

The Lands Tribunal considers the age old question of liability for
"Inherent Defects" and the meaning of
repair and renewal in the context of a Service Charge Dispute

(When is a landlord entitled to repair or replace an item and able to recover the cost via a service charge?)

Introduction

Since the commencement of the Commonhold and Leasehold Reform Act 2002, the jurisdiction of the Leasehold Valuation Tribunal ("LVT") has greatly increased, particularly in the field of service charge disputes. Prior to this Act, the LVT could only determine the reasonableness of service charges. This meant that the LVT was unable to deal with issues relating to the construction or interpretation of Leases but it is now open to either a landlord or tenant to apply to the LVT for a determination as to not only whether a service charge is reasonable but also as to whether it is payable under the terms of the Lease. One area of frequent dispute between landlords and tenants is the extent to which tenants are liable to pay through their service charges for repairs to, or replacement of, inherently defective items. An example arose on the Dulwich Estate in South London in 2003 in relation to works carried out by the Estate to a badly designed retaining wall. The dispute was initially referred to the LVT and, subsequently, to the Lands Tribunal on appeal.

The Dispute

The Dulwich Estate comprises a number of houses and flats that are, or were, demised on long leases. The Estate retains ownership of common parts, including certain roads, pathways and amenity areas. The tenants and owners of the various flats and houses pay a service charge to the Estate for the maintenance of these retained areas.

The dispute arose over works to a retaining wall originally built in 1961. The wall was not constructed in accordance with the then current Codes of Practice. By 1995, it had fallen into disrepair and, although works were carried out at that time, they were inadequate. This led to further deterioration and partial collapse. In 2003, rebuilding work commenced. The retaining wall was removed and was rebuilt throughout almost its entire length to a new and much improved specification involving re-inforced concrete supporting walls on wide footings. Following completion of the works, the residents refused to pay for the cost of the works to the wall through their service charge. The Estate issued an application pursuant to Section 27A of the 2002 Act against each of the residents seeking a determination by the LVT that the cost of the works was payable under the service charge provisions.

The residents relied on two arguments in support of their case. Firstly, that since the repairs stemmed from an inherent defect in the original construction of the wall, they should not be liable to pay for the repairs. Secondly, that the works carried out went beyond repair as a matter of fact and degree and were, in effect, works of improvement beyond the scope of the Estate's repairing covenants. There was no dispute that the wall was out of repair and that the works that were carried out were necessary. The LVT, therefore, had to consider whether the original defective construction of the wall absolved the residents from any liability for the costs of its repair and, if not, whether the works had gone beyond the repairing obligations as set out in the service charge provisions of the various leases.

The residents with whom the dispute arose fell into 3 categories, each defined by the contractual documentation that governed their liability to contribute towards the maintenance of the Estate. The first category were the residents of a block of flats subject to 99 year leases. The second and third were owners of houses enfranchised at different times under the Leasehold Reform Act 1967 and subject to a scheme of management which meant that the service charge provisions under their leases continued. The leases in each case were slightly different:

- The residents of the block of flats were subject to 99 year leases that imposed an obligation to pay the Estate a *"fair and rateable proportion of the cost and expenses of maintaining and renewing the ...retaining walls...within the Estate"*.
- The residents under the earlier house leases were subject to the obligation *"from time to time during the said term pay the lessors a fair and rateable proportion of (iv)the expense of maintaining, repairing and renewing the retaining walls"*
- The residents under the later house lease were under the obligation *"to pay a fair and rateable proportion of the cost and expense incurred or expected to be incurred by the lessors in the performance of their covenant under clause 6b hereof. The relevant parts of clause 6b imposed an obligation to keep...the retaining walls contained within the Estate properly repaired"*

Inherent Defect

The LVT was clear in its determination relating to the question of an inherent defect and their decision on this issue was upheld by the Lands Tribunal. Following the decision in *Ravenseft Properties v Davestone (Holdings) Ltd 1980* they determined that there is no doctrine of law which can excuse tenants from having to contribute to the costs of remedying something that can be described as an *"inherent defect"*. The doctrine had originated from a case called *Lister v Lane 1893*, which suggested that remedying the results of bad design could never fall within the ambit of a covenant to repair. However, in the case of *Ravenseft* Forbes J examined the authorities in this area in detail and decided that there was no such doctrine. The LVT accepted the test laid down by Forbes J, namely, that it was a question of fact and degree. Do the works go to the whole, or substantially the whole, of the property demised or to only a subsidiary portion? The mere fact that a property suffers from an inherent defect does not mean that the remedying of that defect will not constitute repair.

The Fact and Degree Test

Since the inherent defect point did not absolve the residents from their obligation to contribute, the next question was whether the leases limited their liability. On the question of fact and degree, the LVT decided that the works to the wall were not improvements but constituted renewal and thereby went beyond repair. On this basis, they decided that the residents under the first two types of Lease were liable because these Leases included the word "renewal". The residents under the third type of lease were held to be not liable because the words "properly repaired" did not extend to renewal. It was this part of the decision that fell to be considered by His Honour Judge Huskinson of the Lands Tribunal on the 4 September 2006.

The Lands Tribunal Decision

HHJ Huskinson decided that the LVT had been wrong and that the residents under the third type of Lease were also liable for the cost of the works. The correct starting point in his view was to consider whether the retaining walls were in a state that could be described as "properly repaired". In the light of the expert evidence, the answer clearly was no. By 2003, the retaining walls were leaning dangerously and were not "properly repaired". The expert evidence showed that the walls could not be put into a properly repaired state without being completely rebuilt. The previous unsuccessful "patch" repairs had demonstrated this. The question was, therefore, was the landlord obliged or not obliged to carry out the works of repair? If the answer was yes, then the lessees were liable to pay for the works. HHJ Huskinson stated that it was necessary not to look at the wall alone but to consider the full extent of the obligations under the repairing covenant, which included other parts of the Estate such as amenity areas and fences, not just the retaining wall. In this case, the works required the renewal of a subsidiary part of the subject matter of the covenant and not the whole and, therefore, the Estate was obliged to carry out the repair. As a consequence, the residents were liable to contribute to the cost of the works.

Conclusion

Tenants need to appreciate that the mere fact that works relate to an inherent defect will not absolve them from liability for the cost of repair.

The right test for both Landlords and Tenants is as follows:

- Has the inherent defect resulted in physical damage to the subject matter of the covenant? If there has been no physical damage, no action under the repairing covenant is called for.
- If the inherent defect has caused damage, is it practicable to remedy the damage without remedying the inherent defect? If it is, then the landlord is only required to carry out those works required to remedy the damage and to recover the cost of those works.
- If it is necessary to eradicate the inherent defect and remedy the damage, the question is whether the remedial work goes beyond repair as a matter of fact and degree? In order to answer this question, it is necessary to consider the repairing obligations in the Lease as a whole and then to decide whether the works are so substantial that they do not properly fall within these obligations.

Given that tenants of Estates can have a substantial liability to contribute to the cost of inherent defects in the common areas, they need to make enquiries, and carry out such surveys as they can, to try to establish whether there are such defects before they buy or take a letting of a property.

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