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# REPAIRS, SERVICE CHARGE AND BUILDING SAFETY IN COMMERCIAL LEASES

2nd October 2024

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## ABOUT RICHARD SNAPE

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**REPAIRING COVENANTS**

**INTERPRETATION OF REPAIRING COVENANTS**

**Repair and Inherent Defects**

This is a particular problem in relation to relatively 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.

***City of London v Various Leaseholders of Great Arthur House [2021] EWCA 431***

The Landlord could charge for specified repairs. There was water penetration for a number of years due to 40 construction works. The Court stated that there would be liability if the inherent defect gave rise to disrepair but not otherwise. The fact that work would also remedy damage or

deterioration of the building over time did not give rise to liability for structural defects and the tenants did not have to pay via service charge.

***Tower Hamlets London Borough Council v Long Leaseholders of Brewster House and Maltings House [2024] UKUT 193*** The case concerned two blocks of flats originally constructed as council housing in the early 1960's. Some of the council tenants had purchased long leases under the right to buy provisions. The blocks had been constructed with a Large Panel System which subsequently was found to be defective and remedial works was done over the years. After Grenfell inspection of the blocks showed ore defects and remedial work would cost over £9 million. The service charge allowed the Landlord to charge for repair and maintenance and there was also a sweeper provision. The other tribunal held that repair and maintenance did not cover structural defects and the Leaseholders did not have to pay.

It should be noted that short-term leases of dwellings of less than 7 years, the Landlord cannot charge for repair to the structure and exterior under **S.11 Landlord and Tenant Act 1985** but by buying under right to buy the Leaseholders may be charged depending on the wording of the service charge.

**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. An alternative is 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.

In ***Lurcott v Wakeley and Wheeler [1911] 1KB 905***, repair was defined as restoration or replacement of subsidiary parts. A dangerous front wall which needed to be rebuilt came within the repairing covenant. The fact that it had deteriorated through time was irrelevant.

***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 R22s, 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 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 Commercial 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.

Note: If the tenant has not had a satisfactory fire safety risk assessment for the demised premises, or if they have not implemented it they are in danger of vitiating the insurance. Under the **Fire Safety Act 2021**, if there are at least two sets of dwellings in the premises the landlord

must have a risk assessment in relation to common parts including the structure and exterior, external doors and windows and any external attachments. The provisions came into force in Wales on 1 October 2021 and in England 16 May 2022.

**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.

***Fivaz v Marlborough Knightsbridge [2021] EWCA 989***

Here in the absence of a contrary expression, a front door to a flat was held not to be part of the structure and thus was the tenant's. There was no breach when the tenant replaced the front door. Compare this with ***Holiday Fellowship v Hereford [1959] 1WLR 211*** here external doors and windows were held not to be part of the structure and exterior.

**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, in ***Kumarasamy v Edwards [2016] 40***, the exterior did not include the front path.

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] 1EGLR 53***

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. In ***Mason v TotalFinaelf*** **[2003] EWHC 1604** it was stated that where the tenant of a petrol station was a large multi-national then they may have a greater duty of repair. ***Proudfoot v Hart*** above also made clear that where there is an obligation *to keep in repair* this will require a tenant to put the premises in repair if they are not already.

***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.

**CASES ON SERVICE CHARGE LIABILITY**

In ***Finchbourne v Rodriguez [1976] 1All ER 581***, it was stated that service charge liability was subject to a reasonableness test. This, however, related to a residential property and there is also statutory control of service charges in dwellings under the **Landlord and Tenant Act 1985**. In ***Havenridge Limited v Boston Dyers [1994] 2 EGLR 73***, there was no implied term that insurance rents must be reasonable. In the residential case of ***Redrow Homes v Hothi [2011] UKUT 268***, it was implied that the final service charge must be calculated within a reasonable time of the end of the service charge year. This did not, however, invalidate interim payments but might give rise to a damages claim.

In the case of ***Sara and Hossein Asset Holdings v Blacks Outdoor Retail [2020] EWCA 1521*** 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. Thew tenant would have to pay service charge and could not contest it in the absence of fraud, mathematical error or where manifestly wrong.

The Supreme Court heard this case ***[2023] UKSC 2.*** The Tenant had to pay the service charge. If they objected to the amount they would have to bring a separate court action.

In ***Criterion Buildings v McKinsey & Co [2021] EWHC 256*** 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. A due proportion was stated to be a fair proportion as determined by the Landlord or their surveyors. The court decided that as long as the lease covered the works done the landlord's determination would be conclusive in the absence of fraud, mathematical error or where manifestly wrong.

In light of the above, tenants should introduce a reasonableness test and have caps on service charge. Alternatives might include a provision whereby service charges must be reasonably incurred and of a reasonable standard or service charged liability based on floor area. Problems may arise on lease renewals where tenants would be well advised to object to existing wording of service charges. However, on a **Landlord and Tenant Act 1954** renewal the starting point is that the old lease is the basis of the new lease as regard should be had to the terms of the current tenancy: see ***O'May v City of London Real Property Company Limited*** below. Issue may also arise, as we have seen, in relation to service charge liability for statutory compliance where the cost of required energy efficiency works may be added to service charge.

Note: There have been several residential cases where the cost of removing and replacing cladding and high pressure laminate have been added to service charge as being covered by good estate management. This could also be an issue in relation to commercial property, in particular, in mixed-use developments.

**SOME OTHER CONSIDERATIONS**

**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.

In the county court case of ***WH Smith v Commerz Real Investmentgesellschaft (2021)*** the judge refused to change terms on a renewal relating to the landlord passing the cost of energy performance certificates, energy audits and energy efficiency works to the tenant. They did, however, agree to a change of rent suspension provisions to cover pandemics.

**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***.

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

**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.

**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.

**THE BUILDING SAFETY ACT 2022 AND HIGHER-RISK BUILDINGS**

**Higher-Risk Residential Buildings**

The Act has also introduced the Building Safety Regulator who will be a part of the Health and Safety Executive. They will have a general role in relation to building safety, but will also be responsible for building control in high risk residential buildings. In England a high risk residential building is one with at least two dwellings which is at 18 metres or more in height or, if less than 18 metres, which has 7 or more storeys. Such a building will have an accountable person who has a legal estate in possession in the common parts or is responsible for repair of the common parts. This will include any Right to Manage Company and any Residents Management Company if there is more than one accountable person then there will be a principal accountable person. A residents' panel must be constituted and the accountable person must listen to health and safety complaints. They will have to produce reports to the Regulator and keep records in relation to health and safety and report any fire safety or structural safety problems that have occurred. Originally, there was meant to be a Building Safety Manager who would be an intermediary between the building safety regulator and the accountable person.

The accountable person will have access rights to individual flats on giving at least 48 hours' notice. If there is more than one accountable person, there will be a principal accountable person. They will have an interest in possession of the structure and exterior or be responsible for repair and maintenance of the structure or exterior of the building. There are also offences if anyone removes or disturbs a relevant safety item. Any high-risk buildings must be registered with the Building Safety Regulator. This came into force in England on April 6th 2023 and the principal accountable person will have to register the building with the Regulator by October 1st 2023. Guidance suggests that the registration must be approved by the Regulator and key building information provided by this date. The Regulator will then have to approve the registration.

Safety case report summarising major fire and structural hazards and risk management is mandatory for higher-risk buildings. Organisations must also establish a mandatory occurrence reporting system detailing communications with other accountable persons, arrangements for reporting to the Regulator and summaries of incidents.

Although the legislation will apply to Wales, the ability to decide on the height of the building has been delegated to the Welsh Government where the consultation came to an end on May 12th 2023. The proposal is that a higher-risk building will have the same definition as in England but may only need to include one dwelling. In November 2023 the Welsh Government announced that the legislation on Higher-risk Buildings would only apply to the design and construction stage and not to occupation.

S.112 of the Act implies various terms into a residential lease. The Landlord must co-operate in relation to building safety and the Tenant must also co-operate, allow access at a reasonable time on giving 48 hours notice, allow works to be done on the premises, and any building safety costs can be added to the service charge. Law Society Guidance suggests that this should be made clear to the leaseholders and also the fact that they will be liable in elation to a residents management company.

The CPSE 1 enquiries now have questions in relation to higher-risk buildings (see below). One problem is that registration of a higher-risk building does not seem to be possible after October 1st 2023. It is suggested that enquiry must be made as to whether registration has occurred for an

existing building and whether the Regulator has accepted the application whenever purchasing the reversion of an existing higher-risk building. It is also suggested that there should be an enquiry for new higher-risk buildings as to whether anybody has been allowed into residential occupation prior to the provision of a building control certificate. Enquiry should also be made as to the height of the building and when the building was completed. The register of Higer-risk buildings became available to the public on February 8th 2024 and can be found on the Health and Safety Executive website.

Separately, although there are provisions that leaseholders of residential units must on 48 hours notice allow accountable persons to inspect the premises, there is no such provision in relation to commercial units. It is suggested that in future commercial leases include clauses allowing the accountable person to inspect premises on giving notice, to inspect documents related to health and safety and requiring the leaseholder to notify the accountable person of any health and safety issues. This would include leases, for instance, of roof space to communications operators. It is suggested that enquiry must be made in relation to higher-risk buildings in residential conveyancing. This might be based on the CPSE Enquiries for commercial properties although enquiry 15.5 and 15.6 will not be relevant until later this year and 15.7 is not relevant to residential premises.

**CPSE 1 Enquiries Version 4.0 Enquiry 15**

**15.1** Is the Building (or will it be, when fully built and occupied) a "higher-risk" building as defined by section 65 of the BSA?

If the answer is yes, then please answer enquiries 15.2 to 15.7. If the answer is no, then please go to enquiry 16.1 below.

**15.2** Who is or are accountable person(s) in relation to the common parts of the Building? Which one of them is the principal accountable person?

**15.3** Are you aware of any breach of, alleged breach of or any claim under the BSA, or any regulations made under it, in relation to the Building?

**15.4** Please provide a copy of the entry relating to the Building in the register kept under section 78 of the BSA.

**15.5** Please provide a copy of the most recent building assessment certificate (if any) relating to the Building.

**15.6** Please (a) confirm that the following documents have been compiled and kept up to date; (b) advise where and when they can be inspected; and (c) (where the Buyer will become an accountable person in respect of the Building) confirm that the originals will be handed over on completion:

(i) all safety case reports (section 85)
(ii) all prescribed information (section 88(1))
(iii) all prescribed documents (section 88(2))
(iv) the residents' engagement strategy (section 91)
(v) any request made under section 92, and any information provided in response to such request
(vi) any relevant complaints (section 93)
(vii) any contravention notices (section 96)
(viii) any outstanding requests to enter (section 97).

Note: section references above are to the BSA.

**15.7** Please give the name and contact details of a senior individual within the Seller who deals with BSA issues in relation to the Building; and confirm that the Buyer may make contact with that person in order to obtain information about BSA issues in relation to the Building.

## DAMAGES FOR THE LANDLORD

### Disrepair: Terminal Dilapidations

**S.18** of the **Landlord and Tenant Act 1927** limit damage for terminal dilapidations to the diminution in the value of the reversion. See for example ***Drummond v S & U Stores [1983] EG*** where there is no claim for terminal dilapidations but the new tenant would wish to fit out the premises and put in a new shopfront. In ***Culworth v Licensed Victuallers Association [1989] EG*** the burden on showing lack of damages lay on the tenant and was assessed at the time of the claim.

In ***Mason v TotalFinaelf [2003] 30 EG145***, firstly, following ***Credit Suisse v Beegas Nominees Ltd [1994] EGLR76***, it was found that an obligation to keep in repair "and in good condition" or in "substantial" repair did not add to the normal repairing obligation.

Moreover, the standard of repair was one of reasonableness in relation to the quality of the actual tenant, i.e. a major oil company.

Where repairs were to be carried out to the satisfaction of the landlord's surveyor, this may require greater works than those proposed by the tenant's surveyor. However, the landlord's surveyor's requirements must be reasonable. Furthermore, in a terminal dilapidations claim, the landlord's surveyor does not need to inform the tenant of his requirements before the expiry of the lease; the onus is upon the tenant to seek clarification.

Finally, although the cost of repairs would be £135,000, the diminution in value of the premises was largely measured by reference to the effect of disrepair on trading potential. This amounted to £73,500 and this was the cap on the landlord's damages.

Note: This limitation does not apply to the tenant. The tenant may also seek specific performance and require the landlord to carry out the works. **S.4** of the **Defective Premises Act 1972** allows people reasonably likely to be affected by the landlord's breach to sue in damages whenever the landlord is obliged or entitled to repair.

### Cases on Damages

Repairing covenants do not require a renewal or rebuilding of the property and the standard of repair depends on the age, character and location of the premises: see ***Proudfoot v Hart [1890] 25QBD4Z***. This standard is that at the commencement of the lease and not its termination: see ***Anstreuther – Gough – Calthorpe v McOscar [1924] IKB716***.

The issue of 'supercession' was to the fore in the recent case of ***Tiger Aspect Holdings Ltd v Sunlife Europe Properties Ltd [2013] EWCA 1656***. Here there were two thirty-five year leases created in 1973 and 1974. The landlord was claiming £2.172m in damages for dilapidations including 30 weeks lost rent. The tenant claimed that the damages were no more than £700,000 as the standard of repair would be that in existence in 1973/4. The tenant also claimed that the effect of **S.18** of the **Landlord and Tenant Act 1927** was that the landlord could not be compensated if the landlord was going to carry out additional works on the premises, therefore actual loss was £240,000.

The landlord's claim was based on having to replace the 1970s heating, ventilation, air conditioning, and lighting systems with modern systems. The Court said that there was no requirement for the tenant to upgrade to modern standards. The landlord received £1.353m in damages which was slightly less than the value of the landlord's interest of £1.4m. The landlord conceded that there was improvement which could not be claimed for but replacement of existing systems by modern was a cheaper and more effective alternative.

In ***Hammersmatch Properties (Welwyn) Limited v Saint-Gobain Ceramics and Plastics Ltd [2013] EWHC 1161 (TCC)*** the tenant claimed that the property was obsolete and even if repairs were carried out, the property would be unlettable.

The parties' experts differed in their valuation of the property in and out of repair. The tenant argued that the difference in the two values was only £100,000; the landlord argued that in repair the premises could have been sub-divided with only a minimal amount of work and could have been relet in full within 36 months.

The Court stated that the test for repair would be that of a reasonably minded tenant at the start of the lease. This would be £3.087m. The value when reinstated was £3.061m and the site value in the current state of disrepair was £2.1m. Damages were assessed as being the difference between site value and repair value which was approximately £900,000.

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Published January 2024

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