



The Defective Premises Act 1972

The Defective Premises Act ("The Act") says:

"A person taking on work for or in connection with the provision of a dwelling (whether the dwelling is provided by the erection or by the conversion or enlargement of a building) owes a duty-

(a) if the dwelling is provided to the order of any person, to that person ; and

(b) without prejudice to paragraph (a) above, to every person who acquires an interest (whether legal or equitable) in the dwelling ;

to see that the work which he takes on is done in a workmanlike or, as the case may be, professional manner, with proper materials and so that as regards that work the dwelling will be fit for habitation when completed."

Let us examine a purely fictitious example. Bob the builder builds a block of flats in 2004 and completes them and sells them in 2006 to various clients which include home owners and investors interested in making a few quid in the London rental market. The flats have penthouse suites at the top which have large terraces which also form part of the roof of the flats below. R buys one of these flats below and sells it in 2008 to A. In the meantime Bob has sold the freehold to some investors. Six months later A complains to the building managers that the lounge ceiling and bedroom ceilings have damp patches on them. A month later water starts dripping from the damp patches and continues to this day. The drip manages to damage a computer and some furnishings. The evidence is that the waterproofing of the roof/terrace has failed. A says he intended renting the flat and has lost £100,000 in lost rent. A wants compensation!

A cannot sue the builder Bob for breach of contract because he has no contract with Bob and even if he did it would have said nothing about waterproofing. Further even if he could sue the loss of rent might not have been in the reasonable contemplation of the parties so the loss of rent would not be recoverable.

A cannot sue in nuisance as Bob did not own the freehold when the defect occurred and so could not be said to have held anything dangerous on his property.

A cannot sue B in tort because the loss is pure economic loss as it is the cost of repairing the thing itself and loss of rent. Further the damage to property could have been avoided as the damp was seen a month before the damage occurred.

Can A sue under the Defective Premises Act?

The flat is a dwelling. The Act does not define a dwelling but in *Uratemp Ventures Ltd v Collins (2001)* the word dwelling was defined as the place where a person lives or resides "and makes ones home".

Did Bob "take on work"? The answer is yes, as main contractor they undoubtedly did. Further the waterproofing contractor could have been sued *Alexander v Mercouris (1979)*. The architect or engineer could also be sued as the Act includes an obligation on



professionals to carry out their work in a professional manner. Further the phrase does not require that the work is undertaken for profit.

Conversions are also covered by the Act not just new build.

The duty is owed for 6 years from when the work was completed. However if you go and repair the defect the 6 years starts all over again.

A further requirement is that the breach of duty must be reasonably serious and must make the dwelling unfit for habitation *Thompson v Clive Alexander & Partners (1992)*. *Andrews v Schooling (1991)*. Further the courts are likely to find that matters that effect lighting, power, drainage, sanitation and water supply are such as to render the dwelling unfit *Nottingham Community Housing Association v Powerminster Ltd (2000)*. Whether a defect is such that the dwelling is unfit for habitation will largely be a question of fact on each case. The cause of the unfitness must be a result of the work done rather than a circumstance brought about by other factors *Batty v Metropolitan Realisations (1978)*. If there is an actionable defect it will be irrelevant that there are other external circumstances provided the breach of duty has caused or materially contributed to the defect *Bayoumi v Protim Services Ltd (1996)*.

The phrase "when completed" is likely to mean that normal wear and tear is not caught by the Act but it is likely to cover latent or unknown defects. The defect was present it was just not known about.

What damages are recoverable?

Clearly the repair or cost of repairing the dwelling to make it fit for habitation is covered.

In *Bayoumi* the Court of Appeal considered the correct measure of damages for breach of a statutory duty:

"There is nothing, in my judgment, which would indicate that an injured plaintiff is not entitled to recover such damage as he may prove he suffered by reason of the wording of section 1. The paragraph in Halsbury (volume 45) immediately preceding the one which I read a little earlier, is paragraph 1292 "Measure of Damages", in these terms:

"The damages recoverable in respect of a breach of statutory duty are such as are contemplated by the statute and this will include damages which are the natural consequence of the breach..."

Existing case law

Calibar Properties Ltd v Sticher [1984] 1WLR 287. The claim for loss of rental income was a claim made under a lease. The Court of Appeal rejected the claim.

"The reality of the defendant's loss is the temporary loss of the home where she would have lived with her husband permanently if the plaintiffs had performed their covenant. She cannot increase her loss by deciding not to return after the covenant has been performed, and she does not seek to do so. But she can claim, as it seems to me, to be put in as good a position as she would have been if the plaintiffs had performed their covenant, at least as early as they



had notice that the main structure was out of repair instead of years later. If she had bought the lease as a speculation intending to assign it, to the knowledge of the plaintiffs, the alleged diminution in rental (or capital) value might be the true measure of her damage. But she did not; she bought it for a home, not a saleable asset, and it would be deplorable if the court were bound to leave the real world for the complicated underworld of expert evidence on comparable properties and values, on the fictitious assumption that what the flat would have fetched had anything to do with its value to her or her husband. I do not think we are bound by the authority of Hewitt v. Rowlands, 93 L.J.K.B. 1080, or any other decision to do something so absurd, and Mr. Pryor's second objection must, in my opinion, rule out any damages for difference in rental value."

In *Bayoumi v Protim Services (1996) (CA)*. At first instance the Judge was asked to award loss of rent but at trial no specific loss of rental income was proven. The Judge awarded a sum specifically for general damages for loss of use in the sum of £1500 per annum for 4 years totalling £6,000. The Court of Appeal endorsed the position taken by the Judge:

"The next point that is taken by Mr Hantusch is that there was no pleaded claim for loss of use. The plaintiff put his claim under his heading in this way: "the plaintiff had intended to let the property from November 1988 at a weekly rental of £200 but has been unable to do so by reason of the matters aforesaid". The Judge did not allow that item and said that, in his view, what was claimed was loss of use and enjoyment. The Judge heard evidence on that aspect of the case. In my view there is nothing in the pleadings point. The plaintiff in the paragraph that I have just read is clearly indicating that he was claiming damages for loss of use and once the Judge rejected his claim for damages for his inability to let the premises, he was perfectly entitled to substitute for that damages for loss of use and enjoyment."

In *Bella Casa Ltd v Vinetone Ltd [2006] BLR 72* HHJ Coulson QC held:

"44) Accordingly, on an analysis of the building and property cases in which claims for loss of use have been considered by the courts, I conclude that:

- a) There are no building or property cases in which claims for general damages of the kind now maintained by BCL have been advanced or held to be successful;*
- b) There is at least one case (Calabar) in which a claim similar to (although not precisely the same as) that now maintained by BCL was expressly rejected by the Court of Appeal*
- c) The BCL claim for general damages is not in accordance with the usual situation where a natural claimant is awarded a modest amount to reflect loss of use, such as the £1,500 per year awarded to the claimant in Bayoumi."*

The damages contemplated by the Act

Under the Act the claim may also fail because the purpose of the Act is to protect individuals who suffer from defects in their home. It is not designed to protect commercial men who rent property for profit.



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The point is well made by the Law Commission Report at paragraph 25 where they state:

“We do not think there is any need to alter the law in relation to commercial or industrial premises. In relation to the provision of new dwelling accommodation, however, it seems to us unsatisfactory that a builder should be able by the provisions of his contract to depart from the basic common law obligation (or if he is also the vendor not be subject to any implied obligation) that his work should be done properly, with suitable materials, and in such a way as, to provide a habitable dwelling.”

Conclusion

Whilst the courts have said many times that a claim for loss of rent might succeed. The courts have been equally astute not to allow a homeowner to profit by simply alleging that they intended to rent their property or any such similar claim designed to avoid the £1500 per annum for loss of enjoyment and use.

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