Disrepair and Unlawful Eviction

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Residential Disrepair Claims
Reminder of the basics

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Contents

The Basic Duties

Landlord's Basic Duties

The lease or tenancy agreement will normally include repairing covenants implied by s.11(1) Landlord and Tenant Act 1985 ("LTA")

(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.

Tenant's Responsibilities

The landlord is excused liability for certain forms of disrepair under s.11(2) LTA 1985:

(2)The covenant implied by subsection (1) ("the lessor's repairing covenant") shall not be construed as requiring the lessor—

(a)to carry out works or repairs for which the lessee is liable by virtue of his duty to use the premises in a tenant-like manner, or would be so liable but for an express covenant on his part,

(b)to rebuild or reinstate the premises in the case of destruction or damage by fire, or by tempest, flood or other inevitable accident, or

(c)to keep in repair or maintain anything which the lessee is entitled to remove from the dwelling-house.

Standard of Repair

The standard required isn't perfection but is guided by s.11(3) LTA 1985:

(3)In determining the standard of repair required by the lessor's repairing covenant, regard shall be had to the age, character and prospective life of the dwelling-house and the locality in which it is situated.

This may be uncomplicated: a boiler which does not work at all would be a fairly clear breach of s.11(1)(c) LTA 1985 or a badly leaking pipe s.11(1)(b) LTA 1985, but things will not always be so cut and dry.

A requirement to *keep* in repair implies a duty to *put* in repair disrepair at the commencement of the tenancy- *Liverpool City Council v Irwin* [1976] UKHL 1.

In practice, whether or not there is disrepair is a question for expert evidence. A claimant tenant will normally seek a surveyor's report, a landlord defendant may well seek its own surveyor's report in response to a potential claim.

Damp- a Problem Area

Probably a majority of disrepair cases allege that the disrepair in question relates to damp and mould caused by that damp.

That can be straightforward- if the damp is penetrating, or caused by a leaking internal pipe, the disrepair will fall squarely within s.11(1)(a) or (b). Rising damp, if caused by defective damp-proofing, could also be sufficient *Uddin v London Borough of Islington* [2015] EWCA Civ 369.

But this will not necessarily be the case. Damp can be caused by internal condensation, for example, by the tenant failing to open windows, or by not adequately heating the property, or by blocking ventilation systems. The landlord will not be liable for this form of damp- *Quick v Taff-Ely Borough Council* [1985] EWCA Civ 1. The surveyor's report will, generally, be required to cover the causation of the damp.

Some condensing damp could be caused by disrepair- a defective ventilation fan- s.11(1)(a), or defective boiler causes excess cold- s.11(1)(c) could have this effect.

Contracting Out?

It is common to see express repairing obligations in a written tenancy agreement. This does create a standalone cause of action if those terms are breached, but the effect of such terms are limited by statute.

A written agreement cannot impose on a tenant more stringent requirements than those already imposed by s.11(2)- see s.11(4) LTA 1985.

The parties cannot contract out or exclude the landlords liability, any agreement to that effect is void- s.12(1) LTA 1985.

The parties are, in principle, free to contractually agree terms which are less favourable to the landlord, so this should be checked for.

Other Protections for the Landlord

A landlord is not liable for disrepair until the landlord has had notice of that disrepair, *Earle v Charalambous* [2006] EWCA Civ 1090, and has had a reasonable opportunity to carry out those repairs.

That notice will normally be the tenant telling the landlord, but it can be by other means- the disrepair could also be obvious (or ought to be obvious) to a landlord following an inspection. If there is no awareness of a relevant defect, liability will not flow- *O'Brien v Robinson* [1973] UKHL 1.

A landlord is deemed to have notice of the condition of common areas (e.g. the communal entrance to a block of flats) and the repairing duty applies to those areas- s.11(1A) LTA 1985. This does not include external areas, such as a pathway- *Edwards v Kumarasamy* [2016] UKSC 40

A landlord will not be liable for failure to carry out repairs at a time when access for repairs on reasonable notice is refused by the tenant *Saner v Bilton* [1878] 7 ChD 815, now also in s.11(3A) LTA 1985.

An Applicable Tenancy?

The obligations do not apply to every tenancy, but these will generally be obviously unusual tenancies. The basics are at s.13(1):

(1)Section 11 (repairing obligations) applies to a lease of a dwelling-house granted on or after 24th October 1961 for a term of less than seven years.

There are exceptions to the seven year rule- the obligations apply to most secure social housing tenancies even if for a longer period- s.13(1A). Also note that where a shorter fixed term is automatically renewable for more than seven years, the obligations do not apply- s.13(2)(a) and (c), but a fixed term with a break clause below seven years is caught- s.13(2)(b).

The obligations do not apply to some agricultural tenancies- s.14(3); and some tenancies where the tenant is a public body- s.14(4); and some where the landlord is the Crown- s.14(5).

Most business tenancies are excluded- s.32(2) LTA 1985

Fitness for Human Habitation

Fitness for Human Habitation

There are now new and significant changes introduced by s.1 Homes (Fitness for Human Habitation) Act 2018 by amendments to the LTA 1985. These create new and important implied terms for recent tenancies. They overlap with, but are not the same as the s.11 LTA 1985 duties.

The core duty is at s.9A(1) LTA 1985:

(1)In a lease to which this section applies of a dwelling in England (see section 9B), there is implied a covenant by the lessor that the dwelling—

(a)is fit for human habitation at the time the lease is granted or otherwise created or, if later, at the beginning of the term of the lease, and

(b)will remain fit for human habitation during the term of the lease.

This applies only in England- there are very similar, but not identical, rules in Wales in s.8 LTA 1985.

What is “Fitness”?

This is largely a matter for expert evidence, but see s.10(1) LTA 1985:
(1) In determining for the purposes of this Act whether a house or dwelling is unfit for human habitation, regard shall be had to its condition in respect of the following matters—
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;
in relation to a dwelling in England, any prescribed hazard [s.2 HA 2004]*; and the house or dwelling shall be regarded as unfit for human habitation if, and only if, it is so far defective in one or more of those matters that it is not reasonably suitable for occupation in that condition.*

Scope of the Duty

There are limits on the landlords duties under s.9A(2) LTA 1985 which are very similar, but not identical to, s.11(2) LTA 1985. Generally speaking, the landlord is not liable for matters wholly beyond his or her control; or for which the tenant is wholly or mainly responsible for – s.9A(3).

The duties cannot be contracted out by agreement between the parties- s.9A(4).

As with s.11 disrepair, the landlord has duties in respect of common areas (e.g. an entrance to a block of flats) not extending to external areas – s.9A(6).

There is an implied obligation on the tenant to permit access to carry our repairs- ss.9A(7)-(8).

There is surprisingly no specific statutory provision requiring notice to the landlord, but there is no obvious difference from the common law position.

An Applicable Tenancy?

In general, any tenancy caught or excluded by ss.11-13 LTA 1985 will also be caught or excluded from s.9A LTA 1985, but it is important to check the date of commencement. At least one of the following must apply:

The tenancy was created after 20 March 2019- s.9B(8) LTA 1985.

The tenancy became a statutory periodic tenancy on or after 20 March 2019- s.9B(5) LTA 1985.

Any periodic or secure tenancy for claims issued after 20 March 2020- s.9B(4) LTA 1985.

Certain agricultural tenancies regardless of the date of commencement- s.9C LTA 1985.

Only a very unusual tenancy would not be caught- an assured shorthold tenancy created before 20 March 2019 and still within its fixed term (but that fixed term is less than 7 years).

Other Disrepair Actions

Defective Premises Act 1972

This is usually relevant to claims for personal injury causes by defective premises. The claim is in negligence, rather than contract, and there are two statutorily imposed duties of care:

1) By a person carrying out "construction, repair, maintenance or demolition or any other work" to "to persons who might reasonably be expected to be affected by defects in the state of the premises created by the doing of the work" – s.3 DPA 1972

2) By a "landlord" who knows or ought to know of a relevant defect 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".

This is a separate, standalone, tort claim over and above the claim for damages for breach of contract arising from disrepair. Other conventional requirements in a negligence claim apply.

Local Authority Enforcement Action

Local authorities have a broad range of powers relating to disrepair.

Local authorities have a duty to inspect their area for "statutory nuisances" which include "any premises in such a state as to be prejudicial to health or a nuisance" under s.79(1)(a) Environmental Protection Act 1990. It can then serve an "abatement notice" requiring improvements under s.80(1) EPA 1990; and failure to comply with the same is a criminal offence – s.80(4) EPA 1990.

Local authorities *also* have extensive powers in respect of properties falling short of the Housing Health and Safety Rating System. The local authority can serve an "improvement notice" (requiring works to be carried out) under ss.11-12 Housing Act 2004; a "prohibition notice" (preventing the property being lived in) under ss.20-21 HA 2004; an "awareness notice" under s.28-9 HA 2004 or taking emergency action under s.40 HA 2004.

Other Safety Standards

There are very wide range of other safety standards. Breach does not generally lead to a potential claim for damages but can be relevant to demonstrating disrepair or other related claims. These include:

1) The Asbestos (Prohibitions) Regulations 1985
2) The Gas Safety (Installation and Use) Regulations 1998
3) Regulatory Reform (Fire Safety) Order 2005
4) The Smoke and Carbon Monoxide Alarm Regulations 2015
5) The Electrical Safety Standards in the Private Rented Sector (England) Regulations 2020

It is also worth being aware of other types of claim that typically overlap with disrepair:

1) ss.324-326 Housing Act 1985 in respect of overcrowding
2) Houses in Multiple Occupation under Part 2 Housing Act 2004
3) Selective licencing under Part 3 Housing Act 2004

Remedies

Damages

Damages are notoriously difficult to be precise about.

There are usually claims for general damages for breach of the implied terms, generally expressed as “inconvenience and loss of enjoyment” and calculated on the basis set out in *Wallace & Ors v Manchester City Council* [1998] EWCA Civ 1166- typically a percentage discount of the rent to reflect the extent of the disrepair for the period the disrepair has been present and the landlord has been aware of it. This could be nominal for minor disrepair, or nearly all of the rent for a property unfit for human habitation.

Special damages for loss of belongings (e.g. to mould/damp/infestation) or out of pocket expenses such as the cost of extra cleaning/heating/alternative accommodation.

PSLA where a personal injury claim is included; additional special damages arising from that claim (e.g. medical expenses) on a conventional negligence basis.

Limitation

The limitation period is 6 years for contractual claims (e.g. under s.11 LTA 1985) or non PI Torts- ss.2 and 5 Limitation Act 1980 and 3 years for a personal injury negligence claim (e.g. s.4 DPA 1972)- s.11 Limitation Act 1980.

This is a rolling breach, however- there is a new breach every day the property remains in disrepair. If the disrepair started (say) 10 years ago, but remains unrepaired, the claim would be limited 6 years “worth” of damages, not 10.

A personal injury claim must be brought within 3 years of the date of actual injury, though if that injury is caused by continued exposure to (e.g.) damp conditions, such as aggravation to asthma, that may also be rolling in nature.

Claims relating to fitness for habitation cannot be brought for a period before the date of commencement, generally the first renewal of the tenancy after 20 March 2019.

Specific Performance

A tenant may claim an order for specific performance requiring the landlord to carry out repairs – s.17 LTA 1985 for the ordinary repairing covenants, or s.9A(5) LTA 1985 in respect of fitness for human habitation.

An attraction of pleading a claim for specific performance is that this will normally mean that the claim will be allocated to the fast track if the value of the repairs exceeds £1,000- CPR 26.6(b); and will normally permit costs orders if allocated to the Small Claims Track and the value exceeds £260 CPR 27.14(2)(b) and CPR PD7A para.7.2. This generally makes this kind of claim financially viable.

A Defence to Possession Claims

Disrepair is not a defence to a claim for possession as such, but:

It may be pleaded as a counterclaim in claims for possession on grounds of rent arrears under s.8 Housing Act 1988. A court will not normally order possession as it would not be satisfied of any particular sum of rent being lawfully due.

The prevention of “retaliatory eviction” under the Deregulation Act 2015 is widely known but, in reality, the provisions are fairly toothless. A notice under s.21 Housing Act 1988 cannot be served within six months of “a relevant notice” – one served under ss.11, 12, or 40 (but not other prowers) HA 2004- s.33(1) Deregulation Act 2015. In certain cases of ongoing complaints described in s.33(2), a s.21 Notice can be invalid where the relevant notice is served later.

Breach of many of the safety standards described above can prevent the valid service of a s.21 Notice- this must be checked carefully.

Homelessness Appeals

Disrepair can also be relevant to homelessness and local authority housing duties:

A person will not be intentionally homeless for the purposes of s.191 Housing Act 1996 by reason of giving up property which it would be unreasonable to continue to occupy.

Nor does a duty to rehouse under s.193 Housing Act 1996 terminate on rejection of property which is unsuitable.

A property in a state of significant disrepair will generally be unreasonable to occupy and unsuitable, see chapter 17.14 Homelessness Code of Guidance for Local Authorities 2018 and the explanation in *R (Awua) v Brent London Borough Council* [1995] UKHL 23.

This sort of material will generally be relevant to initial applications, and also the review and appeal process of ss.202-204 Housing Act 1996

Unlawful Eviction

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Protection From Eviction Act 1977(1)

s1 Protection from Eviction Act 1977 makes it an offence to evict an occupier of residential premises without an order of the court or to harass a residential occupier

Our remedy is the civil one from ss 2/3…

s2 ‘Where any premises are let as a dwelling on a lease which is subject to a right of re-entry or forfeiture it shall not be lawful to enforce that right otherwise than by proceedings in the court while any person is lawfully residing in the premises or part of them.’

While s5 details what notice must be given it is still in most cases required to have a court order and enforce via court bailiffs

Protection From Eviction Act 1977(2)

s3 PEA 1977 prevents eviction of tenants

1 Where any premises have been let as a dwelling under a tenancy which is neither a statutorily protected tenancy nor an excluded tenancy and—

(a)the tenancy (in this section referred to as the former tenancy) has come to an end, but

(b)the occupier continues to reside in the premises or part of them,

it shall not be lawful for the owner to enforce against the occupier, otherwise than by proceedings in the court, his right to recover possession of the premises.

Protection From Eviction Act 1977(3)

s3(2B) extends this to licences.

Save for excluded tenancies and licences

'excluded'… s3A

- Sharing accommodation with landlord or family (2/3)
- Granted as 'temporary expedient' to trespassers (6)
- Holiday Lets (7a)
- Not for money or money's worth – ie free (7b)
- Under s4 /Pt VI Immigration and Asylum Act 1999
- Hostel accommodation by LA / public body

The initial question:

Is the occupier anything other than a trespasser (not a trespasser in the sense that they have remained after end of a licence) or occupier under excluded tenancy/licence?

Landlord's Responses…

Has the occupier 'left voluntarily'? – evidence – have they been pushed?

Surrender –

by deed,

by operation of law (unequivocal act of one party that tenancy is at an end accepted by other party),

abandonment (are belongings there?

Is rent being paid? Has tenant said 'going abroad for a while'?

Responses (2)

But they are in arrears
I'm a resident landlord
They are in breach of the terms of the tenancy
The agreement says I can re-enter
The agreement has ended
I had to carry out repairs
I'm redeveloping the building
It wasn't safe
I was sure they had left

What is the basis of claim?

Contract - breach of contract / covenant for quiet enjoyment

Tort – trespass to goods and land (and the person) conversion

- Breach of s3 PEA 1977
- Harassment / nuisance

These can all occur before tenant leaves property

ss27/8 Housing Act 1988

S27 damages –

Section 27 Housing Act 1988 provides a statutory cause of action for damages where a landlord:

unlawfully deprives (or attempts to) the residential occupier of occupation of whole or part of premises (section 27(1))

knowing or having reasonable cause to believe the conduct is likely to cause the occupier to give up occupation

Includes 'acts likely to interfere with the peace or comfort' of occupier (eg interrupting utilities)

and, as a result, the residential occupier gives up occupation

Damages under ss27/8

Damages are calculated by s28(1) – difference between value with and without the tenant's right to occupy and require expert evidence

Claim is only against Landlord but includes superior landlord (27(9)(c) 'the person who, but for the occupier's right to occupy, would be entitled to occupation of the premises and any superior landlord under whom that person derives title'

Note potential overlap with general damages

Features of the claim under s27

s28 damages less relevant for occupiers on short tenancies

Defences – reasonable cause to believe Tenant had left (27(8)) and reinstatement before disposal of proceedings.

Often claimed in the full knowledge that tenant will not be reinstated.

Defendants

Immediate landlord or agents

Superior Landlord?

Contracting Party (landlord) liable in contractual claims

Agents, directors, third parties in tortious claims
whoever has physically carried out the torts

If the landlord is a company it can be joint tortfeasor with directors or agents

Name both

Evidential Matters

Evidence from Tenant

Status – tenancy agreement

possible sham agreements

The fact of eviction / harassment / nuisance

evidence from police /LA housing officers

That they continued to occupy

Damages – General Damages

General Damages in common law

Smith v Khan 2018 EWCA Civ 1137 at (45) 'damages for trespass must compensate the tenant not merely for the letting value of the property of which he has been deprived but also for the anxiety, inconvenience and mental stress involved in the loss of what was the tenant's home' (so they will attract Simmons v Castle uplift)

Measure depends on:

personal characteristics of tenant – vulnerability, children …

Result of eviction – street homeless, sofa surfing, hostel?

General Damages

Period?

‘a cause of action for damages for trespass continues for so long as the right to possession actually subsists’ Patten LJ at 39

That may give difficulty when theorising about when LL could have regained possession.

General Damages - Quantum

1) Loss of enjoyment of property pre eviction? (cf disrepair)

2) Post-eviction

- Street homelessness (car?) – Highest £200-250pd
- Sofa surfing – depending on circumstances - £100-150pd
- Hostel – impact of Covid £200
- Hotel accommodation £100 (plus specials)
- Alternative longer term accommodation – inconvenience in having to rearrange life. Nature of the accommodation; nature of the disruption

Per night or lump sum

Comparators?

Special Damages

Extra costs associated with being homeless – food etc

Hotel costs

Goods lost or damaged in eviction / storage – supposed storage companies may demand extortionate amounts to store/return goods.

Replacement items

Aggravated Damages

Must be pleaded…

Aggravated damages - a measure of the extra impact suffered.

Eg short notice, special characteristics of tenant, violence

Regency UK v Albu-Swalin [2019] EWHC 3713 (QB)

HHJ Luba QC ‘this was not a case at the worst end of the spectrum. No violence was involved, there was no breaking in in the presence of a tenant. Nonetheless, it was a sudden eviction with no warning and no opportunity to remove any personal possessions. He drew attention to one feature of the evidence before him that Regency's builder had required a lump sum before he would allow Mr Albu-Swalin to gain access to his possessions. He described this as disgraceful and awarded aggravated damages of £1,000.’

Noted by QBD as at the low end of scale

Simmons v Castle?

Exemplary Damages(1)

Must be pleaded…

‘action calculated to make a gain’ - it usually is.

Whether: to get rid of a tenant not paying rent,
to let at a higher rent
or even to evict without paying for court process

almost always available

Exemplary Damages(2)

"This was a disgraceful case. It appears that a criminal offence was committed in breaking and entering into a tenanted flat. It appears further that this was done in circumstances where the defendant, first defendant company, knew perfectly well that there was a lawful way of obtaining possession. It knew perfectly well that the flat in question was occupied. In those circumstances, there can only have been one explanation for the action taken by the first defendant and that was to achieve a better profit from its property than it was doing up to that time. That is precisely the profit that has motivated so many landlords to behave badly.

Unless the court meets such behaviour by the imposition of exemplary damages, this sort of disgraceful behaviour will continue. I consider that in this particular case, having looked at other guideline cases and examples of awards for exemplary damages, exemplary damages should be fixed at £4,000."

If you're not sure, just ask…

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Next week: 1CL Festive Case Law Update

16th December, 12pm