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## **The peculiar case of *Pirelli*: Cracks showing but not doomed**

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It is not often that conflicting Supreme Court (or, as it used to be, the House of Lords) decisions remain standing for long. It is even rarer, then, for this to be the case for over two decades. But such is the state regarding the law of limitation in tort in construction cases.

The House of Lords' decision in *Pirelli General Cable Works Ltd v Oscar Faber & Partners* [1983] 2 AC 1 has long been a controversial one and has, over the years, been chipped away at, reinterpreted and even confined to almost obscurity. However, it is still a binding judgment that crops up now and again in niche circumstances. And the Supreme Court is waiting for an opportunity to set the record straight.

Briefly, *Pirelli* concerned a case where a firm of architects designed a building with incorrect material. The incorrect material resulted in cracks appearing in the concrete some years later. The claimants issued a claim seemingly out of time. It is trite that in negligence cases, for the purposes of limitation, time begins to run from the "date of damage". Lord Fraser's view was that the date of damage was from when the cracks began to appear, as opposed to when the claimants first noticed the cracks. This, now, seems obvious to anyone with basic knowledge in limitation matters given the widespread use of section 14A of the Limitation Act 1980. However, *Pirelli* pre-dates that section coming into effect. In fact, the decision was one of the reasons s.14A came into being.

Lord Fraser stated that, save for those buildings which are "doomed from the start" due to defective design such that the damage was inevitable and therefore the date of damage is the same as when the building is handed back to the owners (otherwise known as the date of practical completion), time would run when physical damage manifested.

However, immediately this reasoning is tough to grapple with, not least because by that logic, *Pirelli* should have been a building "doomed" because the defective material used in the concrete mixture was always going to lead to the cracks forming. As such, this began the long search for interpreting what Lord Fraser meant when he contemplated on doomed buildings. In *Ketteman v Hansel Properties Limited* [1987] A.C.189, Lord Keith stated:

*"In the second branch of the argument it was maintained that a distinction fell to be drawn between the case where the defect in a building was such that damage must inevitably eventuate at some time and the case of a defect such that damage might or might not eventuate. The former case was that of a building "doomed from the start" such as was in the contemplation of Lord Fraser of Tullybelton when he made reference to that concept in his dicta in the Pirelli case, at p. 16. In the present case the houses were doomed from the start because the event showed that damage was bound to occur eventually. My Lords, whatever Lord Fraser may have had in mind in uttering the dicta in question, it cannot, in my opinion, have been a building with a latent defect which must inevitably result in damage at some stage. That is precisely the kind of building that the Pirelli case was concerned with, and in relation to which it was held that the cause of action accrued when the damage occurred. This case is indistinguishable from the Pirelli case and must be decided similarly. The second branch of the architects' argument fails. I understand that all your Lordships agree."*

In *Ketteman*, a case concerned with faulty foundations which caused cracks in the walls of the houses, the House of Lords followed *Pirelli*.

The Court of Appeal then, in *London Congregational Union Inc v Harriss & Harriss* [1988] 1 All E.R. 15, dealt with a case where a church hall was completed in January 1970. The drains apparently functioned without obvious problems for 20 months but, from August 1971 onwards, floods occurred due to defects in the drainage design. Proceedings were issued on 18 February 1977, namely within 6 years of the flooding but more than 6 years since the drainage had been completed. The defendant architects raised a limitation defence, arguing that the building was doomed from the start because of the inherent deficiency of the drains. The claimants said that the cause of action accrued when the damage, namely the flooding caused by the defective drainage, first occurred.

Ralph Gibson LJ found that the damage concerned of was not “physical damage” given that the drains were capable of operating and did so for some 20 months. However, Sir Denys Buckley dissented and stated that the fact that the drains flooded only demonstrated that the building was defective from the moment it was handed back. The floods were not the physical damage but a symptom of it. As such, in his dissent he stated that time should run from when the building was handed back.

The state of the law in England & Wales then changed with *Murphy v Brentwood District Council* [1991] 1 AC 398, in which the House of Lords corrected the view that physical damage was needed to complete a cause of action in tort. The House of Lords in *Murphy* stated that a claimant who discovered a defect before physical damage occurred did not have to wait for damage to be able to bring a cause of action. Rather, that claimant would have a cause of action stemming from economic loss.

It seemed now that *Pirelli* was all but sent to rest. However, the House of Lords did not overrule *Pirelli*, despite in essence recharacterizing it as an economic loss case rather than physical damage case. The logic was that the claimants in *Pirelli* would have suffered economic loss through having a defective chimney upon which they required to expend money for the purpose of removing the defect. Lord Keith stated:

*“It would seem that in a case such as Pirelli, where the tortious liability arose out of a contractual relationship with professional people, the duty extended to take reasonable care not to cause economic loss to the client by the advice given.”*

Finally, in *Abbott v Will Gannon and Smith Limited* [2005] EWCA Civ 198, Tuckey LJ found that the facts were on all fours with *Pirelli* and as such it had to be decided in the same way, but in obiter remarks stated that had he not been bound, he would have found that the cause of action would have accrued when the claimants suffered economic loss, such as the cost of repairs or depreciation in market value.

The above are all cases where damage is physically apparent. There are a number of authorities where this is not the case, such as *Tozer Kemsley & Milbourn (Holdings) Limited v J Jarvis & Sons Limited & Ors.* (1983) 4 Con. L.R. 24 (a case concerning a defective heating and air conditioning plant) and *New Islington and Hackney Housing Association Ltd v Pollard Thomas & Edwards Ltd* [2001] PNLR 20 (a case concerning ineffective noise insulation). In the above cases, it was inherent that where there is no physical damage, time begins to run from practical completion as that is when economic loss occurs, following *Murphy*.

In *New Islington*, Dyson J stated that even if he were not bound by *Pirelli*, he would have stated that it was wrongly decided and have come to the same conclusion.

We therefore come to the current state of affairs. In a case stemming from the tragedy at Grenfell Tower, *URS Corporation Ltd v BDW Trading Ltd* [2025] UKSC 21, the Supreme Court convened a 7-bench panel purely to deal with *Pirelli* but unfortunately they were not addressed on it and so only made obiter remarks. However, in the Court of Appeal, Coulson LJ dealt with it comprehensively.

He undertook an examination of the law (as above) over the years, compared it to non-construction cases of limitation in tort, and came to the conclusion that in *URS* the cause of action was complete at the date of practical completion.

Notably, however, at paragraphs 114 to 116, he reiterates the need for the date of damage in cases where there is physical damage. In this case, he found that *Pirelli* and other physical damage cases had no relevance. As such, there is thus a distinction between cases of physical damage and non-physical damage.

So where does that leave us with the application of *Pirelli*?

I recently advised and appeared on behalf of a church with a damaged roof and porch. The church instructed architects to rebuild the roof to do away with damp and rot; the works were practically complete in November 2017. In 2020, damp began to appear again. The church instructed surveyors who produced a report stating that the works were defective due to a failure to account for moisture content in the timber, amongst other things. The claim was issued in 2024.

The architects applied to strike out the claim stating that the claim in both tort and contract was out of time; they were correct regarding the claim in contract. However, it is not so straight forward in tort. The question arises as to when the date of damage is for the purposes of limitation. The architects won at first instance and the matter was appealed.

I appeared at the appeal hearing before HHJ Deane and argued that *Pirelli* was binding; the date of damage was when the damp first appeared and expert evidence would be needed to prove when the process of damp and rot began again. This would need to be proved by the architects if they wished to strike the claim out for limitation. It is worth noting that given the premise of this appeal was overturning a strike out application, the test was whether the church had a reasonable prospect of success (i.e. is it arguable that the date of damage was in 2020 and not in 2017). I argued that this is a *Harriss*-like case, wherein the church roof did operate without fault for some time before developing rot. Further, it was not a “doomed from the beginning” scenario given that damp and rot occur due to a confluence of factors such as moisture from rain or temperatures etc. It is not clear that damage was inevitable and that to find the building was “damaged” from practical completion would be the wrong conclusion.

The architects argued that *Pirelli* was controversial, that the date of damage is a legal question and not a factual one given *New Islington* and *Murphy*, and that in reality time begins to run from the date of practical completion.

We succeeded in appealing the matter and overturning the decision at first instance. HHJ Deane rejected the argument that the date of damage is a legal question and not a factual one. She relied

on the Court of Appeal's judgment in *URS*, and the dicta of Coulson LJ, in finding that there is a distinction between physical damage cases and non-physical damage cases and that this was the former; she could not say whether the damp occurred in 2020 or earlier and that this was a matter of factual evidence at trial. The expert evidence before her at this stage did not suggest that the church roof was doomed and that, as in *Harriss*, the church roof did operate functionally for approximately 2 years before developing rot. She found that she was bound by *Pirelli*.

Counsel for the architects sought permission to appeal and HHJ Deane refused permission but stated that she would have been minded to grant permission had the basis for permission been different. That is now a matter for the architects as to whether they wish to appeal or to simply proceed to trial.

Pending a potential determination at the Court of Appeal, what is clear is that *Pirelli* is still alive and kicking, despite the gradual shift away from its reasoning. The state of affairs is not one that is welcome and certainly needs resolution. The Supreme Court is the only court that can resolve the matter and cases such as this do not often make it all the way there. Whether this does is to be seen.

*Adil Navaid was instructed by HF Law.*

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