

**Civil Courts Structure Review**

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**About HLPA**

The Housing Law Practitioners Association (HLPA) is an organisation of solicitors, barristers, advice workers, environmental health officers, academics and others who work in the field of housing law. Membership is open to all those who use housing law for the benefit of the homeless, tenants and other occupiers of housing. It has members throughout England and Wales.

HLPA has existed for over 25 years. Its main function is the holding of regular meetings for members on topics suggested by the membership and led by practitioners particularly experienced in that area, almost invariably members themselves. Presently, meetings the take place every two months and are regularly attended by c.100 practitioners.

The Association is regularly consulted on proposed changes in housing law (whether by primary or subordinate legislation or statutory guidance). During 2015 it has given oral evidence to committees of both the Welsh Assembly (on the Renting Homes (Wales) Bill) and the House of Commons (on legal aid reforms) and has given written evidence in response many other consultations. HLPA’s responses are available at [www.hlpa.org.uk](http://www.hlpa.org.uk).

Membership of HLPA is on the basis of a commitment to HLPA’s objectives. These objectives are:

* To promote, foster and develop equal access to the legal system.
* To promote, foster and develop the rights of homeless persons, tenants and others who receive housing services or are disadvantaged in the provision of housing.
* To foster the role of the legal process in the protection of tenants and other residential occupiers.
* To foster the role of the legal process in the promotion of higher standards of housing construction, improvement and repair, landlord services to tenants and local authority services to public and private sector tenants, homeless persons and others in need of advice and assistance in housing provision.
* To promote and develop expertise in the practice of housing law by education and the exchange of information and knowledge.

*About the authors*

Giles Peaker is a partner in the Housing and Public Law department at Anthony Gold Solicitors. He is the chair of the HLPA. He writes widely on housing law and edits the Nearly Legal: Housing Law news and comment website.

1. HLPA has had sight of the consultation response by the Law Society and would broadly support the points raised in that document. As a specialist practitioners’ association, HLPA’s response will restrict itself to specific issues relating to housing law.
2. HLPA are pleased to see the recognition in the Interim Report that homelessness appeals and most possession proceedings are not suited for the ‘online court’.

**Mandatory Possession Proceedings**

1. At 6.4.3(a) it is suggested that “‘no fault’ claims under s.21 of the Housing Act 1988 and “claims where there is a mandatory ground for possession and no dispute that it applies” may be suited for the ‘online court’. We would strongly suggest that this is not appropriate in either case.
2. Following the Housing Act 2004, the Localism Act 2012 and the Deregulation Act 2015, there are significantly more restrictions on the validity of a s.21 notice and therefore proceedings based upon that notice. In the case of provisions such as the ‘retaliatory eviction’ section in Deregulation Act 2015, it is possible for events such as service of a qualifying notice by a local authority to make a s.21 notice retrospectively invalid, even after the issue of the claim.
3. The conditions for validity of a s.21 notice are most often challenged by way of a defence. The case then turns on evidence, often disputed evidence, requiring documentary support and a court hearing. The Claimant’s assertion that the ground has been made out is not, by itself, sufficient, where both facts and technical validity of the notice may be contested.
4. As approval of an uncontested accelerated possession procedure claim is done on the papers by the court, but any contested case or a case where the court was not satisfied on the papers that the conditions were met would need to be set down for a hearing, it is difficult to see any particular gain from inclusion of the initial stage in the online court.
5. Other mandatory grounds, such as ground 8 of Schedule 2 Housing Act 1988, require the court to find on the level of arrears at the date of a hearing. In addition, the court has powers to adjourn prior to hearing the claim where it appears that there is a good reason to do so. Often this power is used to enable the tenant’s position to be rectified and mandatory possession avoided, for example where delayed or mistakenly interrupted benefit payments are the primary cause of the arrears. Mandatory possession claims that rely on a factual condition being met as at the date of a court hearing are unsuited for the online court.
6. In addition to those already mentioned, there are currently no mandatory grounds of possession without a potential defence of one form or another. As against public bodies or social landlords, there are potential Article 8 ECHR defences and public law defences, in addition to technical defences that the requirement of the ground have not been made out. Alleged trespasser claims may have a defence of tenancy or licence. Alleged claims against licensees may have a defence of a tenancy having been created.
7. Potential defences are often raised orally at first hearing. Defendants to mandatory claims, for example against introductory or demoted tenants, alleged licensees, or social tenants, are often vulnerable, and/or have difficulty with formal processes. The requirement for a hearing enables the court to hear potential defences, or to discern when one may be raised. An adjournment with directions for a defence to be filed and served is not uncommon, giving the defendant the opportunity to seek legal advice. This would not be possible within the proposed online court process and would risk injustice to the vulnerable.
8. Most county courts with significant possession lists have some form of Duty Solicitor scheme, some funded by the LAA, enabling tenants to obtain advice and representation at court on the date of first hearing. HLPA members participate in a number of such schemes. These have considerable success in obtaining adjournments for defences and counterclaims to be filed, or in claims being dismissed where based on invalid notice. It is routinely the case that the tenant defendant is unaware of a potential defence or counterclaim.
9. While there are good sources of information available on line, primarily through Shelter’s advice site, the experience of HLPA members is that these are infrequently accessed by tenant defendants, or that tenants have considerable difficulty applying that advice to their own position. The Duty Solicitor schemes are practically and economically based upon physical presence at a county court and could not realistically be integrated into an online court.
10. HLPA submits that no possession proceedings should be within the online court.

**Housing disrepair claims**

**The nature of disrepair claims**

1. On the current state of the law, disrepair claims are usually heavily reliant on expert evidence to establish causation, liability, and the works required. The limitation of landlords’ repairing obligations to those set out in section 11 Landlord and Tenant Act 1985 often means that the key element in any case is establishing that a ‘section 11’ defect is present. As a very common example, tenants will complain of ‘damp and mould’, but the cause of the damp has to be established to establish liability. Condensation damp and consequent mould growth is not in itself actionable disrepair (Quick v Taff-Ely Borough Council ([1985] 3 W.L.R. 981, CA (Eng)), but a leak, or defective damp proof course would be.
2. It is not uncommon for tenants not to know, or even to be able to establish for themselves, what the cause of the problems they are experiencing is. It is also not uncommon for landlords to simply blame the problems on non-actionable causes (condensation, tenant use) until confronted with expert evidence to the contrary.
3. Quantum of general damages in disrepair claims is usually assessed as a proportion of the rent (English Churches Housing Group v Shine [2004] EWCA Civ 434). This is not widely known by tenants. The experience of HLPA members is that until advised, tenants routinely overvalue or undervalue the potential damages, by significant amounts.
4. The elements of a disrepair claim – notice, duration, causation and liability – require documentary and witness evidence. There are very frequently disputes about notice and subsequent events. Claims are often defended beyond the pre-action protocol by both social and private landlords, regardless of the strength of the claim.

**Disrepair claims, funding and costs risks**

1. Housing disrepair currently occupies an anomalous position. It has long been recognized that, as with personal injury claims, as an issue of access to justice and to enable an effective remedy disrepair claims fell outside the standard boundaries of allocation to track. The current position is that for a claim including an order for works, either the works or the damages sought must be over £1,000. Damages only claims fall under the usual small claims limit of £10,000.
2. Lord Jackson’s original proposal was that disrepair claims should, like personal injury, be subject to QOCS. However, this was not enacted, leaving such claims with the usual rules on cost shifting.
3. Legal Aid funding for disrepair claims was reduced in scope by LASPO, such that only claims for urgent works where there was a significant risk to the health and well being of occupants are eligible for legal aid, and only for that element of the claim. There is no legal aid funding for less urgent, though no less necessary, works and no funding for the damages component of the claim (though any damages are still subject to the statutory charge). In practice, this means that legal aid is wholly inadequate for bringing disrepair claims in the very large majority of cases. Costs protection for the tenant through legal aid is either not available or only for that element of the claim, the urgent works, that is funded.
4. As a result of the LASPO changes in 2013, there is now a developed market for conditional fee agreements for funding disrepair claims. For example, in London 10 or more HLPA member firms offer CFAs for such cases.
5. It is important to note that CFAs usually include the solicitors firm initially funding the disbursements for the expert inspection and report, and court fees.
6. There are some ATE insurers willing to provide insurance for disrepair claims. However, availability is limited.
7. In the absence of legal aid or QOCS, it is not possible to provide wholly ‘risk free’ representation on post-issue disrepair claims.
8. However, the risk is substantially mitigated through the availability of CFA representation. A key effect of the availability of Claimant solicitors is that cases lacking merit, or sufficient evidence, or which prove on investigation to lack liability by the proposed Defendant, are effectively filtered out at pre-issue stage and do not proceed. Issued claims are overwhelmingly those with strong prospects of success.
9. This is borne out by results. 5 HLPA member firms provided figures for 2014 and 2015. Of all issued disrepair claims funded by CFAs, one firm reported 95% were successful, and the other four reported 100% success rates. The costs risk to claimant tenants is minimized successfully.
10. In any event, HLPA would submit that the most appropriate step to take to enable ‘risk free’ disrepair claims for tenants would be to implement QOCS for such cases, as originally envisaged by Lord Jackson, rather than to remove tenants’ access to representation on what are not straightforward claims.

**Disrepair and the ‘Online Court’**

1. The Interim Report suggests at 6.43(b) that “claims for injunctions or other non-monetary relief requiring the close attention of the court (such as specific performance or declarations)”should not be included in the ‘Online Court’. The very large majority of issued disrepair claims include a claim for an injunction and/or order for specific performance. HLPA would suggest that on that basis and at the minimum, all disrepair claims that include a claim for an order for works should be excluded from the Online Court.
2. The current position is that a damages only claim must exceed £10,000 in value to be allocated to the fast track. Given the method for assessment of quantum, these will be relatively rare, being claims for periods of 6 years, or the higher value leaseholder or private rental claims. But the same complications of notice, causation, liability and evidence apply. A tenant may need to prove liability across multiple heads of claim for a period of 6 years (or up to 12 years for leaseholders). This is beyond the capabilities of most litigants in person, even if they have relevant information on how to set out the claim.
3. Surprisingly, a significant proportion of both social and private landlords will not settle at protocol stage, but will continue to defend even clear, strong claims after issue, until settling at a later stage. Landlords appear to be content to pay for legal representation on a defence even where their experience and legal advice would indicate settlement at an early stage, and thus in circumstances where there are no real prospects of recovering their costs. The frequency with which this happens suggests that the ‘Online Court’ will not deter these landlords from paying for representation, which raises a real issue of equality of arms, particularly in circumstances where the legal basis of a disrepair claim is not clear to the tenant and an expert report is unaffordable.
4. For the reasons set out at 13 to 16 above, disrepair claims are legally and factually complex. HLPA member’s experience is that tenants (and indeed many private landlords) have limited or little understanding of the relevant statute, let alone the main principles from case law. HLPA’s view is that an automated diagnostic or triage system for disrepair would be extremely complex. Indeed, some members have attempted to formulate just such a diagnostic structure and found it impractical beyond a very basic level, inadequate to amount to a form of particulars of claim.
5. Given the lack of general understanding of the legal basis for disrepair claims, by both tenants and private landlords, and the misvaluation of claims by tenants and private landlords, it is likely that the Online Court would see a significant number of claims without merit, or which would unnecessarily end up at ‘trial’ if access to representation were to be removed. This would be a burden on the Online Court and on the parties. The role of claimant solicitors in filtering viable claims and in ensuring that expectations on quantum are reasonable has not been sufficiently acknowledged.
6. In view of the above, HLPA would submit that disrepair claims in general, and most certainly claims for an injunction or order for specific performance, are unsuited to the proposed Online Court, regardless of value. HLPA would instead recommend the introduction of QOCS for disrepair claims to mitigate the costs risk to tenant claimants.

**Housing Law Practitioners Association**

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