

TENANTS' REMEDIES AGAINST LANDLORDS

by

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¹ In case any judges are reading this, Stephen would like to point out that, in recent years, he has noticed how young, attractive and delightful the judges have become.

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Introduction

Training sessions tend to focus on the enforcement of tenant obligations by the landlord. This is probably because 90% of the average lease is devoted to setting out the things that the tenant must do, and may not do. Leases invariably include a right for the landlord to forfeit if the tenant does not pay the rent, or breaches his obligations, but have you ever seen a lease that allowed the tenant to end the lease if the landlord breaches his?

So I have been asked to redress the balance a little, by looking at some aspects of the tenant's remedies against the landlord.

There may, of course, be specific covenants in the lease on the part of the landlord which the tenant can enforce. There, the tenant's remedies will depend on the specific drafting of the lease. However, even if there are not any specific covenants which are relevant, there are three potential bases for claiming a remedy that may be relevant and which I propose to look at:

- the law of nuisance
- the implied obligation on the landlord not to derogate from his grant
- the covenant for quiet enjoyment

The Sherlock Holmes Arcade

As we go along, I will pose various situations to illustrate and test the legal principles. It is helpful to have a setting for those examples.

So let me take you to the (wholly imaginary) Sherlock Holmes Arcade. It is an arcade with its entrance at 22B Baker Street, with units on either side of a pedestrian walkway. Most of these are shop units, but one is a bar. The landlord is a professor of mathematics called Moriarty. You are advising George Lestrade, a former police inspector and now the tenant of one of the shop units towards the far end of the arcade. His shop is called "Elementary" and sells Sherlock Holmes themed merchandise – deerstalker hats, magnifying glasses, calabash pipes and so forth.

When Lestrade took his lease, he was told by Prof Moriarty that he was crucial to the success of the Arcade because, by selling Holmes themed merchandise, he would give the Arcade its distinctive character. Moriarty promised Lestrade that no-one else would be allowed to sell such merchandise. Lestrade's lease includes a covenant by the landlord that:

“No other unit in the Arcade will be used for the sale of Sherlock Holmes themed items”.

The noisy neighbour

“Elementary” is right next doors to the bar, which trades under the name “What’s On?!” It is part of a chain owned by a rather glamorous opera singer called Irene Adler.

Lestrade has been experiencing serious problems as a result of noise produced by the patrons of the bar. This is due to an association of property lawyers. The members of this association come to the bar for what they describe as all day “legal training seminars” but which really appear to be nothing more than extended drinking sessions. For some time, they have been making a great deal of noise inside the bar. More recently, they have started coming to drink outside. Lestrade says that now, when potential customers come down the passageway, and see and hear the lawyers talking loudly and angrily about incomprehensible subjects such as “the Jackson Reforms” the potential customers tend to turn pale and walk straight out again. Lestrade says that his sales have plummeted as a result.

Lestrade has tried to contact Adler to complain, but her staff say they do not know where she is and there is nothing they can do without her authority. Lestrade has complained repeatedly to Moriarty, but the Professor says that he has no responsibility to control the activities of customers of other tenants.

Lestrade has read his lease and sees that there is a covenant in it which is headed “quiet enjoyment” and says

“The Landlord covenants to permit the Tenant peaceably and quietly to hold and enjoy the Premises without any interruption or disturbance from or by the Landlord or any person claiming under or in trust for him”.

He says that his shop is not quiet and he is not enjoying it and he wants the landlord to do something about it.

He has also seen that his lease includes a covenant by him that:

“The Tenant will not do, or allow to be done, anything on the Premises that may be or become a nuisance or cause annoyance, disturbance, inconvenience, or damage to the Landlord or his tenants or the owners or occupiers of any adjoining property of the Landlord or any other adjacent or neighbouring premises.”

He suspects that all the leases of units in the arcade include this covenant and therefore Moriarty could, if he wished, enforce that covenant against Adler.

Let us assume that the noise produced by the customers of the bar is sufficiently disturbing to constitute an actionable nuisance. Irene Adler, the tenant of the bar, is certainly liable for the nuisance, even though it is actually caused by her customers rather than her or her employees. In *Lyons, Sons & Co v Gulliver* [1914] 1 Ch 631, Swinfen Eady LJ at p 647 quoted with approval from an earlier case: “If a person

collects together a crowd of people to the annoyance of his neighbours, that is a nuisance for which he is answerable". But what about the landlord?

Is the landlord liable for the noise?

The law on the liability of a landlord to one tenant for nuisance caused by other tenants has rather ebbed and flowed. But a series of decisions in the Court of Appeal have settled the law, at least at that level.

The traditional view was that a landlord is not liable for nuisance caused by his tenant unless he is personally responsible for the nuisance in some way – for example, if he lets the premises for a use which, even if carried out in the ordinary way and with reasonable care would be bound to cause a nuisance. So, for example, in *Harris v James* (1876) Law Times 240, the landlord let land for the express purpose of mining and burning lime. This use was carried on in the ordinary way, and caused a nuisance to the neighbours. The landlord was held liable because the nuisance was the natural and necessary consequence of the letting. Blackburn J said the landlord was liable because he had authorised the nuisance. The position would have been different if, for example, the landlord let land for agricultural use, and the tenant brought on "an enormous quantity of the most odoriferous manure" – there, the landlord would not be liable because he had not authorised or requested what was done.

But if the landlord does not authorise the nuisance, he is not liable for it. In *Malzy v Eichholz* [1916] 2 KB 308, the landlord had leased a restaurant in the Strand to Malzy. The landlord then let the shop next doors to Mr Castiglione for use as "a dealer in fine arts with power to sell by auction diamonds, jewellery, plate and Japanese curios"; and Castiglione covenanted not to permit or suffer to be done any act which might be an annoyance or disturbance to the landlord or his tenants. Castiglione then granted a licence to a Mr Dent to carry on mock auctions in the shop. Dent carried on these auctions in such a way as to be a public nuisance. The landlord frequently wrote to Castiglione to remonstrate, but took no active steps. Malzy sued both the landlord and Castiglione. At trial, he recovered damages against both defendants. The jury held that the landlord had known about and assented to the mock auctions and that he had not taken all reasonable steps and make all reasonable efforts short of legal proceedings to stop them.

But the Court of Appeal allowed the landlord's appeal. The landlord could not be liable, for nuisance, derogation from grant or breach of the covenant for quiet enjoyment, unless he had actively participated in what was complained of. Letting premises for use which may or may not cause a nuisance is not sufficient to render the landlord liable if it does. Pickford LJ said: "Authority to conduct a business is not an authority so to conduct it as to create a nuisance unless the business cannot be conducted without a nuisance." The landlord was not obliged to interfere in the use of the next doors property.

The traditional view was re-stated in *Smith v Scott* [1973] Ch 314. Mr Smith owned a house next to a property owned by the council, into which the council placed the Scott family as tenants. The Scotts had a long record of nuisance-causing behaviour, well known to the council, and unsurprisingly carried on as usual in their new home. Sir John Pennycuik V.C said that they were: "... a large and unruly family. I am satisfied beyond doubt, indeed it is not challenged, that the conduct of the Scott family as a whole was

altogether intolerable both in respect of physical damage and of noise". The Smiths sued both the Scotts and the council for an injunction. They won against the Scotts. But they lost against the council. Pennycuik VC said, at 321

"It is established beyond question that the person to be sued in nuisance is the occupier of the property from which the nuisance emanates. In general, a landlord is not liable for nuisance committed by his tenant, but to this rule there is, so far as now in point, one recognised exception, namely, that the landlord is liable if he has authorised his tenant to commit the nuisance: *Harris v. James* (1876) 35 L.T. 240. But this exception has, in the reported cases, been rigidly confined to circumstances in which the nuisance has either been expressly authorised or is certain to result from the purposes for which the property is let... I have used the word "certain," but "certainty" is obviously a very difficult matter to establish. It may be that, as one of the textbooks suggests, the proper test in this connection is "virtual certainty" which is another way of saying a very high degree of probability, but the authorities are not, I venture to think, altogether satisfactory in this respect. Whatever the precise test may be, it would, I think, be impossible to apply the exception to the present case. The exception is squarely based in the reported cases on express or implied authority... The exception is not based on cause and probable result, apart from express or implied authority. In the present case, the corporation let no. 25, Walpole Road to the Scotts as a dwelling house on conditions of tenancy which expressly prohibited the committing of a nuisance, and, notwithstanding that the corporation knew the Scotts were likely to cause a nuisance, I do not think it is legitimate to say that the corporation impliedly authorised the nuisance."

Developments in the law of nuisance then caused that traditional view to be questioned. These developments started with the decision of the House of Lords in *Sedleigh-Denfield v O'Callaghan* [1940] AC 880. There, a landowner was held liable for flooding caused by works undertaken by a trespasser which the landowner knew or should have known created a risk of flooding. The House of Lords held that a landowner is liable if he continues a nuisance caused by another, and he continues it if "with knowledge or presumed knowledge of its existence he fails to take any reasonable means to bring it to an end though with ample time to do so", per Viscount Maugham at 894.

That was then built on in *Goldman v. Hargrave* [1967] 1 A.C. 645 (landowner liable for fire damage caused when a fire which started accidentally on his land spread) and *Leakey v. National Trust* [1980] Q.B. 485 (landowner liable for damage caused when mound of soil fell from his land on to land below). In those cases, the courts developed the principle that the owner of land owes a "measured duty of care" to do that which is reasonable in all the circumstances to prevent or minimise the known risk of damage or injury to one's neighbour or to his property.

In *Hilton v James Smith & Sons (Norwood) Ltd* [1979] 2 E.G.L.R. 44, the *Sedleigh-Denfield* principle was applied against a landlord. The case concerned a private roadway at the rear of a parade of shops in St John's Wood. The claimant was the tenant of the shop at the end and his lease included a parking bay behind his shop at the end of the roadway. The roadway was owned by the landlord of the parade. The tenants of the other shops persistently parked on the roadway so that the claimant could not get to his parking bay. He sued the landlord for damages and an injunction and won, both at trial and on appeal. In the Court of Appeal, Eveleigh LJ supported the

decision on the basis that the landlord had permitted the use of the roadway. But both Ormrod and Scarman LJ supported it by reference to the *Sedleigh-Denfield* principle – that the landlord, knowing that his property was being used in a way which caused a nuisance, failed to take reasonable steps to stop it. Ormrod LJ said that the landlord could control the parking in two ways – first, because, as occupiers of the roadway, they could bring an action in trespass against anybody who is trespassing on the roadway. They would have to prove nothing more than the presence of the vehicle. Second, because the shop leases all included a covenant not to obstruct the roadway, which the landlord could enforce.

The tenants won again in *Page Motors Ltd v Epsom BC* [1982] J.P.L. 572. The plaintiffs were tenants of business premises on the council's estate, adjoining a piece of open land belonging to the council on which gipsy caravans had for several years camped illegally. The gipsies caused substantial nuisance to the plaintiffs. The council obtained a possession order against the gipsies but, for political reasons, chose not to enforce the order. On the contrary, they provided the gipsies with a water supply, skips for the disposal of their refuse, and sewage disposal points for their sewage. The Court of Appeal held that the council was liable. The council had an immediate right to possession of that land and were in a position in law, and in fact, to control the property. Therefore the *Sedleigh-Denfield* principle applied.

In *Chartered Trust v Davies* [1997] 2 E.G.L.R. 83, the defendant tenant was granted a lease of a shop in a shopping mall owned by the landlord. Four years later, the adjoining unit was let to a pawnbroker. The pawnbroker attracted customers who had little money to spend in the other shops and who had to wait outside in that part of the shopping mall outside the defendant's shop. A pawnbroker's sign was erected in this part of the mall and the light to the mall was restricted by the pawnbroker's windows being obstructed, all of which deterred passing trade. The trial judge held that the pawnbroker's conduct was such as to constitute a nuisance, that the landlord was in repudiatory breach of its obligations and that the tenant had been entitled to accept that repudiation and terminate the lease. The Court of Appeal upheld that decision.

Henry LJ gave the only judgment, with which Staughton LJ agreed. He held that the landlord had derogated from his grant and was liable in nuisance.

As to derogation from grant, he explained the relevant principle - that where a landlord lets part of his property for a particular use, he comes under an obligation, imposed by law, to abstain from doing anything on the remaining portion which would render the demised premises unfit, or materially less fit, for carrying on such use in the way in which it is ordinarily carried on. Derogation from grant embodies in a legal maxim a rule of common honesty – that a grantor having given the right to use the land in a particular way with one hand, is not to take away the ability to use it in that way with the other hand. The obligation therefore must be construed fairly. It must be such as, in view of the surrounding circumstances, was within the reasonable contemplation of the parties at the time when the transaction was entered into. The exercise to identify what obligations, if any, on the part of the grantor can fairly be regarded as necessarily implicit, having regard to the particular purpose of the transaction when considered in the light of the circumstances subsisting at the time the transaction was entered into.

Henry LJ then applied that principle to the facts. The key point was that the defendant's shop had been let not as a standalone unit, but as part of an arcade, and the landlord

had retained control over the common parts. For the landlord to allow the common parts to be used in a way which rendered the shop materially less fit for its permitted use was, therefore, a derogation from grant.

As to nuisance, he questioned whether *Malzy v Eichholz* was still good law as authority for the proposition that a landlord is never obliged to take any action himself to restrain harmful activities by his tenants: "I question whether so sweeping a proposition can be the law today." He said that the law had developed since, including the milestone decision in *Sedleigh-Denfield*.

However, in a series of subsequent cases, the Courts have held that, apart from cases where the landlord authorises the nuisance, a landlord can only be liable for nuisance emanating from property over which he is in control – such as common parts. So if the landlord grants a lease of property, then except in a lime-burning sort of case he is not liable for nuisance caused by the tenant. *Malzy v Eichholz* remains good law. But if the landlord grants a licence, retaining possession, he is liable for nuisance caused by his licensees: see *Hussain v Lancaster CC* [2000] 1 QB 1 (council not liable for violent racial harassment committed from the highway by its tenants), *Lippiatt v South Gloucestershire DC* [2000] QB 51 (council capable in law of being liable for nuisance caused by travellers to the council's tenants – the travellers were either licensees or trespassers on the council's land); *Mowan v Wandsworth LBC* (2001) 33 H.L.R. 56 (council not liable for severe nuisance caused by its tenant of one flat to the flat beneath) and *Octavia Hill Housing Trust v Brumby* [2010] EWHC 1793 (QB) (housing trust would be liable in law if it had failed to stop nuisances emanating from common parts under its control).

The law as stated in those cases is now settled at the level of the Court of Appeal. But it has not been reviewed by the Supreme Court. In *Mowan*, one council tenant made the life of another in the flat below intolerable. She regularly blocked her toilet so as to cause the flat beneath to flood with sewage, and she banged, chanted and moaned late at night, pursuant to her activities as a clairvoyant. The Court of Appeal held that the council was not obliged to do anything about this. Sir Christopher Staughton said: "I find this a deplorable result; but the law in this court has already been stretched as far as it will go in the two previous decisions to which I was a party, *Chartered Trust* and *Lippiatt*." There is a respectable argument that the law should be stretched further – see *Loveland: Fixing landlords with liability for the anti-social behaviour of their tenants: stretching the orthodox position: Part 1*. (2005) J.P.L. Mar, 273-282.

As the law stands, however, Prof. Moriarty cannot be held responsible for any nuisance emanating from inside the bar. But he can be held responsible for nuisance caused by the use of the passageway. It looks as though he is probably liable in nuisance, and for derogating from his grant, and for breach of the covenant for quiet enjoyment (which for these purposes effectively covers the same territory as the obligation not to derogate from grant – see *Southwark London Borough Council v Mills* [2001] 1 AC 1).

Remedies

What about remedies? Clearly Lestrade can recover damages, but what can he do to avoid the problem in the future. In *Hilton* the tenant got an injunction against the landlord, and provided it is possible to identify what it is that Moriarty should be ordered

to do the court may well be willing to grant an injunction. It would be sensible for Lestrade to also seek an injunction against Adler.

A more drastic remedy is that obtained by Davies against Chartered Trust – a determination that the landlord's derogation from grant is so serious as to amount to a repudiation of the lease, which the tenant can accept, so bringing the lease to an end. In *Chartered Trust*, it was clearly assumed that a lease can end through repudiation and acceptance, but the point was not argued.

The issue is one of some difficulty, and deserves a lecture to itself. Mr Assistant Recorder Sedley Q.C. (later to become Sedley LJ), held in the county court in *Hussein v Mehlman* [1992] 2 E.G.L.R. 287 that a lease could be brought to an end by the tenant's acceptance of a repudiatory breach by the landlord. In *Reichman v Beveridge* [2007] 1 P & CR 20, the Court of Appeal left the point open. Lloyd LJ said: "We were shown the Blundell lectures delivered in 2000 by Lord Millett and Sir David Neuberger, respectively against and for the proposition that the doctrine of repudiation is and should be part of the English law of landlord and tenant. It is clear from those powerful texts that there is much to be said each way on the point of principle." In *Grange v Quinn* [2013] EWCA Civ 24, Jackson LJ said, at [70]: "Although there were earlier indications to the contrary, it is now clear that a lease may be brought to an end by repudiation and acceptance". But again the point does not seem to have been argued in that case and it is far from clear that Jackson LJ was right about that. The issue in *Grange v Quinn* was not whether termination of a lease by repudiation and acceptance is possible, but the measure of damages for unlawful eviction, and all three judges in the Court of Appeal reached different decisions, with Arden LJ and Gloster J agreeing on the applicable principles but disagreeing on their application to the facts, and Jackson LJ and Gloster J agreeing on the result, but for quite different reasons.

The competing shop

Lestrade has learned that Prof Moriarty has recently purchased the shop unit at 221A Baker Street. This unit is just next to the entrance to the Sherlock Holmes Arcade, but is not part of the Arcade itself. Prof Moriarty is planning on letting the shop to a known associate of his, Colonel Moran, and the Colonel is going to use the shop to sell Sherlock Holmes themed merchandise, in direct competition with Lestrade.

This will not be a breach of the covenant that "No other unit in the Arcade will be used for the sale of Sherlock Holmes themed items" because the "Arcade" is defined by reference to a plan which does not include 221A Baker Street.

Can Lestrade stop Moriarty on the ground that, by granting the proposed lease, he will be derogating from his grant?

The answer is, possibly.

The obligation not to derogate from grant is capable of restricting the use of property acquired by the grantor after the grant: see *Johnston & Son v Holland* [1988] 1 E.G.L.R. 264, at 268, where Nicholls LJ said: "... in considering what is necessarily implicit in a transaction in a case where the grantor owns no other land, very great weight indeed must be given to that factor. It will be a very exceptional case for it to be necessarily implicit in a lease that the activities of a lessor who owns no adjoining land, and has no

plans to buy any adjoining land, are to be restricted on the adjoining land should he ever become owner or tenant of that land. Whether it is so implicit or not will depend on all the circumstances, including the purpose of the grant and the nature of the activities sought to be restrained. But if the facts in a given case point clearly to such a restriction being implicit, I can see no reason in principle why the law should treat that case differently from one where the lessor already owns the adjoining land at the time of the lease.”

Nor does the presence of an express restrictive covenant necessarily prevent further restrictions arising as a result of the obligation not to derogate. In *Oceanic Village v Shirayma Shokussan* [2001] L. & T.R. 35, Nicholas Warren Q.C. had to consider a somewhat similar situation. There, by a 1997 lease, the landlord let to the tenant parts of the Riverside Building (the old County Hall Building) next to the Thames to use as a high quality gift shop in connection with the London Aquarium. The lease contained a covenant by the landlord not to permit any other gift shop to be operated “in the Building”, but the lease did not define the extent of “the Building”. Between the facade of the Riverside Building and the river wall is a wide walkway forming part of Queen's Walk. The landlord proposed to erect two kiosks on Queen's Walk and use them for the sale of gift items, including items relating to the Aquarium. The tenant brought proceedings claiming that the walkway formed part of the building for the purposes of the landlord's covenant and that, in the alternative, the use of the proposed kiosks to sell aquarium-related items would be in derogation of the landlord's grant. Mr Warren held that the walkway was not part of the building and so there would be no breach of the express covenant. But there would be a breach of the obligation not to derogate from grant.

He said that the general rule, established by *Port v. Griffith* [1938] 1 All E.R. 295 and *Romulus Trading Co. Ltd v. Comet Properties Ltd* [1996] 2 E.G.L.R. 70 was there is no derogation from grant where a landlord allows a competing business to be set up (whether by himself or his tenant) next door to premises which he has already demised for the purposes of the same trade. But that did not determine the question of what can properly be said to be in the reasonable contemplation of the parties at the time of the lease, which is the crucial question when considering derogation from grant. This question had to be approached in a practical way, looking at the geographical and commercial realities. In this case, the purpose for which the lease was granted was to run the aquarium gift shop; a purpose which carried with it an exclusivity over the sales of aquarium-related products. The fact that the parties had expressly bargained for a restriction relating to gift-shop use generally in the building did not exclude the implication of a further term relating to the sale of aquarium-related products from a gift shop not within the area of the express restriction. The scope of the express restriction—which relates to all gift shops—was substantially different from the implied restriction—which relates only to aquarium products.

One way of looking at the express covenant here is that it defines the agreed extent to which the landlord's freedom of action was fettered, and that it would be wrong to use the obligation not to derogate from grant to go beyond that. The other is that the ambit of the covenant was limited to the Arcade because that was all that Moriarty owned at the time, and that it is obvious that Moriarty should not be able to use or permit to be used after acquired property which is at the entrance to the Arcade to compete with the exclusivity which Lestrade was promised when the lease was granted.

One matter which needs to be considered when covenants of this kind are under consideration is the Competition Act 1998². However, bearing in mind the OFT Guidance³ and the nature of the restriction here, it seems somewhat unlikely that precluding Moriarty from letting 221A for the sale of Sherlock Holmes themed merchandise would have an appreciable impact on competition in a related market and be caught by the 1998 Act.

If there is a breach, Lestrade can obtain an injunction to restrain Moriarty from using the unit at 221A or permitting it to be used for the sale of Sherlock Holmes themed merchandise.

The leaking drainpipe

Lestrade's store room has been terribly damp since he opened up. It looked fine when he took the lease, but more or less as soon as he started trading, damp started coming through the wall. The plaster has fallen off the wall and he cannot store his goods in it because of the damp. His surveyor has worked out that the cause of the problem is a leaking drainpipe on the outside of the store room wall. Investigations have established that it is a fairly new drainpipe, which Moriarty put up about a year before Lestrade's lease was granted, and that it is a manufacturing fault in the drainpipe which is causing the problem, not any deterioration in the pipe since it was installed.

The lease includes a covenant by Moriarty to "repair, maintain, uphold and keep in good and substantial repair the structure of the Arcade and all gutters and drainpipes serving the Arcade". But Moriarty says, correctly, that he is not in breach of this covenant in relation to the drainpipe because an obligation to repair is not breached unless there has been a deterioration from an earlier, better condition: *Post Office v Aquarius Properties Ltd* [1987] 1 All E.R. 1055. The plaster is Lestrade's responsibility under the lease. The wall itself is Moriarty's responsibility, but the surveyor says that the damp in the walls does not adversely affect them in any way, and this means that Moriarty is not in breach of his repairing covenant: *Janet Reger International Ltd v Tiree Ltd* [2006] 3 EGLR 131.

What about nuisance, derogation from grant and the covenant for quiet enjoyment?

Sadly, here they are of no use.

A landlord can be liable in nuisance to his tenant in respect of harm caused by the physical condition of property which the landlord is in possession of next to or near the demised premises. For example, in *Tennant Radiant Heat v Warrington Development Corp* [1988] 1 E.G.L.R. 41, the landlord was liable in nuisance to the tenant of an industrial unit for water damage after the roof collapsed. The collapse was caused by the accumulation of rain water after the outlets for the water on the roof become blocked up due to seagull droppings, feathers and silt, so that the rain-water had no means of getting away, something the landlord had been warned about. The roof covered not only the tenant's unit, but also the neighbouring units which were unlet and

² Which by virtue of the Competition Act 1998 (Land Agreements Exclusion Revocation) Order 2010 has applied to land agreements since 6 April 2011

³ Land Agreements: The application of competition law following the revocation of the Land Agreements Exclusion Order (OFT March 2011)

therefore in the landlord's possession. The Court of Appeal held that the tenant was responsible for keeping the outlets on the part of its roof above its unit clear under the terms of the lease, and the landlord was responsible for keeping the outlets in the remainder of the roof clear in nuisance, and as most of the roof was in the possession of the landlord, it was liable for 90% of the loss suffered by the tenant.

But that will not be the case unless there has been some change for the worse in that physical condition since the lease was granted. In *Jackson v J.H. Property Investment Ltd* [2008] Env. L.R. 30, the claimant was Mr Jackson, a Chancery barrister practising in Liverpool. He held a long lease of a flat. The defective laying of concrete to light-well grills which adjoined, but were not part of, the flat, had resulted in the ingress of water to the flat. This had necessitated waterproofing and other remedial works, the costs of which Mr Jackson sought to recover, together with diminution in value. The defect had existed at the time of the commencement of the lease, and had got no worse, which meant that there could be no liability under W's covenant to repair. But he argued that there was a nuisance. His claim failed. HHJ Behrens held that it was well established law that a landlord is not liable in nuisance for physical defects present when the lease was granted, under the principle of caveat lessee.

As for quiet enjoyment and derogation from grant, in *Southwark London Borough Council v Mills* [2001] 1 AC 1, the House of Lords held that these obligations are prospective in operation and as such did not extend to interference consequent on the condition of the property before the grant of the tenancy. Lord Hoffmann approved a statement from an earlier case that:

"The express covenant for quiet enjoyment and implied covenant against derogation from grant cannot in our opinion be invoked so as to impose on [the plaintiffs] positive obligations to perform acts of repair which they would not otherwise be under any obligation to perform."

One possibility that might be worth exploring here is that of a claim for misrepresentation. The store room looked fine when the lease was granted, even though the faulty drainpipe had been up for a year. Could it be that Moriarty plastered over a wet wall to disguise the problem? If so, that would be a fraudulent misrepresentation, and Lestrade might be able to rescind the lease or claim damages.

In *Gordon v Selico* (1986) 18 H.L.R. 219, the landlord of a block of flats wanted to sell one of them. The flat was in a poor condition, with evidence of dry rot, and the managing agents arranged for work to be done which concealed patches of dry from view. The plaintiffs bought the flat, after obtaining a detailed surveyor's report which stated that no dry rot had been found. After they moved in, extensive dry rot was found to be present. The trial judge held that the concealment of the dry rot was a knowingly false representation that the flat did not suffer from dry rot, which was intended to and did deceive the plaintiffs, to their detriment. The misrepresentation had been made by the managing agents in the course of their duties and therefore both the managing agents and the landlord were liable for damages for the tort of deceit. The Court of Appeal upheld his decision.

