HOUSING DISREPAIR: AN INTRODUCTION

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Introduction

The law regulating the housing conditions of tenants is a complex area and, it has to be said, not one which makes particularly happy reading for those living in rented property (whether public or private sector).

This seminar aims to provide a brief introduction to one aspect of the relevant law - housing disrepair. For the law on nuisance, defective premises and the new provisions of the Housing Act 2004, interested parties should turn to the relevant books:

- *Dowding and Reynolds on Dilapidations* - Sweet & Maxwell
- *Housing Conditions* - Sweet and Maxwell
- *Encyclopedia of Housing Law* - Sweet & Maxwell
- *The Manual of Housing Law* - LAG
- *Legal Action* - LAG

Contents:

1) What is (and is not) disrepair?
2) Common defences
3) Remedies
4) Appendix - checklist and pre-action protocol
1. **What is (and is not) disrepair?**

1.1 Disrepair occurs when (a) there is a breach of a repairing covenant that (b) the landlord has notice of and (c) fails to remedy within a reasonable period of time.

1.2 Repairing covenants occur in all tenancy agreements. As a very minimum, tenants will have the benefit of s.11 *Landlord and Tenant Act 1985* and, in some cases, there will be an express term going beyond the statutory minimum.

*s.11 Landlord and Tenant Act 1985*

1) *In a lease to which this section applies 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.*

1.3 The effect of s11(1) LTA is clear. The landlord covenants to keep in repair the structure and exterior of the dwelling house and to keep in repair and proper working order in the dwelling-house the installations mentioned in s11(1)(b) and (c).
Express Terms of the tenancy

1.4 Alternatively, look to the express terms of the agreement in each individual case. The tenancy agreement will usually contain repairing obligations of the parties. Insofar as the landlord is concerned the express terms may be wider than those implied under statute.

1.5 In *Welsh v Greenwich*¹ the claimant was a secure tenant whose tenancy agreement stated that the landlord was to “maintain the dwelling in good condition and repair, except for such items which are the responsibility of the tenant.” The flat became affected by severe mould at the base of the windows, the external walls and under the carpets and soft furnishings. The mould was caused by condensation damp which was the result of the absence of thermal insulation in the flat’s external wall. It was agreed between counsel that there was no damage to the physical structure of the dwelling. The judge held that clause 2.1 imposed an obligation to maintain all aspects of the flat which could have an effect on its condition including the insulation of the exterior walls. The Court of Appeal upheld that conclusion.

1.6 Latham LJ stated:

“the phrase “good condition” is intended to be treated as a separate concept from the word “repair,” even though there may be overlap. As far as the phrase “good condition” is concerned, it seems to me to concentrate the mind in the state of the dwelling, whereas “repair” is looking at the matter more from the perspective of the need to do particular repairing work.”

¹ (2001) 33 H.L.R. 6
**Why is the difference important?**

1.7 It is important to look at the express terms because the provision provided by s.11 is relatively limited.

**What falls outside the scope of s.11?**

1.8 For the purposes of s.11, disrepair occurs when there is deterioration, that is when a part of the building is in a worse condition than it was at some earlier time.2

1.9 Repair does not include improvement. There is, in general, no obligation to remedy an inherent defect.3

1.10 This is best illustrated by looking at the case law concerning particular types of disrepair:

(a) penetrating damp:

(i) It is necessary to show that the cause of the penetrating damp has arisen from disrepair to the subject matter of the covenant.

(ii) In *Stent v Monmouth District Council*,4 the front door did not have weatherboarding and permitted water ingress. The landlord was not liable at that point because the door had always been defective in this way. It was only when the door, the subject matter of the repairing covenant, began to rot, that the landlord was held to be liable.

(iii) In *Southwark London Borough Council v McIntosh*,5 the claim failed because the tenant did not allege any physical damage to the structure.

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2 *Post Office v Aquarius Properties* [1987] 1 All ER 1055; *Quick v Taff- Ely Borough Council* [1986] QB 809; *Anstruther- Gough- Calthorpe v McOscar* [1924] 1 KB 716


4 (1987) 19 H.L.R. 269

and exterior of the property or that such damage caused the penetrating damp.

(b) condensation damp:
(i) A tenant may be able to seek damages for condensation damp where the landlord covenants to keep the premises in good condition.6
(ii) There will be no recourse to s.11 LTA 1985 unless it can be shown there is damage to the structure and exterior rather than a design or planning defect.
(iii) In *Quick v Taff- Ely Borough Council*7 the Court of Appeal held that a landlord was not liable for the damage caused by condensation because there was no disrepair to the structure and exterior of the dwelling-house.
(iv) It should be noted that it has been held that plaster and mere decorative items do not constitute part of the structure of the dwelling house under terms implied by s.11 LTA 1985.8

2. Common Defences

2.1 It’s not disrepair – see above

2.2 Limitation Act 1980
(i) Where the claim relates to a long period of time, the landlord should plead the 1980 Act. With periodic tenants, this will be 6 years (in breach of contract - s.5; and in tort - s.2). As breach of repairing covenant is a

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6 Welsh v Greenwich London Borough Council (2001) 33 H.L.R. 40
7 [1986] Q.B. 809
“continuing breach”, this does not amount to an absolute defence but it will reduce damages.

(ii) Note also that where the claim “includes” a claim for personal injury, the time limit is 3 years. It appears that this applies to all the claims arising, which could have a dramatic effect on the rest of the disrepair claim. (The claimant could, however, apply to extend the limitation period under s.33.

2.3 Access

(i) One of the common problems that can arise is that the landlord may feel that the claimant has failed to give access to allow works to be carried out. This can undoubtedly found a defence that there has been no breach (where access was sought within a reasonable time) or that any loss suffered has not been caused by any breach of covenant.

(ii) The difficulty is always the practical evidential problem; what records are there of access being sought; what prior arrangements were made; what was done when the tenant was not in?

2.4 Notice

(i) It is an implied term of all tenancy agreements that the landlord is not liable to carry out any repair unless and until he has been put on notice of the need for repair and has failed to carry out the repair within a reasonable period of time thereafter.9

(ii) The information received by the landlord must be sufficient to put a reasonable person on enquiry as to whether works of repair are needed.

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9 O’Brien v Robinson [1973] AC 912
2.5 Tenant responsibility

(i) The tenant is under a duty to use premises in a tenant like manner.\textsuperscript{10} Records should be checked for reports of ASB or other evidence of misuse of the property.

2.6 The claimant is a tolerated trespasser

(i) The essential first step is to establish whether or not the ‘tenant’ is actually a tenant.

(ii) Not all those who occupy rented residential property are tenants. Since the decision of the House of Lords in \textit{LB Brent v Burrows}\textsuperscript{11} people who have occupied property after a suspended possession order has been made are now likely to be tolerated trespassers.

(iii) This has taken on a greater significance following the decision in \textit{Harlow v Hall}\textsuperscript{12} and \textit{Knowsley HA v White}\textsuperscript{13} which have confirmed that the old N28A (the standard form used by the county courts for suspended possession orders) had the effect of turning people into tolerated trespassers.

(iv) A tolerated trespasser cannot sue for breach of covenant but must apply back to the court to revive their tenancy.\textsuperscript{14}

3. Remedy

3.1 The starting point should perhaps be to consider the purpose of an award of damages. Griffiths LJ in \textit{Calabar Properties Limited v Stitcher}\textsuperscript{15} summarised the aim of the courts in awarding damages to a tenant for disrepair to a

\textsuperscript{10} \textit{Warren v Keen} [1954] 1 QB 15
\textsuperscript{11} [1996] 1 WLR 1448
\textsuperscript{12} [2006] H.L.R. 27
\textsuperscript{13} [2007] EWCA Civ 404
\textsuperscript{14} \textit{Rogers v Lambeth LBC} [2000] HLR 32
\textsuperscript{15} [1984] 1 WLR 287 (CA)
property: -
“The object of awarding damages against a landlord for breach of his covenant to repair is not to punish the landlord but, so far as money can, to restore the tenant to the position that he would have been in had there been no breach. This object will not be achieved by applying one set out rules to all cases regardless of the particular circumstances of the case. The facts of each case must be looked at carefully to see what damage the tenant has suffered and how he may be fairly compensated by a monetary award”.

3.2 Calabar Properties concerned a long lease of a top floor flat situated in a block which was built in the 1960s. The tenant first complained of damp penetration in 1976. Damages were assessed in December 1982. The tenant said at trial that “the external woodwork was rotting, mastic sealing around the windows was perishing and the damp penetration was so bad that after two attacks of pleurisy and one of bronchitis he and his wife decided to leave.” The tenant was awarded the total sum of £7,606.44. This was made up of £3000 for ‘disappointment and discomfort’ and £4,606.44 for diminution in value which was actually calculated by reference to the cost of making good the defects. The tenant’s appeal against the judge’s refusal to award damages for the rates, rent and running costs of the property during the period the premises were inhabitable as a result of the disrepair and consequential losses for loss of use during that period was dismissed. The following were considered to be recoverable: cost of alternative accommodation if obliged to move out; cost of removals and storage of furniture; cost of any consequential decoration/cleaning up; damages for worry and inconvenience of moving into alternative accommodation.
3.3 In the case of *Wallace v Manchester City Council*,\(^\text{16}\) the tenant was a secure tenant with two children. The defects complained of included collapsed wall below the living room window, rotten windows, mould growth, defective plaster, and skirting boards and leaking rainwater pipe. The premises were cold. In that case a global award of £3,500 for 3 years inconvenience and distress including any further discomfort experienced during the execution of remaining repairs was upheld by the Court of Appeal.

3.4 The Court of Appeal re-stated that the object of an award of damages is to place, as far as money can, the tenant in the position as if the obligation to repair had been performed by the landlord. This involves a comparison of the property when in disrepair with the state it would have been if the obligation had been complied with. The Court went on to clarify that where the tenant had remained in occupation, the loss to be compensated was the loss of comfort and convenience arising from living in a property which was not in the state of repair it should have been. If the tenant does not remain in occupation, he can recover for the diminution of the price of the recoverable rent.

3.5 Morris L.J. said:

“First the question in all cases of damages for breach of an obligation to repair is what sum will, so far as money can do it, place the tenant in the position he would have been in if the obligation to repair had been duly performed by the landlord. Second, the answer to that question inevitably involves a comparison 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. Third, for periods when the tenant remained

\(^\text{16}\) (1998) 30 HLR 1111, (CA)
in occupation of the property, notwithstanding the breach of the obligation to repair, the loss to him requiring compensation is the loss of comfort and convenience that results from living in a property that was not in the state of repair it ought to have been if the landlord had performed his obligation...Fourth, if the tenant does not remain in occupation, but, being entitled to do so 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.....

....Thus the question to be answered is what sum is required to compensate the tenant for the distress and inconvenience experienced because of the landlord’s failure to perform his obligation to repair. Such sum may be ascertained in a number of different ways, including but not limited to a notional reduction in the rent. Some judges may prefer to use that method alone (McCoy v Clark), some may prefer a global award for discomfort and inconvenience (Calabar Properties Ltd v Stitcher and Chiodi v De Marney) and others may prefer a mixture of the two....

...expert evidence is not of assistance when assessing damages in accordance with my third proposition. The question is the monetary value of the discomfort and inconvenience suffered by the tenant. That is a matter for the judge.....a judge who seeks to assess the monetary compensation to be awarded for discomfort and inconvenience on a global scale 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 landlords’ breach of covenant.... ”
3.6 The Court of Appeal having looked at the then available authorities on residential cases assumed (but did not decide) that there was an unofficial tariff of between £1,000 - £2,750p.a. for damages under this head. The court stated that the basis of the source of the money with which to pay the rent is irrelevant to the extent of the discomfort and inconvenience suffered by the tenant and what would be proper monetary compensation for it. It was therefore not relevant that the tenant was in receipt of Housing Benefit.

3.7 In *Shine v English Churches Housing Group*,[^17] Mr. Shine was a secure tenant of the flat owned by English Churches Housing Group. The premises were subject to damp and dry rot. Mr. Shine complained about the condition of the premises to his landlord in January 1995 and again in May 1999. By May 1999 the premises were badly affected by the damp so that substantial works were necessary. In January 2001 Mr. Shine commenced proceedings against his landlord for disrepair. In February 2003 Mr. Shine vacated the premises to allow works to be carried out. At first instance he was awarded damages for disrepair of £19,000, representing £3,000 for the period January 1995-May 1999 and £16,000 for the following four years. On appeal, the Court of Appeal allowed:

- January 1995-1996: £1,589 (50% of the rent for 1.5 years)
- 1996-mid-1999: £3,000
- Mid-1999-January 2001: £3,217 (75% of rent x £55 per week)
- January 2001-completion: £60 per week for 2 ½ years (discount of 75% because works could have been completed in 6-9 months had Mr. Shine cooperated).

3.8 Wall L.J. said

“Whilst we accept that the guidelines helpfully set out by Merritt L.J. in Wallace v Manchester CC are not to be applied in a mechanistic or dogmatic way, and whilst we equally accept that there will be cases in which the level of distress or inconvenience experienced by a tenant may required an award in excess of the level of rental payable, we the view that the plain inference of Morritt L.J.’s judgment, and the figures identified in the case itself, demonstrate that if an award of damages for stress and inconvenience arising from a landlord’s breach of the implied covenant to repair is to exceed the level or the rental payable, clear reason 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.

It must, we think, be remembered that an award of damages under LTA 1985 s. 11 is an award for a breach of contract by the landlord, not for a tort committed by the landlord. It is, accordingly in our judgment logical that the calculation of the award of damages for stress and inconvenience should be related to the fact that the tenant is not getting proper value for the rent, which is being paid for the defective premises. Moreover, the reason for the awards being modest is, it seems to us, related to the fact that the tenant in a secure weekly tenancy has the benefit of occupying premises at aren’t which is well below that which the same premise would be likely to command in the open market...... ....we see nothing in the instant case to take it tout of what might be described as the basic rule of thumb - all other things being equal - the maximum award for damage in the case such as the present should be the rental value of the premises...”

3.9 There are, of course, many factors which will influence the level of an award of damages. Each case will turn on its facts.
(a) Children or other family members
(b) House-proud?
(c) Age
(d) Living alone?
(e) Cumulative effect of the disrepair
(f) The standard of the area/premises
(g) Alternative accommodation
(h) Failure to give access

3.10 Also remember to consider any special damages

3.11 If the tenant is still living at the property, then they will likely want the necessary repairing works to be done. The court can order the landlord to do the works by granting an order for the specific performance of the repairing covenant, which will force the landlord to do the works (or, ultimately, he may be committed to prison for contempt of court). Orders for specific performance should be sought as well as damages in any proceedings.

4. Procedural issues
4.1 Read the Pre-Action Protocol for Disrepair cases
a) **Is the client a tenant?**
   (i) Tenants who had “SPOs” made against them may not be tenants.
   (ii) If they are not tenants, you need to make an application to the court to
        revive the tenancy before bringing any claim.

b) **Is it disrepair?**
   (i) What is the scope of the repairing covenant? S.11 or contractual term?
   (ii) Is the thing complained of caught by the repairing covenant?
   (iii) Does the landlord have notice?
   (iv) Has a reasonable time passed without action?
   (v) Might the tenant have contributed to or caused the problem?

c) **How much is it worth?**
   (i) What is the rent?
   (ii) What other expenses has the tenant incurred?