

Construction law: Shaping new developments into solution-focused answers for your clients

Where are the flash-points following URS v BDW, including satellite litigation, the limits of a BLO and how to protect clients from them?

BEN PATTEN KC | 25TH NOVEMBER 2025



What happened?

2005 - 2012 construction of Capital East and Freemans Meadow



BDW developer; URS structural engineer



2015 BDW disposes of last interest



2019 Structural defects uncovered



2019 BDW Commits to carrying out remediation



No claims made against BDW

What was the dispute?

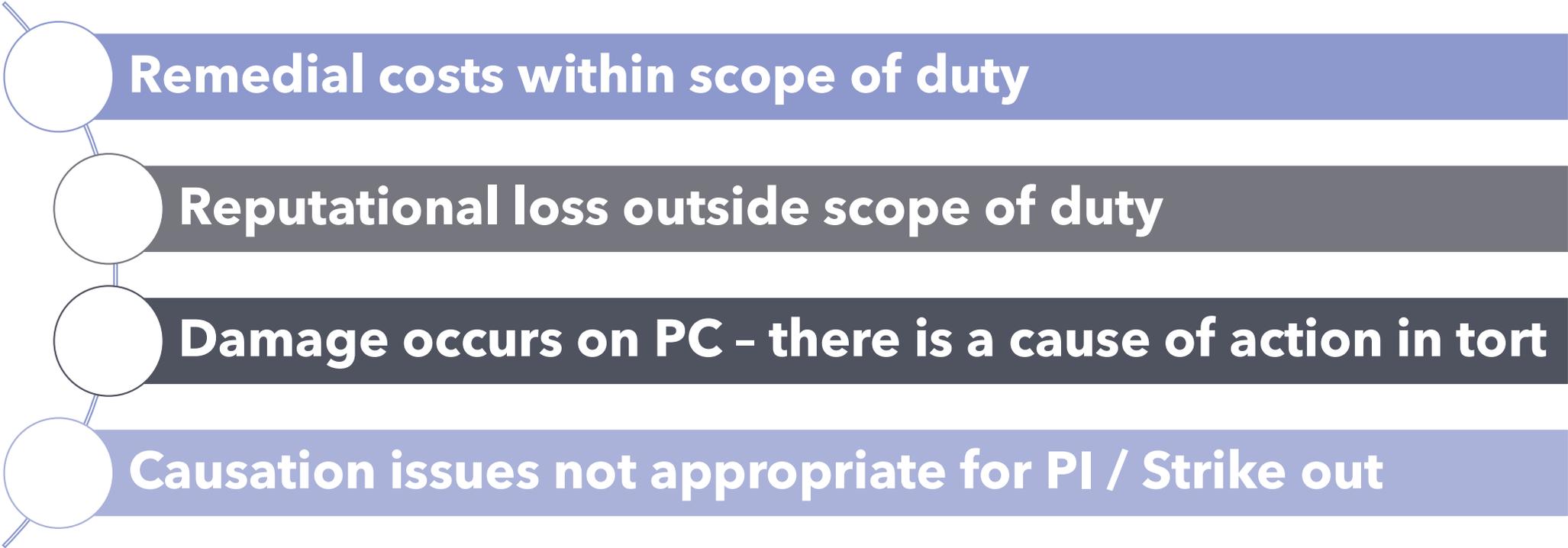
BDW sues URS – part of its claim is that it was required to remediate to protect its reputation

URS contends:

- (1) loss outside scope of duty
- (2) loss not recoverable in tort (no ownership & no claim)
- (3) no causation/failure to mitigate

PI on assumed facts and strike out

Decision of Fraser J - 22 October 2021



Remedial costs within scope of duty

Reputational loss outside scope of duty

Damage occurs on PC - there is a cause of action in tort

Causation issues not appropriate for PI / Strike out

What then happens ?

Building Safety Act 2022

BDW apply to amend

- Direct cause of action (BDW a developer)
- Contribution - both liable to others

Court of Appeal – 3 July 2023

Scope of duty to safeguard against economic loss caused by defects

Economic loss suffered at PC (Pirelli is not the exclusive test)

Permission rightly given for amendments relating to BSA

Supreme Court – 21 May 2025

No “bright line” rule that voluntary loss is irrecoverable (SS Amerika depends on its facts)

Damage at PC (Pirelli wrongly decided, but law unclear)

DPA duty owed to developers

Extension of limitation (s.135 BSA) has broad application

Contribution can be claimed from B when A has paid or has been ordered to pay C

So, nothing about BLO's ?

**No direct
reference**

**Nothing that
explains when a
BLO application
can be made**

**But some indirect
guidance as to
when it might
succeed**

The threshold question

Can you appeal from a decision on “just and equitable”?

Permission to appeal in Triathlon refused - no error of law

But URS is a 7 Judge Court - almost certainly because of BSA

“Just and equitable” does get appealed - section 61 Trustee Act 1925

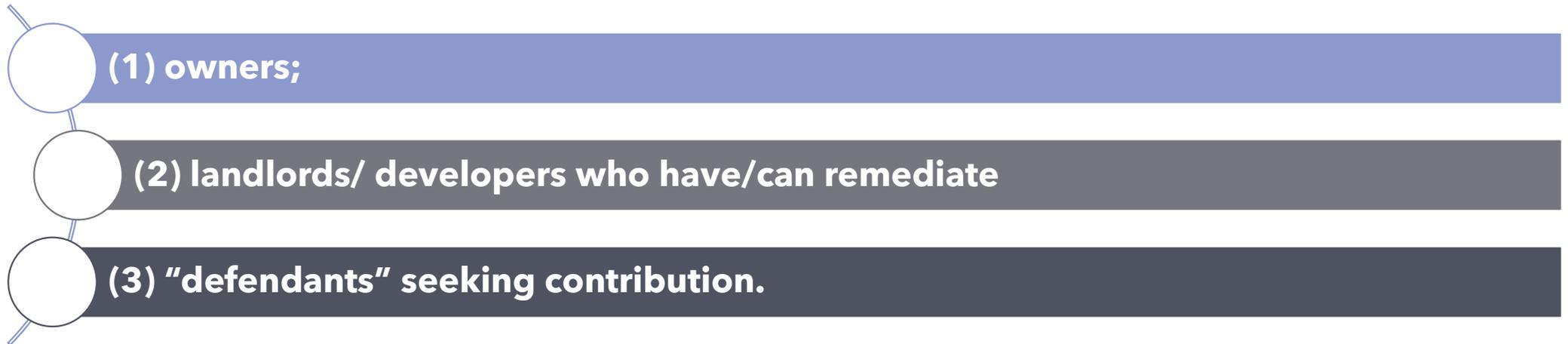
Discretion does not exist in the abstract - it must be principled

Strong likelihood that Section 130 exercise is appealable.

The “right” claimant

- The policy of the law favours incentivising a claimant in BDW’s position to carry out the repairs so as to ensure that any danger to homeowners is removed. (para 69)
- The BSA is part of the Government’s response to the need to identify and remediate historic building safety defects as quickly as possible, to protect leaseholders from physical and financial risk and to ensure that those responsible are held to account (para 84)

The range of claimants:



Any of the three will do, but with increasing “inequity”. Risk of there being no funds to remediate may be a trump card.

The "right" defendant (1) – who is the statutory target?

- A central purpose and policy of the BSA in general, and section 135 in particular, was to hold those responsible for building safety defects accountable. (para 104)
- ...ensuring that those directly responsible for building safety defects are held to account was central to the BSA and various of its provisions, including specifically section 135. (para 106)

Explanatory Notes to the Act are a guide to construction (para 105)

Paras 1072&1073 to the Act:

- "A practice used in property development is where a subsidiary company (which may be thinly capitalised) is set up to own and manage a development on behalf of the corporate group it is a part of. The subsidiary company is often wound up once the development has been completed. A consequence of this practice is that the corporate group has no long term liability for its developments. Building liability orders have been designed to address the consequence described above, given the context of the wider building safety issues which have been discovered within medium and high rise buildings."

The "right" defendant (2) – what is meant by "responsible"?

- (1) companies using shielding;
- (2) contemporaneous association;
- (3) "knowing" association after the fact;
- (4) "innocent" association after the fact;
- (5) "innocent" association after limitation expires.

Any of the five could ground a BLO, but with decreasing "responsibility" and therefore decreasing likelihood.

What about the Convention ?

2 related challenges:

- 1) Piercing the corporate veil
- 2) Retrospective removal of a limitation defence

Under Article 1 of the Convention both require “exceptional circumstances”

URS points both ways:

- Ct recognises the common law antipathy to retrospective legislation (para 124)
- Ct recognises need to uphold a clear Parliamentary intention
- Convention rights conspicuous by their absence in the section 135 debate

Approach may be to let the ECHR take its own course.

Predictions

Section 130 will reach the SC in next few years

SC will want to give guidance on the principles

Other decisions on “just and equitable” offer limited assistance

Guidance is likely to leave plenty of room for decisions either way

As with Trustee Act cases, the CA (and possibly SC) will see a number of appeals

Judicial support for BLOs may subtly decline over time

Further complication will follow if ECHR decides the powers are or can be outside the margin of appreciation

Questions

