Housing Law Practitioners' Association

Minutes of the Meeting held on 20 July 2011
Portland Hall, University of Westminster

Bringing Disrepair Claims

Speakers: **Michael Paget, Garden Court Chambers**
Timothy Waitt, Anthony Gold Solicitors

Chair: **Melanie Gonga, South West London Law Centre**

Minutes

Chair: Good evening everyone, welcome to this evening's HLPA meeting where we will be tackling the tricky subject of disrepair. At the end we are also going to have a discussion about what is happening with legal aid so I hope you can stay for this. I would now like to introduce our first speaker, Michael Paget from Garden Court Chambers.

Michael Paget: Good evening. I am going speak about some of the basic building blocks of a disrepair claim. Four essential questions; who is entitled to bring one, when do they have to do it, what can be included in a claim and, finally, why would anyone want to do it? So let us start with the first of those questions. Who is entitled to bring the claim? Well, it is estimated that there is still over 300,000 houses that are below the decent home standard in the public sector so there is probably still a fair bit of disrepair about for us to tackle. But it can only be tackled by the tenant, relying on either the tenancy agreement or Section 11 of the Landlord and Tenant Act 185 so that raises an issue about tolerated trespassers who now have the benefit of replacement tenant since the 20 May 2009. That entitles them to a number of new rights under the replacement tenancy but it does not entitle them to bring a disrepair claim for the period whilst they were a tolerated trespasser. Instead they have to make a continuity application pursuant to Schedule 11 of the 2008 Act which I have set out in paragraph 3 of my notes. It gives the court a discretion whether or not to allow their application. They have got to make the continuity application and the court has got to decide "*in proceedings on a relevant claim, the court concerned may order the new tenancy and the original tenancy are to be treated for the purposes of the claim as the same tenancy, and a tenancy which continued uninterrupted throughout the termination period.*"

So how should the court exercise its discretion? Well, the two county court cases that have been decided on continuity applications, these are the only ones I am aware of, in the first, **Lewisham LBC v Litchmore** there had been a suspended possession order and the terms of that suspension had been breached so the occupier then became a tolerated trespasser but it was a technical breach. She had essentially complied with the terms of the suspension on the possession order and, indeed, she had managed to pay off the rent arrears during the period of the tolerated trespass. For whatever reason, the local authority brought fresh possession proceedings against her and she may have been able to argue in the course of those that that created a new tenancy but in the intervening period of time the 20 May 2009 passed so she was entitled to a replacement tenancy anyway. But she sought to counter-claim for disrepair for the whole of the period and following **Bradford v Marshall** she would have had to have made an application to revive or, now, under the new Act a continuity application. So that was done and she said that the local authority had never reduced the rent between the period while she was a tenant to the period while she was a tolerated trespasser. Let us say 15-20% of the rental liability would be used to upkeep the property so, in theory, whenever anyone goes into that status as a tolerated trespasser their use and occupation charges should be reduced by a consequential amount because no repairing obligations are owed to them. So effectively they had been treating her as if they did owe her this obligation and indeed they had been charging her, most importantly, as if that obligation was owed. So it did not sit well when they then resisted the application on the basis that this was not fair that she was going to retrospectively claim disrepair for that whole period while she was a tolerated trespasser. Furthermore she said they have got a money judgement in the possession claim and these arrears are admitted so they have got potential to bring

another claim against me and obtain a money judgement for the current rent arrears; in fact there were not any because, as I say, she had gone back into credit. And she said, also, that this would shut her out of the ability to legitimately bring a disrepair claim. Her application was allowed.

The only other case I am aware of in relation to continuity applications that has been reported is **Chase v Islington LBC** at circuit judge level whereas **Lewis v Litchmore** was a district judge level and that is reported in Legal Action October 2010. A much more restrictive approach was taken to the exercise of discretion by His Honour Judge John Mitchell in **Chase**. In that case the tolerated trespass had been for quite a long period of time, 2001 through to 2009, and he then set out some guiding principles that courts should use when considering continuity application and I have set them out in the notes at paragraph 7. They are pretty anodyne in the main and he says that the courts should produce a result which is fair to both parties, etc. etc. But he says at viii) that regard should be had to the amount and merits of the claim; I do not know if that is a legitimate criterion for the court to be concerned about, and also, ix) if the costs of defending the claim would be out of proportion to the amount claimed, or if the merits were slight, it may be unfair to allow the claim to proceed. Well, surely these are all matters that are relevant to the disrepair claim itself and if the local authority thinks there is no merit in the claim then they can always make a strike out application but in my view it should not be used as a bar to bringing the claim for that period whilst there was a tolerated trespasser. But most importantly, what he decided to do was impose a restriction on the amount of damages that could be claimed and only allowed the application on the basis that the damages would be limited to the amount of the arrears at the time that the replacement tenancy came into existence.

Now we can contrast that with the situation under the old test with the **Lambeth v Rogers** case at paragraph 10 and a revival application, a Lazarus application, under Section 85. Surely things have moved on since those criteria which His Honour Judge John Mitchell essentially replicated in the continuity application because, of course, all the other tolerated trespassers have got a replacement tenancy as of right from 20 May 2009 onwards, regardless of their payment history. If they get that in any event, regardless of their approach to their occupation, surely that cannot be one of the criteria on which to shut out a continuity application.

So, that is the way to get the tenancy up and running for the whole of the requisite period. Are there any other ways that the occupier can force the landlord to do repairs or improve the property? I have set out in the notes two recent approaches to the Equality Act. Can you use the Equality Act 2010 to get your landlord to do a little bit more than they would be obliged to do under the Housing Acts or under the Landlord and Tenant Act 1985? Well, in principle you can, following a case called **Beedles v Guiness Northern Counties**, which was in the Court of Appeal this year. In that case the occupier had mobility issues and it meant that, as a result of that, he could not comply with the term of the tenancy agreement which required him to keep in good decorative order the internal parts of the property. He, relying on the Disability Discrimination Act 1995, which is superseded now by the Equality Act 2010, asked for a reasonable adjustment and the landlord said yes, we are quite happy to waive that criteria or that requirement under the tenancy agreement because of your disability but the landlord refused to go further and actually undertake the decorative works themselves. He said in the Court of Appeal that this amounted to a breach under the DDA 1995; the Court of Appeal, in principle, said that that is acceptable but in practice on the facts his property had not deteriorated to such an extent that the decorative condition of the property was affecting his enjoyment of the property.

It is pretty difficult to rely on other avenues instead of or in addition to the contractual relationship between the parties and that is illustrated by the **Jackson V JH Watson Property Investment Ltd** case where there had been defective works undertaken on the property by the landlord's predecessor in title. The tenant came along and brought the property then had to affect remedial works and sought to claim that against the current freeholder on the basis that the water that had been penetrating into his property was coming from the freeholder's part of the property so it was a nuisance. Unfortunately that did not succeed because the court took the view that it was a caveat lessee situation; that he took the property as he found it and the water penetrating from some defective works around the light wells had always been the case, it had not resulted in any disrepair, it was a defect and so the Section 11 could not get off the ground and neither could a nuisance claim get off the ground because he took the property in that condition. He could not complain about any pre-existing defect. Sometimes in practice it is quite a moot point; what is a defect and what is disrepair?

So the next question, once you have established who can bring the claim you need to decide when should the claim be brought? Well if you are trying to avoid a mandatory ground for possession under ground 8, **North British v Matthews** says all you have to do is raise an arguable claim for disrepair and the matter will be adjourned off because if there is a disrepair claim to be brought against the

ground 8 claim, the court is not certain what the net arrears would be at that stage and cannot definitively say that two months is owed and ground 8 is made out so you can get your adjournment. So as the duty solicitor a client may come along and they will say, oh yes, I have been complaining about the condition of the property, it is damp and I have complained to the landlord. That is enough to get over the arguable claim ground; a case is adjourned off, the client may be able to get some Welfare Benefit advice and then ground 8 is no longer made out. When it returns to court on investigating the disrepair, yes it is damp but it is damp because they have been using it for water torture purposes and yes, they have complained to the landlord but they have just shouted at the bin men when they came round on a Monday so there may not be anything in the disrepair claim itself but that is enough to avoid the full effect of ground 8.

The claim can be brought either as a counter-claim to a possession claim or as a free-standing claim and that is illustrated by the case called **Henley v Bloom**. Mr Henley had been living in this property for a number of years, since 1986 or so, and he had put in his own kitchen and done various improvement works to the property. The property was then bought by Mrs Bloom in 2001 and she bought the freehold and then partitioned off his property with a leasehold interest and sold the remainder of the freehold. She then received a number of notices from the local authority saying that the property was in pretty poor condition and she was served with improvement notices. No works were actually undertaken by her during the period when Mr Henley was in the property and instead she brought possession proceedings against him saying that he was an assured shorthold tenant. He defended on the basis that he was actually a Rent Act tenant and also that he had done improvement works to the property if he was an assured shorthold tenant. That claim was settled by consent, the terms of the consent order were that Mrs Bloom gave him £16,000 and paid his costs. You might think it is probably more likely that his arguments were going to hold favour with the court rather than hers saying it was an assured shorthold tenancy because generally you do not get settlements where assured shorthold tenants are paid £16,000 to give vacant possession. But in addition to that, it said in the terms of the consent order that this was in full and final settlement of any claim and also that he needed to give the property back in good condition. He did that a few months later but before he did that he took the opportunity to get an expert to look at the condition of the property; the expert said, oh there is a lot of penetrating damp here and there is disrepair and it is your landlord's fault. He did not do anything initially and then, when he was entitled to public funding again once he had spent the £16,000, he brought a disrepair claim and Mrs Bloom sought to strike it out on the basis that this was an abusive process for two reasons.

One that he could have and should have brought the claim as a counter-claim in the possession proceedings; she said that that was the subject matter of the possession claim and so therefore, following **Henderson v Henderson** and **Johnson v Gore Wood** that if you have got a claim you should not hold it back; you should include it as part of the action that is being litigated by the court so she said it was an abusive process. Furthermore she said, now that she had, in fact, done improvement works herself on the property, it was impossible for her to have a fair trial because she could not inspect the property in the condition it was when he obtained his expert. That was allowed by the district judge and it was struck out; he felt that Mr Henley had not been putting all his cards on the table and that he should have done and so it was an abusive process. That was upheld by the first instance appellant because the circuit judge said that the condition of the property was the subject matter of the litigation. Looking at the consent order that was all included in there and so the strike-out was upheld. Mr Henley then appealed to the Court of Appeal and said that the reason why he could not have brought the case as a counter-claim was because at that stage he did not know that there was disrepair. He knew that there was water penetrating through his property but that of itself does not mean that there is disrepair. You could live in an eighteenth century cottage built into the side of a Welsh hill, inevitably there is going to be damp but that of itself is not disrepair but if it has been tanked or there is a damp-proof course and that is not effective then that would amount to disrepair. So he said until I had the expert's report I was not in the position to bring a claim. Well the Court of Appeal did not seem to worry too much about that; they said that he had enough evidence purely with the improvement notices from the local authority but he did not have to bring the claim there because, in fact, his landlord's obligations were not part of the subject matter of the litigation; the litigation was about the possession claim and nothing to do with the landlord's repairing obligations. True, the consent order did say condition but that just pertained to his obligations; nothing to do with the landlord's obligation so the appeal was allowed. You can bring the claim either as a counter-claim or, if you do not have everything ready, wait and then bring it as a free-standing claim.

However, what you can only do is bring the matter once; if you do not succeed you cannot return with further, beefed up evidence as is illustrated by the **Onwuama v Ealing LBC** where she brought a claim complaining about dampness; the first trial judge found that that dampness was caused purely

by condensation. She was a litigant in person at that stage; she then went off and got an expert's report which said that the dampness had a structural origin, namely the absence of a damp proof membrane and therefore that this was disrepair and a fresh claim was brought. I would query whether or not the absence of a damp proof membrane was actually disrepair, my view is that, as I just explained, that it probably would not be, but in any event that was not the important point concluded in the case which was her argument that Section 11 of the Landlord and Tenant Act being a continuing duty obviated her from the need to comply with the principles of res judicata did not get very far in the Court of Appeal. They said, sorry you could have got this evidence together in the first place, it is the same damage that you are litigating in the second claim therefore you are struck out.

So the third question is then what can you bring within a disrepair claim? Anything that the landlord has agreed to do in the tenancy agreement and I have set out in the notes some examples of where landlords have agreed to do more than they have to do under statute. Normally what happens is that a clever tenant lawyer reads a tenancy agreement and notices this; their clients are then paid off and then the landlord immediately changes their tenancy agreements for the rest of their housing stock. What the landlord cannot do is use the tenancy agreement to avoid their statutory obligations and that is illustrated by the **Islington LBC v Keane** case at paragraph 41 of the notes. In that case Islington had said in the course of its tenancy agreement, if there is a problem with the washer the tenant needs to fix that. Well, the washer is connected to the tap, the tap is connected to the water supply system and under Section 11 that is a requirement that the landlord has to ensure is in proper working order so that part of the tenancy agreement was excluded under the Unfair Terms in Consumer Contracts Regulations 1999. The net effect of that; instead of tenant popping down to hardware store and getting a washer for 50p, the landlord has to call in Pimlico Plumbers and is charged £250. Under Section 11 the landlord is obliged to keep in repair the structure and exterior of the property. What you cannot use Section 11 for is asking for any improvements. The tenant may complain about the avocado suite in the bathroom but you cannot use Section 11 to change that. But, having said that, if the landlord is doing any works they have to comply with current building regulations so if it is a requirement that a damp proof course is put in, although that may be technically an improvement, the landlord would still have to do it. Likewise, if a landlord is affecting a programme of general maintenance, they should replace like for like. In the **Bilgili v PCHA** case the windows were being replaced but the window had an extractor fan in it and that was not replaced and it was held that that had to be replaced and so you have to replace like with like.

So where does the structure of the property stop? Well, we have had the case from the Court of Appeal called **Grand v Gill** which finally decided that plasterwork is part of the structure. In that case the two bedroom flat was suffering from dampness and mould growth throughout and it also had a very temperamental heating system for the first few years. Ms Grand brought a claim for compensation; she was awarded £5,600, £350 of that being for the breach of her quiet enjoyment. The rent was about £10,000 a year and the dampness was caused by the fact that there were cold surfaces because of defective construction but this was aggravated in a number of different ways, in a minor way because there was a smashed double glazed window for some of the period of time, but also because the property was not properly heated and also that there had been a leak from the roof and guttering causing water ingress into the property. An expert found that there were two areas of defective plasterwork to the living room and to the kitchen ceiling. The condensation throughout the property could have been wiped off by the tenant with a cloth and, in fact, that is what she did most of the time. So the trial judge gave her £1,200 per annum for the inadequate heating so that came to a total of £3,600. There was a period when there was absolutely not hot water as well; that added up to £1,700. That needed to be taken off the £3,600 which ended up with a net result of £4,650 for problems with the boiler.

The trial judge also found that if the landlord had been solely responsible for the condensation and mould growth problems in the property he would have awarded £2,000 per annum which only equates to a 20% rental discount and this was a property where the dampness was so bad that the daughter had to move out of the second bedroom and was sleeping the in the living room so I think that that assessment is pretty low as a rental discount. Likewise, I think, that the award for the defective boiler was pretty low as a proportion of the rent. But the vast majority of that was discounted because he said that this was a defective problem with the construction of the property, not the landlord's fault and only 10% of it was caused by the problems with the boiler so the ineffective heating system had resulted in an aggravation of the condensation by about 10% so £600 was awarded for that. She appealed and she said that the trial judge had incorrectly applied the principles in **Quick v Taff Ely** and so therefore she should be entitled to £5,000 for the problems with the condensation because it was the boiler and the inadequate heating that was primarily causing that, she asserted. But she also argued that the two areas of defective plasterwork that the expert had identified should be the

landlord’s responsibility for 100%. This would only have worked if the court found that plasterwork was included as the structure and exterior of the property. It was accepted that it was in disrepair but it would have required the court to say, yes, that is part of the structure and exterior, otherwise if it is just purely decorative, again it is not the landlord’s obligations.

Well, the court had to bite the thorny issue that it had been avoiding for a number of years and dealt with a first instance case called **Irvine v Moran** which had held that the structure of the building is “those essential elements of the dwelling house which are material to its overall construction”. That court did not find that it had to be a load-bearing aspect to the structure; it was broader than that. But the Court of Appeal went even further and said that the structure includes any part of the dwelling house that is essential to its appearance and shape. In **Irvine v Moran** the first instance judge had found that plasterwork was decorative in its construction but the Court of Appeal said, no, that is not the situation now; when tenants are moving into the property they will expect the structure to include finished walls within the property and so, therefore, that is included as structure and consequently, Mr Gill was responsible for those two areas of defective plasterwork. The net result of that was she increased her damages from £5,600 to £6,275, a net increase of £675 so it would have been very difficult for a publically funded client to have pursued that appeal. The fact is that the appeal was done on a pro bono basis with a costs order applied for and granted by the Court of Appeal.

So what effect does that have on our client base? Would it have any material effect on the old case of **Southwark LBC v McIntosh** where the tenant had sought compensation for the condensation in her property? Well, probably not because there she had failed to plead that there was a cause of the condensation and all she was saying was there is condensation and mould growth. To get a claim up and running post **Gill** you have to say it is the plasterwork that is now in disrepair and if you plead that the plasterwork is in disrepair then you can get the claim up and running.

I have asked some general questions, what happens if the tenant does not do anything? If there is a design fault, as if often the case, where the exterior walls are quite cold causing condensation to form and, unlike Ms Grand, the tenant does not wipe the walls and just lets the condensation stay there, then that causes the plasterwork to then become damp and fall into disrepair, would the landlord be able to avoid his/her responsibility by saying, oh well that is a tenant default? I do not think so. Would the landlord be able to include in the tenancy agreement a term that because they are aware that there is defective construction that the tenant has to wipe down the walls? Maybe or maybe not. Or could they also require them to keep the trickle vents open on all the windows to ensure ventilation?

Lastly, why does anyone want to bring a disrepair claim or counter-claim? Well, it is to get damages and to get specific performance and I have set out in the notes there the test for a long leaseholder that Timothy is going to talk about as well, and also that you can use it for underlying defects but not for minor de minimus disrepair. What you cannot use a disrepair claim to do is to claim damages that are too remote from the repairing obligations. That is why the claim in **Ryan v Islington** failed where the tenant said, “the property was in disrepair, I got the landlord to repair the property but that took so long and in the intervening period of time my right to buy application fell into abeyance. Please can I have damages for the period when the property was in disrepair as a tenant?” Yes. “But can I also have damages for the loss of the opportunity to buy the property with the requisite discount?” No, that is an economic loss which is too remote from the contractual relationship between the parties.

Chair: Thank you Michael, I will now hand over to our second speaker, Timothy Waitt from Anthony Gold Solicitors.

Timothy Waitt: I am going to talk about one of those subjects which many housing lawyers view as rather boring and rather dull, namely disrepair. I will share with you a little anecdote; I was at a garden party, not the famous Prosecco party last Friday, but of another chambers where I asked if the barristers did disrepair and I was told they tolerated it. I am sure that is not true for any of the counsel here today. I hope that, as part of going through this talk, you will appreciate that disrepair is far from dull; that there are interesting legal issues to grapple with on a par with many of the difficult ones in possession cases, homelessness cases and that there is plenty to interest us as lawyers and also plenty of opportunity for us to get better results for our clients.

In many issues relating to defects we can often find a claim, often there is some form of Section 11 disrepair, often there is some form of notice even if that is just a letter of claim and so we can get repairs and some money for our clients. But can we do better? Can we get more money; can we get more repairs, what about the decorations as well as stopping the water dripping through? I hope that going through the talk tonight we can spot some of the opportunities to do that.

You will see in the paper that under the heading, Resources, I have listed some of the key ones for you. Some are, of course, obvious; the excellent Repairs book by Jan Luba, Deirdre Forster and Beatrice Prevatt. Some might be less obvious, the Housing Law Encyclopaedia has an excellent commentary on Section 11including a whole list of quantum cases for disrepair. And Woodfall on landlord and tenant; an excellent commentary on the application of the repairing covenants, nuisance and, of course, the notice provisions.

The paper discusses the various courses of action; Section 11, the Section 4 of the Defective Premises Act and also discusses nuisance so I do not want to spend to long dealing with those issues. I want to move on to some of the knotty problems that we encounter in practice but I will briefly touch on them. It is a straightforward point but it is worth repeating that you are not going to be able to find the landlord liable unless you can point to a duty. Always worth looking at, as Mike mentioned, is the tenancy agreement. You are probably not going to find these days a wonderful clause saying that the landlord will keep it looking like Buckingham Palace, although that is not really the case because that is in disrepair too, but the point being that it is unlikely that you are going to get a clause from the landlord saying that they are going to keep it in absolutely tip-top condition. But there is often scope in the tenancy agreement to widen the standard terms, perhaps there is an obligation to keep in repair installations which were present at the start of the tenancy that may go beyond Section 11. What about internal joinery, the kitchen units? What about maintaining neighbouring flats? It is worth having a look there.

Then, of course, Section 11, Section 4 of the Defective Premises Act, you will see I discuss briefly Section 4.4 of the Defective Premises Act, that is round about paragraph 12, that discusses that, potentially, the landlord's liability for dealing with defects, dealing with repairs, can be much wider than their obligation under the tenancy, particularly where the landlord has the right to do that repair and to inspect. Much will turn on the individual facts but it might be appropriate, particularly in a case where you have the leak from the leaseholder above because Section4 obligations under the Defective Premises Act are owed to anybody who might reasonably be expected to be affected by the defect, including the tenant next door, including the visitor.

In terms of Section 11 disrepair we are well aware of the issue regarding notice. Just to highlight some issues at paragraph 25, the requirement to give notice in an unqualified covenant for repair is an exception rather than the rule. The normal rule is where the landlord promises to keep something in repair he is bound by that whether he knew about it or not. The only exception is where the defect occurs in the demise, in the flat. If the defect occurs outside the demise, on the roof, in the retained part, the service ducts, where a leak occurs the landlord is liable regardless of notice. Fitting into that, if there is no requirement to give notice there is also no reasonable time for the landlord to carry out repairs so you get liability straightaway which can be very important if it is a flood but more on that in a moment.

A word regarding proving notice, if you are a tenant and you have got to prove notice you have got to get the documents. That might mean at minimum the documents for your client's flat, the repair records, the correspondence, inspection records but what about other records? What about the repair records for the flat next door - potentially they could be relevant where you have a leak through the roof and you are trying to say that the roof generally is defective. Often the repair records in a block of flats, the individual flats repair records will not include the repair records for the structure, for the roof, so think carefully about what you need to prove your claim and where you can get those documents. If need be you can do pre-action disclosure; I would suggest most of the time you would want to force the disclosure issue if you can in proceedings because then you can get the advantage of a sanctions order potentially striking out a defence as part of that.

Moving quickly through to damages in paragraph 27, I would like to touch briefly on the calculation of damages. We are all aware, I hope, of the **Wallace v Manchester** "Unofficial Tariff" which back then runs from round about £1,000 - £2,750. Do not forget to update it to present day; it is above £3,000 once you take into account inflation. But **Shine**, detailed in the notes, says that you have got to consider the rent as well. Now if we look at modern rents, even for social housing, they are quite often way above £4,000. **Shine** says your maximum is 100% of rent. Once we start to look at the rent figures, suddenly our maximum has gone up from a little bit over £3,000 to in excess of £4,000.

The **Shine** case and the other High Court authorities around disrepair are actually quite positive for tenants. You have got some details there of what was actually wrong in the **Wallace** case and if you do the maths with the damages awarded it works out that they get 50% of the rent as their damages

award. In the **Earle v Charalambous** case we get 50% too and the judge said that they considered the tenant's advisors had underestimated the award. In **Shine** (and everybody refers to **Shine** as to how the bad tenant who did not let the landlord in had his damages torn apart), it is important to remember that the Court of Appeal was quite willing to give 75% and 100% awards for the disrepair. These awards should not be so unheard of. Of course in **Shine**, the judge then did then massively discount that because of the tenant's conduct but the key point is that the Court of Appeal was quite willing to award 100%. Now, that is very different from many of the offers that you and I are getting where a landlord is saying 10% or 20% and therefore there is good justification for arguing those figures up. Maybe a high risk thing to do when you are running those claims and the risk of missing out on a Part 36 offer but I would suggest that it is not quite as bad as we think.

Moving forward through to nuisance, one point to highlight there, is that the normal position is that a landlord is not liable for the nuisance of the tenant. That is straightforward where the tenant above is flooding their bathroom by leaving the taps on and flooding the tenant below. But what if the issue is caused because the landlord fails to repair the leaking pipes in the upstairs tenant's dwelling? Well, case law does support the proposition that in those situations the landlord can be held liable in nuisance for the resulting leak because they have the obligation to carry out the repairs in that flat. In some circumstances, even where the landlord just has the power to enter and carry out repairs rather than the duty, there may be liability. A big word of warning here, a lot will depend on what is reasonable for the landlord to do but there is potential liability so something not to immediately dismiss.

If you cannot bring your claim within any of these courses of action what are your options? Well, the Housing Health and Safety Rating System might help where your landlord is not a local authority. Local authorities have very extensive powers to inspect and carry out enforcement action. In most cases involving damp, and in particular damp and mould because most of these cases will be condensation issues, the local authority will be under an obligation to carry out an inspection and, if they find a hazard which they will do if it is damp and mouldy, they will have to carry out some form of enforcement action. That could be just a notice telling them to address the issue; you can then consider whether you can judicially review them as to what they are doing.

Alternatively, of course, you could bring a prosecution under the Environmental Protection Act. I know these are well out of fashion as criminal proceedings in the Magistrates Court but I and my colleagues have run them; they are detailed in Legal Action Group magazine update. They can be won, compensation can be achieved and you will potentially get works to abate the nuisance and to prevent a recurrence. Those works could be very valuable to the client; they could involve putting in extra heating, they could involve putting in extra insulation. If you are thinking about one of those cases take care, they are criminal proceedings, they are risky, but if you know what you are doing, if you are careful and if you are sure that you can win they are not something to dismiss out of hand.

Finally, there is the possibility of a claim under the Human Rights Act. There are two cases detailed there which are worth a look at. **Lee v Leeds City Council** is probably the better of the two but the conditions were by no way near extreme enough to justify the claim. Do not think about doing a Human Rights Act claim for disrepair unless it is really, really extreme but do not dismiss it as a possibility.

Moving on to some of the specific issues that we face as advisors of tenants with disrepair, we come to the flood from above and it presents one of the more knotty problems for advisors of tenants. Maybe it is a one off, maybe it is a repeated problem with water coming through the roof, but there is damage in the property, the tenant's belongings are damaged and the tenant wants repairs and they want recompense. Frequently you will get a letter from the landlord's insurers saying it is not foreseeable, it comes from a third party and there is no notice anyway and there is no liability.

That is not the end of the story you will be pleased to hear and we have to start by looking at what was the cause of this leak. The easy ones, of course, are the defective roof in which case you have got them on Section 11. What about the defective service pipe? Again, you potentially have got them on Section 11 installation for supply of water to the premises. A useful case there, **Greg v Planque** which refers to blocked gutters and drains. It does not matter what the cause of your blocked gutter or your drain; it is in disrepair even if it is a little dead pigeon blocking the gutters, blocking the drains and giving you your flood. It becomes more difficult, though, when the defect is actually in the flat above; it is not the end of the world; there can still be liability. We talked earlier about nuisance. If the issue is a form of Section 11 disrepair then potentially the landlord owes that tenant a duty to carry out the repair and therefore you can get them in nuisance on that basis; the landlord owing you a duty of

nuisance because of their failure to carry out the repair in the flat above. Remember though, to fix the landlord with liability of nuisance you have got to take a step backwards. Landlords are only going to be liable to fix that defect in the flat above once they have had notice anyway and they have had a reasonable time to carry out repairs so in terms of the one off flood it might not help you but in terms of the on-going problem it probably will, that you can fix the landlord with liability to fix the on-going issue.

If they are a leaseholder, you might be able to take advantage of the mutual enforceability clause. Most leases in blocks will have a clause saying that these rights are for the benefit of the other occupiers and if it has something like that then you may be able to enforce those repair obligations of the landlord as the leaseholder by using the Contracts (Rights of Third Parties) Act 1999 arguing that essentially the covenant is for the benefit of you as a third party and that Act gives you the option to enforce the landlord covenants under the lease. Not straightforward but it is another option, it is another string to your bow, but again, if you are doing that you are going to need notice and in the one off leak you will not have that but in the on-going leak gives you the right to repairs and, potentially, damages for the water penetration.

Of course, if the leak is caused by the tenant upstairs washing the floor, overflowing the bath, washing machine misbehaving then your landlord is not going to be liable; you are not going to be able to fix them with liability for the water pouring through. That is not the whole of the story though, because water pouring through into premises does not get on very well with many of the things in the property. It does not do very well with electrics; it does not do very well with plaster. The Section 11 covenants can then come into play and create an independent course of action against your landlord so your tenant upstairs may have flooded you out but your electrics now need repairing. The electrics are caught by Section 11; the landlord is caught by that so you get your electrics repaired from your landlord. **Grand v Gill**, which Mike referred to earlier, the case about plaster, will be particularly useful here because plaster and water do not get on very well. If the plaster suddenly needs replacing because of the flood then the landlord will be fixed with liability under Section 11 independent of the cause of the leak. Obviously, if the landlord has to replace the plaster then suddenly they will also have to make good and that may mean that you get some decorative repairs as well. If they are replacing chunks of plaster they will need to redecorate as a result. You could argue regarding whether you can get the whole room done. You will want to think about those issues carefully as to how far you are pushing the envelope and what the judge will give you but there are certainly arguments there to run with.

Section 11: in that scenario the general repairing covenants can even sometimes help you make the landlord stop the leak even if you cannot fix them with ordinary liability anyway. A good case illustrating that point is **Stent v Monmouth DC**. There was a design defect on the door which meant that water came through. Monmouth, in true local authority fashion, instead of repairing the problem decided to replace bits of the door which went rotten as a result of the design defect, as they are obliged to do under Section 11 repairing obligations, over the next thirty years. The Court of Appeal decided that that was not an adequate repair and the way to solve the problem was to replace the door and deal with the inherent defect. No liability for the inherent defect but actually fixing the disrepair meant that the primary cause of it had to be addressed. Now, where you are getting an on-going leak which you cannot make the landlord liable for that could give you a route to force your landlord to stop the leak. I have a case at the moment where the leak is causing the structural beams of the floor above to rot. The landlord can replace them but they are only going to rot again. In that case it strikes me that there is a good basis for making the landlord carry out the repairs to stop the leak, stop your beams rotting by making them fix that leak.

Moving on to condensation, we all know, I hope, what condensation is and that, generally, a landlord is not liable for it because it is a design defect. Take the bus in winter and you will see what happens with condensation, especially if you lean against a window upstairs; your clothes are getting wet and it is not very nice. **Lee v Leeds** and the **Quick v Taff Ely** decisions say a landlord is not responsible for it; condensation per se is not a defect. The ways of dealing with condensation include moisture control; shutting the doors of the kitchen and the bathroom, taking the moist air out of those rooms by extractor fans, heating and insulation. Now, although the landlord is not going to be liable for the design defect nature of the condensation, if there are issues of disrepair which are causing it the landlord will be. If you have got defects to things which are causing condensation, potentially a defective extractor fan resulting in the moist air not being taken out of the house, that will likely be contributing or, potentially, causing the condensation issue. What about lack of heating or defective heating? Again, cools the property, encourages condensation, results in condensation and mould growth. Insulation issues, the nature of a leak will reduce the thermal efficiency of the wall and make it

colder and make the property colder and, potentially, trigger your condensation problem. These are things to look into; you may be able to fix liability.

By way of example, I took three cases earlier on this year looking at them all as Environmental Protection Act prosecutions, one the heating was working about 20% of its efficiency and, as a result, we were able to bring a disrepair claim for the damp and mould to get the heating fixed and to get general damages for the damp and mould. Another, the ventilation system had been set up incorrectly such that instead of taking moist air out of the bathroom it was forming a positive pressure system introducing nice dry air into the bathroom and forcing it out via the door into the passage causing a whole load of mould problems in the passage. The final one was a straight EPA. So looking at these issues, you may be able to fix your liability for condensation and, indeed, in **Grand v Gill** that is exactly what the tenant did; they were able to show liability because of the lack of heating for at least some of the condensation and the dampness and the mould that resulted. One of the key things to remember with condensation is that it is about a balance of the various moisture productions, ventilation and heating and a small change can cause a big deal. It is worth asking your client what has been going on before the heating went down, was there a problem with damp, and was there a problem with mould? Could it be easily controlled with just wiping off the windows? I also have a case where a leak into the bathroom triggered condensation, dampness and mould throughout the property thus making a relatively straightforward leak into something that affects the whole of the property for which we can get liability for it all because it was caused by the leak, by the increased moisture in the property.

Moving forward to enforcement issues, paragraph 86 and onwards, in these straitened times landlords, particularly local authority landlords and registered providers, as they are now known, housing associations to most of us, have less money, there are more disrepair claims and even once you get your order for repairs the work does not get done. Remember, if you settle under a Tomlin Order you have to get that turned into an order before you can enforce it and you have got the principles from White Book with regards to how to do that; making an application under the liberty to restore the provisions. You can get damages for breach of your Tomlin Order, **The Bargain Pages Ltd v Independent Newspapers Ltd** points out that under the Civil Procedure Rules you are able to do that. There is contrary authority pre-CPR which says you cannot, a case called **Hollingsworth** but that is referred to in **The Bargain Pages** and it is Chancery Division but it is by the Vice-Chancellor and I would suggest that it over-rides the **Hollingsworth** decision, finding the **Hollingsworth** decision pre-CPR, pre-over-riding objective and no longer applying.

Once you have got your order for works, what then? Well, the normal way of enforcing an injunction order is to get a penal notice on it and apply for committal at which point the court can then fine or send the wrongdoer to prison. But remember, those proceedings are essentially criminal; you have got the criminal standard of proof. Is the court really going to send the Director of Housing to sit in clink for a week? Do you really want the local authority fined? Probably not, the money goes to central Government, your client does not see it, there is even less money to do repairs. Obviously you will want to do that with a private landlord but where there is another way of dealing with this. The **MSA v London Borough of Croydon** case which is an administrative court decision, and therefore arguably distinguishable, says that that you can apply to court for a finding of contempt even though you have not got your penal notice. If you are applying to court for finding of contempt, so the administrative court say, a public authority will be shamed into acting and even if they do not, once there is a finding of contempt you can then get potentially a penal notice.

Now it strikes me as a very powerful method to apply to court for a finding of contempt against your opponent and ask for an order that the Director of Housing turns up before the judge to answer the allegations and to explain what they are going to do. It strikes me as a better way forward than a simple committal; you get the Director in court before the judge and he gets a nice rap over the fingers. We did that, we got that order and successfully resolved in one of my cases. I was looking on Google recently about it and you can indeed find the story if you search for “Anthony Gold Ants”! It gave rise to some wonderful headlines such as “Bugged by Ants”!

We are, of course, faced, at the moment, with the funding challenges which are coming through. Disrepair has escaped a little in that there is still funding where there is a risk of serious harm to the health and safety of an individual so I imagine we will be getting letters from the doctor to attach to our public funding applications in due course. One of the more worrying issues, though, is the funding caps for experts. Surveyors are going to have to charge £50 an hour if they want to work under legal aid and they are going to be capped at £225 an hour. I think we can all think of one particular expert whose reports come in at approaching five times that amount who will not be doing legal aid work. But

that aside, where are we going to get the experts to advise on these disrepair claims, because without them we cannot prove the case? That is one of the challenges that we are going to have grapple with and not in the distant future but in October. Most proposals are in and due to come into force then along with the pay cut.

Chair: Thank you to both our speakers. Before we move on to the question and answer session I realise I have taken things slightly out of order and not approved the Minutes of the last meeting. Were there any amendments to those Minutes? Thank you, I will take it that they were approved. Before opening questions to the floor could I ask a question of my own directed to Mike? We have got quite a lot of cases on where housing stock has been transferred, the disrepair may span both periods, before the stock transfer, do you issue against the former landlord, the successor landlord, against both or do you then bring two claims and consolidate?

Michael Paget: I think you issue against the current landlord because with a stock transfer there is going to be an assignment of the rent arrears from the previous landlord. If there has been an assignment of the rent arrears that entitles you to rely on **Smith v Muscat** and the other cases I mentioned in the notes there so that if they are pursuing you for the rent arrears you can do a set-off. If the situation is where there are no rent arrears and it is a pure, free-standing disrepair claim, then you may be wise to include both landlords.

Contributor: If the funding on surveyors' fees will be limited to £225, would this necessarily mean that if you, say, instructed a joint expert with, say, the council, that the expert would only get £225 or could you argue to the LSC, £225 that is only legally aided, the remainder of, say, their £450 bill is paid for by the proposed defendant so you get it that way?

Timothy Waitt: You could certainly make that argument. Whether the local authority will agree to pay two-thirds of the fee or not is an issue. I guess what you are suggesting is that you sub them £225 …

Contributor: I was not saying that they paid £450. Generally in my experience the fees of the expert we use generally come out at around £450 or thereabouts so it could be half and half.

Timothy Waitt: There is certainly an argument there that you could apply the cut in that way but we simply do not know the details, the cap is out for consultation. Knowing the Legal Services Commission, they will take the advantage of the cap and say, not it is £112.50 each, ie reduce the cap by 50% to say the total fee is £225, but we simply do not know at this stage. We could argue that.

Contributor: In which case the question is, what is the point of bringing a single joint expert in? The point of having a single joint expert is to keep costs down in the first place.

Timothy Waitt: That is something that we will have to argue with the Legal Services Commission.

David Watkinson, Garden Court Chambers: This is a practical question, really, it seems to me that the argument for disrepair cases is generally not about whether there is disrepair but is about notice and the assessment of damages and the usual scenario is that no notice in writing is given until a lawyer appears on the scene which can be several years down the line and the client says, "I went down to the housing office time and time again and banged on the table and said there is ghastly disrepair and nothing was done". The council, it usually is the council, or social housing landlord produces yards of computer records which show not a single item of disrepair that has been complained about on them. Or, if you are complaining about reeking damp, oddly enough all that appears on the computer records is a broken door handle from time. So, my question is what are arguments about that, how you combat the computer records?

Michael Paget: Well, as Timothy and I both mention in our notes and Timothy explicitly talked about, the notice is only required if it is inside the property and it may be that the particular aspect of disrepair has been caused leaks coming through from the roof, in which case you can bypass all the worries about computer records down at the local neighbourhood office.

Timothy Waitt: What you have got to do, if is it an evidential issue, is you have got to fight and you have got to get your evidence. You have got to make sure you get all the disclosure from the landlord, you need to go through those records and other documents and get the evidence. Are there inspections? Are those inspections going to give you some records? Can you make the landlord give those inspection records? If the inspection records have long been lost, well you have then got a question mark in your favour that you can exploit in due course. That inspection record would have

shown the damp. What about other witnesses, can you get neighbours, can you get relatives, can you get third parties to give you witness statements confirming the damp? What about drilling down into how disrepair is actually reported? Are there telephone records; is it a case that the housing officer makes an initial assessment before deciding to raise a repair? Are the only records where the landlord raises a repair? Well, your argument there is you did not carry out the repair, it is obvious that there are no records, you never raised your repair because you did not accept the point I was making. But you have got to make an evidential case and it is wonderful when you have got the records on a computer system to prove the case but if you do not, we are lawyers, we have to go out and find the evidence and that might mean witnesses, but that will mean witnesses ultimately but you can make your case stronger by forcing the issue on disclosure, potentially, by making the argument once the records do not exist, of showing that the landlord cannot deny your case that the client turned up to report the problem if the only record is when they actually raised a repair. So you have got to fight on your evidence.

Chair: I think that is right, in my experience you generally have to be prepared to challenge the records or the lack of records as part of your evidential case rather than relying on the landlord to keep records where they have got no incentive to do so. In addition, they are at an advantage because they are supposedly obliged to keep written records whereas our clients rarely keep chapter and verse of all the times that they contact the local authority, expecting the local authority, social landlord to have done so but I do not think that we should automatically accept at face value the records that we are given as being the full story.

Vivien Gambling, Lambeth Law Centre: Just on the last point, on the subject of getting records, it took me a little while to realise that, in this case Lambeth local authority, employ contractors to service the hot water and the heating so you never got the hot water and heating records when you applied to send the early notification letter and get the disclosure. You always have to go back and say, "but this doesn't include anything about the boiler" other than possibly telephone calls from the tenant so you have to specifically ask for the heating records. I have never seen any heating records, I have never seen anything from British Gas or their other contractors but I think in a couple of cases it has actually prompted them to settle the case.

Both of these talks have been very, very useful, particularly, I think, the reminder from Timothy about the fact that the **Shine** case does say that in some cases you can get 100% because I can hear myself, having advised clients, "Oh you never get 100% of the rent" but, of course, you can and I think I have only ever argued that once in negotiations where, arguably, the tenant should have got more than 100% because she was effectively living in a building site. My question is actually about the **Grand v Gill** case and it is particularly about the amount awarded for lack of heating and hot water so, Mike, I do not know if you know the answer to this but I just wonder if the figure that was awarded, which I have just worked out is about £50-60 per week for the period of total lack of heating, was that made with reference to the amount of rent or not?

Michael Paget: It was not explicitly, it was made with reference to an older case that I did not put in the notes. That was about £1,1000 per annum and then it was increased to £1,200 per annum to account for a bit of inflation but it was a 2001 case that he relied on there and took a broad brush **Wallace v Manchester** approach rather than going explicitly for the amount on the rent because, if you look at the rent there, as I say it was £10,000 per annum, so as a rental discount it is pretty low.

Vivien Gambling, Lambeth Law Centre: That is useful, so those figures and that case could be used to argue for similar figures for local authority and housing association tenants on lower rent than if the court followed **Wallace v Manchester**?

Michael Paget: Yes, for low rent accommodation rather than going for the rental discount look at the discrete figure awarded for that disrepair item. However, in Ms Grand's case the award was not referenced back to her £10,000 per annum rent. It should have been, in my view, and if it had been I think she would have been awarded more. She should have been awarded a bit more than that.

Timothy Waitt: Just to add the figures on **Grand v Gill** on basis are not wonderful but if you actually drill into the figures as they were awarded, the headline figures do not tell the whole story. She did not have all the problems for all of the time; the heating was not a continuous issue. I do not have any of those figures to hand but I did put a comment on the **Nearly Legal** post regarding these issues and it is not as bad as it looks from first sight. The other point to remember with regards **Grand v Gill** is that the damages award, the actual calculations for the damages award were not challenged; it was about

the issue of what damages were being awarded for and thus the judge gave the extra damages because he was giving it for an extra issue, namely the plaster.

Michael Paget: It is about 15% for three years of inadequate heating, thirty weeks of which there was absolutely no heating and no hot water so that is on the low side. You know, the rental liability for that period was £30,000 so you might think you could be entitled to £10-12,000. But as Timothy said, those figures were not challenged.

Chair: There was one other observation I wanted to make in relation to notice and requesting records. I found that local authorities often keep records in several different places so you may also find that you have to ensure that you ask for records kept locally as well as centrally, computerised records as well as hand-written records and, similarly, that you ask for their emergency call out records.

Tony Martin, South West London Law Centre: I just had an observation to make on notice, I had a case recently against a registered social landlord where all repairs had to be made to a call centre and when you ring the call centre it warns you that the calls may be recorded for training purposes and when they denied liability I asked them to release the recordings of all the calls. After saying that it was disproportionate to do, eventually they decided that my client had given them notice after all. You had to do that even if you went to the office; you were directed to a phone so that seems to be an increasing trend.

Chair: Can I just ask on a matter of procedure, where a lot of local authorities and housing associations are amending their tenancy conditions to be less favourable in terms of what they capture on disrepair would you plead the pre-amendment position and the post-amendment position to capture disrepair that maybe was not subsequently covered by the tenancy?

Timothy Waitt: I certainly would. The effect of the amendment may mean that you cannot get your injunction for repairs; you could argue whether they should have done the repair previously under the old agreement so there are all sorts of knotty issues there. But you can certainly use it to get damages.

Chair: Thank you. I am now going to move on to the information exchange and I know that Robert has some very useful information for us on the legal aid changes.

Robert Latham, Doughty Street Chambers: There are probably two issues we need to discuss. One is how we are going to respond to the Legal Aid Bill and I am going to pass on that and possibly look towards someone else. I would like to deal with the Community Legal Services Funding Amendment No. 2 Order, a draft of which was published on 13 July and we have already heard that it would cap experts' fees to a fixed fee of £225. One thing we did get through our responses to the legal aid consultation is that risk rates are not going to be extended and I think that was a very significant advantage and we should note that. But in this funding order, and we have until 10 August in which to respond, we now see the 10% cuts in remuneration across the board that was foreshadowed in the consultation paper and it will extend to the 2010 standard contracts. Legal help standard fee for housing will go down to £157 and I think we are all aware of the impact that is going to have for the not-for-profit sector and I think we need to consider how we can support any campaign that law centres and CABs are going to wage on that. Also, the level of enhancements that can be paid to solicitors will be limited to 100% per cases heard in the Upper Tribunal High Court, Court of Appeal and Supreme Court and 50% for all other proceedings. Barristers' rates are going to be codified and reduced by 10% and if one looks at the table in Schedule 7 I suspect that the 10% reduction for barristers is going to be applied to levels of remuneration which are less than are being paid at present.

Some reductions in fees have been deferred and everyone will be aware of the history of the family housing contracts and I do not know how many of our members hold those. Those have been extended until 30 November and they are then going to be further extended until, I think, next February and there is a consultation at present about what they are going to do in the interim. I think we are all aware, probably in October next year, the scope changes are going to be introduced after the primary legislation has been passed and the standard contracts and any housing family contracts are then likely to be determined. Those of our members who are happy enough to operate under CLACS or CLANS are not going to face a 10% reduction. Apparently the Government decided they could get into some contractual and legitimate expectation problems so they are backing off on that. I have already mentioned the effect on experts.

My personal view is that, as a legal profession, the chance of hitting the 10% reductions head on has not got a chance of getting anywhere but I do think that there is a community campaign from the not-for-profit sector. What I do think we probably need to do is to look at the detail and try and do some fine tuning, particularly with regard to experts' fees and anywhere else where we think we can make some limited headway. What I have done is a short paper which I have circulated to the Executive Committee and in the light of any comments today I will put it on the website and then perhaps we can generate a discussion as to what we can do through the consultation period, but time is very tight.

David Watkinson, Garden Court Chambers: In fact I hope our Chair is going to talk about the Legal Aid Bill but I do have a report on law reform and also an information request as well information to give. The request is on behalf of Beatrice Prevatt who writes the disrepair column in Legal Action and it is for your notes of your disrepair cases over the past years. Her time of writing is coming up so could you please send those to her at Garden Court Chambers, beatricep@gclaw.co.uk

Yesterday in the High Court in a case called **JL v Defence Estates** the Deputy High Court Judge gave permission to appeal in a case which raises the issue as to whether the proportionality test applies at the point of enforcement of a possession order as well as when a possession order is actually made. We know about the position when the possession order is actually being made but there has been no clear holding so far as to the enforcement stage. It is a High Court writ to enforce a possession order which is in question here. The case of **JL v Defence Estates** you will find in the current Legal Action at its European Court stage, because it is one of those cases which have been outstanding following **K v UK**.

The second case I am going to mention is called **Christina Sharples v Places for Homes Ltd** and the neutral citation for this EWCA2011CIV813, it is the Court of Appeal 15 July. I mention it because it concerns the effect of bankruptcy orders and debt relief orders on rent arrears cases. It has come up for discussion here as whether, when there are one or other of those orders in force, that puts a limit on the landlord claiming possession on the grounds of rent arrears because the rent cannot be recovered by the creditor landlord and, particularly during the moratorium period of the debt relief order. Well, I am afraid that case decides that there is no such limit on the landlord bringing possession proceedings on the grounds of rent arrears during the currency of bankruptcy orders or debt relief orders. That is because of the possession claim is not related to the debt; it is as required by the Insolvency Act. Instead it is related to the landlord's assertion of his right to possession. There are great minds at work there in the Court of Appeal.

So, I come on to pending legislation now and there is another consultation paper about trespass and squatting. It is issued by the Ministry of Justice, it called Options for Dealing with Squatting and the consultation period is from 13 July to 5 October. The options, as you might have guessed, run from doing nothing to introducing a full criminal trespass offence in relation to buildings and that would affect not only residential squatters but also protesters occupying university, college, factory premises and so on. So that is something to respond to.

Next, the committee stage of the Localism Bill is finishing today and then goes on to the report stage on 5 September. However, as of yesterday, the House of Lords committee had not yet reached the housing provisions of the Localism Bill, although they had reached Amendment 166, v, v. Now, amendments to come include the Government's proposals on tenancy deposits so what they are going to do is to extend the landlord's time for compliance to thirty days, to have a three times deposit penalty, but that will be at the discretion of the court rather than mandatory, and there will be a range of one by the amount of the deposit to a three by the amount of the deposit penalty. That will continue after the tenancy has terminated so that is a limited restoration position as it was before the recent cases of **Tensia** and the other. There is also an amendment in relation to ground 8 to provide for a discretion in the court not to make a possession order where the arrears have arisen because of Housing Benefit delays. In addition, drafted by the Tenants Disrepair LAG book team and accepted by the Liberal peers, a whole raft of amendments in relation to repair and those include extending the unfitness for human habitation implied term to all tenancies of less than seven years and to introducing responsibilities on landlords for keeping in repair and condition furniture, fixtures and fittings, ventilators and so on. So it will be interesting to see how those fare. Finally, there is an amendment which has been proposed by HLPA and accepted by the Liberal peers for putting down to extend the powers to suspend possession orders under Section 89 of the Housing Act so that the court can extend as it considers it proportionate to do so and not just be limited to the six weeks. So that is where we are on the Localism Bill and I hope to pass over to somebody else on the Legal Aid Bill.

Vivien Gambling, Lambeth Law Centre and Chair of HLPA: What we are trying to do at the moment is lobby the Ministry of Justice, obviously they are not going to decide to change the Bill because that is not within their remit but this is looking forward. As well as the Bill itself which contains the bare bones there will have to be some flesh on that so the point of meeting the Ministry of Justice is to try and flesh out what they really intend to be covered. I went to one meeting which was not just about housing; it was various practitioner groups and I think the main positive thing that came out of that, which is maybe clutching at straws, but talking about the telephone gateway which I think is one of the most pernicious aspects of the whole proposals, there is actually no proposed date for that to be introduced for housing. Initially it is intended to come in for quite small areas, one of those being community care so all those clients with mental health problems trying to access community care services are expected to do so through the telephone gateway. Again, I think a useful thing that came out of that is that the Government has backed down on unlawful eviction but I think because they do not really have a practical grasp of what actually goes on in these cases. Trespass to goods which, obviously, often goes hand in hand when somebody is unlawfully evicted, is not in scope of the Legal Aid Bill so we are trying to arrange a meeting specifically on housing where hopefully we will highlight and focus on that issue among others. Also at present legal aid is going to obviously cover defending possession proceedings but housing benefit is out of scope so let us have a discussion really to persuade them that in defending possession proceedings it would be absolutely ludicrous if you could not deal with the housing benefit issue or possibly other benefit issues if that is actually the main reason for rent arrears.

I think in terms of HLPA launching a campaign on its own, I do not think that is really practical, given our limited resources. I, and possibly James Harrison, will be attending the meeting at the Ministry of Justice. There is also a meeting at the Law Society on 1 August, the main purpose of which, I think, is for people to share ideas about lobbying on the Legal Aid Bill and also to discuss tactics about drafting amendments on the Bill and really having a common cause insofar as there are common issues. For example, telephone gateway being one of those and just general issues. I think there is still a proposal in there about taking a percentage of clients' damages and recovering that for the legal aid fund. So there are quite a lot of common issues and still quite worrying issues.

In terms of the Bill itself, I will run just through issues that I have noticed myself specifically on the scope of housing. I have issues with the actual wording because it does not talk in terms of defending possession proceedings; it talks about the services provided to an individual in relation to court orders for serving possession of the individual's home. It is talking about court orders and eviction as opposed to advising at the start and the point there that tenants actually need help. I think from everything that the Ministry of Justice says, they do intend that advice can be given once the threat of possession proceedings is made but it is just extraordinary to look at the Bill because you just do not get that from the Bill itself so I think we are going to have to draft amendments to make that absolutely clear. Another incredible gap is that it does not refer at all to disrepair counter-claims and yet we hear in the Government's response that they are intended to be within the scope of the Bill, so that is another big issue. In relation to disrepair, as people know, it talks about serious hazards that are likely to cause serious harm and my concern is that it does not refer to claims for compensation so is there a risk that once the hazard has gone are you allowed to continue those proceedings? I am sure the intention is that you are but these are the kinds of areas that we need to think about. On the definition, the sort of high threshold for disrepair, risk of serious harm, I would like to hear from people who do CFA cases because on this question I think the Government will say that CFA funding is available for disrepair cases; that is one of the rationale for setting the threshold so high or possibly one of their reasons. I think it would help us in our arguments to say that there are very significant disrepair cases in cases which have not quite reached the level of causing serious harm to the tenant so it is not necessarily a risk. I think that is causing serious harm and it would be useful to have evidence or information about the types of cases that will not be taken on CFAs. I do not do CFAs at the moment so I do not have that information available.

In some of the discussions in some of the Government's response to this I have noticed that it almost seems as if there a wish to divide private practice solicitors doing legal aid work from not-for-profit agencies. They are now talking about looking at the effect of the proposals on the not-for-profit sector and I think it is important that we and other practitioner organisations get across that it is as important for private practice solicitors to remain in force. There is no way that the not-for-profit sector can do all the cases that are out there and I think it is something that we need to be alert to.

On the question of experts, I think this is a very, very important issue. Obviously we can ask the experts that we know if they would be prepared to do a report for £225 and count up the negative

answers to that question. I do wonder about asking the Ministry of Justice where are the experts that will do reports for £225 because I have not come across them. That might be a slightly risky strategy if they come up with a whole list of experts that are willing to do the work for that. But it does seem it is not really viable to do it. Any ideas on how to tackle any of this would be welcome. What we need to do is to come up with amendments to the Bill within the next two weeks and if anyone is willing to be on a working group to look at the detail of that then I would be delighted to hear from them.

Chair: Thank you very much, Viv, I know you have put a lot of work into that. It reminds me a little bit of the Pastor Demola poem. At first they came for the personal injury lawyers but I did not speak out because I was not a personal injury lawyer then they came for the criminal legal aid lawyers and I did not speak out because I was not a criminal legal aid lawyer and then they came for the family legal aid lawyers and I did not speak out because I was not a family legal aid lawyer and then they came for me and there was no-one left to speak out for me. I do think there is a very strong argument that we should see the wider picture of what is going on with legal aid, with cuts in general and that there should be a larger campaign against them. Unless there are any other contributions from anyone else on the floor, I would like to wind up the meeting now. It just remains for me to thank our contributors and in particular our speakers tonight and remind you that our next meeting will be held on 21 September on the topic of Homelessness and Allocations.

Housing Law Practitioners Association

Bringing Disrepair Claims: Who? When? What? and Why?

July 2011

Paper produced and presented by Michael Paget Barrister of Garden Court Chambers

Not to be re-produced in whole or part without permission – 20.07.11

Bringing Disrepair Claims

July 2011

Overview

1. This paper is aimed at providing a summary of the essential legal limbs needed to pursue a claim for disrepair. Timothy's paper focuses on the 'How?' question.

2. On 21 January 2010 the National Audit Office published a report on the Decent Homes Programme which indicates that 100% decency will not be achieved until 2018/19 and that 305,000 social sector homes are still non-decent. So there is probably still a lot of disrepair about!

Who?

Must be brought by the tenant

3. Continuity applications. Only the tenant can rely on the tenancy agreement or section 11. The provisions of section 299 and schedule 11 of the Housing and Regeneration Act 2008 mean that tolerated trespassers now have replacement tenancies, but can only bring disrepair claims for the period when they were tolerated trespassers if the replacement tenancy is treated as, in effect, the revival of the original tenancy pursuant to s21(3) Schedule 11 HRA 2008 which states:

   'In proceedings on a relevant claim, the court concerned may order that the new tenancy and the original tenancy are to be treated for the purposes of the claim as the same tenancy, and a tenancy which continued uninterrupted throughout the termination period.'

4. How should the court exercise this discretion? In ***Lewisham LBC v Litchmore Legal Action Dec 09 p21*** the tenant had been a tolerated trespasser following the breach of an earlier suspended possession order. The level of arrears on the rent/mesne profit account had vacillated between £2500 odd and £100 credit over a six year period. It was anticipated that a disrepair claim for the full period would exceed the current rent arrears. Fresh possession proceedings were brought by the Council and the tenant brought a disrepair counterclaim. The Council did not challenge the tenant's status or right to bring a counterclaim before 20 May 2009 and thereafter he had a replacement tenancy. The tenant subsequently made a continuity application.

Not to be re-produced in whole or part without permission – 20.07.11

The Council opposed the application and the tenant argued that:

- There had been no reduction in the charge for mesne profits,
- The Council had acted as if it was bound by the original repairing obligations throughout.
- That to refuse the application would amount to a double penalty and be a breach of Article 6 where the current rent arrears was an admitted debt which could be enforced by the Council against him.

5. The Court (at District Judge level) allowed the revival application.

6. But in ***Chase v Islington LBC Legal Action October 2010*** a different approach was taken. Ms C had been a tolerated trespasser from about Feb 2001 following possession proceedings for rent arrears. In 2010, she brought a claim for disrepair and for specific performance, with a continuity application.

7. At the application hearing, HHJ John Mitchell set out principles for considering such applications:

   i) The burden of showing that the discretion under Schedule 11 should be exercised rests on the tenant.

   ii) The aim of the Court is produce a result which is fair to both parties

   iii) The discretion should be exercised having regard to all the circumstances of the case including any benefit or prejudice to the parties in granting or refusing the application

   iv) Regard should be had to the extent to which the parties believed or treated the original tenancy as having continued during the period of tolerated trespass, including the extent to which either party acted to their detriment.

   v) It would be unjust to refuse relief to a tenant in technical breach of a suspended possession order by missing a payment by a day but who thereafter for a number of years complied with the terms of the tenancy and discharged the arrears

   vi) It would be unjust to grant relief where the landlord allowed a vulnerable occupant to occupy the premises as a matter of grace for a

Not to be re-produced in whole or part without permission – 20.07.11

limited period while s/he was attempting to find alternative accommodation but failing to make any payments on account of the occupation.

vii) The importance of granting or refusing relief to the parties should be considered.

viii) Regard should be had to the amount and merits of the claim.

ix) If the costs of defending the claim would be out of proportion to the amount claimed, or if the merits were slight, it may be unfair to allow the claim to proceed.

x) There is a need to avoid protracted satellite litigation

xi) The Court can impose conditions on the grant of relief, for example, by limiting the amount of damages which can be recovered.

8. The application was allowed. However, the arrears remained high throughout, although reduced by £1000. It was therefore fair to limit the claim for damages to the amount of the arrears outstanding at 20 May 2009.

9. It is not clear why all these principles should apply. Why should the court be allowed to limit the damages in the disrepair claim? This decision is very unhelpful for replacement tenants.

10. All tolerated trespassers obtain a replacement tenancy in any event regardless of their payment history. The old test in ***Lambeth v Rogers [2000] 32 HLR 361*** has arguably now been superseded. A LA can resist a continuity application because compensation has already been paid or perhaps use and occupation charges were reduced but I don't think it should be able to because of the payment history.

11. The LA has the original money judgment and has other remedies to recover rent monies. And there will be a set-off. The applicant's legitimate claim should not be shut out on the basis of the rent arrears, nor should restrictive conditions be applied. This would, arguably, amount to a breach of Article 6.

Other Claims for Occupiers

12. Section 11 LTA 1985 cannot be used for improvement works. Perhaps the Equality Act 2010 can be used by certain tenants to get their landlords to do more? ***Beedles v Guinness Northern Counties 2011 EWCA Civ 442***

Not to be re-produced in whole or part without permission – 20.07.11

considered a disability discrimination claim under s.24C Disability Discrimination Act 1995 (now Equality Act 2010 ss20-22, 38 and Schedule 4) for a failure to make reasonable adjustments. It was part of the tenancy agreement that the tenant keep the property in good decorative order. The landlord agreed to waive this obligation but the tenant asked for the landlord to undertake the decorative work as a reasonable adjustment. That part of the claim was not allowed as the condition of the premises had not degraded to such an extent as to interfere with their ordinary use and hence his enjoyment.

13. A private nuisance occurs when something escapes from neighbouring land and unreasonably affects the use and enjoyment of the legal occupier of land. It does not extend to visitors – see ***Hunter v Canary Wharf Ltd (1997) AC 655***. An action in nuisance cannot be brought for the ordinary usage of land – see ***Southwark LBC v Mills (2001) 1 AC 1*** – it must be an unreasonable use.

14. In ***Jackson v JH Watson Property Investment Ltd [2008] EWHC 14 (Ch) LAG Dec 2008 p31*** (dealt with in greater detail by Stephen Evans at the HLPA talk 'Disrepair in a cold climate' last year) the Court considered the meaning of covenant to 'well and substantially repair and maintain the exterior of the estate and all structural parts thereof' and whether that covenant was sufficient to require landlord to remedy disrepair existing before the grant of the covenant. A long leaseholder claimed that his landlord was liable in nuisance for water penetration to his flat. The water penetration was caused by the defective laying of concrete to the light wells that adjoined the tenant's flat which were in the control of the landlord. The defective workmanship had occurred when the building was converted into flats, by the landlord's predecessor in title, which was sometime before the commencement of the tenant's lease. The tenant had carried out remedial works and sought to recover the costs of these works and damages from his landlord. He argued that there was a continuing nuisance, which although not caused by the landlord, was adopted by his landlord when he bought the building and that the landlord was responsible for a failure to take reasonable steps to abate it.

15. The claim was dismissed. There was no breach of any repairing obligations as there had been no deterioration in the state of the premises since the commencement of the lease and there was no obligation to keep the structure in good repair going beyond the ordinary obligation to repair. The court also held that there was no liability in nuisance as the principle of caveat lessee applied, ***Southwark LBC v Mills [2001] 1 AC HL***. The tenant took the demised premises as they were and could not complain about any pre-existing defect. The court distinguished the case of ***Sedleigh–Denfield v O'Callaghan 1940 AC 880 HL*** relied upon by the tenant (where a landlord was held to have adopted a nuisance) as in that case the nuisance had been

Not to be re-produced in whole or part without permission – 20.07.11

created after the commencement of the tenancy with the result that that principle of caveat lessee did not apply. The tenant could not rely upon the law of nuisance to impose an obligation to put right faulty construction work by his landlord's predecessor in title.

16. It can sometimes be pretty difficult to distinguish between a defect and disrepair.

Who is the right Landlord?

17. If the landlord has changed then the tenant cannot counterclaim for compensation during an earlier period. However if earlier arrears have been assigned to the new landlord the tenant can seek a set-off for earlier disrepair – ***Edlington Properties Ltd v Fenner & Co [2006] EWCA Civ 403***. and ***Smith v Muscat (2003) 1 WLR 2853***

When?

18. If faced with a Ground 8 claim - ***North British Housing Association v Matthews [2004] EWCA Civ 1736***. If there is an arguable claim for damages on a counterclaim which will go to set off the rent arrears then the claim can be adjourned. What amounts to an arguable claim? Not much.

19. Disrepair can be brought either as a counterclaim to a possession claim or after the possession claim has finished. In ***Henley v Bloom [2010] EWCA Civ 202*** the Court of Appeal held that a bringing a claim for disrepair after earlier possession proceedings had been settled did not amount to abuse of process.

20. Mr H was the tenant of a basement flat since about 1986. Ms B was the landlord from about 2001, when she acquired the freehold of the property, later just retaining a lease of the basement flat. In October 2002, Brighton Council served notices stating that it was minded to serve formal notice requiring repairs, including defective pipes, brickwork and plaster, windows and doors on Mrs B. In November 2002 formal notice was served. In February 2003 Mrs B obtained a builders survey which highlighted penetrative damp and defective plaster work. No works were done. In September 2006, Mrs B obtained another builder's survey, showing similar problems.

21. Meanwhile, in August 2006, Mrs B had begun possession proceedings against Mr H on the grounds that the tenancy was an AST which had been duly terminated. Mr H defended on the basis that he was a regulated tenant under the Rent Act 1977 and there were no grounds for possession under that

Not to be re-produced in whole or part without permission – 20.07.11

Act. Alternatively, it was a shorthold tenancy, no notice had been served under s.52 Housing Act 1980, and it was not just and equitable to dispense with notice.

22. The possession claim was settled in January 2007 on terms that Mr H would vacate by 1 June 2007 and Mrs B would pay him £16,000 and £4,000 costs. In the recital to the consent order it stated that this was full and final settlement of any claim Mr H might have arising out of improvements he had carried out at the flat, and that Mr H was to leave the flat in a good and tenantable condition when he vacated.

23. Mr H left on 1 May 2007, but before he did, he obtained an expert report from an environmental health officer on the condition of the property, showing extensive disrepair.

24. Mrs B refurbished the flat in July 2007, receiving a report from the builders on damp penetration and other issues. Soon afterwards, Mr H raised his disrepair claim with Mrs B and the claim was issued in November 2008.

25. Mrs B defended on the basis that the claim was an abuse of process and that a fair trial was impossible. Mrs B applied for a strike out on that basis. She also counterclaimed for untenant-like behaviour and breach of the agreement to deliver up in tenantable condition.

26. The first instance DJ granted the strike out. He held:

that there was no good reason for Mr Henley not having raised the disrepair claim during the course of the possession claim and that he "was not putting his cards on the table" during the negotiations which settled that claim. He said that the disrepair claim "ought to have been brought in the earlier proceedings", and was "eminently capable of being settled in those proceedings".

27. Accordingly, he concluded, the claim was an abuse of process. He also concluded that it would be impossible to have a fair trial as Mrs Bloom was "now in a position in which she cannot instruct an expert to inspect the alleged defects in the flat.

28. Mr H appealed to the Circuit Judge. The CJ dismissed the appeal. He relied on the fact that "the state of the property was raised in the possession proceedings and in the negotiations that led to the consent order", and also on the fact that "the tenant agreed that he would deliver up the property in good condition". Accordingly, as the condition of the flat was raised both in the

Not to be re-produced in whole or part without permission – 20.07.11

argument contained in the pleadings and in the agreed terms contained in the consent order, he concluded that it was an abuse of process to raise a subsequent claim for damages for disrepair of the flat. As to the fair trial issue, Judge Simpkiss said that Mrs Bloom "would be fighting the case with one hand behind her back" and that the unfairness "had been caused entirely" by Mr Henley.

29. On appeal Mr H argued that he could not have brought the disrepair claim until he had an expert's report because although there was penetrating dampness and damp plasterwork he did not know the cause and hence whether there was any disrepair (see below). And arguably there would only be disrepair if there was a damp prevention system that had failed.

30. The Court of Appeal, after reviewing the precedent cases (***Johnson v Gore Wood & Co (a firm) [2002] 2 AC 1, Stuart v Goldberg Linde (a firm) [2008] 1 WLR 823***) and noting that it would be "wrong to hold that because a matter could have been raised in earlier proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive" (Lord Bingham in Johnson), and the Art 6 entitlement to access to justice for an arguable case, the Court of Appeal found that Mr H's disrepair claim was not an abuse of process. Mr H could indeed have raised the claim in the possession proceedings (no problem about cause of action for the Court of Appeal), but the issue was whether he should have. The Court held:

    i) the possession proceedings did not involve the question of whether the flat was out of repair. The provisions in the consent order related solely to Mr H's improvements to the flat and/or his obligation on the condition of the flat at the end of the tenancy. it did not touch on Mrs B's obligations.
    ii) If the possession claim had gone to trial, whether Mrs B had won or lost, there would be no question that a subsequent disrepair claim by Mr H would not have been an abuse of process. It was therefore only the 'integrity of the consent order' that was at issue. But that order was clear on its terms and it was, of course, open to Mrs B to introduce terms on disrepair at that time. Given the factual history it could not be said that she was unaware of the possibility of such a claim and it was as much up to her to raise it in the possession proceedings as Mr H.

31. The bringing of the claim was not an abuse of process. If at trial the court was unhappy about the manner in which the claim had been brought, it was open to deal with that in costs.

32. On the fair trial issue, it was clearly possible for there to be a fair trial. While Mrs B could no longer obtain an expert report on the condition of the property

Not to be re-produced in whole or part without permission – 20.07.11

at the relevant time, she had an abundance of material relating to the condition of the property between 2001 when she purchased it to July 2007 when the builders conducting the refurbishment reported to her.

33. Mr H may have been underhand in keeping the disrepair claim up his sleeve, but it was not abuse to do so. The disrepair claim was subsequent settled in Mr H's favour with no penalty or discounting in costs for his approach to the collective litigation.

34. Once for the same problems. In ***Onwuama v Ealing LBC [2008] EWHC 1704 (QB) LAG Dec 2008 p30*** a council tenant had brought a claim for damages for disrepair in 2005. The main problem was dampness in her home. She did not have legal representation or expert evidence. Her claim was dismissed. The judge found that there was no evidence of rising dampness or structural problems and that the likely cause of the dampness was condensation. In 2007, the tenant issued a second claim, relying upon expert evidence to show that the dampness had a structural origin, namely the absence of a damp proof membrane in the floor. The claim was dismissed on the basis that it was "estopped per rem judicatam" i.e. the same issue had already been raised and decided by another court. The tenant argued that the principle of res judicata should not apply to section 11 Landlord and Tenant Act 1985 as it imposed a continuing duty to keep the premises in repair and to apply the principle would frustrate the will of parliament.

35. The High Court dismissed the tenant's appeal. It was clear that the tenant was seeking to claim in the second action in relation to the same damp of which she had complained in the first action. If there had been some new type of dampness or new cause of dampness asserted, a fresh claim might have been brought, but the tenant could not allege that the cause of the dampness which was the subject of complaint in the first action was other than as found by the judge. The tenant could not circumvent the pre-existing judicial decision as to the cause of the same and continuing dampness.

What?

36. Look at the original tenancy agreement to identify who has responsibility for the condition of the property. These sometimes impose obligations on the landlord going well beyond any statutorily implied minimum terms. For example:

Welsh v Greenwich LBC (2001) 33 HLR 438, CA – express obligation to keep the property 'in good condition'

Not to be re-produced in whole or part without permission – 20.07.11

Long v Southwark LBC (2002) 34 HLR 983, CA – express obligation to keep the estate and common parts 'clean and tidy'.

37. Must ensure that the parties are governed by the original contract or that it has been properly varied pursuant to Housing Act 1985 s.103.

38. There is usually an implied term by common law that there is an obligation to keep in repair paths or steps giving access to the property even when they are beyond the exterior of the property – ***King v South Northants DC (1991) 24 HLR 284***.

39. Similarly there will be an implied term by common law an obligation that the landlord will take reasonable care to maintain the common parts, communal lighting, lifts, rubbish chutes etc – ***Liverpool CC v Irvin [1977] AC 239***.

40. There are often implied terms that the tenant will enjoy quiet enjoyment and that there is to be non-derogation from that grant.

41. In ***Islington LBC v Keane Legal Action December 2005 p 28*** a disrepair counterclaim was brought because the tenant had been left without a cold water supply from his kitchen tap for a number of years. This had most probably been caused by a defective washer. The Council resisted first, on the basis that the tenant was obliged under the tenancy agreement to replace tap washers and secondly, on the ground that the defect was not covered under s.11(1)(b) LTA 1985 to keep in repair and proper working order the installations in the dwelling house for the supply of water. This was rejected. The washer is part of the tap and is concerned with the water supply and is thus covered by s.11(1)(b). Accordingly because it is covered by s.11(1)(b) it could not be excluded by the tenancy agreement – Unfair Terms in Consumer Contracts Regulations 1999 (S.I. 1999/2083).

Statutory Obligation

42. The most important implied terms are statutory. The most extensive are contained in Landlord and Tenant Act 1985 s.11. Where section 11 applies the landlord will be liable to keep in repair:

- The structure and exterior of the dwelling let, and also

- (If the tenancy was granted after 15.1.1989) the structure and exterior of the building containing the dwelling.

Not to be re-produced in whole or part without permission – 20.07.11

- The relevant installations in the dwelling let, and also

- (If the tenancy was granted after 15.1.1989) the relevant installations directly or indirectly serving the dwelling.

43. If the defect is within the premises let, the statutory terms are construed as putting the landlord in breach only when:

- The landlord has had knowledge sufficient to put a reasonable landlord on enquiry as to the need for remedial works, and

- A reasonable opportunity to do the works has passed. An action for damages arises if, after having been given notice of disrepair if it is internal, the landlord does not effect repairs within a reasonable time - ***British Telecommunications plc v Sun Life Assurance [1996] CH 69, CA.***

44. There is no need to show knowledge nor allow a reasonable period if the defect is outside the demised dwelling – ***Passley v Wandsworth LBC (1998) 30 HLR 165, CA***.

45. There is no overriding principle that a property must be fit for habitation – see ***McNerny v Lambeth LBC (1988) 21 HLR 188 CA***. It is a term implied by common law that a house or flat let furnished must be fit for occupation at the date of the letting – see ***Wilson v Finch-Hatton (1877) 2 Ex.D 336***.

46. Improvements cannot be sought under s.11 – see ***Wainwright v Leeds City Council (1984) 13 HLR 117*** where the Court refused to order the Landlord to install a damp proof course but, on the other hand, any repair works must comply with current building regulations. And replacements must be on at least a like-for-like basis – see ***Bilgili v PCHA [2010] EWCA Civ 1341*** (failed permission hearing) replacement windows needed to include replacement extractor fan.

47. Small defects, for example minor plaster cracking, which would be expected in a property of a certain age, its character and the local area, are not serious enough to amount to disrepair – see ***Plough Investments Ltd v Manchester CC [1989] 1 EGLR 244***.

Where does the structure stop?

48. The main structure of a building can include the floor joists of a tenant's

Not to be re-produced in whole or part without permission – 20.07.11

property even though they are only benefiting one unit in the block – ***Marlborough Park Services v Rowe and another [2006] EWCA Civ 436***.

49. In ***Grand v Gill [2011] EWCA Civ 554 (19 May 2011)*** the Court of Appeal finally considered whether or not plasterwork should be considered part of the structure of a property.

50. This was an appeal by the tenant Ms Grand against the trial judgment award of £5,600 general damages for disrepair and breach of quiet enjoyment against the landlord, Mr Gill.

51. Ms Grand was the assured shorthold tenant of the property, a 2 bed flat and she lived there with her daughter. A 12 month AST began in November 2004. The rent was £850 per month (£10,200 per annum). The main issue with the flat was damp and mould throughout the flat. It became so bad in the second bedroom that the daughter had to move into the living room.

52. There was water ingress through the ceiling from a leaking roof above the flat and from defective guttering. However, Mr Gill was the lessee of the flat, the roof was outside the demise and the responsibility for the repair of the roof and gutter was found to lie with the head landlord. In addition, the boiler was defective. It did not work at all for 207 days between Nov 2004 and Nov 2007, when it was finally replaced. The rest of the time the heating was inadequate. A double glazed window had lost one layer of glass (smashed) and this had not been repaired.

53. An expert had also found defective plaster in two areas, to the external wall of the living room and the kitchen ceiling, both caused by the water penetration. At trial in May 2009, Ms Gill was awarded £350 damages for breach of quiet enjoyment. On the disrepair issues, the judge held that liability for the roof and guttering did not fall on Mr Gill. He found that the damp and mould was principally an issue of condensation, which was a consequence of a design fault and for which Mr Gill was not liable under ***Quick v Taff Ely BC [1986] QB 809.*** The condensation could be wiped off with a cloth and it did not cause the plasterwork underneath to be damp or mouldy.

54. However, he also held that the lack of proper (or any) heating for the 3 years 2004 to 2007 had contributed to the damp and mould by increasing the incidence of cold surfaces leading to condensation. He also held that the missing pane to the double glazed window had made a "small" contribution for about a year.

55. The following general damages were awarded: £1200 pa for the 3 years of lack of adequate heating due to the boiler. £700 was deducted from this in

Not to be re-produced in whole or part without permission – 20.07.11

respect of the 30 weeks covered by a separate award of £1750 for the period with no heating at all. So £2900 for defective heating for 2 years 22 weeks, and £1750 for no heating at all for 30 weeks. Totalling £4650. "Full liability" for the damp and mould would have resulted in £2000 pa (20% rental discount), but assessed on an exacerbation by the lack of heating and window of 10%, £600 awarded for the 3 years of the claim. The expert indicated that an area of defective plaster in the living room needed to be replaced but no specific performance was ordered, the judgment was silent on liability or damages for defective plaster.

56. Ms Grand appealed. The grounds of appeal included that the judge was wrong to award only 10% in respect if the damage caused by the damp, in that the application of ***Quick v Taff Ely*** was wrong, specifically in relation to defective plasterwork. She sought £5000 for the effect of the boiler problem on the condensation.

57. Ms Grand argued that the expert report identified two areas of defective plasterwork requiring replacement, in the living room and the kitchen. Although these had been caused by the roof leaks, for which Mr Gill was not liable, the defective plaster was a lack of repair under s.11 L&T Act 1985 for which he was responsible. The discount of 90% ignored Mr Gill's 100% of liability for the defective plaster and its consequences.

58. However, this would require plaster to form part of the 'structure' under s.11 LTA. In ***Quick v Taff Ely***, the defendant conceded plaster was part of the structure. In ***Irvine v Moran (1992) 24 HLR 1*** Mr Recorder Thayne Forbes QC had held that structure should be limited to 'those essential elements of the dwelling house which are material to its overall construction '. Internal wall plaster was 'in the nature of a decorative finish' so not structural. The definition of 'structure' in ***Irvine v Moran*** was approved in ***Marlborough Park Services Lyd v Rowe [2006] EWCA Civ 436***, but not the point on plaster.

59. In Rimer LJ's lead judgment, with which the others agreed:

'For myself, whilst I would accept and adopt Mr Recorder Thayne Forbes's observations as to the meaning of 'the structure … of the dwellinghouse' as providing for present purposes, as Neuberger LJ put it, a good working definition, I am respectfully unconvinced by his holding that the plaster finish to an internal wall or ceiling is to be regarded as in the nature of a decorative finish rather than as forming part of the 'structure'. In the days when lath and plaster ceiling and internal partition walls were more common than now, the plaster was, I should have thought, an essential part of the creation and shaping of the ceiling or partition wall, which serve to give a dwellinghouse its essential appearance and shape. I would also regard plasterwork generally,

Not to be re-produced in whole or part without permission – 20.07.11

including that applied to external walls, as being ordinarily in the nature of a smooth constructional finish to walls and ceilings, to which the decoration can then be applied, rather than a decorative finish in itself. I would therefore hold that it is part of the 'structure'. I would accordingly accept that the wall and ceiling plaster in Ms Grand's flat formed part of the 'structure' of the flat for the repair of which Mr Gill was responsible.' [paragraph 25]

60. Plaster is part of the appearance and shape of premises. It followed that Mr Gill was liable for the defective plasterwork and the Judge should have addressed this in damages. While Ms Grand's submissions that the whole of the 90% discount should be overturned were not accepted, full compensation for the two areas of defective plaster were 'with a broad brush' assessed at being £750 of the Judge's notional £6000. Thus the 90% discount applied to the remaining £5250. In place of the £600 awarded by the Judge, £1275 was awarded, increasing overall damages from £5600 to £6275.

61. Ms Grand appealed for an additional £4400 and was awarded an additional £675. Pursued on a pro bono basis but would have been difficult to justify on a costs benefit analysis.

62. So in a washing machine flooding case the tenant can bring a claim for special damages against the leaseholder upstairs for damage to her personal property and a disrepair claim against her landlord for plasterwork problems.

63. Would the outcome in ***Southwark LBC v McIntosh [2002] 08 EG 164*** (where the High Court overturned an award of £7500 compensation for serious dampness which had existed for 5 years because it was not alleged to have been caused by disrepair to the structure or exterior of the property) be different now? No. Dampness per se not enough, still need to plead disrepair to the structure but now that can include plasterwork. Pleading dampness and mould growth to the plasterwork now probably enough. (Furthermore it would be tenant default as she was drying clothes on the hot pipes and causing most of the condensation.)

64. What happens if the condensation, arising as a design fault, does cause the dampness in the plasterwork? Or if the tenant does not bother to wipe down the walls? Or if tenant causes condensation by failing to properly ventilate but where it could not be called a default? Can the landlord include a tenancy condition requiring a tenant to wipe down walls where there is a design fault in the premises? Or would that fall foul of the Consumer Regulations 1999? But requiring tenant to leave trickle vents open might not?

65. ***Grand*** may also help to inform the ongoing ***Herelle*** (condensation aggravation) litigation.

Not to be re-produced in whole or part without permission – 20.07.11

Why?

66. To get damages (general and special) and to order specific performance.

67. A remedy in contract is only normally available to the parties to it. If it is a joint tenancy, all or any of the joint tenant(s) may rely upon the contract. The normal remedy is specific performance plus damages for breach of compliance. The usual equitable conditions governing availability of relief by way of specific performance are disapplied by section 17 Landlord and Tenant Act 1985.

68. Damages for a long leaseholder are referable to the notional market rent – ***Earle v Charalambous [2006] EWCA Civ 1090***.

69. If an underlying defect is likely to cause the same disrepair over and over again then, unless the work involved is disproportionately extensive and/or costly, repairs to the underlying defect will be ordered. Patch repairs will not be adequate - see ***Elmcroft Developments Ltd v Tankersley-Sawyer (1984) 15 HLR 63***. 24.

70. Where the tenant is forced to do repair works these can be sought as special damages – see ***Brongard Ltd v Sowerby Legal Action May 2007 p 30.***

Remoteness of loss

71. In ***Ryan v Islington LBC [2009] EWCA Civ 578 LAG Dec 09 p 22*** (again analysed by Stephen Evans 'Disrepair in a Cold Climate') the Court of Appeal considered whether in a claim for disrepair a tenant could claim damages for a lost opportunity to exercise her right to buy by reason of her inability to get a mortgage because of disrepair to the property.

72. In 2003, a council tenant sought to buy her home which suffered from subsidence and required underpinning. The Council served 2 notices to complete and upon the expiry of the 2nd notice, treated the tenant's right to buy notice as withdrawn in January 2005. The tenant brought a claim for breach of the Council's repairing obligations. She was awarded damages and an agreed order for specific performance was made. The tenant also sought a declaration that she was still entitled to exercise her right to buy by way of performance of the terms of the offer in 2003 or alternatively that she was entitled to damages for the loss of the right to buy on the basis that the

Not to be re-produced in whole or part without permission – 20.07.11

Council's failure to remedy the subsidence prevented her from raising a mortgage to enable her to complete the purchase

73. The claims in respect of the right to buy failed at first instance and the tenant's appeal was dismissed. The Court of Appeal held that while the Council, as the proposing purchaser's landlord, was under a continuing obligation to discharge its repairing obligations under the purchaser's secure tenancy and the tenant would be able to compel the performance of those obligations, it did not follow that the tenant also had a right to insist that completion of the purchase be deferred until all works of repair and structural rectification have been carried out by the landlord. Accordingly the failure to repair was not an outstanding matter relating to the grant disentitling the Council from serving the second notice to complete.

74. However in ***Scinto v Newham LBC [2009] EWCA Civ 837*** a failure to repair was held to be an outstanding matter relating to the grant where Newham had agreed to suspend a right to buy application pending investigation of repairs as the parties had by their conduct agreed that this was the case.

75. The damages claim in ***Ryan*** failed on the facts but would have failed in any event as the loss was too remote. In assuming the repairing obligations in the secure tenancy the Council was clearly assuming an obligation to compensate the tenant for the kind of loss likely to be occasioned in the ordinary course to her as an occupying tenant in consequence of any failure to perform those obligations. However, the Council was not thereby also assuming an obligation to compensate a tenant in remote circumstances in which, because of its failure to perform its repairing obligations, a tenant was unable to complete a purchase under the right to buy provisions. Any such purchase was not in the contemplation of the parties when the secure tenancy was granted.

76. In assuming the repairing obligations in the secure tenancy the Council was clearly assuming an obligation to compensate the tenant for the kind of loss likely to be occasioned in the ordinary course to her as an occupying tenant in consequence of any failure to perform those obligations. However, the Council was not thereby also assuming an obligation to compensate a tenant in remote circumstances in which, because of its failure to perform its repairing obligations, a tenant was unable to complete a purchase under the right to buy provisions. Any such purchase was not in the contemplation of the parties when the secure tenancy was granted. The loss was too remote.

77. For recent quantum see Beatrice Prevatt's Legal Action updates.

Not to be re-produced in whole or part without permission – 20.07.11

Bringing Disrepair Claims

Getting Excellent Results

Timothy Waitt – Solicitor Advocate – Anthony Gold Solicitors

Introduction

1. Most housing lawyers consider disrepair claims are simple and boring and dull. They are to be tolerated. This paper attempts to challenge that perception.

2. The vast majority of cases brought by tenants include some disrepair – a leaking pipe, a rotten window, no heating. The vast majority can be won in the sense of making the landlord fix the problem and pay some compensation.

3. But can they be won better? Are there more issues for which the landlord can be held liable? Can more repairs be won? Can more compensation be won? Can the client's aims be achieved?

4. Can we get excellent results for our clients?

5. This paper first goes back to basics on disrepair to look at the key means of finding the landlord liable for the defect and then applies these principles to some of the tricky problems encountered in practice –leaks from the leaseholder upstairs, condensation and pests. Then we will take a brief look at enforcement issuce before turning to the funding challenges ahead..

Resources

6. I do not intend to discuss the basics of bringing a disrepair claim. The excellent Repairs textbook does this very well.

   - Repairs – Tenant's Rights (4th Edition) Jan Luba, Deirdre Forster & Beatrice Prevatt (LAG 2010)
   - The Housing Disrepair Pre-action Protocol for Disrepair Claims
   - Housing Law Encyclopaedia (loose leaf) Sweet & Maxwell
   - Woodfall
   - Nearly Legal
   - The Housing Act 2004 & Residential Lettings: A Practical Guide – Francis Davey & David Smith (RICS Books, 2008)

Elements of a "disrepair" claim

The Covenants to Repair…

7. You must be able to prove that the landlord is responsible for the repair before they can be liable. The starting point is the tenancy agreement, not **Section 11 Landlord & Tenant Act 1985**. Many tenancies go further than section 11, including for example kitchen units, plaster, door furniture, installations present at the start of the tenancy (e.g. vent systems), and so on. It is unlikely that the clause will extend to cover pure condensation dampness but unless you check you will not know.

Section 11 Landlord & Tenant Act 1985

Repairing obligations in short leases.

(1)In a lease to which this section applies (as to which, see sections 13 and 14) there is implied a covenant by the lessor—

(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.

(1A)If a lease to which this section applies is a lease of a dwelling-house which forms part only of a building, then, subject to subsection (1B), the covenant implied by subsection (1) shall have effect as if—

(a)the reference in paragraph (a) of that subsection to the dwelling-house included a reference to any part of the building in which the lessor has an estate or interest; and

(b)any reference in paragraphs (b) and (c) of that subsection to an installation in the dwelling-house included a reference to an installation which, directly or indirectly, serves the dwelling-house and which either—

(i)forms part of any part of a building in which the lessor has an estate or interest; or

(ii)is owned by the lessor or under his control.

(1B)Nothing in subsection (1A) shall be construed as requiring the lessor to carry out any works or repairs unless the disrepair (or failure to maintain in working order) is such as to affect the lessee's enjoyment of the dwelling-house or of any common parts, as defined in section 60(1) of the Landlord and Tenant Act **M1**1987, which the lessee, as such, is entitled to use.]

8. Covers short residential leases of 7 years or less (section 13 L&T 1985).

9. This is the key tool in the tenant's armoury but it is not the only tool and this should be remembered.

10. Note the limits of section 11. It covers the structure and exterior of the dwelling and that held the rest of the building which is held by the landlord. It covers the installations for supply of water and electricity to the dwelling. It does not cover:

- (Pre the amendments) The structure of the building or installations for the supply of water, gas, electricity and heating outside of the dwelling.
- Other flats

- Installations for the supply of gas, water, electricity and heating which do not direction serve the dwelling.

11. But does it cover wired in devices such as extractor fans? There are tricky arguments of whether they are installations… If not they might be part of the structure or exterior…e.g. ventilation systems – arguable – go through the walls and thus part of structure?

Section 4 Defective Premises Act

Landlord's duty of care in virtue of obligation or right to repair premises demised.

(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)For the purposes of this section obligations imposed or rights given by any enactment in virtue of a tenancy shall be treated as imposed or given by the tenancy.

(6)This section applies to a right of occupation given by contract or any enactment and not amounting to a tenancy as if the right were a tenancy, and "tenancy" and cognate expressions shall be construed accordingly.

12. This provision provides a basis for a tenant or anyone reasonably expected to be affected by defects, to claim Personal Injury or damage to property (but not general damages for disrepair) where the landlords' fails in the duty of care set out above. It applies to all residential leases.

13. In addition sub-section (4) places an obligation on a landlord to *repair* something outside of the ordinary repairing covenants if it raises the risk of personal injury or damage to property. It can be used proactively to get the repairs before the injury or damage occurs (**Barrett v Lounova (1982) Ltd [1990] 1 QB 348, CA**.

14. It does depend on a power to enter and carry out maintenance or repair. As a result it will apply to most leaseholders and tenants. The court of appeal held in **McAuley v Bristol CC (1991) 23 HLR 586** that a landlord of a council house let on a periodic tenancy had an implied right to enter and carry out any work of repair which were necessary to remove a significant risk of personal injury.

Notified to the landlord…

15. Generally an unqualified repairing covenant does not require notice to the landlord. In **British Telecommunications v Sun Life Assurance PLC (1996) CH 69 CA**. In that case the landlord was found to be liable for defects to cladding to a building as soon as the defect appeared. Lord Justice Nourse stated:

    The general rule is that a covenant to keep premises in repair obliges the covenantor to keep them in repair at all times, so that there is a breach of the obligation immediately a defect occurs. ***There is an exception where the obligation is the landlord's and the defect occurs in the demised premises themselves, in which case he is in breach of his obligation only when he has information about the existence of the defect such as would put a reasonable landlord on enquiry as to whether works of repair are needed*** *and he has failed to carry out the necessary works with reasonable expedition thereafter.*

Do <u>you</u> need to give notice?

16. We are not interested in formal notice – only the landlord having the requisite knowledge of need for repair. Thus notice by friends, relations or even an unrelated inspection by the Environmental Health Officer, a housing officer or another third party: **Sheldon v West Bromwich Corporation (1973) 13 HLR 23 CA** and **Dinefwr BC v Jones (1987) 19 HLR 44 CA**.

17. Section 4 DPA provides that notice is imputed where the landlord should reasonably have known about the issue. This includes failure to undertake pre-let inspection (**smith v Bradford MC (1982) 4 HLR 86 CA**) and failure to carry out a gas safety check (**Sykes v Harry [2001] EWCA Civ 167**). In **Morsley v Knowsley BC May 1988 Legal Action 22, CA,** the court expects landlords to inspect for latent defects when the landlord is aware that a problem might exist, but not inspect for unforeseeable dangers.

When is Notice not Required

18. Remember that the requirement for notice in relation to defects within the demise is an exception to the general rule. It is not the rule. Thus notice is not required if the defect is outside of the demise.

Proving Notice

19. It is essential to ensure that you get proper disclosure from the opponent if notice is not adequately admitted. This means the repair records, the correspondence housing

file, records of all relevant inspections, relevant records for the block and neighbouring properties. If need be you can bring an application for pre-action disclosure. Generally better to bring the application during proceedings because you can then get sanctions on the claim.

20. Ultimately in most cases you get the liability to repair (but see below) by proving noticed based on your letter of claim, if nothing else.

…and not repaired within a reasonable time thereafter

21. There is no liability until the defect has been reported and repairs have not been carried out within a reasonable time. **Schedule 1 to the Secure Tenants of local Housing Authorities (Right to Repair) Regulations 1994** gives some guidance. So often do tenants handbooks or the tenancy. Expert evidence will be needed. Temporary repairs pending permanent repairs may be acceptable.

Should the landlord always be allowed a reasonable time for repairs?

22. The section 11 repairing covenant is absolute – to “keep” in repair. Thus, but for the notice provision the covenant is breached as soon as the property is not in repair. So if there is no notice requirement, then there is no reasonable time to carry out repairs (see BT above).

Damages

23. If the landlord has not breached the obligation until notified of the repairs and failed to carry out the work, there is no claim until the reasonable time for works has passed. Thus the tenant will lose the first weeks or months of the claim depending on what this reasonable time is. Landlords will use this to reduce damages and the claim.

24. If the landlord has still not carried out the works then the landlord is in breach until the works are completed. So don’t allow a reduction in damages at the start of the claim for the reasonable time to do the works before there is a breach and then a *double discount* at the end when post settlement the landlord has their reasonable to complete repairs. Argue for no discount but damages up to the date of the settlement because you are then giving a reasonable time to complete repairs.

25. Of course where notice is not required, the landlord is in breach at once and damages start to run at once. On this basis damages run until the actual repair so argue for more money.

Quantum

26. We are all well aware of the “Unofficial Tariff” of damages for disrepair as discussed in the case of **Wallace v Manchester**. But in **English Churches Housing Group v Shine [2004] EWCA Civ 434; [2004] HLR 42** the Court of Appeal made clear that damages in a disrepair claim such as this should be linked to the rent.

27. *Shine* confirms that generally damages awards for contractual disrepair should not exceed the rent due. But it also states that this "limit" can be exceeded:

    "…we take the view that…if the award of damages for stress and inconvenience arising from a landlord's breach of the implied covenant to repair is to exceed the level of rent payable, clear reasons need to be given by the court for taking that course, and the facts of the case – notably the conduct of the landlord – must warrant such an award."

28. There is little authority to clarify how these figures should be calculated. Almost none of the reported cases give any indication of the rent. Old cases from which a percentage reduction figure can be obtained are of limited help because there was no fear in going over the "normal" 100% of rent limit from **Shine** – see for example **Walker v Andrews (1997)***(***Housing Law Encylclopedia***)* where £1,200 general damages was awarded plus £850.00 being 6/7 of the rent, giving a total award of some 221% of the rent!

29. Such help as there is in reported cases indicates awards above 50% are the norm. The higher courts decisions on damages give the following guidance:

    In **Wallace** the relatively minor disrepair was:
    - Rotten windows, leaving the living room cold even though heated.
    - Defective damp proof course causing mould behind an item of furniture
    - Plaster and skirting's are falling off and loose to bedrooms
    - External defects having limited effects on the use of the premises

    The tenant was awarded some 50% of the rent.

    In **Earle v Charalambous [2006] EWCA Civ 1090; [2007] HLR 8**, the 50% award suggested by the Claimant for water penetration was generally upheld by the judge; indeed he stated that the tenant's advisers had likely underestimated damages.

    In **Shine** the property was suffering from rising damp which was affecting the walls and also flooring adjacent to the walls. The Court of Appeal assessed damages for an initial period "where the landlord was reasonably responsive" at a Rental Reduction award of 75%. For the second period the Court of Appeal considered 100% appropriate, partly because of the disrepair and partly because of the landlords delay in doing the work. Due to the tenants conduct in refusing to allow works to commence the award was discounted by 75% giving in the event an award of only 25%.

30. Contrast this to most landlords arguing that the tenant should only get 10-20% of the rent! In addition **Shine** clearly supports the argument that damages for disrepair should not be linked to useable floor area – the 1 room out of 5 unusable so only a 20% reduction in rent.

31. To succeed on the damages side of the claim you need to prove the effects. A judge needs to understand what living with the leak was like.

Repairs

32. The nature of the repair, where there are options, is up to the landlord as long as the defect is repaired.

Patch Repairs?

33. Repeated patch repairs are not acceptable: **Elmcroft Developments Ltd V Tankersley-Sawyer (1984) 15 HLR 63 CA**. Where patch repairs are proposed a tenant must prove that repeated works are so unsatisfactory as not to amount to a repair.

Very Expensive Repairs

34. There are a number of cases dealing with very expensive and or extensive works. Generally landlords want to do limited works, the tenant the major work. The issue often then comes down to one of whether the limited works are a satisfactory repair and or whether the extensive works amount to an improvement.

35. Where there are options regarding how to repair the problem then the issue of improvement or repair may come into play; particularly in the case of very expensive works (e.g. **McDoughall v Easington DC (1989) 21 HLR 310 CA**). The cases on these issues focus on which of two competing schemes should the landlord carry out.

36. Where there are defects then fixing the defect is a repair. This is the first issue. Issues about the price of the repair or it's extensive nature only come into play once there are two competing schemes and the issues need to be resolved.

37. Thus where expert evidence shows that repairs will be very expensive and that patch repairs are inappropriate, then the landlord will be obliged to carry out the works.

Nuisance

38. Any claim by a tenant against their landlord is going to involve the tort of nuisance sooner or later. Nuisance is an interference by one party with another's use of and enjoyment of their land. Generally the interference is one of the following:

- a leak
- a trespass
- a pest infestation

39. Note that to be able to bring the claim the claimant must have exclusive possession of land: **Hunter v Canary Wharf [1997] AC 655**. A tolerated trespasser can maintain an action in nuisance.

40. A person will be liable in nuisance if they

- Cause a nuisance.
- Authorise a nuisance

- Adopts or continues a nuisance and fail to take reasonable steps to abate it.

41. The obvious example of causing a nuisance is a tenant who splashes water on to the floor while showering and so floods the tenant below.

42. Authorising a nuisance may involve a landlord granting permission to a third party to cause a nuisance to his tenant. For obvious reasons it is of limited relevance.

43. Although a landlord is not liable for the nuisance of his tenants. However a landlord will be liable for a nuisance due to a breach of a covenant by him to put premises in repair or where he has reserved the right to carry out repairs. (**Mint v Good 1 KB 517**).

44. Most relevant are cases where the landlord adopts or continues a nuisance created by someone else and fails to take reasonable steps to abate it. In this scenario the landlord will only be liable if he had control over the land and the duty stop it is not absolute.

Duty of care

45. Case law is clear that a landlord owes no duty of care to a tenant other than that implied by the Defective Premises Act.
    - Anybody fancy challenging this?
    - PI lawyers generally don't seem to find this very difficult.

No Claim?

46. These causes of action are our basis for briniging a claim for disrepair. If we can't get it in to these then there is no county court claim. Other remedies are a private prosecution under the Environmental Protection Act 1990 or using the Housing Health and Safety Rating System (HHSRS) under the Housing Act 2004. These are beyond the scope of this paper but I will comment on them briefly.

Local Authority Action

47. The HHSRS is a system for assessing a variety of hazards in dwellings by a Local Authority. In some instances the local authority will be under a duty to inspect and to take some form of enforcement action, including giving simple recommendations for repair.

48. Similarly the local authority may have duties to act with regard to a statutory nuisance as per the Environmental Health Act 1990.

49. If the Local Authority do not act and comply with the law then of course a Judicial Review claim can be brought. Similarly the local authority may have duties to act with regard to a statutory nuisance as per the Environmental Health Act 1990.

Private Action

50. The local authority will not take action against itself under either the HHSRS or the Environmental Protection Act 1990. In this case the only option is a private prosecution in the Magistrates Court.

Human Rights?

51. In extreme cases a Human Rights claim might be appropriate but it would have to be extreme case. **R (on the application of Erskine) v Lambeth London Borough [2003] EWHC 2479 (Admin)** and **Lee v Leeds City Council [2002] 1 W.L.R. 1488** both raise this as a possibility.

Specific problem issues

The flood from above

52. The flood from above. Perhaps it is a one off, maybe it's a repeated problem, but there is substantial damage, belongings are damaged. This is one of the tricky disrepair scenarios.

53. Often the landlords' insurers respond to the claim saying:

- It was unforeseeable
- It came from a third party dwelling and they are responsible
- There was no notice and so no liability

54. Can these claims be won or, are they simply a case of leaks will happen?

Cause and liability:

55. A crucial issue in these claims is the cause of leak:

Caused by the landlord

56. The simple cases: a roof leak or a communal area service pipe or an outside drain pipe. These are easy cases where, once this is proved, liability is straight forward. It is a straight nuisance or a breach of s.11. In these scenarios frequently no notice is required because the defect is outside of the demise. Thus there is no reasonable time to do repairs. Blocked gutters and gully's are in disrepair and fall within section 11: **Greg v Planque [1936] 1 KB 669**.

A Defect in the Flat above which the landlord is under an obligation to repair viz a viz that tenant

57. It becomes more difficult when the leak is from a defect in the flat above which would be the landlord's obligation to repair under that tenant's tenancy agreement. Unless there is something in our tenancy agreement the landlord will not owe us a contractual duty to repair that leak.

58. The position might be different if the person above is a leaseholder and their lease includes a mutual enforceability of lease term, thus potentially enabling us to rely on the **Contracts (Rights of Third Parties) Act 1999** to rely on the leaseholders lease and force the repair as per the leaseholders lease.

59. Section 11 (1A) might help. But it only applies to installations – pipes – which serve our dwelling directly or indirectly. If the leak in the flat above comes from a mains cold water pipe then it may fall within the covenant. The notice requirement will not apply because it is not our demise.

60. Otherwise there may be liability in nuisance. However the liability stems from the landlord being in breach of the covenant to repair the flat above and as we have seen above, there then needs to be notice and a reasonable time to carry out repairs. Thus liability for the one off flood, which is quickly resolved, may be difficult. Notice is therefore key here because the issue is not the time to fix the leak into our flat, but the time to fix the leak in the flat above. But if the defect has been present for some time already then you might be able to get liability for the leak.

61. If we are relying on the power of the landlord to enter and carry out repairs as opposed to a duty (which may be the case with a leaseholder) the issue is very much one of reasonable steps. It may be reasonable for the landlord to simply write asking the leaseholder to do repairs and then to wait a substantial period before doing the work themselves.

Caused by the occupier above

62. The classic scenario is that of the overflowing bath or washing machine. Naturally the tenant could sue that occupier in nuisance. It is always worth considering this first; they may own their property, they may have assets or work. But they may have no money or assets and thus it is pointless to sue them.

63. A landlord is not liable for the nuisance of their tenants. Thus we cannot sue our landlord for a leak caused by the flat upstairs. But this is not the end of the story.

Effects of the leak

64. If our opponent cannot be found liable for the cause of the leak as described above it does not mean they escape liability. They may be liable for the effects of the leak.

65. It is quite probable that a substantial leak of any duration has caused section 11 disrepair which is a separate cause of action, quite apart from the original cause of the leak. And it is here that the new case on plaster, **Tanya Grand v Param Gill [2011] EWCA Civ 554** will have a huge impact. Plaster does not like water and water damaged plaster often needs replacing as the surveyor will tell you. Other defects may also result. Thus although the landlord was not responsible for the leak, they are liable for the effects of it.

66. In addition, as well as being responsible to repair the effects of the flood, the landlord may be responsible as part of their section 11 obligations, to fix the original defect for which they ordinarily would not be liable.

67. A good example of this in practice is **Stent v Monmouth DC (1987) 19 HLR 269 CA** is a key case. A door had an inherent defect namely no weatherboard. Naturally the landlords were not liable to repair it because it was not a defect. As a result of the defect, rain entered the dwelling and caused the door and frame to rot; section 11 disrepair. The landlord repair the section 11 disrepair by replacing the rotten bits over the past 30 years, but never remedied inherent defect. The Court of Appeal concluded that this was not an appropriate repair and instead as part of the repair they had to stop the leak by fitting the weatherboard.

Condensation

68. Condensation involves moist air hitting a cold surface, cooling and the water in it condensing. The result is damp and in due course mould growth. Whether a property suffers from condensation depends on a tight balance between moisture production, ventilation, heat and cool surfaces. Affect one of these issues slightly and a condensation problem may appear or go away.

69. The solution is inevitably:

- Doors to kitchen/bathroom to control wet air migrating around the premises
- Moisture control by way of extractor fans to remove wet air.
- Heating to raise the ambient temperature
- Insulation to reduce cold spots

70. Condensation frequently occurs due to design – take the windows on a busy bus in winter time as a good example. As a result fixing it is not a repair. Thus, as we all know a landlord is not liable for condensation; **Lee v Leeds (supra)**

Really?

Environmental Protection Act 1990, HHSRS and Human Rights

71. The situation is not as simple as that however. First even though the problem is design the landlord may be forced to repair and pay compensation under EPA 1990, HHSRS or in an extreme case, a Human Rights claim.

Back into the County Court?

72. The situation is not necessarily as doom laden as described above. Turning back to the remedies we have an answer. If an effect of disrepair is that condensation results, then there is liability for the condensation. The following can all cause and or contribute to condensation and the resulting mould:

- Defects with anti-condensation measures such as extractor fans, leaving moisture laden air in the premises
- Leaks adding moisture to the air
- External leaks soaking walls and reducing the walls insulating properties
- Defective heating, cooling the premises.

73. The recent case **Tanya Grand v Param Gill [2011] EWCA Civ 554** confirms this; there defective heating resulted in condensation and the landlord was held liable.

74. A key issue in these sorts of case is to get the evidence from your client and the expert evidence to support the claim. It is quite possible that defective heating will have caused quite severe condensation.

75. Remember you only get damages for the effect on the condensation. Thus in **Grand v Gill** the contribution was 10% and thus they only got 10% of the damages if the full condensation damp was due to disrepair.

Pest Infestations

76. As you will know pests come in all shapes and sizes from the kitten size Rat down to the pen tip sized translucent Ghost Ant. These creatures are quite amazingly adept at urban city life. But they are unpleasant and horrible. I have seen video of tiny ants scurrying around a dinner plate and I am very glad that so far I do not have them in my home.

77. A claim about a pest infestation is not a straightforward claim. Sometimes a mouse or squirrel claim could be brought as a disrepair claim because they are entering due to disrepair or they are causing disrepair. But because they are can get through such tiny holes it is by no means certain that the holes are in fact disrepair.

78. Most claims are brought in nuisance and the claim is essentially that the landlord has adopted the nuisance, the pest who have made their home in the landlord's property. Thus the landlord's obligation is to take reasonable steps to abate the nuisance.

79. Two issues immediately arise. First where are the ants coming from? If not from the common or retained parts then there is and immediate problem. Second is the landlord taking reasonable steps.

Origin of the ants

80. Sometimes your client will be able to provide nice photos of pests in the communal passages or crawling out of the ducts. Often they will not. Sometimes you may find the nest; often you will not. If you can't point to the origin of the ants you face an immediate liability issue. Just because the ants are walking across the communal passage does not make the landlord liable.

81. **Habinteg Housing Association v James (1995) 27 HLR 299** was just such a case. No one knew the origin of the ants. This case is often quoted as authority for saying that if there are no common parts then the landlord cannot be liable for a pest infestation. That is not the whole story.

82. As we have seen a landlord may remain liable in nuisance if the nuisance is coming from a tenanted property but he has a right of access to carry out repairs. The same principle applies to the right of access and power to eradicate pests. Just that submission was made in Habinteg and the Judge was prepared to consider that the authorities were in accordance with it. However in Habinteg the landlord did not have such authority and so the claim failed. It just means you have to check your tenancy agreement again.

Reasonable Steps

83. Since the landlord has not caused the nuisance they merely have to take reasonable steps to stop it. Taking reasonable steps does not mean getting rid of the pests or doing everything possible.

84. Expert evidence is crucial here as to what should be done. This then need to be compared to what the landlords treatment programme says and what the pest records say about what is actually happening on the ground. This has all got be considered with the clients evidence.

85. Sometimes the pest treatment programme is hopeless and showing the failure to take reasonable steps is easy. But other times the programme is excellent, as for example is London Borough of Southwark's. Then the pest records need to be properly analysed to see if it is being complied with. This is not a job to hand to abdicate to the expert' it is a crucial part of finding the evidence to prove the claim and it is potentially a very big job. A computer with Excel is very useful for this sort of work.

Enforcement

86. In these straightened times landlords who are not very good at doing repairs are more likely to disobey court orders. What can you do?

Tomlin Orders

87. If you settle under a Tomlin Order it must first be converted into an order before enforcement steps can be taken. The White Book at Paragraph 40.6.2 sets out the following principles:

- A Tomlin Order records settlement terms between parties.
- The terms of the order (the schedule) are not ordered by the court.
- The terms contained in the schedule are not something for the approval by a judge.
- Terms in the schedule cannot be enforced on an application to commit; an injunction order for specific performance must first be obtained.
- Where the scheduled terms are clear an order to give effect to them can be obtained under the liberty to apply provision, notwithstanding that they go beyond the ambit of the original dispute, could not have been obtained or enforced in the original dispute and that the obligation did not exist but arose for the first time under the compromise.
- the defendants liability for "costs of this action" includes the costs of the claimant carrying the terms into effect

88. Damages can be sought for breach of the Tomlin Order by an application to enforce it as per the judgement of Sir Andrew Morritt Vice Chancellor in **The Bargain Pages Ltd v Independent Newspapers Ltd (2003) CHD** (unreported – Lawtel Transcript).

89. The first step is to convert the Tomlin Order into an order as detailed above under the liberty to restore provisions.

Order for Works

90. An injunction order can only be enforced by way of committal if a penal notice is attached. But there is another way of enforcing, perhaps a better way.

91. In **MSA v London Borough of Croydon [2009] EWHC 2474 (Admin)** the administrative court held that a penal notice was not necessary to enforce an order by way of an application for finding of Contempt of Court, particularly with a Public Authority. Of course committal or a fine is not possible without the penal notice. Instead the court would hold a 'shaming' hearing to make a finding of contempt against the defendant. Then the Public Authority defendant would be fearful of the

further wrath of the court and forced to comply with the order. After the finding of contempt the defendant would be expected to go back and comply, on pain of a penal notice.

92. The advantage of the Contempt hearing is primarily that it is not committal hearing. Such a hearing requires matters to be proved to the Criminal Standard. Ultimately the court is unlikely to fine a Public Authority. If they did the money goes to the Crown. Surely this is contrary to the interests of the client.

93. Instead you can ask the court to order a senior officer, perhaps the Director of Housing, to court to answer the allegation of contempt. The civil burden of proof applies. In any event the embarrassment of the Director going to court encourages them to obey, just as a penal notice would. If they don't do the repairs, then they get a dressing down from the judge.

94. **MSA** was an Administrative Court decision and it is certainly possible to distinguish enforcement of a Prerogative Order from that of a private law injunction order in the County Court. It is certainly arguable that *MSA* does not apply to such proceedings and can be distinguished. In any event *MSA* was about enforcing an order against a Public Authority and not against a private individual and there is no basis in my view to apply it such cases.

Funding

95. Legal aid will remain for disrepair cases where there is a risk of "serious harm to the health and safety of an individual".

96. But current proposals will cap surveyor's fees to £225.00 at £50.00 an hour and this will crease substantial difficulties in prosecuting these claims. Will experts carry on working? How will we bring claims?

97. For those not eligible for legal aid, insurance and CFA success fees will no longer be recoverable. A small success fee deductable from damages is possible. Will solicitors take risky cases? How will such people fund their claims?

19 July 2011

Timothy Waitt
Solicitor Advocate
Anthony Gold Solicitors