



**What are the legal and practical options for carrying out fire safety remedial work? Can the costs go via service charges, does the work qualify as landlord repairs or improvements, and can lessees claim for loss and disruption?**

**Christopher Heather KC**

[tanfieldchambers.co.uk](http://tanfieldchambers.co.uk)



# Typical Covenants

# Repairing Covenants

- [The Landlord] [the Tenant] covenants to keep the Property in good and substantial repair and condition

OR

- The Landlord covenants to provide the Services

“**The Services**” includes ... inspecting, testing, repairing, servicing, maintaining and, where beyond economic repair replacing and renewing the Common Parts and Retained Property

# Interpretation

*Post Office v Aquarius Properties Ltd* [1985] 2 E.G.L.R. 105

" ... deploying my ordinary understanding of language, I do not think it would be appropriate to describe any of the three schemes of treatment as work of repair. In my judgment, they involve structural *alterations and improvements* to the basement."

Hoffman J

# Other Covenants

## Example Lease Clauses

Legal Obligation means

Any obligation arising under any present or future statute, statutory instrument, directive, code of practice, regulation, order, notice, direction or requirement of any authority or under common law irrespective of the person on whom such obligation is imposed

The Tenant covenants to comply with all Legal Obligations affecting the Premises or their use or occupation

# Other Covenants

## Example Lease Clauses

The Landlord covenants to provide the Services

Services ... includes:

Carrying out works and taking appropriate action (including maintaining records and audits) to comply with Legal Obligations relating to the Common Parts or the Building, their occupation, use or energy performance, or the requirements and recommendations of an insurer including commissioning fire risk assessments;

# Other Covenants

## *Cugg Property Ltd v Gibo Property Ltd* [2001] NSWSC 297

Tenant covenant (cl.10) to:

"comply with the terms of *any present or future legislation* affecting the demised premises and with any notices served upon the Lessor or the Lessee by the Board of Health, licensing, municipal or other competent authority involving the destruction of noxious weeds or animals or the carrying out of any repairs alterations or works (including works of a structural character)."

# Other Covenants

## *Cugg Property Ltd v Gibo Property Ltd* [2001] NSWSC 297

"99. cl.10 of the memorandum is not restricted in its effect by either cl.8 or cl.9. The two latter clauses in effect require the lessee to repair, and they limit this requirement to the condition of the property at the commencement of the lease ...

100. The result of this approach is that the lessee would not be under an obligation to repair the slab in the absence of a Council order that the slab be repaired, but would be obliged to repair it if a Council order is made."

Hodgson CJ in Eq

**Can the Lessee claim for loss?**

# Can the tenant claim for loss?

## *Goldmile Properties Ltd v Lechouritis* [2003] 1 E.G.L.R. 60

"10.... the obligation to keep the building in repair has to coexist with the tenant's entitlement to quiet enjoyment of the premises he is paying rent for. This by itself points towards a threshold, for disturbance by repairs, of all reasonable precautions rather than all possible precautions ...

14. The district judge's construction in our view conforms most nearly with what would have been apparent to the parties when they signed the lease. It would have been apparent that the tenant's enjoyment of the demised premises might be made temporarily less quiet and less profitable by the carrying out of structural repairs. It would similarly have been clear that the lessor's rights and obligations were neither to ride roughshod over the lessee's entitlements nor to be unreasonably impeded by them."

Sedley LJ at 61

# Can the tenant claim for loss?

## *Timothy Taylor v Mayfair House Corp* [2016] EWHC 1075 (Ch.)

- (a) Provided that in doing that work the landlord has taken all reasonable steps to minimise the disturbance to the tenant;
- (b) Relevant what knowledge or notice the tenant had of the works intended to be carried out by the landlord at the commencement of the lease;
- (c) An offer by the landlord of financial compensation to the tenant to compensate the tenant for disturbance caused by the works is a factor which the court is entitled to take into account in considering the overall reasonableness of the steps which the landlord has taken;
- (d) Where the carrying out of those works, whilst profiting the landlord, confers little or no benefit on the tenant, it seems to me that this is a factor which the court is entitled to take into account when viewing the reasonableness of what the landlord is doing.

Alan Steinfeld QC sitting as a Deputy High Court Judge at [24]-[25]

# Can the tenant claim for loss?

## *Timothy Taylor v Mayfair House Corp* [2016] EWHC 1075 (Ch.)

"98. ... What, however, it seems to me is strikingly missing here ... is any real liaison with the Tenant right from the start of the works, indeed from before the start of the works, to inform the Tenant as to the likely duration of the works, the noise levels likely to be experienced and to discuss with the Tenant the means of being able to mitigate the impact of the noise on the use of the gallery."

"107. Another aspect of the failure properly to liaise with the Tenant is the failure to give any real indication to the Tenant as to how long the works are going to last."

Alan Steinfeld QC sitting as a Deputy High Court Judge

# Decanting the tenant during the works

# Decanting the Tenant

## *Saner v Bilton* (1876) 7 Ch 815

The covenant to repair:

"... carries with it an implied license to the lessor to enter upon the premises of the lessee, and to occupy them for a reasonable time to do that which he has covenanted to do, and which he has not only covenanted to do, but which he has & right to do, because he has an interest in being allowed to perform his covenant."

Fry J at 824

# Decanting the Tenant

## *McGreal v Wake* (1984) 13 HLR 107 (CA)

"... [the] right to enter and occupy must be limited to that which is strictly necessary in order to do the work of repair. The obligation to allow the landlord to enter and occupy in order to effect repairs does not seem to us to involve a further obligation to give the landlord exclusive occupation unless this is essential for the execution of the repairs. Nor does it involve an obligation to give him access to all parts of the house at the same time unless again this is essential."

Sir John Donaldson MR at 114–115

# Decanting the Tenant

## *McGreal v Wake* (1984) 13 HLR 107 (CA)

"[The landlord] could have asked the tenant to move out, but if this was not essential- and it does not seem to have been - he could not have compelled her to do so. He would have had to make the same choice as that which confronted the tenant - pay more for getting the work done in circumstances in which the contractors could only tackle one room at a time and had to protect the plaintiff's furniture and carpets or pay less and meet the plaintiff's expenses."

Sir John Donaldson MR at 115

# Building Safety Act 2022

# Impact of the Building Safety Act 2022

## Meaning of "relevant building" – s.117

(2) "Relevant building" means a self-contained building, or self-contained part of a building, in England that contains at least two dwellings and—

(a) is at least 11 metres high, or

(b) has at least 5 storeys.

Exclusions "tenant-owned" etc or commonhold – s.117(3)

Definitions of "self-contained" etc – s.117(4) and (5)

# Impact of the Building Safety Act 2022

## Meaning of "relevant defect" – s.120

(2) "**Relevant defect**", in relation to a building, means a defect as regards the building that—  
(a) arises as a result of anything done (or not done), or anything used (or not used), in connection with relevant works, and  
(b) causes a building safety risk.

(3) In subsection (2) "**relevant works**" means any of the following—  
(a) works relating to the construction or conversion of the building, if the construction or conversion was completed in the relevant period;  
(b) works undertaken or commissioned by or on behalf of a relevant landlord or management company, if the works were completed in the relevant period;  
(c) works undertaken after the end of the relevant period to remedy a relevant defect (including a defect that is a relevant defect by virtue of this paragraph).

"**The relevant period**" here means the period of 30 years ending with the time this section comes into force.

# Impact of the Building Safety Act 2022

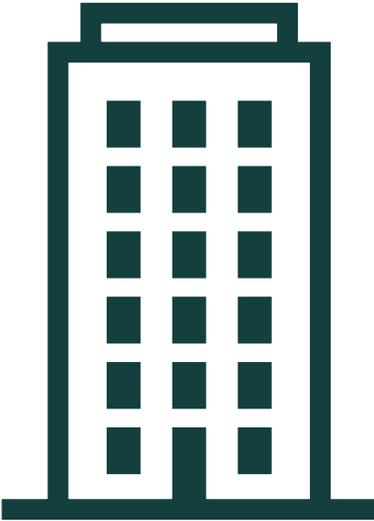
## Meaning of "relevant defect" – s.120 contd.

(5) "building safety risk", in relation to a building, means a risk to the safety of people in or about the building arising from—

(a) the spread of fire, or

(b) the collapse of the building or any part of it;

# Background



5 stories or  
11 meters

# Impact of the Building Safety Act 2022

*Schedule 8, paragraph 2: No service charge payable for defect for which landlord or associate responsible*

- (1) This paragraph applies in relation to a lease of any premises in a relevant building.
- (2) No service charge is payable under the lease in respect of a relevant measure relating to a relevant defect if a relevant landlord—
  - (a) is responsible for the relevant defect, or
  - (b) is associated with a person responsible for a relevant defect.
- (3) For the purposes of this paragraph a person is "responsible for" a relevant defect if—
  - (a) in the case of an initial defect, the person was, or was in a joint venture with, the developer or undertook or commissioned works relating to the defect;
  - (b) in any other case, the person undertook or commissioned works relating to the defect.

# Impact of the Building Safety Act 2022

## Schedule 8, paragraph 2 contd

(4) In this paragraph –

"developer" means a person who undertook or commissioned the construction or conversion of the building (or part of the building) with a view to granting or disposing of interests in the building or parts of it;

"initial defect" means a defect which is a relevant defect by virtue of section 120(3)(a);

"relevant landlord" means the landlord under the lease at the qualifying time or any superior landlord at that time.

# Impact of the Building Safety Act 2022

## Schedule 8, paragraph 10

(1) This paragraph supplements paragraphs 2 to 4, 8 and 9 (the "relevant paragraphs").

(2) Where a relevant paragraph provides that no service charge is payable under a lease in respect of a thing—

...

(b) any amount payable under the lease, or met from a relevant reserve fund, is limited accordingly (and any necessary adjustment must be made by repayment, reduction of subsequent charges or otherwise).

# Impact of the Building Safety Act 2022

## Building Safety (Leaseholder Protections) (England) Regulations 2022 SI 2022/711

### Regulation 10

(1) The reference in paragraph 2 of Schedule 8 to the Act which states that no service charge is payable under a lease in a relevant building in respect of a relevant measure relating to a relevant defect is modified in accordance with paragraph (2).

(2) For the purposes of paragraph 2 of Schedule 8 to the Act—

(a) no service charge is payable under a **non-residential lease** in a relevant building where the conditions set out in paragraph 2(2) of the Act are met; and

(b) the reference in paragraph 10(2) of Schedule 8 to the Act applies to **non-residential leases**.

# Impact of the Building Safety Act 2022

## No increase in service charge for other tenants

BSA 2022 Schedule 8, paragraph 11

Where –

(a) an amount ("the original amount") would, apart from this Schedule, be payable by a tenant under a lease of premises in a relevant building, and

(b) a greater amount would (apart from this paragraph) be payable under the lease as a result of this Schedule,

the lease has effect as if the amount payable were the original amount.

# Conclusions

**Fire safety issues will always be fact-specific**

- Type of Building
- Use
- Type of Lease
- Contractual Terms

# Thank you.

## Contact us

Tanfield  
2-5 Warwick Court  
London WC1R 5DJ  
T: +44 (0) 20 7421 5300  
E: [clerks@tanfieldchambers.co.uk](mailto:clerks@tanfieldchambers.co.uk)

## Follow us

