Disrepair: Update on Tenants' Remedies [May 2004]

by Ian Miller

Introduction

1. This paper examines two topics: damages for disrepair and the availability of an equitable set-off where there has been a change of landlord.

Damages

2. The leading authority on the assessment of damages for disrepair is *Wallace v Manchester City Council* (1998) 30 H.L.R. 1111. One of the key issues in that case was whether or not the judge should have made an award in respect of the diminution in the value of the Claimant's tenancy arising from the disrepair by reference to the rent paid in addition to an award for discomfort and inconvenience.

3. Morritt L.J. gave the leading judgment and summarised the law in this area in a series of helpful propositions (see page 1120):

    a. The first question is what sum will place a tenant in the position he would have been in if the obligation to repair had been duly performed by the landlord;

    b. In answering that question a comparison is required of the property as it was for the period when the landlord was in breach of his obligation with what it would have been if the obligation had been performed;

    c. For the periods when the tenant is in occupation notwithstanding the breach of the obligation to repair the loss to him requiring compensation is the loss of comfort and convenience which results from living in a property which was not in the state of repair it ought to have been if the landlord had performed his obligation

d. If the tenant does not remain in occupation and is forced by the landlord's failure to repair to sell or sublet the property he may recover for the diminution of the price or recoverable rent occasioned by the landlord's failure to perform his covenant to repair.

4. He found that an award for distress and inconvenience could be ascertained in a number of different ways: either by a notional reduction in rent; or by awarding a global sum; or by a mixture of both approaches. In terms of practical guidance he said that expert valuation evidence was not of assistance when assessing damages for loss of comfort and inconvenience. Furthermore, he said that if a judge was minded to assess the monetary compensation for discomfort and inconvenience on a global basis he would be well advised to cross-check his prospective award by reference to the rent payable for the period equivalent to the duration of the landlord's breach of covenant.

5. The Court of Appeal have reaffirmed this approach in the recent case of *English Churches Housing Group v Shine* [2004] EWCA Civ 434. The appellant was a registered social landlord who appealed against parts of an order made in proceedings brought by one of its secure tenants for damages for breaches of its repairing covenants. It was common ground that the tenant's flat had been in a poor condition for some time and the landlord accepted its obligation to repair. A jointly appointed expert reported that it was necessary for the tenant to vacate the premises in order for repairs to be carried out. At the final hearing, the judge awarded the tenant total damages of £19,000 covering a seven year period. The award included the sum of £16,000 for the four years immediately preceding the hearing.

6. The Court of Appeal concluded that whilst the guidelines in *Wallace v Manchester City Council* were not to be applied in a mechanistic or dogmatic way and whilst there would be cases where an award in excess of the level of rental payable might be required, where an award of damages for stress and inconvenience are to exceed the level of rent payable, clear reasons need to be given by the court for taking that course. The judge was therefore wrong to

award what amounted to £4,000 per year when the Claimant's rent had been on average £2,600 per year for the same period.

7. Wall L.J. suggested that as a rule of thumb the maximum award for damages in a case such as this should be the rental value of the premises. The Court of Appeal substituted an award of damages for that of the judge. It divided up the periods of disrepair and awarded 75% of the rental value for one period and reduced it to 15% for another on the grounds that the tenant had prevented the Claimant from carrying out repairs by refusing to move out of the premises.

8. It is perhaps worth noting Wall L.J.'s observation that the reason for awards of damages being modest is related to the fact that the tenant in a secure weekly tenancy has the benefit of occupying premises at a rent which is well below that which the same premises would be likely to command in open market. From a practical point of view comparable cases need to be handled with care: even if the disrepair is similar one of the most important factors will actually be the value of the rent.

Equitable set-off

9. The second section of this paper considers the recent case of *Smith v Muscat* [2003] EWCA Civ 962 and the availability of an equitable set off in cases where there has been a change of landlords during the duration of the tenancy. The problem is best illustrated by the facts of the case.

10. Mr. Smith had been a statutory tenant of a house for over 40 years. The lessor was a Mr. Walker. In 1995 the local authority served a disrepair notice under s.189 of the Housing Act 1985. Remedial work took place from June 1995 to February 1997 but was apparently not completed or sufficient to deal with the problem. In December 1995 Mr. Smith began withholding rent. On 12th October 1999 the freehold was purchased by Mr. Muscat. Rent owed to Mr. Walker became due to Mr. Muscat by operation of law and, the debt was separately assigned to Mr. Muscat by deed. Mr. Smith continued to withhold

rent and on 6th March 2001 a notice to quit was served on him followed by possession proceedings.

11. The judge held that Mr. Muscat was liable to Mr. Smith in the sum of £2,000 for disrepair since he became lessor in October 1999. He held that no right of set off existed against Mr. Muscat in relation to similar breaches of covenant by Mr. Walker, his predecessor. Mr. Smith's arrears of rent amounted to £5,232.06 and therefore he remained indebted to Mr. Muscat for arrears totalling £3,232.06 which he had no prospect of paying off. Accordingly the judge made an outright possession order which he stayed pending appeal.

12. The Court of Appeal held that:

a. The entitlement to recover rent arrears ran with the reversion by virtue of s.141 of the Law of Property Act 1925;

b. The obligation to repair also ran with the land by virtue of s. 142 LPA 1925. This made the new lessor liable from the moment of assignment for all extant disrepair but not for breaches occurring prior to the assignment;

c. There is no case supporting a general principle making set off available where the defendant has a claim against someone other than the plaintiff: such a rule would be contrary to the doctrine of privity of contract; the essential nature of set-off and to assumptions made in judicial authority;

d. The Defendant was however entitled to an equitable set off on the basis that an assignee takes subject to existing equities; or, put another way, the assignee is bound by a set-off that could have been asserted against his assignor. A valid assignment is recognised as an exception to the general doctrine of privity.

13. On this basis the possession order was set aside and the matter remitted for retrial.

14. The decision in *Duncliffe v Caerfelin Properties* [1989] 27 EG 89 still stands that a tenant cannot bring a claim for damages against a new owner for an earlier landlord's breach of obligation. However whilst no claim can be brought there may be an entitlement to an equitable set-off where there has been an assignment of arrears of rent.

15. What are the practical consequences?

a. The decision of the Court of Appeal seems to rule out any equitable set-off where there has been no assignment of arrears of rent.

b. Where a court has allowed an equitable set-off in similar circumstances to those in the case of *Smith v Muscat* it is difficult to see how the landlord might be able to recoup the arrears of rent assigned to him by the assignor. Where such an assignment takes place the possibility of a set off by the tenant should be factored into the bargain.

c. A tenant in Mr. Smith's position would have been best advised to have brought proceedings against his previous landlord for damages for disrepair and had them joined with proceedings brought against him for arrears of rent. In the event that no equitable set-off had been allowed he would at least have recovered damages against his previous landlord and then been in a position to pay off any arrears of rent.

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