

Neutral Citation Number: [2004] EWCA Civ 53
IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM CENTRAL LONDON COUNTY COURT
His Honour Judge Ryland
CL154716

Royal Courts of Justice
Strand,
London, WC2A 2LL

Tuesday 10 February 2004

Before :

LORD JUSTICE TUCKEY
LORD JUSTICE DYSON
and
LORD JUSTICE JACOB

Between :

Niazi Services Ltd Appellant
- and -
Johannes Marinus Henricus van der Loo Respondent

(Transcript of the Handed Down Judgment of
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Official Shorthand Writers to the Court)

Tim Cowen (instructed by Messrs Child and Child) for the Appellant
James Browne (instructed by Messrs Dutton Gregory) for the Respondent

Judgment

This is the judgment of the Court to which all members have contributed.

Lord Justice Jacob:

1. This appeal, by permission of Arden LJ, is from a decision of HHJ Ryland given on 25 June 2003.
2. Niazi Services Ltd have a long lease of Flat 2, 165 Draycott Avenue, Chelsea - a four storey building. Flat 2 is on the top floor; Flat 1 on the first. Restaurants occupy the ground floor and basement. Niazi's lease is only of Flat 2. The defendant, Mr Van der Loo, was the sub-tenant of Flat 2, having taken a number of annual tenancies commencing in 1996. The tenancy formally terminated in October 2001 but Mr van der Loo held over until May 2002.
3. The flat was in an expensive part of London, was meant to be of a high standard and the rent was commensurate with that, being £34,800 per annum. Disputes broke out because of items of disrepair. Mr van der Loo at one point refused to pay the rent saying that there should be a reduction. He was sued for the rent and judgment was obtained for the amount owing. This dispute concerns items of disrepair, raised by counterclaim. We are concerned with that portion of the counterclaim which remains alive. Other items were disposed of by agreement or by the Judge and there is no appeal in respect of them.
4. The Judge found that there was a period of 33 months during which the water pressure in the flat was inadequate, leading either to a trickle or no supply at all at certain times of the day. The Judge held Niazi liable for this. He also held Niazi liable for lesser matters: a failure of the lighting of the common parts, including the stairs, for a period of about four months, a failure of the thermostat to one of the two showers so that that shower could not be used for seven months, various water leaks in a bathroom and into the dressing room and kitchen, cracks in the plasterwork and a failure to paint parts of the flat.
5. The judge's order was in the sum of £48,000 plus interest. The bulk of this was calculated by reference to a notional reduction of 40% of the rent for a 33-month period. He reached the 40% by way of a global assessment of all the defects which he found. There was added a minor amount, £4,500, for the repainting claim.
6. Niazi say:
 - i) They have no liability for the inadequate water supply or lighting failure;
 - ii) In any event the period of 33 months should be reduced because:
 - a) It was perverse to find that the water problem commenced in August 1999 – the only proper finding could be April 2000;
 - b) In any event there should be no liability for the inadequate water pressure until Niazi had notice of the problem which was in April 2000,

c) The judge's finding that a period of one month from notification was a reasonable period to investigate and remedy the water problem is wrong – the period should be longer.

iii) They have no liability for cracks in the plaster;

iv) The damages are too high and were calculated on the wrong principle;

v) The amount awarded for repainting was too high;

7. We say no more about liability for the lighting failure because it was common ground that it should be dealt with in the same way as the questions concerning the water supply. Niazi now accept liability for the water leaks, the non-working shower and failure to paint. We do not need to say anything about the cracks in the plaster. In the end it was agreed that even if there were some liability in respect of this, it would not significantly affect damages. In those circumstances it would not be sensible for this Court to go into this question. It is not free from difficulties of its own – can one regard plasterwork as part of “the structure” of a dwelling house within the meaning of s.11 of the Landlord and Tenant Act 1985 as amended?
8. We turn to the principal question, therefore, that raised by the inadequate water supply. The Judge found that this was caused by works done to the restaurant premises, a larger take-off pipe to their premises having been installed as part of the works. This caused inadequate supply upstairs when water was being drawn downstairs. The Judge found that the problem started in August 1999, that Niazi had notice of it from the outset and that it was never solved.
9. So the water problem ran for 33 months. But was it Niazi's duty to sort it out? That is the key question on this appeal and it is to that we now turn. Mr van der Loo bases his claim on the covenants implied by s.11 of the Landlord and Tenant Act 1985 as amended by the Housing Act 1988. So far as is material this provides:

“(1) In a lease to which this section applies (as to which, see sections 13 and 14) there is implied a covenant by the lessor –

(a) to keep in repair the structure and exterior of the dwelling-house (including drains, gutters and external pipes).

(b) to keep in repair and proper working order the installations in the dwelling-house for the supply of water, gas and electricity and for sanitation (including basins, sinks, baths and sanitary conveniences, but not other fixtures, fittings and appliances for making use of the supply of water, gas or electricity), and

(c) to keep in repair and proper working order the installations in the dwelling-house for space heating and heating water.

(1A) If a lease to which this section applies is a lease of a dwelling-house which forms part only of a building, then, subject to subsection (1B), the covenant implied by subsection (1) shall have effect as if –

(a) the reference in paragraph (a) of that subsection to the dwelling-house included a reference to any part of the building in which the lessor has an estate or interest; and

(b) any reference in paragraphs (b) and (c) of that subsection to an installation in the dwelling-house included a reference to an installation which, directly or indirectly, serves the dwelling-house and which either –

(i) forms part of any part of a building in which the lessor has an estate or interest; or

(ii) is owned by the lessor or under his control.

(3A) In any case where –

(a) the lessor’s repairing covenant has effect as mentioned in subsection (1A), and

(b) in order to comply with the covenant the lessor needs to carry out works or repairs otherwise than in, or to an installation in, the dwelling-house, and

(c) the lessor does not have a sufficient right in the part of the building or the installation concerned to enable him to carry out the required works or repairs.

then, in any proceedings relating to a failure to comply with the lessor’s repairing covenant, so far as it requires the lessor to carry out the works or repairs in question, it shall be a defence for the lessor to prove that he used all reasonable endeavours to obtain, but was unable to obtain, such rights as would be adequate to enable him to carry out the works or repairs.”

10. So, the landlord impliedly covenants to keep in repair and proper working order the installations in the dwelling house for the supply of water and electricity, s.11(1)(b). But on the evidence the problem was not in Flat 2. It was with the pipework elsewhere in the building - wherever the enlarged take-off was. Whether that was in the common parts or in one of the restaurants was not explored and remains unknown. Since it was not in Flat 2, it was common ground that s.11(1)(b) does not apply.
11. The landlord's covenant extends also to an installation which *directly or indirectly serves the dwelling house* provided that the installation satisfies one or other of the conditions specified in s.11(1A). The second of these (owned or controlled by the lessor) will cover, so far as we can see, all cases where the landlord owns the building and the tenant has a direct tenancy from him. If here Mr van der Loo had had a direct tenancy from the owner there would have been an implied covenant by virtue of s.11(1A)(b)(ii).
12. But Mr van der Loo was a sub-tenant. His landlord, Niazi, neither owns nor controls the relevant part of the pipework. For Mr van der Loo to succeed, he must show that the installation *forms part of any part of a building in which the lessor has an estate or interest*. These words are not easy. The contest was over their meaning – what is meant by “estate or interest” and in what must it subsist?
13. Both sides cast around for guidance on the problem. Mr Browne, for Mr van der Loo, looked to see whether there was help in the Parliamentary debates – there was none. Each side found a textbook to support them. Mr Cowen found a footnote in *Woodfall* (2003) which says, commenting on s.11(1A):

“The landlord's liability to keep the structure and exterior of the dwelling-house itself in repair is not dependent on his ownership of the structure. His liability to keep other parts of the building in repair is. Thus if the structure of a block of flats is owned by a management company rather than by the landlord, the extended obligation will not apply.”

On the other hand Mr Browne found a passage in the White Book (para 3A-307 of the 2003 Edition) which says:

“The obligation to repair and maintain installations was extended from those in the dwelling to any installation which ‘directly or indirectly’ serves the dwelling and is either part of the same building or owned by the landlord”

Neither of these passages does more than assert an answer. Without reasons they do not assist.

14. So we are left just with the words *installation which forms part of any part of a building in which the lessor has an estate or interest*. There are a number of possible meanings:

- i) An installation in which the landlord merely has some sort of commercial interest – for instance a lessor who had sublet would have a real commercial interest in all the services working properly towards the end of the sub-tenancy so that he could relet without problems;
- ii) An installation (or the defective portion of an installation) in that part of a building in which the landlord has an estate or interest;
- iii) An installation (including the defective portion), wherever it is in a building provided that the landlord has an estate or interest in that installation itself, considered as itself part of the building.

15. We have no hesitation in rejecting (i). It is much too vague – and indeed was not seriously advanced. Some sort of legally recognised right (particularly a covenant or easement or both) must be vested in the landlord. That leaves meanings (ii) and (iii) in contention. Meaning (ii) would absolve Niazi from liability because the defects in the plumbing and electricity supply were in parts of the building outside Flat 2 and hence not in a part of the building in which it has an interest. Meaning (iii) would make Niazi liable because it has an interest in the pipework and electricity supply by way of covenant from the head-landlord or easement or both. We say that without having seen the head-lease: it would be so extraordinary for the position to be otherwise so this is a fair presumption.

16. Mr Cowen, for Niazi, thus advanced meaning (ii). He submitted that his clients, as mere lessees of the flat, had no other interest or estate. The defect in the installation was not in any part of the building where they had an interest. He said the Judge failed to deal with this properly, merely asserting that there was “an interest in the property to that extent.”

17. We think he is right and reject meaning (iii). Parliament has not said that the reference to an installation in a dwelling-house includes a reference to an installation in which the lessor has an estate or interest. The qualifying interest of the lessor in the installation itself is defined in para (ii): it is limited to ownership or control. If any interests in the installation itself other than ownership or control were to be regarded as sufficient, then it is reasonable to suppose that para (ii) would have been expanded to include them.

18. Para (i) has nothing to do with the lessor’s interest in the installation. It provides an altogether different kind of qualifying condition, which is that the installation should form part of any part of a building in which the lessor has an estate or interest. It is not, therefore, sufficient for the lessee to show that the lessor has an interest in the installation itself (other than ownership or control of it). He must show that the lessor has an estate or interest in the part of the building of which the installation forms a part.

19. Putting it another way para (i) does not refer to an installation which “forms part of a building in which the lessor has an estate or interest”. It refers to an installation which “forms part of *any part of* a building in which the lessor has an estate or interest” (emphasis added). The emphasised words are critical. There is no doubt that Niazi has an estate or interest in the building of which the defective section of the installation forms part. It has a leasehold interest in the top floor flat. That flat is part of the building, and its leasehold

interest in the flat is sufficient to give it an interest or estate in the building, although only in a part of the building. It is not a misuse of language to say of a lessor who has an interest in part of a building that he has an interest in the building.

20. But the critical question is not whether Niazi has an estate or interest in the building of which the defective section of the installation forms part, but whether it has an estate or interest in *that part of* the building of which it forms part. It is not sufficient that Niazi has an estate or interest in any part of the building; it must have an estate or interest in any part of the building of which the defective section of the installation forms part. The implied covenant does not extend to installations located in parts of a building in which the lessor does not have an estate or interest, even if the lessor has an estate or interest in other parts of the same building. Parliament has decided that, in relation to installations which are not owned or controlled by the lessor, the implied covenant should be confined to installations which are in those parts of a building in which the lessor has an estate or interest.
21. It is only this construction which gives any meaning to the words *any part of*. Although the language of para (b)(i) is convoluted, its effect is clear. This interpretation is consistent with the scheme under section 11(1A)(a) in relation to repairs to the structure and exterior. Under para (a), the lessor's extended liability is limited to the obligation to keep in repair the structure and exterior of any part of the building in which he has an estate or interest. In the present case, Niazi has no estate or interest in any part of the building except the top floor flat. Thus, if Mr Van der Loo suffered damage as a result of some structural disrepair in the lower part of the building, he would have no redress against Niazi under the statute.
22. We recognise that this construction means that there will be cases where a sublessor will have the benefit of the covenant implied by section 11(1A) from the headlessor in circumstances where the sublessee has no corresponding benefit from the sublessor. But this is inherent in the statutory scheme. It is clear that such a mismatch may arise in relation to the covenant that arises under section 11(1A)(a). Thus, if the freeholder (X) grants a lease of a flat on the top floor of a building to Y, and damage is caused to the flat by the disrepair of part of the building which has not been included in the demise, say the roof, Y will be able to claim damages for breach of the covenant implied by section 11(1A)(a). If Y has sublet the flat to Z, Z will not be able to claim damages from Y for breach of the implied covenant because Y has no interest or estate in the part of the building which is in disrepair.
23. It may be thought that this produces an unsatisfactory state of affairs. One solution is for the sublessee to ensure that the terms of the sublease secure for him all the rights that the sublessor enjoys as against the headlessor under the headlease. It may be that Parliament would wish to consider whether such a term should be implied. But at present it is not.
24. We add that we see nothing in s.11(3A) which casts doubt on what we believe to be the correct interpretation of s.11(1A)(b)(i). It seems to us that s.11(3A) has been inserted because there will be cases where, although the lessor has an estate or interest in the part of the building which is in disrepair, or of which the installation which is in disrepair or not in working order forms part, nevertheless the lessor does not have a sufficient right in the part of the building concerned or the installation to enable him to carry out the required work. The statutory defence provided by s.11(3A) is a defence to claims made for breach of both implied covenants. The existence of such a defence does not shed light on the interpretation of s.11(1A)(b)(i) any more than it sheds light on the meaning of s.11(1A)(a).

25. Before passing from this point we should mention *O'Connor v Old Etonian Housing Assn.* [2002] Ch. 295 relied upon by Mr Cowen. There, this court was concerned with a case about s.11(1), not s.11(1A). The pipes in a block of flats had been changed from 1½ to 1 inch. This was all right for some 6 years until the water pressure of the supply to the building dropped. The issue was whether there was a breach of the s.11(1) covenant. The problem came up by way of a preliminary issue which this Court found unsatisfactory. It was unsatisfactory because the extent and period of the drop in pressure was not known. The Court held that:

“an installation will be in proper working order if it is able to function under those conditions of supply that it is reasonable to anticipate will prevail”

26. We do not see that as having any relevance here. The drop in supply to Flat 2 was something quite different – a permanent (unless something was done) defect in the installation within the building but outside Flat 2.
27. Our conclusion on the principal question makes it unnecessary for us to decide the further points to which we have referred in paragraph 6(ii). Clearly the quantum of damage must be reduced by disallowing that element attributable to the water and electricity failures. But we must still decide what the quantum of damage is for the admitted breaches of the implied covenant. This first involves the appropriate principle. The Judge settled on a global figure based on a notional reduction in rent for the breaches he found. Was it wrong for him to use the notional reduction in rent principle?
28. Mr Cowen submits he was. He submits that the damages for breach of covenant are to compensate the tenant for inconvenience and discomfort of occupying premises in disrepair, not for diminution in rental value, relying upon *Calabar Properties v Sticher* [1984] 1WLR 287 at 293 G-D per Stephenson LJ.
29. Mr Cowen is right in saying that he must show the Judge has gone wrong in principle in choosing this method – this Court does not merely substitute one value judgment for another. We are unable to see, however, where the Judge went wrong in principle. In *Wallace and Manchester City Council* [1998] 3 EGLR 38 this Court considered the position further. Morritt LJ said this at p.42:

“Third, for periods when the tenant remains in occupation of the property, notwithstanding the breach of the obligation to repair, the loss to him requiring compensation is a loss of comfort and convenience that results from living in a property that was not in the state of repair it ought to have been in if the landlord had performed his obligation: [here he cited authorities including *Calabar*].”

Later on the same page he said:

“Thus the question to be answered is what sum is required to compensate the tenant for the distress and inconvenience experienced because of the landlord’s failure to perform his obligation to repair? Such sum may be ascertained in a number of different ways, including, but not limited to a notional reduction in the rent. Some Judges may prefer to use that method alone (*McCoy v Clarke*), some may prefer a global award for discomfort and inconvenience (*Calabar* and *Chiodi*), and others

prefer a mixture of the two (*Sturoloson v Mauroux* and *Brent LBC v Carmel*). But in my judgment they are not bound to assess damages separately under heads of both diminution in value and discomfort. Whilst in cases within the third proposition these heads are alternative ways of expressing the same concept.”

30. Given that, we cannot see how it can be said that the Judge went wrong in principle in choosing the notional reduction in rent – it was a legitimate option to take. We propose to apply it here, albeit only to the admitted breaches of covenant.
31. We have set these out above. The evidence was that although Mr van der Loo was often away, when he was in his flat he often had guests, including his parents. To have only one shower (particularly when the water supply, although through no fault of Niazi was often inadequate) for an upmarket flat of this kind is of some significance. So are persistent water leaks. Mr Cowen accepted that the tenant of an upmarket flat might be entitled to somewhat more than a tenant in a humbler dwelling, but submitted that there cannot be that much difference between the two cases. We do not agree. This was a high class flat in very high-class neighbourhood. The sub-tenant was paying for and entitled to expect high class standards. The landlords were taking rent on that basis. We think the appropriate sum by way of damages for the admitted breaches other than the failure to repaint should be £5,000.
32. Finally we turn to the failure to paint. This was assessed separately by the Judge. It is agreed that failure to paint the conservatory windows and the dining room windows was a breach of covenant but that a failure to paint the roof terrace parapet was not. The Judge accepted Mr van der Loo’s evidence that these 3 items were repainted at a cost of £4,500 in all and awarded the full sum. This included the parapet for which there was no liability. It is accepted that the Judge awarded too much by way of special damages here. Mr Cowen suggested there should be a reduction of 25%. The sub-tenant’s estimate given via Counsel was 5-10%. Plainly it would not be appropriate to remit this small matter for precise determination. We take Mr van der Loo’s figure of 10% bearing in mind as we do that the Judge found him to be “of great trust and credibility.” That leads to a figure of £4,050.
33. In the result the appeal succeeds in part. The damages are reduced to £9,050.

Order: Appeal allowed in part; the award of damages made by the County Court judge on the counterclaim set aside and the amount of £9,050 plus interest to be substituted; the respondent to pay 75% of the appellant’s costs of the appeal; the defendant awarded 50% of his costs on the counterclaim; permission to appeal to the House of Lords refused.

(Order does not form part of the approved judgment)