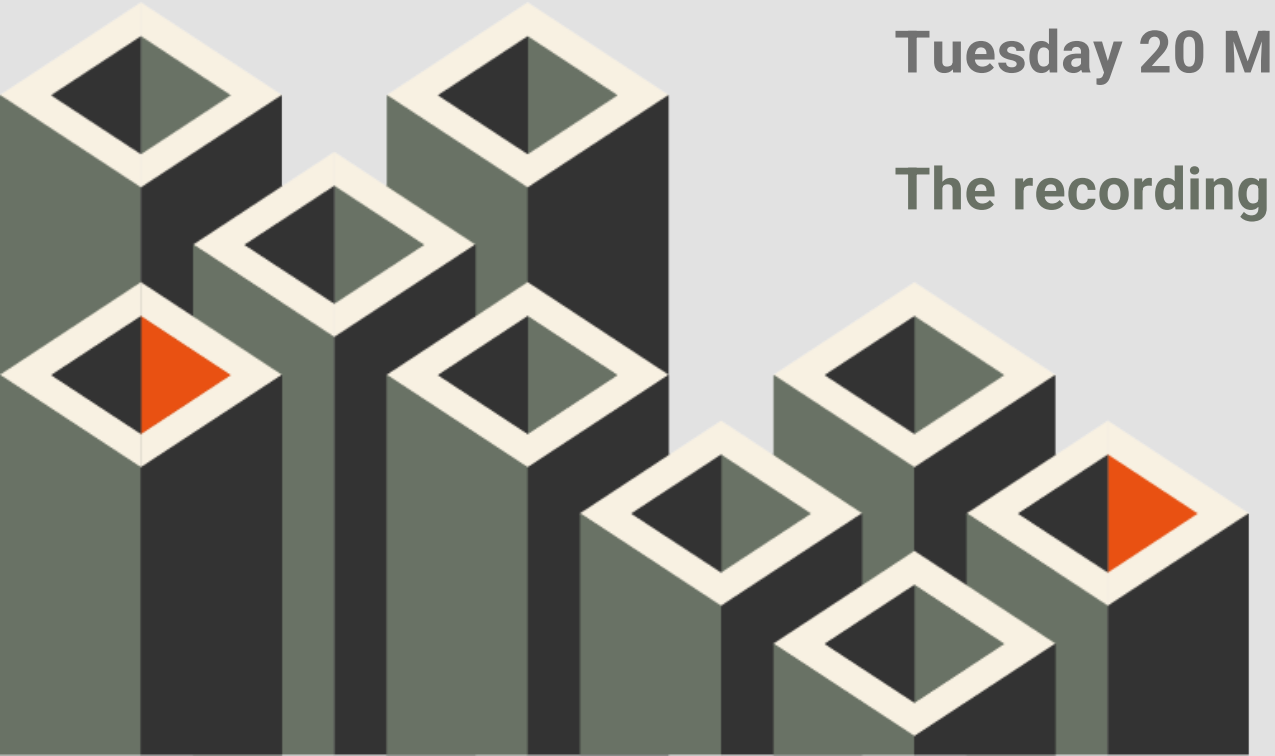
Property Nuts and Bolts – Part 5 – Disrepair claims and counterclaims

Tuesday 20 May 2025

The recording can be accessed here.



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Your speakers today

Admas Habteslasie (Chair)

The role of experts

Kate Traynor

Procedural Issues and Tactics

Edward-Arash Abedian

The legal principles

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Disrepair claims and counterclaims: The legal principles

Edward-Arash Abedian

What we will cover

1. Sources of tenant's rights and landlord's obligations

    Express terms in the tenancy agreement

    Implied terms – ss.9A and 11 of the Landlord and Tenant Act 1985

    Rights and obligations arising outside of the tenancy agreement

2. Related rights

3. Damages principles

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Sources of rights and obligations

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Tenancy agreement – Express terms

May contain express or implied obligations on landlord relating to condition of property which they are bound to perform

E.g. *"put in repair"*, *"keep in repair"*, *"good and substantial repair and condition"*

Common for landlords of residential property to contract to:

- Carry out repairs (but not improvements or to keep premises in as good a state as when let)
- Repair only structural or external parts (but not internal / non-structural, e.g. internal doors, kitchen fittings etc.)

Check the tenancy agreement

May contain more extensive terms – e.g. liability for severe condensation and mould covered under obligation to "maintain the dwelling in good condition and repair" (*Welsh v Greenwich LBC* [2001] 33 HLR 40, CA)

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Tenancy agreement - Construction

Common sense approach to construction

Normal principles of contractual interpretation (see *Rainy Sky SA v Kookmin Bank* [2011] UKSC 50, [2011]; *Arnold v Britton* [2015] UKSC 36; *Wood v Capita Insurance Services Ltd* [2017] UKSC 24)

Repairing covenant to be construed having regard to the condition of the property as it was at the date of the letting (*Proudfoot v Hart* [1890] 25 QBD 42, CA)

Will not be construed as requiring:

- Renewal of whole property (*Lister v Lane* [1893] 2 QB 212, CA); or
- Removal of all potential hazards (*Alker v Collingwood Housing Assoc.* [2007] EWCA Civ 343)

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What constitutes “repair”

Brew Brothers Ltd v Snax (Ross) Ltd [1970] 1 QB 612, Sachs LJ at 640:

> *“It seems to me that the correct approach is to look at the particular building, to look at the state which it is in at the date of the lease, to look at the precise terms of the lease, and then come to a conclusion as to whether, on a fair interpretation of those terms in relation to that state, the requisite work can fairly be termed repair. However large the covenant it must not be looked at in vacuo.”*

Ravenseft Properties Ltd v Davstone (Holdings) Ltd [1980] QB 12, Forbes J at 21BC:

> *“The true test is, as the cases show, that it is always a question of degree whether that which the tenant is being asked to do can properly be described as repair, or whether on the contrary it would involve giving back to the landlord a wholly different thing from that which he demised.”*

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Common issues

Distinction between “repair”, “renewal” or “improvement”

- *Lurcott v Wakely* [1911] 1 KB 905
- *Anstruther-Gough-Calthorpe v McOscar* [1924] 1 KB 716
- *McDougall v Easington DC* [1989] 58 P&CR 201, CA
- *Hunt v Optima* [2013] EWHC 681

Inherent defects

- *Quick v Taff Ely BC* [1986] QB 809
- *Stent v Monmouth DC* [1987] 19 HLR 269, CA
- *Uddin v Islington LBC* [2015] EWCAQ Civ 369
- *City of London v Various Leaseholders of Great Arthur House* [2021] EWCA Civ 431

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Tenancy agreement – Implied terms

Statute (cannot be excluded or transferred by express contractual terms)

- Section 9A, Landlord and Tenant Act 1985
- Section 11, Landlord and Tenant Act 1985

Common law (generally, can be excluded by express terms)

- (Where let of furnished dwelling for immediate occupation) premises to be fit for human habitation at start of tenancy (*McNerny v Lambeth LBC* [1989] 21 HLR 188, CA)
- Landlord to take reasonable care to keep means of access and communal facilities in repair and proper working order (*Duke of Westminster v Guild* [1985] QB 688, CA)
- Landlord to take reasonable care to ensure condition of ancillary property does not deteriorate and cause personal injury / property damage (*Duke of Westminster v Guild* [1985] QB 688, CA)
- Quiet enjoyment of rented premises (*Gordon v Selico Ltd* [1986] 18 HLR 219, CA)

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Section 9A, Landlord and Tenant Act 1985

Implies an obligation that the property is fit for human habitation into all *relevant* tenancies

Relevant tenancies set out in s.9B:

- Leases under 7 years
- Secure tenancies, including introductory tenancies
- Any tenancy granted on or after 20 March 2019 (as from start date)
- Tenancies granted before 20 March 2019 (from 20 March 2020 onwards)

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Section 9A, Landlord and Tenant Act 1985

Section 9A:

"(1)In a lease to which this section applies of a dwelling in England (see section 9B), there is implied a covenant by the lessor that the dwelling—

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

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

…

(6)Where a lease to which this section applies of a dwelling in England forms part only of a building, the implied covenant has effect as if the reference to the dwelling in subsection (1) included a reference to any common parts of the building in which the lessor has an estate or interest."

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Section 9A, Landlord and Tenant Act 1985

Exceptions:

"(2)The implied covenant is not to be taken as requiring the lessor—

(a)to carry out works or repairs for which the lessee is liable by virtue of—

(i)the duty of the lessee to use the premises in a tenant-like manner, or

(ii)an express covenant of the lessee of substantially the same effect as that duty;

(b)to rebuild or reinstate the dwelling in the case of destruction or damage by fire, storm, flood or other inevitable accident;

(c)to keep in repair or maintain anything which the lessee is entitled to remove from the dwelling;

(d)to carry out works or repairs which, if carried out, would put the lessor in breach of any obligation imposed by any enactment (whenever passed or made);

(e)to carry out works or repairs requiring the consent of a superior landlord or other third party in circumstances where consent has not been obtained following reasonable endeavours to obtain it.

(3)The implied covenant is also not to be taken as imposing on the lessor any liability in respect of the dwelling being unfit for human habitation if the unfitness is wholly or mainly attributable to—

(a)the lessee's own breach of covenant, or

(b)disrepair which the lessor is not obliged to make good because of an exclusion or modification under section 12 (power of county court to authorise exclusions or modifications in leases in respect of repairing obligations under section 11)."

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Section 9A, Landlord and Tenant Act 1985

In determining whether a house is fit for human habitation, regard is to be had to conditions set out in s.10(1)

Includes: repair, freedom from damp, internal arrangement, natural lighting, ventilation, water supply, drainage and sanitary conveniences, cooking facilities, prescribed hazards

Dwelling shall be regarded as unfit for human habitation if, and only if, it is so far defective in one or more of those matters that it is not reasonably suitable for occupation in that condition (s.10(1))

“Prescribed hazard” defined in Housing Health and Safety Rating System (England) Regulations 2005, Schedule 1

“Hazard: defined in Housing Act 2004, s.2(1)

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Section 11, Landlord and Tenant Act 1985

Implies repairing obligations upon landlords into all *relevant* tenancies

Implied into all tenancies of less than 7 years beginning on or after October 1961

Also implied into secure (and some assured) tenancies granted after 1 April 2012 with fixed term of 7 years or more (s.13(1A))

See ss.12-15 for scope

Does not assist most business tenants (s.32(2))

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Section 11, Landlord and Tenant Act 1985

Section 11:

"(1) In a lease to which this section applies (as to which, see sections 13 and 14) there is implied a covenant by the lessor–

> *(a) to keep in repair the structure and exterior of the dwelling-house (including drains, gutters and external pipes),*
>
> *(b) to keep in repair and proper working order the installations in the dwelling-house for the supply of water, gas and electricity and for sanitation (including basins, sinks, baths and sanitary conveniences, but not other fixtures, fittings and appliances for making use of the supply of water, gas or electricity), and*
>
> *(c) to keep in repair and proper working order the installations in the dwelling-house for space heating and heating water."*

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Section 11, Landlord and Tenant Act 1985

Extended to include not only structure / exterior but also remaining parts of building in which landlord retains an estate or interest, provided disrepair affects tenant's enjoyment of their dwelling-house or the common parts (s.11(1A))

Landlord cannot exclude or transfer the obligations using express contractual terms (s.12(1)(a), 11(4))

Landlord/agent given statutory right to enter premises for purposes of viewing the condition and state of repair on giving tenant 24 hours' notice in writing (s.11(6))

Standard of repair

Regard is to be had to the age, character, and prospective life of the dwelling-house and locality in which it is situated (s.11(3))

See *Montoya v Hackney LBC*, December 2005 Legal Action 28, QBD

May require expert evidence

Landlord entitled to perform repairing obligations in least onerous manner, provided method is reasonable – includes cheapest option where there are multiple ways of performing covenant (*Gibson Investments Ltd v Chesterton Plc* [2002] EWHC)

Where installations beyond economic repair, obligation to replace is "like for like" or "nearest equivalent" basis. No requirement to upgrade and bring in line with current standards unless required by law / regulations (*Sunlife Europe Properties Ltd v Tiger Aspect Holdings Ltd* [2013] EWHC 463

Standard of repair the same regardless of whether social or private landlord (*Wainwright Leeds CC* [1984] 13 HLR 117, CA)

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Rights and obligations arising outside of tenancy agreement

Occupiers' Liability Act 1957

- "common duty of care" (sections 2(1) and (2))

Defective Premises Act 1972:

- Section 1 – duty to undertake work to a dwelling in a professional / workman-like manner; use proper materials; and ensure that the dwelling is fit for human habitation when completed
- Section 4 – duty owed *"to all persons who might reasonably be expected to be affected by defects in the state of the premises … to take such care as is reasonable in all the circumstances to see that they are reasonably safe from personal injury or from damage to their property caused by a relevant defect"*
- Sections 4(1)-(3) do not create new repairing or maintaining obligations, but superimpose a "duty to take care" on top of existing obligations
- Section 4(4) – where landlord expressly or impliedly permitted to enter the premises to carry out repairs or maintenance, introduces a positive duty to ensure that failure to carry out that act does not cause personal injury/property damage

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Related rights

Related rights

Notice requirement – implied into all tenancy agreements which impose repairing obligations

- No liability until landlord (1) put on notice or otherwise has knowledge of need for repair; and (2) has failed to carry out repair within reasonable period of time thereafter (*Morris v Liverpool CC* [1988] 20 HLR 498, CA)
- Knowledge must be proven
- No prescribed "reasonable time"
- Does not apply to parts retained in control of landlord – i.e. outside demised premises

Right of access – landlords may have rights of access under terms of tenancy agreement, common law or statute

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Damages principles

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Damages

Fundamental principle = to place tenant in position they would have been had the obligations been performed

Object is not to punish the landlord

Courts have offered only broad guidance on assessing damages. Appropriate approaches include:

- Global award for discomfort and inconvenience
- Notional reduction in rent
- Combination of rent reduction and award for discomfort and inconvenience

Usual rule (both general and special damages will be available) has been applied in disrepair cases

Period attracting compensation runs from date when landlord had reasonable time to carry out works up to either (1) date works were carried out, or (2) if ongoing, date of trial

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Damages

Assessment will depend on extent of defects as well as level of distress and inconvenience experienced

Examples:

- *Wallace v Manchester CC* [1998] 30 HLR 111
- *English Churches Housing Group v Shine* [2004] EWCA Civ 434
- *Earle v Charalambous* [2007] EWCA Civ 1090
- *Grand v Gill* [2011] EWCA Civ 554
- *Moorjani v Durban Estates Ltd* [2015] EWCA Civ 1252

Remember to account for inflation

10% uplift applies in disrepair and unfitness claims (*Simmons v Castle* [2012] EWCA Civ 1288)

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Procedural issues and tactics

Kate Traynor

What we will cover

- Procedural issues
    - *Failing to comply with the pre-action protocol*
    - *Failure to plead actionable disrepair*
    - *Getting the drafting of the claim right*
- Tactics
    - *Early disclosure*
    - *Compelling ADR*
    - *Pleading limitation*
- Best Practice Hints and Tips
- Getting advice

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Procedural Issues

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Failure to comply with the pre-action protocol

‘”1.3 If a claim proceeds to litigation, the Court will expect all parties to have complied with the Protocol as far as possible. The Court has the power to order parties who have unreasonably failed to comply with the Protocol to pay costs or to be subject to other sanctions.”

“6.4 Failure to respond within 20 working days of receipt of the Letter of Claim or at all, is a breach of the Protocol (see paragraph 1.3) and the tenant is then free to issue proceedings.”

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Failure to plead the actionable disrepair

In *Bryant v Trivallis and Griffiths v Trivallis (3 July 2023, County Court in Cardiff).* HHJ James held:

- Inappropriate for the Claimant to plead the claim by reference to the expert report. The Claimant must plead the actionable disrepair.
- Ought not to have instructed their expert without advising the expert of the defendant's schedule of work
- Emphasised the importance of compliance with the pre-action protocol

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Inadequate Particulars of Claim

- Citing s.4 of the Defective Premises Act 1972 without any pleadings
- Failure to plead engagement of s.11 Landlord and Tenant Act 1985 - see for example, *Southwark LBC v McIntosh* [2002] 1 E.G.L.R 25
- Claim limited to the pleading – see for example, *Rolled Steel Products (Holdings) Ltd v British Steel & Corp & Others* [1985] 3 ALL ER 52

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Gaining the tactical advantage

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Pre-Action Disclosure (PAD) applications

- Becoming increasingly common in disrepair claims where the landlord fails to engage with the tenant
- Attempt to catch the landlord off-guard
- Significant legal costs

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The Rule – CPR 31.16

(1) This rule applies where an application is made to the court under any Act for disclosure before proceedings have started.

(2) The application must be supported by evidence.

(3) The court may make an order under this rule only where–

(a) the respondent is likely to be a party to subsequent proceedings;

(b) the applicant is also likely to be a party to those proceedings;

(c) if proceedings had started, the respondent's duty by way of standard disclosure, set out in rule 31.6, would extend to the documents or classes of documents of which the applicant seeks disclosure; and

(d) disclosure before proceedings have started is desirable in order to –

(i) dispose fairly of the anticipated proceedings;

(ii) assist the dispute to be resolved without proceedings; or

(iii) save costs.

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Two-Stage test

"Stage 1– A jurisdictional question - the court is only permitted to consider the granting of pre- action disclosure where there is a real prospect in principle of such an order being fair to the parties if litigation is commenced, or of assisting the parties to avoid litigation or of saving costs in any event.

Stage 2 – the exercise of discretion - If there is such a real prospect, then the court should go on to consider the question of discretion, which has to be considered on all the facts and not merely in principle but in detail."

Black v Sumitomo Corporation [2001] EWCA Civ 1819, per Rix LJ at [81]

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Alternative Dispute Resolution (ADR)

CPR 1.4 *" The court must further the overriding objective by actively managing cases. Active case management includes – encouraging the parties to use an alternative dispute resolution procedure if the court considers that appropriate and facilitating the use of such procedure".*

Pre-action Protocol for Housing Conditions Claims, para 4.1

"The courts take the view that litigation should be a last resort, and that claims should not be issued while a settlement is still actively being explored. Parties should be aware that the court will take into account the extent of the parties' compliance with this Protocol when making orders about who should pay costs."

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Ordering ADR

"[A]s a matter of law, the court can lawfully stay existing proceedings for, or order, the parties to engage in a non-court- based dispute resolution process … the court should only stay proceedings for, or order, the parties to engage in a non-court-based dispute resolution process provided that the order made does not impair the very essence of the claimant's right to proceed to a judicial hearing, and is proportionate to achieving the legitimate aim of settling the dispute fairly, quickly and at reasonable cost."

Churchill v Merthyr Tydfil County Borough Council [2023] EWCA Civ 1416, per Sir Geoffrey Vos MR [eliding 58 and 65]

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Pleading Limitation

In *Dezitter v Hammersmith and Fulham Homes (Central London County Court, 7 November 2023)*, the court considered the disrepair from the commencement of the tenancy up to the date of the hearing, where *Hammersmith* did not raise a limitation defence.

See also, *Ketteman v Hansel Properties Ltd* [1987] AC 189 (HL) at page 219:

"A defence of limitation permits a defendant to raise a procedural bar which prevents the plaintiff from pursuing the action against him. It has nothing to do with the merits of the claim which may all lie with the plaintiff; but as a matter of public policy Parliament has provided that a defendant should have the opportunity to avoid meeting a stale claim. The choice lies with the defendant and if he wishes to avail himself of the statutory defence it must be pleaded…"

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Best Practice Hints and Tips

- Carry out the repairs early on
- Keep evidence of appointments and failed attendance
- Avoid asking the tenant to confirm appointment

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Getting Advice Early

- Contact: clerks@landmarkchambers.co.uk

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Disrepair claims – The role of experts

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Disrepair claims – The role of experts

- Roles of experts in disrepair claims
- Experts in civil litigation: procedural and other requirements
- Issues/tactics

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Experts in disrepair claims

1) Causation – breach of L obligation or T's failures?

- E.g. damp caused by tenant's failure to ventilate (etc) or damage to property falling within repair covenant?

2) Is subject-matter of covenant/property in a damaged or deteriorated condition?

- E.g. has external façade deteriorated so as to engage repair obligation? Luxcool Limited v London Borough of Waltham Forest, 20 April 2022

3) Is nature of damage/deterioration such as to bring condition below the standard contemplated?

4) What work is required to put the property into the contemplated condition?

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(3) Is nature of damage/deterioration such as to bring condition below the standard contemplated?

- E.g. s.11(3) of LTA 1985: “In determining the standard of repair required by the lessor's repairing covenant, regard shall be had to the age, character and prospective life of the dwelling-house and the locality in which it is situated.”
- Warping of doors/windows – below standard of repair or commensurate with age of dwelling-house? Main issue in Montoya v London Borough of Hackney . Judge’s departure from single joint expert’s conclusion was wrong.

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(4) What work is required to put the property into the contemplated condition?

- Do works constitute repair or improvement? E.g. see Craighead v Homes for Islington Ltd [2010] UKUT 47 (LC) – whether replacing single-glazing with double-glazing went beyond repair (no)

- Pre-action protocol for housing conditions claims, para. 7.1(c): *"The expert should be asked to provide a schedule of works, an estimate of the costs of those works, and to list any urgent works."*
- Practicalities associated with execution of works – e.g. is it reasonable to expect T to remain in the property during the works? Shine v English Churches Housing Group [2004] EWCA Civ 434 at [36(7)] and [60].

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Experts in disrepair claims

- Not normally on damages – Court will have a ready basis in the rent being paid to calculate
- Pre-action protocol for housing conditions claims, para. 7.1(c): *"it might not be necessary to instruct an expert to provide evidence of the housing conditions, for example, if the only issue relates to the level of any damages claimed."*
- May be needed in commercial disputes and/or where rent passing is not based on a market rent

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Experts in civil litigation: Procedural and other requirements

Key sources:

- CPR Part 35
- Practice Direction 35
- Pre-action Protocol for Housing Conditions Claims, especially para. 7
- Guidance for the instruction of experts in civil claims published by the Civil Justice Council, available at https://www.judiciary.uk/wp-content/uploads/2014/08/experts-guidance-cjc-aug-2014-amended-dec-8.pdf (also hyperlinked in Pre-Action Protocol, para 7.1(b))

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Experts in civil litigation: Procedural and other requirements

- General rule: Expert evidence shall be restricted to that which is reasonably required to resolve the proceedings (CPR 35.1) and no party may call an expert or put in evidence an expert's report without the court's permission (CPR 35.4)
- Expert evidence given in a written report and court will not direct attendance in small claims or fast track unless necessary in interests of justice: CPR 35.5
- Requirements of report: CPR 35.10: Report must: comply with PD 35 requirements; contain statement of compliance; state substance of all material instructions;
- Once disclosed, any party may rely on report: 35.11
- Court may direct single joint expert (35.7-8), discussion between experts (35.12)
- Party may put written questions to expert: CPR 35.6

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Experts in civil litigation: Procedural and other requirements

- Parties asked to state in Directions Questionnaire whether:
- Any party will be seeing to adduce expert evidence
- Name, estimated costs, other details;
- Whether party is suitable for single joint expert

- In fast track cases, matters to be dealt with by directions include expert evidence; generally expert evidence will be restricted to two experts per party; single joint experts where possible (CPR 35.7)
- In small claims, most of Part 35 disapplied; no expert may give evidence, whether written or oral, at a hearing without the permission of the court (CPR 27.5)

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Experts in civil litigation: Procedural and other requirements

Obligations of expert (Ikarian Reefer case, [1993] 2 Lloyd's Rep 68):

- Expert evidence must be independent product of expert uninfluenced by exigencies of litigation
- Provide independent assistance to the court by way of objective, unbiased opinion within their expertise;
- Should state underlying facts and assumptions;
- Should indicate where issue falls outside expertise or conclusion is provisional;
- Should append any photos, reports, analyses etc. relied upon;
- If after exchange expert changes minds, should update other side/court asap
- Judge has to give sufficient reasons for preferring evidence of one expert to another, or that of a factual witness to an expert and (particularly) disagreeing with an expert where their evidence is uncontested: see Montoya v Hackney, 15th July, 2004 (unreported)

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Experts in civil litigation: Procedural and other requirements

Practice Direction 35 – essential reading. Key sections:

- para 2 – general requirements: focus on independence, duty to assist court, distinction between matters within/outside expertise;
- Para 3 – form and content of report: reflecting duties;
- Para 5 – cross-examination on contents of expert's instruction generally not allowed
- Para 6 – questions to experts
- Para 7 – factors court will take into account in deciding whether to direct single joint expert
- Para 9 – discussions between experts

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Issues

- Undermining other side's expert evidence
- Strengthening own side's expert evidence
- Status of expert evidence that is not produced for the proceedings/outside CPR Part 35

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Issues: Weakening other side's evidence

- Points to highlight if applicable:

- Compliance with directions?
- Any conflict or potential conflict of interest? (goes to weight)
- Compliance with duties as an expert?
- Is evidence within expertise or has expert strayed beyond?
- Is expert acting as expert or advocate?
- Is evidence directed at relevant issues or tendentious commentary?
- Has whole of evidence been considered and not just that which supports case of client?
- Have to cross-examine expert if going to invite the Court not to accept their evidence: see Griffiths v TUI UK Ltd [2023] UKSC 48 (and exceptions to that general rule at [70])

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Issues: Strengthening your side's expert evidence

- Duty of legal team to:

- Assess the expertise/admissibility of expert's evidence
- To ensure expert is aware of their duties;
- Disclose to expert all the relevant factual material, including material which undermines as well as supports instructing party's case;

See Kennedy v Cordia (Services) LLP [2016] UKSC 6 at [57].

- In practice, it will fall to legal team to ensure evidence complies with the relevant requirements under limit scope for challenge on the basis that it doesn't

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Issues: Non-Part 35 expert evidence

- CPR Part 35 deals with expert evidenced prepared for purpose of the proceedings
- Part 35 is not a comprehensive code
- Court can always take into account 'the opinion of skilled witnesses….wherever the subject is one upon which competency to form an opinion can only be acquired by a course of special study or experience' *Phipson on Evidence, 19th Ed, para 33-09*
- E.g. judge entitled to come to factual conclusions about installation of a damp-proof course and its failure to address damp from expert reports made predating proceedings which were in the bundle; Uddin v Islington [2015] EWCA Civ 369; NB para 27.2 of Practice Direction 32, which provides that documents contained within an agreed bundle are admissible unless court orders otherwise/a party gives written notice of objection

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Thank you

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