Issues that Arise in the Life of a Lease

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Obligations to Repair and Maintain, Market Rent Reviews and Contribution to Landlord's Operating Expenses

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1. General overview: repair and maintenance issues

1.1 Leases are contracts and, like many other contracts, leases can last for a long time. Entry into them requires the landlord and the tenant to gaze into the future and to set down their expectations about how things should pan out between them over the course of the lease. Unfortunately, this inevitably means that 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.

1.4 While there is an implied obligation at common law for a tenant to use leased property in a "tenant like manner" (or "husband like manner" as it is sometimes referred to), the courts have made it clear that this obligation does not amount to a covenant to repair. Lord Denning had this to say in the English Court of Appeal in the 1950's which still holds good today:

... apart from express contract, a tenant owes no duty to the landlord to keep the premises in repair. The only duty of the tenant is to use the premises in a husband-like, or what is the same thing, a tenant-like manner... But what does 'to use the premises in a husband-like manner' mean? It can, I think, be best shown by some illustrations. The tenant must take proper care of the place. He must, if he is going away for the winter, turn off the water and empty the boiler. He must clean the chimneys, when necessary, and also the windows. He must mend the electric light when it fuses. He must unstop the sink when it is blocked by waste. In short, he must do the little jobs about the place which a reasonable tenant would do. In addition, he must, of course, not damage the house wilfully or negligently; and he must see that his friends and guests do not damage it; and if they do he must repair it...

... [the tenant] is, by the common law under an obligation not to commit waste, that is to say, voluntary waste, and he is also under an obligation to use the premises in a tenant-like manner... those are not obligations to repair. They are obligations as to his conduct, and user of the premises, and so long as they are fulfilled, as they ought to be, no question of repair arises. It is true of course that if the tenant breaks those obligations... he must execute repairs or pay damages. But in doing so he is not fulfilling an obligation to repair under the terms of the tenancy, express or implied. He is only remedying his own breaches of common law obligations as to conduct and user. These obligations are altogether separate and distinct from those imposed by a covenant to repair, and give rise to separate and distinct remedies.

1.5 As a result a tenant will only be under an obligation to repair and maintain the leased property if either:

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

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2 Regis Property Co Ltd v Dudley [1959] AC 370 at 407
1.6

For freehold land (irrespective of whether the leased property is used for retail or some other purpose) that means our starting point to see how legislation has changed the common law is section 92(ii) of the Transfer of Land Act 1893 (WA) (TLA). That section implies into leases an obligation upon the tenant to:

\[ \ldots \text{keep and yield up the leased property in good and tenantable repair accidents and damage from storm and tempest and reasonable wear and tear excepted.} \]

However, this section only applies to leases that are made under the TLA. It also will not apply if excluded by the terms of the lease.

1.7

There no implied common law obligation, nor any implied statutory obligation that is similar to that in section 92(ii) of the TLA, requiring the landlord to repair and maintain the leased property.\(^3\)

1.8

Leaving aside for the moment the provisions of the Commercial Tenancy (Retail Shops) Agreements Act 1985 (WA) (CTA), so far as the landlord is concerned as a general rule in the absence of an express provision in the lease:

(a) If the tenant's obligation to repair excludes certain works this exclusion does not automatically shift responsibility for that work onto the landlord.\(^4\) 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\(^5\), this passes the obligation for those excluded works to the landlord. This is not the case.\(^6\) An express obligation on the part of the landlord is needed.

(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. However, the landlord will be responsible for any fraudulently concealed defects.\(^7\)

(c) The landlord has no repair and maintenance obligation in relation to the leased property over the course of the lease.\(^8\)

1.9

Despite the general principles discussed in paragraph 1.8 (a)-(c) above, courts are not prevented from implying an obligation on the landlord in certain factual circumstances.\(^9\) For example:

\[ \ldots \]

\(^3\) However, if the lease is a retail shop lease in a retail shopping centre then section 14 of the CTA does provide tenants with some degree of remedy. This is discussed below.


\(^5\) As to the meaning of "fair wear and tear" see the House of Lords in Regis Property Co Ltd v Dudley [1959] AC 370.

\(^6\) Arden v Puller (1842) 152 ER 492; Collins v Winter [1924] NZLR 449.

\(^7\) 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.

\(^8\) Gordon v Selico Ltd (1986) 278 EG 53 (Court of Appeal).

\(^9\) Ibid.

\(^10\) 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.
(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 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.11

(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.12

1.10 In addressing these principles concerning the landlord's repair obligations (or, should we say, lack thereof), it is important to make a distinction between the leased property itself and any 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.13 Note that this lesser obligation would not be implied if it is excluded in the lease.

1.11 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 (Gotze) the Supreme Court of Queensland held that:

……[it was] 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.14

1.12 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.

1.13 Section 14 of the 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

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12 See, for example, Duke v Westminster Guild [1985] QB 688; Carbure Pty Ltd v Brile Pty Ltd [2002] ANZ ConvR 584; Carrathool Hotel Pty Ltd v Scutti [2005] ANZ ConvR 471.
13 Liverpool City Council v Irwin [1976] 2 All ER 39 (House of Lords).
encouraging the landlord to effect those repairs. However, section 14 only applies to retail shopping centre leases.

1.14 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.

1.15 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.

1.16 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.

1.17 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. This general rule does not apply where the defect is located in a part of the building that the landlord has retained control over. However, whether or not a court or tribunal will

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15 *Morgan v Liverpool Corporation* [1927] 2 KB 131; *McCarrick v Liverpool Corporation* [1927] AC 219.

16 *Bishop v London Consolidated Properties Ltd* [1933] All ER Rep 963.
imply a requirement for notice depends on the particular facts, including the terms and nature of the particular covenant.\textsuperscript{17}

1.18 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{18}

1.19 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{19} 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{20}

1.20 Another example is where the landlord may have made pre-contractual representations. In the English case \textit{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.

1.21 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 particular circumstances of the latter case do not fairly allow the same construction to be placed on the words.\textsuperscript{21}

(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.\textsuperscript{22}

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

\textsuperscript{17} \textit{Greetings Oxford Hotel Pty Ltd v Oxford Square Investments Pty Ltd} (1989) 18 NSWLR 33 (\textit{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.

\textsuperscript{18} 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: \textit{Payne v Haine} (1847) 153 ER 1304; \textit{Proudfoot v Hart} (1890) 25 QBD 42.


\textsuperscript{20} \textit{Lurcott v Wakely and Wheeler} [1911] 1 KB 905 (\textit{Lurcott}); \textit{Credit Suisse v Beegas Nominees Ltd} [1994] 4 All ER 803.

\textsuperscript{21} \textit{Calthorpe v McOscar} [1924] 1 KB 716.

\textsuperscript{22} \textit{White v Nicholson} (1842) 4 Man & G 95.
(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. 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). 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. 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.

(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, 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 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.

(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.

23 Lurcott, above.


27 Proudfoot, above.

28 See Gotze, above.
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. 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.

1.23 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."  

1.24 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.

1.25 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... 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 and if that is the simple criterion, we are in this case certainly not dealing with decorative repairs.... We are dealing here with structural repairs of a substantial nature'.

29 *Progressive Mailing House Pty Ltd v Tabali Pty Ltd* (1985) 157 CLR 17.

30 *Alamdo Holdings Pty Ltd v Australian Window Furnishings (NSW) Pty Ltd* [2006] NSWCA 224.

31 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.
(i) the roof and (ii) one of the main walls of a cinema, and surely those are parts of the structure of a building'.

1.26 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 our 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, 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.

1.27 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 is 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.

1.28 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

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32 See Granada, above.
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:

...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.

1.29 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.

2. **Market Rent Reviews**

2.1 It is not necessary for a valid lease to exist for there to be rent payable. However, from a landlord’s perspective, the main reason for entering into a commercial lease is invariably to make a profit - the bigger the better.

2.2 Rent is the compensation (or return) that the landlord receives from the tenant in exchange for the tenant having exclusive use of the leased property. That rent can take various forms but the form we are most used to seeing is what I will call a base rent which may or may not be coupled with a turnover or percentage rent based on the gross receipts of the business. It is the former type of rent that this paper will address.

2.3 Unless the lease has provision for the rent to be reviewed during the course of the lease, neither the landlord nor the tenant is entitled to review the rent. In order to review the rent it is essential that there is an express provision in the lease. Most long terms lease as a result provide for the rent to be reviewed at stipulated points along the way.

2.4 The purpose of a rent review clause has been dissected in the courts and by way of example Sir Nicholas Brown-Wilkinson VC noted as follows:

> There is really no dispute that the general purpose of a provision for rent review is to enable the landlord to obtain from time to time the market rental which the premises would command if let on the same terms on the open market at the review dates. The purpose is to reflect the changes in the value of money and real increases in the value of the property during a long term....'

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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.

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*34 Hamilton v Martell Securities Ltd [1984] 1 All ER 665.*

*35 Francis Longmore & Co Ltd v Stedman [1948] VLR 322 and R v Registrar of Titles; Ex parte Commonwealth (1915) 20 CLR 379. Parties sometimes insert a nominal rent in the lease (for example, a peppercorn) incorrectly believing that rent is essential in order for a lease to exist.*

*36 Booker Industries Pty Ltd v Wilson Parking (Qld) Pty Ltd (1982) 149 CLR 600.*

*37 British Gas Corp v Universities Superannuation Scheme Ltd [1986] 1 All ER 978 at 980-981*
2.5 To provide some balance and to illustrate the mutuality involved in a rent review, Lord Salmon\textsuperscript{38} has also noted as follows:

'[A rent review clause] is for the benefit of the tenant because without such a clause he would never get the long lease which he requires; and under modern conditions, it would be grossly unfair that he should. It is also for the benefit of the landlord because it ensures that for the duration of the lease he will receive a fair rent instead of a rent far below the market value of the property which he demises.]

2.6 As a result under the general law it is left to the landlord and the tenant between themselves to set down in the lease when and how the rent is to be reviewed. We see that happening, for example, in office buildings and industrial premises. The parties are free to negotiate and agree whatever mechanism they like.

2.7 It was not unusual some years back, and wholly lawful, for rents in leases to be reviewed annually to the greater of:

- current market rent (with the definition drafted by landlords to oust general valuation principles so as to assure to the landlord the highest rent possible);
- CPI increases (with or without a margin added and using the weighted average of the 8 capital cities as at that time this produced a better result for the landlord than the Perth index); and
- 10% above the prior rent.

2.8 As a matter of general law, and without the intervention of legislation, the review mechanism chosen and the drafting used in the lease to reflect that mechanism is determinative of what the outcome will be according to normal construction principles.

2.9 The terms 'current market rent', 'open market rental value', 'current annual market rent', 'current annual open market rent' are effectively identical in their meaning.\textsuperscript{39} Similarly, the expressions 'market rent' and 'market rental value' have identical; meanings\textsuperscript{40}.

2.10 Harman J considered the distinction between 'market rent' and 'open market rent' in \textit{Sterling Land Office Developments}\textsuperscript{41}. His honour stated at 137:

"I do not believe there is any difference between an 'open market rent' and a 'market rent'. I am convinced that the words 'market rent' are not by themselves apt to refer to a rent within a closed or circumscribed market to which only certain bidders are admitted."

2.11 The leading case regarding the meaning of "current market rent" is \textit{Spencer}\textsuperscript{42}, notwithstanding it was expressed in relation to the value of chattels. Griffith J expressed the concept as follows at 431:

\textsuperscript{38} \textit{United Scientific Holdings Ltd v Burnley Borough Council} [1978] AC 904


\textsuperscript{40} Davine, Derry, 'Market rent reviews in commercial leases', (2006) 13 Australian Property Law Journal at 300, referencing \textit{Ropart Pty Ltd v Kern Corp Ltd} [1991] ANZ ConvR 347.

\textsuperscript{41} [1984] 2 EGLR 135.

\textsuperscript{42} (1907) 5 CLR 418.
"The necessary mental process is to put yourself as far as possible in the position of persons conversant with the subject at the relevant time, and from that point of view to ascertain what, according to the then current opinion of land values, a purchaser would have had to offer for the land to induce a willing vendor to sell it, or, in other words, to inquire at what point a desirous purchaser and not an unwilling vendor would come together".

2.12 Isaacs J stated at 441:

"We must suppose both to be perfectly acquainted with the land, and cognizant of all circumstances which might affect its value, either advantageously or prejudicially, including its situation, character, quality, proximity to conveniences, its surrounding features, the then present demand for land, and the likelihood, as then appearing to persons best capable of forming an opinion, of a rise or fall for whatsoever reason in the amount which one would otherwise be willing to fix as the value of the property".

2.13 The concept was put more plainly in Burns Philp Hardware, where the NSW Court of Appeal held that "current annual market rent "is:

"an expression which ordinarily means what the demised premises would fetch in the market, under the state of things for the time being in question, and taking into account any covenants materially affecting the value of the premises and any interest in them, and... what the relevant prospective lessor would pay for the lease of the premises at the time of, and for the term remaining for the lease in question."44

2.14 In In the Matter of a Lease from the Colonial Mutual Life Assurance Society Limited to HW Tasal Services Pty Ltd, Dowsett J affirmed Stirling Land Office Developments and held the term "current open market rental value of the demised premises for the relevant period" was defined as:

"[T]he market rental able to be obtained for such premises in the market-place, on terms substantially similar to those of the leases in question, the market including (but not exclusively) the market for premises not currently occupied."45

2.15 However, just to show how complex the issue of interpretation of the lease is, regard should be had to Eureka Funds Management Ltd and another v Freehills Services Pty Ltd (2008) 19 VR 676 which dealt with a rent review in the tenant's long term lease in Melbourne's Collins Street.

(a) The review clause required the valuer on the first review to determine the "current annual market rental value" of the leased property and in subsequent rent reviews "the current annual market rental" of the leased property.

(b) The valuer was directed in all reviews to have regard among other things to the "current annual rental value" of comparable premises.

(c) No incentive was given to the tenant.

(d) On the first review the valuer took into account the extent to which rents of comparable premises had been inflated by incentives and discounted for the effect of those incentives (i.e. undertook an effective market review).

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43 (1987) 8 NSWLR 642.
45 unreported, QSC, 6 June 2006.
However, in the next review the valuer did the same effectively treated "current annual market rental value" and "the current annual market rental" as meaning the same. The landlord objected and required the review to be a face rent with the effect of incentives disregarded. The landlord lost as first instance but was successful on appeal where the Court of appeal held that the valuer had failed to undertake a valuation in conformity with the lease.

The court noted as follows:

(i) The cases which have interpreted the meaning of "current annual market rental", "current annual market rental value" and other similar expressions were of limited assistance in interpreting the expressions used in the particular lease as those expressions needed to be interpreted in the context they appeared. In this lease the parties had made the distinction 5 times.

(ii) Decisions illustrate that where both of these expressions are used in a lease it may be required to assign different meanings to them. In those cases it was held that "rental" was used to denote the amount paid as rent for a given period under the lease, while the term "rental value" represented net amount after due allowance was made for financial incentives or other inducements.

(iii) The lease terms and also the factual context in which the lease was negotiated, there was a clear intent for a significant distinction to be made between the 2 expressions and that to treat them the same would deprive the word "value" of meaning. (The difficulty caused by the description of the comparable premises rent criterion for both reviews did not alter that view).

(iv) The valuer should have adjusted the rent upwards to provide a face rent review.

2.16 In May 1997 the [47]Reid Report was disseminated by the House of Representatives Standing Committee on Industry, Science and Technology. The Committee had been asked to investigate and report on a number of business conduct issues in Australia (including retail leasing) and in particular the relationship between small/medium business and big business. The intent of the review was to determine what the problems were in the business community and whether legislative intervention was needed to help fix them.

2.17 The Reid Report was highly critical of shopping centre owners and operators (describing the situation as being "... it is war out there between the retailers and the owners and managers") and made a number of far reaching recommendations, with particular emphasis on retail leasing.

2.18 While a national uniform lease has not come into being (as recommended in the report), since the Reid Report there has been substantial legislative intervention across Australia in the retail leasing sector. Here in Western Australia substantial changes were made to the CTA in 1998 with others following over the intervening period - the most recent being on 1 January 2013.

2.19 One of the principal areas addressed by the Reid Report was that of rent reviews. The committee investigated whether reviews were unfairly weighted in the landlord's favour causing the retail property market to be overvalued thus causing artificially high rents. The committee also scrutinised other conduct affecting retail rents. That conduct included the disparity of rents between specialty shop tenants themselves, between specialty shop tenants and the majors and in particular the sitting tenant's vulnerability at rent review.

46 Such as Colonial Mutual Life Assurance Society Ltd v Australian and Overseas Telecommunications Ltd [1993] ANZ ConvR 347 and Re McCafferty (1992) V ConvR 54-55

47 Finding a Balance - Towards Fair Trading in Australia
2.20 The CTA as it stands today and in its application to those leases that fall under it provides substantial protection to tenants and the requirements of the CTA cannot be contracted out of. Any attempt to override the CTA requirement is void and the provisions of the CTA prevail. Those protections would not otherwise be available to a tenant unless the tenant had the bargaining power and obtained the legal or other specialised assistance to negotiate them into the lease.

2.21 Section 11 of the CTA today provides, for example, the following protections:

(a) A rent review clause is void if it provides for other than a single basis of review to apply in respect of each review date. [This does not meant that only one method of rent must be used over the whole lease term. Instead it stops a review from being the greater of various different methods of review. This also means that if a CPI review is chosen it is possible for a margin to be added].

(b) A definition of market rent is supplied and must be used in the valuation process if the parties agree to have a market review. [Among other things, the definition treats the premises as being vacant, allows the inflationary effect of incentives in the market to be discounted, prevents improvements made or paid for by the tenant being taken into, prevents the goodwill of the tenant's business being taken into account etc].

(c) Rent resulting from a market review cannot be either capped or collared. It must be able to both rise or fall naturally according to the outcome of the definition.

(d) Unless the lease itself specifies the time for when a review may take place (which leases usually do so as to prevent the operation of the CTA) either party may initiate the review not earlier than 3 months before and not later than 6 months after the review date by serving notice on the other party.

(e) If the parties to a market review cannot agree on the market rent the CTA provides a valuation process between the parties with person required to provide written reasons. If that process still does not result in agreement (either because of dispute or because a party has not co-operated) then the matter can be referred to the Tribunal for determination (except that leave of the Tribunal is required in the latter instance). A question about the rent payable on a market rent review cannot otherwise be referred to the Tribunal.

(f) If a question about the rent payable on a market rent review can be referred to the Tribunal section 11(8) then provides that "... the Tribunal, after considering all of the circumstances of the case, may determine that any increase or reduction in rent payable as a result of the determination of the Tribunal under that subsection as the Tribunal thinks fit."

(g) To address one of the main complaints reported by the committee in the Reid Report (that landlords have better access to rent information), a landlord who is a party to a market rent review in a retail shopping centre must within 14 days after request provide a valuer acting in the review process with such information as is requested about leases for retail shops in the retail shopping centre. Section 11(3B) of the CTA provides examples of the information that can be requested. The tenant has rights to apply to the Tribunal if the landlord does not supply the information the tenant is entitled to receive.

(h) Section 11A of the CTA then has confidentiality requirements applying to the information supplied by the landlord (including the usual exceptions to confidentiality) with a right to compensation for a breach (either as agreed or determined by the Tribunal).

3. Contribution to Landlord's Operating Expenses

3.1 Hand in hand with a landlord's desire to maximise the returns from the leased property by way of rental payments, a landlord is keen to ensure that the tenant pays for all of the landlord's expenditure of owning, managing, repairing, maintaining and operating the leased property.
As a result leases should be and are usually drafted with extensive provisions detailing what costs the landlord can pass down to the tenant and, if there is more than one tenant, in the building, how the landlord's expenses are to be shared between them. Without legislative intervention this is purely a matter of contract and the lease should carefully spell these matters out and should be carefully checked.

One of the matters to check for, for example, in an office building lease is that the lease is not drafted so that tenants carry the share of the outgoings that relates to un-let space. Another is whether there is a sinking fund for major capital or structural works.

The question of operating expenses was addressed in the Reid Report and the following areas of concern in particular were highlighted:

(a) The fairness for a landlord to charge a tenant management fees.
(b) The lack of control tenants have over expenditure on operating expenses including promotions.
(c) The scarcity of documentation kept by centre management concerning expenditure and the possibility of fraud.

Operating expenses have continued to be a highly contentious area.

Protections inserted into the CTA as a result of the Reid Report include the following provisions in section 12:

(a) Identification of certain expenses that a landlord cannot pass down to tenants. See above for the prohibition on recovering from tenants in a shopping centre the amortisation of structural or capital costs. Further, in all leases falling under the CTA land tax can only be recovered on a single ownership basis. Management fees cannot be recovered. The list continues to expand, and recently certain legal costs were also outlawed.

(b) A tenant is exonerated from paying any item of operating expense that is not specified in the lease as being payable wholly in part by the tenant. If an item is specified the tenant is nevertheless exonerated from payment if the lease does not specify both how the amount payable by the tenant is to be calculated and how and when that amount is to be paid.\footnote{Corvaia v Others v Kindale Pty Ltd [2003] WADC 3; Heng v Levison [2005] WADC 157; Roma Holdings Pty Ltd v Clestone Pty Ltd (1996) 16 SR (WA) 20.}

(c) A regime is set in place for the giving of annual estimates of operating expenses to the tenant, the information that needs to be provided both as to the items of expenditure as well as the floor area of the centre, the end of year audit to be undertaken and the adjustments to be undertaken.\footnote{Burnett v M.L. Holdings Pty Ltd CT 97 of 1998; Gill & Ors v Wildnight Pty Ltd [2008] WASAT 84.}

(d) The general rule is that operating expenses must be allocated on a lettable to total lettable area of the shopping centre. However, a tenant is not required to contribute towards any item of expenditure that is not "referable" to the tenant's premises\footnote{Gill & Ors v Wildnight above - landlord's costs of operating a bakery and in respect of a disused area in the centre - not 'referable' expenses.} and the landlord is entitled to spread the item of expense across the group of premises that are benefitted having regard only to the total lettable area of the group of premises to which the operating expense is referable.
(e) The recent amendments to the CTA dealt to some degree with the issue of what is and what is not lettable area. New regulations 3AA and 3AB have been inserted. Those regulations specifically state that if a tenant has the exclusive use of a storage room then that storage room is lettable area of the centre.

(f) "Standard trading hours" are prescribed. At the moment those hours are 8.00 am to 6.00 pm Monday, Tuesday, Wednesday and Friday; 8.00 am to 9.00 pm Thursday; and 8.00 am to 5.00 pm Saturday. There are no standard trading hours prescribed for Sundays. A tenant's allocation of outgoings is payable by a tenant during the standard trading hours whether or not the tenant trades. However, where there are a group of premises and only some of the tenants trade outside the standard trading hours, only those tenants who open can be required to pay an allocation of operating expenses. A tenant who is not open cannot be required to pay.

3.7 Section 12A has detailed provisions concerning the operation of sinking funds for repairs or maintenance and section 12B concerning promotion funds including record keeping, auditing and restrictions on use.