



Repair Covenants in Commercial Leases

DILLON  EUSTACE

DUBLIN CORK BOSTON NEW YORK TOKYO

REPAIR COVENANTS IN COMMERCIAL LEASES





Introduction

In recent years the commercial lease has assumed significant proportions, with more emphasis than ever being placed on the commercial concerns affecting both landlords and tenants. One of the most critical concerns for both parties is their repair obligations in respect of the property. This update is a brief consideration of the salient issues.

Repair Obligations

Broadly speaking, a tenant will be leasing either an entire building or part of a building in a multi-let situation. In respect of the former, the lease should be drafted so as to include a full repairing covenant on behalf of the tenant. In respect of the latter, the tenant's repairing obligations should be limited to the interior of the premises being leased, while the landlord remains responsible for the structure of the whole building and for all areas not being leased. In this situation the lease should provide for the landlord to be fully reimbursed by all tenants for the cost incurred in maintaining the building. This may be facilitated through a service charge provision included in the lease or by covenant on the part of the tenant to pay the landlord an apportioned amount of the cost of any works done.

Both of the above scenarios require particular attention to be paid to the definition of the 'demised premises'. In the case of a lease of part of a building the definition of the 'retained parts' should be considered in tandem with the 'demised premises' to ensure that there are no omissions in what either party is required to repair. A failure accurately to define the relevant areas and obligations of the parties could result in the landlord being unable to recoup monies spent on repairs and maintenance. It is normal for the landlord to be responsible for:

-  roof and foundations;
-  load-bearing walls and columns;
-  external walls (excluding the glass in exterior windows);
-  floors;

- ▣ ceilings; and
- ▣ all other structural parts (excluding the finishes applied to internal walls, ceilings and floors.

Definition of 'Repair'

The extent of the works which must be carried out in order to conform with the obligations to repair is unclear. Some authorities suggest that, regardless of the terms used, there is no requirement to give back to the landlord a different premises from that which the tenant received when it entered into the lease. In other words, repairs are necessary only to restore the premises to its condition when the tenant took occupation. However, other authorities suggest that repair requires something to be restored by renewal or replacement. In this regard, it is maintained that including a term such as 'keeping the building in repair' can involve a duty to put a property into repair even if the property was in a poor state at the time of granting the lease.

Ultimately, where a dispute arises it will fall to the courts to decide on the intentions of the parties in any given case. Consequently, it is recommended that the lease should clearly reflect the extent of the obligations envisaged by the parties to the lease.

Impact of other Covenants in a Lease

While the repair covenant in a commercial lease will be the first port of call when dealing with repair obligations, there are several other covenants which may have an impact on the lease. The following is a brief examination of some such covenants.

Redecoration Covenants

Most commercial leases will include a specific obligation on a tenant to redecorate the demised premises at the end of given periods, namely prior to the rent review date. This ensures that the premises are in good order at that time. It is arguable that the tenant's general repair obligations encompass a redecoration requirement, however, the inclusion of a redecoration covenant can only be of added assistance to the landlord.

Yield-up Clauses

All commercial leases include a provision which sets out the situation in relation to the yielding up of the property. Generally speaking, this will set out that the tenant can yield up the property only once it has complied with all the tenant's covenants contained in the lease. Consequently, a tenant, on yielding up the property, must have fully complied with the repair covenant in the lease.

Insurance Provisions

The obvious exception to a tenant's obligation to repair is where damage is caused as a result of an insured risk. A tenant should always establish that the 'insured risks' as defined in the lease are covered by the policy in place to ensure no ambiguities arise at a later date.

Statutory Requirements

Most commercial leases will include a generic covenant requiring tenants to comply with any statutory obligations which may arise with regards to the property. Compliance with the covenant may, from time to time, impose repair obligations on a tenant. For example, the Energy Performance of Buildings Directive (2002/19/EC) will require all new non-residential buildings to produce an energy efficiency certificate in respect of the building as of July 1 2008, and all existing non-residential buildings will require same as of July 1 2009 (for further details please see "Implementation of Energy Performance of Buildings Directive in Ireland"). This will undoubtedly impose increased repair obligations on both landlord and tenants in the future.

Comment

Evidently, it is imperative that great care be taken when drafting repair covenants in commercial leases. It is clear that the repair covenants should be viewed not in isolation, but rather in conjunction with other covenants which may have an impact on its interpretation and effect. Ultimately, landlords must seek to protect their investment as best they can with the minimal amount of expenditure incurred to themselves.

Date: September, 2007

Author: Linda Lynch

CONTACT US

Our Offices

Dublin

33 Sir John Rogerson's Quay,
Dublin 2,
Ireland.
Tel: +353 1 667 0022
Fax.: +353 1 667 0042

Cork

8 Webworks Cork,
Eglinton Street,
Cork, Ireland.
Tel: +353 21 425 0630
Fax: +353 21 425 0632

Boston

26th Floor,
225 Franklin Street,
Boston, MA 02110,
United States of America.
Tel: +1 617 217 2866
Fax: +1 617 217 2566

New York

245 Park Avenue
39th Floor
New York, NY 10167
United States
Tel: +1 212 792 4166
Fax: +1 212 792 4167

Tokyo

12th Floor,
Yurakucho Itocia Building
2-7-1 Yurakucho, Chiyoda-ku
Tokyo 100-0006, Japan
Tel: +813 6860 4885
Fax: +813 6860 4501

e-mail: enquiries@dilloneustace.ie
website: www.dilloneustace.ie

Contact Points

For more details on how we can help you, to request copies of most recent newsletters, briefings or articles, or simply to be included on our mailing list going forward, please contact any of the team members below.

Paul Eustace

e-mail: paul.eustace@dilloneustace.ie
Tel : +353 1 667 0022
Fax: + 353 1 667 0042

DISCLAIMER:

This document is for information purposes only and does not purport to represent legal advice. If you have any queries or would like further information relating to any of the above matters, please refer to the contacts above or your usual contact in Dillon Eustace.

Copyright Notice:

© 2009 Dillon Eustace. All rights reserved.

This article was first published on www.internationallawoffice.com - the Official Online Media Partner to the International Bar Association, an International Online Media Partner to the Association of Corporate Counsel and European Online Media Partner to the European Company Lawyers Association. Register for a free subscription at www.internationallawoffice.com/subscribe.cfm

DILLON EUSTACE

DUBLIN CORK BOSTON NEW YORK TOKYO

33 Sir John Rogerson's Quay, Dublin 2, Ireland.
www.dilloneustace.ie

In alliance with Arendt & Medernach