Housing Law Practitioners' Association

Minutes of the Meeting held on 18 January 2017
University of Westminster

Disrepair

Speakers: **John Beckley, Garden Court Chambers**
Deirdre Forster, Anthony Gold Solicitors

Chair: **Dominic Preston, Doughty Street Chambers**

Chair: Good evening everyone and welcome to tonight's meeting which is on the topic of Disrepair. My name is Dominic Preston and I am from Doughty Street Chambers. Before I introduce tonight's speakers, on behalf of the Executive I would like to thank those who responded to our request for evidence regarding the Jackson consultation, if it is a consultation, on Fixed Costs. We are putting in our submission and we're very grateful for all the contributions that have been received. I would also like to ask if anyone has any corrections or amendments to the minutes of the last meeting. If not, I will introduce tonight's speakers.

John Beckley is from Garden Court Chambers. He has taken over very recently the update in the Legal Action group on disrepair. He sits as a Deputy DJ and from a past life has lots of knowledge about the wonderful housing in Tower Hamlets, so hopefully he'll be able to give us a bit of information about that.

We also have Deirdre Forster. She has been a solicitor since 1982, fighting the good fight for quite some years now. She was originally in her own firm and since 2014 has been at Anthony Gold. She survived, or probably prospered, in a practice originally which was not a legal aid practice but was indeed a CFA practice, so if you have any questions on CFAs she is the person to ask. She also is the co-author of the Repairs Tenants Rights Book from LAG.

John Beckley: My part of the talk will deal with recent case law updates and then Deirdre will talk about tips and tactics for running a disrepair claim.

So the first case I will talk about is the case in the Supreme Court of *Edwards v Kumarasamy*. I'm sure that all of us as lawyers have a moment where you talk to your client who thinks they're bound to win their case, and you talk to them about litigation risk. If you need a case as a good example of that then I don't think you will get better than *Edwards v Kumarasamy*. Mr Edwards won in front of the DDJ in the County Court. He then lost on appeal in front of HHJ May in the Central London County Court. He won again the Court of Appeal and finally lost in the Supreme Courts. Just goes to show that there is no open and shut case.

Mr Kumarasamy was a long leaseholder of a flat in a block and Mr Edwards was his assured shorthold tenant. Mr Kumarasamy's lease gave him the right to use the entrance hall, the access road, a parking space and the communal bins. Mr Edward's tenancy gave him the right to use any shared rights of access, stairways, communal parts, paths and drives. Mr Edwards was going out one day to put some rubbish in the bins which were located in the communal car park. He trips on an uneven paving slab which formed part of the paved area, and sued for damages. The DDJ found that Mr Kumarasamy was

liable and awarded £3750 in damages for the injuries that Mr Edwards sustained. HHJ May allowed Mr Kumarasamy's appeal. She found that the paved area wasn't part of the structure and exterior and therefore didn't fall within the implied term implied by s11 and she found that even if it was part of the structure and exterior, Mr Edwards hadn't given notice to Mr Kumarasamy and he'd received notice in no other way, and therefore there had been no liability. As I say, the Court of Appeal allowed Mr Edward's appeal. They decided that the pathway amounted to the exterior of the hall and therefore was covered by the repair and covenant implied by s11 and they found that no notice was required because the access way wasn't demised to Mr Edward, therefore the general rule that we know from *British Telecom v Sun Life* which means that if the area of disrepair isn't in the part of the property demised to the tenants then the landlord's liable as soon as disrepair occurs and they don't need notice before they're liable.

Supreme Court, as I say, reversed the decision of the Court of Appeal and decided there were three issues which they had to decide. First of all was the paved area part of the exterior of the hall, and therefore covered by s11; secondly did Mr Kumarasamy have an interest in the hallway so that s11(1)(a) Landlord and Tenant Act 1985 applied; and a final issue they had to decide was, if Mr Edwards succeeds on the first two points, then was notice required.

So the first question, is the paved area part of the front hall? What was said by Lord Neuberger, is it's not possible as a matter of ordinary language to describe a path leading from a car park, which serves the building and can be said to be within its curtilage, to the entrance door which opens directly onto the front hall of a building as part of the exterior of the front hall. He agreed there was some force in the part of the argument that a purposive approach to the words of s11(1)(a) suggests they should be given a wide rather than narrow effect, but given that the section imposes obligations on a contracting party over and above those which have been contractually agreed, wanted not to be too ready to give an unnaturally wide meaning to any of its expressions. Further, the fact that s11(1)(a) is specifically extended to cover drains, gutters and external pipes, tends to support the notion that when it refers to the exterior the word is to be given a natural rather than artificially wide meaning. So if the paved area was part of the exterior then it's likely that external pipes would also be part of the exterior of the building without them having to be brought back in by the specific wording of the section. So the paved area wasn't part of the front hall and in making that decision the Supreme Court overruled a case that I certainly have relied on in the past, the case of *Brown v Liverpool Corporation* which found that a pathway and steps leading to the front door of a property were part of the structure and exterior and therefore covered by the implied repairing covenant.

So, as I say, that's overruled. That decision in reality allowed Mr Kumarasamy's appeal and decided the case. But the Supreme Court went on to consider the second question, being whether Mr Kumarasamy had an interest in the front hall. What was found was that although Mr Kumarasamy, by the grants of the assured shorthold tenancy to Mr Edward, lost his right of use over the front hall for the time that the tenancy subsisted, he still retained his interest over it. What was said is there would have to be a powerful reason not to give the word interest when it appears in a property statute its natural meaning in law. If it is to give a more limited meaning it's hard to identify a satisfactory way to cut down which is consistent with the general policy of s11. And if the head lessee – in this case Mr Kumarasamy – had no liability to a sub tenant to disrepair in the common parts the subtenant would be without any contractual remedy, because, of course, there's no contractual relationship between the freeholder and the assured shorthold tenant who's taking his tenancy from the long leaseholder. Fourthly, it would be a defence for Mr Kumarasamy to prove that he used all reasonable endeavours to obtain but was unable to obtain such rights as would be adequate to enable him to

carry out the works or repairs, given that those works or repairs would have to be carried out in land which was retained by the freeholder.

The final question which had to be decided was would notice have been required? The Supreme Court started out by setting the general principle, which is that where a landlord or a tenant or anyone else covenants to keep premises in repair the general principle is that the covenant effectively operates as a warranty that the premises will be in repair – a principle laid down in the case of *British Telecom v Sun Life Assurance*. Accordingly as soon as any premises subject to such a covenant are out of repair the covenantor is in breach, irrespective of whether he has had notice of the disrepair or whether he has had time to remedy the disrepair. However, as we all know, there's an exception to that general principle which is that a landlord is not liable under a covenant with his tenant to repair premises which are in possession of a tenant and not of a landlord unless and until the landlord has notice of the disrepair. So the normal situation we're faced with is where you have to show notice before the landlord is liable if the disrepair occurs to part of the premises which have been demised to the tenant.

It was argued on behalf of Mr Kumarasamy that s11 always requires notice so whilst you might not need notice for an express contractual repairing obligation, you do if you're relying on implied s11, but what Lord Neuberger said is: I agree with the Court of Appeal that this submission must be rejected. It's clear that various cases the repairing covenant applied by s11 is to be interpreted and implied in precisely the same way as a landlord's contractual repairing covenant. Which in the particular facts of this case the Supreme Court found that notice was necessary if the landlord were to have been found to be liable. The basis of that was really that if you're the long leaseholder and you then grant an assured shorthold tenancy to a tenant, the use of those common parts in effect passes from you to the tenant. You will not to be walking to the bins every day to put your rubbish out, because you can't do that whilst your tenant is using the property and therefore using the communal bins. So therefore they found that, given that therefore your tenant would be the person who could see that there was disrepair to those common parts, the landlord would require notice of that disrepair before they became liable. So that's *Edwards v Kumarasamy*.

Next is the case of *Moorjani v Durban Estates Ltd*, another long leaseholder case. In this case Mr Moorjani held a long lease of a flat in a mansion block. In 2005 a flood from the flat above caused damage not only to his flat, but also all the flats below his flat, going right down to the basement. Some repairs were carried out and paid for by the freeholders' insurance, but they didn't do a very good job of it, and the flat remained in disrepair until the claimant engaged his own contractors in 2007. There was also disrepair to the common parts. What Lord Justice Briggs said is that the underlying issue of principle is whether the loss caused by such a breach, which being temporary causes no damage to the capital value of the lessee's interest, lies in the impairment of the amenity value of the lessee's proprietary interest in the flat, for which he has paid rent or a premium, or in the experience of discomfort, inconvenience and distress which the lessee actually suffers because of the disrepair. So to put that in simpler language, do you get damages for your damp flat because your damp flat is worth less than a dry flat, or do you get damages for your damp flat because it's awful to live in a damp flat?

Again this case came before HHJ May in Central London County Court. She found, as facts, that:

- there was a serious leak in the flat above which caused serious damage to the flat;
- shortly after the 2005 flood the lessor's agent had said to the tenant: leave it to us, we'll deal with the repairs;

- the contractor's works were seriously inadequate, both because of the poor quality of the works done and because of omissions to do all that was required – although these deficiencies were essentially decorative and did not render the flat uninhabitable.

At the time Mr Moorjani wasn't living in the flat, he was living with his sister and continued to do so until 2008 when he returned to live in the flat. During the same period, 2005 to early 2008 the judge found that the common parts were also in a state of disrepair due to the landlord's failure to perform its repairing obligations in relation to them - and that state of repair continued in 2011.

The claim was brought under three heads: Loss of rental income; special damages consistent with cost and repairing the outstanding items after the flood; general damages for breach of the lessor's obligation in relation to insurance and reinstatement; and general damages for the failure to repair the common parts from 2001 until 2011.

The Judge of First Instance rejected the loss of rental value and Mr Moorjani wasn't given permission to appeal on that. She refused the special damages claim and refused the general damages claim on the basis that Mr Moorjani wasn't living in the flat. The reason he wasn't living in the flat was nothing to do with the fact there was disrepair in the flat, he was choosing to live with his sister and therefore didn't suffer any inconvenience because of the damage that had been caused by the flood and failure to properly repair it. No damages were awarded for disrepair to the common parts again for that same period in which Mr Moorjani wasn't living in the property.

The Court of Appeal first of all considered the question of principle by looking at various earlier authorities. The first one was *Calabar Properties v Stitcher*, where Lord Justice Griffiths said: The object of awarding damages against a landlord for breach of his covenant of repair is not to punish the landlord but so far as money can restore the tenant to the position he would have been in had there been no breach. This object will not be achieved by applying one set of rules to all cases regardless of the particular circumstances of the case. The facts of each case must be looked at carefully to see what damage the tenant has suffered and how he may be fairly compensated.

They then looked at *Wallace v Manchester City Council* where again Lord Justice Merit said something very similar: The question in all cases of damages for breaches of an obligation to repair is what sum will, so far as money can, place the tenant in the position he would have been in had the obligation to repair been duly performed by the landlord.

Finally, the case of *Earle v Charalambous* - where what was said by Lord Justice Carnworth is central to this appeal - as the issue of whether in assessing a normal measure of damages for breach of a repairing covenant in respect of residential premises for distress, discomfort and inconvenience for which the tenant is being compensated under the head difference in value, should be assessed according to past awards for such non pecuniary loss or is actually dependent upon the market rent of the premises.

So, concluding, what was said in the case of *Moorjani* was that: "Although the language of the *Calebar Properties* and *Wallace* cases speaks of discomfort, inconvenience and distress as if they were the very losses caused to the lessee by the lessor's breach, the better view is that the loss consists in the impairment to the rights of amenity afforded to the lessee by the lease of which discomfort, inconvenience and distress (and even the deterioration of the heath of a loved one) are only symptoms." So you get damages on the basis of a loss of value of your lease rather than the fact it's awful to live in the property which is afflicted by disrepair.

Secondly it's therefore: "not a fatal obstacle to a claim for damages for that impairment in the lessee's rights that the lessee may have chosen not to make full use, or even any use, of them during part, or even all, of the relevant period, for reasons unconnected with the disrepair itself." So in this case Mr Moorjani was awarded damages for the period both of the disrepair to his own flat but also for the disrepair to the communal areas for the period in which he was living with his sister rather than living in his own flat.

A useful point from *Moorjani* is that for the disrepair which was described by HHJ May as being merely decorative, 20% of rent for that period was awarded, so quite a high figure for merely decorative disrepair. But what was also found by the Court of Appeal is that you don't ignore the fact that the tenant wasn't living in the flat, and therefore because Mr Moorjani was living elsewhere, even though he wasn't doing it in relation to mitigation, they reduced that by half. So although 20% would have been awarded if he'd been living there, that was reduced to 10% for the actual award.

There are two cases both relating to handrails on staircases and whether a landlord is liable under the Defective Premises Act 1972. The first case is *Sternbaum v Dhesi* where the tenancy of a Victorian house was granted with two staircases. The one at the front appears to have been safe, but there was a very narrow staircase at the back of the building which may at some point have had a handrail, but didn't have a handrail at the time the lease was granted to a company which Mrs Sternbaum and her partner worked for, and it was their business. She fell down the first flight of stairs and was injured and brought a claim under s4 of the DPA contending that the absence of a bannister or handrail on the staircase was a relevant defect which the defendant had a duty to repair under the tenancy agreement. The Court of Appeal said no. "The first, and ultimately in our view the only question we have to answer is whether the appellant has established that the premises were in disrepair. If she has not, any discussion of whether the staircase and bannister were part of the structure under the meaning of s4(4) is irrelevant. I begin therefore with my conclusion on the issue of disrepair".

There was a photograph which was the only evidence they had which showed it and what was said: "It looks very much like one of the examples given by Lord Justice Laws in *Alker* of a hazard that is not an estate of disrepair, namely a very steep stairway with no railings. Given the narrowness of the tread and the steepness of the flight of steps, particularly where it turns the corner, I have little doubt that without a handrail it was a hazard. But as unsafe as it may have been, there is nothing about it that to my mind could possibly justify the description of being in disrepair. The walls and stairs themselves are apparently sound and there is nothing wrong with the floor covering."

The case he referred to of *Alker* was a case where a tenant put her hand through a glass door – the glass wasn't safety glass. Even though everyone recognised that a glass panel that isn't safety glass in a door, which from memory was at the bottom of a flight of stairs, is hazardous, again it was held by Lord Justice Laws it didn't amount to disrepair because the glass, unsafe as it was, wasn't in itself in disrepair.

The case of *Dodd v Raebarn Estates* isn't in the handout I'm afraid. It will be included in the Legal Action Update. The facts in *Dodd* are fairly awful. Mr Dodd fell down another staircase which didn't have a handrail and died, so the claim was brought by his widow under the Fatal Accidents Act. There were two questions really in *Dodd*. Firstly the claim brought against Raebarn Estates who were the freehold owners of the property. It is a complicated case with, I think, seven different defendants.

The claim against Raebarn Estates under the Occupiers Liability Act failed because they had demised the staircase to the fourth defendant, a property developer. There were commercial premises shops at the bottom with flats above and the fourth defendant was developing the flats. Mr and Mrs Dodd

were visiting someone who was granted a lease to one of the flats which had been developed by the fourth defendant, but given that the staircase had been demised to the fourth defendant there was no claim under the 1957 act against the freeholder. But just as in the previous case, it was held that although there wasn't a handrail, and that rendered the staircase potentially dangerous, and indeed the property developers got planning permission to develop the upper stories on the basis that there would be a handrail and the plans on which they got planning permission showed a handrail was going to be installed, the fact that they didn't put in a handrail wasn't a relevant defect. Therefore, again, a claim under the DPA brought on behalf of her dead husband by Mrs Dodds also failed.

The next case is also a DPA case, *Lafferty v Newark and Sherwood DC*. Mrs Lafferty, the secure tenant of the local authority, had gone into her back garden to hang out her washing. As she went out a hole suddenly opened up in her garden, which she fell down, and injured her leg. Her injuries luckily weren't particularly serious, but were serious enough that the Judge at First Instance awarded damages subject to liability at around £12,000. So fairly serious it would appear. The Judge found the following facts: "What actually happened to cause the ground to open up under Mrs Lafferty has been explained following an inspection by engineers. It would seem that when a soakaway was constructed the underground pipe leading to it was fractured close to the point where it would have discharged water into the rubble filed hole. The most likely cause of that was that, in seeking to cap the soakaway, concrete was dropped onto the pipe which fractured it at a point before it was able to soak away itself. Water from the pipe was thus able to escape before it fell into the soakaway proper and that saturated the ground. Over the years the ground underneath was eroded, causing a void, and it was into that void, which suddenly opened up under Mrs Lafferty, that she fell." It was also found as a fact that no one could have had knowledge about that. No one knew that water was soaking into the ground in the back garden under the washing line and not going into the soakaway and dissipating into the earth.

What was argued on behalf of Mrs Lafferty was that: "On the basis of s4(4) Defective Premises Act where premises are let under a tenancy which expressly or impliedly gives the landlord the right to enter the premises to carry out any description of maintenance or repair of premises then from the time he first is, or by notice or otherwise can put himself into position to exercise the right, and so long as he is, or can put himself in that position, he shall be treated, for the purposes of ss 1 – 3 above as if he were under an obligation to the tenant for that description of maintenance or repair of the premises."

S1 is the section we're familiar with which says that where a premises let under a tenancy is in disrepair then the landlord has a duty to take such steps to make sure that the tenant or people who may be reasonably affected by defects are reasonably safe from personal injury or from damage to their property and ss2 says that the said duty is owed if the landlord knows or if he ought in all circumstances to have known the relevant defect. So in this case it was found that the landlord didn't know the defects and couldn't reasonably have known of it, because it wasn't obvious even if he'd have inspected the garden on a regular basis, but it was argued on behalf of Mrs Lafferty that, nonetheless, s4(4) created a strict liability. Mr Justice Jay in the High Court didn't agree with that. He said that the purpose of s4(4) is not to create a strict liability but to extend the application of s4(1) to relevant defects which are outside its scope and therefore to bring them within the scope of the section as a whole. The purpose of s4(4) is not to confer an additional or alternative route to recovery where the claim under s4(1) fails on its facts because s4(2) is unsatisfied. So the fact that the landlord has the right to go into the garden and inspect the garden doesn't mean that the landlord is liable if that inspection wouldn't have created the knowledge of the defects for the reasonable landlord who is carrying out such an inspection. So unfortunately for Mrs Lafferty, because you couldn't sense that a sink hole was going to open up, the landlord wasn't liable for the injuries she had suffered.

Zohar v Lancaster City Council was an appeal to the Upper Tribunal against a decision of the First Tribunal. Lancaster had taken emergency remedial action under s40 Housing Act 2004. Basically the lock on the front door of a building in Lancaster allowed access to all flats. Two empty flats were being used, it is suspected, by people to take drugs and to sell drugs and, on occasion, those people had got into the common parts and had then got into other flats itself. Lancaster City Council decided that because it was a Category 1 hazard they could carry out remedial works themselves, they changed the lock and charged £150 to Mr Zohar, who was the landlord, for doing so. He appealed to the First Tier Tribunal. His appeal was refused. He then appealed to the Upper Tribunal who held that, given that an appeal to the First Tier Tribunal is essentially a rehearing, the First Tier Tribunal had to have gone through the criteria for taking emergency remedial action under s40. They had failed to do that and therefore the appeal was allowed and they set out at para 24 the matters upon which the First Tier Tribunal should have reached conclusions.

The final case that I refer to is *Fresca-Judd v Golovina*. In this case Mrs Fresca-Judd had granted a tenancy to Ms Golovina that included a term which was that she was to take all appropriate precautions, including any such as may be required from time to time by the landlord, to prevent damage occurring to any installation in the premises which may be caused by frost, including providing background heat at all times during the winter months especially when premises are vacant provided that the sub-clause shall not oblige the tenant to lag or otherwise protect pipes that are not already lagged or protected.

Ms Golovina went away for Christmas. It was very frosty and cold. The pipes burst and the property flooded. The property was insured and it was a term of the tenancy agreement that the property would be insured, and indeed the insurance company paid for the repairs. The insurance company then sought to recover the cost of the repairs from Ms Golovina on the basis that she was in breach of her tenancy term by not heating the property when she was away. What was found in this case was that the insurance clause in the tenancy agreement was designed and it was envisaged that both the landlord and the tenant would be indemnified. That meant that the landlord couldn't recover damages from the tenant because it was envisaged by both parties that damages would be covered by the insurance claim. Given that the landlord couldn't recover damages against the tenant it followed that the insurer couldn't bring a subrogated claim against the tenant because the insurer couldn't be in a better position than the landlord herself.

So that's a bit of a brief run though. You'll see in my notes that I then go on to discuss some cases on quantum, some cases that have been sent through to me in the last year for inclusion in Legal Action. If anyone has any questions about any of those cases I'll be happy to answer them.

Deirdre Forster: I have concentrated on two aspects of disrepair that I think present the most difficulties. The first of those is disputes about access, and the second is how to craft a witness statement that will maximise your damages and win you the case.

Winning disrepair cases is getting more difficult. Certain local authorities have decided to fight where they always used to roll over, and that is putting us on our toes. I've always thought that the three items that you really have to watch are usefully expressed as DNA: Design, Notice and Access. There is nothing that muddies the water of disrepair dispute like an access dispute, because unlike usually in disrepair where you have objective evidence and records to rely on, with access it is one word against another and suddenly the prospects are uncertain. If, in a damages claim, you're acting under a Conditional Fee Agreement, you do not need uncertainty, you need a 65% chance of success.

So let's have a look at the law regarding access first. It should be obvious that you should always start with the express terms about access in the tenancy agreement because they will overrule anything in statute, and usually both private and public tenancies have a great deal of information about obligations to give access. Then let's look at statute and that's where, when researching for this talk, I came across a puzzle. If you actually look at the wording of s11(6) Landlord and Tenant Act 1985, it says: "In a lease in which the lessor's repairing covenant is implied, there is also implied a covenant by the lessee that the lessor or any person authorised by him in writing may at reasonable times of the day and on giving 24 hours' notice in writing to the occupier, enter the premises comprised in the lease for the purpose of *viewing their condition and state of repair*. Where is the wording about actually carrying out the repairs? There's an obligation to let the landlord inspect, but not an obligation on the tenant to let the landlord in to repair. If anybody knows where the statutory obligation is to let a council landlord in to repair, apart from, of course, in the tenancy agreement, tell me, because it's certainly not in the Housing Act 1985. I had a look today.

As far as access for repairs is concerned, in Assured tenancies, s16 Housing Act 1988 covers it. It includes the words: "Any repairs which the landlord is entitled to execute". You will find that there is exactly the same wording in s148 Rent Act 1977.

At common law a tenant doesn't have to let a landlord in to carry out improvements unless there's an express term, and we all knew that anyway I would have thought but it was confirmed in *Yeomans Row Management Ltd v Bodentien*, which is in the handout.

Let's have a look at cases where tenants have wanted to claim for repairs but haven't been willing to let the landlord in. The first of those, is Beaufort Park v Sahabipour where the tenant did not like the landlord-this is something that comes up a lot. Mr O'Brien was a resident and he was the director of the Right to Manage company, and the leaseholder was complaining about a leak which he thought was the freeholder's responsibility to fix. Before he engaged a plumber, Mr O'Brien wanted to satisfy himself that the leak was the freeholder's responsibility rather than that of the long leaseholder. He was saying, of course, he knew these flats inside out and he knew where the pipes were and would be able to tell in seconds whether it was a freeholder responsibility or not. They had a long history of arguing and Mr Sahabipour said he would let anybody in but not Mr O'Brien and he also said, quite reasonably, that Mr O'Brien had no technical expertise. But the court were not interested in Mr Sahabipour's arguments. They looked at the lease which had a very widely drafted access term. It gave the freeholder access to inspect and to repair. They held that the tenant had to let anybody that the freeholder appointed come in, he could not object to Mr O'Brien.

So that's a problem for us because sometimes freeholders, contractors, or, indeed, housing officers, behave very badly indeed. I had a case where the tenant was complaining that one of the contractors had made lewd remarks to her 16 year old daughter, and she, on no account, wanted that contractor to come back in. I'm sure that some of us had cases where contractors have made racist or disablist remarks. You don't want a case like that to go to trial but you may want to use the Equality Act 2010 if what is happening is that somebody with a protected characteristic, such as they're a woman means they're having sexual innuendoes said to them, or the fact that they're disabled means they're being tormented by a workman, you might want to use that to negotiate with the landlord to insist that they send someone else.

Other reasons for refusing access: What happens if the landlord wants to turn up and do work and they haven't told the tenant what type of work it is, how long it's going to go on for; or what happens if you and the tenant aren't satisfied that the work they want to do is going to remedy the disrepair? Well, you need to be aware of the case of *Granada Theatres v Freehold Investments*. This was a

commercial case but the principles apply. In that case the tenant wasn't going to let the freeholder repair the roof because they thought that the freeholder was going to patch the roof and they said full replacement was necessary. The court held that all that the landlord has to do is give the tenant sufficient warning of their intention to do the repairs and the nature of the work they proposed to do and, since they had done that, the tenant had no right to damages. When you think about it, that is logical. We, as tenants' representatives, are not supposed to be dictating to the paying party how they carry out their work. The case of *Riverside v Blackhawk* made it clear that where there are two reasonable methods of repair, it's the paying party - the landlord – who is entitled to choose between the two reasonable methods of doing the repair and, of course, they are likely always to choose the cheapest option.

The next problem that we encounter as tenants' lawyers is that often a tenant comes to you and they don't really want repairs done at all. What they want is to move. You should have alarm bells ringing straight away when that happens because we, as lawyers, cannot get an injunction compelling a landlord to transfer a tenant into permanent alternative accommodation. So at a very early stage, usually at the first interview, or even on the first phone call, I tell them that I almost certainly can't get a move for them and that they really shouldn't go any further if that's what they want. Otherwise you will have a disappointed and disgruntled tenant denying access further down the line.

We solicitors routinely ask the experts whether the work can be done in occupation. Now that's OK but why are we doing it? Are we fooling ourselves that if the expert says that the work can't be done with the tenant in occupation we can force a landlord to a move that tenant? Are we leading the tenant up the garden path and giving them false expectations? *Green v Eales* makes it clear that there is no obligation on a landlord to rehouse. There is no obligation on a landlord to provide temporary accommodation whilst works are carried out. "The landlord covenanted to repair but he did not covenant to find the tenant another house" while the repairs were going on.

Calabar v Stitcher is the other case that John has already mentioned and it confirmed *Green v Eales* from the point of view that you will *only* get the cost of alternative accommodation if there was delay that caused the repairs to be more extensive. Let me give you a quick example of this. If there's rising damp and the best method to do it is not a chemical damp proof course injected from the outside, but is tanking, that is going to be enormously disruptive whether it's done a month after the tenant reports it or four years afterwards. Either way all of the plaster will be hacked off. So the arguments about alternative accommodation will be very difficult in that situation.

To make it worse, a landlord has a right to vacant possession for the period of the work. So you report your disrepair, the landlord says: Yes, I will repair it. There's evidence from perhaps your own expert that it can't be done with the tenant in occupation and the landlord then requires the tenant to move out at their own expense while they do the work. Well, *Mc Greal v Wake* did say that that would only happen if the repairs cannot be done on a room by room basis with the tenant in occupation, but you need to bear it in mind.

So if the repairs cannot be done with the tenant in occupation, then unless you can show that they would have been much less extensive if the landlord had repaired promptly, you will not have a damages claim to pay for the cost of alternative accommodation. So that's something you absolutely have to factor in. When you're speaking to your tenant at the very beginning, if they say that the work can't be done with them in occupation, they're overcrowded or whatever, you need to ask them how they will give access. You need to find out whether there's a relation they can camp with in the short term because otherwise, unless you have the neglect argument, you will hit a brick wall. Now I do have to say that many social landlords will automatically provide at least temporary rehousing in this

situation but you need to be aware that just because that's what usually happens, that is not what the law says.

Let me tell you about a couple of tenant-friendly cases just to cheer you up.

Dodd Properties v Canterbury City Council said that a claimant is under no obligation to mitigate if they're financially unable to do so, so that really helps you. You will not get an order for specific performance for the work to be done if your tenant's sitting there saying we can't afford to move, but you might get damages. It's possible that the damages claim will continue. The case of *Lubren v Lambeth* confirmed that. I suspect this is a case where somebody, probably the council in this case, didn't put in the evidence because the tenant had refused two offers of alternative accommodation but they still got damages for the whole period of the disrepair because the court said there was no evidence that the offers had been refused "capriciously" -we think it's probably the same meaning as unreasonably, because the next case you have to look at is *English Churches v Shine*.

Mr Shine was a terror really. He kept saying he would move out to let them do the work and then changing his mind and not doing so. In the end the landlord got an injunction compelling him to move out and he still didn't move out and in that case the landlord was offering temporary alternative accommodation. He still got damages, but they were reduced by 75% and the court did a cross check on diminution of value. They looked at the period during which he wasn't being unreasonable and they calculated 100% of damages for that period, and then they gave him nothing for the periods when he was refusing to move and then they did it the opposite way round, which was they took the whole period and gave him 25% for the whole period and it came out about the same, so they were happy. So that is what you're probably looking at, a quarter of the damages, and quite likely no order for specific performance.

Bear in mind that s17 Landlord & Tenant Act 1985 says that the normal equitable restrictions don't apply to claims for specific performance, but this is actually for very technical reasons about mutuality - it was thought in the nineteenth century that a tenant could never get an injunction against a landlord. I don't think that takes away a judge's discretion in our cases because the wording in section 11 is that the court may order specific performance, not must. So it is a discretionary remedy and when you have a nightmare tenant who's being difficult, you might lose.

Practical problems to do with refusal of access: I met someone from Northern HLPA who does loads of these cases and she told me that she routinely doesn't let the landlord in to do repairs until she's got her expert report, and she puts that in her early notification letter. I personally think that's really dangerous and I certainly think it would suspend any damages whilst the landlord is denied access, because the landlord's got a right to go in, and the parties are meant to be acting cooperatively. There are other ways of preserving the evidence, especially these days when tenants have smartphones. You can take video evidence of leaks, can you take photographs? What if it's something that you can't photograph like a broken boiler? Well consider getting an emergency report if you really must.

One of the problems I've come across, particularly doing cases under CFAs, is where tenants are not eligible for legal aid because they're in full time work. How can they repeatedly take time off to give access? Well that's actually not the landlord's problem and you may not get the sympathy of the court. Once again you will muddy the waters if you get into arguments about that so at an early stage I ask how the tenant will give access. I ask if they have a neighbour or a friend who will help with keys, and if they haven't I proceed either not at all or with considerable caution.

The other issue is keeping a tenant on board when the landlord – particularly corporate landlords – mess about the way they do, with fruitless inspection after inspection, no workmen knowing what

they are supposed to be doing. How do you keep the tenant letting them in, taking time off work to let them in? Well you somehow have to find your way through this.

Now I want to talk to you about witness statements. When I was preparing this talk I asked a few friendly barristers what they think are the worst things that we solicitors do. I'm not trying to have a go at us solicitors because, let me tell you barristers, ours is a very, very difficult job. It's very easy to spot mistakes when you're the second line of fire but when you are at the coal face everybody makes mistakes - and it's very hard to spot that you've made them.

People like me qualified before we were taught about evidence, so I've learned on the job and even in the last few years I've learned things about witness statements and evidence that I didn't know before. Some of you know this inside out and to you I apologise, but let's have a quick look at the law on witness statements because, I have to say, an awful lot of witness statements that I see, seem to be completely oblivious to the rules. I have also to state that the ones that counsel draft also offend this quite badly at times.

So, the first point is that a witness statement should only contain the evidence that a person would be allowed to give orally. For 15 or 20 years now we've been using written statements rather than having to take evidence in chief, so it's only practitioners here who've done criminal law who will have good recent experience of taking a witness through their evidence and learning not to lead them, not to put words into their mouth. As you are taking the statement you have to imagine that the tenant is standing in the box and replying to questions asked by their barrister. You will need permission to orally amplify that statement at trial- don't assume that permission will be given. CPR 32.5 you can only amplify orally at trial for a good reason.

Submissions and arguments do not belong in a witness statement – but almost everybody puts them in, and it really annoys me when the other side do it. Quite often the landlords don't have anything else other than submissions and arguments; they usually don't have any evidence from the people who actually visited the property and so why are they putting in evidence at all? They don't know what they're doing. The cases of *William v Wandsworth LBC,* and *Bellamy v Hounslow* are very good examples where Stephen Sedley said: "witness statements are a proper vehicle for relevant and admissible evidence going to the issue before the court and for nothing else. Argument is for advocates, innuendo has no place at all."

The same thing was said in the case of *JD Wetherspoon plc v Harris*. Indeed the court said to include such things confuses the role of a witness of fact with the advocate.

So if you're trying to make submissions or give your lay tenant's opinion, you are out of order and your statement is probably too long for bad reasons.

The witness statement should be, so far as possible, in the witness' own words, but nobody told me that. I always used to paraphrase. The tenant would stumble through the story trying to conveying it as best they could in their own words and I would paraphrase it into perfect grammar.

For a start it's wrong, it's not what the rules say you should do. But secondly, it can really backfire. The case of *Alex Lawrie Factors v Morgan* was a case where a defendant was trying to say that she wasn't responsible for a mortgage that her husband had fooled her into signing. In her witness evidence she included complicated legal arguments and quoted case law. The judge said "well this is clearly a highly intelligent lady, she knows a lot of law, there's no way her husband could have fooled her". So she lost and had to go to appeal and her lawyers had to eat humble pie and explain that really

she wasn't very intelligent at all and the statement wasn't in her words. She did manage to succeed on appeal but the solicitors got hammered.

Similarly in the case of *Mahmoud Assi v Dina* the exact same words appeared in the main witness statement as in the supporting witness' statement. The judge said that he didn't find this credible because they were not words that someone using English as a second language would have used and clearly they had been made up by someone else and he therefore disbelieved both witnesses.

I'm putting myself on the line here. I'm using an example of one of my very early witness statements would you just take a moment to read it:

> From slide: Witness statements – example. Pro Forma: *"I was reluctant to invite my friends to my home because of the poor conditions in which I was living. Several of them commented upon it on a number of occasions. As a result I felt ashamed and my social life suffered".*

You would have found that sort of thing in every one of my statements - so not much impact. The next example is taken from one of my colleagues' witness statement that I raided on Monday:

> From slide: Witness statements - example. Own Words: "*Growing up, I didn't have a chance to bring friends over, because our home was so horrible. I came up with any and every excuse in the book to keep anyone from coming. At the time I was pretty embarrassed. I was a popular kid, but in my eyes that made it ten times worse, because everyone always wanted to come to mine. Now and then I would hear snide comments like "by the time we're allowed in your house we'll have walking sticks" or "you've been decorating for years". I laughed it off, but inside I was fuming."*

Now that to me has the ring of truth about it. That has impact because it's different in every case because it's not in words that a solicitor would use. Obviously the rules say that you have to use the client's words as far as practicable, and you have to make some allowances. I have clients for instance who don't know the word for wall plaster so they can't say it. So I have to put that in for them, but otherwise, why would you not use the client's words?

One of my colleagues takes clients through their evidence – he examines them in chief and records on a handset what they're saying and then gets somebody a lot cheaper than him to transcribe it. Obviously it will take preparation time to knock that into shape and to get it in the right order but the statements have way more impact than pro formas.

However, it's no good having a impact laden statement that is not relevant. Why would you have five paragraphs about how awful it was living in damp in one room when, in fact, it has turned out that it was condensation in that room and you case is now about the remaining problem of a roof leak affecting a different room? Avoid emphasising the matters that you can't claim and ignoring the matters that are still in play. What sometimes happens is that people delegate the witness statement to somebody inexperienced who just takes everything down and then the senior person doesn't actually go through it and delete items that aren't good claims.

Similarly, if things are alleged in the defence, such as access, you have to deal with them. If you don't deal with them, your opponent will walk all over you at trial because you will not be able to get that evidence in if it's not it in your witness statement. The case of *Clark v Affinity Sutton* was a case where the tenant had complained vociferously about repairs for years and then there was a huge gap in the landlord's repair records and then the complaints started again. In that case the judge awarded nothing for the period during which there were no complaints showing on the records. That gap, in an ideal world, should have been explained in a witness statement-perhaps the witness was suffering

from depression during that period, perhaps they just felt completely ground down, but it wasn't explained and the result was nil damages.

One of my favourite cases that I talked about last time I was here was the case of *Heffernan v Hackney*, in which Sedley again complained. He said that he was being given no detail of the special damages - it was like being "a blind man searching for a black hat in a dark room." That being said, you don't want pages and pages of detail about special damages. I put it in a schedule of special damages which include how it arose, what the damage was and I then put a statement of truth on the schedule and get the tenant to sign it, or get them to authorise me to sign it. That is evidence under CPR, so that's another way of doing it without having a witness statement that runs for hundreds of pages.

Statements that are too long; statements that are too short. Have a think for a moment about what is an optimum statement length. Now everybody thinks that their statements are the right ones, so I will tell you that mine for a tenant with a long history of disrepair run to about twelve pages, and for a supplemental witness, a son or whatever, usually four or five pages. I would say that any longer than that and you will lose the concentration of the judge. If you produce a really long statement, for a start I don't believe your tenant will read it before they sign it. Furthermore the judge will lose the will to live part way through it as well. And, very short, formulaic witness statements will not get you anywhere.

So my conclusions are: prepare every case as if it's going to trial; keep your client on board through what will be a lengthy process; and, whatever you do, address the issues.

Chair: I will now invite questions from the floor.

Giles Peaker, Anthony Gold Solicitors: It's a request for views rather than a question. If the difference between assessing quantum on a tenancy and on a lease are between the actual rent or, in the case of the lease, the notional open market rent, how do we approach shared ownership where we have a, let's say, 40% share which is not at a rent and then a 60% share at a social rent? So you have combinations of leasehold interest and a social rent interest. I've had opponents say social rent, I've had opponents fold over on full open market rent. But as far as I know this has not been tested yet and I would be interested in views.

John Beckley: I think if I was assessing damages in that case as a Deputy District Judge I would try and apportion it, so I would look at how much of it you shared and how much we're paying in social rent and then try and fix a figure which covered both those issues. Obviously if I was acting for the tenant I'd say you should do it all on the market rent.

Deirdre Forster: That's what I do.

Chair: There's a footnote in *Earle v Charalambous* which is a little bit unhelpful in terms of social rent, but I would have thought that if the premium that's been paid out is fairly high presumably for the half share that must be significant, but how that goes depends.

I would also like to invite the room to think about the difference between personal injury claims and disrepair claims. If you have a personal injury claim, taking some of the s4 ones you've heard about as an example, no bannister, somebody falls down the stairs, you have got one incident and one cause of action and you have one set of damages all from the same incident. When you're dealing with disrepair you have anywhere between one and a hundred causes of action. There might be the roof, it might be a floor board, and each one might require you to look at a separate covenant, it might require you to look at a separate set of circumstances and, although its relatively easy to get the evidence in relation to each and every one of those causes of action, the plea is: remember that they

are separate causes of action. You need to go through the linear process of hitting each and every one of the preconditions for liability, and you need to show causation, and you need show a remedy is due for it.

Now when it comes to damages everything tends to be included together generally, but in terms of the liability it's missing simple things in the witness statements, which Deirdre talked about, it's remembering what the issues are about. Remember that although disrepair's easy in the sense that it's fairly easy to ask the client for the evidence that you need, it's also really easy to forget that each and every item has to be dealt with as a separate cause of action. So that would be my barrister's plea, when you get the papers and you look at it, it's those small things that can make a difference because one item might be extremely valuable for distress and inconvenience, and another might not.

David Foster, Foster & Foster Solicitors: Could I just ask the speakers to comment on their views on the consultation on introducing fixed costs where damages are recovered. Bearing in mind that it seems that most of disrepair litigation, certainly for claimants, now appears to be about maximising the claim for damages, what will the effect be if in the future the costs which you recover are fixed at a low level?

Deirdre Forster: Hopefully there'll be ways of getting off the fixed costs model, maybe Part 36, maybe multi track. But if that is not the case I don't think we can go on the way we have been doing. Certainly my little firm had to deal with personal injury fixed costs and we very rapidly found we were on a hiding to nothing trying to tailor make our cases and give clients a personal service. It just couldn't be done, so I think we'll all have to find a different business model, maybe be concentrating on injunction cases and not damages.

John Beckley: I think that's probably right. I think part fixed costs will become even more important as a way of getting out of the fixed costs regime, but I think what you see in personal injury claims is a different business model which is factories which churn out straightforward PI claims in Road Traffic Accidents and you just have to win a large enough number on the least amount of work to make it a profitable model. I think that's much more difficult in disrepair because, as Dominic said earlier, there are multiple causes of action, there is both the express terms of the tenancy agreement as well as those terms which are implied, there is the need for notice. They are much, much more complex than straightforward PI claims and therefore it will be much more difficult to proceed with that sort of claim under a fixed fee arrangement.

Chair: I would probably have thought that the crunch time wasn't necessarily in terms of taking the case on, because most cases will succeed, and if you look at the figures from Jackson for Law Value Claims it might, at the moment, not be that bad. That doesn't mean to say they will go up. So listening to the question, it's whether or not they're low or not, which may make a difference, but I think it is will become more of a crunch at the offer stage. I think you will be compromising the cases much more quickly so that you haven't necessarily incurred quite as much costs as your fixed fees might allow at that particular stage of the project, if I can call it that. That may mean that you don't frontload so much, that may mean that you tailor when you do the work according to the individual stages that Jackson's proposed. But it seems to me it's up for grabs at the moment and the real fear is, even if a decent figure is set for costs, it's what happens in the future when they don't get upgraded, or which category we get into if there's an injunction claim, or specific performance claim.

Deirdre Forster: In the personal injury model, from what I remember the fixed fee if it's settled pre-issue was £400. You know you can't actually see your client, get them set up and decide whether they've got a case or not for that sort of figure, let alone give them any personal service, so we need

to worry and those cases were done on evidence. Paul Fenn got masses of evidence in and worked out what the average case costs were, whereas Jackson this time is just asking us to throw in what we can. It's not being done scientifically this time.

Chair: If there are no further questions, I would like to thank the speakers for their talks and request you to show your appreciation.

Are there any legal updates from the Executive Committee?

Eleanor Sullivan, Anthony Gold Solicitors: All I have to report is that the Legal Aid Agency are waiting for ministerial approval before they can announce anything about the new housing contracts but they say it will be announced imminently.

Chair: Finally I would like to thank you all for coming and remind you that the next meeting is on 15 March on the topic of Defending Possession Claims.

.