Housing Law Practitioners' Association

Minutes of the Meeting held on 16 September 2015
University of Westminster

Money Claims

Speakers: **Andrew Brookes, Head of Housing, Anthony Gold Solicitors**
Rebecca Chan, Barrister, Arden Chambers

Chair: **John Gallagher, Shelter**

Chair: My name is John Gallagher and I am from Shelter. Our topic this evening is Money Claims and our two speakers are Andrew Brookes from Anthony Gold and Rebecca Chan from Arden Chambers. Could I first ask if there are any corrections to the minutes of the last meeting on Possession Proceedings? If not, I would like to introduce Andrew Brookes. Andrew is partner and Head of Housing at Anthony Gold Solicitors. Andrew was Chair of HLPA for six years between 1999 and 2005. He has also been a member of the board of a housing association in South London and is presently on the editorial board of the Journal of Housing Law.

Andrew Brookes: Good evening everyone. This evening I will go through some practical issues regarding housing money claims, both in terms of funding and procedure; and then I will talk about damages, compensation in housing disrepair claims particularly, and how to maximise those for tenants; and then finally I will go through a couple of recent relevant cases. Rebecca will then talk more specifically about unlawful eviction and harassment claims.

First of all I would like to talk about availability of legal aid for money housing claims. One of the changes brought about by the 2012 LASPO was the abolition in some senses of legal aid for money claims, but it is worth just pausing to remind ourselves what still can be done in money claims as far as legal aid is concerned. I will not spend too long on this, the reason being that there are two excellent resources available to practitioners. The first is an article by my colleagues Sara Stephens and Jan Luba sorting myths from facts over housing cases, which is in the November 2014 Legal Action Magazine and that explains what remains in scope in some detail; and also on HLPA's very own website there is a guide to housing legal aid after LASPO. If you'd forgotten that existed, it's really rather good and I can thoroughly recommend it and I can ensure you that, in preparing these notes, I made extensive reference to it. So for that reason I will not spend a long time talking about legal aid and housing money claims, but in essence the situation is that where the claimant is seeking remedies in respect of disrepair, legal aid is only available in very limited circumstances where there is a "serious risk of harm". You will see from the notes that I put some more detail as to what the Legal Aid Agency mean by that. In essence, though, the difficulty is that not only is there that stringent test, but that the legal aid only appears to cover the injunction part of the claim and not the damages part of the claim. Now that seems to have been the intention and I'll be very interested to hear if people have managed to obtain certificates. As far as the rules themselves are concerned, it is very difficult not only to get legal aid to take a housing disrepair claim as claimants, but also to maintain it once the urgent problem has been resolved, particularly in pursuing a money claim for the aggrieved tenant.

I'm very happy to talk more about that later. I think the really important thing as far as legal aid is concerned is that it is still available for possession claims to counterclaim. There the scope of the

funding covers not only the injunction side of things, but also the money side of things which is, of course, what we're concentrating on tonight. As I understand it, there are still quite a lot of certificates being granted for counterclaims and it may even be that practitioners familiar with legal aid have concentrated on counterclaims rather than acting for tenants who are not subject to possession proceedings.

It is also worth noting, finally on the issue of legal aid, that legal aid still remains for harassment and unlawful eviction cases. Again I'd be interested to hear whether people are having problems getting certificates or whether there are any issues relating to that. So although legal aid is severely restricted as far as housing money claims are concerned, there are those circumstances where it is still available. If the tenant is eligible then it will of course be the best option for them to use legal aid if you can possibly get through the labyrinth of the bureaucracy in getting the certificate and the means assessment and all of that.

But what about those people who are now excluded, which will often include those tenants who, prior to LASPO, were very much eligible for legal aid to take housing disrepair claims where there are no possession proceedings and you can't get it within the serious risk of harm. Again, I will not talk in massive detail about Conditional Fee Agreements, but they are, I suppose, the alternative way of continuing to fund housing disrepair claims in particular and I wanted to touch on some of the key issues regarding. Although I think more people are becoming familiar with them now, many housing practitioners are not. I would say that I think they are nothing to be afraid of and they are the only way for tenants to get redress in circumstances where there is not a possession claim for example. There is a model CFA on the Law Society website which also has guidance on issues such as the Consumer Protection legislation, which is also engaged by the agreement. That model CFA I have put in the link is designed for personal injury and clinical negligence cases but with a few amendments it can be used for housing disrepair cases as well.

CFAs themselves are governed by s.58 and 58(A) Courts and Legal Services Act 1990 as amended. Those two sections are surprisingly brief and do not include any lengthy and complicated legislative provisions. Basically the provisions allow a CFA which has to be in writing and that if there is a success fee this has to be specified.

Prior to April 2013 the success fee and the insurance premium, if there was any, were recoverable from the opponent but following the changes brought in by LASPO the Courts and Legal Services Act was amended to mean that if there is a success fee, and if there is an insurance premium, they cannot be recovered from the opponent, even if you win. The consequence being that if those two issues exist then they have to come out of the client's damages. It's worth saying that there is no requirement whatsoever for there to be a success fee or for there to be after the event insurance. It is perfectly possible, lawful and legitimate to pursue a case on a client's behalf under a CFA where there is no success fee and there is no after the event insurance. You have to advise the client of the costs risk if they lose, because, of course, one of the crucial differences between a CFA and legal aid is that a legally aided person, if they lose, has the costs protection afforded by the certificate; whereas a claimant under a CFA does not, and so that is what the insurance is supposed to cover. There may, however, be circumstances, if the client is properly advised, that they are perfectly happy to proceed without insurance. They may for example be of very limited means and even if they lose then there is no realistic come back on them by the winning landlord.

The other two points to note is that in order for the conditional fee to work you have to win the claim in the sense of getting an order for costs against the opponent. It is certainly the case that, particularly in the old days under legal aid certificates, works would be carried out under a legal aid disrepair claim and then the claim would peter out, maybe the client lost interest or perhaps the solicitor lost interest or the adviser. So the certificate would be discharged, the solicitor would be paid under the certificate

but there wouldn't be a damages or a costs order. If you do that, of course, under a CFA you as the adviser or solicitor do not get paid anything so it's a different scenario in the sense that you have to be confident that your client will stay with you and your client's has to be confident that you will stay with them. The whole case has to be seen through to a successful conclusion for conditional fees to work and that, I think, can involve a culture change sometimes for people who are not familiar with CFAs. It involves possibly a slightly different relationship with the client; not necessarily a worse relationship either, in my opinion perhaps a better relationship. The other issue is whether, because the success fee, which is the percentage on top of the cost which is designed to compensate you for taking the risk of taking the no win no fee claim, cannot be recovered from the opponent so you have the option of recovering it from the client's damages. Of course if you intend to do that one of the key points to get across when advising clients on conditional feels is to explain that up front. In some ways it is equivalent to the statutory charge, which we're used to explaining in legal aid cases, because it's a percentage of the damages.

Unlike in personal injury cases, which is what CFAs are primarily used for, where there is a cap of 25% of the damages, so the success fee can't be more than that even if on a calculation it is, there is no cap for housing disrepair and other non-personal injury claims, so if you felt it proper to do so, you could take whatever you agree with the client at the start. I would suggest though that taking much more than 25% starts to look like a rather bad bargain for the client.

The other reason, perhaps, not to be so frightened of conditional fees is that when success fees and insurance premiums were recoverable from the other side there was a fierce contest at the end of the case over costs and when you entered into the CFA you had to serve a notice of funding. Of course the costs are still payable but now it's just the base costs and I think it's fair to say that although there is still a contest there isn't perhaps the same fierceness of contest between you and the paying party as far as the CFA is concerned.

I suppose this part of the talk is an encouragement for people who are not using CFAs yet to go for it and to use them because, as I said, for a lot of tenants suffering disrepair, they are the only real option to get redress now. They're not the only option perhaps, but they are certainly an option.

I will move away from funding now and talk about some practical issues relating to issuing claims and progressing claims. Again, when I say claims, I'm mainly talking about housing disrepair claims because the majority of housing money claims are housing disrepair claims. It does however also apply to harassment and unlawful eviction claims and tenancy deposit claims which are also housing money claims.

The small claims limit is now £10,000, but it isn't, of course, for everything and for the claims that the people in this room deal with it often isn't £10,000 so there are special rules for both housing disrepair and harassment and unlawful eviction claims, meaning that many of the claims that we are dealing with will actually be fast-track claims rather than small claims track claims. If you look in the notes I have included the relevant extract of CPR 26.6. Just to remind everyone that for a housing disrepair claim to be a fast track claim it only needs either the damages or the works to be valued at over £1000,. It doesn't need both, it just needs one of those two to be over £1000 and the claim should be allocated to the fast track. So those limits are quite low and that means that most disrepair claims, where there is an outstanding claim for works, will be fast track claims. I'm trespassing on Rebecca's talk here, but for harassment and unlawful eviction claims there is a specific part of CPR 26.7 which says that they will not be allocated, no matter how small they are, to the small claims track, so you are bound to be on the fast track or above for those types of claims.

The problems that people worry about as far as the track is concerned are twofold really, and I'm talking about housing disrepair claims here. The first problem is where perhaps even before you have

seen the client all the works have been done and there is a damages claim only. If that is the case and there is no injunction claim whatsoever then it will, unless the damages are over £10,000, be allocated to the small claims track, so there is quite a substantial difference where there is an injunction claim. I suppose theoretically that means that even the smallest injunction claim should be pursued tactically speaking if you want to get your claim into the fast track, after all the injunction claim could be very minimal but provided the damages claim is more than £1000 it should go into the fast claim track. I guess for practitioners that means that if the tenant tells you that all the works have been done you want to press them on that. If there is any doubt and they already have a surveyor involved, get your surveyor to have a look, because it is amazing how surveyors can find small amounts wrong with pretty much any property. If they do and there is still an actionable disrepair claim, an injunction claim, that means that almost certainly your claim will be a fast track claim and that might make all the difference as to whether you can pursue it.

The other issues relate to what happens when the works are done during the course of the proceedings, either before you issue or after you issue, but perhaps before allocation to track or perhaps even after allocation to track. What happens there? Will it be moved into small claims and all the work that you have done won't be paid for and you'll have to cease acting or act on a wholly different basis? You will see in the notes that I refer to the case *Birmingham v Avril Lee* where one of those situations happened. That referred back to the protocol, which is much the same now in this respect as it was back in 2008, so in *Avril Lee* the works were completed by the time of allocation and so it was allocated to the small claims track, but because the protocol says it should have been fast track Ms Lee was awarded her costs up to the date that the works were carried out. So although there's been talk about landlords applying to reallocate to the small claims track once the works are done, in practice that would only work to a certain extent, firstly because the costs liability might still arise up to the date the works were done and secondly because of the procedural delays in the court. I have not really seen landlords using it as a tactic to try to get things out of the fast track once they're in there, but perhaps some of you have.

The other point I wanted to bring to your attention so far as procedure is concerned is first of all that the protocol was updated in April 2015. In the bullet points in the notes I set out what the changes are and the differences between new and old. Some of it is just clarification. The protocol doesn't apply to counterclaims in possession proceedings. The early notification letter, much beloved by housing practitioners, is no more. It does not exist, so that two stage process of early notification letter, waiting 20 working days, getting a surveyor's report and then sending the full letter of claim does not appear in the protocol any more. It does, of course, say that a tenant can send a form of early notification if appropriate, so the process has been streamlined to some extent. The 20 working day time limit in relation to response to the letter of claim is still the same and you will see from the other couple of bullet points that there is a requirement to take stock before issue. There is a specific point about limitation as well, so there should be a limitation agreement if that is an issue.

I have included a small extract from the Housing Disrepair Protocol. It's worth remembering that the Protocol applies to pretty much all claims by tenants against landlords for disrepair. In contrast the Rent Arrears Protocol, for example, just refers to social housing tenants essentially, so the Housing Disrepair Protocol applies to private sector tenants just as much as it does to social housing tenants. So it's important and should never be forgotten. I have also included a recommended appendix letter of claim to the protocol in case you are not that familiar with housing disrepair claims. On the Court Service website, there are also standard directions for housing disrepair cases, but bizarrely for multitrack housing disrepair cases which in my experience are not unknown, but are fairly unusual. The can however be easily be adapted to fast track housing disrepair cases and are very useful. It's very strange that they appeared there because housing disrepair is a fairly esoteric area, I would imagine, of the overall number of cases issued in the county court.

The standard directions include provision for a Scott Schedule. If you don't know what a Scott Schedule is or looks like then I have included one in the notes. It's basically a summary of what is in issue between the parties as far as the repairs are concerned. The standard directions do make reference to having a single joint expert, the same expert who inspected at the pre-action protocol stage. That is very helpful for tenant advisers if the landlord hasn't responded and you have instructed your own expert on time. If there is a dispute over directions you can point to the standard directions published on the justice website which provide that the expert should be a single joint expert and should be the expert who inspected at the pre-action stage. This is well worth knowing about and it is relevant not just for multitrack claims but also to fast track claims as well.

Moving on to quantum, I refer to some resources in the notes, in particular the Housing Repairs Update which is published annually in Legal Action Magazine which gathers together lots of reported and unreported cases and is a very useful up to date resource. Also Nearly Legal has its own disrepair section which you surely must all subscribe to because it's wonderful. The reason I refer to that is that the primary authorities on general damages in housing disrepair cases are still these now ancient case of *Wallace v Manchester City Council* and *English Churches v Shine* which I refer to in the notes. I think the key issue is that *Wallace* is the classic case for the £1000 per year for general damages, but what it really does say is that the general damages should be compared to, or cross checked against, the rent. When you are negotiating on a tenant's behalf I would recommend that you always use the percentage rent rather than an annual lump sum and set out some calculations so that your opponent can see that you know what you are talking about.

For leaseholders there is a case called *Earle v Charalambous* which again is in the notes. Occasionally you get claims by long leaseholders. Of course there is no rack rent, there is no market rent, there is just a ground rent, so how do you calculate damages - you calculate it on the basis of what you would be able to rent the property out for, so effectively a private sector rent for those properties.

Lastly, a couple of issues relating to damages, and I am happy to talk about it more in questions afterwards. *Simmons v Castle* which applies to housing disrepair cases was supposed to raise general damages for personal injury cases, but also housing disrepair cases. When you have worked out your percentage rent you need to add 10% to that and refer to *Simmons v Castle* because that case is still relevant to all cases issued after April 2013, so that is a way hopefully of boosting your general damages by 10%.

I have referred in the notes to the Court of Appeal case of *Grand v Gill* which concerned a private sector let with no heating and related to whether plaster was in disrepair. It's quite interesting to read that case as far as general damages are concerned, because it was looked at by the Court of Appeal much more recently than *Wallace*, for example. The Court of Appeal allowed for different percentages for the different elements of disrepair, so there was a percentage for no heating and a percentage for damp plaster added together. I would suggest that as a way of calculating damages as far as tenants are concerned this is a good method, because you are likely to come to a more defendable and possibly a larger percentage rather than by having one percentage for the disrepair overall.

Beware claims for personal injury. It is easily accidentally to plead personal injury in a housing disrepair claim, because if you say that your tenant's asthma was made worse by the penetrating damp then that is a claim for personal injury and you may not have any sort of medical report, not even a GP report. Now you might say, well, so what. The problem is that the limitation period on personal injury claims is only three years and there is case law which says that where there is a six year claim period for your contractual housing disrepair claim, and a three year claim for personal injury, if you put them together and accidently plead personal injury you're limited to three years. Obviously there are ways round that but you have to beware of accidentally pleading personal injury as you might run into difficulties.

I have referred to Special Damages Claims because I think practitioners sometimes forget special damages and if you closely question your client then there often are special damages. Also sometimes there is the opposite, the case where there's a huge special damages claim for design elements and you have to be very careful about being able to support that claim with some sort of evidence.

In 2015 there have been two cases of significance for housing disrepair claims. The first one is *Uddin and Another v Islington* which concerned a Victorian house. There was a lot of dampness in the house and there was damage to the plaster and other parts of the interior of the property. It appears that he house was built without a damp proof course, very common in Victorian times, and Islington said, well, it's an inherent defect and there is no liability here because there is no damp proof course that has deteriorated or caused the damp, and therefore the claim should fail. The Court of Appeal disagreed, the issue being that there was damage and deterioration in the flat and objectively speaking there was damage to the plaster. If it was just condensation that's one issue but where there was actually damage to the flat it was disrepair. It did not matter how it was caused and the fact that there may never have been a damp proof course wasn't relevant in the sense. Indeed as far as a remedy is concerned it is conceivable that the LA might have to put in a damp proof course in order to remedy the disrepair, so this issue about inherent defects often come up as far as condensation type claims are concerned. Of course, there is the famous case from the 80s of *Quick v Taff Ely* where the house was tremendously mouldy but there was no civil liability for breach of covenant to repair because nothing had gone out of condition. I think in most cases where there is severe mould it will have damaged the plaster and if it has damaged the plaster there is disrepair, and therefore a civil claim, and so actually the scope of *Quick v Taff Ely* is in fact quite limited. I also think that if *Quick v Taff Ely* was run today, after cases like *Uddin*, there might be a different result.

Finally, *Kumarasamy*. This is one by the way where permission has been given to appeal to the Supreme Court so there is going to be a further appeal, an actual Supreme Court on disrepair, gasp, there hasn't been one of those in a long time, since the 80s I don't think, in fact. So this is quite a surprising one. The flat was in a block, all private sector. The immediate landlord owned just one of the flats in the block and the rest of the flats and the common parts up to the block of flats were owned by the freeholder, somebody else. The tenant tripped over on the common entrance way outside the flats and rather than suing the freeholder he sued his landlord for disrepair and he won in the Court of Appeal because of s.11(1)(A) Landlord & Tenant Act 1985 which I have put out in full in the notes and that says that the covenant to repair applies to any part of the building in which the lessor has an estate or interest. Now what the Court of Appeal said that there was an easement allowing the immediate landlord to get in and out of the flat, and indeed the sub tenants as well. If there is an easement then there is a common law right to repair that easement, even though it belongs to someone else, and for that reason the lessor did have an estate in the common parts even though they did not own it, and therefore they were liable for disrepair. You can see, perhaps, from my description why that is going to the Supreme Court and it will be a great surprise to many landlords and many tenants that the landlord can be liable for defects outside the flat that they have rented out.

Chair: Thanks very much Andrew. I would now like to introduce Rebecca Chan who is a barrister at Arden Chambers. Before Rebecca came to the Bar she was a senior housing caseworker at Shelter, so we claim credit for her, and she was also a volunteer adviser at Islington Legal Advice centre. She is also the Co-Editor of Quiet Enjoyment, the Legal Action Group guide to harassment and illegal eviction so her talk tonight is particularly apposite.

Rebecca Chan: I will be speaking about unlawful eviction tonight and my notes set out mainly the issues relating to civil remedies. I will not be dealing with the criminal side of unlawful evictions or the action that can be taken under that mainly because they are actions taken by either the police or local

authorities and also because public funding will not be available so you will not be dealing with in any event. So this is the overview for the civil proceedings and causes of action.

What I will focus on are the main causes of action that can be pursued in cases where there is unlawful eviction. I'll also look at what can be done by an occupier who appears not to have a cause of action and then I'll look at the possible remedies. Of course, this is a talk about money claims, although I will touch very briefly on the injunction part because, as most of you will know, they will usually be hand in hand. I will focus on the damages side, also looking briefly at how that is assessed and then I will outline some practical steps.

To start with I will tell you a story about a landlord who rented out property to a Romanian woman. She rented it out as an assured shorthold tenancy. There appeared to be some disputes about rent, so the landlord says that the tenant didn't pay. There's also an issue about the tenant's boyfriend not being allowed to stay over, or so the landlord says, so the landlord's solution was to storm into the property in the middle of the night. She brought with her a 6'7" friend and both of them started to smash up the tenant's furniture and hurled her belongings into the street. The 6'7" henchman who she brought with her started shouting racist abuse at the tenant, they manhandled the tenant and her partner who was in the property at the time and hurled them out, locked the doors and changed the locks.

Probably something that you're familiar with, but it will be interesting to note that this was, in fact, an example of a real life story from 2010 from a magistrate as the landlord called Stephanie Lippiatt, so she's the villain in this story. I have named and shamed her because that type of behaviour is unforgivable. The action that was taken was on the criminal side of the law but I think what we would ask you to bear in mind today is to take that factual scenario and we will see how that applies to each of the causes of action on each of the headings that we talk about. So we will call that the Lippiatt scenario.

So bearing that in mind we'll turn to the causes of action. Actually, before I do that, as John has mentioned I will give a shameless plug to the book *The Quiet Enjoyment* which also sets out both the civil and the criminal side of matters and it has a lot of useful templates to which you can refer.

The first cause of action I will discuss is **Breach of Contract** which has two main headings the first of which is **Breach of Quiet Enjoyment.** Looking at who can sue in that type of scenario, the answer to that is all tenants. So if you have a Tenancy Agreement, even if it doesn't say anything in the Tenancy Agreement about quiet enjoyment or the tenant having the right to enjoy that property and having quiet enjoyment of it, it doesn't matter. It is automatically implied into the tenancy and therefore any tenant can come forward and say that they have been in breach of covenant of quiet enjoyment if they have been unlawfully evicted. It does mean that a licensee cannot - so it's only for tenants who can raise this as a cause of action. The example that I will give, which is set out at paragraph 8, is of *Smith v Nottinghamshire* so although I've said that licensees can't raise breach of quiet enjoyment in the same way tenants can, there is an equivalent provision which the court of appeal has said can be implied into licensee's agreements and licence agreements. So, again you can raise that as an analogous situation. One point I haven't raised in the note is that it can also apply to a landlord who has been subjected to a possession order, so this example is, say you have a landlord who has a buy to let property, his mortgage company takes action against him for mortgage arrears, they get a possession order, and the landlord has a tenant that he has rented it out to. That tenant could then go after that landlord, even in that scenario, for breach of covenant of quiet enjoyment, so the tenant is also able to pursue the landlord or sue them on that occasion.

Who can be sued? It's usually just the landlord. The essence of contract though is that it is between those people who are subject to the agreement, so it's only the people who are named within it, and the action can arise between them.

I've talked about examples of breach. The first is obviously if the landlord goes in to change the locks of the property and unlawfully evicts them, the tenant can then raise breach of covenant of quiet enjoyment. If there are acts, for instance, of harassment or threatening eviction, again that can take place and they can pursue on that basis.

If we take our Lippiatt Scenario, yes, they can. Because we have an assured shorthold tenant, so she's a tenant, and the covenant is implied irrespective of what was in any agreement. Her tenant or her occupier would have been able to sue Lippiatt for this.

Regarding the remedies that are available, we potentially have an injunction, so you can go to the court to try to get the occupier readmitted. When you're looking at damages the point to bear in mind with this particular covenant is because it's breach of contract you're quite limited in what you can recover under damages. You have your usual headings which we'll come to later on where you have your specials, your generals and other exemplaries, aggravated etc, but for breach of quiet enjoyment you can only claim for special damages. It is not possible to recover for your general damages. So, for instance, if you are looking at trying to recover for the occupier's anxieties, the stress, the shock and discomfort that they have suffered during that eviction, you cannot do it under breach of quiet enjoyment. This is not to say that you shouldn't plead it, but you should plead it alongside another cause of action if possible. So I would always have that in there and then have something else lined up to have in support of that cause of action. The authority for that is *Branchett v Beaney* which is set out at para 12.

The next cause of action under breach of contract is for **Derogation from Grant**. It is implied into a tenancy that the landlord has to ensure that the tenancy is suitable for the practical purpose it is let out for and if the landlord permits it no longer to be fit for that purpose then there is a breach of derogation from grant, which is again another contractual cause of action that an unlawfully evicted occupier can have.

So that is to bear in mind the contracts side. We then look at the torts that are possible to claim against a landlord in this type of situation. I have started with the Breach of Protection from the Eviction Act 1977 and in particular you have ss.3 and 3A and how this is applicable to all tenants and licensees where the premises have been let as a dwelling. You're all familiar I imagine with *CN* which has come to light fairly recently so keep in mind this term of "let as a dwelling". So usually it is that all tenant and licensees, if the premises have been let as a dwelling, can sue their landlord if unlawfully evicted. There are two exceptions to that, which are the statutorily protected tenant, but also those who are excluded pursuant to s.3A of that Act.

So who is a statutorily protected tenant and why are they excluded? You have protected tenants under the Rent Act. You also have assured tenants - and that includes assured shortholds - long leaseholders, business tenants and protected agricultural tenants.

So if we go back again to our Lippiatt Scenario – you have your assured shorthold tenant and I think it's quite a common misunderstanding to say that most people think you can rely on this particular cause of action, so the Protection From Eviction Act 1977 for that type of scenario. That is not quite correct because it related to a statutorily protected tenant under the Housing Act 1988 and accordingly that occupier has their own protections, so this will not be cause of action available to the occupier in the Lippiatt Scenario.

The excluded are listed in s.3A. I think people are quite familiar with the occupier who shares with a resident landlord, and those are usually excluded occupiers, in which case they cannot claim under this particular cause of action. That counts whether they shared with a landlord or if they have a member of the landlord's family who occupies also, so that covers those two scenarios.

The other thing is in relation to licensees granted temporary accommodation on holiday accommodation, and public sector hostels and accommodation provided to asylum seekers or temporarily displaced persons. There is a whole list in s.3A so it's always worth checking to see whether the unlawfully evicted occupier who has come to you falls under any of those headings, and if they do unfortunately they cannot proceed under this particular cause of action, but there may be other causes of action available which I will come to later.

At paragraph 19 we talk about *CN*. Usually this cause of action is available where the premises have been let as a dwelling, so eleven years ago we had the House of Lords in *Uratemp* deal with what a dwelling is and they said a dwelling can be any form of occupier's residence or home, where he or she lives, and has included a room, even if it is without cooking facilities. So it's quite a broad description of what a dwelling is. The issue that has come to light relatively recently is the revisiting of whether somebody in temporary accommodation under Housing Act functions is occupying as a dwelling. The Supreme Court, unfortunately, have said that it is not occupied as a dwelling, although I think many of us know the types of accommodation that some of these occupiers are in, and they would in my opinion probably fall under the definition as earlier set out in *Uratemp*. But we are where we are, so it is the case unfortunately, further to *CN*, that these licensees of temporary accommodation will not be able to proceed under this cause of action. Issues are being raised as to whether that extends to people who have a duty accepted to them, because what was being considered in *CN* were the homeless applicants who had been offered s.188 accommodation. There is some argument as to whether it is possible to extend to those who have had a full duty accepted to them, which I think some of us also realise is for quite a long period of time, in many cases up to a year if not more than a few years in some scenarios I've heard of. So it will be interesting to see what happens with that and you should be starting to look at them as well in the future.

The examples of occupiers who do enjoy the protection of s.3 include restricted contract tenants; tenants who have ceased to be assured because they no longer occupy it as their only or principal home, and licensees of private hostels. So those people are able to raise a claim for breach of Protection From Eviction Act if they have been unlawfully evicted.

Who can those people sue? They can sue the owners of the premises. So you need to look at who has conducted the act of unlawfully evicting the occupier. Has it been the owner themselves, or has it been an agent, or is it just somebody off the street? It's probably unlikely to be somebody completely unassociated with the property so I think in most scenarios we will be able to provide that there is a link, certainly to the owner, even if they didn't do it themselves, but that any action was taken under their instigation. I would refer again to the Lippiatt Scenario but, as I said earlier, that was a shorthold tenancy so doesn't apply here.

What remedies are available? We're looking at injunctions again to readmit the tenant or licensee to the property. In this scenario, because it's a tort and not under breach of contract, we have the full range of damages available to bring a claim including generals, specials, aggravated and exemplaries. You can then claim for any anxiety or distress or discomfort caused to the occupiers at the time of the eviction and, in fact, afterwards as well.

I then move on to **breach of s.27** - so this is under the Housing Act 1988. Looking at who can sue, in this scenario it's all tenants that have occupied it as a dwelling, except those excluded as discussed earlier on. That also transfers across and is looked at for this cause of action, breach of s.27.

Who can be sued? That will be the landlord again. It can only be taken against the landlord and where the acts in question have been committed by the landlord's agent, again following landlords agency and the principles of agency the landlord will be liable in that scenario.

In paragraph 27 I list three scenarios where this can be available for breach of s.27. That is where someone unlawfully evicts a residential occupier; where they have caused him or her to leave as a result of attempting unlawfully to evict him or her; or where they cause him or her to leave as a result of committing an act or acts, knowingly or with cause to believe that conduct was likely to make the occupier give up the accommodation. Again looking at the Lippiatt Scenario I would say that that falls squarely within those criteria and, in fact, most unlawful evictions that do occur that are not accidental will potentially fall under this heading and could therefore be relied upon for s.27.

The reason why many people pursue s.27 is that there can be big bucks attached to it. We're looking at the valuation of the difference between the value of the landlord's interest at the time the occupier is in accommodation, before the eviction, and also looking at that value of the interest with vacant possession. So sometimes that can be quite a large difference. Unfortunately with assured shorthold tenants it may not be because it could be the case that the valuer assesses that the landlord can quite easily take back possession of an assured shorthold tenancy, in which case the difference in value between the landlord's interest will probably be quite small. So the cases that this will apply to the most, and be most valuable to, will be for secure tenancies.

I will come to *Loveridge* in a moment but just also to bear in mind when you're looking at these types of cases, and wanting to know whether you might have a potential defence from the landlord, is that the landlord can say that it's a complete defence if they have reinstated the tenant to the property before the proceedings are finally disposed of, so that's not at the time of the application, or the claim, this is at the time of it being disposed of, so at the end of trial. So it may be that following getting legal advice the landlord decides that they will reinstate the tenant before the trial is over, in which case this may no longer be applicable. It shouldn't stop you though applying or putting it as part of your claim because, as I say, it may be that some large amount of damages may be awarded and it may be an incentive to the landlord to readmit the tenant and to restore them in the property.

The one I would say to bear most in mind is the **trespass to land**, referred to in paragraph 32. You will note from earlier on I said in relation to your breach of covenant of quiet enjoyment you have some limited damages that you might be able to obtain in respect of that. Also in terms of s.27 these might not be available to most, especially if they get reinstated, and with s.3 Protection From Eviction Act, again, may not be applicable to all tenants. Therefore the one to bear in mind and is key is the trespass to land, and it should be pleaded alongside any other cause of action that you plead, particularly if you're dealing with breach of covenant of quiet enjoyment. The reason why it's probably important to do so is because, again, this is where all the damages are available to an occupier. You have your generals, specials, aggravated and exemplaries, so it will be important that you also include this cause of action if you can at the outset.

Who can sue? This will be anyone in possession of land, so long as they are in exclusive possession. It is said that this includes owners, tenants and trespassers, even if they're in adverse possession, and tenants excluded under s.3A during their tenancy, so again that's a lot of people who are covered by this cause of action. There is some reference to a licensee with exclusive possession being able to claim under this but that's a bit confusing because that makes me think they must be a tenant so I am not sure how that applies.

If you have your Lippiatt Scenario, would the occupier be able to claim under trespass to land? I would say yes, she falls squarely within that. She has had her land entered onto and I would say it constitutes a tort of trespass. It is not necessary for there to be any harm shown or proven in this case, so

sometimes you might think that with trespass to land that there has to be some harm caused. However, that is not necessary to bring a claim under this cause of action.

I've talked about the damages in respect of that, but also I've said that you can claim an injunction or ask the court to make an injunction to stop that trespass happening or try to prevent it happening again in the future. So even if you have a landlord who is saying, well I've readmitted them now, it may still be prudent to get an injunction preventing that behaviour from happening again if you think there is a risk to your occupier. That usually happens if you have a course of conduct that has happened a couple of times. I have had one where a claim was brought of unlawful eviction, breach of quiet enjoyment, trespass and the like, and she readmitted the tenant. She paid him some money and paid our costs, but within about four months did exactly the same thing. So I think in that scenario you think firstly why hasn't she learned and secondly you might be looking to extend the types of injunctions you can get to prevent that happening again since she has shown form.

I have listed some of the other causes of action at paragraph 40 but I will not cover them in any detail. They include nuisance; breach of Protection From Harassment Act 1997 s.3; assault and battery; trespass to goods; conversion; intimidation and Breach of Human Rights Act 1998. You can find more details in the Quiet Enjoyment book. But just running through them very quickly in relation to the Lippiatt Scenario I would say that the tenant might be able to raise a claim of nuisance; and potentially something in the Protection From Harassment Act, since she has been subject to harassment by landlord; again she was manhandled out of the property so I would say that potentially there is a trespass to the person. She said that her belongings had been tampered with and thrown out and smashed up, again trespass to goods; whether that's conversion as well; intimidation, yes; breach of Human Rights Act, yes, as she was deprived in respect of her home, but I think you probably would not want to include that at this point, it's probably more likely to be of use to occupiers who don't come under some of those earlier headings under causes of action that I have set out.

Which leads me onto the next section, which is about what if the causes of action are not available - so you're not left with many people. Some of the examples are where you have a freeholder who has been evicted by a mortgagee; you have someone who is a tenant or a licensee and that has come to an end and is an excluded tenant or licensee; and one of those exceptions set out and listed in s.3A. If they are one of these then what would apply is what is set out in any of the agreements, either written agreement or in the oral agreement, so you would be able to fall back on those. It may be in that scenario that you're able to rely upon a breach of human rights argument as well.

I have set out the remedies that are possible to claim, including injunctions and the reasons why that may be important. When you go to court you will probably be asking for an interim injunction because, as is the nature of these things, you probably have somebody who turns up at your offices who have been unlawfully evicted that day, they can't get back into the property and they need something done urgently. You would then want to be making sure that you make an application for the injunction alongside all your other causes of action, through to damages included. Apply for your injunction to get them readmitted and it may be that you are able to get hold of the landlord. You should always try to get hold of the landlord to negotiate and see if you can get them back in. If you can't then you might need to apply without notice to the court and ask the court to make an interim injunction from the outset. If the injunction is made on an interim basis on an ex parte basis, what the courts usually do is relist it for a very short time frame to come back to allow the landlord to make representations. Sometimes it's a couple of days, sometimes a week, depending on the court listings. One point also to bear in mind is to make sure you call ahead if you intend to make an ex parte injunction, call ahead to the court so that they are aware that they need to get a judge ready to hear your application.

If the landlord turns up at the returned hearing it may be that they dispute some of the factual nature of your assertions, or they might hold their hands up and say yes we will comply, in which case you

might be able to deal with a disposal of the matter there and then and just have discussions about quantum or it goes for a quantum hearing. In relation to a landlord who turns up and disputes it, this might result in directions being made to take the matter forward to trial and you would want to ask the court to extend that interim injunction to cover the cause of conduct that you are concerned about.

If you are doing it on notice you might feel that there is enough time or the nature of the scenario is that it's not necessary for there to be such an urgent application to the court, for instance you might have an occupier who has someone else to stay for a short while. If that's the case then you might feel that you can proceed on an on notice application for the injunction so it's worth doing an application in that way, in which case you ask the court to make sure that the injunction is made, or an interim injunction is made, but you will need to make sure that three clear days' notice has been given to the other side. Make sure the injunction is served on the landlord in person. If there's a breach that can lead to a fine or can lead to imprisonment for contempt of court.

Moving on to the damages side, I have listed at the end of each heading what types of damages and what heads of damages you could claim for that particular cause of action, so it's just worth cross referring to that. The general rule obviously being when you have breach of contract you are looking at making sure that the party who has been wronged go back into a position they would have been in if the contract had been properly fulfilled. Again, note the limited damages that may be available to the occupier claiming under breach of contract.

If you're looking under either breach of contract or tort you would need to look at whether the loss arises directly and naturally from the conduct complained of, so for instance if there's been discomfort and stress and anxiety actually linked to the action that was taken by the landlord and that unlawful eviction.

We often turn to, as examples of damages, the Quiet Enjoyment book at Chapter 3, but there's also the Housing Law Casebook which I think is going to be useful in setting out some of the historic claims that have gone through the County Court. As Andrew pointed out there is also the Nearly Legal website, and also checking in Legal Action for any recent cases, or coming to meetings like this to find out how much county court judges are awarding for particular types of cases and using those, if possible, as comparators, to give you an idea of how to proceed if you are negotiating with the landlord about how much damages your occupier might be entitled to.

So for general damages you're looking at harm, discomfort, loss of enjoyment, pain, suffering, shock, physical injury and inconvenience. Again, that is normally just available for torts.

With special damages you're looking specifically at loss. If your occupiers had to spend time in alternative accommodation that's cost them money then obviously you'd want to try and claim that money back; if their belongings have been damaged in the throwing out like in the Lippiatt Scenario then you would want to claim for any damage that may have occurred to belongings. As applies to most special damages you need to look at the market value at the date it was taken, not the purchase price.

With aggravated and exemplary damages, this is something that really gets overlooked in these types of cases. I mention them both together but with aggravated you're looking at compensating an occupier for the bad behaviour of the landlord. What is important to note is one of the ways it has been described by the Court of Appeal in *Drane v Evangelou*, in which Lord Justice Lawton said:

> *"To deprive a man of a roof over his head is, in my judgment, one of the worst torts which can be committed. It causes stress, worry and anxiety."*

So with that in the background I would be asking everyone to bear in mind that this is what the Court of Appeal has endorsed as an approach, this is one of the worst torts that can be committed. The

reason why I say that this is something we could perhaps review or keep an eye on, particularly in terms of exemplary damages, is about a punitive element. If this is one of the worst torts that can be relied on, I would be saying that the way that current or previous cases have been approached, the amounts that are given in the county court are notoriously low for this type of case and for exemplary damages. I think the most I've seen is £2000 for exemplary damages, around that sort of figure. I don't know if anyone else has seen much more but I can't imagine it would be a lot more than that. If it's one of the worst torts that can be committed, surely that element should be much higher.

I would refer you to one of the recent articles by Riccardo Calzavara from Arden Chambers, who has recently been taken on as a tenant. It's in the Journal of Housing Law from a couple of months ago called: *Deterring unlawful eviction, a plea to District Judges*. The examples of previous awards are low to moderate and I think that if it's a punitive element to stop and deter landlords from carrying this out, having £1000 to £2000 is probably not going to deter them. If that's the purpose of this head of damage, surely judges should be inflating that amount to an amount that will actually deter a landlord from carrying it out in the future. We're talking maybe tens of thousands of pounds if possible, and I would be saying, if you can, be pushing that in the county courts to explain that because at the moment we're facing increased court fees. So a landlord who wants to take an action against an occupier through the property route and obtain a court order will have to pay the increased court fees of probably c£400. You have court costs, you have all of the issues that might be involved in terms of a trial. We're looking at tens of thousands of pounds. So what's a landlord going to do? A landlord might think "I might just change the locks, I might just go and throw my tenant's belongings out onto the street rather than pay tens of thousands of pounds for possession proceedings". So really they're hedging their bets by taking that action. So if we are looking at exemplary damages as a punitive element, I would be saying to District Judges and County Court Judges that they should be inflating that amount to deter this happening in the future.

I've talked very briefly about ss.27 and 28 of the Housing Act and the difference in the values. One point to bear in mind is *Loveridge* which was recently in the Supreme Court, 2014, when they were assessing the statutory damages relating to a secure tenant of a local authority. What the Court of Appeal noted was that you have to be looking at the value of the interest at the time of the eviction and looking at this particular scenario as a secure tenant, so even though if, with that secure tenant the property was sold to another person and the prospective buyer comes in, then that tenant would become an assured tenant rather than stay a secure tenant. So what was argued on behalf of the landlord was that you should be looking at the assured tenancy security of tenure and not looking at the value for the secure tenancy. The reason why that was deemed to be important in this case was because the valuer, the expert who comes in (as you need to get an expert to come in and value the property and tell you what they think the value is of the landlord's interest before, with the occupier in occupation, and also afterwards with vacant possession) said that there was a great difference between the value of the assured and for the secure for whatever reason. I am not sure why, but that's what they said so this is something to bear in mind as well.

Moving on to the practical steps, I have set out some of the applicable provisions for public funding. Make sure, if you can, that the landlord is notified of the complaint before you make the application, making sure they have some reasonable time to resolve the matter. That will be one of your criteria that will be looked at as part of the regulations. I know sometimes that's not possible, but so long as you can set out your reasons and the fact that you have attempted to, that will hopefully be sufficient.

I have set out in paragraph 75 the issuing of the claims. I've already talked through what you might do in terms of process and getting the court to be on notice while making a without notice application. What would need to be includes in your witness statements is set out at 75(d) and that list, so make sure you set out everything you can in respect of details of background and be clear from the outset

about the cause of action you are going to pursue, so that you can maximise, if possible, the damages which you can recover.

The last point I want to make is one I think Giles Peaker wrote up in Nearly Legal in 2010 about actions against the police. It's one from Manchester, so in that scenario I think many of you will know anecdotally from your tenants and occupiers that approach you that they were being unlawfully evicted and called the police, who said it's a civil matter, or well the landlord said this it's fine, and they've helped the landlord in effect and assisted them in unlawfully evicting a tenant. It's only when you get involved in trying to pick up the pieces that the police may realise that they've done anything wrong.

What can be done, what can be added to your claim? You can take an action against the police for their wrongdoing and getting the law wrong. The case that is an example is *Naughton v Whittle and the Chief Constable of Greater Manchester Police*. Mr Naughton was subject to harassment from his landlord and unlawfully evicted. When the police called they threatened him with arrest for breach of the peace, and then physically manhandled him or removed him from the property. I think he was knocked out. So assisted the landlord in effect. Mr Naughton brought a claim against the landlord, but in addition to that he also included an action against the police for trespass to the person because he was physically removed from the property. The police did not want to take the matter through to trial so they settled it and they offered him £2500, so he had that plus the claim that he had brought against his landlord, and what was taken into account by the County Court in that case was even though he was paid £2500 that should not be set off against any award that he got from the landlord. So there were two separate amounts, so it is a good way to try to inflate, if you can, or recover some damages to assist your occupier. Hopefully these are things that Ms Lippiatt's tenant pursued against her and recovered some money from her as well for her actions.

One observation to finish on is just to make sure that everyone is aware of s.21 Notices and the standard form changing. I envisage that lots of landlords are going to get this wrong. I envisage that we will end up having some failed possession proceedings and maybe again another set of failed possession proceedings after that and they may just decide to take matters into their own hands, so if that is the case you might be seeing a few more of these on your office doorsteps.

Chair: Thank you very much Rebecca. Can I now ask if there are any questions to Rebecca or to Andrew.

Nik Antoniades, Powell & Co: Andrew, in one of your earlier slides I was very excited to see there was a bullet point about availability of after the event insurance, which you didn't cover in your talk, and I thought you would tell us where we can get it from in disrepair cases and that we will be able to get very economic after the event insurance possibly with deferred premium or even an open no fee premium. So are you going to meet my excitement?

Andrew Brookes: Probably not, but I'm happy to say what I know on the subject. There is after the event insurance out there, I think is the first thing to say. There is an online broker, or more than one online broker, I have no stake in it. There's one called thejudge.uk, and I think that they are used quite a lot by people seeking bespoke after the event insurance policies. There are some devolved policies out there from insurers like Temple who are interested in people who are doing the work in quite large volume because it doesn't make sense to them unless there are quite a lot of cases going through as the way they do their analysis involves a statistically largish sample. So it's probably not a complete answer but I think go searching. However, as I said to you, clients need to be advised on the availability of after the event insurance, and if they're properly advised, and say well I'm going to take the risk, and you're prepared to take the case, then I think that's absolutely fine.

Timothy Waite, Anthony Gold Solicitors: I have a question for Rebecca regarding actually being able to get the money out of landlord at the end of the day. What's your experience of that?

Rebecca Chan: I think it can be quite difficult. I think what you would probably need to do is if the landlord owns the property and if they will not pay up then you can take action against them getting a charging order perhaps against the property and try to see whether that changes their position. I imagine sometimes when they feel that their property is likely to be at risk then maybe they will be more likely to pay up, or if they don't then you will have the benefit of trying to have the courts assist you.

Joan Grant, Advice for Renters: You mentioned in the paper that Rent Act protected tenants aren't entitled to avail themselves of the Protection From Eviction Act. Have I understood that correctly?

Rebecca Chan: Yes. I think it's surprising for a lot of people because the Protection From Eviction Act is applicable to all tenants and licensees unless you fall under one of those categories and one of the categories is whether you are protected by statute in effect. So if you are a Rent Act tenant you are protected by that so unfortunately you are not able to pursue a claim under this heading. The same as the example I gave earlier for the assured shorthold tenants or the assured tenants, they can't claim under this because they are again protected, they have a cloak of protection from statute. So it doesn't mean that you can't have another cause of action that you can pursue, it's just that this particularly one you might not be able to.

David Foster, Foster & Foster Solicitors: A question for Andrew. Have you any view on using public funding certificates for interim injunctions combined with CFAs for damages at the same time?

Andrew Brookes: Well my view is that that is the only way really of pursing a damages claim at the same time as issuing a certificated injunction claim, so I understand that that's what some people are doing. I don't see that there is necessarily a problem there because you do not have overlapping retainers, you have two separate retainers for two different things essentially. Also there is no alternative if you want to properly pursue the claim which will include the damages element. Of course the claim has to be suitable for an interim injunction, essentially, but you wouldn't get public funding anyway under the serious risk of harm criteria I assume unless it was suitable for an interim injunction, so it wouldn't be for all cases, but there are scenarios where that would work.

Ed Fitzpatrick, Garden Court Chambers: Following on from what Rebecca was saying about Section 3A Protection From Eviction Act, you see it in many cases pleaded incorrectly and quite often judges will award damages for everything including s.3A, but yes, the limitations are there. A point for Andrew. I was also in Birmingham today doing a case of disrepair, Part 20, which settled, thankfully, because it started off with the usual possession claim based on rent arrears, Part 20, quite significant disrepair. The landlord a couple of weeks ago discontinued the possession claim and the Legal Aid Agency yesterday said well we're not going to treat this as a Part 20 claim any more in terms of the damages side of it and they said you have legal aid to pursue specific performance to get works done but not in respect of your damages claim. They were trying to get the client to sign a CFA but happily it settled before that happened. I just wanted to know if that was your experience. The Community Law Partnership were saying that's happened in a couple of their cases with Part 20 claims.

Andrew Brookes; Yes, I think I've come across that as well and that is a problem, that tactically it can be worth the landlord discontinuing a possession claim because it pulls the rug from under the Legal Aid funding. I'm interested to know the nuance there that the Legal Aid Agency was prepared to carry on the injunction side of things. I assume it was because they were persuaded that there was a serious risk of harm, but it can be a problem where suddenly you are left with a freestanding counter claim and you don't have the public funding. However, if it's a meritorious claim then maybe a CFA is the way to pursue it properly to conclusion and to thwart the landlord's attempt to prevent a legitimate good disrepair claim.

Anna Rosen, Island Advice Centre: This is for Andrew for the case of *Kumarasamy*. I'm finding it quite extraordinary because I'm thinking of a scenario with a council block of flats where many of them are now owned privately. Do the private owners how have a right to carry out repairs in the common

parts? The council are very unhappy when anybody does anything to the common parts. Does it extend to the tenants, or is it just for owners?

Andrew Brookes: Not for the tenants. I think the decision was talking about the right the landlord has under the lease they hold to pass and repass the easement and because of that easement gives an estate in land that does indeed do that extraordinary thing of giving the right anyway for the landlord to maintain the easement effectively, so if it's in disrepair carry out the repairs. As I said, that is a decision which is being appealed to the Supreme Court and whether it will survive is something we'll have to wait and find out.

Anna Rosen, Island Advice Centre: Is it going to give the right, or do they have to do it otherwise they'd be sued by their tenant?

Andrew Brookes: Well in this case that's exactly what did happen, they were sued by the tenant and the situation would be the same in the case of a council block of flats. So there is the ongoing risk to the landlord if the freeholder isn't maintaining the common parts. Of course there may be a Part 20 claim against the freeholder for an indemnity for any damage caused, so there are those further complications as well, but yes I think the way that s.11(1)(A) was interpreted in that case was very broadly drawn. There are landlords who never dreamed that they might be liable for defective paving stone on the common entrance way who may indeed be liable.

Chair: I would like to thank Andrew and Rebecca very much for their talks and their very helpful handouts which I'm sure will have wider circulation. If we have no further contributions I will bring the meeting to a close, but before if I do can I please mention the Housing Law Conference on 8 December. Book early for this unmissable event - a panel discussion on homelessness; keynote address on the successes and challenges of the last twelve months; Jan Luba QC as usual, on the challenges on the horizon; seminars on tenants' rights; facing claims for possession; homelessness; the end of the supreme silence; and successful civil billing.

The next meeting will be held on 18 November and will comprise the annual Housing Law Update