

# Notices of Entry and Repair - Practicalities and Pitfalls

## An illustrative problem

1. Enterprise House is a 1970s building in Norbury, with a garage on the ground floor, offices on floors 1-5, and two flats on floor 6. It is located in an area where a number of office buildings have been converted to blocks of flats over the past 15 years.
2. Your client is the freeholder, Kirk Investments Ltd, owned and run by a retired Naval officer, Captain James Kirk.
3. The building is held under a headlease dated 25 March 1985, for 25 years, expiring on 24 March 2010. The headlessee is Klingon Overseas Properties LLC, a company incorporated under the laws of Delaware, USA. The Klingon group has been experiencing severe financial difficulties lately.
4. There are two underleases, both expiring on 23 March 2010:
  - The ground floor garage is held under an underlease granted on 1 January 2001. It is held by Montgomery Scott, an irascible Scotsman, with convictions for actual body harm and possession of an offensive weapon.
  - The upper floors (the offices and flats) are held under an underlease granted on 1 April 1997, by Bones, a charity which provides counselling and support to families affected by osteoporosis. The flats are used to accommodate vulnerable families. The offices are used for general administration, and to provide counselling for affected families.
5. Until the credit crunch, Captain Kirk had proposed to recover possession of the building when the headlease expired, and convert the whole building to flats. As Bones were aware of this, they have made arrangements to move out. Now, Captain Kirk, thinks it more likely that he will want to keep the building as it is and will want to find a new tenant(s) for the upper floors.
6. Captain Kirk has, in the past, had unhappy experiences with terminal dilapidations claims, with tenants (as he puts it) “wriggling out of their obligations in reliance on that blasted section 18”. He has been told that he can avoid the “blasted section 18” by entering and repairing before the leases come to an end. He wants to send in his favourite contractor, Check Off Ltd. (who he is says is “pricey but jolly good”) to do the works he wants done as soon as possible.

7. A recent inspection of the building has raised the following issues:
  - (a) The roof is leaking. Captain Kirk wants to put a new roof on.
  - (b) The air conditioning system is not working properly. The M&E engineer, Mr. Spock, advises that, in order to work out what needs to be done, he will need to remove the outer casings of the air handling unit and some of the fan coil units and carry out some tests.
  - (c) There are dark stains on the forecourt of the garage. Captain Kirk is worried that there may be oil contamination to the soil and if he decides to redevelop at some future date, he may be required to carry out expensive decontamination works. He wants to have an environmental expert investigate the position.
  - (d) The offices are very shabby, with holes in the suspended ceilings, stains on the carpets, lights that do not work, chips, scratches and marks on most surfaces.
  
8. The headlease includes a covenant:
  - “(7) To permit the landlord (with or without workmen) to enter upon the premises for the purpose of ascertaining that the covenants herein contained have been duly observed and to view and inspect the condition of the premises and to leave on the premises written notice of all wants of repair there found
  - (8) Within three months next after every such notice to repair and make good all such defects and wants of reparation as required by such notice
  - (9) If the tenant shall fail to comply with the requirements of such notice it shall be lawful for the landlord to enter upon the premises to execute such works as may be necessary to comply with the same
  - (10) In that event the tenant will pay the landlord’s costs and expenses of executing such works on demand as liquidated damages and such sums shall be recoverable forthwith by action or by distress as if such moneys formed part of the rents payable hereunder.”
  
9. The underleases all contain covenants in the same terms, and also a provision that: “All references herein to “the landlord” include the superior landlord”.
  
10. Captain Kirk believes that there were licences to underlet, but he cannot find them.
  
11. Both subtenants have made it clear they object to Kirk entering and doing works. Mr Scott told Mr Spock that he would “have him” if he was seen on the premises again. Bones say that they care for a number of highly vulnerable people, and cannot have them being disturbed.

**(1) Can the landlord carry out intrusive investigations to establish the extent of the breaches?**

12. Captain Kirk wants to have the subsoil investigated, and also to have his M&E engineer carry out intrusive investigations into the air handling unit and FCUs. Can he do this?
13. Two recent cases where this issue has been considered, both concerning Kwik Fit.

*Possfund Custodian Trustee Ltd v Kwik Fit Properties Ltd* [2008] CSIH 65 (Ct of Session, Inner House)

*Heronslea (Mill Hill) Ltd v Kwik-Fit Properties Ltd* [2009] EWHC 295 (Sharp J)

14. Points arising:
- Need to look at all relevant covenants
  - Digging holes in the property, with part of the premises cordoned off, requires more than just a right to enter and inspect
  - Reference to “workmen” may imply inspection can extend to lifting floorboards, covers etc. but position not clear
  - If there is only a suspected breach of covenant, as with the sub-soil contamination, landlord probably can’t proceed
  - If there is an actual breach, as with the air conditioning, it may be permissible for the notice to identify the breach, and say that the remedial works consist of stripping off the covers of the units, carrying out all necessary tests, and carrying out the work found to be necessary as a result

**(2) Works carried out by superior landlord**

15. Given the precarious financial position of Klingon, the head lessee, can Kirk recover any costs involved from the sub-tenants?

*The need for a covenant with the superior landlord*

16. Unless there is a covenant by the sub-tenant with the superior landlord, the superior landlord cannot sue a sub-tenant to recover the cost of works carried out: *Amsprop Trading Ltd v Harris Distribution Ltd* [1997] 1 WLR 1025 (Neuberger J)

*Does Landlord and Tenant (Covenants) Act 1995 produce a different result?*

17. *Amsprop* concerned a pre-1996 lease. Does the 1995 Act produce a different result for new tenancies?
18. S.12 treats covenants enforceable by management companies in the same way as covenants enforceable by landlords. It applies where:

- “(a) a person other than the landlord or tenant (“the third party”) is under a covenant of a tenancy liable (as principal) to discharge any function with respect to all or any of the demised premises (“the relevant function”); and
- (b) that liability is not the liability of a guarantor or any other financial liability referable to the performance or otherwise of a covenant of the tenancy by another party to it.”
19. With a *Jervis v Harris* clause, is the superior landlord a person who is “under a covenant of a tenancy liable ... to discharge any function with respect to all or any of the demised premises”?
- He is entitled to discharge a function, but is he “liable” to?
  - Does “liable to discharge any function” mean
    - “bound to discharge any function” or
    - “may discharge any function”?
  - If the former, does s.12 apply where a management company has power to do works, but is not obliged to do them?
20. S.15 allows tenant covenants to be enforced by
- “(a) any person (other than the reversioner) who, as the holder of the immediate reversion in those premises, is for the time being entitled to the rents and profits under the tenancy in respect of those premises, or
- (b) any mortgagee in possession of the reversion in those premises who is so entitled.”
21. Does this apply to a superior landlord – not obviously within the section, but poorly drafted.

*Does the Contracts (Rights of Third Parties) Act 1999 change the position?*

22. The 1999 Act does not apply in relation to a contract entered into before 11 May 2000, unless the contract is entered into on or after 11 November 1999 and expressly provides for the application of the Act 1999: s.10(2), (3). So it will not be relevant unless the underleases were entered into after 11 May 2000.
23. Under s.1 of the 1999 Act, a “third party” i.e. a person who is not a party to a contract, may in his own right enforce a term of the contract if the term purports to confer a benefit on him, unless, on a proper construction of the contract, it appears that the parties did not intend the term to be enforceable by him.
24. The third party must be expressly identified in the contract by name, as a member of a class or as answering a particular description but need not be in existence when the contract is entered into.
25. In deciding whether a contract purports to confer a benefit on a third party under the 1999 Act, the Court must (as always) consider the document as a whole, and have regard to the fact that the document as a whole benefits the third party, and apply

commercial common sense: *Laemthong International Lines Co Ltd v Artis* [2005] 2 All ER (Comm) 167, at paras 40 and 45.

26. Commercial leases normally contain clauses excluding the effect of the Act, so unlikely to be relevant. However, it is important to check.

*Does a covenant by the subtenant in the licence to underlet to “perform the covenants in the underlease” change the position?*

27. If there is a licence to underlet, in which the proposed subtenant covenants with the superior landlord to perform the covenants in the underlease, that might produce a different result. There would then be a direct covenant with the superior landlord, which was not the case in *Amsprop*. However, depending on the wording, it may be arguable that the only covenant is to perform obligations owed to immediate landlord.

*Treatment of costs as rent*

28. The covenant here says (as in *Amsprop*): “In that event the tenant will pay the landlord’s costs and expenses of executing such works on demand as liquidated damages and such sums shall be recoverable forthwith by action or by distress as if such moneys formed part of the rents payable hereunder.”

29. The current right for landlords to recover rent from sub-tenants is set out in s.6 of the Law of Distress Amendment Act 1908:

“In cases where the rent of the immediate tenant of the superior landlord is in arrear it shall be lawful for such superior landlord to serve upon any under tenant or lodger a notice (by registered post addressed to such under tenant or lodger upon the premises) stating the amount of such arrears of rent, and requiring all future payments of rent, whether the same has already accrued due or not, by such under tenant or lodger to be made direct to the superior landlord giving such notice until such arrears shall have been duly paid, and such notice shall operate to transfer to the superior landlord the right to recover, receive, and give a discharge for such rent.”

30. Will this apply to a sum which the lease says is to be treated as rent? In *Escalus Properties Ltd v Robinson* [1996] QB 231, the Court of Appeal held that, in statutory provisions deriving from 18th and 19th century statutes, “rent” referred to:

“... rent in its correct sense being (1) a periodical sum (2) paid in return for the occupation of land, (3) issuing out of the land, (4) for non-payment of which a distress is leviable” (per Nourse LJ).

31. Service charges reserved as rent fell within this definition, but is unclear whether sums payable under a *Jervis v Harris* clause would do so.

32. S.6 may in due course be replaced by s.81 of the Tribunals, Courts and Enforcement Act 2007, if it is ever brought into force. Under s.76 of the 2007 Act, “rent” is defined as: “the amount payable under a lease (in advance or in arrear) for possession and use

of the demised premises, together with (a) any interest payable on that amount under the lease, and (b) any value added tax chargeable on that amount or interest. It is provided that “rent” does not include any sum in respect of rates, council tax, services, repairs, maintenance, insurance or other ancillary matters (whether or not called “rent” in the lease). Thus the landlord will not be able to recover *Jervis v Harris* sums from the sub-tenant under s.81.

### (3) Works carried out after lease end

33. The leases expire in March 2010, so there is not very long to serve notice, leave 3 months, and then organise the necessary work. Under a *Jervis* clause, the landlord can probably only recover if the works are carried out before the end of the lease: *Amsprop Trading Ltd v Harris Distribution Ltd* [1997] 1 WLR 1025 (Neuberger J)
34. However, the position will depend on the wording of covenant – see below for a case where there was a covenant specifically applying to the position after the end of the lease.

### (4) Clause providing for payment of cost as “liquidated damages”

35. The clause in the present case (as in *Amsprop*) provides for the cost of the work to be payable as “liquidated damages”. Does that affect Kirk’s rights?
36. In *Jervis v Harris* [1996] Ch 195, the Court of Appeal held that the Leasehold Property (Repairs) Act 1938 did not apply to a clause which permitted the landlord to enter to view the state of repair, give notice of any want of repair; tenant to repair within 3 months; in default landlord could do work and recover the costs and expenses of the work from the tenant on demand. The tenant’s liability to reimburse the landlord for his expenditure on repairs was not a liability in damages for breach of his repairing covenant all. The landlord’s claim sounds in debt not damages; and it is not a claim to compensation for breach of the tenant’s covenant to repair, but for reimbursement of sums actually spent by the landlord in carrying out repairs himself. Also, the claim was not caught by the rule that penalty clauses not enforceable. The clause provided for the payment of a sum of money upon the happening of a specified event other than a breach of a contractual duty owed by the party liable to make the payment to the party entitled to receive it.
37. However, what if the clause says: “the Tenant will on demand pay to the Landlord the costs of the work as liquidated damages”? *Dowding & Reynolds* (4<sup>th</sup> ed) para 28-37: “It is thought that a court faced with this point would look at the reality of the obligation, and not at the label used by the parties.”
38. In *Street v Mountford* [1985] AC 809, 819, Lord Templeman said:

“If the agreement satisfied all the requirements of a tenancy, then the agreement produced a tenancy and the parties cannot alter the effect of the agreement by insisting that they only created a licence. The manufacture of a five-pronged implement for manual digging results in a fork even if the manufacturer, unfamiliar with the English language, insists that he intended to make and has made a spade.”

39. However, although it is not possible to turn a legal fork into a legal spade by misnaming it, the courts will pay attention to the way in which the parties describe their relationship: *Clear Channel UK Ltd v. Manchester City Council* [2005] EWCA Civ 1304 at paragraph 29, Jonathan Parker LJ (applied in *Scottish Widows plc v Stewart* [2007] 1 P. & C.R. DG5):

“On the other hand the fact remains that this was a contract negotiated between two substantial parties of equal bargaining power and with the benefit of full legal advice. Where the contract so negotiated contains not merely a label but a clause that sets out in unequivocal terms the parties’ intention as to its legal effect, I would in any event have taken some persuading that its true effect was directly contrary to that expressed intention.”

40. It is arguable that the clause should be construed generally against the landlord, and if the landlord has called the sum recoverable “damages” that is what it should be treated as. In *Amsprop Trading Ltd v Harris Distribution Ltd* [1997] 1 WLR 1025, Neuberger J said (obiter):

“... a provision such as clause 3(8), which gives the landlords substantial powers, and in particular the power to carry out work at the tenant's expense, should be construed narrowly rather than widely.”

That approach is similar to the approach of the Court of Appeal to service charge covenants, in *Gilje v Charlgrove Securities Ltd* [2002] 1 EGLR 41.

41. Liquidated damages are a pre-estimate of claimant’s loss caused by a breach of contract: *Halsbury’s Laws* (4<sup>th</sup> ed) vol 12(1) para 1065. “... the essence of liquidated damages is a genuine covenanted pre-estimate of damage” *Dunlop Pneumatic Tyre Co Ltd v New Garage and Motor Co Ltd* [1915] AC 79 at 86– 87, per Lord Dunedin. So liquidated damages are a type of damages – compensation for loss suffered – a type where the parties agree in advance on the quantum of the compensation. If the parties agree in advance that a sum of money is to be paid, following a breach of covenant by the tenant, which they describe as “liquidated damages”, there is a risk that the court accepts that they have accurately described the payment as being one to compensate the landlord for loss suffered, rather than as a debt payable to the landlord in the event described in the clause.

##### **(5) The tenant who challenges the landlord’s right to enter**

42. It may well be that one or both subtenants will oppose any attempt to enter. Mr Scott in particular seems unlikely to co-operate. The landlord may not use violence to enter premises if there is someone present on those premises at the time who is opposed to the entry which the violence is intended to secure, and the landlord knows that: Criminal Law Act 1977 s.6. (There are limited exceptions in the case of residential premises). “Violence” includes violence directed against property e.g. breaking in.
43. In addition, there may be a common law rule that self help remedies may only be used in emergency or simple cases: *Burton v Winters* [1993] 1 WLR 1077.

44. Therefore the landlord will need to go to court: *Hammersmith London Borough Council v Creska Ltd* [2000] L. & T.R. 288.
- Exceptional case, and not a guide to the normal order the Court is likely to make
  - Since decided, Court of Appeal has held repeatedly that, where a legal right is infringed, damages in lieu of an injunction should only be awarded in “very exceptional circumstances”, such that it is oppressive to grant an injunction: *Regan v Paul Properties Ltd* [2007] Ch. 135 (right to light), *Jacklin v Chief Constable Of West Yorkshire* [2007] EWCA Civ 181 (obstruction of right of way), *Watson v Croft Promo-Sport Ltd* [2009] EWCA Civ 15 (noise nuisance)

**(6) Can the landlord require only part of the necessary works to be undertaken?**

45. What if the landlord wants to remedy some of the breaches of covenant, but not all of them? The clause here says the landlord may: “leave on the premises written notice of **all** wants of repair there found”.

*Bruntwood 2000 First Properties Ltd v British Telecom plc* (unreported decision of HHJ Pelling QC, sitting as a High Court Judge, 11 December 2008)

- 1970s office building in Manchester held by BT under 25 year FRI lease
- After expiry of lease, landlord carried out full refurbishment, at cost of £4.7 million.
- The cost of the repair works which BT should have done was £1 million
- The refurbishment work carried out included some items BT should have carried out (survival items) e.g. stripping out partitions, renewing the lifts, which cost £323,000
- Principal issue was about diminution in value; dealt with at two hearings; damages of £480,000 awarded
- Court also considered alternative claim to £323,000, the cost of the survival items under following clause 4.11:

“...provided further that if the Tenant shall fail to leave the demised premises in such condition as aforesaid then and in such case the Landlord may do or effect **all such repairs renovations and decorations for which the Tenant shall be liable hereunder** and the cost thereof shall be paid by the Tenant to the Landlord on demand and the certificate of the Landlord's Surveyor certifying the cost to the Landlord shall be final and binding on the Tenant and the Tenant will also pay to the Landlord mesne profits at the rate of the rent payable hereunder immediately prior to the said expiration or determination during the period reasonably required for carrying out such work and the amount of such mesne profits shall be added to the cost of carrying out such work as aforesaid save in the case of such delay being attributable to the Landlord”

- Court held this did not apply unless landlord did **all** the work that the tenant was liable for. Judge held clause:  
“... can apply only where the landlord does all and not just some of the work for which the tenant is liable under the repairing covenant, at any rate where such is combined with a redevelopment scheme. As to construction this is the effect of the words actually used in the clause that I have highlighted above. Had it been

intended that the clause was to apply in cases where the landlord had partially executed dilapidation works then the clause could with ease have been drafted so as to say precisely that. However, the more fundamental point is that in principle this is the correct outcome for the purposes of the clause is to enable the landlord to take remedial action himself to avoid any loss being caused by the tenant's failure to repair and recover the cost with relative ease and at moderate cost. If the landlord carries out the work the value of his interest in the property is restored. As Millet LJ said in *Jervis v. Harris* [1996] Chan. 195 at 203: "The landlord is out of pocket, but that is because he has carried out repairs, not because the property is in disrepair." If the claimant is correct in its analysis then potentially difficult legal and factual issues would arise which are avoided if a clear distinction is maintained between the landlord either (a) carrying out the whole of the work necessary to make good the dilapidations and making a claim under the clause or (b) making a claim in damages for diminution whether or not the landlord has carried out the whole of the works necessary to make good the dilapidation. Accordingly, I conclude that in the circumstances of this case the claimant is confined to its claim for damages for breach of covenant."

46. The issue will turn on the construction of the relevant clause in each case. Query if HHJ Pelling's reliance on *Jervis v Harris* correct. It is not clear that the Court in *Jervis* held that, if landlord enters and remedies some breaches, that precludes a damages claim in respect of any loss caused by other breaches.

#### **(7) The position where a breach can be remedied in two different ways**

47. A covenant to repair can often be complied with in two different ways e.g. patch repair a roof, or replace it. Where the tenant covenants to repair, damages will be assessed on basis of the less expensive alternative: *Carmel Southend Ltd v Strachan & Henshaw Ltd* [2007] 3 EGLR 15 (HH Judge Peter Coulson QC).
48. Where the landlord covenants to repair, and can recover a contribution by way of service charge, the choice of remedy is that of landlord, subject to an implied proviso that the choice must be reasonable having regard to fact that the tenant will be contributing to cost: *Plough Investments Ltd v Manchester City Council* [1989] 1 EGLR 244 (Scott J).
49. Where landlord enters following tenant's default, what is position?
- Must the landlord choose cheaper alternative, on basis he is carrying out the work required to remedy a breach of the tenant's obligations, and the cheaper alternative would remedy that breach?
  - Or is the choice for the landlord, as he is undertaking the work, and therefore is in a similar position to the landlord who covenants to repair and has the right to recover contributions to the cost by way of service charge?
  - In the absence of authority on this point, can the landlord take the risk of doing the more expensive work?

**(8) Works not mentioned in the notice**

50. What if landlord, in course of doing works, discovers other defects, or more extensive examples of defects mentioned in the notice? Depends on terms of covenant, but may well be limited to works in notice. In the example, the covenant allows the landlord to enter the premises “to execute such works as may be necessary” to comply with the notice, not other works.
51. Would a sweeper clause in the notice assist: “Any other defects which the tenant is liable to remedy and which may be found in the course of carrying out the works listed above”? There can be no harm in including such a clause, but its efficacy must be doubtful.

**(9) What if the landlord does work that goes beyond tenant’s obligations?**

52. E.g. Air handling unit is not working properly. Landlord replaces it at cost of £50,000. Judge later decides that the work required under tenant’s covenant was to service the unit, and replace defective parts, at a cost of £10,000. Can the landlord recover the £10,000?
53. *Crane Road Properties LLP v Hundalani* [2006] EWHC 2066 (Ch), (Charles Aldous QC) may suggest not:
- A transfer gave H a right of way over a roadway “subject to the payment of one half of the cost of maintaining repairing and re-surfacing the said roadway”
  - It also contained a covenant: “To contribute on demand (for so long as the Transferees have a right of way over the same) one half of the cost of maintaining and repairing the roadway”.
  - In 1979, at time of transfer, roadway was a dirt track, surfaced at some time in the past with a thin layer of tarmac
  - Later improved, at no cost to H, to a basic tarmac road laid over brick and clinker hard core with the two end sections and a widened western edge concreted
  - In 2002, roadway was in need of repair – surface broken, potholes
  - Works done involved building adoptable road – accepted went far beyond repair
  - Owner claimed half of the hypothetical cost of repairing the road, on the basis of a specification which bore little relationship to the works actually done; the claimed cost was based on a purely notional sum, not representing the cost of any works actually undertaken
  - Claim failed. The covenant itself presupposes that repair and maintenance costs have actually been incurred. It is for this that there is a liability to contribute. If nothing has been incurred for what can fairly be described as “repair maintenance and resurfacing” within the terms of the covenant then the obligation does not arise. The liability does not arise just because work has been done which has avoided the need to repair the road. Covenants of this sort are intended to operate in a way which other parties can apply, without the necessity to have to engage expert quantity surveyors. The person required to pay expects to see the repair work carried out, and the invoices for the work, and satisfy himself that the work being charged for was appropriate and to standard.
  - “A good illustration in the context of landlord and tenant would be where although the roof was in disrepair for which the tenant was liable to contribute, the

landlord decided to remove it and build an additional storey. Can the landlord charge the tenant for what it would have cost to repair the existing roof? I think not.”

- So owner could only charge for those elements of the work actually undertaken which would have been incurred if the roof had merely been repaired in accordance with the covenant, and not for work which would have had to have been done had the roof been so repaired, but was avoided by its upgrading.

54. A landlord who proceeds without agreement from the tenant or a ruling that the proposed works are within the clause is taking a substantial risk:

- He may not recover anything for the works.
- As he is only entitled to enter to do works falling within the clause, he will be trespassing, and breaching the covenant for quiet enjoyment, if he enters or remains to do other works.

### **(10) The tenant in occupation**

55. What are landlord’s rights in respect of:

- Requiring tenant to move furniture, stock, employees etc. out of the way
- Use of electricity and water?

56. If the landlord goes beyond what is permitted, he may be committing trespass and a breach of the quiet enjoyment covenant; he could be liable for any physical damage and general damages or loss of profits.

57. *McGreal v Wake* [1984] 1 EGLR 42, CA

- Short tenancy of house; landlord’s covenant implied by s.32 Housing Act 1961 to keep in repair the structure and exterior of the house and specified installations
- Landlord had an implied right to enter and occupy the demised premises to carry out the repairs he was liable to do
- Donaldson MR: “This right to enter and occupy must be limited to that which is strictly necessary in order to do the work of repair. The obligation to allow the landlord to enter and occupy in order to effect repairs does not seem to us to involve a further obligation to give the landlord exclusive occupation unless this is essential for the execution of the repairs. Nor does it involve an obligation to give him access to all parts of the house unless again this is essential”.
- If the work could be done with the tenant in residence, even if that would take longer and would be more expensive, the landlord could not insist on the tenant moving out.

58. Query if applies to an express right to enter; where implications are concerned, a test of necessity generally applies.

59. *Goldmile Properties Ltd v Lechouritis* [2003] 1 EGLR 60 (Court of Appeal)

- Lease of restaurant forming part of building. Landlord covenanted to repair etc. the roof, external walls and other load bearing members of the structure; tenant to contribute to cost by way of service charges

- Landlord carried out works which disrupted tenant's business; tenant claimed damages
- District judge held landlord took all reasonable steps to avoid disturbance and was not liable for breach of the covenant for quiet enjoyment
- On appeal, Circuit Judge disagreed. Landlord had to take all possible steps, not just all reasonable steps, to avoid disturbing tenant
- Court of Appeal agreed with District Judge.
- Sedley LJ<sup>1</sup> explained what landlord had done, saying:  
“... it illustrates what may make the difference between the reasonable and unreasonable execution of repairs that are going to disturb a tenant's quiet enjoyment”.
- Landlord had:
  - sent the lessee a copy of the full estimate that it proposed to accept, prices included
  - changed date for commencement of works to avoid interfering with the restaurant's busiest period over Christmas
  - agreed to spread the first instalment of the consequent service charge over a year

**(11) Is there an implied term that the costs must be reasonable?**

60. Can Kirk use his favourite contractors, even though they are expensive? Or must he go out to tender and select the lowest tender?
61. With service charges, there is an implied term that excessive works will not be undertaken. It is reasonably well established that a landlord cannot carry out works to an unreasonably high standard, and then recover the cost through the service charges: see *Holding & Management v Property Holding & Investment Trust* [1990] 1 EGLR 65 and *Fluor Daniel Properties Ltd v Shortlands Investments Ltd* [2001] 2 EGLR 103.
62. There is probably also an implied term that the cost of the works should be properly incurred, meaning that the payment must be one made in the ordinary course of business. It is less clear that there is any implied requirement to shop around for cheapest quote.
63. With residential service charges, s.19(1) of the Landlord and Tenant Act 1985 says only that costs must be “reasonably incurred”, not that the price must be the lowest.
64. *Finchbourne Ltd v Rodrigues* [1976] 3 All ER 581 (Court of Appeal), *Morgan v Stainer* [1993] 2 EGLR 73 (David Neuberger QC) and *Crane Road Properties LLP v Hundalani* [2006] EWHC 2066 (Ch), (Charles Aldous QC) may support a general implication that costs must be reasonably and properly incurred, but this does not necessarily mean the cheapest cost.

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<sup>1</sup> Giving the judgment of the Court

65. In *Havenridge Ltd v Boston Dyers Ltd* [1994] 2 EGLR 73:
- The lease required the landlord to insure with some insurance office of repute and the tenant to pay as insurance rent all sums “properly expended”.
  - This meant that the landlord could not recover in excess of the premium which he had paid and agreed to pay in the ordinary course of business to a reputable insurer.
  - He was under no obligation to investigate whether some other reputable insurer might charge far less. The safeguard for the tenant was that, if the rate was high in comparison with other rates available in the insurance markets at the time, then the landlord can be called upon to prove that there was no special feature of the transaction which took it outside the normal course of business.
- (12) Must the landlord serve notice under s.20 of the Landlord and Tenant Act 1985?**
66. The 1985 Act applies to a service charge payable under a lease of a “dwelling”. “Dwelling” means “a building or part of a building occupied or intended to be occupied as a separate dwelling, together with any yard, garden, outhouses and appurtenances belonging to it or usually enjoyed with it”.
67. It has been held by the Court of Appeal that this protection applies to any building which includes one or more “dwellings”: see *Ruddy v Oakfern Properties Ltd* [2007] 1 All ER 337 (building containing 24 flats). It had previously been held that it applies to a lease of a building containing offices, shops and flats: *Heron Maple House Ltd v. Central Estates Ltd* [2002] 1 EGLR 35.
68. However, in *Buckley v Bowerbeck Properties* [2009] 1 EG 78, an LVT held that it did not apply to a lease of medical suite and flat. That was because the residential part of the premises was not sufficiently separate from the commercial part as to be a “separate dwelling”.
69. Where the Act applies, then in the case of service charges in respect of works, the recoverable amount cannot exceed £250 per tenant unless the consultation requirements set out in the *Service Charges (Consultation Requirements) (England) Regulations 2003* are complied with, or dispensed with by the LVT. The procedure is, essentially, an initial notice, followed by a 30 day consultation period, and then an estimates notice, giving details of at least 2 estimates and giving the tenants the opportunity to inspect all the estimates, followed by another 30 day consultation period.
70. In the present case, it may be that the flats on the top floor, let as they are with the offices, are not “a separate dwelling”, but it would be risky to proceed on that basis.
71. Are sums payable under a *Jervis v Harris* clause capable of being a “service charge” as defined in s.18(1):
- “an amount payable by a tenant of a dwelling as part of or in addition to the rent—
  - (a) which is payable, directly or indirectly, for services, repairs, maintenance, improvements or insurance or the landlord’s costs of management, and
  - (b) the whole or part of which varies or may vary according to the relevant costs.”
- There must be a risk that they are.

72. If Kirk complies with s.20 when he does not have to, he will be safe, and will also have satisfied any implied term as to reasonableness in relation to consultation.

**(13) The way forward**

73. In the light of the problems identified above, what is a landlord to do? It is very risky to simply proceed, especially if the premises are occupied.

74. It is open to a landlord faced with a tenant who objects to proposed works to seek a declaration from the court and an injunction prior to entering. Court can then resolve whether there are breaches, what works are appropriate, whether proposed method of working is reasonable, whether landlord entitled to recover costs under the clause.

75. It is possible to get a speedy trial if there is genuine urgency, although “there must be very cogent reasons indeed for giving preference to one litigant over all the others who are waiting for their cases to be heard”: *W L Gore v Geox* [2008] EWHC 462 (Pat) .

76. The landlord would be well advised to:

- Provide a detailed draft specification to the tenant and invite comments within a set time
- Inform the tenant of whether a tendering process is intended, and if so, keep the tenant informed of the tender process
- Provide a copy of the tender report and explain the landlord’s choice of contractor
- If at any stage the tenant raises a dispute on any issue, offer a meeting to discuss the issue
- Consider mediation
- Consider resolution of any disputes about the scope of the works by independent expert determination
- Consider seeking a declaration and injunction from the court
- Before entering into a contract with the contractor, weigh up the risks of proceeding against the risk of a terminal dilapidations claim being met by a s.18 defence