In a fix?

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Chris Sullivan explains the options open to landlords when they want a tenant to undertake remedial work to a property during their lease

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Many scheduled lease expiries or break events in 2015 will relate to leases agreed during 2008-12. Such leases contain favourable tenant terms such as Schedules of Condition, diluted covenants, service charge caps, frequent breaks, low rent and high rent-free periods. Inevitably, little may have been spent on maintenance.

The market is now swinging back in favour of the landlord. Terms have softened, particularly in the past six months, and landlords are keen to improve their returns. With aggressive forfeiture cases, interim claims and contested lease renewals on the rise, surveyors are busy dealing with a growing caseload of disputes.

In my experience, the contract is almost always in breach somewhere; the question is whether the conditions are favourable for enforcement.

There are a few clear reasons why tenants fail to comply with their terms. First, they focus expenditure on maximising business returns and not on maintaining a property they do not own. Second, they will often believe they have to undertake limited maintenance because they have a Schedule of Condition. This is a major catalyst for disputes. They are of very limited benefit for leases of more than a few years.

Third, a number of major tenants develop long-term exit strategies on surplus property relying on running a building down so much that substantial works or redevelopment is inevitable. They then seek the protection of Section 18(1) of the Landlord and Tenant Act 1985 . From a landlord's perspective, there will clearly be concerns about a building's condition,especially if it will hinder a sale or detracts from letting other space in the same development. Investment value is all important and if a lender's valuation reports negatively, this can affect borrowing terms and increase costs.

It is inevitable that interim claims will continue to rise, particularly against the backdrop of tightening controls over energy use in buildings. The latest government consultation on proposed energy efficiency regulations under the Energy Act 2011 for the non-domestic private rented sector strongly indicated that it will be illegal to continue to let commercial property with an Energy Performance Certificate grade F or G from 2023. Unless leases are redrafted, landlords will be left with little choice but to implement aggressive interim claims.

Covenants

While there are clearly other enforceable covenants, relating to redecoration or alterations, the key ones are:

Repair

The tenant will generally be obliged to put and keep the property in good and substantial repair. To establish whether disrepair exists, it is necessary to undertake a series of tests. Dowding & Reynolds' *The modern law and practice* 5th edition outlines a comprehensive and widely adopted checklist:

- what is the physical subject matter of the covenant?
- is the subject matter in a damaged or deteriorated condition?
- is the nature of the damage or deterioration such as to bring the condition below the standard contemplated by the covenant?
- what work is required to put the subject matter of the covenant into the contemplated condition?
- is that work nonetheless of such a nature that the parties did not contemplate that it would be the liability of the covenanting party?

Compliance with statute

A tenant is duty bound to comply with a wide range of statutory instruments, including but not limited to Control of Asbestos Regulations 2012 , Regulatory Reform (Fire Safety) Order 2005 , the Workplace (Health, Safety and Welfare) Regulations 1992 , Electricity at Work Act 1989 etc. These obligations generally relate to occupation or control of the premises. The time to enforce such covenants can therefore only be during the term and while in the tenant's control.

If the tenant does not adequately deal with a landlord's legitimate concerns, particularly over health and safety, a suggested approach is to report the incident to the statutory authorities.

Remedies

There are a number of remedies available to a landlord for a tenant's breach of covenant, namely:

Repairs notice/interim schedule

The landlord is entitled to notify the tenant of any failure of any of the covenants at any time. This is nothing more than a gentle nudge, although it is generally the forerunner to more formal actions.

Forfeiture

This remedy is reserved for serious breaches of the repairing covenant. The procedure involves serving a notice under Section 146 of the Law of Property Act 1925 , outlining that the landlord intends to bring the lease to an end. A tenant is afforded considerable legal protection by the Leasehold Property Repairs Act 1938 or under Section146 (2) of the 1925 Act . There are many procedural matters to follow, particularly to prevent waiver such as continuing to demand rent.

While forfeiture is an option for repossessing the property, once the procedure has commenced it is irreversible. If a tenant is minded to fight, a landlord can be left without an income stream until the dispute is resolved, which could be many months. A sensible approach is to only serve notice for works which would pass one of the five grounds under the

1938 Act.

Damages

The landlord again serves a Section 146 notice seeking damages (rather than forfeiture). This is rarely used, particularly as it does not get the works done and requires specialist diminution valuation advice. Where other self-help clauses exist, this would be the last resort.

Specific performance

This is also a rarely used mechanism enabling the courts to impose an injunction forcing the tenant to undertake works to rectify breaches of their repairing covenant. It will usually only be used if there are no other landlord self-help clauses. Key case *Rainbow Estates Ltd v Tokenhold Ltd* [1998] 2 EGLR 34.

Undertaking work and recovering cost from tenant

Leases contain provisions allowing a landlord to enter the property to record its condition and request the tenant to undertake the works. However, the Court of Appeal ruling in *Jervis v Harris* [1996] held that the Leasehold Property Repairs Act 1938 does not apply to a claim for the cost incurred in carrying out works, for which the tenant is liable under such a provision.

A building surveyor would be ill-advised to undertake such a task without specialist property litigation advice and may well need the additional support of M&E experts, validation contractors etc. Care must be taken when inspecting to gather sufficient data to prove disrepair. Some items are clear, others less so, particularly with M&E services.

If a tenant is minded to fight, a landlord can be left without an income stream

Once the evidence has been gathered, it is sensible to conduct a detailed review. To engage such a provision clearly there must first be disrepair and the five-stage test must be followed. It is often better to focus on a key area or areas of disrepair that will be very difficult to contest, rather than going after every marked carpet tile or scratched toilet cubicle panel.

It is worth remembering that this may end with the landlord entering the property and undertaking works to remedy disrepair. There are considerable risks if you get this wrong. If works are carried out to elements that are not in disrepair or the process set out in the lease is not correctly followed, a landlord risks:

- an injunction
- claims for breaching the tenant's right to quiet enjoyment
- claims for trespass
- failing to recover some or any of their costs.

If the matter goes to court, clearly there is much more at stake.

The format of the report can follow the example Terminal Schedule of Dilapidations provided in the RICS Dilapidations guidance note 6th edition . However, it is not usually appropriate to include cost or remedy columns.

It is not uncommon for a tenant to refuse access; this may necessitate an injunction to re-enter. These are not hard to obtain in most circumstances.

If the tenant fails to implement the works, it is a commonly held view that the landlord can choose the most appropriate remedy given all the circumstances. This does not necessarily need to be the cheapest. However, the management of workmen is crucial, they will need to be tightly controlled and briefed. They must fully understand, for instance, whether the tenant will allow use of their electricity to undertake the works as this is not something usually contemplated by the lease.

The *Jervis v Harris* remedy is the most effective option available to a landlord. Tenants should ensure that they do not fail to deal with such notices. The process is not easy or straightforward but if correctly implemented provides the landlord with a very powerful mechanism to enforce the covenants. For example, it is quite achievable to bring a claim against a tenant for a new roof under a *Jervis v Harris* remedy and improve the EPC rating to boot.

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Further information

- Related competencies include Landlord and tenant
- This feature is taken from the RICS *Property* journal (March/April 2015)