IN THE SUPREME COURT OF JUDICATURE
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM CENTRAL LONDON COUNTY COURT
(MR RECORDER PROFESSOR HAYTON)

CCRTF 97/ll22/2

Royal Courts of Justice
Strand
London W2A 2LL

Friday l2th June l998

B e f o r e

LORD JUSTICE EVANS
MRS JUSTICE HALE

CRESKA LIMITED — Appellant

v.

LONDON BOROUGH OF HAMMERSMITH AND FULHAM — Respondent

(Handed down transcript of
Smith Bernal Reporting Limited, l80 Fleet Street
London EC4A 2HD Tel: 0l7l 42l 4040
Official Shorthand Writers to the Court)

MR JOHN CHERRYMAN QC and MR JOHN DAVIES (instructed by Messrs Wiggin & Co, Cheltenham, Gloucestershire) appeared on behalf of the Appellant (Plaintiff).

MR KIM LEWISON QC (instructed by Messrs Legal Services of London Borough of Hammersmith and Fulham) appeared on behalf of the Respondent (Defendant).

J U D G M E N T
(As approved by the court)

LORD JUSTICE EVANS: This is the judgment of the Court.

l This appeal raises a single issue. It is the scope of a tenant's undertaking to repair and maintain the electrical heating installation in office premises which it occupies. The installation consists of under-floor storage heating where the concrete floors themselves are warmed by electrical cables passing through them and using off-peak power. The installation is admittedly defective and the tenants have provided individual storage heaters in the spaces where the lack of under-floor heating occurs. They propose to provide more heaters as further defects occur.

2 The issue is whether the tenants are entitled to discharge their undertaking in this way or whether, as the landlords contend, they are bound by the covenant to restore and maintain the under-floor heating in working order.

3 PARTIES

The landlords are the appellants and the plaintiffs in the action. The respondents/defendant Council are tenants of four floors of an office building at 27l/285 King Street, Hammersmith, under a lease dated l4 July l993 for a period of ten years from 25 March l993, with a rent review clause operative at 25 March l998. The ten-year lease took the place of five separate leases which were due to expire in l996. The details do not matter, but insofar as it may be relevant the fact is that the tenants, whom I shall call "the Council", occupied the premises for some years before l993 and the existence of defects in the under-floor heating installation was already known to them when they took the ten-year lease.

4 PREMISES

The building was constructed during the l960's at a time when, it may be assumed, individual storage heaters were generally available on the market. Instead, the designers chose to install an

under-floor system which uses the same techniques. Electrical power running through cables embodied in a heat-retaining substance (concrete floors in this instance, bricks, sand or possibly even concrete blocks in individual units) produces heat during off-peak hours which is stored and gradually released into the surrounding spaces during the remainder of the 24 hours. In order to provide the necessary electrical circuits, the cables have to pass between the concrete floors and adjacent parts of the building.

5 THE DEFECTS

These are described in a Report produced by Mr Michael Brown, an experienced electrical engineer called as expert witness by the Council. He tested the large number of individual circuits and found that some of them were "open", that is say, the cables were broken or their insulation was damaged. He was not able to discover the precise location of these faults, but he ascribed them generally to one, or possibly two, causes. The first was movement between the concrete floor slabs and adjacent parts of the building. This could be caused by differential rates of expansion and it would break the cables unless they were fitted with flexible connectors, which they were not. The second cause was subsidence of the building which led to cracks in the concrete floors themselves and thus to breaks in the cables inside. Some cracks were found, but the breaks in the cables are impossible to discover, without breaking open the concrete and thereby destroying the floors. The number of open circuits was on average about one quarter of the total.

6 THE PROCEEDINGS

The appellant claimed by Summons dated 4 June l996 (issued in the High Court but transferred to the Central London County Court)(l) a declaration that "the Defendant is obliged by virtue of clause 3(6) of the said lease to carry out repairs to the under floor heating", and "(2) further or other relief". The hearing took place before Mr Recorder Professor Hayton and by his judgment on 28

July l997 he held that the landlords were entitled to the Declaration which they sought. Certain points were raised by the Council which he decided against them, and they accept that the appellants are entitled to the Declaration which he made. But this is merely to the effect that the Council is obliged to repair the defects. It leaves open the extent of their obligation and in particular the issue whether it is or may be discharged by the provision of storage heating units. The Recorder held in the Council's favour that it could be so discharged, and this part of his judgment led to him making a further Declaration:-

> "2. The Defendant is entitled to discharge that obligation by installing modern electric night storage wall heaters as and when requisite or by relaying the under floor cables in separate zones with flexible terminators".

The appellants submit that this Declaration was based on an incorrect interpretation of the covenant in clause 3(b).

7 THE LEASE

Clause 3(b) so far as material provides:-

> "3. The Tenant HEREBY COVENANTS with the Landlord as follows:-
>
> .....
>
> (b) During the Term at its own expense well and substantially to repair and maintain and in all respects keep in good and substantial repair and condition the interior of the Premises and every part therefore including without prejudice to the generality of the foregoing ... the Pipes and all electrical heating mechanical and ventilation installations therein which exclusively serve the Premises".

The definition of "Pipes" includes "wires cables channels flues and all other conducting media including ..... any other ancillary apparatus" (clause l(0)), and the Rent Review provisions of the Fourth Schedule require the future rent to be assessed "disregarding ..... (iii) any effect on rent of any alteration or improvement to the Premises made (otherwise than pursuant to any obligation of the Tenant to the landlord to carry out such work) by the Tenant....".

In our judgment, none of these further provisions is relevant to the issue which arises under clause

3(6). The material words are “repair etc..... all electrical heating ... installations therein”. The definition of Pipe as including cables etc adds nothing to this, and the Rent Review provisions depend upon rather than influence the true construction of clause 3(6), although the l998 Review which is pending may be affected by the outcome of those proceedings.

8 SUBMISSIONS

Mr Cherryman QC for the appellants, who did not appear below, submits that the judge’s conclusion was wrong, for the simple reason that clause 3(6) means what it says: the tenant undertook to repair etc “all electrical heating... installations therein”. It is not a case where the under-floor heating system, which is installed, cannot be repaired. The Recorder found this, albeit in the context of a different question which arises from the authorities, as to whether repairs would be futile and repetitive. The judgment reads:-

> “It would be possible to remedy the under-floor heating by replacing it, subject to the new design to allow flexibility... So that would not be futile. It could well be futile and repetitive according to the case law I have just mentioned, if the replacement only lasted for two or three years and the replacement exercise had to be repeated time after time, but here one could have a more modern design of under-floor heating that would operate satisfactorily for a lengthy period. Counsel for the plaintiff said “Exactly. One should therefore order this more modern design to go ahead. That is the way to carry out the repair in covenant. One cannot say that it would be futile or repetitive to do that”.”

Mr Cherryman further submits that, earlier in his judgment, again in a different context, the Recorder did direct himself correctly:-

> “... In this context it does seem to me that the function of this covenant is to ensure the tenant is to put in repair, maintain and in all respects keep in good repair the particular heating and electrical installations that existed at the time, whether or not they are actually functioning properly at the time”. Meaning, at the time of the lease."

Mr Lewison QC for the Council, on the other hand, submits that the Recorder was correct to reach the conclusion which he did. A repairing covenant may be performed by installing the modern equivalent of what was installed before. Individual storage heaters operate on the same technical principles as under-floor storage heating and they can be regarded as just a different type of storage

heating. Both types use off-peak over night electricity and essentially there is no difference between "one big under-floor storage heater, or ten to a dozen [wall] storage heaters" (judgment l0). Although individual heaters may take up some of the available floor space, and if they do, there is an issue as to whether this could have repercussions on the floor areas by reference to which the rent is assessed, nevertheless individual heaters are much better from the landlord's as well as the tenant's point of view. Mr Brown gave evidence in his report and orally which the Recorder summarised as follows:-

> "It seems that nowadays, with office buildings, it is unheard of to have under-floor storage heating because wall storage heating, or other forms of heating for that matter, are much more effective."

Mr Brown's evidence shows, however, that he compared under-floor heating with individual units because "they provide exactly the same function", and that must mean, the function of keeping the spaces warm. He also made it clear that the disadvantages of under-floor heating as he saw them were economic rather than technical. It could be done, but when asked whether replacing and if necessary redesigning the under-floor system was "a sensible and practical way to deal with the heating problem?" he answered:-

> "A. Not really. I have never come across any office building that had this form of [heating]. Electric under-floor heating is normally installed in places where you have very little wall or floor area and want to put down a cheap installation to start with. If you ever come to want to replace it or modify it, it becomes a very very expensive option."

Mr Lewison submits, therefore, that repairing the existing installation is no longer a "sensible and practicable" way of maintaining the heating installation, and that on the authorities the party liable to keep the installation in good repair is entitled to modify the installation, at least to the extent of providing individual storage heaters. He accepted in the course of his oral submissions that if this is the correct approach, then in principle the Council can install whatever alternative form of heating it chooses to provide, extending even to a conventional hot water circulating system with radiators. We are not sure on reflection that the submission need go so far, and we will consider it on the

basis that it is limited to individual heaters which operate on the same storage principle as under-floor heating does. Mr Lewison submitted that the judge's conclusion was correct:-

> "In my judgment the tenant has a choice here either to repair the under-floor heating by repairing the under-floor heating as such, or the opportunity to replace and repair in way which will be likely to be an improvement by way of installing [wall] heaters form time to time. These installed [wall] heaters... are designed to improve the building permanently. But instead of improving the building permanently by virtue of them being under-floor heating, the building is to be improved permanently by the under-floor heating continuing so far as it natural life allows, but being replaced by wall storage heating as appropriate. There will come a stage in four or five year when the under-floor heating will have been totally replaced by [wall] storage heating."

We have bracketed the reference to "[wall]" because it was agreed before us that the individual heaters stand on the floor and may even be fixed to it, so they are not clear of the floor as the phrase "wall heaters" might suggest.

9 THE AUTHORITIES

We were referred to a number of authorities where similar questions have arisen, although in different contexts.

In Morcom v Campbell-Johnson [l956] lQB l06 the landlords of an elderly block of flats claimed that they were entitled to increase the standard rent of the tenants by reference to expenditure they had incurred on what they said was an "improvement of the dwelling-house" within relevant statutory provisions. They had spent a considerable sum of money on drainage, installing a modern one-pipe system for drainage from water closets and from wash hand basins and baths in place of the original two-pipe system, and on providing one water supply tank at the top of the building to supply all six flats, in place of individual tanks for each flat. The original system had come to the end of its life. The Court of Appeal held that the replacement of the old drainage and cold water systems by their modern equivalents, although resulting in making the dwelling-house better than it was before, were not "improvements" within the statute, but repairs only. Denning LJ said this:-

> "I find great difficulty in framing a definition of what is an "improvement" as distinct from a "repair" .... It seems to me that the test so far as one can give any test in these matters is this: If the work which is done is the provision of something new for the benefit for the occupier, that is, properly speaking, an improvement: but if it is only the replacement of something already there, which has become dilapidated or worn-out, then, albeit that it is replacement by its modern equivalent, it comes within the category of repair and not improvements".

He added:-

> "It is material to notice that, so far as the tenants are concerned, the position in the flats from the practical point of view is no different from what it was before. The water-closets, the baths and the cold water system all operate just as they did before.... In a sense, the work benefits them in the same way as any repairs must benefit the people who live in a house, because when it gets old dilapidated they are better, they are better off when it is repaired and made good. But that is the extend of the benefit to them. There is no provision of anything new for their benefit, but only the replacement of the old parts by a modern equivalent, and in my judgment, that does not amount to improvement so as to qualify the landlords for an increase in rent".

Hodson LJ said:

> "I think it is clear that what one has to look at is whether there has been the provision of something new, rather than the replacement of what was there before" (pll8).

In Elmcroft Developments Ltd v Tankersley Sawyer [l984] 270 EG l40 the landlords' covenant was to "maintain and keep the exterior of the building and the roof, the main walls, timbers and drains thereof in good and tenantable repair and condition". There was a severe damp problem within the ground-floor flats, because the slate damp-proof course which installed was ineffectual, being positioned below ground level. This was due either to a defect in design or construction or to bad workmanship. The Court upheld the judge's decision that the landlords were obliged to cure the damp "by using the only practical method at this price, namely injecting silicone into the wall..... The damp-proof course, once inserted, would on the expert evidence cure the damp." The alternative was to patch or renew the plaster as it became affected by rising damp, but that work would have to be repeated as often as the damp re-appeared. "I have no hesitation in rejecting the submission that the [landlord's] obligation was repetitively to carry out futile work instead of doing the job properly once and for all" (per Ackner LJ at l42).

Finally, in Stent v Monmouth District Council [l987] l EGLR 59 the local authority as landlord was obliged to repair and maintain the structure and exterior of a dwelling-house. The dispute concerned the front door of the house, which stood on an exposed site facing the prevailing west wind. The tenant complained of the constant ingress of water blown through or under the door which, over a period of 30 years, had been source of trouble and inconvenience and had inter alia caused damage to carpets (p59). The report shows that originally a wooden door was fitted. Water collected at the foot of the door causing it to become rotten and distorted, thus allowing water ingress which damaged the carpets. Repairs were undertaken and the door was replaced, but the problem was not solved until an aluminium self-sealing weather-proof door was fitted. A number of questions arose. The first was whether the landlords could be in breach of the repairing covenant when the door as originally fitted was not itself defective and the problem could be attributed to an inherent design defect. The court accepted this submission to the extent that on the authority of Quick v Taff-Ely Borough Council [l986] QB 809, "the fact that the door did not fulfil its function of keeping out the rain was not ipso facto a defect for the purpose of the repairing covenant". However, when the door itself became damaged, an obligation to repair or replace it arose, and the landlord was in breach of the repairing covenant by reason of its failure to replace the wooden door by a self-sealing aluminium door earlier than it did. In the leading judgment, Stocker LJ said that in his judgment:-

> ".... the replacement of the wooden door by a self-sealing aluminium was a mode of repair which a sensible person would have adopted; and the same reasoning applies if for the word "sensible" there is substituted some such word as "practicable" or "necessary".... [The wooden door] became distorted. It needed accordingly replacement in order to enable it to perform its function at all, quite apart from the question of repairing obvious defects which it had exhibited..... In my view the obligation under the covenant in this case was one which called upon the appellants to carry out repairs not only effected the repair of the manifestly damaged parts, but also achieved the object of rendering it unnecessary in the future of the continual repair of this door." (pp64/5)

The President Sir John Arnold held that "the repairing covenant on its true construction does not require any design defect to be made good", but that:-

> "... On the true construction of the covenant to repair there is required to be done, not only the making good of the immediate occasion of disrepair, but also, if this is what a sensible practical man would do, the elimination of the cause of that disrepair through the making good of an inherent design defect at least where the making good of that defect does not involve a substantial rebuilding of the whole". (p65).

He concluded:-

> "... It is plain that if all was done to the door which stood in need of repair was to patch it or even to renew it and to leave when so doing the cause of the damage which was the absence of any agent to defeat the collection of the rotting water beneath the door, then one was not doing that which the sensible, practical man would have advised as a sensible way of dealing with the problem....

The appellant Council had the obligation of making-good the design defect which caused the collection of water which occasioned the rotting, and...

> "the failure so to do was in the circumstances a breach of the appellants' covenant for which they were properly required to pay damages by the learned judge" (p65).

From these authorities, particularly Stent v Monmouth District Council, Mr Lewison derived his submission that where, on the evidence, the sensible and practicable course is to install the modern equivalent of an existing installation which has proved defective, then the party who is liable under the covenant to repair is at least entitled to perform his obligation under the covenant by substituting a different system which performs the same function in place of the old.

l0 CONCLUSION

This is not a case where it is impossible or even impracticable to maintain the existing under-floor storage heating system in good working condition, nor where doing so would be "futile" in the sense that the repair would be short-lived and commercially unsound. Nor in our judgment can it be said that individual storage heaters are the same "electrical heating.... installation" in a different guise. It seems to us that they are two different methods achieving the same result, notwithstanding that the same techniques are employed. We therefore hold that the case is as straightforward as Mr Cherryman submits. The Council undertook to maintain the

existing under-floor installation in good repair. It is defective and needs repair and the repairs, although expensive, can be carried out. The fact that repairs carried out now would incorporate some improvements in design, particularly the use of flexible connectors where appropriate, does not mean that they cease to be works of repair which the party liable under the repairing covenant is bound to perform. Morcom v Campbell-Johnson is direct authority for this. On the evidence, the existing installation (as distinct from the failure to incorporate flexible connections) cannot properly be regarded as a design defect in the original structure at the date of the Lease, but even if it was, the case is not one where attempts to repair it would be futile or where the only "sensible and practical" course is to substitute some other system. We therefore hold that the Council is not entitled to discharge its obligations under the repairing covenant by substituting individual storage heaters for the under-floor system, and the question whether they would be entitled or bound to do so, if repairs to the existing installation were no longer practicable, does not arise.

ll We have assumed in Mr Lewison's favour that the judgments in Stent v Monmouth Borough Council are authority for the proposition, not merely that in the circumstances of that case the landlord was entitled to provide a modern substitute, but that he was bound to do so: in other words, he was not entitled to replace the wooden front door, if he had wished to do so. We doubt whether the decision goes that far, but for obvious reasons there is no suggestion in the present case that the Council are not entitled to remedy the under-floor heating if they choose to do so. The sole question is whether they can discharge their obligation by alternative means which, they say, are the sensible and practical course for them to adopt. In our judgment, they are bound to perform the covenant in accordance with its terms, as they still can, and the alternative method of performance which they suggest is not open to them.

l2 We therefore allow the appeal and make a negative declaration accordingly.

Order: Appeal allowed with costs here and below;
costs to be on standard basis; application
for leave to appeal to the House of Lords refused.