation period has now increased dramatically to 30 years for works completed before the 2024 Act came into force (21 September 2024) and 15 years for claims regarding work completed after this date.[56]

What is also distinctive about the Building Safety Act 2022 and the Defective Premises Act (NI) 2024 is that they are born in a post-Human Rights Act 1998 age, contradistinctively to the 1970s defective premises legislation in both jurisdictions. Resultingly, both Acts stipulate that when previously statute-barred actions proceed under each jurisdiction's respective defective premises legislation '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 (within the meaning of the Human Rights Act 1998)'.[57] This applies only to those category of cases brought within the 30-year retrospective limitation period.[58] Indeed, the construction and affiliated industries argue that it prejudices their right to a fair trial under article 6 of the European Convention on Human Rights as promulgated under schedule 1 to the Human Rights Act 1998.[59]

Thus, looking at Northern Ireland, where construction projects were completed as far back as 1994 (ie 30 years before the 2024 Act's inception) there are inevitable evidential hurdles arising out of the passage of time, namely, the destruction of paper and electronic records pertaining to development projects; the unavailability of relevant witnesses; and changes in technical standards that were in force in previous time periods.[60] Indeed, during the Defective Premises Bill's passage through the Northern Ireland Assembly, outpourings in the media from the Royal Society of Ulster Architects expressed concern that:

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56 Art 8A of the Limitation (NI) Order 1989 as inserted by art 2 of the Defective Premises Act (NI) 2024.

57 S 2(4) of the Defective Premises Act (NI) 2024 and s 135(5) of the Building Safety Act 2022.

58 For Northern Ireland see art 3 of the Defective Premises (NI) Order 1975 and article 8A of the Limitation (NI) Order 1989 inserted under s 2 of the Defective Premises Act (NI) 2024. For England and Wales, see s 1 of the Defective Premises Act 1972 and s 4B(1) of the Limitation Act 1980 inserted under the s 135 of the Building Safety Act 2022.

59 Art 6(1) of the European Convention on Human Rights states that: 'In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.'

60 Construction News, 'Building Safety Act's 30-year liability: Compassionate or draconian?' (22 August 2024). See also Royal Society of Ulster Architects, 'RSUA calls for MLAs to reject Defective Premises Bill' (1 July 2024).

> For example, an 85-year-old architect who has done nothing wrong could potentially be held liable for defective building materials in a housing project she designed when she was 55 … this legislation would not hold the supplier of the faulty material liable.[61]

Considering the fair trial implications of unknown or uncertain limitation periods, the European Court of Human Rights in *Oleksandr Volkov v Ukraine*[62] opined that:

> The Court has held that limitation periods serve several important purposes, namely to ensure legal certainty and finality, protect potential defendants from stale claims which might be difficult to counter and prevent any injustice which might arise if courts were required to decide upon events which took place in the distant past on the basis of evidence which might have become unreliable and incomplete because of the passage of time.[63]

It is without doubt that the impact of time on evidential quality and credibility will be to the forefront of these types of cases the further back in time they go. Whilst a positive initiative at face value, the real-life benefit to claimants proceeding under the Defective Premises Act (NI) 2024 for cases pre-dating the Act's enforcement may amount to nothing more than tokenism in the short term.

BUSINESS MODELS, INSURANCE PREMIUMS AND BUSINESS LIABILITY ORDERS

The somewhat perfunctory nature of the law-making noted above becomes particularly stark when contrasted with how the Building Safety Act 2022 would position claimants of the Victoria Square type if they had resided in England and Wales. The expediency of the Northern Ireland legislation following the backlash of the outcome of the Victoria Square case and the Act's minimal content mean that the law is ill equipped to offer any satisfactory remedy for this category of claimant. Furthermore, the Construction Industry Council (CIC) in Northern Ireland expressed concerns about the changes proposed by the Defective Premises Bill, stating that the construction sector here 'will be exposed to risks that the English construction industry (which

61 R Morgan, 'Changes to legislation could leave architects "at risk"' (*BBC News NI* 14 June 2024).

62 *Oleksandr Volkov v Ukraine* Application no 21722/11 (ECHR 27 May 2013); See also *Stubbings and Others v United Kingdom* Application nos 22083/93; 22095/93 (ECHR 22 October 1996).

63 *Oleksandr Volkov* (n 62 above) para 137.

is much larger and has arguably broader shoulders to suffer such actions) has never been exposed to'.[64]

Importantly, when the Defective Premises Bill was being debated in the Assembly, the CIC posted on its website in June 2024 those matters regarding which it considered the Assembly was being short-sighted. Two main areas of concern were the business/finance models used by the construction industry and the inevitable surge in insurance premiums because of the legislation. The CIC has emphasised how the construction sector in Northern Ireland is composed of mostly 'micro SMEs[65] or sole practitioners'[66] who 'will simply not have the capital to fund uninsured losses for remedial work over which they had no influence or control, nor the cost of dealing with claims'.[67] What is more, the special purpose vehicle (SPV) is commonly deployed by construction companies to isolate financial risk associated with building projects. Exploration of the complex machinations of the SPV is beyond the scope of this article, however, for context, Merna et al succinctly define this type of company as '[A] legally and economically independent project company financed non-/limited recourse debt for the purpose of financing a single purpose capital asset usually with a limited life.'[68] The attractiveness of the SPV is that it mitigates ordinarily high financial risk associated with a given project by taking it 'off the balance sheet so that the project failure does not damage the owner's financial condition. The project stands on its own. Debt payment comes only from the SPV rather than from any other entity.'[69] Resultantly, as the CIC has pointed out, construction and affiliated companies who have used SPVs will fall outside the grasp of the new legislation,[70] inevitably weakening aggrieved claimants' prospects of success in terms of financial reward or otherwise.

The Building Safety Act 2022, however, has attempted to circumvent this problem in the form of the building liability order (BLO) of

64 Construction Industry Council, Proposed Defective Premises (Northern Ireland) Bill (CIC 17 June 2024).

65 Small and medium-sized enterprises.

66 Construction Industry Council (n 64 above).

67 Ibid.

68 A Merna, Y Chu & F Al-Thani, *Project Finance in Construction: A Structured Guide to Assessment* (Wiley-Blackwell 2010) 13. See also, T Sainati et al, 'Types and functions of special purpose vehicles in infrastructure megaprojects' (2020) 38(5) International Journal of Project Management 243–255, 243: 'SPVs are legal persons (eg corporations, limited liability companies) engineered to serve specific purposes and transactions … which are widely used in different contexts, including finance, tax optimisation and projects. … The SPV is not reported on the balance sheet of the sponsors; making the SPV an "orphan entity".'

69 Merna et al (n 68 above) 18–19.

70 Construction Industry Council (n 64 above).

which there is no concomitant in the rushed Defective Premises Act (NI) 2024. Essentially, under section 130 of the Building Safety Act 2022, the High Court can issue such an order where it considers it 'just and equitable to do so'.[71] Given the newness of the legislation there is little case authority on the practical impact of BLOs on the construction industry. One case is *Willmott Dixon Construction Ltd v Prater*,[72] which indicates the stark way in which companies can react when informed of the prospect of such a claim coming their way. Wilmott made a claim in damages for £47 million in relation to the remediation of fire safety defects in the external wall of a development at Love Lane in London against various defendant companies. Prater and Linder who were amongst these and part of the same corporate group, upon being made aware of an ensuing claim for compensation, underwent an extensive corporate restructuring to the extent that they would not be able to meet any judgment claim made against them. Aecom Ltd, another defendant in the case, sought a BLO against them under section 130 of the 2022 Act and was successful in arguing that this request ought to be dealt with alongside the main proceedings on liability.

The intended practical effect of the BLO is to pierce the corporate veil so that the incurred liability of one company within a corporate group can be extended to an associated company or companies making them jointly and severally liable. Section 131 of the 2022 Act defines an 'associated company along traditional corporate lines; thus a body corporate (A) is associated with another body corporate (B) if (a) one of them controls the other, or (b) a third body corporate controls both of them'.[73] Thus, where an SPV is used to administer a construction project, this arguably makes the company more susceptible to a BLO.[74] However, again, the court must only administer these where it is 'equitable and just to so', and so it is conceivable that, where a company would be put in the vicinity of insolvency as a result, a grant might be denied.[75]

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71 Building Safety Act 2022, s 130(1).

72 *Willmott Dixon Construction Ltd v Prater and Others* [2024] EWHC 1190 (TCC).

73 Building Safety Act 2022, s 131(1)(a)(b).

74 See D Korcz, 'Building Safety – Building Liability Orders' (*Mills & Reeve* 7 March 2023).

75 Further, in deciding whether to apply for a BLO, applicants can apply for an 'information order' under s 132 of the Building Safety Act 2022 which 'is an order requiring a specified body corporate to give, by a specified time, specified information or documents relating to persons who are, or have at any time in a specified period been, associated with the body corporate'.

CONCLUSION

The plight of the Victoria Square apartment owners has highlighted the strictures in the legal regime in Northern Ireland when catastrophic defects in residential buildings come to light years after the relevant limitation period has passed and when the loss incurred is purely economic. Notwithstanding that the Defective Premises Act (NI) 2024 is a welcome step in widening the prospects of legal redress for such claimants, much remains to be done to bring the system here in line with the more favourable regime in England and Wales.

Whilst the increase in the retrospective limitation period to 30 years appears attractive on the surface, both pieces of legislation house a gatekeeper to claimant success – the European Convention on Human Rights. Thus, it has been shown that the breadth of the retrospective limitation period of 30 years not only risks infringing defendant companies' right to a fair trial due to the difficulty in meeting certain evidential requirements, but also grinds to a halt any claim where the court upholds such a finding. Northern Ireland further operates under the failure of the Assembly to provide key protective mechanisms in the form of the business liability order. This is conceivably the by-product of an expedited legislative process. What is more, prospective defendants may find it difficult to secure insurance as the 30-year time period poses an unknown risk which professional indemnity insurers will struggle to quantify until the legislation is further tested in the courts. This may render smaller businesses within the wider construction industry unviable. Another problem for claimants of the kind discussed in this commentary is that the defendant with deep pockets may become even more elusive. Finally, this case also brings into the spotlight the role of property management companies which have surged in recent years. In light of the various covenants that may exist on the maintenance and repair of a given development under leasehold, they too will have to reconfigure how they calculate their service charges and insure for potential compensation claims, as under the current system, the wider construction industry may not be the most attractive target from which to seek a replete redress.