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Repairing Covenants

The purpose of this briefing is to highlight some of the pitfalls to avoid in the drafting and operation of repairing covenants under commercial leases.

The Standard of Repair

Proudfoot v Hart [1890] 25 QBD 42, CA established that the standard of repair depends on the age, character and locality of the premises and the type of occupier and, more pertinently, that the criteria to be applied in deciding the standard of repair should be those in existence when the lease was entered into, and not at the date of the disrepair itself (*Anstreuther – Gough – Calthorpe v McOscar* [1924] 1 KB 716, CA*).*

The same applies for terminal dilapidations. Section 18 of the Landlord and Tenant Act 1927 limits damages for terminal dilapidations to the diminution in the value of the reversion. See for example *Drummond v S & U Stores* [1983] EG in which it was found that the tenant was not liable for terminal dilapidations in respect of the shopfront and fit out, because the new tenant would renew it anyway.

In *Sunlife Europe Properties Ltd v Tiger Aspect Holdings Ltd* [2013] EWHC 463 (TCC) the landlord was claiming £2.172m in damages for dilapidations. The tenant claimed that the damages were no more than £700,000 as the standard of repair would be that in existence at the commencement of the leases in 1973/4. The tenant also claimed that the effect of S.18 of the Landlord and Tenant Act 1927 was that the landlord could not be compensated if they were going to carry out additional works on the premises, and therefore actual loss was £240,000. The tenant won.

It was not disputed that the tenant did not comply with its repairing obligations under the leases. At trial the landlord produced a costed schedule of dilapidations, and the total damages sought were £2.172 million. The tenant, by contrast, asserted that the remedial works attributable to want of repair amount to around £700,000. However, the tenant contended that it was not obliged to pay more than £240,000 being the diminution in the landlord's reversionary interest under S.18(1) of the Landlord and Tenant Act 1927. The tenant's argument was that even if it had left the premises in a good state of repair that would have been by reference to 1973/4 standards; the building would not have been lettable without the substantial upgrade and improvement work which the landlord would have had to carry out.

The starting point is to consider whether, if the tenant had handed back the premises in accordance with its repairing obligations under the lease, the landlord would have been able to relet or sell the building without significant discount. If not, then it is necessary to look at what the landlord would have to do to be able to relet the premises at a fair market price; in other words, what 'extra' work must the landlord do to make the premises lettable in today's market? In looking at that 'extra' work, the court must have in mind two points: Firstly that the landlord cannot recover the cost of this 'extra' work from the tenant and secondly that this 'extra' work may make some of the tenant's repair works redundant – and so the landlord has suffered no loss if the tenant fails to carry out such 'redundant' repair works.

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Length of term

A landlord might be justified in arguing that the tenant should be liable for repair under a 25-year lease, but this should not be the case under a shorter term. Repairs might then be more for the benefit of the landlord than the tenant.

For a lease protected under the 1954 provisions it is more important to have more significant repairing covenants and, where there is a long lease, the landlord might legitimately expand on the normal repairing obligation. It should be noted, however, that this may in turn have a detrimental effect in the event of a rent review. See *Norwich Union Life Insurance Society v British Railways Board* [1987] 2 EGLR 137 in which a 125-year lease of premises provided for repair and “when necessary to rebuild, reconstruct and replace the same”. The tenant successfully argued for a 27.5% reduction of rent on review.

Repair, renewal and improvement

With older buildings the major issue with repairing covenants tends to be whether works can be said to constitute repair or renewal. Traditionally arguments surrounding this premise tend to centre on the tenant who may be required to renew subsidiary parts of premises as part of a repairing obligation, the general rule being that repair does not involve renewal of the whole or substantially the whole to the point where the tenant is giving back something more than he originally let.

But landlords should be wary of this issue too, especially when it comes to clawing back the cost of repairs through service charge. In *Mullaney v Maybourne Grange* [1986] 1 EGLR 70 a large block of flats in Croydon, constructed in the 1930s, had single glazed windows throughout. Landlord was responsible for the structure and exterior of the premises (including the windows and window frames), the cost of which he could reclaim through service charge. The landlord decided to replace all the windows with double glazed UPVC windows, on the basis that this would be more energy efficient and save on maintenance in the long run. However, to do so costs twice what it would have done if the landlord had simply replaced the old wooden frames and left the windows single glazed. The tenants objected and the court decided that this was an improvement to the property and so the landlord couldn’t charge a penny of the replacement back to the tenants. This provides a salutary lesson to any landlord wanting to make improvements without first consulting with their tenants.

The situation is quite different if the replacement is made on account of intervening statutory provisions that require the change to be made. See by way of example the case of *Craighead v Homes for Islington Ltd* [2010] UKUT 47*,* in which windows were not replaced like for like, due to intervening changes in Part L of the Building Regulations (the new FENSA Regulations). The court authorised the change under the existing repairing obligation and allowed the landlord to add the cost to the service charge.

This finding throws up all manner of issues for landlords and tenants if it is to be followed to the letter. Take, for example, the new rules relating to R22s, a type of CFC. R22s were banned in new air conditioning systems back in 2004, but not in existing systems until 1 January 2015. Does this then mean that, in accordance with the above, a landlord could replace (and thereby improve) a broken air conditioning system with a new improved CFC free one, and add the cost to service charge, regardless of what the lease says? Equally, a tenant who is responsible for the air conditioning system under the terms of their lease may find themselves having to improve it or be sued for terminal dilapidations.

This is creating some dangerous ground. No one can predict what statute is going to come in between now and the end of a lease. Will a landlord nevertheless be able to argue that the tenant is liable for improvements under the repair provisions of their lease, or even that they are liable to make improvements because there is a requirement in their lease to comply with statute? This is doubly pertinent in the context of minimum energy efficiency standards. These are going down to C-rating soon for commercial premises and landlords will be responsible for getting their premises up to scratch. Following *Craighead v. Homes for Islington*, can the landlord then charge this back to the tenants?

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Inherent Defects

The basic rule is that repairing covenants require you to repair and that doesn't include curing inherent defects (see *Post Office v Aquarius Properties* [1987] 1 All ER 105*)*.

So, if there is no disrepair caused by the inherent defect, there is no liability to fix it. The prime example of this is *Quick v Taff-Ely B.C.* [1985] 3 All ER 3*,* in which it was held that there was no liability on the part of the landlord to replace metal window frames that sweated and caused major condensation in the property. Why? Because the condensation did not cause any disrepair for which the landlord could be liable.

As a lawyer looking at the drafting of the lease, express wording would be required to make a tenant responsible for curing inherent defects, and this would be highly unusual. However, tenants should beware: a tenant can still be caught up in repairing an inherent defect during the process of repairing damage caused by it. If the tenant is required to repair damage that has been caused by an inherent defect, then they will be required to also remedy the defect itself, if this is the best way of remedying the disrepair.

The same applies to landlords. In *Elmcroft v Tankersley-Sawyer* [1984] 270 EG 140, CA the property in question was a short term residential letting and so responsibility for the structure and exterior of the building rested with the landlord. A badly situated (beneath ground level) damp proof course resulted in water penetration and damage to plaster work. The landlord was held liable for the disrepair to the plaster and was consequently required to remedy the defect in the course of the repair.

Just a word about 'putting and keeping' premises in repair: a tenant may be required to put the property in repair from the outset, before they can keep it in repair. However, to 'put in repair' assumes the property was at one time *in repair*, and so doesn't stretch to inherent defects.

It should be noted that the tenant will not have an action in tort against the building contractor, or architect for any inherent defect in the absence of injury to the person or physical damage to other property. This is because damages in tort are not available for pure economic loss, i.e. the cost of putting right the defect. See *D and F Estates v Church Commissions for England and Wales* [1989] AC 177*, Murphy v Brentwood D.C. [*1991] 1 AC 398. The landlord may be able to make a contractual claim against these parties, however. An alternative to this, if you can get it, is for the tenant to request collateral warranties from the contractor (or developer), whereby the contractor warrants that they have not been and will not be negligent in carrying out the work.

Fire Damage and the Grenfell Tower Case

If tenanted property is damaged by fire the tenant will be liable to rebuild it: *Matthey v Curling* [1922] 2 AC 180. But where it is the landlord's responsibility to insure, the tenant should make sure that he is exempt from liability caused by peril against which the landlord has insured and recovers costs, unless that insurance is vitiated by the tenant.
It should be noted that if tenants don't have a fire safety risk assessment or they have one but don't implement it, the buildings insurance will be vitiated. Landlords should therefore check their tenants have had this done and put something in the lease to require them to provide a copy of the assessment when it has been done.

Following the Grenfell disaster in June 2017, mortgage companies became reluctant to lend on flats in blocks that might have combustible cladding. The industry's response was the EWS1 (external wall survey) Certificate which was introduced in December 2019 and is now required by mortgage companies for any externally clad multi-let residential property of more than 18 metres (c. six stories) in height. The inspection must be carried out by a recognised property professional with the requisite qualification.

If the cladding is deemed safe then the mortgage company will proceed, if not it will require the cladding to be replaced. The EWS1 Certificate lasts for five years. On 22 November 2020 the Department of Housing confirmed that an EWS1 Certificate will not be required for buildings without cladding. The use of EWS1 certificates is currently undergoing review.

On 27 November 2018 in England (January 2020 in Wales), cladding was finally banned in multi-let residential properties of more than 18 metres in height. If the building was completed under the 2018 Building Regulations the mortgage company should not require the certificate. Following the Hackett Enquiry in response to the Grenfell disaster, the government have confirmed that they will pay for any work required on account of the incident in relation to residential properties. This will not apply to commercial property, however.

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