

The Defective Premises Act 1972: A useful tool in a claimant's armoury

The Defective Premises Act 1972 (“the Act”) enables the owner or tenant of a defective residential property to bring a claim under the Act if the defect was present when the dwelling was completed and has rendered the property unfit for human habitation. Before the Act was passed, it was felt that the law did not provide enough security to purchasers or tenants of defective dwellings. The Act offers additional protection and operates under the principle of strict liability, meaning that by failing to comply with the Act a person is automatically liable to pay damages to the innocent party.

What are the alternatives to the Act?

Before the introduction of the Act, someone wishing to bring a claim for a defect in a dwelling had two basic options. Firstly, they could sue for breach of contract, if they had entered into a contract with the party responsible for the defect. This would be the case, for example, if the claimant had commissioned the development and was therefore the contractor's employer. They could also bring a claim for breach of contract if they had entered into a purchaser's collateral warranty with the defendant.

Secondly, they could sue in negligence if the defective property had caused the claimant personal injury or had damaged their property. However, the case of *Murphy v Brentwood District Council* has established that it is not possible to bring a claim in negligence for the cost of carrying out repairs to remedy defects in the building itself. Since this is the type of loss that most claimants will want to recover, a claim in negligence is not often of any value.

What hurdles need to be overcome?

If the claimant is not able to bring a claim in either of the above situations, then they may be able to bring a claim under the Act against any person who has undertaken work in connection with the construction of the dwelling. This would include building work and the provision of designs. The word 'dwelling' is not defined in the Act and will be assessed as a matter of fact in each case.

In order for a claim to be brought, it has to be proven, on the balance of probabilities that there is a defect in the

dwelling which has been caused by failure to carry out work to a suitable standard or with appropriate materials and that, because of this the dwelling was unfit for habitation at the time of completion. This includes not only the construction of new buildings but also the extension and conversion of existing buildings. A person who has instructed others to carry out the work can also be liable under the Act.

The duty is owed to any person who commissioned the development and any person who acquires an interest in the property. This includes owners, anyone who contributed to the purchase price and tenants. There is therefore a greater number of potential claimants under the Defective Premises Act than there would be under a claim in contract or negligence. It is also important to note that the effects of the Act cannot be excluded by agreement: It is not possible to contract out of the Act.

Is the dwelling 'unfit for habitation'?

There are a number of cases which discuss the meaning of 'unfit for habitation' within the Act. For example, in the case of *Alderson v Beetham* black mould and fungus growth on bedroom walls was held to make a dwelling unfit for habitation. The recent Court of Appeal case of *Bole v Huntsbuild* held that fitness for habitation must be judged as a matter of fact on a case by case basis.

Another case, *Alexander v Mercurius* held that whether a building is fit for habitation should be considered to be a consequence of work done in a workmanlike manner and using proper materials and not a separate duty imposed by the Act. The Law Commission Report of 1970 recommended that the Act should only apply to dangerous defects and the judge in *Bole* confirmed that for a dwelling to be unfit for habitation there should be more than just minor defects. Defects may be latent, i.e. hidden, at the time of completion and still fall within the Act.

How long do you have in order to bring a claim?

Any claimant has six years from when the building is completed in which to bring a claim. If remedial work has been carried out by the original parties involved in the construction or conversion of the building in order to try and fix the defects and these are not successful, then the six years begin to accrue from the date that the remedial work was completed – see *Alderson v Beetham*.

In a claim for breach of contract, the six year period runs from the date of the breach and, in a claim for negligence, it runs from the date the damage is suffered. There is potentially therefore a longer period under the Act in which to bring a claim.

Are there any defences?

There is a defence to a claim under the Act if the person who carried out the work was acting reasonably on the instructions of another. This would probably cover the majority of sub-contractors. A contractor may also be able to argue that they were following the instructions of an architect as to the construction of the dwelling. However this defence does not apply if the defendant has a duty to warn that there are issues or problems with the building if the instructions are followed. So if a contractor knows or ought to have known the design would not work, has a duty to warn and fails to warn, this defence would not be available.

The Act excludes claims where the claimant is covered by an 'approved scheme.' The NHBC Buildmark scheme for residential properties used to be approved by the Secretary of State but that approval has expired, so a claimant can bring a claim under the Act even if they are covered by the NHBC.

Conclusion

Despite the fact that the Act has been in force for over three decades it is used infrequently by claimants. However, it is important to consider it when a claim for defective work on a recently completed residential building exists, that may have resulted in the building being unfit for habitation. It is strict liability and allows the claimant to recover the cost of any remedial work that will need to be carried out. It is also possible to bring the claim within six years of completion of the building, even if the damage occurred many years previously, during the construction of the dwelling.

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