

Adrian Jack's criticisms of the 3rd edition of *Clarity for Lawyers* (all relating to the **precedent lease** on pages 241 – 248) and our replies (slightly improved 21.10.18).

If you'd like to contribute to the discussion please follow the guidelines on our [What readers say](#) page (under the link to this page).

Adrian Jack

- 1 The book suggests that no ground rent be reserved because "[t]he tenants between them own the freehold." This means, however, that, if there is a service charge dispute and some of the landlord's expenses are disallowed, then the landlord company becomes insolvent.

This is a not infrequent scenario. Small developments (like Orchard Court) are notorious for generating bitter disputes between tenants. Often one clique takes over the running of the block and another group objects. In the absence of a professional managing agent (again a frequent occurrence in tenant-managed blocks) repeat appearances in the First-tier Tribunal (the Leasehold Valuation Tribunal as was) can result.

Much better is to reserve a reasonable ground rent, but have the landlord waive collection of it unless and until the money is needed. This gives the landlord some independent income and capital.

- 2 The service charge provisions are inadequate on several levels. The procedure in clause 8 is unworkable. If we consider calendar year 2018, what is required is this. The landlord has as soon as possible after 31st December 2017 to produce the service charge accounts for 2017. (In practice, it may well take until April or May 2018 to produce these.) When the landlord

The authors

The no-rent provision replaces the traditional (pointless) peppercorn rent. But we agree that if the articles of association don't provide a suitable power the lease should. We see two possible approaches, that could both spread large costs over many years:

- A sinking fund (as suggested in point 3). But there might still not be enough in the fund to meet an unexpected outlay.
- A power to raise extra money as needed or anticipated. If the landlord looks far enough ahead, this could operate as a flexible sinking fund, reducing the need for sudden large demands but allowing them when necessary.

We therefore offer a new clause 8D for the precedent lease:

If the landlord needs, or reasonably expects to need, additional funds, it may [on passage of a special resolution] serve demands on the tenants, and the tenant of each flat must pay 1/40th of the amount needed within [28] days.

The clause *is* workable: the landlord can estimate the service charge for the coming year (2018) before the year begins or the 2017 accounts are available, in time for the tenants to pay the first instalment on 1 January.

But we agree that it can be improved. We have amended clause 8 on the *Updates* page so that

produces the accounts, it then has to “estimate the service charge for the next year.” That next year will be 2019.

The tenant’s duty is to pay that estimate in monthly instalments, but when does the first instalment fall due? Is it, say, 1st May 2018 (assuming the landlord gets the 2017 accounts out in April 2018)? Or is it 1st January 2019? But if it is 1st January 2019, how is the adjustment for the balance in the previous year to be made? As at 1st January 2019, the accounts for 2018 will not have been prepared, so any adjustment will be unknowable.

- 3 The absence of a sinking fund would need to be reported to any mortgagee, since it is a serious defect.

- 4 The lease does not adequately define the landlord’s repairing obligations. The main obligation is to keep the “retained parts clean, tidy and in such condition as is reasonable...” There is at least an argument that “in such condition” needs to be read *eiusdem generis* with “clean” and “tidy” and does not refer to repairs at all.

it reads:

A. By the end of November each year, the landlord will estimate the service charge for the next year and notify the tenants.

B. As soon as practicable after 31 December, the landlord must produce accounts for the year then ending.

C. The tenant must pay by banker’s order one-fortieth of the landlord’s estimate (adjusted by bringing forward any balance from the previous year) by equal instalments on the 1st of each month.

The Mortgage Lenders' Handbook for England & Wales, containing the standard instructions to lenders' conveyancers, does not require a sinking fund but only that "there are ... adequate covenants and arrangements ... [for] maintenance and repair".

Clause 7 obliges the landlord to:

(A) *Keep the retained parts clean, tidy, and in such condition as is reasonable having regard to the class and age of the building.*

(B) *Manage Orchard Court as a high-class residential estate, maintaining the facilities to a reasonable standard*

[our emphasis]

Could this mean that the landlord has no duty (or even power) to repair?

The *eiusdem generis* interpretation tool (pages 222-224) can be applied to general words like “or anything else” after (or perhaps before) a list of items of a particular type. But it can only be used to resolve ambiguity when the “ordinary meaning” of the words is unclear, taking into account the parties' presumed intentions and the rest of the “context” (which includes the commercial efficacy of the document). In that case a court might — if

common sense so requires [*BOC v. Centeon* (1999 WL 250125)] — limit the meaning of "anything else" to "anything else of this type".

But "in reasonable condition" is not a generalisation of any class of things of which "clean" and "tidy" are members; each of the three categories has a distinct meaning, although there is some overlap. My house is in reasonable condition but at the moment untidy and in need of a duster.

Moreover, clause 9 provides that:

Any management decision made on behalf of the landlord is binding on the tenant unless it is shown that no reasonable landlord could have made it.

5 However, even if "condition" or the duty to "manage [the property] as a high-class residential estate, maintaining the [undefined] facilities to a reasonable standard" covers repairs, using a new form of words is asking for trouble. There is a large body of law about what constitutes "repair" and "renewal" and the extent to which a landlord can carry out improvements. It is probably the most heavily litigated issue in landlord and tenant law.

Any wording carries a risk. But the central point of the book is that new words carefully chosen are safer than old ones chosen, regardless of their defects, because they are traditional. There can be no improvement without change.

Judicial definition might resolve some future disputes but its benefits are limited, as explained on page 11 and in *Tried & tested: the myth behind the cliché* (Mark Adler's 1996 review of some of the case law on repairing covenants over the previous 160 years, at www.adler.demon.co.uk/t&t.htm).

Inevitably, traditional wording continues to generate litigation.

6 A good lease provides in detail for what a landlord may or must do and then sets up a system for recharging the costs through the service charge accounts. This draft effectively relies on implied terms for this. For such a critical part of the entire relationship of the parties that is not to my mind good drafting.

Clauses 7 and 8 state explicitly what the landlord must do, allowing some necessary discretion. Other clauses set out what else it may do.

Clause 8 sets up a system for recovering all the costs through the service charge accounts.

The failure of the lease adequately to define the services the landlord must and may provide is again a defect. Well drafted leases include a

The duties and powers are in general terms rather than detailed lists for the reasons given on pages 109, 131-2, and 222-224.

long list of things which a landlord must do and things which it may do. This makes clear which items the landlord can recharge under the service charge.

7 By not defining, save in the most general terms, what a landlord must or may do, disputes are almost inevitable as to whether works were reasonably incurred.

8 A tenant's right to dispute the reasonableness of the works and the amount of the service charges cannot be contracted out of in advance (as the draft appears to seek to do): [Landlord and Tenant Act 1985 section 19, *Hounslow LBC v Waaler* \[2017\] EWCA Civ 45.](#)

MA: This system has been used in several tenant-owned properties that I know about, both before and since its publication in *Clarity for Lawyers* in 1990 and *The Conveyancer* soon afterwards, and as far as I know has functioned without incident.

The tenants have the usual rights of control as shareholders of the landlord company. Clause 9 (quoted in our reply to point 4 above) protects the landlord from unreasonable challenges to its decisions.

The relevant sub-section of s.19 was replaced in 2003 (with some changes of detail we need not consider) by [s.27A\(6\)](#), which provides that an attempt to contract out is void *only to the extent* (our emphasis) that it:

purports to provide for a determination—

(a) in a particular manner, or

(b) on particular evidence,

of any question which may be the subject of an application [to the appropriate tribunal] ... under subsection (1) or (3).

We agree that clause 9 of the lease (point 4 above) cannot bar a tenant from challenging a service charge before the tribunal. Nor is it intended to. It doesn't stipulate either manner or evidence but only sets the "reasonableness" threshold — which seems to be the one *Waalder* said the tribunal should apply. In paragraph 37 of the judgement in that case Lewison LJ said:

... [I]t must always be borne in mind that where the landlord is faced with a choice between different methods of dealing with a problem in the physical fabric of a building (whether the problem arises out of a design defect or not) there may be many outcomes each of which is reasonable. I agree with Mr Beglan that the tribunal should not simply impose its own decision. If the landlord has

chosen a course of action which leads to a reasonable outcome the costs of pursuing that course of action will have been reasonably incurred, even if there was another cheaper outcome which was also reasonable.

Patten and Burnett LJ agreed.

Of course a later court or statute could change this (as it could restrict the applicability of any clause) but meanwhile clause 9 protects the landlord against unreasonable challenges to *any* decision — not just those relating to service charges.

9 An obligation to paint the common parts in every third year may appear unnecessarily prescriptive, but it means that a tenant cannot complain if the landlord carries out its obligation. By not including such a clause, any tenant will be able to say that the common parts were in a reasonable state and only needed painting every fourth or every fifth year. The tenant may well succeed before the Tribunal on such an argument.

In the absence of this clause tenants are precluded from *unreasonable* complaint by clause 9. But s.27A(6) (discussed immediately above) gives them the right to object if their service charges are unreasonably inflated by unnecessary work.

MA: In my experience, few if any landlords (whose solicitors almost invariably draft the lease) impose such an inflexible timetable on themselves, although they commonly impose it when the tenant is responsible for redecoration. Then it can work unfairly by imposing a heavy indirect penalty for a trivial breach, the direct remedies for which are severely constrained by [s.18 of the Landlord and Tenant Act 1927](#). For example, in *Bairstow Eves (Securities) Ltd v Ripley* in the Court of Appeal, the tenant lost the right to renew its lease because it had decorated the premises just before the last year of the lease rather than during the last year.

10 The precedent deliberately uses new wordings for covenants. However, some of the covenants appear unworkable.

A ban on tenants (and only tenants) making “a sound audible in other flats” does not appear to

MA: The rules were drafted according to the instructions of the original landlord-tenants, who approved the final wording. As can be seen from the extract below, although there is a covenant to obey the rules they are distinct from the covenants themselves and can be

stop noise produced by a third party, like a builder or a sub-tenant. (Tenants' covenants are always construed contra preferentem.)

You dislike using "cause or permit" and including liability for subtenants, but it covers this situation. The covenant is in any event impractically strict. There must be very few blocks of flats where no escape of noise is possible. Further, it would appear to mean that a baby crying would be a breach.

There is a similar problem with the covenant not to "allow water to soak through the floors." If a leak occurs in the demise, is there an immediate breach of the covenant? Or only after the tenant becomes aware of the leak and fails to call in a plumber. What if the leak comes from an upstairs flat? What must the tenant who is leaked into do to prevent the water going into a downstairs flat? Is there a breach if the flooding is too great for a bucket to catch the leak?

"reasonably varied" at any time. So if they are unworkable or "impossibly strict" they can easily be adjusted.

But there is a drafting slip in the book: the **red** text shouldn't be there, as it doesn't fit either semantically or syntactically. That it is a slip — and does not exonerate noise from builders and resident sub-tenants — is clear from the *italicised green* words.

The relevant parts of clause 6 read:

The tenant must: ...

K. Obey (*and ensure any occupiers of and visitors to the flat obey*) the following rules (*as reasonably varied at any time by the landlord for the benefit of the tenants as a whole*):

Tenants may not:

1. Make a sound audible inside other flats (**except between 9am and 6pm to an extent inevitable for normal housework, normal repairs, or normal decoration**).

The **brown** text was an attempt to create a reasonable balance between perpetrator and listener, bearing in mind the needs of both and the available sound-proofing. This is a good example of the impossibility (discussed in chapter 23) of legislating precisely and fairly in a finite number of words for an infinite range of possible circumstances.

There is further protection given by the tenants' covenants:

G. Not do or allow in Orchard Court anything which:

1. Might annoy others. ...

and

H. Not dispose of nor part with possession of:

1. Part only of the flat.

2 The whole flat, except ... by a sublease ... in which the subtenant agrees with the landlord to abide by the terms of this lease... .

Could a crying baby be said to be "disobeying" a rule of which it cannot be made aware? Either way, tenants who take reasonable steps to minimise the disruption would not be "permitting" it (page 106). Is this lease any more ageist than any other that seeks to protect residents against undue noise, or any that may not be assigned to under-55s?

Some degree of reasonable give-and-take between the tenants will always be required (by a judge if not by those involved) but we'd be interested in suggestions for improving this clause.

(As I review this in October 2018, no suggestions have been received. – MA)

11 There is no covenant against causing a nuisance. This may be deliberate, because "nuisance" is a word with a lot of legal baggage. However, failing to use a term which has a defined legal meaning leaves other tenants in the block without recourse against general anti-social behaviour by an individual tenant.

The purpose of clause 6G1 (quoted just above) was not to import centuries of legal baggage (which is inaccessible — and of no interest — to the tenants) but to forbid them from doing anything which might annoy their neighbours. Anti-social behaviour annoys. In *Wood v. Cooper* (1894 3 Ch 671) Bowen LJ said:

The expression "annoyance" is wider than "nuisance", and a thing that reasonably troubles the mind and pleasure ... of the ordinary sensible English inhabitant of a house, seems to me to be an "annoyance"....

12 The book rightly condemns lawyers' use of two words where one will do. No one could disagree, so long, however, as one word is truly sufficient. Often multiple words are used to cover all eventualities. Consider a standard landlord's covenant to "insure and keep insured" (a form of wording going back at least

To argue that insurance wasn't a continuing obligation one would have to argue (untenably) that the covenant would be satisfied by taking out a policy and cancelling it the next day. (See the "context" and "commercial efficacy" tests mentioned in point 4.)

to 1811). You substitute a covenant only “to insure” in the belief this means the same. But does it? Suppose the insurer becomes insolvent mid-insurance year and disclaims the policy. Is the landlord in breach of covenant? After all, it did insure.

To avoid even that argument, without the duplication of “insure and keep insured”, you might replace “insure” with “keep insured”. But:

As a matter of language, keep indemnified adds nothing to indemnified.

Peter Butt: *Legal Usage: A modern Style Guide*, p. 332

and

A variant of “shall indemnify” is “shall indemnify and keep indemnified”. Don’t use it – it serves no discernable purpose.

Kenneth Adams: *A Manual of Style for Contract Drafting*, para 13.430.

- 13 Or suppose the landlord, acting reasonably, takes insurance with a warranty against sub-letting to students or benefit claimants. One lessee sublets to students who burn the property down. The insurer repudiates. Breach or no breach?

How could the landlord be acting reasonably if, without each tenant's consent, it gives a warranty inconsistent with the tenants’ freedom to sub-let under clause 6H2b? It would put any tenant exercising — or who has already exercised, if they renew the sublease — that right into breach of clause 6G3 (not to prejudice landlord’s insurance) and would deprive the whole block of insurance cover.

Added 17.10.18:

A similar point arose in [*Duval v. 11-13 Randolph Crescent Ltd*](#), in which Lewison LJ, giving the judgment of the Court of Appeal, said:

There is a long line of authority in which the courts have consistently held that where an obligor undertakes a contingent or conditional obligation, he is under an obligation not to prevent the contingency from occurring; or from putting it out of his power to comply with the obligation if and when the contingency arises.

[2018] EWCA Civ 2298, para 20: 10 Oct 2018

- 14 It is bad practice to include references to documents not reproduced in the lease. The draft requires the landlord to insure “against the perils required of borrowers by the Council of Mortgage Lenders.” It is unclear whether the

We agree that, other things being equal, it is better not to divert the reader to another document. But sometimes other things are **unequal**, so inflexible obedience to rules is bad practice.

perils are those required by the Council from time to time or those required at the time of the lease.

I suspect you mean the former construction, but this is likely to be unworkable.

A Tribunal is likely to prefer the latter construction, but you then have the practical problem of identifying what were the Council's requirements at the time of the grant of the lease (which will become increasingly distant in time).

A better approach is to ask: what is the purpose of the clause and what is the most convenient way to achieve it?

Clause 7C1 is intended:

(a) to inform the landlord's insurance brokers when they arrange the policy, and annually when they renew it, that CML-compliance is required and

(b) to reassure buyers' and lenders' conveyancers that the landlord is committed to this.

Lenders differ in their requirements. Moreover, the requirements are long and detailed and change from time to time; they will change often within the lifetime of most leases. So they cannot be set out in the lease. But it doesn't matter. They will rarely if ever be consulted by the landlord (who in this case is responsible for the insurance) and are even less likely to be consulted by the tenants. Anyone wanting to know the terms of the insurance will look at the policy, not the CML requirements. Anyone who does need to check those requirements has free online access to the current version at www.cml.org.uk/lenders-handbook.

This system works smoothly. The traditional method of listing in full detail in the lease every requirement then current, as advocated by Mr Jack in point 6 above, could not possibly work.

15 There is no reason to suppose that the Council of Mortgage Lenders will exist in twenty years' time, let alone five hundred years'.

A fair point. In fact, on 1 July 2017, just after the book went to press, the Council of Mortgage Lenders was "integrated into a new trade association, UK Finance" and this announcement was made on the CML website at www.cml.org.uk/lenders-handbook:

All references to the CML Lenders' Handbook shall be deemed to mean the UK Finance Mortgage Lenders' Handbook. Any associated documents which refer to the CML shall be deemed to mean UK Finance. A set of FAQs

and responses has been prepared to assist users of the Handbook during the transition from the Council of Mortgage Lenders to UK Finance.

If the clause *did* become unworkable at any time, landlord and tenants would have a strong interest in complying with the requirements of any successor body, and a decision to do so would be protected by clause 9 (quoted above). As we said on page 180:

A sensible drafter will recognise that you cannot legislate for everything and must agree with the client a sensible cut-off point. For instance, in drafting a will with a gift to A it is sensible to ask who is to take it if A predeceases the testator. It might be worth including a second reserve in case both A and the first reserve have died. But you have to draw the line somewhere, and the sensible place to do so depends on a balance involving the amount at stake, the cost and convenience of adding further precautions, and the likelihood of mass extinction.

16 Lastly, the book says that the “standard of repairs is not set impractically high; the tenants, voting through the company, can allow the building to age gracefully and may eventually sell for redevelopment.” Unfortunately, this overlooks tenants’ rights qua tenant. Any one of the forty tenants can insist that the building be maintained as a high-class residential estate. The landlord (even if 39 tenants agree) cannot lawfully refuse to do that. The single aggrieved tenant would be entitled to apply to the Tribunal for the appointment of a manager. (There is a discretion, so in an extreme case, the Tribunal might refuse appointment, but in principle the parties are bound by their bargain.)

Likewise you appear to believe that the landlord could sell the entire block for redevelopment. This is not the case. Every

The landlord’s duty is to:

manage [not repair] ... as a high-class residential estate, maintaining the facilities to a reasonable standard (clause 7B).

The repairing standard in clause 7A is only to:

such condition as is reasonable having regard to the class and age of the building.

At some point, the age of the building will dictate that it is no longer reasonable to keep the building habitable or even upright. Repairing covenants in traditional leases do not address this problem but we have suggested a solution. When a majority of tenants (or whatever super-majority the articles prescribe) consider that the class and age of the building make it uneconomical or undesirable to continue, they can sell — subject to the discretion of the court on the application of any

tenant (and every mortgagee) would have to agree. Any single tenant or mortgagee would have a veto. You are quite right that it is ridiculous to suppose that a building can sensibly be kept for a thousand years. Some sensible system could be included in the lease for allowing redevelopment after, say, a hundred years, but merely setting up a tenant-owned landlord will not do it.

disgruntled minority. If a dissenting tenant tried to prevent the sale, relying on clauses 7A and 7B, the outcome would depend on what standard of repair and facilities it was still reasonable to maintain. As MA noted on page 248:

When struggling with Clause 7A for the original version of this lease I asked a much older and more experienced solicitor how he would avoid the conflict between the usual repairing covenant and the fact that the lease was intended to outlive the building. "Who cares?", he said: "you'll be dead by then."

This lease offers a more responsible approach but we're open to better suggestions.