
**OUTER HOUSE, COURT OF SESSION**

**[2021] CSOH 70**

**CA109/20**

OPINION OF LORD CLARK

In the cause

KILMAC PROPERTIES LIMITED

Pursuer

against

TESCO STORES LIMITED

Defender

**Pursuer: Thomson QC; Brodies LLP**
**Defender: Lake QC; Morton Fraser LLP**

16 July 2021

**Introduction**

[1] The pursuer is the landlord of a unit leased to the defender ("the premises"), located in a shopping centre. The pursuer seeks declarator that the defender's obligations under the terms of the lease cover both ordinary and extraordinary repairs to the premises. In the alternative, the pursuer seeks declarator that those terms obliged the defender to address extraordinary repairs to the premises caused by and arising from a failure to carry out ordinary repairs throughout the period of the lease. The case called before me for a diet of debate on the proper construction of the terms of the lease.

**Background**

[2] There is a long-established distinction in Scots law between ordinary and extraordinary repairs in the context of a lease, although the authorities do not actually "give any very precise method of distinguishing between ordinary and extraordinary repairs": *House of Fraser plc* v *Prudential Assurance Co Ltd* 1994 SLT 416 (at 419L, *per* Lord McCluskey). However, in the present debate, the court is asked to deal only with the question of contractual construction, that is, to decide whether extraordinary repairs are covered by the tenant's obligations in the relevant lease terms. The issue of whether any particular alleged failure to repair by the tenant concerned an ordinary repair or an extraordinary repair is a separate matter, to be dealt with after the issue of construction is determined. Accordingly, there was no discussion before me of the cause, nature or extent of the specific repairs in the present case said by the pursuer to fall within the scope of the tenant's obligations.

[3] It is unnecessary to set out the factual background in any detail, as it was not relied upon by either party for any purpose, including interpretation of the contractual terms. It suffices to note the relevant provisions of the lease. The lease was entered into in January 1978, with the duration stated as being from 25 November 1977 until 11 November 2019. In the section dealing with "Tenants' Obligations", Clause (FOURTH) provides:

> "THE TENANTS HEREBY AGREE AND DECLARE that with regard to the maintenance and use of the premises they shall implement and fulfil the following conditions, namely:-
> (1) At all times throughout the period of this Lease they shall at their own expense maintain and keep the structure and the fabric of the premises both inside and outside including all additions thereto and the fixtures and fittings thereof and the water and sanitary apparatus, sewers, drains, pipes and pertinents thereof in good and substantial repair, condition and decoration (damage by fire and other risks against which the Landlords have insured excepted)…"

**Submissions for the defender**

[4] The defender accepted that, as tenant, it is liable for ordinary repairs and that this would include liability for wants of repair if it was established that they arose from a failure to implement the obligation to carry out ordinary repairs. There was accordingly no dispute as to the second conclusion. This had been the position prior to raising of the action and as there was no dispute the declarator sought in the second conclusion was not required.

[5] On the main point (the first conclusion) the appropriate place to start was to consider the obligations at common law and then to consider whether the lease had innovated upon that set of obligations. At common law, the tenant is liable for ordinary repairs and the landlord is liable for extraordinary repairs (*House of Fraser* v *Prudential Assurance*, and *Co-operative Insurance Society* v *Fife Council*, [2011] CSOH 76, and the authorities reviewed therein). Together, the ordinary repairs and the extraordinary repairs make up the whole of the repairs (apart from where damage is caused by *damnum fatale*). As to whether the common law position had been modified in terms of the lease, the terms quoted did not impose liability for extraordinary repairs on the tenants. The lease commenced in 1978 and finished in 2019. The pursuer's position was that irrespective of the extent and cause of any damage, including the deterioration of the building over time and latent defects, the defender was obliged to carry out renewal as well as repair. The key principles, quoting from the authorities, were to be found in Lord Glennie's opinion in *Co-operative Insurance Society* v *Fife Council*. In *Napier* v *Ferrier* (1847) 9D 1354 the tenant's obligation was similar to that in the present lease. The decision was that the tenant was liable only for ordinary repairs. Reference was also made to *Johnstone* v *Hughan* (1894) 21R 777, *Turner's Trustees* v *Steel* (1900) 2F 363, *Sharp* v *Thomson* 1930 SC 1092 and *Co-operative Insurance Society* where the same outcome followed with similar wording. Thus, the same outcome should follow here.

[6] If there was to be liability to repair, or indeed renew, irrespective of the cause of damage one would expect to see some reference in the wording to that being the position. For the pursuer to succeed, it must be shown that the transfer of liability for extraordinary repairs from the landlord to the tenant had occurred. There was no reference to renewal here, or indeed to the cause or extent of defects, or to taking on obligations which would otherwise fall upon the landlord. While it was correct that the tenant was relieved of liability for that which the landlord had insured and it was open to the landlord to insure against extraordinary repairs, the fact that the tenant had to pay the premium did not change the common law position as reflected in the terms of the lease. There was no substance in the pursuer's point about the absence of any provision allowing access for the landlord to carry out extraordinary repairs having some impact upon construction of the terms. If the tenant was to prevent any such access, it would be left with defective premises and no right to retain rent.

**Submissions for the pursuer**

[7] The pursuer's pleadings were entirely relevant and indeed decree *de plano* should be granted in respect of the first and second conclusions of the summons. It was clear, at common law, that a tenant is not liable for what may be termed extraordinary repairs: see, for example, *Napier* v *Ferrier*. Equally, however, the common law obligations of parties may always be modified by conventional stipulations: *Sharp* v *Thomson* (at 1096); see also *Westbury Estates Ltd* v *The Royal Bank of Scotland plc* 2006 SLT 1143 (at 1146F). It was, therefore, in every case a matter of contractual construction whether or not a tenant, under any given lease, is or is not liable to effect extraordinary repairs. It was important to appreciate the limited assistance which may be gained from the extensive citation of

authority when dealing with a matter of contractual construction: *Westbury* (at 1145K-1146E). Rather, the proper approach was simply to apply the established principles of contractual construction: see eg *@SIPP Pension Trustees* v *Insight Travel Services Ltd* 2016 SC 243 (at [17]); *British Overseas Bank Nominees Ltd* v *Stewart Milne Group Ltd* 2020 SC 24 (at [6]-[8]). There was no particular form of words required in order to make a tenant liable to carry out extraordinary repairs. The principles that when parties contract they are taken to know the state of the law and the common law, and that if a word or phrase used by the parties has acquired a definite meaning that meaning should apply, were accepted. There were three particular features of the contractual language in the lease which made clear that the defender is indeed liable to effect both ordinary and extraordinary repairs.

[8] Firstly, the scope of the repairing obligation was extremely wide: it relates *inter alia* to "the structure and the fabric of the premises both inside and outside". A repairing obligation of such breadth was not consistent with one which is limited to ordinary repairs and therefore covered the carrying out of extraordinary repairs where necessary (see, for example, *House of Fraser plc,* at 419B-J).

[9] Secondly, the clause contained a specific exclusion from the ambit of the repairing obligation being undertaken by the tenant. In particular, it stated "(damage by fire and other risks against which the Landlords have insured excepted)". The express wording of the clause, accordingly, provided an exception and limitation to the obligation imposed on the tenant. It was not possible to construe the actual wording of the clause as meaning that there are in fact excepted from the repairing obligation, first, repairs necessitated by fire and other insured risks and, secondly, repairs which are extraordinary repairs. Had the clause contained broad words, such as "irrespective of the cause of damage", there could have been no argument but that the tenant was liable for both ordinary and extraordinary repairs. No

different conclusion should arise from the fact that what the parties actually agreed was to exclude from the repairing obligation one particular category of repairs. The section of lease dealing with the landlord's obligations did not set out any liability for extraordinary repairs, which would be expected to be stated if that was what was intended.

[10] Thirdly, had the pursuer remained liable for extraordinary repairs one would logically expect the lease to make provision for the pursuer, as landlord, to be able to take entry to the premises to effect such repairs. No such right was reserved to the landlord. The absence of such provision could be contrasted with the other provisions within the lease which do confer certain rights of access upon the landlord. All of that was entirely inconsistent with the proposition that the landlord remains liable to carry out extraordinary repairs. One would not expect the landlord to have to rely upon some common law right to gain entry.

[11] On the second conclusion, the underlying proposition of becoming liable for extraordinary repairs caused by failing to carry out ordinary repairs ought to be uncontroversial, but it was apparently disputed by the defender. It was amply supported by the authorities. No relevant defence was offered by the defender in respect of the second conclusion. The submission for the defender that prior to the action being raised it had accepted liability as stated in the second conclusion was incorrect. There had been no such acceptance in the pre-action correspondence. Moreover, in the pleadings there was no admission of such liability and it was identified as an issue in the parties' joint statement of issues.

**Decision and reasons**

***The first declarator***

*The case law*

[12] The common law position, repeatedly vouched in the authorities, is that the tenant is liable for ordinary repairs and the landlord is liable for extraordinary repairs. In *Co-operative Insurance Society* v *Fife Council* Lord Glennie gave a comprehensive review of the case-law and quoted the relevant *dicta* on whether the lease terms altered that common law position. I refer to some of these cases below but it is not necessary for present purposes to discuss them in detail. As Lord Reed made clear in *Westbury Estates Ltd* v *The Royal Bank of Scotland plc,* the focus is on the interpretation of the language used by the parties in this lease in accordance with the usual principles, and whether, as result of its true interpretation, it covers extraordinary repairs.

[13] Before turning to the interpretation, it is relevant to note in at least very broad terms the scope of what is covered by extraordinary repairs. There is no definition, but the case law indicates that matters such as latent defects, long-term decay and deterioration, problems with foundations and serious damage caused by fire are likely to fall within that category. Accordingly, a liability for extraordinary repairs will have the potential to significantly extend the scope of the tenant's obligations. It is of course possible for the tenant to seek to insure against loss caused by damage, but I was not addressed on any issues that might arise in that regard, for example in relation to obtaining insurance against the consequences of latent defects in the foundations of a unit within a shopping centre. It was not suggested that the tenant's ability or inability to insure pointed one way or another in relation to whether the clause covered extraordinary repairs.

[14] As senior counsel for the pursuer accepted, the parties to the lease are to be taken as being aware of the law and if a word or phrase has thus acquired an established meaning and is used by the parties then that meaning should apply. The precise language used in the present lease has not itself been construed in any other case, but a broader principle emerges from the authorities. The pursuer relied very strongly upon the width of the terms of the relevant clause and the reference in it to the obligation to "maintain and keep the structure and the fabric of the premises both inside and outside…in good and substantial repair, condition and decoration". The reference to such fundamental elements as structure and fabric was said to point in favour of a liability for extraordinary repairs. While the language used in leases in the relevant authorities differed in many respects, it is worthy of note that the liability to repair was often expressed in respect of the whole premises or the subjects let. This was nonetheless viewed as involving only ordinary repairs. Without quoting any of the terms in full detail, I note the following points. In *Co-operative Insurance Society* v *Fife Council* (para [5]) the duty was "to repair and keep in good and substantial repair and maintained, renewed and cleansed in every respect all to the satisfaction of the Landlords the leased subjects". Notwithstanding the references to "renewed" and the subject-matter of repairs being "the leased subjects", Lord Glennie held that the clause did not cover all extraordinary repairs. In *Napier* v *Ferrier* the duty was "to keep the new mansion-house, offices and porter's lodge in good and sufficient repair and condition…"(page 1354). This covered the whole premises let. In *Duff* v *Fleming* the duty was to "keep the said premises in good order and repair" (page 769). In *Johnstone* v *Hughan*, the lease was of a farm, including a granary and a pig-house, and the obligation to repair was that "the houses and fences on the premises hereby let" had to be maintained in good and substantial repair (page 788). In *Sharp* v *Thomson,* the tenant had to "maintain and uphold" in a good and sufficient state of

repair "the whole lades, dams, sluices, aqueducts, and water courses" and "the whole ditches on the farm" (page 1094). In each one of these cases, notwithstanding the broad references in the wording of the obligation to repair, encompassing the subjects let, the tenant was held not to be liable for extraordinary repairs. The obligation to put or keep the premises let in good and sufficient or substantial repair is equated in the authorities with the common law obligation to cover all things that can come under ordinary repairs (see eg *Napier* v *Ferrier* at 1359). It was observed in *Sharp* v *Thomson* (*per* Lord Justice-Clerk (Alness) at 58) that the case law appeared to establish that clauses of this kind applied to ordinary but not extraordinary repairs.

[15] In *House of Fraser* v *Prudential Assurance* (noted at 417F-H) the obligation upon the landlords was:

> "to keep the foundations, the roof, the main walls, main structural members and the supporting columns of the Building, the Service Yard and the pipes, wires, water, gas, drainage and electricity services in the common parts and the service yard in good and substantial repair and condition so far as such services are not maintainable by a statutory undertaker but so that this undertaking shall not extend to the repair and maintenance of fascias and shop-fronts in the subjects let and the building."

These terms, on a natural reading, were held to give the landlords:

> "…the same responsibility for extraordinary repairs that the common law would have imposed upon them, given that the same common law would have imposed upon the tenants of the different parts of the building the responsibility for the carrying out of ordinary repairs in those respective parts…"

In context, the words "repair" and "in good condition" were:

> "…entirely appropriate to confer on the landlords a responsibility for extraordinary repairs, given the common law background."

The Extra Division therefore placed strong reliance on the common law background and appeared to me to adopt, at least broadly, the same approach as that taken by the Lord Ordinary (Cullen) that in the absence of an express stipulation or necessary inference

to the contrary the tenant is responsible only for ordinary repairs and the responsibility for extraordinary repairs falls on the landlord.

[16] In *Westbury Estates* v *Royal Bank of Scotland* the relevant provision (quoted at para [2]) stated:

> "The Tenants accept the Let Subjects in their present condition notwithstanding all (if any) defects therein whether latent or otherwise…and throughout the whole currency of this Lease the Tenants shall at all times uphold, maintain, repair and renew the Let Subjects both externally and internally so as to keep the Let Subjects in good and substantial repair and condition, it being declared that the Tenants' obligations shall extend to all work necessary upon the Let Subjects whether structural or otherwise and whether of the nature of maintenance, repair, renewal or rebuilding and whether normally the obligation of a Landlord or of a Tenant, the Landlords having no duties, liabilities or obligations in respect of such work or the cost thereof…"

Lord Reed held (at para [18]):

> "It appears to me that the present repairing covenant, extending as it does to ''all work necessary whether structural or otherwise and whether of the nature of rebuilding and whether normally the obligation of a landlord'', is designed to cover what the older Scottish cases would have treated as extraordinary repairs…I conclude that the distinction between ordinary and extraordinary repairs is not relevant for present purposes".

It is noteworthy that it was the reference to these three points that resulted in the clause being construed as designed to cover extraordinary repairs.

[17] While the clauses in these last two cases each included the expression "good and substantial repair and condition", similar to the earlier cases, there was nonetheless a liability for extraordinary repairs. In *House of Fraser* it was the specific features of the premises (including the foundations, the roof, the main walls, main structural members and the supporting columns of the building) and the fact that these were the subject of the landlord's obligation, against the common law background, that were significant. In *Westbury* the broader language of covering all work, including rebuilding, whether it was normally the obligation of the landlord or the tenant, was important.

*Interpretation of clause FOURTH (1)*

[18] In the present case, the clause makes no reference to rebuilding (or renewing) or to undertaking what would normally be the obligation of the landlord for repairs. Nor does it identify any of the relevant features of damage giving rise to extraordinary repairs, such as the origin of the damage, or its nature or extent. For example, there is no reference to repairs in respect of decay or deterioration over time, or latent defects. I accept entirely the point that different language used in other leases is of no real assistance. There is, however, the line of authority noted above supporting the view that even where the obligation is to repair the premises or the whole subjects let it will not cover extraordinary repairs, without the presence of language which makes it sufficiently clear that it does cover such repairs.

[19] As noted, the main words viewed by the pursuer as pointing in the direction of extraordinary repairs being covered are "the structure and the fabric of the premises both inside and outside" and I begin by considering the effect of those words. A degree of support for the pursuer's position can perhaps be gleaned from the authorities. Again recognising that different wording is used, there is a reference to "main walls" and "main structural members" in the lease terms in *House of Fraser* v *Prudential Assurance.* In *Co-operative Insurance Society* v *Fife Council* (at [21]-[22]) Lord Glennie accepted that there were provisions in the lease which appeared to place some responsibility on the tenants for the structure. He concluded that these provisions

> "…do not drive me to alter my conclusion that the terms of the lease do not make the tenants generally liable for all extraordinary as well as ordinary repairs."

However, he also stated that while items in the claim being extraordinary repairs made the defence of the tenant relevant in principle,

> "whether it could be made good in respect of any particular item in dispute is another matter, and in relation [to] some of them there may be arguments based on some of the particular terms of the lease which have been discussed…"

Arguably at least, this could be taken as leaving open the possibility of specific terms of the lease making the tenant liable for particular extraordinary repairs, including perhaps to structure. I also recognise that in the present case the words "structure and fabric both inside and outside" do have a clear meaning and cover matters of some width. Structure and fabric are items which might require extraordinary repairs, although in my view it is plainly possible to have ordinary repairs required to the structure or fabric, whether inside or outside.

[20] But, in light of the common law position a sufficiently clear pointer away from the tenant being liable for only ordinary repairs must be contained in the wording. Such indications were present in *House of Fraser* and *Westbury*. As there can be ordinary repairs to a structure or fabric in a unit in a shopping centre, and as the language falls quite far short of what requires to be conveyed (such as by the terms used in those cases) in order to cover extraordinary repairs, I conclude that there is no sufficiently clear pointer towards such liability arising from the reference to structure and fabric, both inside and outside. I reach that view mainly because of the absence of language to that effect, particularly when in many of the cases an obligation to repair the premises or the whole subjects let did not suffice. I also have regard to the fact that extraordinary repairs may be very significant in terms of work and costs and that this was a lease covering a period in excess of 40 years when the potential liability of the tenant for extraordinary repairs would have been a serious matter for the parties. It is obviously not for me to identify specific wording which would make such a liability sufficiently clear, but the *Westbury* case uses one approach that would suffice. *House of Fraser* is dealing with a landlord's obligation and I view that as a relevant

factor when the court came to discuss any deviation from the common law position. In the present case, the pursuer contended that had the clause contained broad words, such as "irrespective of the cause of damage", there could have been no argument other than that the tenant was liable for both ordinary and extraordinary repairs. But it did not contain any such wording and I do not require to comment on whether that would have sufficed. The clause also does not say that any or all forms of repair to the structure or fabric are covered.

[21] If Lord Glennie's approach (noted above) is taken to mean there may be wording that identifies a particular item or repair that could include, in respect of that item, a liability for extraordinary repair, that is not a relevant issue in the present case. The approach taken by the parties here was that the clause either did or did not cover all extraordinary repairs; there was no suggestion of a partial coverage. In any event, for the reasons just given, I would have not have found it possible to conclude that the reference to repairing structure and fabric, both inside and outside, covered extraordinary repairs.

[22] It is of course necessary to construe the wording in the context of the other parts of the clause and the lease. I accept, as was submitted for the pursuer, that in *House of Fraser* reference was made to the lease being a substantial commercial lease of a relatively recent date and to the expectation that the parties would not consciously decide to leave the important matter of extraordinary repairs to be dealt with by the common law. However, that view was predicated on the court noting that the parties had taken the trouble to set out at length the responsibilities of each party in relation to repair, which I do not consider as having occurred, at least to the same extent, in this case. It is true that in the present case the terms of the lease have sections headed "Tenant's Obligations" and "Landlord's Obligations" and that there is no reference under the latter heading to any liability for extraordinary repairs, but there is also no restriction of the landlord's obligations so as to

exclude extraordinary repairs. The older authorities also illustrate terms which make the tenant liable only for ordinary repairs even where nothing appears to have been separately said in the lease about the landlord's obligations for repairs. The fact that only the tenant's liabilities to repair are expressed does not of itself allow the inference that the landlord's common law obligations have been changed.

[23] The pursuer also relies upon the words "(damage by fire and other risks against which the Landlords have insured excepted)" as providing an exception and the only limitation to the repair obligation imposed on the tenant. The principal difficulty with this point is that the exception could equally be viewed as restricting liability for ordinary repairs to those which are not the subject of insurance by the landlord. I accept that fire damage may well result in extraordinary repairs, but there may be types of minor fire damage that fall within the category of ordinary repairs. Another problem is that the insurance obligation is to cover damage by fire and such other risks as the landlord in its absolute discretion shall determine to insure against, for the cost of rebuilding and reinstating the premises in the event of total destruction, and the tenant is obliged to pay the costs of that insurance. Thus, the landlord, exercising its discretion, could exclude from its insurance a number of types of damage that could give rise to extraordinary repairs. On the pursuer's approach, this would result in the tenant having to meet that uninsured liability (unless the tenant has been able to insure against such damage under a separate policy of its own). Leaving it to the landlord to decide what damage is to be insured against is in my view more consistent with the landlord having liability for extraordinary repairs, even though the insurance cost is to be reimbursed by the tenant. No reason was suggested as to why this exception is stated in the clause if in fact the tenant is responsible for extraordinary repairs. However, I view the exception as a neutral point for the purposes of

construction. The reference in the clause to the exception does not therefore result in it being construed as including liability for extraordinary repairs.

[24] The further point raised (the absence of any reference in the lease to the landlord having a right of access to carry out extraordinary repairs) does not in my view make any difference to the interpretation of the terms. Refusal of such a request for access would cause difficulties for the tenant. The presence or absence of such a provision is not a factor that appears to have been relied upon in any other case as pointing for or against a deviation from the common law principles. It is not a matter of substance, even when viewed cumulatively with the other points made on behalf of the pursuer.

[25] I therefore conclude that, in construing the whole wording of the clause and the lease, the absence of sufficiently clear language imposing a liability for extraordinary repairs results in the meaning of the clause being restricted to ordinary repairs.

***The pursuer's second conclusion***

[26] Turning to the second conclusion, it is clear from the pleadings that the averments stating the basis for this declarator are not the subject of admission and indeed are covered by a general denial. No amendment to the pleadings was proposed by the defender. I have not seen the pre-action correspondence but nothing showing any such acceptance or admission before the action was raised was presented to the court. Moreover, the parties' joint statement of issues, lodged on 31 March 2021, just prior to the preliminary hearing, expressly identifies the point covered by the second conclusion as a matter which was, or would be likely to be, the subject of determination in the action. In *North British Railway Co* v *Birrell's Trustees* 1918 SC (HL) 33, Lord Dunedin explained that a declarator cannot be used for the mere purpose of declaring legal propositions where no dispute lies beneath.

However, as was also observed in that case, the defender here caused the action to proceed in this form: the point remained in dispute in the pleadings, as reflected in the joint statement of issues, and only became no longer disputed when the defender lodged its note of argument. It is therefore appropriate to grant the declarator sought.

**Disposal**

[27] I shall therefore sustain the defender's first plea in law and dismiss the action in respect of the first conclusion and grant decree in terms of the second conclusion, reserving in the meantime all questions of expenses.