The wording of a repair covenant incorporating a Schedule of Condition is critical to understanding repair responsibilities, as **James McAllister** explains

For better or worse?

Schedules of Condition have become increasingly commonplace in commercial leases over recent years. This is largely due to well-advised tenants taking the necessary steps to avoid inheriting the disrepair left by their predecessors. Landlords also benefit from the ability to shift property that is in less than desirable condition without having to forward-fund a pre-occupation refurbishment, thus deferring the problem to a later date.

Business tenants with the foresight to have obtained a Schedule of Condition at the outset of their lease may take some comfort in the fact that they have documentary 'protection' as to the condition of the premises at lease commencement. What they may not know, certainly at the time of signing, is just how much protection this might later afford them. As with all things legalese, it hangs on the wording.

Amended wording

The validity of a Schedule of Condition will depend on its incorporation into the lease. Aside from physical annexation, this involves amending the wording of the standard repairing covenant. Occasionally, the decoration covenant will also be modified, thereby widening the reach of the Schedule. Commonly, a modified repairing covenant will obligate the tenant to keep the premises in good and substantial repair, but in "no better condition" than evidenced in the Schedule. Alternatively, the tenant may covenant to leave the premises in "no worse condition". The layperson might be forgiven for believing both terms amount to the same thing, but the true distinction is ascertaining where the liability benchmark rests.

In instances of a "no worse condition" clause, the benchmark is set at the condition evidenced in the Schedule. Therefore, the moment the property falls below the recorded condition, the liability to repair is triggered. In this situation, there is no upward limit on how far the repairing obligation might have to stretch to satisfactorily reverse the disrepair.

Conversely, a "no better condition" clause means there is a ceiling on the extent to which the tenant might be required to repair the premises. Accordingly, the Schedule acts as a cap on liability, rather than a trigger, but the repairing obligation still bites when disrepair arises.

Common mistake

A common mistake with a "no better condition" obligation is to simply not repair at all on the basis this may improve the premises beyond the documented condition. However, this type of clause does not preclude the tenant from the duty to repair when disrepair occurs. Exceeding the condition evidenced in the Schedule may, therefore, be unavoidable.

In context, the property 'condition' is a reflection of the repair state of the various building elements, each element attracting an individual obligation to repair. In most instances it is implausible to only part-repair something; often only a full and proper repair will cure the underlying disrepair.

For instance, corrosion cannot be reversed by a few microns or a rotten window frame cannot be returned to a partially rotten condition. Only a full repair will suffice, which may well take the condition of that element, and possibly the premises as a whole, beyond the condition recorded by the Schedule. This is an inescapable by-product of the repair process.

In rare instances, an obligation might arise to leave the premises in "no worse or better condition", which appears to combine both concepts. This evokes a scenario of leaving the property in animated suspension since repairing or failing to repair would compromise either obligation. In reality, such an obligation connotes the intention of ensuring the covenantor adopts a proactive approach to ongoing maintenance so that the property is yielded up more or less exactly as it was demised.

A further common term is to "keep in as good and substantial condition as evidenced in the Schedule of Condition". This appears to underpin the concept of proactive maintenance with the trigger point being a fall in condition below the standard evidenced, although absent any ceiling on the extent and scope of repair required.

In conclusion, a Schedule of Condition may convey a detailed catalogue of all defects within a property, but it is the wording of the repair clause that will determine how it is to operate and its scope in protecting a tenant from disrepair existing at commencement of the lease term. The mere existence of a Schedule of Condition may not, therefore, be the panacea to all ills.

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