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REPAIRS, SERVICES CHARGES AND EWS1 CERTIFICATES

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BY RICHARD SNAPE

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ABOUT RICHARD SNAPE

Richard has been the Head of Professional Support at Davitt Jones Bould since 2002. He speaks at numerous courses for law societies all over the country, various public courses, in-house seminars within solicitors firm and has also talked extensively to local authorities and central government bodies. His areas of specialism include both commercial and residential property, in particular in relation to local government law, conveyancing issues, development land, commercial property and incumbrances in relation to land.

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OUTCOME FOCUSED TRAINING INFORMATION

Lecture is aimed at: Property professionals and fee earners involved in both contentious and non-contentious property work

Learning Outcome: To give an increased knowledge of the subject matter. To update on current issues, case law and statutory provisions and to be able to apply the knowledge gained in the better provision of service to the client.

Satisfying Competency Statement Section: B – Technical Legal Practice

For further information please see http://www.sra.org.uk/competence

CONTENTS

REPAIRING COVENANTS

A. INTERPRETATION OF REPAIRING COVENANTS

Repair and Inherent Defects

This is a particular problem in relation to new properties. A repairing covenant will not involve a liability to remedy inherent defects in the absence on express wording. (As an evidential point, surveyors should be encouraged not to describe defects as disrepair). However, the tenant (or landlord) may be liable to remedy the defect if this is the best way of remedying disrepair which arises as a consequence of the defect.

Quick v Taff-Ely B.C. [1985] 3 All ER 3

The landlord was not obliged to replace metal window frames which sweated, causing major condensation, with wooden or UPVC ones. This condensation did not cause any disrepair for which the landlord was liable.

Post Office v Aquarius Properties [1987] 1 All ER 105

The basement of the demised premises was composed of porous material and flooded frequently. At the time of the action the water table had subsided and there was no actual disrepair. The tenant was not obliged to spend substantial sums of money remedying the defect (between £86,000 and £175,000).

Elmcroft v Tankersley-Sawyer [1984] 270 EG 140, CA

A badly situated damp proof course resulted in water penetration and damage to plaster work. The landlord was liable for the disrepair to the plaster and was required to remedy the defect in the course of this repair.

Stent v Monmouth D.C. [1987] 1 EGLR 59, CA

A badly designed wooden door let in water. This caused the door to warp. As there was disrepair to the door, the landlord was required to remedy the design defect.

Ravenseft v Davstone (Holdings) Ltd [1980] QB 12

Here the premises, valued at £3 million, suffered from rusting to the metal framework and damage caused by the fact that expansion joints had not been used in the original construction. Remedial work costing £55,000, including the provision of expansion joints, not common practice at the date of the original building, and costing £5,000, amounted to repair. See also Re ***Davstone 1969*** where the landlord having replaced the inherent defective flat roof could not collect the service charge as this only allowed collection for repairs.

Inherent Defects and Actions against Third Parties

The tenant will not have an action in tort against the building contractor, or architect for any inherent defect in the absence of injury to the person or physical damage to other property. Damages in tort are not available for pure economic loss, i.e. the cost of putting right the defect. See ***D and F Estates v Church Commissions for England and Wales [1989] AC 177, Murphy v Brentwood D.C. [1991] 1 AC 398, Department of Environment v Thomas Bates [1991] 1 AC 499***. There may however be a contractual claim by the landlord.

Collateral Warranties

Alternatives to the above are collateral warranties between tenant and contractor, whereby the contractor warrants that they have not been and will not be negligent in carrying out the work. As such warranties are yet to be tested in the courts, a better course is perhaps for the landlord to accept liability for inherent defects through the lease, or at least during the first years of the lease. Defects still need to be defined, however, preferably by reference to whether the landlord has a cause of action against the builder or professional team.

See for instance, ***Smedley v Chumley and Hawke Ltd [1981] 261 EG 775***. The landlord was expressly liable for defects due to faulty materials and workmanship. He was responsible for substantial repair when the raft on which the premises was supported tilted. An argument that there was no mention of repair to foundations but merely to the exterior failed.

Repair as Opposed to Renewal

For older buildings the major issue tends to be whether works can be said to constitute repair or renewal. The tenant may be required to renew subsidiary parts of premises (as in ***Ravenseft*** above) as part of a repairing obligation. However, repair does not involve renewal of the whole or substantially the whole, and giving back something more than originally let.

Brew Bros v Snax (Ross) Ltd [1975] 1 QB 612

Works to prevent tilting of premises would cost £8,000. After completion the premises would be worth between £7,500 and £9,500. The works constituted renewal for which the tenant was not liable.

Mullaney v Maybourne Grange [1986] 1 EGLR 70

Replacement of old wooden window frames with double glazing at twice the cost amounted to an improvement beyond repair which the landlord could not pass on to the tenant by means of a service charge.

Craighead v Homes for Islington Ltd [2010] UKUT 47

Where windows were not replaced like for like, due to intervening changes in Part L of the Building Regulations, it was implied that the landlord could improve the windows to modern standards under the repairing obligation and add the cost to the service charge. This, in spite of the fact that the building was listed and potentially exempt from Part L. Contrast this with ***Mullaney v Maybourne Grange Ltd*** where service charges which allowed repairs, but not improvements, to be charged for did not cover replacement of wooden single glazed window frames with UPVC double glazing. The difference between the two cases seems to be due to the intervening statutory provisions. If correct, this may be an extremely useful argument for landlords, e.g. in relation to increased energy performance of buildings.

Another example of statute rendering repairs impossible occurred in relation to R22's, a type of CFC. These were banned in new air conditioning systems in 2004 but not in existing systems until 1 January 2015. Presumably, according to the above the landlord could improve the air conditioning system and add the cost to service charge regardless of what the lease says. A tenant who is responsible for the air conditioning system may find themselves having to improve or be sued for terminal dilapidations.

Peverel OM Ltd v Peverel Freeholds Ltd [2010] UKUT 137

There is nothing particularly new in this case. However, it is a timely reminder, as the service charge allowed charging for inherent defects, the tenants had to pay for the cost of rectifying structural defects. Moreover, they could not claim against the builder who was responsible as they had no contract with him, or for negligence. The claim amounted to one for pure economic loss: see ***Murphy v Brentwood District Council [1991] 1 AC 398.***

ACT Constructions Ltd v Customs and Excise Commissioners [1982] 1 All ER 84

Underpinning a building to correct subsidence and comply with modern building regulations thus increasing life expectancy fell beyond repair and maintenance.

Likewise, in ***Elite Investments v TI Bainbridge Silencers Ltd [1986] 2 EGLR 43*** replacement of the roof of an industrial unit (as being the only way to repair) at a cost of £84,000 compared to a re-instatement value of £140,000 for the building amounted to repair.

See also **Ravenseft** above, the provision of new expansion joints constituted a fraction of the value of the premises.

Note: Effect on rent review. Where there is a long lease, of greater duration than the life expectancy of the building, it may be legitimate for the landlord to expressly expand on the normal repairing obligation. This may have a detrimental effect on rent on review however.

Norwich Union Life Insurance Society v British Railways Board [1987] 2 EGLR 137

A 125-year lease of premises provided for repair and "when necessary to rebuild, reconstruct and replace the same". The tenant successfully argued for a 27.5% reduction of rent on review.

For old buildings there may be various possible methods of avoiding problems. Primarily use of a surveyor is important prior to the lease. In the event of major potential problems the tenant will require a reduction in liability. There are various ways in which this may be done:-

- Limiting extent of liability, e.g. only for internal decorative repairs.
- Preparing a Schedule of Condition. Make sure that defects are clearly spelt out and that the tenant is not liable to rectify the consequences of disrepair.
- The Law Society Short Form Model Lease. This provides a covenant "to maintain the state and condition of the property" but "not to alter and improve it".

Presumably surveyors would have to be used to agree the state of the premises on commencements. Moreover, maintaining to a large extent involves repair, although not requiring the tenant to put the premises in repair. Lack of an obligation to improve may cause fundamental problems of interpretation.

Fire Damage

The tenant will be liable to rebuild the whole property if damaged by fire: ***Matthey v Curling [1922] 2 AC 180***. Thus, where the landlord is bound to insure, the tenant should ensure that he is exempt from liability caused by peril against which the landlord has insured unless the insurance is vitiated by the tenant.

Exemptions should only be available to the extent that the landlord recovers costs from the insurance company.

The Premises Subject to Repair

Here there may be major problems of definition. There are various possibilities.

The Demised Premises

This is a frequently used term. Beware of situations where the draft lease does not with certainty define the extent of the premises, in particular as to whether shared walls, ceilings etc. fall within the demise.

There may also need to be clarification with respect to future constructed buildings and whether these fall within the definition, likewise similar problems arise with respect to repair of landlord's

fixtures. Where the premises form part only of a building and the tenant's liability is not limited to the interior of the premises, precision is required.

In ***Tanya Grand v Param Gill [2011] EWCA 554***, the Court of Appeal found that plasterwork in the nature of a smooth constructural finish to walls and ceilings to which decoration could then be added was part of the structure.

The Interior of the Premises

Problems arise with respect to layered floors and walls. Interior of the premises should be clearly spelt out as to whether including e.g. interior structural and load bearing walls or merely decorative finish.

Structural Repairs

It the landlord accepts repairing obligations in return for a reimbursement covenant or service charge, there must be further expansion of the definition of structure as various possible interpretations exist.

Granada Theatres Ltd v Freehold Investment (Leytonstone) Ltd [1958] 2 All ER 551

Structural repairs were defined as repairs to the structure as opposed to decorative repairs. Thus, the landlord would be required to carry out all repairs other than decorative repairs. Here, slates on the roof constituted a part of the structure.

Alternatively, structure may be interpreted as including only load bearing elements which give strength and stability.

Finally, a midway position may be met where serious disrepair is the responsibility of the landlord. In particular, external windows seem to cause major problems of interpretation.

Boswell v Crucible Steel Co. [1925] 1 KB 119

Sheet glass windows which could not be opened and which formed part of the fabric were within the definition of structure.

Holiday Fellowship Ltd v Hereford [1959] 1 All ER 433

Normally, windows will not constitute a part of the structure. Thus, draftsman should take full instructions as to the construction of premises.

Sheffield City Council v Oliver (2008)

This case, in the context of social housing, stated that external windows were part of the structural exterior and within the liability of the landlord under Section 11 of the Landlord and Tenant Act 1985.

Definition of Exterior

This needs to be clearly defined where the landlord is liable for the exterior.

Exterior includes inner-party walls unless the covenant is expressed as one with respect to repair of "structure and exterior of the building of which the demised premises forms a part". ***Camden Hill Towers Ltd v Gardner [1977] 1 All ER 739***. In the absence of contrary provision, it appears that exterior includes main access ways and staircases***: Brown v Liverpool Corporation [1969] 3 All ER 1345***, but not side entrances: ***Hopwood v Cannock Chase D.C. [1975] 1 All ER 796***.

Ceilings may also present problems. Where the exterior of demised premises are the subject of the clause, this will include an outer roof only if the ceiling and roof are inseparable: ***Douglas-Scott v Scorgie [1984] 1 All ER 1086.***

Rapid Results College and Angell 1986

The cornice going around the roof was not a part of the structure and thus could not be collected via the service charge.

The Standard of Repair

Proudfoot v Hart [1890] 25 QBD 42, CA

Established that the standard of repair depends on the age, character and locality of the premises and the type of occupier. Quaere whether large and financially strong business tenants owe a greater duty.

Anstreuther – Gough – Calthorpe v McOscar [1924] 1 KB 716, CA

The criterion is that in existence when the lease commenced and not at the date of disrepair.

Ladbroke Hotels Ltd v Sandhu [1995] 39 EG 152

The bad construction of a hotel was irrelevant to the assumption that the tenant had complied with repairing covenants on rent review. To ensure its full life expectancy, the premises would require £500,000 worth of repairs. The tenant unsuccessfully argued for lesser repairs which would increase expectancy by 15 years and costs £60,000.

Postel Properties Ltd v Boots, the Chemist [1996] 41 EG 164

The landlord can rely on the report of a reasonable surveyor in determining whether to carry out patch up repairs or, in the short-term, more expensive major remedial work.

PRACTICAL CONSIDERATIONS

(a) Length of the Term

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

On the other hand, consider ***O'May v City of London Real Property Co [1983] 2 AC 726 and Wallis' Fashions v General Accident [2000] EGCS 45.*** A short-term lease may in fact last a comparatively long time period with a series of renewals under ***Part II LTA 1954*** and it is unlikely that the landlord will be able to insist on a change of the repairing obligation on such a renewal.

In ***Samuel Smiths v Howard de Walden [2007]*** a judge accepted the tenants' argument that user covenants in relation to a public house could not be changed on a renewal without the consent of the tenants. The landlords wished to allow the sale of food arguing that this was the industry norm. The tenants objected to this as he felt it would have the effect of increasing future rent on review.

Edwards and Walkden v Mayor of London [2012] EWHC 2527

In spite of O'May, the judge held that a relevant circumstance on a lease renewal was a different tenant had a different service charge liability in the original leases. These were allowed to be standardised.

(b) The Nature of the Building

If the tenant leases out a detached building then a full repairing covenant may be appropriate. If there is multiple occupation, a service charge in relation to the common parts may be more desirable. Note, however, that the landlord will be liable for disrepair to the common parts as soon as it occurs. See ***BT v Sun Life [1995] 4 All ER 44*** below.

Where there are hybrid lettings to a small number of tenants, full repairing obligations on the tenants may prove unjust, eg. the burden of repairing the roof may fall on just one tenant. In many situations a service charge may be more desirable.

(c) Extensive Repairing Obligations

To remedy inherent defects during a long lease. See ***Norwich Union v BRB [1987] 2 EGLR 137*** above. This may have disastrous consequences on rent review.

(d) Age of the Building

The tenant may be exonerated from anything but maintenance by a covenant in an old building, or may wish to exclude liability for fair wear and tear. Likewise, he may be exempted from curing inherent defects in a new building. However, it is quite possible that nobody is responsible for the dilapidation and either landlord (in a short lease) or tenant (in a long lease) will have to take steps in relation to the dilapidation.

SERVICE CHARGE PROVISIONS

What services will be provided?

This depends on the facts of each case, but the landlord will want to recover:

- All expenses incurred in complying with the landlord covenants in the lease.
- The cost of all the other services which the landlord may decide are appropriate to provide.
- The costs and expenses incidental to providing the services and other costs arising out of his ownership of the property.

It would generally be considered reasonable for a landlord to seek to recover:

- Rates, water rates, insurance costs, drainage costs, gas, electricity and other fuel costs.
- The cost of cleaning, repairing, maintaining, servicing and renewing structure, exterior, common parts, including gardens, parking areas, windows, doors, plant, machinery, air-conditioning, lifts, central heating.
- The cost of providing essential staff (eg. security and cleaning)
- Management fees and any banking costs.

It would generally be considered unreasonable for a landlord to seek to recover:-

- Development costs (either original or subsequent).
- Expenditure which goes beyond repair or cost-effective replacement.
- Capital improvement costs.
- Estate management costs (e.g. rent review, lease renewal, licence applications).

The landlord will want to include a "sweeping-up provision" to enable recovery of the cost of other services relating to the building provided by the Landlord during the term and not expressly mentioned. The landlord will argue that this is necessary because it is not possible at the outset to envisage every aspect of expenditure which may be required and, over a period of time, the requirements of the building may change. Sweeping-up provisions are narrowly construed, but the tenant should in any case limit the clause to items of expenditure which are reasonably incurred, which are capable of benefiting the tenant, and which are in keeping with principles of good estate management. Certain items might be expressly excluded. See ***Mullaney v Maybourne Grange [1982] 2 EGLR*** where improvements were not covered by the Service Charge, a charge for replacing wooden window frames with double glazed UPVC ones could not be made).

In the case of ***Sara and Hossein Asset Holdings v Blacks Outdoor Retail [2020] EWCA1521*** a landlord's certificate in relation to service charge was stated to be conclusive as to liability. The Court of Appeal held that this applied to both the itemised works and total amount. The clause was clear and unambiguous and could not be contested.

In ***Criterion Buildings v McKinsey & Co [2021]*** **EWHC 216** the landlord successfully claimed £2.2 million plus interest of service charge arrears. The lease stated that the tenant would pay a "due proportion" of the service charge as determined by the landlord. The court decided that as long as the lease covered the works done the landlord's determination would be conclusive save in exceptional circumstances.

SERVICE CHARGE RECENT CASE LAW

The results of the Hackett Enquiry in relation to Grenfell have now been produced. In February 2021 the Government announced a building safety fund whereby in residential buildings an application could be made to pay for the removal of combustible cladding. However, the amount set aside is £5.1 billion and the estimated costs of removal is around £15 billion. This will not apply to commercial property.

FirstPort Property Services Ltd v various long leaseholders of Citiscape LON/00AH/LSC/2017/0435

In March 2018 First Port obtained the tribunal rulings to the effect that tenants would be responsible for the replacement of aluminium cladding in a block of flats in Croydon. The cost is currently assessed at £2m including a bill of £4,000 per week to employ fire wardens. The maximum individual liability is £31,300.

In April 2018, the developer, Barratts, announced that they would voluntarily pay for the works.

In ***Zagora Management v Zurich Insurance Plc [2019] EWHC 140 (TCC)*** the cost of replacing the cladding was £10m. This was covered by a newbuild guarantee but the guarantee had a cap of £3.5m. This case has now been reversed by the Court of Appeal ***[2019] EWHC 257 (TCC).***

Blue Manchester Ltd v North West Ground Rents Ltd [2019] EWHC 142 (TCC) the case involves the Beetham Tower in Manchester. The tower consists of an hotel with residential properties above. It was found that the cladding was not sufficiently bound with the glasswork. The landlords were a ground rent management company with who held the freehold. They originally proposed stitch plate repairs but the tribunal held this as not satisfactory. The damage constituted disrepair and was thus within the landlords' liability and it seems that some of the cost cannot be recouped by service charge. It is unlikely that any of the parties foresaw such major works in the early years of the building. In October 2020 North West Ground Rents applied to Court arguing that they could not reasonably comply with the terms of the specific performance. They failed in this application.

Building Regulations and Grenfell

Prior to the Grenfell disaster the Welsh Government had already introduced a requirement for sprinkler systems in new residential buildings. In December 2018 similar requirements were introduced in England but only for residential buildings of 30 metres or more in height. There is also a ban on various types of cladding in relation to buildings more than 18 metres in height. This is not retrospective but is under review.

FIRE SAFETY BILL 2019 – 2021

This Bill has now been through both Houses of Parliament and the Commons is due to consider House of Lords amendments. It amends the Regulatory Reform (Fire Safety) Order 2005. If a building has two or more dwellings then, not merely communal areas, but also structure, external walls, doors and windows require fire safety risk assessments. The effect of non-compliance may vitiate building's insurance.

THE EWS1 FORM AND EXTERNAL CLADDING

Following the Grenfell disaster in June 2017, mortgage companies naturally became reluctant to lend on flats in blocks which might have combustible cladding. On occasion, valuers were valuing such flats at £0. There was, moreover, no standardisation between the lenders.

The industry's response was the EWS1 (external wall systems) Certificate which was introduced in December 2019 after discussion between UK Finance and the Royal Institution of Chartered Surveyors. A recognised property professional with the requisite qualification would carry out an inspection where deemed appropriate and would produce an EWS1 Certificate which would be required by the mortgage company. The certificate would last for five years and would only be required for multi-let residential properties of more than 18 metres (c. six storeys) in height. If the cladding was deemed safe then the mortgage company would proceed, it would require the cladding to be replaced, a process which can take a significant amount of time.

Unfortunately, in January 2020, the Department of Housing Communities and Local Government muddied the waters somewhat when it produced **Advice for Building Owners of Multi-Storey, Multi-Occupied Residential Buildings**. This suggested that the EWS1 may be appropriate in some multi-let premises of less than 18 metres in height and which do not have external cladding, the concern apparently being high pressure laminate which is causing some concern. This concern increased after it was found to contribute to a fire in a block of halls of residence in Bolton in November 2019. As a consequence of this, some mortgage companies have required the EWS1 on buildings with three storeys and where brick is the building material. This is surely not what was intended.

The real problem is that there appear to be only 300 qualified fire safety inspectors in the country and insurers are not prepared to allow other property professionals to carry out the assessments due to the potential level of liability where there is a claim. Estimates vary but at the higher end there may be up to 3 million flats which may be affected. The certificates can cost upwards of £10,000 and there are examples of landlords or agents (who commission the assessments) being quoted of up to the 10 years for one to become available.

On 27 November 2018 in England (January 2020 in Wales), cladding was finally banned in multi-let residential properties of more than 18 metres in height. If the building was completed under the 2018 Building Regulations the mortgage company should not require the certificate.

The EWS1 is undergoing review and this cannot come too soon for many, especially at the current time when many are unable to relocate to the countryside from their small city-centre dwellings. If changes are not made soon, some estimate that the level of negative equity in such premises will be greater than during the credit crunch of 2008-2011.

Note: On 22 November 2020 the Department of Housing announced that they have reached agreement with the RICS and UK Finance whereby an EWS1 Certificate will not be required for buildings without cladding. At the time of writing, many mortgage lenders are saying that they know nothing about this. They are also pointing out that many brick buildings may have cladding behind the brickwork.

On 8 March 2021, the Royal Institution of Chartered Surveyors produced its new guidance note on the valuation of properties in multi-storey multi-occupied residential buildings with cladding. The guidance comes into effect on 5 April 2021, but it is expected that valuers will take it into account immediately.

The guidance is as follows:

- The certificate should be required for buildings over six storeys in height where there is cladding or curtain wall glazing or where there are balconies vertically above one another and both the balustrades and decking are constructed where combustible material such as timber, or where the decking is constructed of combustible material and the balconies are directly linked by combustible material.

- If the building is of five or six storeys in height then a certificate will be required if approximately one quarter of the whole elevation estimated from a viewing at ground level is comprised of cladding, or there is aluminium or metal composite material or high pressure laminate panels on the building or fire risk in relation to balconies as above

- If the building has fewer than five storeys a certificate will be required if there are aluminium or metal composite or high pressure laminate panels on the building

The guidance also makes clear that if the building complies with the Building (Amendment) Regulations 2018 (or 2020 in Wales) an EWS1 certificate should not be required.

At first glance this alleviates many of the problems, in particular there are examples of EWS1 certificates being required for three or four storey buildings with brick facades. Hopefully, this will be a thing of the past. However, the original purpose of the EWS1 certificates has been expanded to include high pressure laminate and balconies and not merely combustible cladding. Buildings of less than 18 metres in height may also still require the certificates which was not what was intended when the EWS1 was introduced.

Although a step in the right direction and the guidance has solved the problems for some, do not assume that the issue has gone away.