Fit-Out, Repair & Make Good Obligations

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Obligations to repair and maintain in commercial leases, including considerations of the tenant's initial fit out and end of lease make good obligations

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1. General overview: repair and maintenance issues

1.1 Disputes between a landlord and tenant about repair and maintenance are very common. The case law on the topic is extensive.

1.2 As a result, it is very important that the lease clearly sets out the parties' mutual expectations about who is meant to do what works and at whose expense, as well as making it clear what works or costs are excluded from a party's area of responsibility.

1.3 At common law there is no implied obligation upon a tenant to repair and maintain the leased property. A tenant will only be obliged to repair and maintain the leased property if either:

   (a) there is a covenant implied by statute into the lease to that effect; or

   (b) the lease contains a covenant for the tenant to do so.

1.4 Section 92(ii) of the Transfer of Land Act 1893 (WA) (Act) implies into leases an obligation upon the tenant to:

   ... keep and yield up the leased property in good and tenantable repair accidents and damage from storm and tempest and reasonable wear and tear excepted.

This only applies to leases that are made under the Act, and will not apply if excluded by the terms of the lease.
1.5 There is no implied common law obligation, nor any implied statutory obligation that is similar to that in section 92(ii) of the Act, requiring the landlord to repair and maintain the leased property.¹

1.6 As a general rule, in the absence of an express provision in the lease:

(a) If the tenant is not made responsible for an item of repair, this does automatically shift responsibility for that work onto the landlord.² It is a common misconception by tenants that if, for example, the lease states that the tenant is not responsible for fair wear and tear, this passes the obligation for those excluded works to the landlord. This is not the case.³

(b) The landlord is under no obligation to put the leased property into proper repair at the commencement of the lease. The courts will not construe into a lease an obligation upon the landlord to make the leased property suitable or fit for purpose.⁴ However, the landlord will be responsible for any fraudulently concealed defects.⁵

(c) The landlord has no repair and maintenance obligation in relation to the leased property over the course of the lease.⁶

1.7 Despite the general principles discussed in (a)-(c) above, courts are not prevented from implying an obligation on the landlord in certain factual circumstances.⁷ For example:

(a) In the English case Barrett v Lounova [1989] 1 All ER 35, the tenant had an express obligation to repair the inside of the leased premises, but there was no express obligation in the lease dealing with the exterior. On the facts, the court implied a covenant on the landlord to repair the exterior of the premises to give the lease business efficacy, as the tenant was unable to perform its obligations under the lease without the exterior of the premises being in good repair.

It should be noted that this decision has received much criticism. It appears that the decision is a product of the unique facts in the case, and

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¹ However, if the lease is a retail shop lease in a retail shopping centre then section 14 of the Commercial Tenancy (Retail Shops) Agreements Act 1985 (WA) does provide tenants with some degree of remedy. This is discussed below.
³ Arden v Puller (1842) 152 ER 492; Collins v Winter [1924] NZLR 449.
⁴ Chappell v Gregory (1864) 55 ER 361; Western Electric Ltd v Walsh Development Agency [1983] QB 796. Note that different rules apply to a furnished residence.
⁵ Gordon v Selico Ltd (1986) 278 EG 53 (Court of Appeal).
⁶ Ibid.
⁷ See McAuley v Bristol City Council [1992] 1 All ER 749 (Court of Appeal) for a discussion of the principles for implication of landlord repair covenants.
therefore does not stand as a general principle of law. What is necessary to be done in order to carry out a repairing obligation normally falls on the person who has that obligation. It is also possible for premises to be leased without either party carrying the responsibility.\(^8\)

(b) The courts have been prepared to imply landlord covenants where, for example, the lease contains a covenant on the tenant to pay for repair work and the tenant cannot perform the tenant's obligations without the landlord undertaking works which are outside the express terms of the tenant's obligations.\(^9\)

1.8 In addressing these principles concerning the landlord's repair obligations (or lack thereof), a distinction needs to be made between leased property and common areas. If the tenant does not lease the whole building and the landlord retains various parts (for example stairs and other similar common areas), then the landlord, while not under an absolute repair obligation, will fall under a lesser implied obligation to take reasonable care to maintain the common areas.\(^10\) Note that this lesser obligation would not be implied if it is excluded in the lease.

1.9 Where a tenant is not satisfied with a landlord's repair and maintenance of the property, there are potential avenues for a tenant to pursue a landlord in tort, on the basis of a breach of duty of care. For example, in Gotze v Ylitalo [2005] ANZ ConvR 159 (\textit{Gotze}) the Supreme Court of Queensland held that:

\[\text{[it was]} \text{ satisfied the septic system was negligently installed. It was not done by qualified tradespeople. It was not done properly. It was always foreseeable that people in the position of Mr and Mrs Gotze would suffer damage if the septic system was not properly installed. Even if the damage caused was purely economic, Mr Ylitalo as the builder and the person responsible for the installation would nonetheless remain liable…a person who personally constructs premises for a particular commercial purpose and then leases those premises to a tenant will be liable for the foreseeable economic loss flowing from negligent construction.}^{11}\]

\(^8\) Adami v Lincoln Grange Management Ltd [1998] 1 EGLR 58.
\(^9\) See, for example, Duke v Westminster Guild [1985] QB 688; Carbure Pty Ltd v Brique Pty Ltd [2002] ANZ ConvR 584; Carrathool Hotel Pty Ltd v Scutti [2005] ANZ ConvR 471.
\(^10\) Liverpool City Council v Irwin [1976] 2 All ER 39 (House of Lords).
As a matter of standard leasing practice within a jurisdiction, many leases do not contain any obligations on the landlord to repair and maintain either the building or the landlord’s plant and equipment. This usually reflects the stronger bargaining position of the landlord. Note that in instances where an obligation is given, it is usually restricted to maintaining the structural soundness of the building and is coupled with a limitation upon liability for breach.

Section 14 of the Commercial Tenancy (Retail Shops Agreements) Act 1985 (WA) (CTA) is an example of where statute deliberately intervenes to provide the tenant with some measure of redress for failure of the landlord to undertake repairs and maintenance, thereby encouraging the landlord to effect those repairs. However, section 14 only applies to retail shopping centre leases.

Section 14 of the CTA enables a tenant to claim compensation from the landlord in a number of specific circumstances:

(a) where the landlord fails to rectify a breakdown of plant or equipment for which the landlord is responsible (and that breakdown causes the tenant loss of profits); and

(b) where the landlord fails to adequately clean, maintain or repair the buildings comprising the centre or any common area connected with the centre.

In both cases the tenant's right to compensation follows the common law: the tenant must first give the landlord written notice of the matter requiring rectification within such time as is reasonably practicable, then the landlord must fail to do so.

Note should also be made of section 12(2) of the CTA, which prevents a landlord from recovering certain costs from a tenant notwithstanding the provisions in the lease. Section 12(2) provides that:

A provision in a retail shop lease in respect of premises in a retail shopping centre to the effect that the tenant is obliged to make a payment to or for the benefit of the landlord, whether by way of contribution to a sinking fund or otherwise, for or in respect of the amortisation of all or part of the costs of or incidental to:

(a) the construction of the retail shopping centre;

(b) any extension of the centre or structural improvement to the centre; or
(c) any plant or equipment that is or becomes the property of the owner of the retail shopping centre, is void.

1.14 Section 12(2)(c), in particular, has given rise to numerous disputes and proceedings. For example, in the Western Australian State Administrative Tribunal case Gil & Ors v Wildnight Pty Ltd [2008] WASAT 135 (16 July 2008) (member B De Villiers). One of the matters in dispute concerned the landlord's claim from the tenant of costs the landlord had incurred in undertaking repairs to air-conditioning units following fire damage, and then replacing two of the units a couple of years later. On the facts of the case, the particular works these costs related to were "capital" repairs and so did not fall within the definition of "maintenance" in the relevant leases (this also highlights how important it is to draft repair and maintenance clauses carefully). Most importantly, however, the Tribunal held that, in any event, the air-conditioning units were part of the plant and equipment of the landlord, so section 12(2) of the CTA applied. Even if the repair work fell within the definition of "maintenance", the CTA rendered void such a definition.

1.15 If a covenant is imposed on the landlord to repair, it is often construed as being dependent on the tenant first giving the landlord notice to repair (i.e. the obligation on the landlord does not materialise until after receipt of notice from the tenant requesting repair). The rationale for this implication is that the landlord has given the tenant exclusive possession, and it would be unjust to require the landlord to rectify a defect that the landlord is not in a position to know, and does not have the means of knowing, needs to be rectified.\(^{12}\) This general rule does not apply where the defect is located in a part of the building that the landlord has retained control over.\(^{13}\) However, whether or not a court or tribunal will imply a requirement for notice depends on the particular facts, including the terms and nature of the particular covenant.\(^{14}\)

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\(^{12}\) Morgan v Liverpool Corporation [1927] 2 KB 131; McCarrick v Liverpool Corporation [1927] AC 219.

\(^{13}\) Bishop v London Consolidated Properties Ltd [1933] All ER Rep 963.

\(^{14}\) Greetings Oxford Hotel Pty Ltd v Oxford Square Investments Pty Ltd (1989) 18 NSWLR 33 (Greetings Oxford Hotel). In this case, a covenant by the landlord to maintain lifts and replace them as required did not require notice, and the landlord had an obligation to take preventative action to avoid malfunctions and then to address them if they occurred.
Covenants upon tenants in leases are usually extensive and can be onerous. Often tenants (and their lawyers) do not appreciate the implications of particular wording used, and the case law behind it.\textsuperscript{15}

A tenant's obligation in a lease to repair may, however, be qualified depending upon the wording in the lease or the circumstances. For example, the general rule is that a covenant to repair is construed with reference to the age, character and locality of the premises.\textsuperscript{16} However, the express wording of the lease can oust this rule and if the tenant agrees to keep an old property in good condition, then the tenant will be obliged to do so, regardless of the means required to fulfil that obligation.\textsuperscript{17}

Another example is where the landlord may have made pre-contractual representations. In the English case Brikom Investments Ltd v Carr [1979] 2 All ER 753, a lease contained covenants by the landlord to repair and maintain the structure of the building including the roof, with a covenant by the tenant (in common with other tenants of the building) to contribute to costs of excess maintenance. Before the lease was entered into, the landlord made oral representations that it would do these works at its own cost. The tenants were relieved of these obligations either on the basis that the landlord had waived payment, or that there was a collateral contract.

The nature and scope of a tenant's repair obligation contained in a lease depends on the wording used and its context. When interpreting a lease, the ordinary rules of construction of a contract apply. These general rules include:

(a) The wording used should be given its proper legal significance as applied to the subject matter to which the covenant refers. Effect should be given as far as possible to every word. Decisions upon the meanings of particular expressions provide valuable guidance, but they must not be applied blindly to the facts of another case even where the expressions used are the same or have been held to have the same meaning if the

\textsuperscript{15} A good example of this is the word "keep". If a tenant is obliged "to keep" an item in repair, this means that even if the item was not in repair at lease commencement then the tenant is obliged to put it into repair: Payne v Haine (1847) 153 ER 1304; Proudfoot v Hart (1890) 25 QBD 42; Proudfoot v Hart (1890) 25 QBD 4 (\textit{Proudfoot}); Clowes v Bentley Pty Ltd (1970) WAR 24; Justelle Nominees Pty Ltd v Martin [No 3] [2009] WASC 264 (17 September 2009)(Blaxell J).

\textsuperscript{16} Lurcott v Wakely and Wheeler [1911] 1 KB 905 (\textit{Lurcott}); Credit Suisse v Beegas Nominees Ltd [1994] 4 All ER 803.
particular circumstances of the latter case do not fairly allow the same construction to be placed on the words.18

(b) Words are not necessarily to be given their strict literal meaning, and it is the "good sense" of the agreement reached by the parties that needs to be ascertained.19

1.20 The case law does set out a number of general principles for interpreting repair and maintenance covenants, including the following:

(a) A covenant to "repair" does not generally extend to "renew" or "replace." Put differently, repair does not extend to reconstruction of the whole or substantially the whole of a building.20 However, it can and usually does involve replacement of subsidiary parts. In some extreme cases, repair could extend to replacement of the whole building (for example, to cure an unsuspected inherent defect).21 This rule generally connotes the idea of making good damage so as to leave the subject, as far as possible, as though it had not been damaged.

(b) The extent to which repair or renewal requires rebuilding, and if so, to what extent rebuilding is required, is a question of fact.22 If the tenant cannot perform a covenant to repair without making improvements, then the expense of the improvements falls on the tenant.

(c) Where there is more than one way of properly satisfying an obligation, the tenant can take the least expensive option, provided that it satisfies the obligation.23

(d) The tenant's obligation to repair is often qualified in leases by words such as "good", "habitable" or "tenantable." It appears that in general, these all mean essentially the same thing,24 but this must not be considered an inflexible rule and there are factors which may affect the outcome, such as the length of the term.

(e) A covenant to repair does not ordinarily carry with it an obligation to fix design defects. However, if works are needed for another reason and it would be sensible and practical to carry out the rectification works at the same time, then the tenant may be obliged to undertake those

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18 Calthorpe v McOscar [1924] 1 KB 716.
19 White v Nicholson (1842) 4 Man & G 95.
20 Lurcott, above.
24 Proudfoot, above.
rectification works as part of the repair works, provided that the works do not involve substantial rebuilding of the whole, and do not give the premises a wholly different character.25

(f) As was noted in Brew Bros Ltd v Snax (Ross) Ltd [1970] 1 QB 612, whether the work required at the end of the day is indeed "repair" is a complicated exercise in each case, which involves looking at a number of factors. Those factors may include:

(i) all or any of the particular wording in the lease and its context in the lease as a whole;

(ii) the factual circumstances such as the age and location of the premises, the state of the premises when the lease was granted, what the defect is and the cost and work needed to fix it;

(iii) what the current building practice is; and

(iv) the effect of the works on the value of the premises, the lifespan of the premises etc.

The weight to be attached to any factors will vary from case to case.

(g) The tenant's breach of a covenant to repair is not at common law a repudiation or fundamental breach of the lease.26 Unless the lease is drafted to give the landlord a right of termination for breach of the repair covenant, the landlord's remedy would be damages not termination.

1.21 The tenant's covenant to repair in leases is usually drafted to exclude a number of matters, including "structural repairs." There is extensive case law on what constitutes "structural" repairs. This case law demonstrates that whether repairs are to be properly characterised as "structural" or not is very much dependent on the particular facts of a given case, and that it is not possible to lay down hard and fast rules. While works that are structural can only be undertaken in relation to something that is a "structure," not all works done to a structure are properly characterised as "structural."27

25 See Gotze, above.
26 Progressive Mailing House Pty Ltd v Tabali Pty Ltd (1985) 157 CLR 17.
27 Alando Holdings Pty Ltd v Australian Window Furnishings (NSW) Pty Ltd [2006] NSWCA 224.
1.22 As was noted by Brereton J in Hampson v Clyne (1967) 86 WN (NSW) 321:

'Structure' of course is a word of which the meaning varies considerably according to the context, and the phrase 'structural character' or 'defect of a structural character' varies correspondingly. Literally 'structure' means something which has been constructed and 'defect of a structural character' means either a fault in putting the structure together or some subsequent failure on the part of the structure to remain satisfactorily put together. With particular reference to buildings in common parlance we refer to the bare building as the structure. We refer to the fixtures and fittings attached to the structure although they may themselves as individual units be technically 'structures'. We refer also to installations, such as gas and water and piping and electrical circuits. Each of these may, however, independently be in certain contexts regarded as a 'structure' in that it is something which has been constructed within another structure.

1.23 In the earlier case of Granada Theatres Ltd v Freehold Investments (Leystone) Ltd [1959] Ch 592 (Court of Appeal) (Granada), the nature of structural repairs was discussed in the context of a cinema. The lease in question imposed an obligation on the tenant to keep the premises in good and substantial repair and condition and properly decorated, "but nothing in this clause contained shall render the [tenant] liable for structural repairs of a substantial nature to the main walls roof foundations or main drained of the demised building." Separately, the landlord covenanted to "repair maintain and keep the main structure walls roofs and drains of the demised premises in good structural repair and condition."

Vaisey J noted that:

The case is not without difficulty, and I confess that I have changed my mind more than once during the hearing which has lasted for no less than 4 days of the present term. I have first to construe, and secondly to apply to the particular facts of the case some words which at first sight might seem reasonably easy to interpret. They are these: 'structural repairs of a substantial nature'. It appears that the expression 'structural repairs' has never been judicially defined, a fact to which attention is drawn in Woodfall on Landlord and Tenant (25th ed.)...The writer of the text book submits .. that 'structural repairs' are those which involve
interference with, or alteration to, the framework of the building, and I would myself say that 'structural repairs' means repairs of, or to a structure. It has been said that repairs must always be either structural or decorative\(^{28}\) and if that is the simple criterion, we are in this case certainly not dealing with decorative repairs….We are dealing here with (i) the roof and (ii) one of the main walls of a cinema, and surely those are parts of the structure of a building.

1.24 In the Western Australian State Administrative Tribunal case Wilde and Smith [2010] WASAT 9 (29 January 2010) (Members Raymond and Ednie-Brown), in determining whether the landlord had failed to carry out structural maintenance and repairs, the Tribunal considered what constituted "structural repair" in the context of a lease of premises used for a bakery, café and tearoom where:

(a) clause 2(e) included a covenant by the lessee to "keep the leased premises in good and tenantable repair and condition (fair wear and tear, damage by fire, storm, tempest, earthquake, explosion excepted...) and to keep the leased premises in safe condition so as to avoid any injury to any person occupying entering or being in or upon the said premises";

(b) clause 2(ss) provided that "Building Repairs not being of [a] structural nature are to be the responsibility of the Lessee"; and

(c) clause 3(a) provided "Structural Repairs - The Lessor is responsible for all structural maintenance and repairs of the Leased Premises".

The Tribunal noted that:

As a matter of ordinary language, we would understand 'structural' which is the adverb of the corresponding noun (structure), to mean no more when used to describe 'structural repairs' than to speak of 'repairs to the structure'. But the true meaning of the phrase 'structural repairs' depends on its context and must be construed within the lease read as a whole. Clause 2(ss) and clause 3(a) of the lease must be reconciled within that context...We find, on our construction of the lease, that the landlord's obligation is to carry out any repairs necessary to the structural elements of the building, being those elements which are load bearing or must resist the type of action as described in the BCA. The obligation is,

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\(^{28}\) Note that this possible distinction between structural and decorative repairs has been criticised and cannot be held to be good law Carbure Pty Ltd v Brile Pty Ltd [2002] VSC 272 and Advance Fitness Corp Pty Ltd v Bondi Diggers Memorial and Sporting Club Ltd [1999] NSWSC 264.
however, subject to the specific provisions in the lease, such as clause 2(oo), in terms of which the lessee is still liable to carry out repairs to a structural element, the floor, provided the repairs are not, in themselves, of a structural nature, for example, such as re-screwing a floor board which has become loose.

1.25 Also of interest are the following observations of Recorder Thaye Forbes QC in Irvine v Moran [1991] 1 EGLR 261:

I have come to the view that the structure of the dwelling house consists of those elements of the overall dwelling house which give it its essential appearance, stability and shape. The expression does not extend to the many and various ways in which the dwelling house will be fitted out, equipped, decorated and generally made habitable.

I am not persuaded...that one should limit the expression 'the structure of the dwelling house' to those aspects of the dwelling house which are load bearing in the sense that sort of expression is used by professional consulting engineers and the like; but what I do feel is...that in order to be part of the structure of the dwelling house a particular element must be a material or significant element in the overall construction.

To some extent, in every case the will be a degree of fact to be gone into to decide whether something is or is not part of the structure of the dwelling house.

1.26 As a general rule, a court will not order specific performance of an obligation to repair. However, there are exceptions. One of those, in the case of a landlord's obligation to repair, is where the landlord has covenanted to repair or maintain some property which is not located on the leased premises, and which the tenant cannot enter onto and maintain at his or her own expense. In a case such as this, a court of equity may grant a mandatory order to compel the landlord to carry out the repair or maintenance. In more recent case law, such as Price v Strange [1978] Ch 337, it has been recognised that:

See Granada, above.
See Greetings Oxford Hotel, where the covenants in question related to maintenance of the lifts in the common areas and to replace them when needed. See also Storer v Great Western Railway Co (1842) 63 ER 21, where the plaintiff agreed to withdraw his opposition to the railway passing across his land on condition that the railway company construct and forever after maintain a particular archway on the land. The railway company got the use of the land but declined to build the archway. The court ordered it to both construct and maintain the archway as agreed.
...there is a wider principle which would avail the principle in this case, namely, that in these days the Court can always grant an injunction or give other equitable relief where justice requires it...One manifestation of this principle is that in an appropriate case, despite the general principle, equity does give specific performance of a contract to build or do repairs.

1.27 Consideration should also be given to the express terms of the lease and the remedies contemplated by the parties. For example, a party may have reserved to it an express right to rectify the breach of the other party and claim the costs. Such a claim is a claim for a debt due and not a claim for damages.31

2. **Tenant's fit out obligations**

2.1 Given that the general rule is that the tenant's repair and maintenance obligations during the lease are determined by the state of repair and condition of the leased property at the commencement date, care needs to be taken in drafting the hand over and fit out provisions to ensure that the intent of the parties is recorded clearly.

2.2 Often the tenant has a fit out period before the lease commences. From the landlord's point of view, it is preferable to have the base line to be the earlier of the commencement date and the date of possession by the tenant to commence its fit out works. For example, the landlord does not want the tenant to obtain the advantage of any defect caused by the tenant during fit out. It also does not want the lease end obligations to be measured back against the state of the premises after the works were completed, so that the tenant can walk away without making good.

2.3 These issues need to be clearly covered in the lease using careful drafting.

2.4 From a tenant's perspective, usually the lease will incorporate the landlord's fit out guide by reference. A copy should be obtained and studied carefully by the tenant, and expert advice taken, if needed, before signing the lease so that any appropriate amendments can be made to the lease.

2.5 The tenant needs to take care particular care in establishing what is being handed over to it as the "premises". The lease must clearly meet the tenant's expectations.

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31 Hamilton v Martell Securities Ltd [1984] 1 All ER 665.
as to what works the landlord will do before hand over for the tenant to commence its fitting out. The tenant may want the premises stripped back to the basic building, but then with particular works done by the landlord (for example, certain services brought to certain points, the floor, walls and ceiling to be of a particular specification etc.).

3. **Tenant's make good obligations**

3.1 Before entering into a lease, the tenant also needs to look ahead to lease end, and consider whether it wishes to negotiate an exemption from any make good obligations. For example:

(a) If the landlord hands the premises over with another tenant's existing fit out behind, the new tenant should check carefully to see what its obligations are regarding that fit out. Usually the landlord will expressly require that the tenant accepts the premises are provided on an "as is" basis and that the tenant assumes responsibility for the fit out (including any defect during the lease term as well as removing it at lease end).

(b) If the landlord has done any works to the base building in order to suit the tenant's purposes, the landlord will require the lease to be carefully drafted, to ensure that the return to the base building is the tenant's responsibility. The tenant may wish to try to exempt itself from certain works (such as removal of a grease trap).

3.2 The tenant should ensure that it has investigated these matters and is aware of the obligations it is taking on, and what works and cost is involved, before entering into a lease.

3.3 The lease usually also requires the tenant to leave the premises in state of repair and condition commensurate with the due and punctual performance of the tenant's repair obligations. The tenant needs to check these clauses carefully to ensure that any exemptions it secured during the term (for example, fair wear and tear, structural repairs and insured risks) also apply at lease end.

3.4 At common law, if the tenant has not undertaken its end of lease obligation:

(a) The tenant is liable to pay the landlord damages in a sum that will cover the fair and reasonable costs that the landlord would incur in putting the
premises into the state of repair the tenant was bound to leave them.32 This measure of damages still applies even if the landlord does not intend to do the works. In Joyner, the landlord had re-let the premises to a third party who intended to pull down the premises and rebuild them, and who had also agreed to pay higher rent. The tenant was still required to pay the full measure of damages. New South Wales and Queensland have enacted legislation to cure this unjust result,33 but there is no corresponding legislation in Western Australia or other Australian jurisdictions.

(b) Additional damages may be awarded to the landlord for the loss of the use of the premises while they are undergoing repair.34

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32 Joyner v Weeks [1891] 2 QB 31 (Joyner).
33 Section 133A Conveyancing Act 1919 (NSW) and section 112(1) Property Law Act 1974 (Qld). These are based on the English Landlord and Tenant Act, 1927.
34 Woods v Pope (1835) 172 ER 1461.