Repair v Replacement: A Service Charge Matter

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This article gives an overview of the law relating to repair v replacement in the context of the reasonableness of service charges with a spotlight on cases involving roof disrepair.

Introduction

Almost all modern leases include a provision for collecting a charge intended to cover the cost incurred by the landlord in providing repairs, insurance and other services. Both statute and common law combine to provide the regime for determining the reasonableness of service charges including the amount that can be charged, what expenses are recoverable, and how disputes between landlords and their tenants may be resolved.

The key statutory provisions regarding service charge can be found in the Landlord and Tenant Acts 1985 and 1987. Some charges in older leases are still regulated by the Rent Act 1977, but such provisions are beyond the scope of this article.

The Tribunal's jurisdiction

The First-tier Tribunal's power to determine the reasonableness of service charges is conferred by s.27A of the 1985 Act as amended by the Transfer of Tribunal Functions Order 2013 (SI 2013/1036), art.1 Sch.1 para.54 (with Sch.3). Section 27A(3) provides that:

> "An application may also be made to the appropriate tribunal for a determination whether, if costs were incurred for services, repairs, maintenance, improvements, insurance or management of any specified description, a service charge would be payable for the costs and, if it would, as to -
> (a) thepersonbywhomitwouldbepayable,
> (b) thepersontowhomitwouldbepayable,
> (c) theamountwhichwouldbepayable,
> (d) thedateatorbywhichitwouldbepayable,and
> (e) themannerinwhichitwouldbepayable."

By virtue of s.19 of the 1985 Act, such a determination includes an assessment of the reasonableness of the service charges incurred. Specifically, the Tribunal will consider:

"(1) Relevant costs shall be taken into account in determining the amount of a service charge payable for a period—
  (a) onlytotheextentthattheyarereasonablyincurred,and
  (b) wheretheyareincurredontheprovisionofservicesorthecarryingoutof works, only if the services or works are of a reasonable standard; and the amount payable shall be limited accordingly.

(2) Where a service charge is payable before the relevant costs are incurred, no greater amount than is reasonable is so payable, and after the relevant costs have been incurred any necessary adjustment shall be made by repayment, reduction or subsequent charges or otherwise."

General principles of "reasonableness"

What does reasonableness mean?

The tribunals and appeals' courts have considered s.19 extensively. The consensus appears to be that a commonsense approach should be taken. A useful summary of the position can be found in *Veena SA v Cheong* [2003] 1 E.G.L.R. 175 at [103]. This case was an appeal from the subsequently abolished Leasehold Valuation Tribunal to the Lands Tribunal (LT). The LT carefully considered the meaning of reasonableness as a word and a concept in the context of service charges, concluding, at [103], as follows:

> "The word 'reasonableness' should be read in the general sense and given a broad, common sense meaning. It should be distinguished from the words 'reasonably incurred' as used in s.19(2A)(a) of the 1985 Act. The question is not solely whether costs are 'reasonable' but whether they were 'reasonably incurred', that is to say whether the action taken in incurring the costs and the amount of those costs were both reasonable."

The LT went on to state that both elements of this test must be met for the landlord to succeed.

Burden of proof

In the earlier case of *Hyde Housing Association v Williams* LRX/53/1999 (20 July 2000), the LT clarified two issues regarding evidence in service charge appeals. First, it was held, at [29] that

"when determining whether a repair is reasonable, as to cost or standard, there is no presumption either way. It is for the court or tribunal to decide on the whole of the evidence."

Secondly, citing the judgment of the Court of Appeal in *Yorkbrook Investments Ltd v Batten* (1986) 18 H.L.R. 25; (1986) 52 P. & C.R. 51, the LT made it plain that, at first instance, provided that the tenant presents evidence that successfully establishes a prima facie case, it is for the landlord to meet those allegations. On appeal, the proceedings in the Upper Tier Tribunal (formerly the Lands Tribunal) will be in the form of a re-hearing with the burden of proof on the appellant to show that the decision of the tribunal below was wrong.

Key considerations

In *Forcelux Ltd v Sweetman* [2001] 2 E.G.L.R. 173, Mr P. R. Francis FRICS stated, at [39]–[40]:

"The question I have to answer is not whether the expenditure for any particular service charge item was necessarily the cheapest available, but whether the charge that was made

> was reasonably incurred. To answer that question, there are, in my judgment, two distinctly separate matters I have to consider. Firstly, the evidence and from that whether the landlord's actions were appropriate, and properly effected in accordance with the requirement of the lease, the RICS Code and the 1985 Act. Secondly, whether the amount charged was reasonable in light of that evidence. The second point is particularly important as if that did not have to be considered, it would be open to any landlord to plead justification for any particular figure, on the grounds that the steps it took justified the expense, without properly testing the market."

In *Williams* at [31(3)], the LT set out the matters that a tribunal should consider when assessing reasonableness:

> "Tests to be applied to ascertain whether the works carried out by Hyde were reasonable, that is to say whether the costs thereof were 'reasonably incurred', include: whether Hyde would have carried out the same works if the cost was wholly borne by them; whether the works were required to comply with statutory requirements or regulations; whether the works were carried out in reliance on reasonable and competent professional advice."

The Court of Appeal expanded on the issue of cost in *Hounslow LBC v Waaler* [2017] EWCA Civ 45; [2017] L. &. T.R. 19 at [26]–[27]. The Court of Appeal held that, when considering whether costs have been reasonably incurred, it is necessary to consider the fact that the cost of the work is to be borne by the lessees. This point is emphasised by the definition of "relevant costs" in s.18(3)(c) of the 1985 Act, by virtue of which, no cost is a relevant cost unless it is part of an amount payable by a tenant.

The judgment in *Waaler* went on to highlight the importance of the lessees' perspective and the essential nature of the consultation requirements. The Court of Appeal stated (at [36]) that "the interests of the tenants are to be taken into account in 'weighing up' the relevant factors."

The importance of the issue of costs was further elaborated on by the Upper Tribunal (UT) in *Garside v RFYC Ltd* [2011] UKUT 367 (LC). The UT held that the financial impact on the lessees should be considered in "broad terms" having regard to the amount of service charge demanded at the time of the proceedings and in previous years, in addition to the nature and location of the property because

> "reasonable people can be expected to make provision for some fluctuations in service charges but at the same time would not ordinarily be expected to plan for substantial increases at short notice."

Repair v replacement

General principles

In *Ultraworth v General Accident Fire & Life Assurance Corp Plc* [2000] L. & T.R. 495; [2000] 2 E.G.L.R. 19 (C.S.), the Tribunal was faced with assessing whether repairing an old but functional air conditioning and heating system was adequate or whether replacing the system was the only reasonable option. The Tribunal considered the judgment in *Elmcrofts Development Ltd v Tankersley-Sawyer* [1984] 1 E.G.L.R. 47 and *Stent v Monmouth DC* (1987) 19 H.L.R. 269; (1987) 54 P. & C.R. 193. The factual circumstances of both these authorities involved fruitless repairs in the face of necessary replacement of a failing or defective element. The Tribunal distinguished the facts from the case before them in *Ultraworth*, holding that:

> "The claimant is not entitled to a new system simply because the system was new at the beginning of the term. It is sufficient to comply with the repairing covenant that the system be in good working order (…) Whether the covenant is complied with is a question of fact and degree."

In *Carmal Southend v Strachan and Henshaw Ltd* [2007] EWHC 1289 (TCC); [2007] 3 E.G.L.R. 15, the High Court followed *Ultraworth* and held that "the fact that the covenants referred to repair and condition did not somehow render the patch repairs inappropriate or inadequate". The court or tribunal, as it may be, must look to the evidence when assessing whether a patch repair option is "reasonably and sensibly possible". Where the evidence supports a patch repair, the landlord is not required to replace the element in question. The Court, at [9(a)], also considered the key practitioners' texts and confirmed that

> "if there is more than one possible method of repair, each of which would comply with the required standard, the choice is for the tenant is make (…) and if there is a cost differential, the measure of damages at common law is based on the less expensive option".

The presiding view is that a careful balance must to be struck between costly and immediate improvements with an immediate high cost to tenants which would result in many years of low or non-existent charges, versus the comparatively low cost of pure repair work which would result in further charges being made from time to time (see *Hyde Housing Association v Wynnstay Leaseholders' Association* L/31/98/WS at [46]).

While the cost of repairs or replacement is key, the Tribunal in *Garside* noted that the urgency and extent of repairs is also highly relevant. In the Tribunal's view, the degree of disrepair and the urgency of the work or the extent to which it can wait is likely to be an important consideration. The Tribunal went on to highlight another relevant consideration, specifically the extent of any increase in the total cost of the works if carried out in phases as opposed to in one contract. The Tribunal concluded, at [19]:

> "These are only examples of factors that may or may not be relevant and there may be others to take into account. All are factual issues and matters of judgment for the LVT to weigh up against the hardship of substantial increased costs when deciding on the evidence before it whether the service charge costs are reasonably incurred."

Compliance with the repair clause

In addition to following the statutory test, landlords and tenants must also comply with the repair clauses in the lease when considering whether repairs or replacement are appropriate. In *Land Securities plc v Westminster City Council (No.2)* [1995] E.G.L.R. 245, the tenants were permitted to repair rather than replace an air conditioning unit said to have a lifespan of five years. The clause was not so narrow as to limit their options to replacement only. The decision in *Dame Margaret Hungerford Charity Trustees v Beazeley* (1994) 26 H.L.R. 269; [1993] 29 E.G. 100 further emphasises the need for a reasonable approach to assessing compliance. In this case, undertaking sufficient running repairs to maintain the roof was found to comply with the requirements of the repairing covenant. The judgment reiterated that replacement is only required if repairs are not reasonably or sensibly possible.

Expert reports and industry standards

Where the question involves a technical aspect, it will be for an expert to determine whether the time has come to renew rather than patch repair. In *Postel Properties Ltd v Boots the Chemist Ltd* [1996] 2 E.G.L.R. 60, the item in need of repair was a flat roof. With expert information in mind, the Tribunal held that the cost of replacement must be balanced against the cost of patch repairs. While expert reports will be essential, the High Court has made it clear that a landlord cannot require the tenant to bear the costs of replacement simply because an item has reached the end of its industry recognised lifespan (see *Fluor Daniel Properties Ltd v Shortlands Investments Ltd* [2001] 2 E.G.L.R. 103). Industry guidance should be treated as a starting point not a solely determinative factor.

The UT provided further guidance on the weight to be attributed to expert reports that comment on whether repair or replacement is appropriate in *Lord Mayor and Citizens of the City of Westminster v Fleury* [2010] UKUT 136 (LC). The Tribunal held that the question is always whether the decision to repair or replace is a reasonable one in all the circumstances:

> "The fact that there is evidence a reasonable surveyor might recommend the roof be recovered is no doubt an important factor (…) but it cannot be determinative. Further the weight to be attached to such evidence may depend upon where in the range of reasonableness the recommendation lies."

Cases concerning roofs

The following cases serve as helpful examples of the approach taken by the courts to disputes over the appropriateness of repairs or replacement. The focus on matters concerning roofs allows us to see the key factors common to each judgment, as discussed below.

Carmal Southend Ltd v Strachan and Henshaw Ltd [2007] EWHC 1289 (TCC); [2007] 3 E.G.L.R. 15

This case involved a dispute as to the repairs that *Carmal* should have carried out in order to yield up the premises with the roof in good repair and condition for the purposes of the relevant covenants in the lease. The Court concluded that patch repairs were reasonable. In reaching this conclusion, the Court identified the following key considerations:

1. Bothsurveyorshadagreedatonetimethatpatchrepairswereappropriate[at50].
2. Thesortofpatchrepairsproposedwereverycommonintheindustryaccordingto guidance from the Advisory Council on Roofing and the Health and Safety Executive [at 51].
3. Patchrepairswereappropriateandnotfutileaccordingtotheexpertevidence[at 53].
4. Therewasnoevidencetosuggestthatpatchrepairsweremoredangerousor involved more of an unacceptable level of risk than the alternative involving overcladding [at 55].

Murray v Birmingham City Council (1988) 20 H.L.R. 39; [1987] 2 E.G.L.R. 53

The landlord had chosen repeatedly to repair the roof rather than replace it. Because the leaks kept recurring, the tenant argued that replacement was the only reasonable option. The Court of Appeal disagreed and upheld the decision of the court below. A stage may come where the only practicable way of performing the relevant covenant was to replace the roof altogether. However, there was no evidence to suggest that piecemeal repair was not still a perfectly practicable solution.

Hyde Housing Association v Wynnstay Leaseholders' Association L/31/98/WS

The dispute in this case was the reasonableness of works undertaken to flat roofs. The Tribunal found that patch repairs would have fulfilled the landlord's obligation under the lease without causing the leaseholders accelerated and high charges. The recovering works that had been carried out were unnecessary on the evidence and, therefore, the charges were unreasonable.

Hyde Housing Association v Williams LRX/53/1999

In this case, the Tribunal had to consider the issue of repair versus replacement in the context of a dispute as to whether a flat roof had reached the end of its "economic life". Following careful consideration of the expert evidence provided by both parties, the Tribunal held that the roof covering had not reached the end of its economic life and that patch repairs would have been satisfactory for a few more years. It was relevant that there was no evidence of water penetration into the building.

Postel Properties Ltd v Boots the Chemist [1996] E.G.L.R. 60

In this case, it was considered reasonable to replace rather than repair the roof coverings over a shopping centre. This included adding improved insulation and priming the roof troughs. It was held that the roof replacement and the insulation works were recoverable by way of service charge, but the cost of priming the roof troughs was not recoverable because it served no useful purpose. The following matters were highlighted as relevant in the course of the tribunal's reasoning:

1. Theroofwastoasignificantextentliabletoattackfromcondensationrisingfrom the interior of the building through any apertures in the steel sheeting [at 3].
2. Thetenantshadintroduced(insomecases,extensiveandnumerous)itemsofplant which had to be sited on the roofs. To that end, structures were built to support the plant, and this involved piercing the thickness of the roof covering and the steel sheeting. In other instances, tenants fixed suspended ceilings to their interiors and pierced the steel sheeting with their hangers. The presence of the plant on the roof involved traffic over it which caused local damage to the roof covering during servicing [at 4].
3. Someofthebayswereleakingandoneoftheexpertwitnesseswasabletoplot the extent of damp penetration in a part of the roof which had not yet been repaired.

Conclusion

The cases serve as a reminder to parties to carefully consider the requirements imposed by the repair covenant. The original contract between the parties will always be relevant to the assessment of reasonableness. However, parties should be aware that, following *Ultraworth* and *Carmal*, the Tribunal will look further than the precise wording of the repairing covenant. Whether the repairing covenant is complied with is a question of fact and degree. Furthermore, a covenant that does not mention repairs is not necessarily breached because repairs (and not replacement) are carried out, especially where repairs (including piecemeal repairs) are the most reasonable option in the circumstances.

Whilst expert evidence is important, it is not a sole determinative factor. This is made clear by various cases, including *Postel* and *Fleury*. Additionally, agreement between the experts may assist with narrowing the issues and condensing the litigation process, but disagreement between the experts is not necessarily a fatal blow. It is evident from the judgment in *Fluor* that a similar approach will be taken to industry standards. Although slightly less weight appears to be attributed to industry standards as compared to expert evidence. Relevant industry guidance will be considered, but not in a vacuum.

The decisions in *Waaler* and *Garside* demonstrate that the cost of the repairs as compared to replacement will always be highly relevant. The judgment in *Williams* shows that landlords will be well served by considering how to carry out the works in a way that promotes the best interests of the tenants. In summary, any practitioner advising a leaseholder faced with and opposed to bearing the costly expenses of replacement (for example of a roof), when their preference would be for significantly cheaper patch repairs, should consider the following:

- whetherpatchrepairswouldfulfilthelandlord’sobligationsunderthetermsofthe lease;
- whecurrentconditionoftheroof(havingregardtoexpertevidence);
- theremaininglifespanoftheroof;
- whethertheconditionoftheroofislikelytodeteriorateinthenearfuture;
- whetherundertakingpatchrepairswouldbedangerousfromahealthandsafety point of view or involve an unacceptable level of risk;
- theurgencyofrepairs(havingregardtotheextentofdisrepair,andwhetherthere is any water penetration);
- thefinancialimpactonthelessees(havingregardtotheservicechargesfromthe previous years and the nature and location of the property, and the financial means of the lessees).

The law is stated as at 13 June 2024.