CCRTF 1999/0978/B2

Neutral Citation Number: [2000] EWCA Civ 501

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE CENTRAL LONDON COUNTY COURT
(HIS HONOUR JUDGE LEVY QC)

Royal Courts of Justice
The Strand
London
Friday 10 March 2000

B e f o r e:
LORD JUSTICE PILL
and
LADY JUSTICE HALE
B E T W E E N:

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	(1) CHARLES GEORGE SAMUEL EYRE (2) JAMES HENRY ROBERT EYRE (3) PETER LOMAS (4) HUGH JOHN LOMAS (as Trustees of the Eyre Estate)	**Respondents/Claimants**
	and	
	ROBERT McCRACKEN	**Appellant/Defendant**

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(Computer Aided Transcription by
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Official Shorthand Writers to the Court)

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MR JONATHAN FERRIS (instructed by Messrs Freedman Green, London NW8
ORG) appeared on behalf of THE APPELLANT
MR KIRK REYNOLDS QC and MR W HANSEN (instructed by Messrs Lee
Pemberton, London SW1X OBX) appeared on behalf of THE RESPONDENTS

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J U D G M E N T

Friday 10 March 2000

1. LORD JUSTICE PILL: This is an appeal against the judgment of His Honour Judge Levy QC given at Central London County Court of 2 June 1999. The dispute is between landlord and tenant at premises at 35 Clifton Hill, St John's Wood, London. The issue is whether identified works come within the tenant's repairing covenant.

2. The tenant, Mr Robert McCracken, was granted a tenancy for a term of seven-and-a-quarter years on 25 March 1976, pursuant to a lease dated 15 April 1976. There was a prohibition upon assignment. The tenant was a protected tenant and has held over on the expiry of the term. The term was of sufficient length that the landlords' repairing covenant implied by statute did not in this case apply. The current rent is £17,000 a year.

3. As summarised in the written submission of the landlords, who are the trustees of the Eyre Estate, the tenant's repairing obligations were as follows:

> "To put the premises .... in good and substantial repair and condition"

4. and

5. "To well and substantially repair, maintain, cleanse, paint, amend and keep the said premises as so intended to be put into such repair as aforesaid."

6. Those covenants appear in clause 2(2) and 2(4) of the lease.

7. The landlords commenced proceedings for possession pursuant to Cases 1 and 3 of Schedule 15 to the Rent Act 1977 and damages for breach of the repairing covenants in the lease. The disrepair complained of was set out in a schedule of delapidations and in a Scott Schedule. The trial judge found the tenant liable for much of the disrepair claimed in the schedule, though he found in the tenant's favour on certain items. One of the items related to subsidence. That is no longer in dispute between the parties, and the work is to be done by the landlord with payments from an insurance company.

8. The appeal relates only to item 26 on the schedule. It is submitted by the tenant that the work falls outside his repairing covenant. The judge ordered that the tenant must give up possession unless within one year the specified work was done.

9. It is common ground that the basement at the premises is and has been damp. There has been resulting damage, the remedying of some of which comes within the repairing

covenant. The dispute is as to whether major work required to prevent a repetition of the dampness comes within the repairing covenant.

10. There is not before the court a precise identification of the relevant work and I have been somewhat surprised by that. The court has not been encouraged to investigate further precisely what work is the subject of the present dispute, that is distinguishing the disputed work from work which it is accepted the tenant must do. The disputed work was first put by both parties to involve a cost of £20,000. That was subsequently reduced to £15,000. The parties agreed, when the point was investigated with them, that for present purposes the disputed work can be described as the insertion of a damp-proof course and ancillary work, costed at £15,000.

11. That approach is supported by the stance the parties took before the judge. At page 21 of the judgment the Judge Levy noted the submissions of Mr Hansen for the landlord as follows:

12. "The issue was whether he [the tenant] was liable to do more than make good the damage in the basement by installing an effective damp-proof course."

13. The parties agree that the sensible way to deal with the problem is by the insertion of such a damp-proof course together with the ancillary work recommended by Mr Hanlon, the chartered surveyor instructed by the landlord. The tenant contends, however, that there is no obligation on him to do or to pay for that work costing £15,000. The judge's findings of fact appear at page 16 of the judgment:

> "The house was built with no damp-proof course at all. It was built on a shallow foundation and there was no evidence that the damp-proof course was inserted before the tenant did something himself after he took the lease. The building dated back from 1841. There were no trial bore holes. It was common ground that in the early years of the century, when the house was built, the heating from the ground floor up may well have stopped damp from coming into the property, which no longer applies with so-called modern methods of heating. Bricks suck up hydroscopic salt and attract moisture from damp atmospheres, and salt present in the wall draws in the moisture from the building. The rising damp is compounded by salt. The construction of the time probably led to the problem, and modern buildings on clay subsoils, as has this property, have foundations 1.2 metres below the surface, and if there is a tree in the vicinity, as there is in this property, much further below. It was also accepted that similar problems had arisen in two houses in Clifton Hill.
>
> As I may have already said, it was also accepted by Mr Hanlon that if a modern damp-proof course was now put in the building, it might add a very long lease of life to it which would not otherwise be the case."

14. Mr Ferris, for the tenant, submits that the judge has understated the effect of the evidence with respect to the potential life of the building. Mr Hanlon's evidence given on 28 May 1999 at page 15 was:

15. ".... the structures within the building help to support the outer walls and if those supports are affected by decay or rot and it is permitted to continue and is totally ignored the stability of the building could be affected in about seven years."

16. Mr Hanlon was than asked about the potential life span of the building if the work was done, including the subsidence work to which I have referred. He replied:

17. "Bearing in mind it has already lived 150 years, Victorian buildings are fragile. Nevertheless, if you compare it with a Tudor building (which is also a very fragile building) they have lasted 500 to 600 years, so there is no reason to suppose that a Victorian house should not last equally as long if it is properly maintained and looked after."

18. The value of the building, if maintained, is indicated by a valuation of £780,000, obtained in 1999. It is common ground that the premises were in a poor state of repair at the commencement of the lease. In 1978 the tenant attempted, at a modest cost, to insert a form of damp-proofing, but that has not proved effective.

19. The judge's conclusions appear at page 21 of his judgment:

20. "Despite [Mr Ferris'] submissions, in my judgment it seems to me that the evidence is all one way and points to a need for the actions suggested by Mr Hanlon. The sensible thing to do now is to take steps to remedy the defect in the basement once and for all by provision of an effective damp-proof course. I have taken account of the fact that the tenant is elderly and infirm, and all the matters which were drawn to my attention which arose in Mr Hanlon's cross-examination. But at the end of the day, a damp-proof course was necessary at the commencement of the tenancy; the covenant might well, in the circumstances, have required such an 'improvement' to be done then, notwithstanding the term was for seven and a half years and the tenant had no assignable interest. Having regard to the work done by the tenant in the 1970s, it is incumbent on him now to do the work required by the landlord."

21. The judge continued:

22. “Accordingly, in my judgment, the tenant must be held liable for the repairs in the schedule resulting from the inadequate damp-proof course and to eradicate dry rot.”

23. I make several comments upon those findings. First, I have difficulty in understanding the use of the word “improvement”. It might suggest that there was a tenant’s covenant requiring work of improvement, and no such covenant is suggested to exist. Second, and reflecting what I said earlier, the judge appears in the last sentence which I have cited not to have made the clear distinction which the parties each make between work which is admitted to be within the repairing covenant and the insertion of a damp-proof course and ancillary work which is not. Third, reference is made the tenant’s work in the 1970’s. On behalf of the landlord, Mr Reynolds QC draws attention to the presence of the expression “put the premises .... in good and substantial repair and condition” in the covenant. He submits that the presence of that clause, together with the poor condition of the premises at the commencement of the term, and the fact that the tenant did some work (albeit of a modest kind) point in the direction that the parties understood that quite extensive work would required of the tenant under the covenant. Mr Reynolds does not, however, submit that those considerations are decisive. He accepts that the extent of the interest of a covenanting party is a relevant element in considering whether particular work is work of repair. There is a relevant difference between the limited interest of a tenant and the interest of a landlord.

24. The parties agree that it is a question of fact and degree whether a particular piece of work is work of repair within the scope of the repairing covenant. Counsel referred to the decision of this court in Holding & Management Ltd v Property Holding & Investment Trust Plc and others [1990] 1 EGLR 65. The facts of the case need not be set out for present purpose. Nicholls LJ, at page 68F, considered the meaning of the word “repair”. He first cited the judgment of Hoffmann J in Post Office v Aquarius Properties Ltd [1985] 2 EGLR 105, 107C:

25. “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.”

26. Nicholls LJ quoted the words of Sachs LJ in Brew Brothers Ltd v Snax (Ross) Ltd [1970] 1 QB 612 at page 640:

> “It seems to me that the correct approach is to look at the particular building, to look at the state which it is in *at the date of the lease*, to look at the precise terms of the lease, and then come to a conclusion as to whether, on a fair interpretation of those terms in relation to that state, the requisite work can fairly

be termed repair. However large the covenant it must not be looked at in vacuo. (Sachs LJ's emphasis) Quite clearly this approach involves in every instance a question of degree...."

27. Nicholls LJ continued:

"Thus the exercise involves considering the context in which the word 'repair' appears in a particular lease and also the defect and remedial works proposed. Accordingly, the circumstances to be taken into account in a particular case under one or other of these heads will include some or all of the following: the nature of the building, the terms of the lease, the state of the building at the date of the lease, the nature and extent of the defect sought to be remedied, the nature, extent, and cost of the proposed remedial works, at whose expense the proposed remedial works are to be done, the value of the building and its expected lifespan, the effect of the works on such value and lifespan, current building practice, the likelihood of a recurrence if one remedy rather than another is adopted, the comparative cost of alternative remedial work and their impact on the use and enjoyment of the building by the occupants. The weight to be attached to these circumstances will vary from case to case.

This is not a comprehensive list. In some cases there will be other matters properly to be taken into account."

28. Mr Ferris relies upon the decision of this court in Pembery v Lamdin [1940] 2 All ER 434. In that case there was an obligation on the landlord to keep the premises in repair in the condition in which they were demised. The premises were ground floor and basement premises which were let for the purpose of providing accommodation for the public for drinking cocktails and wines. The covenant was that the landlord "would keep the external part of the demised premises other than the shop front in good and tenantable repair and condition". At page 437A Slesser LJ said:

29. "It is an old house, 100 years or more in age, and it was built at a time when modern devices for avoiding the consequences of damp were unknown. As the surveyor points out in his report, there was no provision for waterproofing it. When one comes to construe the repairing covenant, and looks (as directed by the authorities) to the nature of the premises demised, it is clear from the evidence, the judgment, and the surveyor's report that this was a house of the old type, with a cellar for the most part built into the ground, without any precautions against damp oozing through the porous bricks into the cellar. The house above fortunately may have remained dry, but that was the kind of house which was demised."

30. Slesser LJ then set out the repairing covenant and continued:

"The first question which arises in this case is what was the nature of the obligation to repair. In order to

> ascertain that, it is first necessary to consider the nature of the premises which had to be repaired under the covenant. I think that, for the purposes of this case, the principle which has never been doubted, is to be found stated in a short passage in a judgment of Lord Esher, MR, in Lister v Lane & Nesham. That is a case which has been subsequently followed and approved in Lurcott v Wakely & Wheeler. In Lister v Lane & Nesham, after reviewing the earlier authorities, Lord Esher, MR, who was speaking there of a tenant, says, at pp 216,217:
> 'Those cases seem to me to show that, if a tenant takes a house which is of such a kind that by its own inherent nature it will in course of time fall into a particular condition, the effects of that result are not within the tenant's covenant to repair. 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. He has to repair that thing which he took; he is not obliged to make a new and different thing ....'
> Applying that to a landlord, in the same way as it is in that case applied to a tenant, if the counterclaim here made by Mrs Lamdin be correct, she is entitled to receive at the hands of this landlord 'a different thing' form that which she took when she entered into the covenant. She took this old house with a cellar without any waterproof protection, and she is asking the landlord so to repair that house as to give her a cellar which has a waterproof protection and is dry. That is not a right which she can possibly maintain, because the obligation of the landlord is to repair that which is demised, and not to give her something much drier in its nature than that which was demised."

31. Mr Reynolds, in seeking to distinguish that case, refers to the fact that the lease was of the ground floor and basement parts of the premises only and to the extent of the work which was required in that case to make the demised premises dry.

32. Mr Ferris' general submissions are that the insertion of damp-proofing will change the character of the building, and radically so. There was a defect in the original building by reason of the current methods of design and construction. That has been compounded by the passage of time. The original contract was for only seven-and-a-quarter years and it had a prohibition on assignment. He draws attention to the age and character of the building, to the limited interest of the tenant, and to the condition of the building at the date of the demise. He submits that what is at stake does not involve doing the same thing differently; it involves putting into the building something which was not in the original building; and that constituted an improvement and not a repair.

33. For the landlord, Mr Reynolds relies upon the decision of this court in Elmcroft Development v Tankersley-Sawyer [1984] 1 EGLR 47. That was a case where this court (Ackner and Watkins LLJ) had to consider a landlord's covenant which required the landlord 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". The premises concerned were a part of a late Victorian purpose-built mansion block consisting of 27 flats, including seven basement flats. They formed part of a larger terrace of buildings of a similar character and provided high-class accommodation in a sought-after fashionable area of London. Ackner LJ referred to the subject matter of the dispute as stated by the trial judge:

34. ".... there was constructed into the walls what was intended to be a damp-proof course, consisting of slates laid horizontally. These existed in the external and the party walls of the flat, but, owing either to a defect in design or construction or bad workmanship, this layer of slates intended to be a damp-proof course was ineffectual because it was positioned below ground. The result was obvious. It allowed moisture to be drawn up from the ground by capillary action, with the inevitable result that the flats were in a damp condition, rising damp resulting from what was described as the bridging of the damp-proof course, and parts of the interior of main walls of the flats had been adversely affected up to a hight of about 1 to 1.5m."

35. At page 48D Ackner LJ stated:

> "To my mind it is unarguable that the state of that flat in particular, bearing in mind the age, character and locality of the flat was such as to be quite unfit for the occupation of a reasonably minded tenant of a class who would be likely to take it -- very probably unfit for any tenant...."

36. Ackner LJ referred to the statement of Sachs LJ in Brew Brothers Limited v Snax (Ross) Ltd [1970] QB 612, 640:

37. "It seems to me that the correct approach is to look at the particular building, to look at the state which it is in at the date of the lease, to look at the precise terms of the lease, and then come to a conclusion as to whether, on a fair interpretation of those terms in relation that that state, the requisite work can fairly be termed repair. However large the covenant it must not be looked at in vacuo."

38. Ackner LJ referred to the decision of Forbes J in Ravenseft Properties Ltd v Davstone (Holdings) Ltd [1980] 1 QB 12 where it was held that it was a question of degree whether the work carried out on a building was a repair or work that so changed the character of the building as to

involve giving back to the landlord a wholly different building to that demised. Reference was made by Ackner LJ to Pembery v Lamdin (already cited), who stated that he found the case of no assistance at all. He set out the very different facts, to which the parties in this case also draw attention, between those in Elmcroft and those in Pembery. Having considered the authorities, Ackner LJ's conclusion at page 49B was:

39. "I therefore conclude that the learned judge was wholly right in the decision which he made as to the failure by the appellants to comply with the repairing covenant and their obligation in regard to curing the damp by using the only practical method at this price, namely, injecting silicone into the wall. Mr Whitaker was at one stage prepared to concede that, as the plaster became saturated (which, of course, it was), his clients had the obligation to do the necessary patching -- that is removing -- the perished plaster and renewing it. I am bound to say that concession made the resistance to inserting the damp-proof course a strange one. The damp-proof course, once inserted, would on the expert evidence cure the damp.... I have no hesitation in rejecting the submission that the appellants' obligation was.... to carry out futile work instead of doing the job properly once and for all."

40. In Wainwright v Leeds City Council [1984] 1 EGLR 67, this court considered a landlord's covenant. The issue was whether a damp-proof course should be inserted under that covenant. Dunn LJ, with whom Wood J agreed, stated that the case was on the facts indistinguishable from Pembery v Lamdin. Dunn LJ stated:

41. "...applying the facts of that case to the facts of this case, the tenant in this case took a house without a damp-proof course. What he is asking from the landlord is a house with a damp-proof course, which is a different thing to the house which was the subject of the demise."

42. Mr Reynolds draws attention to the fact that Elmcroft was not cited in Wainwright.

43. In Stent v Monmouth District Council (1987) 54 P & CR 193, the issue was whether under a repairing covenant a wooden door should be replaced with a self-sealing aluminium door. It was held in this court (Sir John Arnold, President, and Stocker LJ) that the replacement came within a repairing covenant as a sensible way to deal with a persisting problem. The extent of the work required, however (the replacement of a door), was such that I do not find it helpful upon the present facts where the works involved are a good deal more extensive. The question is whether they come within the repairing covenant at all.

44. Mr Reynolds' submissions are that the court should have regard to the protection which is afforded to the tenant. While nominally this is a seven-year-three-month lease, he has the statutory protection which involves the contemplation, borne out by events, that the lease could be for a much longer period.

45. I referred earlier to Mr Reynolds' submissions as to the state of mind of the parties when the term was commenced. He submits that, for work to fall outside the repairing covenant, there must be a change of circumstances which puts the work outside the contemplation of the parties. The work required in this case does not involve major new additions to the premises such as a piled foundation. The basement is a subsidiary part of the premises, not the entire premises. Where there are repetitive consequences of a condition, the tenant under his repairing covenant is liable to effect a cure of the underlying defect. Mr Reynolds submits that the court should have due regard to the findings of the County Court judge, though he accepts that this court is not limited to reviewing a discretion in the County Court judge. This court must make a judgment as to whether the disputed work comes within the definition of "repair".

46. Although I have regard for the findings of the County Court judge, in my judgment this is a case where this court must make its own judgment. I have drawn attention to the difficulties I have in construing the factors which the county court judge took into account in reaching his conclusion, in particular his use of the word "improvement", which would not come within the definition of "repair".Having set out the considerations which the court should keep in mind, I can state my conclusions briefly. I accept the learned judge's finding of fact which I have set out. I have regard to the age (over 150 years) and the design of the building. It has no damp-proof course. That is an original design feature common to buildings of that age. Its absence will eventually allow dampness to develop. I bear in mind the limited interest of the tenant and the poor condition of the premises at the date in 1976 when the term started. It is common ground that it would be sensible to put in a damp-proof course. The issue is whether, under his repairing covenant, the tenant is required to do so in the circumstances of this case. My conclusion is that he is not. In my judgment, to require the tenant to insert the damp-proof course and ancillary work would be to require him to give back to the landlord a different thing from that demised to him in 1976. The circumstances are very different from those involved in the consideration of the landlord's covenant in Elmcroft Development.

47. I would allow the appeal. I welcome the indication which has been given on behalf of the tenant that, as with the remedial work upon subsidence, obstacles will not be put in

the way of the landlord inserting a damp-proof course and doing the necessary ancillary work if the landlord considers it appropriate to do so in order to protect his asset.

48. LADY JUSTICE HALE: I agree that this appeal should be allowed. It is, of course, in every case a matter of fact and degree whether the proposed and admittedly sensible works fall within the particular repairing covenant in question, this being a covenant to put, and thereafter keep, the premises well and substantially in repair. In the context of this particular house and this particular lease, there is a clear distinction between the works entailed in installing a comprehensive modern system of damp-proofing, for example by inserting damp-proof courses and the related works such as are described in paragraph 8(i) of Mr Hanlon’s report, and the works entailed in simply dealing with the consequences of damp. The latter are repair and might include the renewal or replacement of what was there before. The former are not. They will, as my Lord has said, turn this house into a very different property from the one which was let. ORDER: (Not part of judgment) Appeal allowed; the appellant to have the costs of the appeal; the order for costs below to be varied to the extent that there be no order for costs below; legal aid detailed assessment; permission to appeal refused.