§4. A  C, who suffers economic loss arising from his ownership of a defective building, has two avenues of claim (apart from any contractual claim which may be open to him): (1) a claim in negligence – but only in circumstances where that defect has actually caused damage to C’s person or to other property (albeit that the costs which C incurs to remove a threat of danger to C’s person or property are not recoverable); or (2) the Defective Premises Act 1972, but only where C’s claim falls within the narrow confines of that statute.

Liability in negligence

Setting the scenario: there is a building contract between builder D and original house purchaser C1, and after the building is constructed, defects in workmanship appear. Two legal questions may arise. First, does D owe C1 a duty of care, separate from the building contract which exists between the parties? Secondly, if C1 sells the building to C2, before defects in the building appear, so that it is C2, the subsequent purchaser, who owns a building which is defective and upon which money will need to be spent to put the defects right, there is clearly no contract between builder D and C2 – but is a duty of care owed by D to C2 nevertheless?

The answer to these questions has followed a rather convoluted path in English law, and has come to depend entirely upon the problematical categorisation of damage which C suffered, as well as some far-from-clear exceptions.
What is recoverable in tort

§4.B

D (a builder or other person connected with the manufacture or construction of a building) owes a very limited duty in negligence, where that building suffers from defective workmanship. D owes an original owner, C1, or a subsequent purchaser/owner of that building, C2, a duty to exercise reasonable care to avoid two types of damage: (1) any personal injury to C which is consequential upon the defects; and (2) any damage to C1’s or C2’s property, other than the defective building itself, which is consequential upon the defects.

In Robinson v PE Jones (Contractors) Ltd, Jackson LJ described the duty in tort which is owed by D, a builder, as a ‘more limited duty’ – ‘not only towards the first person to acquire the ... building, but also towards others who foreseeably own or use it.’ It is limited in the ways described in the principle above. Where a defect in the building or structure is latent, i.e., concealed and not readily discernible, this causes particular difficulties when the building was on-sold by an original owner C1 to a subsequent purchaser C2. For the purposes of this principle, an ‘owner’ is (as Jackson LJ indicated above) widely construed to encompass anyone who may foreseeably suffer economic loss as a result of having a proprietary interest in the defective property or a right to use it.

The fact that builder D owes various contractual obligations to C1 does not preclude this limited duty of care in tort from being owed to C1. Indeed, the nature of the duty is quite different. In contract, there may be a contractual warranty given by D to provide a house that is free of defects; and that warranty may be sued upon by C. However, in negligence, the duty of care only imports that D will exercise reasonable care, and not that D will provide a perfect house or building. There is no such thing as ‘a warranty against negligence’.

What is not recoverable in tort

General principle

§4.C

D (a builder or other person connected with the manufacture or construction of a building) does not owe an immediate owner, C1, or a subsequent purchaser/owner of that building, C2, a duty in tort to avoid the costs of rectification/reinstatement which are incurred solely because of the remedial work which C1 or C2 incurs to fix the defects to the building itself. Notwithstanding that such economic costs are reasonably foreseeable (and will constitute remedial costs, or a diminution in value of the building, or both), they are classified as pure economic loss, and are irrecoverable in negligence for policy reasons (per ‘the Murphy principle’). The Murphy principle applies, regardless of whether the building was defective, dangerous, or both.

This prohibition on any duty of care arising in C1’s or C2’s favour for pure economic loss was established by the House of Lords in Murphy v Brentwood DC. In doing so, the House overruled Anns v Merton LBC (as discussed in Chapter 2). Although Murphy concerned a local authority as D, the House remarked, in dicta, that the same principle applied where D was a builder too.

In this context, pure economic loss means that C1 or C2 discovers that the building is defective, before that defect has caused any personal injury or damage to other property; but C1 or C2 is seeking to recover from D the cost of rectifying the defect. There is, of course, property damage, because of the defect – but the loss is treated as being pure economic damage, because expenses are being incurred to reinstate the building or structure itself.

This proposition was stated emphatically in *Murphy* – e.g., Lord Bridge commented that, ‘if the defect becomes apparent before any injury or damage has been caused, the loss sustained by the building owner is purely economic. ... [and] in the absence of a special relationship of proximity, they are not recoverable in tort’. Lord Bridge reiterated this earlier in *D&F Estates Ltd v Church Commrs*: ‘liability can only arise if the defect remains hidden until the defective structure causes personal injury or damage to property other than the structure itself. If the defect is discovered before any damage is done, the loss sustained by the owner of the structure [C], who has to repair or demolish it to avoid a potential source of danger to third parties, would seem to be purely economic’. Another line of reasoning was adopted by Lord Keith in *Murphy* (based upon an earlier view of the High Court of Australia in *Sutherland SC v Heyman*) – that once the building was constructed with the defect, then it never existed in any other condition, and hence, damage was not done to the structure, it was inherent in the structure. For this reason too, any loss of value and/or costs of rectification were pure economic loss.

In *Murphy v Brentwood DC*, Mr Murphy, C1, purchased a house from a building company, ABC Homes, as one of 160 homes which formed part of a housing estate constructed at Brentwood. Two of the houses, including C1’s, were built over filled ground, upon a concrete raft foundation. The design was submitted to the Council, D, for approval under s 64 of the Public Health Act 1936. C1 purchased his home in 1970, and from 1981 onwards, serious cracks started appearing in the internal walls of the house, and the subsidence also caused a gas pipe to fracture. C1 sold the house for £35,000 less than what the house would have been worth without the structural defects. C1 sued D in negligence for approving the design plans. **Held:** D owed no duty of care to protect C1 against the economic loss which C1 suffered (or could suffer), in rectifying the foundations or defects and/or for the reduced value of the house upon re-sale. In *D&F Estates*, a block of flats was constructed in Gloucester Square, London, with plastered ceilings and walls, which was applied by specialist subcontractors. Subsequently, the plaster became flaky and fell off the walls in patches. D&F Estates, C, a long-term (98-year) tenant of the building, sued the main builder, Wates Ltd, D, seeking damages for the costs of remedial works plus the prospective loss of rent to be suffered while the remedial work was done. **Held:** no duty of care was owed by D to C. Until that falling plaster caused either personal injury to C, or damage to C’s ‘other property’ (such as marred carpeting), this defect in the building was pure economic loss only. In *Bellefield Computer Services Ltd v E Turner & Sons Ltd*, E Turner & Sons, D, were a design-and-build contractor who constructed a dairy, which included a processing and bottling factory, offices, laboratories, and a storage area. A fire started in the dairy, and spread to the rest of the building, due to D’s failure to construct a compartment wall that would have contained the seat of the fire for a limited period. Bellefield, C2, were not the original owner, but the premises were onsold to it, and therefore C2 could only sue D in negligence, there being no contract between C2 and D. **Held:** D owed a duty of care to reasonably safeguard C2 against consequential damage to the contents of the building (i.e., plant and equipment in the building), but was not liable for damage, caused by the fire, to the structure of the building.

As Schiemann LJ pointed out in *Bellefield*, it may seem ‘odd’ that D can owe a duty of care in respect of contents which he has never seen, but not owe a duty of care in relation to defects in a building which he built. Also, Stanley Burnton LJ remarked, in *Robinson v PE Jones (Contractors) Ltd*, that, ‘the crucial distinction is between a person who supplies something which is defective, and a person

---

4 [1991] 1 AC 398 (HL) 475 (emphasis added).
6 (1985) 60 ALR 1 (HCA) 60–61.
who supplies something [e.g., a building] which, because of its defects, causes loss or damage to something else.\textsuperscript{8} It is only in relation to the latter that a duty of care is owed.

**Overruling Anns**

A more liberal duty of care test was espoused in *Anns* in 1978 – that a builder did owe a duty of care to an owner C (original or subsequent) of a house, for the costs of rectification caused by defective foundations. However, that was primarily because C’s loss was characterised as property damage.

In *Anns v Merton LBC*, a block of flats was constructed, but started to show severe cracking in their walls some years later. The Merton Council, D, had a statutory duty to inspect the adequacy of the foundations of buildings before they were covered over, but despite that inspection, D did not notice that the foundations were too shallow to comply with relevant building regulations at the time and passed the building plans. A number of long-term lessees of maisonettes affected by the cracking, C, sued D, seeking recovery of the repair costs. At the time that C entered into their leases, some were original long-term lessees, whilst others acquired their leases by assignment from the original lessees. **Held (as a preliminary issue):** D owed a duty of care to C, in respect of those rectification costs. The damages recoverable could include the cost of repairing cracks in the structure and of underpinning the foundations of the block of maisonettes.

Lord Wilberforce called the defects in the maisonettes ‘material, physical damage’,\textsuperscript{9} for which the rectification costs were recoverable in the law of negligence. *Anns* was followed in a string of cases, which gave rise to increasingly-alarming burdens upon insurers. However, the *Anns* two-part test of duty of care was overruled in *Caparo Industries plc v Dickman* (see Chapter 2), and the actual ratio in *Anns* was overruled in *Murphy v Brentwood DC*\textsuperscript{10} The position, as expressed by Lord Bridge in *D&F Estates*,\textsuperscript{11} is that if C2 acquires a dangerously defective structure, attributable to the bad workmanship of the builder D, it was ‘difficult to see’ how C2 could sue the builder for the cost of either repairing or demolishing the structure: ‘no physical damage has been caused. All that has happened is that the defect in the wall has been discovered in time to prevent damage occurring.’

In *Robinson v PE Jones (Contractors) Ltd*,\textsuperscript{12} Jackson LJ remarked that *Murphy* is ‘seen by many (myself included) as returning to the orthodox and principled basis of tortious liability for negligently-inflicted harm, as formulated by the House of Lords in *Donoghue v Stevenson*’. In the same case, Stanley Burnton LJ noted that all first-instance decisions where a builder owed a duty of care in tort, in relation to pure economic losses resulting from defects in the building he constructed, in the absence of damage to other property or personal injury – and there were a number of such decisions\textsuperscript{13} – were wrongly decided.

The *Murphy* principle has been applied since, both where C1 was the original owner with whom D, the builder, had a contract, and where C2 had no contract at all:

In *Robinson v PE Jones (Contractors) Ltd*,\textsuperscript{14} James Robinson, C1, had a house built by PE Jones, D. During construction, C1 told D that he wished to have gas fires in two rooms. D agreed to construct a second chimney flue in order to serve the second gas fire. The work was finished in April 1992. In

\textsuperscript{8} [2011] EWCA Civ 9, [2012] QB 44, [93]. \textsuperscript{9} [1978] AC 728 (HL) 759. \textsuperscript{10} [1991] 1 AC 398 (HL), with quotes in the Table at: 469, 481, 520. The *Anns* ratio was overruled by the invocation of the *Practice Statement (Judicial Precedent)* [1966] 1 WLR 1234. \textsuperscript{11} [1989] AC 177 (HL) 206. \textsuperscript{12} [2011] EWCA Civ 9, [44] (Jackson LJ) and [95] (Stanley Burnton LJ).

\textsuperscript{13} e.g., *Storey v Charles Church plc* [1995] 73 Con LR 1 (TCC); *Tesco Stores Ltd v Costain Construction Ltd* [2003] EWHC 1487 (TCC); *Mirant-Asia Pacific Ltd v Ove Arup and Partners Intl* [2004] EWHC 1750 (TCC), all cited *ibid.*

\textsuperscript{14} [2011] EWCA Civ 9, with quotes in the Table at: [79], [84].
September 2004, C1 arranged for a British Gas service engineer to attend and service the gas fires, and one of the gas fires failed the test. An expert report stated that the flues had not been constructed in accordance with good building practice or in accordance with the Building Regulations. The cost of remedial works was substantial, because the flues required reconstruction. C1 sued D in both contract and in negligence. **Held:** this was pure economic loss, which was irrecoverable. The defective flues did not cause personal injury, or any other property damage. Hence, D did not owe C1 a duty of care to avoid the pure economic loss suffered. In any event, the parties effectively excluded liability in negligence by contractual provision. In *Dept of Environment v Thomas Bates & Son Ltd*, the Govt Dept, C, leased part of a tower block for office premises. It was then discovered that the building contractors, Thomas Bates, D, had constructed its pillars defectively, with a mix containing an excess of aggregate and a deficiency of cement. C had to pay for the pillars to be strengthened. There was no contract between C and D, so the claim was brought only in negligence. **Held:** D did not owe a duty of care to C, and C could not recover for the pure economic losses. This was an application of the *Murphy* principle (because the defective pillars caused no personal injury or damage to property other than the building itself).

### The factors in play

- **Indeterminate liability:** if a local authority owed a duty of care to avoid the costs of rectification, then so should the builder of the house, or the manufacturer of a chattel – and that duty could be owed to original or subsequent purchasers. All of this would ‘open up an exceedingly wide field of claims, involving the introduction of something in the nature of a transmissible warranty of quality’ (Lord Keith, *Murphy*). The law will not impose upon D ‘an obligation in the nature of a transmissible warranty of quality’ in negligence, whether for a chattel or a building (Lord Bridge, *Murphy*);

- **Parliamentary intent:** the fact that Parliament has enacted the Defective Premises Act 1972, imposing liability on builders, local authorities, and other parties, meant that it would be wrong to judicially create ‘a large new area of responsibility on local authorities in respect of defective buildings’ (Lord Bridge, *Murphy*);

- **The incremental test:** would the Anns duty apply only when the building suffered from a dangerous defect; or where the structure was not dangerous, but merely of limited use; or if the defect caused the collapse of the structure itself, without causing any personal injury or damage to other property (i.e., where a building collapsed whilst unoccupied)? Where would its limits lie, incrementally? (Lord Keith, *Murphy*);

- **The need for consistency in principle:** under the principle in *Donoghue v Stevenson*, a manufacturer of a chattel will not be liable for any repairs carried out by C to the chattel itself. The manufacturer would only be liable for any personal injury or property damage (to other property) caused by the defect in the chattel. It was desirable to treat the manufacturers of chattels and buildings the same, as a matter of principle (Lord Keith, *Thomas Bates*);

- **Inconsistency with the contract:** where D and C1 have entered a contract for the construction of a house or building, then the rights and remedies of each of them are set out in a written contract; they allocated the risk between them; they were legally represented when the contract was drafted, and must have known where they stood. D must complete the construction of the house or building for C1, on C1 paying the purchase price. In all of these circumstances, tort will not impose any assumption of responsibility on D, where that liability would be inconsistent with (and wider than) the contractual allocation of responsibility (Jackson LJ, *Robinson*).

---

15 [1991] 1 AC 499 (HL), with quotes in the Table at: 511, 520.

Hence, although builder D may well have foreseen that, if he constructed the building with defects, then the person who engaged him, or a later purchaser, could suffer economic loss of various forms, D does not owe a duty to anybody to avoid causing that loss (unless it was physical injury to persons, or damage to property other than the building itself). Foreseeability of damage, and proximity as between C and D, may well be proven; but it is not fair, just and reasonable to uphold a duty of care to avoid causing that loss (per *Payne v John Setchell Ltd*).16

The ‘saving’ role of contract for C1

Where D enters a contract for the construction of a building or structure for C1 which turns out to be defective, then (absent any valid exclusion or disclaimer), C1 may be able to sue D for breach of merchantible quality – which would enable C1 to recover the same pure economic losses (i.e., the costs of rectification or reinstatement) which are irrecoverable in negligence. This is not open to C2, who has no contract with D.

Insofar as pure economic loss is concerned, negligence is a lost cause for C1 where the building is defective – but C1 may sue for breach of contract, if D has committed a breach of a relevant contractual provision which gives rise to a right to damages. The quantum of those contractual damages will be the costs of repair (reinstatement) – or, if the building cannot be repaired but has to be abandoned as unfit for occupation, the costs of replacement. In Tort, this would be treated as irrecoverable economic loss, but in Contract, it is recoverable.

A subsequent purchaser C2, of course, cannot take advantage of this route, as there is no contract in existence with D; this avenue is limited to the original purchaser C1. Hence, the *Murphy* principle creates a lacuna in the law, wherever the building has been onsold from C1 to C2. Builder D is likely to be liable in contract to the original owner, C1, for whom the building was constructed (including for the pure economic losses, as reinstatement or rectification costs), if the defect is discovered before the building is sold. However, where it is not, and where C2 has suffered all the damage, he cannot sue for the pure economic losses, because the duty owed to him only extends to personal injury or to consequential damage to the contents of the building and not to the building itself, under the *Murphy* principle.

There may, however, be a few ‘life-lines’ for C1 or C2, to circumvent the *Murphy* principle.

D (the builder or other entity connected with the manufacture or construction of a building) may owe a duty of care to C1 or C2 to avoid pure economic loss (i.e., the costs of rectification or reinstatement), because of the operation of exceptions to the *Murphy* principle, whereby the building or structure: (1) presents a danger to neighbours, who might sue C1 or C2 if injured; (2) was a ‘complex structure’ (albeit that this exception is subject to judicial uncertainty); or (3) was one for which D assumed a responsibility at law for the task, and C1 or C2 relied upon D to acquit that task carefully (i.e., the *Hedley Byrne* test of duty of care).

(1) The ‘danger to neighbours’ exception. In *Murphy*, Lord Bridge outlined one exceptional circumstance, in which C1 or C2 would be entitled to sue builder D, for the costs of rectifying or replacing the defective building. It requires that the defective building stands so close to the boundary of C1’s or C2’s land that the defect made that building a potential source of injury.
to persons or property on that neighbouring land (or to users of a nearby roadway). In that circumstance, C ‘ought, in principle, to be entitled to recover in tort from the negligent builder, D, the cost of obviating the danger, whether by repair or demolition, so far as the cost is necessarily incurred in order to protect himself from potential liability to third parties.’

In *Morse v Barratt (Leeds) Ltd*, C were owners of houses built by D. C were served with a dangerous structure notice, and were hence liable to repair the wall adjoining a road. The wall, which had stood for 150 years, had been destabilised by D, because D had negligently altered the level of the ground next to it. **Held:** C was able to recover damages from D for the costs of rectifying the wall.

(2) **The ‘complex structures’ exception?** This exception was proposed by Lord Bridge in *D&T Estates Ltd v Church Commrs for England*. It provides that, in the case of complex structures, if there is a defect in one element of the structure – and if that defect causes damage to other parts of the structure – then that damage to the other parts of the structure can be treated as damage to ‘other property’, which is recoverable by C1 or C2, under the *Murphy* principle. Under this theory, the building is not one structure, but rather, separate and distinct items of property (i.e., its footings, walls, ceilings, built-in fixtures, etc), so that a defect in one item of property, which caused damage to another item of property in the building owned by C, would indeed be recoverable by C. However, the exception did not provide any avenue for C in *D&T Estates* itself.

Some courts have considered that the complex structures theory is obsolete. Indeed, in *Murphy v Brentwood DC*, the members of the court were quite disparate as to their acceptance of the exception. Lord Keith and Lord Bridge seemed to endorse the exception in limited cases, where different parts of the building were done by different parties (e.g., where electrical wiring was installed by D, and negligent defects in that wiring caused a fire which destroyed the building, or where a central heating boiler manufactured negligently by D exploded, also destroying C’s house – in both instances, C could recover, because the structure was not a whole, but divided according to different installers and their ‘bits’ of that structure). Lord Jauncey seemed to take a similar view, holding that ‘to apply the complex structure theory to a house, so that each part of the entire structure is treated as a separate piece of property, is quite unrealistic. A builder who builds a house from foundations upwards is creating a single integrated unit of which the individual components are interdependent. To treat the foundations as a piece of property, separate from the walls or the floors, is a wholly artificial exercise. If the foundations are inadequate, the whole house is affected.’

Lord Jauncey put forward one example, however, as ‘the only context for the complex structure theory in the case of the building’ – i.e., where one integral component of the structure, say, a steel frame built by a separate contractor, was defective, and where that defect caused damage to other parts of the structure such as the floors or walls. That damage to floors or walls would be damage to ‘other property’. However, Lord Oliver regarded the exception with a distinct lack of enthusiasm altogether, describing it, in general, as being ‘artificial’ as a means of enabling C’s recovery of damages.

In light of the comments in *Murphy*, the court concluded, in *Payne v John Setchell Ltd*, that the complex structures exception ‘was no longer tenable’. The court was not prepared to

---

17 [1991] 1 AC 398 (HL) 475.  
19 [1989] AC 177 (HL) 207.  
20 [1991] 1 AC 398 (HL) 470 (Lord Keith), 477–78 (Lord Bridge), 497 (Lord Jauncey), 489 (Lord Oliver).  
22 [2001] EWHC 457 (TCC) [39].
regard the defective foundation slab under one flat as separate from the foundation slab under the adjoining flat. A reluctance to recognize the exception was also evident in *Broster v Galliard Docklands Ltd*,\(^{23}\) and in *Linklaters Business Services Ltd v Sir Robert McAlpine*,\(^{24}\) where damage to the ‘bit’ was considered to be damage to the ‘thing itself’. However, in *Robinson v PE Jones (Contractors) Ltd*,\(^{25}\) Jackson LJ was not prepared to hold that the theory had disappeared from English law, preferring not to express an opinion about the point. Hence, given this appellate uncertainty, it is not possible, at this juncture, to strike the exception as being legally irrelevant.

(3) **The assumption of responsibility exception.** Where D has given specific design advice in relation to the building or structure, then a ‘special relationship’ theoretically may be created, giving rise to a duty of care owed by D to C1 or C2, based (principally) upon D’s assumption of responsibility and C’s concomitant reliance. According to the first-instance decision in *Payne v John Setchell Ltd*,\(^{26}\) a duty of care will be very unlikely on a designer’s part (and by analogy, by any professional associated with a construction process), for several reasons:

i. *Murphy* and *Thomas Bates* established that D, undertaking works or services in the course of a construction process which renders the building defective, will ordinarily not be liable to C1 or C2 for pure economic loss (i.e., the costs of rectification or reinstatement) – so this exception must only apply where D provided advice or statements upon which reliance was placed, and where D assumed responsibility for the loss (per the principle in *Hedley Byrne*);

ii. no matter whether it is a builder or designer (or other professional associated with the construction of the building), the *Murphy* principle applies, because ‘[e]ach is, in the eyes of the law, “a builder”, as each is responsible for part of the process that leads to completion of a building or other works’;

iii. further, no assumption of responsibility is likely to be found in the building context where the parties’ relationship is governed by contract. This had earlier been stated in *Henderson v Merrett Syndicates Ltd*, where Lord Goff said, obiter, ‘there is generally no assumption of responsibility by the sub-contractor or supplier direct to the building owner, the parties having so structured their relationship that it is inconsistent with any such assumption of responsibility.’\(^{27}\) Notably, no assumption of responsibility was upheld in *Bellefield Computer Services v E Turner*\(^ {28}\) (where D was a design-and-build contractor).

This particular exception (especially point i) does emphasise, however, that C’s prospects of recovery depend significantly upon whether the claim is framed as loss accruing from a negligent misstatement (for which recovery is potentially possible, per *Hedley Byrne*) or as loss accruing from defective workmanship in the building (for which recovery is very unlikely, per *Murphy*).

**Liability under the Defective Premises Act 1972**

The purpose of the Act

§4.F Under the Defective Premises Act 1972, s 1(1), any person ‘taking on work’ associated with providing a ‘dwelling’ (e.g., builders, developers, local authorities, engineers, architects) owes a duty to C to ensure that it: (1) is done in a workmanlike and professional way; (2) is constructed with suitable materials; and (3) will be fit for human habitation.
As the Court of Appeal explained in *Jenson v Faux*, the Defective Premises Act 1972 was enacted, at the recommendation of the English Law Commission,\(^{29}\) precisely to overcome the perceived deficiency in the common law explained previously in this chapter: ‘it was generally considered that a purchaser of a house had no remedy in respect of defects ... against any person doing work at the house before the date of the purchase ... Many thought that this state of affairs was unsatisfactory, particularly if the builder was himself the vendor.’\(^{30}\) In *D&F Estates Ltd v Church Commrs for England*, Lord Bridge described the 1972 Act as ‘effect[ing] far-reaching changes in the law’.\(^{31}\) The parties cannot contract out of the operation of the Defective Premises Act 1972, pursuant to s 6(3).

The Defective Premises Act 1972\(^ {32}\) came into force on 1 January 1974,\(^ {33}\) and only applies where D was acting in the course of a business of providing dwellings (i.e., residential houses). If D is not providing a house, but rather, a commercial or industrial building, then this statutory duty does not apply for C’s benefit.

The Act is particularly useful, because a range of Cs can take an action pursuant to it. It covers those for whom a house was ‘ordered’ (i.e., the house-owner who entered a contract with the builder or developer for the construction of his residence). The Act also gives standing to anyone who acquires a legal or an equitable interest in the house (i.e., mortgagees per *Payne v John Setchell Ltd*\(^ {34}\) or subsequent purchasers who did not contract with D for the work to be done but who acquired a legal interest thereafter, or tenants).

In *Jenson v Faux*\(^ {35}\) Mr and Mrs Jenson, C, purchased a house at Battersea from Mr Green in 2007. Mr Green had arranged for refurbishment works to be carried out by Mr Faux, D, in 2003–4. C alleged that the works were defective, because there were problems concerning waterproofing of the basement, and the basement repeatedly flooded. C sued D, as a subsequent purchaser, but with whom there was no contract. **Held:** the 1972 Act potentially applied (although, on the facts, no liability was proven).

According to Lord Bridge in *Murphy v Brentwood DC*, ‘[b]y s 1 of the Defective Premises Act 1972, Parliament has, in fact, imposed on builders and others undertaking work in the provision of dwellings the obligations of a transmissible warranty, of the quality of their work and of the fitness for habitation of the completed dwelling.’\(^ {36}\) Furthermore, the subsequent purchaser obtains a fresh cause of action, and is not taking an assignment of an existing cause of action (per *Payne v John Setchell Ltd*\(^ {37}\)).

**Some points of statutory construction**

Space limitations preclude a detailed examination of the 1972 Act, but a few interpretative points may be useful, to contrast with the common law position.

**The composite statutory duty.** The duty upon D, to build houses adequately, is derived from s 1(1) of the Act.

---

\(^{29}\) *Civil Liability of Vendors and Lessors for Defective Premises* (Rep 40, 1970).

\(^{30}\) [2011] EWCA Civ 423, [1]–[2].  


\(^{32}\) Per long title, ‘An Act to impose duties in connection with the provision of dwellings and otherwise to amend the law of England and Wales as to liability for injury or damage caused to persons through defects in the state of premises.’

\(^{33}\) Per s 7(2).  

\(^{34}\) [2001] EWHC 457 (TCC) [50].  

\(^{35}\) [2011] EWCA Civ 423.  

\(^{36}\) [1991] 1 AC 398 (HL) 480 (emphasis added).  


---

There are two possible constructions of s 1(1). Under viewpoint #1: D will be in breach of this duty, only if the defects rendered the house unfit for human habitation when complete. The whole duty must be read subject to the requirement that the house will be fit for habitation when completed. Hence, D will only be in breach of the duty if, regardless that the building work was unworkmanlike and/or the materials were unsuitable, the eventual building was unfit for human habitation. This is, of course, a fairly pro-D construction.

Under viewpoint #2: alternatively, s 1(1) could be treated as containing individual duties on D, such that any failure to use proper materials or to carry out the work in a workmanlike or professional manner – even if the house was fit for human habitation – could trigger liability under the Act. This is a pro-C construction.

According to the Court of Appeal in *Alexander v Mercouris*, s 1(1) contains one duty, i.e., viewpoint #1 is preferred. There is no liability under the 1972 Act, unless the dwelling was not fit for habitation. Requiring the house to be fit for habitation is a measure of the standard of work and materials required, and ensures that trivial defects do not trigger liability (per *Thompson v Alexander*).

However, not all judges agree with that construction. In *Harrison v Shepherd Homes Ltd*, Ramsey J noted his strong preference for a construction of s 1(1) which permitted C to sue under the Act for defective workmanship, even if the house was fit for habitation – and that the three components should be read separately, in C’s favour. Ramsey J acknowledged, however, that he could not do so, given that the Court of Appeal’s construction in *Alexander v Mercouris* was binding upon him at first instance. The point was also left open by Akenhead J in *Millharbour Management Ltd v Weston Homes Ltd* (‘[i]t may, as floated by [D], be argued that liability under the Defective Premises Act can only arise if, conjunctively, there is bad workmanship or the use of improper materials which leaves the dwelling in question unfit for habitation’).

What is ‘a dwelling’? This term is not defined in the 1972 Act. Judicially-defined, a dwelling is ‘a building used, or capable of being used, as a dwelling house, and not a building which is used predominantly for commercial and/or industrial purposes’ (per *Catlin Estates Ltd v Carter Jonas (a firm)*). It is sufficient to be a house, if C uses it for his family; when entertaining business associates; but does not use it as a regular home (as in *Catlin*, where a shooting lodge that was used irregularly for shooting parties was a dwelling for the purposes of the Act).

---

38 [1979] 1 WLR 1270 (CA) 1274 (Buckley LJ).
41 [2011] EWHC 661 (TCC), [2011] 3 All ER 1027, [27].
42 [2005] EWHC 2315 (TCC) [296].
Duty III – Pure economic loss

Different parts of the one building can be a ‘dwelling’, when only those parts can be used for living purposes. In *Rendlesham Estates plc v Barr Ltd*, 43 which concerned two apartment blocks in Leeds which were blighted with many construction defects, both within flats and in common areas, Edwards-Stuart J held that: each individual apartment, together with its balcony, constituted a separate dwelling for the purposes of the 1972 Act; and that whilst the common areas and the basement car park did not form part of any particular dwelling, their construction constituted work ‘for, or in connection with, the provision of a dwelling [viz, each apartment]’, so that the duty imposed by s 1 of the 1972 Act applied in respect of the common areas and that car park too.

**Whether the house is fit for human habitation.** The criteria for ‘fitness for habitation’ include: C being able to maintain security of the home; being able to live in it safely and without inconvenience; and it is always material as to whether it would be necessary for C to vacate the dwelling while remedial works were being done to fix the defects (per Dyson LJ in *Bole v Huntsbuild Ltd* 44) – albeit that Carnwath LJ noted, in the same case, that, ‘[f]or a statute which has been on the books since 1972, there is a surprising dearth of authority on the precise meaning and effect of the “fitness for habitation” test’. 45

Indeed, more recently, in *Rendlesham Estates plc v Barr Ltd*, 46 further useful legal principles associated with that phrase were articulated, viz, that: to be ‘fit for habitation’ requires that it be so for all people who might reasonably be expected to occupy them, ‘including babies and those who suffer from common conditions such as asthma or hay fever’; something can be ‘unfit for habitation’, even where the particular defect could be remedied at relatively modest cost; and a defect (say, defective foundations) may render a dwelling ‘unfit for habitation’, even though both the owner and the builder were unaware of its existence at the relevant time when the works were completed.

In *Bole v Huntsbuild Ltd*, Huntsbuild contracted to construct and sell a house to C, and they retained structural engineers, RMA, D, to carry out site investigations, and to advise on and design the foundations for the dwelling. Subsequently, C noticed cracking in 2002, eventually attributable to the fact that the foundations had been badly designed. Doors were warped, cracks appeared in walls, and the garage doors could not be locked, all due to ground heave. D argued that there were cracks in the building, but they did not cause it to be unfit for habitation. **Held:** the house was unfit for habitation. In *Harrison v Shepherd Homes Ltd*, 47 Shepherd, builders/developers, built a housing estate of 94 homes at Hartlepool, some of which showed signs of extensive cracking, due to the inadequate pile foundations. The estate was built on a former landfill site. The cracking caused cosmetic defects in the properties, a long way short of substantial physical damage, nor was significant damage likely to develop in the houses. However, taken together, the defective piles and the damage caused by them was significant. **Held:** the house was unfit for habitation. In *Catlin Estates Ltd v Carter Jonas (a firm)*, 48 a shooting lodge on the moors near Durham had structural problems, in that, during the winter months, fires could not be lit because the chimneys smoked; and there was a substantial risk that the wind and rain would penetrate within the building, causing some damage. **Held:** the lodge was fit for human habitation, ‘although it is clear that there are substantial defects in its construction which need to be remedied’.

---

What is a new dwelling, to which the Act applies? Wherever what D builds/renovates/constructs is the same dwelling, both before and after the works, the 1972 Act cannot apply, and C cannot sue for a breach of a duty under it. Whether D has provided a dwelling is a question of fact and degree (*Jenson v Faux*[^49]).

Merely enlarging, fixing or renovating a building is not sufficient. A new dwelling must be created, something that has not existed before. Enlarging premises so as to produce a separate flat is sufficient; and so is doing extensive work to an existing dwelling, so as to create ‘a new dwelling, the identity of which was wholly different from the old’.

In *Saigol v Cranley Mansions Ltd*[^50] Mrs Saigol, C, had extensive alterations done to her fifth-floor flat in the block of flats known as Cranley Mansions, in conjunction with a refurbishment of the entire block. Very serious problems ensued, and C sued the renovators. **Held:** the Act did not apply. No new dwelling was created. Improvements were done on all four floors (basement to top floor, including an extension of the loft), but the identity of the refurbished and extended house was not ‘wholly different’ from how the house was before. The changes did create more space, but the ground floor and first floor were about the same floor area and had the same use as previously. Further, the cost of the works ($400,000 in 2007) was not decisive.

The Court of Appeal acknowledged, in *Jenson*, that a very small sum may be sufficient to build a ‘separate one-floor dwelling’ which would be covered by the Act, whereas very expensive work could be done to a house which would not make that house ‘wholly different’, so that such work would not be covered by the Act.[^51] Similarly, enlarging an existing house by adding a back extension, a loft conversion, or some other improvement, was not providing a house – because the house already exists (*Zennstrom v Fagot*[^52]).

What does it mean by providing a dwelling in the course of business? To fall within the scope of the 1972 Act, and to be in the business of providing houses, D does not need to have built a dwelling prior to the defective one in question. A duty is owed, even in respect of D’s first house – otherwise, developers could set up a new company for each house, and avoid the operation of the Act altogether (*Mirza v Bhandal*[^53]).

When a person arranges to build a new house but – when it is built – has no intention at all of living in it as his home (or only intends to live there a very minimal time), but intends to sell it on, it is reasonably arguable that he was building the house as a business venture. However, it is unlikely that ‘a person who demolishes his home and then arranges for another house to be built on the same site, with the intention of living in it for some time before selling it on, can necessarily be said to be acting in the course of the business which includes arranging for the provision of dwellings’ (*Zennstrom v Fagot*[^54]).

In *Zennstrom v Fagot*, Ms Moseley and Ms Wilks, D, were companions for 20 years. They sold their house at Southampton, in a much-prized private road with a view over the marina, to C for £1.1M. The house had been completely rebuilt by D in a contemporary Bauhaus style, with a striking exterior and a minimalist modern interior. However, C said that the building was structurally unsafe and had to be demolished. D stated that they built their house as a ‘dream home’, in which they intended to live permanently, but they sold, after 12 months or so, because of upsetting comments from a neighbour about their lesbian relationship. C claimed that D had developed

[^49]: [2011] EWCA Civ 423, [8].
[^50]: CA, 6 Jul 1995 (Hutchison LJ, McCowan and Aldous LJJs agreeing).
[^51]: *ibid*, [18].
[^52]: [2013] EWHC 288 (TCC) [37].
[^54]: [2013] EWHC 288 (TCC) [38].

the house in the course of a business, and hence were liable under the Act, given that it was not built in a workmanlike manner nor was it fit for habitation when completed. **Held:** the Act did not apply. The house was not built in the course of business. D intended to live in the house post-completion.

This case also confirmed that assessing whether a house was built in the course of business must be done prospectively, at the time that the contract to build the house was entered into. Whenever a house is built, the person authorising that has a choice whether to live in the house or sell it. If that decision is made after the house is built, he does not owe any duty under the 1972 Act.

**Causation.** The statutory duty under s 1(1) of the 1972 Act requires C to prove that, on a balance of probabilities, D’s failure to do his work in a workmanlike manner caused the house to be unfit for habitation. C does not have to prove that D’s breach of duty was the only cause of the building being unfit (per Bayoumi v Protim Services Ltd).

**The two relevant limitation periods.** The first, and primary, limitation period under the Defective Premises Act 1972 starts to run when the defective workmanship or usage of improper materials occurred (which is deemed to have occurred when the building was completed), and **not** when the house became unfit for human habitation (if that occurred later than completion). The relevant limitation period is six years. As noted previously in this section, the Court of Appeal held, in Alexander v Mercouris, that the dwelling being fit for habitation was not part of the duty itself, but was a measure of the standard of the requisite work and materials which was required by the duty. This has the consequence that C cannot wait until the dwelling is unfit for human habitation, for the cause of action to accrue (i.e., to start running). Rather, the cause of action starts running when the work was done in an unworkmanlike manner or when improper materials were used. Hence, the cause of action will be deemed to have accrued at the point at which the house was completed – for by then, the work was done and the materials were incorporated.

As the court pointed out in Catlin Estates Ltd v Carter Jonas (a firm), this limitation period can work in favour of, or against, C. When C knows of the existence of defects in the house, C does not have to wait years until the house becomes unfit for human habitation. On the other hand, the existence of the defect may not become evident until well after the house is completed, in which case the cause of action accrued well before C was aware of it. In Catlin Estates, the house was completed in 1988 (by which point the defects had occurred); and the proceedings were filed by C in 2005. This was outside the six-year limitation period, and hence, was statute-barred.

The second limitation period issue arises under s 1(5) of the Defective Premises Act 1972. With respect to any remedial or rectification work done by D, the cause of action accrues when the remedial work is finished. Again, the relevant limitation period is six years. If D, upon whom the duty in s 1(1) was cast, carries out rectification works, s 1(5) establishes that the cause of action, in relation to those works, starts again, when that remedial work is completed.

In Alderson v Beetham Organisation Ltd, Judge LJ remarked that such arrangements ‘make good practical sense. On occasions, defects in the building will not emerge until close
to the expiry of the limitation period, and arranging and completing any necessary remedial work will be time-consuming. As an alternative to immediate litigation, [C] may agree that the original builder or craftsman [D] should remedy the defect, without running any risks in relation to limitation periods.’ Of course, as Judge LJ also pointed out, the first question, in order for C to take advantage of that limitation period, is for C to prove that what was carried out was indeed rectification or remedial work. If D does carry out further work, but it is not related to the original defective workmanship, then they are two entirely different problems, and time will start to run from when the building is completed, and not when the remedial work was finished. However, where D was attempting to rectify the original work – and misunderstood the original defect – then the work is truly remedial, and the second limitation period applies. It is a ‘cause of action in respect of that further work’, as required by s 1(5).

In *Alderson v Beetham Organisation Ltd*, Mrs Alderson and her daughter, C, lived in separate basement flats of a building which had been converted into flats by Beetham, D, in 1994. In 1995, C noticed black mould and fungus growth on the bedroom walls of both flats, and complained. The basement flats were susceptible to damp because the damp proof system was defective, and the flats were thus not fit for habitation when completed. D misdiagnosed the problem and, instead of rectifying the damp proof system, relaid surrounding flagstones and laid extra drainage pipes under the pathway running alongside the flats. That work, whilst done in a workmanlike manner, did not rectify the problem. C sued D in Jan 2001. **Held:** C’s claims were not statute-barred, and could progress under s 1(5). The limitation period did not run from the completion of the original works (1994), but from when D carried out the ineffective remedial works (1995, so it expired in May 2001). That further work was done to rectify the damp proofing problem, and C could sue to recover for the failure of that work to fix the original problem.

**No longstop limitation period.** The extension of a limitation period, so that the cause of action commences from date of knowledge rather than from date of damage under s 14A of the Limitation Act 1980, does not apply to actions brought pursuant to the Defective Premises Act 1972. Section 14A was inserted by the Latent Damage Act 1986, specifically to provide that a cause of action begins to run from the date of knowledge, rather than the date at which the damage was actually sustained (but not known about). However, per *Société Commerciale v ERAS (Intl)*, the Court of Appeal held that s 14A can only apply to actions for negligence at common law. An action pursuant to s 1(1) of the 1972 Act is not an action in negligence. Hence, the extended limitation period in s 14A does not cover breach of the duty under that Act. Moreover, (per *Payne v John Setchell Ltd*), as a matter of statutory interpretation, the second limitation period in s 1(5) is not capable of extension under s 14A either.

**Exemptions of Schemes from the Act.** Under s 2 of the Defective Premises Act 1972, the statutory duty imposed on D by the Act is specifically excluded, where the house is one to which an ‘approved scheme’ applies which confers rights in respect of defects when they are first let or sold for habitation. At the time of writing, the principal scheme is the National House-Builders Registration Council (NHBC) scheme.
The NHBC scheme

The NHBC ... started as the National House-Builders Registration Council (NHBRC) in 1936, created to tackle sub-standard building practices following government slum clearances. It was an important voluntary venture into self-regulation and consumer protection by the industry.

An inter-war housing boom was marred by builders who, through technical incompetence or financial pressure, skimped in the building process. Countering a drop in confidence in the industry, NHBRC aimed to increase the professionalism and care shown by housebuilders, therefore improving the finished product. Its motto, ‘Cavendo tutus’ – be safe by taking care – laid down the values NHBC lives by today.

If an owner buys a brand new home, there is an 80% chance that it will have a 10-year warranty and insurance cover from NHBC. The cover is split into two periods: (I) Damage or defects to the home which occur during the first two years from the date of legal completion; and (II) Damage to specified parts of the home (essentially the structural elements), in years 3–10. If the home is sold within the 10 year period, the balance of the cover can be transferred to the new owner.

However, any such scheme must receive the approval of the Secretary of State under s 2, conferring exemption from liability for breach of statutory duty under s 1. That approval has not in fact occurred, under the Act. Hence, even where C has entered into the NHBC scheme, an action is not precluded under the 1972 Act (as demonstrated, e.g., in Harrison v Shepherd Homes Ltd).