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The Price of Proportionality: Why You Can't Demolish a House Because You Feel Like It

[Mallas v Persimmon Homes Ltd & Anor \[2025\] EWHC 2581 \(TCC\)](#)

Date: 9 October 2025

Judge: Alan Bates sitting as a Deputy Judge of the High Court

Key Words:

Mallas v Persimmon Homes, Construction Law, Defective Premises Act, Proportionality, Cost of Cure, Ground Heave, Foundation Failure, Underpinning, Demolition Rejected, Damages

Summary

The case involved a newly built family home suffering from extensive cracking and differential movement caused by inadequate trench strip foundations too shallow for the ground conditions (London clay, tree removal, ground heave) [1-9].

The Defendant admitted breach of Clause 1 of the Contract. The Claimant sought damages based on demolition and rebuild (Scheme 1 or 2); the Defendant proposed underpinning with a piled raft and repairs (Scheme 3) [11-14, 16-20, 45-46, 79-83].

The Court ruled in favour of Scheme 3, finding demolition disproportionate and unreasonable because no structural or latent defects in the superstructure were proved. Damages were based on underpinning plus garage works [13-17, 29-33, 45-47, 78-83, 89].

Total provisional damages: £423,243 (including project costs, alternative accommodation, and aggravated damages) [109-117].

Key Themes:

1. **Defective Foundations and Ground Heave:** Defects stemmed from shallow trench strip foundations on London clay affected by tree removal, causing differential movement and ground heave [4, 7-10, 12].
2. **Proportionality in Remedies (Cost of Cure):** The Court applied the proportionality test, assessing whether demolition costs were a reasonable course of action compared to less costly repairs [12, 13(ii), 14-17, 25-27, 28-30, 31-33, 45-47, 85-88].

3. **Proof of Latent Defects:** *The Claimant failed to prove latent defects through opening-up works, relying instead on “known unknowns” and alleged poor quality. This was fatal to the demolition argument [14(i), 14(iii), 15-16, 16(ii), 16(iv), 17(ii), 33, 40-41, 61-64].*
4. **Breach of Contract and Statutory Duty:** *The Defendant breached Clause 1 (good and workmanlike manner) and s.1(1) of **Defective Premises Act 1972 (DPA 1972)** [12, 19-26, 29, 31-32, 75, 115-116].*
5. **Fitness for Human Habitation (DPA 1972):** *While the house foundations did not render it unfit, the unsafe porch on shallow foundations requiring supports breached s.1 DPA 1972 [9-10, 22, 25-27, 50-52, 55-57].*

Background

The Property, at 6 Westcroft Close, Earley, Reading, was a four-bedroom timber-framed house on trench strip foundations. Cracking soon appeared due to differential movement [2-7]. Tree removal had caused soil desiccation and ground heave risk, making piled foundations appropriate [8-9].

The claim was issued on 14 September 2021. The Defendant joined Simpson Associates Consulting Engineers LLP but settled pre-trial [10]. The Defendant admitted breach of Clause 1, with damages assessed on the cost of cure [12].

Legal Issues and Analysis

A. Liability and Causes of Action

The Defendant admitted breach of Clause 1 for inadequate foundations [12].

The DPA claim was not time-barred; the Court found a breach of s.1 DPA because the porch, on its own shallow foundations, was unsafe and required propping [11, 22-26].

B. The Appropriate Measure of Damages (Cost of Cure vs. Demolition)

The Court adopted the principle that the cost of repair is the default measure unless disproportionate [16]. Demolition is only justified if cheaper and reasonable.

The Claimant’s reasons for demolition were rejected:

1. **Latent Incurred Damage** – No evidence of damage to the timber frame; no opening-up works were carried out [14(i), 16(ii), 40, 62].
2. **Information Deficit** – Hundreds of drawings were provided; no legal requirement for ‘as built’ drawings; opening-up would suffice [14(ii), 16(iii), 75-77].
3. **Construction Quality/Defects** – General quality concerns (e.g. cavity barriers) did not justify demolition; issues could be addressed by local repairs [14(iii), 15, 16(iv), 17, 65, 72-74].

Cracking in the house was essentially cosmetic once the movement was cured [16(i)].

C. Final Remediation Scope and Quantification

The Court adopted **Scheme 3** (piled raft underpinning and repair) [13(ii), 45(iii), 16(i), 17-18, 75, 89, 116].

- **Garage:** Underpinning required [17-18, 78-80, 83-84].
- **Footpath & Retaining Wall:** Rebuilding on piles disproportionate; minor repairs sufficient

[17-18, 45(ii)-(iii), 85-88].

The Court preferred the Defendant's cost estimates [90-92, 97-98, 100-101], with adjustments:

1. OHP increased from 10% to 13% [101-102].
2. Contingency increased to 15% [103-106].
3. £35,000 added for garage underpinning [110-112].

For non-defect losses, £27,700 was awarded for accommodation and £10,000 for aggravated damages. Other claims (surveys, blinds, wardrobes, stigma) were rejected [113].

Conclusion

The Defendant breached Clause 1 and s.1(1) DPA 1972 [115].

Scheme 3, with garage underpinning, was adopted [83].

Total provisional award: £423,243 — £385,543 for defects and £37,700 for non-defects [116].

Key Takeaway:

*The judgment reinforces that **proportionality** governs the measure of damages for building defects. Demolition and rebuild is an extreme remedy requiring direct proof of irreparable structural defects. The Court will not accept speculative risks or missing drawings as justification.*

Parting Thoughts

In an era of maximalist claims, the TCC delivered engineering common sense. This case turned on legal arithmetic: fix or demolish? The Defendant accepted liability for foundation failure, but the Claimant's demand for total reconstruction was disproportionate.

The Judge found no evidence of structural failure beyond the porch. Visible cracking was "essentially cosmetic" once movement was addressed. The Claimant relied on "known unknowns" rather than proof.

The Court adopted the pragmatic underpinning solution (Scheme 3), including garage works, and reaffirmed proportionality as the foundation of construction remedies. The provisional award of £423,243 reflects a robust repair, not an extravagant rebuild.

#ConstructionLaw #Adjudication #DisputeResolution #LegalUpdate #CaseLaw #DDAlegal #TCC #HighCourt #BuildingDispute #ContractBreach #DefectivePremisesAct #MeasureOfDamages #CostOfCure #LegalProportionality #DemolitionRejected #FoundationFailure #GroundHeave #Underpinning #PiledFoundations #NewBuildDefects #StructuralDamage #PersimmonHomes #Mallas #SibleyPark #Reading

Authorities

Case Law:

Measure of Loss and Proportionality in Damages

- **McGlenn v Waltham Contractors** [\[2007\] EWHC 149 \(TCC\)](#), [787]-[794] – **Principle Relied Upon:** Established that demolition and rebuilding is an "**extreme course**", which will

ordinarily only be justified if the building is dangerous or structurally unsound. The Court adopted this principle when assessing the quantum of damages [30].

- **Axa Insurance v Cunningham Lindsey** [2007] EWHC 3023 (TCC), [256]-[266] – **Principle Relied Upon:** Supports the rule that the cost of reinstatement or repair will not be used as the measure of loss if such cost is **disproportionate to the end to be attained** [30].

Statutory Liability and Limitation (Defective Premises Act 1972)

- **BDW Trading Ltd v URS Corporation Ltd** [2024] KB 827 (upheld by [2025] UKSC 21, [2025] 2 WLR 1095)) – **Principle Relied Upon:** Confirms the correct statement of law that the retroactive insertion of s.4B into the Limitation Act 1980 by the Building Safety Act 2022 increased the limitation period for claims under the DPA 1972 to **30 years** [24].
- **Vainker and another v Marbank Construction Ltd and others** [2024] EWHC 667 (TCC) – **Principle Relied Upon:** Defines the requirement for a dwelling to be "**fit for human habitation**" under s.1 DPA 1972, stipulating that it must be capable of occupation for a reasonable time without risk to the occupants' health or safety, and without undue inconvenience or discomfort [23].

Legislation:

Statutory Duties and Fitness for Habitation

- **Defective Premises Act 1972 (DPA 1972)** – **Principle Relied Upon:** Establishes the duty on a developer to ensure that works are done in a workmanlike and/or professional manner with proper materials so that the property, when completed, is **fit for human habitation**. The judgment found a breach of s.1 DPA 1972 specifically because the porch structure was unsafe due to inadequate construction from the outset, constituting an ongoing risk to safety. (NB: The judgment referred to the statute as 'DPA 1977').

Limitation Periods and Retroactive Changes

- **Building Safety Act 2022** – **Principle Relied Upon:** Section 135 of this Act was relied upon for the retroactive insertion of s.4B into the Limitation Act 1980, which **increased the limitation period** for DPA 1972 claims to 30 years, thus confirming the Claimant's claim was not time-barred.
- **Limitation Act 1980** – **Principle Relied Upon:** This Act, as modified by the Building Safety Act 2022 (s.4B), sets the applicable **limitation period** (30 years) for claims brought under the Defective Premises Act 1972.

Regulatory Requirements

- **Building regulation consent** – **Principle Relied Upon:** The Contract (Clause 1) warranted that the house was built in accordance with the terms of the relevant planning permission and **building regulation consent**. The judgment examined whether the Defendant's alleged lack of 'as built' drawings or information constituted a failure to comply with any regulatory requirement, finding no such requirement had been proven.

Legal Texts & Commentary:

Measure of Loss and Damages

- **Hudson (Specifically reference: [Hudson, [7-006]])** – **Principle Relied Upon:** Provides the

two conditions that must be satisfied for a court to adopt **demolition and rebuilding** as the correct measure of loss: (1) the cost of demolition and rebuilding must be less than the cost of remediation, and (2) remedying the defects must represent a **reasonable course of action**, ensuring the amount awarded is "objectively fair as between the claimants and the defendants". This principle was adopted by the Court when determining that the Claimant's demolition schemes were disproportionate [29(4)].

Quantification and Cost Estimation

- **Spon's Architects' and Builders' Price Book ("SPONS") - Principle Relied Upon:** Used as a source of **published guideline rates** for cost estimation in quantity surveying. The Court preferred the estimates of the Defendant's expert (Mr Somerset) when they were based on applying the SPONS rates, though acknowledging that these rates might need adjustment for the scale of the particular remediation project (Scheme 3) [92].

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ICE DRC Member

ICE DRC CPD Committee Chairman

Adjudicator Exam Question Setter for the ICE

CIArb Adjudication Panel Member since 2006

CIArb Arbitration Panel Member since 2006

CIC Adjudication Panel Member since 2010

Law Society Panel Arbitrator

RIBA Adjudication Panel Member since 2018

RICS Adjudication Panel Member since 2006

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FIDIC Adjudication Panel Member since 2021

ICE Adjudication Panel Member since 2021

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