

**IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE SHOREDITCH COUNTY COURT
(MR. RECORDER D. KEANE)**

Before:

**LORD JUSTICE KERR
and
MR. JUSTICE SWINTON THOMAS**

MR. R. PRYOR Q.C. and MR. S. MONTY (instructed by Messrs. Bernstein & Co., Solicitors, London, N16 5SR) appeared on behalf of the Defendant (Appellant).

MR. D. WOOD Q.C. and MR. M. SEAWARD (instructed by Messrs. George J. Dowse & Co., Solicitors, London, E8 3DF) appeared on behalf of the Plaintiff (Respondent).

ELSIE MAY BARRETT Plaintiff
(Respondent)
and
LOUNOVA (1982) LIMITED Defendant
(Appellant)

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(Revised)

LORD JUSTICE KERR: This is an appeal from a decision of Mr. Recorder Keane in the Shoreditch County Court given on 10th December 1987. The case concerns an end of terrace house in the East End of London in the Borough of Hackney, 70, Lansdowne Drive, E8, which has been occupied under the Rent Acts since 1941. The outside of the premises is in a bad state of repair and dilapidated; probably no work has been done to it for decades.

The issue is whether the landlord is bound to repair the outside. The tenancy contained a covenant that the tenant should keep the inside in good repair and it gives the landlord access for any reasonable purpose. But there is no express obligation on anyone to keep the outside in repair. The Recorder held that a term was to be implied, correlative to the tenant's obligation, to the effect that the landlord would keep the outside in a reasonable state of repair. There is also, in the alternative, an issue under section 4 of the Defective Premises Act 1972, but the main issue on this appeal has been whether a term can be implied as the Recorder has held.

I turn to the tenancy agreement. This was made on 5th April 1941 between a Mr. Frank Hayllar of Brighton, described as a Solicitor, as "the landlord", and a Mr. Albert Arbon of Dalston, described as a bread baker as "the tenant". It demised the house together with the landlord's fixtures in and about the premises, "From the twelfth day of April 1941 for the term of One year certain and thereafter on a monthly tenancy At the yearly rent of Seventy-eight pounds such rent to be payable weekly in advance on Monday in each week. The first payment of one pound ten shillings to be made on the signing hereof". There followed the covenant to pay the rent; I need not read that. But I must read the following one:

"The tenant hereby agrees.....To do all inside repairs (if any) now required

and to keep and at the expiration of the tenancy to leave the inside of the said premises and fixtures in good repair order and condition but fair wear and tear to be allowed at the end of the tenancy."

Next the tenant agreed:

"To permit the landlord and his agents to enter at all reasonable times upon the said premises and for all reasonable purposes."

Then I can go on to the tenant's agreement:

"Not without.....consent.....to make any alterations in or addition to the said premises (and) not to carry on any trade or business upon the said premises or to use the same otherwise than as a private dwellinghouse."

The only relevant agreement on the part of the landlord was that the tenant should be entitled to quiet possession in the usual way and that the landlord would pay all rates and taxes payable in respect of the premises so long as the tenant performed his part of the agreement and paid all monies due from him punctually.

The whole agreement must of course be construed by reference to the circumstances as they existed at the conclusion of the contract. The Recorder referred to some allowances in the early rent books in evidence, which had evidently been made by the landlord for minor external work done by the tenant, as being consistent with his conclusion that the landlord was under an obligation to repair, though rightly not as any aid to the construction of the agreement. I put that matter out of my mind. The plaintiff occupies the house as the result of two transmissions under the Rent Acts. After the death of the original tenant the tenancy was transmitted to his widow and I understand that the plaintiff is her daughter. So far as the landlord company is concerned, it is not known when they acquired this freehold.

To complete the history, more for historical than for any other purposes, the rent has now gone up to £15.00 per week.

Complaints from the tenant about the state of disrepair of this property began in May 1985, and proceeded with a solicitors' letter in August 1985. There was then a surveyors' report with further chasers which were sent more or less throughout 1986. Ultimately there was some response from the landlord and an inspection was carried out on his behalf. But recently the landlord changed his mind and claimed that upon the true construction of the agreement there was no obligation to repair.

The particulars of claim were issued on 20th March 1987. Under the heading "Particulars of Defects" they include the following:

"The structure and exterior, including the drains and gutters, of the premises is in such poor condition as to cause extensive water penetration and damage to the . internal plaster and timbers."

Then there is reference to a survey report which sets out the defects in detail. There was also a claim in the alternative under the Defective Premises Act 1972, to which I shall come later. The defence was simply a denial of liability on all counts.

In the course of the hearing it was agreed that the plaintiff was entitled to damages in the sum of S.1,250 subject to liability. These were to cover special as well as general damages - damages for inconvenience, any damage caused to the contents by damp and so forth. A fairly comprehensive schedule of dilapidations was also agreed, on the basis of what a repairing covenant by the landlord, if one were to be implied, would require to be done to the premises. The cost was estimated at about £10,000.

As I have mentioned, the Recorder took the view that such a covenant should be implied. He accordingly gave judgment for the sum of £1,250 and ordered an injunction in terms of the schedule agreed between the surveyors, to be carried out within six months from 10th December 1987, the date of his order. He granted a stay of twenty-one days for the purposes of an appeal, but only subject to the payment of £5,000 into court within seven days.

Apart from giving notice of appeal, the landlord did nothing at all in relation to that order and it was rightly conceded on his behalf that the company was clearly in contempt of court. When the time for the hearing of this appeal approached, a few days after the expiry of the six-month period on 10th June, it appears that a builder was sent to the premises, but without any prior notice, and not surprisingly he was not admitted by the plaintiff in those circumstances. Moreover, the sum of £5,000 was not brought into court.

Accordingly, we declined to proceed with the appeal unless and until £5,000 was brought into court.

That was done last Monday, the day on which we heard this appeal, and the sum was duly paid into the Shoreditch County Court.

Against that background I turn to the issue whether or not there is to be implied a term to the effect that the landlord was bound to keep the outside in reasonable repair, as the Recorder decided.

In that regard it is common ground that he directed himself correctly when he said:

"Clearly on the authorities the law does not permit the court to imply terms merely on the basis that implication would seem to be reasonable or fair. In essence, what is required before such implication is made is either a situation where the parties to the agreement, if asked about the suggested implied term would have said words such as 'Oh yes, of course we both agree. Is there any need to mention it?'; or where it is not merely desirable but necessary to imply such a term to give business efficacy or in other words necessary to make the contract workable, which amounts to the same thing."

Those two ways of putting the test as to whether or not a term should be implied, sometimes referred to as "the officious bystander test" and the "business efficacy test", are of course correct. But whether or not, on applying those tests, the implication falls to be made is not easy, and the authorities are of no direct assistance.

The landlord relied strongly on a well-known passage in Woodfall on Landlord and Tenant, 28th Edition, paragraph 1 - 1465 at page 618, in the following terms:

"In general, there is no implied covenant by the lessor of an unfurnished house or flat, or of land, that it is or shall be reasonably fit for habitation, occupation or cultivation, or for any other purpose for which it is let. No covenant is implied that the lessor will do any repairs whatever"

The first was the old case of Hart v. Windsor in 1843, reported reported in 12 Meeson & Wellsby at page 68. There was a full tenant's repairing covenant of a house, but he declined to pay the rent because the house was bug-infested to such an extent that he said it was unfit for human habitation.

That plea was rejected. Baron Parke, giving the judgment of the court, said at page 87: "We are all of opinion that there is no contract, still less a condition, implied by law on the demise of real property only, that it is fit for the purpose for which it is let. The principles of the common law do not warrant such a position; and though, in the case of a dwellinghouse taken for habitation, there is no apparent injustice in inferring a contract of this nature, the same

rule must apply to land taken for other purposes - for building upon, or for cultivation; and there would be no limit to the inconvenience which would ensue. It is much better to leave the parties in every case to protect their interests themselves, by proper stipulations, and if they really mean a lease to be void by reason of any unfitness in the subject for the purpose intended, they should express that meaning."

Secondly, there is an even stronger passage in a dictum of Lord Justice Banks in *Cockburn v. Smith*, (1924) 2 King's Bench 119, a decision of this court. The owner of a block of flats had let one of the top flats but had kept the roof of the building and the guttering in his own possession and control. The guttering became defective, water escaped and wetted the tenant's outside wall and so caused damage to the inside. Not surprisingly, it was held that since the landlord had retained control of the guttering he was under a duty to take reasonable care to remedy any defects in it of which he had notice and which were a source of damage. Those facts, of course, do not apply here, but in an obiter dictum Lord Justice Banks said at page 128:

"I want to make it plain at the outset that this is not a letting of the whole house where, without an express covenant or a statutory obligation to repair, the landlords would clearly be under no liability to repair any part of the demised premises whether the required repairs were structural or internal and whether they had or had not notice of the want of repair." That statement was not only obiter, but if it purported to lay down any general rule that no repairing covenant could arise by implication then, with all respect, it clearly went too far,, as shown by later cases.

Finally in this context the landlord relied on the decision of Mr. Justice Goddard, as he then was, in *Wilchick v. Marks & Silverstone*, (1934) 2 King's Bench 1956. But implication derived from the true construction of the terms of the letting was not raised in argument in that case. It was also not dealt with by the judge since no relevant implication could have been derived from the terms of that particular instrument.

I turn now to the more recent cases. They show that there is no rule of law against the implication of any repairing covenant against landlords and that the ordinary principles, of construction concerning implied terms apply to leases in that context as they apply generally in the law of contract. That is illustrated, but in a very different context, by the decision of the House of Lords in *Liverpool Corporation v. Irwin*, (1977) AC 239. I need not refer to that case, but I should mention two other cases, both decisions of this court, which show that implication of a landlord's repairing covenant is a permissible approach if the terms of the agreement and circumstances justify it.

The first is *Sleafer v. Lambeth Borough Council*, (1961) QB 43. That was an extraordinary case, in which the tenant found that he was unable to open his front door due to a minor defect which caused it to jam. So he pulled hard on the only external handle, the letterbox knocker. That came off, and he fell backwards against an iron balustrade and suffered injury to his back. He sued the landlord for allowing the door to get into that state. Perhaps not surprisingly, it was held that in relation to a minor defect of that kind no question of any obligation on the landlord could arise. It is also to be noted that the lease provided, by clause 2, that the tenant was to reside in the dwelling - that is to say, in the same way as here, that it was not to be used for any business purposes; and by clause 9 the tenant was not to do, or to allow to be done, any decorative or other work without the landlord's consent in writing. In rejecting the tenant's claim against the landlord, Lord Justice Morris, who gave the first judgment, quoted the passages in *Hart v. Windsor* and *Cockburn v. Smith* which I have already set out. But I do not think that he said anything about the possibility of implying a term dealing with repairs. However, that was dealt with by Lord Justice Ormrod at page 60, in a passage which I must read:

"When this matter was argued before the judge it was contended by counsel for the defendants that in no circumstances could a condition be implied that the landlords should be under an obligation to repair. The judge dealt with that in this way: 'although I cannot follow Mr. Lowe in saying that the mere fact that the landlord has reserved the right to do repairs means that there is imposed on him an obligation, I cannot agree with Mr. Rawlinson when he says to me that the

absence of some express term in the tenancy, whether oral or in writing, means that there can never arise a contractual duty on the landlord to do the repairs - in other words, that such term can never be implied. I am not sure that that is right; I am not prepared to say that circumstances may not arise in which a court could find itself impelled to imply such terms in a tenancy agreement".

He went on:

"Without having, of course, to decide that question, as at present advised I should certainly agree with the judge. A tenancy agreement, like any other agreement, must be read as a whole, and it may very well be that in construing the agreement it is possible to imply an obligation on the landlord to do repairs. But the question which the judge had to decide and which this court has to decide was whether in this particular agreement such an obligation could be implied." That is equally the issue which arises on the present appeal.

Lord Justice Wilmer said at page 63:

"I think there is much to be said for the view that clause 2 of the agreement, which requires the tenant to reside in the dwellinghouse, does by implication require the landlords to do such repairs as may make it possible for the tenant to carry out that obligation. At least it seems to me that that is a possible view."

Then he said that even if that view be right, in his judgment the obligation would not extend to cover the type of repairs which fell to be considered in that case, which was no more than easing the bottom of the jammed door. He said in that regard:

"Wherever the line is drawn, even assuming that Mr. Beney is right in saying that some obligation on the part of the council to execute repairs must be implied, that line must be drawn, I should have thought, well short of including the responsibility for such a trivial repair as the unsticking of this door."

Finally, there is a recent decision of this court in *Duke of Westminster and others v. Guild* (1985) 1 QB 688, in which the judgment was delivered by Lord Justice Slade. On pages 696 and 697 he referred to two decisions in which an obligation from landlords had been implied to do certain work, in the first case the cleaning of the common parts of the premises and in the second painting the premises. These obligations were implied from terms imposed on the tenants to pay for the cost of a cleaner in the first case, and for the cost of the necessary paint in the second. The position in those cases was of course far stronger than here. At page 697, before quoting the general proposition from *Woodfall* which I have already set out, Lord Justice Slade said: "We do not question the correctness of these two decisions on their particular facts, or doubt that in some instances it will be proper for the court to imply an obligation against a landlord, on whom an obligation is not in terms imposed by the relevant lease, to match a correlative obligation thereby expressly imposed on the other party. Nevertheless we think that only rather limited assistance is to be derived from these earlier cases where obligations have been implied." - and then he referred to the proposition preceded by the words "In general" from *Woodfall*, which I have read.

So it follows that a repairing obligation upon the landlord can clearly arise as a matter of implication. But that leaves the question already mentioned, which I find difficult and on the borderline, whether the terms and circumstances of this particular lease enable such an implication to be made. As to that, although I have not found this an easy case, I agree with the conclusion of the Recorder. In my view the clue lies in what Lord Justice Slade referred to as a "correlative obligation", in this case one which is correlative to the express covenant by the tenant to keep the inside and fixtures in good repair, order and condition.

The considerations which lead me to that conclusion are the following. It is obvious, as shown by this case itself, that sooner or later the covenant imposed on the tenant in respect of the inside can no longer be complied with unless the outside has been kept in repair. Moreover, it is also clear that the covenant imposed on the tenant was intended to be enforceable throughout the tenancy. For instance, it could not possibly be contended that it would cease to be enforceable if the outside fell into disrepair.

In my view it is therefore necessary, as a matter of business efficacy to make this agreement workable, that an obligation to keep the outside in repair must be imposed on someone. For myself, I would reject the persuasive submission of Mr. Pryor Q.C. on behalf of the landlord, that both parties may have thought that in practice the landlord would do the necessary repairs, so that no problem would arise. In my view that is not a businesslike construction of a tenancy agreement.

Accordingly, on the basis that an obligation to keep the outside in a proper state of repair must be imposed on someone, three answers are possible.

First, that the tenant is obliged to keep the outside in repair as well as the inside, at any rate to such extent as may be necessary to enable him to perform his covenant. I would reject that as being unbusinesslike and unrealistic. In the case of a tenancy of this nature, which was to become a monthly tenancy after one year, the rent being paid weekly, it is clearly unrealistic to conclude that this could have been the common intention. In that context it is to be noted that in *Warren v. Kean (1954) 1 QB 15*, this court held that a weekly tenant was under no implied obligation to do any repairs to the structure of the premises due to wear and tear or lapse of time or otherwise, and that it was doubtful whether he was even obliged to ensure that the premises remained wind and watertight. Any construction which casts upon the tenant the obligation to keep the outside in proper repair must in my view be rejected for these reasons; and also because there is an express tenant's covenant relating to the inside, so that it would be wrong, as a matter of elementary construction, to imply a covenant relating to the outside as well. The second solution would be the implication of a joint obligation on both parties to keep the outside in good repair. I reject that as being obviously unworkable and I do not think that Mr. Pryor really suggested the contrary.

That leaves one with the third solution, an implied obligation on the landlord. In my view this is the only solution which makes business sense. The Recorder reached the same conclusion by following much the same route, and I agree with him.

Accordingly I would dismiss this appeal. However, for the sake of completeness I should also refer briefly to the alternative claim under section 4 of the Defective Premises Act 1972, with which the Recorder also dealt. Subsection (1) of section 4 is in the following terms:

"Where premises are let under a tenancy which puts on the landlord an obligation to the tenant for the maintenance or repair of the premises, the landlord owes to all persons who might reasonably be expected to be affected by defects in the state of the premises a duty to take such care as is reasonable in all the circumstances to see that they are reasonably safe from personal injury or from damage to their property caused by a relevant defect."

Subsection (4) provides as follows, so far as material:

"Where premises are let under a tenancy which expressly or impliedly gives the landlord the right to enter the premises to carry out any description of maintenance or repair on the premises then, as from the time when he first is, or by notice or otherwise can put himself, in a position to exercise the right and so long as he is or can put himself in that position he shall be treated for the purposes of subsections (1) to (3) above, but for no other purpose, as if he were under an obligation to the tenant for that description of maintenance or repair of the premises."

The Recorder held that the effect of subsection (4), read together with subsection (1) and in the present case with the express right of entry for any reasonable purpose granted to the landlord, was that the landlord owed a duty of care under section 4(1) and was in breach of it, and that this enured to the benefit of the tenant as well as third parties.

Originally the landlord had appealed against that conclusion. But that was rightly dropped, having regard in particular to the decision of this court in *Smith v. Bradford Metropolitan Council* (1982) 44 Property and Compensation Reports, 171, where it was held that the reference to "any person" in subsection (1) of section 4 could include the tenant himself.

The sum of £1,250 by way of damages, which I have already mentioned, had been agreed also to cover any liability, as is now conceded, owed to the tenant under the 1972 Act. But the schedule of dilapidations had not been agreed with reference to the limited scope of the statutory duty. In those circumstances it was conceded below by counsel for the tenant - not Mr. Wood Q.C. who appeared on this appeal - that no injunction could issue under the Act compelling the landlord to carry out any repairs. On the present state of the evidence that is clearly right. But on proper evidence and proper considerations as to whether or not an injunction should issue there is no reason, of principle or jurisdiction, why an injunction to enforce obligations under section 4(1) of the 1972 Act should not issue in appropriate circumstances. In that context there was a brief reference to the decision of this court in *de Falco v. Crawley Borough Council* (1980) 1 QB 460. If this appeal had been allowed instead of being dismissed, we would accordingly have remitted the matter to the Shoreditch County Court to deal with the alternative claim under the Defective Premises Act for the purpose, not of recovering damages, which are already covered by the agreement which was made, but to enable the plaintiff to apply for an injunction under the Act if so advised. However, since we are agreed that this appeal fails, that aspect falls away.

It follows that in my view the plaintiff is entitled to the agreed damages and to an injunction, once again in mandatory terms, to compel the landlord to carry out the work in the agreed schedule of dilapidations. In relation to that we shall have to hear counsel as to a timetable which, having regard to the lamentable history, should be stringent.

For those reasons I would dismiss this appeal.

MR. JUSTICE SWINTON THOMAS: I confess that my mind has wavered in the course of the extremely persuasive submissions that have been presented to us on this appeal. Like the learned judge below I do not find the central point that arises in the appeal easy, but in the end I have been wholly persuaded that in order to give business efficacy to this tenancy agreement it is necessary to imply the term set out by my Lord in his judgment.

I am also persuaded that if the parties had been asked, in April 1941, whether such a term should be included in this particular tenancy agreement, which provides that the tenant shall be responsible for internal repairs, they would immediately and without hesitation, have agreed that it should be so included.

Accordingly, and for the reasons that have been given by my Lord, I too would dismiss this appeal.

(Order: Appeal dismissed with costs; legal aid taxation; injunction to continue on the basis that the work should be done within four months from today's date; £5,000 to remain in court until that order is complied with; application by defendant/appellant for leave to appeal to House of Lords refused).