

# Contractual rights

---

- 1.1 **Introduction**
- 1.2 **The contract of letting**
- 1.5 **Express terms**
- 1.18 **Meaning of 'repair' and 'disrepair'**
- 1.21 Inherent defects
- 1.24 Disproportionately extensive or costly work
- 1.27 Small defects
- 1.29 Repair and decoration
- 1.30 Prevention of future damage
- 1.31 Patch repairs or complete renewal
- 1.36 Blocked conduits
- 1.37 **Non-statutory implied terms for the benefit of tenants**
- 1.38 Lettings of furnished dwellings
- 1.44 Dwelling-houses held under a licence
- 1.45 Means of access and communal facilities
- 1.46 Ancillary property owned by the landlord
- 1.48 Quiet enjoyment/derogation from grant
- 1.52 Correlative obligations
- 1.56 Implied term on quality of repair work
- 1.57 **Statutory implied terms for the benefit of tenants**
- 1.58 Landlord and Tenant Act 1985 s8

1.69 Landlord and Tenant Act 1985 s11  
*Interpreting s11 • Standard for s11 repairs • Limitations of s11 • Important note for pre-1961 tenancies*

**1.100 Implied terms for the benefit of the landlord**

1.100 The notice requirement

1.111 Access for the landlord

*Access at common law • Access by statute*

1.118 Use in a tenant-like manner

---

## Introduction

- 1.1 Fraud apart, there is no law against letting a tumble-down house, and the tenant's remedy is upon his contract, if any.<sup>1</sup>

Although this broad declaration must now be read subject to much statutory and judicial development, the terms of the tenancy remain the foundation of most tenants' rights in relation to repairs and of any subsequent legal claims.

## The contract of letting

- 1.2 A tenant occupies premises under the terms of a contract of letting. This contract may be made orally or in writing or may even be inferred from the circumstances (for example, where a person occupies premises with exclusive possession and the landlord accepts money as rent).<sup>2</sup>
- 1.3 The terms of the contract or 'tenancy agreement' may be:
- expressly incorporated into the agreement either orally or in writing; or
  - implied into the tenancy agreement either by statute or by the operation of common law.
- 1.4 Whether express or implied, these terms may impose an obligation on the landlord to carry out repairs, which the landlord is then contractually bound to perform.

## Express terms

- 1.5 The common law (the judge-made law developed by the system of precedent) concerning rights to repair, which was formulated in the 18th and 19th centuries and which underpins present-day repairs law, rested on the fundamental principle of *caveat emptor*, ie let the buyer beware the bargain. In dealings with land and houses (as with other property) the onus was placed on the person intending to take the premises to have inspected them, assessed their quality, and then freely negotiated an appropriate contract accordingly.

1 *Robbins v Jones* (1863) 15 CB (NS) 221 at 240.

2 *Street v Mountford* [1985] AC 809, HL; *A-G Securities Ltd v Vaughan* [1990] 1 AC 417, HL.

- 1.6 It followed from the application of this principle that, once property had been accepted by the tenant, the landlord had almost complete immunity from repairing obligations other than those imposed by the contract (if any). Clearly, a strict application of the principle *caveat emptor* in today's society is wholly inappropriate and artificial, since the landlord and incoming tenant no longer (if they ever did in the past) bargain as equals over the letting of property. Intervention has come not from the common law but from statute.
- 1.7 Where repairing obligations are now imposed by law on landlords (eg, by the Landlord and Tenant Act (LTA) 1985 s11 or s8),<sup>3</sup> the statutes generally provide that these obligations cannot be transferred to tenants by way of express contractual terms and any attempt to do so is void.<sup>4</sup>
- 1.8 The Unfair Contract Terms Act 1977 does not apply to leases but the Unfair Terms in Consumer Contracts Regulations (UTCC Regs) 1999<sup>5</sup> do where the tenant takes as a consumer and the landlord lets as a business on standard terms.<sup>6</sup> These regulations can be used to render unenforceable written tenancy terms which are unfair,<sup>7</sup> where the tenancy was entered into after 30 June 1995 and the term was not individually negotiated. The regulations can therefore assist tenants by preventing landlords from relying on unfair contractual terms by which they might seek to qualify or undermine their own repairing obligations. In *Governors of the Peabody Trust v Reeve*<sup>8</sup> it was held that if a standard tenancy agreement allowed a landlord to vary the terms of a tenancy agreement unilaterally, such a term would be unfair.
- 1.9 For general guidance on the correct approach in determining whether terms on repair are fair, reference may usefully be made to the Office of Fair Trading (OFT)'s *Guidance on unfair terms in tenancy agreements*. This suggests, for example, that a term excluding a tenant's right to set off the cost of repairs against rent would be unfair.<sup>9</sup> This was indeed decided in *Cody v Philips*,<sup>10</sup> where the district

3 See paras 1.57–1.99.

4 *Islington LBC v Keane* December 2005 *Legal Action 28*; *Housing Law Casebook* para P5.27, Clerkenwell County Court.

5 1999 SI No 2083.

6 *R (Khatun) v Newham LBC* [2004] EWCA Civ 55; [2004] HLR 29.

7 See UTCC Regs 1999 reg 5; *Director General of Fair Trading v First National Bank plc* [2001] UKHL 52.

8 [2008] EWHC 1432 (Ch).

9 *Guidance on unfair terms in tenancy agreements* OFT356, OFT, September 2005, para 3.26.

10 December 2005 *Legal Action 28*; *Housing Law Casebook* para P12.11, West London County Court.

judge struck out a clause which prevented any set-off or deduction whatsoever against the rent, thereby enabling the tenant to defend a possession claim for rent arrears on the basis of a disrepair counterclaim. Advisers may also wish to refer to the OFT's investigations of tenancy terms in *Newham and Wandsworth in 2005*.<sup>11</sup>

1.10 If the tenancy agreement contains an express term imposing a repairing obligation on the landlord, the adviser should consider whether the term covers the disrepair in question. This involves asking:

- (a) what activity has the landlord contracted to perform? and
- (b) on which parts of the dwelling has the landlord contracted to perform this activity?

1.11 The terms of a tenancy can be varied by agreement. Secure tenancy agreements can be varied unilaterally by the landlord under the Housing Act (HA) 1985 s102.<sup>12</sup> The adviser should therefore ascertain whether the original terms about repair have been varied.

1.12 Various different formulations of wording, such as 'put in repair', 'keep in repair', 'good and substantial repair and condition' and many others, are used in express repairing obligations, and the meanings of the various permutations are examined in detail in the traditional legal textbooks.<sup>13</sup> Whatever the wording of an express term, a repairing covenant will never be construed to require the landlord to renew the whole property, ie, to turn an old and decaying house into a new and sound one.<sup>14</sup> Nor will it be construed to require the landlord to remove all potential hazards.<sup>15</sup> Accordingly, a repairing covenant is to be construed having regard to the condition of the property as it was at the date of letting.<sup>16</sup>

1.13 In *Holding & Barnes plc v Hill House Hammond*,<sup>17</sup> the Court of Appeal reviewed the modern authorities on the proper approach to

11 See [www.of.gov.uk/advice\\_and\\_resources/resource\\_base/consumer-regulations/traders/1990/1/](http://www.of.gov.uk/advice_and_resources/resource_base/consumer-regulations/traders/1990/1/) and [/www.of.gov.uk/advice\\_and\\_resources/resource\\_base/consumer-regulations/traders/539/1/](http://www.of.gov.uk/advice_and_resources/resource_base/consumer-regulations/traders/539/1/).

12 HA 1985 s102(1); *Palmer v Sandwell MBC* (1988) 20 HLR 74, CA; *R v Brent LBC ex p Blatt* (1992) 24 HLR 319, DC.

13 See Woodfall, *Landlord and Tenant*, Sweet & Maxwell, Volume 1-13.048; Hill and Redman, *Law of Landlord and Tenant*, Butterworth; Dowding and Reynolds, *Dilapidations the Modern Law and Practice*, 4th edn, Sweet & Maxwell, 2008.

14 *Lister v Lane* [1893] 2 QB 212, CA; *Pembrey v Lamdin* [1940] 2 All ER 434, CA.

15 *Alker v Collingwood Housing Association* [2007] EWCA Civ 343; (2007) 29 HLR 430.

16 *Proudfoot v Hart* (1890) 25 QBD 42.

17 [2001] EWCA Civ 1334; [2002] L&TR 7.

the construction of contracts. It held that, in construing express repairing obligations, a common sense approach was required, having regard to the background factual matrix in which the contract was produced and disregarding the 'old intellectual baggage of "legal" interpretation'. This was applied in *Petersson v Pitt Place (Epsom) Ltd*,<sup>18</sup> where a judge's decision that both a landlord and tenant were obliged to repair a roof terrace was overturned. The Court of Appeal held that leases have to be construed so as to avoid overlapping repairing obligations.

1.14 It is common for landlords of residential property to (a) contract to carry out repairs (but not to carry out improvements, or to keep the premises in as good a state as when let, or to ensure that the dwelling remains suitable for human habitation); and (b) contract to repair only the structural or external parts of the dwelling (but not the internal, non-structural parts, eg, internal doors, kitchen fittings, decorations and so forth).

1.15 The adviser must check carefully whether the tenancy agreement contains repairing obligations which are more extensive. For example, in *Welsh v Greenwich LBC*,<sup>19</sup> the tenancy agreement provided that the landlord would 'maintain the dwelling in good condition and repair'. The landlord was held liable in civil proceedings for severe condensation and mould growth not involving structural or external disrepair. The Court of Appeal accepted that the phrase 'good condition' was intended to mark a separate concept and to make a significant addition to what was conveyed by the word 'repair'. Liability for condensation dampness was also established in *Johnson v Sheffield CC*,<sup>20</sup> where the tenancy agreement provided that the landlord would keep the dwelling 'fit to live in'.

1.16 Many tenancy agreements particularly those drafted by social landlords, contain express repairing obligations dealing with common parts. In *Long v Southwark LBC*,<sup>21</sup> the tenancy agreement provided that the landlord would 'take reasonable steps to keep the estate and common parts clean and tidy'. The landlord was held liable for rubbish left outside the rubbish chute, which, although in working order, was inadequate in size. It was not sufficient that the landlord had instructed contractors to clean because it did not have an adequate system for monitoring the contractors' performance.

18 [2001] EWCA Civ 86; [2002] HLR 52.

19 (2001) 33 HLR 40, CA.

20 August 1994 *Legal Action* 16, Sheffield County Court.

21 [2002] EWCA Civ 403; [2002] HLR 56.

- 1.17 Many social landlords also include lengthy definitions of exactly what is covered by their repairing obligations, which may be wider than the obligations implied by statute. For example, many social landlords agree that they are obliged to repair the plasterwork to demised premises. Other landlords may have contracted to keep parts of the interior in repair or to keep fittings in repair and working order. The message for all tenants and their advisers is: always check first exactly what the tenancy agreement says.

## Meaning of 'repair' and 'disrepair'

- 1.18 What exactly does the word 'repair' cover and how is it to be applied? Ultimately, the question of whether a disputed item of required work is repair or renewal or maintenance or improvement will be one for the courts, based on the facts of the individual case, but some early decisions give a useful indication of the principles to be applied. For example, in *Lurcott v Wakeley*<sup>22</sup> it was said that repair means the restoration by renewal or replacement of subsidiary parts of the whole; whereas renewal, as distinguished from repair, means the reconstruction of the whole. In *Lurcott*, repair was held to cover the replacement of a deteriorated wall, since the wall was only a subsidiary part of the whole.

- 1.19 Denning LJ also gave guidance on the test to be applied:

If the work which is done is the provision of something new for the benefit of the occupier, that is, properly speaking an improvement; but if it is only the replacement of something already there which has become dilapidated or worn out, then, albeit that it is a replacement by its modern equivalent, it comes within the category of repairs not improvements'.<sup>23</sup>

More recently, Sachs LJ said that the correct approach is to:

... look at the particular building, look at the state which it is in at the date of the lease, look at the precise terms of the lease, and then come to a conclusion whether, on a fair interpretation of those terms in relation to that state, the requisite work can fairly be called repair.<sup>24</sup>

- 1.20 It is clear that repair is the converse of disrepair. There must be disrepair before the landlord is liable to repair. Disrepair occurs when

22 [1911] 1 KB 905, CA.

23 *Morcom v Campbell-Johnson* [1956] 1 QB 106, CA.

24 *Brew Bros Ltd v Snax* [1970] 1 QB 612, CA.

there is deterioration, ie, when part of the building is in a worse condition than it was at some earlier time.<sup>25</sup>

## Inherent defects

- 1.21 It follows that the landlord is not liable under a contractual repairing obligation simply because part of the dwelling was designed or constructed badly. If the dwelling has always had the defect in question, there has been no deterioration. In *Stent v Monmouth DC*<sup>26</sup> the front door did not have weatherboarding and permitted rain-water to penetrate into the dwelling but the landlord was not liable at that point because the door had always been defective in that respect. In *Post Office Properties Ltd v Aquarius Properties Ltd*<sup>27</sup> a defective kicker joint allowed ground water to penetrate laterally into a basement but the landlord was similarly not liable because the joint had always been defective.
- 1.22 It would, however, be going much too far to say that landlords are never liable to put right building defects which are 'inherent', ie, which have been present since construction. In *Stent v Monmouth DC*<sup>28</sup> the rain-water penetration eventually caused the door itself to rot, ie, deteriorate. Because the landlord was obliged under the terms of the tenancy agreement to keep the door in repair, it was required to repair the door. It was not relevant that the deterioration had been caused by an inherent defect. Furthermore, the court ordered the landlord to repair the door in such a way that future rain-water penetration and future disrepair to the door would not occur: by installing a proper, weather-proof door. In effect, the court ordered the landlord to rectify an inherent defect in order to remedy current disrepair and prevent future disrepair.
- 1.23 If the inherent defect causes disrepair to other parts of the building for which the landlord is responsible under the terms of the tenancy agreement, the court will usually require the landlord to remedy that damage.<sup>29</sup> If it would be practical and sensible to remedy the underlying defect to prevent it from causing the same disrepair over and over again, then the courts will order the landlord to remedy the

25 *Post Office v Aquarius Properties* [1987] 1 All ER 1055, CA; *Quick v Taff-Ely BC* [1986] 1 QB 809, CA.

26 (1987) 19 HLR 269, CA.

27 [1987] 1 All ER 1055, CA.

28 (1987) 19 HLR 269, CA.

29 *Staves and Staves v Leeds CC* (1991) 23 HLR 107, CA.

inherent defect.<sup>30</sup> The only exception occurs when the work involved is disproportionately extensive and/or costly.

## Disproportionately extensive or costly work

- 1.24 It is always a question of degree whether that which the landlord is being asked to do can properly be described as a repair, or whether on the contrary it would involve producing a wholly different thing from that which was demised: *Stent v Monmouth DC*.<sup>31</sup> Examples of work which has been held to be too extensive or costly to be a 'repair' are: complete replacement of foundations;<sup>32</sup> complete replacement of cladding to a high-rise building;<sup>33</sup> the replacement of the whole of a steel frame;<sup>34</sup> and the installation of a damp-proof course.<sup>35</sup> Whether or not the work required is too extensive or costly in any given case will depend on exactly what work is required, what it is likely to cost, how long it will prolong the life of the dwelling and what the terms of the tenancy agreement are.<sup>36</sup>
- 1.25 The most recent guidance is given in *McDougall v Easington DC*,<sup>37</sup> where Mustill LJ said:

It is my opinion that three different tests may be discerned, which may be applied separately or concurrently as the circumstances of the individual case may demand, but all to be approached in the light of the nature and age of the premises, their condition when the tenant went into occupation, and the other express terms of the tenancy:

- (i) whether the alterations went to the whole or substantially the whole of the structure or only to a subsidiary part;
- (ii) whether the effect of the alterations was to produce a building of a wholly different character than that which had been let;
- (iii) what was the cost of the works in relation to the previous value of the building and what was their effect on the value and lifespan of the building?

30 *Ravensfe Properties v Davstone (Holdings) Ltd* [1980] QB 12, QBD; *Elmcroft Developments Ltd v Tankersley-Sawyer* (1984) 15 HLR 63, CA; cf *Quick v Taff-Ely BC* [1986] QB 809, CA.

31 (1987) 19 HLR 269, CA.

32 *Lister v Lane* [1983] 2 QB 212.

33 *Holding & Management Ltd v Property Holding & Investment Trust Ltd* (1989) 21 HLR 596, CA.

34 *Plough Investments Ltd v Manchester CC* [1989] 1 EGLR 244.

35 *Eyre v McCracken* (2001) 33 HLR 169, CA.

36 *Holding & Management Ltd v Property Holding & Investment Trust Ltd* (1989) 21 HLR 596, CA.

37 (1989) 21 HLR 310, CA.

- 1.26 In *McDougall v Easington DC*,<sup>38</sup> considerable work had been undertaken to a council house of system-built, concrete panel construction, namely the removal of the whole of the front and rear elevations, the replacement of the roof structure, and rain-water system, replacement of windows and doors, and stripping out of the interior fittings. These works were held to constitute an improvement rather than a repair, as the house 'not only looked different but was different ... The outcome was a house with a substantially longer life and worth nearly twice as much as before.' The works had given the house 'a new life in a different form'.<sup>39</sup> A similar view was taken in *Eyre v McCracken*,<sup>40</sup> where the Court of Appeal reviewed the authorities on the installation of damp-proof courses and found that to require a Rent Act protected tenant to insert a damp-proof course into a property in 2001 would be to require him to give back to the landlord a different thing from that demised to him in 1976 and would therefore be an improvement rather than a repair. This case is not, however, authority for the proposition that a landlord will not be obliged to insert a damp-proof course under the landlord's repairing obligations because the court held that 'the circumstances are very different from those involved in the consideration of the landlord's covenant in *Elmcroft Developments*'<sup>41</sup> (see paragraph 1.32), where such works were held to be a repair.

### Small defects

- 1.27 Conversely, small defects such as nail holes and minor cracking (to plaster or rendering) are in many cases not considered to be sufficiently serious to amount to disrepair.
- 1.28 The reason is that the courts have qualified the meaning of disrepair. It does not mean any degree of deterioration, but deterioration which as a matter of fact and degree is unacceptable after taking into account and making allowances for the age of the premises, their character, the local area and the type of tenants likely to want to rent them.<sup>42</sup>

38 (1989) 21 HLR 310, CA.

39 *McDougall v Easington DC* (1989) 21 HLR 310, CA, per Mustill LJ at 316.

40 (2001) 33 HLR 169, CA.

41 *Eyre v McCracken* (2001) 33 HLR 169, CA, per Pill LJ at para 46.

42 *Anstruther-Gough-Calthorpe v McOscar* [1924] 1 KB 716, CA.

## Repair and decoration

- 1.29 An obligation to repair includes, if necessary, an obligation to carry out decoration required to preserve whatever is to be repaired.<sup>43</sup> It should also be noted that the requirement to ‘repair’ carries with it an obligation on the landlord to make good or redecorate on completion of repair works.<sup>44</sup> On the extent of a landlord’s obligation to redecorate, see *Vukelic v Hammersmith and Fulham LBC*.<sup>45</sup> There is no liability to redecorate after improvement works (which are not considered to be works of repair) save where such redecoration is negotiated as a condition for granting a landlord permission to do improvement works.<sup>46</sup>

## Prevention of future damage

- 1.30 An obligation to repair can include an obligation to prevent future damage.<sup>47</sup>

## Patch repairs or complete renewal

- 1.31 The obligation to repair can sometimes require the landlord completely to renew or to replace part of a dwelling instead of carrying out a temporary or patch repair.
- 1.32 In *Elmcroft Developments Ltd v Tankersley-Sawyer*,<sup>48</sup> for example, the landlords conceded that their obligation to repair the structure required them to hack off and replace wall plaster each time it became damp but denied that it required them to tackle the source of the dampness (rising damp) by installing a damp-proof course. Ackner LJ said:

The patching work would have to go on and on, because as the plaster absorbed (as it would) the rising damp, it would have to be renewed and the cost to the [landlords] in constantly being involved in this sort of work, one would have thought, would have outweighed easily the cost in doing the job properly. I have no hesitation in rejecting the

43 *Irvine v Moran* (1991) 24 HLR 1, QBD.

44 *McGreal v Wake* (1984) 13 HLR 107, CA; *Bradley v Chorley BC* (1985) 17 HLR 305, CA.

45 [2003] EWHC 188 (TCC); November 2003 *Legal Action* 13.

46 *McDougall v Easington DC* (1989) 21 HLR 310, CA.

47 *Holding & Management Ltd v Property Holding & Investment Trust Ltd* (1989) 21 HLR 596, CA; *McDougall v Easington DC* [1989] 21 HLR 310, CA.

48 (1984) 15 HLR 63, CA.

submission that the appellant's obligation was repetitively to carry out futile work instead of doing the job properly once and for all.

- 1.33 The notion that patch repairing was sufficient to discharge the duty was similarly rejected in *Stent v Monmouth DC*.<sup>49</sup> In that case there had been a problem for over 30 years of rot to a wooden front door and frame. The landlords had repeatedly cut out and repaired parts of the door and frame and from time to time replaced the rotten wooden door with another wooden door which then rotted. The Court of Appeal had no hesitation in holding that, on the facts, the obligation to 'repair' was not discharged by these patch repairs. The council 'had the obligation to make good the design defect which caused the collection of water which occasioned the rotting'.<sup>50</sup> This was achieved by installing a self-sealing aluminium door.
- 1.34 *Quick v Taff Ely BC*<sup>51</sup> does not fit happily with this line of authority. In that case a window sill and wall plaster required replacement because of acute condensation dampness. That in turn could be cured by double glazing, insulation etc. However, insufficient findings of fact had been made in the county court to show that the only 'proper' way of tackling the limited disrepair which had been proved was the major work urged by the tenant.
- 1.35 In summary, the test of whether patch repairs will suffice is whether tackling the root cause would be a 'mode of repair which a sensible person would have adopted; and the same reasoning applies if for the word "sensible" there is substituted some such word as "practicable" or "necessary"'.<sup>52</sup> The burden is on the tenant to lead the evidence which shows that further patch repairs will not suffice and that a more radical repair or replacement is necessary.<sup>53</sup> The tenant was unable to discharge this burden in *Dame Margaret Hungerford Charity Trustees v Beazeley*<sup>54</sup> where it was held that, since the property was to be completed reconstructed in the near future, further patch repairs were sufficient, even though ordinarily the replacement of the roof would have been required.

49 (1987) 19 HLR 269, CA.

50 *Stent v Monmouth DC* (1987) 19 HLR 269, CA, per Sir John Arnold at 286.

51 [1986] 1 QB 809.

52 *Stent v Monmouth DC* (1987) 19 HLR 269, CA, per Stocker LJ at 284–5; see also *Carmel Southend Ltd v Strachen and Henshaw* [2007] EWHC 1289 (TCC).

53 *Murray v Birmingham CC* (1988) 20 HLR 39, CA.

54 (1994) 26 HLR 269, CA.

## Blocked conduits

- 1.36 Gutters and flues which are blocked are in disrepair.<sup>55</sup>

## Non-statutory implied terms for the benefit of tenants

- 1.37 At common law, the landlord has no duty to repair or to ensure that the dwelling is habitable.<sup>56</sup> Neither is the landlord under a common law duty of care to take reasonable steps to ensure that any occupier of the rented premises does not suffer personal injury or damage to his or her property as the result of defects to the premises.<sup>57</sup> This is historically why the terms of the contract are of such importance to a tenant with repairing problems. There are, however, a number of exceptions to the common law immunity of the landlord achieved by implying terms which impose obligations on landlords.

## Lettings of furnished dwellings

- 1.38 Where the landlord lets a furnished dwelling for immediate occupation it will be an implied term of the contract of letting that the premises are fit for human habitation at the start of the tenancy.<sup>58</sup>
- 1.39 The term does not apply to lettings of unfurnished dwellings.<sup>59</sup> Furthermore, the obligation is strictly an initial one, ie, that the premises were fit when they were let.<sup>60</sup> However, the term will be broken if the dwelling is initially unfit but the lack of fitness becomes obvious only at a later stage of the tenancy.<sup>61</sup>
- 1.40 The courts have held that dwelling-houses are unfit for human habitation at common law if they are infested by bugs,<sup>62</sup> have a

55 *Melles & Co v Holme* [1918] KB 100, KBD; *Bishop v Consolidated London Properties Ltd* (1933) 102 LJKB 257; *Greg v Planque* [1936] 1 KB 669, CA; *Passley v Wandsworth LBC* (1998) 30 HLR 165, CA.

56 *Cavalier v Pope* [1906] AC 428, HL; *Robbins v Jones* (1863) 15 CB(NS) 221.

57 *McNerny v Lambeth LBC* (1989) 21 HLR 188, CA.

58 *Smith v Marrable* (1843) 11 M&W 5; *Hart v Windsor* (1844) 12 M&W 68; *Wilson v Finch-Hatton* (1877) 2 Ex D 336.

59 *McNerny v Lambeth LBC* (1989) 21 HLR 188, CA.

60 *Sarson v Roberts* [1895] 2 QB 395.

61 *Harrison v Malet* (1886) 3 TLR 58.

62 *Smith v Marrable* (1843) 11 M&W 5.

defective drainage<sup>63</sup> or sewerage system,<sup>64</sup> or carry an infection,<sup>65</sup> or if there is a lack of safety,<sup>66</sup> or an insufficiency of water supply.<sup>67</sup> Note, however, that the obligation is confined to fitness for habitation and that the implied term does not require the landlord to ensure that the premises are in structural repair when let, eg, cracked ceiling plaster will not be covered.

1.41 Guidance on whether premises are unfit at common law may be obtained from the case-law on statutory provisions referring to that term in a housing context.<sup>68</sup> In its modern application, the implied term will still be of use to tenants of furnished dwellings whose homes were in very poor condition when let.<sup>69</sup> Examples would include premises which were affected by penetrating dampness, infested with cockroaches or fitted with dangerous electrical wiring.

1.42 Generally, implied terms can be excluded from any letting by an express term to the contrary. However, the OFT Guidance suggests that it would be unfair for a landlord to use an express term to avoid this implied term in lettings to which the UTCC Regs 1999 apply.<sup>70</sup>

1.43 As long ago as 1996 the Law Commission proposed a general implied term about fitness.<sup>71</sup> But to date its recommendations have not been implemented. In *Lee v Leeds CC*,<sup>72</sup> the Court of Appeal held that there was no basis for implying into tenancies of social housing let by public authorities an obligation to keep a dwelling in good condition or to remedy defects which make it unfit for human habitation. Any such extension to the law will have to come from Parliament, which seems unlikely at the present time.

63 *Wilson v Finch-Hatton* (1887) 2 Ex D 336.

64 *Harrison v Malet* (1886) 3 TLR 58.

65 *Bird v Greville* (1884) C & E 317; *Collins v Hopkins* [1923] 2 KB 617.

66 *Edwards v Etherington* (1825) Ry & M 268.

67 *Chester v Powell* (1885) 52 LT 722.

68 See case-law on HA 1985 s604 (repealed in England by HA 2004 Sch 16, with effect from 6 April 2006) and Defective Premises Act 1972 s1, eg *McMinn v Bole & Van den Haak v Huntsbuild Ltd & Money* [2009] EWHC 483 (TCC).

69 See, eg, *Shefford v Nofax Enterprises (Acton) Ltd* December 2006 *Legal Action 24*; *Housing Law Casebook* para P11.53, Central London County Court.

70 *Guidance on unfair terms in tenancy agreements* OFT356, para 3.14.

71 Law Commission, *Landlord and Tenant: Responsibility for State and Condition of Property* LC238, HMSO, 1996.

72 [2002] EWCA Civ 6; [2002] 1 WLR 1488.

## Dwelling-houses held under a licence

- 1.44 Where there is a licence and not a tenancy, a term may be implied in the licence requiring the licensor to take reasonable care to ensure that the condition of the dwelling does not cause personal injury to any of the occupiers or damage their property.<sup>73</sup>

## Means of access and communal facilities

- 1.45 It is an implied term for most tenancies of residential accommodation that the landlord is obliged to take reasonable care to keep means of access and communal facilities (eg, shared rubbish chutes or lifts) in repair and proper working order, if that is not already required by an express term.<sup>74</sup>

## Ancillary property owned by the landlord

- 1.46 The courts will generally imply a term imposing a duty on the landlord to take reasonable care to ensure that the condition of ancillary property retained in his or her ownership (eg, the roof of a block of flats, common hall, water tanks, heating plant or drains) does not deteriorate so as to cause personal injury to the tenant or damage to his or her property.<sup>75</sup>
- 1.47 There will, however, be no grounds for implying a term about repair of the common parts where provision is comprehensively made for such repairs in a written tenancy agreement.<sup>76</sup>

## Quiet enjoyment/derogation from grant

- 1.48 A landlord either expressly or by necessary implication contracts to give the tenant 'quiet enjoyment' of the rented premises for the duration of the letting. This may be breached in circumstances of disrepair, for example by a landlord failing to keep watertight the building containing the tenant's flat, thereby allowing the flat to be penetrated

73 *Greene v Chelsea BC* [1954] 2 QB 127, CA. See also *Wettern Electric Ltd v Welsh Development Agency* [1983] 1 QB 796, QBD; *Morris-Thomas v Petticoat Lane Rentals* (1987) 53 P&CR 238.

74 *Miller v Emcer Products* [1956] Ch 304, CA; *Liverpool CC v Irwin* [1977] AC 239, HL; *King v South Northamptonshire DC* (1992) 24 HLR 284, CA; cf *Duke of Westminster v Guild* [1985] QB 688, CA.

75 *Dunster v Hollis* [1918] 2 KB 795; *Cockburn v Smith* [1924] 2 KB 119; *Duke of Westminster v Guild* [1985] QB 688, CA.

76 *Gordon v Selico Ltd* (1986) 18 HLR 219, CA.

by rain-water or dampness,<sup>77</sup> or by carrying out work on other parts of the building, causing noise and nuisance to the tenants.<sup>78</sup>

1.49 The covenant of quiet enjoyment is prospective in nature and does not apply to things done before the grant of the tenancy even though they may have continuing consequences.<sup>79</sup> Accordingly, in *Southwark LBC v Mills*,<sup>80</sup> the landlord did not breach the covenant by failing to install effective soundproofing. The doctrine of *caveat lessee* applied: the tenant took the premises in the state in which they were let and could not complain about any pre-existing defect.

1.50 The covenant does not create new repairing obligations. But if the landlord fails to perform his or her obligations or carries out those obligations so as to interfere unreasonably with the tenant's occupation there will be a breach of the covenant of quiet enjoyment in addition to other causes of action.<sup>81</sup> In *Goldmile Properties v Lechouritis*,<sup>82</sup> the Court of Appeal held that a lease containing a landlord's repairing obligation and a covenant for quiet enjoyment had to be construed to give effect to both provisions. Accordingly, a landlord had to take all reasonable precautions to prevent disturbance being caused by repairs but could not be required to take every possible precaution. In *Thornton and Jarrett v Birmingham CC*,<sup>83</sup> HHJ McKenna found that the council had breached the covenant of quiet enjoyment when it had failed to rehouse the tenant while repair works were carried out, even though she had not asked to be rehoused; not all reasonable steps to minimise the risks had been taken having regard to the tenant's children, aged 8 and 10.

1.51 A landlord shall not 'derogate from his grant' of a tenancy to the tenant. This implied term may be breached in relation to disrepair if a landlord allows premises retained in his or her ownership or occupation to be in such a state as to interfere with the tenant's tenancy. The principle of non-derogation from grant cannot be used to create new repairing obligations.<sup>84</sup>

77 *Booth v Thomas* [1926] Ch 397, CA; *Gordon v Selico Ltd* (1986) 18 HLR 219, CA.

78 *Mira v Aylmer Square Investments* (1990) 22 HLR 182, CA; *Sampson v Wilson* [1996] Ch 39.

79 *Southwark LBC v Mills* [2001] 1 AC 1, HL.

80 [2001] 1 AC 1, HL.

81 *Duke of Westminster v Guild* [1985] 1 QB 688, CA.

82 [2003] EWCA Civ 49, CA.

83 November 2004 *Legal Action 27*; *Housing Law Casebook* para P11.58, Birmingham County Court.

84 *Duke of Westminster v Guild* [1985] 1 QB 688, CA.

## Correlative obligations

- 1.52 If the tenancy agreement requires the tenant to pay for certain works or services, it will usually be implied that the landlord will actually perform those works or services.<sup>85</sup> In *Edmonton Corporation v Knowles*,<sup>86</sup> the tenant was obliged to pay to the landlord the cost of redecorating the exterior in every third year of the term. It was held that there was a correlative obligation on the landlord to carry out the redecoration. Similarly in *Collins v Northern Ireland Housing Executive*,<sup>87</sup> tenants were obliged to pay standing charges and amounts for consumption of heating and hot water provided through a central system. It was held that it was an implied term of a collateral contract, which existed between the parties, that the landlord authority would provide and maintain the heating system.
- 1.53 Other tenant's obligations can also result in terms being implied which are binding on the landlord. In general, a term will be implied into a contract where the implication of the term is necessary to give business efficacy to a transaction and where both parties would have agreed to its insertion had its absence been pointed out to them when they concluded the contract.<sup>88</sup>
- 1.54 In *Barrett v Lounova (1982) Ltd*,<sup>89</sup> the tenant was contractually bound to carry out all inside repairs and leave the inside of the premises in good repair and condition. There were no express repairing obligations binding on the landlord and LTA 1985 s11 (see paragraphs 1.69–1.99) did not apply because the tenancy began before 24 October 1961. The dwelling was in a poor state of repair, suffering from severe rain-water penetration as the result of roof defects. The Court of Appeal held that it was an implied term of the agreement that the landlord would keep the structure and exterior of the dwelling in repair:

It is obvious, as shown by this case itself, that sooner or later the covenant imposed on the tenant in respect of the inside can no longer be complied with unless the outside has been kept in repair ... In my view, it is therefore necessary, as a matter of business efficacy, to make this agreement workable, that an obligation to keep the outside in repair must be imposed on someone.<sup>90</sup>

85 *Edmonton Corporation v Knowles* (1962) 60 LGR 124.

86 (1962) 60 LGR 124.

87 [1987] 2 NIJB 27 CA(NI); *Housing Law Casebook* para P4.14.

88 *Liverpool CC v Irwin* [1977] AC 239, HL.

89 [1990] 1 QB 348, CA.

90 *Barrett v Lounova (1982) Ltd* [1990] 1 QB 348, CA, per Kerr LJ at 358C.

- 1.55 The extent to which correlative obligations such as this may be imposed remains unclear,<sup>91</sup> but the modern trend is against the implication of new implied terms, see, eg, *Adami v Lincoln Grange Management Ltd*<sup>92</sup> (a long leaseholder case), where it was held that the decision in *Barrett v Lounova*<sup>93</sup> should be confined to its own facts. More recently in *Lee v Leeds CC*,<sup>94</sup> the Court of Appeal declined to imply a term that the landlord remedy design defects or keep the dwelling in a condition which enabled the tenant to perform her obligations under the tenancy, namely to keep the inside of her home clean and in a reasonable state of decoration. The court relied on the fact that the landlord was already liable to repair the exterior, whereas in *Barrett v Lounova*<sup>95</sup> there was no exterior repairing covenant.

### Implied term on quality of repair work

- 1.56 It has been held at county court level that there is an implied term to do repairs with reasonable care and skill and proper materials.<sup>96</sup> The Supply of Goods and Services Act 1982 also creates a duty on those providing goods to ensure that they are of satisfactory quality and on those providing services to do so with reasonable care and skill.

## Statutory implied terms for the benefit of tenants

- 1.57 As we have seen, the basic rule at common law is that the landlord is not liable for housing defects except in so far as expressly provided in the tenancy agreement. The common law exceptions to this rule, described above, are piecemeal and limited in scope. As a result, Parliament has legislated to imply limited and basic repairing obligations into certain types of tenancy.

### Landlord and Tenant Act 1985 s8

- 1.58 Section 8 of the LTA 1985 implies into lettings at a low rent (for example, certain periodic tenancies) two separate contractual terms which are absolute and non-excludable:

91 *Demetriou v Poolaction Ltd* (1991) 25 EG 113, CA.

92 (1997) 30 HLR 982, CA.

93 [1990] 1 QB 348, CA.

94 [2002] EWCA Civ 6; [2002] 1 WLR 1488, CA.

95 [1990] 1 QB 348, CA.

96 *Walton v Lewisham LBC* May 1997 *Legal Action* 20; *Housing Law Casebook* para P4.13, Tunbridge Wells County Court.

- that the premises are fit for human habitation on the date of letting; and
- that the premises will be kept fit for habitation, by the landlord, throughout the duration of the tenancy.

See appendix A for the full text of s8.

- 1.59 Both terms apply to lettings of whole houses or parts of houses.<sup>97</sup> The apparently wide scope of s8 is, however, limited by the narrow range of lettings to which it applies. In order to have the benefit of these implied terms the annual rent (irrespective of who pays the rates<sup>98</sup>) must be less than the maximum amounts shown below:

Date of letting	Maximum annual rent
Before 31 July 1923	£40.00 in London £26.00 in boroughs or districts with over 5,000 people £16.00 elsewhere
On or after 31 July 1923 and before 6 July 1957	£40.00 in London £26.00 elsewhere
On or after 6 July 1957 and before 1 April 1965	£80.00 in London £52.00 elsewhere
On or after 1 April 1965	£80.00 in inner London £52.00 in outer London and elsewhere

- 1.60 If the letting was originally at a rent not greater than the maximum figure shown above, the tenant has the benefit of the implied terms. The current rent is irrelevant. As will be apparent, very few periodic tenancies remain which can benefit from s8. The failure to uprate the rent levels to give protection to more recent tenants has attracted judicial comment in the Court of Appeal.<sup>99</sup> The Government has declined to increase the rent levels, because in its view the s8 provisions are 'effectively out of date', having been overtaken by the more modern provisions of s11.<sup>100</sup> The Law Commission has recommended<sup>101</sup> that, subject to certain exceptions, legislation should impose a term on leases of dwellings for less than seven years that the landlord will

97 LTA 1985 s8(6).

98 *Rousou v Photi* [1940] 2 KB 379, CA.

99 *Quick v Taff Ely BC* [1986] 1 QB 809, CA.

100 Lord Skelmersdale, HL Debs col 370, 22 October 1986.

101 Law Commission, *Landlord and Tenant: Responsibility for State and Condition of Property* LC238, HMSO, 1996, at para 7.7.

keep the dwelling fit for human habitation, applying the statutory definition of unfitness which used to be contained in HA 1985 s604. The Law Commission's proposals have yet to be acted on.

1.61 Section 8 is not applicable to a letting for a fixed term of three years or more where it is expressly agreed that the tenant will put the premises into a condition reasonably fit for habitation (s8(5)). If the letting contains no such term, the benefit of s8 extends to any long lease which fulfils the low rent condition.

1.62 The section gives the landlord an express power to enter and inspect premises after giving the tenant or occupier 24 hours' notice in writing of his or her intention to do so (s8(2)).

1.63 In determining whether a house is fit for human habitation, regard is to be had to its condition in respect of: repair, stability, freedom from damp, internal arrangement, natural lighting, ventilation, water supply, drainage/sanitary conveniences, facilities for the preparation and cooking of food, and facilities for the disposal of waste water. The house is deemed to be unfit for human habitation if, and only if, it is so far defective in one or more of these respects that it is not reasonably suitable for occupation in that condition: LTA 1985 s10.

1.64 Breaches of the terms implied by s8 have been successfully established in a wide range of cases, for example: a small house in which the sole window in a main room could not be safely opened;<sup>102</sup> premises where plaster had fallen from the ceiling;<sup>103</sup> the complete collapse of a ceiling;<sup>104</sup> and accommodation in which a sanitary convenience was defective and serious dampness had accrued from defective guttering.<sup>105</sup>

1.65 It should be noted that liability arises only in relation to the defects within the premises let to the tenant, so that, for example, defective common staircases<sup>106</sup> and occasional incursions of vermin from elsewhere<sup>107</sup> will be outside the scope of the terms implied by s8.

1.66 A 'rule of thumb' guide to the standards required by s8 was set out by Atkin LJ in 1926:

If the state of repair of a house is such that by ordinary use damage may naturally be caused to the occupier, either in respect of personal

102 *Summers v Salford Corporation* [1943] AC 283, HL.

103 *Walker v Hobbs & Co* (1889) 23 QBD 458.

104 *Fisher v Walters* [1926] 2 KB 315, KBD.

105 *Horrex v Pidwell* [1958] CLY 1461.

106 *Dunster v Hollis* [1918] 2 KB 795, KBD.

107 *Stanton v Southwick* [1920] 2 KB 642, KBD.

injury to life or limb or injury to health, then the house is not in all respects reasonably fit for human habitation.<sup>108</sup>

- 1.67 The courts have, however, developed a serious limitation to the usefulness of s8 by confining its application to premises which can be made fit by the landlord at reasonable expense.<sup>109</sup> This controversial decision rests on a concession made in argument and has no foundation within s8 itself. It has stood unchallenged for over three decades and is ripe for review.
- 1.68 Advisers should note that s8 is not applicable to tenants of temporary accommodation owned by local authorities in clearance areas or subject to prohibition orders.<sup>110</sup>

## Landlord and Tenant Act 1985 s11

- 1.69 This is the main statutory repairing obligation which is implied into all tenancies of less than seven years beginning on or after 24 October 1961. Nowadays, most tenants can rely on this repairing obligation, even if their tenancy agreement contains no express repairing obligations.
- 1.70 LTA 1985 s11 implies into tenancy agreements an obligation on landlords to effect certain repairs which is both absolute and non-excludable. Section 11 replaced HA 1961 s32. For the full text of LTA ss11–17 see appendix A.
- 1.71 The obligation is as follows (as amended by the HA 1988 in respect of tenancies entered into on or after 15 January 1989):
- 11(1) In a lease to which this section applies ... 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.
  - (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

108 *Morgan v Liverpool Corporation* [1927] 2 KB 131, CA.

109 *Buswell v Goodwin* [1971] 1 WLR 92, CA.

110 HA 1985 s302.

subsection (1B), the covenant implied by sub-section (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; and
- (b) any references in paragraphs (b) and (c) of that subsection to an installation in the dwelling-house included a reference to an installation which, directly or indirectly, serves the dwelling-house and which either –
  - (i) forms part of any part of a building in which the lessor has an estate or interest; or
  - (ii) is owned by the lessor or under his control.

(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, which the lessee, as such, is entitled to use.

1.72 Tenancies which pre-date 15 January 1989 do not have the benefit of s11(1A) and s11(1B), so the obligation to repair is limited to the structure and exterior of the dwelling and the installations therein. However pre-1989 tenants not covered by the amendments to s11, may be able to rely on the common law implied terms described in paragraphs 1.37–1.56.

1.73 The landlord cannot exclude the obligation imposed by s11 by the use of express contractual terms. Any term purporting to exclude liability (s12(1)(a)) or transfer it to the tenant (s11(4)) is void.<sup>111</sup>

1.74 The landlord or the landlord's agent is given a statutory right to enter premises for the purpose of viewing the condition and state of repair on giving the tenant 24 hours' notice in writing: s11(6).

### *Interpreting s11*

1.75 Owing to the breadth of the implied terms contained in s11, the component parts have been subject to close scrutiny.

1.76 '**keep in repair**' The covenant to keep in repair is a continuing obligation to keep up the standard of repair in the dwelling throughout the duration of the tenancy. Moreover, it also requires the landlord to put the premises into repair if they were not in good repair at the outset of the tenancy.<sup>112</sup>

111 *Irvine v Moran* (1991) 24 HLR 1, QBD; *Islington LBC v Keane* December 2005 *Legal Action* 28; *Housing Law Casebook* para P5.27, Clerkenwell County Court.

112 *Proudfoot v Hart* (1890) 25 QBD 42.

- 1.77 For the scope of works covered by the term ‘repair’ see paragraphs 1.18–1.36.<sup>113</sup>
- 1.78 **‘the structure and exterior’** For s11(1)(a) or s11(1A)(a) to apply it must be shown that there is actually some part of the structure or exterior which is in a state of disrepair and therefore requires ‘repair’, ie, ‘the covenant will only come into operation where there has been damage to the structure and exterior which requires to be made good’.<sup>114</sup> Evidence of damage to decoration, clothing, bedding, curtains, etc is all to no avail unless some part of the structure or exterior can be shown to require repair.
- 1.79 The **structure** is less than the whole dwelling but more than just the load-bearing elements. It is usually taken to refer to:
- those elements of the overall dwelling-house which give it its essential appearance, stability and shape. The expression does not extend to the many and various ways in which the dwelling-house will be fitted out, equipped, decorated and generally made to be habitable ... in order to be part of the structure of the dwelling-house a particular element must be a material or significant element in the overall construction.<sup>115</sup>
- 1.80 It is the opinion of the Law Commission that internal plaster should be treated as part of the structure for the purposes of LTA 1985 s11<sup>116</sup> and there are a number of cases in which concessions have been made to that effect or the court has assumed that plaster was part of the structure.<sup>117</sup> In *Hussein v Mehlman*<sup>118</sup> it was held that the contention that bedroom ceiling plaster was not part of the structure was untenable. However, the only binding authority directly on the point held that plaster is not part of the structure for the purposes of LTA 1985 s11, but more in the nature of a decorative finish.<sup>119</sup> But even in that case, it was held that ‘to some extent, in every case there will be a degree of fact to be gone into to decide whether or not something is or is not part of the structure of the dwelling-house’.<sup>120</sup>

113 See too *Brunskill v Mulcahy* [2009] EWCA Civ 686.

114 *Quick v Taff Ely BC* [1986] QB 809, CA, at 818E.

115 *Irvine v Moran* (1991) 24 HLR 1, QBD, at 5. See also *Pearlman v Governors of Harrow School* [1979] QB 56, CA.

116 Law Commission, *Landlord and Tenant: Responsibility for State and Condition of Property* LC238, HMSO, 1996, at p69.

117 *Staves v Leeds CC* (1991) 23 HLR 107, CA; *Quick v Taff-Ely BC* [1986] QB 809, CA; *Palmer v Sandwell MBC* (1988) 20 HLR 74, CA.

118 [1992] 2 EGLR 87; [1992] 32 EG 59, Wood Green Trial Centre.

119 *Irvine v Moran* (1991) 24 HLR 1, QBD.

120 *Irvine v Moran* (1991) 24 HLR 1, QBD, at 5.

1.81 It was hoped that this issue might be resolved in *Niazi Services v Van der Loo*<sup>121</sup> but in the end the Court of Appeal declined to say anything about the cracks in the plaster in that case while acknowledging that the issue whether plasterwork was part of the structure was 'not free from difficulties of its own'.<sup>122</sup> In practice, the issue appears to depend on the extent and degree of the damage to any plasterwork with major problems being held to be structural.<sup>123</sup>

1.82 The **exterior** is the outside or external part of the dwelling-house. The liability under the covenant extends to all outside parts of the demised dwelling.

1.83 The interpretation of the words 'structure' and 'exterior' may be illustrated as follows:

- A partition wall between the dwelling and another house or flat is part of the structure or exterior.<sup>124</sup>
- Floor joists in a dwelling are part of the structure; the structure is not limited to items in the ownership of the landlord.<sup>125</sup>
- In relation to a house, the path and steps which are the immediate and ordinary means of access are within the 'exterior'<sup>126</sup> but the paving of the backyard is not.<sup>127</sup>
- The roof (if any) is part of the structure of a house as is any skylight it contains (see paragraph 1.84 for roofs of flats).<sup>128</sup>
- The walls are part of the structure, together with any cement rendering.<sup>129</sup> But a plasterboard false wall which had been nailed to the wall surface was not: it was affixed to the structural wall; it had not become part of it.<sup>130</sup>

121 [2004] EWCA Civ 53; [2004] 1 WLR 1254, CA.

122 *Niazi Services v Van der Loo* [2004] EWCA Civ 53; [2004] 1 WLR 1254 at para 7.

123 See, eg, *Willis and Willis v Fuller* May 1997 *Legal Action* 20; *Housing Law Casebook* para P5.30, Hastings County Court; *Thornton v Birmingham CC* November 2004 *Legal Action* 27; *Housing Law Casebook* para P11.58, Birmingham County Court; *Hyde Southbank Homes v Oronkaye and Obadiara* December 2005 *Legal Action* 28; *Housing Law Casebook* para P11.36, Bow County Court; cf *Morgan and Daniels v Birmingham CC* December 2007 *Legal Action* 29, Birmingham County Court.

124 *Green v Eales* [1841] 2 QB 225.

125 *Marlborough Park Services Ltd v Rowe and Another* [2006] EWCA Civ 436; [2006] HLR 30, CA.

126 *Brown v Liverpool Corporation* [1969] 3 All ER 1345, CA.

127 *Hopwood v Cannock Chase DC* [1975] 1 WLR 373, CA.

128 *Taylor v Webb* [1937] 2 KB 283.

129 *Granada Theatres Ltd v Freehold Investment (Leytonstone) Ltd* [1959] Ch 592, CA.

130 *Fincar SRL v 109/113 Mount Street Management Co Ltd* [1999] L&TR 161; [1998] EGCS 173, CA.

- External joinery will usually be part of the structure, and failure to paint it so as to protect it from rot will be a failure to repair.<sup>131</sup>
- Windows will be part of the structure if they are a substantial and integral part of the wall.<sup>132</sup> On the other hand, the ordinary windows in a house or flat are part of the exterior of the dwelling.<sup>133</sup> But external windows will usually be both part of the structure and exterior.<sup>134</sup>

1.84 Where the dwelling-house is a flat, ‘structure and exterior’ has been held to extend to: the outside wall(s) of the flat, the outside of the inner party wall of the flat, the outer sides of the horizontal divisions between the flat and the flats above and below, and ceilings and walls of the flat,<sup>135</sup> and the whole of the roof terraces of flats except for their tiled surface areas.<sup>136</sup> Where the ceiling and roof of a top-floor flat form an inseparable structural unit, the roof will be within the structure or exterior of the flat. In the case of other flats, whether a common roof is within the covenant will be a question of fact according to the particular circumstances.<sup>137</sup>

1.85 **‘the dwelling-house’** This means the building or part of a building which is let to the tenant wholly or mainly as a private residence: LTA 1985 s16(b).

1.86 The ‘structure and exterior’ with which s11(1)(a) is concerned, then, is the ‘structure and exterior of the dwelling-house’ let to the tenant, ie, the tenant’s own house or flat. Usually, therefore, the provision could not be used by the tenant of the lower of two flats to get the roof over the upper flat repaired, even if the disrepair was causing damage to the lower flat, since on any view the roof would not be part of the structure or exterior of the lower flat. The position is different for tenancies commencing on or after 15 January 1989. In these tenancies, the term implied by s11 is extended to include not only the structure and exterior of the demised premises but also

131 *Irvine v Moran* (1991) 24 HLR 1, QBD.

132 *Boswell v Crucible Steel Co of America* [1925] 1 KB 119, CA; *Holiday Fellowship v Hereford* [1959] 1 WLR 211, CA.

133 *Ball v Plummer* (1879) 23 SJ 656.

134 *Sheffield CC v Oliver* Lands Tribunal LRX/146/2007, December 2008 *Legal Action* 31.

135 *Campden Hill Towers v Gardner* [1977] QB 823, CA.

136 *Ibrahim v Dovecorn Reversions Ltd* (2001) 82 P&CR 362, ChD.

137 *Douglas-Scott v Scorgie* [1984] 1 WLR 716, CA; *Rapid Results College v Angell* [1986] 1 EGLR 53, CA; *Straudley Investments v Barpress Ltd* [1987] 1 EGLR 69, CA; *Hatfield v Moss* [1988] 2 EGLR 58, CA.

the remaining parts of the building in which the landlord retains an estate or interest (s11(1A)), providing the disrepair is in fact affecting the lessee's enjoyment of his or her own dwelling-house or the common parts. So in the example above, if water was penetrating into the lower flat owing to defects in the roof above the upper flat, the tenant of the lower flat could use s11(1A) to get the roof over the upper flat repaired, (even though it was not part of the structure or exterior of the lower flat), provided that the landlord of the lower flat owned or had some other interest in the roof above the upper flat as well.

- 1.87 **'keep in ... proper working order'** These words necessarily presuppose that at the start of the tenancy the relevant installations were in proper working order, so that, if by reason of disrepair or design fault an installation has never been in proper working order, a landlord with knowledge of the defect will be in continuing breach of the implied term.<sup>138</sup>
- 1.88 But what if an installation for the supply of water, gas or electricity has been in proper working order but ceases to work properly owing to changes in supply? In *O'Connor v Old Etonians Housing Association Ltd*,<sup>139</sup> the Court of Appeal held that an installation would be in proper working order if it was able to function under those conditions of supply that it was reasonable to anticipate would prevail. If a variation to the supply occurred which could not have been reasonably anticipated, the landlord's duty to keep an installation in proper working order might require him or her to make modifications to the installation depending on the circumstances of the case, including the duration of the variation and the cost of modification.
- 1.89 **'the installations in the dwelling-house'** The landlord is obliged to keep in repair and in working order the installations specifically mentioned in s11(1)(b) and (c). The provision also extends to other installations for the supply of water, gas, electricity, sanitation, heating and hot water. Thus, water or gas pipes, electrical wiring, water tanks,<sup>140</sup> boilers, radiators and other space heating installations, such as vents for underfloor heating, will be within the repairing obligation.
- 1.90 The installations must usually be *in* the tenant's dwelling. However, some tenants (and particularly those in high-rise flats) experience major problems as a result of the failure of installations serving blocks or estates but sited outside their homes, for example, central

138 *Liverpool CC v Irwin* [1977] AC 239, HL.

139 [2002] EWCA Civ 150; [2002] Ch 295.

140 *Sheldon v West Bromwich Corporation* (1984) 13 HLR 23, CA.

heating boilers. The courts have declined to extend the benefit of the repairing covenant to such tenants. In the *Campden Hill Towers* case,<sup>141</sup> Megaw LJ said:

... the installations in the physical confines of the flat must be kept in repair and capable, so far as their own structural and mechanical condition is concerned, of working properly. But no more than that.

1.91 The requirement that the defective installations must be in the dwelling has been lifted for more recent tenants. If the tenancy was granted on or after 15 January 1989, the obligation to repair and keep in proper working order is extended to any installation which (a) either directly or indirectly serves the dwelling and (b) is either owned by or under the control of the landlord or forms part of any part of a building in which the landlord has an estate of interest, providing that the defect is in fact ‘such as to affect the lessee’s enjoyment of the dwelling-house or of any common parts’ (s11(1A)(b)). This provision effectively overcomes the restrictions of the *Campden Hill Towers* decision. It gives these more recent tenants rights to require repairs to, for example, the communal heating boiler, the pump in the district heating system and the water tank on the roof of the tower block. However, it does not assist tenants where the defect to an installation is in a part of a building in which the landlord has no estate or interest. In *Niazi Services Ltd v Van der Loo*,<sup>142</sup> the landlord of a flat above a restaurant was held not liable for poor water pressure where this was because of works in the restaurant below, in which the landlord had no interest.

1.92 Apart from the installations specifically mentioned in the section, the repairing obligation does not extend to fixtures, fittings, and appliances for making use of water, gas, electricity and sanitation (s11(1)(b)).

1.93 In *Wycombe Area Health Authority v Barnett*,<sup>143</sup> the Court of Appeal held that the obligation in s11(1)(b) and (c) to keep the installations in the premises in proper working order did not impose a duty on the landlord to lag water tanks and pipes so as to avoid damage in exceptionally severe cold weather. The court did indicate, however, that a landlord would be liable if the pipes were prone to burst within the normal temperature range, and that since there was in any event no liability on the part of the tenant to do so, any prudent landlord would insulate the pipes to avoid damage being caused to his or her reversion.

141 *Campden Hill Towers v Gardner* [1977] QB 823, CA at 835H.

142 [2004] EWCA Civ 53; [2004] 1 WLR 1254.

143 (1982) 5 HLR 84, CA.

1.94 Even though the landlord will be presumed to know of the disrepair in the parts of the property he or she retains (so that there is no need for actual notice of such disrepair to be given), it is not certain that the courts will presume that the landlord knows of the effect on the individual tenants. It may, therefore, be advisable to ensure that the landlord has actual knowledge (preferably by notice) of both the defect and effect before proceeding for breach of s11(1A). It is a defence for the landlord to show in such proceedings that, despite using reasonable endeavours, he or she was unable to obtain the right to carry out the works to the particular part of the building concerned (eg, where the disrepair emanates from a flat of which the landlord is the freeholder but where the leaseholder is exercising a right to refuse access): s11(3A).

### *Standard for s11 repairs*

1.95 The repairing obligations implied into tenancy agreements by s11 are subject to the important qualification that, in determining the standard of repair to be required, regard is to be had to the age, character, and prospective life of the dwelling-house and the locality in which it is situated: s11(3). Reference to age, character and locality does no more than re-state the position which applies in any event at common law: see paragraph 1.28. This is an area in which expert evidence may be required. In *Montoya v Hackney LBC*,<sup>144</sup> a finding that twisting of the doors and windows amounted to disrepair was overturned in the light of evidence from the single joint expert that the defects were commensurate with the age and type of property and so they did not amount to disrepair; the judge should not have departed from the only expert evidence in the case.

1.96 At least where disrepair is materially affecting the tenant's comfortable enjoyment of the dwelling-house, its 'prospective life' is only relevant if demolition is imminent.<sup>145</sup> On the other hand, the fact that complete reconstruction is envisaged is a good reason for patch repairing the roof in the meantime, even though ordinarily replacement would have been required.<sup>146</sup>

1.97 The standard of repair is no higher for a social landlord than it is in the private rented sector.<sup>147</sup>

144 December 2005 *Legal Action* 28, QBD.

145 *Newham LBC v Patel* (1978) 13 HLR 77, CA; cf *McClean v Liverpool CC* (1988) 20 HLR 25, CA.

146 *Dame Margaret Hungerford Charity Trustees v Beazeley* (1994) 26 HLR 269, CA.

147 *Wainwright v Leeds CC* (1984) 13 HLR 117, CA.

### Limitations of s11

- 1.98 The operation of s11 is circumscribed in a number of ways:
- No liability can be imposed on the landlord for breach of s11 until the landlord has knowledge of the defects complained of and fails to effect repairs within a reasonable period of time thereafter (but see paragraphs 1.100–1.110).
  - The provision applies only to tenancies commencing on or after the passage of the HA 1961, ie, 24 October 1961 (s13(1)).
  - It applies only to periodic tenancies and fixed-term leases of less than seven years. Lettings for longer periods are also covered where the landlord has an option to end the letting within seven years of commencement. But, by s13(2), lettings for less than seven years may fall outside s11 if the tenant can renew for a further term, making more than seven years in total. These provisions, together with those relating to renewed lettings, are somewhat complex and an adviser should pay close attention to the terms of ss12–15 before giving a conclusive opinion.
  - Section 11 does not apply to certain agricultural tenancies within the Agricultural Holdings Act 1948 (s14(3)).
  - Except in the case of post-15 January 1989 tenancies, it does not extend to common parts of the building containing the accommodation let to the tenant, nor to parts of the premises retained by the landlord but which the tenant is permitted to use.
  - Section 11 does not extend to any item which the tenant is entitled to remove from the premises, for example, a tenant's own electric fire (although the position would be different if the fire was provided by the landlord). Nor does it relieve the tenant of the obligation to use the premises in a tenant-like manner (see paragraphs 1.118–1.119). Nor does it require the landlord to re-instate premises destroyed by act of God or inevitable accident etc (s11(2)).
  - Section 11 does not assist most business tenants (s32(2)).
  - Section 11 does not apply to certain properties let to local authorities and other public bodies (s14(4)).
  - Section 11 does not bind the Crown. It cannot therefore be relied on by the tenants of most government departments and agencies.<sup>148</sup>

But this may be discriminatory in breach of article 14 of the European Convention on Human Rights.<sup>149</sup>

<sup>148</sup> *Department of Transport v Egoroff* (1986) 18 HLR 326, CA.

<sup>149</sup> *Larkos v Cyprus* (1999) 7 BHRC 244; [1998] EHRLR 653.

*Important note for pre-1961 tenancies*

- 1.99 Tenancies which would otherwise be outside s11 because they started before 24 October 1961 may nevertheless gain the benefit of the provision. For example, where a fair rent has been registered on the basis that the tenancy is subject to s11 and the landlord has accepted rent following that registration, the landlord will be bound by the repairing obligation.<sup>150</sup> Alternatively, a pre-1961 tenant may be able to show that he or she is covered by s11 because the earlier tenancy has been determined and replaced by one commencing after 1961. This will be the case for all local authority tenants because in the 1960s and 1970s council rent increases were achieved by a process of notice to quit and re-grant. Pre-1961 tenants not covered by s11 may be able to rely on one of the common law implied terms described above.

## Implied terms for the benefit of the landlord

### The notice requirement

- 1.100 It is an implied term of all tenancy agreements which impose an obligation on the landlord to repair property rented out to a tenant that the landlord is not liable to carry out any repair unless and until he or she (1) has been put on notice or in any other way has knowledge of the need for repair and (2) has failed to carry out the repair within a reasonable period of time thereafter.<sup>151</sup> Although a common law rule, it has been consistently held to apply also where the repairing obligations are imposed by statute, eg, by LTA 1985 ss8 and 11. The burden of proving both these matters is on the tenant.<sup>152</sup>
- 1.101 The landlord's knowledge of the defect must be proved even if the disrepair is latent. Thus, a tenant injured by the collapse of a ceiling which no one could have expected to be liable to fall cannot recover damages from his or her landlord for breach of repairing obligations.<sup>153</sup>
- 1.102 It should be noted that it is the 'knowledge' of the landlord which is important. Usually this knowledge will arise from notice of disrepair given by the tenant. However, a landlord may be imputed with

150 *Brikom Investments v Seaford* [1981] 1 WLR 863, CA; *Johnstone v Charlton and Taylor* May 1998 *Legal Action* 21, Sunderland County Court.

151 *Makin v Watkinson* (1870) LR 6 Ex 25; *O'Brien v Robinson* [1973] AC 912, HL; *Morris v Liverpool CC* (1988) 20 HLR 498, CA.

152 *Morris v Liverpool CC* (1988) 20 HLR 498, CA.

153 *O'Brien v Robinson* [1973] AC 912, HL.

knowledge if the disrepair is brought to the attention of his or her workmen,<sup>154</sup> rent-collector or any other person (eg, a resident care-taker) employed by the landlord and having express or implied authority to receive complaints of disrepair on behalf of the landlord.

1.103 The route by which the landlord receives knowledge of the disrepair is not significant, except that it has been suggested that the informant must be a 'responsible source'.<sup>155</sup> In *Dinefwr BC v Jones*,<sup>156</sup> the council was held to have actual notice of the disrepair seen at the property by the council's environmental health officer (EHO) even though the EHO was not from the housing department and was inspecting the property after complaints relating to cleanliness rather than disrepair. The EHO, however, was not treated as having implied knowledge on behalf of the council about defects other than those obviously visible (ie not those which would have been discovered only on a thorough inspection). A tenant cannot necessarily rely on the proposition that, because the premises were inspected by the landlord or landlord's unqualified agent, it follows that the landlord knew of the defects in the premises. It is for the tenant to show that the landlord or unqualified agent saw the defect.

1.104 The *Jones*<sup>157</sup> case also indicates that knowledge will be established where the landlord receives information about the defects in a property from an independent valuer (in that case from the valuation officer following a right-to-buy application). This was confirmed in *Hall v Howard*,<sup>158</sup> where the landlord received an offer to purchase from a private tenant, accompanied by a surveyor's valuation report listing (and costing) repairs needed. Receipt of the report was sufficient to fix the landlord with knowledge of the defects. Similarly, service by a local authority of some form of statutory repair notice is sufficient to establish knowledge on the part of the landlord and thus, liability.<sup>159</sup>

1.105 The information received by the landlord must be sufficient to put a reasonable person on enquiry about whether works of repair are needed.<sup>160</sup> It will therefore be useful or usual for the tenant to make the

154 *Sheldon v West Bromwich Corporation* (1973) 13 HLR 23, CA.

155 *Dinefwr BC v Jones* (1987) 19 HLR 445, CA.

156 (1987) 19 HLR 445, CA.

157 *Dinefwr BC v Jones* (1987) 19 HLR 445, CA.

158 (1988) 20 HLR 566, CA.

159 *McGreal v Wake* (1984) 13 HLR 107, CA.

160 *O'Brien v Robinson* [1973] AC 912, HL; *Sheldon v West Bromwich Corporation* (1973) 13 HLR 23, CA; *British Telecommunications plc v Sun Life Assurance Society plc* [1996] Ch 69, CA.

landlord aware of the disrepair needing to be tackled, but the notice given need not particularise the degree or extent of the disrepair nor the remedial works required.<sup>161</sup> Where the tenant informs the landlord that he or she will be preparing a detailed list of items of disrepair and estimates for the works required, the landlord is not treated as having knowledge of the defects until the list and estimates are served.<sup>162</sup> Where no notice or knowledge can be established, the Defective Premises Act 1972 s4 may be helpful (see paragraphs 2.37–2.41).

1.106 Even after a landlord has knowledge of disrepair, there is no breach of the repairing obligation until 'a reasonable time has elapsed in which the repair could have been carried out'.<sup>163</sup> There is no prescribed 'reasonable time', so the length of the period for completion of repairs will vary according to the circumstances in each case. A useful guide to what the Government considers a reasonable period for ordinary minor repairs is given in Schedule 1 to the Secure Tenants of Local Housing Authorities (Right to Repair) Regulations 1994.<sup>164</sup>

1.107 If the landlord has given some advance indication to the tenant of the times within which particular repairs will usually be completed (perhaps by showing 'target periods' in a tenants' handbook) these will be strongly indicative of what a 'reasonable time' would be for repairs falling within those categories. Some landlords may even have placed such time limits within the tenancy agreement (in which case they can be directly enforced). In other cases, the courts (and initially those advising tenants) will determine the reasonable period, taking into account a variety of factors. Obviously the scale and severity of the disrepair will be critical factors but also relevant will be: whether the tenant is actually living in the property; the availability of replacement parts; and (in the case of social landlords) the overall workload.<sup>165</sup> The burden of proving that a reasonable time has been exceeded lies on the tenant. This will require firm evidence rather than inference. For example, even where the repair required is the replacement of a missing or damaged front door and door frame, it does not necessarily follow that a landlord allowing a week to pass before effecting final repairs is in breach of s11, where a temporary repair has been made.<sup>166</sup>

161 *Griffen v Pillet* [1926] 1 KB 17, KBD.

162 *Al Hassani v Merrigan* (1988) 20 HLR 238, CA.

163 *Calabar Properties v Sticher* [1984] 1 WLR 287, CA at 298.

164 1994 SI No 133.

165 *Morris v Liverpool CC* (1988) 20 HLR 498, CA.

166 *Morris v Liverpool CC* (1988) 20 HLR 498, CA.

- 1.108 It is important to recognise that the implied term about knowledge applies only to parts of a building which have been rented to the tenant. It does not apply to parts which have been retained in the control of the landlord. When there is disrepair to part of a building which (a) the landlord is contractually obliged to repair, and (b) the landlord continues to control, then the landlord is liable immediately disrepair occurs whether or not he or she knows or could have known of the need for repairs.<sup>167</sup>
- 1.109 This will be particularly important where a tenant is unable to prove knowledge, but failure by the tenant to draw the defect to the landlord's attention in this type of case can in some circumstances be taken into account as a failure to mitigate.<sup>168</sup> It is also important in those disrepair cases where the majority of the damage occurs immediately a defect arises and before any reasonable time to carry out a repair has elapsed, eg, in flooding cases.<sup>169</sup> In any event, reliance on the fact that there is no need for notice will increase the period of breach, because time will start to run immediately a defect occurs rather than after a reasonable time has elapsed, and may thereby increase any damages which may be recovered.<sup>170</sup>
- 1.110 It has recently been suggested in *Charalambous v Earle (Addendum to judgment)*<sup>171</sup> that this rule may need modification to take account of the practicalities of the modern relationship of residential landlords and tenants but this was said in the context of a long lease where there is a reciprocal obligation on lessees to contribute to the costs of the remedial works.

## Access for the landlord

- 1.111 For the purposes of carrying out repairs or inspecting for repairs, landlords may have rights of access at either common law or under statute. In the absence of an express term, or some relevant statutory

167 *Melles & Co v Holme* [1918] 2 KB 100, KBD; *Bishop v Consolidated London Properties Ltd* (1933) 102 LJKB 257; *Loria v Hammer* [1989] 2 EGLR 249, ChD; *British Telecommunications plc v Sun Life Assurance Society plc* [1996] Ch 69, CA; *Passley v Wandsworth LBC* (1998) 30 HLR 165, CA; *Charalambous v Earle (Addendum to judgment)* [2006] EWCA Civ 1338; [2007] HLR 8, CA.

168 *Minchburn v Peck* (1988) 20 HLR 392, CA.

169 See, eg, *Passley v Wandsworth LBC* (1998) 30 HLR 165, CA.

170 *Charalambous v Earle (Addendum to judgment)* [2006] EWCA Civ 1338; [2007] HLR 8.

171 [2006] EWCA Civ 1338; [2007] HLR 8, CA.

provision, a landlord has no power to enter tenanted property in order to carry out improvements.<sup>172</sup>

### *Access at common law*

- 1.112 The landlord who is subject to an express or implied duty to keep premises 'in repair' will have the right at common law to enter to carry out those works (but no others):

I have construed that covenant to mean that he shall put them into good condition if necessary and it is my judgment that the covenant carries with it an implied licence to the lessor to enter upon premises of the lessee and to occupy them for a reasonable time to do what he has covenanted to do.<sup>173</sup>

- 1.113 The right to enter to do repairs is subject to an obligation to give the tenant reasonable notice and must be exercised reasonably, although the tenant is not usually entitled to a copy of the specification of works.<sup>174</sup>
- 1.114 The landlord has the right to temporary vacant possession in order to carry out repairs only when vacant possession is essential.<sup>175</sup>
- 1.115 In the case of periodic tenancies of dwelling-houses, the landlord has an implied right to enter to repair defects which might cause personal injury.<sup>176</sup>

### *Access by statute*

- 1.116 Most statutory repairing obligations carry within them express rights of entry for the landlord (see particularly the discussions of LTA 1985 ss8(2) and 11(6) at paragraphs 1.62 and 1.74).
- 1.117 In addition, s148 of the Rent Act 1977 s148 gives landlords an express right to enter for the purpose of carrying out repairs in the case of protected or statutory tenancies. HA 1988 s16 gives the same right of access to the landlord of an assured tenant.

### *Use in a tenant-like manner*

- 1.118 Under LTA 1985 s11(2), a landlord is not obliged to do repairs which the tenant is liable to do by virtue of his or her duty to use the premises

172 *McDougall v Easington DC* (1989) 21 HLR 310, CA; *Yeoman's Row Management Ltd v Bodentien-Meyrick* [2002] EWCA Civ 860.

173 *Saner v Bilton* (1878) 7 ChD 815 at 824.

174 *Granada Theatres v Freehold Investments (Leytonstone) Ltd* [1959] Ch 592, CA.

175 *McGreal v Wake* (1984) 13 HLR 107, CA.

176 *McAuley v Bristol CC* [1992] QB 134, CA.

in a tenant-like manner. In *Warren v Keen*,<sup>177</sup> Denning LJ described this duty as an obligation ‘to do the little jobs around the place which a reasonable tenant would do’ and included in his definition turning the water off when the tenant went away, cleaning chimneys and windows, mending fuses and unblocking the sink. A local authority’s view that changing a tap washer might be added to that list was rejected in *Islington LBC v Keane*,<sup>178</sup> where it was held that changing a tap washer was part of repairing a tap and its component parts and something most people would call a plumber to do; it therefore fell within s11(1)(b); the express term suggesting that the tenant was liable for this defect was accordingly void.

- 1.119 Earlier, in *Churchill v Nottingham CC*,<sup>179</sup> it was held that, while cleaning a chimney might still be part of a tenant’s duty to act in a tenant-like manner in respect of a small cottage on the moors where wood or coal was still burned and the chimney used in the old fashioned way, in modern housing a tenant was not obliged to disconnect a fixed gas fire, remove the back plate and clean the flue behind it; this obligation fell on the landlord under s11.

177 [1954] 1 QB 15, CA.

178 December 2005 *Legal Action* 28; *Housing Law Casebook* para P5.27, Clerkenwell County Court.

179 January 2001 *Legal Action* 25; *Housing Law Casebook* para P5.25, Nottingham County Court.