Personal Injury Claims against Landlords

Jonathan Mitchell
Georgina Cursham

We give every single case the care and attention it deserves.

ROPEWALK
CHAMBERS

+44 (0) 115 947 2581 - www.ropewalk.co.uk

Introduction

1) This article is concerned with liability arising for injury and loss suffered on or immediately around demised premises. It does not include consideration of liability to neighbours or users of adjoining premises, land or the highway.

Common law liability

2) Common law liability is distinct from liability arising under contract, i.e. the tenancy agreement. It has always been the case that where a landlord undertakes express duties in a lease, he will be liable to his tenant for foreseeable losses caused by breach of those express duties. Such claims depend upon a proper interpretation of the lease. Generally leases imposed no obligation on the landlord. Parliament therefore intervened to impose such duties (see below).

3) Originally the common law took a typically robust approach and a landlord had no liability at common law for defects in premises let by him[1]. The rationale for this was that since the landlord owed no liability beyond any undertaken in the lease to his tenant for the condition of the premises, he could not owe a duty to those who came onto the premises.

4) In *Cavalier v Pope* [1906] AC 428 the landlord knew that the premises were dilapidated when he let them and had covenanted with his tenant to repair them, but had failed to do so. However, when the tenant's wife suffered injury by reason of the state of the premises, of which she too was aware, her claim against the landlord failed because she was a stranger to the contract.

5) So the starting position at common law is that a landlord of premises owes a duty in respect of those premises to his tenant only and then only to the extent that he had undertaken an obligation to the tenant in the lease.

[1] *Lane v* Cox [1897] 1 QB 415, CA

6) Indeed the common law position still stands as long as the defect in question is not of the landlord's own making and he has parted with possession of the premises to his tenant. In the case of *Boldack v E Lindsey DC*[2], the landlord escaped liability for injury caused to a small boy when a large flagstone left propped against the side of the property fell over. The Court of Appeal held that a landlord is no longer liable for the state of the premises once he has handed over possession to the tenant, even if he knew of a pre-existing defect at the time of parting with possession.

Landlord/Builder

7) By contrast, in the case of *Rimmer v Liverpool City Council* [3] the Court of Appeal determined that a landlord will be liable where he has done work so as to create the defect that gives rise to a foreseeable risk of injury. The tenant had complained to his council landlord about a thin plate glass door in his home, which had been constructed by the defendant council. The council had argued that it was not required to rectify an inherent defect in the design of the premises, since such defect did not amount to a state of disrepair. In due course the tenant tripped and fell and put his hand through the plate glass door. He sued and succeeded.

8) Stevenson LJ held:

> *The landowner, who designs or builds a house or flat, is no more immune from personal responsibility for faults of construction than a building contractor, or from personal responsibility for faults of design than an architect, simply because he has disposed of his house or flat by selling or letting it. The council through their architects' department designed, and through their direct works department built, the plaintiff's flat with its dangerous glass panel. They owed him, not as tenant but, like his wife or his child, as a person who might reasonably be expected to be affected by the provision of the glass panel in the flat, a duty to take such care as was reasonable in all the circumstances to see that he was reasonably safe from personal injury caused by the glass panel.*[4].

[2] (1999) HLR 41, CA
[3] [1985] QB 1, CA
[4] *Rimmer* at 13F-H

9) Liverpool City Council argued that it should not be liable because the defect was not a latent defect; it was patent – the tenant knew and had complained about it. The Court of Appeal refused to accept this distinction, on the basis that the tenant was not *really and truly free to act on his knowledge*:

> *An opportunity for inspection of a dangerous defect, even if successfully taken by A who is injured by it, will not destroy his proximity to B who created the danger, or exonerate B from liability to A, unless A was free to remove or avoid the danger in the sense that it was reasonable to expect him to do so, and unreasonable for him to run the risk of being injured by the danger*[5].

10) The case of *Rimmer* was decided in reliance upon the now discredited decision of the House of Lords in *Anns v Merton LBC*[6]. *Anns* was overruled by the House of Lords in *Murphy v Brentwood DC*[7]. Nevertheless, it appears that *Rimmer* remains good law. In the case of *Targett v Torfaen BC*[8], the Court of Appeal applied *Rimmer* and distinguished *Murphy*. Russell LJ sought to clarify the apparent inconsistency between the two authorities as follows:

> *A weekly tenant is in an entirely different position from an owner of a house defectively constructed who discovers the defect thereby rendering it no longer a latent defect. In my judgment the scope of Murphy was defined by Lord Keith at page 463 when he said:*
>
> > *"The question is whether the appellant council owed the respondent a duty to take reasonable care to safeguard him against the particular kind of damage which he has in fact suffered, which was not injury to person or health nor damage to anything other than the defective house itself."*
>
> *[...]*
>
> *I am firmly of the opinion that the House of Lords in Murphy did not overrule Rimmer by implication or otherwise, and in my view Rimmer remains an authority binding upon this court.*

11) It is arguable that *Targett* is wrongly decided given that the decision in *Rimmer* was based on *Anns*, and *Anns* was overruled by the House of Lords in *Murphy*. However, in *Murphy* the decision was that there was no claim for the economic cost of putting right the defect which was discovered before it caused any loss.

[5] *Ibid* per Stevenson LJ at 14E-G
[6] [1978] AC 728
[7] [1991] 1 AC 398
[8] (1992) 24 HLR 164, CA

It does not appear to have been the intention of their Lordships to exclude liability for other losses or injury caused by the defect. They appear to have accepted that, had the defect manifested itself and caused other loss, that other loss would be recoverable. However, it is important to note the words of Lord Bridge of Harwich in *Murphy* at 475E-F:

> *If a builder erects a structure containing a latent defect which renders it dangerous to persons or property, he will be liable in tort for injury to persons or damage to property resulting from that dangerous defect. But if the defect becomes apparent before any injury or damage has been caused, the loss sustained by the building owner is purely economic. If the defect can be repaired at economic cost, that is the measure of the loss. If the building cannot be repaired, it may have to be abandoned as unfit for occupation and therefore valueless. These economic losses are recoverable if they flow from breach of a relevant contractual duty, but, here again, in the absence of a special relationship of proximity they are not recoverable in tort.*

It appears, therefore, that there might still be an argument to be had that where a defect is known of before it causes loss or personal injury, no cause of action will lie. However, this is a point that only the Supreme Court can now resolve.

12) So, at common law the position has been reached that where a landlord does work, which creates a foreseeable risk of personal injury on premises, he will be liable to a person who suffers a personal injury by reason of that risk.

Defective Premises Act 1972

13) It was to remedy the perceived lacuna in the common law that the Defective Premises Act 1972 ("the Act") was passed. It seems that this Act is often overlooked in personal injury cases.

14) The Act is one of the shortest on the statute book – only 7 sections:

1) Duty to build dwellings properly
2) Cases excluded from remedy under section 1

3) Duty of care with respect to work done on premises not abated by disposal of premises
4) Landlord's duty of care in virtue of obligation or right to repair premises demised
5) Application to Crown
6) Supplemental
7) Short title, commencement and extent

15) It is to be noted that the section 1 duty is to provide dwellings properly and is owed only

a) if the dwelling is provided to the order of any person, to that person; and
b) … to every person who acquires an interest (whether legal or equitable) in the dwelling.

It is not, therefore, a generally owed duty to anyone who may come into the dwelling.

16) Further, the section only bites on the provision of a new dwelling; it does not bite on the refurbishment of a dwelling unless what is thereafter provided is so substantially different to what was there before as to be in effect a new dwelling[9]. In *Jenson*, an existing dwelling house was effectively gutted as described by Longmore LJ at paragraph 5 of his judgement. The Court of Appeal held that, notwithstanding such extensive works, the refurbished property was not so substantially different as to be the provision of a new dwelling within the scope of the Act.

17) Section 3, however, is wider in scope and applies to premises generally. It provides:

> ***3. Duty of care with respect to work done on premises not abated by disposal of premises.***
> *(1) Where work of construction, repair, maintenance or demolition or any other work is done on or in relation to premises, any duty of care owed, because of the doing of the work, to persons who might reasonably be expected to be affected by defects in the state of the premises created by the doing of the work shall not be abated by the subsequent disposal of the premises by the person who owed the duty.*

[9] *Jenson v Faux* [2011] 1 WLR 3038, CA

(2) This section does not apply—

(a) in the case of premises which are let, where the relevant tenancy of the premises commenced, or the relevant tenancy agreement of the premises was entered into, before the commencement of this Act;

(b) in the case of premises disposed of in any other way, when the disposal of the premises was completed, or a contract for their disposal was entered into, before the commencement of this Act; or

(c) in either case, where the relevant transaction disposing of the premises is entered into in pursuance of an enforceable option by which the consideration for the disposal was fixed before the commencement of this Act.

18) It is to be noted that the section itself does not create a duty of care. It merely makes provision in respect of *"any duty of care owed"* and provides that subsequent disposal of the premises does not abate the duty owed. Its effect, therefore, is to extend such duties as may be owed beyond those who commission the work; in other words, claims will not be defeated by the fact that the person claiming was not a party to the contract pursuant to which the work was done. The question is whether or not a duty is owed in the first place. As we have seen at common law, a landlord (or for that matter any other person) who does work to premises owes a duty of care to see that the work is done in a non-negligent fashion and will owe that duty to all persons who might reasonably be expected to suffer injury or loss by reason of any failure to exercise reasonable care and skill in the execution of the work.

Section 4

19) Section 4 of the Act provides for the specific landlord duty of care. In *Sykes v Harry* [2001] QB 1014, CA, Potter LJ noted at paragraph 16 of his judgment:

Section 4 of the 1972 Act was passed to replace section 4 of the Occupiers' Liability Act 1957, which Act had in turn been passed to alleviate the former position under the common law (see Cavalier v Pope *[1906] AC 428) that a landlord was under no liability to his tenant's family or visitors for injuries suffered by reason of the condition of let premises, on the basis that the letting transferred to the tenant all rights of control over the premises and that third parties must therefore look to the occupier for any remedy in law. Section 4 of the 1957 Act provided in effect that a landlord who was*

under a repairing obligation to his tenant owed to all those who normally visited or had goods on the premises a common duty of care in respect of his discharge of that obligation. However, since the landlord was not usually liable to his tenant unless he had received from him notice of a defect [...], the rights of a visitor against the landlord generally depended on whether or not the tenant had given the landlord notice of the defects in the premises responsible for the injury to the visitor [...]. The 1972 Act had the additional purposes of (a) extending the category of protected persons from visitors to all those who should have been in the landlord's contemplation as likely to suffer injury as a result of failure to repair and (b) to extend such liability from cases where the landlord was under an obligation to repair to the position where he had only a right to repair.

20) Section 4 of the Act provides as follows:

(1) Where premises are let under a tenancy which puts on the landlord an obligation to the tenant for the maintenance or repair of the premises, the landlord owes to all persons who might reasonably be expected to be affected by defects in the state of the premises a duty to take such care as is reasonable in all the circumstances to see that they are reasonably safe from personal injury or from damage to their property caused by a relevant defect.

(2) The said duty is owed if the landlord knows (whether as the result of being notified by the tenant or otherwise) or if he ought in all the circumstances to have known of the relevant defect.

(3) In this section "relevant defect" means a defect in the state of the premises existing at or after the material time and arising from, or continuing because of, an act or omission by the landlord which constitutes or would if he had had notice of the defect, have constituted a failure by him to carry out his obligation to the tenant for the maintenance or repair of the premises; and for the purposes of the foregoing provision "the material time" means—

(a) where the tenancy commenced before this Act, the commencement of this Act; and

(b) in all other cases, the earliest of the following times, that is to say—

(i) the time when the tenancy commences;

(ii) the time when the tenancy agreement is entered into;

(iii) the time when possession is taken of the premises in contemplation of the letting.

(4) Where premises are let under a tenancy which expressly or impliedly gives the landlord the right to enter the premises to carry out any description of maintenance or repair of the premises, then, as from the time when he first is, or by notice or otherwise can put himself, in a position to exercise the right and so long as he is or can put himself in that position, he shall be treated for the purposes of subsection (1) to (3) above (but for no other purpose) as if he were under an obligation to the tenant for that description of maintenance or repair of the premises; but the landlord shall not owe the tenant any duty by virtue of this subsection in respect of any defect in the state of the premises arising from, or continuing because of, a failure to carry out an obligation expressly imposed on the tenant by the tenancy.

(5) For the purposes of this section obligations imposed or rights given by any enactment in virtue of a tenancy shall be treated as imposed or given by the tenancy.

21) In the case of *Alker v Collingwood Housing Association*[10], the Court of Appeal confirmed the importance of, and interrelationship between, subsections (2) and (4). Namely, that where a lease gives the landlord a right of entry to inspect premises to see if the tenant is discharging his obligations or for the purpose of discharging his own repairing obligations, he will be fixed with deemed knowledge of any defects which in fact exist in the premises. Laws LJ explained the operation of s.4 of the Act as follows:

It can be seen that the duty under section 4 arises if and only if the following conditions are fulfilled:

(1) the landlord owes an obligation to the tenant under the tenancy for the maintenance or repair of the premises: section 4(1);

(2) the landlord knew or ought to have known of whatever is the relevant defect: section 4(2).

However those requirements are qualified by section 4(4): the landlord is treated as under a section 4(1) duty if he can exercise a right enjoyed by him to enter the premises in order to carry out works of maintenance or repair. The duty itself, however, is only to take reasonable care to protect potentially affected persons from injury or damage caused by a relevant defect. That is defined by section 4(3)[11].

[10] [2007] 1 WLR 2230, CA
[11] *Alker* at paragraph 6

22) The importance attaching to a right of entry is not to be underestimated. In *Sykes's* case (above) the tenant suffered from carbon monoxide poisoning from a faulty gas fire. The landlord was liable to maintain the fire pursuant to section 11 of the Landlord and Tenant Act 1985. Section 11(6) confers a right of entry on the landlord for the purpose of discharging the statutory repairing obligations. The landlord knew the fire had not been serviced and understood the importance of the need to service such an appliance. The result was that the court held him liable. The question of actual knowledge of the defect did not arise. Given that he had a right of entry for the purpose of discharging his repairing obligations the sole question for consideration was whether or not he had taken reasonable care to see that the premises were reasonably safe. He had not, and was held liable accordingly.

23) Further, it is to be noted that the obligation cast on the landlord pursuant to subsection (1) is by reason of subsection (3) no wider than the reach of the repairing covenant itself:

> *In general terms it is clear that the reach of the duty arising under section 4 is no longer than the reach of the covenant to repair and/or maintain owed by the landlord in any particular case.*[12]

24) Therefore, in order to succeed in an action under the section a Claimant must prove the following matters:

(i) the landlord owes an obligation to the tenant under the tenancy for the maintenance or repair of the premises;

(ii) the landlord knew or ought to have known of the "relevant defect";

(iii) if the landlord has the right of entry in order to carry out works of maintenance and repair he is treated as having knowledge of the "relevant defect";

(iv) once the landlord has that knowledge, he has a duty to take reasonable care to protect potentially affected persons from injury caused by a "relevant defect"; and

[12] *Alker* per Laws LJ at paragraph 11

(v) a "relevant defect" is one which arises out of a failure by the landlord to carry out his obligations under the lease for maintenance or repair of the premises.

Inherent Defects

25) The Court of Appeal has confirmed, in the case of *Quick v Taff Ely BC*[13], that an inherent defect built into the premises will not place the landlord in breach of his repairing obligations:

> *"I find helpful the observation of Atkin L.J. in Anstruther-Gough-Calthorpe v. McOscar [1924] 1 K.B. 716, 734 that repair "connotes the idea of making good damage so as to leave the subject so far as possible as though it had not been damaged." Where decorative repair is in question one must look for damage to the decorations but where, as here, the obligation is merely to keep the structure and exterior of the house in repair, the covenant will only come into operation where there has been damage to the structure and exterior which requires to be made good."* [14]

26) See also Lawton LJ at 821G-H:

> *"As a matter of the ordinary usage of English that which requires repair is in a condition worse than it was at some earlier time. This usage of English is, in my judgment, the explanation for the many decisions on the extent of a landlord's or tenant's obligation under covenants to keep houses in repair. Broadly stated, they come to this: a tenant must take the house as he finds it; neither a landlord nor a tenant is bound to provide the other with a better house than there was to start with; but, because almost all repair work requires some degree of renewal, problems of degree arise as to whether after the repair there is a house which is different from that which was let."*

27) Therefore if the premises are inherently unsafe there is no breach by the landlord of the section 4 duty. In *Alker* (above) the injured Claimant tenant put her hand through a glass door and suffered injury. The glass was ordinary annealed glass; it was not toughened or safety glass. There was no claim under

[13] [1986] 1 QB 809, CA,
[14] per Dillon LJ at 818D-E

section 1 of the Act or at common law. The tenant sought to argue that, because the glass was unsafe, the premises were not in good repair. Laws LJ noted at paragraphs 13 and 14 of his judgment:

> *In my judgment the reasoning of the recorder, and with respect the arguments of counsel for the claimant, are fundamentally flawed. They equate a duty of repair and/or maintenance with a duty to make safe. They propose such an equation moreover in a case where the thing in question - here the glass panel - is not in disrepair at all and there has been no failure at least as a matter of ordinary language to maintain it. I do not think there is any warrant for such an equation. I do not think that a covenant to maintain comes any closer to a covenant to make safe than does a covenant to repair.*
>
> *There is, as Carnwath LJ pointed out in the course of argument, much learning on this dichotomy between maintain and repair. It is not necessary to go into it in this case. No doubt the two concepts overlap. Neither of them, however, can in my judgment possibly be said to encompass or to include a duty or obligation to make safe. Moreover a duty to keep in good condition, the words used here, even if it encompasses a duty to put into good condition, again cannot encompass a duty to put in safe condition. A house may offer many hazards: a very steep stairway with no railings; a hidden step; some other hazard inside or outside the house of the kind often found perhaps in particular older properties. I do not think it can be said that the Act requires a landlord on proof only of the conditions I have described for the application of section 4 to make safe any such dangerous feature. McAuley's case [1992] QB 134 is to be distinguished on the footing that there the garden step was unquestionably in a state of disrepair.*

28) Further, an imaginative argument that the provisions of the Human Rights Act 1998 and, in particular, rights under Article 8 of the ECHR, require section 4 of the 1972 Act to be interpreted so as to compel local authorities to make premises safe failed in *Ratcliffe v Sandwell MBC*[15].

29) If complaint is to be made about the inherent state of the premises arising out of their construction, then liability will have to be sought either at common law or under section 1 of the 1972 Act.

[15] [2002] 1 WLR 1488, CA

Limitation

30) It is pertinent to note subsection 1(5):

> *Any cause of action in respect of a breach of the duty imposed by this section shall be deemed, for the purposes of the Limitation Act 1939, the Law Reform (Limitation of Actions, &c.) Act 1954 and the Limitation Act 1963, to have accrued at the time when the dwelling was completed, but if after that time a person who has done work for or in connection with the provision of the dwelling does further work to rectify the work he has already done, any such cause of action in respect of that further work shall be deemed for those purposes to have accrued at the time when the further work was finished.*

31) Time starts to run for the purpose of the Limitation Act 1980 once the relevant work is completed. The period is 6 years[16].

32) Therefore. where the loss or damages is suffered more than 6 years after the relevant work was done, it is only possible to rely on the common law since, in negligence, no cause of action arises and time does not begin to run until the loss or damage is suffered.

Occupiers' Liability Acts 1957 & 1984

33) In general, a landlord who has parted with all possession of his premises to his tenant will cease to be an occupier and will, therefore, cease to have any liability for the condition of the premises under the provisions of the Acts, even though he might have retained a repairing obligation:

> *First, where a landlord let premises by demise to a tenant, he was regarded as parting with all control over them. He did not retain any degree of control, even though he had undertaken to repair the structure. Accordingly, he was held to be under no duty to any person coming lawfully on to the premises, save only to the tenant under the agreement to repair. In* Cavalier v. Pope *it was argued*

[16] See section 9(1) of the Limitation Act 1980 and *Alderson v Beetham Organisation Limited* [2003] 1 WLR 1686, CA

that the premises were under the control of the landlord because of his agreement to repair: but the House of Lords rejected that argument[17].

34) It is to be noted that the touchstone of occupation is control. However, as was made clear in that case, there can be more than one occupier of premises. There, the premises were a public house. A guest of the landlord of the public house, who was the tenant of the brewery, suffered injury in that part of the public house used for the purposes of the brewery, as opposed to being the private residence of the tenant. Both the brewery and the tenant were held to be occupiers for the purposes of the 1957 Act. The touchstone is that of control. The key to the brewery's liability was that it had not demised to its tenant those parts of the building used for the purposes of the brewery's business.

35) Thus, where a landlord remains in occupation of common parts of a building, he will be an occupier of those parts under the provisions of the 1957 and 1984 Acts.

36) It must be noted that both Acts provide that they replace the rules of the common law insofar as the duty owed is concerned: section 1(1) of both Acts. Therefore there is no claim in negligence against an occupier of premises *qua* occupier. The only claims that can be made arise under the Acts.

37) Generally a landlord of premises will escape liability for common parts under the 1957 Act because the tenant, and the tenant's visitors, e.g. the milkman and postman and Auntie Ethel, will have a right of access over the common parts. At common law, the rules of which continue to apply to determine who is and who is not a visitor, a person who gains access to premises as of right is not a visitor[18]. Therefore, the common duty of care is not owed to such people. However, they are, as we have seen owed a duty under the provisions of the 1972 Act.

38) Such persons can, however, bring a claim under the provisions of the 1984 Act, which provides for the duty an occupier owes to non-visitors. The 1984 Act is another mercifully short Act; it has 5 sections. The principal operative sections are subsections (3), (4) and (5) of section 1. They provide:

[17] *Wheat v E Lacon & Co. Ltd* [1966] AC 552 at 579B-C per Lord Denning
[18] *McGeown v Northern Ireland Housing Executive* [1995] 1 AC 233

(3) An occupier of premises owes a duty to another (not being his visitor) in respect of any such risk as is referred to in subsection (1) above if—

(a) he is aware of the danger or has reasonable grounds to believe that it exists;

(b) he knows or has reasonable grounds to believe that the other is in the vicinity of the danger concerned or that he may come into the vicinity of the danger (in either case, whether the other has lawful authority for being in that vicinity or not); and

(c) the risk is one against which, in all the circumstances of the case, he may reasonably be expected to offer the other some protection.

(4) Where, by virtue of this section, an occupier of premises owes a duty to another in respect of such a risk, the duty is to take such care as is reasonable in all the circumstances of the case to see that he does not suffer injury on the premises by reason of the danger concerned.

(5) Any duty owed by virtue of this section in respect of a risk may, in an appropriate case, be discharged by taking such steps as are reasonable in all the circumstances of the case to give warning of the danger concerned or to discourage persons from incurring the risk.

39) The provisions speak for themselves. They provide a very useful checklist, but are often they are overlooked in pleadings.

40) It may be that the plate glass window cases could be won under the provisions of this section, even though they cannot be won under other provisions, but no concluded view is offered on that point.

Managing Agents

41) Often a claim intimated against a landlord is re-directed by the landlord to the managing agent. This does not necessarily relieve the landlord of his obligations under the Occupiers Liability Acts. It will require very clear words in the contract between the landlord and the managing agent to make the managing agent the sole occupier of the premises. Managing agents will respond that their duties are prescribed by the terms of their contract and such duty as they owe is to the landlord only pursuant to contract. It is my opinion that the landlord remains primarily liable both as an occupier and, in any event, as a principal

liable for the acts and defaults of his agent. If it is intended or asserted that the occupation duty should rest entirely on the managing agent, the contract between the managing agent and the landlord should be carefully checked to ensure that total control has been passed over. Often they expressly provide to the contrary.

42) That is not to say that a managing agent cannot be an occupier. As we have seen the touchstone of occupation is relevant control. If the managing agent does indeed have control over the matter complained of, then he may well be an occupier for the purposes of the Acts.

Implied covenants

43) As detailed above, the general starting point at common law is that a landlord is not liable for personal injury to his tenant or the tenant's guests caused by defects in demised premises which he did not design or construct:

> *A landlord who lets a house in a dangerous state is not liable to the tenant's customers or guests for accidents happening during the term; for, fraud apart, there is no law against letting a tumble-down house; and the tenant's remedy is upon his contract, if any*[19].

44) In order to avoid potential injustice, the courts and parliament have, over the years, enabled a tenant to find a *remedy upon his contract*, through implied covenants for repair.

Landlord and Tenant Act 1985

45) Perhaps the most important provision for the protection of residential tenants is the implied covenant for repair imposed by section 11 of the Landlord and Tenant Act 1985 ("LTA"). As can be seen from discussion of the Defective Premises Act above, a cause of action under section 4 of that Act is reliant upon there being an obligation to the tenant for the maintenance or repair of the premises. In the absence of any express covenant to repair in the lease, the tenant might be in no better position under the

[19] *Robbins v Jones (1863) 15 CBNS 221, 240*

DPA than under the common law. Thus, the obligations implied through section 11 LTA may be crucial for founding a damages claim for injury or damage caused by a relevant defect in the demised premises.

46) Section 11 provides as follows:

> *In a lease to which this section applies (as to which, see sections 13 and 14) there is implied a covenant by the lessor—*
>
> *(a) to keep in repair the structure and exterior of the dwelling-house (including drains, gutters and external pipes),*
>
> *(b) to keep in repair and proper working order the installations in the dwelling-house for the supply of water, gas and electricity and for sanitation (including basins, sinks, baths and sanitary conveniences, but not other fixtures, fittings and appliances for making use of the supply of water, gas or electricity), and*
>
> *(c) to keep in repair and proper working order the installations in the dwelling-house for space heating and heating water.*

Application of Section 11

47) The section 11 repairing covenant is implied into any lease of a dwelling house granted on or after 24 October 1961 for a term of less than 7 years[20].

48) If the landlord has an option to terminate the lease before the expiry of 7 years, then it is deemed to be for a term of less than 7 years[21]. The lease will not be deemed to be for a term of less than 7 years if the tenant has the option to renew for a fixed term which would, together with the original term, amount to 7 years or more[22].

[20] s. 13(1) LTA
[21] s.13(2)(b) LTA
[22] s.13(2)(c) LTA

49) "Lease of a dwelling-house" means a lease by which a building or part of a building is let wholly or mainly as a private residence and "dwelling-house" means that building or part of a building[23]. Thus, a tenant who takes a lease of a building for the purpose of sub-letting to multiple occupants would not have the benefit of section 11 because he is not taking the building wholly or mainly as a private residence[24].

50) In tenancies entered into after 15 January 1989, further obligations are implied by virtue of section 11(1A) & (1B) LTA, where the lease is for dwelling house premises which form part only of a building:

> *(1A) If a lease to which this section applies is a lease of a dwelling-house which forms part only of a building, then, subject to subsection (1B), the covenant implied by subsection (1) shall have effect as if—*
>
> *(a) the reference in paragraph (a) of that subsection to the dwelling-house included a reference to any part of the building in which the lessor has an estate or interest; and*
>
> *(b) any reference in paragraphs (b) and (c) of that subsection to an installation in the dwelling-house included a reference to an installation which, directly or indirectly, serves the dwelling-house and which either—*
>
> *(i) forms part of any part of a building in which the lessor has an estate or interest; or*
> *(ii) is owned by the lessor or under his control.*
>
> *(1B) Nothing in subsection (1A) shall be construed as requiring the lessor to carry out any works or repairs unless the disrepair (or failure to maintain in working order) is such as to affect the lessee's enjoyment of the dwelling-house or of any common parts, as defined in section 60(1) of the Landlord and Tenant Act 1987, which the lessee, as such, is entitled to use.*

[23] s.16(b) LTA
[24] *St Catherine's College v Dorling* [1979] 3 All ER 250

51) The effect of section 11(1A) is to widen the scope of the landlord's liability, to include repair of the structure, exterior and installations beyond the demised property itself, provided the disrepair affects the tenant's enjoyment of the dwelling house or common parts.

52) Section 14 LTA sets out various exceptions for the application of the implied covenant. For example, section 11 does not apply in circumstances where the new lease is granted to an existing tenant who occupied the premises under a previous lease to which s.11 didn't apply[25]. By way of further example, the implied covenant does not apply to the lease of a dwelling house which is a tenancy of an agricultural holding or a farm business tenancy[26].

53) Section 11(2) LTA limits the landlord's obligation in certain circumstances:

> *The covenant implied by subsection (1) ("the lessor's repairing covenant") shall not be construed as requiring the lessor—*
>
> *(a) to carry out works or repairs for which the lessee is liable by virtue of his duty to use the premises in a tenant-like manner, or would be so liable but for an express covenant on his part,*
>
> *(b) to rebuild or reinstate the premises in the case of destruction or damage by fire, or by tempest, flood or other inevitable accident, or*
>
> *(c) to keep in repair or maintain anything which the lessee is entitled to remove from the dwelling-house.*

54) By section 12 LTA, there is a restriction on contracting out of the section 11 covenant. Parties may only contract out by consent and with the authority of the county court, where it is reasonable to do so in all the circumstances.

Repair and Proper Working Order

[25] s.14(1) LTA
[26] s.14(3) LTA

55) The covenant implied by section 11 to "keep in repair" the structure and exterior does not require the rectification of inherent defects which are not in a state of *disrepair* which "connotes a deterioration from some previous physical condition"[27]. Thus, for example, there is no obligation under the Act to install a damp proof course or double glazed windows in properties built without them.

56) By contrast, the obligation to keep the specified installations "in proper working order" may require the landlord to remedy deficiencies in the design of an installation if the faulty system prevents it from working properly. Thus, where a lavatory overflowed because the cisterns were inefficient by design, the landlords were held to be in breach of their obligation[28].

57) In determining the standard of repair required by the lessor's repairing covenant under section 11 LTA, regard shall be had to the age, character and prospective life of the dwelling-house and the locality in which it is situated[29]. Thus, if a property has reached the end of its life, a landlord may not be in breach of his repairing covenant even though the house is unfit for human habitation[30]. Where a property's prospective life is short, the landlord may only be required to carry out limited works to parts, such as a roof, which would otherwise require complete replacement[31].

Public authorities

58) It was confirmed by the Court of Appeal in the case of *Post Office v Aquarius Properties Ltd*[32] that the standard of repair required of public authorities is no higher than that required of private landlords. There, the Council was under no duty to install a damp course in an old back-to-back terraced property, notwithstanding the extensive condensation and damp problem within the property.

59) Further, as mentioned above in the context of the Defective Premises Act 1972, it was held in the combined appeal of *Lee v Leeds City Council* and *Ratcliffe v Sandwell MBC*[33] that a local authority is not in

[27] [1987] 1 All ER 1055
[28] *Liverpool City Council v Irwin* [1977] AC 239
[29] s.11(3) LTA
[30] *London Borough of Newham v Patel* [1978] 12 HLR 77
[31] *Dame Margaret Hunderford Charity Trustee v Beazley* [1993] 29 EG 100
[32] *Wainwright v Leeds City Council* (1984) 270 EG 1289, CA
[33] [2002] EWCA Civ 6; [2002] 1 WLR 1488, CA

breach of the Human Rights Act 1998 for a failure to rectify inherent defects in a property in the absence of any disrepair. In a personal injury claim for aggravated asthma caused by damp and condensation in the demised premises, it was held that conditions were not so bad as to constitute a breach of the tenant's rights under Article 8 ECHR (right to private and family life). It remains to be determined, however, whether such rights might be infringed if a dwelling house let by a public authority is unfit for human habitation.

Subject matter of repair

60) *Structure:* The structure of a building consists of *those elements of the overall dwelling house which give it its essential appearance, stability and shape*[34].

61) In the case of a flat, the structure consists of the walls of the flat, both outside and inner party walls; the horizontal divisions between flats and the structural framework and beams supporting floors, ceilings and walls. The obligation also applies to windows, frames and sash cords, except where the glass has been damaged by the tenant.

62) The duty to repair *structure* also extends to wall and ceiling plaster but not decorations. Thus, where condensation or damp has damaged decoration but not the structure of a building, the landlord is not liable under section 11 LTA. In the case of *Quick v Taff-Ely BC* (above), the dwelling was rendered unfit for human habitation as a result of the condensation, which had damaged decor and tenant's furniture, but no liability arose because there was no damage to the structure of the premises.

63) *Exterior:* the exterior of a dwelling house will not normally include a garden or yard attached to it, nor a garage, nor the boundary fences[35]. The duty to repair the exterior may include repair of an essential means of access, such as a path and steps which are an integral part of the dwelling house but not a path running between two adjoining dwellings[36].

[34] *Irvine v Moran* [1991] 1 EGLR 261, approved in *Marlborough Park Services v Rowe* [2006] 2 EGLR 27, CA
[35] *Hopwood v Cannock Chase DC* [1975] 1 WLR 373, CA; *McAuley v Bristol CC* [1991] 3 WLR 968
[36] *Brown v Liverpool Corporation* [1969] 3 All ER 1345, CA

Notice

64) A covenant to repair, whether express or implied by section 11 LTA, is subject to an implied term that the landlord's liability does not arise until he has notice of the defect[37]. The landlord is not in breach of covenant as soon as the premises are in disrepair. No breach arises until he has notice of the disrepair. Even then he is only in breach if he does not carry out the work within a reasonable time. It should be noted, however, that once the landlord has notice of a defect, he is under an immediate duty to render the premises temporarily safe if their condition is dangerous[38].

65) The requirement for notice does not apply where the landlord has possession or control of the premises or part of the premises in disrepair. In such cases, the landlord is in breach of covenant as soon as the disrepair occurs and his covenant amounts to an obligation not to allow the premises to fall into disrepair.

66) Section 11(6) LTA provides that where a repairing covenant is imposed under section 11, there is also an implied covenant, subject to certain conditions, that the tenant will permit the landlord to view the state of repair.

67) The landlord's right to enter premises under section 11(6) LTA does not fix him with constructive notice. He must have actual notice of the disrepair before breach can be established.

68) It is important, however, to note the position under the Defective Premises Act 1972, where the landlord is liable if he *ought* to have known of the relevant defect in all the circumstances, and where he is deemed to have notice if he has a right to enter to inspect premises. It is envisaged that, in most claims for injury brought for breach of an express covenant or an implied obligation to repair under section 11 LTA, the notice provisions of the 1972 Act will render it unnecessary to consider whether the landlord had actual notice of the disrepair.

69) The fact of notice must be specifically pleaded.

[37] *Makin v Watkinson* (1870) LR 6 Ex 24
[38] *Griffin v Pillett* [1926] 1 KB 17

Other implied covenants

70) Where a repairing covenant is implied, the duty arises in contract rather than in tort. Thus, provided the term is not subject to the prohibition for contracting out under section 12 LTA, it may be expressly avoided in the terms of the lease[39].

Fitness for habitation

Furnished accommodation

71) In the absence of any express agreement to the contrary, there is an implied covenant that furnished accommodation shall be fit for occupation at the start of the tenancy[40]. It is no defence for the landlord to contend that he had an honest belief that the house was habitable when he let it, if it was not[41].

72) The presence of infectious disease (eg. measles, pulmonary tuberculosis) will be deemed to render the accommodation unfit for habitation where there is an actual and appreciable risk to the tenant, his family or household by occupying the house[42]. Premises have also been held to be uninhabitable where defective drains rendered them unsanitary[43].

73) There is no implied covenant that furnished premises will remain fit for habitation for the term of the tenancy, nor any obligation on the landlord to inform the tenant if the house is no longer fit for occupation[44].

Dwelling house under construction

[39] *Gordon v Selico Co* (1986) 18 HLR 219, CA
[40] *Collins v Hopkins* [1923] 2 KB 617
[41] *Ibid*
[42] *Collins v Hopkins* above
[43] *Bird v Greville (Lord)* (1884) C&E 317
[44] *Sarson v Roberts* [1895] 2 QB 395

74) Where a dwelling house is in the course of construction at the time of entering into the lease, there is an implied term in the lease that the house will be fit for habitation upon completion[45].

Dwelling house let at a low rent

75) Where a house is let for human habitation at a low rent (£80 in London; £52 elsewhere) by a contract made on or after 6 July 1957, there is implied into the lease by section 8 LTA 1985:

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.

76) There is **no** implied covenant as to fitness for habitation or any other purpose in the lease of unfurnished accommodation[46]. Further, there is no implied obligation for any repairs of unfurnished premises[47].

Landlord's ancillary property

77) Where the landlord retains possession and control of property ancillary to the premises demised, and the maintenance of such property is necessary for the protection of the demised premises or the safe enjoyment of them by the tenant, there is an implied covenant that the landlord will take reasonable care to ensure that the ancillary property is maintained in such a condition as to avoid causing damage to the tenant or to the demised premises[48].

78) There are two elements to the duty. Firstly, there is a duty to protect the demised premises. This duty is frequently concerned with preventing things escaping from the landlord's property. For example, a

[45] *Perry v Sharon Development Co* [1937] 4 All ER 390
[46] *Bottomley v Bannister* [1932] 1 KB 458 – fatal carbon monoxide poisoning from faulty gas boiler
[47] *Westminster (Duke) v Guild* [1985] QB 688 CA
[48] *Perry v Sharon Development Co* [1937] 4 All ER 390

landlord is under a duty to take reasonable care to prevent a roof or gutter on his land from falling into disrepair, and causing damage to the tenant or to the demised premises[49].

79) It is important to note, however, that whilst a landlord may be liable for damage caused by water flowing from a blocked drain on to the demised premises, he is under no obligation (unless the lease provides otherwise) to keep unblocked a drain which serves the demised property across the landlord's land[50].

80) The second element is the duty to take reasonable care to keep reasonably safe a common staircase or other common access to parts of a building let to separate tenants[51]. Thus, it seems that the common law duty may assist where the Occupiers Liability Acts do not.

Implied Covenants by Necessity

81) In certain circumstances, covenants to repair may be implied into a lease in order to make the contract work.

82) The leading case is *Liverpool City Council v Irwin*[52], which concerned a maisonette on the 9th and 10th floor of a tower block. The tenancy agreement imposed various obligations on the tenants, but was silent as to the landlords' obligations. Over the years, the condition of the tower block deteriorated very badly. In particular, the lifts were frequently out of order, there was no proper lighting on the stairs and the rubbish chutes were continuously getting blocked. The House of Lords held that obligations on the part of the landlords had to be implied in order to give proper effect to the lease. There had to be implied easements for the tenants and their guests to use the stairs and the lifts, and an implied easement for use of the rubbish chutes. In the absence of any express obligation to keep the common areas in repair, it was held that the landlords were under a duty to take reasonable care to maintain them in a state of reasonable repair and usability.

[49] *Hargroves & Co v Hartopp* [1905] 1 KB 472
[50] *Westminster v Guild* above
[51] *Dunster v Hollis* [1918] 2 KB 795
[52] [1977] AC 239, HL

83) The decision in *Irwin* is not limited to high rise apartment blocks, but has been applied in wider circumstances. For example, where a house could not be used as it was intended without access via a path at the rear, it was held that the landlord was under an implied duty to keep the path in repair[53].

84) Other circumstances which have given rise to implied covenants by necessity include situations where a tenant is under an obligation which is dependent upon the landlord carrying out works or services. For example, where the tenant covenants to pay for the costs of works or services to be carried out by the landlord, it may be implied that the landlord is under an obligation to carry out those works[54]. Similarly, where the tenant has agreed to carry out works which can't be performed if the landlord doesn't repair, then an obligation on the landlord may be implied[55].

85) The imposition of covenants by necessity depends on the precise circumstances and wording of the agreement. Repairing obligations will only be implied where they are necessary to make the contract work[56]. In the cases of *Russell v Laimond Properties Ltd*[57] and *Westminster (Duke of) v Guild*[58], it was held that there is no duty on the landlord to provide services where the tenant had only agreed to pay for works and services *if* the landlord provided them. That can be contrasted with the position where the tenant covenanted to pay for the cost of redecorating the exterior of the premises every 3 years, whether or not the landlord had completed the work. It was held there that the landlord was under an implied obligation to carry out the work[59].

Building regulations

86) Section 71 of the Health and Safety at Work, etc Act 1974 and, subsequently, section 38 of the Building Act 1984 provide that a breach of duty imposed by Building Regulations is actionable at civil law where damage is caused, except where the regulations otherwise provide. "Damage" includes the death of, or injury to, any person. Such liability does not arise, however, until a regulation is made bringing the

[53] *King v South Northamptonshire DC* [1992] 06 EG 152
[54] *Barnes v City of London Real Property Co Ltd* [1918] 2 Ch 18 – fixed contribution to cleaning services
[55] *Churchward v R* (1865) LR 1 QB 173
[56] *Liverpool City Council v Irwin* above
[57] [1984] 1 EGLR 37
[58] [1985] QB 688
[59] *Edmonton Corporation v Knowles (WM) & Son* (1961) 60 LGR 124

section into force. Section 71 of the 1974 Act was revoked without being brought into force, and section 38 of the 1984 Act is not yet in force. There is currently, therefore, no statutory provision for breach of Building Regulations to give rise to civil liability.

87) Further, it appears that there is no common law liability for breach of statutory duty, independent from that potentially available under the above provisions. *There is nothing in the terms or purpose of the statutory provisions which support the creation of a private law right of action for breach of statutory duty*[60]. It should be noted, however, that the above comments were obiter dicta and that the authorities prior to *Murphy* were not entirely clear as to whether liability arose. It is suggested in *Keating on Construction Contracts* (8th Edition) that the very existence of section 38 is against such an independent right of action.

88) Whilst breach of building regulations does not give rise to breach of statutory or common law duty per se, a failure to comply with the regulations is generally sufficient to establish breach of duty in builder/landlord claims brought in negligence.

Conclusion

89) It can be seen that the law relating to claims against landlords is complex. Any potential claim or defence will require careful consideration of the tenancy agreement, followed by close analysis of the various statutory provisions and common law remedies.

Jonathan Mitchell

Georgina Cursham

November 2012

[60] *Murphy v Brentwood DC* [1991] 1 AC 398, HL per Lord Oliver at 490; see also Lord Bridge at 481

Jonathan Mitchell

Jonathan Mitchell was called to the Bar in 1992.

He read law at UCW Aberystwyth and graduated in 1985, after which he joined the company secretariat of British Aerospace plc (now BAE Systems plc) where he spent 4 years. From there he moved to the legal department of Yorkshire Television plc for two years. He then attended the Bar Vocational Course at the Inns of Court Law School and was called to the Bar in 1992. He joined Ropewalk Chambers as a pupil that year and has remained with Chambers ever since.

Believing that variety is the spice of life, he has a broad ranging practice with particular interests and expertise in planning and environmental law, highways, local government, rights of way and other property disputes, fraudulent claims, costs, professional negligence, personal injury and disease litigation.

He prides himself on being approachable and accessible to his clients and is always willing informally to discuss cases in which he is involved. He is a vigorous advocate in court bringing careful attention to detail to his preparation in particular of technical matters requiring the assistance of expert witnesses.

jmitchell@ropewalk.co.uk

Georgina Cursham

Georgina Cursham was called to the Bar in 2007.

She was awarded a major scholarship from Gray's Inn for the CPE year. She achieved the Nottingham Law School Prize for the highest overall result on the Graduate Diploma in Law, followed by the Taylor Prize for best overall performance on the Bar Vocational Course at Nottingham Law School.

Prior to coming to the Bar, she worked for the Legal Services Commission before travelling extensively and teaching English in Russia and China. She returned to the UK to manage a 4 star hotel in Central London. She speaks fluent French.

She has a general civil law practice, with a keen interest in business and property matters, particularly involving landlord and tenant disputes. She represents Claimants and Defendants in a wide range of personal injury matters, at fast track, multi-track and appeal level.

georginacursham@ropewalk.co.uk