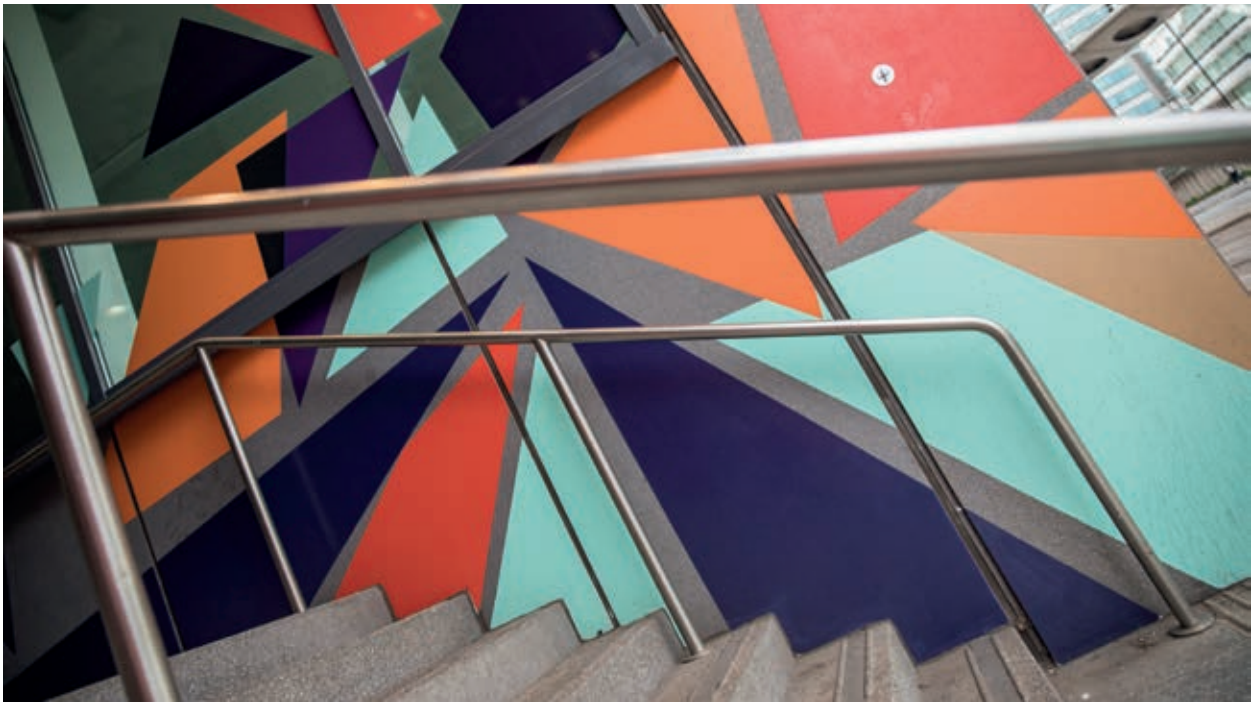

PHOTOGRAPHY **RACHEL BYWATER**

Top tips on housing claims

Social housing claims are a major concern. Part two covers claims relating to landlords' duty of care to those entering their land and property.

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The law imposes a duty of care on landowners to those entering their land and property. An alleged breach of this duty forms the basis of countless claims for compensation against local authorities and social landlords. Part two of the *Smart Guide* to housing claims provides top tips on defending such claims.

The law

The Occupiers' Liability Acts

The duty under the *Occupiers' Liability Act 1957* (*OLA 1957*) is the 'common law duty of care'. This is to take such care as (in all the circumstances of the case) is reasonable to see that a visitor will be reasonably safe in using the premises for the purposes for which he or she is invited or permitted by the occupier to be there. It is the duty of reasonableness and not perfection. An occupier is not expected to remove every possibility of danger.

The *Occupiers' Liability Act 1984* (*OLA 1984*) extends a duty of care to trespassers and other non-visitors. However, it is restricted to personal injury and *s.1(7)* of the *Act* specifically excludes a duty to persons using a public right of way.

An occupier owes a duty under *OLA 1984* if he or she is aware of a danger or has reasonable grounds to believe it exists, knows or has reasonable grounds to believe the claimant is in the vicinity of the danger, or may do so. The risk is one against which in all circumstances he should guard against. While often of limited practical significance, these additional requirements present a further hurdle for a claimant to overcome.

Key points to note under the *Acts* are:

- The duty under both *Acts* is: 'in respect of dangers due to the state of the premises or to things done or omitted to be done on them'. *(s.1(1).)* »

Liability checklist

1 Do you own the land where the accident occurred?
If in doubt check with land registry.

2 Is the land in question adopted highway?
If so, divert the claim to the highway authority.

3 Did the accident occur on a public right of way?
- Is the accident location likely to have been used by the public for over 20 years?
- Where does the path lead to? A back path leading to a few properties only (which is not a way across land) generally does not fit the criteria (*Ley v Devon County Council [2007]*).
- Are there any barriers, gates or signs that inhibit or prohibit use indicating that the way is private, negating the presumption of dedication?
- Do you have any employees with personal knowledge of the area who can give evidence regarding 20 years use by the public? If not, can evidence be obtained from local residents?

4 Is the defect complained of a dangerous defect, giving rise to a foreseeable risk of injury?
- Consider the nature, size and position of the defect. Conventionally in *Highways Act* claims the threshold is 20mm to 25mm on a footpath. While a lesser defect might be regarded as hazardous in occupier claims, this measurement is a useful starting point.

5 Have you discharged your duty?
- What steps, if any, have you taken to see that visitors will be reasonably safe?

- 'Premises' include land, buildings and any fixed or moveable structures.
- No duty is owed to a person under either *Act* in respect of risks willingly accepted by that person.
- The standard of care can vary according to the nature of the occupier and the circumstances. For example, a higher standard is likely to be placed on a public body than a private occupier, and a higher duty of care placed on all occupiers in respect of children.

S.2(4)(b) of the *OLA 1957* provides a potential defence where the danger is due to the faulty execution of any work of construction, maintenance or repair, by an independent contractor employed by the occupier. This should be contrasted with a landlord's duties under the *Landlord and Tenant Act 1985*, and the *Defective Premises Act 1972* which are non-delegable.

Who is an occupier?

The key to occupation is control. Consider the following three factors:
- Do you own the premises?
- Do you have exclusive possession of the premises?
- Does any other party have a degree of possession?

A land registry search should determine ownership. It is not always apparent, for example, when land is acquired via a stock transfer.

A landlord relinquishes control of property when it is let and is not an occupier for the purposes of the *Act*, even with a remaining obligation to repair. The tenant, not the landlord is the occupier of property demised. However, the landlord remains the occupier of common parts (for example stairwells) in multi-occupied buildings.

There can be more than one occupier of premises. A landlord and managing agent may both be occupiers.

A landlord relinquishes control of a property when it is let and is not an occupier for the purposes of the *Act*, even with a remaining obligation to repair.

Who is a visitor?

A lawful visitor under *OLA 1957* is someone who enters the premises by express or implied permission of the occupier or in the exercise of a right conferred by law.

■ Do you have an inspection system?
■ Is this system appropriate for the nature and use of the premises?
■ Were there any warning signs? If so, were they sufficient to enable a visitor to be reasonably safe?

6 Was the defect created by an independent contractor? If so, consider the independent contractor defence under *OLA 1957*.

■ Were enquiries undertaken to check the contractor was competent?
■ Has the contractor carried out works previously and demonstrated competence?
■ Was there a system to check the works were carried out properly?
■ Where the contractor carries out works under a maintenance contract, are a sample percentage of the works checked?

However, a person using a private right of way, such as an easement over land, is not a visitor. For example, a tenant. Nevertheless, they can bring a claim under *OLA 1984*.

Highways – public rights of way

A highway is a place where the public has a right to pass and re-pass unhindered. A highway is a public right of way but not necessarily one maintainable at public expense.

A public right of way can be created by statutory presumption of dedication, which can be 20 years uninterrupted use by the public (*s.31 Highways Act 1980*) or by the common law doctrine of dedication and acceptance.

The onus of proving uninterrupted use is on the defendant so witness evidence will have to confirm that the public has used the way for at least 20 years.

Examples of potential public rights of way include footpaths crossing housing estates and shop forecourts on a high street.

It is well-established that the owner of land over which a public right of way passes is under no liability towards members of the public for negligent nonfeasance (a failure to maintain). This principle is not modified by *OLA 1957*, as confirmed by the House of Lords in *McGeown v Northern Ireland Housing Executive [1994]*. It was also held that a person using a public right of way did so by way of right and therefore could not be a visitor or licensee.

Defects - conventionally in *Highways Act* claims the threshold is 20mm to 25mm on a footpath. While a lesser defect might be regarded as hazardous in occupier claims, this measurement is a useful starting point.

Once a footpath becomes a public right of way, there is no duty owed to anyone using that footpath in respect of a failure to maintain, including invitees (*Campbell v Northern Ireland Housing Executive [1996] CA*). However, this does not apply to negligent misfeasance, for example if a landowner creates a hazard by digging a hole and does not reinstate it.

Highways – maintainable at public expense

If a highway is adopted by a highway authority, it will be maintainable at public expense. A footpath or road may have been adopted even if a local authority has never owned the land.

There are circumstances where a highway will be deemed to be maintainable at public expense, normally where it is constructed as a housing provision under statutory powers, see *Gullicksen v Pembrokeshire County Council [2002]*. ●

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Don't DESPAIR over housing DISREPAIR

Use the *Pre-action Protocol for Disrepair Cases* to your advantage.

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How do landlords comply with the *Protocol* while balancing other competing demands on their limited resources?

The ***Pre-action Protocol for Disrepair Cases*** applies to all civil claims and counter-claims for disrepair on residential property in England and Wales, (there is currently no pre-action protocol in Scotland) brought by tenants, leaseholders and members of their families.

On first reading of the *Protocol*, it appears particularly tenant friendly. For instance, the tight timescale of 20 working days to investigate a claim for housing disrepair and respond to the letter of claim is onerous for landlords, especially for social housing landlords with thousands of tenants and limited resources. A failure to respond to a letter of claim is deemed a breach of the *Protocol* and the tenant can issue proceedings.

To inspect within 20 days puts pressures on limited resources, which tenants' solicitors are fully aware of. They attempt to obtain a tactical advantage by sending claims in bulk, hoping the landlord will fail to respond. A prudent landlord will need to inspect the property to respond adequately but how do landlords comply with the *Protocol* while balancing other competing demands on their limited resources? The answer is to use the *Protocol* to the landlord's advantage.

How to respond to a letter of claim

On receipt of the letter of claim consider if the tenant has complied with the *Protocol* and has included all the information required.

A failure to respond to a letter of claim is deemed a breach of the *Protocol* and the tenant can issue proceedings.

The letter of claim should include:

- Details of the defects to be carried out in the form of a schedule if appropriate (rarely seen attached to a letter of claim).
- A history of defects already repaired and/or attempts to rectify any of the defects listed in the schedule.
- Details of notification given to the landlord.

Consider whether the letter of claim provides specific details of the alleged items of disrepair and not merely, for example, reference to generalised widespread damp throughout the property. The letter of claim may not comply with the *Protocol* and may lack the particulars required by it. Respond to the tenant's solicitors with clarification questions. Confirm that you do not consider the *Protocol* 20-day time limit commences until they have rectified the inadequacies in the letter of claim.

You can question how a tenant knows of the technicalities of the required repairs, such as inadequate insulation, defective pointing, water staining on the roof and asbestos in the property. It could be that an expert report has already been obtained, despite the *Protocol* encouraging single joint experts (see below). Importantly if you have received letters of claim in bulk, check they differ in detail and are not just a copy and paste exercise.