

E: Briefing - Disrepair

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Please contact us if you have any queries.



If I can help with any of the issues in this E-Briefing then please contact me on the number or email address below.

Glyn

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Redecoration after repairs

You got the report, you completed the repairs then the tenant wants everything making good and a home makeover - what do you do?

Your organisation may have a policy that answers this question but for the many landlords that don't, this question is one that will sometimes make your repairs manager's blood boil!

Sadly, the law doesn't provide an easy answer to this however lessons can be learnt from others and there are some cases out there that challenge certain assumptions.

As ever, if you have any queries about any issues or you are experiencing problems with this matter, then please give me a call.

Regards

Glyn

NEW COURSES ...

This is a new course designed to help asset management and maintenance teams fully understand the potential impact of Damp & Condensation in claims for Disrepair. The half-day seminar comprises:

- **Types of dampness—the surveyor's perspective**
- **Understanding and challenging the 'other side's' survey**
- **Condensation and legal action**
- **The legal framework of Damp & Condensation**
- **Landlord's Liability**
- **Grey areas**

The seminar includes lunch and refreshments and can be delivered to in-house teams or on an open-access basis. Delegate rates start from £95.00 + VAT.

For more information or to book a seminar, please contact Neil Whitehead on neil.whitehead@whiteheadsols.co.uk

Making good and re-decoration

In this article, we visit the vexed question of the landlord's duty to make good and re-decorate after carrying out repairs and Improvements. As a starting point, consideration has to be given to section 11, Landlord and Tenant Act 1985, which implies into short-term leases and tenancy agreements for social housing an obligation to maintain the structure and exterior of the dwelling-house. Therefore, a term of a tenancy agreement which attempts to place such burden on the tenant will undoubtedly fail. However, there is no settled authority, either by statute or by a decided case precedent, as to whether plaster amounts to structure. The only guidance arises as a result of concessions made by Counsel appearing for the landlords in the cases of Quick v Taff Ely BC [1985] 3 All E.R. 321 and Staves v Leeds City Council (1990) 23 HLR 107, both in the Court of Appeal, that it did.

In Irvine v Moran (1992) 24 HLR 1, Mr. Recorder Thayne Forbes QC, sitting in the Queen's Bench Division of the High Court, was asked certain preliminary questions, including whether plaster was part of the structure, for the purposes of section 11. He held that "structure":

- Consists of those elements of the house which gave it its essential appearance, stability and shape
- Was not limited to those parts which were load-bearing
- Any particular element must be a material or significant element in the overall construction.

He went on to say that wall plaster was more in the nature of a decorative finish, therefore, it did not form part of the structure. However, contrast this with the important case of McGreal v Wake (1984) 13 HLR 107, in the Court of Appeal, which established that where damage to plaster occurs from other disrepair, or from works to remedy disrepair, making good falls within the landlord's obligation.

The decision in McGreal went on to extend the landlord's obligation, by emphasising that it included making good any consequential damage to decorations and that there should be no reduction in redecoration cost on the ground of betterment if, as seemed to be the case, re-decoration could not be carried out without betterment. In other words, even taking into account the duty on the tenant to redecorate periodically under the tenancy agreement or lease if, by carrying out redecoration, the landlord was doing the tenant's job for him, then so be it if it were unavoidable.

The Court of Appeal in the case of Bradley v Chorley BC (1985) 17 HLR 305 makes more depressing reading for social landlords. Here, the tenant had not honoured his obligation under the tenancy agreement to re-decorate, but the Court of Appeal held, overturning the decision of the trial judge, that following a re-wiring, the landlord was obliged to redecorate.

Making good and re-decoration ...

Sir John Donaldson MR even said, “In some circumstances [it] may involve a windfall profit to the tenant because it may be impossible to do [the re-decoration] without giving him rather better decorations than he had beforehand.” However, he went on to add that “the tenant who has very torn, damaged wallpaper which is further damaged, may well not be in a position to complain that the landlord has failed to make good consequential damage to the decorations, if he is presented with an emulsion-painted wall. It may even be that the existing wallpaper is so damaged anyway that there was no consequential damage to the decorations, looking at the matter in the round. Those are decisions which will have to be made on the facts of every case. The law as it exists at the moment is that the landlord’s obligation is to make good consequential damage to decorations.”

So there it is. The landlord must re-decorate in almost every event. Neither *McGreal* nor *Bradley* was appealed to the House of Lords. These days, the decorating duties of tenants in tenancy agreements are often more specific, for example to paint and/or re-paper every five years, but it would be a brave landlord who resists redecoration costs to run the point in the higher courts. Any landlord offering a modest re-decoration allowance or vouchers might be storing up further expenditure later on if the tenant spends the money or vouchers on something else and the property requires extensive re-decoration before it can be re-let further down the line.

If you need further clarifications or would like to discuss any of the issues highlighted, please do not hesitate to contact me.

Glyn Jones, Disrepair Team Leader

Relevant cases...

Quick v Taff Ely Borough Council (1985) 3 All E.R.321

Failure to remedy an inherent defect in the building is not, as such, a failure to “keep in repair”, even though it renders the building uninhabitable. The Plaintiff was a council tenant in a house built in the early 1970s under the Building Standards Regulations at the time. Due to inherent defect in the window, coupled with inadequate heating, the condensation became so bad that clothes and bedding rotted and in the winter the house was almost uninhabitable. The County Court Judge found that the Council was in breach of its implied covenant under the Housing Act 1961, s32 (1) to “keep the structure and exterior in repair”. He ordered specific performance and awarded the Plaintiff damages.

Staves v Leeds City Council (1990) 23 HLR 107

Staves were the tenants of an end of terrace house owned by Leeds City Council. The house was built in 1973 and had ducted air heating. There was a problem of dampness attributable to condensation, the extent of the problem being of extensive mould growth on the internal gable wall of two of the bedrooms. These walls were continuously mouldy and damp and by 1987 there were four small areas of plaster which had perished. Staves brought an action under the Landlord & Tenants Act 1985, s11 (1) asserting that Leeds City Council were in breach of their implied covenant to keep in repair the structure and exterior of the house. The County Court Judge held that the plaster was defective and in need of repair and that therefore there was a breach of s11 (1).

Irvine v Moran (1992) 24 HLR 1

By a lease made in September 1978 for less than 7 years, Moran took on extensive repairing and decorating obligations. In an action for damages in respect of Moran’s alleged failure to comply with repairing and decorating covenants, two preliminary issues were raised. The first of these was which items fell within the landlord’s implied obligations under the Housing Act 1961, s32 and the second was whether Moran’s covenants to paint and decorate parts of the house remained wholly or partly in effect under a true construction of s32. The landlord argued that the covenants to paint and decorate elements of the building were not overridden by s32, as this work was purely decorative and did not involve keeping in repair. s32 implied, inter alia, a covenant by the landlord to “keep in repair the structure and exterior of the dwelling house” and the obligations under this section were to be subtracted from the tenant’s express covenants in the lease to see what residual obligations remain.

McGreal v Wake (1984) 13 HLR 107

The tenant took a short lease of a house, in to which the landlord’s repairing covenant was implied by s32 of the Housing Act 1961. The house was in poor condition but the tenant failed to give the landlord notice of repair for several years. In early November 1979, the tenant finally complained to the Council who served the landlord with a notice under the Housing Act 1957, s9 (No.1A) and upon the landlord’s failure to comply within the requisite 42 days, the Council performed the work itself in the following year and at the landlord’s expense. In order to facilitate the work, the tenant agreed to take the lease of other premises for 15 weeks, whilst continuing to pay rent at the subject premises. She also incurred expenditure in storing furniture and carpets, clearing up dirt and debris, re-fitting the carpets and carrying out substantial redecoration made necessary by the works. She claimed this expenditure, together with general damages from the landlord. The Judge found that there was no liability on the part of the landlord for the following reasons:-

- The landlord had not received notice of disrepair until November 1979
- The subsequent delay of a few months was negligible
- The landlord was not liable for incidental expenses which included decoration

Rising Dampness

Rising dampness occurs because water in the ground soaks up by capillary action into the walls and keeps on rising to a point at which the amount being sucked up is matched by the amount evaporating off the surface. If there is a working damp proof course in the house, all other things being equal, it won't rise above the dpc level, it won't be a problem and there is no disrepair.

If however, the damp proof course has broken down or there was never one in the first place or the ground level has built up above the dpc or the cavity or other hidden voids have built up
With debris above the dpc level

then the ground water will rise up the walls as aforesaid to a greater or lesser degree.

The ground water carries with it dissolved salts of various kinds. Some of these, notably nitrates and chlorides, are hygroscopic i.e. they readily absorb moisture from the air. As the water that has come up from the ground evaporates off the surface these salts get left behind. If rising dampness occurs for any length of time these salts will accumulate in the wall plaster and they will cause the plaster to become damp depending on the humidity in the atmosphere.

If the house you inspect is damp for any of these reasons, the dampness is structurally related and it will be the landlords' obligation to sort it out. The defect in each case will be that the walls are damp from a structural cause.

If the house was built without a damp proof course but there is no dampness in the walls then there is no defect as such, and no obligation to provide a dpc. But if the walls become damp it is not a defence to say that the house was not built with a dpc therefore there is no obligation to provide one. The defect is - damp walls – how you fix it is up to you, but the chosen repair will need to be efficacious and not lead to continuing problems in the future e.g. *Elmscroft Developments v Tankersley-Sawyer*. Usually the most effective and available way to deal with rising damp problems will be to provide a new dpc (or clean out the cavities as the case may be). Even after you stop new dampness from rising up the walls, the old plaster containing all those salts, will continue to absorb moisture from the air and keep the walls damp. So you have to get rid of the old salt-affected plaster – hack it off and renew it.

Rising Dampness cont...

If you aren't sure what the cause of the dampness is, call in a professional (defined as someone who knows about dampness but doesn't have an interest in selling you a new dpc and who is going to charge you a realistic fee), to give real, unbiased and worthwhile advice.

An independent report is also helpful in demonstrating to a Court sometime in the future that you were taking reasonable steps to sort out the problem.

When the remedial works go wrong, which they do surprisingly often, despite the fact that they are all Specialist Damp Proofing Companies who do the work employing Highly Trained Professionals, there is often great difficulty sorting out the matter because:

The landlord wants to pass on the complaint to the Specialist Company rather than get involved in the detail.

The Specialist Company don't want to admit they made a mistake OR

They want to pass it on to another bunch (the insurers) (or the chemical company who supply the gunk)

so the tenant is left as piggy in the middle. Landlords, remember at the end of the line the responsibility lies with you for the work and your tenants' damages are mounting as the weeks go by. Impress on your contractors that they really need to sort the matter out, and don't just leave them to get on with it.

Renewing DPC's and renewing plastering is pretty messy, so you will usually end up with a liability to make good all the tenant's nice decorations which they did on moving in and which are now ruined. *Calabar v Stitcher*.

It's all to do with the structure and exterior, or the consequences of failing to keep it in repair. So don't argue, just do the repairs. Delays will just cost more money.

John Kershaw BSc FRICS, MFPWS

What You Can't Access You Can't Repair

Sometimes, the courts are called upon to decide matters which are so obvious that you often wonder why the case was ever brought in the first place.

A recent case* involving a local council is a prime example of the mysterious ways in which the law works!. The council was concerned that the dilapidated state of part of a building was impairing the visual amenity of the area and decided to serve a notice on the occupants requiring them to take remedial steps to repair the elevations of the upper floors of the building. The notice was served by the council on the ground floor and basement tenants (the ground floor and basement not being in disrepair) as well as the tenants of the upper floors (which were dilapidated) and the freeholder.

Clearly those tenants in the basement and ground floor had no control over the condition of the upper floors, and the council accepted this but they refused to withdraw the enforcement notices issued against them, so the matter ended up in court.

The court ruled that when serving such a notice, the land in respect of which the owner and occupier might be served with a notice must be the same as the land in relation to which remedial works were needed and that the notice could only relate to the part of the property which was having an adverse impact on the amenity of the area. The ground floor and first floor tenants did not occupy the relevant part of the property and the therefore the notices served on them were therefore quashed.

In this case, the tenants could not have rectified the dilapidations even if they had wanted to, as the upper floors of the building were not within their control. Fortunately for them, the court saw sense.

*Toni & Guy (South) Ltd. v Hammersmith & Fulham London Borough Council [2009] EWHC 203 (Admin)

See <http://www.lawreports.co.uk/WLRD/2009/QBD/feb0.3.htm>.

Elaine Davies, Solicitor

Want to write an article?

We are looking for contributions to our E-Briefings from practitioners who can share their expertise and experience with us and other clients.

What we are looking for:

- Best practice
- Common problems and how your organisation is addressing them
- Any unusual cases and how you dealt with them
- Questions to other professionals
- Advice

Send articles and suggested topics to neil.whitehead@whiteheadsols.co.uk.

New courses

Tools in the Toolkit - *ASB remedies from early intervention to court action*

Evidence gathering & building your case

Gas servicing Masterclass

Damp & Condensation - *the differences and your liability*

HHSRS & Disrepair

Leasehold Management Skills and Service Charges

Tenancy Management Masterclass

Effectively dealing with Hate Crime & Domestic Violence

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Please remember, if you need detailed advice on any issue included in this E-Briefing, please contact us.