James McAllister explores the legal responsibilities for repairs, where the express terms are not set out in the lease

Hidden liabilities

The subject of dilapidations is traditionally set against the contractual backdrop of the lease; specifically the express terms carefully drafted by the covenanting parties. This usually focuses on the repairing responsibilities of the tenant.

However, taking the widely adopted definition of dilapidations being *"a state of disrepair in property for which there is a legal liability to remedy"*, it is immediately apparent this is not limited to the covenants expressly stipulated within the lease, and may not necessarily be confined to the tenant.

It is obviously unusual for a commercial business lease not to contain an express covenant to repair. It goes without saying that where a lease clearly and unequivocally confers certain obligations on either covenanting party, then there is little doubt as to the parties' contractual duties.

Occasionally, a drafting lacuna will arise – meaning neither covenanting party has the express responsibility to repair.

This was the position in Demetriou v Poolaction Ltd [1991] 1 EGLR 100. This type of scenario has presented the courts with the challenging task of determining the allocation of repairing liability where the lease is silent. Ironically, the contrasting position where overlapping obligations arise has proven equally challenging: Petersson v Pitt Place (Epsom) Ltd [2001] EWCA Civ 86.

The fabled concept that "there is no law against letting a tumble-down house" (Robbins v Jones (1863) 143 ER 768) presents an initial insight in to the perennial issue that not all property is let in perfect condition. In the House of Lords decision of Southwark London Borough Council v Mills [2001] 1 AC 1, Lord Millett confirmed: *"In the absence of statutory intervention, the parties are free to let and take a lease of poorly constructed premises and to allocate the cost of putting them in order between themselves as they see fit"*.

Accordingly, the covenanting parties are free to negotiate their repairing obligations, and whether or not they elect to include any such obligations is a matter of agreement. But what are the repairing obligations if they are not expressly defined?

Implied covenants

The first consideration is therefore the implied obligation to repair. While in general terms the established principle that there is no rule a repairing obligation will necessarily be implied in the lease (*Southwark LBC v Mills*) there are a number of grounds where this does not apply in residential tenancies (i.e. where the landlord has implied obligations to repair as codified by statute under the Landlord and Tenant Act 1985).

The principal exception, in a commercial context, is where it is necessary to imply an obligation on one of the parties in order to give the lease 'business efficacy'. This was demonstrated in Barrett v Lounova (1982) Ltd [1990] 1 QB 238, where it was necessary for the court to imply an obligation on the landlord to repair the exterior of the property in order to enforce the tenant's express obligation to repair the interior. The implied obligation of the landlord was necessary to make the contract workable so that the tenant's obligation to repair could then be invoked.

From a tenant's perspective, there is an underlying implied obligation to use the premises in a 'tenant-like manner', as championed by Lord Denning in Warren v Keen [1954] 1 QB 15. The familiar passage from this case provides a guide as to the expectations, albeit later considered by Denning in Regis Property Co Ltd v Dudley [1959] AC 370 to be a common law obligation in tort, rather than a contractual obligation due to the remedies available in the event of breach.

Outside of the contract, the tenant may find the landlord has other grounds in tort to bring an action for disrepair.

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> Landlords generally have no liability in negligence for damage arising from defects in their property

Waste

Even if the express repair covenant is absent, there will usually be an express obligation imposed on the tenant not to commit waste. Failing that, tenants have a common law duty in tort not to commit waste.

This liability primarily exists either as 'voluntary' or 'permissive' waste. Voluntary waste is the action of causing deliberate damage to the premises, as opposed to permissive waste, which is the failure to act to prevent damage.

There has been uncertainty over the continued application of the law of waste, which has been termed 'archaic' by the Law Commission, with a strong recommendation for abolition.

Nonetheless, the principles remain extant as demonstrated in the comparatively recent case of Dayani v Bromley London Borough Council (No. 1) [1999] 3 EGLR 144. This case is also demonstrative of the measures landlords will pursue, in the absence of express repairing obligations, to find other means of enforcing repair. In this case the landlord made use of the Statute of Marlborough 1267, one of the oldest operational statutes, to successfully bring an action under the doctrine of permissive waste.

Nuisance

The tort of nuisance also falls within the purlieus of landlord and tenant repairing obligations in the absence of express terms. This is contextualised by a tenant failing to keep in repair the subject premises to the extent this impacts on neighbouring property, or where the landlord fails to maintain and repair retained parts of the premises so causing damage to the tenant's demise (Tennant Radiant Heat Ltd v Warrington Development Corporation [1998] 1 EGLR 41). Thus, an implied duty to take reasonable care falls on both covenanting parties and may invoke a repairing obligation where the condition of the property falls below the standard necessary to ensure reasonable care is satisfied.

However, it has been held that where a landlord is not liable under an implied obligation to repair, there is unlikely to be a residual liability in tort for nuisance (Baxter v Camden London Borough Council [2001] 1 AC 1), although such an obligation may well be supplanted by the provision of express terms elsewhere in the lease.

In the recent case of Jackson v JH Watson Property Investment Ltd [2008] EWHC 14 (Ch) the landlord was held not to be liable in nuisance for a defect that pre-existed the lease term. The tenant of a 125-year lease granted by the landlord's predecessor tried to claim against the new landlord for defects to his flat that emanated from the common parts within the landlord's control.

The tenant's claim failed on the principle of *caveat lessee* because the defects existed before the lease was taken, drawing an obvious parallel with the law regarding inherent defects.

Negligence

It is established that landlords generally have no liability in negligence for damage arising from defects in their property (Cavalier v Pope [1906] AC 428). However, where implied repairing obligations can be construed against a landlord, a duty of care may arise under the Defective Premises Act 1972. This means that the landlord is required to undertake necessary measures to ensure the protection of *"all persons who might reasonably be expected to be affected by defects in the state of the premises"* (section 4(6)).

Nonetheless, in the absence of any express or implied repairing obligations and, commercially, where the premises are unfurnished, no such liability will arise (McNerny v Lambeth London Borough Council [1989] 21 HLR 188); the exception to the rule being where the landlord has designed or constructed the premises (Rimmer v Liverpool City Council [1985] QB 1). This has invited judicial criticism. As stated by Kerr LJ in *Barrett v Lounova*: *"On its true construction the Defective Premises Act 1972 does not allow the implication of a repairing covenant"*, inferring the Act should not be seen as an alternative means of enforcing a repairing obligation on the landlord when all else fails.

Occupiers' liability

Tortious liability to repair also exists under statute. Under the Occupiers' Liability Act 1957, the 'occupier' is under a 'common duty of care' to 'visitors' of the premises. The Act defines an occupier as the person who has control of the premises.

This will usually be the tenant of the areas under exclusive possession, but may revert to the landlord for common parts of a multi-tenanted building. The definition of visitors is broad and includes any person given permission (express or implied) to enter the premises by the occupier.

Therefore, the duty of care owed by the occupier might not be discharged until certain repairs are undertaken to ensure safe access to the premises. Under the Occupiers Liability Act 1984, an occupier is under an extended duty of care to ensure the safety of trespassers and to ensure they do not suffer injury while on the premises.

It is clear from the above that the liability to repair is not strictly limited to the covenants articulated by the lease. While it is unusual for a commercial lease to be silent on the allocation of repairing obligations, it can happen, and the absence of such terms does not always mean the parties are off the hook.

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