Schedules of condition – a silver bullet?

Paul Raeburn stresses the importance of properly produced, well-evidenced schedules of condition

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It is rare these days for a new letting of commercial premises to not include a schedule of condition (SoC). The purpose is, in theory, to record the condition of the property at lease commencement, thus ensuring that the new tenant has to hand back at lease expiry in no worse condition, hence avoiding the trap of also being liable for inherited disrepair. In practice, however, SoCs commonly provide tenants with far less protection than envisaged.

It is trite law (*Payne* v *Haine* [1847] 16 M&W 541) that the standard of repair is an objective one. So, if premises are out of repair at lease commencement, the covenanting party is obliged to put them into repair. This is so, even when the obligation is no more than to "keep" the property in repair, since that cannot be achieved unless it is first put into repair.

Hence the now common practice of qualifying tenant repairing covenants with the intention that, while the tenant must keep the property in repair, it is not obliged to hand back in any better (or worse) state than at the start, as evidenced by an SoC attached to the lease.

Wording

The two phrases that are most commonly used to amend the standard full repairing covenant are "no better condition" and "no worse condition". The former is most common. While there is unlikely to be any material difference between the two in practice, because the obligation to keep in repair is to the standard evidenced at commencement, the latter should be avoided as it could be argued that its terminology provides no upper limit as to where the liability to repair ends.

Two common pitfalls arise. First, the SoC tends to only be referenced in the repairing obligation. Unless also expressly linked to the decorating obligation(s), it will not apply. Not only does this leave the tenant potentially liable to hand back at expiry in better decorative order than at the outset, certain elements excluded from the repairing obligation in the SoC might nonetheless require to be put into repair before they can be adequately decorated (eg the rotten woodwork). Similarly, the SoC should be referenced in the statutory compliance clause.

Second, it is rare for the landlord to have an express obligation to repair the elements the tenant is excluded from. For example, the photographs excluding the tenant from having to repair the flat roof, still apparently watertight at lease commencement, provide no practical solution to the water subsequently pouring in. Absent any express obligation on the landlord to repair, the tenant will have no choice but to do so.

Negotiating more comprehensive protection from SoCs is of course more likely achievable in weak market conditions (eg taking a lease of a high street shop) and less so when strong (most sheds acquisitions these days).

A good schedule

Even today, many SoCs consist of too few and/or poor-quality photos, with either no, or inadequate, written descriptions.

To be of maximum effect, extensive high-quality photographs are required, with clear annotations. Photographs of plant and machinery are in themselves of little use, so specialist reports for these should be commissioned, and, if defects are found, the parties should agree either that the landlord will carry out the repairs or that the tenant's liability is excluded. Consider similar for potentially contaminated land (including intrusive soil testing).

Beware Kelvin's second law of thermodynamics, which posits that, without direct intervention, all processes manifest a tendency towards decay, by way of increasing entropy, or greater disorder. In the context of building pathology, many key elements will inevitably and inexorably decay. This fact can mask what in practice will amount to significant potential liabilities for a tenant, even with an SoC. The classic example is that of a wooden window sill, clearly evidenced in the SoC as 25% rotten at lease commencement. By lease expiry it is 50% rotten. Practically, it is impossible to fix only the additional rot arising during the lease, and so the whole sill requires replacement in order to achieve repair. This becomes a significantly more daunting potential cost exposure with, say, a profile steel roof over a 150,000 sq ft factory, with well-evidenced cut edge corrosion at lease commencement, inevitably having advanced by lease expiry. Extend this practical contemplation to the impracticality, if not impossibility, of remedying just your portion of worsened decorations, delaminating cladding panels, failing concrete hardstandings, and so on.

For so many items appearing in an SoC, deterioration is inevitable, and remedying only the advance during the most recent lease is simply not possible in practice. That said, SoCs properly and comprehensively constructed do provide extensive protection for items which simply are, and will remain, as evidenced, eg inoperable dock levellers, 10 dents to a specified elevation, heavily damaged door reveals to a clearly identified loading door, etc.

Missing SoC

It is not unusual to come across a repairing clause referencing an SoC, but with none appended. In the Scottish case *Dem-Master Demolition Ltd* v *Healthcare Environmental Services Ltd* [2017] CSOH 14, it was held that the absence of the SoC provided an evidential, rather than interpretative, issue. There "was an actual standard, which was the state of the Premises as at commencement of the lease", and so the parties could lead extraneous evidence on that.

As SoCs are so common, tenants should take care to make them as comprehensive as possible both in terms of extent of coverage within all covenants relating to maintenance, and as to detailed evidence by way of photographs, text, and specialist reports.

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