

Interim repairs: Remedies and relief

Received (in revised form): 6th May, 2021



Michael Duncan

Michael Duncan

Associate, Burges Salmon, UK

Michael Duncan is an associate in the real estate disputes team at Burges Salmon LLP and a member of the Property Litigation Association. He acts for clients across all sectors on contentious and risk management issues relating to their real estate portfolios. His experience encompasses acting for commercial landlords and tenants, developers, institutional landowners and high-net-worth individuals. Michael regularly provides CPD training for surveyors and other property professionals.

ABSTRACT

Repair covenants are fertile ground for disputes, both during the term of the lease and on termination. This paper examines the significance of repair covenants in commercial leases during the lease term, and the allocation of responsibility to carry out works to a property in the event of disrepair. The primary focus is on the extent of a tenant's repairing obligations under the terms of the lease. Relevant case law is considered, albeit, when considering the extent of a tenant's contractual obligations, the question is usually fact-specific and can only be answered by taking into account all of the surrounding circumstances. If a tenant fails to comply with their covenants, the landlord has a number of potential remedies, ie to enforce compliance with the lease. This paper explores the range of options available and the circumstances in which they might be exercised. Some remedies (for example, forfeiture) require the taking of strict procedural steps, which can prove to be traps for the unwary. The paper also considers the ways in which a tenant could potentially obtain relief, ie in circumstances where the landlord takes action against them. These options, as well as a number

of areas that are commonly contested and ripe for negotiation, are explored to provide guidance for both landlords and tenants.

Keywords: leases, interim repair covenants, remedies, forfeiture, self-help

INTRODUCTION

The British Property Federation has estimated that between March 2020 and December 2020 commercial tenants failed to pay a total of £4.5bn in rent, as a result of the COVID-19 pandemic.¹

The failure to pay rent, however, and the restrictions placed on landlords wishing to take action to enforce the payment of rent is only one of the many impacts of COVID-19 on the commercial property industry. Less easy to quantify will be the mounting disrepair claims arising from premises let to tenants who have either not been in occupation, are unable to afford repairs, or simply have other commercial priorities at present.

It is, of course, in the landlord's interest to ensure that the tenant complies with the repair obligations throughout the term of the lease to avoid deterioration of the premises, which has an impact on the value of the landlord's investment. This is particularly important in uncertain economic times, where there is less certainty that a tenant will have the financial means to pay compensation (or indeed exist) at the end of the lease, such that a terminal dilapidations claim by the landlord may be of significantly reduced effectiveness. This is further compounded if

Burges Salmon LLP,
One Glass Wharf,
Bristol, BS2 0ZX,
UK

Tel: +44 (0)7866 890264;
E-mail: michael.duncan@
burges-salmon.com

Journal of Building Survey,
Appraisal & Valuation
Vol. 10, No. 2, 2021, pp. 132–142
© Henry Stewart Publications,
2046–9594

disrepair is allowed to get worse over time, meaning the landlord's loss (and therefore exposure) at lease expiry will be even greater.

There is, therefore, an increased onus at present upon landlords to ensure that their tenants are complying with repairing obligations during the term of their lease. If a tenant fails to adhere to their repairing obligations, there are a number of mechanisms a landlord can use to ensure that the necessary repairs are carried out or obtain redress from the tenant. The decision as to which remedy to pursue will be a tactical one, which can only be taken after the full range of options has been considered.

While a great deal is written about terminal dilapidations claims, remedies during the term of a lease have historically tended to receive less attention. This paper, therefore, comprises a brief review of the law relating to the repair of commercial leasehold property, options for enforcing repair covenants during the term of the lease, and some of the steps that can be taken by tenants in response to enforcement action. The focus will be primarily on the tenant's repairing obligations and enforcement by the landlord if those obligations are not met. We will also consider how a tenant might meet any action that is taken by their landlord.

CONTRACTUAL REPAIRING OBLIGATIONS

Overview

Leases usually contain express provisions that allocate the burden of keeping the premises in a specified state of repair. The longer the lease, the more likely the obligations to keep the premises in repair will fall to the tenant. In this section, we will be primarily considering covenants that impose liability for repairs on the tenant.

There are a variety of ways in which the obligation to repair can be framed, such as 'putting and keeping' the premises in repair, as well as less onerous requirements, eg

'the tenant must keep the premises in no worse state of repair than they were in at the beginning of the lease'. While the covenants are usually agreed and contained in the lease, additional obligations may also be contained in other documents (eg licences for alterations and deeds of variation). It is therefore important that all supplemental documents are examined alongside the lease when ascertaining the extent of the tenant's repairing obligations.

'Full repairing leases'

A 'full repairing lease' is usually one where the tenant has responsibility for the repair of the whole property, ie the tenant is directly responsible for carrying out repair works and must bear the cost of such repairs.

In the case of a lease of part of a building, the tenant is generally required to keep the interior repaired while the landlord remains responsible for the exterior, common parts and the structure of the overall building. Consequently, a 'full repairing lease' of part places direct responsibility for repairing the demised premises on the tenant and, additionally, indirect responsibility for the cost (or a proportion of the cost) of repairs to the structure, exterior and common parts of the building. The landlord will usually recover the cost of such repairs through a service charge.

What does it mean to keep a property 'in repair'?

Following *Proudfoot v Hart*,² the obligation to keep the demised premises 'in repair' extends to putting the premises into a state of repair if they are in disrepair at the start of the lease. The rationale behind this is that if the tenant is to 'keep' the premises in repair, the tenant cannot comply with their obligation unless they first put the property into the required level of repair.³ Consequently, at the start of their tenancy, tenants should carry out a thorough inspection of the property (and the building of which their demise forms part)

and assess any potential repairs that will fall directly to them or indirectly via a service charge.

Tenants may try to narrow their obligations to merely keeping the property ‘in repair’ and avoid assuming a higher standard of repair that can be interpreted by additional and alternative words such as ‘good repair’ or ‘substantial repair’. Case law has suggested, however, that these additional words generally have no effect — ie they do not create a more onerous standard of repair. Instead, the construction of the repairing covenant depends on the length of the term of the lease, the property’s location and the nature of the tenant’s use of the property.⁴

Do the required works fall within the repair covenant?

Whether the necessary works constitute ‘repair’ is generally a question of fact and degree. If the tenant is being asked to carry out works which would result in the tenant giving back the property in a form ‘wholly different’ to that which was originally demised, those works will be exceeding the tenant’s obligation to repair.⁵ For example, a covenant to repair will not require a tenant of an old building to modernise it.

Consequently, the standard and extent of repairs required is fact-specific. The wording of the lease has primacy; however, the lease will be interpreted in light of the circumstances surrounding the individual property in question. A sensible approach that has been proposed when considering whether or not a property needs to be ‘repaired’ is to:

- (1) Look at the particular building;
- (2) Look at the state which it was in at the date of the lease;
- (3) Look at the precise terms of the lease; and
- (4) Conclude whether, on a fair interpretation of those terms in relation to that state, the requisite works can fairly be termed repair.⁶

This approach is in line with the test of ascertaining whether the suggested works seem reasonable or whether they would result in the tenant handing back something that is ‘wholly different’ to that which was originally demised to them under the lease.⁷

Other types of repair covenants

Typically, a tenant will covenant to keep the premises ‘in repair’. Other words or phrases can be used, however — eg an obligation to keep the property in ‘good condition’, ‘to maintain’, ‘to renew’, ‘to replace’, ‘to improve’, or some combination of these words.

Good repair and condition

A covenant requiring the tenant to keep the property ‘in good repair and condition’ is more onerous than an obligation to merely keep a property ‘in repair’, as this type of covenant can require a tenant to carry out works even if there is no ‘disrepair’. Additionally, and in contrast to the approach for analysing the extent of ‘in repair’, ‘good repair and condition’ goes beyond the given state of the property as at the time of the grant of the lease.⁸ Instead, the meaning of ‘good condition’ refers to a level of condition that a tenant of the type generally considered to take a lease of the building would require.⁹ When used alone, however, an obligation to keep the property ‘in good condition’ imposes a lesser obligation than that of repair. The High Court clarified in *Firstcross Ltd v Teasdale* that a tenant’s covenant to ‘keep it in good and a tenantable condition’ requires no more than that the premises are capable of being used in a tenant-like manner.¹⁰

To maintain

The interpretation of ‘to maintain’ remains ambiguous because the meaning is dependent on the context in which it is used. An Australian case suggested that the interpretation of ‘to maintain’ should be construed as

meaning ‘to keep in operating condition’.¹¹ In the English case of *Janet Reger International Ltd v Tiree Ltd*,¹² it was held that ‘maintain’ may refer to something less than ‘repair’ and means maintenance of the premises in the state they were in when demised.

To renew

A covenant imposing an obligation ‘to renew’ is considered more onerous than a covenant to repair. In *Lurcott v Wakely*,¹³ a covenant to renew was held to extend to rebuilding the entire property, if required. It may, therefore, be in the tenant’s interest to avoid agreeing to accept a covenant ‘to renew’ and, additionally, it could be disadvantageous to the landlord at rent review (ie supporting a lower rent because of the extent of the obligation on the tenant).¹⁴

Repair versus improvement

In some cases it may be difficult to ascertain whether the proposed works are genuine repairs or better characterised as improvements. This issue was explored in *Gibson Investments Ltd v Chesterton plc*.¹⁵ The High Court clarified that where works remedy disrepair, but also create a material difference from what would have resulted from merely remedying the defect and therefore increase the letting value, the difference constitutes an improvement.

Repair versus replacement

The party with the obligation to repair will usually have discretion as to the form and method of the repairs. Consequently, they will be able to decide whether to repair the damage to the property or just replace the damaged parts, if that is more viable.¹⁶ *New England Properties plc v Portsmouth New Shops Ltd*¹⁷ explored the interpretation of a covenant ‘to renew and replace’. It was held that ‘to renew or replace’ extended beyond the ordinary meaning of repair, which only requires renewal of subsidiary parts of the whole.

TENANT LIABILITY FOR BREACH OF THE REPAIR COVENANT

The property must be in disrepair before the tenant’s obligation to repair will arise. *Post Office v Aquarius Properties Ltd*¹⁸ confirmed that ‘disrepair’ means deterioration of the physical condition of the property. When seeking to understand whether there has been a breach of covenant for which the tenant will be obliged to remedy, in addition to looking at the factual circumstances and contrasting the meaning of repair with other concepts such as ‘renew’ or ‘improve’, Dowding *et al.*¹⁹ have proposed a five-stage approach to analysing whether liability has arisen under to repair:

- (i) What is the physical subject-matter of the covenant?;
- (ii) Is the subject-matter in a damaged or deteriorated condition?;
- (iii) Is the nature of the damage or deterioration such as to bring the condition of the subject-matter below the standard contemplated by the covenant?;
- (iv) What work is required in order to put the subject-matter of the covenant into the contemplated condition?;
- (v) Is that work nonetheless of such a nature that the parties did not contemplate that it would be the liability of the covenanting party?

While some of the answers to these questions may be abundantly obvious, this approach ensures a logical method when assessing the tenant’s liability when the boundaries between ‘repair’, ‘renew’ or ‘improve’ may not be so clear.

ENFORCEMENT OF THE REPAIR COVENANT BY THE LANDLORD

The following paragraphs consider the rights and remedies that may be available to a landlord when dealing with a tenant who is in breach of their covenant to repair.

Exercise of the landlord's entry rights to carry out the remedial works

Most leases will contain an express 'self-help' provision clause which entitles the landlord to enter the property and carry out repairs to the property when a tenant is in breach of the repair covenant, ie a *Jervis v Harris* clause. A self-help provision also entitles the landlord to reclaim the costs of the repairs from the tenant. In a case where a right to enter and repair is not expressly provided for in the lease, however, this option will not be available to the landlord and entry to the property could constitute either trespass or breach of an express or implied covenant for quiet enjoyment.

A *Jervis v Harris* clause will almost always require the landlord to first serve a notice on the tenant, specifying the covenants that the tenant is in breach of. If the tenant fails to remedy the breaches within a specified time period, the landlord can then re-enter the property, carry out the works and recover the costs of the works from the tenant as a straightforward debt (ie rather than via a damages claim).²⁰

Self-help is useful in circumstances where a landlord needs to remedy urgent or immediate repairs that have a material impact on the value of the property, or where the repairs needed spread over parts of the property that fall outside the tenant's demise. In addition, it gives the landlord control and enables them to ensure that repairs to the property are carried out to the standard required.

Perhaps most importantly, the use of self-help provisions ensures that the repair works are not subject to the restrictions imposed by Section 18 of the Landlord and Tenant Act 1927 (LTA 1927), which provide that a tenant's repairs shall not exceed the amount by which the value of the lease diminishes owing to the breach of the covenant (more on this below). Self-help redress can therefore be a preferable alternative to waiting until the end of the lease and pursuing

a terminal dilapidations claim (which will always be subject to the Section 18 cap).

A landlord's right to intervene with repairs under a self-help clause can give rise to a number of practical and legal issues. In addition to making arrangements for the relevant works to be carried out, the landlord will have to use their own money for the repairs, which will then be recovered from the tenant. The landlord may also face challenges from the tenant relating to:

- (i) The validity of the notice (or service thereof) complaining of the tenant's breach of covenant and confirming the landlord's intention to carry out repairs;
- (ii) The reasonableness of the cost of the works;
- (iii) The exercise of the right to enter the property – and a potential damages claim from the tenant, if the right of entry had not arisen or was exceeded;
- (iv) Alleged breach of the tenant's quiet enjoyment covenant; and
- (v) The implications of the landlord's workmen being in the tenant's property while the tenant is running a business – for example, allegations that the landlord's workmen have damaged the tenant's possessions or unreasonably interfered with the tenant's ability to carry out their business.

It should be noted that if the tenant refuses entry to a landlord attempting to exercise self-help, the landlord may not always be entitled to an order from the court giving them the right to enter and carry out the works. In *Hammersmith LBC v Creska*,²¹ such an order was refused, as the repair works were deemed to be of no practical use and the landlord had not suffered any loss. Landlords can, and should, however, resist attempts by tenants to prohibit entry where substantial works are required.

The landlord must ensure that the extent of the repairs undertaken pursuant to this

remedy is within the exact confines of the tenant's repairing covenants under the lease. Repairs by the landlord, beyond the scope of the repairing covenant, will risk a damages claim by the tenant and the landlord's expenditure would not be recoverable. Similarly, where there is more than one potentially viable way of effecting a repair, landlords will need to be able to justify why a particular method of repair was chosen (particularly where it is more expensive than the alternatives). In these circumstances, expert evidence from a suitably qualified surveyor will assist.

One should also be aware that if the lease gives the landlord the right to enter the property and carry out repairs, the landlord will owe a duty of care to anyone who might be affected by defects in the premises, ie pursuant to Section 4 of the Defective Premises Act 1972. The duty is to take 'such care as is reasonable in all the circumstances' to see that the tenant, and anyone else who might be affected, is reasonably safe from personal injury or damage to property caused by a 'relevant defect'.²²

The above issues perhaps explain why this remedy is rarely used. The practical inconvenience caused to tenants can also create commercial tensions and some landlords might not want to risk souring a relationship with a good tenant. If a landlord is up-front about how and why it plans to repair the property and opens a dialogue about the extent of the repairs, in many cases this will prevent the issue from becoming contentious.

Damages

A landlord can claim damages, during the term of the lease, for losses caused by a tenant's breach of the repair covenants. The level of damages awarded would aim to put the landlord in the same position they would have been in had the breach not occurred (subject to the usual rules with regard to causation, remoteness and mitigation of

loss). A landlord's right to claim damages is also restricted by Section 1 of the Leasehold Property (Repairs) Act 1938 (LPRA 1938) and by Section 18(1) of the LTA 1927.

Section 1 LPRA 1938 provides that if the lease was granted for a term of at least seven years, and has at least three years left to run, a landlord may only bring a damages claim if they have:

- (i) Served a Notice in compliance with Section 146 of the Law of Property Act 1925 in relation to the breach of covenant;
- (ii) Served the Notice at least one month before bringing the claim for damages; and
- (iii) Referred to the tenant's rights under the LPRA 1938 in the Notice itself.

If the landlord serves a Section 146 Notice, as described above, the tenant has 28 days to serve the landlord with a counter-notice. If the tenant does serve a counter-notice, the landlord must obtain permission from the court before they can either bring a claim for damages or take steps to forfeit the lease pursuant to the disrepair.

Section 18(1) of the LTA 1927 states that damages available to the landlord for the tenant's breach of repair covenants are limited to the diminution in the value of reversion caused by the tenant's breach, whether that claim is brought during the lease or upon its expiry.

As a result, interim damages claims may not be as effective as other interim remedies (if they are available), due to the difficulty in demonstrating the required diminution in value of the property part-way through the term of the lease. Nonetheless, there may be circumstances — eg if a tenant's demise is part of a larger, complex holding, the value of which is being adversely affected by the disrepair, in which a landlord wishes to pursue a damages claim.

As discussed above, Section 18(1) of the

LTA 1927 does not apply if the landlord is bringing a claim to recover a debt that has accrued pursuant to a landlord carrying out repairs under a *Jervis v Harris* clause. Use of the self-help remedy may therefore be preferable where damages are likely to be limited as a result of a long unexpired term and the landlord's reversion being subject to that lease.

Forfeiture

Forfeiture is the process by which a landlord exercises an express right in the lease to bring the lease to an end in the event of a tenant's breach of covenant.

Forfeiture can be exercised either by peaceable re-entry of the property or by obtaining an order from the court. For commercial leases, peaceable re-entry offers a cost-effective route to bringing the lease to an end; provided that no persons remain in the premises, the landlord can simply enter the premises and change the locks, while leaving a written notice at the premises confirming that the tenancy has terminated.

A landlord cannot forfeit a lease for breach of the repair covenant unless and until they have served a Section 146 Notice under the LPA 1925. The Section 146 Notice must set out the relevant breaches under the lease, require the tenant to remedy the breach (if it is capable of remedy) and provide the tenant with a reasonable time to remedy the breaches, as well as containing the information required by Section 1 of the LPA 1938 (if applicable). It is imperative also that notice is served in accordance with any provisions in the lease relating to the service of notices.

Once the reasonable time provided within a Section 146 Notice has elapsed, the landlord is entitled to peaceably re-enter the premises or commence court proceedings to evict the tenant. It is paramount that a landlord complies with each of the provisions required by Section 146 of the LPA 1925. This was demonstrated by *Akici v LR Butlin*

*Ltd*²³ where the tenant extricated themselves from forfeiture proceedings on the basis that the landlord failed to specify the correct breach of the lease in the Notice.

It is important also that when exercising a right of forfeiture, the right has not already been waived by the landlord. Waiver will occur when the landlord is aware of the breach of covenant and continues to treat the lease as ongoing, for example by continuing to accept rent. As breaches of repair covenants are treated as a continuing breach, so the breach arises afresh each day and, consequently, is harder to waive.

A decision to pursue forfeiture of a lease should always be taken with the commercial consequences of a resulting empty property in mind. The state of the property market should be considered, as a landlord will not want to be left with an unlet property, facing empty rates charges and other hold costs, and the expenses of attempting to relet the property. In a falling rental market, forfeiture is always likely to be a less attractive option than when rents are increasing. These considerations must be weighed against any financial loss to the landlord resulting from the breach of repairing covenants by the tenant.

Specific performance

Specific performance is an order by the court requiring the tenant to carry out specific and discrete remedial works, pursuant to a provision in the lease. The works must then be carried out by the tenant at their expense. Failure to comply with the order will leave the tenant in contempt of court (punishable by imprisonment or a fine).

An order for specific performance is useful when the breach of covenant and subsequent repair works are urgent and the landlord either cannot, or has no right under the lease to carry out the works themselves.

In cases where it is difficult to demonstrate real urgency, or where there are a number of alternative schemes that the tenant could

legitimately implement to repair the property, it is likely to be difficult to persuade the court to exercise its discretion and grant such an order. Additionally, the landlord must be able to prove to the court that they have a legitimate interest in requiring the tenant to perform the remedial works and must also show that other remedies available are either inadequate or that good reasons exist for not exercising them.²⁴

Injunction

An injunction is an order requiring somebody to take certain actions (ie a mandatory injunction) or refrain from continuing with certain types of conduct (ie a prohibitory injunction). Where the landlord seeks to obtain an injunction, it is often appropriate to initiate forfeiture at the same time, and a Section 146 Notice could be served alongside a letter before claim.

Injunctions are an equitable remedy and therefore the courts may refuse to grant an injunction to enforce compliance with an oppressive covenant and can award damages in lieu where appropriate to do so. To obtain an injunction, the landlord must usually demonstrate that damages would not be an adequate remedy.

Additionally, an injunction may be a useful option for a landlord whereby the tenant is refusing the landlord access into the property for the exercise of rights under self-help provisions.

Combining remedies

A landlord can combine some of the remedies available, but not all.

Forfeiture:

- Can be combined with a claim for damages;
- Cannot be combined with exercise of rights under self-help provisions. If the landlord has exercised these rights and entered the property to carry out the

works himself, this will qualify as a waiver of the right to forfeit the lease;

- Cannot be combined with a claim for specific performance.

Damages:

- Can be combined with a forfeiture claim or a claim for specific performance;
- It may be possible in principle for a landlord, who has exercised their self-help rights to carry out the works and then sue for the cost as a debt claim, to also bring a claim for damages. This will only be available, however, in exceptional circumstances where the landlord has suffered losses exceeding the cost of the remedial works.²⁵

Right of entry via self-help provisions:

- As above, in exceptional circumstances, self-help can be combined with a damages claim.

Specific performance:

- Can be combined with a claim for damages;
- Cannot be combined with forfeiture or self-help provisions.

Injunction:

- Can be combined with a claim for damages;
- Cannot be combined with forfeiture.

TENANT OPTIONS FOR RESPONDING TO ENFORCEMENT ACTION

Repair the property

The tenant will be in breach of their covenant to repair as soon as the premises are in disrepair, ie liability for the relevant works occurs immediately. There are other issues that the tenant should consider when in breach of their covenant to repair — eg the tenant's behaviour in performing their covenants under the lease may be critical where

the lease contains a break or renew option that is conditional on the tenant's compliance with their covenants.

Technical legal arguments

Liability relating to covenants to repair is generally a contested area and there are a number of angles that may assist tenants in negotiations with their landlords. Some of the commonly raised arguments are as follows.

Betterment

Where the landlord claims for damages, if the repair works would make the property more valuable, it can be argued that a deduction in the level of damages should be made. This principle is referred to as a discount for betterment. Often, however, it is not possible to carry out repairs without some level of improvement to the premises, so tenants must be sure to frame their arguments carefully.

Section 18, LTA 1927

As discussed above, another possibility for a tenant is identifying whether and, if so, by what value the landlord's reversion has diminished as a result of the disrepair, where the landlord is attempting to pursue the tenant for damages (as opposed to other remedies). Section 18 LTA 1927 provides that damages for breach of the repairing covenant shall not exceed the amount (if any) by which the value of the reversion of the premises is diminished owing to the breach of covenant. This places a cap on the cost of repairs and recovery of damages.

To assess the value of the cap, a comparison is made between two imaginary sales. Sale 1 is based on the value of the premises 'in repair' and sale 2 is based on the value of the premises 'out of repair'. The difference in value of the property pursuant to sale 1 and sale 2 will operate as a limit on the damages that the landlord is entitled to.

Forfeiture and LPA 1938

The requirement of the landlord to serve a Section 146 Notice, and the additional requirements under Section 1(1) of the LPA 1938, is mentioned above. If the lease falls within Section 1(1) and the tenant serves a counter-notice within 28 days of the Section 146 Notice, the landlord must obtain permission from the court to forfeit the lease or to claim damages for the breach of repair covenants. The landlord will only obtain leave of the court if they satisfy one or more of the following conditions:

- (i) The immediate remedy of the breach is required to prevent a substantial diminution in value of the reversion, or the value has already substantially diminished due to the breach;
- (ii) The immediate remedy of the breach is required to give effect to any law, statute or court order;
- (iii) The immediate remedy of the breach is required in the interests of the occupier of the premises, where the tenant is not in occupation themselves;
- (iv) The breach can be immediately repaired at a small cost compared to the cost of the remedy of the breach if it is postponed; and/or
- (v) Special circumstances that render it just and equitable for the court to grant leave.

Relief from forfeiture

When a landlord attempts to exercise a right to determine the lease by forfeiture, the tenant can apply for relief from forfeiture under Section 146(2) LPA 1925. The court has complete discretion as to whether to set aside the forfeiture and, if so, on what terms. The tenant may seek relief either as part of the landlord's court application (if the landlord is effecting forfeiture via court proceedings) or alternatively by bringing a separate action of their own (ie after the landlord has forfeited the lease).

The tenant may apply for relief as soon as the landlord has served their Section 146 Notice and at any time while the landlord 'is proceeding' to enforce the right of re-entry.²⁶ If the landlord is pursuing forfeiture via court order, the tenant may obtain relief any time prior to the execution of any order for possession.²⁷ Due to the discretionary nature of the court's jurisdiction to grant relief, it will be in the tenant's interest to apply promptly where possible, and, ordinarily, no later than six months after forfeiture has been effected.²⁸

When granting relief, the court can grant it on the terms it sees fit; however, the general principle is that the landlord is entitled to be put in the position they would have been in had the breach of covenant not occurred. Therefore, the tenant will need to remedy any outstanding breaches and also pay the landlord's legal costs.

CONCLUSION

As outlined in this paper, there are a variety of ways in which an interim repair claim can be resolved. As ever, it is recommended that landlords and tenants take advice at an early stage when faced with an interim repair issue. Picking the right remedy will always be crucial to the swift and efficient resolution of a repairing issue, and there is a tactical decision to be made as to which remedy to go for, ie in circumstances where a landlord has to elect between remedies. Tenants, on the other hand, will always be well advised to revisit the exact scope of their repairing obligation and consider whether the works in question fall within their obligation to repair.

The appropriate choice of remedy will be determined by a number of factors, including the prevailing market conditions and the landlord's long-term objectives for the property. In sectors where there is currently a glut of supply, one would expect to see forfeiture used less often. Similarly,

in circumstances where there are doubts as to the viability of a tenant's business, landlords may wish to consider options that will enable them to crystallise their disrepair claims, rather than waiting until lease expiry.

REFERENCES

- (1) Bourke, J. (September 2020), 'Commercial property landlords could face unpaid rent bills of £4.5 billion', *Evening Standard*, available at <https://www.standard.co.uk/business/commercial-property-landlords-could-face-unpaid-rent-bills-of-ps4-5-billion-a4549551.html> (accessed 17th June, 2021).
- (2) *Proudfoot v Hart* (1890) 25 QBD 42.
- (3) *Payne v Haine* [1847] 16 M&W 41.
- (4) *Ibid.*, ref. 2.
- (5) *Ravensft Properties Ltd v Davstone (Holdings) Ltd* [1980] QB 12.
- (6) Woodfall, W., *The Law of Landlord and Tenant*, Sweet & Maxwell, Yorkshire. Continually updated resource.
- (7) *Ibid.*, ref. 5.
- (8) *Credit Suisse v Beegas Nominees Ltd* (1995) 69 P. & C.R. 177.
- (9) *Ibid.*, ref. 8.
- (10) *Firstcross Ltd v Teasdale* [1983] 8 HLR 112.
- (11) *Greetings Oxford Koala Hotel Pty Ltd v Oxford Square Investments Pty Ltd* (1989) 18 NSWLR 33.
- (12) *Janet Reger International Ltd v Tiree Ltd* [2006] EWHC 1743 (Ch).
- (13) *Lurcott v Wakely* [1911] 1 KB 905.
- (14) *Norwich Union v British Railway Board* [1987] 2 EGLR 137.
- (15) *Gibson Investments Ltd v Chesterton plc* [2003] EWHC 1255 (Ch).
- (16) *Riverside Property Investments Ltd v Blackhawk Automotive* [2004] EWHC 3052.
- (17) *New England Properties plc v Portsmouth New Shops Ltd* [1993] 2 WLUK 125.
- (18) *Post Office v Aquarius Properties Ltd* [1987] 1 All ER 1055.
- (19) Dowding, N., Reynolds, K. and Oakes, A. (2018), *Dilapidations: The Modern Law and Practice*, 6th edn, Sweet & Maxwell, Yorkshire.

- (20) *Jervis v Harris* [1995] EWCA Civ 9.
- (21) *Hammersmith LBC v Creska* (No 2) [2000] L&TR 288.
- (22) The Defective Premises Act 1972, Section 4(1).
- (23) *Akici v LR Butlin Ltd* [2005] EWCA Civ 1296.
- (24) *Ibid.*, ref. 19.
- (25) *Ibid.*, ref. 19.
- (26) Law of Property Act 1925, s.146(2).
- (27) *Hammersmith and Fulham Borough Council v Top Shop Centres Ltd* [1990] Ch. 237.
- (28) *Ibid.*, ref. 19.