

The Defective Premises Act 1972: Establishing and Escaping Liability

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Published May 2017

St John's barrister Ben Handy examines the extent of a landlord's duties under section 4 of the Defective Premises Act 1972.



Introduction

1. The duty under section 4 of the Defective Premises Act 1972 ('the Act') is as important as it is confusing. It is often the best and sometimes the *only* way of successfully claiming for injuries caused by the dangerous condition of rented premises. Both injured parties and landlords need to understand the extent – and limits – of their rights and responsibilities under the Act. This paper is meant to provide an overview of this difficult area of law.

The Background to the Defective Premises Act 1972

2. To properly understand the Act, it is important to know a bit about its history. It was created to plug an unsatisfactory hole in the law that largely excused non-resident landlords from liability for injuries caused by the dangerous condition of the premises they leased. The injured person had no claim against the landlord at common law or under the Occupiers' Liability Act 1957 (see *Cavalier v Pope [1906] AC 428* and *Wheat v E Lacon & Co Ltd [1966] AC 522*). Wounded visitors were left with an unattractive claim against the tenant, who rarely had the money to compensate them. If tenants were hurt they had to rely on the law of contract.
3. Landlords could (and no doubt did) therefore make a lot of money renting out unsafe properties to vulnerable tenants without having any responsibility

for the accidents that occurred as a result. Parliament rightly recognised that it was the landlord who made all the money from the property and therefore the landlord who should cover the expense of basic maintenance and upkeep – including the cost of claims arising from failures to do so (which is simply the cost of proper insurance, if the landlord is sensible).

The Law

4. The Act was drafted with all of this in mind. As far as landlords are concerned, section 4 is the relevant provision. It could not be called bedtime reading, though it might make you fall asleep. It reads:

- 1) *Where premises are let under a tenancy which puts on the landlord an obligation to the tenant for the maintenance or repair of the premises, the landlord owes to all persons who might reasonably be expected to be affected by defects in the state of the premises a duty to take such care as is reasonable in all the circumstances to see that they are reasonably safe from personal injury or from damage to their property caused by a relevant defect.*
- 2) *The said duty is owed if the landlord knows (whether as the result of being notified by the tenant or otherwise) or if he ought in all the circumstances to have known of the relevant defect.*
- 3) *In this section "relevant defect" means a defect in the state of the premises existing at or after the material time and arising from, or continuing because of, an act or omission by the landlord which constitutes or would if he had had notice of the defect, have constituted a failure by him to carry out his obligation to the tenant for the maintenance or repair of the premises; and for the purposes of the foregoing provision "the material time" means:*
 - a. *where the tenancy commenced before this Act, the commencement of this Act;*
and
 - b. *in all other cases, the earliest of the following times, that is to say—*
 - i. *the time when the tenancy commences;*
 - ii. *the time when the tenancy agreement is entered into;*
 - iii. *the time when possession is taken of the premises in contemplation of the letting.*
- 4) *Where premises are let under a tenancy which expressly or impliedly gives the landlord the right to enter the premises to carry out any description of maintenance or repair of the premises, then, as from the time when he first is, or by notice or otherwise can put himself, in a position to exercise the right and so long as he is or can put himself in that position, he shall be treated for the purposes of subsections (1) to (3) above (but for no other purpose) as if he were under an obligation to the tenant for that description of*

maintenance or repair of the premises; but the landlord shall not owe the tenant any duty by virtue of this subsection in respect of any defect in the state of the premises arising from, or continuing because of, a failure to carry out an obligation expressly imposed on the tenant by the tenancy.

5. As a general proposition then, where the tenancy agreement includes provision that the landlord is responsible for the relevant repairs and maintenance, a landlord will be responsible for any injury caused by a defect that they (a) knew about, or (b) *ought* to have known about.
6. NB: There is also an interesting debate to be had about whether the Act goes further, and imposes strict liability on landlords for latent, hidden defects that the landlord could not have known about. There is persuasive case law from the lower courts¹ that says not, but *obiter* comments made by more senior judges suggest that there is still an argument to be had.
7. Each subsection of the Act presents a potential tripwire or defence, depending on which side of the argument you are on. Each therefore requires careful analysis.

Subsection 4(1) In Focus

8. The first subsection reads:

“Where premises are let under a tenancy / which puts on the landlord an obligation to the tenant for the maintenance or repair of the premises, / the landlord owes / to all persons who might reasonably be expected to be affected by defects in the state of the premises / a duty to take such care as is reasonable in all the circumstances to see that they are reasonably safe from personal injury or from damage to their property caused by a relevant defect.”

9. *“Where premises are let under a tenancy”*

The Act covers the parts of the premises specifically included in the tenancy and those parts essential for the enjoyment of the rights under the tenancy – for example, where the premises is a flat, the path up to the front door of

¹ *Pritchard*, dealt with later in this paper.

the flat will probably be 'the exterior' as it is the essential means of accessing the flat.

10. "Which puts on the landlord an obligation to the tenant for the maintenance or repair of the premises"

This is simple - section 11 of the Landlord & Tenant Act 1985 implies into every short-term (i.e. less than seven year) residential lease the condition that the landlord is at the very least responsible for maintenance of the structure and exterior of the premises. The crucial point will always be whether the defect in question fell within the scope of the repairing obligation.

11. NB: it must always be borne in mind that the purpose and effect of section 11 is to impose a *minimum* standard – where the terms of the lease impose a more onerous duty on the landlord, the landlord will be bound by that.

12. "The landlord owes"

It seems clear from the wording of the Act that there is no scope for the landlord to defend a claim by blaming third parties. The Act contains no provision similar to the "skilled independent contractor" defence in section 2 of the Occupiers' Liability Act 1957. If the landlord wants to seek a contribution or indemnity from a third party, they can do so, but they are in any event directly liable to the injured person.

13. "To all persons who might reasonably be expected to be affected by defects in the state of the premises"

One of the problems that the Act was specifically designed to solve was the lack of protection the law gave to people living in, staying at and visiting tenanted properties. It is now almost inconceivable that anybody in fact injured when visiting the premises would not be covered, except maybe burglars or similar.

14. "A duty to take such care as is reasonable in all the circumstances to see that they are reasonably safe from personal injury or from damage to their property caused by a relevant defect."

The duty is simply one to take reasonable care, which means exactly what it says – what would a reasonable, prudent landlord have done? It is not controversial to say that they would certainly try and repair any defect that posed a foreseeable risk of injury.

Subsection 4(2) In Focus

15. The second subsection reads:

"The said duty is owed if the landlord / knows (whether as the result of being notified by the tenant or otherwise) / or if he ought in all the circumstances to have known / of the relevant defect."

16. "The said duty is owed if the landlord"

This is the duty to take reasonable care, at paragraph 14 above.

17. "Knows (whether as the result of being notified by the tenant or otherwise)"

It usually goes without saying that if the landlord actually knew about a defect, he should have done something about it. Normally the dispute is *whether* the landlord knew about it and whether it was a foreseeable danger. The important point to note is that the subsection is specifically worded so as to prevent a landlord from relying solely on notification by the tenant.

18. "Or if he ought in all the circumstances to have known"

The Act goes further and fixes the landlord with knowledge of a defect where they *should have known* about it. Where, for example, they (or their agents) had visited the premises for some other reason and failed to spot it; or they had simply failed to carry out routine checks, inspections and maintenance altogether. Certain rules assist with this. For example, regulation 36 of the Gas Safety (Installation and Use) Regulations 1998, require that the landlord send out an agent to inspect gas installations at

least once every twelve months. A failure to do so would, in the event that a gas fire then leaked, almost certainly amount to a breach. A sensible landlord will also ensure that workmen and agents visiting the property on their behalf are properly instructed to keep an eye out for defects and report back, and/or carry out regular inspections themselves. The question of whether a landlord “ought to have known” of a relevant defect will turn on the facts of each case.

Subsection 4(3) In Focus

19. The third subsection reads:

“In this section “relevant defect” means a defect in the state of the premises existing at or after the material time and arising from, or continuing because of, an act or omission by the landlord which constitutes or would if he had had notice of the defect, have constituted a failure by him to carry out his obligation to the tenant for the maintenance or repair of the premises; and for the purposes of the foregoing provision “the material time” means:

- a. where the tenancy commenced before this Act, the commencement of this Act; and*
- b. in all other cases, the earliest of the following times, that is to say—*
 - i. the time when the tenancy commences;*
 - ii. the time when the tenancy agreement is entered into;*
 - iii. the time when possession is taken of the premises in contemplation of the letting.”*

20. To translate, a relevant defect is one which:

- a. Existed at or after the date the tenancy started - or the date the tenancy agreement was entered into, or the date the tenant moved in – whichever is the earliest. In practice they will usually be the same. It is hard to think of a defect that wouldn't pass that test;
- b. Arises from, or continues because of, an act or failure by the landlord which constitutes a breach of the obligation to repair and maintain the premises.

21. Question one is therefore whether the defect is one that the landlord is responsible for repairing (or would have been if he knew about it). The lease will define those things that the landlord is meant to repair and those things that the tenant is meant to repair. Whatever the tenancy agreement says, the landlord has to *at the very least* keep in repair the “structure and exterior” of the property, because that is the term implied by section 11 of the Landlord & Tenant Act 1985. The wording of the lease may well go even further than that and, if so, the obligation will be wider. It will never be narrower. If the defect is not one that the landlord is required to repair under the terms of the lease, it probably will not be a “relevant defect”.

22. There will be inevitable debate about how to interpret the wording of the tenancy agreement. Each case and each provision will obviously turn on its own facts and its own wording. However, the obligation is never narrower than the requirement to maintain the “structure and exterior” of the property, and there is useful guidance on the extent of that minimum duty:

- a. A bannister is part of the “structure” of the property: *Hannon v Hillingdon Homes Limited* [2012] EWHC 1437 (QB);
- b. The plaster covering a wall is part of the “structure”: *Grand v Gill* [2011] EWCA Civ 554;
- c. The main access route to the property is part of the “exterior”: *Liverpool City Council v Irwin* [1977] AC 239;
- d. The duty has been held to include the rear yard of a premises and the whole of the demised premises: *Smith v Bradford* [1982] 44 P.&C.R. 171;
- e. Of course, the landlord will often attend and fix the defect following the accident, which is strong evidence that they were responsible for doing so, or at least had the right to enter the premises to do so.

23. Question two is whether there is a “defect”. The premises must be *defective*, not poorly designed. ‘Defective’ means that something that was in good condition has gone to ruin because of a failure to maintain it. There is

therefore no duty to *improve* something that is already in place in the property and in good condition, but old-fashioned, inadequate or out-of-date:

- a. That is why in *Alker v Collingwood Housing Association [2007] EWCA Civ 343*, the landlord was not in breach of the Act when the claimant fell through a single-glazed floor-length window - when the window was installed it complied with the Building Regulations of the time. It was in good condition, but out-dated - by the time the accident happened Building Regulations had moved on to require that such windows were double-glazed. The Court was clear that the landlord did not have to *improve* the window to keep up with Building Regulations, he had to *maintain* what was there. Had the single-glazed window been defective – if the sealant had gone around the edges so that it collapsed where otherwise it would have held, for example, then the Act would almost certainly have bitten;
- b. Similarly, where the landlord painted steps and made them slippery – and both the steps and the paint remained in good condition – there could be no claim under the Act: *Drysdale v Hedges [2012] 3 E.G.L.R. 105* (although note that there could well be a claim in negligence where the landlord has actively *created* a danger through misfeasance (a negligent act) rather than non-feasance (a negligent omission)).

Subsection 4(4) In Focus

24. It reads:

"Where premises are let under a tenancy which expressly or impliedly gives the landlord the right to enter the premises to carry out any description of maintenance or repair of the premises, then, as from the time when he first is, or by notice or otherwise can put himself, in a position to exercise the right and so long as he is or can put himself in that position, he shall be treated for the purposes of subsections (1) to (3) above (but for no other purpose) as if he were under an obligation to the tenant for that description of maintenance or repair of the premises; but the landlord shall not owe the tenant any duty by virtue of this subsection

in respect of any defect in the state of the premises arising from, or continuing because of, a failure to carry out an obligation expressly imposed on the tenant by the tenancy.”

25. The intended purpose and effect of subsection 4(4) has been the subject of fairly recent debate. His Honour Judge Seys-Llewellyn dealt with the issue persuasively in November 2013, in *Pritchard v Caerphilly CBC, Cardiff County Court – available on Lawtel*. He found that subsection 4(4) means that where a landlord has the *right* (as opposed to the *duty*) under the lease to enter the premises to carry out a certain type of repair, they will be treated as if their *duty* extended to that kind of repair. In other words, the right is treated as if it were a duty.
26. Tenancy agreements often include a term that the tenant must grant their landlord access to carry out *any* type of ‘*repair, maintenance or improvement*’. In such cases the landlord may well have unwittingly exposed themselves to a far wider obligation than they might wish.

Epilogue: latent defects

27. That is still not as wide a duty as some would argue for. If HHJ Seys-Llewellyn’s interpretation of subsection 4(4) is correct, landlords will usually escape liability for injuries caused by hidden (or ‘latent’) defects. Not always², but usually.
28. In *Pritchard*, the (losing) claimant argued that the effect of subsection 4(4) was to fix a landlord who had the *power* to enter premises with *knowledge* of any relevant defect - even if they did not know about it and could not have known about it. If that were right, it would put a heavy burden on the landlord indeed – it is very rare that a tenancy agreement does not allow the landlord to enter the premises to carry out repairs and maintenance, so landlords would almost always be fixed with knowledge of (and therefore liable for injuries caused by) a defect.

² If, for example, there were clear signs of a leak running down under some floor tiles, and lifting the tiles would have revealed the damp, rotten floor boards the injured party subsequently fell through, then the landlord may well be fixed with knowledge.

29. That would have an important impact on cases involving hidden defects. It is not uncommon for something to become defective suddenly and catastrophically – a ceiling collapses, for instance, or part of the floor gives way, or a handrail comes away from the wall. If this interpretation of subsection 4(4) is correct, a landlord is responsible for injuries caused by these defects even though there is no way he could have known about them. While we are without a binding higher-court authority on the point, it is an argument that might still be useful for claimants³.

Conclusion

30. This is not intended to be any more than an introduction to what can be a complicated area of law. As ever, cases turn on their facts. There is no substitute for careful consideration of (and creative arguments on) the circumstances of the individual claim.

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May 2017

³ 12KBW's Andrew Roy (who acted for the unsuccessful Claimant in *Pritchard*) and Emily Gordon Walker set out this argument persuasively and in detail in their 2013 article "*Liability for Defective Premises*".