



---

# Successfully Tackling Disrepair

## November 2018

## South East Consortium

---

- **Jonathan Hulley**, Partner, Capsticks LLP - [jonathan.hulley@capsticks.com](mailto:jonathan.hulley@capsticks.com)

# Tackling Disrepair?

- Disrepair is where part of a house or a flat has deteriorated from a previous better condition; AND
- The landlord is responsible, on notice, to put it right



# What is disrepair?



- Structural defects, eg no DPC or CWI?
- Water ingress;
- Dampness?
- Inadequate heating?;
- Defective drainage & water supplies;
- Something that renders the property in some way unsafe?

# Pre-action Protocol – the use of ADR



- 
- PAP amended in April 2015 – requirements to consider ADR stressed in the Practice Direction;
  - Very few prospective litigants have considered this or used the internal complaints procedure;
  - Consider your internal complaints procedure
  - A method to nip dispute in the bud

# Pre-Action Protocol – the use of ADR



- 
- Replying to Letters of claim from Claimant's solicitors;
  - Comply with disclosure requests timeously;
  - Invite ADR;
  - Instruct your housing officers and repairs team to continue their contractual relationship with tenant;
  - Demand access be given and begin process of defects investigation;
  - Make an early decision on potential liability

- 
- Get an in-house surveyor into the property upon receipt of L of C;
  - The Report should be comprehensive supported by photos and findings;
  - Consider internal budget allocations;
  - Be very careful about agreeing appointment of SJE suggested by Claimants solicitors – they are frequently hired guns
  - Try to delay appointing SJE until after your own surveyor has gained access and prepared a schedule of repairs for their approval.

# Legislation concerning disrepair

---



- i. Landlord and Tenant Act 1985
- ii. Defective Premises Act 1972
- iii. Occupiers Liability Acts 1957 & 1984
- iv. Environmental Protection Act 1990

# Landlord & Tenant Act 1985



## Section 11 - Repairing obligations in short leases

- (a) to keep in repair the structure and exterior of the dwelling-house (including drains, gutters and external pipes),*
  
- (b) to keep in repair and proper working order the installations in the dwelling-house for the supply of water, gas and electricity and for sanitation (including basins, sinks, baths and sanitary conveniences, but not other fixtures, fittings and appliances for making use of the supply of water, gas or electricity), and*
  
- (c) to keep in repair and proper working order the installations in the dwelling-house for space heating and heating water.*



# REPAIR OR IMPROVEMENT?



- 
- L not obliged to improve property under s.11
  - Work which substantially improves or changes the dwelling unlikely to constitute “repair”

# NOTICE OF DISREPAIR



- 
- Notice crucial where defect occurs within demised premises
  - Notice not necessary where defect occurs within retained parts
  - Knowledge by L's employee/agent is sufficient
  - Requirement of notice before liability clock starts to tick;

## General rule:

Notice of disrepair is required to be given by a tenant to a landlord where the disrepair arises within the demised premises, notice is not required where it arises in areas retained by the landlord.

# RIGHTS OF ACCESS



- 
- S.16 Housing Act 1988
    - Reasonable notice – 24 hours
    - Emergency – immediate
  - S.11(6) LTA 1985
    - In a case where the lessor's repairing covenant is implied there is also implied a covenant by the lessee that the lessor, or any person authorised by him in writing, may at reasonable times of the day and on giving 24 hours' notice in writing to the occupier, enter the premises comprised in the lease for the purpose of viewing their condition and state of repair
  - Refusal of access – consider injunction proceedings

# Environmental Protection Act 1990

---

## Definition of Statutory Nuisance

### Section 79(1) EPA 1990:

*Subject to subsections (1A) to (6A) below, the following matters constitute “statutory nuisances” for the purposes of this Part, that is to say—*

*(a) any premises in such a state as to be prejudicial to health or a nuisance;*

# Environmental Protection Act 1990

---

- Section 82 of the Environmental Protection Act 1990 enables an occupier to bring proceedings for an order against a lessor/licensor in a criminal court if they are aggrieved by the existence of a “statutory nuisance”
- Adverse consequences for landlords of prosecution: orders for works, fines, costs, compensation payable and a criminal record

# Definition of Prejudicial to Health



---

Section 79(7) EPA 1990:

- *“Injurious, or likely to cause injury, to health”*

Example: *Birmingham DC v Kelly & Others* (1985) 17 HLR 572 DC (damp and mould)

# Who is a “person responsible”?



---

Section 79(7) EPA 1990:

*“Person responsible”* in relation to a statutory nuisance, means the person to whose act, default or sufferance the nuisance is attributable

# Costs in EPA claims

---

Section 82(12) EPA 1990:

*“(12) Where on the hearing of proceedings for an order under subsection (2) above it is proved that the alleged nuisance existed at the date of the making of the complaint..., then, whether or not at the date of the hearing it still exists or is likely to recur, the court ... shall order the defendant ... to pay to the person bringing the proceedings such amount as the court ... considers reasonably sufficient to compensate him for any expenses properly incurred by him in the proceedings.”*



# Costs in EPA claims

---

## Defenses to costs claims:

- Challenge the validity or service of the information or preliminary notice
- Abate the nuisance before the complaint is laid
- Prove that there was no nuisance when the complaint was laid
- Challenge the tenant's litigation funding arrangement
- Challenge the amount of costs claimed

# Homes (Fitness for Human Habitation and Liability for Housing Standards) Bill



---

What does the Bill do?

- It replaces s. 8 Landlord and Tenant Act 1985 (and the rent limits last changed in 1957) to provide for an implied covenant by the lessor of any lease of a dwelling for a term of less than 7 years that:-
  - *a) that the dwelling is fit for human habitation at the time of the grant;*  
*and,*
  - *(b) that the lessor will thereafter keep it fit for human habitation.*

# Homes (Fitness for Human Habitation and Liability for Housing Standards) Bill



- 
- The covenant extends to “*any part of the building in which the lessor has an estate or interest*”, ie not just to the specific flat demised.
  - No liability if unfitness due to tenant’s own breach

# Homes (Fitness for Human Habitation and Liability for Housing Standards) Bill



---

What does this mean?

- Tenants will be able to obtain legal aid to bring a claim against their landlord for 'removal of risk claim'
- S.10 L&TA 1985 will be amended to list matters considered unfit as follows:-
- *repair, stability, freedom from damp, internal arrangement, natural lighting, ventilation, water supply, drainage and sanitary conveniences, facilities for preparation and cooking of food and for the disposal of waste water;*

# Homes (Fitness for Human Habitation and Liability for Housing Standards) Bill



---

*Cont..*

- *any other matter or matters that may amount to a Category 1 hazard under section 2 Housing Act 2004.*
- *and the house shall be regarded as unfit for human habitation if, and only if, it is so far defective in one or more of those matters that it is not reasonably suitable for occupation in that condition.*
- A Category 1 hazard is a “serious and immediate risk to a person’s health and safety”.

# Homes (Fitness for Human Habitation and Liability for Housing Standards) Bill



---

## *What does that mean?*

- Tenants can obtain legal aid to bring a claim against their landlord for removal of the 'unfitness', this will include matters such as condensation and fire safety due to construction or refurbishment
- For condensation damp, will we see ever more detailed arguments and expert reports about the *cause* of damp?

# Homes (Fitness for Human Habitation and Liability for Housing Standards) Bill



---

The new implied covenant would apply to:

- New tenancies of less than 7 years term granted after commencement of Section 8;
- New secure, assured or introductory tenancies for a fixed-term of 7 years or more granted after commencement of Section 8;
- Existing periodic or secure tenancies as at commencement date are given a grace period - the covenant will only apply from 12 months after the coming into force of Section 8 (Section 8A(4)); and
- Fixed-term leases renewed after the commencement of the Bill for a further fixed-term (the renewal would be treated as the grant of a new tenancy at which point the covenant would apply).