



Successfully Tackling Disrepair



South East
Consortium

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What is 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



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- 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



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- 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

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- 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

Defective Premises Act 1972

Section 4 – landlord’s duty of care

- Duty of care in respect of maintenance or repair of the property is owed to the tenant and all persons “*who might reasonably be expected to be affected by the defects in the state of the premises*”.
- A duty of care is owed that 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*”.
- Duty arises where the landlord knows, or ought to have known, of the defect.

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.*

Landlord and Tenant Act 1985

- Section 11



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- Assured tenancies – repairing obligations extend to common parts of a building.
 - Landlord is only responsible for parts of a building in which an “estate” or “interest” is held.
 - Excluded from the landlord’s responsibility:-
 - anything for which the tenant is responsible;
 - rebuilding or reinstatement following destruction or damage by fire, storm, flood etc; or
 - anything the tenant is entitled to remove from the property.

Landlord and Tenant Act 1985

- Section 11



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- Cannot contract out of Section 11 and any attempt to do so is void (S.12 LTA 1985)
 - Section 13 provides that Section 11 only applies to leases for less than 7 years.
 - Civil action in the CC for failure to comply with obligations under Section 11.
 - Relevance of Tenancy Agreement, can contract above but not below s.11

DEFINITIONS



- 'Keep' - the nature of the duty; keep = put
 - the requirement of notice
 - what constitutes notice; of what and to whom?
 - when does the obligation bite?
 - exceptions to the requirement for notice



DEFINITIONS



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- 'Repair' - the converse of 'disrepair'
 - inherent design defects
 - condensation
 - 'damp' and mould
 - repair or improvement; taking preventative steps
 - standard of repair (s.11(3))

DEFINITIONS



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- Structure and exterior (walls, roofs, foundations, drains, guttering, external pipes, windows and external doors);

What is included?

- Liability for decorations
 - Grand v Gill (2011)
- Exterior
 - Is CWI part of the structure?
 - Are windows part of the structure?
 - What about fences?
 - Garages?

Edwards v Kumarasamy [2016] UKSC 40

- AST of a flat, Mr Edwards, tripped over a raised edge of a paving slab when rubbish from the main door of a block of flats to the bin store.
- Mr Kumarasamy was a buy-to-let investor. He only had a long lease of the flat itself, together with rights of access. He did not own the block. He did not have a lease of the external area where Mr Edwards fell. And had not had notice of the disrepair to the paving

Edwards v Kumarasamy [2016] UKSC 40

- Issue for the Supreme Court:-
 - i. Was the external paved area “the exterior of the front hall”?
 - ii. If the statutory implied obligation applied to the external area where Mr Edwards fell, then was that obligation itself subject to an implied requirement that Mr Kumarasamy had notice of the disrepair?

Edwards v Kumarasamy [2016] UKSC 40

- The Court held that it was not possible, as a matter of ordinary language, to treat a path leading from a car park and bin store to the front door of the block as “*part of the exterior of the front hall*”.
- On the ‘notice’ point, Court held that neither the landlord nor the tenant had possession of the common parts of the block and that in such circumstances there was an implied term that the landlord must have notice of the disrepair before he can be liable for breach of a repairing covenant over those parts.

DEFINITIONS



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- Installation for the supply of water, gas, electricity and sanitations (basins, sinks, baths, toilets and associated pipework, gas and water pipes, electrical wiring);
 - Installations for space and water heating (water tanks, boilers, radiators, gas lines, fitted electrical lines or fitted heaters).

Keep in Repair and Proper working order



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- Inadequate installations and changes in supplies
 - *O'Connor v Old Etonian Housing Association Ltd (2002)*

 - Preventative measures
 - **Passley v Wandsworth Borough Council [1998]**
 - Water pipes in the roof burst during freezing weather flooding tenant's flat.
 - The council attended and carried out repairs promptly.
 - The tenant claimed compensation for the damage caused by the flooding
 - HELD as repair arose in common parts retained by landlord, the covenant to “keep in repair” imposed an obligation on the landlord to keep the pipes in good order ‘*at all times*’

Condensation

- Damp does not equal disrepair
- Must be disrepair to structure or exterior that has caused it
 - Quick v Taff Ely Borough Council
 - Lee v Leeds City Council



Condensation



- BUT, Landlord will be liable for effects of condensation if
 - Has caused damage to the structure and exterior
 - If tenancy has express term that Landlord will keep the premises “in good condition” are other similar wording then may be liable for condensation.



INHERENT DEFECTS



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- Where caused by design or construction unlikely to be any obligation to repair as there is no “deterioration”
 - But where inherent defect causes disrepair to other parts of the building L liable for resulting disrepair
 - Stent v Monmouth DC 1987
 - The court considered whether under a repairing covenant a wooden door should be replaced with a self-sealing aluminium door.
Held: The replacement came within a repairing covenant as a sensible way to deal with a persisting problem

STANDARD OF REPAIR



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- S.11 (3) Landlord & Tenant Act 1985;
 - Consider the standard of repair qualification – age, character, prospective life and locality
 - Proudfoot v Hart 1890
 - *“Property need only be put into such state of repair as renders it fit for the occupation of a reasonably minded tenant of the class who would be likely to take it”*

REPAIR OR IMPROVEMENT?



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- L not obliged to improve property under s.11
 - Work which substantially improves or changes the dwelling unlikely to constitute “repair”
 - McDougall v Essington DC 1989
 - Repairs are undertaken to remedy defects which are present in the building
 - Maintenance comprises minor works to preserve existing condition
 - Improvement adds to the quality of the building

IMPROVEMENTS



Repair or Improvement?

“if the work which is done is the provision of something new for the benefit of the occupier, that is properly speaking an improvement; but if it is only the replacement of something already there which became dilapidated or worn out, then albeit that it is a replacement by its modern equivalent, it comes within the category of repairs not improvement”

Denning LJ, Morcom v Campbell_Johnson (1956) 1QB 106, CA

NOTICE OF DISREPAIR



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- 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



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- 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

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- Section 82 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
 - criminal record – Regulatory consequences!

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;

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)
- “prejudicial to health” is to be determined objectively, rather than by the needs of the particular occupants: *Cunningham v Birmingham CC* (1997) 30 HLR 158, DC.

Who is the correct Defendant?



Section 82(4) EPA:

“Proceedings.....shall be brought—

- (a) except in a case falling within paragraph (b), (c) or (d) below, against the person responsible for the nuisance;*
- (b) where the nuisance arises from any defect of a structural character, against the owner of the premises;*
- (c) where the person responsible for the nuisance cannot be found, against the owner or occupier of the premises.*
- (d) [noise cases]”*

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

Defences 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
- Whilst CFAs are permitted in EPA prosecutions, success fees are not.
- Also, look for the definition of "win". In circumstances where no conviction has been secured and all that might be obtained is the collateral benefit of having the works done, the definition of "win" in the CFA might not be met

Why are EPA prosecutions on the increase?



- An increasing favourite of the tenant disrepair lawyer, private prosecution under s.82.
- Popular in respect of mould, inadequate heating, water ingress, and structural defects.
- Can force L to carry out improvements
- Orders can prohibit the use of premises “unfit for human habitation” until the premises are rendered as such to the satisfaction of the court.
- Where criminal proceedings are commenced, civil action will invariably follow.
- Drives up legal costs exponentially and puts greater pressure on a landlord to settle.

DEFENCES TO CLAIMS UNDER S.11



- Lack of Notice
- Age, locality and character of premises
- Condition not caused by any breach of covenant
- Repairs carried out within “Reasonable time”
- Non-tenant like user
- Limitation – a claim which includes PI brings limitation down to 3 years
- Tenant’s failure to mitigate loss
- Lack of or refusal to provide access
- Losses valued at date of loss not replacement cost

DAMAGES



- Compensation for diminished use of property calculated by reference to % reduction of the rent – could be 1% - 100%.
- Compensation for personal injury or damage to belongings – special damages.
- Costs!!!
- Abundance of County Court case law which tenants' solicitors rely on to suit the case in question.

DAMAGES



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- Diminution of Rent method of calculation of damages;
 - The relevance of Housing Benefit?
 - The relevance of the rent
 - Stepped awards
 - Part 36 offers;
 - Assessment of costs in compromised claims – the sting in the tail

DAMAGES



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- 'Special damages'
 - Types
 - Alternative accommodation
 - Damage to possessions
 - 'Loss of time'
 - Consequential losses
 - Valuation

Homes (Fitness for Human Habitation) Act 2018



What does the Act 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) Act 2018



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- 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.
 - Includes Common Parts e.g. communal bin store area, entrance hall and stairwells.
 - No liability if unfitness due to tenant’s own breach
 - (i) “little jobs around the house”
 - (ii) Not causing damage
 - (iii) Keep ventilated/heated
 - (iv) Allow access
 - (v) Express terms of tenancy
 - A likely battleground

Homes (Fitness for Human Habitation) Act 2018



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 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) Act 2018



Cont..

- *any other matter or matters that may amount to a Category 1 hazard under section 2 Housing Act 2004 i.e. “serious and immediate risk to a person’s health and safety” and including, exposed wiring, defective boiler, leaking roof, damp and mould growth, rodent infestation and lack of security.*
- *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.*

Homes (Fitness for Human Habitation) Act 2018



What does that mean?

- For condensation damp, will we see ever more detailed arguments and expert reports about the *cause* of damp?
- In-house expert evidence will suffice.
- That report will need to include commentary on whether or not the property is fit for human habitation.

Homes (Fitness for Human Habitation) Act 2018



Will the Landlord have to pay damages if the property is in an unfit state?

- (i) Potentially yes, but the “notification principal applies”;
- (ii) Diminution of rent principle to calculate damages likely to apply;
- (iii) Tenant must give access. If not, consider access injunction proceedings;
- (iv) Existing Housing Disrepair Protocol to be amended.

Homes (Fitness for Human Habitation) Act 2018



The Act will apply to:

- New secure, assured or introductory tenancies for a fixed-term of 7 years or more granted after 20 March 2019;
- 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 Act for a further fixed-term (the renewal would be treated as the grant of a new tenancy at which point the covenant would apply) will be caught by the Act after 20 March 2019.

Homes (Fitness for Human Habitation) Act 2018



What to do?

- (i) Consider a repairs audit of all older stock;
- (ii) An in-house surveyor education programme;
- (iii) Revisit new tenancy terms and conditions.

QUESTIONS?



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