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Disrepair litigation in changing times: new law and new challenges

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Overview of section 11 of the Landlord and Tenant Act 1985

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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.)*

Sources of landlord obligations

- 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

- **“Repairing obligations in short leases”**

- 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

What does it mean to ‘keep in repair’?

- Continuing obligation to keep the standard of repair throughout tenancy.
- AND requires the landlord to put the premises in repair if they were not so at the outset of the tenancy (*Proudfoot v Hart* (1890) 25 QBD 42, CA)
- Q: But what does ‘repair’ mean? A: The converse of disrepair…

Meaning of disrepair (1)

- Disrepair occurs where there is **deterioration** (when part of the building is in a worse condition than at some earlier time) (see *Post Office v Aquarious Properties Ltd* [1987] 1 All ER 1055.)
- See also Denning LJ in *Morcom v Campbell-Johnson* [1956] 1 QB 106, [1955] 3 WLR 497, CA:

"If the work which is done is the provision of something new for the benefit of the occupier, that is, properly speaking an improvement, but if it is only the replacement of something already there **which has become dilapidated or worn out, albeit that it is a replacement by its modern equivalent, it comes within the category of repairs not improvements**"

Meaning of disrepair (2)

- See the remarks of Sachs LJ in *Brew Bros Ltd v Snax* [1970] 1 QB 612, [1969] 3 WLR 657, CA :

"Look at the particular building, look at the state which it is in at the date of the lease, look at the precise terms of the lease, and then come to a conclusion whether, on a fair interpretation of those terms, in relation to that state, the requisite work can fairly be called repair"

Meaning of disrepair (3): Landlord will not be liable for 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)

Meaning of disrepair (4): is ‘repair’ required?

- Classically a matter of fact and degree: is the work too extensive or costly? Would it render the property ‘wholly different’ from that which was let?
- Guidance provided by Mustill LJ in *McGougall v Easington DC* (1989) 21 HLR 310, (1989) 58 P&CR 201, CA:

> “In my opinion three different tests may be discerned, which may be applied separately or concurrently as the circumstances of the individual case may demand, but all to be approached in the light of the nature and age of the premises, their condition when the tenant went into occupation, and the other express terms of the tenancy:
>
> (i) Whether the alterations went to the whole or substantially the whole of the structure or only to a subsidiary part;
>
> (ii) Whether the effect of the alterations was to produce a building of a wholly different character than that which had been let;
>
> (iii) What was the cost of the works in relation to the previous value of the building, and what was their effect on the value and lifespan of the building.”

Standard of repair at property

- NOTE: when conducting repairs there is also an obligation on the landlord to make good/redecorate after the works are complete

- 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)

Performing repairs

- Landlord may perform repairs in whichever manner is the least onerous for him (can choose the cheapest options if so desires)

- Where repair requires replacement of installations or fittings the obligation is to replace on a like for like or nearest equivalent basis. Although note there is no requirement to upgrade fittings to bring them in line with current standards (unless required to do so by law or to comply with necessary regulations)

Areas to which the repairing obligation applies

- Section 11(a) LTA 1985: The **structure** and **exterior…**
- **Structure**: "[…] those elements of the overall dwelling house which give it its essential appearance, stability and shape […] to some extent, in every case there will be a degree of fact to be gone into to decide whether or not something is or is not part of the structure of the dwelling house" (see *Irvine's Estate v Moran* (19920 24 HLR 1, QBD at [5])
- Exterior: the outside / external part of the dwelling house, including all outside parts of the dwelling that has been let

Areas to which the repairing obligation applies (2)

Examples:

a. Plaster
b. Walls and any cement rendering
c. The roof (in relation to a house)
d. The path and steps leading to a house if they form ordinary means of access
e. A partition wall between the dwelling and another house
f. Substantial or integral windows are part of the structure
g. An extractor fan
h. External joinery

Areas to which the repairing obligation applies (3)

- Section 11(b) and (c) LTA 1985: **Installations**
- **Usually** within the tenant's dwelling
- BUT some tenants experience problems in relation to installations which are housed outside their homes (eg a boiler in a block of flats) (if this is a tenancy granted on or after 15 January 1989, consider s.11(1A)(b) LTA 1985)

Can the operation of s.11 LTA 1985 be excluded?

- A landlord may not exclude the obligation imposed by s.11 LTA 1985
- See s.12(1)(a)
- Similarly, an attempt to transfer liability for repairs to the tenant will also be void.
- See s.11(4)
- *Irvine's Estate v Morgan* (1991) 24 HLR 1, QBD and *Islington LBC v Keane* December 2005, *Legal Action* 28

Notice

- The Landlord is not liable to carry out repairs unless and until he/she:

  (1) has been put on notice of the need for repair

  and

  (2) has failed to carry out the repair within a reasonable time period thereafter (see *Morris v Liverpool CC* (1988) 20 HLR 498, [1988] 14 EG 59, CA.

Notice (2)

- Usually ‘notice’ will be provided by the tenant to the landlord by a direct complaint, but a landlord may also be imputed with knowledge if the disrepair is recognised by his employees
- Burden of demonstrating that Notice has been provided lies with the tenant
- There is no requirement that the complaint be detailed – a notification that works are required is sufficient (note that where no notice can be established, a tenant may still rely on s.4 Defective Premises Act 1972)
- Notice not required for defects outside the demised premises (e.g. common parts)

Reasonable time to effect repairs…

- There is no prescribed statutory definition – will depend on the facts of each case
- Guide on what the government considers reasonable within Secure Tenants of Local Housing Authorities (Right to Repair) Regulations 1994 Sch 1 (SI No. 133)
- If the landlord has given some indication of the times within which repairs will be completed, these will normally be relevant to whether ‘reasonable time’ has passed since notice was provided

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Fitness for Human Habitation: the new law

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Common law

- Implied term that furnished premises are fit for habitation eg free from vermin but not to keep FFHH
  - *Wilson v Finch Hatton (1877) 2 Ex D 336*
  - ‘that it should be reasonably healthy, and so not dangerous to the life of those inhabiting it.’
- Implied term that premises being erected will be FFHH on completion

Ratcliffe and Others v Sandwell Metropolitan Borough Council

- [2002] EWCA Civ 6
- Tenant argued that HRA meant that there should be implied term that property was FFHH

> 50 That is not to say that there will never be cases in which a local authority, as the landlord of a dwelling house let for the purposes of social housing which is unfit for human habitation or in a state prejudicial to health, will be in breach of the positive duty inherent in respect for private and family life which is imposed by section 6 of the 1998 Act and article 8 in Schedule 1 to that Act.

Landlord and Tenant Act 1985: pre-amendment

- **8 Implied terms as to fitness for human habitation.**
- (1) In a contract to which this section applies for the letting of a house for human habitation there is implied, notwithstanding any stipulation to the contrary—
  - (a) a condition that the house is fit for human habitation at the commencement of the tenancy, and
  - (b) an undertaking that the house will be kept by the landlord fit for human habitation during the tenancy.

  Only applied to very low rents – was virtually meaningless

Proposal for reform

- Law Commission 1996 report, Landlord and tenant: responsibility for state and condition of the property
- The right of civil remedy for tenants against their landlords in cases of unfitness had been allowed to “wither on the vine” as the rent limits had remained unchanged for 40 years
- Gained cross-party support after Grenfell

New section 9A: Fitness for human habitation

- In substantially the same terms as old section 8 (which now applies to Wales)
- Does not require landlord to do works required because of the tenant's failure to use the property in a tenant-like manner
- Or because of tenant's own breach of covenant
- Includes common parts

New section 9A: Fitness for human habitation: application

- 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

New section 9A: Fitness for human habitation: what does it mean?

- Section 10: old legislation but updated
- In determining for the purposes of this Act whether a house is unfit for human habitation, regard shall be had to its condition in respect of the following matters—
  a. Repair
  b. Stability
  c. Freedom from damp
  d. Internal arrangement
  e. Natural lighting
  f. Ventilation
  g. Water supply
  h. Drainage and sanitary conveniences
  i. Facilities for preparation and cooking of food and for the disposal of waste water

Current section 10: Fitness for human habitation

- And any prescribed hazard
- and the house 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.

What is a prescribed hazard?

- Any matter or circumstance amounting to a hazard for the time being prescribed in regulations made by the Secretary of State under section 2 of the Housing Act 2004
- This is a reference to the HHSRS
- But omitting reference to “potential occupiers” is it’s the actual occupiers that count

Section 2 definitions

- *"Category 1 hazard"* means a hazard of a prescribed description which falls within a prescribed band as a result of achieving, under a prescribed method for calculating the seriousness of hazards of that description, a numerical score of or above a prescribed amount;
- *"Category 2 hazard"* means a hazard of a prescribed description which falls within a prescribed band as a result of achieving, under a prescribed method for calculating the seriousness of hazards of that description, a numerical score below the minimum amount prescribed for a category 1 hazard of that description; and
- *"Hazard"* means any risk of harm to the health or safety of an actual ~~or potential~~ occupier of a dwelling or HMO which arises from a deficiency in the dwelling or HMO or in any building or land in the vicinity (whether the deficiency arises as a result of the construction of any building, an absence of maintenance or repair, or otherwise).

HHSRS: Category 1 hazards

- A category 1 hazard is a hazard that poses a serious threat to the health or safety of people living in or visiting the home:
  - Exposed wiring or overloaded electrical sockets
  - Dangerous or broken boiler
  - Bedrooms that are very cold
  - Leaking roof
  - Mould on the walls or ceiling
  - Rats or other pest or vermin infestation
  - Broken steps at the top of the stairs
  - Lack of security due to badly-fitting external doors or problems with locks

    (Examples from Shelter website)

What must be present?

- One of the matters in s.10 (a deficiency in those matters)
- Which make it not reasonably suitable for occupation

Edwards v. *Etherington* (Ry. & M. 268; S. C., 7 D. & R. 117)

There the defendant, who held a house as tenant from year to year, quitted without notice, on the ground that the walls were in so dilapidated a state that it had become unsafe to reside in it; and Lord Tenterden, at Nisi Prius, held these facts to be an answer to an action by the landlord for use and occupation: telling the jury, that although slight circumstances would not suffice, such serious reasons might exist as would justify a tenant's quitting at any time, and that it was for them to say whether, in the case before them, such serious reasons existed as would exempt the defendant from the plaintiff's demand, on the ground of his having had no beneficial use and occupation of the premises.

Smith v Marrable 152 E.R. 693

- Evidence was given to shew that the house was in fact greatly infested by bugs. The Lord Chief Baron, in summing up, stated to the jury, that in point of law every house must be taken to be let upon the implied condition that there was nothing about it so noxious as to render it uninhabitable; and that if they believed that the defendant left the plaintiff's house on account of the nuisance occasioned by these vermin being so intolerable as to render it impossible that he could live in it with any reasonable comfort, they ought to find a verdict for the defendant.

Hussein v Mehlman

- [1992] 2 E.G.L.R. 287
- Serious breaches of s.11
- Tenants suffered real hardship as a result of the breach and were dprived of an essential part of what they had contracted for

Ahmed v Murphy

- [2010] EWHC 453 (Admin)
- They require the landlords to maintain the premises in the state of repair that it was in at the time of the grant of the tenancy in 1974 but they do not require the landlords to undertake any improvements save as are necessary to keep the premises in a state fit for human habitation. Thus, in these premises, there was an obvious and essential need to provide facilities for cooking, to repair the ceilings, to eradicate the damp, to provide a hot water supply and to decorate the common parts and the exterior of the premises. These obligations would not extend to providing central heating, partitioning or any other improvements, refurbishment or development works. If the landlords wished to carry out any such additional work, this could only be undertake with the agreement of the tenant, which he would not be obliged to provide.

So what does it mean today?

- The condensation came about from the warm air of the environment in the rooms reaching the cold surfaces of the building. The moisture of the condensation was then absorbed by the atmosphere, and transferred to bedding, clothes and other fabrics which became mildewed and rotten. There was evidence that carpets and curtains had been ruined - but such damage in the living room and hall could well be attributable to the water penetration. There was evidence which the judge accepted that a three-piece suite in the living room was ruined by damp so that it smelt and rotted and had to be thrown out. The evidence of the plaintiff and his wife was that, because of the appearance and smell, they hardly used the living room, took visitors to the kitchen and sent the children up to their parents' bedroom to watch television. I would conclude that, by modern standards, the house was in winter, when, of course, the condensation was worst, virtually unfit for human habitation.

Defences

- Breach the duty of the lessee to use the premises in a tenant-like manner
- Destruction or damage by fire, storm, flood or other inevitable accident
- Anything which the lessee is entitled to remove from the dwelling
- Breach of any obligation imposed by any enactment
- Consent of a superior landlord where consent has not been obtained following reasonable endeavours to obtain it

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
- Correlative implied terms??
- A likely battleground

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*

Quantum

- Likely to be 100% rent – if not, it's not unfit
- Division of liability between landlord and tenant?

New pre-action protocol

- Now called the Pre-action protocol for Housing Conditions Claims (England) – Previously the Pre-action Protocol for Disrepair claims.
- Applies to all civil claims and counterclaims relating to residential property in England brought by tenants, leaseholders and members of their families regarding disrepair and fitness for human habitation but NOT to counterclaims or set offs which are part of other proceedings (e.g. rent arrears possession claims).
- Updated to embrace claims based on the new s.9A of the Landlord and Tenant Act 1985.
- Covers ADR -> Letter of Claim -> Landlord's Response -> Experts -> Inspection (Covid-19 difficulties) -> Time Limits -> Limitation -> Costs -> Annex contains useful template letters.

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Practical points: PAP and stays

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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

- Ensure that notice has been provided (if required), and that a reasonable time for the works to be carried out has passed
- 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 Letter of Claim:** Provide disclosure and deal with expert issues (agree SJE if poss).
- Either within the response to the Letter of Claim or within 20 working days of receipt of the report of a single joint expert (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 days 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

Practice Direction 51Z

- All possession proceedings brought under CPR Part 55 / all proceedings seeking to enforce an order for possession by warrant or writ of possession stayed for 90 days from date of PD (27 March 2020 -> 25 June 2020 **and now extended to 12 August 2020**)

- Where directions have been agreed the parties can carry those directions out during the stay (eg disclosure / exchange of witness statements). Party may rely on another party's failure to comply with a direction after the stay is lifted or expires (*Arkin v Marshall*)

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Disrepair working practices in the time of Corona

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Historical note

- Lockdown started 23/3/20
- Non statutory guidance: 28 March 2020, updated 1 June 2020: Coronavirus (COVID-19) Guidance for Landlords and Tenants https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/888843/Updated_Landlord_and_Tenant_Guidance.pdf
- Government guidance 11 May 2020: https://www.gov.uk/guidance/working-safely-during-coronavirus-covid-19/homes

Overarching principle

- There is no change to a landlord's obligations
- There is no ban on visiting properties to carry out repairs
- Damages will still run, but subject to the "reasonable period of time" – longer when it's harder to do repairs
- Will vary from case to case and "one size fits all" policies will be hard to defend in court

Guidance

- We understand current restrictions may obstruct some routine and statutory inspections, but we expect landlords to make every effort to meet them. If resources remain stretched, we are recommending a pragmatic approach to enforcement from local authorities. This should mean that tenants who are living with serious hazards that a landlord has failed to remedy can still be assured of local authority support. Landlords should also know they should not be unfairly penalised where COVID-19 restrictions may have prevented them from meeting some routine obligations.

Think about the risk

- Who is the tenant? Are they at increased risk from Covid-19 - or from the effect of prolonged disrepair? Are they sheltering?
- What records do you have? System for flagging up vulnerable tenants?
- How do you balance the risks? Who decides this?
- What's the risk of *not* doing the repairs – are there some you want to insist on?

Guidance

- No repair or maintenance work should be carried out in any household which is self-isolating or where an individual is being shielded, unless that work is to remedy a direct risk to the safety of the household. In such cases, additional steps should be taken to ensure safety, for example avoiding face-to-face contact. Direct risks are those which will affect your tenant's ability to live safely and maintain their mental and physical health in the property.

How do you carry out inspections?

- 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

Carrying out repairs

- 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

Things to think about

- How to get in without tenant being exposed?
- Tenant should be asked to leave internal doors open so handles won’t need to be touched
- Ask tenant in advance to describe their needs, how 2m distance can be maintained etc
- Keep tenants informed of the backlog and timescales for repairs

Compelling access

- Difficult to get access to the courts at the moment but can be done remotely
- No possession claims so would need injunction to enforce the terms of the tenancy including implied term
- Negotiation better – work with the tenant
- Record all refusals

Quantum

- Quantum of damages may be higher – being locked down in a property in disrepair may increase the stress
- Or may be lower – given the impossibility of doing repairs
- May be zero if access refused – however reasonable the refusal was, because reasonable period of time doesn’t run

Advice to tenants

- There is no rent holiday
- You should still allow routine inspections eg gas safety checks (landlord will have a defence if can show could not carry out annual inspection and took reasonable steps to do so)