

Tried and tested: the myth behind the cliché

by

Mark Adler

Solicitor in private practice; past chairman of Clarity

First published in *Clarity* 34 (January 1996)

Due for republication in *Scribes Journal of Legal Writing*

I am very grateful to Richard Castle, Justin Nelson, and Richard Oerton for their helpful criticism of the first draft of this article.

The traditional wisdom

Those who mistrust plain English say that the traditional style of legal writing brings to new documents the wisdom of earlier litigation. But that is not true. If anything, it brings the folly which triggered the litigation.

Lawyers are so fearful of departing from precedents that they often include things which neither they nor their clients mean. Once a clause has been allowed into a firm's standard document (or spotted in someone else's draft) it is copied indefinitely. So we get covenants for maintaining a lift in a single-storey building, and much less obvious but equally superfluous nonsense.

I am often told that it is dangerous to adopt plain language because, unlike traditional language, it is not "tried and tested". This cliché is itself typical of legalese, in that it uses three words where one would do, and is both ambiguous and inaccurate.

Documents are litigated because their meaning is unclear. This sort of litigation represents a failure by the drafting lawyers (except on what must be the rare occasions on which they were instructed to leave the meaning deliberately obscure). Usually the clients thought they had a firm arrangement, but have been let down by their lawyers, and the courts must do their best to unravel the mess. Similar wording is then used in other documents on the assumption that its meaning has been laid down by the courts. But the wording is in fact rarely identical, and of course the circumstances (including the parties' intentions) are also likely to be different. And there will probably be a different bench. So we get a hotchpotch of decisions which are confusing or impossible to reconcile. Professor Mellinkoff reports (*The Language of the Law*, Little Brown & Co, 1963, p.377) that epitomes of judicial interpretations of the word "accident" fill over 200 pages of his law dictionary. At what stage in this history of litigation does "accident" become precisely defined, so that it need never again be disputed?

But does "tried and tested" means "tested by the courts"? The other possible meaning is that the drafter's firm has used the precedent many times before. "Tried", perhaps, but not "tested". I am frequently told, when I ask the intention behind a clause that is either ambiguous or has no identifiable meaning, that it has been accepted by all previous recipients without objection. Sometimes, if I am to believe what I am told, developers' conveyancing documents have been accepted hundreds of times with gibberish unquestioned. I strongly suspect that many solicitors do not have the patience to read the documents they are paid so much to vet. So much for testing.

An example

Let us take as an example a typical repairing clause picked at random from a recent lease, and ask to what extent the wording has been dictated by precedent:

To repair and keep the Demised Premises and every part thereof and all Landlord's fixtures and fittings therein and all additions thereto in good and substantial repair order and condition at all times during the said term including the renewal and replacement

forthwith of all worn or damaged parts but so that the Lessee shall not be liable for any damage which may be caused by any of the risks covered by the insurance referred to in the Fifth Schedule hereto (unless such insurance shall be wholly or partially vitiated by any act or default of the Lessee or of any member of the family employee visitor of the Lessee or other such occupiers) or for any work for which the Management Company may be expressly liable under the covenants on the part of the Management Company hereinafter contained.

The case law

[Quotations are from the reports, in which the disputed covenants may have been summarised.]

Gutteridge v. Munyard (*1 Moo & R 336, 1834*)

The tenant's covenant

"That he, his executors, administrators, or assigns, should and would from time to time, and at all times during, &c, at his and their own proper costs and charges, well and sufficiently repair, uphold, support, maintain, glaze and amend, and keep the said messuage or tenement, and other the buildings, and the windows and sashes, tilings, &c, and all other the appurtenances thereby demised, in, by, and with all and all manner of needful and necessary reparations and amendments whatsoever. And should and would at the end or other sooner determination of the said demise, leave, surrender, and yield up unto the said John Stayley, his heirs and assigns, the said messuage or tenement, and all and singular other the premises, with the appurtenances thereby demised, so well and sufficiently repaired, upheld, supported, maintained, glazed, &c, and kept as aforesaid, and all new erections, buildings, and improvements that should or might be made in or upon the said premises in the meantime, (reasonable use and wear thereof in the meantime only excepted)."

The facts

The building was at least 200 years old, and perhaps more than 300. It was very dilapidated. The walls were out of perpendicular, and cracked; the floors had sunk; many timbers were rotten; the tiling and woodwork were broken; and there were other defects not listed in the report. The tenant had painted the inside two or three years before the trial, but "it did not appear that much else had ever been done to it".

The dispute

Could the landlord forfeit the lease because the tenant had broken the covenant to repair?

The jury instruction (by Tindal CJ)

"Where a very old building is demised, and the lessee enters into a covenant to repair, it is not meant that the old building is to be restored in a renewed form at the end of the term, or (to be) of greater value than it was at the commencement of the term.... But the tenant is to take care that the premises do not suffer more than the operation of time and nature would effect; he is bound by seasonable applications of labour to keep the house as nearly as possible in the same condition as when it was demised. If it appears that he has made these applications, and laid out money from time to time upon the premises, it would not perhaps be fair to judge him very rigorously by the reports of a surveyor, who is sent upon the premises for the very purpose of finding fault. Still, there is only a certain latitude to be allowed in these cases."

The result

The tenant won. (The landlord lodged a motion before the Lord Chancellor on the ground that the verdict was against the weight of the evidence, but did not object to the jury instruction. The outcome is not recorded.)

Comment

The judge ignored the detailed verbiage of the covenant, and treated it as a simple covenant to repair.

Scales v. Lawrence (1860 2 F&F 289)

The tenant's covenant

"So often as need should require, well and sufficiently to repair, uphold, sustain, paint, glaze, cleanse, scour, &c a house and premises, with all needful reparations and cleansings, and to leave the premises in such repair, reasonable wear and tear excepted."

The facts

The tenant had spent a substantial amount at the beginning of his seven-year lease, and more the year before it ended, but work was needed after he left.

The dispute

Was the tenant liable for replacing dirty wallpaper?

The jury instruction (by Willes J)

"The tenant was bound to do the things specially mentioned, and also all that was necessary to leave the house in a good condition.... You must consider the character and condition of the , thus if he takes an old house, he must not let it tumble down, he must keep it up; but only as an old house.... And if he painted the ... inside within seven years, he is not bound to do it again when leaving, unless so far as is required by actual dilapidations or destruction of the paint.... He should 'cleanse' the old paint, &c (or renew it only where destroyed), and give up the house in a clear and fair condition, and for fair wear and tear he would not be liable. Questions of this sort are questions of fact for you, to be decided on what are the substantial merits of the case rather than on strict rights or extreme law. The landlord is not to claim for every crack in the glass or every scratch on the paint. The reasonable rule probably would be not to charge for a pane of glass merely with one crack in it.... Such covenants must not be strained, but reasonably construed, on the principle of 'give and take'."

The result

The tenant won.

Proudfoot v. Hart (1890 25 QBD 42)

The tenant's covenant

"During the said term keep the said premises in good tenantable repair, and so leave the same at the expiration thereof".

The facts

At the end of a tenancy, the house needed redecoration: the wallpaper had worn; the paint on the woodwork had faded; the staircases and ceilings were ready for cleaning and whitewashing. And the kitchen floor needed replacement.

The dispute

Was the Official Referee right in assuming that the tenant was responsible for the cost?

The judgment (by Lord Esher MR)

"What is the true construction of a tenant's contract to keep and deliver up premises in 'tenantable repair'? Now, it is not an express term of the contract that the premises should be put into tenantable repair, and it may therefore be argued that, where it is conceded, as it is in this case, that the premises were out of tenantable repair when the tenancy began, the tenant is not bound to put them into tenantable repair, but is only bound to keep them in the same repair as they were in when he became the tenant of them. But it has been decided - and, I think, rightly decided - that, where the premises are not in repair when the tenant takes them, he must put them into repair in order to discharge his obligation under a contract to keep and deliver them up in repair....

"Now, what is 'tenantable repair'? ... In *Belcher v. Mackintosh* (8 C&P 720) Alderson B ... says ...: 'It is difficult to suggest any material difference between the term "habitable repair" used in this agreement, and the more common expression "tenantable repair"; they must both import such a state as to repair that the premises might be used and dwelt in not only with safety, but with reasonable comfort, by the class of persons by whom, and for the sort of purposes for which, they were to be occupied. That is the whole definition, and, so far as it goes it is a good one.' In *Payne v. Haine* (16 M&W 541) the contract was to keep the premises, and at the expiration of the tenancy deliver up the same, in "good repair", which is much the same thing as "tenantable repair".... Parke B ... said: 'This is a contract to keep the premises in repair as old premises, but that cannot justify the keeping them in bad repair because they happened to be in that state when the defendant took them. The cases all shew that the age and class of the premises let, with their general condition as to repair, may be estimated in order to measure the extent of the repairs to be done. Thus a house in Spitalfields may be repaired with materials inferior to those requisite for repairing a mansion in Grosvenor Square; but this lessee cannot say he will do no repairs, or leave the premises in bad repair, because they were old and out of repair when he took them....' Lopes LJ has

[in *Proudfoot*] drawn up a definition of the term “tenantable repair” with which I entirely agree. It is this: “Good tenantable repair” is such repair as, having regard to the age, character, and locality of the house, would make it reasonably fit for the occupation of a reasonably-minded tenant of the class who would be likely to take it.’...

“I will add a few words as to the way in which the definition should be worked out in the present case. The official referee appears to have said that in his view ‘tenantable repair’ included painting, papering, and decorating. If he meant, as I think he must have meant, that it included all painting, papering, and decorating, I have no hesitation in saying that his construction of the term ‘tenantable repair’ was wrong... I agree (with Cave J in the court below) that (the tenant) is not bound to repaper simply because the old paper has become worn out.”

Comment

Lord Esher reads an implied covenant to “put into repair” in an express requirement to “keep and deliver up in repair”. It would make the tenant’s obligations clearer - but no more onerous - to make this duty explicit; if the extra liability is not intended, it should be clearly excluded.

From one line to another, Lord Esher uses “tenantable repair” without comment as a synonym for “good tenantable repair”, and he draws no distinction between that and “habitable repair”. He also says that “good repair” is “much the same thing”, without committing himself to any particular difference.

But “repair” does not include all decoration, for which a lease should explicitly provide.

Lister v. Lane & Nesham (1893 2 QB 212)

The tenant’s covenant

“When and where, and as often as occasion shall require, well, sufficiently and substantially repair, uphold, sustain, maintain, glaze, pave ... amend and keep all and singular the said wharf, Shot Tower, warehouse, messuage, buildings and premises ... and all the walls, pavements, &c, to the said premises belonging or in anywise appurtenant ... and the said wharf, Shot Tower, warehouse, messuage, buildings and premises ... so well and substantially repaired, upheld, sustained, maintained, glazed ... amended, and kept, at the end or other sooner determination of the said term hereby granted, will peaceably and quietly leave, surrender and yield up” to the landlord in such good and substantial state and condition as the landlord “may be bound to deliver up the same premises to the superior landlord or landlords thereof at the expiration of the lease under which they now hold the premises”.

The facts

The house was over 100 years old, and had been built on a platform of timber floating on mud. It had not been anchored in the gravel 17 feet below. The tenant had often repaired the house, but its nature and age called for underpinning (that is, anchoring to the gravel) if it was to be stabilised, and this the tenant had refused to do. Consequently, the house became dangerous, and after the tenancy ended the landlord had to demolish and rebuild it.

The dispute

Was the tenant responsible for the rebuilding costs?

The result

No.

Lord Esher MR said: “However large the words of the covenant may be, a covenant to repair a house is not a covenant to give a different thing from that which the tenant took when he entered into the covenant.”

Comment

Despite copy-typing the passage and reading it several times, I did not notice, until Richard Oerton pointed it out, that a grammatically essential “and” was missing from between the two parts of the covenant. Such hidden errors are surprisingly frequent in traditional, “precise” legal writing.

Ravenseft v. Davstone (1980 1 QB 12)

The tenant’s covenant

“When where and so often as occasion shall require well and sufficiently to repair renew rebuild uphold support sustain maintain pave purge scour cleanse glaze empty [!] amend and keep the premises and every part thereof

(including all fixtures and additions thereto) and all floors walls columns roofs canopies lifts and escalators (including all motors and machinery therefor) shafts stairways fences pavements forecourts sewers drains ducts flues conduits wires cables gutters soil and other pipes tanks cisterns pumps and other water and sanitary apparatus thereon with all needful and necessary amendments whatsoever”

The facts

In accordance with the practice then current, stone cladding had been fixed to the concrete during construction of a building without expansion joints. After completion, the building was let, the tenant being responsible for repairs. Some years later, the different coefficients of expansion of the stone and concrete pushed the stones away from the frame and created a danger that they would fall. The cost of the expansion joints was some £5,000 and the cost of reattaching the cladding some £50,000; against this it was estimated that the cost of erecting the building as new at the time of the repairs would have been at least £3,000,000.

The dispute

The landlord sought to recover the cost of repairs from the tenant under the repairing covenant in the lease. The tenant company argued that the repairing covenant did not make it liable for inherent defects.

The judgment

There is no rule exempting inherent defects. Whether the repair would result in giving back to the landlord a different building from that let - so exempting the tenant under the *Lister v. Lane* rule - is a matter of degree, and does not depend on a distinction between inherent defects and those arising later. “The expansion joints form but a trivial part of this whole building and looking at it as a question of degree, I do not consider that they amount to such a change in the character of the building as to take them out of the ambit of the covenant to repair.”

The judge's comment on the drafting

This was a complex case, but the complexity had nothing to do with the verbosity of the repairing covenant. Mr Justice Forbes said: “I have already mentioned the plethora of words used to describe the obligations of the tenant.... The view I have formed is, of course, relative to the use of the word ‘repair’, and that by itself seems to me to be sufficient to render the tenant in this case liable for the whole cost of the remedial works. It is not, therefore, necessary to pursue the question of whether, if it had not been so, other words used would have been sufficient to fix the tenant with liability.”

***Post Office v. Aquarius Properties Ltd* (1987 1 All ER 1055)**

The subtenant's covenant

“Well and substantially to repair ... amend ... renew and keep in good and substantial repair and condition....”

The facts

A new office building was let in 1966 for 125 years, and in 1969 underlet for 22 years. Between 1979 and 1984 the basement had been flooded by a combination of poor design, careless construction, and a rise in the water table. There was no residual damage when the water had receded but it was necessary to prevent recurrence. This would require “a very substantial structural addition to the building”, costing over 15% of its capital value.

The dispute

Was the sub-tenant responsible?

The result (by Hoffman J)

No.

“In the end ... the question is whether the ordinary speaker of English would consider that the word ‘repair’ as used in the covenant was appropriate to describe the work which has to be done. The cases do no more than illustrate specific contexts in which judges, as ordinary speakers of English, have thought that it was or was not appropriate to do so.”

Norwich Union v. British Railways Board (1987 2 EGLR 137)

The landlord's covenant

"To keep the demised premises in good and substantial repair and condition and when necessary to rebuild, reconstruct or replace the same and in such repair and condition to yield up the same at the expiration or sooner determination of the said lease."

Comment

This case was unusual on three counts:

- The tenant (rather than the landlord) argued that "rebuild and reconstruct" meant what it said, imposing a more onerous duty than the normal repairing covenant; (the tenant's motive was to minimise the reviewed rent).
- The judge stressed the fundamental importance of the "plain meaning" rule.
- He used it to impose the "complete rebuilding" obligation for which so many landlords have argued unsuccessfully.

The judgment (by Hoffman J)

"According to normal rules of construction the additional words should be given some additional meaning. But [counsel for the landlord] says, with some justification, that this rule frequently can not be applied in its full force to documents such as leases, where a torrential style of drafting has been traditional for many years. He contrasts the repairing covenant with the insuring covenant which says that the tenant shall be obliged:

'in the case of loss or damage or destruction ... (to use the proceeds) in rebuilding, reinstating or replacing the demised premises or erecting alternative new buildings approved by the lessor.'

"Now I accept that in the construction of covenants such as this one one cannot ... insist upon giving each word in a series a distinct meaning. Draftsmen frequently use many words either because it is traditional to do so or out of a sense of caution so that nothing which could conceivably fall within the general concept which they have in mind should be left out. I also accept that if the language is not entirely clear the covenant should not readily be assumed to impose unusual obligations. In the ordinary way a covenant in a lease to rebuild the entire premises would be unusual....

"This is, however, a lease for a term of 150 years, and it seems to me that in such a case it is not as inconceivable as it would have been in *Lister v. Lane* that the tenant should have accepted an obligation to rebuild the premises when they come to the end of their natural life.

"One therefore returns to the language of the covenant. I could ... perhaps say no more than that in my judgment the language of the covenant is clear and indicates that the draftsman had two separate concepts in mind....

"After all that analysis (omitted here), however, I come back to what seems to me to be the plain question: what as a matter of ordinary English do the words of the covenant mean?"

Credit Suisse v. Beegas Nominees Ltd (1994 1 EGLR 151)

The landlord's covenant

"To maintain repair amend renew cleanse repaint and redecorate and otherwise keep in good and tenable condition... Provided that the landlord shall not be liable ... for any defect or want of repair ... unless [it] has had notice thereof...."

The facts

A prestigious office building was erected and the relevant part let to bankers. A certificate of practical completion had indicated that the only leak was trivial, but because of an inherent defect in the cladding many serious leaks soon appeared - and could not be cured. Consequently, no final certificate was granted. For this and unrelated reasons the tenant decided to move out, but the persistent leaking prevented it from selling the lease.

The dispute

Was the landlord's failure to stem the leaks a breach of its covenant? The landlord argued that the necessary work (recladding to a better design at a cost of £1.2m) was not "repair" and fell outside its covenant.

The reasoning (by Lindsay J)

The parties to a contract are free to contract in any terms they like, and may add obligations to the usual form of repairing covenant if they wish.

The normal rule of construction is that additional words should be given additional meaning.

A covenant 'to repair and otherwise to keep in good and tenable condition' suggests something more than a covenant merely 'to repair'. And it is established that a covenant 'to keep' premises in good condition includes a covenant 'to put' them into that condition.

There can be no breach of a covenant to repair until there is disrepair. But a covenant to keep (and put) in repair can be broken before there is disrepair.

The cladding has not been put into, nor kept in, good and tenable condition.

The replacement of the cladding with a new design is not 'repair' but it does come under 'amend (and) renew'. And even if the state of the cladding is not a 'want of repair' it is a 'defect', and so is covered by 'defects or wants of repair'.

The judge's comment on the drafting

"The lease is over 45 pages of single-spaced typescript and I am far from confident that its draftsmanship is of a quality such that one can derive very much from [contrasts between the wording of two clauses 30 pages apart]...."

My comment

Superficially, *Credit Suisse* is a counter-example to my theme, which is that the torrential style of drafting is pointless. Clearly, in this case the extra words did have an effect (though one that backfired on the drafter's client). It does, however, support my argument that torrential drafting creates rather than resolves doubts about the meaning, so promoting expensive and unpredictable litigation. This decision was not predictable and might not be followed in future.

Applying the cases to the example

None of the cases - and certainly no statute - suggests that the tortuous traditional language is necessary, or that it does anyone the least good. Drafters cannot be sure that their additional words will be given additional meaning (preferably by the other side, without recourse to the courts) unless they make it clear that each word is used advisedly. The torrential style is self-defeating. Because judges know that lawyers pour in unnecessary words with little thought about their meaning they generally (though with occasional unpredictable exceptions) treat a repairing covenant in much the same way however it is phrased, and the exact wording chosen by the drafter is largely irrelevant.

The excuse that lawyers write as they do because the words have been litigated is almost invariably false, because:

- Few practising lawyers have memorised - or look up - the facts giving rise to the litigation, nor copy the precise wording of the disputed clauses (so the particular words whose justification is claimed have probably not been litigated); and
- What litigation there has been provides no rational basis for the wording in question.

Note, incidentally, how plain and unpretentious is the language of the judges compared to that of the disputed documents.

Analysing the example

The Flesch test (see *Clarity* 20 (April 1991), p.9) provides a very rough guide to readability (based on sentence length and the number of syllables to a word). On the Flesch scale from 0 (very difficult) to 100 (very easy), the passage I used as an example scores minus 71. It would not do as well with a more sensitive test; it is made opaque by the absence of punctuation, the use of unfamiliar words, and the nesting of clauses within clauses. None of these faults is required - or even suggested - by law.

Let us look again at this clause, and examine it in detail using footnotes. I have italicised the words which have no function.

To repair (1) and keep the Demised Premises (2, 3) and every part thereof (4,5) and all Landlord's fixtures (6) and fittings (7) therein (5) and all additions (8) thereto (5) in good (9) and substantial (10) repair (11) order and condition (12) at all times (13) during the said (14) term (15) including (16) the renewal (17, 18) and replacement (19) forthwith (20) of all (21) worn or damaged parts but (22) so that (23) the Lessee (24) shall (25) not be liable for any damage which may be (26) caused by any of the (27) risks covered by the insurance referred to in the Fifth Schedule (28, 29) hereto (5, 30) (unless (31, 32) such (33) insurance shall be (34) wholly or partially (35) vitiated (36) by any act or default of the Lessee or of any member of the family employee (37) visitor of the Lessee or other such occupiers (38)) or (39) for any work for which the Management Company may be (40) expressly (41) liable under the covenants on the part of the Management Company (42) hereinafter contained (41,43).

- 1 "Repair" is implied by the "keep ... in ... repair" which follows. But see note 12.
- 2 The initial capitals are supposed to warn us that the phrase has been defined. But capitals are used at random for undefined common nouns (as in "the Fifth Schedule" and "the Lessee").
- 3 It is illogical to pad out with redundant words the short name by which the property is to be referred throughout the document. We know the premises are demised. Why not call them "the premises" or, if appropriate, "the shop"?
- 4 The last four words are empty verbiage. Might anyone argue that an obligation to maintain the premises could be satisfied by maintaining only part, while some other part was neglected?
- 5 "Thereof" , therein" , "hereto", and "thereto" are pompous words used only by lawyers. They are not terms of art. Nor are they necessarily precise; it is not always clear to which noun they refer.
- 6 As a matter of law, fixtures are part of the property, so the explicit reference is unnecessary.
- 7 "Fittings" are the same as "fixtures".
- 8 Additions are also part of the property.
- 9 "Good" is superfluous. If it were not, the drafter must have intended a different standard between "repair" in line 1 and "keep ... in ... good ... repair" in lines 1-3.
- 10 Was this an unusually tolerant landlord who meant to exempt the tenant from minor repairs? Presumably not, judging from the context and from the absence of the exemption from the line 1 "repair". So what does "substantial" mean?
- 11 "Repair" completes the verb phrase begun with "keep" 23 words before. Implanting long subordinate clauses confuses the reader, who forgets the beginning of the verb phrase before the end is reached.
- 12 *Credit Suisse* and the similar *Anstruther-Gough-Calthorpe v. McOscar* (1924 1 KB 716) are authority for the view that "good order and condition" can add something to "repair", but not that "repair [and] order" adds to "good condition". However, the reasoning in those cases (that extra words imply extra meaning) would be difficult to support where there is much obvious redundancy.
- 13 Would the omission of the last three words mean that the tenant need only sometimes comply with this obligation? (We often read [as in *Gutteridge v. Munyard* above] "at all times and from time to time", which means, illogically, "continuously, but with breaks".)
- 14 "Said" merely repeats the sense of "the". Like the "therein" group of words, it is a pompous lawyerism with no technical meaning.
- 15 "During the term" would go without saying, as it did in other covenants in the lease.
- 16 Everything from "including" to "damaged parts" is covered by the repairing covenant already expressed.

- 17 Does “renewal” mean “repair” or “replacement”? Either way, it duplicates what is said elsewhere in the passage.
- 18 “To repair ... including the renewal” is ungrammatical. (As a matter of logic, an obligation to do something can only include obligations to do other things: a noun doesn’t fit.)
- 19 The case law either includes this under “repair” or, in the absence of particularly clear words to the contrary, absolves the tenant from liability.
- 20 “Forthwith” means not “forthwith” but “within a reasonable time”, which is implied anyway (*Doe d. Pitman v. Scrutton* [9 C&P 706], quoted in *Woodfall*.) In any case, the adverb, if of any use at all, should be applied not here but to the main verb (word 2 of the passage).
- 21 Could “only some” be implied if “all” was omitted?
- 22 This signals what should be a new paragraph.
- 23 If the text was less precious “so that” would be omitted.
- 24 Why use the unfamiliar term “lessee” rather than “tenant”?
 - The drafter has used “landlord” not “lessor”.
 - Our clients confuse “mortgagor” and “mortgagee”, and may confuse “lessor” and “lessee”.
 - It is easy for us - and our typists - to use the wrong suffix under the soporific effects of 50 pages of this deathless prose.
 - “Landlord” and “tenant” is less repetitive than “lessor” and “lessee”.
- 25 The archaic “shall” is supposed to be a precise form of imperative, but can be ambiguous and is often inappropriately used; (Peter Butt and Richard Castle, in a work still in preparation, list 10 different meanings). The drafter of this clause is not ordering the tenant not to be liable. Here “shall” expresses the future. Why not simplify the unnecessary future, with its complex “shall have been”s to the “always speaking” present?
- 26 No tenant is liable for damage which “may be” caused, but only for damage which is caused. “May be” and “perhaps” are overused by those too diffident to say what they mean (a serious fault in a lawyer).
- 27 "Of" constructions can often be trimmed (as pointed out by Bryan Garner), in this case to "caused by any risk".
- 28 It would have been better to define “the insured risks”.
- 29 Why tuck these details away in a fifth schedule? It should be where a reader can easily find them. (Incidentally, it is often impossible for readers to tell from each page which schedule (if any) they are in; shoulder-notes would be a useful navigational aid.)
- 30 If “hereto” was omitted, would the reader look for the fifth schedule in some other document?
- 31 “Shall not ... unless” is a double negative, best avoided (especially as the following limb - “or for any work” - is positive).
- 32 As drafted, the tenant loses the benefit of all the insurance even if only part of the proceeds are withheld. Presumably the drafter meant “to the extent that” rather than “unless”.
- 33 “Such” used for “the” is another pompous lawyerism.
- 34 “Shall be” = “is”.
- 35 “Partially” = “partly”.
- 36 How many of us have seen “vitiating” in any other context, and know (rather than guess) what it means?
- 37 The omission of commas can create ambiguity in lists whose individual items contain more than one word. The refusal to punctuate is an affectation criticised by the House of Lords in *Houston v. Burns* (1918 AC 337).
- 38 This implies, wrongly, that anyone in the categories mentioned is an occupier, and leaves open the argument that the exception would not bite against one who was not. (Perhaps a confused drafter or typist omitted an “or” between “employee” and “visitor”.)
- 39 The reader must search back for the beginning of the first alternative to see

how the different parts of the sentence fit together. The answer is 40 words back.

40 “May be” should be “is”.

41 Presumably the tenant would be exempted from any work for which the

management company is liable, whatever the basis of that liability.

42 “The covenants on the part of the Management Company” = “the management company’s covenants”.

43 “Hereinafter contained” is mere pomposity.

How we might improve it

How might this clause be better expressed?

I recommend a three-stage rule of thumb for writing:

1. Think what you want to say.
2. Say it unpretentiously and without fuss.
3. Then stop.

Applying that rule, we might get something (depending on instructions and negotiation) like this:

[The tenant must:]

(A) Subject to clause (B):

- (1) Repair the premises at the beginning of the term; and
- (2) Keep them in repair, and well decorated, throughout it;

(B) But the tenant need not repair:

- (1) Damage from an insured risk, except to make good any loss of insurance proceeds caused by the fault of the tenant (or of anyone under the tenant’s control); or
- (2) Defects of design or construction.

This scores 73 (fairly easy) in the Flesch test.