

Housing repairs: update 2015

Beatrice Prevatt provides her annual round-up of changes in disrepair policy, legislation and case law.



Beatrice Prevatt

Policy and legislation

Decent homes standard

Decent homes must meet the current statutory minimum standard for housing: they must pose no category 1 hazards, be in a reasonable state of repair, have reasonably modern facilities and services and provide a reasonable degree of thermal comfort. The government's target was that all social housing should meet the decent homes standard by the end of 2010 but this has not been met.

In February 2015, the *English Housing Survey Headline Report 2013-14* was published. This recorded that the number of non-decent homes in England continued to decline. In 2013, 4.8m dwellings (21 per cent) failed to meet the decent homes standard, a reduction of some 2.9m homes since 2006, when 35 per cent of homes failed to meet the decent home standard. As in previous years, the private rented sector had the highest proportion of non-decent homes (33 per cent) while the social rented sector had the lowest (15 per cent). Around a fifth (19 per cent) of owner occupied homes failed to meet the decent homes standard in 2013.

While housing conditions improved in all tenures between 2006 and 2013, the greatest improvement occurred in the social rented sector, where the number of non-decent homes almost halved from 1.1m (29 per cent) in 2006 to 593,000 (15 per cent) in 2013 (albeit this is an increase of 12,000 non-decent homes since 2012).

Over that same period, the number of non-decent private sector dwellings fell by around 2.4m, from 6.6m to 4.2m. This was driven by a drop in the number of non-decent owner occupied homes. While there was a marked decrease in the proportion of private rented sector homes that were non-decent (from 47 per cent to 30 per cent), the absolute number of non-decent dwellings did not fall due to the general increase in size of the sector.

Failing to meet the minimum safety standard was the most common

reason for not meeting the decent homes criteria. Overall, in 2013, 12 per cent of dwellings failed for this reason. Category 1 hazards were more prevalent in the private sector, with 12 per cent of owner occupied dwellings and 16 per cent of private rented sector dwellings failing the minimum safety standard, compared with 6 per cent of social sector dwellings. Private rented sector dwellings also had a higher rate of disrepair (7 per cent, compared with 4 per cent of owner occupied dwellings and 3 per cent of social sector dwellings).

Around 999,000 homes (4 per cent) had some problems with damp in 2013, compared with 2.6m (13 per cent) in 1996. The most common damp problem was condensation and mould, affecting 618,000 (3 per cent) homes, followed by 400,000 (2 per cent) homes affected by penetrating damp and 294,000 (1 per cent) by rising damp.

Incidences of damp varied by tenure. In particular, owner occupied dwellings were less likely to have any damp problems at all, while all types of damp problems were more prevalent in private rented dwellings than in any other tenure. Some 8 per cent of private rented dwellings had damp problems, compared with 5 per cent of social rented dwellings and 3 per cent of owner occupied dwellings. Private rented dwellings were more likely to be older and so more likely to have defects to the damp-proof course, roof covering, gutters or downpipes, which could lead to problems with rising or penetrating damp affecting at least one room. Social sector homes and owner occupied dwellings had low levels of rising or penetrating damp (1 per cent), but social sector dwellings were more likely to experience condensation and mould growth (4 per cent) than owner occupied dwellings (1 per cent).

In July 2015, the *English Housing Survey: Profile of English Housing 2013* report was published, which provides more detail about the housing stock. Among other findings, it reports that from 2001 there was a fall in the number of dwellings with each type of damp, particularly penetrating damp, which reduced from 1m in 2001 to around 400,000 in 2013. The overall reduction in any form of damp from 2m homes (10 per cent) to 1m (4 per cent) was mainly due to improvements in the maintenance of dwellings and in the energy efficiency of homes. Despite this increase in energy performance, the incidence of serious condensation and mould decreased at a slower rate, falling from 860,000 to 618,000 homes. The report suggests that this was likely to be partly attributable to how occupants behave in their homes,

eg not creating an adequate air flow by keeping their windows closed too often. Between 2001 and 2013, the most marked decrease in the presence of damp occurred in private rented homes (from 21 per cent to 8 per cent), although the proportion of dwellings with damp in this sector was still higher than in other tenures in 2013.

The *English Housing Survey: Households 2013-14* report was also published on 16 July 2015. This records that over two-thirds of private rented sector tenants (68 per cent) were satisfied with the repairs carried out by their landlords. A similar proportion (69 per cent) were satisfied with the housing services their landlord provided. While just under a third of homes in the private rented sector were classified as non-decent, this was considerably higher among particular sub-groups of private renters. For example, 43 per cent of households where the tenant in whose name the tenancy was listed was unemployed were non-decent compared with 27 per cent of those where the tenant was in full-time employment. Similarly, those in the lowest income group were more likely to be living in non-decent accommodation (35 per cent, compared with 24 per cent of the highest income group). Non-decent homes in the social rented sector were spread fairly evenly among the sub-groups of the population, with few significant differences. Most social renters were satisfied with their accommodation; 81 per cent said they were either very satisfied or fairly satisfied with their current accommodation. Those in local authority accommodation were more likely than those in housing association accommodation to be slightly or very dissatisfied.

Deregulation Act 2015

The Deregulation Act 2015 gives legal effect to the commitment in the code of best practice in the private rented sector (published by the Royal Institute of Chartered Surveyors in October 2014) not to evict tenants for simply requesting repairs to their home. It seeks to prevent retaliatory evictions where a tenant makes a legitimate complaint to their landlord about the condition of their home and, in response, instead of doing the repair, their landlord serves them with an eviction notice.

The provisions apply to all new assured shorthold tenancies that start on or after 1 October 2015, save for statutory periodic tenancies that arise on the coming to an end of a fixed-term tenancy that was entered into before 1 October 2015. From 1 October 2018,

the provisions will all apply to all assured shorthold tenancies whenever made.

DA 2015 s33(1) prohibits the service of a s21 notice (Housing Act 1988 s21) within six months of the service of a 'relevant notice' by a local authority, namely:

- an improvement notice relating to a category 1 hazard (HA 2004 s11);
- an improvement notice relating to a category 2 hazard (HA 2004 s12); or
- an emergency remedial action notice (HA 2004 s40(7)).

It is only the service of these prescribed notices that prevents retaliatory eviction. Service of, for example, hazard awareness notices, abatement notices under the Environmental Protection Act 1990 or early notification letters are not sufficient.

DA 2015 s33(2) renders the service of a s21 notice retrospectively invalid where, prior to service of the s21 notice or a relevant notice, the tenant made a written complaint about the condition of the property and the landlord did not respond within 14 days, or provided an inadequate response or served a s21 notice following the complaint, and thereafter the housing authority served a relevant notice in response to a tenant's written complaint. A response will only be adequate if it provides a description of the action the landlord proposes to take to address the complaint and sets out a reasonable timescale within which that action will be taken (DA 2015 s33(3)). There is no need for a written complaint where the tenant does not know the landlord's postal or email address and/or where they have made reasonable efforts to contact the landlord to complain about the condition of the dwelling but have been unable to do so (DA 2015 s33(4)-(5)).

The s33 protection will not apply where the housing conditions giving rise to the service of the relevant notice are due to the tenant's failure to use the dwelling house in a tenant-like manner or their breach of the tenancy terms (DA 2015 s34(1)), or where the property is genuinely on the market for sale (DA 2015 s34(2)). It may be that the exemption under s34(1) will lead to many more contested arguments about tenant default, but until there is a finding that this has occurred, the landlord will be unable to gain possession.

It is to be hoped that these provisions will prevent retaliatory eviction and also improve the condition of the private rented housing stock. However, it remains to be seen whether they will be effective given that their operation is dependent on the enforcement of

housing standards by local authority environmental housing offices, at a time when many authorities are seeking to reduce expenditure on services.

The DA 2015 also contains provisions requiring that the landlord must provide a tenant with a valid energy performance certificate, a valid annual gas safety certificate (HA 1988 s21A inserted by DA 2015 s38) and a copy of the department's *How to rent: The checklist for renting in England* guide (HA 1988 s21B inserted by DA 2015 s39). Failure to comply with these requirements will also render the service of a s21 notice invalid.

Consumer Rights Act 2015

From 1 October 2015, the Unfair Terms in Consumer Contracts Regulations 1999 SI No 2083 and parts of the Unfair Contract Terms Act 1977 were replaced by Consumer Rights Act 2015 Pt 2 in respect of tenancies commencing after that date. Part 2 applies to all consumer contracts regardless of whether they have been individually negotiated with the consumer (CRA 2015 s61). Otherwise, the law is largely unchanged, with unfair terms (namely those that, contrary to the requirement of good faith, cause a significant imbalance in the parties' rights and obligations under the contract to the detriment of the consumer) rendered unenforceable (CRA 2015 s62). However, the act does contain a new requirement for the court to consider whether a term is unfair, even if the issue is not raised by any of the parties (CRA 2015 s71).

The CRA 2015 can therefore assist tenants by preventing landlords from relying on unfair contractual terms by which they might seek to qualify or undermine their own repairing obligations. CRA 2015 Sch 2 Pt 1 contains an indicative and non-exhaustive list of terms of consumer contracts that may be regarded as unfair for the purposes of Pt 2 of the act (CRA 2015 s63). For general guidance on the correct approach in determining whether terms on repair are fair, reference may usefully be made to the Office of Fair Trading's *Guidance on unfair terms in tenancy agreements* (OFT356, September 2005). This has been adopted by the Competition and Markets Authority, which has taken over many of the OFT's functions since its demise in April 2014.

Homes (Fitness for Human Habitation) Bill

The Homes (Fitness for Human Habitation) Bill is a private members' bill introduced by Karen Buck MP that, if passed, would finally make

landlords liable again for unfit rented accommodation, in accordance with Law Commission proposals dating back to 1996. The bill would repeal Landlord and Tenant Act 1985 s8, which contains similar obligations to keep rented premises fit, but which has fallen into disuse due to the very low rent levels required for its operation (less than £80 per annum in London). It would replace LTA 1985 s8 with a slightly modified version of the Law Commission proposals, requiring that residential rented accommodation is provided and maintained in a state of fitness for human habitation. The bill exempts damage caused by tenants themselves or by natural disaster and makes clear that it does not apply to property owned by the tenant. It also updates LTA 1985 s10 by providing that the presence of a category 1 hazard (HA 2004) is to be treated as a factor for assessing fitness for these purposes.

The bill had its second reading on 16 October 2015 but was talked out. If it had become law, it would have finally given tenants a civil remedy for design defects such as condensation and made removal of some category 1 hazards enforceable in the civil courts.

Case law

Liability

Contractual liability

- **Edwards v Kumarasamy** [2015] EWCA Civ 20, 28 January 2015

A landlord of a second-floor flat was held liable under LTA 1985 s11(1A) (the covenant to keep in repair the structure and exterior of any part of the building in which the lessor has an estate or interest) for an injury caused to his tenant when he tripped on a broken paving slab leading from the front entrance door of the block across a courtyard to the communal rubbish bins.

At first instance, the landlord was held liable on the basis that the paved area between the front door and the car park was part of the exterior of the tenant's flat. This was overturned on appeal to HHJ May QC, who also found that the landlord was not liable under the extended covenant implied into the tenancy by s11(1A) on the basis that it was a precondition to liability that notice of the defect had to be given.

The Court of Appeal allowed the tenant's appeal. It found that the path was part of the exterior of the front hall and that the landlord's right (under his lease) to use the front hall, the car-parking spaces and bin store took effect as a legal easement so that

the landlord had an estate or interest in the paved area where the tenant sustained his accident. The landlord was liable even though he had no notice of knowledge of the defect in accordance with the general rule that a covenant to keep in repair is one to keep in repair at all times so that there is a breach immediately when a defect occurs. The landlord's liability on his covenant to repair requires notice only where the defect is within the demised property itself. While the tenant might be the first person to become aware of the defects falling within the landlord's obligation, there is nothing in the statute to limit the landlord's liability; the critical division is between what is demised and what is not.

Permission was granted to appeal this decision to the Supreme Court on 23 July 2015.

- **Uddin and another v Islington LBC** [2015] EWCA Civ 369, 10 March 2015

The tenants of a four-bedroom maisonette were awarded damages for breach of the council's repairing obligation by virtue of rising damp due to a defective damp-proof course. The Court of Appeal dismissed the council's appeal on all four grounds:

- It rejected the argument that the judge had been wrong to rely on surveyors' reports that had been included in the bundle as Civil Procedure Rules PD32 para 27.2 makes it clear that documents in the bundle shall be admissible as evidence of their contents, unless the court orders otherwise or a party gives written notice objecting to the admissibility of particular documents.
- It found that the judge was entitled to find that there had been a deterioration in the structure for which the council was responsible.
- It rejected an argument that the claim should have failed as no defective damp-proof course had been pleaded. While this was correct, it was clear that the particulars alleged that the flat was badly affected by rising damp and there was an explicit reference to there being no effective damp-proof course in the skeleton argument filed. The court found there was no injustice as the council knew the case it had to meet.
- It also dismissed a ground of appeal that the judge had been wrong to accept further submissions on receipt of the draft judgment as to the date from which damages were to be awarded. If a judge is persuaded by short submissions, as in this case, that they have made a mistake then the right thing to do is

to correct the draft judgment. The Court of Appeal found that the mere fact that damp is caused by an inherent defect does not of itself absolve the landlord from liability. It approved the decision in *Elmcroft Developments Ltd v Tankersely-Sawyer* [1986] 1 EGLR 47 that the landlord was liable to install a damp-proof course where the existing one was ineffective as it was positioned below ground, and also accepted that there was no sensible distinction between that case and one where no damp-proof course had been installed to begin with.

• **DR v Southwark LBC**

Central London County Court,
18 June 2015¹

The tenant brought a claim for disrepair including for historic penetrating damp to the bathroom wall and condensation that caused saturated plaster to the external wall in the bathroom. Although it had been considered that the damp was a mixture of penetrating dampness and condensation, an expert inspection before trial that included carbide testing showed that the core of the wall was dry. However, the internal surface of the plaster on the walls was wet. The expert said the plaster was saturated but maintained that it was due to water penetration from the outside. At trial, the tenant conceded that the majority of the damp was condensation, but argued that the landlord was liable for the damp plaster in the bathroom. The landlord argued that wet plaster was not in disrepair as there was no deterioration in its structure, relying on *Post Office v Aquarius Properties Ltd* [1987] 1 ALL ER 1055 and *Quick v Taff Ely BC* [1986] QB 809. It also argued that the claim should be limited to three years on the basis that it included a personal injury claim.

At first instance, District Judge Desai found that the claim included a claim for personal injuries as it was pleaded that the tenant suffered from considerable distress and anxiety, with reference to depression and threats to the health and safety of the tenant, due to mould and the tenant had not responded to the defence claim that a three-year limitation period applied. She held that the saturated plaster was in disrepair, finding that it cannot be said that the level of humidity or moisture retention, whatever the cause, meant that it has not reached a stage of being in disrepair. The council appealed both liability and quantum.

HHJ Cochrane dismissed the appeal on liability but reduced the award of damages (see 'Quantum', below). He found that District Judge Desai was entitled to prefer the evidence of the single joint expert to that of

the council's witness, given that the council had abandoned an application to call the single joint expert as a witness and the judge had heard oral evidence from the council's witness so that she was able to evaluate him closely. HHJ Cochrane reviewed the authorities dealing with the question of what amounts to physical damage and found that the judge was entitled to accept the evidence of the single joint expert that the plaster was not just wet but had become hygroscopic (ie had changed in its character) and damaged beyond recovery so that it had to be replaced. He rejected the argument, based on *Post Office v Aquarius*, that there was no damage to the structure, finding that both the plaster and the brickwork were damaged by the water penetration and damp; the plaster was hygroscopic and there was also damage to the pointing that would have to be replaced. HHJ Cochrane also rejected an argument that a tenant must show that there has been a physical deterioration since the commencement of tenancy. He held that the principle in *Proudfoot v Hart* (1890) 25 QBD 42, that if the premises are not in repair when the tenant takes them a landlord must put them into repair, was applicable to the statutory obligations of the landlord under LTA 1985 s11.

• **Kwegan and Kwegan v Industrial Dwellings Society²**

Clerkenwell and Shoreditch County Court,
19 March 2015;
Central London County Court,
21 September 2015

The tenants issued a claim for disrepair, relying on express repairing obligations in their tenancy agreement and the terms implied by LTA 1985 s11. The agreement contained a section headed 'Services'. It stated: 'IDS shall provide the following services in connection with the Premises for which the Tenant shall pay a Service Charge - landlord's lighting, cleaning of communal areas, electric gates, door entry system, refuse disposal, depreciation of entry gates and courtyard service.' A further section listed as an obligation of the respondent: 'Repair of Common Parts - To take reasonable care to keep the common entrances, halls, stairways, lifts, passageways, rubbish chutes and any other common parts, including their electric lighting, in reasonable repair and fit for use by the Tenant and other occupiers of and visitors to the Premises ...'

The major items claimed were: an inoperative entry-phone system and electric gates, which allowed entry into a courtyard, giving access to the Kwegans' house and those of their two neighbours; a defective heating and hot water system; and water

penetration into their living room from the shower on the floor above. The landlords counterclaimed for damage to doors and kitchen cabinets, and for unauthorised electrical works.

District Judge Cooper dismissed the disrepair claim. She took into account the fact that the gates belonged to the freeholder and that IDS had no rights over the gates and entry-phone and no right to do anything in relation to them. There was no duty on IDS to repair or to reinstate the gates. In relation to heating and hot water, District Judge Cooper found that IDS had not acted unreasonably in carrying out repairs for a number of years before finally replacing the boiler. In relation to the water leak from the shower, she found that although the shower had been leaking into the living room for five years, IDS had acted reasonably in attempting to locate the source of the leak and that it was a particularly difficult problem to solve. She allowed the counterclaim in part, namely in relation to a damaged door and a damaged kitchen unit. The claimants were ordered to pay the defendant's costs.

The tenants appealed on two grounds: that the district judge was wrong to find no obligation on IDS to repair the electric gates and entry-phone; and that the time taken to fix the leaking shower could not be reasonable. HHJ Wulwick granted permission to appeal on the first ground only.

HHJ May QC allowed the appeal. She found that the electric gates and entry-phone system were an integral part of the common entrance and, therefore, fell within the defendant's express repairing obligations. Given that she found they were covered by an express rather than an implied term, she did not have to go on to consider whether the landlord had used all reasonable endeavours to obtain rights from the freeholder that would have allowed it to carry out repairs (LTA 1985 s11(3A)).

HHJ May QC remitted to District Judge Cooper the question of quantum of damages for breach of the landlord's express repairing obligation. It is understood that the landlord is seeking the permission of the Court of Appeal for a second appeal.

Tortious liability

Defective Premises Act 1972 s1

• **Rendlesham Estates Plc and others v Barr Ltd**

[2014] EWHC 3968 (TCC),
28 November 2014

The claimant apartment owners claimed damages from the defendant, which had constructed two apartment blocks, on the basis that they had not been fit for habitation when

completed, within the meaning of the Defective Premises Act 1972 s1 as they had developed problems with the intercom system, leaks from walkways, balconies and showers, as well mould and condensation in a number of apartments and in the common parts. The claimants argued that the two blocks constituted a single dwelling within the act whereas the defendant argued that each dwelling was limited to the premises that were the subject of the demise under each lease.

Edwards-Stuart J found that 'dwelling' for the purposes of s1 is the individual apartment as described in the lease together with, possibly, those parts of the building to which an apartment's occupiers had, in practice, exclusive access for living, such as their balcony. Each block was a building containing a number of separate dwellings. Although the common parts did not form part of any dwelling, work done to the common parts is work done in connection with the provision of a dwelling and therefore within the definition in DPA 1972 s1.

Ordinarily, a structure would have to be physically or functionally connected with a dwelling before it could be said to have been constructed in connection with the provision of that dwelling. The requirement under s1 that work was done in a professional or workmanlike manner suggested that work had to be carried out in accordance with the regulations and standards in force when it was carried out. For a dwelling to be fit for habitation, it had, on completion, to be capable of occupation for a reasonable time without risk to the occupants' health or safety, and without undue inconvenience or discomfort to them. Each apartment had been rendered unfit for habitation because of a variety of defects to the common parts and the individual apartments. The claimants were entitled to the costs of rectifying the applicable defects.

Breach of statutory duty

• **Begum v Birmingham City Council³**

Birmingham County Court (TCC),
4 June 2013 and 18 December 2013
The tenant bought her house under the right to buy in 2004. In 2008, she noticed cracks in the kitchen and bathroom, and made a claim on her insurance. The insurer repudiated the claim on the basis that there was pre-existing damage at the time the initial policy was taken out. The tenant successfully sued the council for breach of its statutory duty under HA 1985 s125(4A) to notify any structural defect known to it, based on its failure to disclose a history of structural movement and cracking. Although the defects were not apparent when the house sale inspection report (HSIR) was

completed, the court found that the council had been aware of them in 1990 when thermal boarding was applied to the rear wall and the back addition was rendered. This knowledge remained vested in the council even though it had kept no records of it, although the absence of a specific record absolved the person who signed the HSIR of any personal responsibility or liability.

The court found that there were two concurrent causes of damage to the property, namely a lack of wall ties, which the council was aware of, and inadequate foundations with associated damage to the drains, which it did not know about. However, the former was the cause of 90 per cent of the damage, based on the evidence that the inadequate foundations would have led only to there being cracking at low level. Claims based on negligence and misrepresentation were dismissed. The court awarded damages based on the current cost of necessary remedial works in the sum of £71,178.19 on the basis that if the tenant had known of the defects, she would have proceeded with the purchase but required the council to carry out the necessary and appropriate repairs. In addition, damages of £3,000 a year general damages were awarded for the 3.75 years that the tenant had resided in a property suffering from category 5 (severe) structural damage. Permission to appeal was refused both by the trial judge and the Court of Appeal.

Quantum

In accordance with the decision in *Simmons v Castle and others* [2012] EWCA Civ 1288, 10 October 2012 (paras 48 and 50), from 1 April 2013 general damages in disrepair claims have been increased by 10 per cent. It is likely that this will be a further incentive to calculate general damages by reference to diminution in rental value, given that it will be clear how to uprate such an award, whereas global awards are inherently more arbitrary. Advisers are reminded that the 10 per cent uplift should be sought on all occasions, save where the case is funded under a conditional fee agreement (CFA) that was signed before 1 April 2013.

- **Uddin v Islington LBC⁴**
Clerkenwell and Shoreditch County Court,
6 May 2014

The tenants of a four-bedroom maisonette, on the basement and ground floor of a converted house, claimed damages for rising dampness that affected their home from October 2004 until mid-September 2009, when remedial works were eventually carried out.

HHJ Mitchell found the council liable for

breach of its repairing obligations during this period. The damp was visible in defective plaster work and black mould growth in the bedroom, which felt cold and smelt. Taking into account that only the basement was affected, he awarded 30 per cent of the rent minus a six-week period by reason of a failure to provide access, totalling £8,801.53 and special damages of £4,022.86.

He also found the council liable for a six-week period for breach of the covenant of quiet enjoyment on the basis that the works had been unreasonably carried out and unreasonably delayed, despite the fact that no such claim had been pleaded. He took judicial notice of the fact that it is possible to limit the effect of the dust by sealing the room where work was carried out and using industrial vacuum machines to remove the dust from the air as the works were carried out. If these could not have been used, the council should have provided temporary housing. Merely using ineffective dust sheets was not sufficient. He was satisfied that, for five weeks, the tenants suffered serious inconvenience because the council failed to prevent the dust in the premises impacting on them. For an additional week, there were workmen in the house when the work should have been completed previously. The inconvenience was severe for the five weeks. The premises were virtually uninhabitable, with the tenants having to bathe and use the lavatory at the homes of family and neighbours. In truth, they should have been rehoused temporarily. He allowed an amount equal to the rent for five weeks and 25 per cent of the rent for the additional week, totalling £702.03 plus a 10 per cent uplift on all the general damages of £965.36. He also awarded interest at 2 per cent on both general and special damages from 1 October 2014, shortly after issue, totalling £956.

- **Thomson v LB Southwark⁵**
Lambeth County Court,
30 September 2015

From 2009, the claimant, a tenant, in a block of flats, complained about water penetration from the property upstairs and from the exterior, ill-fitting, draughty windows with defective putties, an intermittently blocked kitchen sink and substandard workmanship following plumbing repairs in her bathroom. Subsequently, the building and her property started to suffer from subsidence, resulting in cracking, falling plaster and uneven floors. In August 2015, the claimant's expert noted a significant deterioration of the condition of both the property and the building in comparison to his first inspection in June 2013.

A default judgment was entered against

the defendant. Deputy District Judge Sofaer awarded the tenant general damages amounting to 20 per cent reduction in rental value for the period from 1 January 2009 to 23 June 2013, amounting to £4,659.59. For the period from 30 June 2013 to 30 September 2015, the court awarded the tenant 40 per cent reduction in rental value, amounting to £5,521.25, making a total of £10,180.84. Applying the uplift of 10 per cent, the award for general damages was £11,198.92.

- **McLoughlin v Tower Hamlets LBC⁶**
Clerkenwell and Shoreditch County Court,
15 January 2015

The tenant of a two-bedroom cottage complained of rotting windows, a defective boiler and damp to the kitchen and bedrooms from 2007. In addition, the tenant suffered a gas leak in 2013, reportedly caused by the damp corroding a copper pipe. District Judge Rand made an award of damages as follows:

- a 30 per cent reduction in rent for the damp and defective windows, making a total award of £16,359, including the 10 per cent uplift;
- a £1,000 one-off payment for the gas leak; and
- £750 in respect of special damages, which was two-thirds of the replacement cost, even though the tenant had no receipts as the claim was not inflated.

The claimant beat her Part 36 offer and was awarded costs on an indemnity basis.

- **Williamson v Khan⁷**
Birmingham County Court,
12 March 2015

The tenant of a one-bedroom flat sought damages for disrepair throughout her tenancy namely:

- no hot water between February 2004 and October 2007 and January 2011 and April 2013;
- inadequate and defective heating throughout the tenancy;
- rising and penetrating damp;
- leaks from the kitchen waste pipe, bathroom basin and defective rainwater goods;
- infestation of rats due to defects in the structure;
- perished and defective plasterwork;
- holes in the floorboards;
- external brickwork, rendering and boundary wall in disrepair;
- damaged paving; and
- drainage problems resulting in offensive odours in the property.

HHJ Lopez upheld the claimant's case in full, despite a vicious and sustained attack on her character by the landlord, whom he found to be unconvincing,

implausible and untruthful. He found that while the defective conditions did not cause the multiple and complex psychological and psychiatric problems from which the tenant suffered, her state was exacerbated by the appalling conditions. It was a matter of common sense that anyone living in such appalling conditions would experience distress, anxiety and embarrassment. The lack of hot water for extended periods and the ineffective heating must have made life unbearable and the regular annual infestation of rats made the situation even worse and at times insufferable. He awarded diminution in value of 80 per cent of the rent for a period of 10.5 years, totalling £39,093.60, plus a 10 per cent uplift in accordance with *Simmons v Castle*, making a total of £43,002.96. He refused an application to plead limitation at the start of the trial on the basis that it was too late, especially as the landlord had made a late counterclaim for arrears. As there was no reliable supportive documentary evidence and the landlord was unable to give cogent oral evidence in support, he also refused to allow the landlord to set off an earlier money judgment he had obtained against the tenant.

- **DR v Southwark LBC**
Central London County Court,
18 July 2015

The facts are set out at 'Contractual liability', above. The council was found liable for the damp plaster in the bathroom. At first instance, District Judge Desai awarded damages of 20 per cent of the rent for a three-year period (approximately £3,000), having found that the claim included a claim for personal injuries. The council appealed to the circuit judge, who upheld the finding on liability but reduced the award of damages to £1 a day or £365 a year.

- **Gabriel v Investinc Ltd⁸**
Clerkenwell and Shoreditch County Court,
23 July 2015

The tenant issued a claim, funded by a CFA, in relation to water penetration into his property, relying on the terms implied by LTA 1985 s11. The cause of water penetration through the roof was not agreed by the two experts. The landlord counterclaimed for some rent arrears, which were admitted, and for deep-cleaning and repairing the property at the end of the tenant's tenancy.

District Judge Parker dismissed the landlord's argument that the fact that the cause of water penetration was not agreed meant disrepair was not proven. She found that a roof that allowed water to penetrate through it was a roof in disrepair. She also found that the roof was not part of the premises

let to the tenant but remained in the control of the landlord, so that it was immediately liable for the disrepair (*BT plc v Sun Life Assurance Society plc* [1996] Ch 69). She found that the effect of the disrepair was not severe. The photographs only showed slight damage and the smell of damp was not commented on by the tenant. She noted that his first email to the landlord did not mention a leak through the roof. On that basis, she made an award of 22 per cent of rent, which amounted to £2,800 a year. She noted that this fell within the unofficial tariff referred to in *Wallace v Manchester CC* (1998) 30 HLR 1111, updated to take into account inflation and with a 10 per cent uplift added because of the date of the CFA (*Simmons v Castle*). Interest was added to the award of damages.

The counterclaim in relation to deep-cleaning and repair was dismissed on the basis that the cleaning required at the end of the tenant's nine-year tenancy was no more than would reasonably be expected.

• **Espute v Lambeth LBC⁹**

The tenant of a three-bedroom maisonette complained of mould growth present in the entrance hallway, kitchen, and lounge ceiling, heavy mould growth on the stairway to the upper floors, and some mould in each of the three bedrooms. A surveyor's report found that the growth was caused in part by water leakage and in part by condensation aggravated by the poor design of the property, principally a solid concrete ceiling above the stairwell. The tenant alleged that the works had not been done because of contractors' concerns that the affected plaster might contain asbestos and the council's failure to schedule specialist asbestos removal services. A global settlement of £13,000 was agreed in April 2015 for the leaks and damp for six years prior to issuing. The settlement amount was the equivalent of a rent rebate of 40 per cent.

Costs

• **Begum v Birmingham City Council** [2015] EWCA Civ 386, 20 April 2015

The facts are set out under 'Breach of statutory duty', above.

At a subsequent costs hearing, the trial judge made different costs orders in respect of different parts of the proceedings:

- He made no order for costs in respect of the period before issue of proceedings.
- In respect of the period from issue to the 14 May 2012, when the original trial had been adjourned and the

counterclaim amended to plead breach of statutory duty, he ordered the claimant to pay the defendant's costs but the defendant was to pay the claimant's costs of obtaining expert evidence during that period.

- In respect of the period from 14 May 2012 to 4 June 2013, when the trial on liability took place, he ordered the defendant to pay 40 per cent of the claimant's costs as the claimant was pursuing three causes of action, only one of which succeeded.
- In respect of the period from the 5 June 2013 to 18 December 2013, when he ordered further evidence and awarded damages, he ordered the defendant to pay 80 per cent of the costs on the basis that if the claimant's case had been properly pleaded, all issues would have been dealt with during the hearing in May, with the result that the claimant's inadequate pleading caused two hearings rather than one.

The claimant appealed all the costs orders save in respect of the last period.

The Court of Appeal held that the claimant's pleaded claims for negligence, misrepresentation and breach of statutory duty were different labels that the pleader applied to the same underlying facts. Both parties would have prepared and adduced substantially the same evidence even if the claimant had only ever pleaded breach of statutory duty. The case was very different from *Beoco Ltd v Alfa Laval Co Ltd and another* [1995] QB 137, where the claimant's late amendment substantially altered the case the defendant had to meet. In the present litigation, the case that the defendant had to meet was essentially the same both before and after the claimant's amendment. There was no suggestion that the defendant had lost an opportunity to settle.

The claimant was awarded 85 per cent of her costs from pre-issue to June 2013 and 80 per cent thereafter.

• **N J Rickard Limited v Holloway and Holloway** [2014] EWCA Civ 1809, 11 December 2014

The tenants of a property from March 2008 to September 2010 counterclaimed for disrepair in possession proceedings based on rent arrears. They complained of water penetration through the roof, a defective electrical system causing a shock, failure of the primary air/draught controls associated with the solid fuel stove and a leak from the shower. Judgment was given for the landlord in the sum of £12,639 plus £5,001.95 interest minus the £800 deposit. Judgment was also given in

the counterclaim in the sum of £6,960, being 30 per cent of the rent, as the inconvenience to the tenants was variable. Accordingly, the landlord recovered a net sum of £9,881.71. The tenants were also ordered to pay the landlord's costs on a standard basis up to 17 October 2011 and indemnity costs thereafter, following a purported Part 36 offer that was rejected. The tenants appealed.

Vos LJ refused permission to appeal as to the level of compensation and the period of compensation but granted permission in relation to the costs order generally. He found that the tenants had been substantially successful in their counterclaim, having succeeded on the state of the property, notice, the breach and extent of the demise. The landlord had succeeded on a number of points but overall it could be said that since the rent was not in dispute, the tenants were the main winners. On that basis it was at least arguable that the judge may not have properly concluded under CPR 44.2 that the tenants should pay all the costs when he did not find that they behaved unreasonably in relation to their conduct of the claim.

Environmental Protection Act 1990

Practitioners are reminded that action under the Environmental Protection Act 1990 remains an alternative to disrepair claims and is especially useful for condensation cases. Such claims may also be a means of obtaining compensation for clients where the claim is relatively short-lived and would therefore be likely to be small in any event. Legal representation is not available, but such claims can be funded under a CFA provided that there is no success fee. Legal help can be used to obtain an expert's report and to advise the tenant.

• **Duke v Uthayakanthan¹⁰**

Camberwell Green Magistrates' Court, 2 January 2015

The tenant's flat had suffered from a cockroach infestation, as well as issues with damp and mould, for several years. Despite the tenant repeatedly reporting these problems, her landlord did nothing to resolve them. A notice of intention to prosecute under EPA 1990 s82(6) was served on the landlord. The landlord failed to take any action to remedy the nuisance at the property.

The tenant brought a private prosecution against her landlord on the grounds that her flat was in such a state that it was prejudicial to the health of her and her young daughter and that the landlord was responsible. She gave evidence that she saw the cockroaches every day and she had to throw out

food that had become infested. She also said they were in the bedrooms of the flat and had been seen on her and her daughter's beds.

District Judge Inyundo found in the tenant's favour, saying that the landlord's response to the issues with the flat was 'virtually non-existent' and 'woefully inadequate'. The landlord was ordered to rectify the problems with her flat and pay £1,000 compensation. The landlord appealed to the Crown Court but the appeal was dismissed.

The tenant's solicitors acted under a CFA.

• **Darlington Borough Council v Munnely**

23 January 2015

The defendant was a private landlord. His tenant was a mother with three young children. The property had broken heating, draughty windows, damaged light switches and disrepair to the staircase guarding. The council considered the state of the property was prejudicial to health and served a statutory nuisance abatement notice under EPA 1990 Pt 3. The defendant failed to comply. On a guilty plea, he was fined £1,000 with costs of £500. The work was done by the council in default at the landlord's cost.

- 1 Andrew Brooks, Anthony Gold solicitors, and Beatrice Prevatt.
- 2 Satvir Sahota and Sadhari Perera, Hodge Jones & Allen solicitors, London, and John Beckley, barrister, London.
- 3 Gurbinder Gill, Eric Bowes & Co solicitors, Birmingham, and Stephen Cottle, barrister, London.
- 4 Rebekah Carrier, Hopkin Murray Beskine solicitors, London, and Nicholas Nicol, barrister, London.
- 5 Arman Khosravi, Oliver Fisher solicitors, London, and Barbara Zeitler, barrister, London.
- 6 Jayesh Kunwardia, Hodge Jones & Allen solicitors, London, and David Renton, barrister, London.
- 7 Mike McIlvane, Community Law Partnership solicitors, Birmingham, and Zia Nabi, barrister, London.
- 8 Caroline Brosnan, Hodge Jones & Allen solicitors, London, and John Beckley, barrister, London.
- 9 Mark Pacsoo, solicitor, Centre 70, London, and David Renton, barrister, London.
- 10 Dirghayu Patel, GT Stewart solicitors, London.

Beatrice Prevatt specialises in housing and community care law at Garden Court Chambers. She would like to thank the colleagues at notes 1-10 for the transcripts or notes of judgments.