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Tenants' repair despair

Anthony Judge

is a partner in Travers Smith LLP's real estate department

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Anthony Judge discusses tenants' repair costs in the light of Watson v Jackson

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In Brief

- The tenant in *Jackson v Watson* put forward two unsuccessful arguments in his attempt to recover from his landlord the expense he incurred in repairing damage caused by a latent defect:
- a contractual claim for breach of the landlord's repairing contract; and
- a claim in nuisance.

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As readers will remember from the judgment in *Jackson v Watson* [2008] EWHC 14 earlier this year, the unfortunate tenant Mr Jackson spent several thousand pounds repairing damage to his basement flat caused by leaks from some light wells located outside his demise. The parties agreed that these leaks occurred because the concrete encasing the grills connected to a downpipe outside these light wells had been laid defectively when the property was converted into flats before the date of the lease. The High Court decided that the landlord was not liable for the tenant's repair costs, first because the tenant had no contractual claim against his landlord and second because the principle of "caveat lessee" overrode any possible tortious claim of nuisance that Mr Jackson might have had against his landlord.

This article will examine these two strands of reasoning from the perspective of a commercial tenants' lawyer wishing to protect his clients as much as possible from this sort of irrecoverable expense.

The nuisance claim and caveat lessee

Mr Jackson, who was a barrister, put together a rather ingenious claim that the leaks constituted a nuisance which, although not caused by the landlord, were adopted and continued by him when he bought the build-

ing. He compared this to a drainage pipe in *Sedleigh Denfield v O'Callaghan* [1940] AC 880, 3 All ER 349 which went through A's land although it had been laid there by a third party. A did not clean or maintain it very often so it became blocked and flooded B's land. A was held liable in nuisance because it had adopted the nuisance (by using the pipe) and allowed the nuisance to continue.

However, the landlord in *Jackson v Watson* successfully countered these arguments by saying that the principle of "caveat lessee" trumps any such tortious claim--in *Cheater v Cater* [1918] KB 247, All ER Rep 239 the claimant's horse died after eating some yew leaves from a branch overhanging his farm from the neighbouring land (which was owned and occupied by his landlord) but his nuisance claim against the landlord was rejected on the basis that the branches were overhanging the farm when he signed up to the lease. The court held that he knew of the danger when he signed the lease, whereas if this nuisance had developed during the course of the lease then the outcome would have been different.

The contractual position

In Mr Jackson's lease the landlord covenants: "At all times during the term well and substantially to repair...and maintain...the exterior of the estate...and the entrance ways paths and staircases main walls party walls roof foundations and all structural parts thereof...and all drains...gutters down pipes and other conduction media belonging thereto respectively with all necessary reparations and amendments whatsoever."

This is a fuller repair obligation than most commercial tenants manage to negotiate but did not assist Mr Jackson with his damp problem because the leaks resulted from faulty workmanship which predated the grant of the lease, and the court held that the terms of the repair obligation were limited to preventing the further decay of the structure rather than putting the property into a better state of repair than it was in at the date of grant of the lease.

Woodfall tells us that, subject to the terms of the repairing covenant, if the state of the premises are no worse than at the start of the lease then there is no want of repair. For instance in *Pembery v Lamdin* [1940] 2 All ER 434, a landlord of old basement premises not constructed with a dampcourse or with waterproofing for the outside walls was not bound by his repairing covenant to render the place dry by waterproofing the walls. Although each repair covenant would of course be interpreted on the exact wording and the facts of each case, it does seem that a tenant can only oblige the landlord to take action in this situation if the repair obligation is expressed to include an obligation such as to "amend and renew" the structure, to "put and keep" the property in repair, *Payne v Haine* (1847) 11 JP 462, *Proudfoot v Hart* (1890) 25 QBD 42, All ER Rep 782, or to keep it "in good and tenantable condition", *Credit Suisse v Beegas Nominees Ltd* [1994] 4 All ER 803. These rules of interpretation apply equally to the tenant's repair covenants.

The tenant's solicitor

So how should the tenant's solicitor protect his client? Looking at each area in turn:

Caveat lessee

The caveat lessee principle means that it is up to the tenant to be sure of his bargain before entering into a lease. The first steps will be to scrutinise the plans of the demise and the building itself, as well as carrying out an inspection, looking for potential structural and practical issues. In terms of the tenant's pre-contract searches and enquiries, the tenant should obtain a survey of the premises to be demised, which should also comment on the state of the structural and external aspects of the whole building.

The tenant's solicitor will also ask the landlord's solicitor to complete CPSE1 question eight, which asks about the property's physical condition. The landlord's solicitor will often decline to give details and instead suggest that the tenant rely on his survey, but if the landlord deliberately conceals a known physical defect then he could be open to a claim in tort for deceit (*Gordon v Selico Co Ltd* (1986) 278 EG 53) and if he does reply but gives an incomplete answer, then he could be liable for misrepresentation.

Repairing obligations

Inevitably, commercial landlords would like to shift the whole burden of repairing a property onto tenants, but in market conditions where the average length of a lease is falling, tenants are more able to resist this approach.

The type of building where the division of repairing obligations between landlord and tenant is likely to be problematic are those with multiple occupiers such as office buildings or shopping centres where the landlord retains responsibility for the structural and external elements of the building. What both parties wish to avoid is a situation where there is a lacuna between the parties' repairing obligations, with the result that important repair works are left undone, and indeed the courts sometimes attempt to construe repair obligations as widely as possible to fill such a gap, on the basis that this cannot be what the parties intended. The ideal drafting solution is to ensure that the respective repairing covenants of the landlord and the various tenants dovetail perfectly. The aim of the draftsman must be to ensure that the obligations are expressed as clearly as possible. The courts will always strive to give effect to the commercial agreement between the parties, and may also take account of who the parties are. For instance in *Welsh v Greenwich London Borough Council* [2000] All ER (D) 880 where the tenancy agreement was between a social housing provider and a tenant, who was not likely to have taken legal advice, Lord Justice Walker stated that the words used in that agreement had to be interpreted on the basis of what an ordinary person in the street would regard as their natural meaning.

To the extent that the landlord agrees to take on any repairing obligations he will want to recover these through the service charge, but most tenants would prefer to pay their percentage of these costs than to occupy a dilapidated building and risk having to repair the consequences of any structural or external disrepair.

Old buildings

Where the building is old, the tenant may want to limit his own repair obligations (eg to internal aspects of the demise only, by reference to a schedule of condition, or by excluding disrepair caused by (i) fair wear and tear, (ii) risks covered by the landlord's buildings insurance policy, or (iii) uninsured risks) but also to make sure that there is no "black hole" comprising elements of disrepair for which neither party is responsible.

New buildings

With new buildings the tenant runs the risk of being responsible under his repair covenant for the consequences of an inherent defect and even for the remedy of that defect itself. Ideally a first tenant will obtain collateral warranties from the developer and/or contractor and professional team but obviously these are only as good as the covenant strength, or insurance arrangements, of those parties and it is by no means certain that all such defects will have come to light before the expiry of that warranty.

The tenant should also obtain a covenant from the landlord to remedy both any inherent defect and its consequences, and for the landlord to bear these costs rather than putting them through the service charge, on the basis that it can recover these from the developer. Such defects should also be excluded from the tenant's own repair covenant.

A possible compromise is for the landlord to covenant to enforce his contractual rights against the developer on behalf of the tenant, but clearly it would be preferable for the tenant to retain control of any litigious process.

Reporting to the client

The tenant's solicitor should highlight to the tenant:

- the possibility that the survey may not pick up all defects especially if they have not resulted in secondary damage as yet;
- the risk of the landlord's repair covenant being narrowly interpreted and/or the tenant's own covenant being deemed to include defects; and
- the fact that the courts will not necessarily construe the lease in a tenant's favour; this is a commercial transaction in which there are no protections for the tenant other than those which he has negotiated for himself.