

*When leaseholders are landlords:  
Edwards v Kumarasamy [2016] UKSC 40;  
[2016] 3 W.L.R. 310*

Article

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## WHEN LEASEHOLDERS ARE LANDLORDS

Edwards v Kumarasamy [2016] UKSC 40; [2016] 3 W.L.R. 310

The course of social changes can often be traced in the evolution of case law. The recent decision of the Supreme Court in *Edwards v Kumarasamy*<sup>1</sup> is a good example. Here landlord and tenant law has had to get to grips with how far a landlord should be under an obligation to repair, where the landlord is himself a leaseholder, and not primarily liable for repairs. This scenario has arisen due to the revival of the ‘buy-to-let’ property market, and because properties which are affordable – both to the buyer and the renter – will often be leasehold flats. In allowing the landlord’s appeal, the Supreme Court has clarified the extent of the immediate landlord’s repairing obligations towards the tenant, and rejected some rather unorthodox views expressed by the Court of Appeal.

### **Repairing obligations implied by statute: the background**

The statutory repairing obligations owed by a landlord to a residential tenant under a short lease (not exceeding seven years) can, in their present form, be traced back to the Housing Act 1961.<sup>2</sup> Section 32 of that Act placed upon the landlord the now familiar obligations to repair the structure and exterior of a dwellinghouse, and also to keep in repair and proper working order the installations for the supply of certain services.

An obligation couched in such simple terms sufficed to address the archetype of an individual house, probably fairly modest, which had been let as a whole. It is surprising that so late as 1961

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<sup>1</sup> *Edwards v Kumarasamy* [2016] UKSC 40, [2016] 3 W.L.R. 310.

<sup>2</sup> The implication of a covenant of fitness for human habitation at the outset of the tenancy can be traced back to *Smith v Marrable* (1843) 11 M. & W. 5 and was given statutory recognition in s.12 of the Housing of the Working Classes Act 1885; this was extended to continue throughout the tenancy by s.15(1) of the Housing, Town Planning, etc. Act 1909, and re-enacted by the Housing Acts of 1925 and 1936. The focus on repair, rather than on fitness for human habitation, came in the Housing Act 1961, but the principle that the statute operated by implying a term within the contract of tenancy was continued (see the historical overview by Lord Diplock in *O’Brien v Robison* [1973] A.C. 912, 926-7).

more specific provision was not made for multi-occupied buildings, as flats<sup>3</sup> were hardly uncommon even then. Another omission was that the landlord was not required to ensure that the means of access to the building should be kept in repair. This was largely remedied by the decision of the Court of Appeal in *Brown v Liverpool Corpn*<sup>4</sup> to the effect that steps just inside the front gate, approximately two metres along a short entrance path from the front door of the premises, formed part of the exterior of the building for the purposes of s.32. The decision was not, however, followed in *Hopwood v Cannock Chase District Council*,<sup>5</sup> which involved an accident in a back yard which was out of repair. *Brown* was distinguished on the basis that the rear yard did not form part of the principal means of access to the building, and so could not be said to be part of its structure or exterior.

### **Applying the obligations to ‘common parts’**

Section 32 was clearly not drafted to address the issues raised where the dwelling formed part of a larger building, and the tenant complained of a lack of repair to the common parts. In *Campden Hill Towers Ltd v Gardner*<sup>6</sup> the Court of Appeal confirmed that, where s.32 implied a covenant ‘to keep in repair the structure and exterior of the dwellinghouse’ then, in respect of a flat which comprised only part of the building, this related only to the structure of the part of the building immediately surrounding the flat, and not the exterior of the building in general, so limiting the scope of the section when applied to flats. Slightly earlier the House of Lords in *Liverpool City Council v Irwin*<sup>7</sup> had accepted that s.32 could not be treated as implying a covenant on the part of the landlord to keep the common parts in repair. The House was nevertheless able to hold that the

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<sup>3</sup> Flats were common in the public sector throughout the country; particularly in London there were many private lettings of flats constructed in the 1930s and earlier, though ‘break-ups’, leading to the sale of the latter on long leases, were by then getting underway. The *Report of the Committee of Inquiry on the Management of Privately Owned Block of Flats* (Department of the Environment, 1985) (‘*The Nugee Report*’) discusses these trends.

<sup>4</sup> *Brown v Liverpool Corpn* [1969] 3 All E.R. 1345, (1984) 13 H.L.R. 1.

<sup>5</sup> *Hopwood v Cannock Chase District Council* [1975] 1 W.L.R. 373.

<sup>6</sup> *Campden Hill Towers Ltd v Gardner* [1977] Q.B. 823 (24 Nov 1976).

<sup>7</sup> *Liverpool City Council v Irwin* [1977] A.C. 239, 252, [1976] 2 W.L.R. 562 (31 March 1976).

landlords would in principle owe some duties to the tenants by virtue of obligations to be implied at common law to give efficacy to the tenancy contract.

In view of the evident lacuna in the law exposed by *Campden Hill Towers Ltd* – which *Liverpool CC v Irwin* did not entirely fill – it is perhaps surprising that s.32 of the Housing Act 1961 was re-enacted in substantially the same form, as s.11 of the Landlord and Tenant Act 1985, though this was a consolidating statute. The problem of the extent of the statutory repairing covenant in horizontally-divided buildings was not addressed until the Housing Act 1988<sup>8</sup> inserted new subsections (1A), (1B) and (3A) into section 11, which required that the building of which the demised premises formed part should be kept in repair (1A), though not if the lack of repair did not affect the tenant's enjoyment of his dwellinghouse (1B); the inability of the landlord to make such repairs due to a lack of legal rights amounted to a defence (3A).

### **Implications of the revival of the private rented sector**

With the passage of time it is easy to forget that at the time when the scope of s.11 was extended in 1988, scenarios such as that encountered in *Edwards v Kumarasamy* would have been unusual. The additional subsections inserted in s.11 were intended to cover the situation where the dwelling formed part of the building and the landlord owned the whole of the building of which the dwelling formed part. These provisions would have been highly relevant to public sector tenancies, but at the time private rented tenancies represented a small and declining proportion of the housing stock.<sup>9</sup> Where private flats were tenanted, it was likely that the landlord would own the whole of the building. Save in exceptional circumstances, one would not normally have purchased a leasehold flat with a view to letting it out. The Housing Act 1980 had introduced

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<sup>8</sup> S.116.

<sup>9</sup> Annex Table 1.1 in the English Housing Survey Headline Report, 2014-15 (Department for Communities and Local Government) shows that the proportion of households in the private rented sector hit its lowest level (9.1%) in 1988, began to increase in 1989, rising to 11% by 2004, and now (2014-15) stands at 19%.  
<<https://www.gov.uk/government/statistics/english-housing-survey-2014-to-2015-headline-report>> accessed 17 October 2016.

*protected shorthold tenancies*, which required that a notice be given before the tenancy was granted, warning the prospective tenant that their security of tenure would be limited, but also required that a ‘fair’ rent be registered by the local rent officer.<sup>10</sup> Uptake of these was very slow, and the private sector did not really begin to revive until the introduction of *assured shorthold tenancies* by the Housing Act 1988. While the Act originally kept the requirement for prior notice,<sup>11</sup> it was no longer necessary to register a fair rent for the property. The Housing Act 1988 thus marked the beginning of the revival of the private rented sector in England and Wales.<sup>12</sup> Only once long leasehold flats were being purchased for ‘buy-to-let’ would the problem which raised its head in *Edwards v Kumarasamy* be likely to arise.

The first reported case where a tenant alleged that his immediate landlord was liable to repair<sup>13</sup> a part of the building which was not owned by him – because the landlord was himself a leaseholder of only part – was *Niazi Services Ltd v Van der Loo*.<sup>14</sup> The claimant claimed that, as a result of work to modify the water supply to the restaurant on the ground floor, the water pressure to his second floor flat was inadequate. The defendant was the claimant’s landlord, but held a lease only of the flat itself. The Court of Appeal was therefore faced with deciding between two alternative constructions of sub-section (1A), namely whether it was sufficient that the sub-landlord had an estate or interest in any part of the building of which the installation formed part, or whether it was essential that the sub-landlord should have an estate or interest in the part of the building in which the installation was to be found. The Court of Appeal preferred the narrower interpretation.

## **The present case**

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<sup>10</sup> Housing Act 1980, s.53(1)(c).

<sup>11</sup> This was formerly required by s.20(1)(c) and (2), but was abolished by s.96 of the Housing Act 1996, which made the assured shorthold tenancy, in effect, the default status for assured tenancies.

<sup>12</sup> See Annex Table 1.1 in the English Housing Survey Headline Report, 2014–15 (Department for Communities and Local Government).

Against this somewhat unpromising background Mr Edwards (E) sought to sue Mr Kumarasamy (K). K was the long leaseholder of a flat on the second floor of a small block, and had let the flat to Mr E on an assured shorthold tenancy, which was continuing as a periodic tenancy (although nothing turns on its precise status). E was injured due to disrepair to a paved area outside the front door of the communal hallway to the flats. The District Judge found K liable for breach of covenant, and awarded E damages of £3,750, but on appeal the Circuit Judge found K not liable. The Court of Appeal then reversed the Circuit Judge, and reinstated E's judgment, so K appealed to the Supreme Court. Lord Neuberger, PSC, gave the sole judgment of the Court,<sup>15</sup> and pointed out that, in order for E to resist the appeal, he would need to succeed on all three points of law which had been decided in his favour in the Court of Appeal and were now before the Supreme Court:

- (1) whether the paved area in front of the outer front door of the block of flats could be characterised as part of the 'structure and exterior' of the building;
- (2) whether, if it was, K could be said to have an 'estate or interest' in it; and
- (3) whether K could be liable if he had not been given notice of the disrepair.

### **Was the paved area part of the 'structure and exterior'?**

The Court of Appeal, to the surprise of the present author, had held that the paved area in front of the front door of the building was part of the 'structure and exterior' of the building, on the basis that, although it was not part of the 'structure' of the building, it was part of its 'exterior'. Some reliance was placed on the Court's previous decision in *Brown*, in that, although it could not be said that the paved area was part of the exterior of E's flat, it could be said to be 'the exterior of the front hall', and it was also part of the essential means of access to the front hall.

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<sup>13</sup> More accurately, 'to keep in repair and proper working order [an] installation[...] for the supply of water' (s.11(1)(b) LTA 1985).

<sup>14</sup> *Niazi Services Ltd v Van der Loo* [2004] EWCA Civ 53, [2004] 1 W.L.R. 1254.

The Supreme Court, unsurprisingly, rejected this analysis, preferring a ‘normal’ or ‘natural’<sup>16</sup> meaning as to what amounted to the ‘structure and exterior’ of the building, rather than an ‘unnaturally wide’ one.<sup>17</sup> Although accepting that it might be appropriate to give a purposive, and therefore a wide, interpretation, as the statute was imposing obligations beyond those contractually agreed, they should be imposed with caution.<sup>18</sup> The fact that the sub-section is specifically extended to refer to ‘drains, gutters and external pipes’ supported the conclusion that the word ‘exterior’ should be given ‘a natural, rather than an artificially wide, meaning’.<sup>19</sup> Also unsurprisingly, having reached this conclusion on the meaning of ‘structure and exterior’ in this case, the Supreme Court affirmed the conclusion of the Court of Appeal in *Campden Hill*,<sup>20</sup> but held its decision in *Brown v Liverpool Corpn* to be wrong.<sup>21</sup> The result - that s.11 does not ensure that a tenant has a right to safe access to demised premises – shows up a lacuna in the law, though its effect is mitigated by the *Irwin* decision on when terms may be implied.

### **Did the sub-landlord have an ‘estate or interest’ in the common parts?**

As the Court pointed out, its decision on the first point meant that E could not succeed, but it went on to determine the other points as they had been fully argued. The second point – whether K could be held to have an ‘estate or interest’ in the paved area (if it *had* been part of the front hall) – was the only one upon which the Supreme Court agreed with the Court of Appeal. Whilst it was clearly right for the Supreme Court to express its views on this issue, it was ruling on the basis of assumed facts, and, it is therefore important carefully to consider the effect of its ruling.

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<sup>15</sup> With whom Lords Wilson, Sumption, Reed and Carnwath agreed.

<sup>16</sup> *Edwards v Kumarasamy* [2016] UKSC 40, [2016] 3 W.L.R. 310 at [17].

<sup>17</sup> *Edwards v Kumarasamy* [2016] UKSC 40, [2016] 3 W.L.R. 310 at [18].

<sup>18</sup> *Edwards v Kumarasamy* [2016] UKSC 40, [2016] 3 W.L.R. 310 at [18].

<sup>19</sup> *Edwards v Kumarasamy* [2016] UKSC 40, [2016] 3 W.L.R. 310 at [18].

<sup>20</sup> *Edwards v Kumarasamy* [2016] UKSC 40, [2016] 3 W.L.R. 310 at [19].

<sup>21</sup> *Edwards v Kumarasamy* [2016] UKSC 40, [2016] 3 W.L.R. 310 at [21].

The Supreme Court agreed with the Court of Appeal that K had a leasehold easement to use the front hall, which was appurtenant to K's long leasehold estate in his flat. Applying the definitions in section 1 of the Law of Property Act 1925, K did not therefore have an 'estate' in the front hall, but he did clearly have an 'interest' in it within the meaning of section 11(1A)(a) of the LTA 1985. K, however, argued that, after sub-letting the flat to E, he no longer retained an interest in the common parts, including the hallway. Lord Neuberger recognised that there was a 'practical attraction, at least at first sight' in this contention,<sup>22</sup> as it was unlikely that Parliament could have intended that a headlessee should be under an implied obligation to repair the common parts. He nevertheless went on to hold that when 'interest' was used in a property statute, it was difficult to avoid the conclusion that it should be given its normal meaning. It was not possible to restrict 'interest' in s.11(1A)(a) as meaning 'an interest in possession', as clearly the landlord would not be in possession of the items which had been demised to the tenant.<sup>23</sup> K's interest in the flat and in the front hall was in each case an interest in the reversion.

One might be forgiven for inferring from this that, had E's accident occurred in the front hall itself, then, subject to the further discussion (below) on the question of notice, K would have been liable. But, on closer examination, this conclusion would be unwarranted. It is one thing to say that K had an 'interest' in the front hall: it is quite another to say that the front hall was part of the 'structure and exterior' of the dwellinghouse. As the hallway was neither structural nor external, it is difficult to see how K could ever have been liable to E on this basis, particularly when, in overruling *Brown v Liverpool Corpn*, the Supreme Court impliedly rejected the idea that s.11 would necessarily guarantee to the tenant that the means of access to the demised premises should be kept in repair. Lord Neuberger went on to suggest that someone in K's position would be able to defend an action brought by E for disrepair by invoking sub-section (3A), namely that

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<sup>22</sup> *Edwards v Kumarasamy* [2016] UKSC 40, [2016] 3 W.L.R. 310 at [24]. The paragraph refers to 'an implied liability to [the] subtenant of the flat to repair the common parts'. The suggestion is, as noted, subsequently rejected,

he did not ‘have a sufficient right in the part of the building or installation concerned to enable him to carry out the required works or repairs’,<sup>24</sup> but it is difficult to see how someone in E’s position would even get as far as that (a ‘part of a building’ falls within sub-section (3A) only if it forms part of the ‘structure and exterior’: the reference to ‘installations’ is clearly irrelevant).

Lord Neuberger’s further observations might also encourage one wrongly to believe that someone in K’s position might have some liability for the common parts. In discussing the case of *Niazi Services Ltd v van der Loo* he suggested that Jacob LJ was not directing his mind to possible easements of way over the common parts when he stated there that the headlessee “has no estate or interest in any part of the building except the top floor flat”.<sup>25</sup> What Lord Neuberger actually says here is, on its face, unobjectionable, but it would seem wrong to infer from this that someone in K’s position would therefore incur liability. It is in fact difficult to see how any part of a building such as a block of flats could at the same time both form part of the common parts, over which there would be rights of access to individual flats, and also form part of ‘the structure and exterior’ of the main building. The balconies of blocks – almost always public sector - which give access to individual flats, might qualify. Disrepair of the threshold itself might also qualify; so, possibly, might disrepair to steps or a ramp immediately outside the front door. Although the Supreme Court disapproved (and apparently overruled) *Brown v Liverpool Corpn*, the steps there led down from the garden gate, some seven feet from the front door, and thus (according to the Supreme Court) unsurprisingly formed part of neither the structure nor the exterior of the building.

So, having confirmed that a sub-landlord will have an estate or interest in the front

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but not specifically because the common parts are not part of the ‘structure and exterior’.

<sup>23</sup> *Edwards v Kumarasamy* [2016] UKSC 40, [2016] 3 W.L.R. 310 at [25].

<sup>24</sup> *Edwards v Kumarasamy* [2016] UKSC 40, [2016] 3 W.L.R. 310 at [27].

<sup>25</sup> *Edwards v Kumarasamy* [2016] UKSC 40, [2016] 3 W.L.R. 310 at [28]

hall (and, by analogy, any other parts of the common parts used for access) there would seem to be very few scenarios where this will be of relevance and will assist the sub-tenant. Overruling *Brown v Liverpool Corporation* means that tenants are not even able to rely on s.11 to guarantee that their means of access to rented property will be kept in repair, though *Liverpool CC v Irwin* may offer some comfort here. But this case, of course, deals with the scenario where the common parts over which access is required are in the outright ownership of the landlord, and so the case cannot be directly applied to the situation in *Edwards v Kumarasamy*.

### **Is the sub-landlord's liability contingent upon having been given notice of disrepair?**

The Supreme Court shared the view of the Court of Appeal that, as section 11 of the LTA 1985 operated by implying covenants into the tenancy agreement, the same principles should apply as applied at common law. The Court of Appeal had taken the view that the general principle was that a covenant 'to keep in repair' was breached as soon as premises were out of repair,<sup>26</sup> but that there was a long established exception here, formally expressed in *Makin v Watkinson*,<sup>27</sup> that this did not apply where the disrepair was within part of the premises demised to the tenant. Here, 'commercial necessity'<sup>28</sup> dictated that, because the landlord had no way of knowing about the state of disrepair, but the tenant did, the landlord should not come under any liability to the tenant until the landlord had received notice and a reasonable time had elapsed to carry out the repair. The exception applied as much to a covenant 'to keep in repair' implied by statute as to an express covenant.<sup>29</sup> The fact that a lease might (and generally would) give the landlord a right of

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<sup>26</sup> Neither the Court of Appeal nor the Supreme Court cites any specific authority for this principle, but it is widely accepted. It was discussed in *British Telecommunications plc v Sun Life Assurance Society plc* [1996] Ch. 69 and it would appear to go back to *Luxmore v Robson* 1 B. & Al.d 584, 585 and *Lurcott v Wakely & Wheeler* [1911] 1 K.B. 905, 918.

<sup>27</sup> (1870) L.R. 6 Ex. 25. Lord Neuberger in his judgment refers to this exception as 'the Rule'. In the interests of clarity this note will refer to it as 'the exception'.

<sup>28</sup> *Edwards v Kumarasamy* [2016] UKSC 40, [2016] 3 W.L.R. 310 at [31].

<sup>29</sup> *O'Brien v Robinson* [1973] A.C. 912, cited in *Edwards v Kumarasamy* in the CA: [2015] EWCA Civ 20 at [12].

entry for the purpose of inspection did not override this, as clearly the tenant would still be in a better position to know about the disrepair.<sup>30</sup>

So much was clear law. The point which divided the Court of Appeal and the Supreme Court was how these principles should be applied to common parts which, although they were not included in the demise to the sub-tenant, were not included either in the demise to the sub-landlord.<sup>31</sup> The Court of Appeal had taken the view that, as the common parts were not demised to the sub-tenant, the general principle applied, and not the exception. *British Telecommunications v Sun Life*<sup>32</sup> had explained that the exception – what was there termed ‘the rule in *O’Brien v Robinson*’ – applied only where a defect occurs ‘in the demised premises themselves’<sup>33</sup>. As the lack of repair had occurred outside the flat, the sub-landlord could not claim the benefit of the exception. This principle was not restricted to express covenants as it had been applied to the statutory covenant in *Passley v Wandsworth LBC*.<sup>34</sup> Lewison LJ accepted that this substantially limited the scope for s.11(3A) to operate, but it did not render it entirely redundant.

The Supreme Court approached this issue from, in effect, the opposite direction. Although it accepted that, if there were a lack of repair within the demised premises, the landlord would not be liable without notice, and that this applied as much when the covenant was statutory as when it was express,<sup>35</sup> it parted company with the Court of Appeal’s view that, if the defect were outside the demised premises then the general principle<sup>36</sup> and not the exception would apply. The quandary was recognised by Lord Neuberger:

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<sup>30</sup> The Supreme Court (at [36]) cites *Morgan v Liverpool Corpn* [1927] 2 K.B. 131 in support of this proposition; *McCarrick v Liverpool Corpn* [1947] A.C. 219 affirmed it. Lewison LJ in the Court of Appeal clearly accepted the proposition (at [10]), without citing authority for what, is after all, entirely uncontroversial.

<sup>31</sup> For the purposes of understanding, one might think of the hallway as the hypothetical archetype here, but, for the reasons just given, it is difficult to see how this could be classed as part of the ‘structure and exterior’ of the building.

<sup>32</sup> *British Telecommunications plc v Sun Life Assurance Society plc* [1996] Ch. 69

<sup>33</sup> Per Lewison LJ at [16].

<sup>34</sup> *Passley v Wandsworth London Borough Council* (1996) 30 H.L.R. 165: per Lewison LJ at [17].

<sup>35</sup> *Edwards v Kumarasamy* [2016] UKSC 40, [2016] 3 W.L.R. 310 at [46].

<sup>36</sup> Viz. that a covenant to ‘keep in repair’ was breached as soon as something was in disrepair: see fn.26xxx.

“It can be said that the dicta in the cases do not speak with one voice on this question, as some appear to emphasise the unfairness of imposing an absolute liability on a landlord in circumstances where he is not in possession and therefore not in a position to know of any disrepair, whereas other dicta indicate that the rule also depends on the tenant being in possession and therefore in a position to know of the disrepair.”<sup>37</sup>

Or, to put it another way, does the exception apply only when the tenant is in possession of the demised premises, or does it apply whenever the landlord is not in possession? The Court of Appeal, in effect, favoured the former: the disrepair was outside the property demised to the sub-tenant, so the exception did not apply. The Supreme Court, on the other hand, favoured the latter: the sub-tenant was not in possession of the common parts, but then neither was the sub-landlord, so the exception did apply, and the sub-landlord could therefore not be under any liability to the sub-tenant under s.11(3A) until he had notice of the disrepair.

Whilst finding for the sub-tenant on this particular point, Lord Neuberger was not prepared to accept the more far-reaching arguments of the sub-landlord. He did not accept that a landlord is entitled to invoke the exception in all cases where a covenant is implied by s.11, even where the reserved property is undoubtedly within the possession of the landlord. This submission was supported by Dowding & Reynolds, *Dilapidations: The Modern Law and Practice*,<sup>38</sup> and counsel for the sub-landlord claimed that *O'Brien v Robinson* was more consistent with that analysis. Lord Neuberger nevertheless rejected the submission: it would create too much uncertainty, and the exception was not based merely on the proposition that the tenant might be better placed to observe the disrepair.<sup>39</sup>

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<sup>37</sup> *Edwards v Kumarasamy* [2016] UKSC 40, [2016] 3 W.L.R. 310 at [41].

<sup>38</sup> N. Dowding Q.C., K. Reynolds Q.C. and A. Oakes, *Dilapidations: The Modern Law and Practice*, 5<sup>th</sup> edn (London: Sweet and Maxwell, 2013) para. 20-37.

<sup>39</sup> *Edwards v Kumarasamy* [2016] UKSC 40, [2016] 3 W.L.R. 310 at [47].

The Supreme Court was therefore ultimately faced with the question of whether the exception should be extended to the present case. It recognised that none of the previous cases had addressed this specific point, as the exception had previously been applied to disrepair only within the demised premises, and the (hypothetical) property which was in disrepair here was technically in the possession of neither the sub-landlord nor the sub-tenant. The previous cases were therefore inconclusive.<sup>40</sup> Looking therefore at the principles behind the existence of the exception, the sub-landlord ought to be given the benefit of the exception. The sub-landlord had the right, as against the freeholder, to use the common parts, though in practice he was unlikely to take advantage of it. He might use it to gain access to the flat to inspect and repair, but that was insufficient to take him outside the exception. Again, the sub-tenant was best placed to observe disrepair, whether it was within the demised premises or within the common parts.<sup>41</sup> Although Lord Neuberger did not go as far as counsel for the sub-landlord in relying on the defence included in s.11(3A), he did concede that it “shows that Parliament was concerned not to impose an unrealistically demanding duty on a landlord”.<sup>42</sup> In other words, the section would operate fairly, in that, if there were disrepair within the common parts, the sub-tenant would give notice to his sub-landlord, who could himself then take the matter up with the freeholder.

### **Is the sub-tenant left in an entirely satisfactory position?**

Put in these terms, the overall outcome of *Edwards v Kumarasamy* seems justified. If the sub-tenant is faced with disrepair in the common parts, then he notifies his sub-landlord, who notifies the freeholder. The sub-landlord has obligations to her tenant, but is not placed – as the Court of Appeal would have held – in the position of being liable before she can do anything about it. On closer analysis, however, the position of the sub-tenant is not in reality so satisfactory:

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<sup>40</sup> *Edwards v Kumarasamy* [2016] UKSC 40, [2016] 3 W.L.R. 310 at [54].

<sup>41</sup> This is what is stated at [52], but this does not sit easily with what was stated at [47] (see text to fn.33). It may be that the statements can be reconciled on the basis that, where the tenant is in possession, the exception applies as a matter of principle; where neither party is in possession, a balance of convenience has to apply.

(1) the tenor of the Supreme Court judgment is that it is discussing the scenario of a state of disrepair in the common parts of – typically – a block of flats, whether the common parts are internal or external. In fact this will cover disrepair to the main structure (i.e. roof, external walls, foundations, etc.) but will not, with certain very limited exceptions – as discussed above<sup>43</sup> – cover the means of access through the internal common parts or the external paths, etc. For redress in this area the sub-tenant would have to rely either on express covenants in the tenancy agreement (which the sub-landlord may well not have given), or such covenants as can be implied by analogy with *Liverpool CC v Irwin*; and it may be difficult to imply any covenants at all when the common parts are not vested in the sub-landlord.

(2) whilst it is difficult to criticise the Supreme Court for overruling the rather tortuously extended meaning put on ‘exterior’ by *Brown*, as a result section 11 no longer seems to guarantee the repair of the principal means of access to a dwelling. This is an obvious shortcoming.<sup>44</sup>

(3) Lord Neuberger refers<sup>45</sup> to the argument of Counsel for the sub-Landlord that the exception cannot be applied to s.11(3A) as he “cannot be required to use “reasonable endeavours” to have repairs carried out until he knows of the relevant disrepair.” The discussion relates to extent to which the exception applies to ‘buy to let’ scenarios, but it is perhaps noteworthy that Lord Neuberger does not explicitly approve this interpretation. It is easy to assume that, in a case such as this, if the sub-landlord receives from the sub-tenant notice of disrepair, then – in order to fulfil his obligations to the sub-tenant under s.11 – he is required to use “all reasonable endeavours” to get the head landlord to fulfil his. This is an attractive approach, but it is not what subsection (3A) actually says; it is worth quoting it:

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<sup>42</sup> *Edwards v Kumarasamy* [2016] UKSC 40, [2016] 3 W.L.R. 310 at [53].

<sup>43</sup> See previous section of this note.

<sup>44</sup> It is suggested in the conclusions that some statutory reform might be advisable.

<sup>45</sup> *Edwards v Kumarasamy* [2016] UKSC 40, [2016] 3 W.L.R. 310 at [53].

“it shall be a defence for the lessor to prove that he used all reasonable endeavours to obtain, but was unable to obtain, *such rights as would be adequate to enable him to carry out the works or repairs.*”<sup>46</sup>

So the subsection envisages that the sub-landlord will attempt *to obtain the right* to carry out the works himself, not require the head-lessor to do so. It seems to be directed at some other scenario – possibly where a property enjoys shared services – rather than the scenario where the immediate landlord is the leaseholder of part of a building. If K had been served with a notice requiring him to put part of the main structure of the building in repair, then it is far from clear that he would be under an obligation even to pass this on to the freeholder: self-evidently there are no steps that he could take to *obtain* rights over the common parts to enable *him* to remedy the defect. This conclusion is not surprising: as previously noted, when subsection (3A) was added to section 11, ‘buy to let’ had not yet taken off, and it would have been highly unusual for someone to buy a long leasehold flat with a view to letting it out.<sup>47</sup>

It is worth noting here that the judgment of the Supreme Court has rejected part of the judgment of the Court of Appeal which could have addressed this issue but would have had quite far-reaching and undesirable consequences for property managers if it had been allowed to stand. The ratio of the Court of Appeal relied in part on the common law principle that “an express grant of an easement... will carry with it an ancillary right on the part of the dominant owner to carry out repairs on the servient owner’s land in order to make the easement effective”.<sup>48</sup> The fact that the leaseholder enjoyed this ancillary right justified the imposition of liability upon him. That this ancillary right to repair existed, in the context of easements over the common parts of blocks of leasehold flats, came as a surprise to the present author. The case cited in support of this

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<sup>46</sup> Landlord and Tenant Act 1985, s.11(3A) - italics added. The subsection was considered in *Niazi v van der Loo* at [24] and this suggests that it bears its literal meaning.

<sup>47</sup> The recollection of the writer, who was in practice at the time, was that most lettings of privately owned flats in purpose-built blocks would be short term lets e.g. when an owner was working abroad.

<sup>48</sup> Per Lewison LJ at [11].

proposition – *Newcomen v Coulson*<sup>49</sup> - involved a right of way over a roadway which had been granted as part of an inclosure award, and seemed far removed from the circumstances of *Edwards v Kumarasamy*. The Supreme Court rejected the idea that this was a principle of universal applicability, and explained that, where the implication did arise, it was because normally the servient owner was under no obligation to repair the way. When the owner of the servient tenement (i.e., the freeholder) covenanted to keep it in repair, there was no room for the ancillary right to arise,<sup>50</sup> except perhaps – as suggested by Etherton J in *Metropolitan Properties Co Ltd v Wilson*<sup>51</sup> – in exceptional circumstances, such as those that arose in *Loria v Hammer*.<sup>52</sup> The prospect of leaseholders taking it into their own hands to repair common parts would have caused concern among property managers, who would be worried at whether such repairs were carried out properly, and who would be liable if a leaseholder personally, or leaseholders’ contractors, carried out unsatisfactory work. Now it seems clear that a leaseholder – or leaseholders collectively – would be entitled to exercise such rights only if the disrepair was serious, notice had been given to the landlord, and he had failed within a reasonable time to remedy matters.

Applying this to s.11(3A), a sub-landlord could therefore be required to ‘use all reasonable endeavours’ to obtain rights to repair the common parts, only – if at all – if one had reached the rather exceptional state of affairs that existed in *Loria v Hammer*. The wording of the subsection seems inadequate to require any action at all in the more usual cases.

## **Conclusions**

The present writer broadly welcomes the decision of the Supreme Court, as consistent with established case law, and as reaching the correct outcome on the facts of the case. It is suggested,

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<sup>49</sup> (1875) 5 Ch. D. 133.

<sup>50</sup> *Edwards v Kumarasamy* [2016] UKSC 40, [2016] 3 W.L.R. 310 at [57].

<sup>51</sup> *Metropolitan Properties Co. Ltd v Wilson* [2002] EWHC 1853 at [49] – [51].

<sup>52</sup> *Loria v Hammer* [1989] 2 E.G.L.R. 249.

however, that, if one scratches the surface, and analyses the judgment, it is becoming clear that s.11 as it stands is not really ‘fit for purpose’ in addressing the problems that are increasingly arising where so many long leasehold flats are purchased with a view to letting them on short-term tenancies. It is not surprising that there is a difficulty here: the subletting is a short term tenancy, with certain terms statutorily implied so as to offer some protection to the tenant, but sitting within a matrix where the terms of the tenancy between the freeholder and sub-landlord are almost entirely open to negotiation (though in practice constrained by the requirement of mortgageability). Any reform would need to take account of the inherent tensions here.

It is submitted that the current provisions relating to where notice is required, and where the exception applies, are broadly logical, and should be left as they are, but that certain reforms to s.11 are needed, namely:

(1) to imply a statutory covenant that the principal means of access to the structure of the dwellinghouse, whether such access lies within or outside the demised premises, and whether or not the means of access are within the property demised to the landlord. This would statutorily reverse the overruling of *Brown v Liverpool Corporation*. It would also ensure that – in the case of a sub-tenancy of a flat – there is some provision to require that the common parts generally be kept in repair.<sup>53</sup>

(2) to amend subsection (3A) so as to clarify that a sub-landlord, after receiving notice of disrepair, instead of being required to use all reasonable endeavours to obtain rights to enable him to carry out repairs, is required to use reasonable endeavours to ensure that his superior landlord carries them out. An inability to achieve this should continue to be a defence. It seems objectionable to require a sub-landlord to achieve what is clearly impossible, without re-writing

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<sup>53</sup> It has been argued above that this does not represent the current meaning of s.11. If a covenant to keep in repair the common parts is to be implied at law, then it may be necessary to limit it to repairs which are necessary to ensure safe access. This might include lighting, maintenance of lifts, etc., but an unqualified implied covenant to keep in repair would seem to include redecoration of the common parts and other purely cosmetic matters.

long leases generally. Cases where this would apply ought to be rare, as the overwhelming majority of residential long leases will include adequate repairing covenants.