Disrepair and Buy-to-Let Properties

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1. It was reported this year that nearly 6% of households receive income from rented properties and nearly 1 in 5 homes is owned by a private landlord. The rapid growth of the buy-to-let sector has given rise to a number of issues in landlord and tenant law and this paper addresses one such issue: that of disrepair.

2. A particular difficulty arises in the context of buy-to-let flats because of the disconnect between the terms of the long lease under which the buy-to-let investor holds his interest in the flat and the terms of the short tenancy agreement under which the investor lets the flat to a tenant:
   - The long lease will typically be for 99, 125 or 999 years and will contain provisions whereby the freeholder covenants to provide certain services and the headlessee (here, the buy-to-let investor) covenants to pay a service charge for those services.
   - The tenancy agreement (or subtenancy) will typically comprise an assured shorthold tenancy for, maybe, 1 year. It will not contain any service charge regime.

3. In relation to repair:
   - The long lease will usually oblige the freeholder to keep the common parts in repair subject to a requirement that notice is given of any disrepair and to an entitlement to recover the costs of repair through the service charge.
   - The subtenancy will be subject to the provisions of s.11 of the Landlord and Tenant Act 1985 (which cannot be contracted out of – see s.12(1)). Section 11 provides:

     "(1) In a lease to which this section applies[1]…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)…

[1] i.e. a lease of a dwelling-house that was granted on or after 24 October 1961 for a term of less than 7 years.

(1A) If a lease to which this section applies is a lease of a dwelling-house which forms part only of a building, then, subject to subsection (1B), the covenant imposed by subsection (1) shall have effect as if –

(a) the reference in paragraph (a) of that subsection to the dwelling-house included a reference to any part of the building in which the lessor has an estate or interest…[2]

(1B) Nothing in subsection (1A) shall be construed as requiring the lessor to carry out any works or repairs unless the disrepair (or failure to maintain in working order) is such as to affect the lessee's enjoyment of the dwelling-house or of any common parts as defined in section 60(1) of the Landlord and Tenant Act 1987[3]*, which the lessee, as such, is entitled to use."*

4. Section 11 implies into the relevant assured shorthold tenancy a covenant by the buy-to-let investor to keep in repair the structure and exterior of the flat. This obligation includes (by reason of s.11(1A)(a)) keeping in repair the structure and exterior of any part of the building in which the buy-to-let investor has an estate or interest.

5. In *Edwards v. Kumarasamy* [2016] UKSC 40, the Supreme Court considered the operation of s.11 in the buy-to-let flat context. The relevant facts of the case were as follows:
   - Mr Edwards was an assured shorthold tenant of a flat. In July 2010, Mr Edwards tripped on a paving stone whilst taking his rubbish from the main door of the block of flats to the bin store. He suffered injuries to his hand and knee and sued his landlord, Mr Kumarasamy, for breach of the implied covenant under s.11(1A).
   - Mr Kumarasamy was a buy-to-let investor, who did not own the block of flats. Rather, he had a long lease (199 years) of the flat, together with rights of access. He

[2] S.11(1A) was added by the Housing Act 1988 and applies in relation to tenancies granted on or after 15 January 1989.

[3] S.60(1) defines "common parts", in relation to any building or part of a building, as including the structure and exterior of that building or part and any common facilities within it.

did not have a lease of the area where Mr Edwards fell, albeit it was part of the Common Parts (over which he had rights of access).

- The headlease provided that the freeholder would not be liable for any breach of covenant to repair unless he was given written notice of the disrepair and had had a reasonable opportunity to remedy it. Mr Kumarasamy had not been aware of the disrepair to the paving stone prior to Mr Edwards' fall and accordingly had not given notice to the freeholder.

At first instance, Mr Edwards' claim was successful and he was awarded £3,750 in damages. HHJ May allowed Mr Kumarasamy's appeal on the grounds that: (i) the paved area where Mr Edwards had fallen was not within the ambit of the s.11 covenant; and (ii) even, if it had been, Mr Kumarasamy could not have been liable as he had had no notice of the disrepair. The Court of Appeal then reversed HHJ May for reasons given by Lewison LJ (see [2015] Ch 484).

6. Before the Supreme Court, there were three issues to be decided:
   (i) Was the external area, where Mr Edwards fell, part of "the exterior of the front hall" ?
   (ii) Did Mr Kumarasamy have an "estate or interest" in the front hall within the meaning of s.11(1A)(a) ?
   (iii) Could Mr Kumarasamy be liable to Mr Edwards for disrepair notwithstanding that he had had no notice of the disrepair ?

7. The reason points (i) and (ii) arose was because, under s.11(1A), the implied repairing obligation extends beyond the demised premises (i.e. the flat) and includes obligations over *"the structure and exterior of any part of the building in which the lessor has an estate or interest"*. Obviously. the paved area itself was not a building (because it was not "a structure with a roof and walls"). This, though, was immaterial because the statutory question was whether the paved area was part of *structure or exterior* of any part of the building in which Mr Kumarasamy had an estate or interest (as s.11(1A)(a) effects an extension of the term "dwelling-house").

8. The Supreme Court decided point (i) in Mr Kumarasamy's favour. The paved area leading to the bin store was not part of the exterior of the front hall. A feature (such as the paved path) which was not part of the fabric of the building and lay wholly outside that building (and therefore outside the floors, ceilings, walls and doors that encased the front hall) was not part of the exterior of that front hall. Whilst the paved area might abut the immediate exterior of the front hall, it was not, as a matter of language, part of the exterior of the front hall.

9. The Supreme Court stated that the decision in ***Brown v. Liverpool Corporation*** (1983) 13 HLR 1 was thus wrong. In ***Brown***, the Court of Appeal had held that steps leading to the front door of a dwelling were part of the exterior of the dwelling[4]. This was because the steps provided the essential and sole means of access to the building. However, Lord Neuberger stated in ***Edwards*** that the fact that a piece of property is a necessary means of access to a building does not (as a matter of language) make it part of the exterior of that building.

10. A number of situations on the scope of s.11(1) and s.11(1A) may be considered:
    - Mr Edwards' belongings are damaged by a leak from the flat roof of the block (where the flat is on the top floor and the ceiling of the flat and the roof are a single structural unit) – The disrepair is to the structure of the dwelling-house and Mr Kumarasamy is *prima facie* liable[5].
    - A sash window in Mr Edwards' flat falls out injuring Mr Edwards – The disrepair is to the exterior of the dwelling-house and Mr Kumarasamy is *prima facie* liable.
    - Mr Edwards suffers a fall due to damaged flooring in the entrance hall – The disrepair is to the structure of a part of the building in which the lessor has an

[4] Dankwerts LJ said: *"They are attached in that manner to the house for the purpose of access to this dwelling house, and they are part of the dwelling house which is necessary for the purpose of anybody who wishes to live in the dwelling house enjoying that privilege. If they have not means of access of some sort they could not get there, and these are simply the means of access. They are outside structures, steps that are built, and therefore it seems to me they are plainly part of the building, and therefore the covenant implied by [s.11] of the Act fits and applies to the obligations of the landlords in this case."*

[5] see ***Douglas-Scott v. Scorgie*** [1984] 1 WLR 716. The situation may be different if there is a void or uninhabited loft between the flat and roof – see Slade LJ in ***Douglas-Scott***.

interest. This is within the ambit of the extended implied repairing obligation and Mr Kumarasamy is *prima facie* liable.

- Mr Edwards injures himself on glass which has fallen from a pane in the lobby of the block – The disrepair is to the exterior of a part of the building in which the lessor has an interest. This is within the ambit of the extended implied repairing obligation and Mr Kumarasamy is *prima facie* liable.
- Mr Edwards trips on the damaged external fire escape attached to the side of the block – The disrepair is to the structure of a part of the building in which the lessor has an interest. This is within the ambit of the extended implied repairing obligation and Mr Kumarasamy is *prima facie* liable.

11. On point (ii) the Supreme Court rejected Mr Kumarasamy's argument that he had no "estate or interest" in the paved area. The Court accepted he had a leasehold easement over the common parts of the block – under the headlease he had a right to pass and repass over the common parts. Section 1 of the Law of Property Act 1925 defines an easement as an interest in land (albeit it does not constitute an estate in that land) and so, giving the words in s.11 their ordinary (property law) meaning, Mr Kumarasamy had an interest in the front hall. It mattered not that Mr Kumarasamy could derive no real benefit from this "interest" having effectively disposed of his right of way to Mr Edwards because:

(i) The word "interest" in a property statute ought to be given its normal meaning unless there is a powerful reason to do otherwise;

(ii) It was not practicable to read "interest" in s.11(1A)(a) to mean "interest in possession" as this would run counter to the object of s.11 which was to impose repairing obligations in respect of items demised to the tenant which *ex hypothesi* were not in the possession of the landlord; and

(iii) If the tenant had no remedy for disrepair of the common parts against his immediate landlord, he would be left without a remedy. This would seem unjust particularly as his immediate landlord would normally expect to pass the claim onto the freeholder and would also be able to rely upon s.11(3A) if he was unable to obtain the necessary rights to enable him to carry out the repairs.

12. Perhaps the most interesting decision was on point (iii). At common law the general rule is that a covenant to keep premises in repair obliges the covenantor to keep them in repair at all times, so that there is a breach of the obligation immediately a defect occurs. Hence, at first blush, if a tenant covenants to keep premises in repair he is obliged so to do regardless of his knowledge of any defect. There is, though, an established exception in relation to a landlord's liability: if the defect occurs in the demises premises themselves the landlord is in breach **only** when he has information as would put a reasonable landlord on inquiry as to whether works of repair are needed and he has failed to carry out the necessary works within a reasonable time (*British Telecommunications plc v. Sun Life Assurance Society plc* [1996] Ch 69 at 78-79). If, though, the defect appears in part of a building which is not demised to the tenant but is retained by the landlord, the landlord is liable even though he has no notice of the disrepair (*Murphy v. Hurly* [1922] 1 AC 369). At common law, notice is only relevant if the defect occurs within the demised property and the landlord is responsible for repair[6].

13. In *O'Brien v. Robinson* [1973] AC 912, a case concerning the statutory predecessor of s.11, the House of Lords held that the same considerations of interpretation applied to the statutory covenant as applied at common law. So, in *Passley v. Wandsworth LBC* (1998) 30 HLR 165, the Court held the Council liable for breach of the statutory covenant in circumstances where the defect was in pipes outside of the demised flat even though the Council had no notice of the defect.

14. In *Edwards* the Supreme Court ruled that:
    - It was **not** the law that in every case where the tenant relied upon s.11, notice of disrepair was required to be given to the landlord.
    - Generally speaking, where the landlord (e.g. a freeholder) does have a legal estate in retained parts (and has covenanted to repair such parts) but has let those parts to

[6] As a matter of history this is because it was assumed in the 19th Century cases that the landlord had no right of entry in order to inspect the demised premises. As Collins MR stated in *Tredway v. Machin* (1904) 91 LT 310: *"The rule rests upon the principle that the landlord is not the occupier of the premises, and has no means of knowing what is the condition of the premises unless he is told, because he has no right of access to the demised premises, whereas the occupier has the best means of knowing of any want of repair."*. Although this assumption is no longer realistic (as almost all modern leases reserve to the landlord a right to enter the demised premises on notice in order to inspect them and s.11(6) of the Landlord and Tenant Act 1985 confers a similar right on the landlord), the existence of a right of entry has never been held to make any difference to the interpretation of the landlord's repairing covenant.

another tenant (e.g. to a management company by a management lease) the tenant of the flat would not be required to give notice of disrepair to the freeholder.

- But, where neither the landlord (being a buy-to-let investor) nor the tenant is in possession of the common parts (but both have rights of way over those parts), the tenant of the flat is required to give notice of disrepair to his landlord despite the disrepair being without the demised premises.

15. The Supreme Court thus held that the question is not one of location of the disrepair (i.e. within demised premises = notice required, without demised premises = no notice required), but is rather one of possession of the property in disrepair. If the landlord is not in possession of the property in disrepair and the tenant *"has the best means of knowing of any want of repair"*, notice is required.

16. In ***Edwards*** the Court of Appeal ([2015] Ch 484) had justified their conclusion that notice to the landlord was not required on the basis that Mr Kumarasamy had, by reason of his easement over the paved area, an immediate implied right to go on and repair that area. The Supreme Court held that this was mistaken:

(i) In general, a right of way does not carry with it a right to carry out repairs to the way: such an ancillary right only arises as a matter of implication and is normally justified because the servient owner has no obligation to repair the way[7].

(ii) Even if a right to enter and repair could be implied, this would not be material to the question of whether notice was required. After all, the fact that a landlord has a right to enter and inspect demised premises has no impact upon the question of notice of disrepair within the demised premises.

17. In practice this means:

(a) Buy-to-let landlords' can breathe a little more easily. Whilst it is not correct to state that their responsibilities automatically end at the front-doors of their flats, the

[7] Lord Neuberger accepted that: *"It may well be…such a right could arise in extremis as Etherton J suggested in Metropolitan Properties Co Ltd v. Wilson [2002] EWHC 1853…"*

suggestion that they (or their managing agents) must at all times be on the look-out for any disrepair in communal areas and/or walkways/drives has been rejected.

(b) Nonetheless buy-to-let landlords must not ignore any suggestions or complaints of disrepair in communal areas and ought therefore to ensure that their insurance covers potential liabilities in respect of areas outside of the property being rented out.

(c) Buy-to-let landlords will not be entitled to exercise self-help remedies in respect of disrepair to easements, save as a remedy of last resort.

(d) Those advising in respect of easements should not assume that a right of way carries with it an implied right to enter and repair the way. The self-help remedy is only available where it is necessary.