Case No: B2/2002/1026

Neutral Citation Number: [2003] EWCA Civ 49
IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE STOCKPORT COUNTY COURT
(H.H. JUDGE TETLOW, SITTING AT MANCHESTER COUNTY COURT)

Royal Courts of Justice
Strand,
London, WC2A 2LL

Wednesday 29th January 2003

Before:

LORD JUSTICE SEDLEY
and
LORD JUSTICE RIX

- -

Between:

GOLDMILE PROPERTIES LIMITED	**Defendant/ Appellant**
- and -	
SPEIRO LECHOURITIS	**Claimant/ Respondent**

- -

(Transcript of the Handed Down Judgment of
Smith Bernal Wordwave Limited, 190 Fleet Street
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Tel No: 020 7421 4040, Fax No: 020 7831 8838
Official Shorthand Writers to the Court)

- -

MR NICHOLAS DOWDING QC and **EDWARD PETERS** (instructed by **Messrs Guillaumes**) for the Appellant
MR DAVID BERKLEY QC and **JONATHAN RULE** (instructed by **Messrs Gorvins**) for the Respondent

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Judgment
As Approved by the Court

Sedley LJ:

This is the judgment of the court.

The appeal

1. This is a second appeal. Lord Justice Carnwath gave permission for it to be brought because it raises a question of general importance: where the performance of a lessor's repairing covenant impinges on the lessee's quiet enjoyment, is it sufficient that the lessor has taken all reasonable steps to avoid disturbing the tenant or is he required to take all possible precautions?

2. It will be apparent from this formulation of the issue that neither party contends that one covenant simply trumps the other, and for the reasons which follow we consider this to be the correct approach.

The lease

3. The tenancy in question is a business tenancy held on a lease of just under twenty-two years of the ground floor and basement of a seven-storey building in Warrington at a rent of sixteen thousand pounds per annum. The claimant, who was the lessee, conducted a restaurant business there. The lease, in familiar form (including the traditional eschewal of all punctuation, however convoluted the clause), contained the following provisions:

    a) By clause 5.1, an express covenant for quiet enjoyment in the following form:

    > "That the Tenant paying the rents hereby reserved and observing and performing the several covenants and stipulations on the Tenant's part herein contained shall peaceably hold and enjoy the Demised Premises during the Term without any interruption (except as herein provided) by the Landlord or any person rightfully claiming under or in trust for it"

    b) By clause 5.3, the following covenant to provide services:

    > "That [*sic*] subject to the Tenant paying the Service Charge to use its reasonable endeavours to provide the services specified in Part IIA of the Fifth Schedule hereto ".

    c) The material services as specified in paragraph 1 of part IIA of the schedule:

> "Repairing cleansing maintaining renewing replacing amending decorating and putting keeping in substantial repair and condition the roof external and any party walls and other load bearing members of the structure of the Building and such other parts of the Building and the Common Parts as are not the responsibility of the tenants of the Building".

d) In paragraph 2.3, provisions for payment by way of additional rent of a service charge, defined in part I of the fifth schedule to include the costs of structural repairs, apportioned among the tenants of the building.

e) In clause 6.1, a provision for relief from payment of rent where loss of user is caused by an insured event.

The works

4. In March 1997 the lessor brought in contractors to clean the external walls and windows of the building and to repair the seals between the frames and the walls. The work, which was completed within the six-month contract period, required scaffolding and sheeting to be fixed to the outside of the building. One consequence was that the tenant's restaurant business was quite seriously disrupted: from outside, the restaurant appeared to be closed; inside, it became dingy and frequently contaminated with building dust. These facts, which must be typical of many such situations, are not in dispute.

The claim

5. In this situation the lessee claimed damages in the Stockport County Court for loss of profit and disruption to his business. In a short and lucid judgment, District Judge Russell found for the defendant lessor. He concluded:

> "I accept that the work was carried out to meet, as far as possible, the claimant's requirements within the time scale of the contract period and I believe that the defendant has been as helpful as it can with regard to the reduction and the payment of the service charge. I accept that the defendant is entitled to repair only in such a way that the covenant for quiet enjoyment is not breached and in broad terms, given the extent and nature of the works undertaken by the landlord, I suppose it is inevitable that any tenant will suffer a measure of

> inconvenience during the duration of the works. There will have been noise; there will have been dust, and there will have been some diminution in the light to the premises as a consequence of the sheeting.
>
> "As I have indicated, I am satisfied that the landlord (the defendant) was necessarily carrying out a repairing obligation under the terms of the lease. In addition to being necessary, those works were extensive. I am satisfied on the evidence before me today that the defendant took all reasonable steps to minimise the potential risks. I am not satisfied that the defendant has breached the covenant for quiet enjoyment and in those circumstances I find for the defendant."

6. On the claimant's appeal, heard at Manchester County Court on 30 April 2002, His Honour Judge Tetlow reversed the district judge's conclusion because he rejected its legal premise. He held:

> "In the absence of any express provision in the lease, granting a landlord the right to do things which might otherwise breach the covenant of quiet enjoyment, such a right would have to be implied. There is nothing in the wording of the lease that I have been referred to which would give rise to such an implication or give rise to such a construction. … . Such a right cannot be unfettered. If it is fettered, is it a right subject to taking all [or] reasonable steps, or is it a right subject to taking all possible precautions? … .
>
> "I suppose it might be arguable that if the necessary works could not be carried out at all without some disturbance mounting to a breach of covenant, then licence *pro tanto* would be implied. However, that does not meet the situation here. The finding of all reasonable steps having been taken does not equate to all possible steps having been taken or that the works would be impossible without some nuisance. I decline to put the construction upon the lease asked for by the respondent."

7. For reasons to which we now turn, the question where the burden of proof of impossibility lies and the possibility of remission for further fact-findings do not arise. In our judgment the test adopted and applied by the district judge was right, and that adopted and applied by the circuit judge was wrong.

Construing the lease

8. It is axiomatic that where the provisions of any contract, including a lease, come into conflict, they are to be interpreted and applied so as to give proper effect, if possible, to both of them. Neither side contends that to do so is not possible in the lease which is before the court; their dispute is about how the fit is to be achieved.

9. The covenant for quiet enjoyment in the present lease is expressly qualified by the parenthetic phrase "except as herein provided". Nicholas Dowding QC, for the lessor, does not predicate his principal argument upon this, although he relies on it as putting his case beyond doubt. As he submits, the fit between the covenants would have to be achieved even if the proviso were not there. His principal argument is that the covenant for quiet enjoyment is not a guarantee against all disturbance: it guarantees against disturbance only of that which is demised, and the demise includes the lessor's obligation to use its reasonable endeavours to keep the building in repair.

10. This proposition is unexceptionable; but the lessor in turn must live with its converse – that the obligation to keep the building in repair has to coexist with the tenant's entitlement to quiet enjoyment of the premises he is paying rent for. This by itself points towards a threshold, for disturbance by repairs, of all reasonable precautions rather than all possible precautions.

11. There are other pointers to the same conclusion. The repairing covenant is there for the tenant's as well as the landlord's benefit. It is of no advantage to the tenant to be running a restaurant in a dilapidated building, any more than it is in the lessor's interest to own the reversion to one.

12. Both parties seek to make use of the proviso in the covenant for quiet enjoyment. Mr Dowding, on the one hand, relies on it – as we have said – as putting his case beyond doubt. David Berkley QC for the tenant, on the other hand, submits that it is there purely to preserve the contractual rights of entry and re-entry; so that, by making these express, the parties have excluded the admissibility of any other ground for disturbing the tenant's quiet enjoyment. The argument might be an effective one if the proviso were so limited; but in our judgment it is not. The ways in which the tenant's quiet enjoyment may be disturbed under the lease plainly include the execution of structural repairs and maintenance. It is now clear from the decision of the House of Lords in *Southwark London Borough Council v Tanner* [2001] 1 AC 1, that:

> "the covenant for quiet enjoyment is broken if the landlord or someone claiming under him does anything which substantially interferes with the tenant's title to or possession of the demised premises or with his ordinary and lawful enjoyment of the demised premises. The interference need not be direct or physical" (per Lord Millett at 23).

13. And then what would be the outcome if the test preferred by the County Court Judge were adopted? Take the present case. Assuming for the sake of argument that the restaurant was closed on Mondays, it would have been possible, however unrealistic, to erect the scaffolding and sheeting each Monday morning, to work on the building for the day and to strike the scaffolding in the evening, repeating the process for perhaps eighteen months or two years. As Mr Berkley accepted, such a course, though possible, would not be reasonable, not least because it would greatly inflate the cost to be borne ultimately not only by the claimant but - with no additional benefit to themselves - by the other tenants of the building.

14. The district judge's construction in our view conforms most nearly with what would have been apparent to the parties when they signed the lease. It would have been apparent that the tenant's enjoyment of the demised premises might be made temporarily less quiet and less profitable by the carrying out of structural repairs. It would similarly have been clear that the lessor's rights and obligations were neither to ride roughshod over the lessee's entitlements nor to be unreasonably impeded by them.

Other decided cases

15. We have reached the foregoing conclusion without reference to authority, because no decided case which is binding upon us is directly in point. In our judgment, however, the approach taken by the district judge is more consonant with the reported decisions in this field than is the approach preferred by Judge Tetlow. In *Lyttelton Times Company Ltd v Warners Ltd* [1907] AC 476, an appeal to the Privy Council from New Zealand concerning a hotel which shared premises with a 24-hour print shop, with predictable consequences for the sleep of its guests, Lord Loreburn LC said:

> "Ought the fact that one of the parties was the grantor and the other the grantee of a lease to dominate the decision of the case? … .if A lets a plot to B, he may not act so as to frustrate the purpose for which in the contemplation of both parties the land was hired. … .The fact that one lets and one hires does not create any presumption in favour of either in construing an expressed contract … .
>
> [Counsel for the plaintiff hotel] argued the case … as though the common intention was that the plaintiffs should have reasonably quiet bedrooms. If it was so, that was only one half of the common intention. The other half was that the defendants should keep on printing. One cannot bisect the intention and enforce one half of it when the effect of doing so would be to frustrate the other half."

The Privy Council's reasoning confirms our view that the two covenants must be construed and applied so far as possible so as to coexist on a basis of parity, not of priority, respecting the terms of both.

16. This approach sits comfortably, in our view, with the classic judgment of Fry J in *Saner v Bilton* (1878) 7 Ch.D. 815 that a lessor's covenant to do structural repairs carried an implied licence to enter for that purpose:

> "It is further said that the construction of the covenant, as carrying with it an implied licence to enter, is inconsistent with the lessor's covenant for quiet enjoyment. I do not think it is, and for this reason, that the covenant for quiet enjoyment, if read as absolutely unqualified, is as inconsistent with an entry on the warehouse for a single moment as it is with an

> occupation for a month or a year … I think the covenant for quiet enjoyment must be read as subject to the licence which I have held to be implied in the covenant to repair. ”

17. Our preferred approach also sits comfortably with the law of nuisance. There (in the absence of the contractual relationship which robbed the defendant of a defence in *Owen v Gadd* [1956] 2 QB 99) the law as stated by Clerk and Lindsell (18th edition, 2000), para-19-15, is that:

> “Noise and dust caused by demolition and rebuilding will not be actionable if the operations are reasonably carried on, and all reasonable and proper steps are taken to ensure that no undue inconvenience is caused to neighbours.”

Reasonableness

18. We have deliberately made no reference so far to an aspect of the case to which the district judge paid express attention in the passage of his judgment cited above. He found that the work had been arranged to meet the claimant’s requirements as far as possible, and that the lessor had been helpful with regard to the reduction and payment of the service charge. It is worth explaining what he was referring to, because it illustrates what may make the difference between the reasonable and unreasonable execution of repairs which are going to disturb a tenant’s quiet enjoyment. In brief, before embarking on the works the lessors had sent the lessee a copy of the full estimate which they proposed to accept, prices included. The lessee wrote back, strongly querying the price but also pointing out that the proposed start date would interfere with the restaurant’s busiest period over Christmas. The lessors, having considered these representations, postponed the start of the works until March 1997 and agreed to spread the first instalment of the consequent service charge over a year. It can readily be seen why the district judge’s view that the lessor had taken all reasonable steps to respect the lessee’s contractual interests was not contested on appeal. It will always be necessary for reasonableness to be looked at on the facts and in the light of the legal considerations which we have set out above.

19. This lease, like many leases, makes limited provision to compensate the tenant for interruption of the enjoyment of the demise. It is perfectly possible, at least in principle, to make provision in a lease to cover the kind of disruption which has occurred here. In its absence, while there is no obligation or necessity to reflect the disturbance of quiet enjoyment by remitting rental service charges, an offer to do so may well help in establishing the overall reasonableness of the lessor’s intervention.

Conclusion

20. The appeal will therefore be allowed and the judgment of the district judge dismissing the claim restored.

ORDER: Appeal allowed and the order of District Judge Russell dated 31 January 2002 be restored. The respondent to pay the appellant's costs here and below, the amount of such costs to be determined in accordance with the Community Legal Services (Costs) Regulations 2000.

(Order not part of approved judgment)