

CONSTRUCTION CONFERENCE

TUESDAY 27 SEPTEMBER 2022

Right now – where is the legal wriggle room over latent defects insurance, HomeBond and Collateral Warranties?

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LATENT DEFECTS INSURANCE

1 Long term protection – policies 10/12 years

4 No need to prove negligence/fault

2 Assignable

5 Types of cover – loss of rent cover?

3 Once-off premium – no annual renewal

6 Unaffected by insolvency of developer/contractor/design team

7 Unaffected by low levels of Professional Indemnity or maintenance of PI cover for design team

LATENT DEFECTS COVER

Provides cover for latent defects

Undiscovered/latent at date of practical completion

An inherent defect in design, workmanship or materials

Any damage caused by or arising from the defect

Defects in building structure and building envelope

Covers the property not an individual/entity – Landlord and Tenant co-insured

Pays up to the sum insured for reinstatement, repairing or replacing

Expensive – put in place at earliest stage

LATENT DEFECTS COVER

Restrictions and exclusions from cover

- Policy may exclude M&E, fitout plant and equipment
- Some exclusions and caps re water ingress?
- Consequential losses, loss of rental income, loss of profit
- Loss of rent cover - time limited and capped
- Loss or damage due to failure to maintain \ repair the building
- Maximum sum insured and high deductible/ excess
- Excludes liability for structural changes introduced after the date of PC
- Insurers may refuse cover
- Insurers may avoid claim for non disclosure or misrepresentation



HOME BOND COVER

- Two relevant elements - Defects Insurance and Structural Insurance
- Key definition - “Latent Defect”
- Material non-compliance in design, workmanship or materials of a functional requirement of the Building Regulations in the construction of a unit
- Applicable at commencement and Latent Defect remained undiscovered at Final Certificate

HOME BOND COVER

Defects Insurance – indemnity to policy holder



Smoke and water ingress
caused by Latent Defect



Certain physical danger
caused by Latent Defect
related to fire safety



Damage caused by Latent Defect
materially and adversely affecting use of
a significant portion of the unit in respect
of certain Building Regulations, e.g.
drainage, pipework

HOME BOND COVER

- Structural Insurance – indemnity to policy holder
 - Cost of complete or partial rebuilding/rectifying work as a result of
 - Major Damage caused by a Latent Defect of an element of the Structure
 - discovered during the Structural Insurance Period
 - time limits - 5 years for defects, 10 years for structural
- Monetary Caps
 - Continuous structure - monetary cap
- Extensive exclusions
 - Consequential loss, mould, personal injury, settlement, compensation

HOME BOND LIABILITY

Wilkinson v. Ardbrook Homes Limited and others

- Personal injury claims and breach of contract and negligence claims against HomeBond
 - Failing to properly certify foundations and roof constructions
 - Inspected during construction, final certificate issued
 - Specific exclusion of compensation relating to any act or omission concerning the dwelling
 - No liability for negligence or default in inspecting or failing to inspect
- Final Notice excluded liability
 - Policy expressly excluded the claim
 - Tort - case pleaded was the negligent performance of contractual obligation
 - No assumption of responsibility outside of the contractual relationship and therefore no liability

COLLATERAL WARRANTIES

Create a contractual link between parties where otherwise there would be none

For Funder, Purchaser and Tenant

Given by Contractor, Design Team and Design Subcontractors

Commercial developments and large residential developments

Standard of skill and care

Intellectual property rights

Assignment

Funder step in rights

PI insurance

COLLATERAL WARRANTIES LEGAL ISSUES

- Expiry of limitation period - 6 or 12 years?
- Need to prove negligence
- PI insurance - low levels
- Claims made basis
- Capped liability, capped to the level of PI insurance?
- PI cover in the aggregate \ each and every claim basis
- Failure to maintain PI insurance, PI insurance no longer available at commercially reasonable rates?

COLLATERAL WARRANTIES LEGAL ISSUES

- Exclusions from PI cover
- Other limitations on liability
 - Net contribution clause
 - Physical damage only, exclude consequential losses
 - No greater liability clause
- Insolvency of Contractor/Design Consultant/Design Subcontractors

CLAIMS IN TORT



Time runs from manifestation of the damage



Time runs from the damage – not the defect



When it is capable of being discovered



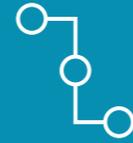
Bradley v. Deane – Supreme Court decision

GAME CHANGER IN UK

Building Safety Act 2022



Building Safety Regulator to monitor compliance



Maintain a golden thread of data



Leaseholder protections re cladding costs



New Construction Products Regulator and liability for inherently defective products or misleading statements



Expanded “principal designer” role to oversee safety in high risk buildings

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