Court of Appeal

B e f o r e :
Lord Justice STEPHENSON, Lord Justice KERR and Lord Justice SLADE

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Between:

WESTMINSTER (DUKE OF) AND OTHERS
V
GUILD

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Gavin Lightman QC and A Ginsberg (instructed by Boodle Hatfield & Co) appeared on behalf of the plaintiffs;

Kim Lewison (instructed by T J James & Sarch) represented the defendant.

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1. Giving judgment, SLADE LJ said: This is the judgment of the court on an appeal from a judgment of His Honour Judge Lipfriend, sitting as a High Court judge, given on May 14 1982 at the trial of a preliminary issue in an action. The plaintiffs in the action are the trustees of the will of the second Duke of Westminster. The defendant is Mr Ivan Robin Guild. The action was begun by a writ issued on February 7 1979, by which the plaintiffs as landlords claimed against the defendant as tenant payment of alleged arrears of rent and certain other relief. The plaintiffs subsequently issued a summons for summary judgment. The defendant raised by way of defence and set-off against the rent a claim for damages in respect of loss suffered by him through the failure to repair a drain which, he said, the plaintiffs were bound to repair. On December 15 1980 Master Elton gave the defendant liberty to defend the action and gave certain directions which were intended to enable the question of the liability for the repair of the drain to be determined as a preliminary issue. Following his directions, a statement of facts was agreed between the parties on January 25 1982. The preliminary issue was then tried before His Honour Judge Lipfriend on July 2 1982. He decided it in favour of the defendant. He decided that the liability for the repair of the drain fell upon the plaintiffs and awarded the defendant the costs of the preliminary issue. The plaintiffs now appeal from his order.

2. The relevant facts all appear from the agreed statement of facts and from the lease itself. We will extract those of them which seem to us most material for the purposes of this judgment.

3. By a lease dated August 11 1976 the plaintiffs granted to the defendant a lease of certain premises now known as 107a Pimlico Road, SW1, in the City of Westminster, for a term beginning on August 11 1976 and ending on March 25 1997. The demise included the express grant of a right of way over a private roadway or mews leading from the demised premises to Pimlico Road, the right being expressed to endure so long as the Lessee and his successors in title and Assigns shall pay a proportion of the expenses hereinafter referred to in Clause 2 (IV) hereof.

By clause 2 (I) the defendant covenanted to pay the rent thereinbefore reserved and 'such proportionate part thereof as aforesaid'. Clause 2 (III) began with the following words:

The Lessee will at all times during the said term well and sufficiently repair
paint paper and cleanse the whole of the demised premises . . .

4. There followed in clause 2 (III) a long list of particular obligations of the defendant as regards the exterior of the demised premises, relating to such matters as paint and stonework, which were expressed to operate without prejudice to the generality of the opening provisions.

5. Clause 2 (IV) read as follows:
(IV) The Lessee will on receipt of the Landlords' written demand forthwith pay and contribute to the Landlords a fair proportion with other lessees interested therein of the expenses of making repairing and scouring all party and other walls gutters sewers and drains belonging or which shall belong to the demised premises or be used jointly with the occupiers of any adjoining or neighbouring hereditaments And also a fair proportion of the expenses of maintaining repairing cleansing and keeping in good order and condition the paving or surface of the roadway of the passageway and private roadway shown coloured brown and also of the lighting of the said passageway and private roadway and further a fair proportion of the expenses of preserving the amenities of the demised premises and adjacent or neighbouring premises such proportion (if in dispute) to be determined by the Estate Surveyor of the Landlords whose determination shall be final and binding on the Lessee.

6. Clause 2 (VI) gave the plaintiffs liberty at any time during the term to enter the demised premises for any lawful purpose including (*inter alia*) viewing its condition. It further provided that, upon any such entry, they might bring any requisite appliances and execute as well repairs on adjoining premises belonging to the Landlords as repairs which ought to be done on or to the demised premises the Lessee paying the cost of any such repairs to the demised premises and the Landlords making good all damage occasioned to the demised premises by any such entry to repair adjacent premises.

7. Clause 5, so far as material, provided as follows:

THE LANDLORDS COVENANT with the Lessee that the Lessee duly paying the said rent and performing and observing all and every the covenants clauses and agreements hereinbefore respectively reserved and contained shall and may (subject nevertheless as aforesaid) peaceably enjoy the demised premises for the term hereby granted without any interruption by the Landlords or any person lawfully claiming through or under them.

8. The lease did not expressly impose any obligations whatsoever on the plaintiffs in regard to repair or maintenance. The issue of law raised on this appeal substantially concerns the extent of their liability (if any) to repair and keep in repair a drain which is situated partly under the demised premises and partly under the mews. The position of this underground drain ('the green drain'), which serves only the demised premises, is shown on a plan at p 19 of our bundle of documents. The demised premises are shown on the plan marked as 107a and bounded by a pink line. The green drain runs through the premises from left to right in the plan and then towards the bottom of the plan down the mews. At the date of the grant of the lease the demised premises drained into the public sewer in Pimlico Road by means of the green drain, which was intended to take both surface and foul water. The green drain was not expressly identified or referred to in the lease. In this court it has been common ground that (a) that part of it which was situated beneath the demised premises formed part of 'the demised premises' within the meaning of Clause 2 (III); (b) the lease included the implied grant of an easement of drainage through that part of the green drain situated beneath the mews and belonging to the plaintiffs.

9. Before the lease was granted, the defendant made no structural survey of the drains serving the demised premises and at the date of the grant neither the plaintiffs nor the defendant knew of the existence of the green drain outside the demised premises. The landlords had not carried out any works of maintenance to it for many years, if ever.

10. There are two manholes situated beneath the demised premises which are shown by dotted lines on the plan and respectively marked '1' and '2'. The green drain is shown as running from manhole 1 on the left of the plan to manhole 2 on the right of the plan and then bending round so

as to run from manhole 2 to a third manhole (numbered '3') at the bottom end of the mews. Manhole 3 was sealed shut and only at the conclusion of the excavations to which we will refer was it opened by the defendant's builders and found to be dry. There is also a manhole situated under the mews very near the defendant's boundary, shown in a circle on the plan and marked '4'.

11. Following the grant of the lease the defendant and a company called Homeworks Furnishings Ltd ('Homeworks') converted the demised premises from a warehouse into a showroom at a cost of around £ 200,000. In March and early April 1979 it became apparent that the green drain serving the demised premises was defective. The defendant and Homeworks employees found on opening manhole 1 that the drain was blocked.

12. By April 2 1979 the plaintiffs had been informed of the want of repair of the drain and thereafter a series of meetings took place at the demised premises in connection with the drainage problems. Various investigations were carried out and the defendant made various attempts to clear the drain. These investigations and attempts were described or detailed in the statement of facts. Eventually the large manhole no 2 was discovered underneath the demised premises. There had been no obvious indication of its existence; its inspection cover had been covered over before the grant of the lease. Most important of all (we quote from the statement of facts):
The green drain leading from manhole no 2 along the Mews towards manhole no 3 was full of earth and appeared not to have been cleared or maintained for many years.

13. So far as the plan shows, there was no other drain which served the demised premises, so that it is not surprising to learn from the statement of facts that the contractors excavating the premises ran into waterlogged ground before striking the run of the green drain.

14. In order to avoid the expense of rebuilding the entire length of the green drain, it was agreed between the plaintiffs and the defendant that he should be at liberty to construct a new drain connecting the demised premises to a private sewer of the plaintiffs which served the mews and is shown coloured red on the plan. A new manhole was also constructed. Its position and that of the new drain are shown coloured violet on the plan.

15. The defendant and Homeworks incurred expenses totalling about £ 17,000 in respect of the costs of the drainage, excavation and building works and other incidental expenses. The defendant contends that he is entitled to set off this expenditure against the rent which otherwise is admittedly owing from him. The plaintiffs contend that he alone is liable for the cost in question and that he is not entitled to make any such set-off. It is common ground that, if a local authority had lawfully called upon the defendant to repair the green drain, he would have been under an obligation to the plaintiffs to carry out such works pursuant to a subsidiary provision of clause 2 (III) of the lease, which obliged him to carry out all works whatsoever which public authorities might lawfully require to be carried out on the demised premises.

16. By his order of July 2 1982 the learned deputy judge declared as follows: It is adjudged and declared that (1) upon the true construction of the Lease dated August 11 1976 made between the Plaintiffs and the Defendant under which the Plaintiffs let to the Defendant the premises known as 107A Pimlico Road, London SW1 in the City of Westminster the Plaintiffs had an obligation to the Defendant to make repair and scour all party walls gutters sewers and drains belonging to or which should in future belong to the demised premises therein mentioned or be used jointly with the occupiers of any adjoining or neighbouring hereditaments (2) that the Plaintiffs owed to the Defendant a duty to take reasonable care to keep in repair and unobstructed the drain referred to as 'the green drain' in the Agreed Statement of Facts where not subjacent to the demised premises and (3) that the Plaintiffs were on February 28 1979 in breach of the said obligation the said duty and clause 5 of the said Lease AND FOR an amount of damages to be assessed by a Circuit Judge assigned to Official Referee's business.

It is further adjudged and ordered that the Plaintiffs do have leave to contend that the damages to be assessed as aforesaid should be abated in whole or in part by reason of the provision of clause 2 (IV) of the said Lease.

17. For the rest of this judgment, we shall refer to that part of the green drain which is subjacent to the demised premises as 'the tenant's part of the green drain' and to that part which is subjacent to the property retained by the landlords as 'the landlords' part of the green drain'.

18. Mr Lewison, on behalf of the defendant, has sought to support the decision of the learned deputy judge on two alternative bases, which are substantially the same as those relied on by the judge, namely that (a) the lease on its true construction places on the landlords an implied contractual obligation to keep in repair and unobstructed the landlords' part of the green drain; (b) even if the lease imposes no such implied contractual obligation, the landlords are under a duty of care to the lessee, which obliges them to do these things.

19. We will deal separately with both these arguments.

Implied contractual obligation

20. The green drain must undeniably fall within the class of drains referred to in clause 2 (IV) of the lease. Mr Lewison conceded, as he had to concede, that under clause 2 (III) the obligation to repair the tenant's part of the green drain undeniably falls on the tenant. Nevertheless he pointed out, having regard to clause 2 (IV), the landlords clearly have the right to do works to the landlords' part of the green drain and then to submit a demand to the tenant for reimbursement of a 'fair proportion' of the cost of such works. We observe in passing that (i) the fair proportion in this context must be the whole, since the green drain serves only the demised premises; and (ii) in the event of failure by the tenant to repair the tenant's part of the green drain, the landlords would under clause 2 (VI) have a similar right to do works to that part also, and to debit the tenant with the cost.

21. In view of the specific obligation to pay the cost of repairs to the green drain which the lease imposes on the tenant and the rights of the landlords to effect the repairs, the only way to make sense of this lease, it is submitted on behalf of the defendant, is to imply a correlative obligation on the landlords to carry out the repairs to the landlords' part of the green drain. In deciding that such an obligation exists, the learned deputy judge principally relied on the decision in *Barnes* v *City of London Real Property Co* [1918] 2 Ch 18. In that case landlords had let various sets of rooms and by the tenancy agreement had imposed on the tenants the obligation to pay a stated additional rent specifically for the cleaning of rooms by a house-keeper to be provided for the purpose. The agreements placed no express obligation on the landlords to provide for the cleaning of the rooms, but Sargant J (albeit obiter) was of the clear opinion that such an obligation should be implied (see *ibid* at pp 32 and 33). That, however, was a much stronger case than the present, if only because the obligation of the tenants to pay the rent for the particular service was an unqualified obligation to pay a definite periodic amount in respect of that service, the obligation to pay not being expressed so as to be conditional on the provision of the service or on the service of notice requesting payment. Mr Lewison also relied on the decision in *Edmonton Corporation* v *W M Knowles & Son Ltd* (1962) 60 LGR 124, where McNair J implied from a provision in a lease obliging the tenant to pay to the landlords 'the cost . . . of painting in a workmanlike manner every third year of the term all outside wood and metal work and other external parts of the demised premises' a matching obligation on the landlords to do the repairs (see at p 128).

22. 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.

The general rule is, in our judgment, correctly stated in *Woodfall's Landlord and Tenant* at para 1 - 1465: 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 whatsoever . .

23. On occasions special facts may no doubt justify a departure from the general rule. However, the decision of the Court of Appeal in *Sleafer* v *Lambeth Borough Council* [1960] 1 QB 43 well illustrates that, though the provisions of a lease may indicate the parties' contemplation that in fact and in practice the landlord will do repairs, and indeed may confer express rights on him to enter the demised premises for this purpose, it does not follow that any contractual obligation to do the repairs is to be implied against him (see, for example, at pp 56-57 per Morris LJ).

24. When then is the test to be applied in considering whether an obligation is to be implied against the landlords in the present instance? In *Liverpool City Council* v *Irwin* [1977] AC 239 the House of Lords had to consider the nature and extent of the obligations of landlords of a building in multiple occupation to repair essential means of access. In the Court of Appeal ([1976] QB 319) Lord Denning MR had suggested that the court had power to imply a term if it was reasonable so to do, and held that the landlords were under an implied obligation to repair accordingly. The majority (Roskill and Ormrod LJJ) came to a contrary conclusion. Roskill LJ said (*ibid* at p 337):

But I am afraid, with profound respect, I cannot agree with his view that it is open to us in this court at the present day to imply a term because subjectively or objectively we as individual judges think it will be reasonable so to do. It must be *necessary*, in order to make the contract work as well as reasonable so to do, before the court can write into a contract, as a matter of implication, some term which the parties have themselves, assumedly deliberately, omitted to do.

25. The House of Lords unequivocally rejected the suggestion of Lord Denning MR that the courts have power to introduce terms into contracts merely because they think them reasonable. Nevertheless they supported his ultimate conclusion, by allowing the appeal on rather different grounds. Lord Cross of Chelsea (at pp 257 and 258) referred to the distinction between two classes of case where the courts are prepared to imply terms in contracts, a distinction pointed out by Lord Simonds and Lord Tucker in their speeches in *Lister* v *Romford Ice & Cold Storage Co Ltd* [1957] AC 555 at pp 579 and 594. The first class of case is where the court lays down a general rule of law that as a legal incident of all contracts of a certain type (sale of goods, master and servant, landlord and tenant and so on) some provision is to be implied. The second class is where there is no question of laying down any *prima facie* rule applicable to all cases of a defined type, but the court is being asked in effect to rectify a particular contract by inserting in it a term which the parties have not expressed. In this second situation, as Lord Cross pointed out, a quite different test is applicable.

26. In *Liverpool City Council* v *Irwin* at least the majority of the House of Lords clearly regarded the case as falling within the first class of case referred to by Lord Cross. Lord Wilberforce, with whose speech Lord Fraser of Tullybelton agreed, pointed out (at p 254A) that the court was there simply concerned to establish what the contract was, in the absence of a formal tenancy agreement, the parties themselves not having fully stated the terms (see at pp 253 A to C and 254 A). He concluded (at p 254 F-G):

The relationship accepted by the corporation is that of landlord and tenant: the tenant accepts obligations accordingly, in relation inter alia to the stairs, the lifts and the chutes. All these are not just facilities, or conveniences provided at discretion: they are essentials of the tenancy without which life in the dwellings, as a tenant, is not possible. To leave the landlord free of contractual obligation as regards these matters, and subject only to administrative or political pressure, is, in my opinion, inconsistent totally with the nature of this relationship. The subject matter of the lease (high rise blocks) and the relationship created by the tenancy demand, of their nature, some

contractual obligation on the landlord. 27. He regarded it as a 'legal incident of this kind of contract' (see at p 255 A).

28. Lord Cross likewise thought that the type of case was one which rendered it appropriate for the court to lay down a *prima facie* rule. He pointed out (at p 259 B) that the general principle is that the law does not impose on a servient owner any liability to keep the servient property in repair for the benefit of the owner of an easement. He said, however (at p 259 E): In such a case I think that the implication should be the other way and that, instead of the landlord being under no obligation to keep the common parts in repair and such facilities as lifts and chutes in working order unless he has expressly contracted to do so, he should - at all events in the case of ordinary commercial lettings - be under some obligation to keep the common parts in repair and the facilities in working order unless he has expressly excluded any such obligation.

29. The present case is in our judgment distinguishable from the *Liverpool City Council* case in at least two material respects. First there is a formal lease which, on the face of it, represents the apparently complete bargain between the parties. Secondly, this present case is not in our opinion a type of landlord-tenant situation, which gives rise to special considerations, such as the case of a high-rise building in multiple occupation, where the essential means of access to the unit are retained in the landlord's occupation, thus making it appropriate for the court to imply any particular term as a legal incident of the contract.

30. Accordingly, for the purpose of considering whether the suggested contractual obligation falls to be implied in the present case, we can see no justification for applying a test more favourable to the defendant than the test applicable to the construction of any ordinary commercial lease of unfurnished premises or land which does not fall into a special category such as was referred to by Lord Wilberforce or Lord Cross. While this test is capable of being formulated in many different ways, it is clearly stated by Lord Cross in the *Liverpool City Council* case at p 258:

Sometimes, however, there is no question of laying down any *prima facie* rule applicable to all cases of a defined type but what the court is being in effect asked to do is to rectify a particular - often a very detailed – contract by inserting in it a term which the parties have not expressed. Here it is not enough for the court to say that the suggested term is a reasonable one the presence of which would make the contract a better or fairer one; it must be able to say that the insertion of the term is necessary to give - as it is put - 'business efficacy' to the contract and that if its absence had been pointed out at the time both parties - assuming them to have been reasonable men - would have agreed without hesitation to its insertion.

31. This is the test which we consider relevant in the present instance; as Lord Edmund-Davies pointed out in the last-mentioned case (at p 266 E): 'the exercise involved is that of ascertaining the presumed intention of the parties', by which of course he meant *both* parties to the contract.

32. Applying this test to the construction of the lease in the present case, we find ourselves quite unable to apply the suggested provision in the favour of the tenant by a process of implication. There are far too many factors which seem to us to point in the opposite direction.

33. First, clause 2 of the lease contains a number of careful and elaborate provisions defining the tenant's contractual obligations in regard to repair and maintenance. If it had been intended that other contractual obligations relating to repair should be placed on the landlords themselves, one would *prima facie* have expected this particular lease to say so.

34. Secondly, the obligations which it is now sought to impose on the landlords by a process of implication would be obligations of an extensive and onerous nature. Mr Lewison accepted, and contended, that, if the landlords were under an obligation to repair the drains mentioned in clause 2 (IV) of the lease, a similar obligation would fall upon them in regard to all the other items mentioned in that subclause (such as party and other walls and gutters and the surface of the

roadway) - and indeed that they would be subject to a positive obligation to preserve 'the amenities of the demised premises and adjacent or neighbouring premises'.

35. Thirdly, as Mr Lightman pointed out, the implied covenant contended for by the defendant would in some respects be in direct conflict with express provisions of the lease. For, as has already been said, the implied covenant is claimed to extend to all the items mentioned in clause 2(IV) of the lease. But these items include (*inter alia*) walls, utters and sewers 'belonging to the demised premises', which *the tenant* is plainly obliged to repair by virtue of clause 2(III).

36. Fourthly, the implication of the suggested obligation does not seem to us in any way necessary to make the scheme of the lease a workable one. The subject of the dispute, that is the landlords' part of the green drain, is property in respect of which the tenant enjoys an easement of drainage governed by the general law of easements. It is well settled that the grant of an easement ordinarily carries with it the grant of such ancillary rights as are reasonably necessary to its exercise or enjoyment (*Jones* v *Pritchard* [1908] 1 Ch 630 at p 638 per Parker J). In our opinion therefore it is plain that the tenant would have the right, when reasonably necessary, to enter the landlords' property for the purpose of repairing that drain and to do the necessary repairs. In contrast, however, it is an equally well-settled principle of the law of easements that, apart from any special local custom or express contract, the owner of a servient tenement is not under any obligation to the owner of the dominant tenement to execute any repairs necessary to ensure the enjoyment of the easement by the dominant owner; apart from special local custom or express contract, the law will ordinarily leave the dominant owner to look after himself (see *Gale on Easements* 14th ed at p 47; *Holden* v *White* [1982] 2 WLR 1030 at p 1034, per Oliver LJ).

37. Thus, if regard is to be paid to considerations of business efficacy, we think that a perfectly workable scheme may be derived from this lease in regard to the green drain, without implying any such obligations as that for which the defendant contends. The scheme is as follows:

(a) The tenant is under a contractual obligation to keep in repair at his own cost the tenant's part of the green drain (clause 2(III)).
(b) If the tenant allows the tenant's part of the green drain to go into disrepair, the landlords have the right under clause 2(VI) to enter the demised premises, do the necessary repairs themselves and debit the tenant with the cost.
(c) The landlords have the right, if they choose, to do repairs to the landlords' part of the green drain and to demand reimbursement of the cost of such repairs by the tenant, under clause 2(IV).
(d) If the landlords do not keep the landlords' part of the green drain in good repair, the tenant has the right, as ancillary to his easement of drainage, to enter the landlords' property and do the necessary repairs, again at his own cost.

38. Perhaps it would have been sensible or even reasonable for the defendant on entering into the lease to exact an express covenant by the plaintiffs to do these repairs. But he did not do so and we find it impossible to presume an intention on the part of all parties to the lease that such a covenant should be included. An obligation of this nature cannot in our judgment properly be added to the lease by a process of implication.

Duty of Care

39. We now turn to consider the defendant's submissions based on an alleged breach of duty of care by the plaintiffs. There is a general principle established by such cases as *Hargroves & Co* v *Hartopp* [1905] 1 KB 472 and *Cockburn* v *Smith* [1924] 2 KB 119 which is summarised, in our opinion accurately, in *Woodfall's Landlord and Tenant* 28th ed, vol I at p 621 as follows: Where the lessor retains in his possession and control something ancillary to the premises demised, such as a roof or staircase, the maintenance of which in proper repair is necessary for the protection of the demised premises or the safe enjoyment of them by the tenant, the lessor is

under an obligation to take reasonable care that the premises retained in his occupation are not in such a condition as to cause damage to the tenant or to the premises demised.

40. In *Hargroves & Co* v *Hartopp* (*supra*), the plaintiffs were tenants of a floor in a building of which the defendants were landlords. A rainwater gutter in the roof became stopped up and the defendants failed to clear it out for a few days after receiving notice of the stoppage. They were held to be in breach of a duty of care to the plaintiffs and liable for the damage done. In *Cockburn* v *Smith* (*supra*) the facts were similar and the defendant landlords were held liable to the tenant for damage suffered by her as a result of defects in the guttering of the roof of the building of which the landlord retained control.

41. Scrutton LJ considered that the landlord's duty was based on 'that modified doctrine of *Rylands* v *Fletcher*, which is applicable where he retains in his control an artificial construction which becomes a source of danger to the tenant' (see [1924] 2 KB at p 133). Bankes LJ and Sargant LJ preferred not to decide whether the relevant duty arose out of a contract between the parties or whether it was an instance of the duty imposed by law upon an occupier of premises to take reasonable care that the condition of his premises does not cause damage (see *ibid* at pp 130 and 134). But they expressed no doubt that the relevant duty existed.

42. Mr Lewison forcefully submitted that in the present case the plaintiffs have retained in their possession and control something ancillary to the demised premises, that is the landlords' part of the green drain, the maintenance of which in proper repair is necessary for the proper protection of the demised premises and the safe enjoyment of them by the defendant. Accordingly, he submitted, the plaintiffs are under a duty to take reasonable care that the landlords' part of the green drain is not in such a condition as to cause damage to the demised premises. It matters not, in his submission, whether the duty is properly to be considered as arising at common law, having regard to the principles governing the torts of nuisance or negligence, or in contract, having regard to the duty of the landlords not to derogate from their grant or to interfere with the tenant's quiet enjoyment of his premises (as to which see clause 5 of the lease). Whichever be the right way of looking at the matter, in his submission the duty exists, as a legal consequence of the relationship between the plaintiffs and the defendant, quite irrespective of clause 2(IV) of the lease. True it is that a servient owner is normally under no liability to repair the subject-matter of the easement. However, Mr Lewison contended, the position is different where a landlord and tenant relationship subsists. He referred by way of analogy to the decision of this court in *Hilton* v *James Smith & Sons (Norwood) Ltd* (1979) 251 ESTATES GAZETTE 1063 as illustrating that landlords may be under a positive duty to their tenants to prevent obstruction of a right of way.

43. Mr Lewison's argument was very well presented and we found it an attractive one. Nevertheless, we are not persuaded by it. To explain our reasons, we begin by emphasising that this is not a case such as *Hargroves* v *Hartopp* or *Cockburn* v *Smith* (and a number of others in the same line of authority) where there has been an escape of some dangerous, noxious or unwelcome substance from the landlords' premises to the demised premises. The situation in the present case is quite different. Here the essence of the defendant's complaint is that because of the lack of repair of the green drain, he has been prevented from discharging noxious water from his own premises on to the landlords' premises through the green drain. It is the water from the tenant's own premises which has caused the demised premises damage.

44. However, in the absence of a specific right enjoyed by his neighbour, there is no general duty on a landowner to receive noxious water flowing from his neighbour's land. In the present case, it is the tenant's easement of drainage which alone entitles him to discharge noxious water into the plaintiffs' land through the landlords' part of the green drain.

45. In these circumstances, the obstacles in the way of the tenant in seeking to establish liability on the part of the landlords to repair the landlords' part of the green drain, on the basis of cases such as *Hargroves* v *Hartopp*, are in our judgment insuperable. To establish such a liability, he has to establish the requisite *duty* on the part of the landlords to repair the drain. In the absence

of any express or implied covenant in the lease, however, this he cannot do. The general law of easements applies and, as we have already pointed out, clearly imposes no such obligation on the landlord. On the contrary the tenant himself, though theoretically under no obligation to repair the landlords' part of the green drain, could find himself in practice obliged to do so, in order to avoid committing a trespass against the landlords by the escape of water through that part (see *Gale on Easements*, 14th ed at pp 45-46; *Jones* v *Pritchard* [1908] 1 Ch 630 at pp 638-639 per Parker J). The fact that the relevant easement happens to have been granted to the tenant under a lease does not assist him in any way. If, at the time of the grant of the lease, he wished to impose on the landlords in relation to any easements granted to him more onerous duties than would be implied under the general law, it was in our judgment incumbent on him to ensure that the lease so provided.

46. In addition to holding the plaintiffs liable to the defendant on the bases of implied covenant and the principle of *Hargrove* v *Hartopp*, the learned deputy judge also held them liable specifically on the bases of breach of covenant for quiet enjoyment or derogation from grant. As to the latter heads, he relied on the decision of this court in *Booth* v *Thomas* [1926] Ch 397. In that case a landlord, whose predecessor in title had enclosed a natural stream in an artificial culvert which was incapable of retaining it, was held liable to the tenant for injury suffered by the demised premises as a result of the outflow of water consequent upon the culvert falling into disrepair. The Court of Appeal, without finding it necessary to decide whether liability arose on other grounds also, considered that it arose under an express covenant for quiet enjoyment contained in the lease. This decision shows that a mere act of omission on the part of a landlord is capable of constituting a breach of the covenant for quiet enjoyment, if, but only if, there is a duty to do something (see, for example, at p 403 per Sir Ernest Pollock MR, and at p 410 per Sargant LJ). In that case 'it was the duty of the owner of this culvert which, if neglected, might cause damage to the adjacent property, to prevent such damage by taking reasonable precautions' (see at pp 403-404 per Sir Ernest Pollock MR). In the present case, for the reasons given earlier in this judgment, we are of the opinion that no relevant duty fell on the landlords.

The express covenant for quiet enjoyment and implied covenant against derogation from grant cannot in our opinion be invoked so as to impose on them positive obligations to perform acts of repair which they would not otherwise be under any obligation to perform.

47. It follows that this appeal must succeed. In conclusion we would make three unconnected observations:
First, while in the course of this judgment we have frequently used the single word 'repair' in connection with the green drain, it should, where the context permits, be read as including references to cleansing and unblocking this drain. Secondly, we think that the present case well illustrates that a tenant who contemplates that his landlord shall carry out repairs to property retained by the landlord over which the tenant is granted easements will ordinarily be well advised to demand an express covenant to this effect.
Thirdly, in this court we have clearly had the benefit of a much fuller argument on the relevant law than did the learned deputy judge, at least in regard to the law of easements. We get the impression from his judgment that this important aspect of the case was not specifically ventilated in argument before him at all, because the word 'easement' appears nowhere in his judgment.

48. As things are, respectfully differing from his conclusion, we must allow this appeal. We will set aside his judgment and declare in effect that on the true construction of the lease the plaintiffs are under no obligation to the defendant to keep the green drain in repair and unobstructed. We will hear argument as to the precise form which the declaration should take.

The appeal was allowed with costs in the Court of Appeal and below. Declarations were made to the effect that the plaintiffs were not under the repairing obligations or under the duty of care for which the tenant had contended. Leave to appeal to the House of Lords was refused.