

ALTERATIONS TO LEASEHOLD PREMISES

- Questions which you must not forget to ask

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by

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Introduction

1. One question which we all usually remember to ask is whether the tenant is permitted to carry out the alterations under the terms of the lease.
2. This, however, is not the only matter to be considered when a tenant wishes to alter premises or has already carried them out. It is important also to ask three other questions:
 - (1) What is the impact of the **Landlord and Tenant Act 1927**?
 - (2) How will the alterations **affect the rent** of the premises on rent review or renewal? Are there any steps which must be taken if the tenant is to protect its position?
 - (3) What are the tenant's obligations in respect of the alterations **at the end of the lease**? If the landlord has a right to require reinstatement, what should he do to be sure he properly exercises that right?

It is remarkable how often in practice these questions are not asked until it is too late.

Can the tenant carry out alterations?

3. The extent to which a tenant may alter premises which are demised to him is usually limited. Even in the absence of covenants restricting alterations, the ancient law of waste restricts what the tenant may do. In deciding whether and to what extent the tenant can carry out alterations four matters need to be considered.
 - (1) Is there an express covenant restricting alterations?

- (2) To what extent will alterations amount to a breach of a covenant to repair?
- (3) The impact of the law of waste.
- (4) Are there any Implied obligations?

Restriction I: Express covenants restricting alterations

4. These are common. As with restrictions on use and on alienation, covenants against carrying out alterations to the demised premises commonly take three forms. They may:
 - (1) be absolute;
 - (2) restrict alterations without the consent of the landlord; or
 - (3) restrict alterations without the consent of the landlord with a proviso that consent is not to be unreasonably withheld.

The tenant may also be under obligations to comply with statutes which may limit alterations. To breach these covenants risks a claim for damages and/or forfeiture. The Court may also grant an injunction requiring reinstatement.

5. A covenant not to “alter” a building will usually mean an alteration which affects the form or structure of the building¹. Less substantial alterations may also be expressly prohibited. In any event, it is possible expressly to refer to the sort of alteration which is meant: for instance a covenant may prohibit “alteration of the external appearance of a building”². Conversely, the restriction on alterations may be limited to more specific, substantial parts of a building: for instance, a covenant may prohibit the cutting or maiming of the principal walls or timbers³.

¹ *Bickmore v Dimmer* [1903] 1 Ch 158 per Vaughan Williams and Cozens-Hardy LJJ.

² *Heard v Stuart* (1907) 24 TLR 104 (the covenant has been held to be broken merely by letting a wall as bill posting station). See also *Gresham Life Assurance Society v Ranger* (1899) 15 TLR 454 (keeping down of shop blind, no breach); *Hagee (London) Ltd v Cooperative Insurance Ltd* (1992) 63 P & CR 362 (air conditioning unit in context of a “hideous jumble of back of buildings”, no breach).

³ *London County Council v Hutter* [1925] Ch 626; *Lilley & Skinner Ltd v Crump* (1929) 73 Sol. Jo. 366.

6. Frequently the covenant will be in a hybrid form. It will prohibit absolutely the making of alterations to structural or external elements of the building, but will then permit the making of non-structural alterations to the interior either without further qualification, or, more usually, subject to landlord's consent not to be unreasonably withheld.
7. Where the covenant contemplates the making of alterations it will often be subject to an express proviso that the alterations be reinstated by the tenant at the end of the term if so required. We will consider this later.

Restriction II: Demolition and alteration as breach of covenant to repair

8. While leases often make express provision restricting alterations by the tenant, unless the tenant has been given the right to carry out alterations or the landlord has consented to the tenant doing so then the demolition or alteration of the premises may also constitute a breach of repairing covenant⁴. In general, a covenant to repair, uphold and maintain or keep in good repair raises a duty not to destroy the demised premises and pulling them down, wholly or partly, is a breach of such covenant⁵.
9. This, however, is not an absolute rule of law and (depending on the context) a different construction of such a covenant is possible. For instance, in the case of a long lease where the parties could not have contemplated that the buildings on the demised premises would remain in the same form for the duration of the term and where alterations are not otherwise prohibited, then if alterations to the demised premises are made it is unlikely that an obligation to repair would extend to the reinstatement of the premises to their unaltered condition.⁶

⁴ See *Doe d Dalton v Jones* (1832) 4 B & Ad 126; *Hyman v Rose* [1912] AC 623.

⁵ *Gange v Lockwood* (1860) 2 F & F 115. See too *Doe d Vickery v Jackson* (1817) 2 Stark 293; *Doe d Wetherell v Bird* (1833) 6 C & P 195; see *Borgnis v Edwards* (1860) 2 F & F 111.

⁶ *British Glass Manufacturing Confederation v University of Sheffield* [2003] EWHC 3108, Lewison J.

Restriction III: Waste

10. The carrying out of some types of alterations may amount to waste and so may be unlawful even in the absence of an express restriction.

Definitions of “waste”

11. “Waste” is an act which alters the nature of the land⁷. It is “a spoil or destruction to houses, gardens, trees, or other corporeal hereditaments, to the injury of the reversion of inheritance”⁸.
12. Where a tenant carries out an alteration to the premises you should consider the law of “voluntary waste”. This is a deliberate or negligent commission of an act which tends to the destruction of the demised premises⁹. Whether an alteration has this effect is a question of fact¹⁰. An alteration to the character of the thing demised can have this effect¹¹ but unless an alteration has a substantial effect and is injurious to the reversion, it will not amount to tortious waste¹². The injury may consist of diminishing the value of the reversion or increasing the burden on it or impairing the evidence of title¹³. It has been suggested, however, that to regard a change in the identity of the premises as impairing the evidence of title is no longer tenable in modern circumstances¹⁴.
13. The sort of alterations which have been held to amount to “waste” have included:
 - pulling down houses on the premises¹⁵;

⁷ Co. Litt. 53 a, b.

⁸ *Mancetter Developments Ltd v Garmanson* [1986] 1 All ER 449 CA.

⁹ *Mancetter Developments Ltd v Garmanson* [1986] 1 All ER 449 CA

¹⁰ *Hyman v Rose* [1912] AC 623. See too *Jones v Chappell* (1875) LR 20 Eq 539, 541; *Tucker v Linger* (1882) 21 Ch D 18 at 29.

¹¹ *West Ham Central Charity Board v East London Waterworks Co* [1900] 1 Ch 624.

¹² *Ibid*; *Hyman v Rose* [1912] AC 623; *Marsden v Edward Heyes Ltd* [1927] 2 KB 1.

¹³ *Doe d Grubb v Earl Burlington* (1833) 5 B & Ad 507 at 517.

¹⁴ *Jones v Chappell* (1875) LR 20 Eq 539, 542; *Doherty v Allman* (1873) 3 App Cas 709 at 735 per Lord Blackburn.

¹⁵ Bac. Abr. Tit. “Waste” (C.5); Co. Litt. 53; *Cole v Green* (1672) 1 Lev 309; sub nom *Cole v Forth* 1 Mod Rep 94; *City of London v Greyme* (1607) Cro Jac 181; *Manchester Bonded Warehouse Ltd v Carr* (1880) 5 C.P.D. 507. partitioning a house *North v Guinan* (1829) Beat 342

- substantial alteration of a shop with residential accommodation above to create a shop with a store room;
 - the dumping of hard and soft rubbish raising the level of the demised premises by some 10 feet in a manner which would have impeded development of the land¹⁶.
14. On the other hand, it has been held that the conversion of a chapel to a cinema by the removal of iron railings, the opening of a new door and various internal alterations did not constitute waste¹⁷. Further, merely to build a new house (without pulling down an old one) on demised land is not waste unless it destroys evidence of the owner's title¹⁸. Where property is let for a particular purpose and reasonable use of the premises consistently with that purpose causes damage, this will not amount to waste. Accordingly, it seems likely that damage caused when trade fixtures are installed for a purpose reasonably contemplated by the lease this will not constitute waste, but a tenant will commit waste if he does not make good the damage caused to the premises upon their removal¹⁹.

Remedies for waste

15. The obligation not to commit waste arises in the law of tort and the landlord's remedies are damages and/or an injunction. The remedy is not affected if a lease contains an express obligation on the part of the tenant to repair the demised premises²⁰. As the obligation arises in tort waste may be committed by a person who is not a party to the lease²¹. It has, however, been held that a cause of action cannot be assigned²².

¹⁶ *West Ham Central Charity Board v East London Waterworks Co* [1900] 1 Ch 624

¹⁷ *Hyman v Rose* [1912] AC 623

¹⁸ *Jones v Chappell* (1875) L.R. 20 Eq 539

¹⁹ *Mancetter Developments Ltd v Garmanson* [1986] 1 All ER 449 CA per Kerr LJ

²⁰ *Mancetter Developments Ltd v Garmanson* [1986] 1 All ER 449 CA

²¹ *Ibid.*

²² *Defries v Milne* [1913] 1 Ch 98.

16. An action can be brought after the expiration of the term for waste done during the term²³. Where a tenant holds over after the expiration of notice to quit and commits waste, the landlord's reversionary estate is treated as continuing, so as to entitle him to sue for waste²⁴. Alternatively, the tenant holding over might be considered liable for waste on the basis that he is a tenant at sufferance.

17. In principle, the measure of damages for waste is the diminution in the value of the reversion. This will not necessarily be equivalent to the cost of the works, but if the cost of works is taken as the measure and if the lease has some years unexpired, the landlord must give credit for early receipt of the cost of repairs. It has been held that "vindictive" (in other words exemplary or aggravated damages) may be awarded in appropriate cases. Since, in general, no act or omission amounts to waste unless it causes damage to the reversion, a claim for nominal damages would not appear to lie.

18. In principle, an injunction may be awarded to restrain voluntary waste²⁵. In the case of acts which may technically be waste but which in fact improve the inheritance (i.e. "ameliorating waste") the court will not interfere to restrain them by injunction²⁶; nor will they be a ground for forfeiture under a proviso for re-entry on commission of waste²⁷; nor, (as mentioned above) in general can damages be recovered in respect of them since the reversioner has suffered no loss²⁸.

Restriction IV: Implied contractual obligation not to commit voluntary waste

19. Waste is a tort, but it appears that the duty not to commit voluntary waste is also part of the implied contractual obligations upon a tenant to use the premises in a

²³ *Kinlyside v Thornton* (1776) 2 Wm Bl 1111.

²⁴ *Burchell v Hornsby* (1808) 1 Camp 360.

²⁵ See e.g. *Onslow v Anon* (1809) 16 Ves. 173; *Smyth v Carter* (1853) 18 Beav. 78; *Lewis v Fothergill* (1869) 5 L.R. Ch 103; *Brocklesbury v Munn* [1870] W.N. 42. But see *Doherty v Allman* (1878) 3 App Cas 709 for a case where an injunction was refused where some 900 years of the term were unexpired.

²⁶ *Jones v Chappell* (1875) L.R. 20 Eq 539; *Doherty v Allman* (1878) 3 App Cas 709, 722; *Meux v Copley* [1892] 2 Ch 253.

²⁷ *Doe d Earl Darlington v Bond* (1826) 5 B & C 855. See also *Doe d Grubb v Earl Burlington* (1833) 5 B & Ad 597, 516.

²⁸ *Jones v Chappell* (1875) L.R. 20 Eq 539.

tenant-like manner²⁹ so that the landlord will also have contractual remedies for breach of this obligation.

The effect of Landlord and Tenant Act 1927

20. There are two statutory provisions in the Landlord and Tenant Act 1927 which provide the tenant with some help against restrictions on alteration. The first is well known, the second is far less so.

Landlord and Tenant Act 1927 s.19(2)

21. First, a covenant against making “improvements” without consent is deemed to be subject to a proviso that consent is not to be unreasonably withheld: Landlord and Tenant Act 1927 s.19(2). In other words covenants of the form described at paragraph 4(2) above are converted into covenants in the form of paragraph 4(3). Absolute covenants are unaffected by this provision.
22. What is an “improvement” is something to be judged from the point of view of the tenant but the burden of proving that the landlord unreasonably withheld consent lies on the tenant³⁰.
23. If a landlord unreasonably withholds his consent, the tenant may carry out the works. On the other hand, a tenant has no claim for damages against a landlord who unreasonably withholds his consent; statute has not intervened (as it has in the context of alienation with the Landlord and Tenant Act 1988) to impose a duty to give consent.
24. Where this term is statutorily implied by s.19(2) of the Landlord and Tenant Act 1927, the landlord is not precluded from requiring (as a condition of the granting

²⁹ *Marsden v Edward Heys Ltd* [1927] 2 KB 1.

³⁰ *F W Woolworth & Co Ltd v Lambert* [1937] Ch 37.

of licence or consent) the payment of (1) a reasonable sum in respect of any damage to or diminution in the value of the premises or any neighbouring premises belonging to the landlord, and (2) any legal or other expenses properly incurred in connection with the giving of such licence or consent. If the improvement does not add to the letting value of the holding, the landlord may also require as a condition of such licence or consent, where it would be reasonable to do so, an obligation to reinstate³¹.

25. The term is not implied into leases of agricultural holdings, farm business tenancies or mining leases. In the case of protected statutory³² and secure tenancies³³, there are separate statutory codes.

Landlord and Tenant Act 1927 Pt I

26. Secondly, even when the covenant is absolute there is a procedure set out in Pt I of the Landlord and Tenant Act 1927 under which a tenant can obtain a certificate from the court that the improvement is a proper improvement, something which then entitles him to carry out the works notwithstanding any covenant to the contrary. These provisions are unfamiliar to many and are under-utilised. They are perceived to be complex³⁴. They do, however, provide a tenant subject to an absolute covenant restricting improvements with a very important remedy and enables him to receive compensation for “improvements” made to the premises.

³¹ In *Lambert v F.W. Woolworth & Co.* [1938] Ch 883, CA, it was held by the majority that if the landlord wished to contend that there would be damage or diminution of the kind referred to in s.19(2), he had to make that assertion when refusing consent. The landlord could not demand a sum that was in fact unreasonable, but could request a sum subject to determination of the question of reasonableness by the court. This could be done by asking for £X or such other sum as is found to be reasonable by the court: per MacKinnon LJ at page 913.

³² Housing Act 1980 s.81

³³ Housing Act 1985 ss.97-98.

³⁴ See the observations of Neuberger J in *Daejan Properties Ltd v Holmes* [1996] EGCS 185.

The principle

27. The principle is that a tenant of a holding to which Pt I of the 1927 Act applies is entitled, upon quitting the holding at the end of the tenancy, to compensation from his landlord for any improvement (including the erection of any building) on the holding made by him or his predecessors in title³⁵. His predecessor in title is any person through whom he has derived title by assignment, will, intestacy or operation of law³⁶.
28. In order to attract compensation the improvement must add to the letting value of the holding at the end of the tenancy, and it must not be a trade or other fixture which the tenant is by law entitled to remove.
29. Where there is only a freeholder and a tenant in occupation, i.e. there are no subtenancies, the freeholder gets the permanent benefit of the improvement at the end of the tenancy and must pay the compensation for it. Where there are head tenancies/subtenancies, the immediate landlord of the tenant who has effected the improvement gets the immediate benefit at the end of the tenancy and must pay the compensation: there are, however, provisions whereby the mesne landlord who is liable to pay compensation may recover the compensation from his landlord following service of a notice under section 8 of the Act.

Tenancies within the provisions

30. The preconditions to the application of these provisions are:
 - (1) that there must be a letting of the premises (including in the meaning of letting an underlease or agreement for a lease)³⁷;

³⁵ See Landlord and Tenant Act 1927 s.1. Predecessor in title is defined in s.25(1). It means a predecessor in title to the legal interest which the tenant holds in the property: see *Pasmore v Whitbread & Co Ltd* [1953] QB 226: compare *Corsini v Montague Burton Ltd* [1953] 2 QB 126.

³⁷ Landlord and Tenant Act 1927 ss.1(1), 17(1).

- (2) that a trade, business or profession must be carried on at the whole or a part of the premises let³⁸; when the premises are used partly for business and partly for other purposes compensation is only payable for improvements in so far as they relate to the trade or business³⁹.

31. There are three express exceptions

- (1) premises let under a mining lease⁴⁰;
- (2) agricultural holdings and farm business tenancies⁴¹;
- (3) holdings let to a tenant as the holder of any office, appointment or employment from the landlord, which continues so long as the tenant holds that position. This exception only applies to tenancies created after 24 March 1928 (the commencement of the 1927 Act) if the tenancy is in writing and expresses the purpose for which it was created⁴².

The provisions apply to tenancies created before as well as after the Landlord and Tenant Act 1927. Land owned by the Crown is within the provisions.

Limitations on the right to compensation

32. The 1927 Act as modified by the Landlord and Tenant Act 1954 contained five limitations on the right to compensation⁴³ of which only the third is of general importance today.

- (1) An improvement made before the commencement of the 1927 Act, i.e. before 25 March 1928, does not create a right to compensation.
- (2) An improvement made in pursuance of a statutory obligation does not create a right to compensation provided it was begun before 1 October 1954 (i.e. the commencement of the 1954 Act).

³⁸ Landlord and Tenant Act 1927 s.17(1).

³⁹ Landlord and Tenant Act 1927 s.17(4).

⁴⁰ Landlord and Tenant Act 1927 s.17(1).

⁴¹ Landlord and Tenant Act 1927 s.17(1)(a), (b).

⁴² Landlord and Tenant Act 1927 s.17(2).

⁴³ Landlord and Tenant Act 1927 s.2.

- (3) **An improvement does not create a right to compensation if it is an improvement which the tenant or his predecessors in title were under an obligation to make in pursuance of a contract made for valuable consideration including a building lease.** This limitation remains in full force unaffected by the 1954 Act. It applies, for example, where a landlord agrees to pay a sum of money to the tenant or to reduce the rent in consideration of the tenant carrying out an improvement. It would obviously be unjust in these circumstances that the landlord should have to pay twice over for such benefit as he may ultimately obtain from the improvement.
- (4) No compensation is payable in respect of an improvement made less than three years before the termination of the tenancy provided it was begun before 1 October 1954. It follows, of course, that this limitation is of no effect today.
- (5) It was formerly possible for a landlord who received a claim for compensation to defeat it by serving on the tenant a notice that he was willing and able to grant or procure the grant to the tenant of a renewal of the tenancy on terms to be agreed or settled by the court. That procedure was abolished as from 1 October 1954 by the 1954 Act. Its purpose has been superseded by the right to a new tenancy created by the 1954 Act.

Procedure

33. In order to obtain compensation under Landlord and Tenant Act 1927 Pt I and for improvements to be authorised under these provisions, it is **essential** for the tenant to follow the statutory procedures. The scheme of the Act requires that if compensation is to be payable and improvements to be carried out by the tenant are to be authorised, the landlord **must be notified of the proposed improvement and either he does not object to it or the court overrules his objection.**

Tenant's Notice⁴⁴

The tenant must to serve on his landlord notice of his intention to make the improvement. There is no prescribed form of notification but the notice must have with it a specification and plan of what is proposed showing the part of the premises affected. (There is case law indicating what documents might be said to constitute "specifications" and "plans".)

Landlord's Notice of Objection⁴⁵

The landlord then has three months in which to serve a notice of objection. No notice of objection can be served in relation to an improvement made in pursuance of a statutory obligation.

If no objection⁴⁶

If no notice of objection is served, the improvement is authorised and may attract compensation.

If notice of objection, tenant's application to court⁴⁷

If the landlord does serve a notice of objection the tenant can then apply to the court - that is the county court or the High Court, which have concurrent and unlimited jurisdiction to entertain claims and applications under the 1927 Act (although the Practice Direction to CPR Part 56 encourages the commencement of such claims in the county court).

Certification by Court⁴⁸

If proceedings are commenced, the court may certify that the improvement is a proper improvement, if satisfied on each of three matters:

- (1) that the improvement is of such a nature as to be calculated to add to the letting value of the holding at the end of the tenancy;

⁴⁴ Landlord and Tenant Act 1927 s.3(1), s.3(5)

⁴⁵ Landlord and Tenant Act 1927 s.3(1)

⁴⁶ Landlord and Tenant Act 1927 s.3(4)

⁴⁷ Landlord and Tenant Act 1927 s.3(1)

⁴⁸ Landlord and Tenant Act 1927 s.3(1).

- (2) that the improvement is reasonable and suitable to the character of the holding. In considering this question the court must have regard to evidence adduced by the landlord or any superior landlord (but not by any other person) that the improvement is calculated to injure the amenity or convenience of the neighbourhood;
- (3) that the improvement will not diminish the value of any other property belonging to the landlord or to any superior landlord.

If the court is satisfied on these three matters and issues a certificate, it may also make modifications in the specification or plan or impose other conditions.

The landlord's objection: offer of execution of improvements himself in consideration of increased rent⁴⁹

The landlord can object to the giving of a certificate by offering to execute the proposed improvement himself in consideration of an increase in rent, and in that event no certificate is to be given unless it is subsequently proved that the landlord has not fulfilled his undertaking. The making of an offer by the landlord precludes the court from giving a certificate but it does not entitle the landlord to execute the improvement himself against the wishes of the tenant⁵⁰.

Effect of certificate⁵¹

If the certificate is granted, the improvement becomes lawful "anything in any lease of the premises to the contrary notwithstanding".

Carrying out of improvement⁵²

To be entitled to compensation at the end of the term, the tenant must follow the above procedures and carry out the improvement in compliance with any conditions imposed by the court. If he is to claim compensation he must also complete the work within a time agreed with the landlord or fixed by the court. He, or his successor in title, will then be entitled to compensation at the

⁴⁹ Landlord and Tenant Act 1927 s.3(1).

⁵⁰ *Norfolk Capital Group Ltd v Cadogan Estates Ltd* [2004] EWHC 384 (Ch) [2004] 3 All ER 889.

⁵¹ Landlord and Tenant Act 1927 s.3(4).

⁵² Landlord and Tenant Act 1927 s.3(5).

termination of the tenancy upon quitting the holding. The tenant can require the landlord to give him a certificate that the improvement has been duly executed.

The effect of the procedure

It follows from the points made above that not only does compliance with this procedure entitle a tenant to compensation, it affords a method whereby the tenant may lawfully carry out the improvement **even though there is a prohibition against it in his lease**. The Act provides that having received no objection from the landlord, or having obtained a certificate from the court, the tenant can carry out the improvement **'anything in any lease of the premises to the contrary notwithstanding'**.

Obtaining compensation

The procedure for obtaining compensation is governed by Landlord and Tenant Act 1954 s.47⁵³ and CPR 56 as supplemented by paras 5.1-5.9 of the Practice Direction. Proceedings are commenced by claim form. **The claim must also be made within the statutory time limits**. The correct period depends on how the tenancy comes to an end. The periods are as follows.

- (1) If the tenancy ends by effluxion of time the claim form **must be issued between three and six months before the term date**.
- (2) If the tenancy ends by service of a notice to quit or by a notice served under the 1954 Act the claim form must be issued **within three months after the service of the notice**.
- (3) If the tenancy ends by forfeiture or re-entry the claim form must be issued **within three months after the date of the order for possession or the date of the actual re-entry** if there is no court order.
- (4) If the tenancy ends by a tenant's request for a new tenancy under s.26 of the 1954 Act the claim form must be issued **within three months of the landlord's notice** that he will oppose the grant of a new tenancy or, if the landlord gives no such notice, the last date on which he could have given

⁵³ Landlord and Tenant Act 1927 s.1(1).

the notice (that is two months from the tenant's request for a new tenancy).

Note that the court probably has no jurisdiction to extend the statutory time limits imposed by s.47.

The amount of compensation⁵⁴

The amount of compensation for an improvement must not exceed either the net addition to the value of the holding as a whole which directly results from the improvement or the reasonable cost of carrying out the improvement at the termination of the tenancy (less the cost of putting the works into reasonable repair except so far as the tenant is contractually bound to effect the repair). It should be noted that it is the "net addition to the value" of the holding which is considered: accordingly matters which are detrimental to the property are to be set off against the benefits in order to ascertain this sum⁵⁵.

In determining the addition to the value of the holding, regard should be had to any proposed change in the use of the premises and to any proposed demolition or structural alteration, and to the time that will occur before the change of use or demolition or alteration. It may be that the improvement will not add at all to the value of the holding because of such proposals and no compensation will then be payable. If the court holds that no compensation or reduced compensation is payable because of such proposals, it may authorise a further application to be made by the tenant if the proposal is not implemented within such time as it fixes⁵⁶.

In determining the amount of compensation, a reduction must be made on account of any benefit received by the tenant from the landlord in consideration of the improvement. The circumstances in which such a reduction can be necessary are limited since if there has been an ordinary contract between the

⁵⁴ Landlord and Tenant Act 1927 s.1.

⁵⁵ *National Electric Theatres Ltd v Hudgell* [1939] Ch 553, 561.

⁵⁶ Landlord and Tenant Act 1927 s.1(3).

parties obliging the tenant to do the work, there will be no right to compensation at all.

In the absence of agreement all questions both as to the right to compensation and as to its amount are to be settled either by the High Court or the county court.

Contracting out

34. Contracting out of the 1927 Act provisions is expressly prohibited. This is subject to a proviso that if on the hearing of a claim or application under the Act it appears to the court that a contract so far as it deprives any person of any right under Pt I was made for adequate consideration, the court may in determining the matter give effect to that contract.⁵⁷ Accordingly, unless the tenant is adequately compensated, any agreement which deprives the tenant of his ability to carry out improvements and to be compensated for them will not be given effect.

How are alterations to be valued on rent review or lease renewal?

35. When a tenant wishes to carry out alterations it is important to consider the impact they may have later.
36. Where the tenant has carried out improvements to the premises at his own expense he often believes that he should not have to pay rent for his own improvements and that they should be disregarded on later rent reviews. It has been decided, however, that in the absence of a provision in the rent review clause that tenant's improvements be disregarded, the reviewed rent (where it is set by reference to the value of the premises) is to be ascertained taking account

⁵⁷ Landlord and Tenant Act 1927 s.9.

of the improvements. This is because the improvements become part and parcel of the realty and of the demised premises and a direction in a rent review clause to find the rental value of the demised premises must, in the absence of a stipulation to the contrary, include the value of the improvements⁵⁸.

37. In practice, however, there is now usually a provision in rent review clauses providing that the value of improvements carried out by the tenant is to be disregarded when ascertaining the open market value of the demised premises. What works are to be disregarded will be a matter of the precise terms of the lease.
38. For instance, it is common to find provision that improvements carried out by “the tenant” are to be disregarded. This requirement will be satisfied if the tenant can show that he has made an arrangement with a third party, (typically, but not necessarily, a contract) under which the third party agreed with the tenant to do the specific works involved in effecting the improvements⁵⁹.
39. Again, often the improvements to be disregarded are only those carried out “with the landlord’s prior written consent”. It is important, therefore, that the tenant obtain the landlord’s consent to improvements if he is to ensure they are disregarded upon rent review.⁶⁰
40. In the case of *Hamish Cathie Travel England Ltd v Insight International Tours Ltd*⁶¹ the High Court held that where works had been completed before the landlord’s consent was obtained they were not to be disregarded upon rent review and it was too late to obtain the landlord’s consent. This seems unimpeachable. On the other hand, the judge also held that one could not read the disregard as applying to improvements “to which the landlord shall have given written consent

⁵⁸ *Ponsford v HMS Aerosols Ltd* [1979] AC 63, [1978] 2 All ER 837; *Laura Investment Co Ltd v Havering London Borough Council* [1992] 1 EGLR 155.

⁵⁹ See *Durley House Ltd v Viscount Cadogan* [2000] 1 WLR 246, [2000] 1 EGLR 60; *Scottish & Newcastle Breweries plc v Sir Richard Sutton’s Settled Estates* [1985] 2 EGLR 130. There may be some event, such as a provision in a deed, which estops the landlord from contending that it was someone other than the tenant who carried out the improvement: *Daejan Investments Ltd v Cornwall Coast Country Club* (1984) 50 P & CR, [1985] 1 EGLR 77.

⁶⁰ *Hamish Cathie Travel England Ltd v Insight International Tours Ltd* [1986] 1 EGLR 244.

⁶¹ *Ibid.*

or in respect of which the landlord's consent had been unreasonably withheld". This, however, is doubtful: where the parties have agreed that a landlord's consent to alterations may not be unreasonably refused, it is difficult to see how sensibly they could also have intended that a landlord who unreasonably withholds his consent can be entitled to rely upon his unreasonable refusal on subsequent rent review. The "officious bystander" test points to the implication of a term.

41. If a tenant invokes the provisions of Pt 1 I of the Landlord and Tenant Act 1927 and carries out improvements, the landlord would **not** be entitled to obtain the benefit of these improvements on rent review even if he has not consented in writing. This is because of the anti-avoidance provisions contained in section 9 of the Act. In essence, by obtaining an increase in rental to take account of the improvements, the landlord would deprive the tenant of at least part of the benefit of the compensation to which it is entitled.

42. There are statutory provisions to similar effect in the Landlord and Tenant Act 1954 s.34. This applies where the court has to determine the rent to be paid under a new tenancy ordered to be granted of business premises. These statutory provisions are sometimes incorporated into rent review clauses. The statutory disregard, however, does not apply to improvements carried out not under the current tenancy and more than 21 years ago, and the disregard only applies where the premises have been comprised in tenancies to which the Act applies at all times since the improvement was completed. If the statutory provisions are to be incorporated into a rent review clause good drafting therefore requires that appropriate modifications are made⁶². The statutory provision as enacted in 1954 were substantially modified in 1969⁵ and in some older leases it may be necessary to decide whether it was the original or the amended version which is to apply⁶³.

⁶² See per Slade LJ in *Brett v Brett Essex Golf Club Ltd* [1986] 1 EGLR 154 at 157.

⁶³ See *Brett v Brett Essex Golf Club Ltd* [1986] 1 EGLR 154, in which it was held by the Court of Appeal that the reference was to the former unamended version of the Act even though the lease was granted after the amendments had been effected.

43. In practice, one most commonly has to consider a situation where the tenant has carried out the improvement during the current tenancy. Possible difficulties arise where the tenant has carried out the work but before the grant of the current tenancy.

(1) Where the work was carried out under a previous tenancy of the premises by a previous tenant these are not “improvements” to the demised premises as they were let and not improvements by the tenant. The disregard of “improvements by the tenant” will not apply.

(2) Where the tenant under the current tenancy has carried out the work under a previous tenancy of the premises, it is sometimes argued that if the rent review clause directs that there be disregarded any improvement carried out by “the tenant”, that work is to be disregarded since it was carried out by the tenant. While this will be a matter of construction in each case, in most instances (in the absence of express provision) this suggestion is likely to be wrong. Michael Barnes Q.C. in Hill & Redman’s *Guide to Rent Review* states:

“There are two reasons why in such a case the value of the work is to be taken into account. First, the work in question is not an improvement as that word is to be understood in the context of a provision in the current lease. In the provision an improvement means an improvement to the premises as demised, not an improvement which itself created the premises as demised⁶⁴. Second, it may be that the context requires some qualification to be placed on the word

⁶⁴ Compare *Brett v Brett Essex Golf Club Ltd* [1986] 1 EGLR 154 the tenants had erected a golf clubhouse on land demised to them in 1973. That lease was surrendered and a new lease granted to them in 1978. The second lease required that under rent reviews there should be disregarded ‘any effect on rent of any improvement carried out by the tenant or a predecessor in title of his otherwise than in pursuance of an obligation to his immediate landlord’. The Court of Appeal held that in the context of the above provision in the second lease the clubhouse was not an improvement and so was not to be disregarded. In *Panther Shop Investments Ltd v Keith Pople Ltd* [1987] 1 EGLR 131 the tenants had during an earlier lease constructed a back extension and a separate storage building on the demised premises. The required disregard was of any improvement carried out by the lessees. Again, it was held that the works had to be taken into account on the ground that an improvement meant an alteration to the existing premises and not some previous works which were a part of the premises as demised. In *Scottish & Newcastle Breweries plc v Sir Richard Sutton’s Settled Estates* [1985] 2 EGLR 130 at 137 Judge Baker QC described an improvement as an alteration or addition to a building which the landlord has provided, so that what is contemplated is that the landlord provides a building and the tenant then adds something to it or improves it in some way.

‘tenant’, the obvious qualification being that it means the tenant in his capacity as the tenant under the current lease. A similar qualification had been applied in a similar context by the House of Lords when considering the original provisions of the Landlord and Tenant Act 1954⁶⁵. It follows that if a tenant taking a new lease wishes that the effect on value of improvements which he has carried out under a previous lease should be disregarded on rent reviews under the new lease he should insist on the inclusion of a clear express provision to this effect. The Landlord and Tenant Act 1954 was amended by the Law of Property Act 1969 so as to provide for such a result when the rent is determined for new leases granted under the Act, but subject to substantial qualifications.”

- (3) Where the tenant carries out the work not as tenant under a previous tenancy but in contemplation of the grant of the current tenancy and before that tenancy is actually granted, then it may be that even though not carried out by the “tenant” before he became tenant (strictly so called) they will be disregarded⁶⁶. The question will be one of construction in the circumstances in each case. If the works were referable to the current tenancy, their value will probably be disregarded, but if referable to some prior interest of the tenant, they will be taken into account⁶⁷.

44. It is also common to provide that improvements shall be disregarded except when carried out pursuant to an obligation to the landlord. This provision is also found in s.34 of the Landlord and Tenant Act 1954. A number of points should be noted.

- (1) An improvement may be carried out by the tenant pursuant to a statutory obligation as well as pursuant to an obligation to the landlord. Covenants

⁶⁵ *East Coast Amusement Co Ltd v British Transport Board* [1965] AC 58, sub nom *Re Wonderland, Cleethorpes, East Coast Amusement Co Ltd v British Railways Board* [1963] 2 All ER 775.

⁶⁶ Compare *Hambros Bank Executor and Trustee Co Ltd v Superdrug Stores Ltd* [1985] 1 EGLR 99; *Scottish & Newcastle Breweries plc v Sir Richard Sutton’s Settled Estates* [1985] 2 EGLR 130.

⁶⁷ *Scottish & Newcastle Breweries plc v Sir Richard Sutton’s Settled Estates* [1985] 2 EGLR 130.

in leases often require that the tenant is to comply with statutory obligations. In such a case the improvement is not to be disregarded since, notwithstanding the effect of statute, it is still carried out pursuant to an obligation to the landlord⁶⁸.

- (2) Where there is a qualified covenant restricting alterations improvements are often permitted by a licence granted by the landlord. Such licences often contain provisions that the tenant shall carry out the permitted improvements in a certain way, for example to a proper standard, in accordance with specified plans or within a specified time. Such obligations are merely ancillary and are subsidiary to the main purpose of the licence which is to grant permission for the works⁶⁹. Even a term in a licence that the provisions of the lease shall apply to the altered premises as if the premises in their altered state had originally been comprised in the lease does not prevent the application of the disregard⁷⁰.
- (3) On the other hand, the licence may expressly provide that the works are deemed to be carried out pursuant to an obligation to the landlord. This must mean that the disregard is not to apply with the result that the valuation on a subsequent rent review is to take into account the improvements in question⁷¹.
- (4) If a licence to carry out an improvement requires that the tenant shall remove the improvement at the end of the term that obligation in the licence will not normally be a term of the hypothetical lease⁷².

⁶⁸ *Forte & Co Ltd v General Accident Life Assurance Ltd* (1986) 54 P & CR 9, [1986] 2 EGLR 115

⁶⁹ *Godbold v Martin The Newsagents Ltd* [1983] 2 EGLR 128; *Historic Houses Hotels Ltd v Cadogan Estates* [1993] 2 EGLR 151; *Daejan Properties Ltd v Holmes* [1996] EGCS 185. Cf *Ivory Gate v Capital City Leisure Ltd* [1993] EGCS 76.

⁷⁰ *Historic Houses Hotels Ltd v Cadogan Estates* [1993] 2 EGLR 151

⁷¹ *Daejan Properties Ltd v Holmes* [1996] EGCS 185

⁷² *Pleasurama Properties Ltd v Leisure Investments (West End) Ltd* [1986] 1 EGLR 145.

How are the alterations to be treated at the end of the term?

45. In the absence of any obligation to reinstate the premises, if an alteration has been carried out lawfully then it has become part of the demised premises. Accordingly, subject to any obligation to repair the demised premises, the tenant will be obliged to deliver up the demised premises with the alterations (though he has a right to remove “tenant’s fixtures” subject to making good).
46. If alterations have been carried out by the tenant in breach of covenant, then the tenant will in principle be liable for damages to the landlord if the premises are delivered up in that state at the end of the term. The quantification of damages will be made on usual principles.
47. Often tenants enter into agreements to reinstate premises either as a covenant in the lease itself or as a term of a licence to carry out alterations. There are three common forms of covenant:
 - (1) unqualified covenants to reinstate;
 - (2) covenants to reinstate upon notice;
 - (3) covenants to reinstate unless notice to the contrary is given.
48. In principle, there is no difficulty in determining whether a tenant is in breach of an unqualified covenant to reinstate. If the tenant has covenanted to reinstate premises which have been altered he must restore the premises and make good any damage caused by the removal of any items.
49. Covenants to reinstate upon notice by the landlord, however, often give rise to difficulties in practice. There are two questions which arise: (1) the form of the notice and (2) the timing of the notice.
50. In general, there is no requirement about the form of notice given and whether notice has been given will depend upon the construction of the obligation and the documentation purporting to give notice. The question of whether a schedule

- of dilapidations gives sufficient notice will depend on whether a reasonable recipient would have understood that one of the purposes of the schedule was giving the notice necessary to invoke the obligation to reinstate⁷³.
51. In most cases there is no express requirement upon the landlord to give notice at any particular time. It is not uncommon to find surveyors requiring reinstatement in notices served *after* the lease has expired. Whether this is sufficient will depend upon the construction of the obligation and a prudent landlord will take a decision on reinstatement and serve notice in good time before the end of the lease.
 52. First, there must be some implicit time limit on when the landlord can give notice. Most naturally one would expect that the latest when the notice could be served is the expiration of the lease after which the relationship of landlord and tenant ends and the tenant has no right to possession.
 53. Secondly, it is necessarily implicit to give business efficacy that the tenant should have sufficient time to carry out the works required. There are two possible answers:
 - (1) it is necessarily implicit that the obligation requires notice to be given sufficiently *before the expiration of the lease* to allow the tenant to carry out the reinstatement before he has to give up possession; or
 - (2) it is necessarily implicit that if the landlord is to rely upon the notice, he must permit the tenant to remain upon the premises to the extent that it is necessary for him to perform his obligation to reinstate.
 54. In the absence of a clear indication the context might be considered to support the former interpretation: after the lease ends the relationship of landlord and tenant ends and the landlord would be expected to retake possession and use

⁷³ *Westminster City Council v HSBC Bank plc* [2003] 1 EGLR 62: obligations to reinstate on notice contained in licences; schedule of dilapidations requiring reinstatement sufficient despite no reference to licences.

the premises for its own purposes. If the tenant is to be required to do something to the premises one would expect this to take place during the term. There are, however, two cases which support the latter interpretation.

55. In *Scottish Mutual Assurance Society v British Telecommunications Plc*⁷⁴ a licence to alter provided that the tenant “should reinstate the property to its original design and layout at the expiring of the Lease at its own cost should the Lessor reasonably so require”. The lease expired on 24th June 1992. The Landlord served its Schedule on 18th June 1992. The Judge held that the intention was, given a reasonable requirement by the landlord that the work should be carried out, to require the necessary work to be put in hand at the time of, but not to be completed by, the expiry of the lease, the tenant being allowed a reasonable time after the expiry of the lease to complete the works.
56. Further, in *Matthey v Curling*⁷⁵ the House of Lords held in that particular case that a covenant to lay out insurance moneys in reinstating damage by fire was capable of being breached after the end of the term. Lord Atkinson said that in the case of an “ordinary covenant to reinstate, a covenantor shall in the absence of words expressly or impliedly fixing a time for performance of his covenant, have what is a reasonable time under all the circumstances of the case for performance, whether, in the case of a leasehold, that time extends beyond the term or the contrary”.
57. Covenants to reinstate unless notice to the contrary is given are not without potential complications. One problem might be if the tenant reinstates *before* the landlord gives notice to the contrary. Until the landlord has given notice to the contrary it is difficult to see how the works of the tenant are in breach of covenant and it is difficult to see how a notice given after the works have been carried out can render works already performed in breach of covenant. The question, however, is undecided and will turn on the precise form of covenant.

⁷⁴ Unreported decision of Anthony Butcher QC sitting as recorder hearing Official Referee's business, 18th March 1994 noted at Dowding & Reynolds, *Dilapidations*, 3rd edn., p 327.

⁷⁵ [1922] AC 180.

Conclusions

58. The law of alterations can cause difficulties if one forgets some basic points. Leaving aside the question of whether the alterations are prohibited by the terms of the lease, it is important to remember:

- (1) **even absolute prohibitions against alterations can be overridden** if the alterations fall within Pt I of the Landlord and Tenant Act 1927 (and these provisions give the tenant an entitlement to **compensation** if he has complied with the statutory procedure);
- (2) **before** altering premises tenants should consider how the works are to be treated on rent review and whether there are any procedural steps which must be taken if they are to be disregarded (e.g. is the landlord's consent in writing required);
- (3) the provisions for reinstatement (in particular, landlords should consider precisely what steps they must take if they are to require tenants to reinstate the premises).