cornerstone barristers

Defending disrepair claims: Dos and Don’ts

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Early steps: assess, record, protect

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Disrepair in overview

1. There must a property that a landlord is obliged to keep in a state of repair;
2. At least part of that property must have fallen into disrepair;
3. The landlord has been told (or been put 'on notice') of the disrepair;
4. And the landlord must have failed to repair the property within a reasonable period of time *(consider landlord's ability to carry out repairs / access.)*

Assess: is this something you need to do?

- Check the tenancy agreement – Terms may well impose obligations on the landlord going well beyond any statutorily implied minimum terms. For example: *Welsh v Greenwich LBC* (2001) 33 HLR 438, CA – express obligation to keep the property "in good condition"

- Otherwise, see s.11 Landlord and Tenant Act 1985 - will apply to most residential tenancies of terms under 7 years (see s.12-15 LTA 1985)

s.11 Landlord and Tenant Act 1985

- **<u>"Repairing obligations in short leases"</u>**
- By s.11, a landlord has an obligation to:

a. Keep in repair the structure and exterior of the dwelling house (including drains, gutters and external pipes)
b. Keep in repair and proper working order the installations in the dwelling house for the supply of water, gas and electricity and for sanitation (inc. basins, sinks, baths and sanitary conveniences, **but not** other fixtures, fitting and appliances for making use of the supply of water, gas or electricity).
c. Keep in repair and proper working order the installations in the dwelling house for pace heating and heating water.

New section 9A: Fitness for human habitation

- Act came into force on 20 March 2019
- Applies to leases under 7 years, secure tenancies, assured tenancies, including introductory tenancies
- Applies to any tenancy granted on or after **20 March 2019 –** as from the start date
- Applies to any tenancy granted before 20 March 2019 as from **20 March 2020** but only as from that date – so must be FFHH at 20 March 2020 and thereafter
- Does not apply if the tenancy was granted before 20 March 2019 and ended before 20 March 2020

Assess: is this something you need to do?

- Just because the tenant's expert has said it falls within your repairing obligations does not make it so!
- Record: what is the view of the landlord as to
  - Existence of the defect
  - Impact of the defect
  - Liability for the defect
  - Appropriate work to be done

Should you deal with inherent defects?

- The landlord will not be liable for issues arising solely because the dwelling was designed or constructed badly.
- Such dwellings have not fallen into disrepair – they have always been defective (see *Stent v Monmouth DC* (1987) 19 HLR 269, CA)
- BUT in some cases a landlord may be required to remedy an inherent defect (see *Ravenscroft Properties v Davstone (Holdings) Ltd* (1980) QB 12).
- It may make the property FFHH
- AND it may make sense

Standard of repair at property

- In determining the standard of repair at a property, consider the age, character and prospective life of the dwelling house and its locality (s.11(3) LTA 1985) (see *Montoya v Hackney LBC* December 2005 *Legal Action* 28 QBD)
- NOTE: when conducting repairs there is also an obligation on the landlord to make good/redecorate after the works are complete.

Performing repairs: what do you need to do?

- Landlord may perform repairs in whichever manner is the least onerous for him (can choose the cheapest options if so desires).
- No obligation to do what tenant demands!
- Where repair requires replacement of installations or fittings the obligation is to replace on a like for like or nearest equivalent basis.
- no requirement to upgrade fittings (eg electrics) to bring them in line with current standards (unless required to do so by law or to comply with necessary regulations).

Performing repairs: what do you NOT need to do?

- Section 11 doesn't mean…
  - You guarantee there will never be disrepair
  - You carry out improvements
  - You do the tenants' job
  - You repair everything in the property

What does tenant-like mean now?

- “little jobs around the house”
- Not causing damage
- Keep ventilated/heated so as to avoid condensation dampness
- Allow access
- Express terms of the tenancy
- A likely battleground

Record

- Record the state of the property generally, not just the disrepair
- Record anything said in the course of inspections
- Record any attempts to get access that are not successful and what you do about them

Carry out inspections in Covid times?

- Video from the tenant will be useful but not conclusive
  - Will put you on notice
  - Possibly virtual tour live?
- Tenant not expected to diagnose causes of the disrepair
- Can you ask the tenant to leave the property while you carry out an inspection?
- Consider what level of PPE and sanitisation required

Notice

- Produce records and *explain*
- Give a list of abbreviations
- Explain what the dates on the records signify
- Give any evidence to show that they are accurate

Protect

- Protect your position by
  - Complying with the PAP
  - carrying out repairs speedily and efficiently
  - Flagging up issues timeously
  - Asking for access and if it's not granted make an application to the Court
- Make appropriate offers of settlement but not excessive
- Record what works are done and report back

Carrying out repairs in covid times?

- Consider decants? (Please ensure properly documented!) Test before a move?
- Consider a "bubble" team assigned to each property?
- Ensure proper training and equipment
- Check that the tenant really wants workmen coming in – not just a letter before action from a solicitor who hasn't checked
- Keep records to evidence the reasons for not doing works if that's the decision

Government Guidance in respect of Covid-19

- On 28 March 2020, the government published 'Guidance for landlords and tenants' (Ministry of Housing, Communities & Local Government) in England during the pandemic some of which relates to dealing with disrepair, last updated on 7 April 2021.
- Also on 28 March 2020, the government published 'Guidance for local authorities' providing advice as to how local authorities in England should enforce standards in rental properties including housing association properties during the pandemic, last updated on 7 April 2021.
- On 26 March 2020, the Welsh government published 'Guidance for landlords and managing agents in the private rented sector: coronavirus (COVID-19)', updated on 27 October 2020.
- On 30 March 2020, the Welsh government published 'COVID-19 (coronavirus) and the enforcement of standards in rented properties in Wales'. On 2 April 2020, new guidance was published called 'Guidance for local authorities on enforcing standards in rental properties: coronavirus (COVID-19)', updated on 2 July 2020.

Access

- New section 9A(7)
- *In a lease to which this section applies of a dwelling in England, there is also implied a covenant by the lessee that the lessor, or a person authorised in writing by the lessor, may enter the dwelling for the purpose of viewing its condition and state of repair*
  - *At reasonable times of day*
  - *On 24 hours notice*

New pre-action protocol

- the Pre-action protocol for Housing Conditions Claims (England) – different protocol applies in Wales
- Applies to all civil claims and counterclaims **arising from the condition of** residential premises in England brought by tenants, leaseholders and members of their families ie disrepair and fitness for human habitation but does not apply to counterclaims or set offs which are part of other proceedings (e.g. rent arrears possession claims).
- Covers ADR -> Letter of Claim -> Landlord's Response -> Experts -> Inspection (Covid-19 difficulties) -> Time Limits -> Limitation -> Costs -> Annex contains useful template letters.

Purpose of Pre-Action Protocol?

- The aim of the pre-action protocol is to avoid litigation, offer an opportunity for problems to be addressed early, resolve matters at a low cost, and to achieve quick compensation when appropriate.

- It therefore encourages ADR/mediation/ombudsman/use of 'the right to repair' scheme.

PAP: Letter of Claim

- The Letter of Claim should be provided as soon as possible. Depending on the circumstances, tenant may like to provide an early notification letter and then follow up with a detailed letter of claim setting out full details
- Specimen letter at Annex A of Protocol.
- Letter should request disclosure of documents relevant to claim.

PAP: Landlord's response

- Should be within **20 working days** of receipt of Letter of Claim: ie a month
- Provide disclosure and deal with expert issues (agree SJE if appropriate).
- Either within the response to the Letter of Claim or within 20 working days of receipt of the report of a single joint expert (if agreed):

1. Explain whether liability admitted or not, and if so, in respect of which defects.
2. If liability is disputed, explain the reasons.
3. Make points in relation to lack of notice or difficulty gaining access to conduct repairs.
4. Provide Schedule of intended works (inc. anticipated start and completion dates and timetable).
5. Make any offer of compensation.
6. Make any offer in relation to costs.

PAP: Experts

- PAP Encourages use of SJE if necessary.
- If landlord doesn't respond to the proposed expert within 20 working days of receipt of the Letter of Claim, the tenant's expert will be instructed as SJE.
- If can't agree joint instructions then the landlord and tenant should send their own separate instructions to SJE.
- If can't reach agreement to instruct SJE parties should attempt to arrange joint inspection & produce an agreed schedule of works.
- Inspection should take place within 20 working days of the landlord's response and any report or schedule of works should be provided with 10 days thereafter.

PAP: Costs

- Failure to comply with the pre-action protocol is a factor the court may consider when determining what costs order is appropriate.
- Where tenant's claim settled without litigation (on terms which justify bringing it) the landlord will pay the tenant's reasonable costs (see Form N260).
- Where separate experts instructed, parties may have to justify the costs of such instruction

Final note on PAP

- Deadlines may be altered (by agreement between parties)
- There is no reason a party shouldn't attempt to take action more speedily than the timeframes set out above.
- Where limitation is about to expire, tenants should request that the landlord allows time for the pre action protocol process to be followed rather than issue straight away.
- Advisable to a provide timely response –> investigate the claim so that concessions can be made to narrow the issues and therefore keep costs down.

Assessing quantum of damages and making timely offers

Principles

Principles relating to damages for disrepair can be summarised as follows:

- The aim of the award of damages is to put the claimant into the position he or she would have been in had the obligations been performed, which is compensatory as opposed to penal;
- The trial judge has a broad discretion in his approach whether related to diminution in rental value, or general damages for distress and inconvenience, or both
- The usual starting point in such an assessment will be a notional reduction in rental value and there would have to be some good reason for any award to exceed the rental value – but this is possible.

Case Law for damages for disrepair

- *Wallace v Manchester CC (1998) 30 HLR 1111*
- *Shine v English Churches Housing Group [2004] HLR 42*
- *Earle v Charalambous [2007] HLR 8*
- *Moorjani v Durban Estates Ltd [2016] 1 WLR 2265*

- Uplift in respect of general damages
  - The claimant will usually be entitled to a 10% uplift in general damages following *Simmonds v Castle [2013] 1 W.L.R. 1239*

Part 36 offers

- Assess merits and quantum and consider an early Part 36 or Without Prejudice Offer to protect the landlord's position on costs
  - What's the difference between Pt 36 and WP?
- Have all necessary works been carried out?
- What are the tenant's funding arrangements?
- Has PAP been complied with?

Other causes of action

Section 4 Defective Premises Act 1972

- *McAuley v Bristol City Council [1992] QB 134*
- CA held that the obligations imposed on a local authority by s32 of the Housing Act 1961 (the predecessor to the 1985 Act) did not extend to a defect in a garden, and in the absence of a statutory duty or an express term in the tenancy agreement, the council could only be liable under s4(4) of the 1972 Act if there was an implied obligation on the council to repair a defect in the premises of a description for which the council had a right to enter the premises.

Section 4 Defective Premises Act 1972 (2)

- The duty under s4 of the 1972 Act will not extend beyond the landlord's repairing obligations, e.g. in the case of a design defect or latent defect *Quick v Taff Ely BC [1986] QB 809; Lafferty v Newark & Sherwood DC [2016] L & TR 16;*
- *Sternbaum v Dhesi [2016] HLR 16* – stairs unsafe without bannister but had never had one so not in disrepair and the defendant was not in breach of his duty under s4; see also *Dodd v Raebarn Estates Ltd [2017] HLR 34*.
- The statutory duty applies to all of the land let, not just the building which comprises the dwelling-house so it can apply to a paved area of garden *Smith v Bradford Metropolitan Council (1981-82) 4 HLR 86*

Section 4 Defective Premises Act 1972 (3)

- A claim under s4 potentially has a number of advantages for claimants:-
- The duty extends so as to take care that all persons who might reasonably be expected to be affected by defects in the state of the premises are reasonably safe from personal injury or damage to their property.
- A landlord is under a duty to prevent a relevant defect causing personal injury;
- The notice requirements are arguably less stringent that in a s11 disrepair case *Sykes v Harry [2001] QB 1014; Rogerson v Bolsover DC [2019] Ch 450;*
- The duty under s4 applies to all of the land let to the tenant such as a paved area of garden.

Nuisance

- Generally, private nuisance concerns an interference by one party with another's use of and enjoyment of land.
- A person will be liable in nuisance if they cause a nuisance, authorise a nuisance or adopt a nuisance.
- The damage or interference with the enjoyment of the land suffered by the landowner must be substantial or unreasonable, and can arise from a single incident or a 'state of affairs'.
- In the social housing context, claims often arise from water penetration/leaks, or insect/vermin infestation.

Damages for private nuisance: examples

- *McGuigan v Southwark LBC [1996] CLY 3721* – ant and cockroach infestation attracting general damages of between £1000 and £3,500 per annum, (updated to between about £2000 and £6,800 per annum today), plus special damages.
- *Habinteg Housing Association v James (1995) 27 HLR 299* – no liability for cockroach infestation where no common parts retained by the landlord.
- *Sarmad v Okello, 24 October 2003, Shoreditch County Court* – rat infestation - £2000 per annum, (updated to about £3,300 per annum today).

Damages for private nuisance: examples

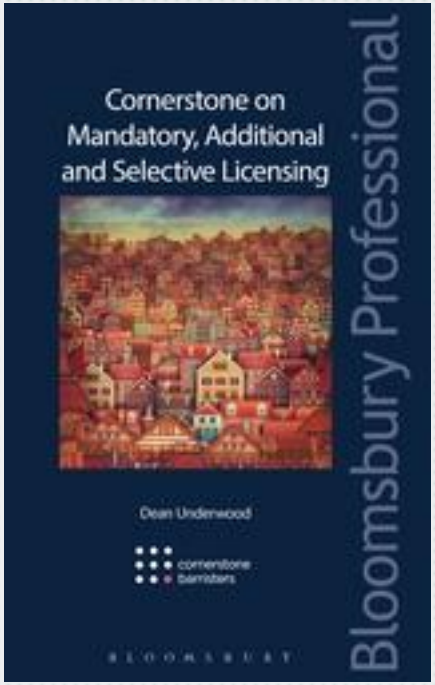
- *Bernard v Meisuria, 22 November 2010, Central London County Court* – rat infestation caused by drains in disrepair, and other minor disrepair attracting damages of £20,000 including special damages.
- *Read v Notting Hill Housing Trust, 13 June 2013, Bow County Court* – rat infestation. Notional reduction of 80% of the rent
- *Walsh v Amicus Horizon Limited, Lambeth County Court, 12 September 2013* – mice infestation – notional reduction of 25% of the rent.

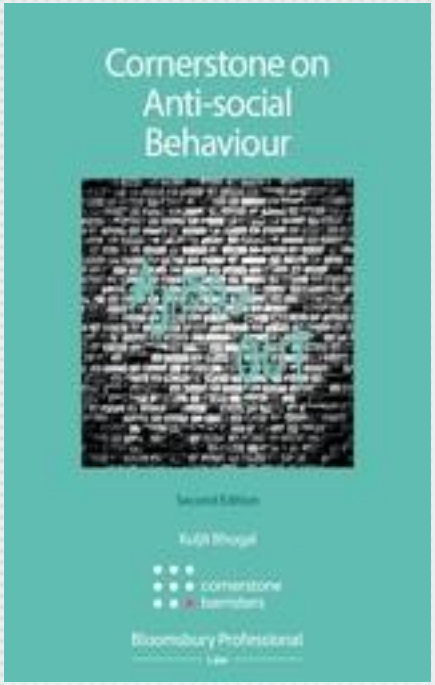
Special Damages

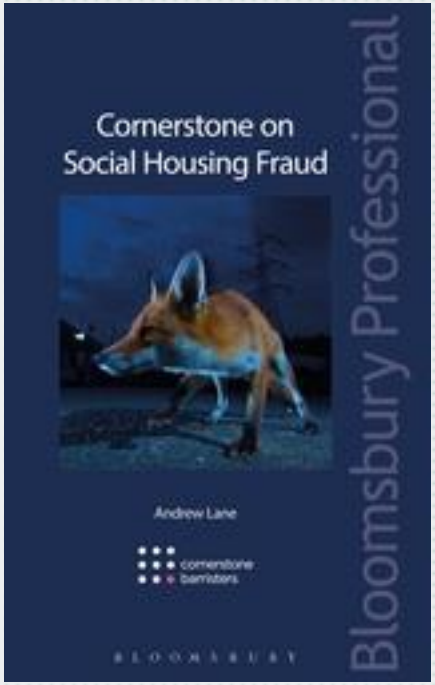
- Be alert to exaggeration.
- What is the evidence of special damages?
- Usually second-hand value of items lost or damaged unless there is no second hand market. If there is no such second-hand market, the claimant may be able to claim replacement value

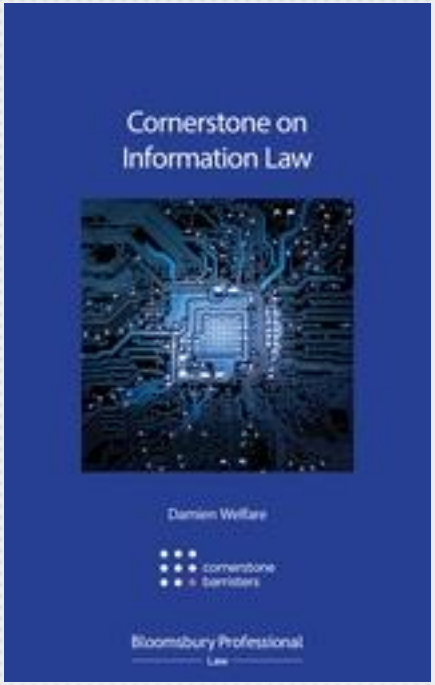
Questions

Cornerstone Books









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