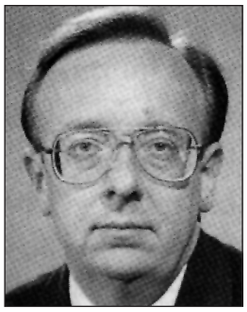
Patch me if you can

Mark Pawlowski examines a recent High Court ruling which provides further insight as to when repair – as opposed to complete replacement – will suffice



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'Replacement is only required if repair is not reasonably or sensibly possible.'

It is not uncommon for a tenant to dispute a landlord's claim for disrepair on the ground that continuing 'patching up' of the premises provides a reasonable (and less costly) way of complying with the tenant's repairing covenant than complete replacement. Indeed, if such a course is recommended by a reasonable surveyor, it will be very difficult for a landlord to argue for more extensive remedial works, since it is for the tenant to make the choice (as covenantor) if there is more than one possible method of repair. Moreover, if there is a cost differential, the landlord's damages will be based on the less expensive option.

Repair or replacement?

The case law makes clear that replacement work will only be justifiable if continuing repair is not a reasonable or sensible option. The choice between these alternatives will be heavily influenced by the relative costs involved in mere patching on the one hand, and complete replacement on the other: see *Postel Properties Ltd v Boots the Chemist* [1996] (replacement of flat roof coverings of large shopping centre).

In *Land Securities plc v Westminster City Council (No. 2)* [1995] Jonathan Parker J held that the tenants were not obliged by the repairing covenant to replace an air conditioning plant which still had a life expectancy of five years. In this case, there was another way by which the tenants could comply with their repairing obligation (involving crisis or ad hoc repairs from time to time) which did not involve replacement. Similarly, in *Fluor Daniel Properties Ltd v Shortlands Investments Ltd* [2001] the landlord wrote to the tenants informing them that it was about to spend £2m replacing substantial parts of the air conditioning system and other structural repairs. The tenants challenged this on the ground that the works were unnecessary. Significantly, Blackburne J held that the lease did not enable the landlord to recover expenses (by way of service charge) incurred in renewing or improving the system if the plant and equipment was still capable of rendering the particular service the landlord had covenanted to provide. Moreover, the fact that an item of plant had reached the end of its recommended lifespan (as suggested by industry guidelines) did not mean that it would be reasonable for the landlord to want to replace it at the tenant's expense. Here again, a programme of repair (as opposed to replacement) was more appropriate, at a lower cost.

Standard of repair

In *Fluor* the learned judge concluded that the standard of remedial work to be adopted in such cases had to be such as the tenants, given the length of their leases, could fairly be expected to pay for. The alternative standard (put forward by Nicholls LJ in *Plough Investments v Manchester City Council* [1989]), namely that which a prudent building owner (if they had to bear the cost themselves) might reasonably decide upon, was rejected because it did not take into account the tenant's more limited interest in the property. In the words of Blackburne J:

> The landlord cannot, because he has an interest in the matter, overlook the limited interest of the tenants who are having to pay by carrying out the works that are calculated to serve an interest extending beyond that of the tenants. If

> the landlord wished to carry out repairs that go beyond those for which the tenants, given their more limited interest, can be fairly expected to pay for, then, subject always to the terms of the lease or leases, the landlord must bear the additional cost himself.

What a tenant could be expected to pay is to be judged by reference to the formula adopted in *Proudfoot v Hart* [1890], namely whether the repair is to a standard necessary to make the premises reasonably fit for the occupation of the tenant of the class which would be likely to take it.

Put another way, the standard is that of an intending occupier 'who judges repair reasonably by reference to his intended use of the premises' (see *Commercial Union Life Assurance Co v Label Ink* [2001]). Thus, in *Dame Margaret Hungerford Charity Trustees v Beazeley* [1993] the Court of Appeal agreed with the trial judge that the landlords had complied with their statutory repairing obligation (under s11 of the Landlord and Tenant Act 1985) by carrying out running repairs to the roof during the tenancy (albeit that the roof required complete overhaul). The landlord was able to demonstrate compliance with the covenant by reference to the *Proudfoot* standard and, in particular, the age and character of the property in question (see *Murray v Birmingham City Council* [1987] on repairs to roof).

Futile work

As noted earlier, it is for the covenantor to decide how to perform the covenant provided they act reasonably in their preferred choice. A tenant, therefore, is not entitled to insist that cheaper works are undertaken or insist on a minimum standard of repair if that course of action is unreasonable. If, for example, continued patching work would be futile, the only meaningful method of repair will involve complete replacement – see *Gibson Investments Ltd v Chesterton plc* [2002]. In the words of Ackner LJ in *Elmcroft Developments Ltd v Tankersley-Sawyer* [1984]:

> The damp-course, once inserted, would on the expert evidence cure the damp. The patching work would have to go on and on and on, because, as the plaster absorbed (as it would) the rising damp, it would have to be renewed, and the cost to the [landlords] in constantly being involved with this sort of work... would have outweighed easily the cost in doing the job properly. I have no hesitation in rejecting the submission that the [landlords'] obligation was repetitively to carry out futile work instead of doing the job properly once and for all.

It is for the covenantor to decide how to perform the covenant, provided they act reasonably in their preferred choice. A tenant is not entitled to insist that cheaper works are undertaken or insist on a minimum standard of repair if that course of action is unreasonable.

The above-cited passage suggests that, where one method of repair would involve the continual re-doing of the same work from time to time and another method would provide a once-and-for-all cure, the latter should be adopted as proper compliance with the repairing covenant.

Much will turn, however, on the actual defect in question. In *Elmcroft* the damage to the plasterwork could only be dealt with effectively by the insertion of a damp-course to prevent the rising damp. In *Stent v Monmouth District Council* [1987] the problem related to the front door of a house which let in rain. The regular repair of the rotting door did not cure the problem – this could only be achieved by replacing it with a self-sealing aluminium door. In *Roper v Prudential Assurance Co Ltd* [1992] the tenant of an agricultural holding was held liable for the replacement of the electrical wiring in the farmhouse. The replacement was due simply to old age and the court had no difficulty in holding that this fell squarely within the tenant's covenant to repair.

Again, in *Manor House Drive Ltd v Shahbazian* [1965] the landlord was advised by its surveyor that a new zinc layer (below the canvas and bitumen covering) was required to render the roof watertight. This would then last for about 25-30 years. The tenants argued that, instead of a new zinc roof, first aid repairs could be done using a bitumen coating. Although this was less enduring, it was considerably cheaper. The Court of Appeal rejected this approach

Carmel Southend Ltd v Strachan & Henshaw Ltd
[2007] EWHC 1289 (TCC)

Commercial Union Life Assurance Co Ltd v Label Ink Ltd
[2001] L&TR 380

Dame Margaret Hungerford Charity Trustees v Beazeley
[1993] 2 EGLR 143

Elmcroft Developments Ltd v Tankersley-Sawyer
[1984] 270 EGLR 140

Fluor Daniel Properties Ltd v Shortlands Investments Ltd
[2001] 2 EGLR 103

Gibson Investments Ltd v Chesterton plc
[2002] 2 P&CR 494

Land Securities plc v Westminster City Council (No 2)
[1995] 1 EGLR 245

Manor House Drive Ltd v Shahbazian
(1965) 195 EG 283

Murray v Birmingham City Council
[1987] 2 EGLR 53

Plough Investments Ltd v Manchester City Council
[1989] 1 EGLR 244

Postel Properties Ltd v Boots the Chemist Ltd
[1996] 2 EGLR 60

Proudfoot v Hart
(1890) 25 QBD 42

Roper v Prudential Assurance Co Ltd
[1992] 1 EGLR 5

Stent v Monmouth District Council
(1987) 54 P&CR 193

Ultraworth Ltd v General Accident Fire & Life Assurance
[2000] 2 EGLR 115

In summary

The choice between two different remedial schemes will be governed by a number of factors:

- If patching is futile, the replacement option will be preferred.
- If, on the other hand, both repair and replacement alternatives are feasible, each of which comply with the required standard under the lease, the covenanting party has the choice of option provided they act reasonably.
- Replacement is only required if repair is not reasonably or sensibly possible.
- In all cases, the standard of repair that must be taken into account is that of the reasonably-minded (incoming) tenant taking a lease on the same terms as the actual lease.
- If the scheme of covenants in the lease places the obligation on the landlord to carry out repair works and the tenant to pay for them (by way of service charge), the scheme is treated as being for the mutual benefit of both parties. Thus, where there is more than one reasonable way of carrying out the obligation, it is for the landlord (based on the covenantor principle, above) to choose how to discharge it. The tenant cannot complain, provided the landlord acts reasonably in its choice, even though another method could have been adopted.
- The standard of work, however, must be judged by what the tenant, given the length of the lease, could fairly be expected to pay for the works. Anything beyond this, given the more limited interest of the tenant, must be borne by the landlord itself.

on the ground that mere patching was not a reasonable option.

In all these cases, therefore, replacement was the only sensible and cost-effective solution to the problem. Where, however, both a repair and a replacement solution could equally be adopted by a sensible and practical person, the fact that one is more enduring than the other will not prevent either from constituting performance of the covenant. In *Ultraworth Ltd v General Accident Fire & Life Assurance* [2000] the landlord sought damages for terminal dilapidations, under a lease of an office building, alleging that the air conditioning and heating system required renewal at a cost of £420,500. The tenant, on the other hand, contended that the systems could be reconditioned at a cost of about £100,000.

HHJ Harvey QC held that the landlord was not entitled to a new air conditioning and heating system simply because the system was new at the beginning of the term of the lease – it was sufficient that the system was in good working order. Moreover, where there was more than one method of repair, the party undertaking the covenant to repair could choose which method to adopt. In this case, the tenant could reasonably opt for reconditioning the system as an alternative (and less costly) way of complying with the covenant.

Latest High Court decision

The facts

In *Carmel Southend Ltd v Strachan & Henshaw Ltd* [2007] the roof of the demised property had leaked throughout the tenancy and attempts had been made to patch it up. At the end of the tenancy it remained in disrepair and the landlord sought to recover the cost of overcladding, which it considered to be the only proper method of remedying the problem. The tenant challenged this on the basis that building surveyors appointed by both the parties had agreed that patch repairs would be of the appropriate standard to comply with the tenant's repairing covenant.

The landlord, however, had carried out more extensive works for a number of reasons. First, the subtenant (who had remained in occupation at the end of the lease) had required the overcladding of the roof as a precondition of taking a new sublease of the property. Secondly, the landlord's surveyor had later changed his mind and concluded that overcladding was the only appropriate remedial course and that patching repairs were impracticable, owing in part to certain health and safety issues involved in working on an asbestos roof with defective roof lights.

The ruling

HHJ Peter Coulson QC concluded that the tenant's patch-repair scheme was to be preferred. Apart from being both feasible and practicable, it was an appropriate method of repair having regard to the state of the roof and the tenant's obligations under the lease. In particular, the main problem areas were the roof lights and the gutters – only a few roof sheets (not more than 20) were damaged and required replacement. Patch repairs had been agreed between the parties' surveyors and were very common in the industry for this type and age of roof. Far from being a futile exercise, therefore, such repairs would have been more than adequate to put the roof into appropriate repair and condition under the terms of the lease. In any event, the principal source of the leaks had been the roof lights and there was no dispute about these being replaced in their entirety as part of the patch-repair scheme.

In relation to the subtenant's demand for a new roof, this was only marginally relevant as the standard of repair (as noted earlier) was an objective one which did not depend on what an incoming tenant would accept at the relevant time. In the instant case, the subtenant's demand was not based on the terms of the lease between the parties and, therefore, had to give way to the views expressed by the parties' surveyors, who had both initially agreed that patch repairs were appropriate. The upshot, therefore, was that the landlord could only recover damages representing the cost of the patch-repairs scheme. ■

Where there is more than one method of repair, the party undertaking the covenant to repair can choose which method to adopt.