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A covenant to keep a property in good & substantial repair & condition can hold hidden pitfalls, as Nicholas Asprey reports

IN BRIEF

- A covenant to keep a property "in good and substantial repair and condition" is effectively two covenants
- The covenant to keep in good condition has potential to go beyond the liability to keep in good repair.
- There is a need to examine the covenants for unsuspected liability before the lease is signed to avoid disputes

Leases sometimes contain a covenant to keep the property "in good and substantial repair and condition". In effect, this is two covenants; namely, a covenant to keep the property in good and substantial repair and a covenant to keep the property in good and substantial condition. This article examines how the covenant to keep in good condition has potential to go beyond the liability to keep in good repair. This is not a new topic but there are unresolved issues and the potential for the second covenant to go beyond repair is not always understood.

It must be emphasised that each case turns on the particular covenant construed in its own context and surrounding circumstances, as was emphasised by Robert Walker LJ in *Welsh v Greenwich LBC* [2000] 3 EGLR 41. The factors to be taken into account were described by Nicholls LJ in *Holding & Management Ltd v Property Holding & Investment Trust Plc* [2001] 2 EGLR 65. No hard and fast rules apply. But some guidance can be derived from the authorities and it serves as a useful warning to examine the covenants critically before clients undertake liability.

The potential to go beyond repair

The first question is whether, on the true construction of the covenant, the expression "good and substantial condition" adds anything of substance to the expression "good and substantial repair". On ordinary principles of construction, the court will strive to give full meaning to each of the words used.

In *Lurcott v Wakely and Wheeler* [1911] 1 KB 905, the court had to consider a covenant to "well and substantially repair...and keep in thorough repair and good condition...the premises demised". Fletcher Moulton LJ first examined the covenant to keep the premises in good condition and the covenant to keep them in thorough repair, in contrast with the covenant to repair. The first two covenants imposed an obligation to keep the premises in a certain state. He drew "no wide distinction" between keeping in thorough repair and keeping in good condition, as both expressions described the condition of the house. The covenant to repair, on the other hand, imposed an obligation on the lessee to perform the operation of repair.

Of the covenant to keep in good condition he said: "It seems to me that it is entirely free from any consideration of the means that have to be employed by the lessee to do the work. The duty undertaken is expressed in clear language and must be performed."

In *Norwich Union Life Assurance Society v British Railways Board* [1987] 2 EGLR 137, Hoffmann J referred to what he called a "torrential style" of drafting, which leaves little scope for finding a different meaning or shade of meaning for every word used. Referring to this in *Crédit Suisse v Beegas Nominees Ltd* [1994] 4 All ER 803, Lindsay J commented that "even where there is a torrent, each stream of which it is comprised can be expected to have added to the flow".

In *Smedley v Chumley & Hawke Ltd (Warrell, third party)* [1982] 1 EGLR 47 Cumming-Bruce LJ drew no distinction between good structural repair and good structural condition. In *Welsh v Greenwich LBC*, on the other hand, where the covenant was to maintain the dwelling in good condition and repair, Robert Walker LJ thought the reference to "good condition" was intended to mark a separate concept and to make a significant addition to what was conveyed by the word "repair".

In *Crédit Suisse*, where the covenant was to "maintain repair amend renew... and otherwise keep in good and tenantable condition", Lindsay J emphasised the word "otherwise" in giving the second part of the landlord's covenant a potential going beyond repairs strictly so called. This suggests he might have reached a different conclusion if that word had been omitted.

The lesson is that even a simple covenant such as the covenant to keep the property "in good and substantial repair and condition" has the *potential* to go beyond repair, depending on the wording and on the circumstances.

> *"There is potential for a costly dispute here & a need to examine the covenants for unsuspected liability before the lease is signed if such disputes are to be avoided"*

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The relevance of this issue

In *Crédit Suisse* Lindsay J accepted that the covenant to keep in good condition has two features in common with the covenant to keep in repair. First, it imposes an obligation to put the premises in good condition and to keep them in that condition. Secondly, it refers to such condition as, having regard to the age, character and locality of the premises, would make the property reasonably fit for occupation by a reasonably minded tenant of the class likely to take it. He based both propositions on *Proudfoot v Hart* (1890) 25 QBD 42. Beyond that the two covenants diverge.

It is well established that a covenant to keep in repair does not have effect unless the premises are in a state of disrepair. Thus, if water penetrates into the building owing to a defect in the structure, the covenant will not impose an obligation to remedy the defect unless it has caused damage: see *Post Office v Aquarius Properties Ltd* [1987] 1 All ER 1055. Even then, the obligation to remedy the defect will only arise if that is the only sensible way to repair the damage: *Ravenseft Ltd v Davstone Ltd* [1980] 1 QB 12.

In *Crédit Suisse*, Lindsay J refused to apply these principles to the covenant to put and keep the premises in good condition. He said: "One cannot sensibly proceed from 'no disrepair, ergo no need to repair' to 'no disrepair, ergo no need to put or keep in the required condition'." He said that "all that is needed, in general terms, to trigger a need for activity under an obligation to keep in (and put into) a given condition is that the subject matter is out of that condition".

Even a brand new building can harbour an unsuspected defect. If the lessee is the covenantor the lessee will be obliged to remedy the defect even if it does not cause damage. Lindsay J put it thus: "...where, as here, one has not only the verbs other than 'repair' but a context showing that 'defects' in express contradistinction to 'repairs' are within the covenant, the great body of law debating whether a given shortcoming is or is not a repair or is or is not an inherent defect such that remedying it goes beyond repair does not, in my judgment, apply."

Not surprisingly, Slade LJ in *Post Office v Aquarius Properties* said that "clear words are needed to impose a contractual obligation on the tenants to remedy the defects in the original construction, at least at a time before these have caused any damage". However, if the words are clear the lessee will be stuck with a liability both unsuspected and substantial and from which he will derive no benefit if his lease expires before the work is done.

Are there any limits on this liability?

Assume the tenant takes a new office building for a term of five years and covenants in the lease to keep the building in good and substantial repair and condition. Soon after the grant of the lease, cracks appear in the walls and, upon investigation, he is advised that the cracks are caused by defective foundations and that the only remedy is to underpin at a cost equivalent to twice the annual rent. Assume also that the covenant to keep in good condition is not circumscribed by the word "repair", but imposes a separate obligation on the tenant to do whatever is necessary to put and keep the property in the specified condition.

It is well established that a covenant to keep in repair "is not a covenant to give a different thing from that which the tenant took when he entered the covenant": per Lord Esher MR in *Lister v Lane and Nesham* [1893] 2 QB 212. In this regard, works are not "repair" if they result in the whole or a substantial part of the property being made different: see *Eyre v McCracken* (2000) 80 P & CR 220. Moreover, works will not be works of repair if they go beyond what a reasonable person would contemplate as being within the term "repair": see *Brew Bros Ltd v Snax (Ross) Ltd* [1970] 1 QB 612.

On the assumed facts, the tenant would probably escape liability under the covenant to keep in repair because the works would involve giving to the landlord something different from the subject-matter of the demise, namely a building with solid foundations compared with the building as let. He might also escape liability on the ground that it was not within the contemplation of the parties that such extensive and costly works should fall within the ambit of repair.

But the question is whether similar reasoning can apply to the covenant to keep the property in good condition. Lindsay J in *Credit Suisse* said nothing about this but (at p 822C) he left open the possibility. It is submitted that there is no obvious reason why similar reasoning should not apply, although there may be difficulties if the wording of the covenant appears clearly to cover the works in question.

On the assumed facts it would be unreasonable for the tenant to be burdened with liability to underpin the foundations given that his term is limited to five years. The landlord would get back a "different thing" from the building as let; or, at any rate, different from the building contemplated by the parties when the lease was granted: per Cumming-Bruce LJ in *Smedley v Chumley & Hawke*. Moreover, no reasonable person would contemplate such works falling within the covenant.

However, there is potential for a costly dispute here and a need to examine the covenants for unsuspected liability before the lease is signed if such disputes are to be avoided. **NLJ**

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