Neil Gilbert explains the definitions behind lease repair covenants

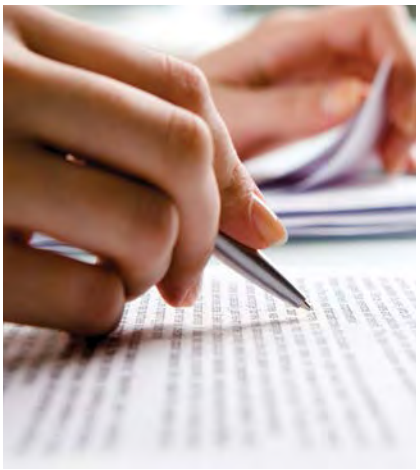
Every word counts

While the general principle that each word in a lease repair covenant must, if possible, be given a separate meaning is true, it is also important to look at the whole covenant at face value. What were the intentions of the parties at the time of signing the lease? It can be easy to miss the detail or the theme of the covenant.

It is generally understood that the standard of repair required of any lease should have regard to the age, character and locality of the property in question and the works that would make them fit for occupation of a reasonably-minded tenant of the class likely to take them. For example, the standard of repair to a Grade A office on a smart business park will be substantially higher than that to a 1970s office in a town centre high street.

However, while this is the general rule, the repair covenant requires close scrutiny to identify any wording that may influence this position.

In basic terms, the requirement to keep premises in repair is the same as to put and keep it in repair, in that the obligation extends to the tenant having to undertake such repairs that put the premises into the state required by the lease, and then keeping it in that state until expiry. Where the covenant is simply to repair, this also implies 'to put and keep'; regardless of the exact wording. Furthermore, additional words such as 'from time to time' or 'at all times during the term' add nothing to the outcome of the covenant except to specify an approximate timeframe.



Lease repair covenants continue to be written in the 'torrential style' in that they contain a number of additional expressions that more often than not mean the same thing. They may also include qualifying expressions such as 'good' and 'substantial', or 'support', 'uphold' and 'maintain'. These terms add little weight to the repair obligation.

However, the terms 'tenantable' and 'habitable' do emphasise the importance for the state of repair not to affect a tenant's ability to occupy. In fact, use of the term 'condition' in the repair covenant imposes a more onerous obligation on a tenant where the emphasis is on the state in which the premises are to be kept, in addition to the overarching requirement to 'repair'. While the terms 'repair' and 'condition' have separate meanings, there is often overlap. The cases of Lurcott v Wakeley [1911] and, again, Credit Suisse v Beegas Nominees Ltd [1994] reinforce the difference in meaning. In the latter case, the obligation was to keep the subject matter maintained to a given standard, and this would only be required if it could be proven that the subject fell below that standard.

There are several terms that place an obligation on a tenant that enlarge the covenant and extend liability past simple repair. The presence of the terms 'rebuild', 'reconstruct' and 'replace' in a covenant were tested by two cases, Norwich Union Life Assurance Co Ltd v British Railways Board [1987] and New England Properties Ltd v Portsmouth New Shops Ltd [1993]. Both ruled that these terms extended the tenants' repairing liability far beyond the usual requirement to keep the premises in good and substantial repair.

However, inclusion of the term 'renew' adds little to the covenant, because most repairs will involve the renewal of subsidiary parts, and some degree of improvement. This was proven in the cases of Janet Reger International v Tiree [2006] and, again, in Credit Suisse v Beegas Nominees Ltd [1994].

> "Repair covenants are often brief but the wording used is of critical importance when assessing liability

It is rare to find a repair obligation that expressly requires a tenant to rectify 'defects in the construction or design' of a building. However, where such defects have caused physical damage, then the tenant may be liable to repair not only the defect but also the underlying cause.

In summary, repair covenants are often brief but the wording used is of critical importance when assessing liability. Surveyors must take care when reading them, to properly understand the underlying meanings behind the wording, before and during their inspections, and before preparing a Schedule of Dilapidations. Care must be taken not to overestimate liability to suit clients' wishes, which sometimes expect a property to be yielded up in perfect repair. This is an obligation that is scarcely ever seen in a commercial lease.

Neil Gilbert is Partner and Head of Dilapidations at Tuffin Ferraby Taylor
ngilbert@tftconsultants.com

Further +info

Related competencies include **T051, T013**