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A modern approach to Housing Disrepair Claims

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1 – Why a “modern” approach?
2 - Gaining the early tactical advantage
3 – Upcoming changes

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Why a “modern” approach?

Catherine Rowlands

April 2024

Back in the mists of time...

25 years ago

Quarter of a century ago

Key case

Wallace v Manchester City Council (1998) 30 HLR 1111

Key points

Damages can be calculated in lots of ways.
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 (*Sturolson v. Mauroux* and *Brent L.B.C. v. Carmel Murphy*). But, in my judgment, they are not bound to assess damages separately under heads of both diminution in value and discomfort because in cases within the third proposition those heads are alternative ways of expressing the same concept.

“An unofficial tariff”

How much did they get?	How much would it be today?
July 1997	April 2024 (in round figures)
Children claimed damages for “ill-health” and were awarded £2,000 – no appeal	About £3,800
Special damages of £780 – no appeal	About £1,480
Mrs Wallace got damages of £3,500 for inconvenience including having to put up with the repairs – judge took into consideration the fact she had been in receipt of Housing Benefit. This was (she said) for a five year period ie £700 p.a	About £6,650
She appealed and argued “an unofficial tariff of damages for discomfort and inconvenience of £2,750 per annum at the top to £1,000 per annum at the bottom.”	About £1,325
	About £1,900 to £5,250

“An unofficial tariff”

How much did they get?	How much would it be today?
July 1997	April 2024 (in round figures)
Children claimed damages for “ill-health” and were awarded £2,000 – no appeal	About £3,800
Special damages of £780 – no appeal	About £1,480
General damages – the court had not made a finding on the actual period! Council argued it was really 3 years (and COA agreed) so it was really about £1,000 p.a (consistent with the “tariff”)	About £1,900
Total award was upheld - £6,280	About £12,000

Since then: *Khan v Mehmood*

01

[2022] EWCA Civ 791

Simmons v Castle uplift applies to disrepair too

02

Update Wallace by 10%

Global uplift would have meant she got £6,908
Updating for inflation then adding 10% = £13,200

So where are we now with damages?

Some current examples

CK V Lambeth LBC

County Court at Clerkenwell and Shoreditch, 26 April 2023 [LAG]

The claimant was a long leaseholder of a ground-floor maisonette flat that had been affected by structural defects, including leaks, which caused the occurrence of mould and damp inside the flat. The matter initially settled by a Tomlin order in October 2015 and Lambeth LBC agreed to carry out repairs by January 2016. Lambeth did not complete the outstanding repairs within the relevant period and the claimant commenced enforcement proceedings. The matter settled by a further Tomlin order but , yet again, Lambeth did not complete the outstanding repairs. Further enforcement proceedings were commenced and settled at a mediation in May 2021. Again, Lambeth did not comply and the claimant commenced further enforcement proceedings.

DJ Swan made an injunction requiring Lambeth to complete the remaining works by 26 July 2023 and imposed a penal notice. The judge also ordered Lambeth to make an interim payment of £19,500. Before a further hearing on 30 June 2023, the claimant accepted an offer of a further £50,000 plus temporary accommodation costs until the works were completed.

Nearly £70,000 – albeit mainly avoidable

Dezitter v Hammersmith and Fulham Homes

County Court at Central London, 7 November 2023

Disrepair included cracks to the walls and ceilings, ill-fitting and draughty doors and windows, damp and mould, lights hanging from and watermarks to the ceiling, and a boiler that frequently lost pressure. Claimant said she had complained about the disrepair since the day she moved in. Hammersmith did not raise a limitation defence, did not attend the trial, nor did it file a skeleton argument or any evidence. As a result, DDJ Harris struck out its defence and entered judgment for Claimant.
For the period 14 June 2010–24 December 2013 –condition of the property deteriorated as a result of a leak to the roof – award 35% of the rent, about £8,000
From 24 December 2013–19 March 2020 when the roof leaked – 40% of the rent, amounting to £16,200
From 20 March 2020–7 November 2023 (the date from which the Homes (Fitness for Human Habitation) Act 2018 applied) – the report prepared by a single joint expert had found the property **unfit for human habitation**. Thus 100% of rent - £24,786.82.

The 10% uplift was applied, making a total award of £53,664.95 – plus an injunction requiring repairs

Leaman and Howard-Merrill v Hackney LBC

The claimants were long leaseholders of a three-bedroom Victorian maisonette. They pleaded that there were defects to the roof, guttering and drainage in parts of the property retained and controlled by the freeholder, Hackney LBC. The defects to the roof caused water ingress after heavy rainfall and internal decorations including plasterwork and woodwork were spoiled, particularly in the bedrooms, kitchen and hallway.
Scaffolding was left in situ for 12 months. The market rental value of the property in May 2023 was £4,000 per month. The case settled two days before trial with Hackney accepting the claimants' CPR Part 36 offer in respect of damages of £35,000, an average discount on the market rent over 3¼ years of 22.5%, inclusive of any Simmons v Castle uplift.

Damages are considerably higher than they used to be. There is far more at stake.

How has the CPR kept up?

- This is the 25th anniversary of the CPR!
- *(1) These Rules are a new procedural code with the overriding objective of enabling the court to deal with cases justly and at proportionate cost.*

- **In 1999:**
- Small claims track:
- *any claim which includes a claim by a tenant of residential premises against his landlord for repairs or other work to the premises where the estimated cost of the repairs or other work is not more than £1,000 and the financial value of any claim for damages in respect of those repairs or other work is not more than £1,000)*

- **In 2024**
- Small claims track:
- *any claim which includes a claim by a tenant of residential premises against his landlord for repairs or other work to the premises where the estimated cost of the repairs or other work is not more than £1,000 and the financial value of any other claim for damages is not more than £1,000)*

And fixed recoverable costs?

Most claims in fast track and intermediate track

CPR 45
Costs depend on the complexity band
eg

Trial costs on fast track
1 £3,923
2 £3,303 + an amount equivalent to 20% of the damages agreed or awarded
3 £5,265 + an amount equivalent to 30% of the damages agreed or awarded
4 £8,155 + an amount equivalent to 40% of the damages agreed or awarded + £785 per extra defendant

But not disrepair claims

45.1 do not apply to a claim or counterclaim which relates, in whole or in part, to a residential property or dwelling and which, in respect of that property, includes a claim or counterclaim for—
(a) possession;
(b) disrepair; or
(c) unlawful eviction

Excluded for [at least] 2 years from October 2023

Cost remain at large…

So there is every reason to explore alternatives to litigation.

Cheaper * faster * better ?

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Gaining the early tactical advantage

1. Successfully resisting pre-action disclosure (PAD) applications
2. Forcing ADR under *Churchill*

Kelvin Rutledge KC

April 2024

PAD Applications

- Becoming increasingly common in disrepair claims
- Can catch the defendant off-guard
- Run up substantial costs
- Lead to full-blown litigation

The Rule – CPR 31.16

"(1) This rule applies where an application is made to the court under any Act for disclosure before proceedings have started.

(2) The application must be supported by evidence.

(3) The court may make an order under this rule only where–

(a) the respondent is likely to be a party to subsequent proceedings;
(b) the applicant is also likely to be a party to those proceedings;
(c) if proceedings had started, the respondent's duty by way of standard disclosure, set out in rule 31.6, would extend to the documents or classes of documents of which the applicant seeks disclosure; and
(d) disclosure before proceedings have started is desirable in order to –

(i) dispose fairly of the anticipated proceedings;
(ii) assist the dispute to be resolved without proceedings; or
(iii) save costs."

A two-stage test

STAGE 1 – A jurisdictional question - *the court is only permitted to consider the granting of pre- action disclosure where there is a real prospect in principle of such an order being fair to the parties if litigation is commenced, or of assisting the parties to avoid litigation or of saving costs in any event.*

STAGE 2 – the exercise of discretion - *If there is such a real prospect, then the court should go on to consider the question of discretion, which has to be considered on all the facts and not merely in principle but in detail."*

Black v Sumitomo Corporation [2001] EWCA Civ 1819, per Rix LJ at [81]

Other possible routes to disclosure

- Pre-action Protocol for Housing Conditions Claims, para 5.3
- Internal complaints procedure
- Subject access request (SAR)

The SAR route

"[A] subject access request is … a concomitant part of alternative ways of resolving litigation, because it allows the parties to obtain material in a simple and straightforward way, and to make determinations as to the merits of potential litigation."

HHJ Ralton in Hockett v Bristol CC (Bristol County Court, 27.4.2020)

Refusing the claimant permission to appeal, Bean LJ said:

"Pre-action disclosure is always a discretionary remedy. To make an order when the tenant has not used the council's complaints procedure, has not made a subject access request and has apparently refused to allow inspection of the premises goes against both the letter and the spirit of the relevant pre-action protocol, and the policy of the courts to encourage parties to treat litigation as a last resort. I can see no plausible explanation for the course being adopted on behalf of the Claimant other than to increase the income of its solicitors ..."

Heys v Swindon BC

"In my judgment, the jurisdictional question involves far broader considerations than those which were applied by the judge in this case. For instance, the Court should be asking, not only have the parties co-operated in terms of attempting to make the relevant material available, but is the invited approach of using the SAR route a reasonable one? Is it fair to the tenant, or is she put at a disadvantage if there is a contemplation of proceedings? Would disclosure assist any dispute to be resolved without proceedings, or could that be achieved if the material is made available in some other way? Finally, would early disclosure save costs? This is particularly important in my judgment, because of the costs implications of a PAD. Here the council was required to pay several thousands of pounds to the Claimant's solicitor. There is no doubt that the cost of a subject access request would have been minimal, probably non-existent, just, if a solicitor was involved, maybe half an hour filling in a form …

… there has been established a reticence that should be adopted by the courts when dealing with these cases. In other words, the default position should not be that the application is granted. The burden is upon the Claimant seeking the order, or the potential Claimant, and the order should only be granted on compelling grounds."

(Liverpool County Court, 24.2.2023, per HHJ Wood KC at [24] & [37])

See also Bristol City Council v Abdullah Said & Ubax Abshir (Bristol County Court 17.12.2021, per HHJ Ambrose)

Court-Ordered ADR

CPR 1.4 *"The court must further the overriding objective by actively managing cases. Active case management includes – € encouraging the parties to use an alternative dispute resolution procedure if the court considers that appropriate and facilitating the use of such procedure".*

Pre-action Protocol for Housing Conditions Claims, para 4.1

"The courts take the view that litigation should be a last resort, and that claims should not be issued while a settlement is still actively being explored. Parties should be aware that the court will take into account the extent of the parties' compliance with this Protocol when making orders about who should pay costs."

The traditional approach

"It is one thing to encourage the parties to agree to mediation, even to encourage them in the strongest terms. It is another to order them to do so. It seems to us that to oblige truly unwilling parties to refer their disputes to mediation would be to impose an unacceptable obstruction on their right of access to the court …"

Halsey v Milton Keynes General NHS Trust [2004] 1 W.L.R. 3002 Dyson LJ at [9]

The modern approach

"[A]s a matter of law, the court can lawfully stay existing proceedings for, or order, the parties to engage in a non-court- based dispute resolution process … the court should only stay proceedings for, or order, the parties to engage in a non-court-based dispute resolution process provided that the order made does not impair the very essence of the claimant's right to proceed to a judicial hearing, and is proportionate to achieving the legitimate aim of settling the dispute fairly, quickly and at reasonable cost."

Churchill v Merthyr Tydfil CBC [2024] H.L.R. 8, per Sir Geoffrey Vos MR [eliding 58 and 65]

How should the judge decide?

“[66] I do not believe that the court can or should lay down fixed principles as to what will be relevant to determining those questions … It would be undesirable to provide a checklist or a score sheet for judges to operate. They will be well qualified to decide whether a particular process is or is not likely or appropriate for the purpose of achieving the important objective of bringing about a fair, speedy and cost-effective solution to the dispute and the proceedings, in accordance with the overriding objective.”

See also

Housing Ombudsman Service Guidance on Pre-Action Protocol for Housing Conditions Claims and Service Complaints (October 2021)

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Upcoming changes

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New legislation

Social Housing (Regulation) Act 2023

Social Housing (Regulation) Act 2023: Awaab's Law

New section 10A in the Landlord and Tenant Act 1985

- Applies where section 9A applies (ie <7 years)
- (2) There is implied in the lease a covenant by the lessor that the lessor will comply with all prescribed requirements that are applicable to that lease.
- *"prescribed requirement"* means a requirement prescribed in regulations under subsection (3);
- This is enforceable by action for breach of covenant and it is a defence under section 10A(5)
  - *for the lessor to prove that the lessor used all reasonable endeavours to avoid that breach.*

Section 10A(3) requires the Secretary of State to make regulations which require the lessor to take action, in relation to prescribed hazards which affect or may affect the leased dwelling, within the period or periods specified in the regulations.

New section 10B in the Landlord and Tenant Act 1985

Tells us more about the regulations;

Section 10A(3) requires the Secretary of State to make regulations which require the lessor to take action, in relation to prescribed hazards which affect or may affect the leased dwelling, within the period or periods specified in the regulations.

"prescribed hazard" means those set out in section 2 of the Housing Act 2004

Any regulations must be approved by both Houses of Parliament

What we don’t know yet...

01

When?

No regulations have yet been laid before Parliament (and we don’t know when Parliament will be dissolved, or whether any time will be given before then) (see also the Renters’ Reform Bill!)

02

What?

As there are no regulations in draft, this is all guesswork! But we can be pretty sure that they will follow the Guidance already promulgated

Suggested timescales

- Initial investigation – 14 days
- Start work within 7 days if there's a risk to health
- Provide written summary – 14 days
- Start work within 7 days of that summary
- Complete works within "reasonable time period"
- Faster timescales for emergency repairs
- Immediate decant if serious risk to health
- Keep records!

Damp and mould: new guidance

Understanding and addressing the health risks of damp and mould in the home - GOV.UK (www.gov.uk)

“tenants should not be blamed for damp and mould. Damp and mould in the home are not the result of ‘lifestyle choices’, and it is the responsibility of landlords to identify and address the underlying causes of the problem, such as structural issues or inadequate ventilation.”

Damp and mould: new guidance

- always tackle the underlying issue promptly, and act with urgency when concerns have been raised about tenant health. Landlords should not delay action to await medical evidence or opinion - medical evidence is not a requirement for action

- NB ignore tenant's solicitors who tell you not to do works!

- identify and tackle the underlying causes of damp and mould, including building deficiencies, inadequate ventilation and condensation. Simply removing surface mould will not prevent the damp and mould from reappearing

Damp and mould: new guidance

- inspect the home at least 6 weeks after remedial work has been carried out, to ensure that the issue has been fixed and damp and mould have not reappeared. If damp and mould have reappeared, further investigation and intervention should be pursued.

Proposals for reform of HHSRS

- Report: https://www.gov.uk/government/publications/housing-health-and-safety-rating-system-hhsrs-review-outcomes-and-next-steps/summary-report-outcomes-and-next-steps-for-the-review-of-the-housing-health-and-safety-rating-system-hhsrs
- New regs proposed to reduce the number of hazards
- Decent Homes Standard – proposed legislation
- Again, no clear timetable and both require regulations to be placed before Parliament

Defences

- Section 10A(5)
- If you are in breach of the new implied term in the lease – ie you have not complied with the regulations – you have a defence of “reasonable endeavours”
- If you’ve done everything you can in relation to a repair that needs to be completed within a “reasonable time scale” you won’t be in breach anyway
- Where there is a prescribed timescale, the onus is on the landlord to prove that there were reasonable endeavors.

Reasonable endeavours

ACCESS PROBLEMS
- Records, records, records!
- Flexibility?
- Need to seek injunction?

RESOURCES
- Can’t get supplies (but need to show plan)
- Can’t get specific part from another supplier
- Not funding issues

Reasonable endeavours

RISKS
- Property filthy
- Dangerous dogs etc
- Records, records and more records!

DISPUTES
- Is this within the definition?

CONFERENCE

Housing Day

Monday 14th October 2024

Save the date!

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Thanks!

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