

Housing Team Bulletin

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Protecting tenants from serious disrepair: the use of injunctions

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When disrepair is so serious it poses an imminent and real risk to the health and safety of the tenant, simply issuing a disrepair claim may not sufficiently protect the tenant as it may take weeks or months to come before a judge.

Where electrics are faulty or a wall is in danger of collapse, any tenant would be at risk of harm. Other types of disrepair may put certain types of tenants at risk of harm. For example, broken heating would be dangerous for the elderly or young children during cold weather and severe damp would arguably affect the health of any tenant, but particularly those with chest problems.

Tenants in this situation can apply for an order for specific performance of the landlord's repairing covenants under section 17 of the Landlord and Tenant Act 1985 or an injunction under the County Courts Act 1984.

Test

American Cyanamid Co v Ethicon Ltd [1975] A.C. 396 is the well known authority on whether an injunction should be made. The test is essentially:

- Is there a serious question to be tried? If the answer to that question is, "yes", then two further related questions arise; they are:
- Would damages be an adequate remedy for a party injured by the court's grant of, or its failure to grant, an injunction?
- If not, where does the "balance of convenience" lie?

American Cyanamid explains that serious question means 'not frivolous or vexatious' - this is a relatively low threshold because otherwise the court would essentially have to conduct a mini-trial of the merits. Tenants can argue that damages would not be an adequate remedy where, for example, the disrepair is affecting or threatening their health and safety.

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Normally, a party applying for an injunction would have to undertake to pay damages to the landlord for any loss resulting from the injunction, should it transpire at trial that it should not have been made. Of course, in housing cases tenants are highly unlikely to be able to offer any or sufficient undertaking. In that scenario, the question for the court is whether the potential loss to the landlord is outweighed by the nature and degree of harm and inconvenience to the tenant - bearing in mind the impact of serious disrepair on a low income tenant with few resources to mitigate it.

The leading case on injunctions in disrepair claims is *Parker v Camden London Borough Council* [1986] Ch. 162, a case which involved a large number of tenants who were left without heating and hot water when the Council refused to arrange for boilers to be repaired while the boilermen they employed were on strike. A significant proportion of those tenants were elderly living in sheltered homes. There was no dispute that the Council was in breach of its contractual obligations.

Sir John Donaldson MR said it would only be in 'very rare cases that a mandatory injunction will be issued at an interlocutory stage.' However, in practice the courts have not always followed such a strict approach and indeed *Parker* states that an injunction may be granted where there is 'an undoubted breach of covenant giving rise to actual and immediate major discomfort and inconvenience and to a real risk of damage to health flowing from the admitted breach.'

As can be seen by *Redland Bricks Ltd v Morris* [1970] AC 652, the content of the injunction is also closely circumscribed. In that case the House of Lords stated that the principles applicable when a court is considering whether to exercise

its discretion to grant a mandatory injunction are:

- (i) A mandatory injunction can only be granted where the plaintiff shows a **very strong probability upon the facts that grave damage will accrue** to him in the future.
- (ii) Damages will not be a sufficient or adequate remedy if such damage does happen.
- (iii) The **question of the cost to the defendant** to do works to prevent or lessen the likelihood of a future apprehended wrong **must be an element to be taken into account**. However, where a defendant has acted unreasonably he may be ordered to repair his wanton and unreasonable acts by doing positive work to restore the status quo even if the expense to him is out of all proportion to the advantage to the claimant.
- (iv) If in the exercise of its discretion the court decides that it is a proper case to grant a mandatory injunction, then **the court must be careful to see that the defendant knows exactly in fact what he has to do** and this means not as a matter of law but as a matter of fact, so that in carrying out an order he can give his contractors the proper instructions.

Procedure

Applications for injunctions are made on form N16A and can be made without notice where the matter is urgent, although in all cases representatives are advised to put the landlord on notice. If the landlord attends the hearing they may offer an undertaking, which can be an effective resolution.

The pre-action protocol for housing disrepair claims does not apply where there is an urgent need for an injunction.

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Evidence

Applying for an interim injunction will usually (save in the most obvious and urgent cases) involve obtaining expert evidence and always some witness evidence. Indeed, where possible as much medical evidence as can be obtained will assist the court in particular analysing where the balance of convenience lies. As is clear from the discussion above expert and medical evidence will be crucial to convince the court it is an appropriate case for an interim injunction.

Enforcement

Landlords who fail to comply with the orders or injunctions made against them can be brought back to court under Part 81 of Civil Procedure Rules 1998 and receive a fine or even a suspended or immediate sentence of imprisonment. Best practice is to ask for a penal notice to be attached to the court order (which should be served personally on the landlord). It is advisable that time limits to complete work run from the day service is effected, to avoid the order becoming ineffective if the landlord proves elusive.

Legal aid and costs

As injunction applications involve a serious risk of harm to the health and safety of an individual (which can include a member of the tenant's family) they are in scope for legal aid under paragraph 35 of Schedule 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012.

Having prepared witness statements and obtained expert reports with the benefit of legal aid in order to obtain an injunction, tenants and representatives may then proceed to pursue

damages claims on the basis of a conditional fee agreement or other funding agreement with less risk than in a normal case.

Representatives should bear in mind the costs implications of an unsuccessful application or no order as to costs - these could come out of any damages later awarded to the tenant, who must be made aware of this risk.

Please bear in mind that barristers at GCN are always available to give informal advice on any housing matters. In the first instance please contact the clerks (Sarah Wright, Annmarie Nightingale, Nicola Carroll or Calum Hamilton) on 0161 817 6377.

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