PHILIP BRITTON &
MARK FAIRWEATHER*

THE WALK TO PARADISE GARDENS: CONSTRUCTION DEFECTS IN RESIDENTIAL DEVELOPMENTS IN ENGLISH LAW

'The earthly paradise! Don't you want to go there? Why of course!' HARRY WHITNEY[1]

This paper derives from two talks: to the Society of Construction Law in Birmingham on 7 April 2009 and to the Building Dispute Practitioners' Society in Melbourne on 30 November 2010. It is a substantially revised, updated and extended version of SCL Paper 156 with a similar title (May 2009). Thanks go to chartered building surveyor Chris Easton FRICS of Easton Bevins (*c.easton@eastonbevins.co.uk*) and to solicitor Julian Bailey BComm LLB of CMS Cameron McKenna (*julian.bailey@cms-cmck.com*) for valuable additional material, as well as comments on earlier drafts. The named authors are alone responsible for any errors or omissions.

The scenario described in the paper includes elements drawn from several real cases lived through by the authors, as well as from the OFT 2008 report, *Homebuilding in the UK*;[2] no reference to any individual case or party is intended unless made explicitly.

Later in 2011 the SCL will publish 'Domestic Bliss or Paradise Regained? Consumer Rights in Construction in England and Australia' by Philip Britton and Julian Bailey, contrasting the two countries' approaches to the regulation of residential construction, following their SCL talk in London on 2 November 2010. A version of the same article will also be published by the International Journal of Law and the Built Environment. And the Construction Law Journal will publish Philip Britton's 'A Lesser Splash: Trade Associations, Insolvency and Tort Liability', a discussion of *Patchett v SPATA*, summarised at B1 of the present paper.

Philip Britton LLB BCL (*philip.britton@kcl.ac.uk*) is Visiting Professor, Centre of Construction Law, King's College London and a consultant to the solicitors' firm of Mark Fairweather MA (*mfairweather@fairweatherstephenson.co.uk*) in Aldeburgh, Suffolk, Fairweather Stephenson & Co Ltd.

---

1 From Harry Whitney, *The Hawaiian Guide Book* (1875), quoted by David Lodge at the start of his novel *Paradise News* (London, Secker & Warburg, 1991).

2 The OFT report: n 87.

CONTENTS

A BACKGROUND

A1 The development

Paradise Gardens is an estate of 150 flats (units), constructed by a subsidiary of Inferos Homes plc in a series of multi-storey blocks on a brownfield site close to central London. All but ten of the flats have now been 'sold'. Under the devices of English law traditionally used for such a development, each flat will be let on a long lease (typically 99 or 999 years) with a low ground rent, but acquired via a capital payment almost equivalent to what would have been its market price, had it been sold outright (freehold).[3] Each first 'buyer' (technically, a tenant or lessee) can sell his/her flat on to a new 'owner' by assigning that person the remainder of the lease; the current tenant can also grant a shorter (sub)tenancy – typically an assured shorthold tenancy[4] – to a person willing to pay a market rent for the right to occupy the flat.

At the start, Inferos was not only the developer but also the original landlord, through owning the freehold (the reversion, in landlord and tenant terms) of the whole development site. This dual status is not necessarily the case; similarly, in the UK the developer and main contractor for construction need not be, but often are, the same entity ('vertically integrated', as it is called).

In fact Inferos carried out a phased development, so the initial sales at Paradise Gardens took place between June 2000 and the end of 2003. The contracts for the early sales were all entered into off-plan, when parts of the development were no more than a hole in the ground. Most of the flat-owners are buy-to-let investors, looking to rental income as well as capital growth; about a third are resident outside the UK, some of these using a company as registered owner.

Off-plan sales

Each intending buyer first paid a non-refundable 'reservation fee', then entered into a purchase contract with Inferos, paying a 10% deposit to the developer's solicitors. The developer's sales team made it difficult for a potential buyer to see the sale contract documentation until after s/he had paid the reservation fee.[5] Each contract was on terms drafted by the developer, which the buyer's solicitor or licensed conveyancer (often picked from a list supplied by the sales team) had little real scope to negotiate or modify. The essence of each contract was that Inferos committed to building a named flat, for which the buyer

3 Lease structures are used partly because they permit with certainty the imposition on both landlord and tenants of positive obligations (especially related to insurance, maintenance and repair); these can reliably be enforced into the future, though the identity of the landlord and individual tenants may change over time.
4 Under the Housing Act 1988 (as amended): no statutory rent control or security of tenure.
5 OFT 2008 report n 87 [6.22]; such practices should have ended under the *Consumer Code* (B4 below).

would pay an agreed price, in return for being granted a lease of that flat when completed.

Committing to buy so far ahead of completion of construction (whether new-build or a conversion) gives the intending purchaser the chance of speculative gain if the market rises. It also carries significant risks:

(a) The developer may become insolvent, after the buyer has paid a deposit (the deposit will only be safe if insurance is in place to protect it, or if the developer's solicitors hold it as stakeholders, rather than as agents for the developer);[6]

(b) Property values may drop between contract and completion ('settlement' in Australian terminology);

(c) The would-be buyer who needs finance will seldom be able to get a firm 'offer of advance' from a lender more than three months ahead of completion, so runs a risk that changes in the market and/or his/her own circumstances may make a mortgage harder to get at the point when it becomes essential; and

(d) A market downturn, as in (b), may itself make (c) occur.

The Great Recession, which led in 2006 to Northern Rock, the UK's third largest mortgage lender, being taken into temporary public ownership, has had severe and long-lasting effects on housebuilding. Fewer than half the number of new homes completed in 2007 were completed in 2009 – the lowest number of new homes completed in any peacetime year since 1924.[7]

In parallel, UK mortgage lending more than halved between 2007 and 2009;[8] the number of lenders dropped dramatically as lower interest rates brought in less money from savers and wholesale money market lending dried up. Lending criteria became much tighter: the maximum loan-to-value ratio went down, buyers now having to find 20% or more of the purchase price as a deposit;[9] they could borrow lower multiples of their income; the calculation of what could be borrowed was based on the lender's current valuation, often

6 If the *Standard Conditions of Sale* (4th ed, 2003) in England & Wales are used unamended, the developer's solicitor will hold the deposit as stakeholder (para 2.2.6); but sale contracts used by developers often insert a special condition making their own solicitors agents instead.

7 Anthony Hilton, 'The grim reality facing housebuilders', *Evening Standard*, 15 September 2010, summarising a speech by Roger Humber, former chief executive of the Home Builders Federation; also Julia Kollewe, 'Nation of homeowners becomes a land of perpetual tenants', *The Guardian*, 18 December 2010.

8 Gross mortgage lending in September 2010, estimated at £10bn, was 7% down on September 2009: *www.cml.org.uk/cml/media/press/2745* (visited 27 October 2010).

9 The 'FirstBuy' scheme, announced in the March 2011 Budget and to start in September 2011, will offer support for those who meet individual financial criteria and who wish to buy a new-build home for the first time: if they can find 5% of the purchase price, a further 20% of this price will be financed by an 'equity loan', likely to be half-and-half from the Government and housebuilders and interest-free for the first five years. This is in effect a modified continuation of the Labour Government's 'HomeBuy Direct' scheme.

significantly lower than the agreed purchase price; and the interest rate differential between saving and borrowing increased substantially.[10]

In part because new-build dwellings may have dropped in value more than older properties, buyers in off-plan UK developments have been specially hard hit. They are widely reported as trying to extract themselves from their contractual commitments (personal insolvency being the likely alternative). Some hope to renegotiate the terms of their contracts with developers, in turn probably anxious for cash-flow; others are attempting to rely on misrepresentation at the point of sale about shared facilities (health clubs and the like), which had now failed to materialise as developers cut back their plans.

The buyer's position: information and bargaining power

The evidence suggests that location and price are by far the most important factors in buyers' choices of where to live: as most homeowners move house only every 10 years or more, few are ever likely to be 'repeat players' from the same developer. As a result, if they are buying off-plan they can have no individual experience of what quality of build to expect and what level of after-sales service, nor will they have access to reliable data on these important aspects of the bargain. A Google search against the developer's and main contractor's names will at best produce anecdotal evidence of past problems. Economic theory suggests that this 'information asymmetry' has negative implications for competition – a problem for which it is hard to devise a solution not involving bureaucratic overkill. The chances of any such intervention by regulation or legislation are reduced by the fact that the supply side has well organised representative bodies, which can lobby Government and Parliament effectively. There is no equivalent for home buyers, except general consumers' groups and the public bodies which are their defenders (notably the Office of Fair Trading).

The gap in the buyer's knowledge could be filled by what is known about a developer through its 'brand'; but according to the OFT the housebuilding industry in the UK has low levels of branding, individual players within it not generally enjoying well defined reputations.[11] Hence perhaps the heavy – and often exaggerated – emphasis in developers' sales literature and oral 'patter' on the certainty and security offered by third-party warranties. It seems as if would-be buyers, having few alternatives, rely gratefully on these reassuring claims. However, they do not actually understand much about the reality, as Professor James Sommerville reported:

10 In November 2010, the Financial Services Authority put out to consultation new rules which would make the criteria yet tougher for being granted a mortgage (especially an interest-only mortgage) – to the vocal opposition of housebuilders and the Council of Mortgage Lenders: *The Guardian*, 'FSA reforms will create 'mortgage famine'' (5 November 2010).

11 OFT 2008 report n 87 [4.137ff].

> 'Many of the respondents [*to an OFT survey of home-buyers*] were unfamiliar with the contents and coverage of their home warranty, were confused as to who actually provided the cover under the warranty and yet, they valued the warranty being available since it provided some form of 'peace of mind'.'[12]

The peace of mind thus induced may be shattered when the buyer later discovers – when it really matters – how limited the cover is under the warranty actually offers; and that the sale contract may unfairly exclude or limit the developer's liability for oral or written pre-contractual representations.[13]

Legal steps towards purchase of a flat

When an existing home is sold, a term in the contract will often provide for a 'not later than' longstop date (and time) for completion in the legal sense – when the buyer pays the rest of the purchase price, the seller in return providing the buyer with the means to become owner in his place ('a good title').[14] In an off-plan new-build context, by contrast, legal completion is often at the developer's initiative and discretion. At Paradise Gardens it was to take place 14 days after Inferos gave notice to the buyer that his/her particular flat was ready for occupation.

Although this had to be within a reasonable time, there was no promise of even a longstop date; and significant categories of events were excepted, like the contractor's default or weather conditions. Some, but not all, of these were outside the developer's control; none were within the buyer's control; yet contractually all these risks were shifted to the buyer. As a result, if a flat were to be ready for occupation significantly later than expected, the contract gave the buyer little chance of compensation,[15] or of escaping from the bargain without losing his or her deposit.[16]

In April 2003 the Council of Mortgage Lenders brought new rules into effect in its *Lenders' Handbooks*:[17] mortgage funds should not be released for purchase of a newly built or converted home until there is evidence of a satisfactory final inspection of the property. This will usually come from a warranty provider, in

12 OFT 2008 report n 87, Annexe J [1.5].
13 OFT 2008 report n 87 [6.59].
14 For a case from Hong Kong where 10 minutes' delay by the buyer's legal team in presenting the necessary documents and cheque to the seller's solicitors caused him to lose his purchase – and his deposit of HK$420,000 – see *Union Eagle Ltd v Golden Achievement Ltd* [1997] AC 514 (PC). A claim against his lawyers must have been the most likely next step.
15 The annual costs to all buyers of such moving-in delays have been estimated at £33m: the OFT 2008 report n 87 [4.175]. To put the risk of delay so completely on the buyer, often with a requirement to pay the rest of the full purchase price even when specific items of construction (eg roads) may not yet be completed, may be an unfair term under the UTCCR: n 126 and linked main text.
16 For the impact of the new *Consumer Code* on sale contracts, see B4 below.
17 See the 2007 *Handbook* for England and Wales para 6.6.2, downloadable at *www.cml.org.uk/cml/handbook/england* (visited 29 October 2010); there are separate *Handbooks* for Scotland, Northern Ireland and the Isle of Man.

the form of a cover note whose wording has to be 'CML-compliant'.[18] If there is a lender but no warranty cover, or if the conveyancer for the buyer wishes to take all sensible precautions, a Final Certificate from a professional consultant – usually an architect – may do the same job. This too has to be in a form laid down by the CML.[19]

If there is a warranty in place, all the cover note will do is to confirm that this is so, not changing the buyer's position at all; if on the other hand – the less common case – a construction professional gives a certificate, this may provide some legally backed reassurance about build quality.[20] The CML-approved wording for England & Wales suggests that the professional who gives it undertakes a duty of care in tort to the first buyer and to its successors, as well as to any lender, for six years (the usual limitation period, starting when the certificate is signed); the professional must also keep PI cover in place against this potential liability. More generally, because an off-plan buyer has been physically unable to inspect the flat – and the development of which it is part – the risk of defects cannot reasonably pass to him/her on committing to buy. By contrast, when a building for sale already exists, the principle of 'caveat emptor' (let the buyer beware) operates. The seller here has no duty of disclosure, so the buyer has the responsibility of finding out anything relevant, by enquiries to the seller's solicitor and the local planning authority and (if necessary) by commissioning a survey before entering a contract to buy. This applies equally to a sale by a flat-owner at Paradise Gardens to a successor, so the new owner is very unlikely to have any remedy in contract against his predecessor if defects in the flat later come to light.

It is, as might be expected, very unusual for an individual off-plan residential buyer to be able to insist on holding on to a small part of the purchase price as a 'retention' against the potential 'snagging' liability of the developer after handover. Such provisions are common in standard construction contracts (and might even apply between the developer and its main contractor, if a

18 For a pre-2003 Awful Warning, where the builder ceased to be on the NHBC Register some months before contracts were exchanged with buyers Mr & Mrs Rickards, see *Rickards v Jones* [2000] EWCA Civ 260, with its sequel at [2002] EWCA Civ 1344. The buyers' solicitor did not know that the builder had lost his registered status (nor did the lender), so they allowed the purchase to go ahead. The solicitor submitted the warranty papers months after completion to the NHBC, which then claimed that there could be no warranty cover. The house proved to be seriously defective and the builder insolvent, so the Rickards sued their solicitors. The court then adjourned the case to allow for ADR which could – as hoped – include the NHBC as participants (though it did not resolve the issue of liability). In the end the court found the solicitors' firm liable for the Rickards' losses (the house being effectively worthless), since the lawyers could and should have checked that cover was in place before completion, which instructions from the Rickards' lender also expected. The court held that it was not open to the solicitors to dispute the NHBC's denial of cover.

19 CML, *Professional Consultant Certificate* (England & Wales), downloadable from *www.cml.org.uk/cml/handbook/certificates* (visited 30 January 2011). Because each flat at Paradise Gardens was covered by the NHBC *Buildmark* warranty, there were no consultants' certificates produced for each purchase, so this paper does not further consider the possible liability of consultants on this basis.

20 See the Construction Industry Council's *Liability Briefing, on CML Certificates*, downloadable from *www.cic.org.uk* (visited 30 January 2011).

separate entity[21]), but are seldom seen in a residential 'construct-and-sell' context.[22] This is so, though these minor items will rarely be covered by any warranty; even if they were, they might fall within the warranty's standard 'excess'.

Lease structures

The standard lease for each flat at Paradise Gardens was between three parties: the landlord/developer, the first buyer/tenant and the Residents' Management Company (RMC) of the new development. Like each purchase contract, the leases were on standard terms, drafted on behalf of Inferos; there are no statutory default (or required minimum) provisions for such arrangements, so all depends on the terms of the leases for a particular development.[23]

On buying a flat, each new owner became a member of the RMC, with one vote. The company had already been set up by Inferos, its constitution giving the developer a 'golden share' while any flats remain unsold (which is the current position). As usual in such a scheme, under each lease the RMC is responsible for – without owning – 'the common parts' (including in our case a car park for residents and visitors under a concrete piazza) and for the structure of the buildings composing the development, estate management in general, building repairs and insurance. It is therefore the collective instrument and voice of the flat-owners: in return for this, the flat-owners pay a service charge, set from time to time by the RMC. Few first buyers have, or can have, much idea of the likely level of these service charges at the point when they commit to buying, so the initial amounts and later increases are often an unwelcome surprise.[24]

Inferos, the developer, no longer owns the freehold of the development. In theory, the flat-owners could acquire this via statutory leasehold enfranchisement;[25] in fact, Inferos sold it in 2004 to a separate company, for whom the ground rents are income. The freeholder plays no further part in this story, simply because a landlord has no general obligation under English law to remedy original construction defects, even if in existence at the time the lease was granted (and hence known to, or reasonably discoverable by, the landlord

21 See eg the Joint Contracts Tribunal, *Standard Building Contract with Quantities* (SBC/Q), (London, Sweet & Maxwell, Revision 1 2007), clauses 4·18-4·20.

22 A housing association or similar social landlord, if acquiring many units in a new development, may successfully negotiate for such a retention; but its value may not be enough to pay for significant repairs to each unit (eg proper fire-stopping, if all bathroom and kitchen fittings have to be removed and then replaced).

23 For the future management of a development, there are good reasons why all the individual leases should be in virtually identical terms: as a result, one of the landlord's covenants in each lease will often be to impose the same obligations on all future buyers of flats within the development (and on the RMC).

24 OFT 2008 report n 87 [6.25ff].

25 Under the Leasehold Reform Act 1967 (as amended).

at that time).[26] Nor do the lease terms at Paradise Gardens alter this default position: they impose no obligations at all on the landlord in relation to the condition of each flat or of the 'common parts'. Quite the reverse, in fact: there are well defined maintenance and repair obligations on individual tenants and on the RMC. Under each lease, the landlord does make the usual 'quiet enjoyment' covenant, but this does not bring with it any liability for defects, either to an individual tenant or to the RMC.[27]

A2 The problems

You are approached by Amelia S, a flat-owner at Paradise Gardens and secretary to the RMC. She reports a long history of complaints about the standard of construction, mostly concerning minor items such as windows that won't close properly, condensation and mould in bathrooms, cracked kitchen worktops and so on. There is also a significant problem with rainwater penetration into the car park under the concrete piazza. The RMC has asked the developer to investigate the defects, but not much has yet happened.

A group of concerned flat-owners has independently asked (and paid) a local building surveyor to have a look round a sample of flats and aspects of 'the common parts'. This is a non-destructive first look, and the surveyor's report does not at this stage aim to comply with the expert witness requirements of the Civil Procedure Rules (CPR);[28] but it is a useful starting-point. He considers the construction defects far more serious than anyone has so far realised:

- The water penetration into the car park is caused by cracks in the piazza slab above it
- The fire integrity of the flats ('compartmentalisation') is compromised because service ducts have not been sealed as they pass vertically between storeys and horizontally into individual flats[29]
- There is no central fire detection and alarm system (required by Building Regulations, he says)

---

26 A landlord may owe an obligation to a tenant in relation to defects compromising the habitability of residential premises at the start of a tenancy, both at common law and under statute; but there is no covenant implied at common law to remedy design defects: *Lee v Leeds CC* [2002] EWCA Civ 6, [2002] 1 WLR 1488. The Landlord and Tenant Act 1985 ss 8 and 11, which do imply absolute and non-excludable covenants, do not apply to long leases. For implied contractual terms on habitability, see also the main text to n 97.

27 Sample wording for such a covenant to an individual tenant might be: 'The tenant paying the rent hereby reserved and performing and observing the covenants on behalf of the tenant hereinafter contained shall peaceably hold and enjoy the demised premises for the term hereby created without any interruption by the landlord or by any person lawfully claiming title under through or in trust for the landlord'.

28 The Civil Procedure Rules (SI 1998/3132, as heavily amended); see Rt Hon Lord Justice Waller (Editor-in-Chief), *Civil Procedure* 'The White Book', London, Sweet & Maxwell (2010 edition), also n 221.

29 The experience of BLP as an insurer n 83 is that inadequate fire-stopping is one of the most common defects to occur on site in residential construction.

- A number of prefabricated windows (double-glazed units already fitted off-site into wooden window-frames) have failed, one or both of the glass panes cracking for no obvious reason
- Within the flats, ordinary plasterboard has been used in bathrooms and showers, where for obvious reasons waterproof plasterboard would have been preferable
- Electrical systems are unsafe.

How much would all this cost to put right, if the faults in the individual flats surveyed were replicated widely? The surveyor hesitates to put a figure on it, since he has not yet been instructed to write the specifications for these works – and if he were, he would then ask an independent quantity surveyor to cost them. But as a rough figure, £2m doesn't seem unreasonable. And that is only the start: flat-owners would have to move out while remedial work was carried out, so there would be the costs of alternative accommodation. Those owners who are also investors would suffer losses of rental income; and if word of the problems gets round, the marketability and value of the flats may be affected. If there is an increased fire risk, there may also be worries about continuing insurance cover, both for the development as a whole and for individual flat-owners and occupiers.

Inferos' representative on the RMC sees the surveyor's report and assures the owners' group that, as a national developer, the company takes pride in the standard of its construction. Despite repeated phone calls and letters, nothing actually happens. Diplomacy having got nowhere, Ms S now wants some hard and practical legal advice.

A3 Dealing with the defects

Analysing what has gone wrong

There is unlikely to be a single explanation, cause or villain for all the defects in A2 above:

- Some may derive from whoever did the design specifying inappropriate components or methods of construction, or expecting the materials or equipment to be used in ways in which their performance could not be adequate
- Some may come from corners being cut during construction, with cheaper or lower performance materials being used than

those specified (perhaps by subcontractors hoping to increase their profit)[30]

- Some of the products or materials may have been the right ones for the purpose but in themselves faulty
- Some of the defects may come from faulty installation and inadequate workmanship, undetected by any inspection (eg by the site supervisor or project manager, or by whoever was responsible for Building Control)
- Some may even come from inadequate maintenance since the development was completed (if so, not down to anyone at the construction stage).

That gives a range of parties, any of whom might have been responsible for some of the defects: the developer, the project's architects or other consultants, the main contractor, specialist sub-contractors and the many suppliers of equipment and materials. If non-compliance with Building Regulations is a possible diagnosis (especially Part B1 on the spread of fire and Parts B2 and B3 on resistance to fire), the Building Control Body – in fact the BCB in our case was a local authority, but a private sector Approved Inspector could have been used instead – may bear a share of the factual, if not also legal, responsibility for failing to spot non-compliant design or construction.[31]

Starting to think tactically

The flat-owners will not relish a series of individual legal actions attempting to 'pick off' each of these potential defendants for its particular alleged shortcoming, even if you advise them (which you won't) that all the present flat-owners have potential rights of action in contract or tort against all those who might be responsible. Such a tactic would require the claimants to engage with the detail of each party's relationship with others and with the allocation of responsibility between them for different aspects of the project.

At the minimum this would require an understanding of the contractual relationships between them and how far obligations have (in law or in fact) been passed down a chain from one party to another. This would only be possible if documentation for the legal position of all relevant parties and for the day-to-day running of the construction project could be obtained – itself no easy task for flat buyers, all of whom were by definition outsiders to the whole process. There is no legal requirement on Inferos to supply any of the plans or

30 Invoices from small suppliers for the right materials, when lesser performing materials were in fact installed, may suggest a fraudulent 'kickback' system between supplier and main contractor.

31 'Building Regulations': the principal rules are now the Building Regulations 2010 (SI 2010/2214) and the Building (Approved Inspectors etc.) Regulations 2010 (SI 2010/2215), both adopted under the Building Act 1984.

specifications as a matter of course to the RMC, to the present landlord or to individual residents. For a development of this scale, the documentation would fill many filing cabinets, so even if it could all be located or obtained (see D2 below), indexing and managing it is a challenging organisational task; having got it complete and in order, assessing its significance would require significant specialist professional input.

Going down the road of more than one claim would also require the claimants to look far ahead to the ultimate outcome – a settlement with, or judgment against, one or more individual defendants – in order to start recording separately now the costs incurred for a possible or actual claim against each. This is difficult and time-consuming, especially in the early fact-finding and tactical stages of discussions with a newly assembled legal or professional team: the shape and legal basis of possible claims always takes time to emerge.

Instead, the flat-owners will hope to identify a single party to attack (D^1) who is solvent and who bears the lion's share of possible liability. The legal context is the long established common law doctrine of joint and several liability, under which a claimant can recover in full against D^1 and leave it to that party to shift a share, or all, of its own liability to D^2, D^3 and others if it can. This comes about because, unlike all Australian States and Territories, English law has no statutory proportionate liability in contract; happily, there is no 'net contribution clause' in the standard sale contract for Paradise Gardens. Apportionment of damages between D^1, D^2 and others, if each is responsible in law for the same damage, is possible under the Civil Liability (Contribution) Act 1978, but only in tort cases.

Having already excluded the present landlord, the best target is, for obvious reasons, the developer Inferos, with whom at least some of the potential claimants have (or have had) a direct contractual relationship. Before pursuing that goal, by considering and preparing for court proceedings, can they achieve their aims by any other route?

B REPAIRS WITHOUT NEEDING TO LITIGATE?

B1 Background

Most residents, when they discover construction defects in the development of which their flat is a part, do not want a court victory as such (and want it even less, when they learn of the risks, delay and costs involved). Instead, they want the defects repaired – the one remedy an English court will never normally give them (F2 below). Their sense of justice will often point to the same party who in their view should have delivered a defect-free development in the first place. This is the one who should 'come back and finish the job properly'.

Limited intervention by the law in the UK

Unlike all States and Territories in Australia,[32] the law in the UK imposes no industry-specific registration or solvency requirements to restrict the ability of a developer or builder to set up in business and take on domestic construction work, nor does the law dictate or limit the terms on which this work is undertaken.[33] The number of builders becoming newly registered each year with the NHBC, combined with changes over time in the rankings of homebuilders, shows that, in economic-speak, there is 'a high level of entry into and expansion within the homebuilding industry'.[34] The final report of Sir Michael Latham's influential *Constructing the Team* noted the negative consequences of these low barriers to entry into construction in general: the risks to employers, to responsible firms, to consumers and to the reputation of the industry. In the end, though, he was unconvinced that a registration requirement would achieve much of value.[35]

Again unlike the situation throughout Australia, the law in the UK does not impose any insurance for works of domestic construction or repair.[36] Instead, it leaves the whole field of construction defects insurance to the free market. In our field, the only situation in which some form of warranty is in effect compulsory – but not by law – is for new housing financed by a mortgage, where the CML rules (A1 above) require one of the existing commercially available third-party warranties to be in place, as a condition of releasing funds for the purchase.

The Latham Report did recommend that latent defects insurance should become compulsory by statute, though consumer issues as such were outside Sir Michael's terms of reference. Filling that gap, the JUSTICE Committee on the Protection of the Householder recommended shortly afterwards that latent

---

32 The principal current statutes are: the Domestic Building Contracts Act 1995 (Vic); the Home Building Act 1989 (NSW) – now amended by the Home Building Amendment (Warranties and Insurance) Act 2010 (NSW); the Domestic Building Contracts Act 2000 (Qld); the Home Building Contracts Act 1991 (WA); the Building Work Contractors Act 1995 (SA); the Housing Indemnity Act 1992 (Tas); the Building Act 2004 (ACT); and the Building Act 2005 (NT). As with the HGCRA in the UK, professional and industry groups have produced standard forms compliant with the local statutory regime, eg the ABIC Major Works Contract for Housing in Victoria (MW-2008 H Vic): *www.masterbuilders.asn.au* (visited 30 November 2010).

33 The closest the UK has ever got to a licensing system for builders was temporarily in wartime: but its aim was to direct and control scarce resources and materials, rather than protect consumers. In the First World War, this took effect under Regulation 8E of the Defence of the Realm (Consolidation) Regulations 1914, making it illegal without a licence to take on or carry on building work where the total contemplated cost was more than £500. As a result, a builder could not recover from the employer the balance due under a contract for work done over the limit: *Brightman & Co Ltd v Tate* [1919] 1 KB 463 (KB). In the Second World War, equivalent powers took effect under Regulation 56A of the Defence (General) Regulations 1939, with payment for illegal work similarly irrecoverable: *Bostel Bros Ltd v Hurlock* [1949] 1 KB 74 (CA).

34 OFT 2008 report n 87 [4.61-4.62]. There is also a high level of attrition, especially in hard economic times, with builders becoming de-registered from the NHBC or ceasing operation altogether, some through insolvency.

35 Sir Michael Latham, *Constructing the Team*, Final Report, London, HMSO (1994) ch 11.

36 Following the collapse of the major insurance group HIH in 2001, compulsory defects insurance cover in Australia is now very limited in scope; and in all States and Territories except Queensland is now only as a 'last resort' – if the builder becomes insolvent or ceases trading. In NSW, the State has become the insurer.

defects insurance should become compulsory for consumer/residential projects.[37] In the post-Latham euphoria of the mid-1990s, Working Group 10 of the Construction Industry Board developed Sir Michael's insurance proposals further, but its members could not agree whether legislation was appropriate.[38] In the end, no part of Latham's ideas on liability or insurance (including the replacement of joint and several liability by proportionate liability) came close to implementation. The only aspects of the report's many proposals to make it into law were versions of his payment and adjudication schemes – and even these arrived with residential construction work exempted (D3 below).

As a result, *individual consumers have almost no special legal protection in English law, simply because they have dealings with developers or builders*. The only real exception to address this situation specifically is the Defective Premises Act 1972 (C3 below). Beyond the DPA, we have already seen that lease documentation will often prove unhelpful, so it is to the common law of liability in contract and tort, and to the remedies for breaches of these obligations, on which a consumer must rely, with some potential assistance from the law of unfair contract terms (C2 below). For a summary of all these possibilities, see Tables A and B in the separate Appendix.

The limits of building control

Our system of building control attempts to ensure that all new buildings are designed to, and then built to, meet basic construction standards. However, it offers no legally enforceable guarantee in each case that these objectives have in fact been attained. Nor does it offer any mechanisms for ensuring compliance at a second pass, if evidence comes to light well after completion – as at Paradise Gardens – that aspects of work newly constructed (or converted) may not comply with Building Regulations. This is so, though the project was 'signed off' in a final certificate from the local authority (or an Approved Inspector) as Building Control Body.

To Ms S's astonishment, there is no real mechanism for re-involving the BCB post-completion, in the hope that it could now force the developer to make the construction comply: the building control system has done its work once that final certificate has been issued, and anyway the sanctions behind building control are primarily criminal, not civil.[39] Non-compliance, if it can be clearly established, may however justify a claim under the NHBC warranty (B2 below); or may offer a springboard to legal action in contract or tort against

37 JUSTICE, *Protecting the householder against defective building work*, London (1996): see also n 173 and 186.

38 Construction Industry Board, *Liability Law and Latent Defects Insurance* (Working Group 10), London, Thomas Telford (1997). WG10 recommended that, if latent defects insurance were imposed by law and extended to residential projects, consumers' existing rights, for example under the DPA 1972, should not be prejudiced.

39 For prosecution of a BCB, see n 68 and linked main text.

someone at the owners' initiative (C below) – though probably not, strange though this may seem, against the BCB itself.

Since some of the defects at Paradise Gardens are fire-critical (failing to achieve the 'compartmentalisation' necessary between each unit and floor of a block), it may be worth involving the fire authorities, who have wide powers of inspection and investigation in order to enforce the extensive duties resting on the 'person responsible' under the Regulatory Reform (Fire Safety) Order 2005[40] or under the Housing Health and Safety Rating System, introduced under the Housing Act 2004.[41] The Environmental Health department of the local authority also has an enforcement role in relation to fire prevention; if this could be mobilised, it could put pressure to get repair work done even after it might be too late for any of the residents (or the RMC) to start a claim for damages. Under both these possibilities, residents can do little more than inform these public bodies and encourage them to intervene; and it is unclear whether formal notices requiring remedial work will be addressed to the landlord or RMC (if to the RMC, the cost will be recharged to the residents, which would not be a welcome result).

Industry-level alternatives – with State support

Moving beyond positive law, voluntary or semi-voluntary schemes at industry level could fill parts of these legal gaps. Most have a welcome focus on attempting to prevent defective work in the first place, rather than providing redress after the event. A decent interval after a hard-hitting 1988 DETR Working Party report, *Beat the Cowboys*, the DTI, local authorities, mortgage lenders and Aon Home Assistance together unveiled the *Quality Mark* scheme. It was for builders and tradesmen dealing with individual consumers, starting in two pilot areas, Birmingham and Somerset, in 2001; the plan was to extend it to other parts of the country.

It comprised an independent initial test of competence (with later regular checks) and imposed a code of practice on all QM members. Amongst other things, the code required compliance with the law, recognised standards and codes of practice and use of a 'recognised contract' for the job, giving the client precise written information on cost, timing and payment procedures and taking reasonable care to ensure that all others who worked on the job observed the same principles. Under the scheme, a client's deposit was protected against insolvency, there was a clear procedure for the independent processing of complaints and a six-year warranty on the quality of all work, backed by

40 Regulatory Reform (Fire Safety) Order 2005 (SI 2005/1541). Under article 5(4), a person who has a maintenance or repair obligation, under a contract or tenancy, can be 'the responsible person' under the Order, against whom the fire authorities can serve an 'alterations notice', 'enforcement notice' or – in case of the threat of serious personal injury – a 'prohibition notice'.

41 See *HHSRS: Guidance for Landlords and Property Professionals* (May 2006), downloadable from *www.dclg.gov.uk* (visited 5 March 2011).

liability insurance. [This came close in effect to the regimes imposed by statute in many of the Australian States and Territories.] The certification bodies for trades within the QM scheme were themselves monitored by the UK Accreditation Service (UKAS). However, too few firms joined the scheme and it closed at the end of 2004.[42]

To replace the QM scheme, a plan was developed for *The New Quality Schemes for Domestic Repair, Maintenance and Improvement,*[43] another partnership between Government, industry and consumer groups with similar aims. This was formally launched via the then DTI's Construction Minister in June 2005 as *TrustMark*, a company limited by guarantee licensed by the DTI to use the *TrustMark* logo. It started to receive applications from businesses, trade associations and independent certification bodies and went 'live' in early 2006. The launch press release claimed:

> 'Consumers using a firm registered with *TrustMark* will know that the firm they have chosen has:
>
> - signed up to an industry code of practice and rigorous complaints handling process;
> - allowed the quality of work and trading practices of the business to be regularly checked; and
> - agreed to make clients aware of any building control notifications required to cover the work involved (or is provided with a certificate of compliance where the firm has Competent Persons self-certification rights).'

The standards which a scheme must meet for approval by *TrustMark* also include:

- a method for ensuring no conflicts of interest with consumers
- the scheme's code of practice requiring members to hold adequate insurance and to observe good trading practices in relation to consumers
- offering a low-cost dispute resolution mechanism as an alternative to court action (funded by the parties), as well as an optional warranty system to cover problems if the firm ceases to trade[44]

---

42 The Quality Mark website has now been withdrawn.

43 Original documents available at *webarchive.nationalarchives.gov.uk/+/dti.gov.uk/construction/qualityschemes/* (visited 11 October 2010).

44 Compare with the Federation of Master Builders' *MasterBond* scheme (*www.fmb.org.uk* – visited 29 October 2010): '… the cover protects you even if your *MasterBond* builder has gone out of business…'. This was criticised in *Guardian Money*, 26 January 2008 as requiring an individual client to allow a builder suspended from the scheme for shoddy work to complete the job, rather than paying for another builder to step in; and as having a maximum payment of 25% of the contract value, capped at £10,000. The unhappy client may, as under *Buildmark*, complain to the Financial Ombudsman Service (n 63). *TrustMark* uses the same approach: the consumer must give

- having systems for monitoring firms' compliance with its code and disciplinary sanctions for non-compliance.[45]

By September 2008, *TrustMark* had more than 14,000 registered firms across a wide range of trades through a large number of sectoral schemes.[46] Many of these at the same time run Competent Persons schemes under the Building Regulations.[47] However, the focus remains on smaller projects of 'repair, maintenance and improvement'; not many of the developers or main contractors who would take on a development as large as Paradise Gardens will become members. But general builders are not excluded: the National Register of Warranted Builders – an offshoot of the Federation of Master Builders – claims to be the largest *TrustMark* scheme.[48]

In the background, where complaints by individuals about shoddy building or repair work are concerned, are the statutory powers of local authorities: Trading Standards officers, who can prosecute in appropriate cases.[49] During 2002, Surrey County Council equipped a house with video cameras and secretly filmed workmen completing simple repair tasks: a quarter charged for work they did not carry out, did work of poor quality or replaced parts unnecessarily.[50] Some faced prosecution, as did others captured on CCTV in a similarly well-publicised 'sting' by the same local authority in January 2004.[51] Some local authorities and other groups run their own 'approved trader' schemes, listing those vetted by police and Trading Standards officers in their area and making unedited consumer feedback available via websites.

---

the tradesman a chance to come back to rectify the problem, or the central organisation will then refuse to help, as it will if the consumer starts legal action.

45 See the *Core Approval Criteria*, downloadable from *www.trustmark.org.uk* (visited 11 October 2010).

46 The website does not give more up-to-date totals for numbers of individuals, firms or companies registered under any of its schemes (visited 11 October 2010).

47 Under Schedule 1, para 4(a) of the Building Regulations n 31, the Department for Communities and Local Government has authorised a number of 'Competent Person' schemes. Under each, particular technical functions related to individual lettered Parts of the Regulations may be self-certified by a CP scheme member, so that compliance with the relevant Part of the Regulations does not need separate signing off by a Building Control Body. Each CP scheme is accredited by the UK Accreditation Service (UKAS). For more detail, see the DCLG website at *www.communities.gov.uk/planningandbuilding/buildingregulations/competentpersonsschemes/whatarecpss/* (visited 18 October 2010).

48 See n 44.

49 Eg under the Fair Trading Act 1973 (as modified by the Enterprise Act 2002) or the Consumer Protection from Unfair Trading Regulations 2008 (SI 2008/1277), implementing Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market ('the Unfair Commercial Practices Directive') OJ L 149/22, 11 June 2005. For a recent example, Dorset Trading Standards successfully prosecuted the Mears brothers at Bristol Crown Court for misleading advertising for 'Lapland New Forest', resulting in custodial sentences and a ban from being company directors for five years: The Guardian, 'Lapland con lands brothers with 13-month jail sentences' (19 March 2011).

50 The Times, 'Big Brother spy house catches cheating traders' (6 November 2002), also *Which?* (February 2003), p 7.

51 The Times, 'How a cornflakes packet and a duck helped to expose the antics of the rip-off tradesmen', 23 January 2004; also 'Rogue trader jailed for more than five years' on the Surrey CC website, *www.surreycc.gov.uk* (visited 12 November 2010).

Trade associations

Moving beyond schemes with a specific consumer focus and with some form of official support, there are very large numbers of trade associations in construction. Their logos, websites and promotional material often suggest that membership is a byword for financial stability and competence. Consumers could easily believe – are implicitly encouraged to believe – that the logo on the side of the van, or at the top of a printed estimate, is in some sense a guarantee if anything goes wrong: that the association is in some sense a regulator. Beyond the schemes in the previous section, there is no specific regulation either of the claims such bodies make or of what services they must or may offer. Some associations may achieve valuable aims, including via warranty schemes (usually optional extras, ultimately paid for by the client); some may assert them and not deliver; but many do not even aspire that high.

No surprise, then, that legal proceedings sometimes follow. Mr & Mrs Patchett[52] found their swimming pool installer Crown Pools Ltd via the 'Member Search' facility on the website of the specialist trade body, the Swimming Pool and Allied Trades Association. The site declared:

> 'SPATA pool installer members are fully vetted before being admitted to membership, with checks on their financial record, their experience in the trade and inspections of their work. They are required to comply fully with the SPATA construction standards and code of ethics, and their work is also subject to periodic re-inspections after joining. Only SPATA registered pool and spa installers belong to SPATASHIELD, SPATA's unique Bond and Warranty Scheme offering customers peace of mind that their installation will be completed fully to SPATA Standards – come what may!' [53]

Crown stopped work part-way through the job for the Patchetts (original agreed price over £55,000), then became formally insolvent. The couple started legal action in tort (negligence) against SPATA, attempting to shift to the trade association the extra cost of having their pool completed (£44,000, they claimed). They were relying on the principle of liability derived from the famous 1960s House of Lords case of *Hedley Byrne v Heller*: negligent advice or misstatement, reasonably relied on within a context of a 'special relationship' or an 'assumption of responsibility', which results in economic loss.[54]

---

52 Since the first-instance proceedings were in the Birmingham County Court, it seems likely that Gary Patchett is the same person who in 2009 became owner of the Birmingham Speedway stadium at Perry Barr and temporary owner of the Birmingham Brummies team: see *news.bbc.co.uk/sport2/hi/motorsport/9043518.stm* (visited 8 November 2010).

53 *Patchett v Swimming Pool and Allied Trades Association Ltd* [2009] EWCA Civ 717 [5].

54 *Hedley Byrne & Co Ltd v Heller & Partners* [1964] AC 465 (HL): see also n 149 and linked main text. For a claim in contract relating to another home swimming-pool project which went wrong, see *Ruxley v Forsyth* n 245.

In the Court of Appeal, Lord Clarke of Stone-cum-Ebony MR (with whom Scott Baker LJ concurred) held that the claimants came close to showing that SPATA owed them a duty of care in relation to their loss:[55]

> '… SPATA did make representations on its website which it expected, or at least hoped and reasonably foresaw, would be acted upon by people like the claimants [*intending pool customers*], including representations that those on its members list would have the benefits of membership because there was no indication that there were different types of member.' [56]

However, the Patchetts fell at the last legal hurdle, because they failed to take up the website's invitation to apply for an information pack. As the judge below already considered, this 'further enquiry' process would have made clear that SPATA's insurance protection was available only for its full members (Crown was merely an 'affiliated' SPATA member – not clear from the website itself) and would have required a job-specific contract with SPATA. Smith LJ, dissenting, took the opposite view:

> '… objectively construed, the website invites reliance on the qualities inherent in membership without further inquiry'.[57]

Although the Patchetts failed in their claim, the judgment shows that a trade association potentially owes a duty of care in tort to would-be employers who reasonably rely on website representations in order to decide to use one of its members for a project, if loss then results. All such associations in construction must now be careful about the claims their websites make about how membership protects consumers; and SPATA's own website has changed, perhaps as a result of the Patchetts' litigation.[58]

B2 Insurance: the NHBC *Buildmark* warranty

Each flat at Paradise Gardens was sold with the benefit of this 10-year warranty from the National House-Building Council – a big selling point, which the first buyers' conveyancers seemed to think this was a quality kitemark. Can the flat-owners now claim on the policies for the cost of repairing the defects now identified, plus the associated costs they will incur while that happens?

It will usually be worthwhile at least to register a claim, especially if there seems any risk that the builder may be, or become, insolvent. A builder has to be registered with the NHBC in order for the warranty to be available to a buyer

55 As recently discussed at length by the House of Lords in *Customs and Excise Commissioners v Barclays Bank plc* [2006] UKHL 28, [2007] 1 AC 181.
56 *Patchett* n 53 [30].
57 *Patchett* n 53 [55].
58 The site now makes clear that only full members' work can have the benefit of the warranty: *www.spata.co.uk* (visited 26 October 2010).

in relation to the builder's work; about 18,000 are at present.[59] A developer can be independently registered, in order to offer *Buildmark* to would-be buyers, as long as the builder, if a different entity, is also registered.

Beyond the initial application fee, a registered builder or developer pays an annual renewal fee which goes down dramatically per home, the more properties registered with the NHBC the previous year. An additional discount ('Premium Rating') may apply, reflecting the length of NHBC registration and the builder's or developer's positive or negative claims history over a period of time; the period varies according to the number of homes registered in the previous three years. The track record of the builder or developer with the NHBC also affects the premium charged for *Buildmark* cover for a new home, but for a well-established player with a decent claims record, this would be around 0.3% of the purchase price of the home.[60]

The builder, if also the developer, may be required to pass to the NHBC some or all of the deposit the buyer has paid, as a kind of retention to fund repair work later on, if the builder becomes insolvent. [The cover does not protect against insolvency of the developer, where – as in our case – it is a different entity from the builder and itself unregistered; this may have dire consequences if the developer goes under while holding deposits from intending off-plan buyers.][61]

There is no magic in the word 'warranty', as Ramsey J pointed out in *Harrison v Shepherd Homes Ltd*:

> '… essentially this [*Buildmark*] is a policy of insurance… liability under such provisions arises when the loss is suffered and … the cause of action is one of breach of contract against NHBC.'[62]

As an insurer, the NHBC is regulated by the Financial Services Authority, which brings the right to complain (free) to the Financial Ombudsman Service against a determination by the NHBC – apparently only rarely used, perhaps because a large majority of complaints end in the NHBC's favour.[63] The fact that this is a form of insurance also brings in the requirement on the insured to

---

59 The NHBC gave undertakings to the Secretary of State on 7 December 1995 about its registration rules, which had the potential to deter new entrants to the market, according to the Monopolies and Mergers Commission: *A report on the existence or possible existence of a monopoly situation in relation to the supply within the United Kingdom of structural warranty services in relation to new homes* (Cm 1439, March 1991). These undertakings were brought into the new Enterprise Act regime by the Enterprise Act 2002 (Enforcement Undertakings and Orders) Order 2004 (SI 2004/2181); the NHBC market share, according to its own website, has in fact dropped from 90% in 1991 down to around 80% today. For the status of the NHBC warranty under the Defective Premises Act 1972, see n 158.

60 OFT 2008 report n 87, Annexe J [4.38].

61 There is also a 'Solo' version of the Buildmark policy, for self-build projects where the construction employer is also the consumer and where there may be no registered builder.

62 *Harrison v Shepherd Homes Ltd* [2010] EWHC 1398 (TCC) [30].

63 The Financial Ombudsman Service operates under the Financial Services and Markets Act 2000. Its website at *www.financial-ombudsman.org.uk* records no new or resolved cases against the NHBC in the period 1 January – 30 June 2010 (visited 20 October 2010). For other warranty systems and the FOS, see n 44.

show 'utmost good faith' in every aspect of his/her dealings with the insurer. One application of this well-established principle is the rule of law that fraud in part of a claim (for example, an inflated or fictitious cost for alternative accommodation) may invalidate the whole claim, even if this is otherwise well founded.[64]

Like any insurer, the NHBC uses the small print as a tool of claims management. There are time-limits which run from the date of practical completion of construction work (which may be much earlier than the date of sale). In the first two years from that start date, claims must initially be made to the builder – the NHBC will step in only if the builder fails to respond, though offers a disputes resolution service between buyer and builder. In years 3 to 10, property owners (including successors of an first buyer, via an opt-in to the Contracts (Rights of Third Parties) Act 1999), can claim directly against the NHBC. This is where we are now for most flats, though the earliest sold were completed more than ten years ago, so their *Buildmark* cover may already have expired.

Scope of cover

A Basic extent

The main cover offered by *Buildmark* from years 3 to 10, in the August 2009 version of the documentation,[65] is against the cost of putting right actual physical damage caused by a defect. [The NHBC retains the right, as do most defects warranty providers, to commission the necessary repair work itself; this can raise difficult questions for an insured about exactly what diagnosis the NHBC is adopting, hence what specifications its contractors are to work to and how compliance with these can be assured.] 'Defect' is defined as the breach of any mandatory NHBC requirement (which in turn incorporates all relevant Building Regulations and its own Technical Specifications) in a specified part of the home. So the cost of repairing a defect, replacing inadequate materials or rectifying faulty workmanship is not covered unless damage has also been caused.

These limitations in part mirror the common law (C3 below), which defines very narrowly the scope of the potential liability in negligence of a developer or builder, as well as of a Building Control Body. The scope of the warranty is slightly wider, if the NHBC's own subsidiary BCS Ltd acted as Approved Inspector for building control compliance (the NHBC claims building control coverage via BCS of around half of all new homes built annually in England &

64 See *Aviva Insurance Ltd v Brown* [2011] EWHC 362 (QB), where the policyholder had to pay back to the insurers the full cost of the repair work for subsidence to his home, his having obscured the fact that a house he was proposing to 'rent' while the repairs were done was actually his own.

65 The current on-line version of the *Buildmark* documentation, dating from 2009 (earlier versions differ) is at *www.nhbc.co.uk* (visited 13 July 2009).

Wales).[66] Even so, the extra cover applies only for 'present or imminent danger to the physical health and safety of the occupants [*caused by non-compliance with specific Parts of the Building Regulations*]'.[67] Inadequate fire-stopping might be serious enough to justify a claim under this heading. At the same time it might be worth asking the relevant local authority to consider prosecuting BCS for giving a notice or certificate known to be false or misleading, or for recklessly giving one which was in fact false or misleading.[68]

B Exclusions

In addition to the relatively narrow scope of cover, a long list of general exclusions must also be taken into account – beyond even those of the common law. Taking the NHBC documentation at face value – in practice the organisation could be more generous – the warranty offers no compensation in respect of cost, loss or damage resulting from flood or fire, even if the result of faulty construction. Nor does it cover any reduction in value of the home, loss of enjoyment, use, income or business opportunity, inconvenience, distress or other consequential loss (all heads of claim the Paradise Gardens residents would hope to make, and could at least assert in court – see F2 below).

There is both an excess (currently £1,000 *per item of claim*) and a maximum aggregate amount (currently £1m) *per home*; these figures are adjusted annually and therefore could in theory fall if building costs drop. For the structure or 'common parts' in a multi-occupation single development like ours, cover is identical, starting when a *Buildmark* warranty takes effect for the first flat sold, but the £1,000 excess and £1m maximum both apply to *each item of claim by each flat-owner*. So every item of claim relating to the common parts of 150 flats will have £150,000 deducted from it at the start.

In October 2009, Graham Norwood in *The Guardian* reported that in 2008-2009 complaints by householders to the NHBC (not the same as claims accepted, of course) reached 64,000, with £59.3m paid out and its resolution service finding in favour of buyers in 64% of cases. The trend of numbers of complaints and the level of payouts is clearly upward, even though housebuilding completions dipped sharply in the same period.[69] The NHBC's figures given to the OFT reported 17,311 claims active in 2006-2007, of which 42% were ones where all the items reported required work under the warranty, 9% where some of the items required work and 47% where no items required

66 OFT 2008 report n 87, Annexe J [4.42].

67 Almost the same words were used by Lord Wilberforce in *Anns v Merton LBC* [1978] AC 728 (HL) 759H to justify imposing liability in tort for the costs of repair (the case was later overruled by *Murphy*: n 143 and linked main text).

68 In 1990 Sandwell BC prosecuted BCS under the Building Act 1984 s 57 for recklessly giving a final certificate containing a false statement relating to a development of new houses in its area, arguing that the inspectors had not discharged their functions properly, having failed to notice the absence of proper fire-stopping between garages and houses: *NHBC Building Control Services Ltd v Sandwell BC* 50 BLR 101 (DC).

69 Graham Norwood, 'Home truths for the housebuilder', *Guardian Money* 31 October 2009.

work. This suggests very substantial resources devoted to processing and investigating claims, only to reject almost half in the end; it must reflect the unsurprising fact that 'homebuyers appear to think that warranties cover much more than they do'.[70] All this activity led, in 2006-2007, to an average (mean) payout by the NHBC of only £4,790.

Buildmark *in the courts*

An unwelcome feature of this scheme is that there is a tripartite relationship between the NHBC, the registered builder (in our case, a different entity from the developer) and each buyer. [An RMC plays no part in the *Buildmark* scheme, so certainly cannot make a claim under the warranty on its own behalf, for example for defects in common parts.] But which provisions in the documentation apply to which relationship, and what is their effect? Two recent cases in the Technology and Construction Court (the TCC) illustrate the uncertainty which can arise; both are about how post-construction disputes should be managed.

In the first, *Holloway v Chancery Mead Ltd*,[71] Mr and Mrs Holloway bought a new house from Chancery Mead, a developer. In the sale contract, the developer undertook to deliver the house completed in a 'proper, neat and workmanlike manner' and in accordance with the NHBC Technical Specifications. The developer also agreed to supply the buyers with NHBC documentation, which offered them *Buildmark* cover in the names of the builder (a separate company, but associated with Chancery Mead) and the NHBC itself; this they accepted. The Holloways wanted to go to arbitration with Chancery Mead over alleged defects and asked the Chartered Institute of Arbitrators (CIArb) to nominate an arbitrator; the developer would not co-operate in the appointment process, claiming that the Holloways had to use the (informal and free) NHBC Resolution Service[72] first – and that the court should not intervene.

Ramsey J was willing to hear the case, pointing out that the documentation gave the buyers a choice. They had remedies for defects against the *seller* (Chancery Mead) under their purchase contract; under the *Buildmark* scheme they could expect the *builder* to remedy defects and damage, with recourse to the NHBC if the builder failed to comply. Since their present dispute was with the seller, the NHBC Resolution Service was irrelevant and inapplicable: arbitration under their purchase contract could therefore go ahead.

70 OFT 2008 report n 87 [6.42ff].
71 *Holloway v Chancery Mead Ltd* [2007] EWHC 2495 (TCC), 117 Con LR 30.
72 Described variously in the documentation as 'conciliation', 'determination by an NHBC investigator' and the 'Dispute Resolution Service': the judge held that these all referred to the same thing.

The more recent case, *Crest Nicholson (Eastern) Ltd v Western*,[73] raised a similar issue but between buyer and builder: under *Buildmark*, is arbitration mandatory for disputes between these parties about defects, and who should nominate the arbitrator, if the parties fail to agree? Mr & Mrs Western, the buyers, asked the Royal Institution of Chartered Surveyors (RICS) to nominate: the arbitrator started work at £140 an hour, in the teeth of protests from the builder, Crest Nicholson, who then asked the TCC to declare that the arbitrator had no jurisdiction. Akenhead J held that the wording in the 2005 text of its 'Complaints and Disputes Procedures' document did not amount to a binding arbitration clause at all.

That was fatal to the jurisdiction of the arbitrator the RICS had nominated; but in case this conclusion was incorrect, the judge agreed with the developer that, had there been a valid arbitration clause, the existing text successfully identified the CIArb – not RICS – as sole nominating body. By a further ironic twist, the very same arbitrator as had already been apparently appointed by the RICS in fact also appeared on the CIArb list. The judge finally awarded the builders £4,000 of their claimed costs of £7,000+ for the outing to Fetter Lane; but the court had no power to award any of the costs incurred in the abortive arbitration. These presumably had to lie where they fell. All this in the context of a dispute worth only £20,000 or so – no closer to ultimate resolution.

Ambiguity apart, to require consumers to go to arbitration, thus preventing them taking claims to court, can itself be legally doubtful, even in an apparently agreed contractual context. Specific rules make some arbitration clauses with consumers (widely defined) statutorily unfair;[74] at least twice in a construction context the TCC has held similar clauses unenforceable under the Unfair Terms in Consumer Contracts Regulations 1999 (the UTCCR), including an earlier version of the NHBC warranty.[75] No surprise, then, that the 2010 text no longer includes the provisions which led to the dispute in *Crest Nicholson*;[76] instead, it says 'Nothing in *Buildmark* compels you to agree to use arbitration or to enter into an arbitration agreement with your Builder'.

---

73 *Crest Nicholson (Eastern) Ltd v Western* [2008] EWHC 1325 (TCC).

74 The Arbitration Act 1996 s 90 extends the scope of the UTCCR (n 126 and linked main text) to arbitration agreements where the consumer is a company or partnership obtaining goods or services other than for the purposes of its business; under s 91, an arbitration agreement with a consumer (in this specially extended sense), if not individually negotiated, is statutorily unfair if it requires the consumer to submit a claim for a pecuniary remedy of under a prescribed sum to arbitration, currently £5,000 in England, Wales or Scotland. Beyond the £5,000, such an agreement falls under the general UTCCR controls on fairness. These provisions and other parts of paragraph 1(q) are considered – with no clear conclusions – in *Zealander*: n 75.

75 For an NHBC arbitration clause being unenforceable against individual consumers, on the basis that it was unfair under the 1994 Regulations (n 127 and linked main text), see *Zealander & Zealander v Laing Homes Ltd* (2000) 2 TCLR 725 (TCC). The outcome and reasoning are criticised in the unsigned editorial note which follows the report of the judgment. *Zealander* was followed (under the UTCCR 1999) in *Mylcrist Builders Ltd v Buck* [2008] EWHC 2172 (TCC), discussed in Philip Britton, 'Court Challenges to ADR in Construction: European and English Law', SCL Paper 152 (January 2009): *www.scl.org.uk*.

76 *Crest Nicholson*: n 73.

Relationship with other possible claims

There are potential complications about the relationship between rights under the NHBC warranty and rights which a consumer might separately have against a party responsible for defective construction, as *Holloway v Chancery Mead Ltd* above illustrates.[77] The Introduction to the current NHBC standard terms make clear that rights under it against the builder (in years 1 and 2) are 'in addition to, and do not replace any other legal rights…'. However, a consumer who has a contract with the builder – not the case for any resident in the Paradise Gardens situation – may find that the terms of that contract cross-refer to the NHBC warranty in such a way that his or her rights under *Buildmark* in effect replace the consumer's rights under the contract.[78]

Further, the NHBC wording, like all well-drafted insurance policies, includes a subrogation clause.[79] This gives the NHBC the right to make (or take over) any claim an insured may have against a third party (an architect, project manager or sub-contractor, for example) for items covered by the *Buildmark* warranty, in order to reimburse itself for having itself paid out under the policy. To keep this as a live possibility, potential claimants have a duty to disclose such a claim to the NHBC, at least at Letter of Claim stage (D4 below); and may thus find that they lose control of their own claim entirely, having to lend their name (which is what subrogation really means) to a claim brought – and then run – by the NHBC itself.[80]

This is however only an option: the NHBC may choose to let a policyholder make a claim against a third party without intervening. Equally, it could in theory intervene only at the end, 'grabbing' any damages already recovered, making the position of the costs bill the claimants will have already incurred uncertain, unless covered by an agreement made in advance. However, the rationale of many claims against third parties will be to recover damages for items *not* covered under *Buildmark* (as we have seen, there are potentially plenty of those), so the proceeds will not necessarily all go to the NHBC, even if it does exercise its subrogation rights. As a result, how subrogation works in practice must depend on the facts of each case, as well as on careful and detailed negotiation between claimant/s and the NHBC, or between their lawyers.

77 *Holloway v Chancery Mead*: n 71 and linked main text.
78 This was the case in *Robinson v PE Jones*: n 111 and linked main text.
79 And the common law would imply one anyway, if not expressed: Charles Mitchell and Stephen Watterson, *Subrogation: Law and Practice*, Oxford, OUP (2007), ch 10.
80 For an example of a claim by the NHBC against one of its own registered builders, following a compromise agreement with a residents' association after the builder had failed to deal with defects, see *National House-Building Council v Relicpride Ltd* [2009] EWHC 1260 (TCC).

B3 Other forms of construction defect insurance

The buyer of a new home is normally given no choice between warranties; the builder or developer will organise cover with one or other provider, paying the premium, and the buyer is unlikely to appreciate the differences or the consequences. In a context where the buyer needs mortgage finance, whichever warranty is chosen has to be acceptable to the CML – as all those discussed in this paper already are. In the same way, all those who offer insurance cover for construction defects are regulated by the Financial Services Authority.

The variation in coverage between the policies offered by three of the non-NHBC warranty providers – Zurich Municipal, Premier Guarantee and the LABC New Home Warranty – is less than might be expected: so much so that the OFT 2008 report treated NHBC and Zurich's policies as 'similar enough to be construed as being the same'.[81] As it is, the non-NHBC providers together have only about 20% of the market; and Zurich Municipal announced in September 2009 that it would take on no new home warranty business.[82]

Although NHBC *Buildmark* continues to have the lion's share of domestic building warranty cover (and has been in the field longest – since 1967), its model is no longer the only one on the UK market. An alternative is now offered by insurer Allianz, through its underwriting agent BLP – called *BLPSecure*.[83] This has evolved out of long-duration defects cover originally developed for social landlords on a mutual basis, which entailed building a sophisticated and constantly updated piece of construction risk analysis software, CACTUS (Computerised Audit Claims Tracking and Underwriting System) as the technical front end of an insurance offering.

For all common construction methods, components, fittings and materials, CACTUS allows the defects risk of each aspect of a planned building to be assessed in precise detail at the design stage. This starts an audit trail which leads to inspections at key stages of the project during construction: the timing, frequency and intensity of inspections is determined by the system's assessment of the risk. The aim is to focus attention only where it is really needed. The same process also informs BLP's decision whether to accept the risk for 10 or 12 years from practical completion (and on what terms); and gives effect to BLP's obligations as agent of the underwriter. So the focus is preventative and on the building itself (not the builder) and on achieving, as far as possible, 'zero

81 OFT 2008 report n 87 , Annexe J [2.13].

82 Starting in 1993, Zurich Municipal provided structural warranties and latent defects insurance to developers and self-builders in the UK, but a Press Release dated 30 September 2009 said: 'the sustained decline in UK house-building, as compounded by the economic downturn and continued uncertainty concerning the pace of recovery, means that this no longer represents a viable market for Zurich's business': *www.zurich.co.uk/municipal/newsroom* (visited 15 October 2009). All existing policies will of course be honoured.

83 See *www.blpinsurance.com* for policy details (visited 11 October 2010).

defects, first time'.[84] This also translates – as it is designed to do – into a very small number of claims; and can also be used to produce whole-life costing for a building.

The BLP approach has some superficial similarities to *Buildmark* and its 'clones' (the main risk insured is against 'damage', and there is a £1000 excess), but the differences are more noteworthy:

- BLP does not look to the track record of the builder via a registration system, nor does it protect against the insolvency of the builder
- It does not take a buyer's deposit as a retention from a builder/developer against possible later claims, nor a bond or indemnity from developer or builder (who is thus not tied into an all-embracing 'defects liability period')
- Premiums are based on the contract value of the work (the cost of basic cover will start at around 0.6% of this), not the sale value of the property
- The basic coverage is for any 'defect in the structural works [*further defined*] notified to the insurers during the period of insurance which is attributable to a defect in design or workmanship or materials which was not manifest at the date of inception [*of the cover – exchange of contracts for the sale or issue of the Certificate of Practical Completion (whichever is the later)*]'
- A policyholder can thus have a valid claim without having to show exactly how the defect arose, provided that the defect has destroyed or physically damaged the premises or threatens to do either, such that immediate remedial measures are necessary
- The original builder has no general responsibility for remedying defects within the early years of the policy, so there is no need for the additional machinery *Buildmark* offers if the builder fails to do so
- The insurer will not exercise subrogation rights against the builder.

This is therefore first party insurance in the proper sense, not a warranty, so with few exceptions the current building owner or occupier gets the cost of

84 As others have suggested, this is the kind of systematic process which Building Control Bodies (including the NHBC's Approved Inspector subsidiary) ought ideally to operate, but with the constraints on their resources cannot.

remedying the defect.[85] The standard cover is for structural defects only, but a version of the policy called *BLPSecurePlus* extends the cover to non-structural components (including M&E systems) in relation to residential buildings. As Sir Michael Latham said in *Constructing the Team*:

> 'Reliable and timely restitution [*for construction defects*] has been shown to result only from first party material damage non-cancellable insurance. Within the terms of the policy, repairs are funded on proof of relevant damage, without proof of fault.'[86]

B4 The new *Consumer Code*

In 2008 the Office of Fair Trading published the results of an investigation into the homebuilding sector, including all aspects of consumer rights and avenues of redress.[87] This argued – following earlier such calls, not yet acted on[88] – for an industry-wide code of conduct in relation to new homes. This would go beyond just defects and apply to the whole buying process, including the contractual terms involved and after-sales dispute resolution. If this code were not operational by the end of March 2010, the OFT threatened to impose a statutory alternative, to which all homebuilders would be required to belong and which would be funded by an industry levy.

Eleven homebuilding and related organisations (including the NHBC and the CML) picked up the gauntlet the OFT had thrown down, agreeing to devise and adopt a brand-new *Consumer Code for Home Builders*. This led the OFT to lift its threat – though the new *Code* does not have statutorily approved status. It came into effect for any would-be buyer reserving a new, or newly converted, home after 1 April 2010. Offering an NHBC, Premier Guarantee or LABC New Home warranty requires compliance with it for the future.

The website for the new *Code* grandly claims:

> '[It] adds to the already world beating consumer protection enjoyed by home buyers in the UK'.[89]

However, in reality it does surprisingly little: for example, it does not augment any of the rights enjoyed by a would-be off-plan buyer or curtail the freedoms of the developer in drafting such contracts; nor does it extend the minimum protection available under any of the warranty systems now on the market.

---

85 Water ingress in the first year is not covered, so here the insured has to look to the original builder, BLP offering a 'Negotiated Settlement Process' with the builder on the insured's behalf; and the insurer retains the right – seldom exercised – to do the repair work itself.

86 The Latham Report n 35, para 11.16.

87 OFT, *Homebuilding in the UK – a market study* (OFT1020, September 2008) – downloadable from *www.oft.gov.uk* (visited 18 November 2010).

88 Eg the Barker Review of Housing Supply (Final Report, March 2004), downloadable from *www.hm-treasury.gov.uk/media/E/3/barker_review_report_494.pdf*; and the Calcutt Review of Housebuilding Delivery (November 2007), downloadable from *www.communities.gov.uk/documents/housing/pdf/callcuttreview.pdf* (both visited 26 October 2010).

89 See *www.consumercodeforhomebuilders.com* (2nd edition, visited 11 October 2010).

However, it does lay down additional information duties on any builder or developer, so would-be buyers should now be told more clearly what the reservation fee means[90] and on what terms sales will take place; and it brings in a new Independent Dispute Resolution Service, an adjudication procedure which sits on top of the home buyer's warranty provisions.

Meanwhile, though, on scope and time grounds the NHBC warranty is not likely to assist in our Paradise Gardens situation; nor will the new *Code*, though here there is the extra reason that all relevant flat sales pre-dated its arrival.

B5 Other 'warranty' claims

What about other warranties (guarantees) linked to specific items of equipment, materials or installations in the flats or common parts in the list of defects? Between seller and buyer, a warranty can always have contractual force, whether offered as an integral part of the sale terms or as an optional add-on via an extended warranty contract, separately paid for.

Beyond that familiar sale-of-goods nexus, manufacturers of equipment regularly offer guarantees to the ultimate consumer at the far end of the supply chain and – by and large – choose to honour them. This used to be only for reasons of commercial expediency and self-interest, rather than expecting to create enforceable legal obligations about quality, at least under English law. However, following a 1999 EC Directive,[91] a warranty in relation to 'consumer goods' may these days have legal force between manufacturer and ultimate consumer (not otherwise in a direct contractual relationship). Only the original flat-owners (and perhaps their assignees) could hope to benefit from this new legal protection, but even they appear to be excluded:

- 'Consumer goods' in the Directive refers only to tangible movable items, which hardly covers materials and equipment intended to be incorporated into a new building
- The original flat-owners did not themselves buy the window units, or any other defective items, from the developer or anyone else: their contract was for work-and-materials (each flat) and was not a purchase of goods, or even a supply of goods[92]

90 The OFT Report n 87 suggests at [6.58] that sales practices relating to reservation agreements may violate the Consumer Protection from Unfair Trading Regulations 2008 (SI 2008/1277).

91 Council Directive 99/44/EC of 25 May 1999 on Certain Aspects of the Sale of Consumer Goods and Associated Guarantees, OJ 1999 L171/12 (7 July 1999), implemented for the UK by the Sale and Supply of Goods to Consumers Regulations 2002 (SI 2002/3045) – adopted under s 2(2) of the European Communities Act 1972 and in force from 31 March 2003.

92 Article 4 provides: 'Contracts for the supply of consumer goods to be manufactured or produced shall also be deemed contracts of sale for the purpose of this Directive'; even if the sale contract for each flat could come within this wider definition, the narrow meaning of 'consumer goods' would still exclude our situation from the protection of the Directive.

- 'Consumer', as in the earlier 1993 Unfair Contract Terms Directive,[93] refers only to a natural person.

Though the law may not help them directly, Paradise Gardens residents should still consider approaching any manufacturer of parts of the construction now apparently faulty (for example, the window units), inviting them to have a look at a representative sample of problem locations and encouraging them to honour any publicly made promise about the product's normal life. This may get the units replaced, if they have failed prematurely; or it may at least add some factual detail helpful for a claim against someone else.

In the same direction, it may be wise in parallel to get some of the window units independently inspected and tested, to head off a possible response from the manufacturer denying responsibility for the problem – by asserting, for example, that the main contractor (or whoever installed the windows) failed to follow the manufacturers' own prescribed method of mounting the windows in place and that this subjected them to tensions which have caused them now to break. This detective work might of course show that they were installed in a situation for which they were not appropriate, according to the manufacturers' own literature; if so, the search for a remedy may turn away from the manufacturer (clearly not at fault, or unlikely to be generous enough) to others involved in the process of construction.

Part of this exploratory work (all having to be funded and paid for way ahead of any chance of reimbursement) could also include getting access to documentation about those aspects of the construction which now appear to be defective. An application to the court for pre-action disclosure may be helpful in this connection, even at this early stage – see D3 below.

C FIND YOUR DEFENDANT, CLAIMANT AND RIGHT OF ACTION

What claims then can be made in law against the developer (or other defendant), who can make them and on what legal basis? Warning against litigation in building defect cases, the OFT 2008 report summarises the overall picture. It ends with a gloomy conclusion:

> '… this is a particularly complex area of the law which is likely to be difficult to understand for the average homebuyer… access to redress via the court system is unlikely to provide many homebuyers with effective protection.'[94]

How far is this accurate in relation to Paradise Gardens?

93 The 1993 Directive: n 127 and linked text.
94 OFT 2008 report n 87 [6.52] and [6.54].

C1 Claims by first purchasers

In contract

Each first buyer – who acquired his or her flat off-plan – did so through a purchase contract with Inferos' subsidiary. That, though, is their only contractual link relating to construction of their flat: each has no such link with any other party potentially responsible. Theoretically they could have done, if the main contractor, architect or project manager had given each the benefit of a *collateral warranty*. This would have created a direct contractual link with each buyer – giving the buyer a right to sue for a breach of whatever obligations the party offering the warranty undertook (usually backed by insurance cover).

Collateral warranties are a well established legal technique in the world of major projects, to ensure that the project's ultimate owner or tenant has remedies in law against a party responsible for aspects of the construction; and the benefit of a collateral warranty can usually be assigned onwards to a new tenant or owner. However, they figure hardly at all in the residential sector, largely because potential future buyers of flats have no presence at the table when a development project is being assembled. Nor is it realistic to imagine individual buyers negotiating with all the other parties involved in constructing the project – and with their insurers.

Returning then to each first buyer's contract with the developer, such a buyer can of course only make a claim if s/he can show a clear contractual obligation of which the developer is in breach, leading to one or more recoverable heads of not-too-remote damage (assuming, that is, that the contract itself says nothing about remedies for breach of the construction obligations of the developer, which is usual in residential sale contracts). Provided that the defects can be linked to a breach by Inferos of its obligations in relation to the quality of each flat – ideally of the structure and common parts too, further discussed below – then getting as damages the cost of repairing those features of Paradise Gardens up to the expected standard would be relatively straightforward.

Whom to sue?

The flat-owners appear to have the welcome luxury of a developer to sue which is still in existence when the defects come to light – though whether it has assets to make it worth suing (or whether, if not, its liability can be passed up the chain to its parent company) is another matter: a check at Companies House and from a credit rating agency should provide some background. Finding out whether Inferos has adequate PI insurance cover (or any cover at all, since a developer has no legal obligation to take out insurance) will be more difficult.

The fact that Inferos may attempt to shift some or all of its ultimate liability to other parties – notably the NHBC-registered main contractor for the development – is at this stage irrelevant. However, if at the developer's initiative other defendants get added later, this may significantly complicate and delay the litigation, hence increasing the total pool of costs. Some of these costs may fall on the claimants, even if they win most or all of their claim. So the claimants are vulnerable to this – and can do little to stop it.

The content of the developer's obligations

A Basic duties

As we shall see (F2 below), it is unlikely that the law would say that a sale contract promised each buyer any particular level of pleasure at living in (or owning) one of the flats. However, each contract is likely to have included an obligation to build each flat in a good and workmanlike manner. If so, it requires the developer to attain a defined result, so proving a breach requires only showing that the flat was *not* built in a good and workmanlike manner, though this is an issue on which rival experts on each side will probably disagree.

If the contract were unclear or silent, section 13 of the Supply of Goods and Services Act 1982 would imply a term in a contract for the supply of a service that the supplier – if acting in the course of a business – will carry out the service 'with reasonable care and skill'. But this duty under the 1982 Act is only a default: subject to the controls on certain types of contract term under the Unfair Contract Terms Act 1977 (UCTA) and the wider powers in relation to unfair terms under the UTCCR 1999,[95] the parties are free to agree otherwise. Happily, in our case they seem not to have done so – but a purchaser's conveyancer should be on the lookout for any attempt to dilute this basic obligation. Proving a breach of a term expressed in terms of reasonableness requires showing fault (negligence) on the part of the developer: here too, each side's experts will probably disagree on whether the prescribed quality standard has been attained.

Some lawyers for developers argue that the 1982 Act does not apply where the contract is one for the sale of land (transferring an interest in land not being the same as providing a service), this overlooks the very substantial construction element in an off-plan sale contract. The TCC was recently unimpressed by a suggestion that the developer owed no quality obligations at all, if none were expressly laid out in the contract.[96] However, this does not go so far as a fitness for purpose obligation, whose breach might be easier to prove. The courts have often accepted the habitability of a dwelling at completion as an

95 The UTCCR: n 126 and linked main text.
96 Judge Stephen Davies in *Robinson v PE Jones Ltd* n 111 [77].

implied term in a construction contract,[97] though this would not of course cover the full range of problems now identified at Paradise Gardens.

B Non-compliance with Building Regulations?

On any view of the developer's duties, these include the obligation to provide a flat complying with all externally imposed 'statutory requirements' affecting the work of construction. The standard suites of construction contracts used in the UK, like JCT 05,[98] ICE 7th[99] or even NEC3,[100] impose the same duties on a main contractor. Similarly, to offer the buyer the benefit of the NHBC *Buildmark* warranty (B2 above) will bring with it a duty on the builder, and perhaps developer too, to comply also with the NHBC's own Technical Specifications;[101] these add extra levels of detail but also cross-refer to the Building Regulations.

At Paradise Gardens, the flat-owners' surveyor considers that the failure to provide fire seals on the ducts is a breach of Building Regulations. Beware: Inferos may not agree. For a start, the developers flourish the Building Regulations final certificate, a copy of which they have obtained from the local authority as BCB. If the local authority were satisfied when the development was first constructed (which is what counts), who is the residents' surveyor now to say otherwise?

The certificate, issued under section 51 of the Building Act 1984, certainly suggests that the requirements of the Building Regulations have been complied with. But its terms will not be absolute:

> '… the building works … have been inspected and, as far as this Authority, after taking all reasonable steps, have [*sic*] been able to ascertain, comply …'[102]

Wording like this does not on its face assert actual compliance; and everyone of course knows why these certificates cannot be unconditional – overworked building control officers (and Approved Inspectors trying to make a profit on

---

97 *Miller v Cannon Hill Estates Ltd* [1931] 2 KB 113 (Div Ct KB) 120-121 (Swift J) and 123-124 (Macnaghten J); Lord Denning MR in *Hancock v BW Brazier (Anerley) Ltd* [1966] 1 WLR 1317 (CA) 1332; Edmund Davies LJ in *Billyack v Leyland Construction Co Ltd* [1968] 1 WLR 471 (QB) 478; Lord Denning MR in *Greaves & Co (Contractors) Ltd v Baynham Meikle* [1975] 1 WLR 1095 (CA) 1098-1099; *Test Valley BC v Greater London Council* (1979) 13 BLR 63 (QBD); *Hampshire CC v Stanley Hugh Leach* (1990) 8 Const LJ 174 (QB (OR)); Longmore LJ in *Alderson v Beetham Organisation Ltd* [2003] EWCA Civ 408, [2003] 1 WLR 1686 [40]. For implied covenants on habitability in residential tenancies, see n 26.

98 JCT 05, SBC/Q: n 21.

99 Institution of Civil Engineers, ICE Conditions of Contract Measurement Version, (7th edition Thomas Telford, London 1999).

100 Institution of Civil Engineers, Engineering and Construction Contract (NEC3, Thomas Telford, London 2005).

101 As was the case in the sale contract in *Holloway v Chancery Mead* (n 71 and linked main text) and *Bole v Huntsbuild* (n 165 and linked main text); and in the contracts for leases in *Scobie v Fairview Land Ltd* [2008] EWHC 147 (TCC): interlocutory hearing before Akenhead J, 1 February 2008 [13]-[15].

102 Actual example known to the authors (grammar and all).

their fees) don't have time to poke their noses into everything. Their final certificates are qualified, as above, by reference to the inspections which they have in fact been able to carry out. Further, Building Regulations are not written on tablets of stone and speak of the *performance* of aspects of a building, rather than (as they once did) prescribing particular components or design solutions; and many use inherently vague tests, with the word 'reasonable' central to their requirements. Their application to specific construction projects – especially large ones – is therefore often a matter of interpretation and is invariably negotiated between the BCB and the developer. Further, public sector BCBs often issue formal dispensations or relaxations under Regulation 11 of the Building Regulations,[103] which in this instance for example might explain the absence of a central fire detection and alarm system. However, there ought to be a record, so if necessary you will make a Freedom of Information Act application to the local authority to obtain this, preferably (if there is time) before issuing the claim.

Even if a certificate apparently suggested compliance, the law makes clear that this will not be legally conclusive.[104] Indeed, no would-be claimant would ever wish that it were, for this would close off the many claims against parties other than BCBs in which non-compliance with Building Regs is the central assertion, in the teeth of what the paperwork from the BCB may suggest. If non-compliance can be established, it will be helpful towards establishing liability in contract, tort or under the DPA (all these possibilities are further explored below). This, however, is only valuable provided that there are claimants (including the RMC or RTM company) who have a 'live' right to sue on any of these grounds for any of the relevant defects and who can point to a defendant worth suing whose legal duty it was to ensure compliance, or whose duties, if carried out without negligence, would in fact have led to compliance.

The physical extent of the developer's obligations

The definition of the flat in the standard long lease for each unit at Paradise Gardens includes only its inner skin, the non-structural internal walls, fixtures, fittings, windows, doors and the service ducts which exclusively serve the particular flat. Nothing external or structural. Astonishing as it may seem, Inferos will argue that their contractual obligation to build *the flat* in a good and workmanlike manner (or equivalent) does not extend to the structural elements and common areas, which is where the lion's share (in value) of the defects the unhappy flat-owners are complaining about have been identified.

---

103 The Building Regulations: n 31.

104 The Building Regulations n 31, Regulation 17(4): 'A certificate given in accordance with this regulation shall be evidence (but not conclusive evidence) that the requirements specified in the certificate have been complied with.' Regulation 18 offers a procedure for checking whether past unauthorised work done in fact conforms to the Regulations: if it does, after inspection, the LA issues a Regularisation Certificate. Like a Completion Certificate, this is evidence, but not conclusive.

So the potential claimants have to be ready to argue that the express term about defects (if there is one) in the contract, or an implied term imposing obligations on the developer in relation to what is within the flat (as defined), extends to these 'external' elements. In other words, the claimants have to be confident that they can persuade a court that an implied term about the quality of the structure and common parts must, in the traditional formulae of contract doctrine, be necessary to give the contract business efficacy; and so obvious that it goes without saying. To label the hoped-for implied term as reasonable and equitable is essential, but not enough.[105]

There is no caselaw directly in point for a development like ours, though the House of Lords looked closely at a multi-unit residential block in *Irwin v Liverpool City Council*, producing a classic discussion about implied terms.[106] The judges were clear that someone must owe obligations to the tenants – in this case the local authority (freeholder and landlord) – in relation to those parts of the tower block not comprised in each flat, especially as the printed documentation for tenants was self-evidently incomplete. Since then, courts have anyway become less obsessed with the literal interpretation of terms in contracts and more willing to use the contract's commercial purpose and context as a guide to resolving ambiguities.[107]

Ms S is stupefied by the suggestion that Inferos might not be liable for defects in the structural elements and common areas – and her reaction ('what are we expected to do, parachute into our flats?') does suggest an approach which should lead to an implied term. But Inferos have a neat counter-argument: any necessity there might have been for an implied term of this scope is displaced by the express terms of the NHBC *Buildmark* warranty (B2 above), which does of course cover (subject to a hefty excess) a limited range of defects in the structure and common parts. However, this overlooks the fact that the NHBC warranty is supposed to enhance, not limit, the rights of purchasers (and its wording says precisely that); in any event it makes the builder, where not also the developer, the main party responsible for defects for the first two years. There's no caselaw directly in point, but you advise that in all likelihood a court in our situation will find an implied term relating to the structure and common parts in the purchase contract with the developer.

Additional claim under statute

Original flat purchasers can also make a claim by relying on duties imposed on the developer (amongst others) by the Defective Premises Act 1972. These are

105 See Lord Simon of Glaisdale, giving the judgment of the majority in *BP Refinery (Westernport) Pty Ltd v Shire of Hastings* (1994) 180 CLR 266 (PC) [40].
106 *Irwin v Liverpool City Council* [1977] AC 239 (HL).
107 See eg Lord Hoffmann in *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896 (HL) 912-913, applied in *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38, [2009] AC 1101.

very similar to those in contract above (and with some of the same uncertainties), but cannot be contracted out of; they are discussed at C3 below in relation to those flat-owners who are *not* first buyers. This is because the DPA is of greatest value where a would-be claimant has no separate right of action in contract against his or her chosen defendant/s.

Concurrent duties in tort?

A Background

It is theoretically possible for a contractual situation – like between our developer and each original flat purchaser – to give rise to a parallel 'duty of care' in the tort of negligence. If so, the claimant can rely on either legal basis for a claim (or both, as alternatives), thus ensuring the benefit of whichever basis is more favourable – though of course can only recover one set of damages.[108]

The special value to a claimant is that the limitation period in tort often starts (and hence ends) later than it does in contract, especially for latent defects (see D1 below). To be sued in tort may have an advantage for a defendant too: it makes available the Civil Liability (Contribution) Act 1978, which permits a court to apportion liability, where more than one party is responsible in tort 'for the same damage'. But the courts have in the past analysed relationships in this way primarily where a professional provides *services*, eg solicitor to client,[109] or designer to construction employer,[110] where the negligent performance of these duties causes the client to suffer 'pure economic loss'. Can a sale contract from a developer to a consumer ever produce the same result?

B Concurrency in a new-build sale contract: Robinson v PE Jones (Contractors) Ltd[111]

In this recent case, first heard in the TCC in Manchester in 2009, Judge Stephen Davies, determining preliminary issues, suggested that the same approach can apply where an 'ordinary' builder sells a new building off-plan. In such a situation, part of the contract is for the supply of services, just as an architect does under his/her terms of engagement; the fact that the contract is also for sale of the to-be-constructed dwelling (land), and that the building is in fact a

108 *Henderson v Merrett Syndicates Ltd* [1995] 2 AC 14 (HL).
109 *Midland Bank Trust Co Ltd v Hett Stubbs & Kemp* [1979] Ch 384 (Ch).
110 *Bellefield Computer Services Ltd v E Turner & Sons Ltd* [2000] BLR 97 (duty of care owed by main contractor to construction employer); *Abbott v Will Gannon & Smith Ltd* [2005] EWCA Civ 198, [2005] BLR 195 (duty of care owed by consultants to construction employer).
111 *Robinson v PE Jones (Contractors) Ltd* [2010] EWHC 102 (TCC): beyond the duty of care point, crucial because the claimant's action could only have been brought in time if he could rely on the special 'latent damage' rules in the Limitation Act 1980, there was also an issue on the impact of the Unfair Contract Terms Act on the same clause 10, which also failed, as it did again on appeal.

dwelling, are both irrelevant. The builder may therefore be liable in tort for any financial loss the first buyer suffers – in this case, the claimant Mr Robinson's need to rebuild (at a claimed cost of £35,000) allegedly faulty chimney flues for two gas fires in the new house bought from the defendant company.

However, in such a situation the parties could expressly prevent any parallel duty in tort arising, or could exclude any such duty by what they included in their contract. Here is how Ramsey J put the point in a more recent case in the TCC:

> '… in considering whether a contractual provision affects the existence or scope or extent of a duty of care, the test is whether the parties have so structured their relationship that it is inconsistent with any such assumption of responsibility or with it being fair, just and reasonable to impose liability. In particular, a duty of care should not be permitted to circumvent or escape a contractual exclusion or limitation of liability for the act or omission which would constitute the tort.'[112]

Applying these principles to the arrangements for Mr Robinson's new house, Judge Davies thought that clause 10 of the Building Conditions, incorporated in the contract between developer and buyer, was crucial:

> 'The vendor shall not be liable to the purchaser or any successor in title of the purchaser under the Agreement or any document incorporated therein in respect of any defect error or omission in the execution or the completion of the work save to the extent and for the period that it is liable under the provisions of the NHBC Agreement on which alone his rights and remedies are founded.'[113]

The impact of this, the judge concluded, was that builder and purchaser had together adopted *Buildmark* in place of their normal contractual relationship – and *Buildmark* of course offered greater protection to the buyer than the original sale contract would have done, above all by bringing in the NHBC. However, more than ten years now having elapsed since the warranty had come into force, a claim against the NHBC was a non-starter: it was a free-standing claim in contract or tort against the builder or nothing – and a claim in contract was already out of time. The judge held that clause 10 (combined with clause 8) left no scope for superimposing a tort duty of care on the contractual obligations the builder had undertaken, since these had been subsumed into *Buildmark*. As here, therefore, a judge may conclude that the parties have in effect (and whether realising it or not) opted out of any concurrent duty in tort. Perhaps more accurately, they have so organised their relationship to leave no scope for a court to conclude that the builder has 'assumed responsibility' to the buyer for economic losses which may the buyer may reasonably foreseeably suffer, if the builder negligently carries out his obligations.

112 *BSkyB Ltd v HP Enterprise Services UK Ltd* [2010] EWHC 86 (TCC) [356].
113 *Robinson v Jones*: n 111 [73].

C *The significance of* Robinson v Jones

The TCC judgment caused quite a stir, as it appeared to offer new hope to original flat purchasers in an off-plan purchase, above all because a parallel claim in tortious negligence benefits from a more flexible and later starting-point than a claim in contract for the time to run within which legal action must be started (D1 below). This new possibility, if it applied, could be relied on by a would-be claimant who also had an existing contractual nexus with the defendant. However, statute provides that a subsequent purchaser of a flat acquired with latent defects can also benefit from a right of action in tort to which, under normal principles, they would not be entitled, if these defects then come to light. But it remains uncertain whether such a right would extend to latent defects discovered in the 'common parts' of a multi-unit development, for which an individual flat-owner's right of action is problematic anyway.

Even looking only at the TCC judgment, there is a further potential limitation on the idea of a concurrent right of action in tort. The defendant in *Robinson v Jones* was a combined builder/developer, not a developer alone. In other words, the case happens to concern a small builder who could reasonably be treated as responsible personally for all the activities which had led to the defects being incorporated in the house, especially if the house was constructed by his own employees, for whom the builder is of course responsible in law, in contract as well as tort. The same is not true of a developer, and to pin a tortious duty of care on that party might involve liability for the acts of 'independent contractors' (main contractor, sub-contractors, designers etc) – which goes against the normal rules of the law of negligence.[114] In a developer situation, the best that might be asserted is that the developer had its own duty to manage and supervise its independent contractors, and had failed to carry out this duty with the standard of care expected – but proving this duty and its breach will often be hard evidentially. Further, the field offers plenty of conflicting first-instance authority, as the discussion in the TCC itself summarises.

Judge Davies was careful not to short-circuit or undermine the general rules limiting the situations in which a party may owe a duty of care in tort for 'pure economic loss' (C3 below). So the case could not help purchasers at Paradise Gardens in claiming directly against construction parties with whom they never had a contract but who might have been responsible for some of the defects – main contractor, architect, project manager or sub-contractor.

The excitement generated by *Robinson v Jones* has now been discouraged by the approach of the Court of Appeal to the same issues, which dismissed the

114 Note that this 'scope of liability for others' point was not raised either in the TCC or before the Court of Appeal. On it, see *Biffa Waste Services Ltd v Maschinenfabrik Ernst Hese GMBH* [2008] EWCA Civ 1257, [2008] 3 WLR 324, [2009] BLR 1, 122 Con LR 1; discussed by Ben Patten, 'Ultra-hazardous acts: where do we go after Biffa?' (SCL Paper D104, October 2009).

appeal by the claimant Mr Robinson.[115] The court agreed with Judge Davies that clauses 8 and 10 of the contract[116] excluded any possibility of a remedy in contract or tort against the builder and were not unfair, but took a narrower approach to the question of principle: when can a concurrent duty of care be found to exist, alongside the contractual obligations a builder/developer has undertaken to his purchaser?

Jackson LJ (with whom Stanley Burnton and Maurice Kay LJJ concurred) reached his conclusion in two stages:

> 'Absent any assumption of responsibility, there do not spring up between the parties duties of care co-extensive with their contractual obligations. 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.'[117]
>
> […]
>
> 'Building contracts come in all shapes and sizes from the simple house building contract to the suite of JCT, NEC or FIDIC contracts. The law does not automatically impose upon every contractor or sub-contractor tortious duties of care co-extensive with the contractual terms and carrying liability for economic loss. Such an approach would involve wholesale subordination of the law of tort to the law of contract.
>
> If the matter were free from authority, I would incline to the view that the only tortious obligations imposed by law in the context of a building contract are those referred to in paragraph 68 above. I accept, however, that such an approach is too restrictive. It is also necessary to look at the relationship and the dealings between the parties, in order to ascertain whether the contractor or sub-contractor 'assumed responsibility' to its counter-parties, so as to give rise to *Hedley Byrne* duties.
>
> In the present case I see nothing to suggest that the defendant 'assumed responsibility' to the claimant in the *Hedley Byrne* sense. The parties entered into a normal contract whereby the defendant would complete the construction of a house for the claimant to an agreed specification and the claimant would pay the purchase price. The defendant's warranties of quality were set out and the claimant's remedies in the event of breach of warranty were also set out. The parties were not in a professional relationship whereby, for example, the claimant was paying the defendant to give advice or to prepare reports or plans upon which the claimant would act.'[118]

115 *Robinson v PE Jones (Contractors) Ltd* [2011] EWCA Civ 9.
116 Main text to n 113.
117 *Robinson v Jones* n 115 [68].
118 *Robinson v Jones* n 115 [81]-[83].

In the light of this, we must now assume that any claim that first buyers at Paradise Gardens can make against the developer is in contract alone (and, where relevant, under the DPA as well), so must be started within the ordinary time limits for such actions.

C2 Successors of first purchasers: claiming in contract

Routes to legal action

Few of those first Paradise Gardens residents who have already sold their flats on will now have any interest or inclination to sue for breach of their purchase contract; and they certainly cannot be made to do so. Even if they did successfully go to court, it is unclear what loss of their own they could show to justify an award of more than nominal damages in their favour.[119]

What then of their successors, some of the present flat-owners? They have every motivation to make a claim, and can show clear losses attributable to the alleged defects; but by definition were not parties to the original sale contracts to their predecessors. In only one respect are they in exactly the same position than the original flat-buyers: they can – within the 10-year time limit – claim under the NHBC *Buildmark* warranty. However, as B2 above shows, the scope of this is so narrow that it is unlikely to help. Leaving that aside, therefore, can those current flat-owners who did not buy directly from Inferos bring a claim in contract against the developer?

There are two main routes in law to this result:

1 *Assignment*: in principle, a subsequent purchaser who can show that s/he has had assigned to him/her in due form the benefit of the original purchase contract can 'step into the shoes' of the first buyer, including (provided that the claim could be started in time) the right to sue the developer on that contract. In *Technotrade Ltd v Larkstore Ltd*,[120] the Court of Appeal confirmed recently that, provided the breach of contract dates from before the assignment, an assignee can claim in damages the same losses as the original owner could have done, had the

119 They certainly cannot normally sue for the losses now suffered by their successors, though the majority of the House of Lords in *Panatown* (n 140 and linked main text) confirmed the possibility of such a claim, but only in unusual circumstances.

120 *Technotrade Ltd v Larkstore Ltd* [2006] EWCA Civ 1079, [2006] 1 WLR 2926, in effect adding a gloss to the original rule in *Dawson v Great Northern and City Railway Co* [1905] 1 KB 260 (CA), and rehabilitating the dissenting judgment of Staughton LJ in *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd* and *St Martin's Property Corporation v Sir Robert McAlpine Ltd* 57 BLR 57 (CA) 80-81. Could tort liability under *Hedley Byrne* n 149 have been imagined instead in *Technotrade*, the party which suffered the loss then being able to sue directly?

flat not been sold: the change of ownership does not break the link between breach and substantial remedy.[121]

2 *The Contracts (Rights of Third Parties) Act 1999*: this creates ways round the general 'privity' rule in English contract law. This rule normally prevents someone who is not a party to a contract – and who has not given 'consideration', in the legal sense – from taking action to enforce any of its terms, by way of an action for damages or any of the other, less usual, contractual remedies; the statute permits enforcement by a 'third party' (under conditions).

However, Inferos' standard contract of sale includes two awkward special conditions. The first states that the benefit of the contract is assignable by a flat-buyer only with Inferos' written consent – and does not go on to say that this consent may not be unreasonably withheld; the second purports to exclude the rights of third parties under the 1999 Act.

Assignment: general principles

No assignments of the benefit of the original purchase contracts have yet taken place – but many of the original leases have been assigned, which is how each flat will have been sold on to its current owner, if the first buyer has now moved on. The sale of a flat by its first buyer to a successor does not impliedly assign rights derived from the earlier purchase contract under which the present seller originally acquired it; on the other hand, there's no rule that this assignment has to accompany the sale of the flat to which part of a possible claim may relate. So it is not too late to track down as many as possible of the former flat-owners and ask each to execute an assignment of the benefit of their purchase contract in proper form now (offering to pay the costs of doing so).

However, no relevant current owner can insist on an assignment; and with litigation against Inferos already a real possibility (which the developer already knows about via the RMC), if a first buyer asks for consent, the developer may well refuse. What are the consequences?

Construction lawyers will be familiar with *Lenesta Sludge*,[122] the picturesque name of one of a pair of House of Lords cases from the 1990s which consider the effect of a total bar on assignment (or conditions prescribed for assignment which have not been fulfilled, such as getting the consent of the other party to the original contract). The judges refused to accept an argument that

121 This in turn suggests that the assignment in *Darlington v Wiltshier* n 140 itself could have permitted the Council to get substantial damages without needing the help of the 'black hole' doctrine developed in *Lenesta Sludge* and *St Martin's* n 122; but the fact that Morgan Grenfell, the construction employer, at no time owned the site might still have been an obstacle.

122 *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd* and *St Martin's Property Corporation v Sir Robert McAlpine Ltd* [1994] 1 AC 85 (HL).

restrictions on assignability might violate principles of public policy; or that there was a distinction between claims already matured before assignment and those which might arise following it. Instead, they gave such clauses a wide and literal effect. As Lord Browne-Wilkinson put it, simply and clearly:

> '… an assignment of contractual rights in breach of a prohibition against such assignment is ineffective to vest the contractual rights in the assignee.'[123]

Equally, if assignment is theoretically possible (the default legal position) but third party consent is necessary, failure to obtain this consent is similarly catastrophic: the would-be assignor passes no rights to the would-be assignee. For those second or later flat-owners now interested in getting a remedy against the developer, that could destroy their hopes of claiming in contract, unless the 1999 Act (below) comes to their aid. If the prohibition takes the form – as it did in *Lenesta Sludge* – of a promise not to assign, attempting to do so may even constitute a breach of contract between the would-be assignor and the other original contracting party.[124]

Assignment: challenging a bar

Can a contractual bar on assignment without consent be challenged, and, if so, how? If what was being assigned was a tenancy and the landlord's power to consent was only to be exercised reasonably, statute would add some procedural safeguards so as to enable the landlord's exercise of this power to be challenged;[125] but that is not our situation. Nor can it be argued that this clause on assignment was not in fact agreed as part of each sale contract, or that Inferos has somehow waived its right to consent.

A Available legal doctrines

The only obvious way forward is to consider challenging the clause as an unfair contract term, under either UCTA 1977 or the UTCCR 1999,[126] the main current UK measure implementing the 1993 EC Directive.[127] UCTA is concerned almost wholly with contractual provisions and notices seeking to

123 *Linden Gardens Trust* n 122 109C.
124 See Greg Tolhurst, *The Assignment of Contractual Rights* (Oxford and Portland OR, Hart Publishing 2006) [6.87]-[6.89].
125 Landlord and Tenant Act 1988, as amended by the Landlord and Tenant (Covenants) Act 1995.
126 The UTCCR 1999 (SI 1999/2083) were in turn modified by the Unfair Terms in Consumer Contracts (Amendment) Regulations 2001 (SI 2001/1186), which extended standing to the FSA to bring proceedings for an injunction to prevent a body using an unfair contract term. These powers have in turn been overtaken by Part 8 of the Enterprise Act 2002: n 127.
127 Council Directive 93/13/EEC of 5 April 1993 on Unfair Terms in Consumer Contracts, OJ 1993 L95/29 (21 April 1993), first implemented for the United Kingdom by the UTCCR 1994 (SI 1994/3159), adopted under the European Communities Act 1972 section 2(2), as extended by Directive 98/27/EC of the European Parliament and of the Council of 19 May 1998 on injunctions for the protection of consumers' interests, OJ 1998 L166/51 (11 June 1998), implemented for the UK by The Stop Now Orders (EC Directive) Regulations 2001 (SI 2001/1422). These and separate powers under the Fair Trading Act 1973 have now been overtaken by wider powers under Part 8 of the Enterprise Act 2002: see *www.oft.gov.uk*.

limit or exclude liability (in contract and/or tort), or to achieve an equivalent effect. However, it potentially applies to both business-to-business (B2B) and business-to-consumer (B2C) contracts, though under different conditions.[128]

There are, however, some threshold worries about the availability of UCTA in our situation. First, just as for implied statutory quality obligations (C1 above), there is an argument that the 1977 Act does not apply to a contract for purchase of a house or flat. This is because under Schedule 1, para 1(b), UCTA does not apply to 'any contract so far as it relates to the creation or transfer of an interest in land'. However, a TCC judge recently took the view that 'so far as' means that the exemption covers only those terms within the contract which relate to the creation or transfer of the property interest. Hence the Act may not apply to post-completion sales of houses or flats, but must apply to at least the construction aspects of an off-plan sale contract.[129] Second, a bar on assignment of a contract does not easily fit within any of the categories of contract term made actually or potentially unenforceable by UCTA (whose scope is narrower than its title suggests), except at the outside section 13(1)(b), which treats as an exemption clause potentially subject to the Act's reasonableness test one 'excluding or restricting any right or remedy in respect of the liability [*of the contracting party which is not the consumer, or on whose standard terms the contract is based*]'; but no caselaw yet treats a bar on assignment as capable of being challenged under these rules.

B Applying the UTCCR

By contrast, the UTCCR – which 'copy out' word-for-word the parent Directive – are concerned with any form of unfairness in almost any contract term,[130] provided that this has not been individually negotiated and is within a B2C contract (where one party deals as seller/supplier and the other as an individual – not corporate – consumer). The Regulations protect only a 'natural person who … is acting for purposes which are outside his trade, business or profession', so any first buyer (and any current potential claimant) which happens to be a company or other legal entity will not be able to claim their protection.

Whether the provisions in each lease concerning assignment were 'not individually negotiated' is a further threshold issue. The fact that initial

128 A corporate body not acting (nor holding itself out as acting) in the course of its business can be protected under UCTA, which also confers a limited form of protection on B2B contracts, if one party deals 'on the other party's written standard terms of business' (section 3(1)).

129 Judge Stephen Davies in *Robinson v PE Jones Ltd* n 111 [86]; on appeal n 115, the builder did not argue that UCTA was inapplicable, so the CA judges therefore assumed that it was.

130 Under the parent EC Directive n 91, terms defining the main subject-matter of the contract and the price/quality ratio of the goods or services supplied are outside its scope, though this is at present (2009) under review: see the Green Paper on the Review of the Consumer Acquis, (COM) 2006 744 final (February 2007), discussed by Michael Shillig in 'Inequality of bargaining power versus market for lemons: Legal paradigm change and the Court of Justice's jurisprudence on Directive 93/13 on unfair contract terms' (2008) 33 Eur Law Review 336.

purchasers were represented by lawyers or licensed conveyancers is not relevant to this issue. Instead, we are looking simply at the history: how far were the terms pre-formulated by the landlord (or developer) or its lawyers and survived in that form into the final draft, or how far are they the result of significant negotiation at the drafting stage?

As the European Court of Justice put it in the *Oceano Groupo* case:[131]

> '… the system of protection introduced by the Directive is based on the idea that the consumer is in a weak position I the seller or supplier, as regards both his bargaining power and his level of knowledge. This leads to the consumer agreeing to terms drawn up in advance by the seller or supplier without being able to influence the content of the terms.'

In this connection, note the detailed provisions of regulation 5:

> '(2) A term shall always be regarded as not having been individually negotiated where it has been drafted in advance and the consumer has therefore not been able to influence the substance of the term.
>
> (3) Notwithstanding that a specific term or certain aspects of it in a contract has been individually negotiated, these Regulations shall apply to the rest of a contract if an overall assessment of it indicates that it is a pre-formulated standard contract.
>
> (4) It shall be for any seller or supplier who claims that a term was individually negotiated to show that it was.'

If the relevant terms were in effect offered on a 'take it or leave it' basis, with the result that they are identical in all contracts, the developer will have difficulty convincing a court that these provisions were individually negotiated, even if the contracts vary in other respects.

The final preliminary issue relates to legal status of the terms themselves: can a term within a contract for the sale of a dwelling be challenged as unfair? Neither the Directive nor the Regulations defines 'contract' at all; but the Regulations can certainly apply to contracts for the sale or letting of land or buildings. Further, the Office of Fair Trading (OFT) has regularly investigated standard terms in leases under UTCCR.[132] The better view seems to be that obligations or restrictions in leases are primarily contractual, even if between parties who could not under the law of contract alone acquire rights or obligations and who need the intervention of the law of landlord and tenant to achieve this. If so, a contract to grant a lease can hardly be less protected.

---

131 *Oceano Grupo Editorial SA v Rocio Murciano Quintero* (Joint Cases C240/98 - 244/98), [2000] ECR I-4941, [2002] 1 CMLR 43 (ECJ) [25]; see also *Freiburger Kommunalbauten GmbH Baugesellschaft & Co KG v Hofstetter* (Case C-237/02) [2004] 2 CMLR 13 (ECJ).

132 OFT, *Guidance on unfair terms in tenancy agreements* (2005); also reports of individual investigations into unfair terms in tenancies and tenancy-like relationships, eg *Bankway Properties* (3 March 2005), *Allen & Harris* (9 September 2005), *Chelsea Yacht and Boat Co* (12 November 2004); *Harquail Homes Ltd* (15 August 2006) and *McCarthy & Stone plc* (5 September 2008) – *www.oft.gov.uk*.

Having disposed, with some confidence, of the threshold issues, we reach the question of substance: does a clause barring assignment of the benefit of a contract without the other party's consent fall foul of the UTCCR?

C Unfairness: applying the test in UTCCR

The primary test(s) of unfairness are in regulation 5(1):

> '… if, contrary to the requirement of good faith, [the term] causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer.'

In the *National Bank* case in the House of Lords, Lord Bingham (with whose speech all the other Lords agreed) gave his views about these tests:

> 'The requirement of significant imbalance is met if a term is so weighted in favour of the supplier as to tilt the parties' rights and obligations under the contract significantly in his favour. This may be by the granting to the supplier of a beneficial option or discretion or power, or by the imposing on the consumer of a disadvantageous burden or risk or duty.'[133]

The application of the formula in regulation 5(1) is made easier in many situations by Schedule 2 of the Regulations, which contains 'an indicative and non-exhaustive list of the terms which may be regarded as unfair'. You point out that this is colloquially called 'the Grey List', because its effect is neither white nor black. So is not essential to locate a particular term anywhere in this list for it to be considered unfair; but if a term does fit within the list, this gets closer to a finding of unfairness.

The 'Grey List' mentions terms 'Inappropriately excluding or limiting the legal rights of the consumer vis-à-vis the seller or supplier or another party …' and 'Excluding or hindering the consumer's right to take legal action, or exercise any other legal remedy …'. This heads in the right direction, though clearly it looks primarily at the *original* contracting parties (the power to assign), rather than their successors (the rights gained via assignment). After all, it is the *later* purchaser of a flat who will find his or her rights of action or remedies limited by an ineffective purported assignment – can such a 'third party' rely on the Regulations to argue that the restrictions on assignment are unreasonable, therefore unenforceable?

As well as regulation 5(1), there are further provisions in regulation 6(1):

> '… the unfairness of a contractual term shall be assessed, taking into account the nature of the goods or services for which the contract was concluded and by referring, at the time of conclusion of the contract, to all the circumstances attending the conclusion of the contract and to all the other terms of the contract or of another contract on which it is

133 *Director General of Fair Trading v National Bank plc* [2001] UKHL 52, [2002] 1 AC 481 [17].

dependent.'

About this, Lord Hope in the *National Bank* case said:

> 'It provides that the assessment is to be done as at the time of the conclusion of the contract. But an appreciation of how the term will affect each party when the contract is put into effect must clearly form part of the exercise.'[134]

Taking a purposive approach, as the ultimate interpreter of the parent Directive – the European Court of Justice (since December 2009 renamed the Court of Justice of the EU) – would do, the network of protection would have a serious gap if only the would-be assignor could rely on UTCCR; but no English or European caselaw appears to deal with this point.

It helps our flat-owners that the OFT takes the view that a complete bar on assignment affecting a residential tenant, or a consumer client for home repairs or improvements, is likely to be unenforceable, like a clause requiring an unreasonable fee and/or a deed for consent to an assignment.[135] However, in a tenancy situation the OFT considers that a clause simply making assignment subject to the consent of the landlord, as long as this is not to be unreasonably withheld, would not be objectionable. In our case, though, the bar on assignment does not impose any duty on the developer to act reasonably; on the other hand the bar applies equally to developer and first purchaser – so there may not be that 'significant imbalance' to the detriment of the consumer which the UTCCR require if a term is to be labelled as unfair, and hence unenforceable.

In a recent interlocutory TCC judgment (unreported), in a case close on its facts to our scenario, Wilcox J dismissed as 'fanciful' the notion that the UTCCR would enable him to set aside a clause barring assignment in just such a contract. In conclusion, you have to advise Ms S that the way forward to a claim under the original purchase contracts by *all* current flat-owners, both originals and successors, is therefore not obvious, especially as it would require the claimants to take on the litigation risk on this issue.

D Help in enforcement?

A comforting aspect of UTCCR, not shared with UCTA, is that a party does not always have to take on challenging a contract term in court, either as claimant or defendant. This is because the OFT and other independent enforcement bodies can act as 'consumer champions': if convinced that a term may be unfair, when alerted by a complaint from the party affected, they may

134 *National Bank* n 133 [45].

135 OFT, *Unfair contract terms guidance* (2001), Annexe A, Group 18(d); *Guidance on unfair terms in home improvement contracts* (2005); also reports of individual investigations, eg *Chelsea Yacht and Boat Co* (12 November 2004); *Harquail Homes Ltd* (15 August 2006) and *McCarthy & Stone plc* (5 September 2007) – *www.oft.gov.uk*.

start a formal investigation.[136] As part of this, the OFT regularly 'encourages' parties to modify or withdraw doubtful terms, the outcome being on public record as a formal undertaking.

Behind these powers of investigation lies the OFT's power to go to court for an enforcement order (effectively a statutory form of injunction). This is a course of action seldom in fact adopted;[137] but the 'bank overdraft charges' case which went to the Supreme Court at the end of 2009 is a good example.[138] The complaining party does have to mobilise the OFT or other investigating body to act, in the light of the law described above, but that is all: it is not formally a party to the investigation or to an enforcement action, so risks no award of costs against it if neither intervention leads to a positive outcome. [As part of the 'bonfire of the quangos' announced by the UK coalition Government in October 2010, the investigation and enforcement functions of the OFT at a national level in relation to consumer protection appear now to be under threat, or perhaps simply will be transferred to the planned new Consumer Protection and Markets Authority.]

The Contracts (Rights of Third Parties) Act 1999

A Effect of the 1999 Act

In relation to contracts entered into on or after 11 May 2000 (our case), section 1 of the 1999 Act provides that parties may expressly 'opt in' to its provisions, which then allow a third party to enforce a term of the original contract. The original parties may also opt in by implication, through 'purporting to confer a benefit' on a third party (in our case, this would be second and subsequent flat-owners, provided they were identifiable as a class in the contract – their identities do not have to be known when the original contract is made).

However, the 1999 Act also makes clear that by their words or from other evidence the parties may instead show that they did *not* intend specific (or any) terms of their contract to be enforceable by a third party. Inferos' contract clearly exercises the power not to opt in, and is not unusual in doing so, following the lead of many standard form construction contracts, like most

136 For these powers, see UTCCR Regulation 10 and n 127.

137 An example of the OFT using its enforcement powers (but under UTCCR 1994) is the *National Bank* case n 133. In April 2009 the Court of Appeal agreed, in a case challenging standard terms used by Foxtons the estate agents, that an injunction, if issued, could bar the use of an unfair term in *existing* contracts as well as those entered into in the future: *Office of Fair Trading v Foxtons Ltd* [2009] EWCA Civ 288, [2009] 3 All ER 697. The terms attacked were then declared unfair in July 2009 in *Office of Fair Trading v Foxtons Ltd* [2009] EWHC 1681 (Ch), with a final judgment in 2010: see OFT press release 19/10 'OFT secures final high court order against Foxtons' (22 February 2010).

138 *Office of Fair Trading v Abbey National plc* [2009] UKSC 6, [2010] 1 AC 696: holding that these charges were not capable of being tested against the fairness requirements of the UTCCR n 126, since they formed part of the price or remuneration for the services offered by the banks.

members of the JCT 05 family, still the dominant suite of contracts for UK construction projects.[139]

A court is unlikely ever to agree that exercising a right given by statute – to make clear that the same statute is not to apply – is itself an unreasonable contract term. It is even possible that, if the contract said nothing about the applicability of the 1999 Act, a clause permitting assignment but only with the developer's consent would be regarded as inconsistent with, and therefore leaving no space for, the operation of the Act. Further, an express contract term excluding the operation of the 1999 Act, combined with the possibility of assignment with the other party's consent – as in our scenario – could deter the judiciary from permitting an *original* flat-owner to sue in contract for the losses now suffered (or about to be suffered, in repair bills and increased service charges) by his or her successor, under the quartet of building defect cases culminating in *Alfred McAlpine Construction Ltd v Panatown Ltd*.[140]

B The cases leading to Panatown

This exceptional group of cases concerned an original construction employer who had parted with (or in the extreme case never owned an interest in) the land on which the construction took place. When construction defects came to light, the land's current owner – who had suffered the loss – had no right to sue, having no contract with the original main contractor, no right in contract acquired via assignment and no right of action in tort either. Could the law permit the original construction employer now to sue the main contractor and get substantial damages (for the cost of reinstatement or the loss in value of the land), even though it looked as if it was the building's current owner which had really suffered this loss? The courts said that, under appropriate conditions, he could – the current building owner could not force him to sue, but if he chose to, the law would not stand in his way; and he would if necessary be required to pass the damages on to the current owner.

This avenue to a claim in contract was designed to fill a legal 'black hole' – where the party which has suffered the loss has otherwise no possibility of recovering those losses from the party responsible; and where the party with a right to sue has apparently no loss of his own for which he can recover

139 JCT 05: n 98.

140 *Alfred McAlpine Construction Ltd v Panatown Ltd* [2001] 1 AC 518 (HL) following *Lenesta Sludge* and *St Martin's* n 122 and *Darlington Borough Council v Wiltshier Northern Ltd* [1995] 1 WLR 68 (CA). Note that in *St Martin's* the original construction employer could recover substantial damages in a context in which his attempt to assign the benefit of the construction contract had failed. Later cases discussing *Panatown* principles include *Sabena Technics SA v Singapore Airlines Ltd* [2003] EWHC 1318 (Comm); *Catlin Estates Ltd v Carter Jonas* [2005] EWHC 2315 (TCC), [2006] PNLR 15; *Mirant Asia-Pacific Construction (Hong Kong) Ltd v Ove Arup and Partners International Ltd* [2007] EWHC 918 (TCC); and *Biffa Waste Services Ltd v Maschinenfabrik Ernst Hese GmbH* [2008] EWHC 6 (TCC), [2008] BLR 155, 118 Con LR 104 [reversed on a different ground – [2008] EWCA Civ 1257, [2009] BLR 1].

damages.[141] It is part of the legal jigsaw puzzle, but has never been applied to help a subsequent purchaser of a flat in a multi-unit development get a remedy against a developer. Further, as we have seen, it hinges on the willingness of the original contract party (in our case, an original flat buyer who no longer has any link to Paradise Gardens) to sue. It would not apply at all if the subsequent purchaser had a right to sue the developer directly in contract (including under a collateral warranty, as was the case in *Panatown* itself); but a claim under the Defective Premises Act (C3 below) may not have this effect.[142] And the broader contractual context might rule it out anyway. It is therefore very unlikely to be any help to Paradise Gardens.

C3 Successors of first purchasers: claiming by other routes

Via negligence at common law

A Against a 'builder'

It is obvious that if a 'builder' (meant generically) is negligent and allows a building to be completed with defects, some of these may only come to light (or be realised to be defects) long after the building has been completed. If so, it is then reasonably foreseeable that the current owner will incur the costs of repair (or suffer a loss in value) caused by those defects; and that the current owner may not be the same party as originally commissioned the construction or first occupied the building. So it may seem obvious that the current owner should have a right of action in tort against this 'builder' for damages. The fact that the current owner may not also be the first buyer ought to be irrelevant, except that if the current owner has no right to sue the developer in contract (for reasons already discussed), a right of action in tort is even more important: it may be his or her only hope.

But English law has held, since *Murphy v Brentwood DC* in the House of Lords in 1991, that a 'builder' owes no duty of care in tort to anyone in respect merely of the cost of repairing defects – or of compensating someone for the reduction in value of their building caused by the same defects.[143] This form of harm the law labels as 'pure economic loss': not normally recoverable via the law of negligence, except as a side-effect of a kind of harm for which the law does more readily provide a remedy – physical injury to individuals or damage to (or loss of) goods.[144] So the fact, where it has occurred, of a sale onwards by

141 The 'broad ground' in the cases – not adopted by the majority in *Panatown* – holds that the original construction employer does have a loss of his own, for which he can therefore gain substantial damages, even if no longer (or ever) owning the land where the defective building is.

142 See *Catlin Estates Ltd v Carter Jonas* n 140 [301]-[304].

143 *Murphy v Brentwood DC* [1991] 1 AC 398 (HL): a case of inadequately specified foundations (on which also see n 166). In the New Zealand equivalent five years later, negligent operation of the local authority's building control function did lead to liability – *Invercargill City Council v Hamlin* [1996] AC 624 (PC).

144 For examples of liability for damage to, or loss of, goods in tort caused by a latent defect in a building, see *Bellefield Computer Services Ltd v E Turner & Sons* [2000] BLR 97 (CA) (later

an first buyer of a flat at Paradise Gardens may make finding a remedy for the defects in that flat much more difficult – and normally impossible via the common law tort of negligence.

A potential way round this barrier could have existed via *Robinson v Jones* (C1 above),[145] where the TCC suggested that a builder/developer might owe the first buyer a duty of care in tort, provided he also owed equivalent obligations in contract. If so, and if the breaches resulted in latent defects, the Latent Damage Act 1986 (D1 below) would give a later purchaser (the current flat owner) the same right to sue the developer in negligence which the first buyer would have had – provided that legal action were started within the specially extended period which applies in such cases. However, the Court of Appeal in *Robinson v Jones*[146] was against finding that a house-builder owed a concurrent duty in tort to its purchaser, even via the 'assumption of responsibility' idea introduced by *Hedley Byrne*,[147] so its potential in our context now seems slight.

B Against a Building Control Body

There is probably no mileage in considering adding the local authority as a potential defendant in tort, if it its building control service was used and failed to spot defects in the plans or during construction which now make the development non-compliant with Building Regulations. This is because the House of Lords in *Murphy*[148] made clear that the scope of a duty of care in tort of a local authority did not cover 'pure economic loss', even if it acted negligently in supervising the project.

The only possible way forward against the local authority is if a claim can be framed within the special category of negligence under *Hedley Byrne*,[149] as attempted (in both cases unsuccessfully) by the Patchetts against the swimming pool trade association (B1 above)[150] and by Mr Robinson against his builder

---

acquirer of industrial building owed duty of care by original builder for inadequate firestopping leading to loss of its goods and other costs in a fire – but the defendant builders had not started the fire, so the claim was only for those losses caused once the fire crossed the partition between the storage area and rest of the building); *Baxall Securities v Sheard Walshaw Partnership* [2002] BLR 101 (CA) (damage to the current tenant's goods in a warehouse because of rain incursion – the architects who were the designers and certifiers of the rainwater system were potentially liable, but the defects were no longer latent when the damage occurred); and the very similar *Pearson Education Ltd v The Charter Partnership Ltd* [2007] EWCA Civ 130, [2007] BLR 324 (current tenant's contents of warehouse damaged because architects underspecified the rainwater capacity of the gutters in the roof: duty of care, and action not statute-barred under the 15-year longstop period) – the drainage sub-contractors were even the same company. An unresolved question relates to the impact on a tort claimant of a limitation of liability or exclusion clause in the contract the current defendant had with the party for whom the work now alleged to be defective was done.

145 *Robinson v Jones*: n 111 and linked main text.

146 *Robinson v Jones*: n 115.

147 *Hedley Byrne & Co Ltd v Heller & Partners* [1964] AC 465 (HL); applied to a local authority's exercise of statutory inspection functions in *Welton v North Cornwall District Council* [1997] 1 WLR 570 (CA).

148 *Murphy v Brentwood*: n 143 and linked main text.

149 *Hedley Byrne & Co Ltd v Heller & Partners* [1964] AC 465 (HL); applied to a local authority's exercise of statutory inspection functions in *Welton v North Cornwall District Council* [1997] 1 WLR 570 (CA).

150 *Patchett v SPATA*: n 53 and linked main text.

(C1 above).[151] This looks inherently unlikely in the present state of the law, given the distant relationship between our present claimants (especially those who are not first buyers) and the building control process at the time of construction. If building control had been carried out instead by a private sector Approved Inspector, the same is probably true of possible claims in tort by current residents against this person or organisation.[152]

Via statute: the Defective Premises Act 1972

A Scope of the statute

In contrast with this rather unpromising situation at common law, later purchasers can, at least in theory, make claims against Inferos for what is in effect statutory negligence under the DPA 1972, which gives effect to a Law Commission report.[153] [The existence of these statutory rights is a point the House of Lords relied on in *Murphy* to refuse to recognise, as a matter of English common law, that a 'builder' owed any general duty of care in tort in relation to construction defects causing pure economic loss.]

Section 1 imposes a statutory duty on any 'person taking on work for or in connection with a dwelling' (note the limitation to 'dwelling'): 'to see that the work is done in a workmanlike or professional manner with proper materials and that, as regards that work, it will be fit for habitation when completed'.[154]

Section 1(4) extends the meaning of 'takes on work' to include a professional developer or installer of services in dwellings,[155] as well as a person exercising a statutory power which leads to arranging for another to take on work, though this probably does not include the BCB concerned; but section 1(2) eliminates as a possible defendant a person who does no more than competently follow instructions given by someone else (except where s/he may have a duty to warn if the instructions are inadequate).

---

151 *Robinson v Jones*: linked main text to nn 111-118.

152 Had an Approved Inspector (eg NHBC Building Control Services Ltd, the NHBC's own subsidiary) carried out building control functions for Paradise Gardens, instead of the local authority, then the AI's employer (probably the main contractor) would have had a contract with the AI, hence a possible claim against them for breach of contract, if they carried out their functions negligently. But current flat-owners would have had no contract with the AI – and hence no claim; and the NHBC's standard conditions for building control services severely limit the scope of the duties it owes, though also claiming adherence to the nationally agreed *Building Control Performance Standards*. The NHBC conditions also exclude the operation of the Contracts (Rights of Third Parties) Act 1999.

153 Law Commission, *Civil Liability of Vendors and Lessors for Defective Premises* (Law Com No 40, 1970).

154 Section 4 imposes a duty of care on landlords of tenanted residential property who have failed to maintain or repair (or who have a right of entry to maintain or repair), in relation to personal injury and damage to property suffered by anyone reasonably expected to be affected; this duty is like that under the Occupier's Liability Act 1957.

155 Can the claimant sue any or all of those whom the statute regards as 'taking on work'? *Bole v Huntsbuild* (n 165 and linked main text) suggests that s/he can. *Mirza v Bhandal*, *Independent*, 14 June 1999 (QBD) discussed by Tony Bingham in *Building*, 28 January 2000, suggests a distinction between the person who 'orders' work (the construction employer) and the person who 'takes on' work, though this conflicts with the Law Commission proposals on which the Act was based.

The duty may, as in our case, overlap with contractual duties the developer already owes to each original flat purchaser. Most importantly, the statute provides that it can equally be relied on by every person who later acquires an interest (legal or equitable) in the dwelling;[156] and against the person responsible, even after they have parted with any interest in the building.[157] The extended scope of this regime is obviously helpful in our situation, since some of the would-be claimants are successors to the first buyers, and Inferos has parted with the freehold.[158]

The specially attractive feature of the DPA is that it allows claims for 'pure economic loss': the cost of repairing defects, or the loss in value of the building or land caused by the defects. Further, under section 6 the duty the Act imposes cannot be contracted out of; and is additional to any other duties the relevant defendant may have taken on, in contract or otherwise. The Act is likely to have been relied on more after the courts narrowed the scope of the common law duty of care of builders in tort, though caselaw on it is sparse.[159]

B Applying the Act's tests

Compliance or non-compliance with Building Regulations is likely to be relevant in judging claims under the DPA, since the 'workmanlike or professional manner with proper materials' part of the duty imposed by the 1972 Act corresponds very closely with that in Regulation 7:

> '[The work] shall be carried out–
>
> (a) with adequate and proper materials which–
>
> (i) are appropriate to the circumstances in which they are used,
>
> (ii) are adequately mixed and prepared, and
>
> (iii) are applied, used or fixed so as adequately to perform the functions for which they are designed; and

156 DPA s 1(1)(b); compare the 'right to sue' problem in nuisance in *Hunter* v *Canary Wharf* [1997] AC 655 (HL). As under the DPA, Australian statutes n 32 give subsequent owners rights against builders for defective work done for a domestic client, but via implied terms and transmissible warranties.

157 DPA s 3.

158 Section 2 of the DPA provides that where an approved scheme applies, offering equivalent remedies for defects in domestic buildings, section 1 of the Act does not then apply. The NHBC warranty, as the Law Commission intended, had approved status under three successive Statutory Instruments (SI 1973/1843, SI 1975/1462 and SI 1977/642). But this came to an end when the House-Building Standards (Approved Scheme etc) Order 1979 (SI 1979/381) lapsed, apparently once the NHBC 1979 Scheme specifically approved in the Order was no longer the current version (no new Order being adopted for any of its successors). Otherwise reliable sources, like the OFT 2008 report n 87, Annexe H, continue to suggest that s 1 cannot now be relied on by a claimant also protected by *Buildmark*, but if this argument were available, it is hard to see why the defendants in *Bole v Huntsbuild* n 165 did not rely on it.

159 For a successful claim partly via the DPA, see *Samuel Payne v John Setchell Ltd* [2002] BLR 489 (TCC) (engineer laid down inadequate specifications for a house's foundations), where Judge Humphrey Lloyd QC also discusses limitation issues under the DPA and the Act's possible interaction with the Latent Damage Act 1986 and the Limitation Act 1980.

(b) in a workmanlike manner.'[160]

But what does the 'fit for habitation' part of the test mean? It certainly covers all things missing which make the premises not fit for habitation when the property is handed over, including defects which only manifest themselves later on, like dampness penetrating into a long leasehold flat from another part of the building retained by the defendant owner/developer.[161] But it does not cover fixtures or installations (in this case a boiler) added to a property after it has been built.[162]

In *Andrews v Schooling*, the defendants argued that failure to do something – in the case itself, to deal with the damp cellar underneath – could not be within the scope of unfitness, but Balcombe LJ (with whom Beldam LJ and Sir Denys Buckley concurred) took a wider view of section 1:

> '… a developer who is professionally qualified, eg an architect or surveyor, instructs a builder to erect a dwelling house or to convert an existing house into a number of separate dwellings. His instructions are detailed, but make no provision for the inclusion of a damp course, which is necessary if the dwelling is to be fit for habitation when completed. The builder will be exempt under subsection (2) [*by following instructions from the developer*]. But the developer, who will not have physically done any work, is to be treated under subsection (4) as a person who has taken on the work. In those circumstances there can be no difference between acts of commission and acts of omission.'[163] [*text in italics added*]

In a 2005 TCC case, *Catlin Estates Ltd v Carter Jonas*,[164] Judge Toulmin suggested that unfitness for habitation always has to be proved (the party asserting this having the burden of doing so, presumably). The flat-owners at Paradise Gardens have their gripes about the standard of construction, but they have been living there happily for the last six years or more – no one has dreamed of moving out, thinking their flat uninhabitable. Does this mean that they have no chance of a claim under this limb of the DPA?

C *More recent guidance:* Bole v Huntsbuild[165]

In this 2009 case, a couple sued their builder, both in contract and under the DPA, for the cost of repairing the inadequate depth of the foundations of their new house in Huntingdon, now allegedly needing underpinning; they also relied on the DPA to sue the consultant engineers the builders had engaged.[166] In the TCC it was Judge Toulmin again; he made clear that good workmanship,

160 The Building Regulations n 31, Regulation 7.
161 *Andrews v Schooling* [1991] 1 WLR 783 (CA) (an interlocutory appeal on the plaintiff's request for an interim payment by the first three defendants).
162 *Tillott v Jackson* [1999] 5 Current Law §530.
163 *Andrews v Schooling* n 161 789.
164 *Catlin Estates*: n 140.
165 *Bole v Huntsbuild Ltd* [2009] EWHC 483 (TCC).
166 The experience of BLP as an insurer n 83 is that inadequate foundations are one of the most common design defects in residential construction, especially where trees have been removed first.

proper materials and fitness for habitation are separate but cumulative tests: all have to be met. Unfitness was a question of fact in each case, but the statutory test of unfitness for local authority tenants provided a useful checklist.[167]

There was no need, the judge said, for the house, or part of it, to be in danger of imminent collapse: relying on a passage in the Law Commission report on which the 1972 Act was based,[168] defects of quality which (seen as a whole) were more than minor and made the dwelling as a whole *unsuitable for its purpose* were sufficient, including defects which became evident after the house was completed. In the case itself, soil movements where willow trees had been removed in 2000 in order to build the house had over time caused 'heave'; starting in 2002, this movement showed as cracks in the walls. Judge Toulmin concluded:

> '… applying the test of whether the house was unfit for habitation in the sense of being unsuitable for its purpose, I have no hesitation in finding that the house, as built, was unfit for habitation under section 1 of the DPA in that it was built with unstable foundations which resulted in movement and cracking and other defects caused by heave.'[169]

Having got to liability, on whom should this rest? This was an NHBC *Buildmark* project, so NHBC Technical Specifications applied, and a clause in the buyers' contract with the builder expressly required compliance with these.[170] So the builder was liable in both contract and under the DPA, since the foundations were too shallow for NHBC Standard 4.2 'Building near trees'. The engineers clearly also owed a duty to the buyers under the DPA, though had no contract with them. The engineers had failed to give clear and workable instructions about the depth of the foundations to meet the NHBC standards; this combined with the resulting defects was enough to establish their liability. So judgment was given against both defendants for the more than £200,000 necessary to add a new piled raft foundation and repair the interior of the house, plus agreed general damages of £4,500, with a later hearing if necessary to allocate liability between the two.

To have included the engineers in the claim proved a wise move on the claimants' part, since the builder took no part in the trial, later becoming insolvent; but the Court of Appeal gave the engineers leave to appeal against the TCC judgment against them under the DPA.[171] Their main argument was

---

167 Housing Act 1985 s 604(1). Unfitness is now judged against the Housing Health and Safety Rating System under Part 1 of the Housing Act 2004.

168 Law Com no 40 n 153 [34]: '… it is possible to imagine cases in which, however skilful the work and however good the materials, these is some defect of design or layout which makes the resulting dwelling unfit for its purpose'.

169 *Bole v Huntsbuild* n 165 [179].

170 The case may have come to court because *Crest Nicholson v Western* (n 73 and linked main text) had already decided that there was no binding arbitration clause between purchaser and builder under the NHBC *Buildmark* scheme; or perhaps because litigation was the only way to establish the possible liability under the DPA of the consulting engineers.

171 *Bole v Huntsbuild Ltd* [2009] EWCA Civ 770 (leave to appeal).

that the judge had misinterpreted the statute and applied too easy a test of unfitness; and had included too many items in his assessment of the damages payable.

In the Court of Appeal, Dyson LJ (with whom Longmore and Pill LJJ concurred) was unwilling to say that Judge Toulmin had applied the wrong test or taken inappropriate considerations into account:

> '… the judge took into account all the defects and the fact that they were caused by a fundamental defect; namely, the inadequacy of the foundations.'[172]

So the TCC judge had not reached an incorrect conclusion on unfitness – though 'unfit for purpose' was perhaps better avoided as a phrase, since the statutory test is 'unfit for habitation'. On the scope of liability, Dyson LJ once again thought Judge Toulmin had reached the right result, since the cost to the buyers of remedying all the defects attributable to the defective foundations was a foreseeable consequence of the breach of section 1 of the 1972 Act.

Even with this clearer picture of the scope of liability under the DPA, to rely on the 1972 Act to provide a remedy for the defects at Paradise Gardens looks uncertain; there are also time-limit issues, discussed in D1 below. Further, the focus of the statute on defective dwellings provides no convincing platform for claims in respect of those structural elements and common parts which are not themselves dwellings, though an integral part of the development.

Via statute: the Building Act 1984

The 1984 Act, the consolidating Act for the building control system in England & Wales, contains a general rule in section 38(1):

> '(a) breach of a duty imposed by building regulations, so far as it causes damage, is actionable except in so far as the regulations provide otherwise …'

This therefore creates a distinct right of action in a civil court for *breach of statutory duty*, independent of any claim for breach of contract or for negligence (and not necessarily dependent on proof of fault or of a relationship imposing a duty of care). The right is available against any person on whom the Act imposes duties – ie the owner and contractor and the BCB involved.

However, section 38 may be less significant than it first appears:

1 The legal structures of building control – in particular the inspection regime operated by BCBs – rely more on powers than duties.

172 *Bole v Huntsbuild Ltd* [2009] EWCA Civ 1146 [35].

2 Section 38(4) goes on to provide:

> 'In this section, "damage" includes the death of, or injury to, any person (including any disease and any impairment of a person's physical or mental condition).'

These words do not clearly go so far as to include compensation just for the cost of repair or for the loss in value ('pure economic loss' in other words), following non-compliance with Building Regulations.

3 Crucially, *section 38 has never been brought into force*.[173] There is no clear explanation: perhaps it was thought, at least in the heyday of the 1980s cases like *Anns*[174] and *Junior Books*,[175] before the reversal of direction in *Murphy v Brentwood*,[176] that existing common law remedies in tort and contract were sufficient. (If it were activated, section 38(3) would preserve all alternative rights of action in respect of the same facts.)

At present, therefore, the mere fact of a breach of Building Regs is not thought to be enough to establish liability in tort on anyone's part: all the normal ingredients of negligence – or some other tort, at common law or created by statute – have to be proved.

C4 Claims by the RMC

Relationship to developer

Surely, as Inferos had the structural elements and common areas built, it was under an obligation to the RMC to ensure that those aspects of it were in good condition and free from defects when the whole development was initially handed over? So one might reasonably assume. Unfortunately, the RMC started off as a captive subsidiary of Inferos, all of its initial directors being members of the developer's own staff. Even now, Inferos retains a stranglehold on decision-making within the RMC because the unsold flats preserve its golden share. Tactically, this may also mean that the details of any discussions within the Board of the RMC about possible legal action may automatically reach Inferos.

If litigation is a serious possibility, disclosure may flush more information out, but the RMC's records show no documented contract between Inferos on one hand and it on the other, either when the company was first formed or when residents started to arrive and become its members. So there is no formal

173 One of the recommendations of the JUSTICE report n 37 was that section 38 should be activated, as an additional legal protection for homeowners.
174 *Anns v Merton BC* [1978] AC 728 (HL).
175 *Junior Books Ltd v Veitchi Co Ltd* [1983] 1 AC 520 (HL).
176 *Murphy*: n 143 and linked main text.

statement of mutual rights and obligations, except in each lease (which speaks only of the RMC's obligations towards flat-owners and says nothing about the developer's obligations on initial handover). Worse: there is no certainty that the RMC ever had any contractual relationship with Inferos at all.

Who can bring a claim?

The RMC does not itself own any part of the development or have responsibility for a dwelling as such, so it probably cannot bring a claim under the DPA; nor (as we have seen) is it certain that individual owners can claim under the same Act for repairs in those parts of the development for which the RMC is responsible. It may turn out that Inferos' obligations to flat-owners are limited in scope, not allowing them to recover for the increased liabilities they will incur in service charges because the RMC needs (or chooses) to repair the structural elements and common areas. If so, the developer may escape liability altogether for the cost of these repairs: there would be a legal 'black hole' (save perhaps for the limited cover provided by the NHBC *Buildmark* warranty). The way forward would be for the RMC to be able to claim in tort under the general law of negligence, in parallel to flat-owners' possible claims in contract (but not of course so as to allow double recovery for the same losses). But can it?

A The Singapore exception

In the context of a condominium (functionally identical to Paradise Gardens), the Singapore Court of Appeal was willing to permit the statutory management corporation (MC) of a block to sue the developer in tort for the cost of repairing construction defects in the block's 'common parts'. This *Ocean Front* case[177] adopted a specific and limited local exception to the general rule, shared with English law in *Murphy*,[178] that a developer or constructor owes no duty of care in negligence in relation to 'pure economic loss' (the cost of repair, or the loss in value of the property) brought about by construction defects.

The Singapore court has taken a further step, where at least *some* of the individual flat-owners have a right to sue in contract under their purchase contracts for defects in the structure or common parts (not clear in our Paradise Gardens scenario). If these owners authorise the MC to take action, it can use its statutory position to sue in a representative capacity, the service charge fund bearing the cost (and costs) of doing so. So it does not matter if there are some

177 *RSP Architects Planners and Engineers v Ocean Front Pte Ltd* [1996] 1 SLR 113 (Singapore Ct of Appeal); the court then applied the same logic to uphold the liability to another management corporation of the same architectural and engineering firm for the cost of repairing its negligent design and supervisory work in the *Eastern Lagoon* case, *RSP Architects Planners and Engineers v MCST Plan No 1075* [1999] 2 SLR 449 (at first instance the firm had failed to pass on liability to the project's main contractors).

178 *Murphy v Brentwood*: n 143 and linked main text.

unit owners who cannot, or would not, sue individually (subsequent purchasers, or the developer itself, in relation to flats still unsold).

The downside is that the damages the MC can win in a representative contractual claim will be limited to the shares – as a proportion of the total composing the MC – held by those unit owners who are eligible to sue individually and have authorised the MC to do so. Those who were not eligible will thus reduce the damages recoverable.[179] Although this clarifies several issues left uncertain in the Paradise Gardens scenario, the MC in the Singapore context is no more a party to a contract with the developer, let alone the sale contracts individual first purchasers entered into, than our RMC: it has no right of action in contract in its own capacity and is not even a company in the normal sense.[180]

B Application in English law?

In England, judicial ingenuity has gone in a different direction: making it easier for an original party to gain substantial damages in contract (the *Panatown* line of cases, considered above[181]), to make up in part for the narrowed scope of duties of care in tort and the absence of a chain of contractual obligations from one flat-owner to his/her successor/s. No English court has been so bold as to create an exception in negligence for a multi-unit development like Paradise Gardens (nor, apparently, has any English court been asked to do so). There has therefore been, so far, no 21st century Lord Denning in the judiciary willing to mount his charger and ride to the rescue. If he did, the developer may respond that, even if the RMC has a right of action, the defects cause it to suffer no loss known to the law, since it can (must, even) reimburse itself from the flat-owners via increases in the variable service charge.

Mobilising the RMC

There's also a very real practical obstacle: even without using its voting power, Inferos has been using stalling tactics which, to the despair of the flat-owners, may already have pushed some potential claims beyond the limitation period (see D1 below). There is, put simply, a real conflict of interest between Inferos as potential defendant and Inferos as having a controlling voice in the decision-making of the RMC. While any flats remain unsold, can Inferos be prevented from exercising its voting power in the RMC to block any further moves towards legal action? No legal principle seems available for this, save at the limit a claim by a resident (minority shareholder) that the company structures

179 *MCST Plan No 1938 v Goodview Properties Pte Ltd* [2000] 4 SLR 576 and *MCST Plan No 2297 v Seasons Park Ltd* [2005] SGCA 16, [2005] 2 SLR 613.

180 Alice Christudason summarises the Singapore position in 'Representative Action for Defects in Common Property of Strata Developments', a paper presented at the COBRA Research Conference, London October 2006 – *www.rics.org*.

181 *Panatown*: n 140 and linked main text.

are being used in an oppressive manner. Against that, the RMC constitution was, after all, part of the contractual structure each purchaser notionally accepted on acquiring their flat.

The only way – provided the game seems worth the candle – of surmounting the problematic current structure of the RMC is for enough flat-owners to act together to exercise their statutory right to form their own Right To Manage (RTM) company.[182] If an RTM company were formed, it would take on responsibility for the common parts etc under the standard leases and would replace the RMC, which is – and until the last flat is sold, will remain – the creature of the developer. But changing the management structure does not appear to start time running afresh for any claim the original RMC could have brought, nor does it augment any of the rights the original RMC had in relation to defects. It therefore makes sense as a move only if there will still be real claims to launch once the new company has been formed. And the cost and time involved (statutory notice and counter-notice procedures) to form an RTM company and get it in place have to be borne in mind.

D STARTING A CLAIM

D1 Limitation issues

When you ask Ms S how long ago each flat was first sold, she reminds you that the first tranche were occupied in 2000-2003 (we are now in 2010). When you explain that you are worried about the expiry of the limitation period in relation to those early buyers, she says 'Oh, it's all right; I made sure they all sent a letter to Inferos warning that we might sue'. You have to let her down gently: the only thing which counts is *formally starting legal action* (issuing a claim form, which must then be served within four months). Nothing less will do, not even a Letter of Claim which complies with the relevant Pre-Action Protocol laid down by the courts: otherwise the action may be out of time.

'Out of time' is sometimes also called 'statute-barred', since all limitation periods derive from statute, which lays down different periods for different categories of claim. You also explain to Ms S that if a possible claim is within any relevant period, this does not mean that it is bound to succeed; a claimant still has to have a valid claim under the principles of law – whatever they are – on which it is based. To be within the limitation period merely removes a possibly fatal bar to pursuing the claim.

182 This possibility derives from Chapter 1 of Part 2 of the Commonhold and Leasehold Reform Act 2002. On RTM companies, see also n 231 and linked main text.

Period: claims under the DPA or in contract

A six-year time limit applies to claims under the DPA and in contract; for a flat to have been sold onwards, or for the benefit of any of the original purchase contracts to be assigned (if they indeed can) has no impact on time running for these two categories of possible legal action. If the conveyancers acting for the first buyers were bright enough to insist that the contracts should be executed as deeds, the limitation period for contractual claims will be extended to 12 years (all too rare). But when does the limitation period start to run?

The flat-owners are naturally interested in the latest possible starting-point, to minimise the risk that any of their potential claims are already statute-barred. For claims in contract and under the DPA (which actually uses the word 'completion'),[183] the likely date is 'practical completion', a term in frequent use in construction law but with no fixed meaning from one project to the next. In a typical construction contract between employer and main contractor, this point would usually occur when the contractor has completed all but minor details of the works ('snagging') and has handed possession of the site back to the employer, so that the building is in its essentials ready for use. At this stage any defects became 'set in stone', since the contractor has lost the ability to remedy them except under specific defects correction procedures (if any) for a defined short period.

But what does 'practical completion' mean, in the context of a single contract between developer and first buyer to supply a particular completed flat, in fact part of a much larger development? Is there a different date for each flat? If so, is it the date on which in each case Inferos gave notice that the particular flat was ready for occupation, or the date of completion of the sale? If there is a single date for all the flats, what is it? Or are there in fact two dates for each flat – one applying to the interior of the flat and being the date on which the developer completed the flat itself, the other being the date on which Inferos completed work on the structural elements and common parts (which might have been some time after sale of flats in the initial phases)? The law gives no clear answers. On any basis, all subsequent purchasers must have bought their flats with time already running, so most possible DPA claims are already too late. [If on the other hand Inferos can be persuaded to come back and repair, the new repair works – if themselves defective – start time running again for the DPA, once they are completed.[184]]

As this shows, it's the *fact* of completion which sets time running – so latent defects which are not discovered (even defects which could not reasonably have

183 Section 1(5).
184 Defective Premises Act 1972 s 1(5), applied in *Alderson v Beetham Organization Ltd* [2003] EWCA Civ 408, [2003] 1 WLR 1686.

been discovered) until long after completion do not benefit, for claims in contract or under the DPA, from a later start for limitation purposes.

Period: common law claims in tort

For claims based in negligence at common law, actionable harm, damage or loss must be suffered by the potential claimant before a right to make a claim comes into existence. Only then does time start to run – so there is often an advantage in suing in tort, if possible, over suing in contract; so much so that sometimes only a negligence claim will be in time. But caselaw holds that the damage may be suffered without the would-be claimant knowing about it, or even being able to know by taking reasonable steps,[185] so statute has intervened to limit this obvious unfairness.

Hence, in tort claims based on negligence at common law – but only in this class of case[186] – there are special statutory rules under ss 14A and 14B of the Limitation Act 1980, inserted by the Latent Damage Act 1986. In situations where it helps a potential claimant, a special secondary three-year period may run from the date of reasonable discovery (or actual knowledge, if earlier) by a potential claimant of a defect which before then was hidden, subject to an ultimate 15-year long-stop from the date when the cause of action originally arose. It is to benefit from this more flexible test that a claimant will often attempt to frame a claim in negligence, even where the same party may have a possible claim in contract (perhaps already out of time).[187]

The 1986 Act goes an important step further, its section 3 giving someone who acquires a flat or other property with latent defects the same ability to sue in tort in relation to those defects as their predecessor potentially already enjoyed (but could not use, since the defects had not already come to light before the sale). So a change in ownership of a flat will not block the chance of a remedy, provided that the present owner starts legal action within the special three-year period from the date of reasonable discovery (or actual knowledge, if earlier) and within the 15-year maximum period. However, in a multi-unit development, the present owner's chance to sue may apply only to defects actually within the flat itself, rather than also to the 'common parts'.

185 *Pirelli General Cable Works Ltd v Oscar Faber and Partners* [1983] 2 AC 1 (HL), discussed in *Abbott v Will Gannon and Smith Ltd* n 110. *Pirelli* was not followed in New Zealand in *Invercargill v Hamlin* n 143.

186 For a discussion of the narrow scope of the Latent Damage Act's more generous limitation periods, including their inapplicability to claims under the DPA, see Judge Humphrey LLoyd QC in *Payne v Setchell* [2002] BLR 489 (TCC) [54]-[56]. The JUSTICE report n 37 recommended extending the limitation period under the DPA to 10 years.

187 For an example, see *Robinson v PE Jones Ltd* n 111.

Delayed start for prescription period

Separate from the potential extra time in negligence actions discussed above, there are general provisions in section 32 of the 1980 Act which postpone the start of the prescription period in case of fraud, concealment or mistake. It is the concealment provisions which are most likely to be relevant to construction: section 32(1)(b) uses the formula '… any fact relevant to the [*claimant's*] cause of action has been deliberately concealed from him by the defendant'. If so, the prescription period only starts when the claimant discovers the concealment, or could with reasonable diligence have discovered it.

The word 'deliberately' appears only to apply where someone in the defendant's organisation or for whom that organisation is responsible in law has intentionally concealed some fact or document, though there seems to be no caselaw directly applying the statute to construction work.[188] As a result, the only real candidates at Paradise Gardens for these provisions would be the rainwater problems with the concrete slab and the inadequate fire-stopping within ducts; but of course the design called for both the waterproof membrane within the slab and the ducts to be enclosed, so this alone does not suggest deliberateness. It would be tactically hostile for a claimant to assert deliberateness without clear additional evidence.

In the rare situation where section 32(1)(b) applies, the special rules deriving from the Latent Damage Act (above) are not available, so the normal fixed six-year period then applies, if the start date is postponed by reason of concealment.[189]

Conclusions

The law of limitation is too complex and uncertain: proposals by the JUSTICE report in 1996 to extend the period for claims under the DPA to 10 years have not been implemented,[190] nor has the Law Commission's long report reviewing the whole area in 2001.[191]

---

188 In *Cave v Robinson Jarvis & Rolf* [2002] UKHL 18, [2003] 1 AC 384, the House of Lords treated s 32(1)(b) as referring to a deliberate breach of duty either concealed or undisclosed and committed in circumstances unlikely to be discovered for some time.

189 Section 32(5).

190 The JUSTICE report: n 37.

191 Law Commission, *Limitation of Actions* (Law Com No 270, July 2001), recommended unifying the law by applying the existing regime for personal injuries to most other actions under English law. There would be a basic three-year period running from the date the claimant knew, or ought reasonably to know, (a) the facts giving rise to the cause of action; (b) the identity of the defendant; and (c) if the claimant has suffered injury, loss or damage or the defendant has received a benefit, that the injury, loss, damage or benefit was significant. In addition there would be a long-stop 10-year period from the date of accrual of the cause of action or (for claims in tort or for breach of statutory duty) the date of the act or omission which gives rise to the cause of action; but this would not be available for claims for personal injuries. For the first time, the law would explicitly allow parties to agree to change the limitation period, but any shorter period than that otherwise applicable would need to be shown to be fair and reasonable within UCTA 1977. In December 2008, the Leader of the House of Commons announced that the Government intended to include

Here is a summary of the present law, as it applies to Paradise Gardens and its potential claimants – the flat-owners and the RMC (or RTM company); the key principles also reappear in Tables A and B in the separate Appendix.

BASIS OF CLAIM	LIMITATION PERIOD	START DATE
CONTRACT	6 yrs If contract in deed form: 12 yrs	When breach occurred (in a construction context, usually means 'practical completion')
DPA	6 yrs	When dwelling completed (probably same date as for contract claim)
TORT (NEGLIGENCE)	Primary period: 6 yrs	When damage/loss suffered (even if at that time undiscoverable)
	Secondary period (if facts giving rise to claim not known at normal start date): 3 yrs, if this expires later than the normal period Ultimate long-stop: 15 yrs from date damage/loss suffered Statute may give new owner of affected property a right to sue	When claimant had – or could reasonably have had – knowledge of the key facts making a claim possible[192]

It is obviously in the interests of flat-owners to avoid being entangled in limitation issues, if at all possible. Ms S asks whether the court will check if each claim is in time; you reassure her that it is for the defendants to object if they think some claimants have come to court too late for their particular claim, so there's a chance the potential issues here may never materialise. However, if Inferos do object, it is then for the claimants to prove that any contested claim is within its relevant limitation period.[193]

If Inferos realise from pre-action procedures you undertake on the flat-owners' behalf that the claim looks serious, their lawyers may be willing to extend time for a short period – in effect agreeing that they will not later raise a limitation defence in relation to it – in order to attempt to reach a settlement via ADR.

---

provisions on this subject within a Civil Law Reform Bill. However, the draft Bill as published (December 2009) did not include any of the Law Commission's proposals; the Government had decided against implementing the 2001 report.

192 This summarises a complex set of statutory tests defining 'the date of knowledge', which starts the secondary period running, for claims in negligence for damage or loss caused by latent defects (but not for claims under the DPA). For a construction example, see *Robinson v PE Jones Ltd* n 111. Claims for damages for personal injuries have a similar, but not identical, set of 'knowledge' tests in s 11 of the Limitation Act 1980.

193 *Cartledge v E Jopling & Sons Ltd* [1963] AC 758, HL.

If legal action is timed out?

Given the present law of limitation, residents often discover defects at a time when it is too late to attempt to shift the repair cost to the developer or to another original party to construction. This is specially true of defects found in closed ducts serving multi-unit blocks of more than one storey, as at Paradise Gardens. If residents find themselves in this unhappy position, can they assert that 'missing the boat' on a potential claim is someone else's fault and not their own? Could they shift the repair costs to, for example, the managing agents for the development? In theory they could, but only if they could show that the managing agents were clearly in breach of an obligation pro-actively to investigate the condition of all relevant parts of the development; and that doing so would have discovered (in time) that there were defects for which a claim could have been launched against one or more other parties.

However, managing agents are employed and paid by RMCs, so technically have no contractual relationship with individual residents at all, which complicates any attempt to make them liable for anything. Their standard conditions of engagement, via a Management Agency Agreement, often limit their responsibilities to assisting the RMC to fulfil its lease obligations.[194] In such a context, if the standard leases impose no obligation on the RMC to investigate original construction defects and to consider starting legal action against those who may be responsible, the managing agents will escape liability. (As we have seen in C4 above, the RMC may not even have a *power* to sue, let alone a *duty* to do so).

It might be different if the RMC had, with clear support from residents (on whom the cost would fall via the variable service charge), specifically commissioned the managing agents to do a thorough (meaning intrusive) survey into construction defects, to be completed before the end of the fifth year of the development's life.[195] The agents might then be liable if they had failed to carry out these instructions in time, potential claims thus being lost. But in this unlikely scenario it would be the chance, not the certainty, of recovery against others which would have been thrown away; and a court would discount the damages accordingly.[196]

194 Such as the terms of the *Model Agreement* suggested to its members by the Association of Residential Managing Agents, *www.arma.org.uk* (visited 18 February 2011).

195 The ARMA *Model Agreement* n 194 specifically excludes any responsibility on the managing agents for any intrusive regular inspection of the 'common parts', as well as any liability for the cost of remedying defects.

196 The same might be true (with liability concurrently in contract and tort) if the residents had contacted solicitors for legal advice and the solicitors had failed, knowing of the chance of a claim, to issue and serve proceedings (even if only as a precaution) against every potential defendant before the relevant limitation period ran out: *Midland Bank Trust Co Ltd v Hett Stubbs & Kemp* n 109.

D2 Pre-action disclosure

Although the residents at Paradise Gardens already have some clear technical evidence from a building surveyor about what has gone wrong, this may not give them all the information they need in order to launch a claim. Under the CPR rule 31.16, deriving from section 33(2) of what is now the Senior Courts Act 1981, prospective litigants can nowadays apply to court for disclosure of documents relevant to a potential claim against a possible defendant. The application must not be 'a fishing expedition' – a speculative attempt to discover a cause of action. Pre-action disclosure is nevertheless a powerful tool in the context of construction litigation.

A prospective claimant may, for example, wish to find answers to the following questions:

1 Is the building as erected consistent with the plans and specifications? Just because there are differences does not necessarily mean that the developer is in breach of his obligations (there may have been perfectly sound reasons to depart from the plans) but in the case of a substantive departure from the plans and specifications, the developer at the very least has a case to answer.

2 Are apparent non-compliances with statutory requirements, such as Building Regulations, justified by waivers issued by the local authority as BCB?

3 Have services been commissioned and signed off by the relevant installers?

The order is in the discretion of the court, but in any event can be made *only* where *all* the following conditions precedent are satisfied:

1 The respondent is likely to be a party to subsequent proceedings; *and*

2 The applicant is likely also to be a party to the proceedings; *and*

3 If proceedings had started, the respondent's duty of disclosure on the standard basis would extend to the documents or classes of documents sought; *and*

4 Disclosure before issue of proceedings is desirable to:

- dispose fairly of the proceedings; *and*
- assist the dispute to be resolved without proceedings; *and*
- save costs.

The application must be supported by a witness statement addressing each of these conditions. Under the TCC Practice Direction,[197] the application should be made to a TCC judge, and the written evidence in support must state that the claim is a TCC claim. As far as possible the applicant should particularise the documents or classes or documents he wants to see on an item-by-item basis – perhaps in the form of an early draft of a Scott Schedule, which sets out an itemised list of each defect, its location, the claimed cost of repair and other details in the form of a table with columns.[198] The would-be claimants will increase their prospects of success if they apply for pre-action disclosure following a breach of the relevant Pre-Action Protocol (PAP)[199] by the defendant – for example, where the defendant has failed to respond adequately or in time to the claimant's initial letter of claim.

Not least of the benefits of an application for pre-action disclosure is that it forces the prospective defendant to think carefully about the claim. But there is a sting in the tail: the applicant must pay the costs of the application, win or lose, unless the respondent opposes the application unreasonably. And the applicant must pay the costs of the respondent's disclosure exercise in any event. In order to maximise the prospects of a successful costs outcome, the applicant should send a copy of the application to the defendant in draft form before actually issuing it in court, together with the draft witness statement in support. The first ever application for pre-action disclosure in the High Court was made in the TCC in *Burrells Wharf Freeholds v Galliard Homes*: the judgment of Dyson J (as he then was) provides a valuable summary of the issues which the court will consider in exercising its discretion.[200] It is now clear, for example, that the documents, or classes of documents, of which disclosure is sought must be ones which would be subject to standard disclosure if litigation had already been started.[201]

What is the potential claimant to do where relevant documents are in the possession or control of someone *other than* the prospective defendant? This might be the case at Paradise Gardens, where the prospective defendant is the developer and relevant plans and specifications may be held by the main contractor or a firm of architects. Here there are specific provisions in CPR rule 31.17; but the equitable jurisdiction of the court in *Norwich Pharmacal* may also assist, if the information needed can be got no other way.[202]

197 Civil Procedure Rules, Practice Direction 60, para 4.
198 On Scott Schedules, see the *TCC Guide*, n 216, para 5.6.
199 See n 219 and linked main text.
200 *Burrells Wharf Freeholds Ltd v Galliard Homes Ltd* [2000] CP Rep 4, (2000) 2 TCLR 54, 33 EG 82 (TCC). See also *Black v Sumitomo Corporation* [2001] EWCA Civ 1819, [2002] 1 WLR 1562; *Langbar International Ltd v Rybak* [2007] EWHC 3255 (Ch); and *Resthaven Properties Ltd v Kier Regional Ltd* [2009] EWHC 542 (TCC).
201 *Hutchison 3G UK Ltd v O2 UK Ltd* [2008] EWHC 55 (Comm).
202 *Norwich Pharmacal Co v Customs and Excise Commissioners* [1974] AC 133 (HL), summarised in *Mitsui & Co Ltd v Nexen Petroleum UK Ltd* [2005] EWHC 625 (Ch), [2005] 3 All ER 511.

This case in the Lords established the principle that where a person is not liable for a wrong but has been 'mixed up' in the wrongdoing, eg by providing facilities for its commission, then an action for disclosure (only) may be brought against him. Historically, *Norwich Pharmacal* applications have usually been made to establish the identity of wrongdoers. But more recently the court has widened the scope of this equitable jurisdiction, allowing prospective claimants to obtain information to complete a statement of case in a breach of contract case.[203] And CPR rule 31.18 expressly preserves these additional inherent powers, so they are not limited by the more specific powers discussed above.

D3 ADR and litigation

Statutory adjudication

Ms S has heard that construction cases these days have the advantage of a specially introduced 'rough and ready' disputes procedure – will this apply to Paradise Gardens?[204] Part II of the Housing Grants, Construction and Regeneration Act 1996 (the HGCRA) came into force on 1 May 1998. It gives each party to a 'construction contract' (as defined) a right at any time – an option, not an obligation – to take a dispute to adjudication. If the parties to a contract within the scope of the HGCRA have not made provision for adjudication themselves in a way compliant with the Act, then a statutory Scheme steps in to provide, amongst other things, the machinery for adjudication.

This is, as construction specialists know, a speedy and relatively cheap procedure designed to reach a provisional decision on the merits (usually ordering payment by one party to the other). However as in Singapore,[205] but in contrast to Australasia,[206] such a decision is not immediately enforceable as if

---

203 *Carlton Film Distributors Ltd v VCI plc* [2003] EWHC 616 (Ch), [2003] All ER (D) 290.

204 'Rough and ready': Judge Seymour in *RSL (South West) Ltd v Stansell* [2003] EWHC 1390 (TCC) [33].

205 Building and Construction Industry Security of Payment Act 2004 (revised 2006) (Cap 30B) (Singapore), sections 21 and 27(1): 'An adjudication determination made under this Act may, with leave of the court, be enforced in the same manner as a judgment or an order of the court to the same effect.' Section 27(5) also provides – unlike the UK regime – a separate procedure for asking the court to set aside a determination of an adjudicator, if not made in accordance with the Act, but the debtor first has to pay into court as security the unpaid portion of the adjudicated amount. Section 18 also introduces a procedure (under tightly defined conditions) by which the respondent can ask for the determination to be reviewed; here, too, the respondent has to pay the adjudicated amount to the claimant first.

206 Eg the Building and Construction Industry Security of Payment Act 1999 (NSW), section 25(1): 'An adjudication certificate [*ie a copy of the decision, authenticated by a nominating body*] may be filed as a judgment for a debt in any court of competent jurisdiction and is enforceable accordingly'. Almost identical wording can be found in section 31(1) of the Building and Construction Industry Payments Act 2004 (Qld), section 45 of the Construction Contracts (Security of Payments) Act 2004 (NT) (as amended) and section 43 of the Construction Contracts Act 2004 (WA); similar, but more complex, provisions exist within the current text of the Building and Construction Industry Security of Payment Act 2002 (Vic), culminating in section 28R. The Construction Contracts Act 2002 (NZ), section 59 makes adjudicators' payment determinations enforceable as if judgment debts.

a court judgment.[207] But it can, if necessary, be turned into an enforceable court judgment by summary proceedings, normally before the specialist TCC, which sits in Fetter Lane in London and several regional centres. The issues which have led to an adjudicator's decision can be revisited later in litigation, arbitration or any other procedure the parties have agreed on (though in practice few are re-opened); but there are only very limited possibilities to escape from the need to comply right away with an adjudicator's decision.[208]

Scope of the 1996 Act

A contract with a developer to buy a flat off-plan clearly looks like a construction contract within the terms of section 104(1)(b) of the HGCRA: 'arranging for the carrying out of construction operations by others'. But section 106(2) provides that Part II (including statutory adjudication) does not apply to any construction contract 'which principally relates to operations on a dwelling which one of the parties to the contract occupies, or intends to occupy, as his residence'. This appears to be our precise situation, at least in relation to individual flats; but does it make a difference that some occupiers were (or are) companies, or that many flats were bought as buy-to-let investments? The 1996 Act does not define the key phrase, except to add that 'dwelling' means 'a dwelling house or a flat' and to explain 'flat' further, in ways unproblematic for Paradise Gardens.

As with rights to sue under the DPA discussed in C3 above, a contract which relates to work both on a flat and on the other integral parts of a multi-unit development (themselves not being flats – the structural elements and common parts) may come within the 'dwelling house or flat' exception. But there is no certainty of this. Under the HGCRA, the word 'principally' may help, but the only limited case law so far does not address this issue.[209] Further, the HGCRA brings in its form of statutory ADR only for disputes within a contractual framework. As we have seen, one possibility in our case is an action under the DPA and/or the general law of negligence; and one potential claimant is the RMC, which seems to have no contract with Inferos (and even if it does, this may not be a 'construction contract' within the HGCRA).

---

207 Paragraph 24 of the current text of the default Scheme for England, Wales and Northern Ireland extends to adjudicators' decisions a slightly modified version of the existing court powers in relation to 'peremptory orders' of arbitral tribunals under the Arbitration Act 1996 s 42. Dyson J in *Macob Civil Engineering Ltd v Morrison Construction Ltd* [1999] BLR 93, TCC said at [38] that it was not at all clear why Scheme adjudicators had these extended powers under the 1996 Act, when adjudicators in HGCRA adjudications under contractual procedures did not.

208 As the Court of Appeal said in *Carillion Construction Ltd v Devonport Royal Dockyard Ltd* [2005] EWCA Civ 1358, [2006] BLR 14 [85]: 'The objective which underlies the Act and the statutory scheme requires the courts to respect and enforce the adjudicator's decision unless it is plain that the question he has decided was not the question referred to him or the manner in which he has gone about his task is obviously unfair'.

209 In *Shaw v Massey Foundation & Pilings Ltd* [2009] EWHC 493 (TCC), Coulson J holds that a contract which relates to work on more than one dwelling house (or flat) is excluded by s 106; and that the time the contract is made is crucial, in relation to occupying (or intending to occupy) a dwelling house or flat as a residence.

Adjudication, by relying on the mandatory intervention of the 1996 Act, therefore appears a non-starter to deal in one go with all the possible claims and parties.

Costs under statutory adjudication

In any event, adjudication may be unacceptable as offering little chance that a winner will get his/her costs paid by the other side. Neither the Act nor the Scheme gives an adjudicator power to allocate the parties' costs between them, so the default result is that each bears all its own costs.[210] Many contractual adjudication provisions reach the same result.[211]

Following a long review, Part II of the 1996 Act has been modified by Part 8 of the Local Democracy, Economic Development and Construction Act 2009 (not yet in force – January 2011). Few of these changes are relevant to Paradise Gardens, except possibly the new section 108A, which makes any 'contractual provision'[212] on the allocation of costs reached between the parties ineffective, unless it either empowers the adjudicator to allocate his own fees and expenses between the parties or is made in writing after the notice of intention to refer a dispute to adjudication.[213]

Other forms of alternative dispute resolution (ADR)

As we already saw in relation to the dispute resolution provisions of *Buildmark* (B2 above), a term in a contract which provides for ADR between a professional or business and an individual consumer, if the clause has not been individually negotiated, may be challenged as unfair – or at the limit as not validly part of the contract. As Judge Toulmin CMG QC said in the TCC in *Picardi v Cuniberti*:

> 'This [*adjudication under the HGCRA*] is an unusual procedure invented for good reason, primarily to assist the construction industry to resolve its disputes. Parliament, having considered the Latham recommendations, specifically excluded private dwelling houses from its application. A provision that, despite this exclusion, adjudication is to be included as a matter of contract, is clearly an unusual provision which must be brought to the specific attention of the lay party if it is later to be validly invoked.'[214]

210 *Total M&E Services Ltd v ABB Building Technologies Ltd* [2002] EWHC 248 (TCC), 87 Con LR 154 [24]-[25]; see also HHJ Peter Coulson QC, *Construction Adjudication*, Oxford, OUP (2008), chapter 11.

211 The CIC Model Adjudication Procedure (4th ed, 2007) provides expressly in its paragraph 29 that each side bears its own costs – obtainable via *www.cic.org.uk* (visited 26 October 2010).

212 These new provisions will therefore apply to Scheme adjudications – which have no default costs rules – and to those entirely contractual in origin, though HGCRA-compliant.

213 Section 141 of the 2009 Act.

214 *Picardi v Cuniberti* [2002] EWHC 2923 (TCC) [127].

This reasoning could apply between developer and individual buyer, for example – but in fact does not, the standard sale contract being silent on dispute resolution. However, for a consumer to argue that contractual ADR is unfair or inapplicable is only an option: nothing stops the parties giving effect to such a clause, or, once a dispute has arisen, *agreeing* on adjudication – or any other form of ADR – as the way forward instead of, or ahead of, traditional litigation.

If a case does get to court, every civil court, including the TCC, will as part of its case management role under the CPR consider the appropriateness of encouraging or facilitating ADR (which could include adjudication, mediation or a whole range of different possibilities). This will in almost all cases be one of the topics the judge will raise at the first Case Management Conference (CMC).

But in our example this will in the end only work if the parties' interests converge enough; if there is any compulsion, it will not be statutory under the HGCRA but procedural from the court, which has hefty costs sanctions up its sleeve under CPR Part 44.[215] So one context within which ADR may play a part is traditional court litigation, for which expert evidence will be crucial (though carrying the risk that claims might be perceived as expert-led).

D4 Suing in the TCC

Starting an action

The TCC has its own *Guide* (revised in 2010), as well as a Practice Direction under CPR Part 60; both are essential reading for cases like ours. The courts' general approach to how parties should behave before formally launching *any* category of legal proceedings is now summarised in the April 2009 Practice Direction on Pre-Action Conduct.[216] For engineering and construction disputes, the TCC's own *Pre-Action Protocol* (PAP)[217] requires a Letter of Claim, whose contents are laid down in detail. It must include the parties' details, the factual and legal basis of the claim, what will be sought from the court and any experts' details. The section on the relief claimed uses the phrase 'a breakdown showing how the damages have been quantified': some lawyers for defendants argue from this that, even at this early stage, the letter must not only explain what heads of damages are sought but should include a precise breakdown and total for every individual claimant (an expensive and time-consuming task, especially if the real aim is to get repairs done; also, some of the claimants' costs may be increasing while defects remain unrepaired).

215 See Philip Britton's SCL Paper 152: n 75.
216 The *TCC Guide* (2nd ed 2005, 2nd rev 2010) and the 2009 Practice Direction are both downloadable from *www.hmcourts-service.gov.uk* (visited 10 October 2010).
217 All Pre-Action Protocols are reproduced in *Civil Procedure*: n 216.

In addition, the parties are (uniquely, in English civil procedure at present) also required to have a pre-action meeting, in an attempt to resolve their differences. Paragraph 5.2 of the PAP defines the meeting's objectives:

> '… to agree what are the main issues in the case, to identify the root cause of disagreement in respect of each issue, and to consider (i) whether, and if so how, the issues might be resolved without recourse to litigation, and (ii) if litigation is unavoidable, what steps should be taken to ensure that it is conducted in accordance with the overriding objective, as defined in rule 1.1 of the Civil Procedure Rules.'[218]

A 'PAP meeting' with the developer might flush out an offer to come back and do repairs; but the terms of this would have to be carefully negotiated (see G below).

There are potential procedural and costs penalties for failure to comply with the relevant PAP[219] or to engage meaningfully in ADR, if later suggested by the court.[220] All TCC actions are at present classed as 'multi-track', which under CPR Part 29 (varied in detail for the TCC via the Part 60 Practice Direction) gives the court wide flexibility to manage each case individually, including via CMCs and/or pre-trial reviews (PTRs).

---

218 'The overriding objective' (CPR rule 1.1):
'(1) These Rules are a new procedural code with the overriding objective of enabling the court to deal with cases justly.
(2) Dealing with a case justly includes, so far as practicable—
(a) ensuring that the parties are on an equal footing;
(b) saving expense;
(c) dealing with the case in ways which are proportionate—
(i) to the amount of money involved;
(ii) to the importance of the case;
(iii) to the complexity of the issues; and
(iv) to the financial position of each party;
(d) ensuring that it is dealt with expeditiously and fairly; and
(e) allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases.'

219 A claimant's failure to follow the requirements of the relevant PAP may, if challenged, cause the court to stay the proceedings until compliance has been achieved: *TCC Guide* n 216 [2.6]. In *Cundall Johnson & Partners LLP v Whipps Cross University Hospital NHS Trust* [2007] EWHC 2178 (TCC), [2007] BLR 520, 115 ConLR 125 Jackson J granted a stay of more than two months, even though the particulars of the claim were clearly set out once proceedings had been issued: failure to follow the PAP had short-circuited a stage in the procedure which in his view could still lead to a settlement. By contrast, in *Orange Personal Communications Services Ltd v Hoare Lea (a firm)* [2008] EWHC 223 (TCC), 117 ConLR 76, Akenhead J refused a stay following non-observance of the PAP (the costs consequences being left for decision on a later occasion); in *TJ Brent Ltd v Black & Veatch Consulting Ltd* [2008] EWHC 1497 (TCC) the same judge refused an application for costs from a defendant alleging that the PAP had not been observed. In substance the claimants had complied with its principles; the defendants had not shown that a real chance of settling the dispute had been lost; and had delayed raising the PAP issue. For another failed attempt to argue non-observance of a PAP as a reason for depriving the winner of some or all of his normal costs, see *Carleton v Strutt & Parker* n 220. More recently, Akenhead J in the TCC imposed a stay until money ordered to be paid by an adjudicator was paid: *Anglo Swiss Holdings Ltd v Packman Lucas Ltd* [2009] EWHC 3212 (TCC), [2010] BLR 109.

220 See eg *Dunnett v Railtrack plc* [2002] EWCA Civ 303 (Practice Note), [2002] 1 WLR 2434; *Shirayama Shokusan Co Ltd v Danovo Ltd* [2003] EWHC 2006 (Ch), [2004] 1 WLR 2985 (first hearing) and 2992 (second hearing); *Halsey v Milton Keynes General NHS Trust* [2004] EWCA Civ 576, [2004] 1 WLR 3002; and *Carleton v Strutt & Parker* [2008] EWHC 424 (QB), (2008) 158 NLJ 480. All these and other cases are discussed by Nicholas Gould, Claire King and Philip Britton in *Mediation in Construction Disputes: An Evaluation of Existing Practice* (King's College London, 2010); Appendix 3 summarises the English caselaw on costs and ADR.

Because of the high 'front-end' costs which claims like this involve, an early claimants' Part 36 offer is often a powerful tool in negotiation: this is a written offer to settle which either side can make at any stage, including before litigation is begun. Once made, it puts the costs risk on the other side from that moment on, if the offer is not accepted, the claim proceeds to trial and the side which refused the offer does less well than the terms of the offer (the judge will never know about the offer until after judgment has been given). And where it turns out to have been unwise to refuse a Part 36 offer, the costs then payable are on the 'full' indemnity basis, rather than the more usual 'standard' basis. A claimant should therefore make such an offer – or refuse one from the other side – only on the basis of a realistic assessment of litigation risk. As Ms S is now aware, this is a tricky process. There is also the niggling worry that, although Inferos (the parent company) is hugely successful, the development at Paradise Gardens was carried out by a subsidiary, a special purpose vehicle for that one project.

Multiple claimants

How will the fact of multiple claimants in the Paradise Gardens situation be reflected in the procedure before the court? 'Class action' is an American term which has not so far made its way into the lexicon of the CPR. In the US context, a class action usually refers to a case brought by multiple (and usually unconnected) parties, arising for example from a major physical disaster, an industrial disease or a defective consumer product. Alternatively, a class action can refer to legal proceedings by a single representative party on behalf of prospective claimants. This latter sense does in fact arise in English law, but only at the moment in the context of competition claims, where representative bodies have the legal authority to bring claims on behalf of consumers.

By contrast, the CPR do recognise the concept of *Group Litigation*, which arises where there are multiple parties linked by a common nexus of fact or law. In such circumstances, the court can make a Group Litigation Order under CPR r 19.10 and r 19.11 for the collective management of the related cases – again, usually reserved for cases where there are huge numbers of prospective parties who may not even be aware of each others' existence. A Group Litigation Order is unlikely to be of relevance to the type of construction defects claim under consideration in this paper – because the structure to manage the claim will already be in place by way of the RMC or an action group comprising flat-owners affected by the defects (E2 below).

If the claim under consideration involves a large number of flat-owners in a single building or estate, then the correct term is simply *a multi-party action*. This avoids association with Group Litigation Orders, which the term group litigation might otherwise imply. It also avoids contamination with the mode of operation which applies to American-style class actions.

Next steps

Starting a multi-party action in the TCC, as described above, must therefore be the next step – and soon, in the light of the limitation issues discussed above. You explain that you will ask as many as possible of the original flat-owners who have sold on to execute legal assignments to their successors of their right to sue on their contracts with Inferos *before* those purchasers start legal action; this will require each to ask Inferos for consent. If consent is given, you will also serve notice of those assignments on Inferos under section 136 of the Law of Property Act 1925, to head off a possible further argument about the validity of the assignments. If consent is refused, the next issue is whether to commit resources to finding a way round this lack of assignment (C2 above); or to accept that later purchasers may have no possible right of action against Inferos, except perhaps under the DPA 1972 (C3 above).

E COST (AND COSTS) ISSUES

Before a claim is started, up to 140 flats have to be inspected and reported on, not to mention structural elements and common areas; and if litigation begins the costs will inevitably start to mount further. How can the cost be controlled, and by what routes and devices can all this be paid for?

E1 Upfront costs

Cases like this cost huge amounts of money, not least because they turn on expert evidence and must run up experts' fees, which both parties will start to do well before the TCC gets involved.[221] Limiting the role and number of experts is a prominent theme in today's civil procedure. The 2009 Practice Direction on Pre-Action Conduct may impact here, requiring at least the names of experts to be agreed between the parties at an early stage.[222] The *TCC Guide* provides in paragraph 5.4.1 that the judge at the first CMC will wish to consider issues relating to expert evidence, in order to ensure that the scope of such evidence is limited as far as possible. One approach is for the court to insist on a single joint expert. However, paragraph 13.4.1 accepts that this is not usually appropriate for the principal liability issues in a large case, or where considerable sums have already been sent on an expert in the pre-action stage [both conditions being fulfilled in Paradise Gardens].

The CPR lays down detailed rules on experts, their role and position (attempting to guarantee their independence as 'helpers of the court') and what their written reports should contain. The claimants in a construction defects

221 On expert evidence in general, see also CPR Part 35 and its Practice Direction, as well as the *Protocol for the Instruction of Experts to give Evidence in Civil Claims* (Civil Justice Council, 2005) – all included in *Civil Procedure*: n 28.

222 The 2009 Practice Direction: see the main text linked to n 216.

claim will at a stage well before issuing a Letter of Claim need to commission a CPR-compliant expert witness report from a building surveyor whom they trust and whom they think – hoping it will not come to that – will make a good witness in court. This may well involve a team of surveyors doing intrusive investigations in a larger sample of dwellings and aspects of 'the common parts' than has so far been attempted; and will have to be paid for up front, since their independence as experts would be compromised if their fees hinged in any way on the progress or eventual outcome of the dispute or claim.

Beyond the specific costs of experts, a consequence of the TCC PAP is to force parties to incur substantial costs at an early stage ('front-loading'). As part of his 2009 review of costs in general in civil litigation, Jackson LJ floated for discussion the possibility of delaying the pre-action process until after – rather than before – the issue of the claim form; and involving the court in supervising compliance with the Protocol in real time, rather than retrospectively.[223] However, following conflicting advice from the consultees, his Final Report did not pursue this recommendation; instead it suggested that the operation of the TCC PAP should be reviewed again in 2011, when the TCC will become organisationally and geographically integrated into the Commercial Court in a new location.[224]

E2 Funding by individual flat-owners

Setting up an action group

One way forward is for those flat-owners who feel strongly about the issues and are willing to risk their own money to support a claim to set up an action group: a continuation of what some of them have already done in commissioning a surveyor's report. If so, this group needs a *constitution* which will establish funding arrangements and clear paths to decision-making by and for the group's members, resulting in instructions to the group's team of lawyers and experts. The constitution will also provide for:

- A democratically accountable (and ultimately elected, though at the start perhaps self-selected) committee as the link between the members and the professional team
- Regular consultation with the membership
- AGMs (and conditions under which EGMs can or must be called)
- Record-keeping of its deliberations and decisions

223 Rt Hon Lord Justice Jackson, *Review of Civil Litigation Costs: Preliminary Report* vol 1 (May 2009) ch 34, section 4, downloadable from *www.judiciary.gov.uk/about_judiciary/cost-review* (visited 13 July 2009).

224 The Jackson Review n 223 *Final Report* (December 2009) ch 34, section 4, downloadable from *www.judiciary.gov.uk/about_judiciary/cost-review* (visited 10 February 2010).

- (If it holds funds) provisions for accounts and a treasurer.

In parallel, there needs to be an individual *participation agreement*, entered into by each flat-owner who wishes to join the group and has a clear individual right of action. Each member will be encouraged to take the opportunity of taking independent legal advice before signing the document, including understanding the costs risk. S/he will appoint the action group irrevocably as his/her agent to pursue his/her claim (the action group having a wide discretion as to how to do so and the terms on which to settle, subject to the duty to consult with members). The document will describe the scope of the claim; will provide for priority in the destination of any recoveries; and each member will commit to making regular payments (which may go into the client account of the legal team). This should create a 'war-chest' enough to fund at least the expert investigation necessary to get a claim off the ground. Tactically, it is good to make sure the defendant knows the strength of support, moral as well as financial, behind the claims.

The downside is that an action group may have to exclude those whose claims are out of time or in other ways legally doubtful (eg subsequent purchasers to whom the right to sue has not validly been assigned), even though they may be keen to help. There's also the inevitable risk that those who do not join may nonetheless benefit directly from the commitment and financial investment of those who do. No-one would wish repairs to be done only to those flats within a block whose owners are action group members (especially as fire-related defects in one unit or a duct in the 'common parts' are likely to compromise the integrity of the whole block); but if Inferos agrees to do all the repairs necessary, non-members will thus 'piggy-back' on the efforts of the action group.

Solidarity between all those affected by construction defects ought to be expressed through widespread participation in the action group, but achieving this is not easy, since it requires a regular financial commitment up front, many months (sometimes years) ahead of an eventual victory. In a top-end development like Paradise Gardens, such payments may not cause most tenants even to blink; but in a development of small flats for first-time buyers, for whom dealing with lawyers and construction experts is unknown territory, getting widespread participation in an action group (and regular payments from all those who agree to become members) may be uphill work. A small group of energetic, well-organised and persuasive residents as the action group's founding committee is vital – having got the organisation started, they must also keep it alive through those times when the visible signs of progress may be slight and morale may falter.

Funding an action group

The risk of litigation in construction can potentially be shared with lawyers on a 'no win, no fee' basis – technically a *conditional fee arrangement* (CFA).[225] Such an arrangement will mean that the action group does not have to fund the legal team from Day 1, if the lawyers are willing to have a stake in the outcome and hence to share the litigation risk. The lawyers will be looking to the ultimate success of the claim in order to recover all their costs and fees (plus a success fee, or 'uplift', which may be up to 100% of base costs) from the defendant; this final victory should also reimburse action group members for all their cash-flow contributions along the way.

Residents may therefore find a CFA tempting, as they may then have to raise funds up-front only for their own action group's expenses and for expert witnesses' fees (who may be willing to wait or to be 'drip-fed' meanwhile). However, the claimants' freedom from having to make any fee payments to the legal team on account may make them less careful about the extent of their reliance on their lawyers than if they saw a monthly statement of every e-mail and phone call, some part of which had to be paid up front. This indiscipline, unless it can be tamed by clear rules on communication (for example, a weekly group phone conference, rather than innumerable spontaneous e-mails), may mean a difficult negotiation on fees and costs with the other side once a deal is struck on liability, the legal team potentially losing out.

A The CFA: nuts and bolts

If the solicitors wish, they can adapt the Law Society's Model CFA and client information document *Conditional Fee Agreements: What You Need To Know* (which apply only to personal injury and clinical negligence). These documents are not mandatory, but are at the very least a good starting-point in consideration of the issues which may arise. Solicitors who use CFAs have additional duties of disclosure under the 2007 *Solicitors' Code of Conduct* (which the Solicitors Regulation Authority plans to replace by 'outcomes-based regulation', following consultation which ends during 2010).[226]

Specifically, the present rule 2.03 of the *Code*, *Information About the Cost*, imposes a duty on solicitors to explain to the client:

(a) When the client might be liable for costs, and if so the extent of that liability;

(b) The client's right to have the costs assessed externally; and

(c) Fee-sharing arrangements (if any) which might apply.

225 After the Conditional Fee Arrangements (Revocation) Regulations 2005 (SI 2005/2305), the Courts and Legal Services Act 1999 ss 58(3) and (4) (as amended) remain the primary rules, coupled with the Solicitors Practice Rules.

226 See *www.sra.org.uk* (visited 11 February 2010) and the Legal Services Act 2007 s 1.

Note that the solicitor probably has a duty in any case to investigate Before The Event (BTE) insurance which might be available to the client. If the solicitor, as part of the CFA, arranges After The Event (ATE) insurance, The Solicitors Financial Services (Conduct of Business) Rules 2001 will apply. Once a CFA is in place, the other side has to be formally notified via the court on form N251; this applies also if any terms of the CFA are changed or if the arrangement is brought to an end.[227]

There are also pre-conditions for recovery of the success fee, in particular:

1 Under CPR r 44.15 the existence (although not the detail) of the success fee must be disclosed to the paying party;

2 Under CPR r 44.3B, the reason for setting the percentage of the success fee at the level claimed must be disclosed in a detailed assessment; and

3 Under the general principles of CPR Part 44, the success fee must be reasonable and proportionate (one way round this – endorsed by the court – might be a two-stage success fee, at a lower rate in the case of a 'quick win' and rising to a higher rate if the paying party contests the case and the litigation risk increases).[228]

B The solicitor and the CFA

Leaving aside the regulatory framework, there are practical reasons why in many instances CFAs will be unattractive, or even unworkable, for the solicitor:

1 Does s/he really want to assume the litigation risk? The time and effort which s/he will have to commit to a case such as this may well be very substantial. Even in the most promising cases, developers have defences and the outcome may be uncertain.

2 Many defendant developers are now on their knees financially. If costs are not recoverable from the developer because of financial collapse, who is going to pay? The CFA can make the client liable for irrecoverable costs, including the success fee, but this just adds to the costs risk that the client faces anyway.

3 The solicitor's costs tend to be a relatively small element of the whole. A CFA is really only worthwhile for the client if the expert witness and counsel are also willing to operate on the same basis. But if the expert witness enters into a conditional fee arrangement, he may fatally damage his independence in relation

227 The duty to inform comes from the General Costs Practice Direction under CPR Part 44, para 19; also – in potentially inconsistent terms on the timing – from the Protocol for Pre-Action Conduct para 9.3.

228 *Halloran v Delaney* [2002] EWCA Civ 1258, [2003] 1 WLR 28. For a construction case where the court disallowed a 100% success fee, see *Buildability Ltd v O'Donnell Developments Ltd* [2009] EWHC 3196 (TCC), [2010] BLR 122.

> to the court, because he has a significant financial stake in the outcome of the litigation. And there is always the argument that CFAs compromise the independence of *any* adviser, including the solicitor, who may not be able to advise with the same objectivity as before.

C Other funding issues

A theoretical alternative is to use *contingency fees*. Under the old rules, contingency fees were prohibited in relation to court (as opposed to tribunal) proceedings. The burning of the old rule book may now allow contingency fees, but the balance of opinion remains that such fees are irrecoverable from the paying party because they breach the indemnity principle; and the exception which applies to permit conditional fee agreements does not apply to contingency fees as well.

The broader questions of how civil litigation should or could be funded and the place of recoverable costs in that equation were explored in detail in Jackson LJ's two-part Review of 2009.[229] Many of the points in this paper are therefore subject to change – especially CFAs in their present form, which may be replaced by a new form of 'no win, no fee' arrangement, where the lawyer gets a share of the damages recovered (not helpful for claims like ours, where the real aim is to get repairs done).

E3 Funding by the RMC (or RTM company)

A more obvious place to look for funding may be the RMC (or RTM company, if there is one). Can it pay for legal action, and how? One possible approach, if it is still an RMC and if its articles of association permit, is to make a cash call on the residents, as shareholders rather than as flat-owners. Controversially, the Court of Appeal recently approved this in *Morshead Mansions Ltd v Di Marco*,[230] though this tactic apparently avoids the statutory controls on service charges – and the flat-owners' right to challenge these in the Leasehold Valuation Tribunal (LVT). If the powers of the RMC do not include raising cash from shareholders, or if such a resolution could not be passed, the next alternative looks to the service charge account which the RMC runs. But can this fund litigation? And if the case is not won in full, can the other side's costs be paid from the service charge as well?

Here the major constraint is the terms of the standard lease. This seldom contains any express power to sue the developer (or anyone else); the RMC's main obligation may be defined as only to 'maintain, repair, redecorate and renew' the common parts and structure of the property. Despite this, a case can

229 For the Preliminary Report: n 223; for the Final Report: n 224.
230 *Morshead Mansions Ltd v Di Marco* [2008] EWCA Civ 1371, [2008] NPC 138.

be made for applying service charge funds for claims in respect of the structural elements and common parts, so long as the work needed falls properly within the RMC's obligations in the standard lease. If the RMC decides that suing the developers is the most cost-effective way of paying for the remedial works, that seems a reasonable course of action, even though it unavoidably exposes the company to the risk of the developer's (and any additional defendant's) costs.

If an RTM company has taken over, the standard lease remains the key document, but two of the company's objects in the statutory Memorandum of Association may help:

> 'to monitor, keep under review, report to the landlord, and procure or enforce the performance by any person of the terms of any covenant, undertaking, duty or obligation in any way connected with or affecting the Premises or any of its occupants; …
>
> to commence, pursue, defend or participate in any application to, or other proceedings before, any court or tribunal of any description;'[231]

Under the current text of section 20 of the Landlord and Tenant Act 1985, there is a duty to consult flat-owners about the costs of major repairs and qualifying long term service contracts (contracts for over a year). These provisions probably do not apply to the company's engagements with its lawyers and experts. All the same, regular consultation with flat-owners – by way of an email group as well as meetings – is obviously sensible and desirable, to ensure their continuing support.

Aware of the large sums involved, and rightly anxious about the distant spectre of personal liability, the RMC's directors may sensibly decide to take a formal precautionary step: to check out the validity of their strategy in advance by making an application to the LVT under the Landlord and Tenant Act 1985.[232] They will ask it to hold that their intended legal action against Inferos properly falls within the activities whose costs the RMC can incur and then be reimbursed via the service charge from all tenants. This LVT route may be equally helpful if no claim appears to be possible against any third party (eg because it is now too late to sue or there is no-one worth suing) and the RMC therefore wants to undertake the work itself, similarly looking to all tenants for reimbursement.

Whether an LVT would support the RMC in either scenario will depend primarily on its interpretation of the lease, but we may hope that it will be keen to find a practical solution which will get the work done (especially as some of it is safety-critical). The tribunal will of course have to pay heed to any objections from those tenants who do not agree with the RMC's plans; they

231 The RTM Companies (Memorandum and Articles of Association) (England) Regulations 2003 (SI 2003/2120), Schedule Part 1 (Memorandum of Association), paras 4(d) and (k). On RTM companies, see n 182 and linked main text.

232 Section 19 (as amended).

will be notified of the application and have the chance to be heard, but the RMC will do its best to get them 'on side' before the application goes to the tribunal.

F *REMEDIES*

F1 Settlement terms

Surely, says Ms S, if we can overcome these liability issues, the court will order Inferos to come back to site and carry out the remedial work at their expense? Inferos might offer this, as a negotiating gambit (and as saving the company money and costs). The flat-owners will normally welcome such an outcome, but it needs to be carefully negotiated and comprehensively documented. What might such a settlement agreement contain?

1 Acknowledgment by the defendant of each defect, defined in detail;

2 Agreed specifications for each aspect of the remedial work and who will carry it out;

3 Programming for remedial work (projected start and end dates, number of days' work in each flat, adequate warnings to residents of interruptions in any services or of the need to move out temporarily);

4 Arrangements for alternative accommodation, paid directly by the defendant, if residents have to move out – and confirmation of insurance cover for their belongings during that period;

5 Agreed communication channels between claimants, their representatives and the defendants (and their representatives and contractors) in relation to repair work;

6 Inspection rights of remedial work in progress by a representative of the claimants;

7 A procedure for the claimants' representative to 'sign off' the work when completed;

8 Availability of any warranties linked to the remedial work, including perhaps their assignment to the RMC;

9 A method of quick and cheap dispute resolution, if needed during or just after remedial work; and

10 A parent company guarantee for all the obligations undertaken, if the developer is a subsidiary or SPV of a larger company.

F2 If no settlement?

If no such all-in-one deal with the developer can be reached, the claimants have to appear willing to press onwards towards court, though an English court will rarely insist on a defendant doing repairs, because it will not put itself into a position of having to supervise the quality of building work.[233] Nor can residents who 'want out' expect any help from the court in telling or encouraging the developer to buy them out, perhaps at current market value. Nothing stops a developer (or the NHBC) agreeing to do so, but in practice it is almost unheard of. The reason is simple: it will usually be far more expensive than fixing the defects, especially if the developer can pass part of this cost (and the responsibility for carrying out repairs on the ground) down the line to specialist sub-contractors.

In court, therefore, the only likely outcome will be an award of damages. In English law, damages in civil cases are, in all but the most exceptional case, purely compensatory: they are to restore the claimant to the position s/he would have been in, had the other party not failed to carry out his or her obligations.

Damages for reinstatement

So what courts are used to awarding is the 'cost of repair', usually called 'reinstatement': an odd term, when applied to the remedying of those defects which have been present in a building from the start. 'Rectification', the term used in Australia, would make more sense.[234] It is the normal measure of damages a court would award in a case like ours, since it puts the claimants in a position to satisfy their 'expectation interest': that the other party's obligations in the contract should be performed. The cost of repair is usually measured at the time the defects are discovered.[235] This assumes – as will normally be the case in a residential development like Paradise Gardens – that repairing the defects is of itself a reasonable course of action: that the expenditure is not disproportionate to the scale of the breach.

---

233 The OFT 2008 report n 87, Annexe G [3.32ff]. If the claim was in contract and the court could be persuaded to go beyond an award of damages, it could theoretically make an 'order for specific performance' of the original contract; if the claim was on any other legal basis, the court would impose a 'mandatory injunction'. Some of the specialist statutory Australian tribunals do have the power in residential defect cases to order the builder or developer to do repair work, eg VCAT under s 53(2)(g) of the Domestic Building Contracts Act 1995 (Vic).

234 Matthew Bell, 'After *Tabcorp*, for whom does the *Bellgrove* toll? Cementing the expectation measure as the 'ruling principle' for the calculation of contract damages' (2009) 33 Melbourne University Law Review 684.

235 *East Ham Corporation v Bernard Sunley* [1966] AC 406 (HL). Similar 'timing' questions can arise where property has been damaged by construction work on a neighbouring plot (ie a claim in tort), as in *Dodd Properties Ltd v Canterbury City Council* [1980] 1 WLR 433 (CA). Here the court held that the relevant date for assessing the cost of repairs is the date when the repairs might first reasonably have been undertaken – often much later than the date the cause of action arose; so increases in construction costs are at the defendant's risk. In the case, it was reasonable for the claimant to wait for a clear outcome on liability – part of which hinged on the outcome of a trial.

If the court holds that a claimant is acting unreasonably in proposing to shift the cost of repair to the defendants, compensation will instead be based on the loss in value of the property caused by the presence of the defects – which may be much less than the repair costs, or even zero ('nominal damages').[236] Whatever the basis for the main award of damages in relation to construction defects, other proved consequential losses can be added – eg damage to other property or loss of use of the flat (if uninhabitable) or of income from subtenants.[237]

Damages for inconvenience?

Beyond the central 'reinstatement' part of the possible claim, though, courts are notoriously hesitant to go. This is even – or perhaps specially – true of the TCC, most of whose work concerns large commercial or engineering projects where individuals are rarely claimants. So getting substantial damages for the inconvenience already suffered by living in a defective development and the further nuisance and cost of having perhaps to move out (or move subtenants out) while repair work takes place is unlikely.[238]

The relevant principles derive from two different but intertwining branches of law: the law of landlord and tenant, where a landlord may have responsibility in law for services and a tenant may therefore have a claim for damages when these are not supplied; and the general law of damages for breach of contract – in our case the sale contract from developer to first (long leasehold) buyer. They share the same starting-point: a claim for damages for inconvenience or distress (however it is named) cannot succeed unless this category of harm is a foreseeable consequence of the defendant's breach of contract, of covenant or of duty. Few cases appear to turn on this remoteness issue, but a claimant will be wise to assert the foreseeability of the link between the defendant's conduct and the distress for which s/he now wishes to claim damages.

A Landlord and tenant law

If our would-be claimants had been tenants on short periodic tenancies and Inferos had been their landlords, with a duty to provide services, then as claimants who have stayed in occupation they would have a right to 'a

236 In *Dodd Properties v Canterbury* n 235, relied on by the Singapore High Court in *Afro-Asia Shipping Co (Pte) Ltd v Da Zhong Investment Pte Ltd* [2003] SGHC 286, [2004] 2 SLR 117. In *Dodd*, Donaldson LJ said at 456H: 'If he [*the claimant*] reasonably intends to sell the property in its damaged state, clearly the diminution in capital value is the true measure of damage. If he reasonably intends to continue to occupy it and to repair the damage, clearly the cost of repairs is the true measure. And there may be in-between situations'.

237 For the limits on 'loss of use' claims in construction contract cases, see *Bella Casa Ltd v Vinestone Ltd* [2005] EWHC 2807 (TCC), [2006] BLR 72, discussed in Harvey McGregor QC, *McGregor on Damages*, London, Sweet & Maxwell (18th ed 2009) at 26-018ff.

238 For two valuable surveys of the English caselaw, including unreported County Court cases, see Kim Franklin, 'Damages for Heartache: The Award of General Damages for Inconvenience and Distress in Building Cases' (1988) 4 Const LJ 264 and 'More Heartache: A Review of the Award of General Damages in Building Cases' (1992) 8 Const LJ 318.

substantial award for the disappointment, distress, discomfort and loss of enjoyment' if any of these services became unavailable, as a form of disrepair.[239] The court would reach a figure for this by (a) looking at the reduction in rent which a tenant might reasonably claim for having a home without those services; (b) making a global award for discomfort and inconvenience; or (c) both. For claimants who have their own subtenants in occupation, the damages would be measured by the reduced rent (or absence of rent at all) caused by the failure in the supply of services, if any.

There is authority that, where a dwelling is let on a long lease with a ground rent (ie all of Paradise Gardens), then a notional rent can be fixed, assuming that it was in good repair and let on a short tenancy. A discount is then applied for the failure in supply of services or other elements of disrepair, which may be claimable as damages:

> '… where the tenant wishes to remain in occupation of the property the diminution in value occasioned by the landlord's failure to repair for which he is entitled to be compensated is the personal discomfort and inconvenience he has experienced as a result of the want of repair.'[240]

However, the specific extra annoyances of actually having repair work done by the landlord (or equivalent) seem not to be claimable, since the law says that an occupier has to put up with the other party doing what the law requires him to do (unless the work would have been unnecessary, had the other party acted in good time). However, the annoyance and inconvenience of having to move out while repair work is done can give rise to a claim for damages, at least if the landlord's failure to repair in good time has made the flat uninhabitable; these damages could include wasted service charges (if any) and standing utilities costs.[241]

So landlord and tenant law looks relatively favourably on claims by residential occupiers against other parties who have failed to supply services – though the amounts awarded under these headings are not large. However, if the problems at Paradise Gardens are purely original construction defects and do not compromise any of the services to the flats, there may be no element of 'disrepair' which could be laid at the (real or notional) landlord's door. If so, the authorities providing for awards of damages in this category of case may be little help.

239 Jan Luba QC, Deirdre Forster & Beatrice Prevett, *Repairs: Tenants' Rights*, 4th ed 2010 ch 8.

240 Morritt LJ in *Wallace v Manchester City Council* (1998) 30 HLR 1111 (CA) at 1119, also reported at [1998] 3 EGLR 38; see also *Earle v Charalambous* [2006] EWCA Civ 1090 and *Niazi Services Ltd v Van der Loo* [1999] 1 EGLR 130 (CA).

241 For the limits on claims by tenants for standing costs and alternative accommodation, see *Calabar Properties Ltd v Stitcher* [1984] 1 WLR 287 (CA).

B Damages for breach of contract

In the normal 'pure' breach of contract case, the law offers a remedy in damages primarily only for the breach's measurable pecuniary effects (loss or expense to the claimant resulting from the defendant's breach). Beyond this category of 'special damages', the law makes it possible – but difficult – to claim 'general damages' for the distress and inconvenience (sometimes called 'loss of amenity') which may also result from the same breach.

The easiest way of succeeding in such a claim is to argue that the main purpose, or one of the main purposes, of the contract was to provide the claimant with pleasure (or peace of mind) and that the defendant has not attained this aim. But contracts containing such a contractual obligation are rare and exceptional – package holidays are the starting-point for this line of authority, where damages attempt to measure the diminution in value between the holiday promised and the holiday received.[242]

Contracts relating to domestic housing appear not to fall into the same category as holidays – so the Court of Appeal in *Watts v Morrow* held that a contract with a surveyor to report on the condition of a property does not include an undertaking to keep the would-be buyers free from worry, so they had no right under this heading to general damages for distress when the property turns out to need more work than the survey suggested.[243] As *Construction Industry Law Letter* commented: 'Much better to have a spoilt holiday or be libelled than have a negligent survey'.[244]

At Paradise Gardens, the main object of each sale contract was for the buyer to acquire a dwelling matching the undertakings the developer had given; this has already been achieved in large part, and the pleasure of living in one of the units cannot easily be seen as one of the outcomes the developer was promising (as an implied term of the sale contract). Even where a claimant can successfully argue that 'amenity' was promised and has not been delivered, the level of awards by the courts under this head is low.[245]

Beyond these exceptional cases, a claimant may still claim something for the non-pecuniary aspects of living in a property needing repair: damages for physical inconvenience, and discomfort and mental suffering directly related to

242 Lord Denning MR in *Jarvis v Swans Tours Ltd* [1973] QB 233 (CA), followed and extended by *Jackson v Horizon Holidays Ltd* [1975] 1 WLR 1468 (CA).
243 *Watts v Morrow* [1991] 1 WLR 1421 (CA).
244 [1990] CILL 692.
245 *McGregor on Damages* n 237 ch 26, discussing *Ruxley Electronics Ltd v Forsyth* [1996] AC 344 (HL), where the Lords upheld the small award of £2500 to the plaintiff for his loss of amenity, when the swimming pool he had commissioned was several inches shallower than specified; he would otherwise have been awarded only nominal damages, the breach of contract causing no loss of value to his property, nor (according to the court) was rebuilding the pool to the correct depth a reasonable course of action. For another home swimming pool case, but in a tort context, see *Patchett v SPATA*: n 53 and linked main text; and for Australian divergence from *Ruxley*, see Bell n 234.

that inconvenience.[246] But the court will refuse to make an award in order to exact revenge or punishment on the developer, or to mark its gross incompetence, unreliable and untrustworthy promises, bad selection and inadequate supervision of contractors – or any other failings. Where inconvenience within the rather narrow definition acceptable to the law can be shown, compensation will depend on the duration and extent of the claimant's, and claimant's family's, suffering and the effect of the defendant's breach on them.[247] However, awards remain 'not excessive, but modest'[248] and 'may not be very substantial'.[249]

There is no fixed tariff or ceiling, but a good recent example is *Eiles v LB Southwark*,[250] where parts of the claimant's house showed signs of cracking and she had the worry over several years of attempting to establish what was going on and who was legally responsible (with multiple visits from building surveyors, loss adjusters etc). In the TCC, Ramsey J awarded her £2250 in total under this head: £1000 for the first five years and £1250 for the last two. She was also awarded 'special damages' of the costs of having to move out, while the four weeks of work necessary (as the court found) for underpinning her house took place.

As this summary shows, on no established legal basis can claimants expect more than token sums as general damages for the disruption and annoyance of living in defective homes. This is partly for policy reasons: inconvenience and stress are predictable consequences of living with defects, while attempting to get remedies, but the courts wish to keep a balance between the level of compensation for our sort of non-pecuniary loss and for personal injuries, where even a permanent injury or disability (unless it also leads to loss of income or extra costs) may lead to a relatively small award of damages. This highlights once again how a negotiated settlement may achieve more by way of compensation than a victory in court. A defendant may be more generous than the courts would be in return for the certainty of a deal achieved more quickly (and with a much smaller exposure to liability for the claimants' costs) than waiting for the gamble of a trial.

F3 What will a court award for reinstatement?

You will wish to take a realistic view about what level of damages a court might award in order to fund repairs. This is because Inferos will have a

246 Ralph Gibson LJ in *Watts v Morrow* n 243 at 1441D.
247 Kim Franklin n 238 (1988) 4 Const LJ 264 at 270.
248 Lord Denning MR in *Perry v Sidney Phillips & Son* [1982] 1 WLR 1297 (CA) at 1303A.
249 Oliver LJ in *Perry v Sidney Phillips* n 248 at 1305F.
250 *Eiles v London Borough of Southwark* [2006] EWHC 1411 (TCC) [152ff]. This is a tort case (liability in nuisance and negligence for damage caused by tree roots from next door), but the applicable principles seem to be the same in all cases of domestic disrepair, including contract claims against negligent surveyors, like *Watts v Morrow* n 243 and *Perry v Sidney Phillips* n 248.

battery of arguments they can deploy, of which here are just a representative few:

1 *The disrepair argument*. The developers may well assert that some of the alleged defects are not defects at all, but disrepair as a result of poor maintenance. Take the cracks in the piazza roof. Could the water penetration into the under-piazza car park arguably be the result of punctures in the waterproof membrane which have not been (but could and should have been) repaired? What about the complaints concerning the windows which wouldn't close properly? After six to eight years some maintenance is bound to be called for. Or the condensation in the bathrooms which is causing the plasterboard to disintegrate? The type of plasterboard used, according to Inferos, wouldn't be a problem if the grout between the tiles and the sealant around the edges was renewed every now and again.

2 *The 'so what?' argument*. 'Yes, we admit the defect, but so what – there is no loss. Even if the bathroom and shower enclosures are made of the wrong plasterboard, does it really matter? If they had been constructed of the correct material they would have had a life of about 50-60 years. If incorrect material was used, that might reduce the useful life of the enclosures by 10 years – so what?'

3 *The proportionality argument*. If it will cost £3,000 to replace the bathroom and shower enclosure in each flat, is that really proportionate to the flat-owner's loss, if there is no diminution in value, or if the reduction in value is much more modest, say £300? Why should Inferos pay more by way of damages? This was precisely the argument which won the day before the House of Lords in *Ruxley Electronics v Forsyth*.[251]

4 There is huge scope to argue about *schemes of remedial work*. Take the roof of the car park (water penetration caused by failure of the waterproof membrane, as the claimants' surveyor suggests). The Rolls-Royce solution – at a cost of say £150,000 – is to replace the waterproof membrane. But patch repairs are equally possible, at a fraction of the cost. While the flat-owners might want the best, the court will award only what it considers reasonable. If therefore Inferos persuades the court that patch repairs are sufficient, the court will limit the damages in line with that finding – and to unsuccessfully claim a much higher sum will expose the claimants to a nasty share of the costs bill of the defendant (or defendants, if Inferos bring in the building

251 *Ruxley*: n 245.

contractor as a defendant under CPR Part 20, in the hope of shifting part or all of any liability onwards).

5 An issue mentioned in C4 above relates to *the position of an RMC (or RTM company) as claimant in court*: can it claim to suffer a loss by having to – or choosing to – execute repairs on the common parts, when the way in which it is funded guarantees that any lawful expenditure it makes will be covered by the service charge it levies on flat-owners? An astute defendant might attempt to exploit the point, though there is apparently no record in caselaw of this yet having happened.

6 Additionally, the quantum of claims for the structural elements and common areas, even if the RMC (or RTM company) can sue for these, is vulnerable to the argument that *damages should be limited by reference to the number of flats whose owners are successful claimants, as a proportion of the total number of flats*. Ms S explains to you that a third of the flats have already changed hands since the first purchases, and the non-resident flat-owners are on the whole passive investors, who will not want to involve themselves in litigation. The RMC will do well to rally more than say 65 out of the 150 flat-owners to the cause. This will allow Inferos to argue that quantum on the structural elements and common areas should be limited to 65/150 of the total cost of those remedial works: especially unfair if the litigation has been funded by the service charge or by a cash call on the RMC shareholders, so that all current flat-owners are contributing.[252]

More generally, this sort of individualised court outcome has the serious disadvantage that it can only compensate those who are parties to legal action, for defects which they can show they have suffered: it cannot offer an adequate global remedy for all the relevant defects in a whole block (especially those in 'the common parts'), unless all those in the block commit to suing the developer or unless a way can be found for the RMC to bring legal action (unlikely – C4 and E3 above). This underlines further why a negotiated solution has to be the real aim.

G CONCLUSIONS

As you try to explain all this to Ms S, her impatience with English law grows by the minute. Why is liability for construction defects not clearer? Why, even in what seems a straightforward case, is there doubt about who can sue whom, on

252 This appears to be the Singapore situation too: see main text linked to n 179.

what legal basis and for what remedy? Why does the right to sue for defects not 'run with' ownership rights in each flat, beyond the limited scope of the DPA? And why should it require the threat of litigation – the most expensive and risky form of dispute resolution – to move forward?

There is no simple answer, except that the very limited intervention by statute to protect consumers of residential construction forces claimants to make the best they can of the common law. That law's narrow concept of contractual terms and who can rely on them is the start of their difficulties. These are compounded by its similarly limited approach to imposing a duty of care in negligence for the sorts of harm represented by construction defects; by the modest statutory help offered by the DPA; by the separation between a right to sue for defects and the property rights in each flat; and by the impact of the law of limitation.

It makes the situation worse that the sale onwards of each flat normally carries with it no warranty by seller to purchaser about the flat's freedom from defects ('caveat emptor' operates fully here, so the starting-point is that the risk is on the purchaser). It will comfort Ms S not at all to learn that other comparable legal systems take a more interventionist approach.

'In my country we do this differently'

There could be a statutory structure for a multi-unit development like Paradise Gardens, as in Singapore (which follows the New South Wales *strata title* model; New Zealand has an equivalent called *unit titles*).[253] For off-plan first purchasers, this legislative regime imposes standard terms which the flat-owners at Paradise Gardens would be delighted to have. These include making the developer liable for defects in the workmanship or materials of the structure and common parts and for the development's non-conformity with the specifications or the plans approved by the building or other regulatory authorities.[254] Further, as discussed in C3 above, the statutory management corporation enjoys powers to take legal action in its own right and as representing residents.[255]

English law already has an equivalent legal structure for multi-unit residential developments – commonhold, introduced by Part I of the Commonhold and Leasehold Reform Act 2002.[256] This does not go half as far as the Singapore scheme, was not in force when Paradise Gardens was built and is not compulsory anyway, so is apparently little used. As a result of our free-market

253 There are five NSW statutes on the operation of the strata title system; see also the Land Titles (Strata) Act (Cap 158) and Building Maintenance and Strata Management Act (Act No 47 of 2004) (Singapore); and the Unit Titles Act 1972 (as amended) (NZ).
254 Under the Housing Developers (Control and Licensing) Act (Cap 130).
255 See n 177 and linked main text.
256 See also the Commonhold Regulations 2004 (SI 2004/1829, as amended by SI 2009/2363). There are separate Regulations for the land registration aspects of this form of tenure.

approach, all hinges on the documentation (or lack of it) for each development and the legal structure chosen by the developer, with no default 'code' of rights and liabilities, let alone a standard 'core' regime imposed by law.

Beyond its strata title regimes, Australia has an attractive combination of builder licensing, contractual protections for residential employers, statutory contractual warranties (transmissible to new owners) for up to ten years and backed by insurance (though the scope of this is now too narrow in most States) and specialist informal dispute-resolution bodies with strong interventionist traditions and practices. It is a remarkably complete package of consumer protections in our specific area.

France has a comprehensive statutory regime for several different categories of construction defects over a ten-year period ('la garantie décennale'), backed by compulsory liability insurance. Here the accidents of the parties' contractual relationships and duties (or lack of them) play no real part, the rights of the current flat-owners and the collective management entity against any of those involved in the original development (and their insurers) being derived from specific provisions inserted into the *Code civil*. Regarded as a matter of public policy, this statutory regime cannot be contracted out of.[257] The French approach has also been exported to those jurisdictions whose own Codes start from the French model – for example, many now independent francophone African states, as well as Egypt and the Gulf states whose private law is influenced by Egyptian law (eg the UAE).

Better use of existing English law

Even in the context of English law as it is, the situation in Paradise Gardens could have come closer to the ideal if:

1 The standard sale contract with each original flat purchaser had been in deed form (giving a longer limitation period) and gave buyers greater legal rights [the new *Consumer Code for Home Builders* hardly improves the situation];

2 The duties of Inferos in relation to defects, especially those affecting the structural elements and common parts, had been spelt out in the contract;

3 The original flat purchasers had not agreed to a sale contract which included a bar against assignment without consent and a clause opting out of the Contracts (Rights of Third Parties) Act;

4 Buyers could have known in advance how the RMC would be set up, and thus objected to the developer having a 'golden share',

257 Articles 1792 - 1792-6 c.civ.

alloweing Inferos' representatives to prevent the RMC actively protecting the rights of residents in relation to defects;

5 The rights of the RMC had been clearer, with a handover date and procedure to start the company's rights and duties going and the developer making clear contractual undertakings on handover about the good condition of the development at that moment, these being spelt out in a deed;

6 The powers of the RMC in the leases clearly gave it the right to take legal action, including on behalf of individual owners (if expressly authorised)

7 A less narrowly drawn warranty than the NHBC *Buildmark* had been available [for example, the radically different competing product from BLP];

8 Second and later purchasers of flats had insisted on having the benefit of the original sale contracts assigned to them by their sellers at the time they purchased; and

9 The flat-owners had realised – or been advised earlier on – that they may have no more than six years after each flat was completed to start legal action for defects, in order to insist on intrusive professional surveys in both common parts and individual flats which would spot defects *before* the right to sue anyone could be lost.

These are therefore all points to be aware of, when advising clients in similar residential developments in the future. As will be clear, most of the problems at Paradise Gardens derive from negative features of the original legal relationship between the developer and the off-plan first buyers. It is at the conveyancing stage – where construction specialists usually play no part – that thought to the future could pay dividends, if defects later come to light.

Postlude

One of the cases on which this paper is based led to proceedings in the TCC, initially against the developer alone. The table summarises the different parts of the claim, those marked § being advanced with only limited confidence:

CLAIMANT/S	LEGAL BASIS	CLAIM
Original flat-owners	Breach of obligations (express and implied) in the sale contracts Liability under DPA	Damages for 'reinstatement' (cost of repair of all defects) [unless RMC able to recover for defects in structure and common parts] *plus* 'General damages' (loss of investment income, cost of alternative accommodation, distress etc)
Successors of original flat-owners	Liability under DPA § Claims under the original sale contracts: struck out by TCC, since purported assignments of these contracts invalid – no consent sought from developer	
The RMC	§ Liability in contract § Liability under DPA § Liability in negligence at common law	Damages for 'reinstatement' (cost of repair of defects) in structure and common parts [unless flat-owners able to recover these]

This final position was only reached by successive amendments to the original claim, which added to the total costs by requiring interlocutory TCC hearings, each amendment being opposed by the developer. 'Get the claim correct and complete at the start' is of course the ideal, following 'Make sure that the Letter of Claim – like all pre-litigation steps – is compliant with the PAP'. As the litigation progressed, changes to the claim were inevitable as individual flats changed hands or additional flat-owners joined or left the action: names had to be substituted and deleted, as well as new ones added. A further hazard of the litigation was its possible impact on the flats' marketability.

Midway towards trial, the developer used CPR Part 20 to add its main contractor as an additional defendant (under the *TCC Guide*, it should signal this no later than the first CMC). This extra party was later freed from further involvement in the case on making a payment offer following mediation. The developer and claimants in the end reached a settlement a few months ahead of the trial date, which is why so many of the legal questions in this paper remain without an authoritative answer.

Another case which has inspired aspects of the scenario has not yet advanced beyond advice to the RTM company and flat-owners (limitation issues looming large); in a third multi-unit development, the NHBC has now declined to consider a claim to have missing fire-collars installed, there being so far no 'damage' and the NHBC not yet agreeing that there is 'present or imminent danger to the physical health and safety of the occupants'. Once there has actually been a fire, the NHBC may show more interest – but one of the general exclusions and limitations in the policy documentation refers to 'Any cost, loss or damage resulting from the destruction of the whole or part of a Home as a result of fire, however caused'…

APPENDIX

CONSTRUCTION DEFECTS IN MULTI-UNIT RESIDENTIAL DEVELOPMENTS: RIGHTS OF ACTION IN ENGLISH LAW

NB These tables are only a summary of the main possibilities. They assume traditional legal structures for the development: a sale contract between the developer and each first buyer, leading to the grant to each of a long lease by a landlord – who may or may not be the same entity as the developer; and a Residents' Management Company, also a party to each lease, responsible for the common parts, insurance etc.

TABLE A: POSITION OF FIRST BUYER OF A FLAT (CURRENT OWNER)

FIRST BUYER: RIGHTS AT COMMON LAW			FIRST BUYER: STATUTORY RIGHTS
IN CONTRACT	IN TORT	UNDER THE LEASE	
Against developer, including where responsible in law for others Express contract terms (whatever they are) of sale contract Term implied at common law that dwelling will be habitable on completion; other implied terms possible depending on context (eg access to flat via common parts) *Limitation period*: 6 years from breach by developer (12 years from breach, if contract in deed form – unlikely)	*Against developer, including where responsible in law for others* May be able to argue that developer also owed concurrent duty of care in tort (unlikely, and contract terms may exclude it) – potentially useful for limitation reasons (below), but NB that developer unlikely to be responsible in law for 'independent contractors' *Limitation period*: 6 years from suffering of damage, but if defect latent, may have extra 3 years from date of reasonable discovery (or actual knowledge, if earlier) by potential claimant of a defect which before then was hidden, subject to ultimate 15-year long-stop from the date when cause of action originally arose	*Against landlord (no rights against developer as such)* Express terms of lease (whatever they are) fix landlord's obligations: no mandatory or default duty on landlord to repair original construction defects *Limitation period*: 6 years from breach of covenant by landlord (12 years from breach, if lease in deed form – normally the case)	SGSA 1982 implies terms into sale contract as to quality, time and price (default only) Buyer can also assert breaches of quality obligations in relation to 'dwelling' imposed on 'builder' by DPA 1972 *Limitation period*: 6 years from completion of dwelling May also be able to challenge in court any unfair terms in purchase contract under UCTA 1977 and/or UTCCR 1999

FIRST BUYER: RIGHTS AT COMMON LAW			FIRST BUYER: STATUTORY RIGHTS
IN CONTRACT	**IN TORT**	**UNDER THE LEASE**	
Against other construction party responsible No contractual link (collateral warranty from any other party to first buyer highly unlikely), so no right of action	*Against other construction party responsible* Unlikely to be owed duty of care in relation to 'pure economic loss' (loss of value, or cost of repairs) caused by defects	*Against other construction party responsible* Lease can give rights only against parties to it, eg the RMC, which usually has obligations in relation to insurance of whole development and maintenance of its 'common parts', but not in relation to original construction defects	*Against other construction party responsible* 'Builder' owing duties under DPA 1972 may include construction parties with whom buyer had no contract *Against landlord and RMC* Tenants have statutory rights in relation to estate management – RMCs, service charges etc
Against third-party warranty provider – insurer (if any) May have claim under warranty for 10 years from completion of construction – depends on precise terms of cover (may require owner to approach builder in first two years of policy) NB Successful claim against other party may cause warranty provider to trigger subrogation clause, to recoup money paid out under the policy *Time limit for claim*: whatever rules are in the policy *Limitation period for legal action against insurer*: 6 years from its breach of contract (12 years from breach, if contract in deed form – unlikely)	*Against third-party warranty provider – insurer (if any)* Contract law central to rights against warranty provider; tort law unlikely to be relevant	*Against third-party warranty provider – insurer (if any)* None – lease can give rights only against parties to it	*Against third-party warranty provider – insurer (if any)* Right to complain to Financial Ombudsman Service against insurer's determination *Time limit for complaint*: 6 months from final response from insurer (which must mention the 6-month time limit); *and* 6 years from event consumer is complaining about (or – if later – 3 years from when s/he knew, or could reasonably have known, s/he had cause to complain) May also be able to challenge in court any unfair terms in warranty under UCTA 1977 and/or UTCCR 1999

TABLE B: POSITION OF SECOND OR LATER BUYER OF A FLAT (CURRENT OWNER)

SECOND OR LATER BUYER: RIGHTS AT COMMON LAW			SECOND OR LATER BUYER: STATUTORY RIGHTS
IN CONTRACT	**IN TORT**	**UNDER THE LEASE**	
Against developer, including where responsible in law for other parties Cannot normally assert any of the terms in the original sale contract against the developer Could acquire same rights as first buyer against developer: • if benefit of original sale contract assigned by previous owner, or • if Contracts (Rights of Third Parties) Act 1999 applies NB No certainty of either – terms of original sale contract may exclude both *Limitation period*: 6 years from breach by developer (12 years from breach, if original sale contract in deed form – unlikely)	*Against developer, including where responsible in law for other parties* If developer owed first buyer concurrent duty of care in tort, current owner may acquire own right of action if defects were latent and if the extended limitation period for legal action starts running under Latent Damage Act 1986 while dwelling owned by present owner *Limitation period*: 6 years from suffering of damage, but if defect latent, may have extra 3 years from date of reasonable discovery (or actual knowledge, if earlier) by potential claimant of a defect which before then was hidden, subject to ultimate 15-year long-stop from the date when cause of action originally arose	*Against landlord (no rights against developer as such)* Express terms of lease (whatever they are) fix landlord's obligations: no mandatory or default duty on landlord to repair original construction defects	*Against developer* Can assert breaches of obligations imposed on 'builder' by DPA 1972 *Limitation period*: 6 years from completion of dwelling Cannot challenge any terms in original purchase contract as unfair unless has same rights as first buyer
Against other construction party responsible Same as first buyer: no contractual link (collateral warranty from any other party to first buyer, assignable on to subsequent buyer, highly unlikely), so no right of action	*Against other construction party responsible* Same as first buyer: owner unlikely to be owed duty of care in relation to 'pure economic loss' (loss of value, or cost of repairs) caused by defects	*Against other construction party responsible* Lease can give rights only against parties to it, eg the RMC, which usually has obligations in relation to insurance of whole development and maintenance of its 'common parts'	*Against other construction party responsible* 'Builder' owing duties under DPA 1972 may include construction parties with whom present owner never had any contract *Limitation period*: 6 years from completion of dwelling *Against landlord and RMC*

SECOND OR LATER BUYER: RIGHTS AT COMMON LAW			SECOND OR LATER BUYER: STATUTORY RIGHTS
IN CONTRACT	**IN TORT**	**UNDER THE LEASE**	
			Tenants have statutory rights in relation to estate management – RMCs, service charges etc
Against third-party warranty provider – insurer (if any) Same as first buyer: may have claim under warranty for 10 years from completion of construction – depends on precise terms of cover (may require owner to approach builder in first two years of policy) NB Successful claim against other party may cause warranty provider to trigger subrogation clause, to recoup money paid out under the policy *Time limit for claim*: whatever rules are in the policy *Limitation period for legal action against insurer*: 6 years from its breach of contract (12 years from breach, if warranty in deed form – unlikely)	*Against third-party warranty provider – insurer (if any)* Same as first buyer: contract law central to rights against warranty provider; tort law unlikely to be relevant	*Against third-party warranty provider – insurer (if any)* None – lease can give rights only against parties to it	*Against third-party warranty provider – insurer (if any)* Same as first buyer: right to complain to Financial Ombudsman Service against insurer's determination *Time limit for complaint*: 6 months from final response from insurer (which must mention the 6-month time limit); *and* 6 years from event consumer is complaining about (or – if later – 3 years from when s/he knew, or could reasonably have known, s/he had cause to complain) Same as first buyer: may also be able to challenge in court any unfair terms in warranty under UCTA 1977 and/or UTCCR 1999