

**PROBLEMS AND SOLUTIONS IN ENFORCING DUTIES TO REPAIR IN
LEASES OF COMMERCIAL PREMISES**

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LECTURE

Introduction

1. The purpose of this Lecture is to address some problems and to suggest some solutions in relation to the enforcement of repairing covenants in relation to leases of commercial premises. I shall divide the lecture into a number of separate topics, which will take us through, from the creation of repairing covenants to the remedies available where breaches of repairing covenants occur. Along the way I shall look at some other potential sources of obligations to repair and maintain, over and above covenants in leases.
- 1.1 I shall also seek to incorporate, where appropriate, references to recent cases in dilapidations. Dilapidations is one of those areas of law which is largely governed by the common law, and which has the ability to produce a constant stream of cases on areas which one might have expected to have litigated to death some time ago. The last year or so has been no exception to this position. Indeed the downturn in the economy and the property market has, if anything, increased the scope for dilapidations claims, particularly terminal dilapidations claims.
- 1.2 The law of dilapidations is, as you will be aware, a substantial topic. This lecture is not a comprehensive guide to the law. My emphasis in this lecture is on the practical. In relation to each topic which I have selected, my aim is to point up matters which it is important to have in mind in giving advice to your clients, whether landlords or tenants, in relation to dilapidations, from the point where a lease is being negotiated, to the point where a claim in dilapidations is being made. There is also another area where the content of this lecture will, I hope, be useful to you. This is in the context of service

charges. Service charge provisions in leases usually set out the work of repair for which a landlord is entitled to charge the tenants through the service charge. In this context the law of dilapidations is highly relevant. A landlord who is busy carrying out works of improvement to his building may well be carrying out work which goes beyond that for which he is entitled to charge under the relevant service charge clause. A knowledge of dilapidations law is therefore vital in making or scrutinising claims for service charges under a lease in respect of work carried out or to be carried out by the landlord.

Creation of the repairing obligation

(1) Express contractual obligations

2. The usual source of a repairing obligation, in relation to a lease of commercial premises, is the lease itself. In relation to leases of residential premises the parties' freedom of contract is substantially interfered with by statute, in particular by the provisions of the Landlord and Tenant Act 1985. The same is not true in relation to leases of commercial premises. The parties are largely free to agree on their own repairing obligations.

2.1 This means that it is important, in negotiating a lease, to pay close attention to terms of the repairing obligations which are imposed by the lease. Some obvious questions to consider are as follows.

- (1) What are the premises which are to be the subject of the repairing obligations? Are they clearly defined? Are they to include additions, alterations, fixtures?
- (2) Who is to be subject to repairing obligations? Landlord or tenant, or are the obligations to be shared?
- (3) What is the standard of repair required? Is there to be any schedule of condition to qualify the obligations?
- (4) What is the wording of the obligation to be? Is the obligation to be confined to repair, or are specific obligations to do such things as rebuild or renew or replace to be imported?
- (5) What other obligations are there to be in the lease, which supplement the repairing covenant? Do those obligations fit in with the repairing covenant?

(6) What obligations are to apply in relation to the yielding up of the premises at the end of the relevant lease?

(2) The Code of Practice

2.2 There is then the Code of Practice; more accurately the Code for Leasing Business Premises in England and Wales 2007. This is a relatively new, voluntary Code, drawn up after extensive consultation with bodies representing commercial landlords and tenants. The Code is intended to promote fairness in commercial leases. Although it does not yet have the force of law, the Government has indicated that it will legislate, if that is what is required in order to secure fairness in commercial leases. Paragraph 7 of the Code deals with repairing obligations in leases. Paragraph 7 is a short paragraph, and says only this.

“Tenants’ repairing obligations should be appropriate to the length of term and condition of the premises.

Unless expressly stated in the heads of terms, tenants should only be obliged to give the premises back at the end of their lease in the same condition as they were in at its grant.”

2.3 Although the paragraph is short it will be seen that its effect, if followed, is potentially dramatic. The essence of the usual repairing obligation is that it includes an obligation to put in repair. If therefore a tenant signs up to a full repairing covenant in relation to a severely dilapidated building, the tenant is signing up to extremely onerous repairing obligations. It is the tenant’s task to put the building into repair, unless the repairing obligation is subject to a schedule of condition. This is something which is not always understood by tenants and their advisers, with the inevitable recriminations when a massive bill for terminal dilapidations arrives at the end of the lease. As can be seen the intention of the Code is to ensure that tenants do not inadvertently sign up to such obligations.

2.4 The principal point to bear in mind in relation to the Code seems to me to be this. The Code does not have the force of law, but it is inevitable that it will come to have an increasing importance in the context of commercial landlord

and tenant dealings. A knowledge of the Code is therefore essential, both in terms of negotiating with a party who makes reference to the Code, and in terms of what is likely to be perceived as best practice in commercial landlord and tenant relationships.

(3) Other sources of repairing obligations

2.5 Aside from the express terms of the lease, from where else may repairing obligations arise? The sources of such repairing obligations are few. Some important points to bear in mind are as follows.

(1) As a general rule the law is reluctant to imply repairing obligations between landlord and tenant. There are examples of repairing obligations being implied, but these usually arise in the context of residential premises, particularly those let by local authorities, and then only in limited circumstances; see Liverpool City Council v Irwin [1977] AC 239 and Lee v Leeds City Council [2002] 1 WLR 1488 CA. They do not usually arise in the context of commercial premises. A useful recent discussion of this topic is to be found in Janet Reger International Limited v Tiree Ltd [2006] EWHC 1743 (Ch), where the Deputy Judge reviewed this area of the law, and reiterated the point that the law is reluctant to imply repairing obligations into leases.

(2) A tenant has an implied obligation to use premises in a tenant like manner and an implied obligation not to commit acts of waste. These obligations are however weak obligations. They cannot be relied upon to require a tenant to carry out substantial works of repair. There are essentially two types of waste. In summary,

(i) Voluntary waste involves the doing of an act that damages or otherwise alters the premises (for example removing landlord's fixtures or removing tenant's fixtures without making good damage to the structure thereby caused). Alterations that will result in a substantial alteration in the character of the demised premises amount to voluntary waste. The duty not to commit voluntary waste arises in tort. Where there is an express tenant's repairing covenant which covers the damage then the

landlord has an election whether to sue in tort for waste or in contract on the covenant.

- (ii) Permissive waste means allowing damage to occur to the premises through failure to act (for example by allowing buildings to deteriorate by failure to repair). Only tenants for fixed terms can be liable for permissive waste and liability arises under one of the oldest statutes still in force, namely Section 2 of the Statute of Marlborough 1267; see Dayani v Bromley LBC [1999] 3 EGLR 144. This section is, however, subject to a contrary indication. The existence of a landlord's covenant to repair the premises would exclude liability for permissive waste.
- (3) Section 4 of the Defective Premises Act 1972 imposes a duty of care on a landlord for defects in the state of premises which he has let where he has an obligation or right to remedy such defects. It will be appreciated that Section 4 increases the burden on the landlord, because it imposes a duty not only where the landlord has an obligation to repair, but also where a landlord has the right to repair. While Section 4 does not impose a liability on the landlord in respect of a defect which is the consequence of the tenant's failure to comply with a repairing obligation, Section 4 can impose a liability on a landlord towards his tenant where the landlord has failed to take such care as is reasonable in the circumstances to ensure that the tenant and the tenant's lawful visitors were reasonably safe from injury. For a recent example of a case where a landlord was held not to be in breach of duty under Section 4, in relation to a tenant suffering injury when she put her hand through a glass panel in a door which was not made of safety glass, see Alker v Collingwood Housing Association [2007] EWCA Civ 343. The glass in the door shattered because it was annealed glass rather than safety glass. At first instance the landlord was held liable under Section 4, but the Court of Appeal reversed this decision.
- (4) There is then a variety of statutes which, indirectly, may impose obligations in relation to the repair of property; the most obvious

examples of this being obligations imposed by health and safety legislation.

Construction of the repairing obligation

3. As a general rule, there is no reason why the construction of repairing covenants (and other covenants relevant to dilapidations) should not be approached in the same way as any other type of contract. The modern approach to construction, as described in Investors Compensation Scheme Ltd v West Bromwich Building Society [1998] 1 WLR 896, and as now developed further in Chartbrook v Persimmon [2009] UKHL 38, is familiar. But the principle that, if possible, every word used should be given some meaning presents particular difficulty in the context of repairing covenants. This is because many repairing covenants are examples of what has been described as the torrential drafting style. The traditional formula has one or both of two separate features. First there is the obligation to carry out the operation of repair (by way of example “*..well and substantially to repair uphold support maintain cleanse...the demised premises*”). Second, there is the separate obligation to keep the premises in a particular state (by way of example the obligation to keep premises “*in good tenantable repair*”).
 - 3.1 Even though in some of the cases statements can be found to the effect that the precise words used may not matter, the principle identified above does apply. In many cases the right conclusion will be that the various expressions were intended to have much the same meaning; but in others it will be possible to construe different words as having different meanings. It is therefore always important to consider all the words of the relevant repairing covenant. This is important not least because a change in wording may impose a significantly higher obligation. An obligation to repair is not necessarily an obligation to rebuild or renew. The use of words, additional to “*repair*”, in the relevant covenant may be important in considering what is required in relation to a particular defect in a building.
 - 3.2 A good example of this can be found in Credit Suisse v Beegas Nominees Ltd [1994] 1 EGLR 78. In this case the relevant obligation provided as follows.

“to maintain, repair, amend, renew, cleanse, paint and redecorate and otherwise keep in good and tenable condition.”

The demised premises in this case comprised an office building. As a consequence of a design defect, the cladding in the building leaked so badly that water penetrated the ground floor, causing a lamp to explode in an area used for client consultations. The cladding was not in disrepair. It simply did not do the required work. Accordingly, an obligation on the landlord simply to repair would not have required the landlord to repair the leak. Lindsay J held that the latter part of the covenant imposed a separate obligation to keep the subject matter in good and tenable condition, which imposed a liability going beyond repair. The complete removal of the cladding system of the building and its replacement with a new and redesigned system, whilst not within the liability to repair, was within the obligation to keep in good and tenable condition. As can be seen, the last six words of the repairing covenant had a dramatic impact upon the result of the case.

- 3.3 When does the landlord’s obligation to repair arise? The general principle is that a covenant to keep premises in repair obliges the covenantor to keep the premises in repair at all times; see British Telecommunications Plc v Sun Life Assurance Society Plc [1996] Ch 69. This is however subject to an exception where the defect occurs in the demised premises themselves. The landlord’s obligation to repair only arises when he has notice of the relevant want of repair. This notice requirement applies even if the landlord has the right to enter and view the state of repair of the premises in question. Once the landlord has notice (in general, actual notice is required) then he has a reasonable time within which to carry out the work.
- 3.4 What is meant by the word “*repair*”? One might think this a simple question with a simple answer. In fact, and remarkably, the word “*repair*” has no fixed or special meaning but, so it has been said, is to be construed according to “*the good sense of the agreement*”; that is to say what the parties are taken, judged objectively, to have intended. It does not require renewal of the whole or substantially the whole of the premises; see Lister v Lane [1893] 2 QB 212, but it may require the renewal of a subsidiary part; see Lurcott v Wakely

[1911] 1 KB 905. As demonstrated above however, the particular wording of the covenant in question may make it clear that something more than mere repair is required. By way of example the repairing covenant may include the words “...and where necessary to rebuild reconstruct or replace”; see Norwich Union v British Railways Board [1987] 2 EGLR 137.

- 3.5 In principle, an obligation to repair does not require the tenant to remedy an inherent defect in design even though this gives rise to the want of repair. A landlord may not however be treated so generously. In Elmcroft Developments Ltd v Tankersley- Sawyer [1984] 1 EGLR 47 the landlord was held liable, under a repairing covenant, to keep the main walls by inserting a damp proof course as well as remedying the defective plaster caused by the lack of a damp proof course.
- 3.6 The remedying of a design defect does not necessarily lie outside the scope of a repairing covenant. Where the only sensible way of effecting repair to the appropriate standard in accordance with current good building practice is to remedy the design defect, this may be what has to be done. In Ravenseft Properties Ltd v Davstone [1980] QB 12 it was held that an obligation to repair stone cladding included the introduction of expansion joints, originally omitted from the design of the original building, because the necessity for them was not realised when the building was designed.
- 3.7 What do we learn from this brief review of the principles relevant the construction of repairing covenants? There are, I suggest, three important lessons to learn.
- (1) Every word in the covenant matters, or at least is capable of mattering. Small changes in language can make a substantial difference to the scope of the repairing obligation. This obviously matters both when a repairing covenant is being drafted, and when it is being enforced.
 - (2) No repairing covenant can be drafted to cover every eventuality. Most disputes over the scope of a repairing covenant are likely to be fact sensitive, depending upon the particular defect which is under consideration. By way of example it is a matter of fact and degree

whether an obligation to repair requires the renewal of a particular item in a building. This is particularly important, as I shall explain below, in the context of design defects, where it is usually critical to establish whether the design defect has caused actual damage to the subject matter of the repairing obligation.

- (3) As a general principle rule of construction, case like Investors Compensation and recent decision in Chartbrook v Persimmon, tell us that Courts prefer to construe agreements in accordance with commercial sense. If something is seen to have gone wrong with the wording under consideration, the Courts, if they follow the lead of the House of Lords, have quite a wide latitude to find the intended meaning. There may however be less flexibility in the context of a repairing covenant, where small changes of wording can a make significant difference to scope of the obligations imposed by the covenant, and where it may be more difficult than it is in the context of other commercial agreements to say that something has clearly gone wrong with the relevant wording.

Has there been a breach of the repairing obligation?

4. In order to determine whether there has been a breach of covenant it is first necessary to determine what is the required standard of repair. As a general rule, the standard and condition contemplated by the covenant is that which having regard to the age, character and locality of the premises, would make the premises reasonably fit for the occupation of a reasonably minded tenant of the class likely to take them.

- 4.1 The case which is usually cited in this context is Proudfoot v Hart [1890] 25 QBD 42. In this case the relevant covenant was a covenant to keep in “*good tenable repair*”. In analysing the meaning of this covenant, Lord Esher MR said this, at pages 52 and 53.

“... “*Good tenable repair*” is such repair as, having regard to the age, character and locality of the house, would make it reasonably fit for the occupation of a reasonably minded tenant of the class who would be likely to take it. The age of the house must be taken into

account, because nobody could reasonably expect that a house 200 years old should be in the same condition of repair as a house lately built; the character of the house must be taken into account, because the same class of repairs as would be necessary to a palace would be wholly unnecessary to a cottage; and the locality of the house must be taken into account, because the state of repair necessary for a house in Grosvenor Square would be wholly different from the state of repair necessary for a house in Spitalfields. The house need not be put in the same condition as when the tenant took it; it need not be put into perfect repair; it need only be put into such a state of repair as renders it reasonably fit for the occupation of a reasonably minded tenant of the class likely to take it.”

- 4.2 It is first necessary to identify the class of tenants likely to occupy the premises and to ask for what purposes they would be likely to occupy. It must be assumed that the premises are being let on the same terms as the actual lease and at the going rate for similar premises of that age and class in the same area. It is then necessary to ask whether the premises are in a state in which they are reasonably fit for occupation by a reasonably minded tenant of that class.
- 4.3 At both stages it is necessary to have regard to the age, character and locality of the premises. Qualifying words such as “*tenantable*”, “*good*” and “*substantial*” generally do not add anything to the standard of repair required.
- 4.4 What if the character of the premises changes during the course of the lease? Generally, a deterioration in the class of tenants likely to take the premises does not produce a corresponding deterioration in the standard of repair. In Anstruther-Gough-Calthorpe v McOscar [1924] 1 KB 716 premises in Grays Inn Road were, when newly erected in 1825 at the date of grant of a 95 year lease of the premises, in a fashionable prosperous area. By 1920 the character and locality of the premises had undergone considerable deterioration. This did not however mean that the standard of repair required by the lease had similarly declined.

- 4.5 The emphasis is on what is reasonable, measured by reference to the age and character of the premises at the date of the lease. An old building still has to be kept in repair but only to a standard appropriate to a building of its age. It is however very important to keep this in perspective. Most wants of repair are not location sensitive. A broken window or a set of cracked tiles or a set of rotten floorboards are out of repair and require repair wherever they are situated. It will therefore be a relatively unusual case where the scope of the repairing obligation is materially affected by a factor such as the location of the building.
- 4.6 Similarly the same test applies where standard of repair is applied to equipment in the demised premises, and can have more impact. In Ultraworth v General Accident Fire & Life Assurance Corporation [2002] 2 EGLR 115, it was held that the landlord was not entitled to the provision of a new air-conditioning and heating system by the tenant, simply because the system had been new at the beginning of the term. It was sufficient to comply with the repairing covenant that the system was in good working order. All that was required was that the system was in repair and that the system worked substantially as well as it did when originally installed. It was not necessary that it should require as little maintenance as a new system.
- 4.7 A covenant “*to keep the demised premises in repair*” is satisfied by keeping them in substantial repair. Trivial matters will not amount to a breach; see Plough Investments Limited v Manchester City Council [1989] 1 EGLR 244, where hairline cracks in the curtain walling of building that was old when demised were held not to be in breach of the repairing covenant.
- 4.8 Disrepair connotes damage or physical deterioration (and repair connotes remedying damage or physical deterioration). It does not necessarily equate with a failure in function. This is the design defect point which I mentioned above. So, in Quick v Taff Ely BC [1986] QB 809 CA, where there was condensation owing to lack of cold bridging in the relevant premises, it was held that this was not a breach of the relevant repairing covenant. In Post

Office v Aquarius Properties Ltd [1987] 1 All ER 1055 CA the flooding of a basement due to a rise in water table did not constitute a breach of the relevant repairing covenant.

- 4.9 Property is not necessarily out of repair simply because it is not the as the landlord's surveyor might wish to see it. Items in a schedule of dilapidations such as "*remove redundant ironwork from exterior*" or "*strip out asbestos*" or "*re-wire*" a 20 year old but properly functioning electrical system are not justifiable as repairs.
- 4.10 This last point emphasizes an important factor in the enforcement of repairing obligations. It is not unusual, indeed it is almost routine to see schedules of dilapidations which assume that the obligation to repair includes an obligation to renew or replace all the mechanical and electrical services in a building simply because they are out of date. Such claims should be scrutinised with great care. An old but functioning electrical system is not out of repair simply because it is old. Similarly, an old but functioning lift is not out of repair simply because it is old. The obligation to repair is not necessarily an obligation to modernise.
- 4.11 A recent consideration of the issues raised by the Taff Vale and Post Office v Aquarius cases is to be found in the Janet Reger case. In that case the tenant claimed that the landlord was in breach of its repairing covenant by failing to carry out works to prevent damp entering the basement of the demised premises. The cause of the damp penetration was traced to a defectively installed damp proof membrane. The Deputy Judge found that there was no obligation to carry out any such works. No actual damage to the structure of the building had been caused by the damp penetration and the landlord was not in breach of its repairing obligations. Such a breach would only have occurred if there had been substantial damage to the structure of the building and, in order to remedy that damage, the sensible course would have been to remedy the defective design of the damp proofing. In the absence of such substantial damage the tenant's claim failed. Further recent guidance on

issues of this kind is to be found in Jackson v JH Watson Property Investment Limited [2008] 1 EGLR 33.

What is required to remedy the breach of the repairing obligation?

5. It is often said that the word “*repair*” is to be construed no differently in a landlord’s covenant and in a tenant’s covenant. However, the question who is obliged to do (or more importantly, to pay for) the works will have a bearing on the particular decision since frequently works which could fairly be described as “*repair*” can be effected in different ways, to different standards and at different costs.
 - 5.1 A landlord who is entitled to repair a building at the tenant’s expense is not obliged to adopt a minimum standard of repair, although his decision to adopt any higher standard must be reasonable; see Plough Investments Ltd v Manchester City Council [1989] 1 EGLR 244 at 247M-248A. A tenant (or a landlord) who is complying with a covenant to repair at his own expense is free to adopt the minimum standard that would comply with his obligation, or even the maximum standard.
 - 5.2 I refer once again to the Ultraworth case. This case, as explained above, involved the question of liability to repair dilapidated heating and air conditioning systems in a 1970s office building. It was held that where there was more than one method of repair which a reasonable practical surveyor would adopt, it was for the covenantor to choose which method to adopt.
 - 5.3 Being entitled to choose the method of repair does not entitle the tenant to substitute an alternative solution for remedying the disrepair, if that alternative solution does not involve effecting a repair at all. In Creska v Hammersmith & Fulham LBC [1998] 3 EGLR 60, the tenant had covenanted to repair an under floor heating system. It was held that it had to do so, and could not rely on having achieved a perfectly effective result, much more cheaply, by installing storage heaters.
 - 5.4 A recent example of a dispute over the extent of work required in order to comply with a repairing obligation is to be found in Carmel Southend Ltd v

Strachan & Henshaw Ltd [2007] EWHC 1289 (TCC). The dispute in this case was as to whether wholesale recovering of a roof was required or whether, as the tenant contended, more limited work was required. The Judge held that the more limited, patch repairs were all that was required. Those works were neither futile nor impractical. As the Judge said:

“Often, the dispute, such as the one in the present case, is between, on the one hand, a replacement option and, on the other, a repair option. In such circumstances, replacement will be required only if repair is not reasonably or sensibly possible.”

What can be done to enforce the repairing obligation?

(1) Damages for breach of tenant’s repairing covenant - the common law position

6. Where an action for damages is brought during the term of the relevant lease, the measure of damages is the diminution in the value of the reversion which results from the breach.

6.1 It is however much more usual for the landlord to sue the tenant for breach of repairing obligation after the relevant lease has expired, and after the tenant has failed to yield up the premises in the state of repair required by the lease. In such a case the basic measure of damage at common law for breach of a tenant’s covenant to leave in repair is the cost of carrying out those repairs. This typically includes the cost of the relevant works, plus professional fees incurred in connection with the works, plus VAT where applicable, plus an allowance for loss of rent for time spent carrying out the required remedial works.

6.2 This position is however substantially affected, in relation to terminal dilapidations claims, by Section 18 of the Landlord and Tenant Act 1927.

(2) Damages for breach of tenant’s repairing covenant – Section 18

6.3 Section 18(1) of the Landlord and Tenant Act 1927 caps the basic measure of damages in two situations (the first and second limbs) by providing:-

“(1) Damages for a breach of a covenant or agreement to keep or put premises in repair during the currency of a lease, or to leave or put

premises in repair at the termination of a lease, whether such covenant or agreement is expressed or implied, and whether general or specific, shall in no case exceed the amount (if any) by which the value of the reversion (whether immediate or not) in the premises is diminished owing to the breach of such covenant or agreement as aforesaid; and in particular no damage shall be recovered for breach of any such covenant or agreement to leave or put premises in repair at the termination of a lease, if it is shown that the premises, in whatever state of repair they might be, would at or shortly after the termination of the tenancy have been or be pulled down, or such structural alterations made therein as would render valueless the repairs covered by the covenant or agreement.”

- 6.4 Thus, the basic rule is that the damages are the cost of the repairs. This is then subject to the limitations contained in Section 18. Under the first limb of Section 18, damages are limited to the diminution in the value of the landlord’s reversion as a consequence of the breaches of repairing covenant. If the relevant premises are to be demolished or redeveloped in such a way as to render the required works of repair valueless, the second limb of Section is engaged, and the damages are nil.
- 6.5 In order to establish whether the premises would have been or would be pulled down or structurally altered as provided, the test is that of the landlord’s intention at the relevant time; that is to say at the termination of the tenancy. Thus, where the landlord intended to demolish at the term date of the tenancy, but subsequently changed his mind, the tenant could rely on Section 18: Marquis of Salisbury v Gilmore [1942] 2 KB 38. The test is the same as that for establishing the landlord’s intention under Section 30(1)(f) and (g) of the Landlord and Tenant Act 1954.
- 6.6 A tenant cannot profit from his own wrong by letting the premises fall into such a poor state of repair that the only sensible course is to demolish and then claim the benefit of Section 18; see Hibernian Property v Liverpool Corporation [1973] 1 WLR 751.

- 6.7 In a simple case where the repairs will be done, the cost of repairs (including professional fees and loss of rent) will be prima facie evidence or a very real guide to the diminution in value of the reversion, on a common sense basis; see Smiley v Townshend [1950] 2 KB 311.
- 6.8 If there are subtenants in occupation who will be bound to carry out the relevant work (eg under renewal tenancies under the 1954 Act) then there may be no damage to the value of the reversion at all; see Family Management Ltd v Gray [1980] 1 EGLR 46. However, where the sub-tenancy obligations do not fully correspond to the headlease obligations, and/or the sub-tenancy does not account for the entire property, the headlessor can claim damages in relation to those repairs not covered by the obligations arising under the sub-tenancy, subject to the usual rules as to proving such loss; see Crown Estate Commissioners v Town Investments [1992] 1 EGLR 61.
- 6.9 These principles have recently been reiterated in Lyndendown Ltd v Vitamol Ltd [2007] EWCA Civ 826. In this case a landlord was, again, suing his former tenant for breaches of repairing covenant in circumstances where a sub-tenant was holding over in the relevant property protected by Part II of the Landlord and Tenant Act 1954 as a business tenant. At first instance it was found that there had been no substantial damage to the landlord's reversionary interest. An appeal against that finding was dismissed. The case might be thought to be rather harsh on the landlord because, in contrast to Family Management and Town Investments, the landlord was not left with a sub-tenant which was known to be renewing its protected sub-tenancy. The expert evidence of the tenant was however to the effect that the continued presence of the sub-tenant, subject to the same repairing obligations as the tenant, was sufficient to prevent damage to the landlord's reversion. The judge at first instance preferred this expert evidence and the landlord, on appeal, was unable to overturn this finding.
- 6.10 An unusual example of Section 18 in operation is to be found in Culworth Estates v Society of Licensed Victuallers [1991] 2 EGLR 54. The relevant

lease terminated in June 1986, and it was common ground that the cost of repairs was £227,875. There was evidence that the landlord was contemplating either redevelopment or sale. In September 1986 the landlord sold the building, unrepaired, for £320,000 to a purchaser who intended to redevelop but who in fact sold the building on in March 1988, still unrepaired and undeveloped, for £550,000. The second purchaser redeveloped completely. The court decided, on the evidence of the market at the time, that the premises as a whole would have had a value for letting or sale at the end of the lease if they had been in repair. On the tenant's valuation evidence, that value was £320,000. The landlord's valuation evidence gave a figure of £645,833. The judge preferred the landlord's evidence and therefore awarded the cost of the repairs as damages, as these were less than the suggested diminution in value. The Court of Appeal whilst finding the landlord's valuation evidence "startling" felt unable to award any other figure.

- 6.11 The preferred expert evidence in Culworth suggested the unusual situation that the diminution in value of the reversion might exceed the cost of repairs, but as the cost of repairs was all that was claimed, the court did not have to decide whether, in that situation, the landlord could recover more than the cost of repairs. In general, common sense would suggest that the landlord could achieve the extra value by doing the repairs, so that it would be his duty to mitigate by doing so.
- 6.12 The case of Mather v Barclays Bank [1987] 2 EGLR 254 provides a salutary warning on the importance of preparing evidence properly for the pursuit of a dilapidations claim. The contractual term of the lease expired in June 1982 and the tenant left the building (out of repair) in June 1984, abandoning a claim for a new tenancy. The landlord re-let to a building society who spent about twice as much on improving the premises as the repairs would have cost and were granted a reduced initial rent. However, the works of repair and the works of improvement could not have been separately identified or carried out and no attempt to do so was made. The landlord obtained no damages because, on the evidence, the investment value of its reversion with the deal it had actually achieved was higher than the investment value put on the premises

with the building simply re-let repaired but unimproved. Here, the landlord who had not carried out, and did not intend to carry out, the repairs failed to discharge the burden of proving that there had been a diminution in value of his reversion.

6.13 The moral of this part of my lecture is that a landlord making a terminal dilapidations claim requires valuation evidence in order to prove the diminution in the value of his reversionary interest in the relevant premises as a consequence of the tenant's breaches of repairing covenant. In my view it is always essential for a landlord to have this valuation evidence, in addition to evidence of what the required repair work will actually cost. If parties follow the PLA Protocol for Dilapidations Claims, all this evidence will have to be obtained at an early stage, and subsequent disaster should be avoided.

6.14 If however you do not have all this evidence, this may not be fatal. While I do not recommend this course, there is a recent example of a court being prepared to infer damage to a landlord's reversion, notwithstanding the absence of valuation evidence. The example in question is Latimer v Carney [2006] EWCA Civ 1417. In this case the landlords' claim failed at first instance because, as the first instance Judge found, the landlords had failed to prove the cost of the work required to remedy the breaches of repairing covenant and had failed to prove any damage to their reversionary interest. The Court of Appeal disagreed. The substantive judgment was given by Arden LJ. She took the view that, although the landlords' evidence had been inadequate, there was sufficient material from which the first instance Judge could and should have been able to estimate the cost of the required repair work and could and should have inferred that the landlords' reversionary interest had been diminished by that amount. Arden LJ concluded thus at paragraph 52 of her judgment.

“In all the circumstances, the right course in my judgment was for the judge to have inferred diminution in value to the reversion from the estimated costs of any repairs required to be done by the outgoing tenant which the landlord could actually show they had done. This would include damage to the roof. In the case of any other repairs the

judge should have applied a discount to take account of the possibilities referred to above. The amount of such a discount was for the judge doing the best he could on the material available to him. The parties have not invited us to refer the matter back to the judge for the purpose of making this discount. In my judgment it would disproportionate to take that step. The court should formulate its best judgment on the material available to it, and in all the circumstances of this case it should be generous to the outgoing tenants. In my judgment, the discount should be 60%.”

6.15 Latimer v Carney was a very unusual case. The landlords were lucky, in that the deficiencies in their evidence were excused. It seems likely that the landlords’ actual recovery was less than it should have been, given that an estimate had to be made of their damages. In my view Latimer v Carney is no licence for a landlord to pursue a terminal dilapidations claim without valuation evidence as to the diminution in the value of his reversion, still less without evidence of what the required repair work is actually going to cost.

6.16 It is also worth remembering, from a tenant’s point of view, that Section 18 works best in a buoyant property market, and works much less well in a market such as we have at the moment. In a buoyant property market a dilapidated building may well be ripe for redevelopment into something else. In such circumstances there is likely to be scope for the argument that the landlord suffers no damage to his reversionary interest as a consequence of the building being handed back by the tenant in a dilapidated state. In a weak property market the opportunities to turn the relevant building into something else are likely to be much reduced, with the consequence that the landlord will be confined to re-letting the relevant building as it stands. In such circumstances, the landlord will of course say that putting the building into repair at the end of the term of the relevant lease is essential if the building is to be re-let at its full value.

(3) Forfeiture

- 6.17 Forfeiture is, obviously, a remedy available to a landlord who wishes to take action during the term of the lease. In order to seek to forfeit the lease for breach of a covenant to repair the landlord will need to serve a notice under section 146 of the Law of Property Act 1925 and allow the tenant a reasonable opportunity to remedy the defects. There will then be the question of whether the tenant can have relief from forfeiture, if relief from forfeiture can be claimed. In reality forfeiture is something of a cumbersome option, and is unlikely to produce quick or effective results.
- 6.18 There is also an additional problem in many cases. Where the relevant lease has been granted for a term of 7 years or more, and 3 or more years remain unexpired (except for leases of agricultural holdings) the provisions of the Leasehold Property (Repairs) Act 1938 will apply. The Section 146 notice must include a statement that the tenant is entitled to serve a counternotice claiming the benefit of the Act. Additionally it is a condition precedent to a claim for damages where the Act applies that a Section 146 notice shall have been served.
- 6.19 Where the Act applies, if the tenant claims the benefit of the Act within 28 days of service of the section 146 notice, then the landlord will not be able to pursue a claim for forfeiture, or damages, without the leave of the Court. The landlord must prove the existence of one or more of 5 grounds in order to obtain leave to proceed.
- (1) The immediate remedying of the breach is necessary to prevent substantial diminution in the value of the landlord's reversionary interest or its value has already been substantially diminished;
 - (2) The immediate remedying of the breach is required to give effect to some enactment, byelaw etc or court order;
 - (3) Where the tenant is not in occupation of the whole of the premises, the immediate remedying of the breach is required in the interests of the occupier of the whole or part;
 - (4) The breach can be immediately remedied at an expense that is relatively small in comparison with the much greater expense that would probably be occasioned by the postponement of the work;

(5) Special circumstances exist which in the opinion of the court render it just and equitable that leave should be given.

6.20 The landlord must prove one or more of these grounds on the balance of probabilities; see Associated British Ports v CH Bailey [1990] 2 AC 704.

6.21 Similar restrictions are imposed by the Act if the landlord wishes to make a claim for damages in circumstances where the Act applies. The reality is that the Act imposes a substantial fetter on a landlord who wishes to take action against his tenant for breach of repairing covenant during the term of a lease granted for seven years or more.

(4) Entry by the landlord to carry out works

6.22 Many leases give the landlord a right to enter the demised premises and carry out works of repair which the tenant has, in breach of covenant, failed to carry out, and then to claim the cost of those works as a debt from the tenant. In Jervis v Harris [1996] Ch 195 CA the lease allowed the landlord to serve notice requiring the tenant to carry out repairs within a period of 3 months of giving the notice. If the tenant defaulted, the landlord was entitled to do the works and to recover costs and expenses from the tenant. After service of the notice the tenant failed to do the work and refused to allow the landlord's workmen to enter to carry them out. The landlord applied for an injunction to provide the necessary access. The Court of Appeal decided that the landlord did not have to give notice or apply for leave under the Leasehold Property (Repairs) Act 1938 as the claim was one for a debt, namely the failure to pay the landlord for the cost of the works, and was not a claim for damages for breach of a repairing obligation.

6.23 Another advantage of this kind of self-help remedy is that the limitations in the Landlord and Tenant Act 1927 also do not apply. If the lease contains a Jervis v Harris clause there are nevertheless pitfalls to avoid. Does the clause relate to repairs only or does it encompass renewal and redecoration? If only the former, then arguably the others are not covered and the landlord has no right to carry out such works.

6.24 If the clause provides that the landlord should specify the wants of repair then he must do so rather than stating how the defect should be remedied. If the landlord specifies only how to remedy the defect then the notice could be invalid as specifying an inappropriate method of repair or if the tenant defaults and the landlord carries out the works in a manner differing from that specified in the notice the tenant could argue that those costs were irrecoverable (as the method was not stated in the notice). If a period of time for compliance is specified in the clause the landlord must not enter to carry out the works before the prescribed period has expired.

6.25 There are therefore advantages and disadvantages in this kind of self help remedy. The principal advantages are that the landlord can outflank the statutory restrictions in the 1927 Act and the 1938 Act. The principal disadvantages are that the landlord has to take the initiative and carry out the required works, and ensure that the procedure is operated correctly, so that the contractual right to recover the cost of the works actually arises under the lease.

(5) Specific performance

6.26 Specific performance is another remedy which can be claimed during the term of the lease. The tenant can claim specific performance of a landlord's repairing obligation; see Jeune v Queen's Cross Properties [1974] Ch 97. A tenant has always been able to obtain an order for specific performance of the landlord's obligation provided that the works required are sufficiently and clearly defined. Until fairly recently, it was thought that the landlord could not obtain an order for specific performance of the tenant's repairing obligation. In Rainbow Estates Ltd v Tokenhold [1999] Ch 64 the court did however make an order for specific performance of the tenant's covenant to repair. The facts of the case were however unusual as the lease contained no forfeiture clause and no Jervis v Harris clause. The Court also said that it should be alert to the risk of such orders being claimed in order to circumvent the provisions of the 1938 Act.

6.27 Specific performance is an option for both landlord and tenant seeking to enforce repairing obligations during the term of a lease. It is however a discretionary remedy, and may be difficult to obtain, particularly for a landlord. It is more likely to be granted to the landlord if it is just and equitable to make the order, assuming that damages are an inadequate remedy and that the works are sufficiently identified. The landlord will have a legitimate interest in the covenant being performed if, by way of example the defective state of the premises is a source of danger to the public, or if the defective state of the premises affects the value of the landlord's adjoining premises, by making them harder to let, or if the defective state of the premises is causing damage to other parts of the building occupied by the landlord or other tenants of his, or if the landlord wishes to sell or mortgage his interest in the premises and the disrepair affects the chances of his doing this on favourable terms.

(6) Damages for breach of the landlord's repairing covenant

6.28 From the tenant's point of view, the most straightforward option, in circumstances where the landlord is failing to comply with its repairing obligations, is to claim damages for breach of covenant. If the tenant does make a claim for damages in respect a breach by the landlord of his repairing obligations there is some authority on the quantification of the tenant's damages. Where the tenant remains in occupation of the demised premises the basic measure of damages is the difference between the value to the tenant during the relevant period of the premises in their defective condition and the premises in the condition in which they would have been had the landlord fulfilled his obligation to repair, for an example of damages being quantified in this fashion, where the landlord had failed to provide adequate air conditioning, see Clarke v Lloyds TSB Bank [2002] 3 EGLR 93.

Litigation

7. Finally, a few words on litigation in relation to dilapidations claims. There is a formal Protocol which applies to housing disrepair claims, but there is no Protocol which applies generally to dilapidations claims.

- 7.1 This gap is however filled by the Pre-Action Protocol for Claims for Damages in relation to the Physical State of Commercial Property at the Termination of a Tenancy. This is published by the Property Litigation Association and is now in its Third Edition. This pre-action protocol is endorsed by the RICS. It is good sense to follow this protocol in relation to a commercial dilapidations claim, whether acting for landlord or tenant. One of the many advantages of the protocol is that it forces the landlord, before litigation is commenced, to formulate its claim properly, both in terms of the required schedule of dilapidations and in terms of valuation evidence in relation to Section 18.
- 7.2 Dilapidations claims are expensive to litigate, so it makes even more sense than usual to try to settle such claims without resort to litigation. It is also worth bearing in mind the perils of exaggeration in relation to such claims. In Business Environment Bow Lane Ltd v Deanwater Estates Limited [2008] EWHC 2003 (TCC), the landlord served a schedule of dilapidations which claimed a total sum of £416,000, and commenced court proceedings. The tenant ended up paying the landlord a sum of £1,070 in respect of the claim; that is to say about 0.25% of what had been claimed. Not surprisingly, the Court concluded that there had been significant exaggeration in the claim and, with the exception of the costs of a preliminary issue which the landlord had won, ordered the landlord to pay the tenant's costs of the claim. It is of course unlikely that there will be many cases which throw up such a stark disparity between the sum claimed and the sum recovered. Many schedules of dilapidations do however adopt a kitchen sink attitude to what can legitimately be claimed. The Business Environment case is therefore worth bearing in mind as a weapon against a landlord who is significantly exaggerating his claim. The good old days, of landlords being able to claim vast sums for dilapidations, confident in the knowledge that some sort of recovery will carry the costs of litigation, are well and truly over.

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5th October 2009