CCRTF 2000/0251/B2
Neutral Citation Number: [2001] EWCA Civ 86
IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE CENTRAL LONDON COUNTY COURT
(His Honour Judge Roger Cooke)

Royal Courts of Justice
Strand
London WC2

Friday, 19th January 2001

B e f o r e :

LORD JUSTICE LAWS
MR. JUSTICE PENRY-DAVEY

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GEORGE PETERSSON (1)
MOHAMED EL NASCHIE (2)
LYDIA THORSEN-EL NASCHIE (3)

- v -

PITT PLACE (EPSOM) LIMITED
Appellants

- - - - - - - - - - - - -

(Computer Aided Transcript of the Stenograph Notes of Smith Bernal Reporting Limited
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MR. D. HOLLAND (instructed by Messrs Paton Walsh Laundy, London, SW19) appeared on behalf of the Appellants/Defendants.

MR. J. PICKERING (instructed by Messrs Cooper & Burnett, Tunbridge Wells, Kent) appeared on behalf of the Respondents/Claimants.

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J U D G M E N T

1. LORD JUSTICE LAWS: The primary matter before us in this case is the defendants' appeal, brought with permission granted by the court below, against a part of the judgment of His Honour Judge Roger Cooke given in the Central London County Court on 8th February 2000 and his order made pursuant to that judgment on 14th March 2000. The judge below granted permission to appeal in relation to one issue only, namely the defendants' (appellants as I will hereafter call them) contention that in his judgment he had misconstrued a repairing covenant contained in certain leases to which the appellants and the respondents were parties as landlords and tenants respectively. The tenants desire also to appeal against two other aspects of the judge's judgment, but for those permission below was refused. The appellants propose to seek permission from this court. We have deferred consideration of that matter until after delivering judgment upon the single issue for which permission has been granted. I now proceed to give my judgment upon that question.

2. The judge's judgment of 8th February 2000 was given in four actions which the judge had heard together over 17 days. The case arose from a protracted, complex and bitter dispute between some at least of the tenants at the complex of flats to which the leases related and the managing agents and the landlords. There were two claims by the appellants for arrears of service charge, a claim by the respondents for the removal of the managing agents and a claim by the respondents for damages and other relief for disrepair.

3. The premises in question are called Pitt Place. Pitt Place is a substantial complex of flats situated at Church Street in Epsom. There are 52 flats divided into three blocks, A B and C. C, the last to be constructed, was completed in 1980. From 1979 the management of the flats was in the hands of a firm of managing agents called Slater Howard & Co ("SH"), whose partners were Mr Roger Slater ("RS") and Mr Gordon Howard ("GH"). In September 1986 the reversion in the property was sold to a company owned and controlled by RS and GH. On 23rd November 1993 it was transferred for a nominal consideration to the appellant company which is also owned and controlled by RS and GH. As I understand it, the freehold in Pitt Place is the appellants' only substantial asset.

4. I say a word about the respondents (claimants), though it is not necessary to go into great detail for the purpose of the single issue with which we are dealing. Mr Petersson ("GBP"), who is an elderly gentleman over 90 years of age, has at all relevant times been the tenant of Flat 49 in Block C. Professor El Naschie ("PEN") and his former wife ("LEN") took a lease of Flat 51, also in Block C in 1985, and then in 1988 took an assignment of the

lease of Flat 48 from an existing tenant. Thereafter until 1993 they occupied these two flats together. I shall explain the geography in a moment. In late 1983 LEN moved out and purchased a new home in Cobham. In 1996, after the couple were divorced, both flats were transferred to her. I should say that all the leases ran for 125 years from 29th September 1974. The appellants and the ENN, as I may refer to LEN and PEN, were opposing parties in all four sets of proceedings. GBP was party to one only.

5. The design of Pitt Place, which is relevant to the issue relating to the repairing covenant, may be described as follows. Roughly speaking, the three blocks form an L shape. The judge said this in his judgment:

> "The basic design is of a series of straight sided multi storied structures with flat roofs. However there are more complex details. Many of the flats have 'flying box' balconies - a little reminiscent of the Festival Hall - one above another. These balconies are quite large and have railed fronts, which give them an open appearance. In Block C especially the roof line is staggered. In particular there is a group of flats (including the ones with which I am particularly concerned) which stand above the level of the others and are partly surrounded by the lower flat roofs of their neighbours, while being themselves under or partly under a main flat roof. The lower flat roofs surrounding this group of flats have been adapted as amenities to the flats which abut them by treating them as terraces or patios.... Access is obtained by means of patio doors. The overall appearance of this part of the block slightly resembles a stepped pyramid. It is with this complex structure that the repairing issues are concerned.
>
> The ENN have flats No 48 and 51 and which are directly under the central roof. Flat No 51 is on two storeys with a single room abutting on a terrace on the lower floor which is at the same level as 48. GBP's flat, No 49 is on the same level as 48 and part of his flat is under one of the terraces of 51."

6. In order to make sense of the point as to the repairing covenant, I should also read a passage later in the judgment where some more detail is given:

> "Flat 49 (GBP) is L shaped and has a 'flying box' balcony. Flat 48 (LEN) is a quadrilateral the short side of which abuts 49 and the outer long side forms part of the outer flank of the block. At the far end of that side there is another 'flying box' balcony.
>
> The lounge of flat 51 ... is another quadrilateral and the inner long side of which is half alongside the inner long side of 48

> and half projects clear of the main line of the building. The inner short side abuts the common parts, the outer short side is part of the outer flank of the building. Abutting the outer long side of the lounge of 51 is one of the 'terraces with which these problems are much concerned. It forms a flat roof over part of Flat 44....
>
> Above all of this are the flats of the fourth floor, Nos 51 (LEN) and 52 (Mrs Hunt). 52 is more or less T-shaped with the base of the stem of the T partially abutting the inner long side of 51. In the outer angle between the stem and the cross is another terrace which lies over part of 49. 51 is L shaped. The outer long side of the L is the outside wall of the block and the top of the L extends to another terrace which lies over another part of 49. The shorter side of the L is partly over the lounge of 51, but the remainder of the lounge lies under another (this time L shaped) terrace. It will readily be seen what a complex structure this is.
>
> Over the top of Flats 51 and 52 is the main roof."

7. All this, I acknowledge, takes a good deal of digestion. There are plans of some of the flats in the bundle before us which help to make the position clear.

8. The judge summarised the very complex chronology of events in the case at pages 2 to 4 of his judgment. It is unnecessary for present purposes to replicate the detail. There were long running disputes over the service charges. In this it seems fair to say that the ENN spoke with the loudest voices. Payments of service charges were withheld. The ENN fell out with the Residents Association. In 1994 a notice under section 146 of the Law of Property Act 1925 was served on the ENN. On 9th November 1994, relying on the section 146 notice, the appellants issued forfeiture proceedings against the ENN. From that time onwards there were exchanges between GBP and SH about water ingress, and on 6th August 1996 the ENN and GBP both issued proceedings for relief for breach of the appellants' repairing obligations in the lease or leases.

9. The judge encapsulated the disputes before him at page 5 of the judgment under four heads. It is only necessary to read the fourth:

> "Whether the landlords are in breach of their repairing covenant as regards areas of damp and water penetration in both the ENN's flat and GBP's flat."

10. The judge proceeded later on to describe the particular complaints as to disrepair as

follows:

> "There are three areas of complaint.
>
> (a) water penetration (vertical) through the main roof.
>
> (b) water penetration (vertical) of GBP's flat (49) through the small roof terrace at the upper level of Flat 51.
>
> (c) lateral water penetration of Flat 51 through the adjacent roof terrace.
>
> There is no doubt as to (a). Subject to the issue (below) as to whether what is complained of arises through want of repair it is clearly within the landlords' covenant and nobody says otherwise.
>
> (b) and (c) though physically different give rise to the same problem. The question in short order is whether the landlords are responsible for repairs to the roof terraces. It is necessary to consider the terms of the leases which are all in identical form (save as to detail on the plans annexed to them)."

11. I turn to the relevant terms of the leases. The following quotations are taken from the lease of No 51:

> "the Lessor HEREBY DEMISES unto the Tenant ALL THAT flat numbered 51 Block C and shown edged red on the floor plan hereto annexed and including one half part in depth of the structure between the ceilings of the flat and (if any) the flat or other premises above it and including one half part in depth between the floors of the flat and the flat or other premises below it and SUBJECT as hereinafter provided the internal and external walls on such level..."

12. Looking at the annexed plan (page 180 in our bundle) it is plain beyond any possibility of sensible argument that the areas there marked "terrace" are within the demise as defined in the words I have just read. The demise also includes, it is to be noted (and I have read it), one half part in depth of the structure between the ceiling of the flat and any flat above and the floor of the flat and any flat below.

13. The tenant's repairing covenant is set out at paragraph 2(c):

> "To maintain uphold and keep the Flat and all walls ceilings sewers drains pipes cables wires and appurtenances thereto belonging in good and tenantable repair and condition..."

14. I should also note the covenant given by the tenant to the lessor and to his fellow tenants at paragraph 3(a):

> "The tenant hereby covenants with the Lessor and with and for the benefit of the owners and lessees from time to time during the currency of the term hereby granted of the other flats and residential units comprised in the estate that the tenant will at all times hereafter during the said term:-
>
> (a) (sic) To repair maintain uphold and keep the flat and all walls ceilings sewers drains pipes cables wires and appurtenances belonging thereto so as to afford all necessary support shelter and protection to the parts of the building of which the flat forms part..."

15. Taking the demise and paragraphs 2(c) and 3(a) together, all read in the light of the plan to which I have referred, it is in my judgment plain that the tenant obliged himself to repair and maintain the roof terraces of the flats, as the judge described them.

16. Mr. Pickering for the respondents did not in terms accept that proposition but it is no discourtesy to him to say that he opposed it but faintly. The judge accepted without cavil that the roof terraces of No 51 fell within the demise. He observed at page 78 of the judgment:

> "It is reasonably plain that the draftsman of this fairly basic lease did not turn his mind specifically to the status of and liability for the roof terraces. The word only appears in the plans ... annexed to the lease."

17. The judge also seems to have accepted that the roof terraces of Flat 51 did fall within the tenant's obligations of repair and maintenance. In any event I would certainly so hold. They are part of the flat defined in the demise, and this is the plain subject of the repairing covenant at paragraph 2(c) and the further covenant at 3(a). It follows in my judgment that, if these terraces do fall within the landlord's obligation to repair, as Mr Pickering contends and as the judge accepted, then both tenant and landlord are liable to repair them.

18. It is time to look at the landlord's repairing covenant. That is set out at paragraph 4(c) of the lease:

> "4. THE LESSOR hereby covenants with the tenant as follows:
>
> "(c) That (subject to contribution and payment as hereinbefore provided) the Lessor will maintain and keep in good and substantial repair and condition

> (i) the main structure of the buildings upon the Estate including the external walls foundations balconies and the roof thereof with its gutters and rain water pipes."

19. The judge was inclined to reject the view that the word "balconies" there set out in paragraph 4(c) was apt to cover the roof terraces on Flat 51. He gave his reasons at page 80 of his judgment as follows:

> "As Mr. Holland points out the more conventional (and dictionary) definition of a balcony is something that overhangs and there are plenty of balconies in this block which satisfy that definition without straining language. Nor I think is there any help to be got from whether a particular flat has a balcony or not, because the covenant extends to the entire block. I think on an extended use of the definition the terraces could be considered balconies but it is frankly something of a knife edge point and on the whole I would be against it."

20. For my part I do not regard it as a knife-edge point, but I agree with the judge's conclusions. The lease is not intended, as I read it, to include these roof terraces within the term "balcony".

21. The judge found however that the roof terraces did fall within the obligation provided for by paragraph 4(c). Here is his reasoning:

> "We have all of us in the course of argument used the expression 'roof terraces'. To my mind this apt and useful description actually points the solution. There is no reason whatever why a roof or a portion of roof - especially if flat - cannot fulfil another function as well. Some buildings have roof gardens. There is no reason why a landlord should not demise a portion of roof to a tenant for a pleasure purpose - sunbathing is one of the most obvious. It does not stop the roof being a roof as far as the structure of the building is concerned, it does what it did before, protect the building from the weather. To my mind these terraces are part of the 'roof thereof', the fact that the roof is in stepped layers does not stop it being a roof. Suppose there had been no demise of the terraces would there have been any doubt when one of them leaked that this was a leak in the roof?I think not. In my judgment this is the answer to the question and the landlords are accordingly liable."

22. Thus as I foreshadowed the judge's conclusion entails the proposition that both tenant and landlord are liable each to the other for the repair and maintenance of these obligations. The words in which the obligations are expressed differ slightly: the tenant's obligation is

"to keep in good and tenantable repair and condition", while the landlord's obligation is "to keep in good and substantial repair and condition". The difference is elusive. The results of the judge's findings are that they are in reality mutual obligations, in effect to do the same thing. It is then submitted by Mr. Holland in his skeleton argument at paragraph 16:

> "This interpretation leads to an absurd and uncommercial result. Each party would have a remedy against the other for failure to do the work and the practical result would be to stultify both obligations. For example if the judge is correct, then the defendant could issue contribution proceedings against Professor and Mrs El Naschie in respect of the damages awarded against the defendant in favour of the first claimant Mr Petersson."

23. Indeed Mr Holland submitted this morning that it was still open to his clients to take precisely that course. Having regard to the terms of the Civil Liability (Contribution) Act 1978 he has two years from the date of the judgment in which to do so.

24. As it seems to me, this lease ought to be construed so as to avoid such a deeply impractical result unless it is literally impossible to do so. That approach is given some support by a passage in Dowding and Reynolds on Dilapidations The Modern Law and Practice, Sweet & Maxwell 1995 at page 88:

> "A stronger case can be made out for the existence of a presumption against an intention to create overlapping obligations, i.e. obligations of both parties to do the same work to the same part of the building. In such a case, each party would have a remedy against the other for failure to do the work, and the practical result would be to stultify both obligations. It is therefore submitted that mutual repairing covenants should, if possible, be construed so as to avoid any such overlap. For example, a tenant's covenant to repair a flat may expressly include 'the window frames (both inside and outside)'. This might enable a landlord's covenant in the same lease to repair 'the exterior of the building containing the flat' to be construed as excluding the outside window frames of the flat, even though these might otherwise be encompassed in the expression 'the exterior.'"

25. An example of such a presumption operating in practice is to be found in a decision of Evans-Lombe J in Toff v McDowell 69 P & CR 535. It is not necessary to go into the background facts. Part of the judge's task there was to construe terms in a lease bearing a fairly marked similarity to those with which we are concerned here. The demise in the lease

before Evans-Lombe J included these words:

> "all that piece or parcel of land shown coloured pink and green on the plan annexed hereto together with the flat hereinafter called 'the flat' numbered 1 . . ."

26. Then the judge proceeds to set out the lessee's repairing covenant which included these words:

> "The lessee hereby covenants with the lessor and the owners and lessees of other flats comprised in the property that the lessee will at all times hereafter (a) from time to time and at all times during the said term, keep the flat other than the parts thereof comprised or referred to in clause 6(d) hereof and all walls party walls sewers drains cables wires and appurtenances thereto belonging in good and tenantable repair and condition..."

27. I go to the lessor's covenant in that case. The lessor's covenant is thus:

> "That subject to the contribution and payment as hereinbefore provided the lessor will maintain repair decorate and renew (i) the main structure and in particular the roof chimney stacks gutters and rainwater pipes of the building."

28. The judge, after citation from a further passage in the lease, recorded the parties' arguments and I give some short extracts only (page 540 of the judgment):

> "It is submitted for the plaintiff that the floor or ceiling, depending which way you look at it, apart from its decorative coverings, between Flats 1 and 2 must be part of the main structure of the building and so included in the landlord's covenant to repair contained in clause 6(d)(i) of the lease to which I have just referred. ... It is submitted on behalf of the Crown that the floor forms no part of the main structure, as spoken of in the lessor's covenant to repair. Main structure, it is said, is not a term of art but must be given a meaning special to this lease. That meaning must be more restrictive than the word 'structure' simpliciter where that term is used without being qualified by the word 'main' in the lease. It is further submitted that the lease should be construed so as to avoid shared liability, in particular for repairs, unless such a construction is forced on the court by the express words used in the lease."

29. Towards the end of page 541 the judge expresses his conclusion thus:

> "I accept the Crown's submissions. It seems to me that for the reasons submitted on behalf of the Crown and which I have

> sought to summarise above, the lease is to be construed so that the words 'main structure' do not include the floor separating the ground floor from the basement flat. That structure not forming part of the main structure, therefore is the shared responsibility of the tenants of the ground floor and basement flat to repair in accordance with the tenant's repairing covenants and is not the responsibility, in my judgment, of the landlord to repair."

30. The question in the present case is whether the words of the lease compel the result at which the judge arrived, entailing, as I have said more than once, a shared or overlapping responsibility between tenant and landlord.

31. Mr. Pickering for the respondent tenants has submitted with very considerable force that the terraces in question here plainly form part of the main structure within clause 4(c). He showed us photographs, with Mr. Holland's consent, of part of the building showing how these terraces are integrated into the design of the building. He submits that it is not possible to arrive at any view other than that they are part of the main structure of the flats. The submission the other way is that "main structure" is to be differentiated from "structure" just as was done in Evans-Lombe J's case. It is possible to give a sense and content to the use of the term "main structure" in clause 4(c) of the lease so that it does not include the subject matter of the tenant's repairing covenant. In particular, Mr. Holland submits that the expression "the roof thereof", meaning as I accept the roof of the main structure, by no means needs to include the terraces as being the roof of the flat below. The main roof of the building above Flat 51 may upon the geography here sensibly be given a more restricted meaning and "main structure" may be given a meaning more restricted than that which Mr Pickering's submission implies. Mr. Holland would have it that his opponent's submission implies that "main structure" is to be taken as meaning the whole structure of the building. Mr Holland says that "main structure" has to be interpreted in the light of the lease as a whole. If it is reasonably possible to arrive at an interpretation of clause 4(c)(i) which avoids the consequence of shared or overlapping responsibility, then that is the construction which the court should adopt.

32. In the course of argument Mr. Pickering had two further points to make. He referred us to the lease relating to Flat 41. In short, the plan in the case of that lease, analagous to the plan to which I have referred in the case of the lease of Flat 51, shows that the balconies properly so-called of Flat 48 are within the demise. That is not the case in relation to Flat 51.

That being so, Mr. Pickering submits that it is inescapable that the balconies in the case of Flat 48 are the subject both of the tenant's and of the landlord's covenants to repair. Assuming that that is right in relation to that particular lease (we are not directly concerned to construe that lease) it does not seem to me to amount to a good reason for supposing that there is an analagous overlap of responsibility in the lease of Flat 51 if, in the case of that lease, such an overlap may reasonably be avoided given the language used by the lease's draftsman. If there is such an overlap in the case of the lease of some flat in this block other than Flat 51, that does not begin to demonstrate that such a vice should be more easily replicated in relation to the lease of any other flat.

33. Mr. Pickering was also at pains to point out that the demise (and I have read it) includes the external walls of the flat; and the tenant's repairing covenant includes all walls. The landlord's repairing covenant also uses the phrase "external walls" in relation to the main structure of the building. Here, says Mr Pickering, there is undoubtedly an overlapping obligation. Mr Holland's riposte is to point to the fact that the external walls are included in the demise only "subject as hereinafter provided". He would submit that the reference to external walls in the landlord's repairing covenant, clause 4(c), impliedly takes them out of the machinery for the tenant's obligations of repair in the lease.

34. I have found this a difficult problem. It is plain and obvious that there is a very great deal of force in Mr. Pickering's submission, accepted by the judge, that as a matter of common sense these terraces fall within the main structure of the building. It seems to me however that the consequences of a conclusion which allows for shared or overlapping repairing obligations are so impractical that such a conclusion must be avoided unless it simply cannot be done on the language. I do not consider that the language here brings us to such a pass as that. It is clear that the lease could and should have been drafted a great deal more clearly than it was. I suspect that the judge is right when he indicated (and I have referred to the passage) that the draftsman did not think about the position relating to these terraces. But in performing the duty of construing this lease, the imperative of avoiding if possible overlapping obligations has driven me to the conclusion that Mr Holland's submissions ought to be accepted. They may be accepted as a matter of language. I do not say that it is the plainest or most obvious sense to be given to clause 4(c); but insofar as it is possible to construe "main structure" as not including these roof terraces I, for the reasons I have given, would do so and accordingly I would allow the appellants' appeal upon this part

of the case.

35. MR. JUSTICE PENRY-DAVEY: I agree.

Order: Appeal for which permission was given by His Honour Judge Roger Cooke allowed; respondent to pay costs of the appeal; assessment of damages to be remitted to the county court if necessary; application for permission to appeal to House of Lords refused. (Order not part of the judgment of the court)