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The Covenant to Maintain & Repair: How Far Does It Go?

Typically, commercial leases express obligations on the part of the landlord and tenant to maintain and repair certain property, including leased premises, common areas, facilities and equipment. Although the natural and ordinary meanings of these words are easy enough to grasp, you may be interested to find out just how far a covenant to “repair and maintain” extends.

Defining “Maintenance”

A dictionary definition of “maintenance” is “the process of preserving a condition or situation or the state of being preserved”. Canadian Courts have adopted this definition, holding that a lease covenant to maintain premises imposes an obligation to preserve the premises and keep them up to the standard that existed when the lease was made.

How does maintenance differ from repair with respect to landlord and tenant obligations? Generally, maintenance is a protective measure while repair is a curative measure. Put another way, where the work merely preserves the functioning of the premises, it is maintenance work. Where the work mends parts of the premises that have ceased to function, it amounts to repair work.

The obligation to maintain premises is generally easy to understand, and correspondingly, the case law on the topic is sparse. The story is different where repair is concerned.

Meaning of “Repair”

A dictionary definition of “repair” is the “restoration to good condition by renewal of decayed or damaged parts; to fix...” In the 1924 decision *Royal Trust Co. v. R.*, the Canadian Exchequer Court clarified the meaning of “repair” in the context of a commercial lease by holding that an obligation to repair is discharged by keeping the subject property in repair according to its age and nature and the condition it was in when the tenant took possession. In other words, the covenant to repair must be construed with moderation, not with severity. Repair, not perfection, is the test. So, just how far does the covenant to repair go?

When does Repair mean Replace?

In the 1991 British Columbia Court of Appeal decision *708-1111 West Hastings Ltd. v. Coopers & Lybrand Vancouver Ltd.*, the Court held that a covenant to repair includes replacement of any worn or damaged elements, but it does not include a duty to improve those elements. In the 2006 case *Brennan v. Brennan Education Supply Ltd.*, the Saskatchewan Court of Appeal determined that repair will include replacement where the only viable way to restore the premises to working order and thereby fulfill the covenant is to replace any worn out or dilapidated parts.

In the 1997 Ontario Court of Justice case of *Shenkman Corp. v. O.A.C. Holdings Ltd.*, the landlord and tenant entered into a lease containing the following provisions:

- “the obligation of the tenant to repair shall include...structural repairs and repairs to the walls and roof...”;
- “the tenant shall keep the roof reasonably free and clear of snow and ice”;
- “the landlord shall...carry out...any structural repair...except where such repairs are caused by the overloading of snow and ice”.

In the spring of 1993, the roof began to leak. The tenant demanded replacement of the roof. The landlord replaced the roof and attempted to recover the cost from the tenant. The landlord claimed that (1) the tenant's repair obligations included the roof; and (2) the tenant was negligent in failing to properly maintain and repair the roof by disregarding its obligation to remove any snow or ice.

The tenant refused to pay for the cost of the new roof, claiming that the work fell outside the scope of its covenant to repair. The Court held that the roof did not fail because of poor or inadequate maintenance by the tenant. The Court sided with the tenant, but noted that, in every case, the question of repair is one of degree. The Court held that while a covenant to repair includes replacement by way of modern equivalent, the new roof in that case involved a change of such a nature and to such an extent that it amounted to an improvement, not a repair.

Therefore, by virtue of the common law, “repair” can include “replace” in certain contexts. Clarity is best achieved, however,

by incorporating express replacement obligations in the lease.

Does Repair mean Restore to Original Condition?

In the 1963 decision *Vicro Investments Ltd. v. Adams Brands Ltd.* (Vicro Investments) the Court relied on the historic English case *Inglis v. Buttery & Co.* (Inglis) for the proposition that a covenant to “repair” does not impose an obligation to restore a property to its original condition. In the Inglis decision, the Court noted that under an absolute covenant to repair, the standard of repair required will invariably depend on the age, condition and use of the subject property. However, the covenant will not require repairs that would make the property new again, or that would merely eliminate natural signs of aging.

As stated in *Vicro Investments*, the duty imposed under a covenant to repair is a reasonable one, and it does not impose an obligation to restore the property to its original condition, but rather to return the property in a substantial state of repair, with due allowance for wear and tear. Accordingly, any obligation to restore a property to its original condition must be expressly stated in the lease.

The Final Word

Determining repair and maintenance obligations in a lease is partially a fact-dependent exercise and partially a function of the words used in the lease. Based on the case law described here, the importance of drafting clear maintenance, repair, replacement and restoration covenants should be evident.



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