HL/PO/JU/4/3/1289

HOUSE OF LORDS
LIVERPOOL CITY COUNCIL (as successors to the Lord Mayor, Aldermen and Citizens of the City of Liverpool) (RESPONDENTS)
v.
IRWIN (A.P.) and another (A.P.) (APPELLANTS)

Lord Wilberforce
Lord Cross of Chelsea
Lord Salmon
Lord Edmund-Davies
Lord Fraser of Tullybelton
Lord Wilberforce

MY LORDS,

This case is of general importance, since it concerns the obligations of local authority, and indeed other, landlords as regards high-rise or multistorey dwellings towards the tenants of these dwellings. This is a comparatively recent problem though there have been some harbingers of it in previous cases. No. 50, Haigh Heights, Liverpool, is one of several recently erected tower blocks in the District of Everton. It has some 70 dwelling units in it. It was erected 10 years ago following a slum clearance programme at considerable cost, and was then, no doubt, thought to mark an advance in housing standards. Unfortunately, it has since turned out that effective slum clearance depends upon more than expenditure upon steel and concrete. There are human factors involved too, and it is these which seem to have failed. The defendants moved into one of the units in this building in July 1966: this was a maisonette of two floors, corresponding to the ninth and tenth floors of the block. Access to it was provided by a staircase and by two electrically operated lifts. Another facility provided was an internal chute into which tenants in the block could discharge rubbish or garbage for collection at the ground level.

There has been a consistent history of trouble in this block, due in part to vandalism, in part to non-cooperation by tenants, in part, it is said, to neglect by the Corporation. The defendants, with other tenants, stopped payment of rent so that in May 1973 the Corporation had to start proceedings for possession. The defendants put in a counterclaim for damages and for an injunction, alleging that the Corporation was in breach of its implied covenant for quiet enjoyment, that it was in breach of the statutory covenant implied by section 32 of the Housing Act 1961, and that it was in breach of an obligation implied by law to keep the " common parts " in repair. The case came for trial in the Liverpool County Court before His Honour Judge T. A. Cunliffe. A good deal of evidence was submitted, both orally and in the form of reports. The judge himself visited the block and inspected the premises: he said in his judgment that he was appalled by the

general condition of the property. On 10th April, 1974, he gave a detailed and careful judgment granting possession to the Corporation on the claim, and on the counterclaim judgment for the defendants for £10 nominal damages. He found that the defects alleged by the defendants were established.

These can be summarised as consisting of (i) a number of defects in the maisonette itself—these were significant but not perhaps of major importance ; (ii) defects in the common parts, which may be summarised as continual failure of the lifts, sometimes of both at one time, lack of lighting on the stairs, dangerous condition of the staircase with unguarded holes giving access to the rubbish chutes, and frequent blockage of the chutes.

He found that these had existed or been repeated with considerable frequency throughout the tenancy, had gone from bad to worse, and that while some defects in the common parts could be attributed to vandalism, not all could be so attributed. No doubt also some defects, particularly the blocking of the rubbish chutes, were due to irresponsible action by the tenants themselves. The learned judge decided that there was to be implied a covenant by the Corporation to keep the common parts in repair and properly lighted, and that the Corporation was in breach of this implied covenant, of the covenant for quiet enjoyment and of the repairing covenant implied by the Housing Act 1961, section 32.

The Corporation appealed to the Court of Appeal, which allowed the Corporation's appeal against the judgment on the counterclaim. While agreeing in the result, the members of that Court differed as to their grounds. Roskill and Ormrod L.JJ. held that no covenant to repair the common parts ought to be implied. Lord Denning M.R. held that there should implied a covenant to take reasonable care, not only to keep the lifts and stairs reasonably safe, but also to keep them reasonably fit for use by the tenant and his family and visitors. He held, however, that there was no evidence of any breach of this duty. The court was agreed in holding that there was no breach of the covenant implied under section 32 of the Housing Act 1961 ; the tenants did not seek to uphold the judge's decision on the covenant for quiet enjoyment, and have not done so in the House.

I consider first the tenants' claim in so far as it is based on contract. The first step must be to ascertain what the contract is. This may look elementary, even naive, but it seems to me to be the essential step and to involve, from the start, an approach different, if simpler, from that taken by the members of the Court of Appeal. We look first at documentary material. As is common with council lettings there is no formal demise, or lease or tenancy agreement. There is a document headed " Liverpool Corporation, Liverpool City Housing Dept." and described as " Conditions of Tenancy ". This contains a list of obligations upon the tenant—he shall do this, he shall not do that, or he shall not do that without the Corporation's consent. This is an amalgam of obligations added to from time to time, no doubt, to meet complaints, emerging situations, or problems as they appear to the

council's officers. In particular there have been added special provisions relating to multi-storey flats which are supposed to make the conditions suitable to such dwellings. We may note under " Further special notes " some obligations not to obstruct staircases and passages, and not to permit childrden under 10 to operate any lifts. I mention these as a recognition of the existence and relevance of these facilities. At the end there is a form for signature by the tenant stating that he accepts the tenancy.

On the landlords' side there is nothing, no signature, no demise, no covenant: the contract takes effect as soon as the tenants sign the form and are let into possession.

We have then a contract which is partly, but not wholly, stated in writing. In order to complete it, in particular to give it a bilateral character, it is necessary to take account of the actions of the parties and the circumstances. As actions of the parties, we must note the granting of possession by the landlords and reservation by them of the " common parts "—stairs, lifts, chutes, etc. As circumstances we must include the nature of the premises, viz., a maisonette for family use on the ninth floor of a high block, one which is occupied by a large number of other tenants, all using the common parts and dependent upon them, none of them having any expressed obligation to maintain or repair them.

To say that the construction of a complete contract out of these elements involves a process of " implication " may be correct: it would be so if implication means the supplying of what it not expressed. But there are varieties of implications which the courts think fit to make and they do not necessarily involve the same process. Where there is, on the face of it, a complete, bilateral contract, the courts are sometimes willing to add terms to it, as implied terms: this is very common in mercantile contracts where there is an established usage: in that case the courts are spelling out what both parties know and would, if asked, unhesitatingly agree to be part of the bargain. In other cases, where there is an apparently complete bargain, the courts are willing to add a term on the ground that without it the contract will not work—this is the case, if not of *The Moorcock* itself on its facts, at least of the doctrine of *The Moorcock* as usually applied. This is, as was pointed out by the majority in the Court of Appeal, a strict test—though the degree of strictness seems to vary with the current legal trend, and I think that they were right not to accept it as applicable here. There is a third variety of implication, that which I think Lord Denning M.R. favours, or at least did favour in this case, and that is the implication of reasonable terms. But though I agree with many of his instances, which in fact fall under one or other of the preceding heads, I cannot go so far as to endorse his principle: indeed, it seems to me, with respect, to extend a long, and undesirable, way beyond sound authority.

The present case, in my opinion, represents a fourth category, or I would rather say a fourth shade on a continuous spectrum. The court here is simply

concerned to establish what the contract is, the parties not having themselves fully stated the terms. In this sense the court is searching for what must be implied.

What then should this contract be held to be? There must first be implied a letting, i.e., a grant of the right of exclusive possession to the tenants. With this there must, I would suppose, be implied a covenant for quiet enjoyment, as a necessary incident of the letting. The difficulty begins when we consider the common parts. We start with the fact that the demise is useless unless access is obtained by the staircase: we can add that, having regard to the height of the block, and the family nature of the dwellings, the demise would be useless without a lift service: we can continue that there being rubbish chutes built in to the structures and no other means of disposing of light rubbish there must be a right to use the chutes. The question to be answered—and it is the only question in this case—is what is to be the legal relationship between landlord and tenant as regards these matters.

There can be no doubt that there must be implied (i) an easement for the tenants and their licensees to use the stairs, (ii) a right in the nature of an easement to use the lifts, (iii) an easement to use the rubbish chutes. But are these easements to be accompanied by any obligation upon the landlord, and what obligation? There seem to be two alternatives. The first, for which the council contends, is for an easement coupled with no legal obligation, except such as may arise under the Occupiers' Liability Act 1957 as regards the safety of those using the facilities, and possibly such other liability as might exist under the ordinary law of tort. The alternative is for easements coupled with some obligation on the part of the landlords as regards the maintenance of the subject of them, so that they are available for use.

My Lords, in order to be able to choose between these, it is necessary to define what test is to be applied, and I do not find this difficult. In my opinion such obligation should be read into the contract as the nature of the contract itself implicitly requires, no more, no less: a test in other words of necessity. 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 demands, of its nature, some contractual obligation on the landlord. I do not think that this approach involves any innovation as regards the law of contract. The necessity to have regard to the inherent nature of a contract and of the relationship thereby established was stated in this House in *Lister* v. *Romford Ice & Cold Storage Co. Ltd.* (1957] A.C. 555. That was a case between master and

servant and of a search for an " implied" term ". Viscount Simons makes a clear distinction between a search for an implied term such as might be necessary to give " business efficacy " to the particular contract and a search, based on wider considerations, for such a term as the nature of the contract might call for, or as a legal incident of this kind of contract (I.c. p. 579). If the search were for the former, he says, " I should lose myself in the attempt to formulate it with the necessary " precision ". We see an echo of this in the present case, when the majority in the Court of Appeal, considering a " business efficacy term "—i.e. a " *Moorcock* " term—found themselves faced with five alternative terms and therefore rejected all of them. But that is not, in my opinion, the end, or indeed the object of the search.

We have some guidance in authority for the kind of term which this typical relationship (of landlord and tenant in multi-occupational dwelling) requires in *Miller* v. *Hancock* [1893] 2 Q.B. 177. There Bowen L.J. said:
" The tenants could only use their flats by using the staircase. The
" defendant, therefore, when he let the flats, impliedly granted to the
" tenants an easement over the staircase, which he retained in his own
" occupation, for the purpose of the enjoyment of the flats so let.
" Under those circumstances, what is the law as to the repairs of the
" staircase? It was contended by the defendant's counsel that, accord-
" ing to the common law, the person in enjoyment of an easement is
" bound to do the necessary repairs himself. That may be true with
" regard to easements in general, but it is subject to the qualification
" that the grantor of the easement may undertake to do the repairs
" either in express terms or by necessary implication. This is not the
" mere case of a grant of an easement without special circumstances.
" It appears to me obvious, when one considers what a flat of this kind
" is, and the only way in which it can be enjoyed, that the parties to the
" demise of it must have intended by necessary implication, as a basis
" without which the whole transaction would be futile, that the landlord
" should maintain the staircase, which is essential to the enjoyment of
" the premises demised, and should keep it reasonably safe for the use
" of the tenants, and also of those persons who would necessarily go up
" and down the stairs in the ordinary course of business with the tenants ;
" because, of course, a landlord must know when he lets a flat that
" tradesmen and other persons having business with the tenant must
" have access to it. It seems to me that it would render the whole
" transaction inefficacious and absurd if an implied undertaking were
" not assumed on the part of the landlord to maintain the staircase so
" far as might be necessary for the reasonable enjoyment of the demised
" premises."

Certainly that case, as a decision concerning a claim by a visitor, has been over-ruled. *(Fairman* v. *Perpetual Investment Building Society* [1923] A.C. 74.) But I cite the passage for its common sense as between landlord and

tenant, and you cannot over-rule common sense.

There are other passages in which the same thought has been expressed. *De Meza* v. *Ve-Ri-Best Manufacturing Co., Ltd.* (1952) 160 Estates Gazette 364 was a case of failure to maintain a lift in which Lord Evershed, M.R. sitting with Denning and Romer L.J.J. held the landlords liable in damages for breach of an implied obligation to provide a working lift. The agreement was more explicit than the present agreement in that there was an express demise of the flat " together with the use of the lift ", but I think there is no doubt that the same demise or grant must be implied here, and if so can lead to the same result.

In *Penn* v. *Gatenex Co. Ltd.* [1958] 2 Q.B. 210, a case about a refrigerator in a flat, Sellers L.J. said this:
" If an agreement gives a tenant the use of something wholly in the
" occupation and control of the landlord, for example, a lift, it would,
" I think, be accepted that the landlord would be required to main-
" tain the lift, especially if it were the only means of access to the
" demised premises. I recognise that a lift might vary in age and
" efficiency, but in order to give meaning to the words ' the use of' and
" to fulfil them, it should at least be maintained so that it would take
" a tenant up and down, subject to temporary breakdown and reason-
" able stoppages for maintenance and repairs."

That was a dissenting judgment but Lord Evershed M.R. (I.c. p. 220) makes a similar observation as to lifts.

These are all reflections of what necessarily arises whenever a landlord lets portions of a building for multiple occupation, retaining essential means of access.

I accept, of course, the argument that a mere grant of an easement does not carry with it any obligation on the part of the servient owner to maintain the subject matter. The dominant owner must spend the necessary money, e.g. in repairing a drive leading to his house. And the same principle may apply when a landlord lets an upper floor with access by a staircase: responsibility for maintenance may well rest on the tenant. But there is a difference between that case and the case where there is an essential means of access, retained in the landlord's occupation, to units in a building of multi-occupation: for unless the obligation to maintain is, in a defined manner, placed upon the tenants, individually or collectively, the nature of the contract, and the circumstances, require that it be placed on the landlord.

It remains to define the standard. My Lords, if, as I think, the test of the existence of the term is necessity the standard must surely not exceed what is necessary having regard to the circumstances. To imply an absolute obligation to repair would go beyond what is a necessary legal incident and would indeed be

unreasonable. An obligation to take reasonable care to keep in reasonable repair and usability is what fits the requirements of the case. Such a definition involves—and I think rightly—recognition that the tenants themselves have their responsibilities. What it is reasonable to expect of a landlord has a clear relation to what a reasonable set of tenants should do for themselves.

I add one word as to lighting. In general I would accept that a grant of an easement of passage does not carry with it an obligation on the grantor to light the way. The grantee must take the way accompanied by the primaeval separation of darkness from light and if he passes during the former must bring his own illumination. I think that the case of *Huggett* v. *Mien* [1908] 2 K.B. 278 was decided on this principle and possibly also *Devine* v. *London Housing Society Ltd.* [1950] 2 All E.R. 1173. But the case may be different when the means of passage are constructed, and when natural light is either absent or insufficient. In such a case, to the extent that the easement is useless without some artificial light being provided, the grant should carry with it an obligation to take reasonable care to maintain adequate lighting— comparable to the obligation as regards the lifts. To impose an absolute obligation would be unreasonable; to impose some might be necessary. We have not sufficient material before us to see whether the present case on its facts meets these conditions.

I would hold therefore that the landlords' obligation is as I have described. And in agreement, I believe, with your Lordships I would hold that it has not been shown in this case that there was any breach of that obligation. On the main point therefore I would hold that the appeal fails.

My Lords, it will be seen that I have reached exactly the same conclusion as that of Lord Denning M.R., with most of whose thinking I respectfully agree. I must only differ from the passage in which, more adventurously, he suggests that the courts have power to introduce into contracts any terms they think reasonable or to anticipate legislative recommendations of the Law Commission A just result can be reached, if I am right, by a less dangerous route.

As regards the obligation under the Housing Act 1961, section 32, again I am in general agreement with Lord Denning M.R. The only possible item which might fall within the covenant implied by this section is that of defective cisterns in the maisonette giving rise to flooding or, if this is prevented, to insufficient flushing. I do not disagree with those of your Lordships who would hold that a breach of the statutory covenant was committed in respect of the matter for which a small sum of damages may be awarded. I would allow the appeal as to this matter and dismiss it for the rest.

Lord Cross of Chelsea

MY LORDS,

I have had the advantage of reading the speeches of my noble and learned friends Lord Wilberforce, Lord Salmon and Lord Edmund-Davies. I agree with them that on the main point—the liability of the respondent council to pay damages to the appellants for failure to keep the staircases and chutes in repair and the lifts in working order—this appeal should be dismissed; but that it should be allowed so far as concerns the claim under section 32 of the Housing Act 1961 relating to the lavatory cistern inside the maisonette.

I do not wish to add anything with regard to the latter claim, but in view of its general importance and because I am—with respect to him—unable to agree with a passage in the judgment of the Master of the Rolls I will add a few words of my own on the main point.

When it implies a term in a contract the court is sometimes laying down a general rule that in all contracts of a certain type—sale of goods, master and servant, landlord and tenant, and so on—some provision is to be implied unless the parties have expressly excluded it. In deciding whether or not to lay down such a *prima facie* rule the court will naturally ask itself whether in the general run of such cases the term in question would be one which it would be reasonable to insert. 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. The distinction between the two types of case was pointed out by Lord Simonds and Lord Tucker in their speeches in *Lister v. Romford Ice and Cold Storage Co. Ltd.* [1957] A.C. 555 at p. 579 and p. 594, but I think that Lord Denning in proceeding—albeit with some trepidation—to "kill off" Lord Justice Mackinnon's "officious bystander" must have overlooked it. Counsel for the appellant did not in fact rely on this passage in the speech of the Master of the Rolls. His main argument was that when a landlord lets a number of flats or offices to a number of different tenants giving all of them rights to use the staircases, corridors and lifts there is to be implied, in the absence of any provision to the contrary, an obligation on the landlord to keep the " common parts" in repair and the lifts in working order. But—for good measure he also submitted that he could succeed on the " officious bystander " tests. I have no hesitation in rejecting this alternative submission. We are not here dealing with an ordinary commercial contract by which a property company is letting one of its flats for profit. The respondent council is a public body charged by law with the duty of providing housing for members of the public selected because of their need for it at rents which are subsidized by the general body of ratepayers. Moreover the officials in the council's housing department would know very well

that some of the tenants in any given block might subject the chutes and lifts to rough treatment and that there was an ever present danger of deliberate damage by young " vandals "—some of whom might in fact be children of the tenants in that or neighbouring blocks. In these circumstances, if at the time when the respondents were granted their tenancy one of them had said to the council's representative, " I suppose that the council will be under a legal liability to us to keep the chutes and the lifts in working order and the staircases properly lighted ", the answer might well have been—indeed I think, as Roskill L.J. thought, in all probability would have been—" Certainly not".
The official might have added in explanation—" Of course we do not expect " our tenants to keep them in repair themselves—though we do expect them

" to use them with care and to co-operate in combating vandalism. The
" council is a responsible body conscious of its duty both to its tenants and
" to the general body of ratepayers and we will always do our best in what
" may be difficult circumstances to keep the staircases lighted and the lifts
" and chutes working; but we cannot be expected to subject ourselves to a
" liability to be sued by any tenant for defects which may be directly or
" indirectly due to the negligence of some of the other tenants in the very
" block in question." Some people might think that it would have been,
on balance, wrong for the council to adopt such an attitude; but no one could possibly describe such an attitude as irrational or perverse.

I turn, therefore, to consider the main argument advanced by the appellants. One starts with the general principle 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. If I let you a house on my land with a right of way to it over my property and the surface of the way is in need of repair you cannot call on me to repair it if I have not expressly agreed to do so. I can say: " I do not use that road much myself and so the fact that it is out of repair does not trouble me. If it troubles you you can repair it yourself ". I see no reason why the same principle should not be applicable when the owner of a house lets part of an upper storey in it to a single tenant. The landlord would, no doubt, be subject to the liability of an occupier under the Occupiers' Liability Act 1957; but as a matter of contract between himself and his tenant he could, I think, say
" I agree that the staircase is dark and somewhat in need of repair; but I " am content with it as it is. If you are not content with it you can repair
" it and light it yourself". But must it follow that the same principle must be applied to the case where a landlord lets off parts of his property to a number of different tenants retaining in his ownership " common
" parts "-halls, staircases, corridors and so on—which are used by all the tenants? I think that it would be contrary to common sense to press the general principle so far. 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. This was the view taken by the Court of Appeal in *Miller v. Hancock* [1893] 2 Q.B. 177 and though the actual decision in that case which gave a visitor the right to sue on the implied obligation was wrong and was later overruled by this House I think that so far as concerns the position as between landlord and tenant the Court of Appeal was right. I agree, however, with your Lordships that the obligation to be implied in such cases is not an absolute one but only a duty to use reasonable care to keep the common parts and facilities in a state of reasonable repair and efficiency. So far as concerns ordinary commercial lettings I do not suppose that the acceptance by this House of the correctness of the view expressed by the Court of Appeal in *Miller* v. *Hancock* as to the implied obligations of a landlord in such cases is of much importance for normally the tenancy agreement contains detailed provisions as to the extent of the landlord's liability for the repair, cleaning and lighting of the common parts and the maintenance of the lifts coupled often with provisions for the payment by the tenants of a service charge separate from the basic rent to cover the cost incurred by the landlord in such repair and maintenance. But the question remains—and it is the only question in this appeal over which I have felt any doubt—whether the considerations which make it to my mind impossible to apply the " officious bystander " test in this case ought not to lead to the drawing of a distinction between ordinary commercial lettings and the grant of tenancies of council flats—so that while in the former class the landlord should be under an obligation unless he has expressly excluded it, the general rule as to the repair of easements should apply in the latter class and the council only be under an obligation if it has expressly assumed it. But on reflection I do not think that the differences between the letting of council flats and of privately owned flats are great enough or clear cut enough to justify the drawing of such a distinction.

Nowadays most tenants pay less than the full economic rent for their accommodation, though in the case of privately owned properties the subsidy is at the expense of the landlord and not of the local community, and it is not only council flats that suffer from " vandalism ". If local authorities wish to avoid any contractual liability to their tenants with regard to the repair and lighting of the common parts and maintenance of the lifts and chutes then they must expressly exclude it. But to succeed in their claim the appellants had to prove negligence on the part of the respondent council and I agree with all the judges in the Court of Appeal and with your Lordships that they did not prove it in this case.

Lord Salmon

MY LORDS,

On the llth July 1966 Liverpool City Council accepted the defendant and his wife as their tenants of a council maisonette consisting of three bedrooms, together with a sitting room, kitchen, bathroom, W.C. and an outside balcony. This

dwelling was on the 9th floor of a fifteen storey block known as Haigh Heights which comprised some seventy similar dwellings.

The only access to any of the fifteen storeys was by two lifts and a staircase. These lifts and this staircase remained in the possession and control of the council. The original rent was £3 1s. 2d, a week inclusive of rates. This was undoubtedly a low rent; and it still is, although I understand that it has now been increased by about three times that amount. The tenancy was terminable by either party giving to the other four weeks' notice in writing ending on any Monday.

After a rent strike by the tenants (including the defendant) caused by what the County Court Judge found to be appalling conditions to which the tenants in this multi-storey block were all subjected, a notice to quit was served upon the defendant in 1973. Subsequently the council brought an action to evict him, and on the 18th June 1973 the defendant filed a defence and a counterclaim for £10 nominal damages. The County Court judge found rightly that there was no defence to the action and made an order for possession. He awarded the defendant the £10 damages counterclaimed. The judgment on the counterclaim was based chiefly on the ground that the council, in breach of its obligations, continuously failed to keep the lifts in operation and left the staircase in complete darkness and also on the ground that the council was in breach of section 32(1)*(b)* of the Housing Act 1961, to which I shall presently refer. Without challening any of the facts, the council appealed from that judgment and the appeal was allowed, the majority of the Court of Appeal, Roskill and Ormrod LJJ., deciding that the council was under no obligation of any kind to keep the lifts or the staircases in repair, and Lord Denning M.R. deciding that, although the council was under a duty to use reasonable care to keep the lifts working and staircase lit and in repair, they had not failed in that duty.

The Court of Appeal unanimously concluded that the council was not in breach of the Housing Act 1961. The defendant now appeals from that judgment.

This appeal turns chiefly upon whether the council was under any, and if so what, contractual obligation to their tenants. The printed Conditions of Tenancy dated 11th July 1966 imposed a great many express obligations upon the tenants but did not expressly impose any obligations of any kind upon the council. It has been argued that the council should not be taken to have accepted any legal obligations of any kind. After all, this was a distinguished city council which expected its tenants happily to rely on it to treat them reasonably without having the temerity to expect the council to undertake any legal obligations to do so. I confess that I find this argument and similar arguments which I have often heard advanced on behalf of other organizations singularly unconvincing.

Clearly, there was a contractual relationship between the tenants and the council with legal obligations on both sides. Those of the tenants are meticulously spelt out in the council's printed form which mentions none of the council's obligations. But legal obligations can be implied as well as expressed. In order to discover what, if any, are the council's implied obligations, all the surrounding circumstances must be taken into account.

Amongst the most important surrounding circumstances are the following: This was a block fifteen storeys high which was built to be let to parents with young children. The lifts and staircases were obviously provided by the Council as being necessary amenities for their tenants which they impliedly gave the tenants and their families and visitors a licence to use.
" This is not the mere case of a a grant of " (licence) " without
special circum-
" stances. It appears to me obvious, when one considers what" (a
block) " of this kind is, and the only way in which it can be enjoyed,
" that the parties to the demise of it must have intended by necessary
" implication, as a basis without which the whole transaction would
" be futile, that the " (council) " should maintain " (the lifts and staircases),
which are " essential to the enjoyment of the premises demised ",
(and that the council) should keep (them) reasonably safe. ..." It seems
" to me that it would render the whole transaction inefficacious and
" absurd if an implied undertaking were not assumed on the part of
" the" (council) " to maintain the" (lifts and staircases) " so far as
" might be necessary for the reasonable enjoyment of the demised
" premises ". *Miller v. Hancock*[1893] 2 Q.B. 177 per Bowen L.J. at p. 181.

Could it in reality have been contemplated by the council or their tenants that the council undertook no responsibility to take, at any rate, reasonable care to keep the lifts in order and the staircases lit? No doubt the tenants also owed a duty to use the lifts and staircases reasonably ; indeed, so much was clearly implied in the printed terms of the tenancy. Can a pregnant woman accompanied by a young child be expected to walk up fifteen, or for that matter nine, storeys in the pitch dark to reach her home?

Unless the law, in circumstances such as these, imposes an obligation upon the council at least to use reasonable care to keep the lifts working properly and the staircase lit, the whole transaction becomes inefficacious, futile and absurd. I cannot go so far as Lord Denning M.R. and hold that the courts have any power to imply a term into a contract merely because it seems reasonable to do so. Indeed, I think that such a proposition is contrary to all authority. To say, as Lord Reid said in *Young & Marten Ltd* v *McMamus Childs Ltd.* [1969] 1 A.C. 454 at 465, that:
"... no warranty ought to be implied in a contract unless it is in all
" the circumstances reasonable ".

is. in my view, quite different from saying that any warranty or term which is, in all the circumstances, reasonable ought to be implied in a contract. I am confident that Lord Reid meant no more than that unless a warranty or term is in all the circumstances reasonable there can be no question of implying it into a contract, but before it is implied much else besides is necessary, e.g. that without it the contract would be inefficacious, futile and absurd.

The decision in *Miller* v. *Hancock* [1893] 2 Q.B. 177 to the effect that a visitor to demised premises who met with an injury could take advantage of the implied contractual terms between the landlord and tenant and accordingly sue the landlord for injuries which the visitor suffered as a result of the breach of those terms was naturally overruled in *Fairman* v. *Perpetual Investment Building Society* [1923] A.C. 74. But the general propositions of Bowen L.J. to which I have referred have never been overruled. It has, however, been made clear that those propositions were not intended to impose an absolute obligation to maintain but only an obligation to take all reasonable care to maintain the lifts and staircase for the reasonable enjoyment of the demised premises *(Dunster* v. *Hollis* [1918] 2 K.B. 795, at p. 803).

For my part, I do not think that the propositions laid down by Bowen L.J. as modified are in any way weakened—indeed, I think they are supported— by two of the authorities cited by Roskill L.J. namely, *In re Comptoir Commercial Anversois* v. *Power, Son and Company* [1920] 1 K.B. 868 and *Rex* v. *Paddington and St. Marylebone Rent Tribunal, Ex parte Bedrock Investments Ltd* [1947] K.B. 984. In the first of these cases, Scrutton L.J. said at pp. 899-900 " (the court) ought not to imply a term " merely because it would be a reasonable term to include if the parties had " thought about the matter, or because one party, if he had thought about " the matter, would not have made the contract unless the term was included ;
" it must be such a necessary term that both parties must have intended that
" it should be a term of the contract and have only not expressed it because
" its necessity was so obvious that it was taken for granted ". In the second authority Lord Goddard C.J. said at p. 990: "No covenant ought ever to
" be implied unless there is such a necessary implication that the court can
" have no doubt what covenant or undertaking they ought to write into the
" agreement." I find it difficult to think of any term which it could be more necessary to imply than one without which the whole transaction would become futile, inefficacious and absurd as it would do if in a 15 storey block of flats or maisonettes, such as the present, the landlords were under no legal duty to take reasonable care to keep the lifts in working order and the staircases lit.
It may be that further codification of the law of landlord and tenant is desirable.

The recommendations of the Law Commission referred to in the Court of Appeal may be translated into statutes sooner or later—perhaps much later. I respectfully agree with Lord Denning M.R. that, in the meantime, the law should not be condemned to sterility and that the judges should take care not to

abdicate their traditional role of developing the law to meet even the advent of tower blocks.

The next point for decision is whether the defendant has proved that the continuous failure of the lifts and of the lights on the staircases was due to the council's failure to take reasonable care. The difficulty is that in his pleadings the defendant never alleged that the council owed a duty to take reasonable care. He alleged that they were under an absolute duty to maintain the lifts and keep the staircases lit.

If any such absolute duty rested on the council—which, as I have indicated, I cannot accept—the defendant, on the judge's findings of fact, would clearly be entitled to succeed. I, of course, recognise that in the County Court pleadings are apt not to be so strictly regarded as in the High Court. I am also conscious that most of the evidence on both sides seems to have been directed to the issue of whether or not the failure of the lifts and the lights were to be attributed to the council's fault. Nevertheless, had failure to take reasonable care (which was the council's only obligation under the contract) been pleaded as it should have been, it may be that the council would have armed themselves with more convincing evidence that they had done everything which could reasonably be expected of them. I have, with some reluctance and doubt, come to the conclusion that it would not be fair to find against them on an issue which has never been pleaded against them, or, indeed, expressly raised before the County Court Judge.

My doubts are certainly not diminished by the impression I have drawn from the judge's notes that if failure to take reasonable care had 'been pleaded the judge might well have found it proved. The lifts were out of action inordinately often and only a little more than half the time on account of vandalism. Moreover, Mr. Tyrer, the council's District Housing Manager, conceded that a lot of the damage was not done by the children in the blocks—Haigh Heights being one of a group of three blocks. Since, however, only an absolute obligation was pleaded against the council to which they had a complete answer, I do not think it would be right for the reasons I have already given to find against them on the ground that they failed to take reasonable care. I would accordingly dismiss the appeal in so far as it relates to the lifts and staircase.

It remains to consider whether the council were in breach of their obligations under section 32 (1) (b) of the Housing Act 1961 which admittedly applies to the tenancy in question. It reads, so far as relevant, as follows:
" In any lease of a dwelling house, being a lease to which this section
" applies, there shall be implied a covenant by the lessor . . . (b) to keep
" in repair and proper working order the installations in the dwelling house
" —(i) for the supply of water ... for sanitation (including . . . sanitary con-

" veniences. . .)" The judge found that every time a water closet was used, the water overflowed and was apt to flood the floor and escape on to the landing where it lay without any means of draining away.

Whether the ball-cock as fitted caused this tiresome fault or whether it was due to the design of the sanitary convenience is not clear—nor in my view does it matter. Some tenants tried using pails to catch the overflow.

Others attempted to bend the ball-cock down which stopped the overflow but did not allow sufficient water to flush the water closet efficiently. For my part I do not understand how on any acceptable construction of the section, it can be held that in the circumstances I have recited the council complied with their statutory obligations to keep the sanitary conveniences in proper working order. I can well understand that sanitary conveniences may be in proper working order even if they are too small or there are too few of them, but how they can be said to be in proper working order if every time they are used they may swamp the floor passes my comprehension.

My Lords, I would accordingly allow the appeal in relation to that part of the counterclaim based on the council's breach of the Housing Act 1961, and reduce the damages awarded from £10 to £5.

Lord Edmund Davies

My lords.
The questions to which this appeal gives rise fall into two parts: (1) Were the respondents, the Liverpool City Council, under any obligation to the plaintiffs as ninth floor tenants of Haigh Heights, Everton, in respect of the common parts of that tower block which they, as landlords, retained in their possession and control? If so, what the nature of their obligation, and were they in breach of it? (11) Were the respondents in breach of section 32(1) of the Housing Act 1961?

I. *Maintenance of the Common Parts*

The Conditions of Tenancy signed by the appellants imposed no express duty on their landlords. They were drafted mainly with houses in mind and, towards the and, there were added " Further special notes for multi-storey dwellings " These imposed on the tenants certain prohibitions in respect of hallways, staircases and lifts, but again imposed no express obligations on the landlords. Yet, to all save tenants occupying groundfloor maisonettes, the tenancies were useless unless adequate means of ascent were provided. Even so, the finding of the majority of the Court of Appeal was that there was no sort of obligation on the landlords to keep available such access without which the premises were not worth even the extremely low weekly rent of £3. 1. 2d. fixed in July 1966. Such a. conclusion is explicable only on the basis that the members of the Court of Appeal adopted what I respectfully regard as an initially wrong approach to the the novel problem presented by the facts. The case for the tenants was founded upon *Miller* v.

Hancock [1893] 2 Q.B. 177. where a landlord was held liable to compensate his tenant's visitor for personal injuries sustained while descending stairs leading from the tenant's second-floor premises owing to the worn and defective condition of one of the stairs. Woodfall (27th Ed. 12p. 577) cites that decision as authority for the proposition that: "Where " the landlord of a building let out in flats or offices retained the possession " or control of a staircase, there is an implied agreement by him with his " tenants to keep the staircase in repair". That set the Court of Appeal off on considering in what circumstances a contractual term could be implied, and that understandably but unfortunately led them to *The Moorcock* (1889) 14 P.D. 64, C.A. It had not been cited in *Miller* v. *Hancock* (ante) but the Court of Appeal considered that it enshrined the only possible basis for implying such a term as that contended for by the tenants. It is right to say, furthermore, that such was the only basis advanced on behalf of the tenants themselves at that time. The Court of Appeal accordingly proceeded to consider whether, in the light of *The Moorcock* (ante), such a term could he implied in the tenancy agreement. Roskill, L.J. (with whom Ormrod LJ. agreed) said (1975 3 W.L.R 677):

" I cannot agree .... that it is open to us in the court at the present
" day to imply a term because subjectively or objectively we as indi-
" vidual judges think it would 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
-i implication some term which the parties have themselves, assumedly
" deliberately, omitted to do ".

Lord Denning M.R., on the other hand, " with some trepidation " (which was understandable), took a different view and, after referring to some out of the "stacks" of relevant cases, said *(ibid.,* 670B):

'..... in none of them did the court ask: what did both parties
" intend? If asked, each party would have said he never gave it a
" thought: or the one would have intended something different from
" the other. Nor did the court ask: Is it *necessary* to give business
" efficacy to the transaction? If asked, the answer would have been:
" ' It is *reasonable,* but it is not necessary '. The judgments in all those
" cases show that the courts implied a term according to whether or not
" it was *reasonable* in all the circumstances to do so. ... This is to
" be decided as a matter of law, not as a matter of fact".

I have respectfully to say that I prefer the views of the majority in the Court of Appeal. Bowen L.J. said in the well-known passage in *The Moorcock* (ante, at p. 68):

" In business transactions such as this, what the law desires to effect
" by the implication is to give such business efficacy to the transaction
" as *must* have been intended at all events by both parties who are
" business men ; ... to make each party promise in law as much, at
" all events, as it *must* have been in the contemplation of both parties

" that he should be responsible for ... ".

That is not to say, of course, that consideration of what is reasonable plays no part in determining whether or not a term should be implied. Thus, in *Hamlyn & Co.* v. *Wood & Co.* [1891] 2 Q.B. 488, at 491, decided only two years after *The Moorcock* (to which he had been a party), Lord Esher said:
"... the court has no right to imply in a written contract any such
" stipulation *unless,* on considering the terms of the contract *in a*
" *reasonable and business manner,* an implication *necessarily* arises
" that the parties must have intended that the suggested stipulation
" should exist. It is not enough to say that it would be a reasonable
" thing to make such an implication. It must be a necessary implica-
" tion in the sense that I have mentioned ".

Bowen and Kay L.JJ., who had also been members of *The Moorcock* court, delivered similar judgments. The touchstone is always *necessity* and not merely *reasonableness:* see, for example, the judgment of Scrutton L.J. in *Reigate v. Union Manufacturing Co.* [1918] 1 K.B. 592, at 605, and in the case cited below by Roskill L.J. In *re Comptoir Commercial Anversois* v. *Power, Son & Co.* [1920] 1 K.B. 868, at 899.

But be the test that of necessity (as I think, in common with Roskill and Ormrod L.JJ.) or reasonableness (as Lord Denning M.R. thought), the exercise involved in that of ascertaining the presumed intention of the parties. Whichever of these two tests one applies to the facts of the instant case, in my judgment the outcome would be the same for, in the words of Roskill LJ. *(ibid.* at 677H):
" I find it absolutely impossible to believe that the Liverpool City
" Council, if asked whether it was *their* intention as well as that of
" their tenants of these flats that any of the implied terms contended
" for by Mr. Godfrey should be written into the contract, would have
" given an affirmative answer. Their answers would clearly have been
" No ' ".

It follows that, had such continued to be the case presented on the appellants' behalf to your Lordships' House, for my part I should have rejected it. But it was not, for Mr. Godfrey adopted before your Lordships a previously unheralded and more attractive approach, which was very properly not objected to by Mr. Francis despite its late appearance on the scene. As an alternative to his argument based on *The Moorcock* (ante), Mr. Godfrey submitted before this House that an obligation is placed upon the landlords in all such lettings of multi-storey premises as are involved in this appeal by the general law, as a legal incident of this kind of contract, which the landlords must be assumed to know about as well as anyone else. This new approach was based largely upon *Lister* v. *Romford Ice & Cold Storage Co. Ltd.* [1957] A.C. 555, a case concerning the incidents

of a contract of service between master and servant, in which Viscount Simonds said (at p. 576):

" For the real question becomes, not what terms can be implied in
" a contract between two individuals who are assumed to be making a
" bargain in regard to a particular transaction or course of business;
" we have to take a wider view, for we are concerned with a general
" question, which, if not correctly described as a question of status, yet
" can only be answered by considering the relation in which the drivers
" of motor-vehicles and their employers generally stand to each other.
" Just as the duty of care, rightly regarded as a contractual obligation,
" is imposed on the servant, or the duty not to disclose confidential
" information (see *Robb* v. *Green),* or the duty not to betray secret
" processes (see *Amber Size and Chemical Co. Ltd.* v. *Menzel),* just as
" the duty is imposed on the master not to require his servant to do any
" illegal act, just so the question must be asked and answered whether
" in the world in which we live today it is a necessary condition of the
" relation of master and man that the master should, to use a broad
" colloquialism, look after the whole matter of insurance. If I were to
" try to apply the familiar tests where the question is whether a term
" should be implied in a particular contract in order to give it what is
" called business efficacy, I should lose myself in the attempt to formu-
" late it with the necessary precision. The necessarily vague evidence
" given by the parties and the fact that the action is brought without
" the assent of the employers shows at least *ex post facto* how they
" regarded the position. But this is not conclusive ; for, as I have said,
" the solution of the problem does not rest on the implication of a
" term in a particular contract of service but upon more general
" considerations ".

From this basis one reverts to *Miller* v. *Hancock* itself, where Lord Esher M.R. said (at p. 179):

" What ... are the rights of the tenants and the duties of the land-
" lord towards them? Their only mode of access to their tenements
" was ... by this staircase. This may be called an easement, but it was,
" in my opinion, under the circumstances, such an easement as the
" landlord was bound to keep so as to afford a reasonably safe entrance
" and exit to the tenants. It seems to me that there is an implied
" obligation on the part of the landlord to the tenants to that effect,
" or else he is letting to the tenants that which will be of no value to
" them ".

Bowen L.J. (p. 180) and Kay L.J. (182) expressed similar views. Mr. Godfrey submitted (and it is important to stress that Mr. Francis did not challenge) that, in lettings of the kind here under consideration, the general law confers upon the tenants easements of access by the staircases and lifts provided such as gives them a legal remedy were the landlord to prevent the tenants from enjoying them

by, for example, locking the lifts or erecting a barrier across the stairs. But the question is whether the general law imposes any duty upon the landlord save the duty of non-interference and, above all, whether it obliges the landlord to repair such means of access.

Mr. Francis denies that any such extended obligation exists, and relies upon the well-established principle that the law imposes, for example, no duty of repair on the servient owner in respect of a right of way over his land, leaving it to the dominant owner to effect such repair as he finds necessary for the proper enjoyment of his easement. Accordingly, so ran his argument, to hold that any obligation of repair rests upon the Liverpool Corporation would be a radical and impermissible departure from wellestablished law and only Parliament can impose such an obligation.

But there appears to be no technical difficulty in making an *express* grant of an easement coupled with an undertaking by the servient owner to maintain it. That being so, there seems to be no reason why the easement arising in the present case should not by implication carry with it a similar burden on the grantor. As Bowen L.J. said in *Miller* v. *Hancock* (ante, at p. 181):
" It was contended by the defendant's counsel that, according to the
" common law. the person in enjoyment of an easement is bound to do
" the necessary repairs himself. That may be true with regard to ease-
" ments in general, but it is subject to the qualification that the grantor
" of the easement may undertake to do the repairs either in express
" terms or by necessary implication. This is not the mere case of a
" grant of an easement without special circumstances. It appears to me
" obvious, when one considers what a flat of this kind is, and the only
" way in which it can be enjoyed, that the parties to the demise of it
" must have intended by necessary implication, as a basis without
" which the whole transaction would be futile, that the landlord should
" maintain the staircase, which is essential to the enjoyment of the
" premises demised . . ."

There is modem support for such a view. Thus in *de Meza* v. *Ve-Ri-Best Manufacturing Co. Ltd.* (1952) 16o Estates Gazette 364, where a fourth floor flat had been demised " together with the use of the lift " and the lift had been out of order for three years, the tenants were held entitled to damages for the landlords' failure to maintain it in working order. Lord Evershed M.R. (with whom Denning & Romer L.JJ. concurred) dealt with the submission advanced on the landlords' behalf that there was no express covenant to repair in the tenancy agreement and that none could be implied by saying that the terms of the agreement imposed upon the landlords the obligations to maintain a working lift. The tenants are afforded a further measure of support by the observation made *obiter* by Sellers L.J. in his dissenting judgment in *Penn v. Gatenex Co. Lid.* [1958] 2 Q.B. 210 at p. 227) that—
" If an agreement gives a tenant the use of something wholly in the

" occupation and control of the landlord, for example, a lift, it would,
" I think, be accepted that the landlord would be required to maintain
" the lift, especially if it were the only means of access to the demised
" premises. I recognise that a lift might vary in age and efficiency, but
" in order to give meaning to the words ' the use of' and to fulfil them,
" it should at least be maintained so that it would take a tenant up and
" down, subject to temporary breakdown and reasonable stoppages for
" maintenance and repair."

I therefore conclude that the City Council were under an obligation to the tenant in relation to the maintenance of stairs and lifts in Haigh Heights in such a condition as to enable them to be used as means of access to and from their maisonettes. This also involved the maintenance of reasonably adequate lighting of the staircases at such times and in such places as artificial lighting was called for.

Bowen LJ. (p. 180) and Kay LJ. (182) expressed similar views. Mr. Godfrey submitted (and it is important to stress that Mr. Francis did not challenge) that, in lettings of the kind here under consideration, the general law confers upon the tenants easements of access by the staircases and lifts provided such as gives them a legal remedy were the landlord to prevent the tenants from enjoying them by, for example, locking the lifts or erecting a barrier across the stairs. But the question is whether the general law imposes any duty upon the landlord save the duty of non-interference and, above all, whether it obliges the landlord to repair such means of access.

Mr. Francis denies that any such extended obligation exists, and relies upon the well-established principle that the law imposes, for example, no duty of repair on the servient owner in respect of a right of way over his land, leaving it to the dominant owner to effect such repair as he finds necessary for the proper enjoyment of his easement. Accordingly, so ran his argument, to hold that any obligation of repair rests upon the Liverpool Corporation would be a radical and impermissible departure from wellestablished law and only Parliament can impose such an obligation.

But there appears to be no technical difficulty in making an *express* grant of an easement coupled with an undertaking by the servient owner to maintain it. That being so, there seems to be no reason why the easement arising in the present case should not by implication carry with it a similar burden on the grantor. As Bowen L.J. said in *Miller* v. *Hancock* (ante, at p. 181):
" It was contended by the defendant's counsel that, according to the
" common law, the person in enjoyment of an easement is bound to do
" the necessary repairs himself. That may be true with regard to ease-
" ments in general, but it is subject to the qualification that the grantor
" of the easement may undertake to do the repairs either in express
" terms or by necessary implication. This is not the mere case of a

" grant of an easement without special circumstances. It appears to me
" obvious, when one considers what a flat of this kind is, and the only
" way in which it can be enjoyed, that the parties to the demise of it
" must have intended by necessary implication, as a basis without
" which the whole transaction would be futile, that the landlord should
" maintain the staircase, which is essential to the enjoyment of the
" premises demised . . ."

There is modern support for such a view. Thus in *De Meza* v. *Ve-Ri-Best Manufacturing Co. Ltd.* (1952) 160 Estates Gazette 364, where a fourth floor flat had been demised " together with the use of the lift" and the lift had been out of order for three years, the tenants were held entitled to damages for the landlords' failure to maintain it in working order. Lord Evershed M.R. (with whom Denning & Romer L.JJ. concurred) dealt with the submission advanced on the landlords' behalf that there was no express covenant to repair in the tenancy agreement and that none could be implied by saying that the terms of the agreement imposed upon the landlords the obligations to maintain a working lift. The tenants are afforded a further measure of support by the observation made *obiter* by Sellers L.J. in his dissenting judgment in *Penn* v. *Gatenex Co. Ltd.* [1958] 2 Q.B. 210 at p. 227) that—
" If an agreement gives a tenant the use of something wholly in the
" occupation and control of the landlord, for example, a lift, it would,
" I think, be accepted that the landlord would be required to maintain
" the lift, especially if it were the only means of access to the demised
" premises. I recognise that a lift might vary in age and efficiency, but
" in order to give meaning to the words ' the use of' and to fulfil them,
" it should at least be maintained so that it would take a tenant up and
" down, subject to temporary breakdown and reasonable stoppages for
" maintenance and repair."

I therefore conclude that the City Council were under an obligation to the tenant in relation to the maintenance of stairs and lifts in Haigh Heights in such a condition as to enable them to be used as means of access to and from their maisonettes. This also involved the maintenance of reasonably adequate lighting of the staircases at such times and in such places as artificial lighting was called for.

The next question that arises is: what is the nature and extent of such obligation? In other words, is it absolute or qualified? If the former, any failure to maintain (save of a wholly minimal kind) would involve a breach of the landlord's obligation, and in *Hart* v. *Rogers* [1916] 1 K.B. 646 at 650 Scrutton J. considered that such was the view taken by the Court in *Miller v. Hancock* (ante). But later decisions, such as *Dunster* v. *Hollis* [19181 2 K.B. 795 and *Cockburn* v. *Smith* [1924] 2 K.B. 119, treat the duty only as one of reasonable care, and such is the conclusion I have come to also. To impose an absolute duty upon the landlords in the case of buildings in multiple occupation would, I think, involve such a wide

departure from the ordinary law relating to easements that it ought not to be held to exist unless expressly undertaken and should not be implied.

Then, adopting the standard of reasonable care, were the landlords shown to have been in breach? The County Court judge made no such finding, and this for the good reason that no such breach had been alleged in the counterclaim of the tenants, who were then asserting that the landlords owed an absolute duty. In these circumstances, and for the reasons appearing in the judgments of Lord Denning M.R. & Roskill L.J. it would, I think, be wrong now to hold on such evidence as was adduced that lack of reasonable care had been established. I therefore concur with my Lords in dismissing this part of the appeal. II *Housing Act,* 1961

It is clear that section 32(1)*(b)* of the Housing Act 1961 imposes an *absolute* duty upon the landlord " to keep in repair and proper working order the installations in the dwelling house . . . .". It could be said that the opening words (" to keep . . .") apparently limit the landlord's obligation to preserving the *existing* plant in its original state and create no obligation to improve plant which was, by its very design, at all times defective and inefficient. But the phrase has to be read as a whole and, as I think, it presupposes that at the inception of the letting the installation was " in " proper working order ", and that if its design was such that it did not work " properly " the landlord is in breach.

Bathroom equipment which floods when it ought merely to flush is clearly not in " working order ", leave alone " proper " working order (if, indeed, the adjective adds anything). To say that such whimsical behaviour is attributable solely to faulty design is to advance an explanation that affords no excuse for the clear failure " to keep .... in proper working order ".

Just as badly designed apparatus has been held not of " good construction " *(Smith* v *A. Davies & Co. (Shopfitters) Ltd.* (1968) 5 K.I.R. 320, per Cooke, J.), so in my judgment the landlords here were in breach of section 32(1)*(b)* by supplying bathroom equipment which, due to bad design, throughout behaved as badly as did the Irwins' cistern. I do not, however, find established any of the other statutory breaches alleged.

In the result, while otherwise dismissing the appeal, I hold that the appellants are entitled to succeed in the one respect indicated and I concur in the award of damages of £5.00 in respect thereof.

Lord Fraser of Tullybelton

my lords.

I have had the advantage of reading in print the speech of my noble and learned friend on the Woolsack. I agree with him that there is to be implied, as a legal

incident of the kind of contract between these landlords and these tenants, an obligation on the landlords to take reasonable care to maintain the common stairs, the lifts and the lighting on the common stairs.

I agree also that the landlords have not been shown to be in breach of that obligation.

With regard to the second point I am of opinion that the landlords were in breach of their statutory obligation under section 32(l)*(b)*(i) of the Housing; Act 1961 in respect of the cisterns, but not in any other respects. The cisterns, apparently because of their faulty design, were so inefficient that tenants had either to bend the ball-cock arm so that the cistern did not fill completely, with the result that it did not flush the lavatory properly, or to leave the ball-cock in the designed position, with the result that the cistern overflowed and caused flooding. Such a cistern was clearly not in " proper "working order" and in my opinion the landlords failed to "keep" it in proper working order.

I would allow the appeal on the second point and reduce the damages to £5.