Housing repairs update

In this annual review, Beatrice Prevatt details policy, legislation and case-law concerning housing disrepair from December 2009 to date.

POLICY AND LEGISLATION

Decent homes standard

Decent homes must meet the current statutory minimum standard for housing: they must pose no category 1 hazards, be in a reasonable state of repair, have reasonably modern facilities and services and provide a reasonable degree of thermal comfort. The previous government's target was that all social housing should meet the decent homes standard by the end of 2010.

On 21 January 2010, the National Audit Office published a report on the decent homes programme, which indicated that 100 per cent decency will not be achieved until 2018/2019 and that 305,000 social sector homes are still non-decent.[1]

On 18 March 2010, the House of Commons Public Accounts Committee published its review of the decent homes programme in England.[2] It concluded that the 2010 target will be missed and that the government needs to do more to ensure that landlords can complete the outstanding work and properties are not allowed to fall back into disrepair.

On 26 August 2010, provisional statistics on local authority-owned, non-decent homes were released.[3] Based on these provisional returns:

- On 1 April 2010, 10.2 per cent of the social housing stock was non-decent, down from 14.5 per cent a year earlier.
- For local authority stock only, the percentage of non-decent homes declined from 22 to 16.2 per cent.
- While for registered social landlords, the percentage of non-decent homes declined from 8.3 to 5.3 per cent.

In the 2010 Spending Review settlement for housing, published on 20 October 2010, the government announced that it will invest over £2bn of capital funding to help towards completing the decent homes programme, which was due to have ended in December 2010. Funding of £1.595bn will be available over the next four years to help make local authority social homes decent with an additional £0.510bn being provided for 'gap' funding existing stock transfers. On 11 November 2010, the housing minister announced that the targeting of the funding would change and that the Homes and Communities Agency (HCA) would now ensure that the decent homes funding is allocated where it is most needed.

Tenant Services Authority

On 1 April 2010, the Tenant Services Authority (TSA) became the new regulator for all social housing, both council and housing association stock. The TSA published a 'regulatory framework' indicating how the authority will exercise its powers.[4] The new framework contains six new national standards that social housing providers have to meet. The home standard requires registered providers:

- to ensure that tenants' homes meet the standard set out in section 5 of the government's decent homes guidance (*A decent home: definition and guidance for implementation. June 2006 – update*) by 31 December 2010 and continue to maintain their homes to at least this standard after this date; however, the TSA may agree an extension to the deadline where this is reasonable;
- to provide a cost-effective repairs and maintenance service to homes and communal areas that responds to the needs of, and offers choice to, tenants and has the objective of completing repairs and improvements 'right first time';
- to meet all applicable statutory requirements that provide for the health and safety of occupants in their homes; and
- to set out in an annual report how they are meeting the above obligations and how they intend to meet them in future, and providers shall then meet the commitment that they have made to their tenants.

In June 2010, the housing minister announced that the coalition government was reviewing the role and purpose of the TSA and the best framework for regulating social housing. In October 2010, the coalition government published its review of social housing regulation.[5] The review proposed that the TSA should be abolished and the regulation of social housing transferred to the HCA, which will establish a separate independent regulation committee for this purpose. The HCA will be expected to focus only on serious failings by providers of social housing of clear service standards, with complaints being dealt with at a local level. It is proposed that tenants should contact MPs, councillors or a tenant panel once the landlord's complaints procedure has been exhausted, and that those dealing with the complaint should intervene in order to resolve the problems and only refer the matter to the Housing Ombudsman or the Local Government Ombudsman if it cannot be resolved. The ombudsmen should be the sole government bodies dealing with individual complaints, but in determining individual complaints the ombudsmen should have regard to the national and locally negotiated standards.

On 24 November 2010, the TSA wrote to all social housing providers to notify them that it anticipates that the main changes to social housing regulation will come into effect from 1 April 2012.[6] Until then, the TSA will work with the HCA to ensure a smooth transfer of functions and people to the new regulator, but will meanwhile retain and exercise its regulatory functions.

Ombudsmen's complaints

Tenants of social housing in England can complain about their landlords' services to either the Local Government Ombudsman, in respect of council housing, or the Housing Ombudsman, in respect of most other social housing. In April 2010, the two ombudsman services agreed a protocol to improve joint working and information sharing between them. The protocol will help to direct social housing tenants to the appropriate ombudsman scheme and paves the way for more collaborative working between the two services, for example in relation to feedback to landlords, staff development and the issue of good practice guidance. Tenants of social housing in Wales can complain to the Public Services Ombudsman for Wales.

In September 2010, the Law Commission issued a consultation paper on reforming the statutory provisions governing public services ombudsmen, including the Housing Ombudsman, the Local Government

Ombudsman and the Public Services Ombudsman for Wales.[7]

Review of civil litigation costs

On 14 January 2010, Lord Justice Jackson's final report on the review of civil litigation costs was published.[8] Chapter 26 of the final report deals with the costs regimes for housing cases. The final report maintained the view that there should be fixed costs for fast-track disrepair claims, but no longer sought to suggest that these should be treated as road traffic claims with a personal injury element. Lord Justice Jackson stated that further data should be obtained on housing cases before recommending any matrix of fixed costs for fast-track housing cases. In making any such recommendation, Lord Justice Jackson indicated that he would take account of two facts:

- That lawyers who specialise in housing are dependent on recovered costs in cases which they win, in order to cross-subsidise their other activities.
- That it would be important not to set fixed fees at a level which would exacerbate any problems with the availability of solicitors and Law Centres® that are willing and able to undertake housing work in areas where tenants need their services (Part 3: chapter 15 para 6.16).

Lord Justice Jackson also indicated that an alternative approach to low-value housing disrepair claims might be to set up an ombudsman scheme to deal with such claims, which might then allow for the raising of the small claims limit to £5,000. However, this was not a recommendation simply a matter raised for further consideration (Part 3: chapter 15 para 6.17). (It appears that Lord Justice Jackson was unaware that tenants of registered social providers already have the ability to complain to an ombudsman in respect of housing disrepair.)

In November 2010, the Ministry of Justice (MoJ) issued a consultation paper in relation to the implementation of some of Lord Justice Jackson's recommendations, which included the following:[9]

- The reform of conditional fee agreements (CFAs) so that success fees and after-the-event (ATE) insurance premiums are no longer recoverable from the losing party.
- That success fees be limited to 25 per cent of damages.
- An increase of ten per cent in general damages to help claimants in paying towards the success fee for which they will become liable.
- Strengthening the Civil Procedure Rules (CPR) Part 36 arrangements to encourage parties to make and accept reasonable offers.
- Qualified one way costs shifting (QOCS) in personal injury claims so that a losing claimant would only have to pay the defendant's costs where, and to the extent that, in all the circumstances it is reasonable for him/her so to do. Responses are sought concerning whether or not QOCS should apply to other categories. (In his final report, Lord Justice Jackson stated that there was a strong case for saying that non-legally aided claimants in housing disrepair cases should benefit from QOCS (Part 5: chapter 26, para 4.4).)

The coalition government is still considering the recommendations on fixed recoverable costs in the fast track.

Legal aid reform

In November 2010, the MoJ published its proposals for the reform of legal aid in England and Wales in order to achieve a £350 million cut in the legal aid budget by 2014/2015.[10] The consultation paper proposes that serious housing disrepair cases, where the litigant is not primarily seeking damages but a repair of such significance that without it the life or health of the litigant or his/her family may be at serious risk (such as the repair of gas equipment) (para 4.78), and damages claims for disrepair where they are brought as a counterclaim in rent arrears possession claims (para 4.76), should remain in scope. However, less serious disrepair and housing disrepair proceedings where the primary remedy sought is damages, including damages for personal injury (para 4.194), and tortious claims, including negligence and nuisance claims (para 4.239), will be out of scope.

The consultation paper also makes proposals for the reform of expert witness fees drawing on the responses to the 2009 consultation paper *Legal aid: funding reforms*.[11] In the long term, the coalition government wishes to put in place a new set of fees for expert witnesses, wherever possible, made up of fixed fees, graduated fees and a limited number of hourly rates (para 8.13). In the short term, the coalition government proposes that the benchmark hourly rates currently applied by the Legal Services Commission (LSC) when considering whether or not experts' charges are reasonable should be codified and subject to a ten per cent reduction (para 8.14). The benchmark figure for a surveyor is £50 per hour. This would be the maximum allowable subject to the LSC having discretion to authorise that the rates be exceeded in exceptional circumstances, namely, where the expert's evidence is key to the client's case and either the complexity of the material is such that an expert with a high level of seniority is required, or the material is of such a specialised and unusual nature that only very few experts are available to provide the necessary evidence (para 8.16).

The consultation paper also proposes to introduce a supplementary legal aid scheme in which a percentage of funds are recouped from cases where successful claims for damages have been made and the claimant was receiving legal aid. These funds would then be used to supplement the legal aid costs of other cases (para 9.27). This proposal is made to ensure that legal aid does not become a more attractive funding route than privately funded CFAs, in the light of the proposal that success fees should come out of damages awarded (para 9.33).

Housing disrepair pre-action protocol

The Civil Justice Council (CJC) is conducting a review of the effectiveness of the housing pre-action protocols, including the disrepair protocol. The CJC invited the Law Society to bring together stakeholders with relevant experience to consider how well (or otherwise) the housing protocols are operating. It is anticipated that the CJC will make recommendations for reform to the Civil Procedure Rules Committee and is due to report shortly.

CASE-LAW

Funding: conditional fee agreements

■ Morris and another v Southwark LBC

[2010] EWHC B1 (QB), 5 February 2010

The tenants appealed against a decision of the deputy costs master that a CFA was unenforceable for public policy reasons. The CFA had been used for housing disrepair claims that had been settled for relatively low values. It contained an indemnity clause whereby, instead of costs being protected by ATE insurance, the solicitor had undertaken to pay the opponent's costs if the claim was lost so that the tenants were fully protected against costs.

On appeal, it was held that the CFA was enforceable. The question was whether or not public policy demanded that this CFA – looked at in the round – should be struck down because of the interest which the solicitor had in the litigation. The public interest required the court to decide whether or not what was agreed had given rise to a conflict of interest that prevented the solicitor from acting properly in the interests of justice. The CFA regulations were permissive in the sense

that they allowed agreements and arrangements which were otherwise unlawful. However, it did not follow that the addition of an extra provision, such as the indemnity clause, could bring down the rest of the CFA merely because there was no permission for that particular clause within the scheme. The question to be considered was whether or not the obligation created by the indemnity clause to pay the other side's costs would place on the tenant's solicitor an unacceptable burden which might realistically cause him/her to override the interests of the client and to put forward different interests.

Here, there was no real or significant risk that the CFA might tempt the tenant's solicitor, for his personal gain, to inflame the damages. The scheme applied to cases with a low risk, low quantum, low volume, low success fee and an enhancement of access to justice. The one disadvantage, namely the potential conflict of having a modest financial stake in the litigation, was so small as to be clearly outweighed by the advantages and potential value of the scheme. The CFA was neither a contract of insurance, albeit that the indemnity clause created principles similar to such a contract, nor was it unlawful on this basis.

The council has appealed and judgment is awaited.

Practice and procedure

■ Henley v Bloom

[2010] EWCA Civ 202, 9 March 2010

The tenant had complained to his landlady about damp problems for some years. The landlady commissioned a report from a building company but no works were carried out. A claim for possession brought by the landlady against her tenant was compromised by an agreement that possession would be given on payment of an agreed sum. Before departing, the tenant commissioned an inspection by an expert on housing conditions. On taking possession, the landlady sent in builders who renovated the premises. The tenant then brought a claim for damages for disrepair. The landlady applied successfully to strike out the claim on the basis that it was an abuse of process not to have raised the claim in the previous proceedings, and because it would be impossible to have a fair trial as she could not commission an expert to report on what conditions had been before the renovation.

The Court of Appeal allowed the tenant's appeal and restored his claim. There had been no 'abuse'. While the tenant could have raised the disrepair as a counterclaim in the possession proceedings, he was not obliged so to do. Had the possession claim proceeded to trial, it would not have necessitated any finding about whether or not the flat was in disrepair. Nor was it impossible for there to be a fair trial. Although the landlady was liable to be at some disadvantage, she was in possession of sufficient information to enable her to advance a proper defence; she had surveyors' reports about the condition pre-renovation and could call her builders to give evidence of the conditions they had found. Although there were grounds for thinking that the tenant had acted in a rather unattractive way by keeping the disrepair claim up his sleeve, he had not acted unlawfully or dishonestly, and the claim could not have come entirely out of the blue for the landlady.

■ Campbell v PCHA

[2010] EWHC 859 (QB), 15 April 2010

The claimant applied for an injunction requiring the tenant to allow staff to make a gas safety inspection. A judge granted the injunction and awarded £1,000 costs of the application. The tenant appealed on the basis that no injunction should have been made as other proceedings for possession and a disrepair counterclaim were outstanding between the parties and the question of access could have been addressed in them, and as she had notified the landlord's agents that she did not use gas at the premises.

The High Court upheld the judge's order for the injunction, but reduced the costs from £1,000 to £150. However, as the tenant had lost the substantive issue on appeal, she was ordered to pay the costs of the appeal in the sum of £1,499.

■ Fearns (trading as 'Autopaint International') v (1) Anglo-Dutch Paint & Chemical Company Ltd and others

[2010] EWHC 2366 (Ch), 23 September 2010

In certain circumstances, tenants can 'set-off', against rent due to the landlord, the amounts they have paid in getting repairs carried out and damages for disrepair. *Fearns* is not a housing case, but it contains the most up-to-date judicial discussion of what a 'set-off' is and how and when it works.

Liability

Contractual liability

Contractual disrepair claims are only possible for the periods when the contract or tenancy agreement exists. This caused problems for former secure tenants/tolerated trespassers who had breached suspended possession orders and thereby lost their tenancies. Such former tenants had to resurrect their tenancies under Housing Act (HA) 1985 s85(2) in order to be able to pursue disrepair claims.

The provisions of Housing and Regeneration Act (H&RA) 2008 s299 and Sch 11 mean that such former tenants now have replacement tenancies, but can only bring disrepair claims for the period when they were tolerated trespassers if the replacement tenancy is treated as, in effect, the revival of the original tenancy under H&RA Sch 11 para 21(3).

■ Chase v Islington LBC

Clerkenwell and Shoreditch County Court, 30 July 2010[12]

A tolerated trespasser brought a claim against her landlord for damages for disrepair and for an order for specific performance. Within the claim she issued an application for an order that her current tenancy and her former original tenancy, which had terminated in 2001, should be treated as the same tenancy. When considering her application, HHJ Mitchell set out the following principles:

- The burden of showing that discretion to treat the former and replacement tenancy as the same tenancy should be exercised rests on the tenant.
- The aim of the court is to produce a fair result for both parties.
- Discretion should be exercised having regard to all the circumstances, including any benefit or prejudice to the parties in granting or refusing the application.
- Regard should be had to the extent to which the parties believed or treated the original tenancy as having continued during the period of tolerated trespass, including the extent to which either party acted to his/her detriment.
- It would be unjust to refuse relief to a tenant who had technically been in breach of the suspended possession order by missing an instalment payment by a day, but who thereafter complied with the terms of the tenancy for a number of years and discharged all the arrears.
- It would be unjust to grant relief where the landlord allowed a vulnerable occupant to occupy the premises as a matter of grace for a limited period while s/he was attempting to find alternative accommodation, but failing to make any payments on account of the occupation.
- The importance of granting or refusing relief to the parties should be considered.
- Regard should be had to the merits of the claim.
- If the costs of defending a claim would be out of proportion to the amount claimed or if the merits were slight, it may be unfair to allow the claim to proceed.
- There is a need to avoid protracted satellite litigation.
- The court can impose conditions on the grant of relief, for example, by limiting the amount of damages which can be recovered.

The judge noted that, in this case, the use

and occupation charges were identical to what would have been charged for a tenancy, and included an amount to fund repairs. Although the arrears had remained high throughout, they had fallen by almost £1,000 but there had been no agreement by the applicant to clear the arrears, or any agreement by the council not to enforce the order for so long as the applicant kept to the terms of the agreement. The judge also considered it unlikely that the claimant would receive much more than £5,000 in damages. Taking these matters into account, he decided to exercise his discretion in favour of permitting the new tenancy to be treated as part of the original tenancy for the purpose of the disrepair claim.

However, fairness required that the claim for the disputed period, namely from May 2003 to 20 May 2009, should be limited to the amount of arrears outstanding on 20 May 2009, ie, £3,880.33. He considered that this struck the correct balance between the interests of the claimant who had paid monies, which in part were calculated to contribute towards the costs of repairs, and those of the defendant who for seven years had a tolerated trespasser who failed regularly to comply with her obligations.

The judge stated that the judgment should not be taken to imply that it will always be appropriate to grant leave on condition that the award is limited to the arrears owed.

In some cases there will be a much better payment history and much lower arrears. In others the likely award is likely to be higher than in this case. To limit the award in such cases may cause injustice to the applicant (para 54).

Comment: This judgment appears to impose a much more onerous test than that for resurrecting tenancies under HA 1985 s85(2) (see, for example, *Lambeth LBC v Rogers* (2000) 32 HLR 361; (1999) 29 October, CA, where it was held that several months' compliance with an agreement to pay towards the arrears was sufficient to warrant the postponement of the date of possession and the consequent resurrection of the tenancy). However, in this case there had been no agreement to clear the arrears and the judge took the view that the claimant would not have succeeded in any application under section 85.

■ Kirkham v Link Housing Group Ltd

[2010] CSOH 31,
12 March 2010

A tenant claimed damages for personal injury when she tripped on one of the concrete paving slabs forming part of the footpath from the front door of the house to the pavement. No defects to the footpath had ever been reported to the landlord but the claim was brought for breach of her tenancy agreement, which was in the terms of the model Scottish secure tenancy agreement. The tenant relied on the landlord's breach of its obligation to carry out inspections of the common parts at reasonable intervals on the basis that the definition of common parts included any common facilities in that building such as entrance steps, paths and accesses, among other things. The claim failed on the basis that the footpath was not a common part, but a means of access to the accommodation which was exclusive to the tenant and not shared with or used by any other tenants.

■ Veolia Water Central Ltd v London Fire & Emergency Planning Authority

[2009] EWHC 3109 (QB),
2 December 2009

This case concerned a dispute about the financial responsibility for the maintenance of fire hydrants where the water authority had a duty to keep the hydrants in good working order, but the expense of doing so was recoverable from the local fire and rescue authority. The case gives useful guidance on the interpretation of the term 'proper working order' found in Landlord and Tenant Act 1985 s11 and many express repairing obligations. Justice Edwards-Stuart said:

In the context of something being in working order, there are other adjectives that come to mind apart from 'good'. A machine could be described as in perfect working order, or proper working order or, if different, in satisfactory working order. 'Working order' is defined in the Shorter Oxford Dictionary *as 'the condition in which a machine, system, etc, works satisfactorily or in a specified way'. On the basis of this definition it is clear that the adjective 'satisfactory' adds nothing. I consider also that the adjective 'proper' adds nothing to the definition of 'working order'. However, when a person speaks of a machine being in 'perfect working order', I consider that he or she would be describing a machine that ran flawlessly. A proud owner of a vintage motor car, if describing it as being in 'perfect working order', would be conveying the impression that it was working just as well as it did many decades earlier shortly after it left the factory.*

As a matter of ordinary language, I consider that 'good' denotes a rather better condition than 'satisfactory' but a poorer condition than 'perfect'. Whether it is closer to 'satisfactory' or to 'perfect' might be a matter of debate, although I would incline to the former. Accordingly, I consider that the adjective 'good' does add something to the expression 'working order' and that the word is not simply redundant (paras 91–92).

■ Bilgili v Paddington Churches HA and Pathmeads HA

[2010] EWCA Civ 1341,
2 November 2010

Tenants agreed to their landlords undertaking a window replacement programme. As part of the work, the kitchen window, which had contained a spinner vent, was replaced by a sealed glazed unit with no vent. The tenants later claimed damages for consequent condensation dampness and mould growth in the kitchen on the basis of a breach of the admitted covenant to carry out repairs in a proper workmanlike manner. A district judge refused the claim on the basis that what was being asked of the landlords went beyond their covenant and required them to improve rather than repair. This decision was overturned on appeal to a circuit judge who held that in removing the fan and essential fitting, the landlords were in breach of their covenant to the tenants.

The Court of Appeal refused the landlords' application for permission to appeal. It said ' … a kitchen window which is acknowledged to require ventilation and so has a spinner vent in it, has not been properly repaired if it is replaced with a sealed window that has neither a means of opening nor any form of ventilation' (para 5).

Tortious liability

■ Robinson v P E Jones (Contractors) Ltd

[2010] EWHC 102 (TCC),
27 January 2010

Over 12 years after he bought a house, the owner discovered that the flues to the gas fires had not been constructed in line with good building practice or the building regulations. Two years later, the owner sued the builder who had sold the house to him. As a claim for breach of contract was statute barred, the claim was brought in tort on the basis that it was brought within three years of the owner's knowledge of the defect, and therefore not statute barred in line with Limitation Act 1980 s14A. As a preliminary issue, it was held that while a builder did not in general owe a duty of care to a subsequent owner or occupier of the building where there was economic loss, this did not apply where the owner had entered into a contract with the builder who, therefore, had a special relationship of proximity.

However on the facts of this case, the builder owed no duty of care to the owner as any such liability was excluded by the building conditions attached to the contract. If the builder had owed a duty of care to the owner, the action would not have been statute barred

as the owner did not have actual or constructive knowledge of the defects more than three years before the proceedings were commenced. The owner was reasonably entitled to take the view, over the first 12 years, that the gas fires were simple appliances which did not require servicing, but only repair as and when necessary. So, he did not have constructive notice of the defects before they were found by the gas service engineer.

■ Esdale v Dover DC

[2010] EWCA Civ 409,
15 March 2010

The claimant sued for personal injuries sustained when she tripped on a footpath that gave access to the block of flats in which she lived. There was a change in level, where the concrete path changed to tarmac, that had not been reported to the council. A council officer had inspected the footpath but had not regarded it as requiring attention. The council officer indicated that if a defect was more than three-quarters of an inch in height, he would report it for repair. The judge found that the height of the tripping point had been between three-quarters of an inch and one inch, but did not find that the council had breached its duty of care under Occupiers' Liability Act 1957 s2(2). The judge did not consider that the defect gave rise to a real danger; he held that it was a minor defect and that by instructing an officer to inspect the pathway periodically, the council had complied with its duty of care. The claimant appealed on the basis that as it was the council's policy to repair defects of more than three-quarters of an inch in height, the defect should have been regarded as dangerous and repaired.

The Court of Appeal dismissed the appeal. The test whether or not the council has taken such steps as are reasonable to see that visitors are reasonably safe does not depend on what standards of safety the council sets itself as a matter of policy. The test to be applied is an objective one. The judge was obliged to form his own independent view of the dangerousness of the defect and his conclusion was one which he was entitled to reach.

■ Lambert and others v Barratt Homes Ltd and Rochdale MBC

[2010] EWCA Civ 681,
16 June 2010

The claimants brought a claim in nuisance against a developer and their local council. They claimed that water accumulating on the council's land had escaped and flooded their homes. The accumulation of water had been the result of local housing development work which had interfered with previous drainage arrangements. It was held that the developer was primarily responsible, but the claim against the council was also upheld on the basis that it had breached its duty of care in failing both to abate the nuisance and actively co-operate to solve the problems.

The Court of Appeal allowed the council's appeal. The court held that as the developer was liable to pay for the cost of the remedial works, it was not fair, just or reasonable to impose on the council a duty to carry out and pay for any part of the works. The council was under a duty to co-operate in a solution but that did not extend to obliging it to meet the whole costs of the relief works. The court gave guidance about the extent of the measured duty of care that one property owner might owe to a neighbour to control the escape of accumulated surface water from its land.

■ Hines and another v King Sturge LLP

[2010] CSIH 86,
5 November 2010

A fire occurred in a multi-storey building in Scotland. The tenants claimed that the fire had caused extensive damage because a fire alarm system, which the managing agents of the building were obliged to maintain, had not operated properly. The judge held that the agents did not owe a 'duty of care'. By a majority, the appeal court decided that it might be possible for a duty of care to be owed, and directed that the matter be tried.

Quantum

■ Photis v Shamas, Uddin and Shamas

Bow County Court,
3 December 2009[13]

The tenant brought a claim for disrepair from March 2004 to January 2009 in respect of the following:

- A sagging ceiling in the living room which had sustained damage because of a leak from the overflow to the bath above.
- A front entrance door which did not open and close properly.
- Damp to the left of the front door.
- A broken patio door.
- Disrepair to a bedroom window.
- Some damp to one bedroom.

There was also a significant problem with rodents which came from the adjoining property owned by the defendants. The tenant also claimed for damage to her laptop computer caused by a leak to the living room when she used the bath, having been wrongly advised that the bath had been fixed.

Circuit Judge Wright accepted that there was significant disrepair, although the property was habitable. The tenant had been unable to have a bath or shower because she was worried about the overflow leaking, the patio door was a security risk and the front door, which was difficult to open and shut in the winter months, was both a security and fire risk.

The judge awarded damages at the rate of 20 per cent of the rent from March 2004 to July 2007, and 25 per cent of the rent from July 2007 to January 2009, as the level of disrepair increased and because of the rodent problem. The rent payable was as follows: £520 per month from March 2004 to June 2005; £600 per month from June 2005 to September 2006; and £650 per month from September 2006 to date.

So, the award totalled £7,455 general damages and £400 special damages, plus interest on general damages in the sum of £211.

■ Fakhari v Newman

Woolwich County Court,
7 January 2010[14]

From May 2008 the tenant rented a property from his landlord at a rent of £984 per month. There were problems with the boiler from the outset. In December 2008, the boiler broke down completely leaving the tenant without heating and hot water until 17 June 2009 when hot water (but not heating) was restored. The property was also draughty because of defective windows that leaked during periods of heavy rain. The landlord harassed the tenant and claimed possession. On the tenant's counterclaim, he was awarded £9,250 for disrepair, namely:

- 25 per cent of the rent from May 2008 to December 2008;
- 75 per cent of the rent between December 2008 and June 2009; and
- 43 per cent of the rent from June 2009 on.

The tenant also recovered damages for the harassment and failure to protect his deposit.

■ Ontas v Pathmeads HA

Edmonton County Court,
12 April 2010[15]

The claimant was the tenant of a three-bedroom house from 26 March 2007 to 25 August 2008. The house was let fully furnished at a rent of £255 per week rising to £277 per week from 1 April 2008. The tenant brought a claim for the following:

- defective heating and hot water for a period of 4½ months;
- defective windows and doors causing heat loss;
- disrepair that enabled access for a serious mouse infestation;
- a defective conservatory roof permitting damp;
- damp to the downstairs WC, which also had a missing light;
- minor kitchen-sink blocking;
- various exterior dilapidations; and
- broken glazing left for three weeks, which caused problems with local drunks who thought that the property was unoccupied.

District Judge Joslin made a global award

of £5,000 general damages, plus special damages of £315 and interest from the date of issue of the proceedings.

■ Shazad v Khan

Birmingham County Court, 26 August 2010[16]

The tenant lived with his wife and five children (aged between 13 and 2½ at the date of trial) in a three-bedroom house, which he rented for £4,200 per annum. He brought a claim for disrepair from 2005. One bedroom suffered from water penetration originally as a result of a leaking roof, and then from a blocked gutter and broken downpipe. This bedroom was unusable throughout the year. A second bedroom suffered from water penetration because of defects to the chimney and was only usable in the summer months. Since 2008 there had also been water penetration from the front entrance door when it rained. Since 2005 the boiler had not worked properly and would cut out unexpectedly, so that there had only been intermittent heating and hot water.

District Judge Musgrove described this as a serious case because the inconvenience and distress to the family was wholly disproportionate to the landlord having to incur expenses to resolve the problems. He found that the provision of heating and hot water is the basis of living in the 21st century and their absence was wholly unacceptable.

■ He awarded 40 per cent of the rent for the disrepair to the bedroom and front entrance door for a period of four years and seven months: £7,700.

■ He held that the assessment of damages relating to the inconvenience from the loss of heating should be assessed separately, and awarded £2,000 per annum in respect of the intermittent heating and hot water for four years and ten months.

■ The counterclaim had been restricted to £15,000, so damages were limited to that amount.

Comment: As a global award, this amounted to over 75 per cent of the rent.

■ Smyth v Circle Anglia

Clerkenwell & Shoreditch County Court[17]

The tenant brought a claim for some water penetration to his living room from the balcony above and condensation dampness to most rooms in his one-bedroom flat from 30 July 2007 until 25 February 2010, when he was rehoused temporarily for remedial works to be carried out, including installing ventilation to the bathroom and kitchen, and adding thermal insulation to external walls, ceiling and floor which were identifiable as cold bridging sites. The claim for condensation was brought on the basis that the landlord was liable for breach of an obligation to keep the property in 'good condition'. Judgment was entered in default of a defence. The landlord's application to set aside the judgment was refused on the basis that there was no good explanation for the failure to file a defence or to comply with the pre-action protocol. The claim was settled for damages totalling £10,000.

Comment: This equates to over 75 per cent of the rent, which was £90.94 per week.

■ Bernard v Meisuria

Central London County Court, 22 November 2010[18]

The tenant of a five-bedroom house, who lived with his disabled wife and five children, brought a claim for a rat infestation from 2005 until March 2009, when he moved out of the premises, and other more minor items of disrepair, namely, some dampness to one bedroom, defective wiring and a defective boiler, for shorter periods of time.

After a contested trial, the landlord was found liable for the rat infestation and defects. The judge preferred the evidence of the tenant's environmental health officer to the pest control officer and CCTV expert relied on by the landlord, and found that the infestation had emanated from the drains, which were in disrepair.

■ He awarded damages of £20,000 in respect of the rat infestation, to include the special damages claim, having found that a property which was infested with rats had little rentable value.

■ He awarded a further £1,250 in respect of the other disrepair.

■ As the tenant had beaten a CPR Part 36 offer made on 3 December 2007, the judge also awarded indemnity costs and interest on the damages and costs at one per cent over the minimum lending rate from 24 December 2007. The total damages award was £22,290.

Ombudsman Report

Local Government Ombudsman

Complaint

■ Harlow DC

09 005 422, 14 April 2010

The tenant complained about the council's unreasonable delay in carrying out repairs to her home. A water leak rendered the ceiling to her daughter's bedroom unstable and the room could not be used for 18 months. The tenant's daughter had to share a bed with her, sleep on the sofa or stay with friends. This took place during her daughter's final year at college and had a negative impact on their family life. The Ombudsman upheld the complaint. He recommended payment of £4,500 compensation in respect of inconvenience experienced, and the time and trouble taken by the tenant in pursuing her complaint.

Comment: This report suggests that the Ombudsman is now awarding more than the £500–£2,000 per annum guidelines which were being used in 2008. However, the report does not identify the level of the tenant's rent, so it is not possible to cross check the damages award with the rent.

Housing standards

■ Bolton MBC v Patel

[2010] UKUT 334 (LC), 19 October 2010

The council was satisfied that the condition of rented premises was a category 1 hazard, arising from the fact that the central heating and hot water boiler were defective and not working (giving rise to hazards of excess cold and food safety), and that there were exposed electric wires in two locations. The council decided that emergency remedial action was required on the basis that there was a category 1 hazard which involved an imminent risk of serious harm to the health and safety of the occupiers of the premises: HA 2004 s40. The council instructed a gas engineer to replace the boiler and deal with the faulty electrical fittings. On the landlord's appeal under HA 2004 s45, a Residential Property Tribunal (RPT) held that the council's decision in relation to the electrical hazards was justified, but that emergency remedial action was not a course that was open in respect of the hazards of excess cold and food safety. The council appealed.

The Lands Chamber dismissed the appeal. The RPT had made no error of law, and its findings of fact: that the weather forecast showed that it was not unusually cold for the time of year; that, in any event, the occupiers were not wholly without heating; and that they had already been without heating for several months, were soundly based.

The judgment provides an instructive guide to hazards assessment and offers guidance on the correct approach to the conditions for emergency remedial action.

■ Hanley v Tameside MBC

[2010] UKUT 351 (LC), 30 September 2010

On receiving a complaint from tenants, a council inspected a rented property in which the loft had been converted to provide a bedroom. The council decided that the steep stairs to the loft and the restricted ceiling height constituted a category 1 hazard, and it issued a prohibition notice requiring occupation to cease. The landlady appealed unsuccessfully to the RPT. On a further appeal, the Lands Chamber found that the RPT has misdirected itself on the correct relationship between HA 2004 Part 1 and the building regulations, but had, nevertheless, reached the right conclusion.

■ Health and Safety Executive v Severn Vale Housing Society and Lee

Gloucester Crown Court, 7 December 2009

The landlord engaged Mr Lee, a self-employed plumber, to decommission its tenant's back boiler. The work was carried out incorrectly with the result that the first time the tenant lit a fire after the job, the boiler exploded killing her. The Health and Safety Executive prosecuted for breaches of Health and Safety at Work etc Act 1974 s3. The court sentenced the landlord to pay a fine of £50,000 and £7,500 costs. Mr Lee was ordered to pay a fine of £7,500 and £1,500 costs.

■ R v Carroll

Nottingham Crown Court, 8 January 2010

A landlord failed to maintain the standard of two properties he let to students. The landlord admitted failing to comply with regulations relating to the management of homes, including fire safety and the condition of the properties. One property had a mouse infestation, mould on the kitchen walls and a socket hanging in the kitchen with exposed wires. The other property had a washing machine and a freezer blocking a stairwell that served as a fire escape, a smoke alarm had been disconnected and electric wiring had not been tested within the past five years. Neither property was licensed as a house in multiple occupation. The landlord pleaded guilty to 17 charges. He was fined £14,700 and had £37,500 in rent payments confiscated for the period when the two properties were unlicensed. He also had to pay £10,000 towards court costs.

Environmental Protection Act 1990

■ R (Ethos Recycling Ltd) v Barking & Dagenham Magistrates' Court and Barking & Dagenham LBC (interested party)

[2009] EWHC 2885 (Admin), 13 November 2009

The claimant was a waste recycling company. The claimant's neighbours and other residents complained to the council about the nuisance caused by the dust it generated. The council issued an abatement notice under Environmental Protection Act (EPA) 1990 Part III. The claimant appealed on the ground that the council had not obtained the consent of the secretary of state before issuing the notice: EPA s79(10). A district judge rejected that point and the claimant sought a judicial review. The Divisional Court rejected the claim.

The EPA only required the council to obtain consent before instituting summary proceedings. The service of the notice was not caught by that requirement albeit that a prosecution for any breach would be so caught.

■ Wilson v Ashford BC

[2010] EWHC 639 (Admin), 9 March 2010

The council served Ms Wilson with a notice to abate a statutory nuisance under EPA s80. She appealed to the magistrates' court but the appeal was dismissed with costs. She gave notice of appeal to the Crown Court, but a few days before the hearing date she withdrew that appeal.

The Divisional Court upheld an order that she should also pay the council's costs incurred in the withdrawn appeal, despite a notification from the Crown Court which had suggested that an appeal could be withdrawn on at least three days' minimum notice.

■ R (Mark Oliver Homes) v Bradford Magistrates' Court

[2010] EWHC 2477 (Admin), 18 June 2010

The claimant was fined £2,000 in respect of a complaint by residents of foul water accumulating under the new-build property that it had constructed. The claimant argued that as it had not been served with a notice under EPA s82(6), the proceedings were invalid and the fine should be set aside. The Divisional Court rejected the claim.

The court held that section 82(6) is a procedural requirement, failure of which is not capable of invalidating proceedings that are taken subsequently in consequence of the complaint made and the issue of a summons by the magistrates' court. The issue to which section 82(6) goes, as a procedural requirement, is to the possible effect on the fairness of the proceedings which are taken subsequently. There was no unfairness in this case as, at all material times, the claimant was aware of the status of the proceedings.

1 *The decent homes programme*, HC 212, session 2009–2010, available at: www.nao.org.uk/publications/0910/the_decent_homes_programme.aspx and from TSO, £14.35.
2 *The decent homes programme. Twenty-first report of session 2009–10*, HC 350, available at: www.publications.parliament.uk/pa/cm200910/cmselect/cmpubacc/350/350.pdf.
3 Available at: www.communities.gov.uk/publications/corporate/statistics/bpsanondecenthomes0910.
4 *The regulatory framework for social housing in England from April 2010*, available at: www.tenantservicesauthority.org/upload/pdf/Regulatory_framework_from_2010.pdf.
5 *Review of social housing regulation*, available at: www.communities.gov.uk/documents/housing/pdf/1742903.pdf.
6 'TSA/HCA letter to all registered providers', available at: www.tenantservicesauthority.org/server/show/ConWebDoc.20887.
7 *Public services ombudsmen* (2010 Law Com CP 196) is available at: www.lawcom.gov.uk/docs/cp196.pdf. The consultation closed on 3 December 2010.
8 *Review of civil litigation costs: final report*, available at: www.judiciary.gov.uk/Resources/JCO/Documents/jackson-final-report-140110.pdf.
9 *Proposals for reform of civil litigation funding and costs in England and Wales: implementation of Lord Justice Jackson's recommendations*, CP 13/10, November 2010, Cm 7947, available at: www.justice.gov.uk/consultations/docs/jackson-consultation-paper.pdf, and from TSO, £16. The consultation period ends on 14 February 2011.
10 *Proposals for the reform of legal aid in England and Wales*, CP 12/10, November 2010, Cm 7967, available at: www.justice.gov.uk/consultations/docs/legal-aid-reform-consultation.pdf, and from TSO, £26.75. The consultation period ends on 14 February 2011.
11 Available at: www.justice.gov.uk/consultations/docs/legal-aid-funding-reforms.pdf.
12 Toby Vanhegan, barrister, London.
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14 Michael Paget, barrister, London, instructed by Brian Tan, Messrs HE Thomas & Co solicitors.
15 Nic Nicol, barrister, London, instructed by Jackie Guest, Harter and Loveless solicitors.
16 Liz Davies, barrister, London, instructed by Barry Brisland, Saltley & Nechells Law Centre.
17 Beatrice Prevatt, barrister, London, instructed by Paul Gilbert, Hutchins & Co solicitors.
18 Beatrice Prevatt, barrister, London, instructed by Rachel Walker, Shelter, London.

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