

Reinstatement of alterations at the end of a lease

Julian Greenhill

Introduction

It is usual for a modern commercial lease to contain a covenant restricting the right of the tenant to carry out alterations to the demised premises. Further it is very common for either a lease or a licence to carry out alterations to also contain an obligation on the part of a tenant to reinstate any alterations made to the premises, usually at the determination of the term of the lease.

Alleged breaches of these obligations are commonly included in a claim for terminal dilapidations brought at the end of a lease. Often such claims are treated and presented alongside and treated as one and the same with items of disrepair. But they are not the same. They raise separate and distinct conceptual and practical issues which it is important to keep firmly in mind. The purpose of this article is to examine various aspects of the obligation to reinstate alterations, identify the ways in which this obligation differs from the obligation to repair and make a practical suggestion as to how this distinction should be dealt with in practice.

The covenant against alterations

We should begin by looking at the covenant against alterations.

Most modern leases of commercial premises will contain a covenant limiting the ability of the tenant to make alterations to the demised premises. Without such a covenant the tenant has a relatively wide freedom to make alterations to the demised premises. In broad terms, absent a covenant against alterations, the tenant cannot be prevented from making alterations to the demised premises, unless the alterations amount to a "waste" or they constitute a breach of the covenant to repair. In order to be "waste" an alteration will generally need to be significant enough to meet the test of being a "substantial alteration in the character of the demised premises"¹, and if the waste nonetheless improves the demised premises (known as "meliorating waste") it cannot generally be prevented by the landlord from being carried out². Relying simply upon the common law of waste or the covenant to repair places far too little restriction on a tenant in the eyes of most landlords. Hence the usual inclusion of a covenant against alterations.

The covenant against alterations may take a variety of forms. It may be absolute, that is to say it prohibits alterations in all circumstances. Or it may be qualified, in that it prohibits the making alterations without the consent of the landlord. Commonly it will take a hybrid form, with certain alterations being prohibited altogether (eg alterations to the structure of the demised premises), and others being permissible with the landlord's consent (eg alterations to the non-structural interior parts). In the case of an alteration to the demised premises that is an improvement to them, the requirement in the landlord's covenant that alterations be made only with his consent will automatically be subject to a proviso implied by statute that the consent will not be unreasonably withheld³.

The covenant will commonly extend beyond the making of "alterations" per se and use a variety of other terminology to define the scope of the obligation. Take a common form of absolute covenant as follows:

"Not to cut or maim any part of the Premises nor make any addition improvement or alterations to the Premises either external or internal whether structural or otherwise"

Such a clause is very widely drawn covering all parts of the Premises, inside and out, structural and non-structural. It comprises a series of overlapping prohibitions. The wording of the clause is clearly intended to be comprehensive in its coverage so as to capture any substantial change to the Premises, structural or non-structural, external or internal other than a repair.

Each covenant must be interpreted in its context. An "alteration" has been held to be limited to such alterations as affect the form or structure of the building¹⁴. Prohibition of an "alteration" will often not prohibit the attachment of a sign or advertisement to a building that can be removed without great damage to the fabric. Nor will it prevent the replacement of one item of permitted plant with another item capable of performing the same function¹⁵. But the context may widen the meaning of the word "alteration" so that, for example, a covenant not to make any alteration in the "appearance" of a building or part of a building might well prevent the erection of bill-boards or items that would not otherwise qualify as "alterations".

The covenant will commonly include an obligation not to "cut or maim" the walls or other parts of the demised premises. This is likely to place a greater restriction on what the tenant can do, preventing any substantial piercing of the walls and so preventing the tenant from mounting signage etc. that requires significant apparatus to affix it. Reference to "additions" may also be used to broaden the scope of the obligation. It is usually intended to capture extensions to existing buildings or even wholly new structures situated on the demised premises. However, in a given context (for example where the nature of the demised premises is such that such substantial erections are unlikely to have been contemplated by either party) a prohibition on "additions" might extend to prevent eg. the attachment of signage or the placing of an ATM in the front of a retail outlet.

An "improvement" is generally determined by application of the test of whether it improves the property from the viewpoint of the tenant ¹⁶. This may include merging the demised premises with other buildings to be erected on adjoining land falling outside the demise ¹⁷. As was said above, an alteration which improves the property from the viewpoint of the tenant is therefore one which, provided the covenant takes the qualified form, a landlord can only prevent on reasonable grounds ¹⁸. It is important to bear in mind that the different terms used in the common form of covenant are not mutually exclusive. Many "additions" will also be "improvements", and so too will many "alterations" also be "improvements".

There are a number of features of the covenant against alterations that distinguish it from the covenant to repair. First a covenant against alterations is a negative covenant, in other words an obligation not to do something. By contrast a covenant to repair is a positive covenant - it requires the tenant to carry out certain steps, namely such steps as are necessary to put and / or to keep the demises premises in a particular state of repair.

A second difference follows from this. Because it is an obligation not to do something, breach of a covenant against alterations (unlike breach of a covenant to repair) is a once-and-for-all breach of covenant committed by the tenant at the moment the alteration is made ¹⁹.

Several important consequences follow, each of which further distinguishes a breach of the covenant against alterations from a breach of the covenant to repair. First, an alteration is a breach of covenant only if it was made after the date of the lease. Whilst a property can be demised in a state of disrepair, a change to the premises which predates the lease cannot generally be an alteration within the meaning of the covenant against alterations because the covenant against alterations is normally a covenant under which the tenant agrees not to alter to add to the premises in the state in which they were demised under the lease. Unlike the covenant to repair it is not an obligation to ensure the demised premises continue to meet some objective standard of physical integrity or maintenance.

The second consequence is that the person liable for an alteration is on the face of it the tenant who was entitled to the term when the alteration was carried out, not an assignee. So if an alteration is made by a tenant who then assigns the lease to an assignee, the assignee would not generally be liable in respect of a breach of the covenant against alterations unless he has expressly agreed to bear such liability. This is the case regardless of whether the lease is or is not a "new tenancy" within the meaning of the Landlord and Tenant (Covenants) Act 1995.¹⁴⁰ The landlord would not thereby be prevented from exercising a right to forfeit the lease against the assignee, but (absent a covenant to reinstate alterations) the assignee could not be made liable in damages for the unlawful alteration. The third consequence is that time will begin to run for limitation purposes from the date on which an alteration is carried out. Again, absent a covenant to reinstate, a claim against the tenant for breach of the covenant against alterations will become statute barred under section 8 of the Limitation Act 1980, 12 years after the offending alteration was carried out by the tenant. (In the case of a lease not contained in a deed the limitation period would be only six years from the date of the alteration pursuant to section 5 of the 1980 Act).

The obligation to reinstate alterations

Where alterations have been carried out, a landlord will usually want to ensure, or at least have the ability to require, that those alterations be reinstated at the end of the lease. What do we mean by "reinstatement"? Each obligation will need to be interpreted in its context, but generally reinstatement involves removing whatever physical changes have been made to the premises and putting back, as nearly as is possible, the features that existed prior to the alterations in question being made. However, it is, of course open to the parties to agree a provision for "reinstatement" that is something of a hybrid repair / reinstatement provision and envisages the premises being brought up to an objective standard, condition, or specification.¹⁴¹

In considering the reinstatement of alterations, the starting point will be to determine whether an obligation to reinstate arises in a given case. A covenant to reinstate alterations will usually be found in one or other of three places. It may be contained within the same clause as the covenant against alterations, particularly if that covenant is limited in scope and permits some alterations to be carried out without consent. Alternatively, an obligation to reinstate is a common feature of a written licence to carry out specific alterations entered into pursuant to a qualified covenant. Or an obligation to reinstate may be contained within the separate covenant to yield up the premises at the determination of the term.

Different types of obligations

The scope of an obligation to reinstate alterations is ultimately a matter of interpretation of the covenant in question. In the case of a specific express obligation to reinstate contained in the lease or in a licence to carry out alterations, it ought to be clear that it is intended to require reinstatement and the principal question is likely to lie in the mechanism for triggering the obligation and the scope of works required to fulfil it..

But the covenant to yield up the premises may give rise to difficult questions of interpretation even to determine whether reinstatement is required. The covenant to yield up tends to impose upon the tenant two separate obligations, first, an obligation to deliver up vacant possession of the premises at the end of the term and, second, an obligation to deliver up the premises in a particular state or condition. Such a covenant may not make specific reference to alterations and the need to reinstate them. Consider the following common form of covenant to yield up:

"at the end or sooner determination of the term hereby granted to yield up the demised premises and all fixtures therein (except tenants or trade fixtures) in good and substantial repair and condition..."

Though it is a question of interpretation in each case, a clause using this wording will tend not to be interpreted as requiring the reinstatement of alterations, only that the premises be delivered up in repair. But consider an alternative common form of wording that refers more generally to the tenant covenants in the lease:

"at the end or sooner determination of the term hereby granted to yield up the demised premises and all fixtures therein (except tenants or trade fixtures) in such repair and condition as shall be in accordance with the Tenant's covenants hereinbefore contained ..."

In circumstances where the tenant has carried out alterations in breach of covenant, the reference here to "such condition as shall be in accordance with the Tenant's covenants ..." may be sufficient to enable the landlord to hold the tenant liable for a failure to reinstate those alterations even if they were made too long ago to be the subject of a separate claim under the covenant against alterations.

Features of the covenant to reinstate

Unlike the covenant against alterations, a covenant to reinstate is a positive not a negative covenant. It requires the tenant, either conditionally or unconditionally, to carry out those works required to reinstate the alterations previously made in accordance with the terms of the obligation. Whether a breach of the covenant to reinstate is a continuing as opposed to once-and-for-all breach of covenant may well depend upon the proper interpretation of the covenant in question. If, properly construed the obligation is one to carry out certain works of reinstatement by a defined time then a breach may well be a once-and-for-all breach of covenant.¹²² Otherwise, as a matter of ordinary principle, the failure to carry out reinstatement, like a failure to repair, would be a continuing breach.

This feature potentially distinguishes the covenant to reinstate from the covenant against alterations. However, the impact of this distinction will in practice usually be minimal. This is because the obligation to reinstate usually falls to be performed at the determination of the tenancy and so the various consequences outlined above in relation to the covenant against alterations rarely arise in practice.

Conditional obligation to reinstate

An obligation to reinstate will often be conditional. Usually such a condition will take the form of a condition precedent to the performance of the obligation to reinstate, in other words the obligation is not triggered until the person entitled to require reinstatement has satisfied one or more preconditions. It is particularly common for the obligation to reinstate to be conditional upon the giving of notice to reinstate by the landlord.

Considering more closely this common instance of an obligation to reinstate after notice is given by the landlord, among others, three issues commonly arise.

First, must the requirement to reinstate be exercised or notice given "reasonably" and if so what does this mean? It is quite common for the covenant to provide that the tenant shall reinstate alterations at the end of the term "if the landlord reasonably so requires". Whether or not it is reasonable for a landlord to require reinstatement in a given case will depend upon the facts. Examples of where it might be considered unreasonable for a landlord to require reinstatement are: where the alterations improve the value of the premises; where the cost of reinstatement is wholly disproportionate to any increase in value which the landlord might obtain in consequence of the reinstatement; or where reinstatement is no longer possible, for example because the materials necessary to reinstate the premises to their original condition are no longer available.

Second, how is notice to be given and is it required to take a particular form? This is a matter of interpretation and it is open to the parties to a lease to agree that a landlord's notice to reinstate is required to take a particular form

or to have particular contents. Where a particular form or particular contents are expressly stipulated by the parties, those stipulations must be strictly adhered to, otherwise the notice will not be valid to trigger to obligation to reinstate.¹²³ But unless such stipulations are expressly agreed by the parties, no particular form will be required. In such a case the landlord will simply be required to communicate to the tenant his requirement that the premises should be reinstated. Provided a reasonable recipient of the notice given by the landlord would have understood what was required of him by the landlord, notice will have been effected.¹²⁴

Third, when must notice be given? If the covenant in question expressly provides for the timing of the giving of notice, that provision, properly interpreted, will be conclusive. In order to be valid, a notice must satisfy the requirement contained in the lease or licence as to timing.

But more often than not this point is not dealt with expressly in the covenant. Then the question of timing of notice can give rise to difficult questions in practice.

The starting point is to determine when the obligation to reinstate needs to be performed. Usually this will be at the date of determination of the lease in question, though there is nothing to stop the parties agreeing an earlier or even a later date if they wish.

Unless there are clear and compelling indications to the contrary contained in the clause, logically the time for service of the notice requiring reinstatement at the determination of a tenancy will be interpreted as falling no later than the date of performance of the obligation itself. Thus, where the clause is silent as to the timing of notice, there are two alternatives available. Either notice can be given at any time prior to the date for performance, even if only the day before, or even hours before. Or it must be given a sufficient time prior to the time for performance for the tenant to have a reasonable opportunity to perform the covenant and reinstate the premises prior to the end of the tenancy.

If the first alternative above is the correct one, a further question arises: what is the tenant permitted to do in the event that notice is served on him so late that he cannot actually carry out the reinstatement himself? Is the tenant forced to stand by whilst the landlord carries out the reinstatement himself and then recovers the cost from the tenant? Or does the tenant upon receipt of a notice close to the date of determination obtain the right to stay in temporary occupation of the premises for a reasonable period of time after expiry for the purpose of carrying out the reinstatement?

The authorities such as they are at present tend to suggest that a Court will favour this first alternative. In other words, where the obligation to reinstate is qualified by the requirement for the landlord to give notice, unless there is express words or necessary implication to the contrary, that notice may be given at any time prior to expiry of the term, but, if given sufficiently late, the tenant will be permitted a reasonable time after expiry to complete the work.¹²⁵ Given that the landlord is in complete control of when the notice is given, the Courts are understandably reluctant to hold that a tenant served with notice to carry out substantial works of reinstatement only a short time before the expiry of a lease is in breach the moment the lease expires.

But this solution is far from perfect. If the tenant is to be allowed to remain in occupation beyond the end of the lease for the purpose of carrying out the works of reinstatement numerous difficult questions arise. What will his status be during this period of occupation? Which if any of the terms of the lease will apply to the tenant during that time? The situation will be rendered still more unsatisfactory by the fact that the duration of the occupation is for a period which is not defined and upon which the parties may disagree, namely (one presumes) the period reasonably required for the tenant to complete the works of reinstatement. In the case of a large property after demise under a long lease the amount of work required and so the duration of the occupation needed could be lengthy.

Not least for these reasons, and notwithstanding the reluctance of the Courts so far to adopt this approach, there is a powerful argument in favour of the second alternative outlined above, namely that where the clause permitting the landlord to require reinstatement is silent as to the timing of notice being given, the Court should normally imply into the clause a requirement that notice be given a sufficient time prior to expiry of the lease for the tenant to be reasonably able to complete the reinstatement before the lease expires. Any notice served later than that time should be invalid.

In addition to the practical problems with the first alternative identified above, this solution has the benefit of giving both the landlord and the tenant greater certainty. Many leases will require the tenant to yield up the premises "together with additions thereto" in good and substantial repair etc. In such a case it is not open to the tenant in many cases to carry out reinstatement in advance on the off-chance that the landlord will require it, even if they wanted to. And the service by the landlord of a late notice to reinstate leaves both the landlord and the tenant uncertain of their rights and obligations after determination of the tenancy.

Furthermore, the second solution is preferable as a matter of principle, particularly in the case of a clause providing for reinstatement as part of the obligation to yield up the premises at the determination of the term. The covenant to yield up, of its nature, must be performed at the expiry of the lease. The principal obligation imposed by the covenant is for the tenant to deliver up vacant possession of the property on that date, and no later. This should be the same regardless of whether the premises are to be delivered up in whatever state they are to be found at the end of the tenancy, in substantial repair and condition, or with alterations reinstated. To interpret a conditional covenant to reinstate in such a way that it effectively varies the date for performance of the principal obligation to yield up is unsatisfactory to say the least.

The illogicality seems all the greater when one appreciates that the primary reason for adopting the first solution is to avoid penalising the landlord for giving notice so late that the tenant cannot be expected to carry out the work in time¹¹⁶. Yet this seems to be a fairly weak reason for adopting an interpretation that leads to the numerous complications I have outlined. It lies within the landlord's power to give notice in a timely fashion sufficiently in advance of the determination of the lease to allow the tenant to reinstate. In an ordinary case there is no good reason why he cannot be expected to serve notice in good time.

Particularly because each lease will need to be interpreted on its own facts, it is to be hoped that, absent compelling reasons in support of an interpretation allowing the tenant to remain after determination, an argument in favour of the second solution will tend to receive judicial approval in the future and landlords will be required to serve notice to reinstate in a timely fashion well before determination of the term.

Alterations, fixtures and chattels

It is important to consider also the interrelationship between the covenant to reinstate alterations and the rights and obligations of a tenant to remove fixtures from the demised premises.

English law recognises three notional categories into which an object brought onto a parcel of land may fall. Such an object may be (a) a chattel (b) a fixture or (c) an integral part and parcel of the land itself ¹¹⁷. The test used to determine into which category and object falls is the well-known annexation test which considers the degree and purpose of the object's attachment to the land in question. The test is highly fact sensitive and depends upon the circumstances of each case.

An item which remains a chattel is the property of the tenant and must be removed by him at the determination of the lease as part of his obligation to deliver up vacant possession ¹¹⁸. If he leaves chattels behind the tenant will still be considered to occupy the building and be liable for use and occupation, as well as the cost of removing the

chattels. An object brought onto the premises for a temporary purpose and either not physically attached to the land at all, or merely attached in such a way as it can easily be removed without substantial harm to the premises will tend to remain categorised as a chattel. Furniture and carpets, for example, usually remain chattels.

For present purposes the important point is that objects brought onto the land and falling within the third category (c), or even the second category (b) (ie fixtures), may amount to alterations of the premises for the purposes of a covenant against alterations or an obligation to reinstate. Whether or not they do so, will depend in each case on a proper interpretation of the covenants in the lease.

In the case of objects which become part of the land, the point is an obvious one. To take an example, where an extension is built onto the demised premises a series of objects in the form of building materials will be brought onto the land and, after completion of the building work will usually become part of the premises. This is a classic example of an alteration.

The position will require more careful consideration in the case of fixtures. The question of whether a tenant has a *right* to remove a fixture is determined by application of the three stage test for determining if an object is a tenant's fixture as opposed to a landlord's fixture (ie (i) it was affixed by the tenant, (ii) belongs to a recognised category of tenant's fixture and (iii) it was affixed with the intention of removing it as and when the tenant so wished).

But generally speaking, absent an express provision requiring a tenant to do so, there is no *obligation* on a tenant to remove a fixture. However, a covenant obliging the tenant to reinstate alterations is one way in which a tenant can find himself obliged to remove fixtures. As was discussed above when considering the scope of the covenant against alterations, it will be necessary to interpret the covenant in any given case in order to determine whether a given fixture is also an "alteration" within the meaning of the covenant in question and whether an obligation to remove the fixture arises as an incident of the covenant to reinstate.

Damages

In a claim by a landlord against his former tenant for failure to reinstate alterations, the damages will be measured by reference to normal common law principles the aim of which is to identify as closely as possible the actual loss (if any) that the landlord has suffered.

In particular, a covenant to reinstate alterations is not a covenant to repair. Two important consequences follow. First, the rigid (and anomalous) rule applied in the case of a breach of a covenant to repair that the measure of damages is the cost of the works required to remedy the breach¹⁹⁹ does not apply to breach of a covenant to reinstate. Second, a covenant to reinstate is not generally considered to be "a covenant or agreement to keep or put premises in repair" within the meaning of section 18(1) of the Landlord and Tenant Act 1927, with the result that neither the cap on damages nor the provision preventing their recovery altogether in certain circumstances provided by that section also do not apply in the case of a covenant to reinstate.

Rather in the case of failure to reinstate, the measure of damages at common law will depend upon the loss that the landlord has actually suffered and in particular upon whether it is reasonable in all the circumstances for the landlord to carry out the works alleged to be required in order to effect the reinstatement. The quantum of loss recoverable in respect of such a breach is not necessarily the cost of reinstating the property. Prima facie the cost of reinstatement is recoverable but this is subject to the requirement that it is reasonable in all the circumstances for the landlord to reinstate the alterations. Otherwise the proper measure of loss is the amount by which the alterations reduce the value of the landlord's reversion in the property²⁰⁰. Reasonableness will be judged by reference to factors such as the proportionality of the cost of the works relative to the benefit to be obtained. If, for example, the landlord has no intention of actually reinstating the alterations, they are unlikely to recover the cost of doing so as opposed to recovering such lesser sum (if any) that represents the diminution in the value of the

property caused by the alterations. But there is no rule that prevents a landlord recovering the cost of reinstatement simply because that costs exceeds the harm to his reversionary interest.

Presentational point

Finally, it is useful to consider a practical presentational point. The main purpose of this article has been to highlight the numerous distinctions between breaches of a covenant not to alter, a covenant to reinstate and a covenant to repair. These distinctions are not just a matter of abstract legal theory. They have a significant impact upon the approach to be taken to considering a claim for breach of each obligation and the measure of damages recoverable.

For this reason a well-drawn Schedule of Dilapidations should avoid simply listing items of disrepair alongside alleged failures to reinstate alterations. Often a Schedule of Dilapidations will simply identify all breaches in one long list, whether they relate to disrepair, failure to decorate, failure to reinstate etc. and then identify a global sum claimed in respect of all such breaches. However, by reason of the different considerations that may arise in relation to the measure of damages, limitation etc. it is preferable to avoid this approach and separate out the different categories of breach.^[21] Once the items of disrepair and failure to reinstate are separated it is easy to apply the section 18 cap on damages to the items of disrepair in a principled way solely to the items of disrepair to which it is applicable, and without simultaneously oversimplifying the approach to the measure of damages for failure to reinstate.

Julian Greenhill

jgreenhill@wilberforce.co.uk

[1] *West Ham Central Charity Board v East London Waterworks Co* [1900] 1 Ch 624

[2] *Doherty v Allman* (1878) 3 App Cas 709

[3] Section 19(2) of the Landlord and Tenant Act 1927; *Balls Bros v Sinclair* [1931] 2 Ch 325

[4] *Bickmore v Dimmer* [1903] 1 Ch 158

[5] *Hagee (London) v Cooperative Insurance Society* [1992] 1 EGLR 57

[6] *Lambert v Woolworth* [1938] Ch 883

[7] *ibid*

[8] See s19(2) of the 1927 Act *ibid*

[9] *Savva v Hussein* [1996] 2 EGLR 65

[10] See *Churchwardens of St Saviours, Southwark v Smith* (1762) 1 W Bl 351 and section 23 of the Landlord and Tenant (Covenants) Act 1995

[11] For an example see *Fairgate International Limited v Citibank International Plc* [2005] 2 EGLR 48

[12] By analogy with cases such as *Farimani v Gates* [1984] 2 EGRL 66 and *Channel Hotels & Properties v Al Tamim* [2004] EWCA Civ 1072

[13] *Mannai v Eagle Star* [1997] AC 749

[14] *Westminster CC v HSBC Bank Plc* [2003] 1 EGLR 62

[15] see generally the discussion in the leading textual authority, *Dowding & Reynolds on Dilapidations*, 3rd Ed 2004 para 17-04 ff citing *Plummer v Ramsey* (1934) 78 SJ 175 and *Scottish Mutual Assurance Society Limited v British Telecommunications Plc* (March 18, 1994) Unrep.

[16] This distinguishes the situation under consideration from that where a tenant is entitled to remove fixtures after expiry of a notice to quit where the length of the notice is too short to allow removal of tenant's fixtures: *Smith v City Petroleum Co Limited* [1940] 1 AllER 260. In this latter situation the giving of additional time protects the rights of the tenant not the landlord.

[17] *Elitestone v Morris* [1997] 1 WLR 687

[18] *Cumberland Consolidated Holdings v Ireland* [1946] KB 264

[19] As to which see *Joyner v Weeks* [1891] 2 QB 31

[20] Ruxley Electronics v Forsyth [1996] AC 344.

[21] The approach is suggested in the Draft Pre-Action Protocol for Dilapidations proposed by the Property Litigation Association - see paragraph 3.2