

Disrepair claims: best practice and tactics

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Agenda

- How to choose a cause of action, including claims involving the Homes (Fitness for Human Habitation Act) 2018
- Funding options
- Making the most of expert evidence
- Evidence of notice and witness evidence
- Quantum, allocation

Causes of Action

- Contractual claims
- Terms implied by s11 Landlord and Tenant Act 1985 (L&T Act)
- Terms implied by s9A L&T Act, as inserted by s1 Homes Fitness for Human Habitation Act 2018 (HFHHA)
- Common law
- Statutory rights – Defective Premises Act 1972 (DPA 1972)

Contractual Claims

- Tenancy agreement is a contract.
- Express terms may impose obligations beyond mere 'repairs'.
- *Welsh v Greenwich LBC* (2001) 33 HLR, landlord liable for condensation and mould growth not attributable to disrepair where the tenancy agreement provided that the landlord would 'maintain the dwelling in good condition...'

Contractual Claims

- ❁ Express terms can impose obligations in respect of common parts.
- ❁ *Long v Southwark LBC* [2002] HLR 56, CA, express term that the landlord would ‘take reasonable steps to keep the estate and common parts clean and tidy’.
- ❁ Landlord liable for rubbish left outside a rubbish chute which although no in disrepair was inadequate in size.

Contractual Claims

(Implied Terms)

- ❁ Quiet Enjoyment – at least implied that the landlord will give the tenant quiet enjoyment of the Premises for the duration of the tenancy.
- ❁ May be breached by e.g. failing to keep the Premises watertight, or carrying out works to other parts of the building causing nuisance.
- ❁ Does not impose repairing obligations, but can for example lead to increase in damages for duration of works, or an unreasonable failure to decant during works; *Whittingdon v Uddin*, 14 August 2014, Clerkenwell and Shoreditch County Court.

Contractual Claims

(Implied Terms)

- ❁ The landlord shall carry out works with reasonable care and skill and with proper materials – *Walton v Lewisham LBC* (May 1997, Legal Action 20 Tunbridge Wells County Court).
- ❁ *McGreal v Wake* (1984) 13 HLR 107 – landlord shall make good and redecorate on completion of works.

Section 11 Landlord and Tenant Act 1985

Duty to

-  'keep in repair' the structure and exterior of the dwelling-house (including drains, gutters and external pipes),
-  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
-  to keep in repair and proper working order the installations in the dwelling-house for space heating and heating water.

Section 11 Landlord and Tenant Act 1985

- ‘Keep in repair’ – means a continuing obligation to keep up the standard of repair in the Premises throughout the duration of the tenancy.
- Means the landlord must put the Premises into repair if it was not in good repair at the outset of the tenancy.

Section 11 Landlord and Tenant Act 1985

- ❁ *Quick v Taff Ely Borough Council* [1986] QB 809 - Defects in design or construction may not be disrepair. Condensation caused by an inherent design defect was not disrepair. Damage to the structure though would be actionable, for example if the plaster finish was damaged.
- ❁ *Stent v Monmouth District Council* (1987) 19 HLR 269, CA- where the front door was inherently defective by design as it allowed rainwater to penetrate because it had no weather board at its foot. The landlord was not liable for that particular defect, but the door itself eventually became defective owing to the extent of water penetration. The landlord was ordered to repair it in such a way that it did not allow water penetration in future.

Section 11 Landlord and Tenant Act 1985

- ❁ 'Structure' – *Irvine v Moran* (1991) 24 HLR 1, QBD, is less than the whole property but more than just the load-bearing elements.
- ❁ *'...those elements of the overall dwelling-house which give it its essential appearance, stability and shape. The expression does not extend to the many and various ways in which the dwelling-house will be fitted out, equipped, decorated and generally made to be habitable... in order to be part of the structure of the dwelling-house a particular element must be a material or significant element in the overall construction.'*



Includes plasterwork - *Grand v Gill* [2011] EWCA Civ 554

Section 11 Landlord and Tenant Act 1985

- ‘Exterior’ – the outside/external parts of the Premises.
- ‘Dwelling house’ - means the building or part of a building which is let to the tenant wholly or mainly as a private residence.
- For tenancies commencing on or after January 15th 1989, includes remaining parts of the building in which the landlord retains an estate or interest providing that the disrepair is in fact affecting the tenant’s enjoyment of the Premises.

Section 11 Landlord and Tenant Act 1985

- ❁ ‘Installations’ – includes pipework and anything ancillary for the effective 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 the installations in the dwelling-house for space heating and heating water.

Section 11 Landlord and Tenant Act 1985

Knowledge or Notice of the Need of Repair

- ❁ *O'Brien v Robinson* [1973] AC 912, HL - Implied term for the benefit of the landlord that there is no liability for repairs unless and until the landlord has been put on notice or in any other way has knowledge of the need for repair and has failed to carry out the repair within a reasonable period of period of time.
- ❁ The burden of proof on the tenant.

Section 11 Landlord and Tenant Act 1985

Knowledge or Notice of the Need of Repair

- ❁ Knowledge of the need of repair is critical, without proof of knowledge the claim will fail.
- ❁ Evidence often found in the landlord's own records, may come from telephone records, text messages etc.
- ❁ Notice or knowledge need not be technical, it may be imputed if for example issues are brought to the attention of his workmen or any other employees having express or implied authority to receive complaints of disrepair.
- ❁ The information received by the landlord must be sufficient to put a reasonable person on inquiry about whether works of repair are needed.

Section 11 Landlord and Tenant Act 1985

Knowledge or Notice of the Need of Repair

- ❁ No need of notice or knowledge of the need of repair to parts of the building which have been retained in control of the landlord.
- ❁ Where there is disrepair to part of a building which the landlord is contractually obliged to repair and continues to control, the landlord is liable immediately disrepair occurs whether or not it knows or could have known of the need for repair.

Section 11 Landlord and Tenant Act 1985

Reasonable period of time.

- ❁ No liability until after a reasonable period of time has passed in which the repair could have been carried out.
- ❁ No prescribed reasonable time, what is reasonable will depend on the circumstances of the case.
- ❁ For secure (Local Authority) tenants, Schedule 1 to the Secure Tenants of Local Housing Authorities (Right to Repair) Regulations 1994 – sets out reasonable periods of time to carry out certain repairs.
- ❁ Otherwise depends on (i) the scale and severity of the disrepair; (ii) whether the tenant is in occupation; (iii) the availability of replacement parts; (iv) (in the case of social landlords) the overall workload; (v) time frames set out in tenancy agreements, tenant handbooks or the landlord's policies.

Section 11 Landlord and Tenant Act 1985

Access to the Premises

- The express or implied duty to keep Premises in repair provides an implied right for the landlord to enter to carry out those works subject to an obligation to give the tenant reasonable notice which must be exercised reasonably.
- Where essential, the landlord has the right to temporary vacant possession.

Section 11 Landlord and Tenant Act 1985

Duty to use the Premises in a tenant like manner.

- ❁ A landlord is not obliged to carry repairs which the tenant is liable to do by virtue of his duty to use the Premises in a 'tenant like manner'.
- ❁ Includes turning the water off, when absent for long periods cleaning windows, mending fuses and unblocking sinks etc.

Section 9A Landlord and Tenant Act 1985

As inserted by section 1 Homes Fitness for Human Habitation Act 2018.

- ❁ S1 of the Homes (Fitness for Human Habitation) Act 2018 (the HFHHA 2018), amends the Landlord and Tenant Act 1985 (LTA 1985), by inserting into section 9A, an implied covenant on the part of a landlord of a lease of a dwelling (as defined by section 38 LTA 1985), in England which is let wholly or mainly for human habitation, that the dwelling:
 - ❁ is fit for human habitation at the time the lease is granted or created, or at the beginning of the term of the lease if this is later (section 9A(1)(a)), and
 - ❁ will remain fit for human habitation during the term of the lease (section 9A(1)(b)).

Section 9A Landlord and Tenant Act 1985

As inserted by section 1 Homes Fitness for Human Habitation Act 2018.

- From 20th March 2020, applies to ALL periodic tenancies in existence on that date, statutory periodic tenancies, secure tenancies, assured tenancies and protected tenancies – so all periodic tenancies and fixed term tenancies of less than 7 years.
- Cannot 'contract out' of the statutory provisions. S9A(4), provides that any provision of a lease or tenancy agreement will be void if it purports to:
 - exclude or limit a landlord's obligations under the implied covenant, or
 - authorises forfeiture or imposes any penalty, disability or obligation on a tenant in the event it relies on, or enforces a landlord's obligations under the implied covenant.

Section 9A Landlord and Tenant Act 1985

Fit for Human Habitation.

No explicit definition of 'fit for human habitation'. Guidance derived from section 10(1), provides that in determining whether a house or dwelling is unfit for human habitation, regard will be had to its condition in relation to:

- repair
- stability
- freedom from damp
- internal arrangement
- natural lighting
- ventilation
- water supply
- drainage and sanitary conveniences
- facilities for preparation and cooking of food and for the disposal of waste water; and
- in relation to a dwelling in England, any 'prescribed hazard' (as defined by the regulations made under section 2 of the Housing Act 2004)...

Section 9A Landlord and Tenant Act 1985

Fit for Human Habitation.

- ❖ ... and if the dwelling is so defective in relation to one or more of these matters, so it is not reasonably suitable for occupation in that condition, the dwelling will be regarded as unfit for human habitation.
- ❖ *Morgan v Liverpool Corporation* [1927] 2 KB 131, CA; per Atkin LJ, “If the state of repair of a house is such that by ordinary use damage may naturally be caused to the occupier, either in respect of personal injury to life or limb or injury to health, then the house is not in all respects fit for human habitation”.
- ❖ *Fisher v Walters* [1926] 2 KB 315; under the Housing and Town Planning, etc, Act 1909 (“the HTP Act”), the tenant recovered damages arising from a latent defect to the ceiling in one room which collapsed damaging his furniture, despite the landlord having no notice of the defect. The defect was a breach of the landlord’s undertaking implied by section 15 H&TP Act to keep the house in all respects reasonably fit for human habitation.

Section 9A Landlord and Tenant Act 1985

Fit for Human Habitation.

- The MHCLG, has issued guidance for tenants, landlords and local authorities that suggest HFHHA 2018, covers or is intended to cover the following situations where:
 - the building has been neglected and is in a bad condition;
 - the building is unstable;
 - there's a serious problem with damp;
 - it has an unsafe layout;
 - there's not enough natural light;
 - there's not enough ventilation;
 - there is a problem with the supply of hot and cold water;
 - there are problems with the drainage or the lavatories; or
 - it's difficult to prepare and cook food or wash up.
- The guidance sets out 29 'problems' which, it suggests may give rise to a cause of action if they are *'so bad that they make [the tenant's] house or flat not fit to live in'*.

Common Law

Negligence

- ❖ *Rimmer v Liverpool CC* [1985] QB 1, CA) – no liability in negligence on the part of a landlord that lets defective, dangerous or unsafe Premises on which it has done no work although negligence may arise in other ways, e.g:
 - ❖ Where the landlord designed or built the Premises it owes subsequent occupiers the same duty of care as is owed by builders who do not subsequently become the landlord, i.e. a duty to take reasonable care to ensure that the Premises do not contain any latent defects which cause personal injury or property damage.
 - ❖ The landlord who carries out work after the tenancy begins will also owe his tenant the same duty of care that any contractor would owe to the occupier, that is, a duty to take reasonable care to ensure that defective workmanship or materials do not cause personal injury or property damage. The duty extends to using reasonable materials to ensure that the work is effective.
 - ❖ Where the landlord negligently fails to repair or maintain the common parts.

Common Law

Nuisance

- ❖ A landlord may be liable in nuisance, e.g. in cases of pest infestations from common parts, or from water leaks from either common parts or neighbouring Premises that the landlord is under an obligation to keep in repair.
- ❖ *Dadd v Christian Action (Enfield) Housing Association*, December 1994 Legal Action 18, £2,090 for a rat infestation (c.f. £4,251).
- ❖ *Harwood Properties Ltd v Remuinan*, January 2012, Legal Action 38, 20% of the rental value was awarded for a six month period of infestation of rats.
- ❖ In *Frederick and Simson v Frame*, January 2012, Legal Action 38, 15% of the rental value was awarded in respect of a mouse infestation of the common parts.

Defective Premises Act 1972

Section 1

- ❁ s1 duty applies to ALL those, including landlords, builders, architects and surveyors, who undertake work for or in connection with the provisions of a dwelling to: (i) do the work in a professional or workman like manner; (ii) use proper materials; and (iii) ensure that the dwelling is fit for human habitation when completed.
- ❁ The duty is owed to the persons for whom the dwelling is initially provided and to all persons subsequently acquiring a legal or equitable interest in it.

Defective Premises Act 1972

Section 4

- ❁ S4 imposes a duty on landlords to all persons who might reasonably be expected to be affected by defects in the state of the Premises, to take such care as is reasonable in all of the circumstances to see that they are reasonably safe from personal injury or from damage to their personal Property caused by any defect of which the landlord knows or ought to know about.
- ❁ Section 4 has two purposes, the first is to make the landlord liable for personal injury or damage occurring or which may occur as a result of disrepair whether or not the landlord has or had knowledge of the defects. The second is to give rise to obligations to prevent the condition of the Premises causing personal injury or damage, and so can give rise to claim for an order compelling the landlord to put right a state of affairs that has the potential to cause loss or personal injury *to others whether or not such a claim includes a claim for damages; Barrett v Lounava* [1990] 1 QB 348, CA. There need not be a damages claim to justify issuing proceedings of this type.

Expert evidence

- Do you need it?
 - For some cases where disrepair/cause very obvious, a photograph might be enough – PAP itself highlights that (para 7.1(c))
 - In other cases there may be existing helpful reports e.g. from local authority Environmental Health Officer (EHO)
- Pre-Action Protocol (PAP) for Housing Conditions Cases says expert should be instructed as single joint expert (costs shared) unless there is an objection (para 7.2); if that is not possible try to arrange joint inspection (both experts attending at same time) (para 7.3)
- Seeking out a tenant-friendly expert actually unlikely to be helpful
- Weigh up costs vs ability to consult privately with expert

Expert evidence

- Para 7.5 of PAP sets out circumstances where an expert can be instructed at an earlier stage if this is considered necessary for reasons of urgency e.g.
 - (a) where the tenant reasonably considers that there is a significant risk to health and safety;
 - (b) where the tenant is seeking an interim injunction; or
 - (c) where it is necessary to preserve evidence.
- Template letter of instruction in Annex 3. Should report on all adverse housing conditions which landlord ought reasonably to know about, or which the expert ought reasonably to report on

Expert evidence

- ❁ Must go beyond identifying visible problems e.g. mould – what is the CAUSE? Why is water penetrating walls? Why is there rising damp? Make sure exact type of dampness recorded
- ❁ Is there actionable disrepair? Need something broken, cracked plaster etc
- ❁ Beware of what is suggested actually just being improvement – i.e. provision of something new or reconstruction of the whole unless this is the only practicable way to prevent continuous further disrepair e.g. *Stent v Monmouth DC* (1987) 19 HLR 269

Report will be privileged until satisfied – *Worrall v Reich* [1955] 1 QB 296

Expert evidence

- Make sure expert is aware of contractual obligations that go beyond section 11 so these issues are included
- Make sure there is comment as to how long the disrepair is likely to have existed – e.g. based on extent of plaster decay
- Ask for a room plan – should be easy to understand which room is being talked about
- Make sure acronyms are spelled out
- Make sure it provides a comprehensive schedule of works for negotiation (required by PAP para 7.4(c) for joint inspections)

Expert evidence

- Good quality colour photographs can be determinative/enhance damages
- Tenant's own pictures and videos can be more illuminating
- Remember needs to affect tenant's enjoyment of the property – even if report identifies disrepair you have to think about what the space is used for e.g. slight cracking in garage plaster, or hidden defects, will not significantly affect enjoyment and lead to damages

General damages

- General damages are recoverable for the loss of amenity: discomfort, distress, inconvenience and loss of enjoyment
- Good evidence is **crucial**: detailed, specific witness statement, photographs and videos
- How has tenant's life been affected? Are they having to sleep in a different room? Have they gone to stay elsewhere? Are children affected?
- Loss of hot water/heating has a significant affect on amenity and therefore damages
- Look at how much of the property has been affected – can argue for percentage of rent to reflect that

Personal injury

- ❁ Housing conditions claims may contain a personal injury element without following Personal Injury Pre-Action Protocol unless it requires expert evidence other than a GP letter (PAP, para 3.5)
- ❁ Most likely claims will relate to asthma, colds and other chest problems, and to depression and/or anxiety
- ❁ Possible that if you plead in a way that implies a psychological injury, landlord might argue that this is now a PI claim and 3 year limitation applies – be careful how it is worded. If unsure, bring a separate claim.

Special damages

- Does it relate to the disrepair? E.g. mould/damp damage to soft furnishings, clothes, bedding
- Gather evidence – receipts, bank statements, delivery notes, photos, messages confirming existence of item
- Where there is no direct proof of purchase, tenant can describe the item and when and where it was purchased in a witness statement and use a website or catalogue to estimate current market prices
- NB cost of item is based on value at time of damage i.e. second-hand rather than new, unless not possible/reasonable to obtain second-hand replacements

Damages

- Level of damages determine allocation
- What if works done before issue? Then are in small claims track
- PAP para 11: If the tenant's claim is settled without litigation on terms which justify bringing it, the landlord will pay the tenant's reasonable costs. See also *Birmingham City Council v Lee* [2008] EWCA Civ 891 where Court held that as protocol requires claim to be advanced initially in accordance with its terms (or cost consequences), not longer the case that a claim is only made when litigation is begun
- Cannot refuse access for works where reasonable notice given: *Liverpool Mutual Homes v Mensah*, County Court at Liverpool. 31 August 2017 even if landlord has not accepted all works tenant's expert identified

Funding

- Legal aid for disrepair cases is limited to cases relating to the removal or reduction of a serious risk of harm to the health or safety of the occupiers.
- Doesn't cover damages claims except in cases of counterclaims to claims for possession brought by the landlord.
- Need to establish a serious risk of harm (not a risk of serious harm).

Funding

- ❖ Conditional Fee Agreements (CFA's), are becoming increasingly common in the absence of Legal Aid, together with After The Event Insurance (ATE), however the client has to bear the additional costs of insurance premiums
- ❖ ATE insurance may be available to cover the risk of having to pay the opponent's costs, as well as the client's own disbursements if they lose the case. Deferred and Self-insured premiums may be available in some cases which effectively mean the insured party does not have to pay the premium until the end of the case, and does not have to pay it at all if the case is lost.

Funding

- Frequently encountered sources include:
 - Temple, <http://www.temple-legal.co.uk/>.
 - Financial and Legal <http://www.financialandlegal.co.uk>
 - The Judge (Brokers) - <http://www.thejudge.uk/>