REPAIRS AND IMPROVMENTS

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Introduction

1. This seminar is intended to provide an overview of the current law governing repairs and improvements in respect of properties occupied by tenants in the private rented sector under an assured shorthold tenancy (AST) and in the social rented sector under an AST or assured tenancy.

2. Ordinarily a tenancy agreement sets out the express repairing obligations of the landlord and tenant. Regard must always be had to the terms of a tenancy agreement to ascertain the extent of both parties' contractual repairing obligations. In circumstances where the tenancy agreement is silent as to the parties' repairing obligations or where the landlord's repairing obligations are minimal, there are a number of statutory implied obligations placed on landlords in respect of repairs and improvements.

3. This seminar will provide an overview of the statutory repairing and improvement obligations placed on landlords and focuses on:
   - the implied repairing obligations under section 11 of the Landlord and Tenant Act 1985 ("the 1985 Act")
   - the fitness for human habitation standards under sections 9A to 10 of the 1985 Act as amended by the Homes (Fitness for Human Habitation) Act 2018 ("the 2018 Act")
   - section 4 of the Defective Premises Act 1972 ("the 1972 Act")
   - the housing standards in relation to gas safety, energy performance and electrical safety

4. Where pertinent, I will highlight the effects that the Covid-19 pandemic has had on these statutory obligations.

Section 11 of the 1985 Act

5. Tenants occupying their properties under an AST or an assured tenancy ordinarily tend to bring a claim for disrepair against their landlords for either a breach of their contractual repairing covenants under the lease or for a breach of the implied repairing obligation under section 11 of the 1985 Act.

6. When dealing with claims for disrepair, it is always important to check if the landlord's contractual repairing covenant is more extensive than the implied repairing covenant under section 11 of the 1985 Act.

The applicability of section 11 of the 1985 Act

7. Section 11 of the 1985 Act applies to tenants who occupy their properties under short leases; namely, a lease granted for a term of not more than 7 years. Section 11 of the 1985 Act also applies to assured tenancies if the tenancy is not a shared ownership lease and is granted for a fixed term of 7 years or more by a registered provider of social housing.[1]

8. A tenant who brings a claim for disrepair against their landlord under section 11 of the 1985 Act will only succeed if the following three elements are proved:

   (a) A breach of the statutory repairing covenant;

   (b) Proof that the landlord or the landlord's agent has been put on notice of the alleged disrepair, which falls within the implied repairing covenant; and

   (c) A failure on the part of the landlord to effect repairs within a reasonable period of time.

Breach of the implied repairing covenant under section 11

9. Section 11(1) of the 1985 Act implies into a lease the following repairing obligations that requires a landlord –

   (a) to keep in repair the structure and exterior of the property (including drains, gutters and external pipes);
   (b) to keep in repair and proper working order the installations in the property 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 property for space heating and heating water.

[1] Landlord and Tenant Act 1985, s.13

10. In circumstances where there landlord has an estate, interest or control over the common parts of the building in which the tenant's property is situated, section 11(1A) of the 1985 imposes a repairing obligation on the landlord to

(a) to keep in repair the structure and exterior of the building in which the tenant's property is situated (including drains, gutters and external pipes);

(b) to keep in repair and proper working order the installations for the supply of water, gas and electricity and for sanitation in the building that directly or indirectly serves the property; and

(c) to keep in repair and proper working order the installations in the building for space heating and heating water that directly or indirectly serves the property.

11. The extent of the landlord's implied repairing covenant is limited to keeping in repair and proper working order the matters that are listed in sections 11(1) and 11(1A) of the 1985 Act. Accordingly, a landlord will not be found to be in breach of the covenant to 'repair' unless there is in existence relevant damage, that is to say, a material deterioration in the property from the physical condition in which it was granted.

12. In light of the above, the court has found that the following do not amount to a breach of the landlord's repairing obligations under section 11 of the 1985 Act:

(a) Condensation damp which has not be caused or exacerbated by a deterioration in the exterior or structure of the property or building in which the property is situated. In *Southwark v McIntosh*[2] it was held that a tenant must establish that the damp arose from a breach of covenant.

(b) The presence of asbestos in the fabric of the property or building will not amount to a breach of landlord's implied repairing obligation under section 11 of the 1985 Act unless there is disrepair to fabric of the property which the landlord must keep in repair such as the wall or floor.

(c) Infestations of mice or bed bugs are not actionable per se unless a tenant can prove that the infestation has been caused by disrepair to the structure or exterior of the property or building.

2 (2002) EG 164

Notice of disrepair

13. The liability of the landlord for a breach of the implied repairing covenant is subject to the precondition that the landlord, or the landlord's agent, has been given notice of the disrepair. The requirement for notice applies even if the disrepair in question existed at the date of the tenancy.[3]

14. A landlord will have notice of any disrepair given directly by their tenant. A landlord will also be deemed to have notice of any disrepair that is given by a tenant to the landlord's agent such as a managing agent or a housing officer. Further, a landlord will also be deemed to have notice of any disrepair falling within their implied repairing covenant under section 11 of the 1985 Act following an inspection of the property by the landlord's agent or contractor.

15. The notice that the tenant gives to the landlord must be sufficient to put a reasonable landlord on enquiry about the nature of the damage and whether works may be needed.

16. In order to establish that notice of the disrepair has been provided, the tenant should keep copies of:

    (a) Letters or emails sent to the landlord that provide a full description of the disrepair alleged and the date that notice was given;

    (b) Date stamped photographs of the disrepair and any items that have been damaged as a result of the disrepair;

    (c) Logs of any telephone calls made by the tenant to their landlord with details of date and times of the calls; and

    (d) Social housing tenants should ask their landlord for a copy of the disrepair records that should also provide a record of the items of disrepair that have been reported by the tenant or the landlord's agents.

[3] *Uniproducts (Manchester) Limited v Rose Furnishers Limited* [1956] 1 WLR 45

Reasonable time to effect repairs

17. There is no breach until a reasonable time has elapsed in which the repair could have been carried out.[4]

18. What constitutes a reasonable period of time will depend on the nature of the defect and other surrounding facts.

19. The schedule to the Secure Tenants of Local Housing Authorities (Right to Repair) Regulations 1994 (SI 1994/133) provides set timeframes for what constitutes a reasonable period of time to effect repairs. This schedule is used in respect of the right to repair scheme for local authority tenants. Yet, for tenants who occupy properties under an assured or an assured shorthold tenancy agreement and that agreement is silent as to what constitutes a reasonable period of time to effect repairs, this table provides helpful guidance:

Defect	Prescribed period (working days)
Leaking roof	7
Toilet not flushing (where there is no other working toilet in the dwelling-house)	1
Total or partial loss of space or water heating between 31st October and 1st May	1
Total or partial loss of space or water heating between 30th April and 1st November	3

Access

20. Most contractual AST and assured tenancy agreements contain an express covenant on the part of the tenant to give the landlord and his agents and contractors access to the property to inspect and carry out repairs. If the tenancy agreement does not contain such an express covenant, it is often implied.

[4] *Calabar Properties v Sticher* [1984] 1 WLR 287

21. If a tenant refuses to give their landlord access to the property to carry out repairs, a landlord can rely on the tenant's failure to provide access, as a defence to the tenant's claim for damages for disrepair.

Homes (Fitness for Human Habitation) Act 2018

22. On 20 March 2019 the Homes (Fitness for Human Habitation) Act 2018 ("the 2018 Act") came into force. The 2018 Act provides tenants with improved enforcement mechanisms to force their landlords to deal with dangerous and unhealthy housing conditions.

Application

The new provisions apply to dwellings let "wholly or mainly for human habitation" and the lease is for a term of less than 7 years or is a lease for a secure, assured or introductory tenancy for a fixed term of 7 years or more.[5]

Provisions

23. The 2018 Act inserts a new section 9A into the Landlord and Tenant Act 1985. Section 9A(1) implies a covenant by the landlord that the property:

(a) is fit for human habitation at the time the lease is granted or otherwise created or, if later, at the beginning of the term of the lease; and

(b) will remain fit for human habitation during the term of the lease.

24. By virtue of section 9A(6) of the 1985 Act, the implied covenant extends to the common parts of a building that the landlord has an estate or interest and in which the tenant's property is situated.

25. In determining whether the condition of a property is fit for human habitation, section10 of the 1985 Act sets out the following factors that the court must consider:

- repair
- stability
- freedom from damp
- internal arrangement

[5] Landlord and Tenant Act 1985, s.9B.

- natural lighting
- ventilation
- water supply
- drainage and sanitary conveniences
- facilities for preparation and cooking of food and for the disposal of waste water; in relation to a dwelling in England
- any prescribed hazard

26. The tenant's property will be regarded as unfit for human habitation if, and only if, it is so far defective in one or more of those matters that it is not reasonably suitable for occupation in that condition.

27. Further, a "prescribed hazard" is defined by the Housing Health and Safety Rating System (England) Regulations 2005 ("the 2005 Regulations"). The hazards listed under the 2005 Regulations include, amongst others things, damp and mould growth, excess cold, fire and fire safety, domestic hygiene and pests and refuse. If other factors are added to the 2005 Regulations in future they will become relevant to an assessment of fitness for human habitation under the 1985 Act.

28. The factors listed in the 2005 Regulations broaden the fitness for human habitation criteria. Tenants are also increasingly relying on the provisions when seeking to bring a disrepair claim against their landlord for matters such as condensation damp and excess cold. Yet it is worth bearing in mind that a high hurdle exists for a tenant to prove that their property is unfit for human habitation. It will be found so only if they can establish that it is so far defective in one or more of those factors that it is not reasonably suitable for occupation in that condition.

Exemptions

29. It should also be remembered that subsections 9A(2) and 9A(3) of the 1985 Act, exempt a landlord from liability where, for example, the unfitness is wholly or mainly attributable to the tenant's own breach of covenant or the tenant has not used the property in a tenant-like manner.

Defective premises act 1972

Duty of care

30. Under section 4 of the 1972 Act a duty of care is owed by landlords who are under an implied or express obligation to repair, maintain or enter a tenant's property to effect repairs. The duty of care owed is a duty to ensure that all persons who might reasonably be expected to be affected by "relevant defects" in the state of the property are reasonably safe from personal injury or from damage to their property caused by the relevant defect.

31. A relevant defect is defined as a defect in the state of the premises existing at or after the 1972 Act came into force; namely on or after 1 January 1972. If a person suffers personal injury or damage to property from a relevant defect, the landlord will only be liable if it was reasonably foreseeable that personal injury or damage to property would have been caused or could reasonably have been prevented.

To whom is the duty owed?

32. The duty is owed not only to the tenant, but also to any other occupier of the property as well as visitor to the property.

33. The duty of care will apply in circumstances where the landlord knew or ought to have known of the "relevant defect". Unlike a claim brought under section 11 of the 1985 Act, there is not requirement for the tenant to put the landlord on notice of the "relevant defect".[6]

Repairing obligations during Covid-19

34. A landlord's contractual and statutory repairing obligations were not suspended during the course of the Covid-19 pandemic.

35. A landlord notified of essential repairs was required to take steps to ensure that repairs were carried out within a reasonable period of time if a tenant was not self-isolating or extremely clinically vulnerable. Repairs were required to be carried out in a covid-19 compliant manor as specified by government guidance.

[6] *Sykes v Harry* [2001] EWCA Civ 167

36. In circumstances where landlords have not been able to carry out repairs due to a tenant or a member of the tenant's family self-isolating or shielding a detailed record should be kept of the attempts made by the landlord to carry out the repairs.

Housing Safety standards

Gas safety checks

37. Pursuant to regulation 36(3) and regulation 36(4) of Gas Safety (Installation and Use) Regulations 1998 ("the 1998 regulations"), a landlord has a statutory obligation to ensure that a gas safety check is carried out to all gas pipework, gas appliances and flues that serve the property.

38. Pursuant to regulation 36(6)(a) of the 1998 regulations a landlord must give an existing tenant a copy of the most current gas safety record within 28 days of the gas safety inspection.

39. Pursuant to regulation 36(6)(b) of the 1998 regulations a copy of the current gas safety record must be given to a tenant prior to the tenant going into occupation of the property. In the recent Court of Appeal case of *Trecarrell House Limited v Rouncefield* [2020] EWCA Civ 760, the Court of Appeal has clarified that so long as the landlord gives the tenant a copy of the most recent gas safety certificate and the gas safety certificate that was current before the tenant went into occupation, before service of a notice under section 21 Housing Act 1988 ("the 1988 Act"), that notice will be valid.

Gas safety checks and covid-19

40. Throughout the covid-19 pandemic, landlords were still required to comply with their gas safety obligations under the 1998 Regulations.

41. During period of lockdown the Health and Safety Executive (HSE) provided guidance as to what landlords were required to do when the annual gas safety checks were due. In particular, the HSE provided that where a landlord or their registered gas safety engineer was unable to gain access to carry out an inspection because a tenant or a member of their household was either self-isolating or extremely clinically vulnerable, landlords were expected to demonstrate that they took reasonable steps to comply

with the law. This would include evidencing by way of records, communication with the tenant and details of the engineer's attempts to gain access.

Minimum Energy Efficiency Standards

42. The remaining provisions of the Energy Efficiency (Private Rented Property) (England and Wales) Regulations 2015 SI 2015/962, as amended ("the MEES Regulations") came into force on 1 April 2020 in respect of England and Wales.

43. The MEES Regulations set minimum energy efficiency standards for properties. All rental properties to which the MEES Regulations apply must now meet a minimum energy performance certificate rating of band E, unless an exemption has been obtained. A property that achieves a rating less than band E is deemed to be substandard.

44. A landlord is required to give their tenant a copy of the energy performance certificate for the property. A failure to do so prevents a landlord from serving a notice under section 21 of the 1988 Act. The certificate is valid for a period of 10 years if no further modifications are made to the property that would affect its energy efficiency rating.

45. The MEES Regulations applies to all tenancies let under an AST or an assured tenancy. It does not, however, apply to registered providers of social housing.

46. Further exemptions exist for a landlord in meeting the minimum energy efficiency standards in the following circumstances:

    (a) Where a tenant has refused access to the landlord to carry out the improvements required in the last five years, unless the tenant's lease came to an end after 1 April 2019;

    (b) If the required improvement would cause the landlord's property to depreciate by 5% of its market value;

    (c) The landlord has a registered cost cap exemption.

47. A landlord who relies on an exemption in respect of his property must be registered on the National Private Rented Sector (PRS) Exemptions Register.

MEES Regulations and Covid-19

48. The operation of the MEES regulations was not suspended during the course of the Covid-19 pandemic. Landlords were still required to comply with their statutory obligations.

49. Any difficulties that a landlord had in compliance caused by the Covid-19 pandemic would need to be evidenced and detailed documentation kept as to the efforts made to comply.

Electrical Safety Standards

50. Since 1 April 2021, the Electrical Safety Standards in the Private Rented Sector (England) Regulations 2020 ("The Electrical Safety Standard Regulations") apply to all private rented sector tenancies save for the following:
    - Long leases and tenancies for a fixed term of 7 years or more
    - Tenancies where the landlord is a Private Registered Provider of Social Housing, even if the landlord is not acting in the capacity of a public body
    - Tenancies where the tenant shares facilities, such as a toilet, bathroom, kitchen or living room, with a resident landlord or a member of the resident landlord's family
    - Halls of residence for students
    - Care homes and hospices
    - hostels and refuges

51. The Electrical Safety Standard Regulations places a statutory obligation on landlords to ensure that their rental properties comply with the current wiring regulations and that they are maintained throughout the course of the tenancy.

52. Landlords are also under a statutory obligation to engage a qualified engineer to carry out an electrical safety check of the property before their tenant goes into occupation. The report, known as an Electrical Installation Condition Report (EICR), is valid for a period of five years. If the EICR recommends a shorter interval period until the next electrical safety check, a landlord must ensure that a further check is carried out in the period stated in the EICR.

53. A landlord who fails to comply with the Electrical Safety Standard Regulations could face enforcement action from the local authority.

Electrical Safety Standard Regulations and Covid-19

54. As with the MEES Regulations, compliance with the Electrical Safety Standard Regulations was not suspended during the course of the Covid-19 pandemic. A landlord who has failed to comply with his obligations because of Covid-19 related issues will have to demonstrate that they took reasonable steps to comply with their obligations under the Electrical Safety Standard Regulations.

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