DISREPAIR CASE LAW UPDATE

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CONTRACTUAL LIABILITY

Edwards v Kumarasamy [2016] UKSC 40, [2016] HLR 32

1. The defendant had a lease of one flat in a block of flats, and under the lease he had the right to use the entrance hall and parking area. The defenant let the flat to the subtenant under an assured shorthold tenancy. The tenant brought a claim for personal injury after he tripped on an uneven paving stone on the pathway leading from the main door of the block to the parking area. No notice had been given of the defect to the landlord. Under Landlord and Tenant Act (LTA) 1985 s11(1)(a), there is implied into the tenancy agreement a landlord's covenant to keep in repair the structure and exterior of the dwelling house, which by subsection (1A) includes any part of the building in which the landlord had an estate or interest. The district judge allowed the claim. The Supreme Court allowed the defendant's appeal. The first question was whether the paved area from the front door to the car park could be described as part of the exterior of the front hall of the block. Lord Neuberger, with whom Lords Wilson, Sumption, Reed and Carnwath agreed, held it could not:

   17. … [I]t is 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'. It is hard to see how a feature which is not in any normal sense part of a building and lies wholly outside that building, and in particular outside the floors, ceilings, walls and doors which encase the front hall of the building, can fairly be described as part of the exterior of that front hall. The paved area may be said to abut the immediate exterior of the front hall, but it is not part of the exterior of the front hall, as a matter of normal English …

2. It was held that the decision of the Court of Appeal in *Brown v Liverpool Corpn* [1969] 3 All ER 1345 that the steps from a the street gate down to a two-metre path that led to the front door of the premises were part of the exterior of the dwelling house, was wrong.

3. Although not necessary, the Supreme Court went on to consider whether the defendant had an estate or interest in the front hall and paved area for the purposes of s11(1A)(a). It held that he did as he had a right of way.

4. Consideration was also given to the requirement of notice in general:
   29. 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 … 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, this general principle is subject to exceptions, which are based on normal principles applicable to the interpretation of contracts. The most obvious exception is where the covenant is qualified by an express term …
   30. A further exception to the general principle … is the rule … that a landlord is not liable under a covenant with his tenant to repair premises which are in the possession of the tenant and not of the landlord, unless and until the landlord has notice of the disrepair …

5. The present case was concerned with the application of a landlord's repairing covenant to property which was not in the possession of <u>either</u> the landlord or the tenant, although it was property over which they each had a right of way. However, Lord Neuberger held that the defendant’s (assumed) obligation to repair the paved area was only triggered once he had notice of any disrepair for which the tenant would seek to make him liable.

   50…..In so far as the landlord had any right over the hall and paved area, he has effectively disposed of that right to the tenant for the term of the Subtenancy just as much as he has disposed of his right to use and occupy the Flat to the tenant for the term of the Subtenancy. During the term of the Subtenancy, it is the tenant who uses the common parts, not the landlord, just as it is the tenant who occupies the flat, not the landlord. It is true that the tenant does not enjoy exclusive possession of the common parts, but he is present on them every time he comes to or leaves the flat. The present issue is concerned with the relationship between a particular landlord and a particular tenant, and the landlord has effectively lost the right to use the common parts and the tenant has acquired the right to use them, for the duration of the Subtenancy.

6. In relation to flats let under a tenancy to which section 11 applies, by a landlord who owns the building in which the flat is situated, Lord Neuberger also said:

55…"it seems to me likely that, in so far as the statutory covenant extends to repairing the common parts, it would not normally be subject to the rule. That is because such landlord would ordinarily be in possession of the common parts. Indeed, it may be that the rule would not apply in any case where the landlord is headlessee of more of the building than the single flat he has sublet, as he would have exercisable rights over the common parts in his capacity of headlessee of property other than the flat in question. However, those issues have, understandably, not been even touched on in argument, and it would be wrong to express a concluded view on them." (para 59)

DEFECTIVE PREMISES ACT 1972

***Sternbaum v Dhesi* [2016]** EWCA Civ 155**,** [2016] HLR 16

7. The defendant let the premises, a Victorian house, to a company in which both the claimant and her business partner had an interest. The agreement provided that ss11-16 of the Landlord and Tenant Act 1985 applied to the agreement. At the time of the tenancy agreement, the steep back staircase was enclosed by walls on both sides, and had no handrail or bannister fitted. A remaining post or half-post embedded in the wall at the bottom of the stairs and a post with a bannister at the top of the stairs suggested that a bannister may have been removed from the lower flight at some stage in the building's history. The claimant fell walking up the stairs. She sued in negligence and breach of statutory duty for the absence of the banister/handrail which the defendant had a duty to repair under the agreement and under DPA 1972 s4.

8. The claimant lost at first instance and appealed. Hallett LJ held that while the staircase was unsafe, it was not in disrepair. There was no handrail present at the time of the grant of the tenancy, and the landlord was under no obligation to improve the premises or make them safe.

Lafferty v Newark and Sherwood DC [2016] EWHC 320 (QB), [2016] HLR 13

9. The defendant granted the tenant a tenancy of a house with a garden. In the tenancy agreement, the authority agreed to 'keep essential installations for the supply of water, gas, electricity, sanitation and heating in repair and proper working order'. The authority had a contractual right of access to the property to inspect it or to carry out works.

10. While she was hanging out washing in the garden, the tenant fell into a hole which opened up underneath her and she suffered injuries to her legs. She claimed against the defendant for breach of DPA 1972 s4.

11. The judge at first instance found that hole was caused by a fractured underground pipe that allowed water to saturate the ground and created a void beneath the surface of the garden, and that the most likely cause of the fracture was concrete being dropped on the pipe when a ‘soakaway’ was being constructed. There were no visibile external signs of the problem, so no reasonable inspection of the garden could have discovered it. Accordingly, it was held that there was no reason why the defendant ought to have known of the defect for the purposes of s4(2). The tenant argued, however, that the effect of s4(4) was to make the defendant liable for the defect even though it could not have been expected to know of it. The claim was rejected and the the tenant appealed.

12. Jay J dismissed the tenant’s appeal. The purpose of DPA 1972 s4(4) is to treat the landlord as if they had a contractual obligation to repair the relevant defect in cases where there is no express or implied term in the tenancy requiring them to do so, but where they only had a right of entry to carry out the repair. Section 4(4) does not extend the landlord’s duty under s4(1) beyond a duty to take such care as is reasonable in all the circumstances to all persons who are likely to be affected by defects in the premises to ensure they are reasonably safe from personal injury or from damage to property. In this case no careful inspection would have disclosed the defect.

13. The decision was approved by the Court of Appeal in *Rogerson v Bolsover DC* [2019] EWCA Civ 226 (below).

Dodd v Raebarn Estates Ltd and others [2017] EWCA Civ 439, [2017] HLR 34

14. The freeholder granted a lease of the first and second floors of a three storey building to a development company which then obtained planning permission to redevelop the flats. Its plans showed a new staircase between the ground and first floors with a hand rail. The redevelopment was subsequently carried with the permission of the freeholder but no handrail was installed, in breach of building regulations. The claimant and her husband were staying with a leaseholder of one of the first floor flats when he fell down the staircase and later died of his injuries. The claimant claimed that the freeholder that it was in breach of its duty under the DPA 1972 s4 by virtue of s4(4). The issue was whether the lack of a handrail was a “relevant defect” for the purposes of s4(3) in respect of which the freeholder had a right of entry to repair under a clause of the tenancy agreement.

15. The Court of Appeal re-iterated that a duty to repair cannot be equated with a duty to make safe and that the relevant defect must be in existence at the outset of the tenancy. The developers had permission to make the alterations under the leace and once a new

staircase had been installed without a handrail there had been no subsequent deterioration or damage to the fabric of the staircase such as to give an obligation to repair it. Even if a handrail had been installed but then removed the Court of Appeal held its removal would still not amount to disrepair (and queried the decision in *Hannon v Hillingdon Homes Ltd* 2012) EWHC 1437 (QB)).

Rogerson v Bolsover DC [2019] EWCA Civ 226

16. The tenant had been mowing her lawn at the front of the property when she stepped backwards onto an inspection cover that gave way and fell into the void of a water sewage chamber beneath, suffering injury. The only witness for the respondent landlord was an operational repairs manager, who produced documents relating to an inspection of the property just before the tenant moved in and a 'survey' a few months prior to the incident as a result of a stock review, but had no personal knowledge of these. In the opinion of the tenant's expert, the cover was about 40–60 years old and was clearly beginning to corrode away. The most logical explanation, which the trail judge accepted, was that the mortar support for the cover had deteriorated over time and had not been able to take the tenant's weight. The trial judge held that there was nothing to show that the landlord had carried out a reasonable inspection of the garden, although the inspection cover was a real and obvious safety risk, and held that the it was in breach of its duty pursuant to DPA 1972 s4(1).

17. The Court of Appeal upheld the decision. The primary issue was *"what does s4(1) require a landlord to do?"*. Nicola Davies LJ held that the answer is fact sensitive. While s4(1) does not, without more, require a landlord to implement a system of regular inspection, it is in each case a question of fact, one aspect being the knowledge of the landlord as to any likely or known risks in the property. On the facts of this case, such a system was not required. The issue was whether reasonable care was taken in carrying out the inspections that did occur, and whether the defect could or should have been discovered as a result of either inspection of the property. Once the trial judge had accepted the tenant's evidence as to how the accident occurred, the evidential burden shifted to the landlord to show it had complied with s4. Given the lack of evidence brought by the landlord, there was nothing to show it had carried out a reasonable inspection of the property in relation to the state of the garden, and it had called no first-hand or expert evidence to refute the findings of the tenant's expert in relation to the defect around the inspection cover or that a simple pressure test would have been sufficient to reveal the defect. In the circumstances, on the basis of the facts found, the landlord ought to have known of the defective condition of the support framework for the cover and was in breach of s4.

18. Males LJ held that the statute does not refer to any duty to inspect and what steps to take by way of inspection will depend on all the circumstances. The question is what a competent landlord exercising reasonable care would do. In this case, there were sufficient findings to demonstrate that the respondent ought, in all the circumstances, to have known of the defect. There was a clear and obvious danger and a reasonable landlord would have ensured a system of proper inspection. The cover was part of the structure or exterior of the property, and there was an express contractual right in the tenancy agreement to carry out repairs to it, and even if there were not, such a term could be implied: see *McAuley v Bristol City Council* [1992] 1 QB 134.

RIGHT OF ENTRY

Liverpool Mutual Homes v Mensah Legal Action May 2019 p29

19. The claimant landlord applied for an injunction requiring access to the tenant's property pursuant to the covenants for access for any necessary works of repair and improvement in the tenancy agreement. Following a letter of claim in respect of alleged defects at the property, there had been a joint inspection by the parties' experts, which led to some agreement as to the disrepair. However, the tenant's expert identified additional disrepair, which was not agreed. The landlord then wrote to the tenant with a schedule of works relating to the agreed disrepair on a number of occasions but was not given access to carry out the remedial work. Eventually, the tenant's solicitors wrote to say that as the proposed schedule did not include the additional non-agreed items, no work was to be carried out. The landlord pointed out that the pre-action protocol required it to provide a schedule of intended works and a timetable for the works which it had done. It was not required that the works were agreed. It issued proceedings to gain access.

20. Before the hearing, some agreement was reached on the scheduling of works, but as the tenant would not give undertakings to provide access, the hearing went ahead. It was argued on behalf of the tenant that it was reasonable for her to refuse access until such time as the totality of the works to be undertaken could be agreed. The landlord relied on the statutory provisions as to access and the terms of the tenancy agreement. HHJ Gregory did not accept the tenant's evidence that she had made repeated attempts to communicate with her landlord, which had met with no response; nor was it accepted that the health of her daughter was a significant factor prompting her to refuse access. It was found that the landlord had been patient and reasonable, and that injunction proceedings were a last resort. An injunction was granted to facilitate access.

New Crane Wharf Freehold Ltd v Dovener [2019] UKUT 98 (LC)

21. A landlord appealed against the First-tier Tribunal's decision that the respondent tenant had not breached a covenant in his lease by failing to permit a right of entry. The landlord relied on a clause which required the tenant:

    "To permit the Lessor and its agents and workmen at all reasonable times on giving not less than forty eight hours notice (except in case of emergency) to enter the Demised Premises for …[an number of purposes are set out]".

22. It had initially written to the tenant in the following terms: *"… you are required to give our client access to inspect the Property on 29 September 2017 at 10.30 am. We therefore await hearing from you by close of business on 18 September 2017 … with your confirmation that access will be given on 29 September 2017*."

23. The tenant did not reply in the timeframe given but the landlord did not attend at the property on 29 September. There was further correspondence where the tenant queried the reason for entry, and the landlord re-iterated the contractual right of access and gave a further deadline by which it required confirmation that access would be given by a specified time on a new date, in default of which an application would be made to the tribunal. The tenant did not reply to the letter.

24. In the decision of the Upper Tribunal HHJ Behrens held that the obligation on the tenant in the relevant clause was to permit the landlord to enter the premises on giving the appropriate notice. It was not a clause authorising entry in the absence of such permission. Whether or not the landlord was entitled to enter if permission was refused was not a matter that fell for decision in this appeal.

25. There was nothing in the clause to require the tenant to grant permission before the time and date specified in the notice.

26. The granting of permission requires some positive act by the tenant. As there was no evidence that entry had been refused at the date and time specified in the letter, notwithstanding the absence of a reply from the tenant prior to that time and date, there was no breach of covenant.

27. In cases where there was a clear refusal it would normally be reasonable for the landlord to rely on the refusal as a breach and they would not need to attend. However there may be cases where the refusal was not clear, or cases where the refusal was initially clear but the tenant then agrees access before the date specified.

AGRICULTURAL HOLDINGS ACT 1986

Secretary of State for Defence v Cyril Spencer, David Spencer and Peter Faulkner

[2019] EWHC 1526 (Ch)

28. The secretary of state, as the landlord of an agricultural holding, served a notice to quit under *Agricultural Holdings Act 1986 Sch.3 Case D* on the ground that the tenants (the first and second defendants) had failed to comply with a notice to pay rent due (a mandatory ground). The tenants challenged the validity of the notice to quit at a statutory arbitration on the basis of an equitable set off for disrepair.

29. The arbitrator (the third defendant) stated a case to be referred to the county court under Sch.11 para.26 of the Act, asking *"whether [the tenants] could rely on equitable set-off of unliquidated claims for damages in order to invalidate the notice to pay, because it overstated the rent due, and so to invalidate the notice to quit."* A recorder answered that the tenants could rely on equitable set-off, but on condition that before the date of the notice to pay, the criteria set out in *Fearns (t/a Autopaint International) v Anglo-Dutch Paint & Chemical Co Ltd [2010] EWHC 2366 (Ch)* were met: the claim to be set off had been asserted expressly in reduction or extinction of the rent claimed in the notice to pay; the claim had been quantified; and the assertion and the quantification were bona fide and on reasonable grounds.

30. The secretary of state appealed against the decision that equitable set-off could be applied to the statutory procedure. The tenant cross-appealed against the qualifications to the circumstances in which equitable set-off could be relied upon.

31. In the appeal to the High Court, Birss J held that the fact that the statutory arbitrator had no jurisdiction, when resolving a dispute as to the validity of a Case D notice to quit, to

determine a tenant's claim against the landlord did not render equitable set-off unavailable for Case D. If there was not an enforceable obligation to pay the money said to be due as rent in the Case D notice, as a result of an equitable set off, then that sum was not the "rent due" as a matter of ordinary language. Equitable set-off is a substantive defence which impugned the creditor's right to claim sums due. It is therefore not necessary for the statutory arbitrator to determine the set-off as a cross-claim.

32. However the recorder had been right to adopt the *Fearns* criteria and apply them to the Case D context. Provided the equitable set off was properly asserted, quantified and, and asserted in good faith, it was held to be sufficient to invalidate a notice to pay which does not take it into account.

ABUSE OF PROCESS

Moorjani v Durban Estates Ltd [2019] EWHC 1229 (TCC)

33. Mr Moorjani's claim for disrepair against the first defendant issued in 2018 was struck out pursuant to CPR 3.4(2)(b) as an abuse of process. Mr Moorjani had previously brought a claim in 2011 against the first defendant the County Court in respect of breaches of its repairing obligations. While the judgment in the county court awarded damages only for disrepair in relation to the common parts on the third floor of the block in which his property was located, the particulars of claim had been pleaded more broadly, in relation to the common parts and the block generally. The particulars in the new claim in the High Court relied on a number of the same provisions in the lease as previously, for the same period as the 2011 claim and to subsequent periods, but to parts of the building other than the third floor.

34. The Honourable Mr Justice Pepperall held that Mr Moorjani's new claim was a claim upon the same cause of action as previously, that is a breach of repairing covenants, and was therefore barred by both cause of action estoppel and merger. Further, following *Henderson v Henderson (1843) 3 Hare 100* the action was an abuse of process, there was considerable duplication between the two actions and in so far as the current claims were fresh claims they could, with reasonable diligence, have been raised in the first action.

QUALIFIED ONE-WAY COSTS SHIFTING

35. Where a claim includes a personal injury element, CPR 44.13 could give a claimant some cost protection from the whole of the defendant's costs, known as Qualified One-way Costs Shifting (QOCS). The QOCS regime was introduced as a result of the Jackson Review of Civil Litigation Costs in order to prevent injured persons from being deterred from bringing claims for compensation.

36. The regime is set out at CPR 44.13 - 44.16. CPR 44.13 sets out those proceedings to which the QOCS regime applies:

    "(1) This Section applies to proceedings which include a claim for damages –
    (a) for personal injuries;
    (b) under the Fatal Accidents Act 1976; or
    (c) which arises out of death or personal injury and survives for the benefit of an estate by virtue of section 1(1) of the Law Reform (Miscellaneous Provisions) Act 1934,
    but does not apply to applications pursuant to section 33 of the Senior Courts Act 1981or section 52 of the County Courts Act 1984 (applications for pre-action disclosure), or where rule 44.17 applies."

37. CPR 44.14(1) enshrines the core principle of the QOCS regime:

    "Subject to rules 44.15 and 44.16, orders for costs made against a claimant may be enforced without the permission of the court but only to the extent that the aggregate amount in money terms of such orders does not exceed the aggregate amount in money terms of any orders for damages and interest made in favour of the claimant."

38. Rule 44.15 concerns proceedings which are struck out for misconduct. Rule 44.16 provides as follows:

    "(1) Orders for costs made against the claimant may be enforced to the full extent of such orders with the permission of the court where the claim is found on the balance of probabilities to be fundamentally dishonest.
    <u>(2) Orders for costs made against the claimant may be enforced up to the full extent of such orders with the permission of the court, and to the extent that it considers just, where</u> –
    (a) the proceedings include a claim which is made for the financial benefit of a person other than the claimant or a dependant within the meaning of section 1(3) of the Fatal Accidents Act 1976 (other than a claim in respect of the gratuitous provision of care, earnings paid by an employer or medical expenses); or
    <u>(b) a claim is made for the benefit of the claimant other than a claim to which this Section applies..."</u>

39. The dispute has been where there are a number of claims in one set of proceedings which include a claim for damages for personal injury, does this mean they attract costs protection by virtue of 44.13, or does the exception in 44.16(2)(b) apply.

Brown* v *The Commissioner of Police of the Metropolis

[2019] EWCA Civ 1724 (18 October 2019)

40. Ms Brown brought various claims against the defendant including a claim for damages for personal injury. She was awarded general damages for £9,000 but failed on the personal injury claim. The defendant had made a Part 36 offer of £18,000. Ms Brown was ordered to pay the defendant's costs which post dated the offer. Ms Brown argued that she was protected by the QOCS regime against any adverse costs order in an amount higher than the £9,000 she had recovered. The Court of Appeal considered the proper interpretation of CPR 44.16(2)(b). It held that rule 44.13 provides that the QOCs regime applies to claims for damages for personal injury (including all claims consequential on that personal injury), except where the exceptions in 44.15 and 44.16 apply. CPR 44.16(2) (b) applies where the proceedings also involves claims which are not for damages for personal injury ("mixed claims"). Such claims do not therefore attract automatic costs protection. To equate any claim with the proceedings as a whole would make the exception redundant.

41. However QOCS is still relevant to mixed claims, such as RTA claims. As Lord Justice Coulson explained [para 57]:
"when dealing with costs at the conclusion of such a case, the fact that QOCS protection would have been available for the personal injury claim will be the starting point, and possibly the finishing point too, of any exercise of the judge's discretion on costs. If (unlike the present case) the proceedings can fairly be described in the round as a personal injury case then, unless there are exceptional features of the non-personal injury claims (such as gross exaggeration of the alternative car hire claim, or something similar), I would expect the judge deciding costs to endeavour to achieve a 'cost neutral' result through the exercise of discretion. In this way, whilst it will obviously be a matter for the judge on the facts of the individual case, I consider it likely that, in most mixed claims of the type that I have described, QOCS protection will – in one way or another – continue to apply."

42. The court also held that to the extent that paragraph 12.6 of Practice Direction 44 suggested a different approach, it was wrong and needed to be amended.

43. So, it is for the court at the end of the case in its discretion to decide whether, and if so to what extent, it is just to permit enforcement of a defendant's costs order. The following example was given in *Brown* in the High Court as to how the discretion may be exercised:

    "In an ordinary claim arising out of an RTA, it might be thought unlikely that a court would consider it just to remove QOCS protection, simply because the injured claimant also sought compensation for damage to their car. But the discretion is there, and in an unusual RTA, for example where the personal injury claim is modest but the main issue in the case relates to damage to the car, the court might consider it just to remove QOCS protection".

44. Likewise it is easy to see how a claim for relatively low personal injury damages in comparison to a substantial claim for general damages for disrepair would fall outside QOCS. Clients should therefore be carefully advised of the implications of the judicial discretion on costs in such cases.